

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 School of Law.

SUBSCRIPTION PRICE, \$4.50 A YEAR

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CONSTITUTIONALITY OF THE DECLARATORY JUDGMENT

The familiar maxim "hard cases make bad law," or rather, its colloquial corruption, "poor cases make bad law," has recently been strikingly exemplified in a decision of the supreme court of Michigan, holding unconstitutional the statute of that state providing that

"no action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree, or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not. . . ." *Anway v. Grand Rapids Ry.* (Sept. 30, 1920, Mich.) 179 N. W. 350.

A statute of Michigan¹ forbade street railway companies to "require" motormen and conductors to work more than six days per week, except in certain emergencies. The plaintiff was a non-union conductor employed by the company and wished to work more than six days a

¹ Acts of 1919, Public No. 361.

week. He therefore brought an action against the company as defendant for a declaration that he was privileged to work more than six days if both he and the company were willing. A labor union of street railway employees intervened and contended that the statute should be construed to prevent the plaintiff from working more than six days a week. From a decision in favor of the plaintiff the intervening union appealed to the supreme court. That court invited the attorney general, Professor Sunderland, and others to file briefs on the constitutionality of the declaratory judgment statute. The majority of the court, by Fellows, J., held that the statute imposed on the court "non-judicial" functions. The minority, by Sharpe, J., held otherwise, but concluded that the declaration should not have been granted in the instant case.

At the outset, and in deference to the court, it ought to be said that the act was tested in an inappropriate case. There was no issue between the plaintiff and the defendant. The issue lay between these parties on the one hand, and the state or the attorney general on the other, for the plaintiff claims that he and the defendant are privileged to enter into a contract for a seven-day working week and the party in interest opposed to this contention is not the defendant railway, but the state, which by its statute impliedly threatens prosecution of the parties to such a contract. A judgment in favor of the plaintiff and against the defendant would obviously have no binding force upon the state or its prosecuting officer in a suit for prosecution. When, therefore, the court says that the plaintiff has no contract with the defendant, claims no breach of any contract, does not allege that the defendant has committed or threatened to commit any wrong upon him, or that he has any claim, present or prospective, for any damages from the defendant, it states grounds why a declaratory judgment might be refused in this case; but no ground supporting the unconstitutionality of the declaratory judgment in all cases.

It therefore becomes necessary to examine the grounds upon which the court reached its conclusion that the power given it to render declaratory judgments was non-judicial. The first ground is that the traditional constitutional separation of powers of government confines the functions of the court to those judicial in character, and that the duty of giving advisory opinions is not judicial.

Relying on the unfortunate form in which the plaintiff framed his prayer for a declaration "as to whether the said defendant [railway company] may lawfully permit plaintiff and its other employees who so desire to work more than six days in any one week," and upon the title of an article, "The Courts as Authorized Legal Advisers of the People," the court says, "it at once becomes apparent that by the act the courts of this state are made the legal advisers of all seeking such advice," and concludes that this duty is "non-judicial." In a burst of indignation it adds that the belief "that it is the duty of the state through its courts to

furnish advice to its citizens" adopts the view that "the state is everything, the individual nothing. Under our government the state does not till our farms, manufacture our automobiles, conduct our great department stores, or do our law business for us. The unfortunate people of one country are at present trying such experiment in government."

It is regrettable that the declaratory judgment, used so effectively in England, Scotland, and the British dominions and in continental Europe to prevent and allay disturbances of the legal equilibrium, should have produced such judicial irritation in an American court. It will be a matter of surprise to the judges of the British Empire, who are as familiar with the limitations upon "judicial power" as the courts of the United States,² that any court should have questioned that the rendering of declaratory judgments was anything but the exercise of judicial power. Indeed, the only explanation for the conclusion reached by the Michigan court in the instant case is that the majority completely ignored the distinction between the advisory opinion and the declaratory judgment, which in principle are utterly different, and permitted the resulting confusion to mislead them. This is the more inexcusable, in that at least Professor Sunderland's brief makes the distinction unmistakably clear, and in that the minority opinion, which may be quoted, points out the majority's confusion of ideas. Judge Sharpe says:

"Herein lies the distinction between declaratory judgments and moot cases or advisory opinions. The declaratory judgment is a final one, forever binding on the parties on the issues presented; the decision of a moot case is mere dictum, as no rights are affected thereby; while an advisory opinion is but an expression of the law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between interested persons."

The apparent failure of the majority to understand that a declaratory judgment is as final and binding upon the parties and as conclusive upon their legal relations as any other judgment and differs from the ordinary judgment only in dispensing with a coercive decree, e. g. for damages or an injunction, accounts for the quotation of pages of alleged precedents and dicta denying the power of American courts to render advisory opinions or decide moot cases, which, I submit, have "nothing to do with the case," and for the expression of opinion by the majority, properly contradicted by the minority, that a judgment of a court was not "judicial," unless accompanied by a decree enforceable by process. Even were this latter conclusion correct³—and it clearly

² See, for example, *Queen v. Local Government Board* [1902] 2 Ir. 349, 373; *Huddart v. Moorehead* (1908, Australia) 8 Com. L. R. 330, 335, 383.

³ The few dicta which intimate that power to make an enforceable decree is essential to the exercise of "judicial power," occur in cases where the court

is not—section 3 of the act under examination enables the successful party by petition to obtain any further relief required to carry into compulsory execution the court's determination of the legal relations of the parties. The declaratory judgment, therefore, while carrying with it no coercive decree, is as enforceable, through petition for ancillary relief, as any other final judgment.

The decisions of the United States Supreme Court upon which the court relies to prove the "non-judicial" nature of the declaratory judgment are irrelevant to that point, for they merely establish that the advisory opinion, the moot case, and the judgment not final or binding are deemed "non-judicial" in character. They do establish, however, that the judicial power is properly exercised when the court can hear and finally determine a controversy according to law.⁴ Where the court was able by its decision to adjudge finally, with binding effect, the legal relations of the parties before it, no case has been found where the court has deemed the award of execution or mandatory process essential. Final and effective adjudication, not execution, is the essence of judicial power. The Supreme Court, therefore, has declined to decide cases where its judgment was not binding on the parties, but was merely advisory, being subject to revision by Congress or the Executive. This is the explanation of the Hayburn,⁵ Ferreira,⁶ and Gordon⁷ cases; to cite them as precedents against the final and binding declaratory judgment indicates a failure to make the most obvious and elementary distinctions. So, likewise, in the Muskrat⁸ case, which the majority deemed to "put at rest forever this question," contending parties were not before the court, Congress merely having conferred power on named individuals to carry a question to the Supreme Court to determine the constitutionality of certain Acts of Congress. The parties really affected by the decision had no opportunity as of right to present their claims to the Court, and, as the Court said, "Such judg-

found that the judgment or opinion it was empowered to render was not final or binding on the parties, and where for that reason the power was deemed improperly conferred.

⁴See (1907) 7 COL. L. REV. 601, 602. "To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the law, is the peculiar province of the judicial department." Cooley, *Constitutional Limitations* (7th ed. 1903) 132. The court's quotation from *Devine v. Brunswick-Balke Co.* (1915) 270 Ill. 504, 110 N. E. 780, to the effect that judicial power involves the power "to adjudicate and determine the rights of the parties to the controversy and to render a judgment or decree which will be effectual and binding upon them in respect to their personal or property rights in controversy in such proceedings," is unfavorable to the court in the instant case.

⁵(1792, U. S.) 2 Dall. 409.

⁶(1851, U. S.) 13 How. 40.

⁷(1885) 117 U. S. 697; so also *In re Sanborn* (1893) 148 U. S. 222, 13 Sup. Ct. 577. In the *Sanborn* case it was made abundantly clear that the power to enforce a judgment by process was not indispensable to its judicial character. It was deemed enough, in an appropriate case, that a judgment be made "the final and indisputable basis of action either by the department or by Congress" (p. 226).

ment will not conclude private parties, when actual litigation brings to the Court the question of the constitutionality of such legislation." The facts that the real parties in interest were not before the Court, that there was no actual or potential controversy between the parties appearing, that the judgment was not binding and final, alone suffice to mark the obvious distinction between the Muskrat case and one involving the declaratory judgment.

So, likewise, to draw an analogy from "moot cases," which decide nothing and are without effect even on the parties before the court, is a fundamental error of the majority. They quote, as if it were an authority in their favor, from *Lorimer v. Wayne Circuit Judge*,⁹ where the court said,

"The act under which the proceedings were instituted does not purport to make the proceedings of the probate court conclusive upon anybody. They are not binding even upon the relator."

The court does not seem to realize that this is entirely irrelevant to the declaratory judgment, which *is* binding on the parties and *is* a final determination of their legal relations. That fact also makes the case of *Lloyd v. Wayne Circuit Judge*,¹⁰ where a proceeding to probate the will of a living person was held not to result in a binding or final judgment, altogether irrelevant. So, the Evans case,¹¹ where the court said,

"when the judgment appealed from cannot be affected by the decision of the appellate court the case becomes a moot one and the appeal should be dismissed,"

has no bearing on the declaratory judgment.

