Recent Case Notes

ARBITRATION AND AWARD—CONFLICT OF LAWS—EFFECT IN JURISDICTION HAVING NO ARBITRATION STATUTE OF AGREEMENT TO ABIDE BY EXTRA-STATE ARBITRATION STATUTE.—A New York corporation and a citizen of Ohio entered into a contract for the furnishing and exhibition of motion picture films. The contract contained a clause which provided that any dispute which arose should be submitted to a specified board of arbitration and that the parties would abide by the decision and award of this board. This contract was, by its terms, to be construed in accordance with a New York statute which made such agreements to arbitrate enforceable and irrevocable. There was no such arbitration statute in Ohio. The defendant broke the contract and refused to arbitrate, but the arbitration board proceeded to make an award after submission of the dispute by the plaintiff. The plaintiff sued in Ohio for damages based on this award. The defendant demurred on the ground that the arbitration agreement was not enforceable in Ohio. The lower court overruled the demurrer, and gave judgment for the plaintiff for the full amount of the award. The decision was reversed on appeal. The court held the arbitration agreement to be unenforceable under the law of Ohio, and indicated further that the defendant's refusal to submit his claims to the arbitration board rendered the award of that body ineffective. *Shafer v. Metro-Goldwyn-Mayer Distributing Corporation,* 172 N. E. 689 (Ohio 1929).

At common law an arbitration agreement is revocable,[1] but a mere refusal to arbitrate does not constitute an adequate revocation. Definite and unmistakable notice of such revocation must be given.[2] In the absence of a valid revocation, an arbitral award is conclusive of the issues involved.[3] Even if made in ex parte proceedings, granting proper procedure of the arbitral board, such an award is conclusive both at common law[4] and under the New York arbitration statute.[5] Since the defendant in the instant case neither pleaded proper notice of revocation, nor questioned the propriety of the proceedings of the arbitral board, it would seem that, whether the instant agreement was governed by the common law of the forum or the statutory law of New York, the court was bound to overrule the demurrer, and any declaration as to the general validity of the arbitration agreement in Ohio was quite superfluous. The court's view of the case, however, required a decision of the question, never before presented, of whether a state which has no arbitration statute will recognize an agreement to abide by the arbitration statute of another state. In a jurisdiction having such

[1] Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696 (1904). See Blodgett Co. v. Behe Co., 190 Cal. 665, 667, 214 Pac. 38, 39 (1923).

[2] Goodwine v. Miller, 32 Ind. 419 (1869); Fooks v. Lawson, 1 Marv. 115, 40 Atl. 661 (Del. 1893).

[3] N. P. Sloan Co. v. Standard Chemical & Oil Co., 256 Fed. 451 (C. C. A. 5th, 1918). *Contra*: Conant v. Arsenault, 119 Me. 411, 111 Atl. 578 (1920).

[4] Boring v. Boring, 2 W. Va. 297 (1867).

[5] Matter of Finsilver, Still & Moss, 253 N. Y. 382, 171 N. E. 579 (1930). Similar statutes exist in Conn., Iowa, La., Mass., Mich., Minn., Nev., N. C., Utah, and Wyo. See STURGES, COMMERCIAL ARBITRATION AND AWARD (1930) § 207.

a statute,[6] stay of trial will generally be granted until the foreign arbitration has taken place,[7] although an order to proceed with such foreign arbitration will usually be refused.[8] The instant court, on the other hand, uninfluenced by any local statute, classified the agreement as purely remedial and hence governed by the law of the forum.[9] This classification of arbitration agreements as purely procedural would appear highly questionable.[10] Such agreements have been generally recognized in England as substantive.[11] A similar view seems to prevail in New York where the Court of Appeals not only refused to declare without reservation that a foreign arbitration agreement might be carried into effect through court appointment of an arbitrator in accord with the law of the forum,[12] but suggested that if the state in which an arbitration was to take place had been specified, the law of that state would have been applicable rather than the *lex fori*.[13] It would seem on the whole that the number of arbitration statutes recently enacted, and the general trend of modern judicial opinion favoring arbitration agreements[14] point to a decrease in the opposition to their ready enforcement—a tendency to which the limitation attempted in the instant decision stands in marked contrast.

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[6] Twelve jurisdictions have statutes which enforce agreements to submit future disputes to arbitration: Ariz. Laws 1929, c. 72, § 1; CAL. CIV. CODE (Deering, 1923) § 1280; Conn. Pub. Acts 1929, c. 65, § 1; KAN. REV. LAWS (1925) § 2924; La. Acts 1928, no. 262, § 1; MASS. CUM. STAT. (1927), c. 251, § 14; N. H. Laws 1929, c. 147, § 1; N. J. COMP. STAT. (Cum. Supp. 1925) c. 9, §§ 1-22; N. Y. CONS. LAWS (Cahill, 1930) c. 2, §§ 1-10; Pa. STAT. (Supp. 1928), § 606a-1; R. I. Laws, 1929 c. 1408, § 1; 43 STAT. 883 (1925), 9 U. S. C. A. § 2 (1927). Fifty-one jurisdictions have statutes which permit the arbitration of existing disputes. For a full discussion of these statutes and their interpretation by the courts see STURGES, *op. cit. supra* note 5, at c. 7.

[7] Matter of Inter-Ocean Food Products, Inc. v. York Mercantile Co., 206 App. Div. 426, 201 N. Y. Supp. 536 (1st Dep't 1923); Danielson v. Entre Rios Ry., 22 F. (2d) 326 (D. C. Md. 1927). *Contra*: The Silverbrook, 18 F. (2d) 144 (E. D. La. 1927); The Beechwood, 35 F. (2d) 41 (S. D. N. Y. 1929).

[8] Matter of California Packing Corporation, 121 Misc. 212, 201 N. Y. Supp. 158 (Sup. Ct. 1923); The Silverbrook, *supra* note 7.

[9] This seems to be the general rule. Meacham v. Jamestown, F. & C. R. R., 211 N. Y. 346, 105 N. E. 653 (1914); Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederidktiebolaget Atlanten, 250 Fed. 935 (C. C. A. 2d, 1918). See Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 123, 125, 44 Sup. Ct. 274, 277, 278 (1923).

[10] See Heilman, *Arbitration Agreements and the Conflict of Laws* (1929) 38 YALE L. J. 617. *Cf.* CORBIN, CASES ON CONTRACTS (1921) 1475n.

[11] Spurrier v. LaCloche, [1902] A. C. 446; Pena Copper Mines, Ltd. v. Rio Tinto Co., Ltd., 105 L. T. R. 846 (1912).

[12] Marchant v. Mead Morrison Co., 252 N. Y. 284, 169 N. E. 386 (1929).

