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NOTES

ADMINISTRATIVE BOARDS AND DELEGATION OF POWER.—With the growth of American federalism and the passing of the doctrines of *laissez faire* as axioms of economic and political legal theory, the Congressional function magnified. Throughout the last decade the multiphased problems of Congress has necessitated the creation of administrative commissions to perform the policies of the legislature. Congress continues to declare the law and determine the legal principle to control in given cases. In the same breath of legal creation it goes farther and provides for an administrator or commission to vitiate the doctrine set-

out. The transfusion of power from the national legislature to the administrator promotes sensitive Constitutional objection. Close followers of the separation-of-powers doctrine forget that Montesquieu lived in an era much less affected by a complex federalism than our present conditions present. Despite the conflict arising over the delegation of legislative power, overwhelming authority will admit the delegation of a ministerial function to an administrative group. This harmony discords, however, when the question of statutory standards arises. How much discretion may the established board enjoy? To what extent must they be kept on the puppet-strings of Congress? Recent decisions continue to reflect contrary opinion. From the conflict we may make some conclusions.

The very nature of a delegation demands that the agency of Congress will employ some amount of discretion. As early as 1825 Chief Justice Marshall stated that when Congress had decided the general principle of the measure, the administrative body might Constitutionally "fill in the details." This principle roots deeply in American Constitutional law.[1] The Supreme Court has consistently intimated that Congress must demarcate as completely as is practicable the limits of the general rule it has laid down. Yet Congress has authorized the Secretary of the Treasury "to establish standards" for the admission of tea to this country;[2] it has delegated to the Inter-State Commerce Commission the power "to designate rates and set the maximum variation and standard drawbars for freight cars";[3] it has authorized the same commission to require railroads to keep accounts in a manner specified — not by the national legislature, but by the commission itself.[4] Congress has even delegated the power "to make regulations" pertaining to the sale of oleomargarine.[5] In the creation of the Federal Trade Commission, the Security Exchange Commission, the Federal Communications Commission and a bevy of other bureaus Congress delegated rate-making and regulatory power in terms of sweeping generality as the few instances above show. It must be remembered that a subject of this type requires legislation for the regulation of future conduct. The objects of the delegation are obviously set-out in a declaration of policy but the particular grants of power are so diffuse and

1 Wayman v. Southard, 10 Wheat. (23 U. S.) 1, 6 L. Ed. 253 (1825); United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911); Hannibal Bridge Co. v. United States, 221 U. S. 194, 31 S. Ct. 603, 55 L. Ed. 699 (1911); Inter-State Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 S. Ct. 436, 56 L. Ed. 729 (1912); J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928).

2 Butterfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349, 48 L. Ed. 525 (1904).

3 St. Louis, Iron Mountain & So. Ry. v. Taylor, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061 (1908).

4 Inter-State Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 S. Ct. 436, 56 L. Ed. 729 (1912).

5 In Re Kollock, 165 U. S. 526, 17 S. Ct. 444, 41 L. Ed. 813 (1897).

variable that they can not be distinctly apprehended and comprised in the ordinary terms of legislative classification. If Congress were to classify a complete nomenclature of cases and events in which the board should function, describe a course of action for each possible future event, the very purpose of the delegation would be defeated before the enactment was drawn.

In the decision of the now famous *Schechter Poultry* case,[6] Chief Justice Hughes stated: "Section three of the recovery act is without precedent. It supplies *no standards* for any trade, industry or activity. It does not undertake to prescribe rules of conduct, it authorizes the making of codes to prescribe them." Later in the opinion he continues to say: "For that legislative undertaking section three sets up no standards, aside from the general aims of rehabilitation, correction and expansion." The 1935 high tribunal obviously took little notice of the earlier chain of cases which held: "Standards may be laid down in broad and general terms. If the legislature were required to specify minutely and in detail the course to be pursued by the administrative agency, there would be no advantage gained by the delegation";[7] nor to the previous holding that: "A discretion — broad or narrow as the legislature shall deem expedient — may be vested in the delegate." [8]

In the early years of the Inter-State Commerce Commission the delegation of the rate making power was often challenged on grounds that it provided no standards. In 1913 Mr. Justice Hughes stated: "The rate-making power necessarily implies a range of legislative discretion, and so long as the legislative action is within the proper sphere, the Courts are not entitled to interpose and, upon their own investigation of traffic problems and conditions, to substitute their judgment for that of the legislature or of the railroad commission exercising its delegated powers." Subsequent tests of the constitutionality of the transportation-governing commission have failed to disturb this expression of the earlier court. The Federal Trade Commission has likewise been exposed to this attack on standards and the discretion of the boards. Judge Baker stated the accepted rule to this group of cases when he ruled: "The commissioners, representing the government as *parens patriae,* are to exercise their common sense as informed by their knowledge of the general idea of unfair trade at common law." [9] In this instance the statute did not define the meaning of "unfair trade." Such neglect did not, however, defeat its legality.

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6 A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935).

7 Mutual Film Corp. v. Industrial Commission of Ohio, 236 U. S. 230, 35 S. Ct. 387 (1915).

8 Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina, 222 U. S. 380, 32 S. Ct. 152 (1911).

9 Sears, Roebuck & Co. v. Fed. Trade Comm., 258 F. 307 (1919).

The latest challenge of a legislative delegation of power on grounds of "unfettered discretion" and failure of Congress to provide standards is found in *Roach v. Johnson.*[10] Federal District Judge Slick ruled the Emergency Price Control Act [11] unconstitutional on this ground. The decision states: "Congress, under its War Powers, has authority to regulate prices limited only by the Constitutional inhibition to provide standards." Further along it states: "Again in the case at bar, as was held in the Panama case,[12] if it could be inferred that Congress intended certain circumstances or conditions to govern the exercise of the authority conferred, the Administrator could not act validly without complying with the circumstances and conditions and findings by the Administrator that these conditions existed and were necessary, else it is left entirely to the unfettered discretion of the Administrator." A close inspection of the Emergency Price Control Act leads one to believe that this holding is not entirely founded. Section 902 of the statute states: "So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to prices prevailing between October 1st and October 15th, 1941 . . . and shall make adjustments for each relevant factor as he may determine." Admittedly the statute permits the Administrator discretionary power to investigate previous rentals and commodity prices, to peg both at the date specified and to adjust equitably if the prices of October, 1941 are not generally representative. How else could Congress provide for price fixing? No two districts in the country have identical food, clothing and rental values. By delegating a latitude of operation to the Administrator, the purpose of the act — to prevent inflation by price stabilization, is affected intelligently. We have already seen that general terms stating standards may provide for the power transfusion. Yet this case would confine Congress to specific delegations within stated standards and defeat the expeditious purpose of this War necessity. It is interesting to note that Judge Slick did not cite one of the many authoritative cases providing that Congress "shall do no more than lay down the general rules of action under which the Commission shall proceed," [13] nor was the often cited *Sears, Roebuck* case [14] mentioned — a leading authority for the contrary view which defends the constitutionality of the Federal Trade Commission because Congress declared "the public policy applicable to the situation."

From the majority of cases we would surmise that Congress may delegate legislative power — legislative in the sense of providing rates,

10 Roach v. Johnson, 48 F. Supp. 833 (1943).

11 U. S. C. A. Title 50, App. § 901.

12 Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1935).

13 Roach v. Johnson, 48 F. Supp. 833 (1943).

14 Sears, Roebuck & Co. v. Fed. Trade Comm., 258 F. 307, 169 C. C. A. 323, 6 A. L. R. 358 (1919).

rules and regulations for future conduct — to administrative bodies. In the majority of cases general standards suffice as we have seen from the creation of the Inter-State Commerce, Federal Trade and Federal Communications Commissions. In other instances, the National Industrial Recovery Act and the Emergency Price Control Act being typical, more specific statements by the legislature is necessary — 'though questionably so. What the future of Administrative law will be we can not predict. Perhaps our present Supreme Court will give us a clue in the very near future when the rent-control case [15] stands review.

William B. Lawless, Jr.

CONSTRUCTIVE TRUSTS ARISING OUT OF PURCHASES AT JUDICIAL SALES.—While the English Statute of Frauds of 1676 required a writing to create an express trust in real property, such statute has had no application in cases where the law raises a constructive trust by reason of the fraudulent acts and purposes in procuring title to the land.[1] Constructive trusts have been held not to be within the statute of frauds because they rest in the end on the doctrine of *estoppel* and the operation of an *estoppel* is never effected by the statute of frauds.[2]

A common situation whereby such a (constructive) trust might come into being, would be where A who had mortgaged land to C was about to lose it through foreclosure proceedings. B, a relative of A, came to A and represented to A that he would buy it at the sheriff's sale and hold it for A's benefit, offering also to give A a writing to this effect and containing also permission for A to redeem it, but he baffled A in relation to this writing and never gave it to him. By these circumstances A was prevented from raising money to purchase in the land until it was too late for him to succeed in so doing, and B purchased at the sheriff's sale. It is generally held that B must be taken to have purchased in trust for A.[3] For one purchasing land at a judicial sale under an oral agreement to purchase for the benefit of another will be decreed to hold the land for the benefit of the promisee where there existed between them a confidential relation aside from that created by the agreement to purchase,[4] or where the promisee supplied a part of

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15 Roach v. Johnson, 48 F. Supp. 833 (1943).

1 Johnson v. Hayward, 74 Neb. 157; 103 N. W. 1058 (1905).

2 Parker v. Catron, 120 Ky. 145; 85 S. W. 740 (1905).

3 Dickson v. Stewart, 71 Neb. 424; 98 N. W. 1085; 111 Am. St. Rep. 596 (1904).

4 Strasner v. Carroll, 125 Ark. 34; 187 S. W. 1057; Ann. Cas. 1918E 306 (1916); Carter v. Gibson, 29 Neb. 324; 45 N. W. 634 (1890); Cutler v. Babcock, 81 Wis. 195; 51 N. W. 420 (1892).

the purchase money,[5] or was lulled into inactivity through which the promisee was prevented from protecting his rights in the land,[6] or refrained from doing so whereby the promisor was enabled by his agreement to secure the land at a price materially below the actual value,[7] or where persons interested in the land under the oral agreement remained in possession thereof and made valuable improvements. Where such promisor had been guilty of fraudulent conduct in bringing about such sale by fraud or other wrong a constructive trust arises in favor of the true owner. Under circumstances or state of facts that would make it inequitable to permit him to hold on to his bargain, as by representing that he is buying for the benefit of those who own or have an interest in the property being sold or that he intends to reconvey such property to him or to permit them to redeem it and thereby discourages other bidding or obtains the property at a sacrifice, such purchaser will be deemed in equity a constructive trustee for the persons injured by the fraud.[8]

A noteworthy case that has often been cited by the courts is *Prescott v. Jenness*,[9] where a mortgagor who had been promised the right to redeem, though his rights had been foreclosed, orally agreed with another that the latter should purchase the title of the mortgagee and execute a written agreement to permit redemption within a specified time. The refusal of the party after purchasing the property to carry out the agreement constituted a fraud and he was held to be a constructive trustee for the mortgagor. In a similar case, *Cutler v. Babcock*,[10] the purchaser was not allowed to adopt and use the agreement by which he obtained title and repudiate its condition by which he was to convey it, in execution of the contract to the other party.

Where prospective bidders at a judicial sale, believing that the promisor in the oral agreement was buying for the promisee whose land was being sold to satisfy debts against him, refrained from bidding, the court in *Carter v. Gibson*[11] imposed a constructive trust upon the purchaser and ordered a reconveyance to the debtor. *Cutler v. Babcock*, held likewise, where the promisee in the oral agreement refained from bidding on account of the oral agreement. Also where the promisee relaxed his efforts to save the property from being sold at the judicial

5 Patrick v. Kirkland, 53 Fla. 768; 40 So. 969; 12 Ann. Cas. 540 (1907).

6 Hunt v. Elliott, 80 Ind. 245; 41 Am. Rep. 794 (1881).

7 Strasner v. Carroll, 125 Ark. 34; 187 S. W. 1057; Ann. Cas. 1918E 306 (1916); Patrick v. Kirkland, 53 Fla. 768; 40 So. 964; 12 Ann. Cas. 540 (1907).

8 Dickson v. Stewart, 71 Neb. 424; 98 N. W. 1085; 111 Am. St. Rep. 596 (1904).

9 77 N. H. 84; 88 A. 218 (1893).

10 81 Wis. 195; 51 N. W. 420 (1892).

11 29 Neb. 324; 45 N. W. 634 (1890); Combs v. Little, 4 N. J. Eq. 310; 40 Am. Dec. 207 (1843); Ryan v. Dox, 34 N. Y. 307; 90 Am. Dec. 289 (1866); Denton v. McKenzie, 1 Desaus (S. C.) 289 (1792).

sale. *Strasner v. Carroll* [12] and *Hunt v. Elliott* [13] held that a constructive trust should be impressed upon the purchaser. The Florida court in *Patrick v. Kirkland* [14] similarly construed a constructive trust where the promisee relaxed his efforts to prevent a sale at a sacrifice. *Dickson v. Stewart* [15] similarly held a constructive trust where the promisor in the oral agreement bought in the property at a price greatly below its value.

It has been said that if one having any interest in land is induced to confide in the verbal promise of another, that he will purchase it for the benefit of the former at a sheriff's sale and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter of the confidence is such a fraud as will convert the purchaser into a trustee *ex maleficio*.[16]

A Missouri case, *Merrett v. Poulter*,[17] held that a man who purchased land at a tax sale induced other bidders to refrain from bidding saying that he would buy the land for the owner, who was his neighbor, would be charged as a trustee for the latter or the sale would be set aside.

A constructive trust is predicated upon betrayal of confidence or the violation of duties arising out of a fiduciary relation. A fiduciary relation may be established in numerous ways.[18] It is a mere incident that it happens in a particular case to arise out of a verbal agreement. Equity will not tolerate a betrayal of confidence and it makes no difference how this confidence was obtained. The court in *Miller v. Henderson* [19] stated that a fiduciary relation does not depend on technical relations created by or defined in law but exist in cases where special confidence has been reposed in one who, in equity, is bound to act in good faith and with due regard to the interests of one reposing the confidence.

A trust is declared due to confidential relation existing between the parties. The terms, "fiduciary relation" and "confidential relation" are comprehensive ones, such relationships existing whenever influence has been acquired and abused or confidence has been reposed and betrayed. *Noble v. Noble* [20] held that a confidential relation existed where a brother held land in trust for a mentally incompetent sister, and *Koelford v. Thompson* [21] said that a confidential relation existed where

12 125 Ark. 34; 187 S. W. 1057; Ann. Cas. 1918E 306 (1916).
13 80 Ind. 245; 41 Am. Rep. 794 (1881).
14 53 Fla. 768; 40 So. 969; 12 Ann. Cas. 540 (1907).
15 71 Neb. 424; 98 N. W. 1085; 111 Am. St. Rep. 596 (1904).
16 Gruhn v. Richardson, 128 Ill. 178; 21 N. E. 18 (1889).
17 96 Mo. 237, 9 S. W. 586 (1888).
18 42 A. L. R. 78-115.
19 33 Pac. (2nd) 1098 (1934).
20 225 Ill. 629; 99 N. E. 631 (1912).
21 73 Neb. 128; 102 N. W. 268 (1905).

the legal title was given to the grantee by a quasi-partner to be pledged and money obtained to pay the grantor's debts. Such a relation was held confidential in *Pope v. Dufray* [22] where the relation the promisor and promisee sustained to each other was parent and child; likewise, where the relation was mother-in-law and son-in-law,[23] a similar holding is found.

