YALE LAW JOURNAL

Published monthly during the Academic Year by the Yale Law Journal Co., Inc.
Edited by Students and members of the Faculty of the Yale Law School.

SUBSCRIPTION PRICE, $4.50 A YEAR SINGLE COPIES, 80 CENTS
Canadian subscription price is $5.00 a year: foreign, $5.25 a year.

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PROHIBITION SEARCHES BY NEW YORK STATE POLICE

The familiar doctrine of the federal courts which bars the use of evidence obtained by an unreasonable search has figured prominently in prosecutions under the National Prohibition Act. Defendants have not been slow to discover the value of the timely

motion to suppress evidence[1] as a method of halting, *in limine*, the cases against them nor, when seeking the reversal of a conviction, have they been unaware of the efficacy of an appeal to the protection of the Fourth Amendment. As a result, cases involving an interpretation of the so-called "federal rule" have multiplied. But the decisions have too frequently turned upon technicalities. Consequently, lest the champions of a glorified rule of evidence completely thwart the efforts of the government to enforce its liquor laws, courts have found it necessary to give increasing scope to certain recognized exceptions to the rule.[2]

One of the most important of these exceptions has been the stipulation that the federal rule does not operate to exclude evidence produced by state officers, even though the search may have been unreasonable. This limitation is, obviously, but an application of the long accepted view that the first ten amendments of the United States Constitution are restrictive only of acts by the federal government.[3] But the stipulation has nevertheless been utilized as an avenue of escape from the apparent inadequacy of federal courts to cope with so complex a police measure as the Prohibition Act. The number of prosecutions based upon searches by state officers has rapidly increased and it is now the admitted policy of the federal authorities to rely wherever possible upon the activity of the local peace officers for the arrest and prosecution of the typical bootlegger and inland rumrunner.[4]

While it is undoubtedly true that one reason for the adoption of this policy has been the desire to throw as many Prohibition cases as possible into the state courts because those courts are more easily adapted to the enforcement of police regulations, it is equally true that the federal authorities have understood the advantage of basing a case even in a United States court upon a search beyond the condemning reach of the federal rule. That this latter motive has been influential is suggested by the fact that in New York, although the state enforcement has been repealed, the United States attorneys have quite generally based their prosecutions upon evidence secured by local police. Indeed, it has been said that, because of the rigidly narrow grounds upon which a federal search will be declared reasonable, the activity of the state officers is indispensable.[5]

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[1] The requirement of a motion prior to trial originated with Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341 (1914).

[2] See Comment (1927) 36 YALE LAW JOURNAL 536.

[3] Barron v. Baltimore, 7 Pet. 243 (U. S. 1833); Twining v. United States, 211 U. S. 78, 29 Sup. Ct. 14 (1908).

[4] See Comment (1927) 36 YALE LAW JOURNAL 988, for a report of the actual practices of federal officials.

[5] *Supra* note 4.

In the face of this situation comes the decision of the United States Supreme Court in *Gambino v. United States*, 48 Sup. Ct. 139 (U. S. 1927), declaring a liquor search by a state trooper in New York to be a search by a "federal officer," and therefore subject to every scrutiny now required under the federal rule. The search in question was made in the defendant's automobile which was stopped at a wayside garage in the northern part of the state. No federal agent was present, nor was there evidence of any cooperation between the federal and state authorities concerning this specific search. But Mr. Justice Brandeis, who wrote the opinion in the case, argues that since the Mullan-Gage law (the state enforcement act) had been repealed,[6] the state troopers must have known that they were acting solely to enforce a federal law. The learned Justice also attaches significance to certain memoranda issued by the Governor of the state at the time the Mullan-Gage law was repealed, urging the state police to continue their aid in the enforcement of the national act; and to certain conferences held between state and federal enforcement agencies at Albany in 1924. The conduct of the state troopers in turning over the evidence to the federal authorities immediately after the arrest of the defendants is thought to be particularly damaging to the searchers' status as local officers. The court admits that a state trooper cannot be brought within the enabling clauses of the National Prohibition Act and thus clothed with an express "agency" from the federal government,[7] but it concludes that the prosecution in a United States district court was "in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States." Having thus raised the difficult question of "agency," the court nevertheless feels that it has "no occasion to inquire" whether, in spite of the repeal of the Mullan-Gage law, other statutes of the state of New York might have imposed the duty to search in this particular case.

The significance of the *Gambino* case can be appreciated only after a consideration of the decisions dealing with searches by state officers that were to be found in the reports at the time the case was before the Supreme Court. Some months prior to the date of the *Gambino* case, the Supreme Court had promulgated its condemnation of a search initiated by the state authorities, but consummated in part by federal agents.[8] In the *Byars* case, however, the controlling factor was the actual *participation* of the federal agent in the search, and, although some of the court's language in that case would seem to indicate a growing unfriend-

[6] Act, June 1, 1923, c. 871; N. Y. Laws 1923, 1690.

[7] Dodge v. United States, 272 U. S. 530, 47 Sup. Ct. 191 (1926).

[8] Byars v. United States, 273 U. S. 28, 47 Sup. Ct. 248 (1927).

liness toward all searches by state officers,[9] the decision was expressly confined to the facts found.[10] A decidedly contrary point of view had been expressed almost contemporaneously in *McGuire v. United States*.[11]

The often cited *Flagg v. United States* [12] is perhaps more closely related on its facts to the *Gambino* case. There a seizure made by the city police for the purpose of a federal prosecution for using the mails to defraud was declared invalid under the federal rule. But the court in that case simply held that the authority of the state officers to make the search had been left "largely to inference and conjecture" and that "to attribute such an elaborate and carefully prepared proceeding as planned to convict the defendant to a few local patrolmen or to some unknown parties . . . . makes too severe a demand on the imagination." [13] In

[9] "The court must be vigilant to scrutinize the attendant fact with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods." *Ibid.* 32, 47 Sup. Ct. at 249. "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the Colonies; and the assurance against any revival of it so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the constitutional right." *Ibid.* 33, 47 Sup. Ct. at 250.

[10] "Similar questions have been presented in a variety of forms to the lower federal courts, but nothing is to be gained by attempting to review the decisions, since each of them rests as the present case does, upon its own peculiar facts." *Ibid.* 33, 47 Sup. Ct. at 250. For an excellent analysis of the Byars case see Ely, *Federal Constitutional Limitations on Searches by State Authority* (1927) 12 ST. LOUIS L. REV. 159. See also Thompson v. United States, 22 F. (2d) 134 (C. C. A. 4th, 1927); Marron v. United States, 8 F. (2d) 251 (C. C. A. 9th, 1925). But even in those cases the reason for excluding the state officer's testimony may be simply the inability of the court to segregate the activities of the two agencies. See Legman v. United States, 295 Fed. 474 (C. C. A. 3d, 1924). Ordinarily, in the absence of any direct participation by federal agents, the federal rule cannot be invoked. Kanellos v. United States, 282 Fed. 461 (C. C. A. 4th, 1922); Coates v. United States, 290 Fed. 134 (C. C. A. 4th, 1923); Thomas v. United States, 290 Fed. 133 (C. C. A. 4th, 1923); Nunn v. United States, 4 F. (2d) 380 (C. C. A. 9th, 1925); United States v. O'Neil, 19 F. (2d) 934 (S. D. Idaho, 1927); Gordon v. United States, 18 F. (2d) 531 (C. C. A. 8th, 1927). And the mere presence of federal agents at a search conducted by state officers is not usually deemed sufficient participation. Crawford v. United States, 5 F. (2d) 672 (C. C. A. 6th, 1925); Brown v. United States, 12 F. (2d) 926 (C. C. A. 9th, 1926); Klein v. United States, 14 F. (2d) 35 (C. C. A. 1st, 1926).

[11] "A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to the rule." 273 U. S. 95, 99, 47 Sup. Ct. 259, 260 (1927).

[12] 233 Fed. 481 (C. C. A. 2d, 1916).

[13] *Ibid.* 483.

other words the court found evidence of a minutely planned arrangement for the specific search (an element totally lacking in the *Gambino* case) and, in absence of proof to the contrary, it presumed the plans to have been effected at the instigation of the federal authorities.

There need be no quarrel with a decision which invokes the federal rule where the search is nothing more than the execution of some specific agreement made by the local police at the behest of federal agents.[14] But does it follow that a conference between the two agencies held almost four years prior to the search in question is to be given the same effect? Or shall we say that any kind of prior agreement between state and federal officers will bring a subsequent search within the federal rule, even though, at the time of the agreement, no search was contemplated? Two district court rulings in the early years of Prohibition enforcement would seem to support the *Gambino* case in permitting such a broad interpretation of the federal rule.[15] The court in the *Falloco* case having found that a general policy of cooperation existed between the state and federal agencies, seemed to conclude that so long as the result of that policy was to cause a majority of the prosecutions in the federal courts to be based on arrests by the local police, the federal rule would be applied. It was expressly stated that special knowledge or special direction by the federal agents was unnecessary for each specific case. The *Schuetze* decision sets forth a similar point of view.[16]

These two decisions tending to support the conclusion reached in the *Gambino* case run counter to most of the authority on the question. In this connection *Park v. United States*,[17] to which no reference is made in the *Gambino* case, is significant. The court in that case held that previous arrangement or cooperation between state and federal agencies was immaterial, so long as the direct authorization of the search came from state statutes.

It would seem, therefore, that the Supreme Court deems par-

[14] United States v. Costanzo, 13 F. (2d) 259 (W. D. N. Y. 1926).

[15] United States v. Falloco, 277 Fed. 75 (W. D. Mo. 1922); In Re Schuetze, 299 Fed. 827 (W. D. N. Y. 1924).

[16] "Although in this state there is no concurrent prohibitory law, it was and is the duty of the local officers equally with federal officers to enforce all laws passed by congress, and since at the time of the seizure, the officers engaged therein were co-operating with federal officials, they were required to strictly comply with the Constitution and laws of the United States. It makes no difference that the federal agent of this district was unaware of the specific search, or that he gave no instruction to the detective or policeman in relation thereto. It is enough that there was a general arrangement or understanding, express or implied, or an acquiescence to search premises pursuant to the ordinance of the city or directions of the police department and use the evidence and discovery for prosecution in federal courts." In re Schuetze, *supra* note 15, at 830.

[17] 294 Fed. 776 (C. C. A. 1st, 1924).

ticipation or specific agreements unnecessary, where the state enforcement act has been repealed. It is of course true that most of the rulings on searches by state officers have been predicated upon the existence of concurrent state legislation.[18] But does the court now imply that every search made by a local officer in pursuit of some violation of a federal statute for which there can be no concurrent state law is to be evaluated according to federal standards? The leading case on the federal rule, *Weeks v. United States*,[19] concerned a conviction for the unlawful use of the mails, yet the decision expressly excepted the seizures made by local police.[20] Similarly, courts have not been hesitant to accept evidence from state officers, although unreasonably seized, where the prosecution has been for bringing liquor into Indian territory.[21] In view of these decisions, it would seem that the Supreme Court in the *Gambino* case has in effect suggested that the Fourth and Fifth Amendments are to be given a much wider scope than has been traditionally accorded the first ten amendments to the federal constitution. It would be but a short step from the *Gambino* case to hold that the constitutional guaranties embodied in those amendments restrict the activities of state agencies generally.

It may be argued that the situation in New York is unique. But, granting the singularity, the Supreme Court did not seem affected by decisions of the Court of Appeals in the Second Circuit dealing with situations similar to that existing in the *Gambino* case, and decisions, which, we may assume, were influenced to no small degree by the court's first hand knowledge of conditions.[22]

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[18] Timonen v. United States, 286 Fed. 935 (C. C. A. 6th, 1923); Robinson v. United States, 292 Fed. 683 (C. C. A. 9th, 1923).

[19] 232 U. S. 383, 34 Sup. Ct. 341 (1914).

[20] "As to the paper and property seized by the policemen, it does not appear that they acted under any claim of federal authority such as would make the amendment applicable to such unauthorized seizure. The record shows that what they did by way of arrest, search and seizure was done before the finding of the indictment in the federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to the individual conduct of such officials." *Ibid.* 398, 34 Sup. Ct. at 346. See also Stearn v. United States, 18 F. (2d) 465 (C. C. A. 4th, 1927).

