

# YALE LAW JOURNAL

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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.

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SUBSCRIPTION PRICE, \$4.50 A YEAR SINGLE COPIES, 80 CENTS

Canadian subscription price is \$5.00 a year; foreign, \$5.25 a year.

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## ADMISSIBILITY OF EVIDENCE OF TRADE USAGE

One of the justifiable criticisms of our present juridical system is that too often "the law is looked upon as a thing apart from life, whereas, in truth and in reality, the law is a part of life. To vary the proposition is to alter the entire point of view."<sup>1</sup>

There is a vital necessity of understanding the relation of law to business, the effect of law upon business and of business upon law, and the connection between these, on the one hand, and the prevalent social and economic conditions in the community, on the other. The law must be made to conform to the business and economic demands of the community, as well as to the *mores* of the times. As also said, "it should be a mirror to reflect the progress of society,"<sup>2</sup> and must not be unduly hobbled.

Perhaps nowhere in the law is the truth of these observations more forcefully illustrated than in connection with the admissibility of evidence of trade usage.

In a large number of the early decisions, evidence of trade usage or custom was excluded, on the ground that its admission would involve a violation of the parol evidence rule, and would tend to contradict and vary the contract entered into between the parties.

Thus, in the very early New York case of *Mutual Safety Insurance Co. v. Hone, Receiver, etc.*,<sup>3</sup> the Court of Appeals, in rejecting evidence of usage, said:

"The usage went to contradict the plain unequivocal language of the policy and was therefore inadmissible."

Similarly, in the early case of *Vail v. Rice*,<sup>4</sup> it was held that a written contract, definite and certain in its terms, could not be modified or explained by proof of commercial usage.<sup>5</sup>

In other words, the doctrine of these early cases was that where a contract between the parties is couched in simple language, free from ambiguous or doubtful terms, the meaning of the contract could not be evidenced by the admission of proof of any trade custom or usage.

Manifestly, these decisions were unfortunate in tendency and mischievous in result. Instead of carrying out, they served to frustrate the intention of the parties, for parties must always be assumed to have contracted in the light of the trade meaning which attaches to certain terms and with which it necessarily must be assumed they were cognizant.

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<sup>1</sup>"*The True Function of Schools of Law*," an address delivered by the writer at the Bronx County Bar Association, June 8, 1923.

<sup>2</sup>*Ibid.*

<sup>3</sup>(1849) 2 N. Y. 235, 241.

<sup>4</sup>(1851) 5 N. Y. 155.

<sup>5</sup>See, also, *Wadsworth v. Allcott* (1851) 6 N. Y. 64, at p. 67; *Bank of Commerce v. Bissell* (1878) 72 N. Y. 615.

Where the words used are technical in nature, or where they have a distinctive significance under the circumstances in which they are used, it is now well settled that parol evidence is admissible to show what their meaning is.<sup>6</sup> This rule should be, and by the better modern authority now is, likewise applicable, where the words, although they have a common and popular meaning, have also acquired a peculiar meaning between the parties to the contract by reason of the fact that such meaning has become attached to the words by customary trade usage.

There are, however, only too numerous recent decisions which do violence to and cannot be reconciled with the true doctrine.

In the recent case of *Rodgers v. Edward M. Rodrock Co.*,<sup>7</sup> for example, the Court of Errors and Appeals of New Jersey held, in an action for breach of contract brought for failure to deliver bricks, that there was no error in refusing to admit proof of a trade custom to limit the amount of material required to be furnished by a specific contract to the quantity of material necessary to complete the building which the contractor was erecting. The learned court, by Mr. Justice Bergen, said:

“ . . . In other words, that a clear and unambiguous contract is subject to be modified by a trade custom in a particular locality. This was properly excluded. The contract in express terms required the delivery of a given number of bricks at a fixed price, and—‘where there is a contract, either by parol or in writing, its terms must fix the rights of parties and it cannot be contradicted by proof of usage or custom.’ (*Schenck v. Griffin*, (1875) 38 N. J. Law, 462.)”<sup>8</sup>

If the learned court intended to lay down as an invariable rule, which it seems to have done, that evidence of trade custom is never admissible to change the apparent or face meaning of a written contract, then its decision is clearly contrary to sound principle and against the weight of the better modern authority.

Where a written expression is ambiguous or the words used are technical in nature or have a peculiar significance in connection with the circumstances in which they are used, as we have seen, parol evidence is admissible to show the true meaning of the words. The reason is that the parol evidence rule is merely one which has been created by a wise judicial policy to prevent parties, once they have entered into a written contract, from trying to show that their agreement in fact was

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<sup>6</sup> *Collender v. Dinsmore* (1873) 55 N. Y. 200, 205; Greenleaf, *Evidence* (16th ed. 1899) sec. 295.

<sup>7</sup> (1923, N. J.) 120 Atl. 1.

<sup>8</sup> See an editorial in N. Y. L. JOUR. May 14, 1923. In connection with this subject I wish to express my obligation to my assistant, Leonard Acker, Esq., who made, with me, an exhaustive examination of the authorities upon this interesting subject.

different from the contract as written. But the rule in its correct interpretation is not intended to prevent the parties from showing the meaning of the contract itself as written, so as to show what the real intent expressed actually was.

For the same reason, therefore, that evidence is admitted to show the meaning of technical words, evidence of trade custom is correctly admitted to show the true meaning and the peculiar significance that is attached to a trade term used between parties cognizant of the trade custom. The reason is that the words, having acquired a certain peculiar meaning between the parties because of this trade usage, to refuse to admit the evidence of the usage, instead of upholding the contract as it has been written, serves rather to defeat the expressed intention of the parties, since it prevents them from showing what the real meaning of the written words is.

The Appellate Division of the Supreme Court of New York, First Department, in the case of *Schipper v. Milton*,<sup>9</sup> laid down the correct rule, that "When a custom has been proved to exist, the mere fact that it apparently varies the contract is not sufficient to exclude proof of the custom, because it is impossible, without changing to some extent its apparent effect, to add a material incident by showing that the words are not employed in their usual meaning."

The Court of Appeals of New York, in *Collender v. Dinsmore*,<sup>10</sup> had expressed, in slightly different language, the same rule, pointing out that the mere fact that the word on its face had one meaning did not prevent the admission of evidence of usage when such usage as between the parties had given the word a meaning different from its ordinary one.

Professor Williston frankly and soundly states, with characteristic terseness, that the statement that usage is inadmissible to contradict the plain meaning of a written contract, "is inconsistent with many decisions and wrong on principle."<sup>11</sup>

The United States Circuit Court of Appeals, Second Circuit, in *Nicoll v. Pittsvein*,<sup>12</sup> writing through Judge Hough, recently correctly pointed out the social reason and the true basis for the admission of evidence of trade usage, stating that, "when tradesmen say or write anything, they are, perhaps without any present thought on the subject, writing on top of a mass of habits or usages which they take as matter of course. So (with Professor Williston) we think that anyone contracting with knowledge of a usage will naturally say nothing about the

<sup>9</sup> (1900) 51 App. Div. 522, 528, 64 N. Y. Supp. 935, 940.

<sup>10</sup> *Supra* note 6.

<sup>11</sup> 2 Williston, *Contracts* (1920) sec. 650; see, also, 5 Wigmore, *Evidence* (2d ed. 1923) sec. 2440.

<sup>12</sup> (1920) 269 Fed. 968, 971, discussed and approved in (1921) 30 YALE LAW JOURNAL, 761.

matter unless desirous of excluding its operation; if he does wish to exclude, he will say so in express terms."<sup>13</sup>

A few of the recent numerous cases which follow this correct doctrine, that unless the parties have specifically in their writing excluded the trade usage, they shall be deemed to have contracted and used the words in the light of the trade usage, are illustrative of the effects of the doctrine.

In *Pucci v. Baney*,<sup>14</sup> the court held that where a contract provided for excavation work at a certain rate per cubic yard, custom was admissible to show that extra allowances were to be made to the excavators when they had to excavate by necessity below the depth mentioned by the contract.

In *Brunald v. Glasser*,<sup>15</sup> evidence was held correctly admitted to show that a contractor was to be paid for laying bricks by reason of a trade usage on a different basis than that apparently provided in the contract.

In *Richardson & Co. v. Cornforth*,<sup>16</sup> where the parties in their written contract provided for the sale of oats that would test from thirty-six to thirty-seven pounds a bushel, it was held that evidence was admissible of a custom in the trade which showed that such an expression meant oats that measured thirty-two pounds to the bushel.

In *Burton v. Jennings*,<sup>17</sup> where a contract provided for the delivery of lumber with "no waney" stock, it was held that evidence was admissible to show that a certain percentage of "waney" lumber could be tendered.

In *Oswego Falls Pulp & Paper Co. v. Stecher Litho. Co.*,<sup>18</sup> where a contract involved the delivery of cardboard of a certain grade, the Court of Appeals of New York held that it was proper to admit evidence showing a trade usage allowing the vendor to deliver paper varying in grade and thickness from the exact terms of the written contract, saying:

" . . . in other words, to show that it was practically impossible to have such a quantity of cardboard without a variation in some slight degree. *Such evidence is admissible, not for the purpose of contradicting express terms of the contract, but rather to show a trade usage and custom in the manufacture of goods.* *Newhall v. Appleton*, (1889) 114 N. Y. 140; *Whitney v. Hop Bitters Mfg. Co.*, (1888) 2 N. Y. Supp. 438, affirmed (1890) 121 N. Y. 682, 24 N. E. 1098, 18 N. Y. St. Rep. 892."<sup>19</sup>

<sup>13</sup> See Bentham, *Rationale of Judicial Evidence* (1827) Book IX, Part VI, Ch. IV, 556, note, on this point.

<sup>14</sup> (1893, C. P. N. Y.) 2 Misc. 354, 21 N. Y. Supp. 1099.

<sup>15</sup> (1898, Cty. Ct.) 25 Misc. 285, 53 N. Y. Supp. 1021. But if the terms of the contract preclude the assumption that the parties had the usage in mind it will not be permitted to alter the plain meaning of the contract. *North Shore Improvement Co. v. N. Y. P. & N. R. Co.* (1921) 130 Va. 646, 108 S. E. 11.

<sup>16</sup> (1902, C. C. A. 7th) 118 Fed. 325.

<sup>17</sup> (1911, C. C. A. 2d) 185 Fed. 382.

<sup>18</sup> (1915) 215 N. Y. 98, 108, 109 N. E. 92, 95.

<sup>19</sup> Italics are mine.

In the very recent case of *Gumbinsky Bros. Company v. Smalley*,<sup>20</sup> the First Appellate Division of the New York Supreme Court, affirming Mr. Justice James O'Malley at Trial Term, New York County, held that, where a contract provided for the delivery of paper "guaranteed free from ground wood," evidence was admissible to show that under such an expression there was a well-known trade usage allowing delivery of paper containing a limited quantity of ground wood.

The doctrine which permits the admission of trade usage, where the expression used is a trade expression, even though on its face the expression is plain and unambiguous, it is submitted, is both sound and wise, as well as conforming to the business demands and necessities of the community. If, in fact, the parties who have entered into the written contract are members of a certain trade, or cognizant of its customs,<sup>21</sup> and have used a trade term in their contract, then it seems manifest that in using that term they used it with the meaning attached to it by the trade usage. To shut out evidence of such trade usage, far from sustaining the written contract, would only serve to defeat it, for it would enforce between the parties a contract different in meaning than that intended, since the parties contracting in the light of the trade usage presumptively used the words with their special meaning in the trade, and not in their ordinary meaning.

Such evidence of trade usage, therefore, unless the parties, in their writing, have specifically shown that they intended to contract outside of the usage, should always be admissible in order to show the true meaning of the terms used in the contract.

The importance of observing this principle must be self-evident. The narrow doctrine of the early cases tends to hamper business and business men with the shackles of an unsound technicality. The more recent and better doctrine conforms to the demands of business men, satisfies the social, economic and financial demands of the community, and, as by the writer said in another connection, is, therefore, sound law, because "the law is simply a part of life itself, and must correspond to the inexorable business, economic, social and ethical demands of the community."<sup>22</sup> It is to the credit of the Federal and New York courts rendering the above cited recent decisions on this subject, that they have realized that the early cases, which run counter both to common sense and to business demands, must be disregarded, and that they have, accordingly, enunciated a less oppressive and more businesslike rule of law, which corresponds with matured and thoughtful commercial sentiment.

