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CONSTITUTIONAL METHODS OF REGULATING JITNEYS

Not every business or profession is subject to general state regulation. In order to justify such legislation the health, safety, morals, or general welfare of the public must be involved.¹ Jitney transportation, by reason of the number and quality of the machines engaged therein and of the usual inexperience and financial irresponsibility of their operators, is a fit subject for the exercise of the police power in the protection of public safety.² The only question to be discussed is the extent and manner of regulation.³ The police power is of indefinite and ever increasing magnitude, but subject, nevertheless, to certain rules and limitations, varying according to the character of the matter involved. The cases are in apparent confusion and there is need for classification and analysis. Three general groups are possible, the first two of which are usually recognized.⁴ The third is apparently unappreciated as an additional classification, but it is submitted that it exists as a distinct group

¹ *Ex parte Hadacheck* (1913) 165 Calif. 416, 132 Pac. 584; (1918) 31 HARV. L. REV. 1034.

² *Public Service Commission v. Booth* (1915) 170 App. Div. 590, 156 N. Y. Supp. 140.

³ For notes collecting the cases see L. R. A. 1918 F, 475, note.

⁴ See Freund, *Police Power* (1904) secs. 643-644.

by reason of distinctions in the facts of the decisions and that recognition of it may prove helpful in the solution of a difficult problem.

The first group of cases includes those dealing with occupations affected with a public interest but not inherently harmful or dangerous. The regulation imposed upon such occupations must be reasonable and must tend to reach the result desired.⁵ The statute may merely prescribe a policy, appointing a commission to make proper rules and to administer them.⁶ But the statute cannot allow its whole operation,⁷ or the granting and refusal of a license,⁸ to depend upon the unregulated discretion of an administrative board. All proceedings before such a board must be strictly regular,⁹ a litigant being entitled in all cases to hear the evidence adduced against him.¹⁰

Quite different from the first group just discussed are those cases involving occupations inherently harmful, or dangerous, to the public if not properly conducted; in these no citizen is absolutely privileged to engage.¹¹ A license to maintain a saloon¹² or to sell milk¹³ may be granted and revoked in the discretion of an administrative board. And summary action may be taken if safety requires it, though at the peril of the board.¹⁴

These two classes are familiar enough. In addition, a third class exists, in which a private right is claimed in public property, as in a street or park. It has been customary to group such cases together with those in which the acts may be prohibited. But they may fairly and accurately be regarded as of a distinct type. To this type the jitney problem belongs. The privilege of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and

⁵ *State v. Porter* (1920) 94 Conn. 639, 110 Atl. 59; *Ingham v. Brooks* (1920) 95 Conn. 317, 111 Atl. 209; (1916) 16 COL. L. REV. 345; COMMENTS (1920) 30 YALE LAW JOURNAL, 171.

⁶ *Buttfield v. Stranahan* (1904) 192 U. S. 470, 24 Sup. Ct. 349; *Interstate Commerce Commission v. Goodrich Transit Co.* (1912) 224 U. S. 194, 32 Sup. Ct. 436; *State v. Atlantic Coast Line Ry.* (1908) 56 Fla. 617, 47 So. 969; Cheadle, *Delegation of Legislative Functions* (1918) 27 YALE LAW JOURNAL, 892.

⁷ *O'Neil v. Fire Insurance Co.* (1895) 166 Pa. 72, 30 Atl. 943; *Fite v. State* (1905) 114 Tenn. 646, 88 S. W. 941; *State v. Gt. Northern Ry.* (1907) 100 Minn. 445, 111 N. W. 289.

⁸ *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064; *Noble v. Douglas* (1921, W. D. Wash.) 274 Fed. 672.

⁹ *Blunt v. Shepardson* (1918) 286 Ill. 84, 121 N. E. 263; COMMENTS (1919) 28 YALE LAW JOURNAL, 692.

¹⁰ *Interstate Commerce Commission v. Louisville, etc. Ry.* (1913) 227 U. S. 88, 33 Sup. Ct. 185.

¹¹ See *State v. Conlon* (1895) 65 Conn. 478, 486, 33 Atl. 519, 521.

¹² *Wallace v. Reno* (1903) 27 Nev. 71, 73 Pac. 528.

¹³ *Lieberman v. Van De Carr* (1905) 199 U. S. 552, 26 Sup. Ct. 144; but see COMMENTS (1919) 28 YALE LAW JOURNAL, 391.

¹⁴ *Durand v. Dyson* (1915) 271 Ill. 382, 111 N. E. 143.

business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain. One is the usual and ordinary privilege of a citizen, while the other is special, unusual, and extraordinary. The extent of legislative power on the former is that of regulation, but the latter may be wholly denied.¹⁵ And since it may be wholly denied, it may be granted upon any conditions that the legislature deems proper, the reasonableness of the regulation being purely a legislative question.¹⁶

This power may be delegated to municipalities by charter or statute.¹⁷ To be valid, however, local regulations must be reasonable.¹⁸ It is another question when the legislature has vested the power to grant licenses for the use of public places in the discretion of an administrative commission. To require the latter to grant licenses to jitneys when, in their opinion, the public convenience and necessity require it, is not an unconstitutional delegation of power.¹⁹ The Supreme Court of the United States has held that the mayor of a city may be given absolute discretion in granting licenses to move buildings over the public streets,²⁰ and in granting licenses to speak on the public common.²¹ There are, however, cases which deny this discretionary power to an official.²² But these involve the right to use the street for parades, and not for business purposes, and they may be supported on the ground that the right of persons to assemble and parade is so well established historically that it can be regulated but not prohibited, or made dependent upon the will of any official.

The Connecticut jitney statute,²³ though vague and ungrammatical,²⁴

¹⁵ *Ex parte Dickey* (1915) 76 W. Va. 576, 85 S. E. 781; *Schoenfeld v. City of Seattle* (1920, W. D. Wash.) 265 Fed. 726.

¹⁶ *Hadfield v. Lundin* (1917) 98 Wash. 657, 168 Pac. 516; *Peters v. San Antonio* (1917, Tex. Civ. App.) 195 S. W. 989.

¹⁷ *City of Memphis v. State* (1915) 133 Tenn. 83, 179 S. W. 631; *Huston v. Des Moines* (1916) 176 Iowa, 455, 156 N. W. 883; *Cummins v. Jones* (1916) 79 Or. 276, 155 Pac. 171; *McGlothern v. City of Seattle* (1921, Wash.) 199 Pac. 457.

¹⁸ *Jitney Bus Association v. City of Wilkes-Barre* (1917) 256 Pa. 462, 100 Atl. 954; *Curry v. Osborne* (1918) 75 Fla. 85, 79 So. 293; *Parrish v. Richmond* (1916) 119 Va. 180, 89 S. E. 102.

¹⁹ See *Public Service Commission v. Booth*, *supra* note 2.

²⁰ *Wilson v. Eureka City* (1899) 173 U. S. 32, 19 Sup. Ct. 317 (briefly digesting many cases); but see *Cicero Lumber Co. v. Cicero* (1898) 176 Ill. 9, 51 N. E. 758.

²¹ *Davis v. Massachusetts* (1897) 167 U. S. 43, 17 Sup. Ct. 731; *contra*, *State v. Coleman* (1921, Conn.) 113 Atl. 385.

²² *Matter of Frazee* (1886) 63 Mich. 396, 30 N. W. 72; For other similar cases see Freund, *op. cit.* secs. 643-644.

²³ Pub. Acts, 1921, ch. 77.

