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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

CONSTITUTIONAL LAW—POLICE POWER—CONSTITUTIONALITY OF ACT DECLARING SALE OF FILLED MILK TO BE FRAUD UPON PUBLIC.
—The Supreme Court of Illinois, in the case of Carolene Products Co. v. McLaughlin,1 recently decided that the statute passed by the General Assembly of Illinois and known as the Filled Milk Act2 was unconstitutional. The plaintiff was a domestic corporation engaged in manufacturing and selling two products known as Carolene and Milnut. They are composed of skimmed milk to which is added cocoanut oil to replace all of the milk fat which has been extracted. It was admitted that both skimmed milk and cocoanut oil when used separately or when combined are nutritious and wholesome. There was evidence introduced that the said compounds contained little or no vitamin "A." It was

1 365 Ill. 62, 5 N. E. (2d) 447 (1936).
2 The Statute, Laws of 1935, page 886; Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 56½, §§ 19c - 19e, reads as follows:
"Sec. 19c. The term 'filled milk' means any milk, cream or skimmed milk, whether or not condensed, evaporated, concentrated or desiccated, or any of the fluid derivatives of any of them, to which has been added any fat or oil other than milk fat. . . ."
"Sec. 19d. 'filled milk' as herein defined, is an adulterated food and its sale constitutes a fraud upon the public.
"Sec. 19e. It shall be unlawful for any person, by himself, his servant or agent, or as the servant or agent of another, to manufacture for sale within this State or sell or exchange, or have in his possession with intent to sell or exchange, any 'filled milk' as defined in this Act."

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further admitted that the absence of this vitamin is not injurious to the health of adults while on the other hand its absence is deleterious to infants if it continues for a considerable time. The only actual fraud alleged arose in the case of two or three retail merchants who sold the said products as condensed milk. There was no contention that Carolene or Milnut were misbranded, as the labels on the cans read as follows: “Especially prepared for use in coffee, baking and for other culinary purposes. This product complies in all respects with the Federal Food and Drugs Act of June 30, 1906, and is neither adulterated nor misbranded under the provisions thereof.” The court based its decision on two propositions: first, that the statute was an arbitrary and unreasonable use of the police power, and second, that Section 19d of the said act was an invasion, by the legislature, of the province of the judiciary. 3

From an early date governments have passed laws, in the exercise of the police power, which prohibited certain acts because they proved deleterious to the public health. 4 However, such acts must be reasonable, 5 and when there is a doubt as to whether the act is injurious to the public health, the judgment of the legislature upon the point is generally accepted by the courts. 6 When

3 It is well to note that in the instant case, the court did not construe the act as being primarily an adulteration act. For a like construction of similar statutes, see Carolene Products Co. v. Banning, 268 N. W. 313 (Neb., 1936); Carolene Products Co. v. Thompson, 176 Mich. 172, 267 N. W. 608 (1936). However, a similar statute was construed by Mr. Justice Holmes, in the case of Hebe Company & Carnation Milk Products Company v. Shaw, 248 U. S. 297, 39 S. Ct. 125, 63 L. Ed. 255 (1919), to be an adulteration act which prescribed a certain standard for condensed milk. For a distinction between the instant case, and Carolene Products v. Thompson, supra, see the latter case.

4 Blackstone’s Commentaries (Philadelphia: Robert H. Small, 1825), IV, 165—“2. A second, but much inferior species of offence against public health is the selling of unwholesome provisions. To prevent which the Statute 51 Hen. III. st. 6, and the ordinance for bakers, c. 7, prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. II. c. 25, § 11, any brewing or adulteration of wine is punished with the forfeiture of 100l. if done by the wholesale merchant; and 40l. if done by vintner or retail trader. These are all the offences which may properly be said to respect the public health.” Rex v. John Dixon, 3 M. & S. 11, 105 Eng. Rep. 516 (1814), “Mixing alum with bread in such manner as that crude lumps were found in the bread, was holden to be indictable.”

5 Purity Extract and Tonic Co. v. Lynch, 226 U. S. 192, 57 L. Ed. 184 (1912); Pierce Oil Corp. v. City of Hope, 248 U. S. 498, 63 L. Ed. 381 (1919).

6 This principle is stated in Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. Ed. 184 (1912), by the United States Supreme Court, as follows: “With the wisdom of the exercise of that judgment the court has
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courts consider an act passed under the police power, the inquiry must always be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat. It is not within the scope of the police power to deprive a citizen of valuable property rights under the guise of prohibiting or regulating some business or occupation that has no tendency to injure the public health or morals or affect the general welfare.

The judgment of the legislature is not necessarily conclusive, therefore, since it is a question subject to review by the courts as to whether the act in question has any vital relation to the public health. The statute in the instant case did not prohibit subtractions from, merely additions to, milk. There was no fraud by the plaintiff, the only fraud that might arise would be with respect to isolated instances of resale by retail merchants and this is too remote and uncertain to come within the province of the legislature under the police power. And too, the products were admittedly wholesome. Clearly, therefore, the legislature exceeded the limits of its authority in attempting to prohibit the sale of the compounds. To hold otherwise would mean that the legislature might unreasonably impair as well as conserve the property rights of the individual. To extend this principle to other trades would enable the legislature to ban many common articles, such as syrup, not all maple, shoes, not all leather, and the like. It is patent that the police power was never intended to be so construed.

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In considering the second proposition, the court pointed out that Section 19d of the Act, under discussion, provided that the sale of filled milk constituted a fraud upon the public. If such a provision, unjustifiable under the police power, were to be sustained, where is the line to be drawn? In the instant case, the provision was treated as a conclusive presumption of fraud, and it was urged by the plaintiff that it was unconstitutional, because it was made conclusive instead of merely prima facie.9 It was contended by the defendant, on the other hand, that this provision was really a change in the substantive law. It is well settled that the legislature may change the substantive law,10 and whether this is done in the form of a conclusive presumption or

9 The legislature may say that proof of one fact in issue shall be prima facie evidence of another fact, as this merely serves the purpose of shifting the burden of going forward with the evidence, and since the slightest bit of evidence will overcome the presumption, a person is not denied due process of law within the meaning of the Fourteenth Amendment. See C. B. & Q. R. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141 (1894); Meadowcroft v. People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 171 (1896); Bailey v. Alabama, 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191 (1911); Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463 (1910); United States v. Luria, 184 F. 643 (1911), aff'd, 231 U. S. 9, 34 S. Ct. 10, 58 L. Ed. 101 (1913); Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. Ed. 369 (1910); Reitler v. Harris, 223 U. S. 437, 36 L. Ed. 497 (1912); Cooley's Constitutional Limitations, (7th ed., 1903) p. 524; People v. Troche, 206 Cal. 35, 273 P. 767 (1929), cert. denied, 50 S. Ct. 87, 74 L. Ed. 592 (1929). The only limitations on the exercise of this power are these: (1) There must be some rational connection between the fact proved and the ultimate fact presumed; (2) the inference of the existence of the ultimate fact from proof of the other fact must not be so unreasonable or unnatural as to be a purely arbitrary mandate; and (3) the defendant must not be deprived of a proper opportunity to present his rebuttal to the main fact so presumed and thus preserve his right to have the case submitted upon all the evidence. Fenner v. Boykin, 3 F. (2d) 674 (1925); Hawes v. State of Georgia, 32 S. Ct. 204, 258 U. S. 1, 66 L. Ed. 431 (1922); Shellenberger v. Illinois Central Railroad, 278 Ill. 333, 116 N. E. 170, L. R. A. 1917E, 1011 (1917); People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668 (1893); McFarland v. American Sugar Refining Co., 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899 (1916); Hall v. Johnson, 87 Ore. 21, 109 P. 119 (1901), Ann. Cas. 1918E, 49 (1917); State v. Beach, 147 Ind. 74, 43 N. E. 949, 36 L. R. A. 179 (1896); Robertson v. People, 20 Colo. 279, 38 P. 326 (1894); Banks v. State, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007 (1905); State v. Thomas, 144 Ala. 77, 40 So. 271, 2 L. R. A. (N. S.) 1011, 113 Am. St. Rep. 17 (1906); State v. Sheppard, 64 Kan. 451, 67 P. 870 (1902); Parsons v. State, 61 Neb. 244, 85 N. W. 65 (1901).

10 Hawkins v. Bleakly, 243 U. S. 210, 61 L. Ed. 678 (1917); Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. Ed. 552 (1899); Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002 (1898); Jones v. Brim, 165 U. S. 180, 41 L. Ed. 677 (1897); Street v. Farmers' Elevator Co., 34 S. D. 523, 149 N. W. 429 (1914); Conrad v. Smith, 6 N. D. 337, 70 N. W. 815 (1897); State v. District Court, 139 Minn. 409, 166 N. W. 772 (1918); State v. La Pointe, 81 N. H. 227, 123 A. 692 (1924); Matter of Buchanan, 171 N. Y. S. 708 (1918).
by some other means, is immaterial, since it is wholly within the power of the legislature. However, this power is not unlimited, for when an act is violative of either the Federal or state constitutions, it is beyond the power of the legislature. Thus, we see that when the legislature lacks the power to change the substantive law they can not do so by a conclusive presumption. To hold otherwise would be to say that the legislature may escape constitutional restrictions by doing indirectly what they are without the power to do directly.

In the present case, the legislature did not have the power to make a change in the substantive law by the method adopted, because it was violative of both the state and Federal constitutions. This disability could not be removed by the assertion that the legislature made a change in the rules of evidence. It is not within the province of the legislature to declare that to be a fact—as was done in the instant case—which is clearly shown not to be a fact, since such a statute would operate to deny a fair opportunity to rebut it, and for that reason it would be violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States. Clearly the court was correct in its holding.

H. N. LINGLE

CONSTITUTIONAL LAW—POLICE POWER—CONSTITUTIONALITY OF EMPLOYMENT STATUTE RELATING TO POISONOUS FUMES AND DUST.

—The Illinois Supreme Court held recently in the case of Agnew v. Woodruff & Edwards, Inc., that the provisions of an act concerning "Protection from Poisonous Fumes or Dust," to the

1 Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 48, § 134 et seq. The act provides as follows: "That every employer of labor in this State, engaged in the manufacture, repairing or altering of any metals, wares or merchandise which may produce or generate poisonous or noxious fumes or dusts in harmful quantities, such as metal polishing, grinding, plating and dipping of metals in acid solution or dips, are hereby declared to be especially dangerous to the health of the employees so engaged. Such manufacture, repairing or altering of any metals or merchandise in such processes and places of employment shall be conducted in rooms lying wholly above the surface of the ground." Sections 136 and 137 of the act further provide that for its violation, the employer shall be fined, and that, for an injury to the health of any employee caused by the employer's willful violation of the act or willful failure to comply with any of its provisions, the employee shall have a right of action for injuries to his health caused proximately by such violation; in case of loss of life occasioned by such willful violation or willful failure to comply with such provisions, a cause of action was allowed the widow, "lineal heirs," adopted children or other dependents.
effect that certain processes of manufacture were declared to be especially dangerous to the health of employees so engaged and were required to be conducted in rooms lying wholly above the surface of the ground, were invalid as not having a direct relation, in some degree, towards the protection of the health of employees engaged in the types of labor mentioned.

The plaintiff, having sustained an injury to his health, and having no cause of action at common law for such injuries, brought an action to recover under this statute. As the defendant made a motion in the nature of a demurrer, challenging the constitutionality of the act, that was the only question before the court. It was stated that if the act could be sustained it would be only by virtue of the police power. When it was pointed out that the production of deleterious gases and dusts, and not the location of the business where the same are produced is the agency which inflicts injuries to the workmen's health, and that the act did not apply to the same businesses carried on above the ground, notwithstanding that such fumes and dusts might there be produced, the court without hesitation declared the act to be unconstitutional. It was declared that "the legislature has the unquestioned right, under the police power to adopt reasonable laws for the protection of the health of those engaged as laborers in industry, but it cannot, by calling a statute a health measure, arbitrarily and capriciously deprive the owner of his property. Section 1 of the act . . . unlawfully discriminates between persons similarly situated and is an invasion of property rights under a purported police power."

In the instant case employers engaged in businesses that might be the valid subject of regulation for the protection of the health of their employees under the police power are classified arbitrarily as to the location of their business above or below the surface of the ground. It is not doubted that the legislature has the power to classify persons or objects for the purpose of legislative regulation or control and to pass laws applicable only to such persons or objects. However, the legislature cannot make an arbitrary classification and then limit a statute in its operation to such class.


5 People v. Edmands, 252 Ill. 108, 96 N. E. 914 (1911); People v. Kaelber, 253 Ill. 552, 97 N. E. 1068 (1912); Rogers v. Carterville Coal Co., 254 Ill. 104, 98 N. E. 270 (1912); Cook v. Big Muddy-Carterville Mining Co., 249 Ill. 41, 94 N. E. 90 (1911).

6 People v. Schenck, 257 Ill. 384, 100 N. E. 994 (1913).
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In *Bailey v. People*, an act made it unlawful for more than six persons to occupy the same room for sleeping purposes at the same time "in any lodging house," and prohibited the occupation of any room in a lodging house which did not contain at least "four hundred cubic feet or more of space for each person sleeping therein at the same time." The act was held unconstitutional, because the classification of the places affected by the act was not based on substantial differences existing between lodging houses and other public places where lodging was furnished to the public, such as boarding houses, inns, hotels, and the like.

