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## STATE LEGISLATION AND MARITIME CASES

In recently denying to Congress the power to amend the Judicial Code so as to extend to claimants other than seamen rights and remedies under the workmen's compensation laws of any state, the Supreme Court brought to a close the struggle of maritime shore workers to obtain in full the benefits of modern state industrial legislation.[1] It

[1] *State of Washington v. W. C. Dawson & Co.* (1924) 264 U. S. 219, 44 Sup. Ct. 302. Mr. Justice Brandeis dissented. The Act of October 6, 1917 (40 Stat. at

would perhaps be easier to acquiesce in the result reached if one could be quite satisfied with the reasoning of the Court in so far as it involves the problem of the power of the states to legislate on maritime matters. Indeed, when one reads recent decisions in which this problem has been considered, he discovers that the extent of the power of the states to enact legislation affecting maritime matters is in such a state of uncertainty that it is impossible to predict with any reasonable degree of accuracy the fate of legislation not yet passed upon. Much of this uncertainty, it is believed, is due to an erroneous notion that all cases in which the validity of state statutes is involved can be solved through the application of one set formula or test. The problem is not a single one but comprises several distinct questions the answer to each of which depends on distinct considerations of policy.

An examination of the decisions since the adoption of the Constitution will reveal that they may be divided into two classes: first, those in which it was sought to enforce state legislation in admiralty, and second, those in which it was sought to apply local legislation to maritime cases in state courts. The first involves a question of power of a state to enact legislation affecting maritime law as administered by the federal courts; the second, one of power of state tribunals to apply to maritime cases their own rules of law.

Statutes which have been held to be enforceable in admiralty include legislation giving a right of action for wrongful death,[2] creating liens for supplies to a vessel in her home port[3] and regulating pilotage fees.[4] This legislation may be properly included within the term "legislation affecting maritime law," since, being enforceable in admiralty, it substitutes local for general maritime rules of law or creates new local

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L. 395) undertook to amend the provision of Secs. 24 and 256 of the Judicial Code which saves to suitors in all causes of admiralty and maritime jurisdiction "the right of a common-law remedy where the common law is competent to give it," by adding the words, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." This amendment having been held unconstitutional in *Knickerbocker Ice Co. v. Stewart* (1920) 253 U. S. 149, 40 Sup. Ct. 438, a second attempt was made to amend the saving clause by adding substantially the words of the first amendment but excluding from their scope injuries to master and crew. Act of June 10, 1922 (42 Stat. at L. 634). In holding both amendments unconstitutional the court treated them as attempts on the part of Congress to delegate to the states the power to enact legislation affecting maritime law, which would be prejudicial to the uniformity of the maritime law in its interstate and international relations. Workmen injured on land may obtain relief under local law. *State Industrial Commission v. Nordenholt Corp.* (1922) 259 U. S. 263, 42 Sup. Ct. 473.

[2] *The Corsair* (1892) 145 U. S. 335, 12 Sup. Ct. 949; *The Hamilton* (1907) 207 U. S. 398, 28 Sup. Ct. 133.

[3] *The Lottawanna* (1874, U. S.) 21 Wall. 558; *The J. E. Rumbell* (1893) 148 U. S. 1, 13 Sup. Ct. 498.

[4] *Ex parte McNiel* (1871, U. S.) 13 Wall. 236.

maritime rules where before there were none. The moving factor in applying these local rules in maritime courts seems to have been a desire to make use of the relief they provide to fill gaps in the maritime law which have resulted from prior decisions or inability of courts to act.[5] In recently re-affirming the doctrine that state wrongful-death acts are enforceable in admiralty, the Supreme Court merely re-affirmed this policy.[6]

While the first class of cases involves only a question of the Constitutional power of the states to enact legislation affecting the maritime law of admiralty courts, an important element in the second is the fact that immediately after the adoption of the Constitution the First Congress, by vesting in the Federal Courts "exclusive cognizance of all civil causes of admiralty and maritime jurisdiction," and at the same time saving "to suitors in all cases the right of a common law remedy where the common law is competent to give it," granted admiralty and common law courts concurrent jurisdiction in maritime cases.[7] Until recently it had been generally supposed that the saving clause authorized common law courts to apply to maritime cases their own rules of substantive as well as procedural law.[8] However, in 1917, in *Southern Pacific Co. v. Jensen*,[9] the Supreme Court held the New York Workmen's Compensation Act invalid in so far as it was sought to apply it to a case involving compensation to the widow of a stevedore killed while engaged in loading a vessel in New York harbor. This case, the first to hold a state statute creating a substantive right, and enforceable in a state court alone, inapplicable to a maritime tort, was

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[5] In *The Harrisburg* (1886) 119 U. S. 199, 7 Sup. Ct. 140, the Supreme Court held that independently of statute a right of action for wrongful death does not exist in admiralty. In *The General Smith* (1819, U. S.) 4 Wheat. 438, it was held that under the general maritime law of the United States there is no lien for supplies to a vessel in her home port. In both instances relief in admiralty was desirable; and since Congress had not legislated, the court had recourse to state legislation. Likewise regulation of pilotage fees was desirable. Since such regulation could only be made by legislation and Congress had not legislated, state regulation was acquiesced in. On the other hand, if a rule of liability exists in admiralty and the matter is one not requiring regulation, there would be no need for state legislation. Thus far no state statute has been applied in admiralty where a rule of liability already existed under the maritime law.

[6] *Western Fuel Co. v. Garcia* (1921) 257 U. S. 233, 42 Sup. Ct. 89. See also *Great Lakes Dredge & Dock Co. v. Kierejewski* (1923) 261 U. S. 479, 43 Sup. Ct. 418.

[7] Judiciary Act of 1789, sec. 9 (1 Stat. at L. 73, 77); *cf.* Judicial Code, secs. 24, 256. Art. 3, sec. 2 of the Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction."

[8] *Belden v. Chase* (1893) 150 U. S. 674, 14 Sup. Ct. 264; *cf. Steamboat Co. v. Chase* (1872, U. S.) 16 Wall. 522, in which a state wrongful-death statute was held applicable to a maritime tort in a suit in a state court as a "common-law remedy."

[9] 244 U. S. 205, 37 Sup. Ct. 524.

followed by *Chelentis v. Luckenbach S. S. Co.*,[10] in which a seaman who had been injured in the course of his employment brought an action in a common law court. It was held that his right to redress was governed solely by maritime law and that, if action should be brought in a common law court, that court could give only such relief as would be given in admiralty. Mr. Justice McReynolds, speaking for the Court, distinguished between a common law right and right to a common law remedy, it being only the latter which is saved to suitors.

In thus holding that the right is created by maritime law and that the only power in a common law court is that of applying its procedure and remedies in enforcing it, the Supreme Court imposed on state courts, in which actions under the saving clause are brought, a doctrine similar to its own rule of Conflict of Laws as applied to foreign torts.[11] Like the obligation created by foreign law in case of tort, the theory here is that the obligation is created by maritime law, and following the defendant, is equally enforceable in common law and admiralty courts. Consistent application of this doctrine would seem to preclude state courts from applying to maritime cases statutory rules of substantive law different from those applied in admiralty, but it would not impair the validity of decisions holding that local tribunals are free to apply their own statutory rules of procedure in enforcing maritime causes of action.[12]

However, the majority opinion in *Southern Pacific Co. v. Jensen* also announced a new test for determining the validity of state statutes affecting maritime cases; though state legislation may to some extent change, modify or affect maritime law, "no such legislation is valid if it works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony of that law in its international and interstate relations."[13] This test has been

[10] (1918) 247 U. S. 372, 38 Sup. Ct. 501. See also *Carlisle Packing Co. v. Sandanger* (1922) 257 U. S. 255, 42 Sup. Ct. 475; *Port of New York Stevedoring Corp. v. Castagna* (1922, C. C. A. 2d) 280 Fed. 618; *Kennedy v. Cunard S. S. Co.* (1921, 1st Dept.) 197 App. Div. 459, 189 N. Y. Supp. 402.

[11] In *Slater v. Mexican N. R. Co.* (1904) 194 U. S. 120, 126, 24 Sup. Ct. 581, 582, the doctrine applied to foreign torts was expressed as follows: "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligation, which like other obligations, follows the person, and may be enforced wherever the person may be found." For a criticism see COMMENTS (1918) 28 YALE LAW JOURNAL, 67.

[12] A number of decisions have held that the saving clause authorizes state courts to apply to maritime cases local statutory rules of procedure, subject to the limitation that a state may not authorize proceedings *in rem* according to the course in admiralty in maritime cases in state courts. *Knapp Stout & Co. v. McCaffrey* (1900) 177 U. S. 638, 20 Sup. Ct. 824; *Rounds v. Cloverport Foundry & Machine Co.* (1915) 237 U. S. 303, 35 Sup. Ct. 596. To the effect that a state may not authorize proceedings *in rem* in a state court, see *The Glide* (1897) 167 U. S. 606, 17 Sup. Ct. 930; see also *Red Cross Line v. Atlantic Fruit Co.* (1924) 264 U. S. 109, 44 Sup. Ct. 274.

[13] (1917) 244 U. S. 205, 216, 217, 37 Sup. Ct. 524, 529.

applied in all subsequent cases in which state workmen's compensation acts have been considered. But these statutes create substantive rights enforceable in state tribunals only.[14] Since their enforcement in state tribunals cannot in any manner affect maritime law as applied in admiralty courts, the question involved is, not one of power of a state to change, modify or affect the general maritime law, but, more specifically, one of power of state tribunals to apply to maritime cases rules of substantive law different from those applied in the federal admiralty courts. If it is the purpose of the Supreme Court to preserve a theory of "vested maritime rights" and workmen's compensation acts create obligations *ex delicto,* they would never be applicable to maritime cases.[15] On the other hand, if they create obligations *ex contractu,* their application to maritime cases would depend, perhaps, on the nature of the contract and its binding force in admiralty.[16]

Whether state tribunals should be precluded from applying to maritime cases statutory rules of substantive law different from those

[14] Workmen's Compensation Acts provide special machinery for the enforcement of the rights they create. No attempt has been made to obtain the relief they grant in admiralty.