[21] Elam v. United States, 7 F. (2d) 887 (C. C. A. 8th, 1925); Lerskov v. United States, 4 F. (2d) 540 (C. C. A. 8th, 1925).

[22] Schroeder v. United States, 7 F. (2d) 60, 64 (C. C. A. 2d, 1925): "It is true that there is no state enforcement act in the State of New York, the Mullan-Gage law having been repealed. That fact, however, is quite immaterial. If all these local police officers did had been done by private citizens acting without any color of authority the result would not have been different." See also Greenberg v. United States, 7 F. (2d) 65 (C. C. A. 2d, 1925); Katz v. United States, 7 F. (2d) 67 (C. C. A. 2d, 1925).

The effect of the decision in the *Gambino* case cannot fail to be far reaching. By implication, at least, it repudiates most of the prevailing views on the question in the lower federal courts. It would also seem that the Supreme Court cannot limit the decision to New York, but must be ready to extend its holding to all jurisdictions where state enforcement acts may be repealed. Unquestionably it makes the so-called "nullification" of the National Prohibition Act much more real than even the advocates of the repeal of the state law could have anticipated. It will render the enforcement of liquor laws in New York much more difficult, and in many instances impossible. It emphasizes the juxtaposition of the federal procedure, which seems now to be suffering from a kind of auto-intoxication, and the procedure of the state courts in New York which follows the rules of logic and the dictates of common sense expounded in *People v. Defore*.[23]

R. J. S.

VENDEE RECEIVING CONVEYANCE AFTER NOTICE OF PRIOR EQUITIES AS BONA FIDE PURCHASER

Where a purchaser has paid value and taken a conveyance from one having the "legal title" to land before receiving notice of equities of third parties in it, the courts have uniformly protected him against the prior equities.[1] If, in addition to paying the purchase price, he has only *contracted* to purchase, however, it is said that his interest is only an "equitable" one and that as between the two equities the one which was prior in point of time prevails.[2] With this as the state of the law the problem has presented itself: Shall the added fact that the purchaser of a mere "equitable" interest has acquired the "legal" title by a conveyance *after notice* of a prior equity entitle him to claim the rights of a bona fide purchaser for value? Shall one who has paid value without notice but not obtained a conveyance be allowed to protect himself by obtaining his conveyance after knowledge of the prior equity?

The court in the Gambino case attempts, but, it is submitted unsuccessfully, to distinguish the Schroeder case.

[23] 242 N. Y. 13, 150 N. E. 585 (1926).

[1] See 2 TIFFANY, REAL PROPERTY (1920) 2171, n. 8; AMES, LECTURES ON LEGAL HISTORY (1913) 254, 255; AMES, CASES ON TRUSTS (1893) 286, and cases cited.

[2] See 2 TIFFANY, *op. cit. supra* note 1, at 2175, nn. 14, 15. This applies, of course, only where the court considers the two equities "equal." Hume v. Dixon, 37 Ohio St. 66 (1881) (prior vendor's lien deferred to equity of later purchaser of equitable title without notice). As few equities are disfavored as is the vendor's lien, however, this statement describes the majority of the cases. The rule in Dearle v. Hall, 3 Russ. 48 (1827), and the doctrine of latent equities would also militate against this statement were it not for the fact that they do not apply to interests in land.

The American jurisdictions seem to have reached conflicting decisions on this question. A minority of the states including Illinois,[3] Iowa,[4] North Carolina,[5] and Ohio [6] appear to favor protecting such a purchaser even though he obtained his legal title after notice. Indiana has distinguished between cases where the conveyance of the legal title involved a wrong on the part of the grantor and cases where it did not. Thus an equitable claimant, *A*, may obtain a prior right to the land by getting legal title from a stranger to the transaction by which the first equity was created [7] but not by receiving a conveyance from the grantor who had first contracted to sell to *B* and then contracted to sell to *A*.[8] Other states do not seem to make this distinction.[9] The federal courts have also evidenced a disposition to protect the holder of a later equity who has obtained the legal title after notice.[10]

[3] See McNary v. Southworth, 58 Ill. 473, 476 (1871).

[4] Weston & Co. v. Dunlap, 50 Iowa 183, 185 (1878).

[5] Carroll v. Johnston, 55 N. C. 120 (1855) (*X* contracted to sell land to *A*, *A* contracting to sell to *P* and later to *D* for value and without notice. *D* after notice of *P*'s claim obtained legal title from *X* by paying the rest of the price and was held entitled to keep the land); see Jones v. Zollicoffer, 4 N. C. 645, 660-661 (1817). But see Goldsborough v. Turner, 67 N. C. 403 (1872), where *A* conveyed in trust for creditors, later sold to *B* (giving him an equitable title) and then procured a conveyance of the legal title by the trustee to *B* by fraudulently representing that the creditors had been paid. It was held that since *B* gave no value for the *legal* title the deed would be set aside.

[6] In Dueber Watch Case Mfg. Co. v. Dougherty, 62 Ohio St. 589, 57 N. E. 455 (1900), the defendant corporation conveyed a share of stock to *A* to qualify him as a director, *A* agreeing to hold it as trustee. *A* later contracted to assign this share of stock to the plaintiff as indemnity, the plaintiff having no knowledge of the defendant's equity. After notice the plaintiff obtained legal title by obtaining an assignment from *A*. It was held that the plaintiff had a prior claim, one of the three grounds being that the plaintiff had the rights of a bona fide purchaser even though he had notice before obtaining legal title. In Gibler v. Trimble, 14 Ohio 323 (1846), the defendants had an equitable title to certain land through being owners of land warrants from the government. The plaintiffs purchased these warrants from another for value and without notice and later, after notice, obtained the legal title by compliance with certain governmental regulations. It was held that the plaintiffs were entitled to the land.

[7] Campbell v. Brackenridge, 8 Blackf. 471 (Ind. 1847).

[8] Gallion v. M'Caslin, 1 Blackf. 91 (Ind. 1820); see Rhodes v. Green, 36 Ind. 7, 10 (1871).

[9] Deuber Watch Case Mfg. Co. v. Dougherty, *supra* note 6.

[10] Fitzsimmons v. Ogden, 7 Cranch 2 (U. S. 1812); see Lea v. Polk County Copper Co., 62 U. S. 493, 498 (1858); Fidelity Mut. Life Ins. Co. v. Clark, 203 U. S. 64, 74, 27 Sup. Ct. 19, 21 (1906). See also United States v. Detroit Lumber Co., 131 Fed. 668, 678 (C. C. A. 8th, 1904); United States v. Clark, 138 Fed. 294, 299 (C. C. A. 9th, 1905). In these two latter cases the question was one between the government and the bona

In a larger number of the states, however, the rule seems to be that one must have both paid the purchase price and received a conveyance before notice of prior equities if he is to be given the rights of a bona fide purchaser. Among the states that have so indicated are Alabama,[11] Arkansas,[12] Colorado,[13] Kentucky,[14] Maryland,[15] Massachusetts,[16] Mississippi,[17] Nevada,[18] New Jersey,[19] New York,[20] Oregon,[21] Pennsylvania,[22] South Carolina,[23] Tennessee,[24] and West Virginia.[25]

Although the majority of the states do not recognize the "equitable" purchaser without notice as entitled to the land as against one having a prior equity, many of them give him a "lien" on

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fide purchaser of an equitable estate from a fraudulent transferee from the government. It seems that a special policy is involved in such cases as it is felt that at some point titles from the government should become unassailable in the hands of a purchaser without notice, and the final issuing of the patent is chosen as this point. See U. S. v. Clark, *supra* at 298, 299, where the court said: "What, then, becomes of the security intended to be given by such an instrument? The innocent holder of such a patent would have absolutely no security. He could never know what day, week, month, or year the government might bring him into court and take away the title . . . ." These cases also differ from the ordinary one in that it is in part the improvements of the purchaser which have earned the patent from the government.

[11] Louisville & Nashville R. R. v. Boykin, 76 Ala. 560 (1884); Fash v. Ravesies, 32 Ala. 451 (1858).

[12] See Duncan v. Johnson, 13 Ark. 190, 192 (1852).

[13] Paul v. McPherrin, 48 Colo. 522, 111 Pac. 59 (1910), 21 Ann. Cas. 460 (1911) annotation.

[14] Blight's Heirs v. Banks, 6 T. B. Mon. 192 (Ky. 1827); Nantz v. McPherson, 7 T. B. Mon. 597 (1828); see Corn v. Sims, 3 Metc. 391, 400, 401 (Ky. 1860); Cline v. Osborne, 24 Ky. L. Rep. 511, 512, 68 S. W. 1083, 1084 (1902).

[15] See Atkinson v. McCulloh, 132 Atl. 148 (Md. 1926).

[16] Wenz v. Pastene, 209 Mass. 359, 95 N. E. 793 (1911) (purchaser who paid price without notice but received notice before deed obtained takes land subject to unrecorded [equitable] lease); see Ratshesky v. Piscopo, 239 Mass. 180, 184, 131 N. E. 449, 450 (1921).

[17] See Kilcrease v. Lum, 36 Miss. 569, 572 (1858).

[18] See Boskowitz v. Davis, 12 Nev. 446, 466 (1877); Moore v. DeBernardi, 47 Nev. 33, 55, 220 Pac. 544, 547 (1923).

[19] Dean v. Anderson, 34 N. J. Eq. 496 (1881); see Brinton v. Scull, 55 N. J. Eq. 747, 757, 35 Atl. 843, 847 (1897); Cranwell v. Clinton Realty Co., 58 Atl. 1030, 1035 (N. J. Eq. 1904); Patterson v. Loiseaux Lumber Co., 92 N. J. Eq. 569, 581, 114 Atl. 336, 342 (1921); Toplan v. Hoover, 135 Atl. 463 (N. J. Eq. 1926).

[20] See Grimstone v. Carter, 3 Paige 421, 436 (1832); Dickinson v. Tillinghast, 4 Paige 215, 221 (1833); Frost v. Beekman, 1 Johns. Ch. 273, 301 (1814).

[21] See Jennings v. Kierman, 35 Or. 349, 362, 55 Pac. 443, 447 (1899).

[22] See Union Canal Co. v. Young, 1 Whart. 410, 432 (Pa. 1836).

[23] See Peay v. Seigler, 48 S. C. 496, 514, 26 S. E. 885, 892 (1896).

[24] See Pillow v. Shannon, 3 Yerg. 508, 512 (Tenn. 1832).

[25] See Webb v. Bailey, 41 W. Va. 463, 469, 23 S. E. 644, 646 (1895).

the land for the money paid before notice, holding the claimant of the first equity not entitled to the land, or his claim against it, until he has repaid the later purchaser.[26]

The American cases which allow the holder of a junior equity to obtain a good title as against a senior equity by getting in the legal title after notice refer to the English cases as their authority. This English doctrine of *tabula in naufragio*[27] was developed in connection with the mortgage cases where the third mortgagee who obtained his mortgage without notice of a second mortgage and whose claim was a mere "equitable" one, bought in the "legal" first mortgage after notice of the "equitable" second mortgage. In this situation the third mortgagee was allowed to "tack" the first and third mortgages and thus obtain preference for both over the second mortgage.[28] The preference in such case was one entitling the mortgagee to the amount of his loan and in this respect was much like that given by many American courts in the sales cases for the return of the purchase money paid before notice of the prior equity.[29] The doctrine of tacking mortgages has generally been repudiated in this country.[30] It

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[26] Weidenbaum v. Raphael, 83 N. J. Eq. 17, 90 Atl. 683 (1914); Hynes v. Meador, 193 S. W. 1111 (Tex. Civ. App. 1917); Youst v. Martin, 3 Serg. & R. 423 (Pa. 1817); Webb v. Bailey, *supra* note 25; see Union Canal Co. v. Young, *supra* note 22, at 432; Sims v. Richardson, 12 Ky. 274, 276 (1822); Dickinson v. Wright, 56 Mich. 42, 49, 22 N. W. 312, 315 (1885); Henry v. Phillips, 163 Cal. 135, 140, 124 Pac. 837, 839 (1912); House v. Davis, 196 Ala. 153, 71 So. 685 (1916); 2 POMEROY, EQUITY JURISPRUDENCE (1918) § 750; Donaldson v. Thomason, 137 Ga. 848, 851, 74 S. E. 762, 763 (1912). *Contra:* Wenz v. Pastene, *supra* note 16.