Another instance of an unreasonable classification is to be noted in *Starne v. People*, in which an act, generally known as the "Miners Washhouse Act," requiring owners and operators of coal mines to provide and maintain a washhouse for employees who worked in mines was held unconstitutional. It was there pointed out that there is no substantial difference between an employee who worked in a coal mine, in respect to the condition of his person at the close of his day's work, and many other employees such as those who work in foundries, machine shops, and the like.

It is interesting to note that the case principally relied upon by the court in deciding the instant case was that of *People v. Schenck*. That case dealt with an act concerning employees operating emery wheels and similar grinding or polishing machinery in any room lying wholly or partly beneath the surface of the ground. The act was declared unconstitutional, and the present decision, adopting the reasoning used in that case, stated that

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7 190 Ill. 28, 60 N. E. 98 (1901).
8 222 Ill. 189, 78 N. E. 61 (1908).
9 The following are further instances in which statutes were declared unconstitutional. An ordinance, requiring motor vehicles designed for carrying freight and merchandise of fifteen hundred pounds' capacity or more to be equipped with a fender in the front end in such a manner as to prevent injury to pedestrians, was held discriminatory, having no reasonable basis for classification. Consumers' Co. v. City of Chicago, 298 Ill. 239, 131 N. E. 628 (1921). Where a statute singled out owners and operators of coal mines as a distinct class and required that they provide scales for the weighing of coal at the mines, and making such weight the basis of wages, was held to be unconstitutional on the ground that such a statute imposed burdens upon such owners and operators not imposed on other owners of property or employers of laborers. Millet v. People, 117 Ill. 294, 7 N. E. 631 (1886). An act prohibiting the sale and use of cans, boxes, bottles, etc., having the registered mark of the owner, without his consent, was held to be in contravention of the provisions in the Illinois Constitution prohibiting special legislation, as it gave the owners of property of the class named rights not enjoyed by owners of property of other classes. Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938 (1903). See also Lippman v. People, 175 Ill. 101, 51 N. E. 872 (1898), to the same effect.
10 257 Ill. 384, 100 N. E. 994 (1913).
there was no substantial legal difference between the two acts. It should be further noted that after this action was commenced the statute involved was expressly repealed by another, the "Workmen's Occupational Diseases Act." 11

So it may be said that the evil at which this statute was aimed deserves eradication, but that it cannot be accomplished by an act which does not attempt to set up a standard by which all manufacturers operating such mechanical processes mentioned in the act are to be regulated and governed.

E. J. MEDLIN

CONSTITUTIONAL LAW—TRIAL BY JURY—CONSTITUTIONALITY OF ALTERNATE JUROR STATUTE.—The Court of Errors and Appeals of New Jersey, in State v. Dolbow, 1 held that a statute, 2 authorizing the trial court to impanel fourteen jurors in a criminal trial which promises to be protracted, and providing for elimination of two by lot before the jury retired for deliberation if they had not been before that time excused by the court, was not unconstitutional as depriving the defendant of the right to trial by jury. The act in question also provides that the jury shall have the same qualifications and be impaneled and sworn in the same manner as other juries as provided for by law, that all fourteen juror shall sit and hear the cause, that when any condition arises "during the trial of said cause, which, in the opinion of the trial court, justifies the excusal of any of the jurors so impaneled from further service, he may do so, and the said trial shall proceed, unless the number of said jurors shall be reduced to less than twelve." 3

Dolbow had been indicted and convicted of murder, and the principal ground relied on for reversal was that the foregoing statute was unconstitutional in that it deprived the accused of the right of a trial by jury as guaranteed by the state constitution. 4

It was urged in support of this contention that the certain twelve who rendered the verdict were not definitely ascertained until the proofs were closed. The court, in answer thereto, suggested that inasmuch as legally chosen jurors were supposed to be indifferent between the parties, their individual character and personality should likewise be a matter of indifference.

It was also urged that, inasmuch as it was in the discretion of the judge to order this special jury and to excuse a juror should

1 189 A. 915 (N. J. L., 1937).
3 Ibid.
4 Const. N. J., Art. I, par. 7.
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a condition arise during the trial justifying such course, too broad a power was vested in the trial judge. This was answered by an observation of the court that there was no safer place to deposit such authority and that no danger existed in giving the trial judge discretion to excuse a juror. A dissenting opinion by Justice Case was based on this contention.

Other states, in seeking to eliminate the evil of a mistrial due to the death, illness, or other incapacity of jurors, have adopted somewhat similar acts. The provisions of these acts, however, are chiefly concerned with the selection of alternate jurors as such, instead of the choice of a number from which twelve are ultimately to be drawn by lot, as is the procedure under the New Jersey statute under discussion.

In People v. Mitchell, the New York Court of Appeals held constitutional a statutory provision for the calling of alternate jurors, who were required to be discharged when the original twelve retired for deliberation, if they or one of them had not already taken the seat of a discharged juror. In California, a like provision for the calling of an alternate juror, by the judge, when it appeared to him that the trial would be protracted, was held to be constitutional in People v. Peete. It was necessary for such alternate to have the same qualifications, take the same oath, and be subject to the same number of challenges as other jurors. In the latter case, the court observed that the legislature has the right to make any reasonable regulation or condition respecting the enjoyment of trial by jury, provided only that the essentials of a jury trial as known to the common law remain unchanged. The essential and substantive attributes or elements of jury trial are number, impartiality, and unanimity. A provision for alternate jurors does not affect any of these attributes.

In this country, where the constitutions provide that the right of trial by jury shall remain confirmed as part of the law of the land, or the right of trial by jury shall remain inviolate, the words "trial by jury" import a trial by jury as at common law.

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8 California, New York, Michigan and Ohio are examples. The New Jersey court erroneously enumerates Illinois as a state having substantially similar legislation.
6 Code of Ohio (1934), secs. 11419-47; Compiled Laws of Michigan (1929), secs. 14334, 17311.
7 266 N. Y. 15, 193 N. E. 445 (1934).
8 54 Cal. App. 333, 202 P. 51 (1921).
11 Const. Ill., Art. II, sec. 5. "The right of trial by jury as heretofore enjoyed, shall remain inviolate."
The proposed Criminal Code for Illinois\textsuperscript{13} contains a provision giving the court discretion, when the trial is likely to be a protracted one, to direct the calling of one or two additional jurors, to be known as "alternate jurors." Under it, such jurors are to be drawn from the same source, and in the same manner, and have the same qualifications as regular jurors, and be subject to examination and challenge as such jurors, except that each defendant will be allowed one peremptory challenge to each juror to be chosen. Such "alternate jurors" are required to take the same oath, and they must have equal facilities for seeing and hearing the proceedings of the case. The court may order such "alternate juror" to take the place of a regular juror in case of death or discharge, and if there be two "alternate jurors," the court must select one by lot to take the vacant place in the jury box.\textsuperscript{14}

It would seem that the inquiry in cases of this sort is always whether or not there is a "reasonable" regulation by the legislature of the right to trial by jury, and so long as such statutes do not materially impair that right, their constitutionality will be upheld.

E. J. Medlin

\textbf{Criminal Law—Evidence—Impeaching Defendant's Character Witnesses on Cross-Examination by Rumors of Defendant's Misconduct.}—In \textit{People v. Page}\textsuperscript{1} the Supreme Court of Illinois reaffirmed its view that evidence of particular acts of misconduct by the defendant, whether based on rumor\textsuperscript{2} or on personal knowledge,\textsuperscript{3} is inadmissible to impeach his character witnesses in a criminal case. As the weight of authority\textsuperscript{4} permits proof of rumors of particular misconduct by the accused for such purpose, this inquiry is directed primarily toward the advisability of that doctrine.

\textsuperscript{13} Senate Bill No. 87, sec. 426; House Bill 214, sec. 426.
\textsuperscript{14} Senate Bill No. 87, sec. 426; House Bill 214, sec. 426.
\textsuperscript{1} 365 Ill. 524, 6 N. E. (2d) 845 (1937).
\textsuperscript{2} McCarty v. People, 51 Ill. 231 (1869); Gifford v. People, 87 Ill. 210 (1877); Aiken v. People, 183 Ill. 215, 55 N. E. 695 (1899); Jennings v. People, 189 Ill. 320, 59 N. E. 515 (1901); People v. Willy, 301 Ill. 307, 133 N. E. 859 (1921); syllabus note 4 is contra, but dictum; People v. Williams, 316 Ill. 575, 147 N. E. 443 (1925).
\textsuperscript{3} McCarty v. People, 51 Ill. 231 (1869); People v. Willy, 301 Ill. 307, 133 N. E. 859 (1921); People v. Celmars, 332 Ill. 113, 163 N. E. 421 (1928); People v. Anderson, 337 Ill. 310, 169 N. E. 243 (1929).
\textsuperscript{4} See 71 A. L. R. 1498 and note, citing all states except Illinois, North Carolina, Florida and Nebraska in accord. The basic case appears to be Rex v. Wood, 5 Jur. 225 (Eng.) (1841).
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There is no doubt that good or bad character is relevant to show the probability that the accused did not or did do the criminal act charged. However, the benignity of the law gives the defendant the privilege of putting his good character at issue in the first instance. Once confined to capital cases, and then to doubtful cases because of the misconception that admissibility hinged upon weight, the privilege has been extended to all criminal cases. But the exercise of that privilege has been restricted so that the character trait in issue must be directly at variance with the nature of the crime charged, and the accused may avail himself of only one mode of proof, i.e., his current general reputation in the community in which he lives. The state may then cross-examine his character witnesses or rebut their testimony by testimony of its own witnesses.

Since an early case, the prosecution in Illinois has been denied the right to cross-examine defendant’s witnesses as to rumors of his prior misconduct, because “every man is presumed ready at all times to defend his general character, but not his individual acts—of those he must have due notice.” Another case states that the accused has the right to have the evidence confined to the charge in the indictment. These premises are erroneous, according to the majority view, for the purpose is not to prove specific acts of misconduct on his part, but to impeach the credibility of his character witnesses only. The accused is not involved. If the state can prove that these witnesses knew of such rumors, their credibility is shaken, for the jury may infer that they are mistaken, lying, or uninformed. If no rumors discrediting the accused have been heard, then the impeachment fails.

5 For example, the trait involved in rape is chastity and not character as a “peaceable and quiet citizen,” Wistrand v. People, 218 Ill. 323, 75 N. E. 891 (1905); nor as attentive to duty and sober minded, People v. Celmars, 332 Ill. 113, 163 N. E. 421 (1928). It is irrelevant that the accused is “peaceable” in case of larceny, People v. Redola, 300 Ill. 392, 133 N. E. 292 (1921).


7 McCarty v. People, 51 Ill. 231 (1869).

8 Aiken v. People, 183 Ill. 215, 55 N. E. 695 (1899).

9 State v. Rowell, 172 Iowa 208, 154 N. W. 488 (1915); Randall v. State, 132 Ind. 539, 32 N. E. 305 (1892); People v. Laudiero, 192 N. Y. 304, 85 N. E. 132 (1908); Best on Evidence, I, sec. 261; Spalitto v. United States, 39 F. (2d) 782 (1930), which relies on Wigmore on Evidence (2d ed.) II, 413, sec. 988. It is interesting to note from an examination of numerous cases that the cases cite Wigmore on Evidence as to the purpose of the evidence but fail entirely to consider the serious objections to such evidence, stated on pp. 416-17, sec. 988 and p. 633, sec. 1111.
Yet, most of these courts, and Illinois also, adhere to the doctrine of Regina v. Rowton, which holds that evidence of personal knowledge or opinion of those acquainted with the accused is inadmissible whether by direct examination of defendant's own witnesses or on cross-examination. The objection is that such inquiry not only tends to raise confusion and a multiplicity of issues, but is also apt to bring out petty scandal and mislead the jury. Moreover, it has been firmly established that proof of particular acts of misconduct is inadmissible for the purpose of impeachment, as the inferences of guilt from prior misconduct would be strong.

In view of these premises, it appears illogical to permit evidence of rumors of specific misconduct, as is done under the majority view, and yet at the same time to disallow proof of personal knowledge by those acquainted with the accused. If the purpose of evidence is proof to a moral certainty, rumors have a very remote probative value, as they are hearsay at the best. True, the purpose of such evidence is to impeach the character witness, but will the jury in fact consider it as such or will it deem the evidence as proof of particular acts of misconduct by the defendant, thereby judging him by his prior misconduct rather than by the act charged in the indictment? No particular answer can be given, but it is certain that the majority method affords greater possibilities for such misjudgment.

The Illinois method has been criticized on the ground that it affords no test of the credibility of defendant's character witnesses to disclose fabrication. The other view, however, fails to consider that the nature of a rumor question is leading in most instances, therefore demanding a limited reply. If the witness wants to perjure himself he could easily do so by steadily answering "no." The majority asserts that its method tests the basis upon which the witness's answer is formed and it may show that

10 Wigmore on Evidence (2d ed.), IV, 211-33, sec. 1980 et seq., with cases cited, gives an illuminating history of the entire doctrine.

11 See footnotes 1, 2, 3.


13 Aiken v. People, 183 Ill. 215, 55 N. E. 695 (1899); People v. Celmars, 332 Ill. 113, 163 N. E. 421 (1928); People v. Page, 365 Ill. 524, 6 N. E. (2d) 845 (1937).

