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UNION OF LAW AND EQUITY AND TRIAL BY JURY UNDER THE CODES

It is an interesting speculation whether an able court does not tend naturally because of its own high level of efficiency to require of others a greater facility in matters of procedure than may reasonably or practically be expected. The New York Court of Appeals now furnishes an occasion for such a speculation. That able tribunal has recently gone far to reëstablish the requirement that the pleader must have and stick to one theory of his cause of action.[1] It has stated, in reversing a judgment because of lack of a jury trial, that "the inherent and fundamental difference between actions at law and suits in equity cannot be ignored," coupling with this some encomiums upon the necessity of exact pleading which have a distinctly antiquarian sound.[2] Still more recently it has expressed "a desire to preserve to litigants the forms of procedure prescribed by law and the rights flowing therefrom."[3] It has made doubtful the former New York law that a plaintiff who sued for specific performance knowing that he could get only damages, could nevertheless get the latter,[4] for it states that the weight of authority is that "the court will not retain the action and grant purely legal relief, but will dismiss the complaint."[5] And it has now just held in *Syracuse v. Hogan*

[1] *Walrath v. Hanover Fire Ins. Co.* (1915) 216 N. Y. 220, 110 N. E. 426; see also the case in note 3, *infra*. See criticism of the requirement of a theory of the pleading and discussion of the former New York rule in Albertsworth, *The Theory of the Pleadings in Code States* (1922) 10 CALIF. L. REV. 202; Whittier, *The Theory of a Pleading* (1908) 8 COL. L. REV. 523; (1911) 24 HARV. L. REV. 480; (1918) 32 HARV. L. REV. 166.

[2] *Jackson v. Strong* (1917) 222 N. Y. 149, 18 N. E. 512. This was brought as an action for an accounting between partners but turned out to be merely an action for breach of contract. For criticism of the case, see NOTES (1918) 32 HARV. L. REV. 166; Scott, *Progress of the Law* (1919) 33 HARV. L. REV. 236, 240; Albertsworth, *op. cit. supra* note 1. In the NOTE first cited it is said that inasmuch as the defendant admitted his breach of contract there was no question of fact at issue. It seems, however, that the defendant should be entitled to a jury trial on the issue of damages. In any event the court did not show itself astute to discover a waiver of the defendant's right to trial by jury through his failure to assert it seasonably.

[3] *Merry Realty Co. v. Shamokin & Hollis R. E. Co.* (1921) 230 N. Y. 316, 130 N. E. 306 (reversing 186 App. Div. 538), action to foreclose a mortgage given on exchange of real property; counterclaim for rescission of the exchange, return of the defendant's realty and damages; on the plaintiff's appeal, judgment for the defendant for money damages for deceit was held error as inconsistent with the theory of the pleadings; the pleadings were for equitable relief, the judgment was for legal relief; all the courts who heard the case were convinced of the plaintiff's gross fraud and deception; justice seems to have been done; and yet a new trial is necessary to allow full damages only if rescission cannot be had, since the action is equitable.

[4] *Barlow v. Scott* (1861) 24 N. Y. 40.

[5] *Jackson v. Strong, supra* note 2. Apparently, however, the court will not go so far as to dismiss the complaint. In *Saperstein v. Mechanics & Farmers' Bank* (1920) 228 N. Y. 257, 126 N. E. 708, the court says that if in addition to an equitable cause of action "the facts as stated give rise to a legal liability then there should be no dismissal; the action remains to be tried." There is a quite

(1923) 234 N. Y. 457,[6] that in a suit to enjoin one from maintaining a building and other encroachments on a strip of land, title to which was claimed by the plaintiff, the defendant who claimed title in himself by adverse possession is entitled as of right to a trial by jury. Judge Cardozo dissented in an able opinion, in which Judges Pound and Crane concurred.

It is submitted that in this series of cases the learned court has approached the problem of the union of equity and law under the codes from a fundamentally unsound standpoint. It ought not to be true that actions at law and suits in equity must be considered still inherently different. It would be a disgrace to our law if the ancient cumbersome methods of doing justice by two separate systems of law were still necessary. And the experience of enlightened states, such as Connecticut, shows that it is not necessary. The difficulty is the same as that discussed in Professor Cook's article earlier herein,[7] namely, the failure to appreciate that equity and law were not two concurrent systems of law but were to a large extent two conflicting systems and that the purpose of the makers of the code seems clearly to have been to end such conflict by providing for one system of justice. This system cannot be called either legal or equitable as these terms were anciently used. It is a combination of the two, wherein the substantive jural relation enforced by the court in the first instance is the same as would ultimately have been preserved under the old system by a roundabout method of a proceeding in equity to prevent its non-enforcement at law.[8]

A large part of the confusion is undoubtedly due to the fact that the state constitutions preserve inviolate the constitutional right of trial by jury as existing at the time of their adoption. This adds to the inconvenience of trial but should do no more. The jury does not determine the method of procedure except in one part thereof, namely, the ascertainment of the facts. Other parts of a lawsuit, such as the framing of issues, and proceedings after judgment, may proceed in substantially the same manner whether a jury trial is had or not.[9] Hence the right to a

surprising amount of confusion generally on this point. See 19 L. R. A. (N. S.) 1064, 1075, note. See NOTES (1916) 16 COL. L. REV. 326. In the *Saperstein* case the action is said to be "now an action at law"; in *McGraw Co. v. Zanta Tire & Rubber Co.* (1922, Iowa) 190 N. W. 129, the remedy is said to be by motion to transfer to the "law calendar"; in *Northern Life Ins. Co. v. Walker* (1923, Wash.) 212 Pac. 277, "there came into being by the pleadings of the parties .... a simple law action" in what had been an action for equitable relief, or else the defendant lost his right to trial by jury. The continued use of the term "law" is unfortunate as tending to perpetuate a distinction which no longer exists.

[6] Reversing (1922) 201 App. Div. 874.

[7] Cook, *Equitable Defenses* (1923) 32 YALE LAW JOURNAL, 645.

[8] See discussion, *ibid.*

[9] *Liberty Oil Co. v. Condon* (1923, U. S.) 43 Sup. Ct. 118, discussed by Cook, *op. cit. supra* note 7, at p. 656, illustrates a not uncommon distinction still preserved between equitable and legal causes, namely that the appellate court may review the

jury trial should mean merely that after the issues have been formed they should, upon motion of any party, be examined to determine whether, at the time of the adoption of the constitution, under such issues the facts had to be ascertained by a jury. Since court and jury trials were kept separate by the existence of separate tribunals until the adoption of the codes, our question is substantially therefore an historical one as to the situation which existed at the time of adoption of the codes.[10] Moreover, the parties should be held to have waived the raising of the question and their constitutional right by not asserting it seasonably.[11]

In the principal case, therefore, where the right was asserted in due fashion, the question is really whether equity would have tried a disputed title to land, before the amalgamation of equity and law. The majority try to dismiss the question more summarily by asserting that the case comes within the terms of the code action of ejectment where the parties by the code are entitled to a jury trial, and it is claimed that the plaintiff may be given complete relief therein by an award, provided for in the code, of damages and expenses for removing encroachments.[12] The argument seems to be that although you have tried to bring an action for "equitable" relief, yet since "legal" relief is sufficient, we will compress your action into one for "legal" relief. But as Judge Cardozo clearly demonstrates, the plaintiff in such a case should be given an injunction compelling the defendant to remove the encroachment or else the sheriff, acting for the plaintiff, is put in the position of Shylock limited exactly to his pound of flesh. The better rule, already followed in New York, gives the owner "the remedy that will place the risk and the cost upon the shoulders of the wrongdoer."[13] Hence the plaintiff should be held entitled to "equitable" relief.

Now there is a rule of some vogue that equity will not try a disputed title to realty but will await a decision at law before awarding permanent

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facts in the former but not in the latter cases. This is not a necessary rule. Under the Connecticut procedure findings by court or jury are equally respected. See *Meriden Trust & Safe Deposit Co. v. Miller* (1913) 88 Conn. 157, 90 Atl. 228 (action of interpleader).

[10] See the admirable Connecticut provision quoted by Cook, *op. cit. supra* note 7, at p. 652. The method there set forth was applied in *Roy v. Moore* (1912) 85 Conn. 159, 82 Atl. 233, a case similar to the principal case.

[11] Here again the Connecticut provisions seem admirable. In effect they require a party affirmatively to ask for a jury trial within a certain time or the right is waived. Conn. Gen. Sts. 1918, sec. 5752. The cumbersome New York provisions referred to by Cook, *op. cit. supra* note 7, at p. 651, require *affirmative* action in order to *waive* the right. The Connecticut provision is constitutional. *Noren v. Wood* (1899) 72 Conn. 96, 43 Atl. 649.

[12] Code Civ. Proc. sec. 3343, subd. 20; sec. 968, subd. 2; sec. 1496, 1497; sec. 1660-1662; sec. 1240; N. Y. C. P. A. 1920, sec. 7, subd. 8; sec. 425, subd. 2; sec. 920, 504, 505.

[13] Cardozo, J., *dissenting* in the principal case; *Hahl v. Sugo* (1901) 169 N. Y. 109, 62 N. E. 135; *City of New York v. Rice* (1910) 198 N. Y. 124, 91 N. E. 283. See discussion by Professor G. E. Woodbine in COMMENTS (1917) 27 YALE LAW JOURNAL, 265.

relief. Some courts have thought the rule to be jurisdictional,[14] but equity scholars seem in the main to view it only as a rule of policy, not of power.[15] Even so, if the equity court did not actually and in practice try the title, the defendant now should have his jury trial on this issue only and such has been the result sometimes reached under the codes.[16] In some states, however, the entire rule had been repudiated,[17] and this, so says Judge Cardozo, was the situation in New York. The cases seem to bear him out, even though in certain of them the judges enter a caveat as though they were not entirely sure of their ground.[18] Nevertheless, there seems to have been clearly sufficient basis so that a decision refusing a jury trial, a result desirable as avoiding an expensive and inefficient procedure, could not have been considered as any vital attack upon the ark of the constitution.

