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ANCIENT WRITS AND MODERN CAUSES OF ACTION

In a stimulating article recently published in this Journal Professor O. L. McCaskill condemns the conception of the code cause of action held by Pomeroy, Bliss, Phillips, and others, including the present writer, and sets forth a novel view which he frankly admits to be "utterly at variance with that of standard text writers, and at variance with what courts profess to follow."[1] Space is here lacking for a full discussion of the ingenious argument, presented as it is with the

[1] McCaskill, *Actions and Causes of Actions* (1925) 34 YALE LAW JOURNAL, 614, 633, 634.

highest dialectic skill; but since it is believed that his position is quite at variance also with desirable pleading conceptions, an immediate *caveat* seems desirable.

A summary of the position of the learned author will hardly do justice to it; and yet he has, I believe, made his fundamental position clear even if the details are not so certain. First, the concept of the cause of action as an aggregate of operative facts, larger or smaller as convenience or law dictates, giving ground for judicial interference,[2] is arraigned as indefinite. Then constructively it is asserted that the cause is to be determined by the right to be enforced, the right in turn is to be determined by the remedy, and the remedy in turn by its historical origin.[3] And so we have the modern code cause going back directly to the ancient writs of the common law and the former bill in equity. Thus, to determine the extent of a cause of action for "legal" relief, we are to look to the limits sets by the analogous old common law writ. Further, while law and equity may touch elbows in the same lawsuit, each is to preserve its ancient independent form within the confines of a separate cause of action. This novel view of the code reform is supported apparently on these grounds: that it is an immutable deduction from fixed and absolute premises, and that it makes the concept of the cause of action definite and certain.[4]

Since words are but counters for expressing ideas, the latter are the more important. The words employed to convey ideas are not themselves fixed and invariable things; they serve their purpose when they get the ideas over to minds other than those which originated the ideas. Hence we look not so much for a previously established or invariable meaning to words as for the most convenient meaning to convey our ideas. Where the words are used in a statute, we should at least not do violence to the ideas of the statute makers and must therefore put a reasonable meaning to the words they used. Since in our present inquiry we do not find these ideas ascertained and settled beyond possible question, we cannot say that the words in dispute have an immutable meaning. We might even urge the discarding of the term cause of action, on the ground that usage has been so variable, except that it is employed in the code and that moreover it has become

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[2] See Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817. Professor McCaskill is quite correct in pointing out the fundamental similarity of Pomeroy's views and those of mine, as well as those of Judges Bliss and Phillips. The form of definition employed by Pomeroy seems to me objectionable, although I accept what I think is the meaning behind it.

[3] See especially McCaskill, *op. cit. supra* note 1, at p. 638.

[4] Incidentally it is argued that flexibility is secured since the cause as thus defined is a much smaller unit than under current definitions. If it be "flexibility" to do away with the rules against splitting a cause of action and of *res adjudicata,* perhaps this must be conceded. This actually seems to be his position. See e. g., McCaskill, *op. cit. supra* note 1, at pp. 648-651; also discussion hereinafter.

a part of so may pleading rules as to make such discarding inconvenient. We might urge that its meaning must in each case be determined by the particular use to which it is then being put, except that, as the writers all seem to concede, there is a general idea behind all the surface variations in use. Our real problem, therefore, is to give a content to the term definite enough to indicate this general idea, flexible enough to be convenient in the various uses we make of it, and accurate enough to do no violence to the ideas and plans of the code makers.

My first objection to the suggested definition is that I believe it to be opposed to the ideas and plans of the code makers. True, they expressed these only in a broad, general way, since naturally they could not foresee all details of the operation of the change they were effecting. But broadly speaking their purpose seems clear. In fact, it was definitely expressed, as I have attempted to show elsewhere.[5] They planned to do away with the old common law forms of action, to "blend" law and equity together by abolishing the distinctions not alone between the forms of actions at law and suits in equity, but also between the actions and suits themselves, to adopt the main features of equity pleading for the new procedure, and to provide a method of pleading facts only, leaving the application of the proper rule of law to be made by the court.[6] The position of the learned author seems to be that they could not have intended to do these things, no matter what they said, because (a) the common law system was a good system anyhow, in the manner in which it presented the issues to court and jury, and hence they must have wanted to continue it, and (b) the constitutional right to a jury trial still obtains in "law" cases. This conclusion first being reached, the code is then carefully examined and every detail in any way backing such conclusion is emphasized and elaborated with the true skill of a trained advocate. The beauty of the argument is to be admired; nevertheless it must be recognized as an argument rather than a scientific investigation of the codifiers' plans. One example of the method must suffice. It is skillfully

[5] Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1; Clark, *op. cit. supra* note 2, at p. 816, referring to First Report of the Commissioners on Practice and Pleadings, N. Y. 1848, 145; *ibid.* supplement, 3, and *passim.* Nearly all the Codes provide that the sufficiency of the pleadings shall be determined only by the rules prescribed in the Code, abolishing forms of pleading heretofore existing. First Report, N. Y. 1848, sec. 118; Calif. C. C. P. 1923, sec. 4, 421; Idaho, Comp. Sts. 1919, sec. 6684; Minn. Gen. Sts. 1913, sec. 7752.

[6] Clark, *op. cit. supra* note 5. Mr. McCaskill has an extended argument against the well-nigh universally accepted code principle that the remedy, the prayer for relief, forms no part of the cause of action, a principle following directly from the code provision that if the defendant has answered the court may grant the plaintiff relief other than that asked for. N. Y. C. P. A. 1921, sec. 479; First Report, sec. 231; Clark, *op. cit. supra* note 5, at p. 4. His position is that the right enforced in the cause is determined only by its appropriate historical remedy, a position the doubtfulness of which is hereinafter suggested.

developed that the classes of permissive joinder of code causes were apparently obtained largely by combining certain of the old common law forms. From this it is argued that there is shown a preservation of the old forms. But the really important thing is not that the codifiers worked with the mental background that they had, and that they employed old common law and equity concepts, but that they attempted to cut across them.[7]

My second criticism is that the claimed benefits of the new definition, even the one of definiteness and certainty, do not exist. The old equity cause is to exist as before; and here it is admitted that the extent of the equity cause was determined not by arbitrary rule but by principles of administrative convenience (that is, substantially the method urged for the code cause by the present writer in the criticised article).[8] Further the idea that a definite and clear-cut right was isolated and enforced in each common law action is an illlusion. Even the boundaries of the old actions became shadowy, as witness the attempt to established the dividing line between trespass and case.[9] The pleader to a considerable extent had the option of determining the extent of his right as in the case of trespass *quare clausum* where consequential damages may also be claimed.[10] This variableness of the common law remedies available in one action is really admitted by our author; and ultimately he comes to the conclusion that any variation in the operative facts establishes a new right and hence a new cause of action.[11]

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[7] Much is made of the required separate statement of causes and defenses. This requirement, narrowly applied, is simply a nuisance. *Cf. infra* note 19. But applying the fact test that defenses or causes are distinct when they refer to essentially different past happenings, it does not seem improper. Thus the facts of the defense of release are entirely distinct from those of the statute of limitations and the separate statement is logical and helpful.

[8] Clark, *op. cit. supra* note 2.

[9] *Cf. Loubz v. Hafner* (1827, N. C.) 1 Dev. 185; Sunderland, *Cases on Common Law Pleading* (1914) 7, 42.

[10] *Ditcham v. Bond* (1814, K. B.) 2 Maule & S. 436. As to trespass with a *continuando* for mesne profits, see *Smith v. Wunderlich* (1873) 70 Ill. 426.

[11] In reaching this result he criticises the general view expressed by Stephen and others that the old discredited count practice of the common law *infra* note 19, which he desires to revive, was employed to state the *same* cause of action in different ways; for, so he says, due to the variation in the facts, it is not the same cause of action, but two or more different causes of action. This provides a novel method of substantially doing away with the prohibition against joining inconsistent causes. "Where, upon *identical* operative facts, a plaintiff seeks alternative reliefs, the plaintiff has joined inconsistent causes of action. Where, upon *variable* operative facts, he seeks alternative reliefs he has not joined inconsistent causes of action. . . . As the relief prayed for characterizes the causes of action, *identical* facts calling for different reliefs are inconsistent causes of action, but variable facts calling for the same or different reliefs are not. The variation in the facts prevents the inconsistency." McCaskill, *op. cit. supra* note

Here, it is submitted, we have a pretty pickle. Probably Professor McCaskill would say that the new or changed fact must at least be a material one. Immediately we have our old discussion of the materiality of the change and our illusion of certainty has gone.[12] But at any rate we do have a cause of a very limited scope. Thereupon serious difficulties arise as to certain important and definite rules of law, such as the rule against splitting a cause of action, the closely connected rule of *res adjudicata,* the rule against setting up a new cause of action by amendment of the complaint after the statute of limitations has run, and so on.[13] Of course we might so much like our definition of cause of action as to be willing to remodel all these rules, though it would be vastly inconvenient to do so. Apparently, however, Professor McCaskill contemplates incorporating his definition in these rules without changing them, for he inveighs against a leading case holding that a fact once litigated in asking for a "legal" remedy cannot be relitigated by seeking an "equitable" remedy.[14] On his theory there would here be no improper splitting of a single cause, but there would be two separate causes. The reaches of this doctrine are startling. Facts once litigated in one common law action have been held settled for other common law actions.[15] The same rule was applied in equity and law cases.[16] The code tendency has, it is

1, at p. 643. You are inconsistent when you claim specific performance *or* damages, but not if you put the defendant in New York and Honolulu at the same moment.

[12] A similar view of the cause has been applied in Illinois with harsh and illiberal results as to amending the declaration. *Walters v. Ottawa* (1909) 240 Ill. 259, 88 N. E. 651; Clark, *op. cit. supra* note 2, at p. 823, note 39, 829, note 64.

