Notes and Comment

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation

Notes and Comment, 3 Cornell L. Rev. 274 (1918)
Available at: http://scholarship.law.cornell.edu/clr/vol3/iss4/3

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
Notes and Comment

Bills and Notes: Banks: Liability for paying raised check.—The case of Commercial Bank of Grayson v. Arden and Fraley, 197 S. W. (Ky.) 951 (1917), raises the question as to whether a drawee of a negotiable instrument may, under certain circumstances, be a holder in due course of such instrument. The case was decided under section 124, chapter 90b, of the Kentucky statutes, which corresponds to section 205 of the New York Negotiable Instrument Law, providing that, “when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.” The drawee bank cashed the depositor’s checks, which had been fraudulently raised, and the Kentucky court held, in this action by the depositor against the bank to recover the money paid out on these raised checks, that under the Kentucky statute, the bank was liable only for the difference between the checks as drawn, and as cashed, holding the drawee bank to be a holder in due course.

There is a conflict as to whether the payee of an instrument may be such a holder in due course, as is contemplated by the statute. At common law the payee could be such a holder in due course,1 and there are supporting dicta in the majority of states, including Massachusetts,2 Maine,3 New Hampshire,4 and Arkansas.5 This rule has also been adopted by the New York courts in two recent cases.6 The Iowa case of Vander Ploeg v. Van Zuu6, is often referred to as sustaining a contrary view. But that case primarily involves the question of fraud in filling in blank spaces without authority of the makers, and so is of little force. But Missouri8 is the leading state holding the contrary view, that court holding that the delivery of the paper to the payee is not a “negotiation” thereof, and hence not within the terms of this section.

In the principal case, the Kentucky court disposes of the question as to whether the drawee bank of a check may be such a holder in due course, by saying, “It is also conceded that the appellant [the drawee bank] became the holder of the checks in due course.” The facts were that the Second National Bank of Ashland indorsed the checks to the Citizens Bank of Grayson, which in turn endorsed them to the drawee bank. The drawee bank paid them, and charged them to the depositor’s account. From these facts it would seem that the drawee bank did nothing more than it was bound to do under its agreement

---

3 South Boston Iron Co. v. Brown, 63 Me. 139 (1873).
4 Horn v. Fuller, 6 N. H. 511 (1834).
5 Cagle v. Latne, 49 Ark. 465 (1887).
7 195 Iowa 350 (1907).
with the appellee, its depositor. The checks were addressed to the
bank, and the bank merely charged the depositor's account with the
amount it paid out on the checks. The bank did not buy the checks.
The relation between banker and customer is created by their own
contract, under which the banker is bound to honor the customer's
drafts. In the case of Crawford v. West Side Bank, the New York
Court of Appeals says, "The relation existing between a bank and its
depositor is, in a strict sense, that of debtor and creditor. It receives
the depositor's funds upon the implied condition of disbursing them according to his order, and upon an accounting is liable for all such sums deposited, as it has paid away without receiving valid directions therefor."

At common law, as is seen in the old English case of Hall v. Fuller, the
drawee bank could charge the drawer of the check with the
original amount thereof, for the court said that the drawer had, before
the alteration of the check, directed the bank to pay such original
amount, and in paying up to that amount the bank did only what it
was authorized to do. This, it seems, was an exception to the general
common law rule that a material alteration in any commercial paper
extinguished the liability of the maker, in that the agreement was no
longer the one into which he had entered. And this exception was
also the common law rule in New York. The leading American case
supporting this view of the common law, is Greenfield Savings Bank v.
Stowell, Gray, C. J., afterward an associate justice of the Supreme
Court of the United States, writing the opinion. The discussion is
careful and exhaustive, reviewing all the important cases in England
and United States bearing upon the subject, which had been decided
up to that time, 1877.

In an action under section 205 of the New York Act, (in which,
however, the drawer was not involved), the Appellate Term of the
New York Supreme Court held that section 91 of the Negotiable
Instruments Act, defining what constitutes a holder in due course,
governs a case under section 205. Section 91 provides that a holder
in due course is a holder who has taken an instrument that is complete
and regular upon its face; who becomes a holder of it before it is over-
due, and without notice that it has been previously dishonored, if such
is the case; and who takes it in good faith and for value; and who, at
the time it was negotiated to him, has no notice of any infirmity in
the instrument, or defect in the title of the person negotiating it.
Justice Goff, the next year, in Smith v. State Bank, a case decided in

6Bank of the Republic v. Millard, 10 Wall. (U. S.) 152, 155 (1869); Carr v.
10100 N. Y. 50, 53 (1885).
15 B. & C. (Eng.) 750 (1826).
11Susquehanna Valley Bank v. Loomis, 85 N. Y. 207 (1881), citing with approval
Hall v. Fuller, supra, note 11.
12123 Mass. 196 (1887), holding that a material alteration of a negotiable instru-
ment, without the consent of a party sought to be charged thereon, renders the
contract wholly void, as against him, even in the hands of one who takes it in good
faith, and without knowledge or reasonable notice of the alteration.
14104 N. Y. Supp. 750 (1907).
the Appellate Term of the Supreme Court of New York, seems to have taken it for granted that the defendant bank, which was the drawee of the check, and which cashed the check for the payee, was such a holder in due course that the bank could charge the drawer's account according to the original tenor of the check. The plaintiff in the case, an accommodation endorser, who had been charged by the drawee bank for the full amount of the check as raised, was allowed to recover the original amount of the check, he being held liable for the difference between the amount to which it was raised, and the check as originally drawn, under section 55 of the New York Act, which makes an accommodation party liable to a holder for value.

The Missouri court, though declaring that the relationship between a bank and a depositor is ordinarily that of debtor and creditor, holds, nevertheless, that where there are no funds to the credit of the maker, who signed the check in blank, the bank paying the forged paper is to be treated as a bona fide purchaser, and not in the relation of bank to depositor. This decision is based upon the fact that there are no funds to the credit of the maker, and certainly does not go the length of deciding that the bank paying the check of its depositor is, in all cases, a holder in due course.

It is surprising that there is so little authority on the question. The text book writers generally, and writers of notes in annotations to reported cases, as well as judges in their opinions, apparently overlook the specific question. This is in part due to the fact that cases on the subject are rare. People generally seem to have taken it for granted that the Act was intended to allow the drawee bank to charge its depositor with the original amount of the check, failing to notice that by the terms of the Act, the only party who can charge the maker or drawer according to the original tenor of the instrument, is a holder in due course, and that a drawee bank does not readily fall within the definition of a holder in due course contained in the Act. Even the late Dean Ames, in his quite exhaustive criticism of the Negotiable Instruments Act, fails to notice this defect in section 205. He approves of the section as a "judicious change for the better," but fails to notice that it hardly seems to cover the case of a drawee bank.

It seems obviously just that the drawee bank should be able to charge the drawer-depositor with the amount of the check according to its original tenor, for this partial protection to the bank is but giving effect to the intention of the drawer, and works no hardship upon him. Perhaps this may be done by giving a strained interpretation to the definition of a holder in due course or it may possibly be effected under the provision of the Act to the effect that "In any case not provided for, in this chapter, the rules of the law merchant shall govern," although in view of the sweeping language used in section 205 it is difficult to say this case is not provided for by the Act. It would seem that really there is here a defect in the statute which should be corrected by amendment.

M. M. Yellen, '18.

Harv. L. Rev. 241.
NOTES AND COMMENT

Constitutional Law: Delegation of legislative powers.—The Optional City Government Law of New York was upheld as constitutional in the case of Cleveland v. City of Watertown, 222 N. Y. 159 (1917). The act, passed in 1914, permits any city of the state of the second or third class to adopt, providing a majority of the qualified electors of such city so determine, one of the forms of government set forth, in place of the one existing under its present charter. The city of Watertown, a city of the third class, adopted the commission form of government by a vote of a majority of the electors of the city. A taxpayer's action was brought to procure a judgment declaring the law to be unconstitutional, and to restrain the city of Watertown and its officers from organizing thereunder. It was claimed that the act was an unconstitutional delegation of legislative powers to the voters of the city. The New York Supreme Court decided that the act was unconstitutional because the legislative power was delegated to the voters of the city in violation of the Constitution of the State of New York. It was declared that the act was passed in an uncompleted state, and left to be completed by the discretion of the city council, instead of the discretion of the legislature. The Appellate Division, with a dissenting opinion by one justice, affirmed the decision of the Supreme Court. The Court of Appeals reversed these decisions and upheld the constitutionality of the law. This court argued that there was no delegation of the powers of the legislature, but that the act was complete in itself, and was to take effect only upon the happening of a certain event, namely, the approval of the majority of the voters of the locality.

Our federal and state constitutions establish governments by representatives of the people, and not governments directly by the people. All the powers intrusted to the government, whether state or national, are divided into three departments, the executive, the legislative, and the judicial. The functions of each branch of government are vested in a separate body of public servants, and the separation of powers is a fundamental theory of our government. The legislative power has been placed in the hands of the legislature, and that body has no right to delegate its powers to any other body or authority. However an exception has been made to this general rule in the case of municipalities with regard to local affairs.

1 Laws of New York 1914, ch. 444.
2 Cleveland v. City of Watertown, 99 Misc. (N. Y.) 66 (1917).
3 The legislative power of this State shall be vested in the senate and assembly.” Art. III, sec. I, Constitution of the State of New York.
4 Cleveland v. City of Watertown, 179 App. Div. (N. Y.) 954 (1917).
5 The Federalist, arts. 47, 48; for sources of this doctrine, see I Montesquieu’s Spirit of Laws 174 (Book XI, ch. 6); and I Black. Comm., sec. 146 (Lewis’s ed.).
6 Locke on Civil Government, sec. 142: “The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.” Also Kilbourn v. Thompson, 103 U. S. 168 (1880).
7 Care and control of highways: People v. Kerr, 27 N. Y. 188 (1863); Village of Carthage v. Frederick, 122 N. Y. 268 (1890); People ex rel. Collins v. Ahearn, 193 N. Y. 441 (1908); City of Buffalo v. Stevenson, 207 N. Y. 258 (1913). Public safety and public health: Metropolitan Board of Health v. Heister, 57 N. Y. 661 (1868); Polinsky v. People, 73 N. Y. 65 (1878); People ex rel. Lieberman v. Vandervort, 175 N. Y. 440 (1913); City of Rochester v. Macanulty-Fien Co., 199 N. Y. 207 (1910); People v. Kaye, 212 N. Y. 497 (1914); Cooley on Constitutional Limitations (7th ed.) 166, with collection of cases from all jurisdictions.
Des Moines, the court said, "We may concede that the lawmaking body of the State is not authorized to submit to a popular vote of the State the question whether or not an act proposed by it shall become a law. * * * But while this is so, it does not follow by any means that the lawmaking body may not reserve to the electors of a subdivision of the State—included within the intended scope of operation of an act designed to have effect upon local government conditions—the right to determine on popular vote whether or not they will advantage themselves of the act. If an act in question is complete in itself, and requires nothing further to give it validity as a legislative act, it is not vulnerable to attack on constitutional grounds simply because the limits of its operation are made to depend upon a vote of the people." Certain governmental and administrative functions which affect the people of the state as a whole may be delegated to a municipal corporation as a state agency, to be exercised within its territorial limits, and the municipality may be empowered to make ordinances upon the subjects thus committed to it, and such ordinances have the force of law within the territorial limits over which their jurisdiction extends. These local option laws are now always upheld. Various reasons have been given for their validity. Some are justifiable as police regulations in which it is proper that the local judgment should control. And the people of certain localities are peculiarly interested in the particular legislation. They may fairly be supposed more competent to judge of their own needs than any central authority. The reference is reasonable and expedient.

It is generally held that legislation may be enacted to take effect upon a contingency. If the act is complete in itself as a law when it leaves the legislature, requiring nothing to give it validity, it is immaterial that its operation may be contingent upon the performance of some condition. But it has been held that the contingency cannot be the vote of the people, as this would be a delegation to the people of legislative powers. The leading New York case on the question of delegation of powers is Barto v. Himrod, decided in 1853. The constitutionality of an act, entitled "An act establishing free schools throughout the state," was involved. The act did not purport to be complete upon its face and whether it should ever become

---

8137 Ia. 452 (1908).
9Note 7 Supra; 6 R. C. L. 168, and cases there cited; 12 C. J. 839.
10People ex rel. Love v. Nally, 49 Cal. 478 (1875); Taylor v. McFadden, 84 Ia. 262 (1892); Stone v. Charleston, 114 Mass. 214 (1873); Smith v. McCarthy, 56 Pa. 359 (1867); Fallbrook District v. Bradley, 164 U. S. 112 (1896).
11Erlinger v. Boneau, 51 Ill. 94 (1869); Commonwealth v. Fredericks, 119 Mass. 199 (1875); Bancroft v. Dumas, 21 Vt. 456 (1849).
12Stone v. Charleston, supra, note 10; Locke's Appeal, 72 Pa. 491 (1873); Field v. Clark, 143 U. S. 649 (1892).
13Ex parte Wall, 38 Cal. 279 (1874); Weir v. Cram, 37 Ia. 649 (1873); Opinion of the Justices, 160 Mass. 586 (1894); Brodbine v. Inhabitants of Revere, 182 Mass. 558 (1902); State ex rel. Pearson v. Hayes, 61 N. H. 264 (1881); Barto v. Himrod, 3 N. Y. 483 (1853).
14Laws of New York 1849, ch. 140. Certain provisions in it were as follows:
"Sec. 10. The electors shall determine by ballot at the annual election to be held in November next whether this act shall or shall not become a law."
"Sec. 14. * * *; and in case a majority of all the votes in the state shall be cast for the new school law, then this act shall become a law * * * ."
a law was left to the electors of the state to say. In his opinion Ruggles, Ch. J., said:15 "The legislative power in this state is vested by the constitution in the senate and assembly. The power of passing general statutes exists exclusively in the legislative bodies. ** **

The exercise of this power by the people in other cases is not expressly and in terms prohibited by the constitution; but it is forbidden by necessary and unavoidable implication. The senate and assembly are the only bodies of men clothed with the power of general legislation."

The act was held unconstitutional because on its face it did not purport to be a law when it came from the hands of the legislature, but was only to become a law in case it should have a majority of the votes of the people in its favor. It was the popular vote which made the law. The legislature merely proposed the law, while the people passed or rejected it. It was legislation by the people.

Before Barto v. Himrod had been decided, two important decisions on the same subject had been made in other states.16 In Rice v. Foster17 the court said that direct legislation by the people was against the representative system and the republican form of government, and declared that the natural result of submitting laws to popular vote would be to "demolish the whole frame and texture of our representative system of government and prostrate everything to the worst species of tyranny and despotism, the ever varying will of our irresponsible multitude." To the same effect was Parker v. Commonwealth,18 decided in the same year. There are only two decisions19 upholding the opposite doctrine, while the weight of authority holds that in the absence of express constitutional authorization a legislative act cannot be made contingent upon being accepted by a popular

---

15 N. Y. 483, 488, 489 (1853).

A short review of the later New York authorities may not prove out of place: In Bank of Rome v. Village of Rome, 18 N. Y. 38 (1858), an act which left to the voters of a locality to determine whether they desired to have the municipality subscribe to the stock of a railroad corporation or not, was held to be constitutional. The constitutionality of similar acts was also upheld in Starin v. Town of Genoa, 23 N. Y. 439 (1861), and Bank of Chenango v. Brown, 26 N. Y. 467 (1863). People v. Fire Association of Philadelphia, 92 N. Y. 311 (1883), holds that the legislature might pass statutes to take effect upon the arising of a future contingency. See also Stanton v. Board of Supervisors, 191 N. Y. 428 (1908), where the court recognized the difference between enactments pertaining to the whole state and those pertaining to localities. In People ex rel. Unger v. Kennedy, 207 N. Y. 533 (1913), an act of the legislature entitled, "An act to erect the county of the Bronx" was held constitutional, although it contained a provision that the new county should not be formed, and the act should not become effective until a majority of the qualified electors of the territory, out of which the proposed county was to be erected, should vote in favor of it. The court held that the act was complete when it left the legislature, and the fact that it was for the voters to determine whether or not they would accept it, did not make it unconstitutional. Hiscock, J., at page 545, referring to the Barto case, said: "Subsequent decisions have declared that the doctrine of that case should not be pushed beyond the question there involved and that the legislature may pass a statute which is a completed law affecting or conferring rights upon a restricted locality but to become operative only in the event of an affirmative vote by the people of such locality."