14 Though the extent of cross-examination is within the trial court's discretion, Randall v. State, 132 Ind. 539, 32 N. E. 305 (1892); Russell v. State, 17 Okla. Crim. Rep. 164, 194 P. 242 (1920), "it is quite impossible definitely to fix the boundary between pettifoggery on one hand and proper cross-examination on the other, so as to govern all cases with exactness," State v. Bateham, 94 Ore. 524, 186 P. 5 (1919).

15 Brindisi v. People, 76 Colo. 244, 230 P. 797 (1924); State v. Popa, 56 Mont. 587, 185 P. 1114 (1919).
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he is mistaken. Then it assumes that such rumors have some probative value; but this is more speculative than morally certain. As one eminent authority on evidence has stated, "On the one hand, reputation implies the definite and final formation of opinion by the community; while rumor implies merely a report that is not yet finally credited." If it is feared that the witness has no basis for his testimony, then it appears more expedient to make the qualifications of character witnesses more rigorous.

Furthermore, the majority doctrine affords the prosecution a strategic position which appears unfair. The defendant's proof is limited to that trait involved, but the prosecution may propound all sorts of rumors which the accused can neither explain nor deny on the ground that collateral issues cannot be raised. Such action has been justified on the ground that the accused assumes the risk of such probes by exercising his privilege, and it appears novel to hinge admissibility upon such a reason. At first the accused is given the privilege of proving his good character, and when the credibility of his character witnesses is attacked by reference to rumors of his misconduct, it is presumed that the prosecutor acted in good faith and that the defendant was not prejudiced. The effect is to render

17 Wigmore on Evidence (2d ed.) III, 360, sec. 1611.
18 Some courts hold that the cross-examination must be limited to acts involving the particular trait of character at issue, State v. Holbrook, 98 Ore. 81, 192 P. 640 (1920); State v. Bell, 206 Iowa 816, 221 N. W. 521 (1928). This restriction appears to make the proof partake more of the nature of a rebuttal of the accused's good character rather than impeachment of his character witnesses.
19 Hollingsworth v. State, 53 Ark. 387, 14 S. W. 1 (1890); People v. Mather, 4 Wend. (N. Y.) 229 (1830), at p. 257.
22 State v. Shull, 131 Ore. 224, 282 P. 237 (1929). However, State v. Jones, 48 Mont. 505, 139 P. 441 (1914), intimates that if the form of question is obnoxious to rule against particular facts, a mere asking of the question is prejudicial and grounds for reversible error. This appears to be an adaptation of the "Exchequer heresy," taken from Crease v. Barrett, 1 C. M. & R. 919, 149 Eng. Rep. 1353—an error of ruling creates per se for the excepting and defeated party a right to a new trial. The doctrine obtained a strong foothold in America, though the courts are gradually repudiating it. See Wigmore on Evidence (2d ed.) I, 201, sec. 21. Illinois appears inconsistent. In Jennings v. People, 189 Ill. 320, 59 N. E. 515 (1901), the court said, even though the rumor questions were improper, as the answers were "no," the result was favorable rather than prejudicial to the accused. How-
his privilege nugatory unless he can affirmatively and clearly prove prejudice, and this cannot be done easily in the average case.

The perversion of the logical method, adopted in Illinois, that of limiting both sides to general reputation only, has perhaps made the use of character evidence unsatisfactory. If so, corrective measures are readily available. If the hearing tends to be a farce, exclude character evidence for that purpose entirely or else make the preliminary qualifications for the character witnesses more rigorous. But in all fairness, both sides should be confined to the same methods and within the same limits.

R. F. Olson

Divorce — Condonation — Applicability to Divorce on Ground of Voluntary Separation — The proposed new amendment 1 to the Illinois Divorce Act 2 which was recently discussed in the columns of this Review, 3 authorizes the granting of a divorce upon the application of either party, where the parties have been living separate and apart for a period of two years. Under a similar statute in Rhode Island 4 the recent case of Reilly v. Reilly 5 arose presenting the question of whether cohabitation of the parties during the statutory period would bar the action, or whether it would be considered as a condonation with its theory of conditional forgiveness, so that the subsequent separation would revive the former and the two periods would be added so as to equal the statutory requirement. The court sustained the dismissal of the bill as the wife had proven that the parties had cohabited several times during the ten year period required by the Rhode Island statute. It was held that the doctrine of condonation was inapplicable and that the parties must not only live separate and apart but that all of the ordinary relations ever, most the Illinois cases under footnotes 1, 2, 3, were reversed either on the ground that the evidence was inadmissible or that the evidence improperly admitted created a prejudice against the accused in the minds of the jury.

1 Senate Bill 179.
2 Ill. State Bar Stats. (1935), Ch. 40.
4 Gen. Laws of Rhode Island (1923), Ch. 291, sec. 3. “Whenever in the trial of any petition for divorce from the bonds of marriage it shall be alleged in the petition that the parties have lived separate and apart from each other for the space of at least ten years, the court may in its discretion enter a decree divorcing the parties from the bond of marriage, and may make provision for alimony.”
5 190 A. 476 (R. I., 1937).
between husband and wife must be discontinued during that period.

As statutes containing like grounds for divorce appear in relatively few states, no other case presenting the same question is to be found. But courts have considered analogous cases where divorces were sought on the ground of a desertion which had continued for a specified length of time. In these cases, by the weight of authority, cohabitation during the period of desertion or abandonment bars the action, and a subsequent desertion does not revive the former so that the two periods may be tacked. There are, however, some cases that apparently apply the law of condonation with its theory of conditional forgiveness, but upon examination they are found to be decided upon the factual question of the continuity of period of desertion. They are cases in which the deserted spouse visits the deserting spouse for the purpose of effecting a reconciliation, the parties cohabit for a brief period, but the deserting party does not return. Instead of applying the law of condonation to this type of case, the courts have held that the desertion is continuous because the deserting spouse never brought the desertion to an end.

Among these cases is the early Illinois case of Kennedy v. Kennedy, where the deserted husband visited his deserting wife in her brother's home for two days for the purpose of inducing her to return. The Supreme Court in allowing his bill for divorce said, "It can not be inferred from that single act, nor is there any evidence to show that she agreed or intended to permanently resume their marriage relations. . . . Had she gone to his house and they had so cohabited, then there would have been

6 Arizona, Session Laws (1931), Ch. 12; Kentucky, Baldwin’s 1936 Rev. St., Ch. 66, sec. 2117; Nevada, Laws of 1931, Ch. 111; Louisiana, Gen. St. (1932), Tit. 17, Ch. 4, sec. 2202; New Hampshire, P. L. 1926, Ch. 287, sec. 6; North Carolina, Code of 1935, Ch. 30, sec. 1658-1658a; Texas, Vernon’s Ann. St. (1926), Vol. 13, Tit. 75, Ch. 4, Art. 4629; Washington, Remington’s Rev. St. (1932), Ch. 12, sec. 982; Wisconsin, Gen. St. (1929), sec. 247.07.


8 "Unlike cruel and barbarous treatment and indignities to the person alleged acts of desertion can not be tacked onto alleged prior desertions, if they are broken or separated by the parties living together in the family relation, however brief such period may be." Trussell v. Trussell, 116 Pa. Sup. 592, 177 A. 215 (1935); Mikecz v. Mikecz, 95 N. J. Eq. 39, 122 A. 695 (1923).

9 87 Ill. 250 (1877).
entirely a different question presented. . . . We are of opinion . . . that the continuity of the time was not interrupted. . . .”¹⁰

While the holding in the Kennedy case has found favor in other jurisdictions,¹¹ it was criticized in the West Virginia case of Burk v. Burk¹² as being wrong in principle and dangerous to good morals. Where the facts show that the parties have frequently cohabited during the period of desertion, as in the Burk case, the Illinois court also holds that the period is interrupted, as it did in Phelan v. Phelan.¹³ Massachusetts declined to adopt the reasoning of the Kennedy case and held that such conduct puts an end to the desertion saying, “It can not be said that the husband’s conduct in resuming matrimonial relations with his wife was merely a condonation or conditional forgiveness of her prior misconduct. . . .”¹⁴

In addition to this factual inconsistency of a desertion continuing while the parties have cohabited (which the Kennedy case rationalizes with a plausible argument) it has been held that condonation can not apply to desertion cases,¹⁵ as there is not in existence at the time a cause for divorce which may be enforced;¹⁶ and that the statute overrides the unwritten law of condonation in desertion cases.¹⁷

From a review of these cases and the fact that the proposed amendment specifically states that the parties “have been living separate and apart¹⁸ without cohabitation with each other for a period of two years consecutively, immediately before the filing of a complaint for divorce hereunder, and shall then so be living separate and apart . . .” it appears that there will be no room for the application of the doctrine of condonation to cases arising

¹⁰ Id., p. 254.
¹¹ Danforth v. Danforth, 88 Me. 120, 33 A. 781, 31 L. R. A. 608 (1895); Dickerson v. Dickerson, 207 S. W. 941 (Tex. Civ. App., 1918).
¹² 21 W. Va. 445 (1883).
¹³ 135 Ill. 445, 25 N. E. 751 (1890).
¹⁴ In LaFlamm v. LaFlamme, 210 Mass. 156, 96 N. E. 62 (1911).
¹⁶ In LaFlamme v. LaFlamme, cited in note 14, the cohabitation took place after the statutory period of desertion had run and the cause of action complete. The court refused the divorce because the statute also required that the period of desertion be immediately preceding the filing of the bill.
¹⁸ That living in the same house but with a complete cessation of all matrimonial relations is living separate and apart is held in Stewart v. Stewart, 45 R. I. 375, 122 A. 778 (1923). For the contrary view that the separation must be open for the community to observe, and that it should not be necessary to go into the matrimonial domicile for the evidence, see Arnoult v. Letten, 155 La. 275, 99 So. 218 (1924); Quinn v. Brown, 159 La. 570, 105 So. 624 (1923).
under it, with the possible exception of where the wife is induced
to cohabit with her husband by his fraud.\(^{10}\)

F. G. ANGER

**EQUITY—CLOUD ON TITLE—FORFEITED LEASE AS CLOUD ON TITLE.**—The Supreme Court of Illinois in the case of Hill et al. v. 1550 Hinman Avenue Building Corporation et al.\(^1\) recently held that a ninety-nine year lease which had been recorded and, so far as the record disclosed, was apparently valid, but which had been forfeited and was therefore invalid as a lease, is not a cloud on the title of the lessor. To constitute a cloud, it was said, an instrument must not only be valid on its face, but it must also affect the record title, irrespective of whether it may affect the marketability of the title.

In this case, the plaintiff, in 1926, executed to one Feiwel a ninety-nine year lease on premises located at 1550 Hinman Avenue, Evanston, Illinois. Feiwel had the lease recorded and in 1928 assigned his interest therein to one of the present defendants; the assignment was recorded. Later the assignee executed a mortgage on his interest, which was also recorded and which never was released of record. In 1929, the lease was further assigned to the defendant corporation—which will be designated hereafter as the lessee—and this assignment was recorded. A trust deed was executed by the lessee which was recorded and never released of record. Among other undertakings the lessee covenanted and agreed to construct a building on the leased premises, to pay rent, to pay the taxes, and to deposit certain funds to secure the lessors in the performance of the contract by the lessee. The lessee defaulted in the performance of the aforementioned covenants and abandoned the premises. The lessors served a notice of default on the lessee and sixty days later re-entered and took possession of the premises which they now hold. The lease, the assignments thereof, and the trust deeds are still apparently valid in so far as the record shows, notwithstanding the forfeiture by the lessee.

It is well to note that a cloud on title, as previously defined by the Illinois Supreme Court, is "the semblance of a title, either legal or equitable or a claim of an interest in land appear-


\(^1\) 365 Ill. 129, 6 N. E. (2d) 128 (1936). For a comment on this case as it appeared in 282 Ill. App. 109 (1935), see 14 CHICAGO-KENT REVIEW 189. In the case of Waller v. Wilson, 282 Ill. App. 418 (1935), the court removed a lease as a cloud on title; however, the questions raised in the instant case were not raised in the Waller case.
ing in some legal form, but which in fact is unfounded, or which it would be inequitable to enforce. If the claim sought to be removed is valid, and may be enforced, either at law or in equity, it is not a cloud. This definition is accepted by the text writers and by courts of other jurisdictions. It is submitted that the definition is sufficiently broad to include the present case, since the lease apparently gave to the defendants the right to an interest in the property. In so far as the record discloses, a subsequent purchaser of the lessor’s interest would apparently be buying a law suit, since the lessee might bring an action to regain the possession.

The court based its holding upon the fact that the record title is “in a state of perfect tranquility” in that the plaintiff’s possession is in no way threatened and, too, a lessee is bound to admit his lessor’s title. In considering this latter point, it may be noted that the truth of the statement is based upon the

2 Rigdon v. Shirk, 127 Ill. 411, 19 N. E. 698 (1889); Goodkind v. Bartlett, 136 Ill. 18, 26 N. E. 387 (1891); Reed v. Tyler, 56 Ill. 288 (1870); Brooks v. Kears, 86 Ill. 547 (1877). The Illinois Supreme Court has held that a bill will not lie to remove a mere verbal claim or oral assertion of ownership in property as a cloud upon title. Allott v. American Strawboard Co., 237 Ill. 55, 86 N. E. 685 (1908); McCarty v. McCarty, 275 Ill. 573, 114 N. E. 322 (1916); Trustees of Schools v. Wilson, 334 Ill. 347, 166 N. E. 55, 78 A. L. R. 22 (1929). Where the title claimed is invalid on its face, so that it can never successfully be maintained, it can never amount to a cloud. Gage v. Starkweather, 103 Ill. 559 (1882); Roby v. South Park Commissioners, 215 Ill. 200, 74 N. E. 125 (1905).

