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MORATORY LEGISLATION BY CONGRESS

An Act recently passed by Congress and signed by the President on March 8th, known as the Soldiers' and Sailors' Civil Relief Act, is of great and immediate interest to the profession. Its aim is to protect persons in military service from certain hardships which may result from their absence and their inability to look after their business interests at home.

The Act contains six Articles. Article I (entitled "General Provisions") defines who are "persons in military service," and certain other terms of the Act and provides that the Act is applicable "to the United States, the several states and territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein." It provides further that certain relief granted under the Act may be given also with respect to sureties, guarantors, indorsers, and other persons liable upon the contract or liability in question.

The principal provisions of Article 2 (entitled "General Relief") are the following:

1. Before a judgment by default is entered in any court the plaintiff shall file an affidavit stating that the defendant is not in military service. In the absence of such an affidavit no judgment is to be entered without first securing an order of court directing such entry; and no such order shall be made if the defendant is in military service until after the court shall have appointed an attorney to represent him. Unless it appears that the defendant is not in military service the court may require as a condition before judgment is entered that the plaintiff file a bond to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment, should the judgment be thereafter set aside. It will be seen that the provisions of this Article affect all judgments by default in any court *whether the defendant is in military service or not.*

2. Judgments rendered against any person in military service during the period of such service or within thirty days thereafter may be opened not later than ninety days after the termination of such service if it appear that the defendant was prejudiced by reason of his military service in making his defense to such action or proceeding.

3. Any action or proceeding commenced in any court by or against a person in military service during the period of such service or within sixty days thereafter shall be stayed on application of such person or some person on his behalf, or may be stayed in the discretion of the court on its own motion, unless the ability of the plaintiff to prosecute the action or of the defendant to conduct his defense is not materially affected by reason of his military service.

4. In an action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the execution of any judgment or order entered against such person may be stayed and any attachment or garnishment of property, money, or debts in the hands of another may be vacated or stayed, unless the ability of the defendant to comply with the judgment or order is not materially affected by reason of his military service.

5. The period of military service is not to be included in computing any period limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators or assigns, whether such cause of action shall have accrued prior to or during the period of such service.

Article 3 of the Act deals with "Rents, Installment Contracts, Mortgages."

1. It forbids eviction or distress in respect of any premises the rental of which does not exceed \$50 per month, and which are occupied

chiefly for dwelling purposes by the wife, children or other dependents of a person in military service, except upon leave of court. The court may stay proceedings for not longer than three months, and shall do so on application, unless the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service, or it may make such other order as may seem just. The Secretary of War or the Secretary of the Navy is empowered to order an allotment of the pay of a person in military service, in reasonable proportion, to discharge the rent.

2. Parties to whom a deposit or an installment of the purchase price has been paid under a contract contemplating the purchase of real or personal property by persons who after such date of payment have entered military service, are prohibited from rescinding or terminating the contract or resuming possession of the property for non-payment of any installment falling due during the period of such service, except by action in a court of competent jurisdiction. Upon the hearing of such an action the court may order the re-payment of prior installments or deposits or any part thereof as a condition of terminating the contract and resuming possession of the property, or in its discretion may, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings, unless in the opinion of the court the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interests of all parties.

3. With respect to obligations originating prior to the date of the approval of the Act which are secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service, it is provided that in any proceeding commenced in any court during the period of military service to enforce such obligation, arising out of non-payment of any sum due thereunder or out of any other breach of the terms thereof, occurring prior to or during the period of such service, the court, after hearing, in its discretion may on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service, (a) stay the proceedings or (b) make such other disposition of the case as may be equitable to conserve the interests of all parties. No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court.

The provisions of Article 4 (entitled "Insurance") aim to protect persons in the military service who shall apply for the benefits of this Act against the lapsing of any policy or policies of insurance which they may carry not exceeding in each case a face value of \$5000.

The provisions of Article 5 (entitled "Taxes and Public Lands") aim to protect the rights which persons in military service may have in any public lands and to protect such persons against the consequences resulting from the non-payment of taxes or assessments falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents.

Article 6 (entitled "Administrative Remedies") lays down, as the title indicates, various administrative remedies.

The outbreak of the war gave such a shock to the financial systems of the various belligerent countries in Europe that they found it necessary to declare immediately moratoriums extending for specified times the period within which payments might be made. Such a moratorium was put into effect in England by proclamation on August 2, 1914, and was confirmed by what is known as the Postponement of Payments Act, which was passed by Parliament on the following day. The Act conferred authority on the King to postpone the payment of all contract obligations and provided that it was to remain in force for a period of six months. No such legislation was required in this country after its entry into the war because our financial system had already adapted itself to the new conditions created by the war.

Special legislation was required, however, to meet the needs of those entering the military service. Laws aiming to protect their interests were passed in Europe promptly after the outbreak of the war. In Germany such a law was passed on August 4, 1914; in France, on August 5, 1914; and in England, on August 31, 1914. The English Act, which is known as the Courts Emergency Powers Act, was amended twice in 1916 and again in 1917. In this country it has required a much longer time to enact the necessary legislation in behalf of our men in the military service. Maryland was one of the first states to realize the need of prompt action and it passed the necessary legislation at the special session of its legislature in 1917. It was almost a year after the declaration of war before the Congress of the United States took the matter in hand. By providing a very comprehensive statute on the subject, it has made further state legislation with reference to the matter unnecessary.

In the Soldiers' and Sailors' Civil Relief Act we have a striking instance of Congressional action based upon the constitutional power to declare war, to support armies, to maintain a navy, and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The Act is a vast improvement upon the English model and is a fine piece of legislation, both as regards substance and legislative draftsmanship.

CAN A SOLDIER UNDER AGE MAKE A VALID WILL?

When a nation is in arms questions which have been thought only of academic interest may become of large practical moment. The age at which a soldier or sailor attains testamentary capacity is an instance in point, for the armies and navies of the warring nations contain many boys under 21. A recent English case involved the will of an infant officer of the British army who attempted to dispose of £1,000,000 over which he had a testamentary power of appointment. He was killed in action, while still an infant, and his will was admitted to probate as a soldier's will under section 11 of the Wills Act of 1837. Section 7 of the Act declares that no will made by any person under 21 years of age shall be valid; sections 9 and 10 prescribe the formalities for executing wills; and section 11 reads: "Provided always and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." Questions arising as to the validity of the attempted exercise of the power of appointment, the case came before the Chancery Division. It was held that so long as the probate stood unrevoked the testamentary power of appointment was validly exercised; but the learned judge expressed the opinion that the practice of admitting to probate wills of infant soldiers was not justified by the Wills Act and that if the question should come before the Court of Appeals it would be necessary under existing legislation to declare such wills invalid. *Re Wernher* (1918, Ch. D.) 117 L. T. Rep. (N. S.) 801.

The age at which a person shall be deemed to have legal capacity to make a will depends upon the provisions of the statute governing the making of wills. American statutes closely follow those of England—either the Statute of Frauds of 1676 or the present Wills Act of 1837. The tendency of modern legislation has been to advance the age of testamentary capacity and many of the American states¹ now place it at 21, as does section 7 of the Wills Act. Likewise many of the American statutes² have provisions favoring the wills of soldiers and sailors and corresponding to section 11 of the Wills Act. The English decisions therefore will be of value in helping to solve under American statutes the problem whether a soldier under age can make a valid will.

¹ See 1 Schouler, *Wills* (5th ed.) secs. 39-43; Rood, *Wills*, sec. 126 *et seq.*

² See 1 Schouler, *op. cit.* sec. 365 *et seq.*; Rood, *op. cit.* sec. 238.

The opinion of Justice Younger in the principal case contains so admirable a review of the origin and history of the special favor which the law shows to soldiers and sailors in the making of wills that it would be useless to attempt to add to it.³ But a summary of his argument may be of interest to American readers. Prior to the Statute of Frauds no formality of execution, nor even a writing, was required for the testamentary disposition of personal estate, and testamentary capacity was deemed to exist at the age of 14 for males and 12 for females. When the Statute of Frauds introduced certain forms and solemnities into the making of wills of personalty it was thought expedient to reserve—as was done by section 23⁴—their former privileges to soldiers in actual military service and to sailors at sea, because their peculiar circumstances rendered it more difficult for them to observe the forms required of testators in ordinary circumstances. The Statute of Frauds contained no provision as to the age required for testamentary capacity and the reservation by section 23 of the soldier's privilege did not lower the age at which he was competent to make a will. It simply did away with the formalities of execution.⁵ With this survey of the earlier law, it seems clear that section 11 of the Wills Act does not affect the capacity to make a will—the age of capacity being fixed at 21 years by section 7, just as before that Act it had been fixed at 14 years for males by the established common-law rule, unchanged by the Statute of Frauds—but reserves merely the privilege of disregarding formalities of execution, just as did section 23 of the Statute of Frauds. And this is made the clearer by reason of the form of section 11 which is that of a proviso following sections 9 and 10 which deal with the formalities of execution. Moreover, it is to be noticed that the privilege reserved extends only to the soldier who is in actual military service. When he returns to civil life it ceases. Now if the reservation were intended to confer capacity to make a will regardless of age how extraordinary it would be to withdraw it when the soldier returns to civil life, and thus leave him unable, until he should reach majority, to alter or revoke by a later will his military will.

The court's argument demonstrates beyond question the soundness of its interpretation of the statute. Yet the English text writers⁶ have

³ The special testamentary privilege extended to soldiers and sailors was borrowed by the common law from the civil law. 2 Justinian, *Institutes*, Title 11. See *Drummond v. Parish* (1843, Eng.) 3 Curt. Eccl. Rep. 522, 531; also *Leathers v. Greenacre* (1866) 53 Me. 561, 570.

⁴ Section 23 reads: "Provided always: That notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this Act."

⁵ This was the construction placed upon the privilege under the civil law. See Swinburne, *Wills*, 61.

⁶ 1 Jarman, *Wills* (6th ed.) 102; Theobald, *Wills* (7th ed.) 56.

been accustomed to assert that soldiers in actual military service and sailors at sea may make wills of personalty at the age of 14, and it has been the practice of the English courts of probate to admit to probate the wills of soldier-infants. But, as Justice Younger points out, this rule and this practice originated in a case in which probate was granted on *ex parte* motion and without any adequate consideration.⁷

American text writers have been strangely silent on the subject. No discussion of the problem has been found in any of them. There is, however, one American decision which supports the view of Mr. Justice Younger.⁸ It is believed that in this country as well as in England additional legislation will be necessary if soldiers or sailors are to have testamentary capacity at an earlier age than civilians.

WHAT IS COMMERCE?