[27] This term was used to describe the doctrine that as between two equities, either could gain preference for his claim by obtaining the legal title even after notice. AMES, LECTURES ON LEGAL HISTORY (1913) 267; 1 STORY, EQUITY JURISPRUDENCE (12th ed. 1877) § 415.

[28] Taylor v. Russell [1892] A. C. 244; see Ex parte Knott, 11 Ves. 609, 619 (1806); 3 TIFFANY, *op. cit. supra* note 1, § 639.

[29] See *supra* note 26.

[30] See Grant v. United States Bank, 1 Caines Cas. 112 (N. Y. 1804); Chandler v. Dyer, 37 Vt. 345, 354 (1864); 3 TIFFANY, *op cit. supra* note 1, § 639, n. 19; AMES, *op. cit. supra* note 27, at 268, n. 2; 1 STORY, *op. cit. supra* note 29, §§ 413–419; 4 KENT, COMMENTARIES (13th ed. 1884) 177–179. In Osborn v. Carr, 12 Conn. 195, 210 (1837), the court, after refusing to follow the tacking doctrine, said: "There are other reasons than those which we have suggested which, independent of decided cases in our own courts, would constrain us to reject the English doctrine of tacking. It is unjust and inequitable, and is supported there, only by the weight of authority. Chancellor Kent calls it 'harsh and unreasonable'. He says: 'There is no natural equity in tacking; and when it supersedes a prior incumbrance, it works manifest injustice. By acquiring a still more antecedent incumbrance, the junior party acquires, by substitution, the rights of the first incumbrancer over the purchased security; and he justly acquires nothing more. The doctrine of tacking, is founded on the assumption of a principle which is not true in point of fact; for, as between *A*, whose deed

was disapproved of by English courts and writers as inequitable even while followed because of the force of precedent,[31] and was finally abolished by statute, with certain exceptions, in 1924.[32]

A study of the English cases will show that practically all of the cases in which the doctrine of *tabula in naufragio* was applied were cases of tacking mortgages.[33] In the few cases in which one, whose equitable claim was that of a purchaser of the land, has attempted to perfect his title by obtaining a conveyance after notice of the prior equity, there appears to be some conflict. It would seem that the decisions on the point are on the whole against the application of the doctrine to such a fact situation, however.[34]

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is honestly acquired and recorded today, and *B*, whose deed is with equal honesty acquired and recorded tomorrow, the equities upon the estate are not equal. He who has been fairly prior in point of time, has the better equity; for he is prior in point of right'."

[31] See Jennings v. Jordan, 6 App. Cas. 689, 714 (1881); Jenks, *The Legal Estate* (1908) 24 L. Q. REV. 147, 155; AMES, *op. cit. supra* note 27, at 268, n. 3.

[32] LAW OF PROPERTY ACT, (1925) 15 Geo. V, c. 20, § 94:

"(1). After the commencement of this Act, a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable)—

(a) if an arrangement has been made to that effect with the subsequent mortgagees; or

(b) if he had no notice of such subsequent mortgages at the time when the further advance was made by him; or

(c) whether or not he had such notice as aforesaid, where the mortgage imposes an obligation on him to make such further advances.

This subsection applies whether or not the prior mortgage was made expressly for securing further advances.

(2) In relation to the making of further advances after the commencement of this Act a mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered as a land charge or in a local deeds registry, if it was not so registered at the date of the original advance or when the last search (if any) by or on behalf of the mortgagee was made, whichever last happened.

This subsection only applies where the prior mortgage was made expressly for securing a current account or other further advances.

(3) Save in regard to the making of further advances as aforesaid the right to tack is hereby abolished:

Provided that nothing in this Act shall affect any priority acquired before the commencement of this Act by tacking, or in respect of further advances made without notice of a subsequent incumbrance or by arrangement with the subsequent incumbrancer.

(4) This section applies to mortgages of land made before or after the commencement of this Act, but not to charges registered under the Land Registration Act, 1925, or any enactment replaced by that Act."

[33] See AMES, *op. cit. supra* note 27, at 269.

[34] In Wigg v. Wigg, 1 Atk. 382 (1739), land was devised to *A* charged with the payment of a sum of money to *B*. *A*'s heir sold the land to *C* who paid value before notice of the charge but had notice before he re-

It would appear, therefore, that the English cases are not very strong authority for the minority view in this country, especially in view of the fact that tacking mortgages, to which the doctrine was principally confined, is not recognized here, and that if the principle is to be upheld it must stand on its merits alone. Its merits are hard to discern, whether or not we agree with the rule that the bona fide purchaser of a mere "equitable title" is not protected against prior equities. It gives priority by a hit or miss, catch-as-catch-can method which has nothing

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ceived his conveyance. It was held that the land was still subject to the charge.

In Whitworth v. Gangain, 3 Hare 416, 428 (1844), the court said: "If a party contracts specifically for a given property, pays the purchase-money, *and obtains the legal title, without notice up to the time of obtaining the conveyance, as well as of paying his money,* that may give him a right to be preferred to an equitable claim which is prior in point of time." (Italics ours).

In Sharpe v. Foy, L. R. 4 Ch. App. 35 (1868), where it was held that the purchaser had priority even though the deed wasn't effectually acknowledged before notice of a prior equity, the court seemed to consider the fraud of the grantor as important and to rest the holding on a special rule where there is fraud on the part of a married woman.

In Blackwood v. London Chartered Bank of Australia, L. R. 5 Priv. Council App. 92 (1874), there is a dictum at page 111 that the doctrine applies as between purchasers of a contract right to land, but the recording statute there provided that priority was to be given in such cases not according to priority in point of time but according to the time of registration. The first transferee here did not have his "transfer" recorded at the land office and the second did. It would seem that this fact alone decides the case.

In Bailey v. Barnes [1894] 1 Ch. 25, 37, the court said in reference to the doctrine of *tabula in naufragio:* "It was contended that this doctrine was confined to *tacking* mortgages. But this is not so. The doctrine applies in favour of all equitable owners or incumbrancers for value without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it to them." The holding was that the bona fide purchaser of an equity of redemption could, by paying off the mortgage after notice of a prior equitable claim, get an indefeasable title. No authorities are cited for the proposition that the doctrine applies to all cases and the court said on page 36: "Equitable owners who are upon an equality in this respect may struggle for the legal estate, and he who obtains it, having both law and equity on his side, is in a better situation than he who has equity only. *The reasoning is technical and unsatisfactory;* but, as long ago as 1728, the law was judicially declared to be well settled and only alterable by Act of Parliament: see Brace v. Duchess of Marlborough [2 P. Wms. 491]." (Italics ours). The case cited is merely a typical case permitting the tacking of the first and third mortgages, and would not seem to have the binding effect attributed to it by this court in a vendor-purchaser situation.

See also 2 POMEROY, *op. cit. supra* note 26, § 755; AMES, *loc. cit. supra* note 33.

It is settled that the purchaser of an equity from a trustee cannot gain priority over the cestui of an express trust by getting a conveyance from the trustee after notice. Saunders v. Dehew, 2 Vern. 271 (1692).

to do with the merits of the claims.[35] It is a probable explanation of the minority rule that it arose out of the influence of Sugden, who argued strenuously for protecting the bona fide purchaser of an equitable title,[36] and whose ideas were widely disseminated in this country during the early nineteenth century. Although Sugden's theory did not prevail, it did, it is thought, cause some courts in this country to protect such a purchaser if any pretense could be found for doing so. Examples of this tendency may be seen in the American cases giving the equitable purchaser a "lien" for the purchase money paid before notice [37] and those holding that the transferee of a "chose in action" takes free of "latent equities." [38]

But even if we concede that it is socially and economically desirable to protect the bona fide purchaser of an equitable title, which is not at all certain,[39] this unsystematic, devil-take-the-hindmost method seems an undesirable one.

EFFECT OF A CESSION OF JURISDICTION BY A STATE TO THE UNITED STATES

The greatest landed proprietor throughout the several states is undoubtedly the United States. Besides numerous Indian reservations, national parks, and forest and game preserves, the federal government maintains military or naval stations in every state but one,[1] post offices and court houses in most large cities,[2] and many other institutions, from life-saving stations to penitentiaries, throughout the country. Thus, such places as Ft. Leavenworth, Muscle Shoals, West Point, Sandy Hook and Old Point Comfort are under federal proprietorship. Moreover, the United States is the country's greatest landlord. Besides a numerous official personnel, its reservations contain thousands of civilian inhabitants, whose status, by reason of the nature of federal proprietorship, is often peculiar. They are within the physical limits of a state but, in many cases, beyond its jurisdiction. Hence they are to a certain extent beyond the law.

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[35] *Cf.* EWART, ESTOPPEL (1900) 252, 254.

[36] SUGDEN, VENDORS & PURCHASERS (14th ed. 1873) 791, 798.

[37] *Supra* note 26.

[38] Hopple v. Cleveland Discount Co., 157 N. E. 414 (Ohio App. 1927); Davis v. Barr, 9 Serg. & R. 137 (Pa. 1822).

[39] See HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY (1915) 130, 131. Compare Ames, *Purchase for Value Without Notice* (1886) 1 HARV. L. REV. 1, 9, 11; Note (1912) 12 COL. L. REV. 156, 158; (1925) 39 HARV. L. REV. 271, 272.

[1] The military reservations are listed in MILITARY RESERVATIONS, NATIONAL CEMETERIES AND MILITARY PARKS (Judge Advocate Gen. Dept. 1916).

[2] Congress appropriates funds for the erection of approximately 100 new federal buildings a session. See ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS (3d ed. 1926) § 91.

Land for federal undertakings may be reserved by the United States at the time of a state's admission, or subsequently acquired with or without the state's consent.[3] Jurisdiction over such land may be retained by the United States at the time that the land is reserved,[4] or acquired later by cession from the state to the United States, under the terms of the Constitution.[5] Where land is acquired without the state's consent, the United States holds as an ordinary proprietor,[6] except that the state cannot interfere with the use of the land for governmental purposes.[7] But Congress has brought about cessions of jurisdiction over most lands acquired for federal enterprises by making such cession a condition precedent to the spending of public funds upon the land.[8]

In the words of the Constitution, a cession of jurisdiction by a state gives Congress the "Power . . . to exercise exclusive Legislation" over the territory concerned.[9] Federal jurisdiction becomes "exclusive" in the sense that the only *new* laws respecting private rights applicable thereto,[10] and the only penal laws

[3] Kohl v. United States, 91 U. S. 367 (1875).

[4] See Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 526, 5 Sup. Ct. 995, 996 (1885).

[5] U. S. CONST. Art. I, § 8: "The Congress shall have Power to exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-yards and other needful Buildings."

It has been urged that the phrase "other needful Buildings" means only other structures for military or defensive purposes. Lieber, *Cessions of Jurisdiction by States to the United States* (1898) 32 AM. L. REV. 78; [1912] Dig. Op. Judge Advocate Gen. 931. But in various acts of cession the phrase has been construed to include all federal enterprises, as, in addition to those enumerated *supra*, aqueducts, cable terminals, canals, custom-houses, hospitals, land offices, levees, lighthouses, military cemeteries, mints, soldiers' homes, and weather bureaus.

[6] 14 Op. Att'y Gen. 557 (1875); Pothier v. Rodman, 291 Fed. 311 (C. C. A. 1st, 1923).

[7] Pundt v. Pendleton, 167 Fed. 997 (N. D. Ga. 1909) (teamster in employ of quartermaster at national park held under no duty to work on state roads); United States v. Hunt, 19 F. (2d) 634 (D. Ariz. 1927) (enforcement of state game law restricting killing, under federal authority, of surplus deer in national forest enjoined).