16 Rice v. Foster, 4 Harr. (Del.) 479 (1847); Parker v. Commonwealth, 6 Pa. 507 (1847).
17 Supra, note 16.
18 Supra, note 16.
19 State v. Parker, 26 Vt. 357 (1854); Smith v. Janesville, 26 Wis. 291 (1870).
vote of the state at large. The remarks of Holmes, J., in *Opinions of the Justices* are interesting. "But the question is whether an act of the Legislature is made unconstitutional by a proviso that, if rejected by the people, it shall not go into effect. If it does go into effect, it does so by the express enactment of the representative body. I agree that the discretion of the legislature is intended to be exercised. I agree that confidence is put in it as an agent. But I think that so much confidence is put in it that it is allowed to exercise its discretion by taking the opinion of its principal, if it thinks that course to be wise."

The legislature is unable to exercise its power over municipal subdivisions of the state without the co-operation of local officers, and in order to facilitate local administration it is necessary to delegate powers with respect to local government to designated agents. The legislature cannot manage all the public interests of a certain locality. If local legislative power may be conferred upon officials of municipal corporations as representatives of the people, why not confer certain legislative powers upon the electors themselves? As was said in *Locke's Appeal*, "Can anyone distinguish between committing the determining power to the authorities of the district, and to the people of the district? If the power to determine the expediency or necessity of granting licenses to sell liquors in a municipal division, can be committed to a commission, a council, or a court, which no one can dispute, why cannot the people themselves be authorized to determine the same thing?"

The spirit of localized government, by local territorial subdivisions, found early root and growth in the notions of English liberty. It was believed to be essential to freedom. From an early period the local territorial subdivisions of England, such as shires, towns, and parishes, enjoyed a great degree of freedom and were permitted to manage their local affairs. Our ancestors brought these notions with them to this country and they were given an opportunity for free development. These laws are in accordance with the general theory of our government, that all our laws should be made in conformity to the wishes of the people.

William E. Vogel, '19.

**Constitutional Law: Due process: Segregation of prostitutes.** — An ordinance passed by the City of New Orleans provided that after a certain date it would be unlawful for any prostitute or woman notoriously abandoned to lewdness, of the black or colored race, to occupy, inhabit, live, or sleep in any house, room or closet situated outside of prescribed limits. Section 2 of the ordinance provided similarly for those of the white race, with the exception that a different territory was designated for their segregation. In the case of *City of New Orleans v. Miller et al*, 76 So. (La.) 596 (1917), this ordinance was attacked as outside of the power of the commission council of New

---

20See note 13, supra.
21*Supra*, note 15.
22See his dissenting opinion at page 594.
2372 Pa. 491, 499 (1873).
Orleans to enact. The defendants were of the colored race, and had been convicted of a violation of the ordinance. On appeal, they challenged its constitutionality upon the ground that its enforcement would deprive them of their personal liberty without due process of law, and because it was oppressive, discriminatory and unjust, and upon the further ground that it was ultra vires of the municipal corporation of the City of New Orleans. The court upheld the defendant's demurrer to the affidavit upon which the action was brought, the theory being that the ordinance did not attempt to regulate houses of prostitution (express authority to do which was granted by the city's charter), but regulated the dwelling places of prostitutes by forbidding them to live outside of the designated portions of the city. "The right to live in a community," said the court, "is of the very essence of personal freedom and opportunity that the Fourteenth Amendment to the Constitution proposes to secure. * * * Each person in the community has the essential right to live there, and in such place as he may choose to live, provided he lives there in conformity to the laws of the land, and does not engage in any occupation in his domicile which is prohibited by law." This right could not be taken away except by due process, and an ordinance ultra vires of a municipality is not due process. It seems to be on this ground that the defendant's demurrer was sustained, and not upon the ground that the segregation of prostitutes is not constitutionally possible, while segregation of houses of prostitution is admitted to be constitutional.

Ordinances dealing with this evil are usually aimed at houses of prostitution rather than at the prostitutes themselves, and it seems generally conceded that these places of ill-fame may be regulated and even suppressed entirely. But legislation similar to that in the principal case seems not to have been considered by the courts except in that case and in the case of L'Hote v. New Orleans, decided by the Supreme Court of the United States. This latter decision is generally cited in favor of the constitutionality of such legislation. It involved an ordinance of the City of New Orleans similar to that in the principal case, except that it segregated all prostitutes within the same territory, making no distinction between blacks and whites. The plaintiffs in that case were property owners within and adjacent to the segregation territory, and the ordinance was attacked chiefly upon the ground that it decreased the desirability of the locality, and materially impaired the value of the plaintiff's property. The court held the ordinance constitutional, at least as against the plaintiffs. But, in considering the effect of this decision upon the question involved in the principal case, and upon the segregation of prostitutes in general, it is interesting to note, as Mr. Justice Brewer pointed out

---

1. Hudson v. Jennings, 134 Ga. 373 (1910); State v. Botkin, 71 Ia. 87 (1887); Commonwealth v. Goodall, 165 Mass. 588 (1896); City of St. Ignace v. Snyder, 75 Mich. 649 (1889); Missouri v. Clark, 54 Mo. 17 (1873); Hatcher v. City of Dallas, 133 S. W. (Tex.) 914 (1911).

2. 177 U.S. 587 (1900). But see, also, the case of Dunn v. Commonwealth, 105 Ky. 834 (1899), where an ordinance prohibiting prostitutes from being on the streets and alleys, except in instances of reasonable necessity, between the hours of 7 P. M. and 4 A. M. was held valid.
in his opinion, that "no woman of that character is challenging its validity; there is no complaint by her that she is deprived of any personal rights, either as to the control of her life or the selection of an abiding place. She is not saying that she is denied the right to select a home where she may desire, or that her personal conduct is in any way interfered with. * * * no person owning buildings outside of the prescribed limits is complaining that he is deprived of a possible tenant by virtue of the ordinance, or saying that the abridgment of her freedom of domicile operates to cut down the amount of his rents." Nevertheless, the tenor of the opinion seems to accept the view that segregation of prostitutes is a valid exercise of the police power. In respect to the ordinance involved in the case, the court remarked, "It attempts to confine their domicile, their lives, to certain territorial limits. Upon what ground shall it be adjudged that such restriction is unjustifiable; that it is an unwarranted exercise of the police power? Is the power to control and regulate limited only as to the matter of territory? * * * At any rate, can the power to so regulate be denied?"

It is submitted that this is the better view. The Fourteenth Amendment was not designed to interfere with the power of the state to prescribe reasonable regulations to promote the health, peace, and morals of the people. It can hardly be questioned that those persons whose vocations rely for support entirely upon human weaknesses and passions affect vitally the public health and morality. Legislation of the character in question seldom results, unless conditions exist which demand it, and the legislative body is usually in a far better position to determine whether they do exist than the courts. If prostitution is an evil, and admittedly it is, it would seem that the means taken to suppress it by the City of New Orleans were not so clearly unreasonable as to be outside the police power of the state, if the state itself should act, or should delegate to the municipality the power to act in this respect.

In view of the recent decision of Buchanan v. Warley, the validity of the provision, contained in the New Orleans ordinance, segregating the black or colored prostitutes from those of the white race, might seem to be somewhat doubtful. In the Buchanan case, the Supreme Court of the United States held that the segregation of races was unconstitutional. The Louisiana court, in the principal case, implied that legislation segregating black and white prostitutes would be valid. The attitude of the Louisiana court is probably explained by the general leniency of this state in respect to social discrimination between the races. Perhaps, however, a desire to prevent sexual intercourse between persons of the white and colored races might justify segregation of prostitutes of the different races even though the races as a whole cannot be segregated.

W. J. Gilleran, '18.

4245 U. S. 60 (1917). See comment on this case and upon segregation of the races in general in 3 Cornell Law Quarterly 133.
6Pace v. Alabama, 106 U. S. 583 (1882); State v. Gibson, 36 Ind. 389 (1871).
Constitutional Law: Police power: Reserved power: Their relationship.—In *People v. Beakes Dairy Company*, 222 N. Y. 416 (1918), the Court of Appeals of New York was confronted with the question of the state legislative power over corporations. The statute passed upon provided, to use the summary of the court: “(1) No person, firm, association or *corporation* shall as a business, buy milk or cream within the state from producers for the purpose of shipping the same to any city for consumption or manufacture without having (a) an established office within the state, and (b) a license. (2) No such person, firm, association or *corporation* may obtain a license without (a) satisfying the commissioner of agriculture of his character and financial responsibility; (b) either by giving a surety company bond of not less than five thousand dollars or more than one hundred thousand dollars, or making a deposit of money or securities, or (c) if an individual or a domestic corporation, satisfying the commissioner that he is solvent and possessed of sufficient assets to reasonably assure compensation to probable creditors.’ (3) On default of payment by a licensee of money due for the purchase of milk and cream the commissioner shall apply the security to the extinguishment of the claims of creditors filed with him.”

The court dismisses the complaint on a point of pleading, then proceeds to discuss the constitutionality of the statute, stating that the state may regulate a business however honest in itself, if it may become a medium of fraud. But this statute, the court says, has for its object the collection of debts through the agency of the state; it points to protection from the probability of financial loss rather than fraud and goes far beyond any mere licensing statute by requiring the licensee to give security for the payment of his debts. The question of the validity of the statute under the police power of the state is not passed upon, but the court says this is a valid exercise of the reserved power to amend corporate charters.

Among others, two interesting questions are presented by the case and its decision. Is the statute a valid exercise of the police power? If not, what broader right of taking property is there under the reserved power than under the police power?

Constitutional law is, as the court quotes, “to a certain extent, a progressive science,” and “The needs of successive generations may make restrictions imperative today which were vain and capricious to the vision of times past.” The police power has been held to be the “least limitable of the powers of government” and to embrace “regulations designed to promote the public convenience or the general prosperity, as well as * * * public health, the public morals or the public safety,” and the validity of police regulations “must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose.”

Applying these broad doctrines to the particular question pre-
sented here, several cases have been decided which have some analogy. Perhaps the most interesting of them as bearing upon the present case are those interpreting two New York statues. The first provided that all persons, firms or corporations who sell steamship tickets and also carry on the business of receiving money for the purpose of transmitting the same or the equivalent thereof, to foreign countries, shall give a bond to the state of fifteen thousand dollars, conditioned for the faithful holding and transmission of said money, and that a suit might be brought to recover on the bond by or for any party aggrieved. This was held within the police power because fraud had been practiced in such transactions. In the second case the statute forbids an individual or partnership to engage in the business of receiving deposits of money for safekeeping or transmission to another, or for any purpose, without a license from the controller. To obtain the license the licensee must (1) deposit ten thousand dollars in money or securities, (2) give a bond to the state conditioned upon faithful holding of money deposited with the applicant in accordance with the terms of deposit and repayment. Upon insolvency or bankruptcy of applicant, payment of the full amount of the bond shall be made to the assignee or receiver for the benefit of persons making deposits. Such statute was held valid, as being for the purpose of preventing fraud. The court thought paternal supervision justified here because of the nature of the people (immigrants) with whom the applicant dealt. The guaranteed bank deposit cases go a step farther and take the property of one bank for the possible debt of another, the court saying in one case: "* * * still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business." And the Washington Workmen's Compensation Act, which has recently been held constitutional, provided for compulsory contribution to a state fund for the compensation of employees who might be injured with or without the fault of the employers. These cases uphold under the police power, legislative action which provides for the compulsory creation of a fund for the payment of debts or obligations upon the ground that some element of public welfare is involved, and in the case last cited the statute even creates new obligations to be met.

This brings us to the present case. Applying the broad doctrines of the police power as interpreted by these cases, is the statute valid on that ground? As pointed out in the dissenting opinion of Kellogg, P. J., when the case was before the Appellate Division, it is vital to the welfare of the people of the large cities of the state, whose milk supply is received largely through these stations, that they should be supplied with pure and wholesome milk. To reach this result, the farmers must be induced to produce it. If irresponsible persons or

---

corporations are allowed to conduct these stations and the farmer is to suffer damage thereby, he will soon be convinced that it is better for him to limit the production of milk and increase his activities to produce other farm products, or to take his milk to locally conducted factories for manufacture. Here are, then, two aspects of public welfare to be served by the statute: (a) that of protection to a large class of farmers from fraud, and (b) the assuring a sufficient supply of milk to a larger class of consumers in the cities. The statute does not compel the giving of a bond except in cases where the individual or corporation cannot show financial soundness, and where such cannot be shown, that circumstance seems to justify the requirement. It does not seem unreasonable to say that the purpose of this statute is to induce an adequate supply of milk for the cities of the state by protecting the producers from being defrauded of payment for it.

While discussing at length the legislative power and stating that this statute "goes far beyond any mere licensing statute," yet the court holds that it is a proper use of the reserved power of the state over corporations. The court's discussion of the extent and limitations of this power is limited to: "* * * the legislature may not defeat or substantially impair the object of the grant, the right of the corporation to transact business, but it may qualify it by reasonable restrictions."

The corporate charter was early held to be a contract which was protected by the federal constitution against impairment, but, nearly all jurisdictions acting on a suggestion in that decision, have reserved the right to alter, amend or repeal the charter. The effect of this clause now seems to be to prevent the charter from becoming a contract which is protected from impairment by the Federal Constitution.

Since by a charter a corporation is given life by the state and becomes a "person", under the Fifth and Fourteenth Amendments, it is thereby protected from deprivation of property without due process, and is guaranteed the equal protection of the laws. Does the reservation of the power to alter or amend a corporate charter take away the protection of the Fourteenth Amendment, or make that due process which would not be due process under the police power? The object of the reservation was early declared to be "to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference." And again, "to protect the rights of the public and of corporators or to promote due administration of the affairs of the corporation." In another case it was said it "may be exercised, and to almost any extent, to carry into effect the original purposes of the grant * * *." Its limitations have

2State, Morris & Essex R. R. Co. v. Comm'r. of R. R. Taxation, 37 N. J. L. 228 (1874); see also Mr. Justice Bradley in Sinking Fund Cases, 99 U. S. 700, 748 (1878), and Cooley, J., in Detroit v. Detroit & Howell P. R. Co., 43 Mich. 140, 147 (1880).
4Holyoke Co. v. Lyman, 15 Wall. (U. S.) 500, 519 (1872).
5Miller v. The State, 15 Wall. (U. S.) 478, 498 (1872).
been defined as "any alteration * * * which will not defeat or substantially impair the objects of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right." The language in these cases clearly upholds merely the alteration of the charter privileges and duties, and not the taking of vested property.