It has been suggested in two legal periodicals¹ and held in two recent cases that interstate transportation of property by the owner for purely personal use is not interstate commerce. *United States v. Mitchell* (1917, S. D. W. Va.) 245 Fed. 601.² But inasmuch as there are at least two decisions squarely *contra*³ and apparently none in accord, and inasmuch as the solution of the question goes to the very root of the whole commerce clause of the Constitution, the problem seems to be doubly worthy of consideration.

What, then, is commerce, or rather what is commerce in the sense in which that term is used in the Constitution? The specific aspect of this question as it arose in the principal case was whether the owner of intoxicants who personally carries the same from one state to another, not for purposes of trade but for personal use, is transporting intoxicants in interstate commerce. The court held that such a transaction is not interstate commerce for the reason that the term commerce "*necessarily connotes*" a business transaction. But does the term *commerce, in the sense in which it is used in the Constitution, "necessarily connote"* a so-called "commercial" transaction? It was argued in the leading case on interstate commerce that commerce was limited to traffic, but Mr. Chief Justice Marshall, speaking for the court, irrefutably answered the argument with the observation that "*this [limitation] would restrict a general term, applicable to many*

⁷ *Re Farquhar* (1846) 4 Notes of C. 651; see also *Re M'Murdo* (1867) L. R. 1 P. & D. 540; *Goods of Hiscock* [1901] P. 78.

⁸ *Goodell v. Pike* (1867) 40 Vt. 319.

¹ (1903) 3 COLUMBIA L. REV. 411; (1898) 12 HARV. L. REV. 353.

² The other case, from the Northern District of West Virginia, is unreported.

³ *State v. Holleyman* (1899) 55 S. C. 207, 33 S. E. 366; *Alexander v. State* (1910) 3 Okla. Cr. 478, 106 Pac. 988.

objects, to one of its significations."⁴ If, then, as the Supreme Court has repeatedly held, the term "commerce" as used in the Constitution "is a term of the largest import,"⁵ and cannot be restricted "to one of its significations,"⁶ it becomes important to ascertain what the "largest import" of the term is—what "its significations" are. According to the best authorities the word commerce has *two principal* "significations": (1) business intercourse, and (2) social or personal intercourse.⁷ Moreover, this latter signification was the more widely developed in the early use of the word commerce and has ever since been quite common.⁸ Furthermore, it may be appropriately observed that the word commerce comes from the Latin word *commercium* which, like its English derivative, has a double and very comprehensive meaning: (1) commercial intercourse, (2) non-commercial intercourse.⁹ For example, the Romans spoke of a social exchange of letters as commerce (*commercium*),¹⁰ and, in fact the word commerce is still used to convey that meaning or similar meanings.¹¹ The derivative word commercial, however, has been confined to only "one of the significations" of the root word commerce, *viz.*, to business transactions, and doubtless it is partly to this conception that the holding in the principal case must be attributed. But the power given to Congress was to "regulate *commerce*," not to "regulate *commercial* transactions." Therefore, to use again the language of Mr. Chief Justice Marshall, the holding in the principal case, if correct, would "*restrict a general term, applicable to many objects, to one of its significations*,"—such a restriction the great expounder of the Constitution held could not be made.

Such being the "large import" of the term, the next important question is whether in giving Congress the power to regulate interstate commerce the broad purpose—the evil sought to be remedied—is necessarily confined to purely business or so-called "commercial" transactions. "It is a matter of public history that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation."¹² Hence, the principal purpose of the commerce clause was to prevent interference by a state with the free interstate

⁴ *Gibbons v. Ogden* (1824, U. S.) 9 Wheat. 1, 189. Italics in the quotation are the writer's.

⁵ *Welton v. State of Missouri* (1875) 91 U. S. 275, 280.

⁶ *Gibbons v. Ogden*, *supra*.

⁷ See Century Dictionary and Encyclopedia, and Webster's New International Dictionary.

⁸ See Webster's New International Dictionary.

⁹ See Harper's Latin Dictionary.

¹⁰ *Id.* See, also, Seneca, *Epistolae*, 38, 1.

¹¹ See, *e. g.*, Emerson, *Friendship*; and Century Dictionary.

¹² *County of Mobile v. Kimball* (1880) 102 U. S. 691, 697.

transportation of persons or property. Does not this purpose, then, cover transactions like that in the principal case? It is difficult to see why it does not, for if such interstate transportation is not interstate commerce then one wishing to transport his own property for personal use from, say, New York to San Francisco might be subjected to all sorts of "conflicting and discriminating state legislation." For instance, suppose that A has a pleasure car which he never uses for "commercial" purposes and he wishes to drive it from New York to San Francisco for purely pleasure purposes. Could each state tax him for the mere privilege of crossing the state line? Or could the interlying states put prohibitive taxes on the flask of brandy which he carries in his pocket for the purpose of use in case of accident? It would seem clear that such transactions fall within the general purpose of the commerce clause and, hence, constitute interstate commerce.

Perhaps the most satisfactory judicial exposition of the term is the one recently quoted with approval by the United States Supreme Court in *International Textbook Co. v. Pigg*.¹³ Said the court:

"Importation into one state from another is the indispensable element, the test of interstate commerce, and every negotiation, contract, trade and dealing . . . which contemplates and causes such importation whether it be of goods, persons or information is a transaction of interstate commerce."

The omitted words are, "between citizens of different states," but it seems quite clear that diverse citizenship has nothing to do with commerce. And, besides, the Supreme Court has recently held that transportation by the owner for himself, *i. e.*, transportation not "between citizens of different states" may be commerce.¹⁴ In other words, as it was more concisely expressed by the United States Supreme Court in *Railroad Co. v. Husen*,¹⁵ "transportation is essential to commerce or rather *is commerce* itself," *i. e.*, commerce in the constitutional sense is simply transportation (including transit and transmission) of persons or things. Moreover, this conception of the term commerce, *viz.*, as simply transportation of persons or things, seems to be carried out by the unbroken current of Supreme Court decisions. Thus, Mr. Justice Holmes, speaking for the United States Supreme Court, has said:¹⁶ "Transportation for others as an independent business is commerce irrespective of the purpose to sell or retain the goods

¹³ (1910) 217 U. S. 91, 30 Sup. Ct. 481. The quotation is from *Butler Shoe Co. v. United States Co.*, 156 Fed. 1.

¹⁴ *The Pipe Line Cases* (1914) 234 U. S. 548, 34 Sup. Ct. 956.

¹⁵ (1877) 95 U. S. 465, 470.

¹⁶ *Hanley v. Kansas City, etc. Co.* (1903) 187 U. S. 617, 619; 23 Sup. Ct. 214, 215.

which the owner may entertain with regard to them. . . ." It is true that the learned justice says transportation *for others* is commerce, irrespective of the purpose, but the case was a case dealing with transportation for others, and a judge usually, and wisely, confines his language as nearly as possible to the facts of the case. Besides, the same learned justice, speaking for the same court, has subsequently held that the fact that the transportation is by and for the owner of the thing transported (*i. e.*, the fact that it is transportation not for others) does not prevent the transportation from being interstate commerce.¹⁷ Hence, it would seem to follow that interstate transportation is interstate commerce, irrespective of the purpose of the transportation or of the person for whom the person or thing is transported.

Furthermore, apart from Congressional legislation, such as now exists,¹⁸ it is settled law that a state cannot prevent a person from importing (through another) intoxicants for his own personal use, the reason being that such importation is interstate commerce.¹⁹ But if the principal case is correct the state could without such congressional legislation prevent him from *personally* importing it into the state. In other words, if the principal case is correct, then what is admittedly commerce if done by an agent ceases to be commerce if done by the principal himself. But such a conclusion seems absurd, for certainly the essential nature of the transaction is the same whether it is done by the principal himself or by his paid agent.

In accord with the view herein expressed is the well-reasoned opinion of the Supreme Court of South Carolina in a case in which the facts were substantially the same as in the principal case but the conclusion reached was squarely *contra*. In that case²⁰ the defendants had purchased liquor in North Carolina and had transported it in their own buggy into South Carolina, for their own personal use. The court held that the transportation was interstate commerce, though it was transportation by the owner for his own non-commercial use. The only other case squarely in point seems to be *Alexander v. State*.²¹ There, too, the accused had personally carried liquor into the state for his personal use, but the court did not hesitate to hold the transportation interstate commerce, although it was, as in the principal case, a transportation by the owner for a non-commercial purpose.

Text-writers, as a rule, have wholly ignored the precise point raised in the principal case and do not cite either of the two cases last con-

¹⁷ *The Pipe Line Cases, supra*.

¹⁸ See COMMENT, *The Webb-Kenyon Act and Interstate Commerce* (1917) 26 YALE LAW JOURNAL, 399.

¹⁹ *Vance v. W. A. Vandercook* (1898) 170 U. S. 438, 18 Sup. Ct. 674.

²⁰ *State v. Holleyman, supra*.

²¹ *Supra*, note 3.

sidered. But upon principal and such authority as there is, it is submitted that the distinction taken in the principal case and suggested in the above-mentioned periodicals cannot be supported; that it is not practical to draw any distinction between transportation by the owner for so-called "commercial" and transportation by the owner for so-called "non-commercial" purposes; that each is commerce in the constitutional sense; that to hold so does violence neither to language nor to legal principle, but rather gives full effect to the "largest import" of the term commerce, enables Congress to regulate evils which would seem to fall clearly within the general purpose of the commerce clause, and finally, while effectuating complete justice, avoids the adoption of a wholly impractical and unnecessary limitation to a just and practical general rule.

T. P. H.

THE ACT OF STATE DOCTRINE APPLIED TO ACTS OF MEXICAN
REVOLUTIONISTS

The United States Supreme Court in two recent decisions has made an interesting application of the Act of State doctrine. *Oetjen v. Central Leather Co.* (1918) 38 Sup. Ct. 309; *Ricaud v. American Metal Co.* (1918) 38 Sup. Ct. 312. Both cases arose out of the acts of a military commander of the Constitutionalist Army in Mexico. In the first case personal property of a Mexican citizen had been seized for non-payment of a military contribution duly levied, and in the second case personal property claimed to have been owned by an American corporation had been seized on military requisition. In both cases, the property was sold by the military commander to an American citizen, who brought it into the United States, and suit for the recovery of the property was instituted—in the first case, by the American assignee of the original Mexican owner, and in the second case, by the alleged original American owner. The court was asked to decide upon the conflicting claims of title of two American citizens.

The lower court in the first case¹ decided that by the seizure and sale of the military commander title passed to the defendants, on the ground that war existed, that the contribution was properly levied under the laws of war, and that a sale of an inhabitant's property, for failure to pay the contribution assessed against him, was valid. That is, the court examined the legality of the seizure and sale according to the rules of international law.