[15] Three theories of the nature of the obligation created by Workmen's Compensation Acts have been advanced in Conflict of Laws cases. Massachusetts follows a tort theory. *In re Gould* (1913) 215 Mass. 480, 102 N. E. 693. Connecticut has adopted a contract theory. *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, 94 Atl. 372. New York seems to have adopted a quasi-contract theory. *Smith v. Heine Safety Boiler Co.* (1918) 224 N. Y. 9, 119 N. E. 878. If the obligation is treated as arising from tort, following the analogy to the decisions in Conflict of Laws cases, a theory of "vested maritime rights" would preclude application of these statutes to maritime cases in state courts.

[16] In *Grant Smith-Porter Ship Co. v. Rhode* (1922) 257 U. S. 469, 42 Sup. Ct. 157, a shipbuilding company and a carpenter employee accepted a state workmen's compensation act by making payments to an industrial accident fund. It was held that the carpenter, who had been injured on a vessel in the course of construction, but launched, was barred from proceeding in admiralty for damages. The court seems to have adopted the view that the parties contracted with reference to the state law. But its decision was also based on the test announced in the *Jensen* case. If a contractual theory had been definitely adopted, the contract, being binding in admiralty, would preclude relief in that court, but would permit relief in a state tribunal in accordance with local law; and as a result maritime shore workers, who contract with reference to local law, since they work partly on shore and partly on board ship in port, would be entitled to the advantages of state workmen's compensation acts which were enacted for their benefit as well as for the benefit of land workers. In enacting the second amendment Congress probably had in mind the possibility of such a theory being adopted. It is believed that it would have been better policy to adopt this theory in order to avoid some of the consequences of denying to maritime workers who are not seamen, the advantages of modern state industrial legislation. See dissent of Brandeis, J. in *State of Washington v. Dawson & Co., supra* note 1.

It should be noted that application of the state act would not impair a doctrine that state courts must apply to maritime cases rules of substantive law similar to those in admiralty, as the state tribunal would be enforcing a contract that is binding on the parties in admiralty and hence binding on them in a state court.

applied in admiralty is a question on which opinions may differ, but it is believed to be one which must be decided if confusion is to be avoided in the future. As it is, as the result of attempts to reach a solution through the application of an inadequate test, the problem involved in the workmen's compensation cases has been confused with that involved in applying state statutes in admiralty, and needless uncertainty introduced into a subject already sufficiently complicated by prior decisions.[17]

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## THE VARIABLE QUALITY OF A VESTED RIGHT

A recent New York case, *Robinson v. Robbins Dry Dock & Repair Co.* (1924) 238 N. Y. 271, 144 N. E. 579, brings forward once again that troublesome problem, whether a right[1] can become so "vested" as to be beyond the reach of governmental power. The plaintiff recovered under the New York Workmen's Compensation Act for the death of her husband. Later the act was declared unconstitutional, but before the plaintiff could assert her common law right, the statute of limitations had barred her cause of action, the New York Supreme Court, Appellate Division, so declaring. Thereafter, the Legislature, to give relief to a large number of sufferers in this same situation, passed a relief act, granting them a year within which to sue. The plaintiff recovered in the Court of Appeals, the basis of the decision being the well-established rule thus phrased by Mr. Justice Holmes:[2] "Multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing view of justice, and if the obstacle in the way of creation were small."[3]

[17] The test of the *Jensen* case is also open to the objection that it has no definite meaning. A comparison of the legislation upheld with that declared invalid does not reveal any reason why the one interferes with the general maritime law in its international and interstate relations more than the other.

[1] "Right" is here used in its general sense; but by splitting the term into some of its component legal parts of "right," "power," "privilege," and "immunity," the nature of the interest involved is made more manifest. Property interests are no more than legal relations of lesser or greater value, any one of which may accurately be brought within the popular term, "private property."

[2] *Danforth v. Groton Water Co.* (1901) 178 Mass. 472, 477, 59 N. E. 1033, 1034.

[3] *Goshen v. Stonington* (1822) 4 Conn. 209 (act validating a marriage performed by minister under a disability); *Watson v. Mercer* (1834, U. S.) 8 Pet. 88 (act validating deed of married women); *Syracuse City Bank v. Davis* (1853, N. Y. Sup. Ct.) 16 Barb. 188 (act curing defect in organization of corporation); *Thomson v. Lee County* (1865, U. S.) 3 Wall. 327 (act validating subscription of bonds); *Lane v. Nelson* (1875) 79 Pa. 407 (act curing defect in judicial proceedings); *Ewell v. Daggs* (1883) 108 U. S. 143, 2 Sup. Ct. 408 (act curing contract void for usury); *Evans-Snider-Buel Co. v. McFadden* (1900) 105 Fed. 293, 44

This case falls in the field of so-called "curative acts." In these cases the rights of an individual are subordinated to the "prevailing view of justice." The same subordination of individual interest can be found whenever a court strains a rule of law to mete out substantial justice.[4] It appears most prominently in cases under the police power, the vague instrument whereby society effects its adjustments, whenever the court determines that some property interest is not so sacred but that it may be cut off by legislative enactment.[5] Somewhat different terminology is used in the "curative acts" cases and in the police power cases. In the former the term "vested right" indicates a property interest which the court believes to be so fixed that it cannot be impaired by retrospective legislation.[6] In the latter, the term, when employed at all, has generally the significance that "vested rights"[7] may be taken away under the police power provided they are not so impregnable or sacred that they can be taken only under the power of eminent domain.[8] But this latter use of the term "vested right" seems to render still more misleading an already misleading term; for the problem in each group of cases is analogous. In the "curative acts" cases: Is the property interest involved so sacred that it may not be impaired at all? In the police power cases: Is the property interest so sacred that

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C. C. A. 494 (act curing invalid mortgage against attaching creditor who had already obtained judgment against the debtor); *Dunbar v. Boston Ry. Corp.* (1902) 181 Mass. 383, 63 N. E. 916 (act extending time for filing petitions for damages, after time had expired); *West Side Belt Ry. Co. v. Pittsburgh Construction Co.* (1911) 219 U. S. 92, 31 Sup. Ct. 196 (act curing contract void because of a statute); Cooley, *Constitutional Limitations* (7th ed. 1903) 528-546.

[4] The fiction of common recovery was adopted by judicial legislation to meet the popular demand for a relaxation of the practice of strictly entailing lands. *Taltarum's case* (1473) Y. B. 12 Ed. IV, f. 19, pl. 25. Similarly the anomalous doctrine of ancient lights was created by the English Court, probably influenced by the plague-scare terrorizing London, to keep all the light and air possible. *Lewis v. Price* (1761) 2 Wms. Saunders. 175a, note.

[5] See *infra* note 18.

[6] *Huffman v. Alderson's Admr.* (1876) 9 W. Va. 616.

[7] The courts even in police power cases occasionally speak of some legislative act as unconstitutional as impairing "vested rights." *Farist Steel Co. v. Bridgeport* (1891) 60 Conn. 278, 283, 22 Atl. 561, 563; *Arizona Copper Co. v. Hammer* (1919) 250 U. S. 400, 423, 39 Sup. Ct. 553, 557. In *Dobbins v. Los Angeles* (1904) 195, U. S. 223, 239, 25 Sup. Ct. 18, 22, the court says, "The plaintiff . . . . had acquired 'property rights.'"

[8] Private property may always be taken by the government for public purposes under the power of eminent domain, and where an interest is involved which lends itself to compensation the courts will be found determining whether the police power or the power of eminent domain is the appropriate instrument. See *Pumpelly v. Green Bay Co.* (1871, U. S.) 13 Wall. 166. But where the interest does not lend itself to compensation, the courts do not mention the power of eminent domain, saying that since the interest may not be taken under the police power it may not be taken at all. *Burns Baking Co. v. Bryan* (1924) 264 U. S. 504, 44 Sup. Ct. 412.

it may not be taken away without compensation? And in each instance "Due Process" is invoked to protect the rights of the individual.

Just as the problems involved are analogous, so are the processes of rationalization by which the courts reach their conclusions. These famous clauses: "Due Process of Law," "Equal Protection of the Laws," and others, have defended the interests of the individual against the encroachment of society; but their restrictive interpretation has gradually receded before the expanding police power.[9] The point of contact of these opposing forces is constantly shifting.[10] An ulterior public advantage may justify a comparatively insignificant taking of private property," says Mr. Justice Holmes, in a case involving the police power,[11] practically paraphrasing his language in the "curative acts" cases. In the instant case the Legislature was enabled, in complete harmony with "Due Process," to take from the defendant his privilege not to respond in damages, worth to him in money the exact amount of the damages he was later called upon to pay.[12] Under the

[9] *Meffert v. State Board of Medical Registration* (1903) 66 Kan. 710, 718, 72 Pac. 247, 250, aff'd (1904) 195 U. S. 625, 25 Sup. Ct. 790; *Arizona Copper Co. v. Hammer*, *supra* note 7.

[10] 1 Bryce, *The American Commonwealth* (1888) 267.

[11] *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 110, 31 Sup. Ct. 186, 187. "When private property becomes attached with a public interest it ceases to be *juris privati* only." Hale, C. J. in *De Portibus Maris*, 1 Harg. Law Tracts, 78. This doctrine has been relied on in many police power cases. *Munn v. Illinois* (1876) 94 U. S. 113, 132; *Budd v. New York* (1892) 143 U. S. 517, 533, 12 Sup. Ct. 468, 472; *German Alliance Ins. Co. v. Kansas* (1914) 233 U. S. 389, 408, 34 Sup. Ct. 612, 617. Compare: "Police powers of a state are nothing more or less than the powers of government, inherent in every sovereignty." Taney, C. J., in *License Cases* (1847, U. S.) 5 How. 504, 583.