There has been a tendency in recent cases for the courts to talk about the reserved power in upholding regulative statutes, which infringe rights of property. Sometimes the legislation is justified on this ground, sometimes on this ground and on the ground of the police power. An act requiring a sinking fund for railroad corporations' indebtedness on bonds and other securities, was held valid because a protection to a large number of various kinds of investors. The fixing of water rates, rates for transportation and street car fares for school children, were thus upheld because affected with a public use. A statute requiring street railway corporations to pave between and outside its tracks, was held valid on the ground that the care of highways is a public right of great extent. A statute prohibiting persons and corporations from maintaining a school for both white persons and negroes, was held valid under the reserved power, and a like classification has been held good under the police power. A labor law of New York requiring railroad corporations to pay its employees semi-monthly and in cash, was held valid by the Supreme Court of the United States under either power, the court saying: "Cost and inconvenience * * * would have to be very great before they could become an element in the consideration of the right of a State to exert its reserved power or its police power", and speaking of the decision of the New York court when the case was before it, the Supreme Court said: "How far the reserved power of the State * * * was helped out by its police power, the court gave no indication." A very recent case in the United States Supreme Court held a statute requiring street railway companies to carry detectives on duty free of charge, to be a valid exercise of either power. It is submitted, however, that all of the statutes in question could have been upheld solely upon the police power.

It would seem clear that the reserved power merely prevents the charter becoming a contract, protected from impairment by the constitution. Under the reserved power, therefore, anything may be done which could be done if the Federal Constitution did not forbid impairment of contracts. But if that clause were struck out of the constitution, the due process and equal protection clauses would be

---

16Close v. Glenwood Cemetery, 107 U. S. 466, 476 (1882); see also, Sinking Fund Cases, supra, note 12.
17Sinking Fund Cases, supra, note 12.
19Shields v. Ohio, 95 U. S. 319 (1877).
23Plessy v. Ferguson, 163 U. S. 537 (1896).
24Erie R. R. Co. v. Williams, 233 U. S. 685, 700, 698 (1914).
there, and with these, it is believed that the reserved power has nothing to do. The following language of Judge Cooley is very clear: "But there is no well considered case in which it has been held that a legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights." It is submitted that the court could have held in the principal case that reasonable men might believe the legislation in question necessary for the protection of the public, and so ought to have refused to hold the legislation an abuse of the police power, but that when it supported the legislation on the reserved power, it put the decision on questionable ground. It is also a matter of regret to the reader of the opinion that the court did not feel called upon to consider more fully the extent of this power.

Ralph L. Emmons, '18.

Constitutional Law: Taxation: Establishment of a municipal fuel yard.—In Jones v. City of Portland, 38 Sup. Ct. Rep. 112 (1917), the Supreme Court of the United States dismissed an action brought by certain citizens and taxpayers of the city of Portland, Maine, to enjoin the creation of a municipal fuel yard in that city. The legislature of the state had given the authority to the city to establish the yard if it so desired. The city had voted to carry out the project and had appropriated one thousand dollars for the purpose. The court held that the taxation for this project was for a public purpose and not a violation of the due process clause of the fourteenth amendment, and was, therefore, constitutional.

Previous to this decision the authorities on this question were very scant. The matter of the establishment of public fuel yards and the constitutionality of state laws and municipal ordinances authorizing the construction of such yards and appropriating money therefor, had come up in three states—Massachusetts, Michigan, and Maine. In

2Detroit v. Detroit & Howell P. R. Co., supra, note 12. On the same page the court says again: "But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired." Shaw, C. J., in Commonwealth v. Essex Co., 13 Gray (Mass.) 239, (1859), said at page 253: "Perhaps * * * the rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." The same conclusion is reached in Lake Shore & M. S. Ry. Co. v. Smith, 173 U. S. 684,690 (1898), citing the two above cases. At page 698 the court said: "The power to alter or amend does not extend to the taking of property of the corporation either by confiscation or indirectly by other means." See also Cullen, C. J., in Ives v. South Buffalo Ry. Co., 201 N. Y. 571, 310-320 (1911), and Field: J., in Spring Val. Water Wks. v. Schottler, 110 U. S. 347, 368 (1883).

3Revised Statutes of Maine, chap. 4, sec. 87; "Any city or town may establish and maintain, within its limits, a permanent wood, coal, and fuel yard, for the purpose of selling, at cost, wood, coal, and fuel to its inhabitants. The term 'at cost' as used herein, shall be construed as meaning without financial profit."
and again in 1903, the Justices of the highest court of Massachusetts advised the legislature of that state that the establishment of public fuel yards, with the idea that they should be at all permanent, would be unconstitutional. The remarks of the Michigan court in Baker v. City of Grand Rapids, while they were largely obiter and not a necessary or controlling factor in the case, were, nevertheless, in accord with the opinion of the Massachusetts court. The Maine court, in Laughlin v. City of Portland, took the opposite view and held that the establishment of these fuel yards was in every way constitutional.

The view of the Supreme Court of the United States and of the Maine court would seem to be the one which is more in accord with modern economic ideas and tendencies and with sound public policy. The decision in the principal case is, furthermore, based upon well recognized principles of constitutional law. The Supreme Court points out that "the decision of the case turns upon the answer to the question whether the taxation is for a public purpose." It is hard to see any validity in a contention that, under present wartime conditions at least, the distribution of fuel is not such a public purpose.

Harry H. Hoffnagle, '17.

Contracts: Assignability.—In Little Co. v. Cadwell Transit Co., 163 N. W. (Mich.) 952 (1917), the facts were that the B. & O. Sand, and Gravel Company and the defendant made a contract, to continue during the navigation season, whereby the defendant company which was the owner of a vessel, was to carry sand and gravel in such quantities as might be required up to the capacity of the vessel. Payments were to be made on the twelfth of each month for the quantities delivered during the previous month. As security for payment, the B. & O. Company was, at the request of the defendant, to assign any contract made by the B. & O. Company for the sale of the sand and gravel being carried by the defendant. In the course of performance, the B. & O. Company contracted with the Superior Company to sell that company all the sand and gravel which the defendant company was to deliver to the B. & O. Company. This contract, together with the principal contract, was assigned by the B. & O. Company to the Little Company on the same day. Both the Superior Company and defendant company were at once given notice of the assignments, but refused further performance on the ground that the contract was not assignable. It was held by a divided court that the contract was assignable.

The essence of the prevailing opinion was that the personal element was lacking, the court being of the opinion that it could make no difference to the defendant whether the sand and gravel were furnished by the B. & O. Company or by the plaintiff; that the plaintiff took the contract subject to the liabilities of its assignor, and the defendant could require an assignment to it of the contract made by the B. & O. Company with the Superior Company as security for payment to be made to the defendant company; that there was no claim that the Little Company was less responsible than the B. & O.

2Opinion of the Justices, 155 Mass. 598 (1892).
3Opinion of the Justices, 182 Mass. 605 (1903).
442 Mich. 687 (1906).
5111 Me. 486 (1914).
Company and by assigning the contract the B. & O. Company was not released from its performance.

The case chiefly relied on was *Northwestern Lumber Co. v. Byers*, where the rule was laid down that if "an executory contract is not necessarily personal in its character, and can, consistent with the rights and interests of the adverse party, be * * * executed as well by an assignee as by the original contractor, and * * * the latter has not disqualified himself from a performance * * * it is assignable."

The dissent relied upon *Boston Ice Co. v. Potter*, where the defendant had purchased ice from the plaintiff, but being dissatisfied made a contract with the Citizens' Ice Company for a supply of ice. The latter's business was bought out by the plaintiff company, which delivered ice to the defendant, who was not notified of the change until after the delivery and consumption of the ice. This case, however, is not in point. So far as the report shows, the case was one of mistake and not one of assignment. No assignment of the vendor's contracts was made, but merely a sale of the vendor's business.

The decision of the principal case seems to state the present law upon this confused subject. As was held in a New York case, if the promisor could not object to performance by a bona fide agent of the assignor, he should not be allowed to object to performance by an assignee merely because he possesses an interest in connection with his power as agent. But it is obvious that the rule is different, and that performance of a contractual duty is not even delegable, when the performance involves personal trust or confidence. Of course in all these cases of assignment, where duties are delegable the assignor remains ultimately liable. An assignment which purports to divest an assignor of his ultimate responsibility is not permissible.

In the principal case, the rights of the contract were assigned and the duties were delegated to the plaintiff. Here the duties did not involve the element of trust and confidence, and hence, the decision of the Michigan court was clearly correct on principle.

Charles Warren Little, '20.

---

1. 133 Mich. 534, 538 (1903).
2. 123 Mass. 28 (1877).
3. However, Professor Costigan, writing in 7 Col. L. Rev. 32, regards the case as one of assignment.
4. For a very admirable review of the cases and principles of the law of assignability of contracts, see Professor Woodward's article in 18 Harv. L. Rev. 23.
6. Kemp v. Bresselton [1906] 2 K. B. 604; Hays v. Willo, 4 Daly (N. Y. C. P.) 259 (1872), where it was held that the manager of a contortionist could not assign his contract; Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379 (1888), where the vendee-assignor had, after the title passed to him by his vendor, the right to assay ore delivered by the vendor, upon which assay the price to be paid was to be calculated. The court held that personal confidence and trust were involved and that the duties of the vendee were not even delegable.
7. Even though a period of credit is given, yet the contract may be assigned, if it is of such a nature that the assignor need not perform in person. Liberty Wall Paper Co. v. Stoner Wall Paper Co., supra, note 5.
Contracts: Unilateral or bilateral: Employment contract partly performed.—In the recent case of Wood v. Lady Duff Gordon, 222 N. Y. 88 (1917), the defendant was a well known "creator of fashions" whose approval on the works of other manufacturers is of monetary value, while her own work has an enhanced value. Plaintiff, who was in the business of marketing such indorsements, was given the exclusive right, for one year, to place indorsements of defendant on the designs of others, subject to her approval, and to market her own creations. He was to take out all patents, copyrights, or take any other steps necessary to protect defendant's interests, and was to render monthly accounts to the defendant of all money received by him as the result of such exclusive privileges, and pay to her one-half the profits. Defendant placed her indorsement on the work of another without plaintiff's knowledge or consent and he sued for breach of contract. Defendant denied liability because of lack of mutuality of obligation, asserting that the plaintiff had merely accepted the exclusive privilege granted him but had not promised on his part to make any effort to obtain contracts, place defendant's endorsements, or do other acts. The court refused to take this view and concluded that this was a bilateral contract with mutual promises, the promise of plaintiff to use reasonable efforts being implied from the whole context of the contract, Cardozo, J., saying that "the law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman and every slip was fatal. * * * A promise may be lacking and yet the whole writing may be "instinct with an obligation" imperfectly expressed."

This case raises the question, are courts to enforce a contract unilateral in form as unilateral and permit one side to withdraw before completion of the act called for, to the hardship and injury of the other party who has been depending in good faith on performance? According to strict principle, a contract unilateral in form imposes an obligation on one side only and does not become binding until the act called for is completed. Until then either side may withdraw. The hardship to one party which must in this way result at times was recognized by Chief Judge Gibson, but he says, "it is his folly not to guard against it by exacting a mutual engagement instead of making a conditional one which leaves the party employed to earn the promised reward or not, at his pleasure."2 Professor Langdell also recognized the possible "great hardship and practical injustice," but his solution is similar: let parties make bilateral contracts by mutual promises and failing in this "any hardships they may suffer should be left at their doors."3 Correct though this may be on principle when enunciated in dictum or stated in a text book, it is quite a different matter when the actual case comes up for decision. In the face of hardships presented, the courts by one method or another, based more or less on legal principle, have found some way of evading the rigid conclusions of Gibson and Langdell.

---

1Quotation from Judge Scott's opinion in McCall Co. v. Wright, 133 App. Div. (N.Y.) 62 (1909).
2Clark v. Russel, 3 Watts (Pa.) 213 (1834).
3Langdell, Contract, pp. 3, 4.
In a Wisconsin case the defendant had made an offer of a promise in return for an act and just before the completion of the act had withdrawn the offer. The withdrawal worked special hardship and the court said that persons making offers “cannot arbitrarily withdraw their offers for the purpose of defeating payment when to do so would result in the perpetration of fraud.” As there was no evidence of deceit in the case the statement of the court appears to mean it will not permit an unconscientious and unfair revocation of an offer where hardship will result to the offeree because of acts done in reliance upon the offer.

The California Supreme Court managed to arrive at an equitable solution in a different manner. In *Los Angeles Traction Co. v. Wilshire* the court said that “it would be manifestly unjust [after the plaintiff had begun performance] to permit the offer that had been made to be withdrawn. The promised consideration had been partly performed and the contract had taken on a bilateral character.” It is clearly abandonment of legal principle to say that an offer to make a unilateral contract may by partial performance by the offeree take on a bilateral aspect and that by some strange means, an offer of a promise for an act is thus changed to a promise for a promise. The reason for the statement may be found in the words of the court, that to do otherwise would be “manifestly unjust.”

Another way of solving the problem is found in New York in the instant case, and without departing from legal principle. The whole contract is to be considered. Explicit mutual promises may be lacking but mere form is immaterial. It is a question of intent as gathered from the reading of the entire instrument. If the intention of the parties and the consideration on which the obligation is assumed is that there shall be a correlative obligation on the other side the law will find one, though not expressed. In the principal case the court points out that, first, plaintiff was granted an exclusive agency which would of itself imply a promise of reasonable efforts to fulfill the purpose of this agency. Secondly, the plaintiff was to submit monthly reports of contracts made, and receipts, and turn over half the profits; that the meaning of this is that the plaintiff must make efforts, in order to have something to report about and make profits to have some to divide; that such conditions were put in for a purpose and contracts must not be construed so as to deprive them of a legal meaning. Thirdly, the plaintiff was to take all necessary steps to protect the rights of himself and defendant. The conclusion of the court, therefore, from a careful analysis of all the facts is that it was the evident intention of both parties that correlative obligations should be assumed; the whole contract was “instinct with obligation,” and

---

4Zwolanek v. Baker Co., 150 Wis. 517 (1912). Plaintiff was in the employ of defendant who had offered a share of the profits to any one who shall have been in the regular employ of the company for 4500 consecutive hours during 100 consecutive weeks provided he was in their employ on Jan. 1. Plaintiff who met all the other conditions was discharged on Dec. 30.

5135 Cal. 654 (1902). Defendant agreed to pay the traction company a sum on the completion of its line to a certain point. The company purchased a franchise and did considerable work, but before completion defendant withdrew his offer.
the explicit promise lacking, was part of the contract by implication.\(^6\)

To discover the intended mutuality may sometimes require the keenest search for the evidence of it, but if the end sought is equitable, the search is likely to be rewarded. Such efforts may be merely another "ingenious attempt" characterized by Professor Langdell as without principle to rest upon. Yet it is submitted that it is in keeping with the present tendency away from "formalism and strict precision, when every slip was fatal," and reaches by a sounder process of argument the equitable results sought by the Wisconsin and California courts.

Benjamin Pepper, '20.

**Corporations: Liability on promoters' contracts.**—There has been a great deal of litigation involving the question as to when, under what circumstances, and by what legal theory, a corporation may be bound by contracts made by its promoters or organizers before its incorporation. The question recently arose in *Morgan v. Bon Bon Co.*, 222 N. Y. 22 (1917), in which the promoters of the defendant corporation, before its organization, made a contract with the plaintiff for services to be rendered by him for the corporation after its incorporation. After the corporation was organized, the plaintiff performed for it the services with the knowledge and apparent approval of the officers, who had been promoters and were fully cognizant of the terms of the contract. In an action against the corporation for damages for breach of contract, it was held that there was sufficient evidence for the jury to find that the corporation had adopted the contract and had become bound by its terms.

In the first place, the authorities seem to be substantially in accord that promoters, though they purport to act for and on behalf of the projected corporation and not for themselves, cannot be treated as agents, because the nominal principal is not then in existence; and hence, when there is shown nothing more than a contract by the promoters in which they undertake to bind the future corporation, such

\(^6\)In England the same solution was applied in *M'Intyre v. Belcher*, 14 C. B. (N. S.) 653 (1863). The plaintiff, a physician, sold his practice to the defendant for a percentage of his receipts during the succeeding four years. The court held this contract not to be lacking in mutuality but that a promise on the part of the defendant to remain and continue in practice was implied.


