apply to any foreign newspaper or magazine although containing matter copyrighted in the United States when such matter is printed or reprinted by authority of the owner of the United States copyright, unless such newspaper or magazine contains also copyright matter printed or reprinted without such authorization.

Perkins Bill (H. R. 5841)

PROHIBITION OF IMPORTATION

SEC. 41. The copyright in any work shall be deemed to be infringed by any person who knowingly imports for sale or hire or otherwise distributes in the United States copies of any piratical reprint of a work in which copyright subsists in the United States, and the importation into the United States of piratical copies of any work copyrighted in the United States, shall be, and is hereby, prohibited; and such prohibition of importation shall extend also to any authorized foreign reprint of an American author's work or of a work by an alien author domiciled or resident in the Unted States, whenever an agreement authorizing such reprint shall from type set within the limits of the United States or its dependencies, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States or its dependencies from type set therein; or, if the text be produced by lithographic, mimeographic, photogravure, or photo-engraving or any kindred process or any process of manufacture hereafter devised, then by a process wholly performed within the limits of the United States or its dependencies, and the printing or other reproduction of the text; and the binding of said book or periodical shall be performed within the limits of the United States or its dependencies. Said requirements shall extend also to the illustrations within a book or periodical consisting of printed text and illustrations produced by the printing press by means of lithographic, photogravure or photo-engraving or any kindred process or any process of manufacture hereafter devised, and also to reproductions by the printing press of separate lithographs, photogravures, photo-engravings, or reproductions by the printing press, by any kindred process or any process of manufacture hereafter devised, except, where in any case, the subjects represented are located in a foreign country or illustrate any scientific or technical work or reproduce a work of art. Said requirements shall not apply to works in raised characters for the use of the blind or to works by foreign authors.

SEC. 29. That in the case of a book, lithograph, photogravure, photo-engraving, or reproduction by any kindred process or any process of manufacture hereafter devised, manufacture of which is required in the United States or its dependencies under the preceding section, an affidavit under the official seal of any officer authorized to administer oaths within the United States or its dependencies, duly made by the person claiming copyright, or by his duly authorized agent or representative residing in the United States or its dependencies, or by the printer who printed the book, lithograph, photogravure, photo-engraving, or reproduction, shall be filed in the copyright office within thirty days after such publication, setting forth the manner in which compliance has been had with the requirements of the preceding section. Such affidavit shall state also the place where, and the establishment or establishments in which, such type was set or plates were made or lithograph, photogravure, photo-engraving, or reproduction by any kindred process or any process of manufacture hereafter devised, or printing and binding, were performed, and the date

of completion of printing of the work or the date of publication; and no action shall be maintained for infringement of the right to publish, print, or vend the said work in any form produced by any of the printing press processes mentioned in the preceding section, at any time or times when compliance with such preceding section is requisite, or because of any act or thing done or undertaken during said time or times, unless said affidavit shall be filed within said time or the court shall find that the failure to file said affidavit was due to excusable neglect. The provisions of this section shall not apply to periodicals, issued regularly at least four times a year or more frequently.

SEC. 30. During the existence of the copyright in any work the author of which is an American citizen and to which protection is accorded under this Act, and in any work by a foreign author when such work has been published and manufactured within the limits of the United States or its dependencies, under an assignment covering stated rights for the United States, registered in the copyright office; then, during the period in which any edition of American manufacture is published and copies of such American edition sufficient to supply customers are in the possession of the publisher, the importation into the United States of any copies thereof printed or produced by any of the processes mentioned in sections 28 and 29 of this Act, or of plates or mediums of any kind for making copies thereof (although authorized by the author or proprietor of any foreign copyright), except used copies, shall be, and is, hereby prohibited after a registration of a claim to copyright or rights under section 36 of this Act and deposit of two copies of the American edition: *Provided, however,* That such prohibition shall not apply—

(a) To any work published in the country of origin with the authorization of the copyright proprietor, when imported not more than once copy at a time for use and not for sale or hire for profit, in good faith, by or for any person, library or branch thereof, school, college, society or institution incorporated for educational, literary, philosophical, scientific, or religious purposes, or for the encouragement of the fine arts; provided the proprietor of the United States copyright of such work has, within ten days after written demand, declined or neglected to agree to supply the copy demanded at a price equivalent to the foreign price thereof and transportation charges, plus customs duties when subject thereto, or provided that at the date of the order of such copy for importation no registration and deposit of copies of the American edition have been made as aforesaid;

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(c) To works which form parts of libraries or collections purchased en bloc for the use of societies, institutions, or libraries designated in the foregoing paragraph (a), or form parts of the libraries or personal baggage belonging to persons or families arriving from foreign countries and are not intended for sale;

(d) To a foreign newspaper or magazine, although containing matter copyrighted in the United States printed or reprinted by authority of the copyright proprietor, unless such newspaper or magazine contains also copyright matter printed or reprinted without such authorization;

(e) To motion pictures and motion-picture photo plays;

(f) To the authorized edition of a book on a foreign language or languages;

(g) To works in raised characters for the use of the blind;

(h) To works imported by the authority or for the use of the United States:

Provided, further, That copies imported as above may not lawfully be used in any way to violate the rights of the proprietor of the American copyright or annul or limit the copyright protection secured by this Act, and such unlawful use shall be deemed an infringement of copyright.

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HENRY WADE ROGERS

It is with great sorrow that the Journal reports the death of Judge Henry Wade Rogers on August 16, 1926. Judge Rogers was the dean of the Yale Law School from 1903 to 1916. His methods and his personality indelibly stamped themselves upon

the minds of all the students in the School during that period. Prior to his appointment by President Wilson as Judge of the United States Circuit Court of Appeals in 1913, the work of Judge Rogers had been almost wholly that of an educator. He had served for long periods as professor and dean of the University of Michigan Law School and as president of Northwestern University. At the Yale Law School he was held in affectionate esteem not unmixed with awe by all the students. None can fail to have a most lively remembrance of his vigor and impressiveness in the classroom. Many, indeed, thought that he was too exacting in his requirements.

When Judge Rogers was appointed dean, the Yale Law School and the development of legal education in the country had reached such a stage as to call for certain important changes in law school policy. The reasons for such changes were given ringing expression in the reports made by him to the American Bar Association as chairman of its Committee on Legal Education. Under the existing requirements for admission, the Yale Law School was growing so rapidly in numbers that in a very few years it must have rivaled the very largest of the unwieldy commercial law schools of today. No one at Yale was desirous of such a development; and, acting in harmony with the whole faculty and the corporation, Judge Rogers very courageously sacrificed the huge expected income from tuition and adopted the requirement of college work for admission to the School—first two years and very shortly afterwards a complete college course. Judge Rogers was never accused of lack of courage.

The law faculty in 1903 was composed almost wholly of practicing lawyers and judges. The increasing complexity of our national life was already calling for greater specialization and concentration of effort. Law teaching and research had become an independent profession. During the administration of Dean Rogers, the character of the faculty was almost wholly changed. Judge Rogers was not generally believed to be very diplomatic in his methods; but it can be said of him that in this development—one that in many other schools caused such heart-burning as to burst out into violent conflict—he brought about the result without any serious amount of resentment.

By the time of Dean Rogers the case method of instruction had established itself as far superior to methods previously used. The Dean recognized this fact and he acquiesced and assisted in the formal recognition of the case system in this School. This was in spite of the fact that he regretted the necessity of making the change in his own courses.

In these ways Judge Rogers greatly influenced the history of

the Yale Law School. Without making a marked impression himself in the field of legal scholarship, he fostered scholarship in others and as a teacher and administrator left his impress upon the lives and characters of all with whom he came in contact. The Law School owes much to the services of Judge Rogers as dean.

As a member of the United States Circuit Court of Appeals Judge Rogers won the esteem of the bar. He was an arduous worker and his opinions show his fondness for searching and accumulating the authorities.

THE RENVOI THEORY REJECTED—EXCEPTIONS

The law of every state includes a domestic or internal law which applies to local situations, and a body of law which is applicable in situations involving a foreign element. The latter is commonly referred to as the conflict of laws rule. Where a foreign state is the place of domicile, or the place where the contract was made, or the situs of the property, the conflict of laws rule of the forum may require that the "law" of the foreign state be applied. Does this reference to foreign "law" mean a reference to the local law of the foreign state, or does it mean a reference to the conflict of laws rule of that state? If the latter, then the court of the forum has accepted what is known as the *renvoi* doctrine.[1]

The answer to this problem depends upon the basic theory of the conflict of laws. According to some authorities each state possesses exclusive jurisdiction to control the legal consequences of facts occuring within that state.[2] This theory has been inappropriately called a theory of vested rights.[3] That this is a misnomer becomes apparent upon a careful analysis of the legal concept of "right." [4] No right exists unless a court will recognize

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[1] Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country"* (1917) 27 YALE LAW JOURNAL, 509, 511; HIBBERT, INTERNATIONAL PRIVATE LAW (1917) Introduction, xxix. When the conflict of laws rule of the second country refers back to the law of the forum it is called remission (*Rückverweisung*); but if the reference is to the law of a third country it is termed transmission (Weiterverweisung).

