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THE MEANING OF THE FEDERAL RULE ON EVIDENCE ILLEGALLY OBTAINED

When, in 1886, the United States Supreme Court decided the *Boyd* case[1] out of which arose the federal rule against illegally seized evidence, the exigencies of a prohibition era could not have

[1] Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524 (1886).

been foreseen. Cases in which evidence had been procured by unconstitutional searches and seizures were relatively infrequent. The court, therefore, was confronted with no practical difficulty in adopting a policy based purely upon history. But an entirely different situation prevails today. The courts in jurisdictions where the rule is followed are crowded with prohibition cases and the most popular mode of defense is to seek the suppression of evidence on the ground that it was unreasonably seized.[2]

The application of the federal rule to these new conditions has not been easy. The purpose of the rule as an auxiliary to the Constitution has often been found incompatible with the task of enforcing present day laws, and courts have been willing to forego the former to accomplish the latter.[3] As a result of this tendency, many exceptions and limitations of the federal rule have arisen which have greatly narrowed the scope that the rule was originally thought to have.[4]

[2] An examination of volumes of the American Digest system discloses that since January 16, 1920, the date the National Prohibition Act became effective, more than 700 cases involving the admissibility of illegally obtained evidence were reported. Of this number approximately 575 have been prosecutions for violations of the liquor laws. As many as 490 were decisions in federal jurisdictions and in 290 of those cases the courts admitted evidence under exceptions to the rule. The intimate relation of this rule to prohibition enforcement is further illustrated by the fact that the number of liquor cases turning upon the rule has increased from four, during the first year, to more than 220 during the past year.

These cases indicate that, in addition to the federal courts, the following states still observe the rule: Alaska, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Oregon, Tennessee, Washington, West Virginia, Wyoming and Wisconsin. Since prohibition began, the following states have discarded the rule: Alabama, Iowa, New York and South Carolina. On the other hand, the rule has been subsequently adopted by Missouri, Montana, Ohio and Alaska. Litigation in states which have not adopted the federal rule has consisted merely in a few reiterations of the more general rule. *Cf.* State v. Reynolds, 101 Conn. 224, 125 Atl. 636 (1924); Hall v. Commonwealth, 143 Va. 554, 130 S. E. 416 (1925). One notable exception has been Texas where the general rule was reaffirmed in more than fifty cases until a restrictive law was introduced by the legislature. Tex. Laws 1925, c. 149. *Cf.* Deaver v. State, 103 Tex. Cr. App. 575, 281 S. W. 861 (1926) (introducing exceptions to the statute). In Mississippi a statute (Laws 1924, c. 244, par. 3) abolishing the federal rule was declared unconstitutional. Orick v. State, 140 Miss. 184, 105 So. 465 (1925).

[3] "An unlawful arrest of an offender does not work a pardon in his behalf. . . ." See United States v. Fenton, 268 Fed. 221, 222 (D. Mont. 1920). "Every constitutional or statutory provision must be construed, with the purpose of giving effect, if possible, to every other constitutional and statutory provision and in view of new conditions and new circumstances in the progress of the nation and the state." Nulan v. United States, 296 Fed. 629, 631 (C. C. A. 4th, 1924). See also the excellent opinion of Cardozo, J., in People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926) in which the New York Court of Appeals unequivocally rejected the federal rule.

[4] It is not within the scope of this comment to review past events in the

The first and most important limitation of the federal rule is the requirement that the legality of the seizure be determined by motion before trial.[5] This qualification was made expressly for the purpose of reconciling the rule with the more general proposition that the trial court will not question the source of relevant evidence. But the readiness of the courts applying the federal rule thus to compromise, weakens their main argument that the rule is a necessary adjunct of the Constitution.[6] Emphasis placed upon the preliminary motion obscures the constitutional foundations of the rule and characterizes it as a mere procedural device.[7] *State v. Childress*, 284 S. W. 520 (Mo. App. 1926), recently decided in a jurisdiction following the federal rule, illustrates this change of attitude toward the rule. In that case the defendant failed to make the preliminary motion. The evidence was declared admissible without a single reference to constitutional rights.[8] Thus does safeguarding the Fourth Amendment and kindred provisions in state constitutions become dependent upon timely procedural tactics.

But even where the preliminary motion has diligently been filed, the courts are reluctant to make a general application of the federal rule. This reluctance is reflected in a growing tendency to give a liberal construction to already established exceptions to the rule, and to seize upon the barest technicalities to enforce these exceptions. For instance, the first ten amendments to the Constitution restrain only federal officers. Federal courts, therefore, logically hold that the fruits of an illegal search by state or municipal officers need not be excluded.[9] But what is a search

controversy over the federal rule. Arguments in favor of the rule are found in: Atkinson, *Prohibition and the Doctrine of the Weeks Case* (1925) 23 MICH. L. REV. 748; Fraenkel, *Concerning Searches and Seizures* (1921) 34 HARV. L. REV. 361; Carroll, *Search and Seizure Provisions of the Federal and State Constitutions* (1924) 10 VA. L. REV. 124. Arguments against the rule are expressed in: Harno, *Evidence Obtained by Illegal Search and Seizure* (1925) 19 ILL. L. REV. 303; 4 WIGMORE, EVIDENCE (2d ed. 1923) 2183-2184; (1926) 11 CORN. L. Q. 250.

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

[6] See Harno, *op. cit. supra* note 4, at 312.

[7] *Cf.* Atkinson, *op. cit. supra* note 4, at 753; *et seq.* Prof. Atkinson gives a clear exposition of the motion, but he justifies it entirely upon procedural grounds without considering its relation to the major tenet of the rule.

[8] Courts disagree on the importance of the motion. The stronger view is that unless the motion is made the evidence is admissible. Levin v. United States, 5 Fed. (2d) 598 (C. C. A. 9th, 1925); People v. Kerwin, 209 N. W. 157 (Mich. 1926). The contrary holding is that the seizure cannot be questioned before trial. Youman v. Commonwealth, 189 Ky. 152, 224 S. W. 860 (1920) . In Tennessee and Illinois the defendant has his choice. State v. Bass, 281 S. W. 936 (Tenn. 1926); People v. Castree, 311 Ill. 392, 143 N. E. 112 (1924). For a discussion of the procedural problems raised by the development of the motion, see the opinion of Cook, J., in State v. Bass, *supra.*

[9] Crawford v. United States, 5 Fed. (2d) 672 (C. C. A. 6th, 1925).

by a state officer? Apparently the fact that federal agents actually accompany the state officers makes no difference.[10] The extent to which this exception is used to circumvent the rule is indicated in two recent cases. In *Klein v. United States,* 14 Fed. (2d) 35 (C. C. A. 1st, 1926) the evidence was admitted although the federal officers were called immediately to the raided house and carried away the paraphernalia for their own use. In *Brown v. United States,* 12 Fed. (2d) 926 (C. C. A. 9th, 1926) the raid was held to have been made by state officers though the information leading up to it was given by federal prohibition agents. These cases suggest that the courts will be satisfied if it can be shown that the state officers were the first to cross the threshold of the raided premises and execute the formality of touching the articles to be seized. [11]

A similar disposition is reflected in the readiness of courts to find that the defendant consented to the search and in that way waived his constitutional privilege.[12] The ramifications of this exception are confusing. Many courts go so far as to hold that mere acquiescence in the demands of the searching officer is conduct sufficiently voluntary to prevent any subsequent application of the federal rule.[13] The conflict is between courts using an un-

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[10] Crawford v. United States, *supra* note 9.

[11] The extent of this exception is, however, the subject of some conflict. It is difficult to reconcile the cases already cited with Legman v. United States, 295 Fed. 474 (C. C. A. 3d, 1924). In United States v. Costanzo, 13 Fed. (2d) 259 (W. D. N. Y. 1926) a definite agreement between federal and state officers that the latter should raid certain premises was held to render the evidence inadmissible. Some state courts refuse to follow the inverse of this exception. They admit evidence of federal officers only if it has been legally seized. State v. Rebasti, 306 Mo. 336, 267 S. W. 858 (1924); Walters v. Commonwealth, 199 Ky. 182, 250 S. W. 839 (1923). It has been held that a search by a military picket does not violate the Fourth Amendment, although if made under similar circumstances by a civil officer it would be illegal. United States v. Crowley, 9 Fed. (2d) 927 (N. D. Ga. 1925). But *cf.* State v. Ethridge, 135 Wash. 500, 238 Pac. 19 (1925). Most courts agree that evidence illegally seized by private individuals is admissible. Burdeau v. McDowell, 256 U. S. 465, 41 Sup. Ct. 574 (1921). But *cf.* People v. Defore, *supra* note 3, at 23, 150 N. E. at 588: "We exalt form above substance when we hold that the use is made lawful because the intruder is without a badge of office. . . ."

[12] Windsor v. United States, 286 Fed. 51 (C. C. A. 6th, 1923). "In this connection several cases turn upon the alleged consent of the party to be searched. We think such cases usually strain a point to justify the search." See State v. Owens, 302 Mo. 348, 358, 259 S. W. 100, 102 (1924).

[13] Opening the door of the premises on demand is called consent. Commonwealth v. Meiner, 196 Ky. 840, 245 S. W. 890 (1922). So, also, where the search is permitted in the belief that it is for some non-incriminating purpose. State v. Roop, 73 Mont. 177, 235 Pac. 336 (1925); Massei v. United States, 295 Fed. 683 (C. C. A. 4th, 1924). Records that are required to be made under the National Prohibition Act may be taken for use as evidence in a prosecution under the Act. Guckenheimer v. United States, 3 Fed. (2d) 786 (C. C. A. 3d, 1925); Marron v. United States, 8 Fed. (2d)

reasonable method to secure a justifiable end and courts insisting upon a logical observance of an impractical rule.

The idea that the constitutional privilege is personal to the owner of the premises also plays an important part in this modification of the federal rule. The illegality of the search is of no avail to a defendant who is not owner of the premises searched.[14] But here, too, the practice of construing away the general rule where it ought logically to be applied has produced many conflicting holdings.[15] In this respect it is proper to consider the relation of section 25 of the National Prohibition Act to the observance of the rule. The Act provides that "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor." A search of a private dwelling used merely for the unlawful

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251 (C. C. A. 9th, 1925). Likewise, where the files are required under the Harrison Narcotic Law. Spring Co. v. United States, 12 Fed. (2d) 852 (C. C. A. 8th, 1926). Evidence secured by tax officials examining the defendant's books has been held admissible in a prosecution for violation of the Prohibition law. Cooper v. United States, 9 Fed. (2d) 216 (C. C. A. 8th, 1925). Yet other decisions maintain that mere acquiescence in an official's demands is not to be construed as consent. Dukes v. United States, 275 Fed. 142 (C. C. A. 4th, 1921); States v. Luna, 266 S. W. 755 (Mo. 1924). In Re Lobosco, 11 Fed. (2d) 892 (E. D. Pa. 1926) is in direct conflict with Cooper v. United States, *supra*.

[14] Rouda v. United States, 10 Fed. (2d) 916 (C. C. A. 2d, 1926); Shell v. Commonwealth, 197 Ky. 264, 246 S. W. 797 (1923).