I. MAURICE WORMSER

New York City

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<sup>20</sup> (1922) 203 App. Div. 661, 197 N. Y. Supp. 530, opinion *per* Mr. Justice Greenbaum, *affirmed* 235 N. Y. 619, 139 N. E. 758.

<sup>21</sup> Even where one party did not actually know of the usage it has been admitted. See NOTES (1922) 22 COL. L. REV. 741.

<sup>22</sup> See, *supra*, note 1.

## TRANSMISSION OF MONEY AND SALE OF CREDIT

Within the United States one common method of effecting distant payments is by drafts drawn upon correspondent banks.<sup>1</sup> From this method two advantages over the use of the debtor's own check result: the signature is known and can be honored at once; and payment can be had by the creditor immediately without delay or deduction for collection. The drawing bank maintains balances with the banks of the larger cities, replenishing any deficiencies in the exchanges by the transfer of securities, or of credits at the Federal Reserve Bank, or by the occasional shipment of coin;<sup>2</sup> and against payment to it by cash, checks, or otherwise, it issues drafts upon its correspondents in favor of the payee designated by the purchaser. Usually the drawing bank hands the draft to the purchaser; and he remits it to the payee. Where the draft is made to the purchaser's own order, and indorsed by him, few questions arise that are not covered in the usual law of bills of exchange. When, however, the mercantile short cut is used, and the draft made to the order of a fourth party named by the purchaser, the situation presents more difficult problems; problems which are only slightly lessened by the tendency of some courts to overlook their existence and treat the transaction as if the purchaser were the named and indorsing payee.<sup>3</sup>

In *Gellert v. Bank of California* (1923, Or.) 214 Pac. 377, the purchaser of drafts drawn by the defendant bank upon its New York correspondent died without delivering them to the named payee. His executor then presented the drafts to the defendant and asked that their face amount be paid him. The court held (one judge *dissenting*) that he could recover the face amount of the drafts.<sup>4</sup> The legal relations arising from such facts have been considered under various theories according to the interpretation that courts have placed upon the transaction.

If the purchase price is treated as a special deposit, a trust relation-

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<sup>1</sup>United States Post Office orders, American Railway Express orders, bank drafts, individual checks, small silver coins, and postage stamps are the mediums commonly employed. See Holdsworth, *Money and Banking* (1914) sec. 109. Practically no shipments of coin or paper money are made between individual debtors and creditors, except those of silver coins for small debts.

<sup>2</sup>In most banks the outgoing and incoming out of town items balance. Whatever shipments of coin and bank notes are made between banks for change are not in payment of debts. For an explanation of domestic exchange see Harris, *Practical Banking* (1915). The necessity for seasonal shipments of money to move crops has been eliminated by the Federal Reserve System.

<sup>3</sup>*Cf. Wright and Co. v. Ellis* (1855, Ohio) 1 Handy, 546; *Talbot v. Bank of Rochester* (1841, N. Y. Sup. Ct.) 1 Hill, 295.

<sup>4</sup>It is to be observed that recovery of the \$3 exchange charge, part of the purchase price, was not allowed, indicating in some degree that the recovery was not of money paid.

ship is created,<sup>5</sup> and the money may be recovered by the purchaser under the familiar doctrine that where one receives money from another for a purpose which cannot be accomplished, or is abandoned, he becomes a trustee of that fund.<sup>6</sup> Substantially the same result is reached where the drawer bank is treated as an agent, the purpose of the agency having failed or become incapable of execution.<sup>7</sup> Since ordinary banking transactions create the relation of debtor and creditor between the bank and the customer, the weight of authority soundly holds that money given for such a draft is not a special deposit and that no trust results.<sup>8</sup>

When the transaction is termed a purchase and sale the difficulty is to discover just what is the subject matter involved. It has been suggested that the remitter purchases a negotiable instrument, and that the drawing bank's obligation thereon is measured solely by the law applicable to such instruments.<sup>9</sup> But it is obvious that to talk of "sale" of the drawer's executory contract, whether or not such contract be integrated into a paper of particular effect, is a misleading use of terms. And even considering the transaction as a sale, under the laws of negotiable instruments has not the purchaser some rights other than the mere power of vesting title in the payee? Concededly the purchaser's original intention was to vest title in the payee; but this may have become impossible by the payee's refusal to receive it, or by the death of the purchaser as in the instant case. Does the purchaser then have no remedy? And if a remedy is open in such cases, is it not equally open where some

<sup>5</sup> *Ryan v. Phillips* (1896) 3 Kan. App. 704, 44 Pac. 909; *Carlson v. Kies* (1913) 75 Wash. 171, 134 Pac. 808; 16 A.L.R. 190, note; Stone, *Some Problems Involved in the Transmission of Funds* (1921) 21 Col. L. Rev. 507, notes 9 and 10.

<sup>6</sup> *St. Louis v. Johnson* (1879, C.C. 8th) 5 Dill. 241; *Atlantic Communication Co. v. Zimmerman* (1918) 182 App. Div. 862, 170 N. Y. Supp. 275; *Legniti v. Mechanics and Metals Bank* (1919) 186 App. Div. 105, 173 N. Y. Supp. 814, but reversed in 230 N. Y. 415, 130 N. E. 596; 4 L. R. A. 328, note; NOTES (1919) 19 Col. L. Rev. 322.

<sup>7</sup> *McGorray v. Stockton Loan Assn.* (1901) 131 Calif. 321, 63 Pac. 479; cf. *Safian v. Irving National Bank* (1922) 202 App. Div. 459, 196 N. Y. Supp. 141.

<sup>8</sup> *Clark v. Toronto Bank* (1905) 72 Kan. 1, 82 Pac. 582; *Spiroplos v. Scandinavian Bank* (1921) 116 Wash. 491, 199 Pac. 997; *Harrison v. Wright* (1884) 100 Ind. 515; *American Express Co. v. Cosmopolitan Trust Co.* (1921) 239 Mass. 249, 132 N. E. 26; *Louisville Banking Co. v. Paine* (1890) 67 Miss. 678, 7 So. 462; *Grammel v. Carmer* (1884) 55 Mich. 201, 21 N. W. 418. A trust is created if the drawing bank knows it is insolvent at the time it issues the draft. *Whitcomb v. Carpenter* (1907) 134 Iowa, 227, 111 N. W. 825; *Widman v. Kellogg* (1911) 22 N. D. 396, 133 N. W. 1020; 10 L. R. A. (N. S.) 928, note. But this is the case also with the receipt of general deposits under those circumstances.

<sup>9</sup> See *Foreign Trade Corporation v. Cosmopolitan Trust Co.* (1922) 240 Mass. 413, 134 N. E. 403; COMMENTS (1918) 28 YALE LAW JOURNAL, 695, note 16. ". . . foreign exchange or credit is a subject of purchase and sale, and not only may be, but is commonly contracted for in the same manner and governed by the same laws as in the case of purchase of wheat, cotton, or any other subject of commerce." Dissenting opinion by Judge Shean in *Legniti v. Mechanics and Metals Bank*, *supra* note 6, at p. 111, 173 N. Y. Supp. at p. 819.

supervening fact leads the purchaser to change his mind? The cases seem so to hold,<sup>10</sup> a rule hardly consonant with the law of sales of chattels. Another objection to the sale theory is that an oral contract for the delivery of such drafts would seem to be not within the Statute of Frauds.<sup>11</sup>

Another possibility is to regard the transaction as an assignment to the payee of the amount of the draft. This view would necessarily deny a recovery by the purchaser. But if the payee's rights are conditioned upon delivery to him such an interpretation is unsound.<sup>12</sup> Or if it be regarded as an assignment to the purchaser of the draft, his right would be against the drawee, not against the drawer. But the Negotiable Instruments Law provides that a bill of exchange does not, of itself, operate as an assignment of the funds deposited with the drawee.<sup>13</sup> And by the weight of authority, even the drawer's supervening insolvency effects no assignment of the funds upon deposit.<sup>14</sup> The parties

<sup>10</sup> Recovery by the purchaser was allowed in *Lime Rock Bank v. Macomber* (1849) 29 Me. 564 (promissory note); *Bank of Natchez v. Claiborne* (1840, Miss.) 5 How. 301 (same); *Hunt v. Aldrich* (1853) 27 N. H. 31 (same); *Bank of Chenago v. Hyde* (1825, N. Y. Sup. Ct.) 4 Cowen, 567 (same); *Bull v. Latimer* (1904, Tex. Civ. App.) 80 S. W. 252 (same); *Planters' Bank v. Blair* (1843) 4 Ala. 613 (same); *Rhyan v. Dunnigan* (1881) 76 Ind. 178 (same); *Ward v. Northern Bank* (1853, Ky.) 14 B. Mon. 283 (same); *Pfotenhauer v. Equitable Trust Co.* (1921, Sup. Ct.) 188 N. Y. Supp. 464 (draft); *Plüschner v. Taylor* (1922, Mun. Ct.) 193 N. Y. Supp. 236 (same); *Chemical National Bank v. Equitable Trust Co.* (1922) 201 App. Div. 485, 194 N. Y. Supp. 177 (same); *Wasserman v. Irving National Bank* (1921, Mun. Ct.) 114 Misc. 704, 187 N. Y. Supp. 243 (wireless transfer); *Western Union v. Lapenna* (1922, Ind. App.) 133 N. E. 144 (telegraph transfer); *Stern v. Barrett* (1922, Sup. Ct.) 195 N. Y. Supp. 160. Recovery was denied in *Goeske v. Taylor* (1923, Sup. Ct.) 199 N. Y. Supp. 577 (draft where statute as to lost instruments not complied with); *Grossman v. Zaro* (1922, Sup. Ct.) 119 Misc. 713, 197 N. Y. Supp. 305 (draft—presentment to drawee not shown); *Foreign Trade Corp. v. Cosmopolitan Trust Co.* (1922) 240 Mass. 413, 134 N. E. 403 (sale of draft); *Alemian v. American Express Co.* (1921) 237 Mass. 580, 130 N. E. 253 (letter transfer—drawer's contract completed); *Nicoletti v. Bank of Los Banos* (1923, Calif.) 214 Pac. 51 (same); *Lemon v. First National Bank* (1923, Calif.) 216 Pac. 620 (draft—investment); *Rosenblatt v. Josephsohn* (1918, Sup. Ct.) 172 N. Y. Supp. 719 (letter transfer—action prematurely brought). For cases showing the right of a special depositor for the purposes of transmission to recover, see Stone, *op. cit. supra* note 5, at p. 524, note 66.

<sup>11</sup> Cf. *Equitable Trust Co. v. Keene* (1922) 232 N. Y. 290, 133 N. E. 894 (cable transfer). A contract for the creation of a draft can hardly be regarded as a "sale of a thing in action" within the Uniform Sales Act, sec. 4 (1). A sale implies the existence of the thing sold before transfer of title. Cf. sec. 76.

<sup>12</sup> Stone, *op. cit. supra* note 5, at p. 524.

<sup>13</sup> Sec. 127; cf. also sec. 189.