[2] STORY, CONFLICT OF LAWS (8th ed. 1883) § 20; BEALE, TREATISE ON THE CONFLICT OF LAWS (1916) 100, 104–105. But see Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE LAW JOURNAL, 457; Guinness v. Miller, 291 Fed. 769, 770 (D. N. Y. 1923).

"In the very nature of things courts can enforce no obligations which are created elsewhere; when dealing with such obligations they merely recognize them as the original of the copies which they themselves enforce." Learned Hand, J. in The James McGee, 300 Fed. 93, 96 (S. D. N. Y. 1924).

[3] BEALE, *op. cit. supra* note 2, at 104 *et seq.*

[4] For an analysis of this concept *cf.* HOHFELD, FUNDAMENTAL LEGAL

and enforce it as such. If, therefore, the theory of vested rights be accepted, we should expect, when the court of the forum says that the "law" of the place of contracting, or of the testator's last domicile, or of the situs of the property must be invoked, it means only that the court of the forum will enforce the same right the court of that foreign state would have enforced in the identical situation before the court of the forum. According to this theory of vested rights, the court of the forum cannot create rights in respect to facts occurring in that foreign state; it must recognize and enforce only the "rights" created by the law of a foreign state.[5] But does the court of the forum actually enforce rights vested by the foreign law, or does it create rights which the foreign law would not grant, rights which do not exist in that foreign state? Does it enforce the conflict of laws rule applicable in that foreign state, or does it enforce some new legal relation created by the court of the forum?

Let us note to what extent the courts of the forum have looked to the conflict of laws rule of the foreign state. The *renvoi* problem came first into prominence on the continent as a result of the *Forgo* case,[6] decided by the French Court of Cassation. In that case it was accepted. France, Belgium, Spain and Portugal seem to have adopted *renvoi;* but it has been rejected in Italy and Switzerland.[7] It has been recognized also in the German Code.[8] Authorities disagree, however, as to whether or not England should be classified as a *renvoi* state. Dicey[9] and Westlake[10] have stated that *renvoi* has become imbedded in the English law.[11] On the other hand, this view is questioned by Sir Freder-

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CONCEPTIONS (1923) 65; Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL, 169.

[5] See the statement of the problems of the conflict of laws in BEALE, CONFLICT OF LAWS (1916) § 77–78; Cook, *op. cit. supra* note 2, at 459; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE LAW JOURNAL, 736.

[6] In re Forgo, 8 Clunet, 61 (1881); *aff'd* 10 Clunet, 64 (1883).

[7] Lorenzen, *The Renvoi Theory and the Application of Foreign Law* (1910) 10 COL. L. REV. 190, 194; Schreiber, *Doctrine of Renvoi in Anglo-American Law* (1917) 31 HARV. L. REV. 523; LORENZEN, CASES ON CONFLICT OF LAWS (2d ed. 1924) 843, note 11.

[8] See articles cited *supra* note 7. It has been recognized by the German Code expressly with respect to capacity, marriage, matrimonial property, divorce, and succession, provided the foreign law refers back to German Law. Article 27, INTRODUCTORY ACT, CIV. CODE. It has been applied to the relations between parent and child. Imperial Court, Dec. 29, 1910, 8 *Revue de Droit International Privi et de Droit Penal International* 138, and it has been extended even to a case where the foreign law, instead of referring to the German law referred to the law of another state. Imperial Court, Nov. 8, 1917, *Juristische Wochenschrift* (1918) 173.

[9] DICEY, CONFLICT OF LAWS (3d ed. 1922) 771, 776.

[10] WESTLAKE, PRIVATE INTERNATIONAL LAW (7th ed. 1925) 25, 42.

[11] BENTWICH, THE LAW OF THE DOMICILE IN ITS RELATION TO SUCCESSION

ick Pollock.[12] In none of the English cases prior to the recent case of *Davidson v. Annesley* [1926] 1 Ch. 692,[13] was the problem plainly presented and squarely met.[14] In this case, Mr. Justice Russel said:[15] "When the law of England requires that the personal estate of a British subject, who dies domiciled according to the requirements of English law in a foreign country, shall be administered in accordance with the law of that country, why should this not mean in accord with the law which that country would apply, not to the *propositus*, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France we mean that French municipal law which France applies in the case of Frenchmen." *Renvoi* was, therefore, frankly rejected as it was in the case of *In re Tallmadge*,[16] which was the first American decision in

(1911) c. 8, favors it so far as the law of domicile is concerned. This conclusion, however, has been questioned. Abbot, *Is the Renvoi a Part of the Common Law* (1908) 24 L. Q. REV. 133, 135; Lorenzen, *op. cit. supra* note 7, at 332–344. Schreiber, *op. cit. supra* note 7, at 537; BATE, NOTES ON THE DOCTRINE OF THE RENVOI (1904) 9, 77, 108–120; BATY, POLARIZED LAW (1914) 115–120.

[12] *The Renvoi in New York* (1920) 36 L. Q. REV. 91, 92.

[13] Here an English testatrix had, according to the English law, become domiciled in France. She left a will disposing of movables in England. According to French international law, one having a *de facto* domicile in France and leaving surviving children, could not dispose of more than two-thirds of his movables by will. The French conflict of laws rule referred the validity of the will to the law of that person's nationality. *Held*, that the French internal law should be looked to in the first instance.

[14] In the following English cases the problem of *renvoi* was involved: De Bonneval v. De Bonneval, 1 Curt. 856 (Prerog. 1838); Collier v. Rivaz, 2 Curt. 855 (Prerog. 1841); Maltass v. Maltass, 1 Rob. 67 (Prerog. 1844); Frere v. Frere, 5 Notes of Cases, 593 (Prerog. 1847); Bremer v. Freeman, 10 Moore P. C. 306 (P. C. 1857); Hamilton v. Dallas, L. R. 1 Ch. D. 257 (1875); In re Goods of Lacroix, 2 P. D. 94 (1877); In re Trufort, 36 Ch. D. 600 (1887); Abd-ul-Messih v. Farra, 13 App. Cas. 431 (1888); In re Goods of Brown—Sequard, 70 L. T. R. (N. S.) 811 (Prob. 1894); In re Johnson [1903] 1 Ch. 821; In re Baines, unreported, decided March 19, 1903 by Mr. Justice Farwell; Armitage v. Attorney General [1906] P. 135; In re Bowes, 22 T. L. R. 711 (1906); Guarantee Trust Co. v. Hanna & Co., [1918] 1 K. B. 43.

The conclusion in Hamilton v. Dallas was opposed to *renvoi*. The dictum in Re Johnson favors *renvoi*, but it is believed that in that case the court was not only mistaken as to the law relative to domicile, but was not fully aware of the implications involved in *renvoi*. None of the decisions were rendered by a higher court. Bremer v. Freeman was a Privy Council decision. This case, however, cannot be said to contain a clear holding on the subject of *renvoi*. See cases collected and discussed by Lorenzen, *op. cit. supra* note 7.

[15] At 709.