A contract whereby one person employs an agent to negotiate for the sale of real estate is not a contract for the creation of an estate or interest in land, or trust, or power over or concerning land within the statute of frauds, as was held in *Johnson v. Hayward.*[24] And where the agent, employed to purchase the real estate becomes the purchaser for himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money, subject to reimbursement for his proper expenses in that behalf.[25]

The fact that the owner in reliance on the agreement has refrained from bidding or has relaxed his exertion to raise money to prevent the sale, is such a circumstance at least where the property was bid in at less than its value. In such a case there may be said to have been such a change of position by the owner in reliance on the agreement as to *estop* the bidder from setting up the statute of frauds.

It is not the parol contract but the trust that is sought to be enforced. If the owners were lulled into insecurity and thereby induced to desist from trying to save their property and the person agreeing to buy it acquires it at a grossly inadequate price, then the right of action rests not upon the parol contract but upon the fiduciary relations and transactions of which the agreement was a mere attendant. In *McNinch v. American Trust Co.*[26] the court stated that it was not necessary that actual fraud be shown, but the establishment of such conduct and bad faith on the part of the defendants as would shock the conscience of the chancellor would suffice to invoke the aid of a court of equity. The promisee acting on the faith of the agreement with the promisor may have ceased his efforts to raise money for the purpose of paying off the execution and thus preventing the sale of his property. In fact it could only be for the purpose of saving his property that such an oral agreement would be made, and it is but reasonable and natural to suppose that further efforts would be made, did not the particular promisor afford sufficient assurance that he would make the desired purchase and therefore afford the desired protection.

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22 176 Ill. 478; 52 N. E. 58 (1898).

23 Stubbins v. Briggs, 68 S. W. 392 (1902).

24 74 Neb. 157; 103 N. W. 1058 (1905).

25 Rose v. Hayden, 25 Kan. 106; 57 Am. R. 145 10 Pac. 554 (1886).

26 183 N. C. 331; 110 S. E. 663 (1922).

Some cases [27] hold that where a person who had agreed to buy land for another bought in his own name and paid for the purchase with his own money, he will nevertheless be held a trustee for the other, where it is shown that it was understood he should advance the purchase money as a loan to the one for whose benefit the land was bought.

Fraud can only be predicated upon existing facts, or facts alleged to exist, not upon a mere promise to do something afterwards,[28] and the fraud must be something more than a mere refusal to perform the oral agreement, such as the use of deception or other unfair means in procuring the conveyance.[29]

Constructive trusts are raised by equity for the purpose of working out right and justice where there is no intention of the party to create such a relation and often directly contrary to the intention of the one holding the legal title. If one party obtains legal title to the property not only by fraud or by violation of confidence or fiduciary relations but in any other unconscientious manner so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is considered in equity as the beneficial owner.[30] It follows as a result of this rule that fraud arises at once upon repudiation by the trustee of any trust, even though it is in parol [31] and even though its effect is very nearly to do away with the statute of frauds in this class of cases.[32] It is seen therefore that the statute of frauds cannot be set up as a defense as it cannot be used to work a fraud.[33] The New Hampshire Court added that whatever the intention of the purchaser may have been at the time of the sale, his subsequent refusal to declare the trust in writing and to hold the property for the protection of the other party's interest operates as a palpable fraud, which the statute of frauds was not intended to validate. When it appears that the understanding at the time of the verbal promise was by a writing to comply with the provisions of the statute of frauds, it is something more than a mere verbal promise or stipulation to reduce it to writing and this makes him secure. If, in confidence that such a writing will be executed the legal title is acquired, it is a fraud in the purchaser to refuse to do what was promised and is a claim to hold discharged of it which will constitute him a trustee *ex maleficio*.[34]

27 Jackson v. Steven, 108 Mass. 94 (1871); McDonough v. O'Neill, 113 Mass. 92 (1873); Kendall v. Mann, 11 Allen 151 (1865).

28 Gregory v. Bowlshy, 115 Ia. 327; 88 N. W. 822 (1902).

29 Goff v. Goff, 98 Kan. 201; 158 Pac. 662 (1916).

30 1 Pomeroy, Equity Jurisprudence 155 (1905).

31 Bogert, Trusts 127 (1921); Willats v. Bosworth, 33 Cal. App. 710; 166 Pac. 359 (1917).

32 Westphal v. Heckman, 185 Ind. 88; 113 N. E. 299 (1916).

33 Prescott v. Jenness, 77 N. H. 84; 88A 218 (1893).

34 Wolford v. Herrington, 74 Pac. 311, 315; 15 Am. R. 548 (1873); Jones National Bank v. Price, 37 Neb. 291; 55 N. W. 1045 (1893).

It is alleged that such a judicial interpretation does not do violence to the statute of frauds, since the court is not enforcing the express oral trust itself, but is raising a constructive trust upon the failure of the express trust in order to prevent unjust enrichment. The cases rest on the doctrine that though the statute of frauds prevents the enforcement of the express oral trust of land, a court of equity will make the grantee a constructive trustee since "it is not honest for him to keep the land." [35]

The theory of the courts is that they are doing no more violence to the statute of frauds by preventing unjust enrichment through the doctrine of constructive trusts in equity than a court of law does violence to the statute of frauds in allowing recovery in quasi-contract where the statute of frauds requires a writing in the transfer of lands. While there must be fraud to raise a constructive trust, the courts will make a special effort to give full weight to any evidence of fraud in order to work out justice in a case which otherwise would result in unjust enrichment.[36]

Some courts have held that while usually the burden of showing that a conveyance was obtained by fraud is on the party attacking the conveyance, nevertheless the burden of proof shifts where there is a family relationship of confidence between the grantor and no consideration was paid for the property.[37]

It would seem then that the same courts might hold that the burden should be upon the grantee of a gratuitous conveyance to show that it was free from fraud where (1) there was proof of importunity by the grantee in securing the conveyance from the grantor, (2) where there was an intimate family relationship involving confidence such as husband and wife, (3) where there were suspicious circumstances which would seem to show that an absolute conveyance in accordance with the face was not intended.[38]

It has been noted that the owner of the land who has permitted his interest to be extinguished by a judicial sale, relying upon the oral agreement of the purchaser, is entitled to be put in *statu quo* if the purchaser refuses to carry out his promise. The principle underlying the imposition of a constructive trust in such a case is that the defendant would be unjustly enriched at the expense of the plaintiff if he were permitted to keep the property and in order to prevent this unjust enrichment a court of equity will restore the *statu quo* by compelling the defendant to reconvey the property to the plaintiff on being reimbursed by the plaintiff for the amount expended by him in making the purchase.

Timothy M. Green.

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35 Davies v. Otty, 35 Beavan 208, 55 Eng. Rep. 875 (1865).

36 Bogert, Trusts § 129.

37 2 Pomeroy, Equity Jurisprudence § 962; 1 Bigelow, Law of Fraud 537.

38 36 Harvard Law Review 105; 4 Wigmore, Evidence § 2503.

EVIDENCE — IMMUNITY FROM PROSECUTION.—The Supreme Court of the United States on January 11, 1943 handed down a decision interpreting the "immunity" clause which is contained in Sherman Anti-Trust Act, Interstate Commerce Act, and other Acts passed wherein said clause is identical, and settled, for the time being at least, the question of the obligation of a witness to claim his constitutional privilege before he is entitled to immunity from future criminal prosecution, where he gives self-incriminating evidence before a grand jury under a subpoena. This question has, since the amendment to the Sherman Act, plagued the Federal Courts with indecision and uncertainty. The arguments pro and con are multitudinous, as each District Judge seemed to decide the question on his own logic and attitude toward the immunity clause. Uniformity on the issue was unknown.

Finally late last year the question was placed directly before the Supreme Court. Was or was not a witness, subpoenaed before a grand jury, entitled to immunity from criminal prosecution upon giving self-incriminating testimony? In said case, *U. S. v. Monia*,[1] the court said: "A natural person who in obedience to subpoena gives testimony under oath, or produces evidence under oath, before a grand jury inquiring into an alleged violation of the Sherman Anti-Trust Act substantially touching the alleged offense obtains immunity from prosecution for the offense although he does not claim his privilege against self-incrimination." The Sherman Act [2] in part provides: "No person shall be prosecuted or be subjected to any penalty or forfeiture for an account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts; Provided further, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." As supplemented [3] it reads materially: "Under the immunity provisions immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

After running briefly through the history of the Act and presenting the decisions and other factors that have caused the Act to read as it now does, Mr. Justice Roberts, writer of the majority opinion, based his view upon the language of the clause and its apparent meaning to the layman. To quote the learned judge: "The legislation involved in the instant cases is plain in its terms and, on its face, means to the layman that if he is subpoeaned, and sworn, and testifies, he is to have immunity. . . . Congress evidently intended to afford Government officials the choice of subpoenaing a witness and putting him under oath, with the knowledge that he would have complete immunity from pros-

1 63 S. Ct. 409 (1943).
2 32 Stat. 904, 15 U. S. C. A. 32.
3 34 Stat. 798, 15 U. S. C. A. 33.

ecution respecting any matter substantially connected with the transactions in respect of which he testified, or retaining the right to prosecute by foregoing the opportunity to examine him. That Congress did not intend, or by the statute in issue provide, that, in addition, the witness must claim his privilege, seems clear. It is not for us to add to the legislation what Congress pretermitted." To which view of the court Mr. Justice Frankfurter dissented and was joined in his dissent by Mr. Justice Douglas.

It is the dissent, rather than the majority view upon which we wish to comment for it seems the more logical and better substantiated of the two opinions. Justice Frankfurter as the foundation of his dissent attacks the problem from a different viewpoint. At the axis of the problem, he sees a duty not a privilege. The privilege is the offspring, a qualification of the duty, and the immunity a substitute for the privilege, which has been crystallized into our fundamental law. To quote: "Duty, not privilege, lies at the core of the problem — the duty to testify, and not a privilege that relieves of such duty." In the classic phrase of Lord Chancellor Hardurche, "the public has a right to every man's evidence." The duty to give testimony was qualified at common law by the privilege against self-incrimination. And the Fifth Amendment has embodied this privilege in our fundamental law. But the privilege is a privilege to withhold answers and not a privilege to limit the range of public inquiry. The Constitution does not forbid the asking of criminative questions. It provides only that a witness cannot be compelled to answer such questions unless a *"full substitute"* for the constitutional privilege is given. But the Constitution does not protect a refusal to obey a process. There never has been a privilege to disregard the duty to which a subpoena calls. And when Congress turned to the device of immunity legislation, therefore, it did not provide a *"substitute"* for the performance of the universal duty to appear as a witness — it did not undertake to give something for nothing. It was the refusal to give incriminating testimony for which Congress bargained, and not the refusal to give any testimony. And it was only in exchange for self-incriminating testimony which "otherwise could not be got" because of the witness's invocation of his constitutional right that Congress conferred immunity against the use of such testimony. The learned Justice then follows up his logic by denying that the immunity provision was an act of general amnesty, but a *quid per quo* for the constitutional privilege, and that as a witness to avail himself of his constitutional privilege must claim such a privilege, he must also claim the substitute of that privilege, namely the immunity. On the exigencies of the case, it seems more reasonable to put the burden of claiming the immunity upon the witness, rather than force the officials of government to call upon him to elect to do so, as in most cases the witness alone knows whether the information requested will tend to incriminate him. The one subpoenaed as a witness is not the

person under investigation, and if the District Attorney suspects the criminal involvement of said witness he will, of necessity, advance the immunity in exchange for that person's testimony. But, as in the majority of cases, the District Attorney has not the slightest inkling that the witness is criminally involved. Therefore, the burden should fall upon the witness to claim his privilege by refusing to so testify, and then the immunity will extend to him if the grand jury insists upon said testimony. The argument has been advanced that if the witness must claim the immunity before becoming entitled to it, the provision will operate as a trap upon said witness. But such is not the case, as the witness will no more be entrapped by the requirement that he stand upon his constitutional rights, if he desires this protection, when there is an immunity statute than where there is none at all. Judge Gubbin *U. S. v. Skinner* [4] said: "If any hardship attends the imposition of this burden on the witness, it has never been considered weighty enough to relieve him therefrom in exercising his constitutional privilege prior to the immunity statutes. The immunity granted by the statute is a mere substitute for the constitutional safeguard, and has been held to be conterminous with it. There would seem, therefore, to be no reason for a different practise as to the assertion of the privilege where immunity is desired and where the constitutional privilege is insisted upon."

In the majority opinion the immunity clause was interpreted upon its face and according to its language only. Mr. Justice Frankfurter in the dissent attempts to go behind the language and points out that Congress intended that the witness must claim the immunity to beget its benefits. Since the *Securities Act of 1933*,[5] seventeen regulatory measures, which contain provisions for immunity from prosecution in exchange for self-incriminating testimony, have been passed by Congress. Of these, fourteen confer immunity when a person testifies under compulsion "after having claimed his privilege against self-incrimination." The remaining three, the *Motor Carrier Act of 1935*,[6] the *Industrial Alcohol Act*,[7] and *Fair Labor Standards Act of 1938*,[8] do not contain this additional clause, but merely follow the old form customarily used prior to 1933. It is pointed out that both *Motor Carrier Act*, and the *Industrial Alcohol Act* were enacted as amendments to the Interstate Commerce, and the *National Prohibition Act* respectively, and that these acts naturally incorporated the inforcement provisions of the old Acts. The *Fair Labor Standards Act of 1938* is even a more conclusive argument in his favor, for this Act when first introduced contained the explicit provision that a person gains immunity "after having claimed his privilege against self-incrimination." It remained

4 218 F. 870 (1914).
5 48 Stat. 87, 15 U. S. C. A. 77v.
6 49 Stat. 550, 49 U. S. C. A. 305.
7 49 Stat. 875.
8 52 Stat. 1065, 29 U. S. C. A. 209.

in this form until a year later when the whole conception of the bill was changed. Everything was struck out, and a new bill was presented, in which bill the provision for the attendance of witnesses in the enforcement of the Act, simply incorporated by reference the provision of the *Federal Trade Commision Act*.[9] By this history of more modern Acts, the justice infers the intent of Congress to put the burden upon the witness to claim his privilege.

Let us now look at the more important decisions upon this question, of which the majority will necessarily be from the District Courts, the Supreme Court not having decided the issue previously. The hosts of opinions were put underway, when in March of 1906 in *U. S. v. Armour and Co.*,[10] Justice Humphrey ruled that individuals who afforded the Commissioners an opportunity to examine packers' books and papers were entitled to immunity under the immunity clause. This presumably was a startling decision to the makers of the law, for the President [11] immediately advised Congress to pass a declaratory act to set aside Judge Humphrey's misconception. Congress on June 30, 1906 amended the Act as above mentioned, correcting the two errors of Judge Humphrey, namely that a corporation was not entitled to the immunity, and that a person must give evidence under the ordinary formalities incident to being a witness.

For seventeen years thereafter, it was unquestioned that Congress had given no more than the Constitution required, and that a witness must claim his privilege to refuse to incriminate himself. Decisions such as *Heike v. U. S.*[12] which, while not deciding upon the same set of facts, or the same issue, did attempt an interpretation of the immunity clause. Justice Holmes' view of the clause comes to light from the following words: "But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity for crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned." Such is Justice Holmes' view, rendered soon after the passage of the amendment, and clearly upholding the dissenting opinion in the present case under discussion.