[8] 5 Stat. 468, (1841) U. S. Comp. Stat. (1916) § 6902 (R. S. § 355): "No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, customs-house, lighthouse, or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. . . ."

[9] *Supra* note 5.

[10] *Infra* notes 41, 42 and 43.

existing therein,[11] are those enacted or adopted by Congress. Crimes committed within the territory can only be punished,[12] and real actions brought,[13] in the local federal court. Transitory actions arising within the territory may, however, be tried wherever the plaintiff can get service on the defendant.[14] A cession of jurisdiction may concern land already acquired or to be acquired,[15] and may contain such reservations as the state sees fit to make, providing they do not interfere with the intended use of the property.[16] Thus the usual reservation of a right to serve civil and criminal process with regard to actions arising within the state but without the territory is considered a valid measure to prevent the territory from becoming an asylum for fugitives from justice.[17] Similarly, the right to tax

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[11] Thus, state liquor laws penalizing sale without license become inoperative over territory when it is ceded to the United Sates. In re Ladd, 74 Fed. 31 (D. Neb. 1896).

[12] Federal courts have jurisdiction: Kelly v. United States, 27 Fed. 616 (C. C. Maine, 1885); Benson v. United States, 146 U. S. 325, 13 Sup. Ct. 60 (1892); United States v. Holt, 218 U. S. 245, 31 Sup. Ct. 2 (1910).

State courts have no jurisdiction: State v. Kelly, 76 Me. 331 (1884); State v. Morris, 76 N. J. L. 222, 68 Atl. 1103 (1908); People v. Hillman, 246 N. Y. 467, 159 N. E. 400 (1927).

It has, however, been held that a federal court had no jurisdiction over a crime committed at a soldiers' home where Congress, in acquiring the land, did not unequivocally declare that exclusive federal jurisdiction was intended or necessary, and where the state ceded only such jurisdiction as Congress found necessary. In re Kelly, 71 Fed. 545 (E. D. Wis. 1895). And that the state had jurisdiction over a similar offense, since ownership of the land by a corporation created by Congress was not ownership by the United States. In re O'Connor, 37 Wis. 379 (1875); People v. Mouse, 259 Pac. 762 (Cal. App. 1927).

[13] See Palmer v. Barrett, 162 U. S. 399, 401, 16 Sup. Ct. 837, 838 (1896) (wrongful ouster).

[14] Madden v. Arnold, 22 App. Div. 240, 47 N. Y. Supp. 757 (3d Dept. 1897), *aff'd* 162 N. Y. 638, 57 N. E. 1116 (1900) (bite by vicious dog); Hoffman v. Leavenworth Light Co., 91 Kan. 450, 138 Pac. 632 (1914) (wrongful death); Kaufman v. Hopper, 220 N. Y. 184, 115 N. E. 470 (1917) (same); Fant v. Arlington Hotel Co., 170 Ark. 440, 280 S. W. 20 (1926) (loss of personal property in hotel fire); Lieber, *loc. cit. supra* note 5.

[15] Ft. Leavenworth R. R. v. Lowe, *supra* note 4; United States v. Holt, *supra* note 12; 15 Op. Att'y Gen. 480 (1878). Forty-two states have general acts of cession, all of them prospective in application, and seven of them with limitations as to use or size. Thirty-four of these provide for service of state process within the territory concerned, of which five reserve criminal jurisdiction. Twenty-one cede jurisdiction only for as long as the United States uses the land for federal purposes. For a collection of acts of cession, both general and special, see MILITARY RESERVATIONS, NATIONAL CEMETERIES AND MILITARY PARKS, *loc. cit. supra* note 1.

[16] See Ft. Leavenworth R. R. v. Lowe, *supra* note 4, at 539, 5 Sup. Ct. at 1003; ROSE, *op. cit. supra* note 2, § 96.

[17] State v. Mack, 23 Nev. 359, 47 Pac. 763 (1897).

private property or corporate franchises,[18] or to open roads,[19] may be reserved. But reservations inconsistent with "exclusive" federal jurisdiction as contemplated by the Constitution, such as reservations to the state of concurrent or criminal jurisdiction, while they are not inoperative as reservations, do not comply with Congressional provisions respecting appropriations,[20] except where they have been sanctioned by special legislation.[21] Where the state legislature provides that the cession is only for as long as the land is used for the purposes enumerated in the Constitution, it has been held that jurisdiction over such land as is leased for private enterprise, as a market[22] or hotel,[23] reverts to the state. But where there is no such stipulation, the United States loses jurisdiction only by abandonment, as where a military reservation is opened to Indians and homesteaders,[24] and no retrocession of jurisdiction to the state is necessary.[25]

Congress early enacted penal laws for territory over which it had jurisdiction,[26] and in 1825 passed the first assimulation crime statute,[27] providing that where an offense was not specially provided for by any federal law, it should be prosecuted in the federal courts and receive the same punishment as the laws of the state in which the territory was situated prescribed for a like offense. This statute was held to be not unconstitutional as a delegation of legislative power,[28] since it was construed as adopt-

[18] Ft. Leavenworth R. R. v. Lowe, *supra* note 4.

[19] *Cf.* In re Ladd, *supra* note 11. But the state does not thereby retain jurisdiction over the land which the road occupies. People v. Hillman, *supra* note 12 (conviction in state court for robbery on highway within military reservation reversed); *cf.* Baker v. State, 47 Tex. Cr. Rep. 482, 83 S. W. 1122 (1904).

[20] 20 Op. Att'y Gen. 611 (1893); 31 Op. Att'y Gen. 260, 265, 294 (1918). But *cf.* 24 Op. Att'y Gen. 617 (1903).

[21] (1880) 21 Stat. 142 authorized the purchase of a site for a federal building at Montgomery, "provided that no money to be appropriated for this purpose shall be available until . . . the State of Alabama shall have ceded to the United States exclusive jurisdiction over the same during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of said State and the service of any civil process therein." For other special acts with similar provisions, see (1882) 22 Stat. 94, 152, 161; (1885) 23 Stat. 282; (1887) 24 Stat. 544; (1888) 25 Stat. 444; (1891) 26 Stat. 115, 724.

[22] Palmer v. Barrett, *supra* note 13; 17 L. R. A. 720 (1892) annotation.

[23] Crook, Horner & Co. v. Old Point Comfort Hotel Co., 54 Fed. 604 (E. D. Va. 1893).

[24] La Duke v. Melin, 45 N. D. 349, 177 N. W. 673 (1920). Thus the federal courts have jurisdiction over a murder committed on a military reservation, but in a part used for farming. Benson v. United States, *supra* note 12.

[25] [1912] Dig. Op. Judge Advocate Gen. 934.

[26] (1790) 1 Stat. 113.

[27] (1825) 4 Stat. 115.

[28] Franklin v. United States, 216 U. S. 559, 30 Sup. Ct. 434 (1909).

ing only such state penal laws as existed at the time of its enactment,[29] or re-enactment.[30] It has been substantially re-enacted in 1866,[31] when a provision that no subsequent repeal of any state law should have any effect was added, in 1898,[32] and in 1909.[33] It is not operative, however, when the state law in its terms does not permit of adoption, as where the state law provides that a prosecution for criminal libel may be brought only in the county where the libelous paper is published.[34]

While Congress has thus provided a criminal code for ceded territory, it has enacted little or no law respecting private rights. Under the rule of international law applicable when territory passes from one sovereignty to another, the local law regarding private rights existing at the time of the cession, so far as it is not inconsistent with the laws of the United States, has been held to continue until superseded by federal legislation.[35] Thus a railway has been held responsible as an insurer for the killing of cattle on its right of way through a military reservation, when at the time of the cession a state statute imposed on it such responsibility on failure to fence its track.[36] But a refusal on the part of the War Department to permit fencing because it would "greatly restrict the use of the reservation for drill and maneuver purposes" has been held a good defense to a similar action.[37] The laws of negligence [38] and the rights of action for wrongful death [39] in effect at the time of the cession have likewise been

[29] United States v. Paul, 6 Pet. 141 (U. S. 1832).

[30] United States v. Tucker, 122 Fed. 518 (W. D. Ky. 1903). Hence until reenactment, the statute does not apply to the laws of a state which was admitted to the union after its enactment. United States v. Barnaby, 51 Fed. 20 (D. Mont. 1892).

[31] (1866) 14 Stat. 13.

[32] (1898) 30 Stat. 717.

[33] 35 Stat. 1145, (1909) U. S. Comp. Stat. (1916) § 10462, 18 U. S. C. A. (1927) § 468: "Whoever, within the territorial limits of any state, organized territory, or district, but within or upon any of the places now existing or hereafter reserved or acquired, described in § 272 of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the state, territory, or district in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such state, territory, or district law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such state, territory or district."

[34] United States v. Press Pub. Co., 219 U. S. 1, 31 Sup. Ct. 212 (1911).

[35] Chicago, R. I. & P. Ry. v. McGlinn, 114 U. S. 542, 5 Sup. Ct. 1005 (1885).

[36] *Ibid.*

[37] Anderson v. Chicago & N. W. Ry., 102 Neb. 578, 168 N. W. 196 (1918).

[38] Steele v. Halligan, 229 Fed. 1011 (S. D. Wash. 1916).

[39] Hoffman v. Leavenworth Light Co., *supra* note 14; Kaufman v. Hopper, *supra* note 14.

held to continue, except where abrogated by the enactment of a federal employees' compensation law.[40] But state laws, such as a workmen's compensation act[41] or a law imposing responsibility on a telegraph company for failure to deliver a message,[42] passed subsequent to the cession and creating new causes of action, have no application. Similarly, where a subsequent state law, in accord with a change of social policy throughout the country, abolishes a cause of action which existed at the time of the cession, it is held that the cause of action still persists in territory over which jurisdiction has been ceded.

Such is the effect of the recent case of *Williams v. Arlington Hotel Co.*, 22 F. (2d) 669 (C. C. A. 8th, 1927).[43] There the plaintiff brought an action for personal property consumed in the burning of the defendant's hotel while she was a guest thereof. The hotel was situated on land leased from the United States which was a part of the Hot Springs, Arkansas, military reservation. The state had ceded jurisdiction over the reservation to the United States in 1903, reserving only the rights to serve process and to tax private property therein. At the time of the cession, the state law imposed an insurer's responsibility on innkeepers for the loss of property of guests, but in 1913 a statute relieved them of responsibility for loss by fire except where the fire was started by their intention or negligence. The lower court held that the act of 1913 applied, on the ground that jurisdiction reverted to the state while the land was not being actually used for governmental purposes, but was reversed on appeal, there being no express provision for such reverter in the act of cession.[44]

While Congress has kept the penal law of ceded territory reasonably up to date by re-enactment of the assimulation crime statute, private rights within such territory are in general determined only by such law as existed at the time of cession, in many cases fifty or one hundred years ago. Morever, its inhabitants are usually denied by the state wherein the territory is situated the civil and political rights which it accords to residents, and are given no substitutes by Congress. Thus it has been held that they are not entitled to vote in state elections,[45] to send their

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[40] Webb v. White Engineering Corp., 204 Ala. 429, 85 So. 729 (1920).

[41] McCarthy v. Packard Co., 105 App. Div. 436, 94 N. Y. Supp. 203 (1st Dept. 1905), *aff'd* 182 N. Y. 555, 75 N. E. 1130; Kaufman v. Hopper, *supra* note 14.

[42] Western Union Tel. Co. v. Chiles, 214 U. S. 274, 29 Sup. Ct. 613 (1909).

[43] For a similar holding in the state court on identical facts, see Fant v. Arlington Hotel Co., *supra* note 14.

[44] *Supra* notes 22, 23 and 24.

