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The JOURNAL takes pleasure in announcing the appointment to the Editorial Board of C. Vernon Porter, 1910, of Natchitoches, La.

INTOXICATING LIQUORS—INTERSTATE COMMERCE.

The Supreme Court of the State of South Dakota has recently handed down a decision in the case of *Paul Jones & Co. v. Yokum*, 123 N. W. 272, involving the question of interstate commerce as applied to the sale of intoxicating liquors. The law of South Dakota requires all persons who sell, or offer for sale, intoxicating liquors in quantities of five gallons or more to pay a license of \$500.00 per annum in every township, precinct, town or city in which said sale, or offer for sale, is made. The plaintiffs were wholesale liquor dealers in Louisville, Kentucky, and the defendant a retail liquor dealer residing and doing business at Pierre, South Dakota. Plaintiff's traveling salesman solicited an order from the defendant, who gave his notes in payment therefore, such order and notes being subject to the approval of his principals in Louisville, Ky. The order was received at Louisville, the notes there approved, and the goods shipped f. o. b., Louisville, addressed to the defendant at Pierre. It thus appears that the sale was consummated and delivery made in Kentucky. The above action was brought to enforce the payment of the above notes; the trial court directed a verdict in favor of the

plaintiffs, but the supreme court on appeal reversed the lower court, holding that such notes were unenforceable where the wholesalers had not taken out a license as required by law.

It was contended on the part of the plaintiffs that this was an interstate commerce transaction and that the power to regulate such rested entirely with Congress to the exclusion of the state authorities, *Walling v. Michigan*, 116 U. S. 444; *Asher v. Texas*, 128 U. S. 129, and that this power was not changed by the so-called Wilson Act (26 U. S. Stat. at Large, 313), as that act applied to the liquor only after it came within the borders of a state or territory, making it then subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police power. This view was not upheld by the supreme court and it bases its opinion upon four cases, *i. e.*, *Conrad-Seipp Brewing Co. v. Green*, 122 N. W. 662 (S. D.); *Delameter v. State*, 205 U. S. 93; *State v. Asher*, 54 Conn. 299, and *Lang v. Lynch, et al.*, 38 Fed. (C. C.) 489.

A careful consideration of these four cases throws some doubt on the soundness of the decision in the principal case, as the first two cases are distinguishable from the principal case and not in point therewith, while the latter two cases have been in effect overruled.

In the *Conrad-Seipp* case, orders were taken from several persons for a car load of beer. The car load was then shipped to a central point within the state and each individual order re-shipped, under the direction of an agent of the wholesaler, from that point within the state to other points within the same state. The court held that the purchase price of such liquors could not be recovered, no license authorizing the sale having been obtained. This act of re-distributing made that car a warehouse and brought the transaction within the provisions of the so-called Wilson Act, hence, liable to the license laws of the state, and this act of re-distribution clearly distinguishes this case from the principal case. *In re Rhodes v. Iowa*, 170 U. S. & 422.

In the *Delameter v. State* case a traveling salesman solicited orders for quantities of liquor less than five gallons, to be forwarded for acceptance to another state, where delivery was to be made, and he had not paid the license fee upon the business of selling, or offering for sale, intoxicating liquors at retail by the

jug or bottle in lots less than five gallons. It was there held that the state legislature had the power to require the payment of a license before engaging in the *business of soliciting orders*, or offering for sale liquors, and *there being a specific law in that state upon that subject*, Delameter was guilty of a violation thereof. This point differentiates this case from the principal case, as there is no law in South Dakota requiring a traveling salesman to pay a license upon the *business of soliciting orders for liquor in quantities in excess of five gallons*.

The case of *State v. Asher* has been in effect overruled by the case of *Eager v. Burke*, 74 Conn. 537. In this latter case, in referring to section 3087 of the *General Statutes* of that state, which prohibit the sale of liquors without a license "by sample, by soliciting and procuring orders, or otherwise," the court uses this language: "The decision (in *State v. Asher*) does not hold that the person making the sale in another state sells the goods in this state by procuring orders, or otherwise, in violation of our law, and its effect should not be extended beyond the precise point necessarily involved." See also *N. Y. Breweries Corp. v. Baker*, 68 Conn. 341, where the *State v. Asher* case is commented upon. In so far as *State v. Asher* is an authority upholding the principal case, it has thus been overruled.

