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Contributor to September Issue/Notes

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NOTES

ADMISSIBILITY OF CONFESSIONS AS EVIDENCE IN INDIANA.—A confession in criminal law is a statement by a person, at any time afterward, that he committed or participated in commission of a crime.¹ With this definition in mind let us try to determine when a confession is admissible as evidence. The Indiana statute says: "The confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him, except when made under the influence of fear produced by threats or by intimidation or undue influence; but a confession made under inducement is not sufficient to warrant a conviction without corroborating evidence."²

Again in *Hamilton v. State* the court held that a confession of guilt by accused is admissible against him when, and only when it was freely

¹ State v. Dixon, 80 Mont. 181, 260 P. 138 (1927).

² Burns Indiana Statutes Annotated § No. 9-1607 V. 4.

and voluntarily made without having been induced by the expectation of any promised benefit or by the fear of any threatened injury, or by the exertion of any improper influence.³ Thus we begin to see that voluntary confessions are admissible as evidence.

The next question that confronts us is, what constitutes a voluntary confession. Generally confessions induced by the promise or encouragement of any hope, benefit, or favor made or held out by persons in authority or others in their presence are inadmissible.⁴ Confessions induced by threats and fear as we saw from the statute quoted are inadmissible.⁵

In *Ogle v. State* it was held that if defendant's confession was otherwise voluntary, it could not be rendered incompetent by the mere circumstance that at the time of making it he was in the custody of officers.⁶ It is held, however, that a confession is not conclusive on either the accused, the prosecution, or the jury.⁷

Next we must examine the defendant's right to rebut the confession. The defendant has a right to show under what circumstances the confession was made before it is admitted in evidence. However, a confession is deemed voluntary in absence of showing by the accused to the contrary. In *Thurman v. State* the court said: "A confession by a person accused of crime is presumed to be voluntarily made until the contrary is shown."⁸

After the court determines that a confession is competent the accused has the right to present to the jury evidence tending to contradict or discredit it. In *Mack v. State* the court held "that in absence of the jury, the court should hear evidence as to the circumstances under which the confession was made, and the burden of proving the confession incompetent is upon the defendant." Going further, the court said: "But after the court has determined that a confession is competent and admissible and it is introduced in evidence, the defendant has the right to present to the jury evidence as to the conditions under which it was obtained, evidence that he did not make the confession, or evidence which tends to contradict, discredit, or lessen the weight thereof."⁹

Having determined that voluntary confessions are admissible as evidence let us next discuss the admissibility of an extra-judicial confession, for there is little question that a confession of guilt in open

³ 207 Ind. 97, 190 N. E. 870 (1934).

⁴ *Mack v. State*, 203 Ind. 355, 180 N. E. 279 (1932).

⁵ *Hamilton v. State* (3 Supra).

⁶ 193 Ind. 187 (1920).

⁷ *Hicks v. State*, 213 Ind. 277, 11 N. E. (2d) 171 (1937).

⁸ 169 Ind. 240, 82 N. E. 64 (1907). Also see: *Hauck v. State*, 148 Ind. 238 (1897) and *Ginn v. State*, 161 Ind. 292 (1903).

⁹ *Mack v. State* (4 Supra).

court before the jury will support a conviction.¹⁰ As to extra-judicial confessions, it was held in *Gains v. State* that: "In the case of all extra-judicial confessions it is the rule that the *corpus delicti* must be proved by additional evidence before a conviction upon the naked confession will be upheld."¹¹ In *Snyder v. State* a confession before coroner's inquest was held admissible.¹²

In *Hamilton v. State*, supra, it was held that confessions made by a prisoner after he had been professionally advised of their effect are admissible in evidence against him.¹³ Similarly, in *Manley v. State* the court said: "The fact that defendant told the policemen in answer to questions asked in the presence of the wounded man, that he shot Pemberton over a political argument and was sorry for it immediately after Pemberton had identified him as the man who did the shooting, was not inadmissible merely because defendant was under arrest at the time."¹⁴

In *Hicks v. State* the court maintained that the fact that accused, charged with murder, was removed from place to place after his arrest and held for a long time, did not make his written confession inadmissible, where it was not made under influence of fear produced by threats, intimidation, or undue influence.¹⁵

Other situations of interest may also be noted. In *Anderson v. State* the court held that an admonition to accused to tell the truth and a statement that making the confession would save him some time was not a promise rendering the confession inadmissible.¹⁶

In *State v. Laughlin* it was held that the examination of the accused by questions and answers taken down in shorthand in which the accused admitted that he struck the deceased upon the head with the butt end of a billiard cue, rendering him unconscious, on stating other details of the fatal trouble, was admissible.¹⁷

Thus we may conclude that in Indiana voluntary confessions are admissible as evidence though by themselves they are not conclusive of guilt. We further saw that after a confession has been accepted by the court, the defendant has an opportunity to offer evidence showing that the confession was not given voluntarily.

¹⁰ *Dantz et. al. v. State*, 87 Ind. 398 (1882). Also see: *Eastman v. State*, 54 Ind. 441 (1876) and *Griffeth v. State*, 36 Ind. 406 (1871).

¹¹ 191 Ind. 262, 132 N. E. 580 (1921).

¹² 59 Ind. 105 (1877).

¹³ *Hamilton v. State* (3 Supra).

¹⁴ 197 Ind. 583, 151 N. E. 403 (1926).

¹⁵ *Hicks v. State* (7 Supra).

¹⁶ 205 Ind. 607, 186 N. E. 316 (1933).

¹⁷ 171 Ind. 66, 84 N. E. 756 (1908).

Confessions are important in criminal law today and although we must ever be on the lookout for confessions obtained by force and intimidation, yet we must accept voluntary confessions with open arms since the aid such confessions lend to the prosecution of criminals is unmeasurable.

Arthur M. Diamond.

DEFAMATION OF A GROUP.—In maintaining an action for defamation it is necessary for the plaintiff to show that the defamatory matter was directed toward him. In examining the ability of an individual to maintain an action in libel or slander to himself when the defamation was directed against a group, of which he is a member, it would seem only logical that the same rule should apply—that the plaintiff must show that the defamatory matter is directed toward him. It is not enough that the group of which he is a member is the object of slander or libel. The courts have been unanimous in holding the plaintiff to proof that the defamatory matter is directed at himself,¹ and it is not enough for him to show that the class of which he is a member has been defamed.² The difficulty of proving this imputation varies directly with the size of the group. In *Louisville Times v. Stivers*,³ the court said, "The plaintiff must be able to show he is the one against whom the article is directed, that he is the one defamed. In a comparatively small group this presents no difficulty. * * * As the size of the group increases it becomes more and more difficult for the plaintiff to show he was the one at whom the article was directed, and presently it becomes impossible. As a result of that, there are men who make their living by circulating falsehoods against the Jews, Catholics, Masons, and so forth, taking care to mention no names, and to make only general charges against all, and are thus able to ply their nefarious trade in safety because the group is so large that no particular individual can show the article is directed at him."

The reasons for such a rule are based on the well-known judicial refuge of Public Policy. In *Ryckman v. Delevan*,⁴ the court said, "It is far better for the public welfare that some occasional consequential injury to an individual arising from general censure of his profession, his party, or his sect should go without remedy than that free discussion on the great questions of politics, morale, or faith should be checked by the dread of embittered and boundless litigation."

1 *Louisville Times v. Stivers*, 252 Ky. 843, 68 S. W. (2) 411 (1934).

2 *Ryckman v. Delevan*, 25 Wend. (N. Y.) 186 (1840).

3 252 Ky. 843, 68 S. W. (2) 411 (1934).

4 25 Wend. (N. Y.) 186 (1840).

In implementing these doctrines the courts have created an artificial distinction between groups according to size, the larger being called *classes* and the smaller *groups*.⁵ A *class* is defined as a large number of persons which may be designated by a single name, irrespective of geographic limitation, political division, or place of abode, while *group* is used to designate a particular part or section of a *class*. Members of a *class* are said to have no right of action for defamation used broadly with respect to that class. However, if defamatory language is used toward an entire *group*, including every member thereof, it may be said to refer to each member to the extent that he may maintain an action.⁶

According to this distinction, families have been held to constitute a *class*,⁷ and a *group*.⁸ In the former case, the defamatory matter complained of was contained in a newspaper article concerning a feud between two families and referring to the plaintiff's family as the "Stivers Clan." The court would not allow recovery to be sought in a civil action, since it was not apparent that the defamatory matter was directed at the plaintiff. In the latter case, however, under similar circumstances, libelous matter published about a family was held to entitle any member thereof to maintain an action.

The courts have also differed on the classification of occupants of a house. The owner of an apartment house who resided therein was held to have no right of action against one who threw suspicion upon the house and intimated it was a house of ill fame, where the owner was not named or designated as being of questionable character.⁹ But in another case,¹⁰ it was held that a newspaper article characterizing a house as disorderly was directed at each occupant of the house and thus each had a cause of action for libel.

A race has been considered to constitute a *class*, so that no member thereof could maintain an action for its defamation,¹¹ but a written attack on the Jewish population of a city, consisting of 75 families, was held to afford a right of action to any individual member.¹²

A Catholic clergyman has been held unable to maintain an action for a defamation of Catholic clergymen, generally,¹³ although a libelous publication concerning the vestry of a church gave a right of action to any of the individual vestrymen.¹⁴

⁵ Swell v. Boutwell, 138 Va. 402, 121 S. E. 913 (1924).

⁶ People v. Eastman, 188 N. Y. 478, 81 N. E. 459 (1907).

⁷ Louisville Times v. Stivers, 252 Ky. 843, 68 S. W. (2) 411 (1934).

⁸ Fenstermaker v. Tribune Publishing Co., 13 Utah 532, 45 P. 1097 (1896).

⁹ Hyatt v. Lindner, 133 La. 614, 63 So. 24 (1913).

¹⁰ McLean v. New York Press Co., 64 Hun. 639 (1892).

¹¹ Germain v. Ryan, Rap. Jud. Quebec, 53 C. S. 543 (1918).

¹² Ortenberg v. Plamandor, Rap. Jud. Quebec, 24 K. B. 69 (1914).

¹³ People v. Eastman, 188 N. Y. 478, 81 N. E. 459 (1907).

¹⁴ Goldsborough v. Orem, 103 Md. 761, 64 Atl. 36 (1906).

An officer of a regiment has been held unable to maintain an action for a libel on the officers of the regiment generally,¹⁵ but a member of a court martial was held to have a right of action for a libelous cartoon.¹⁶

The same rule has apparently been applied to defamation of persons engaged in a business or profession. The courts have held that defamatory matter concerning correspondence schools generally would not give a right of action to any particular school,¹⁷ that an article condemning certain practices of insurance agents was not libelous to an individual insurance agent,¹⁸ but a newspaper article defaming the medical staff of a public hospital was considered to constitute a libel to each of the doctors as if he had been mentioned by name.¹⁹

Partnerships are generally regarded as *groups*, and a libel which injures the partnership may be considered to injure each partner so that each may maintain an action to recover the damage caused thereby to his interest.²⁰

A defamation of a public board (district board of registry and election), leveled against it without exception, necessarily condemns every member thereof although none are named and every member may maintain an action.²¹ A member of a city council who was superintendent of accounts and finances was allowed to maintain an action against a newspaper publishing an article criticizing the city council and mayor in respect to their conduct of the city's fiscal affairs.²²

It sometimes occurs that the group itself will attempt to recover for libel or slander directed toward it. The difficulty encountered is usually in getting into court, since, with the exception of corporate bodies, groups are not recognized as entities in law. Cases of this type are thus limited, with the exception of Trade Unions, noted below, to suits by corporations. In this connection, the legal personality of a corporation has been regarded diversely by the courts. The majority of opinions appear to hold that the corporate personality is quite different from that of a real person, so that it is necessary for the corporation to show special damages in order to maintain an action.²³ The rule as stated in a U. S. Supreme Court case,²⁴ is that a corporation can only be injured in respect to its credit, property or business

¹⁵ Sumner v. Buel, 12 Johns (N. Y.) 475 (1815).

¹⁶ Ellis v. Kimball, 16 Pick (Mass.) 132 (1834).

¹⁷ International Text Book Co. v. Leader Printing Co., 189 F. 86 (1910).

¹⁸ McGee v. Collins, 156 La. 291, 100 So. 430. (1924).

