NOTES

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NOTES

THE LAMB DISBARMENT PROCEEDINGS*

In the fervor of argument before a trial judge, it is not unusual for an attorney to lapse into hasty, ill-conceived phrases. Particularly when the issue involves fundamental social problems, the formal and dignified atmosphere of the courtroom is apt to lose much of its restraining influence. A pending disbarment proceeding against a CIO attorney for his courtroom conduct has focused the attention of bar and public on how vehemently a lawyer may press his convictions without being guilty of an unpardonable violation of his duties as an officer of the court.

The charges against the attorney are intelligible only in the light of the situation which formed the background for the alleged improprieties. After having obtained individual contracts of employment from many of its workers, the Williams Manufacturing Company of Ohio brought suit in a state court to enjoin a local union from picketing the factory on the ground that it would interfere with the performance of these contracts. At the preliminary hearing, the attorney for the union, Edward Lamb, argued for a denial of the petition for a temporary restraining order because the company was guilty of unfair labor practices under the Wagner Act, and therefore did not come into court with clean hands. He also contended that the contracts were void.

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*In the Matter of Charges against Edward Lamb, Court of Common Pleas, Scioto County, Ohio, No. 29986.

1. Courts have taken into account this propensity in cases involving counsel's conduct in the trial court. Curran v. Superior Court, 72 Cal. App. 258, 236 Pac. 975 (1925) (contempt); People v. Ginsberg, 87 Colo. 115, 285 Pac. 753 (1930) (disbarment).

2. The same is true, of course, under the less formalized procedure of administrative bodies performing functions similar to those of courts. See, e.g., the angry outburst of Mr. Columbo, attorney for the Ford Company, in hearing before trial examiner of NLRB: "... I'm treated like a horse-thief here instead of an officer of a court of justice." N.Y. Times, July 28, 1937, p. 6, col. 1.


4. The contracts provided that the employee agreed to work for the company for six months; the company promised to hire him at the same basic rate as was then being paid. Either party could terminate the contract on fifteen days notice. The company had the power to dismiss the employee if an insufficiency or stoppage of work required it. Record, Williams Mfg. Co. v. United Shoe Workers of America, Local 119, p. 22 (Hereinafter referred to as Record, Williams case).

5. Some of the employees were also joined as plaintiffs.

6. Mr. Lamb is Executive Vice-President of the National Lawyers Guild and Regional Counsel for the CIO. A committee consisting of Solicitor-General Robert H. Jackson, Assistant Attorney-General Thurman W. Arnold, Commissioner Jerome Frank of the SEC, and numerous other practicing attorneys, judges and professors have supported the Guild in defending him. N.Y. Times, April 11, 1938, p. 1, col. 3.

7. Testimony was proffered to the effect that the company had discharged men for union activities, had refused to bargain collectively, and had broken an agreement,
because secured by coercion and for the unconscionable purpose of strike-breaking;\(^8\) that the picketing did not constitute an interference with performance of the contracts;\(^9\) and that the right to strike was of necessity a pertinent, if not decisive, factor in the case.\(^10\) The presiding judge refused to consider either the merits of the case or the strike issue,\(^11\) and ruled that the scope of the hearing would be confined to determining whether the contracts existed, whether they were legal,\(^12\) and whether the defendant union threatened interference with their performance.\(^13\) After a hearing on this basis, the judge granted the temporary restraining order.\(^14\) Later the judge appointed a committee of three members of the Ohio bar to investigate Lamb's conduct during the hearing.\(^15\) The committee recommended that Lamb be disbarred for "unprofessional conduct involving moral turpitude."\(^16\)

In view of the novelty of the charges, the committee's complaint merits detailed examination. The first of four specifications charges Lamb with unprofessional conduct because he knew that his statements during the trial would bring the court into disrepute by causing spectators to believe that it was unfair, partial and unjust. Excerpts from the trial record are quoted to substantiate this charge. In addition to scattered angry outbursts and ill-phrased incidental remarks, particular emphasis is placed upon Lamb's statements concerning the plaintiff's attempted use of the court as a strike-breaking agency;\(^17\) his vigorous assertion of the union's right to employ the defense

made with a Regional Director of the NLRB, to rehire certain employees with backpay. Record, Williams case, pp. 10, 84, 113, 119-121, 173, 176, 182, 185.

8. The proffered evidence indicated that the employees were threatened with dismissal unless they signed the contracts. Record, Williams case, pp. 2, 7, 56, 161, 175.

9. Record, Williams case, pp. 103, 104.


11. The court stated that a second hearing would be had on the merits. Record, Williams case, pp. 15, 24, 107, 120.

12. The contracts followed the pattern of similar employment contracts previously upheld by an Ohio court. Hamilton Tailoring Company v. Cincinnati Joint Board, 132 Ohio St. 259, 7 N. E. (2d) 259 (1937), dismissing on procedural grounds an unreported decision of the Court of Appeals, rev'd 4 Ohio O. 295 (C. P. 1935).

13. The strike had evidently been peaceably conducted, marked only by scattered incidents of name calling, hair pulling, and threatening words and actions, for which the strikers appeared only partly responsible. Record, Williams case, pp. 48, 51, 52, 58-61, 63-65, 70, 75, 76, 89, 90, 97, 98, 125.

14. The defendants were restrained "from making statements, either verbally or through signs or placards, calculated to induce the plaintiff employees to break their employment contract . . . or preventing the plaintiff company from carrying out its part of the contract by furnishing employees with employment . . . " (1938) 6 I. J. A. Bull. 105 (criticizing sweeping terms of injunction).


17. By Mr. Lamb: "If they can get the Court to act as their strike-breaking agency, Mr. Williams will be able to say, 'See what we did. We can't get the judge of our Court, but we can get another foreign judge to come in and break the strike for us.'" Record, Williams case, p. 28. The presiding judge was from another county
of the "filthy, dirty hands" of the employer, and his statement, upon the court's denial of the applicability of this defense, that "this proposition is the rawest ever presented in a Court;" his vehement insistence on categorizing the employment agreements as "yellow dog" contracts; and, most serious of all, his claim that "we were hijacked through this Court all day yesterday, and I tell you right now I don't intend to be hijacked all day today." The second specification alleges that Lamb was guilty of a disrespectful, threatening and intimidating attitude toward the court, and of attempting to incite his clients against any adverse order that might be rendered. To support this charge the committee relies chiefly upon Lamb's oft-repeated statement that an injunction would not settle the labor difficulties, since "we are not through with the Williams Manufacturing Company." The third specification accuses Lamb of making certain statements for the purpose of stirring up ill-will, class hatred and violence. In addition to a reiteration of previous items, the committee points in this connection to his colorful description of strike-breaking methods; his definition and use of the word "scab;" a brief four line speech which elicited cheering and clapping on the part of the spectators; and his charge that a company witness had turned "things over to his attorney to escape prosecution." Finally, the fourth specification charges intentional discourtesy to the court, ungentlemanly and unprofessional conduct, and an attempt to appeal to passion and prejudice without regard to defending his clients' cause or assisting the court and had been appointed to hear the case because the regular judge had disqualified himself.

18. Record, Williams case, p. 2.
20. At the judge's sustaining the objection to the use of the phrase "yellow-dog" contracts, Lamb replied, "I don't know how to label it. I know I can't think of a lower or worse name." The judge also denied Lamb the right to refer to the contracts as "individual contracts," but no objection was made when Lamb used this term immediately thereafter. Both "yellow dog" and "individual contracts" were phrases subsequently used by the judge himself. Record, Williams case, pp. 73, 74, 134, 148.
21. This remark followed the sustaining of an objection to Lamb's questioning of a witness as to how the contracts had been obtained. The judge warned Lamb that if he continued such conduct he would be subject to an investigation to determine if he was a fit person to practice law. This constituted the only material warning the Court gave to Lamb. Record, Williams case, p. 132. Compare Lamb's remarks with those of Ford's counsel, cited in note 2, supra.
22. Record, Williams case, pp. 33, 37, 103. The "threat" was also phrased in the following words, "Strike-breaking does not end the desire of human beings to secure their social security." Record, Williams case, p. 104.
25. The outburst was seemingly provoked by an unnecessary remark by opposing counsel. Record, Williams case, p. 139.
26. Lamb had asked to see the correspondence between the company and the NLRB, which the witness testified was in his attorney's office in Cincinnati. This same request had been made on the previous day and plaintiffs had promised to produce it if possible. Record, Williams case, p. 136.
in reaching a fair decision. Under this finding the complaint repeats previous quotations, cites various isolated inapt remarks, and stresses his indirect indictment of a witness as a liar.\(^{27}\)

Disbarment proceedings are not aimed at inflicting punishment upon an individual for a wrong he has committed. This function is left to criminal or civil processes. The purpose of disbarment, rather, is to insure respect for the judicial process and to protect the interest of the general public by purging from the profession those attorneys who have demonstrated their incapacity to practice ethically. Any punitive effects are regarded as merely incidental to the accomplishment of this larger purpose.\(^{28}\) So plentiful are the less severe penalties at the disposal of the judge that the extreme sanction of disbarment is usually reserved for conduct involving "moral turpitude."\(^{29}\) Hence disbarment has been most frequently employed against attorneys who have committed serious crimes,\(^{30}\) or have attempted to deceive the court,\(^{30}\) or swindle their clients.\(^{31}\) In extreme cases, the elastic concept of "moral turpitude"\(^{32}\) has been stretched to include abusive criticism of the court in briefs and other legal papers or in newspapers.\(^{34}\) But the reports are barren of instances where a court has based a finding of moral turpitude solely upon the conduct of counsel in litigating his case before the trial court; in fact, the charge itself has been made but rarely.\(^{35}\) The distinction between conduct

\(^{27}\) A witness had testified that he was working against the union in order to keep his job, but later denied having made this statement. Record, Williams case, pp. 83–86.

\(^{28}\) In re Huppe, 92 Mont. 211, 11 P. (2d) 793 (1932); In re Woodworth, 31 Ohio N. P. (n.s.) 107 (C. P. 1933); State Board of Examiners v. Brown, 77 P. (2d) 626 (Wyo. 1938).


\(^{30}\) "It [moral turpitude] is subjective in meaning and restricted to those who commit the gravest offenses—felonies, infamous crimes, those that are malum in se." Bartos v. United States District Court, 19 F. (2d) 722, 724 (C. C. A. 8th, 1927).


\(^{32}\) State v. Rohrig, 159 Iowa 725, 139 N. W. 908 (1913).

\(^{33}\) "Moral turpitude" is incapable of precise definition. See Bradway, Moral Turpitude as the Criterion of Offenses that Justify Disbarment (1935) 24 Calif. L. Rev. 9, 16.

\(^{34}\) Bar Association of San Francisco v. Philbrook, 35 Cal. App. 460, 170 Pac. 140 (1917); In re Thatcher, 80 Ohio St. 492, 89 N. E. 39 (1909); State v. Breckenridge, 126 Okl. 258 Pac. 744 (1927) (suspension). But cf. In re Hickey, 149 Tenn. 344, 258 S. W. 417 (1924). Even in these cases a finding for contempt is more common. See (1934) 8 Temp. L. Q. 543.

outside and inside the courtroom is readily apparent. The former cases represent premeditated attacks upon courts which have repeatedly acknowledged their willingness to be subjected to fair criticism if couched in courteous language.\textsuperscript{36} But when an attorney blurts out improper statements in the heat of combat in open court, the crucial element of deliberateness inherent in the written word is missing,\textsuperscript{37} and further repetition can be checked by an alert court. Therefore, only the most deliberately vicious and flagrantly disgraceful language in oral argument could possibly justify imposition of the concededly drastic penalty of disbarment.