[13] *Ibid.* 293, 169 N. E. at 389. *Cf.* Estate Property Corporation v. Hudson Coal Co., 132 Misc. 590, 596, 230 N. Y. Supp. 372, 378 (Sup. Ct. 1928), in which the court based its decision on an interpretation of the foreign arbitration statute.

[14] See Ezell v. Rock Mountain Beam & Elevator Co., 76 Colo. 409, 232 Pac. 680 (1925) (no statute); Atlantic Fruit Co. v. Red Cross Line, 276 Fed. 319, 322 (S. D. N. Y. 1921); Red Cross Line v. Atlantic Fruit Co., *supra* note 9, at 121, 44 Sup. Ct. at 276, 277 (1923). *Cf.* Note (1928) 28 COL. L. REV. 472, 476.

ATTORNEY AND CLIENT—CHARACTER REQUIREMENTS FOR ADMISSION TO THE BAR.—An applicant for admission to the New York Bar, during his appearance before the Committee on Character and Fitness, was asked: "Who discovered America?" and "What are the expressed powers reserved to the United States Government under the Constitution?" Upon his respectful refusal to reply to either question, the Committee declined to certify him as qualified for admission. The applicant then sought and was granted a judicial order directing the Committee so to certify, the court holding that the Committee had exceeded its jurisdiction by inquiring into legal or academic knowledge. *Application of Brennan*, 243 N. Y. Supp. 705 (App. Div. 2d Dep't 1930).

In order to assure to the public the efficient and proper conduct of its legal affairs, every state makes proof of moral fitness [1] a condition precedent to admission to practice,[2] though some few jurisdictions neglect to indicate in what manner such fitness shall be determined.[3] Under the simplest and most generally used system of character investigation, practically the sole criterion of an applicant's moral fitness is his ability to produce a specified number of affidavits [4] signed by eligible individuals.[5] The necessity of relying solely on character testimonials which the applicant may have been able to procure from prejudiced or irresponsible persons is obviated by the requirement, in force in some jurisdictions, that each candidate register and submit proof of character before commencing his study of the law.[6] Here at least the opportunity for actual observation is created.[7] An interesting elaboration of this system, proposed by the Committee of Bar Examiners in California, would place each law student under the tutelage of an attorney engaged in active practice, whose duty it would be to inculcate an understanding of the ethics and duties of the profession, and ultimately to certify to the authorities his estimate of the applicant's character.[8] If, as has also been suggested, candidates were admitted to

[1] See Coleman, *Character Requirements for Admission to the Bar* (1929) 15 A. B. A. J. 769, 772; Lightner, *A More Complete Inquiry Into the Moral Character of Applicants for Admission to the Bar* (1913) 38 A. B. A. REP. 775, 778 (defining "moral fitness" as applied to the lawyer).

[2] See Holmgren, *A Synoysis of the Present Requirements for Admission to the Bar in the States and Territories of the United States* (1928) 5 AM. L. S. REV. 735, 736; rules listed in HOLMGREN, RULES FOR ADMISSION TO THE BAR (1930) 35, 44, 47, 66, 70.

[3] See rules listed in HOLMGREN, *op. cit. supra* note 2, at 13 (Ariz.), 15 (Ark.), 53 (Ind.).

[4] See rules listed in HOLMGREN, *op. cit. supra* note 2, at 25 (Conn.), 38 (Ga.), 81 (Mich.), 138 (Ore.). Several counties in Connecticut also make further inquiries.

[5] See rules listed in HOLMGREN, *op. cit. supra* note 2, at 21 (in Colorado three affidavits are required; one from a member of the bar, one from a business man, and one from an attorney, known personally to some member of the Bar Committee), 55 (in Iowa character is certified by the district judge or clerk of the District Court), 81 (Michigan accepts the diploma of a reputable law school as presumptive evidence of character).

[6] See rules listed in HOLMGREN, *op. cit. supra* note 2, at 108 (N. J.), 141 (Pa.), 182 (Wash.).

[7] Some states obtain the same result by requiring applicants to file proof of character a long time before the day of examination. See rules listed in HOLMGREN, *op. cit. supra* note 2, at 129 (Ohio), 134 (Okla.).

[8] 1 STATE BAR OF CALIFORNIA, PROCEEDINGS (1928) 197.

practice for a probationary period preceding final admission,[9] or if only term licenses, renewable on proof of good behavior were granted,[10] legal character could be tested under the fire of actual practice. Only a few states have followed New York in its establishment of a specialized committee for character investigation, before which each applicant must personally appear.[11] The purpose of such a requirement must be to enable the committee to observe the general bearing of the applicant, as largely indicated by his manner of responding to oral questioning. Thus, while an erroneous answer to an inquiry involving legal or academic learning should not necessarily disqualify an applicant, any restriction on the committee's choice of questions constitutes a limitation of its opportunity to stimulate responses which might, in manner rather than substance, be indicative of the applicant's character.

BANKRUPTCY—PRIORITY BASED ON TRANSFER OF PHYSICAL ASSETS.—The defendant corporation was organized to take over a bankrupt hotel company under a plan approved by the equity receivers of the hotel, pursuant to a court order which allocated stock to the hotel's stockholders and assenting creditors but made no provision for nonassenting creditors. The hotel property was conveyed to the defendant subject to a first mortgage, but $30,000 of working capital was raised by means of a second mortgage. Prior to the defendant's bankruptcy, foreclosure of the first mortgage absorbed the full value of the hotel property, so that the defendant's trustee in bankruptcy received none of the physical property of the original hotel company. The state of New York sought to collect from the defendant a license tax due from the hotel company and claimed priority under Section 64(b)(6) of the Bankruptcy Act, providing that states shall have priority as regards taxes legally due. The District Court disallowed this claim and the Circuit Court of Appeals reversed the decision on the ground that, although the state could not be allowed priority under Section 64(b)(6), its claim merited preference under Section 64(b)(7) as "a debt owing any person who by the law of the states is entitled to priority." *In re Alemac Operating Corporation*, 42 F. (2d) 120 (C. C. A. 2d, 1930).

The court assumes that a corporation organized to take over the assets of an insolvent corporation is liable to non-assenting creditors of the insolvent to the extent of the assets so received.[1] Under such circumstances the state's preferential right against the bankrupt carries over as against the new corporation.[2] Such preferential rights, however, have in general been based on an actual transfer of "physical" assets to the new corpora-

[9] See Rutter, *Bar Examinations in Relation to Admission Requirements* (1929) 54 A. B. A. REP. 688, 696; REED, REVIEW OF LEGAL EDUCATION (1929) 30.

[10] REED, *op. cit. supra* note 9, at 29.