[12] Ordinarily the defendant's defense might have been said to be "vested" though there is some conflict on this point. Where the statute of limitations has run in favor of the adverse possessor of real or personal property the title to that property becomes "vested" as though by grant, and is beyond the reach of the legislature. *Chapin v. Freeland* (1886) 142 Mass. 383, 8 N. E. 128; *Toltec Ranch Co. v. Cook* (1903) 191 U. S. 532, 24 Sup. Ct. 166; Taylor, *Due Process* (1917) 523, 524. Likewise a contract of record becomes "vested" when the period for filing bill of exceptions has expired. *Johnson v. Gehbauer* (1902) 159 Ind. 271, 64 N. E. 855; *Smith v. Walton* (1924, N. J. Ch.) 125 Atl. 878. And in defenses to debt actions the majority rule favors the "vesting" of the defense. *Chambers v. Gallagher* (1918) 177 Calif. 704, 171 Pac. 931; Clark, *Adverse Possession of One's Own Debt* (1919) 29 YALE LAW JOURNAL, 91. Though for a long time a contrary view was held. *Campbell v. Holt* (1885) 115 U. S. 620, 6 Sup. Ct. 209. See 3 Ames, *Select Essays* (1909) 569, that *Campbell v. Holt* "stands almost alone," and *Robinson v. Robbins Dry Dock & Repair Co.* (1924) 238 N. Y. 271, 144 N. E. 579, for a similar view. This distinction that has been drawn between the effect of the statute of limitations in actions for real or personal property and the effect in debt actions may be due to the fact that the early jurists could not see how there could "be a transfer of a right unless the right is embodied in some corporeal thing." 2 Pollock & Maitland, *History of English Law* (2d ed. 1905) 226. But, expressing the modern view, Holmes, J. says in *Portuguese-American Bank of San Francisco v. Welles* (1916) 242 U. S.

police power, in nuisance cases, individuals, also in harmony with "Due Process," have been deprived of privileges relating to the use of their property, losing property interests as valuable as those of which the defendant was deprived.[13] But the police power has expanded more startlingly than has the doctrine of the "curative acts" cases. In the Granger Cases,[14] and later in the Insurance Company cases,[15] semi-public corporations lost privileges which were property interests of large value; while under prohibition laws, going brewery concerns,[16] worth as businesses many millions of dollars, were reduced to practical worthlessness.[17] Such use of the police power[18] was not contemplated before the Granger cases, and no one can tell to what uses it may be put in the future. Under the police power, and its legitimate offspring, the doctrine of the "curative acts" cases, it is impossible to say that a property interest is so sacred to-day that it may not be taken away to-morrow.

There is in fact no standard of sacredness.[19] The language that Mr.

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7, 11, 37 Sup. Ct. 3, 4, "when a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse." Compare note 1, *supra*.

[13] *Pa. Lead Co.'s Appeal* (1880) 96 Pa. 116; *Baltimore & P. Ry. v. Fifth Baptist Church* (1883) 108 U. S. 317, 2 Sup. Ct. 719.

[14] *Munn v. Illinois, supra* note 11; *Chicago, B. & Q. Ry. v. Iowa* (1876) 94 U. S. 155; *Peik v. Chicago & N. W. Ry.* (1876) 94 U. S. 164; *Chicago M. & St. P. Ry. v. Ackley* (1876) 94 U. S. 179; *Winona & St. Peter Ry. v. Blake* (1876) 94 U. S. 180; 3 Warren, *The Supreme Court in United States History* (1922) ch. 33. The Granger cases "evidently represent a different point of view of the sacredness of private rights and of the powers of a Legislature, from that entertained by Chief Justice Marshall and his contemporaries." Bryce, *loc. cit. supra* note 10.

[15] *German Alliance Ins. Co. v. Kansas, supra* note 11.

[16] *Mugler v. Kansas* (1887) 123 U. S. 623, Sup. Ct. 273; *Crowley v. Christensen* (1890) 137 U. S. 86, 11 Sup. Ct. 13.

[17] It had been previously thought that rights of corporations had been settled as absolutely "vested" and indefeasible. *Dartmouth College v. Woodward* (1819, U. S.) 4 Wheat. 518. There it was held that in the absence of a reservation of power the rights granted in the charter of a corporation could not be taken away by a subsequent legislature.

[18] Many valuable property interests have been taken away under the police power. *Barbier v. Connolly* (1885) 113 U. S. 27, 5 Sup. Ct. 357 (denying privilege of working in laundries between 10 p.m. and 6 a. m.); *Davis v. The State* (1880) 68 Ala. 58 (forbidding transportation of cotton at night); *Powell v. Pennsylvania* (1888) 127 U. S. 678, 8 Sup. Ct. 992 (suppressing the sale of oleomargarine). And see many cases cited in *Wilson v. New* (1917) 243 U. S. 332, 349, 37 Sup. Ct. 298, 302, and Warren, *op. cit. supra* note 14, ch. 38. Also a striking recent case where it was held constitutional under the police power to prevent negroes from voting in primaries. *Chandler v. Neff* (1924, W. D. Tex.) 298 Fed. 515. The doubtful character of this decision serves to emphasize the indefinite limits of the police power.

[19] Compare the campaign remark of John W. Davis at Omaha, Neb., N. Y. Times, Sept. 7, 1924, p. 28: "When this country was set up . . . . we gave Americans . . . . certain fundamental rights which can never be taken away."

Justice Holmes uses in speaking of the police power,[20] like his language in referring to the "curative acts" cases,[21] seems to imply the existence somewhere of a definitely fixed "property right."[22] But his words of apparent limitation do not in fact limit, and have little significance save as they indicate a natural shrinking from laying down in cold words a doctrine so pregnant with unlimited power. Private property has been taken in the police power cases and in the "curative acts" cases in all but name.[23] And we are driven to the conclusion that the term "vested right" as used in the latter cases, and occasionally even in the former, is one of convenience and not of definition.[24] It cannot mean more than a property interest, the infringement of which would shock society's sense of justice. For the idea of a "vested right" is less legal than political and sociological. The traditions, mores, and instincts of a community determine it. The conception of a "vested right" in a socialistic state will naturally differ greatly from that in a purely individualistic state; just as the conception of a "vested right" in war time[25] or emergency[26] will little resemble the conception that prevails in days of peace. And since society's concept of a "vested

[20] *Supra* note 11.

[21] *Supra* note 2.

[22] Compare the language of Holmes in *Danforth v. Groton Water Co., supra* note 2: "The prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power."

[23] "The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed." Holmes, J. in *Block v. Hirsh* (1921) 256 U. S. 135, 155, 41 Sup. Ct. 458, 459. See also comment on "manual tradition," *supra* note 12.

[24] See *supra* note 7. The attempted definitions of the police power show their vagueness on their face, and that they state conclusions and not reasons: "Police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of public interests." *Camfield v. United States* (1897) 167 U. S. 518, 524, 17 Sup. Ct. 864, 866. See similar statement regarding "due process of law." *Davidson v. New Orleans* (1877) 96 U. S. 97, 104.

[25] By conscription in war time the individual's most valuable interest, his liberty, is taken away. In the event of future wars we are promised by the 1924 platforms of the two major parties that "every resource which may contribute to success" shall be "drafted." *Platform of Republican Party* (1924) 12; *Democratic Campaign Book* (1924) 39.

[26] Rent laws were justified under the due process clause "as a temporary measure . . . . to tide over a passing trouble"; whereas they could "not be upheld as a permanent change." *Block v. Hirsh* (1921) 256 U. S. 135, 157, 41 Sup. Ct. 458, 460; *Wilson v. New, supra* note 18 (Adamson law upheld "because of the existing emergency").

right" is the measuring yardstick of the right itself, it must be said that in any absolute sense there is no such thing as a "vested right," and that there is no property interest so sacred that it may not be sacrificed to the public need.[27]

Nevertheless, society's conception of a "vested right" must be interpreted. Until about 1890 the Supreme Court, and following its lead the courts of the several states, declared that where a legislature acted reasonably under the appropriate power it was not within the province of the court to pass on the social wisdom of the measures enacted.[28] Thus the ultimate definition was for the legislature; and the remedy for abuse of power was, as a famous judge said, for the people at the polls.[29] Since the eighteen-nineties, however, the Supreme Court has undertaken, against the protests of a minority of its membership, to set up as the standard of a "vested right" its own idea of the "ulterior public advantage."[30] But a single court cannot represent the diverging views of a large number of individual communities. At best it can represent but the average. The result has been the cutting off of social and political experiments in some of these states, because their view of a "vested right" has shocked the sense of justice of the court.[31] The Progressive Party this year proposes a considerable reduction of the court's powers. Less radical opinion speaks for a return to the theory of 1890, if not by judicial reinterpretation of its functions, then by the removal by constitutional amendment of the Due Process Clause, which would accomplish the same result.[32] There seems, however, to

[27] It is interesting that in those statutes upheld under the police power the individual is placed under a duty to society in general, while in *Robinson v. Robbins Dry Dock & Repair Co., supra* note 12, a further step is taken, the defendant being placed under a duty to a specific individual.

[28] "Those employments when too long employed the legislature has judged to be detrimental to the health of employees, and so long as there is a reasonable ground for believing that this is so its decision upon this subject cannot be reviewed by the Federal courts." McKenna, J. in *Holden v. Hardy* (1898) 169 U. S. 366, 395, 18 Sup. Ct. 383, 389.

[29] Waite, C. J. in *Munn v. Illinois, supra* note 11, at p. 134.

[30] See *Truax v. Corrigan* (1921) 257 U. S. 312, 42 Sup. Ct. 124; Hough, *Due Process of Law To-day* (1919) 32 HARV. L. REV. 218; Smith, *Decisive Battles of Constitutional Law* (July, 1924) A. B. A. JOUR. 505. This is one phase of the clash between Federalism and States Rights. Mr. Smith calls the result a "revolution."

[31] "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." Holmes, J. *dissenting* in *Truax v. Corrigan, supra* note 30.

[32] Clark, *The Courts and the People,* Locomotive Engineers' Journal (Aug. 1923) 626; editorial, *The Red Terrorism of Judicial Reform,* The New Republic (Oct. 1, 1924) 110; Borchard, *LaFollette and the Courts,* The Nation (Oct. 29, 1924) 468.

be some evidence in recent decisions of the Supreme Court of a tendency toward the view of 1890.[33] But whatever theory be adopted, the difficulty that causes such a volume of disagreement[34] is the chameleon character of the term "property right" or "vested right": the fact that it is not an absolute standard, but a variant which each man, layman, legislator, and judge, determines individually out of his own background.