The United States Supreme Court proceeded on an entirely different theory. It refused to examine the legality of the seizure and sale. It

¹ *O'Neill and Oetjen v. Central Leather Co.* (1915, Ct. Err.) 87 N. J. L. 552, 94 Atl. 789.

turned its attention solely to the character of the authorities making the seizure and sale, and finding, in both cases, that the political department of our Government had since recognized, first, the *de facto* and subsequently, the *de jure* character of the Government on behalf of whose armies the seizures and sales were made, it declined to re-examine or sit in judgment upon the acts of a foreign government carried out within its own territory; and this, notwithstanding the fact that the property thus sold was brought into the United States and the conflict of title arose between two American citizens. Redress of grievances by reason of such acts of a foreign government, said the court, must be sought in the courts of that government or through diplomatic channels.

A decision of the United States District Court for the District of California in the unreported case of *Union Fertilizer Co. v. Atchison, Topeka and Santa Fé Railroad Co.* (March, 1917) seems to have been at variance with these conclusions. A concession granted by Diaz in 1911 to one S. to gather guano from certain islands off Lower California was cancelled in 1914 and granted to A. by a Constitutionalist Governor then exercising military authority in the region. A. brought the guano to the United States and sold it to the plaintiff, billing it to the plaintiff on the defendant railroad. S., the original concessionaire, demanded and obtained the guano from the railroad, claiming to be the true owner, and this title the defendant set up in an action by the plaintiff for recovery of the value of the guano. The court held that the Constitutionalist authorities could take private property only for immediate military needs, which necessity in this case was not shown, and that the concession of S. was a vested right which the Constitutionlists could not disturb. It is submitted that, however valid this complaint might be if advanced by the political department of our Government, an American court, as held in the principal cases by the Supreme Court, should not have passed upon the validity of the acts of the Constitutionalist authorities, nor assumed to examine a question of title to an interest in Mexican realty.²

The same principle which induces the courts to refrain from drawing into question or passing upon acts of the political department of our

²Moreover, the decision is open to the further objection that, on common law principles, S. could not have brought an action for the guano in question against A or those claiming under him, on the ground that a disseizee cannot sue his disseizor or those claiming under him for the disseizor's wrongful acts with respect to the property or for anything taken from the land so long as the disseizin continues. The disseizee in such case must either first regain possession by legal action or otherwise, and then bring his action for injury to the property or for the personalty removed therefrom, or recover for those injuries as an incident to his action to regain possession. He cannot sue the disseizor for the tort independently until he has come into possession. *Avery v. Spicer* (1916) 90 Conn. 576, 581, 98 Atl. 135, and other cases there cited.

own government acting within its jurisdiction³ would *a fortiori* exempt from similar examination the acts of a foreign government acting within its jurisdiction,⁴ even though such acts affect the property of American citizens in its territory. The reason for the rule in the first case is based upon the inconvenience that would result from the courts interfering with the acts of the political department when acting within its jurisdiction. That reason is fortified in the case of acts of a foreign government by the fact that a re-examination of such acts in municipal courts would "imperil the amicable relations between governments" and by the further fact that individual recourse is not barred, but is merely directed to be sought in other quarters, namely, in the courts of the foreign country or through a diplomatic claim instituted on behalf of the citizen by the foreign office of his own government.

This immunity from re-examination of Acts of State of a foreign government extends to acts of legislation⁵ and executive acts,⁶ but is predicated upon their operation having been confined within the proper limits of the jurisdiction of that government.⁷ Still, while it would be impossible to justify acts committed under authority of State A. in State B. contrary to the laws of State B., judicial cognizance of such acts in State B. can be taken collaterally only, and only so far as they affect private rights, and not directly, when they involve an assumption of jurisdiction over State A. or its property. Convenience and

³ In the field of foreign relations, see *Foster v. Neilson* (1829, U. S.) 2 Pet. 253, 307; *Williams v. Suffolk Ins. Co.* (1839, U. S.) 13 Pet. 415, 420; *In re Cooper* (1891) 143 U. S. 472, 499; 12 Sup. Ct. 453. In England see *West Rand Central Gold Mining Co. v. The King* [1905] 2 K. B. 391.

⁴ *Underhill v. Hernandez* (1897) 168 U. S. 250, 253; 18 Sup. Ct. 83; *American Banana Co. v. United Fruit Co.* (1909) 213 U. S. 347, 359; 29 Sup. Ct. 511.

⁵ *Carr v. Francis Times & Co.* (H. of L.) [1902] A. C. 176, 180. No such immunity from re-examination extends to the legislation of one state in the courts of another state of the United States, notwithstanding the "full faith and credit" requirement of the Constitution for the "public acts" of sister states. Of course, this matter is independent of the question of enforcement of a foreign statute, which is not required by international or interstate law. See articles by Judge J. K. Beach in (1918) 27 YALE LAW JOURNAL, 656, and by Henry Schofield in (1908) 3 ILL. L. REV. 65.

⁶ *American Banana Co. v. United Fruit Co.*, *supra*.

⁷ See *Dobree v. Napier* (1836, Eng. C. P.) 2 Bing. N. C. 781 (acts on the high sea under authority of Queen of Portugal, when not in violation of international law, held not justiciable in English courts). In *Reg. v. Lesley* (1860) 29 L. J. M. C. 97, an act done under the authority of a foreign state (Chile) on the high seas by an English vessel, contrary to English law, did not escape judicial condemnation in England, because Chilean law had no extraterritorial effect on an English ship outside Chilean waters. See also *Vavasseur v. Krupp* (1878, C. A.) 9 Ch. D. 359, where it was said that infringement of a patent in England could not be justified by alleging that it was done under authority of a foreign sovereign.

comity among nations operate to exempt foreign sovereigns and their property from the jurisdiction of municipal courts.⁸

An exception to the general rule that the legality of the acts of a foreign government (apart from those committed within the territory of the forum contrary to local law) will not be examined in judicial proceedings, is to be noted in the case of prize captures made under authority of a foreign state but in violation of the neutrality of the state into which the prize is brought. As was said by Justice Story in *The Santissima Trinidad*:⁹

"In each case, . . . the illegality of the capture is the same; in each, the duty of the neutral is equally strong to assert its own rights, and to preserve its own good faith, and to take from the wrongdoer the property he has unjustly acquired, and reinstate the other party in his title and possession which have been tortiously divested."¹⁰

When we come to the judgments of foreign courts, however, we find that recognition of such judgments is not treated as obligatory but is based on the doctrine of comity and is qualified by the universal rule that the court rendering the judgment shall have had jurisdiction in the international sense.¹¹

Had the plaintiffs in the instant cases been able to proceed in tort in this country against the individuals who committed the alleged wrong, they would still have had to show that the act was unlawful in the place where committed, i. e., Mexico,¹² even if the defendants could not have pleaded the Act of State to escape personal liability.¹³

Although the acts of seizure by the military commanders were committed before their revolution became successful, their acts from the beginning of the revolution are considered as those of the government

⁸ *Vavasour v. Krupp*, *supra*. In *The Parlement Belge* (1880, C. A.) 5 P. D. 197, the Court of Appeal held that when a foreign sovereign claims property as the public property of his state, that declaration cannot be inquired into.

⁹ (1822, U. S.) 7 Wheat. 283, 351.

¹⁰ See also *The Estrella* (1819, U. S.) 4 Wheat. 298, 308; *The Steamship Appam* (1917) 243 U. S. 124, 154; 37 Sup. Ct. 337, 342.

¹¹ So in *Rose v. Himely* (1808, U. S.) 4 Cranch. 241, the Supreme Court disregarded the judgment of a San Domingan court, because founded on a jurisdiction acquired by seizure of an American vessel in the open sea. A sale made under that judgment was held insufficient to divest the title of the American owner. Had the court had jurisdiction, the judgment of condemnation would have been regarded as conclusive on all the world. See paper of Mr. Justice Kennedy, *To what extent should judicial action by courts of a foreign nation be recognized?* in (1904) *Official Report of the Universal Congress of Lawyers and Jurists*, St. Louis, 1905, p. 186.

¹² *Slater v. Mexican National R. R. Co.* (1904) 194 U. S. 120, 126; 24 Sup. Ct. 581, 583. *American Banana Co. v. United Fruit Co.*, *supra*. *Phillips v. Eyre* (1870, Ex. Ch.) L. R. 6 Q. B. 1, 28; *Carr v. Francis Times & Co.* (H. of L.) [1902] A. C. 176, 180.

¹³ They could, of course, have successfully made this defense. See *Underhill v. Hernandez*, *supra*.

ultimately created through their efforts, on the theory that the revolution represented *ab initio* a changing national will, crystallizing in the final successful result.¹⁴

The Department of State, of course, may diplomatically contest the validity or legality of the acts of the Carranza commanders and assert the liability of Mexico for any acts deemed to have been unlawful according to Mexican or international law. With respect to the claim of plaintiff Oetjen, it will be recalled that he derived it, with his alleged title, by assignment from a Mexican citizen. His claim, therefore, would seem to be barred by the rule that the "right" of governmental interposition cannot be created by the assignment of a claim by a foreigner to a citizen and that the Department of State will not espouse a "nationalized" claim which came into American hands after it had accrued.¹⁵ This rule would not, of course, affect the claim of the American Metal Co., which appears to have had title to the property at the time it was requisitioned. The receipt of General Pereyra should be presented to the Mexican authorities in Mexico.¹⁶ On the merits, from the meager evidence disclosed by the opinions of the Supreme Court, it would seem that the contribution in the *Oetjen* case and the requisition in *Ricaud v. The American Co.* were properly levied according to the rules of international law.

E. M. B.

THE RELATION OF THE LAW OF THE DOMICIL TO THE CAPACITY OF A
MARRIED WOMAN TO MAKE A PERSONAL CONTRACT

Louisiana abides by the rule that a married woman's capacity¹ to

¹⁴ *Williams v. Bruffy* (1878) 96 U. S. 176; *Bolivar Railway Co. (Gt. Brit.) v. Venezuela*, Feb. 17, 1903, *Ralston's Venezuelan Arbitrations*, 388, 394.

¹⁵ 6 Moore, *Digest of International Law*, 982; Borchard, *Diplomatic Protection of Citizens Abroad*, 661. The rule has frequently been enforced by international commissions. Borchard, *op. cit.* 662, note 2.

¹⁶ Under the treaty of 1831 with Mexico, this requisition might have been regarded by the United States as a forced loan, from which American citizens were deemed to be exempt. Mr. Fish, Secretary of State, to Mr. Foster, Aug. 15, 1873, 6 Moore, *Digest of Int. Law*, 916. The United States-Mexican commissions of 1839, 1849 (domestic) and 1868 (until Thornton became umpire), considered forced loans illegal, and made awards in favor of the claimants. Thornton held them to be legal, provided they were equally distributed amongst all the inhabitants, without discrimination. See Borchard, *op. cit.* 269-270. But this treaty was abrogated by notice from Mexico in 1881.