The following year another decision, *U. S. v. Skinner*,[13] deciding exactly the same situation presented here, was handed down by District Judge Gubb. To quote the decision, he says: "A person to be entitled to immunity from prosecution, must claim his constitutional privilege

9 15 U. S. C. A. 41.

10 142 F. 808 (1905).

11 Message from the President, April 18, 1906, H. Doc. No. 706, 59th Cong., 1st Sess.

12 227 U. S. 121, 33 S. Ct. 226 (1913).

13 218 F. 870 (1914).

against self-incrimination while testifying before the Commission, since it was always competent for a person to voluntarily incriminate himself, and the statute was necessary only to enable the government to obtain testimony which otherwise would not be given, and the statutes should not be construed, as going further than the necessity of the case demanded, thereby conferring a gratuitous amnesty for crime, unnecessary for the purposes of law enforcement, especially as the government is entitled to know whether the testimony is given voluntarily, for the purpose of exoneration, or with the intention of claiming immunity, in order that it may exercise its option to admit the testimony and thereby grant the immunity, or reject the testimony and deny the immunity." These words are forcible, clear, and precise. No comment need be made, the case is squarely in point and decisively decided.

Then again, the succeeding year Judge Hunt in *U. S. v. Elton* [14] upheld Judge Gubb's decision. The facts in said case were as follows: The defendant was subpoenaed, and testified under oath before the Interstate Commerce Commission as to an attempt to create a monoply of transportation facilities in violation to the Sherman Act, after being led to believe that immunity would be given, and under threats that the Commission would proceed criminally against any person testifying under a subpoena who refused to give his evidence. The Commission had expressly refused immunity to others not sworn, and defendant had not conferred with counsel as to a possible waiver of immunity before testifying. He was subsequently indicted upon grounds as to which he had testified before the Commission. It was, on that set of facts, decided that circumstances were such, that in justice the defendant should be construed to come under the immunity clause. But in rendering the decision Judge Hunt also warned, citing *U. S. v. Skinner,* that, "such immunity is only conferred where the witness would have been privileged under Constitution U. S. Amendment 5, and where such evidence is given without assertion of the constitutional privilege, or is declined to be given on any ground other than because of its incriminating tendency, immunity is not conferred, the statute having been passed with regard to the prior construction of the 5th amendement, under which an assertion of privilege is necessary."

Another decision in favor of the dissent is *U. S. v. Lee* [15] wherein District Judge Bledsoe ruled that, "to entitle a person to immunity from prosecution because of information given the commission, he must have put the government on notice that the information required might tend to incriminate him, and that it was given only in consideration of the immunity afforded by the statute."

Closely following this decision, seventeen years after the passage of the amendement of the immunity clause, the first decision denying the

14 222 F. 428 (1915).
15 290 F. 517 (1921).

burden of claiming the immunity appears. This decision was rendered by District Judge Hutcheson in *U. S. v. Pardue,*[16] wherein he decides that to be entitled to the immunity it is not necessary that the witness should claim it before the commission. As authority he cites *U. S. v. Armour* [17] already commented upon as being in error, evidenced by the amendment, *U. S. v. Swift,*[18] a doubtful decision which could almost be cited by either side, but seems more logically to point against Hutcheson's opinion, *People of N. Y. v. Sharp,*[19] and *State v. Murphy,*[20] a Wisconsin case, which has been repudiated by the court which rendered it.[21] In discussing the opposing view, he cited *U. S. v. Heike,*[22] but overlooked the appeal to the Supreme Court as above mentioned.

Again the next year in *U. S. v. Ward,*[23] the question of immunity was decided. Some cite this as authority for the proposition that the necessity of claiming the immunity does not exist, but in the decision that exact question is not raised, nor even considered. In fact no authorities, or cases are cited concerning any point. The court merely decided that under the circumstances presented the witness was immune from prosecution.

U. S. v. Moore,[24] still another case advancing an opinion supporting the majority, was decided two years subsequent to the previous mentioned case. This last case was decided primarily upon the construction given the immunity clause in *Brown v. Walker* [25] wherein the court said: "The act securing a witness immunity from prosecution, is virtually an act of general amnesty; that it completely shields a witness against any criminal prosecution." This view of the statute was later rejected in *Heike v. U. S., supra.* It must also be considered that the witness, under the indictment had refused to testify, thereby raising the claim to his constitutional privilege, and so was entitled to the immunity. *U. S. v. Goldman,*[26] also a case for the majority, was decided upon the strength of *U. S. v. Moore, supra.*

The latest case decided, upon the exact set of facts previous to the Supreme Court's decision, was *U. S. v. Greater New York Live Poultry Chamber of Commerce,*[27] wherein, after listing the case advanced to

16 294 F. 543 (1923).
17 142 F. 808 (1905).
18 186 F. 1002 (1911).
19 107 N. Y. 427, 14 N. E. 319 (1887).
20 128 Wis. 201, 107 N. W. 470 (1906).
21 Carchide v. State, 187 Wis. 438, 204 N. W. 473 (1925); State v. Grosnickle, 189 Wis. 17, 206 N. W. 895 (1925).
22 175 F. 852 (1910).
23 295 F. 576 (1923).
24 15 F. 593 (1926).
25 161 U. S. 591, 16 S. Ct. 644 (1896).
26 28 F. 2d 424 (1928).
27 33 F. 2d 1006 (1929); See also U. S. v. Lay Fish Co., 13 F. 2d 136 (1926).

support each side consisting of cases mentioned herein, District Judge Knox ruled that a witness testifying before the grand jury, even though he does incriminate himself, is not entitled to immunity, unless he claims his privilege before he testifies.

In concluding the citations of the authorities for both sides it would be well to give the learned Wigmore's interpretation of the act. He says:[28] "The anticipatory legislative pardon or immunity is not authorized absolutely but only conditionally upon and in exchange for the relinquishment of the privilege. The Legislature did not intend to give something for nothing, *i.e.* to give immunity merely in exchange for a testimonial disclosure which it could in any event have gotten by ordinary rules or by the witness' failure to insist on his privilege. The immunity was intended to be given solely as a means of overcoming the obstacle of the privilege; and therefore (irrespective of the precise formality of the judge's procedure) could not come into effect until that obstacle was explicitly presented and thus needed to be overcome."

Thomas J. Mitchell.

PART TWO.[1]—At a first and cursory perusal of the opinions rendered in this case, the dissenting opinion of Justice Frankfurter seems to be a clearer statement of the law. But a man must go beyond the primary appraisal of a judicial opinion. Perhaps, one man is able to express his views in a more intelligible and possibly a more intelligent manner. Intelligibility in itself does not indicate correct facts nor logical reasoning. The law as such must be divorced from the idyosyncrasies of lawyers and judges alike. It must be made to stand naked and unadorned if a critical analysis is to be formulated. Too often men accept the obvious, abandoning the truth through negligence or sloth. Too many men will accept the better written opinion without regard to the truth and principle of the law involved. Men are fallible; judges are only men. Men are at variance; there are dissenting opinions.

In a discussion of this paper we must not lose sight of the fact that the majority opinion is the law as it stands now. In all probability it will remain so.

As a predication of this paper, I think it well to say that this analysis is of the law as it stands today, not as Justice Frankfurter would have it. I shall attempt to show by analysis and inference, where authority fails, why the majority opinion expresses the correct and preferable law.

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28 4 Wigmore on Evidence (2d ed.) § 2282, p. 958.

1 The following article expresses the views of the majority opinion in the preceding case.

The case arose thus:[2] An indictment was returned charging corporations and individuals, including Mr. Monia, with conspiracy to fix prices in violation of the Sherman Act.[3] Mr. Monia alleged that, in obedience to a subpoena duly served, he appeared as a witness for the United States before the grand jury inquiring respecting the matters charged in the indictment and gave testimony. The government then attempted to prosecute him. He claims immunity under a provision of the Sherman Act that stipulated that no person should be prosecuted concerning the subject matter of his testimony.[4] The United States claims that since Monia did not at the time claim his immunity, he is not entitled to be immune now.

The Court held that the decision of the District Court was correct. In other words it simply stated that a person compelled to testify under oath in a crimial case need not claim his immunity to prosecution in order to be immune.

This decision seems to be in accord with past precedent, to be concurrent with the intentions of the makers of the Constitution that gave to every man the privilege of not incriminating himself by his own testimony, and to be in conformity with every principle of justice known in our world.

That it is in accord with past precedent is shown when the case of *Heike v. U. S.*[5] is reviewed. It was held that the Sherman Act affords immunity from prosecution where the evidence in former investigations does not relate to nor concern the specific charge against him. "The purpose of the statute is to make evidence available and compulsory that otherwise could not be obtained. It offers no gratuity to crime and should be construed so far as its words fairly allow the construction, as coterminous with what otherwise would have been the constitutional privilege of the person accused."[6]

It however has been held that there is no immunity when the person claiming immunity has merely filed answers.[7]

If a witness gives incriminating evidence voluntarily and without insisting on his constitutional privilege, the testimony may be used against him. But if he is compelled to testify in violation of his privilege under a statute guaranteeing immunity, the testimony cannot afterwards be used against him.[8]

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2 United States v. Monia, U. S. 63 S. Ct. 409 (1943).

3 Act of 1903, 15 U. S. C. A. 32.

4 Act of 1903, 15 U. S. C. A. 32.

5 Heike v. United States, 57 L. Ed. 450, 227 U. S. 131 (1913).

6 Heike v. United States, 57 L. Ed. 450, 227 U. S. 131 (1913).

7 Simon v. Amer. Tobacco, 192 F. 662 (1912); U. S. v. Stan. Sanitary Co., Ann. Cas. 1914C 128.

8 Sandwich v. State, 137 Ala. 85, 34 So. 620 (1903); Steel v. State, 76 Miss. 387, 24 So. 910 (1899); McMasters v. State, 83 Miss. 1, 35 So. 302 (1903).

The weight of authority acknowleges that there is a constitutional right of not being subject to incrimination by ones own testimony.[9] And that under the Sherman Act, cases of this type are examples of the use of incriminating testimony against the testifier. The whole question and point of controversy is whether the testifier claims his immunity by words or by significant acts? In *United States v. Monia* [10] the majority held no. In other words, the immunity arose as a natural consequence of the testifier's action in giving testimony as a witness for the government. The minority held that the testifier must claim his immunity. Let us look to that.

It has been held [11] that no statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Furthermore, a statutory enactment to be valid must afford *absolute* immunity against future prosecution for offenses to which the question relates.

Several cases have held that this privilege cannot be abridged or taken away unless *complete* immunity is provided.[12]

Can it be said with any logic whatsoever, can it be said with any regard for the doctrine of *stare decisis* that a man must claim this immunity by express words or actions amounting to the same effect? Hardly so. The person must be afforded *absolute immunity*.[13] It would certainly not be thus if he were to be defeated merely because he neglected or failed to ask for such privilege. *Complete* immunity must be provided.[14] Can it be complete if the Constitutional privilege is suspended merely because the testifier was ignorant? Such is merely a technicality in some jurists' minds.

The makers of the Constitution provided that: "Nor shall any person be compelled in any criminal case to be a witness against himself." The authors of the Sherman Act and other such acts were willing to bargain with testifiers to the extent that immunity would be provided if the individual would exchange pertinent testimony for such immunity. Surely it was not within the contemplation of the makers of the Constitution that a right impelled by a spirit of justice would have to be claimed. A man is not required to claim the rights of life, liberty, and pursuit of happiness. Nor is he required to claim freedom of religion, of speech, and of the press. These rights accrue to him because

9 Brown v. Walker, 161 U. S. 591, 40 L. Ed. 819 (1896); Hale v. Henkel, 201 U. S. 43, 50 L. Ed. 652 (1906); Wilson v. U. S., 221 U. S. 361, 55 L. Ed. 771 (1911); United States v. Price, 96 F. 960 (1899).

10 United States v. Monia, U. S. 63 S. Ct. 409 (1943).

11 Counselman v. Hitchcock, 35 L. Ed. 1110, 142 U. S. 547 (1892).

12 United States v. Bell, 81 F. 954 (1897); Wyckoff v. Wagnef Type. Co., 99 F. 158 (1899); Foot v. Buchanan, 113 Fd. 156 (1902).

13 Counselman v. Hitchcock, 35 L. Ed. 1110, 142 U. S. 547 (1892).

14 United States v. Bell, 81 F. 954 (1897).

he lives under the Constitution. Why should a distinction be made to the extent that a man must claim his immunity, when that immunity has been substituted for his privilege under the Constitution of not being a witness against himself?

Justice demands that technicalities of the type that Mr. Frankfurter would have imposed be made no requisite for claiming a Constitutional privilege. A poor man who is inadvised because he can not afford to retain a staff of lawyers to interpret his rights would be a man without enforceable rights. Likewise, an ignorant man or a careless lawyer. The principle is the important thing. The frills and dress are hiding the issues. The individual is compelled to testify without warning as to his rights. Certainly, it is in the best interests of the government for whom he testifies to protect the testifier's interests, even though there are some who would hold that it is not their duty to do so.

Frankfurter fears that criminals will take advantage of the immunity and escape punishment. If the government has bargained to give them this immunity in return for specific testimony, why should they not be able to take advantage of the bargain and be immune without having to claim this immunity in order to give the prosecutor warning? Furthermore, the law holds that this immunity accrues only when the person is *compelled* to testify for the government, and that voluntary admissions that might be set up by guilty parties do not give rise to the immunity.[15]

Justice Frankfurter fears that the prosecutor will be at a disadvantage in not knowing when he is giving immunity. But why in justice's sake should the prosecutor be placed in any more advantageous position than the witness testifying? The witness should have the benefit of the doubt if we are to carry our principle — a man is innocent until he is proved guilty —to its logical extreme. It should be up to the prosecutor to inform himself as to the facts of the case he is trying. He should be given no carpet of roses.

In conclusion, it certainly seems that from the viewpoint of past authority, from the intention of the makers of the Constitution, and from our sense of justice that the majority opinion rendered in *United States v. Monia* is a correct, just, and reasonable statement of what the law is and should be.

John D. Ryan.

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15 Sandwich v. State, 137 Ala. 85, 34 So. 620 (1903); Steel v. State, 76 Miss. 387, 24 So. 910 (1899).

INSANITY AND ITS EFFECT IN DIFFERENT STATES OF CRIMINAL TRIALS.—Perhaps one of the most important questions which arises in regard to criminal procedure is the effect of insanity during the different stages of the criminal trial. This problem is particularly important as a defense in criminal trials. One of the significant points to notice with regard to the plea of insanity is just when the accused was stricken with the infirmity. It is also imperative to examine just what effect the infirmity has on the mind or reason of the accused. This latter point is important to the attorney because many of the states have set tests which are used in determining the sanity of the accused.

In order to examine the effect of insanity in criminal procedure, there are four different situations which will be discussed. These situations are as follows: (1) The effect of insanity at the time of the commission of the criminal act; (2) The effect of insanity after the commission of the crime and at the time of the trial; (3) The effect of insanity after the trial but before sentence; and (4) The effect of insanity after the trial and during execution of sentence. These situations will be discussed in this order so as to provide a reasonable continuity for the study. But before taking up these four situations, it is interesting to look at the questions of insanity in its broad aspects and manifestations.