<sup>14</sup> *Dickinson v. Coates* (1883) 79 Mo. 250; *Grammel v. Carmer*, *supra* note 8; *Clark v. Toronto Bank*, *supra* note 8; *Lummus Cotton Gin Co. v. Walker* (1916) 195 Ala. 552, 70 So. 754; *People v. Merchants' Bank* (1879) 78 N. Y. 269; *contra: First National Bank v. Coates* (1881, W. D. Mo.) 8 Fed. 540. A preference is allowed if the drawing bank knew it was insolvent when it issued the draft.

may, of course, by the employment of appropriate language effect an assignment.<sup>15</sup> In such a case the drawee would become liable to the payee to the extent of the funds then on deposit, subject, of course, to the rules on notice. But such language is not common in case of remittance drafts,<sup>16</sup> and it is generally held that the mere issuance of a draft by a bank upon its correspondent is not an assignment of the funds upon deposit.<sup>17</sup>

The transaction may also be treated as an executory contract to establish credit for the benefit of, or procure payment to a third party, although this view seems confined to transfers of credit, and contracts for payment which are not evidenced by and integrated into drafts delivered to the purchaser. A so-called "draft" forwarded by the drawing bank to the drawee stands on obviously different footing as a mere memorandum. In these cases the ordinary contract rule that rescission is not allowed after notice to the beneficiary has not been followed, and the purchaser seems to have been allowed to rescind until the funds have been delivered to the payee.<sup>18</sup> Often, especially in international banking, the process is simplified, the purchaser and payee being one. And in the cases so far decided, no conflicting claims of a complaining payee seem to have been urged. It is not easy to say how far such urging may produce a modification of the rules.

Finally the transaction may be treated as an executory contract to pay money, integrated into a draft, but reserving to the purchaser a power to return the draft and secure its face value; a power not apparent from the face of the instrument, but implied in fact on the basis of business practice and understanding. This seems to be the only sound interpretation of the instant case. Professor Underhill Moore urges

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*Whitcomb v. Carpenter* (1907) 134 Iowa, 227, 111 N. W. 825; *Stoller v. Coates* (1886) 88 Mo. 514.

<sup>15</sup> *Fourth Street Bank v. Yardley* (1896) 165 U. S. 634, 17 Sup. Ct. 439; Brannan, *Negotiable Instruments Law* (3d ed. 1920) 407.

<sup>16</sup> Many printed blank checks provided by merchants for their customers contain this phrase: "I hereby represent that I have this amount on deposit in the above bank and subject to this check which amount is hereby assigned to the payee or holder hereof." The effect of this provision seems not to have been judicially determined. Several possibilities are suggested: (1) The instrument may be both a negotiable instrument and an assignment and the holder of it may determine which it will be by electing his remedy. (2) It may be a negotiable instrument only, the attempted assignment failing for want of certainty as to the assignee. (3) Or it may be an assignment only, the added provisions rendering the check non-negotiable within the meaning of sections 1 (2) and 3 of the Negotiable Instruments Law.

<sup>17</sup> *Florence Mining Co. v. Brown* (1887) 124 U. S. 385, 8 Sup. Ct. 531; *Fulton v. Gesterding* (1904) 47 Fla. 150, 36 So. 56; *Hanna v. McCrory* (1914) 19 N. M. 183, 141 Pac. 996; Brannan, *op. cit. supra* note 15, at p. 356.

<sup>18</sup> *Carpenter v. Sparta Savings Bank* (1920, Sup. Ct.) 182 N. Y. Supp. 172; see *Meador v. Rudolph* (1920, Tex. Civ. App.) 218 S. W. 520 (deposit); *Gravenhorst v. Zimmerman* (1923) 236 N. Y. 22 (wireless transfer).

that there is a true condition implied in law<sup>19</sup>—that if the purchaser does not want to use the draft he may return it and secure the face of the instrument. Professor Chafee declares that the true theory of recovery is in quasi-contract to the extent of the unjust enrichment.<sup>20</sup> In the instant case the Oregon court avoided choosing a theory of recovery, saying, “Whether the purchase of the draft created the relation of principal and agent for the transmission of funds, or amounted to a contract for the sale of credit, under a well established rule, money paid for a purpose which cannot be accomplished because of a subsequently intervening obstacle may be recovered.”

In commercial practice banks which have sold drafts payable to another, even in the absence of “an intervening obstacle,” have usually refunded the face amount of the instrument to the purchaser if he has chosen to return it. The drawing bank has made its profit from the transaction and it should be immaterial to the bank whether it pays the named payee, or a third party, provided that the payment will discharge its duty.<sup>21</sup> The drawer has been protected where it refunded to the purchaser upon surrender of the instrument,<sup>22</sup> and the purchaser’s power to compel the bank to pay has also been established.<sup>23</sup> There is a practical banking difficulty, in that if drafts can be returned at the will of the purchaser, the drawing bank must maintain funds both at its place of business and with the drawee bank. If this is an onerous burden, not included in the original charge, it should be added to the cost of the draft or deducted from the amount refunded. Actually it seems to be mostly a question of bookkeeping and the adjustment of interest charges not involving any considerable sum.

A related problem concerns the payee’s rights where the purchaser seeks to return the draft. Several situations are possible: (1) If the payee is rightfully in possession by proper delivery it seems that the

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<sup>19</sup> “Is not the remitter’s claim equitable? No, his remedy is in *assumpsit*. Surely equitable in origin? There is not a trace of it in the books. Is it not merely a quasi-contractual claim for restitution of the consideration? No, it is for the payment of the face at the time and place of payment; the action is *assumpsit* on the instrument. But is not the claim really quasi-contractual; have not the courts in attempting to give restitution simply slipped into error as to the measure of damages? No trace of this slip marks the opinions which are unusually realistic.” Moore, *Right of Remitter of a Bill* (1920) 20 COL. L. REV. 749, 753.

<sup>20</sup> “An action for money had and received was the only proper remedy.” Chafee, *Progress of the Law: Bills and Notes* (1919) 33 HARV. L. REV. 255, 264. And see *Elliot v. Abbot* (1841) 12 N. H. 549, 555. Compare note 3, *supra*.

<sup>21</sup> Moore, *op. cit. supra* note 18, at p. 753. “The principle is this, that when a note is made to raise money [a draft is issued to transmit money], it does not change the liabilities of the parties to the note [draft] that the money is advanced [that the draft is presented] by a third person instead of the payee.” Eastman, J., in *Hunt v. Aldrich*, *supra* note 10, at p. 36.

<sup>22</sup> *Buehler v. Galt* (1889) 35 Ill. App. 225.

<sup>23</sup> *Garthwaite v. Bank of Tulare* (1901) 134 Calif. 237, 66 Pac. 326; see also cases cited in note 10, *supra*.

function of the instrument has been fulfilled; that the purchaser has no rights against the drawer; and that the payee could hold the drawer in event of dishonor by the drawee. Furthermore the purchaser could not effectually destroy the payee's rights by inducing the drawer to stop payment.<sup>24</sup> If the purchaser subsequently gains possession of the instrument fraudulently the bank would not be protected in paying him.<sup>25</sup> Even those cases which hold that a payee cannot ordinarily become a holder in due course seem to agree that in this case he may. But if the payee voluntarily relinquishes possession to the purchaser without endorsing, he apparently relinquishes his rights on the instrument and the purchaser's rights are the same as if there had been no delivery.<sup>26</sup> (2) If the payee has come wrongfully into possession payment to him by the drawee would discharge the drawer's liability to the purchaser.<sup>27</sup> Should the purchaser intervene before payment had been made to the payee the drawer could defend a suit by the payee upon the grounds of no delivery.<sup>28</sup> (3) If the payee has never been in possession he would have no rights unless the theory of assignment should be adopted.<sup>29</sup> And even under such a theory, the rule should be that the

<sup>24</sup> *Canterbury v. Bank of Sparta* (1895) 91 Wis. 53, 64 N. W. 311 (draft); *Bobrick v. Second National Bank* (1916) 175 App. Div. 550, 162 N. Y. Supp. 147 (draft); *Freund v. Importers' and Traders' Bank* (1879) 76 N. Y. 352 (certified check); *Merchants' Bank v. New First National Bank* (1917) 116 Ark. 1, 170 S. W. 852. But the drawee is, of course, under a duty to the drawer not to pay after notice of stoppage is given. *Western Union Telegraph Co. v. Louissell* (1914) 11 Ala. App. 563, 66 So. 839.

<sup>25</sup> It seems that the payee can hold the drawer, as he can sue the drawee in trover for the conversion of the draft, where the drawee has paid a fraudulent holder. *Ellery v. People's Bank* (1909, Sup. Ct.) 114 N. Y. Supp. 108 (face amount with interest recovered); *Burstein v. People's Trust Co.* (1911) 143 App. Div. 165, 127 N. Y. Supp. 1092 (face amount with interest recovered); *Kansas City Co. v. Westport Bank* (1915) 191 Mo. App. 287, 177 S. W. 1092 (face amount recovered); *Graves v. American Exchange Bank* (1858) 17 N. Y. 205 (face amount recovered). But not in assumpsit for money had and received. *Baltimore Ry. v. First National Bank* (1904) 102 Va. 753, 47 S. E. 837. Nor in an action on the check. *Elyria Savings Co. v. Walker Co.* (1915) 92 Ohio St. 406, 111 N. E. 147.

<sup>26</sup> See cases *supra* note 3.

<sup>27</sup> *Schaeffer v. Marsh* (1915, Sup. Ct.) 90 Misc. 307, 153 N. Y. Supp. 96; *Boston Steel Co. v. Steuer* (1903) 183 Mass. 140, 66 N. E. 646; see *Colonial Fur Co. v. First National Bank* (1917) 227 Mass. 12, 116 N. E. 731; *Bergstrom v. Ritz-Carlton Co.* (1916) 171 App. Div. 776, 154 N. Y. Supp. 959. The payee can be a holder in due course. *Herdman v. Wheeler* [1902] 1 K. B. 361; *Liberty Trust Co. v. Tilton* (1914) 217 Mass. 462, 105 N. E. 605; *contra: Vander Ploeg v. Van Zook* (1907) 135 Iowa, 350, 112 N. W. 807.

<sup>28</sup> Lack of delivery or conditional delivery may be shown as a defense against the payee. *Seattle National Bank v. Becker* (1913) 74 Wash. 431, 133 Pac. 613; *In re Continental Engine Co.* (1916, C. C. A. 7th) 234 Fed. 58. Parol evidence may be used to show such conditional delivery. *Norman v. McCarthy* (1914) 56 Colo. 290, 138 Pac. 28.

<sup>29</sup> *Carpenter v. Sparta Savings Bank* (1920, Sup. Ct.) 182 N. Y. Supp. 172; *Buehler v. Galt*, *supra* note 22; *Stone, op. cit. supra* note 5, at p. 524.

assignment is accomplished by the delivery of the instrument and not by its issuance.<sup>30</sup>

In all of these cases it is intended that the drawer shall pay but once. But the drawer in paying the purchaser can seldom be positive that the payee has acquired no rights by prior delivery; especially where the payee is in another city. A practical solution of that problem would be afforded by compelling the purchaser who obtains reimbursement to indemnify the drawer against a successful suit by the payee. Even determination in a suit at law that no delivery had been made would not be *res judicata* against a payee.

In the field of foreign exchange the drawing bank agrees to ship gold, silver, or paper money to the named payee; or to draw upon existing credits with a foreign correspondent; or to have such foreign credits made available; or to make payment to a designated party.<sup>31</sup> At present little gold is being shipped out of the United States and practically all transfers are of credit, accomplished by letter, cable, and wireless telegraphy. In rare cases, more frequent in foreign than in domestic transfers, where the transaction contemplated is the shipment of specific gold, silver, or bank notes, either deposited by the remitter, or specifically appropriated to the contract by the transmitter, the bank or other transmitter becomes a bailee and holds the specific funds as a fiduciary.<sup>32</sup> More usually the transaction contemplates a transfer of credit and is held to be either a purchase and sale of foreign credit or a contract to perform a service, and as in domestic transfers, no trust relationship between the purchaser and drawer is established.<sup>33</sup> So where the value of foreign credit has diminished and payment to the payee has become impossible, the purchaser is entitled, not to the sum he paid, but to the value of the undelivered credit at the time delivery could reasonably have been discovered to be impossible.<sup>34</sup> Indeed, the only vital distinction

<sup>30</sup> But see *contra*: *Morris v. Bank of Pittsburgh* (1923, Pa.) 120 Atl. 698.