Lamb's conduct in the Williams case falls far short of any such interpretation of "moral turpitude." Some of the quoted statements seem entirely innocuous; others represent minor eruptions invariably accompanying the impassioned atmosphere of a labor controversy.\textsuperscript{38} For instance, his insistence upon referring to the employment agreements as "yellow dog" contracts, stressed in the complaint by repetitions of the same incident,\textsuperscript{39} is hardly an outrageous perversion. The same phrase has been accepted by Congress,\textsuperscript{40} employed in judicial decisions,\textsuperscript{41} and recognized for its descriptive value by respectable legal periodicals.\textsuperscript{42} His "threats" that an adverse decision by the Ohio court would not terminate his clients' activities, while not meticulously articulated, certainly do not warrant a finding of an attempt to incite to violence. Rather, in the light of contemporaneous and subsequent events, a reasonable interpretation is that the union intended to pursue before the NLRB a complaint which had already been filed at the time of the injunction proceedings. In this connection, it is significant that a recent decision by the NLRB found the company guilty of unfair labor practices and enjoined the enforcement of the contracts on the ground that they were exacted by coercion for the express purpose of securing an injunction.\textsuperscript{43} This condemnation of the com-

\textsuperscript{37} \textit{Ex parte} Morriss, 110 Tex. Crim. App. 585, 10 S. W. (2d) 105 (1928); State v. Rubin, 201 Wis. 30, 229 N. W. 36 (1930). See 2 \textsc{Thornton, Attorneys at Law} (1914) § 184. See note 2, supra.
\textsuperscript{38} See note 2, supra.
\textsuperscript{39} The same incident is reported three times in the complaint.
\textsuperscript{40} 47 \textsc{Stat.} 70 (1932), 29 U. S. C. § 103 (1934).
\textsuperscript{41} See the dissenting opinions in Coppage v. Kansas, 236 U. S. 1, 27 (1915); Kraemer Hosiery Co. v. American Federation of Hosiery Workers, 305 Pa. 205, 238, 157 Atl. 588, 594 (1931).
\textsuperscript{42} See Doskow, \textit{Statutes Outlawing Yellow Dog Contracts} (1931) 17 \textsc{A. B. A. J.} 516; Comments (1932) 17 \textsc{Corn. L. Q.} 472; (1928) 41 \textsc{Harv. L. Rev.} 770. Use of the word "scab," incorporated in the Lamb charges, has been held to warrant a finding for contempt. State v. Zioncheck, 171 Wash. 388, 18 P. (2d) 35 (1933). But cf. Richard Boiler Co. v. Benner, 14 Ohio Dec. 357 (C. P. 1904).
\textsuperscript{43} \textit{In re} Williams Manufacturing Co. and United Shoe Workers of America, C-288, R-334, 6 NLRB No. 30 (March 24, 1938).
pany indicates that Lamb's conduct was not lacking in good faith, and that his arguments and accusations, though poorly extemporized, were motivated by a desire to present a forceful defense of his clients' cause and to persuade the Ohio court to make a just disposition of the case. If Lamb's demeanor is thought to have descended at times to the level of an appeal to passion and prejudice, surely the consequences could not be regarded as serious when it is remembered that he was addressing an impartial court, not an impressionable jury. And the accusation that an attorney can be responsible for stirring up ill-will between the parties to a labor dispute overlooks the obvious truism that strikes are always accompanied by bad feelings and aroused tempers. The only serious impropriety would seem to be his caustic criticism of the court. Even if these remarks were unprovoked, at most they called for a reprimand, a warning, and, if repeated, a citation for contempt. But to terminate, or even to suspend, the professional career of an attorney for disrespect in oral argument would unduly emphasize courtroom manners at the expense of denying to attorneys an opportunity to advance the best arguments at their disposal. The enhancement of judicial dignity—certainly a desirable end—will be more readily achieved if judges deserve, rather than coerce, respect.

Doubt on the part of the committee itself as to the validity of the disbarment proceedings may be inferred from a recent amendment to the complaint, recommending that Lamb be found guilty of contempt if the charge of moral turpitude should fail. But even this procedure would appear to be inappropriate at the present time. The purpose of direct contempt, as distinguished from the protective function of disbarment, is primarily to vindicate the court, punish the offending attorney, and eliminate troublesome impediments to a speedy trial. A finding of direct contempt, moreover, requires a weighing of intangible elements of demeanor observable only by the trial judge. Since no separate hearing is required, it is therefore customary for the presiding judge to resort to this sanction during the course of the trial.

Moreover, sincere service to a cause which has been regarded by many as unpopular has received recognition in disbarment proceedings as a mitigating circumstance. In re Ades, 6 F. Supp. 467 (D. Md. 1934) (services rendered in behalf of the rights of southern negroes). Lamb has been active in behalf of labor since 1933. Cleveland Plain Dealer, April 13, 1938, p. 5, col. 6.


Direct contempt, involved here, embraces acts committed in the presence of the court. See Thomas, Problems of Contempt of Court (1934) p. 3.

Blodgett v. Superior Court, 210 Cal. 1, 290 Pac. 293 (1930). See Beale, Contempt of Court, Criminal and Civil (1908) 21 Harv. L. Rev. 161.

Blankenburg v. Commonwealth, 272 Mass. 25, 172 N. E. 209 (1930). Compare Merchants' Stock & Grain Co. v. Board of Trade, 201 Fed. 20 (C.C.A. 8th, 1912) (only the court in which the contempt is committed may punish it), with Melton v. Commonwealth, 160 Ky. 642, 170 S. W. 37 (1914) (where court is composed of several districts, contempt against one is contempt against all).

Thomas, Problems of Contempt of Court (1934) c. 1.

In re Grossman, 109 Cal. App. 625, 293 Pac. 683 (1930) (to impose contempt immediately after trial is within reasonable time); In re Contempt of Cary, 165 Minn.
While a fine for contempt might not have aroused critical comment if imposed at the trial, in the pending case contempt proceedings are being brought more than nine months after the commission of the alleged wrongful acts. A contempt conviction would therefore have no possible connection with expediting the trial. At this late date, vindication of the court and punishment of the offense could be adequately achieved by a reprimand from the court and an apology by Lamb.

The disbarment proceedings against Lamb for his courtroom conduct in the *Williams* case involve consequences even more serious than unjust curtailment of a professional career. Rather than encouraging respect for law, disbarment or suspension under present circumstances would indicate, to some at least, the futility of hazarding a solution of basic social problems by acquiescence in the legal process. It would afford an additional weapon against attorneys appearing in defense of labor and civil liberties—more refined, it is true, but no less devastating than some of the more direct methods which have been used to terrorize lawyers defending unpopular causes. It would seriously restrict the bar's vital role of preserving the democratic tradition of representation for all causes, whatever their nature.

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203, 206 N. W. 402 (1925) (court may wait until jury has retired); *In re Thatcher*, 80 Ohio St. 492, 89 N. E. 39 (1909) ("In not entertaining Specification 15 we do not wish to be understood as holding that the facts therein stated show nothing that is reprehensible, but that it discloses a want of decorum which could have been adequately taken care of at the time by the court in whose presence the conduct of the respondent occurred.").


54. A. L. Wirin, labor attorney, was kidnapped, beaten, and left in the desert by Imperial Valley, Calif., vigilantes (Jan. 1934). David Levinson, International Labor Defense attorney defending ten miners on murder charges growing out of a strike, was kidnapped and severely blackjacked by Gallup, N. M., vigilantes (May, 1935). Henry Paull, Minnesota attorney for Timber Workers Union, was beaten, kidnapped and abandoned by vigilantes of Ironwood, Michigan (July, 1937). C. A. Stanfield, attorney for three negroes, was physically mistreated and ejected from town before the trial in Forest City, Arkansas (Oct., 1937). Further instances could be multiplied. (Information from files of American Civil Liberties Union). See also description of maltreatment of Allan Taub, attorney for International Labor Defense, in *Harlan Miners Speak* (1932) 320–322, 330–338 (Dreiser Report on Terrorism in Kentucky Coal Fields).
INSCRIPTION OF A QUESTION OF LAW AS A BASIS FOR ESTOPPEL IN INSURANCE LAW*

Insurance companies commonly defend actions on their policies on the ground that the insured committed an inceptional breach of contract. When the insured seeks to negate this defense by parol evidence that the insurer's agent had complete knowledge of the facts and had told the plaintiff that the policy as issued protected him, a basic problem in insurance law is presented. It has received diverse treatment. The United States Supreme Court has reversed its earlier position and is now firmly committed to the proposition that the admission of such testimony is violative of the parol evidence rule. But when the insured has entered into the transaction in good faith and on the assumption that he is securing a valid policy, the application of this doctrine creates hardship. Commentators have devised various theories by which the opposite result may be supported. A frank recognition of an exception to the parol evidence rule has been demanded. Since insurance is a purchasable commodity, the familiar doctrine of sales law that the vendor supplying a specific article impliedly warrants its suitability for its purpose has been invoked. Another approach stems from the rule that upon breach by the insured, an insurance contract is not void but only voidable. It has therefore been contended that issuance of the policy with knowledge of the breach constitutes an election to affirm and not to avoid, which should be operative to impose liability upon the insurer.

1. See generally 2 Joyce, Insurance (2d ed. 1917) § 536; Vance, Insurance (2d ed. 1930) 520; 3 Williston, Contracts (Rev. ed. 1936) § 748; Comment (1920) 5 Minn. L. Rev. 136.
2. Union Mutual Ins. Co. v. Wilkinson, 13 Wall. 222 (U. S. 1871) (parol evidence admissible to create an equitable estoppel against the insurer).
4. 3 Williston, Contracts (Rev. ed. 1936) §§ 748-750; Langmaid, Waiver and Estoppel In Insurance Law (1931) 20 Calif. L. Rev. 1.
5. 3 Williston, Contracts (Rev. ed. 1936) § 749. This argument is based on the theory that since a policy of insurance is ordinarily made in a fixed form it is an entirely natural and probable thing for the parties to make a separate oral agreement rather than revise the terms of the printed policy.
7. Vance, Waiver and Estoppel in Insurance Law (1925) 34 Yale L. J. 834, 851 et seq.
Courts have rarely applied these theories. Less imaginative, perhaps, but nonetheless eager to permit recovery to the insured, they have usually bottomed their decisions on the more familiar doctrines of fraud, reformation, waiver, and estoppel. The insurer rarely has actual intent to defraud, but the acceptance of a premium with the imputed knowledge that the contract is worthless to the insured may fairly be regarded as fraud by a court which does not invariably insist that an actual wrongful intent be demonstrated. Reformation requires an untrue statement in the application or the policy as a result of mutual mistake. The contract may then be reformed in equity to express the real intent of the parties, and as a short cut an action at law on the policy may be permitted. But the theories most widely used to permit recovery in this situation are waiver and estoppel. Commentators make a clear distinction between the two concepts. Waiver contemplates the relinquishment of a privilege or a power, and is said to be founded on a substitute agreement between insured and agent which changes the terms of the written contract. The parol evidence rule should bar proof of any such agreement made before or contemporaneously with the delivery of the policy. The essential requisites of an equitable estoppel are the making of a false statement of material fact by the insurer or his agent, the expectation that it will be relied upon, and actual reliance by the insured to his detriment. Since estoppels were originally cognizable only in courts of equity, the parol evidence rule should be relaxed even though the estoppel be claimed in a proceeding at law. But the majority of courts, with little attempt at either logical or historical analysis, treat the two terms as virtually synony-
mous and allow the introduction of parol evidence indiscriminately.²⁰ Even where the concepts are ostensibly differentiated they are often employed in factual situations in which their application can with difficulty be justified on any other ground than the general principle that the insured should be permitted a recovery.²¹

A recent Connecticut case presents a recurrent factual set-up in which the doctrine of equitable estoppel has generally been employed with but little discussion of the soundness of the premises implicit in its use. The plaintiff purchased property with buildings thereon and took the deed in the name of a third person. When the former sought to have the existing fire insurance transferred, the agent of the defendant company, cognizant of all the facts, informed him that the insurance would have to be in the name of the record owner. The agent was aware that the plaintiff was not only the equitable owner but would also be the real insured, paying all premiums and suffering all loss in case of fire. But apparently the agent thought and assured the plaintiff that the policy written in the name of the record owner would cover the risk. The record owner subsequently conveyed the property to the plaintiff by an unrecorded deed. After fire occurred, the defendant denied liability on the ground that the plaintiff was not the insured under the policy and that there had been an inceptional breach of the "sole and unconditional ownership" clause. A judgment for the plaintiff was affirmed. The court held that because of the knowledge and acts of its agent, the insurer was equitably estopped from preventing parol proof by the plaintiff that he was the owner of the equitable title, and that as such the latter satisfied the sole and unconditional ownership requirement. Further support for the decision was marshalled on the theory that the plaintiff should be allowed to sue as a beneficiary of the purchase-money resulting trust which arose by virtue of the dealings between the plaintiff and the record owner of the property.²²

²⁰ Yorkshire Ins. Co. v. Gazis, 219 Ala. 96, 121 So. 84 (1929); Aldridge v. Greensboro Fire Ins. Co., 194 N. C. 683, 140 S. E. 706 (1927); Bardwell v. Commercial Union Assurance Co., 105 Vt. 106, 163 Atl. 633 (1933); see Vance, supra note 7, at 839.