### CIVIL RESPONSIBILITY OF JUDGES FOR OFFICIAL ACTS

The state of mind of the disappointed litigant, prepared to disagree, and perhaps embittered, has sometimes led to suits against judges for acts done in a judicial capacity. Such actions raise the question as to whether judges are immune from civil responsibility in damages for official acts; and courts jealous of their dignity and independence, have not been disposed to look too favorably at these attempts to undermine their prestige.[1] In *Dean v. Kochendorfer* (1924) 237 N. Y. 384, 143 N. E. 229, a judgment was rendered against a City Magistrate for malicious prosecution and abuse of process. While the case presents interesting questions as to malicious prosecution and abuse of process,[2] it is intended here to examine solely the problem of judicial responsibility to the injured litigant.[3] Unfortunately the question seems not

[33] See the *dissenting* opinions of Taft, C. J. and Holmes, J. in *Adkins v. Children's Hosp.* (1923) 261 U. S. 525, 43 Sup. Ct. 394; Smith, *op. cit. supra* note 30, at p. 510.

[34] See the wide and excited differences of opinion over the Granger cases as illustrated by press comments of the time. Warren, *op. cit. supra* note 9, at pp. 303-310. Also the same disagreement among members of the Supreme Court itself. *Munn v. Illinois, supra* note 11; *Chicago B. & Q. Ry. v. Iowa, supra* note 14. For later phases of the same dissension see Pomeroy, *The Supreme Court and State Repudiation* (1883) 17 AM. L. REV. 684; Vance, *The Road to Confiscation* (1916) 25 YALE LAW JOURNAL, 285; Swayze, *The Growing Law* (1915) 25 YALE LAW JOURNAL, 1, 17; Brewer, *Protection to Private Property from Public Attack* (1891) *passim*.

[1] "De fide et officio Judicis non recipitur quaestio, sed de scientia, sive error sit juris sive facti. The law doth so much respect the certainty of judgments, and the credit and authority of judges, as it will not permit any error to be assigned that impeacheth them in their trust and in wilful abuse of the same; but only in ignorance, and mistaking either of the law of the case or matter in fact." Sir Francis Bacon, *Law Tracts* (2d ed. 1741) 82. However, in the twelfth and thirteenth centuries justices were in certain situations subject to penalty or amercement for erroneous judgments. Morgan, *Brief History of Special Verdicts and Special Interrogatories* (1923) 32 YALE LAW JOURNAL, 575, 582-586.

[2] The ordinary case of malicious prosecution deals with procedure instituted by the now defendant before a judicial officer; here the judge himself starts the action. For a wide distinction between an action against a prosecutor for malicious prosecution, and one against a magistrate for malicious conviction, see Winfield *The Present Law of Abuse of Legal Procedure* (1921) 219.

[3] Judicial responsibility in general is here considered without special reference to "privilege" of the judiciary in defamation, as to which see COMMENTS (1922)

to have been raised by counsel in the instant case. There are traces of the exemption from responsibility early in the reports,[4] and according to Chancellor Kent "it has a deep root in the common law."[5] But while it is frequently asserted that the exemption applies to all persons acting in a judicial capacity, of whatever degree,[6] it is necessary to consider different grades of judges and different kinds of acts[7] in order to ascertain the extent of the doctrine to-day.

Beginning then, with judges of courts of superior or general jurisdiction,[8] it is well settled that no action can be maintained against them for judicial acts, irrespective of motive.[9] As to judges of courts of inferior or limited jurisdiction,[10] there has been some dispute; their lesser rank has perhaps prevented them from receiving as much protection, and their freedom from responsibility is not as extensive. The difference in the authorities is professedly based on the individual court's conception of the materiality of two elements: lack of jurisdiction[11] and bad faith. Thus some courts have held that a judge of an inferior court acting without power (beyond his jurisdiction) is civilly answerable to the aggrieved litigant regardless of motive.[12] On the other hand, it has been held that an act in excess of power unaccompanied by bad faith will not subject the judge to responsibility in a

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31 YALE LAW JOURNAL, 765, 766; 32 *ibid.* 414. For protection afforded to judges acting under unconstitutional statutes, see (1905) 3 MICH. L. REV. 486; (1906) 4 *ibid.* 239; NOTES (1906) 6 COL. L. REV. 586.

[4] Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (1921) 78.

[5] *Yates v. Lansing* (1810, N. Y. Sup. Ct.) 5 John. 282, 291.

[6] 2 Cooley, *Torts* (3d ed. 1906) 795 and note.

[7] It is quite difficult in practice, sometimes, to distinguish between a ministerial and a judicial act; the rule seems to be that in the former the exemption cannot be relied on. See *Evarts v. Kiehle* (1886) 102 N. Y. 296, 6 N. E. 592.

For the position of officers acting in a quasi-judicial capacity with respect to the rule here involved, see Mechem, *Law of Public Offices and Officers* (1890) secs. 636-643; Cooley, *op. cit. supra* note 6, pp. 797-805.

For a mere error in judgment there obviously should be no responsibility; to impose responsibility here would be to discourage anyone from ever ascending the bench. Cooley, *op. cit. supra* note 6, at p. 792.

[8] General jurisdiction is here used to indicate a power to adjudge generally over the subject matter and person without respect to any particular set of facts.

[9] *Floyd v. Barker* (1608, Star Chamber) 12 Co. 23; *Fray v. Blackburn* (1863, Q. B.) 3 B. & S. 576; *Bradley v. Fisher* (1871, U. S.) 13 Wall. 335.

[10] Limited jurisdiction is here used to indicate a power to adjudge only within prescribed limits.

[11] For an analysis of the term "jurisdiction" see Cook, *The Powers of Courts of Equity* (1915) 15 COL. L. REV. 106, 107. "Jurisdiction" is here used in the strict sense, denoting "power to act."

[12] *Piper v. Pearson* (1854, Mass.) 2 Gray, 120 (committed witness for contempt in case over which another court had exclusive jurisdiction); *Vaughn v. Congdon* (1883) 56 Vt. 111 (issued warrant on complaint void on its face); *Grace v. Teague* (1888) 81 Me. 559, 18 Atl. 289 (tried and sentenced after term of office had expired).

civil suit.[13] Where the act complained of is an abuse of jurisdiction, *i. e.* within the jurisdiction of the court but prompted by bad motive, there is a similar divergence of opinion. It has been held that such an act renders the judge civilly responsible.[14] It seems, however, that the greater number of American courts are in favor of absence of responsibility.[15] English authorities are similarly against responsibility.[16]

There is no compelling logic demanding different results based on the presence or absence of the elements enumerated above. Modern cases show that the distinction between judges of courts of inferior or limited jurisdiction and those of superior or general jurisdiction in determining responsibilty is not being strictly followed.[17] On principle it would seem that there should not be such a marked distinction; the reasons for lack of responsibility in the latter class apply with equal force in the former. An absolute freedom from responsibility, regardless of the status of the court and the character of the act,

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[13] *Thompson v. Jackson* (1895) 93 Iowa, 376, 61 N. W. 1004 (entered judgment in good faith on non-resident not served with notice). See criticism in 27 L. R. A. 92, note. See *Health v. Halfbill* (1898) 106 Iowa, 131, 133, 76 N. W. 522, 523. Similarly, a magistrate having acquired jurisdiction and proceeded beyond it has been exempted from civil responsibility unless he acted maliciously. *Starrett v. Connolly* (1912, 2d Dept.) 150 App. Div. 859, 135 N. Y. Supp. 325. See *Bowman v. Seaman* (1912, 2d Dept.) 152 App. Div. 690, 694, 137 N. Y. Supp. 568, 571. And where the judge erroneously and wilfully attempted to take jurisdiction, having no power over crimes punishable by imprisonment in state prison, he was held responsible. *Robertson v. Parker* (1898) 99 Wis. 652, 75 N. W. 423.

[14] *Knell v. Briscoe* (1878) 49 Md. 414 (malicious rendition of judgment); see *Pepper v. Mayes* (1884) 81 Ky. 673, 676.

[15] *Stone v. Graves* (1843) 8 Mo. 148 (neglect, and wilful refusal to give judgment); *Pratt v. Gardner* (1848, Mass.) 2 Cush. 63 (maliciously received groundless complaint); *Raymond v. Bolles* (1853, Mass.) 11 Cush. 315 (issued writ on false claim and secreted and destroyed it after service); *Irion v. Lewis* (1876) 56 Ala. 190 (wilfully tampered with jury); *Kress v. State* (1878) 65 Ind. 106 (fraudulently rendered smaller judgment); *Curnow v. Kessler* (1896) 110 Mich. 10, 67 N. W. 982 (maliciously issued summons to enable plaintiff to collect civil demand); see *Moser v. Summers* (1916) 172 Ky. 553, 557, 189 S. W. 715, 717; *Seneca v. Colvin* (1917, 4th Dept.) 176 App. Div. 273, 275, 162 N. Y. Supp. 834, 835.

[16] (1848) 11 & 12 Vict. c. 44, sec. 1, required that malice must be alleged and proved in bringing an action against a justice of the peace. But it has been pointed out that this statute, while it provides for bringing the action, does not create the remedy, but merely assumes its existence. The statute therefore regulates what does not necessarily exist. The existence of civil liability, nevertheless, can be shown both prior to 1848 and after the passage of the act. See *Cave v. Mountain* (1840, C. P.) 1 Man. & G. 257, 263; *Kendall v. Wilkinson* (1855, Q. B.) 4 E. & B. 679, 689. *Gelen v. Hall* (1857, Exch.) 2 Hurlst. & N. 379, however, has been taken to indicate the beginning of the rule against the responsibility of Justices of the Peace. Winfield, *op. cit. supra* note 2, at p. 218.

[17] *Broom v. Douglas* (1912) 175 Ala. 268, 57 So. 860; 44 L. R. A. (N. S.) 164, 171, note.

would seem the sounder social policy.[18] By allowing the civil action the magistrate's position is weakened; the decisions of one who has been adjudged guilty of malicious prosecution are not unlikely to go unquestioned. Furthermore ". . . . a prosecution at the instance of the State is a much more effective method of bringing him to account than private suit . . . . Where an officer is impeached his whole career may be gone into . . . . but in private suits the party is confined to the facts of his own case."[19] In *Dean v. Kochendorfer* the provision of the Penal Law which the court cited[20] to show that there was abuse of process, provides for the removal of a magistrate acting as the defendant here did. The result would have been more desirable had the Penal Law been allowed to take its course. While there was here perhaps a clear case of an injustice done to the attorney, the rule should not be relaxed for occasional injustices.[21] "One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice."[22]

## THE POWER OF THE EXECUTIVE TO PARDON CRIMINAL CONTEMPTS OF COURT[1]

A general popular disapproval of the exercise of the power to punish for contempt of court in cases of political and public interest has led many of our executives to apply their pardoning power to cases of

[18] Reasons which have been advanced for non-responsibility are: (1) It would take up the judge's time unnecessarily to consider his own defense. (2) It would invite him to consult public opinion when he ought to be uninfluenced by it. (3) It would increase litigation—the judge trying the first judge's responsibility could also be tried, and so on *ad infinitem*. (4) It would deter capable men from taking office. Cooley, *op. cit. supra* note 7, at p. 793 *et seq.;* Mechem, *op. cit. supra* note 7, sec. 620.