<sup>31</sup> Kniffin, *Practical Workings of a Bank* (4th ed. 1917) 587; Holdsworth, *Money and Banking* (1914) sec. 109. Observe the distinction between remit and pay: the former connotes the duty of sending forward and making available, while the latter includes the duty of hunting up the designated payee. *Nicoletti v. Bank of Los Banos* (1923, Calif.) 214 Pac. 51; *Alemian v. American Express Co.* (1921) 237 Mass. 580, 130 N. E. 253. So, too, the transaction may be considered as an investment in foreign money. *Lemon v. First National Bank* (1923, Calif.) 216 Pac. 620. In that case no payment to a beneficiary was expected, and the contract was made unusually explicit.

<sup>32</sup> *Musco v. United Surety Co.* (1909) 132 App. Div. 300, 117 N. Y. Supp. 21. And the transmitter is guilty of larceny if he misappropriates such fiduciary funds. *People, ex rel. Zotti, v. Flynn* (1909) 135 App. Div. 276, 120 N. Y. Supp. 511.

<sup>33</sup> *American Express Co. v. Cosmopolitan Trust Co.* (1921) 239 Mass. 249, 132 N. E. 26; *Legniti v. Mechanics and Metals Bank*, *supra* note 6; NOTES (1919) 19 COL. L. REV. 322; COMMENTS (1921) 31 YALE LAW JOURNAL, 416.

<sup>34</sup> *Fliker v. State Bank* (1916, Mun. Ct.) 94 Misc. 609, 159 N. Y. Supp. 730; *Katcher v. American Express Co.* (1920) 94 N. J. L. 165, 109 Atl. 741; *Oshinsky v. Taylor* (1918, Sup. Ct.) 172 N. Y. Supp. 231; *Katzeborn v. Liberty*

between foreign and domestic transactions is that foreign remittances are normally translated into another medium of payment, whose exchange relation with our own varies. That fact, however, should not obscure the basic identity of the two transactions. As in domestic transfers, the money paid for the draft or contract becomes the property of the drawer, and no preference is allowed to the purchaser in case of the drawer's insolvency.<sup>35</sup>

The effect of one point of banking practice found in the instant case still requires discussion: the drawee was advised of the drawing of the draft by the drawer, and the drawee's account credited. In foreign transactions the selling banks almost universally advise their correspondents of the drafts drawn, and the correspondent debits the drawer at once upon receipt of the advice of drawing instead of upon the ultimate payment of the draft.<sup>36</sup> In domestic transfers the practice of forwarding notice is not general; it is hardly used at all and when used is to prevent alterations or impersonations.<sup>37</sup> The account is charged only upon actual payment. It is, therefore, to be expected that the court gave the advice no effect of assigning the drawer's credit with the drawee; and that the provisional book entries were likewise dealt with. This view is sound, and suggests that the same result should follow in foreign banking practice, even though the entries after notice received have been made on the books of both the drawer and drawee.<sup>38</sup>

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*Bank* (1923, Mo. App.) 253 S. W. 103; *Carmen v. Higginson* (1923, Mass.) 140 N. E. 246; *Safian v. Irving National Bank*, *supra* note 7. The amount paid may be recovered when drawer is negligent. But the drawing bank is not liable for the failure of the cable company to transmit the order. *Strohmeyer & Co. v. Guaranty Trust Co.* (1916) 172 App. Div. 16, 157 N. Y. Supp. 955; *cf. Alemian v. American Express Co.*, *supra* note 10; (1923) 32 YALE LAW JOURNAL, 179.

<sup>35</sup> *Taussig v. Carnegie Trust Co.* (1913) 156 App. Div. 519, 141 N. Y. Supp. 347, *affirmed* 213 N. Y. 627, 107 N. E. 1086; *Beecher v. Cosmopolitan Trust Co.* (1921) 239 Mass. 48, 131 N. E. 338. But *contra*, if the parties have contracted for a special deposit. *Drovers' Bank v. O'Hare* (1887) 119 Ill. 646, 10 N. E. 360; *Cutler v. American Exchange Bank* (1889) 113 N. Y. 593, 21 N. E. 710.

<sup>36</sup> So common is the practice that drawee banks usually refuse to pay drafts which have not been advised. Barrett, *Modern Banking Methods* (1902) 235. This precaution perhaps reflects the state of the law where payment over a forged indorsement, and perhaps, of a raised instrument, can be charged to the drawer's account if made in due course of business. And where the practice of "indirect drawing" is used, whereby a metropolitan bank permits its domestic correspondent out of courtesy, or for a consideration, to draw directly upon the metropolitan bank's foreign balances, the draft can obviously be honored only after receipt of the advices which give the drawee their only guaranty of genuineness. Observe, too, that indirect drawing may work the other way permitting foreign banks to draw directly against their New York bank's interior correspondents.

<sup>37</sup> Notice of the drawing and of the purpose thereof seem, however, to be customary where the payee named is another bank; at least, where such payee is a correspondent of the drawer. This fact should bear on the determination of whether the payee cashing such an instrument for a stranger is a holder in due course.

<sup>38</sup> Such entries relate only to the regulation of interest; the parties regard

## STATE STATUTES LIMITING EXPORT OF NATURAL RESOURCES

Once again an alarmed state legislature, viewing with anxiety the ever more rapid exhaustion of the state natural gas fields, has exerted its law-making ingenuity<sup>1</sup> in a vain effort to preserve for its own constituents<sup>2</sup> what remains of the precious commodity. A recent West Virginia statute<sup>3</sup> required all producers of natural gas to supply local consumers to the extent of their demand before supplying any consumers outside the state.<sup>4</sup> The two states most affected by this change

stopping payment of such advised drafts as perfectly proper. And while by the law, e. g. of France, the draft works an assignment *pro tanto* of the balance if the drawer later becomes insolvent, the N. I. L. would seem to settle the case to the contrary in this country.

<sup>1</sup>It was thought that the statute here involved might be sustained as a mere regulation of a public utility. Some of its exponents, before the passage of the act, said: "The question here is, not whether a state may prohibit or restrict the transportation of natural gas from its territory into another state, but whether the state may require companies—owing to its people the obligation of adequate service—to perform that service, even though the performance may involve the intrastate consumption of gas which otherwise might be transported to another state." Steptoe and Hoffheimer, *Legislative Regulations of Natural Gas Supply in West Virginia* (1918) 25 W. VA. L. QUART. 257, 271. The same point was also urged in an article by Hardman, *Exportation of Natural Resources* (1919) 26 W. VA. L. QUART. 1. The opinion in the instant case replies to the argument by saying that the business is also a public utility in Ohio and Pennsylvania. But, at any rate, if the statute in fact effects too great a control of interstate commerce, the particular power of the state under which it is passed seems immaterial. See *infra* note 2.

<sup>2</sup>Ever since the value and the limited extent of this natural resource have been appreciated, states enjoying gas fields within their territories have invoked almost all the possible state powers in attempts to restrict the export of gas. (1) *Power of Eminent Domain*. Statutes denying the use of state highways for the pipes of corporations transmitting natural gas outside the state have been held unconstitutional. *Manufacturers' Gas Co. v. Indiana Natural Gas Co.* (1900) 155 Ind. 545, 58 N. E. 706; *West v. Kansas Nat. Gas Co.* (1911) 221 U. S. 229, 31 Sup. Ct. 564; *Haskell v. Kansas Nat. Gas Co.* (1912) 224 U. S. 217, 32 Sup. Ct. 442. (2) *Police Power*. Statutes forbidding gas to enter pipes under a pressure of more than 300 pounds and forbidding the use of artificial pumps along the way have been held unconstitutional. *Benedict v. Columbus Construction Co.* (1892) 49 N. J. Eq. 23, 23 Atl. 485; *Manufacturers Gas Co. v. Indiana Gas Co.* (1900) 155 Ind. 566, 58 N. E. 851; *Haskell v. Kansas Nat. Gas Co.*, *supra*. A statute similar except that artificial maintenance of the prescribed pressure along the pipe line was not forbidden was upheld as a *bona fide* police regulation. *Jamieson v. Indiana Nat. Gas Co.* (1891) 128 Ind. 555, 28 N. E. 76. (3) *Taxing Power*. A statute imposing a tax on petroleum transported in pipe lines has been held to be invalid as a regulation of interstate commerce. *Eureka Pipe Line Co. v. Hallanan* (1921) 257 U. S. 265, 42 Sup. Ct. 101; *United Fuel Gas Co. v. Hallanan* (1921) 257 U. S. 277, 42 Sup. Ct. 105.

<sup>3</sup>The statute was enacted February 10, 1919; Barnes' Ann. W. Va. Code, 1923, ch. 15 O, secs. 29, 30.

<sup>4</sup>For a history of the circumstances leading to the adoption of the statute see an article by Steptoe and Hoffheimer, *op. cit. supra* note 1.

in policy promptly brought suit for an injunction to restrain the enforcement of the statute,<sup>5</sup> and in the twin cases of *Pennsylvania v. West Virginia* and *Ohio v. West Virginia* (1923) 43 Sup. Ct. 658, the Supreme Court of the United States granted the injunction and declared the statute in conflict with the interstate commerce clause of the federal constitution.<sup>6</sup>

While a state may never impose directly or indirectly any serious burden on interstate commerce as such,<sup>7</sup> yet in its control of public welfare and of business enterprise within its territorial jurisdiction, regulation of trade between the states is necessarily involved, and is permitted to some degree.<sup>8</sup> The limitations on the power of the state

<sup>5</sup> An interlocutory injunction was granted and remained in force until the permanent injunction was granted by the decision of the instant case.

<sup>6</sup> Mr. Justice Holmes, Mr. Justice McReynolds and Mr. Justice Brandeis dissented, the last two largely on the ground that the court lacked jurisdiction because this was not a justiciable controversy between states within the Judiciary Article of the Constitution. There seems to be ample authority for the proposition that a state may sue in behalf of her citizens where the welfare of a large number of them is involved in the question. *Kansas v. Colorado* (1902) 185 U. S. 125, 22 Sup. Ct. 552; *Georgia v. Tennessee Copper Co.* (1907) 206 U. S. 230, 27 Sup. Ct. 618; *Hudson County Water Co. v. McCarter* (1908) 209 U. S. 349, 28 Sup. Ct. 529. In this case, furthermore, it seems that the interest of the complainant states as proprietors of public institutions using natural gas is sufficient to enable them to maintain the suits.

<sup>7</sup> The United States Supreme Court has made a convenient collection of cases in support of the following propositions: ". . . States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it; or upon persons or property in transit in interstate commerce . . . . They have no power to prohibit interstate trade in legitimate articles of commerce; or to discriminate against the products of other States; . . . or to prescribe the rates to be charged for transportation from one State to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection." *Minnesota Rate Cases* (1913) 230 U. S. 352, 400, 33 Sup. Ct. 729, 740.