²² Limitations on the actual authority of an agent do not usually prevent the insured from establishing an estoppel, but it has been held that knowledge of a soliciting agent cannot bind the insurer. Salvate v. Firemen's Ins. Co., 42 R. I. 433, 108 Atl. 579 (1920).

The general stipulation that no agent has any authority to waive any of the provisions in the policy unless the waiver is written thereon or countersigned by some higher authority is uniformly held to refer to facts which may arise after the policy is written and not retroactively to those existing before or at the time of the execution of the contract. MacKay v. Aetna Life Ins. Co., 118 Conn. 538, 173 Atl. 783 (1934); Bible v. John Hancock Mut. Life Ins. Co., 256 N. Y. 458, 176 N. E. 838 (1931).


Traditionally, the representation requisite for the creation of an equitable estoppel had to be a material fact and not an opinion or a conclusion of law.\textsuperscript{23} In the case of an opinion the truth was deemed to be uncertain,\textsuperscript{24} and in the case of a conclusion of law the parties were presumed to have equal knowledge.\textsuperscript{25} Reasonable grounds for reliance on such representations were therefore lacking. The only representation made by the agent in the instant case was that the policy as written covered the plaintiff's risk. Even though the distinction between law and fact is not easily discernible,\textsuperscript{26} it would nonetheless appear that the interpretation of the operative effect of the policy is a conclusion of law.\textsuperscript{27} This incipient obstacle to the creation of an equitable estoppel has of course been rationalized. The agent, it is true, states his opinion in good faith. But his acts and knowledge are imputed to the company. The latter knows that a condition broken makes the policy unenforceable. When, therefore, it assures the plaintiff through its agent that he will be protected, it misstates the material fact of what its opinion actually is, and the basis for the estoppel springs into being.\textsuperscript{28} This ingenious explanation has met severe criticism.\textsuperscript{29}

The majority of courts have not been overly bothered by such conceptual difficulties, and the problem has received meager treatment at their hands. It is generally stated, without question or discussion, that a representation such as the one involved in the instant situation is sufficient to support an estoppel.\textsuperscript{30} But there have been sporadic indications of dissent. It has been held that a soliciting agent is not an agent to give legal advice. He therefore cannot bind the company by any statement as to the necessity of making changes in a policy\textsuperscript{31} or by a statement that a policy will be valid despite the breach of a warranty by the insured.\textsuperscript{32} And a statement by a general agent

\textsuperscript{23} Bower, \textit{Estoppel by Representation} (1923) §§ 40, 57; Bigelow, \textit{Estoppel} (5th ed. 1890) 572.

\textsuperscript{24} Bigelow, \textit{Estoppel} (5th ed. 1890) 573.

\textsuperscript{25} West London Commercial Bank v. Kitson, 13 Q. B. D. 360 (1894); see Bigelow, \textit{Estoppel} (5th ed. 1890) 573; Bower, \textit{Estoppel by Representation} (1923) § 55.

\textsuperscript{26} Bower, \textit{Estoppel by Representation} (1923) § 56; Thayer, \textit{Evidence} (1893) 202; (1924) 2 Tex. L. Rev. 361.

\textsuperscript{27} \textit{Cf.} Prophet v. Roberts [1918] 88 L. J. 975 (C. A.) (statement by employer to workman as to legal effect of a clause in Workmen's Compensation Act held to be conclusion of law and not ground for an estoppel); see Langmaid, supra note 4, at 7.

\textsuperscript{28} Vance, \textit{Insurance} (2d ed. 1930) 520.

\textsuperscript{29} See Ewart, \textit{Waiver in Insurance Law} (1926) 35 Yale L. J. 970; Langmaid, supra note 4, at 6.


that the application was a mere matter of form has been held to be an expression of opinion which could in no way mislead the applicant.\textsuperscript{33}

The refusal of most courts to deny recovery to the insured on the basis of tenuous distinctions between questions of law and fact is hardly open to serious criticism. Where the agent acts in good faith, and the insured believes his word, the frank admission and application of an exception to the rule that a statement of law will not support an estoppel seems eminently justified. The inclination of the company to adopt a fast-and-loose policy, as evidenced by its denial of liability to the named insured previous to the institution of the present suit, reinforces this conclusion. It has been stated that if the representor stands in a confidential relation to the other party, or chooses to make the statement as a matter within his own personal knowledge, his statement may be considered a representation making him liable to an estoppel.\textsuperscript{34} The insurance agent is usually held out to be the qualified representative of the company, and the average person feels, rightly or wrongly, that the former has a superior knowledge of the factors necessary to the creation of a valid contract.\textsuperscript{35} To impose a duty on the insurer to provide agents with that knowledge seems a not undue requirement.

Another solution is perhaps feasible in situations analogous to the instant case. The court indicated that a purchase-money resulting trust in the land was raised in favor of the plaintiff. But since the latter paid all the premiums and was the real insured, it would follow that he was also the beneficiary of a resulting trust in the policy itself.\textsuperscript{36} The rule that a cause of action against a third party must be prosecuted by the trustee and not the \textit{cestui} does not apply to passive trusts of this nature.\textsuperscript{37} The trustee, as holder of the legal title, could presumably satisfy the unconditional ownership requirement and recover against the company.\textsuperscript{38} If he did so, he could be forced to remit the proceeds to the instant plaintiff. Permitting the latter to establish the trust directly against the company, perhaps by joining the named insured as a party-defendant, would avoid possible circuity of action. It would also

\textsuperscript{33} Southern Ins. Co. v. White, 58 Ark. 277, 24 S. W. 425 (1893); see Swereign Camp, W.O.W. v. Richardson, 151 Ark. 231, 237, 236 S. W. 278, 280 (1922); 2 Joyce, \textit{Insurance} (2d ed. 1917) 1329. Some courts, admitting that the statements of the agent were conclusions of law, have nevertheless applied the doctrine of estoppel. Pacific Employers' Ins. Co. v. Arenbrurst, 85 Cal. App. 263, 259 Pac. 121 (1927); Forney v. Farmers' Mutual Fire Ins. Co., 181 Minn. 8, 231 N. W. 401 (1930).

\textsuperscript{34} Bigelow, \textit{Estoppel} (5th ed. 1890) 572; Bower, \textit{Estoppel by Representation} (1923) § 51.


\textsuperscript{36} Purchase-money resulting trusts are not confined to realty. 1 Perry, \textit{Trusts and Trustees} (7th ed. 1929) § 130. See Rider v. Kidder, 10 Ves. 363, 367 (Ch. 1805).

\textsuperscript{37} 4 Bogert, \textit{Trusts and Trustees} (1935) §§ 453, 870.

\textsuperscript{38} But the peculiar circumstance of the reconveyance of the legal title to the plaintiff after the making of the contract would probably defeat such a recovery in the instant case.
accomplish the ultimate objective without the necessity of dealing with the troublesome problems inherent in the application of the doctrine of equitable estoppel.  

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**Regulation of the Milling-in-Transit Privilege by the Interstate Commerce Commission**

Transit privileges evolved largely through the voluntary action of railroads in a competitive effort to encourage industrial development along their lines and to assure for themselves control of the outbound movement of shipments. They are now extensively granted on a variety of commodities. An illustration of the privilege in simple form is that of a miller at B, an intermediate point on a railroad line, who ships wheat from A to B, there mills it, and then ships the product to a market at C at the through rate from A to C, rather than the higher combination of locals which would otherwise apply. Use of the through rate is based on a fiction of one continuous shipment. Actually, the shipper pays the local rate to the transit point, and upon sur-

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1. The first transit privilege in this country was inaugurated about 1870. See Duncan & Co. v. Nashville, C. & S. L. Ry., 35 I. C. C. 477, 480 (1915).


3. See In the Matter of Substitution of Tonnage at Transit Points, 18 I. C. C. 280, 295 (1910). But it is unreasonable for a railroad to increase its local rate as a penalty to be forfeited if the outbound shipment does not move on its line. Red River Oil Co. v. Texas & Pac. Ry., 23 I. C. C. 438 (1912).

4. See In the Matter of the Transportation of Wool, Hides and Pelts, 23 I. C. C. 151, 174 (1912); Superior Commercial Club v. Great Northern R.R., 24 I. C. C. 95 (1912). The number of transit arrangements extant in this country has been estimated at over 300. Wilson, Transit Services and Privileges (1925) 81. Transit seems most widely used on grain, particularly wheat, at least a half of which receives such service as storage, cleaning, milling, or inspection, and on cotton for the purpose of compression and grading. See Grain and Grain Products, 164 I. C. C. 619, 700 (1930). See Freight Traffic Redbook (1935) 284 et seq. for a summary of the nature and kind of transit privileges.

5. Ordinarily the through rate is less than the sum of the intermediate rates. See In the Matter of Transportation of Wool, Hides and Pelts, 23 I. C. C. 151, 170 (1912).

render of inbound billing at the time of the outbound shipment, pays the difference between such local rate and the through rate from point of origin to final destination. 7 And although logical adherence to the fiction of a through movement would require the shipment of a product derived from the identical raw material moved inbound, different shipments have regularly been commingled as a natural incident of the processing which takes place at the transit point. 8 The transit privilege has thus tended to place intermediate points on a rate equality with producing points and market centers in the competition for the business of processing raw materials. 9

Treatment of transit practices and arrangements by the Interstate Commerce Commission has been rather fragmentary in nature. When first called upon to consider them, the Commission expressed doubts concerning their legality. 10 But rapid extension of the practice of granting these privileges soon entailed recognition that the railroads, in the absence of unjust discrimination or undue prejudice, should be permitted to grant or refuse them in their discretion. 11 The affirmative power to order the establishment of transit privileges, included by implication in the 1906 and subsequent amendments to the Interstate Commerce Act, 12 has never been exercised, 13 but abuses in transit practice have been the subject of remedial action and suggested regulation. Thus the Commission has ordered a reasonable limitation on the granting of out-of-line and back hauls without a separate charge in connection with transit, 14 and has approved the adoption of the “three-way rule” which provides that the through rate to final destination will be the

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7. This difference is known as the transit balance. Grain and Grain Products, 164 I. C. C. 619, 633 (1930).
The highest of three rates, namely, from origin to transit point, transit point to destination, and origin to destination. The storage in transport of manufactured products of grain which require no further processing after leaving the point of origin or intermediate transit point has been held not to be a legitimate function of the transit privilege. In addition, the Commission has attempted to prevent the use of surplus billing to accomplish the substitution and forwarding on the transit billing of local commodities by requiring the daily cancellation of all billing which does not represent a transit commodity actually at hand and awaiting shipment. However, despite the possibility of frequent abuse of transit privileges and their tendency to disorganize the rate structure, remedial measures have in the past stopped short of securing discontinuance of the practice.

