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EDITORIAL

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MORATORIUM DECREES AND THE CONFLICT OF LAWS

A bill of exchange was drawn and accepted in Paris, payable in New York. Both drawer and acceptor were citizens of France. In an action brought against the acceptor in New York, it was held that the latter might set up in defense a moratorium decree of the French government extending the time of payment of commercial paper.[1]

The report of the case leaves us in doubt whether the decree in question was an executive order issued pursuant to a law existing at the inception of the contract, or a retrospective act of legislation. We are therefore uncertain which of the two following problems in the conflict of laws is involved: *first*, whether the rule governing the *creation* of a contractual obligation (be it *lex loci contractus* or *lex loci solutionis*) or the rule

[1] *Taylor v. Kouchakji* (1916) 56 N. Y. L. J. 813.

of the place of *performance,* as *such,*[2] should be applicable to determine the effect of subsequent facts in modification of such contractual obligation; *second,* whether the rule usually applicable (be it the one or the other as above specified) should be adopted (or "incorporated") by the law of the forum as the applicable rule, even though the incorporated rule be a retroactive law in the country of its origin. A brief discussion of each of these two problems may not be without interest.

First: rule usually applicable: The action having been brought in New York, and the court of that state having acquired jurisdiction over the parties, the initial inquiry is: how does the forum ever come to confront the question as to the possible application of a foreign rule to the subject-matter before it? Why should it in any case apply any other substantive law than its own local rule?

Correctly understood, the entire process of adoption and application of foreign rules by the *lex fori* (in the widest sense)—i. e., what may be called "incorporation by reference"—is to be regulated purely according to considerations of justice, policy, expediency, and international reciprocity, as formulated in the domestic rules as to the conflict of laws.[3] If the domestic law-

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[2] In favor of the latter contention, that is, that the *lex loci solutionis* as *such* should control even though the *creation* of the particular primary obligation involved is to be determined according to the *lex loci contractus,* are *New York & Cuba Mail S. S. Co. v. Maldonado & Co.* (1915) 225 Fed. 353, Rogers, Circuit Judge, *dissenting;* Professor Beale (1896) 10 HARV. L. REV. 168, 173, and *Cases on Conflict of Laws,* Vol. III, Summary, secs. 54, 96, 97.

[3] See, to this effect, Professor Wesley N. Hohfeld (1909) 9 COL. L. REV. 496, 520, 522, note 16, where the logical and jural bases of the conflict of laws are set forth.

This view of free adoption and incorporation by reference is, of course, radically opposed, both as regards logical analysis and as regards practical results, to any theory which assumes that, according to some *a priori* principle or supposed necessity due to the intrinsic nature of law, the application of foreign rules is limited in some way to the "recognition" and "enforcement" of "foreign-created rights"—the "power" of the foreign law to "create" rights being in turn limited by some supposed principle of "territoriality."

Compare Professor Beale, Summary, *supra,* sec. 1: "The topic called 'Conflict of Laws' deals with the recognition and enforcement of foreign-created rights." Also sec. 90: "If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so."

Compare also Professor Beale (1910) 23 HARV. L. REV. 267: "If the law

making power, in formulating such rules, feel the pressure of any external constraint at all, the latter can consist only of those very generic principles of "international law" which forbid a fundamental denial of justice to aliens.[4] The purpose of a system of rules of conflict of laws being to minimize the practical inconvenience of the operation of more than one system of substantive law upon a single transaction, manifestly such purpose would best be served by a determination with reference to a *single* body of law of both questions, first, the *creation* of the contractual obligation, and, second, the *nature* of the contractual obligation, including of necessity the liability to subsequent modification by the operation of supervening facts.[5] From this viewpoint, therefore, the French local rule, being regarded by the New York court as applicable to determine the *creation* of the acceptor's obligation, was properly held similarly applicable to determine the effect of the moratorium decree in postponing the maturity of his obligation.

This conclusion would seem to be supported by three lines of leading decisions. If, instead of a moratorium decree "modifying" the primary obligation as regards time of payment (i. e.,

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of the place where the parties act refuses legal validity to their acts, it is impossible to see on what principle some other law may nevertheless give their acts validity. The law of the place of performance can have no effect as law in another place, namely, the place where the parties act. . . . Any attempt to make the law of the place of performance govern the act of contracting is an attempt to give to that law extraterritorial effect."

Ibid., 268: "In all these cases the matter must, it seems, be determined theoretically by the law governing the transaction, *i. e.*, the law of the place where the parties act in making their agreement. If by that law their acts have no legal efficacy, then no other state can give them greater effect."