First it is interesting to note the forms of insanity. With regard to mental function chiefly, insanity may be classified as perceptional, intellectual, and emotional or volitional.[1] However, it must be said that not all of these forms are recognized by the law as unassailable defenses for criminal responsibility.[2]

The first of these above named forms which was recognized by law was that of the intellectual variety. It is also interesting to note the modern test for insanity, namely, the "Right and Wrong Test," had its origin in the intellectual form of insanity. The test was evolved out of judicial determination of this type of insanity and it was put forth as a method of evaluating the intellectual form and the mental capacity of the accused.[3] The recognition of this type of insanity came before the test was developed.

After the intellectual form had been recognized, the courts made note of the perceptional type. They applied the test in some cases as to whether the illusion or the hallucination entertained by the subject would have justified his action had such illusion or hallucination been real.[4]

In the case of volitional insanity, the courts have been reluctant to accept it as a defense in criminal actions. Some jurisdictions have ac-

1 10 L. R. A. (N. S.) 1032.
2 10 L. R. A. (N. S.) 1032.
3 10 Clark and Finnelly 200, 8 Eng. Reprint 718 (1843).
4 L. R. A. 1917 F. 650 (Note).

cepted this form when it has been accompanied by some measure of intellectual insanity, and the courts in these cases, have called the infirmity "irresistible impulse." [5]

Emotional insanity, a part of the volitional form, is not accepted *per se* by the courts either. However, some courts recognize a distinction between passion which for a space of time effects a complete derangement of the intellect. This latter form is legal insanity which some courts will recognize.[6] In the case of *Plake v. States,*[7] the Indiana courts said, "where the will is overcome by mere passion alone there would be criminal responsibility."

Many courts have stated that regardless of the form of insanity from which the accused is suffering, he will not be excused from criminal liability just because of the affliction. Different tests will be applied to the person from which the court will determine whether the defendant will be held responsible. It is generally conceded that if a person has the capacity to distinguish between right and wrong, mere emotional insanity, passion, or frenzy produced by anger, jealousy or other emotion will not excuse him from criminal responsibility.[8]

Closely associated with insanity in the popular mind are the cases of persons who are so-called "weak minded." There is a distinction between these individuals and those who are afflicted with insanity.[9] Many authorities declare that the mere weakness of mind is not of itself sufficient to excuse the responsibility of a criminal act.[10]

Often the term partial insanity is used to denote these cases of weak mindedness and emotional insanity. However, regardless of the name given, the courts look for a test to determine the mental capacity of the accused to distinguish the right and wrong of his act. The New York court said in *Freeman v. People,*[11] that "partial insanity or monomania is no excuse for crime unless it deprives the party of his reason in regard to the act charged."

In cases of loss of memory, epilepsy and delirium tremens there can be conditions which will relieve criminal liability provided they are extreme in their effect or coupled with other insanities or other circumstances which will destroy the capacity of the person from distinguishing between right and wrong.

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5 10 L. R. A. (N. S.) 1033 (Note).

6 10 L. R. A. (N. S.) 1033 (Note).

7 121 Ind. 433, 23 N. E. 273 (1890).

8 Watson v. State, 177 Ark. 708, 7 S. W. (2d) 980 (1920); Plake v. State, 121 Ind. 433, 23 N. E. 273 (1890).

9 W. B. Pillsbury, *Elementary Psychology of the Abnormal,* p. 286 - 310, (1932).

10 Roger v. State, 128 Ga. 67, 57 S. E. 227 (1907); Leache v. State, 22 Tex. App. 279, 3 S. W. 539 (1886).

11 4 Denio 9, (N. Y.) 47 Am. Dec. 216 (1847).

It is interesting to note how the law treats with persons who commit an act while under a delusion. This is best explained by an example. Suppose A, believing B is an evil spirit and holds an evil influence over him, kills B thus freeing himself, A, from the evil influence. The courts call this an insane delusion. The Court of Massachusetts said in the case of *Commonwealth v. Rogers*,[12] that "if a crime is committed because of such a delusion, the person committing it is to be judged, so far as criminal responsibility is concerned, just as if the facts which in his delusion, he believed to be true, were true." A little further along this line, the California court said in *People v. Hurbert*,[13] that "an insane delusion will not relieve one from criminal responsibility for his act where the fact upon which it is based would not, if actually existing, excuse the act."

Other courts refuse to follow this line of the Massachusetts and California courts. The Alabama court in *Parsons v. State*,[14] said that "the guilt of one who relies on an insane delusion as a defense cannot be made to depend upon whether the delusion was such that if things were as he imagined them to be, he would be justified in the act springing from the delusion."

The Mississippi court falls back on the "Right or Wrong Test" and says "that delusional insanity is not a defense to a charge of crime unless at the time the accused was unable to distinguish moral right from wrong."[15] The Colorado court makes a better refinement than that of the Mississippi court when in the case of *Ryan v. People*[16] it said, "where the evidence of the delusion shows that a person is so insane at the time of the commission of the act as to be incapable of entertaining criminal intent, it is in point of law insanity as to all acts resulting from such delusion. And in such circumstances the act is no more a crime than a like act would be in a person totally mad." This distinction made by the Colorado court seems to be quite logical and sound.

Some states have made another refinement in the general field of insanity. These states recognize what is called an "irresistible impulse." They say that this form is an impulse induced by, and growing out of, some mental disease affecting the volitive as distinguished from the perceptive powers, so that the person afflicted, while able to understand the nature and consequences of the act charged against him and to perceive that it is wrong, is unable, because of such mental disease, to resist the impulse to do it.[17]

However, courts do not agree as to whether the irresistible impulse is an excuse for crime. Some courts have held that notwithstanding one

12 7 Met. 500, (Mass). 41 Am. Dec. 458 (1844).
13 119 Cal. 216, 51 P. 329 (1897).
14 81 Ala. 577, 2 So. 854 (1887).
15 Smith v. Smith, 95 Miss. 786, 49 So. 945 (1909).
16 60 Colo. 425, 153 P. 756 (1915).
17 27 L. R. A. (N. S.) 461 (Note).

accused of committing a crime may have been able to comprehend the nature and consequences of his act and to know it was wrong, nevertheless, if he was forced to do the act by an impulse which he was powerless to control because of an actual disease of the mind he will be excused.[18]

On the other hand, many courts refuse to recognize the irresistible impulse doctrine as a test of criminal responsibility and require that the "Right and Wrong Test" be complied with before the accused may be excused.[19] These courts hold the view that an irresistible impulse will not relieve criminal responsibility unless the disease renders the accused incapable of distinguishing between right and wrong as to the act committed.

Before proceeding any further it would be helpful to study some of these tests which have been used by the courts to determine the accused's insanity. Some courts reject all tests of insanity and say that all cases depend on the circumstances and on the basis that it is erroneous to treat as a matter of law that which is really a question of fact.[20] Also in Illinois, the court said in *Happs v. People* [21] that "in order to make insanity a good defense it must appear that at the time of the crime, the defendant was not of sound mind, and afflicted with insanity, and that the affliction was the cause of the act, and the act would not have been done except for the affliction."

As we have seen certain courts depend on the "irresistible impulse test." However, more courts depend on the "Right and Wrong Test." This test had its foundation in the English case called *M'Naghton's Case*.[22] Here the judges put down the rule that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as to be unaware of the nature and quality of the act he was doing, or if he had known it, that he did not know he was doing what was wrong. After this was put forth some courts construed the rule as referring to the power to distinguish between right and wrong conduct in general.[23] More courts had adopted the view that the capacity of the accused to distinguish right from wrong in respect to the act charged as a crime at the time from wrong in respect to the act as a crime at the time of its commission is made the test of his responsibility and not his capacity or ability to distinguish right from wrong in the abstract.[24] And as *American Jurisprudence* [25] so apt-

18 Parsons v. State, 81 Ala. 577, 2 So. 854 (1887); Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634 (1869).

19 People v. Hurbert, 119 Cal. 216, 51 P. 329 (1897); People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915).

20 State v. Jones, 50 N. H. 369, 9 Am. Rep. 242 (1871).

21 31 Ill. 385, 83 Am. Dec. 231 (1863).

22 10 Clark and Finnelly 200, 8 Eng. Reprint 718 (1843).

23 Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634 (1869).

24 Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20 (1879); Hornish v. People,

ly puts it, "if a person at the time of the commission of an alleged crime has sufficient capacity to understand the nature and quality of the particular act or acts constituting the crime and to know whether they are right or wrong, he is responsible if he commits such act whatever may be his capacity in other particulars, but if he does not possess this degree of capacity, then he is not so responsible.[26] Thus, if a person is entirely sane, except in one act, and he commits that act his defense is complete. And on the other hand we can say that if a person has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, then whatever may be his mental weakness, he is in the eyes of the law of sound mind and memory and will be subject to punishment.[27]

It is very interesting to note in passing that where the question of the determination of the issue of insanity as a defense is raised that in certain jurisdictions where judges are permitted to comment upon the weight and value of evidence, it has been held proper for the court to caution the jury concerning this defense which judicial experience has shown to be often attempted by contrivance and perjury, but instructions by the trial court which are designed to cast discredit or suspicion upon the defense are not regarded with favor.[28] However, Missouri is an example of those states which allow its juries to bring in a general "not guilty" verdict in cases of insanity.[30]

With these rather general remarks about insanity and its forms, let us turn now to our original four situations. Besides giving the general jurisdictions and their method of handling them, we will also put forth the way Michigan holds under the situations.

I.

Effect of Insanity at the Time of Commission of the Criminal Act.

Our first situation is the effect of insanity at the time of the commission of the criminal act. It seems to be well settled in all jurisdictions that a person cannot be legally punished or held criminally responsible for an act done by him while insane, although such act would be criminal if done by a sane person. In Utah for example, the court said in *State v. Brown* [31] that "since a criminal intent is an essential element

142 Ill. 620, 32 N. E. 677 (1892).

25 American Jurisprudence, Vol. 14 Criminal Law, § 43.

26 Rogers v. State, 128 Ga. 67, 57 S. E. 227 (1907); People v. Marquis, 344 Ill. 261, 176 N. E. 314 (1931); Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634 (1861).

27 Rogers v. State, 128 Ga. 57 S. E. 227 (1907).

28 State v. Jones, 50 N. H. 369, 9 Am. Rep. 242 (1871).

30 State v. Porter, 213 Mo. 43, 111 S. W. 529 (1908).

31 36 Utah 46, 102 P. 641 (1909).

of crime, if by reason of insanity a person is incapable of forming any intent, he cannot be regarded as guilty by law."

In the case of *State v. Kearl*,[32] the court of Montana said that "there are forms of mental deficiency or derangement which will not excuse the commission of crime. The mental derangement which will excuse must be such as to render the one afflicted therewith incapable of forming a criminal intent."

Then, of course, many of the questions which we have already dealt with come up under this, our first situation. Such cases of emotional insanity, partial insanity, and delusions come up as points of determining whether the accused is really insane. For example, in case of weak minded people, the court of Illinois, said in the case of *People v. Marquer* [33] that unless the mentality of such a person is of such a subnormal character as to render him incapable of distinguishing between right and wrong, in which case it is undoubtedly a defense." The New Jersey courts said that "the law doesn't require full possession of one's faculties in full vigor or a mind unimpaired by disease or infirmity to be the basis for which the criminal responsibility for a crime is determined." [34]

The Michigan Courts have held, along with all the other jurisdictions, that when a person is insane at the time he commits a criminal act, he is not criminally responsible. This is in line with our first situation.

II.

The Effect of Insanity After Commission of the Crime and Before Trial.

The second situation which is to be examined is the effect of insanity after the commission of the crime and at the time of the trial. The rule at Common Law and by statute in many jurisdictions is well settled that a person while insane cannot be tried, sentenced, or executed.[35] The court of New York in *Freeman v. People* [36] said that "it is obvious that if the accused is tried while insane, his insanity may disable him from making a rational defense." In many jurisdictions, if at any time while criminal proceedings are pending against a person accused of a crime, whether before, during or after the trial, the trial court, either from observation or upon the suggestion of counsel, has facts brought to its attention which raise a doubt of the sanity of the defendant, the

32 29 Mont. 508, 75 P. 362 (1904).

33 344 Ill. 261, 176 N. E. 314 (1931).

34 State v. James, 96 N. J. L. 132, 114 A. 553 (1921).

35 Tucker v. Hayatt, 151 Ind. 332, 51 N. E. 469 (1898); Hawie v. State, 121 Miss. 197, 83 So. 158 (1919).

36 4 Denio 9, (N. Y.) 47 Am. Dec. 216 (1847).

question should be settled before further steps are taken.[37] This is the general rule in all the states, but closely akin to this question is the procedure, manner and method of bringing the question before the court at the end of trial.

In *Re Smith* [38] the court said that "the method of settling the question of insanity is generally within the discretion of the trial court." However, in other cases the court has held that the court itself can enter upon the inquiry or submit the question to a jury impanelled for that purpose.[39] Also in the case of *Freeman v. People* [40] the court said that "a trial of the question of present insanity is not a trial of an indictment but is preliminary to such trial, and the object is simply to determine whether the person charged with an offense and alleged to be insane shall be requested to plead and proceed to the trial of the main issues of guilty or not guilty."

The courts have definite tests which will preclude trial. For example, in the case of *Freeman v. People,*[41] the court said that "the broad question is whether the accused, in so far as it may devolve upon him, may have a full, fair and impartial trial. An important part of this question is whether the accused is mentally competent to make a rational defense." It is proper to inquire whether the accused, by reason of insanity, comprehends his position, whether he has mind and discretion which will enable him to appreciate the charge against him and the proceedings thereon, or whether he is mentally capable of rendering his attorney such assistance as a proper defense to the indictment preferred against him demands.[42] And again, in *Freeman v. People* [43] the courts said "if the person can comprehend his situation as to the charge against him, he will be deemed to be sane, although on some other subjects his mind may be deranged or unsound."

The question presents itself in line with this second situation, what is the recourse of a person who is tried even though insane? The answer is that there are various remedies. In some jurisdictions, an application for a writ of error *corom nobis* is proper.[44] Other courts have recognized the right of the defendant, after conviction, to raise by a motion for a new trial the question of his sanity at the time of the trial.[45] In still other jurisdictions, the judgment has been reserved on appeal or error, where the trial judge refused to inquire into the insanity of the accused

37 Ferguson v. Martineau, 115 Ark. 317, 171 S. W. 472 (1914); Hawie v. State, 125 Miss. 589, 88 So. 167 (1921).
38 25 N. M. 48, 176 P. 819 (1918).
39 Weiland v. State, 58 Okla. Crim. Rep. 108, 50 P. (2d) 741 (1935).
40 4 Denio 9 (N. Y.) 47 Am. Dec. 216 (1847).
41 4 Denio 9 (N. Y.) 47 Am. Dec. 216 (1847).
42 Jordan v. State, 124 Tenn. 81, 135 S. W. 327 (1911).
43 4 Denio 9 (N. Y.) 47 Am. Dec. 216 (1847).
44 Hawie v. State, 121 Miss. 197, 83 So. 158 (1919).
45 10 A. L. R. 215 (Note).

or refused to admit evidence offered to prove defendant's insanity.[46] In Michigan the statutes provide that a write of *habeas corpus* shall be had by the victim or by some friend in his behalf upon a proper petition to the circuit court of the county in which the said hospital is situated.[47]

Keeping in mind our second situation, the statutes of Michigan provide for this event. However, the same statute provides for the third situation also; namely, the effect of insanity after the trial but before sentence. This statute[48] provides: "If it is claimed that such person became insane after the commission of the felony with which he is charged and before or during the trial thereon, the test on the trial of such issue shall be whether such person is capable of understanding the nature and object of the proceedings against him and of comprehending his own condition in reference to such proceedings, and of assisting in his defense in a rational or reasonable manner. If such person is found insane, the judge of said court shall order that he be discharged from imprisonment and that he be turned over to the sheriff for safe custody and removal to the Ionia State Hospital, to which hospital such person shall be committed to remain until restored to sanity, and that fact has been determined by the superintendent of said hospital or by any other proceeding authorized by this section; the said superintendent of said hospital shall forthwith certify that fact in writing to said judge and prosecuting attorney. The judge shall thereupon immediately require the sheriff without delay to bring such person from said hospital and place him in proper custody until he is remanded to prison, brought to trial, or judgment as the case may be, or is legally discharged."