¹⁹ Bornmann v. Star Co., 174 N. Y. 212, 66 N. E. 723 (1903).

²⁰ Tobin v. Alfred M. Best Co., 105 N. Y. S. 294 (1907).

²¹ Reilly v. Curtiss, 53 N. J. 677, 84 Atl. 199 (1912).

²² Swearingen v. Parkersburg Sentinel Co., — W. Va. —, 26 S. E. (2) 209 (1943).

²³ National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F. (2) 763 (1927).

²⁴ Ibid.

by a false publication. On the other hand, in a case where a charitable and religious corporation was allowed to maintain the action,²⁵ the court said, "A corporation may therefore have a reputation which is equally as valuable to it as that of a natural person and may be injured in that reputation in the same way," and supported this statement by the reasoning that if it were not allowed to maintain this suit, it and other like corporations would become the prey of the libelors, since, because they are non trading, they cannot show special damages.

Municipal corporations have not been allowed to maintain an action for defamation, but upon totally different grounds. In a leading case on this subject,²⁶ the court pointed out that maintenance of such an action would seriously endanger such constitutional rights as freedom of the press and of speech, and continued to state that a city should not be allowed to maintain an action for damages for libel even though publications are malicious and directed towards the city's private enterprises. A similar succeeding case has adopted this reasoning.²⁷

In general, as before noted, a voluntary association, being unincorporated, has no legal personality and is thus unable to appear in court. However, in New York, under its General Associations Law, such associations have been endowed with some of the character of a legal entity to the extent that they may sue and be sued. Outstanding are two cases in which trade unions have been allowed to maintain actions for libel.²⁸ In these cases it was held that the members of a trade union, which was an unincorporated association, would have such a common interest in the damages consequent upon the publication of an article, tending to injure the reputation of the work being done by the union by charging wrongdoing on the part of the officers, as would give rise to a cause of action for libel, which could be maintained, through its president, by regarding the union as an entity to the extent necessary to permit such an action.

It is interesting, at this point, to note the difference in civil and criminal liability for defamation of a group. In many cases in which an individual or group was not allowed to maintain an action for defamation of that group the court pointed out that the defamer would be criminally liable.²⁹ The court sums up the problem in *People v. Eastman*,³⁰ saying, "The charges in this article being against a whole class, no single individual could maintain an action for libel against its author, but not so, however, as regards a criminal prosecution for libel. The foundation of the theory on which libel is made a crime is that

²⁵ Finnish Temperance Society v. Publishing Co., 238 Mass. 345, 130 N. E. 845 (1921).

²⁶ City of Chicago v. Tribune Co., 307 Ill. 595, 139 N. E. 86 (1932).

²⁷ City of Albany v. Meyer, 99 Cal. A. 651, 279 P. 213 (1929).

²⁸ Kirkman v. Westchester Newspaper, Inc., 24 N. Y. S. (2) 860 (1942).

²⁹ Ryckman v. Delevan, 25 Wend. (N. Y.) 186 (1840).

³⁰ People v. Eastman, 188 N. Y. 478, 81 N. E. 459 (1907).

by provoking passions of persons libeled, it excites them to violence and a breach of the peace. Therefore a criminal prosecution can be sustained where no civil action would lie, as for instance in this very case, where the libel is against a *class*."

John H. Merryman.

DISMISSAL OR REMOVAL OF PUBLIC SCHOOL TEACHERS UNDER TEACHERS' TENURE LAWS.—As a basis to the consideration of the question of dismissal or removal of public school teachers under teachers' tenure laws of various states, the following opinion is set forth which contains a worthy exposition of the history of teachers' tenure legislation and the purposes and motives behind that legislation:

"Teachers' tenure, like civil service and other similar movements, dates back over a period of many years. The abuses existing by reason of the 'spoils system' which came into prominence during Jackson's administration, later followed by national and other administrations, led to much-deserved criticism. That is why on January 16, 1883, the first civil service act was passed. In 1885, the National Education Association brought forth the question of tenure of school officials. A committee of that association studied the matter and later submitted a report. Generally speaking, the tenure so sought was interpreted to mean, in substance, the application of the principles of civil service to the teaching profession. It was thought for the good of the schools and the general public that the profession should be made independent of personal or political influence, and made free from the malignant power of spoils and patronage. In 1886 the state of Massachusetts enacted a law 'relating to the tenure of office of teachers.' Thereunder school districts were permitted to enter into contracts with teachers for a longer period than one year. In 1889 the committee on rules of the Boston School Committee suggested a tenure law providing for a probationary period of one year, four years of annual elections, and thereafter permanent tenure subject to removal for cause after proper hearing. The bases for recommendations were that better talent would be attracted to the teaching profession; that annual contracts theretofore in vogue had not resulted in the elimination of poor, incompetent, and inefficient teachers; that the principle of annual election or appointment was not generally applied to policemen, firemen, or judicial officers, and in the very nature of things should not apply to teachers; that not infrequently the best teachers were discharged for inadequate reasons. Foreign countries have long recognized the principle of teachers' tenure. Since 1900 the principle of teachers' tenure in this country has developed more rapidly. In a general way it has followed the civil service plan. The objectives sought have been to

protect the teachers against unjust removal after having undergone an adequate probationary period; that the movement itself has for its basis public interest, in that most advantages go to the youth of the land and to the schools themselves, rather than the interest of the teachers as such.

"Plainly, the legislative purposes sought were stability, certainty, and permanency of employment on the part of those who had shown by educational attainment and by probationary trial their fitness for the teaching profession. By statutory direction and limitation there is provided means of prevention of *arbitrary* demotions or discharges by school authorities. The history behind the act justifies the view that the vicissitudes to which teachers had in the past been subjected were to be done away with or at least minimized. It was enacted for the *benefit and advantage of the school system* by providing such machinery as would tend to minimize the part that malice, political or partisan trends, or caprice might play. It established *merit* as the essential basis for the *right* of permanent employment. On the other hand, it is equally clear that the act does not impair *discretionary* power of school authorities to make the best selections consonant with the public good; but their conduct in this behalf is strictly circumscribed and must be kept within the boundaries of the act. The provision for a probationary period is intended for that very purpose. The right to demote or discharge provides remedies for safeguarding the future, against incompetence, insubordination, and other grounds stated in the act. The act itself bespeaks the intent. Provisions for notice and hearing, the requirements of specified causes for discharge or demotion, are indicative of the general purpose. With these general considerations in mind, it is our duty so to construe such parts of the act which on their face do not clearly delineate the legislative intent as will bring about a result in harmony with the expressed legislative policy."¹

"Tenure legislation of one sort or another is now in force in nineteen states and the District of Columbia. Three states provide for 'continuing contracts,' whereby a teacher's contract is deemed to continue in existence from year to year unless, on or before a fixed date each year, it is terminated by the school board. The other sixteen states and the District of Columbia have enacted legislation modeled after that adopted by New Jersey in 1909. Although varying in specific details, the general pattern of these laws may be described briefly. For a period ranging from one to five years, the teacher is on probation and during that time he may be denied re-employment at the end of any school year, but dismissal during the year must be for cause. If re-employed at the end of the probationary period the teacher then holds his position without further election during efficiency and good behavior. He may be dismissed only for cause, and only after notice

¹ McSherry v. City of St. Paul, 202 Minn. 102, 277 N. W. 541 (1938).

accompanied by written charges, opportunity to be heard, and a finding by the board that the charges filed against him are true. The teacher is allowed the assistance of counsel, and the board is authorized to subpoena witnesses for either side to give testimony under oath. Some of the statutes make the action of the board final, subject of course to judicial review with respect to the requirements of due process of law. Others provide specifically for administrative appeals to higher educational board or official, or for appeals to the county or district court. When enumerated, the grounds for dismissal include dishonesty, immoral character or conduct, insubordination, physical or mental incapacity to perform the duties of employment, persistent refusal to obey reasonable rules and regulations, and natural diminution in the number of pupils."²

Tenure may be established also by regulations of a Board of Education incorporated in the teacher's contract.³

The Supreme Court of Indiana states that the purpose of the Indiana Teachers' Tenure Act was to protect the educational interests of the state by the establishment of a uniform system of permanent contracts; and it was not the purpose of the statute to foster the interests of, or create special privileges to, any teacher or class of teachers. And the policy of the law was to establish a uniform tenure system for all the schools of the state, and it must be construed liberally with that aim and end in view.⁴

The Pennsylvania court holds essentially the same way in the opinion that the Teachers' Tenure Act of Pennsylvania was designed to secure the citizens of Pennsylvania a competent and efficient school system by preventing dismissal of capable teachers without just cause; and it is clear that the legislature did not intend that the act confer any special privileges or immunities upon the teachers themselves to retain permanently their positions regardless of merit, or affect the future policy of the legislature as to their employment.⁵

The Ohio Supreme Court states that the purpose of the Teachers' Tenure Act is not to secure absolute permanence of tenure to re-employed teachers eligible for continuing service status but to afford them continuity of service and provide an orderly procedure for termination or suspension of such contract, and a board of education may terminate such contract when statutory ground is shown to exist subsequent to the effective date of contract.⁶

Tenure statutes are antedated by statutes in some states forbidding school boards to execute contracts with teachers for more than a

² B. H. Lebeis, 37 Mich. L. R. 430-432 (1939).

³ State ex. rel. Keeney v. Ayers, 108 Mont. 547, 92 P. (2d) 306 (1939).

⁴ School City of Lafayette v. Highley, 12 N. E. (2d) 927 (1938) (Ind.).

⁵ Teachers' Tenure Act Cases, 329 Pa. 213, 197 A. 344 (1938).

⁶ State ex. rel. Weekley v. Young, 141 Ohio 260, 47 N. E. (2d) 776 (1943).

named period: "More than four school years" (Ohio),⁷ "not exceeding the ensuing school year" (Iowa),⁸ "not to exceed two years" (Texas).⁹ In the absence of such restrictions it is generally held that a board may appoint a superintendent or teacher for any reasonable period, even beyond the term of the board itself.¹⁰

The Teachers' Tenure Act extends to the superintendent of schools of a city, and his status is the same as that of a permanent teacher under an indefinite contract.^{11 4}

However, in one jurisdiction it was held that the superintendent of schools employed by the board of education of the Independent School District of Duluth is not a "teacher" within the Teachers' Tenure Act, and that the board acted within its power in discontinuing his employment upon expiration of contract, though he had served as superintendent for seven years.¹²

The power to dismiss or remove is generally vested in the school board or authorities who have the power of employing teachers and of controlling and managing the school,¹³ except where the law, or rules and regulations, provide that the power of removing or dismissing a school-teacher shall be in some other particular board or officer; and where the power to dismiss is not expressly placed in a particular officer or board, it is generally held that it exists by implication in the officer or board having the power to employ.¹⁴

In one jurisdiction, it has been stated that generally the policy of the general assembly is that a board of directors or a board of education as such has no authority to hear charges against and remove a school teacher or a school superintendent.¹⁵

One of the primary considerations which arise with regard to dismissal or removal of public school teachers under teachers' tenure laws is the question of whether those teachers occupy a contractual status, and the determination of the rights thereto.

In California, the court has held that "These and other expressions of California courts compel the conclusion that tenure in California, under the 1921 amendments to the Political Code, and under the terms of the present School Code, is statutory and not contractual; that there

⁷ Ohio General Code No. 7691 (1937).

⁸ Iowa Code No. 4229 (1931).

⁹ Comp. Texas Stats., Art. 2781 (1928).

¹⁰ Tate v. School Dist., 324 Mo. 477, 23 S. W. (2d) 1013 (1929).

¹¹ School City of Peru v. State ex. rel. Youngblood, 212 Ind. 255, 7 N. E. (2d) 176 (1937).

¹² Eelkema v. Board of Ed. of City of Duluth, 215 Minn. 590, 11 N. W. (2d) 76 (1943).

¹³ Baird v. Fremont Co. School Dist. No. 25, 41 Wyo. 451, 287 P. 308 (1930).

¹⁴ Tadlock v. Guadalupe Co. School Dist. No. 29, 27 N. M. 250, 199 P. 1007 (1921).