²⁴ The words of the statute which are important in this connection are as follows: "Sec. 3. No person . . . shall operate a jitney until the owner thereof shall

has recently been held constitutional in the case of *Lane v. Whitaker* (1921, U. S. D. C. Conn.) 65 N. Y. L. JOUR. 149, the court construing it as requiring the Public Utilities Commission to hold hearings and to grant licenses if, and whenever, in their opinion, public convenience and necessity so require. This interpretation, while resting on inference only, is perhaps justified by the rule that a statute must be construed so as to be constitutional whenever it is possible to do so. It seems questionable whether by the wording of the statute this interpretation was actually justified, especially when it is considered that the provision for revocation seems not to require a hearing.²⁵ The Supreme Court of Connecticut has recently held, in *State v. Coleman*,²⁶ that an unregulated authority to grant licenses to speak in a public park may not be given to an administrative official. Under the authority of this case, if it be considered that an unguided discretion is vested in the commission either to grant or to revoke licenses, then this statute must be held unconstitutional. And federal courts should take into consideration the Connecticut authorities when passing on the constitutionality of a Connecticut statute. On the other hand, the doctrine of the Federal

have obtained a certificate from the Public Utilities Commission specifying the route and that the public convenience and necessity require its operation over such route. . . . Upon receipt of application said commission shall fix a time and place of hearing thereon and public hearing held thereon. (note that this clause has no grammatical connection with what precedes it). . . . The commission may amend or revoke any certificate." "Sec. 7. Any person aggrieved by any act or order of the commission may appeal to the Superior Court in the same manner and with the same effect" as is provided in Rev. Sts. 1918, sec. 3828.

²⁵ On this point, however, the section providing for an appeal may have a considerable bearing, for it seems probable that, in providing for an appeal, the legislature must have intended the commission to hold hearings. The court, in the instant case, seems to have considered this section as a general panacea. But it is submitted that, outside of its influence upon the interpretation of the statute, it has no effect whatever. While its words seem to indicate that the case, on appeal, shall be transferred bodily to the Superior Court, and the judge of that court vested with the same discretion as was given the Commission, still, its operation is otherwise, for it has been held that, where administrative questions are involved, the Superior Court may not try the question *de novo*, but must first be satisfied by the appellant that the commissioners acted irregularly. *Stevens v. Connecticut Co.* (1912) 86 Conn. 36, 84 Atl. 361. This is the rule even when no appeal is expressly given. The courts cannot review the discretion which has by law been vested in an administrative board. *State v. Board of Dental Examiners* (1905) 38 Wash. 325, 80 Pac. 544. But they can interfere if an application is arbitrarily rejected without reason given (*Ampere v. City of Kalamazoo* (1886) 59 Mich. 78, 26 N. W. 222); or if the discretion is clearly shown to have been abused. *Board of Dental Examiners v. People* (1887) 123 Ill. 227, 13 N. E. 201; *Thompson v. Koch* (1895) 98 Ky. 400, 33 S. W. 96. An express statutory declaration that the decisions of the board shall be final violates due process. *Chicago, M. & St. P. Ry. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 702.

²⁶ *Supra* note 21.

Supreme Court cases already referred to,²⁷ if carried to its logical conclusion, would sustain the statute. In connection with the *Coleman* case it will be noted that the authority upon which the court relied included only cases which belong to the group of ordinary enterprises mentioned above as class one and which, it is believed, therefore, were not controlling. While the case may appeal to one's sense of justice, nevertheless, it is submitted that this is a legislative, and not a judicial question, for there can be no property right in the use of a public place for private gain.²⁸

TARDY PRESENTATION OF CHECKS BY SENDING FROM PAYEE'S
BRANCH TO HEAD OFFICE

The present danger of bank failures should draw attention to an interesting variation of the "stale check rule" recently discussed in *Republic Metalware Co. v. Smith* (1920) 218 Ill. App. 130. Ordinarily, one receiving a check drawn on a bank in the same city, if he would preserve his rights against the drawer in case the bank fails, must present the check for payment not later than the following business day,¹ twenty-four hours being considered a reasonable time. But what constitutes a reasonable time when paper is originally sent to more distant points is less easy to settle and in consequence not so certainly established.²

²⁷ *Supra* notes 20 and 21.

²⁸ *LeBlanc v. City of New Orleans* (1915) 138 La. 243, 70 So. 212.

¹ *Grange v. Reigh* (1896) 93 Wis. 552, 67 N. W. 1130; *Gordon v. Levine* (1907) 194 Mass. 418, 80 N. E. 505. Few checks are now presented by the payee, but they are generally deposited in his own bank. And since the great bulk of city checks are collected through clearing houses, a method now legally recognized, one wonders whether a special rule of reasonableness should not be applied, allowing an extra day in the case where the payee, receiving a check too late to deposit it the same day, deposits it the next, and it is presented through the clearing house the day after. This is the rule of *Loux v. Fox* (1895) 171 Pa. 68, 33 Atl. 190; Cf. *contra*, *Edmisten v. Herpolsheimer* (1901) 66 Neb. 94, 92 N. W. 138, Sedgwick, J., dissenting in a vigorous opinion. See also *Willis v. Finley* (1896) 173 Pa. 28, 34 Atl. 213; *Dorchester v. Merchants Nat. Bk.* (1914) 106 Tex. 201, 163 S. W. 5; *Holmes v. Roe* (1886) 62 Mich. 199, 204, 28 N. W. 864, 866 (intimating that clearing house methods are without bearing on cases); *Alexander v. Burchfield* (1842, C. P.) 7 Man. & G. 1061, 1067 (no extra day for passing through bankers); *Zaloom v. Ganim* (1911, Sup. Ct.) 72 Misc. 36, 129 N. Y. Supp. 85, Delany, J., dissenting, affirmed without opinion (1911) 148 App. Div. 892, 132 N. Y. Supp. 1151. Why the court in the last case entered upon a learned historical discussion of clearing houses and their methods can only be imagined, for the evidence conclusively shows (case on appeal, folio 76) that the check did not go through the clearing house but was presented for payment over the counter by the old method employed before clearing houses were known.

² See Cent. Dig. tit. *Bills and Notes*, secs. 1095-1097. The "next day" rule applied to each step in the transaction is standard and seems to have general acceptance. See *First National Bank of Grafton v. Buckhamon Bank* (1895) 80 Md.

The instant case savors somewhat of both the local payment type and the distant remittance type. The plaintiff, a Buffalo manufacturing company, maintained a sales office in Chicago and from it sold goods to the defendant, who always remitted his check on his Chicago bankers to the local office, despite a printed request on each invoice, unnoticed by the defendant, to make payments direct to Buffalo headquarters. The plaintiff kept a Chicago bank account for local expenditures, in which also were deposited cash payments for merchandise sold by that office, but check payments, when sent contrary to request, like the defendant's, were forwarded instead to Buffalo headquarters and there deposited for collection. The defendant's check, in consequence of being so handled, was presented to the drawee bankers for payment after they had closed their doors, June 29, 1917. It is conceded that the check would have been presented in time and paid if collected through the plaintiff's depository. There is no question but that the plaintiff acted quickly in each step of the course it took,—forwarding, depositing, collecting—but the court held that the course of collection was not duly diligent. The drawer was discharged.³ Dispensing with collateral arguments that enter the decision, such for example, as the waiver by the plaintiff of its right to have payments made at Buffalo by its having received them at Chicago, and considering the case as if this had been the first remittance from the defendant to the plaintiff, the following propositions are clear: (1) if the defendant had himself sent his check to Buffalo he would have remained liable, because the collection from Buffalo was prompt and direct; (2) if, on the other hand, the plaintiff had been a Chicago concern which had for any cause chosen to collect through a Buffalo bank, the defendant would have been discharged upon the failure of his bankers, because routing checks to Buffalo would have been circuitous, and not reasonably diligent.⁴

