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POLYGAMY AND THE CONFLICT OF LAWS

A marriage celebrated in the form prescribed by the law of the place of celebration is universally regarded as valid from the standpoint of the Conflict of Laws if the essential requisites for marriage are present.[1] As regards the law governing the essentials, there exists in the different countries great diversity of view.[2] According to the law of the United States such a marriage must conform to the law of the place of celebration.[3] The conditions prevailing in this country, with its influx of foreigners, have caused this rule to be established in preference to the law of domicil or that of nationality, which prevails elsewhere.[4] Our courts would apply this rule, it seems, not only to marriages celebrated in this country, but also to those celebrated abroad.[5] Suppose, however, that a marriage is contracted, in con-

[1] *United States:* Minor, *Conflict of Laws* (1901) 167; *England:* Dicey, *Conflict of Laws* (3d ed. 1922) 661; *France:* Civil Code, arts. 170, 171; *In re Montefusco,* Trib. Civ. Seine, Mch. 8, 1920, (1920) 47 Clunet, 206; *Germany: Law of Introduction, Civil Code,* arts. 11, 13; *Italy:* Prel. Disp. Civil Code, art. 9. *Brazil:* Intr. Civil Code, art. 11.

[2] In England the law of the domicil of the parties governs on principle, but if a marriage is celebrated in England between persons of whom the one has an English, and the other a foreign, domicil, it is not affected by any incapacity, which, though existing under the law of the foreign domicil, does not exist under English law. Dicey, *op. cit. supra* note 1, 661, 683.

The continental countries generally apply the national law of the parties. *France:* Civ. Code, art. 3; *Germany:* Law of Intr. Civ. Code, art. 13; *Italy:* Civ. Code, art. 102; so also *Brazil:* Intr. Civ. Code, art. 8.

[3] Minor, *op. cit. supra* note 1, sec. 73.

[4] The same rule was adopted by the Convention of Montevideo. *Convention on International Civil Law,* art. 11.

[5] Wharton, *Conflict of Laws* (3d ed. 1905) sec. 165c. It is evident, however, that this rule cannot be applied without qualification to marriages celebrated in foreign countries. Suppose, for example, that two French people, domiciled in Switzerland, should get married in the latter country, that they have no "capacity" to marry under the local Swiss law, but that they are under no "incapacity" according to the local French law. Let us assume also that both the French and Swiss courts would determine the question with reference to the national law of the parties. It seems clear that our courts should recognize the validity of such a marriage, although it does not conform to the local law of the place of celebration. See Lorenzen, *The Renvoi Doctrine in the Conflict of Laws* (1918) 27 YALE LAW JOURNAL, 529, 530.

Suppose, again, that two American citizens, domiciled in this country, should get married in a country under the local law of which they have no "capacity" to marry, but that they possess such "capacity" under the law of their domicil. Should not such a marriage be entitled to recognition? Such a result cannot be reached, however, without invoking the *lex domicilii.* If the rule of the Conflict of Laws of the state in which the marriage is celebrated should provide that the law of domicil or nationality controlled the "capacity" to marry, our courts might sustain it under the above conditions by resorting to the *renvoi* doctrine. But this doctrine is objectionable and can be usefully invoked only, as regards marriage, for the purpose of validating marriages, and not where it would operate to defeat them. See Lorenzen, *supra,* 530.

formity with the local law, in a country allowing polygamy; would this marriage be recognized by the courts of this country? Anglo-American writers generally answer this question with an emphatic, No. They say that such a marriage is not a marriage as understood among the Christian nations and that its recognition would be opposed to sound public policy.[6]

Courts and writers are in the habit of ascribing the recognition of "foreign" law to some fundamental theory. The internationalists regard the rules of the Conflict of Laws as imposed upon each state by some system of International Law.[7] The territorialists derive them from the "principle" of territoriality,[8] invoking generally either the "comity" theory[9] or that of "vested rights."[10] The nationalists maintain that the rules are always prescribed by the sovereign state before whose tribunals the question in issue arises, with due regard to all the interests involved.[11] Whatever the particular theory followed, all recognize that effect will not be given to "foreign" law in so far as its application would conflict (1) with any prohibitory statute of the state in which the suit is brought; or (2) with the public policy of such state.

Much learning has been expended by continental jurists[12] in an attempt to elucidate the notion of "public policy" or "public order," which plays such an important part in the discussion of problems arising in the Conflict of Laws, yet nothing substantial has been accomplished in this direction.[13] The reason for this is not far to seek. Starting with the theory that the ordinary rules of the Conflict of Laws are imposed by International Law, as most of them did, the writers were compelled by practical considerations to find some theory by which to limit the operation of "foreign" law whenever its application was deemed inexpedient. In their eagerness to find a general doctrine in this regard they were not sufficiently mindful of the fact that the refusal to apply

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[6] Minor, *op. cit. supra* note 1, sec. 75; Story, *Conflict of Laws* (8th ed. 1883) 188; Wharton, *op. cit. supra* note 5, secs. 130, 131; Dicey, *op. cit. supra* note 1, 289; Foote, *Private International Jurisprudence* (4th ed. 1914) 98; Westlake, *Private International Law* (6th ed. 1922) 68, 69.

[7] Beale, *Conflict of Laws* (1916) 86.

[8] *Ibid.* 102.

[9] *Ibid.* 100.

[10] *Ibid.* 105.

[11] Most of the German writers on the Conflict of Laws belong to this group.

[12] See the literature given by Professor Beale, *op. cit. supra* note 7, 77, 78, note; also Fink, *Die Prinzipien des Internationalen Privatrechts und die Vorbehaltsklausel* (1914) 24 Zeitschrift für Internationales Recht, 138; Kosters, *Public Policy in Private International Law* (1920) 29 YALE LAW JOURNAL, 745.

[13] "No attempt to define the limits of that reservation (public order) has ever succeeded, even to the extent of making its nature clearer than by saying that it exists in favor of any stringent domestic policy, and that it is for the law of each country, whether speaking by the mouth of its legislature or by that of its judges, to determine what parts of its policy are stringent enough to require its being invoked." Westlake, *op. cit. supra* note 6, 51.

the "foreign" law depends upon a great variety of circumstances and largely upon the points of contact which the operative facts may have with the state in which the question comes up.[14] In the very nature of things these elements cannot be reduced to a few simple and general propositions.

The territorialists also have started out with an *a priori* theory, namely, that the law of the State where the operative facts occur has the *exclusive* power to attach legal consequences to such facts.[15] Like the internationalists they in turn were compelled to fall back upon the "public policy" argument whenever the law of the forum found it inconvenient to give effect to such "foreign" law. But if it be recognized that it is impossible in the Conflict of Laws to operate with *a priori* theories and that in the actual state of affairs each sovereign State has the power, with very slight exceptions, to attach any legal consequences it sees fit to any operative facts in the world,[16] all problems in the Conflict of Laws reduce themselves in the last analysis to the question whether under a particular set of circumstances sound policy demands that the forum apply the local or some "foreign" rule of law.[17]

[14] See Fink, *op. cit. supra* note 12, 164; also Kahn, *Abhandlungen aus dem Internationalen Privatrecht: I: Die Lehre vom Ordre Public* (1898) 39 Jhering's Jahrbücher für die Dogmatik, 4.

The internationalists often speak of the application of the *lex rei sitae* governing the devolution or disposition of realty as an exception to the general rule that the personal law or that of the place of contracting controls. 3 Weiss, *Traité de droit international privé* (2d ed. 1912) 103.

In order to distinguish between those rules of public order which are not applicable to foreigners and those which are applicable to all, without regard to nationality, Brocher called the former, rules of "internal public order," and the latter, rules of "international public order." 1 Brocher, *Cours de droit international privé* (1882) sec. 44; see also 3 Weiss, *op. cit. supra* note 14, 77.

[15] "The question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to perform its terms, can on general principles be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law of that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it. If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so." Beale, *What Law Governs the Validity of a Contract* (1910) 23 HARV. L. REV. 270, 271.

[16] Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 269-279; Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws* (1921) 31 YALE LAW JOURNAL, 658-662. The power of the individual states in this country is limited, of course, by the federal constitution.

[17] For purposes of discussion it may be convenient to refer to the law of the place of contracting, the law of the place of performance, the law of the domicil, etc., as the "general rules" governing in the Conflict of Laws and to say that these rules will not be applied in certain cases when their recognition or enforcement would violate the "public" policy or some "stringent" policy of the forum. This mode of speaking should not blind us to the fact, however, that both the so-called rule and the exception rest upon considerations of policy.

As regards marriage, our courts have said that under our conditions it is convenient to determine its validity according to the law of the place of celebration. In the case of foreign marriages also they appear to deem it expedient to apply the *lex loci celebrationis*.[18] Under special circumstances, however, our courts hold that the policy of the forum requires the application of its own rules to the exclusion of all foreign rules. To this class of cases belong polygamous marriages. Will effect be denied to them by our courts under all circumstances? Although we are dealing here with an institution which is particularly repugnant to Christian people, it seems that our courts cannot completely ignore the fact that polygamy is a lawful institution among a large body of people on the face of the globe.[19] Effect can properly be denied to such marriages only if their recognition would prejudice vital interests of the forum.[20] The extent to which such interests may be affected thereby will depend upon the circumstances.[21] If, for example, a Turk should succeed in importing several wives into this country[22] and seek to restrain them by virtue of the power vested in him by

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[18] See *supra* note 5.

[19] Kahn, one of the most acute writers on the subject of the Conflict of Laws, has made the following observations concerning this matter:

"None of our laws, however fundamental it may be, requires exclusive, absolute application. No foreign legal institution, however much we may disapprove of it, can be simply ignored by us. . . .

"If the point of contact is not intensive, and of relatively small importance as regards the particular legal relationship, even the laws which are of the most fundamental importance to the entire state, may yield in their application. On the other hand, if the point of contact is of greater intensity or of particular significance as regards the particular legal relationship, a law of little importance may perhaps not yield to the foreign law." Kahn, *op. cit. supra* note 14, 28, 73.