Equally irrelevant are the numerous dicta and judicial statements to the effect that the court will not decide abstract questions upon which no rights depend,¹² or where there is no matter in dispute between adverse parties,¹³ or where the state of facts is merely assumed and not real.¹⁴ Nor is it a precedent to cite cases, very few in number,

⁹ (1898) 116 Mich. 682, 75 N. W. 133.

¹⁰ (1885) 56 Mich. 236, 23 N. W. 28.

¹¹ (1908) 213 U. S. 297, 29 Sup. Ct. 678. The same criticism applies to the quotation from *California v. San Pablo Ry.* (1893) 149 U. S. 308, 13 Sup. Ct. 876, and *Ex parte Steele* (1908, N. D. Ala.) 162 Fed. 694.

¹² *Hanrahan v. Terminal Station Commission* (1912) 206 N. Y. 494, 100 N. E. 414; *Hamer v. Commonwealth* (1907) 107 Va. 636, 59 S. E. 400; *Snell v. Welch* (1903) 28 Mont. 482, 72 Pac. 988; *State v. Boughman* (1883) 38 Oh. St. 455; *Richardson v. McChesney* (1910) 218 U. S. 487, 31 Sup. Ct. 43; *Williams v. Hagood* (1879) 98 U. S. 72.

¹³ *Sennette et al. v. Police Jury* (1911) 129 La. 728, 56 So. 653; *Lonergan v. Goodman* (1910) 241 Ill. 200, 89 N. E. 349; *Ward v. Alsup* (1898) 100 Tenn. 620, 46 S. W. 573.

¹⁴ *Wahl v. Brewer* (1894) 80 Md. 237, 30 Atl. 654; *Smith v. Cudworth* (1883, Mass.) 24 Pick. 196; *Judson v. Flushing Jockey Club* (1895, C. P.) 14 Misc. 350, 36 N. Y. Supp. 126.

where the courts have declined to enter declaratory decrees in the absence of statutory power to do so.¹⁵

The majority, on the other hand, dismisses from consideration the many types of cases in which courts now render declaratory judgments carrying no mandatory process. Judgments removing clouds from title and quieting title are cast aside as "not persuasive"; judgments determining title to property real and personal, declaring marriages void, determining heirs without an order of distribution, construing wills and other written instruments, confirming the validity of municipal bond issues,¹⁶ the binding judgments of the Court of Claims as to amounts due—to mention but a few—all of which carry no mandatory process for execution, were cited to the court and dismissed as not "convincing to our minds." The English practice in rendering declaratory judgments, which has proved by long experience so valuable to private parties, is dismissed as a precedent by the assertion that England has no written constitution and that the courts are bound by Acts of Parliament. But when it is recalled that England has for at least two centuries been familiar with the doctrine of separation of powers and that the existing provision for declaratory judgments was adopted by the courts themselves under their rule-making authority and not imposed on them by Act of Parliament, the validity of the Michigan court's argument is weakened. No English court, nor probably any other but this court, could possibly conceive that a declaratory judgment was not the exercise of "judicial power." The fact that Canada, Australia, New Jersey, and Connecticut render declaratory judgments under written constitutions providing for separation of powers, is not taken into consideration, except that the court says of the later New Jersey cases, which of course did not question the constitutionality of the declaratory judgment, that they have not "treated the constitutional question or determined that the act was valid."

It is unnecessary to cite those many functions performed by courts under legislative authority and more or less remote from the province of adjudging the legal relations of parties before it,¹⁷ to conclude that the declaratory judgment settling "for all time the rights of the parties in the matter presented"¹⁸ is strictly within the "judicial power," and that the majority, by failing to understand the character and effect of a declaratory judgment, have misread and misconstrued the decisions and

¹⁵ *Hanson v. Griswold* (1915) 221 Mass. 228, 108 N. E. 1035; *Greeley v. Nashua* (1886) 62 N. H. 166.

¹⁶ This conclusion is not affected by the dictum of Brewer, J., in *Trega v. Modesto Irrigation District* (1896) 164 U. S. 179, 17 Sup. Ct. 52, relied upon by the court.

¹⁷ See the article by W. W. Thornton in (1908) 66 Cent. L. J. 24; *Meis v. Maddox* (1907) 121 App. Div. 147, 105 N. Y. Supp. 702, and notes in (1907) 21 HARV. L. REV. 138 and (1907) 7 COL. L. REV. 601.

¹⁸ This was the test applied by Sharpe, J., in his dissenting opinion.

opinions from which they quote in support of their conclusion that the declaratory judgment is unconstitutional. The unfortunate effect of the decision is evident by the fact that in the very next case submitted to the Michigan court, involving contested claims of parties under a written lease and hence most appropriate for a declaratory judgment, the declaration sought was denied on the ground that the act authorizing such judgments had been held unconstitutional. It is to be hoped that in the light of further consideration of the subject the court will be persuaded to open the question to argument in another case; if it does, it is hardly to be doubted that a different conclusion will be reached.

E. M. B.

ILLEGITIMATE CHILDREN AS BENEFICIARIES UNDER WRONGFUL DEATH ACTS.

The recent case of *Washington, B. & A. Ry. v. State* (1920, Md.) 111 Atl. 164, again raises the question as to the exact relationship between an illegitimate child and its mother, a wrongful death Act being involved on this occasion. By the Maryland statute,¹ which is almost the same as Lord Campbell's Act, an action may be maintained by the state for the "benefit of the wife, husband, parent, and child of the person whose death shall have been caused," the jury to give such damages as they may think proportionate to the injury resulting from such death, to the parties for whose benefit such action is brought. In this case, an action was brought for the death of a woman, one of the beneficiaries being her illegitimate child. It being necessary to decide, in order to ascertain the relevancy of certain evidence, whether an illegitimate child could recover under the Maryland statute, the court held that an illegitimate child could not recover, as the word "child," when used in a statute, prima facie means legitimate child.²

The rule adopted by the courts, in construing the word "child" in a statute to mean legitimate child, seems to have no legal or logical basis. At common law, the rule that a bastard was *nullius filius* applied to cases of inheritance,³ but the ties of nature were binding for many other purposes.⁴ When the word "child" is used in an inheritance statute giving certain rights to children, there is reasonable ground for holding that the statute does not confer any rights on an illegitimate child, as under the common law an illegitimate child has no inheritable blood. But when the word "child" is used in a statute which in no way relates to inheritance, this reasoning is not applicable.

¹ Ann. Code Laws of Md. (1911) art. 67.

² 5 Am. & Eng. Encyc. (2d ed. 1900) 1095; 7 C. J. 959.

³ 2 Kent, *Commentaries* (13th ed. 1884) 277; 1 Coke, *Littleton* (1st Am. ed. 1853) sec. 188; 1 Coke, *Law of England* (2d Am. ed. 1836) 116, note F.

⁴ 2 Kent, *Commentaries* (13th ed. 1884) 277.

In saying that the rule of construction which it follows is a prima facie rule of construction, the court is impliedly asserting that if there were any indication that the legislature intended to include an illegitimate child within the provisions of the statute, it would construe the word "child" to include an illegitimate child. As an illustration, suppose that a state statute provides that children of the same parent cannot intermarry. Would the statute operate so as to prevent illegitimate children of the same parent from intermarrying? If the purpose of the legislature, in enacting the statute, was to prevent the birth of deformed offspring or imbeciles, there is no doubt that the prima facie rule of construction would not be applied, since such a purpose would thereby be defeated. The further fact that at common law it was held unlawful for a bastard to marry within the Levitical degrees,⁵ would be considered as an indication that the legislature intended to include illegitimate children within the provisions of the statute. What the court is in fact saying in the principal case, then, is that the legislature, by naming "child" as beneficiary, intended to exclude an illegitimate child from its provisions.

It seems that there is no good reason of logic or policy to attribute such an intention to the legislature. The preamble to Lord Campbell's Act,⁶ which the Maryland statute closely follows, states the act to be one for *compensating* the families of persons killed by accident. The purpose of the statute is to provide a money substitute for the benefits which the beneficiary could have reasonably expected from the continued life of the deceased.⁷ If a mother owes certain duties to her illegitimate child which the law recognizes as arising from the blood relationship, can it be said, when the child is deprived of these rights through the death of its mother, that such a child was not intended to be included as a beneficiary under the statute?

There was doubt in England, whether a mother was under a common-law duty to support her bastard child.⁸ By the Poor Laws,⁹ however, such a duty was imposed on her. In this country, even in the absence of statute, it has been held that a mother, as the natural guardian of the child, is under a duty to support it.¹⁰ Since the child has a right to support from its mother, there seems to be no principle of public policy or justice upon which the court can base its refusal to

⁵ *Hains v. Jeffel* (1695) 1 Ld. Raym. 68.

⁶ 9 & 10 Vict. (1846) c. 93.

⁷ 17 C. J. 1318, sec. 188, *id.* 1328, sec. 199; Tiffany, *Death by Wrongful Act* (2d ed. 1913) sec. 153; cf. *Ormsbee v. Grand Trunk Western Ry.* (1917) 197 Mich. 576, 164 N. W. 408; *Georgia Ry. & Power Co. v. Beale* (1920, Ga.) 103 S. E. 434.

⁸ See *Humphrys v. Polak & Wife* [1901] 2 K. B. 385, 389.

⁹ 4 & 5 Wm. IV (1834) c. 76, sec. 71.