[15] Evidence secured by an illegal search of the father's farm is admissible against the son living there. Frye v. State, 151 N. E. 728 (Ind. 1926). But the husband is protected from a wrongful search of premises owned by his wife. Sanders v. State, 106 So. 822 (Miss. 1926). The exception is used to justify the admission of bottles owned by another, but taken from the automobile of the defendant. Hurwitz v. United States, 299 Fed. 449 (C. C. A. 8th, 1924); and, on the other hand, the admission of bottles of the defendant taken from the premises of another. State v. Fenley, 305 Mo. 520, 275 S. W. 36 (1925). A jug of liquor wrongfully taken from the buyer may be used against the seller. State v. Ditmar, 132 Wash. 501, 232 Pac. 321 (1925). That the illegally seized articles were owned by one defendant is no bar to their use against co-defendants. Brooks v. United States, 8 Fed. (2d) 593 (C. C. A. 9th, 1925). The courts apparently will minutely scrutinize the defendant's right to possession. Snedegar v. State, 196 Ind. 254, 146 N. E. 849 (1925). Thus, evidence seized from defendants in possession of an abandoned barn is admissible. Tritico v. United States, 4 Fed. (2d) 664 (C. C. A. 5th, 1925). Ownership must affirmatively be pleaded. Earle v. State, 194 Ind. 165, 142 N. E. 405 (1924). And having once disclaimed ownership, the defendant may not later object to the evidence. State v. District Court, 72 Mont. 77, 236 Pac. 257 (1925). The evidence is always admissible if legal title be found to be in the corporation, as such, rather than in the defendant officers thereof. Guckenheimer v. United States, *supra* note 13. It has been held that evidence secured by a search of the defendant's lands without a warrant is admissible so long as his house has not been entered. State v. Cobb, 309 Mo. 89, 273 S. W. 736 (1925); Simmons v. Commonwealth, 210 Ky. 33, 275 S. W. 369 (1925); Hester v. United States, 265 U. S. 57, 44 Sup. Ct. 445 (1924).

manufacture of liquor is, therefore, not permitted and evidence secured in such a search should, under the federal rule, be suppressed.[16]

A search otherwise illegal is in many cases justified on the ground that an offense was being committed in the presence of the officer.[17] A comparison of the cases on this point shows that the courts are not agreed on what constitutes "in the presence of an officer." But it is apparently the practice to settle the doubt by admitting the evidence.[18] Where the search is incidental to an arrest, similar questions on the legality of arrest and the extent to which the search is to be permitted arise.[19] It has also been said that the federal rule will operate to exclude neither the so-called corpus delicti of a crime,[20] nor that which by statute is declared contraband.[21] Furthermore, the use of evidence will not be barred because of any technical defect in the search warrant.[22] In some states the warrant need be valid only on its face,

[16] Bell v. United States, 9 Fed. (2d) 820 (C. C. A. 9th, 1925). The protection thus afforded by section 25 has been said to extend to a garage attached to the house. Temperani v. United States, 299 Fed. 365 (C. C. A. 9th, 1924). But *cf.* Earl v. United States, 4 Fed. (2d) 532 (C. C. A. 9th, 1925) (where a search of a garage in the basement of the dwelling was held legal). Does the mere fact that someone sleeps in the building render it immune from search? The recent decision of Schroeder v. United States, 14 Fed. (2d) 500 (C. C. A. 9th, 1926) reaches that conclusion but it is in conflict with United States v. Mitchell, 12 Fed. (2d) 88 (D. Tex. 1926) and also Steele v. United States, 267 U. S. 498, 45 Sup. Ct. 414 (1925). The dissenting opinion of Judge Gilbert in the Schroeder case, *supra*, expresses an intelligent view of the scope of section 25. Evidence seized under a city ordinance permitting the search of a house where liquor is manufactured is admissible in a federal court notwithstanding section 25. United States v. Viess, 273 Fed. 279 (W. D. Wash. 1921).

[17] MCFADDEN, THE LAW OF PROHIBITION (1925) 28, 29.

[18] United States v. Gaitan, 4 Fed. (2d) 848 (S. D. Calif. 1925); Miland v. United States, 296 Fed. 629 (C. C. A. 4th, 1924); Nicholson v. United States, 6 Fed. (2d) 569 (C. C. A. 7th, 1925). The past criminal record of the defendant was, in Jones v. United States, 296 Fed. 632 (C. C. A. 4th, 1924) held to justify the search. But for a decision limiting the exception, see Brock v. United States, 12 Fed. (2d) 370 (C. C. A. 8th, 1926). Greater confusion exists among state courts. Compare People v. Dungey, 209 N. W. 57 (Mich. 1926) with Boyd v. State, 152 N. E. 278 (Ind. 1926); and People v. Mushlock, 207 N. W. 834 (Mich. 1926) with Testolin v. State, 188 Wis. 275, 205 N. W. 825 (1925).

[19] It is sufficient to refer to (1926) 35 YALE LAW JOURNAL, 612, which considers this phase of the general subject.

[20] United States v. Welsh, 247 Fed. 239 (S. D. N. Y. 1917); Fenton v. United States, 268 Fed. 221 (D. Mont. 1920). *Contra:* United States v. Kelih, 272 Fed. 484 (S. D. Ill. 1921).

[21] State v. Ditmar, 132 Wash. 501, 232 Pac. 321 (1925); *cf.* Rosanski v. State, 106 Ohio St. 442, 140 N. E. 370 (1922); State v. Martin, 285 S. W. 777 (Mo. 1926); CORNELIUS, SEARCHES AND SEIZURES (1926) 47-49. But *cf.* State v. Owens, *supra* note 12.

[22] Rothlisberger v. United States, 289 Fed. 72 (C. C. A. 6th, 1923) (where the wrong street number was given, and the person named was not the

and the truth of the affidavits cannot be attacked.[23] Even though the officers contrary to law destroy part of the liquor seized, their testimony is nevertheless admissible.[24]

The Supreme Court definitely contributed to this tendency to modify the federal rule by holding that the Fourth Amendment was not to be extended beyond the literal scope it was by its framers intended to have.[25] An excuse was in that way found for discarding the rule in many situations of prohibition enforcement.

The foregoing instances of limitations placed upon the federal rule suggest several conclusions. The generalization in the *Boyd* case has been found incompatible with prohibition enforcement. In an attempt to adapt it to the new conditions courts have lost sight of its function as a constitutional safeguard. The rule has become merely a technicality in procedure. But even in that field it has been necessary to curb its operation. So frequently are courts shaping exceptions to the rule, so rapidly is an unwieldy mass of precedent growing, that an exact definition of the rule no longer is possible. The original federal rule against illegally seized evidence has been broken down; confusion and uncertainty remain.

RECIPROCITY AND THE RECOGNITION OF FOREIGN JUDGMENTS

In actions concerning foreign judgments it has been commonly said that a sister-state money judgment is conclusive evidence of a cause of action, but a foreign money judgment is merely "prima facie" evidence.[1] "Conclusive" seems to mean "conclusive as to the merits"; it does not refer to questions of lack of jurisdiction [2]

owner of the premises); Golden v. United States, 4 Fed. (2d) 846 (C. C. A. 8th, 1925) (failure to make proper return of the warrant).

[23] Smee v. Commonwealth, 199 Ky. 488, 251 S. W. 622 (1923). Evidence is not disqualified because the warrant is unaccompanied by affidavits when introduced at trial. Terrell v. Commonwealth, 196 Ky. 288, 244 S. W. 703 (1922). Nor because the warrant has been lost. State v. Price, 274 S. W. 500 (Mo. App. 1925).

[24] Hurley v. United States, 300 Fed. 75 (C. C. A. 1st, 1924). *Contra:* United States v. Cooper, 295 Fed. 709 (D. Mass. 1924). The Cooper case is disapproved of in In Re Quirk, 1 Fed. (2d) 484 (W. D. N. Y. 1924).

[25] Carroll v. United States, 267 U. S. 132, 45 Sup. Ct. 280 (1924).

[1] See Burnham v. Webster, Fed. Cas. No. 2179 (C. C. Me. 1846); Bimeler v. Dawson, 5 Ill. 536, 540 (1843); Warren v. Flagg, 2 Pick. 448, 449, 450 (Mass. 1824); Robinson v. Prescott, 4 N. H. 450, 453, 454 (1828); Hitchcock v. Aicken, 1 Caines, 460, 463, 464 (N. Y. 1803); Pelton v. Platner, 13 Ohio, 209, 217 (1844); Eastern Townships Bank v. Beebe, 53 Vt. 177, 182 (1880); *cf.* Betts v. Death, Addis. 265, 266 (Pa. 1795).

[2] Ferguson v. Oliver, 99 Mich. 161 (1894); Tremblay v. Aetna Life Ins. Co., 97 Me. 547, 55 Atl. 509 (1903); Middlesex Bank v. Butman, 29 Me. 19 (1848); Grubel v. Nassauer, 210 N. Y. 149, 103 N. E. 1113 (1913); Boyle v. Semenoff, 201 App. Div. 426, 194 N. Y. Supp. 309 (1st Dept. 1922); Traders Trust Co. v. Davidson, 146 Minn. 478, 178 N. W. 735 (1920);

or of fraud in obtaining the judgment,[3] either of which is ground for impeaching the judgment.[4] The meaning of "prima facie," however, seems obscure. The earlier English cases may be interpreted as indicating that a foreign judgment can be reviewed on the merits, that is, tried anew on all points.[5] But some of the earlier American cases seem to have meant no more than that the judgment could be impeached for fraud or lack of jurisdiction.[6] This makes "prima facie" and "conclusive" mean the same thing.[7] Leaving cases involving reciprocity aside for the moment, American decisions have, with the exception of one doubtful case,[8] given only two grounds for reviewing foreign judg-

Roussillon v. Roussillon, 14 Ch. D. 351 (1880); Phillips v. Batho [1913] 3 K. B. 25; Duflos v. Burlingham, 34 L. T. 688 (Q. B. 1876); see Hilton v. Guyot, 159 U. S. 113, 203, 204, 16 Sup. Ct. 139, 158, 159 (1895); FOOTE, PRIVATE INTERNATIONAL LAW (5th ed. 1925) 598–603. For foreign default judgments, see Fisher v. Fielding, 67 Conn. 91, 34 Atl. 714 (1895); Ouseley v. Lehigh Valley Trust Co., 84 Fed. 602 (C. C. Pa. 1897); Christian & Craft Grocery Co. v. Coleman, 125 Ala. 158, 27 So. 786 (1900). For view *contra* see Hammersley, J., dissenting in Fisher v. Fielding, *supra*, citing The Delta, L. R. 1 P. D. 393 (1876). *Cf.*, however, Schibsby v. Westenholz, L. R. 6 Q. B. 155, 160, 161 (1870).

[3] What is fraud in obtaining a foreign country's judgment is not definitely settled. An alternate ground of the decision in Tremblay v. Aetna Life Ins. Co., *supra* note 2, apparently accords with the English view as represented by Abouloff v. Oppenheimer, *infra* note 12. Cases as to sister state judgments are plentiful. Dobson v. Pearce, 12 N. Y. 156 (1854); Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663 (1901); Ann. Cas. 1914 D, 999 *ff.* These are chiefly cases of fraud where jurisdiction was obtained through fraud. See 3 FREEMAN, JUDGMENTS (5th ed. 1925) § 1401; (1911) 32 L. R. A. (N. S.) 913–917. The English rule as to fraud is likewise uncertain. See *infra* note 11; Hilton v. Guyot, *supra* note 2, at 206, 207, 16 Sup. Ct. at 160.

[4] The same is apparently true as to penal judgments. See Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 289, 290, 8 Sup. Ct. 1370, 1374 (1888); Huntington v. Attrill, 146 U. S. 657, 670–683, 13 Sup. Ct. 224, 229–233 (1892); Huntington v. Attrill [1893] A. C. 150, 155, 156; Folliott v. Ogden, 1 H. Bl. 123, 135 (C. P. 1789). *Cf.* Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641 (1908). And it is true as to judgments not final in their nature. American Nat'l Bank v. Garland, 235 S. W. 562 (Tex. Comm. App. 1921); *cf.* Janous v. Columbus State Bank, 101 Neb. 393, 164 N. W. 1053 (1917); Harrop v. Harrop [1920] 3 K. B. 386; *cf.* Beatty v. Beatty [1924] 1 K. B. 807.

[5] Sinclair v. Fraser, 1 Doug. 4 n. (H. L. 1771); Walker v. Witter, 1 Doug. 1, 5 (K. B. 1778); Phillips v. Hunter, 2 H. Bl. 402 (C. P. 1795); Houlditch v. Donegal, 8 Bligh (N. S.) 301 (1834). Except perhaps for the last case cited, none of these is authority for reviewing a foreign judgment on the merits. There apparently was such review, however, in Otway v. Ramsey, 2 Stra. 1090 (K. B. 1736) and in a very early case cited by Kuhn, *Doctrines of English and American Private International Law Contrasted with Those in Continental Europe* (1912) 12 COL. L. REV. 44, 46: Y. B. 2 Ed. II (1 S. S.) 111. See FOOTE, *op. cit. supra* note 2, at 617–621.

[6] Buttrick v. Allen, 8 Mass. 273 (1811); Smith v. Lewis, 3 Johns. 157, 169 (N. Y. 1808).

[7] Except, of course, as to merger. See *infra* note 14.

[8] Burnham v. Webster, *supra* note 1. See *infra* note 10.

ments in addition to those recognized for reviewing sister-state judgments: (a) that there has been an unfair trial,[9] (b) that the suit is on a cause of action unknown in the forum and against the public policy of the forum.[10] Two other grounds are sug-

[9] Bank of Minero v. Ross, 106 Tex. 522, 172 S. W. 711 (1915). In this case a Mexican judgment was denied recognition because the technicalities of Mexican procedure had prevented the defendant there from setting up a good defense and the omission to affix a stamp to the document of appeal had deprived him of his right to appeal. The case cites no authority and is believed to be the first direct decision in this country on the point. Accord: Brussels Conference draft (1925) Article 2(a) reported in Wigmore, *Execution of Foreign Judgments* (1926) 21 ILL. L. REV. 1, 4.