[11] See rules listed in HOLMGREN, *op. cit. supra* note 2, at 6 (Ala.), 38 (Conn.), 47 (Ill.), 62 (Ky.), 77 (Mass.), 116 (N. Y.). In Connecticut recommendation must be secured from the local county bar association, several of which have character committees.

[1] Okmulgee Window Glass Co. v. Frink, 260 Fed. 159 (C. C. A. 8th, 1919) (assets of old corporation held by new corporation in trust for creditors of old corporation); Northern Pacific Ry. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554 (1913) (judicial sale not binding on non-assenting creditors); American Railway Express Co. v. Kentucky, 190 Ky. 636, 228 S. W. 433 (1921).

[2] In re Grand Leader, 5 F. (2d) 509, 511 (N. D. Tex. 1925) (two cases).

tion.[3] In the instant case the court could find no transfer of "physical" assets[4] and held that the obligation of the defendant was not to pay "a tax legally due," but rather "an obligation imposed by law upon a constructively fraudulent grantee." The defendant's position was thus considered analogous to that of one who has agreed to pay the tax of another, and under such circumstances the state has no preferential right.[5] This seems to be a reversion to the earlier and more literal construction of the Bankruptcy Act by which governmental right to priority in general was closely circumscribed.[6] The Bankruptcy Act, revised[7] to overcome this tendency and clarify the order of priority, now states in Section 64(b)(7) that prior payment shall be made "of all debts owing to any person who by the laws of the States or of the United States is entitled to priority: *Provided,* That the term 'person' shall include . . . the several States."[8] Since the common law of New York provides that the state has succeeded to the crown's prerogative of priority as to all debts due the state[9] the instant court felt itself bound to grant the state priority under this latter Section. Thus the claim of the state is subordinated to "taxes legally due" and is set one step lower in the scale of priorities. But although under New York law this holding does not destroy the state's preferential right over general creditors,[10] if adopted as a precedent in other jurisdictions it would place an obstacle in the way of governmental attempts to claim priority for tax payments where the law of the forum does not give express preference to the government.[11] This obstacle seems out of harmony with the intent of the Bankruptcy Act which recognizes the vital function of tax collection for revenue purposes by granting it priority. Furthermore, in holding Section 64(b)(6) inapplicable, the instant decision adopts the idea of property as a physical res, and although an equity of redemption would not qualify as property under this theory, the defendant was able to raise $30,000 on the equity which it received from the hotel company.

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[3] *Ibid;* Heyward v. United States, 2 F. (2d) 467 (C. C. A. 5th, 1924); Evered v. St. Croix Mines Corp., 285 Pac. 1008 (Utah 1930).

[4] Due to the foreclosure of the first mortgages on the property transferred.

[5] Hardeman v. Hendryx, 29 F. (2d) 738 (C. C. A. 5th, 1929).

[6] United States Shipping Board Emergency Fleet Corp. v. Wood, 258 U. S. 549, 42 Sup. Ct. 386 (1922) (corporation which is instrumentality of United States denied priority); Davis v. Pringle, 268 U. S. 315, 45 Sup. Ct. 549 (1925) (priority of United States limited to taxes); Matter of Stewart, 6 Am. B. R. (N. S.) 741 (D. N. D. Referee, 1925) (same limitation for state); (1926) 39 HARV. L. REV. 767. See Blair, *Priority of United States in Equity Receiverships* (1925) 39 HARV. L. REV. 1, 6.

[7] May 27, 1926. See McLaughlin, *Amendment of the Bankruptcy Act* (1927) 40 HARV. L. REV. 341, 345.

[8] 44 STAT. 666 (1926), 11 U. S. C. A. § 104b(7) (1927).

[9] Matter of Carnegie Trust Co., 206 N. Y. 390, 99 N. E. 1096 (1912); Matter of Niederstein, 154 App. Div. 238, 138 N. Y. Supp. 952 (2d Dep't 1912); Marshall v. New York, 254 U. S. 300, 41 Sup. Ct. 143 (1920).

[10] The court holds that there are no taxes legally due in the instant case. Hence no claims are given preference over the state's.

[11] City of Richmond v. Bird, 249 U. S. 174, 39 Sup. Ct. 186 (1919). *Cf.* In re Fahnstock Mfg. Co., 7 F. (2d) 777 (W. D. Pa. 1925); In re Green River Jockey Club, 5 F. (2d) 259 (W. D. Ky. 1925) (subsisting valid liens entitled to priority over tax claims).

CORPORATIONS—CRIMINAL RESPONSIBILITY OF OFFICERS AND DIRECTORS FOR MISAPPROPRIATION OF TRUST FUNDS.—A corporation, as trustee, held certain mortgages to secure notes owned by third parties. The defendants as officers and directors of the corporation deposited money paid on these notes into the general account of the corporation. They were indicted for embezzlement under Section 6515 of the Connecticut General Statutes [1918] which provides that every trustee of an express trust who wrongfully appropriates to his own use the money of such trust shall be fined or imprisoned. A finding of guilty was reversed on appeal, the court holding that the statute was inapplicable since the defendants as individuals were not the trustees. *State v. Parker*, 151 Atl. 325 (Conn. 1930).

A corporate officer or director cannot ordinarily escape criminal responsibility for his acts on the ground that they are the acts of the corporation and hence impersonal,[1] although the corporation is not thereby freed of responsibility for the same acts.[2] In cases arising under the bankruptcy laws and somewhat analagous to the instant case, officers and directors have been held responsible as aiders and abetters of, and even conspirators with, the corporation.[3] And corporate officers and directors have occasionally been subjected to an almost vicarious criminal liability for the offenses of employees.[4] Since in the foregoing cases the concept "corporate entity" does not appear to have been usefully employed save as a device for stating results reached by independent considerations,[5] the question arises whether the instant case presents any consideration tending to justify the intervention of that concept to deprive the court of its power to punish the proper parties. The responsibility for the conversion here was easily traceable to the officers and directors, who had the physical management of the trust in their hands and hence in reality occupied the position of trustees,[6] whereas responsibility in other situations is frequently imposed for

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[1] Milbrath v. State, 138 Wis. 354, 120 N. W. 252 (1909); State v. Thomas, 123 Wash. 299, 212 Pac. 253 (1923). See Note (1924) 33 A. L. R. 781.

[2] New York Central R. R. v. United States, 212 U. S. 481, 29 Sup. Ct. 304 (1909); Crall & Ostrander v. Commonwealth, 103 Va. 855, 49 S. E. 683 (1905). See Edgerton, *Corporate Criminal Responsibility* (1927) 36 YALE L. J. 827, 833.