[16] 109 Misc. 696, 181 N. Y. Supp. 336 (Sup. Ct. 1919).

which the *renvoi* doctrine was clearly presented and understood.[17]

Theoretically, it would be impossible to decide any case under the *renvoi* doctrine, for the court of the forum cannot decide the case as though it were sitting as a court of the foreign state.[18] Thus, in the instant case, the English conflict of laws rule requires that the law of the domicile—France—be applied. A French court would have applied its conflict of laws rule—namely that the law of the nationality—England—governs. But the English conflict of laws rule would refer the case back to the conflict of laws rule of France which in turn would refer the matter again to English law. Cases which have purported to apply the *renvoi* doctrine have generally considered that the reference back to the law of nationality is to internal and not to the conflict of laws rule.[19]

Renvoi has been applied in two situations in this country, and then only to reach a result dictated by policy. In one a divorce was secured in a foreign jurisdiction under such circumstances that it would not otherwise have been a valid divorce according to the conflict of laws rule of the forum;[20] in the other a marriage took place which would not have been valid[21] unless the conflict of laws rule of the place of celebration had been invoked. To these two instances should be added a third. When the conflict of laws rule of the situs of real property will recognize the valid-

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[17] Schreiber, *op. cit. supra* note 7, 523, 565 *et seq.* collects the cases in which it has been suggested that *renvoi* might have arisen. The cases are Dupuy v. Wurtz, 53 N. Y. 556 (1873); Harral v. Harral, 39 N. J. Eq. 279 (1884); Lando v. Lando, 112 Minn. 257, 127 N. W. 1125 (1910); Guernsey v. Imperial Bank of Canada, 188 Fed. 300 (C. C. A. 8th, 1911); Bell v. Riggs, 34 Okla. 834, 127 Pac. 427 (1912). In only one of these, Lando v. Lando, was the problem really involved, but it was not discussed as such in the opinion. In that case the court in sustaining a marriage incidentally attempted to apply a supposed conflict of laws rule. The decision proceeds upon a rather obvious mistake as to the meaning of the German Code (art. 13, Introductory Act). The later cases of Ball v. Cross, 231 N. Y. 329, 132 N. E. 106 (1921), and Dean v. Dean, 213 App. Div. 360, 210 N. Y. Supp. 695 (4th Dept. 1925) applied *renvoi* in order to secure greater uniformity in the recognition of the marriage status. These decisions are found expedient in the states adopting the *in personam* theory of divorce. For a discussion of New York and Pennsylvania cases see (1926) 35 YALE LAW JOURNAL, 372.

[18] See Collier v. Rivaz, *supra* note 14, at 862.

[19] Carried to its logical conclusion there would be a never ceasing reference between the courts of the countries involved. Westlake, *loc. cit. supra* note 10, explains the final conclusion by the *desistement* theory *i.e.*, that since both courts refuse to accept jurisdiction of the case at hand, the court of the forum must of necessity decide the matter. This theory is criticized by Schreiber, *op. cit. supra* note 7, at 530.

[20] Ball v. Cross, *supra* note 17.

[21] Lando v. Lando, *supra* note 17.

ity of a transfer of that realty, it is not for the court of the forum to hold that that rule should be inapplicable.[22]

In an attempt by supporters of the vested rights theory to rationalize these exceptions,[23] it was said that they might be explained on the ground that they fall within the category of the "rights" which are vested by a foreign law, and which must therefore be recognized and enforced by the court of the forum. According to this view, only where the law of the forum itself creates the right, *i.e.*, where the property is in the state of the forum, should the law of the forum be regarded as referring merely to the local law of the foreign state, exclusive of its rules of the conflict of laws. This would lead to the application of *renvoi* in all contract and tort cases for a right created by a foreign law is created by the totality of that law—the internal and the conflict of laws rules—and the proper enforcement of the right thus created requires that the forum apply the totality of the foreign law including its conflict of laws rule. But there is no decision in any country extending the *renvoi* doctrine to such cases where the operative facts occur outside of the forum. Nor does the restatement of the conflict of laws,[24] which purports to accept the theory of vested rights as the basis of the conflict of laws, go so far as the above "rationalization," for it rejects *renvoi* in general, including cases of contract and tort, and limits its application to questions of "status" and of "title" to land.

From the standpoint of the theory of vested rights, a case should logically be decided in all instances as the court of the foreign state which is deemed to have created the right would enforce it. If the court of the forum enforces some right other than the right which the court of the foreign state would enforce, it is a misnomer to speak of the recognition and enforcement of a foreign created *vested* right. It is singular, therefore, that the restatement should reject the *renvoi* doctrine and allow it only

[22] The problem was at issue in Re Baines, unreported, decided March 19, 1903 by Mr. Justice Farwell. A digest of the case is found in Schrieber, *op. cit. supra* note 7, at 558.

[23] (1921) 35 HARV. L. REV. 454.

[24] (1926) THE AMERICAN LAW INSTITUTE, CONFLICT OF LAWS RESTATEMENT NO. 2:

§ 7. Except as stated in § 8, if a right alleged to have been created in one state is brought in question in a court of another state, its existence will be determined by that court, applying only such part of the law of the first state as determines in that state the creation of similar rights involving no question of foreign law.

§ 8. If a question of status or of title to land is to be determined, the court first decides in accordance with its own conflict of laws, by the law of what state the existence of the status or of the title is to be determined and it then decides the question as it would be decided by a court of that state.

by way of exception in two classes of cases. The only view adequate to do justice to the manifold situations arising in the conflict of laws and consistent with true analysis is that the law of the forum recognizes and enforces in all cases only rights created by itself. Whether it will take into consideration the foreign local law or the foreign law inclusive of its conflict of laws rules in cases involving foreign elements becomes then only a question of justice and expediency. From this viewpoint it would seem that, generally speaking, it is best to say that the court of the forum creates rights only in accordance with the internal law of the foreign state; and that only in particular cases, where certainty in the law is thereby promoted, or some other proper result dictated by policy is thereby attained, should the right be created in the same manner as the foreign court would have created it, that is, with reference to the foreign conflict of laws rule.

ADMISSIBILITY OF STATEMENTS AGAINST PENAL INTEREST

The decisions that arbitrarily limit the recognized exception to the hearsay rule to statements against pecuniary or proprietary interest have been widely criticised.[1] The consequent exclusion of extra-judicial declarations against penal interest has been deplored as illogical and inconsistent. The elements that are deemed to take a statement against pecuniary interest out of the realm of inadmissible hearsay are also present if the statement is against penal interest.[2] It was this fact that moved Mr. Justice Holmes to write his *dissenting* opinion in the *Donnelly* case,[3] when the United States Supreme Court rejected testimony tending to show that a third person, then dead, had previously confessed to the crime for which the defendant was held.

Courts in this country have, nevertheless, very generally followed the English rule[4] which was adopted in the *Donnelly* case. But little or no attempt is made to justify the rule. Some

[1] 3 WIGMORE, EVIDENCE (2d ed. 1923) §§ 1476–1477 (discussing the historical background of the rule); (1925) 35 A. L. R. 441 (note on Hines v. Commonwealth); Ann. Cas. 1913 E, 723 (disapproving Donnelly v. United States); (1913) 26 HARV. L. REV. 755; (1923) 37 HARV. L. REV. 156; (1923) 10 VA. L. REV. 83.

[2] Wigmore, *op. cit. supra* note 1, § 1477; Mr. Justice Holmes, *dissenting* in Donnelly v. United States, 228 U. S. 243, 277, 33 Sup. Ct. 449, 461 (1913).

[3] *Supra*, note 2.

[4] Goodwin v. State, 161 Ark. 266, 255 S. W. 1095 (1923); West v. State, 155 Ga. 482, 117 S. E. 380 (1923); Factor v. State, 229 Pac. 154 (Okla. Cr. App. 1924) (in this case, however, the declarant was a co-defendant). For a collection of cases see (1925) 35 A. L. R. 441, note. The Massachusetts hearsay law, [Mass. Gen. Laws (1921) c. 233, §65], apparently cannot be used in criminal cases as a basis for admitting statements against penal interest. See Commonwealth v. Stuart, 207 Mass.

courts simply cite cases;[5] others advert to the objections raised against hearsay generally.[6]

This weakness of cases invoking the rule in the *Donnelly* case was recently illustrated when in *Moya v. People*, 244 Pac. 69 (Colo. 1926), the question was before the Supreme Court of Colorado for the first time. In this case the defendant was charged with statutory rape of a girl fifteen years old. The lower court refused to admit testimony tending to show that one Galveston, who was out of the jurisdiction at the time of the trial, had admitted causing the pregnancy of the complaining witness. The defendant was convicted and sentenced to a term in the penitentiary. The Supreme Court affirmed the conviction on the ground that the alleged admission by Galveston was not within a valid hearsay exception. The court frankly observed that ". . . logically there is no distinction between declarations of third parties of pecuniary or proprietary character, and declarations of criminal liability."[7] But it nevertheless felt compelled by some vague notion of "comity" (said to exist between state and federal courts) to follow the *Donnelly* case.

It is difficult, however, to approve of the court's policy in this case. Uniformity between the laws of two jurisdictions is desirable when it serves to obviate certain obstacles that arise in inter-jurisdictional affairs. But the question in this case was one of purely local concern,[8] and furthermore, a deferential attitude of a state court is indeed empty, when in the same opinion the court declares itself incapable of giving any rational explanation of the view it is adopting. Thus has there been recorded one more contradiction to Mr. Justice Holmes's observation that "the rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law."[9]

563, 568, 93 N. E. 825, 827 (1911); Commonwealth v. Wakelin, 230 Mass. 567, 575, 120 N. E. 209, 212 (1918). In states following the English rule the fact that the declaration was made on the death bed does not create an exception to the rule. West v. State, 76 Ala. 98 (1884); Davis v. Commonwealth, 95 Ky. 19, 23 S. W. 585 (1893). If the declarant is available at the time of the trial, the necessity for an exception to the hearsay rule does not arise. 3 WIGMORE, *op. cit. supra* note 1, §§ 1456, 1476. *Cf.* Goodwin v. State, *supra*, where, although no mention was made of the fact, it appeared that the declarant was available.