[19] Mechem, *op. cit. supra* note 7, at p. 403; Cooley, *op. cit. supra* note 6, at p. 794.

[20] Penal Law, N. Y. (1919) sec. 854; (1924) 237 N. Y. 384, 390.

[21] Salmond, *Law of Torts* (5th ed. 1920) 539.

[22] Bigelow, J. in *Piper v. Pearson, supra* note 13, at p. 122.

[1] The courts generally distinguish between contempts which consist of violation of a court order made for the benefit of a party to a civil action, and contempts which consist of acts or conduct tending merely to interfere with the process of the court. The former are denominated civil contempts, the latter criminal contempts. *People, ex rel. Munsell, v. Court of Oyer & Terminer* (1886) 101 N. Y. 245, 4 N. E. 259; *Gompers v. Bucks Stove & Range Co.* (1911) 221 U. S. 418, 31 Sup. Ct. 492; *Adams v. Gardner* (1917) 176 Ky. 252, 195 S. W. 412; Beale, *Contempt of Court, Criminal & Civil* (1908) 21 HARV. L. REV. 161; Taylor, *Procedure in Contempt Cases* (1914) 2 VA. L. REV. 265. The essential nature of civil contempts being coercive, to secure the civil rights of party litigants, it is generally agreed that they are not within the pardoning power. The executive may not destroy civil rights. *In re Bahama Islands* (1893, P. C.) A. C. 138; *In re Nevitt* (1902, C. C. A. 8th) 117 Fed. 448; *People, ex rel. Brundage, v. Peters* (1922) 305 Ill. 223, 137 N. E. 118; *State, ex rel. Rodd, v. Verage* (1922) 177 Wis. 295, 187 N. W. 830; *Contempt of Court and the Pardoning Power*

contempt.[2] In the recent case of *State v. Magee Pub. Co.*[3] the defendant was tried for criminal libel. During the pendency of the libel action, he published in a newspaper owned and controlled by him, derogatory remarks concerning the justice presiding at his trial. He was tried and convicted of contempt of court, but immediately thereafter was pardoned by the governor. The Supreme Court of New Mexico held the pardon valid.[4] An opposite conclusion was reached by a lower federal court in the recent case of *United States v. Grossman.*[5] A temporary injunction was issued restraining the defendant from selling liquor in violation of the Volstead Act. The defendant disobeyed the injunction, and was imprisoned for contempt. The President having pardoned the defendant, the court held that the pardon was invalid.[6]

In this country the power to pardon has its source in constitutional provisions. The federal and state constitutions limit it to "crimes or offenses against the state except treason and impeachment."[7] The first difficulty encountered is in attempting to determine whether criminal contempts are offenses within such provisions. Little help is to be derived from precedent.[8] It has been held repeatedly that a prosecution for contempt does not require the regular criminal procedure of indictment or trial by jury.[9] On the other hand a criminal contempt has been held to be within the criminal statute of limitations, and also within the federal statute providing for the removal of criminals from one federal district to another.[10]

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(1893) 46 ALB. L. JOUR. 259. For the difficulties that exist in drawing the line in particular cases between criminal and civil contempts, see *People, ex rel. Stearns, v. Marr* (1905) 181 N. Y. 463, 74 N. E. 431; *Hake v. People* (1907) 230 Ill. 174, 82 N. E. 561; NOTES (1921) 5 MINN. L. REV. 459; (1923) 36 HARV. L. REV. 617.

[2] See (1921) 7 A. B. A. JOUR. 658; (1922) 8 A. B. A. JOUR. 136. See also COMMENTS (1923) 33 YALE LAW JOURNAL, 537.

[3] (1924, N. M.) 224 Pac. 1028 (one judge dissenting).

[4] Accord: *Ex parte Hickey* (1840, Miss.) 4 S. & M. 751; *State, ex rel. Van Orden v. Bauvinet* (1872) 24 La. Ann. 119; *Sharp v. State* (1899) 102 Tenn. 9, 49 S. W. 752.

[5] (May 15, 1924) N. D. Ill. E. Div. The case is now in the United States Supreme Court and will be decided in the October term.

[6] Accord: *Taylor v. Goodrich* (1897) 25 Tex. Civ. App. 109, 40 S. W. 515.

[7] U. S. Const. Art. 2, sec. 4; N. M. Const. Art. 5, sec. 6; Mich. Const. Art. 6, sec. 9; Conn. Const. Art. 4, sec. 10.

[8] For different definitions of "crime or offense" see *State v. Ostwalt* (1896) 118 N. C. 1208, 24 S. E. 660; 4 Blackstone, *Commentaries* 5; 1 Wharton, *Criminal Law* (11th ed. 1912) 18.

[9] *State v. Markuson* (1895) 5 N. D. 147, 64 N. W. 934; *People v. Tool* (1905) 35 Colo. 225, 86 Pac. 224; *Ex parte Allison* (1905) 48 Tex. Cr. App. 634, 90 S. W. 492; *State v. Thomas* (1906) 74 Kan. 360, 86 Pac. 499; *State v. Sides* (1915) 95 Kan. 633, 148 Pac. 624; Rapaljie, *Contempts* (1886) 12.

[10] A federal statute provided that, "No person shall be prosecuted, tried, or punished for any offense not capital . . . . unless the indictment is found or the information is instituted within three pears after such offense shall have been committed." Act of April 13, 1876 (19 Stat. at L. 32). *Held*, that the statute

The lack of a settled judicial definition of the term 'offense' permits a court passing upon the question in the first instance to be influenced by its notions of the nature of the contempt power.[11] Adopting Wilmot's unpublished opinion in *King v. Almon,*[12] that the power to summarily punish for contempt is of immemorial usage and is an inherent attribute of our judiciary, it has been said that an executive pardon is an unwarranted interference with the judicial power.[13] Recent investigations have, however, thrown considerable doubt on the correctness of Wilmot's opinion.[14] The evidence seems to show that prior to the sixteenth century, constructive contempt by one other than an officer of the law was punishable only after trial by jury in the regular criminal procedure.[15] At its source, the power to punish for contempt was regarded not as a mysterious attribute of judicial power but as a practical means to assure the unimpeded transaction of the court's business. Where the obstruction was indirect, it was thought that no impairment of efficiency would result from resorting to the regular criminal procedure. In considering, to-day, the applicability of the power to pardon to cases of contempt, the use of a meaningless phrase such as "inherent power" seems only to cloud the issue, which is practicability and public expediency.[16]

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applied to contempts. *Gompers v. United States* (1913) 233 U. S. 604, 34 Sup. Ct. 693.

A statute provided that "For any crime or offense against the United States, the offender may by any commissioner of a circuit court . . . . be arrested and imprisoned, or bailed as the case may be, for trial before such court of the United States as by law has cognizance of the offense." Act of May 28, 1896 (29 Stat. at L. 184). *Held,* that the statute applied to contempts. *Castner v. Pocahontas Collieries Co.* (1902, D. Va.) 117 Fed. 184. See Barrett, *Contempt in the Federal Courts* (1911) 72 CENT. L. JOUR. 5.

[11] See Cardozo, *The Nature of the Judicial Process* (1921) 71; Pound, "Courts and Legislation," 9 *Modern Legal Philosophy Series* (1917) 223.

[12] (1765, K. B.) Wilmot's Notes 243.

[13] See Larremore, *Constitutional Regulation of Contempt of Court* (1900) 13 HARV. L. REV. 615.

[14] See the series of essays by Fox, *The King v. Almon* (1908) 24 L. QUART. REV. 184, 266; *The Summary Process to Punish Contempt* (1909) 25, *ibid.* 238, 354; *Eccentricities of the Law of Contempt of Court* (1920) 36 *ibid.* 394; *The Writ of Attachment* (1924) 40 *ibid.* 43.

[15] See Fox, *The Summary Process to Punish Contempt, supra* note 14.

[16] "If the President has the power to pardon those who are committed for criminal contempts . . . . this immemorial attribute of judicial power is thus withdrawn from the courts and transferred to the executive . . . . Is there any provision of the Constitution of the United States which grants this inherent and essential attribute of judicial power to the executive?" Sanborn, J. in *Re Nevitt, supra* note 1. "These (contempts) are *sui generis,* neither civil actions nor prosecutions for offenses within ordinary meaning of these terms—and are exertions of the power inherent in all courts to enforce obedience." Mr. Justice McReynolds in *Meyers v. U. S.* (1924, U. S.) 44 Sup. Ct. 272. Compare the attitude of Justice Thacher in *Ex parte Hickey, supra* note 4, at p. 779." A practice of the courts however remarkable for its antiquity, however, far back into a remote

It has been urged, however, that the pardoning of prisoners committed for contempt would subject the judiciary to the control of the executive and would tend to destroy the judiciary as an independent branch of the government.[17] Whatever weight such an argument had in the first instance, the repeated exercise of the power to pardon without apparent impairment of judicial power has greatly detracted from its force.[18] The executive is an elective officer responsible to the electorate, and is normally not likely to exercise this power except to correct hasty action on the part of the judges. To assume gross abuse by the executive of his power is to argue for the abolition of the entire pardoning power, since the executive might nullify the criminal laws by freeing all convicted criminals.[19] Equally so might the judiciary rob the legislature of all its function by abuse of its power to declare legislation unconstitutional. It is interesting to note that similar fears for the prestige of the judiciary were expressed more than a century ago when the question of appellate review of contempt was considered.[20] The reply of Senator Clinton that such fears were imaginary and idle seems still pertinent.[21]

A recent decision of the United States Supreme Court upheld provisions of the Clayton Act for jury trials in constructive contempts. It may be inferred from the opinion that a provision for jury trials in cases of direct contempts would not have been upheld.[22] Should the

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period it looks for its origin . . . . claims no respect or veneration when it is shown to be unessential to the existence, utility or preservation of those courts. This (the power to pardon contempts) is a quasi-political question."