[3] Kaufman v. United States, 212 Fed. 613 (C. C. A. 2d, 1914) (held as aiders and abetters); United States v. Young & Holland Co., 170 Fed. 110 (C. C. R. I. 1909) (held as conspirators). *Contra*: United States v. Lake, 129 Fed. 499 (E. D. Ark. 1904); Field v. United States, 137 Fed. 6 (C. C. A. 8th, 1905). See, Lee, *Corporate Criminal Responsibility* (1928) 28 COL. L. REV. 1, 24-28.

[4] *Cf.* Overland Cotton Mills v. People, 32 Colo. 263, 75 Pac. 924 (1904); People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735 (1890); State v. Burnam, 71 Wash. 199, 128 Pac. 218 (1912). The liability is not, from one aspect, totally vicarious, for the officer or director, by due and diligent supervision, might have prevented the act of the subordinate. See Lee, *op. cit. supra* note 3, at 16, for a discussion of these cases.

[5] See Lee, *op. cit. supra* note 3, at 198. *Cf.* Comment (1926) 36 YALE L. J. 254, 259; Sturges, *Unincorporated Associations as Parties to Actions* (1924) 33 YALE L. J. 383, 396, 405.

[6] Compare the statement in HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) 201, that "all corporate transactions and all propositions relating to the law of corporations can be stated in terms of ultimate physical realities" and the statement in the instant case that the defendants "actively managed, directed, and controlled the affairs of the company, comprising the entire board of directors and all of the officers."

offenses resultant from the unified action of the stockholders. Moreover, the alternative of suit against the already failing corporation would, if successful, impose an excessive and vicarious penalty upon the general creditors and stockholders and would yet be ineffective as a deterrent against future conversions of a like character.

EMINENT DOMAIN—EVIDENCE OF FUTURE IMPROVEMENTS AS A FACTOR IN MARKET VALUE.—In an eminent domain proceeding to condemn certain land for park purposes, the defendants claimed that the availability of the land for apartment house sites should be considered in determining its market value. The track lacked streets, sewers and other improvements necessary for the erection of apartment houses, but the defendants offered in evidence a plan of development which included these improvements. The lower court sustained the condemnor's objection to the admission of this evidence on the ground that the land was unimproved and that the proposed plan had not been approved by the city. On appeal it was held (two judges dissenting) that the evidence should have been admitted. *In re Inwood Hill Park*, 243 N. Y. Supp. 63 (App. Div. 1st Dep't 1930).

In eminent domain proceedings proof of market value is said to be limited to demonstration of the present condition of the land sought to be appropriated and the uses to which it is naturally adapted, and hence not to embrace inquiries as to uses to which the land might be applied if improvements and changes were made.[1] Thus evidence as to what expense would be necessary to drain land in order to render it suitable for building purposes has been held incompetent.[2] And it has been held reversible error for a trial court to permit the introduction in evidence of a plan for the reclamation and irrigation of swamp lands.[3] Land is said not to be presently available for a particular use when the possibility of its being applied to that use depends upon the affirmative action of some agency which the owner does not control.[4] Accordingly, testimony as to the value of land for wharf purposes has been held inadmissible where the party claiming compensation had no wharf franchise,[5] as has proof of realty value for a manufacturing site where the requisite co-operation of a railroad had not been assured.[6] Under the authority of these cases, not only was the land in the instant case in its existing condition unfit for the proposed use but the improvements necessary to fit it for that use could not have been made without the approval of the city. The decision, as well as being unorthodox, seems unnecessarily harsh in that it appears to countenance the basing of an enhanced condemnation value on a remote and speculative possibility of enhanced actual value.

INSURANCE—WAR RISK INSURANCE—INTEREST.—In an action on a policy of life insurance issued by the United States to soldiers and sailors pursuant to an amendment to the War Risk Insurance Act of 1914, the plaintiff recovered a judgment which included, *inter alia*, interest on installments

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[1] See City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224 (1893); Richmond & Petersburg Electric Ry. v. Seaboard Airline Ry., 103 Va. 399, 49 S. E. 512 (1905); 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) § 709.

[2] Manda v. City of Orange, 82 N. J. L. 686, 82 Atl. 869 (1912).

[3] San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson, 63 Cal. App. 767, 220 Pac. 427 (1923).

[4] See Darlington v. Pennsylvania Ry., 278 Pa. 307, 313, 123 Atl. 284, 286 (1924).

[5] Central Pacific R. R. v. Pearson, 35 Cal. 247 (1868).

[6] In re Morris & Cumming's Dredging Co., 96 N. J. L. 248, 119 Atl. 308 (1921).

due. On an appeal taken to the Circuit Court of Appeals that tribunal certified to the Supreme Court of the United States the question of whether interest was allowable upon such installments. The Supreme Court answered this question in the negative. *United States v. Worley*, 281 U. S. 339, 50 Sup. Ct. 291 (1930). The Circuit Court of Appeals thereupon directed that the judgment be modified by eliminating therefrom all interest charges, thus adopting the view of the Supreme Court that the amendment did not provide that such interest should be paid, and that no agreement on the part of the government to pay interest could be implied. *United States v. Worley*, 42 F. (2d) 197 (C. C. A. 8th, 1930).

Interest is generally not allowable on claims against the United States except where the liability therefor is expressly assumed by statute or by contract.[1] A further exception was added, however, by the Supreme Court of the United States in *Standard Oil Co. v. United States*,[2] in which the court allowed interest to be assessed on a policy of marine insurance issued by the government pursuant to the War Risk Insurance Act of 1914.[3] Judicial attempts to reconcile this decision with the decisions denying interest on life policies[4] issued under the amendment[5] to the War Risk Insurance Act are unconvincing. It has been argued that the United States entered the marine insurance business for commercial purposes and should, therefore, be subjected to the ordinary business liability of insurance companies, whereas life insurance issued to soldiers and sailors was both insurance and a pension and consequently subjected the government to no liability for interest.[6] But since both types of insurance were authorized by the War Risk Insurance Act as amended, it would seem that the purpose of Congress in providing them was the same in each instance, namely, to promote the general welfare of the people in war times,[7] and not to bestow a gratuity on favored classes in either case.[8] The fortuitous circumstance that the government realized a profit on the marine insurance[9] is hardly decisive as to its commercial character, for the government stood ready to pay all losses arising on the policies, however great.[10]

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[1] See Cherokee Nation v. United States, 270 U. S. 476, 487, 46 Sup. Ct. 428, 432 (1926); Boston Sand & Gravel Co. v. United States, 278 U. S. 41, 47, 49 Sup. Ct. 52, 53 (1928); United States v. North American Co., 253 U. S. 330, 40 Sup. Ct. 518 (1919) (no recovery of interest on an implied contract); *cf.* United States v. Rogers, 255 U. S. 163, 41 Sup. Ct. 281 (1921) (interest recoverable in condemnation proceedings as part of just compensation).