¹⁵ State ex. rel. Brokaw v. Board of Ed. of City of St. Louis, 171 S. W. (2d) 75 (1943) (Mo. App.).

is no contractual relationship between the teacher and the State of California; that the tenure provisions of the law did not become a part of the teacher's contract of employment, but rather are restrictions upon the power of the school district to dismiss a teacher after he has been employed under specified conditions for a certain length of service. Certainly there is a contract of employment between the school district and the teacher and the terms thereof are carefully prescribed by the statutes and explained by cases The maximum term of employment is one year Nowhere is there any term of the contract relating to permanent tenure nor, significantly enough, is there any provision anywhere in the School Code or in any statute requiring the teacher to remain in the service of the school district, once he has obtained tenure, as long as he is physically, mentally and morally able, or giving the school district a cause of action against the teacher for breach of contract if the teacher resigns without leave of the district at the end of any school year after the teacher has acquired tenure."¹⁶

The same court said that under well-recognized principles of law, a legislative act which would, if construed to be a contract, limit or extinguish the power of the government completely to control the subject matter of the enactment, will not be so construed unless the legislative intention to create the contract clearly appears, and all doubt must be resolved in favor of the continuance of the power of the government; and that the reservation of such power to the government was clearly indicated by the legislature in the enactment of the statute providing that all employment under the provisions of the Teachers' Tenure Act should be subordinate to the rights of the legislature to amend or repeal that statute or any provision thereof at any time, and that nothing therein contained should ever be held, deemed or construed to confer upon any person employed pursuant to the provisions thereof, a contract which would be impaired by the amendment or repeal of the statute or any provision thereof.¹⁶ The court in this case relied upon the decisions of the United States Supreme Court in two cases.^{17 18}

But submitting to the decision of the United States Supreme Court in another case,¹⁹ reversing decisions of the Supreme Court of Indiana, to the effect that the tenure rights of a permanent teacher were purely statutory and not contractual and were therefore subject to being dissolved by the repeal of the act out of which they arose, the court recognized that a teacher who after serving for a period of five or more consecutive years had entered into a contract to teach for another

¹⁶ Taylor v. Board of Education, 89 P. (2d) 148 (1939) (Calif. App.).

¹⁷ Phelps v. Board of Education, 57 S. Ct. 483 (1937).

¹⁸ Dodge v. Board of Education, 58 S. Ct. 98 (1937).

¹⁹ Anderson v. Brand, 58 S. Ct. 443 (1938).

year, and had, prior to the repeal of the Teachers' Tenure Act, thereby acquired the status of a permanent teacher with an indefinite contract, continued in that status notwithstanding the subsequent repeal of the statute. The court, in recognizing that status, said that the decision of the United States Supreme Court went no further than to hold that the rights of the teacher arose out of contract and as such were entitled to the protection of the United States Constitution with respect to impairment of obligations of contract, and did not consider the precise nature of the contractual rights acquired or the manner of their enforcement.

Conceding that in other jurisdictions various conclusions have been reached upon the question of whether teachers employed under the Teachers' Tenure Act occupy a contractual status, depending upon the statute involved in each case, the court held that under the Pennsylvania statute expressly requiring a school district, within thirty days after the enactment of the Teachers' Tenure Act, to tender to all the professional employees of the district then employed new contracts drawn in accordance with the form prescribed in the statute, it was useless to say that the school teachers did not have contracts of employment, because the legislature had expressly so provided. The court pointed out that *assumpsit* by school teachers for the enforcement of contractual rights has been recognized in that jurisdiction; and that in this respect the teacher's position differed from that of other governmental employees who held their positions solely by tenure of appointment, without express contractual rights.⁵

But the contract of a school teacher with the state, under the Pennsylvania Teachers' Tenure Act, is a qualified contract, in that it is subject to the limitation of its operation by subsequent statutory changes.⁵

Also, it has been held in Pennsylvania, where a teacher's contract is specifically made subject to the provisions of the School Code, "and amendments thereto," the quoted phrase is broad enough to include future amendments as well as those existing at the time the contract was entered into; and where an amendatory act took effect prior to the date of the teacher's suspension, and at a time when her contract was in full force, it was held that the amendment was automatically incorporated into the contract existing between her and the school district, and the right of the teacher must be controlled by the amendatory act.²⁰

In Indiana, the court has held that a permanent tenure teacher's indefinite contract is a protected contractual right entitling the teacher to a succession of definite contracts with terms meeting the requirements of pertinent statutes.²¹

20 Bragg v. School Dist., 337 Pa. 363, 11 A. (2d) 152 (1940).

21 Engel v. Mathley, 113 Ind. App. 458, 48 N. E. (2d) 463 (1943).

In another jurisdiction it has been held that the status of a permanent teacher under the Teachers' Tenure Act, while in a sense contractual, is, in essence, dependent on a statute, like that of an incumbent of a statutory office which the legislature may abolish at will, or whose emoluments it may change.²²

Although there is a conflict of authorities as to whether the status of teachers under Teachers' Tenure actually is or is not contractual, the general rule may be laid down that a contract to teach school is clothed with the same sanctity as other contracts and cannot be avoided except for grounds recognized by law.²³

The rules of law relating to performance and breach generally apply to contracts between teachers and school authorities.²⁴ Thus a teacher was allowed to recover damages for breach of contract of tenure, and also, in a second suit brought by plaintiff teacher, she received a judgment for salary since the first judgment, although in the interval she had rendered no services.²⁵

With respect to the validity of contracts between teachers and school authorities, the general contract requirements of mutual assent, consideration, and fraud must certainly be applied as tests of whether a binding contract has been formed in addition to determining whether the specific statutory requirements have been fulfilled. There must be mutual assent at the time of formation of the contract, that is the parties must agree as to every provision of the contract; the element of consideration must be present, that is, something of legal detriment to the promisee or of some benefit to the promisor, or the doing of some act on the part of the promisor which he is not legally bound to do; and, according to the statute of frauds, if the agreement is not to be performed within one year from the making thereof, it must be in writing, or some written memorandum thereof, and must be signed by the party to be charged.²⁶

A teacher is bound to take notice of all statutory provisions controlling and for that reason incorporated into the contract as one of its terms,²⁷ and of all the rules of the school board which may affect the power to dismiss, although insofar as they are inconsistent with the statute, his rights will not be affected thereby.²⁸

A teacher, by entering into a contract under the Teachers' Tenure Law must be deemed to have agreed that the contract might be canceled

²² *Steck v. Board of Education*, 8 A. (2d) 120 (1939) (affirmed in 11 A. (2d) 260 (1940).

²³ *Walker v. State ex. rel. Kirton*, 13 Fla. 14, 13 So. (2d) 443 (1943).

²⁴ *Cons. School Dist. No. 4, Bryan Co. v. Millis*, 139 P. (2d) 183 (1943) (Okla.).

²⁵ *Board of Ed. of Washington Co. v. Cearfoss*, 168 Md. 29, 176 A. 486 (1934).

²⁶ *Williston's Cases on Contracts*, pages 1, 169, 415.

²⁷ *Chehock v. Marion Indep. School Dist.*, 210 Iowa 258, 228 N. W. 585 (1930).

²⁸ *De Hart v. St. Louis Co. School Dist. No. 39*, 214 Mo. App. 651, 263 S. W. 242 (1924).

by the board of trustees, and the teacher is not entitled to a hearing before any other body than that provided for in the statute.²⁹

With respect to recovery, a teacher wrongfully prevented by the board of trustees of the school district from occupying a position as teacher in the school which he had previously occupied for seven consecutive years was entitled to recover salary lost as a result thereof and until he could find other employment.³⁰

Many interesting cases have come before the courts with regard to this question of the authority of school boards and administrative groups to "hire and fire" public school teachers. The teachers' tenure statutes which govern teachers' contracts have been interpreted in the courts through the years with regard to the many points of law that have arisen in the cases. As a final consideration of the question of dismissal or removal under teachers' tenure laws, we shall point out some of these important judicial interpretations.

It has been held in New York that the school directors or the school board having, under the Education Law, control, management, and direction of teachers and other employees of school districts may, unless prohibited by statute, discharge a teacher employed by them for incompetency or for neglect in the discharge of duties; and where such teachers have a tenure of office, such directors or board of education may file or hear charges against the teachers and act thereon as the evidence warrants, subject only to such review of the decisions as is provided by statute. The charges must be received and acted upon in good faith and not arbitrarily, and they must include a dereliction on the part of the teacher, or neglect of duty, or something affecting his character or fitness for the position, and must not precede a predetermined removal.³¹

An interesting case on this point is one in which the statements made by a permanent teacher to his pupils that it was silly and foolish to salute the American flag, that Russia had the best government in the world and the United States had the worst, that Russia had always paid its debts, that it was this country which had not paid its debts, that the United States was the aggressor in every war, and that the United States was a bully among nations and took advantage of all smaller nations, his disapproval of the attendance of his pupils at the movies to view a patriotic moving picture, his distribution to his pupils in the classroom of pamphlets commenting on communism and on the case of Thomas J. Mooney, whom he described as a greater martyr than Abraham Lincoln, and his statement to his pupils that he would rather be a live coward than go to war, and that if the United States became involved in war he would have nothing to do with it,

²⁹ *Arburn v. Hunt*, 207 Ind. 61, 191 N. W. 148 (1934).

³⁰ *Smith v. School Dist. No. 18, Pondera Co.*, 139 P. (2d) 518 (1943) (Mont.).

³¹ *Cooke v. Didge*, 229 N. Y. S. 257, (1937) (N. Y.).

were held to be sufficient evidence of his unfitness to be the teacher of children of an impressionable age, to constitute unprofessional conduct, and to be a violation of his oath, which he took as a teacher to obtain his credentials, to support the Constitution and laws of the United States and of the state of California, and to give undivided allegiance to the Government of the United States, to furnish sufficient ground for his dismissal under the School Code of California.³²

A case on the same point, but not quite as strong arises in a Florida jurisdiction, wherein the dismissal was upheld of a public high school teacher who obtained a 4-E draft classification as a conscientious objector. He was opposed to participation in the war in any form, either in the combatant or in the noncombatant service. Upon learning these facts, the county board of education dismissed him from service in the school system, finding his attitude wholly inimical to the ideals of citizenship and the responsibilities of citizens, notwithstanding his admitted qualifications for service in the school system in other respects. The teacher sought by a mandamus action to compel the board to reinstate him, but the trial court set aside the writ and on appeal, the Supreme Court of Florida affirmed the decision saying: "The realtor's qualifications, as clearly manifested by the record, failed to conform with the requirements of our law, and the respondent board's conclusions are within the spirit of the law."³³

It has been held that a teacher holding a contract under the Teachers' Tenure Act, providing that the only valid cause for termination of a contract in accordance with the provisions of the statute should be immorality, incompetence, intemperance, cruelty, wilful and persistent negligence, etc., may be discharged for incompetency where the evidence shows that she acted as a waitress in a restaurant conducted by her husband, and on certain occasions served as bartender after school hours and during the summer vacation; that she, in this restaurant, and in the presence of her pupils, took an occasional drink of beer, served beer to the customers, shook dice with customers for drinks, played, and showed customers how to play a pinball machine on the premises; and that she was rated by the superintendent of schools as 43 per cent competent — a rating of 50 per cent being the passing or average rating. The court said that the term "incompetency" has a common and approved usage, and that its meaning is not limited to a lack of substantive knowledge of the subject taught.³⁴

"Incompetency" as used in the Teachers' Tenure Act making incompetency a valid cause for termination of contract with the professional employee of a school district also embraces a lack of physical ability to perform duties incident to the employment. The physical

³² Board of Education v. Jewett, 21 Col. App. (2d) 64, 68 P. (2d) 404 (1937).

³³ State ex. rel Schweitzer v. Turner, 19 So. (2d) 832 (1944) (Fla.)