As was pointed out in 14 CHICAGO-KENT REVIEW 189, at p. 191, one of the principal reasons for equity’s removing clouds on title is that outstanding invalid instruments are calculated to affect the marketability of the title of the one in possession, who is without remedy at law. In the case of Domin v. Brush, 174 Ga. 32, 161 S. E. 809’(1931), it is pointed out that the general test is whether the instrument would be sufficient to support a recovery in ejectment against the party in possession of the land if no evidence was offered to rebut it. However, the case of Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020 (1896), suggests that the true test in every case ought to be whether in fact the outstanding instrument does cloud the title; that is, does interfere with the free sale or mortgage of it.

3 Walsh on Equity (1st ed. 1930), p. 546, sec. 117 states the reason for the holding as follows: “The purpose of these actions is to relieve the plaintiff from invalid claims based on instruments which make his title doubtful and therefore unmarketable where no adequate remedy at law exists to correct the situation.” See also, Pomeroy, Equity Jurisprudence (3rd ed., 1905), sec. 1397.

4 Ashurst v. McKenzie, 92 Ala. 484, 9 So. 262 (1890); McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162 (1915). In the latter case a restrictive covenant was removed as a cloud because of changed conditions in the neighborhood. No instrument was canceled and only this provision was declared invalid.

For cases wherein a conveyance was compelled in order to remove a cloud, see, Arrington v. Liscom, 34 Cal. 363 (1868); Rayner v. Lee, 20 Mich. 384 (1870); Tourtelotte v. Pearce, 27 Neb. 57, 42 N. W. 915 (1889).
existence of a relationship of landlord and tenant, that is, that there exists a valid lease. However, the court did not hold that there was a valid lease in existence, instead they held that "there is a valid instrument evidencing the agreement of the parties." The query arises as to whether the instrument is valid as a contract or as a conveyance of a right to an interest in land.\(^5\) It is suggested that the instrument is valid as a contract, determining the rights and liabilities of the parties, but that it is invalid as a conveyance of a right to an interest in land, and so it is, in this respect, a cloud on the plaintiff's title and as such should have been removed. To hold the instrument valid as a conveyance of a right to an interest in land would be to say that the lessee has a right to the possession of the premises, since that is all that the instrument purports to convey to the lessee. Thus it would seem that the lessee might regain possession by either an action in ejectment or an action in forcible entry and detainer.\(^6\) But in this case, since these are possessory actions, they will not lie, because the lessee has forfeited his right to the possession of the premises, under the instrument, by breaching his covenants.

The court makes much of a provision in the lease to the effect that after service of notice of default the lessor could re-enter the premises and expel all occupants, repossessing the buildings thereon, "without such re-entry working a forfeiture of the rents to be paid and the covenants of said lease to be performed during the term of said lease." Such a provision is not uncommon in long-term leases and has been treated as an agreement for liquidated damages in case of breach.\(^7\) It is suggested that


\(^6\) As to the right to bring an action in Forcible Entry and Detainer see Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 57, § 2. Also, in the case of Allen v. Webster, 56 Ill. 393 (1870), the court held that the landlord who parted with his right to the possession could not maintain forcible detainer and that the lessee who had the immediate right to possession could alone bring the action. As to the right to bring ejectment, see Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 45, §§ 3, 4.

\(^7\) Feinsot et al. v. Burstein, 138 N. Y. S. 185 (1912). In this case a clause of the lease provided that, in case the lease was terminated, the landlord could retain a deposit of $2000 as liquidated damages.
the rights of the parties, in the instant case, would in no way have been prejudiced had such been the decision of the court here, as this would be merely the recognition of the dual character of a lease. In fact, one court has held that although proceedings, under the statute regulating summary proceedings, terminated the lease and all existing rights thereunder, still it was competent for the parties to agree that certain obligations might continue thereafter, such as the covenant for the payment of rent.8

The fact that there was no allegation in the complaint that the possession of the lessor was threatened is the other ground of the court's holding. To require such an allegation in a complaint to clear cloud on title would appear to be inequitable in that it would work a hardship on the plaintiff. It is not difficult to conceive of a state of facts which would ordinarily entitle one to have a cloud removed from his title and yet where there would be no threat to his possession. It is well settled that equity will grant relief to one in possession, to remove an instrument as a cloud on his title for the reason that the remedy at law is inadequate.9 Hence, it would seem that whether the possession of the plaintiff was threatened or not is immaterial since that has nothing to do with the relief to be granted, that is, the removal of the instrument as a cloud. In the instant case, the plaintiff cannot bring ejectment or a forcible entry and detainer action, since he already has possession, therefore his remedy at law is clearly inadequate and an action in equity is his only relief. The plaintiff's choice of equitable relief was not without precedent, for courts of other jurisdictions have removed, as clouds, leases which have become invalid by reason of subsequent acts of the parties.10

8 Michaels v. Fishel, 169 N. Y. 381, 62 N. E. 425 (1902). The court held as follows: "While it was within their [the lessor's and lessee's] power to agree that the lessee should continue to pay rent after the premises had been taken away from him owing to his default, still a covenant to pay, with no right to enjoy, should be clear and unambiguous as to the event which calls it into action." Such was the case here. The court, in the instant case, said that the terms of the lease were unusually clear.


10 See cases to this effect collected in 78 A. L. R. 92. A number of these cases involve oil and gas leases. It seems that this should make no difference, however, since the form of the instrument is immaterial. The query always is whether or not the instrument, which is apparently valid but actually of no force and effect, clouds the plaintiff's title. Such was the holding in the case of Wilmore Coal Co. v. Brown, 147 F. 931, 153 F. 143, certiorari denied, 209 U. S. 546, 38 S. Ct. 758, 52 L. Ed. 920 (1906). This case involved a bill to cancel certain coal leases, executed in 1878 and 1880, as clouds upon title. The section where the leases were located was, except for farming, entirely undeveloped at the time the leases were made. There was no railroad into the section and the leases provided that unless one was so built
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The restrictions now placed on the doctrine by the present case tend to restrict this remedy to a very narrow and limited scope, since now an instrument is not a cloud unless it affects the record title and even then when the plaintiff is in possession, it would appear that he could not prevail unless he alleged that his possession was threatened. In this case the lessee's claim undoubtedly affected the marketability of the lessor's title—but this is now immaterial—and the claim was invalid as a conveyance of a right to an interest in the premises, yet the court held it is not a cloud on the lessor's title merely because the instrument is still valid as a contract.

H. N. LINGLE

EVIDENCE — HUSBAND AND WIFE — ADMISSIBILITY OF THEIR TESTIMONY AS TO NON-ACCESS DURING MARRIAGE TO PROVE ILLEGITIMACY OF CHILD.—The Supreme Court of Mississippi in Moore v. Smith,1 considering the question as one of first impression in that state, and not controlled by statute, has decided that in a case where the paternity of a child begotten during wedlock is in issue, testimony of the parents as to non-access of the husband during wedlock is admissible.

While admitting the generally accepted rule to be that in such cases parents may not testify to non-access, the court cited Rex v. Reading,2 decided by Lord Hardwicke in 1734, to establish the fact that prior to 1777 such testimony was permitted and stated that the basis of the present rule lies in Lord Mansfield's dictum

within five years the leases should be null and void. No railroad was ever built, and lessee for twenty-four years took no steps to mine or develop the land. The court held that under the facts of the case the leases were invalid and constituted a cloud upon the title. The court recognized the peculiar character of mining leases, stating as follows: "According to the law of Pennsylvania, by which the subject is necessarily governed, the so-called leases constitute a sale and conveyance of the coals and minerals in place."

Investigation has disclosed, aside from cases involving mining leases, only the case of Wright v. Davis, 145 Va. 370, 133 S. E. 659 (1926), in which the court did remove a lease as a cloud on title. In this case a milling company leased premises with water power rights from a trustee and the beneficial owners. In deciding the case the court said: "A generation has passed, several of the original parties are dead, and their plans for developing and utilizing the water power have all failed. Neither the lessee milling company nor its successors, the appellants, ever either asserted or claimed any of their peculiar rights under the lease (which also imposed burdens) or discharged any of its obligations thereunder. There has been a failure of consideration to the lessors. What then should a court do? We confess that we know of nothing better to be done than that which the trial court concluded to do, and that is to put the parties in the same position which they occupied at the time they made and expressed their agreement in writing."

1 172 So. 317 (Miss., 1937).
in *Goodright v. Moss,*³ where he said, "As to the time of birth the father and mother are the most proper witnesses to prove it. But it is a rule founded in decency, morality and policy that they shall not be permitted to say after marriage that they have had no connection and therefore that the offspring is spurious, more especially the mother who is the offending party. That point was solemnly decided at the Delegates."

But *Rex v. Reading* did not decide that the husband or wife were competent as sole witnesses to prove non-access. On the contrary, it held that they were not—not because of any rule founded in decency and morality, but because "it must be of very dangerous consequence to lay it down in general that a wife should be a sufficient sole evidence to bastardize her child, and to discharge her husband of the burden of his maintenance." And Hardwicke pointed out that in cases where the wife's statements had been received, there was already ample evidence by others to prove the fact of non-access.

The Mississippi court criticizes the rule because it permits the right of a child not to be bastardized to outweigh the right of the presumed father not to be charged with the support of a child not his. The court states further that it is in accord with Wigmore's opinion that to permit the child to be bastardized by testimony of parents to non-access should not be considered to offend decency, morality and policy any more than does their testimony as to lack of a marriage ceremony, birth of the child before marriage, that one party was already married to a third person, or their declarations as to legitimacy used after their death, all of which, Wigmore says, have the effect of bastardizing the child.⁴

Although Professor Wigmore may have disposed of Mansfield's dictum that the rule is founded in decency and morality, he has not shown that it is good policy to permit married persons, by self-serving statements, to put the support of their legitimate children on third persons. The rule does not forbid the wife to testify to her intercourse with a third person, "by reason of the nature of the fact, which is usually carried on with such secrecy that it will admit of no other evidence."⁵ But such testimony would not alone prove the latter's fatherhood. Protection to the husband against liability to support a child not his is accomplished by admitting testimony as to non-access by others

⁴ Wigmore on Evidence (2d. ed.), sec. 2064.
⁵ *Rex v. Reading, Cas. T. Hard. 79 at. p. 82, 95 Eng. Rep. 49 at p. 51 (1734).
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than the presumed parents. And the fact of such separation would not likely be so secret as to permit of no evidence but the statements of the parties themselves.

Whether the rule that husband and wife may not testify to non-access during wedlock is considered to date from Lord Mansfield's dictum in 1777, or whether it existed earlier, it has been consistently followed by the English courts. Indeed, in 1879, Grove, J., said that a decision was hardly needed to show that such evidence was inadmissible at common law, and it is English law today. The American courts have followed it almost without exception; it is law in Illinois.

L. Whidden

EXECUTORS AND ADMINISTRATORS—NEGligence—LIABILITY OF EXECUTOR FOR LOSS BY REASON OF FAILURE TO SELL STOCKS ON A FALLING MARKET.—In the case of Busby v. First National Bank of Chicago the Illinois courts have for the first time been confronted with one of the so-called "depression" cases, involving the question as to whether or not an executor is liable to a surcharge for failing to sell securities on a falling market. The Appellate Court, upon the facts involved, reversed the circuit court and allowed the surcharge, stating that although the court might take judicial notice of the depression since 1929, such depression did not give "any immunity bath to imprudent and negligent executors."

Briefly, the facts of the instant case are as follows: Leonard A. Busby died September 9, 1930, leaving his widow and two minor children surviving him. The decedent's will nominated the First Union Trust and Savings Bank (an affiliate of, and since merged with, the defendant bank) as executor and residuary trustee of his estate which consisted chiefly of securities with a market value of approximately $1,450,000, held on marginal accounts by an equity of not over 33 1/3 per cent. Melvin A. Traylor, president of both banks, assumed direct control of the estate although he later delegated the same to one of the vice-presidents. The two investment committees of the bank immediately considered the financial status of the estate and recommended that it be liquidated at the earliest possible moment, and two lists of

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6 Nottingham Guardians v. Tomkinson, L. R. 4 C. P. D. 343 (1879).
8 People ex rel. Cullison v. Dile, 347 Ill. 23, 179 N. E. 93 (1931).
2 Ibid. See also In re Stump's Estate, 274 N. Y. S. 466 (1934); In re Winburn's Estate, 249 N. Y. S. 758 (1931).
the securities were drawn up by the bank experts: List A designating about $920,000 worth of stocks that should be sold immediately because of their speculative nature, and the remainder in List B as possible to hold although only slightly less speculative. Mrs. Busby was called in and asked to sign a consent to the sale, which she did. At this time, the market was declining at a rate which would wipe out the equity of the estate in ten or twelve days, but it would have been possible to have disposed of the stock. Despite the investment department's advice, the defendant bank, on instructions from Mr. Traylor, paid the balance due to the brokers, pledging the securities to themselves as collateral for the loan. This collateral was objected to as insufficient by the senior vice-president of the bank and eventually all assets of the estate, including approximately $150,000 worth of unpledged securities, were pledged to the First National Bank so that the entire estate was just an equity in pledged securities. During the following year, the decline in the market wiped out all the equity leaving the estate insolvent. Neither the allowed claims nor the specific legacies were paid by the executor. The plaintiffs in this action seek to surcharge the executors for the depreciation in the market value of the securities retained in 1932 as compared with their market value September 23, 1930, an amount of approximately $400,000.