475, 480, 31 Atl. 302, 303; *Dorchester v. Merchants' Nat. Bank of Houston* (1914) 106 Tex. 201, 209, 163 S. W. 5, 8; *Plover Savings Bank v. Moodie* (1906) 135 Iowa, 685, 687, 110 N. W. 29, 30. The last case, however, countenances the circulation of checks. The "next day" rule should be straightened in one place. It seems only right to demand that banks intermediate in the chain of collection—that is, those which must send the check on by mail to another place—should mail the paper on the day it is received, unless after the close of regular banking hours. See *Givan v. Bank of Alexandria* (1898, Tenn. Ch. App.) 52 S. W. 923. Many of the great collecting banks have, as a matter of practice, done even better than this by the maintenance of sleepless transit departments. Certainly the reasoning advanced by Story, J., for the "next day" rule in the matter of giving notice of dishonor—that one "is not compellable to lay aside all other business" in order to give such notice the same day (quoted in the *Hubbard Case*, *infra*, note 4), is equal ground for a "next day" rule in collections—has no application to banks whose very business that is.

³ To the extent of his loss. See note 8, *infra*.

⁴ On sending a check away from, or across, the place of payment instead of toward or to it, see *Gifford v. Hardell* (1894) 88 Wis. 538, 60 N. W. 1964. So too,

The case introduces, however, the additional factor of branch offices and agencies and the question is really whether the time consumed by a branch office or agent in forwarding customers' checks to the head office is to be added in the calculation of the reasonable time for presentment.

Cases on this point are neither numerous, harmonious, nor helpful. In one old English case,⁵ where a cotton buyer, as agent of a seller, had gone to the house of a salesman and had there paid an account by check on Liverpool (probably to the order of the sellers), it was held that the time for the salesman to deliver the check to his principals, the sellers, was a part of the reasonable time to transpire before presentation. But this established no general rule, for, as the court said, "It is clear that the defendant never intended that Kershaw (the salesman) should do more than take it to his master on the following morning." The payment was as if made the next day to the principals. Two early American cases⁶ add little, for in each the check was drawn to the order of the agent.

sending a check for deposit to the opposite side of the same city has been considered laches,—a sound enough view as to outlying banks, not members of the clearing house, but miles apart and standing to each other as distant points despite their inclusion within the corporate limits of one municipality. *Nat. Plumbing & Heating Co. v. Stevenson* (1918) 213 Ill. App. 49. Collections must not be unduly circuitous, but they need not be literally "direct," as confusedly intimated in some cases. The true rule is instantly grasped from the remark of Dibell, J., in *Sublette Exch. Bank v. Fitzgerald* (1912) 168 Ill. App. 240, 242: "By requiring that the check be forwarded directly to the bank upon which it is drawn, the rule above stated does not mean that it shall be sent in a direct line as a bird might fly, but by the usual commercial route. . . ." This permits a certain amount of evidence as to the custom of banks in collecting items (see *Watt v. Gans* (1896) 114 Ala. 264, 271, 21 So. 1011, 1013) of which, in a general way, depositors must be expected to know. See *Lewis, Hubbard & Co. v. Montgomery Supply Co.* (1906) 59 W. Va. 75, 88, 52 S. E. 1017, 1022. Collections between small places pass through key cities—collection centers. This custom could be shown as indicating what was *commercially* direct. Of course the absurd routes followed by some checks to avoid exchange charges could not be justified on the ground that such routing was customary,—which it certainly has been. The national clearing houses, such as those of Boston and St. Louis, and of late the Federal Reserve System, diminish this practice, so that the point becomes constantly less important, and it may be that as the Federal Reserve collection system sweeps in all the banks, its routing will be "presumed" free from unreasonable circuitry.

⁵ *Firth v. Brooks* (1861, Q. B.) 4 L. T. R. 467, 468.

⁶ *Hazelton v. Colburn* (1863) 24 N. Y. Super. Ct. 345; *Nat. Newark Banking Co. v. Ind. Nat. Bank of Erie* (1869) 63 Pa. 404. The cases are otherwise distinguishable; that in Pennsylvania concerned a bank draft, as to which "the rule of diligence is much more liberal." Campbell, J., in *Nutting v. Burked* (1882) 48 Mich. 241, 245. In the New York case the court said: "The circumstance that the payees of the check were the agents of the plaintiffs, did not authorize them to withhold the presentment" (p. 349). If this is so, what of attorneys who receive checks to their own order and forward them endorsed to their clients?

A later case⁷ involved a state of facts similar in many ways to those of the principal case. The branch office to which the check was sent was in New York City, and the head office to which it was forwarded was in Germantown, Pennsylvania. The check was presented for payment to the New York bankers, on whom it was drawn, without delay except that involved in the Pennsylvania detour, and payment was refused. The court, by dictum,⁸ characterized the transaction as duly diligent, but no reasoning appears. It may well be doubted whether, if the head office had been a far distant point (such as San Francisco) instead of one nearby, such a rule would have been laid down.

Two other cases⁹ have recognized the time involved for a collecting agent to place the customer's check in the hands of the principal as a proper part of the period of diligent collection. But in each case payment was made to a travelling representative, who can hardly be placed in the same legal category as a branch office so far as the reasonably assumed power of collecting the company's paper is concerned.¹⁰ They may then be classed with the English case first cited.¹¹

There remains one other case¹² which the instant court considers and distinguishes. The major difference seems to be that the local "office" was nothing but a local warehouse from which deliveries were made. The conclusion reached, that forwarding checks from branch to headquarters constitutes sufficient diligence, is contrary to that of the principal case and can probably be best explained and differentiated by emphasizing the unauthoritative character of the local office. Certainly the reasons given, that the remitter knew he was dealing with a foreign corporation¹³ and also knew how long checks sent to headquarters

⁷ *Allen v. Kramer* (1878) 2 Ill. App. 205.

⁸ Dictum only, because the check actually reached the drawee New York bankers before they failed and payment was refused because of doubt as to the drawer's signature,—a reason for non-payment which would have been the same had the check not gone to Pennsylvania. The negligence of the payee, if any there was, did not occasion the drawer's loss, essential to the drawer's discharge. Norton, *Bills & Notes* (4th ed. 1914) 577; *Daniels v. Kyle* (1846) 1 Ga. 304.

⁹ *Rosenthal v. Ehrlicher* (1893) 154 Pa. 396, 26 Atl. 435; *Lewis Hubbard & Co. v. Montgomery*, *supra* note 4.

¹⁰ See, however, on the occasional power given collectors of going to the drawee banks themselves and receiving cash or bank drafts in exchange for customers' checks, *Swift & Co. v. Miller* (1916) 62 Ind. App. 312, 113 N. E. 447; *Rosenthal v. Ehrlicher*, *supra* note 9.

¹¹ See note 5 *supra*.

¹² *Balkwill v. Bridgeport Wood Finishing Co.* (1895) 62 Ill. App. 663.