The *Lang v. Lynch, et al.*, case held that orders taken for the sale and delivery of liquors in violation of the law of the state were part of the contract of sale, and as such rendered the entire transaction void. This case is founded upon the construction of the New Hampshire law placed thereon by the courts of that state—as it is a well known rule that the Federal courts will follow the construction put upon the state statutes by the highest courts of that state—in the case of *Jones v. Surprise*, 64 N. H. 243. This case of *Jones v. Surprise* has twice since been passed upon by the supreme court of that state, once before the passage of the Wilson Act in the case of *Durkee v. Moscs*, 67 N. H. 115, and once after the passage of that act in the case of *Corbin v. McConnell*, 52 Atl. 447 (N. H.), and was overruled by the supreme court in both cases. Hence, the case upon which *Lang v. Lynch, et al.*, rests having fallen, that case falls with it and cannot now be considered as an authority in point.

The petition for a rehearing filed on the part of the plaintiffs in the main case goes into these four cases in detail, taking each

one up separately and considering it in relation to the main case.

The decision in the main case gives an extra-territorial effect to the laws of the State of South Dakota, and bases its reason for so doing upon the power given the several states and territories over interstate commerce in intoxicating liquors by the Wilson Act and the fact that the commodity involved in the main case was intoxicating liquor. But the Wilson Act, as construed by the Supreme Court of the United States, gives the several states and territories power over interstate commerce in intoxicants only after such have arrived within the borders of the state or territory, and does not give the states authority to interfere with interstate commerce in liquors by enacting laws having an extra-territorial effect. *Corbin v. McConnell*, 52 Atl. 447 (N. H.). All the authorities, both state and federal, are reviewed in this case. See also *State v. Hanaphy*, 117 Ia. 15; *State v. Hickox*, 64 Kan. 650; *In re Loeb*, 72 Fed. 657.

There is no question but what a state may impose a license upon the business of soliciting orders for intoxicating liquors, and where a statute has been enacted doing this, all the authorities concede that an order taken to be filled in another state, and the contract there completed, no license having been obtained, comes within the provisions of the Wilson Act, and is not contrary to that clause of the United States Constitution giving Congress the sole power to regulate commerce among the several states. But a great many appear to lose the distinction between the cases where such a statute imposing a license upon the *business* of soliciting orders for intoxicating liquors exists, and the cases where there is only a statute imposing a license upon the *selling* of such liquors. In the first instance, Congress by the Wilson Act has delegated its power to regulate interstate commerce in intoxicants to the several states, while in the second instance, the order being taken in the one state does not overcome the fact that the sale is really made and completed in another state, and when the goods are shipped into the state where the order is taken, they become a part of interstate commerce. In the states where there is a statute imposing a license upon the business of soliciting orders, the seeking and taking of the order is a separate and distinct transaction from the sale. In the states where there is no such statute the soliciting of the order and the actual sale are an entirety and the laws in such a state cannot be given an extra-territorial effect.

The later cases, at first inspection, appear to be inconsistent with the earlier ones, but if this distinction is borne in mind, all can be reconciled.

The law of South Dakota imposes the duty of obtaining a license upon all wholesale liquor dealers who "sell, or offer for sale." If the phrase "offer for sale" can be construed as meaning the business of soliciting orders, the main case is sound in both principle and law; if such cannot be so construed, then the principal case is not consistent with the rule as laid down by the United States Supreme Court in the case of *Delameter v. State*, above cited. Bearing in mind the distinction above noted, the only question in the principal case is how to construe the phrase "offer for sale," the decision in the main case impliedly (no express mention being made in the opinion as to this question) construing such phrase as meaning a business.

DUTY OF STREET RAILWAY CONDUCTOR TO MAKE CHANGE.