Another well defined class of cases in which mutuality will frequently be implied is employment contracts: *McCall v. Wright*, *supra*, note 1; *Moran v. Standard Oil Co.*, 211 N. Y. 187 (1914); *Geringer v. Friedman*, 80 Misc. (N. Y.) 212 (1913); *Fuller & Co. v. Schrenk*, 58 App. Div. (N. Y.) 222 (1901), aff'd. without opinion 171 N. Y. 671 (1902).

There are cases where the courts have found it impossible or undesirable to imply mutuality, e.g., in *Rafolovitz v. American Tobacco Co.*, 73 Hun (N. Y.) 87 (1893), and in *C. & G. E. R. R. Co. v. Dane*, 43 N. Y. 240 (1870).
contract cannot be enforced against the corporation. It must be noted that under such circumstances the promoters themselves are liable on the contract, unless it is agreed that the corporation alone shall be liable, for it is a well recognized principle of the law of agency that one who professes to make a contract as agent for a principal that has no existence is himself liable thereon.

But how can a corporation, after its organization, become bound by a contract made by its promoters? First, it has sometimes been held that a corporation can "ratify" a contract made by its promoters. But this view is unsound, if ratification be used with the ordinary technical meaning which it bears in the law of agency. A ratification, properly so-called, implies and presupposes a principal existing at the time of the agent's action, on whose behalf the contract is made at that time. Therefore, it is generally held that there can be no technical ratification of a contract made before the corporation had existence. It follows that since the promoters are in no true sense the agents of the corporation and since the corporation cannot ratify a promoter's contract, the corporation cannot be held liable upon such contracts on any principle of the law of agency.

There is another theory, however, under which a corporation may be held liable upon such a contract, i.e., by an adoption of the contract made by the promoters. The term "adoption" may be said to connote two different theories, viz., (1) the making of a new contract theory, and (2) the continuing offer theory.

In England and Massachusetts the doctrine of the first theory of adoption is strictly enforced, and the making of a new contract on

---


6 See 1 Machan, Corporations, p. 284.
the terms of the pre-incorporation contract is the only method of rendering the corporation liable to the third party who has dealt with the promoters.\footnote{In re Empress Engineering Co., 16 Ch. Div. (Eng.) 125 (1880); In re Northumberland Hotel Co., 33 Ch. Div. (Eng.) 16 (1886); Spiller v. Skating Rink Co., 7 Ch. Div. (Eng.) 368 (1878); Abbott v. Hapgood, 150 Mass. 248 (1889); Koppel v. Mass. Brick Co., 192 Mass. 223 (1905), in which it was said that a corporation cannot ratify a promoter's contract, but that the corporation can be bound by introducing into the transaction such elements as would be a sufficient foundation for a new contract.} There must be all the requisites of a valid contract between the corporation and the third party, \textit{i.e.}, offer and acceptance, meeting of the minds, consideration, etc. Under this theory a mere unilateral act of the corporation, such as a formal confirmation or adoption of the contract will not constitute a contract between the corporation and the third party, because there is no meeting of the minds and no consideration moving to the corporation.\footnote{In re Northumberland Hotel Co., supra, note 7; Gunn v. L. & L. Ins. Co., 12 C. B. (n. s.) (Eng.) 604 (1862); In re Dale & Plant, 61 L. T. (Eng.) 206 (1889).} The new contract, necessary under this theory, may be worked out upon the principle of a novation, \textit{i.e.}, the corporation makes a promise to the third party in consideration of his releasing the promoters from their liability on the pre-incorporation contract.

Generally in the United States, when it is said that a corporation may adopt a pre-incorporation contract so as to be bound thereby, according to the continuing offer theory it is meant that when the third party makes a contract with the promoters on behalf of the corporation to be formed, there is a continuing offer on his part to enter into a like contract with the corporation when incorporated;\footnote{Gent v. Manf. & Merchants' Ins. Co., 107 Ill. 652 (1883); Penn Match Co. v. Hapgood, 141 Mass. 145 (1886); Holyoke Envelope Co. v. U. S. Envelope Co., 182 Mass. 171 (1902); Omaha Loan & Trust Co. v. Goodman, 62 Neb. 197 (1901); Weatherford, \textit{etc.}, Ry. Co. v. Granger, \textit{supra}, note 1; Pratt v. Oshkosh Match Co., 89 Wisc. 406 (1895).} if the promoters are by the contract made exempt from liability thereon, the offer of the third party is naked until accepted by the corporation; if the promoters are liable, the offer of the third party, in theory, may be to substitute the corporation in the place of the promoters by novation.\footnote{That novation is the apparent theory, see Harrill v. Davis, 168 Fed. 187 (1909).} Under this American theory of continuing offer, any unilateral action on the company's part, communicated to the third party, evincing a desire to abide by the contract would amount to an acceptance of the offer, and therefore complete the formation of a new contract. Thus, under either the English or American theory, adoption, in the final analysis, means a contract on the terms of the old one. The English theory requires proof of a new offer and acceptance; the American theory requires proof only of an acceptance.

It is often stated that in England a corporation cannot "adopt" a contract made by its promoters before its incorporation, but that the corporation must enter into a new and original contract,\footnote{Clark, Corporations (3d ed.), p. 131; 3 Cook, Corporations (7th ed.), p. 2416; Abbott v. Hapgood, \textit{supra}, note 7, in which it was said that a corporation cannot become a party to a promoter's contract, even by adoption or ratification of it. But in Spiller v. Skating Rink Co., \textit{supra}, note 7, it was said that the corporation could become bound by adoption.} apparently...
drawing an analogy to the English rule that a third person cannot sue on a contract made for his benefit and that corporations cannot become privy to such a contract made for its benefit by adoption. This is doubtless on the theory that adoption is not the making of a new contract; but, as we have seen, under any view of adoption a new contract must be made.

Under either theory of adoption, the evidence sufficient to establish adoption is that which would be sufficient to establish a new contract. Thus adoption may be either by express act or by implication from acts of the corporation which tend to indicate that it has made such contract its own.12

The circumstance most often seized upon as evidence of adoption is the acceptance by the corporation of the benefits of the contract. The voluntary acceptance of the benefits of the promoters' contract is indeed strong evidence to establish a contract by the corporation on the same terms and, accordingly, it is generally held that where the corporation after its organization, with full knowledge of all the facts, enters into the enjoyment of such contract or receives the benefits accruing thereunder, the corporation will be held liable as upon an original contract, on the ground that it cannot accept and retain the benefits of the contract of its promoters without taking upon itself the burdens and liabilities thereof.13 This is, in effect, equivalent to holding that acceptance of the benefits, with full knowledge of all the facts, is conclusive evidence of adoption, or, as is sometimes said, such acceptance of benefits is adoption by estoppel.14 The principal case is an example of liability by acceptance of benefits.

But there are some limitations upon this rule of acceptance of benefits which must be noted. In a leading Texas case15 it was held that if promoters agree that if a bonus is raised, the railroad will run through certain places, by accepting the bonus the company becomes bound to carry out the contract. But if the promoters agree to pay a person for procuring the bonus, the company does not become liable to make payment for the services by receiving the bonus, since the contract for services was no part of the contract, the benefits of which were accepted. This is, in effect, a decision that acceptance of benefits does not render the corporation liable on the contract unless the


14 Belfast v. Belfast Water Co., supra, note 12; Grape Sugar, etc., Co. v. Small, 40 Md. 395 (1874). See also 50 L. R. A. (N. S.) 979, 984.

15 Weatherford, etc., Ry. Co. v. Granger, supra, note 1; and for a like distinction, see Hecla Consolidated Gold Mining Co. v. O'Neill, 19 N. Y. Supp. 592 (1892).
corporation has direct dealings with the third party. It has also been held that adoption will not be implied from the acceptance of benefits where the acceptance of the benefits is without knowledge on the part of the corporation of the terms of the promoters' contract, nor unless the original contract was made with intent that the corporation should become bound. But doubtless the prospective corporation is ordinarily looked to, as well as the promoters personally.

Many courts have used the terms "ratification" and "adoption" interchangeably and have regarded them as equivalent or synonymous, without thoroughly analyzing the two terms. These courts have said that a corporation can ratify or adopt its promoters' contracts. But ratification is impossible, as we have seen, for there was no existing principal when the contract was made. But in most of the cases which have held that a corporation can ratify, or can ratify or adopt, there has been no occasion to sharply distinguish between ratification and adoption. But this distinction may sometimes become very important. In McArthur v. Times Printing Co., the question arose as to whether the contract was one which by its terms was not to be performed within one year from the making thereof, and therefore required to be in writing by the Statute of Frauds, and this question depended upon the time the corporation became bound by the contract which had originally been made by its promoters. It was held that the corporation had adopted the contract, and that by thus adopting, it had made a new contract as of the time of the adoption and that therefore the contract was not within the Statute of Frauds. If the principles of ratification had applied, the corporation would have been bound from the date of the making of the contract by the promoters, instead of from the date of adoption, and the contract would have been within the Statute of Frauds. At least one case which held that a corporation can ratify a contract made by its promoters has also held that the corporation becomes bound from the date the contract was made.

The New York courts have likewise fallen into the loose practice of using the terms "ratification" and "adoption" as equivalent and synonymous. This resulted from the opinion in the case of Oakes v. Cattaraugus Water Co., where it was stated, without any analysis of the question or citation of authorities, that ratification and adoption mean the same thing. The dissenting opinion of Judge Gray very carefully pointed out the distinction between ratification and adop-

---

21 Supra, note 3.
22 Supra, note 19.
23 48 Minn. 319 (1892).
25 Supra, note 19.
tation. Later cases in the lower courts have consequently said that a corporation can ratify its promoters' contracts and most of these cases have cited the *Oakes* case for that proposition. On the other hand, some of the lower courts have held that the corporation can adopt, and some of these cases have cited the *Oakes* case for that proposition. But it is important to note that in none of the New York cases, which have said that the corporation could ratify, has there been involved a question like that presented in the case of *McArthur v. Times Printing Co.*, which made it necessary for the court to carefully distinguish between the two terms. When such a question is presented to the New York courts, they will, no doubt, follow the reasoning of Judge Mitchell in the *McArthur* case and of Judge Gray in the dissenting opinion of the *Oakes* case, but it is hoped that the courts will not wait until such time to depart from the incorrect use and loose construction of the term "ratification."

It has generally been held that it is a question for the jury whether there has been an adoption by the corporation of the promoters' contract. Where the only evidence of adoption is the acceptance of benefits there is no doubt that the jury will, under proper instructions, find that the corporation has adopted the contract and is therefore liable in an action on the contract. But there may be circumstances under which it would be impossible to find that the corporation was liable on the contract, and therefore liability must be worked out, if at all, on some theory of quasi-contract. For example, in an English case the corporation, though it had accepted benefits of the promoters' contract, could not be held liable on any theory of adoption—the making of a new contract—because the corporation believed that the pre-incorporation contract of the promoters was binding upon it. In another English case the company formally *ratified* the contract of the promoters and it was correctly held that the company was not liable in an action on the contract, as ratification is impossible. In both cases it was intimated that the company would be liable for benefits conferred upon it in an action of quasi-contract. On principle, such a result would be sound, since the plaintiff has conferred benefits upon the company with the expectation of being paid therefor, and the company has accepted them knowing that the plaintiff expected pay, and since the company cannot be held liable in an action on the contract, it should be held liable in an action of quasi-contract to prevent its unjust enrichment at the expense of the plaintiff. Such a result

---

27 In re Northumberland Hotel Co., 33 Ch. Div. (Eng.) 16 (1886).
28 In re Dale & Plant, 61 L. T. (Eng.) 206 (1889). See also In re Hereford & S. Wales Wagon Co., 2 Ch. Div. (Eng.) 621 (1876); In re Empress Engineering Co., 15 Ch. Div. (Eng.) 125 (1880).
should follow where the company has expressly refused to adopt its promoters' contract but has, nevertheless, accepted the benefits with the knowledge that the plaintiff expected remuneration. There is, however, a dictum to the contrary. 29

There is another class of cases where the corporation has been held liable in an action of quasi-contract. Where services, necessary for the formation of the corporation, have been rendered by one of the promoters or a third person before incorporation with the expectation that the corporation would pay therefor when organized, it has been held that the corporation is liable in quasi-contract if it afterwards accepts the benefits of such services. 30 But, on the other hand, many courts have held that there is no quasi-contractual liability under such circumstances. 31

Fred S. Reese, Jr., '18.

Criminal Law: Suspended sentence; Right of convict to notice and hearing before commitment.—In Ex parte Lucero, 108 Pac. (N. M.) 713 (1917), the petitioner, who had been brought to trial in 1913, was sentenced to a term in the penitentiary of from two to three years under an indictment charging a felony. This sentence was suspended during good behaviour. In 1916 the court, having found that the convict had violated the condition upon which his sentence had been suspended, committed him to custody without giving him notice or an opportunity to be heard. The question raised was whether he had been deprived of his liberty without due process of the law, in violation of his constitutional rights. 4 The counsel on both sides stated that they were unable to find a precedent on this proposition. The court compared the situation of the petitioner to that of one who, having been conditionally pardoned, violates the condition, and cited cases holding that such a person is entitled to notice and a hearing before he may be recommitted to custody. It also stated that, on principle, the suspension of sentence on condition gave to the petitioner a valuable right, of which he ought not to be arbitrarily deprived, and held that he was entitled to notice and a hearing, but not to a jury trial, unless he should plead that he was not the same person who had originally been convicted.

In New Mexico the right of a court to suspend sentence on such conditions as it sees fit is expressly given by statute, 2 but the statutes of that state contain no provision as to the procedure by which the convict shall be committed to custody for the violation of such condi-


1New Mexico Constitution, Art. 2, sec. 18; United States Constitution, 14th Amendment, sec. 1.
2N. M. Ann. Stats. (1915) sec. 5075.
tions. In determining what this procedure should be, it is necessary to consider the nature of the rights which a suspended sentence gives to a convict. In *Ex parte Bates*, it is said by the same court, that the power to suspend sentence is exercised as part of the discretionary power of the court in rendering judgment, and that, while the court has the power to suspend or postpone sentence at the time of giving judgment, it may not stay the execution of a sentence already passed. In *People ex rel. Forsyth v. Court of Sessions*, Judge O'Brien, of the New York Court of Appeals, holding that a statute giving the courts power to suspend sentence is not unconstitutional as infringing upon the pardoning power vested in the governor, said that, while a pardon takes away all the penalties and disabilities of a convict and restores him to his civil rights, blotting out of existence his guilt, the suspension of sentence "simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered." The court also doubted the power of a judge to suspend sentence on such a condition that it would be necessary to try a question of fact before the convict could be committed to custody. In *People v. Goodrich*, it was held that no distinction should be made between the power to postpone or suspend sentence when judgment is rendered, and the power to suspend or stay the execution of a sentence already passed, and that a court may exercise the latter as well as the former.