¹³ The weakness of this as a controlling element is evident when the present fashion of incorporating in states far from the real headquarters of the company is considered. Furthermore, even if the corporation was "foreign" also as to its real business location, there is nothing to prevent its branches being vested with power to receive and deal with payments. It is in fact a matter of common knowledge that they do so.

took for collection,¹⁴ are neither convincing nor satisfactory. The usual transaction starts and finishes with the local office, whether the customer is observant and knows there is a main office somewhere else, or whether he is unobservant and fails to appreciate that fact. Although arbitrary or mechanical rules of reasonableness are undesirable in such cases,¹⁵ the result reached in the principal case seems sound. In the absence of strong evidence to warrant another conclusion, when an office, whether known as a branch or not, is vested with general selling authority and has the apparent power to make collections, it may be expected by persons dealing with it to have proper collecting facilities which will be utilized for the expeditious presentation of paper drawn in its sales territory. Before regarding the rule as soundly established, however, the actual business purpose of the "send-checks-to-headquarters" practice should be considered. Such legal questions cannot be answered satisfactorily without a consideration of the business reasons underlying the practice. It is a device to prevent losses from the juggling of large local sales revenues by dishonest local sales managers.¹⁶ But while thus preventing one loss, it makes possible another when bank failures occur. Perhaps bank failures are less common, however, than sales managers who play the races, the wheat pit, or the stock market. A possible solution is to place the responsibility upon the bank carrying the local sales deposits by limiting the checking privileges of the local sales manager. Between the drawer and the selling house, any risk incident to protecting the latter from the possible crime of its agent belongs to the party protected.

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RENOI IN DIVORCE PROCEEDINGS BASED UPON CONSTRUCTIVE
SERVICE

That the "renvoi doctrine" furnishes no proper basis for the solution of the problems in the conflict of laws in general admits of little doubt.¹ As the term is generally understood, it means that when a

¹⁴ Whether this information was thought to have been gained from an examination of the endorsements on his cancelled checks previously paid to the same company does not appear. The principal case correctly declares that there is no duty on the part of a drawer of checks to make such an examination.

¹⁵ Many cases, including the principal case, take the precaution to state that they are decided on all the facts. Note the language of the trial Judge quoted in the *Newark Case*, *supra* note 6.

¹⁶ See *First Nat. Bank of Phila. v. Farrell* (1921, W. D. Pa.) 272 Fed. 371.

¹ Pollock, *The Renvoi in New York* (1920) 36 L. QUART. REV. 92; Baty, *Polarized Law* (1914) 117; Lorenzen, *The Renvoi Theory and the Application of Foreign Law* (1910) 10 COL. L. REV. 190, 327; *The Renvoi Doctrine in the Conflict of Laws* (1918) 27 YALE LAW JOURNAL, 509.

court is to apply the law of some other state or country, it must consult not only the particular provisions relating to the matter in issue, but also the rules of the conflict of laws governing in that state or country. For example, if the question relates to the distribution of personal property upon death, the acceptance of the "renvoi doctrine" signifies that the property will not necessarily be distributed according to the statute of distributions of the state or country in which the decedent was domiciled at the time of his death, for if his domicile was in a state or country in which the rule of the *lex patriae* has been substituted for that of the *lex domicilii*, the rights of the parties would be determined by the statute of distributions of the decedent's national law. Again, if the law of the forum provides that capacity to enter into a commercial contract shall be controlled by the law of the place of contracting and the conflict of laws of the *lex loci* should prescribe the *lex domicilii* or the *lex patriae*, the validity of the contract would be governed by the local rules relating to capacity existing in the state in which the party in question had his domicile or to which he belonged by nationality. If the law of the forum says that the validity of a contract, apart from capacity and formalities, is to be subject to the law of the place of performance and the rule of the conflict of laws of the state or country in which the performance is to take place says that the law of the place of contracting controls, the validity or invalidity of the contract would depend upon the law of contracts of the place where the contract was entered into.

Illustrations of the same problem could easily be multiplied in view of the fact that the rules of the conflict of laws of the various countries differ as regards most questions that may arise in this branch of the law. It must suffice here to call attention to the fact that the "renvoi doctrine" effects in every instance a substitution of the foreign rule of the conflict of laws for that prescribed in the first place by the law of the forum.² A mere statement of the operation of the "renvoi doctrine" should be sufficient to condemn it. The policy which guides our courts when they apply the law of domicile, the law of the contract, or any other rule of the conflict of laws, must manifestly be determined by our own law and cannot reasonably be left to the judgment of a foreign legislator.³ This has also been the conclusion of the only decision, by an English or American court, in which the problem of *renvoi* was clearly presented.⁴ It would be well for the future develop-

² "For a court to hold that the legislature meant that the French conflict of laws rule is to apply and New York internal law to be enforced is to abrogate this provision of the statute, or to amend it by substituting therefor the French rule, namely, that the law of the nationality is to govern." *In re Tallmadge* (1919) 62 N. Y. L. JOUR. 216; COMMENTS (1919) 29 YALE LAW JOURNAL, 214.

³ Baty, *op. cit.* 117; Lorenzen, *op. cit.* 27 YALE LAW JOURNAL, 509, 519-520.

⁴ *In re Tallmadge*, *supra* note 2; COMMENTS (1919) 29 YALE LAW JOURNAL,

ment of our rules of the conflict of laws if every court in this country would subscribe to the following words, pronounced by the learned Referee in the case referred to:⁵

"On account of its inconsistency with common-law theories of the conflict of laws, its fundamental unsoundness and the chaos which would result from its application to the conflicts arising between the laws of the states of this country it is my opinion that the 'renvoi' has no place in our jurisprudence."

Of course it does not follow that some exceptions may not have to be recognized to the fundamental doctrine that the rules of the conflict of laws call for the application of the foreign *local* law, to the exclusion of its rules of the conflict of laws. In some instances a desirable result may be attained by referring to the foreign law inclusive of its rules of the conflict of laws. A clear case is presented, for example, in the matter of the execution of a deed. Suppose that a deed is executed and acknowledged in the style customary at the place of execution, that it does not satisfy the formal requirements for deeds executed in the state in which the property is situated, but that the law of the latter state authorizes deeds to be executed in the mode prescribed by the law of the place of execution. Such a deed must certainly be regarded as valid everywhere, even apart from constitutional requirements, and yet this cannot be done without giving effect to a rule of the conflict of laws of the situs.⁶

A recent case, *Ball v. Cross* (1921) 231 N. Y. 329, 132 N. E. 106, decided by the Court of Appeals of New York, has raised the question whether the "renvoi doctrine" should be recognized, by way of exception, with regard to divorce also. Suppose that A and B are domiciled in the State of X, that A leaves his wife and procures a divorce from B in the state of Y upon constructive service, and that B thereafter marries, in the state of Z, a citizen of New York, C. Can C have the marriage annulled in New York on the ground that B was never properly divorced from her first husband? Let us assume for the pur-

214. The *renvoi* doctrine was argued also before Mr. Justice Farwell in the case of *In re Johnson* [1903] 1 Ch. 821, but it was not squarely presented, as it was to no one's interest to contend that the local law of Baden should govern as the *lex domicilii*, and it is not possible to say, therefore, what conclusion Mr. Justice Farwell would otherwise have arrived at. See NOTES (1903) 19 L. QUART. REV. 245; Pollock, *op. cit.* 36 L. QUART. REV. 92.

⁵ *In re Tallmadge*, *supra* note 2.