³⁴ Horosko v. Mt. Pleasant Twp. School Dist., see 135 Penn. Sup. 102, 4 A. (2d) 601 (1939).

inability of a dental hygienist employed by the school district to perform her duties for several months due to pregnancy constituted "incompetency" warranting her discharge under the Teachers' Tenure Act.⁸⁵

However, quick temper and an uncontrolled tongue, although very serious delinquencies on the part of a teacher, not to be excused, are correctible faults, and are, therefore, within the contemplation of a statute requiring the school board not to act to dismiss a permanent teacher upon charges of incompetency, except upon at least ninety days' prior notice of such incompetency, specifying the nature thereof with such particularity as to furnish the employee an opportunity to correct his faults and overcome his incompetency.⁸⁶

Two absences without leave on the part of a permanent teacher may not be considered as a "persistent" course of conduct violative of the rules of the school board prohibiting absences without leave except for sickness, within the contemplation of a statute which makes persistent violation of such rules of the school board ground for dismissal of a permanent teacher.⁸⁷

The phrase "other good and just cause" within the Teachers' Tenure Law authorizing cancellation of teachers' contracts for enumerated causes and for "other good and just cause" has been held to include "lack of cooperation" and any cause which bears reasonable relation to a teacher's fitness or capacity to discharge duties of his position.⁸⁷

"Good cause" within the statute authorizing dismissal of a teacher employed at discretion includes any ground put forward by the school committee in good faith which is not arbitrary, irrational, unreasonable or irrelevant to the committee's task of building up and maintaining an efficient school system, and the cause assigned is sufficient if at least fairly debateable and asserted honestly and not as subterfuge.⁸⁸

School authorities have been held vested with discretion to dismiss a permanent tenure teacher for cause other than those specifically enumerated in statute, limited only by statutory provisions that additional causes must be good and just, and that dismissal may not be for personal or political reasons.⁸⁹

And so, a teacher's candidacy for public office was not a ground for cancellation of his contract as a permanent teacher, but a general rule applying to all teachers requiring any school employee who becomes a candidate for any elective political office to take a leave of absence

⁸⁵ Appeal of School Dist. of Bethlehem, 347 Pa. 418, 32 A. (2d) 565 (1943).

⁸⁶ Fresno City High School Dist. v. De Caristo, 92 P. (2d) 668 (1939).

⁸⁷ Stiver v. State ex. rel. Kent, 211 Ind. 380, 1 N. E. (2d) 1006 (1936).

⁸⁸ Rinaldo v. Dreyer, 294 Mass. 167, 1 N. E. (2d) 37 (1936).

⁸⁹ McQuaid v. State ex. rel. Sigler, 211 Ind. 595, 6 N. E. (2d) 547 (1937).

without pay was not an unreasonable exercise of the school board's statutory powers warranting judicial interference.⁴⁰

For there to be a dismissal or removal of tenure teachers, there must be some cause, as it has been ruled that boards of education have power to dismiss teachers from employment for cause only,⁴¹ and the term "cause" in the statute authorizing dismissal of school teachers and superintendents for cause meant a cause sufficient in law.⁴²

With regard to superintendents, it has been held that the board of school trustees could upon hearing and trial properly cancel the contract of a city superintendent of schools, who was a permanent teacher serving under an indefinite contract, for insubordination and refusal to obey directions of the school board after giving him written notice of the charges against him and giving him an opportunity to appear at a hearing.⁴

Where, after transfer of a tenure teacher from the position of school superintendent to the principalship of a school, he declined to accept the principalship and brought an action to enjoin the board of school trustees from transferring him, and there was also evidence that he had counseled and abetted strife in the school, had shown partiality in permitting a teacher to teach without a license, had lowered other teachers' success grades because they were not friendly to him, and had sought to have a teacher make a payment to secure a position, the board was justified in holding him guilty of insubordination.¹¹

In relation to married women teachers, the Massachusetts rule of the school committee that marriage on the part of a permanent woman teacher should operate as an automatic resignation, that no married woman should thereafter be elected as a permanent teacher, and that no married woman already in the service shall thereafter be employed as a permanent teacher, unless she proves to the satisfaction of the school committee that she is living apart from her husband and receiving no support from him, or that her husband is physically or mentally disabled, so that he is unable to provide for her support, has been held to be within the policy-making power of the school committee, and is not unconstitutional on the ground of discrimination.⁴³

But in Indiana, a school board's rule that a woman teacher's marriage automatically terminates her service has been held unreasonable, so that disobedience thereof was not "insubordination" justifying can-

⁴⁰ *School City of E. Chicago v. Sigler*, 219 Ind. 9, 36 N. E. (2d) 760 (1941).

⁴¹ *Hartman v. Board of Ed. of Westville Tp. H. S. Dist. No. 220*, 356 Ill. 577, 191 N. E. 279 (1934).

⁴² *Graves v. School Committee of Wellesley*, 299 Mass. 80, 12 N. E. (2d) 176 (1937).

⁴³ *Houghton v. School Committee of Somerville*, 306 Mass. 542, 28 N. E. (2d) 1001 (1940).

cellation of a woman teacher's contract.⁴⁴ However, marriage was a "good and just cause" for the cancellation of a tenure teacher's contract, where the contract was made with specific reference to, and with full knowledge of, the rule or policy adopted in good faith against the retention of a married woman teacher.³⁹ That a teacher did not disclose to the school board her recent marriage, and signed a teaching contract by her maiden name, held not "insubordination," and justifying the contract under the statute.⁴⁵

In Pennsylvania, a teacher's violation of the school board rule forbidding female teachers to marry would not be a ground for the termination of a teacher's contract under the Teacher Tenure Act, since the board was not empowered to make such a rule.⁴⁶

But a teacher who has not completed her probationary period may be lawfully dismissed, although the reason therefor is a policy of the school board not to employ married women as teachers.⁴⁷

In addition to the enumerated causes for which a tenure teacher may be dismissed there exist generally under the tenure laws other grounds for the removal of a teacher which do not relate in any way to the ability or character of the teacher, but rather to the economic conditions and educational methods of the district. (The provisions for notice or hearing do not generally apply to this type of situations.)

So, where the board was empowered to make a reduction in the number of teachers in the interest of economy, it was held that a teacher who had been employed under a general contract to teach in the public schools, and had by service of more than three years come under the protection of the statute providing for indefinite tenure, could not be dismissed for reasons of economy, while other teachers not protected by the tenure statute, any of whose places the tenure teacher was competent to fill, were retained in employment, despite the fact that the prosecutrix had been detailed to teach a special class which was later merged with the general group of pupils. Discussing the rights of the tenure teacher, the court said: "She has the same standing as the other teachers under similar general contracts, with the added advantage of indefinite tenure arising from three years of service, as against those who have not served that length of time. Granting that, apart from statute, a school board may in the interest of economy reduce the number of teachers, the protection afforded by the statute would be little more than a gesture if such board were held entitled to make that reduction by selecting for discharge teachers exempt by law therefrom, and retaining the nonexempt. If such reduction is to be made at all, and a place remains which the exempt teacher is qualified

⁴⁴ *Kostanzer v. State ex. rel. Ramsey*, 205 Ind. 536, 187 N. E. 337 (1933).

⁴⁵ *McKay v. State ex. rel. Young*, 212 Ind. 338, 7 N. E. (2d) 954 (1937).

⁴⁶ *Goff v. School Dist. of Borough of Shenandoah*, 154 Pa. Sup. Ct. 245, 35 A. (2d) 902 (1944).

⁴⁷ *State ex. rel. Schroeder v. School Directors*, 225 Wisc. 444, 274 N. W. 301 (1937).

to fill, such teacher is entitled to that place as against the retention of a teacher not protected by the statute."⁴⁸

Where non-tenure teachers were discharged in compliance with a court order requiring reappointment of tenure teachers, but were retained in their positions and formally re-employed as special substitute teachers, it was held that madamus would lie to compel the reinstatement of additional tenure teachers to replace the substitute teachers regularly employed, by whatever title they were designated, the court declaring that the action of the board was a mere "subterfuge" to avoid the effect of the Tenure Act.⁴⁹

The provision of the Teachers' Tenure Act of Pennsylvania, for termination of a teacher's tenure contract upon a natural decrease in the number of students refers generally to enrollment in a course, school, or district; and when there is a decrease of students in a course due to the establishment of another department, such a decrease is one due to natural causes, and if a teacher is thereby rendered unnecessary to the proper operation of the school, his contract may be terminated.⁵⁰ And when an entire department is abolished for valid reasons, which may include financial ones, in the interest of a more efficient system, the teachers in that department can be dismissed, although they have the status of tenure teachers, under the Tenure Act.⁵¹ Also, when a teacher contracts under the Tenure Act of Pennsylvania, the contract is subject to the provisions that his contract be terminated if the district school in which he teaches is joined with those of another district; and such provision is a condition subsequent, which, when fulfilled, extinguishes the relation between the teacher and the board and terminates the contract.⁵²

The Chicago Board of Education may transfer a principal from elementary to high schools, or vice versa, in conformity with its rules and statutes as the best interest of the respective schools may require, and the transfer of a high school principal to an elementary school principalship without cause was not a "removal" contrary to the statute.⁵³ A similar rule has been laid down by the court in Indiana,¹¹ and in West Virginia.⁵⁴

⁴⁸ *Sedel v. Board of Education*, 110 N. J. L. 31, 164 A. 901 (1933), (affirmed in 168 A. 297) (1933).

⁴⁹ *Downs v. Board of Education*, 12 N. J. Misc. 345, 181 A. 688 (1935).

⁵⁰ *Jones v. Holes*, 6 A. (2d) 102 (1939) (Pa.).

⁵¹ *Ehret v. Kylpmont School Dist.*, 333 Pa. 518, 5 A. (2d) 188 (1939).

⁵² *Walker's Appeal*, 2 A. (2d) 770 (1938) (Pa.).

⁵³ *People ex. rel. McCoy v. McCahey*, 296 Ill. App. 310, 15 N. E. (2d) 988 (1938).

⁵⁴ See note 11.

⁵⁵ *Rowan v. Board of Education of Logan Co.*, 125 W. Va. 406, 24 S. E. (2d) 583 (1943).

But in Montana, the board of trustees of a school district has no power to transfer a teacher from a higher to a lower grade, since assigning a teacher to a lower grade is a "removal" to the same extent that a dismissal would be.⁵⁰ However, under the Montana statute, where one of the conditions of employment was that the board reserved the right to close the school for lack of attendance, as they were authorized to do under the express terms of the statute, the trustees had the right to close the school and thus avoid the contract of employment for the current year.^{55a}

In Ohio, it has been held that a county board of education, after having created the position of county superintendent of schools, could thereafter abolish the position and terminate the contract of the one holding the position upon showing that such an action was motivated by a reduced school enrollment with consequent reduction of school revenues and by necessary requirements of economy, and was not required to continue the position indefinitely.⁵⁶

The Minnesota court has stated that the Teachers' Tenure Law was not intended as a guaranty of continuous employment during health and good behavior regardless of whether the number of pupils or the availability of positions justifies the continued retention of teachers.⁵⁷

In conclusion, it is stated that under established legislative policy, school committees and boards are given the general management of the public schools including the election and dismissal or removal of teachers and such committees and boards have administrative control of the school systems and are responsible for the proper functioning of the schools.⁵⁸ The school directors can exercise their statutory power to dismiss a teacher for cause, notwithstanding that the teacher may have been employed under contract for a definite period of time.⁵⁹ A teacher with a tenure contract under the Teachers' Tenure Act may not be dismissed by the school board without the mention of the statutory ground for terminating the contract, and the board could not characterize the move as being economical, efficient, and productive having that be sufficient grounds for such dismissal, for it would amount to saying that whenever the board deemed a teacher unnecessary for any reason whatever the contract may be successfully terminated.²⁰ Certainly that arbitrary action would not conform with the purposes

^{55a} *Moses v. School Dist.*, 107 Mont. 300, 86 P. (2d) 407 (1938).

⁵⁶ *State ex. rel. Frank v. Meigs Co. Board of Ed.*, 140 Ohio 381, 44 N. E. (2d) 455 (1942).

⁵⁷ *State ex. rel. Ging v. Board of Ed. of City of Duluth*, 313 Minn. 550, 7 N. W. (2d) 544 (1942).

⁵⁸ *Davis v. School Committee of Somerville*, 307 Mass. 354, 30 N. E. (2d) 401 (1940).

⁵⁹ *Cadman v. School Directors of School Dist. No. 14, Winnebago Co.*, 288 Ill. App. 627, 6 N. E. (2d) 246 (1937).

and motives of the teachers' tenure laws. The causes set forth in those laws which authorize the preferment of charges for the discharge or removal of a tenure teacher are exclusive of all other causes, and the school board may not undertake to add to those causes a cause of their own creation.⁶⁰

Alfred E. Kuenzli.

ENFORCEMENT OF JUDGMENT LIENS IN INDIANA.—The general procedure for levying executions in Indiana is regulated in detail by statute, so that statutory sources must be thoroughly consulted when any question of execution arises.