The tender of a five-dollar gold coin by a passenger for three fares on a street railroad was held to be an unreasonable amount by the Supreme Court of Georgia in *Burge v. Georgia Ry. & Elec. Co.*, 65 S. E. Rep. 879, and the plaintiff was denied the right to have a jury pass upon the question as to whether or not the conductor should have accepted the five-dollar gold piece and made change for it. As to the rule of the defendant railroad requiring conductors to carry change to the amount of two dollars and no more, the court followed the decisions in New York and Pennsylvania and held that whether the rule was reasonable or not is a matter of law to be determined by the court.

Pennsylvania, New York and California seem to be the only other states in which this question has arisen as to the reasonableness of tendering a five-dollar piece for a five cent fare.

In *Barker v. Central Park N. E. R. R. Co.*, 151 N. Y. 237, the court held that the tender of a five-dollar bill was unreasonable as a matter of law, even though the conductor admitted in the evidence that he was able to make the change. A superior court in Pennsylvania has followed this New York decision, holding that the tender of a five-dollar bill was unreasonable as a matter of law. *Muldowny v. Traction Co.*, 8 Penn. Sup. Ct. 335.

In *Barrett v. Market St. Ry. Co.*, 81 Cal. 296, the supreme court, affirming the trial court, held that it is not necessary that a passenger tender the exact amount of fare on a street car, but he must tender a reasonable amount, and the carrier must furnish change, and that five dollars is such a reasonable amount. The court added: "It is a well-known fact that the five-dollar gold piece is practically the lowest gold coin in use in this section of the country," and the New York court distinguishes this decision on the ground that there probably existed local reasons for such a decision in California.

In these cases the five dollars was tendered for one fare, but the Georgia court sees no difference, apparently, between tendering that amount for one fare or for three fares. The mere tendering of five dollars to a street car conductor, it holds, is unreasonable as a matter of law, and it would seem that this court would hold that the tender of a five-dollar piece for a dozen fares would also be unreasonable as a matter of law. However, if each of the three passengers had tendered a two-dollar bill, requiring the conductor to change six dollars, the court would have been compelled to hold it reasonable as a matter of law.

The Georgia court further held that whether it is reasonable for the railroad company to make a rule that conductors shall furnish change for two dollars and no more, is not a question of fact for the jury. The court says that what would appear reasonable to one jury would not so appear to another, and that there would be no fixed rule by which the corporation and the public should be governed. In reviewing the few cases on this point, however, it would seem that the courts themselves are not absolutely certain as to what is reasonable. In summing up the cases on this point, a note to *Barker v. Central Park N. E. R. R. Co.*, in 35 L. R. A. 489, says that the result of the decisions is to lay down the rule that a reasonable sum may be tendered and change required, but to leave the question what is reasonable quite uncertain.

EVIDENCE: PRIVILEGED COMMUNICATIONS IN WRITING THAT HAVE
PASSED BEYOND THE CONTROL OF THE PARTIES.

In *O'Toole v. Ohio German Fire Insurance Co.*, 123 N. W. 795, the Supreme Court of Michigan was called upon to decide a question which arose for the first time in that state and upon

which the court says: "The cases are not numerous; the rulings are not harmonious." This was an action by Myrtle E. O'Toole to recover on a contract of insurance. That one ground of defense was that she had herself burned the insured property, that she wrote letters to her husband containing statements tending to prove this charge, that the letters were accidentally lost by the husband, found by a third party, and delivered to the defense. The court decided that these letters should have been received in evidence.

That these letters were privileged communications in the hands of the husband can scarcely be doubted. See 4 *Wigmore on Evidence*, Sect. 2332-2341. The question then arises: is the privilege lost when the letters come into the hands of a third person? 23 *Amer. & Eng. Encyc. of Law* (2nd. ed.), 95, says: "It has been repeatedly held that where such a letter has come into the hands of a third person, it may be produced in evidence but there are, on the other hand, a number of cases in which this has been denied." A review of the cases there cited shows a great confusion of opinion.

The case of *State v. Hoyt*, 47 Conn. 518, is one of the earliest cases on the subject. In that case, certain letters written by the defendant to his wife were admitted to disprove his claim as to his mental condition at the time of committing the alleged offense. The letters were admitted on the theory that this sort of evidence is the same as that of one who has overheard a conversation which would otherwise have been confidential. The court says: "The fact that the communications in this case were written, places them on no higher grounds than if they were merely oral. And as to the latter, it is well settled that conversations between husband and wife are not privileged so as to prevent a third person who overheard them from testifying." *State v. Centre*, 35 Vt. 378; *Com. v. Griffin*, 110 Mass. 181.