Judge Cardozo says: "We have left far in the distance the wasteful duplication of remedies and trials. We shall set the clock back many years if we return to it to-day." Perhaps he overstates the case: for if the jury is to be considered only as one of several bodies available for determining the facts, as it is, and not as a kind of central pivot about which the whole case revolves, the only result is to require the use of this particular body as the fact-finding machinery in this case.[19]

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[14] *Hermann v. Mexican Petroleum Corp.* (1915) 85 N. J. Eq. 367, 96 Atl. 492; *Freer v. Davis* (1903) 52 W. Va. 1, 43 S. E. 164.

[15] 1 Ames, *Cases in Equity Jurisprudence* (1903) 515; 5 Pomeroy, *Equity Jurisprudence* (2d ed. 1919) 4355, 4356, and cases cited. The entire equitable rule has been subjected to severe criticism. See William Draper Lewis, *Injunctions Against Nuisances and the Rule Requiring the Plaintiff to Establish his Right at Law* (1908) 56 U. PA. L. REV. 289; Clark, *Equity* (1920) sec. 193.

[16] So in *Roy v. Moore, supra* note 10, the court found that in Connecticut, on January 1, 1880, the equity court would not have tried the title and hence it properly concludes that the parties have rights to jury trials. Cases from other jurisdictions are therein cited.

[17] *Lux v. Haggin* (1886) 69 Calif. 255, 284, 10 Pac. 674; *cf. Ladd v. Osborne* (1890) 79 Iowa, 93, 44 N. W. 245; *Pohlman v. Evangelical Lutheran Trinity Church* (1900) 60 Neb. 364, 83 N. W. 201; *Williams v. Riley* (1907) 79 Neb. 554, 113 N. W. 186. See Lewis, *op. cit. supra* note 15, at p. 315, upon the rule in nuisance cases: "But, though we may observe that the rule is dying, it is unfortunately not yet a corpse; and the difficulty is that no lawyer knows when it will be galvanized into sufficient life to delay and vex his client's pursuits of justice." In some jurisdictions the rule is overthrown by statute or rule of court. See Lord Hale's Act (1862) 25 & 26 Vict. c. 42; Federal Equity Rule No. 23, 226 U. S. App'x. 6, 33 Sup. Ct. xxiv; *cf. Carpenter v. Dennison* (1919) 208 Mich. 441, 175 N. W. 419.

[18] See cases cited by Cardozo, J., *dissenting,* including *Hahl v. Sugo, supra* note 13; *Baron v. Korn* (1891) 127 N. Y. 224, 27 N. E. 804; *Hinckel v. Stevens* (1897) 17 App. Div. 279, 45 N. Y. Supp. 678, (1900) 165 N. Y. 171, 58 N. E. 879; *Olmsted v. Loomis* (1854) 9 N. Y. 423. See also *Belknap v. Trimble* (1832, N. Y.) 3 Paige Ch. 577; Kent, Ch., in *Gardner v. Newburgh* (1816, N. Y.) 2 Johns. Ch. 162.

[19] Historically the jury developed as only one of several methods of finding the facts. In earlier times the court determined the method of trial, whether by ordeal,

Nevertheless, the decision is unfortunate. Jurists of experience find little to say in support of the delays, the expense, and the aleatory results of trial by jury.[20] In England it is being more and more restricted.[21] Its real advantage seems to be as a kind of safety valve for the judicial system. It relieves the judges of the burden and the odium of deciding close questions of fact in cases, such as personal injury actions, where the feelings of litigants are apt to run high. Surely it is a loss to extend the field of its application by the application of the constitutional strait-jacket where not necessary.

C. E. C.

C. I. F. CONTRACTS IN AMERICAN LAW, I

That familiarity which breeds contempt has some points of advantage over the unfamiliarity which breeds confusion. Until quite recently c. i. f. contracts have been regarded as "British contracts,"[1] and left for full discussion to the British writers.[2] But the overseas trade which

compurgation, battle, and so on. Since the jury became increasingly popular to litigants, the judges of the king's courts saw their opportunity to extend the popularity of those courts and increase the king's revenues by making use of this new fact-finding machinery. It is a later development which gave to the jury the unique position it so long occupied in English law. See Bigelow, *History of Procedure* (1880) "The Medial Judgment," 288 *et seq.;* Thayer, *Preliminary Treatise on Evidence* (1898) chs. 1 & 2.

[20] Judge J. C. McWhorter, *Abolish the Jury* (1923) 29 W. VA. L. QUAR. 97; Ex-Senator and Judge John D. Works, *Juridical Reform* (1919) 50.

[21] In England, by the Administration of Justice Act, 1920, in any action except libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and certain matrimonial and probate cases, where the court or judge upon application of a party is "satisfied" that "the action or matter cannot as conveniently be tried with a jury as without," he shall have power "notwithstanding anything in any Act," to order it tried without a jury. (1920) 10 & 11 Geo. V, c. 81, sec. 2; *Annual Practice* (1923) 2155; Order 36, rules 2-6, *Annual Practice,* (1923) 580-585. This procedure has been objected to by the judges of the Court of Appeal in *Ford v. Blurton* (1922) 38 T. L. R. 801, and in various notes in (1922) 153 LAW TIMES, 196; (1922) 154 *ibid.* 37; (1923) 155 *ibid.* 45, 227, but it seems not undesirable.

[1] See Williston, *Sales* (1909) 408; 11 C. J. 765; (1920) 30 YALE LAW JOURNAL, 90. Recently the subject has been receiving attention. Williston, *The Progress of the Law 1919-1920, Sales* (1921) 34 HARV. L. REV. 741, 750 *et seq.;* Lucas, *Liability under C. I. F. Contracts* (1921) 41 CAN. L. T. 556; Craighill, *Sales of Goods on C. I. F. Terms* (1919) 6 VA. L. REV. 229; (1921) 21 COL. L. REV. 724; (1922) 22 *ibid.* 601; (1920) 20 *ibid.* 101; 10 A. L. R. 701, note; 20 A. L. R. 1236, note; 7 B. R. C. 956.

[2] Not that the references in the British writers can always be counted on for help. See Benjamin, *Sales* (6th ed. 1920) 808 *et seq.;* Blackburn, *Contract of Sale* (3d Canadian ed. 1910) 241, note; although there is scattered through each of these books a great quantity of uncorrelated material on the subject. See also 25 Hals. Laws Eng. 211. But Chalmers, *Sale of Goods Act* (8th ed. 1920) 86-88, contains an excellent brief discussion; so also Scrutton, *Charter Parties* (8th ed. 1917) 166-7.

developed with 1914 of necessity led to wider introduction into American business of the c. i. f. terms of sale, along with branch banking, commercial letters of credit, an acceptance market, and the machinery of British foreign trade generally. With the price decline of 1920 began the litigation which will some day make clear the legal status of these useful, though still rather unfamiliar institutions. The somewhat confused opinion recently handed down in *Arctic Ice & Coal Co. v. Southgate*[3] challenges thought on the close relation of c. i. f. terms to the commercial letter of credit, and presents again the question: at what point, under c. i. f. terms, does the seller acquire the right to immediate payment of the purchase price?[4] The first of these problems perhaps leads too far afield for more than incidental discussion here; the second is both timely and interesting. In the case referred to it seems to have been held that the right to the price accrued, despite the buyer's refusal to take delivery, on presentment by the seller of a draft accompanied by the requisite documents, a conclusion in line with the weight and sounder current of authority.[5]

The letters c. i. f. mean "cost, insurance, freight," and in the classic language of Blackburn, J.: "The terms at a price, 'to cover cost, freight, and insurance, payment by acceptance [or cash] on receiving shipping documents,' are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignee [or buyer, where the bill of lading runs to seller's order] with the agreed price . . . . and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee [buyer] which he is bound to accept [or pay] (if the shipment [or documents?] be in conformity with his contract), on

[3] (Feb. 9, 1923) U. S. C. C. A. 4th, Oct. term, 1922, No. 368.

[4] As far as appears, the action may have been either for non-acceptance or for the price, the facts being such as to make no difference in the amount of recovery, as the goods had been promptly realized at the market; the reasoning indicates an action for the price. A vigorous dissent was filed to so much of the opinion as held the buyer's bank, which had procured a credit to be opened "under our guarantee," not to be liable. This holding turned partly on whether a credit good against "shipping documents" is satisfied by presentment of a delivery order, partly on how far the terms of the underlying sales contract are read into ambiguous language in a letter of credit, and partly on the effect of a bank "guaranty" of indemnity as curing non-conformance of the documents tendered under a credit. The opinion is also notable as implying the possibility of suit by the beneficiary of the credit directly against the original bank which "opens" the credit "through" another bank (the latter apparently acting in its own name); and for citing no authority at all.

The case does not present a strictly standard c. i. f. contract, as will appear below, since the quotation c. i. f. was modified by "ex dock New York, duty paid," and "seller's obligation as to delivery complete upon presentation of shipping documents," and "payable . . . . on presentation of dock receipt or bill of lading," this last being subsequently changed to "delivery order."

[5] *Clemens Horst Co. v. Biddell Bros.* [1912, H. L.] A. C. 18; cases cited 10 A. L. R. 701, note; Scrutton, *op. cit. supra* note 2.

having handed to him the charter-party, bill of lading, and a policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In substance, therefore, the consignee [buyer] pays, though in a different manner, the same price as if the goods had been bought and shipped in the ordinary way."[6] "Thus, the purchaser deals with the matter in gross, and not in detail, transacts the various branches of the business with one person instead of three, fixes his liability at a lump sum, and in case of loss will recover the amount of his interest under the policy."[7] Thus, then, these terms serve the convenience of the buyer, relieving him of the burden of making arrangements; and, like f. o. b., f. a. s., c. & f., apportion between buyer and seller the outlay for incidental charges; and, finally, throw on the seller the risk or profit from fluctuation in freight or insurance rates between the closing of the contract for sale and the contracts for carriage and cover.

But, despite spasmodic indications to the contrary,[8] the c. i. f. terms do more. They are working out—in England, indeed, they have already worked out—into a fairly definite standardized form of contract covering not only the amount of the price, but the time and place of payment, the risk of damage, the risk of loss, the absence of a condition of opportunity to inspect, and similar matters[9]; a standardized form which is, however, like most such forms, subject to modification in any particulars by parties who so express themselves. In regard to this form there has been in the last few years a harvest of decisions, not only here but in England. A convenient approach to the cases is to consider successively the amount of payment, the time of payment, the place of payment, the seller's breach and the measures of damages, and—a more

[6] *Ireland v. Livingston* (1872) L. R. 5 H. L. 395, 406. The square brackets are the writer's, and indicate the more obvious qualifications and extensions necessary.