[17] See *Taylor v. Goodrich, supra* note 6.

[18] Executive pardons for contempt have been upheld from an early date. See *Dixon's Case* (1841) 3 Op. Atty. Gen. 622; *Rowan & Wells Case* (1845) 4 *ibid.* 458; *Drayton & Sears Case* (1852) 5 *ibid.* 579; *Anonymous* (1890) 19 *ibid.* 476.

[19] See Johnston, *Constitutional Power to Pardon Contempt of Court* (1909) 12 LAW NOTES, 185.

[20] In the absence of statute a judgment of contempt by a court of competent jurisdiction was final and could not be reviewed by appeal or writ of error. *Ex parte Kearney* (1822, U. S.) 7 Wheat. 38; *State v. Schneider* (1892) 47 Mo. App. 669; Rapaljie, *op. cit.* sec. 141. In a few states a review was allowed in civil contempts. *Haught v. Irwin* (1895) 166 Pa. 548, 31 Atl. 260. This rule has been modified in some jurisdictions by statute. See *Leopold v. People* (1892) 140 Ill. 552, 30 N. E. 348. Where the rule still prevails the tendency of appellate courts is to construe questions of jurisdiction strictly so as to check abuses of the contempt power. See Talbert, *Review of Contempt Proceedings by Habeas Corpus* (1912) 46 AM. L. REV. 838.

[21] Clinton, Senator, in *Yates v. People* (1810, N. Y. Sen.) 6 Johns. 337, 468: "The inconvenience arising from interfering with convictions of contempt of court is imaginary and idle. . . . It is to be remembered that summary convictions are against the genius and spirit of our constitution and in derogation of civil liberty, and the accused is without the usual guards of freedom. There is no grand jury to accuse, no petit jury to try, but his property and liberty depend upon the fiat of the court. Is not the necessity of the check at least equal to the delegation of power?"

[22] *Michaelson v. United States* (1924, U. S.) 45 Sup. Ct. 18.

power to pardon be also limited to constructive contempts? There seems to be no authority for denying the power to pardon for direct contempts.[23] In principle it seems sound to allow the power of pardon in all criminal contempts. The distinction between direct and constructive contempt is merely one of degree, and while it may be essential that a judge have the power to summarily punish those creating a disturbance in the court room without resorting to the delays of a jury trial, it is not so patent that the punishment should be beyond mitigation. The pardon does not take away the power to punish, but is merely the application of executive clemency after conviction.[24]

Several criminal statutes provide for injunctions to be issued by the court restraining their violation. The disobedience of such injunctions is by express provision made punishable as a contempt.[25] It has been suggested that the power to pardon should be limited to such contempts as are expressly provided for by these statutes, since the contempt process is merely incidental to the enforcement of the criminal law.[26] The proposed limitation would, however, exclude the large class of contempts for offending the dignity of the courts where the likelihood of judicial abuse is the greatest and where there is the most need for such a check as is provided for by an executive pardon.

### TORT RESPONSIBILITY OF CHARITABLE CORPORATIONS

Two recent cases, *City of Shawnee v. Roush* (1924, Okla.) 223 Pac. 354 and *St. Vincent's Hosp. v. Stine* (1924, Ind.) 144 N. E. 537, line up on opposite sides of the question whether or not charitable corporations are responsible for the torts of their servants. The facts in the two cases are similar: the plaintiff, a pay-patient in a charitable hospital, was injured through the negligence of a nurse. He sues the hospital. The Oklahoma court imposes on the charity the responsibility of any profit-making corporation; the Indiana court imposes no responsibility at all in the absence of negligence in the selection of the servant. In Oklahoma the problem seems to have been presented for the first time; in Indiana the court follows precedent.[1]

All jurisdictions agree in placing the paying and the non-paying

[23] There seem to be no modern cases involving the pardon of direct contempts. The probable reason is the reluctance of the executive to pardon such offenders. That the power to pardon for direct contempts has been exercised, see *Dixon's Case, supra* note 18 (affray in the presence of the court); *Thomas of Charthan v. Benet of Stanford* (1313) 24 Seld. Soc. 184 (assault with intent to kill in presence of the court).

[24] See Williston, *Does a Pardon Blot out Guilt* (1915) 28 HARV. L. REV. 647.

[25] Sherman Anti-Trust Law, Act of July 2, 1890 (26 Stat. at L. 209, sec. 4); Clayton Act, Act of Oct. 15, 1914 (38 *ibid.* 736, secs. 15-19); Volstead Act, Act of Oct. 28, 1919 (41 Stat. at L. 306, 314, secs. 4, 22, 23).

[26] COMMENTS (1924) 19 ILL. L. REV. 176.

[1] *Pittsburgh, C. C. & St. L. Ry. v. Sullivan* (1895) 141 Ind. 83, 40 N. E. 138.

patient of a charitable corporation on a common footing,[2] but they disagree as to what that common footing shall be. "Public policy" is frankly admitted to be the determining factor. Some courts give no other justification for their decisions.[3] But where reasons are given they may fall within one or more of three categories. There is the "trust fund" doctrine which declares that trust funds may not be diverted from the purposes of the trust, lest, by the frittering away of its resources, the charity become crippled or wiped out.[4] There is the doctrine that *respondeat superior* shall not apply, since charities receive no profit from the activities of their servants: a doctrine which, in fact, merely states the result of the "trust fund" doctrine, but which is nevertheless often relied on by a court to support its conclusions.[5]

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[2] *E. g. Powers v. Mass. Homoeopathic Hosp.* (1901, C. C. A. 1st) 109 Fed. 294.

[3] *E. g. Weston v. Hosp. of St. Vincent* (1921) 131 Va. 587, 107 S. E. 785.

[4] In the following cases the decision was based, wholly or in part, on the "trust fund" doctrine: England: *Heriot's Hosp. v. Ross* (1846, H. L.) 12 Cl. & F. 507. But the doctrine was not relied on in *Hillyer v. St. Bartholomew Hosp.* [1909] 2 K. B. 820. United States: *Lyle v. Nat. Home* (1909, C. C. E. D. Tenn.) 170 Fed. 842. But the "waiver" doctrine was later adopted in *Powers v. Mass. Homeopathic Hosp., supra,* note 2. *Fordyce v. Woman's Assoc.* (1906) 79 Ark. 550, 96 S. W. 155; *Butler v. Berry School* (1921) 27 Ga. App. 560, 109 S. E. 544; *Parks v. N. W. Univ.* (1905) 218 Ill. 381, 75 N. E. 991. But recovery in contract was allowed in *Armstrong v. Wesley Hosp.* (1912) 170 Ill. App. 81; *Davin v. Kansas Benevolent Assoc.* (1918) 103 Kan. 48, 172 Pac. 1002; *Cook v. Norton Infirmary* (1918) 180 Ky. 331, 202 S. W. 874; *Jensen v. Maine Infirmary* (1910) 107 Me. 408, 78 Atl. 898; *Loeffler v. Enoch Pratt Hosp.* (1917) 130 Md. 265, 100 Atl. 301; *Roosen v. Brigham Hosp.* (1920) 235 Mass. 66, 126 N. E. 392; *Downs v. Harper Hosp.* (1894) 101 Mich. 555, 60 N. W. 42. But the "waiver" doctrine was relied on in *Bruce v. Central Church* (1907) 147 Mich. 230, 110 N. W. 951. *Nicholas v. Evangelical Home* (1920) 281 Mo. 182, 219 S. W. 643; *Marble v. Nicholas Senn Hosp.* (1918) 102 Neb. 343, 167 N. W. 208; *Corbett v. Industrial School* (1903) 177 N. Y. 16, 68 N. E. 997. But the "waiver" doctrine was relied on in *Schloendorf v. N. Y. Hosp.* (1914) 211 N. Y. 125, 105 N. E. 92. *Hoke v. Glenn* (1914) 167 N. C. 594, 83 S. E. 807; *Taylor v. Flower Deaconess Hosp.* (1922) 104 Ohio St. 61, 135 N. E. 287; *Hill v. Tualatin Academy* (1912) 61 Or. 190, 121 Pac. 901; *Gable v. Sisters of St. Francis* (1910) 227 Pa. 254, 75 Atl. 1087; *Vermillion v. Woman's College* (1916) 104 S. C. 197, 88 S. E. 649; *Abston v. Waldon Academy* (1907) 118 Tenn. 24, 102 S. W. 351; *Maia v. Eastern Hosp.* (1899) 97 Va. 507, 34 S. E. 617. This was a state agency. But the "waiver" doctrine was relied on in *Hosp. of St. Vincent v. Thompson* (1914) 116 Va. 101, 81 S. E. 13.

[5] In the following cases the decision was based, wholly or in part, on the doctrine that *respondeat superior* shall not apply: *Union Pac. Ry. v. Artist* (1894, C. C. A. 8th) 60 Fed. 365. But the "waiver" doctrine was relied on in *Powers v. Mass. Homoeopathic Hosp., supra* note 2. *Fordyce v. Woman's Assoc.* (Ark.) *supra* note 4; *Hearns v. Waterbury Hosp.* (1895) 66 Conn. 98, 33 Atl. 595; *Parks v. N. W. Univ.* (Ill.) *supra* note 4. But recovery was allowed in contract in *Armstrong v. Wesley Hosp., supra* note 4; *Eighmy v. Union Pac. Ry.* (1895) 93 Iowa, 538, 61 N. W. 1056; *Emery v. Jewish Hosp. Assoc.* (1921) 193 Ky. 400, 236 S. W. 577; *Thornton v. Franklin Sq. House* (1909) 200 Mass. 465, 86 N. E. 909; *Nicholas v. Evangelical Home* (Mo.) *supra* note 4; *Hoke v. Glenn* (N. C.)