[10] De Brimont v. Penniman, Fed. Cas. No. 3,715 (C. C. S. D. N. Y. 1876). This case holds that suit cannot be maintained on a French judgment for support of a son-in-law. It, also, seems a first impression case. *Cf.* In re Macartney [1921] 1 Ch. 522 (Maltese decree that father support bastard child); Robinson v. Fenner [1913] 3 K. B. 835 (one ground of the decision is in accord). The Hague Conference draft (1925) Article 1(2) reported in KOSTERS, LA CINQUIÈME CONFÉRÉNCE DU DROIT INTERNATIONAL PRIVÉ (1926) 45, 46, establishes as a condition to recognition of a foreign judgment "that the recognition of the decision be not contrary to public order or to the principles of law of the State where its enforcement is sought." See also article 2(b) of the Brussels Conference draft, *supra* note 9, ". . . against the public policy of the State in which its enforcement is sought." And section 2 of the Stockholm Conference (1924) INTERNATIONAL LAW ASSOCIATION, REPORT OF THE THIRTY-THIRD CONFERENCE (1925) 146, 148, "contra bonos mores."

A case out of line with the general trend is Burnham v. Webster, *supra* note 1. Here there was judgment for the plaintiff in New Brunswick on a number of notes. But as to one of them there was judgment for the defendant (that he "go without day") with no verdict as to it, and an alleged agreement that there should be no action on it. Under such circumstances the plaintiff was allowed to bring an action on the note in the United States. MacDonald v. Grand Trunk Ry., 71 N. H. 448, 52 Atl. 982 (1902) is a stronger case involving a similar question of res adjudicata. In England the "prima facie" doctrine has never been considered in connection with res adjudicata. Ricardo v. Garcias, 12 Cl. & F. 368 (H. L. 1845); Barber v. Lamb, 8 C. B. (N. S.) 95 (1860); BIGELOW, ESTOPPEL (6th ed. 1913) 342. But there seems to be no reason for distinguishing res adjudicata from enforcement, for all other cases on enforcement of foreign judgments (still excepting those involving reciprocity) have held them conclusive in the absence of fraud or lack of jurisdiction. Lazier v. Westcott, 26 N. Y. 146 (1862); Baker v. Palmer, 83 Ill. 568 (1876); Rankin v. Goddard, 54 Me. 28 (1866) (query, whether "fraud" as used in this case means fraud in obtaining the judgment); Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171 (1895); Christian & Craft Grocery Co. v. Coleman, *supra* note 2; *cf.* Strauss v. Conried, 121 Fed. 199 (C. C. N. Y. 1902); Gioe v. Westervelt, 116 Fed. 1017 (C. C. N. Y. 1902); Ouseley v. Lehigh Valley Trust Co., *supra* note 2; see Hatch v. Spofford, 22 Conn. 485, 500, 501 (1853); Boston India Rubber Factory v. Hoit, 14 Vt. 92, 94 (1842); Alberta Lumber Co. v. Pioneer Lumber Co., 244 Pac. 250, 251 (Wash. 1926). Anderson v. Haddon, 33 Hun, 435 (N. Y. Sup. Ct. 1884) purports to follow De Brimont v. Penniman, but the decision probably turns on lack of jurisdiction.

It appears, therefore, that except for cases under the reciprocity doctrine,

gested in English cases: (a) that the foreign court has rendered a judgment refusing to recognize any rule of private international law almost universally recognized;[11] (b) that there has been fraud.[12] Whether these grounds will be adopted by the American courts is, of course, a matter for the future to decide. As "prima facie evidence" indicates the possibility of a review on the merits, and as the difference between the recognition of foreign-country and sister-state judgments has ordinarily been so slight, the expression seems unfortunate in this application.[13] It is, however, appropriate when dealing with non-merger[14] and reciprocity.

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only three cases have actually reviewed foreign country judgments on grounds other than those which allow a review of sister-state judgments.

[11] Simpson v. Fogo, 1 H. & M. (Ch. 1862). Here an English court refused to give effect to a Louisiana judgment which had refused to recognize the title of a mortgagee of an English ship under the English law. None of the three conventions mentioned *supra* note 10 has adopted this rule in its tentative draft.

[12] *I.e.*, fraud generally—not confined to fraud in obtaining the judgment. Abouloff v. Oppenheimer, 10 Q. B. D. 295 (1882); Vadala v. Lawes, 25 Q. B. D. 310 (1890); Manger v. Cash, 5 T. L. R. 271 (Q. B. 1889); FOOTE, *op. cit. supra* note 2, at 603–605. Whether or not this is still English law is doubtful. Bank of Australasia v. Nias, L. R. 16 Q. B. 717 (1851); Robinson v. Fenner, *supra* note 10; 1 PIGGOTT, FOREIGN JUDGMENTS (3d ed. 1908) 387, 395; FREEMAN, *op. cit. supra* note 3, § 1488. It is perhaps significant that the cases holding it is not still English law deal with judgments obtained in colonies.

It seems fairly well settled that sister-state judgments are impeachable only for fraud in obtaining the judgment. See citations *supra* note 3.

[13] Story was, more than anyone else, influential in bringing about the present tendency to recognize foreign judgments where possible. He bitterly criticized the vague use of "prima facie": "the rule, that the judgment is to be *prima facie* evidence for the plaintiff, would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial." STORY, CONFLICT OF LAWS (6th ed. 1865) § 607. Wigmore points out that a judgment when enforced is not treated as evidence; rather it is lending the court's executive aid, on certain terms, without investigation of the merits of fact. 2 WIGMORE, EVIDENCE (2d ed. 1923) 1019.

[14] When a sister-state judgment has been obtained, action can only be brought on the judgment itself, but when a foreign judgment has been rendered, action may be brought on either the judgment *or* on the original cause of action. Swift v. David, 181 Fed. 828 (C. C. A. 9th, 1910); Long v. Peters Mill Co., 157 La. 283, 102 So. 402 (1924); 3 FREEMAN, *op. cit. supra* note 3, § 1502; (1925) 34 YALE LAW JOURNAL, 550; 1 PIGGOTT, *op. cit. supra* note 12, at 17, 18. The theory apparently is not applied to cases in which the foreign judgment for the defendant is set up as a bar. *Cf.* MacDonald v. Grand Trunk Line, *supra* note 10; Ricardo v. Garcias, *supra* note 10; Johnston v. Compagnie Generale Transatlantique (cited *infra* in the text). It is peculiar to American and English jurisprudence, the typical procedure being the obtaining of an *exequatur*. See Lorenzen, *Enforcement of American Judgments Abroad* (1919) 29 YALE LAW JOURNAL, 188, 192. Of course to say that a foreign judgment is prima facie evidence

In 1895 it was held that in an action on a judgment of a foreign country, the judgment would be reviewed on the merits unless that country recognized our judgments.[15] This doctrine of reciprocity was strictly limited by dictum to actions brought on foreign judgments against United States defendants.[16]

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with the only reason that of non-merger would be inaccurate in the cases under discussion, since they involve actions on the judgment itself or res adjudicata.

[15] Hilton v. Guyot, *supra* note 2.

[16] *Ibid.* at 170, 15 Sup. Ct. at 146. It is possible that those judgments are limited to those secured by foreigners in foreigners' courts. On the basis of the rules postulated in Hilton v. Guyot and the few cases on the subject, the following classification may be made as to the treatment to be accorded judgments of foreign countries which do not recognize our judgments as conclusive:

1(a). *Foreign plaintiff and United States defendant—judgment for plaintiff in the foreign country;* reciprocity will be applied. This was the actual holding in Hilton v. Guyot. Until 1926 it had not been followed by any case in which a judgment of a nation which did not recognize our judgments was involved. It was given lip service, however, in three cases involving nations which recognize our judgments: Cruz v. O'Boyle, 197 Fed. 824 (D. C. Pa. 1912); Strauss v. Conried, *supra* note 10; Gioe v. Westervelt, *supra* note 10 (counterclaim). *Cf.* Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N. W. 735 (1920) (action on Manitoba judgment in which there had been no jurisdiction over the defendant; court notes "in passing" that Hilton v. Guyot could apply). *Cf.* Fisher v. Fielding, *supra* note 2, at 108, 34 Atl. at 716.

1(b). *Foreign plaintiff and United States defendant—judgment for the defendant in the foreign country;* reciprocity will not be applied (the judgment will be held conclusive). Again, this rule has had no direct following until 1926. In MacDonald v. Grand Trunk Ry., *supra* note 10, the Canadian court which gave judgment for the defendant was one which gave recognition to our judgments.

2(a). *United States plaintiff and foreign defendant—judgment for plaintiff in the foreign country;* reciprocity will not be applied. No cases have been found on this point. Presumably the reasoning behind 1(b) and 2(a) is that, since recognition or non-recognition of foreign judgment as conclusive is purely a matter of comity, there is no reason to question a foreign adjudication with consequent possible benefit to a foreigner, who should be content with his or another country's adjudications, and detriment to a United States citizen.

2(b). *United States plaintiff and foreign defendant—judgment for the defendant in the foreign country;* reciprocity will not be applied. The theory stated to substantiate this is that he who invokes the jurisdiction should be bound by a judgment against him. See Cammell v. Sewell, 3 H. & N. 617, 646 (Exch. 1858).

3. *Foreign plaintiff and foreign defendant, judgment for either in the foreign country;* here it would seem that the reasons for 2(a) and (b) would apply.

Hilton v. Guyot does not mention a fourth class:

4(a). *United States plaintiff and defendant, judgment for plaintiff in the foreign country.* On analogy to 1(a) reciprocity would be applied; on analogy to 2(a) it would not be. We are given no intimation of which would be followed.

Whether there is such a limitation and whether there should be such a doctrine in New York, were questions raised by two recent cases. In *Johnston v. Compagnie Générale Transatlantique*, 242 N. Y. 381, 152 N. E. 121 (1926) there was judgment for the defendant (a French corporation) in France. The plaintiff of the French action (an American citizen) sought to get a judgment in New York on the same cause of action. The court refused to go into the merits and gave judgment for the defendant. This case may be interpreted (a) as confirming the limitation suggested by *Hilton v. Guyot* upon the doctrine of reciprocity to actions on foreign judgments [17] or (b) as standing for the entire abolition of the doctrine in New York.[18] In the subsequent case of *Cowens v. Ticonderoga Pulp & Paper Co.*, 127 Misc. 898, 217 N. Y. Supp. 647 (Sup. Ct. 1926) a lower New York court rendered a decision which, if affirmed, will necessarily limit the effect of the *Johnston* case to (a).[19]

Reciprocity has been bitterly criticized.[20] The criticism generally takes the form of comparing it disadvantageously with a theory of universal recognition of foreign judgments.

There are three main arguments for universal recognition. The first is that a judgment is a law governing private rights, and that it should be recognized as is foreign contract or property

4(b). *United States plaintiff and defendant, judgment for defendant in the foreign country.* Analogy to 1(b) and 2(b) indicate reciprocity would not be applied.

A modern divorce case affirming by way of dictum the reciprocity doctrine of Hilton v. Guyot in dictum is Warren v. Warren, 73 Fla. 764, 75 So. 35 (1917).

[17] *I.e.*, as being the first case to arise under 2(b) (*supra* note 16).

[18] Both grounds were given in the opinion.

[19] In this case the plaintiffs, citizens of Quebec, brought action against the defendant, a New York corporation, in Quebec. There was judgment for the plaintiffs. The plaintiffs now bring action on the judgment in New York. Held, that since Quebec does not regard our judgments as final, this judgment will not be so regarded, and the plaintiff is not entitled to judgment on the pleadings; the defendant may plead any defense which he might have pleaded in the original action.

This, then, is the first case since Hilton v. Guyot to arise under 1(a) (*supra* note 16).