[13] These rules are discussed in (1924) 33 YALE LAW JOURNAL, 817.

[14] *Hahl v. Sugo* (1901) 169 N. Y. 109, 62 N. E. 135, criticised in (1925) 34 YALE LAW JOURNAL, 648-651. It is believed that a sounder view of this case is taken in COMMENTS (1925) 34 YALE LAW JOURNAL, 536, 541. The facts should be considered as settled; but this should not prevent further action to enforce the as yet unsatisfied judgment.

[15] That judgment in trover bars claims in trespass, implied assumpsit, detinue and replevin, see cases collected in COMMENTS (1921) 30 YALE LAW JOURNAL, 742, note 8. See also *Johnson v. Odom* (1914) 11 Ala. App. 364, 66 So. 853 (detinue and trover); *Davis & Co. v. Stukes* (1923) 122 S. C. 539, 115 S. E. 814 (claim and delivery and conversion); *Roberts v. Moss* (1907) 127 Ky. 657, 106 S. W. 297 (quasi-contract and trespass); *Leler v. Guild* (1922) 71 Colo. 349, 206 Pac. 803 (tort and contract); *La Vasser v. Chesbrough Lumber Co.* (1916) 190 Mich. 403, 157 N. W. 74 (quantum meruit and express contract); *Orino v. Beliveau* (1922) 122 Me. 168, 119 Atl. 199 (same); but see *Meirick v. Wittemann Co.* (1923) 98 N. J. L. 531, 121 Atl. 670; *Janouneau v. Wetherill* (1922) 98 N. J. L. 80, 118 Atl. 707.

[16] See cases collected in 1 Cook, *Cases on Equity* (1923) 76-88; 2 Black, *Judgments* (2d ed. 1891) secs. 517, 518. See also *Barnett v. Western Assur. Co.* (1920, Ark.) 220 S. W. 465; *Snell v. Turner Lumber Co.* (1922, C. C. A. 2d) 285 Fed. 356; *Medley v. Brown* (1918, Tex. Civ. App.) 202 S. W. 137; *Church v. Gallic* (1905) 76 Ark. 423, 88 S. W. 979; *Fitzgerald v. Heady* (1916) 225 Mass. 75, 113 N. E. 844; *McCreary v. Stallworth* (1924, Ala.) 102 So. 52. But

to be conceded, extended this principle in the interest of shortening litigation.[17] Are we to go violently to the other extreme through the device of cutting our cause of action up into molecules? The asserted definition brings uncertainty rather than certainty; it renders unsettled well-settled rules of law.[18]

My final criticism is the most serious. It is that this is very definitely an attempt to resurrect old technical rules of law. The forms of action will truly rule us from their graves. The only change is that we may consider them side by side in one action, rather than successively in separate actions. The old procedural subdivisions must be conned again to see whether the mystic formula applicable to our case is contained in count one or in count two. The argument made for this—outside of the one that it is a necessary deduction from the given premises—is that the busy judge and the unlearned juror can assimilate small bundles of facts more easily than large ones. This idea of the practical desirability of minute subdivisions of the case seems fundamentally unsound.[19] The busy judge and the untutored jury are going to look at the whole case rather than at small details. But even if a microscopic examination of the case is to be expected, the subdivisions looked for should be logical according to the mental habits of the jurors. The common law subdivisions were not

compare *Louisville Gas Co. v. Kentucky Heating Co.* (1909) 132 Ky. 435, 111 S. W. 374; *Piro v. Shipley* (1907) 33 Pa. Super. Ct. 278. Matters which could not be put in issue of course were not *res adjudicata*. See *infra* note 17; *cf. Harlow v. Pulsifer* (1923) 122 Me. 472, 120 Atl. 621.

[17] This is due to the fact that all remedies are obtainable in one action and hence the matters which may be put in issue are more numerous than before the code. *Gilbert v. Boak Fish Co.* (1902) 86 Minn. 365, 90 N. W. 767; *Thompson v. Myrick* (1877) 24 Minn. 4; *Waldo v. Lockhard* (1917) 101 Neb. 797, 165 N. W. 154; *Inderlied v. Whaley* (1895, Sup. Ct. Gen. T.) 85 Hun, 63, 32 N. Y. Supp. 640; *Yager v. Bedell* (1924, 3d Dept.) 206 App. Div. 803, 201 N. Y. Supp. 466; *Naugle v. Naugle* (1913) 89 Kan. 622, 132 Pac. 164; *Brice v. Starr* (1916) 90 Wash. 369, 156 Pac. 12. As to the effect of the code see discussion in *Perdue v. Ward* (1921) 88 W. Va. 371, 106 S. E. 874; (1922) 22 COL. L. REV. 180; *Royal Ins. Co. v. Stewart* (1918, Ind. App.) 121 N. E. 307.

[18] It should be noted that inherent in the new definition of cause of action is a new and restricted definition of "right." *Right* is also to be tied up to, and limited by, some ancient remedy. This does not seem desirable from the standpoint of analysis or of convenience. *Cf.* Corbin, *Rights and Duties* (1924) 33 YALE LAW JOURNAL, 501; Corbin, *Legal Analysis and Terminology* (1919) 29 *ibid.* 163, 167.

[19] Perhaps as good a criticism as any of the idea is found in the Report of the Common Law Commissioners in reporting the Hilary Rules (1834) as quoted in Stephen, *Pleading* (Williston's ed. 1895) *lxxxii-*lxxxvi. They said *inter alia* that the practice of multiplying counts and pleas "often leads to such bulky and intricate combinations of statements, as to present the case to the judge and jury, in a form of considerable complexity; and it is apt, therefore, to embarrass and protract the trial, and occasionally leads to ultimate confusion and mistake in the administration of justice." See also references Clark, *op. cit. supra* note 2, at pp. 825, 826; COMMENTS (1924) 34 YALE LAW JOURNAL, 192.

logical; they grew, like Topsy. And we are asked to spend our time and energy in perfecting pleadings to preserve these illogical divisions. Has not the whole reaction from common law pleading shown both the hopelessness and the uselessness of the task?[20]

The attempted resurrection seems especially unfortunate in keeping alive the old distinction between equity jurisdiction and legal jurisdiction, one of the great blemishes of the pre-code procedure.[21] Formerly we bickered over which court we should be in; now we are to engage in the same process for the yet more unsubstantial purpose of seeing under which part of the complaint we are to proceed. The right of trial by jury does not force us to any such useless task. It prescribes the form of trial, not the form of pleading. Many cases are tried now in jurisdictions which have code pleading in its truest sense where the question of form of trial is not raised at all. If it is raised by a specific motion for a jury trial, then and only then is the court called upon to decide what tribunal formerly tried this particular kind of an issue. This narrow inquiry, often not made at all, need not send us back to common law pleading.[22] True, our author says that "there is no such thing as a legal issue or equitable issue apart from a legal or equitable cause of action." Even so, many courts are doing extremely well in the belief that it is only the issue which in any event may now be termed "legal" or "equitable," and which is to determine the form of trial.[23]

I suspect that in the last analysis we are far apart as to what we expect of pleading. The true believer in the common law system, among whom apparently we must include the learned author, thought that it well performed its function of separating the real dispute from all extraneous matter before the actual trial. But many of us have had a suspicion that it did not, and the reforms of pleading have fol-

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[20] This reaction and the causes therefor are discussed with references by the present writer in an article, *History, Systems and Functions of Pleading* (May, 1925) 11 VA. L. REV. 517.

[21] So recognized by the codifers, First Report (1848) 68-87, 145, 146. See also my article, *supra* note 20.

[22] The problem is discussed at length with references to the procedure in several states in Clark, *The Union of Law and Equity* (1925) 25 COL. L. REV. 1. See also Cook, *Equitable Defenses* (1923) 32 YALE LAW JOURNAL, 645; COMMENTS (1923) 32 *ibid.* 707.

[23] In the code states where the divisions between law and equity are still maintained, the statutes permitting "equitable defenses" in the law actions, expressly provide that "equitable issues" in "proceedings at law" shall be tried as formerly in equity. See Ark. Dig. Sts. 1921, sec. 1045; Iowa Comp. Code, 1919, sec. 7066; Carroll's Ky. Codes, 1919, par. 11 (2); Or. Code, 1920, sec. 390. Compare U. S. Comp. Sts. 1916, sec. 1251b; *Plews v. Burrage* (1921, C. C. A. 1st) 274 Fed. 881. How would the learned author analyze the situation in a non-code state where an "equitable defense" is permitted to a legal action? *Cf.* Cook, *op. cit. supra* note 22.

lowed as a result of suspicion. We have believed that not many lawyers were clever enough to be able to do what common law pleading expected of them, and that those who possessed the requisite cleverness had likewise the ability not to do it,—not to give away their case before trial. We perhaps may even contemplate with some degree of equanimity the civil and continental ideas of pleadings of a simple informatory character.[24] At any rate we feel that the best results may be expected by trying merely to make the parties put on record their stories of past doings, their versions of the past happenings which led to the litigation. And hence our modern pleading properly emphasizes, not ancient legal formulae, but the stating of the facts simply as they appear to the parties. Therefore, the accepted definition of the code cause is one which makes the break from one cause to another depend not on the limits of some ancient writ, but upon some apparent break in sequence of a series of acts or events which have actually taken place.