[2] 267 U. S. 76, 45 Sup. Ct. 211 (1924).

[3] 38 STAT. 711 (1914), 38 U. S. C. A. § 502 (1927).

[4] United States v. Worley, 281 U. S. 339, 50 Sup. Ct. 291 (1930); United States v. Lyke, 19 F. (2d) 876 (C. C. A. 9th, 1927); United States v. Jackson, 34 F. (2d) 241 (C. C. A. 10th, 1929), *aff'd*, Jackson v. United States, 281 U. S. 344, 50 Sup. Ct. 294 (1930).

[5] 40 STAT. 398, 409 (1917), 34 U. S. C. A. §§ 171, 502 (1927).

[6] See United States v. Worley, *supra* note 4, at 343, 50 Sup. Ct. at 293; United States v. Lyke, *supra* note 4; United States v. Jackson, *supra* note 4.

[7] See preamble of War Risk Insurance Act, *supra* note 3.

[8] Since only American vessels were insured under the War Risk Insurance Act, it might be argued that this insurance was also in the nature of a subsidy. See War Risk Insurance Act, *supra* note 3.

[9] ANNUAL REPORT OF THE DIRECTOR OF THE UNITED STATES VETERAN'S BUREAU (1923) 675.

[10] $5,000,000 were appropriated to this end in 1914 by the War Risk Insurance Act, *supra* note 3, at § 7.

Further, the same provision was made for suit to enforce both the life and the marine policies.[11] It thus seems quite illogical to refuse interest to the soldier's dependent while allowing the shipowner to collect, and it is believed that the Supreme Court's refusal to tax interest against the United States in the life insurance cases can reasonably be interpreted only as a recession by that court from the position taken in the *Standard Oil* case.[12]

INSURANCE—WHAT CONSTITUTES "VEXATIOUS REFUSAL TO PAY."—In a suit on a fire insurance policy, the defendant pleaded that the plaintiff had no insurable interest, and that the loss was due to an explosion which had not been caused by fire. The jury found for the plaintiff, and assessed a penalty against the insurer under a statute providing that if an insurance company has vexatiously refused to pay a loss the court may award the plaintiff, in addition to the amount of the loss, damages not exceeding ten per cent of such amount, plus a reasonable attorney's fee. [MO. REV. STAT. (1919) § 6337]. On appeal it was held, *inter alia*, that although the defendant had produced evidence at the trial from which it might be inferred that the loss was caused by an explosion, there was nothing in the record to show that the defendant had been in possession of such evidence at the time of the refusal to pay, and hence that the court did not err in submitting to the jury the question of vexatious refusal to pay. *Buffalo Insurance Co. v. Bommarito*, 42 F. (2d) 53 (C. C. A. 8th, 1930).

A wilful refusal to pay, without foundation in law or in fact in the view of a reasonably prudent man, is generally said to be vexatious,[1] under statutes similar to that involved in the principal case.[2] Under so broad a definition the question obviously becomes one of degree, dependent upon the facts of the individual case. A verdict in favor of the insured on the policy does not determine that the insurer's refusal to pay was vexatious.[3] But arbitrary[4] or dilatory[5] dealings, or unethical pro-

[11] War Risk Insurance Act, *supra* note 3, at § 5; Amendment, *supra* note 5, at § 405.

[12] Standard Oil Co. v. United States, *supra* note 2.

[1] See Georgia Life Ins. Co. v. McCranie, 12 Ga. App. 858, 78 S. E. 1115 (1913); Patterson v. American Ins. Co., 174 Mo. App. 44, 160 S. W. 59 (1913).

[2] See GA. ANN. CODE (Michie, 1926) § 2549; TENN. ANN. CODE (Shannon, 1917) § 3340a and 3340a(1) (a corresponding and reciprocal provision in favor of the insurer); *cf.* TEX. COMP. STAT. (1928) art. 4736; ORE. LAWS (Olsen, 1920) § 6353 (more prevalent types of statutes fixing a penalty in all cases where the insurer has failed to pay the loss within the period specified by the policy, or by the statute).

[3] Weston v. American Ins. Co., 191 Mo. App. 282, 171 S. W. 792 (1915); *cf.* Lafont v. Home Ins. Co., 193 Mo. App. 543, 177 S. W. 1029 (1916). *Contra:* Central Manufacturers Mutual Ins. Co. v. Graham, 24 Ga. App. 199, 99 S. E. 434 (1919).

[4] Murray v. Niagara Fire Ins. Co., 265 S. W. 102 (Mo. App. 1924) (defendant failed to investigate facts before refusing to pay); Leer v. Continental Life Ins. Co., 250 S. W. 631 (Mo. App. 1923) (attempt to coerce insured into settlement by overbearing and threatening conduct).

[5] Avery v. Mechanics Ins. Co., 222 Mo. App. 31, 295 S. W. 509 (1927) (failure to return premiums although insurer insisted policy was void ab initio). But *cf.* Mackey v. Home Ins. Co., 284 S. W. 161 (Mo. App. 1926).

cedure[6] on the part of the insurance company refusing to pay, warrants the imposition of the statutory penalty. And while an insurer may with impunity litigate a disputed point of law[7] or a meritorious issue of fact,[8] a defense which lacks substance and is based solely on technicalities evidences a lack of good faith in the refusal to pay.[9] What constitutes sufficient substance to create a meritorious issue of fact has presented an especially nice point for judicial consideration.[10] The instant case raises a further problem, never before directly considered, concerning the time when the insurer must be in possession of the facts substantiating his reason for refusing to pay. It has been held that a strong suspicion affords justification for a refusal to pay, even though the facts suspected were not made a part of the insurer's defense when the case came to trial.[11] *A fortiori*, the fact that the insurer has obtained in support of that suspicion evidence which is produced at the time of the trial tends to establish the good faith of his earlier refusal. According to the holding of the instant case, however, an insurer, lacking time to obtain adequate and available evidence, might be forced to pay a loss within the specified period, however strong or *bona fide* his doubts as to the merit of the insured's claim. Furthermore, it has been uniformly held that it is unnecessary for the insured to adduce affirmative proof of a vexatious refusal to pay in order to collect the penalty.[12] Yet the principal case would seem to require that the insurer, in order to avoid the penalty, produce affirmative proof that he was in possession of the evidence negativing his liability at the time of the refusal to pay.