Sec. 2-3601 Burns' Ind. Stat. provides in substance that when a writ of execution issues to a sheriff from a court of competent jurisdiction, he must levy upon the judgment-debtor's property and make at least one offer to sell the property levied upon within sixty days. All property of the defendant is *prima facie* liable to execution; and so remains until some claim for exemption is interposed.¹ In order to constitute a levy on personalty within the contemplation of the statute, possession thereof must be taken by the sheriff.² Leaving property with the judgment debtor is an abandonment of the levy.³ It should be noted that proceedings commenced to review the judgment on which an execution is issued does not prevent a levy and sale under this section.⁴

An injunction will lie to prevent illegal sales of property under an execution.⁵ And if the property fails to sell for enough to pay the amount due, the judgment will not be satisfied.⁶

In Sec. 2-3602 Burns' Ind. Stat., the execution debtor is given the right to designate what property he wishes the levy to be made on. Where a question of suretyship is involved, the property of the principal is by law to be sold first, unless the surety shall direct otherwise.⁷ Current coin and lawful money of the United States are a proper subject of a levy.⁸ Where this is done, of course, the money is merely turned over to the judgment creditor, as a judicial sale would be obviously

⁶⁰ Knoxville v. State ex. rel. Hayward, 133 S. W. (2d) 465 (1939) (Tenn.).

¹ Terrell v. State ex rel Grubbs, 66 Ind. 570 (1879). Stark v. Lamb, 167 Ind. 642, 78 N. E. 668 (1908).

² McPherson v. Beckner, 132 Ind. 371, 31 N. E. 950 (1892).

³ Brown v. Loesch, 3 Ind. App. 145, 29 N. E. 450 (1891).

⁴ State ex rel Holiday v. King, 30 Ind. App. 398, 66 N. E. 85 (1902).

⁵ Sec. 2-3605, Burns' Ind. Stat. Ann. (1933).

⁶ Dehority v. Paxon, 115 Ind. 124, 17 N. E. 259 (1888).

⁷ Sec. 2-3605, Burns' Ind. Stat. Ann. (1933).

⁸ Sec. 2-3606, Burns' Ind. Stat. Ann. (1933).

absurd. Sec. 2-3607 et seq. provide for the handling of bills, notes, drafts, and choses in action generally, and for their assignment by sheriff to purchasers at judicial sales. By virtue of another section, mortgaged chattels may be levied on and sold subject to the conditions of the mortgage.⁹

Another section of Title 2 defines the various interests in real property which may be reached in execution:¹⁰

"The following real estate shall be liable to all judgments and attachments, and to be sold on execution against the debtor owning the same, or for whose use the same is holden, viz: First. All lands of the judgment debtor, whether in possession, remainder or reversion. Second. Lands fraudulently conveyed with intent to delay or defraud creditors. Third. All rights of redeeming mortgaged lands; also, all lands held by virtue of any land-office certificate. Fourth. Lands or any estate or interest therein, held by any one in trust for or to the use of another. Fifth. All chattels real of the judgment debtor."

Life estates in lands may be sold on execution.¹¹ And in construing specification number five of this statute, the Indiana Supreme Court in *Kohring v. Bowman* held that a mechanics' lien may attach to and be enforced against a leasehold interest in land with option to purchase, such leasehold interest being treated as an interest in land under this section.¹² Another statute provides that in all cases where the personal estate (personal property) of the debtor subject to execution is sufficient to satisfy the execution, the real estate shall be exempt from levy and sale until the personal estate is levied upon and sold, unless the debtor exercises his right of designation under Sec. 2-3602.¹³

No property can be sold on execution in Indiana without an appraisalment thereof. Unless waived by the judgment debtor, he has the legal right to insist that his property sold on execution bring at least two-thirds of the appraised cash value, exclusive of liens and encumbrances.¹⁴ Sec. 2-3704 outlines the mechanics of selecting the appraisers. This is a matter of detailed statutory regulation and need not be fully explored here.

An execution defendant may retain possession of personal property up to the time of the sale by delivering to the sheriff a written undertaking, payable to the execution plaintiff, with sufficient surety to be approved by the sheriff, to the effect that the property will be delivered to the sheriff at the time and place of the proposed sale.¹⁵ Such re-

⁹ Sec. 2-3612, Burns' Ind. Stat. Ann. (1933).

¹⁰ Sec. 2-3613, Burns' Ind. Stat. Ann. (1933).

¹¹ Reed v. Ward, 51 Ind. 215 (1875).

¹² 194 Ind. 433, 142 N. E. 117 (1924).

¹³ Burns' Ind. Stat. Ann., Sec. 2-3614.

¹⁴ Burns' Ind. Stat. Ann., Sec. 2-3701. See also *Stockwell v. Byrne*, 22 Ind. 6 (1864).

¹⁵ Burns' Ind. Stat. Ann., Sec. 2-3801.

tention by the debtor is conditioned, however, upon proper appraisal made under the supervision of the sheriff.¹⁶ Where the debtor breaks the conditions of the undertaking, the judgment plaintiff may bring suit thereon.¹⁷ If a surety on a delivery bond is compelled to pay the debt of the execution creditor, he is subrogated to the rights of such creditor and has a lien on the property levied on.

Previous notice of the time and place of the sale of personal property levied upon must be given for ten days successively by posting written notices in at least three of the most conspicuous places in the township where the sale is to be made.¹⁸ The sale is public, and the bidding is competitive.

Where realty is being sold on execution, the procedure appears to be quite different. The time and place of making the sale must be advertised by the sheriff for at least twenty days successively next before the day of the sale, much in the manner of advertising the judicial sale of personal property, except that the period of advertisement is longer. Also, the sale must be advertised for three weeks successively in a newspaper of general circulation, printed in the English language, and published in the county where the real estate is situated, where such a newspaper is available.¹⁹ Real estate is sold at public auction "at the door of the court-house of the county in which the same is situated; and if the estate shall consist of several lots, tracts and parcels, each shall be offered separately; and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same is not susceptible of division * * * * " ²⁰

After realty is sold, as described in the foregoing paragraph, it becomes the duty of the sheriff to issue to the purchaser a *certificate of purchase* in lieu of a sheriff's deed. Execution by the sheriff of a deed would, of course, be impossible because of the redemption features of the law which will be explained shortly.

Upon the issuance of the certificate of purchase by the sheriff, the law requires that the clerk shall immediately record the certificate in the *Lis Pendens Record*. The purpose of such recordation is to give constructive notice to the public of the fact that the land has been judicially sold subject to redemption. Other provisions of this section relate to the assignability and indorsement of these certificates, and provides for their devolution by way of testate or intestate succession.²¹ A defective title does not release the bidder from payment of the pur-

¹⁶ Burns' Ind. Stat. Ann., Sec. 2-3802.

¹⁷ Burns' Ind. Stat. Ann., Sec. 2-3805.

¹⁸ Burns' Ind. Stat. Ann., Sec. 2-3901.

¹⁹ Burns' Ind. Stat. Ann., Sec. 2-3903.

²⁰ Burns' Ind. Stat. Ann., Sec. 2-3904.

²¹ Burns' Ind. Stat. Ann., Sec. 2-3909.

chase price; in *Weaver v. Guyer* the Supreme Court of Indiana said that there is no warranty in judicial sales, the rule of caveat emptor applying.²²

If real property is sold on execution for more than will satisfy the execution, including interest and costs, the sheriff is directed by law to pay the excess over to the execution debtor, unless he has been notified of the existence of subsisting liens.²³

In the event of a failure of title, the purchase-money is not recoverable from the execution creditor.²⁴ But by statute the purchaser in such a case becomes subrogated to the rights of the creditor against the debtor, to the extent of the money paid and applied to the debtor's benefit; and where the judgment has been entered satisfied, in whole or in part by reason of the sale, the purchaser, upon notice to the parties to the proceeding, may have the entry of satisfaction vacated, and his lien for the full amount automatically attaches upon the property.²⁵

Sec. 2-3919 provides in substance that the owner of realty sold on execution against him shall be entitled to the possession of the same for one additional year. At any time during this year of grace, the execution defendant can *redeem* the property by paying to the clerk of the court the amount of the purchase-money, and interest at the rate of eight per cent per annum.²⁶ Redemption may be had by owner, his legal representative, heirs or devisees. Immediately upon such redemption being made, the clerk shall make another entry in the Lis Pendens Record indicating the extent of the redemption and by whom redeemed. The trustee in bankruptcy of the debtor may redeem lands sold.²⁷

The nature and extent of the sheriff's duties and liabilities on his official bond are set out at length in Secs. 2-4101 et seq. There is no need that they be recited here. Other sections of Title 2 deal with the so-called capias writs, proceedings supplementary to execution, and the garnishee law, none of which bear directly upon the subject of this paper.

David S. Landis.

²² 59 Ind. 195 (1877).

²³ Burns' Ind. Stat. Ann., Sec. 2-3916.

²⁴ *Lewark v. Carter*, 117 Ind. 206, 20 N. E. 119 (1888).

²⁵ Burns' Ind. Stat. Ann., Sec. 2-3918.

²⁶ Burns' Ind. Stat. Ann. Sec. 2-4001.

²⁷ *Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754 (1887).

MUNICIPAL ADVERTISING — IS ITS PURPOSE PRIVATE OR PUBLIC.— The modern municipality is a highly complex organization confronted with many problems which were not thought of, or at least not to as serious a degree, a century ago. A city of today wants to grow, become more efficient, obtain more industry, and more transportation facilities. As a result, some municipalities have turned to advertising as one means of encouraging people to immigrate to their city. In many instances, such expenses are incurred by the Chamber of Commerce, but there are occasions where the city has attempted to levy a tax to cover the cost of such advertising. It is at this point where the controversy arises. Is allocation of municipal funds for such purposes a private or public interest?

If it is found that the use of public funds for municipal advertising is a private purpose, no legislature can authorize nor compel such use of the funds. "A state legislature can neither authorize nor compel a municipal corporation to expend any of its funds for a private purpose, and consequently, since every undertaking of a municipality does or may require the expenditure of money, a municipal corporation cannot, even with express legislative sanction, embark on any private enterprise, or assume any function which is not in a legal sense public."¹ They go on to say, "It is generally conceded that a municipal corporation has no implied power to expend its funds for providing refreshments, entertainments, and dinners for delegates to a convention; or for entertaining at a supper or a ball; or indeed for the purpose of extending hospitality or furnishing social pleasures either to citizens or invited guests."² The article goes on to say that in the commemoration of historical events, money can oftentimes be expended, but even here, there must be an express grant of power.

In *Loeb v. City of Jacksonville*,³ a taxpayer attempted to have a certain item on the budget declared illegal. The municipality had included in its budget several thousand dollars for advertising purposes. The plaintiff contended that such use of the money was not for a public purpose. The city contended that it had the power to levy a tax for the advertising of the city, its properties, and, generally, as a place to live or set up business. The lower court upheld the defendant city's contention on the grounds that the city itself was in business in selling electricity, water, dockage, amusement, and gas, and that therefore, they should be permitted to advertise these. The decision of the lower court was reversed upon appeal and the ordinance was held void as the court said: " * * * the function of government is the enactment and enforcement of rules of conduct for the people within its territories

¹ 19 R. C. L., title, Mun. Corp. Para. 19.

² 19 R. C. L., title, Mun. Corp. Para. 99.

³ *J. B. Loeb, Appt. v. City of Jacksonville et al.*, 101 Fl. 429, 134 So. 205, 79 A. L. R. 459 (1931).

in order to secure opportunities for the enjoyment of the so-called inalienable rights, which include the pursuit of happiness by the people within the territory, and not to induce other people from other states and territories to migrate to the territory to enjoy them."