Thus we see in Michigan, the statute provides that if the insanity develops after the commission of the crime and before, during, or at the end of the trial, the whole criminal proceeding is suspended and the accused is tried by jury on the issue of his insanity. If he is pronounced sane, he is returned to trial and the criminal proceedings go on where they were interrupted. If the accused is pronounced insane, he is committed to the Ionia State Hospital. When he regains his sanity he is bound over to the court again which proceeds with the criminal prosecution where it was interrupted by the issue of the accused's insanity.

III.

The Effect of Insanity After the Trial But Before Sentence.

The Michigan statute is clear on this point. The proceedings are interrupted until the issue of sanity has been tried and the person is

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46 10 A. L. R. 215 (Note).

47 Michigan Statutes Annotated, Vol. 25, p. 300, § 28.967 (1937).

48 Mich. Stat. Ann., Vol. 25, p. 300, § 28.967 (1937). Also see same statute for reference as to procedure of court in testing the issue of insanity and the

judged sane or insane. In either case he is returned to the criminal proceeding and the court to render judgment. In case of insanity if the accused should regain his sanity, the same rule applies. The same provisions are made in other jurisdictions. If the question of present sanity is raised after verdict but before sentence, the court may cause the sentence to be stayed until the question is determined.[49] Upon restoration to sanity one, who becomes insane only after the commission of a crime, may be punished the same as if he had always been sane.

IV.

The Effect of Insanity After Trial and During the Execution of Sentence.

This is the fourth situation under which we are to examine the effect of insanity. Before we see what the different courts hold on this situation, there is one thing which almost all the courts recognize. This fact is that if a person is sane at the time of the crime and at the trial and sentence but claims to have become insane during his confinement, he does not have an absolute right to a trial to determine his present mental condition unless expressly conferred by statute. The reason behind this rule is that if the convicted person were permitted to have a trial as an absolute right on their mental condition and thus be released from jail for treatment it would be tantamount to granting them the privilege of thwarting the administration of criminal justice for an indefinite period. Thus even a person in confinement awaiting the execution of the death penalty has no legal right except where the right is conferred by statute to have an inquisition into their mental condition. The instituting of such a proceeding is within the discretion of the court or executive having jurisdiction in such matters.[50] However, in some jurisdictions it is held that the court which pronounced the sentence does not hereafter have power to stay execution and the only recourse the prisoner has is an appeal to the governor.[51] On the other hand, certain jurisdictions have held that the court has authority, frequently conferred by statute, to stay execution of a sentence for the purpose of instituting an inquiry into the sanity of the prisoner.[52] In some jurisdictions the duty of the court either to pass upon the question of the sanity of a person under sentence of death or to impanel a jury for that purpose is mandatory, where an application is made and a sufficient showing made to

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method of calling two qualified physicians for their examination. The statute provides for a jury trial in the issue of insanity.

49 Nobles v. Georgia, 168 U. S. 398, 42 L. Ed. 515 (1897).

51 Ex parte Wilson, 19 W. N. C. 37 (Pa.) (1887); 49 A. L. R. 807.

52 Ex parte State ex rel Atty. Gen. 150 Ala. 489, 43 So. 490 (1907); Ferguson v. Martineau, 115 Ark. 317, 171 S. W. 472 (1914).

raise a doubt. In line with this the courts of Nebraska and Georgia said that if the court fails to take this prescribed action, an appeal may be taken.[53]

It is interesting to see the test which some of the jurisdictions apply to the question of insanity in the situation of the prisoner's appeal after he has been convicted. In the case of *Re Smith* [54] in New Mexico, the court said "the test to determine the sanity of a person about to be executed is whether he has at the time of the examination sufficient intelligence to understand the nature of the proceedings against him, the purpose of the punishment, his fate awaiting him — a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or to the court." This reasoning is generally recognized by most of the courts in this country.

Another question which arises with regard to this fourth situation is who may bring up the issue of the prisoner's sanity. In line with this, in the case of *In Re Smith* [55] the court said that "where the sanity of a person held under the death penalty is questioned before the court or other public official, who has jurisdiction, an investigation of the mental condition of the prisoner will be ordered if the court has any doubt of such person's sanity." But where this procedure is not regulated by statute, it would seem that the suggestion of the insanity of the person need not be made by any particular individual.[56] However, each state seems to allow many different people to bring the question up. In Georgia, for example, the court may raise the question and act in such matter by its own motion.[57] In Kentucky the court said in the case of *Davidson v. Commonwealth* [58] that "the officer holding the person in custody is the one who must raise the question." However, it is generally held by most of the states that an interested person such as the attorney for the person when he was tried can bring the question.[59] In the case of *Baker v. State* [60] the court of Nebraska said that "sometimes the warden of the penitentiary where the prisoner is confined is authorized by statute to give notice to a judge of the court of the county where the person is located if the prisoner appears to be insane. But if the warden refuses to take action in such case, the prisoner's attorney can apply to the court for an examination."

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53 Barker v. State, 75 Neb. 289, 106 N. W. 450 (1905); Sears v. State, 112 Ga. 382, 37 S. E. 443 (1900).

54 25 N. M. 48, 176 P. 819 (1918).

55 25 N. M. 48, 176 P. 819 (1918).

56 Ex parte Chesser, 111 S. 720 (Fla., 1927).

57 Baughn v. State, 100 Ga. 554, 28 S. E. 68 (1897).

58 174 Ky. 789, 192 S. W. 846 (1917).

59 State v. Nordstrom, 21 Wash. 403, 58 P. 248 (1899); See 49 A. L. R. 808 (Note).

60 75 Neb. 289, 106 N. W. 450 (1905).

In the states where statutes apply to this question the statute must be followed and no other person except those provided for can bring the matter up. For example, in *Commonwealth v. Barnes* [61] the court of Pennsylvania said concerning its statute that "where the statute provides that the question of a person held under sentence shall be raised by application of the superintendent, jail phycisians, warden, or other chief executive officers of the institution or other responsibile person, the term 'other responsible person' refers to people connected with the penal institution where the person is confined and no others." Just how Michigan handles this situation will be discussed a bit later.

Another interesting point to be brought up under this question is, what is the manner of raising the issue? In the case of *Nobels v. Georgia* [62] the Federal court said that "in the absence of statute, the question of the existence of insanity which has supervened subsequent to the trial may be raised in an informal way before the trial judge; no technical nicety of pleading is required." However, in Florida, the court said that "the question cannot be raised by *habeas corpus,* but should be raised by petition supported by affidavits of fact sufficient to make a *prima facie* showing of insanity." [63] Then in Pennsylvania the court has said that "a petition based upon the belief of the petitioner as to insanity of the prisoner and supporting affidavits, not giving anything more in detail and with no allegations as to whether the alleged insanity occurred after the trial or when the case was tried, does not make a sufficient showing of insanity or require the court to which it is presented to inquire into the question of insanity." [64]

Perhaps a good summary of these reasons for this interest in insanity after conviction of the person is shown by the opinion of the Attorney General of Georgia.[65] He said "upon the theory that the stay of execution to investigate the sanity of a prisoner is based upon the public will and sense of propriety rather than any right in the prisoner, the latter is not entitled as a matter of right to a judicial investigation, and that any investigation had is merely to inform the court imposing the sentence as to the mental condition of the prisoner, for the sole purpose of determining whether it would be consistent with public decency and propriety to take away the life of a person who was not sane enough to realize what was being done. It has been held that the question of sanity of a person held under sentence of death should be raised in the court imposing the sentence, since such a person is technically in the custody of the court to see that the sentence is executed."

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61 280 Pa. 351, 124 A. 636 (1924).

62 168 U. S. 398, 42 L. Ed. 515 (1897).

63 Ex parte Chesser, Fla. 111 S. 720 (1927).

64 Commonwealth v. Barnes, 280 Pa. 351, 124 A. 636 (1924).

65 Ex parte State ex rel Atty. Gen. 150 Ga. 489, 43 So. 490 (1907); upheld in Ferguson v. Martineau, 115 Ark. 317, 171 S. W. 472 (1914); and State v. Nordstrom, 21 Wash. 403, 58 P. 248 (1899).

With this general discussion of the problem and how the other states handle the matter let us turn to Michigan. In this state the whole problem is handled by statute. The first important statute refers to the "Transfer of Insane Convicts." [66] This law says that whenever a physician of one of the various Michigan prisons shall certify to the warden of the prison or other officer of the institution that an inmate is insane, it shall be the duty of such officer to make an examination into the condition of such inmate, and if he is satisfied of the insanity, then he shall immediately cause the prisoner to be transferred to the Ionia State Hospital. This statute also provides that if any person who has been treated in the Ionia State Hospital before, or who has been sentenced to prison before and is received in any of the state hospitals, he must be transferred to Ionia State Hospital at once. Thus we can see that if the prisoner is insane while being confined, he will be transferred to the state insane hospital upon regular examination and prescribed methods.

Another Michigan statute [67] provides that in case the insanity of any criminal in Ionia State Hospital shall continue after the expiration of his sentence, the superintendent of the hospital shall, within five days after the expiration, make application to the judge of probate of the county where the hospital is located for an order to retain the convict in the hospital until he shall be restored to reason. The judge of probate, upon receipt of application shall notify the persons concerned and the attorney general of the state and shall fix a time for a hearing. The judge shall appoint two physicians to examine the prisoner. If the convict is indeed insane, the judge may also compel witnesses to attend. This statute goes on and provides that whenever any convict confined in Ionia State Hospital shall have recovered his sanity and this is certified by the superitendent of the said hospital, before the end of his original sentence in a penal institution, the prisoner shall be forthwith transferred back to said penal institution from whence he came. The statute also provides that if the convict's sentence has expired and he is still committed to the State Hospital, the superintendent may parole the man as he sees fit within the rules as prescribed by the State Hospital Commission. In line with this statute the Attorney General rendered an opinion in 1935 in which he said, "a patient whose sentence has expired has no legal right to demand a jury in proceedings to retain such patient at Ionia State Hospital until restored to reason." [68]

Another Michigan statute [69] provides that before an inmate of the Ionia State Hospital is discharged at the expiration of his sentence, the

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66 Michigan Statutes Annotated, Vol. 10, § 14.854 and 855, Transfer of Patients with Homicidal Tendencies (1937).

67 Michigan Statutes Annotated, Vol. 10, § 14.856 (1937).

68 Opinion of Attorney General, April 9, 1935.

69 Michigan Statutes Annotated, Vol. 10, § 14.857 (1937).

superintendent shall notify his relatives, or if he has none, the sheriff of his county, and the judge of probate there, and the judge shall issue orders that the sheriff shall receive the prisoner and bring him before the judge. He will hold a hearing as to the convict's situation and future interests.

The State of Michigan has recognized a rather important modern form of insanity. It is termed criminal sexual insanity. The statute [70] says that "any person who is suffering from a mental disorder and is not insane or feebleminded, which mental disorder has existed for a period of not less than one year and is coupled with criminal propensities to the commission of sex offenses is hereby declared to be a sexual psychopathic person." Then, further, the statutes provide the methods of a trial on these grounds.[71] This statute then provides that "no person who is found in such original hearing to be a criminal sexual psychopathic person and such finding having become final, may thereafter be tried upon the offense with which he originally stood charged in the committing court at the time of the filing of the original petition. Thus Michigan has well covered the four situations which we have under consideration.

The treatment of these four situations has been dealt with here from the standpoint of statutory and common law procedure in criminal cases, with particular treatment of the Michigan statutes for the reason that Michigan has completely covered the four situations outlined here, in statutes on crimes and criminal procedure.

Charles Boynton.

SECURITY PROBLEMS RAISED BY THE CHANDLER ACT.—The National Bankruptcy Act [1] took its present form in 1898. Its purpose among others ". . . is to distribute the assets of the bankrupt equitably among his creditors. . . ."[2] In order to arrive at this stated purpose, there were included in the Act means of preventing a creditor of a certain class from obtaining more than his share of the bankrupt's assets. One of the more important of these was Section 60 which provided that certain transfers by the bankrupt to a creditor were voidable by the trustee in bankruptcy.[3] Its object was to strike down secret liens which depleted the assets of the bankrupt and prevented an equal distribution among

70 Michigan Statutes Annotated, Vol. 25, § 28.967 (1) (1942).

71 Michigan Statutes Annotated, Vol. 25, § 28.967 (2), (3), (4), (5), (6), and (7) (1942).

72 Michigan Statutes Annotated, Vol. 25, § 28.967 (8) (1942).

1 11 U. S. C. A.

2 Gilbert's Collier on Bankruptcy (4th Edition) 1937, p. 4.

3 Section 60, 11 U. S. C. A. § 96.

the creditors. Section 60 has been amended from time to time to more fully accord with this purpose. In 1903, it was amended to prolong the running of the time, i. e., the time in which a transfer must be completed to be valid aginst the trustee in bankruptcy. This 1903 amendment provided that the transfer was deemed made at the date of recording, when recording was required by state law.[4] This did not necessarily mean, however, that the transfer was to be tested as to its preferential character at the time of recording and not at the time of transfer.[5] Thus, a mortgage given for present consideration but not recorded until later was not regarded as having been given for an antecedent debt,[6] and if the mortgagor was insolvent at the time the mortgage was recorded, but solvent at the time the mortgage was given, the transaction was held not to be a preference since the date of determination was still that of the original transfer.[7]

The 1910 amendment to Section 60 (b) ruled that the time of recording, when recording was required, should be the date for determining when the transfer took place. The state law relative to registration or recording determined whether or not a transfer was to be registered or recorded.[8] A transfer was required to be recorded within the intention of this section in those cases in which, under the state law, recording was necessary to make the transfer valid as against general creditors [9] or lien holders..[10]

In 1926, Section 60 was amended again adding to sub (a)[11] the words, "or permitted." However, these words were not added to sub (b), and a conflict arose concerning the proper interpretation. Some courts held that recordation still would not operate as a voidable preference where the recording was only permitted.[12] Other courts held that subs (a) and (b) should be read together and that where recording was permitted, but the instrument was not actually recorded until within four months of bankruptcy, the recordation would operate as a voidable preference.[13]

In 1938, Section 60 was again amended and a transfer was deemed a voidable preference when it allowed one or more creditors to get a greater share of the bankrupt's estate when the transaction was not so

4 In re Klein, 197 Fed. 241 (1912).
5 In re Sturtevant, 188 Fed. 196 (1911).
6 In re Jackson Brick and Tile Co., 189 Fed. 636 (1911).
7 McAtee v. Shade, 185 Fed. 442 (1910).
8 Hawkins v. Dannenberg Co., 234 Fed. 752 (1916).
9 Marsh v. Leseman et al., 242 Fed. 484 (1917).
10 Hawkins v. Dannenberg Co., 234 Fed. 752 (1916).
11 Sub (a) defines which transfers are preferences and sub (b) defines which preferences are voidable.
12 First National Bank of Lincoln, Neb., et. al. v. Livestock National Bank, 31 F. (2d) 416 (1929); Bank of Wadesboro v. Little, 71 F. (2d) 513 (1934).
13 Foltz v. Davis, 68 F. (2d) 495 (1934); In re Jackson, 9 Fed. Supp. 717 (1935).

far perfected that a bona fide purchaser and a creditor could thereafter have obtained rights superior to that of the transferee.[14]

The scope of this article is limited to a discussion of the operation of the Bankruptcy Act as concerns voidable preferences of the common security transactions. It might be well to say now that in all the instances mentioned hereafter where only one element of a voidable preference is discussed, in order that the preference be voidable, all other necessary elements must also be present.