¹ It is as well to attempt definition before proceeding. "Capacity" is used in this comment to mean the sum of personal qualifications to which the law attaches power to make a normal contract—one not void for illegality, etc. Or, to illustrate without defining, when a given person cannot make a contract which an ordinary person could, capacity is involved. Married women at common law present the striking example. And such partial survivals of their old disabilities as the law may have left, though perhaps not strictly within the above

enter into a personal contract is fixed by the law of her domicile,² and this idea of a personal law, whether of domicile or of nationality, which tails after the person whithersoever he or she may wander, prevails throughout the Continent of Europe.³ Not so in the United States. Here the almost universal rule is that such capacity in a married woman is determined as to each individual contract by the law of the place of making.⁴ The reasons for following the American rule in America are clear and cogent. With a multitude of divergent local laws on capacity in states between which intercourse is ever increasing; with no mark of garb or tongue to signal to outsiders the state of any person's domicile; with ready, accurate advice on the law of a foreign jurisdiction almost impossible to obtain—decidedly commercial expediency calls for the application of the law of the place of contracting.⁵ And apparently that law governs, as it should, the capacity of infants as well.⁶

definition—to become surety for one's husband's debt, for instance—are treated by the courts and will be treated here as relating to capacity.

"Personal contract" is used to exclude contracts so relating to real estate that the law of the *situs* enters into consideration. Nor are marriage contracts here discussed, as the questions of policy involved in them differ materially from those playing upon commercial contracts.

² *Garnier v. Poydras* (1839) 13 La. 177; and see *Baer Bros. v. Terry* (1902) 108 La. 597, 32 So. 353.

³ Story, *Conflict of Laws*, sec. 51 ff. And see Prof. E. G. Lorenzen, *Conflict of Laws as to Bills and Notes* (1917) 1 MINN. L. REV. 10, 15-18, and notes, where the question of capacity is treated at length. Prof. Lorenzen shows, however, that each of the countries discussed by him applies the *lex loci contractus* to contracts made on its own soil. Such an inconsistent exception, to protect the local citizen, is an interesting and rather amusing parallel to the action of our own courts in dodging the application of the *lex loci* when domicile and forum are one. See *infra*.

⁴ The rule is stated in greater detail in (1910) 26 L. R. A. (N. S.) 764, where a valuable discussion of the problem will be found, and where, as in *ibid.* 774 and (1902) 57 L. R. A. 513, the authorities are accurately outlined. It is important to keep clearly separate the nature and extent of the obligation (assuming an obligation to exist), which are governed by the "law of the contract;" and the *prior* question of capacity in the parties, on which depends the creation of any obligation at all.

⁵ This reasoning applies to the original, typical, and common case where the parties contract in each other's presence; it is of little force where the contract is made by correspondence. In the latter case, however, it does not seem that any reason can be assigned for choosing one law rather than another, which outweighs the value of uniformity of rule on transactions of one kind. Indeed the occasional difficulty in determining what a person's domicile is, speaks in favor of the place of making. Nor does there appear good reason in policy why a woman should be unable to do by letter or by agent what she can do by taking her person where she sends the letter. And so the cases. *Milliken v. Pratt* (1878) 125 Mass. 374 (letter); *Bell v. Packard* (1879) 69 Me. 105 (letter); *Chemical Natl. Bk. v. Kellogg* (1905) 183 N. Y. 92, 75 N. E. 1103 (agent). For further discussion see n. 11.

⁶ Story, *op. cit.* sec. 103; *Phoenix Mut. Life Ins. Co. v. Simons* (1893, K. C. App.) 52 Mo. App. 357, 362. *Thompson v. Ketcham* (1811, N. Y. Sup. Ct.) 8

But there are cases which seem to hold capacity to be determined, as is the extent of the obligation, by the "law of the contract."⁷ These same cases⁸ fix as the "law of the contract" that law with a view to which the parties made their agreement.⁹ Thus the contractors' intention would be permitted to determine what system of law fixed their capacity to contract. This result has been criticised,¹⁰ and, we think, with reason. For the concepts of contractual capacity on the one hand, and of the realization of individual intention on the other, can hardly stand together. It requires existing contractual capacity to give effect to the parties' intention; that capacity must, by some system of law, be conferred in advance of the contracting; whence, then, are the parties to derive the power which this rule gives them to choose for

Johns 190, is often relied on to this effect. There the law of the domicile was not considered; an infant's capacity to contract was held by Chancellor Kent to be governed by the law of the place of making, but apparently because the parties intended no other law to govern their contract. The law has not in general followed the Chancellor in this way of reasoning; there are indications, though none too free from doubt, that he himself later adopted Story's sounder view. See 2 Kent, *Commentaries*, *233 n., *458, *459 n.

⁷ *Robinson v. Queen* (1889) 87 Tenn. 445, 448, 11 S. W. 38; *Mayer v. Roche* (1909, Ct. Er.) 77 N. J. L. 681, 682, 75 Atl. 235; *International Harvester Co. v. McAdam* (1910) 142 Wis. 114, 119, 124 N. W. 1042; so also apparently *Thompson v. Ketcham*, *supra*.

⁸ Except *Robinson v. Queen*, which declares the law of the place of performance to govern validity, obligation and capacity. The court there relies in some strange fashion on Story, sec. 241, citing but taking no heed of its essential complement, sec. 103, where capacity is said to be governed "by the law of the place where the contract is made or the act done." *First Natl. Bk. of Geneva v. Shaw* (1902) 109 Tenn. 237, 70 S. W. 807, without mention of the earlier case, repeats much of its language, but quotes further and more carefully from Story, and apparently shifts to the generally accepted view. In each case, as in the *International Harvester Case*, and *Thompson v. Ketcham*, *supra*, place of making and place of performance were one, and a determination of which governed capacity not therefore necessary to the decision. *Basilea v. Spagnuolo* (1910, Sup. Ct.) 80 N. J. L. 88, 77 Atl. 531, leaves it somewhat doubtful whether the presumption of intention rule of *Mayer v. Roche*, *supra*, still governs capacity to contract in New Jersey, or whether it is the law of the place of making.

In *Baum v. Birchall* (1892) 150 Pa. St. 164, 24 Atl. 620, the capacity of a married woman was said to be governed by the law of the place of performance. The use of authority was hopelessly loose. Moreover, the place of performance coincided with that of making, and the contract had to do with realty there situate. *Dulin v. McCaw* (1894) 39 W. Va. 721, 20 S. E. 681, suggests an alternative rule, taken from Wharton, *Conflict of Laws*, secs. 102, 104: that law should govern by which capacity would be enlarged.

⁹ The choice must probably be limited to those systems of law which have some reasonable connection with the transaction: the place of making, of performance, of the parties' domicile or citizenship, the situs of the property involved, or, it may be, of the flag. Cf. the cases summarized by Prof. J. H. Beale, Jr. (1909) 23 HARV. L. REV. 102-103.

¹⁰ (1910) 26 L. R. A. (N. S.) 764 ff.

themselves a law which shall at once invest them with capacity and their contract with validity?¹¹

But whatever the law which governs capacity in a given case,—whether the law of the place of making as such, or the “law of the contract” above discussed,—if that governing law declares a woman capable, her contract’s validity so far as concerns capacity will be everywhere upheld, save only where forum and domicile coincide; and so, where that law declares her incapable, will the validity of that contract be everywhere denied, without exception.¹²

The exception to the first, the active half, of this rule, is but one phase of the great common exception of conflict of laws: no forum will lend its aid to enforce a right, contractual or otherwise, whose enforcement runs counter to what that forum believes vital to its own policy and interest. Against such considerations, say the courts, “comity” cannot prevail.¹³ It will be observed that the language is

¹¹ *Union Natl. Bk. of Chicago v. Chapman* (1902) 169 N. Y. 538, 62 N. E. 672, seems to weaken the above argument. There a married woman’s capacity to become surety on a note was held determined by the place where her contract was made; her contract in turn was said to be made where the instrument was negotiated *in accordance with her intent*. It not being shown that she intended the negotiation in a jurisdiction where married women had capacity, the note was held unenforceable against her. The weakness of the decision lay in measuring the extent of the agent’s power to bind not by the authority which he apparently had, but by that which the court held to have been given him in fact. In *Chemical Natl. Bk. v. Kellogg*, *supra*, n. 5, Vann, J., following much in the path of his own dissent in the earlier case, reached the opposite result on facts not distinguishable, and brought the law on the point into harmony with the ordinary rules of agency. But *cf. Basilea v. Spagnuolo*, *supra*, n. 8.

But that a woman should be able at her own choice to project herself into capacity abroad: to do by agent (or by letter) a thing which the jurisdiction within whose bounds she remains denies her capacity to do, is believed to be a real inconsistency, one inherent in any attempt to apply a territorial theory of law to transactions extending beyond the borders of a single state. *Cf. Freeman’s Appeal* (1897) 68 Conn. 533, 37 Atl. 420, where territorialism is applied in logical perfection, and resultant absurdity. Criticism of the case has been free. See *First Natl. Bk. of Chicago v. Mitchell* (1899, C. C. A. 2nd) 92 Fed. 565. Yet it is submitted that the fault lies not with a court which applied with rare intellectual honesty a theory to which all our courts do homage, but in the theory itself. This is one of the many points on which the nationalist theory, as presented, for example, by Kahn (1898) 39 *Iherings Jahrbuecher*, 1; (1899) 40 *ibid.* 1, furnishes a more satisfactory explanation.

¹² See authorities cited below. This rule, and all the generalizations in this comment, are believed applicable equally to contracts void and to contracts voidable for reasons of capacity. *Cf.* note 6, as to infants’ contracts; and the cases in states where married women’s contracts are voidable only: *Armstrong v. Best* (1893) 112 N. C. 59, 17 S. E. 14; *Wood v. Wheeler* (1892) 111 N. C. 231, 16 S. E. 418; *First Natl. Bk. of Geneva v. Shaw*, *supra*, n. 8.

¹³ In the case of foreign judgments, on the other hand, “comity” does decidedly prevail, and this whether or no the judgment be an American one which the full faith and credit clause forces the court to respect. There seems to be no pressing reason why the law of a foreign state should meet less respect when

elastic. Under the strain toward certainty in the conflict of laws, "comity" has slowly, steadily shifted from a matter of each forum's whim of the moment toward a growing body of rules which take ever more definite shape. Of this there is an occasional indication in the phrasing of opinions. Enforcement of foreign-acquired rights "from comity, not of strict right,"¹⁴ will sometimes be replaced by their enforcement "as matter of right, by . . . universal comity."¹⁵ There is indeed still tough enough pulling ahead in the state-individualistic stump-field. Yet in our capacity cases we may expect the policy and interest of the forum to take on considerable proportions before they will bar enforcement.