Ibid., 271: "This doctrine gives full scope to the territoriality of law, and enables each sovereign to regulate acts of agreement done in his own territory."

[4] See, as regards fundamental denial of justice to aliens, Professor Edwin M. Borchard, *Diplomatic Protection of Citizens Abroad* (1915) pp. 13, 178, 196-199, 330 ff.

[5] For a discussion of the various considerations of expediency with reference to the similar question of the law governing the secondary rights and duties resulting from a breach of contract, see (1915) 25 YALE LAW JOURNAL, 147, criticising the majority opinion in *New York & Cuba Mail S. S. Co. v. Maldonado & Co.* (1915) 225 Fed. 353, and the doctrine thereof that the secondary relations should be regulated by the *lex loci solutionis*, as *such*. See note 2, *supra*.

really extinguishing the original obligation and substituting a new one), we have an attempted assignment by the obligee to a third person, the effect of this attempted assignment in imposing upon the obligor a substituted obligation to the assignee is, by the weight of authority, determined by the same rule as governs the creation of the contract.[6] The power to assign really involves the extinguishment of the original obligation and the creation of a new and more or less corresponding obligation in favor of a new obligee.[7] In the case of assignment, in other words, the modification relates to *persons*. In the case of a moratorium decree made by governmental officers empowered by previously existing law, the modification relates to *time of performance*.

Affording similar support to the views here expressed are cases involving the validity of an attempted discharge by agreement or other act of the parties. Such validity depends, not upon the law of the place of the attempted discharge, nor upon that of the place of performance as such, but upon the law of the contract.[8]

A like result has been reached where the question was the effect of certain supervening non-legal facts, independent of the acts of the parties. Such, for example, are cases of impossibility of performance arising from physical causes.[9]

We conclude, therefore, that the law of the contract was properly held to determine the effect of the moratorium decree in the principal case.[10]

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[6] See *Zipcey v. Thompson* (1854) 1 Gray (Mass.) 243; *Jackson v. Tiernan* (1840) 15 La. 485; *Lebel v. Tucker* (1867) L. R. 3 Q. B. 77; compare *contra, Lee v. Abdy* (1886) 17 Q. B. D. 309; Professor Beale, *op. cit.*, Summary, sec. 68.

[7] See, for a complete analysis and discussion of the power to assign, comment in (1917) 26 YALE LAW JOURNAL, 302-308.

[8] *Lindsay v. Collings* (1916) 182 S. W. (Tex.) 879; *Tenant v. Tenant* (1885) 110 Pa. St. 478; *Gibbs v. Société Industrielle* (1890) 25 Q. B. D. 399; see *contra,* Professor Beale, *op. cit.*, Summary, sec. 96.

[9] *Jacobs v. Credit Lyonnais* (1884) 12 Q. B. D. 589; see *contra,* Beale, Summary, sec. 97.

[10] The following authorities clearly holding or intimating that the law of the contract as such governs the entire contractual relation, are in point: *Gray v. Western Union Tel. Co.* (1901) 108 Tenn. 39; *Gray v. State* (1880) 72 Ind. 567, 581; *Coghlan v. S. C. Ry. Co.* (1891) 142 U. S. 101; *Thurman v. Kyle* (1883) 71 Ga. 628; *Amsinck v. Rogers* (1907) 189 N. Y. 252; *In re Commercial Bank* (1887) 36 Ch. D. 522; *Allen v. Kemble* (1848) 6 Moore P. C. 314.

More explicitly to the same effect are the following:

"Whatever goes to the substance of the obligation and affects the rights of the parties, as *growing out of* the contract itself, or *inhering*

Second: applicability of same law even though retroactive: This second question is more difficult. Would the result be affected if the moratorium decree were a piece of retroactive legislation? This question obviously can arise only where, by the law of the contract, such retroactive legislation is constitutionally possible. According to the general principles of conflict of laws, there could be no distinction between the case of a pre-existing statute creating an antecedent liability to a subsequent modification of a contractual obligation by executive decree, and the case of a constitution creating a similar liability to a subsequent modification by retroactive legislation. In either case this liability would inhere in the contract in its inception, as a part of the law of the contract at that time. Is an exception, based on the public policy of the forum, to be recognized as regards retrospective legislation? Such exception can arise only in case the domestic constitutional objections to retroactive legislation find some correspondence in a rule of conflict of laws requiring the exclusion of similar foreign legislation from the usual recognition.