As pointed out in the principal case, one who violates the condition of a pardon may not be committed to custody without a hearing. The proceedings may be informal, and, though the court may in its discretion grant a jury trial, the accused is not entitled to such a trial as a matter of right, except upon the question of his identity with the person originally convicted. The conditional pardon, as indicated

---

20 N. M. 542 (1915).
21 N. Y. 288 (1894).
22 The statute authorizing courts to suspend sentence is now sec. 2188 of the N. Y. Penal Law. See also N. Y. Code Crim. Proc., secs. 483, 487.
23 New York Constitution, Art. 4, sec. 5.
24 In *Matter of Hart*, 29 N. D. 38 (1914), Spalding, C. J., in a dissenting opinion says that a suspended sentence "does not restore to him his rights as a citizen, or wipe out the record of his conviction; the defendant enjoys his liberty outside the walls of the jail, yet he remains under the sentence to which he has been condemned, and may be imprisoned at any time."
26 *Ex parte Alvarez v. Florida*, 50 Fla. 24 (1905); *State ex rel. O'Connor v. Wolff*, 53 Minn. 135 (1893). See also *People v. Potter*, 1 Park. Cr. R. (N. Y.) 47, 62 (1843), as to the mode of procedure recommended by the attorney general. In *Ex parte Brady*, 70 Ark. 376 (1902), a pardon was granted on condition that the grantee should not repeat the offense, and he afterwards committed the same offense and was convicted therefor. It was held that the condition of the pardon having been broken, the former judgment of conviction was restored. The court said that while it might have been more regular to have first brought Brady before the circuit court to show cause why judgment should not be entered against him, the failure to do so was an irregularity which furnished no ground for his discharge from custody, as it clearly appeared that the pardon had been annulled by his own act. It would seem that this case was decided on the ground that his second conviction judicially established the fact that he had violated the condition of his pardon.
in the Forsyth case,\textsuperscript{11} restores to the convict all his privileges as a free citizen and arbitrarily to take these rights away from him would be a deprivation of liberty without due process of the law. It is difficult to comprehend the distinction apparently drawn by the New York court in the last mentioned case between the quantum of liberty acquired under a conditional pardon and that acquired under a sentence suspended on condition, since a suspended sentence in New York is only allowed in cases of misdemeanors, and in the case of misdemeanors a sentence does not carry with it civil disabilities.\textsuperscript{12} In each case commitment will seemingly deprive one of the same degree of personal liberty, and "due process" requires that one shall not be deprived of personal liberty without notice and a hearing.\textsuperscript{13} The New York court was therefore correct when in the case of \textit{People ex rel. Stumpf v. Craig}\textsuperscript{14} it held that a convict, on violation of his parole, is entitled to notice and a hearing before he may be committed to custody. It is to be noted that in New Mexico it is possible to suspend sentence and still leave the convict under civil disabilities.\textsuperscript{15} This was the situation of the petitioner in the principal case, and yet it was held that he was entitled to notice and a hearing before commitment. On principle it seems reasonably clear that a suspended sentence gives at least some personal liberty even though it is allowed in the case of a felony where sentence involves civil disabilities, and that an arbitrary deprivation of this would be a violation of the due process clause of the federal and state constitutions.\textsuperscript{16}

\textsuperscript{11}\textit{Ex parte} Alvarez v. Florida and \textit{State ex rel. O'Connor v. Wolfer}, \textit{supra}, note 9. But in \textit{People v. Moore}, 62 Mich. 496 (1886), it was held that a pardoned convict charged with having violated the condition of his release must be arrested, held, and tried in the same manner as any other offender.\textsuperscript{12}\textit{Supra}, note 4.

\textsuperscript{12}Sec. 2188 of the N. Y. Penal Law provides that the sentence of one who has been convicted of a felony cannot be suspended, and therefore a suspension of sentence under this statute is possible only in the case of misdemeanors. Sec. 510 of the same law provides that "a sentence of imprisonment in a state prison for any term less than for life, forfeits all the public offices, and suspends, during the term of the sentence, all the civil rights, and all private trusts, authority, or powers of, or held by the person sentenced." Sec. 2 defines a felony as a "crime which is or may be punishable by 1. Death; or 2. Imprisonment in a state prison." It follows that sec. 510 applies only to felonies. Hence a person whose sentence is suspended is not subjected to any civil disabilities under sec. 510.

\textsuperscript{13}Petition of Doyle, 16 R. I. 537 (1889); \textit{In re Allen}, 82 Vt. 365 (1909). In \textit{Hagar v. Reclamation District, 111 U. S. 701, 708} (1884) it is said: "Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party affected shall have notice and an opportunity to be heard."

\textsuperscript{14}\textsuperscript{15}Sec. 2188 of the N. Y. Penal Law provides that the sentence of one who has been convicted of a felony cannot be suspended, and therefore a suspension of sentence under this statute is possible only in the case of misdemeanors. Sec. 510 of the same law provides that "a sentence of imprisonment in a state prison for any term less than for life, forfeits all the public offices, and suspends, during the term of the sentence, all the civil rights, and all private trusts, authority, or powers of, or held by the person sentenced." Sec. 2 defines a felony as a "crime which is or may be punishable by 1. Death; or 2. Imprisonment in a state prison." It follows that sec. 510 applies only to felonies. Hence a person whose sentence is suspended is not subjected to any civil disabilities under sec. 510.

\textsuperscript{15}Petition of Doyle, 16 R. I. 537 (1889); \textit{In re Allen}, 82 Vt. 365 (1909). In \textit{Hagar v. Reclamation District, 111 U. S. 701, 708} (1884) it is said: "Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party affected shall have notice and an opportunity to be heard."

\textsuperscript{16}\textsuperscript{79} Misc. (N. Y.) 98 (1913).

\textsuperscript{17}\textsuperscript{9}N. M. Ann. Stats. (1915), secs. 5062, 5075, and 5066; \textit{New Mexico Constitution}, Art. 7, sec. 1.

\textsuperscript{18}Most of the cases dealing with the termination of a suspended sentence throw little light on the question as to what sort of a hearing, if any, is required. In \textit{Commonwealth v. Miller}, 63 Pa. Super. Ct. 548 (1916), the convict under suspended sentence was committed to a house of correction after a hearing in open court. It was held that it was not necessary that the record of the second proceeding should show a formal adjudication that the defendant was guilty of a second offense, as the court was merely imposing the sentence suspended by the court at the first hearing, at which time the question of her guilt had been adjudicated. In \textit{Ex parte Moore}, 12 Cal. App. 161 (1909); \textit{People v. Patrich}, 118 Cal. 332 (1897); and \textit{People v. Goodrich}, \textit{supra}, note 8, it appears that the convict
It is quite evident that a suspended sentence may be terminated without a jury trial, except when the identity of the accused is in issue.\(^7\) The violation of the condition of the suspended sentence is no more a crime, in itself, than is the violation of the condition of a pardon, and it has been held that the latter is not a crime.\(^8\) But where the identity of the alleged convict is in issue, the situation is different, for the denial of a jury trial in this case might result in the imprisonment of one who has never had such a trial.

Charles V. Parsell, Jr., '19.

Evidence: Enforced physical acts as self incrimination.—Two cases have recently arisen dealing with the familiar self incrimination clauses of the federal and state constitutions. In *State v. Barela*, 168 Pac. (N. M.) 545 (1917), the sheriff, acting under no judicial process, made the accused take off his shoes, and fitted them to tracks near the scene of the crime. The introduction of this testimony was held not to violate the constitutional guarantee against self incrimination. The court said, "The provisions against self incrimination are limited to testimonial compulsion under process of some kind directed against the defendant as a witness. It cannot and does not logically apply to actions of the defendant under compulsion of persons or officers without judicial sanction." In *People v. Sallow*, 100 Misc. (N. Y.) 447 (1917), the finger prints of the prisoner were taken without his consent by officers acting under legislative powers. Referring to cases of like nature the court said, "In all these cases, inasmuch as the defendant was merely required to remain passive, it was held that there was no element of torture." It distinguished this from compelling the defendant to write his name, an act calling for volition. It will be seen that while reaching the same result, the reasons given differ in the two cases above. In the *Barela* case the testimony was admitted both because the act itself was not of the nature contemplated in the prohibition, and because judicial process was lacking in the officer. In the *Sallow* case the officer was acting under judicial authority, and the holding was based entirely upon the nature of the act.

The precise meaning of this constitutional guarantee has always been the subject of much discussion and confusion. Three distinct elements enter into the opinions on the subject: (1) whether the examination or act was under judicial process, (2) whether the examination or act was compulsory, (3) if compulsory, whether such compulsion was testimonial. It is universally agreed that unless there be compulsion such testimony will not be excluded, and that

---

\(^7\)To this effect is *Ex parte Bates*, supra, note 3.
\(^8\)State ex rel. O'Connor v. Wolfer, supra, note 9.
consent waives the right to object. Chamberlayne, in showing the reason for the rule against self incrimination, relates the political struggle of the times, and ascribes it as arising out of the growth of the jury system, it being demanded by the popular party to prevent the expedient of questioning the defendant himself by the courts of the crown. With such an obstacle out of the way, the Whig lawyers could so manipulate juries as to offset the efforts of the court. Wigmore, in a historical review of the subject, points out the following customs leading to the enacting of the law: (1) the inquisitorial oath of the ecclesiastical courts, developed in 1200, which pledged the accused to answer truly, often resulting in abuse; (2) the statute of 1487 which vested in the Star Chamber the authority to examine the accused on oath in criminal cases; (3) the common law rule of the sixteenth century, allowing compulsory examination of the accused while not under oath; (4) the culmination of the dissatisfaction with the above rules and their abuse in Lilburn's Trial. This lead to statutes in 1641 abolishing the Star Chamber, and the administration of any oath requiring answers on matters penal. This had a strong effect on the common law courts, resulting in the rule that witnesses and accused could not be compelled to answer, which was in force at the time of the making of the Federal Constitution, and it is to be inferred, had a strong influence on its drafters. It is also pointed out that the French system of inquisitorial trials was in effect at that time and that the effects were apparent. From these facts Wigmore draws the conclusion, that the object of the protection is to prevent "the employment of legal process to extract from the prisoner's own lips an admission of his guilt, which will thus take the place of other evidence. * * * In other words, it is not merely compulsion that is the kernel of the privilege, in history and in constitutional definition, but testimonial compulsion." This principle was recognized and applied in State v. Ak Chuey, in which it was held that no evidence of physical facts can be held to come within the spirit of the constitution. Here tattoo marks were allowed to be exhibited in the court room. In Holt v. United States the defendant was compelled to put on a blouse, and a witness was permitted to testify that it fitted him. The court said, "the prohibition * * * is a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence, when it may be material. * * * For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent." These are the leading cases which uphold the principle making the test whether the evidence is in fact testimony. From these cases it

1State v. Struble, 71 Ia. 11 (1887); People v. Mead, 50 Mich. 228 (1883); People v. Glover, 71 Mich. 303 (1888); State v. Taylor, 202 Mo. 1 (1907); Johnson v. Commonwealth, 115 Pa. 369 (1887); State v. Fuller, 34 Mont. 12 (1906).
2Chamberlayne, Law of Evidence, sec. 1543.
3Wigmore, Law of Evidence, sec. 2250 et seq.
431 How. St. Tr. (Eng.) 1315 (1837).
5Wigmore, Law of Evidence, sec. 2263.
614 Nev. 79 (1879).
7218 U. S. 245 (1910).
8Court relies upon Adams v. New York, 192 U. S. 585 (1903).
NOTES AND COMMENT

would seem that it is compulsory communication, a compulsion on the mind of the defendant which leads to disclosure, which is prohibited. Muscular exertion or exhibition of the body was not intended to be exempted by the framers of the constitution.

The case of People v. Sallow, supra, elaborates this principle, and distinguishes between compulsion of the mind which leads to disclosure, and compulsion of the mind which produces a physical act, the result of which could be accomplished with no mental effort or volition on the part of the accused. The illustration given is in compelling the witness to write his name. Without volition of the mind there could be no disclosure of the handwriting. On the other hand, the mind may lead to muscular exertion in the making of a fingerprint, but the willing of the mind is in no way required for the act. Such a test meets the objection, which is largely sociological in character, that "any system of administration which permits the prosecution to trust habitually to compulsory self disclosure as a source of proof must itself suffer morally thereby." If this is accepted as the test, the question of whether the arrest or examination was made under due process and judicial sanction would become secondary, if not immaterial, in this class of cases. The Barela case, while in accord with this principle, apparently puts its decision on the lack of judicial authority in the officer, attempting to distinguish several cases on that ground.

The principle has been most commonly applied to cases in which the prisoner has been compelled to stand up in the courtroom for identification. A class of cases somewhat similar to those involving handwriting is represented by State v. Turner. In that case the accused was compelled by threats of the sheriff acting under judicial process to disclose where a gun was. The production of the gun was held admissible. Such disclosure is accomplished with volition compelled by the sheriff, and clearly is not admissible on the theory set forth above. The courts, however, apply a narrower definition to Wigmore's term, "legal process", saying that an order of the court to speak or produce is necessary to make it incompetent, the employment of the accused's

\[\text{9 Wigmore, Law of Evidence, sec. 2251.}\]

\[\text{10 People v. Gardner, 144 N. Y. 119 (1894); cases cited in 28 L. R. A. 699. In the following jurisdictions this principle has been applied to varying facts: People v. Oliveria, 127 Cal. 376 (1899); U. S. v. Cross, 20 D. C. 365, 382 (1892); Lee v. State, 67 So. (Fla.) 883 (1915); Territory v. Chung Nung, 21 Hawaii 214 (1912); O'Brien v. State, 125 Ind. 39 (1890); State v. Graham, 116 La. 779 (1906); Magee v. State, 92 Miss. 865 (1908); State v. Fuller, 34 Mont. 12 (1906); Krens v. State, 75 Neb. 294 (1905); Nevada v. Ah Chuey, supra, note 6; State v. Flynn, 36 N. H. 64 (1858); State v. Cerciello, 86 N. J. L. 309 (1914); People v. Van Wormer, 175 N. Y. 187 (1905); People v. Austin, 199 N. Y. 446 (1910); State v. Graham, 74 N. C. 646 (1876); State v. Thompson, 161 N. C. 238 (1912); Angeloff v. State, 91 Ohio 361 (1914); State v. McIntosh, 78 S. E. (S. C.) 327 (1913); Lipes and Gamble v. State, 15 Lea (Tenn.) 125 (1885); Stokes v. State, 5 Baxt. (Tenn.) 619 (1875), has been cited to the contrary, but this is distinguishable on the ground that the act in the presence of the jury was prejudicial: Walker v. State, 7 Tex. App. Rep. 245 (1879); Guerrero v. State, 46 Tex. Crim. Rep. 445 (1904); State v. Nordstrom, 7 Wash. 506 (1893); Thornton v. State, 117 Wis. 338 (1903); Holt v. U. S., supra, note 7.}\]

\[\text{1182 Kan. 787 (1910); cases cited in 32 L. R. A. (N. S.) 772.}\]
oath or testimonial responsibility being the act which bars. In this way it is distinguished from Boyd v. United States, in which, by order of the court, the defendant was compelled to bring his books and papers into court to be used in evidence against him. This was held to be equivalent to compelling him to testify against himself. But such a holding, as that in State v. Turner, does not meet the objection pointed out above. A refusal to answer could not be used against the accused, but where the answer if made can be used, such compulsion is susceptible of the abuse meant to be guarded against.

A New York case which is sometimes relied on as setting forth a rule contrary to all of the preceding cases is that of People v. McCoy, a case of bastardy proceedings, in which it was held that a compulsory physical examination of the female prisoner under an order of the coroner was in violation of the constitution. People v. Sallow, supra, considers this overruled by later New York cases with which the principle announced is not reconcilable. In People v. Van Wormer evidence was admitted similar to that in Barela v. State, although there was legal process, which indicates that the holding was wholly based on the nature of the act.

The leading authority contrary to those already discussed is the case of State v. Jacobs, in which a negro was compelled to stand to let the jury determine whether or not he was free. This is attempted to be distinguished in People v. Gardner on the ground that this was a means of connecting him with the crime, whereas in People v. Gardner his appearance was merely for identification. It would seem that this would equally connect him with the crime. If the case is distinguishable in principle, which seems doubtful, the better ground would be that suggested in State v. Barela, that such an exhibition in the court room might prejudice the jury. The case is evidently contrary in principle, but in the light of the later cases, which avoid reference to it, the principle hardly seems to have stood the test in its own jurisdiction.