Pledges

The holder of property under a valid pledge agreement is not affected by the new provisions of the Act. However, those who attempt to assert an equitable lien [15] under a pledge agreement will find their position untenable. A bona fide purchaser from a pledgor is able to obtain rights superior to those of the pledgee when the property does not go into the hands of the pledgee. Under previous law, the pledgee could assert his rights over those of a trustee in bankruptcy, to the decided disadvantage of the other creditors by invoking the doctrine of "relation bank" to enforce his agreement.[16] Under the new provisions, the transfer to perfect an equitable pledge within four months of the filing of the petition is deemed complete at a date immediately preceding bankruptcy and is a voidable preference.[17] The Act's application

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14 Section 60. Preferred Creditors.—a. A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under Chapter X, XI, XII, and XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy, or of the original petition under Chapters X, XI, XII or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy.

b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer if made, reasonable cause to believe that the debtor is insolvent.

15 An imperfect pledge due to lack of delivery. Goldstein v. Rusch, 56 F. (2d) 10 (1932).

16 Van Slyke v. Huntington, 256 Fed. 86 (1919); Root Mfg. Co. v. Johnson, 241 U. S. 160, 36 S. Ct. 520, 60 L. Ed. 1934 (1916); Contra: Kirst v. Buffalo Cold Storage Co., 36 Fed. Supp. 401 (N. Y., 1940). In this case the court described an equitable lien as "a secret one of which no opportunity of discovery was given to others."

17 Weinstein, Bankruptcy Law of 1938, p. 120; Lane v. School District of Montessen, 120 F. (2d) 479 (C. C. A., 3d, 1941). Case decided under previous law.

to pledged property in the hands of the bankrupt for a temporary and limited purpose only has been strongly opposed by a noted writer.[18]

Assignments of Accounts Receivable

The States are rather evenly divided in their judicial outlook concerning the rights of a prior assignee of accounts receivable over a subsequent assignee who first gives notice to the debtor of the assignment. In the States holding that the assignee who first notifies the debtor of the assignment has a prior equity on the account,[19] the test set up by Section 60 would allow the trustee in bankruptcy to prevail over the assignee of an account from the bankrupt, who does not give the notice until within four months of the filing of the petition in bankruptcy.[20] In the States which allow the assignee first in point of time to prevail over subsequent assignees,[21] the giving of notice to the debtor within the four month period should not operate as a voidable preference.

The application of the Act to the situations above seems rather clear, but an important problem arises as to the extent the courts should go to apply the test. In all transactions involving assignments of accounts receivable, there are certain situations in which a subsequent assignee can obtain superior rights to those of an assignee first in point of time. "Whatever view may be entertained as to the English doctrine which prefers the assignee who first gives notice, the second assignee (assuming that he paid value in good faith for his assignment), or that if a volunteer he took in good faith, and the first assignee also was a volunteer) is in several contingencies clearly entitled to supplant the first assignee, e. g., (1) if acting in good faith he obtains payment of the claim assigned; or, (2) if he reduced his claim to a judgment in his own name; or, (3) if he affects a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to himself; or, (4) if he obtains the document containing the ob-

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The facts present the precise situation and result that the new test would strike down.

18 Glenn, Fraudulent Conveyances and Preferences (Rev. ed., 1940) p. 835; For the leading case decided under former law, see Sexton v. Kessler & Co. 225 U. S. 90, 30 S. Ct. 657, 36 L. Ed. 995.

19 California—City of Los Angeles v. Knapp, 60 P. (2d) 127; Adamson v. Paonessa, 180 Cal. 530, 179 P. 880 (1919).

Mississippi—Canton Exchange Bank v. Yazoo County, 144 Miss. 579, 109 So. 1 (1926).

Missouri—Klebba v. Struempf, 224 Mo. App. 193, 23 S. W. (2d) 205 (1930).

Tennessee—Peters v. Goetz, 136 Tenn. 257, 188 S. W. 1144 (1916).

20 In re Reim Construction Co., 37 F. Supp. 855 (Md., 1941).

21 Iowa—Ottumwa Boiler Works v. M. J. O'Meara & Sons, 206 Iowa 577, 218 N. W. 920 (1928).

Massachusetts—Goodyear Tire and Rubber Co. v. Bagg, 197 N. E. 481 (1935).

New Jersey—Moorestown Trust Co. v. Buzby, 109 N. J. Eq. 409, 157 A. 663 (1932).

ligation when the latter is in the form of a specialty. In all these cases, having obtained a legal right in good faith and for value, the prior assignee cannot deprive him of this legal right." [22]

The Restatement of Contracts agrees that in the happening of these contingencies, the rights of the subsequent assignee will prevail over those of the prior assignee,[23] and adds another, "A subsequent assignee acquires a right against the obligor to the exclusion of a prior assignee if the prior assignment is revocable or voidable by the assignor." [24]

If the courts strictly apply the act, an assignee of accounts receivable would be left at the mercy of the solvency of his assignor. The method of handling these transactions has been crticized as being inequitable to the other creditors.[25] It becomes a question of economic policy whether or not the present methods are to prevail and if this is decided in the affirmative, it lies within the power of the States to protect these security devices by statute or judicial opinion.

Chattel Mortgages

It is somewhat difficult to generalize too much on the subject of chattel mortgages [26] under the new provisions of Section 60, but it is safe to says almost all of the state recording acts provide that a chattel mortgage is invalid as against a bona fide purchaser which is the test set up by the Act.

The law seems rather well settled that one who loans money to the bankrupt and at that time takes no security, but who later receives a mortgage from the bankrupt within the four months preceding bankruptcy has received a voidable preference.[27] The question which is troublesome arises when a mortgage is given at the time of the loan and is not recorded until within four months of bankruptcy.

To illustrate the workings of the law as concerns chattel mortgages, it might be best to use two typical examples of transactions. Where A loans money to B and receives either a mortgage which he immediately records or possession of B's goods as security, he is in almost every instance protected by state law from future creditors and bona fide purchasers, and he retains this protection when bankruptcy intervenes. This is true even if the transaction occurs during the four months pre-

22 2 Williston, Contracts (1936) p. 1260, and cases cited.

23 § 173, sub, b.

24 Id., sub, a.

25 In 32 F. Supp. 26, at 28 (1940).

26 For a discussion on the allied questions of mortgages containing after acquired property clauses and mortgages on animals and crops not yet in existence, see 3 Coll. on Bankruptcy, 14th Ed., par. 60.42, pp. 933-934 and par. 60.50, pp. 975 ff.

27 Bush v. Seymour, (D. N. H., 1939), 43 Am. B. R. (N. S.) 811, 30 F. Supp. 202 (1939).

ceding the filing of the bankruptcy petition, because in such a case, present consideration has been given for the transfer.[28] However, it is the lax holder of a chattel mortgage as security who must change his ways or find his position threatened by the intervention of bankruptcy.[29] If A loans money to B in June, 1940, and receives in exchange a chattel mortgage which he does not record until June, 1941, when B is insolvent and A has reasonable cause to know of B's insolvency, and a petition in bankruptcy is filed in August, 1941, A's position as security holder should be untenable under the new provisions, as all the elements of a preference are present. There is a transfer of an interest in property effected by the recording; the mortgagee is a creditor; the transfer is made in payment of an antecedent debt (created one year before recordation)[30] and the estate has been diminished by the value of the property; the bankrupt is insolvent; and the mortgagee not only had reasonable cause to know of this insolvency, but he had actual knowledge of B's insolvency.

It must be remembered that the Act as applied to these security devices may be varied by the laws of the different states regarding both the nature of the transaction and the protection afforded by them.[31]

Conditional Sales

Due to the uniqueness of the transaction in conditional sales, the courts have experienced difficulty in determining the proper method of dealing with them as preferences. At the present time, almost all of the States have a statute requiring their recordation for validity against bona fide purchasers from the vendee. It seems apparent that the Act would include them in its operation and the recordation within the four months preceding the filing of the petition would result in a voidable preference. However, the United States Supreme Court in the case of *Bailey v. Baker Ice Machine Co.*,[32] held that there could be no voidable preference in the case of conditional sales because there was no transfer as defined in the Act.[33] "The ownership was not transferred,

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28 Not a diminution of the estate of the bankrupt. Bachner v. Robinson, (C. C. A., 2d) 41 Am. B. R. (N. S.) 172, 107 F. (2d) 513 (1939); In re Webb Grocery Co., 32 F. Supp. 3 (M. D. Tenn., 1940), the case was decided on other grounds but the court ruled that recording within a reasonable time would serve to make the transaction one continuing process and thus be for a present consideration.

29 In First National Bank v. Connet, (C. C. A. 8th) 14 Am. B. R. 662, 142 Fed. 33, 5 L. R. A. (N. S.) 148 (1905), the court stated: "A plain and inexpensive method is prescribed by which a mortgagee may secure a priority of lien, and the evil results that may follow from ignoring it are obvious."

30 See section on Determination of Antecedent Indebtedness, infra.

31 3 Collier on Bankruptcy (14th Ed.) § 60.39, p. 899.

32 239 U. S. 268, 60 L. Ed. 275, 35 S. Ct. 50 (1915).

33 Words and Phrases, 11 U. S. C. A. § 1 (25) (1927) — definition of transfer: "Transfer shall include the sale and every other and different mode of dis-

but only the possession, and it was transferred to the bankrupts, not from them. Being only conditional purchasers, they were not to become the owners until the condition was performed. No doubt the right to perform it and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupts, and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors. So, there was no dimunition of the bankrupt's estate." [34]

The Chandler Act has changed the definition of the word, "transfer" as used in the Act,[35] but inasmuch as the Court reached such a conclusion under the former definition, it is altogether possible that the same result might again be reached, although the new definition is infinitely broader. The next move, then, it would seem, would be for the Supreme Court to either repudiate its former holding or declare it still in effect and thus greatly decrease the perplexity of the proper application of the Act to conditional sales transactions.

Trust Receipts

Trust receipts furnish a problem similar to those of conditional sales.[36] The courts have been quite puzzled in their attitude toward them because of the diversity of opinion as to their legal nature. The prevailing rule is that tripartite trust receipt transactions are not classed as chattel mortgages [37] or conditional sales [38] as far as the recording statutes are concerned. There has been a movement for applicable recording statutes but the contention has been strongly asserted that the need for them is not sufficiently great to justify their passage.[39] The ordinary

posing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage or security."

34 Words and Phrases, 11 U. S. C. A. § 1 (25) (1927) — definition of transfer: "Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage or security."

35 Words and Phrases, 11 U. S. C. A. § 1 (30) (1941 Supp.). "Transfer shall include the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceeding as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise.

36 In a tripartite trust receipt transaction, title never passes to the dealer, but goes directly to the financing agency.

37 Moors v. Drury, 186 Mass. 424, 71 N. E. 810 (1904); General Motors Acceptance Corp. v. Hupfer, 113 Neb. 228, 202 N. W. 627 (1925).

38 In re James, Inc., (C. C. A., 2d) 13 Am. B. R. (N. S.) 304, 30 F. (2d) 555 (1929); Cooley, Cases on Sales, (2d Ed.) 239.

39 In Matter of James, note 37 at 558, the court said: "It has been recognized that there are sound business reasons why it is unnecessary to record trust receipts. . . ."

purchases in the course of business are protected by the doctrine of apparent authority,[40] and in some States, by the Factor's Acts.[41] The U. T. R. A. gives superior rights to a bona fide purchaser in the ordinary course of business even though recorded as required by the Act.[42]

The validity of trust receipts has been upheld several times in bankruptcy cases, [43] but it seems the new test should operate to enable the trustee to avoid them as preferences if goods are turned over to the transferee within the four month period. The court intimated such a result under previous law in the case of *In re Cattus*.[44] This case involved a trust receipt transaction which the trustee was attempting to avoid by an application of the New York Factor's Act, but the court held that the trustee did not occupy the position of a bona fide purchaser as required by that Act, and as the Act did not protect creditors of the bankrupt, the transfer was not a voidable preference.

The magnitude of business operations carried on by means of this security device will more then likely assert itself in the application of the Act by the courts. To insist on a complete renovation in the manner of handling these transactions might well be more harmful than good, and it is somewhat doubtful that the intention of Congress in passing the Act was so extensive as to include such a result, notwithstanding the fact that a strict interpretation of Section 60 (a) and (b) would probably operate to make them voidable preference.

What Constitutes an Antecedent Debt

Because the chief difficulty in the application of the amended Section 60 has been the determination of whether the transfer was made for an antecedent debt or whether there was a present consideration given for the transfer, it seems expedient that a separate portion of this aritcle should be devoted to a discussion of the views taken thus far by the courts. The cases which present the problem are those in which recording is required and the creditor records the instrument within four months of the filing of the petition in bankruptcy. It seems rather well settled that where, e. g., a mortgage is executed within the four

40 New England Auto Investment Co. v. St. Germaine, 45 R. I. 225, 121 Atl. 398 (1923); Jones v. Commercial Trust, 64 Utah 151, 228 P. 896 (1924).

41 Blydenstein v. New York Security and Trust Co., 67 Fed. 469 (1895); International Trust Co. v. Webster National Bank, 258 Mass. 17, 154 N. E. 330, 49 A. L. R. 267 (1926).

42 Section 9, sub 2, a (1).

43 In re Perlhefter, 177 Fed. 299 (1910); Handbook of the National Conference of Commissioners on Uniform State Laws (1933) on p. 246: "the majority of the cases in which the validity of the unrecorded security interest was tested, up to 1929, held the financing agency's interest invalid as against a bona fide purchaser from the dealer in the regular course of trade, but declared it valid against the trustee in bankruptcy."

44 183 Fed. 733 (1910).

months' period to secure a debt incurred previously, it is a transfer for an antecedent debt.

In *Adams v. City Bank and Trust Company,*[45] the bankrupt borrowed money from defendant on two dates, June 24, 1939, and September 15, 1939, at the same time executing to it bills of sale.[46] The defendant did not record these bills of sale until December 18, 1939, when it had reason to believe the bankrupt was insolvent. On December 30, 1939, the bankrupt was adjudicated so. The court in determining whether this was a preference, considered the requirement that the transfer must be "for or on account of an antecedent." On this point, the court said: "This refers to the whole transaction, and not simply to the step to be taken to make it binding as to the subsequent creditors and purchasers for a valuable consideration. The language is more direct and specific than that of the original act and prior amendments, but does not indicate a legislative intent to change the historic import of the word, preference. . . .[47] In the instant case, the bills of sale were given for a present equivalent at the time the debts were incurred, and did not become voidable in bankruptcy by reason of subsequent filing for record."