Manifestly none of the usual reasons for refusing such recognition exist in this case. The resultant legal relation is, after modification no less than before, in all respects consistent with the public policy of the forum. Nor is the fact of modification

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in it, or *attaching to it,* is governed by the law of the contract." *Pritchard v. Norton* (1882) 106 U. S. 124, 129.

"It is a general rule that in all that relates to the nature, validity and interpretation of a contract, the *lex loci contractus* governs; . . . . So the *lex loci contractus* governs in all matters affecting the substantive rights of the parties." *Atwood v. Walker* (1901) 179 Mass. 514, 518-9, containing strong dictum that the secondary right to damages should be determined according to the *lex loci contractus* rather than the *lex loci solutionis.*

"The general rule as to the law which governs a contract is that the law of the country either where the contract was made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such a contract, not merely with regard to its construction, but with regard to *all the conditions applicable to it as a contract.* I say 'applicable to it as a contract' to *exclude mere matters of procedure* which do not affect the contract as such, but relate merely to the procedure of the court in which litigation may take place upon the contract." *Gibbs v. Société Industrielle* (1890) 25 Q. B. D. 399, 409.

See, in accord with the doctrine of the above cases, Professor Wesley N. Hohfeld (1909) 9 COL. L. REV. 497, note 11.

itself repugnant to that policy. In this respect the result is not unlike that of a contract expressly conditioning a modification of its terms upon a subsequent fact beyond the control of the parties. To proceed, in such a case, merely upon a disapproval of a foreign constitutional policy, irrespective of the unobjectionable nature of the resultant situation, would be to give weight to a matter with which the forum could have but little concern, much as if it were to refuse to recognise a title to property acquired in a foreign state, because of the objectionable character of the law under which that title was acquired. In neither case would the law of the forum be acting with a view to preserving vested rights, but merely creating rights of its own unlike those vested under the law of the place.

Such authority as exists supports this view. In *Phillips v. Eyre*,[11] an obligation *ex delicto* created by the law of Jamaica was sued upon in England. A retrospective act of indemnity and discharge in the colony was successfully pleaded as a valid defense. The court, applying its reasoning to contracts as well as to torts, said:

> "As to foreign laws affecting the liability of parties in respect of *bygone* transactions, the law is clear that . . . . if the foreign law extinguishes the right, it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own legislature."

While this authority is not quite conclusive, owing to the fact that no constitutional inhibition against retroactive legislation existed in the English forum, yet the language of the opinions rendered by the English court clearly reveals the substantial similarity of the public policy of the forum to that of jurisdictions where constitutional limitations against such legislation exist.

More directly in point is the case of *Rouquette v. Overman*,[12] in which a retroactive moratory law of France was applied by an English court in a suit upon a bill accepted and payable in France.

Upon either view of the facts, therefore, our conclusions are in accord with the decision of the principal case.[13]

C. R. W.

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[11] (1870) L. R. 6 Q. B. 1; s. c. (1868) L. R. 4 Q. B. 224.

[12] (1875) L. R. 10 Q. B. 525.

[13] For a general discussion of moratory decrees and the conflict of laws, from a comparative standpoint, see Professor Ernest G. Lorenzen, Conflict of Laws as to Bills and Notes—A Study in Comparative Law, Part V. (1917) 1 MINN. L. REV. 401, 412 ff.

THE PROPER INSTRUCTION TO THE JURY AS TO DUTY OF GOING FORWARD AND AS TO THE PROBATIVE FORCE OF FACTS GIVING RISE TO A PRESUMPTION

Wheeler's Appeal[1] is of interest because of the side light which it sheds on *Kirby's Appeal.*[2]

In the latter case the court says:

> "The instruction that the plaintiffs were bound to prove not only that a relation of special confidence existed between the testatrix and the proponent of the will, but that the latter took part in procuring the will, before the *prima facie* presumption of undue influence arose and the burden of proof shifted, was erroneous."[3]

This was said although there was other evidence bearing upon undue influence than the existence of the relation of trust and confidence.

In *Wheeler's Appeal* it is held that there was no error in refusing to charge that from the fact of due execution there is a presumption of sanity, the court saying:

> "The presumption of sanity would be sufficient until evidence tending to show the contrary was introduced by the contestants. The proponents would after the introduction of such evidence be required to rebut this by preponderating evidence, and the presumption of sanity would have no probative force."[4]

It is difficult to see why it should be necessary to charge on the burden of proof (used in the sense of the duty of going forward) in the one case and not in the other. It would seem that the rule stated in *Wheeler's Appeal* is correct and that the implied statement to the contrary in *Kirby's Appeal* was unintended.