[20] Learned Hand, J., in Disconto Gesellschaft v. United States Steel Corp., 300 Fed. 741, 747 (S. D. N. Y. 1924): "So far as I know, the doctrine of reciprocity has been confined to foreign judgments alone, and has no application to situations of this sort" [referring to the question whether the Federal court should hold invalid a title derived in English seizure under the Trading with the Enemy Act, when England might not recognize title derived from similar seizure by us]. ". . . That doctrine, I am happy to say, is not part of American jurisprudence." See (1925) 38 HARV. L. REV. 683; (1925) 34 YALE LAW JOURNAL, 549; (1926) 26 COL. L. REV. 892; (1926) 12 CORN. L. Q. 62; (1926) 25 MICH. L. REV. 70, all approving the Johnston case's purported repudiation of reciprocity. The reciprocity theory is popular on the continent. See Hilton v. Guyot, *supra* note 2, at 210 *ff.*, 15 Sup. Ct. at 161 *ff.*, and Lorenzen, *op. cit. supra* note 14, 199 *ff.*

law.[21] The second is that trade is thereby facilitated.[22] The third is that much unnecessary litigation will thereby be prevented.[23] If it can be said that judgments of foreign countries are as well considered as are ours, and that their policies are not definitely in conflict with ours, these arguments seem convincing. These assumptions can not be called violent when we are dealing with countries such as France and England. Consequently it is better to take a chance on such judgments being correct than suspiciously to examine every one on the merits *(au fond)*. On the other hand, *universal* recognition hardly seems advisable. The judgments of some of the smaller countries are so notoriously ill-considered that some sort of examination would seem to be the only way of doing justice.[24] We seek, then, a rule requiring as full recognition to be given to judgments rendered by reputable foreign courts as is given to domestic judgments, but permitting a more extensive examination of other countries' judgments. Does reciprocity help us thus to distinguish the wheat from the chaff?[25] Obviously it does not. The quality of a court does not depend upon the particular theory it may have as to recognition of our judgments—therein lies reciprocity's salient defect. There being no diplomatic necessity for a system of reprisals, the theory seems entirely without merit.[26] It would seem far better policy to adopt a theory of universal recognition, and to trust to the discretion of judges to eye with suspicion the judgments of inferior countries, at the same time giving almost unqualified approbation to those of other countries. Such dis-

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[21] See periodicals cited *supra* note 20. Foreign writers justify the distinction between foreign "law" and judgments on the ground that a judgment, involving as it does the variable personality of judges, should not be classed for this purpose as "law." 2 PILLET, DROIT INTERNATIONAL PRIVÉ (1924) 508, 509, 663.

[22] See periodicals cited *supra* note 20.

[23] *Ibid.*

A fourth argument has been suggested: the difficulty in getting the evidence before the second country's court. See 38 HARV. L. REV., *supra* note 20. Also the difficulty in predicting unfairness on a procedure differing from ours. *Cf.* Cottingham's Case, 2 Swans, *326 n (H. L. 1678).

[24] Fraud in the judgment, lack of jurisdiction, etc., as now applied can hardly be considered sufficient checks, in view of the difficulties involved in getting evidence of the trial.

[25] Reciprocity has generally been attacked on the ground that it is a political theory; its introduction by the courts therefore improper. See periodicals cited *supra* note 20. Such criticism does not, of course, attack its worth *per se* as a workable theory.

[26] See BAR, PRIVATE INTERNATIONAL LAW (Gillespie's transl. 2d ed. 1892) 97. Even assuming that reciprocity's function of separating the wheat from the chaff is well done, the theory is likely to lead to almost universal non-recognition due to differing modes of enforcing of judgments, differing grounds for impeachment, unfamiliarity with foreign law, etc. Lorenzen, *op. cit. supra* note 14, at 201–207.

cretion could be exercised by giving an elastic meaning to "unfair trial."[27] The defect in this theory is its dependence on individual judges and consequent uncertainty. The solution of the problem appears to be this: The question should be dealt with politically, *i.e.*, by treaties. In this way the various nations could be classified intelligently; certainty is assured. This method has already been adopted (to a limited extent) by France and a few other countries,[28] and it is to be hoped will gain in favor as a result of international conferences.[29]

THE EFFECT OF PLEADING ON JURISDICTION

"One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other with the result that either all system is lost or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves."[1] This difficulty of working out a procedural path which will be workable and yet flexible was illustrated in the recent case of *New Haven Sand Blast Co. v. Dreisbach,* 104 Conn. 322, 133 Atl. 99 (1926). The plaintiff made a motion in the Superior Court to extend a judgment[2] heretofore

[27] See *supra* note 9.

[28] Cited in Lorenzen, *op. cit. supra* note 14, at 194 n. *Cf.* the recent treaties cited in KOSTERS, *op. cit. supra* note 10, 37, 38, 44: Italy and Jugoslavia (1922); Italy and Austria (1922); Netherlands and Belgium (1925).

[29] The matter of enforcement of foreign judgments has been considered at Buffalo (1899), Rouen (1900) and Glasgow (1901). There have since been recent important conferences at Stockholm (1924), Brussels (1925) and The Hague (1925). See INTERNATIONAL LAW ASSOCIATION, REPORT OF THE THIRTY-THIRD CONFERENCE, *supra* note 10, at 146-222; WIGMORE, *loc. cit. supra* note 9; KOSTERS, *op. cit. supra* note 10, at 34-46. In the Brussels Congress of 1925, the International Chamber of Commerce resolved "to recommend that the various Governments consider the possibility of adopting agreements on the basis of reciprocity between States where there exists an affinity of language and legislation, and that an International Conference be convened later by the League of Nations for the establishment of a uniform Convention blending the various separate agreements already concluded by groups of States, or between two States." Wigmore, *loc. cit. supra* note 9. The wholesale repudiation of reciprocity urged in the Stockholm Conference of 1924 (cited in 12 CORN L. Q., *supra* note 20, at 65) has not been urged since and it is to be feared will not be in the future. See Wigmore, *op. cit. supra,* at 7. As an international matter the treaty system argued for in the text seems the only measure which may have effect.

[1] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 251.

[2] In the former action, the plaintiff, a manufacturer of sand blast barrels, sought to compel the defendant, who had been its president and general

obtained between the same parties, alleging facts not already on the record. No answer or other pleading was filed; but a judgment was rendered for the defendant which recited "that the parties stipulated in open court that the matter might be heard by oral argument, as on demurrer, admitting for the purpose of argument the allegations of fact contained in the motion and amendment, but questioning the legal sufficiency of the facts so alleged, and the parties were thus at issue."[3] It was held on appeal that the judgment be reversed on the ground (1) that a motion to extend a judgment which required, in order to establish a right to the relief sought, proof of facts extraneous to the record, was an improper method of bringing to the attention of the court matters properly the subject of a new and independent action; and (2) conceding the procedure by motion to have been regular, that the oral demurrer was a "jurisdictional defect" and the court had no power to render a judgment.

A discussion of the necessity of proper written pleadings and the consequences of a defect in this particular on jurisdiction requires two distinctions in each case. On the one hand, the term "jurisdictional defect" is often used indiscriminately to describe a defect in the pleadings which will prompt a court to reverse a judgment on direct attack, or a defect in the pleadings which will subject a judgment to collateral attack.[4] This ambiguous use often misleads. The problems in each situation are not the same. On the other hand, it is equally important to distinguish the kind of defect. A defect may consist in the mode of presenting facts to the court, such as an oral pleading, or in the improper use of a motion to originate an action. Or it may be that facts sufficient to support the judgment were not pleaded or litigated. For our purposes, defects in the formal presentment of facts, rather than any failure in the facts to support the court's decision, are important.

Looking at the cases first from the point of view of direct attack, the types of defect are various. Thus, where no complaint or bill has been filed, a judgment is very generally reversed.[5] The court does not act on its own initiative and the

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manager, to turn over to it his rights in a new invention relating to sand blast barrels, claiming a constructive trust by reason of his confidential relationship, and also an agreement to assign such rights. A decree was made ordering the defendant ". . . to fully transfer and insure to the plaintiff all rights in the so-called Washburn and Sheldon invention." The present motion prayed the court to issue an order under this decree directing the defendant to assign the British and Canadian patent rights to the same invention.

[3] At 325-6, 133 Atl. at 100.

[4] See L. R. A. 1916E, 316, at 326.

[5] Beckett v. Cuenin, 15 Colo. 281, 25 Pac. 167 (1890); Orchard v. Exchange Bank, 121 Mo. App. 338, 98 S. W. 824 (1906); Rhodes v. Sewell, 109 So. 179 (Ala. App. 1926); Seymour v. Day, 207 Ala. 60, 91 So. 875

inception of an action, to be valid on appeal, requires a formal invocation.[6] Similarly, affirmative relief in favor of a defendant who had not demanded it by counterclaim, or other prescribed mode, is a fatal irregularity.[7] A judgment beyond the relief demanded is "void" for want of "jurisdiction" in spite of an agreement between the parties to extend the issues.[8] Some courts invalidate a judgment where there is a failure to plead a fact necessary to a cause of action even though the fact was proved at the trial or admitted.[9] In West Virginia, a failure by the plaintiff to join issue after the defendant has answered specially to the complaint, renders a judgment based on the allegations of the complaint subject to reversal.[10] In so far as these cases declare irregular, on direct attack, a failure to present properly the facts which are before the court, they indicate an adherence to the doctrine that formal pleadings under our judicial system are necessary and convenient, and parties who omit them are penalized by a reversal of the judgment. The functional basis and necessity for formal pleadings will be discussed later on. The important consideration here is that, assuming formal pleadings to be desirable, the reversal of a judgment on appeal for lack of a complaint, or defect, or omission of a pleading, is a justifiable method of maintaining the rigidity of

(1921). *Contra:* Leach v. Western N. C. R. R., 65 N. C. 486 (1871); Vider v. City of Chicago, 60 Ill. App. 595 (1895). Where pleadings were destroyed by a fire, a judgment entered thereafter, without proper statutory substitution was held erroneous. Puckett v. Morris, 181 Ky. 374, 206 S. W. 157 (1918); *cf.* Grimison v. Russell, 11 Neb. 469 (1881) (lost pleadings). *Contra:* Blades v. Des Moines City Ry., 146 Iowa, 580, 123 N. W. 1057 (1909).

[6] "For jurisdiction of the subject matter of a particular case is something more than the constitutional or statutory power to entertain cases of the general class to which the one in hand belongs: it is that power called into activity not by the court of its own motion for that would ordinarily be insufficient, but by some act of the suitor concerned and in some way recognized by law." FREEMAN, JUDGMENTS (5th ed. 1925) § 338.

[7] Schaefer v. Dinwiddie, 44 Calif. App. 405, 186 Pac. 617 (1919); West v. Shurtliff, 28 Utah, 337, 79 Pac. 180 (1904); *cf.* Title Ins. Co. v. Northwestern Title Co., 88 Or. 666, 173 Pac. 251 (1918); Alywin v. Morley, 41 Mont. 191, 108 Pac. 778 (1910).

[8] Marshall v. Reddick, 177 S. W. 381 (Mo. 1915) (suit for injunction against trespass, converted by agreement into a suit to quiet title; judgment settling title held erroneous).

[9] Moore v. Jones, 278 S. W. 326 (Tex. Civ. App. 1925); Modern Woodmen of America v. Yanowsky, 187 S. W. 728 (Tex. Civ. App. 1916); San Antonio Traction Co. v. Yost, 39 Tex. Civ. App. 551, 88 S. W. 428 (1905).

[10] Del-Carbo Coal Co. v. Cunninghame, 93 W. Va. 12, 116 S. E. 719 (1923); Shires v. Boggess, 68 W. Va. 137, 69 S. E. 466 (1910); McCoy v. Price, 91 W. Va. 10, 112 S. E. 186 (1922). *Acc:* Chopin v. Freeman, 145 La. 972, 83 So. 210 (1919); Teasdale & Co. v. Manchester Produce Co., 104 Tenn. 267, 56 S. W. 853 (1900).

the procedural system, even though we may quarrel with the extent to which some courts preserve this rigidity.

But to declare that a judgment is void because of a "jurisdictional defect" in the pleadings so as to be subject to collateral attack seems to go deeper than the mere desire to preserve the rigidity of procedural working rules. Since some courts realize this, and others do not,[11] we have a contrariety of opinion on the validity of such judgments where the attack is made collaterally. In the leading case of *Reynolds v. Stockton*,[12] the New Jersey court was not required to give full faith and credit to a personal judgment rendered in New York against the defendant, where the complaint merely demanded a fund in the custody of the state insurance superintendent, who was also a party defendant, on the ground that the judgment was not responsive to the issues. Carried to an extreme, this decision would seem to allow collateral attack in any case where there is a failure in the pleadings to state a cause of action; but nearly all jurisdictions refuse to support a collateral attack for insufficiency of the complaint, even though the insufficiency is apparent on the face of the pleadings.[13] The *Reynolds* case is understandable, however, when all the facts appear. It seems that the defendant, although he had filed a pleading, did not appear in court to litigate the question; and the real ground of the decision is that he had not been given an opportunity to be heard on the issue which predicated the judgment. Thus, Mr. Justice Brewer remarked, "Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter."[14] This statement hits directly what should be the

[11] See, for example, the extreme case of Jordon v. Brown, 71 Iowa, 421, 32 N. W. 450 (1887) where a judgment was held void on collateral attack because the caption of the petition was addressed to the wrong court.