PLEADING—"THEORY OF THE PLEADINGS" AS BARRING AMENDMENT IN FEDERAL COURT.—The defendant city sold certain land to the plaintiff development company without disclosing that it knew the land to be unfit for residential purposes. Subsequently, the city passed an ordinance prohibiting the use of this tract for residences. By a bill in equity the plaintiff sought to enjoin enforcement of the ordinance and recover incidental damages, on the ground that the land was suitable for residential purposes. The defendant showed conclusively that periodic flooding made the land unfit for residence—a fact unknown to the plaintiff. The trial court dismissed the bill, holding that under the circumstances the ordinance was a proper exercise of the police power and that there was therefore no ground for relief in equity. Thereafter, the plaintiff unsuccess-

[6] Collins v. Phoenix Assurance Co., 215 Mo. App. 683, 285 S. W. 783 (1926) (fraudulent conduct on the part of defendant's adjuster).

[7] Silliman v. International Life Ins. Co., 135 Tenn. 646, 188 S. W. 273 (1916); Commercial Casualty Co. v. Fruin-Colnon Contracting Co., 32 F. (2d) 425 (C. C. A. 8th, 1929).

[8] Aufrichtig v. Columbia Natural Life Ins. Co., 298 Mo. 1, 249 S. W. 912 (1922).

[9] City of Maplewood v. Southern Surety Co., 19 S. W. (2d) 691 (Mo. 1929).

[10] The court found "substantial evidence," although the verdict was for the insured, in Campbell v. National Fire Ins. Co., 269 S. W. 645 (Mo. App. 1924), and Smith v. Aetna Fire Ins. Co., 269 S. W. 682 (Mo. App. 1924). But *cf.* Malo v. Niagara Fire Ins. Co., 282 S. W. 78 (Mo. App. 1926).

[11] Silliman v. International Life Ins. Co., 135 Tenn. 646, 188 S. W. 273 (1914); *cf.* Columbian Natural Life Ins. Co. v. Harrison, 12 F. (2d) 986 (C. C. A. 6th, 1926).

[12] Patterson v. American Ins. Co., *supra* note 1.

fully sought leave to amend the complaint to make it conform to the findings and thus include an obvious claim of fraud. The upper court affirmed the decision of the trial court, and justified the dismissal on the ground that the plaintiff had chosen a wrong theory of recovery. It also approved the denial of a right to amend, because the desired amendment furnished neither additional ground for equity jurisdiction, nor a valid basis for an action at law without a shift in the "theory" of the complaint. *America Land Co. v. City of Keene*, 41 F. (2d) 484 (C. C. A. 1st, 1930).

The concept of a cause of action as a convenient aggregate of the operative facts[1] has given rise to new pleading policies. Thus, a correct "theory of the pleadings" is no longer considered essential[2] in jurisdictions which uphold any judgment consistent with the issues and the evidence.[3] And amendments changing the "theory of the pleadings" are there freely allowed if based on the same general facts as those alleged in the original pleading.[4] Most federal courts have adopted[5] these liberal views both in regard to causes of action[6] and amendments,[7] and the Supreme Court of the United States has flatly abandoned the "law to law" theory as a test for amendments.[8] Under broadly permissive federal provisions,[9] pleadings have been amended to conform to the findings,[10] even where the findings have raised a new issue.[11] Equity Rule 22[12] specifically permits a transfer of cases improperly commenced in law or equity and precludes any dismissal of a suit brought mistakenly in equity when there is an adequate remedy at law.[13] Furthermore, Section 274(a) of the Judicial

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[1] See Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817, 837; Comment (1925) 34 YALE L. J. 879; PHILLIPS, CODE PLEADING (1896) § 30. But *cf.* McCaskill, *Actions and Causes of Action* (1925) 34 YALE L. J. 614.

[2] *Cf.* CLARK, CODE PLEADING (1928) §§ 43, 76. See Brown v. Baldwin, 46 Wash. 106, 114, 89 Pac. 483, 486 (1907), where the court says: "An applicant for justice is not to be turned out of the temple of justice, scourged with costs, because he happened to come in at one door instead of the other."

[3] See Albertsworth, *The Theory of the Pleadings in Code States* (1921) 10 CALIF. L. REV. 202, 212, 219.

[4] For list of cases, see Comment (1926) 36 YALE L. J. 853.

[5] Conformity Act, 17 STAT. 197 (1872), 28 U. S. C. A. § 724 (1927).

[6] DOBIE, FEDERAL PROCEDURE (1928) 596.

[7] DOBIE, *op. cit. supra* note 6, at 711; Ashland Waterhouse Co. v. City of Ashland, 251 Fed. 492 (C. C. A. 6th, 1918).

[8] Frederichsen v. Renard, 247 U. S. 207, 38 Sup. Ct. 450 (1918); N. Y. Central & H. R. R., v. Kinney, 260 U. S. 340, 43 Sup. Ct. 122 (1922).

[9] Equity Rule 19, 198 Fed. xxiii (1912), 28 U. S. C. A. § 723 (1927). *Cf.* District of Columbia v. Washington Terminal Co., 47 Ct. of App. D. C. 570 (1918) (motion for amendment allowed under a mandate from appellate court after the term of the deciding court had expired).

[10] Pennsylvania Steel Co. v. New York City Ry., 190 Fed. 602 (C. C. S. D. N. Y. 1911).

[11] Davis v. Gates, 235 Fed. 192 (D. C. Pa. 1916).

[12] 198 Fed. xxiv (1912), 28 U. S. C. A. § 723 (1927).

[13] See Brown v. Rossove, 255 Fed. 806 (C. C. A. 8th, 1919); Louisiana Agricultural Corp. v. Pelican Oil Refining Co., 256 Fed. 822 (C. C. A. 5th, 1919), *certiorari* denied, 250 U. S. 646, 39 Sup. Ct. 494 (1919). See Note (1927) 27 COL. L. REV. 66.

Code[14] provides for the liberal use of amendments to effectuate a transfer to the other calendar of a suit improperly brought.[15] The instant case, in ruling in opposition to the spirit of these tendencies, has subjected the plaintiff to delay, needless costs, and the risk of being barred from the courts by a limitation statute. Even the manner of adoption of the theory view is open to criticism in that the court failed to define the limits of the procedural penalty it will in the future impose for the use of a wrong theory. Thus it did not indicate whether an erroneous overruling of an objection made to the admission of evidence, the granting of an amendment, or a ruling on demurrer, as founded on the theory view, would necessitate a new trial and so penalize a litigant for an error on the part of the trial court. Nor did the instant court signify whether an otherwise sustainable objection of this sort, delayed until after the verdict, would be held a defect of substance rather than form and hence a ground for reversal. Even if restricted to the specific holding, the revival of the "law to law" test imperils the transfer of cases improperly commenced since such a transfer generally entails a change in theory. Thus, although the actual decision was probably prompted by the reluctance of the court to countenance this sort of recovery against a municipality, as a matter of substantive law, it is unfortunate that the holding should have been so expressed as to further a retrogressive procedural tendency.