⁶ The rule of the situs that a deed may be executed in the form prescribed by the local law of the place of execution is clearly a rule of the conflict of laws, for it gives only a general reference to the law of another state and does not prescribe the exact mode of execution. If it had provided that all deeds relating to domestic land executed without the state must satisfy a certain definite form prescribed by it the provision would have been an internal one and not a rule of the conflict of laws.

pose of our discussion that the New York courts have jurisdiction to annul the marriage.⁷ Will the New York courts recognize that the divorce decree of the State of Y was operative in New York with respect to B? If B had been a citizen of New York at the time of the divorce proceedings, the established policy of New York, based upon a desire "to promote the permanency of marriage contracts and the morality of the citizens of the state,"⁸ would have been opposed to the recognition of the decree.⁹ What attitude should be taken, however, where B was, at the time of the divorce, a citizen of another state? Two ways were open before the court. It could say that the policy of New York with reference to the non-recognition of a divorce upon constructive service, pronounced by a court other than that of the matrimonial domicil,¹⁰ was limited to New York citizens and that such a decree would be recognized with respect to citizens of another state. In so doing effect might be given to the foreign decree of divorce when it would have none in the state in which the party was domiciled. Or it could hold, as it did in the instant case, that the validity or invalidity of the decree with reference to B should be left to the determination of the state of which B was a citizen at the time of the divorce proceedings. The latter course involves an acceptance of *renvoi*, for it adopts the policy of the *lex domicilii et patriae* in the matter of the conflict of laws as regards the recognition or non-recognition of a foreign decree of divorce based upon constructive service.

The advantage of the position taken by the New York Court of Appeals is that if all courts follow its example, foreign decrees of divorce rendered upon constructive service would have, with respect to the party so served, the same effect in all jurisdictions, a result which in the actual state of the law cannot be attained if the law of the forum decides its own policy without regard to the policy of the state of which the party in question was a citizen. The recognition of *renvoi* in this class of cases may bring with it, however, considerable inconvenience where the parties are foreigners. If the national law of the party served constructively is to determine the validity of the divorce with respect to such party, our courts will frequently be called upon to apply the rules of the conflict of laws applicable to foreign divorce proceedings obtaining in foreign countries, a task beset with no little difficulty.¹¹ The embarrassment so caused may be reduced, however, to

⁷ See Goodrich, *Jurisdiction to Annul a Marriage* (1919) 32 HARV. L. REV. 806.

⁸ *Hubbard v. Hubbard* (1920) 228 N. Y. 81, 126 N. E. 919.

⁹ *People v. Baker* (1879) 76 N. Y. 78; *Olmsted v. Olmsted* (1908) 190 N. Y. 458, 83 N. E. 569.

¹⁰ A decree pronounced upon constructive service by the courts of the matrimonial domicil must be recognized by all other courts under the "full faith and credit" clause of the Federal Constitution. *Atherton v. Atherton* (1901) 181 U. S. 155, 21 Sup. Ct. 544; *Thompson v. Thompson* (1913) 226 U. S. 551, 33 Sup. Ct. 129.

¹¹ For the rules of the conflict of laws governing the recognition of foreign

a considerable extent, if the criterion of domicile is substituted for that of nationality in this class of cases, as well it might be, for the policy of a state in the matter of divorce extends equally to all persons domiciled within the state, irrespective of citizenship. As the number of cases in our courts in which the defendant in a divorce proceeding is domiciled in a foreign country must be relatively few, the inconvenience that may arise from the application of the law of the domicile, inclusive of its rules of the conflict of laws, would appear to be negligible.

E. G. L.

TITLE BY INNOCENT MISTAKEN OCCUPATION

If a man occupies land to a certain boundary, mistakenly thinking that all the land is his when in fact part of it is an extension beyond his true line, and if he so occupies the extension for more than the period prescribed in the statute of limitations, does he gain title thereto by adverse possession? There is some real and much apparent conflict in the answer to this question by American state courts.

Take a case of such occupation arising from pure, unsuspected mistake, unaccompanied by any doubt in the occupier's mind that the boundary to which he occupies is in fact the true boundary.¹ It is evident that in such circumstances the intention and claim of the possessor to the strip of land beyond the true boundary are precisely those with respect to all the rest of the land, which is truly his. This conclusion as to the nature of his intent and claim follows from the fact that he is holding to the boundary as the result of unsuspected mistake. For how can it be said that one who is occupying land under the impression that it is his own occupies it with a frame of mind different from that of an owner? If an owner's possession of his own land is hostile to all the world, in the sense that it is unaccompanied by any recognition of right in others,² it surely follows that the possession of a man who

divorce in France, Germany, and Italy, see Lorenzen, *Cases on the Conflict of Laws* (1909) 564, 565.

¹ *Hopkins v. Duggar* (1920) 204 Ala. 626, 87 So. 103.

² In Tiffany, *Real Property* (1920 ed.) the author identifies hostility of possession with claim of title. He says at p. 1936: "It has been asserted, by perhaps most of the courts in this country, that, in order that the statute of limitations may run in favor of one in possession of land, the possession must be under claim of right or title. There would seem reason to doubt, however, whether in asserting this requirement, the courts ordinarily have in mind anything more than a restatement of the requirement of hostility of possession." As to what constitutes hostility, the same author says, at p. 1931, that a possession is hostile to a true owner, "when it is unaccompanied by any recognition, expressed or inferable from circumstances, of the right in the latter. It does not involve the necessity of an express denial of the title of the true owner, and, it is evident, in the majority of cases there is no such denial."

thinks he is owner is in fact also hostile, to the same degree and for the same reasons, as in the case of a true title holder. The rightful owner of land can subjectively do no more than think of himself as such and intend to claim and occupy as such; and the innocent mistaken occupier, by virtue of his mistake, has just the same frame of mind. In such a case it would seem fitting to say that the latter occupier's claim was hostile to the rest of the world, including the rightful owner, in such a way as to make his possession adverse.³

It may be objected that there is no intention on the part of the occupier to make a claim hostile to the rightful owner. This is true in the sense that there is no such intention with respect to a *known or suspected* rightful owner,—the mere fact that the occupation is by pure mistake precluding any possibility of there being a possession hostile to such a consciously considered individual. But there is a conscious claim hostile to the whole world including the rightful owner,—in his capacity as a member of the general community. Should the sole fact that the true owner is unrecognized as such and his existence unsuspected be reason for saying that the occupation is not hostile to him? The better answer seems to be that the possession is hostile to the true owner,⁴ in quite the same sense that it is hostile to all others,—no more, no less. It follows that an oral claim—as distinct from an assertion by acts—of exclusive dominion over the strip beyond the true boundary should not be essential to establish a hostile possession⁵; one does not expect such an oral claim from a rightful owner of land; neither should it be expected from one who by mistake holds land with precisely the same frame of mind as that of a rightful owner.

Nevertheless some courts answer the question by saying that the possession is not sufficiently hostile to the true owner to make the possession adverse.⁶ In the recent case of *Kinne v. Waggoner* (1921,

³ *Moir v. Bailey* (1920) 146 Ark. 347, 225 S. W. 618; *Hopkins v. Duggar*, *supra* note 1; *Carpenter v. Rose* (1920) 186 Ky. 686, 217 S. W. 1009; *Anderson v. Richards* (1921, Or.) 198 Pac. 570. The last case specifically lays down the rule for cases of mistake; though it does not certainly appear upon the facts as reported that there was necessarily a mistake in the case at bar. The rule may be only dictum here, though it is unquestionably the rule of the state. *French v. Pearce* (1831) 8 Conn. 439, is a leading case in support of this view.