C. E. C.

DUE PROCESS AND THE FULL FAITH AND CREDIT CLAUSE

The recent case of *Egley v. P. B. Bennett & Co.* (1924, Ind.) 145 N. W. 830, presents the interesting problem of when, in view of the "full faith and credit" clause of the federal constitution,[1] the courts of one state are privileged to refuse to enforce a judgment rendered in another state.[2] A survey of the Supreme Court decisions interpreting this clause readily reveals that it is not *every* decision of one state to which a sister state must give "full faith and credit."[3] What, then, are the circumstances in which this clause imposes a duty upon the courts of one state to enforce a judgment of a sister state?

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[24] See my article cited supra note 20. See also Millar, *The Formative Principles of Civil Procedure* (1923) 18 ILL. L. REV. 1, 94, 150.

[1] U. S. Const. Art. 4, sec. 1.

[2] That is, when are the courts of one state under a duty to the plaintiff to recognize in him a right of action based upon a judgment rendered in another state? Ordinarily, a state court has the power to impose duties upon the state's societal agents. The "full faith and credit" clause is intended to enable such a court to impose duties upon the societal agents of sister states as well.

[3] *Cole v. Cunningham* (1890) 133 U. S. 107, 10 Sup. Ct. 269; *National Bank v. Wiley* (1904) 195 U. S. 257, 25 Sup. Ct. 70 (recognition denied because the plaintiff was not the holder of the note and therefore the proceedings were wanting in due process); *Flexner v. Farson* (1919) 248 U. S. 289, 39 Sup. Ct. 97 (full faith and credit denied a money judgment because the defendant, not domiciled within the state, was not personally served with process); *Thompson v. Whitman* (1873, U. S.) 18 Wall. 457 (full faith and credit clause does not prevent inquiry into the jurisdiction of the court rendering the judgment); *Simmons v. Saul* (1891) 138 U. S. 439, 11 Sup. Ct. 369; *Old Wayne Mutual Life Ins. Co. v. McDonough* (1907) 204 U. S. 8, 27 Sup. Ct. 236; *Grover & B. Sewing Machine Co. v. Radcliffe* (1890) 137 U. S. 287, 11 Sup. Ct. 92.

In the instant case, an Illinois corporation brought an action in Indiana upon a judgment rendered in Illinois. The suit in Illinois had been against a resident of Indiana who was not personally served, the action being upon a note which contained a provision authorizing confession of judgment by an attorney in any court of record. The note had been executed in Indiana, but was made payable in Illinois. The Indiana court assumed that by the domestic law of Indiana such a provision in such a note would not confer upon the attorney a legal power by appearing for the defendant, to enter a valid judgment,[4] and conceded that by the domestic law of Illinois such a provision in such a note was valid.[5] Under the circumstances the Indiana court held that it was under a duty to enforce the Illinois judgment, and affirmed judgment for the plaintiff.

While this result is satisfactory, the reasoning in support of it would seem to be of doubtful soundness. Proceeding from the arbitrary rule that the validity of a stipulation in a note providing for confession of judgment is controlled by the law (domestic rule) of the place of performance of the note, the Indiana court had no difficulty in building up the proposition that since the note was payable in Illinois, and since by the law of Illinois such a stipulation in such a note was valid, Illinois properly assumed jurisdiction of the unserved Indiana defendant, and that therefore the Illinois judgment was enforceable in Indiana. It will be noted that this entire chain of thought and resulting decision are founded upon the proposition that the law (domestic rule) of the place of performance governs the validity of the stipulation in question.[6] But the fallacy of the reasoning is apparent upon an

[4] There seems to be no Indiana decision squarely in point, but there are dicta that a provision in a note authorizing any attorney to confess judgment is void. See *Bible v. Voris* (1895) 141 Ind. 569, 572, 40 N. E. 670, 671; *Irose v. Balla* (1914) 181 Ind. 491, 499, 104 N. E. 851, 854. There is, however, a statute authorizing confession of judgment by an attorney, but such power of attorney must be accompanied by an affidavit that the confession is not made to defraud creditors. Ind. Rev. Sts. 1914, ch. 1, sec. 615. A power of attorney in a note lacks an affidavit and for that reason is thought to be invalid.

In view of the statement in the instant opinion that the validity of such a provision is to be determined by the law (domestic rule) of the place of performance, it may well be that even if action had been brought in Indiana, it would have been sustained. The Indiana court, however, might have said that confessing judgment was part of the performance, and if that much of the performance took place in Indiana, the Indiana rule was applicable, even though payment was to be in Illinois. In the instant case both phases of performance occurred in Illinois.

[5] *Whitton v. Whitton* (1895) 64 Ill. App. 53; Ill. Rev. Sts. 1921, ch. 110, sec. 88.

[6] That the law of the place of performance governs, see *Vennum v. Mertens* (1906) 119 Mo. App. 461, 91 S. W. 292. See *Krautz v. Kazenstein* (1903) 22 Pa. Super. Ct. 275. The word "law" here must be taken to mean merely the local or domestic rule which the foreign state would in the opinion of the forum apply to a case similar to that at bar, but not involving any foreign element. See Cook, *Legal and Logical Bases in The Conflict of Laws* (1924) 33 YALE LAW JOURNAL, 457.

examination of the earlier case of *Acme Food v. Kirsch*,[7] where from the premise that the law (domestic rule) of the place of execution should govern, the Michigan court reached an opposite result to that reached in the instant case and refused to give full faith and credit to the Illinois judgment.

The obvious result of such diverse rulings is that a judgment such as that in the instant case will be enforced in some, and not enforced in other sister states. Surely this was not the intendment of the "full faith and credit" clause. It would seem patent that a judgment of one state is entitled to full faith and credit either in all or in none of the other states. The confusion in these cases seems to result partly from a failure to distinguish with sufficient clarity between a suit on the note itself and an action to enforce a judgment upon the note rendered in a sister state. In an action on the note itself no question of full faith and credit is involved. In such an action the question of whether or not the validity of such a stipulation in such a note is governed by the law (domestic rule) of the place of performance or of execution may well be the determining factor In a suit on the judgment already obtained the only question is whether that judgment must be recognized by the sister states, including in the instant case, Indiana, by whose domestic law such a provision is void. If suit on the note in question had been brought in the first instance in Indiana, the courts of that state would have applied whatever conflict of laws rule, with respect to the validity of such a "confession of judgment" provision, which Indiana had developed. That is, reasoning from the Indiana rule that in a note made in Indiana, to be performed in Illinois, the law (domestic rule) of the place of performance shall govern, the Indiana court would probably have recognized the validity of the provision authorizing confession of judgment, though if, as in Michigan, the conflicts of laws rule had been that the law (domestic rule) of the place of execution governs, the court would have refused to recognize the power. The decision as to whether or not the provision was valid, would thus depend upon what rule the state adopted as to what law (domestic rule) should govern—that of the place of execution or that of the place of performance. But where the suit is on the judgment of the Illinois court the test is solely, did the Illinois court have jurisdiction: that is, did its rule, that in Illinois such a provision is valid, and that the place of performance should govern and thus allow application of this rule, give due process of law to the defendant? Assuming that Indiana had, like Michigan, preferred a combination of rules, which would prevent the recognition of such a provision in such a note, it is no reason why they should say to other states, we shall enforce judgments which you render, only if you adopt a similar combination of rules in

[7] (1911) 166 Mich. 433, 131 N. W. 1123.

your domestic proceedings.[8] To counteract just such attitude was the very aim of the "full faith and credit" clause.

Thus in the instant case there would appear to be but one valid ground upon which the courts of one state are privileged to refuse to enforce a personal judgment[9] obtained in a sister state, viz., that the judgment being sued on was invalid in the sister state because that state's rule for acquiring jurisdiction was unconstitutional, as denying "due process" of law within the meaning of the Fourteenth Amendment—and on that ground would have been reversed by the Supreme Court of the United States. Apparently the Supreme Court has never expressly stated that the only ground upon which a personal judgment of one state may be denied recognition in another state is that the defendant in the original suit was deprived of due process of law. But it would seem that in no case where there was due process of law has the judgment been denied the protection of the "full faith and credit" clause.[10] And the inquiry of the courts of the states in which the foreign judgment is sought to be enforced, as to whether or not "due process"

[8] At most the Indiana rule is merely that the Indiana courts will not consider such a provision in such a note to be a submission by the defendant to the jurisdiction of Indiana; the Indiana rule does not, and cannot, say that in an Illinois suit, such a provision will not be considered as a submission to the jurisdiction of Illinois.

[9] This provision must be limited to personal judgments. Divorce decrees have been considered apart. Likewise decrees admitting wills to probate. A finding by the probate court that the testator was domiciled within the state will not be binding upon the courts of other states, unless the parties were all personally before the court. *Baker v. Baker, Eccles & Co.* (1916) 242 U. S. 394, 37 Sup. Ct. 152. And a decree admitting a will to probate in the state of the testator's domicile is not entitled to full faith and credit so as to require probate without the privilege of contesting it in the state where the real property is located. *Selle v. Rapp, Ex'r* (1920) 143 Ark. 192, 220 S. W. 662. The "full faith and credit" clause has been construed to mean that judicial proceedings shall have the same effect in other courts that they have in the state of decision. Since the law of the situs is said to control the disposition of real property, the probate of the will can establish the validity of the will disposing of real property in that state.