[5] Goodwin v. State, *supra* note 4; West v. State, 155 Ga. 482, 117 S. E. 380 (1923); Factor v. State, *supra* note 4.

[6] Donnelly v. United States, *supra* note 2.

[7] 244 Pac. at 69.

[8] Justice Holmes in his *dissenting* opinion in the Donnelly case disapproved a similar attitude by the Supreme Court with respect to English precedents.

[9] *Dissenting* opinion, Donnelly v. United States, *supra* note 2, at 277, 33 Sup. Ct. at 461.

Moya v. People represents the latest exposition of the majority view,[10] but a counter development is reflected in a still more recent case, *Brennan v. State*, 134 Atl. 148 (Md. 1926). In that case the defendant was charged with bastardy. It appeared that the complaining witness had directly testified that the defendant was the father of her child. The lower court refused to admit evidence offered by the defense to show the following points: (1) that a third man had committed suicide on the day the child was born; (2) that on the body was found a letter in the man's own handwriting, admitting that he was the father of the child and giving as the cause of his suicide, threats that had been made against him because of his responsibility for the pregnancy of the prosecuting witness (the letter had been lost at the time of the trial); (3) that sometime prior to his death this same man had told his sister that he was the father of the unborn child and had asked her for money with which to procure an abortion on the complaining witness. On appeal it was held that evidence of the third man's suicide and of the letter in his handwriting which contained a confession of responsibility should have been admitted. It was also held that the verbal admission made to his sister before his death might be proved to corroborate the letter and the alleged cause of the suicide. The court based its decision on the ground that the facts in the case were sufficiently unusual to warrant a departure from the majority rule in force in that state.[11] Yet the court declared that it was in no way questioning or overruling the Maryland cases which held that extrajudicial statements against penal interest were inadmissible.[12]

The significance of this case as representing the most pronounced departure from the majority rule since its adoption in the *Donnelly* case, is better understood after a consideration of

[10] A concise yet cogent *dissenting* opinion in the Moya case was written by Justice Denison, with whom Justice Adams concurred. Justice Denison cited Hines v. Commonwealth, 136 Va. 728, 117 S. E. 843 (1923) of which no mention was made in the majority opinion. Since the question was before the Colorado court for the first time, Justice Denison's intelligent views might well have beeen adopted.

[11] The Court said, "With these unusual circumstances surrounding this proposed testimony and safeguarding it against the dangers of fraud and perjury which are generally urged against similar evidence, we think it should have been admitted." 134 Atl. at 151.

[12] It is seriously to be questioned that the majority view ever was squarely adopted in Maryland. Munshower v. State, 55 Md. 11 (1880) cited as the leading case, involved an extrajudicial statement, but it appeared that the declarant was available at the time of the trial. Bachr v. State, 136 Md. 128, 110 Atl. 103 (1920) uttered the majority rule, but relied on the Munshower case. The Maryland court in the Brennan case did not cite Hines v. Commonwealth, the leading case in its neighboring state, Virginia.

other cases that also have questioned the soundness of the majority rule. For a number of years Texas has in certain cases recognized the probative force of declarations against penal interest.[13] Courts in that state hold that it is permissible for the defendant to prove such declarations whenever the state's case against him is purely circumstantial.[14] The reason for thus limiting the use of the declarations seems to be that in those cases the danger of an unjust conviction is more immediate.[15]

Several years after the *Donnelly* case was decided, the supreme court of Virginia[16] held admissible the confession of one Jenkins that he had killed the man for whose murder the defendant had been tried. The declarant was dead at the time of the trial. Dicta in the case show a general disapproval of the ruling in the *Donnelly* case, but the court, apparently reluctant categorically to repudiate a holding of the federal Supreme Court, expressly confined its decision to the particular facts in the case before it.[17] The result was that the case became authority for the use of an extra-judicial declaration against penal interest only where

[13] Blocker v. State, 55 Tex. Cr. App. 30, 114 S. W. 814 (1908). Earlier cases admitted declarations against penal interest when they constituted a part of the so called *res gestae*. Martin v. State, 33 Tex. Cr. App. 317, 26 S. W. 400 (1894) (in that case the statement was admitted as evidence *against* the defendant). This practice was followed in some other jurisdictions and, it appears, was not confined to criminal cases. Masons Fraternal Accident Association v. Riley, 65 Ark. 261, 45 S. W. 684 (1898). In Coleman and Lipscomb v. Frazier, 4 Rich. L. 146 (S. C. 1850), a declaration against penal interest was freely admitted without question of its difference from a statement against pecuniary interest.

[14] Blocker v. State, *supra* note 13. But the Texas courts refuse to extend the rule beyond that situation. Greenwood v. State, 84 Tex. Cr. App. 548, 208 S. W. 662 (1919); Wise v. State, 101 Tex. Cr. App. 58, 273 S. W. 850 (1925); Stone v. State, 98 Tex. Cr. App. 364, 265 S. W. 900 (1924). The Texas cases also hold that the declaration must exculpate the defendant. Bates v State, 99 Tex. Cr. App. 647, 271 S. W. 389 (1925); Hughes v. State, 101 Tex. Cr. App. 540, 276 S. W. 239 (1925). But even that is, of course, insufficient if the statement does not at the same time incriminate the declarant. Beckham v. State, 101 Tex. Cr. App. 487, 276 S. W. 240 (1925). Other limitations on the Texas rule arise out of more general questions of policy in dealing with the hearsay question. Thus, the extrajudicial declaration of a co-defender will not be admitted. Staton v. State, 93 Tex. Cr. App. 356, 248 S. W. 356 (1923). Accord: Spurgeon v. State, 160 Ark. 112, 254 S. W. 376 (1923). Similarly the statement is excluded where the declarant is claimed by the state to be the defendant's accomplice. McCoslin v. State, 96 Tex. Cr. App. 175, 256 S. W. 294 (1923). The confession of a husband to his wife is excluded as a privileged communication. Pace v. State, 61 Tex. Cr. App. 436, 135 S. W. 379 (1911).

[15] The Donnelly case appears to have had no influence in the Texas decisions. In McDowell v. State, 96 Tex. App. 512, 258 S. W. 186 (1924), the court stated the Texas rule in too general terms.

[16] Hines v. Commonwealth, *supra* note 10.

[17] 136 Va. at 747, 117 S. E. at 848.

the state's evidence against the defendant was circumstantial and where the confession itself was corroborated by other competent evidence.

It is to be noted that the *Brennan* case goes much farther in a repudiation of the majority view than either the cases in Texas, or the Virginia case. Since the complaining witness in the *Brennan* case directly testified against the defendant, it does not require that the evidence against the defendant be merely circumstantial. Furthermore, nothing was said about the necessity for a corroboration of the declaration, other than that certain evidence otherwise inadmissible might be received because it tended to support the declaration in question.

In extending the rule in favor of declarations against penal interest beyond circumstantial cases, the *Brennan* case has, it is submitted, made a satisfactory step toward a complete ratification of those declarations as valid hearsay exceptions. If a declaration against penal interest is deemed sufficiently trustworthy ever to be an exception to the hearsay rule, it should be admitted as freely as a statement against pecuniary interest. The probative quality of the declaration cannot be affected by the character of the state's testimony. If the declaration is false, it ought not to have weight in any case; but the tests of its truth are those to be applied to any exception to the hearsay rule, and not the varying weight of evidence on the other side.

While the *Brennan* case unquestionably has improved the rule, it is difficult to foretell what will be its effect upon the law in Maryland. The decision purports not to overrule earlier cases which were said to uphold the majority view. Yet the basis for its refusal to follow them, namely, "the unusual circumstances surrounding the proposal testimony," might be urged in almost any case. What the court seems really to have decided is that the admission of a declaration against penal interest is a matter within the discretion of the court. This solution of the problem has been suggested before,[18] and is often resorted to as the most efficacious method of dealing with other questions of admissibility.[19] But even that view falls short of the result ultimately to be desired, that the declaration, as a matter of law, be placed on the same footing as a statement against pecuniary interest.

THE DEPRECIATION PROBLEM IN RATE MAKING

The constitutional guarantee of immunity from confiscation of property without due process of law has been interpreted as protecting the privilege of a public utility to earn a fair return

[18] (1923) 37 HARV. L. REV. 156.

