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PRESENT STATUS OF COMPENSATION ACTS IN ADMIRALTY

The decision of the United States Supreme Court in *Southern Pacific Company v. Jensen*,[1] denying to state compensation acts any validity as to cases coming within the jurisdiction of admiralty, has already been commented on in these pages.[2] Relying on this decision, state courts have been compelled to refuse awards to injured maritime employees[3]—"innocent victims of the old feud between federal and state control."[4] This was the situation as regards eight New York

[1] (1917) 244 U. S. 205; 37 Sup. Ct. 524, Ann. Cas. 1917 E, 900.

[2] (1917) 27 YALE LAW JOURNAL, 255.

[3] See *Tallac Company v. Pillsbury* (1917, Cal.) 168 Pac. 17; *Neff v. Industrial Commission of Wis.* (1917, Wis.) 164 N. W. 845. *Cf. Lanigan v. Aetna Life Ins. Co.* (1917) 57 N. Y. L. J. 1035.

[4] 12 NEW REPUBLIC, 283 (Oct. 13, 1917).

cases considered at one time by the Appellate Division, in all of which compensation was denied, and in all but one of which awards made by the Industrial Commission were set aside. *Sullivan v. Hudson Nav. Co.* (1918, App. Div.) 169 N. Y. Supp. 645. The majority held that awards made prior to the *Jensen* decision, either with the assent of the insurers, or without the question of jurisdiction having been raised, might now be reopened and set aside. They also held that the decision included within its scope not only carpenters engaged as repair men and injured while so engaged on board a ship anchored in navigable waters, but also dockworkers who were not working upon navigable waters but were employed under maritime contracts.

The view of the majority that admiralty jurisdiction extends to maritime contracts performed on land is undoubtedly correct.[5] And their view upon the other branch of the case that lack of jurisdiction of the subject matter is never waived and may be asserted at any time is likewise unanswerable.[6] Though the dissenting judges denied that admiralty jurisdiction extended to dockworkers, they did not contest the rule as to jurisdiction, but held that it applied only when lack of jurisdiction appeared from the record. In only two of the cases did they consider that the record disclosed such a situation, and they thought that the other cases should not be reopened to allow proof along those lines. That this position is technical they admit, but say that it is fair "to offset technicality against technicality in the interest of justice." But their position seems unjustifiable. While we may sympathize with their regret at the *Jensen* decision, yet it is the law of the land, and specious means should not be resorted to in order to prevent the insurers from taking advantage of it. That the insurers may have collected premiums upon the basis of agreements to pay such compensation claims is a claim properly to be made only by the employers in seeking refund of premiums paid, and even in such case

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[5] See Mr. Justice Pitney's statement in *Southern Pacific Company v. Jensen, supra,* at p. 252: "The civil jurisdiction in admiralty in cases *ex contractu* is dependent upon the subject matter; in cases *ex delicto* it is dependent upon locality."

[6] 15 C. J. 809; *McClaughry v. Deming* (1902) 186 U. S. 49, 66, 22 Sup. Ct. 786, 46 L. Ed. 1049. The case of *Valley S. S. Co. v. Wattawa* (1917) 244 U. S. 202, 37 Sup. Ct. 523, cited in 27 YALE LAW JOURNAL, 255, n. 1, where the court refused to consider the jurisdictional question decided in *Southern Pacific Company v. Jensen, supra,* on the ground that the point was not raised in the trial court, is not really *contra,* because, whether right or wrong, it went off on questions of state and federal appellate procedure. The case was one, however, where an employee had obtained a judgment in a common law action against his employer for an injury on shipboard under the Ohio elective compensation act, denying to an employer who, as in this case, refused to submit to the compensation features of the act, the defenses based on the fellow-servant rule, assumption of risk, or contributory negligence. As hereinafter developed, it is not clear that the rule of the *Jensen* case applied.

there may not have been an unjust enrichment where the insurance agreement is the usual one to pay only compensation claims legally due.[7]

The majority judges properly cite the *Jensen* decision as sustaining the validity of the saving clause of the Act of 1789, which saved to suitors from the grant of admiralty jurisdiction to the Federal courts "in all cases the right of a common law remedy where the common law is competent to give it."[8] Likewise, they correctly view the Federal decision as holding that it is the form of the remedy rather than the basis of liability created by compensation acts which renders such acts unconstitutional as applied to admiralty, and their conclusion seems correct that if the New York Compensation Act had provided a common law remedy for its enforcement, it might have been upheld in maritime cases.[9] The Court does not, however, refer to the recent amendment by which Congress added to the saving clause the words "and to claimants the rights and remedies under the workmen's compensation laws of any state."[10]

This Amendment, which was popularly supposed to nullify the *Jensen* decision,[11] has caused considerable disagreement among commentators.[12] In the case of *Veasey v. Peters* (1917, La.; rehearing,

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[7] *Cf. Matter of The Iron Steamboat Co.* (1917) 58 N. Y. L. J. 17.

[8] 1 U. S. St. at L. 76, 77, chap. 20, sec. 9; U. S. Comp. Stat. 1916, secs. 991 (1), 1233. But in (1917) 6 CAL. L. REV. 72, n. 18, it was considered that references in the *Jensen* case to the saving clause were mere *dicta*. *Cf.* 27 YALE LAW JOURNAL, 261, n. 21.

[9] "The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction." *Southern Pacific Co. v. Jensen, supra,* at p. 218. That recovery under state statutes has been allowed in both state and admiralty courts for maritime cases of death by wrongful act, for which there was no basis of recovery at common law, see 27 YALE LAW JOURNAL, 258, nn. 11, 12.

[10] 40 Stat. at Large, 385 (Oct. 6, 1917).

[11] See 12 NEW REPUBLIC 283 (Oct. 13, 1917), felicitating Congress on so effectually aiding shipping at a time when the need thereof is vital.

[12] Its constitutionality is considered beyond question in (1917) 17 COLUMBIA L. REV. 705, 707, and in (1918) 3 SOUTH. L. QUART. 76, but its constitutionality is questioned and its effectiveness doubted in (1917) 6 CAL. L. REV. 72, n. 18, and (1918) 31 HARV. L. REV. 488. In 17 COLUMBIA L. REV. 707 it is suggested that the New York Compensation Act will probably be held invalid as to maritime cases as imposing a double liability upon the employer, for which *Cunningham v. Northwestern Imp. Co.* (1911) 44 Mont. 180, 119 Pac. 554 is cited, and a federal compensation law is suggested as a remedy. Yet it is difficult to see how the situation in respect to double liability differs from that in any other case where admiralty jurisdiction is concurrent with state jurisdiction; the tribunal which first acquires jurisdiction retains it and two recoveries are not allowed. If the amendment is valid, claimants would naturally appeal to the state tribunal for their compensation remedy. In 3 SOUTH. L. QUART. 76, a federal compensation law is urged as necessary to cover the case of injuries upon the high seas. This

1918) 77 So. 948, it was relied upon to uphold an award, previously disallowed on the authority of the *Jensen* case, in the case of an injury occurring before its passage. This case, which concerns a stevedore injured in the unloading of a vessel, involves a curious misreading of authorities.[13] Upon the second hearing of the case, the court distinguishes the *Jensen* case on the ground that it was a proceeding *in rem* to hold the ship responsible, which is palpably an error. And it distinguishes *Atlantic Transport Company v. Imbrovek,*[14] upon which it had previously relied for its decision that admiralty had jurisdiction, on the ground that there the stevedore was engaged in loading the vessel, while in the case at bar (as in the *Jensen* case) he was unloading. The court then gives the amendment as a further ground for its decision, stating that because of its remedial character there is nothing to prevent a retroactive effect being given it. This seems erroneous, for the court does not distinguish the case where there is merely a change of remedy from the case where the giving of a certain remedy really creates a new basis of liability.[15] In view of the *Jensen* case, Congress by the amendment attempts to create a new basis of liability and the amendment therefore cannot be retroactive.

The court does not discuss the constitutionality of the amendment. As already suggested,[16] it seems to the writer that the amendment leads to a dilemma. If Congress can legislate to save to suitors in maritime cases their common law remedies,—and the saving clause of the Act of 1789 has always been considered valid and was so considered in the *Jensen* case,—why can it not legislate to save to such suitors their statutory compensation remedies? Yet the *Jensen* case holds that such remedies interfere with the grant of admiralty jurisdiction in the United States Constitution, an authority superior to Congress. There will be some question about any view of the case. To hold the amendment invalid while the saving clause itself has been upheld would be to ascribe some strange virtue to a common law remedy, a narrowness of view implying a recurrence to former times when forms of action were absolutely rigid.[17] To hold the amend-

seems a valid argument if the tort theory of compensation acts is to prevail. If the contract theory is to be adopted, and such acts given extra-territorial effect, this argument would fail, and as indicated in (1917) 27 YALE LAW JOURNAL, 259, local state acts seem otherwise preferable. For discussions of the extra-territorial operation of compensation acts, see (1917) 27 YALE LAW JOURNAL, 113, and (1918) 27 YALE LAW JOURNAL, 707.