¹⁰ *Nine v. Starr* (1879) 8 Ore. 49; 2 Kent, *Commentaries* (13th ed. 1884) 278, 279; see also cases cited in (1920) 15 ILL. L. REV. 215.

let such a child recover. There appears to be but one reason for the court's interpretation of the act, and that is, that by excluding an illegitimate child from the provisions of the act, illicit commerce between the sexes would be discouraged. It is obvious, however, that this remedy will not be particularly effective.

The fact that practically all of our states allow an illegitimate child to inherit from its mother is a further argument for allowing an illegitimate child to recover for her death. Kent says,¹¹ that this

"rests upon the principle that the relation of parent and child, which exists in this unhappy case in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity."

It is true that these statutes do not legitimate bastard children, but the effect is to remove practically the only common-law disability of an illegitimate child with respect to its mother.¹² Having clothed illegitimate children with the relationship and attributes of legitimate children, by allowing them to inherit from their mother,¹³ it is believed that the legislature intended, by the use of the word "child" in the Wrongful Death Act, to include illegitimate children as parties entitled to be beneficiaries of the action, in so far as they claim with reference to their mother. Legislation reflects the mores of the times, and to interpret a statute so as to make it retrogressive, is to defeat the purpose of legislation.

The decision in the principal case seems also to be against the weight of authority, as represented by two cases which are analogous. In *Quinones v. American Ry. of Porto Rico*¹⁴ two illegitimate children brought an action for the death of their father under the Employer's Liability Act, which named "children" as beneficiaries. The father under Porto Rican law was under a duty to support and educate his bastard children, and the court held that it would be too narrow to hold that the word "children," in the statute, did not include illegitimate children.¹⁵ In *Galveston, H. & S. A. Ry. v. Walker*,¹⁶ where two illegiti-

¹¹ 2 Kent, *Commentaries* (13th ed. 1884) 277.

¹² *Smith v. Garber* (1918) 286 Ill. 67, 121 N. E. 173.

¹³ Ann. Code Laws of Md. (1911) art. 46, sec. 30.

¹⁴ (1908) 4 Porto Rico Fed. 254.

¹⁵ The only case that comes near to being an authority against *Quinones v. American Ry. of Porto Rico*, *supra*, is the decision in *Good v. Towns & Sullivan* (1883) 56 Vt. 410, where an illegitimate child, actually dependent on its father, brought an action under a statute giving a right of action to one dependent on a person, whose death was caused by intoxication from the use of liquor unlawfully sold. The court held that "dependent," as used in the statute, meant a legal dependency, and as a father was not under a legal duty to support his illegitimate child, then the plaintiff could not recover. This case, however, is no authority for refusing a recovery where the parent is under a legal duty to support his bastard child. In *Roberts v. Whaley* (1916) 192 Mich. 133, 158 N. W. 209, illegitimate children, living with their father, brought an action for his death under

mate children sued for the death of their mother, the court held that in view of the fact that illegitimate children could inherit from their mother, and that a mother was under a duty to support her illegitimate children, the legislature intended to include illegitimate children within the provisions of the statute, and they were allowed to recover. The many cases which hold that a mother cannot recover for the death of her illegitimate child,¹⁷ even in jurisdictions where a mother and her illegitimate child can inherit from each other, do not seem to be authority for refusing an illegitimate child a recovery for the death of its mother. To let an immoral parent recover, would resemble a case of letting one profit from his own wrong, but to refuse an illegitimate child a recovery, would be punishing it for a wrong for which it was in no way responsible. Public policy demands a liberal construction of the word "child" when an innocent child is the plaintiff, both to protect the child and to prevent it from becoming a public charge. Cases allowing a mother to recover for the death of her illegitimate child¹⁸ are authority, of course, for letting an illegitimate child recover for the death of its mother.

The principal case is the first to refuse to an illegitimate child a recovery for the death of its mother. In view of the authorities and some recent legislation,¹⁹ there is little doubt that the courts would hesitate to follow this interpretation.

the Workmen's Compensation Act, which named "dependents" as beneficiaries. The court held that the deceased was under a legal and moral duty to support his illegitimate children and that they were clearly within the meaning of the statute. See also (1919) 28 YALE LAW JOURNAL, 518. It may also be observed that the principal case is much stronger than that of *Quinones v. American Ry. of Porto Rico*, *supra*. There, illegitimate children recovered for the death of their father, while in the principal case an illegitimate child sought to recover for the death of its mother.

¹⁶ (1907) 48 Tex. Civ. App. 52, 106 S. W. 705.

¹⁷ *Harkins v. Philadelphia & Reading Ry.* (1881, Pa. C. P.) 15 Phila. 286; *Robinson v. Georgia Ry. & Banking Co.* (1903) 117 Ga. 168, 43 S. E. 452; *Lynch v. Knoop* (1907) 118 La. 611, 43 So. 252; *McDonald v. Southern Ry.* (1904) 71 S. C. 352, 51 S. E. 138.

¹⁸ *Marshall v. Wabash Ry.* (1894) 120 Mo. 275, 25 S. W. 179; *Andrzejewski v. Northwestern Fuel Co.* (1914) 158 Wis. 170, 148 N. W. 37; *Hadley v. City of Tallahassee* (1914) 67 Fla. 436, 65 So. 545, Ann. Cas. 1916 C, 719, note.

¹⁹ The trend of the law on the subject, as well as the probable intent of the legislature, may be illustrated by examining the decisions and legislative enactments in the state of South Carolina. In *McDonald v. Southern Ry.*, *supra*, decided in 1904, the court refused to let a mother recover for the death of her illegitimate child. In 1906, the legislature passed an act stating that in the event of the death of such illegitimate child, or the mother of an illegitimate child, by the wrongful act of another, the mother, or the illegitimate child, should have the same rights and remedies as though such illegitimate child had been born in lawful wedlock. *Croft v. Southern Cotton Oil Co.* (1909) 83 S. C. 232, 65 S. E. 216, allowed a mother to recover for the death of her illegitimate child.

EXERCISE OF THE POLICE POWER FOR AESTHETIC PURPOSES.

The proper limitation to place upon the police power is a question that still puzzles the courts. In two recent cases, *Ingham v. Brooks* (1920, Conn.) 111 Atl. 209, and *Lincoln Trust Co. v. Williams Bldg. Corp.* (1920) 229 N. Y. 313, 128 N. E. 209, courts took different views regarding building restrictions. In the Connecticut case a borough ordinance forbidding the erection of any building unless a written permit was issued by the warden and burgesses was held unreasonable. In the New York case the court declared constitutional a statute amending the charter of New York City, which empowered the board of estimate to pass resolutions creating building zones.

The police power is designed to promote the public welfare by restraints and compulsion.¹ When rights in private property are invaded, the courts have held that the basis of the proper exercise of this power must be to promote the public health, safety, morals, or general welfare.² The police power contemplates the destruction of the particular right or privilege legislated against, while under the power of eminent domain that right is transferred to the public use;³ that is, the rights are extinguished in the individual and re-created in the public. When a particular right, or more accurately privilege, cannot be enjoyed by an individual without injury to the public, it is most certain that its transfer to a public use cannot change its harmful character. And hence the prohibition of the use is an exercise of the police power, and not a taking under the power of eminent domain. The abatement of a nuisance is an obvious example. The distinction seems a fine one to draw, but it exists.⁴ Can it be said that the establishment of a building line results in the taking of private property for a public use? The privilege of building upon the land between the line and the street has ceased to exist; the public cannot build there without defeating the very purpose that could give legality to the act establishing the line.⁵ Such

¹ Freund, *Police Power* (1904) sec. 3; Tiedeman, *Limitations on Police Power* (1886) sec. 1.

² *Eubank v. City of Richmond* (1912) 226 U. S. 137, 33 Sup. Ct. 76.

³ Freund, *Police Power* (1904) secs. 511, 512; 1 Nichols, *Eminent Domain* (1917) sec. 54.

⁴ See 1 Lewis, *Eminent Domain* (3d ed. 1909) sec. 1. This author defines the power of eminent domain as "the power to take private property for the public welfare." See NOTES (1920) 20 COL. L. REV. 591, 592.

⁵ Such a taking would fall under Mr. Lewis's definition as a taking for the public welfare. But is this taking really an exercise of the power of eminent domain? For the rights and privileges taken cease to exist and are not transferred to the public. In *St. Louis v. Hill* (1893) 116 Mo. 527, 22 S. W. 861 the court held that the establishment of a building line constituted a "taking" of the property without compensation. Taking, when used in the sense of a taking under the power of eminent domain, connotes the transfer of some privileges in the land to the public.

a distinction seems sound and necessary in order to understand the decisions, for it is under one of these powers that the ordinances in the principal cases must be sustained.