The reverse has been held true in Texas. Here, the municipality's right to advertise has been upheld. The court said that wide powers had been granted by a constitutional amendment known as the "Home Rule Amendment." The charter of the city of San Antonio permits ordinances which are necessary " * * * for the order and good government of the city or for the trade, commerce, and health thereof." The charter also gave the city the privilege of using special funds for this purpose. The court states, "We think the constitution and the laws of Texas do not inhibit the taxation assailed; and, under the provisions of the charter, we think that sufficient authority is given for a levy and collection of the advertising tax. It is clear that the taxation is for a public purpose and not a private purpose. If trade and commerce are increased by advertising, everyone would, to some extent, receive benefits from it." ⁴

In a California case, the municipal charter permitted such use of city funds. In *Sacramento Chamber of Commerce v. Stephens*, the plaintiff attempted to force by mandamus the defendant treasurer of Sacramento to honor a warrant for \$235 in payment of a claim for the printing of a pamphlet called "The Key To Sacramento." The plaintiff had an agreement with the city to advertise the city and charge only the actual expense to the city. The city charter authorized allocation of special funds " * * * to aid or carry on the work of inducing immigration to the city, to exhibit manufactured products of the city, and generally for the purposes of advertising the city." To this the court merely added, "We are of the view that, by common consent, it is now generally held to be well within a public purpose for any given locality to expend public funds, within due limitations, for advertising and otherwise calling attention to its natural advantages, its resources, its enterprises, its adaptability for industrial sites, with the object of increasing its trade and commerce and of encouraging people to settle in that particular community." ⁵

In New York, there must be a public interest. The case of *Lewis v. LaGuardia* was an action by a taxpayer of the city of New York for an injunction to restrain the defendants from allowing broadcasts by the Holy Name Societies of city departments over station WNYC, a municipally owned radio station. The Holy Name Societies are organizations of Catholic city employees. They hold communion

⁴ *San Antonio v. Paul Anderson Co.*, Tex. Civ. Appeals, 41 S. W. 2d 108 (1931).

⁵ *Sacramento Chamber of Commerce v. Stephens*, 212 Cal. 607, 299 P. 728 (1931).

breakfasts in local hotels and have distinguished speakers for their broadcasts. The St. George's Society, is a similiar organization for Protestants, and they also broadcast their programs. For that reason, there seems to have been no discrimination as to religion. The municipal authorities claim that such broadcasts are of public interest and are not for the advancement of a particular religious faith. The law permitting the broadcasts stated that programs may be broadcast, " * * * which are deemed appropriate and necessary for the public interest and advantage," and among the specific examples were " * * * entertainments and functions of civic bodies and organizations such as * * * associations and societies of members and employees of any of the city departments * * *." The judge held, "There is nothing in the evidence before me that at past Communion Breakfasts there have been broadcast matters which may be said to constitute sectarian religious propaganda, of no interest to the general public and not within the scope of matters properly the subject of broadcasts by the Municipal Broadcasting Station. The speeches are educational and cultural in character. That they may also stress the importance of religious ideals is no reason for prohibiting their broadcast over this station." ⁶

If however, an advertising expense arises within a city, and the city has already paid the expense prior to the institution of an action prohibiting payment, the New Jersey court said, "We have carefully examined the other matters argued and find no reason to review the same since the advertising has been paid for * * *." ⁷

In summing up, the general rule has been stated as " * * * it may, perhaps, be stated as a rule that, in absence of legislative authority, found either in a city charter or in a special statute, a municipality has no power to make expenditures for advertising or other forms of publicity." ⁸

Roger D. Gustafson.

NATIONAL SERVICE LIFE INSURANCE.—With the mobilization of over ten million fighting men the federal government became not only the possessor of the strongest fighting force in the history of warfare but it also became the largest life insurance company in the world. For every man or woman, enlisted or commissioned, serving in the armed forces of the United States is eligible for life insurance under federal law.¹ The insurance is provided at unusually low premiums and over

⁶ *Lewis v. LaGuardia, mayor et al.*, 14 N. Y. S. (2d) 991 (1939).

⁷ *In Re Carrick*, 22 A. (2d) 561, 127 N. J. L. 316 (1941).

⁸ 79 A. L. R. 467 annotation.

¹ 38 U. S. C. A. 511.

ninety per cent of all military personnel have availed themselves of the act. The act, known as the National Service Life Insurance Act or perhaps commonly known as War Risk Insurance Act, provides not only for benefits upon the death of the insured but also upon the occurrence of total permanent disability.

A few important points of the National Service Life Insurance Plan or the 5 year Level Premium Term Insurance are:

1. It may be continued in force for 5 years from the date it went into effect.
2. It is called "term" Insurance because it remains in effect for a limited period or term-5 years.
3. By "level Premium" is meant that the premium remains the same or "level" for the full 5 years, whether you are in or out of service.
4. It does not build up a savings fund and has no cash or loan value.

This form of Insurance is open to all those persons in active service in the land or naval forces. Those who are entitled to apply for National Service Life Insurance include: (1) Commissioned officers; (2) Warrant officers; (3) enlisted personnel; (4) members of the Army Nurse Corps; and (5) members of the Navy Nurse Corps. To be eligible for this insurance such persons must be serving under orders to active duty not limited to a period of less than 31 days.

This insurance will be granted to any one person in any multiple of \$500, but not less than \$1,000 or more than \$10,000 provided that no person may carry at any one time a combined amount of National Service Life Insurance and U. S. Government Life Insurance.

In the case of the death of the policyholder, the policy will be paid out to his beneficiary in the form of monthly income. Two factors will determine the amount of monthly income: (1) the age of the beneficiary at the time of death; and (2) the amount of insurance owned. If the beneficiary is under the age of 30 at the time of the death of the policyholder, a monthly payment of \$5.51 per thousand, or \$55.10 on a \$10,000 policy, will be for 20 years; or, such beneficiary may elect to receive monthly payments which will continue for his lifetime. If, however, the beneficiary is age 30 or over, he must receive monthly payments on a lifetime basis. At the present time no lump sum settlement can be made. Such a settlement may be provided by legislation after the war ends.

National Service Life Insurance has a valuable disability clause for which no extra premium is charged. It provides that if the policyholder should suffer a disability prior to reaching age 60, which lasts for six consecutive months or longer, he may notify the Veterans' Administration of the circumstances, and if the claim is approved, the government will waive all premium payments as long as he is so dis-

abled. However the policyholder must continue to pay the premiums until the claim is approved, but when approved, the premiums paid from the commencement of the disability will be refunded. The government insurance has no restrictions as to occupation, residence, travel, or military service.

The present insurance may be changed over or "converted" to one of three permanent plans of insurance or to any combination of them without the necessity of having a physical examination. This change over may be accomplished anytime after the policyholder has had his 5 year term policy for one year, and prior to the end of the 5th year. It may be converted to the Ordinary Life Plan, 20-Year Pay Life, or 30-Year Pay Life, or to any combination of these three plans. The cheapest plan, Ordinary life, will cost approximately twice the present premium, 30-Year Pay Life, about $2\frac{1}{2}$ times, and the 20-Year Pay Life about three times the present premium. The present policy may be converted merely by requesting the necessary form from the Veterans' Administration. This form must be filled out and forwarded to the Veterans' Administration accompanied by the correct premium for the new plan of insurance selected. The three permanent plans of insurance to which the policyholder may convert are mathematically equivalent — one is no better than another. For each there will be some particular one of these three plans that will be best suited to a veteran's particular needs and income. A qualified and reputable commercial life insurance agent may be of help in making the best selection. In this regard, it is important to know that no commercial company can offer similar plans of insurance at as low a rate as the government insurance policy. Because of this fact, all commercial companies strongly recommend the keeping of government insurance and plan to convert as much of it as the policyholder can afford.

The premium rate is the net rate based on the American experience table of mortality and the assumption that the funds will be invested and the interest will be earned at the rate of 3 per cent per annum. It is a guaranteed level premium, computed for payment on a monthly basis, but may be paid monthly, quarterly, semi-annually or annually. If the premium is paid on other than a monthly basis, a discount at the rate of 3 per cent per annum is allowed on the monthly premiums paid in advance. In the event of maturity by death, the discounted value at 3 per cent per annum of the premiums paid in advance beyond the current month shall be paid to the beneficiary.

The provision covering total permanent disability seems certain to take on added importance because of the ever growing number of wounded men from all theatres of operations who are released daily from military hospitals and because of the general magnitude of the present conflict. Courts in adjudicating future cases will unquestionably be guided by decisions of previous litigation arising out of the first World War and the early act and it is in these cases that we chiefly

shall find the trend, the established rules, hazy though they may be, and the basis of decisions of cases yet to come.

The words "total permanent disability" are by their very subjective nature incapable of an adequate definition. For this reason no attempt is made in the act to define the term. The only provision dealing with a definition is one that is superimposed upon the act and one that does not by its insertion prejudice any other cause of disability. This particular provision states that the permanent loss of the use of both feet, of both hands, or of both legs, or of any two appendages or the loss of hearing of both ears or the organic loss of speech shall be considered total permanent disability for purposes of the statute.²

Courts have long decided that in the determination of the total permanent disability of a petitioner the individual facts surrounding each case must be the controlling factors and because of the intrinsically subjective nature of the term, no definite standards can be relied upon in such cases. The courts have said that the terms of the act, particularly the one dealing with total permanent disability, must be interpreted in a reasonable sense for in one case we find the court saying: "Total permanent disability as used in the act must be taken in the reasonable and practical sense, relative to the status of the beneficiary, and to be determined by circumstances of his particular case."³

It is clear from the holdings of many cases that the insurance benefits do not extend to either total temporary or partial permanent disability but only to total permanent disability. And it is equally certain total permanent disability does not mean the absolute incapacity to perform any work. A. L. R. states the rule to be that: "It is well settled that a disability does not cease to be total because of the insured's intermittent business activities, if without the exercise of ordinary care or prudence they are engaged in at the risk of substantially aggravating the ailment with which he is afflicted."⁴ Courts have followed the rule rather closely for in *Lumbra v. U. S.*, a leading case on the question, we find the Supreme Court of the United States saying: "It may be assumed that occasional work for short periods by one generally disabled by impairment of mind or body does not as a matter of law negative total permanent disability."⁵

Equally well settled is the fact that the inability to pursue a particular trade or profession or to perform the same kind of work that had been done before the war is not total permanent disability within the meaning of the statute. In the *Lumbra* (supra) case we find the court stating: "It cannot be said that injury or disease sufficient, merely to prevent one from again doing some work of the kind he had

² 38 U. S. C. A. No. 512c.

³ *Law v. U. S.*, 290 Fed. 972 (1923).

⁴ 73 A. L. R. 351 annotation.

⁵ 290 U. S. 551 (1933).

been accustomed to perform constitutes the disability meant by the act.”⁶

Perhaps the most practical rule to be gathered from the manifold adjudications on the problem is the rule that there must be such impairment or capacity as to render it impossible for the assured to follow continuously some substantially gainful occupation. If the element that precludes him from following a gainful occupation is mental as well as physical it is total permanent disability within the meaning of the act. This definite rule has been followed in many cases the entire case revolves itself into the single determination by the jury as to whether or not the claimant is able to follow continuously some substantially gainful occupation. If he is not able then he is totally permanently disabled. That a mental condition may be the causal factor in total permanent disability is well settled and *U. S. v. McPhee*⁷ is a leading case on this point.

The question as to when a total injury or disability is permanent seems to have been answered in the case of *U. S. v. Meserve* when the court, after repeating the rule as to following a gainful occupation as laid down in the *McPhee* case said: “ * * * and such disability is deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.”⁸

The origin or the cause of the disability is not relevant or material and it appears that even congenital conditions will not invalidate the disability benefits of the insurance if the disability occurs while the policy is in force. American Jurisprudence lays down the general rule, substantiated by a host of adjudicated cases to be: “A policy of war risk insurance covers any permanent total disability that occurs while the insurance is in force and the cause of the disability is not of importance. If the disability takes place while the insurance is in force, it is immaterial that it is due mainly to congenital defects, or that in origin it dates back before the service of the insured, as the disability benefits are not limited to disabilities due to war service.”⁹

Although the origin is not relevant it is incumbent upon the plaintiff-service man to prove that the disability existed before the insurance lapsed or in other words the plaintiff must prove that the disability was in existence at the time the policy lapsed. Equally clear it seems is the fact that the burden of proof to prove total permanent disability is upon the plaintiff. In *La March v. U. S.* we find the court saying: “ * * * but the burden was only on the plaintiff to prove total permanent disability, and that such disability arose during the life of the policy.”¹⁰ Courts generally, if not universally, seem to lend their as-

⁶ *Ibid.*

⁷ 31 Fed. (2) 243 (1929).

⁸ 44 Fed. (2) 540 (1930).

⁹ 29 American Jurisprudence 1565.