The mere fact that the contract would have been invalid for want of capacity if made under the forum's local rule will of course not be enough;¹⁶ else no rights not acquired in accordance with local law could ever hope for recognition. Nor will the additional fact suffice, that the defendant has since making the contract and before suit become a resident of the forum, and thus come within its protection; nor the fact that enforcement is sought out of property lying within the state.¹⁷

it fixes a primary right by general provision, than when it fixes a secondary right by determination of an individual case; although the argument for acknowledging the latter is made somewhat stronger by our policy of avoiding double litigation. This whole question—the present meaning and the inadequacy of "comity" as the basis for recognition of foreign law—is cogently treated by Judge John K. Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE LAW JOURNAL, 656.

¹⁴ *Holmes v. Reynolds* (1883) 55 Vt. 39, 41.

¹⁵ *International Harvester Co. v. McAdam*, *supra*, n. 7, at p. 125.

¹⁶ *Robinson v. Queen*, *supra*, n. 7; *Wood v. Wheeler*, *supra*, n. 12; *Merrielles v. State Bk. of Keokuk* (1893) 5 Tex. Civ. App. 483, 24 S. W. 564. In practically all such cases the domicile, place of making, and place of performance have coincided; the decisions serve therefore in this connection only to point a limit beyond which the forum will not insist on its local policy. *Hayden v. Stone* (1880) 13 R. I. 106, which seems *contra* to the proposition in the text, was explained away in *Brown v. Browning* (1886) 15 R. I. 422, 424, 7 Atl. 403, as referring solely to the remedy. See note 17.

¹⁷ *Meier v. Bruce* (1917, Ida.) 168 Pac. 5. And so Louisiana, too, treats rights validly acquired by what she considers the governing law. *Baer Bros. v. Terry*, *supra*, n. 2. But it must be noted that courts have denied relief on a wholly different ground: that their law gave no remedy that was fitting. See for example *Ruhe v. Buck* (1894) 124 Mo. 178, 27 S. W. 412, where the question and the authorities are ably treated on both sides; the case there turned on whether a married woman of Dakota, where the obligation was contracted and payable, and where her *status* was as that of a *feme sole* for purposes of contract and suit, should in an attachment proceeding before the Missouri court be treated as *sole* or *coverte*; if the former, the attachment would have been valid; see also *Brown v. Browning*, *supra*, n. 16, and see *Bank of Louisiana v. Williams* (1872) 46 Miss. 618, 629. *Contra*, *Gibson v. Sublett* (1885) 82 Ky. 596. The problem is delicate and perplexing; though sometimes inseparably interwoven with that of the forum's policy, it cannot here be discussed. See (1902) 57 L. R. A. 520.

It is only when the defendant was domiciled in the *forum*, at the *time* of making the contract,¹⁸ and the local law gives her no capacity to make such a contract, that the forum is likely to feel that the protection of one of its own citizens is involved; in such circumstances it may well be ready to find in the local restriction of capacity a limit beyond which it will refuse the enforcement sought; and with some reason, for concededly such restriction is intended largely to protect the persons affected. In these cases the forum is the domicil; the local law applied is the law of the domicil; the cases may therefore seem offhand to lend color to a confusing¹⁹ theory that the law of the domicil as such governs a married woman's capacity to make a personal contract. Such is hardly the true bearing of the decisions.²⁰ Refusal of enforcement is solely in the forum's character as *forum*, *protecting its own citizens at home by its laws* intended for their protection; and not at all in its character as *domicil*, as competent to fix everywhere a woman's capacity to enter, in another state, into a contract valid generally.

This is shown in many ways. To begin with, the very cases which refuse enforcement often grant expressly that the contract is good elsewhere, naming in particular, as a rule, the place of making.²¹ When suit is brought in a third jurisdiction, either there is not even inquiry made as to the domicil's law on capacity,²² or it is held not to govern.²³ And if it did in truth govern, a contract would necessarily be good—when capacity was the only issue—whenever the party in question was capable by the law of her domicil, although incapable by the law of the place of contracting.²⁴ Even in the courts of the domicil the opposite

¹⁸ And, it may be suggested, is still so domiciled at the time of suit; else the duty of protection might well be held to have ceased.

¹⁹ Such a theory need not be articulate in order to confuse. Cf. the undue stressing of the law of domicil in the principal case, discussed below.

²⁰ Cases in this field involve so many elements in such varied combination: domicil, place of making, of performance, forum, intention of parties, etc.—that they must be read with care and cited with caution. It is rather startling, for instance, to find *Armstrong v. Best*, *supra*, n. 12, though one of the clearer opinions, cited in its own headnote as holding that “as to capacity of the contracting party the law of the domicil prevails;” and cited in the *International Harvester Case*, *supra*, n. 7, at p. 124, as going “upon the obviously erroneous theory that the law of the forum, as to capacity of the parties to contract, governs”—when in fact it advances neither proposition, but accepts the law of the place of making, subject to the exception explained in the text.

²¹ *Armstrong v. Best*, *supra*, n. 12, at p. 62; *First Natl. Bk. of Geneva v. Shaw*, *supra*, n. 8, at p. 241; cf. even *Freeman's Appeal*, *supra*, n. 11, at p. 541.

²² *Union Natl. Bk. of Chicago v. Chapman*, *supra*, n. 11.

²³ *Connecticut Mut. Life Ins. Co. v. Westervelt* (1879) 52 Conn. 586 (forum at the place of performance).

²⁴ And so the Louisiana rule. Cf. *Garnier v. Poydras*, *supra*, n. 2, which does not even discuss whether the transaction would have been valid under the local law of Louisiana; and see *Roberts v. Wilkinson* (1850) 5 La. Ann. 369, 373.

is held.²⁵ Thus it is evident that the domiciliary law of a married woman's capacity to make a personal contract has in the conflict of laws in the United States practically no meaning; that it is applied only in the courts of the domicil itself; and applied there never to create or enforce rights not recognized elsewhere, but only to give a protection purely local against the enforcement of rights good abroad, rights created despite the law of the domicil.

Even in this form the rule must undergo further narrowing. It has been shown that the domicil's application of its own law on the point is based on policy. What if its policy has changed between the making of the contract and the bringing of the suit? In the leading case in this whole subject, *Milliken v. Pratt*,²⁶ the Massachusetts court under those circumstances applied the normal conflict of laws rule: the law of the place of making. It may be that this case goes "to the verge of the law;"²⁷ yet there seems to be every reason to follow it thither, as has been done.²⁸ How far each state will go, it must of course settle for itself.²⁹ It is certain that New Jersey has gone far beyond *Milliken v. Pratt*. Her position has been that only the sweeping married women's disability of the common law was a rule of policy; once they are admitted to contract at all, subject only to legislative direction as to what contracts they shall or shall not have power to make, the rule of policy has been abrogated in favor of a rule of discretion; and the fact that a sister state differs from New Jersey in the exercise of that discretion, is no reason to refuse enforcement, even against a New Jersey citizen, of a contract validly made under the capacity laws of that sister state.³⁰ A similar leaning has been shown in the federal courts. Sitting in Indiana, the court in *Bowles v. Field*³¹—approved in *First National Bank v. Mitchell*³²—enforced a contract valid where made, but void for want of capacity by the law of Indiana, where the defendant had all along been domiciled. Should

²⁵ *Nichols and Shepard Co. v. Marshall* (1899) 108 Ia. 518, 79 N. W. 282; the forum as forum merely enforces or refuses to enforce; it never creates.

²⁶ (1878) 125 Mass. 374.

²⁷ Holmes, J., in *Union Trust Co. of Chicago v. Grosman*, discussed below. Cf. the language in *Armstrong v. Best*, *supra*, at p. 62.

²⁸ *Phoenix Mut. Life Ins. Co. v. Simons*, *supra*, n. 6. *Holmes v. Reynolds*, *supra*, n. 14, adopts the whole reasoning of the Massachusetts court; but there the woman appears not to have been domiciled in the forum. *Contra*, *Freeman's Appeal*, *supra*, n. 11.

²⁹ And for this reason it is probably true, as stated in (1910) 26 L. R. A. (N. S.) 775, that "decisions of the courts of other jurisdictions on this point have rather less than the ordinary value of foreign decisions as precedents."

³⁰ So the reasoning in *Thompson v. Taylor* (1901, Ct. Er.) 66 N. J. L. 253, 49 Atl. 544. This is still law in New Jersey, with the usual reservation of an attempt to perpetrate a fraud on the law of the state. *Mayer v. Roche*, *supra*, n. 7.

³¹ (1897, C. C. D. Ind.) 78 Fed. 742; and on rehearing (1897) 83 Fed. 886, from which opinion, at p. 887, the language in the text is taken.

the conflict in public policy between the two states be irreconcilable, the court felt it ought to be governed by "the more liberal policy indicated by the act of Congress abolishing common law disabilities of married women in the District of Columbia."

But these federal cases must, as regards policy, be considered no longer precedents in view of the decision of the United States Supreme Court in *Union Trust Co. v. Grosman* (1917) 38 Sup. Ct. 147. A woman domiciled, as the plaintiff apparently knew, in Texas, signed a guaranty of her husband's note, while she was temporarily in Chicago. The plaintiff brought its suit in a federal court in Texas, and appealed from an adverse decision of the Circuit Court of Appeals.³³ Under the Illinois local law such a guaranty by a married woman was assumed to be valid; under the Texas local law it was held to be void. The Supreme Court held the guaranty unenforceable against the woman or her separate property, in a court administering Texas law. It was admitted that the question presented would be a different one if suit had been brought in Illinois or in a third jurisdiction,—there is, indeed, no reason to doubt that a decision enforcing the contract in any state or federal court outside the domicil would be upheld. The court further expressly distinguished cases allowing enforcement—although the contract would not have been good under the local law—where the defendant was not a citizen of the forum whom its laws were intended to protect;³⁴ and distinguished *Milliken v. Pratt*³⁵ on the ground that there, although the defendant was a local citizen, the forum's policy had changed before the bringing of the suit. There is therefore nothing in the reasoning, nor is there anything in the language of the court in contradiction with the analysis urged above. The case falls within the exception: that the domestic policy of the forum may forbid enforcement of a foreign acquired right.³⁶

³² *Supra*, n. 11; this case was reversed (1901) 180 U. S. 471, 21 Sup. Ct. 418, without discussion of the validity of its reasoning, on the ground that *Freeman's Appeal*, *supra*, note 11, had adjudicated the subject matter of the suit.

³³ (1916, C. C. A. 5th) 228 Fed. 610.

³⁴ "It is one thing for a court to decline to be an instrument for depriving citizens belonging to the jurisdiction of their property in ways not intended by the law that governs them, another to deny its offices to enforce obligations good by the *lex domicilii* and the *lex loci contractus* against women that the local laws have no duty to protect." (First italics ours.) It will be observed that the court here—as elsewhere in the opinion—avoids passing on the problem presented to the third, disinterested jurisdiction when the law of the place of making conflicts, as to a party's capacity, with the law of the domicil. Here as elsewhere the opinion squints toward preferring the latter, but apparently without consideration of the cases on the point; for which see nn. 22, 23.