[7] *Mee v. McNider* (1888) 109 N. Y. 500, 17 N. E. 424.

[8] *Collignon & Co. v. Hammond Milling Co.* (1912) 68 Wash. 626, 123 Pac. 1083, limiting the c. i. f. quotation to price definition and stating that "an offer and acceptance on that basis, therefore, does not, more than in other sales, determine as between buyer and seller when or where the title passes, ... is, if read literally, not supported by the authorities and has, in fact, been overruled by our decision in *Andersen, Meyer & Co. v. Northwest Trading Co.* (1921) 115 Wash. 37, 196 Pac. 630." *Northern G. W. Co. v. Northwest Trading Co.* (1921) 117 Wash. 422, 201 Pac. 903, 204 Pac. 202. "The term appears in the clause of the contract relating to price, and has, therefore, very little bearing upon the question of the place of delivery." *Schopflocher v. Essgee Co. of China, Inc.* (1921) 197 App. Div. 781, 785, 189 N. Y. Supp. 498; *George Carocopos, Inc. v. James Chieves & Co.* (1922) 203 App. Div. 104, 196 N. Y. Supp. 425, 428.

[9] F. O. B. and C. O. D. shipments are undergoing a similar process.

intricate problem—the documentary conditions on payment. For it is in the peculiar features relating to payment that the essence of the c. i. f. contract is to be found; and especially in the fact that normally the measure of the conditions on the buyer's duty, like the measure of his security, is in the *documents* tendered to him—making the payment (and right to payment) turn in the ordinary case not on actual performance by the seller of his substantial obligation, but on his providing papers which are on their face in order.[10]

Amount of payment to seller. Despite general quotation of Blackburn as an introduction to discussion of c. i. f. contracts, the American cases tend to disregard his suggestion that freight is to be only arranged, not paid, by the seller, its amount being allowed as a credit against the invoice.[11] Sometimes this difference is explicitly noted[12]; more often

[10] This statement represents the actual state of the English authorities, the needs of the economic situation, and the situation toward which the writer believes the American authorities to be inevitably developing. *Manbre Saccharine Co. v. Corn Products Co.* [1919] 1 K. B. 198, 202: "I conceive that the essential feature of an ordinary c. i. f. contract as compared with an ordinary contract for the sale of goods rests in the fact that performance of the bargain is to be fulfilled by delivery of documents and not by the actual physical delivery of goods by the vendor. All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty." It must be stated, however, that there is a stubborn disposition in many American cases to stress due delivery *of the goods* as a, or the, vital condition to payment. Only when dealing with an issuing bank's obligations under a letter of credit put out on a buyer's behalf in cover of the buyer's obligation, are the American cases as yet clear and consistent in looking to the form of the documents as the true condition on the duty to pay. Mead, *Documentary Letters of Credit* (1922) 22 COL. L. REV. 297; McCurdy, *infra* note 25. But this is believed to result largely from the fact that the American cases have not happened to present repeatedly for decision the situation where payment is demanded purely against documents, before the goods themselves have arrived. And see *Harper v. Hochstim* (1921, C. C. A. 2d) 278 Fed. 102: "The buyer can no more refuse the documents and ask for the goods than can the seller withhold the documents and tender the goods"; the sustaining of a demurrer to the seller's action for breach was there made to turn on his failure to tender documents, tender of goods and allegations of readiness to tender goods being disregarded by the court. See also *Orient Co. v. Brekke & Howlid* [1913] 1 K. B. 531; *Scott v. Barclay's Bank* (1923, C. A.) 14 Ll. L. L. R. 89, 142; Chalmers, *op. cit. supra* note 2; Scrutton, *op. cit. supra* note 2. In *Dewar & Webb v. Rank, Ltd.* (1923, C. A.) 14 Ll. L. L. R. 393, a c. i. f. contract contained a provision that the bill of lading should be considered proof of the date of shipment in the absence of evidence to the contrary. Despite a showing that more bills of lading were issued under date of the last day for shipment than there was grain aboard to correspond, it was held that the buyer in order to sustain his case must further show the bills of lading tendered to be the ones improperly issued. *Quaere,* as to the effect of the evidence, had the stipulation not been in the contract?

[11] Blackburn is followed in the *dicta* in *Thames & Mersey Mar. Ins. Co. v. United States* (1915) 237 U. S. 19, 35 Sup. Ct. 496, and *Staackman, Horschitz & Co. v. Cary* (1916) 197 Ill. App. 601; and again in *Groom, Ltd. v. Barber* [1915] 1 K. B. 316, in England.

[12] *Mee v. McNider, supra* note 7.

it is slurred over, the indication being to the contrary.[13] No American decision squarely on the point has been found. The value of the distinction appears in considering the point of time at which the strain hits the buyer's pocket. Where the terms are cash against documents, Blackburn's rule will normally work to the buyer's advantage by postponing the payment of that portion of the price; where, on the other hand, documents are delivered against acceptance, the freight may have to be paid before the acceptance falls due.

The payment of any import duties would under ordinary c. i. f. terms seem to fall on the buyer, over and above the price;[14] so also any payment involved in the procurement of export licenses.[15] And if insurance is called for by the buyer, and arranged by the seller,[16] outside of what is customary in the trade and between the ports concerned,[17] it seems clear that

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[13] *Seaver v. Lindsay Light Co.* (1922) 233 N. Y. 273, 135 N. E. 329; Williston, *op. cit. supra* note 1, at p. 753; *cf. Warner, Barnes & Co. v. Warner Sugar R. Co.* (1921, Sup. Ct.) 117 Misc. 247, 192 N. Y. Supp. 151; *Smith Co. v. Marano* (1920) 267 Pa. 107, 110 Atl. 94. In *Smith Co. v. Moschalades* (1920) 193 App. Div. 126, 129, 183 N. Y. Supp. 500, quoted with approval in *Andersen, Meyer & Co. v. Northwest Trading Co., supra* note 8, the language is carefully made broad enough to cover either procedure. The uncertainty on the point is beautifully illustrated in *Klipstein & Co. v. Dilsizian* (1921, C. C. A. 2d) 273 Fed. 473: "Under such a contract, the seller must ship the goods, arrange the contract of affreightment to the place of destination, pay its cost *and allow it from the purchase price.*"

[14] See *American Com. Co. v. Fredk. Boehm, Ltd.* (1919, K. B.) 35 T. L. R. 224; *George Carocopos, Inc. v. James Chieves & Co., supra* note 8; see *Lorimer v. Slade* (1905) 5 N. S. W. 71. Even under the terms "duty paid," increase of duty between contracting and importing is recoverable by the seller under the British Finance Act (1901) 1 Edw. VII, c. 7. But our law, having no such statute, seems to be otherwise. 35 Cyc. 109.

[15] Whereas in *Brandt & Co. v. Morris & Co.* [1917 C. A.] 2 K. B. 784, under an f. o. b. contract, it was held a condition to buyer's right for non-delivery that he apply for (and secure) export licenses followed, as to export tax, *Krauter v. Menchacatorre* [(1922) 202 App. Div. 200, 195 N. Y. Supp. 361], in *Anglo-Russian Mcht. Traders, Ltd. v. John Batt & Co.* [1917, C. A.] 2 K. B. 679, the court considered that under a c. and f. contract a duty to obtain export licenses lay on the seller, excused only by impossibility due to government regulations. Whether payments to actual, but bribable, representatives of an unrecognized but effective government would be within the same rule, is an interesting question. *Cf. Rosenberg v. Internatl. Banking Corp.* (1922, K. B.) 13 Ll. L. L. R. 120, where a banker's lien on bills of lading to secure advances made to a forwarding agent was sustained, although such advances covered illicit expenses incident on getting goods out of Russia to avoid danger of confiscation, and though such charges amounted to half the value.

[16] If not called for expressly by the contract, there seems to be no legal duty on the seller to arrange such insurance, even if requested. *Groom, Ltd. v. Barber, supra* note 11, indicating that "war risk for buyer's account" might have the latter meaning.

[17] *Smith Co. v. Moschalades, supra* note 13, holding only evidence of what was usual in trade in shipping from the port of shipment to be admissible; the price was held due, though the goods had been lost through uncovered war risk. *Youill v. Scott Robson* [1908, C. A.] 1 K. B. 270; *Groom Ltd. v. Barber, supra*

the expense of such insurance is an addition to the agreed price. Where the goods were sold c. i. f. to buyer's wharf, it has been held that extra outlay incident to discharge at another wharf fell on the seller[18]; but it seems clear that if non-delivery, or failure to deliver, is due to the carrier's fault, any expenses involved should fall on the buyer, if the bill of lading procured and tendered is according to contract.[19] One last query may be suggested: if, as occasionally happens, the goods beat the documents in, and the buyer needs the goods, does any expense, *e.g.*, of indemnity bond, involved in securing release of the goods properly fall on the seller?[20]

Time of payment. "No one doubts that the seller's breach of a c. i. f. contract arises on failure to ship, but no one suggests that the buyer's duty to pay arises on such shipment."[21] That duty to pay awaits tender of the required documents, and, with such tender, becomes immediate.[22]

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note 11. *A fortiori* will the scope of required insurance not be extended by outbreak of war between contracting and shipment. *Law & Bonar, Ltd. v. Br.-Am. Tobacco Co.* [1916] 2 K. B. 605, also holding a printed clause that goods were at seller's risk until actual delivery to be repugnant to c. i. f. terms; with which *cf. Harper v. Hochstim, supra* note 10.

[18] *Acme Wood Flooring Co. v. Sutherland Innes Co.* (1904, C. A.) 9 Com. Cas. 170. Non-procurement of shipping documents reading to the agreed point of discharge may result not only in extra charges to the seller, and in his failing to acquire a right to the price, but in his being subjected to damages for non-delivery. *Lecky & Co. v. Ogilvy, Gillanders & Co.* (1897, C. A.) 3 Com. Cas. 29 (bill of lading read to Tripoli in Syria instead of to Tripoli in Africa); cases note 23, *infra.*

[19] Blackburn, *op. cit. supra* note 6; see *Groom, Ltd. v. Barber, supra* note 11; Scrutton, *op. cit. supra* note 2.