As shown by Professor Thayer, much of the confusion in the cases on this subject is probably due to the equivocal language used. One of the terms suggested by him, however, seems unhappily chosen. There is never a "duty" on the part of anyone to go forward any more than there is a "duty" to bring a law suit or to defend one. In either case a failure to act may

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[1] (1917) 100 Atl. (Conn.) 13.

[2] (1916) 91 Conn. 40; commented upon in (1916) 26 YALE LAW JOURNAL, 62.

[3] (1916) 91 Conn. 44.

[4] (1917) 100 Atl. (Conn.) 18.

be followed by certain results, i. e., the court will make no decree or will render a decree by default. So if a party against whom a presumption is in force fails to go forward, he loses.

Keeping in mind the distinction between the risk of non-persuasion and the necessity of going forward or losing, and the fact that, as shown by Professor Wigmore, the rules as to the necessity of going forward are laid down for the guidance of the judge in either granting a motion for non-suit, directing a verdict, or setting aside a verdict, whereas the rules as to the risk of non-persuasion are laid down for the guidance of the jury in determining what verdict should be rendered upon any issue in equipoise, it would seem correct to go farther than is done in *Wheeler's Appeal* and to say that there is never any reason why the court should charge the jury as to the rules upon the subject of the necessity of going forward. These rules apply when there is only one possible legal inference from the evidence. Ordinarily this condition arises only when a presumption exists in favor of one of the parties. Under the theory of presumption, as elucidated by Professor Thayer, and as stated by Professor Wigmore, as soon as other evidence is offered, this rule no longer operates. It has become a matter of history, and a matter of history information as to which cannot help the jury.

On the other hand, care must be taken not to draw a wrong conclusion from the statement made in *Wheeler's Appeal,* that after the introduction of other evidence the presumption of sanity would have no probative force. This statement itself is true for the presumption is not evidence. It is merely a rule of law that in the absence of evidence the fact of execution of a paper requires the inference of sanity, while if other evidence is introduced, no such inference is required. It is not true, however, that the fact of execution which furnished the basis for the rule of law no longer has probative force. It is still a circumstance to be considered by the jury, from which proper inference may be drawn.

A clearer illustration of this truth appears in a situation such as exists in *Kirby's Appeal.* As all the facts which appear are that the beneficiary of the gift under a will, not being an heir, stood in a confidential relationship to the maker of the will, there is an implication of undue influence which is sufficient to require a verdict of undue influence unless other evidence is offered.

If, however, other evidence is offered, it becomes a question for the jury who, however, must continue to consider the fact of the existence of the confidential relationship and to give that fact its due weight in its deliberations, and the parties are entitled to have the court explain to the jury the significance of these facts. It would seem that a similar rule should apply to any other set of operative facts that give rise to a presumption.

HARRISON HEWITT.

AN "EXCLUSIVE PRIVILEGE" TO PHOTOGRAPH AS "PROPERTY."

The recent English case of *Sports and General Press Agency v. "Our Dogs" Publishing Co.*[1] suggests a number of interesting and important problems as to the exact nature and extent of the rights, privileges, powers, and immunities possessed by an owner of "property."

An action was brought for an injunction restraining the defendant from publishing photographs taken at a dog show and the court was called upon to decide whether an "exclusive privilege" to take photographs existed in law as "property." It appeared that the promoters of the show purported in good faith to sell the sole photographic privileges at the show to A who in turn purported to assign to the plaintiff. Although no notice appeared on the tickets of admission or elsewhere on the grounds, the court found that the defendant's agent, when he took the photographs, and the defendant when he received them, knew of the assignment of the sole privilege to the plaintiff. In a brief opinion Horridge, J., denied the existence of any such "exclusive privilege" of photographing which the owners could assign as "property."

The principles involved would appear to be closely related if not identical with those which have been recognized and sanctioned in the so-called "right of privacy" doctrine which received positive recognition but a few years ago. Indeed, it might be pointed out that the courts in recognizing this "right of privacy" are merely extending or adding to the sum total or aggregate of rights, privileges, powers and immunities which belong to the individual. In the principal case, it was sought not to increase the rights, privileges, powers, and immunities

[1] [1916] 2 K. B. 880; aff'd (1917) 61 S. J. (Ct. of App.) 299.

enjoyed by an individual but rather those enjoyed by an owner of personalty which it is more usual to designate as "property."[2] It may be of value to analyze the situation presented in the principal case and determine whether the common law, cast in the rigid mould of an earlier economic period, affords the same relative protection and security of person and property under modern industrial and commercial conditions that it did in its beginning.