The executor insisted that the test of its conduct is the exercise of that degree of skill and diligence which an ordinarily prudent man bestows on his own similar private affairs as laid down by the Supreme Court in Christy v. Christy, but the court overruled this contention on the ground that each case of this class is sui generis and pointed out that the fact that ordinarily prudent men in the conduct of their own private affairs might speculate with their own money surely cannot be used as a standard by which to measure a fiduciary's duty of care owed to his ward, and that the Supreme Court has, under other circumstances, held it was the duty of an executor to use "that degree of reasonable diligence ordinarily employed in like business affairs by men of common prudence." The court considers that the defendant in the instant case held itself forth as being especially qualified to administer estates and that, although its good faith is not

3 225 Ill. 547, 80 N. E. 242 (1907). See also Christy v. McBride, 1 Scam. 75 (1832); Rowen v. Kirkpatrick, 14 Ill. 1 (1832).

4 In re Estate of Corrington, 124 Ill. 363, 16 N. E. 252 (1888); Wadsworth v. Connell, 104 Ill. 369 (1882); Whitney v. Peddicord, 63 Ill. 249 (1872); Merchants Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N. E. 59 (1911).
questioned, that cannot exonerate it from liability for its own negligence.

Although the majority of the cases in other jurisdictions have held against the allowance of a surcharge, the court in the instant case is not without some authority for its decision. The New Jersey court in In re Westfield Trust Company\(^6\) held the executor was liable under somewhat similar circumstances, although the decision was later reversed\(^6\) because of the terms of the will which were interpreted as directing the executors to hold the stock. In two cases\(^7\) the New York courts have held the executors guilty of gross negligence where their primary duty was to reduce the estate to cash for distribution.

New York,\(^8\) Connecticut,\(^9\) Pennsylvania,\(^10\) New Jersey,\(^11\) California,\(^12\) and Kentucky\(^13\) have refused to hold executors liable where the loss was incurred as in the instant case. However, as the Appellate Court points out, in none of these are the facts relied upon by the executor at all comparable to the situation in the Busby estate. In the leading case in New York,\(^14\) dealing with a previous depression, the securities held were fully paid for and the will indicated that the testator definitely desired them to be held for at least two years. The estate itself was in strong financial condition. This substantial distinction in fact may be

\(^5\) 115 N. J. Eq. 611, 172 A. 212 (1934).


\(^7\) In re Frame's Estate, 284 N. Y. S. 153 (1935), rev'g 274 N. Y. S. 420 (1934). See also Note, 49 Harv. L. Rev. 1002; In re Junkersfeld's Estate, 279 N. Y. S. 481 (1935), rev'g 269 N. Y. S. 514 (1931).

\(^8\) In re DeWinter's Will, 276 N. Y. S. 576 (1934); In re Balf's Estate, 274 N. Y. S. 284 (1934); In re Andrew's Estate, 265 N. Y. S. 386 (1933); In re McKee's Estate, 265 N. Y. S. 47 (1933); In re McCafferty's Will, 264 N. Y. S. 38 (1933); In re Booth's Estate, 264 N. Y. S. 773 (1933); In re Beadleston's Estate, 262 N. Y. S. 507 (1933); In re Disbrow's Estate, 261 N. Y. S. 635 (1932); In re Kent's Estate, 261 N. Y. S. 698 (1932); In re Sprong's Estate, 259 N. Y. S. 77 (1932); In re Pratt's Estate, 257 N. Y. S. 226 (1932); In re Parson's Estate, 257 N. Y. S. 339 (1932); In re Chave's Estate, 257 N. Y. S. 641 (1932); In re Winburn's Estate, 249 N. Y. S. 758 (1931); In re Lazar's Estate, 247 N. Y. S. 230 (1931).


\(^10\) In re Jones' Estate, 314 Pa. 93, 171 A. 265 (1934); In re Dickinson's Estate, 238 Pa. 561, 179 A. 443 (1935).


\(^12\) In re Kent's Estate, 50 P. (2d) 457 (Cal. App., 1935).


\(^14\) In re Weston's Estate, 91 N. Y. 502 (1883).
noted in all the cases cited by the defendants in the instant case. In not one of them was the executor urged to liquidate the estate. On the other hand, nearly all of the New York cases are comparable to *In re McCafferty’s Will* where the executors received advice that “it was thought anybody that liquidated securities which they owned outright was very foolish.” In all of these foreign jurisdictions the stocks were of high grade and of inherently sound corporations. In no instance is there a case where the loss sustained was more than a paper loss; the estates retained the securities and no debts or legacies remained unpaid. The executors were not faced, as were the defendants, with the necessity of realizing cash from the assets. In only three cases, among those considered by other courts, were the stocks not owned outright, and those three present different aspects than the instant case. In *In re McKee’s Estate*, only 4,000 out of 18,000 shares were pledged and those were held under adequate security, and the executor was advised by supposedly competent authority not to sell. In *In re Lazar’s Estate*, the stocks were held upon a margin of 80 per cent, and in *Peck v. Searle*, the court absolved the executor by reason of the fact that he had taken over the stocks from the brokers only after petitioning and gaining the approval of the probate court to make such a move.

Hence, it may be seen that the Illinois decision is not necessarily a contradiction of the decisions of other courts that have refused to surcharge the executor, and it does not follow therefrom that the Illinois court would, upon a state of facts similar to those in other jurisdictions, hold the executor liable. It may well be noticed, however, that the court says that no cited case presents the situation “where a corporate fiduciary . . . disregarded the recommendation of its investment committee to liquidate a lien indebtedness promptly. Neither do any of the cited cases present the situation where a corporate fiduciary determined on a program of immediate liquidation . . . received the consent of the beneficiary thereto and then deliberately failed to carry out that program.”

Such a statement tends to reflect the inference that the court is holding the defendants, as a corporate fiduciary, to a higher degree of care than it might insist upon from an individual in a like situation. This trend in the law has been recently commented on by

15 264 N. Y. S. 38 (1933).
16 265 N. Y. S. 47 (1933).
17 247 N. Y. S. 230 (1930).
18 117 Conn. 573, 169 A. 602 (1933).
19 At p. 466.
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Professor A. W. Scott, although it has not as yet received any direct judicial approval.

G. O. HEBEL

GARNISHMENT—IMMUNITY OF A GOVERNMENT AGENCY—GARNISHMENT LIABILITY OF HOLC.—A most interesting question which is being presented to the various courts today is whether the Home Owners’ Loan Corporation is subject to garnishment proceedings. Within the last year widely differing opinions have been reported from the Supreme Courts of three different states. A review and comparison of the cases dealing with this problem is both engaging and profitable.

In order, the Appellate Court of Ohio (March, 1936), the Supreme Court of Tennessee (July, 1936, opinion designated for publication January 12, 1937), and the Supreme Court of Nebraska (March, 1937) have considered this proposition. Because the Tennessee tribunal reached a different conclusion from the other two, it may be well to discuss that decision first. The case was that of Home Owners’ Loan Corporation v. Hardie & Caudle, wherein the court held that the HOLC is that type of government instrumentality which is not subject to garnishment. The plaintiffs, Hardie and Caudle, had recovered a judgment against one O’Rear, an employee of the corporation. The execution which issued against O’Rear was levied by garnishment upon the defendant. The lower court rendered judgment in favor of the plaintiff, and the defendant appealed to the Supreme Court of Tennessee. The court decided that the HOLC was that type of governmental agency which is ordinarily immune from garnishment proceedings and that here the sovereign had not stepped into the role of a commercial adventurer and waived its immunity. It also held that, in the Home Owners’ Loan Act authorizing the creation of the defendant corporation, Congress had neither expressly nor impliedly subjected the defendant to garnishment. The court based this holding on its construction of the statute which reads

20 Fifty Years of Trusts, 50 Harv. L. Rev. 60 (1936).
21 It is of interest to note that the present value of the stocks held has increased to such an extent that they will more than cover the amount with which the executor is surcharged.
1 100 S. W. (2d) 238 (Tenn., 1936).
2 Baird v. Rogers, 95 Tenn. 492, 32 S. W. 630 (1895); Board of Directors v. Bodkin, 108 Tenn. 700, 69 S. W. 270 (1902); Dickens v. Bransford Realty Co., 141 Tenn. 387, 210 S. W. 644 (1919).
known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State. . . .”

The Tennessee tribunal distinguished the case from that of *Federal Land Bank of St. Louis v. Priddy* for the reason that the Federal Land Bank Act is worded broadly “to sue and be sued . . . as fully as natural persons.” The court pointed out that, unlike the Federal Land Bank, no stock of the HOLC is issued to private individuals, that all funds are in the custody and control of the Treasurer of the United States, and that salaries of employees are payable by warrant on the United States Treasury. The opinion concluded by holding that garnishment process could not reach funds in the Treasury of the United States and that none elsewhere were shown to be available.

An interesting contrast to this Tennessee opinion is furnished by a decision of the Appellate Court of Ohio handed down early last year. The case arose upon the same fact, but the main issue was raised by the defendant’s motion to quash service of process on the ground that it was a government agency and not subject to garnishment. The Ohio court reached entirely different conclusions on a number of points involved. It decided that the wording of the Home Owners’ Loan Act was such as to show a congressional intent to strip the corporation of the rights and immunities of a sovereign power in relation to the institution of suits by or against it. It held that the business in which the defendant corporation was engaged—that of loaning money and refinancing mortgages on real estate security—was such as had theretofore been conducted by private persons and corporations, and that the activities of the defendant were in the nature of a commercial venture. The court further reasoned that although the under-

4 Ibid.
5 295 U. S. 229, 55 S. Ct. 705, 79 L. Ed. 1408 (1935). In this case the United States Supreme Court held that Congress intended to subject the bank to attachment process at least insofar as it would not directly interfere with any function of the bank as a Federal instrumentality.
8 U. S. C. A., Tit. 12, § 1463, p. 985. Section 7 of the articles of the HOLC provides: “Said corporation shall have power to sue and shall be subject to suit as other corporations, and shall have the usual powers and immunities of corporations of the United States."
9 When the United States enters a commercial business, it abandons its sovereignty and is treated like any other corporation. Salas v. United States, 234 F. 842 (1916); 2 Rose’s Notes 180; White v. Nashville and N. W. Railroad Co., 54 Tenn. 518 (1872); Fields v. Creditors of Wheatley, 33 Tenn. 351 (1853).
taking was a public enterprise to handle a particular emergency, yet Congress had here selected as the instrument for executing the necessary acts a private corporation rather than a government agency. The Ohio judge pointed out that under decisions of the United States Supreme Court a corporation organized to act as a government agent, all the stock of which was owned by the United States, and having the right of eminent domain, was nevertheless subject to garnishment where there was no statutory provision to the contrary. The conclusion reached was that a motion to quash garnishment proceedings would not lie, because the corporation must be regarded as a private corporation even though upon an answer being filed it should later develop that the corporation might partake of the character of a sovereign. They also refused to consider the question of reaching the funds of the defendant in the hands of the Treasurer of the United States upon the same grounds.

The most recent decision involving this same problem was handed down by the Supreme Court of Nebraska. They regarded as the really vital issue the question of whether the HOLC was engaged in a governmental function at the time of the garnishment proceedings. Conceding the existence of an unusual emergency, they nevertheless held that the corporation was acting in a commercial role in that it was loaning money and refinancing mortgages on real estate security which it might eventually come to own in its proprietary capacity. Consequently, in the opinion of the Nebraska court, the immunity of the sovereign did not extend to the corporate agency which Congress had selected for the accomplishment of its purpose.

The Tennessee decision apparently cannot be reconciled with the Ohio and Nebraska holdings. It seems that a kindly disposition on the part of the Tennessee court toward government agencies resulted in a rather unusual construction of the statute.

10 United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U. S. 1, 48 S. Ct. 12, 72 L. Ed. 131 (1927).
11 Although the Emergency Fleet Corporation possessed the right of eminent domain and all its stock was owned by the United States, the corporation was nevertheless held subject to garnishment. Haines v. Lone Star Shipbuilding Co., 268 Pa. 92, 110 A. 788 (1920). As regards ownership of stock by the sovereign, also see Osborn v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204 (1824); Bank of United States v. Planters' Bank of Georgia, 9 Wheat. 904, 6 L. Ed. 244 (1824); Huntingdon, C. & I. Turnpike Co. v. Wallace, 8 Watts (48 Pa.) 316 (1839); Seymour v. Milford & Chillicothe Turnpike Road Co., 10 Ohio 477 (1841).
13 Central Market, Inc. v. King (Home Owners' Loan Corporation, Garnishee), 272 N. W. 244 (Neb., 1937).
courts of most jurisdictions can be expected to follow Ohio and Nebraska in subjecting the Home Owners’ Loan Corporation to garnishment process.