TELEGRAPHS AND TELEPHONES—LIABILITY OF TELEGRAPH COMPANY TO UNDISCLOSED PRINCIPAL OF ADDRESSEE FOR NEGLIGENT TRANSMISSION OF TELEGRAM.—At the plaintiff's request his physician sent to a bacteriologist a culture taken from the plaintiff's daughter for examination and telegraphic report. The return telegram, on which the plaintiff's physician relied to administer a curative dose of anti-toxin, read: "Redding culture received diphtheria." The telegram as written had read: "Redding culture negative diphtheria." The anti-toxin had serious deleterious effects upon the child and suit was brought against the telegraph company for injuries and mental anguish suffered through its negligence. The upper court, in upholding the lower court's award of damages, held that the plaintiff was the undisclosed principal of the sender as well as of the addressee and that the telegraph company therefore owed the plaintiff a duty of care in the transmission of the message. *Western Union v. Redding*, 120 So. 743 (Fla. 1930).

The courts in denying recovery to the undisclosed principal of the addressee for the negligence of telegraph companies in transmitting telegrams[1] have strayed into a labyrinth of legal fiction. They reason that the injury to the plaintiff must have been the probable and proximate result of the defendant's negligence;[2] that the person injured must, there-

[14] 38 STAT. 956 (1915), 28 U. S. C. A. § 397 (1927). *Cf.* Webb v. Southern Ry., 235 Fed. 578 (S. D. Ala. 1916).

[15] See Hicks Co. v. Moore, 261 Fed. 773 (C. C. A. 5th, 1919); Tuckerman v. Means, 262 Fed. 607 (Ct. of App. D. C. 1919).

[1] Western Union v. Schriver, 141 Fed. 538 (C. C. A. 8th, 1905), noted in (1906) 4 L. R. A. (N. S.) 678; Western Union v. Lowden, 116 Miss. 379, 77 So. 145 (1918); BURDICK, LAW OF TORTS (4th ed. 1926) 581, n. 32. But see Western Union v. Potts, 120 Tenn. 37, 51, 52, 113 S. W. 789, 792 (1908) (suggesting that the undisclosed principal of the addressee might recover for actual damages but not for mental anguish).

[2] See Western Union v. Schriver, *supra* note 1, at 540, 550; Barnett v. Western Union, 287 S. W. 1064, 1068 (Mo. App. 1926); Edd v. Western

fore, have been within the contemplation of the telegraph company;[3] that the undisclosed principal of the sender is within this "contemplation," having been privy to the contract between his agent and the company;[4] that an undisclosed principal of the addressee, on the other hand, if he is suing *ex contractu*, is barred from recovery by lack of privity[5] unless he was also the principal of the sender[6] or a beneficiary sufficiently designated within the telegram;[7] that if he is bringing his action *ex delicto*, recovery is likewise barred[8] since telegraph companies, whether considered common carriers of intelligence,[9] independent contractors,[10] or simply public corporations with certain public duties,[11] owe no duty to the public in general and have no notice of the undisclosed principal of the addressee in particular. The liability of telegraph companies, however, has gradually been so extended that it may include the instant type of case where the court can find that the undisclosed principal of the sendee, by constructively authorizing a telegraphic reply, is also the undisclosed principal of the sender and thus "within the contemplation" of the company.[12] The result seems justifiable, even though the method of obtaining it is at best over-elaborate. In the instant case, had the telegram in question been sent to the principal directly instead of through the intermediary of his agent, the court would have found no such difficult obstacles to surmount.[13]

Union, 127 Ore. 500, 505, 272 Pac. 895, 897 (1928); Western Union v. Taylor, 94 Fla. 841, 847, 114 So. 529, 531 (1927).

[3] See Western Union v. Schriver, *supra* note 1, at 548, 550; Western Union v. Brooks, 115 Tex. 168, 173, 279 S. W. 443, 444 (1926); Western Union v. Taylor, *supra* note 2, at 848, 114 So. at 532. But see Western Union v. Green, 153 Tenn. 522, 532, 284 S. W. 898, 899 (1926).

[4] See Western Union v. Schriver, *supra* note 1, at 547, 549; Western Union v. Northcutt, 158 Ala. 539, 557, 48 So. 553, 558 (1909); Milliken v. Western Union, 110 N. Y. 403, 410, 18 N. E. 251, 252 (1888); *cf.* 2 MECHEM, LAW OF AGENCY (2d ed. 1914) § 2059.

[5] See cases *supra* note 4.

[6] Harkness v. Western Union, 73 Iowa 190, 34 N. W. 811 (1887); *cf.* Western Union v. Potts, *supra note* 1, at 45, 113 S. W. at 791.

[7] *Cf.* Western Union v. Fulton, 211 S. W. 285 (Tex. Civ. App. 1919); Western Union v. Smith, 38 Ga. App. 26, 143 S. E. 147 (1928).

[8] See cases *supra* notes 4 and 6.

[9] See Reaves v. Western Union, 110 S. C. 233, 239, 96 S. E. 295, 297 (1918); Western Union v. Brown, 294 Fed. 167, 170 (C. C. A. 8th, 1923). But *cf.* Basila v. Western Union, 24 F. (2d) 569, 571 (S. D. Fla. 1928).

[10] See Harper v. Western Union, 133 S. C. 55, 60, 130 S. E. 119, 120 (1925); Western Union v. Cowin & Co., 20 F. (2d) 103, 107 (C. C. A. 8th, 1927).

[11] See 2 WILLISTON, CONTRACTS (1920) § 1114; Barnett v. Western Union, *supra* note 2, at 1067.

[12] *Cf.* WILLISTON, *op. cit. surpa* note 11, at § 83, for the proposition that the person taking the initiative in using the telegraph authorizes its use by the other party; Western Union v. Chihuahua Exchange, 206 S. W. 364, 365 (Tex. Civ. App. 1918) (person first using the telegraph makes the telegraph company an agent for the purpose of communication).

[13] See JOYCE, ELECTRIC LAW (2d ed. 1907) § 1008; Western Union v. Green, 153 Tenn. 59, 281 S. W. 778 *aff'd*, 153 Tenn. 522, 284 S. W. 898 (1926) (statute); with which *cf.* Western Union v. Alfred, 4 S. W. (2d) 666 (Tex. Civ. App. 1928). In England, however, the courts find some difficulty in allowing the addressee to recover. *Cf.* Dickson v. Reuter's Telegram Co., 37 L. T. 370 (1877); Blakeney v. Pegus (No. 2), 6 N. S. W.