The police power can be properly exercised only in a reasonable manner, without improper discriminations, and without denying due process of law. When municipal corporations have attempted its exercise for apparently "aesthetic" purposes, the courts have refused to recognize their acts as valid.⁶ Ordinances restricting such buildings as livery stables,⁷ garages,⁸ laundries,⁹ junk-shops,¹⁰ brick-yards,¹¹ undertaking establishments,¹² and storage-warehouses¹³ have furnished abundant litigation. Courts generally refuse to recognize the validity of building lines for aesthetic purposes.¹⁴ In those cases where the ordinances have been upheld the courts have often gone a long way to find some threatened injury to public health, safety or morals. Some jurisdictions have sustained such ordinances under the power of eminent domain and have provided compensation.¹⁵ Connecticut has made like provision in the establishment of building lines.¹⁶ Such legislation seems based

⁶ *Quintini v. Aldermen* (1889) 64 Miss. 483, 1 So. 625 (ordinance requiring a permit to build in a certain area held invalid).

⁷ *Curtis v. Los Angeles* (1916) 172 Calif. 230, 156 Pac. 462 (invalid); *Little Rock v. Reimman-Wolfort* (1913) 107 Ark. 174, 155 S. W. 105 (valid).

⁸ *Keller v. Oak Park* (1914) 266 Ill. 365, 107 N. E. 636 (invalid); *Smith v. Horsford* (1920, Kans.) 187 Pac. 685 (invalid); *Myers v. Fortunato* (1920, Del.) 110 Atl. 847 (valid). As to whether a garage is a nuisance *per se* see L. R. A. 1917 E, 369. Some courts consider this and others disregard it as a distinction.

⁹ *Ex parte Quong Wo* (1911) 161 Calif. 220, 118 Pac. 714 (valid); *Waldren v. First Presbyterian Church* (1919, Okla.) 184 Pac. 106 (valid).

¹⁰ *Weadock v. Detroit* (1909) 156 Mich. 376, 120 N. W. 991 (invalid); *Smolenski v. Chicago* (1917) 282 Ill. 131, 118 N. E. 410 (valid).

¹¹ *Denver v. Rogers* (1909) 46 Colo. 479, 104 Pac. 1042 (invalid); *Ex parte Hadacheck* (1913) 165 Calif. 416, 132 Pac. 584 (valid).

¹² *St. Paul v. Kessler* (1920, Minn.) 178 N. W. 171 (valid).

¹³ *Ohio Hair Product Co. v. Rendigs* (1918) 98 Oh. St. 251, 120 N. E. 836 (valid).

¹⁴ *Farist Steel Co. v. Bridgeport* (1891) 60 Conn. 278, 22 Atl. 561; *Eubank v. City of Richmond*, *supra* note 2; *St. Louis v. Hill*, *supra* note 5; *Welch v. Swasey* (1906) 193 Mass. 364, 79 N. E. 262, sustained in 214 U. S. 91, 29 Sup. Ct. 567.

¹⁵ Gen. St. Minn., Supp. 1917, secs. 1639-10 to 1639-16. See *State v. Houghton* (1916) 134 Minn. 226, 158 N. W. 1017; see COMMENTS (1916) 26 YALE LAW JOURNAL, 151; *State ex rel. Twin City Building Co. v. Houghton* (1920, Minn.) 176 N. W. 159; NOTES (1920) 20 COL. L. REV. 591; COMMENTS (1920) 18 MICH. L. REV. 523.

¹⁶ Conn. Rev. St. 1918, secs. 391-396. The constitutionality of this statute has not yet been determined. Similar provisions in city charters have been considered; but the cases seem uniformly to have held the lines invalid for defective procedure in establishing them, and the constitutional question has been avoided. See *Northrup v. Waterbury* (1908) 81 Conn. 305, 70 Atl. 1024; *Hartford v. Poindexter* (1911) 84 Conn. 121, 79 Atl. 79; *Benedict v. Pettes* (1912) 85 Conn. 537, 84 Atl. 332.

upon the idea that if compensation is provided, all the difficulties are avoided. But where there is a taking under the power of eminent domain it must be for a "public use," and there is as much difficulty in defining this term as the term "public welfare."¹⁷

Bearing in mind the distinction between the power of eminent domain and the police power, it is submitted that regulations which have a tendency or are designed to affect the aesthetic are more properly sustained under the police power. Several states have passed legislation providing for the establishment of districts or "zones" in the larger cities.¹⁸ Massachusetts has made it a matter of constitutional amendment.¹⁹ There is similar legislation in other states directed specifically against outside advertising.²⁰ Such legislation has generally been upheld, the courts basing their decisions upon the promotion of the public welfare. In the case of *St. Louis Advertising Co. v. City of St. Louis*,²¹ Mr. Justice Holmes, in upholding an ordinance regulating billboards, said, "it is true. . . . that the plaintiff has done away with dangers from fire and wind, but apart from the question whether those dangers do not remain sufficient to satisfy the general rule, they are or may be the least of the objections adverted to in the cases." There is an intimation that there are other things in mind than the public health, safety, or morals. The present tendency is to broaden the scope of the police power and to use it to accomplish aesthetic purposes wherever in sound public policy there is reason to do so.

The apparently opposed decisions in the two principal cases may possibly be reconciled. In the Connecticut case, the court declared that the ordinance was unreasonable, because it gave discretionary powers to the officer who acted under it, and made no uniform rule for

¹⁷ *Bunyan v. Palisade Park Commissioners* (1915) 167 App. Div. 457, 153 N. Y. Supp. 622; *Parker v. Williams* (1902) 188 U. S. 491, 23 Sup. Ct. 440; *Farist Steel Co. v. Bridgeport*, *supra* note 14.

¹⁸ Calif. Laws of 1917, ch. 734, p. 1419. See *Ex parte Quong Wo*, *supra* note 9; *In re Montgomery* (1912) 163 Calif. 457, 125 Pac. 1070; *Ex parte Hadacheck*, *supra* note 11; Ill. Laws of 1919 ch. 54, p. 262; 2 Wolff's St. of La. (1920) 1355; Minn. Laws of 1915 ch. 128, sustained in *State ex rel. Twin City Building Co. v. Houghton*, *supra* note 15; Neb. Laws of 1919, ch. 185, p. 417; N. J. Laws of 1917 ch. 54, p. 94; N. Y. Laws of 1916, ch. 497, p. 1320, sustained in *Lincoln Trust Co. v. Williams Bdg. Corp.*, one of the instant cases.

¹⁹ Const. of Mass. 60th Amendment (1918).

²⁰ The Supreme Court of the United States has passed upon bill-board restrictions in *Cusack v. City of Chicago* (1917) 242 U. S. 526, 37 Sup. Ct. 190, holding them constitutional. The following states have legislated upon advertising: Conn. Rev. St. 1918, secs. 3024-3030, held constitutional in *State v. Murphy* (1916) 90 Conn. 662, 98 Atl. 343; R. I. Laws of 1910, ch. 542, held constitutional in *Gilmartin v. Standish* (1917) 40 R. I. 219, 100 Atl. 394; Mass. Laws of 1903, ch. 158, p. 121, held unconstitutional in *Commonwealth v. Boston Advertising Co.* (1905) 188 Mass. 348, 74 N. E. 601; Comp. St. of N. J. 1910, sec. 152, p. 1791, held unconstitutional in *State v. Lamb* (1916, N. J.) 98 Atl. 459.

²¹ (1919) 249 U. S. 269, 274, 39 Sup. Ct. 274.

his guidance. Under the New York law, the board of estimate was likewise given full discretionary powers. Perhaps the public welfare requires this discretionary power under the conditions existing in a New York City block, but not with respect to a lone fishing shack on the Connecticut shore. Even so, the two cases represent opposing views on discretionary powers.

Since the above comment went to press, the decision of the Connecticut Supreme Court of Errors in the case of *Town of Windsor v. Whitney et al.* (1920) 111 Atl. 354, has been published. In this case the constitutionality of Rev. St. 1918, secs. 391-395, which provide for the establishment of building lines by a commission on town plans (see note 16 *supra*) was upheld. Justice Wheeler, writing the majority opinion, sustains the establishment of building lines as a valid exercise of the police power. His reasoning proceeds upon the basis that all private property is held subject to regulations that will promote the public welfare and that such regulations do not result in a taking of private property which requires the exercise of the power of eminent domain and the payment of compensation. It seems hardly necessary to state that the writer is heartily in accord with these views. The case is an interesting and proper development of the legal principles involved.

LEGAL PRIVILEGE TO EMPLOY A RUNAWAY SERVANT

It is well settled that the enticement of a servant to commit a breach of his service contract is a tort giving the master a right to damages.¹ The same rule has been laid down in the case of an inducement to commit a breach of a contract, other than that of master and servant, but as to this there is some conflict.² There was a long line of cases holding further that it was a tortious act to harbor and employ the runaway servant of another with knowledge of the facts, even in the absence of enticement.³ In the case of adult servants, however, most of these decisions may be regarded as resting on the Statute of Laborers,⁴ a statute passed over 500 years ago in a time of great shortage of labor,

¹ *Lumley v. Gye* (1853, Q. B.) 2 E. & B. 216; see 7 Labatt, *Master and Servant* (1913) ch. 113.

² *Jones v. Stanley* (1877) 76 N. C. 355. Cf. *Bourlier Bros. v. Macauley* (1891) 91 Ky. 135, 15 S. W. 60.

³ *Blake v. Lanyon* (1795, K. B.) 6 T. R. 221; *De Francesco v. Barnum* (1890, Ch.) 63 L. T. 514 (where the rule was held to apply to the employment contract of a ballet girl; and Fry, L. J., said that the repeal of the Statute of Laborers made no difference, in spite of the "very weighty argument of Coleridge, J., in *Lumley v. Gye*"), *Wilkins & Bros. v. Weaver* [1915] 2 Ch. 322. And see 1 Ames & Smith, *Cases on Torts*, 633, note.