[10] COMMENTS (1918) 28 YALE LAW JOURNAL, 264; *ibid.* 579. The general rule laid down by the courts seems to be that a personal judgment of a state court having jurisdiction of the parties and subject matter should have the same effect in every state that it had in the state of decision although founded on a transaction which in the other state would have been invalid. *Fauntleroy v. Lum* (1908) 210 U. S. 230, 28 Sup. Ct. 641; *Christmas v. Russell* (1867, U. S.) 5 Wall. 290 (statute of Miss. that judgments of other states against citizens of that state shall not be enforced if the action would have been barred in her tribunals by her statute of limitations infringes the "full faith and credit" clause); *Mutual Life Ins. Co. v. Harris* (1877) 97 U. S. 331; *Hanley v. Donoghue* (1885) 116 U. S. 1, 6 Sup. Ct. 242; *Carpenter v. Strange* (1891) 141 U. S. 87, 11 Sup. Ct. 960; *Embry v. Palmer* (1882) 107 U. S. 3, 2 Sup. Ct. 25; *Huntington v. Attrill* (1892) 146 U. S. 657, 13 Sup. Ct. 224; *Maxwell v. Stewart* (1874, U. S.) 21 Wall. 71 (fraud in obtaining a judgment is not a good defense to an action upon a judgment in another state).

had been observed, resolves itself, just as should the inquiry of the Supreme Court, in every instance, it is submitted, into this single question: did the sister state court which rendered the judgment act reasonably in taking jurisdiction on the basis of the sum total of the operative facts before it?

Of course, questions of "reasonableness" cannot be settled by rules of thumb.[11] But, as has already been pointed out, in dealing with facts substantially similar to those in the instant case, state courts throughout the country have evolved conflicting views in the determination of the validity of a provision in a note stipulating for confession of judgment. Under these circumstances, would not the selection by the Illinois court of either of these solutions have been sufficiently reasonable to have entitled its judgment to full faith and credit in any other state court, regardless of the domestic rule of such other state?[12] In

[11] "Due process" as a test of whether "faith and credit" will be accorded the judgment is in substance a requirement that a court or legislature shall not conduct itself "unreasonably." In the determination of this question the traditional methods of thinking of the Anglo-American legal community play a large part. Thus, if a given procedure is sanctioned by the usages of the past, it will apparently be recognized as "due process." *Murray v. Hoboken Land and Improvement Co.* (1855, U. S.) 18 How. 272; *Jackman v. Rosenbaum Co.* (1922) 260 U. S. 22, 43 Sup. Ct. 9. Striking illustrations are: *Miedreich v. Lowenstein* (1913) 232 U. S. 236, 34 Sup. Ct. 309 (a false return by the proper officer of personal service within the jurisdiction was not a denial of "due process"); *Owenby v. Morgan* (1920) 256 U. S. 94, 41 Sup. Ct. 433 (a Delaware rule in foreign attachment cases which conditioned the defendant's right to appear upon his first giving special bond was not a denial of "due process" although the defendant was unable to give such a bond and so suffered judgment by default).

New forms of procedure may apparently be introduced, provided they are not "unreasonable." *Maxwell v. Dow* (1900) 176 U. S. 581, 20 Sup. Ct. 448 (Utah constitutional provision for trial by eight jurors instead of twelve). So, in questions of "jurisdiction" the proceeding must be reasonable under the circumstances. *McDonald v. Mabee* (1917) 243 U. S. 90, 37 Sup. Ct. 343; *Pawloski v. Hess* (1924, Mass.) 144 N. E. 760; COMMENTS (1925) 34 YALE LAW JOURNAL, 415.

[12] Residents of different countries may agree to refer all disputes arising under a contract to the law of the domicile of one of the parties, and to submit to the jurisdiction of the courts of that country without service of process if the law of that country authorizes such procedure. A judgment obtained in accordance with such an agreement has been recognized by the courts of the other country. *Feyerick v. Hubbard* (1902) 71 L. J. K. B. 509. Had the maker in the principal case expressly agreed to submit to the courts of Illinois without service of process the situation would be substantially similar. It would seem that an agreement to submit to the jurisdiction of the courts of any one of a number of states cannot well be distinguished. Whether or not this was in fact the agreement in the principal case depends upon a reasonable interpretation of the bargain. If so, and if the doctrine of *Feyerick v. Hubbard* be regarded as sound it would seem that the Illinois judgment ought to be entitled to full faith and credit, as constituting "due process."

On the question of the recognition of a judgment entered by confession by an

view of the "full faith and credit" clause, it is submitted that the only law which controls the courts of any state in rendering judgments which will be enforceable in other states is the "law" of "reasonableness."

VALIDITY OF LIENS AGAINST A TRUSTEE IN BANKRUPTCY

A study of American bankruptcy decisions reveals the presence of two conflicting policies. What may be conveniently called the "generalistic" view seems to stress the importance of an equitable distribution of the assets of an insolvent debtor among all his creditors according to their several deserts; what may be called the "particularistic" view appears to emphasize the hardship of the position of the particular creditor before the court and to favor an exception for his benefit, seemingly on the ground that saving him whole will work but little loss to each of the many others. The first tendency has apparently led to the enactment of successive bankruptcy acts;[1] while the second has seemed to limit the intended effect of such legislation by judicial construction; this in turn, it appears, has called forth amendments more perfectly expressing the legislative intent. But, admittedly, even under the former viewpoint, those who by their superior diligence have secured their rights by legally recognized liens are properly entitled to be first provided for. Fairness to the unsecured creditors, however, especially to those who have lent in reliance on the debtor's appearance of prosperity, requires that lienors give notice to the world of their claims in a recognized manner, such as taking possession or, where in the nature of the transaction that it is impossible, recording in the manner required by statute in the various states.[2]

What acts will create a lien sufficient to put a creditor in a preferred class? By the "generalistic" view a lien valid between the parties, plus the recognized form of notice to third persons would be considered necessary; by the "particularistic" view the former merely

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attorney in another state the prevailing view seems to be that such a judgment must be recognized. *Van Norman v. Gordon* (1899) 172 Mass. 576, 53 N. E. 267; *Miller v. Miller* (1916) 90 Wash. 333, 156 Pac. 8; *Ashby v. Manly* (1921) 191 Iowa, 113, 181 N. W. 869.

[1] Federal Acts of Bankruptcy were enacted in 1800, 1841, 1867, and 1898. The last was amended in 1903, 1906, 1910, 1917, and 1922. The act as amended may be found in U. S. Comp. Sts. 1916, sec. 9585-9656; *ibid.* (Supp. 1919); *ibid.* (Supp. 1923).

[2] The state recording statutes make certain liens (e. g., chattel mortgages and conditional sales) void as to certain parties if unrecorded. The bona fide purchaser is uniformly protected. The statutes vary greatly as to the classes of creditors, to which, if any, the protection is extended.

would be sufficient.[3] The Bankruptcy Act of 1898[4] left the matter open to doubt.[5] The situation is further complicated by the diversity of the state laws as to the validity of liens both as between the parties thereto and as against third parties.[6] Accordingly the decisions of the lower federal courts are in conflict, since each is not only influenced by its own notion of justice, but is called upon to apply the unique and often misunderstood law of a particular state. Thus pledges are upheld by courts influenced by the "generalistic" view only if there is actual possession in the pledgee;[7] but courts influenced by the "particularistic" view hold a more tenuous sort of possession sufficient for a valid pledge[8] or reach the same result by declaring the existence of an "equitable lien."[9] In the case of unrecorded chattel mortgages and conditional sales, the decisions, dependent on diverse state recording acts, were similarly conflicting,[10] until the Supreme Court of the

[3] If before bankruptcy a second creditor intervenes and secures a specific lien of record on the same property, the unrecorded lien of the first creditor is, thereafter, by both views, of no effect. See *York Mfg. Co. v. Cassell* (1906) 201 U. S. 344, 351, 26 Sup. Ct. 481, 483.

[4] *Supra* note 1.

[5] Sec. 67a; U. S. Comp. Sts. 1916, sec. 9651: "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." Sec. 70a; U. S. Comp. Sts. 1916, sec. 9654. "The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the day he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all . . . property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. . ."

[6] The Bankruptcy Act leaves the validity of liens to be determined by state law. *Hiscock v. Varick Bank* (1907) 206 U. S. 28, 27 Sup. Ct. 681; *In re Dancy Hardware Co.* (1912, N. D. Ala.) 198 Fed. 336; *In re Nuckols* (1912, E. D. Tenn.) 201 Fed. 437.

[7] *In re P. J. Sullivan Co., Inc.* (1918, C. C. A. 2d, N. Y.) 254 Fed. 660.

[8] *In re Harvey* (1914, S. D. Ala.) 212 Fed. 340.

[9] *Gage Lumber Co. v. McEldowney* (1913, C. C. A. 6th, Ky.) 207 Fed. 255.

[10] In the following cases involving conditional sales the property was awarded to the trustee: (parentheses throughout indicate the persons protected by state recording statutes) *In re Smith & Shuck* (1904, N. D. Iowa) 132 Fed. 301 (purchasers and creditors without notice); *Unitype Co. v. Long* (1906, C. C. A. 6th, Ohio) 143 Fed. 315 (all subsequent purchasers and creditors); *In re Franklin Lumber Co.* (1906, D. N. J.) 147 Fed. 852 (judgment creditors without notice and subsequent purchasers in good faith). In the following cases the property was awarded to the lienor: *In re McKay* (1899, N. D. Ohio) 1 Am. B. Rep. 292 (all subsequent purchasers and creditors); *In re Hinsdale* (1901, D. Vt.) 111 Fed. 502 (attaching creditors and subsequent purchasers without notice); *In re Kellogg* (1901, W. D. N. Y.) 112 Fed. 52; aff'd (1002, C. C. A. 2d) 118 Fed. 1017 (subsequent purchasers in good faith). In the following cases involving chattel mortgages, the property was awarded to the trustee: *In re Leigh* (1899, D. Colo.) 96 Fed. 806 (all third parties); *Eppstein v. Wilson* (1906, C. C. A. 5th, Tex.) 149 Fed. 197 (creditors and subsequent purchasers for value).