¹⁰ 28 Fed. (2) 828 (1928).

sistance to the service man in carrying this burden of proof for in the La March case we find the Supreme Court saying: "Mere inability on his part (the plaintiff's) to prove the exact time and place of his injury to his hip was not fatal to his case."¹¹ This seems to be the general attitude courts have assumed towards this element of procedure. Other courts have followed the conclusion that the evidence should always be construed more strongly in favor of the petitioning service man for in the Lumbra case we find: " * * * And, for its decision, we assume as established all the facts that the evidence supporting petitioner's claims reasonably tends to prove and that there should be drawn in his favor all the inferences fairly deducible from such facts."¹²

The importance of the total permanent disability element in the National Life Service Insurance Act is attested to by the host of cases arising out of the first World War. That it will assume even greater importance and proportions after this present conflict is ended seems inevitable. To find workable and consistent rules to aid in adjudicating future claims will not be too difficult if the courts keep within legal sight of the cases arising out of the first war and by so doing the tribunals when called upon to decide claims will do substantial justice both as to the claimants who, when called upon, responded to their nation's aid in a national emergency, and to the citizens generally who must bear the burden of the almost unbelievable costs of the insurance program through his taxes. And who, although wanting to give the returning veteran his full measure of benefits, appalls the vision of courts allowing veterans monetary compensation for surreptitious claims of total permanent disability.

Change of Beneficiaries Under the War Risk Insurance Act. The only case to come before the courts under the Federal National Service Insurance Act, construing the act in relation to an attempted change of beneficiary, *Bradley v. United States et al.*¹³ Eugene Morris, a flying officer in the United States Army, obtained a ten thousand dollar insurance policy on his life under the National Service Insurance Act. His mother was made beneficiary. Several months later he married, and shortly after the marriage he expressed his intention to make his wife, Anna Mae Morris, the beneficiary of the policy in the place of his mother. However he delayed, perhaps fearing the paper work, until he died in the course of his duty without having effectuated the change of beneficiary in the usual way.

The day before his demise, however, he filed a "Personal Report" with his commanding officer, in which he stated his desire that his wife be made beneficiary of his policy.

¹¹ Ibid.

¹² 290 U. S. 551 (1933).

¹³ 143 Fed. (2) 573 (1944).

Upon being apprised of Morris's death, the Veteran's Administration determined that the change was effectuated, and notified the wife that she would receive the payments. The mother objected, and alleged that an agreement existed between herself and her daughter-in-law, which purported to divide the proceeds of the policy in two, equally.

The trial court upheld the decision of the Veteran's Administration, saying that the change had been made.

In the Federal Court of Appeals it was decided that first there was no agreement between the mother and the wife. For one reason it was clear that he did not intend to make them both beneficiaries, and second any attempt to divide the proceeds constituted an assignment specifically prohibited by statute.¹⁴

454a "Payments of benefits due or to become due shall not be assignable, and such payments made to or on account of a beneficiary under any of the laws relating to veterans shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever. . . ."

Of course where the Veteran's Administration had received no notice of the change by the insured, in writing, or in the usual manner, the burden of proving such change will rest with the one claiming the change had been made.

Although the Veteran's Administration may waive requirements of the notice in writing for the change of beneficiary, it does not have the power to adjudicate the question of whether a valid change of beneficiary had been effected.

It was held that where the insured had manifested the desire and intent to change beneficiary, and had done everything within his power to accomplish that purpose, leaving only ministerial acts to be performed by the insurer, court of equity would deem as done that which ought to have been done, thereby giving effect to the intent of the insured. But in this case Lt. Morris did not do all in his power. He could have done the task in the regular way, and had many opportunities for so doing. So the court further held that the expressed intention of the insured to change his beneficiary, standing alone and unaccompanied by some affirmative act having for its purpose the effectuation of his intention, is insufficient to effect the change of beneficiary, and the court will not act where the insured has not first attempted to act for himself.

"In every case involving war risk insurance wherein the courts have recognized and decreed a change of beneficiary, the facts have amply shown not only an expressed intention, but positive and unequivocal acts on the part of the insured, designed to effectuate his intentions."

¹⁴ 38 U. S. C. A. 454a.

The plaintiff greatly relied on the "Confidential Report," but it was of no avail, because the Veteran's Administration, the insurer, was a complete stranger to it, and there was nothing to show that the purpose of it was to change the beneficiary. It was neither a notice nor a direction, but rather an expression of belief in a set of facts.

A side light to the case was the decision that an allowance of attorney's fees to be paid in a lump sum out of accrued payments was *unauthorized*, under the statute allowing reasonable fees for attorneys in war risk litigation, to be paid out of the payments allowed under the judgments at a rate not exceeding one tenth of the sum recovered.¹⁵

A strong dissent was registered in the case by Judge Phillips, who said in his opinion:

"In the report, referred to in the majority opinion, (The Confidential Report), the insured stated that he had the policy of insurance and that the beneficiary thereunder was Anne M. Bradley, his wife, and that the policy was in her possession. That he believed that by making such statement in the report and by delivering the policy to his wife he had effected the change of beneficiary is manifest by the fact that immediately thereafter he told his wife he had 'taken care of the insurance at the Army Base.'"

He claimed that in war risk insurance cases involving changes in beneficiary, courts should brush aside legal technicalities in an effort to effectuate the manifest intention of the insured.

From *Johnson v. White*,¹⁶ this passage was quoted in the dissenting opinion:

"The intention, desire and purpose of the soldier should, if it can reasonably be done, be given effect by the courts, and substance, rather than form should be the basis of the decisions of courts of equity. The clearly expressed intention and purpose of the deceased to have his wife named as the beneficiary in this insurance should control, and should not be thwarted by the fact that all the formalities for making their purpose effective may not have been complied with."

Francis J. Paulson.

Harold Berliner.

Thomas Bremer.

¹⁵ 38 U. S. C. A. 551.

¹⁶ 39 Fed. (2d) 793 (1930).

SOLICITATION TO CRIME.—The purpose of this paper is to cover some of the cases dealing with the question of solicitation to commit a crime as a substantive common law offense. *Corpus Juris*¹ holds that "although it has been maintained that a mere solicitation to commit is not indictable, except in a few cases, by the weight of authority it is an indictable offense at common law to solicit another to commit any crime amounting to a felony, although the solicitation is of no effect and the crime is not in fact committed." Thus it has been held a crime to solicit larceny or embezzlement, arson, murder, sodomy or adultery is a felony, or to utter counterfeit money or forged bills. One who solicits another to commit a felony is guilty of a misdemeanor only, if the felony is not committed. If the felony is committed, he is guilty as accessory before the fact, if absent, and as principal in the second degree, if present, at the time of its commission.

The courts are well agreed that one inciting or soliciting another to commit a crime which, either by the common law or by statute, is a felony, commits a substantive crime recognized and punished by the common law. In *State v. Schleifer*² it was held as certainty of what is or is not a crime is essential to the safety of the individual, a solicitation to commit a crime should be held a crime in every instance where an attempt to commit the same offense would be a crime, stating that such rule is practicable, definite and understandable and is just.

An early Nevada case³ held that the solicitation of an attorney to employ money corruptly to influence the jury is indictable under the common law, as a solicitation of another to commit the crime of embezzlement. The Canadian case of *Rex v. Cole*⁴ held that an incitement or solicitation to give false evidence, or to give particular evidence regardless of its truth or falsehood, is a misdemeanor at common law, punishable by fine and infamous corporal punishment.

In *State v. Sullivan*⁵ the court states: "In those jurisdictions where it prevails the common law is a standing declaration that whoever solicits the commission of a felony is guilty of a misdemeanor. It is not a declaration that whoever solicits the commission of an offense which is a felony at any given time shall be guilty of a misdemeanor, but it is a declaration that whoever solicits the commission of an act which is a felony at the time solicited is guilty of a misdemeanor. In Missouri the statute makes it a felony to bribe a legislative officer. If the defendant solicited that he be bribed, he solicited the commission of a felony and he, therefore, committed a common law misdemeanor."

¹ 16 *Corpus Juris* 117.

² 99 Conn. 432, 121 Atl. 805, 35 A. L. R. 835 (1923).

³ *State v. Sales* 2 Nev. 268 (1866).

⁴ 3 Ont. L. Rep. 389, 5 Can. Crim. Cas. 330, 22 Can. L. T. 132 (1921).

⁵ 110 Mo. App. 75, 84 S. W. 105 (1904).

In an early English case⁶ it was held that to solicit a servant to steal his master's goods was a misdemeanor, indictable and punishable at common law. Lord Kenyon, Ch.J., said in this case: "It would be a slander upon the law to suppose that an offense of such magnitude is not indictable. I am also clearly of the opinion that it is indictable at the quarter sessions, as falling in with that class of offenses which, being violations of the law of the land, have a tendency, as it is said, to a breach of the peace, and are, therefore, cognizable by that jurisdiction. Hence in an action for slander where the petition charged the defendant with saying of the plaintiff that he tried to hire a man to kill another, the court in *Lee v. Stanfelt*⁷ says that these words, alleged to have been spoken, charged the plaintiff with a misdemeanor, 'for the overt act of one attempting to hire another to commit murder, which is a felony, is a solicitation to commit a crime, constituting a misdemeanor at common law, punishable by fine or imprisonment or both.'"

A majority of the courts hold that the solicitation to the commission of an offense which neither by statute nor common law is a misdemeanor is a substantive common law crime, at least if the crime solicited is one tending to the disturbance of the peace or harmful to the public welfare. In *State v. Donovan*⁸ the court said: "Certainly to incite or solicit another to commit a felony or other aggravated crime, whether it be actually committed or not, is a misdemeanor at common law, and generally speaking solicitations which in any way attach public society or safety are indictable as distinct offenses."

More recent case of *Wiseman v. Commonwealth*⁹ the court held "that to invite or solicit one to commit crime, where no attempt is actually made to commit it, is indictable at common law as solicitation, at least, but when it proceeds to point of some overt act in commission of crime, it becomes attempt to commit crime, and is indictable as such." A federal decision on this point was handed down in *O'Malley v. United States*¹⁰ where the court said, "In criminal law, he who commands or procures a crime to be committed, is guilty of the crime, the act is his act, and he is present in purpose and design and acts by his agent."

In *State v. Beckwith*¹¹ the court held that "solicitation of a felony is an indictable offense at common law, whether or not the solicitation is effected or the felony is in fact committed." The court said in *In re Malicard*¹² that "solicitation to burn a boat insured against fire is a

⁶ In *Rex v. Higgins* (1801) 2 East. 5, 102 Eng. Rep. 269.

⁷ 171 Ky. 71, 186 S. W. 1196, (1916).

⁸ 5 Boyce (Del.) 40, 90 Atl. 220 (1914).

⁹ 143 Va. Rep. 631, 130 S. E. 249 (1925).

¹⁰ 128 F. (2d) 676 (1942).

¹¹ 135 Me. 423, 198 A. 739 (1938).

¹² 211 N. C. 684, 191 S. E. 730 (1937).

substantive common law offense." In *State v. Dumais*¹⁸ the court held in accord with *State v. Beckwith*, supra, and said that the solicitation of a felony is an indictable offense at common law. This same view was held also in *Commonwealth v. Wiswesser*.¹⁴

In *State v. Peterson*¹⁵ it was held that one who has procured, counseled or commanded another to commit a crime may withdraw before the act is done and avoid criminal responsibility by communicating the fact of his withdrawal to the party who is to commit the crime.

Thomas F. Bremer.

THE POWER OF THE COURT TO REDUCE OR INCREASE VERDICT WITHOUT GIVING THE PARTY AFFECTED THE OPTION TO SUBMIT TO A NEW TRIAL.—This problem, to be correctly understood, should be divided into three distinct parts. These are: (1) The power of the court to grant a *remittitur* without giving the plaintiff the option of a new trial, (2) the power of the court to grant an *additur* or *inccressitur* without giving the defendant the option of a new trial, and (3) the right of the court, without the defendant's consent, to deny a new trial upon the condition of *remittitur* by the plaintiff.

With respect to the first part of the tri-fold problem presented, it is well to note that it is a long standing practice for most courts to give the plaintiff the option of avoiding a new trial by consenting to a reduction of the verdict to an amount deemed proper by the court, when in its opinion a verdict for unliquidated damages is excessive.