[20] "Our rights are always confined to this, that we may treat as non-existent, cut off and put out of sight, those branches and offshoots only which come to light on our own territory. The trunk of the tree, which is rooted in a foreign system of law, is beyond our power, and if the branch or offshoot, which came into existence in this country, had no power to produce any mischievous results, if it could not come into conflict with our legal system, it would be wrong and unjust to destroy it, simply because the trunk from which it sprung could not be tolerated, if it had its roots in this country. For instance, polygamy cannot be suffered to exist in this country; but can we deny to the sons of a Mohammedan, who has lived after the law of his own country in polygamy, the right of property in a thing belonging to the father's succession which happens to be on our territory? Certainly not. Polygamy is in this case only the remote foundation of a claim, which in other respects does not come into conflict with our legal system; it is a condition precedent to the process for asserting that claim. Polygamy exists, and did exist in these foreigners' country, and the decisions of our judges cannot touch it. But if our system of law refused to recognize legal relations of the kind, which are illegal in this country, even as facts or conditions precedent to other legal claims, the final result of this view would simply be to throw intercourse with the foreign country in question into complete confusion, and in truth to do away with any settled intercourse." Bar, *International Law* (Gillespie's transl. 1892) 96.

[21] Fink argues that the refusal to apply "foreign" law should never be based upon its content, but solely upon the point of contact with the state in which the suit is brought. Fink, *op. cit. supra* note 12, 164.

[22] ". . . . Polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy" are excluded from admission to the United States. Act of Feb. 5, 1917 (39 Stat. at L.) ch. 29, sec. 3.

Turkish law or bring a suit based upon his Turkish marital rights, he would be told that he could exercise in this country such rights only as are accorded by our own law,[23] and that our law knows nothing of second and third wives. If he should seek a divorce here, even if he had taken unto himself only one wife in Turkey, our courts might agree with the English case of *Hyde v. Hyde*[24] and hold that our law of divorce cannot be applied to any marital relation arising in a country under the law of which the husband is authorized to take other wives.[25]

Suppose, on the other hand, that the Turk never came to this country, that he inherited some property here and that the question is whether the property will go upon his death to his children born in Turkey of his several wives; would these children be recognized in this country as his legitimate children? The English case of *In re Bethell*,[26] adopting Lord Penzance's definition of a Christian marriage in *Hyde v. Hyde* as that of a "voluntary union for life of one man and one woman, to the exclusion of all others," reached the conclusion that the child of

[23] Questions of individual liberty and power are considered in our law as matters of local police. Minor, *op. cit. supra* note 1, sec. 83. The continental writers also are agreed that if the second wife escaped, the husband would be unable to restrain her, and that she would be free to marry again, notwithstanding the fact that capacity in general is governed in continental countries today by the *lex patriae*. 2 Fiore, *Le droit international privé* (Antoine's transl. 1907) 87; 2 Fiore, *Delle Disposizioni Generali sulla Publicazione, Applicazione ed Interpretazione delle Leggi* (1908) 135, 136; 4 Laurent, *Le droit civil international* (1880) 533; Kahn, *op. cit. supra* note 14, 24; 6 Planck, *Bürgerliches Recht* (3d ed. 1905) 116. An actual case arose some time ago in Italy, although it did not come before the courts, when one of the wives of the Ex-Khedive Ismaïl-Pasha, falling in love with a Neapolitan, escaped. The Ministry of Justice advised the officer of the civil status that the couple could be married. See Bar, *op. cit. supra* note 20, 97, note.

[24] (1866) L. R. 1 P. & D. 130.

[25] ". . . . but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; . . . . The inconsistencies that would flow from an attempt of this sort are startling enough. . . . And as the power of enforcing the duties of marriage would thus be lost, so would the remedies for breach of marriage vows be unjust and unfit. For a prominent provision of the Divorce Act is that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman that the Divorce Act goes further, and declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife. A Mormon, therefore, who had according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the application of English law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void, as he had a wife living at the time of its celebration: and all this without any act done with which he would be expected to reproach himself, or of which either woman would have the slightest right to complain." Lord Penzance, *ibid.* 136, 137.

[26] (1887) 38 Ch. D. 220.

an Englishman, domiciled in England, born of a marriage contracted in South Africa with a woman of the Baralong tribe, which allowed polygamy, according to the customs of that tribe, was not legitimate, although the father had not taken another wife. This case must not be extended, however, beyond its facts. A different conclusion might have been reached, although the court does not dwell upon that fact, if Bethell had not been an Englishman, domiciled in England, but a member of the Baralong tribe.[27] The fact also, that Bethell declined to be married in church, that he had never introduced the Baralong woman to any European as his wife, and that he made special provision for the child in his will out of his property in Africa without mentioning the English property, satisfied the Court that he intended to contract a marriage in the Baralong sense, but not in the English sense. So far as the case may be deemed to lay down a general rule, it cannot be approved.[28] The court in *Hyde v. Hyde,* by whose decision Justice Stirling deemed himself bound in *In re Bethell,* was careful to limit the decision to the facts before it. Lord Penzance says in that case:[29] "This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

In this country this question has arisen with respect to polygamous Indian marriages contracted in conformity with their tribal law. Not only have the children of the first wife been recognized as legitimate,[30] but those born of the second union as well.[31]

Questions may arise also with respect to the wives. Would the several wives of a Turk living in Turkey be entitled to dower in the real estate which the husband might acquire in this country? What rights

[27] As the essentials for marriage are determined in English law on principle by the law of domicil the court might have invoked the English law on that ground, Bethell being domiciled in England at the time of his marriage.

[28] The great Belgium jurist, Laurent, goes very far in regarding such a marriage as non-existing, but feels nevertheless that the children born of a polygamous marriage in a country in which such a marriage is authorized should be allowed to inherit property in Christian countries. 4 Laurent, *op. cit. supra* note 23, 533. This conclusion is shared also by all the other continental writers. Bar, *op. cit. supra* note 20, 96; 2 Fiore, *Le Droit International Privé* (1907) 87; 2 Fiore, *Delle Dispozizioni* (1908) 134, 135; Kahn, *op. cit. supra* note 23, 25; Kuhlenbeck, *Einführungsgesetz,* in 6 Staudinger, *Kommentar zum bürgerlichen Gesetzbuch* (7th & 8th ed. 1914) 150; Orescu, *Le mariage en droit international privé* (1908) 240; 6 Planck, *op. cit. supra* note 23, 116; 3 Weiss, *op. cit. supra* note 14, 488; 1 Zitelmann, *Internationales Privatrecht* (1914) 363.

[29] *Supra* note 24.

[30] *Wall v. Williamson* (1845) 8 Ala. 48.

[31] *Kobogum v. Jackson Iron Co.* (1889) 76 Mich. 498, 43 N. W. 602.

of succession would they have upon his death in property left in this country? If he had taken only one wife in Turkey, what rights would his widow have under the above circumstances? A recent Iowa case, *Royal v. Cudahy Packing Co.* (1922) 190 N. W. 427, has answered these questions in part. In that case an action was brought under the Workmen's Compensation Act by an alleged widow of a deceased employee. The claimant had married the deceased in a Mohammedan country and in accordance with the Mohammedan religion. Thereafter the deceased had come to this country, leaving his wife behind. Under the Mohammedan religion the deceased could marry four wives, but he had actually never contracted any marriage except with the plaintiff. It was urged, as in the *Bethell* case, that a marriage authorizing additional wives is not a marriage which the courts of Christian countries will recognize. The court held, however, to the contrary in view of the fact that there was no evidence that it was the intention of the deceased to take other wives or that his wife intended that he should.

The continental writers have attempted to bring the cases arising from polygamy within their general theories concerning the application of "foreign" law and their notions of "public order," but no agreement exists in the results reached.[32] Questions like the above cannot be determined by any general formula,[33] but demand a careful consideration of the facts of each particular case and of the conflicting policies involved, with a view of discovering whether the recognition of the "foreign" law can be brought into harmony with the legal order of the forum.

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[32] According to Planck, no action for the restitution of conjugal rights, or for support, should be allowed in Germany by the second wife, as long as the first marriage continues. The children of the second marriage born in Turkey prior to the dissolution of the first marriage should be regarded in Germany as legitimate, but as illegitimate if born in Germany. Property rights acquired by either party in Turkey by virtue of the matrimonial property law there in force should be respected. As regards property acquired in Germany by either party to the second marriage, the second marriage should be deemed non-existing. Planck, *op. cit. supra* note 23, 116.

Zitelmann would recognize a polygamous Turkish marriage if the parties remain in Turkey, or if the Turkish husband alone comes to Germany. If the second wife comes to Germany, or to any other country where monogamy prevails, her marriage should be deemed dissolved, but it should be allowed to revive upon her return to Turkey. As long as the first wife is in Germany, she must be recognized as the only wife. The second wife, remaining in Turkey, should be unable in such case to bring an action for support in Germany, and a child born of her during this time in Turkey should be regarded as illegitimate in Germany. If both wives were in Germany the second marriage should revive upon the death of the first wife, provided the second wife had not remarried in the meanwhile, and her marital relations with her husband had continued in fact. Zitelmann, *op. cit. supra* note 28, 363-365.

[33] See also the distinction between static and dynamic rights. Beale, *op. cit. supra* note 7, 165 *et seq.*

ALIMONY PENDENTE LITE FOR HUSBANDS

"New lamps for old" is so accustomed a refrain in modern life that the new lamps are often inadequately examined before the old are yielded up. Small wonder that some of the parties to the exchange find that for them the new lamps shed no more light than did the old. Such must be the situation of the disgruntled husband in Washington, who, basing his claim to alimony *pendente lite* in a suit for divorce on the fact that the legislature in that state had remitted most of the common-law disabilities of *femmes coverts,* was told in return that husbands had received no greater rights or beneficial liabilities than had been expressly put into other statutes for them,[1] and that alimony *pendente lite* was not one of these.[2]

There is, however, some substance in the husband's claim that he should have been given more in return for what he lost.[3] The justification of his claim lies partly in the history of alimony, temporary and permanent, and partly in the character of recent legislation.