⁴ (1349) 23 Edw. III, c. 2.

and repealed in 1863. This was the view of Coleridge, J., who dissented in *Lumley v. Gye*. For many years there seems to have been no case in the United States with respect to this tort of harboring, but it has at last arisen in *Shaw v. Fisher* (1920, S. C.) 102 S. E. 325. One Carver was under contract with the plaintiff for one year as a "share cropper" and voluntarily left the plaintiff's employ in breach of his contract, saying that he would rather "die and go to hell" than work longer for the plaintiff. The defendant later employed Carver, with notice of the foregoing facts, and was sued for damages by the plaintiff. It was held that the defendant's act was not a tort, the old tort of harboring a servant being abolished by the 13th and 14th Amendments to the Constitution.

It was the theory of the court that an involuntary servitude would be created if third parties were forbidden to employ a runaway servant. "The result would have been to coerce him to perform labor required by the contract; for he had to work or starve." It may be admitted that certain types of "peonage" may be an involuntary servitude within the meaning of the Constitution, but this case is hardly one of peonage. Perhaps there is such a thing as "wage slavery," but under ordinary circumstances, one who has *voluntarily* contracted to serve another for pay can scarcely be said to be in involuntary servitude. No one suggests *as yet* that it is not wrong to break a contract or that a contract-breaker should not be penalized by a judgment for damages. In cases where money damages are not adequate, a court of equity has frequently issued an injunction restraining a contractor from rendering service for another in breach of his first contract.⁵ It may be unsound in policy to grant such an injunction, but it seems not to have been attacked as creating an involuntary servitude. It has seldom if ever been held that a contract of service will be affirmatively enforced by mandatory injunction.⁶

No doubt there are intermediate degrees between slavery and voluntary service, some of which may fall within the constitutional prohibition; but until the federal courts have so decided, the present case should not rest upon such a ground. The Amendments should not be held to create a legal privilege to break a service contract, even upon the payment of damages. The present decision should be sustained upon the ground that the tort of harboring and employing a runaway adult servant rested upon the Statute of Laborers, a statute never properly applicable in the United States, and now repealed in England.⁷ Even if such

⁵ *Lumley v. Wagner* (1852, Ch.) 1 D., M., & G. 604; *Philadelphia Ball Club v. Lajoie* (1902) 202 Pa. 210, 51 Atl. 973; *Cort v. Lassard* (1889) 18 Ore. 221, 22 Pac. 1054.

⁶ But cf. *Southern Cal. Ry. v. Rutherford* (1894, C. C. S. D. Calif.) 62 Fed. 796.

⁷ It is interesting to note that many of the southern states enacted legislation at the close of the Civil War, making enticement a crime, and that many of them included the words "knowingly employ" or "knowingly harbor and detain." See

a tort was recognized by the common law this was due to conditions long since passed away. It should now be held that the servant has the legal power of terminating his primary contract relations with his employer (except perhaps in cases of irreparable injury) even though he has not the legal privilege. After definite repudiation by a servant, other persons should be legally privileged to give him employment. Surely this is in accord with the general practice and belief of the community. The instant case really rests upon such modern practice and belief; but to many courts it seems easier to torture statutory words and thus shoulder off the responsibility upon the legislatures for declaring that a change in the law has taken place. A. L. C.

PRIVILEGE OF ALIEN ENEMIES TO INHERIT UNDER TREATY

A distinct contribution to the law has recently been made by Judge Cardozo of the New York Court of Appeals in *Techt v. Hughes* (1920) 229 N. Y. 222, 128 N. E. 185,¹ a decision clearing away much ambiguous terminology and fallacious reasoning with respect to the privilege of alien enemies to inherit realty in New York. The decision involved primarily the construction of the chameleonic term "alien enemy," which, in spite of many important decisions during the war, had still been left obscure and doubtful, and an examination of the extent to which treaty stipulations granting the privilege of inheritance survive the outbreak of war. Both problems are almost without judicial precedent, and the contributions of writers throw but little helpful light upon them.

An American-born woman had in 1911 married in the United States a resident Austrian. On December 7, 1917, war with Austria was declared, and on December 27, 1917, the woman's father, an American citizen, died, leaving real property. Another heir contested the privilege of the woman to inherit, on the ground that she was an alien enemy, whereas the statute of New York confined this privilege to "alien friends." The question for decision, therefore, was (1) whether the American wife of an Austrian subject was during the war an "alien enemy" or an "alien friend" (the Appellate Division had held her to be an "alien friend"²) and (2) whether, if she was an "alien enemy," the treaty between the United States and Austria—which contained a stipulation relieving Austrians to some extent from a state statutory disqualification of inheritance—was still in force at the time of her father's death, i. e. after the war had broken out.

⁷ Labatt, *Master and Servant* (1913) 8067 ff. These are strictly interpreted, however, and are held not to apply to a case where a man merely gives employment to a laborer during the unexpired term of a broken contract. *Tucker v. State* (1908) 86 Ark. 436, 111 S. W. 275.

¹ Writ of certiorari denied by the United States Supreme Court, October 25, 1920.

² (1919) 188 App. Div. 743, 177 N. Y. Supp. 420.

Judge Cardozo found, first, that the woman was an "alien enemy," and not an "alien friend." By her marriage, she acquired the nationality of her husband.³ The historical development of the privileges of aliens begins from a state of total disability and is marked by gradual relaxations thereof. In England, these relaxations were first extended to merchants, and Magna Carta conditions them in time of war upon reciprocity. Even in time of peace aliens had at common law the privilege of taking by purchase only (until office found) and not by descent.⁴ Whatever privileges of taking by descent the alien may now possess must therefore be found in statutory or treaty grant. In New York, the statute of 1913 had extended only to "alien friends" the privilege of taking by inheritance.⁵ Reasoning from the cases decided during the war in England and the United States permitting peaceable resident subjects of enemy states to reside unmolested, to sue in municipal courts, to engage in trade, and to enjoy the ordinary civil rights,⁶ and from the fact that the woman had been left unmolested by federal authorities as a law-abiding resident subject of Austria and that "the laws should be administered" in a spirit in harmony with "the humane and considerate treatment accorded by this country" to such aliens, the Appellate Division had found her to be an "alien friend."

This liberal construction Judge Cardozo did not sustain. The privileges accorded to resident subjects of enemy states, for example, to sue and to trade, were deemed concessions granted to them not because they were not "alien enemies," but because the progress of time had developed a humane relaxation of some of the more severe disabilities resting upon "alien enemies." They were still "alien enemies," and subject to restrictions as such. It cannot be urged that because in treating of "trading with the enemy," the term "alien enemy" has a wider or different connotation—domicil being made the criterion of enemy character—that it has not also its original strict meaning of "subject of the enemy state." It is under this construction, which is beyond question logical and flawless, that the woman was deemed not to be an "alien friend" within the meaning of the New York statute.

The alien enemy deriving no aid from the statute, it became necessary to determine whether the treaty with Austria afforded her any protection. Article 2 of the treaty of 1848 with Austria conferred on nationals of either contracting party, in case title by descent was not freely accorded by municipal law, at least title for a limited period of two years, extendable "according to circumstances," during which the property could be sold. If article 2 of the treaty could be deemed in

³ Act of March 2, 1907, 34 Stat. at L. 1228; *Mackenzie v. Hare* (1915) 239 U. S. 299, 36 Sup. Ct. 106.

⁴ *Martin v. Hunter's Lessee* (1816, U. S.) 1 Wheat. 304.

⁵ Real Property Law, sec. 10, as amended by Laws of 1913, ch. 152; Cons. Laws N. Y., ch. 50.

⁶ See (1917) 27 YALE LAW JOURNAL, 104.

force after the outbreak of war, the alien could claim the title by inheritance thus conferred.

Confronted with the question whether this provision of the treaty survived and could vest the title after the outbreak of war, the court sought authority. Probably no field of international law is more elusive in authorities; for the courts have had but few occasions to pass upon the effect of war on treaties, and the writers, seeking to find a rule in the practice of nations, find themselves baffled, by the diverse action of states, in establishing any criterion or guide for the survival of treaties, and fall back upon theory and ethics.

Two important decisions, one in the United States and one in England,⁷ have held that where title to real property had vested, under article 9 of the British-American treaty of 1794, the outbreak of the war of 1812 did not divest the title, although Judge Story was not sure that the treaty was not "at most, only suspended," during the war. In the instant case, the title, if good, vested *during* the war, so that article 2 of the Austrian treaty must necessarily have remained in full force.