[13] See criticism in (1918) 16 MICH. L. REV. 562.

[14] (1914) 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157.

[15] *Jacobus v. Colgate* (1916) 217 N. Y. 235, 111 N. E. 837.

[16] (1917) 27 YALE LAW JOURNAL, 261, n. 21.

[17] That state courts may apply equitable remedies to cases where the jurisdiction of admiralty is concurrent, see *Reynolds v. Nielson* (1903) 116 Wis. 483, 93 N. W. 455, 96 Am. St. Rep. 1000 (suit for partition of vessel); *Soper v.*

ment constitutional, the course desirable from a practical point of view, is to overrule, in part, the *Jensen* decision, to consider that it turned entirely upon the wording of the statute, and to decide that Congress may authoritatively interpret the meaning of the grant of admiralty jurisdiction in the Constitution.

But is there not a way out through the clear intimation of the Supreme Court that it is the form of remedy which is objectionable? Why not, therefore, provide a common law remedy, capable of enforcement by the ordinary process of the court, for the compensation liability?[18] And under elective compensation acts, such as those of Connecticut and Ohio, or at least under extensions of the idea contained in such acts, why is it not possible to subject such maritime employers as refuse to submit voluntarily to the ordinary compensation procedure to suit in common law actions with the defenses based on the fellow servant rule, assumption of risk and contributory negligence not available?[19] Such actions are enforced by common law remedies and the ordinary processes of the courts, and do not involve any greater change of liability from the common law than do the actions created by the death damage statutes. This would not be unfair discrimination against such employers. At most it would be simply taking from them an unfair discrimination in their favor.

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Manning (1888) 147 Mass. 126, 16 N. E. 752; *Knapp S. & Co. v. McCaffrey* (1899) 177 U. S. 638, 20 Sup. Ct. 824.

[18] It would seem that *Veasey v. Peters, supra,* might have been decided in accordance with this view, and in favor of the employee, on the original hearing, for the Louisiana Act provides that it shall be enforced through an ordinary action at law, though the court is not to be bound by common law rules of evidence or technical rules of procedure. Louisiana Acts of 1914, No. 20, sec. 18. If Louisiana can be considered to have any "common law" remedies, this would appear to be one. But the court, in its original opinion, considers the *Jensen* case as referring, not to the change of remedy created by compensation acts, but to the change of liability. In *Bjolstad v. Pacific Coast S. S. Co.* (1917, N. D. Cal.) 244 Fed. 634, a compensation act was enforced negatively in an admiralty court. Here suit had been brought by libel in admiralty for damages for the death of the defendant's employee, the action being grounded upon the New Jersey death damage statute. The court held that the New Jersey Compensation Act applied, that under that act no recovery could be had for alien dependents, and that in this case, the dependents being aliens, judgment must be for the defendant. In *Southern Surety Co. v. Stubbs* (1917, Tex. Civ. App.) 199 S. W. 343, it was held that the fact that admiralty had jurisdiction was no bar, under the *Jensen* case, to a suit at common law against an insurer for compensation.

[19] See note 6, *supra.*

RESCISSION FOR INNOCENT MISREPRESENTATION

In discussing the "rescission of contracts" on the ground of misrepresentation,[1] a recent English writer makes the following statement: "In order to justify the interference of the court, . . . such contract must be executory, on one side or the other. If it has been fully completed by conveyance, or otherwise fully executed and exhausted on both sides, rescission will always be peremptorily refused, subject to the two exceptions mentioned below."[2] The two exceptions are: (1) "Where the misrepresentation was characterized by fraud"; (2) where "there has been a misrepresentation leading to *error in substantialibus,* or 'essential error,' that is to say, where the representee has received under the contract something totally different, in substance and nature, from that which was represented."[3]

Apparently the American law, following the opinions of American text-writers rather than the English view, is developing a different doctrine.[4] The Appellate Division of the New York Supreme Court

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[1] Like so many of the words in our legal vocabulary, the word "rescission" as applied to contracts is ambiguous. In discussions dealing with the effects of misrepresentation upon purely executory agreements, it is often said that the representee may in a given case "rescind the contract," when all that is meant is that the misrepresentation entitles him to treat the agreement as a legal nullity. In such cases it would seem that upon a correct analysis we must say that the representee is as yet under no contractual *duty* to the representor, for he need do nothing, before action is brought, to "disaffirm" the transaction. *Thurston v. Blanchard* (1839, Mass.) 22 Pick. 18. He has, however, a *privilege* and a *power* to "affirm" or "ratify" the transaction, i. e. to turn it into a binding bilateral contract. This *privilege* and *power* are not subject to destruction by the representor, i. e. they are protected by an *immunity.* On the other hand, "rescission" seems to have a different meaning in discussions of transactions not purely executory. If, for example, the representee has received something from the representor, his promise to pay for it seems to result in a contractual *duty* to do so. This *duty,* however, the representee has the *privilege* and *power* to destroy by tendering back what he received. The misrepresentation alone is therefore no defense to an action by the representor. *Dawes v. Harness* (1875) L. R. 10 C. P. 166. So also if the representee is, as plaintiff, seeking to recover at common law the thing which the misrepresentation induced him to sell to the defendant, he must before beginning his action offer to restore what he himself received from the defendant. *Wilbur v. Flood* (1867) 16 Mich. 40. In still other cases the "right to rescission" means the right to call upon the court of equity to restore the *status quo,* i. e. the condition as it was before the transaction in question took place. Here the representee need not, before action brought, offer to restore what he received from the representor, as the decree of the court will provide for that. *Garner, Neville & Co. v. Leverett* (1858) 32 Ala. 410.

[2] Bower, *Actionable Misrepresentation,* sec. 262.

[3] The author treats the second exception as not fully established by the authorities. See sec. 264.

[4] *Canadian Agency, Ltd. v. Assets Realization Co.* (1914, N. Y.) 165 App. Div. 96, 150 N. Y. Supp. 769.

in 1914 decided squarely that rescission of a fully executed purchase and sale of corporate stock would be granted in equity where the plaintiff was induced to purchase by misrepresentations innocently made. As the case arose on demurrer to a complaint which alleged misrepresentations but failed to allege fraud, the issue was squarely raised. The misrepresentations in that case did not result in "essential error," i. e. the thing received was not so different from the thing bargained for that it could be regarded as "totally different." This decision of the intermediate appellate court has now received the approval of the court of last resort in New York in the case of *Bloomquist v. Farson* (1918, N. Y.) 118 N. E. 855, in which the plaintiff sought to recover corporate bonds which he had transferred to the defendant in exchange for the bonds concerning which the misrepresentations were made. While the complaint alleged fraud, the trial court found that the misrepresentations were innocently made.[5] In affirming the judgment of the Appellate Division, which had affirmed a judgment of the trial court granting rescission, the Court of Appeals relied entirely upon a line of New York cases, ending with the Appellate Division case referred to above.[6] Apparently in doing so the court was not aware that the English law was to the contrary, or that there is in fact only slight authority in the way of actual decisions for the general rule now laid down that "an action may be maintained in equity to rescind a transaction which has been consummated through misrepresentations not amounting to fraud."[7] With the exception of the one Appellate Division case referred to, the prior New York cases cited by the court do not, apparently, sustain the decision, except by way of more or less weighty *dicta*.

The English law seems to be in a state which can hardly be described as ideal. It may be summarized as follows: 1. Innocent misrepresentations are not as such a defense to an action at law for damages for breach of contract.[8] 2. They are as such a defense to actions for

[5] As these findings of fact had been affirmed unanimously by the Appellate Division, the question of their correctness was not open in the Court of Appeals.

[6] Note 4, *supra*.

[7] If the misrepresentations were made "fraudulently," i. e. not innocently, the bonds or their value could of course be recovered at law in an appropriate action.