[19] 1 WIGMORE, *op. cit. supra* note 1, § 16.

on "the fair value of the property being used by it for the convenience of the public." [1] This has brought many of the administrative problems of rate fixing before the courts for review. Since the problem is to limit earning capacity so that there shall be no more than a fair return upon the value of properties, it is obvious that such "value" cannot be ascertained in the customary way by determining earning capacity.[2] Courts and commissions have, therefore, been forced to base their estimates as to present value on two[3] conflicting tests (as evidence of it), "cost of reproduction minus depreciation" [4] and "actual prudent investment." [5] This controversy complicates the problem of depreciation.

There are two aspects to the problem of depreciation in rate making. How much shall be allowed for it as an operating expense? What significance has it as an element in determining the rate base? These questions are closely connected and the answer given to them depends on the choice made as to the basis for valuation.

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[1] Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418 (1898).

[2] The most common conception of value is *"worth* on the market with reference to sale and exchange." Bauer, *Valuation of Public Service Properties* (1915) 30 POL. SCI. QUART. 254 at 256. As value, in the case of corporations, is largely dependent on the rate of return, a "vicious circle" is established if rates are made dependent on it. *Cf.* Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. 389 (1912); Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729 (1913); Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 Sup. Ct. 811 (1915); Hale, *Pseudo Protection of Property In Rate Cases* (1925) 24 MICH. L. REV. 166; Hale, *The "Physical Value" Fallacy in Rate Cases* (1921) 30 YALE LAW JOURNAL, 710; Henderson, *Railway Valuation and the Courts* (1920) 33 HARV. L. REV. 902, 1031; Richberg, *A Permanent Basis For Rate Regulation* (1922) 31 YALE LAW JOURNAL, 263.

[3] The value of service has been suggested as a test but it is criticised as too indefinite. Edgerton, *Value of Service as a Factor in Rate Making* (1919) 32 HARV. L. REV. 516. There are also other theories which are variations of those mentioned.

[4] This is favored by the courts as the chief element for consideration. Minnesota Rate Cases, *supra,* note 2; Galveston Electric Co. v. Galveston, 258 U. S. 388, 42 Sup. Ct. 351 (1922) (cost of reproduction based on theoretical "normal" price level not the current one); Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm., 262 U. S. 276, 43 Sup. Ct. 544 (1923); Bluefield Co. v. Public Service Comm., 262 U. S. 679, 43 Sup. Ct. 675 (1923); Ohio Utilities Co. v. Public Utilities Comm., 267 U. S. 359, 45 Sup. Ct. 259 (1925). See also Brown, *The Defects in Mr. Justice Brandeis's Theory of Prudent Investment as a Rate Base* (1924) 12 CALIF. L. REV. 283; Dorety, *The Function of Reproduction Cost in Public Utility Valuation and Rate Making* (1923) 37 HARV. L. REV. 173.

[5] For this point of view see BAUER, EFFECTIVE REGULATION OF PUBLIC UTILITIES (1925); Hale, *op. cit. supra* note 2; Henderson, *op. cit. supra* note 2; Richberg, *op. cit. supra* note 2; Whitten, *Fair Value For Rate Purposes* (1914) 27 HARV. L. REV. 419; (1923) 32 YALE LAW JOURNAL, 390; (1921) 19 MICH. L. REV. 849.

Some, who advocate using the cost of reproduction minus depreciation, urge that a charge to operating expenses for depreciation should be permitted to cover only the current cost of replacement as the need arises.[6] Depreciation is made to include only deferred maintenance, or that degree of deterioration which impairs the present efficiency of the equipment. From the point of view of cost of reproduction, this is sufficient to maintain the present service value of the plant, because an old plant maintained in good condition has the same present capacity as a new plant. This replacement fund system also relieves the public of the expense of maintaining a depreciation reserve. If this method is used, the additional factor of depletion must be taken into consideration; in order to repay the owners for property used there must be an added payment when part of the corpus of the property is taken out and cannot be replaced.[7] Separate funds must be reserved for replacement of equipment and for depletion of irreparable goods.[8] This depletion would have to be paid for at original cost.[9]

The other method of allowing for depreciation is to have a "depreciation reserve" which charges enough to operating expenses to cover the cost of the per cent. of the total life that has probably been consumed during the period, or the "accrued depreciation." [10] From the point of view of the "actual prudent investment" theory, this is necessary to maintain the value, because although the equipment is in good condition, when part of the probable life is over, so much of the original investment

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[6] Consolidated Gas Co. of New York v. Newton, 267 Fed. 231 (S. D. N. Y. 1920), *aff'd*, 258 U. S. 165, 42 Sup. Ct. 264 (1922); Springfield Gas & Electric Co. v. Public Service Comm. of Missouri, 10 Fed. (2d) 252 (W. D. Mo. 1925); see note 15 *infra*.

[7] "Depletion" is the consumption of property that cannot be replaced and should be amortized at the expense of the consumers and not of the owners of the property. "Depreciation" in the narrow sense is the wearing out of equipment which should be replaced. In the broader sense, "depreciation" includes any lessening of the investment. *Cf.* Erie v. Public Service Comm., 278 Pa. 512, 123 Atl. 471 (1924); Pennsylvania Gas Co. v. Public Service Comm. of New York, 211 App. Div. 253, 207 N. Y. Supp. 599 (3d Dept. 1925); United Fuel Gas Co. v. Public Service Comm. of West Virginia, 14 Fed. (2d) 209 (S. D. W. Va. 1926).

[8] United Fuel Gas Co. v. R. R. Comm., 13 Fed. (2d) 510 (E. D. Ky. 1925).

[9] United Fuel Gas Co. v. R. R. Comm., *supra* note 8, at 518. "So far as this factor alone is considered it would seem quite manifest that such amortization or depletion reserve must be calculated upon investment and not upon the present value of the so-called acreage."

[10] "Accrued" depreciation is being used to include both physical and functional depreciation. "Physical, or theoretical, depreciation exists when a given period of the service life of the plant has elapsed. Assuming that the entire period of the service life is ten years, after the lapse of five years theoretical depreciation to the extent of 50 per cent. of the value of

should be written off the books.[11] This reserve thus serves the purpose of both a replacement fund and a depletion fund. Even though reproduction cost is taken as the chief factor in present value, accrued depreciation is sometimes permitted to repay for the deterioration of equipment.[12]

The problem that comes before the courts is usually the extent to which depreciation shall be considered in the rate base, rather than in the operating expenses.

If, as the tendency of the courts now seems to be, chief weight in determining value is to be given to the cost of reproduction,[13] an allowance for depreciation is necessary to bring down the value of the hypothetical new plant to that of the actual old one. If it were possible to reproduce the identical plant in its present condition, depreciation would not be involved in the rate base.[14] Unfortunately, material in the requisite state of wear cannot be obtained. As in the case of operating expenses, there is a controversy among the advocates of the "cost of reproduction minus depreciation," whether only diminution in present capacity shall be subtracted in determining the rate base.[15] In terms of present capacity, "value" would be found by subtracting merely deferred maintenance. But this fails to take into consideration the fact that the total utility of the new plant minus deferred maintenance would be greater than that of the present plant. This

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the plant would exist. . . . Functional depreciation may be distinguished by the fact that equipment in whole or in part may be superseded by more efficient inventions . . ." due to obsolescence, inadequacy, or regulation, when no diminution in the service value has occurred. Kirchman, *The Principle of Competitive Cost in Public Utility Regulation* (1926) 35 YALE LAW JOURNAL, 805 at 815.

[11] "A depreciation reserve designed primarily to protect the integrity of the investment represents roughly the accrued but incomplete depreciation of parts of the property, which for the property as a whole can never be made good by maintenance and replacements." WILCOX, DEPRECIATION IN PUBLIC UTILITIES (1925) 30 *Cf.* BAUER, *op. cit. supra* note 5, at 142 ff.

[12] Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 Sup. Ct. 148 (1909); Miles v. People's Tel. Co., 166 Wis. 94, 163 N. W. 652 (1917); Chicago R. R. v. Ill. Commerce Comm., 277 Fed. 970 (N. D. Ill. 1922); Mobile Gas. Co. v. Patterson, 293 Fed. 208 (N. D. Ala. 1923); Indiana Bell Tel. Co. v. Public Service Comm. of Indiana, 300 Fed. 190 (D. Ind. 1924). But see *supra* note 6.

[13] See *supra* note 4.

[14] VANDERBLUE, RAILROAD VALUATION BY THE INTERSTATE COMMERCE COMMISSION (1920) 40.