⁴ *Alverson v. Hooper* (1919) 108 Wash. 510, 185 Pac. 808; *Heinrichs v. Polking* (1919) 185 Ky. 433, 215 S. W. 179. In this case evidence of agreement might perhaps have been found; but, as it stands on the language of the court, it is a square decision upon the point under inquiry. *Pfeifer v. Scottsbluff Mortgage Loan Co.* (1921, Neb.) 181 N. W. 533. See also *Blackburn v. Coffee* (1920) 142 Ark. 426, 218 S. W. 836. In this case there may have been doubt in the parties' minds as to the line; and consequently not a pure mistake of boundary.

⁵ *Cassidy v. Lenahan* (1920) 294 Ill. 503, 128 N. E. 544.

⁶ *Kinne v. Waggoner* (1921, Kan.) 197 Pac. 195. There is a good collection of cases on this point—and others—in the note to *Edwards v. Fleming* (1911) 83 Kan. 653, 112 Pac. 836, in 33 L. R. A. (n. s.) 923 *et seq.*; cf. *Long v. Myers*

Kan.) 197 Pac. 195, the defendants had for more than forty years notoriously occupied to a fence which both they and the plaintiffs had mistakenly believed to coincide with the true boundary. The court held that since the original location of the fence was by mistake, there was no basis for adverse possession, saying that the intention to claim and hold adversely was wanting.⁷ But might it not be better to say that although it was wanting against a consciously recognized owner, it was present against that owner as an unknown, unisolated member of the general community?

It would seem reasonable in cases of mistaken boundary, as in other cases of possession of real property induced by mistake, to give more weight to the actual possession by the occupier than to the mistake that was its cause. No one would maintain that because one occupied land under a deed which was mistakenly believed to be valid, the occupation was therefore not hostile to the rightful owner.⁸ There is only a superficial distinction between such a case and that of occupation under a mistake as to the boundary. In both cases the occupation is innocent; in both the occupier has acted upon an unsuspected error of fact; in

(1921, Kan.) 198 Pac. 934. *Bradstreet v. Winter* (1920) 119 Me. 30, 109 Atl. 482 looks like a decision on the point under inquiry, though it may have been decided on the ground that possession for the entire statutory period was not sufficiently notorious. *Phelps v. Brevoort* (1919) 207 Mich. 429, 174 N. W. 281 is an interesting case. The defendant's grantor in 1897 sold part of his tract of land, lot 1, retaining the remainder, lot 2. This sale was made to the plaintiff's predecessors in title. In 1898 one H, holding lot 2 under the defendant's grantor, built a fence several feet over upon plaintiff's lot 1, being in error as to the true line. In 1900 defendant's grantor leased lot 2 to S, describing it and lot 1 correctly, as to their true bounds. The fence then existed, however, and all parties, from 1898 on, looked upon its location as the true line. It was held that since the defendant's grantor in occupying the strip did not do so under any specific, definite agreement with the neighboring owners, and *since there was never doubt or controversy as to the true line*, but merely mistake, the defendant, who had been benefited by the erroneous location of the dividing line—and here all parties were in pure error—might not profit permanently by the mistake, and had no title by adverse possession. It will be observed that the court made no point, as did the trial court, of the fact that the defendant's predecessor was the grantor of the land that he subsequently occupied adversely. This case, both on the facts and decision, is squarely opposed to *Moir v. Bailey*, *supra* note 3, where the adverse occupier was a grantor by deed of the land he continued to occupy.

⁷ The court points out that the defendants might have gained title had they and the plaintiffs agreed, *regardless* of the true boundary line, to treat the fence as the boundary. But where both parties were *mistaken* as to the true line, rather than *regardless* of it, both believing the fence to coincide with it, title by adverse possession was not acquired.

⁸ 2 Tiffany, *op. cit.* 1949; "In no case except in that of a mistake as to boundary has the element of mistake been regarded as of any significance, and there is no reason for attributing greater weight thereto when the mistake is as to the proper location of a boundary than when it is a mistake as to the title to all the land wrongfully possessed."

both there is the same notice of disseisin. Further, it is generally admitted that the statutes of limitation perfect a defective title in one who with knowledge, or at least with suspicion, of his own wrong has occupied another's land to a definite boundary for more than the statutory period.⁹ It is then just that such statutes should be considered equally to perfect the defective title in one who innocently occupies another's land. In either case there is the same hostility to the world at large. Why should the innocent occupant of another's land be regarded with less favor than a conscious wrongdoer?

DAMAGES IN FOREIGN CURRENCY

In times of depreciated and fluctuating currencies the determination of the date governing the rate of exchange becomes important whenever damages are assessed in a foreign currency. In any case where one or more of the operative facts occurred without the territorial limits of the forum, many questions may arise as to the legal consequences to be attached to those facts by the law of the forum.¹ But assuming that damages have been properly assessed, what is the date upon which the rate of exchange shall be taken for the purpose of computing the damages in the currency of the forum?² A classification of the cases with reference to their operative facts may aid in the solution of this rather novel and perplexing problem.

The question arose from a tort action in the recent case of *Owners of S. S. Celia v. Owners of S. S. Volturno* (1921, H. L.) 37 T. L. R. 969. Due to the defendant's negligence, a collision occurred in which the plaintiff's ship was damaged. The collision occurred on December 17, 1917; the ship was detained for temporary repairs at Gibraltar from December 25, to December 30, 1917, and for permanent repairs at Newport News from January 24 to February 18, 1918. A part of the plaintiff's loss was due to the fact that the vessel was at all of these dates under hire to the Italian Ministry of Marine, and the plaintiffs received no pay therefor during the periods of detention for repairs. The damages were assessed in Italian lire and, for the purpose of entering judgment in English currency, it was held that they should be converted at

⁹ *Ibid.* 1940. Tiffany, in discussing the question of necessity of claim of title so that the statute may run, refers to ". . . the general acceptance of the view that, in the absence of an express statutory requirement to that effect, the statute will run regardless of whether the wrongful possession was taken under a *bona fide* claim of right." An interesting case in point is *Virginia Midland Ry. v. Barbour* (1899) 97 Va. 118, 33 S. E. 554.

¹ On theory the forum has the power to attach any legal consequences it sees fit. See Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 Col. L. Rev. 268-280.

² "The court has only jurisdiction to award damages in English money" *Di Ferdinando v. Simon, Smits & Co.* [1920, C. A.] 3 K. B. 409, 412; see *Marburg v. Marburg* (1866) 26 Md. 8, 21.

the rate prevailing at "the time when the actual loss for each detention was incurred."³ While the majority opinion suggests that, in cases of contract or tort, the rate of exchange decided upon should be the rate at the time of loss by "breach or in consequence of the wrong,"⁴ the general discussion, and most of the cases cited as controlling, point to the date of breach of duty as the proper date. But if this date is meant, the instant case is inconsistent, for the collision—and hence the defendant's breach of duty—occurred sometime before the periods of detention. If the periods of detention are meant as the only possible date, then what disposition should be made of cases where there is either no detention or where the detention extends over a long period of time, during which the rate fluctuates?