With this view in mind, no regard will be paid to the possible existence of such an "exclusive privilege" arising *ipso facto* out of the possession of land or as a "personal right." While it would seem that there are possible grounds for so asserting, it is clear that its strongest claim for recognition is as a "personal property right."

The existence before publication of a "property" interest in the author over his compositions or letters even though of a private character and of no value[3]; in the individual over his picture[4]; in the lecturer over his lecture[5]; in the artist over his painting[6]; in the broker over his compilation of stock quotations,[7] can no longer be questioned. In all of these cases the courts

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[2] Professor Wesley N. Hohfeld, Fundamental Legal Conceptions (1913) 23 YALE LAW JOURNAL, 16, 21, states: "A second reason for the tendency to confuse or blend non-legal and legal conceptions consists in the ambiguity and looseness of our legal terminology. The word 'property' furnishes a striking example. Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which the various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a 'blended' sense as to convey no definite meaning whatever."

[3] *Millar v. Taylor* (1769) 4 Burr. 2303; *Macklin v. Richardson* (1790) Amb. 694; *Folsam v. Marsh* (1841) 2 Story (c. c.) 100.

[4] *Pavesich v. N. E. Life Ins. Co.* (1904) 122 Ga. 190; *Edison v. Edison Polyform Mfg. Co.* (1907) 73 N. J. Eq. 136; *Munden v. Harris* (1911) 153 Mo. App. 652.

[5] *Caird v. Sime* (1887) L. R. 12 App. Cas. 326; cf. *Abernethy v. Hutchinson* (1825) 3 L. J. (Ch.) 209.

[6] *Prince Albert v. Strange* (1849) 2 De G. & Sm. 652; *Turner v. Robinson* (1859) 10 Ir. Ch. 121.

[7] *Exchange Telegraph Co. v. Central News* [1897] 2 Ch. 48; *Exchange Telegraph Co. v. Gregory* [1896] 1 Q. B. 147.

have recognized a "property" interest in the owner. In other words the owner possesses certain rights, privileges, powers and immunities as regards the subject-matter of the "property" while the rest of the world are under the corresponding no-rights, duties, liabilities and disabilities.[8]

If, in the principal case, the promoter of the show arranged the dogs according to some artistic scheme there would seem to be little difficulty in recognizing the creation of a "personal property" interest, analogous to those already recognized in other artistic and literary creations. If so, it would follow that the owner would possess an aggregate of rights, privileges, powers and immunities similar to those possessed by any owner of a chattel; that when the defendant attempted to violate his duty to the plaintiff by photographing the arrangement, an injunction would be the proper remedy as in the above named cases. It is assumed of course that once the existence of this aggregate of rights, privileges, powers and immunities is established, they are transferable at will: the power to alienate would seem to be a natural attribute.

Indeed, it should be noted that when the term "exclusive privilege" is employed what is meant is not only a privilege in the possessor to photograph but also a right that others should not; a power or ability to extinguish his own interest and create a new and corresponding interest in another by a transfer as was attempted in the principal case; and an immunity or freedom, as regards the "privilege," from the legal power or control of the assignor. Of course the above-named by no means constitute the whole aggregate of rights, privileges, powers and immunities but merely indicate the wide scope of the concept "exclusive privilege."

Assuming, however, that the defendant did not attempt to take or publish the photograph of the arrangement as an entirety, a more difficult problem is encountered. Yet even in this case it would seem that a similar conclusion should be reached. The court in determining that no "exclusive privilege" did exist intimated that such a privilege could have been created by incorporating a prohibition in the contract of admission. This suggestion raises the question as to the exact content of the privileges secured by the purchasers of the tickets of admission.

[8] For the correct analysis of these conceptions, see Professor Hohfeld (1913) 23 YALE LAW JOURNAL, 16.

Unless the privilege to photograph was expressly granted in the contract of admission those admitted would seem to have acquired a mere privilege of viewing the show; not the privilege of photographing it. And even though it be granted that the privilege of photographing was to be implied from the contract of admission it would not necessarily follow that another privilege to publish was secured.