³⁵ *Supra*, n. 26. And it may be noted that Chief Justice Gray in that case, at p. 383, himself provided for such a distinction. Cf. *Ruhe v. Buck*, *supra*, n. 17, at p. 188.

³⁶ And this cause is now *res judicata* in any other forum. "The precise matter in issue—the liability of Mrs." in this case, Grosman, "notwithstanding

But it is undeniable that the tone of the decision is colored by distinct stress on the law of the domicile as such; a stress believed to be not in consonance with the language and decisions of the American cases on the subject. These latter are meagerly noted in the opinion, very meagerly.³⁷ The only federal case clearly in point, for instance, *Bowles v. Field*,³⁸ is overlooked. This is the more regrettable as the policy there announced must be regarded as reversed by the principal case: federal courts sitting in the domicile may no longer, in deciding whether policy forbids enforcement within a state of contracts made while abroad by married women domiciled in the state, look for guidance to "the liberal policy indicated by Congress;" they must accept as the governing policy the local law of the state in which they sit. If this means a wider application of the "policy of the forum" exception, it is to that extent unfortunate for the sorely needed development of the conflict of laws.

To sum up: on its exact facts the decision in the principal case is clearly sustainable. But extension of the influence of the law of the domicile as such, suggested in the opinion, seems improbable, and is not to be desired. For the rule that, subject to the one exception noted, the law of the place of contracting governs a married woman's capacity to make a personal contract is too firmly established in America, and for too good reason.

MUNICIPAL FUEL YARDS

It is hardly open to question, even by the staunchest of conservatives, that socialistic legislation increases apace; in fact the conservatives may be the first to concede that advance in order to sound a note of alarm against its threatened inroads. Such legislation, either anti-capitalistic or paternalistic, is moreover, receiving to-day more moderate treatment than during our earlier history at the hands of our highest tribunal. That mace of conservatism, the Fourteenth Amendment, is less often swung than heretofore to strike down the work of state legislatures as denying due process of law to the people, and this tendency is recently illustrated in the case of *Jones v. City of Portland* (1918) 38 Sup. Ct. 112. The decision therein is especially timely in these days of coal shortage and the consequent drastic federal action we have just experienced, for it answers the question as to whether a municipality may be constitutionally empowered to operate a fuel yard.

her coverture at the time the guaranty was signed"—has been "adjudicated against the bank in the courts of" Texas. *Mitchell v. First Natl. Bk. of Chicago* (1901) 180 U. S. 471, and 483, 21 Sup. Ct. 418, and 422. The plaintiff's mistake lay in its choice of forum.

³⁷Of cases in this field there are cited six; and of these, one from Louisiana.

³⁸*Supra*, n. 31.

If the operation of such a plant by the city for the benefit of its citizens is a public purpose, a tax may properly be levied to establish and conduct the industry exactly as it may be to pave,¹ sprinkle² and light³ the streets or to operate a waterworks.⁴ If the purpose is not public, as for example, to run a municipal cigar stand or, referring to an actual case, a plumbing supply store,⁵ a tax upon the aggrieved public for the purpose is a taking of property without due process of law.⁶ In the Portland case the Supreme Court of the United States sustained the Supreme Court of Maine which had twice upheld unanimously⁷ the act in controversy here.⁸ A city may sell fuel to its people.⁹

It is worth noting that this was no emergency measure to meet war-time conditions. The state statute was passed in 1903, the city ordinance in 1913, the Maine Supreme Court first upheld its validity in April, 1914, and the decision of that court in the principal case was rendered in February, 1915.

With the economic wisdom or unwisdom of government ownership this comment has primarily nothing to do.¹⁰ Nevertheless it is not to be overlooked that the outcome of particular cases, especially border line cases, will be greatly influenced by just this consideration. Indeed, who shall say that the unanimous decision of our Federal Supreme Court in the principal case may not have been encouraged by a temperature of something less than the governmentally requested 68

¹ *Delphi v. Evans* (1871) 36 Ind. 90, 96, 10 Am. Rep. 12, 17; *Williamsport v. Commonwealth* (1877) 84 Pa. St. 487, 493, 24 Am. Rep. 208, 212.

² *Maydwell v. Louisville* (1903) 116 Ky. 885, 888, 76 S. W. 1091, 1092.

³ *Crawfordsville v. Braden* (1891) 130 Ind. 149, 28 N. E. 849.

⁴ 1 Cooley, *Taxation* (3rd ed.) 217.

⁵ *Keen v. Waycross* (1897) 101 Ga. 588, 591, 29 S. E. 42, 43.

⁶ *Citizens Saving & Loan Assn. v. Topeka* (1874, U. S.) 20 Wall. 655.

⁷ *Laughlin v. Portland* (1914) 111 Me. 486, 90 Atl. 318; *Jones v. Portland* (1915) 113 Me. 123, 93 Atl. 41.

⁸ Maine Rev. St. (1903) ch. 4, sec. 87.

⁹ As indicating the unexpected turn which these decisions have given the law, it may be observed that such recent works as those following laid it down without criticism or doubt that a city could not enter the fuel business: 3 Dillon, *Mun. Corp.* (5th ed.) sec. 1292; 4 McQuillin, *Mun. Corp.* sec. 1809; Gray, *Limitation of Taxing Power*, sec. 246. The authors based these positive statements of the law on two mere advisory opinions of the Massachusetts Supreme Court and on one case in Michigan not squarely deciding the point. *Opinion of the Justices* (1892) 155 Mass. 598, 30 N. E. 1142 and (1903) 182 Mass. 605, 66 N. E. 25; *Baker v. Grand Rapids* (1906) 142 Mich. 687, 106 N. W. 208.

¹⁰ A considerable literature is ranged vigorously on both sides of the question. See, Douglas Knoop, *Principles and Methods of Municipal Trading*, London, 1912; Lord Avebury, *On Municipal and National Trading*, London, 1907; Robert P. Porter, *Dangers of Municipal Trading*, London, 1907; Bernard Shaw, *The Common Sense of Municipal Trading*, London, 1908; *Municipal Industries of Glasgow* (1895) 9 QUAR. JOUR. ECON. 188; *Municipal Ownership in Great Britain* (1906) 14 JOUR. POL. ECON. 257; *Municipal Socialism in Scotland* (1889) 1 JURID. REV. 33.

degrees in the justices' own apartments, or a rapidly dwindling bin of coal in the regions below? Perhaps the legislation in question would not have been upheld if it had been contested a few years ago when economic conditions in the coal industry were not brought so forcibly to public attention. Certainly it would not have been upheld very many years ago.

But in the legal aspect some effort will be directed toward finding the where and why of the rather irregular fenceline between the fields of public and private enterprise,—irregular because courts have set single fence posts according to different surveys of this whole section of the law. Despite the irregularity, however, the cases are susceptible of a rather rough classification which will be undertaken herein.

In proceeding to enquire what kinds of enterprise a state or municipality may enter, no more than passing mention need be made of a first type, the purely governmental functions, and the provision of facilities for their exercise. It is perfectly clear that governments must perform the former and provide the latter, and equally clear that taxes may be levied for these purposes.

A second type of governmental enterprise may be called the police regulation type, and is illustrated by the liquor dispensary cases.¹¹ Under the police power as a protection to the public, liquor selling may be stringently regulated. The sale of liquor by the state is an alternative to intensive regulation, and a means to the same end. The state's object in selling liquor is not to quench thirst at reasonable rates, but, in the interest of health and morals, to control and check public consumption. Perhaps for our purpose, municipal milk stations should be classed with liquor dispensaries. If so, it is because public health is likewise the primary objective there. The governmental action is aimed at providing pure milk to people who otherwise would get an unsanitary product from dealers who sold cheap.¹² Reasonableness of price is incidental. The principal case hardly falls in this class.

A third type of governmental enterprise may be called the free supply type. There are some things regarded as necessary or valuable to society which either would not be supplied at all by private business

¹¹ See Freund, *Police Power*, sec. 218, where the statutes of South Carolina and three other states are discussed.

¹² On police regulation of milk distribution see (1916) 26 YALE LAW JOURNAL, 67. The element of purity is frequently brought into cases of municipal water supply. See *Lumbard v. Stearns* (1849 Mass.) 4 Cush. 60, 62; *Smith v. Nashville* (1890) 88 Tenn. 464, 469, 12 S. W. 924, 925. It was also introduced by block and tackle methods to support a Georgia town in selling ice. *Holton v. Camilla* (1910) 134 Ga. 560, 567, 68 S. E. 472, 476. Cf. *State v. Thompson* (1912) 149 Wis. 488, 521, 137 N. W. 20, 33 and *Union Ice & Coal Co. v. Ruston* (1914) 135 La. 898, 918, 66 So. 262, 269. The element of safety, also falling under this head of police power, was used in a decision upholding a city's right to supply individuals with electric illumination,—easily supportable on

firms, or would be so indifferently supplied,¹³ or would necessarily cost so much, that a substantial part of the population would be inadequately served or would go without altogether, if the government did not go into the business and offer a free supply. Examples are plentiful. Free public schools, hospitals, libraries, art galleries, parks and playgrounds have long been accepted as proper governmental activities.¹⁴ Service entirely without charge, though common in this class of activities, is obviously not essential. On exactly the same principles, service might be and sometimes is furnished, not free, but at cost or less than cost.

The net result in most instances is to charge on the public generally the cost or part of the cost of serving each individual. The emphasis in this class is, therefore, not on the immediate benefit to the individual served, but on the interest of the community at large in having such service rendered to each individual. Hence in some instances, such as the public schools and the fire department, service is not only furnished free but its acceptance is made compulsory. How far the principles governing this class of activities can be invoked to justify the fuel yard decision will be discussed below.

There remains a long list of public necessities, including food, fuel, clothing, water, light, transportation, mechanical power, etc., as to which the public necessity does not require that the enjoyment of service be compulsory, or that service be free at public expense, or even that it be provided at less than a reasonable commercial rate. It requires only that these necessities be available to all at reasonable prices.

Now under free competition in business, both prices and service to all comers are supposed by the judges to look after themselves for the most part. The reason why Smith, the grocer, will charge about the same price for brick butter or dried prunes as does his competitor up the street, is found in this very word competitor. When competition brings reasonable prices for necessities and service to all (and when public control is not necessary for adequate police regulation, as in our second class) the government has no need to regulate. And the government has even less interest in regulating or controlling the sale of luxuries. There is no great public good to come from requiring that poodle dogs and diamond tiaras be sold at reasonable rates to all comers.

But public interest is aroused when the business in question deals with the necessities of life, and when competitive conditions do not exist, so that there is no natural stimulus to serve all and keep prices

other grounds as discussed below. *Crawfordsville v. Braden* (1891) 130 Ind. 149, 159, 28 N. E. 849, 852.