United States settled the matter in favor of the lienor, holding such unrecorded conditional sales[11] or chattel mortgages[12] good against the trustees in bankruptcy under any recording statute. This result being inconsistent with the "generalistic" view, an attempt to remedy the situation was made in the amendment of 1910[13] by giving the trustee in bankruptcy the rights of a lien or execution creditor. This was sufficient to settle the matter in favor of the general creditors in states whose recording statutes protect all creditors or all lien creditors,[14] but a further amendment making the trustee a bona fide purchaser would be necessary to accomplish this result in other jurisdictions.[15] The amendment affects trust receipt transactions where they are treated as chattel mortgages or conditional sales.[16] But where the courts, tending to favor the particular creditor, have declared such receipts to be a peculiar kind of security unaffected by the recording acts they are good against the trustee as before.[17]

The amendment, moreover, had no effect on the battle in another quarter. The act provides a four months' period within which transfers of the bankrupt's property are (subject to certain limitations)

In the following cases the property was awarded to the lienor: *Duplan Silk Co. v. Spencer* (1902, C. C. A. 3d, Pa.) 115 Fed. 689 (no statute); *In re Josephson* (1902, W. D. Ga.) 116 Fed. 404 (no statute).

[11] *Hewit v. Berlin Machine Works* (1904) 194 U. S. 296, 24 Sup. Ct. 690; *accord: York Mfg. Co. v. Brewster* (1909, C. C. A. 5th, Tex.) 174 Fed. 566.

[12] *York Mfg. Co. v. Cassell, supra* note 3; *accord: In re Wade* (1911, W. D. Mo.) 185 Fed. 664.

[13] Sec. 47a (2); U. S. Comp. Sts. 1916, sec. 9631, which now reads: ". . . and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. . ."

[14] *In re Savage Baking Co.* (1919, D. N. J.) 259 Fed. 976 (conditional sale); *In re Schilling* (1918, N. D. Ohio) 251 Fed. 966 (chattel mortgage). But when only subsequently lien creditors are protected the trustee prevails only in so far as he represents subsequent creditors. *In re Johnson* (1914, E. D. Okla.) 212 Fed. 311. And under a statute protecting only innocent purchasers the amendment is ineffectual. *Mergenthaler Linotype Co. v. Hull* (1916, C. C. A. 1st, P. R.) 239 Fed. 26; *contra: American Laundry Mach. Co. v. Everybody's Laundry* (1919) 185 Iowa, 760, 171 N. W. 161 (seemingly out of line with the usual interpretation of the amendment).

[15] 2 Collier, *Bankruptcy* (13th ed. 1923) 1057, 1522.

[16] *In re Gerstman* (1907, C. C. A. 2d, N. Y.) 157 Fed. 549; *In re Richheimer* (1915, C. C. A. 7th, Ill.) 221 Fed. 16; *In re Cullen* (1922, D. Md.) 282 Fed. 902; *In re Schuttig* (1924, D. N. J.) 1 Fed. (2d) 443.

[17] *New Haven Wire Co. Cases* (1888) 57 Conn. 352, 18 Atl. 266; *In re E. Reboulin Fils & Co.* (1908, D. N. J.) 165 Fed. 245; *In re Cattus* (1910, C. C. A. 2d, N. Y.) 183 Fed. 733; *In re Dunlap Carpet Co.* (1913, E. D. Pa.) 206 Fed. 726; *In re K. Marks & Co.* (1922, C. C. A. 2d, N. Y.) 222 Fed. 52; *In re Ford-Rennie Leather Co.* (1924, D. Del.) 2 Fed. (2d) 750.

voidable by the trustees.[18] That a lien valid between the parties before the four months' period may be perfected against the trustee by recording[19] or taking possession[20] within the four months is not now[21] disputed.[22] The doubtful question is: what facts prior to the four months are operative to create a lien which may be so perfected?[23] Execution of a chattel mortgage[24] or conditional sale[25] is certainly sufficient. Not so a mere executory contract so to do.[26] Pledges, invalid at the outset, may not be perfected within the four months in jurisdictions influenced by the "generalistic" view;[27] but where the "particularistic" view obtains they are upheld, either frankly on the

[18] Sec. 60b; U. S. Comp. Sts. 1916, sec. 9644: "If a bankrupt shall have . . . made a transfer of any of his property, and if, at the time of the transfer, . . . and being within four months before the filing of the petition in bankruptcy . . ., the bankrupt be insolvent and the . . . transfer then operate as a preference, and the person receiving it . . . shall then have reasonable cause to believe that the enforcement of such . . . transfer would effect a preference, it shall be voidable by the trustee. . ."

[19] Conditional sales: *Bradley Clark & Co. v. Benson* (1904) 93 Minn. 91, 100 N. W. 670; *In re Bennett* (1920, W. D. Mo.) 264 Fed. 533; chattel mortgages: *In re Dagwell* (1920, E. D. Mich.) 263 Fed. 406.

[20] Conditional sales: *In re Johnson* (1922, N. D. Iowa) 282 Fed. 273; *Frederick v. Motors Mortgage Corp.* (1924, W. D. Pa.) 1 Fed. (2d) 438; chattel mortgages: *Humphrey v. Tatman* (1905) 198 U. S. 91, 25 Sup. Ct. 567; *Kettenbach v. Walker* (1919) 32 Idaho, 544, 186 Pac. 912.

[21] There was formerly authority *contra: Copeland v. Barnes* (1888) 147 Mass. 388, 18 N. E. 65; *In re Builders' Lumber Co.* (1906, E. D. N. C.) 148 Fed. 244.

[22] The amendment of sec. 47a(2) does not prevent this result because the United States Supreme Court has decided that the proper construction is that the title of the trustee vests only on the date of filing the petition. *Bailey v. Baker Ice Machine Co.* (1915) 239 U. S. 268, 36 Sup. Ct. 50; *accord: Emerson-Brantingham Implement Co. v. Lawson* (1916, S. D. Iowa) 237 Fed. 877. But see *Brigman v. Covington* (1915, C. C. 4th, N. C.) 219 Fed. 500, 502.

[23] The situation is analogous to that presented by a new promise to pay an old debt barred by the statute of limitations. The operative facts prior to the lapse of the statutory period are, for example, a loan of money and a promise to pay it on demand. The operative fact after the statute has run is a new promise. Neither the first set of facts nor the last fact is alone sufficient to constitute a good cause of action to-day, yet both together are sufficient. Similarly there may be a set of facts existing before the four months' period before bankruptcy which added to the fact of taking possession or recording subsequent thereto will create a valid lien though neither alone is sufficient.

[24] *Supra* notes 19, 20. The state law governs what property may be included in the mortgage. *Thompson v. Fairbanks* (1905) 196 U. S. 516, 25 Sup. Ct. 306 (after acquired property included under Massachusetts law).

[25] *Supra* notes 19, 20.

[26] *Hayes v. Gibson* (1922, C. C. A. 3d, Del.) 279 Fed. 812; certiorari denied (1922) 259 U. S. 581, 42 Sup. Ct. 464; *In re Traut's Estate* (1924, C. C. A. 8th, Iowa) 297 Fed. 458. These cases declare that an "equitable lien" was created by the agreement before the four months' period, but that it is ineffective against the trustee.

[27] *In re Sheridan* (1899, E. D. Pa.) 98 Fed. 406; *First N. Bank v. Yerkes* (1916, C. C. A. 6th, Ky.) 238 Fed. 278.

ground that possession within the four months' period in execution of a prior agreement for a pledge is all that is necessary,[28] or by the declaration of an "equitable lien."[29]

Most of these lien cases can perhaps be rationalized by considering the transactions involved from an economic rather than a legal point of view. There seems to be a pretty clear line of cleavage dividing from the rest of the cases those involving such transactions as are commonly known as "enabling loans." Courts seem consistently ready to recognize the equity of the creditor who advances the money without which the goods would never have come into the debtor's assets,[30] even if their position can be justified only by the use of a phrase such as "equitable lien," which is uncertain in meaning and to which courts in general attach varying legal consequences. The classic example of this cleavage is the trust receipt transaction.[31] Those cases, placing the trust receipt in a peculiar position of advantage free from the provisions of the recording acts,[32] almost uniformly involve enabling loans; where other loans are involved the trust receipt transaction usually is classed as a conditional sale or chattel mortgage.[33] Similarly when a court declares a pledge good though actual possession was taken only within four months of bankruptcy,[34] or where it declares an "equitable lien" to accomplish the same result,[35] an examination of the facts of the case will usually disclose an enabling loan. The same is true where an "equitable lien" is created to uphold a pledge when actual and complete possession never was taken,[36] or where there was a mere agreement to give an unnamed type of security.[37]

The argument for the lender is that he is only taking out of the bankrupt's estate what he has put in, leaving the other creditors in the same position as if he had never existed. Not even subsequent creditors, it is declared, are prejudiced under the modern system of commercial credit, for nowadays credit is extended not on a basis of visible

[28] *Atherton v. Beaman* (1920, C. C. A. 1st, Mass.) 264 Fed. 878.

[29] *Sexton v. Kessler* (1912) 225 U. S. 90, 32 Sup. Ct. 657.

[30] *Cf.* (1924) 34 YALE LAW JOURNAL, 796, criticizing adversely *Farmers State Bank of Wheatland v. North Oklahoma State Bank of Britton* (1924, Okla.) 230 Pac. 914, where a purchase-money chattel mortgage recorded in a fictitious name was upheld against a bona fide purchaser though if the mortgage had not been for the purchase money the opposite result would have been reached.

[31] Trust receipts perform the same credit function as chattel mortgages, but buyers prefer to have the former outstanding against them because they do not create the suspicion of financial difficulty which the latter from long usage by debtors having an unstable financial background must necessarily give rise to in the minds of third parties.

[32] *Supra* note 17.

[33] *Supra* note 16.

[34] *Supra* note 28.