[12] 140 U. S. 254, 11 Sup. Ct. 773 (1890).

[13] Jarrel v. Laurel Coal Co., 75 W. Va. 752, 84 S. E. 933 (1915); Tube City Mining Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203 (1915); L. R. A. 1916 E, 316, note; Berry v. King, 15 Or. 165, 13 Pac. 772 (1887) (default judgment); Palmer v. Board of Chosen Freeholders, 77 N. J. L. 143, 71 Atl. 285 (1908) (where it appeared on the face that the cause of action was barred by the statute of limitations).

This is not true in the case of a special proceeding where the jurisdictional facts must appear on the face of the petition. Miller v. Thompson, 209 Ala. 469, 96 So. 481 (1923); *cf.* In re Jacobson's Will, 44 S. D. 409, 184 N. W. 237 (1921) (failure to file a petition); see Stockyard Nat'l Bank v. Bragg, 245 Pac. 966, 973 (Utah, 1925).

[14] Compare Munday v. Vail, 34 N. J. L. 418, 423 (1871) cited in Reynolds v. Stockton, 140 U. S. at 268, 11 Sup. Ct. at 776, stating that "A judgment upon a matter outside the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard,

guide in these cases. Total omission of pleadings, formal defects in pleadings, or even failure to state a cause of action should be disregarded in collateral proceedings if it appears from *any part* of the record that the parties have been heard, or have been given an opportunity to be heard, as to the *facts* in controversy between them.[15] Of course, the phrase "opportunity to be heard" may be interpreted broadly or narrowly. It is intended here to refer to a judgment taken in default of pleading or of appearance at the trial or, if there has been a trial, a judgment beyond the actual facts litigated or consented to by the parties. In case of trial there has been an "opportunity to be heard" only with respect to the facts on the record;[16] in case of default, only with respect to the allegations of the complaint and the relief demanded. It would be unfortunate, if, for example, on a plaintiff's claim for damages for trespass to land, a valid judgment by default determining the title to the land could be rendered.

With this background of "jurisdictional defects" on direct attack and on collateral attack, how should we deal with a defect in a pleading which consists in the use of a "motion" instead of a complaint to invoke the machinery of the court? At common law, pleading was a process of affirmation and denial, aiming at a single definite issue either of fact or law.[17] Under the Codes, facts are pleaded; and though we do not generally have the formal joinder of issue,[18] the process of affirmation and denial is still resorted to for the purpose of isolating the material facts and weeding out the irrelevancies. Under both systems the functions of pleading are the same.[19] The court must know the

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or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated." See also Roche v. McDonald, 239 Pac. 1015 (Wash. 1925); but *cf.* Mach v. Blanchard, 15 S. D. 432, 90 N. W. 1042 (1902). For the same reasons a default judgment beyond the relief demanded is reversible on direct appeal. *Cf.* Sache v. Gillette, 101 Minn. 169, 112 N. W. 386 (1907); (1908) 11 L. R. A. (N. S.) 803. But a default judgment on a complaint which fails to state a cause of action will not be reversed if it is sufficient "to inform the defendant of the nature of the claim against him." Trans-Pacific Trading Co. v. Patsy Frock-Romper Co., 189 Calif. 509, 209 Pac. 357 (1922).

[15] Although a decree was "void," a party who "understood and acquiesced" was "estopped" to deny its validity on collateral attack. Ecton v. Tomlinson, 278 Mo. 282, 212 S. W. 865 (1919).

[16] See Munday v. Vail, *supra* note 14.

[17] See STEPHENS, PLEADING (Andrews' ed. 1894) §§ 100–103, in which it is disputed that there can be only a single issue in causes which involve a single "claim."

[18] "No issue need be joined on demurrer nor need any pleadings be formally closed either to court or the jury. . . ." CONN. PRAC. BOOK (1922) § 208.

[19] "It is one of the first principles of pleading that there is only occasion to state *facts* which must be done for the purpose of informing the court, whose duty it is to declare the *law* arising upon these facts and of apprizing the opposite party of what is meant to be proved in order to give him an

facts in order to give judgment. The adverse party must know the facts in order to be given a fair opportunity to be heard, and the facts must appear somewhere on the record in order that it may be known subsequently what issues have been settled by the suit or litigation. If these requisites are satisfied, the purpose of the pleadings has been served.

To make certain that these conditions have been fulfilled, written pleadings in proper form are generally considered necessary. Where the suit is begun without a pleading, or a judgment without or beyond the demand for relief has been rendered, or a material fact is omitted from a pleading, or material facts are merely orally pleaded, it may be desirable for the sake of certainty and the convenience of set working rules to penalize the delinquent party by a reversal even though the facts might be gathered from other sources on the record. As an insurance of this certainty the Connecticut court perhaps correctly disapproved of the inception of an action by "so summary a proceeding as a motion." [20] It is arguable, however, that the name which the plaintiff gives his original pleading is immaterial, and that so long as facts are pleaded with a disclosure of the relief demanded and no prejudice to the defendant appears, the court should have examined the merits of the case. Thus, in a recent Washington decision, an affidavit was allowed to do service as a complaint; [21] and in Utah, a motion requiring proof of facts extraneous to the record was granted nine years after the original judgment had been made, over the objection of the defendants that it was not a proper pleading.[22] To this argument the only answer suggested in the *Dreisbach* case is the desirability of forestalling any precedent for irregularity. Says

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opportunity to answer or traverse it." CHITTY, PLEADING (1879) *235. "The only object of pleading should be first, a fair general statement to apprize the opposite party of the cause of action or defense, secondly, a sufficiently exact statement in the pleadings of the issues, so that it may be known afterwards what the judgment really decides." Arnold, *The Progress of Law and Lawyers* (1926) 60 AM. L. REV. 703. See BLISS, CODE PLEADING (3d ed. 1894) § 138, where he lists the "objects of a written pleading."

[20] For cases in other jurisdictions discussing the use of a motion to begin an action, see Tinn v. District Attorney, 148 Calif. 773, 84 Pac. 152 (1906); Mutual Reserve Fund Ass'n v. Smith, 77 Ill. App. 259 (1898); *cf.* Causey v. Snow, 120 N. C. 279, 26 S. E. 775 (1897).

[21] Reed v. Nat'l Grocery Co., 136 Wash. 7, 238 Pac. 990 (1925). *Cf.* Ginn v. Knight, 106 Okla. 4, 232 Pac. 936 (1924) (where a document headed "petition or motion" was held a motion).

[22] Salt Lake City v. Utah & Salt Lake Canal Co., 43 Utah, 591, 137 Pac. 638 (1913). In this case the original decree recited that the court "shall retain . . . original jurisdiction . . . for the purpose of all necessary supplementary orders and decrees which may be required to make effectual the rights awarded and preserved by this decree"; but this would seem to be equally true in the case of any judgment.

the court: "A practice such as this, once permitted, will lead to a general practice of attempting to restrict or extend the terms of a judgment by the simple and informal method of a motion" and "the certainty which would follow its adjudication will be imperilled." [23] This seems to be aimed at a certainty of "forms" rather than of the "facts" before the court. If the facts and issues are clear to the defendant, to the court, and to anyone making a later inspection, there would seem to be sufficient certainty whatever the plaintiff's pleading is called.

In the second ground of decision the court went further and held that by reason of the oral demurrer the trial court "had no power" to give judgment. The considerations in pleading a demurrer orally, however, do not seem to justify this conclusion. No new facts are presented by demurrer. It is merely an admission of the facts already pleaded for the purpose of argument. What function of certainty does the writing serve if the *fact* of demurrer is apparent from the record? [24] It would seem to be an irregularity which could be waived, even on direct appeal. Thus, in Massachusetts, it has been repeatedly held that a failure of the defendant to plead to a complaint may be waived where judgment was rendered on an agreed statement of facts.[25] This was, in effect, what happened in the instant case.

[23] 104 Conn. at 327, 133 Atl. at 101.

[24] Veysey v. Bernard, 49 Wash. 571, 95 Pac. 1096 (1908) (oral demurrer to a supplemental answer in the nature of a counterclaim. "The issues as thus defined by the record and announced by the court were clearly understood"). The same is true in an oral plea of the general issue. "The only objection against such a course would seem to be that it might not be full, distinct, and certain. But this cannot apply in the present case; for it is impossible that the plea of the general issue can be misunderstood by legal minds." See Gwin v. Williams, 27 Miss. 324, 333 (1854). But *cf.* Ruffner v. Hill, 21 W. Va. 152 (1882) (demurrer entered erroneously on private records of judge; judgment reversed).

If an oral demurrer is held a "jurisdictional defect," *query* as to the propriety of an oral objection at the trial that the complaint fails to state a cause of action (so-called demurrer *ore tenus*). *Cf.* Lehner v. Rudinger, 201 N. W. 748 (Wis. 1925); but *cf.* Adams v. Way, 32 Conn. 160 (1864).

[25] "Regularly, when this answer was over-ruled a further plea or answer should have been filed. But we may take the agreed statement of facts as a waiver of all questions of pleading and deal with the case upon these facts." See Fay v. Locke, 201 Mass. 387, 389, 87 N. E. 753, 755 (1909); Bartlett v. Tufts, 241 Mass. 96, 99, 134 N. E. 630, 632 (1922) (direct attack). In Chzrislonk v. New York, N. H. & H. R. R., 101 Conn. 356, 359, 125 Atl. 874, 875 (1924) it was stated that the parties "cannot confer jurisdiction by waiving this objection." This statement should be true only where lack of jurisdiction is used in the sense of "no power." Blades v. Des Moines City Ry., *supra* note 5. Compare Freeman v. Bank of La Fayette, 20 Ga. App. 334, 93 S. E. 34 (1917) a case of collateral attack, where the court said, "while parties cannot by consent give jurisdiction to the court as to the subject matter of the suit, still where the pleadings are such as authorised a legal judgment, the mere waiver by the plaintiff of a particular pleading is one not involving the jurisdiction of the court, but

The "uncertainty and confusion" and the demolition of "the entire fabric of our system of written pleadings" which would follow in the wake of an oral demurrer seems less a danger than the court would have us imagine. It is possible to conduct legal controversies without formal pleadings. In fact, more than fifty years ago, the rule-making committee of the English judges advocated the abolition of all pleadings.[26] To some extent their purpose was accomplished by the development of notice pleading, since adopted in some of our states.[27] Also in the oral pleadings of the small claims courts of many states, the necessity for simplicity has overcome the cumbersome formalism of written pleadings.[28]

But admitting some utility in requiring written pleadings, demurrers included with the rest, which justifies a reversal on direct attack, imposition of a penalty for the sake of the rigidity of the working rules would seem improper on collateral attack.[29] Unless the defect is such as to cause a failure in the function of fact apprisement, either to the parties, or to the court, or to one subsequently interested, the judgment should be valid. If the parties have been heard, or have had the opportunity of being heard, and the material litigated facts may be gathered from the record, judgments should not be disturbed. To declare an oral demurrer to be a "jurisdictional defect," subject to both direct and collateral attack, would seem to lose sight of pleading as a process of gathering the material facts for the purpose of trial, argument and record. At least, the Connecticut court should limit the scope of its decision on the oral demurrer to direct attack, and not extend it to cases of collateral attack.

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relates rather to how the court should exercise the jurisdiction it undoubtedly has, both of the person and the subject matter before it."

[26] See THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 366-368; ROSENBAUM, RULE-MAKING AUTHORITY (1917) 73-74, 129-130. Compare the REPORT OF THE COMMISSION ON CIVIL PRACTICE IN NEW YORK (1915) drafting a provision for voluntary, informal submission to a trial court: "Section 58. Parties may submit to a trial court or judge having jurisdiction of the subject in controversy a matter in difference between them in person or by attorney upon *oral or written* pleadings or statements to be tried by the court or set down for trial before a referee or abitrator or before a jury, under such procedure as to evidence and appeal and otherwise, as may be agreed upon" [italics ours]. This suggestion was rejected in the final enactment, and submissions were required to be in writing. See N. Y. C. P. A., § 546.