¹³ See *Perry v. Keene* (1876) 56 N. H. 514, 533 (highways).

¹⁴ 1 Cooley, *Taxation* (3rd ed.) pp. 198 and 205; *Attorney Genl. v. Burrell* (1875) 31 Mich. 25, 31; *Salisbury Land & Improvement Co. v. Commonwealth* (1913) 215 Mass. 371, 374, 102 N. E. 619, 621.

within bounds. It is then that the business is said to be affected with a public interest. It becomes a "public calling."¹⁵ The proprietors are required by law, instead of as a natural outcome of competition, to serve all comers, and at rates which may be fixed by the government. History illustrates this. In our early law many of the most ordinary private occupations, as we now view them, were held to be affected in this way. The law of public callings included the surgeon, the blacksmith and the tailor and included them probably because of (1) the public necessity of their services and (2) the then scarcity of such persons in most communities.¹⁶ They are no longer included among our public callings because, although the comparative necessity continues that the public be thus served, there is no general scarcity now: there exists no virtual monopoly in those callings.¹⁷

But though conditions have changed, the test remains the same for public regulation of rates, and service to all comers, despite the reliance in many difficult cases on other auxiliary arguments, which only serve to confuse the issue, and which have been conscripted to support faltering opinions.¹⁸

¹⁵ *Allnutt v. Inglis* (1810 K. B.) 12 East 527; *Munn v. Illinois* (1876) 94 U. S. 113; *Zanesville v. Z. Gas Lt. Co.* (1889) 47 Oh. St. 1, 33, 23 N. E. 55, 60; *State v. Edwards* (1893) 86 Me. 102, 105, 29 Atl. 947; *Cotting v. Kansas City Stk. Yds. Co.* (1897 C. C. D. Kan.) 82 Fed. 850, 852.

¹⁶ Wyman, *Public Service Corp.*, sec. 6-8.

¹⁷ Other callings, once classified as public, have remained in that class, through the law's conservatism, or on the principle of *stare decisis*, though if the question were new they might not now be so classified. See *Laughlin v. Portland*, *supra*, note 7, at p. 491, and cases there cited. The innkeeper is perhaps another example. See Freund, *Police Power*, sec. 388.

¹⁸ Sometimes considerable emphasis is placed upon "holding out" to do business with the public generally. This element may be important to the decision of a particular case but it should not be misunderstood. If holding out were a determining factor, the exquisite example of a public enterprise would be the cheap clothing store whose proprietor holds forth on the sidewalk urging all comers to buy at tremendous bargains. But once it has been settled that an industry is in the public class, holding out becomes important to determine whether the particular individual concerned is conducting the business on a public basis. Carriers are generally in public service but there are private carriers as well, who do not hold out to serve all and who, therefore, are not subject to public regulation. Another point is often raised in cases both of regulation and of governmental operation, namely, the necessity of legislative act. During the anthracite strike in Pennsylvania in 1902, agitation for governmental intervention was opposed by this argument, that there had been no legislation. (1902) 36 A.M. L. REV. 916, 917. In the case of cities, whose powers are confessedly limited, this may be a deciding factor. *Spaulding v. Peabody* (1891) 153 Mass. 129, 26 N. E. 421. But this should not be thought to determine whether a business is or is not public. The validity of a statute (to be decided by the courts) depends upon whether the enterprise which is the subject of the legislation is in fact a public enterprise. To say that the statute makes the subject public is to say that the legislation validates itself,—the old process of lifting by bootstraps. This lack of clearness,—the failure to cut sharply

Now another way of securing reasonable prices to the public, besides fixing the charges of private firms, is for the government to embark in the business itself; and this gives us a fourth class of governmental activities. Municipal light and water plants are common. And the City of Cleveland chose this means to provide its people with a three-cent car fare. Hence it is that the question of what business a government may itself operate to secure reasonable rates and non-discriminating service is closely related to the question of what business it may regulate for the same purpose.¹⁹ These tests of public necessity and virtual monopoly have been generally applied to cases of governmental control and seem nearly always to be present and applicable as well to cases of governmental operation.²⁰ As used in the cases, the phrase "public necessity" is self-explanatory; not so the phrase "virtual monopoly," upon whose application certain limitations have been more or less generally recognized.

The first limitation enters in connection with the element of time. That may be a monopoly to-day which was not yesterday, and the con-

between the questions of whether legislation is necessary before the court will act and whether the business is public so that legislation would be valid if enacted,—is to be observed in the following cases both of control and governmental operation. *Keen v. Waycross* (1897) 101 Ga. 588, 591, 29 S. E. 42, 43 (city entering the plumbing supply business); *Mobile v. Yuille* (1841) 3 Ala. 137, 142-143, 36 Am. Dec. 441, 446 (regulation of the price of bread); *Delaware Lack. & Wn. R. R. v. Central Stk. Yds. & Trans. Co.* (1889) 45 N. J. Eq. 50, 62, 17 Atl. 146, 151 (bill to require Hoboken stock yards to serve all comers, particularly complainant; no statute; dismissed). Note, however, the clearer discussion of this point in the dissenting opinion of Dixon, J. in the case last cited, on rehearing (1890) 46 N. J. Eq. 280, 19 Atl. 185. And see *American Live Stk. Com. Co. v. Chicago Live Stk. Exch.* (1892) 143 Ill. 210, 238, 239, 32 N. E. 274, 282 (membership in exchange not open to all comers), where the usual necessity for a statute was explained by remarking the practical difficulty of placing on the courts the first determination of whether a particular business is public. Cf. *Spaulding v. Lowell* (1839 Mass.) 23 Pick. 71. In one practical way legislation does make that public which was private before. There is a strong presumption that legislation is valid, rebuttable only by a very clear case. *Perry v. Keene* (1876) 56 N. H. 514, 534. Within this presumptive belt between what the judges themselves think about the matter and what they would concede to be a possible view of other reasonable men, the legislature does settle finally that an enterprise is public.

¹⁹ See *Burlington v. Beasley* (1876) 94 U. S. 310, 314; *Opinion of the Justices* (1892) 155 Mass. 598, 30 N. E. 1142; *Wyman, Pub. Service Corp.* sec. 218, note 1.

²⁰ *State v. Thompson, supra*, note 12, at p. 521; *Crawfordsville v. Braden, supra*, note 3; *State v. Toledo* (1891) 48 Oh. St. 112, 26 N. E. 1061. The virtual identity of the two questions—what business a government may regulate and what it may operate—when the only public object to be secured by government operation is service to all at reasonable commercial rates, is, however, often obscured by confusing these cases with those involving other distinct classes of governmental activities, such as those discussed above, which are justified on quite different grounds.

verse is equally true.²¹ Where there is something of permanence about the monopolistic condition, the case is clear enough, but it is not so clear where a mere temporary emergency exists, say, a monopoly because of a one season crop failure, a transportation congestion, or a strike at the source of supply. The *Opinion of the Justices*²² which has been noticed as opposing municipal dealing in fuel, even under legislative authority, expressly differentiated between ordinary and emergency conditions. It conditionally seemed to approve municipal action in the latter case. On the other hand, though the Portland case, by authorizing the sale of fuel in season and out of season, might seem to go much further, it has been thought by a writer in one periodical not to authorize mere emergency sales.²³ There is no question but that conditions for the public become urgently serious in brief emergencies. Governmental interference, however, may be almost as serious as the emergency; and when emergency is the reason for governmental interference, it should likewise be the reason judicially assigned for sustaining municipal action. No effort should be made to crowd the business into the field of those affected with a public interest by decisions which in terms would justify permanent control, where only temporary relief is needed. Emergency action, limited by the extent of the emergency, may perhaps constitute a fifth class of permitted governmental activities.²⁴ But as a test of public callings, with all the broad legal consequences that follow from that classifica-

²¹ The conditions which justified the decisions in the grain elevator cases were said to have been developing over a period of 20 years. *Munn v. Illinois*, *supra*, note 15, at pages 131-132. It has been suggested that conditions are pursuing a contrary tendency in cases under the mill acts. *Laughlin v. Portland* (1914) 111 Me. 486, 491-492, 90 Atl. 318, 320. The importance of this observation lies in the fact that there is no need for precedent to establish a public use. *Munn v. Illinois*, *supra* (regulation); *Sun Printing & Publ. Assn. v. New York* (1896) 8 N. Y. App. Div. 230, 40 N. Y. Supp. 607 (municipal ownership). And conversely (though to a lesser degree because of the doctrine of *stare decisis*) the fact that there is precedent, particularly old precedent, should not settle that a business is public now. Compare the cases of the surgeon, the tailor and the blacksmith referred to above.

²² (1903) 182 Mass. 605, 610, 66 N. E. 25, 26.

²³ (1918) 86 CENT. L. JOUR. 21, 22.

²⁴ Obviously no attempted classification in a growing subject can claim to be complete and final. No such claim is made for the classification in the text. It may be worth while noting, however, that there are municipal or state activities which are purely incidental and which, if undertaken independently, might not be justified. They may be incidental in one of two ways. First, they may be an appropriate aid to accomplishing a proper governmental undertaking, as for example, the operation of a quarry in connection with the paving of streets. See, *Schneider v. Menasha* (1903) 118 Wis. 298, 95 N. W. 94. Second, they may utilize a by-product of a governmental industry. Cf. *Holton v. Camilla*, *supra*, note 12, with the language of Lumpkin, P. J. in *Keen v. Waycross*, *supra*, note 5. A city might sell coke from a municipal gas works.

tion, we conclude that "virtual monopoly" in the legal usage must be something more than an obviously temporary monopoly.

Another and most important qualification is that monopoly must be an inherent tendency of the business. There may chance to be but one clothing store in a town; clothing is a comparative necessity, at least in most latitudes where the due process clause of the American Constitution can be invoked; but the clothing business is not because of this circumstance made subject to price regulation nor to the serve-all-comers rule,—that is, it is not made a public calling,—for there is nothing about the clothing business itself to make free competition difficult.²⁵ Potential competition may be almost as effective a check as actual competition.