[35] *Supra* note 29.

[36] *Supra* note 9.

[37] *Hurley v. Atchison, Topeka, and Santa Fe Ry.* (1909)213 U. S. 126, 29 Sup. Ct. 466.

assets, but on the foundation of financial statements issued by the prospective borrower whose good faith is checked by recommendations of previous lenders, of houses like Bradstreet which make a business of supplying credit information, and of others who are likely to know something of the borrower's status. But seemingly the above argument should not be given too much weight, for it overlooks the fact that the recommenders in the last analysis must be influenced by the debtor's false appearance of prosperity; so that the chain of causation is merely lenghtened one link. It moreover seems to miss the familiar phenomenon that assets added to an estate become after a certain time so dissolved therein as to be indistinguishable from the common mass, after which their removal by the particular creditor who added them would be most inequitable.[38]

An interesting lien situation is the so-called "field-warehousing" contract.[39] Closely related to this is the situation presented in the recent case of *Massachusetts Trust Co. v. MacPherson* (1924, C. C. A. 1st) 1 Fed. (2d) 769, reversing (1923, D. Mass.) 291 Fed. 676, which is a typical example of how sympathy for the enabling lender may lead a

[38] A familiar instance of this occurs when a receiver of a railroad issues receivers' certificates for money borrowed to enable him to continue the business for the benefit of creditors. The certificates are given priority over mortgages antedating the receivership.

[39] Under the typical "field-warehousing" contract the "warehouseman" "leases" space on the premises of the prospective borrower and issues to him "warehouse receipts" for the goods stored therein. These are given to the lending bank as collateral security. If the "warehouseman" is a financially responsible individual, if the goods are placarded with his name and are locked up, if the key is in the possession of a bona fide agent of the "warehouseman" not also in the pay of the borrower, and if the goods are not removable without surrender of the "warehouse receipt," the pledge is of course valid. *Bush v. Export Storage Co.* (1904, E. D. Tenn.) 136 Fed. 918; *Union Trust Co. v. Wilson* (1905) 198 U. S. 530, 25 Sup. Ct. 766. And sometimes it is so held even when one or more of these elements is lacking. *Dunn v. Train* (1903, C. C. A. 1st, Me.) 125 Fed. 221; *In re Cincinnati Iron Stove Co.* (1909, C. C. A. 6th, Ohio) 167 Fed. 486; *Atherton v. Beaman, supra* note 28. Especially when the "warehouseman" or the lending bank has taken actual possession within the four months' period. *MacDonald v. Aetna Ins. Co.* (1916) 90 Conn. 415, 97 Atl. 332; *Britton v. Union Inv. Co.* (1919, C. C. A. 8th, Minn.) 262 Fed. 111. But if the "warehouseman" is a dummy the transaction is obviously merely an attempt to evade the recording statutes. *Geilfuss v. Corrigan* (1897) 95 Wis. 651, 70 N. W. 306; *4th St. N. Bank v. Millbourne Mills Co.'s Trustee* (1909, C. C. A. 3d, Pa.) 172 Fed. 177. Likewise, if the key to the "warehouse" is held by a servant of the borrower appointed "agent" of the warehouseman for this purpose solely. *Security Warehousing Co. v. Hand* (1907) 206 U. S. 415, 27 Sup. Ct. 720. Or if the borrower has permission to use the warehoused goods and substitute others therefor. *In re Spanish-American Cork Products Co.* (1924, C. C. A. 4th, Md.) 2 Fed. (2d) 203. In such cases it has been held that the pledge is invalid against the trustee in bankruptcy. *American Can Co. v. Erie Preserving Co.* (1910, C. C. A. 2d, N. Y.) 183 Fed. 96. And taking possession within the four months' period has been held ineffective. *People's Bank v. Aetna Ins. Co.* (1916) 91 Conn. 57, 98 Atl. 353.

court to uphold a very questionable lien. A trust company took "warehouse receipts," issued by a storage company, as collateral security for notes of an automobile sales company given for an advance of 80% of the purchase price of certain automobiles. The pledgee had received these cars from the manufacturer by shipment, draft against bill of lading. The storage company had officers identical with those of the pledgor, was located in the same building, and had signs on the interior thereof only. By agreement in the receipts cars were displayed in the sales room of the pledgor (identified only by cryptic tags under the hoods) and sold to customers, the note for each car being paid and its receipt taken up before delivery to the customer. Within the four months the pledgee discovered the pledgor's financial instability and took possession of the cars. In a suit by the pledgor's trustee in bankruptcy the district court gave judgment for the plaintiff, holding the possession of the warehouse company insufficient to create a pledge, so that there was no lien between the parties sufficiently valid to be perfected within the four months. The circuit court of appeals reversed the judgment, holding that an equitable lien had been created by the agreement more than four months before bankruptcy. A forceful dissenting opinion declared (perhaps unfoundedly) that no other court had ever gone so far as to declare that a false recital of a pledge as collateral security for a loan could be transmuted into an equitable lien enforceable against a trustee in bankruptcy.

It is submitted that the dissenting opinion, representing the tendency to favor an equitable distribution among all the creditors, expresses the desirable view. To make an exception for the benefit of the enabling creditor seems a strained construction of the bankruptcy act.[40] Although encouragement of enabling loans may be sound economic policy, it would seem to be more properly made subservient to predictability of legal relations resulting from a given state of facts. The latter is especially important in credit transactions. It seems unfortunate that the fairly clear intent of the Bankruptcy Act should be defeated through the medium of the vague phrase, "equitable lien," an all too general tendency of the courts which is reflected in the instant case.

"RESTRAINT OF TRADE" BY ASSOCIATED LABORERS

Any attempt to attribute a fixed meaning to the expression "restraint of trade" is futile; for its content does little more than reflect the emotional response of the court to the general problem of balancing social conveniences in the particular case. This is brought out clearly by a consideration of the cases in the field of labor law.[1] The phrase

[40] *Cf.* Archbald, *Frauds and Preferences* (1910) 44 AM. L. REV. 481, 510; Taylor, *Trust Receipts* (1921) 6 CORN. L. QUART. 168, 175.

[1] *Cf. State v. Coyle* (1913, Okla. Crim. App.) 130 Pac. 316, 320: "Labor is not only blood and bone, but it also has a mind and a soul, and is animated by sympathy, hope, and love; capital is inanimate, soulless matter." *Etc., etc.* And

is found in cases arising under the common law—*i. e.* non-statutory law—involving "combinations in restraint of trade"[2] and in similar cases arising under the anti-trust statutes, state and federal. In the latter class of cases the dominant question may be one of two others: Does the statute apply to labor as well as to capital? Or is such a statute, expressly excluding labor from its operation, unconstitutional? The answer to these last two inquiries will probably depend to a considerable extent, just as in the determination of the question whether there is "restraint of trade," upon the emotional response of the court. But since the expression has become a somewhat convenient label for a variety of unprivileged activities of associated laborers, which may not only be factually similar, but may also produce factually similar economic and social effects, the classification is probably not without utility. In addition, "restraint of trade" is the best approximation to a realistic description of the class of conduct sought to be identified; and it seems clear that the same general problem of making the most convenient adjustments in labor disputes is one which can be solved only by a realistic understanding of the situations in which such conduct has been so characterized by the courts, and by a realistic approach to the new cases as they arise.

The problem of "restraint of trade" was presented in a novel way in three recent cases: *New Jersey Painting Co. v. Local No. 26, Brotherhood of Painters, Etc. of America* (1924, N. J. Eq.) 126 Atl. 399, *J. I. Hass, Inc. v. Local No. 17, Brotherhood of Painters, Etc. of America* (1924, D. Conn.) 300 Fed. 894, and *Barker Painting Co. v. Brotherhood of Painters, Etc. of America* (1924, D. C. Sup. Ct.) 6 LAW AND LABOR, 126.[3] Each case arose out of provisions of the General Constitution of the Brotherhood of Painters, Decorators, and Paperhangers of America, that "where there is a difference between the wage scale of two cities all members employed upon a job done in one of the two cities by an employer from the other...shall receive the higher of the two wages scales";[4] and that at least fifty percent. of the employees on a particular out-of-town job shall be from the locality in which the work is being done.[5] The District of Columbia case was brought

cf. Adkins v. Children's Hospital (1923) 261 U. S. 525, 43 Sup. Ct. 394; COMMENTS (1923) 32 YALE LAW JOURNAL, 829.

[2] The present problem should not be confused with that of "contracts in restraint of trade"; yet it will be found that "nearly every decision against a combination assigns as one of the reasons that it is based on a 'contract in restraint of trade.'" Black, *How Far is the Theory of Trust Regulation Applicable to Labor Unions?* (1924) 11 WASH. UNIV. STUDIES (Humanistic Series, No. 2) 347, 350.

[3] See (1924) 6 LAW AND LABOR, 147.

[4] In a letter from the OPEN SHOP REVIEW (February 26, 1925), it is stated that "while no such rule . . . is embodied in their (carpenters' unions') constitutions, yet in actual practice if a contractor takes a job in another city and the scale there is lower than where he is permanently located, he gets the higher scale."