[8] *Kennedy v. Panama, etc., Mail Co.* (1867) L. R. 2 Q. B. 580. In that case, however, all the judges recognized that if the misrepresentation led to *error in substantialibus*, there would be a defense at law. Bower (*op. cit.* 231) states that innocent misrepresentations are now a defense to all actions on the contract, but apparently cites only *dicta* in support of the proposition. He relies upon the fact that under the Judicature Act "every court is now a court of equity." This hardly seems a sufficient reason for asserting that the rule at "common law" has necessarily been changed, although it is to be expected and hoped that under its influence the courts will ultimately adopt for the "legal" action for damages the principles applied in the "equitable" action for specific performance.

specific performance, except in cases in which it has been thought to be fair to grant specific performance with compensation.[9] 3. They are ground for rescission if the transaction is not "fully executed."[10] 4. They are not ground for rescission where the transaction has been "fully executed."[11]

The decision in the case of the *Canadian Agency, Ltd. v. Assets Realization Co.*,[12] was apparently based largely upon statements of text-writers who cite and rely chiefly upon *dicta*.[13] Indeed, some of them rely upon the very English cases which deny rescission where the transaction has been fully executed by the plaintiff. As a matter of sound policy, it seems only fair to compel a defendant to forego the benefit of a bargain which he has obtained by means of misrepresentations, even though the latter do not lead to *"error in substantialibus."* If so, there seems to be no sound reason for making the distinctions found in the English cases. If we are to be consistent, the innocent misrepresentations ought, subject to the exception set forth in the note below,[14] to be a defense to all actions, whether for damages or for specific performance, in which the representor seeks to obtain the benefit of the bargain; they ought also, with the same exception, to be a ground for compelling him to surrender that benefit if the transaction has been carried out in whole or in part.

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[9] Bower, *Actionable Misrepresentation*, sec. 342.

[10] *Flight v. Booth* (1834) 1 Bing. N. C. 370; *Redgrave v. Hurd* (1881, C. A.) 20 Ch. D. 1. The action usually is "in equity," i. e. in the Chancery Division. Apparently it may be brought in the King's Bench Division when the character of the relief sought makes that the appropriate tribunal.

[11] *Seddon v. North Eastern Salt Co.* [1905] 1 Ch. 326: *Angel v. Jay* [1911] 1 K. B. 666. *Cf.*, however, *Attorney-General v. Ray* (1873) L. R. 9 Ch. App. 397. Apparently "fully executed" must be interpreted to mean "on the part of the plaintiff," and not "on both sides," as Bower seems to state in the passage quoted at the opening of this discussion. If this were not so, rescission would have been granted in at least one of the cases above cited.

[12] Note 4, *supra*.

[13] The court cited, for example, 2 Parsons, *Contracts* (9th ed.) 775; Anson, *Contracts* (13th Eng. ed.) 172; Story, *Commentaries on Equity Jurisprudence* (13th ed.) 149.

[14] This should be subject to the limitation that enforcement of the contract ought not to be entirely denied when the misrepresentation is of such a character that if the transaction is carried out the thing which will be received by the representee will differ from that bargained for only in a way which is unessential, and for which adequate compensation can be made by an abatement in the purchase price. In such cases, very properly, specific performance is refused only if the representor declines to make pecuniary compensation by abatement in price. *Scott v. Hanson* (1829, Eng. Ch.) 1 Russ. & M. 128; *King v. Wilson* (1843, Eng. Ch.) 6 Beav. 124; *Hughes v. Jones* (1861, Eng. Ch.) 3 De G. F. & J. 307.

CONSEQUENCES ARISING FROM MISTAKE IN TRANSMISSION OF A TELEGRAPHIC OFFER FOR THE SALE OF GOODS

Through a mistake in the transmission of a telegram, an offer to sell potatoes at $1.35 per hundred was delivered as an offer to sell at 35 cents per hundred, and was promptly accepted. The offeror shipped the potatoes, sending a bill of lading to a bank with draft attached for the amount of the sale at $1.35 per 100. The offeree tendered the amount due at the 35 cent rate both to the bank and to the carrier, and being refused possession, brought replevin. A decision was rendered in favor of the plaintiff by the Kansas City Court of Appeals. *J. L. Price Brokerage Co. v. Chicago B. & Q. R. R. Co.* (1917, Mo. K. C. App.) 199 S. W. 732.

The conclusion of the court was based upon two assumptions: (1) that the offeror must be held for the mistake of the telegraph company; (2) that upon tender of the contract price the offeree's right of possession was complete. It is submitted that with respect to both of the above assumptions, in view of the particular facts of the case, the learned court was in error.

I.

There is much difference of opinion in regard to the test to be applied to the subject of mistake in the matter of offer and acceptance. Some of the leading jurists support the *will theory,* according to which no contract is formed unless the outward expression of the parties' will coincides with their inner will.[1] Others are in favor of what is called the *mercantile theory.* According to this theory a party will be bound whenever the other party reasonably assumed that the outward expression of the will corresponded with the inner will.[2] Still others entertain intermediate views.[3]

Whether an offer erroneously transmitted by an agent or a telegraph company should be governed by the same principles has been subject to dispute. The German Civil Code[4] allows the offer to be avoided under the same conditions as a declaration of intention made under a mistake. In regard to the later the Code provides:[5]

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[1] For example, Savigny, 3 *System des heutigen römischen Rechts,* 264. Berlin, 1840-1848.

[2] "The legal meaning of such acts on the part of one man as induce another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a 'reasonable man,' i. e. a judge or jury, would put upon such acts." Holland, *Jurisprudence* (10th ed.) 256.

[3] See Dernburg, 1 *Pandekten* (7th ed.) 228, note.

[4] Sec. 120.

[5] Section 119 (Wang's translation).

"A person who, when making a declaration of intention, was under a mistake as to its purport, or did not intend to make a declaration of that purport at all, may avoid the declaration if it is to be supposed that he would not have made it with knowledge of the state of affairs and with intelligent appreciation of the case."[6]

Anglo-American law has not yet adopted any definite theory with respect to the general question of mistake.[7] In the matter of the liability of the offeror for a mistake in the transmission of an offer by a telegraph company, the English[8] and Scotch[9] courts and a few American courts[10] hold that the offeror is not bound. The weight of American authority[11] and the better view make the sender responsible for the mistake of the telegraph company and give to him a right of action against the company.

Both the English and the American courts approach the problem from the standpoint of agency, according to which a principal is held for the mistakes of his agent made within the scope of his employment. The explanation of the English cases lies in the fact that in England the telegraph lines are connected with the postoffice and that according to Anglo-American law the Government is not responsible for the negligence of its employees. It seemed unfair to hold the sender liable on account of the carelessness of the telegraph company without giving him any redress against the company. With respect to the American doctrine the contention may be made that a telegraph company is an independent contractor and that the sender should not be held responsible, therefore, for mistakes in the transmission of telegrams. The liability of the sender of the message may be sustained nevertheless on the second theory above indicated,

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[6] A party avoiding a declaration under Sections 119 and 120 must compensate the other party for any damage the latter may have sustained by relying upon the validity of the declaration, not, however, beyond the value of the interest which the other party has in the validity of the declaration. The duty to make compensation does not arise if the person injured knew or ought to have known of the ground on which the declaration was voidable. Sec. 122, Civil Code.

The Japanese Civil Code renders a declaration which does not agree with the inner will void on principle. Section 95 provides as follows:

"An expression of intention is invalid when there is a mistake in the essential element of the juristic act. But when there is serious fault (culpable negligence) on the part of the person expressing intention he himself cannot assert such invalidity." (De Becker's translation.)

[7] Holland, *Jurisprudence* (10th ed.) 255.

[8] *Henkel v. Pape* (1870) L. R. 6 Ex. 7.

[9] *Verdin v. Robertson* (1871, Scot.) 10 Ct. Sess. Cas. 35.

[10] *Pepper v. Telegraph Co.* (1889) 87 Tenn. 554, 11 S. W. 783; *Shingleur v. Telegraph Co.* (1895) 72 Miss. 1030, 18 So. 425.

[11] *Western Union Telegraph Co. v. Shotter* (1883) 71 Ga. 760; *Ayer v. Western Union Telegraph Co.* (1887) 79 Me. 493, 10 Atl. 495; *Sherrerd v. Western Union Telegraph Co.* (1911) 146 Wis. 197, 131 N. W. 341. See also Jones, *Telegraph and Telephone Companies,* sec. 738.

governing mistake in the declaration of will. The sender having chosen the particular mode of communication should make good the promisee's reasonable expectation as induced by the promisor's act.[12] It follows that if there is anything in the message or in the attendant circumstances indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting.[13] In the case under discussion the exceptionally low price indicated in the telegram as received should have aroused the suspicion of the plaintiff that some mistake had occurred.

II.