Two recent cases leave the status of the milling-in-transit privilege in uncertainty. In *Rudy-Patrick Seed Company v. Abilene & Southern Railway*, a charge of unreasonable rates was denied. The Commission held that the use of split billing, whereby an outbound carload of millet seed was made up of portions of inbound carloads from different points of origin, made the outbound shipment in effect a number of less-than-carload quantities not entitled to the benefit of a through carload rate. This approach seems to overlook the fact that the I.C.C. quantities of tonnage actually moved to and from the transit point as parts of carload shipments, with carload economy, rather than with the added expenses of I.C.C. traffic. This ruling was regarded by many shippers as being destructive of all transit, and, accordingly, the complainant in *Larabee Flour Mills Company v. Chicago, Burlington & Quincy Railroad*, with the cooperation of many large millers, utilized an apparently simple reparation case to seek a review of the *Rudy-Patrick* decision. It was desired to have a determination of the applicability of that holding to grain and grain products, where the single-origin single-destination rule enunciated in the earlier case would work particular hardship because of the necessity in the manufacture of flour of securing a blend of wheat drawn from different points of origin. The Commission, without overruling the *Rudy-

15. Grain and Grain Products, 205 I.C.C. 301, 413 (1934).
17. Surplus billing is accumulated by reason of local consumption, by less-than-carload non-transit movements out, etc. See Transit Case, 24 I.C.C. 340, 343 (1912).
23. Id. at 62. Complainant also sought to prove that the inequality of the average inbound weight of wheat and the outbound weight of the product, as well as numerous other related factors, showed the impracticability of complying with the principles of the *Rudy-Patrick* case.
Patrick decision, recognized the impracticability of prohibiting the use of all split billing, but emphasized its abuses and the desirability of a "single balance" outbound carload. Reparation was nevertheless denied because there had been no showing that the rates on shipments of wheat milled in transit were unreasonable as compared to the rates on non-transited shipments.

In denying reparation in the Larabee case, the Commission failed to indicate whether it was substituting for the Rudy-Patrick doctrine a new basis for denying reparation in transit cases or whether it was merely offering an alternative. Yet a common but unarticulated basis for both decisions may be found in the probable intent of the Commission to favor a cost of service doctrine. It expressly stated in the Larabee case that an award of reparation on transited shipments would ignore the actual transportation service rendered, for the use of split billing only adds to the cost of the service. As a result of the Larabee decision, therefore, no complaint against the carriers for replacing the privilege with a special charge would seem sustainable, since the extra expense of handling, accounting, and policing makes it impossible in any case to show that transit service is less costly than the service connected with separate movements to and from the transit point.

Although the Commission gave no indication of requiring the withdrawal of transit privileges because of their unremunerative nature, it is not unnatural, in view of increasing concern over depleted railroad revenues, to find an attempt to look beyond the fiction of the through movement to the cost of the actual service rendered. And it is perhaps only fair not to

24. See Larabee Flour Mills Co. v. Chicago, B. & Q. R.R., 223 I. C. C. 55, 71 (1937) (Commissioner Eastman and three others dissenting). Subsequent to the Rudy-Patrick decision, western carriers revised their transit rules to limit the number of pieces of inbound billing usable against an outbound shipment. Whether this action constitutes sufficient compliance with the principles of that case remains undecided.


26. In a single origin single destination shipment alone, transit necessitates four switching movements at the transit point. See Fabrication-In-Transit Charges, 29 I. C. C. 70, 78 (1914). The number of movements obviously is greatly increased with additional tonnage slips.

27. For a description of the accounting processes required, see Surrendered Tonnage Slips at Transit Points, 77 I. C. C. 239, 240 (1923).


30. General Commodity Rate Increase, 223 I. C. C. 657 (1937); In the Matter of Increases in Rates, Fares, and Charges, 226 I. C. C. 41 (1938).

31. In the past, the carriers have not generally assessed a separate transit charge [See Tonnage Slips at Transit Points, 77 I. C. C. 239 (1923)] except in the Northwest where lack of competition and a desire to encourage the movement of wheat rather than flour was the motivating force. See Grain and Grain Products, 164 I. C. C. 619, 654 (1930). But the Commission has sustained those instances where reasonable charges were imposed. Stock & Sons v. Lake Shore & Mich. So. Ry., 31 I. C. C. 150 (1914). The Supreme Court reversed the Commission in one case for holding that only the actual cost of the service may be charged. Southern Ry. v. St. Louis Hay Co., 214 U. S. 297 (1909) (reasonable profit may be charged). The Commission and its individual members
include any part of this cost in the regular line-haul rates, where it must be borne by all shippers of the commodity, and to require solely those who use the service to pay for it. [32] On the other hand, since millers located at intermediate points depend to a large extent on the prevailing transit practice and have established businesses in reliance thereon, [33] it might be ill-advised [34] to charge them the actual cost of the service, which probably would be sufficiently high to place them at a serious disadvantage in relation to mills at market points. [35] The Interstate Commerce Commission, however, is under no duty to protect property value based on the enjoyment of the transit privilege, [30] or to compel maintenance of rate schedules for the purposes of equalizing competitive conditions and assuring geographical distribution of manufactures. [37] The ultimate decision would seem to lie with the railroads themselves. Under present conditions they are unlikely to effect wholesale withdrawal of the transit privilege in the grain trade by insisting on cost of service. [38] The growing diversion of freight traffic to highway trucking has already forced rail carriers to resort to the attraction of better and cheaper service, [39] and the pressure of competition between lines will undoubtedly exert a similar deterring influence.

have often stated that the carriers should exact a reasonable charge for the extra service. See In re Transportation of Wool, Hides, and Pelts, 23 I.C.C. 151, 174 (1912); Grain and Grain Products, 164 I.C.C. 619, 708 (1930).


33. See Pickett & Vaile, op. cit. supra note 2, at 54.

34. The Commission has often said that transit is a commercial necessity because of its widespread application and the large investment based upon its continuance. See In re Transportation of Wool, Hides, and Pelts, 23 I.C.C. 151, 171 (1912); The Transit Case, 24 I.C.C. 340, 349 (1912).

35. Since terminal costs constitute such a large part of the total cost of shipment, an assessment for the same might effectively discourage the use of the privilege and result in the decline of milling at interior points. See Kuhlmann, op. cit. supra note 14, at 175 (a main factor in the decline of Minneapolis milling in the past was the withdrawal of the milling-in-transit privilege).


37. The Commission has frequently stated that it is not its function to equalize economic conditions. See Baltimore Chamber of Commerce v. Baltimore & O. R.R., 22 I.C.C. 596, 603 (1912); Port Arthur Board of Trade v. Abilene & So. Ry., 27 I.C.C. 388, 402 (1913).

38. A petition by carriers in the western district for permission to grant three free stops in transit instead of the two previously prescribed by the Commission was recently granted. Grain and Grain Products, 223 I.C.C. 235 (1937).

39. See (1937) 46 Yale L. J. 1420 (pick-up and delivery service).
EQUITY DECREES DETERMINING INTERESTS IN EXTRATERRITORIAL LAND

Plaintiff mortgagor sued his mortgagee for an accounting in the Federal District Court of Vermont, claiming that mortgage notes on Maine timber land had been paid in full. The defendant bank, a resident of New Hampshire, entered a general appearance. After hearings had been in progress for some time, the plaintiff petitioned that an interlocutory decree be framed to approve a contract to cut the timber, enjoin the defendant from interfering by litigation or otherwise with the performance of the contract, and appoint a receiver to superintend operations and handle profits pending the outcome of the accounting proceedings. Upon finding that delay in cutting the timber would cause waste, that the contract was a reasonable one, and that the mortgage notes had been fully paid so that the bank had no further interest in the property, the District Court granted the interlocutory decree. The Circuit Court of Appeals approved the appointment of the receiver, but decided that the court had no "jurisdiction" over the Maine property and hence had no power to approve the contract or issue the injunction.

A court administering equitable relief traditionally has power to act when it has personal jurisdiction over the parties before it. But in theory the court may, in its discretion, refuse to exercise its power. Such refusal is often termed "lack of jurisdiction," even though were the court to invoke its authority the resulting decree would be enforceable and not a mere nullity. Whether courts in certain instances actually exercise complete discretion in deciding whether to grant relief is doubtful. The tendency, rather, has been for courts to limit their freedom in each situation according to generalizations reiterated in preceding cases. This trend is noticeable in those decisions in which an equity decree purports to control a defendant's activities outside the territorial jurisdiction of the court. If the facts of the case initially present proper grounds for equitable relief, courts will generally enjoin a defendant from doing an act in another state, but they have been reluctant to issue a decree which would compel him to perform so-called affirmative acts in that state, even though in the opinion of commentators there is little practical reason for

1. Appeal from interlocutory rulings which grant or refuse injunctions or appoint receivers is provided for by 43 STAT. 937 (1925), 28 U. S. C. § 227 (1934).
4. See McClintock, EQUITY (1936) § 38; Cook, Powers of a Court of Equity (1915) 15 Col. L. Rev. 106, 107.
5. See CLARK, op. cit. supra note 3, at § 15.
the distinction. The same constrictive use of the court's discretionary power is again apparent when the issues involve interests in foreign land. Then the power to exercise control over the person of the defendant clashes with the fundamental doctrine that control of all property within a state's borders is vested in the courts of that state. But the rule that only the courts of the situs may exercise jurisdiction over property interests is not inexorable and is subject to certain recognized exceptions. These have been expressed in terms of the much repeated generalization that where the defendant is under a personal obligation with respect to the property, courts of equity will enforce that obligation regardless of the location of the res. Included in this category are contracts to convey land, express or implied trusts, suits for an accounting, cases involving fraud, and bills to redeem or foreclose mortgages. A number of cases, moreover, have broken through the formula and granted a negative injunction despite the lack of a personal obligation. Though these authorities were available, the court in the instant case found no personal obligation to exist, and felt constrained to follow the orthodox decisions.

A more realistic approach would look beyond generalizations to the ultimate enforceable effect that a decree might have if issued. There is always

11. Massie v. Watts, 6 Cranch 148 (U. S. 1810); see Phelps v. MacDonald, 99 U. S. 298, 308 (1878); 3 FREEMAN, JUDGMENTS (5th ed. 1923) § 1394; 1 Pomeroy, op. cit. supra note 3, at § 298.
17. Philadelphia Co. v. Stimson, 223 U. S. 605 (1912); Alexander v. Tolleston Club, 110 Ill. 65 (1884); Coulthard v. Davis, 151 Iowa 578, 131 N. W. 1038 (1911); see Messner, supra note 8, at 514.
the possibility that the defendant will voluntarily obey.\textsuperscript{18} If he refused, the court might be able to enforce obedience by contempt or sequestration proceedings aimed at local property.\textsuperscript{19} Yet since the defendant is a non-resident, these methods would perhaps be ineffective in the present case. There is then presented the more serious problem of whether the plaintiff would be able to invoke the aid of courts in other jurisdictions to enforce the decree. The Supreme Court of the United States held in \textit{Fall v. Eastin}\textsuperscript{20} that the full faith and credit clause of the Federal Constitution does not compel the court of the situs to put into effect a foreign decree affecting local property interests.\textsuperscript{21} If the defendant did not obey the district court's decree, the plaintiff might have to relitigate all the issues in the courts of the situs. But several jurisdictions have regarded the decrees of other states as binding upon them without constitutional compulsion.\textsuperscript{22} And even if the decree itself were not given full faith and credit, some authority declares that the findings of fact of the first court must be treated as \textit{res judicata} by the courts of other jurisdictions.\textsuperscript{23} Since there is a distinct probability that the decree may be enforced or at least given some lesser effect in another court, mere doubt concerning its recognition should not deter its issuance.