After the attempted transfer of the "exclusive privilege" from the promoter to the plaintiff's assignor, did the promoter retain any such privilege which he could grant to the purchasers of tickets of admission? Previously to the transactions reported in the case the "exclusive privilege" undoubtedly existed in the promoter. The situation is not unlike the case of an artist who has completed his painting but has not published it. The purchaser of the "exclusive privilege" ought certainly to get all the rights, privileges, powers, and immunities possessed by the promoter, which indeed would leave the latter no privilege of photographing to grant to the purchasers of tickets. On the contrary, after the transfer of the "exclusive privilege" the promoter would clearly be under a duty, a no-right, etc., as to it. He had exercised his power to extinguish his interest and create a similar interest in the plaintiff's assignor who likewise extinguished his interest and created a similar interest in the plaintiff. After extinguishing his interest each occupied a position similar to all the rest of the world in that they were under a duty, a no-right, etc. Even though the tickets of admission purported to give the holder a privilege to photograph, unless a doctrine of *bona fide* purchase be invoked it must be held that he received no such privilege. If the doctrine of *bona fide* purchaser be invoked, it might be held that while the promoter retained no privilege he did retain a power to grant a privilege. This would be analogous to the situation in the law of negotiable instruments where a thief with no title has the power to pass a good title to an innocent purchaser. It is not believed, however, that the courts would invoke this rule of the law of negotiable instruments.

But even admitting that in some mysterious way the ticket-holder did secure a privilege to photograph, that privilege in itself would not enable him to publish the photographs. Here the court might well stop and say that while a privilege to photograph existed, yet the photographer was under a duty not to publish any photographs that might be taken.

The entire absence even for all time of a precedent for an

asserted right, privilege, power, or immunity should not be conclusive as to its non-existence. The development of our law must so continue as to meet the changing conditions of social, political, industrial and commercial life. It would be a severe reproach upon our Anglo-Saxon system of jurisprudence if the courts were powerless to avoid the pitfall of antiquarianism and to extend the application of existing legal and equitable principles to subserve the interests of society. When new questions arise like those in the principal case the courts should break through the iron rule of legal exegesis and consider the economic and social ends to be attained.

S. F. D.
C. M.

THE APPLICABILITY OF THE DOCTRINE OF "EQUITABLE CONVERSION" TO CASES OF OPTION CONTRACTS FOR PURCHASE OF REAL ESTATE.

The ever recurring spectacle in our courts of devoted relatives assembled for battle over the worldly goods of a much mourned decedent lends interest to any decision which establishes a definite rule of law as to the distribution of property under a given state of facts. Especially is this true if the opinion of the court represents a progressive step and is backed with convincing argument. On all of these grounds the recent Iowa case of *Ingraham v. Chandler*[1] commends itself to our attention. It involves the important and long standing question of whether an option on real estate works an equitable conversion thereof, the facts being briefly these: One Wykert leased real estate to Dunn for five years with an option to purchase at a fixed price during the term. Wykert died in a year. Dunn later exercised his option, paid the agreed price to the executrix, and received conveyance. The case came up on the question of who should receive the money, the executrix having kept it as legatee. The Iowa court answered the question in favor of the heirs, thereby repudiating the rule established by a long line of English cases[2] which have been followed by some American decisions.[3]

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[1] (1917) 161 N. W. (Ia.) 434.

[2] *Lawes v. Bennett* (1805) 1 Cox, 167; *Townley v. Bedwell* (1808) 14 Ves. 591; *Collingwood v. Rowe* (1857) 3 Jur. (N. S.) 785; *In re Isaacs* (1894) 3 Ch. 506.

[3] *Kerr v. Day* (1850) 14 Pa. St. 112; *Newport W. Wks. v. Sisson*

In examining the case it may be well to consider it from both a legal and a practical standpoint. The legal argument for a conversion by a contract of option is that such a contract is as binding on the owner of the realty as is a contract to convey, in which case an immediate equitable conversion is regarded as taking place.[4] A comparison, however, of the legal status of the parties under each of the above contracts will serve as a criticism of the argument advanced. When A agrees to sell and B to buy a piece of real estate, each is thereafter under a personal duty to perform in accord with the terms of the agreement. To this personal duty is added another factor; namely, the willingness of equity to decree specific performance[5] of the agreement.[6] The result is that A has not only a legal right to damages if B does not buy, but a right in equity to convey and compel payment. Correspondingly, B has his right to damages and he has also a definite, specifically enforceable, claim on property in the hands of A. For this latter reason the purchaser's claim is sometimes spoken of as attaching to the particular piece of land. Sometimes the transaction is considered as making the vendor a trustee of the legal title to the land and the vendee likewise trustee of the purchase money, each for the benefit of the other.[7]

It is this state of facts which has been judicially called equitable conversion, and perhaps the phrase finds some support in the parlance of business, for who has not heard from a layman some such remark as this? "Hello, Smith, I've turned my State street frontage into money at last. We close the deal next

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(1893) 18 R. I. 411; *McCutcheon's Estate* (1915) 24 Pa. Dist. 94; see *Keep v. Miller* (1886) 42 N. J. Eq. 100, 107.