Absolute divorce, as we know it, did not exist in England until 1858, and perhaps a generation or so before in the United States.[4] Until the Commonwealth in England (1649-1660), the ecclesiastical courts had entire cognizance of all matters affecting the dissolution of the marital relation.[5] Only two types of divorce were known. One was the *a vinculo,* or absolute divorce, which was granted only for some reason that made the marriage null and void from the outset—as for example, impotence or consanguinity.[6] The results of such a decree were that the children, if any, were made illegitimate, either party might remarry, the husband was barred of curtesy and the wife of dower, but, on the other hand, she was given back all the property she had brought to

[1] As, for example, "the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." Rem. Wash. Comp. Sts. 1922, sec. 6906. Some nineteen or twenty states have similar provisions.

[2] *State, ex rel. Jacobson, v. Superior Court for Spokane County* (1922, Wash.) 207 Pac. 227. Throughout this discussion, "alimony" refers to support of either spouse, and not support of children.

[3] It must be taken for granted, since the lower court acted favorably upon the husband's application, that the circumstances were the same as those that are required before a wife is granted alimony *pendente lite,* namely, the need of the applicant, and the means of the adverse party. See 2 Schouler, *Marriage, Divorce, Separation and Domestic Relations* (1921) sec. 1781.

[4] See an excellent discussion of the development of divorce from the canon law, as later supplemented by Parliamentary divorce, to the Matrimonial Causes Act (1857) 20 & 21 Vict. c. 85, by Bryce, *Marriage and Divorce,* 3 Select Essays in Anglo-American Legal History (1909) 782, 822 *et seq.* Also 1 Blackstone, *Commentaries,* *440, *441.

[5] "From the twelfth century onwards, the ecclesiastical rules and courts had undoubted control of this branch of law all over Christian Europe." 3 Select Essays, *op. cit. supra* note 4, 822. *Thomas Hyatt's Case* (1615) Cro. Jac. 364; Ayliffe, *Parergon Juris Canonici Anglicani* (1734) 225 *et seq.*

[6] 2 Burns, *Ecclesiastical Law* (1788) 458 *et seq.*

him.[7] The parties were considered as never having been husband and wife, and did not owe each other any of the duties based on that relationship. The other kind of divorce, *a mensa et thoro,* is the legal separation of to-day.[8] Here the marriage was held good as of origin, but its sanctity was destroyed by some intervening cause which justified its partial suspension, such as adultery, infidelity, cruelty, or "entering into religion."[9] The husband and wife were ordered to live apart, the children were legitimate, the parties could not remarry, and the husband's investiture with all the wife's property still held good, as did his duty to support her. Hence she was entitled to permanent alimony, "which the ecclesiastical court assigns in proportion to the circumstances and conditions of her husband."[10]

The absolute divorce then was never followed by a decree for maintenance or permanent alimony, since the latter was based upon a duty arising out of the very status which the decree declared never to have existed.[11] But alimony *pendente lite* would as a matter of course be awarded the wife, whether she was plaintiff or defendant in a suit for divorce *a mensa,* and if she was defendant in a suit *a vinculo.*[12] For in both cases, while she was claiming she was a wife, it was the husband's duty to supply her with funds for defense and support until the issue was decided.

From this angle the conflict as to which tribunal was the successor to the ecclesiastical,[13] and the conflict as to the extent of power conferred by statutes in this connection, appear to lose much of their poignancy. The divorce by Parliament which, from the date of the legisla-

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[7] *Ibid.*

[8] The ecclesiastical decree *a vinculo* was the equivalent of the decree of nullity to-day; the *a vinculo* or absolute decree is now given for the reasons which formerly led to the decree *a mensa et thoro* (which is wholly legislative); and the legal separation to-day has the same elements as the canonical divorce *a mensa et thoro.*

[9] The echo of this particular canonical law may be found in two of our states to-day, which give, among other causes for absolute divorce, ". . . . when either party has joined any religious sect or society which professes to believe the relation of husband and wife unlawful. . . ." N. H. Pub. Sts. 1901, ch. 175 sec. 5; Carr. Ky. Sts. 1915, sec. 2117 (6). Ohio makes it a misdemeanor to persuade a husband or wife to join such a sect. Throck. Ohio Gen. Code, 1921, sec. 13042.

[10] 2 Burns, *op. cit. supra* note 6, 459.

[11] "Upon the marriage, the husband has vested in him all the present available means of the wife, together with the right to claim her future earnings and acquisitions. At the same time, the law casts upon him the duty suitably to maintain his wife, according to his ability and conditions in life." But even where he gets no property with her, he still owes her the duty of support. 2 Bishop, *Marriage and Divorce* (5th ed. 1873) sec. 369; 2 Schouler, *op. cit. supra* note 3, sec. 1750.

[12] Ayliffe, *op. cit. supra* note 5, 59, end of first and second paragraphs.

[13] *Greene v. Greene* (1896) 49 Neb. 546, 68 N. W. 947; 34 L. R. A. 110, note; *Cizek v. Cizek* (1904) 69 Neb. 797, 96 N. W. 657; *Hagert v. Hagert* (1911) 22 N. D. 290, 133 N. W. 1035; *Huffman v. Huffman* (1906) 47 Or. 610, 86 Pac. 593.

tion, totally dissolved a marriage, after an *a mensa* decree of an ecclesiastical court for such a cause as adultery, is the precursor of our present absolute divorce.[14] The power of our courts to grant absolute divorce for new reasons—and to grant a new kind of absolute divorce—must logically be rested to-day on legislative authorization;[15] and so of the power to grant permanent alimony with such divorce.[16] But the historical basis for permanent alimony upon a legal separation, and for temporary alimony in any suit for either legal separation or annulment is so clear that to admit jurisdiction of the suit is almost of necessity to admit power to grant such alimony—to the wife.[17] Neither historically nor actually need such power depend on legislative authorization. And the theory underlying such action applies with full force to the modern type of divorce *a vinculo,* and to alimony *pendente lite* to a husband, where other considerations do not stand in the way of granting it.

These other considerations—the other half of the problem—center about the reason for the award. The final stumblingblock for a husband seeking temporary alimony in the absence of a statute is the fact that the basis for such award to the wife was the husband's common-law duty of support.[18] There is here ground in logic for refusing to extend such relief to a husband, irrespective of the supposed necessity for express statutory power. And it can further be said, with some courts, that the removal of the disabilities of coverture, and even the wife's retention of all the property with which she comes to the marriage, as well as her right to the proceeds of her own services, afford

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[14] It is of interest to note that when Parliament gave the *a vinculo* effect in a case where the ecclesiastical courts had the power to grant only a divorce *a mensa,* they usually added "property clauses" restoring to the wife her property—not alimony at all—giving her no more than if the *a vinculo* decree had been pronounced by the ecclesiastical court. *Wright v. Wright's Lessee* (1852) 2 Md. 429, 453. Further, where American legislatures attempted to grant alimony with a legislative divorce, it was held invalid. *Crane v. McGinnis* (1829, Md.) 1 Gill & J. 463. It is believed that the only case *contra* is *Borden v. Fitch* (1818, N. Y.) 15 John. 121.

[15] Most modern courts recognize these distinctions. *Brenger v. Brenger* (1910) 142 Wis. 26, 31, 125 N. W. 109, 111; *Simpson v. Simpson* (1913) 21 Calif. App. 150, 155, 131 Pac. 99, 101.

[16] *Wright v. Wright's Lessee, supra* note 14; 2 Bishop, *op. cit. supra* note 11, sec. 376.

[17] *North v. North* (1845, N. Y.) 1 Barb. Ch. 241; *McGee v. McGee* (1851) 10 Ga. 477; *Methvin v. Methvin* (1859) 15 Ga. 97, 60 Am. Dec. 664, note; *LeBarron v. LeBarron* (1862) 35 Vt. 365, 371; *Petrie v. People* (1866) 40 Ill. 334; see 19 C. J. 204, sec. 498, and 206, note 53; Bishop, *op. cit. supra* note 11, secs. 396-401; cases cited *infra* note 26.

[18] *Groth v. Groth* (1896) 69 Ill. App. 68; 1 R. C. L. 874; 2 A. & E. Enc. Law, 92; *Somers v. Somers* (1888) 39 Kan. 132, at p. 136, 17 Pac. 841, at p. 846: "There being no corresponding duty on the wife's part to support her husband, alimony cannot be granted him."

no reason for giving the husband temporary alimony.[19] These changes have swept away in considerable part the reasons assigned by the courts as underlying the husband's duty to support the wife, and to the same extent encroach upon the reasons for allowing her alimony.[20] But alimony continues to be allowed her where she needs it,[21] nor does the allowance strike the community as improper. There is in our *mores* a normal expectation that a husband, as husband, will and should support a wife because of the division of labor between them, and because also, as a part of the family unit, he, rather than the community at large, is regarded as her proper source of support.[22]

The first of the reasons indicated goes far also to explain the disinclination of the courts—and legislatures—to make corresponding provision for the needy husband; his membership in the family unit, on the other hand, would tell in his favor. And in those states in which not only have the husband's rights in his wife's property been abolished, and the wife's increased, but there is also a statute expressly imposing on her under specified circumstances the duty of support which only a

[19] *State, ex rel. Hagert, v. Templeton* (1909) 18 N. D. 525, 123 N. W. 283.

[20] NOTES (1912) 25 HARV. L. REV. 556; *Westerfield v. Westerfield* (1882) 36 N. J. Eq. 195; *Pennington v. Pennington* (1897) 71 Mo. App. 438; *Snider v. Snider* (1913) 179 Ind. 583, 102 N. E. 32.

[21] *Supra* note 20.