H. Will

INTERNAL REVENUE—ASSESSMENT—WHETHER MORTGAGEE WHO ACQUIRES THE MORTGAGED PROPERTY AT A FORECLOSURE SALE REALIZES TAXABLE INCOME ALTHOUGH THE VALUE OF THE PROPERTY IS LESS THAN THE LOAN.—In a recent decision, Helvering v. Midland Mutual Life Insurance Company,¹ the United States Supreme Court held that a mortgagee who schedules his income on the cash basis, and who bides in the mortgaged property at the foreclosure sale for the principal of the loan and the accrued interest, realizes income to the extent of the interest. In this case the taxpayer, an insurance company, bid the full amount. It was the only bidder at the sale and the value of the property did not enter into the determination of the amount of the bid, since the company had issued general instructions to its representatives to bid in all cases a sum sufficient to insure it against loss in the event of redemption. The property was entered in the real estate account at an amount equaling the loan and foreclosure costs. The unpaid interest was not taken up in the company’s books or shown in its financial statements.

The arguments of the court in support of this holding were that income may be realized though paid by a credit, that since the mortgagor is entitled to a deduction the same as if he had paid the interest, a fortiori the mortgagee realizes income, and that administrative convenience required the result reached. To the contention of the taxpayer that a decision in favor of the Government would be inconsistent with the rule stated in Louisville Joint Stock Land Bank v. Radford,² that the mortgagee is entitled to have “the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceed of a fair competitive sale or by taking the property itself,” the court said that the taxpayer had at the sale an election either to bid or not to bid, and having elected to bid, it was bound thereby.

Deferring to the Supreme Court as profoundly as the Circuit Court of Appeals for the Sixth Circuit³ (which overruled the Board of Tax Appeals decision and the earlier case⁴ which were

¹ 81 L. Ed. 375 (1937).
⁴ National Life Insurance Co. v. United States, 4 F. Supp. 1000 (1933), cert. den. 291 U. S. 683, 54 S. Ct. 560, 78 L. Ed. 1070 (1933); Missouri
to the same effect) deferred to the courts which had previously considered the problem, the writer submits that the reasoning of the Supreme Court is fallacious. Since the doctrine of "constructive receipt" is now well established with respect to income tax law there can be no question but that the court's major premise, that income may be realized although payment is made by means of a credit, is correct. It is the minor premises of the court which are erroneous.

The first of these is that credit was given for the interest. In a loose sense the mortgagee did give the mortgagor a credit, since the latter's obligation was discharged. From a strictly legal standpoint, however, it was a discharge that the mortgagor received and not a credit. The effect of bankruptcy clearly illustrates that legally at least a discharge is not always the equivalent of a credit. After a discharge in bankruptcy, the bankrupt does in a loose sense get credit for his obligations, but no court would ever say that therefore the creditors realize income. The mortgage case and the bankruptcy case are analogous. The mortgagee like the creditor in bankruptcy takes what he can get in complete discharge of the debt. The fact that he might have had a deficiency judgment should make no difference if the judgment would be uncollectible.

This brings us to the crucial question in the case. Namely, whether inquiry should be made into the market value of the property. The court said that it should not, because of administrative convenience and because in "reality" the mortgagee valued the protection of the higher redemption price as worth the discharge of the interest debt for which it might have obtained a judgment." The "reality" seems to be, however, that the mortgagee did not consider a deficiency judgment worth anything and wanted to get as clear a title to the property as it could under the circumstances. The higher the redemption price, the better the title, for the happening of the contingency which will defeat the title thereby becomes more remote. Although administrative convenience serves as a good argument in many income tax cases, it was hardly appropriate in this case. If the administration of the law "would be seriously burdened" by an "inquiry into the fair market value of the property" in this case, then Congress itself has seriously burdened the administration.

of the law by providing that gain or loss is recognized upon the exchange of property and that the amount realized is the fair market value of the property.\textsuperscript{5} True, the amount bid at a foreclosure sale is evidence of value, but it is hard for one familiar with the administration of the income tax law to conceive of a case involving the receipt of property as compensation or in exchange for other property, in which the Bureau of Internal Revenue would give such a bid conclusive effect.

This decision applies the doctrine of constructive receipt with a vengeance, or as stated by Justice McReynolds in a dissenting opinion, it "requires resort to theory at war with patent facts."\textsuperscript{6} Or as the Circuit Court of Appeals said: "It is true that the law invests it [the mortgage lien] with the virtue of currency, but only for a limited and definite purpose—the purchase of the mortgaged property. We are unable to see by what alchemy this baser metal is transmuted into gold through the mere formalities of a foreclosure sale."\textsuperscript{7}

A complete discussion of this case requires that reference be made to another line of cases\textsuperscript{8} to the effect that where the mortgagee acquires the property by direct conveyance rather than foreclosure, no interest income is realized unless the fair market value of the property is in excess of the amount of the loan, and to the case in which the mortgagee bids less than the amount of the loan, foreclosure costs and interest. Although the Supreme Court has never had occasion to decide a case involving a direct conveyance it would appear that decisions cited will stand in spite of the Midland Mutual Life Insurance Company case. The reason is obvious. There is not a sale in any sense of the word, but rather an exchange of the loan for the property.\textsuperscript{9} Therefore, gain or loss must be determined on the basis of the fair market value of the property,\textsuperscript{10} as in any other taxable exchange transaction.

There is no better way to show the weakness of the Midland Mutual Life Insurance Company case than by comparing the

\textsuperscript{5} U.S.C.A., Tit. 26, §§ 111(b), 112(a), 1936 Act.

\textsuperscript{6} Previous to the decision of the Supreme Court, but after the decision of the Circuit Court of Appeals, which remanded the case to the Board of Tax Appeals, the latter body found that the value of the property was less than the loan.

\textsuperscript{7} 83 F. (2d) 629 (1936).


\textsuperscript{9} National Life Insurance Co. v. United States, 4 F. Supp. 1000 (1933).

\textsuperscript{10} U.S.C.A., Tit. 26, §§ 111(b), 112(a), 1936 Act.
"realities" of that case with those of the line of cases concerned with a direct conveyance. Where the mortgagee acquires the land by direct conveyance he gets a title as clear as that which the mortgagor had. However, if he bids the property in at a foreclosure sale he gets merely a defeasible title because of the outstanding right of redemption. If he bids the full amount of the debt and interest and the actual value of the property is less than the amount of the loan, he is taxed if he gets a defeasible title, but he is not taxed if he gets the clearest title that he can through the mortgagor. In other words, by actually receiving more he legally gets less. Such an anomaly is certainly unjustifiable.

If the mortgagee bids in the property at the foreclosure sale at a figure which is less than the full amount due, it is difficult to believe that the Supreme Court would go so far as to hold that even in such a case he has realized income to the extent of the accrued interest. The mortgagee has clearly not given the mortgagor credit for the interest, since he has taken a judgment for the deficiency. In reality, however his position is the same as it would have been had he bid the full amount due. He has the property subject to the mortgagor's right of redemption and a lien against the mortgagor's interest in the property (the right of redemption) to the extent of the deficiency judgment.

Once more then the Supreme Court has allowed form to control substance, and fiction to control fact, in spite of its statement to the contrary in *Eisner v. Macomber.*

G. T. CHRISTIE

LOCAL IMPROVEMENTS—MANDAMUS—GENERAL LIABILITY FOR DIVERSION OF SPECIAL ASSESSMENT FUNDS AND RIGHT TO COMPEL LEVY OF TAX FOR PAYMENT.—On the ground that the petitioner failed to show a clear legal right to the writ, the Illinois Appellate court refused to issue a mandamus in *People ex rel. Anderson v. Village of Bradley, Kankakee County.* The writ, which had been granted by the circuit court, was sought by the assignee of a contractor who had previously obtained a judgment in assumpsit against the village in the amount of $54,119.12, which amount was due for the construction of a sewer in a special assessment

11 "In order ... that the latter [Sixteenth Amendment] also may have proper effect, it becomes essential to distinguish what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form." 252 U.S. 189, 64 L. Ed. 522 (1919), at p. 528.

1 288 Ill. App. 162, 6 N. E. (2d) 240 (1937).
district. The village had collected over $300,000 from such district and had wrongfully diverted from such collections approximately $25,000. The petitioners obtained his judgment on the ground that such diversion rendered the defendant village generally liable and sought, by the mandamus proceedings, to compel the village to levy a general tax for its payment.

In rendering its decision, the court held that a city is not liable in the event of a diversion of special assessment funds unless such funds were diverted to general corporate purposes. Although such a conclusion might be a logical interpretation of the Local Improvements Act, from the cases previously decided in Illinois, it has not been considered the law in this state. In Rothschild v. Village of Calumet Park, the Supreme Court allowed a judgment against the village where the treasurer preferred some creditors rather than distributing the collected funds pro-rata among the outstanding bondholders. Other cases in this and other jurisdictions have held the city generally liable for any wrongful diversion of special assessment funds. If the instant case were followed as to the issuance of mandamus on this ground, it would completely nullify the effect of the judgments issued in these latter cases if the city involved refused to honor such a judgment.

However, there is no authority that holds the village generally liable for funds that have not been wrongfully diverted from special assessment monies even though such have been collected. The statute may be construed as forbidding such a liability and previous decisions have consistently held this as a ruling principle of law. In the instant case, the amount of the diversion was

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3 350 Ill. 330, 183 N. E. 377 (1932).
5 Smith-Hurd's Ill. Rev. Stats. (1935), Ch. 24, § 740, providing that only property benefited may be subject to special assessment.
6 On the grounds that property outside the district is not liable since it is not benefited and property inside the district may not be taxed because such would result in double taxation. See Berman v. Board of Education, 360 Ill. 535, 196 N. E. 464 (1935); City of Chicago v. Brede, 218 Ill. 528, 75
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only twenty-five thousand dollars while the judgment was issued for the full amount of the claim—over twice as much as the alleged diversion. Upon no theory could the judgment be sustained for this full amount, and the Appellate court was undoubtedly correct in that the liability of the village did not extend thereto.

It must be noticed that the instant case is not an appeal from the decree of judgment, and, although it does not appear to have been raised before the court, there is a question as to the right of the court in mandamus proceedings to go behind the judgment in rendering their decision. It has frequently been declared in general terms by the federal courts that all defenses relating to the validity of the claim on which a judgment against a public corporation is based are concluded by the judgment and that the validity of the claim cannot be litigated in mandamus proceedings to enforce the judgment.7 Although the Illinois courts have generally held that the court may in its discretion refuse the writ, even though the petitioner may have a clear legal right thereto, if the consequences of the writ will not promote substantial justice,8 such declarations are not authority for a review of the judgment where the matter is one which has been adjudicated in the assumpsit proceedings, but rather a question of the validity of the means of payment. On the other hand, in Town of Lyons v. Coolidge,9 the Supreme Court stated that there was no power, in mandamus proceedings, to go behind the judgment and question the sufficiency of the cause of action on which it was predicated. The Appellate Court followed this decision in Brown v. Ellis,10 where, in a mandamus proceeding, the defendant raised an issue as to the validity of the judgment by presenting a defense to its merits, and stated: "The case at bar is not one of collecting a claim that was illegal when made. The legality of

7 United States ex rel. Huidekoper v. County Court of Macon County, 99 U. S. 584, 25 L. Ed. 331 (1879); County Court of Ralls County v. United States ex rel. Douglass, 105 U. S. 733, 26 L. Ed. 1220 (1882); Hill v. Scotland County Court, 32 F. 716 (1887); Fleming v. Trowsdale, 85 F. 189 (1898). See note, 9 L. R. A. (N. S.) 1002.

8 People ex rel. Beardsley v. City of Rock Island, 215 Ill. 488, 74 N. E. 437 (1905); People ex rel. Akin v. Bd. of Supervisors of Adams County, 185 Ill. 288, 56 N. E. 1044 (1900); People ex rel. Stettauer v. Olson, 215 Ill. 620, 74 N. E. 785 (1905); People ex rel. McCormick v. Western Storage Co., 287 Ill. 612, 123 N. E. 43 (1919); Hooper v. Rooney, 293 Ill. 370, 127 N. E. 711 (1920).

9 89 Ill. 529 (1878). See also Durham v. Field, 30 Ill. App. 540 (1920).

10 219 Ill. App. 540 (1920).
the claim has been adjudicated. This is a suit for the collection of a judgment. . . . It is conclusively settled, by the judgment, that the claim upon which it was based was a legal and binding obligation. Appellant cannot in this proceeding go behind the judgment and question the sufficiency of the cause of action on which it was based." Thus it would seem that there is ample authority in Illinois to justify the conclusion that the Appellate Court in the instant case could have held that the principle of res judicata applied and refused to consider the defenses interposed to the merits of the judgment upon which they based their refusal of the writ.

G. O. Hebel

Mortgages—Foreclosure—Fairness of Plan of Reorganization in Foreclosure Action.—In a case of first impression, the Supreme Court of Illinois, in The First National Bank of Chicago v. Bryn Mawr Beach Building Corporation, held that the courts of this state should and do have jurisdiction to pass upon reorganization plans in foreclosure suits. In that case, the trustee had filed a bill to foreclose the lien of the trust deed securing a bond issue of six million dollars. Pursuant to an order of foreclosure and sale, the property was sold to a representative of the bondholders' committee for $1,040,225. Having previously acquired the equity of redemption, the committee representing more than 80 per cent of the bondholders filed an intervening petition asking the court to pass upon the fairness of a proposed reorganization plan. Over the objection of the non-depositing bondholders, the court approved the plan and confirmed the sale.