And there is the doctrine of "waiver" which proceeds on the fiction that a patient, by accepting benefits, releases the institution from all responsibility for the negligence of its servants if "due care" has been exercised in their selection.[6] From these three doctrines come several degrees of responsibility. Some courts, applying the first two, bar entirely the recovery of any injured person, patient, employee, or utter stranger.[7]

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*supra* note 4; *Collins v. N. Y. Medical School* (1901, 2d Dept.) 59 App. Div. 63, 69 N. Y. Supp. 106. But the "waiver" doctrine was relied on in *Schloendorf v. N. Y. Hosp., supra* note 4; though it was disapproved in *Phillips v. Buffalo Hosp.* (1924, 4th Dept.) 207 App. Div. 640, 202 N. Y. Supp. 572. There seems to be no recent case in the Court of Appeals. *Taylor v. Flower Deaconess Hosp.* (Ohio) *supra* note 4; *Vermillion v. Woman's College* (S. C.) *supra* note 4; *Morrison v. Henke* (1917) 165 Wis. 166, 160 N. W. 173.

Some cases hold, as a plain question of agency, that members of a hospital staff are not servants within the rule of *respondeat superior. Basabo v. Salvation Army* (1912) 35 R. I. 22, 85 Atl. 120; see *Kellogg v. Charity Foundation* (1908, 2d Dept.) 128 App. Div. 214, 215, 112 N. Y. Supp. 566, 568. While this can well account for some cases, it will hardly account for all, and the question of tort responsibility remains as urgent as ever.

[6] In the following cases the decision was based, wholly or in part, on the "waiver" doctrine: *Powers v. Mass. Homoeopathic Hosp.* (Fed.) *supra* note 2. But the "trust fund" doctrine was relied on earlier in *Lyle v. Nat. Home, supra* note 4. *Burdell v. St. Luke's Hosp.* (1918) 37 Calif. App. 310, 173 Pac. 1008; *Hearns v. Waterbury Hosp.* (Conn.) *supra* note 5; *Mikota v. Sisters of Mercy* (1918) 183 Iowa, 1378, 168 N. W. 219; *Cook v. Norton Infirmary* (Ky.) *supra* note 4; *Bruce v. Central Church* (Mich.) *supra* note 4; *Adams v. University Hosp.* (1907) 122 Mo. App. 675, 99 S. W. 453; *Marble v. Nicholas Senn Hosp.* (Neb.) *supra* note 4; *Hoke v. Glenn* (N. C.) *supra* note 4; *Schloendorf v. N. Y. Hosp.* (N. Y.) *supra* note 4. But *Phillips v. Buffalo Hosp., supra* note 5, disapproves this doctrine. *Gable v. Sisters of St. Francis* (Pa.) *supra* note 4; *Hosp. of St. Vincent v. Thompson* (Va.) *supra* note 4. But the earlier case of *Maia v. Eastern Hosp., supra* note 4, applied the "trust fund" doctrine.

[7] These cases favor the rule of absolute non-responsibility: *Fordyce v. Woman's Assoc.* (Ark.) *supra* note 4; *Davie v. University of Calif.* (1924, Calif.) 227 Pac. 243. (A state agency.) But the "due care" modification was favored earlier in *Burdell v. St. Luke's Hosp., supra* note 6. See *Johnston v. City of Chicago* (1913) 258 Ill. 494, 498, 101 N. E. 960, 962. (A state agency.) But the "due care" modification was favored in *Marabia v. Mary Thompson Hosp.* (1923) 309 Ill. 147, 140 N. E. 836. And in *Armstrong v. Wesley, supra* note 4, recovery in contract was allowed. See *Emery v. Jewish Hosp. Assoc.* (Ky.) *supra* note 5. But the "due care" modification was earlier favored in *Ill. Central Ry. v. Buchanan* (1907) 126 Ky. 288, 103 S. W. 272. *Jensen v. Maine Infirmary* (Me.) *supra* note 4; *Loeffler v. Enoch Pratt Hosp.* (Md.) *supra* note 4; *Kidd v. Mass. Homoeopathic Hosp.* (1921) 237 Mass. 500, 130 N. E. 55. But in *Thornton v. Franklin Sq. House, supra* note 5, the "due care" modification was favored. *Downs v. Harper Hosp.* (Mich.) *supra* note 4. But in *Gallon v. House of Good Shepherd* (1909) 158 Mich. 361, 122 N. W. 631, the "due care" modification was favored. *Nicholas v. Evangelical Home* (Mo.) *supra* note 4; *Duncan v. Benevolent Assoc.* (1912) 92 Neb. 162, 137 N. W. 1120. But by application of the "waiver" doctrine recovery was allowed a stranger. *Marble v. Nicholas Senn Hosp., supra* note 4; see *Wilson v. N. Y. Homoeopathic College* (1924, Sup. Ct.) 122 Misc. 452, 454, 204 N. Y. Supp. 175, 177. But the "due care" modification was

Others applying the third, refuse recovery to the patient,[8] but allow it to the employee[9] or stranger.[10] Still others, while clinging to the "trust fund" doctrine or to the doctrine that *respondeat superior* does not apply, considerably modify their effect by declaring that recovery may be had against a charity if there has been negligence in the selection of the servant who caused the injury; and while in most cases there

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favored in *Barr v. Children's Aid* (1921, Sup. Ct. Spec. T.) 190 N. Y. Supp. 296. *Overholser v. Nat. Home* (1903) 68 Ohio St. 236, 67 N. E. 487. (A state agency.) But the "due care" modification was later favored in *Taylor v. Flower Deaconess Hosp., supra* note 4. *O'Neil v. Odd Fellows' Home* (1918) 89 Or. 382, 174 Pac. 148; *Gable v. Sisters of St. Francis* (Pa.) *supra* note 4; see *Vermillion v. Woman's College* (1916) 104 S. C. 197, 201, 88 S. E. 649, 650. But the "due care" modification was earlier favored in *Lindler v. Columbia Hosp.* (1914) 98 S. C. 25, 81 S. E. 512. *Abston v. Walden Academy* (Tenn.) *supra* note 4; *Maia v. Eastern Hosp.* (Va.) *supra* note 4. (A state agency.) But the "due care" modification was favored in *Weston v. Hosp. of St. Vincent, supra* note 3.

[8] A few decisions imply that if the "waiver" doctrine were to be applied, the patient would be held to free the charity from all responsibility, even where there had not been "due care" in selecting the servant. *Adams v. University Hosp.* (1907) 122 Mo. App. 675, 679, 99 S. W. 453, 454. Some courts, where there has been no negligence in selection, refuse recovery, and expressly avoid the question as to the result if negligence had been present. *Powers v. Mass. Homoeopathic Hosp.* (Fed.) *supra* note 2, at p. 306.

[9] Recovery by an employee was allowed in the following cases: *Thomas v. German Benevolent Assoc.* (1914) 168 Calif. 183, 141 Pac. 1186; *Bruce v. Central Church* (Mich.) *supra* note 4; *McInery v. St. Luke's Hosp.* (1913) 122 Minn. 10, 141 N. W. 837. But absolute responsibility is imposed in Minnesota, see *infra* note 23. *Hewitt v. Woman's Assoc.* (1906) 73 N. H. 556, 64 Atl. 190. This case seems to adopt a general rule of absolute responsibility. *Hordern v. Salvation Army* (1910) 199 N. Y. 233, 92 N. E. 626; *Hotel Dieu v. Armendariz* (1914, Tex. Civ. App.) 167 S. W. 181.

*Contra: Emery v. Jewish Hosp. Assoc.* (Ky.) *supra* note 5; *Freel v. Crawfordsville* (1895) 142 Ind. 27, 41 N. E. 312 (a state agency); *Zoulalian v. N. E. Sanitarium* (1918) 230 Mass. 102, 119 N. E. 686 (Workmen's Compensation Act); *Whittaker v. St. Luke's Hosp.* (1909) 137 Mo. App. 116, 117 S. W. 1189; *Corbett v. St. Vincent's School* (1903, 4th Dept.) 79 App. Div. 334, 79 N. Y. Supp. 369. But by reliance on the "waiver" doctrine recovery was later allowed in *Hordern v. Salvation Army, supra. O'Neil v. Odd Fellows' Home* (Or.) *supra* note 7; see *Vermillion v. Woman's College* (S. C.) *supra* note 7; see *Bachman v. Y. W. C. A.* (1922) 179 Wis. 178, 182, 191 N. W. 751, 753.

[10] A stranger was permitted to recover in the following cases: *Gallon v. House of Good Shepherd* (Mich.) *supra* note 7; *Marble v. Nicholas Senn Hosp.* (Neb.) *supra* note 4; *Van Ingen v. Jewish Hosp.* (1920) 227 N. Y. 665, 126 N. E. 924; *Basabo v. Salvation Army* (1912) 35 R. I. 22, 85 Atl. 120. But this case favors the rule of absolute responsibility.

*Contra: Fordyce v. Woman's Assoc.* (Ark.) *supra* note 4; see *Emery v. Jewish Hosp. Assoc.* (1921) 193 Ky. 400, 410, 236 S. W. 577, 582; *Loeffler v. Enoch Pratt Hosp.* (Md.) *supra* note 4; *Benton v. City Hosp.* (1885) 140 Mass. 13, 1 N. E. 836; *Hill v. Tualatin* (Or.) *supra* note 4; *Fire Ins. Patrol v. Boyd* (1888) 120 Pa. 624, 15 Atl. 553; *Vermillion v. Woman's College* (Va.) *supra* note 4; *Bachman v. Y. W. C. A.* (Wis.) *supra* note 9; see *Lyle v. Nat. Home* (Fed.) *supra* note 4, at p. 845.

is no such negligence and recovery is refused,[11] in a few the rule is applied to permit recovery.[12]

All three doctrines are open to attack. The doctrine of "waiver" is a mere fiction:[13] for who could maintain that a patient, coming in sickness to a hospital, ever for a moment considers the possibility of a suit against the institution? The "trust fund" doctrine, logically applied, should completely protect the trust funds from tapping for purposes outside the trust.[14] But a charity, even when an agency of the state,[15]