[22] When no sense of injustice is awakened by the rule continuing beyond its "reason," suspicion must be awakened that the assigned reason went at most only to a part of the matter. The physical fact of motherhood and the physical disabilities attendant thereon, present in the type-marriage, have since the origin of the family produced a typical division of labor, long definitely standardized in our thought: that the wife will normally manage the home, while the husband will normally seek, in more direct relation with the outside economic world, the means of subsistence for the family unit. Into this standardization the childless marriage, the marriage of the propertied woman, the marriage of the woman with a career, fit themselves well or ill as exceptions, still without effect on the rule. The normal expectation of support by the husband, thus derived, continues and will continue to afford a basis in the *mores* for awarding alimony to a wife. But the concept of alimony is closely related to, and its rules will probably always be affected by the community's primary interest in avoiding public charges where there are private shoulders to bear the burden. Alimony to a wife, and especially alimony *pendente lite,* will often be refused or reduced as it may appear unnecessary to enable her to live or prosecute her cause. In this same primary public interest, wives are made responsible by statute for the support of husbands—or parents, or children—at least, where they have separate property; or family expenses, though incurred by the husband, are made chargeable upon the property of the wife. Yet even under such statutes the husband is treated as still carrying the primary duty of support. *Taylor v. Taylor* (1909) 54 Or. 560, 103 Pac. 524; *State v. Langford* (1918) 90 Or. 251, 176 Pac. 197; *Kosanke v. Kosanke* (1917) 137 Minn. 115, 162 N. W. 1060; *cf. Skillman v. Wilson* (1910) 146 Iowa, 601, 125 N. W. 343; Conn. Gen. Sts. 1918, ch. 282, sec. 5287. And that a statute making the wife's estate liable for her funeral expenses should, as in *Constantinides v. Walsh* (1888) 146 Mass. 281, 15 N. E. 631, and *Re Stadtmuller* (1905) 110 App. Div. 76, 96 N. Y. Supp. 1101, be construed to allow the husband who paid such expenses a recovery over, must be regarded as wholly exceptional.

husband had at common law,[23] what basis can remain in law or logic for a court's refusal to carry the rule as far as its reason by granting alimony *pendente lite* to the needy husband?[24]

The actual results, as our law stands to-day, are of interest. Practically every state in the Union makes some statutory provision for alimony, permanent or *pendente lite,* for the wife.[25] Those few whose chivalry failed to reënact this portion of the common law, give it to her without the statute.[26] Some nine or ten states give the husband permanent alimony as a sort of penalty against the wife, where it is for her fault that the divorce is decreed.[27] Five more give alimony to him, as is usually given to her, in the discretion of the court;[28] five give him

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[23] "The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and there is no community property, and he is unable from infirmity, to support himself." Calif. Civ. Code, 1915, sec. 176. It will be observed that the wife's duty of support is not made to extend to support "by her labor." See similarly N. D. Comp. Laws, 1913, sec. 4409.

[24] Such a construction of these statutes is obviously in furtherance of their purpose of preventing the husband from becoming a charge on the public rather than on the wife. Such statutes have been made the basis for awards to the husband in suits for maintenance by him apart from divorce. *Livingston v. Superior Court of Los Angeles* (1897) 117 Calif. 633, 49 Pac. 836; *Hagert v. Hagert* (1911) 22 N. D. 290, 133 N. W. 1035; NOTES (1896) 10 HARV. L. REV. 177; NOTE AND COMMENT (1912) 10 MICH. L. REV. 402. This is a much more daring step to take than to grant a husband alimony *pendente lite* on the basis of such a statute, since the power of courts to adjudge maintenance or permanent alimony even to the wife apart from a suit for separation or divorce, without legislative authorization, has been more widely contested than the power to grant alimony *pendente lite* to a wife without statute, and has less basis in history. *Ball v. Montgomery* (1793, Ch.) 2 Ves. Jun. 191, 195. See the cases in this note for reference to the conflict.

[25] See 3 Schouler, *op. cit. supra* note 3, *Divorce Statutes.*

[26] For example, neither Tennessee nor Mississippi gives the wife alimony *pendente lite* by statute. But see *Ross v. Ross* (1906) 89 Miss. 66, 42 So. 382; *Humber v. Humber* (1915) 109 Miss. 216, 68 So. 161; *Lishey v. Lishey* (1873) 2 Tenn. Ch. 1; *Burrow v. Burrow* (1880, Tenn.) 6 Lea, 499.

[27] Me. Rev. Sts. 1916, ch. 65, sec. 10; Mass. Gen. Laws, 1921, ch. 208, sec. 26; Neb. Comp. Sts. 1922, sec. 1537; Throck. Ohio Gen. Code, 1921, sec. 11993; Okla. Rev. Laws, 1910, sec. 4969; Or. Laws, 1920, secs. 511, 513; R. I. Gen. Laws, 1909, ch. 247, sec. 6; Thomp. & Shann. Tenn. Rev. Code, 1918, sec. 4225; Vt. Gen. Laws, 1917, sec. 3593. Also (1857) 20 and 21 Vict. 85, XLV. Some twenty states provide for the support of the children by the guilty party, as for example Wis. Sts. 1919, sec. 2365.

[28] Iowa Supp. Code, 1913, sec. 3180; *McDonald v. McDonald* (1902) 117 Iowa, 307, 90 N. W. 603; N. D. Comp. Laws, 1913, sec. 4405. (This statute, and that in note 23, *supra,* are the result of the refusal of the court in *State, ex rel. Hagert, v. Templeton, supra* note 19, to grant alimony, *pendente lite* or permanent, to the husband without statute, and the suggestion in that case to the effect that it was proper for the legislature to grant it under the changed circumstances of husband's and wife's duties.) Ohio, *supra* note 27, sec. 11992; N. C. Cons. Sts. 1919, sec. 1665; N. H. Pub. Sts. 1901, ch. 175, sec. 17.

alimony *pendente lite*.[29] But strangely enough, although there are only nine or ten states that make it the duty of the wife to support an incapacitated husband where she is able,[30] yet the two cases most strongly holding that a husband cannot get alimony *pendente lite* without statutory authority, both being cited to support the instant case, come from two such jurisdictions—California and North Dakota.[31]

It may be said that a small portion of American husbands are here concerned. The number of cases where husbands request alimony *pendente lite* is not large; nor are there many jurisdictions where a statute imposes upon the wife even a qualified duty of support. Perhaps, therefore, the extent of judicial injustice that calls for remedy is slight. But it may well be argued that in the other cases the legislative injustice should also be remedied.[32] As poor a creature as the husband who needs alimony, either temporary or permanent, may seem to be, he exists, and the penalties already laid on him by life for his incapacities should not be made heavier by law. If "equal rights" mean anything, this is certainly one of the things they should mean.[33]

PLEADING NEGLIGENCE

The appearance of a new edition of the official Connecticut Practice Book,[1] containing additions to the official forms of pleading, serves to call attention anew to the difficulties involved in the statement of the cause of action under the codes. To illustrate the problem involved it

[29] Iowa, *supra* note 28, sec. 3177; *Lindsay v. Lindsay* (1920) 189 Iowa, 326, 178 N. W. 384; N. D. *supra* note 28, sec. 4402; Ohio, *supra* note 27, sec. 11994; Okla. *supra* note 27, sec. 4967; Utah Comp. Laws, 1917, sec. 2998.

[30] Calif. *supra* note 23, sec. 176; Conn. Pub. Acts, 1920-1921, ch. 99, 101 (pauper); Ohio, *supra* note 27, sec. 7995; Nev. Rev. Laws, 1912, sec. 2178; Okla. *supra* note 27, sec. 3351; N. D. *supra* note 23, sec. 4409; S. D. Rev. Code, 1919, sec. 167; Wis. Sts. 1898, sec. 1502, as amended by Laws, 1907, ch. 224.

[31] *State, ex rel. Hagert, v. Templeton, supra* note 19; *Eisenring v. Superior Court* (1917) 34 Calif. App. 749, 168 Pac. 1062. It is believed that the only other cases in which this question has been squarely decided, and *contra* to the husband's claims (except *Groth v. Groth, supra* note 18), are also in such jurisdictions. *Brenger v. Brenger* (1910) 142 Wis. 26, 125 N. W. 109; *Poloke v. Poloke* (1913) 37 Okla. 70, 130 Pac. 535 (neither permanent nor temporary alimony permitted).

[32] There is an obvious social necessity for the compulsion on the husband to support his wife—"the danger of (her) becoming a public charge." Tenn. Code, *supra* note 27, sec. 4249; 55 CENT. L. JOUR. 383, at p. 385. Is there not just as much reason for relieving taxpayers of this additional burden where the husband cannot support himself and the wife has the means to contribute?

[33] The convention of the National Woman's Party, held at Washington, November 11th and 12th, 1922, has officially recommended alimony for husband and wife on equal terms, by approving the North Dakota and Iowa laws (cited *supra* notes 23 and 28) as models. *New York Times,* November 13, 1922, p. 9. Equal terms, however, would not require the giving of alimony to the husband in very many instances.

[1] *Connecticut Practice Book* (1922), compiled by a committee of the judges of the Superior Court.

seems apt to consider the manner in which a cause of action based upon the defendant's negligence must be stated.

It is possible to characterize common-law pleading, code pleading, and the modern brief pleading developed in a few courts, as issue-pleading, fact-pleading, and notice-pleading respectively.[2] This emphasizes the chief purpose supposed to be achieved by each system. Thus the glory of the common-law system was supposed to be that the parties proceeded by successive steps until one affirmed and the other denied a single point, which then became the sole matter to be tried.[3] Under the codes it was expected that each party would tell his story "in simple and concise language" and the court would apply the necessary law to these facts. Hence the pleader must state merely the "dry, naked, actual facts."[4] And under notice pleading the office of the pleading is simply to put the other side on notice in a general way of the pleader's claim.[5]

But after all this is only to single out and emphasize the most important feature of each system. Under common-law pleading the facts were stated, even though it was not quite so heinous an offense as under the codes to mix a little law therewith, and the pleadings did serve the function of notice; while under code pleading issues are created, and under notice pleading the facts are stated, though quite generically. The real difference is one of degree—as Holmes considers all legal distinctions to be—in the particularity of the statement of the facts. The least successful of these systems has been the code system and the reason therefor is in the main the failure to recognize the true nature of the distinction just noted and the consequent vain attempt to restrict the pleading to only "the ultimate facts," excluding on the one hand evidential facts and on the other legal conclusions.[6] Code pleading of course justified itself for certain of its reforms, such as the abolition of forms of action and the amalgamation of law and equity. But in the statement of the cause of action the common law was more successful and the reaction from code pleading must necessarily be towards the common law. The difference between the statement under notice pleading and the common-law statement, stripped of its verbiage and reiteration, is certainly not great.

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[2] See Pound (1920) 33 HARV. L. REV. 326, reviewing Works, *Juridical Reform* (1919); Whittier, *Notice Pleading* (1918) 31 HARV. L. REV. 501.