[4] *Leiper's Appeal* (1860) 35 Pa. St. 420; *Keep v. Miller* (1886) 42 N. J. Eq. 100; *Williams v. Haddock* (1895) 145 N. Y. 144; *Clapp v. Tower* (1903) 11 N. D. 556; *Stewart v. Griffith* (1910) 217 U. S. 323, affirming *Griffith v. Stewart* (1908) 31 App. (D. C.) 29; *Rhodes v. Meredith* (1913) 260 Ill., 138; *Farrar v. Winterton* (1842) 5 Beav. 1.

[5] Often only specific reparation since the date of performance has passed.

[6] Enforcing conveyance, *Herrman v. Babcock* (1885) 103 Ind. 461; enforcing payment, *Hodges v. Kowing* (1889) 58 Conn. 12.

[7] *Green v. Smith* (1738) 1 Atk. 572, 573; *Craig v. Leslie* (1818) 3 Wheat. (U. S.) 563, 578; *Kerr v. Day* (1850) 14 Pa. St. 112, 114; *Lombard v. Chi. Sinai Cong.* (1872) 64 Ill. 477, 482; *Dorsey v. Hall* (1878) 7 Neb. 460, 464. As to the second part, however, that the vendee is trustee of the purchase money. tne statement would appear inaccurate unless he had set aside in a bank, or elsewhere, a specific fund.

week." The fact is that the phrase "equitable conversion" is a fictitious way of describing the jural results which proceed from such a transaction, and this fact should be recognized to avoid confusion.

What is the real situation? A retains the legal title to his land; he obtains a claim against B as noted above, this claim being manifestly personalty.[8] If A should die intestate at this juncture, his heir would inherit the legal title to the real estate and his administrator would come into possession of the claim against B. The legal title would descend subject to the claim of B, and the heir would have to convey *gratis*.[9] Next follow the same series with regard to B. He retains complete title to his money, acquires a personal claim against A to have the deed executed at the proper time, and in addition acquires a set of equitable interests in the real estate contracted for, being thereafter a beneficiary thereof. Should B now die intestate, his administrator takes the money and the common-law claim against A for conveyance. The money he receives is, however, subject to the claim of A for the purchase price.[10] By this is meant not that any particular part of the money is so subject but that the estate of B is debtor to that amount. To the heir descends the equitable interest in the real estate of A, it being as much realty as a legal interest in the same land.[11] Thus, in the case of a contract, equitable conversion is found to be nothing but the result of applying ordinary principles to the facts in hand. Properly conceived, the phrase is harmless; it is brief and perhaps serviceable.

But how is it in the case of an option? Recurring momentarily to the layman's point of view, it would be difficult to imagine a business man making the remark suggested above if all he had done was to give an option on his vacant lot; and investigation may prove the difference legally to be both as real and as patent as it is in the common place illustration.

Two classes of options may be mentioned. The first of these

[8] This would be even clearer in the case of notes being given by B to A, the notes being unquestionably part of A's personal estate. Cf. *Fuller v. Bradley* (1896) 160 Ill. 51.

[9] *Bubb's Case* (1678) Freem. Ch. 39.

[10] *Milner v. Mills* (1729) Mos. 123; *Young v. Young* (1889) 45 N. J. Eq. 27, 34.

[11] *Avery's Lessee v. Defrees* (1839) 9 Oh. St. 145, 147; *Ratcliff v. Ratcliff* (1904) 102 Va. 880, 884.

amounts to a unilateral conditional contract to buy and sell.[12] For ten dollars now received, A agrees to sell certain real estate to B for $1,000, if paid on or before six months. Under these circumstances, A retains his legal title less certain of the usual incidents thereof, important among which is the privilege of conveying free from the obligation to B. He has not, however, as distinguished from the case of an unconditional contract with B, any claim whatever against the latter and never can have. If he die intestate, nothing, therefore, should logically pass to the personal representative,[13] while the heir should take the legal title to the realty subject to the same embarrassments[14] which it possessed in the hands of A himself. The principal case appears to be one of the kind just described and if the reasoning above be sound, it will sustain the decision of the Iowa court.

Let us consider now the other side of the transaction, the position of B. Whatever the interest[15] which he acquired by the option may be, it attaches to the particular piece of land and is consequently realty which should pass to his heir.[16] A careful scrutiny of this interest will reveal it as a power[17] to acquire

[12] See Professor Arthur L. Corbin, Option Contracts (1914) 23 YALE LAW JOURNAL, 650.