[5] In the General Constitution containing the latest amendments (March, 1922) the pertinent provisions are known as sections 132 and 133.

apparently under the Sherman and Clayton Acts; but neither the New Jersey case nor the Connecticut case seem to have involved any statute, the latter case coming before the federal court probably by reason of diversity of citizenship. The plaintiff in each case sought to restrain the enforcement by the local union of the wage-scale provision on the ground that it "restrained trade" among the master painters.[6] In the New Jersey case an injunction was denied;[7] but one was granted in both the District of Columbia case and the Connecticut case.[8]

The resistance of the English courts to associations of laborers about the middle of the nineteenth century was manifested in their declaration in effect that they were *per se* in "restraint of trade."[9] Legislation was later enacted to better the position in which labor unions thus found themselves,[10] and the belief was voiced that such a purpose had been accomplished.[11] However, as a result of the decision in the House of Lords in *Russell v. Amalgamated Soc. of Carpenters, Etc.*[12] it was apparent that Section 3 of the Act of 1871, in the face of Section 4, had not done much to overcome that resistance.[13] But the present-day condition of English organized labor has in other respects been considerably improved by other remedial legislation.[14]

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[6] In the instant cases, the out-of-town wage-scale was, in fact, the higher.

[7] One judge dissenting. Reversing (1923, N. J. Ch.) 122 Atl. 622.

[8] In the Connecticut case, Judge Thomas relied upon both the District of Columbia case and the New Jersey lower court decision which was reversed by the New Jersey case subsequently to Judge Thomas' decision.

[9] The phrase *"per se"* ordinarily has a varying content of fact justifying the classification. It is only when some of the familiar facts are lacking or never present that one is troubled by the mere label. In the following cases the phrase, though not used, was, it seems, implied: *Hornby v. Close* (1867) L. R. 2 Q. B. 153. Cockburn, C. J. said, at p. 158: "... the rules of such a society [trade union] would certainly operate in restraint of trade..." The court relied on the *dictum* in *Hilton v. Eckersley* (1855, Q. B.) 6 El. & Bl. *47, *52. See Sayre, *Cases on Labor Law* (1923) 83, note 2. See also *Bryant v. Foot* (1867) L. R. 2 Q. B. 161; *Farrer v. Close* (1869) L. R. 4 Q. B. 602. In these cases the court refused to entertain an action by associated laborers against a member for withholding funds.

[10] (1871) 34 & 35 Vict. ch. 31, sec. 3.

[11] In *Rigby v. Connol* (1880) L. R. 14 Ch. Div. 482, the plaintiff was fined by the union, under Rule 73, for "binding" his son in a shop where non-unionists were employed. Jessel, M. R., said at p. 491: "... without the Act [of 1871] it is clearly ... an association by which men are ... restrained in trade ..."; *cf.* Farwell, L. J., in *Conway v. Wade* [1908, C. A.] 2 K. B. 844, 853, 854.

[12] [1912] A. C. 421.

[13] In the case cited *supra* note 12, a widow who sued for superannuation benefit was denied recovery because of the character of the rules of the defendant union, to which her late husband had belonged. Lord Robson said, at p. 440: "... the Act did not go to the length of abrogating or altering the general law against restraint of trade ... It maintained the principles of the old law..." But Canada has apparently adopted a more liberal attitude. See *Starr v. Chase* [1924] 4 D. L. R. 55, 61.

[14] *Cf.* Geldart, *The Present Law of Trade Disputes and Trade Unions* (1914) *passim.*

It has been asserted that the notion obtaining in England prior to 1871 "never gained a foothold in the United States."[15] But the American courts have nevertheless been confronted with the similar problem of determining whether a particular group of laborers was or was not "in restraint of trade."[16] The anti-trust statutes play an important rôle in the American situation, and as already stated may present one of the two other problems: their imposed applicability to associated laborers and their constitutionality when such groups are expressly excluded from their operation.[17]

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[15] Commons and Andrews, *Principles of Labor Legislation* (1920) 102, 103. "But let the labor union acquire the purpose of excluding all others except its members from the labor market, or let the union commence . . . unfair excluding practices . . . so as to make the labor market unfree, and the organization becomes illegal at common law. . ." Kale, *Contracts and Combinations in Restraint of Trade* (1918) sec. 72. But see NOTES (1925) 25 COL. L. REV. 65.

[16] In the following cases the court found a "restraint of trade": *More v. Bennett* (1892) 140 Ill. 69, 29 N. E. 888 (The parties were members of a stenographers' association. Under their rules, they might cut only against non-members. The plaintiffs entered into an agreement with Cook County. The defendants, knowing thereof, underbid them. The plaintiffs, not to cease work, met the bid, and sued the defendants in assumpsit. The defendants' demurrer was sustained); *Froelich v. Musicians' Mut. Ben. Assoc.* (1902) 93 Mo. App. 383 (The court said, at p. 391: "These by-laws impose . . . a most slavish observance of the most stringent rules and regulations in the restraint of trade; . . . no musician . . . in any city of the country can find employment as a musician unless he is a member of the association. Such a confederation and combination is a trust pure and simple"); *Kealey v. Faulkner* (1907, Cuyahoga C. P.) 18 Ohio Dec. 498; *cf. Bailey v. Master Plumbers* (1899) 103 Tenn. 99, 52 S. W. 853 (involving an entrepreneurs' association). *Cf. Kemp v. Div. No. 241* (1912) 255 Ill. 213, 99 N. E. 389. But the court found no "restraint of trade": *Snow v. Wheeler* (1873) 113 Mass. 179; *cf. Herriman v. Menzies* (1896) 115 Calif. 16, 22, 46 Pac. 730, 731, where the court said: "Combinations between individuals or firms for the regulation of prices, and . . . competition . . . are not unlawful as in restraint of trade, so long as they are reasonable, and do not . . . create such restrictions as to materially affect the freedom of commerce." And *cf. Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 445, 114 S. W. 997, 1003.

[17] The following cases hold such laws unconstitutional: *Niagara Fire Ins. Co. v. Cornell* (1901, C. C. D. Neb.) 110 Fed. 816; *cf. People ex rel. Akin v. Butler Street Foundry & Iron Co.* (1903) 201 Ill. 236, 66 N. E. 349; *C. W. & V. Coal Co. v. People* (1905) 214 Ill. 421, 73 N. E. 770; see *State v. Duluth Board of Trade* (1909) 107 Minn. 506, 550, 121 N. W. 395, 413; *contra: Cleland v. Anderson* (1902) 66 Neb. 252, 92 N. W. 306; *State v. Coyle, supra* note 1. And see *Waters-Pierce Oil Co. v. Texas* (1900) 177 U. S. 28, 20 Sup. Ct. 518; *Hunt v. Riverside Co-Operative Club* (1905) 140 Mich. 538, 548, 104 N. W. 40, 44; *Waters-Pierce Oil Co. v. State* (1907) 48 Tex. Civ. App. 162, 106 S. W. 918, aff'd *sub nom. Waters-Pierce Oil Co. v. Texas* (1909) 212 U. S. 86, 29 Sup. Ct. 220; *State ex rel. Hadley v. Standard Oil Co.* (1909) 218 Mo. 1, 370, 116 S. W. 902, 1016. A discrimination between vendors of commodities and vendors of labor and between vendors of commodities and purchasers of commodities has been upheld. *International Harvester Co. v. Missouri* (1914) 234 U. S. 199, 34 Sup. Ct. 859. Statutes excluding from their operation agricultural products or live stock while in the hands of the producer or raiser have generally not been upheld.

On the question of applicability, in addition to the varying attitudes of the courts toward labor problems, the differing phraseology of the state statutes has furnished some basis for the conflicting decisions.[18] The provisions of the Sherman Anti-Trust Act, [19] which is expressly and necessarily limited to activities in interstate commerce,[20] include labor organizations: it was decided so in the famous *Danbury Hatters* case,[21] the force of which was soon felt.[22] This decision was obviously prejudicial to labor, and to the reaction following it it may perhaps be possible to trace the passage of the Clayton Amendment.[23] Section 6 of that Amendment contains the well-known declaration that "the labor of a human being is not a commodity or article of commerce"[24] and Section 20 restrains the use of the injunction among certain classes

Connolly v. Union Sewer Pipe Co. (1902) 184 U. S. 540, 22 Sup. Ct. 431; *State ex rel. Atty.-Gen. v. Waters-Pierce Oil Co.* (1902, Tex. Civ. App.) 67 S. W. 1057; *State v. Cudahy Packing Co.* (1905) 33 Mont. 179, 82 Pac. 833; *cf. Low v. Rees Printing Co.* (1894) 41 Neb. 127, 59 N. W. 362; *State v. Shippers C. & W. Co.* (1902) 95 Tex. 603, 69 S. W. 58; *State v. Laredo Ice Co.* (1903) 96 Tex. 461, 73 S. W. 951; *Nat. Cotton Oil Co. v. Texas* (1905) 197 U. S. 115, 25 Sup. Ct. 379; see *Brown & Allen v. Jacobs' Pharmacy Co.* (1902) 115 Ga. 429, 453, 41 S. E. 553, 563; *contra: State ex rel. Astor v. Schlitz Brewing Co.* (1900) 104 Tenn. 715, 59 S. W. 1033. See 52 L. R. A. (N. S.) 525, note. The crux of the whole problem was well put by McKenna, J., *dissenting,* in *Connolly v. Union Sewer Pipe Co., supra* at p. 567, 22 Sup. Ct. at p. 442: "Government . . . must deal with the problems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and in making it a legislature must be allowed a wide latitude of discretion and judgment."

[18] In the following cases the statutes were held applicable to associated laborers: *Webb v. Cooks', Etc. Union No. 748* (1918, Tex. Civ. App.) 205 S. W. 465; *Cooks', Etc. Local Union v. Papageorge* (1921, Tex. Civ. App.) 230 S. W. 1086; *Campbell v. Motion Picture M. O. Union* (1922) 151 Minn. 220, 186 N. W. 781 (see [1922] 31 YALE LAW JOURNAL, 786). *Cf. Bailey v. Master Plumbers, supra* note 16; but *contra: Robinson v. Hotel & Rest. Emp.* (1922) 35 Idaho, 418, 207 Pac. 132; *cf. Rohlf v. Kasemeier* (1908) 140 Iowa, 182, 118 N. W. 276.