Another class of cases in which the problem arises is where the damages allowed for the dishonor of negotiable paper are assessed in a foreign currency. The early cases are not in agreement.⁵ The current decisions generally hold that the owner of a dishonored bill is entitled, besides interest and charges, to an amount in the currency of the forum which will purchase a good bill drawn in the foreign currency at the rate of exchange prevailing on the date of dishonor,—denominated "re-exchange."⁶ There may be situations, however,

³ Few cases have arisen in tort where the damages are assessed in a foreign currency. In *The Verdi* (1920, S. D. N. Y.) 268 Fed. 908, the plaintiff's vessel was injured in New York Harbor in September, 1915. Permanent repairs were made in England and paid for in January, 1916. Held, that the latter date was the proper one for computing the rate of exchange. This is a somewhat different date from that laid down in the principal case. Cf. *The Hurona* (1920, S. D. N. Y.) 268 Fed. 910, where the same judge held, in an action to recover a loan, that the rate existing at the date of judgment was the proper one.

⁴ See instant case at page 970. The dissenting judge (Lord Carson) argues for the date of judgment as proper. *Ibid.* 972. The lira having fallen so much in value, manifestly, if the rate be computed as of this date, the plaintiff would not be adequately compensated; for the theory of damages is that the plaintiff should, so far as money can do so, be placed as nearly as possible in the same position that he would have been in had the defendant not failed to perform his duty. See Sedgwick, *Damages* (2d ed. 1909) 15; Roscoe, *Damages in Maritime Collisions* (1909) 4; *Wertheim v. Chicoutimi Pulp Co.* [1911, P. C.] A. C. 301, 307.

⁵ In New York the plaintiff was formerly allowed, according to a custom of merchants, to recover the face of a bill at the rate prevailing at the time of dishonor, together with twenty per cent damages and interest. *Graves v. Dash* (1814, N. Y. Sup. Ct.) 12 John. 17. In Massachusetts he was allowed ten per cent. *Grimshaw v. Bender* (1809) 6 Mass. 157; cf. the recent case of *Amer. Express Co. v. Cosmopolitan Trust Co.* (1921, Mass.) 132 N. E. 26; see 2 Daniel, *Negotiable Instruments* (6th ed. 1913) sec. 1438; in *Taan v. LeGaux* (1793, Pa.) 1 Yeates, 204, the rate existing at the time of judgment was held proper.

⁶ *Simonoff v. Granite City Nat. Bank* (1917) 279 Ill. 248, 116 N. E. 636; *Pavenstedt v. New York Life Ins. Co.* (1911) 203 N. Y. 91, 96 N. E. 104; *Gross v. Mendel* (1916) 171 App. Div. 237, 157 N. Y. Supp. 357; *Suse v.*

where subsequent to the date of dishonor the exchange has gone against the plaintiff and he thereby suffers loss.⁷

A third situation is where the duty violated by the defendant does not arise out of contract or tort.⁸ In practically all cases of this kind the date when the defendant should have performed is considered the proper one for taking the rate of exchange. In most of them, too, the rate is favorable to the plaintiff; and one might well inquire whether the courts would stand by the rule if the converse of this were true.⁹

When the defendant has broken his contract (negotiable paper not being involved) and the damages are assessed in a foreign currency, the authorities are not in accord. Some apply the date of breach,¹⁰ others the date of judgment,¹¹ a few the date of trial.¹² If any of these dates is considered as the only possible one, it is easy to think of situations in which the plaintiff would be put either in a much better position than he would have been in had the contract been performed, or else in a much worse position. There is a seeming injustice in either of these results.

It is interesting to note, however, that, in most of the cases in these four classes, the courts seem to have attempted—perhaps unconsciously—to apply a date for taking the rate of exchange which would be favorable to the plaintiff.

It seems impossible, therefore, to fix a date for ascertaining the

Pompe (1860, C. P.) 8 C. B. 538; see 2 Daniel, *op. cit.* sec. 1445; 2 Sedgwick, *Damages* (9th ed. 1912) sec. 700; see Fraenkel, *Some Aspects of the Law Relating to Foreign Exchange* (1920) 20 COL. L. REV. 832, 836; *ibid.* 922; *contra*, *Cohn v. Boulken* (1920, K. B.) 36 T. L. R. 767 (the date of trial was held the proper date).

⁷ "It might not be unreasonable to allow the plaintiff to recover on the rate most favorable to him within a reasonable time after the default, . . . for he might have had to borrow or draw re-exchange to cover his necessities at any time within that period." (1916) 28 HARV. L. REV. 873.

⁸ *Cockerell v. Barber* (1810, Ch.) 16 Ves. 461 (legacy payable in Indian rupees); *Scott v. Bevan* (1831, K. B.) 2 Barn. & Ad. 78 (foreign judgment); *Manners v. Pearson* [1898] 1 Ch. 581 (account for money due under contract with plaintiff's testator; the court disregarded the contract and treated the case as one of ordinary account); *Sheehan v. Dalrymple* (1869) 19 Mich. 239 (contribution between tenants in common). See also *Wormser Bros. v. Marroquin & Co.* (1918, C. C. A. 5th) 249 Fed. 428, 430.

⁹ See (1921) 19 MICH. L. REV. 652, 654.

¹⁰ *Lebeauvin v. Crispin & Co.* [1920] 2 K. B. 714; *Barry v. Van Den Hurk* [1920] 2 K. B. 709; *Di Ferdinando v. Simon & Co.*, *supra* note 2; NOTES (1921) 34 HARV. L. REV. 422; (1920) 20 COL. L. REV. 914; (1921) 5 MINN. L. REV. 146; Cf. *Katcher v. Amer. Express Co.* (1920) 94 N. J. L. 165, 109 Atl. 741.

¹¹ *Kirsh v. Allen* (1919, K. B.) 36 T. L. R. 59, overruled in *Di Ferdinando v. Simon & Co.* [1920] 2 K. B. 704; *ibid.* [1920, C. A.] 3 K. B. 409; *Hawes v. Woolcock* (1870) 26 Wis. 629; *Marburg v. Marburg*, *supra* note 2; *The Hurona*, *supra* note 3.

¹² *Smith v. Shaw* (1808, C. C.) 2 Wash. 167; *Comstock v. Smith* (1870) 20 Mich. 338.

amount of the judgment in foreign currency which will always be conclusive. As between the date of breach and the date of judgment, the former seems clearly preferable since the aim of the courts is to make the plaintiff as nearly whole as possible, and not to enable him to speculate in foreign exchange. And where as in the ordinary contract case performance of a duty is promised for a certain date, it may be, as the majority of cases seem to hold, that damages for the breach should be assessed at the current rate of exchange¹³ as of that date, both in the interest of certainty, and because the plaintiff may take steps to protect himself against non-performance.

But where, as in the tort cases, the breach of duty is unexpected, it may be unfair not to allow the plaintiff a short period to protect himself. There is a rule of damages, of fairly wide acceptance in this country, that on conversion of articles of fluctuating value, particularly stock,¹⁴ the plaintiff should have a reasonable time in which to replace the converted articles, and his damage is therefore computed at the highest value of the articles within a reasonable time after he has notice of the breach. A similar rule applied here would lead to the selection of the date when plaintiff reasonably might have repaired his vessel. While this rule is not definitely applied in the principal case and in other similar tort cases, the result seems to approximate it.¹⁵

LIABILITY OF AN INFANT FOR FRAUDULENT MISREPRESENTATION

"Infantile Paralysis" is a term well applicable to the state of the law governing an infant's responsibility for his contractual and tort obligations. The rigid niceties involved are indeed perplexing. Infancy has ever been a safe base from which one might embark upon piratical expeditions against innocent adults and to the technical defences of which he could return for security. Shall its sanctity be preserved when justice obviously requires a remedy for the victims? In *Falk v. McMasters & Co.* (1921) 197 App. Div. 357, an infant had deposited money with brokers for stock margin and then sought to recover his loss from an investment made pursuant to his directions. The ground of recovery was infancy at the time of deposit and at the time of bringing suit. The brokers' defence, sustained by the court, was that the infant had induced them to contract with him by falsely and fraudulently misrepresenting his age. While the weight of authority seems to be that an infant is not estopped from using his infancy as a shield against obligations under a contract induced by his fraud,¹ there is a

¹³ In a few old cases the par of exchange was applied. *Adams v. Cordis* (1829) 25 Mass. 260; *Martin v. Franklin* (1809, N. Y. Sup. Ct.) 4 John. 124.