If it be assumed, for the sake of argument, that the court's conclusion on the subject of mistake was correct, the question is whether the plaintiff was entitled to succeed in his action of replevin. In order to recover he must prove that at the time of the tender of the purchase price of $.35 per 100 he was entitled to immediate possession by virtue of some property right as distinguished from a mere contract right. It is manifest, however, that he had no such right. If the defendant had agreed to sell to the plaintiff potatoes at $.35 per 100 and thereupon declined to deliver them for less than $1.35 per 100 it could hardly be claimed that the plaintiff could replevy the potatoes after tendering $.35 per 100. He could have sued only in an action for breach of contract. The bill of lading in the case does not lead to a different conclusion. The potatoes were apparently consigned to the seller's order and a draft attached for the amount of the potatoes at $1.35 per 100. *Prima facie* these facts show a reservation of title in the shipper. In accordance with mercantile custom the shipper indicated in this manner that he did not intend to part with the legal title to the goods until the payment of the draft.[14] The buyer would thus have only a contract right for the delivery of the potatoes on tender of the purchase price, unless the special facts of the case disclosed an intention to confer upon him a property right. Such an intention may be inferred, perhaps, under ordinary circumstances, where it is reasonable to suppose that the

[12] See Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations*, 26 YALE LAW JOURNAL 169, 205.

The above constitutes also the ground upon which Section 120 of the German Civil Code rests. The Anglo-American doctrine that a principal is responsible for the negligent act of his agent within the scope of his employment is not recognized in Germany nor on the continent in general.

[13] *Ayer v. Western Union Telegraph Co.* (1887) 79 Me. 493, 499; 10 Atl. 495, 497; *Germain Fruit Co. v. Western Union Telegraph Co.* (1902) 137 Cal. 598, 70 Pac. 658.

[14] *Turner v. The Trustees of Liverpool Docks* (1851) 6 Ex. 543; *Dows v. National Exchange Bank* (1875) 91 U. S. 618; *Portland Flouring Mills Co. v. British Marine Insurance Co.* (1904, C. C. A. 9th) 130 Fed. 860.

buyer was to bear the risk of loss incident to the transportation of the goods. In such an event the courts would say that the consignor retained only a special property right. Upon a proper analysis the situation would in such a case be the same as if the seller had passed the title to the purchaser and the latter had given back to the former a purchase-money mortgage. The seller would thus have reserved the bare legal title for purposes of security only, the purchaser having obtained the beneficial ownership.[15] But if this theory be applied to the present case, it would seem clear that, whatever the seller's legal obligations, the "mortgage" right which he had in fact reserved was for $1.35 per 100. This conclusion rests, not on his undisclosed intention, but on the necessary interpretation of his acts in connection with the shipment. If these acts were sufficient to confer any property right on the buyer, it was only a right subject to the shipper's title by way of security to the amount of the draft. And as the buyer had never consented to receive any property right in the goods (and accompanying risk of loss) on these terms, it would follow that no title or property right whatever passed to the buyer.

This conclusion is supported by direct authority in a case even stronger in the buyer's favor, in that the bill of lading was made out to the buyer, but forwarded to a bank with draft attached for an amount claimed to be excessive.[16] In such a case the seller retains as security, not legal title, but what is called the *jus disponendi*—a right in the nature of a lien. But the extent of the right retained is measured, not by his contract obligation as interpreted by the court, but by his acts in connection with the shipment, or specifically by the amount of the draft which accompanies the bill of lading.

REMOVAL OF CAUSES: THE DOCTRINE OF EX PARTE WISNER

Among other cases on the subject of removal to the federal courts discussed in the February number of the present volume of the YALE LAW JOURNAL, the decision in *M. Hohenberg & Co. v. Mobile Liners, Inc.* (1917, S. D. Ala.) 245 Fed. 169, was noted.[1] The case was stated as one in which a citizen of one state sued a citizen of another state in a state court of a third state; and the holding that the defendant might remove to the federal court for the district within which the suit was pending was described as directly in conflict with the decision of the United States Supreme Court in *Ex parte Wisner*.[2]

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[15] See Williston, *Sales*, sec. 284, p. 418 f. This is also the rule adopted in the Uniform Sales Act, sec. 20 (2). The principal case, however, did not come under the act.

[16] *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.* (1905) 72 S. C. 450, 52 S. E. 191.

[1] 27 YALE LAW JOURNAL, 567.

[2] (1906) 203 U. S. 449, 27 Sup. Ct. 150.

The report of the *Hohenberg* case contains no preliminary statement of facts, nor are the facts in regard to the citizenship of the parties stated in the opinion. To determine the exact point presented for decision, it was therefore necessary to rely on inference from the argument of the court. It is believed that any reader of the opinion would draw the same inference which was drawn in our February number.[3] The editors have since been informed by a correspondent that this inference was not correct; that there were two plaintiffs, both citizens of Alabama, one residing, however, in the Middle District of Alabama and the other in the Southern District. The suit was brought in a state court in the Southern District, against a corporation of Louisiana. The question thus presented on proceedings for removal is not wholly novel, as will appear below, nor does it require any modification of our previous conclusion that the decision is directly opposed to the doctrine of *Ex parte Wisner*,[4] but it does furnish one further argument against the soundness of that much doubted decision, which is not applicable to the case where neither plaintiff nor defendant is a citizen of the state in which the suit is brought. The subject is perhaps of sufficient practical importance to justify a more extended examination.

The *Wisner* case arose under the Judiciary Act of 1887, as amended in 1888,[5] but as the adoption of the federal Judicial Code of 1911,[6] now in force, involved only a rearrangement of the provisions in regard to removal, with no change in substance affecting the question now under discussion, it will be sufficient to quote the sections of the present law.

Section 24 provides that "the district courts shall have original jurisdiction . . . of all suits of a civil nature . . . between citizens of different states."

Section 51 provides that:

"No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded

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[3] The nearest approach to a statement of specific facts is in the closing sentences of the opinion (p. 173), which are as follows:

"If plaintiff, being a resident of one state, and defendant of another, bring his suit in a federal court of a third state, defendant can, by appearing generally, waive the objection as to venue, and such court has jurisdiction to try such suit. If therefore, plaintiff brings his suit in a state court, defendant is given by section 28 the right to remove it to this same court, and it has just as much jurisdiction to try such case as if plaintiff had originally brought it there.

"I therefore conclude that the motion to remand should be denied."

[4] *Supra*, note 2.

[5] 24 U. S. St. at L. 552; 25 *ibid.* 433.

[6] 36 U. S. St. at L. 1087; 1 U. S. Comp. St. 1916, Ann. 532. The sections specifically referred to in the text are found in 1 U. S. Comp. St. 1916, Ann. on the following pages: section 24 on p. 553; section 51 on p. 1116; section 28 on p. 841; section 29 on p. 954.

only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 28, after providing for the removal of suits arising under the Constitution or laws of the United States, proceeds as follows:

"Any other suit of a civil nature . . . of which the district courts of the United States are given jurisdiction by this title, and which . . . may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State."

Section 29 provides that:

"Whenever any party entitled to remove any suit mentioned in the last preceding section . . . may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court . . . for the removal of such suit into the district court to be held in the district where such suit is pending, ..."

It will be noted that two of the above sections (24 and 51) purport to deal only with original jurisdiction and original process; in fact they are expressly so limited. That part of section 24 which is material to the present inquiry requires diversity of citizenship as the basis of jurisdiction; and section 51 limits the venue to the district of residence of plaintiff or defendant. Sections 28 and 29, on the other hand, deal expressly with removal. By section 28 the cases which can be removed are limited to those of which the district courts are given original jurisdiction "by this title." In the Act of 1887-8 the words were "by the preceding section"; and the preceding section combined the present sections 24 and 51.[7] This clearly limits the cases which can be removed to those described in section 24. Does it further adopt and incorporate into the removal provisions the limitation to the district of residence of the plaintiff or defendant which is now found in section 51? The argument that it does would seem to rest on the construction of the words "of which the district courts of the United States are given jurisdiction," as found in section 28. Does "jurisdiction" here include venue? Or to put it in another way, are the venue provisions of section 51 strictly jurisdictional?

The words of section 28 would seem to favor a negative answer. That section refers to suits of which "the district courts" generally are given jurisdiction, not those of which any particular district court, such as "the district court of the district in which the suit is pending" or "the district court to which removal is sought," is given jurisdiction.

[7] Section 1 of the Judiciary Act of 1887-8 (note 5, *supra*). This was true also of the earlier act of 1875 (18 U. S. St. at L. 470).

A stronger argument is based on the character of the provisions in sections 24 and 51 respectively, and the way they are expressed. There is a clear distinction between jurisdiction of the *cause,* without which all proceedings are a nullity, and power to subject a particular defendant to process against his will. The wording of the statutes seems to recognize this distinction. Section 1 of the Act of 1887-8[8] first enumerated the suits of which the federal circuit courts should have original "cognizance." This enumeration was in form complete and unqualified. Then was added the following sentence:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the *jurisdiction* is founded only on the fact that the action is between citizens of different states, *suit shall be brought* only in the district of the residence of either the plaintiff or the defendant; . . . ."