The opposite conclusion was reached in the case of *In re Quaker Sheet Metal Co.,*[48] with one justice dissenting: This case concerned the validity of secured claims by assignees of accounts receivable. These assignees had not given notice to the debtor and under Pennsylvania law, a subsequent bona fide purchaser could have acquired rights superior to those of the assignees. The assignments were collateral security for loans advanced to the bankrupt and made at the time of the loans. In considering the requirement that a transfer must be for or on account of an antecedent debt, the court said: "In other words, is a debt to be treated as antecedent to a transfer actually made contemporaneously but not perfected as against purchasers and creditors of the debtor until a later time? We think that a fair construction of the statutory language requires an affirmative answer to this question."

In his dissent to the majority opinion, Justice Jones admits that the majority opinion of the court has the support of learned authors,[49] but he said: "And, so according to the prevailing argument, the entire trans-

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45 (C. C. A. 5th, 1940), 115 F. (2d) 453, cert. den. (1941) 61 S. Ct. 739, noted (1941) 89 U. Pa. L. Rev. 510 (1941), 41 Col. L. Rev. 512.

46 Bills of sale are generally held to be chattel mortgages. 1 Jones, Chattel Mortgages and Conditional Sales (6th Ed., 1933).

47 3 Collier on Bankruptcy (14th Ed.) § 60.02.

48 129 F. (2d) 894 (1942).

49 See McLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act (1937), 4 Univ. of Chicago L. Rev. 369, 388; Mulder, Ambiguities in the Chandler Act (1940), 89 U. Pa. L. Rev. 10, 25; 3 Collier on Bankruptcy, (14th Ed.) par. 60.48, p. 962 et seq. Contra, see 4 Remington on Bankruptcy, (4th Ed.) § 1717.

action of contemporaneous loan and transfer is split apart and the unperfected transfer is 'deemed to have been made immediately before bankruptcy,' as Sec. 60, sub. a, provides, while the loan for which the transfer was contemporaneously made retains the original date of the actual transaction and thus becomes antecedent in relation to the time of the transfer, as statutorily presumed under the attending circumstances. To so hold seems to be a striking instance of lifting oneself by one's bootstraps and terminates in a result which I do not think Sec. 60, sub. a, was intended to bring about." [50]

Justice Jones has admirably made his point, but to so construe this section of the bankruptcy law is to limit it so that the change it will work is practically negligible. In the construction of statutes, courts must look to legislative intent, if it is discernible, and bring about such a result, and in the case of Section 60, that is easily found. In the House Committee Report [51] on the proposed changes in the Bankruptcy Act, it reads: "The new test is more comprehensive and accords with the contemplated purpose of striking down secret liens. . . . As thus drafted, it included a failure to record any other grounds which could be asserted by a bona fide purchaser or a creditor of the transferor, as against the transferee."

In the instant case, and in the *Adams v. City Bank* case,[52] it would have been possible for a bona fide purchaser of the bankrupt to intervene and cut off the rights of the creditor whose security transfer had not been perfected. How it is possible to reach any other conclusion than that the subsequent perfection of the transfers would not operate as a voidable preference under the new provision is hard to realize. It is inconceivable that Congress could have intended such a limitation, and it is definitely out of step with the trend of the times towards open and fair dealings in the field of finance and commerce.

Conclusion

If the courts give heed to the legislative intent in passing the Chandler Act, sweeping changes will result in the method of handling the normal security transaction. Congress has provided the machinery by which the reforms may be manufactured and now it is in the hands of the courts to operate this machinery. The Chandler Act aids the vigilant and fair dealing financier, but denounces the lax and secret holder of securities. If applied wisely, it should result in the handling of security devices more open and equitably and prevent the construction of false credit structures which have been so frequent in the past. Some hardships will undoubtedly result from the operation of the Act

50 129 F. (2d) 897 (1942).

51 Report No. 1409, 75th Congress, 1st Session, July 29, 1937.

52 (C. C. A. 5th, 1940), 115 F. (2d) 453, cert. den. (1941) 61 S. Ct. 739, noted (1941) 89 U. Pa. L. Rev. 510 (1941), 41 Col. L. Rev. 512.

but the overall good which emanates from its principles should outweigh these hardships. If any of the states desire to perpetuate certain methods now used, it is within their power to do so by legislative or judicial action but it may be hoped that they will follow the lead of Congress in bringing these barbarous methods of doing business into the realm of civilization.

John R. Baty.

VALIDITY OF ORAL EXTENSION OF MORTGATE TO COVER ADDITIONAL INDEBTEDNESS.—This paper is limited to a consideration of cases wherein there is a determination of the effect of an oral agreement purporting to extend an existing real estate mortgage or deed of trust to cover an indebtedness not within the contemplation of the parties at the time the security was given. Decisions relating to the right of a lien holder to include items paid by way of protecting or enforcing his security such as taxes, prior liens, insurance, attorney fees, etc., without an agreement with the mortgagor for including these items in the mortgage indebtedness, are excluded, although reference will be made to the equity rule of some jurisdictions requiring payment of all debts on redemption, such doctrine is not covered except in instances where an extension agreement had been made. The reissue or revival of a mortgage which has been released, or discharged by payment, or full performance of other conditions is not within this problem. It will be observed that the parol evidence rule which prohibits the inclusion of "altering" terms in a written instrument is not directly involved in this consideration, and is mentioned only in so far as it is distinguished from the Statute of Frauds which prevents the oral transfer of interests in land. This work will include only agreements for the oral extension made subsequently to the mortgage, and relating only to indebtedness not within the contemplation or purview of the parties at the time the instrument giving the lien was executed.

By way of an entre, or more seasonally a "spring-board" from which to plunge into this subject of the oral extension of the mortgage indebtedness we will consider the recent Wisconsin case of *Healy v. Fidelity Savings Bank.*[1] Richard Healy brought an action against the bank, the administrator of the estate of Theresa Feichtner, and Clara Feichtner, to recover $1500 as the balance due on a loan of $3000, and also $500 further owing on an additional loan, and for the foreclosure of a mortgage on real estate to secure the original and subsequent amount. It was admitted by the defendants that the sums of $1500 and $500 with interest were due on the loans, but they denied that the latter amount was secured by the mortgage. The trial court found that the

1 238 Wis. 12, 298 N. W. 170 (1941).

$500 loan was intended by the parties to be secured by the mortgage which was given originally to secure the loan of $3000, and that plaintiffs were entitled to recover the $2000 owing on both loans and the foreclosure of the mortgage as security for both loans. On appeal the plaintiffs claimed that when the amount owing on the note had been reduced to $1500 the makers of it obtained an additional loan of $500 under an oral agreement between the parties that the mortgage was to stand as security for also the additional loan. The principal contention of the appellants is that the mortgage originally given to secure the $3000 note cannot be effectively extended five years later by a mere oral agreement to secure the subsequent $500 loan. On the other hand the plaintiffs contend that the mortgage to secure the debt which has been reduced to $1500 can be so extended as to secure the subsequent $500 loan where there are no equities of other parties intervening.

Appellants rely principally upon the provision in Section 240.-06, Stats., in contending that the alleged oral agreement is invalid. This provision states that: "No estate or interest in lands, other than leases for a term not exceeding one year . . . shall be created, granted, assigned, surrendered or declared unless by act or operation of law or by deed or conveyance in writing, subscribed by the party creating . . . the same . . ." In view of this provision no rights in and to real property, nor trust or powers over the same, can be granted by parol; and, consequently, no additional mortgage lien or encumbrance on real property can be created by a subsequent parol agreement to secure other indebtedness than that which was intended to be secured when the mortgage was executed. As is stated in 19 Ruling Case Law:[2] "But a mortgage cannot, subsequent to its execution be extended by parol agreement to secure debts or obligations other than those which it was executed to secure. Such an extension, if effective would be equivalent to the execution of a new mortgage to secure the additional obligations. It therefore falls within the prohibition of the Statute of Frauds. It is quite true that oral testimony is admissible to show what obligations were intended to be secured by a mortgage and will be received to establish that the mortgage was in fact given to secure obligations distinct from those expressed. But this doctrine permits parol testimony only to show the intention of the parties at the time the mortgage was executed and not to establish a subsequent agreement, in effect creating a new mortgage to extend the mortgage to secure additional obligations."

On the other hand the contention of the plaintiffs that the security afforded by a mortgage may be extended by a parol agreement to cover an additional loan where the rights of third persons are not prejudiced is based largely upon decisions in suits in equity, which were brought by the mortgagor to redeem, but in which the mortgagee was held en-

2 p. 306, §582.

titled to show that he had made an additional loan to the mortgagor in consideration of an oral agreement between them that the mortgage should stand as security for it also. Obviously it would be inequitable under such circumstances to allow the mortgagor to redeem upon the payment of but the amount originally secured by the mortgage, and so he was considered as being in court with unclean hands in seeking such relief. Therefore, it was considered proper to deny such relief to the mortgagor unless, under the doctrine that he who seeks equity must do equity, the security afforded by the mortgage was held to cover also the additional loan.

The appellate court held that the lower court had erred in concluding that the additional loan of $500 was also secured by the mortgage, and so modified the judgment so as to make only $1500 secured by the mortgage.

Now that we have entered upon the consideration of this problem of extension of the mortgage indebtedness let us examine the cases on this subject. In *Johnson v. Anderson* [3] the court held that in an action by the grantee of a mortgage to enjoin the sale of certain real estate under a mortgage, that the mortgage could not be extended to cover future liabilities on account between the parties by parol agreement subsequently to the execution of the mortgage. An issue as to the right of a bank under a deed of trust to hold the proceeds of the security against the claims of general creditors was presented in *Williams v. Hill,*[4] on a garnishment of such grantee followed by his answer, claiming that he held a certain amount of the proceeds received on sale of the security over and above the amount required to liquidate the original indebtedness specified in the deed of trust, under an oral agreement subsequently made, to the effect that any surplus of the proceeds of the sale should be held as security for a distinct and additional indebtedness. The court in holding that the plaintiff in the garnishment action had been successful in reaching the fund, stated that the parol agreement under which the grantee in the deed of trust claimed the proceeds of the sale was avoided by the Statute of Frauds.

In *Hughes v. Johnson* [5] where the plaintiff sought to foreclose upon an account additional to the original indebtedness secured, alleging that the mortgagors had agreed that such mortgage should stand as security for the additional indebtedness it was held: "No mortgage of lands can, by parol agreement between the parties, be made to cover any other debt or any larger amount of debt than that expressed. This is no longer an open question in this state." The principle governing the foregoing Arkansas cases was re-enunciated by the Arkansas court in *Briggs v.*

3 30 Ark. 745 (1875).

4 19 How. (U. S.) 246, 15 L. ed 510 (1857).

5 30 Ark. 285 (1881).

Steele.[6] Although the court in the latter case makes the statement that: "a parol agreement made subsequently to enlarge the indebtedness which it is to secure will be inoperative," it appears that such determination of the particular point of law may not have been necessary to a decision in the case, since the opinion rendered on rehearing of the cause states that the additional accounts were run without further understanding as to security.

Statutory construction was involved in *London & S. F. Bank v. Bandmann.*[7] There, where appellant sought to show that the giving of a promissory note to cover the indebtedness described in the mortgage was a renewal or extension of the mortgage within the statute providing that "a mortgage can be created, renewed, or extended only by writing executed with the formalties required in the case of a grant of real property," it was held that the term "extended" as used in such statutes referred to a broadening of the security to cover additional indebtedness. In *Tunno v. Robert* [8] where it appeared that the mortgagor obligated hereself to reimburse the mortgagee for expenditures made in repairing and paying taxes upon the premises, and executed the mortgage for the purpose of securing such obligations, it was held that the mortgagee could not take credit for taxes paid for a year not embraced in the agreement. The opinion of the court without making reference to the character of any agreement for the extension of the security as oral or in writing said: "A mortgage cannot thus be extended to a debt not embraced in its provisions where the mortgagee is seeking a foreclosure."

In the Georgia case of *Pierce v. Parrish* [9] the original security transaction had been completed through the grantee advancing the money to complete the purchase of the land in question under a contract of sale, and taking the deed directly from the vendor, with the understanding that a conveyance would be made upon payment of the amount advanced. As a matter of defense to an action for performance of this agreement to convey, the grantee sought to show an extension of the security to cover further advances of money for the purchase of necessary supplies. The court, in refusing to give effect to any security for indebtedness other than the original stated: "At the time of this conversation an alleged agreement, as we have seen, Parrish had no interest in the land save as the possessor of the naked paper title, and if he had desired to secure the payment of his advances to Pierce he should have had such contract of security reduced to writing and executed by Pierce. This is the only way in which such security could have been created." Although there are statements in the syllabus in *Troup v. Speer* [10] which might appear to support the view that, as be-

6 91 Ark. 458, 121 S. W. 754 (1909).
7 120 Cal. 220, 65 Am. St. Rep. 179, 52 P. 583 (1898).
8 16 Fla. 738 (1878).
9 111 Ga. 725, 37 S. E. 79 (1900).
10 23 Ga. App. 750, 99 S. E. 541 (1919).

tween the parties, the lien of a mortgage in the form of an absolute deed might be extended by a subsequent parol agreement, it would seem that the court had reference to agreements made contemporaneously with the execution of the deed.

The Indiana court in *Irwin v. Hubbard* [11] held that under a statute a parol agreement for a change in an existing mortgage to provide that the same should stand as security for an obligation to a third party was not enforceable. The court held that agreement to change the mortgage to cover the additional liability was in effect an agreement to execute a new mortgage.

In *Crooks v. Jenkins* [12] the court held that, where an absolute deed was given by way of security, a subsequent mortgagee took subject to the lien to the extent of the indebtedness secured, but that this indebtedness could not be increased by conversation between the parties after the mortgage had been executed and recorded.

Looking to the Kansas court, we see that in *Bell v. Coffin* [13] where the security was in fact a mortgage but in the form of an absolute deed, the court held that an attempted extension of the security to cover both the original indebtedness and the amount of certain overdrafts arising subsequently to the original indebtedness failed because the parties did not reduce their agreement to writing. The court referred to the Kansas Statute of Frauds.

The mortgage was in the form of an absolute deed in *Reed v. McGinty* [14] and the trial court in computing the amount due had included an indebtedness incurred after the execution of the mortgage. The court in pointing out the error in this computation, used the following language: "That was error, for since the deed was in reality a mortgage to secure a particular indebtedness, the mortgage could not, by implication, be extended so as to include other and subsequent indebtedness of the plaintiff to the defendant. To permit such would be to eke out a mortgage by parol or by mere implication."

While admitting the existence of the equitable doctrine of tacking subsequent indebtedness to the original amount of the mortgage when redemption is sought through action by a mortgagor, the court refused to extend the principle to the situation where the mortgagor is seeking foreclosure in the case of *Hayhurst v. Morin*.[15] It should be observed, however, that the court found another objection to including the additional indebtedness in foreclosure in the fact that there did not appear to be any consideration for the oral agreement on the part of the mort-

11 49 Ind. 350, 19 Am. Rep. 679 (1874).

12 124 Iowa 317, 104 Am. St. Rep. 326, 100 N. W. 82 (1904).

13 2 Kan. App. 337, 43 P. 861 (1896).

14 1 La. App. 325 (1924).

15 104 Me. 169, 71 A. 707 (1908).

gagor that the original mortgage should stand as security for the additional indebtedness.