In *State v. Mathers*, 64 Vt. 101, the prisoner wrote a criminal letter to his wife and gave it to his daughter to hand to her; before delivery, it was stolen from the messenger by another daughter and given to the prosecution. The court in admitting the letter, said: "Conceding this letter would have been a privileged communication in the hands of the wife, yet this is not a reason for excluding it, coming into the possession of the prosecution as it did. When papers are offered in evidence, the court

can take no notice of how they were obtained, whether legally or illegally, properly or improperly, nor will it form a collateral issue to try the question." 1 *Greenleaf on Evidence* (16th ed.), Sec. 254^a; *Legatt v. Tolvervey*, 14 East 302 and note; *Com. v. Dana*, 2 Met. Mass. 329. And this reasoning has been followed in *Geiger v. State*, 6 Neb. 545; *State v. Buffington*, 20 Kans. 599, and *Lloyd v. Pennie*, 50 Fed. Rep. 4. (Cal. Statute.)

The case of *State v. Buffington*, *supra*, carries this doctrine to a very dangerous extent. The defendant wrote a letter to his wife and sent it by mail; the witness got it from the post office and took it to the wife; she read it and immediately turned it over to the witness voluntarily. The court allowed this letter to be read in evidence. If this decision were to be followed, it would practically destroy the privileged communication rule. All that would be necessary to destroy "the sacred shield of privilege" would be to hand over the excluded evidence to some creditable witness and have him bring it into court. *Wilkerson v. State*, 91 Ga. 729, is directly *contra* to the Kansas decision. A letter written to a Mrs. S. by her husband was handed by her to the defendant and he was not permitted to read it in evidence. The court said: "Mrs. S. would not have been permitted as a witness on the stand to read to the jury a letter which he (S.) had written to her. We are therefore decidedly of the opinion that the same result cannot be indirectly accomplished by her voluntarily delivering a letter of this kind to another person.

The New York case of *People v. Hayes*, 140 N. Y. 484, has been cited as supporting this kind of evidence. But, the facts in that case were peculiar and it can scarcely be said to uphold this doctrine. The defendant's wife wrote a letter to him which contained statements tending to discredit some of the testimony given by her in his behalf; he had voluntarily delivered this letter to the witness; the wife not being a party to the suit, the husband was the only one injured by the introduction of the letter and he was held to have waived the privilege by giving it over to a third person. As the court well says: "In this case, every reason upon which the rule rejecting a privileged communication was originally founded is absent."

In *Ward v. State*, 70 Ark. 204, the letter sought to be introduced was written partly to a wife and partly to a third person; the two parts of the letter were separable and the court admitted the part to the third person but excluded that to the

wife. There is a dissenting opinion in this case, however, by the learned Chief Justice in which he expresses it as his view that no part of the letter was admissible, and cites a note in 15 L. R. A. 268, which criticises very severely the reported case of *State v. Mathers, supra*.

The cases which hold that privileged letters and papers retain the privilege without regard to the custody or control seem to be based on the better reasoning and the Supreme Court of Florida in the case of *Mercer v. State*, 40 Fla. 216, discusses the subject with great zeal and thoroughness. The letter sought to be introduced was procured from the wife to whom it was written; the record does not show how it was obtained. The court in refusing to admit it says: "There is a considerable array of authorities to the effect that when confidential communications between husband and wife get out of the control and possession of the parties to the confidence and their agents and attorneys and find their way into the possession and control of third persons, regardless of the manner in which the possession thereof may be obtained by such third persons, that then such communications lose the protected privilege of the law and become competent and admissible evidence. See 1 *Greenleaf on Evidence*, Sect. 254^a; notes to *Com. v. Sapp*, 29 Am. St. Rep. 415. We cannot agree to the correctness of this rule thus broadly laid down by these and other authorities, but think the policy of the law, that forms the foundation of the general rule, is far more strongly upheld and observed by those authorities that recognize and declare certain classes of communications to be privileged from the inherent character of the communication itself and that in such cases the privilege attaches to the communication itself and protects it from exposure in evidence wheresoever or in whosoever hands it may be. Judge Shiras, now of the Supreme Court of the United States, in the case of *Ligget v. Glenn*, 51 Fed. Rep. 381, with great force and clearness explains what we consider to be the correct rule, as follows: "In considering questions of this kind, regard must be had to the nature of evidence sought to be elicited. It not infrequently happens that deeds, contracts, or other written instruments may be delivered by a client to an attorney under such circumstances that the attorney cannot be compelled or permitted to produce the same in evidence against his client at the demand of an adversary. In this class of cases, the deed or other written instrument is not of