[3] Stephen, *Pleading* (Williston's ed. 1895) 136, stating that the *main* object of the common-law system of pleading was to ascertain the subject for decision by the production of an issue.

[4] Pomeroy, *Code Remedies* (4th ed. 1904) 560. Quoted by Cook, *Statements of Fact in Pleading under the Codes* (1921) 21 COL. L. REV. 416.

[5] Whittier, *supra* note 2.

[6] For a statement of the problem involved, see Cook, *supra* note 4; Isaacs, *The Law and the Facts* (1922) 22 COL. L. REV. 1. Among criticisms of code pleading in this regard, see Pound, *supra* note 2; Works, *op. cit. supra* note 2, 45 (considering that the rule may be sound in theory, but indulging in sound criticism of its practical application).

A conspicuous example of the failure of the code ideal is the use of the "common counts" under the codes. These counts, developed in the common-law action of *indebitatus assumpsit*, set forth the defendant's indebtedness to the plaintiff in very general form. But to say that A is indebted to B for a conversion and sale of A's personalty is to state a legal conclusion drawn from the law of waiver of tort, and the addition of the fictitious promise to pay adds no fact. Hence it is not surprising to find bitter objection to the common counts voiced by advocates of fact-pleading such as Pomeroy.[7] But here again the distinction is between a general and a specific statement. To say that A is married is to state a legal conclusion and yet in common every-day speech it is also a generalization of fact and should be treated as such.[8] And so the common courts, which did furnish short and simple forms of statement in cases where intricate and involved explanation was neither necessary nor desirable, have been in general use under the codes, notwithstanding the objections of those who emphasized an unsound theory and did not perceive the needs of practical convenience.[9]

So in stating the ordinary negligence action the problem is to determine how specifically the occurrence in question should be detailed. It is generally said that facts showing the right-duty relation, the breach, and the resulting damage, must be set up. But what is needed to show the defendant's duty and his breach? Let us take the case which has become increasingly important with the use of the automobile, that of injury caused by careless driving on a highway. The gist of the statement at common law was that the defendant so carelessly (unskillfully, improperly, etc.) drove his horse that through his carelessness his horse struck the plaintiff's horse and cart, injuring the plaintiff.[10] There may be kinds of default unknown to the age of the horse which may be committed by a motorist, and yet under the forms appearing in the statutes of Massachusetts—where under a modified common-law procedure the good of the old system has been preserved while its defects have been discarded—a like allegation is provided for the automobile accident case.[11] Under the codes, too, it seems clearly to have been the view originally that the same kind of statement should be

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[7] Pomeroy, *op. cit. supra* note 4, 584-590; Sunderland, *Cases on Code Pleading* (1913) 269; 34 L. R. A. (N. S.) 364, note.

[8] Jessel, M. R., in *Eaglefield v. Marquis of Ludenderry* (1876) L. R. 4 Ch. 693, 702, quoted by Cook, *supra* note 4.

[9] *Supra* note 7.

[10] *Williams v. Holland* (1833, C. P.) 10 Bing. 112; 2 Chitty, *Pleading* (7th ed. 1844) 529.

[11] Mass. Gen. Laws, 1921, ch. 231, sec. 147, no. 13: "And the plaintiff says that the defendant so negligently and unskillfully drove a motor vehicle in a public highway called ——— ——— street, in Boston, that by reason thereof the said motor vehicle struck the plaintiff who was then properly crossing the said highway whereby the plaintiff was thrown down. . . ."

used.[12] And under notice pleading the form suggested by its chief advocate seems not dissimilar except for the omission of the word "carelessly."[13]

Nevertheless there seems to have developed a feeling on the part of both bench and bar that the "particular acts" of negligence must be stated.[14] This attitude is exemplified by rulings of varying strictness. Perhaps the prevailing view is to require the plaintiff to state explicitly each successive act by the defendant leading to the injury, but he is still, by the more general rule, permitted to characterize such acts as having been *negligently* done and such characterization is held to show the breach of duty to the plaintiff.[15] Some courts, however, hold that the word "negligently" means nothing as a statement of fact, and the breach of duty must be otherwise shown.[16]

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[12] See forms in Maxwell, *Code Pleading* (1892) 724 (taken, as the author says, from 2 Chitty, *Pleading* (1855) 860); Phillips, *Code Pleading* (1896) sec. 503; Bryant, *Code Pleading* (2d ed. 1899) 338; Bliss, *Code Pleading* (3d ed. 1894) sec. 211; *Connecticut Practice Book, op. cit. supra* note 1, 452; Abbott, *Forms of Pleading* (2d ed. 1918) 1037, 1039; Alden, *Handbook of Practice under the Civil Practice Act of New York* (1921) 68. Such complaints have been held sufficient against motion. *Hanson v. Anderson* (1895) 90 Wis. 195, 62 N. W. 1055; *Hicks v. Serano* (1911) 74 Misc. 274, 133 N. Y. Supp. 1102; *aff'd.* (1912) 149 App. Div. 926, 133 N. Y. Supp. 1126; see also *Oldfield v. N. Y., N. H. & H. Ry.* (1854, C. P.) 3 E. D. Smith, 103; *aff'd.* (1856) 14 N. Y. 310; *Peterson v. Eighmie* (1916) 175 App. Div. 113, 161 N. Y. Supp. 1065; *cf. Leny v. Paine* (1921) 197 App. Div. 581, 188 N. Y. Supp. 601.

[13] Whittier, *supra* note 2, at p. 504: ". . . . the plaintiff claims damages for personal injuries sustained by being struck by the defendant's motorcycle about August 1, 1916."

[14] Thus it has been concluded from the cases that where a petition contains but a general allegation of negligence it is subject to a motion to make more definite and certain. Pomeroy, *op. cit. supra* note 4, 682, note by Professor Bogle. Missouri, although complaints in the common-law form have been sustained in that jurisdiction, has now ruled that such a statement is vulnerable on motion. *Van Bibber v. Wellman Fruit Co.* (1922, Kansas City Ct. of App.) 234 S. W. 356; but see *Mack v. St. L., K. C. & N. Ry.* (1883) 77 Mo. 232; *Sullivan v. Mo. Pac. Ry.* (1888) 97 Mo. 113, 10 S. W. 852; *Pope v. K. C. Cable Ry.* (1889) 99 Mo. 400, 12 S. W. 891; COMMENTS (1922) 7 ST. L. L. REV. 142.

[15] *Hill v. Fair Haven & W. Ry.* (1902) 75 Conn. 177, 52 Atl. 725; *Bunnell v. Berlin Iron Bridge Co.* (1895) 66 Conn. 24, 33 Atl. 533; 29 Cyc. 570. Apparently, here also, the manner in which the negligent act may be a breach of duty must be apparent to the court. See *O'Keefe v. Nat. Folding Box & Paper Co.* (1895) 66 Conn. 38, 33 Atl. 587 (complaint which alleged that the plaintiff was negligently put to work by the defendant in placing colored paper saturated with poison into a box heated with steam as a result of which he was poisoned, was defective in failing to state facts making it the duty of the defendant to know that the paper was poisonous).

[16] Thus an averment that the persons in charge of a locomotive engine carelessly and negligently and without giving warning ran it at a reckless and high rate of speed upon a switch track where the plaintiff was at work, and negligently and carelessly disconnected a freight car therefrom, leaving it to run with great force against other cars on the track and forced them against the plaintiff, was held

And the English precedents call for a specification of the particulars of negligence.[17]

With such an attitude shown by various tribunals it is but to be expected that lawyers, following the legal axiom of safety first, will see that their complaints are specific beyond question, and hence we have the intricate, complex, verbose, repetitious, and ridiculous complaints of modern pleading. The forms in the new Connecticut Practice Book well illustrate this development. They have been prepared under official authority to accompany the Connecticut Practice Act, one of the most successful codes in this country. The forms which accompanied the original Practice Act have contributed greatly to its success.[18] In the new edition all the original forms seem to have been retained and we still find the old liberal precedents such as that the defendant "carelessly drove against the wagon of the plaintiff, and thereby broke and injured the same";[19] but the new forms which have been added are of a different sort. Thus a form of complaint for damages resulting from an automobile collision contains a paragraph stating the collision in the old style, but in another paragraph there is added the allegation that "the damage to the plaintiff's automobile was caused by the negligence of the defendant in that, etc.," specifying several particulars such as speed, failure to keep a look out, and failure to sound a warning.[20] Another form,

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insufficient to show a duty to the plaintiff. *Chicago & Erie Ry. v. Lain* (1907) 170 Ind. 84, 83 N. E. 632. So an allegation in an action against a city that there was a hole in a city street and that the plaintiff riding a bicycle struck "said defective, unsafe and out of repair street, and by reason of said street being out of repair as aforesaid, defective, and unsafe, she was thrown violently, etc.," was held to fail to show that the defect in the street was the proximate cause of the injury. *City of Logansport v. Kehm* (1902) 159 Ind. 68, 64 N. E. 598. This rule has been changed by statute in Indiana, providing that "all conclusions stated" shall be held allegations of fact unless attacked by motion. Acts 1913, ch. 322, sec. 1, amended by Acts, 1915, ch. 62, sec. 1; Burns' Ann. Ind. Sts. 1918, sec. 343a; *Schlosser v. Nicholson* (1916) 184 Ind. 283, 111 N. E. 13; *Fisher v. Carey* (1918) 67 Ind. App. 438, 119 N. E. 376.

[17] See Bullen & Leake, *Precedents of Pleading* (7th ed. 1915) 367 *et seq.*, with notes thereon.

[18] One reason for the success of the Connecticut Practice Act was that it was not adopted until 1879, when there was available the experience of the other code states and also the English reforms expressed in the Judicature Act. Many desirable features of the English Practice, such as pleading in the alternative, which are only now coming into general recognition in this country, have long been available in Connecticut. For historical note, see the Prefatory Note to the original Act, which is reprinted in this edition of the Practice Book. See also Hepburn, *Development of Code Pleading* (1897) 120. For a favorable reference to the original forms, see Cook, *op. cit. supra* note 2, 423, note.

[19] *Connecticut Practice Book, op. cit. supra* note 1, 452.