[15] Galveston Electric Co. v. Galveston, *supra* note 4; City of Winona v. Wisconsin-Minnesota Light & Power Co., 276 Fed. 996 (D. Minn. 1921); Pacific Tel. & Tel. Co. v. Whitcomb, 12 Fed. (2d) 279 (W. D. Wash. 1926). *Contra;* Minneapolis v. Rand, 285 Fed. 818 (C. C. A. 8th, 1923); Chesapeake and Potomac Tel. Co. of Baltimore v. Whitman, 3 Fed. (2d) 938 (D. Md. 1925); Cincinnati v. Public Utilities Comm., 113 Ohio St. 259, 148 N. E. 817 (1925).

would be taken care of by the future larger charges for the replacement fund.[16] It is submitted, however, that this makes the public pay interest on a higher value than actually exists. Moreover if accrued depreciation is not used, a case is likely to arise where, because of the substitution of more efficient equipment, the plant becomes less valuable[17] and the court will have to admit an "error somewhere, either in theory or application of principle." [18] Whichever measure of depreciation is used in determining the rate base, it should be in terms of present value, not original cost, to be consistent with the measure of value taken,[19] *i. e.* "cost of reproduction less depreciation."

Because of the doubtful character of the early financing of most public utilities, the actual prudent investment theory could not be put into operation in most cases without a preliminary appraisal of the probable original cost.[20] If this appraisal were made, some kind of deduction would have to be made for depreciation as well as addition for replacements and improvements to bring the investment down to date. As it would be a question of how much of the original cost must be written off, the accrued depreciation based on original cost would be the proper measure to be used.[21]

Once this appraisal were made, the problem of depreciation under the "actual prudent investment" theory would be simply a matter of accounting. The charges to operating expense, based on accrued depreciation on the asset side of the ledger, would equal the additions to the capital, as reflected by the de-

[16] "If the proper standard for a 'rate base,' is the present cost of a substitute plant of equal capacity, as I believe, depreciation can be a function of it only in case the allowance for renewals to the plant under consideration will in the future be greater than that of the assumed standard. If the rates allowed in the future include only an allowance for renewals of a new plant, the company will have to abate something from its normal profits because of its extraordinary renewal charges. Theoretically it makes no difference whether this problem is met by giving the plant a smaller value at present because of its future greater renewal charges, and then allowing a higher rate for renewal, or by giving it its present value, based on capacity, and letting it bear its extra renewals out of its normal profits." Consolidated Gas Co. of New York v. Newton, *supra* note 6, at 239.

[17] In Pacific Gas & Electric Co. v. San Francisco, 265 U. S. 403, 44 Sup. Ct. 537 (1924), the company, having patents for equipment for the cheaper production of gas, installed a new plant for less than it would cost to duplicate the old equipment and abandoned the old equipment. The Court held that there would be confiscation unless the patent rights were evaluated at enough to cover the company's loss by obsolescence.

[18] Pacific Gas & Electric Co. v. San Francisco, *supra* note 17, at 415, 44 Sup. Ct. at 540.

[19] Minneapolis v. Rand, *supra* note 15; Michigan Public Utilities Comm. v. Michigan Tel. Co., 228 Mich. 658, 200 N. W. 749 (1924).

[20] BAUER, *op. cit. supra* note 5, at 176.

[21] BAUER, *op. cit. supra* note 5, c. VII.

preciation fund, on the liability side. In this way, the actual investment, the rate base, would remain unchanged by additions out of the depreciation fund because these would be balanced by the deduction for accrued depreciation.[22] Thus there would be no danger of an over—or an under—valuation due to an excessive or an inadequate charge for depreciation.[23]

Such an over—or under—valuation is likely to happen unless the "actual prudent investment" is the rate base. Early corporations did not save any reserves for depreciation. Later, commissions regulated rates so closely that nothing over a replacement fund could be saved. Recently some companies have allowed what seems to be too large an amount for depreciation. In either situation, the use of actual accrued depreciation in determining the rate base places a loss on the present stockholder or on the consumers.[24] Thus it has been suggested that the amount actually saved in the depreciation reserve should be used in determining the rate base.

A similar question came before the Supreme Court in the recent case of *Board of Public Utility Commissioners v. New York Telephone Co.*, No 567, 46 Sup. Ct. 363 (U. S. 1926). The board found that the company had accumulated a credit balance of about seventeen million dollars ($16,902,530) for depreciation, and ordered that future charges for depreciation should be made against the fund, and should be deducted from the amount paid by the public as operating expenses until about a fourth of the fund ($4,750,000) was used up. In effect, the company was ordered to make up any deficiency in a fair return from the excessive depreciation fund. The Court held that this could not be ordered. "The amount, if any, remaining after paying taxes and operating expenses including the expense of depreciation[25] is the company's compensation for the use of its property," the court stated in holding that the company could not be forced to use it to relieve future customers of their obligation to pay a reasonable return on the capital involved.

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[22] BAUER, *op. cit. supra* note 5; WILCOX, *op. cit. supra* note 11, at 31.

[23] Justices Brandeis and Holmes, *dissenting* in Pacific Gas & Electric Co. v. San Francisco, *supra* note 17; *cf.* Chesapeake & Potomac Telephone Co. of Baltimore v. Whitman, *supra* note 15 (valuation was based on an appraisal on 1914 costs, plus subsequent investments; *held*, that an excessive depreciation fund, unless it clearly would never be needed, represented potential depreciation and should be subtracted in finding the rate base).

[24] Hasbrouck, *When Should Depreciation Be Deducted to Find the Rate Making Value of Public Utilities* (1925) 10 CORN. L. Q. 471.

[25] The Court did not define "depreciation," which was to be included as an operating expense, but it did recognize the accounting rule of the Interstate Commerce Commission of making charges "to cover the depreciation in the elements of the plant which for one cause or another will go out of use."

This decision discloses another practical disadvantage of the "cost of reproduction minus depreciation" theory. The difficulty in determining what the depreciation will be leads inevitably to mistaken estimates. If these miscalculations cannot be rectified, as the instant case holds,[26] there is a permanent loss to the public or to the company due to the over—or under—valuation which results from too high or too low a depreciation fund. This makes it especially desirable to have a method of determining the rate base in which the correctness of the determination of depreciation is not so material. As has been shown, by the "actual prudent investment" theory, once an agreement has been reached as to what the "actual" investment was, the allowance for depreciation is merely a bookkeeping matter.

PRIORITIES BETWEEN MORTGAGES AND MECHANICS' LIENS

The lender who takes as security a lien on the land often finds himself in competition with lienors whose interest in the *res* arises by operation of law. The most common and perhaps the most complex of these controversies occurs with respect to the mechanics' liens given to those who enhance the value of the land by services or materials in construction and improvement. These mechanics' liens are wholly statutory, and the legislatures are so prolific with amendments, and the courts so variable in their interpretations of the statutory provisions that the statement of general rules is nearly impossible. Each decision must be studied with strict reference to the statute then in force. But a consideration of the statutes in comparative groups, with an indication of general tendencies to allocate the risks with respect to the contractual lienor, is possible.

There are two types of statutes. In the first, a valid encumbrance on the land before the mechanic's lien attaches is a superior claim on both the land and the buildings subsequently constructed.[1] Strictly following the common law rule that a

[26] This is in accord with the generally accepted rule that past losses or past gains cannot be taken into account to the advantage or to the detriment of the company in determining a fair return. Galveston Electric Co. v. Galveston, *supra* note 4. Certain state commissions have capitalized early losses as "going concern value,"—the Wisconsin rule. Hill v. Antigo Water Co., 3 Wis. Ry. Comm. Rep. 623; see (1925) 23 MICH. L. REV. 670. But see (1923) 32 YALE LAW JOURNAL, 507. It has been suggested that an attempt should be made to equalize deficits and unusual earnings over a longer period than a year. Bauer, *Recent Decisions on Valuation and Rate Making* (1924) 14 AM. ECON. REV. 254 at 256; Ruggles, *Problems of Public Utility Rate Regulation and Fair Return* (1924) 32 JOURN. OF POL. ECON. 543 at 550; Ryall, *Principle of Reparation Applied to Rate Regulation* (1925) 23 MICH. L. REV. 223.

[1] Conn. Gen Stat. (1918) § 5217; N. Y. Cons. Laws (1923) c. 34, § 13;

structure or improvement attached to the land becomes part of the land, the incumbrancer's prior claim absorbs the building, and the mechanic lienor is treated in the same manner as any other subsequent encumbrancer. Regarding policy rather than logic, such a statute seems to present gratuitously to the prior incumbrancer at the expense of the mechanic lienor more security than he had bargained for.