Although there are a few early cases where reorganization plans have been mentioned incidentally, it was not until after the decision of the Supreme Court of the United States in Northern Pacific Railroad v. Boyd, that the parties interested in reorganizations sought to have the plan passed upon by a court before it was put into operation. The corresponding change of attitude of the courts is stated in Bethlehem Steel Company v.

1 365 Ill. 409, 6 N. E. (2d) 654 (1937).
3 228 U. S. 482, 33 S. Ct. 554, 57 L. Ed. 931 (1913). In that case, in spite of the fact that there was a judicial sale of all of the assets of the old corporation to a new corporation formed by the security holders of the old, a creditor was allowed to enforce his claim against the new company. The plan of reorganization, which was not passed upon by the court before it was put into effect, was held to be unfair and a fraud on the creditor as it permitted the stockholders of the original company to participate in the plan of reorganization without giving the creditor the same right.
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International Combustion Engineering Corporation4 where the court said, "Until the last twenty years, the courts, in no uncertain terms, expressed the view that they had no concern with the business of reorganization. Its sole function was, through receivership and injunction, to hold the assets in statu quo, pending either their sale or liquidation as the interested parties might determine. In later years, it has been considered as within the court's jurisdiction to examine the proposed plan and to pass upon its fairness."

It has been said that where only one class of security holder is involved, as in the present case, there is not, strictly speaking, a reorganization, and hence no necessity for passing upon the fairness of a proposed plan.5 However, that there is a need for some judicial supervision in such a case was recognized by Mr. Justice Baker when he decided the case of Investment Registry v. Chicago & Milwaukee Electric Railroad Company.6 In that case, which involved only one class of security holder, he said, "When such a controversy is on, the chancellor, in our opinion, not only has the right but owes the duty of being vigilant to see, on the one hand, that a dissenter be not permitted to create a maneuvering value in his bonds by opposing confirmation, and, on the other, that the majority does not use its power, unique in sales of this class, to oppress a helpless minority."

It is to be noted that the Boyd case and the Investment Registry case, like all of earlier cases where the courts considered reorganization plans, were in the Federal courts and involved a railroad corporation. The public interest in keeping such companies in uninterrupted operation is, of course, a strong argument for the equity courts to assume jurisdiction. The Federal courts, however, have not limited their jurisdiction to cases involving public utilities and railroads, but have, as in the Bethlehem Steel case and others,7 considered reorganization plans for ordinary industrial corporations.

Because of the fact that the first reorganizations were railroads and because of the preference of litigants to bring this type of case to the Federal courts,8 few state decisions9 are to be found.

4 66 F. (2d) 409 (1933).
5 Corporate Foreclosures, Receiverships and Reorganizations, John E. Tracy, (Callaghan & Co. 1929) Section 297, p. 346.
6 212 F. 594 (1913).
8 For a discussion of the advantages of bringing this type of suit in the Federal courts see section 29, p. 34, Corporate Foreclosures, Receiverships and Reorganizations (Callaghan & Co. 1929).
9 Moore v. Spltdorf Electric Co., 114 N. J. Eq. 358, 168 A. 741 (1933);
In a recent case in the Appellate Division of the Supreme Court of New York, the court stated that while it had no direct power to consider a reorganization plan, since the action was in equity, the court should be alert to see that no injustice was done by use of the court's processes to the parties to the suit or those remotely interested but represented by one of the parties.

What elements shall be considered by a court in arriving at a conclusion regarding the fairness of a plan? In Fearon v. Bankers Trust Company, the fact that the dissenters were permitted to participate in the plan on the same footing as the proponents, was held, in and of itself, to indicate that the plan was fair. It would seem that in addition to the right of all to participate equally, the price bid at the sale should be considered by the court in passing upon the plan. It is this price that sets the amount of cash the minority will receive in case it chooses not to participate, and determines the amount of money that the majority will have to raise. If this price is too low, the minority has no real choice, and if it is too high reorganization is made impossible because of the increased number of non-participants who have to be paid in cash.

An attempt to compel the minority to accept the securities offered by the plan in a reorganization by decree was held to be an unconstitutional impairment of contractual rights in the case of Wheeler Kelly Hagny Trust Company v. Heskett. While the forcing of the minority to accept the plan by confirmation of a low sale price is not open to the same legal objection, the result is equally undesirable. If price is to be considered in approving the plan, then the courts should have some control over it. Since it was recently decided that Illinois courts do not

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11 Clinton Trust Co. v. 142-144 Joralemon St. Corp., 263 N. Y. S. 359 (1933).

12 238 F. 83 (1916). "That the plan proposed may be taken advantage of and participated in by all the bondholders including these exceptants... on the same footing as the majority bondholders, in itself shows that the plan proposed is fair and equitable, in that it treats alike all parties interested therein."


14 141 Kan. 186, 40 P. (2d) 440 (1935).
have the power to fix an upset price,\textsuperscript{14} this control may be based upon those cases\textsuperscript{15} which hold that the chancellor had broad discretion in confirming or refusing to confirm the sale. Thus, while the court may not set an upset price before sale, it might refuse to confirm any sale that did not bring a sufficient price; for, once the sale has been confirmed it may not be set aside for inadequacy of price alone, unless the price is so grossly inadequate as to shock the conscience.\textsuperscript{16}

As the holding in the instant case is based upon ample precedent in the Federal courts and there is no reason why state equity courts are or should be more limited, it is legally sound. With the doubt\textsuperscript{17} concerning the courts' power is removed, they should be able to adjust the rights of the various parties in foreclosures involving large numbers of separate bondholders better than they could with the inadequate tools of the simple foreclosure proceeding. That equity has great dormant powers which it uses when the occasion arises is indicated in \textit{Graselli Chemical Company v. Aetna Explosives Company},\textsuperscript{18} where the court said, "In the absence of power created by legislation . . . the federal judges, sitting as courts of equity, have endeavored to secure to the rights of those interested . . . a protection to meet the needs of the occasion. Changing times, with change in economic needs, require the courts of equity to mold remedies to meet the conditions with which they have to deal."

F. G. ANGER

\textbf{Municipal Corporations—Police Power—Right of City to Install Parking Meters.—} The City of Birmingham, Alabama, was denied the right to place coin operated parking meters upon its streets by the Supreme Court of Alabama in the case of \textit{City of Birmingham v. Hood-McPherson Realty Company}.

That the upset price is in theory to protect the minority but in practice has become a weapon of the majority see Joseph L. Weiner, "Conflicting Functions of the Upset Price," 27 \textit{Col. L. Rev.} 132 (1927). For a discussion of these cases see 13 \textit{Chicago-Kent Review} 160 and 355 (1935).

\textsuperscript{14} Chicago Title & Trust Co. v. Robin, 361 Ill. 261, 198 N. E. 4 (1935); Chicago Title & Trust Co. v. Bamburg, 361 Ill. 269, 198 N. E. 10 (1935).

\textsuperscript{15} For example, Robert v. Goodwin, 288 Ill. 561, 123 N. E. 559 (1919).


\textsuperscript{17} Strauss v. Anderson, 283 Ill. App. 342 (1935); In re Knickerbocker Hotel Co., 82 F. (2d) 981 (1936); First National Bank v. LaSalle-Wacker Bldg. Corp., 280 Ill. App. 188 (1935).

\textsuperscript{18} 252 F. 456 (1918).

\textsuperscript{1} 172 So. 114 (1937).
plainant of its property without due process of law and constituted an unauthorized exercise of the taxing power.

The Hood-McPherson Realty Company sought to enjoin the installation of the meters upon the ground that they constituted a nuisance as to the public in general and as to the plaintiff in particular. In holding the parking meters to be a deprivation of complainant's property without due process of law, the court appears to have rested its decision on the basic premise that such regulation denied the complainant and its customers free access to its property. As a general proposition it cannot be doubted that the owner of property abutting the street has the right to ingress and egress to and from his lot over and by means of the adjacent portion of the street. It has further been held that the right of unobstructed accessibility extends to patrons entering and leaving the premises and who need to stop briefly in the street in front of the property.

In the case of Haggenjos v. City of Chicago, the Supreme Court of Illinois held an ordinance absolutely prohibiting parking in the Chicago central business district to be invalid. In the subsequent case of City of Chicago v. McKinley, the same court sustained a new ordinance allowing a parking limit of three minutes in the same area, as such limit allowed a reasonable time for alighting for the purpose of entering adjoining property. Illinois decisions, therefore, indicate that the ordinance might have been sustained as to the due process clause had it provided a reasonable time for stopping without the necessity of paying the parking fee.

The Birmingham ordinance was also held invalid on the ground that it constituted an unauthorized exercise of the taxing power. The power to tax for revenue purposes is not included in the police power of the state, and any attempt to create revenue under the guise of police regulation will be declared invalid. A license fee required by an ordinance designed as a police regulation

2 Ritchhart v. Barton, 193 Iowa 271, 186 N. W. 851 (1922); Central Trust Co. of N. Y. v. Hennen, 90 F. 593 (1898); City of Chicago v. Baker, 98 F. 830 (1900); City of Chicago v. Union Building Association, 102 Ill. 379, 40 Am. Rep. 598 (1882); Sears v. City of Chicago, 247 Ill. 204, 93 N. E. 158 (1910); First National Bank of Montgomery v. Tyson, 133 Ala. 459, 32 So. 144 (1902).


4 336 Ill. 573, 168 N. E. 661 (1929).

5 344 Ill. 297, 176 N. E. 261 (1931).

should not exceed the costs of inspection and supervision occasioned thereby.\textsuperscript{7} The city cannot, however, be expected to anticipate the exact cost of such regulation and the exact yield of such license fee and if the revenues exceed the costs by a reasonable margin the measure will not thereby be rendered invalid.\textsuperscript{8} If the amount of excess revenue is unreasonable, as was apparently the case here, the ordinance will be held to have exceeded the police power.

The court further ruled that the parking meters, having been erected without due authority and constituting a permanent obstruction in the street, were a public nuisance.\textsuperscript{9} The plaintiff, having been particularly and specially damaged thereby, was entitled to maintain an action for their removal.\textsuperscript{10}

The Supreme Court of Florida, in the case of \textit{State ex rel. Har-kow v. McCarthy},\textsuperscript{11} recently upheld a similar ordinance of the city of Miami. In this case the defendant was arrested for parking his automobile in front of a parking meter and failing to deposit the required five-cent coin. The question of due process was not raised. Although holding the ordinance valid as a lawful exercise of the police power the court intimated that a different result would have been obtained if the purpose of the ordinance had been to raise revenue. The court added that the burden of proving the unreasonableleness of the fee charged was upon the party asserting such fact, in this case the defendant.

In view of the questions raised, the holding of the Alabama court in \textit{City of Birmingham v. Hood-McPherson Realty Company} does not appear to be necessarily controlling with regard to ordinances authorizing the installation of parking meters. The questions as to whether the parking meters deny the owner and his customers access to his property and whether the ordinance constitutes a revenue measure are matters of fact to be determined in each case by the jury. The decision is interesting, however, as indicative of the limitations beyond which such ordinances cannot extend.

J. M. LOCKHART

\textsuperscript{7} \textit{State ex rel. City of Bozeman v. Police Court of City of Bozeman}, 68 Mont. 435, 219 P. 810 (1923); \textit{Berry on Automobiles} (3rd ed.), sec. 104.
\textsuperscript{8} \textit{City of East St. Louis v. Trustees of Schools}, 102 Ill. 489 (1882); \textit{State ex rel. City of Bozeman v. Police Court of City of Bozeman}, 68 Mont. 435, 219 P. 810 (1923); \textit{Tenney, Chairman, etc. v. Lenz}, 16 Wis. 589 (1863).
\textsuperscript{9} \textit{Densmore v. City of Birmingham}, 223 Ala. 210, 135 So. 320 (1931).
\textsuperscript{10} \textit{City of Chicago v. Union Bldg. Association}, 102 Ill. 379 (1882); \textit{Rigney v. City of Chicago}, 102 Ill. 64 (1882).
\textsuperscript{11} 171 So. 314 (1936).
MUNICIPAL CORPORATIONS — STATUTORY CONSTRUCTION — RE-
FUNDING OF EXISTING BONDED INDEBTEDNESS AS CONSTITUTING
PAYMENT.—In the case of Tonry v. Board of Levee Commission-
ers for Orleans Levee District, the Supreme Court of Louisiana
validated refunding bonds issued by the Orleans Levee Board and
held that the holders of the new bonds were subrogated to all the
rights of the holders of the old bonds, including the right to have
a special one mill tax levied for the payment of principal and
interest on such bonds. In so doing the court disregarded the
strict wording of the statute authorizing the levy of such special
tax and placed a construction upon it which gave expression to
its intendment rather than its literal wording.

In 1928, the Orleans Levee District issued its bonds to provide
funds to reimburse certain property owners for damages result-
ing from the voluntary destruction of certain levees below New
Orleans. To provide for the payment of principal and interest
on these bonds a special one mill tax was authorized by the Louis-
iana legislature. This legislation provided that "when the bonds,
notes or certificates of indebtedness, issued hereunder, shall have
been paid in full, said tax shall cease to be levied."