Thus liability might better have been imposed by a closer identification of the plaintiff and his physician insofar as the purpose of the telegram was concerned, especially since this nominal change in the identity of the addressee would scarcely have caused the defendant to have been more careful in transmitting the message.

USURY—EFFECT OF ACCELERATION CLAUSE IN LOAN CONTRACT.—Pursuant to a loan by the defendants, the plaintiffs executed their note for the principal, with interest coupons at 12% for the first five years and 6% for the last five. Both the notes and the deeds of trust given as security stipulated that upon a default in the payment of any interest instalment, or a breach of any covenant in the deeds, all the notes should become due at the option of the legal holder. After discharging two coupons, the borrowers sued to have the loan adjudged usurious and to recover double the interest already paid, in accordance with the provisions of the usury statute. [TEX. COMP. STAT. (1928) art. 5073]. The Court of Civil Appeals held the contract valid on the ground that the plaintiffs by their performance could defeat the contingency upon the happening of which alone usurious interest would accrue. The decision was reversed on appeal, the Supreme Court holding that, under the Texas statute defining interest as a sum allowed "for the use or forbearance or detention of money" [TEX. COMP. STAT. (1928) art. 5069], the clause must be considered a stipulation for interest and not a mere penalty as at common law. *Shropshire v. Commerce Farm Credit Co.*, 30 S. W. (2d) 282 (Tex. 1930).

Reluctant to apply the logic of the usury laws to *bona fide* financial arrangements, courts have held that where unlawful interest is payable only upon a contingency going to the entire interest, there is no usury.[1] And if the contingency is within the borrower's control, as where it is stipulated that upon default at maturity the interest will be increased beyond the legal maximum, the contract has been held legal although in such case the contingency affects only the excess interest.[2] Furthermore the exercise of an option to pay the principal before maturity does not taint the loan with usury despite the payment of interest above the lawful rate if reckoned as of the period of actual use of the money.[3] In accord with these principles, courts have almost universally sanctioned "acceleration clauses" similar to those in the instant case.[4] Indeed, the Texas Supreme Court itself followed this view in three early decisions,[5] but has since

223 (1885). Inland communication by telegraph is now in the hands of the Postmaster-General, who is not subject to suit. See POLLOCK, THE LAW OF TORTS (13th ed. 1929) 576.

[1] Clift v. Barrow, 108 N. Y. 187, 15 N. E. 327 (1888) (partnership agreement). See Hartley v. Eagle Insurance Co., 222 N. Y. 178, 118 N. E. 622 (1918); (1918) 18 COL. L. REV. 284.

[2] Law Guarantee & Trust Soc. v. Hogue, 37 Ore. 544, 62 Pac. 380 (1900). See also Lloyd v. Scott, 4 Pet. 205, 225 (U. S. 1830). *Contra:* Richardson v. Brown, 68 Tenn. 242 (1877).

[3] Eldred v. Hart, 87 Ark. 534, 113 S. W. 213 (1908); Smithwick v. Whitley, 152 N. C. 366, 67 S. E. 914 (1910).

[4] Garland v. Union Trust Co., 63 Okla. 243, 165 Pac. 197 (1917); Goodale v. Wallace, 19 S. D. 405, 103 N. W. 651 (1905); Cissna Loan Co. v. Gawley, 87 Wash. 438, 151 Pac. 792 (1915). See also 3 WILLISTON, CONTRACTS (1920) § 1696. *Contra:* Maxwell v. Jacksonville Loan & Improvement Co., 45 Fla. 425, 34 So. 255 (1903).

[5] Seymour Opera House Co. v. Thurston, 45 S. W. 815 (Tex. Civ. App.

adopted the contrary rule[6] in consistent opposition to the Courts of Civil Appeals.[7] Though ostensibly based upon the wording of the statute,[8] this deviation by the higher court seems to reflect a belief that such provisions create an undesirable advantage against which borrowers should be protected.[9] But the narrow rule thus established would tend toward a total disregard of the *bona fide* use of the device.[10] Undoubtedly a loan with an acceleration provision is usurious if it can be proved that upon its execution forbearance after maturity is mutually contemplated, with the excessive interest regarded as the lender's commission.[11] If, on the other hand, the stipulation is a *bona fide* attempt to compel prompt payment by fixing a penalty, which in any event would not be enforced unless conscionable,[12] it appears unreasonable to attach to the loan the effects of usury.[13] The instant decision may possibly have been prompted by an unusual prevalence of extortion from weak borrowers. Nevertheless the court, in addition to opposing the great weight of authority, has failed to follow a pronounced judicial tendency to indulge "legal usury" in the absence of any corrupt intent, out of deference to established business methods.[14]

1898) (writ of error denied); Crider v. San Antonio Real Estate Building & Loan Ass'n, 89 Tex. 597, 35 S. W. 1047 (1896); Dugan v. Lewis, 79 Tex. 246, 14 S. W. 1024 (1891).

[6] Deming Investment Co. v. Giddens, 30 S. W. (2d) 287 (Tex. 1930) (decided at same time as instant case); Shear Co. v. Hall, 235 S. W. 195 (Tex. 1921); Parks v. Lubbock, 92 Tex. 635, 51 S. W. 322 (1899).

[7] See Shropshire v. Commerce Farm Credit Co., 266 S. W. 612 (Tex. Civ. App. 1924); Shear Co. v. Hall, 215 S. W. 567 (Tex. Civ. App. 1919); Parks v. Lubbock, 50 S. W. 466 (Tex. Civ. App. 1899); Seymour Opera House Co. v. Thurston, *supra* note 5. See also Note (1926) 4 TEX. L. REV. 519.

[8] See Parks v. Lubbock, *supra* note 6, at 637, 51 S. W. at 323. But *cf.* Garland v. Union Trust Co., *supra* note 4, decided under a statute of identical wording. And see definition of "interest" in BOUVIER, LAW DICTIONARY (8th ed. 1914)

[9] *Cf.* 1 SUTHERLAND, DAMAGES (4th ed. 1916) 999.

[10] See Shropshire v. Commerce Farm Credit Co., *supra* note 7, at 616; Moore v. Cameron, 93 N. C. 51, 57 (1885).

[11] See Union Mortgage Banking & Trust Co. v. Hagood, 97 Fed. 360, 363 (C. C. S. C. 1899); WEBB, USURY (1899) 90 *et seq.*

[12] Dugan v. Lewis, *supra* note 5; SUTHERLAND, *op. cit. supra* note 9, at 869.

[13] See cases cited *supra* note 4.

[14] See RYAN, USURY AND USURY LAWS (1924) 12; Comment (1930) 39 YALE L. J. 408.