¹⁴ *Galligher v. Jones* (1889) 129 U. S. 193, 9 Sup. Ct. 335.

¹⁵ Cf. McNair, *Rate of Exchange in English Judgments* (1921) 37 L. QUART. REV. 38.

¹ Where the contract is executory, the decisions are practically uniform that the defence of infancy is not lost. *Sims v. Everhardt* (1880) 102 U. S. 300; *Tobin*

respectable minority to the contrary.² Reason and logic are clearly with this latter view. The instant decision, recognizing refinements of reason and distinctions of logic independent of precedent, is indeed refreshing. Iowa and a few other states have already seriously disturbed the traditional privileges of infancy,³ and it is hoped that still others will do likewise. There is no insuperable difficulty involved, for although the weight of authority at law is as stated, an infant stands in a very different position in equity.⁴ When he has fraudulently misrepresented his age so as to procure others to contract with him, he will not be heard to plead his infancy to the prejudice of another.⁵

The tort liability of an infant, in law and in equity, is that he is generally as responsible for his torts as an adult.⁶ The English courts,⁷ however, and many American courts,⁸ deny such responsibility where the cause of action is so directly connected with a contract that to permit the action on the tort would be an indirect way of enforcing the contract. So when an infant has induced an adult to contract with him through fraud and misrepresentation of his age, and a tort action for

v. Spann (1908) 85 Ark. 556, 109 S. W. 534; *International Text Book Co. v. Connelly* (1912) 206 N. Y. 188, 99 N. E. 722. Where it has been executed, there is a conflict, but the weight of authority holds that the infant is not estopped. *Wieland v. Kobick* (1884) 110 Ill. 16; *Ridgeway v. Herbert* (1899) 150 Mo. 606, 51 S. W. 1040.

² *La Rosa v. Nichols* (1918) 92 N. J. L. 375, 105 Atl. 201; *County Board of Education v. Hensley* (1912) 147 Ky. 441, 144 S. W. 63; *Lake v. Perry* (1909) 95 Miss. 550, 49 So. 569.

³ Iowa Code, 1897, secs. 3189-3190: "A minor is bound not only by contracts for necessities but also by his other contracts unless he disaffirms them within a reasonable time after he attains his majority. . . . No contract can be thus disaffirmed in cases where on account of the minor's own misrepresentations as to his majority or from his having been engaged in business as an adult the other party had good reason to believe him capable of contracting." *First National Bank v. Casey* (1912) 158 Iowa, 349, 138 N. W. 897.

⁴ See Tiffany, *Law of Persons and Domestic Relations* (2d ed. 1909) 434.

⁵ Equity will not give to such an infant affirmative equitable relief. *Ex parte Unity Joint-Stock Mut. Packing Ass'n.* (1858, Ch.) 3 De Gex. & J. 63; *Hayes v. Parker* (1886) 41 N. J. Eq. 630, 7 Atl. 511; *Rice v. Boyer* (1886) 108 Ind. 472, 9 N. E. 420 (under reformed procedure, the equity rule on this subject appears to have supplanted the legal rule); *La Rosa v. Nichols*, *supra* note 2. 'Nor will his plea of infancy be sustained as a defence when sued in equity by an adult. *Lempriere v. Lange* (1879) L. R. 12 Ch. Div. 675; 2 Pomeroy, *Equity Jurisprudence* (3d ed. 1905) secs. 815, 945.

⁶ 1 Cooley, *Torts* (3d ed. 1906) 177.

⁷ This really amounts to denying such responsibility where the tort has any connection whatever with an infant's duties under a contract. *Johnson v. Pye* (1793, K. B.) 1 Lev. 169; *Price v. Hewett* (1852) 8 Exch. 146; *Liverpool etc. Ass'n. v. Fairhurst* (1854) 9 Exch. 422; *Bartlett v. Wells* (1862, Q. B.) 1 Best & S. 836.

⁸ *Carpenter v. Carpenter* (1873) 45 Ind. 142; *N. Y. B. L. B. Co. v. Fisher* (1897) 23 App. Div. 363, 48 N. Y. Supp. 152; *Nash v. Jewett* (1889) 61 Vt. 501, 18 Atl. 47; *Covault v. Nevitt* (1914) 157 Wis. 113, 146 N. W. 1115; *Spangler & Co. v. Haupt* (1913) 53 Pa. Super. Ct. 545.

deceit is brought, the plea of infancy has been available to the infant on the ground that the cause of action for deceit arose *ex contractu*. Such a rule is artificial and arbitrary.⁹ With the exception of those purely personal, all torts of infants have some connection, either directly or indirectly, with a contract; and to follow the rule just stated would in effect deny the responsibility of an infant for fraud and misrepresentation in practically every case, an exceedingly undesirable result.¹⁰ It is difficult to see how an infant is deprived of all defences, which public policy may require, by permitting a cause of action for deceit for having induced an adult to contract with him through fraud and misrepresentation. Such acts are entirely unconnected with the terms of the resulting contract except that the latter were induced by the former; and to hold the infant in tort for deceit can hardly be said to be holding him to the terms of the contract. Here, too, there has been a decided tendency in recent years to hold an infant in tort even though it consists entirely in fraudulently inducing an adult to contract with him.¹¹ Despite conflicting tendencies in various jurisdictions, it is becoming increasingly evident that courts of law are gradually coming to hold an infant to a stricter accountability for acts of fraud and misrepresentation against innocent adults acting in good faith, as has been true in equity for some time.¹² All of which is as it should be.

The necessity of accurate legal phraseology is becoming more apparent and more frequently asserted every day. Thus, we find Mr. Justice Holmes recently saying that "the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion."¹ An accepted definition of so essential a concept is imperative.²

⁹ X, an infant, misrepresents his age to A, an adult, who then contracts with him. X purchases a machine from A, who has taken advantage of X's business inexperience and charged him four times the real value. X, upon learning this, returns the machine, now in a dilapidated condition, and sues and recovers the purchase price from A. A thereupon brings an action in tort for deceit against X. The measure of damages is, clearly, the actual loss suffered by A as a result of X's misrepresentation, and not four times the value of the machine. It cannot be said, therefore, that to allow such a cause of action would be indirectly enforcing the original contract.

¹⁰ *Fitz v. Hall* (1838) 9 N. H. 441.

¹¹ *Fitz v. Hall*, *supra* note 10; *Rice v. Boyer*, *supra* note 5; *Wallace v. Morss* (1843, N. Y.) 5 Hill, 391; *Eckstein v. Frank* (1863, N. Y.) 1 Daly, 334; *Patterson v. Kasper* (1914) 182 Mich. 281, 148 N. W. 690.

¹² *La Rosa v. Nichols*, *supra* note 2.

¹ See *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta* (May 16, 1921) U. S. Sup. Ct., Oct. Term, 1920, No. 679.

² See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL, 16; (1917) 26 *ibid.* 710; Corbin, *Legal Analysis and Terminology* (1919) 29 *ibid.* 163.