[20] It is believed not, if the seller has used reasonable diligence to have the documents sent forward. See *Northern G. W. Co. v. Northwest Trading Co., supra* note 8; *cf. Taylor & Co. Ofverberg & Co.* (1923, K. B.) 14 Ll. L. L. R. 131; *Johnson v. Taylor Bros. & Co.* [1920, H. L.] A. C. 144, 156. One would expect the same result as to any demurrage charges not attributable to the seller's default.

[21] Farwell, L. J., in *Biddell v. Clemens Horst Co.* [1911, C. A.] 1 K. B. 934, 951. This must be borne in mind in reading those New York cases which overstress the duty and conditions of proper shipment to the apparent exclusion of all else. "Only one condition is to be performed, that of shipment . . . ." *Mee v. McNider, supra* note 7. "A simple c. i. f. contract requires the seller to deliver to the carrier and upon such delivery the obligation is at an end." *Willits & Paterson v. Abekobei & Co.* (1921) 197 App. Div. 528, 189 N. Y. Supp. 525. But these statements are patently not to be read as they stand: "The seller completes his contract when he delivers the merchandise called for to the shipper [*sic*], pays the freight thereon to point of destination, *and forwards to the buyer bill of lading,*" etc. *Seaver v. Lindsay Light Co., supra* note 13; *Harper v. Hochstim, supra* note 10; Scrutton, *op. cit. supra* note 2.

[22] *Clemens Horst & Co. v. Biddell Bros.*, and cases cited *supra* note 5; *Gillespie Bros. v. Thompson Bros. & Co.* (1922, C. A.) 13 Ll. L. L. R. 519; *Dewar & Webb v. Rank, Ltd., supra* note 10; *Strasbourger v. Leerburger* (1921) 195 App. Div. 481, 186 N. Y. Supp. 797, where, however, the goods seem to have arrived two days before the documents.

More—the buyer has a right that the documents be procured and presented, for non-fulfillment of which an action lies.[23] In the normal course of events the documents, attached to the seller's draft for the price,[24] come forward by mail well ahead of the goods. Payment in cash serves to put the seller in funds and the buyer out, without further operation. If, on the other hand, the buyer accepts the seller's time draft, this makes it possible for the seller to secure credit in primary reliance on the buyer, yet with the ever-present contingency of recourse on himself. But if the acceptance of a proper bank is procured by the buyer, the seller is put into position to secure funds by way of discount, with negligible strain on his own credit resources. In any case, the buyer (subject, it may be, to arrangements with his banker[25]) secures control of the goods for immediate turn-over by selling "to arrive." Under this course of business it is clear that payment must normally be made without inspection by the buyer of the actual merchandise, and in reliance only on the documents[26]—an incident which the c. i. f. contract has in common with every commercial letter of credit transaction, with the c. & f. sale, and with many f. o. b. contracts.[27] And in the c. i. f. contract this rule holds, even though the usual clause "cash against documents," or its equivalent, is not expressed.[28] It is likewise clear that these terms shift from seller to buyer not only the whole or a goodly

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[23] *Lecky & Co. v. Ogilvy, Gillanders & Co., supra* note 18; see *Johnson v. Taylor Bros. & Co.* [1920, H. L.] A. C. 144, 149, 156, 160; *Andersen, Meyer & Co. v. Northwest Trading Co.*, supra note 8; *Schopflocher v. Essgee Co. of China, supra* note 8.

[24] "Price" and "payment" are used in this paper indiscriminately to cover cash or acceptable exchange, or signing an acceptance, according as called for by the contract.

[25] These arrangements, which correspond roughly to a seller's discount of draft on his buyer with bill of lading attached, generally in international trade take the form of the buyer opening a credit with his bank in favor of the seller. Hence so intimate a relation between buyer and banker in reference to the transaction that it has been suggested (with questionable soundness) that payment against non-conforming documents by the banker would operate as a waiver of defects on behalf of the buyer. *Anderson, Meyer & Co. v. Northwest Trading Co., supra* note 8. And that the underlying contract for sale might be used to construe the banker's obligation to the seller-beneficiary. *Arctic Ice & Coal Co. v. Southgate, supra* note 3. For the authorities holding the bank's obligation to be independent of the contract for sale, and for admirable discussion of the legal problems in letters of credit, see McCurdy, *Commercial Letters of Credit* (1922) 35 HARV. L. REV. 539, 715; see also Frederick, *The Trust Receipt as Security* (1922) 22 COL. L. REV. 395, 546; Mead, *op. cit. supra* note 10.

[26] Kennedy, L. J., in *Biddell Bros. v. Clemens Horst Co.* [1911, C. A.] 1 K. B. 934, 952, approved s. c. *supra* note 5; see *Harper v. Hochstim, supra* note 10; *Gillespie Bros. & Co. v. Thompson Bros. & Co.* (1922, C. A.) 13 Ll. L. L. R. 519; Lucas, *op. cit. supra* note 1, 560 *et seq.*

[27] *Lawder & Sons Co. v. Mackie Grocery Co.* (1903) 97 Md. 1, 54 Atl. 634; Craighill, *op. cit. supra* note 1, at p. 230.

[28] *Biddell Bros. v. Clemens Horst Co., supra* note 26.

part of the burden of financing the transportation, but also a by no means unimportant credit risk: that of trusting to the seller's good faith that the goods are in fact as represented[29]; and of trusting to the seller's fairness and continued solvency, in case a claim for refund or for damages should prove necessary.

Here arise several questions. That the documents are fair on their face is assumed in their discussion.

In the first place, suppose that before tender of the documents the goods are, to the knowledge of the parties, either lost or damaged in transit. It seems to be settled that this makes no difference; both risks are on the buyer.[30] At common law this seems to be fairly well settled.[31] The reasoning is that despite the seller's carrying the freight charge, there is no point in insuring at the buyer's expense, as indicated in the price quotation, unless such insurance is for the buyer's benefit, and so, unless the buyer has an interest to insure. And where sec. 19 (5) of the Sales Act is in force, it is held to have no application, because the insurance clause in the contract makes "a contrary intent appear."[32] And printed clauses with reference to the risk are construed with considerable rigor to keep them from altering the standard tenor of the contract.[33] Provisions, on the other hand, which read to place upon the seller the contractual duty of delivering the goods at the point of

[29] *Cf.* Lucas, *op. cit. supra,* note 1, at p. 556.

[30] Loss: *Smith Co. v. Marano, supra* note 13; *Smith Co. v. Moschalades, supra* note 13; *Warner, Barnes & Co. v. Warner Sug. Refing. Co., supra* note 13; *Groom, Ltd. v. Barber, supra* note 11; *Manbre Saccharine Co. v. Corn Products Co., supra* note 10 (knowledge of loss at time of tender immaterial). Damage: *Mee v. McNider, supra* note 7; *Northern G. W. Co. v. Northwest Trading Co., supra* note 8; and see *U. S. v. Andrews* (1907) 207 U. S. 229, 28 Sup. Ct. 100, same rule applied to a contract construed as c. and f. *Contra, Lorimer v. Slade, supra* note 15, a c. i. f. e. contract, but the decision there seems to turn on the seller being an importer doing business in the same market as the buyer.

[31] Cases cited under *Damage,* note 30; Williston, *op. cit. supra* note 1, at p. 754; *cf. Setton v. Eberle Albrecht Flour Co.* (1919, C. C. A. 8th) 258 Fed. 905.

[32] Cases cited under *Loss,* note 30; that the Sales Act left c. i. f. contracts "as before": *Smith Co. v. Moschalades, supra* note 13; *Harper v. Hochstim, supra* note 10; but see *Klipstein & Co. v. Dilsizian, supra* note 13. Williston, *loc. cit. supra* note 31, throws some question on the force of this reasoning, where the insurance is not taken out in terms for the buyer's account. His argument is, however, directed not at the rules putting risks and rights into the c. i. f. buyer on shipment, but at those which deny like results in like cases where the full c. i. f. fact-set is not present.

[33] Printed clause: "In case . . . . the goods are damaged while in transit, the buyer agrees to accept in settlement thereof the same percentage of allowance as the seller may secure from the insurers"; held to contemplate insurance by seller as buyer's agent, or to be repugnant. *Harper v. Hochstim, supra* note 10. "War risk for buyer's account": held to mean that war risk is exclusively buyer's concern, altogether apart from the regular insurance called for by the c. i. f. terms. *Groom, Ltd. v. Barber, supra* note 11. Printed clause: "Goods at seller's risk till actual delivery": held repugnant. *Law & Bonar, Ltd. v. Br.-Am. Tobacco Co., supra* note 17.

destination, show some tendency to be construed as affecting the whole character of the contract.[34]

It has seemed to the writer, however, that the compass-needle of presumed intention—unless that canon means nothing more than whatever on the best evidence obtainable after real search, seems to be business sense in the circumstances—suffers arbitrary and unchartable declination in navigating these waters. In the last case put, for instance, there are, if one is attempting to determine the whereabouts of title, two obviously contradictory factors: the insurance premium included in the price, and the apparent undertaking of the seller to deliver at destination. Commercial practice and understanding, where it can be discovered, is the only safe guide between the whirlpool and the reef. The English Court of Appeals, in *Scott v. Barclay's Bank*,[35] recently declined to pass on a number of points fairly involved in the case and earnestly argued before them, because those points were of far-reaching import, and there were "a number of classes of commercial men from whom they had heard no evidence on the subject." Such judicial policy did not cease to be wisdom when Lord Mansfield left the bench. It may fairly be asked, for instance, whether the language, "net landed weight," in a c. i. f. contract is commercially understood to mean any-

[34] "Net landed weight" construed to mean that weight at the point of landing must accord with the contract, and suit to recover back part of price proportionate to shortage allowed. *Willits & Patterson v. Abekobei & Co., supra* note 21, a case unobjectionable in result, although not uniformly happy in the implications of the opinion. "Landed weights," "delivery to be tendered ex vessel," sellers to draw for not exceeding 90 per cent of invoice, full shipping documents, including policy of insurance, attached: the express provision for delivery of the policy [though surely that provision is inherent in c. i. f. terms] held to throw risk of total loss on buyer, but final determination of price in case of arrival to be by weights as landed, subject to any showing of partial loss during voyage; it was stated, unnecessarily, that title and risk intended to pass on presentment of documents; after total loss, seller's suit for unpaid price was allowed. *Warner, Barnes & Co. v. Warner Sugar Refing. Co., supra* note 13. "New York official landed weights": construed to require delivery on vessel in an American port, to be simultaneous with payment, title to remain in seller until delivery; subject to buyer's election, apparently, to tender payment and demand delivery of documents; this construction was perhaps influenced by the court's reading the Sales Act to mean that "title" is retained till delivery, the bills of lading being to seller's order. Suit for non-acceptance allowed against buyer. *Klipstein & Co. v. Dilsizian, supra* note 13; see also note 32. "Payment 10 days after delivery when passed by the Department of Agriculture": construed to retain title in seller until delivery at destination, meaning, apparently, delivery of the goods; and to make tender of an insurance policy unnecessary to sustain an action for non-acceptance, since buyer had no interest in the insurance. *George Carocopos, Inc. v. James Chieves & Co., supra* note 8; why insurance should be at buyer's expense under this holding remains a mystery; *contra* in substance and decidedly sounder in construction is *Orient Co., Ltd. v. Brekke & Howlid, supra* note 10, where a clause as to payment thirty days after delivery was not permitted to affect the standard c. i. f. character of the contract.