Especially does a decree seem reasonable where the equities, as in the instant case, so favor the granting of immediate relief. The petition for the interlocutory order sought to protect the property pending the outcome of the original action. The lower court found that the timber should be cut immediately in order to prevent waste and realize the land's full value, and that the mortgagor had fully paid his mortgage obligations. Not only do these facts clearly make out a case for relief, but by refusing to grant the interlocutory decree, the court is denying the plaintiff his only available remedy unless he can institute new proceedings in Maine. Even if the latter course were possible, it might be of little value where speedy relief is so essential to the protection of the plaintiff's interests. Finally, despite its reluctance to determine interests in foreign lands, the Circuit Court of Appeals tacitly approved the bringing of the original proceedings in the Vermont District Court by affirming the interlocutory decree insofar as it appoints a receiver, even though


\textsuperscript{19} See Mc Clintock, \textit{Equity} (1936) \S 16, 17; Lorenzen, \textit{Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land} (1925) 34 \textit{Yale L. J.} 591, 608; Comment (1918) 27 \textit{Yale L. J.} 946, 947.

\textsuperscript{20} 215 U. S. 1 (1909).

\textsuperscript{21} Equitable decrees for the payment of money, however, must be given full faith and credit by other states. Pennington v. Gibson, 16 How. 65 (U. S. 1853); Sistare v. Sistare, 218 U. S. 1 (1910).

\textsuperscript{22} Matson v. Matson, 186 Iowa 607, 173 N. W. 127 (1919); Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067 (1896); Burnley v. Stevenson, 24 Ohio St. 474 (1873); Mallette v. Scheerer, 164 Wis. 415, 160 N. W. 182 (1916). Commentators approve the views expressed in these cases. See Cook, supra note 4, at 228 \textit{et seq.}; Lorenzen, supra note 19, at 598; Messner, supra note 8, at 528.

\textsuperscript{23} Redwood Inv. Co. v. Exley, 64 Cal. App. 455, 221 Pac. 973 (1923); see Goodrich, \textit{Conflict of Laws} (1927) \S 207; Restatement, \textit{Conflict of Laws} (1934) \S 449.
standing alone his appointment to supervise the contract appears to be a fruitless gesture. Inasmuch as the lower court had jurisdiction over the original action and made findings of fact which might be treated as res judicata even by the courts of the situs, it should have been permitted to protect the interests of the parties during the complete course of litigation.

**DISQUALIFICATION OF JUDGES BY PEREMPTORY CHALLENGE**

A **California** statute permitted any litigant one peremptory challenge of the judge slated to hear any proceeding pending in a superior or municipal court. Without further action or proof of disqualification by the challenger, the presiding county judge is obliged to assign another judge to the case. The statute was recently declared unconstitutional as an excessive delegation of legislative power, on the ground that it enabled an individual litigant to interfere unlawfully with the constitutional prerogatives of the courts.

The contrasting attitudes of the California legislature and judiciary typify the two divergent philosophies which explain in large measure the varied status of judicial disqualification in the United States. Those states making it difficult to disqualify a judge rely upon the broad premise that the dignity and purity of the judiciary can best be preserved by infrequent disqualification. The judge is considered a distinctly superior being with an Olympian detachment enabling him to shake the bonds of preconception and environment that shackle the judgments of ordinary men. He is capable of impartial justice even though convinced of the guilt of the accused, or even though required to judge between his warm friend and his bitter enemy. To enable a mere litigant to disqualify for prejudice a judge sworn to administer with impartiality the august corpus of the law would discredit this conception of

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24. He would have no status as a receiver in the jurisdiction where the property was located; the powers of the equity receiver are confined to the territorial limits of the court which vests him with authority. Booth v. Clark, 17 How. 322 (U. S. 1854); see 2 Tardy's Smith on Receivers (2d ed. 1920) §§ 712, 713; Laughlin, Extraterritorial Powers of Receivers (1932) 45 Harv. L. Rev. 429.

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1. CAL. CODE CIV. PROC. (Deering, 1937) § 170.5 (as added by Stat. 1937, p. 1496). The benefits of the statute were not afforded to the district attorney in a criminal case. Challenges had to be filed before any ruling in the course of trial, the taking of any evidence, or the impanelment of a jury.

2. Austin v. Lambert, 77 P. (2d) 849 (Cal. Sup. Ct. 1938). In an earlier case before the District Court of Appeal, the exclusion of the district attorney was held an additional ground of unconstitutionality. Daigh v. Schaffer, 73 P. (2d) 927 (1937). This reason was expressly repudiated by the Supreme Court in the later case, cited above, and will not be discussed in this note.

the judiciary. It is said, also, that easy disqualification would be abused by the unscrupulous, thereby disrupting the administration of justice, humiliating a worthy judge for no sufficient reason, and bringing the judicial system generally into disrepute. And in any event a judge's decision does not end a case, for a dissatisfied litigant has an adequate remedy by appeal. On the whole, therefore, these jurisdictions permit disqualification only for those reasons available under common law as interpreted in the United States, i.e., pecuniary interest and relationship to the parties. Some states have also recognized bias and prejudice but have required sufficient proof to establish these charges, for "the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." Possible abuse of this procedure has been regarded by the courts as no more


9. 3 Blackstone's Commentaries *361.

10. See State ex rel. Hannah v. Armigo, 38 N. M. 73, 77, 28 P. (2d) 511, 513 (1933); People ex rel. Burke v. District Court, 60 Colo. 1, 18, 152 Pac. 149, 155 (1915).

11. Here, it is stated, the presumption favors the litigant. Public confidence in the judiciary as a whole is more important than the rights of the judge in any particular case. See Dickenson v. Parks, 104 Fla. 577, 583, 140 So. 459, 462 (1932); Williams v. Howard, 270 Ky. 728, 730, 110 S. W. (2d) 661, 663 (1937); U'Ren v. Bagley, 118 Ore. 77, 82, 245 Pac. 1074, 1075 (1926).
than a single disadvantage which the legislature could properly consider less important than countervailing benefits, and certainly no basis for a declaration of unconstitutionality.\textsuperscript{12} The remedy by appeal has been declared inadequate since a judge, unconsciously or deliberately, can make his bias effective without committing such reversible error as will appear in the record on appeal.\textsuperscript{13} States subscribing to this philosophy provide for disqualification upon the filing by either party of an affidavit of prejudice. Some require that facts be alleged sufficient to constitute bias and prejudice but deny any inquiry into the truth of the allegations.\textsuperscript{14} Others require the judge to certify his own disqualification upon a simple statement that the affiant believes the judge prejudiced against him.\textsuperscript{15} The present trend is distinctly in favor of easier disqualification. Even in those states which recognize only common law grounds, courts have stretched the statutes to afford a change of judge where it formerly might have been denied.\textsuperscript{16} An affidavit which must contain facts sufficient to indicate bias and prejudice has been held to satisfy this requirement if the allegations make it appear in any way doubtful that the petitioner will get a fair trial.\textsuperscript{17}

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\item Berger v. U. S., 255 U. S. 22 (1921); Powers v. Commonwealth, 24 Ky. L. Rep. 1007, 70 S. W. 644 (1903); Anaconda Copper Mining Co. v. Clancy, 30 Mont. 529, 77 Pac. 312 (1904); State ex rel. Beach v. District Court, 53 Nev. 444, 5 P. (2d) 535 (1931).
\item Berger v. U. S., 255 U. S. 22 (1921); Howell v. Florida, 77 Fla. 119, 81 So. 287 (1919); Massie v. Commonwealth, 93 Ky. 588, 20 S. W. 704 (1892).
\item An appeal may be taken from the ruling of the challenged judge upon the sufficiency of the affidavit. Berger v. U. S., 255 U. S. 22 (1921); People ex rel. Burke v. District Court, 60 Colo. 1, 152 Pac. 149 (1915); Rourke v. Bevis, 171 Or. 392, 42 P. (2d) 898 (1933).
\item Under some statutes the challenged judge has the alternative of changing the venue instead of calling another judge. State ex rel. Sell v. District Court, 52 Mont. 457, 158 Pac. 1018 (1916); State v. Bohner, 210 Wis. 651, 246 N. W. 314 (1933). Change of venue for prejudice of the judge involves the same principles as disqualification for prejudice. Perrin v. State, 81 Wis. 135, 50 N. W. 516 (1891). Filing of the affidavit with the governor, followed by his assignment of another judge, has been held unconstitutional. State ex rel. Thompson v. Day, 273 N. W. 684 (Minn. Sup. Ct. 1937). See Comments (1938) 36 Minn. L. Rev. 935; (1938) 22 Minn. L. Rev. 729.
\item People ex rel. Union Bag and Paper Corp. v. Gilbert, 143 Misc. 237, 256 N. Y. Supp. 442 (Sup. Ct. 1932), aff'd, 236 App. Div. 873, 260 N. Y. Supp. 939 (3d Dep't 1932) (judge disqualified for remote relationship to the mayor, a party to the suit in a merely representative capacity). See In re Cameron, 126 Tenn. 614, 660, 151 S. W. 64, 77 (1912); Ex parte Pease, 123 Tex. Cr. 43, 47, 57 S. W. (2d) 575, 576 (1933).
\item Jenson v. Jenson, 96 Colo. 151, 40 P. (2d) 238 (1935); State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 331 (1930) (deposit of $5, unknown to judge before notified by liquidator, enough to disqualify); State ex rel. Wilcox v. Bird, 179 Or. 594, 67 P. (2d) 966 (1937); State ex rel. Conley v. Parks, 32 Or. 374, 239 Pac. 941 (1925).
\end{thebibliography}
proof have met with little success.\(^{18}\) It is said that the challenged judge is in no position to determine whether he himself is biased,\(^{19}\) and that in any event so tenuous a concept as state of mind is incapable of precise proof.\(^{20}\)

Also, because of judicial reluctance to determine the rights of litigants when either party doubts that justice will be done, judges have expressed a desire to be relieved immediately of so delicate a situation.\(^{21}\) Consequently, once the challenge has been made by affidavit, nothing is said to remain for judicial determination.

The California provision for peremptory challenge carries this general trend but a logical step beyond the process of disqualification by simple affidavit. Functionally viewed, there is little basis for differentiating between an affidavit without proof and a peremptory challenge. In either one, the operative factor is the demand for removal, not the actual disqualifying circumstances.\(^{22}\)

Nor is the simple affidavit any more assurance against abuse of the privilege than the peremptory challenge. Since general allegations of bias and prejudice are sufficient to secure disqualification by affidavit, the threat of perjury is no restraint and an unscrupulous litigant may abuse his power as readily as the peremptory challenge.


\[^{19}\text{Berger v. U. S., 255 U. S. 22, 36 (1921); Briggs v. Superior Court, 215 Cal. 336, 344, 10 P. (2d) 1003, 1005 (1932); U'Ren v. Bagley, 118 Ore. 77, 85, 245 Pac. 1074, 1076 (1926).}

\[^{20}\text{People ex rel. Burke v. District Court, 60 Colo. 1, 18, 152 Pac. 149, 155 (1915); State ex rel. Conley v. Parks, 32 Okl. Cr. 61, 65, 239 Pac. 941, 942 (1925); State ex rel. Hannah v. Armijo, 38 N.M. 73, 77, 28 P. (2d) 511, 513 (1933). No further proof beyond the charge of prejudice is possible or necessary. State ex rel. Anaconda Copper Mining Co. v. Clancy, 30 Mont. 529, 77 Pac. 312 (1904); Lincoln v. Oklahoma, 8 Okl. 546, 58 Pac. 730 (1899). Cf. Austin v. Lambert, 77 P. (2d) 849 (Cal. Sup. Ct. 1938) (regrettable that grounds of disqualification not susceptible to proof should seem sufficiently grave to justify this legislation).}

\[^{21}\text{People ex rel. Burke v. District Court, 60 Colo. 1, 18, 152 Pac. 149, 155 (1915); State ex rel. Conley v. Parks, 32 Okl. Cr. 61, 65, 239 Pac. 941, 942 (1925); State ex rel. Hannah v. Armijo, 38 N.M. 73, 77, 28 P. (2d) 511, 513 (1933).}

under one as under the other. The only effective restraint is to limit the time of filing and the number of challenges. Not only were these safeguards included in the California statute, but in addition the legislature imposed more stringent limitations than are included in several similar statutes in other states. While other statutes have enabled the parties to agree upon the judge to be appointed or the venue to which the action is to be transferred and have not limited the number of disqualifications, under the California statute each litigant is limited to a single change of judge and has no influence over the appointment of the substitute assigned by the presiding county judge. The California legislature would therefore appear to have been amply justified in deciding that the simple affidavit was mere ritual which might well be removed, leaving unadorned the peremptory challenge that simple affidavits have in fact become.