This requirement of an inherent tendency in the business,—often expressed by saying that it must be a "natural monopoly,"—has an important application to another kind of monopoly which is familiar to-day and popularly hated, that of combination. In a field wherein competition is readily possible (at least in theory) and wherein the monopoly is solely the result of the action of one or more powerful corporations in buying out competitors, or controlling the market by the use of unfair methods or any of the various modern devices for stifling competition,—in other words where it is a purely artificial monopoly,—the industry does not thereby become clothed with a public interest.²⁶ The remedy is to be sought by breaking up the monopoly.²⁷

²⁵ Conversely, a hundred hotels in a great commercial center do not take the innkeeper out of his legal classification, nor does a choice of several railroad lines between some cities make railroad transportation a private calling. An inherent tendency to monopoly in a business usually results in a generality of that monopoly. But how far generality may be regarded as a test of virtual monopoly is not apparent. The rule of the grain elevator cases, first applied in *Munn v. Illinois*, *supra*, note 15, and *Budd v. New York* (1892) 143 U. S. 517, 12 Sup. Ct. 468, to the strategically important grain ports, was later extended on the authority of those cases to small towns in North Dakota. *Brass v. No. Dakota* (1894) 153 U. S. 391, 14 Sup. Ct. 857, affirming *State v. Brass* (1892) 2 N. D. 482, 52 N. W. 408. But, in the state court decision, the Chief Justice, while yielding to the majority, observed that perhaps the rule applicable to the large centers should not be applied to cases wherein the facts were so different. His view is persuasive. Classification within a particular industry seems reasonable.

²⁶ This limitation has been so generally accepted and observed that express decisions on the point are few. See, however, *Ladd v. Southern Cotton Press & Mfg. Co.* (1880) 53 Tex. 172, 189; *American Live Stk. Com. Co. v. Live Stk. Exch.*, *supra*, note 18, at p. 236-237. It is implied in the many references in the authorities to "natural" and "legal" monopoly.

²⁷ It does not follow that in certain lines of business where an existing tendency to monopoly is now popularly attributed to artificial combination, we may not yet recognize that the tendency is, in fact, inherent in the economic and geographical conditions affecting the business and, abandoning the effort to

Monopoly must then, we conclude, where it is to serve as a test, be (1) reasonably permanent, (2) inherently characteristic of the business, and (3) not merely the result of artificial methods of combination or of stifling competition. Such a monopoly, plus a public necessity, must, it would seem, be present to permit either governmental fixation of prices or governmental serve-all-comers regulation, or governmental operation solely as a means to these ends.

What then of the principal case, wherein the city of Portland was authorized to sell fuel to its inhabitants? In which of our four classes must we find room for this latest addition to the list of lawful municipal activities? We have seen that it clearly is not within either of the first two classes. Is it then to be placed in class three or class four? The chief distinction between the two is that, in the former class, the public interest in the general enjoyment of some service or commodity of public necessity or advantage is thought to require that it be furnished not merely at a reasonable commercial rate, but on still more favorable terms,—either without charge or on better than a business basis; while in the latter class all that is deemed necessary to the public interest is a reasonable commercial rate. In class three, therefore, there need be no monopolistic element. The freest commercial competition will not, at least for any length of time, maintain prices at a level that does not allow a business profit. In class four, on the contrary, it is at least the present theory of our law that free competition will result in reasonable commercial rates; if these are all the situation demands, the monopoly element must be present to require or justify governmental action.

The opinion of the Supreme Court is not illuminating. It emphasizes the great weight to be given in such cases to the opinions of the state courts, quotes at some length from the first Maine decision in which the ordinance in question was upheld,²⁸ and concludes by comparing the furnishing of heat with the furnishing of light and water, and the furnishing of coal for heating with the furnishing of natural gas for the same purpose.²⁹ By the analogies relied on, it seems therefore to treat the case as one of "public calling," coming within our class four. That "heat is as indispensable to the health and comfort of the people as is light or water" may be conceded. But the statement, in effect, that it makes no difference by what means or systems heat is furnished is not so readily to be accepted. The business of furnishing water, electric light, or gas—whether natural or artificial and whether for light or for heat—is a public calling because the necessary

restore competition by legal compulsion, substitute governmental regulation under the law of public callings or the alternative remedy of government operation. The packing house, for example, may follow in the footsteps of the grain elevator.

²⁸ *Laughlin v. Portland*, *supra*, note 7.

²⁹ *State v. Toledo* (1891) 48 Oh. St. 112, 26 N. E. 1061.

machinery for distribution through the public streets makes free competition impracticable. Not only is the duplication of such systems economically wasteful, resulting in higher rather than lower charges to the public, but recognizing this, the public authorities generally refuse to grant the necessary permission for such duplication. There results not only a natural, but in most cases a legal monopoly.³⁰

It is true also, as pointed out in the *Laughlin* case, that a purpose may be public though no governmental permission for the use of the streets is had or needed. But, if applied to "public callings," this merely proves that the monopolistic element need not always be supplied in the same way. It does not answer the objection that, to bring the case of the fuel yard within the same principle as the electric light or water or natural gas company, that element must in some way be supplied. The *Laughlin* case, in a passage not quoted by the Supreme Court,³¹ finds the monopoly element in the alleged existence of "monopolistic combinations" controlling "the mining, transportation and distribution of coal." That monopoly artificially maintained by combination will not satisfy the test of a public calling has already been pointed out. But furthermore, the legislation in question was not directed at mining or transportation; it dealt only with retail distribution. It would not be difficult to argue that the mining of coal, or at least of anthracite coal, if that may be treated as a distinct commodity for which there is no really equivalent substitute, is under present conditions, not merely by artificial combination, but by the inherent tendency of natural and economic conditions, a virtual monopoly;³² but if so there is no magic in a municipal coal yard as a remedy for this condition.³³ Neither the Maine court nor the federal Supreme Court specifically declared that a monopoly of the business of selling coal at retail existed in Portland, or even that there was ground to infer or presume the existence of such a monopoly; still less, that any conditions were shown or suggested which would create an inherent tendency to such monopoly, or place it beyond the reach of state laws against artificial combination. Retail coal yards may not spring up quite as easily on every street corner as retail groceries or drug-stores or clothing stores; but there are no practical requirements of locality or equipment or even of large capital which would seem to place the business outside the operation of the usual laws of competition.³⁴

³⁰ *State v. Thompson*, *supra*, note 12, at p. 521; *Crawfordsville v. Braden*, *supra*, note 3; *Zanesville v. Gas Light Co.*, *supra*, note 15.

³¹ *Laughlin v. Portland*, *supra*, at p. 499.

³² See (1902) 14 Green Bag, 514 and 570; Freund, *Police Power*, sec. 373, note 4. Cf. *State v. Loomis* (1893) 115 Mo. 307, 320, 22 S. W. 350, 353; *Millett v. People* (1886) 117 Ill. 294, 303, 7 N. E. 631, 635.

³³ See *Opinion of the Justices* (1903) 182 Mass. 605, 610, 66 N. E. 25.

³⁴ It must not be overlooked that the Maine court limited its discussion of monopoly to a consideration of the economic conditions in the coal industry,

The opinion in the *Laughlin* case seems finally to rest on inadequacy of supply, with a recurrence to the analogy of the water company. The *cause* of the inadequacy is declared to be immaterial. But the cause is clearly material in determining whether the proposed remedy has any reasonable relation to the object by which it is sought to be justified. A public water supply furnishes a real remedy for the inadequacy of private supply. No attempt is made to show us how a municipal fuel yard will increase the supply of coal.³⁵

It is believed that a much stronger case could be made out for the legislation in question by invoking the underlying principle of class three, rather than of class four; and that a public hospital furnishes a better analogy, though less speciously apparent, than a natural gas company. The public hospital is maintained, not primarily for the well-to-do, who would secure reasonably adequate medical care without it, but because there is a large section of the public, especially in large cities, who could not or would not afford such care without public assistance. So it might not unreasonably be contended and believed that there is a considerable section of the public, made up of the poorer classes in northern cities, who are not in fact under commercial conditions adequately supplied with coal in winter weather at prices they can afford to pay. Those who live from hand to mouth nearly always pay most for everything they buy. The poor buy coal in small quantities, which it hardly pays the dealer to handle, except at prices aggregating much more per ton than the more prosperous consumer is obliged to pay. Nor is it wholly a question of inability to pay a fair commercial price for the quantity purchased. The line between class three and class four may not always be clear cut. So far as the poor are concerned, especially in times of shortage, competition partially breaks down, because the basket trade is hardly worth competing for. Thus though there may be no monopoly, though competition, actual and potential, may sufficiently regulate the price to the well-to-do, and ensure them service, it may fail entirely to protect the poor man who wants but a hodful or two of coal. Indeed it is competition, in another aspect, from which he suffers; he cannot compete with the prosperous charge customer for even his little share of the supply available.

A statute or an ordinance, then, that sought to ensure the poor an unfailing supply of coal in such quantities as they could or would afford to buy, even at prices that would yield a fair business profit, might perhaps be justified, if reasonably adapted to the end in view. Such a case would be on the border-line between class three and class

although both the statute and the ordinance in question specifically provided for the sale of wood as well. The latter business is, if anything, even less monopolistic than the retail selling of coal.

³⁵ Cf. *Opinion of the Justices, supra*, note 33, and dissenting opinion of Loring, J.

four, obtaining some support from the principles of each. The legislation in the instant case, considered as a provision for the poor, came even more directly within the principles of class three, since it provided for sale at cost, or in other words, at less than a reasonable commercial rate.

The objection to the legislation, and to the implications of the opinions in which it was sustained, is that neither statute nor ordinance was limited to any particular class of trade, nor was any such limitation imposed by the decisions. To require an investigation of the financial ability of each customer might be impracticable; but this would not be necessary. By restricting the business to sales in small quantities, the only need which, it would seem, could justify the legislation, would be amply provided for, and the practical effect of this restriction would adjust the remedy to the disease as closely as can be expected in practical legislation.

It does not follow that even without such a restriction either statute or ordinance should have been held wholly invalid. The decisive question might well be what action the city had actually taken or proposed to take under the ordinance. In spite of popular language, constitutional decisions do not deal with the abstract validity of statutes, but with the legality of action taken or proposed in reliance on the statute for authority or justification. If the actual operation of the municipal yard had been governed by the considerations above suggested, the taxpayers' objections might well be overruled, even though the language of both statute and ordinance might go much further than the case actually presented, and beyond what the court could properly approve. But if it appeared that under the authority of these enactments the city had entered without restriction into the business of supplying at cost all the coal requirements of the community, domestic and industrial, for rich and poor, in small quantities and in large, another case would be presented. It is believed that the subject must have further consideration, and that distinctions must be observed of which there is no hint in the opinion under discussion, before the law can be considered as settled, or the real meaning and effect of the Supreme Court's decision can be measured. There is little doubt, however, that the tendency of the times is toward a considerable extension of governmental activities in the line of so-called social legislation, and that there may be worse shocks in store for the conservatives than any they have suffered from the judicial approval of municipal coal yards.³⁶

³⁶For a recent review of the principal case, see, *Is Government Merchandising Constitutional?* (1918) 52 AM. L. REV. 215. Other discussions of the same general subject and of related cases not here considered will be found in (1915) 15 COLUMBIA L. REV. 179; (1914) 2 VA. L. REV. 152; (1913) 12 MICH. L. REV. 132; (1903) 16 HARV. L. REV. 584; (1891) 5 HARV. L. REV. 30; (1873) 21 AM. L. REG. 493, note.