[35] *Supra* note 10.

thing more than that the price paid is subject to adjustment according to the weight as landed—even, perhaps, with leave in the seller to show any shortage to be due to perils of the voyage—in the same fashion that the quality of the merchandise is subject to inspection and test at the time of physical delivery[36]—with no reference whatever to the balance of the incidents to the standard contract. Leakage is one thing, deterioration in transit is another, damage by sea water still another, and total loss yet a fourth. And it seems open to serious question whether sound construction of variations in standard contracts lies in the direction of presuming from minor single clauses to find intention as to when title should pass—with all that that implies.[37]

K. N. L.

THE USE OF MUNICIPAL ORDINANCES IN THE DETERMINATION OF A FELONY

It is a settled rule that state legislatures may delegate to municipalities the power to make their own rules and regulations.[1] Consequently local laws and ordinances have the force of authority, and society will punish a failure to abide by their terms. "An ordinance, like a statute, is a law within its sphere of operation."[2] When, however, an attempt is made to take the ordinance out of its local setting and make it susceptible of wider application, difficult questions arise. For example, a defendant is prosecuted for involuntary manslaughter. It is incumbent upon the state to prove as an element of that offense that the killing occurred while the slayer was in the commission of an unlawful act.[3] The law claimed to have been violated is a criminal statute which prohibits driving a motor vehicle "at a speed greater than is reasonable or proper, having regard to the width, traffic, use and general and usual rules of the road."[4] In determining whether this law has been transgressed, it is necessary to have before the court

[36] Compare the rule of *Warner, Barnes & Co. v. Warner Sugar Refining Co.*, and that of *George Carocopos, Inc. v. James Chieves & Co.*, given in note 34.

[37] The question of suit for the price on non-acceptance and the other topics mentioned in the text will be discussed in a later paper.

[1] *Brodbine v. Inhabitants of Revere* (1903) 182 Mass. 598, 66 N. E. 607; *Louden v. Starr* (1915) 171 Iowa, 528, 154 N. W. 331; see COMMENTS (1921) 31 YALE LAW JOURNAL, 183; (1922) 32 *ibid.* 190.

[2] *Martin v. Herzog* (1920) 228 N. Y. 164, 169, 126 N. E. 814, 815.

[3] Wharton, *Homicide* (3d ed. 1907) secs. 210-213.

[4] In one jurisdiction such a statute has been held void for uncertainty. *Hayes v. State* (1912) 11 Ga. App. 371, 75 S. E. 523. But such statutes are generally sustained. *State v. Schaeffer* (1917) 96 Ohio St. 215, 117 N. E. 220; *State v. Goldstone* (1920) 144 Minn. 405, 175 N. W. 892; Huddy, *Automobiles* (6th ed. 1922) sec. 744; see Freund, *The Use of Indefinite Terms in Statutes* (1921) 30 YALE LAW JOURNAL, 437, 443; (1923) 32 *ibid.* 291. In Ohio all crimes are statutory, so that negligent homicide is not a crime unless it is in the commission of an act prohibited by law. *Johnson v. State* (1902) 66 Ohio St. 59, 63 N. E. 607.

the "rules of the road." The state then seeks to supply this necessary element of the unlawful killing by the introduction of a municipal ordinance, and by proof that he was at the time acting in violation of that ordinance. In a recent case, *State v. O'Mara* (1922) 105 Ohio St. 94, 136 N. E. 885, the court held, three judges *dissenting*, that this evidence was admissible.

The problem presented to the court involved an interesting question of statutory interpretation. The statute by its terms contemplates an inquiry into some definite rules of action binding upon all within their sphere of operation. Any regulations of conduct recognized by the community as such, whether they take the form of custom leading to actions of definite character, or of express agreement by the inhabitants to act in a particular manner, or of legislative enactment, may properly be said to be the "general and usual rules of the road." But a municipal ordinance is undoubtedly "the rule of the road" in that it prescribes definite rules of conduct binding upon all who make use of the streets of the jurisdiction. In order to establish a violation of the statute, it is necessary to determine whether the defendant's conduct was unreasonable having regard to those established rules. The question then arises as to the weight to be attached to a violation of a "rule of the road." Is it conclusive proof that the defendant's conduct was unreasonable, or is it merely a circumstance to be weighed with others?

A similar question has troubled the courts in the field of torts, in considering the effect of a breach of an ordinance on the question of negligence in determining civil liability.[5] Many courts say it is only evidence of negligence.[6] This rests on the basis that an ordinance is not sufficient to create a duty between citizen and citizen; but it does express the municipal opinion as to what is proper conduct. The existence of a legislative enactment is a circumstance to be considered by every prudent driver in regulating his conduct in that community. It may in fact not have been negligence to violate the ordinance in this

[5] See Thayer, *Public Wrong and Private Action* (1914) 27 HARV. L. REV. 317; Malburn, *Violation of Laws Limiting Speed as Negligence* (1911) 45 AM. L. REV. 214; Huddy, *op. cit. supra* note 4, secs. 320-322; (1918) 28 YALE LAW JOURNAL, 91.

[6] *Stevens v. Luther* (1920) 105 Neb. 184, 180 N. W. 87; *Southern Ry. v. Stockdon* (1907) 106 Va. 693, 56 S. E. 713. Some few cases consider the breach of an ordinance *prima facie* evidence of negligence—that is, there is a compelled inference of negligence in the absence of evidence to explain the violation. *Riley v. Rapid Transit Co.* (1894) 10 Utah, 428, 37 Pac. 681; *Oates v. Union Ry.* (1906) 27 R. I. 499, 63 Atl. 675. The effect of this view is to shift the burden of going forward; but the weight attached to it is merely weight as evidence, and it is still open to inquire into other circumstances to determine whether the defendant's conduct was in fact unreasonable. See *Oates v. Union Ry. supra.* The ultimate burden of proving negligence in fact is still on the party alleging it. See *People v. Lloyd* (1913) 178 Ill. App. 66, 70. In Kentucky, the ordinance is entirely disregarded on the ground that a breach thereof no more tends to show negligence than a compliance with its terms tends to show due care. *Ford's Adm'r. v. Paducah Ry.* (1907) 124 Ky. 488, 99 S. W. 355.

particular instance, but it is an element in the situation to be considered with all the other surrounding circumstances. This same reasoning may be applied in considering the criminal statute; and the violation of the ordinance, or "rule of the road," would be only some evidence that the defendant's conduct was unreasonable. The probative value of the fact that such an ordinance existed remains the same whether we are considering negligence in cases of civil liability or negligence made criminal by statute. In the latter case, however, the situation is somewhat complicated by the fact that a violation of the statute may, as in the instant case, be a stepping stone to a conviction for manslaughter. But from this view, the ordinance has only an evidential bearing on the ultimate definition of the crime of manslaughter; it is not even conclusive evidence of a violation of the statute.[7] Its weight as evidence is great or small according to the actual conditions prevailing at the time. Giving such effect to the "rule of the road" is not unreasonable.

The breach of an ordinance, however is often considered as negligence *per se*,[8] for a violation of law cannot be considered as prudent conduct. When the community has declared certain conduct so dangerous as to prohibit it by positive enactment, the question of negligence is no longer for the jury; the defendant cannot set up another standard of care against that of the community. Applying this reasoning to the criminal case, a violation of the ordinance is conclusive of a violation of the statute, and this is sufficient to make a homicide

[7] If the ordinance is considered only as evidence, its relation to the ultimate crime charged is not one of direct definition. Its value as evidence is no greater than that of any other common standard of conduct. So in an action for negligence against a drover or warehouseman, it is helpful to know the degree of care customarily adopted by others of the same class under the same circumstances. *Cass v. Boston & Lowell Ry.* (1867) 96 Mass. 448; *Maynard v. Buck* (1868) 100 Mass. 40. Their standard may be particularly high or unduly lax; but it does aid the jury in fixing the proper standard for the particular case. The practice, however uniform, does not constitute a rule of conduct by which the jury is to be controlled. Considering the ordinance as such a standard adopted by the community, and a violation as merely one of the circumstances surrounding the defendant's act, it would not raise the constitutional problem presented in the instant case. For the effect of the ordinance merely as evidence, see *Yarbrough v. Carter* (1913) 179 Ala. 356, 60 So. 833, where, in a suit for wilful and wanton injury, the ordinance was allowed as one fact to be considered with others, though a breach of it is considered only as simple negligence, and though there was no count claiming damages for its violation. On the question of unreasonable speed, certain types of ordinances are useful only as evidence. Thus the breach of an ordinance requiring vehicles to pass street cars on the left, or to drive on the right hand side of the road, could be no more than evidence of prevailing conditions, and the fact that such an ordinance was disobeyed is only one accompanying circumstance.

[8] *Riser v. Smith* (1917) 136 Minn. 417, 162 N. W. 520; *Weimer v. Rosen* (1919) 100 Ohio St. 361, 126 N. E. 307; *Whaley v. Ostendorff* (1911) 90 S. C. 281, 73 S. E. 186; *Memphis Ry. v. Haynes* (1904) 112 Tenn. 712, 81 S. W. 374; *Anderson v. Kinnear* (1914) 80 Wash. 638, 141 Pac. 1151.

manslaughter. A case may arise where it may be said that but for the existence of the ordinance the unintentional killing would not constitute manslaughter.[9] Clearly the municipality then defines an essential element of the crime of manslaughter.[10] Hence the objection of the minority in the instant case is that it amounts to an unconstitutional delegation to the municipality of the legislative power to define a felony.