[27] See Whittier, *Notice Pleading* (1918) 31 HARV. L. REV. 501.

[28] For example, see S. D. Rev. Code (1921) § 2145; Baldauf v. Nathan Russel, 88 N. J. L. 303, 96 Atl. 96 (1915); see Smith, *Small Claims Procedure is Succeeding* (1924) 8 J. AM. JUD. SOC. 247.

[29] See Rood, *Is a Judgment Open to Collateral Attack If Rendered Without Written Pleadings as Required by Statute, or If the Writings Do Not Comply with the Statutory Requirements* (1912) 10 MICH. L. REV. 384.

PEACEFUL PICKETING IN NEW YORK, 1912–1926

Several recent decisions of the New York courts have been thought to extend the restrictions which will be imposed on labor union activity in respect to picketing.[1] In the year 1925–1926 the New York Supreme Court four times declared that even "peaceful picketing" is unlawful in the absence of a strike. In *Cushman's Sons v. Amalgamated Food Workers' Bakers Local No. 164*, 127 Misc. 152, 215 N. Y. Supp. 401 (Sup. Ct. 1926) the defendant union was enjoined from distributing placards and circulars stating the rate of wages granted by the plaintiff-employer, and requesting the plaintiff's customers and the general public to require the union label on bread; and in *Traub Amusement Co. v. Macker*, 127 Misc. 335, 215 N. Y. Supp. 397 (Sup. Ct. 1925) "peaceful picketing" was enjoined on two grounds: (1) that the defendant union had no grievance against the plaintiff, since the "open shop" was not a justifiable source of grievance, and (2) that the defendant union was seeking to force the plaintiff to employ only members of the union. But in *Bolivian Panama Hat Co. v. Finkelstein*, 127 Misc. 337, 338, 215 N. Y. Supp. 399, 401 (Sup. Ct. 1925) where "peaceful picketing" was also enjoined, the banners incorrectly stated that there was a strike in progress at the plaintiff's business, and in *Daitch & Co. v. Cohen*, 218 App. Div. 80, 82, 217 N. Y. Supp. 817, 818 (1st Dept. 1926) "peaceful picketing" was enjoined largely on the ground that the plaintiff's business was small and that all of his employees were members of his family or personal friends.[2]

An examination of both the facts and decisions in these cases thus reveals that the New York Supreme court has only twice held squarely that "peaceful picketing" is unlawful in the absence of a strike. Moreover, within a year two decisions have directly held that "peaceful picketing" is lawful even in the absence of a strike. In *Public Baking Co. v. Stern*, 127 Misc. 229, 215 N. Y. Supp. 537 (Sup. Ct. 1926) the court refused to enjoin the defendant union from causing its members to parade peacefully in front of the plaintiff's shop bearing placards: "This union label means shorter hours, sanitary shop, and safety to customers. Workers and sympathizers, demand bread and rolls with the union label," and in *N. & R. Theaters v. Basson*, 127 Misc. 271, 215 N. Y. Supp. 157 (Sup. Ct. 1925) the court refused to enjoin the defendant union from maintaining pickets in front of the plaintiff's theater carrying signs: "This theatre does not employ motion picture operators of Local No. 306 affiliated with the American Federation of Labor." The opinion stated that "Expressions have been found in cases that peaceful picketing

[1] (1926) 99 CENT. L. J. 383; N. Y. L. J., Oct. 27, 1926.

[2] See also Yates Hotel Co. v. Meyers, 195 N. Y. Supp. 558 (Sup. Ct. 1922).

is unlawful where there is no strike. But in those cases it will be found that there was an interference with the business of the employer whether by intimidation or misrepresentation." [3]

It was formerly held in New York that labor unions were privileged to use the placard or circular in order to inform the general public or customers that the plaintiff-employer is "unfair" to labor, regardless of whether "the purpose" be (1) to force the employer to grant better working conditions or to recognize the union,[4] or (2) to peacefully persuade the plaintiff's employees to join the union.[5] Such labor-union activity has been called picketing. In the cases which arose the courts tried to distinguish on the facts, instances in which a labor union or its representatives distributed information concerning the labor policy of a plaintiff-employer,[6] or requested the general public and

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[3] See Rentner v. Sigman, 126 Misc. 781, 216 N. Y. Supp. 79 (Sup. Ct. 1926).

[4] "Labor organizations have a right to appeal to the community at large, or any specific member of the community, and request that he withhold patronage from any person against whom they have a grievance." See Maisel v. Sigman, 205 N. Y. Supp. 807, 818 (Sup. Ct. 1924).

[5] ". . . In cases which arose before the war [it seems established] that a labor union may induce or persuade the employees of a manufactory or other business, which is conducted . . . as an open or non-union shop, to become members of the union, and to strike in order to compel the owner to conduct his factory or business as a union shop." Rosenwasser Bros. v. Pepper, 104 Misc. 457, 460, 172 N. Y. Supp. 310, 312 (1918).

"The defendants were justified in reasoning with plaintiff's employees in an effort to persuade them to leave plaintiff's employ and in striving to win the sympathy of the public in order that the latter might withhold its patronage from the plaintiffs. . . . No just complaint can be made by the plaintiff against the union's circularizing the neighborhood, asking the friends of union labor not to patronize this plaintiff, nor can the plaintiff seek to restrain the union . . . from peaceably persuading proposed patrons of the plaintiff from trading in his shop." Heitkamper v. Hoffmann, 99 Misc. 543, 547, 549, 164 N. Y. Supp. 533, 535, 536 (1917).

[6] Andrews, J., in Seubert v. Reiff, 98 Misc. 402, 408, 164 N. Y. Supp. 522, 526 (1917): "I have no doubt that the union owning the label, or anyone else, may recommend the purchase of goods on which it is placed, in preference to others.

"The trouble arises if a further step is taken, and dealers are threatened with loss or injury in case they sell either unlabelled goods generally or such goods made by a certain manufacturer. . . . It may be difficult to state the distinction between a primary and a secondary boycott. I use the word 'boycott' without any implication that it is in itself and under all circumstances illegal. It may be said that, if one persuade customers not to patronize a certain dealer between whom and the union a quarrel exists, so one may persuade customers not to patronize one who deals with the first. . . . But often, when it is sought to draw a line between what is permissible and what is forbidden, it is difficult to say logically why a certain act should be placed on the one side or the other. The courts must be governed in their action by common sense and considerations of public policy."

In N. & R. Theaters v. Basson, cited *supra* in the text, the court refused

customers not to patronize him,[7] and instances in which violence, threats, or fraud were used by the labor union in an effort to coerce the general public or customers of the plaintiff-employer to abstain from all further business relations with him.[8] In that such picketing is unlawful in several other New York cases year.[9] The same judge who prohibited peaceful picketing in the *Bolivian Panama Hat* case, later expressly privileged peaceful picketing in the absence of strike in the *Public Baking* case, and distinguished the former case on the ground that there the peaceful picketing was accompanied by misstatements. But the dictum in the former case has been cited to support the proposition that such picketing is unlawful in several other New York cases within the year.[10]

Since the decision in the *American Foundries* case,[11] New York courts have as before, almost without exception, recognized the

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to enjoin peaceful picketing in the absence of threat or coercion even though the purpose of the defendant union was either to persuade the plaintiff employer to discharge his present employees and engage members of the defendant union, thereby breaking a contract with another union, or to induce plaintiff's employees to join the defendant union. *Contra:* Traub Amusement Co. v. Macker, cited *supra* in the text.

[7] See Maisel v. Sigman, *supra* note 4.

[8] Auburn Draying Co. v. Wardell, 227 N. Y. 1, 124 N. E. 97 (1919) (court upheld an injunction against labor unions of Auburn, restraining the use of their powers over members to compel patrons of the plaintiff or the general public *against their will* to refrain from dealing with the plaintiff).

[9] N. & R. Theaters v. Basson, cited *supra* in text:

"Defendant had a right to make pacific appeal and use legitimate persuasion in its endeavor to induce plaintiff's customers and the ultimate consumer to purchase bread made by its members. There is no evidence whatever here that the defendant resorted to the threat, coercion, intimidation or fraud which it is forbidden to use. . . . Defendant's action was calculated merely to advance its own cause and procure employment for its own members. So long as it kept its conduct within these bounds of the law, the fact that the plaintiff was incidentally damaged thereby entitled it to no legal redress." See Public Baking Co. v. Stern, cited *supra* in text, at 231, 215 N. Y. Supp. at 539.

[10] See cases cited *supra* in text.

[11] American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921) (recognizes the right of men by "persuasion or communication with those whom they would enlist with them 'to accost others' in an inoffensive way" and particularly "to communicate and discuss information with a view to influencing the others' action").

"It is clear that congress [in Section 20 of the Clayton Act] wished to forbid the use by the Federal Courts of their equity arm to prevent peaceable persuasion by employees, discharged or expectant, in promotion of their side of the dispute. . . . This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always." Taft, C. J., at 203, 42 Sup. Ct. at 76.

[12] Workers in time of strike are privileged to strike and picket peacefully. Rentner v. Sigman, *supra* note 3; Albee & Godfrey Co. v. Arci, 201 N. Y. Supp. 172 (Sup. Ct. 1923) (court denied injunction against picketing on the ground that proof presented by plaintiff showed no acts of violence or

privilege of striking workmen to picket peacefully,[12] in the absence of an attempt to induce a breach of contract between the employer picketed and his employees.[13] What different courts have at different times, even within New York state, considered "peaceful picketing" shows far less unanimity.[14] The reasons which led the court in the *American Foundries* case, to limit lawful picketing to the extent to which it did, seemed based on the fear that even "peaceful picketing" in strike times will al-

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disorderly conduct by pickets, or defendants, or persons acting on their behalf); Berg Auto Trunk & Speciality Co. v. Wiener, 121 Misc. 796, 200 N. Y. Supp. 745 (Sup. Ct. 1923) (court granted part of injunction requested so as to restrain picketing, which necessarily involved intimidation according to the view of the Supreme Court in the American Foundries cases, by limiting defendants to one picket at each entrance). Michaels v. Hillman, 111 Misc. 284, 181 N. Y. Supp. 165 (Sup. Ct. 1920) (injunction issued against defendant union, limited to threats, intimidation, coercion and violence); Wood Mowing Mach. Co. v. Toohey, 114 Misc. 185, 186 N. Y. Supp. 95 (Sup. Ct. 1921) (laboring men not only are privileged to strike but also to persuade others to strike and to attempt to persuade others not to take their places); Wyckoff Amusement Co. v. Kaplan, 183 App. Div. 205, 170 N. Y. Supp. 548 (2d Dept. 1918) (restraining order issued against defendant's picketing modified in order to limit prohibited acts to those constituting threats, intimidation, fraud, or injury to persons or property of plaintiff).

[13] Reed v. Whiteman, 238 N. Y. 545, 144 N. E. 885 (1924) (injunction granted to restrain defendant union from persuading, inducing, enticing, or attempting to entice employees to break employment contracts. Cardozo, Pound and Lehman, J. J., dissented on the ground that no irreparable damage was shown); Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917) (fact that defendant union in enforcing its by-laws, that members were not to work with non-union men or on non-union material, did not interfere with contracts between employer and employees or include force or fraud was given by the court as one of the reasons for denying an injunction to restrain defendant from circularizing customers of plaintiff, present or prospective, to the effect that plaintiff was "unfair"); Vail-Ballou Press Co. v. Casey, 125 Misc. 689, 212 N. Y. Supp. 113 (Sup. Ct. 1925) (interference by defendant union with contracts between plaintiff-employer and his employees enjoined); Best Service Wet Wash Laundry Co. v. Dickson, 121 Misc. 416, 201 N. Y. Supp. 173 (Sup. Ct. 1923) (although an employee retains power to breach contract of employment, employees, by engaging themselves under contract, place limitations on right to act in concert).