The Georgia cases are based on Day v. State, the deciding point of which was that the accused was made to put his foot in a track while not under arrest, and this evidence was held inadmissible. This, as pointed out in Barela v. State, is clearly unsound. Many Georgia cases are based on this principle. But in a later case the court seems to regard it as immaterial whether the act was done while the accused was under arrest or not, being equally inadmissible in either case. The most recent important decision is that of Calhoun v. State, in which under an illegal arrest the defendant was searched and incriminating evidence taken from him. The court held this admissible, and said that evidence is only inadmissible if the accused be compelled to produce incriminating evidence, the evidence then

\[121 U. S. 616 (1885).
\[124 Supra, note 10.
\[125 Supra, note 10.
\[126 N. C. 259 (1858).
\[127 Supra, note 10.
\[128 667 Ga. 679 (1879).
\[129 143 Ga. 363 (1915).
\[130 679 Ga. 679 (1916).
being in the nature of an involuntary admission. The criterion is said to be, "Who furnished the evidence?" This seems to be broadening the Georgia rule, but yet makes the physical act of production the test, and not the mental act of disclosure. It is difficult to see what difference it makes whose hand produces the revolver from a person or a place, once it is ascertained that it is there.

Alabama,\(^{26}\) Iowa,\(^{21}\) Michigan\(^{22}\) and Missouri\(^{24}\) apparently refuse to recognize the principle contended for, broadly holding that the accused may refuse to do any act that may tend to incriminate him, and that the results of such forced act are inadmissible. These decisions appear to have been made without a study of the historical conditions which induced the making of the constitutional clause, and represent a small minority. The great weight of authority is in accord with the principal cases.

L. W. Dawson, '19.

Jury: Right to trial by jury of a legal counterclaim in an equitable action: Rule 31 of the New York General Rules of Practice.—In *Manhattan Life Insurance Co. v. Hammerstein Opera Co., et al.*, 101 Misc. (N. Y.) 608 (1917), an action to foreclose a mortgage, the defendant interposed several counterclaims demanding affirmative money judgments, and the plaintiff replied, joining issue. Defendant moved for an order to frame the issues so raised for jury trial, but the court refused the motion on the ground that the defendant had not complied with rule 31 of the General Rules of Practice in that he had failed to apply for jury trial within twenty days after issue joined, or given any sufficient reason for overlooking the default. Reliance was placed chiefly on *Mackellar v. Rogers*\(^{1}\) for the proposition that, although the counterclaim was such as would have been triable as a matter of right by a jury if brought in the form of an action by the defendant against the plaintiff, yet it was not entitled to such a trial in a foreclosure suit.

By the great weight of authority, the interposition of a counterclaim of a legal nature in an equitable action does not, in the absence of a statute authorizing it, give the defendant a right to trial by jury either of the action generally or of the issues raised by the reply to the counterclaim.\(^{2}\) But in New York a peculiar situation has arisen by virtue of certain provisions of the Code of Civil Procedure which seem to make possible a different result.

By section 968 of the New York Code, it is provided that, "In each of the following actions, an issue of fact must be tried by a jury unless a jury trial is waived, or a reference is directed: 1. An action in which the complaint demands judgment for a sum of money only. 2. An

\(^{26}\) Cooper v. State, 86 Ala. 610 (1888); Davis v. State, 131 Ala. 10 (1901).

\(^{21}\) State v. Height, 117 Ia. 650 (1902). The case of State v. Reasby, 100 Ia. 231 (1896), in which it was held admissible for the prisoner to be compelled to stand up in the court room, would seem to indicate an accord with this principle, but a survey of the cases shows a failure to recognize it in its entirety. In State v. Arthur, 129 Ia. 235 (1905), the case was made to turn upon consent.

\(^{22}\) People v. Mead, *supra*, note 1.

\(^{24}\) State v. Eisler, 220 Mo. 67 (1909); State v. Horton, 247 Mo. 657 (1913).
action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel." Section 974 provides that, "Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same, as if it arose in an action, brought by the defendant, against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment." The third section involved is 970 which has the provision that, "Where a party is entitled by the constitution, or by express provision of law, to a trial by a jury, of one or more issues of fact, in an action not specified in section 968 of this act, he may apply, upon notice, to the court for an order, directing all the questions arising upon those issues, to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which by a jury the party is entitled, to be distinctly and plainly stated. * * *

Considering together sections 968 and 970, it is at once apparent that they can be construed to give a jury trial as a matter of right on the issues raised by a reply to a counterclaim demanding an affirmative money judgment only, when interposed to a foreclosure or equitable suit, as in the instant case, the situation being covered by subdivision 1 of section 968. The provision of section 974, that "the mode of trial * * * is the same, as if it arose in an action, * * *

Any construction which would extend the scope of sections 968 and 970 beyond providing that the mode of trial shall be by jury would, however, be unwarranted. At that point section 970 operates and imposes several restrictions and privileges as to the manner in which that mode of trial is to be gained, that is, certain conditions precedent are required by the legislature upon the due performance of which the jury trial depends. The distinction as to the limitation and operation of sections 968 and 970 is to be found in the fact that while under section 968 a general mode of trial is fixed, yet 970 provides in detail the manner in which that general mode of trial is to be accomplished in certain cases. The clause of section 970, "in an action not specified in section 968 of this act," cannot have the effect of excluding the operation of section 970 to counterclaims, for a counterclaim, even though it demand judgment for a sum of money, is not strictly a complaint in an action within the terms of section 968, however analogous to one it may be. By its terms, section 970 expressly excludes an action in which the complaint demands judgment for a sum of money from the conditions precedent laid down by it to obtaining a jury trial. It does not, however, exclude cases where there is an undoubted right of jury trial given by the constitution or by statute,

2aDi Menna v. Cooper & Evans Co., 220 N. Y. 391 (1917).
3But see Mackellar v. Rogers, supra, note 1, at page 471.
unless they are mentioned in section 968. Section 970 does not operate to destroy the right of jury trial in all other cases, nor does it affect the mode of trial (i.e., by jury). It merely lays down certain preliminary requirements to the exercise of that right or mode of trial. It does not by its terms indicate in any way that what would otherwise be a right shall, if it falls within its compass, be merely a privilege grantable at the discretion of the court. By sections 968 and 974 a counterclaim for a money demand, even though in an equity suit, for such suits are not excluded, gives the counterclaimant a right to a jury trial, but to enjoy that right he must comply with the terms of section 970. Sections 967 and 973 provide ways by which the right may be exercised without a confusion of issues or undue delay.

*Mackellar v. Rogers,* 4 cited in the principal case for a contrary result to that arrived at above, has been much misunderstood and cited5 as holding what it in fact does not hold. It was a foreclosure suit to which a counterclaim for a money demand had been interposed. Defendant, as well as plaintiff, moved the case for trial at Special Term, which, of course, is the same as moving for trial without a jury, and, within subdivision 4 of section 1009, amounted to a statutory waiver of jury trial. After this waiver the defendant moved for a jury trial, and the motion was denied. In reviewing the action of the court in denying the application for jury trial under these peculiar circumstances the Court of Appeals said that the granting of the application was within the discretion of the court. It is pointed out that counterclaimants for money demands under 974 do not have an unconditional right to jury trial under 968, but a conditional right within 970. A misprint on page 472 of the opinion (edition of 1888) has doubtless contributed to the misunderstanding of this case. The first reference to section 970 is intended to be a reference to 968 as is shown by a consideration of the context. Otherwise the statement that such a counterclaim is not within 970 is contradicted in the next sentence by a statement that it is within 970. The error is corrected in the 1899 reprint. While the case mentions the extreme inconvenience of granting an application for jury trial on the eve of a trial, there is no intimation in the case that, because a jury trial of a counterclaim for a money demand is conditional within 970, it lies within the discretion of the court in all such cases to grant or refuse it when the conditions there specified are complied with. The reference to discretion, which has been so frequently quoted, was a discretion to permit the withdrawal of the waiver of jury trial.

Rule 31 of the General Rules of Practice provides that in all actions where either party is entitled to have issues tried by a jury, either as a matter of right or by leave of court, motion therefor must be made

4*Supra,* note 1.
within twenty days after issue joined or the right will be waived. Citing *Mackellar v. Rogers* for the proposition that the granting of a jury trial on a counterclaim of a money demand to an equitable claim is discretionary with the court, the Supreme Court has held in a number of decisions that a failure to move within the time required by Rule 31 was a proper ground for the court to exercise its discretion against the granting of a jury trial, since it amounted to a waiver of any rights. The court in the principal case has fallen into the same error. In a recent case the Court of Appeals has held that Rule 31 is invalid in so far as it purports to put any limitations upon the method by which a jury trial is to be had as a matter of right, whether absolute or conditional. Its effect is limited to cases where jury trial is a matter of discretion, which, as pointed out, has no application to counterclaims for money demands, whether to legal or equitable actions. This result is arrived at by pointing out that when the legislature, by section 970, has imposed certain conditions upon the enjoyment of the right of jury trial it has impliedly closed the door to further conditions by the rule making body.

*Frederic M. Hoskins, '19.*

**Mandamus: Nondiscretionary acts: Employment of this writ against a chief executive.—** The irreconcilable conflict of judicial opinion in the several American jurisdictions upon the question of whether the judiciary should have the power to direct the chief executive of a state to perform a ministerial act imposed upon him by statute or the constitution is again emphasized in the case of *State ex rel. Turner v. Henderson*, 74 So. (Ala.) 344 (1917). The Alabama court, in line with its own precedent, decides that it can compel the governor by a writ of mandamus to act in accordance with a statutory enactment requiring him to sanction any proper warrant, and so, as in the principal case, to approve one which had been regularly issued.

It appears to be uniformly recognized that the courts cannot influence an executive's action where an exercise of discretion is required, but the controversy arises where the doing of a purely ministerial act is in issue. Where this is the fact it is clear that any officer below the chief executive may be compelled by mandamus to do a merely ministerial act devolved upon him by the legislature, and not delegated by the president or the governor, in performance of his official duty. But is the governor amenable to this process in performing a ministerial act?

Those states which deny the right to mandamus a chief executive, and they appear to be in the majority, invoke as one basis of their
holding the constitutional doctrine that the executive, legislative and judicial branches of the government shall be separate, distinct and independent of one another. As a conclusion they deduce that the officers of one branch cannot discharge the functions of another, and in turn they cannot be subject to the control of the others, since they are supreme within the sphere of their respective powers.

It is true that the separation of the powers of the executive, legislative and judicial branches of government is a principle of our state and federal constitutions, but this does not mean absolute isolation of one from the other. This is very evident when it is considered that the Federal Constitution itself provides for joint action of the several departments. The President's veto and pardoning powers, and the impeaching power of Congress are fair examples. It is asserted that vesting in the judiciary the right to compel a chief executive to act would not accomplish merely co-operation, but would amount to an exercise of power that would threaten the independence of the executive. But it may be argued that the very instances just mentioned, where the co-operation of one department in the affairs of another is constitutionally recognized, afford greater opportunities for an interference by one branch in the affairs of another than would the power of a court to mandamus the chief executive in a case where he is without discretion but under an absolute duty to act. Can there be any reasonable distinction, as far as the separation of powers goes, between the executive grant of personal liberty to one imprisoned by the judiciary, and the giving of judicial relief against a clear wrong committed by the chief executive because of a failure to perform his nondiscretionary duty? Precedent has shown the reasonableness of the exercise of the veto power by the chief executive, and the exercise by the courts in eleven states of the power to mandamus the state's chief executive to enforce the doing of a ministerial act is some evidence at least of the reasonably beneficial results of this practice.

Nevertheless, though some courts permit the exercise of this power, there are practical considerations, which in most jurisdictions have carried conclusive weight against allowing its exercise. In the first place, there is too great a danger of harassment of the governor with vexatious litigation, for who is to tell whether a particular act required of him is ministerial or political? It is not to be expected that the

320 (1874); Rice v. Austin, 19 Minn. 103 (1872); Vicksburg & M. Ry. Co. v. Lowry, 61 Miss. 102 (1883); State ex rel. Robb v. Stone, 120 Mo. 428 (1894); State v. Governor, 25 N. J. L. 331 (1856), (confined to duty imposed by the constitution and not by statute); People ex rel. Broderick v. Morton, 156 N. Y. 136 (1898); State ex rel. Latture v. Board of Inspectors, 114 Tenn. 516 (1904). In Texas such remedy was provided in an amendment to the constitution in 1891.

Veto power—United States Constitution, art I, sec. 7; pardoning power—United States Constitution, art. 2, sec. 2; impeachment by Congress—United States Constitution, art. 1, secs. 2 and 3.

5State ex rel. Higdon v. Jelks, 138 Ala. 115 (1902); Stuart v. Haight, 39 Cal. 87 (1870); Greenwood Cemetery Land Co. v. Rott, 17 Colo. 156 (1892); Martin v. Ingham, 38 Kan. 641 (1888); Traynor v. Beckham, 116 Ky. 13 (1903); Groome v. Gwinn, 43 Md. 372 (1873); Territory ex rel. Tanner v. Potts, 3 Mont. 364 (1879); State ex rel. Bates v. Thayer, 31 Neb. 82 (1891); State ex rel. Laughton v. Adams, 19 Neb. 370 (1886); Cotten v. Ellis, 52 N. C. 545 (1860); State ex rel. Trauger v. Nash, 66 Ohio St. 612 (1902).

6Note 5, supra.
THE CORNELL LAW QUARTERLY

judiciary would wilfully invade the province of the executive department, and still there would be much risk of involving the governor in such litigation that the public's right to his full effort in his official capacity would be infringed. Again, there is the very germane consideration that a writ of mandamus will not be issued where it is unavailing. It is asserted that a court has no jurisdiction over the person of the governor, and if he refuses to obey the writ, the court cannot commit his person for the purpose of contempt proceedings, which is the only means of compelling observance of the writ. Even if he voluntarily appears it is declared that the court does not thereby gain jurisdiction over him, and his obedience would be entirely optional. Of a somewhat similar nature is the argument that the governor has control of the military forces of the state, and therefore, cannot be compelled to act, having the superior force at his command.

These jurisdictions find in the power of impeachment the only and sufficient safeguard against the refusal of the chief executive to perform his official duties. And, as it is well recognized that private rights and privileges must give way in many instances to those of the public, the denial of a writ of mandamus against the governor, even when he has refused to perform a ministerial act, is regarded as a necessary and reasonable exception to the maxim "for every wrong there is a legal remedy."

The Supreme Court of the United States has not squarely passed upon the right of a state court to mandamus the governor nor of the federal courts to mandamus the President. The declarations in Marbury v. Madison to the effect that the President is not amenable to such process for compelling performance of his duty cannot be accepted as authority on this point, for the case decided only that the Act of Congress conferring original jurisdiction on the Supreme Court in mandamus proceedings was unconstitutional. There is, however, a federal case distinctly holding that the Supreme Court has no jurisdiction to enjoin the President from carrying into effect an Act of Congress. The same reasons that justify this case apply equally where the attempt is made to compel him to enforce such an act. Whether it is restraint or compulsion, the court cannot enforce its decree if obedience is refused.

There is a declaration in Marbury v. Madison by Chief Justice Marshall which would seem to indicate that the Supreme Court favors the issuance of a writ of mandamus by a state court against the governor. It is to the following effect: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus is to

7State ex rel. Dulin v. Lehre, 7 Rich. (S. C.) 234 (1854); People ex rel. Robinson v. O'Keefe, 100 N. Y. 572, 577 (1885); Com'th ex rel. Burns v. Hadley, 106 Pa. St. 245, 252 (1884); People ex rel. Power et al. v. Rose, 219 Ill. 46 (1905).
8People ex rel. Broderick v. Morton, 156 N. Y. 136, 145 (1898).
9State ex rel. Robb v. Stone, supra, note 3.
10Vicksburg & M. Ry. v. Lowry, 61 Miss. 102, 104 (1883).
12Supra, note 2.
13State of Mississippi v. Johnson, 4 Wall. (U. S.) 475 (1866).
be determined.” But in view of the grounds stated in the case of Mississippi v. Johnson, for refusing to enjoin the President, the Supreme Court would probably not recognize the right of a state court to mandamus the Governor. The Supreme Court of the United States has also decided that it has no inherent power, nor can such power be given to it by Congress, to compel a chief executive of a state to perform the ministerial duty, placed upon him by the Constitution of the United States, namely the duty to deliver up upon demand of the chief executive of another state a fugitive from justice who has committed a crime in the other state.