<sup>8</sup> Statutes were held valid in the following cases: *Silz v. Hesterberg* (1908) 211 U. S. 31, 29 Sup. Ct. 10 (prohibiting possession of game during closed season whether imported or not); *Manufacturers' Light and Heat Co. v. Ott* (1914, N. D. W. Va.) 215 Fed. 940 (fixing rates for natural gas sold within state, including imported gas); *Hump Hairpin Mfg. Co. v. Emmerson* (1922) 258 U. S. 290, 42 Sup. Ct. 305 (taxation of sales); *Hebe Co. v. Calvert* (1917, S. D. Ohio) 246 Fed. 711 (prohibiting the manufacture and sale of condensed milk made from skimmed milk). See (1918) 31 HARV. L. REV. 1031. Cf. *United Mine Workers of America v. Coronado Coal Co.* (1921) 259 U. S. 344, 42 Sup. Ct. 570. The seriousness of the interference with interstate commerce, always a question of degree, is the criterion by which the court tests the validity of a statute. *Lemke v. Farmers' Grain Co. of Embden* (1922) 258 U. S. 50, 42 Sup. Ct. 244; *Chicago & N. W. Ry. v. Railroad and Warehouse Commission* (1922, D. Minn.) 280 Fed. 387; *Interstate Motor Transit Co. v. Kuykendall* (1922, W. D. Wash.) 284 Fed. 882; (1921) 34 HARV. L. REV. 333; (1921) 35 *ibid.* 89; (1922) 35 *ibid.* 620, 883. See Powell, *The Supreme Court's Construction of the Federal Constitution in 1920-21, II Regulation of Commerce* (1921) 20 MICH. L. REV. 135, 140.

are perhaps best illustrated in the cases involving legislation for the exclusion from state boundaries of commodities believed to be injurious to public health. Thus every endeavor of the states to enforce local prohibition laws to prevent the importation of intoxicating liquors from other states was held to contravene the interstate commerce clause,<sup>9</sup> until a federal statute finally came to the aid of the states and accomplished the desired result.<sup>10</sup> The struggle to keep diseased cattle and adulterated foods beyond state bounds has resulted in another series of cases in which only the very narrowest statutes directed against cattle known to be diseased or foods known to be adulterated have been sustained, and only on the ground that such cattle or food were not properly subjects of interstate commerce at all.<sup>11</sup>

In the control by the state over its exports, however, there has been a tendency to allow greater power to the state to legislate with respect to its natural resources than to other products. Tonnage and occupation taxes have been sustained in the coal and iron mining industry<sup>12</sup> and a state has been allowed to prohibit entirely the exportation of its fresh waters.<sup>13</sup> In *Geer v. Connecticut*,<sup>14</sup> a statute directly prohibiting the exportation of game killed within the state was sustained on the

<sup>9</sup> *Bowman v. Chicago & Northwestern Ry.* (1888) 125 U. S. 465, 8 Sup. Ct. 689; *Leisy v. Hardin* (1890) 135 U. S. 100, 10 Sup. Ct. 681; *Vance v. Vandercook Co.* (1898) 170 U. S. 438, 18 Sup. Ct. 674; *Louisville & N. R. R. v. Coal Brewing Co.* (1912) 223 U. S. 70, 32 Sup. Ct. 189.

<sup>10</sup> Act of Mar. 1, 1913 (37 Stat. at L. 699).

<sup>11</sup> Statutes prohibiting the importation of sheep or cattle during certain seasons from districts where disease is known to be prevalent have been held void. *R. R. v. Husen* (1877) 95 U. S. 465; *Grimes v. Eddy* (1894) 126 Mo. 168, 28 S. W. 756. So also with a statute prohibiting the importation of all oleomargarine. *Schollenberger v. Pennsylvania* (1898) 171 U. S. 1, 18 Sup. Ct. 757. But a statute prohibiting the sale of oleomargarine colored to resemble butter was upheld. *Plumley v. Massachusetts* (1894) 155 U. S. 461, 15 Sup. Ct. 154. Statutes prohibiting the importation of sheep or cattle actually diseased have been sustained. *Missouri, K. & T. Ry. v. Haber* (1898) 169 U. S. 613, 18 Sup. Ct. 488; *Patrick v. State* (1908) 17 Wyo. 260, 98 Pac. 588; *Rouse v. Youard* (1895) 1 Kan. App. 270, 41 Pac. 426. *A fortiori* statutes requiring inspection of all cattle coming into the state and the dipping of those found to be infected have been upheld. *Asbell v. Kansas* (1908) 209 U. S. 251, 28 Sup. Ct. 485; *State v. Rasmussen* (1900) 7 Idaho, 1, 59 Pac. 933. But a statute forbidding the sale of meat except such as had been inspected by a certain board 24 hours before slaughter, though purporting to be a health regulation, is obviously a discrimination against the products of other states and therefore void. *Minnesota v. Barber* (1890) 136 U. S. 313, 10 Sup. Ct. 862. See 26 L. R. A. (n. s.) 279, note.

<sup>12</sup> *Heisler v. Thomas Colliery Co.* (1922) 260 U. S. 245, 43 Sup. Ct. 83; *Oliver Iron Mining Co. v. Lord* (1923) 262 U. S. 172, 43 Sup. Ct. 526. The state is at least allowed to take its toll before the product has definitely got into interstate commerce. But see *Ohio Collieries Co. v. Stewart* (1923, N. D. Ohio) 290 Fed. 1005.

<sup>13</sup> *Hudson County Water Co. v. McCarter*, *supra* note 6.

<sup>14</sup> (1896) 161 U. S. 519, 16 Sup. Ct. 600.

ground that wild animals can become the subject of ownership only in a qualified way, and can never be the subject of commerce except with the consent of the state and subject to the conditions which it may deem fit to impose for the public good. Since there is no more property in natural gas than there is in game until it is reduced to possession,<sup>15</sup> it is hard to see, if this be good law, why a state may not also impose the conditions under which natural gas may become the subject of commerce.<sup>16</sup> The cases can doubtless be distinguished on their facts in that, first, the collection of the gas and its transmission through the pipes is one continuous act,<sup>17</sup> whereas the capture and shipment of game are disconnected; and secondly,—and the court stresses this point—there was an established current of interstate commerce in gas upon which consumers in Pennsylvania and Ohio had come to rely,<sup>18</sup> and which West Virginia, having encouraged, cannot now cut off.

But despite these distinctions, it is believed that the cases are inconsistent in principle and that the instant case is sounder both in theory and in policy in refusing to allow a state to restrain the export of its natural resources. If the interstate commerce clause, as has so often been reiterated, was intended to make the United States a single nation

<sup>15</sup> A distinction between a state's power of control over gas and over game has been made. The property in animals *ferae naturae* is in the state, whereas "as to natural gas the public has no title to or control over gas in the ground. On the contrary, so far as it is susceptible of ownership, it belongs to the owners of the superincumbent lands in common, or at least such landowners have a limited and qualified ownership in it to the entire exclusion of the public." *Manufacturers' Gas Co. v. Indiana Nat. Gas. Co.*, *supra* note 2, at p. 547, 58 N. E. at p. 707. See also *Ohio Oil Co. v. Indiana* (1900) 177 U. S. 190, 20 Sup. Ct. 576.

<sup>16</sup> This was the contention of Mr. Justice Holmes in his dissenting opinion. It was also ably maintained by Hardman, *op. cit. supra* note 1. The cases are closely analogous, for in each the statute sought to protect the consuming interests of the people of the state. An attempt to protect trade interests by imposing restrictions on the export of wild animals is clearly unconstitutional. *Elmer v. Wallace* (1921, N. D. Ala.) 275 Fed. 86; (1922) 31 YALE LAW JOURNAL, 554.

<sup>17</sup> See *United Fuel Gas Co. v. Hallanan*, *supra* note 2; *Eureka Pipe Line Co. v. Hallanan*, *supra* note 2. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods. *The Pipe Line Cases* (1914) 234 U. S. 548, 34 Sup. Ct. 956; *Public Utilities Commission for Kansas v. London* (1919) 249 U. S. 236, 39 Sup. Ct. 268.

<sup>18</sup> This is a possible ground of distinction from another case relied upon by the dissent and stressed by Hardman, *op. cit. supra* note 1. A New Jersey statute prohibiting the transportation of the fresh waters of the state through pipes into another state was enacted before such pipes had been constructed. *Hudson County Water Co. v. McCarter*, *supra* note 6. But in spite of the fact that the statute dealt with a situation in which no interstate traffic had begun, and of the obvious convenience of securing the local water supply to local consumers, this was a clear and direct regulation of interstate commerce. The case seems anomalous. Furthermore, a similar statute has been held void where there was no established current of interstate trade. *West v. Kansas Nat. Gas. Co.*, *supra* note 2.

in their trade relations, it must follow that the natural resources of the states above all should be made available to the whole country.<sup>19</sup> If the states are one nation, then there can be no reason why people who happen to be geographically located in a particular state should have the exclusive benefit of its peculiar natural products.

THE INTEREST OF A REMAINDERMAN IN A POLICY ISSUED TO THE  
LIFE TENANT

Is a life tenant, who has collected insurance money on a fire policy taken out by him on the property for his own benefit, entitled to the full proceeds of the policy even above the value of his life estate, or must he hold the amount in excess of his life interest in trust for the remainderman? This question was raised by a recent Michigan case, *Blanchard v. Kingston* (1923) 193 N. W. 241.<sup>1</sup> Four judges agreed with the Massachusetts view that the life tenant was entitled to the entire proceeds of the policy,<sup>2</sup> while four judges felt that the court was committed by a former decision to the South Carolina doctrine that the

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<sup>19</sup> See *West v. Kansas Nat. Gas Co.*, *supra* note 2.

<sup>1</sup> The life tenant took out insurance on the property, and on destruction of the premises collected the full proceeds of the policy. She then purchased four other lots which she deeded to the plaintiff. By mistake of the scrivener, two of the lots were left out of the deed, and this action was brought to reform the deed to include all the lots. The life tenant having died, the remaindermen defended claiming that all the lots belong to them, having been bought with the insurance money which the life tenant held as trustee for the remaindermen.

<sup>2</sup> It should be noted that this discussion has to do only with the relative rights of the life tenant and remainderman in the money after it has been finally paid by the insurance company. It does not touch the equally interesting question of the measure of recovery as between life tenant and the insurer. It has been strenuously urged that such measure of recovery is for the full value of the property, regardless of the value of the life estate. McClain, *Insurance of Limited Interests* (1898) 11 HARV. L. REV. 512, 519. This finds seeming support in the cases where a husband as tenant by courtesy insures his wife's property and recovers for the full value. *Trade Ins. Co. v. Barracliff* (1883) 45 N. J. L. 543. ". . . in most cases the claim of the tenant from year to year cannot be answered by handing over to him what may be the marketable value of his property and the reason is that he insures more than the marketable value of the property, and he loses more than the marketable value of his property; he loses the house in which he is living, and the beneficial enjoyment of the house as well as its pecuniary value." Bowen, L. J., in *Castellain v. Preston* (1883) L. R. 11 Q. B. Div. 380, 400. See also *Wash. Mills Emery Mfg. Co. v. Weymouth & Braintree Mut. Fire Ins. Co.* (1883) 135 Mass. 503. But it may well be questioned whether any doctrine which allows a plaintiff to profit by means of insurance is basically sound. Insurance should be an indemnity against loss, rather than an instrument of profit. Hence some courts have more soundly held that the measure of recovery is limited to the value of the plaintiff's interest. *Beekman v. Fire Ins. Assoc.* (1901) 66 App. Div. 72, 73 N. Y. Supp. 110; *Doyle v. Am. Fire Ins. Co.* (1902) 181 Mass. 139, 63 N. E. 394.

life tenant must hold the money above the value of the life estate as trustee for the remainderman.<sup>3</sup>

Although there are relatively few cases on the subject, the leading Massachusetts case of *Harrison v. Pepper*<sup>4</sup> undoubtedly represents the weight of authority.<sup>5</sup> The life tenant there insured for the full value of the property, and was not held accountable to the remainderman for any part of the insurance money. The court said that a contract of insurance is a purely personal contract indemnifying the life tenant against loss sustained by him with respect to the property, and in no way inures to the benefit of third persons not a party to the contract. They denied that the proceeds of the insurance in any way take the place of the property destroyed, or that the life tenant becomes a trustee for the remainderman. The opposing South Carolina doctrine<sup>6</sup> is based on the assumption that the insurance money does take the place of the property destroyed, and that the life tenant becomes a trustee of that money for the remainderman.

Both the life tenant and the remainderman have an entirely separate insurable interest in the same property, and each may insure it to its full value for his own benefit.<sup>7</sup> Of course where the life tenant, under an agreement with the remainderman, insures for the benefit of both, a resulting trust arises.<sup>8</sup> But where he insures solely his own interest, it is difficult to find any basis for raising such a trust, particularly since the life tenant is under no duty to insure in the first place. There is no relationship between them, other than that they each have a separate and distinct interest in a common piece of property. And as the remainderman has an equal opportunity to insure, there is no reason why he should profit from insurance which the life tenant has volun-

<sup>3</sup> They agreed, however, that the rule would not apply in the instant case, because at the time the life tenant purchased the lots, she had just received a legacy of \$1,600, and there was no proof that she bought the lots with the insurance money rather than with the legacy.

<sup>4</sup> (1896) 166 Mass. 288, 44 N. E. 222.