[14] In some cases the courts have granted injunctions restraining the defendant unions from posting more than one picket at each entrance to the plant of the plaintiff. Bellin v. Millinery Workers Union, Local No. 24, 127 Misc. 53, 216 N. Y. Supp. 68 (Sup. Ct. 1926); Berg Auto Trunk & Specialty Co. v. Wiener, *supra* note 12. Or more than two pickets at a time at any at one entrance. Reed v. Whiteman, *supra* note 13. Or more than six at the main entrances and four at the others. Rentner v. Sigman, *supra* note 3. In other cases the courts have required that the plaintiff present proof of acts of violence or disorderly conduct on the part of the pickets. Albee & Godfrey Co. v. Arci, *supra* note 12. Or have expressly recognized that what is peaceful picketing must be determined in the light of the circumstances of the particular case before the court. Michaels v. Hillman, 112 Misc. 395, 183 N. Y. Supp. 195 (Sup. Ct. 1920) ("Picketing may be lawful or unlawful. The legitimate purpose of it is to inform the strikers and

most invariably lead to violence or public disturbance.[15] During a strike feeling runs high, men and women are out of work, and to privilege any interference by the strikers at a time when they see other men and women taking their places, seems a constant source of danger. As a result the courts in some states have gone so far as to hold all picketing illegal.[16] The attitude of the New York courts in regard to picketing likewise seems conditioned by considerations of strike agitation and violence.[17] The very word "picketing" has therefore come to be bound up with the narrow limitations supposedly necessary to protect the employer,

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their union as to what is going on at the plants. Whatever number of pickets was necessary to secure the reasonable and lawful purpose of the union is sanctioned by law but where the number is swelled to 500 or 600 and at times to 1,000 made up in part of workers from other factories, the unnecessary and unlawful purpose to awe and intimidate by numbers is apparent.").

[15] "A restraining order against picketing will advise earnest advocates of labor's cause that the law does not look with favor on an enforced discussion of the merits of the issue between individuals who wish to work and groups of those who do not, under conditions which subject the individuals who wish to work to a severe test of their nerves and physical strength and courage." American Steel Foundries v. Tri-City Central Trades Council, *supra* note 11, at 206, 42 Sup. Ct. at 77. "We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress . . . and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication, and persuasion, but with special admonition that their communications, arguments, and appeals shall not be abusive, libellous, or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps." *Ibid.* at 206, 42 Sup. Ct. at 77. "The name 'picket' indicated a militant purpose inconsistent with peaceable persuasion." *Ibid.* at 205, 42 Sup. Ct. at 77.

[16] Pierce v. Stablemen's Union, 156 Calif. 70, 103 Pac. 324 (1909); see Hardie-Tynes Mfg. Co. v. Cruise, 189 Ala. 66, 66 So. 657 (1914) (all picketing by labor unions held prohibited under Ala. Code (1907) § 6394); See (1920) 7 VA. L. REV. 462, 466, n. 13.

[17] See Yates Hotel Co. v. Meyers, *supra* note 2, at 562 ("even if [picketing] ostensibly peaceful, it should not be permitted, when its purpose is in effect a malicious and wanton interference, not only with another's business or vocation but with the rights and interests of the public"). In Schwartz & Jaffee v. Hillman, 115 Misc. 61, 69, 189 N. Y. Supp. 21, 25 (1921) Van Siclen, J., said that peaceful picketing was a mere figure of speech; "That there ever in reality existed or was practiced, 'peaceful picketing' is a question." He adds: "Courts cannot find the balancing point [in the conflict between capital and labor] by boxing the compass of judicial opinion from extreme radicalism to ultra conservatism. They must stand at all times as the representatives of capital, or captains of industry, devoted to the principle of individual initiative, protect property and persons from violence and destruction, strongly opposed to all schemes for the nationalization of industry, and yet save labor from oppression, and conciliatory toward the removal of the workers' just grievances."

the employees remaining at work or wishing to work, and the general public against violence and public disturbance.[18] Should such reasons with their resultant limitations on the activities of organized workers be applied when no strike is in progress, and especially in cases where there is no complaint that the workers have attempted to use unlawful means, *i. e.*, means involving violence, coercion, intimidation, or fraud?

In picketing cases the courts have only sometimes considered the comparative bargaining power of the two parties immediately concerned, namely the employer and the employees or union. They have, in New York, seemed to discriminate against labor in this regard. On the one hand, they have considered it, although not expressly, in order to enjoin a union from picketing a small employer, who after a strike instead of employing either his old union employees or a new set of workers, employed only members of his family and a few friends.[19] On the other hand, they seem to have entirely disregarded it in enjoining a union from attempting to induce employees to breach their individual contracts with a certain employer,[20] when they base their decision on the ground that an employers' association had been, and would be, enjoined from attempting to induce its members to breach their contracts with union organizations.[21] The courts here invoke the principle of mutuality of remedy; but this does not seem justified, since, in the one case, the union attempted to induce the breach of a contract a single employee had been forced to sign, as a condition precedent to getting work, with a corporation, while, on the other, the employers' association had attemped the breach, a manufacturing corporation or employer had made a contract with a union. In the latter instance there was surely no such variation in bargaining power between the contracting parties as in the former instance.

The purpose for which picketing is conducted seems to be a subject of much concern to the courts.[22] If the purpose of the union activity is regarded as the advancement of the interests

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[18] Bellin v. Millinery Workers, *supra* note 14 (picketing limited to one picket at each entrance); Berg Auto Trunk Co. v. Wiener, *supra* note 12 (picketing limited likewise); Reed v. Whiteman, *supra* note 13 (picketing limited to two pickets at an entrance).

[19] Altman v. Schlesinger, 204 App. Div. 513, 198 N. Y. Supp. 128 (1st Dept. 1923); Yablonowitz v. Korn, 205 App. Div. 440, 199 N. Y. Supp. 769 (1st Dept. 1923).

[20] Best Service Wet Wash Laundry Co. v. Dickson, *supra* note 13.

[21] Schlesinger v. Quinto, 201 App. Div. 487, 194 N. Y. Supp. 401 (1st Dept. 1922).

[22] Bossert v. Dhuy, *supra* note 13 (court reversed an injunction issued against defendant union on ground that all acts enjoined, under the findings of fact, were lawful acts done for lawful purposes. It added that where acts of an employee, or employees in individual or associate capacity, were reasonably and directly calculated to advance lawful objects, they should

of the union and its members, and its intention is not primarily to interfere with the business of the employer, it will not as a rule be enjoined in the absence of what is considered force or fraud.[23] The workers have not been required to justify a strike or combination by proof that their objective lies within the category of justifiable purposes, in a few New York cases where any reason advanced by the workers that seemed to be to their interest as members of the union was held sufficient, although it might have seemed inadequate to the employer and organized society.[24] Too often the courts offer as their major premise that where the action is malicious it is unlawful; as their minor premise, that picketing in the absence of a strike is malicious; and, as the inevitable conclusion that picketing in the absence of a strike is unlawful.[25] To interfere with the business interests of another without justifiable cause is malicious, and the courts thus assume that in the absence of a strike the activity of a union, regardless of the purpose of the picketing, is malicious. Such reasoning fails to answer the main point at issue since it is scarcely cogent on the question of whether a labor union should or should not be regarded as a stranger to the employer-employee relation merely because no strike is in progress. This is especially true today where the strike forms only one and an increasingly unimportant weapon in the bargaining struggle between employers and their employees.

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not be restrained); Rentner v. Sigman, *supra* note 3 (although employees have right to strike and to picket, neither may be used to accomplish a clearly illegal purpose); Edelman v. Retail Grocery Dairy Clerks' Union, 119 Misc. 618, 198 N. Y. Supp. 17 (Sup. Ct. 1922) (injunction in labor disputes to be granted or withheld according to whether, from situation viewed as a whole, defendant's main purpose is to inflict injury on others rather than promote legitimate advantages of its own members); Jaeckel v. Kaufman, 187 N. Y. Supp. 889 (Sup. Ct. 1920) (injunction granted restraining defendant union from striking and peaceful picketing on the ground that the strike was not to better conditions of employees, but rather for the unlawful purpose of interfering in plaintiff's business, *i. e.*, to gain employment for men rightfully discharged because of business depression).

[23] Bossert v. United Carpenters & Joiners of America, 77 Misc. 592, 137 N. Y. Supp. 321 (Sup. Ct. 1912) (informing union employees that they are working on non-union material, in violation of by-laws of union, is not enjoinable though it result in employees quitting their work); Heitkamper v. Hoffmann, *supra* note 5 (peaceful persuasion of sympathizers not to patronize plaintiff in an effort by defendant union to unionize plaintiff's shop not enjoinable, although coercion and intimidation enjoined); N. & R. Theaters v. Basson, cited *supra* in text; Public Baking Co. v. Stern, cited *supra* in text; but where the court decided that the purpose of defendant's activity was to interfere with plaintiff's business, it enjoined that act even though the means were lawful.

[24] Maisel v. Sigman, *supra* note 4, at 814.

[25] Stuyvesant Lunch & Bakery Corp. v. Reiner, 110 Misc. 357, 181 N. Y. Supp. 212 (Sup. Ct. 1920). But compare Taft, C. J., in the American Steel Foundries case, *supra* note 11, at 209, 42 Sup. Ct. at 78: "Union was es-

The courts in picketing, as in strike cases, sometimes seem more affected by the terminology in which the purpose of the union activity is expressed than by the other facts of the case. A tendency is noticeable to be lenient where the immediate objective is improved working conditions such as higher wages or decreased working day, and to be strict where unionization is the immediate objective, in spite of the findings that the union shop is sought as a means to those ends.[26]

To-day an increasing number of efforts are being made to develop machinery, such as arbitration agreements, which shall make the strike unnecessary. It would seem, therefore, that a peaceful appeal to the general public when made by a union or group of workers with the purpose of gaining the economic support necessary to achieve such improved working conditions as they may strike for, should not be discouraged, where coercion is not employed as against third persons.

ANTECEDENT DEBTS AS CONSIDERATION FOR MORTGAGES

Under what circumstances is a person taking a mortgage for an antecedent debt treated as a purchaser for value so as to be protected against "prior equities" of which he has no knowledge? This old question is suggested anew by the recent case of *Williams v. Oconee County Bank*, 134 S. E. 478 (Ga. 1926). In this case, the plaintiff, for a valuable consideration, received from his mother a properly executed deed of conveyance which he failed to have recorded. Subsequently, the mother executed a

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sential to give laborers opportunity to deal on equality with their employer. . . . It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at low wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious."

[26] Jaeckel v. Kaufman, *supra* note 22 (court held that although labor organizations may by lawful means to secure adequate compensation and fair hours; that picketing, while lawful if peaceably conducted, will not be permitted when its purpose is to effect an interference with another's business); Welinsky v. Hillman, 185 N. Y. Supp. 257 (Sup. Ct. 1920) (court granted injunction on the ground that purpose of defendant was not to impose working conditions but to induce plaintiff to continue a manufacturing department which he had abandoned); Edelman v. Retail Grocery Union, *supra* note 22 (court granted injunction against defendant union on ground that its real purpose was seen in threat to drive plaintiff out of business if he did not yield to unionization efforts); Altman v. Schlesinger, *supra* note 19 (same); Traub Amusement Co. v. Macker, cited *supra* in text (court granted injunction to restrain defendant from peaceful picketing on the ground that the only purpose was to injure plaintiff's business to such an extent as to force it to employ members of union, and none other than members of union).

mortgage deed of the same property to the defendant bank to secure a pre-existing debt and any debt "which may hereafter arise." At the time of the execution of the latter deed, the mother, already indebted to the bank, obtained an additional loan. The plaintiff brought suit to enjoin the sale of this property under the power of sale contained in the mortgage deed to the bank. The upper court affirmed a judgment for the defendant on the ground that the further extension of credit (referring to the last loan made by the bank) constituted such "new consideration" as would give the mortgagee priority for the amount of the pre-existing, as well as the subsequently incurred, indebtedness.

If a sufficient consideration [1] is given for a mortgage, the mortgagee is a "purchaser" within the meaning of the recording laws.[2] Between the original parties, a mortgage given to secure a pre-existing debt is supported by a sufficient consideration [3] even though on the same facts, the mortgagee may not be protected against prior equities.[4] The courts, in upholding the mortgage as between the original parties, are merely giving effect to the papers according to the intention of the parties.[5] But a creditor receiving a mortgage to secure a pre-existing debt is not a bona fide purchaser for value entitled to protection against prior equities whether or not he has notice of them.[6] If, how-

[1] For the necessity of consideration to the validity of a mortgage, see (1922) 2 WIS. L. REV. 59.

[2] "This is declared by statute in some states, and in others it is a rule of judicial construction . . . , the mortgagee is a bona fide purchaser for value, and is protected against adverse claims of which he has had no notice, including prior conveyances, and other existing liens and claims." 1 JONES, MORTGAGES (7th ed. 1915) § 459.

[3] Moore v. Fuller, 6 Or. 272 (1877) (foreclosure proceedings); Greig v. Mueller, 66 Or. 27, 133 Pac. 94 (1913) (cancellation proceedings).