[20] *Ibid.* 412. This also contains an allegation that the plaintiff was in the exercise of due care. The "defense" of contributory negligence is available under a simple denial. *Ibid.* 290, 291. But this seems not to require the useless formality of pleading due care. The form, "Negligence in Operation of Motorcycle," is also interesting. *Ibid.* 412. It is based upon the complaint in a recent Connecticut

"Negligence in Operation of an Airplane," gives a modern touch. In the first paragraph it is alleged that the plaintiff resides at a specified address in Bridgeport, an allegation entirely immaterial but possibly designed to supply the lack of the very necessary allegation that the plaintiff owned the house which was injured. Next follows an allegation of the defendant's corporate capacity,[21] and that it was engaged in the carrying of passengers on "short" flights for a profit in airplanes from a specified field. Next comes a long paragraph detailing the flight in question from its inception, and only at the end of the paragraph is the airplane at length conducted to a point "just west of plaintiff's premises." In two more paragraphs the crash into "plaintiff's residence" and the resultant injury thereto are stated.

The next form is perhaps the most suggestive of all. It deals with the complicated situation of a guest in a motor vehicle suing the owner of the vehicle and the trolley company together.[22] It is taken almost word for word from a complaint recently before the court.[23] Here may be asked a question as to the purpose of the forms. The compilers of the original forms stated that they were "designed to guide, not to hamper, the profession."[24] But are they supposed to be models or only examples of what will pass the court? The complaint is too long to be considered in detail. It contains eight intricate and involved paragraphs. The accident is described with such particularity as may be indicated by the following: "When the automobile had reached a point close to the trolley track pole marked '15.'" After a very full statement of the various occurrences, there is added a paragraph containing thirteen finely printed lines specifying particular acts of negligence upon the part of each defendant. An interesting feature of the complaint is the allegation that the trolley car struck the automobile a "*tremendous* blow close to the rear door on the right hand side of the automobile." [Italics ours.]

Should a defendant be entitled to a more specific statement where the complaint is in the old common-law form? He should if he is actually misled, and this was true at common law. The power at common law to order a bill of particulars in all kinds of cases is undoubted.[25] But

case, without correcting the defect there criticized of failing to bring the defendant within the terms of a governing statute. *Gargan v. Harris* (1916) 90 Conn. 188, 96 Atl. 940.

[21] Apparently unnecessary in view of Conn. Gen. Sts. 1918, sec. 5632, requiring the defendant by a special denial to raise the question of lack of right to sue as a corporation. *Merwin v. Richardson* (1884) 52 Conn. 233; *Goodsell v. McElroy Bros. Co.* (1912) 86 Conn. 402, 85 Atl. 509.

[22] *Connecticut Practice Book, op. cit. supra* note 1, 413-415.

[23] See *Dickerson v. Connecticut Co.* (1922) 98 Conn. 87, 118 Atl. 518; see also *Records,* 1st Judicial District, Oct. 1922. The complaint is signed by a leading lawyer of Hartford.

[24] *Connecticut Practice Book, op. cit. supra* note 1, v.

[25] *Tilton v. Beecher* (1874) 59 N. Y. 176; *Johnson v. Birley* (1822, K. B.) 5 Barn. & Ald. 540 (in trespass for assault and battery); 31 Cyc. 565.

the test here should be empirical, depending on the form of complaint. The defendant should be forced to convince the court that he actually needs the information asked for in order to prepare his defense. The old practice of requiring supporting affidavits to a motion seems desirable.[26] The result should be that normally a general statement of the accident should be sufficient even as against a motion to make more specific.[27] A defendant will of course endeavor to tie the plaintiff down to particular specifications of negligence in order to obtain the benefit of the rule that such specifications limit the proof to the defaults specified.[28] It is naturally a part of the game for the defendant to catch a plaintiff in this manner. But outside of this technical advantage what actual difference can it make to a defendant who has prepared his case as it should be, whether or not the plaintiff specifies that the defendant failed to sound a horn? It may be urged that large corporations who act only through agents cannot know or ascertain the exact facts of an accident unless so informed by the plaintiff. But so, too, the plaintiff cannot be sure how his witnesses are going to state the minute details of the affair until they get on the witness stand. The *actual* preparation for each side will be the same, however such details are finally to be understood, and there seems no fair reason for putting such a restriction on the plaintiff. It will probably amount to nothing more than to compel the plaintiff to amend at the trial, thus adding further to the confusion of the record. And with a careful lawyer on the other side the defendant defeats his own purpose, for the plaintiff will set up all manner of allegations of negligence, though he need prove but a single one. The true principle here should be that of reasonable notice to the defendant, the reasonableness of such notice to be decided upon the basis that the defendant is a person who may be assumed to have some previous knowledge of the affair in question.

[26] *Johnson v. Birley, supra* note 25; 31 Cyc. 585.

[27] Whether the common-law form is still sufficient in Connecticut is not entirely clear. It has been held sufficient in the absence of a motion to make more definite and certain. *Eckert v. Levinson* (1917) 91 Conn. 338, 99 Atl. 699; *Jordan v. Apter* (1919) 93 Conn. 302, 105 Atl. 620; *Kearns v. Widman* (1919) 94 Conn. 257, 108 Atl. 661; *Sliwowski v. N. Y., N. H. & H. Ry.* (1920) 94 Conn. 303, 108 Atl. 805. In the *Kearns* case there is a statement that the specific acts or circumstances of negligence should be pleaded, but the supporting citation, 17 C. J. 1006, shows that the court had in mind only the particular question there involved, namely, what allegations were necessary to furnish a basis for a claim of exemplary damages in a negligence action. The attitude of the Court in the *Sliwowski* case, where they said that they were not much impressed by the defendant's contention that it had in fact been misled, seems the proper one. "The Practice Act was designed to simplify our legal procedure, and to abbreviate pleadings by the omission of all unnecessary allegations." Baldwin, J., in *Fisher, Brown & Co. v. Fielding* (1895) 67 Conn. 91, 103, 34 Atl. 714, 716 (that a foreign court "duly adjudged" that a defendant should pay held sufficient).

[28] *N. E. Fruit & Produce Co. v. Hines* (1922) 97 Conn. 225, 235, 116 Atl. 243, 247; *Capell v. N. Y. Transp. Co.* (1912) 150 App. Div. 723, 135 N. Y. Supp. 806; 10 C. J. 361.

But even if not required, may the plaintiff plead specifically when he so desires? His incentive is likely to be that way, first because he wishes to be safe and, secondly in the vain hope of being more impressive. The "tremendous blow" was perhaps penned with an eye to the jury. Here we must allow the plaintiff much latitude and perhaps we ought not to prevent him from so pleading. The great fault of the code was the attempt to state an arbitrary rule of thumb which could always be applied, thus overlooking the fact that the code is really only a tool to enable the court to get judicial business done fairly and conveniently. The code should be a means to an end, not an end in itself, and hence there is danger in arbitrary limitations in form of pleading. Something may be done however to avoid counsel's natural lawyerlike propensity to verbosity. If there is no penalty of any kind attached to pleading briefly, not even the penalty of delay to allow the defendant to criticize and the court to examine the pleading, a main incentive to prolixity is gone. In addition the court may achieve a considerable result by reproving informally and without a definite ruling those lawyers who violate sound rules of pleading. And finally the court may exercise at least somewhat more frequently than it now does, its power to strike out "unnecessary repetition, prolixity," "or the incorporation of irrelevant, immaterial or evidential matter" in a pleading "or otherwise [to] correct" a pleading.[29]

C. E. C.

LEGAL SEARCH AND ARREST UNDER THE EIGHTEENTH AMENDMENT

Many difficult problems have arisen in connection with the Eighteenth Amendment.[1] And not the least of these is that of enforcing it in a constitutional manner. Although the states are not affected by the Fourth and Fifth Amendments to the Federal Constitution, similar provisions exist in practically all of the state constitutions.[2] The Fourth Amendment reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

[29] Conn. Gen. Sts. 1918, sec. 5639. Under the rule, sec. 226, the remedy is to be granted only in a clear case, and the court has discountenanced its use. *Connecticut Practice Book, op. cit. supra* note 1, 295; *Donovan v. Davis* (1912) 85 Conn. 394, 398, 82 Atl. 1025, 1026.

[1] The Eighteenth Amendment to the United States Constitution, sec. 1, provides: "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

[2] Art. II, sec. 10 of the Michigan Constitution: "The person, houses, papers and possessions of every person shall be exempt from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fifth Amendment reads in part: "nor shall any person be compelled in any criminal case to be a witness against himself." The now settled policy of the United States Supreme Court of returning upon demand property illegally obtained, thus preventing its use as evidence, makes the determination of the legality of searches and seizures particularly important.[3] Where the contrary rule is in vogue the defendant may have merely a civil action against the offending searcher.[4] The protection of this right, because of its well known inadequacy is, however, of lesser moment. A criminal penalty, as has been proposed, would be more effective, and would of course increase the necessity of solving the problem in states not using the federal rule.[5]

Two recent Michigan cases are illustrative. A sheriff, while making a general tour of discovery about a public fair-grounds, searched the defendant's parked automobile without a warrant, found liquor, and arrested the owner when he returned. The charge was feloniously possessing intoxicating liquor. In the trial that ensued a motion[6] for the return of the liquor as illegally seized was denied, and the defendant was convicted. *People v. Case*[7] (1922, Mich.) 190 N. W. 289. In the second case the defendant drove into town in an automobile, and offered his liquid wares to a tradesman. The police were informed, and made an arrest on description without a warrant. Liquor was found when the car was searched. The arrest and search were held legal. *People v. DeCesare*[8] (1922, Mich.) 190 N. W. 302.

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[3] *Gouled v. United States* (1921) 255 U. S. 298, 41 Sup. Ct. 261; *Amos v. United States* (1921) 255 U. S. 313, 41 Sup. Ct. 266.

[4] *Williams v. State* (1897) 100 Ga. 511, 28 S. E. 624.

[5] 66th Congress, 2d Sess. H. R. 12816.