<sup>5</sup> See *Spaulding v. Miller* (1898) 103 Ky. 405, 45 S. W. 462; *Bennett v. Featherstone* (1902) 110 Tenn. 27, 71 S. W. 589; *Guassen v. Whatman* (1905, Ch.) 93 L. T. R. 101; *Sawyer v. Adams* (1910) 140 App. Div. 756, 126 N. Y. Supp. 128; *Addis v. Addis* (1891, N. Y. Sup. Ct.) 60 Hun, 581, 14 N. Y. Supp. 657; 2 Perry, *Trusts and Trustees* (4th ed. 1889) sec. 553. *Contra: Green v. Green* (1897) 50 S. C. 514, 27 S. E. 952; *Clyburn v. Reynolds* (1889) 31 S. C. 91, 9 S. E. 973. See *Sampson v. Grogan* (1899) 21 R. I. 174, 42 Atl. 712.

<sup>6</sup> *Green v. Green*, *supra* note 5.

<sup>7</sup> See *Smith v. Cameron* (1909) 158 Mich. 174, 177, 122 N. W. 564, 566. "Where no requirement is contained in the instrument creating a life estate, the life tenant is not bound to insure the interest of the remainderman—also, that either party may insure for his own benefit." See also 2 Perry, *loc. cit. supra* note 5.

<sup>8</sup> *Welsh v. London Assur. Corp.* (1892) 151 Pa. 607, 25 Atl. 142; *Convis v. Citizens Mut. Fire Ins. Co.* (1901) 127 Mich. 616, 86 N. W. 994. See *Smith v. Cameron*, *supra* note 7. While these cases are frequently cited to uphold the trust theory where the life tenant insures for himself alone, they can hardly be considered as authority for that proposition.

tarily taken out.<sup>9</sup> It is true that in the vendor-vendee cases there is a growing tendency to hold the vendor as a trustee of the insurance money for the vendee.<sup>10</sup> But there is already a trust relationship existing between the two in other respects,<sup>11</sup> and it is consequently easier for the courts to imply it in the case of insurance money. In the case of a life tenant and remainderman, however, there is no such relationship in any respect.

Whether or not the proceeds of a policy of insurance take the place of the property insured, depends on what is the true nature of a contract of insurance. Brett, L. J., in *Rayner v. Preston*,<sup>12</sup> pointed out a distinction between the subject matter of the insurance and the subject matter of the contract of insurance. By this he meant that the performance of the contract in no way touches or concerns the physical property. The contract is not appurtenant to the land, but is merely an aleatory contract to pay upon the happening of an event,—a personal contract between the insurer and another for indemnity against possible loss with respect to certain property.<sup>13</sup> Upon the happening of the loss, the money is still the subject matter of the contract and is in no true sense substituted for the subject matter of the insurance, i. e. the property.<sup>14</sup> This is clearly borne out by the vendor-vendee cases where the vendee, though he is still under a duty to pay the price, receives no benefit from the insurance taken out by the vendor.<sup>15</sup> Likewise where

<sup>9</sup> A trust relationship exists between co-tenants under certain circumstances, yet the South Carolina court held in a previous case, *Amely v. De Saussure* (1887) 26 S. C. 497, 2 S. E. 490, that this does not apply to the case of insurance taken out by one for his own benefit. To thereafter hold in a similar situation that a life tenant is trustee for a remainderman seems inconsistent.

<sup>10</sup> *Mattingly v. Springfield Fire & Marine Ins. Co.* (1904) 120 Ky. 768, 83 S. W. 577; *Skinner & Sons Shipbuilding & Dry Dock Co. v. Houghton* (1900) 92 Md. 68, 48 Atl. 85. *Russell v. Elliott* (1922) 45 S. D. 184, 186 N. W. 824. For a discussion of this point see (1922) 6 MINN. L. REV. 607. *Contra*: see *infra* note 15. It is interesting to note that this has been made the rule under the new English Property Act of 1922, 12 & 13 Geo. V, c. 16, sec. 105.

<sup>11</sup> The vendor is already a quasi-trustee in the sense that on tender of the purchase price a court of equity will compel the vendor to convey to the vendee.

<sup>12</sup> (1881) L. R. 18 Ch. Div. 1, 9.

<sup>13</sup> "It is not a contract limiting or affecting the interest of the vendors in the property. . . . It is not even a contract in the event of fire to repair the buildings, but a contract in that event to pay the vendor a sum of money, which if received by them they may apply in any way they see fit." Cotton, L. J., in *Rayner v. Preston*, *supra* note 12, at p. 6.

<sup>14</sup> "It cannot be said that the money on the policy stands in place of the property destroyed. It is in no proper or just sense the proceeds of the policy. It is a sum paid by the insurer in consideration of a certain premium, as an indemnity for the loss of property in which the insured has a legal and insurable interest. This indemnity cannot be taken away by setting up a contingent right or title in third persons in the property in which the insured had a valid insurable interest at the time of the loss." *Lerow v. Wilmarth* (1864, Mass.) 9 Allen, 382, 385.

<sup>15</sup> *Rayner v. Preston*, *supra* note 12; *King v. Preston* (1856) 11 La. Ann. 95.

a mortgagee insures, the contract is purely personal and is not in any way affected by the collateral mortgage contract with the mortgagor whose debt still remains unpaid.<sup>16</sup> It is true that the South Carolina court cites several cases where apparently the money is substituted for the property. Thus where a testator, having insured certain property, dies leaving it to a life tenant with remainder over, upon total loss both the life tenant and the reversioner are entitled to their relative shares of the money.<sup>17</sup> But there it is presumed the testator intended to benefit both when he took out the policy, and while in result the proceeds of the policy were substituted for the land, in reality the court was merely carrying out the testator's intention. In general<sup>18</sup> it seems that the sound view is to consider the insurance money simply as an indemnity for the loss sustained, rather than a substitution for the property lost.

There thus seems to be little or no basis for the South Carolina doctrine. The life tenant is merely indemnified on a personal contract with the insurer for what he has lost—his dwelling house—which to him may represent the whole estate. The fact that he may collect more than the value of his life estate is a matter between himself and the insurer,

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And see *White v. Gilman* (1903) 138 Calif. 375, 71 Pac. 436, where it is similarly held that the vendor has no interest in insurance taken out by the vendee. As a sequence of the doctrine of *Rayner v. Preston*, it is held that the insurance company is subrogated to the vendor's right to the purchase price. *Castellain v. Preston*, *supra* note 2. But those courts that have denied the doctrine of *Rayner v. Preston* naturally deny the right of subrogation. *Skinner & Sons Dry Dock Co. v. Houghton*, *supra* note 10. The basis of these latter cases is that the vendor is a trustee for the vendee, and not that the insurance money is substituted for the land. On the general subject, see (1921) 21 COL. L. REV. 601.

<sup>16</sup> *Burlingame v. Goodspeed* (1891) 153 Mass. 24, 26 N. E. 232; *Dunbrach v. Neall* (1904) 55 W. Va. 565, 47 S. E. 303; *International Trust Co. v. Boardman* (1889) 149 Mass. 158, 21 N. E. 239. And similarly, where a mortgagor insures his interest, the mortgagee has no claim to the benefits of the policy. *Col. Ins. Co. v. Lawrence* (1836, U. S.) 10 Pet. 507; *Plimpton v. Farmers Mut. Fire Ins. Co.* (1871) 43 Vt. 497. Where the mortgagee insures, the insurance company is entitled to be subrogated to the mortgage debt which still remains due. *Gillespie v. Scottish Union Ins. Co.* (1906) 61 W. Va. 169, 56 S. E. 213; 11 L. R. A. (N. S.) 143, note. In Massachusetts, no subrogation is allowed, and the mortgagee may collect both the insurance and the mortgage debt. *Suffolk Fire Ins. Co. v. Boyden* (1864, Mass.) 9 Allen, 123.

<sup>17</sup> That is, the life tenant to the income for life, and the reversioner to the principal after his death. *Haxall's Ex'r v. Shippen* (1839, Va.) 10 Leigh, 536; *Graham v. Roberts* (1851) 43 N. C. 99; *Culbertson v. Cox* (1882) 29 Minn. 309, 13 N. W. 177. But where there is only partial loss, it is the right of either to have the money applied to rebuilding. *Brough v. Higgins* (1846, Va.) 2 Gratt. 408. See (1921) 21 COL. L. REV. 491.

<sup>18</sup> There are a few other cases that tend to support the South Carolina view. Thus where property insured by a testator during his lifetime burns, the right of action rests in the administrator, but the proceeds come into his hands as realty and must go to the heirs. *Wyman v. Wyman* (1863) 26 N. Y. 253. See also *People's St. Ry. Co. v. Spencer* (1893) 156 Pa. 85, 27 Atl. 113; *In re Robt's Estate* (1912) 163 Calif. 801, 127 Pac. 55.

in which the remainderman has no interest. There is no reason in law or in public policy why he should be deprived of the full benefits of his insurance which he had been foresighted enough to take out,<sup>19</sup> and the instant case in so holding has adopted the sounder view.

THE EFFECT OF STATE STATUTES ON EQUITY JURISDICTION IN THE  
FEDERAL COURTS

The Supreme Court of the United States has early said that the jurisdiction of the courts of the United States in equity can not be impaired by the laws of the states,<sup>1</sup> and somewhat later that the legislature of a state cannot directly enlarge the equitable jurisdiction<sup>2</sup> of a federal court.<sup>3</sup> To the former rule there seems to be no exception. Federal courts of equity will not entertain suits where there is a plain, adequate, and complete remedy at law in their own tribunal;<sup>4</sup> but a federal court will act, in a case otherwise proper, even though a state

<sup>19</sup> Nor is the life tenant morally bound, for he is under no legal duty to restore the destroyed premises. See *Rogers v. Atlantic Co.* (1915) 213 N. Y. 246, 107 N. E. 661. It seems that the Michigan court was not committed to the South Carolina doctrine by the *Cameron* case, *supra* note 7, for the reason given by Wiest, J., that it went off on the finding that the insurance was taken out for the benefit of both the remainderman and the life tenant, and hence is not a direct holding on the point.

<sup>1</sup> *Payne v. Hook* (1868, U. S.) 7 Wall. 425. See *Dodge v. Tulleys* (1892) 144 U. S. 451, 12 Sup. Ct. 728.

<sup>2</sup> In this connection one should distinguish carefully the two uses of the word *jurisdiction*. "While jurisdiction, in its proper sense, means authority to hear and decide a cause, it is common to speak of jurisdiction in equity or the jurisdiction of a court of equity as not relating to the power of the court to hear and determine a cause, but as to whether it ought to assume the jurisdiction and hear and decide the cause . . . . We often find the jurisdiction denied where the power exists but ought not to be exercised, and in this sense is the word 'jurisdiction' usually used when applied to courts of chancery. Where there is want of power the decree is void collaterally, but where there is said to be a want of jurisdiction, merely, it is only meant that it would be erroneous to exercise the power and the decree would be reversed on appeal. It means a want of equity and not a want of power." *Miller v. Rowan* (1911) 251 Ill. 344, 348, 96 N. E. 285, 287. Where a court has jurisdiction in the strict sense disobedience and resistance to its order is a criminal contempt. *People v. McKane* (1894, Sup. Ct.) 78 Hun, 154, 28 N. Y. Supp. 981. A court will entertain an objection to jurisdiction in the strict sense at any stage of the case, but objection to "equitable jurisdiction" must be raised by demurrer or plea or be distinctly stated in the defendants' answer. 1 Beach, *Modern Practice in Equity* (1894) ch. 1, secs. 13 and 14; *Waterloo Mining Co. v. Doe* (1897, C. C. A. 9th) 82 Fed. 45. Where a court says that a state law cannot give jurisdiction to a federal court but may give a substantial right which will be enforced in a federal court, jurisdiction in the strict sense is meant. *Ex parte McNiel* (1871, U. S.) 13 Wall. 236.

<sup>3</sup> *Reynolds v. Crawfordsville Bank* (1884) 112 U. S. 405, 5 Sup. Ct. 213.