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[11] The following cases favor the rule that there can be no recovery by patients where there has been "due care" in the selection of servants: *Deming Ladies Hosp. v. Price* (1921, C. C. A. 8th) 276 Fed. 668; *Burdell v. St. Luke's Hosp.* (Calif.) *supra* note 6. But absolute non-responsibility was later favored in *Davie v. University of Calif., supra* note 7. *Hearns v. Waterbury Hosp.* (Conn.) *supra* note 5; *South Florida Ry. v. Price* (1893) 32 Fla. 46, 13 So. 638; *Butler v. Berry School* (Ga.) *supra* note 4; *Marabia v. Thompson Hosp.* (Ill.) *supra* note 7. But absolute non-responsibility was favored earlier in *Johnston v. City of Chicago, supra* note 7. *Mikota v. Sisters of Mercy* (Iowa) *supra* note 6; *Pittsburgh, C. C. & St. L. Ry. v. Sullivan* (Ind.) *supra* note 1; *Davin v. Kansas Benevolent Assoc.* (Kan.) *supra* note 4; *Thornton v. Franklin Sq. House* (Mass.) *supra* note 5. But absolute non-responsibility was favored in *Kidd v. Mass. Homoeopathic Hosp., supra* note 7. *Gallon v. House of Good Shepherd* (Mich.) *supra* note 7. But absolute non-responsibility was favored in *Downs v. Harper Hosp., supra* note 4. *Hoke v. Glenn* (N. C.) *supra* note 4; *Barr v. Children's Aid* (N. Y.) *supra* note 7. But absolute non-responsibility was favored in *Wilson v. N. Y. Homoeopathic College, supra* note 7. *Taylor v. Flower Deaconess Hosp.* (Ohio) *supra* note 4; *Lindler v. Columbia Hosp.* (S. C.) *supra* note 7. But absolute non-responsibility was favored in *Vermillion v. Woman's College, supra* note 7. *Barnes v. Providence Sanitarium* (1921, Tex. Civ. App.) 229 S. W. 588; *Gitzhoffen v. Holy Cross Hosp.* (1907) 32 Utah, 46, 88 Pac. 691; *Weston v. Hosp. of St. Vincent* (Va.) *supra* note 3; *Morrison v. Henke* (Wis.) *supra* note 5.

The rule that "due care" in the selection of servants is a personal non-delegable duty of the master seems to account for this modification of a charitable institution's non-responsibility. *McInery v. St. Luke's Hosp.* (Minn.) *supra* note 9. But if "a charity is not to be liable for the negligence of its employees it should equally not be held liable for the negligence of its officers and managers." Zollman, *Liability of Charitable Institutions* (1921) 19 MICH. L. REV. 395, 406. The modification has been rejected in Massachusetts on this ground. *Roosen v. Brigham Hosp., supra* note 4, at p. 72.

[12] In these cases the "due care" rule was applied affirmatively and recovery allowed: *Ill. Central Ry. v. Buchanan* (Ky.) *supra* note 7. But the rule of absolute non-responsibility was favored later in *Emery v. Jewish Hosp., supra* note 5. *McInery v. St. Luke's Hosp.* (Minn.) *supra* note 9. But the rule of absolute responsibility was adopted later in *Mulliner v. Evangelischer, etc.* (1920) 144 Minn. 392, 175 N. W. 699. *St. Paul's Sanitarium v. Williamson* (1914, Tex. Civ. App.) 164 S. W. 36; *Magnuson v. Swedish Hosp.* (1918) 99 Wash. 399, 169 Pac. 828.

[13] *Gamble v. Vanderbilt University* (1918) 138 Tenn. 616, 200 S. W. 510; *Phillips v. Buffalo Gen'l Hosp.* (N. Y.) *supra* note 5.

[14] See *Love v. Nashville Institute* (1922) 146 Tenn. 550, 564, 243 S. W. 304, 308.

[15] *City of Paducah v. Allen* (1901) 111 Ky. 361, 63 S. W. 981. The ground for the decision was that freedom from responsibility would be in violation of the

must respond in damages if it has been guilty of creating a nuisance;[16] or if a tort has been committed in the course of the administration of the trust;[17] and where a suit has been prosecuted against a trustee personally for alleged misconduct as trustee of which he was not guilty, he may reimburse himself from the funds appropriated to the trust.[18] The adoption of the "due care" modification affords still another opportunity for such wastage. Likewise, the fact that a nuisance has been committed by a servant does not free the charity from responsibility.[19] And the "due care" modification adds this further inconsistency: that *respondeat superior* will apply to the manager of a hospital (who is a servant of the corporation) if he has been negligent in selecting a sub-servant; but it will not apply where the sub-servant has been negligent.[20] But since public policy is the dominant consideration, these technical defects might be overlooked. It would seem better to impose the appropriate responsibility frankly on that ground, without more specific rationalization. But since courts find it necessary to give reasons, the various doctrines, with their modifications, serve their purpose; for a court when it has determined what protection the interests of the community require to be afforded to a charitable corporation, can choose the doctrine that will most accurately support its conclusion.[21] And the doctrine so chosen will, if consistently applied, bring a consistent result.[22]

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clause in the state constitution providing that: "Municipal and other corporations, and individuals invested with the privilege of taking property for public use, shall make just compensation for property taken, injured, or destroyed."

[16] *Love v. Nashville Institute* (Tenn.) *supra* note 14. Here it was said that the "trust fund" doctrine being the "child of public policy" should give way to public policy.

[17] Responsibility has been imposed where the tort was committed in a non-charitable activity. *Stewart v. Harvard College* (1866, Mass.) 12 Allen, 58; *Holder v. Mass Hort. Society* (1912) 211 Mass. 370, 97 N. E. 630.

[18] *Bennett v. Wyndham* (1862, Ch.) 4 De G. F. & J. 259.

[19] *Baker v. Tibbetts* (1895) 162 Mass. 468, 39 N. E. 350.

[20] See *supra* note 11.

[21] Where the injury has arisen from the breach of a contractual duty, courts have sometimes been induced to grant recovery, regardless of their rule of tort responsibility. Canada: *Thompson v. Coast Mission* (1914) 15 D. L. R. 656; United States: *Armstrong v. Wesley Hosp.* (Ill.) *supra* note 4; *Roche v. St. John's Hosp.* (1916, Sup. Ct. Spec. T.) 96 Misc. 289, 160 N. Y. Supp. 401; *Hall-Moody Institute v. Copass* (1902) 108 Tenn. 582, 69 S. W. 327; see *Gitzhoffen v. Holy Cross Hosp.* (1907) 32 Utah, 46, 61, 88 Pac. 691, 696; see *Union Pac. Ry. v. Artist* (Fed.) *supra* note 5, at p. 369. *Contra: Davin v. Kansas Benevolent Assoc.* (Kan.) *supra* note 4; see *Roosen v. Brigham Hosp.* (1920) 235 Mass. 66, 75, 126 N. E. 392, 397; see *Downs v. Harper Hosp.* (1894) 101 Mich. 555, 556, 60 N. W. 42, 43; *Duncan v. Neb. Benevolent Assoc.* (1912) 92 Neb. 162, 137 N. W. 1120; see *Wilson v. N. Y. Homoeopathic Hosp.* (N. Y.) *supra* note 7.

[22] The non-responsibility of the state (under the dogma that the "king can do no wrong") is in some part responsible for the non-responsibility of charitable corporations. This dogma has been severely criticized. Borchard, *Government Liability in Tort* (1924) 34 YALE LAW JOURNAL, 1 ff. But courts, nevertheless,

The Oklahoma case, *supra,* imposes the responsibility of any profit-making corporation.[23] This, it is submitted, best serves the welfare of society. The modern tendency, through various forms of insurance,—fire, accident, life, workmen's compensation acts, and the like—is to shift the burden from the innocent victim to the community.[24] The cases that adopt rules relieving charitable corporations from responsibility, wholly or in part, indicate the fear that any other policy will result in the disappearance of charities through the failure of donations and the dissipation of funds. Even if some reason for fear be admitted, a distinction should be drawn between private charities and those created and supported by the state. The public charity has the taxing power of the state to support it.[25] In England, Canada, and those states where absolute responsibility is imposed, these fears have hardly been realized. Under the present majority rules charitable institutions can with impunity allow their servants to be negligent towards patients. The cases sentimentalize much about the unfairness of subjecting the "Good Samaritan" to an action for damages.[26] The alternative is that those must suffer whom the charities were organized to benefit.

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instinctively, where a charity is created and supported by the state, free it from liability. See many cases in Borchard, *op. cit. supra,* at p. 25. Where it is *not* so created, but where its functions are of a "governmental nature," an analogy is drawn to support the same rule. *Fire Ins. Patrol v. Boyd* (Pa.) *supra* note 10. A charity may be technically private and still be in receipt of funds from the public treasury. It is thus impossible to say whether it is in fact public or private. *Gallon v. House of Good Shepherd* (Mich.) *supra* note 7. If its "objects" are "benevolent and charitable" the courts consider it a "charity" regardless of the source of its funds or the method of its creation. *Zoulalian v. N. E. Sanitarium* (Mass.) *supra* note 9. Purely private charities are thus often drawn in under the same rule. Some writers, however, attempt to treat private charities and agencies of the state on an entirely different footing, overlooking the fact that the cases do not seem to distinguish between the two classes, and that such distinction in fact is hardly possible. See Zollman, *op. cit. supra* note 11, at pp. 395, 397, 398.

[23] This case adopts the rule favored in the following jurisdictions: England: *Hillyer v. St. Bartholomew Hosp., supra* note 4; Canada: *Donaldson v. Gen'l Hosp.* (1890) 30 N. B. 279; United States: *Tucker v. Mobile Infirmary* (1915) 191 Ala. 572, 68 So. 4; *Mulliner v. Evangelischer, etc.* (1920) 144 Minn. 392, 175 N. W. 699; *Glavin v. R. I. Hosp.* (1879) 12 R. I. 411. This case was subsequently overruled by legislative enactment. R. I. Gen. Laws, 1896, p. 538. But see *Basabo v. Salvation Army* (1912) 35 R. I. 22, 43, 44, 85 Atl. 120, 129. See *Hewitt v. Woman's Assoc.* (1906) 73 N. H. 556, 565, 64 Atl. 190, 192.

[24] The modern tendency is also shown by growing agitation for some form of compulsory insurance to be taken out by owners of automobiles to pay damages to those injured in automobile accidents. See Marx, *The Curse of the Personal Injury Suit* (1924) 10 A. B. A. JOUR. 491.

[25] See Borchard, *Government Liability in Tort* (1925) 34 YALE LAW JOURNAL, 248.

[26] *Powers v. Mass. Homoeopathic Hosp.* (Fed.) *supra* note 2, at p. 304.