Since the statute seems to be a logical development from earlier California enactments and decisions, it is surprising that the courts should have interrupted the general trend toward easier disqualification. Perhaps the system of peremptory challenge was too abrupt a modification of existing practice, since the intermediate stage of disqualification by simple affidavit had never been tried in that state. This judicial rebuff, however, need not lead to


24. See Howell v. Florida, 77 Fla. 119, 129, 81 So. 287, 289 (1919) (abuse may be checked by limiting the privilege to a single disqualification for prejudice).


26. State ex rel. Anaconda Copper Mining Co. v. Clancy, 30 Mont. 529, 77 Pac. 312 (1904) (five challenges available for each party). For a general summary, see Roberts Mining and Milling Co. v. District Court, 56 Nev. 299, 50 P. (2d) 512 (1935).


28. McCauley v. Weller, 12 Cal. 500, (1859) (prejudice unseemly, but not yet statutory ground for disqualification); see People ex rel. Smith v. Judge, 17 Cal. 548, 560 (1861) (statute making change of venue mandatory upon application of defendant would be constitutional); People v. Compton, 123 Cal. 403, 56 Pac. 44 (1899) (court desired to consider affidavit of prejudice final); see, generally, Comment (1932) 20 CALIF. L. REV. 312 (disqualification now determined by another judge on basis of affidavits and counter affidavits filed). In special cases, the change is mandatory. Sacramento Drainage District v. Rector, 172 Cal. 385, 156 Pac. 506 (1916); Los Angeles v. Superior Court, 18 P. (2d) 759 (Cal. Dist. Ct. App. 1933).

29. In courts of justices of the peace, the simple affidavit is effective. See People v. Compton, 123 Cal. 403, 413, 56 Pac. 44, 48 (1899). The court stated as a minor ground of unconstitutionality that since the present statute applies only to municipal and superior courts, excluding justice's courts, it violates the constitutional provision that all laws of a general nature shall have a uniform operation. Austin v. Lambert, 77 P. (2d) 849 (Cal. Sup. Ct. 1938). Perhaps the legislature thought the peremptory
abandonment of all attempts to make the process easier. The well-established simple affidavit, which serves the same purposes though less neatly, still remains for adoption in any state where it is not already in operation. If the issue should arise in states accustomed to disqualify their judges by simple affidavit, the courts might well approve a shift to peremptory challenge as a comparatively minor simplification of the process.

**Exemption of Income from Property Purchased with Exempt Insurance Proceeds***

NAMING herself as beneficiary, a widow set up a trust fund with part of $120,000 received from her husband's life and accident insurance policies.¹

The trustee bank purchased for the trust certain income-producing securities. A loan association, in an endeavor to collect $2,500 on a deficiency judgment against the widow, served garnishment process on the bank. Under a statute exempting the "proceeds or avails" of such insurance policies,² the income from the securities in the bank's possession, as well as the securities themselves, was held not subject to attachment.³

With the passing of the social philosophy that condoned the debtors' prison, the desirability of protecting the debtor from utter destitution has long been unquestioned.⁴ More recently, a miscellaneous panorama of statutes exempting to a greater or less degree the proceeds of life insurance policies from creditor's claims has become familiar,⁵ with the result that the debtor has been assured of something more than a minimum protection, still without serious articulate objection. But such a statute rarely declares just how far the exemption is to extend. Perhaps it protects the proceeds in the hands of the beneficiaries. If this is true, it may apply to property purchased with the exempt proceeds. And if carried so far, it may even extend to the income from property so purchased. Since the underlying policy of the exemption challenge too like the simple affidavit to warrant a change of practice in justice's courts. In any event, the two are so similar as to preclude any serious charge of discrimination.

*Cf.* Diehl v. Crump, 72 Okl. 108, 179 Pac. 4 (1919) (simple affidavit limited in its application to a single county).

²WASH. REV. STAT. ANN. (Remington, 1932) §§ 569, 7230-1. The exemption affects only those debts existing at the time the policy is made available for use.
⁴See Folz, Exemption Laws and Public Policy (1905) 53 Am. L. Reg. 721.
⁵A complete compilation of the statutes appears in C. C. H. Bankr. Serv. ¶ 7108 et seq. (1936).
statutes indicates no certain answers to the questions thus raised, the courts have perforce sought determinants in the ever elusive “intention of the legislature.” So seeking, in the instant case, a court for the first time took all three progressive steps, with the startling result that a widow was guaranteed the free enjoyment of an income presumably sufficient, in any one year alone, for the full satisfaction of her judgment debt.

For the courts facing the problem, the first hurdle is low: there is no doubt that a statute of the type here involved protects the insurance money after it has been paid to the beneficiary. Question arises at this first stage only in those states where the statute purports to exempt money “to be paid.” Difficulties here are comparable to those encountered in construing the federal statute of 1873 exempting the proceeds of a government pension. It is generally clear that the protection afforded involves something more than an assurance that the payment will not be cut off at the source—attached in the hands of the insurance company. But even under the most liberal legislation, if the proceeds become mingled with other funds so that they cannot be identified, the right of exemption may well be lost.

6. There is a sharp conflict as to whether the words “to be paid” are in effect descriptive of the proceeds which are the subject of the exemption, or descriptive of the duration or period of the exemption. Those courts which have taken the former view benefit the beneficiary by holding that the exemption continues after the payment of the proceeds by the insurer. First Nat. Bank v. How, 65 Minn. 187, 67 N. W. 994 (1896); State v. Collins, 70 Okla. 323, 174 Pac. 558 (1918); Bank of Cushing v. Funnell, 144 Okla. 188, 290 Pac. 177 (1930) (money exempt when deposited); cf. Merrell Drug Co. v. Dixon, 131 Ky. 212, 115 S. W. 179 (1909). Other authority, taking the latter view upon the tenuous reasoning that these statutes were enacted for the benefit of the insurers, holds the proceeds to be no longer exempt from process after having been paid over by the company. Martin v. Martin, 187 Ill. 200, 58 N. E. 230 (1900); Hathorn v. Robinson, 96 Me. 33, 51 Atl. 236 (1901); Recor v. Bank, 142 Mich. 479, 106 N. W. 182 (1905); Bull v. Case, 165 N. Y. 578, 59 N. E. 301 (1901); cf. Bank of Brimson v. Graham, 335 Mo. 1196, 76 S. W. (2d) 376 (1934); see (1924) 8 Minn. L. Rev. 549.

7. 17 STAT. 576 (1873), 38 U. S. C. § 54 (1934), providing that pension money due or to become due should be exempt from attachment, levy, or seizure. This statute has been interpreted by the Supreme Court of the United States and a number of state courts so that pension money in the hands of the pensioner is not exempt. Rozelle v. Rhodes, 116 Pa. 129, 9 Atl. 160 (1887). Consequently property purchased with such money is not exempt. McIntosh v. Aubrey, 185 U. S. 122 (1902); Coaldey v. Underwood, 13 Ky. L. 654, 18 S. W. 7 (1892); Cranz v. White, 27 Kan. 319 (1882); Friend v. Garcecon, 77 Me. 25 (1885); In re Ferguson’s Estate, 140 Wis. 583, 123 N. W. 123 (1909). In fewer jurisdictions it has been held that the money is exempt from attachment in the hands of the pensioner, and further, that this exemption extends to property purchased with the money so received. Crow v. Brown, 81 Iowa 344, 46 N. W. 993 (1880); Reiff v. Mack, 160 Pa. 265, 28 Atl. 699 (1894); cf. N. Y. Civ. Prac. Act § 667 and cases cited note 18, infra.

8. Baxter v. Old Nat. City Bank, 46 Ohio App. 533, 189 N. E. 514 (1933) (fund not exempt when composed of exempt and non-exempt insurance proceeds). In an early New York case, property was held not exempt because it was unascertainable whether it was purchased with the proceeds of the pension or with profits from its investment
Although the majority of the insurance exemption statutes thus bridge the initial difficulty, at least two courts have literally construed the statutes so as to defeat attempts to extend the exemption to non-exempt property purchased with exempt proceeds.\textsuperscript{9} In effect, the debtor in these jurisdictions is restricted to the purchase of services or special types of property also exempt by statute, such as household goods, or tools of a trade, or a homestead.\textsuperscript{10} The court in the instant case adopted the apparently unique position taken by the Supreme Court of Iowa construing a similar statute.\textsuperscript{11} That court, in 1903, declared the exemption to extend to any property purchased with exempt proceeds.\textsuperscript{12} Even the Iowa decision, however, gives no indication of the result to be expected when the insurance proceeds make up only a part of the purchase price, or when property bought solely with exempt proceeds increases in value.\textsuperscript{13} Perhaps the logical conclusion is to extend the exemp-

\textsuperscript{9} Pefly v. Reynolds, 115 Kan. 105, 222 Pac. 121 (1924) (the statute also provided for exemption from taxation); Ross v. Simser, 193 Minn. 407, 258 N.W. 582 (1935); \textit{cf.} Merrell Drug Co. v. Dixon, 131 Ky. 212, 115 S.W. 179 (1909); Bank of Brumson v. Graham, 335 Mo. 1196, 76 S.W. (2d) 376 (1934).

\textsuperscript{10} All states and the District of Columbia have statutes exempting specific items of property from attachment or sale under a judgment. See C. C. H. Bankr. Serv. \textit{\textsuperscript{7101}} et seq. (1936).

\textsuperscript{11} IOWA CODE (1935) \textsection 8776, exempting "avails" of life and accident insurance policies up to $15,000.

\textsuperscript{12} Cook v. Allee, 119 Iowa 226, 93 N.W. 93 (1903). The force of this case as a holding is lessened by the fact that the property exempted was a house and lot, which might have been eligible for exemption as a homestead. But \textit{cf.} Friedlander v. Mahoney, 31 Iowa 311 (1871) (property not exempt when acquired by assignment of a life insurance policy before death of the insured).