The Judicial Code emphasizes the distinction still more clearly. The first part of section 1 of the Act of 1887-8 is placed by itself in section 24 of the Judicial Code, and the word "cognizance" is changed to "jurisdiction." The provisions in regard to the district in which the suit may be brought are placed in a different section, and one widely separated from the section which now in terms defines the "jurisdiction" of the district courts.

Finally this distinction is authoritatively recognized by the Supreme Court. The doctrine that, while the provisions now found in section 24 are jurisdictional in the strict sense, those now placed in section 51 are intended for the protection of the defendant, and confer merely a personal privilege or immunity which can be waived, had been consistently followed by the Supreme Court before the decision in *Ex parte Wisner,* and the *dictum* to the contrary in that case has since been overruled.[9]

On the whole, the most natural conclusion would seem to be that when section 28 authorized removal of all suits "of which the district courts of the United States are given jurisdiction by this title," or, as it read in section 2 of the Act of 1887-8, "of which the circuit courts of the United States are given jurisdiction by the preceding section," the limitation intended in both statutes was to those cases which come within the enumeration now found in section 24, including cases of diversity of citizenship, and not the further limitation of venue, expressly applicable only to "original process or proceeding," now

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[8] *Supra,* note 5.

[9] See *In re Moore* (1908) 209 U. S. 490, 28 Sup. Ct. 585, which cites the earlier cases, and *Western Loan & Savings Co. v. Butte Mining Co.* (1908) 210 U. S. 368, 28 Sup. Ct. 720.

found in section 51. This conclusion is enforced, as will appear below, by a consideration of the practical results of the opposite construction, in their relation to the policy presumably underlying the constitutional and statutory provisions in regard to the jurisdiction of the federal courts.

It would follow that when a citizen of one state sued a citizen of another state in a state court of a third state, the case would be one "of which the districts courts . . . are given jurisdiction" by section 24, and the defendant, "being a nonresident of" the state of suit, would have, under section 28, an absolute right of removal to the federal district court "for the proper district." From the procedural provisions of section 29, the "proper district" would seem to be very clearly the district in which the case is pending.

The right of removal in such a case had not been passed on by the Supreme Court before *Ex parte Wisner,* but the question had come often before the lower federal courts, and the overwhelming weight of authority was in favor of the right and in accord with the above conclusions.[10] The decision in *Ex parte Wisner*[11] was directly to the contrary. It was rendered without citing or noticing the score or so of lower federal court decisions on the subject, and though the opinion (by Chief Justice Fuller) was not remarkably clear, it appeared to proceed on two grounds. In certain respects not directly touching the present inquiry the Act of 1887-8 had expressly narrowed the jurisdiction of the federal courts and the right of removal.[12] The first ground relied on in the *Wisner* case seems to have been that "in view of the intention of Congress by the Act of 1887 to contract the jurisdiction of the circuit courts," the limitation in cases of diversity of citizenship to the district of residence of the plaintiff or the defendant must be regarded as jurisdictional in the strict sense, so that no consent or waiver could confer jurisdiction on any other federal court. The second ground was that, even if the limitation to particular districts could be waived by consent of both parties, and jurisdiction thus conferred on a district court of a district in which neither resided, there had been no such waiver in the case at bar. The petition for removal was characterized as "in the nature of process," and the action of the defendant in filing such petition was likened to the action of a plaintiff who sues in a federal court in a district in which both parties are non-residents. As such a suit cannot be maintained by a

[10] See authorities collected in *Louisville & N. R. R. Co. v. Western Union Tel. Co.* (1914, E. D. Ky.) 218 Fed. 91, 93-95.

[11] *Supra,* note 2.

[12] The Act of 1875 had allowed suit to be brought in the federal courts in any district in which the defendant could be found, had given the plaintiff as well as the defendant the right to remove, and in diversity of citizenship cases had not limited the defendant's right of removal to cases in which he was a non-resident of the state of suit.

non-resident plaintiff against the objection of the non-resident defendant, so the court held that the petition for removal by a non-resident defendant could not be maintained against the objection of the non-resident plaintiff.

So far as the decision rested on the first ground, it was very shortly overruled by *In re Moore*[13] and the former rule reëstablished, to the effect that the statutory limitation to the district of residence of one of the parties may be waived by voluntary appearance, pleading to the merits, entering into stipulations, or otherwise submitting to the jurisdiction of the court. The facts in *In re Moore* were the same as in *Ex parte Wisner,* except that the plaintiff, after removal, and before moving to remand, had filed an amended complaint in the federal court, and entered into a stipulation giving the defendant time to plead. Chief Justice Fuller, dissenting in *In re Moore,* adhered to the views he had expressed in *Ex parte Wisner.* The latter decision, however, if it stands at all,[14] must now stand on the second ground above stated.[15] Thus limited, its doctrine apparently is that, in diversity of citizenship cases, a defendant may remove to a federal court only if, as plaintiff, he could have sued the actual plaintiff, as defendant, in the same federal court.[16] It follows that where both parties

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[13] *Supra,* note 8. *Accord, Western Loan & Savings Co. v. Butte Mining Co., supra,* note 8; *Male v. Atchison, etc., Ry. Co.* (1916) 240 U. S. 97, 101; 36 Sup. Ct. 351, 353.

[14] Its decision on another point, namely the propriety of *mandamus* as a remedy for refusal to remand, was overruled in *Ex parte Harding* (1911) 219 U. S. 363, 31 Sup. Ct. 324.

[15] The first ground was at least consistent. If both the requirements now found in section 24 and those now found in section 51 are jurisdictional in the strict sense, then the word "jurisdiction" in section 28 would naturally refer to both. The second ground treats the word "jurisdiction" in section 28 as used in a sense sufficiently broad to include not only the requirements of section 24, which all agree are jurisdictional and cannot be waived, but also those of section 51, even though the latter be conceded to confer only a personal privilege which can be waived—a not impossible construction, but one not very convincing. The real source of the error, if error there was, in *Ex parte Wisner* seems to have been a misplaced reliance on general statements in earlier cases to the effect that a suit is not removable unless it is one the plaintiff could originally have brought in the federal court. If this means in *a* federal court, the statement is of course sound, and that was all that was involved in the earlier cases relied on. To say that a case is not removable to a particular federal court, unless it could have been brought originally in the same federal court, is another proposition.

[16] This is in effect the interpretation of the *Wisner* case adopted in such cases as *Keating v. Pennsylvania Co.* (1917, N. D. Oh.) 245 Fed. 155 (discussed in 27 YALE LAW JOURNAL, 567) holding that a non-resident defendant sued in a state court by an alien may remove to the federal court in the district in which the suit is pending, since an alien may be sued in the federal court in any district where he may be found. This interpretation also would explain the action of the Supreme Court in *In re Tobin* (1909) 214 U. S. 506, 29 Sup. Ct. 702, in

are non-residents of the state in which the suit is pending in a state court, there can be no removal, without the plaintiff's consent, to the federal court "in the district where such suit is pending." And as no procedure is provided for removal to any other district, it seems to follow that the case cannot be removed at all.[17]

However doubtful as a matter of statutory construction, this result would not seem to involve any great injustice, or conflict with any essential policy involved in the establishment of federal courts, so long as its application is limited to cases where both plaintiff and defendant are non-residents of the state of suit. Notwithstanding the many difficult questions that have arisen in construing the jurisdictional provisions of the various judiciary acts, and especially those relating to diversity of citizenship, and the considerable conflict of opinion over various points, the cases are singularly lacking in discussion of the general policy which presumably underlay both the constitutional extension of the federal judicial power to controversies between citizens of different states, and the legislation enacted by Congress to put this grant into effect. The most obvious purpose of the removal provisions would seem to be, as suggested in one of the cases,[18] to protect a non-resident sued in the plaintiff's own state againt any possible local favoritism on the part of the state court, by affording him the option of removing to a supposedly impartial tribunal.[19] If this be the purpose, there is no similar reason for removal when both parties are non-residents of the state in which the suit is brought.

But a different situation is presented when there are two or more federal districts within a state, and the plaintiff, being a resident of the state, sues a non-resident defendant in a state court, but not in the district of the plaintiff's residence. If we apply the rule of *Ex parte Wisner,* the suit is not removable. Under section 29 it can be removed, if at all, only to the district court in the district where the suit is pending. But that is not, in the language of section 51, "the district of the residence of either the plaintiff or the defendant," and neither

refusing, without opinion, a writ of *mandamus* to compel the remanding of a case like the *Keating* case. For speculation on the significance of *In re Tobin,* see the *Keating* case, at p. 161; *Sagara v. Chicago, etc., Ry. Co.* (1911, D. Colo.) 189 Fed. 220, 223; and *Louisville & N. R. R. Co. v. Western Union Tel. Co.* (1914, E. D. Ky.) 218 Fed. 91, 103-104.