[13] Note the border line. If the condition is the happening of some event beyond the power of either party to control, the case ceases to be one of option and something exists to pass to the personal representative. Claims against B if it rain on Christmas Day are something, even though of little value. Those against B if he chose to tolerate them are legally nothing at all.

[14] Land subject to a power is not thereby prevented from being inherited by heirs. *Gill v. Grand Tower M. Mfg. & Trans. Co.* (1879) 92 Ill. 249.

[15] The following contain dicta to the effect that no interest is acquired. *Meyers v. Stone & Son* (1905) 128 Ia. 10, 12; *Gustin v. Union School Dist.* (1893) 94 Mich. 502, 504, citing *Richardson v. Hardwick* (1882) 106 U. S. 252.

[16] *In re Adams and the Kensington Vestry* (1883) 24 Ch. Div. 199; *Gustin v. Un. School Dist., supra, contra,* however.

[17] *In re Walker's Estate* (1853) 17 Jur. 706. This was the case of an option given to a railway company which already had by act of Parliament the right of eminent domain. The vice-chancellor speaks of the power from Parliament to take the lands, but does not apply the word to the right derived from the landowner by virtue of the option. It is interesting to note that the two powers are fundamentally the same, the law creating the one without the consent of the landowner, and the other, so to speak, at his request, or as more generally understood, he created it.

title upon payment of the agreed price. The heir who holds this power has the accompanying equitable claim against A that the latter shall not sell the land to a *bona fide* purchaser in whose hands it would be freed from the power.

Allusion has been made to options of a second type. These are continuing offers[18] to make a bilateral contract and not subject to revocation.[19] One who has given such an option is in much the same position over a long period as is an offeror of a bilateral contract by mail for a very brief time. In neither case is he bound to do anything. In both cases he may become so at any time. In the first he cannot revoke; in the second his attempted revocation may prove ineffective because of the law relative to mailing an acceptance. This second class of option contracts contemplate mutual obligations after the exercise of the option, that is, the acceptance of the offer. Instead of one payment and an immediate conveyance, as in the first class considered, there may be a series of payments with various deeds, mortgages and notes executed at stipulated dates before the consummation of the contract. Whereas the vendor A, in the first class of options, never had a claim against B, in this latter class he has such claims from the moment of the exercise of the option. Before that date he had a chance, dependent entirely upon the wish of B, to acquire such claims. The argument for equitable conversion here depends on the passing of this chance to the personal representative. It is submitted that such an argument is not tenable, and that the option when exercised by B should result in transactions entirely with the heir who took the land of his ancestor subject to this very liability.

Some brief word may be added as to practical reasons for the distinction urged above. On these grounds the original case of *Lawes v. Bennett* has been freely criticised by the long line of cases following it in England.

Having in mind the wishes of the testator, it is clear that no third party should be permitted by law to have the power of settling by his act the distribution of the testator's estate. This objection is especially cogent when it is observed that an opportunity is also granted to bid the heir against the personal representative on a threat of exercising, or not exercising, the

[18] *Milw. Mech. Ins. Co. v. Rhea* (1903) 123 Fed. 9, 11.

[19] See Professor Arthur L. Corbin, Offer and Acceptance (1917) 26 YALE LAW JOURNAL, 169, 185.

option. It is a startling and dangerous rule of law which will permit a third party to say to the heir, "Deed me half for nothing or you lose it all." This point seems first to have been advanced by counsel in the case[20] which acted as pioneer in breaking away from the old rule, although the court there does not appear to have based its decision in any degree on the argument.

Another objection to the rule of *Lawes v. Bennett* has been raised in England.[21] The decisions grant rents and profits to the heir until the option is exercised. Under the Iowa rule, when the heir gave up the land, he would receive the purchase price. Under the English rule, the heir would suddenly lose all even although he had been many years in possession.

The Iowa court offers a noteworthy excuse for the acceptance in England of the doctrine which it repudiates here, and one which seems not to have been advanced by the English courts themselves; namely, that in view of the favoritism shown by English law for the eldest son, any rule which breaks the chain of straight descent of realty tends to a wider distribution of the English soil.

For one reason or another the decision of the Iowa court is in line with what promises to be the modern American view of the matter,[22] despite a present conflict of authority.

M. S. B.

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[20] *Smith v. Lowenstein* (1893) 50 Oh. St. 346.

[21] *Townley v. Bedwell* (1808) 14 Ves. 591, 596.

[22] *Smith v. Lowenstein, supra; Rockland-Rockport Lime Co. v. Leary* (1911) 203 N. Y. 469, *accord.*