[45] Sinks v. Reese, 19 Ohio St. 306 (1869) (after this decision, Congress, in (1871) 16 Stat. 399, retroceded jurisdiction to the state); In re Town of

children to the public schools,[46] to benefit by the poor laws,[47] or to sue for divorce in the state courts.[48] The exemption which they enjoy from state taxation [49] and from the duty to work on state roads [50] seems inadequate compensation for so great a loss of civil rights. On grounds of necessity it has been held that a state court retained probate jurisdiction over ceded territory, Congress not having conferred it on the federal courts,[51] and a similar view has been expressed by dissenting judges with regard to divorce.[52] But by the weight of authority inhabitants of such territory are considered non-residents of the state for all purposes.[53]

That this situation presents practical difficulties, and not merely occasional inconvenience, is shown by the frequent rulings of the Judge Advocate General of the Army with regard to military reservations.[54] Thus he has ruled that there was no federal appropriation for schools for children at army posts,[55] and that officer's children must pay tuition if admitted to the local public schools.[56] He has similarly held that the state has no power to license and regulate marriage ceremonies on a reservation, but advised that such marriage be entered into in accordance with the state law as a matter of public record.[57] Another opinion states that the state, unless the domicile of a person dying on a reservation, has no probate jurisdiction, but advises that the decedent's effects be taken outside the reservation and turned over to the administrator appointed by the state.[58] In another case it was ruled that in the absence of an application by an administrator appointed by the state of the domicile of the dece-

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Highlands, 48 N. Y. St. Rep. 795, 22 N. Y. Supp. 137 (Sup. Ct. 1892); State v. Willett, 117 Tenn. 334, 97 S. W. 299 (1906).

[46] Opinion of the Justices, 42 Mass. 580 (1841).

[47] *Ibid.*

[48] Lowe v. Lowe, 150 Md. 592, 133 Atl. 729 (1926), 46 A. L. R. 993, annotation, 36 YALE LAW JOURNAL 146, 40 HARV. L. REV. 130, 11 MINN. L. REV. 74.

[49] Opinion of Justices, *supra* note 46; 6 Op. Att'y Gen. 577 (1854); Concessions Co. v. Morris, 109 Wash. 46, 186 Pac. 655 (1919).

[50] 16 Op. Att'y Gen. 468 (1880).

[51] Divine v. Unaka Nat'l Bank, 125 Tenn. 98, 140 S. W. 747 (1911).

[52] See Lowe v. Lowe, *supra* note 48, at 602, 133 Atl. at 733. See also for the argument *ab inconvenienti*, Crook, Horner & Co. v. Old Point Comfort Hotel Co., *supra* note 23, at 611.

[53] (1926) 40 HARV. L. REV. 130.

[54] [1912] Dig. Op. Judge Advocate Gen. 933–943. See also, MILITARY RESERVATIONS, NATIONAL CEMETERIES AND MILITARY PARKS, *op. cit. supra* note 1, at 497–516.

[55] [1912–1917] Dig. Op. Judge Advocate Gen. 250.

[56] [1912] *ibid.* 938.

[57] *Ibid.*

[58] *Ibid.* 939.

dent, the effects of a soldier dying on a reservation should be sold and the money deposited in the Treasury.[59]

What, then, can be done to enable the law of ceded territory to keep pace with local or national changes in social policy, and to accord civil and political rights enjoyed elsewhere to its inhabitants? It seems improbable that Congress could or would legislate in regard to the varying local needs of these isolated communities, particularly since they are unrepresented in Congress. It is submitted, however, that Congress could readily make the modern law of the state in which each reservation is situated applicable to such reservation by the enactment and frequent re-enactment of a measure concerning private rights, analogous to its assimulation crime statute.[60] Such state law seems more available for adoption than any other, such as that of the District of Columbia, since it is adjusted to local conditions and already has a derivative relation to the law prevailing in the territory. The act of adoption would necessarily limit its scope to such private rights as were not regulated by other federal legislation, and, as in the case of the assimulation crime statute, would operate only on such state law as was susceptible of adoption. It is evident that it would afford no remedy for the loss of civil and political rights incident to residence.

WHAT LAW GOVERNS THE DEFENSES TO A NEGOTIABLE INSTRUMENT IN THE HANDS OF A BONA FIDE HOLDER FOR VALUE[1]

Conflict of laws problems relating to the "title" to negotiable instruments have, because of the adoption by the states of the Uniform Negotiable Instruments Law, become relatively unimportant as far as transactions within this country are concerned.[2] When, however, the transactions reach into foreign countries, the complex problems again become manifest. An example of

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[59] *Ibid.*

[60] *Supra* note 33.

[1] This comment is concerned with the defenses of payment, failure or lack of consideration, fraud, misrepresentation, etc., rather than the so-called "real defenses," such as usury, forgery, illegality, etc., and defenses arising from some defect in presentment, protest, notice, or some defect in form making the instrument non-negotiable.

[2] The problem may, however, still arise in a limited number of situations, due to the variations from the Uniform Negotiable Instruments Law among the states. See Ill. Rev. Stat. (Cahill, 1927) c. 98, § 77 (rights of a holder in due course), § 49 (responsibility of an accommodation party), § 145 (effect of alteration of instrument), § 75 (definition of defective title); N. Y. Cons. Laws (Cahill, 1923) c. 21, § 373 (declaring usurious contracts void); Wis. Stat. (1921) c. 78, § 1676-22 (as to what constitutes a holder in due course), § 1676-25 (when title is defective); Minn. Gen. Stat. (1923) § 7247 (when title is defective); BRANNON, NEGOTIABLE INSTRUMENTS LAW (3d ed. 1920) 105-106.

the latter situation existed in the recent New York case of *Weissman v. Banque De Bruxelles.*[3]

Before any question of defenses to the instrument arises it may be necessary to determine whether the holder is a holder in due course. It has been suggested that the character of the holder and the defenses available against him need not necessarily be determined by the same law.[4] Yet it is difficult to see any reason based on logic or policy for making a distinction.[5] Therefore no distinction will be made except for convenience in treatment.

The question of what law defines the defenses available against the good faith holder has most frequently arisen where the defenses have been asserted by the primary parties to the instrument, *i.e.*, maker and acceptor. Where such is the case the Federal courts [6] and some state courts [7] have taken the attitude that both the character of the holder as a holder in due course and the defenses available present a question of the general commercial law as interpreted by the forum. This view, however, does not prevail in most of the states.[8] The great majority of state courts have treated defenses as arising from the contract of the

[3] 221 App. Div. 595, 224 N. Y. Supp. 555 (1st Dept. 1927). In that case the plaintiff corporation sued the defendant, a Belgian banking corporation, to recover the proceeds of a check drawn to the order of the plaintiff and payable at the Treasury of the United States in Washington. The president of the plaintiff corporation indorsed the check first in his official capacity and subsequently in his own behalf, and deposited it with the defendant bank in Belgium, which credited it to his account. The transfer was without authority and on these facts under New York law the defendant took the check subject to the president's authority to indorse. Under the law of Belgium no such duty of inquiry was imposed upon the defendant. The court held that the law of Belgium, where the transfer to the defendant took place, governed.

[4] 61 L. R. A. 202 (1903) annotation.

[5] LORENZEN, CONFLICT OF LAWS RELATING TO BILLS AND NOTES (1919) 142:

"To say that the *lex loci contractus* is the proper law to determine the nature of the defences which a party may set up against a holder in due course and against a party who is not a holder in due course and yet to deny its competency to define what it understands by the term 'holder in due course' is inconsistent and irrational."

[6] As to what constitutes value: Oates v. National Bank, 100 U. S. 239 (1879); Railroad Co. v. National Bank, 102 U. S. 14 (1880). It has even been suggested in dicta that the Federal courts will in matters of general commercial law disregard state statutes. See Bank of Edgefield v. Farmer's Co-operative Mfg. Co., 52 Fed. 98 (C. C. A. 5th, 1892); Sturdivant v. Memphis Nat'l Bank, 60 Fed. 730, 734, (C. C. A. 5th, 1894).

[7] Fellows v. Harris, 20 Miss. 462 (1849); Franklin v. Twogood, 18 Iowa 515 (1865), 25 Iowa 520 (1868); Roads v. Webb. 91 Me. 406 (1898); Third National Bank v. National Bank of Commerce, 139 S. W. 665 (Tex. Civ. App. 1911); 2 AMES, CASES ON BILLS AND NOTES (1894) 806.

[8] See Sykes v. Bank, 78 Kan. 688, 690, 98 Pac. 206, 207 (1908).

primary party and so to be governed as to him, at least, by the law governing his contract contained in the bill or note. In applying this rule a few of the older cases, in language at least, have intimated that the contract of the primary party is to be governed by the law of the place where the contract was technically made.[9] But today it is supposed that the law of the place where the note or bill is to be paid governs.[10] The language of the courts in the great majority of these cases is to the same effect. It is seldom, however, that the cases unqualifiedly support this proposition on their facts, for rarely do the execution, payment, and indorsement of the instrument occur each in a different jurisdiction so as to make the law of the place where each occurred competing.[11] Yet it is possible to predict in a somewhat negative fashion what the courts will do in given fact situations. Thus the law of the place of indorsement, when it differs from that of both the place of execution and payment will not be held applicable.[12] Nor does the law of the place of

[9] Ory v. Winter, 4 Mart. [N. S.] 277 (La. 1826) (involving the applicability of the Mississippi Anti-Commercial statute; place of payment does not appear); Barrett v. Walker, 14 La. 303 (1840) (place of making and payment coincided); Harrison v. Edwards, 12 Vt. 648 (1840) (applying the *lex loci contractus* to the defenses of payment and set-off); Newton v. Gray, 10 La. Ann. 67 (1855) (set-off; neither the place of payment nor indorsement appear).

The bill or note is technically made at the place where delivered, or where first delivered for value, if accommodation paper. LORENZEN, CASES ON CONFLICT OF LAWS (2d ed. 1924) 391. Capacity to execute a bill or note is determined by the law governing capacity to contract in general, namely, the place where the contract was technically made. Union National Bank v. Chapman, 169 N. Y. 538, 62 N. E. 672 (1902).

[10] 2 WHARTON, CONFLICT OF LAWS (Parmelee 3d ed. 1905) 971, 981; TIEDEMAN, COMMERCIAL PAPER (1889) § 507; Dicey, *Conflict of Laws and Bills of Exchange* (1882) 16 AM. L. REV. 497, 506.

[11] In the following cases the place of making, payment and indorsement coincided: Bliss v. Houghton, 13 N. H. 126 (1842) (set-off); Price v. Gatliff's Ex'rs, 33 Ky. L. Rep. 324 (1908) (fraud). Since the forum was not the situs of these transactions these cases are, at least, authority for the proposition that the law of the forum is not applicable.

[12] In the following cases the place of making and payment coincided, though both differed from the place of indorsement, and the law of the place of "making and payment" was held applicable rather than the law of the place of indorsement. Wilson v. Lazier, 52 Va. 477 (1854) (failure of consideration); Evans v. Anderson, 78 Ill. 558 (1875) (failure of consideration); First National Bank v. Doeden, 113 N. W. 81 (S. D., 1907) (applicability of Minnesota statute exempting from responsibility anyone whose signature is obtained by a fraudulent representation as to the nature of the instrument); Jenks v. Doran, 5 Ont. App. Rep. 558 (1880) (attachment in insolvency). See STORY, CONFLICT OF LAWS (8th ed. 1883) §§ 317, 331, 332.

Compare also Kelly v. Smith, 1 Metc. 313 (Ky. 1858) (applicability of Kentucky anti-commercial statute so as to cut off defenses of failure of consideration, fraudulent representations, and redhibitory rights); Miller,

the execution of the instrument govern when the place of execution differs from the place of payment and indorsement.[13] But where it is possible to isolate the place of payment from both the place of execution and indorsement the courts almost uniformly hold the law of the place of payment to govern.[14] To the extent, then, that the place of payment may be thus singled out, and to the extent that the language of the courts may be used as authority, it is possible to say that the law of the place of payment is controlling.

There seems to be some doubt as to whether the above rule is also applicable to determine whether the holder is a holder in due course. It has been asserted that there is a substantial conflict,[15] one line of authority asserting the above rule and another the rule that the law of the place of transfer governs. Perhaps half of the cases cited [16] to sustain the latter rule might with equal justification be cited to sustain the place of payment rule.[17] The

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Mayhew & Co. v. Mayfield & Traylor, 37 Miss. 688 (1859) (defense of payment); Creston National Bank v. Salmon, 117 Mo. App. 506 (1906) (applicability of Iowa statute permitting holder to recover from a defrauded maker only the amount he expended). In these cases the law of the place of "making and payment" was held to control, the place of indorsement not appearing.