Two schools of thought have developed with respect to the survival of treaties. Due to a misconception of the distinction between *pacta transitoria* or those permanent compacts between states which deal, for example, with boundaries or other vested rights, and "treaties," in the narrow sense, which looked to the future and presupposed a state of peace, it was often said that all "treaties" (now used in the wide sense to cover all compacts between nations) were terminated by war.⁸ While this view, to its full extent, is no longer asserted without qualification,⁹ it being admitted that stipulations relating to boundaries, public debts, and war itself must be deemed to remain in force even during the war, nevertheless the fact that states frequently in treaties of peace stipulate the specific pre-war treaties that shall be deemed to revive or remain in force,¹⁰ and the fact that it is difficult in advance of the peace to make distinctions between abrogation and suspension, have

⁷ *Society for the Propagation of the Gospel v. New Haven* (1823, U. S.) 8 Wheat. 464, 494; *Sutton v. Sutton* (1830, Ch.) 1 Russ. & M., 663. See also *Carneal v. Banks* (1825, U. S.) 10 Wheat. 181 (title acquired under the French treaty of 1778 not divested by abrogation of that treaty or expiration of the treaty of 1800).

⁸ The distinction is carefully preserved by G. F. de Martens in his *Précis du droit des gens* (Paris, 1831) cited in Wheaton, *International Law* (Lawrence's ed. 1863) 460. See 5 Moore, *Digest of International Law* (1906) 382-383.

⁹ It was, however, advanced practically without qualification by Secretary of State Buchanan in 1845 and by President Polk in 1847. Moore, *op. cit.* 375. Spain acted upon it by decree at the outbreak of the Spanish-American war, though it did not fully deprive American citizens of all their treaty rights. See (1898) FOR. REL. 972-974.

¹⁰ See, for example, art. 29 of the treaty with Spain, July 3, 1902, 2 Malloy, *Treaties and Conventions* (1910) 1710. The treaty of Versailles reserves to the Allies the privilege of naming the treaties with Germany which they will deem to remain in force. Treaty, art. 289.

induced many writers to support the doctrine that in principal all treaties are abrogated by war, with certain exceptions of treaties looking to permanent arrangements or the war itself, or treaties to which there are other parties,¹¹ etc. Feeling it incumbent upon them to state a rule, and finding no satisfactory criteria and data for a better rule, they content themselves with announcing this vague formula. Some writers proceed indeed to name the treaties that they deem necessarily abrogated by war, e.g. treaties of commerce and navigation, peace and friendship, consular conventions, etc., overlooking the fact that the general name given to the treaty frequently conceals specific articles having little or no relation to the general title, and easily separable from other parts of the treaty.¹² Thus, in the case of the treaty of 1848 with Austria, under discussion, article 2 relates to the inheritance of real property.

The other school adopts the view that treaties in principle remain in force during hostilities, except such as are incompatible with a state of war. While this doctrine is not yet adopted by many writers, because it is even more difficult of categorical application than the other view, it has nevertheless in its support some weighty opinion, including the authority of Kent and of the Institute of International Law.¹³ In a country by whose constitution treaties confer rights on private individuals, it is much the better principle to adopt. Its application can be worked out pragmatically. Until, therefore, the political department of the government proclaims the termination of treaty stipulations conferring private rights and no injury to the nation resulting, it seems much preferable to give effect to such stipulations as the law in force. And the court in the instant case so held.

The concluding paragraph of this notable opinion of Judge Cardozo warrants quotation:

“No one can study the vague and wavering statements of treatise and decision in this field of international law with any feeling of assurance at the end that he has chosen the right path. One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesman. There are few precepts for the judge. All the more, in this uncertainty, I am impelled to the belief that until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusals to the needs of the occasion; that they are not bound by any rigid formula

¹¹ 3 Phillimore, *International Law* (3d ed., 1879-1885) 795; 2 Westlake, *International Law* (1904) 29 ff.; 2 Pitt Cobbett, *Cases and Opinions on International Law* (3d ed. 1913) 42; 1 Calvo, *Droit International* (4th ed. 1887) sec. 362.

¹² Note in Pitt Cobbett, *op. cit.* 40. See the views of publicists set out in John Bassett Moore's valuable article, (1901) 1 COL. L. REV. 209, reprinted in part in 5 Moore, *op. cit. supra* note 8, at pp. 382-385.

¹³ Kent, *Commentaries*, 176; (1912) 25 ANNUAIRE of the *Institut de Droit Internationale*, 648; *Resolutions of the Institute* (Carnegie Endowment ed. 1916) 172; Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten* (3d ed. 1878) sec. 538.

to nullify the whole or nothing; and that in determining whether this treaty survived the coming of war, they are free to make choice of the conclusion which shall seem the most in keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation."
E.. M. B.

THE PRIVATE LAW OF CHINA

The first installment of the "Chinese Supreme Court Decisions,"¹ which have just appeared in an English translation, deserves more than a passing notice, for they bring to our attention a process of legal development which is unique in the history of law. In a preface to the decisions, the President of the Supreme Court characterizes the former Chinese law as follows:

"In the days of the old régime, civil cases were decided more like by arbitration than by a judicial process; for, except the law of succession and marriage, there was hardly any law to go by; while in criminal cases decisions could be based on analogy, and the judge was even allowed to make punishable an act which in his opinion should not have been done, though it had not expressly been made an offence by law."

In further explanation of the old state of law, F. T. Cheng, an associate justice of the Supreme Court, says:²

"Case law was not unknown in China: it figured prominently in the late Code; but it related to facts rather than principles and mostly concerned crimes, civil cases being always relegated to the background. The explanation is simple. The institution of the judicial officer, as distinct from the administrative, is comparatively a modern idea in China, probably because there was not so much need for him. Punishment of the criminal could be accomplished incidentally to the exercise of administrative functions, while the State took little interest in civil disputes. The people, too, did not like to go to law, partly, perhaps, because they had little confidence in the law, which 'to their eyes her ample page . . . did ne'er unroll,' and partly, perhaps, because they doubted the advisability of entrusting the settlement of their disputes to men who were not their peers. Their disputes were often settled in the chapels or temples in the case of country folks, and in the chambers of commerce or guilds in the case of city men. In this respect, paradoxical though it seems, a sort of 'Government of the people by the people for the people' existed in monarchical China."

A radical reform was effected towards the end of the Tsing Dynasty through the reorganization of the Supreme Court, although its actual work did not really begin until after China had become a Republic. Without any precedents to go by and with no legislation to guide it, what could the Supreme Court do to assist in the establishment of government by law and the development of a legal system fit to meet the needs of the new era and worthy of the confidence of other nations?

¹*The Chinese Supreme Court Decisions*. Translated by F. T. Cheng. Published by the Supreme Court. Peking, 1920.

²*Decisions*, ii.

Fortunately there were to be found in China jurists, thoroughly trained in the western systems of law, men of learning, of broad vision, and of fine courage. These men saw before them a wonderful opportunity for constructive work of the greatest magnitude, and they boldly seized it. They determined not to wait for a reform of Chinese law through legislation, but to go ahead and undertake the task themselves. With this end in view they announced the simple but epoch-making rule that so far as statutes and valid customs did not stand in the way, the Supreme Court would be guided in its decisions by the fundamental principles common to the civilized countries of the world. The principle is formulated in the Chinese Supreme Court Decisions in the following words:³

“Civil cases are decided first according to express provisions of law; in the absence of express provisions, then, according to customs; and, in the absence of customs, then according to legal principles.”

As the draft of the Civil Code has not yet been promulgated and the customs offer little aid to the courts in the solution of the many problems arising from the new development of the country and its new mode of life, the legal principles referred to constitute practically the only guidance for the court. These principles have been drawn from the continental system of jurisprudence, in regard to which Mr. Cheng remarks:⁴

“As to the sources of the principles embodied in this volume the reader will probably find that many of them bear traces of western jurisprudence. It may, however, be pointed out that those principles of law which are fundamental to the notion of justice have really no nationality. They are merely the *jus gentium* which alone according to Austin belongs to the legitimate province of jurisprudence, but there must, of course, be some one first to reduce them to a concrete form, just as the law of gravity had to be discovered by Newton. In this sense, then, it must be admitted that western jurisprudence has been the fruitful field from which these principles have been gathered, and indeed most of our judges have been brought up in western jurisprudence.”

By western jurisprudence the learned justice means continental law. So far as the principles of “civil” law are concerned, no trace of Anglo-American influence can be found. Nor is this surprising, even in view of the fact that some of the Supreme Court judges received their legal education, in part, at least, in England. The reason for their preference of the continental system is not far to seek. The English system is too complex, too little systematized, and too often the product of mere chance or peculiarities of procedure. It does not lend itself readily to transplantation to a country with a different historical background.

The first part of the decisions deals with “General Principles.” This is after the fashion of the German, Japanese, and Brazilian codes, which

deal in the first book with the principles which may equally apply to the law of Property, Obligations, Family, or Succession. The most important concept contained in the "General Part," one whose absence in Anglo-American law is often deeply felt, is that of the "juristic act," in which the central element is the human will. The underlying notion is that a voluntary act shall be given the juristic effect intended by the actor if it is directed towards a lawful object and is declared in the form prescribed by law, by a person possessing legal capacity.

To what extent the Chinese law will adopt the subjective or objective theory regarding declarations of will does not fully appear from the decisions published. In the matter of mistake it lays down the following rule:⁵

"If a mistake as to the tenor of a declaration of intention is such that, had the declarant discovered it, he would not have made the declaration of intention, he may rescind it."