It must be conceded that by such a construction of the statute the legislature adopted as a part of the definition of the crime, not only existing ordinances within the limits of a municipality, but also future ordinances within the same limits. It is then within the power of the municipality by passing ordinances at its discretion in effect to prescribe what conduct shall make a homicide manslaughter. Is such a delegation unconstitutional?

The doctrine of the separation of powers, with the legislative authority vested solely in a general assembly, arose as a political theory and not as a scheme of government perfected by experience.[11] But the increasing diversity of industry and interests generally calls for knowledge exceeding the capacity of legislators. Consequently courts have permitted general legislation with the details to be determined by some delegated body, though intimating that such a delegation is not a strict compliance with the fundamental constitutional principle.[12] It is now recognized that the substance of legislative power is at bottom the choosing and the adoption of a broad rule of policy. This is the power that may not be delegated; but the determination of the details necessary for the application of such a general enactment may be

[9] Such is assumed to be the fact in the dissenting opinion of the instant case.

[10] A similar situation may arise when a state law makes criminal the driving over a certain speed in "closely knit" or "congested" districts of a community, and a municipal ordinance defines what sections are "closely knit" or "congested." To advert to such an ordinance as a completion of the state law is to permit the municipality by characterizing certain localities in this way in effect to prescribe that speed over that particular rate in the specified portions is criminal within the meaning of the statute. The ordinance would be conclusive. *Cf. State v. Born* (1912) 85 Ohio St. 430, 98 N. E. 108, overruled by the instant case; *Weimer v. Rosen, supra* note 8.

[11] "The oracle who is always consulted and cited on this subject [the separation of powers] is the celebrated Montesquieu. . . . . The British constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. . . . . On the slightest view of the British Constitution we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. . . . . In no instance has a competent provision been made for maintaining in practice the separation delineated on paper." James Madison, *Federalist,* No. 47.

[12] "It would not be possible without the introduction of a commission or other agency, for it to properly exercise the power of regulating rates conferred on it by the state Constitution. It is true that the function of fixing rates is legislative in its nature, yet it seems well settled now that the creation of a commission, with power to fix rates, is not an unconstitutional delegation of legislative power." *Ry. Commission v. Central Ry.* (1909, C. C. A. 5th) 170 Fed. 225, 238.

delegated even though it involves some discretion and control.[13] So, in the instant case, the legislature has manifested its intent to prohibit unreasonable speed and to punish homicide caused thereby. The adaptation of the offense to any specific locality may well be delegated in express terms to the legislative body of the city to be determined in accordance with local conditions. In effect, the result of an express delegation is accomplished when existing ordinances are embodied into the state law; but it is still the state law, and not the ordinance *per se,* that is the basis for the charge of manslaughter.[14] Such effect to the "rule of the road" offers little objection on constitutional grounds.

When it becomes a matter of severe criminal punishment, however, it is doubtful whether any *a priori* test as to what conduct shall always constitute negligence ought to be established. It is when one is brought into actual physical relations with another that a duty to use care arises. In the field of torts the severity of an absolute standard is somewhat mitigated by the doctrine of contributory negligence. This doctrine has no application in the field of criminal law.[15] Does it not impose too severe a penalty for the breach of an ordinance to allow it to determine whether a homicide is manslaughter? The instant case is, however, an illustration of the far-reaching consequences that may follow the breach of a municipal ordinance.

[13] Thus the Secretary of Agriculture may be empowered to make rules and regulations for the conservation of forest lands after the legislature has decided upon a conservation policy. *United States v. Grimand* (1910) 220 U. S. 506, 31 Sup. Ct. 480. So too a delegation to a commission to fix reasonable rates or make proper rules is not unconstitutional. *State v. Baltimore & Ohio Ry.* (1915) 76 W. Va. 399, 85 S. E. 714; *State v. Atlantic Coast Line Ry.* (1908) 56 Fla. 617, 47 So. 969; *Buttfield v. Stranahan* (1904) 192 U. S. 470, 24 Sup. Ct. 349. Nor to a board of health to make reasonable regulations. *Blue v. Beach* (1900) 155 Ind. 121, 56 N. E. 89. Legislation made to depend for its operation upon a vote of the people of the community is not vulnerable on constitutional grounds. *Eckerson v. Des Moines* (1908) 137 Iowa, 452, 115 N. W. 177. And it has been the marked tendency in recent years "to break away from the theory of three separate and independent departments of government by imposing upon other departments duties and powers of a legislative character which the courts have been inclined to sustain." *Cook v. Burnquist* (1917, C. C. A. 3d) 242 Fed. 321, 325; see Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE LAW JOURNAL, 892.

[14] It is of interest to note that by the decisions of the Ohio court, the crime of manslaughter cannot be predicated solely on the breach of an ordinance, but it may be predicated on the breach of the statute in the absence of an ordinance. *State v. Collingsworth* (1910) 82 Ohio St. 154, 92 N. E. 22; *State v. Schaeffer, supra* note 4. Hence the ordinance is utterly dependent upon the state law, and only supplies necessary details for defining the primary unlawful act.

[15] The state is required to prove the consequences of the unlawful act and not that the deceased used due care to avoid them. *Schultz v. State* (1911) 89 Neb. 34, 130 N. W. 972; *Lauterbach v. State* (1915) 132 Tenn. 603, 179 S. W. 130. So it is held immaterial that the deceased ran in front of the automobile. *Lauterbach v. State, supra;* but see *People v. Barnes* (1914) 182 Mich. 179, 148 N. W. 400, where it was held that the contributory negligence of the deceased had a bearing only on the question of the "gross" negligence of the defendant.

THE FIFTH AMENDMENT AND THE TUCKER ACT

Because of governmental immunity from suit, prior to the legislation establishing the Court of Claims, there existed no legal machinery to compel payment by the government, where private property had been taken and applied to a public use.[1] This legislation, now embodied in the Tucker Act of 1887, renders the United States liable, among other things, for "claims arising upon contract, express or implied, or for damages in cases not sounding in tort."[2]

In the sense of an unfettered meeting of the minds, it is obvious that a bare appropriation of private property for public use raises no contractual relation between the government and the property owner. But because of the power of the government to take such property by eminent domain and because of the constitutional prohibition against so doing without making adequate compensation, the courts imply an agreement to make such payment from the act of taking.[3] Since the power of eminent domain operates without regard to the consent of the property owner, such consent is quite unnecessary, but by fiction is said to be implied.[4] Thus the contractual basis for suits under the Tucker Act is found and relief is granted thereunder for public appropriations of private property.[5] This general rule is qualified only to the extent

[1] Officers attempting to appropriate private property could, at the outset, be enjoined from so doing until compensation had been made. See *United States v. Great Falls Mfg. Co.* (1884) 112 U. S. 645, 5 Sup. Ct. 306. But, until this legislation, the property owner was dependent for relief upon the grace of Congress, where his property had once been applied to the public use. Freund, *Private Claims Against the State* (1893) 8 POL. SCI. QUART. 625.

[2] Act of March 3, 1887 (24 Stat. at L. 505); U. S. Comp. Sts. (1916) secs. 991 (20), 1136 (1).

[3] *United States v. Great Falls Mfg. Co., supra* note 1; *United States v. Lynah* (1903) 188 U. S. 445, 23 Sup. Ct. 349; *Marion County v. United States* (1918, U. S.) 53 Ct. Cl. 120. The Fifth Amendment to the Constitution of the United States prohibits the taking of property for public use without just compensation. It is a limitation upon the powers of the federal government only. *Barron v. Baltimore* (1833, U. S.) 7 Pet. 243. The several states are similarly affected by the Fourteenth Amendment, and by their own constitutions. These latter occasionally require compensation for property "injured" or "damaged" as well as "taken."

[4] It seems that the actual consent of the owner is wholly immaterial, and that he can not defeat his right to compensation by an affirmative failure to consent. The contract will be implied notwithstanding. See opinion of Mr. Justice Brown, *United States v. Lynah, supra* note 3; *Roberts v. Northern Pacific Ry.* (1894) 158 U. S. 1, 15 Sup. Ct. 756. Only in the patent cases is there an intimation that the consent of the patent owner may be material to the implication of a contract. See *Schillinger v. United States* (1894) 155 U. S. 163, 15 Sup. Ct. 85; *United States v. Palmer* (1888) 128 U. S. 262, 9 Sup. Ct. 104; *Crozier v. Krupp* (1911) 224 U. S. 290, 32 Sup. Ct. 488. However, the question is no longer of importance in patent cases since the Act of June 25, 1910 (36 Stat. at L. 851), which renders the contractual implication unnecessary for a recovery for an infringement by the United States.

[5] It is interesting to note in this connection that the clause of the Tucker Act giving relief for claims arising "upon the constitution," instead of the contractual

that an affirmative intention not to pay on the part of the government is considered as defeating the implication of contract.[6] In such cases the taking is held to be tortious merely, for which the government is no more liable than for any other tort.[7]

The courts, having broadened the Fifth Amendment by the implication of a contract, have found their greatest difficulty in ascertaining under what circumstances and in regard to what injuries to property the Amendment is operative. Riparian rights, easements, and the various other intangible rights of user attaching to real estate are as much property as the real estate itself.[8] Logically, it seems that any injury to the

clause, very nearly became the basis for the relief granted under the Fifth Amendment. Had that view prevailed, there would have been no ground for the "claim of right" distinction. See *infra* note 6; the dissenting opinion, *Hill v. United States* (1893) 149 U. S. 593, 13 Sup. Ct. 1011; the concurring opinions, *United States v. Lynah, supra* note 3.