[13] Brabston v. Gibson, 50 U. S. 263 (1850), where the place of payment and indorsement coincided while the place of making was elsewhere. The language of the court was to the effect that the place of payment is controlling. It should be noted, however, that the same result would have been reached under the law of either state involved.

[14] In the following cases the execution and indorsement occurred in one state while the place of payment was in another. Shoe and Leather National Bank v. Wood, 142 Mass. 563 (1886) (partial failure of consideration; it does not clearly appear that the court regarded the place of payment as differing from the place of making); Midland Steel Co. v. Bank, 34 Ind. App. 107 (1904) (ultra vires and failure of consideration); Sykes v. Bank, *supra* note 8. Compare also the following cases where the place of making and payment differ, though the place of indorsement does not appear. Lienkauf Banking Co. v. Haney, 93 Miss. 613, 46 So. 626 (1908) (Mississippi anti-commercial statute); Houston v. Keith, 100 Miss. 83, 56 So. 336 (1911) (failure of consideration); Johnson County Savings Bank v. Yarbrough, 106 Miss. 79, 63 So. 275 (1913).

[15] 2 WHARTON, *op. cit. supra* note 10, at 971; 61 L. R. A. 202 (1903) annotation; 19 L. R. A. [N. S.] 671 (1909) annotation.

[16] 2 WHARTON, *op. cit. supra* note 10, at 971; 61 L. R. A. 202 (1903) annotation; 8 C. J. 104.

[17] Of the cases cited the following tend most strongly to support the rule of the place of transfer: Brook v. Vannest, 58 N. J. L. 162, 33 Atl. 382 (1895) (value); Palmer v. Minar, 8 Hun 342 (N. Y. 1876) (notice). In Russell v. Buck, 14 Vt. 147, 157 (1842), the place of indorsement did not appear. The extent to which it is authority for the proposition for which it is cited depends upon the statement of the court that, "This was a transaction in the state of New York [which is also the place of making and payment] and must be governed by their decisions." In Roe v. Jerome, 18 Conn. 138, 164 (1846), Waite, J., dissenting, said: "Had the negotia-

weight of authority seems to apply the same rule here as in the case of defenses.[18]

Of course, matters pertaining to the remedy will be governed by the law of the forum, in keeping with the general conflicts rule. But what may be included within the term "remedy?" On one extreme it has been held that the forum in applying the remedy must determine what is value[19] and whether a set-off is permissible,[20] while on the other the burden of proof and pre-

tion of the bill been made in this state, so as to be governed by our laws Platt would be entitled to recover." In King v. Doolittle, 38 Tenn. 77, 88 (1858), the court said: "But, as it appears that the notes in question were both made and indorsed in the city of Philadelphia, of course the determination of this question must be governed by the law of the place where the contract of indorsement was made." In Woodsen v. Owens, 12 So. 207 (Miss. 1892), it was said: "But the negotiations and contracts were had and made in the state of Tennessee, whose laws must control." In Holt v. McCann, 42 S. W. 310 (Tex. Civ. App. 1897), the force of the case as authority depends upon the statement that, "In transactions of this kind the rule is that the rights of the parties are to be determined by the law in force at the place where the contract is made," there being no indication as to whether the contract of maker or indorser was intended.

The law of the place of indorsement has been held to govern the validity of the transfer as against the primary parties. McClintick v. Cummins, 3 McLean 158, Fed. Cas. No. 8699 (U. S. C. C. 1843) (Pennsylvania statute making void the assignment of a note by an unincorporated banking association). So too as to ability to transfer. Dundas v. Bowler, 3 McLean 397, Fed. Cas. No. 4141 (U. S. C. C. 1844) (power of president and directors to transfer); Clanton v. Barnes, 50 Ala. 260 (1874) (capacity of married woman to transfer note).

[18] Roe v. Jerome, *supra* note 17; McCasky v. Sherman, 24 Conn. 605 (1856) (value); Bright v. Judson, 47 Barb. 29 (N. Y. 1866) (value); Harrison v. Pike Bros., 48 Miss. 46 (1873) (value; place of indorsement does not appear); Allen v. Bratton, 47 Miss. 119 (1872) (value, effect of taking instrument after maturity); Woodruff v. Hill, 116 Mass. 310 (1874) (value); Green v. Kennedy, 6 Mo. App. 577 (1879) (value); Webster v. Howe Machine Co., 54 Conn. 394, 8 Atl. 482 (1886) (value); Tyrell v. Cairo & St. L. R. Co., 7 Mo. App. 294 (1879) (value; place of execution and indorsement do not appear); First National Bank v. Dean, 16 N. Y. Supp. 107 (1891), *aff'd* 17 N. Y. Supp. 375 (Sup. Ct. 1892) (value given for warehouse receipt); Badger Mach. Co. v. U. S. Bank and Trust Co., 166 Wis. 188, 163 N. W. 188 (1917) (value); Pratt v. Dittmer, 197 Pac. 365 (Cal. App. 1921) (notice; place of indorsement does not appear).

No cases were found applying the law of the place of execution of the instrument to determine the character of the holder.

[19] Ives v. Farmers' Bank, 2 Allen 236 (Mass. 1861).

[20] Bank v. Hemingray, 31 Ohio St. 168 (1877); Armour v. McMichael, 36 N. J. L. 92 (1872) (where, after announcing the rule that the *lex fori* must govern the remedy, the court said: "No proof having been submitted that in New York a different rule prevails from that which applies here, it is not necessary to consider whether the question of allowing a set-off is to be considered as part of the remedy and therefore to be controlled by our own law."); Davis v. Morton, 68 Ky. 160 (1868); Stevens v. Gregg, 89 Ky. 461 (1890) (where the court seems to hold the *lex fori* applicable to contracts "made with reference to the common or general law," but

sumptions on the issue of who is holder in due course have been held to be substantive so as to be governed by the law of the place where the instrument was made and to be paid.[21] By the prevailing view, however, the question of what defenses are available is held to be substantive.[22] And it would seem the better rule to treat matters such as the type of evidence admissible and the presumptions to be indulged as remedial.[23]

Where the holder's title is to be determined with respect to persons other than those primarily responsible on the instrument, it becomes important to know the nature of the suit, *i.e.*, whether it is sought to charge the secondary party on his responsibility as such party,[24] or whether the issue is that of the holder's right to retain the instrument and enforce the obligation of the primary party.[25] If the former, the duty of the sec-

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holds the statutory law of the *loci solutionis* applicable when such place is nominated, and to this extent overrules Davis v. Morton, *supra*).

[21] Emanuel v. White, 34 Miss. 56 (1857) (presumption that holder is a bona fide holder for value); Webster v. Howe Mach. Co., *supra* note 18 (burden of proof); Houston v. Keith, 100 Miss. 83, 56 So. 336 (1911) (burden of proof).

[22] Yeatman v. Cullen, 5 Blackf. 240 (Ind. 1839) (fraud, failure of consideration); Roe v. Jerome, *supra* note 17; Limerick National Bank v. Howard, 71 N. H. 13, 51 Atl. 641 (1901) (notice); Creston National Bank v. Salmon, *supra* note 12.

[23] Harrison v. Pike Bros., *supra* note 18 (1893) (where the *lex fori* as to presumptions was applied); Robertson v. Burdekin, 3 Scots Rev. Rep. (2d series) 593 (1843) (kind of evidence admissible); Mackenzie v. Hall, 9 Scots Rev. Rep. (2d series) 73 (1854); 2 WHARTON, *op. cit. supra* note 10, at 972.

Today, uniformity is secured in this country by section 59 of the Uniform Negotiable Instruments Law. See also English Bills of Exchange Act (1882) § 30.

The forum also determines the plaintiff's right to sue in his own name. Warren v. Copelin, 4 Metcalf 594 (Mass. 1842); 61 L. R. A. 222 (1903) annotation. However, suit will be allowed in the name of a transferee of an executor appointed in a foreign jurisdiction if the transfer be valid when made. Andrews v. Carr, 26 Miss. 577 (1853); Owen v. Moody, 29 Miss. 79 (1855).

[24] The rights and duties of the secondary party are here considered with respect to a remote indorsee or one who is in a position to assert the rights of a bona fide holder for value against the secondary party.

[25] As against the primary parties no distinction seems to have been drawn because of the nature of the suit. Thus the law of the place where the instrument is payable governs as well where the maker affirmatively challenges the holder's right to the instrument, *e. g.*, where the maker sues for cancellation. Wilson v. Lazier, *supra* note 12; Newton v. Gray, *supra* note 9 (suit by maker to have set-off allowed); Emanuel v. White, *supra* note 21; Allen v. Bratton, *supra* note 18.

According to article 15 of the Uniform Law on Bills of Exchange and Promissory Notes adopted by the Convention of the Hague of 1912, the holder is permitted to retain the instrument as against one dispossessed in any way whatever, "unless he has acquired it in bad faith or in acquiring it has been guilty of gross negligence." According to article 16,

ondary party to pay is said to arise from his contract, evidenced by his endorsement, and so to be governed by the law governing his contract.[26] If the latter, according to the *Weissman* case[27] the situation is to be analogized to a transfer of personal property and, as a consequence, the holder's rights are to be determined in accord with the law of the situs,[28] which in the case of a negotiable instrument will be the place where the transfer occurred.

Perhaps some reason for treating a negotiable instrument as a contract or as a chattel, depending upon the nature of the suit, or the parties involved, may be found in a consideration of the

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"A party sued on a bill of exchange cannot set up against the holder any defense based upon his personal relations with the drawer or with prior holders unless the transfer took place pursuant to a fraudulent understanding." See LORENZEN, *op. cit. supra* note 5, at 269.

[26] Sullivan v. German National Bank, 18 Colo. App. 99 (1902) (where the legality of the contract of indorsement was held to be governed by the law of the place of indorsement); Colonial National Bank v. Duerr, 108 App. Div. 215, 95 N. Y. Supp. 810 (1st Dept. 1905) (material alteration—but *query* whether the contract of the accommodation indorser should not have been held to have taken effect as an Ohio contract where the instrument was first delivered for value rather than as a New York contract where the indorsement was actually made); Krieg v. Palmer National Bank, 51 Ind. App. 34, 95 N. E. 613 (1911) (defense of fraud); Wood v. Gibbs, 35 Miss. 559 (1858) (defenses of failure of consideration and incapacity in a suit against the drawer); TIEDEMAN, *op. cit. supra* note 10, at § 508. But see National Bank of Michigan v. Green, 33 Iowa 140, 146 (1871), where it was held that in determining the holder's rights in the absence of a governing statute at the place of indorsement, "the decisions of Illinois, construing the common law or law merchant applicable to a contract made then, do not conclude the courts of this state as to what the law is." *Contra* as to the drawer: Coffman v. Bank of Kentucky, 41 Miss. 212 (1866) (where the defenses of usury and payment in a suit by the holder against the drawer were held to be governed by the law of the place where the bill was payable). For the general rule as to the drawer see Hunt v. Standart, 15 Ind. 33 (1860) (that the contract of the drawer is to be governed by the law of the place where the bill is drawn).

Since the indorsement rarely stipulates a place for performance of the contract of indorsement, the latter will usually be governed by the law of the place where the indorsement was made. See Hunt v. Standart, *supra*.

[27] *Supra* note 3.

[28] Accord: Culver v. Benedict, 13 Gray 7 (Mass. 1859) (where owner of bearer bonds sued to obtain possession of them from the transferee of his agent who had acted in excess of his authority); Alcock v. Smith [1892] 1 Ch. 238; Keyes v. Wood, 21 Vt. 331 (1849) (where the court said: "If it be conceded, that such is the law of New York [where the transfer took place] and that it is binding upon these parties, it does not appear to us that the plaintiff will be aided thereby"); MINOR, CONFLICT OF LAWS, (1901) 392.