Eugene F. Gilligan, ’19.

Public Service Corporation: Right to discontinue unprofitable service.—In Moore v. Lewisburg & M. E. Ry. Co., 93 S. E. (W. Va.) 762 (1917), the plaintiff, a stockholder of the railroad company, sought to enjoin the tearing up and disposing of the railroad property, which was about to take place pursuant to a vote of the stockholders to dissolve and surrender the franchises held by the corporation, and to sell its assets. Plaintiff contended that defendant being a public service corporation, could not dissolve and surrender its franchises, but that the property of the defendant must be sold as a going railroad company, including in such sale not only the physical property but the franchises thereof. The plaintiff claimed that the resolution of the stockholders was an ultra vires act, which could be enjoined by any stockholder. It appeared that from the beginning the railroad in question was a losing venture. The injunction was refused, the court holding that, “when it appears to the stockholders of a public service corporation that its business cannot be operated except at a loss, and that a fair test has been made in order to determine this fact, they have authority to discontinue the business of such a corporation and surrender its franchises.” In this case the court seems to be of the opinion that the decision of the stockholders controls, but admits that some authorities recognize the right of the state in a proper proceeding to review the action of stockholders. The court concludes, however, that, granting that the stockholders decide this question at their peril, a stockholder who is not peculiarly injured cannot complain, and the evidence showed that the plaintiff would be benefited, not injured.

Public service corporations operate under permission from the state either by charter or under general law. Because they have received special privileges from the state, as, for example, the exclusive right to operate the particular business and the right of eminent domain, they are under greater duties to the public than the ordinary corporation. They must serve all without discrimination, and must provide adequate service, and not charge extortionate rates.¹

---

¹ Cranch (U. S.) 137, 170 (1803).
² Supra, note 13.
³ And see the language of the court in Kendall v. United States, 12 Pet. (U. S.) 524 (1838).
⁴ Com’t of Kentucky v. Dennison, 24 How. (U. S.) 66 (1861).
⁵ Jencks v. Coleman, 2 Sumner (U. S.) 221 (1835); Bennett v. Dutton, 10 N. H 481 (1839); Great Western Ry. Co. v. Sutton, L. R. 4 H. L. 226 (1868); Smyth v. Ames, 169 U. S. 466 (1897).
Is a public service corporation, having once accepted a charter and operated under it, bound to continue to operate such road, or may it abandon the road in whole or in part? Whether the company's right under its charter is permissive or obligatory, it is generally denied that a company can partially abandon its service, and still retain its franchise,\(^2\) the courts holding that after the company has built and operated its road it has become obligated to continue to exercise its franchises, and the obligation is even greater where the company has been the recipient of land grants and subsidies to aid its construction.\(^3\) It is, however, not necessary for the company to maintain equal service on all parts of the road.\(^4\) There is some authority for the proposition that where the franchise is permissive a corporation can partially abandon its service and still retain its franchise; the courts in these cases saying that a corporation may be compelled to perform a duty imposed by statute, which duty may be express or implied, but that when a corporation is granted the privilege of doing an act and there are no terms expressly or impliedly making it obligatory to do the act, no duty will be imposed.\(^5\)

A solvent corporation would not as a practical matter abandon its entire road. When there is a total abandonment of the road the problem of the right to surrender the franchise arises. Where no time is specified in the charter for the continuance of the business, a corporation may be dissolved by the voluntary surrender of its franchise. The decision of the majority of the stockholders to dissolve is binding on the corporation, for it is part of the implied contract among the shareholders that the majority may control the property of the corporation so long as they act in good faith and do not divert it to a purpose other than that for which the corporation is organized.\(^7\) When, however, the charter provides that the corporation shall continue in operation for a specified time, it has been held that it cannot be dissolved before then without the unanimous consent of all the stockholders.\(^8\) What has been said applies only so far as the corporation and its stockholders are concerned, for before a voluntary surrender is effectual as between the corporation and the state such surrender must be accepted by the state. Charters are in many respects compacts between the government and the corporation, and as the government cannot deprive the corporators of their fran-


\(^3\)State v. Sioux City & P. R. R. Co., 7 Neb. 357 (1878).

\(^4\)Commonwealth v. Fitchburg R. R. Co., 12 Gray (Mass.) 180 (1858).


\(^7\)Triscosi v. Winship, 9 So. (La.) 29 (1891); Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393 (1856).

\(^8\)Barton v. The Enterprise Building Assn., 114 Ind. 226 (1887); New York, by sec. 221, Gen. Corp. Law, allows dissolution by a vote of less than all.
chises in violation of the compact, the corporators cannot put an end to the compact without the consent of the government. It is the acceptance which gives efficacy to the surrender.9 A surrender of a corporate franchise is not to be presumed from mere non-user.10 Dissolution of corporations is usually regulated by statute, and it has been held that when a method of procedure is so prescribed it is exclusive.11

In those cases in which abandonment is not justified, what is the procedure for forcing the railroad company to perform its obligations? What the form of action will be depends upon what sort of relief is sought. If the continuation of the service is desired, mandamus to compel the company to operate is the proper remedy.12

In any case where it is shown that the public does not need the service mandamus will not be granted, for, as has already been stated, it is the duty of a railroad company to give only such service as the public needs;13 nor will mandamus be granted when it will be useless.14 Injunction is the remedy in those instances where there will be irreparable injury, as where part of the track is being taken up, or there is other dismantling of the road.15 In any case of the abuse of franchises the state can bring a direct proceeding for forfeiture.16 In most states where there is not a statutory provision,17 quo warranto proceedings are the appropriate means of testing the right to exercise corporate franchises as well as the proper remedy from the abuse by a corporation of the powers with which it has been invested.18 A suit for specific performance is not an allowable remedy.19

Jane M. G. Foster, '18.

Real Property: Drainage of surface waters.—The question of the rights and liabilities of land owners in the drainage of surface waters is raised in the cases of Thompson v. Andrews, 165 N. W. (S. Dak.) 9,

10Regents of Univ. of Md. v. Williams, 9 Gill. & J. (Md.) 365 (1838); Milwaukee Electric Ry. & Light Co. v. City of Milwaukee, 95 Wis. 39 (1897).
11Kohl v. Lilenthal, 81 Cal. 378 (1889).
13Supra, note 6.
18State v. Portland Natural Gas & Oil Co., 153 Ind. 483 (1899); State v. Real Estate Bk., 5 Ark. 595 (1844).
19It seems that in New York by the common law scire facias was the proper remedy where there was a legal body capable of acting, but which was guilty of abuse of power, Sce v. Bloom, 5 Johns. Ch. 366 (1821); and quo warranto was the remedy where there was a usurpation of powers by a body. People v. Utica Ins. Co., 15 Johns. 358 (1818). See note 17, supra.
(1917), and Holman v. Richardson, 76 So. (Miss.) 136, (1917), both of which seem to extend the doctrine of the civil law as to surface drainage beyond the general run of decisions. The former holds that the upper owner of agricultural land may deepen a ditch on his premises, in the reasonable course of improving his land, even though thereby an increased flow of surface water comes on to the lands of lower proprietors, provided the direction of the flow is not changed. In the Holman case, the lower owner was restrained from blocking a natural drain and also from erecting a brick wall along the boundary line between adjoining city lots, the former because it was contrary to the civil law and the latter because, although the lower owner may fend diffused water from his land, yet if two ways of doing so are equally possible and one is reasonable and the other unreasonable, the reasonable way must be adopted. It was decided that artificial drains would cost no more and would be a more reasonable way of diverting the diffused water than the brick wall.

It might be well first to outline the scope of the term "surface water." Surface water includes such water as is carried off by surface drainage, derived from falling rains and melting snows, and it continues to be surface water until it reaches some well defined channel in which it is accustomed to and does flow with other waters. In cases close to the border line it is often difficult to distinguish between running streams and surface water; but in general surface water is characterized by the absence of a continuous flow in a defined natural channel.

The jurisdictions of the United States show a wide divergence of opinion on this question of surface water drainage. They fall into two classes: those which have adopted the doctrine of the civil law, and those which follow the common law rule. According to Domat, the civil law rule of continental Europe is that, if rain-water or other waters have their course regulated from one ground to another, the proprietors cannot change the ancient course of the waters. The upper proprietor cannot change the course or make it more rapid, or in any way prejudice the lower proprietor, and the lower proprietor cannot prevent his ground from receiving the water in the manner in which it has been regulated. American jurisdictions have rejected the civil law rule insofar as it may have compelled upper owners to send down surface waters; the easement in the upper proprietor to send down such waters if he wishes to do so, and the servitude owed by the lower land to receive them, have been adopted. In Louisiana there is an absolute servitude in the lower estate to receive waters which run naturally from the estate above. As between owners of higher and lower grounds the upper proprietor has an easement to have surface water flow naturally from his land to the land of the lower proprietor, which is subject to a corresponding servitude to

---

1Crawford v. Rambo, 44 Ohio St. 279 (1886); Price v. Oregon R. Co., 47 Or. 350 (1906); Rait v. Furrow, 74 Kan. 101 (1906).
2Domat, Civil Law (Cushing's ed.) p. 616.
3Rev. Civil Code La., art. 660.
4Sanguinetti v. Pock, 136 Cal. 466 (1902); Butler v. Peck, 16 Oh. St. 335 (1865).
NOTES AND COMMENT

receive it,\(^5\) and the lower proprietor has not, therefore, the right to obstruct its flow,\(^6\) nor cast it back upon the land above.\(^7\) The upper proprietor may not, however, collect surface water originally flowing in one direction and turn it on to the land of a lower proprietor to his damage;\(^8\) and where the difference in level between lands is considerable, the burden is upon the upper proprietor to show that his is the higher in order to establish his right to the easement.\(^9\)

To this general rule there are two exceptions: diffused surface water, \(i.e.,\) surface water which is diffused over a wide area and from the conformity of the land flows in no special direction; and surface water as it relates to city lots. The former is generally held to impose no duty on the lower land to receive it.\(^10\) The rights of lot owners in cities are not regulated by the same rules as govern in respect to farm land;\(^11\) the civil law rule does not apply under the artificial conditions created by the building of cities and improvement of city lots.\(^12\) \textit{Holman v. Richardson,} in which the Mississippi court reverses its previous decision,\(^13\) fails to acknowledge this latter exception, and puts Mississippi law as to surface drainage on the same plane for city lots and farm lands. While the exception as to diffused water is recognized in this case, it is with a limitation on the lower proprietor to act reasonably.

What is known as the common law rule apparently did not originate in the body of the common law in England, but in the state of Massachusetts as late as 1865. Previous to that time, there were \textit{dicta} that no action will lie for the interruption of surface drainage,\(^14\) but the cases all failed for variance in proof. \textit{Gannon v. Hargadon}\(^15\) is considered to mark the adoption of the common law rule, so called. No English cases are cited, but the court depends on the cases of \textit{Luther v. Winnisimmet}\(^16\) (which failed because of a variance), \textit{Dickinson v. Worcester}\(^17\) (which also failed because of variance), and \textit{Flagg v. Worcester} in this last case the plaintiff brought action against a city because by the construction of the city highways it had diverted surface water on to his land, and the \textit{dictum} in \textit{Parks v. Newburyport}, another Massachusetts case which failed on account of variance in proof, is applied as law. \textit{Gannon v. Hargadon}\(^20\) stands for the broad principle that a person may so use his land as to prevent surface water

\(^{6}\)Gormley v. Sanford, 52 Ill. 158 (1869).
\(^{9}\)Matteson v. Tucker, 131 Ia. 511 (1906).
\(^{10}\)In this last case the plaintiff brought action against a city because by the construction of the city highways it had diverted surface water on to his land, and the \textit{dictum} in \textit{Parks v. Newburyport}, another Massachusetts case which failed on account of variance in proof, is applied as law. \textit{Gannon v. Hargadon}\(^15\) stands for the broad principle that a person may so use his land as to prevent surface water

\(^{11}\)Hall v. Rising, 141 Ala. 431 (1904); So. Ry. Co. v. Lewis, \textit{supra}, note 5; Larrabee v. Cloverdale, 131 Cal. 96 (1900).
\(^{12}\)Holman v. Richardson, 112 Miss. 216 (1916).
\(^{13}\)Luther v. Winnisimmet Co., 9 Cush. (Mass.) 171 (1851); Ashley v. Wolcott, 11 Cush. (Mass.) 192 (1853); Parks v. Newburyport, 10 Gray (Mass.) 28 (1857).
\(^{14}\)10 Allen (Mass.) 106 (1865).
\(^{15}\)\textit{Supra}, note 14.
\(^{16}\)17 Allen (Mass.) 19 (1863).
\(^{17}\)13 Gray (Mass.) 601 (1859).
\(^{18}\)\textit{Supra}, note 14.
\(^{19}\)\textit{Supra}, note 15.
coming thereon or to cause it to pass off in a different direction and in larger quantities than previously, and any injury thereby resulting to adjoining land is *dannum absque injuria*.

At the same time that the case of *Gannon v. Hargadon* was being decided in Massachusetts, a similar question had arisen in New Jersey. The latter court, in the case of *Bowlsby v. Speer,* quoted with approval the *dicta* of the early Massachusetts cases, and also several English cases. In none of these cases is the principal question involved, but the proposition is laid down that the upper owner owes no duty to the lower to maintain his land as a feeder of surface water to the lower land. The cases do not decide whether the lower land would be obliged to receive surface water in the natural course of drainage. *Bowlsby v. Speer* holds that neither the retention, diversion, repulsion nor altered transmission of surface water is an actionable injury, even though damage ensues. This rule was adopted in *Town of Union v. Durkes,* and there denominated the "common enemy" doctrine, by which name it is generally known. Surface water is a common enemy and every landed proprietor has a right to take any measures to protect his property from its ravages, even if in doing so he throws it back upon a coterminous proprietor to his damage. The United States Supreme Court has declared this to be the common law rule.

Various modifications of the rule have been introduced. The common law rule prevails in Kansas except in cases of hilly land with ravines and gullies, where the rule of the civil law is applied under the subterfuge that the ravine or gully constitutes a natural water course bringing it within the common law rule as to running streams. The rule of the common law imposes a serious burden on owners of farm lands by permitting railroad embankments to be erected without sufficient culverts, thereby casting back surface waters. Missouri has a statutory provision making the construction of railway embankments an exception to the common law rule.

The facts in *Chadeayne v. Robinson* are quite similar to those in the *Holman* case. Connecticut follows the common law rule, and the court there held that the lower proprietor had the right to erect for the entire depth of his lot a structure which would form a barrier to surface water. There is a tendency, however, in the application of
the common law rule to require reasonableness in the defendant's acts, as Holman v. Richardson requires it in the civil law rule; unless guilty of some act of negligence, the lower proprietor may do what is reason-
ably necessary to lawfully improve his property.30

The Minnesota courts, after considerable vacillation, have adopted a position somewhat like the decision of the South Dakota court in Thompson v. Andrews. Erhard v. Wagner31 holds that landowners may within reasonable limits deepen natural waterways, but cannot change the face of nature or turn surface waters out of their natural course.