[6] An affirmative intention on the part of the government not to make compensation will defeat the contractual implication and any recovery based thereon. The usual case illustrative of this point is where the government claims title to the property taken under a mistaken "claim of right." *Tempel v. United States* (1918) 248 U. S. 121, 39 Sup. Ct. 56; *Hill v. United States, supra* note 5; *Langford v. United States* (1879) 101 U. S. 341; *Fawcett v. United States* (1890, U. S.) 25 Ct. Cl. 178; *Castelo v. United States* (1916, U. S.) 51 Ct. Cl. 221; *Hijo v. United States* (1904) 194 U. S. 315, 24 Sup. Ct. 727; *Juragua Iron Co. v. United States* (1909) 212 U. S. 297, 29 Sup. Ct. 385; (1919) 29 YALE LAW JOURNAL, 125. Patent cases: *Bliss v. United States* (1917, U. S.) 53 Ct. Cl. 47; *Haupt v. United States* (1918, U. S.) 53 Ct. Cl. 591; *Farnham v. United States* (1916) 240 U. S. 537, 36 Sup. Ct. 427; *Russell v. United States* (1901) 182 U. S. 516, 21 Sup. Ct. 899.

Even if the government recognizes the claimant's title, it seems that there will be no recovery if there was a deliberate intent to take without payment. See *Harley v. United States* (1905) 198 U. S. 229, 25 Sup. Ct. 634; *Ball Engineering Co. v. White & Co.* (1918) 250 U. S. 46, 39 Sup. Ct. 393; *Curved Electrotype Plate Co. v. United States* (1915, U. S.) 50 Ct. Cl. 258. But such intent to do a wrongful act will not be imputed to the government in the absence of the most convincing proof. *United States v. Société, etc.* (1912) 224 U. S. 309, 32 Sup. Ct. 479. In this class of cases, it seems that the greater and more deliberate the injury, the weaker the remedy.

[7] The Tucker Act expressly precludes recovery against the government for injuries "sounding in tort." *Supra* note 2. Consequently, the United States can not be made liable for the tortious or unauthorized acts of its officers. *Bigby v. United States* (1903) 188 U. S. 400, 23 Sup. Ct. 468; *Pendleton v. United States* (1921, U. S.) 56 Ct. Cl. 222; *Journal & Tribune Co. v. United States* (1921) 254 U. S. 581, 41 Sup. Ct. 202; *Basso v. United States* (1916) 239 U. S. 602, 36 Sup. Ct. 226. It is interesting to note that the statutory phrase "not sounding in tort" is taken to defeat recovery in those actions when, between private parties, the tort could be waived and an implied contract set up. *McArthur v. United States* (1894, U. S.) 29 Ct. Cl. 191; *Mann v. United States* (1897, U. S.) 32 Ct. Cl. 580. The legislation existing before the Tucker Act (1887) did not contain this phrase, and evidently at that time such waivers were permissible. See *United States v. Russell* (1871, U. S.) 13 Wall. 623; *Mason v. United States* (1878, U. S.) 14 Ct. Cl. 59. *Cf. McArthur v. United States, supra.*

[8] *Eaton v. B. C. & M. Ry.* (1872) 51 N. H. 504. See *Marion County v. United States, supra* note 3. In the following cases a "taking" was found: *Pumpelly*

use or value of tangible property is as much a taking of property as the complete deprivation or destruction of such use when the owner is ousted from possession, and should consequently be protected under the constitution.[9] But only in a measure has this proposition been accepted. No principle of our law is better settled than that a great many injuries to property are not included in the meaning of the constitutional "taking" and that consequently their infliction is tortious and not contractual.[10]

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v. Green Bay Co. (1871, U. S.) 13 Wall. 166 (land); *United States v. Cress* (1917) 243 U. S. 316, 37 Sup. Ct. 380 (fall necessary to operate a mill); *United States v. Welch* (1910) 217 U. S. 333, 30 Sup. Ct. 527 (easement); *Portsmouth Harbor Land & Hotel Co. v. United States* (1922, U. S.) 43 Sup. Ct. 135 (servitude); *United States v. Lynah, supra* note 3 (utility of land destroyed); *Forbes v. United States* (1917, U. S.) 52 Ct. Cl. 60 (water right); *Monk v. United States* (1921, U. S.) 56 Ct. Cl. 429 (riparian rights); *Chappell v. United States* (1888, C. C. D. Md.) 34 Fed. 673 (servitude); *Heyward v. United States* (1911, U. S.) 46 Ct. Cl. 484; on rehearing (1917) 52 *ibid.* 87 (drainage destroyed).

[9] See the opinion of Mr. Justice Shiras, *dissenting, Scranton v. Wheeler* (1900) 179 U. S. 141, 21 Sup. Ct. 48. *Cf. Shively v. Bowlby* (1893) 152 U. S. 1, 14 Sup. Ct. 548.

Compare the cases, of which *United States v. Grizzard* (1911) 219 U. S. 180, 31 Sup. Ct. 162, is the leading example, holding that "wherever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from the taking." Logically there seems to be no ground for a distinction based upon ownership. See also *Sharp v. United States* (1903) 191 U. S. 341, 24 Sup. Ct. 114. But if this proposition is to be maintained, it follows that benefits to the remainder due to the taking may be set-off to reduce compensation. *Bauman v. Ross* (1897) 167 U. S. 548, 17 Sup. Ct. 966. See *McCoy v. Union Elevated Ry.* (1917) 247 U. S. 354, 38 Sup. Ct. 504.

[10] *Marion County v. United States, supra* note 3 (intermittent flooding of land); *Jackson v. United States* (1913) 230 U. S. 1, 33 Sup. Ct. 1011 (same); *Archer v. United States* (1918, U. S.) 53 Ct. Cl. 405 (same); *Sanguinetti v. United States* (1920) 55 Ct. Cl. 107 (same); *Hughes v. United States* (1913) 230 U. S. 24, 33 Sup. Ct. 1019 (same); *Cubbins v. Mississsippi River Commission* (1916) 241 U. S. 351, 36 Sup. Ct. 671 (same); *Manigault v. Springs* (1905) 199 U. S. 473, 26 Sup. Ct. 127 (same, also impairment of drainage); *Mills v. United States* (1891, S. D. Ga.) 46 Fed. 738 (impairment of drainage); *Natron Soda Co. v. United States* (1919, U. S.) 54 Ct. Cl. 169 (seepage and percolation caused by government irrigation scheme); *Scranton v. Wheeler, supra* note 9 (interruption of riparian access); *Gibson v. United States* (1897) 166 U. S. 269, 17 Sup. Ct. 578 (same); *Transportation Co. v. Chicago* (1878) 99 U. S. 635 (same); *Peabody v. United States* (1911, U. S.) 46 Ct. Cl. 39 (occasional firing of coast defense guns over land); *Portsmouth Harbor Land & Hotel Co. v. United States* (1918, U. S.) 53 Ct. Cl. 210 (same); *Bedford v. United States* (1904) 192 U. S. 217, 24 Sup. Ct. 238 (revetment causing continued erosion); *Hayward v. United States* (1895, U. S.) 30 Ct. Cl. 219 (soil carried away by washout caused by government dam); *United States v. Chandler-Dunbar Co.* (1913) 229 U. S. 53, 33 Sup. Ct. 667 (deprivation of use of water power); *Willink v. United States* (1916) 240 U. S. 572, 36 Sup. Ct. 422 (extension of harbor line across plaintiff's land); *Bothwell v. United States* (1920) 254 U. S. 231, 41 Sup. Ct. 74 (flooding caused loss of stock on forced sale); *Monongahela Navigation Co. v. Coons* (1843, Pa.)

The cases give little help in arriving at the basic criteria upon which the distinction rests. In their results there is the widest conflict[11]; it is only apparent that there is no particular *kind* of property singled out for protection.[12] Their language may be summarized in the following often-cited quotation from *Transportation Co. v. Chicago*[13]: "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." It is obvious that to state this criterion in conjunction with any concrete set of facts is to raise at once the question, "When is an act a direct encroachment, and when merely consequential?" In determining the unexpressed major premise upon which the cases are really decided, the results of the cases themselves can be the only guide.

Turning now to the cases, a few broad tendencies are to be noticed.[14] It may be stated that where private property is itself specifically devoted to an active public use, a taking is generally found, while the opposite is the case where the use of government property entails mere nuisance

6 Watts & S. 101 (destruction of fall necessary to operate mill). See also the following patent cases: *Crozier v. Krupp, supra* note 4; *Schillinger v. United States, supra* note 4; *United States v. Palmer, supra* note 4; *Curved Electrotype Co. v. United States, supra* note 6; *Russell v. United States, supra* note 6.

[11] Many instances of apparent conflict in the results of the cases may be cited. Perhaps one of the most striking is that illustrated by *United States v. Cress, supra* note 8, in which the use of a mill was held to have been taken by the destruction of the fall necessary for its operation caused by the construction of government dams. The case of *Monongahela Nav. Co. v. Coons, supra* note 10, decided in the Pennsylvania court under a similar provision of the Pennsylvania construction, is squarely in conflict. It seems that there should be no essential difference upon theory between the *Cress* case and the *Gibson, Scranton, Bedford,* and *Jackson* cases, *supra* note 10, in each of which a similar rise in water level prevented some riparian use of the claimant's land, or did some other injury. In its opinion in the *Cress* case, the court makes no attempt to distinguish them upon theory, but without explanation brushes them aside upon the facts. For further illustration, compare the cases cited in note 10 with those cited in note 8 and the following: *Morris v. United States* (1895, U. S.) 30 Ct. Cl. 162 (erection of dam on plaintiff's land); *United States v. Great Falls Mfg. Co., supra* note 1 (same); *Archer v. United States, supra* note 10 (same); *Chapman v. United States* (1918, U. S.) 53 Ct. Cl. 203 (intermittent flooding); *King v. United States* (1893, C. C. D. S. C.) 59 Fed. 9 (flooding); *Williams v. United States* (1900, C. C. D. S. C.) 104 Fed. 50 (same); *United States v. Grizzard, supra* note 9. See also the following patent cases: *Bethlehem Steel Co. v. United States* (1918) 53 Ct. Cl. 348; *United States v. Société, etc., supra* note 6; *United States v. Berdan Fire Arms Co.* (1895) 156 U. S. 552, 15 Sup. Ct. 420; *Hollister v. Benedict Co.* (1885) 113 U. S. 59, 5 Sup. Ct. 717; *Cramp v. Curtis Turbine Co.* (1918) 246 U. S. 28, 38 Sup. Ct. 271. In these cases a taking was found.

[12] See cases cited *supra* note 8.

[13] *Supra* note 10.