[4] Heuring v. Stiefel, 152 N. E. 861 (Ind. App. 1926). ". . . it is well settled that a valid legal mortgage may be given to secure a past indebtedness without any new consideration or any forbearance or extension of the debt by the mortgagee, and such a mortgage will rank in the order of its priority over subsequent liens given for value. Such a mortgage, [mortgagee] however, does not rank as a purchaser for value so as to cut off prior equities." Stone, *The "Equitable Mortgage" in New York* (1920) 20 COL. L. REV. 519, 524. See also Alstin v. Cundiff, 52 Tex. 453, 464 (1880).

[5] If the intention is to make a gift, there is no reason why the law should withhold its sanction from this particular form of beneficence.

[6] Salisbury Savings Bank v. Cutting, 50 Conn. 113 (1882); Hubert v. Merchants' Bank, 137 Ga. 70, 72 S. E. 505 (1911); Smith v. Moore, 112 Iowa, 60, 83 N. W. 813 (1900); Senneff v. Brackey, 165 Iowa, 525, 146 N. W. 24 (1914); Western Grocery Co. v. Alleman, 81 Kan. 543, 106 Pac. 460 (1910); Harnish v. Barzen, 103 Kan. 61, 173 Pac. 4 (1918); McGraw v. Henry, 83 Mich. 442, 47 N. W. 345 (1890); Ridings v. Hamilton Savings Bank, 281 Mo. 288, 219 S. W. 585 (1920); Wilcox v. Drought, 71 App. Div. 402, 75 N. Y. Supp. 960 (1st Dept. 1902); Matter of Bedell, 67 Misc. 24,

ever, he gives new consideration he is a bona fide purchaser.[7]

The distinction drawn between a mortgagee for a past consideration and a mortgagee for a present consideration is amply justified.[8] The latter is afforded the protection of a purchaser against prior equities of which he had no notice for the reasons applicable to other innocent purchasers, *i.e.*, in reliance upon the title of record he has parted with goods or money, divested himself of some legal right, or otherwise changed his position, so that a denial of a preferred position would work him an injustice.[9] The former, on the other hand, has parted with no legal right, nor has he placed himself in a worse economic position than before.[10] He is deprived of nothing; he still has the claim for which he bargained in the past without requiring security.[11] There is no public policy which warrants preferring one who does not give new value.

The mortgagee is regarded as giving present consideration, and thereby becoming a bona fide purchaser and entitled to the benefit of the recording acts, if in reliance upon the security he detrimentally changes his position, *e.g.*, if he surrenders any security[12] which he formerly possessed, or if he extends the time[13] of payment. These acts are regarded as sufficient consideration. It has been said that ". . . the extension of time

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124 N. Y. Supp. 430 (Sup. Ct. 1910); Breed v. Nat'l Bank, 171 N. Y. 648, 63 N. E. 1115 (1902); Orthey v. Bogan, 226 N. Y. 234, 123 N. E. 487 (1919); Temple v. Osborn, 55 Or. 506, 106 Pac. 16 (1910); Oliver v. McWhirter, 112 S. C. 555, 100 S. E. 533 (1919); Buckley v. Runge, 136 S. W. 533 (Tex. Civ. App. 1911); Connecticut Investment Co. v. Demick, 105 Wash. 265, 177 Pac. 676 (1919); Malm v. Griffith, 109 Wash. 30, 186 Pac. 647 (1919). See also Larrabee Co. v. Mayhew, 135 Wash. 214, 223, 237 Pac. 308, 311 (1925); Fraham Bank v. Couger, 286 S. W. 657, 660 (Tex. Civ. App. 1926). *Contra:* Frey v. Clifford, 44 Calif. 335 (1872); Smitton v. McCullough, 182 Calif. 530, 189 Pac. 686 (1920).

[7] But the results are often affected by recordation statutes. These vary so much that no general statement of their effect is possible. They are not here considered and the cases cited were decided exclusive of their effect.

[8] The same rule applies to the pledgee of stock to secure an antecedent debt. "But the pledgee of stock to secure an antecedent debt of the pledgor is not a bona fide purchaser for value and therefore holds it subject to any lien which is valid against the pledgor, though he had neither actual nor constructive notice thereof." 4 THOMPSON, CORPORATIONS (2d ed. 1909) § 4234.

[9] See Cook v. Parhan, 63 Ala. 456, 461 (1879).

[10] 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 749.

[11] See Western Grocery Co. v. Alleman, *supra* note 6, at 547, 106 Pac. at 462.

[12] Alstin v. Cundiff, *supra* note 4. "The extinguishment of the pre-existing debt, not a mere change in its form; the creation of a new debt, founded upon a new consideration, giving a new day of payment, brings the mortgagees in the relation of *bona fide* purchasers. . . ." See Cook v. Parhan, *supra* note 9.

[13] Whitfield v. Riddle, 78 Ala. 99 (1884); Dillard v. Propst, 212 Ala. 664,

must be given at the time and in consideration of the mortgage. A mortgagee is not considered a purchaser for value, merely because the result of the mortgage may be to extend the time of payment." [14] But in some cases where there was no affirmative finding that the mortgagee parted with any value, courts have inferred [15] an agreement to forbear; and where the time of payment was in fact extended, they have presumed [16] that the extension constituted the consideration.

There is another class of cases [17] holding that where there is a conveyance in payment of a pre-existing debt, the grantee is a purchaser for value. In such cases it seems unnecessary for the creditor to surrender or cancel any written security in order that his discharge may operate as consideration.[18] This has been criticised because it renders easy the commission of fraud.[19] It leaves little protection to the rights of third persons, since it makes their value depend upon the testimony of those whose interest it is to destroy them.

In the case of negotiable instruments a different rule is ap-

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103 So. 863 (1925); Tripler v. MacDonald Lumber Co., 173 Calif. 144, 159 Pac. 591 (1916); O'Brien v. Flickenstein, 180 N. Y. 350, 73 N. E. 30 (1905); Hunt v. Hunt, 67 Or. 178, 134 Pac. 1180 (1913); Farmers & Merchants Bank v. Citizens Bank, 25 S. D. 91, 125 N. W. 642 (1910); Jiles v. Citizens Nat'l Bank, 257 S. W. 945 (Tex. Civ. App. 1924). See also (1913) 23 YALE LAW JOURNAL, 186.

[14] JONES, *op. cit. supra* note 2, § 461. This accords with Mr. Justice Holmes' theory of consideration; but he admits that "courts have gone very great lengths" in holding a promise binding because of its "natural consequences." See Martin v. Meles, 179 Mass. 114, 117, 60 N. E. 397, 398 (1901); AMERICAN LAW INSTITUTE, CONTRACTS RESTATEMENT No. 2, § 88.

[15] Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 61 Atl. 167 (1905), *aff'd* 71 N. J. Eq. 304, 71 Atl. 1135 (1906).

[16] Brooks v. Asherton State Bank, 278 S. W. 473 (Tex. Civ. App. 1926).

[17] Masterson v. Crosby, 152 S. W. 173 (Tex. Civ. App. 1912); Harris v. Evans, 134 Ga. 161, 67 S. E. 880 (1910) (where the conveyance is for security, the grantee is not a purchaser for value; but otherwise where there is an absolute conveyance in satisfaction of the debt); Adams v. Vanderbeck, 148 Ind. 92, 45 N. E. 645, 47 N. E. 24 (1897); Retsch v. Renehan, 16 N. M. 541, 120 Pac. 897 (1911).

[18] 2 POMEROY, *loc. cit. supra* note 10.

[19] "Some legal rules ought to be settled in accordance with the results of experience and dictates of policy, rather than by a compliance with the deductions of strict logic. To hold that a conveyance as *security* for an antecedent debt is made without, but that one in *satisfaction* of such a debt is made with, a valuable consideration, when the fact of satisfaction is not evidenced by any act of the creditor, but depends upon mere verbal testimony, is opening the door wide for the easy admission of fraud. It leaves the rights of third persons to depend upon the coloring given to a past transaction by the verbal testimony of witnesses, after the event has disclosed to the creditor the form and nature in which it is for his interest to picture the transaction. A rule which renders it so easy to defeat the rights of others is clearly impolitic." *Ibid.*

plied.[20] A holder of a negotiable instrument given to secure a past debt is a purchaser for value and enjoys the same position as one giving a present consideration. This rule has been codified in section 25 of the N. I. L. It is justified on the ground of commercial expediency to encourage the credit and circulation of negotiable paper. Both creditor and debtor are benefitted. The former can safely give prolonged credit and forbear to take legal steps. The latter is enabled to use his negotiable securities as the equivalent of cash.[21]

Exceptions are made to the general rule applicable to mortgages given to secure a past debt. One of these is where the statute of limitations has since run and barred the personal claim.[22] Another is where, at the time of the original bargain, the mortgagor promised to execute a mortgage in the future.[23] In this case the mortgage is part of the agreed equivalent for the original loan. The mortgagee parted with value in return for the promise to give a mortgage, and the granting of the mortgage is merely carrying out the agreement. But courts are often hesitant in applying this principle because of the danger of fraud,[24] and refuse to apply it where there is merely a general agreement to furnish security.[25]

There is little authority, however, regarding the position of a creditor receiving a mortgage given partly to secure a pre-existing debt and partly in return for a new consideration. A few old cases hold that the mortgagee is a bona fide purchaser for value of the entire mortgage.[26] These cases may possibly be explained on the ground that there was an extension of time on the old claim. Several other cases hold the same regarding

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[20] Swift v. Tyson, 16 Pet. 1 (U. S. 1842).

[21] See Swift v. Tyson, *supra* note 20, at 20.

[22] Dunlap v. Green, 60 Fed. 242 (C. C. A. 5th, 1894); Tobin v. Benson, 152 S. W. 642 (Tex. Civ. App. 1913).

[23] Ferris v Chic Mint Gum Co., 124 Atl. 577 (Del. Ch. 1924).

[24] In re Great Western Mfg. Co., 152 Fed. 123 (C. C. A. 8th, 1907) (machinery sold under agreement by vendee to give mortgage; mortgage executed within four months of bankruptcy; vendor held not a preferred creditor).

[25] Where a broker obtained "day loans" (to be repaid in the course of the day) from a bank for the purpose of taking up securities with the understanding that the bank was to have a general lien on all the securities in the hands of the broker, delivery of securities to the bank with notice of the broker's impending insolvency is an illegal preference under the Bankruptcy Act. National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20 (1913); Mechanics' Nat'l Bank v. Erust, 231 U. S. 60, 34 Sup. Ct. 22 (1913) (holding, under similar circumstances, that a general promise to give security upon demand puts the creditor in no better position than an agreement to pay money).

[26] Cook v. Parhan, *supra* note 9; Bank v. Bridgers, 98 N. C. 67, 3 S. E. 826 (1887); Branch v. Griffin, 99 N. C. 173, 5 S. E. 393 (1888).

chattel mortgages.[27] But one court holds that under such circumstances the mortgagee is a bona fide purchaser for value only to the extent of the new consideration,[28] and that his lien for the old debt is inferior to equities of which he had no knowledge. This seems to be the preferable rule.

It may be that if, under these circumstances, the mortgagee is not given the position of a bona fide purchaser he will press litigation and increase the difficulty of refinancing the loan. If, on the other hand, he is given this position, he is given more than he bargained for originally. But the problem of refinancing is not a problem peculiar to cases where there is a present consideration for part of the mortgage. It may be involved as well where the consideration for the mortgage was wholly a past indebtedness. In such cases, however, the effect of their decisions upon the problem of refinancing has apparently not been considered by the courts to be of prevailing importance.

The actual figures in the instant case are of interest. The new loan amounted to about $200; the pre-existing debt amounted to about $4,000. If $200 will operate to give the mortgagee priority as to the $4,000 debt, then why not one dollar? Then the entire rule applicable to mortgages to secure a past debt where there is no new consideration becomes a mere empty form to be defeated by "one dollar in hand received," leaving this rule, which has received almost universal approbation from courts and writers, to be like the old dotard in the sixth stage of life "sans teeth . . . sans everything."

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[27] Commercial Nat'l Bank v. Pirie, 82 Fed. 799 (C. C. A. 8th, 1897); Merchants' Bank v. Soesbe, 138 Iowa, 354, 116 N. W. 123 (1908); Hees v. Carr, 115 Mich. 654, 74 N. W. 181 (1898).

[28] Wells v. Morrow, 38 Ala. 125 (1861).