[17] The attempts of certain federal courts to avoid this result, and, by disregarding the procedural limitation of section 29 of the Judicial Code, to permit removal to the district of the defendant's residence, were referred to in 27 YALE LAW JOURNAL, 567.

[18] *Foulk v. Gray* (1902, C. C. S. D. W. Va.) 120 Fed. 156, 164.

[19] Conversely a non-resident plaintiff, forced to go to the defendant's own state to bring his suit in order to obtain service, is allowed to avail himself of the federal court there. And his option to choose the federal court of his own district, if he can obtain service there, may be explained as merely anticipating the defendant's right of removal.

could have brought an original suit against the other in that district. Hence under *Ex parte Wisner* the defendant cannot remove to that district.[20] The result is that the plaintiff obtains whatever advantage there may be in suing in a court of his own state a non-resident defendant. If local favoritism on the part of state courts is to be feared, it would hardly be limited by the arbitrary lines of federal districts; and the apparent policy of the Constitution and the judiciary acts is thus defeated.

The one federal case found, before the *Hohenberg* case, which was decided in the teeth of *Ex parte Wisner,* was of this sort.[21] Nor was there any dodging of the issue. It was frankly admitted that *Ex parte Wisner* was a direct authority against the removal; but Judge Cochran, in a voluminous and very able opinion, reviewed the authorities both before and after the *Wisner* case, and reached the conclusion, not only that *Ex parte Wisner* was wrong, but that it had been so weakened by subsequent Supreme Court decisions, and was so certain to be overruled altogether at the first opportunity, that he was justified in rejecting its authority. Other federal judges have since applauded his reasoning, but have stopped short of following him to the ultimate conclusion.[22]

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[20] It was so held in *Shawnee Nat. Bk. v. Missouri, K. & T. Ry. Co.* (1909, E. D. Okla.) 175 Fed. 456, and *Wheeler v. Atchison, etc., Ry. Co.* (1911, W. D. Mo.) not separately reported, but quoted in *Stone v. Chicago, etc., R. R. Co.* (1912, W. D. Mo.) 195 Fed. 832, 833.

[21] *Louisville & N. R. R. Co. v. Western Union Tel. Co., supra,* note 10.

[22] Another *reductio ad absurdum* of the doctrine of the *Wisner* case has resulted from its application to the removal of suits arising under the Constitution or laws of the United States. The statutory provisions governing this question are found in the same sections as those governing the removal of diversity of citizenship cases, and are substantially similar, except that an original suit may be brought only in the district where the defendant resides, and the right of removal is not restricted to a non-resident defendant. On the authority of *Ex parte Wisner* it has been held, in effect, that an "arising under" suit may be removed only when the state court in which it is pending is in the district of the defendant's residence, so that the plaintiff could have brought the suit originally in the federal court of that district. *Western Union Tel. Co. v. Louisville & N. R. R. Co.* (1912, E. D. Tenn.) 201 Fed. 932 and cases there cited. These decisions find some support in the language of the Supreme Court in *Matter of Dunn* (1909) 212 U. S. 374, 384, 387 ff., 29 Sup. Ct. 299, 301, 303. It may be suggested that it would be more consistent with the reasoning of the *Wisner* case, as interpreted above, and would produce a somewhat less illogical result, if in these cases the defendant petitioning for removal were regarded as the moving party, in a position analogous to that of a plaintiff bringing an original suit in the federal court, and the actual plaintiff as the defendant in the removal proceedings, and removal were therefore restricted to cases pending in a state court in the district of residence of the removal-defendant, that is, the actual plaintiff. But that is not the view taken by the cases cited.

The underlying reason for giving the federal courts original jurisdiction of suits arising under the federal Constitution or laws, and for permitting the

The *Hohenberg* case, as the facts are stated by our correspondent, presented in substance the same question. One plaintiff, it is true, was a resident of the district in which the case was pending in the state court; but it is settled that to give jurisdiction in the district of the plaintiff's residence under section 51 of the Judicial Code (or the corresponding provisions of earlier acts) *all* the plaintiffs must be residents of the district.[23] So far as removal was concerned, therefore, the case was the same as if both plaintiffs, instead of only one, had been residents of a different district of Alabama from that in which the suit was brought. The case would furnish weightier support to Judge Cochran's views if it had faced the issue with equal frankness. Our correspondent, who approves the decision, informs us that it was thrice argued, and that *Ex parte Wisner* was much relied on by the plaintiffs; but the opinion cites neither that case, nor Judge Cochran's decision, nor any other authorities. Under these circumstances, it rather adds to than helps to clear up the uncertainty in which the law now stands.

JUDGMENTS BASED ON PRESUMPTION OF DEATH AS AFFECTING AN ABSENTEE'S RIGHTS

To determine the effectiveness of a judgment based upon the presumption of death arising from several years' absence[1] to protect a person who acts in reliance upon the judgment against claims of the

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removal of such suits, is obviously to give either party the option of having a federal question decided in the first instance by a federal court. This option on the part of the plaintiff can in no way be defeated by the defendant. The defendant's right should be equally assured. But the result of the above decisions is to permit the defendant to remove only in the cases where he presumably cares least about doing so, namely, where he is sued in his own state court; to leave the choice between state and federal courts for the trial of a federal question wholly in the hands of the plaintiff, provided only that he can secure service on the defendant in some state where the latter does not reside; and to make the right of removal depend on an accidental circumstance which, in this class of cases, has nothing whatever to do with the real reason for allowing removal at all.

[23] *Smith v. Lyon* (1890) 133 U. S. 315, 10 Sup. Ct. 303; *Turk v. Illinois Cent. R. R. Co.* (1914, C. C. A. 6th) 218 Fed. 315.

[1] It is held almost universally that a rebuttable presumption of death arises when a person has been absent from his last or usual place of residence and no tidings of him have been received for a considerable period of time. Usually the necessary period of absence is established as seven years. The beginning of this seven year presumption as a common law rule applicable in all questions of life and death is found in *Doe v. Jesson* (1805, K. B.) 6 East 80. For the origin and history of the presumption, see James Bradley Thayer, *Presumptions and the Law of Evidence* (1889) 3 HARV. L. REV. 151-154. The rule is sometimes modified by statute. See 2 Chamberlayne, *Evid.* sec. 1097 *et seq.*

supposedly dead absentee, in case he afterwards reappears, discrimination is required between three classes of cases.

(1) The actual death of the absentee may be a jurisdictional fact—as in probate proceedings on the estate of a decedent. In such cases a judgment based upon the seven year presumption of death is utterly void, if in fact the absentee was alive. It confers no power to alter legal relations; it cannot change the rights or immunities of the absentee, nor afford protection to anyone making payment in reliance upon it. Hence payment by a debtor of the supposed decedent to the person appointed administrator of his estate is no defense to a subsequent suit by the creditor himself; nor will a court decree protect the innocent purchaser of his property at judicial sale.[2] Nevertheless, in the exercise of its police power over property within its boundaries, a state may provide by statute for the distribution of the estate of absentees, for in this event absence for the required period, not death, is the jurisdictional fact.[3]

(2) If death is not a jurisdictional fact, and if the proceeding in which the judgment is rendered is a proceeding *in rem,* the judgment will protect one acting in reliance upon it against the claims of the absentee erroneously supposed to be dead. A typical instance of cases falling within this second class may be found in a decree of distribution entered in the administration of a decedent's estate. The administrator who makes payment in accordance with the decree is privileged so to distribute the property even though an heir of the decedent was erroneously omitted from the distribution.[4] Such a decree, though based on an erroneous finding of the death of an absent heir, is effective, until set aside, to change legal relations in respect to the *res,* because the court had jurisdiction of the subject

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[2] *Jochumsen v. Suffolk Savings Bank* (1861, Mass.) 3 Allen 87; *Scott v. McNeal* (1894) 154 U. S. 34, 14 Sup. Ct. 1108.

[3] Such statutes do not violate the Fourteenth Amendment to the Constitution if the requisite period of absence is not unreasonably short, if adequate notice by publication is given to the absentee, and if reasonable safeguards are provided for the protection of the absentee's rights in case he returns. *Cunnius v. Reading School Dist.* (1905) 198 U. S. 458, 25 Sup. Ct. 721; *New York Life Ins. Co. v. Chittenden* (1907) 134 Iowa 613, 112 N. W. 96; *cf. Lavin v. Emigrant Savings Bank* (1880, C. C., S. D. N. Y.) 1 Fed. 641; and see *Nelson v. Blinn* (1908) 197 Mass. 279, 83 N. E. 889. The last case sustains the Massachusetts statute as a statute of limitations.

Under such statutes administration of the property of absentees falls within the second class of cases mentioned in the text.