[19] Act of July 2, 1890 (26 Stat. at L. 209).

[20] *Ibid.,* secs. 1, 2.

[21] *Loewe v. Lawlor* (1908) 208 U. S. 274, 28 Sup. Ct. 301. The case was a second time before the Supreme Court. *Lawlor v. Loewe* (1915) 235 U. S. 522, 35 Sup. Ct. 170. See Megaarden, *The Danbury Hatters Case—Its Possible Effect on Labor Unions* (1915) 49 AM. L. REV. 417.

[22] It was followed in *Am. Fed. of Labor v. Buck's S. & R. Co.* (1909, D. C.) 33 App. Dec. 83; but *cf.* s. c. (1911) 219 U. S. 581, 31 Sup. Ct. 472) no decision since, *inter alia,* dispute settled). See *Nat. Fireproofing Co. v. Mason Builders' Assoc.* (1909, C. C. A. 2d) 169 Fed. 259; *Irving v. Neal* (1913, S. D. N. Y.) 209 Fed. 471, 476. And see *Mitchell v. Hitchman C. & C. Co.* (1914, C. C. A. 4th) 214 Fed. 685; s. c. (1917) 245 U. S. 229, 38 Sup. Ct. 65.

[23] Act of Oct. 15, 1914 (38 Stat. at L. 730).

[24] Congress here merely repeated the language found in many cases. But such a statement is of little moment. All that any anti-trust statute contemplates, associated laborers not being explicitly excepted by its terms, is more or less definitely delimited human conduct producing certain factual results. The inquiry then should be: should it be privileged because it is indulged in by associated laborers?

of persons under certain conditions.[25] But as early as 1918, Section 20 was construed as being inapplicable to strikes not entered into for the betterment of labor conditions.[26] On the other hand the United States Supreme Court has refused to grant injunctions where the interference with interstate commerce was incidental and remote,[27] though it has intimated that such relief would not be denied where the defendant had, as it were, the "specific intent" to cause such interference no matter whether incidental and remote or not.[28]

The same phenomena that thus appear in the interpretation of the statutes can be observed in the instant cases. But in order to pass judgment on them, or more specifically, to determine whether or not the practice involved is or is not justifiable, it seems necessary to make a study of the factual situation. The data are meager. But a careful consideration of harm suffered and benefit obtained should be preliminary to any conclusion as to what ought to be the legal relations.

The defendants' argument can be stated briefly. Painting contractors in the United States fall into two classes: national and local. National contractors do either decorative work on fine buildings or work involving large operations. The great demand for such work in the large cities develops journeymen painters of unusual skill and their wages are fixed accordingly. When a small town requires special work, a national contractor is frequently engaged. He bases his charges on the costs of labor in his home town, unless the local wage is higher. He also imports a number of journeymen in his employ, who are necessarily more skilful, to do all or part of the work. Since the obvious effect of this would be the displacement of local journeymen, it was found necessary to adopt the fifty per-cent. rule. And since the wage-scale in each locality would be likely to differ, it was also necessary, to prevent friction between the two classes of workers, to adopt a uniform wage-scale; and the higher rate was chosen, since,

[25] ". . . involving, or growing out of, a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law. . ."

[26] *United States v. Norris* (N. D. Ill.) 255 Fed. 423. And see *Gasaway v. Borderland Coal Corp.* (1921, C. C. A. 7th) 278 Fed. 56; see NOTES (1922) 35 HARV. L. REV. 459; *American Steel Foundries v. Tri-City Cent. Trades Council* (1921) 257 U. S. 184, 42 Sup. Ct. 72; Carrington, *Injunctions in Labor Controversies* (1922) 8 VA. L. REG. (N. S.) 401; (1922) 8 VA. L. REV. 298.

[27] *United Mine Workers of America v. Coronado Coal Co.* (1922) 259 U. S. 344, 42 Sup. Ct. 570; *United Leather Workers' Int. Union v. H. & M. Trunk Co.* (1924) 265 U. S. 457, 44 Sup. Ct. 623; see NOTES (1922) 71 U. PA. L. REV. 48; (1924) 34 YALE LAW JOURNAL, 206. And see *Gable v. Vonnegut Machinery Co.* (1921, C. C. A. 6th) 274 Fed. 66; *Danville Local Union No. 115 v. Danville Brick Co.* (1922, C. C. A. 7th) 283 Fed. 909, 910. See 28 A. L. R. 1015, note.

[28] *Duplex Printing Press Co. v. Deering* (1921) 254 U. S. 443, 41 Sup. Ct. 172; see NOTES (1921) 21 COL. L. REV. 258; NOTES (1921) 7 VA. L. REV. 462; (1921) 1 WIS. L. REV. 186. And see *Western Union Tel. Co. v. Int. Bro. of Electrical Workers* (1924, N. D. Ill.) 2 Fed. (2d) 993.

if the scale prevailing in the locality were lower, and were adopted, it would be manifestly unfair to the out-of-town worker. Moreover, a country builder, engaging a national contractor, figures on out-of-town costs and is willing to pay accordingly.[29]

This argument does not lack plausibility. The program certainly makes for harmony and efficiency among migratory journeymen. Where the local wage-scale is higher, it seems that the national contractor is not prejudiced.[30] Where it is lower, as in the instant cases, it is true that the national contractor has to pay the higher wage, but he is not for that reason outbidden by the local contractor. The national contractors are not prevented from taking the special out-of-town jobs, for they alone are really qualified to do them. The argument to the contrary assumes that the small town has enough contractors who can do the special work to keep out competitors from elsewhere. On the other hand, competition would very probably be present, either where the locality of the work, being a city or town of considerable size, had a qualified, or national, contractor;[31] or where two national contractors were each desirous of getting the job.

It seems that the wage-scale provisions now under discussion are a manifestation of the potency of the building-trades unions in the community. The building crafts seem, more than other unions, to be able to force the recognition of their demands, perhaps because of the ability of the employer to pass the increased expense on to the consumer,[32] a fact which seems to explain the not-infrequent occurrence of combinations between the unions and the employers.[33]

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[29] From the brief of the defendants-appellants in the New Jersey case, 13-16, *passim*. See also *ibid.* 16-19.

[30] Where the local wage-scale is higher, the union requirement obviously has the effect of removing a competitive disadvantage and placing the competing contractors on a par. (It is assumed, of course, that there really is competition. See *infra*, p. 904).

[31] In each of the principal cases, the place was a locality of substantial size: Newark, N. J., Atlantic City, N. J. (N. J. case); Greenwich, Conn. (Conn. case); Washington, D. C. (Dist. of Col. case).

[32] "The manufacturer . . . faces the risk of being undersold or surpassed in quality of product; his orders are contingent and variable. . . The building contractor estimates on the basis of conditions at a definite time and place, and passes on the bill to the owner. The manufacturer cannot pass on the bill to any employing owner. . ." Bullard, *Labor Unions at the Danger Line* (1923) 132 ATLANTIC MONTHLY, 721, 726.

[33] "Building practices may be wantonly wasteful, but they have no immediate relevancy to the contractor's welfare. He tends therefore to compromise. A cost-plus contract is eminently desirable; it leaves him little to worry about. If he makes an 'understanding' with Labor for mutual advantage he only succumbs to a very human temptation." Bullard, *loc. cit. supra* note 32. See *Nat. Fireproofing Co. v. Mason Builders' Assoc. supra* note 22. *Cf. Nat. Assoc. of Window Glass M'f'rs. v. United States* (1923) 263 U. S. 403, 44 Sup. Ct. 148; see (1924) 37 HARV. L. REV. 633. *Cf.* also *Intermediate Report of the Joint Legislative Committee on Housing* (1922, N. Y.) Leg. Doc. No. 60, p. 119. See

All these factors, then, should have an important bearing on the determination of the question whether or not the programs of the unions in the instant cases were "in restraint of trade."[34] But the lack of other factual data makes almost impossible the reaching of a satisfactory legal conclusion. For instance, it would be desirable to know in what proportion of cases in which an out-of-town job is taken there is competition; what percentage of a national contractor's work involves jobs at home or in a very small community; and what percentage in a city of substantial size with a real competitor. These questions apparently were not before the court in the instant cases. Such cases instance what seems to be an obvious need for some fact-gathering machinery, the results of which might be utilized by the courts in the solution of such questions.

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further *ibid.* 51 (agreements between Inside Electrical Workers Union, Local No. 3, of New York City, and employers). See *ibid.* 54, 55; 94 (marble industry); 100 (plumbing); 105 (firring and lathing); 106 (Heating and Piping Contracts Assoc.); 107 (Contractors Protective Assoc.); 108 (plastering); 109 (stone masonry); 110 (tiling, grating, and manteling); 112 (mosaic work); 114 (roofing); 116 (bronze and iron), (architectural iron work); 117 (metal doors and windows), (metal ceilings), (parquet flooring); 120 (electrical supplies); 121 (painting). See *Final Report of the Joint Legislative Committee on Housing* (1923, N. Y.) Leg. Doc. No. 48, p. 60 (Nat. Building Granite Quarries Assoc.).

[34] "There is no reason for such a regulation." "Why the rate of wages to be paid the mechanic should depend on the place in which the office of the employer is located rather than on the prevailing rate where the job is done, is explainable only on the theory that the unions are assuming to regulate and suppress competition between contractors and so that no contractor in one city will be able to compete on a job in another city. It is a thoroughly vicious regulation." *Interm. Rep., etc. supra* note 33, at p. 60. These statements are quoted in the Final Rep., ek. *supra* note 33, at p. 33. It is to be observed, however, that the illustrative case put by the Committee is one coming within the first of the two situations mentioned *ante* (see *supra* note 31 and text).