[6] The federal rule obtains in Michigan. *People v. Marxhausen* (1919) 204 Mich. 559, 171 N. W. 557. It is intimated in the instant case that a distinction may be taken between the return of matters purely evidentiary in nature, and forfeitable goods. *State v. Krinski* (1905) 78 Vt. 162, 62 Atl. 37; *United States v. Fenton* (1920, D. Mont.) 268 Fed. 221. But this distinction has been repudiated. *People v. De La Mater* (1921) 213 Mich. 167, 182 N. W. 57; *Amos v. United States, supra* note 3. It seems that the proper procedure would be destruction of the forfeitable matter and refusal of the evidence. *United States v. Rykowski* (1920, S. D. Ohio) 267 Fed. 866. But some courts permit its return. *Youman v. Commonwealth* (1920) 189 Ky. 152, 224 S. W. 860. For a general discussion see Wigmore, *Using Evidence Obtained by Illegal Search and Seizure* (1922) 8 A. B. A. JOUR. 479; COMMENTS (1921) 31 YALE LAW JOURNAL, 518; NOTES (1923) 71 U. PA. L. REV. 145.

[7] The Court was divided, five to three. The dissenting opinion contains a historical survey of the origins of the Fourth Amendment. See also Fraenkel, *Concerning Searches and Seizures* (1921) 34 HARV. L. REV. 361.

[8] The same three judges dissented as in *People v. Case, supra* note 7.

The decision in the first of these cases seems dangerous and unsound.[9] That in the second case can be technically justified by the application of the law of arrest, and indicates the proper approach to the problem.[10]

Admitting that private homes cannot lawfully be searched without a warrant by the law of that state,[11] the Michigan court in *People v. Case* distinguishes this from the search of vehicles in public places.[12] The latter is held to be "reasonable," and thus permissible under the first clause of the constitutional provision, which is held to apply to search without warrant. The second clause is thus held to be totally independent of the first.[13] In view of the fact that no trace of summary search, unconnected with arrest, appears in Anglo-American law, the question seems impossible to reopen, despite a possible ambiguity in the statement of a constitutional guaranty.[14] Forged in the heat of a contest, precipitated to no small degree by oppressive search, the "searches and seizures" clause of the Federal Constitution has a meaning historically clear.[15]

The famous case of *Entick v. Carrington*[16] is a landmark in English law. It decided two things: (1) that general search warrants were void for uncertainty; (2) that any search to obtain evidence was illegal. The last was linked by Lord Camden with the privilege against self-incrimination. While this connection has been disputed,[17] it is now clearly the federal rule.[18] That the rule of "no search for evidence"

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[9] No probable cause existed for searching the defendant's automobile. Nor is it even apparent that any particular suspicion existed. Of course no magistrate could have issued a warrant under such circumstances.

[10] *People v. Chyc* (1922, Mich.) 189 N. W. 70; *Haile v. Gardner* (1921, Fla.) 91 So. 376; see *State v. Gibbons* (1922, Wash.) 203 Pac. 390; *Ash v. Commonwealth* (1922, Ky.) 236 S. W. 1032; *Youman v. Commonwealth, supra* note 6.

[11] *People v. Marxhausen, supra* note 6. A statute in Michigan forbids search of private homes for liquor even with a warrant. Laws, 1917, Act 338, sec. 31.

[12] But note that the Michigan Constitution makes no distinction between "houses" and "possessions."

[13] The fact that in the federal provision the clauses are connected with an "and," while in the Michigan Constitution they form independent sentences, seems not to afford ground for a radical difference in interpretation. No such change could have been intended at the time.

[14] Rawle defines "unreasonable" as search without a warrant. Rawle, *The Constitution* (2d ed. 1829) 247. *People v. Foreman* (1922) 218 Mich. 591, 188 N. W. 375, seems most difficult to distinguish. *Accord: Ash v. Commonwealth, supra* note 10.

[15] The United States Supreme Court has definitely decided that the first clause of the provision is qualified by the second, and restrains its scope. There can be no reasonable search without a warrant. *Gouled v. United States, supra* note 3. The case of *Entick v. Carrington, infra* note 16, has been regarded as still further limiting the term "reasonable." A search for evidence is not such.

[16] (1765, C. P.) 19 How. St. Tr. 1029.

[17] Wigmore, *loc. cit. supra* note 6; but see Fraenkel, *loc. cit. supra* note 7.

[18] *Gouled v. United States, supra* note 3. It has been said that Congress might have permitted such searches. Chafee, *Progress of the Law, 1919-1922* (1922) 35 HARV. L. REV. 673.

is wise seems apparent. Search in its technical sense involves a trespass, justified by probable cause for belief that a crime has been committed. Obviously, until probable cause independent of search exists, justifiable search is impossible. It is true that (as in the case of forfeitable goods) when the state has an interest that goods shall not continue to exist, they may be searched for and seized despite the fact that they are incidentally evidence.[19] But a warrant is always required.

With such strict rules as the above in force, it may well be asked how to enforce the 18th Amendment, though how its enactment carries assurance of its enforcement is not clear. A legitimate solution exists in the law of arrest,[20] which, however, is entirely distinct from the law of search. Much confusion has arisen in the cases due to a failure to recognize this distinction. Where seizure, apart from search, can be made, no particular difficulty is presented.[21]

Arrest without warrant has been sanctioned from the earliest times. It was the privilege of all citizens and the duty of all constables to arrest one suspected of a felony. By the seventeenth century the sheriff's duty to raise "hue and cry" had become vested in justices of the peace, who issued warrants of arrest.[22] Search warrants, on the other hand, were unknown to the common law and "crept in by imperceptible practice."[23] Lord Coke strongly disputed their legality.[24] Arrest without warrant remained permissible in two classes of cases: (1) where reasonable grounds for belief that a felony had been committed existed; (2) when a breach of the peace was committed in the presence of the officer.[25] The extension of this latter permission to misdemeanors in general has been held constitutional by the Michigan court.[26] Seizure of a person without a warrant when charged with crime thus stood without the constitutional prohibition. As soon, however, as a search becomes necessary to procure evidence to justify the arrest, a far different question is presented. For instance, can an arrest be legally made as for a misdemeanor committed in the presence of an officer when carrying concealed weapons is the crime? The courts have almost uniformly decided in the negative. To be within the presence of the officer the misdemeanor must be capable of detection by the senses.[27]

[19] *Boyd v. United States* (1886) 116 U. S. 616, 6 Sup. Ct. 524.

[20] *Smith v. Jerome* (1905, Sup. Ct.) 47 Misc. 22, 93 N. Y. Supp. 202; *People v. Chyc, supra* note 10.

[21] *State v. Miller* (1922, Wash.) 209 Pac. 9; *State v. Llewellyn* (1922, Wash.) 205 Pac. 394; *People v. Diamond* (1922) 233 N. Y. 130, 135 N. E. 200.

[22] 1 Stephen, *History of the Criminal Law* (1883) 189 *et seq.*

[23] *Entick v. Carrington, supra* note 16.

[24] 4 Coke, *Institutes* *176.

[25] 1 Wharton, *Criminal Procedure* (10th ed. 1889) 71.

[26] *Burroughs v. Eastman* (1894) 101 Mich. 419, 59 N. W. 817. The court was divided, three to two.

[27] *Pickett v. State* (1896) 99 Ga. 12, 25 S. E. 608; *Hughes v. State* (1907) 2 Ga. App. 29, 58 S. E. 390; *Hughes v. Comonwealth* (1897) 19 Ky. L. Rep. 497, 41 S. W. 294; *contra: People v. Esposito* (1922, Sup. Ct.) 118 Misc. 867, 194 N. Y. Supp. 326.

The phrase "committed in the presence of" originated at common law, and in recent times has been incorporated into criminal codes. Originally confined to, and conceived for, breaches of the peace alone, it has been until recently rather strictly confined to crimes of violence and of immediate danger to the peace, but yet not felonies.[28] The arrest, indeed, was justified rather by the necessity of keeping the peace than by the less direct good to the public of bringing the offender to justice.[29] Other types of misdemeanor have been gradually added by statute. But an attempt to include concealed crimes runs into guarantees against unreasonable searches and seizures. Where the misdemeanor was possessing intoxicating liquor the doctrine of the concealed weapon cases has been approved.[30]

After lawful arrest a limited search of the prisoner, his surroundings and possessions, is permitted. At first this permission was probably confined to a search for possible means of resistance and escape.[31] Later it was extended to complete search of the person.[32] Recent cases have indicated that the room in which the arrest has been made may be searched.[33] If this can be done, no objection is seen to the search of the vehicle in which the person has been riding. And the result thus reached is eminently desirable.[34]

Trespass by petty officers upon private property should be discouraged. The temptation is great, and the risk little. Good policy requires that search without warrant—a dangerous expedient—should be confined to those circumstances justifying an arrest of the person, who is thus afforded a real opportunity to defend his rights. Although numerous liquor cases have now reached the courts, the limits of permissible action by enforcement officers are still much in dispute. Great natural difficulties oppose the possibility of enforcement in a manner compatible with constitutional guarantees. Violations are widespread and difficult of detection, for a chemical analysis is necessary for the recognition of intoxicating liquor. And yet an arrest or search to be lawful must be based on facts, not unfounded suspicion. Sentiment and prejudice cloud the issues. But the plain fact remains that the addition of a new public offense by constitutional amendment does not authorize its suppression in a manner otherwise than proper in the suppression of public offenses in general.

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[28] *Booth v. Hanley* (1826, N. P.) 2 Car. & P. 288; *Burroughs v. Eastman, supra* note 26; Hawley, *Law of Arrest* (3d ed. 1919) 49.

[29] 1 Stephen, *loc. cit. supra* note 22.

[30] *Douglass v. State* (1921, Ga.) 110 S. E. 168.

[31] *Leigh v. Cole* (1853) 6 Cox C. C. 329.

[32] *Dillon v. O'Brien* (1887, Exch.) 16 Cox C. C. 245; *State v. Edwards* (1902) 51 W. Va. 220, 41 S. E. 429; *contra: Laughter v. United States* (1919, C. C. A. 6th) 259 Fed. 94.

[33] *Smith v. Jerome, supra* note 20.

[34] *People v. Chyc, supra* note 10.