This rule adopts the subjective theory in its extreme form. It will be interesting to see what safe-guards will be provided by the Supreme Court for the protection of third parties who in good faith dealt with the party making the mistake.⁶

The subjective theory is adopted also with respect to duress, which is defined as "words or actions which are calculated to produce such fears in the mind of the person threatened or under duress as to make it impossible for him to disobey."⁷ As regards fraud, a declaration of intention can be avoided only if it was made with intent to deceive.⁸ An innocent misrepresentation does not affect the binding nature of the declaration. Whether the party innocently misled will have an action for damages upon principles relating to unlawful acts, does not appear.

The English doctrine of consideration finds no favor with the Supreme Court, which holds that "consideration is not essential to the validity of the waiver of a right."⁹ In the matter of *causa* it lays down the following:

"The *causa* of a juristic act differs from the motive for doing it. Unless according to law or to the nature of the act no *causa* is required,

⁵ *Id.*, part 1, 21.

⁶ The German law has adopted the following safeguards: (1) The declaration can be avoided only if it is not to be supposed that the declarant would not have made it with full knowledge of the circumstances and with intelligent appreciation of the case. Civil Code, art. 119. (2) The avoidance must be made without culpable delay after knowledge of the grounds for avoidance. Art. 121. (3) The declarant avoiding his declaration must compensate the other party for any damage the latter sustained by relying upon the validity of the declaration, not, however, beyond the value of the interest which the other had in the validity of the declaration. Art. 122.

⁷ *Decisions*, part 1, 19-20.

⁸ *Id.*, part 1, 19. This is the general continental rule. German Civil Code, art. 123; Swiss law of Obligations, art. 28. See also Japanese Civil Code, art. 96.

⁹ *Decisions*, part 1, 16.

any act which has no *causa* or whose *causa* is illegal is invalid and creates no obligation between the parties.¹⁰

Causa would appear to be required, therefore, as a general principle and may be dispensed with only in particular cases, for example, in the case of negotiable instruments.¹¹

Declarations of will through agents are governed also by continental notions. Such declarations must be made in the principal's name if he is to be bound directly.¹² The doctrine of the undisclosed principal of Anglo-American law is, therefore, not recognized as regards civil transactions. In commercial matters, however, all acts within the scope of the agent's authority are directly operative in favor of, as well as against, the principal, although the latter's name was not disclosed; with this qualification, that if the other party was ignorant of the fact that the agent acted in a representative capacity, he may enforce the agreement against the agent personally and refuse performance when claimed by the principal.¹³ The termination of an agent's power is inoperative as against a bona fide third party and any juristic act performed before such notice on behalf of the principal binds him.

In accordance with continental usage persons are divided into natural and juristic persons, the latter being subdivided into associations and foundations. Associations are corporations in the Anglo-American sense, being either for profit or not for profit. Foundations take the place of the English charitable trust, a corporation being created, but without members or other specific persons who have rights as beneficiaries. Although there are no statutory provisions in China relating to foundations or associations other than trading companies and corporations of the public law, juristic persons are recognized by the Supreme Court as natural products of society, existing in fact because of social necessities. Countenance is thus given to the prevailing continental theory that juristic persons are "real" entities.¹⁴ Foreign associations, however, are not recognized as juristic persons in China, it would seem, although they may have been lawfully constituted as such at home. If a company has a branch office in China the manager is personally responsible for all juristic acts which he may have performed, in behalf of that company.¹⁵

In matters of commercial law the Supreme Court has been to some extent influenced by Anglo-American law. Continental law does not authorize bills of exchange to be made payable to bearer, and promissory notes can be made so payable only in countries adopting the French theory concerning bills and notes. The Chinese Supreme Court follows the example of England, of the United States, and of Japan.¹⁷

¹⁰ *Id.*, part 1, 18. See Lorenzen, *Causa and Consideration in the Law of Contracts* (1919) 28 YALE LAW JOURNAL, 621.

¹¹ *Id.*, part 2, 30.

¹² *Id.*, part 1, 24.

¹³ *Id.*, part 2, 24.

¹⁴ *Id.*, part 1, 25.

¹⁵ See Saleilles, *De la personnalité juridique* (1910) 525 *et seq.*

¹⁶ *Decisions*, part 2, 17-18.

¹⁷ *Id.*, 2, 30.

As one reads the decisions rendered by the Supreme Court of China during the brief period of seven years one marvels that such a change from the old régime should have been possible. With one bound, as it were, China has cut loose from the past and placed herself juridically on a footing of equality with the most civilized countries of our day. Those who had some familiarity with the provisions of the draft of the Chinese Civil Code knew the lofty spirit in which that great work was conceived, but were not without misgivings concerning the ability of the Chinese judiciary to give practical effect to a foreign system of law. The decisions of the Supreme Court just published go a long way, however, in reassuring us in that regard. Apparently the Chinese mind as a result of long centuries of civilization and philosophic study has acquired a nimbleness which enables its judges to apply with mastery the rules of the new *jus gentium*. May we not hope, however, that the legal structure to be erected will not be based exclusively upon the principles of continental law, but that it will appropriate also the good qualities of the Anglo-American legal system? May China be far-sighted enough to send more of her youth to study law in England and the United States, so that they may become acquainted with the spirit of Anglo-American law. If our young sister republic should succeed in blending the two great legal systems of the world—the Roman-continental and the Anglo-American—it would make a contribution to civilization, the effect of which can hardly be over-estimated. For the present we are content to know that its Supreme Court has already made a splendid beginning in the establishment of a new legal order.

E. G. L.

SPECIFIC CRIMINAL INTENT IN STATUTORY ASSAULTS

As is well known, all assaults at common law were misdemeanors, and the fact that the assault was accompanied by an intent to commit a particular felony did not change the grade of the offense, although such aggravating circumstance might properly increase the severity of the punishment imposed upon the misdemeanant.¹ By statute, however, both in England and in the United States, the particular criminal intent actuating the assailant frequently causes his offense to be distinct from an assault delivered by one acting with a different intent. Thus in Connecticut, for example, assault with intent to murder, assault with intent to rob, striking with intent to maim or disfigure, and assault with a dangerous weapon, are treated as distinct offenses for which distinct punishments are prescribed.² Where a specific criminal intent is made

¹ ² Wharton, *Criminal Law* (11th ed.) sec. 838; 2 Bishop, *New Criminal Law* (8th ed. 1892) secs. 42, 55; *Commonwealth v. Bigelow* (1808) 4 Mass. 438; *Stout v. Commonwealth* (1824, Pa.) 11 Serg. & R. 177; *Simpson v. State* (1877) 59 Ala. 1, 9.

² Conn. Rev. St. 1918, secs. 6193, 6199, 6194, 6344. This is only a partial list of

an element of the statutory offense, the necessity of alleging such intent in the indictment and of proving it upon the trial seems obvious and is in general admitted without dispute.³

Questions of difficulty, however, sometimes arise when the victim of the assault is not the person whom the assailant really desired to injure. This may happen either through a mistake of identity, as where A, desiring to kill or maim B, mistakes C for B and under this misapprehension assaults C, or through accident, as where A shoots at B, but by mistake of aim misses B and hits C. The distinction between mistake of identity and mistake of aim has not always been observed in the decided cases. To show its importance is the purpose of this discussion.

The problem involved in mistaken identity was recently presented to the Supreme Court of Connecticut in *State v. Costa* (1920, Conn.) 110 Atl. 875. The information charged the defendant with assaulting C with a razor, with intent to maim and disfigure him, contrary to the statute.⁴ Evidence was offered tending to prove that the defendant had previously quarrelled with one W, that he mistook C for W, and, acting under that misapprehension, came up behind C and slashed his cheek with a razor. The defendant's counsel objected that evidence of a purpose to maim W did not tend to prove the charge of assault with intent to disfigure C. The court answered this contention convincingly, saying in effect, that although the attack was made under a mistake as to the identity of the victim, the defendant intentionally directed his assault at C with intent to disfigure *him*, and thus his act fell squarely within the statutory prohibition.⁵ This analysis, it is submitted, is correct. In cases of mistaken identity there is no need of invoking the doctrine of "transferred intent," as is sometimes done.⁶ The very person assaulted is the person intended to be maimed or killed,

statutory assaults. It should be noted that in such statutes the term "assault" is frequently used to include a battery as well as a technical assault.

³ 2 Wharton, *op. cit.* note 1, sec. 839.

⁴ Conn. Rev. St. 1918, sec. 6194: "Every person who shall put out an eye, slit an ear, nose, lip, or any other part of the head, face, or neck of another, or cut or bite off or disable any member of another, with intent to maim or disfigure him . . . shall be imprisoned not more than ten years."

⁵ Mr. Justice Case's words were as follows (p. 877): "The information accurately presented a charge which the evidence tended directly to substantiate. It in no sense negated or qualified the immediate purpose and legal intent of Clark's assailant to assault Clark that the act may have rested wholly upon a mistaken belief as to Clark's identity. The purpose of the assailant was to accomplish the end immediately in view, and the actual victim was no less the intended direct physical object of the attack because at the time he may have been taken for someone else."