Cf. Wylie v. Speyer, 62 How. Pr. 107 (N. Y. 1881) (where the bonds were treated as chattels but the law of the plaintiff's domicil was held to govern). This case is disapproved by the Weissman case though the latter attempts to distinguish the two.

theoretical nature of a negotiable instrument and especially that phase of negotiability which cuts off defenses in the hands of a bona fide holder for value. Writers have disagreed as to the theory which will reconcile these features of negotiability with the common law. It has been asserted that the element of negotiability which permits the defenses of primary parties to be cut off in the hands of a good faith holder is due to the circumstance that the contract of a primary party runs directly to the bearer [29] or indorsee once he is ascertained.[30] It has also been stated that the result is derived from an analogy to property law.[31] Whichever rationalization is adopted, in a case involving purely domestic facts, the result is identical, *i. e.*, the bona fide purchaser will be protected. This is not necessarily so where a conflict of laws problem arises. In the latter situation if the "contract theory" be adopted the rule ordinarily applicable to debts will be applied: namely, that the assignment wherever made will not vary the obligation of the debtor.[32] If, on the other hand, the property analogy be adopted, the situs will gov-

[29] Story, J., in Bullard v. Bell, 1 Mason 243, 252 (C. C. Me. 1817): "The note is an original promise by the maker to pay any person who shall become the bearer; it is therefore payable to any and every person who successively holds the note bona fide, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer." See also 2 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) 371, 395.

[30] "It [the negotiable instrument] borrows from the law of contract the principle that the person primarily liable is personally bound by his contract to pay the indorsee or bearer producing the bills; and that, therefore, no defense which he might have had to claims by other persons, and no question of title to the bill, can be any answer to an indorsee or bearer producing the bill, who has acquired it in good faith and for value." 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (1922) 145. See also Robertson v. Burdekin, *supra* note 23, at 605.

[31] "Analogies for the familiar doctrine that a bona fide purchaser of commercial paper may not be subject to defenses to the promise sued upon must be sought outside the field of contract law. When the courts began to recognize that a bona fide purchaser might strip the obligation of defenses, there were well known situations in the realm of property law in which a bona fide purchaser did stand better than his transferor and it would not be surprising if these instances served as guiding analogies. The bill or note, particularly the former, was a substitute for money which was property, the bona fide purchaser of which was protected against certain infirmities in the title. To this extent the bill or note was looked upon, not as the evidence merely of certain promissory undertakings, but as a piece of property." Aigler, *Payees as Holders in Due Course* (1927) 36 YALE LAW JOURNAL 608, 620. See also 2 AMES, *op. cit. supra* note 7, at 866.

It has also been argued that the characteristic of a negotiable instrument which permits defenses to be cut off when in the hands of a bona fide purchaser for value is not a principle peculiar to negotiability or to the law merchant but is merely a phase of the ordinary law of estoppel. Ewart, *Negotiability and Estoppel* (1900) 16 L. Q. REV. 135.

[32] DICEY, CONFLICT OF LAWS (4th ed. 1927) 580.

ern the effect of the transfer even as against the primary parties. The courts have chosen to follow the former [33] at least as respects parties to the instrument.[34] In determining the rights of the holder who has been fraudulently deprived of the instrument,[35] however, the courts have proceeded rather to draw an analogy on the basis of the property principles said to be embodied in a negotiable instrument,[36] and have held the situs to control.[37]

If it be conceded that it is necessary to characterize a negotiable instrument as being essentially either a contract or a chattel in order to harmonize the anomalous consequences of negotiability with the common law, such characterization need not necessarily furnish the criterion by which to choose the applicable conflicts rule. Whether the instrument should be treated as a contract or as a chattel in a certain fact situation should, it seems, be determined for the purposes of conflicts of laws from considerations of convenience and expediency or, in short, policy.

It is submitted that the use of negotiable instruments as a device for payment in a foreign jurisdiction as well as the general policy in favor of a free circulation of such instruments would best be furthered by holding the transferee to that law of which he is most likely to be cognizant, namely, the law of the situs at the time of the transfer.[38] And this should be the rule whether

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[33] But in Brook v. Vannest, *supra* note 17, where the plaintiff was seeking to establish his character as a holder in due course as against the maker, the court said: "the validity of a contract depends upon the laws of the state where the contract is made. But a transfer of personal property which is valid by the law of the place where such transfer is made is sufficient to pass a valid title to it."

[34] See *supra* notes 10, 11, 12, 13 and 14. In Bliss v. Houghton, 16 N. H. 90, 92 (1844), the court said: "By the laws of the place where the contract was made, which, as has been said, form a part of the contract itself which resulted between the parties to this suit [indorsee and maker] from the indorsement under which the plaintiff claims, his right under that act extended no further than to enable him to recover of the defendant the sum which he owed the indorser at the moment of the transfer."

[35] It has been argued that the contract analogy should be extended even to this situation. See the argument of Haldane, Q. C., for the plaintiffs in Alcock v. Smith, *supra* note 28, at 251.

[36] "It [the negotiable instrument] borrows from the law of property the easy method of assignment by means of an indorsement and delivery, or a delivery merely of the instrument." HOLDSWORTH, *op. cit. supra* note 30, at 145.

[37] See cases *supra* note 28.

[38] The reason for the rule is accentuated in case of a suit against the indorser, for the place of indorsement may not appear on the instrument, and as against the indorser the indorsement is presumed only "prima facie to have been made at the place where the instrument is dated." N. I. L. § 46. While as against the maker there is a conclusive presumption in favor of a holder in due course to the effect that the instrument was executed at the place indicated by its date. LORENZEN, *op. cit., supra* note 9, at 391.

the holder seeks to establish the responsibility of a party to the instrument [39] or is defending an action for conversion brought by a prior defrauded holder or other person.

The effect of the transfer of a negotiable instrument is considered in the Restatement on Conflict of Laws. According to section 282:

"When a right is by the law which created it embodied in a document, the validity and effect of a conveyance of the right depend upon the validity and effect of the conveyance of the document, and are governed by the law of the state in which the document is situated at the time of the conveyance."

If it be intended in section 282 to treat the negotiable instrument as a chattel to such an extent as to make the effect of a conveyance of the "right" as against all parties depend upon the situs, then the rule suggested above will be achieved. The difficulty with the restatement is that it fails to describe the parties with respect to whom the law of the situs is controlling.[40] But if it be conceded that the effect of section 282 is to apply the law of the situs as against all persons, it does not seem useful to conceive of the "right" as being "created" *in vacuo* and at a particular place, since the quantum of the right would vary with the situs.

It has also been suggested that

"each party ought to be held if the holder of the instrument has acquired title in accordance with the municipal law of the state where such party's contract was made, but that title acquired in conformity with the law of the place of transfer shall be recognized with respect to all parties." [41]

While such a rule would tend to promote the free circulation of negotiable instruments by giving to the transferee additional protection, it may, perhaps, be doubted whether the courts would as yet be willing to go so far at the expense of the parties to the instrument.

An extension of the rule in the *Weissman* case so as to make the law of the situs controlling as to all persons, as has been

[39] *Supra* note 33.

[40] The same objection might be made to section 379 of the Restatement on the Conflict of Laws covering Contracts. According to that section the validity of the transfer of a mercantile instrument is governed by the situs. It is to be noted that this section differs from section 282 in that the word "effect" is omitted. However, it may be that the effect of the transfer is considered in this section and is more definitely described than in section 282 by the Comment (a) under section 379 to the effect that "In the case of a negotiable instrument it [the transfer] may also cut off equities." But even the latter section leaves it uncertain as to whom the equities are cut off.

[41] LORENZEN, *op. cit. supra* note 5, at 140, 142.

suggested, would have an immediate effect on foreign banking transactions. Under the rule [42] now obtaining in this country American banks are privileged to refuse payment on negotiable obligations of American makers or acceptors presented by foreign banks when title which is defective according to the N. I. L. has been acquired by the latter. And where title has been acquired in accordance with the law of the situs, since by virtue of this fact there is no recourse against the transferor, foreign banks are compelled to take the risk of having acquired title in accordance with our law. Such an undue hazard in doing business with this country may well be resented by foreign banks. It is submitted that an adoption of the rule suggested [43] would achieve a desirable result by eliminating this possible source of friction from our foreign commercial relations.

STATUTORY EXTENSION OF JUDICIAL NOTICE OF FOREIGN LAW

The legislature of Massachusetts enacted in 1926 that,

"The courts shall take judicial notice of the law of the United States or of a state, territory or dependency thereof or of a foreign country whenever the same shall be material." [1]

In the case of *Holmes v. Dunning* [2] the Massachusetts court took judicial notice of judicial decisions in Ohio and the District of Columbia, the same being pertinent to the question before the court.

In 1918 the legislature of Virginia provided by statute that,

"whenever in any case it becomes necessary to ascertain what the law, statutory or otherwise, of another state or country, or of the United States is or was at any time, the court, judge or other judicial officer or tribunal shall take notice of and may consult any book of recognized authority purporting to contain, state or explain the same, and may consider any testimony, information or argument that is offered on the subject." [3]

Two years after this statute had been enacted the highest court of Virginia stated, in a case involving the law of a sister state,

[42] See N. I. L. §§ 23, 88.

[43] According to the rule in England the situs determines the validity of the indorsement. Embiricos v. Anglo-Austrian Bank [1905] 1 K. B. Div. 677. But where an inland bill is indorsed in a foreign country English law governs the interpretation of the indorsement. Lebel v. Tucker, L. R. 3 Q. B. 77 (1867). These cases are codified in the English Bills of Exchange Act § 72.

[1] Mass. Acts 1926, c. 168. The enactment of this statute was doubtless the result of the recommendation of the Judicial Council of Massachusetts. FIRST REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS (1925) 36.

[2] 57 N. E. 358 (1926).

[3] Va. Acts 1918, 318; Va. Gen. Laws (1923) § 6194a. This section was

that the proof of such law was to be made to the jury, but that the interpretation of the same was for the court.[4] No hint is to be found in the opinion of the court that a judicial notice statute, the passage of which was doubtless designed to change the very rule applied by the court in this particular case, existed in the state. Thus, by halting steps the rules with respect to the proof of the law of a sister state are changing in an increasing number of states by virtue of legislative command or encouragement.

The rule is well settled that in the absence of statute the courts of one state will not judicially notice the laws of another state.[5] The conventional phraseology of the rule was that the laws of a sister state were facts which must be proved in the same manner as any other facts. Some courts, in an attempt to adhere to the inaccurate statement that the court passes upon the law and the jury upon the facts, allowed the proof of foreign or sister-state law to be made to the jury and a number even went so far as to allow the interpretation of the law to be made by the jury.[6] Many courts, however, balked at letting the jury interpret the law of another state, and the result was that in a number of states the proof of the existence of the law was made to the jury but the interpretation of the same was made by the court.[7]

The inconvenience of proving foreign law in accordance with the rules of the common law or statute led the courts of some states to make an exception to the general rules set out in the preceding paragraph in cases involving suits on sister-state judgments. In this class of cases the question often arises as to the effect which the judgment has in the state of its rendition,[8] and to simplify the procedure whereby the rules governing

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quite obviously based on the West Virginia statute reprinted in the appendix.

[4] Fourth Nat. Bank of Montgomery v. Bragg, 127 Va. 47, 63, 102 S. E. 649, 654 (1920).

[5] 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2573; 67 L. R. A. 34 (1905) annotation.

[6] 5 WIGMORE, *op. cit. supra* note 5, 2558; Thayer, *Law and Fact in Jury Trials* (1890) 4 HARV. L. REV. 147; 11 Am. Dec. 780 (1886) annotation; 34 A. L. R. 1445 (1925) annotation. The Massachusetts rule seems to have been, prior to the enactment of the statute referred to *supra* note 1, that if the statute and decisions under it were clear the interpretation of the same was for the court, but if there were numerous and conflicting decisions the task was one for the jury. Wylie v. Cotter, 170 Mass. 356, 49 N. E. 746 (1898); Hancock Nat. Bank v. Ellis, 172 Mass. 39, 51 N. E. 207 (1898). To plead sister-state laws in a demurrer renders the latter bad as a speaking demurrer. Bennett v. Lohman, 292 Mo. 477, 238 S. W. 792 (1921).