Let us examine a few practical situations, starting with those most free from doubt.[35] The drivers of a vehicle are obviously drunk. Bottles containing suspicious looking liquid lie on the floor. Since no search is necessary, and it is almost a certainty that the contents are intoxicating, seizure may be made, and arrest as well, for a misdemeanor has been committed in the presence of an officer.[36] But suppose a perfectly sober man walks down the street with the neck of a demijohn protruding from a suit-case. The officer on information that he is carrying intoxicating liquor seizes the suit-case. This has been held legal, despite lack of arrest, by assimilating seizure of things without a warranty to summary seizure of persons for felony.[37] And, provided the possession of the article in question is a felony, it appears sound.[38] But, if only a misdemeanor, the analogy would require that the offense be committed within the presence of the officer, and that he be practically certain of its commission.[39] For a third case, suppose one identical with the last except that the officer has no previous information. Here seizure or arrest is clearly illegal. There are no "facts" apart from "surmises," on which to base probable cause. *A fortiori* is this the case when bottles are being concealed in a suit-case or automobile.[40]

The situation then is this. If the offense is a felony, an arrest or seizure can be made without a warrant on probable cause. Search thereafter of the immediate surroundings and possessions of the prisoner is permissible. And it seems that a valid distinction may be here drawn between private portions of a home and vehicles in public places. In the latter case the search may well be wider. But for an offense which is a mere misdemeanor no search to strengthen the case is permissible except after legal arrest on a practical certainty.

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[35] See 20 A. L. R. 639, note.

[36] *State v. Quinn* (1918) 111 S. C. 174, 97 S. E. 62.

[37] *State v. Mullen* (1922, Mont.) 207 Pac. 634.

[38] The remarks of Brantly, J., concurring should be noted as sound. Violation of the National Prohibition Act, Act of Oct. 28, 1919 (41 Stat. at L. 305) is a misdemeanor.

[39] The dissent takes this ground. Since the offense is a misdemeanor, this appears sound.

[40] *Ash v. Commonwealth, supra* note 10; *State v. Gibbons, supra* note 10; *Butler v. State* (1922, Miss.) 93 So. 3; *contra: United States v. Bateman* (1922, S. D. Calif.) 278 Fed. 231; *United States v. Snyder* (1922, N. D. W. Va.) 278 Fed. 650; *Lambert v. United States* (1922, C. C. A. 9th) 282 Fed. 413. While approving the *Lambert* case the latest federal court decision holds that a search without warrant for habit-forming drugs in the apartment of a suspected vendor is "unreasonable" on the facts. Hough, J., *dissenting,* vigorously denies this. The case shows the latitude possible in viewing facts purporting to prove "unreasonableness." *Ganci v. United States* (1923, C. C. A. 2d) 68 N. Y. L. JOUR. 1287.

A PROMISE WITH "OPTION TO CANCEL" AS VALUABLE CONSIDERATION

A promise creates no legally enforceable duty unless some consideration is given for it; but generally the law does not investigate as to its value or amount. This led Mr. Justice Holmes to say: "This being so, consideration is as much a form as a seal."[1] The reaction against mere "formality" has led others to suggest that the time has come for the abolition of the requirement of consideration as well as for the abolition of the common-law operation of a seal. It is believed that the abolition of the second would be undesirable[2] and that an attempt to abolish the first would fail. As Dean Pound, speaking of *nudum pactum,* says:[3] "there is something more than the fetish of a traditional Latin phrase with the hallmark of Roman legal science behind our reluctance to enforce all deliberate promises simply as such."

In *Gurfein v. Werbelovsky* (1922) 97 Conn. 703, 118, Atl. 32, speaking of a bilateral contract, the court said: "Of course, the right to enforce the buyer's promise to buy is such a consideration, and if that right existed, even for the shortest space of time, it is enough to bring the contract into existence." Here the terms of the agreement were as follows: "We have this day accepted your order for 5 cases of plate glass. . . . The above cases are to be shipped within 3 months from date. You to have the option to cancel the above order before shipment." The buyer insistently demanded the goods and finally sued for damages for refusal to ship. The court held that the "option to cancel" did not render the agreement unenforceable.

The contract was bilateral, creating a duty to pay as well as a duty to ship, each promise being the consideration for the other. The "option to cancel" possessed by the buyer meant that he had the legal power of extinguishing the mutual duties. This power would die instantly upon shipment by the defendant. The possession of such a power does not in itself nullify the duty of the buyer who possesses such power. It does not give him the privilege of not paying. It merely gives him the power to create such a privilege. The exercise of the power requires a notice sent by the buyer and received by the

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[1] *Krell v. Codman* (1891) 154 Mass. 454, 28 N. E. 578.

[2] See the doubtful case of *Fountain v. Stein* (1922) 97 Conn. 619, 118 Atl. 47; (1923) 32 YALE LAW JOURNAL, 409. There ought to be available one method of making an enforceable promise without invoking the doctrine of consideration.

[3] *Introduction to the Philosophy of Law* (1922) 280.

Anson, *Contract* (Corbin's ed. 1919) 119, note 2: "The requirement of consideration is not merely to test the promisor's intention to assume a legal duty. It seems more accurate to say that consideration is the criterion to determine whether the customary notions of justice prevailing in the community require the legal enforcement of a promise. In this aspect the idea of consideration assimilates itself to the idea of *causa* in the Roman and Continental law, and the two ideas differ only where the mores of the two communities differ."

seller before shipment of the goods.[4] It could not be exercised merely by refusing to receive the goods or by refusing to pay.

The decision is correct in analysis and sound in policy. The consideration given by the plaintiff was of substantial value and did not approach a mere "form."[5]

A. L. C.

It is universally acknowledged that a thief acquires no title to a thing stolen and can pass no better title to a purchaser, even though the purchaser buys in good faith. So generally accepted is this rule that a citation of authorities is unnecessary. Its logic, however, is questionable. A thief does not get a complete title, but analysis shows that he does acquire an interest which is of some value. He has possession—that is, physical custody plus an intention to exclude all others—and although wrongful, yet if left undisturbed for the statutory limitation period, will ripen into a perfect legal title. Furthermore, it seems that if he is disturbed by anyone except the true owner or one claiming through or on behalf of the latter, his possession will be protected. It is true that diligent search has failed to disclose a reported case in which the precise point has arisen,[1] but no good reason appears why the well settled rule that possession, even though wrongfully acquired, will be protected against trespassers,[2] should not apply. The law protects possession to preserve the peace. Why then should not the same protection be afforded the possession of a thief that is given to the possession acquired by trespass or conversion, which does not amount to a crime.[3] The application of the rule that a thief acquires no title may

[4] The court said: ". . . . the contract is framed on the theory that it remains enforceable by either party unless and until the plaintiff brings home notice of cancellation before shipment."

[5] It may be observed that the plaintiff, so far as his detrimental jural relations are concerned, is in the same legal position that he would be in if he made an ordinary offer to buy glass to be accepted only by actual shipment of the glass ordered. In such case his duty to pay would be enforceable only after shipment. So is it in the instant case. In each case he is under liability to the creation of an enforceable duty to pay by the defendant's exercise of his power by shipment of the glass; and in each case he has power to revoke by a notice delivered. But this does not prove that Werbelovsky was not bound to ship, even though in the case of an unaccepted offer the offeree is not bound to ship. In each case the jural position of the plaintiff is detrimental. In the instant case he offered to put himself in that position in return for the defendant's promise to ship and the defendant accepted by promising. In the supposed case the plaintiff put himself in the detrimental jural position for nothing, and the offeree was not bound to ship because he had promised nothing.

[1] See Bordwell, *Property In Chattels* (1916) 29 HARV. L. REV. 374; see (1921) 34 HARV. L. REV. 681 (transfer of stolen automobile purchased by bankrupt in good faith held a transfer of property within meaning of Bankruptcy Act).

[2] Darlington, *Personal Property* (1891) 37, note 1.

[3] See *Anderson v. Gouldberg* (1892) 51 Minn. 294, 53 N. W. 636.

lead to injustice. In the case of *Hessen v. Iowa Automobile Mut. Ins. Co.* (1922, Iowa) 190 N. W. 150, an innocent purchaser of an automobile from a thief insured it against theft. Subsequently it was stolen from him and in an action on the policy, it was held in substance[4] that he acquired no title from the thief, and therefore had no insurable interest. A person is said to have an insurable interest in property, even where he has neither title nor right in the property, when he stands in such relation to it that he has legal ground for expecting benefit from its continued existence, or loss from its destruction.[5] The situation of a thief with reference to the property stolen seems to fall within this rule, but obvious reasons of policy rebel against its recognition. Clearly those reasons of policy do not exist in the case of an admittedly innocent purchaser. Certainly his right to possession, good against all the world except the true owner, plus his beneficial user, was sufficient basis for expecting benefit from its continued existence, or loss from its destruction.

The law of England is not friendly to skyscrapers. Their erection may even involve a nuisance and bring their constructor within the rule of *Rylands v. Fletcher*.[1] In *Hoare & Co. v. McAlpine & Sons* (1922, Ch.) 39 T. L. R. 97, the defendant was engaged in excavating for new buildings expected to attain the immense height of 120 feet, "the highest buildings in the City except St. Paul's." In the process the defendant encountered one of the arches of "Old London Bridge" in made ground resting on London clay. Piles some 38 feet long were driven through the made ground into the clay to support a concrete "raft," the force being supplied by a "monkey" which dropped a weight of two and a half tons from a height of 5 feet four times a minute, or by a steam hammer delivering 140 blows a minute. The London clay "had a resistance like rubber" and "acted like a fluid in transmitting vibrations." The result was that the plaintiff's hotel, a building about one hundred years old, was so affected by the vibration as to become dangerous and was ordered demolished by the City Corporation. The plaintiff's loss was accentuated by building lines which left him only eight feet on which to erect a new building. The court declared that *Rylands v. Fletcher* was applicable and that the plaintiff was entitled to damages for the loss of his building. "There was no justification for its being shaken down in its declining age by an adventurous and powerful neighbor. It was an alarming proposition that we should have to consider such a question as: When did an old building lose its right to protection?"

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[4] The policy contained a "sole and unconditional ownership" clause, but this is usually held to be merely a warranty of good faith of the insured and not an absolute warranty of perfect title. Vance, *Insurance* (1904) 445.

[5] *Ibid.* 106.

[1] (1868) L. R. 3 H. L. 330.