<sup>4</sup> Act of March 3, 1911 (36 Stat. at L. 1163); *Fenn v. Holme* (1858, U. S.) 21 How. 481; *Whitehead v. Shattuck* (1891) 138 U. S. 146, 11 Sup. Ct. 276.

statute gives a complete and adequate remedy at law in the state court.<sup>5</sup> Not even can a state law expressly forbidding a suit in equity under certain circumstances, bar a suit in equity in the courts of the United States.<sup>6</sup> But where the state law provides for an enlargement of equitable rights, the federal courts will in the exercise of their already existing powers enforce the rights thus created. In enforcing these new equitable rights created by state statutes the federal courts are limited only by the Constitution.<sup>7</sup> Thus legal and equitable actions may not be united in the federal courts,<sup>8</sup> especially where such blending of actions would deprive a litigant of his constitutional right to a trial by jury.<sup>9</sup>

*Pusey and Jones v. Hanssen* (1923, U. S.) 43 Sup. Ct. 454, involved

<sup>5</sup> *Fenn v. Holme*, *supra* note 4; *United States v. Howland* (1819, U. S.) 4 Wheat. 108; *Boyle v. Zacharie* (1832, U. S.) 6 Pet. 648; *McConihay v. Wright* (1887) 121 U. S. 201, 7 Sup. Ct. 940. "Conceding it to be true . . . that the full relief sought in this suit could be obtained in the state courts in an action at law, it does not follow that the Federal court, sitting as a court of equity, is without jurisdiction. The inquiry rather is, whether by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States, the relief here sought was one obtainable in a court of law, or one which only a court of equity was fully competent to give." *Mississippi Mills v. Cohn* (1893) 150 U. S. 202, 205, 14 Sup. Ct. 75, 76. The state statute cannot be pleaded to abate a suit in equity in a federal court. *Suydam v. Broadnax* (1840, U. S.) 14 Pet. 67; *Union Bank v. Jolly's Adm'rs* (1855, U. S.) 18 How. 503; *Green's Adm'x v. Creighton* (1859, U. S.) 23 How. 90. But see *Williams v. Benedict* (1850, U. S.) 8 How. 107; *Peale v. Phipps* (1852, U. S.) 14 How. 368.

<sup>6</sup> *Guffey v. Smith* (1915) 237 U. S. 101, 35 Sup. Ct. 526. Statements of courts, that a party loses nothing by going into a federal tribunal and that he has a choice of tribunals, are then not strictly true. See *Ex parte McNeil*, *supra* note 2; *Davis v. Gray* (1872, U. S.) 16 Wall. 203; *Suydam v. Broadnax*, *supra* note 5.

<sup>7</sup> *Scott v. Neely* (1891) 140 U. S. 106, 11 Sup. Ct. 712.

<sup>8</sup> "The judicial power shall extend to all cases, in law and equity. . . ." U. S. Const. Art. III, sec. 2; *Livingston v. Story* (1835, U. S.) 9 Pet. 632; *Bennett v. Butterworth* (1850, U. S.) 11 How. 669. The acts of Congress on this question were similarly construed. "By the 34th section of the judiciary act of 1789, it is provided, that the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. The Act of May, 1792, confirms the modes of proceeding then used in suits at common law in the courts of the United States, and declares that the modes of proceeding in suits of equity shall be, 'according to the principles, rules, and usages, which belong to courts of equity, as contra-distinguished from courts of common law' . . . The court . . . think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of those principles." *Robinson v. Campbell* (1818, U. S.) 3 Wheat. 212, 221.

<sup>9</sup> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U. S. Const. Amend. VII (1791); *Thompson v. R. R.* (1867, U. S.) 6 Wall. 134; *Whitehead v. Shattuck*, *supra* note 4.

a Delaware statute which provided that, "Whenever a corporation shall be insolvent, the Chancellor, on the application and for the benefit of any creditor . . . . may . . . . appoint . . . . receivers of and for such corporation. . . ." A simple contract creditor of an insolvent corporation filed a bill in a federal court praying that a receiver be appointed for the corporation. Receivers were appointed; but the Supreme Court, two judges *dissenting*, reversed the decree of appointment for lack of jurisdiction. The court distinguished this case from others where they had enforced state statutes creating new equitable rights by saying that here only a remedial right in equity is given while the statute in the other cases changed a rule of substantive law.

It is believed that analysis will show there is ambiguity in the use of the word *remedial* in connection with a right. In the instant case, the court uses the term as if it were synonymous with *adjective* or *procedural* as distinguished from *substantive*. But a remedial right may be either substantive or adjective. Thus, the question whether in a given case a plaintiff is entitled only to damages or may recover property specifically is obviously substantive and not procedural, although it has to do with remedies. A remedial substantive right given by a state statute will be enforced in the federal courts while a remedial adjective right will not be. A statute which allows a suit in equity to accomplish a result which could be attained by an action at law gives a remedial adjective right, and its enforcement would deprive the litigant of his constitutional right to a trial by jury in the law action.<sup>10</sup> A statute which allows a suit in equity to accomplish a result which, except for the statute, could not be attained either at law or equity, creates a new substantive right or enlarges an old one and in so doing is giving a substantive remedial right. The distinction is clear in the cloud on title cases. Where the statute allows relief in equity to quiet title, and under the same circumstances, an action of ejectment accomplishing substantially the same purpose lies at law, the statute confers only a remedial procedural right;<sup>11</sup> but where the statute gives relief in equity under circumstances where no action at law would lie, the right given is substantive although remedial.<sup>12</sup>

Perhaps there is less certainty where the statute grants relief which may not be obtained at law but which would do away with the need for common law relief. For example, if a statute were to allow a suit for the specific performance of a contract under circumstances where it had not been granted before, would this deprive the litigant of his right to a trial by jury in the suit for damages for breach of the contract?<sup>13</sup> It is

<sup>10</sup> Since it is a question of constitutionality this is also true of a federal statute.

<sup>11</sup> *Whitehead v. Shattuck*, *supra* note 4; *McConihay v. Wright*, *supra* note 5.

<sup>12</sup> *Holland v. Challen* (1884) 110 U. S. 15, 3 Sup. Ct. 495; *Reynolds v. Crawfordsville Bank*, *supra* note 3; *Clark v. Smith* (1839, U. S.) 13 Pet. 195. See also *Bodley v. Taylor* (1809, U. S.) 5 Cranch, 191; *Lewis v. Marshall* (1831, U. S.) 5 Pet. 470.

<sup>13</sup> Is there anything in the Constitution of the United States which forbids the extension of the right to specific performance in the federal courts?

submitted that the relief allowed by the statute would be so different from the relief at law that it would not be unconstitutional for the federal courts to enforce the statute.<sup>14</sup>

Several years before the instant case the Circuit Court for Delaware declared that the statute here involved created a new substantive right in equity.<sup>15</sup> In a recent case<sup>16</sup> the Delaware Chancellor has, with what seem persuasive arguments, disagreed directly with the majority in the *Hanssen* case.<sup>17</sup> He said, ". . . the Delaware statute does something more than to create simply an equitable remedy. It . . . creates a substantive right of a clearly equitable nature. The right which this statute creates is not . . . defined in terms. It is to be gathered . . . from what appears to be the evident and manifest purpose of the statute. That right . . . is that the assets of a corporation upon the event of insolvency may be regarded by creditors and stockholders as impressed with somewhat of the nature of a trust to be administered for their benefit. . . . The appointment of the receiver is not the final relief. Such appointment is only ancillary to the primary relief, which is to protect and preserve and ultimately dispose of the corporate assets in harmony with the conception that the statute has conferred upon the classes named a right to have the assets impressed with a beneficial interest common to all."<sup>18</sup>

It seems that the view here suggested is sound; that the statute creates a substantive right, one which is clearly equitable and does not exist at law, and one which, therefore, it would not be unconstitutional for the federal courts to enforce.

#### THE FATE OF THE KANSAS INDUSTRIAL COURT

In the recent case of *Wolff Packing Co. v. Court of Industrial Relations of Kansas*<sup>1</sup> (1923, U. S.) 43 Sup. Ct. 630, where for the first

<sup>14</sup>In the Mississippi statute construed in *Scott v. Neely*, *supra* note 7, and in *Cates v. Allen* (1893) 149 U. S. 451, 13 Sup. Ct. 883, the chancellor was given jurisdiction of bills of creditors who had not obtained judgments at law to set aside fraudulent conveyances of property or other devices resorted to for the purpose of defrauding creditors. As the relief granted by the statute invested the parties with a substantial right which they did not have at law, as suggested by the dissenting opinion in *Cates v. Allen*, *supra*, perhaps it would have been permissible for the federal court to have enforced the statute.

<sup>15</sup>*Jones v. Mutual Fidelity Co.* (1903, C. C. D. Del.) 123 Fed. 506.

<sup>16</sup>*Mackenzie Oil Co. v. Omar Oil & Gas Co.* (1923, Del. Ch.) 120 Atl. 852.

<sup>17</sup>Although suggesting a possible interpretation of its own state statute this decision has, of course, no effect on the United States courts. *Neves v. Scott* (1851, U. S.) 13 How. 268; *Russell v. Southard* (1851, U. S.) 12 How. 139.

<sup>18</sup>*Mackenzie Oil Co. v. Omar Oil Co.*, *supra* note 16, at p. 856. The judge further said at p. 857, "The fact that there is discretion in the chancellor to refuse to appoint a receiver . . . does not seem to me to destroy the right given by the statute any more than it could be said that the discretion which equity always exercises in administering the remedy of specific performance strips the right which underlies the remedy of its equitable character."

<sup>1</sup>The case was on appeal from the Supreme Court of Kansas. *Court of*

time<sup>2</sup> the question of the constitutionality of the Kansas Industrial Court Act<sup>3</sup> was squarely presented, it was held by a unanimous court that the Act "in so far as it permits the fixing of wages in plaintiff in error's packing house is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of law."<sup>4</sup> Two important questions are raised by this decision: What businesses are properly the subject for state regulation, and to what extent will such regulation be permitted in a proper case?

It is undoubtedly true that a business affected with a public interest is subject to state regulation. In the course of his opinion, Chief Justice Taft divides such businesses into three classes: (1) Those which have received a special privilege from the state, such as railroads and public utilities. (2) Certain exceptional occupations, such as innkeeping, which have been regulated since the early days of English history. (3) Businesses which have come to be affected with a public interest because of the "indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation." The grain elevator cases are illustrations of the last group.<sup>5</sup> This classification involves a consideration of the origin of the peculiar public service duties,<sup>6</sup> and prompts one to consider the

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*Industrial Relations v. Wolff Packing Co.* (1921) 109 Kan. 629, 201 Pac. 418; (1922) 111 Kan. 501, 207 Pac. 806. For a further discussion of these cases, see (1921) 31 YALE LAW JOURNAL, 206; (1922) 31 *ibid.* 450.

<sup>2</sup>The case of *Howat v. Kansas* (1922) 258 U. S. 181, 42 Sup. Ct. 277 did not present a federal question. See COMMENTS (1921) 31 YALE LAW JOURNAL, 75; (1922) 31 *ibid.* 889. See also Vance, *The Kansas Court of Industrial Relations and Its Background* (1921) 30 *ibid.* 456.

<sup>3</sup>Kan. Spec. Sess. Laws, 1920, ch. 29, created the Court. The Act is given fully as a note to *State v. Howat* (1921) 198 Pac. 686, 705. The purpose of the act set out in sec. 6 is to compel continuity in the food, clothing, and fuel industries which are declared to be affected with a public interest in sec. 3. Sec. 7 gives the court power, in the event of an industrial controversy which "may endanger the continuity or efficiency of service of any of said industries," to investigate the controversy and fix the "terms and conditions upon which said industry should be thereafter conducted . . ." The court is empowered by sec. 8 to order changes "in the matters of working and living conditions, hours of labor, rules, and practices, and a reasonable minimum wage. . ." Sec. 17 virtually forbids the workmen to strike, though it recognizes a privilege in the individual to quit work at any time.

<sup>4</sup>The court did not find it necessary to pass on sec. 3 of the Act which declares the designated businesses to be affected with a public interest. "We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses . . . because, even so, the valid regulation to which it might be subjected as such, could not include what this Act attempts." 43 Sup. Ct. at p. 634.