itself privileged. It is merely the possession of the attorney that is protected. . . . In such cases, however, it is open to the other party to prove, by any competent evidence, the contents of the paper, because the same are not, in and of themselves privileged. The decisions in this class of cases do not touch the principle that is involved in the matter of confidential communications, whether written or oral, between client and counsel. In the latter instance the privilege attaches to the communication itself. * * * Its competency is not dependent upon the mere manner in which knowledge thereof may be obtained from counsel. The principle forbidding its use is not adopted as a mere rule of professional conduct on the part of the attorney. It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive. * * *

The same reasoning applies with equal, if not greater, force to the communications between husband and wife, upon the inviolacy of which depends that perfect confidence between the twain so necessary to maintain the sacred institution of marriage up to that standard demanded by every well ordered and civilized society." The court then cites *Wilkerson v. State*, 91 Ga. 729; *Bowman v. Patrick*, 32 Fed. Rep. 368; *Mahner v. Linck*, 70 Mo. App. 380; *Mitchell v. Mitchell*, 80 Tex. 101, and *Dreier v. Continental Life Insurance Co.*, 24 Fed. Rep. 670, as having adopted the same conclusion on the same line of reasoning. To these cases should be added the later cases of *Scot v. Com.*, 94 Ky. 511; *Selden v. State*, 74 Wis. 271, and *Lanctot v. State*, 98 Wis. 136, all of which quote *Mercer v. State* with approval and base their decisions on that case.

We are of the opinion that the conclusion reached in the latter cases is based on the better reasoning and that this sort of evidence ought to be rejected.

MANDAMUS.

A contrariety of opinion presents itself in the question whether mandamus will lie to compel a corporation to transfer stocks on its books: If corporation stocks are personal property why should not a purchaser of such stocks from another, compel, by mandamus, a transfer on the books of the corporation?

This question lately presented itself before the Supreme Court of New York in the case of *People ex rel., Julius Rothenberg v.*

Utah Gold & Copper Mines Co., 119 N. Y. Supp. 852, where the party defendant appeals from a peremptory mandamus issued to compel it to transfer on its books, stocks purchased by the plaintiff from another party. The plaintiff claims to be the owner of 1,000 shares of stock of the corporation evidenced by the certificates held by him indorsed in blank. He produced his certificates and offered to surrender them, and demanded that such stock be transferred on the books of the corporation to himself. Upon the defendant's refusal, plaintiff obtained a peremptory mandamus compelling the corporation to make such transfer, whereupon defendant appeals.

It must be borne in mind that mandamus is a high prerogative writ, an extraordinary remedy, applied when a party has a right which cannot be enforced in the courts. In fact, mandamus may be termed, "a criminal process relative to civil rights." 3 Brev. (S. C.) 264.

The leading case in this country and one cited most frequently as laying down the rule on this subject is the case of *Shipley v. Mechanic's Bank*, 10 John. (N. Y.) 484, which holds that mandamus will not lie in an ordinary case where a bank refuses to transfer certain shares on its books, when the applicant has an adequate remedy to recover the value of the stock. This decision might be controverted if it could be shown that the question of the transfer of the bank's stock was one of public concern. *People v. Crockett*, 9 Cal. 112. But where it is clear that the public has no interest and that the contending parties have disputed rights and have a clear, adequate remedy by other means, then mandamus will not lie. *People v. Millers*, 39 Hun. (N. Y.) 557; *Currey v. Scott*, 54 Pa. St. 270. Mandamus is "the right arm of the law" with purpose not to investigate and inquire into, but to command and execute. *Townes v. Nichols*, 73 Me. 515.