Another case in line with the majority rule is *Curle v. Eddy*.[16] In that case, where an absolute deed had been given by way of security, it was held that an agreement purporting to extend the security to cover future advances was void as contrary to the Statute of Frauds. Again in *Bender v. Zimmerman* [17] the mortgage was in the form of an absolute deed. The court, in an action by the mortgagor to compel a reconveyance, held that the Statute of Frauds invalidated an agreement between the mortgagor and mortgagee made subsequently to the date of the deed, that the latter should stand as security or as an indemnity against loss on account of a breach of warranty in another deed between the parties.

In *Stoddard v. Hart* [18] where at the time that the additional advance was made an insertion was made in the bond, adding to the latter a further condition for the payment of the additional advance, the court, after holding that the insertion in the bond could not be construed as actually incorporated in the mortgage, held that, for the court to go ahead and effectuate what appeared to be an understanding between the parties would be to give relief directly in contravention of the Statute of Frauds. In another New York case, *Townsend v. Empire Stone-Dressing Co.*,[19] although the question of whether the mortgage was security for the price of extra stonework supplied by the mortgagor probably rests upon the interpretation of agreements made contemporaneously with the mortgage, the court made statements which show its attitude on parol agreements. One statement is as follows: "As to the decisions in our own state respecting the extension of a mortgage, so as to cover future advances, I understand it to be the law that they never can exceed such sum stated in the mortgage, and I understand it not to be the law of any case that, if such sum was unpaid the mortgage could, by parol, be extended to an additional sum."

Another obiter statement by the New York court indicating its position upon the question in hand appears in *Walker v. Snediker*.[20] There the court said: "It has been settled in equity, by repeated decisions, that a mortgage to secure future as well as present responsibilities is good. But the better opinion, if not the decided law, is that the mortgage must express the object. It is certain that it cannot be rendered available for future liabilities by a subsequent parol agreement." Wherein the case of *Harper v. Spainhour*,[21] a covenant was executed whereby

16 24 Mo. 117, 66 Am. Dec. 699 (1856).
17 122 Mo. 794, 26 S. W. 973 (1894).
18 23 N. Y. 550 (1861).
19 6 Duer (N. Y.) 208 (1856).
20 Hoffm. Ch. (N. Y.) 145 (1839).
21 64 N. C. 533 (1870).

the defendant agreed to convey certain premises to the plaintiff when the latter had performed certain work for the former, the covenant being deposited with a third person for safe-keeping, and afterwards the parties agreed by parol that the covenant should be held to indemnify the defendant for becoming surety on an obligation of the plaintiff, it was held that such parol agreements fell within the Statute of Frauds, and was not enforceable.

The North Dakota statute providing that a mortgage of real property could not be extended except in writing was construed by the court in *Peoples' State Bank v. Francis* [22] as referring to the situation where the mortgage is extended to cover additional indebtedness rather than an extension of time of payment of the debt. The court said: "A mortgage is 'extended' only when it is made to stand as security for some debt or obligation not originally included therein. This can only be done as the statute directs."

In the case of *Walker v. Walker* [23] where the mortgage had been given in the form of an absolute deed, and the mortgagor was seeking, as the defendant, in an action to recover possession of the land, to set up her rights as equitable owner, it was held that the parties might by parol extend the security to cover new indebtedness. Later in *O'Neill v. Bennett,* [24] which was an action of foreclosure on a formal mortgage with bond, it was distinctly held that the security could not be extended by oral agreement to cover subsequent advances by the mortgagee to the mortgagor. Though there are statements in the *Walker Case* [25] which, if given their full import in the *O'Neill Case,* [26] might have resulted in a different decision from that reached, the Walker decision is explained on the ground that the mortgagor therein was in effect a redemptioner seeking equitable relief, and for that reason was required to pay all indebtedness to the mortgagee. This construction of the *Walker Case* [27] was accepted in *Levi v. Blackwell.* [28] There the court said that, where the grantor of a deed was endeavoring to show that the same was not intended to operate as an absolute conveyance, but that by way of security only, the matter involved was not one of contract but of pure equity, and that such grantor, in seeking protection of the court against the holder of the legal title, must come into courts prepared to do equity, and pay not only the original indebtedness, but whatever else he might owe the holder of the legal title.

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22 8 N. D. 369, 79 N. W. 853 (1899).

23 17 S. C. 329 (1882).

24 33 S. C. 243, 11 S. E. 727 (1890).

25 17 S. C. 329 (1882).

26 33 S. C. 243, 11 S. E. 727 (1890).

27 17 S. C. 329 (1882).

28 35 S. C. 511, 15 S. E. 243 (1892).

In *Zastrow v. Knight* [29] which involved an extension of time of payment, the court held that the statute providing, "A mortgage of real property can be created, renewed, or extended only by writing, executed with the formalities required in the case of a grant of real property," had no relation to the extension of time of payment, but, on the other hand, referred to extending the mortgage in the sense of bringing additional indebtedness within the protection of the same.

In Virginia it was held in *Colquhoun v. Atkinson* [30] that a bond and negotiable note could not be included in the indebtedness secured by a previous deed of trust, in the absence of a written agreement to that effect.

According to the more recent case of *Hendrickson v. Farmers' Bank & Trust Co.*[31] where a mortgage is given to secure a specific debt named, the security will not be extended as to antecedent debts unless the instrument so provides and identifies those intended to be secured in clear terms, and to be extended as to antecedent debts, these must be of the same class and so related to the primary debt secured that the assent of the mortgagor will be inferred. The reason is that mortgages, by the use of general terms, ought never to be so extended as to secure debts which the debtor did not contemplate. "Where one contracts in good faith with a debtor that the security given should include not only that specifically mentioned in the mortgage but other indebtedness, whether existing then or to be incurred in the future, it is not difficult to describe the nature and character thereof so that both the debtor and third parties may be fully advised as to the extent of the mortgage."

In *Bank of Searcy v. Kroh* [32] it was held that deeds of trust given as security for a specific debt and extensions or renewals thereof, and as security for the payment of any other liabilities of the grantor already or thereafter contracted, could not be extended to secure an antecedent indebtedness which had been discharged in bankruptcy.

We come now to a consideration of the cases in which the court permitted an oral agreement for the extension of the security mortgaged to cover additional and subsequent indebtedness and notice that the ground for so doing was for the most part based on the equitable principle of requiring one seeking equity to do equity.

In *Mattamuskeet Drainage Dist. v. Wills* [33] which was a bill in equity for a mandatory injunction to compel the defendant contractors to proceed with certain dredging work, the latter defended upon the ground that the services which said defendants were asked to perform

29 72 A. L. R. 379, 229 N. W. 920 (S. D., 1930).
30 6 Munf. (Va.) 550 (1820).
31 73 S. W. 2d 725, 189 Ark. 423 (1934).
32 114 S. W. 2d 26, 195 Ark. 785 (1938).
33 236 Fed. 362 (1916).

constituted extra work payment which was not secured under the deed of trust originally executed for the security of the defendants. No mention was made of the Statute of Frauds in the opinion. The court, however, in holding that the defendants were secured for the extra the same as for the work enumerated in the original agreement for security, whereby the extra work was brought within the protection of the security. A fair statement of this decision, however, demands an inclusion of the statement that the only doubt cast upon the validity arrangement for further security was that raised by the defendant contractors themselves.

The Alabama decision in *Edwards v. Dwight*,[34] the court after alluding to the fact that a ruling on the efficacy of the parol agreement was not necessary to the decision in the case, took the liberty to make the following exposition of principle: "There are, however, two cogent reasons, founded in public policy which would cause us to hesitate long before declaring that, when a mortgage security is executed to secure a debt of defined amount or special description, parol testimony can be let in to enlarge the amount, or to tack to the mortgage another and different debt, whether sought to be done under an alleged contemporaneous or subsequent agreement. The reasons are: (1) It is of doubtful and dangerous policy to allow parties to add in this way to a stipulation to a solemn written contract; (2) such practice would unduly expose the mortgagor to the power and oppression of the mortgagee." The later case of *Hanchey v. Powell* [35] marks the point where the court was called upon to decide whether a debt of the mortgagor for insurance effected by the mortgagee was embraced in the mortgage by virtue of an oral agreement. It was there held that the mortgage cannot be changed or extended by parol, so as to cover debts not covered by the same. In the case of *McWhorter v. Tyson*,[36] however, which was an action by the mortgagor for equitable relief of cancellation, and an injunction to restrain foreclosure, where it appeared that, besides the original mortgage indebtedness, there was a subsequent indebtedness incurred under an arrangement between the parties whereby the original mortgage should stand as security for the new loan, the court held that it would be inequitable to give the mortgagor the relief which he requested without requiring him to restore that which he had obtained upon the strength of the oral agreement.

In *Mead's Appeal*,[37] a Connecticut case, the personal representative of the insolvent mortgagor's estate stood in his shoes, and the court held that, where an absolute deed had been given to the creditor for security, and subsequently through agreements negotiated with the assent of the

34 68 Ala. 389 (1880).
35 171 Ala. 597, 59 So. 97 (1911).
36 203 Ala. 509, 83 So. 330 (1919).
37 46 Conn. 417 (1878).

mortgagor, the land embraced in the deed had been conveyed to another creditor, with the understanding that the security should stand for the original indebtedness taken up by the grantee in the second conveyance and also for the amount which the original grantor owed the second grantee, the land was charged with the payment of both the original indebtedness and the sums that were later agreed to be paid and secured upon said land.

Where a sale of property covered by a mortgage had been made as in *Burke Land & Livestock Co. v. Wells, F. & Co.*,[38] it was alleged that the purchaser had agreed that the mortgage should stand as security for the entire purchase price, which amount represented various items of indebtedness of the vendor company and its organizer to the mortgagee. In answer to the contention made by the purchaser that the enforcement of such an oral agreement would be in conflict with the statute, which required renewal or extension to be in writing, the court said: "That section of our Revised Statutes was enacted to prevent fraud, and not for the purpose of enabling one to procure the property of another through fraud. Its provisions are not applicable to this case. The purchaser is not the mortgagor or mortgagee. It is a stranger to such mortgage, and as it agreed that they should stand and remain as security for the payment of the purchase price of said property, it is estopped from denying that they are security therefor, and at the same time claiming the property under the contract."

Although in *Brown v. Gaffney*[39] the court held that a mortgagee was entitled to hold his lien for security as to subsequent advances made by him without a written agreement to that effect, the decision as interpreted in the later case of *Carpenter v. Plagge*,[40] seems to have been reached under the equitable doctrine of tacking rather than under a rule of law giving effect to an oral agreement for the extension of security to additional indebtedness. In this latter case, where the action was one by the mortgagor to redeem the premises, the court held that the mortgagor, in order to be entitled to redemption, should pay not only the amount of the mortgage, but also further advances which the mortgagee had made to the mortgagor on the oral agreement of the latter that the mortgage should stand as security therefor.

In *Stone v. Lane*[41] it was held that, where the mortgagor or his representative is seeking to redeem the premises, equity will require the payment of a debt which the mortgagor orally agreed should be secured by a mortgage previously executed.

Although the action in *Tierney v. Citizens Sav. Bank*,[42] was not brought to redeem mortgaged premises, the complaint as an encum-

38 7 Idaho 42, 60 P. 87 (1900).
39 28 Ill. 149 (1862).
40 192 Ill. 82, 51 N. E. 530 (1901).
41 10 Allen 74 (Mass., 1865).
42 51 R. I. 329, 154 A. 653 (1931).

brancer demanding an assignment of the mortgage to her nominee, the court, in holding that an oral agreement between mortgagor and mortgagee would be effectual to raise the rate of interest on the secured obligation, cited other cases as authority for the proposition that the higher rate should stand against the complainant seeking to enforce an assignment.

An oral agreement between the mortgagor and the mortgagee that the mortgage should stand as security for an additional indebtedness was considered by the court in *Flanagan v. Westcott,*[43] as sufficient between the parties. Where a mortgage was originally given by a partnership to cover indebtedness of the mortgagor to the partnership, both present and prospective, and on dissolution of said partnership the mortgage was assigned to one of the partners with the understanding between the partners and the mortgagor that the mortgage should stand as security both for the indebtedness already contracted and the indebtedness to be subsequently contracted with the assignee individually, it was held that the mortgage was good security for the indebtedness to the assignee individually. Nothing more than an oral understanding between the parties seems to have been involved in the case of *Kapalczynski v. Sitniski,*[44] where the court said: "It seems to be settled in this state that a mortgage which has been either partly or wholly satisfied may be made security by the mortgagor for a further or other debt than that for which it was originally given, . . . and therefore the complainants contention of a new loan on the security of the mortgage, if true in point of fact, would be well founded in law."

No reference was made to the necessity for a written agreement to extend the security in *Pettis v. Darling.*[45] There the additional indebtedness consisted of a note which was given when the interest rate was raised by agreement between the parties, such note representing the difference between the interest under the old agreement and the interest after the same was raised.

In a trespass to try title suit brought by the holder of a first trust deed, which had taken a renewal trust deed to secure the balance due on the original indebtedness, together with subsequently incurred indebtedness, the evidence was held to establish that the parties intended to make a renewal and extension of the original lien, rather than to extinguish it. It is manifest from a careful examination of the record that it was the intention of Landrum and the appellee to make a renewal

43 11 N. J. Eq. 264 (1856).

44 91 N. J. Eq. 524, 111 A. 24 (1920).

45 51 Vt. 647 (1885).

and extension of the balance due on the Wood $600 note and its lien, in the note and deed of trust of March 3, 1928, and that there was no intention to extinguish either such debt or lien. A recital in such deed of trust that the $2800 note was given in renewal of the balance due on such $600 note, as well as other indebtedness, and that the lien existing at that time to secure its payment was continued, would have furnished better evidence of such intention, but the absence of such recital will not necessarily affect appellee's rights, as appellant is a subsequent encumbrancer thereto with notice.

Now that we have reviewed the holdings and opinions of the courts on this subject of extension of the mortgage security to cover additional indebtedness by parol we look to secondary authorities and authors for a brief summary of the general views on the matter in hand.

Section sixty-eight of AMERICAN JURISPRUDENCE states: "A mortgage doesn't secure obligations which were not contemplated by the parties to be secured thereby. Indeed, it is a general rule that a mortgage cannot, subsequent to its execution be extended by parol agreement to secure debts or obligations other than those which it was executed to secure. Such an extension if effective, would be equivalent to the execution of a new mortgage to secure the additional obligations. It therefore falls within the prohibition of the Statute of Frauds. It is true that the oral testimony is admissible to show what obligations were intended to be secured by a mortgage and will be received to establish that the mortgage was in fact given to secure obligations distinct from those expressed, but this doctrine permits parol testimony only to show the intention of the parties at the time the mortgage was executed and not to establish a subsequent agreement, in effect creating a new mortgage, to extend the mortgage to secure additional obligations."

Then in JONES ON MORTGAGES (Eighth Edition) and section four-hunderd and thirty-nine we find: "By parol agreement, a mortgage cannot be so altered in its operation as to stand as security for a new debt, different in character and amount from that mentioned in the instrument, payable at a different time and to another person especially where the conduct of the parties at the time of the transaction evidenced no such understanding. An agreement that a promissory not shall be substituted for notes of a larger amount already secured by a mortgage, and if paid at maturity shall be considered a payment and discharge *pro tanto* of those notes of the mortgage, and that the mortgage shall be held as collateral security for the new note, and not be discharged or cancelled until that is paid, does not create a lien upon the mortgaged property to secure its payment. The note is not given in renewal or con-