[7] 5 WIGMORE, *loc. cit. supra* note 6.

[8] U. S. Rev. Stat. (1874) § 905, U. S. Comp. Stat. (1916) § 1519, provides that a judgment shall have the effect in the state to which it is taken that it has by "law or usage" in the state in which it is rendered.

the effect of the judgment in the state of its origin the courts of a number, though not all, of the states adopted the practice of taking judicial notice of the laws of a sister-state in judgment cases.[9] The state courts have always noticed the federal laws[10] and the laws in force in states out of whose territory they were carved at the time of the separation,[11] but they seemed hesistant to extend the doctrine of judicial notice to the laws of sister states in general. The feeling of separateness and independence on the part of the people in the states during the first decades of our national history doubtless contributed much to this hesitancy. Another factor of some importance in causing the state courts to refuse to take judicial notice of sister-state laws was the scarcity of statute books and printed reports of judicial decisions. Modern lawyers would have difficulty in appreciating the seriousness of this problem to both city and country lawyers in the period before the Civil War.

Thirteen states now have statutes relating to the judicial notice of the laws of foreign or sister states.[12] These statutes vary in many respects and a brief summary of their provisions may be of interest.

1. *What may be judicially noticed?*

Arkansas—laws.

Connecticut—public statutes and judicial decisions.

Georgia—public laws.

Illinois (The Municipal Court of Chicago)—laws of a public nature.

Massachusetts—law.

Michigan—constitution, laws and resolutions as well as the unwritten or common law.

Mississippi—law.

New Jersey[13]—reports of judicial decisions.

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[9] Field, *Judicial Notice of Public Acts Under the Full Faith and Credit Clause* (1928) 12 MINN. L. REV. 439. *Cf.* subsection 64 of the North Dakota statute in the appendix.

[10] 1 JONES, EVIDENCE (Henderson ed. 1926) § 404.

[11] 5 WIGMORE, *loc. cit. supra* note 5, § 2573e. State laws incorporated into or adopted by laws of Congress are noticed by the state courts. Flanigan v. The Washington Ins. Co., 7 Pa. St. 306 (1874).

[12] These are reprinted in the appendix.

[13] New Jersey has provided as to "statute-books and pamphlet session laws of other states" that they shall be evidence in the courts of the state, "and the court may determine whether any book or pamphlet offered as such" was printed and published under the authority of the state of which they purport to be the laws, within the requirements of the New Jersey statute that books so published shall be evidence of such laws. While this statute does not use the phrases "judicial notice" or "judicial cognizance," it would seem to accomplish substantially the same result as that attained by judicial notice statutes, in so far as the proof of such laws is, under the New Jersey statute, to be made to the court. It would perhaps not

North Dakota—laws.
Tennessee—statutes.
Virginia—law, statutory or otherwise.
West Virginia—law, statutory or otherwise.
Wisconsin—public laws.

Some of the states providing that judicial notice may be taken of the *law* or *laws* of a sister state have construed these terms to include judicial decisions.[14]

2. *To the law of what jurisdictions does judicial notice extend?*
Arkansas—other states.
Connecticut—(a) statutes of the states and territories of the United States.
(b) reports of judicial decisions of other states and countries.
Georgia—United States and states thereof.
Illinois—state or territory of the United States.
Massachusetts—United States, state, territory, dependency, or foreign country.
Michigan—state, territory, or foreign country.
Mississippi—United States, state, territory, District of Columbia, or foreign country.
New Jersey—judicial decisions of other states and countries.
North Dakota—sister state.
Tennessee—sister state.
Virginia—United States, state, or country.
West Virginia—United States, state, or country.
Wisconsin—any state or territory of the United States.

3. *Is judicial notice discretionary or compulsory upon the judges?* Arkansas, Connecticut, Georgia, Massachusetts, Mississippi, Virginia, West Virginia and Wisconsin provide that the courts *shall* judicially *notice* or *recognize* the laws of other states or countries, as the case may be. Words of authorization such as *will* or *may* are used in Tennessee, Michigan, North Dakota, and Illinois with reference to laws, statutes, etc., and in

permit the court, as the true judicial notice statute would, to notice sister-state laws on its own initiative.

[14] Holmes v. Dunning, *supra* note 2; Wells v. Gress, 118 Ga. 466, 45 S. E. 418 (1903); Missouri Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S. E. 96 (1907); Watkins Medical Co. v. Johnson, 129 Ark. 384, 196 S. W. 465 (1917).

Municipal ordinances of other states would perhaps not be included in any of the statutes thus far enacted. In the absence of statute most state courts refuse to take judicial notice of the municipal ordinance of their own state and it would therefore not be likely that under statutes authorizing judicial notice of laws, statutes, judicial decisions, etc., the courts would judicially notice the municipal ordinances of other states. 5 WIGMORE, *op. cit. supra* note 5, § 2572; 4 L. R. A. 41 (1889) annotation.

Connecticut and New Jersey with reference to judicial decisions. It seems, however, that the courts are under no obligation to take judicial notice of the laws of another state unless one of the parties requests it, although the court would seem to be at liberty to notice foreign or sister-state laws on its own initiative in the absence of such a request. Most of the courts that have passed on the question have held that judicial notice does not dispense with the necessity of pleading a statute on which reliance is had in the case, and there is some intimation that this is necessary to avoid the presumption of similarity which is indulged by many courts.[15] North Dakota, Virginia and West Virginia include provisions as to sources of information for the courts, and state that they *may* consult the particular sources named, although other sources are perhaps not excluded. The effect of judicial notice would seem to be to dispense with proof of the laws in the sense of giving evidence that would show that the laws were really the laws of the particular state. Whatever evidence is offered is not strictly evidence, but rather by way of information for the court. For that reason the usual rules of evidence would not apply, and when the court took notice of sister-state law such notice would not be rebuttable.[16]

4. *What courts within the state are to take judicial notice of the laws of foreign or sister states?* In Arkansas, Connecticut, Massachusetts, Michigan, New Jersey, North Dakota and Wisconsin the provision applies to "the courts" of the state. Illinois has thus far authorized only the Municipal Court of Chicago to apply the doctrine. Mississippi, Virginia and West Virginia use terms such as "the court," "judge," or "magistrate" and from the context in which they are used it seems clear that they are applicable to all the courts of the state. Tennessee has a peculiar statute in that it authorizes the superior court on appeal to notice the laws of other states if the same have been introduced in evidence in the lower court, but not otherwise, although it is not necessary for the statutes noticed by the superior court under these circumstances to be set out in the record.[17]

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[15] Savannah, Florida and Western Ry. v. Evans, 121 Ga. 391, 49 S. E. 308 (1904); State v. Rose, 41 N. D. 251, 177 N. W. 879 (1919); *cf.* Warneke v. Preissner, 103 Conn. 503, 138 Atl. 809 (1925).

[16] Professor Wigmore takes the view that judicial notice is generally rebuttable. 5 WIGMORE, *op. cit. supra* note 5, § 2567, n. 5. *Contra:* 5 ENC. of EVID. (1904) 821, 833. If not rebuttable, the rule as to judicial notice of the laws of another state becomes one of substantive law, rather than a rule of evidence. Compare the Mississippi statute reprinted in the appendix.

[17] This creates a situation within the state of Tennessee with respect to judicial notice of sister-state statutes which is similar to that existing in the event that a case comes to the Supreme Court of the United States on writ of error from a state court. In Hanley v. Donaghue, 116 U. S. 1, 6

In conclusion it may be proper to call attention to the brevity and inclusiveness of the Massachusetts statute. It should serve as a model for legislative draftsmen in the many states in which statutes dealing with judicial notice of foreign or sister-state laws are likely to be discussed and enacted in the near future.

O. P. F.

APPENDIX

Arkansas Ark. Dig. Stat. (Crawford, 1921) § 4110: "The courts of this state shall take judicial knowledge of the laws of other States."

Connecticut Conn. Gen. Stat. (1918) § 5726: "The public statutes of the several states and territories in the United States, as printed by authority of the state or territory enacting the same, and the private or special acts of this state, shall be legal evidence, and the courts shall take judicial notice of them."
Section 5727: "The reports of the judicial decisions of other states and countries may be judicially noticed by the courts of this state as evidence of the common law of such states or countries, and of the judicial construction of the statutes or other laws thereof."

Georgia Ga. Code (1926) § 5818: "The public laws of the United States, and of the several states thereof, as published by authority, shall be judicially recognized without proof."

Illinois Ill. Rev. Stat. (Cahill, 1927) c. 37, § 447–2. The Municipal Court of Chicago is authorized to take judicial notice of "laws of a public nature enacted by any state or territory of the United States."

Massachusetts Mass. Acts 1926, c. 168: "The courts shall take judicial notice of the law of the United States or of a state, territory or dependency thereof or of a foreign country whenever the same shall be material."

Michigan Mich. Comp. Laws (1915) § 12,513: "Printed copies of the constitution, laws and resolutions of any other of the United States, or of any territory thereof or of any foreign state, if purporting to be published under the authority of the respective governments, or if commonly admitted and used as evidence in their courts shall be admitted in all courts, and in all proceedings within the state, as prima facie evidence thereof; and the courts of this state may take judicial notice thereof without their formal introduction as evidence."
Section 12,515: "The unwritten or common law of any other of the United States, or of any territory thereof, or of any foreign state or country, may be proved as facts by parol evidence, and the books of

Sup. Ct. 242 (1885), the Supreme Court refused to notice judicially the laws of state *X* in a case coming on writ of error from state *Y* unless state *Y* would judicially notice the laws of state *X*. For a criticism of this decision, see Field, *op. cit. supra* note 9.

reports of cases adjudged in their courts may also be admitted as evidence of such laws; and the courts may take judicial notice of the same as in the case of statutes."

Mississippi Miss. Ann. Code (Hemingway, 1927) § 771: "When any question shall arise as to the law of the United States or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state."

New Jersey N. J. Comp. Stat. (1910) 2229, par. 26: "The reports of the judicial decisions of other states and countries may be judicially noticed by the courts of this state, as evidence of the common law of such states or countries and the judicial construction of the statutes, or laws thereof, and the usual printed books of such reports shall be plenary evidence of such decisions."

North Dakota N. D. Comp. Laws Ann. (1913) § 7937: "No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence, but the judge upon being called upon to take judicial notice thereof may, if he is unacquainted with such fact, refer to any person, document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling on him to take such notice produce any such document or book of reference."

Section 7938: "The courts will take judicial notice:

Subs. 63. "Of the laws of a sister state, when the printed or authenticated volumes are presented to the court for examination."

Subs. 64. "For the purpose of giving credit to judicial proceedings in another state, courts take notice ex officio of the local laws of the state from which they come, and when the judgment of the court in a sister state is impleaded, cognizance of the law of such a state is taken."

Tennessee Tenn. Ann. Code (Thompson's Shannon) § 5586: "And it shall not be necessary, in a case carried from an inferior to a superior court, to have the statutes of a sister state read as evidence in the inferior court, transcribed into the record, except where it is directed to be done by the inferior court; but the superior court may take judicial notice of such laws and statutes, and decide upon them accordingly."

Virginia Va. Gen. Laws (1923) § 6194a: "Whenever in any case it becomes necessary to ascertain what the law, statutory or otherwise, of another state or country, or of the United States is or was at any time, the court, judge or other judicial officer or tribunal shall take notice of and may consult any book of recognized authority purporting to contain, state or explain the

same, and may consider any testimony, information or argument that is offered on the subject."

West Virginia W. Va. Code Ann. (Warth, 1899) c. 13, § 4: "Whenever in any case it becomes material to ascertain what the law, statutory or other, of another state or country, or of the United States is, or was at any time, the court, judge, or magistrate shall take judicial notice thereof, and may consult any printed book, purporting to contain, state or explain the same and consider any testimony, information or argument that is offered on the subject."

Wisconsin Wis. Stat. (1921) § 4135m: "The courts of this state shall take judicial notice of the public laws of any state or territory of the United States."