Statutes of a similar nature are those relating to abandoned bank deposits. See *Provident Institution, etc. v. Malone* (1911) 221 U. S. 660, 31 Sup. Ct. 661; *Commonwealth v. Dollar Savings Bank* (1917, Pa.) 102 Atl. 569.

[4] *Loring v. Steineman* (1840, Mass.) 1 Metc. 204; *Cleaveland v. Draper* (1907) 194 Mass. 118, 80 N. E. 227; *Jones v. Jones* (1916) 223 Mass. 540, 112 N. E. 224; *cf. Ernst v. Freeman's Estate* (1902) 129 Mich. 271, 88 N. W. 636, and *In re Price's Estate* (1917, Minn.) 162 N. W. 454.

matter and notice by publication satisfies the requirements of due process in respect to all parties interested.[5]

(3) The third class of cases is composed of those where death is not a jurisdictional fact, and the proceeding is not *in rem* but *in personam*. A judgment rendered in such a proceeding is entirely inoperative with respect to the rights of any claimant not before the court.[6] The danger that a defendant, after being held liable to claimant B. on the theory that claimant A. is dead, may also have to pay A., should A. later appear, is unavoidable unless the defendant by some statutory form of interpleader is permitted to change the proceeding from one purely *in personam* to one *quasi in rem*.[7]

The necessity of discriminating between the above mentioned classes of cases is illustrated by a decision of the Supreme Court of Pennsylvania. *Maley v. Pennsylvania R. R. Co.* (1917, Pa.) 101 Atl. 911. The defendant railroad was the depositary of an employee's savings fund payable upon the death of the depositor to his sons, or, if they were not living, to his legal representatives. The executrix of a deceased depositor demanded payment of such a fund, the sons of the depositor having been absent and unheard of for some eighteen years. The trial court left to the jury the question whether the sons were dead,[8] and on a verdict for the plaintiff the court entered judgment. The defendant appealed on the ground that the judgment would not protect it from having to pay again to the sons, should they subsequently appear. The judgment was affirmed, with a *dictum* that it would fully protect the defendant against any future claim by the sons.

The case appears to fall within the third group of the classification above mentioned. Clearly it is not in the first class. The sons had left home prior to 1898, while their father, the depositor, did not die until 1913. According to the presumption, therefore, they

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[5] "Wherever the court has jurisdiction as to the subject and parties, its judgment must be conclusive on all parties and privies notwithstanding any error of fact or of law, until it be reversed, or be vacated for fraud." Per Wardlaw, Ch., in *Hurt v. Hurt* (1853, S. C.) 6 Rich. Eq. 114, 120; see also *Mooney v. Hinds* (1894) 160 Mass. 469, 36 N. E. 484.

[6] *Kelly v. Norwich Fire Ins. Co.* (1891) 82 Iowa 137, 47 N. W. 986; *Mahr v. Norwich, etc., Soc.* (1891) 127 N. Y. 452, 28 N. E. 391; *Pennoyer v. Neff* (1877) 95 U. S. 714.

[7] *Cf. Perry v. Young* (1916) 133 Tenn. 527, 182 S. W. 577; and see (1917) 27 YALE LAW JOURNAL, 252.

[8] It is not apparent why the question of the sons' death was left to the jury. The fact of absence for seven years unheard from is to be taken, by a rule of law independent of the jury's belief, as equivalent to death, in the absence of explanatory facts to the contrary. See 4 Wigmore, *Evid.* sec. 2490; 2 Chamberlayne, *Evid.* sec. 1090. But even if the trial court did not charge the jury with precise accuracy as to the effect of the presumption of death, the error was not prejudicial to the defendant.

predeceased their father. The plaintiff's claim to the fund was not derived through the sons, but was based upon the defendant's agreement to pay the depositor's legal representatives, *if* he outlived his sons. Hence the suit against the depositary was in no sense a proceeding to distribute the estate of the sons. Neither does the case fall within the second group. It was not a proceeding *in rem* to distribute a fund admittedly forming part of the depositor's estate.[9] It was simply a suit on a contract to recover money payable to the plaintiff if a certain contingency had happened, or payable to the sons if it had not happened. No attempt appears to have been made to give notice by publication or otherwise to the absent sons. It cannot therefore be considered as a valid proceeding *in rem* to cut off their claims.[10] The suit was simply a proceeding *in personam* to recover money alleged to be owing to the plaintiff as executrix of the depositor.[11]

It is respectfully submitted, therefore, that while the affirmation of the judgment for the plaintiff was correct, the *dictum* that payment thereunder would protect the defendant against the sons' demand, should they reappear, was unsound.[12] There is nothing unusual in subjecting a defendant to the danger of having to pay twice. The possibility always exists that a judgment in a suit *in personam* may be based on an error of fact and that the true claimant may also obtain a judgment against the defendant. Suppose, for example, that A. gets judgment against B. for converting a certain horse alleged by A. to be his. In truth the horse may have belonged to C. and therefore C. may also get a judgment against B. for the very same act of conversion already held tortious as to A. The fact that in the first suit the horse was decided to be A.'s, and that B. has already paid the judgment in A.'s favor, will furnish no protection to B. if C. can establish that the horse was really his.[13]

DECREES AFFECTING FOREIGN PROPERTY

When a court sitting in one state is called upon to render a judg-

[9] *Jones v. Jones, supra,* note 4, was such a suit and is therefore distinguishable from the case under discussion.

[10] *Cf. Perry v. Young, supra,* note 7.

[11] The happening of the condition on which the money was payable to the plaintiff, namely, the death of the sons, was one of the operative facts creating the defendant's duty to pay, which the plaintiff was obliged to prove. Having proved it—by virtue of the presumption of death—she was entitled to judgment.

[12] It is believed that a decision in accordance with this *dictum* would be unconstitutional as depriving the absentee of his property without due process. See (1917) 27 YALE LAW JOURNAL, 121.

[13] The principle is too elementary to require the citation of authorities. On the general subject of the non-conclusiveness of judgments as against strangers to the proceedings, see Black, *Judgments,* sec. 600; 23 Cyc. 1237.

ment involving land or movables situated in another state it usually tries to walk circumspectly in order not to tread roughly on the toes of its neighbor's sovereignty. There appears to exist among states something of an instinctive feeling that each should have exclusive dominion within its geographic limits. And, inspired by this laudable sentiment, as well as moved by some hardheaded realization of their inability to enforce a meddling decree concerning foreign property, courts have laid it down times without number that they cannot, by their own decree, transfer the title to land outside their jurisdiction.[1]

Where, however, they have the owner before them, chancery tribunals, by what paradoxically might be called equitable coercion and duress, require him to part with his own title to whomsoever they direct and so effect the same end,[2]—though by a means supposedly inoffensive to the sovereign of the *situs*.[3] This is orthodox and customary. In thus operating on the person of the defendant and so stimulating him to operate in turn on the foreign situated *res*, or his rights in it, whatever difficulties may arise are largely questions of expediency. The court must enforce its decree by contempt or other personal proceedings against the defendant.[4] It is, therefore, apparent that the decree may be an empty recital if the defendant is outside the jurisdiction, having, perhaps, hastily departed before judgment issued.[5] Ordering the defendant to go into another state and

[1] 67 Am. Dec. 95, note; 69 L. R. A. 673, note; 5 Ann. Cas. 533, note; see, Westlake, *Private Int. Law* (5th ed.) sec. 173. A court at the *situs* will usually not recognize an attempted conveyance or petition by a foreign court. *Watts v. Waddle* (1833, C. C. D. Oh.) 1 McLean, 200, approved on this point in (1832, U. S.) 6 Pet. 389; *Johnson v. Kimbro* (1859, Tenn.) 3 Head, 557, 75 Am. Dec. 781. But compare *Mallette v. Scheerer, post,* note 13. There is, however, one noteworthy break in the application of this rule. Courts have decreed the foreclosure of a mortgage on foreign land. Sir James Bacon, V. C. by insisting that he was only acting personally against the defendant, and so following the general rule, and only foreclosing the defendant's personal right to redeem, really accomplished, if the decree was effective, an absolute blotting out of the defendant's equitable rights in land situated in the West Indies. *Paget v. Ede* (1874) L. R. 18 Eq. Cas. 118, 125, citing *Toller v. Carteret* (1705, Ch.) 2 Vern. 494. Compare the language of the court in *Contee v. Lyons* (1890) 19 D. C. 207, 208. "It (a court of chancery) may conclude dormant equities, but cannot assign legal titles." See, *Strange v. Radford* (1887, Ch. Div.) 15 Ont. Rep. 145, following *Paget v. Ede* in decreeing a foreclosure, but refusing to order a sale pursuant thereto of lands in Manitoba. See also, *Burley v. Kappen* (1910, K. B.) 20 Man. Rep. 154, 157, cancelling a contract for the purchase of foreign land, *i. e.* extinguishing equitable interests as in the mortgage cases.