In the second type of statute, the earlier claimant retains his priority as to the land, but the mechanic lienor is preferred as to the building or improvements.[2] The theory underlying these statutes seems to have been borrowed from the common law artisan's lien, which creates a charge on the specific *res* until payment. It rests also on the principle that there is no injustice in preventing the first lienor from appropriating without compensation the services and material of others to enhance his security. He is in the same position that he would have been in if the structure had not been erected. In some states the mechanic is privileged to sell and remove the building;[3] but if a severance of the building is impossible without seriously injuring the structure or the land, the court may order a sale of both the land and the buildings and apportionment of the fund.[4] In others, the only remedy of the mechanic lienor is foreclosure and sale on execution of both the land and the buildings and a division of the fund.[5] The usual measure of apportionment is the extent to which the buildings have enhanced the value of the property, not the original cost of the services or materials or the value of the building considered apart from the land.[6] A serious objection to this procedure is that the prior incumbrancer is forced to foreclose even though his debt may not be due,[7] but it seems to be one of the inevitable risks which he assumes in order to provide an equitable adjustment among the

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R. I. Gen. Laws (1923) § 4346; Blackmar v. Sharp, 23 R. I. 412, 50 Atl. 852 (1901).

[2] Ala. Code (1923) § 8833; Wimberley v. Mayberry & Co., 94 Ala. 240, 10 So. 157 (1891); Colo. Comp. Laws (1921) § 6444; Bitter v. Mouat Lumber & Investment Co., 10 Colo. App. 307, 51 Pac. 519 (1897); Mont. Rev. Code (1921) § 8344; Murray v. Swanson, 18 Mont. 533, 46 Pac. 441 (1896).

[3] Bitter v. Mouat Lumber Co., *supra* note 2; See Wight, *Mechanics' Liens* (1923) 2 TEX. L. REV. 77.

[4] Tower v. Moore, 104 Iowa, 345, 73 N. W. 823 (1898); Joralmon v. McPhee, 31 Colo. 26, 71 Pac. 419 (1903) (brick building).

[5] Ill. Rev. Stat. (1921) c. 82, § 16; Bradley v. Simpson, 93 Ill. 93 (1879).

[6] Bradley v. Simpson, *supra* note 5; Wimberley v. Mayberry, *supra* note 2. In Fidelity Co. v. Dennis, 93 Va. 504, 25 S. E. 546 (1896), it was decreed, however, that the division should not be according to a ratio of proportionate value, but that the estimated value of the land at time of sale should first be deducted and paid to the mortgagee and that the residue should be divided among the mechanics' lien claimants.

[7] (1926) 39 HARV. L. REV. 384.

claimants, especially where severance of the structure is not feasible.

The problem becomes more complicated where the lien of the mechanic is claimed for improvements and not for a new independent structure. The prior incumbrancer's security includes now not only the land but also the buildings as they were without the improvements. A few states allow a severance if that is possible;[8] if not, an apportionment.[9] In this procedure the objection that the prior incumbrancer is being forced to foreclose and is "improved out of his security" becomes all the more serious. To prevent such a result some courts have held that incapability of severance of an improvement destroys the priority of the mechanic's lien.[10]

It must be understood, however, that if the mechanic's lien is the first incumbrance, it attaches to both the land and the building in probably all jurisdictions. Therefore, it is important to know exactly when the mechanic's lien attaches in each case; and for this purpose, priority in time determines the priority in legal operation. There are at least four different points of time from which the lien of the mechanic is held to attach for the purpose of priority over other incumbrancers. (1) It begins with the making of the contract between owner and mechanic for the contemplated building or improvements.[11] Unless recordation of the contract is required, this would seem to be prejudicial to the rights of innocent parties without actual knowledge of the owner's intentions to build on his property. (2) The lien runs from the commencement of the building.[12] The theory is that this fact is sufficiently patent to put any prospective mortgagee on notice that a lien might attach to this property for these improvements.[13] But what is a sufficient commencement of a building within the rule is difficult to answer. Thus, merely piling lumber without any other acts of building is patent

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[8] Cameron v. Trueheart, 165 S. W. 58 (Tex. Civ. App. 1914).

[9] Morrison v. State Trust Co., 274 S. W. 341 (Tex. Civ. App. 1925) (pavement).

[10] Johnson v. Puritan Mining Co., 19 Mont. 30, 47 Pac. 337 (1896) (mining shaft); *cf.* Joyce Lumber Co. v. Wick, 200 Iowa, 796, 205 N. W. 476 (1925) (hardwood floors); Dugan v. Scott, 37 Mo. App. 663 (1889) (painting and glazing).

[11] Paddock v. Stout, 121 Ill. 571, 13 N. E. 182 (1887); Shaughnessy v. Isenberg, 213 Mass. 159, 99 N. E. 975 (1912).

[12] Nixon v. Knights of Pythias, 56 Kan. 298, 43 Pac. 236 (1896); Murray v. Swanson, *supra* note 2. Where each lienor contracts independently with the owner, each lien dates from the commencement of work or furnishing of materials of the particular independent contractor. Welch v. Porter & Co., 63 Ala. 225 (1879).

[13] Behrens Lumber Co. v. Lager, 26 S. D. 160, 128 N. W. 698 (1910).

enough in some states[14] but not in others.[15] The working rules vary in the different states,[16] for it must be remembered that this is a matter of law and not of fact, of constructive notice and not actual notice. (3) The lien of each claimant commences to run from the time that he began to perform his labor or furnish material.[17] This rule causes a great deal of trouble. It is based on the theory that a mechanic's lien is an extraordinary remedy given to protect one who performs labor or furnishes material in a specific *res*, and until he begins to perform the labor or furnish the material he has no claim. But it is even more difficult in this case to determine the commencement of labor or supply than it is in the case of "commencement of the building."

Since by its operation an intervening mortgagee may be inferior to some lien claimants and superior to others, an interesting problem arises where the statute provides that there shall be no priority among the lien claimants as among themselves. The intervening mortgage, whenever it happens to come in during the construction of the building, arbitrarily creates two classes of mechanic lienors, those who began their labor and supply before the mortgage and those who began later. Some courts hold that in such case all the lien claimants are preferred to the intervening mortgagee who could easily discover that a building was in the course of erection.[18] But here again we have our problem of constructive notice by "commencement of the building." Other courts disregard the resulting arbitrary classification of lienors in the face of the statute and allow the mortgagee to intervene.[19] In Connecticut this has been recently en-

[14] See James v. Van Horn, 39 N. J. L. 353, 363 (1877).

[15] Kansas Mortgage Co. v. Weyerhaeuser, 48 Kan. 335, 29 Pac. 153 (1892); *cf.* Middletown Savings Bank v. Fellowes, 42 Conn. 36 (1875) (furnishing lumber and building a fence).

[16] For an extreme holding see the Texas rule that a contract with the architect is the "inception" of the building within the meaning of the statute. Wight, *op. cit. supra* note 3.

[17] Crowell v. Gilmore, 18 Calif. 370 (1861); Cady Lumber Co. v. Miles, 96 Neb. 107, 147 N. W. 210 (1914) (furnishing lumber for a temporary shanty held sufficient); *cf.* Waterbury Lumber & Coal Co. v. Asterchinsky, 87 Conn. 316, 87 Atl. 739 (1913); Ann. Cas. 1916 B, 613.

[18] Gardner v. Leck, 52 Minn. 522, 54 N. W. 746 (1893) (independent contracts); Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 33 S. W. 652 (1895); see *dissent* of Ailshie, J. in Pacific States Savings, Loan & Bldg. Co. v. DuBois, 11 Idaho, 319, 331, 83 Pac. 513, 516 (1905) (independent contracts). In Minnesota, before the Gardner case, *supra*, the problem was worked out thus: a sum equal to the amount of the prior liens was set aside. From the residue the intervening mortgage was paid first, then the amount remaining was added to the amount set aside and divided ratably among the lienors. Finlayson v. Crooks, 47 Minn. 74, 49 N. W. 398, 645 (1891).

[19] Crowell v. Gilmore, *supra* note 17; Pacific States Savings, Loan & Bldg. Co. v. Du Bois, *supra* note 18.

acted by statute.[20] It seems unfortunate that a third party may thus seriously affect the substantive rights of the lienors. (4) In Vermont[21] and New York[22] there is no mechanic's lien without filing. Priorities are determined solely with reference to the date of filing, being strictly analogous to the priorities existing among several mortgagees. Registry may be had at any time after beginning to perform labor or furnish materials.