\textsuperscript{13} The Iowa court, however, held that a horse obtained in exchange for another purchased with pension money is also exempt to its full value when no additional means are invested, though such value is in excess of the amount originally invested in the first horse. Smith v. Hill, 83 Iowa 684, 49 N.W. 1043 (1891); \textit{cf.} Dargan v. Williams, 66 Neb. 1, 91 N.W. 862 (1902).
tion in all cases only to so much of the property as does not exceed the exempt money in value.\textsuperscript{14} No sound criticism can be made of such a result. Although, strictly speaking, the terms "proceeds or avails" may apply only to the amount collected from the insurance companies, it seems reasonable that legislators would not have intended to limit the exemption to the money itself. For, as has been aptly said, so to limit it would destroy the value of the money as a purchasing medium\textsuperscript{15} and thus frustrate the legislature's purpose in exempting money to provide for the debtor's needs.\textsuperscript{16} Thus, Iowa, in order to avoid the enervating interpretation usually given the federal pension statute,\textsuperscript{17} enacted a statute specifically exempting pension money whether in the actual possession of the pensioner, or deposited, loaned, or invested by him.\textsuperscript{18}

The next step, the Supreme Court of Iowa refused to take, and wisely drew a definite distinction between money invested and its income. Protection was denied to interest accruing on bonds purchased with exempt money.\textsuperscript{19} The indication is clear that this court would have placed a similar restriction on the statute exempting the "avails" of life insurance policies.\textsuperscript{20} The court in the instant case, on the other hand, appeared to find it difficult, despite a vigorous dissent, to exempt the proceeds without also exempting the income.\textsuperscript{21} Accordingly, the money was allowed to be put to a productive use and its product protected. Such use is not itself necessarily improper: the money might well be used to buy "tools of a trade." But it can scarcely be contended that the product of these tools should share the exemption.

Because of the humanitarian ideal underlying exemption legislation, it is generally accepted that the statutes, although in derogation of the common


\textsuperscript{15} See Cook v. Allee, 119 Iowa 226, 229, 93 N. W. 93 (1903); Yates County Nat. Bank v. Carpenter, 119 N. Y. 550, 555, 23 N. E. 1108, 1109 (1890).

\textsuperscript{16} It must be admitted that this argument loses some of its force in the light of the ever-present possibility that the debtor may buy property itself exempt. See note 10, \textit{supra}.

\textsuperscript{17} See note 7, \textit{supra}.


\textsuperscript{20} See note 11, \textit{supra}.

\textsuperscript{21} The court agreed to the exemption of the securities, but divided on the extension of the exemption to the income.
law, are to be liberally construed. Their purpose is not to restrict the rights of creditors any further than necessary to save the debtor and his family from complete misfortune. No principle of public policy can justify unlimited exemptions, and a result as extreme as that reached in the principal case should follow only the explicit and unqualified fiat of the legislature. The "what-are-we-coming-to?" argument, however much maligned, is eminently applicable. If income is to be exempt as "proceeds," it follows that additional property bought with that income is of the same nature, and the income from that property, etc., etc., etc. As a logical consequence of the decision in the instant case, exempt insurance proceeds might be used in the formation of an endless chain of exemptions conceivably leading to enormous accumulations of property, all free from the claims of creditors.

MUNICIPAL SUBSIDIES AND THE INDUSTRIALIZATION OF THE SOUTH*

Municipal subsidies to attract establishment of private industry have in the past run afoul of a double-edged prohibition. They have been compelled to meet the challenge of the "fundamental principle" that taxes may be levied and collected only for a public purpose. And they have often foundered in the face of state constitutional provisions forbidding municipal appropriations


23. See Folz, supra note 4; cases cited note 22, supra.


25. It is interesting to speculate as to the effect on the decision in the principal case had this point been strenuously pressed. The court in its opinion seems unaware of its full import. Even more surprisingly, appellant's brief makes little more than a passing reference to the fact that the securities held by the bank at the time that it was garnished included not only securities purchased with the original $42,500, but also securities purchased with the proceeds obtained from the sale of securities purchased with the original sum, or the income from them. Brief for Appellants 8, Northern Savings & Loan Ass'n v. Kneisley (Pacific Nat. Bank of Seattle, Garnishees), 76 P. (2d) 297 (Wash. 1938); cf. Wygant v. Smith, 2 Lans. 185 (N. Y. 1896).

26. See note 2, supra.

*Albritton v. City of Winona, 178 So. 799 (Miss. 1938).

1. The legislature has no constitutional right "to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose." Black, C. J., in Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 168 (1853). The public purpose doctrine was first justified as being implicit in our system of government. Not until nearly seventy years later [Jones v. Portland, 245 U. S. 217 (1917)] it was definitely grounded in due process. The doctrine was full blown before the depths of the Fourteenth Amendment had been fathomed.
or loans of credit to private corporations. The "public purpose" doctrine, which originally validated municipal bond issues for railroad promotion on the ground that they were aiding public corporations, just as regularly invalidated those which were intended to serve as bounties for purely private industry. Economic necessity soon precluded so limited a construction. With urbanization and its attendant problems of supplying water, light, heat, and transportation for large masses of people came a broadening of the doctrine to embrace these natural monopolies. Municipal experimentation and participation in any industry which supplied a "necessity of life" was later permitted, and the United States Supreme Court indicated that state legislatures and courts were best qualified to isolate the content of that elusive phrase. Express constitutional prohibitions against appropriations and loans of credit have been similarly relaxed. They have upon occasion been circumvented by construing them to apply only to the railroad porkbarrels which instigated their enactment. And where such appropriations have been found to be in the "public interest" with only incidental benefit to individuals, the constitutional safeguards have lost their force. A recent case is indicative that economic pressure may compel further extension of the public purpose doctrine and additional ingenuity in constitutional interpretation.

2. Cole v. LaGrange, 113 U. S. 1 (1885); Carothers v. Town of Booneville, 169 Miss. 511, 153 So. 670 (1934). Most state constitutions contain express restrictions of this nature. They are collected in GRAY, LIMITATIONS ON THE TAXING POWER (1905) 140-157.

3. Railroads were considered public highways because they were subject to state regulation and enjoyed the power of eminent domain. See Town of Queensbury v. Culver, 19 Wall. 83, 91 (U. S. 1873); Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 170 (1853). Contra: People v. Salem, 20 Mich. 452 (1870). See McAllister, Public Purpose in Taxation (1930) 18 CALIF. L. REV. 137, 140 et seq.


A Mississippi statute formulates an Industrial Plan, the declared purpose of which is the relief of unemployment and the balancing of agriculture and industry.\textsuperscript{10} It provides that any municipality may, with the consent of a supervisory Industrial Commission, issue bonds to enable it to acquire, erect, and equip any industrial enterprise. The plant may be operated by the city itself or may be sold, leased, or "otherwise disposed of on terms best promoting the public interest." Pursuant to these provisions, the City of Winona issued bonds to finance the erection of a municipal hosiery, knitting, and wearing apparel factory, to be operated by a former northern firm. In a validation proceeding brought by the city, a decree upholding the constitutionality of the bond issue was affirmed by the Supreme Court of Mississippi.\textsuperscript{11} The majority opinion stated that the intent to balance industry and agriculture and relieve unemployment was a public purpose. It admitted that an outright lease to the prospective company could not have withstood constitutional attack. But it argued that since under the terms of the statute the city was to retain a measure of supervision over the terms and conditions under which the lessee company would be permitted to operate, such control constituted the company the agent of the municipality in enforcing the declared purpose of the legislation.\textsuperscript{12} And if the purpose be public, it is said not to matter if it be achieved through a private channel. The provision in the Mississippi constitution outlawing appropriations to private corporations\textsuperscript{13} was summarily dismissed on the familiar ground that since the purpose had already been determined to be public, the provision was no longer applicable. A reluctant concurring opinion expressed doubt as to whether the domain of manufacturing could be entered purely because other enterprise would be benefited thereby, and hesitated to take the irrevocable step of validating the bonds without further assurance that the city would actually retain a measure of control over the factory.\textsuperscript{14} A single dissenter stood aghast at the effort to make Mississippi "safe not for democracy but for communism."\textsuperscript{15}

The United States Supreme Court, in a memorandum opinion, dismissed an appeal from this decision.\textsuperscript{16} There was no comment upon its implications.

\begin{itemize}
\item \textsuperscript{10} Miss. Laws 1st Ex. Sess. 1936, c. 1.
\item \textsuperscript{11} Albritton v. City of Winona, 178 So. 799 (Miss. 1938).
\item \textsuperscript{12} In Carothers v. Town of Booneville, 169 Miss. 511, 153 So. 670 (1934), the court held invalid a statute authorizing the municipality to issue bonds to erect a plant to be leased to a garment factory. This holding was distinguished on the ground that there was neither a legislative declaration that the purpose was to relieve unemployment and promote the general welfare nor any supervisory power retained to insure that the purpose was carried out.
\item \textsuperscript{13} Miss. Const. § 183.
\item \textsuperscript{14} The majority opinion intimated, however, that a provision in the lease providing for its automatic termination if the conditions imposed by the city and the State Commission were not fulfilled would receive the sanction of the court. Albritton v. City of Winona, 178 So. 799, 808 (Miss. 1938).
\item \textsuperscript{15} Id. at 812. Cf. Allen v. Inhabitants of Jay, 60 Me. 124, 133 (1872) ("It is communism incipient, if not perfected"); Standard Oil Co. v. Lincoln, 114 Neb. 243, 256, 208 N.W. 962, 963 (1926) ("This is socialism and communism, twin enemies of the republic").
\item \textsuperscript{16} Albritton v. City of Winona, 58 Sup. Ct. 766 (1938).
\end{itemize}
The immediate significance of the instant case is not that governments may operate where they may not regulate, nor even that the Supreme Court has as yet no disposition to interfere in experimental steps toward state socialism. The shadows of the power here exercised had already been cast. But the economic implications of the Mississippi Industrial Plan are of considerable moment. For this statute is the latest weapon in a new "War between the States,"—a bitter competition for the attraction and establishment of industry.

Southern agricultural states have long felt the pinch of their dependence upon their more industrialized neighbors. Lack of employment for able workers, depressed markets for raw products, low farm income, and subsistence standards of living have been their lot. They have naturally sought to secure a more equal balance of industry and agriculture. At the same time there has been an appreciable tendency on the part of industry to decentralize into less industrialized areas in order to be nearer sources of supply.

17. "Public use" in such cases would seem to be a term of wider scope than that which clothes property or business 'with a public interest' [under the police power] . . . The use for which the tax is laid may be any purpose in which . . . the legislature thinks the State's engagement . . . will help the general public and is willing to pay the cost of the plant and incur the expense of operation." Taft, C. J., in Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 537 (1923).

For discussion of the recent dilation of the "public interest" concept, see Hamilton, Affectation with a Public Interest (1930) 39 YALE L. J. 1059; (1938) 47 YALE L. J. 1201; Great Atlantic & Pacific Tea Co. v. Erwin, 5 U. S. L. WEEK 1109 (D. Minn., April 29, 1938) (three-judge court).

18. In Green v. Frazier, 253 U. S. 233 (1920), the constitutionality of the statute creating North Dakota's Industrial Commission was upheld. The Commission was empowered to issue bonds and enter into business enterprise in order to secure to the state's farmers adequate prices for their agricultural products. Inefficiency and cost of operation have long since forced it to cease functioning.

19. Reductions in population due to the movement of job seekers to industrial centers, disproportionate increases in mortgage debts, and declining land values are perennial problems. Governor White of Mississippi reports 2,500,000 acres of land in that state alone forfeit for taxes, an average farm income of $180 and a general average of $212, compared with a national average of $636. The average rural family income in Alabama is less than $500. The low farm wage, 48% of that prevailing in the rest of the country, keeps wages lowered in industry, particularly where the training period is short. See generally Bidgood, Industrial Alabama (1931) 153 ANNALS 148, 154; Evans, Southern Labor Supply and Working Conditions in Industry (1931) 153 ANNALS 156; Wickens, Adjusting Southern Agriculture to Economic Changes (1931) 153 ANNALS 193, 194; N. Y. World Telegram, Jan. 5, 1937, p. 17.

20. Coming to the South as an instrument of alleviation and reclamation, industry has acquired a social sanction. It has been imbued with a philanthropic character. This attitude plus a traditional localism explains somewhat the current drive. See Mitchell, Growth of Manufactures in the South (1931) 153 ANNALS 21, 24.