[2] *Penn v. Lord Baltimore* (1750, Ch.) 1 Ves. Sr. 444; *Lyman v. Lyman* (1829, C. C. D. Vt.) 2 Paine, 11, 46, Fed. Cas. 8628. See 67 Am. Dec. 95, note; 69 L. R. A. 673, note. Westlake, *op. cit.* sec. 172.

[3] The courts of the *situs* will enforce rights so conferred. *Tardy v. Morgan* (1844, C. C. D. Ind.) 3 McLean, 358, Fed. Cas. 13752.

[4] *Miller & Lux v. Rickey* (1904, C. C. D. Nev.) 127 Fed. 573, 580; *Phelps v. McDonald* (1878) 99 U. S. 298, 308.

[5] *Wicks v. Caruthers* (1884, Tenn.) 13 Lea, 353, 365. To defeat this a *Ne*

act there, or enjoining him from acting in another state, has the same weakness. The absent defendant can make sport of the decree by simply not following its orders, and a court, often foreseeing the unenforceability, may decline to issue an ineffective decree.[6] Such decisions, however, when rendered *in personam* against a defendant over whom the court has obtained proper jurisdiction, are conceded to be valid and binding, even though they may be perhaps unenforceable.[7] And so in the case of *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.* (1917, C. C. A. 9th) 245 Fed. 9, we find a federal court in Idaho, on personal jurisdiction of the defendant, a Nevada corporation, ordering it (1) negatively, to desist from taking more than a certain quantity of water from the Salmon River in Nevada, and (2) affirmatively, to go into Nevada and place meters on its land there situated to keep track of the water in fact taken. The embarrassment above alluded to in cases of sending defendants out of the jurisdiction to act were probably not present here, since the defendant, a corporation, very likely had offices in both states and so was capable of being present in two places at once, and could be prodded through its officers in Idaho at any time for a failure to place meters in Nevada as ordered.

So much for the orders *in personam,* wherein the court scarcely departed from the well settled doctrine heretofore announced or enlarged the action taken in the *Salton Sea* Cases.[8] But the court went further than that. It decreed that the plaintiff, who was injured by removal of water above him on the land of the defendant, might go upon that land from time to time to read the meters to be installed thereon. This, it will be observed, was an order directly affecting the foreign land, or to speak more accurately, directly dealing with the defendant's rights in his land. This is the thing which courts have repeatedly said they could not do. We have already noted, however, that there is a nick in the rule in the mortgage foreclosure cases wherein the court does blot out the defendant's equities in

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exeat Regnum could be issued against the defendant, although this writ is in present disfavor. *Archer v. Preston* (undated) 1 Eq. Cas. Abr. 133, case 3, cited in *Arglasse v. Muschamp* (1682, Ch.) 1 Vern. 75, 77; *Mitchell v. Bunch* (1831, N. Y.) 2 Paige Ch. 606, 22 Am. Dec. 669, 673; *Enos v. Hunter* (1847, Ill.) 4 Gilm. 211, 214.

[6] *Wicks v. Caruthers, supra.* A court, however, which desires to assume jurisdiction may either require a bond of the defendant before leaving or, as to most matters, require him to act by agent.

[7] Dicey would seem to make expediency the test of a court's right, under established rules, to make such decrees. Dicey, *Confl. of Laws* (2d ed.) p. 40.

[8] (1909, C. C. A. 9th) 172 Fed. 792 and 820, 97 C. C. A. 214. See also, *Miller & Lux v. Rickey* (1904, C. C. D. Nev.) 127 Fed. 573, 575-580; *Rickey Land & Cattle Co. v. Miller & Lux* (1910) 218 U. S. 258, 31 Sup. Ct. 11, and Comment thereon (1911) 5 ILL. L. REV. 442.

foreign land.[9] We now have a case in which the court undertakes to blot out a single one of the defendant's legal rights in foreign land, namely his claim that the plaintiff shall not trespass. Correspondingly and at the same time it creates in the plaintiff a right in that land,—gives him a small piece of the title, in the privilege of going on it for certain purposes.[10] The same court would probably have followed the usual rule and would not have undertaken to transfer the whole title from the defendant to the plaintiff, *i. e.*, to extinguish all the defendant's rights in his Nevada land and invest the plaintiff with a similar set. But it does do the same thing as to one of those rights. This is a matter of degree.

What is the effect of such a decree? Inquiry may be directed to its validity, its expediency (including enforceability and recognition by the courts of the *situs*), and its constitutionality.

There seems, as to the first point, no reason to question the validity of the decree if it involved two foreign countries and so no question of constitutionality. The decision having been rendered, it would create rights in the country where rendered at least. If anything in that country were ever at a future time to turn on the point of who had the particular right in question, the second case would stand or fall on the decree in the first. The question of its effectiveness at the *situs* is not one of validity. That is the point of the second inquiry.

Would it be enforceable,—expedient? If a Prussian court had decreed "made-in-Germany" rights in a plaintiff to go upon land in Nevada, it would decidedly not be enforceable. The question of expediency is one to be worked out by the Court asked to make the decree, in view of that unenforceability.

Now inside the United States both of the above inquiries and answers are qualified by a further question. The Federal Constitution must be reckoned with.

Validity must be considered in reference to due process. Had the defendant in the *Vineyard* case appealed on the constitutional ground that his property, or one right in it, was taken without due process of law, it is not certain what success he would have had. Had the court below purported to divest his whole title, the United States Supreme Court would probably find in his favor and reverse the

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[9] *Supra*, note 1.

[10] In addition to this privilege, the decree establishes also in the plaintiff a claim that the defendant shall not keep him off of the land. It establishes in the plaintiff, as well, an immunity against the defendant's revocation. That is, under the decree, as in the case of an easement, the defendant is unable,—has no legal power,—to divest the judicially conferred rights. In absolute analysis, therefore, the decree does not give a single right only, but since the relatively small number of rights conferred group themselves around the single privilege of going on the land, the expression single right is used for convenience. Indeed any "single right" under a contract carries with it an immunity like that above.

decree.[11] But when a single right is concerned, the Supreme Court might sustain the lower court. As mentioned heretofore, this is a question of degree, for the nature of the deprivation is the same in each instance. The fewer the rights in land which are involved, however, the more nearly does the decree approach to being a personal one.

The above discussion assumes a direct appeal under the due process clause. The decision may come into question in another way. If, in a subsequent suit in Nevada, the decree were set up by the present plaintiff as establishing his right to enter upon the Nevada land, would the Nevada court be required to accord it full faith and credit? It appears from the language of the United States Supreme Court in some cases[12] that an Idaho decree purporting to transfer the *whole* legal title to Nevada land would not be entitled to full faith and credit under the Constitution.[13] A decree, however, affecting so little of the title as does this one might possibly be held on the contrary to be entitled to full faith and credit. That depends on the same question of degree previously set forth. On the whole, although the decree appears sound as regards the due process clause, its sufficiency as a basis for requiring Nevada unwillingly to recognize and enforce this decree rendered in Idaho may well be doubted.

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[11] See language in *Harì v. Sansom* (1884) 110 U. S. 151, 154, 3 Sup. Ct. 586, 588; *Carpenter v. Strange* (1891) 141 U. S. 87, 11 Sup. Ct. 960; *Fall v. Eastin* (1909) 215 U. S. 1, 30 Sup. Ct. 3, affirming *Fall v. Fall* (1907) 75 Neb. 120, 113 N. W. 175.

[12] *Carpenter v. Strange* and *Fall v. Eastin, supra,* note 11. The latter case involved an additional fact. The claims were not against the original parties but against a purchaser of the land. See, Professor Henry Schofield, *Equity Jurisdiction under the Full Faith and Credit Clause* (1910) 5 ILL. L. REV. 1.

[13] If, however, a state voluntarily chooses to give full faith and credit when under the constitution it would not be required to, this is not necessarily a violation of the due process clause as to the person injured. See *Chicago Life Ins. Co. v. Cherry* (1917) 244 U. S. 25, 37 Sup. Ct. 492, Holmes, J., and comment (1917) 27 YALE LAW JOURNAL, 121. See *Mallette v. Scheerer* (1916) 164 Wis. 415, 160 N. W. 182 and comment (1917) 26 YALE LAW JOURNAL, 311, citing case as *Mallette v. Carpenter et al.* The fact that the decree of a foreign court can be and sometimes is recognized and enforced would seem to be an answer to any contention that the foreign court lacked power to make such a decree. See *Haddock v. Haddock* (1906) 201 U. S. 562, 26 Sup. Ct. 525.