A few exceptions to the general rules, depending on the purpose for which the mortgage is given, are recognized. Where a mortgage is given for the purpose of paying for improvements. in a state where a subsequent mechanic's lien has a superior claim on the building, the mortgage is prior as to both the land and the buildings with respect to the money actually used to pay for construction.[23] The theory is that the building loan mortgagee is performing a service in the construction of the building just as much as the mechanics who perform labor or furnish materials. It is submitted that a more equitable adjustment would be to equalize the claims of the building loan mortgagee and the mechanic lien claimants as to the building rather than to prefer the mortgagee.[24] Where a mortgage, after the mechanics' liens attached, was used in liquidating a mortgage prior to the mechanics' liens, it has been subrogated to this priority to the extent of the former lien.[25]

An interesting situation arises where a vendee in possession under a contract for the sale of land, either oral or written, begins to build and later, on receiving a conveyance, gives a purchase money mortgage back to the vendor. The result is almost universal that the purchase money mortgagee has a preference; but the cases work out this result by two distinct lines of reasoning. One argument is that a vendor who delivers possession of an estate to a purchaser without receiving the purchase price is given in equity a lien on the land in the nature of a constructive trust to the extent of the amount unpaid, and the later purchase money mortgage is merely a continuation in changed form of the vendor's lien.[26] The idea is analogous to

[20] Conn. Pub. Acts (1925) 3905–6.

[21] Hinckley & Egery Iron Co. v. James, 51 Vt. 240 (1878).

[22] N. Y. Cons. Laws (1923) c. 34, § 38; Paris v. Lawyers' Title Insurance & Trust Co., 141 App. Div. 866, 126 N. Y. Supp. 753 (2d Dept. 1910).

[23] Chauncey v. Dyke Bros., 119 Fed. 1 (C. C. A. 8th, 1902); Joralmon v. McPhee, *supra* note 4; *cf.* Franklin Soc. v. Thornton, 85 N. J. Eq. 37, 95 Atl. 374 (1915).

[24] *Cf.* Ward v. Yarnelle, 173 Ind. 535, 91 N. E. 7 (1910).

[25] First Ave. Coal Co. v. King, 193 Ala. 438, 69 So. 549 (1915). Compare with Joralmon v. MePhee, *supra* note 4, as to subrogation to a former mortgagee's priority.

[26] Malmgren v. Phinney, 50 Minn. 457, 52 N. W. 915 (1892); Neil v. Kinney, 11 Ohio St. 58 (1860); Irish v. Lundin, 28 Neb. 84 (1889).

that of subrogation. The other cases reason from the statutes which provide that the "owner" can subject to a mechanic's lien only the interest which he himself has in the land. The vendee in possession under a contract for the sale of land is said to have an "equitable interest"; this alone is affected.[27] Nor is the mere instantaneous seisin which vests in the vendee between the conveyance by the vendor and the reconveyance by the purchase money mortgage of the vendee, sufficient to have the lien attach.[28] But if the vendee is in possession under an agreement with the vendor that a building is to be erected,[29] or if the vendor has consented to the construction work,[30] or, in a few cases, even if he merely has knowledge that the vendee is building on the land,[31] the mechanics' liens are held to be superior under some sort of an agency relationship by which the vendee can affect the legal interest of the vendor. This agency is apparent where the agreement or consent is express; but mere acquiescence by a seller who has knowledge seems insufficient to create any agency relationship. This is explained, perhaps, on the ground that in the former cases a "contract" with the owner is required by the statute while in the latter "consent" (which may be implied) is all that is necessary.[32]

Up to this point we have been discussing the normal case of a duly recorded mortgage. Now suppose that the mortgagee has failed to record his mortgage. What are his rights as against a subsequent mechanic lienor? In the majority of jurisdictions a mechanic lienor is not a bona fide purchaser for value within the recording statutes, so that the lien of the mortgage begins to run from the time of its execution.[33] But in Arkansas an unrecorded mortgage, although good between the parties, is not a lien on the land as respects third persons until recorded.[34] Under this provision the mechanic's lien has priority.

The majority rule as to recordation often causes a peculiar

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[27] Russell v. Grant, 122 Mo. 161, 26 S. W. 958 (1894); Getto v. Friend, 46 Kan. 24, 26 Pac. 473 (1891); Hickox v. Greenwood, 94 Ill. 266 (1880).

[28] Hillhouse v. Pratt, 74 Conn. 113, 49 Atl. 905 (1901). But where the mortgage for purchase money is to one other than the grantor, there is a sufficient seisin for the liens to attach. (1917) 30 HARV. L. REV. 293.

[29] Jones v. Osborne, 108 Iowa, 409, 79 N. W. 143 (1899); Carew v. Stubbs, 155 Mass. 549, 30 N. E. 219 (1892).

[30] White v. Kincade, 95 Kan. 466, 148 Pac. 607 (1915); Hill v. Gill, 40 Minn. 441, 42 N. W. 294 (1889).

[31] Buckstaff v. Dunbar, 15 Neb. 114, 17 N. W. 345 (1883); *cf.* Allen v. Rowe, 19 Or. 188, 23 Pac. 901 (1890).

[32] JONES, LIENS (3d ed. 1914) §§ 1251, 1254-5.

[33] Fletcher v. Kelly, 88 Iowa, 475, 55 N. W. 474 (1893); Mathwig v. Mann, 96 Wis. 213, 71 N. W. 105 (1897). But if the mortgagee withholds record in order to give his mortgagor a false credit he loses his preference. Maine v. Waterloo Bank, 198 Iowa, 16, 199 N. W. 414 (1924).

[34] O'Neill v. Lyric Amusement Co., 119 Ark. 454, 178 S. W. 406 (1915).

puzzle of three cornered priorities. For example, in *Miller v. Stoddard*,[35] A conveyed to B giving a purchase money mortgage which A failed to record. C began to work on a house. D took a mortgage during the progress of the building which he did record, but which the court, by reason of its rule as to mortgages given during the progress of a building, held inferior to C's lien. D, because of recordation, had a lien superior to the claim of A. The result was as follows: A's lien was prior to C's, C's lien was prior to D's, but D's lien was prior to A's.[36] The court decreed that from the money realized from the foreclosure and sale a sum equivalent to A's mortgage should be set aside. Out of this was to be paid the amount of D's claim, and then the balance to A. As to the remaining fund the mechanic lienors were to take first, then any sum still owing to A, and the residue if any to B, the owner. The mechanic lienors took the risk that there might be an earlier unrecorded mortgage, but not that any mortgage would intervene during the progress of the work, so that they were entitled to a priority on the sum from which the earlier unrecorded mortgage had been deducted. The mortgagee D assumed the risk of inferiority to any lien claimants but not of an unrecorded mortgage, so that as between the mortgagees he should be satisfied first. The purchase money mortgagee risked the recording of a subsequent mortgage but not the attaching of subsequent liens. Working the problem out in this fashion the rights of each claimant seem to be equitably adjusted, but a closer examination of the inherent inconsistency of this combination of priorities will show that the court's conclusion is open to question. An example will serve to illustrate. Suppose the foreclosure sale nets $4500; that A's claim is for $3000; C's for $2000; and D's for $2000. Following the suggested solution, a sum equal to A's claim for $3000 is set aside, and out of this D's $2000 claim is deducted. The courts theory is that A is getting his full "priority" of $3000 with respect to C, but since he is inferior to D for the failure to record, D shares in A's "priority" to the full extent of his claim of $2000 leaving only $1000 to A. After the $3000 fund has been set aside there remains a balance of $1500. A has apparently received his full "priority" with respect to C, and since D has received full payment he does not share in this fund. Even in the event that there is more due him, as between the two, C has the superior lien, and is entitled to a prior claim in the $1500 fund, which in this case completely absorbs it. What are the results? A gets $1000, C gets $1500, and D, $2000. D has

[35] 54 Minn. 486, 56 N. W. 131 (1893).

[36] For other situations of three cornered priorities, see Jones v. Jones, 8 Sim. 633 (Ch. 1838); Hoag v. Sayre, 33 N. J. Eq. 552 (1881); PARKS, CASES ON MORTGAGES (1926) 134, n.

been paid in full, but C, who was prior to D, received only partial payment. A has received only $1000, and yet he was prior to C who gets $1500. Again, we might vary our example by setting aside a fund equivalent to C's claim, or D's claim, and the results would be relatively different. The court's action in singling out, as a measure of the fund to be set aside, the sum due to A, was arbitrary but it may, perhaps, be justified. A could have avoided the situation by an act of recordation, and it is not unjust that he be penalized by allowing D to share in his "priority." Without this, it seems that the only alternative open would have been to cut the Gordian knot and destroy these mutually destructive priorities by an arbitrary, equal division.

H. L. N.