21. During the period of financial expansion when the number of plants lost by American cities equalled only 58% of those gained, decentralization went almost unnoticed. Sectional migration, too, had a relatively small role, accounting for only 18.7% of the employees gained in various committees. But 40% of the net gain of all plants was in the smaller communities. And positive gains in dispersion during the first three decades of the century were confined to the South Atlantic region. See generally
to avoid social legislation, and to secure cheaper labor.²² Most conspicuous is the movement of the textile mills to the south,²³ although similar relocation has occurred in a number of industries.²⁴ Regulatory depression legislation has accelerated this process.²⁵ American business is making mass readjustments to these suddenly crystallized trends. As plant locations are appraised from a new point of view, alert chambers of commerce in unindustrialized sections make every effort to weight the balance in favor of a migration that will bring new industries to their communities. The state advertises natural advantages,²⁶ local civic associations in their turn offer substantial inducements.

The tariff—stock device for the encouragement of industry nationally—is supposedly unavailable in this sectional struggle.²⁷ But a counterpart may be seen in the growing tendency to attempt to revive "boundary conscious-

CREAMER, IS INDUSTRY DECENTRALIZING? (1930) 11; Industrial Development in the United States and Canada (1926–1927) (Civic Development Committee of National Electric Light Ass'n and Policy Holders Service Bureau of Metropolitan Life Insurance Co.).

²². For common labor, the southern wage is from 50% to 60% that of the rest of the country; for semi-skilled, from 65% to 85%. The migration towards such wage savings was so accentuated by the depression that North Carolina, Virginia and Alabama showed increases in wage jobs in the knitting, furniture and cotton goods factories despite the general reductions in those industries. See generally BURGY, THE NEW ENGLAND COTTON TEXTILE INDUSTRY (1932) 147, 221; BRUNCK AND CREAMER, LOCATIONAL PATTERNS AND FACTORS IN SPECIFIC INDUSTRIES (Unpublished thesis in Burgess Library, Columbia University, 1935) 33, 45; Mitchell, supra note 20, at 25.

²³. When the cotton textile movement began, New England had 90% of the active spindles in the country. By 1924 the South was dominant, and in 1936 New England could account for only 25% of the active spindle hours. See Murchison, Southern Textile Manufacturing (1931) 153 ANNALS 30; BUS. WEEK, Feb. 27, 1937, p. 45. The finishing, repairing, and machinery manufacturing departments of the industry have followed the spindles. Mitchell, supra note 20, at 28.

²⁴. The shoe industry has migrated westward to be nearer cheap labor and the source of hides. Although the number of shoes turned out of her factories is greater than ever before, New England now makes only 33% where she once made 50% of American shoes. See Graham, Southern Industrialism (1931) 153 ANNALS 257, 264; BUS. WEEK, Feb. 27, 1937, p. 45.


²⁶. Appropriations for attracting new industries supply professionally written copy to a well balanced list of publications, pointing out (1) nearness to the undeveloped but growing markets of the South, (2) nearness to raw materials, (3) savings in fuel costs, and (4) abundant less expensive white labor. Recent appropriations include $100,000 by Louisiana and $250,000 by North Carolina. See Bidgood, Industrial Alabama (1931) 153 ANNALS 148, 154; BUS. WEEK, Dec. 5, 1936, p. 37; id., Feb. 12, 1938, at pp. 20, 23.

ness" by fostering "buy at home" campaigns to boost local industry. Exemption from taxation is a common form of inducement, but its efficacy alone in attracting industrial enterprise seems overrated. Manufacturers in labor-conscious industrial states have been most impressed by promised freedom from inhibiting legislation, the closed shop, and labor trouble. Relocation has been encouraged by direct subsidy in the nature of free rent, free light, water, and power, and even cash to lighten the burden of moving. At the same time, trade schools, working in close cooperation with the new industries have attempted to overcome the objection that the lack of skilled workers offsets the favorable wage differential. The sum of these inducements has been a noticeable removal of factories away from the established industrial states. This in turn has called forth competitive concessions on

28. A number of states and sections have inaugurated such campaigns in complete disregard of the effect on national marketing and the large volume of employment depending on distributive functions. See Bus. Week, May 25, 1932, p. 9; Collier's, April 30, 1938, p. 14.

29. States granting such exemptions are confined almost entirely to the New England, Upper Atlantic, and Southeastern areas. Exemptions in New England were more or less forced in an attempt to match similar favors granted in the South. See Stimson, The Stimulation of Industry Through Tax Exemption (1933) 11 Tax Mag. 169, 170, 203; (1937) Tax Policy, Vol. IV, No. 12, p. 22 (list of assessment ratios by cities showing variation of from 37% to 100%).

30. Although liberal tax exemptions were granted to industry, the net income of manufacturing corporations between 1917 and 1927 declined in Alabama 21%, increased in Georgia 19% and declined in Mississippi 88%. The complaint of high taxes, though present, was found to be a relatively insignificant motivating force in the withdrawal of industry from New York City. Industrial Survey of New York: (Report to Hon. Frank J. Taylor, Comptroller, by Chas. E. Murphy, Dec. 30, 1936, March 30, 1937, June 30, 1937); Stimson, supra note 29, at 226.

31. "Labor racketeering" was the chief motive for deserting New York City in 1937. Only the large southern cities have labor trouble. There are no minimum wage laws, and only Louisianna of all the southern states has "yellow-dog" contracts and anti-injunction statutes. See generally Creameer, Is Industry Decentralizing? (1935) 55; Industrial Survey, supra note 30, at 9; Comment (1936) 36 Col. L. Rev. 776, 779; (1934) 24 Am. Lab. Leg. Rev. 180; 1 Prentice-Hall Fed. Labor Serv. [19223; Bus. Week, Feb. 12, 1938, pp. 20, 24.

32. In Dickinson, Tenn., the title to a factory was held by a Dickinson Development Corporation. Workers paid 6% of their weekly wages to pay off the bonds. The operating company paid rent of one dollar a year and got free light and power. In Lewisburg, Tenn., the new "municipal hall" after one town meeting was turned over to the General Shoe Corporation. Thirty thousand dollars of the building's expense is to be paid by employees, in weekly check-offs as they collect their wages. (1937) 123 Ltr. Digest 37; N. Y. World Telegram, Dec. 31, 1936, p. 19.

33. For an account of the removal of a Maryland firm to Virginia, induced by the assurance that the town would conduct a "trade school" in connection with the employer's plant, "learners" to be paid by the town, see N. Y. Times, Jan. 3, 1935, p. 37. See also N. Y. World Telegram, Jan. 7, 1937, p. 9 (one of a series of articles by Thos. L. Stokes running daily from Dec. 30, 1936 to Jan. 19, 1937).
their part, fostered a growing bitterness, and even occasioned violence to prevent the removal of machinery. The phenomenon of the runaway shop has not been accepted without protest.

Successes of these city and state campaigns have been signal, but the migratory industries have brought new problems to their hosts. Private subscription does not confer upon the citizens any systematic control of the new industry, and "industrial carpetbaggers" are by no means unknown. Townspeople, heavily obligated, have found their subsidized factories depressing wages, using the Bedeaux speed-up, and threatening further migration should regulation intervene. Mississippi's Industrial Plan formulates a method of combating these potential abuses. Investigation by, and approval of the State Commission, retention of control over hours, wages, and personnel by the city, and a lease conditional upon the fulfillment of the company's obligations are intended to provide adequate safeguards. At the same time, government funds and organization are placed behind the inducements to relocating industry. Whether the state will exercise its power of control in a salutary manner to prevent the planting of an industrial feudalism upon the debris of an agricultural feudalism can only be conjectured. Nor can it now be determined what will amount to a disposal of these factories "on terms best promoting the public interest." Perhaps the municipality would best be served by eliminating the fly-by-night concerns, manufacturing on

34. "A declining locality is not deserted by labor . . . Before the compelling forces (bankruptcy and poverty) make their appearance many experiments to forestall the workings of economic principles are likely to be tried. Tariff protection and favoritism in taxation and a direct bonus from the treasury may be sought to bolster up a declining locality." U. S. DEP'T COMMERCE, LOCATION OF MANUFACTURES IN THE U. S. (digested from a study by the Employment Stabilization Research Institute of the University of Minnesota, 1933).

35. The anomalous role which the State of Connecticut is playing in helping to finance the relief of the South (ratio of federal relief granted Connecticut to her tax returns is 53%—for Mississippi 1967%, Alabama 818%, Georgia 305%) while at the same time the South is financing the removal of Connecticut industries, has received editorial comment. New Haven Register, April 20, 1938, p. 18.


37. See Comment (1936) 36 COL. L. REV. 776, 780.

38. Southern states in 1936 and 1937 received $186,326,000 ($59,127,000 more than the rest of the country combined) of the money going into the building of new process industries. The southern production of kraft paper has jumped from nothing to 35% of the country's output. Additional instances and figures are given in Mitchell, supra note 20, at 21, 28, 29; Bus. Week, Oct. 24, 1936, p. 40; id., Dec. 5, 1936, p. 37; id., Feb. 12, 1938, p. 20.

39. Vicksburg merchants who financed an $80,000 plant at Vicksburg found the weekly payroll of $3,000 stopped by a strike against seven and eight dollar wages. The Journal of Tupelo, Miss., found an average wage of $9 at Columbia and one considerably lower at Hattiesburg. See (1937) 123 Lit. Dig. 35.

40. N. Y. World Telegram, Dec. 31, 1936.

41. The Tennessee Conference of Social Work (1937) estimates that 70% of the relief load in small cities of the state is the wake left by such migratory concerns. See (1937) 123 Lit. Dig. 35, 36.
scant capital and rented machinery, and replacing them with outright community ownership and operation. In any event, the municipal building provisions of the statute are already being widely utilized, and the plan should prove a potent weapon in Mississippi's fight for industrialization.

More significant than the success or failure of the Industrial Plan in attaining its immediate objectives are the reprisals that may be occasioned by this type of statute. Subsidized municipal industries imported to relieve unemployment need not be operated on an economic basis, but their goods will flow into interstate commerce in competition with those of non-subsidized industries in other states. Such competition might be considered unfair in terms of our present economic predilections. For the Supreme Court to express this viewpoint by a reversal of its present hands-off policy would seem an unwarranted extension of the due process restriction. But the more industrialized states desirous of combating subsidization are perhaps not powerless to do so. Legislative barriers prohibiting importation into these states of the products of subsidized factories would wall off the primary consumer markets and to a large extent nullify the inducements which now motivate migration. Similar statutes aimed at protecting "free labor and industry" now rob of their market goods made in government factories by convict labor. To be effective, such statutes would necessarily have to be supplemented by federal legislation like that which now prohibits interstate commerce in prison-made goods. Similar legislation has already been proposed as a means of strengthening state minimum wage laws. Quite aside from doubtful questions of constitutionality, such state "tariffs" may well be the logical countermove in this increasingly bitter sectional struggle.

42. Since the inauguration of the plan in Mississippi, 15,000 jobs have been created. Sixty communities waited for the decision of the Supreme Court before voting on bond issues. Natchez has voted a $300,000 issue to build a factory designed as a tire plant for a West Haven, Conn. company. See Bus. Week, Feb. 12, 1938, p. 20.


44. Interstate transportation of convict-made goods is unlawful if they are destined for a state in which their sale is prohibited by local law. 49 Stat. 494 (1935) 49 U. S. C. § 61 (Supp. 1938).

45. See Collier's, April 30, 1938, p. 49.

46. In emphasizing the sectional nature of this contest, it should not be overlooked that competition for industry may be intra-regional and intra-state as well. For relocation of the shoe industry within New England, see Hoover, LOCATION THEORY AND THE SHOE AND LEATHER INDUSTRIES (1937). See N. Y. Times, Nov. 24, 1934, p. 17, id., June 16, 1935, at 7, for upstate New York attempts to induce industry to remove from New York City.