[14] The conclusions stated in this paragraph have been evolved from the consideration of a number of cases, and are not to be found stated in the opinions as rules of law. For verification, compare the cases cited, *supra* notes 8, 10, and 11.

or inconvenience to adjoining property owners. The line, then, is to be drawn somewhere between these two extremes. While, as stated above, no distinction is made as to the kind of property which may be the subject of a taking, the courts seem much more ready to grant relief when a claimant has been ousted from the possession of tangible property than when he has suffered the deprivation of some intangible right, such as an easement.[15] Also, a taking is apparently much easier to find when some benefit therefrom accrues to the government than where the act complained of results in a bare injury or destruction of property.[16]

With these tendencies of the cases in mind, the following quotations of judicial language seem highly significant. In *Scranton v. Wheeler*[17] the Supreme Court says: "It was not intended, by that provision in the Constitution [Fifth Amendment], that the paramount authority of Congress to improve navigation of the public waters should be crippled by compelling the government to make compensation for an injury to the riparian owner's right to access to navigability that might incidentally result from an improvement ordered by Congress." The Pennsylvania Court, interpreting a similar provision in the Pennsylvania Constitution, has thus expressed itself:[18] "The word 'taken' must be given its obvious and popular meaning, so as to be restrained to property taken away, and not extended to property injured by an act which did not amount to an assumption of possession . . . . A constitution is made not particularly for the inspection of lawyers, but for the inspection of the million,

[15] It has often been stated that an actual physical ouster of possession is an essential ingredient of a "taking." See *Gibson v. United States, supra* note 10; *Transportation Co. v. Chicago, supra* note 10; *Sanguinetti v. United States, supra* note 10.

[16] The courts say that an injury inherently tortious cannot be turned into a contract upon a quasi-contractual implication, because of the express prohibition of the Tucker Act. See *supra* note 7. *Cf. New York, New Haven & Hartford Ry. v. United States* (1918, U. S.) 53 Ct. Cl. 222; *Baltimore & Ohio Ry. v. United States* (1921, U. S.) 56 Ct. Cl. 377, *aff'd.* (1922) Oct. Term, U. S. Sup. Ct. No. 208. In these cases governmental liability in quasi-contract was denied under the Tucker Act. But a comparison of the results of the cases will show that the judicial mind is much more impressed with a claim for an injury to private property which has resulted in active governmental benefit than one which has not.

It is also interesting to note that occasionally it is said that if an act is tortious as between private parties, it is tortious on the part of the government, and no contractual inference is raised. "If what happened resulted in a damage in the nature of a tort, such as against an individual or a private corporation would necessarily have resulted in an action in tort, and did not, in fact, embody the element of a taking under the Constitution, we have no jurisdiction." *Keokuk & Hamilton Bridge Co. v. United States* (1920, U. S.) 55 Ct. Cl. 480. See also *Langford v. United States, supra* note 6; *United States v. Palmer, supra* note 4. Such language is obviously inaccurate when applied to this problem, since every act of taking would, between private parties, sound in tort. But *cf. Natron Soda Co. v. United States, supra* note 10.

[17] *Supra* note 9.

[18] *Monongahela Co. v. Coons, supra* note 10.

that they may read and discern in it their rights and duties; and it is consequently expressed in the terms that are most familiar to them."

What, then, is the elusive, inarticulate major premise? It seems that there exists in the judicial mind the conviction that the government should not be unduly hindered in its great work of making improvements for the public good.[19] In this connection it is enlightening to remember that at the common law existing before the adoption of the Fifth Amendment the government was under no obligation to make compensation for property devoted to public use, and that the doctrine of governmental immunity from suit, based upon this same consideration, was and is firmly entrenched in our law.[20] And it is no doubt true that if compensation were to be made for every comparatively trivial and indirect damage or nuisance resulting from governmental activities, those activities would be most seriously hampered. The public good demands that such injuries be borne by the individuals upon whom they happen to fall. On the other hand, policy as well as justice and the Fifth Amendment all demand that direct and flagrant appropriations of property be compensated and that the public should not force a few individuals to bear the burden of public improvements. Added to these conflicting considerations is the feeling that the constitutional "taking" is not a word of art to be interpreted technically but, as the Pennsylvania Court put it, to be restrained to its usual meaning of "property taken away" by the government, and accruing to the public benefit.

It seems, then, that there is no definite major premise upon which the cases are predicated. Rather the judicial state of mind is made up of an appreciation of these conflicting considerations, which underlie the conventional language of the opinions and may be traced in the tendencies of the cases as above set forth. Rarely if ever expressed, this appreciation is largely subconscious and operates more by instinct than by reason. In place of a definite major premise, we must be content to say that the question is one of degree,[21] and that the line between the "direct" and the "consequential" injuries of the decisions is drawn by the application of the "rule of reason" so familiar in our constitutional law.

When a man makes a note to a bank for the express purpose of puffing its apparent assets to fool the examining authorities, he has no call to complain when forced to make good his representation that the transaction was genuine. The decision to that effect in *Putnam v.*

[19] See also *Union Bridge Co. v. United States* (1907) 204 U. S. 364, 27 Sup. Ct. 367; *Gibbons v. United States* (1868, U. S.) 8 Wall. 269. *Cf. Richards v. Washington Terminal Co.* (1914) 233 U. S. 546, 34 Sup. Ct. 654.

[20] Freund, *op. cit. supra* note 1.

[21] Occasionally this is intimated in the opinions, as in *Hayward v. United States, supra* note 10, where compensation was refused because "there was no appropriation in any appreciable quantity."

Chase[1] is sound and in line with authority. The novel feature in the facts, not discussed in the opinion, is that during the pendency of the action the plaintiff bank commissioner had sold the claim to a third party, who was substituted as plaintiff. There seems to be no reason, however, for not permitting such a transfer if it will facilitate liquidation of an insolvent bank.

There is another type of irregularity in banking practice, however, which results equally in the note-maker being forced to pay, and with less reason. That is the phenomenon of repeatedly renewable paper. *Nelson v. Sapulpa State Bank*[2] illustrates again that the bank's oral agreement to renew is no defense to suit on the note at maturity. As a matter of negotiable instrument law the rule is unobjectionable. But the situation which gives rise to such a case is decidedly objectionable. If the banking laws which require extreme mobility of short-time credit are sound, banks dealing in such credit have no business financing transactions which require, and are known in advance to require, a longer term for actual re-payment; and paper agreed in advance to be renewable is legal masquerade. If, on the other hand, the "intermediate" credit period presents a legitimate banking field, we need changes in both banking laws and banking organization.[3]

The usual charge to the jury in civil cases requires the party upon whom rests the burden of proof to prove the issue by a preponderance of the evidence. This orthodox charge does not raise the question whether a mere preponderance that does not carry conviction is sufficient. A recent decision[1] has reasserted the view that preponderance in itself is sufficient. To require more "such as to convince the jury, or to satisfy the jury," would be error, it was said. Contrary decisions hold that a charge asserting that the jury must find according to the preponderance is erroneous, "because preponderance may not convince the minds of the jury."[2] Certainly there is a distinction between producing a preponderance of the evidence and sustaining the burden of proof. If one party furnishes any material evidence and the other none, the former has supplied not only the greater mass but also evidence of greater convincing force, for manifestly any material evidence is of greater convincing force than none. And yet it is too obvious for comment that the party having the burden of proof upon an issue may

[1] (1923, Or.) 212 Pac. 365. The opinion is clear and cogent. See also cases there cited and discussion in (1919) 28 YALE LAW JOURNAL, 823.

[2] (1923, Okla.) 212 Pac. 309. See also (1919) 28 YALE LAW JOURNAL, 823.

[3] The Agricultural Credits Act of March 4, 1923, goes some distance toward curing this dilemma as to agricultural paper, but it does not touch the related problem in commercial transactions.

[1] *Teter v. Spooner* (1922, Ill.) 137 N. E. 129.

[2] *Pullman Palace Car Co. v. Adams* (1898) 120 Ala. 581, 24 So. 921.

put in much material evidence thereon and fail to get to the jury or fail to get a verdict, even where his opponent has offered no evidence at all. The distinction exists, but will an attempt to explain it to the jury really clarify the matter or will it serve only to confuse or mislead the jury?[3]

Since *Haddock v. Haddock*[1] decided that "full faith and credit" need not be given to *ex parte* foreign divorce decrees, New York has led the way in discrediting them.[2] The *in rem* theory of a divorce action is thus subordinated to the *in personam* theory. Yet under some circumstances such divorces have been held effective outside the states which have granted them, notwithstanding that New York citizens were involved.[3] Two recent cases arising out of the same matrimonial tangle bring out the inevitable difficulties inherent in the illiberal doctrine. In *Kelsey v. Kelsey* (1922, App. Div.) 197 N. Y. Supp. 371, a husband sued for divorce alleging adultery. His wife had left him, obtained an *ex parte* divorce in Pennsylvania, and had there married a New York citizen. Later they moved to New York. Meanwhile the plaintiff had remarried. The divorce was denied him on the ground of "estoppel."[4] The defendant's second "husband" then died. She brought suit for the admeasurement of dower in his New York lands, which was denied her on the ground that the Pennsylvania divorce was invalid. *Bell v. Little* (1922, App. Div.) 197 N. Y. Supp. 674. These decisions bring about the result that both parties to the original marriage are guilty of adultery and deprive the wife of the right to dower against either husband's estate. Such consequences are surely unfortunate.

ERRATUM

Through error in assembling corrections in the galley-proof of the April issue, a marginal query was inserted as part of the text. The words, "inherited from her husband," in the first line of page 577 should be deleted.

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[3] See 5 Wigmore, *Evidence* (1905) sec. 2498, note 1.

[1] (1906) 201 U. S. 562, 26 Sup. Ct. 525; COMMENTS (1913) 23 YALE LAW JOURNAL, 88; (1917) 27 *ibid.* 117; (1919) 28 *ibid.* 821; (1922) 31 *ibid.* 548.

[2] Minor, *Conflict of Laws* (1901) 204.

[3] *Hubbard v. Hubbard* (1920) 228 N. Y. 81, 126 N. E. 508; *Ball v. Cross* (1921) 231 N. Y. 329, 132 N. E. 106; COMMENTS (1920) 29 YALE LAW JOURNAL, 679.

[4] *Starbuck v. Starbuck* (1903) 173 N. Y. 503, 66 N. E. 193.