A taxpayer contested the issuance of bonds refunding this debt
at a lower rate of interest because the resolution authorizing the
refunding bonds subrogated the new bonds to all the rights of
holders of the old bonds including the right to have a special one
mill tax levied for the servicing of the bonds. The refunding
bonds were sold on the open market and the proceeds used to
pay the old indebtedness, and the plaintiff accordingly asserted that
the payment of the old bonds, from the proceeds of the new bonds,
constituted such payment as was contemplated by the legislative
authorization, and ended the authority of the Levee Board to
levy the aforesaid one mill tax.

In the determination of this question the court was appar-
ently guided by the general rules of statutory construction and
specific holdings with regard to the extension of bonded indebted-
ness. As a general rule a legislative limitation will be construed
in the broadest sense which will advance the benefit sought and
the words used are given a meaning in accordance with their usual
and customary signification and their fair intendment.

In the present case the taxpayers of the Levee District would
benefit from the reduction in interest resulting from the refund-

1 171 So. 836 (La. 1937).
2 Act No. 2 of the Extra Session for 1927 of the Louisiana legislature.
3 Spilman v. City of Parkersburg, 35 W. Va. 605, 14 S. E. 279 (1891).
4 Samuels v. City of Clinton, 184 Ky. 97, 211 S. W. 567 (1919).
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ing operation and a strict construction of the limitation, enacted for their benefit, would tend to penalize them. Courts have been inclined to construe such limitations liberally where a strict construction would tend to prevent the accomplishment of the beneficial purposes for which the limitation was adopted.⁵

In a number of cases involving the extension of existing indebtedness the courts have taken the position that the issuance of bonds to redeem outstanding bonds or other forms of indebtedness is not the creation of a new indebtedness but merely a change in the form of such indebtedness,⁶ and this doctrine has been applied without distinction between cases involving the exchange of bonds and cases where refunding bonds were sold and the proceeds used to redeem the old bonds.⁷

A case squarely in line with the present case is Blanton v. Board of County Commissioners⁸ wherein the court stated: "The mere renewed recognition of a subsisting liability in the issuance of a new bond declared in the very act which authorizes the issue 'to be a continuation of the liability' resting upon the county cannot upon any sound reasoning be deemed the creation of a new debt in the sense of falling under the restrictions applicable to new contracts of indebtedness with the deprivation of the pre-existent means of enforcing performance by the levy of the necessary taxes."

It appears, therefore, that the Louisiana court was justified by precedent and authority in disregarding the strict wording of the statute and applying a construction which granted rather than denied the benefit and protection intended.

J. M. LOCKHART

SALES—IMPLIED WARRANTY OF FITNESS OF FOOD—CONTRACT LIABILITY OF RESTAURANT KEEPER FOR SERVING UNFIT FOOD.—The Supreme Court of Rhode Island in the recent case of Ford v. Waldorf System, Inc.,¹ held that a restaurant keeper who serves food for immediate consumption on the premises impliedly war-

⁵ Levy v. McClellan, 196 N. Y. 178, 89 N. E. 569 (1909); Thom v. Mayor & City Council of Baltimore, 154 Md. 273, 141 A. 125 (1928); Hotchkiss v. Marion, 12 Mont. 218, 29 P. 821 (1892).
⁷ Hotchkiss v. Marion, 12 Mont. 218, 29 P. 821 (1892); Poughkeepsie v. Quintard, 136 N. Y. 275, 32 N. E. 764 (1892).
¹ 101 N. C. 535, 8 S. E. 162 (1888). See also State ex rel. Judd v. Cooney, 32 P. (2d) 851 (Mont. 1934); Board of Commissioners v. Travelers’ Ins. Co., 128 F. 817 (1904).
¹ 188 A. 633 (R. I., 1936), restaurant serving beans containing wood.
rants the fitness of the food for human consumption, and he is liable in assumpsit for a breach of this warranty irrespective of the existence of negligence. This decision adds one more state to those adhering to this relatively new doctrine.

The earliest American case to impose such a liability on a restaurant keeper was that of Leahy v. Essex, decided in New York in 1914. Prior to that time a patron injured by unwholesome food was limited to an action in tort where it was necessary to allege and prove actual negligence. But courts were imposing the harsher rule of liability on an implied warranty to retail merchants who sold food for immediate consumption. The fact that these two different rules of liability were being imposed on cases analogous in fact, although distinguishable, was one factor that led to the same rule being applied to both.

Why is not the serving of food by a hotel or restaurant just as much a sale of the food as where a merchant sells the same kind of food to be consumed elsewhere? The answer is partially historical and partially factual. In early times the serving of food was a function of the innkeeper, and restaurants as we know them today were non-existent. The guest at the inn paid a sum which included his room and food for both himself and horses. Thus the early English cases hold that the innkeeper or victualer did not sell but "uttered his provision" and therefore was not a trader within the meaning of the bankruptcy acts.

In restaurants where service, music, and entertainment comprise the largest part of the price paid for a dinner, this reasoning might apply even today, for the furnishing of food can still

2 148 N. Y. S. 1063 (1914), restaurant serving unwholesome pie. The earlier case of Race v. Krum, 146 N. Y. S. 197 (1914), aff'd 222 N. Y. 410, 118 N. E. 853 (1918) imposed liability on the implied warranty on a druggist who sold some impure ice cream, manufactured by himself. The court stated in deciding it, that it must be borne in mind we are not dealing with a case involving an inn or restaurant keeper. See 27 Yale L. Jour. 1069 for a discussion of this case.


4 Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210 (1898); Race v. Krum, 222 N. Y. 410, 118 N. E. 843 (1918); Williston on Sales, 1, 480-482, secs. 242-242a.


6 "It seems to me idle, in determining the question, to seek analogies derived from implied warranties in sales of goods. In the first place, one is met at the outset by the legal theory which has long prevailed, that food furnished by a victualer is not a sale."—Judge Augustus Hand in Valeri v. Pullman Co., 218 F. 519 (1914).

7 "The analogy between the two cases of an inn-keeper and victualer is so strong that it cannot be got over."—Lord Mansfield in Sanderson v. Rowles, 4 Burr. 2064, 98 Eng. Rep. 77 (1767).

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be said to be a service rather than a sale of the food. However, in the modern restaurants where portions of food are served at stipulated price per portion, the transaction comes closer to being a sale. This is especially true in cafeterias and automats where the price paid is no more for service than is the price set by a retail store on the goods it sells. Every sale includes an element of service. Certainly the argument that title does not pass would have little or no application to this type of restaurant.\(^9\)

For the purpose of enforcement of the criminal or tax laws various states have held the serving of food to be a sale. Thus the serving of prohibited game is a sale within the game laws;\(^10\) the serving of oleomargarine is a violation of a law prohibiting the sale of it;\(^11\) the serving of food in a hotel restaurant is a sale within an act imposing a percentage tax, such as an occupational tax;\(^12\) on sales. These decisions while not directly in point have been relied upon to impose the implied warranty doctrine.\(^13\) It has been stated that before a recovery may be allowed on the implied warranty it is not necessary that there be a sale in fact, but that a qualified sale\(^14\) or contractual relation between the parties will suffice.\(^15\)

Cases allowing a recovery on the implied warranty theory arose on the following facts: restaurant serving beans containing stones,\(^16\) hotel serving kidney saute containing a mouse,\(^17\) restaurant serving unfit fish,\(^18\) restaurant serving spoiled pork,\(^19\) restaurant serving unfit chicken,\(^20\) lunch counter serving spoiled ham salad,\(^21\) and others.\(^22\) In all these cases the one serving the

\(^12\) The Brevoort Hotel Co. v. Ames, 360 Ill. 485, 196 N. E. 461 (1935).
\(^16\) Ibid.
\(^17\) Barrington v. Hotel Astor, 171 N. Y. S. 840 (1918).
food had prepared it and was therefore in a position to determine its fitness.

In the cases where the food dispensed was not prepared by the server of it, but was purchased from others and was of such a nature that its unfitness could not be determined without a destruction of the food itself, recovery has been allowed in such cases as a lunch counter serving deleterious ice cream,\(^\text{23}\) a restaurant serving unwholesome frankfurter,\(^\text{24}\) a restaurant serving a roll containing a pebble,\(^\text{25}\) a lunch counter serving chow mein containing glass.\(^\text{26}\)

Contrasted with the doctrine of liability on the implied warranty theory is the original common law doctrine that, with but a few recognized exceptions, there can be no liability where there is no fault. This doctrine is followed in numerous jurisdictions\(^\text{27}\) although the tendency is toward the adoption of the implied warranty theory as in the instant ease. It has been urged on the courts in jurisdictions adhering to the common law theory that Section 15 of the Uniform Sales Act\(^\text{28}\) should apply, but such courts hold that this act was merely declaratory of the common law and applied only to transactions that were sales at common law.\(^\text{29}\)

Public safety and health is of such primary importance that the application of the implied warranty doctrine can be justified

\(^{23}\) S. H. Kress & Co. v. Ferguson, 60 S. W. (2d) 817 (Tex. App., 1933).


\(^{26}\) Goetten v. Owl Drug Co., 6 Cal. (2d) 683, 59 P. (2d) 142 (1936).


\(^{28}\) Smith-Hurd's Ill. Rev. Stats. (1933), Ch. 121½, § 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

on this ground alone. As between the restaurant proprietor and his patrons, the restaurant keeper is certainly in a better position to select and examine the quality of food that he serves than his guests who are obliged to rely upon his skill and reputation.

In Illinois the earlier case of Sheffer v. Willoughby (which has been cited several times in other jurisdictions as authority for the proposition that there is no implied warranty) was an action in tort and recovery was denied by the Supreme Court because of the failure of the plaintiff to prove negligence. The court followed the rule laid down in Weideman v. Keller, an appellate court case which was later reversed by the Supreme Court on appeal. In the later case of Greenwood v. John R. Thompson Company the Appellate Court refused to sustain a demurrer to a complaint containing a count on the implied warranty theory. In the case of The Brevoort Hotel Company v. Ames, a tax case, the Supreme Court held that the serving of food by a hotel was a sale. In view of these cases, and the trend in other jurisdictions, it would appear that if the question involved in the instant case were presented, the Supreme Court of Illinois might well adopt the reasoning in the Thompson case and apply the implied warranty theory of liability.

F. G. Anger

WILLS—ADEMPTION—REDEMPTION OF STOCKS AND DEPOSIT OF PROCEEDS IN GENERAL BANK ACCOUNT.—In the recently decided case of In re Lewis's Will Trusts the English Court of Chancery held a legacy of specific stocks which were redeemed by the issuing company and the proceeds deposited by testator in his general bank account not to have been adeemed, because the bequest of the named securities contained the clause "or the investments

30 163 Ill. 518, 5 N. E. 253, 34 L.R.A. 464 (1896).
31 58 Ill. App. 382 (1895), sale by retail merchant of pork containing trichina.
32 171 Ill. 93, 49 N. E. 210 (1898). The court said: "Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it was purchased."
34 360 Ill. 485, 196 N. E. 461 (1935). "So far as cases of this type may be considered as having a bearing on the question, we incline to the view that the cases last cited [those holding that food served by a restaurant keeper is a sale of the food with an implied warranty] announce the better rule, but from the nature of those cases do not believe that any of them are of controlling significance here."
1 [1937] 1 Ch. 118.
representing the same at my death if they shall have been con-
verted into other holdings."

Both in England and in this country an intention to revoke a
legacy has been implied from any act of the testator whereby he
disposes of the subject matter of the legacy after making the
will. And unless the specific property composing it is in testa-
tor's possession at the time of his death, a legacy is considered
ademed and lost to the legatee.

In 1789, Lord Chancellor Thurlow said that the only rule to be
adhered to was to see whether the subject of the specific bequest
remained in specie at the time of testator's death, for if it did not
there must be an end to the bequest: and that the idea of dis-
cussing what were the particular motives and intention of the tes-
tator in each case in destroying the subject of the bequest would
be productive of endless uncertainty and confusion.

To speculate, as did the court in the O'Sullivan case on what
the testator meant by "investment," and to conclude that he
considered a bank deposit included in its definition appears to be
just such an attempt to analyze the testator's motive in banking
the proceeds of his stock and to permit what the court decides
was the testator's intent to override the fact that the subject mat-
ter of the legacy has been so changed as not to be identifiable or
even traceable as such.

It would have seemed that the rule holding a specific legacy
lost if the property to which it referred was not in testator's
possession, in specie, at his death, was so firmly established by
stare decisis as to preclude its alteration by other than legislative
action.

L. WHIDDEN

2 Harrison v. Jackson, 7 Ch. 339 (1877); In re Goodfellow's Estate, 166
Cal. 409, 137 Pa. 12 (1913); Kenady v. Sinnott, 179 U. S. 606, 45 L. Ed. 339
(1900); Cowles v. Cowles, 56 Conn. 240, 13 A. 414 (1887).

3 Georgia Infirmary v. Jones, 37 F. 750 (1889), appeal dismissed in 149
U. S. 774, 37 L. Ed. 966 (1892); Welch v. Welch, 147 Miss. 728, 113 So.
197 (1927); King v. Sellers, 194 N. C. 533, 140 S. E. 91 (1927); Elwyn v.
De Garmendia, 148 Md. 109, 128 A. 913 (1925); Tanton v. Keller, 167
Ill. 129, 47 N. E. 376 (1897).