Several leading cases on this subject hold that where a company refuses a reasonable request to make a proper entry on its books by the transfer of shares, whereby the owner is liable to be deprived of any legal right or pecuniary advantage, the company may be compelled to do its duty by issuance of a writ of mandamus. This principle is sustained in the case of *In re Klaus*, 67 Wis. 401, a railroad case, which holds that the secretary of a corporation may be compelled to transfer shares of stock on its books to the plaintiff. The same doctrine is laid down

in the case of *The Green Turnpike Co. v. Bulla*, 45 Ind. 1, which holds that where the owner of shares of stock in defendant company had demanded a transfer on the books to his own name, which was refused, mandamus may be resorted to, to compel the corporation to make such transfer. The decision of the above cases seem to have been founded upon the fact that the Turnpike and Railroad Cos., though private corporations, serve the public and are of public interest and in their refusal to transfer shares they jeopardize the public's rights. But this theory has been exploded by decisions of more recent judges. The above rule laid down by the courts of Wisconsin and Indiana is further substantiated in the case of *State ex rel., Townsend v. McIver*, 2 S. C. N. S. 25; but this case also lays down the startling assertion that mandamus is the only remedy in such circumstances, for an action against the officers of the corporation is too doubtful and uncertain to insure a complete and full remedy. This principle cannot be supported, for innumerable cases following the English view lay down the rule that an action at law for a conversion of these shares upon the company's refusal to transfer is a proper and expedient remedy. *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; *N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 93.

The English rule is clearly established on this subject, which holds that a court will not grant a mandamus to compel a bank to transfer its stock on its books, for there is a certain and complete remedy obtainable by other actions which are more appropriate for the case. *The King v. Bank of England*, 2 Douglas 526.

Mr. Marshall's text on *Corporations*, p. 851, says that mandamus will not lie against a corporation for its refusal to transfer stock to the plaintiff, because he has an adequate remedy at law for damages, or in equity to compel the corporation to register the transfer. Mr. Cook on *Corporations*, Vol. II, p. 1088, coincides with the above view, stating further, that *assumpsit* is the proper remedy, for the stock of a private corporation has no particular value and may be purchased readily in open market, or freely compensated for in damages.

In Massachusetts the question is presented a little differently, though the same conclusion is reached, in the case of *Stackpole v. Seymour*, 127 Mass. 104, where a purchaser of shares of a railroad corporation sought mandamus. The court held that, as "no

public interest or corporate right is in question," the mandamus must be refused. In Illinois it was held that where it can be shown that the corporation has arbitrarily refused to make such a transfer for no good and sufficient reason, there might be a small ground for a resort to mandamus. *People v. Goss*, 99 Ill. 355. This view was also taken in Georgia in the case of *Bailey v. Strohecker*, 38 Ga. 259, but was later overruled in the case of *The Bank of the State of Georgia v. Harrison*, 66 Ga. 696.

Mandamus is an extraordinary action which can only be invoked when there is a clear and established right to be adjudicated. Why should a person insist upon a writ of mandamus to compel a transfer of stock when an action at law on assumpsit or an action in equity for specific performance accomplishes the desired results? A right of action is not dependent upon the possession of certain shares, but could be enjoyed by a possession of other shares which could be purchased on the market by a recovery of damages equivalent to what the shares would be worth.

Should the aggrieved party think that his action at law would not sufficiently compensate him he may have a sure and complete remedy by then compelling the corporation to register a transfer of the stock and by adjusting the various conflicting rights and claims of the parties. *Rice v. Rockefeller*, 134 N. Y. 174; *Iasagi v. Chicago, B. & Q., Ry.*, 129 Mass. 46.

The better opinion derived from the authorities seems to be that mandamus will not lie to compel a corporation to transfer its stocks, for it is a high prerogative writ, an extraordinary remedy, only invoked when the rights of the parties are clear, precise, and well established. An action at law for damages or a suit in equity for specific performance is the proper remedy.