<sup>5</sup>*Munn v. Illinois* (1876) 94 U. S. 113; *Budd v. New York* (1892) 143 U. S. 517, 12 Sup. Ct. 468; *Brass v. North Dakota* (1894) 153 U. S. 391, 14 Sup. Ct. 857.

<sup>6</sup>These duties are as follows: the duty to serve all, and furnish adequate facilities, at a reasonable rate, without discrimination. Able writers have given their theory of the genesis of these duties. See Wyman, *The Law of Public Callings as a Solution to the Trust Problem* (1904) 17 HARV. L. REV. 156, 217;

nature of a public calling both at early common law and in the light of recent decisions.

According to Professor Bruce Wyman,<sup>7</sup> the public character of a business at common law depended on its control of a virtual monopoly and on its importance to the public. Veterinary surgeons in the early days of England were few in number; this was also true of common carriers and farriers.<sup>8</sup> Consequently, because of their importance to the public, persons engaged in these callings were under a legal duty to serve all who applied and for a reasonable compensation. Mr. Wyman attempts to show with respect to businesses in classes (1) and (3) that conditions are not usually competitive but monopolistic, and that because of this and because of their importance to the public, they are properly charged with public service duties.<sup>9</sup>

Professor C. K. Burdick, however, adopts a different view. According to him, anyone who held himself out as ready to serve all owed a duty to serve all and for a reasonable price. The determining factor was not the kind of business, but the manner in which it was carried on. One who was engaged in a common calling and refused to serve, or failed to use due care in serving, committed a breach of his general assumpsit to serve all.<sup>10</sup> But Professor Burdick agrees that Mr. Wyman's monopoly test should determine the businesses to be included in the class of quasi-public businesses (class 3). This test has, however, been rejected by the United States Supreme Court in *Brass v. North Dakota*, where the importance of grain-elevating to the public was the only basis for upholding a statute fixing prices for the storing of

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Burdick, *Origin of the Peculiar Duties of Public Service Companies* (1911) 11 COL. L. REV. 514, 616, 743; Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135.

<sup>7</sup> See Wyman, *op. cit. supra* note 6.

<sup>8</sup> ". . . the farriers were so scattered that the conditions were those of virtual monopoly, which required therefore a special code, else a good horse might be ruined for want of a shoe if the wayside smith should take it into his head to refuse to serve." Wyman, *op. cit. supra* note 6, at p. 158.

<sup>9</sup> As to class (2) it is said (Wyman, *op. cit. supra* note 6, at p. 222) ". . . no business can be granted a privilege under our constitutional system unless it is a public calling." We have already seen what Prof. Wyman's test of such a calling is. And as to class (3): "In these cases of the grain elevator and the stockyard, experience shows us that in a given community there are not usually competitive conditions; monopolistic conditions generally prevail." Wyman, *op. cit. supra* note 6, at p. 225. The monopoly theory was adopted in COMMENTS (1918) 27 YALE LAW JOURNAL, 824, 828. This test was however rejected by the United States Supreme Court in the *Brass* case, *supra* note 5.

<sup>10</sup> "But in fact it seems . . . that the position of one who is engaged in a common calling and refuses to serve an applicant is quite distinguishable from that of the carpenter who promises to build a house and does not do so. The former has in fact entered upon the general undertaking of a common calling, while the carpenter has entered upon no undertaking, and when the former refuses to serve he is not really refusing to enter upon an undertaking as the carpenter is, but is refusing to perform the public undertaking already entered upon." Burdick, *op. cit. supra* note 6, at p. 517.

grain.<sup>11</sup> Mr. Burdick does not accept Professor Wyman's views of the businesses in class (1).<sup>12</sup>

The most far reaching and yet it seems the soundest view is that of Mr. Edward A. Adler. He agrees with Professor Burdick on the nature of a public business at common law, but going further he says:<sup>13</sup>

"Under a true interpretation of the common law, all business is public, and the phrase 'private business' is a contradiction in terms. Whatever is private is not business, and that which is business is not private. Every man engaged in business is engaged in a public profession and a public calling. The parties to business are the merchants on the one hand and the public on the other. The merchant or trader opens his doors into the public street and invites all who pass to enter. By public advertising and circularizing he solicits patronage from all who read. He extends an invitation or makes a continuing offer to all indifferently. He seeks credit, employs the machinery of credit, and by so doing involves the fortunes of the community at large."

Thus the manner in which a business is carried on is the important factor. Mr. Adler's test is wide enough to subject any business to legislative control according to the prevailing views of social policy and expediency. And indeed it seems that in early days there was no limit to the number of businesses subject to public service duties.<sup>14</sup> It is true that with the increase of inventions and the spread of the *laissez faire* idea, the state in fact ceased to exercise a broad regulatory power, but it does not follow that it has lost this power it once possessed. On the other hand, as our social organization becomes more complex and more regulation is found to be necessary, a broader exercise of the regulatory power is to be expected. This is well illustrated by the increasing number of businesses which have been subjected to state regulation since the end of the nineteenth century,—regulations which the United States Supreme Court has sustained in spite of vigorous contentions that the Fourteenth Amendment was violated.<sup>15</sup> It was the

<sup>11</sup> See *supra* note 9; Wyman, *op. cit. supra* note 6, at p. 746.

<sup>12</sup> ". . . it would seem that . . . the potential general usefulness of an undertaking to the members of the community justifies the grant of the power of eminent domain . . . and the acceptance of such a grant carries with it the duty to use such powers reasonably and impartially for the benefit of all applicants." Burdick, *op. cit. supra* note 6, at p. 629.

<sup>13</sup> Adler, *op. cit. supra* note 6, at p. 158. In note 80 Mr. Adler points out that the German Commercial Code requires "the registration of traders as such."

<sup>14</sup> See Adler, *op. cit. supra* note 6, at p. 149.

<sup>15</sup> Some of the decisions referred to beside the grain elevator cases are: *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 31 Sup. Ct. 186 (statute regulating banking business); *German Alliance Ins. Co. v. Lewis* (1914) 233 U. S. 389, 34 Sup. Ct. 612 (regulation of insurance rates); *Block v. Hirsh* (1921) 256 U. S. 135, 41 Sup. Ct. 458 (statute regulating rents); *Muller v. Oregon* (1908) 208 U. S. 412, 28 Sup. Ct. 324 (statute regulating hours of labor); *Bunting v. Oregon* (1917) 243 U. S. 426, 37 Sup. Ct. 435 (same). "Many of the recent cases seem to reflect what may be called an attitude of judicial self-denial or *laissez faire*, a willingness on the part of the courts to regard the legislative determination that social and economic conditions demand statutory regulation as a conclusive determination with which the courts will interfere only in

importance of grain elevating to the public that determined the decision in the *Brass* case and not the fact of monopoly. And it is submitted that the food, clothing, and fuel industries, designated by the Kansas Court for regulation, may well be included in class (3) as businesses affected with a public interest.<sup>16</sup>

The decision of the instant case however forbids regulation which consists in fixing wages on the ground that it is violative of the Fourteenth Amendment.<sup>17</sup> In view of the recent case holding unconstitutional the minimum wage law for women, such a decision was perhaps to be expected.<sup>18</sup> But the Act in question was not a price-fixing statute. The Kansas Act<sup>19</sup> imposed on the owners of the industries it affected the duty of operating their plants "with reasonable continuity."<sup>20</sup> And

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cases of the most obvious and palpable abuse of discretion . . . . The proper sphere of legislative regulation of social and economic conditions ceases to be defined in accordance with judicial tests of reasonableness and becomes, to use the words of Prof. Vance, 'substantially commensurate with the considered legislative policy of the state.'" Cushman, *Social and Economic Interpretation of the Fourteenth Amendment* (1922) 20 MICH. L. REV. 737, 758.

<sup>16</sup>The industries named in the Kansas Act produce the necessities of life. The preparation of food or clothing may not present as strong a case as the mining of coal; but it seems that, under the decisions of the Supreme Court in general and the *Brass* case in particular, there is no constitutional objection to a state statute which would regulate the prices of products of any of the designated industries.

<sup>17</sup>The Supreme Court of Kansas in upholding the validity of the act said: "If the state can make regulations for the government of a business affected with a public interest, it ought to be able to extend that regulation to the wages paid to the employees of that business. The flow of food supply from producer to consumer should not be stopped by conditions produced by industrial unrest arising out of wage problems. If that flow is threatened and the state under its police power can remove the danger that should be done. That and that alone the Kansas industrial court law attempts to do." *Court of Industrial Relations v. Wolff Packing Co.* (1921) 109 Kan. 629, 646, 201 Pac. 418, 426. Indeed whether the regulation be of prices or of wages, in either case the profits and returns of the business are limited. It may also be remarked that hours of labor statutes inevitably affect wages. See especially *Bunting v. Oregon* cited *supra* note 15, where the contention was made that the statute in question was a wage statute. Cf. the principal case with *Wilson v. New* (1917) 243 U. S. 332, 37 Sup. Ct. 298, where the Supreme Court upheld an Act of Congress prescribing a minimum wage, which act was passed to avert a nation-wide railroad strike.

<sup>18</sup>*Adkins v. Children's Hospital* (1923, U. S.) 43 Sup. Ct. 394; COMMENTS (1923) 32 YALE LAW JOURNAL, 829.

<sup>19</sup>Sec. 6.

<sup>20</sup>Compare with the following from *Munn v. Illinois* (1876) 94 U. S. 113, 126: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control." As to the privilege of a public utility to withdraw from service, see COMMENTS (1922) 32 YALE LAW JOURNAL, 75.

it also imposed on the owners a duty to pay prescribed wages as a means of attaining such a continuity. The aim of the latter provision was to eliminate the strike as an obstacle to continuous operations. As a substitute the Kansas Industrial Court was created with power to settle controversies between employer and employee. No great emergency was necessary before the court could act. It was admitted that the plant involved in the instant case was a small one, and "if it should cease to operate, the effect on the supply of meat and food in this state would not greatly inconvenience the people of Kansas."<sup>21</sup> Nevertheless, a majority of the Supreme Court of Kansas held that "such an emergency as the law contemplates existed."<sup>22</sup>

Now that the power to fix wages as a means of insuring continuous operation in industries affected with a public interest has been denied to the state legislature,<sup>23</sup> whatever usefulness the Kansas Court of Industrial Relations had in the solution of social problems incident to industrial unrest, has been practically destroyed.<sup>24</sup> The Kansas Act was indeed far reaching in its scope. Yet similar legislation has been enacted in Australia and New Zealand;<sup>25</sup> and statutes regulating wages as well as prices of commodities are not unknown in English and American history.<sup>26</sup> These statutes were enacted to relieve from economic distresses and "to secure to the people those commodities which were deemed by the legislative branch of the government to be of prime necessity for the existence or for the comfort and convenience of the body politic."<sup>27</sup> The Supreme Court, however, was not prepared to follow the Kansas legislature in the adoption of wage-fixing as the next step in the modern development of state regulation.

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<sup>21</sup> *Court of Industrial Relations v. Wolff Packing Co.* (1922) 111 Kan. 501, 502, 207 Pac. 806, 807.

<sup>22</sup> *Ibid.*

<sup>23</sup> "The employer is bound by this act to pay the wages fixed and while the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him." From the opinion of Chief Justice Taft. The original proceedings against the Wolff Company were in *mandamus* to compel it to establish hours of labor as well as to put into effect a schedule of wages as ordered by the Industrial Court. The power to fix hours of labor was not discussed in the principal case. See the discussion of this matter by the Supreme Court of Kansas in *Court of Industrial Relations v. Wolff Packing Co.* (1921) 109 Kan. 629, 641, 201 Pac. 418, 424. Cf. with the *Muller* and *Bunting* cases cited *supra* note 15.

<sup>24</sup> Cf. sec. 28 of the Act: "If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the Legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court."

<sup>25</sup> See (1921) 31 YALE LAW JOURNAL, 206.

<sup>26</sup> See Gilmore, *Governmental Regulation of Prices* (1905) 17 GREEN BAG, 627; and, for example, Conn. Sess. Laws, 1778, at p. 485.

<sup>27</sup> Gilmore, *op. cit. supra* note 26, at p. 631.