The drainage of surface waters is one of those legal problems the solution of which apparently must work hardship. Both the civil law and common law rules bring injury in their application. The question is: Which is the lesser evil? The common law doctrine grew up through decisions involving city lots, where the adoption of the civil law rule would have prevented development and been con-
trary to sound public policy. On the other hand, the common law rule is essentially selfish, permitting landowners to cast surface water about as a "common enemy" to be gotten rid of regardless of injury to others. Such a practice is inconsistent with the spirit of the modern social order. Water must flow; it seems therefore that here the natural law may most profitably be followed, with such reasonable limitations as will not impose on either upper or lower proprietors too onerous a burden.

Mary H. Donlon, '20.

Trade Unions: Persuading employees in non-union shop to join union.—The Hitchman Coal & Coke Company operated its mine as a non-union mine. Its employees were not bound to stay out of the union, but each agreed that if he joined, his employment with the company should cease. The United Mine Workers of America resolved to unionize the mines in West Virginia, where the Hitchman mine was located, lack of control over these mines having played a large part in the failure of a recent strike in other fields. An organizer was sent to the Hitchman mine to secure an agreement whereby only union members should be employed. He interviewed miners and held public meetings, attempting to induce the men to agree to join the union. He intended to secure a number of such agreements, and then have all the men so agreeing join and stop work at the same time, with the object of securing the owners' consent to the unionizing of the mine. The company sought an injunction against the officials of the union. The United States Supreme Court, in Hitchman Coal & Coke Company v. Mitchell, 245 U. S. 229 (1917), upheld an injunction on the ground that the defendant was inducing a breach of contract which would result in irreparable injury to the plaintiff, and on the further ground that the object which the defendants had in view would not justify them in seeking to unionize the mine. Mr. Justice Brandeis wrote a dissenting opinion in which Mr. Justice Holmes and Mr. Justice Clarke concurred.

31 104 Minn. 258 (1908).
The majority opinion rests the right to an injunction largely upon the ground that a breach of contract was being induced. Not only is this finding of fact questionable, but the court clearly indicates that inducing the plaintiff's employees to join the union would be a wrong regardless of contract if done with the intention of striking in the future. Moreover, the court actually restrains the defendants from persuading the plaintiff's employees to do what they had a clear right to do, leave the plaintiff and join the union; and while it is intimated that tortious means of persuasion had been used, the injunction goes to any sort of persuasion.

In general, the furtherance of the defendant's own interest is clearly a justification for an interference with the plaintiff's profitable relations which involves no breach of contract and no independent tort. So it is that a storekeeper may hire his competitor's clerk or attract his competitor's customers. The defendants in the principal case had a very clear interest in the unionization of the plaintiff's mine. Their personal interest would be served, since their salaries might be raised and their power would certainly be increased through the growth of the union; and in their capacities as representatives of the United Mine Workers of America, they were interested in inducing the plaintiff's employees to cease competing with the union. Their interest was as directly involved as is the interest of the user of various legal methods of trade warfare. The defendants were seeking to rid themselves, in time of strike, of the competition of the very persons they are attempting to persuade—the plaintiff's employees. Certainly, the defendant's interest is as directly involved as in the case of a boycott of materials produced in a non-union shop, where the men refusing to handle the materials do not themselves desire the work of producing them, and are not themselves competing with the non-union makers; a proceeding which was held lawful in Bossert v. Dhuy. The defendant's interest is more directly concerned than the interest of the boycotters in the ordinary secondary boycott; for in that case, the boycotters are not competing at all with the men whom they attempt to influence to refuse to deal with the person boycotted; yet the modern tendency is to treat such a boycott as lawful where the motive is the defendants' gain, and no tortious means of persuasion are used. The defendants' interest is quite as direct in the principal case as in the ordinary trade boycott, in which A, a trader, refuses to trade with B if B deals with C; which is lawful by the great weight of authority; or as in the ordinary strike for the closed shop, which is lawful in many states. The injunction in the principal case condemns conduct which is less open to criticism than the strike for the closed shop; for the discharge of no person is sought here, and it is the interference with the rights of third persons, the non-union men, which has led some courts to treat the strike for the closed shop as illegal.

Furthermore, is it not strange that the law should (as it undoubtedly

---

2221 N. Y. 342 (1917).
3See 3 Cornell Law Quarterly 75.
4Cote v. Murphy, 159 Pa. 420 (1894).
5National Protective Ass'n. v. Cumming, 170 N. Y. 315 (1902).
does) treat the narrow self-interest of the defendant as superior to his class interest, to the interest of a very large number of persons, in furnishing a justification? It is very clear in the present case that the interest of a large body of union miners, if not of all miners, would be best served by the unionization of the plaintiff's mine. Should not this be a justification far greater than any to be found in the self-interest of a few private individuals?

The decision is unfortunate, especially because it leaves uncontradicted statements made in the court below that the union is an illegal organization, and because it casts doubt upon the right of any union to attempt to increase its membership if a strike is even remotely contemplated. It seems to consider the technical rights of the employer of greater importance than the right of the workmen to a system of collective bargaining.

Richard H. Brown, '19.

Trusts: Spendthrift trust: Effect of acquisition of remainder by beneficiary.—In the case of Bowlin v. Citizens National Bank & Trust Company, 198 S. W. (Ark.) 288 (1917), the appellants brought suit against the appellee, as trustee for John Bowlin and Mattie Bowlin for the purpose of terminating the trust and recovering the trust funds. It appears that, by the last will of William Bowlin, a spendthrift trust was created in favor of the cestuis que trustent who, having acquired the interest of the remainderrnen, claimed that, under the doctrine of merger of estates and acceleration of remainders, the trust should be declared terminated. The spendthrift character of the trust was, however, held to prevent a merger and the legal and equitable estates continued separate and distinct, although both became vested in the same persons.

It is a well recognized principle of law that, when the legal and equitable estates in trust property become united in one and the same person, a merger will result, thereby extinguishing the trust. In such cases the theory is, that "a man cannot be trustee for himself, nor hold the fee, which embraces the whole estate, and at the same time hold the several parts separated from the whole."

Of course, in order that there be such a merger in any case, the two estates must be commensurate with each other, or the legal estate must be the more extensive of the two. If the cestui does not have the legal estate, which by the terms of the trust is to exist during the existence of the trust, there can be no merger of the trust estate in that legal estate. On the other hand, if the trust estate of the cestui were to merge in the legal estate in remainder this would destroy the trust, and if the trust were destroyed there would be no estate left in the cestui to merge.1

---

1 Warner v. Spriggs, 62 Md. 14 (1883); Tilton v. Davidson, 98 Me. 55 (1903); Weeks v. Frankel, 197 N. Y. 304 (1910); Dodson v. Ball, 50 Pa. St. 492 (1868); Langley v. Conlan, 212 Mass. 135 (1912).

2 Perry on Trusts, sec. 347. See also, Wills v. Cooper, 1 Dutch. (N. J.) 137 (1855); Boiles v. State Trust Co., 27 N. J. Eq. 308 (1876).

3 Perry on Trusts, sec. 347, and the cases cited therein.

Moreover, equity does not always recognize the legal doctrine of the merger, and, when it is clear that the trustor—that is, the creator of the trust—intended the beneficial and the legal interests to remain separate and distinct, though they should meet in the same party, there will be no merger.\(^5\)

It seems that a line may be drawn between those cases in which the legal and equitable estates have been said to be merged and those in which they continue distinct, although the interests are vested in the same party, thereby keeping the trust alive. Wherever there has been a merger effected, it would appear that the trustee had no active duties to perform but was the holder of a bare, naked trust; that is, a passive trust had been created, in which the trustee is not bound to perform any duty whatsoever.\(^6\)

Moreover, in New York, it would seem that, in view of section 103 of the Real Property Law and section 15 of the Personal Property Law, which render the interest of a beneficiary in a trust to receive and apply the income of property inalienable, there is a further argument for recognizing in the ceptui of such a trust a separate equitable interest despite the fact that the beneficiary may have acquired a legal estate in the property.\(^7\)


Wills: Incorporation of extrinsic documents by reference.—It might well be asked whether the rule permitting the incorporation of extrinsic documents of a testamentary nature into a will has in any way been modified by the late decision in Matter of Fowles, 222 N. Y. 222 (1918).\(^8\) In this case the will of Charles Frederick Fowles, made on April 29th, 1915, by the eighth article gave his residuary estate to trustees to divide into three parts, the first part to consist of forty-five per cent. thereof, and each of the other parts to consist of twenty-seven and one-half per cent. thereof. The income of the first part was to be paid to his wife during her life, and upon her death the trust was to cease and the corpus be divided. Half of the corpus was to be paid by the trustees "pursuant to the provisions of such last will and testament as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last will and testament duly executed by her)." If she failed to execute the power, the corpus was to be held in trust for his daughters by a former wife, with remainder to their children. To them also were given upon like trusts, and with like remainders, the other shares of the residue.

The controversy grows out of the ninth article which reads as follows: "In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all its provisions shall

---


\(^6\) Warner v. Spriggs, supra, note 1; Dodson v. Ball, supra, note 1; Tilton v. Davidson, supra, note 1.

\(^7\) Dale v. Guaranty Trust Co., supra, note 5.

\(^8\) Reversing 176 App. Div. (N. Y.) 637 (1917).
be construed on the assumption and basis that I shall have pre-deceased my said wife."

Husband and wife were lost at sea on May 7th, 1915, with the steamship "Lusitania". There is nothing to show who survived. The wife left a will made at the same time as the husband's. She recites the power of appointment and undertakes to execute it. She gives her residuary estate (including the property affected by the power) to trustees for the use of a sister during life with remainder over.

Is this gift, in its application to the husband's estate, made valid and effective by the ninth article of his will? This question was answered affirmatively, Cardozo, J., writing the prevailing opinion. Crane and McLaughlin, J. J., dissented, writing separate opinions.

In order to reach this result it was obviously necessary to read the will left by the wife into that of her husband.

There is no presumption that one of two persons, who are lost in a common disaster, survived the other. At the civil law there were various presumptions of survivorship based on age, strength, or sex. This doctrine, recognized by a few early English cases, is still retained in California and Louisiana by statute. The testator clearly intended to avoid the result of any presumption or lack of presumption by inserting the ninth article into his will, and his directions should be given effect providing they do not transgress any rule of law. It is said that only one rule is supposed to stand in the way and that is that wills must be executed in compliance with statutory formalities, and are not to be enlarged or diminished by reference to extrinsic documents which may not be authentic.

The judicial precedents of most importance relied upon by the court were Matter of Piffard and Condit v. DeHart. In the former case a testator by his last will gave to his daughter S, one-fifth of all his real and personal property. By later codicil he gave her the power to dispose by her will of this share of his estate and directed such share to be paid to his daughter's executors or trustees, in the case of her death in his lifetime. The court permitted her will to be referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom, and the proportions in which the one-fifth should pass by the father's will in case of the death of the daughter in his lifetime. In Condit v. De Hart the testator by his will devised his residuary estate to his son. By a codicil he afterwards authorized his said son to dispose, by his will, of said residuary estate, and then devised and bequeathed the same to such persons as his son should designate and appoint by his will. The son died before the testator, designating his wife as the person to whom the estate should

---

2 Newell v. Nichols, 75 N. Y. 78 (1878); St. John v. Andrews Institute, 191 N. Y. 254 (1908); Young Women's Christian Home v. French, 187 U. S. 401 (1903); U. S. Casualty Company v. Kafer, 169 Mo. 301 (1902); 51 L. R. A. 863, and cases there collected.

3 Taylor v. Diplock, 2 Phillimore (Eng.) 261 (1815); In Matter of Selwyn, 3 Hagg. Ec. (Eng.) 748 (1831).


5 111 N. Y. 410 (1888).

6 62 N. J. L. 78 (1898).
go. The son's wife was permitted to hold this estate as the devisee of the father himself on the theory that the son's will although not transferring the father's residuary estate by an appointment, could be referred to for the purpose of ascertaining the person to whom the estate passes by the father's will. It will be noticed that in the former case there was an expression of an intent to make an independent bequest and devise to the executors, in case of the death of the legatee, to prevent a lapse. There is no doubt that this case went about as far as possible, as, by reading in the daughter's will, it is evident that a paper which not only described the beneficiaries but also determined the proportions in which they should take, was incorporated. Extrinsic documents not of a testamentary nature may be referred to merely to aid in the identification of a person described, and thus, it seems that the second of the two cases referred to is the sounder in point of law. And where a testatrix devised all of her property to whomever should, at her request, take care of her, providing the person so selected should have a written instrument to that effect, signed by her, it was held that a letter of request written to her granddaughter after the execution of the will was properly admitted in evidence for the purpose of identifying the devisee.

Nor does the law object to a reference to a map for identification purposes.

Frequently by refusing to incorporate outside papers into a will great hardship will result, especially where it is clear that there is no fraud or mistake. Nevertheless, to permit the incorporation of future testamentary papers into a will merely by reference would leave an unusual opportunity for fraud, and would often result in the incorporation of non-authentic documents. It is unquestionably the law of this state that future papers of a testamentary character cannot be incorporated into a will merely by reference. If the law was otherwise, it would allow a testator to reserve the power to make future conditions by unattested instruments. In the case of Keil v. Hoehn, husband and wife executed separate wills on the same day. The wife's will provided that her property, real and personal, should go to her husband for life, and "after his decease the real and personal estate shall be divided as set down in the last will and testament of my husband." The testatrix was held to die intestate as to her residuary estate, the court saying, "The provisions of the will of Mathias [the husband], in so far as they are referred to in the will of Anna Maria [the wife], are dispositive in character; and it seems to be well settled in this State that an extraneous paper or document of a testamentary nature referred to in a last will and testament cannot be incorporated therein, unless it be attested and executed as a will." In a much quoted case, memoranda of the various securities selected by the testator for the payment of several legacies, signed by the testator, were not given effect as an integral part of the will as it was clearly an

---

7Dennis v. Holsapple, 148 Ind. 297 (1897); Hatheway v. Smith, 79 Conn. 506, 519 (1907).
8Dennis v. Holsapple, supra, note 7.
9Tonnele v. Hall, 4 N. Y. 140 (1850).
1072 Misc. (N. Y.) 255 (1911).
unattested paper of a testamentary nature.\textsuperscript{11} Nor can a testator declare that any mere entry on his books, or other writing without attestation according to statute, shall in itself have any effect upon the provisions of his will.\textsuperscript{12} The testator's whole will must be expressed in his testament.\textsuperscript{13}

The general rule in this country is that, in order to incorporate an outside paper into a will, the will itself must refer to such paper, (a) as being in existence at the time of the execution of the will,\textsuperscript{14} (b) in such a way as to reasonably identify such paper,\textsuperscript{15} and (c) so as to leave no question of the testator's intention to incorporate such instrument in his will and to make it a part thereof.\textsuperscript{16} In the case of \textit{Newton v. Seaman's Friend Society}, Gray, C. J., tersely expresses the modern American and English rule as follows: "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will and should be admitted to probate as such."

It would seem therefore that by permitting the wife's will to be read into that of her husband's, the court has gone beyond the rule supported by the great weight of authority, as her will is clearly of a dispositive character in so far as it affects her husband's estate, and was not referred to as being in existence at the time the testator's will was executed. However, other New York cases have previously questioned the correctness of the rule of incorporation as generally stated.\textsuperscript{18}

\textit{Carlos Lazo, }'18.

---

\textsuperscript{11}Booth v. Baptist Church, 126 N. Y. 215, 248 (1891).
\textsuperscript{12}Langdon v. Astor's Executors, 16 N. Y. 9 (1857).
\textsuperscript{13}Langdon v. Astor's Executors, \textit{supra}, note 12.
\textsuperscript{16}Magoohan's Appeal, 117 Pa. St. 238 (1887); Young's Estate, 123 Cal. 337 (1899).
\textsuperscript{17}\textit{Supra}, note 14, at page 93.