⁶ For example, in *People v. Wells* (1904) 145 Cal. 138, 140, 78 Pac. 470, 471, Van Dyke, J. says: "But where one intends to assault or kill a certain person, and by mistake or inadvertence, assaults or kills another in his stead, it is nevertheless a crime, and the intent is transferred from the party who was intended to the other." See also 1 Wharton, *op. cit.* note 1, at p. 184, note 3.

for the defendant desires his blow to take effect upon the particular person before him, although such desire is based upon a mistake of fact, i. e., as to the identity of his victim. Such a mistake of fact is, of course, immaterial and furnishes no excuse.⁷

But if the case involves an accidental blow from mistaken aim, rather than an intended blow from mistaken identity, different considerations are involved. Suppose, for example, the defendant had struck at W, but his blow had been deflected and had fallen upon and slashed the cheek of C. Could he be convicted of the statutory offense of assaulting C with intent to disfigure him? There are cases which imply an affirmative answer,⁸ but it is believed that they are the result of inadequate analysis. In such a case the consequences of the defendant's act are clearly not such as he in fact intended. With respect to C, his act was accidental, for his intent was to have it produce consequences upon W. Now it is true that a person is sometimes held answerable, even in criminal law, for the unintended consequences of his acts. If an unlawful blow intended to kill W accidentally falls upon and kills C, there is no doubt that the actor will be guilty of the murder or the manslaughter of C.⁹ In such a case the general criminal intent to strike one is "transferred from the party who was intended" to the actual victim and gives criminal color to the unintended result of causing the latter's death. This is because the criminal state of mind, which coupled with the act causing death, constitutes murder or manslaughter, need not be a specific intent to kill the person whose death is caused.¹⁰ "Malice" as used in the definition of murder is a technical term and means no more than "a heart regardless of social duty, and fatally bent on mischief."¹¹ This criminal state of mind exists in the defendant when he strikes an unlawful blow, and although the consequences of the blow fall upon an unintended victim, there seems no injustice in punishing him as if he had intended such consequences. But where a statute requires one element of the offense to be a specific intent with respect to the person assaulted, there is no place for such

⁷ In accord with the principal case, see *Queen v. Lynch* (1846, Cent. Cr. Ct.) 1 Cox C. C. 361; *Regina v. Stopford* (1870, N. P.) 11 Cox C. C. 643; *Regina v. Smith* (1853, Cr. Cas. Res.) Dears. C. C. 559 ("the prisoner . . . meant to murder the man at whom he shot"); *People v. Torres* (1869) 38 Cal. 141; *McGehee v. State* (1885) 62 Miss. 772 ("The evil and specific intent to strike the form before him at the time is manifest").

⁸ See *State v. Gilman* (1870) 69 Me. 163; *Callahan v. State* (1871) 21 Oh. St. 306; *Rex v. Jarvis* (1837, N. P.) 2 Moody & R. 40; *Dunaway v. People* (1884) 110 Ill. 333; cf. *People v. Stoyan* (1917) 280 Ill. 300, 117 N. E. 464.

⁹ 1 Wharton *op. cit.* note 1, sec. 441. Wharton notes certain logical difficulties with this doctrine, but recognizes that it is established beyond question. Numerous cases are collected in 90 Am. St. Rep. 582, note.

¹⁰ The rule of pleading should be noted, however, that the indictment must allege the assault to have been made upon the person killed. *State v. Clark* (1898) 147 Mo. 20, 47 S. W. 886.

¹¹ *Pennsylvania v. Honeyman* (1793, Pa.) Add. 147.

doctrine of "transferred intent." The intent to kill or injure another than the one assaulted is not the intent required by statute. The distinction in this respect between cases of murder and of statutory assaults has been well pointed out.¹²

Of course a statute may be so framed that the wounding of one person coupled with an intent to wound another constitutes the statutory offense.¹³ And it would seem the part of wise legislation so to phrase the statutes as to provide for such cases, for clearly the moral guilt of the assailant is as great when his blow accidentally falls upon a third party as when it reaches the intended victim. But usually the statutes are so worded that a conviction for assault with a specific intent against the injured person cannot be sustained where it appears that the assailant's blow was in fact intended for another.¹⁴ A few cases appear to be contrary to this view;¹⁵ but it is believed that the weight of authority as well as the better reasoning sustains the propositions asserted above. It should be noted also that even though the assailant cannot be convicted of the aggravated statutory assault upon the person injured he may be held guilty of a simple assault or battery,¹⁶ for these crimes do not require a specific intent with respect to the injured person.

T. W. S.

¹² *State v. Mulhall* (1906) 199 Mo. 202, 218, 97 S. W. 583, 587 and cases therein cited; cf. *State v. Gilman* and *Dunaway v. People*, *supra* note 8.

¹³ 24 & 25 Vict. (1861) c. 100, sec 18: "Whosoever shall unlawfully and maliciously by any means whatever wound . . . any person . . . with intent to maim, disfigure, or disable any person . . . shall be guilty of felony." It is stated in *Regina v. Latimer* (1886, Cr. Cas. Res.) 16 Cox C. C. 70, that this section was in substitution for and correction of the earlier statute of 9 Geo. IV c. 31, under which it was necessary that the intent should be an intent to injure the person actually injured. See *Re x v. Holt* (1836, N. P.) 7 Car. & P. 518. Mo. Rev. St. 1909, sec. 4483 accomplishes the same result.

In *State v. Thomas* (1910) 127 La. 576, 53 So. 868, 37 L. R. A. (n. s.) 172 a statute reading: "Whoever shall shoot any person with a dangerous weapon with intent to commit murder, shall etc." was construed as not requiring the intent to murder to have been directed against the person actually hit. See also *Wareham v. State* (1874) 25 Oh. St. 601. Perhaps *Dunaway v. People*, *supra* note 8, is also explainable on the ground of statutory construction.

¹⁴ A large number of authorities are collected in *State v. Mulhall*, *supra* note 12; see also *People v. Stoyan*, *supra* note 8.

¹⁵ See cases cited in note 8. In *Callahan v. State* (1871) 21 Oh. St. 306, 309, the court says: "Criminal intent may be properly asserted of an injury by malicious shooting . . . where a shot discharged at one injures another who is at the time known to be in such position or proximity that his injury may be reasonably apprehended as a probable consequence of the act; in which case the law does not permit such reckless disregard of, and indifference to, results to pass with impunity, but will hold the intent to have embraced the victim." Perhaps on the ground that injury to the person in fact injured was a probable consequence of shooting at the intended victim, these cases may be distinguished from cases where the injury to the third party is purely accidental.

¹⁶ *Regina v. Latimer* (1886, Cr. Cas. Res.) 16 Cox C. C. 70; *Simpson v. State* (1877) 59 Ala. 1, 9; *Cowley v. State* (1882, Tenn.) 10 Lea., 282.

Common scolds were indictable at common law¹ and when convicted, were properly ducked,² but the husband was denied the privilege of suing his louder half.³ In spite of recent married women's property acts, ostensibly giving a wife her antenuptial legal status,⁴ the courts are slow to allow either husband or wife to sue the other for torts.⁵ The supreme court of Minnesota has refused to enjoin a wife's nagging. *Drake v. Drake* (1920, Minn.) 177 N. W. 624. He could have sued her for a broken promise, but not for a broken ear drum.⁶ And the Weight of Authority sustains the decision.⁷ Nag on, Xanthippe.

What do we mean by "permanent," and how long is "forever"? If land is conveyed to a railroad company "in consideration of the permanent location of the depot" thereon, to be used "exclusively for a depot," with a street, "which is forever to remain open," does title revert to the grantor's heirs when the land is no longer used for a depot or a street 65 years later? In *Sheets v. Vandalia Ry.* (1920, Ind. App.) 127 N. E. 609, the court held that it does not. The court first held that the words created a condition and not a covenant; that is, that failure to use the land for a depot and street is a fact that operates as a condition subsequent to the vesting of title in the company and not merely as a breach of a legal duty. The occurrence of this fact, therefore, terminates the title of the grantee. The court then further held that this fact did not occur and that the provisions of the deed were substantially complied with. Thus it seems superficially that 65 years constitutes permanency in the case of a depot and "forever" in the case of a street. It may be admitted, however, that "permanent location of a depot" may mean the *location of a permanent depot* and that a "permanent depot" is any depot building firmly attached to the soil. On this theory a very few months' use of the land for depot purposes might satisfy the provisions of the deed.

¹ 4 Blackstone, *Commentaries*, 168.

² *Ibid.*

³ 1 Blackstone, *Commentaries*, 443. But see 8 Hooker, *Laws of Ecclesiastical Politie* (1676) 2, "The law appointeth no man to be an husband, but if a man hath betaken himself unto that condition, it giveth him then authority over his own wife."

⁴ Married Women's Act, Minn. Gen. St. 1913, sec. 7142; (1920) 29 YALE LAW JOURNAL, 454; *Prosser v. Prosser* (1920, S. C.) 102 S. E. 787.

⁵ (1918) 27 YALE LAW JOURNAL, 1081; *Heyman v. Heyman* (1917) 19 Ga. App. 634, 92 S. E. 25.

⁶ See *Brown v. Brown* (1914) 88 Conn. 42, 46, 89 Atl. 889, 891.

⁷ *Dishon's Adm'r. v. Dishon's Adm'r.* (1920, Ky.) 219 S. W. 794, has collection of authorities; *Keister's Adm'r. v. Keister's Ex'rs.* (1918) 123 Va. 157, 96 S. E. 315.