However, the courts almost unanimously hold that unless the party in whose favor the verdict was rendered consents to the reduction that the court cannot reduce the verdict of the jury in an action for unliquidated damages.¹ An Ohio court, in an action for unliquidated damages, held,² that neither a trial court nor any reviewing court has the power to reduce the verdict of a jury, or to render judgment for a lesser amount, without the consent of the party in whose favor the verdict was rendered to such reduction. In the same decision the court went on to say that a reduction of a verdict is possible without the assent of the prevailing party, if, by undisputed testimony an error in the mathematical calculation of the damages is pointed out, thereby pointing out an exception to the general rule laid down.

¹⁸ 137 Maine 95, 15 Atl. (2d) 289 (1940).

¹⁴ — Pa. Sup. Ct. —, 3 Atl. (2d) 983 (1939).

¹⁵ 213 Minn. 56, 4 N. W. (2d) 826 (1942).

¹ *Knight v. Seney*, 290 Ill. 11, 124 N. E. 813 (1919). *Duke v. Fargo*, 172 App. Div. 746, 158 N. Y. Supp. 1009 (1916).

² *Chester Park Co. v. Schulte*, 120 Ohio St. 273, 166 N. E. 186 (1929).

The Wisconsin Supreme Court in the early 1920's held contra to the general rule in a long line of cases.³ The reason driving the Wisconsin Supreme court to take such a view was the desire to avoid reversals and the necessity of new trials. In looking through the history of Wisconsin litigation involving this point it is easy to see that this contrary holding to the general rule might be termed a fad of the Wisconsin Supreme Court which began with the *Karsteadt* decision in 1922 and which was modified in 1927. In the latter year they held that neither the trial court nor the appellate court has the power to order a new trial in all cases where damages assessed by the jury are either excessive or inadequate, in which the proper amount of the verdict has to be determined upon some basis which fairly takes the judgment of the jury for a guide of the independent judgment of the court. It soon followed this decision by holding⁵ that a case previously decided⁶ in which the verdict was reduced without making the acceptance of the reduction optional with the plaintiff, was modified in accordance with the decision on the *Campbell* case, (citation 4) so as to provide that a new trial would be granted unless the defendant would elect to allow entry of judgment for the amount which the court in the first *Rogers v. Lurge Furniture Co.* case had arbitrarily reduced the verdict, the reduced amount being considered the highest amount that an unprejudiced jury could reasonably find under the facts of the case.

The next step in this paper entails the consideration of the power of the court to increase verdicts without giving the defendant the option of a new trial. The general rule is aptly stated by an Ohio court. In a fairly recent decision of the Ohio Appellate tribunal⁷ the following view was held: that the trial court is without power arbitrarily to increase the verdict of the jury without the consent of the party prejudiced, as such action is violative of the constitutional guaranty of trial by jury. The Washington court has taken the view⁸ that in a personal injury suit it is error for the trial judge to enter judgment for the plaintiff in the amount of \$800, such action increasing the verdict of the jury by \$600, notwithstanding the fact that this was done in pursuance of an election made in behalf of the plaintiff to accept such an increased award rather than to have a new trial. This was held to be, in effect, a denial of the defendant's right to trial by jury.

³ *Karsteadt v. Phillip Gross Hardware & Supply Co.* 179 Wisc. 110, 190 N. W. 844 (1922). *Wasicek v. Carpenter Baking Co.*, 179 Wisc. 274, 191 N. W. 503 (1923). *Berghammer v. Meyer*, 189 Wisc. 197, 207 N. W. 289 (1926).

⁴ *Campbell v. Sutliff*, 193 Wisc 370, 214 N. W. 374 (1927).

⁵ *Rogers v. Lurge Furniture Co.*, 193 Wisc. 496, 215 N. W. 457 (1927).

⁶ *Rogers v. Lurge Furniture Co.*, 193 Wisc. 496, 211 N. W. 782 (1927).

⁷ *American Railway Exp. Co. v. Bender*, 20 Ohio App. 436, 152 N. E. 197 (1926).

⁸ *Sigol v. Kaplan*, 147 Wash. 269, 266 P. 154 (1928).

A different view is taken by the Virginia courts. The Supreme court of that state came to the following conclusion:⁹ In an action for damages for injury to a motor car sustained in a collision, the jury returned a verdict in the amount of \$250. The defendant conceded that \$350 was the amount suffered by the plaintiff. The court held that the jury's verdict fixed the question of liability and the defendant could not complain when the trial court set aside the jury's verdict and entered judgment for the plaintiff in the sum of \$350, although there was no evidence to fix the plaintiff's damages at \$250.

The Wisconsin court, along these lines, follows the majority rule. In a very recent decision the court expounded¹⁰ that in a case involving unliquidated damages, the amount found by the jury was deemed by the trial court as wholly inadequate. The court remarked that it seemed clear that the trial court might have granted a new trial unless the plaintiff consented to take the judgment for such increased amount as would represent the least amount that an unprejudiced jury would find.

The third point we have to take up is the right of the court, without the defendant's consent, to deny a new trial upon the condition of *remittitur* by plaintiff. A long line of cases from several jurisdictions have held that an excessive judgment may be cured by a voluntary *remittitur*, or that a new trial may be denied or a judgment affirmed on appeal on a condition of a *remittitur* against the defendant's objection.¹¹ In the Texas Appellate court it was held¹² that where a judgment of the trial court of the plaintiff in an action for alienation of affections was reversed because of prejudicial argument indulged in by the attorney for the plaintiff, and in deference to this holding, the plaintiff filed a substantial *remittitur* of a portion of the judgment, which *remittitur* the defendant refused to accept, it was held that the court was unable to give any effect to the same, for the reason that there was no rule of law by which it was able to determine the extent to which the improper argument affected the judgment. There are scores of cases too numerous to cite on this point all of which hold as does the Texas case.

In recapitulation, it is well to sum up the findings. They are: The courts, in almost all jurisdictions, are powerless to reduce the damages found by the jury without giving the plaintiff the option of a new trial. Secondly, the court is without power to arbitrarily increase the

⁹ Apperson-Lee Motor Co. v. Ring, 150 Va. 283, 143 S. E. 694 (1928).

¹⁰ Risch v. Lawhead, 211 Wisc. 270, 248 N. W. 127 (1933).

¹¹ West. Union Telegraph Co. v. North, 177 Ala. 319, 58 So. 299 (1912). St. Louis I. M. & S. R. Co v. Adams, 74 Ark. 326, 109 Am. St. Rep. 85, 86 S. W. 287 (1905). Sandy v. Lake St. Elev. R. Co., 235 Ill. 194, 85 N. E. 300, (1908). East Chicago v. Gilbert, 59 Ind. App. 631, 109 N. E. 404 (1915).

¹² Nicholson v. Nicholson, (Tex. Civ. App.), 22 S. W. (2d) 514 (1929).

verdict of the jury without the consent of the party prejudiced. Finally that the court may lower the verdict of the jury, if, in its opinion it appears excessive, but does not appear to have been influenced by passion or prejudice, with the assent¹⁸ of the plaintiff to the sum warranted by the evidence.

Norbert S. Wleklinski.

THE VALIDITY OF AUTOMOBILE PARKING ORDINANCES OR REGULATIONS.—This subject is of particular interest at this time due to the fact that a large number of cities are adopting parking-meter ordinances, and also because many disputes and perplexing problems have been raised in connection with their validity.

American Law Reports state that three major issues have arisen concerning the validity of parking-meter ordinances: (1) whether or not the installation of parking-meters in designated zones is a reasonable exercise of the police power conferred by the legislature on the municipality; (2) assuming that the first issue is answered in the affirmative, whether the meter charge imposed has some reasonable relation to the expense of installation, operation, and maintenance of the system and its general supervision, or whether the revenue resulting therefrom is so clearly in excess of that cost that it must be construed as an authorized revenue measure; and (3) whether or not the physical presence of parking meters in front of the premises of an abutting owner constitutes an unreasonable interference with his property rights, especially of his right of ingress and egress.¹

We shall first consider some of the cases holding parking-meter ordinances invalid. In *Birmingham v. Hood-McPherson Realty Co.*² it was held that a municipal ordinance establishing a parking-meter zone in a street which involves municipal revenue from the operation of the meters, is an unauthorized exercise of taxing powers.

Mr. Justice Thomas speaking for the court said, "In short, the city seeks to convert the said avenue into a parking lot, and charge the public a fee for the use of the same; while in the adjoining blocks to that in which complainant's property is located, no fee will be charged. The effect of charging the parking fee for the privilege of parking in the block upon which complainant's property is located will be to divert traffic and travel from said block to adjoining or neighboring blocks where no fee is charged, and where the public may have the

¹⁸ Deutsch & Balicer, How to Take an Appeal, Sec. 89, P. 201.

¹ 130 A. L. R. 316.

² 233 Ala. 352, 172 So. 114, 108 A. L. R. 1140 (1937).

privilege of using the streets of Birmingham without payment of a fee for the use or hire thereof."

In *M. E. Rhodes, Inc. et al., v. City of Raleigh*³ an ordinance providing for a charge for parking on the city's streets by depositing in a parking-meter a 5-cent coin for an hour's parking and a 1-cent coin for twelve minutes parking, with the parking-meters displaying signs indicating illegal parking when the paid for time limits were exceeded, was also held to be invalid on the following grounds: (1) state statutes did not confer upon the city the necessary authority to enact ordinances imposing a parking fee or a charge for parking space; (2) the validity of the parking-meter ordinances could hardly be sustained on the theory that the meter charge was a proper inspection fee, in as much as one who parks a motor vehicle is not, in that particular act, engaged in any business or enterprise demanding inspection; nor is he offering anything to the public the inspection of which is necessary to the public health, safety or welfare; (3) there was no substantial relation between the meter charge for parking space on the city's streets and the correction of the evil resulting from the occupation of a parking space by the same automobile for an unreasonable length of time to the detriment of the rights of others, so as to give the city authority under its statutory powers to regulate traffic; and (4) the meter charge was in reality an "excise tax" for the privilege of using parking space on the city's streets, and hence was a "revenue measure" which the city lacked authority to impose.

Next, in *Brodkey v. Sioux City*⁴ an ordinance establishing "parking-meter zones" was held to be unenforceable although they were not unconstitutional: (1) as constituting an improper delegation of authority; (2) as unreasonable; and (3) were not related to the provisions and purposes of statutes governing the city planning commission so as to be invalid because the city council did not obtain recommendation of the city planning commission before their enactment, and although the city had authority to interfere with public traffic by installing parking-meters on streets, so that such meters would not be deemed "nuisances" unlawfully obstructing the use of streets, nevertheless such ordinances, as they were enforced and administered, were not legitimate measures, but were unauthorized revenue-producing acts.

Mr. Justice Richards speaking for the court said, "Imposing parking charges for revenue-producing purposes being ultra vires, justification thereof if there be any in this case must be found in the measure having been regulatory in character, exacting amounts that no more than approximately reimburse the city's outlay for necessary supervision and enforcement. Expenditures of the city's funds for supervision and enforcement went no further than the payment of police-

³ 217 N. C. 627, 9 S. E. (2d) 389, 130 A. L. R. 311 (1940).

⁴ 291 N. W. 171 (1940).

men's salaries. No moneys went out of any of the city's funds for meters. Upon the amount expended for policemen's salaries being recovered out of the charges for parking, all funds of the city expended for supervising and enforcing the regulations were restored. The aggregate amount of these salaries for the three months the meters were operated preceding the trial was but a small fractional part of the total the public paid into the meters during the same period. The revenues produced were greatly in excess of the amounts that would reimburse the city. In these considerations is a negation that the ordinances as enforced and administered, had the afore-mentioned characteristics of justifiable regulatory measures."⁵

Let us now consider the cases of *Shreveport v. Brister*⁶ and *Monsour v. Shreveport*⁷ wherein it was held that an ordinance of the city of Shreveport, Louisiana stating that when any vehicle is parked in a space adjacent to which a parking-meter is located, the operator of the vehicle is under duty upon entering the parking space to deposit at once a 5-cent coin in the parking-meter, for the purchase of sixty minutes of time or a 1-cent coin for the purchase of twelve minutes of time, and if he or she fails to do so, is subject to the penalty, imposes a "license fee" or a "tax" which the city exacts for the privilege of parking on certain designated streets, and hence, the ordinance is void, under a state statute providing that no municipality may impose any tax, license, or excise of any character whatsoever "upon the exercise of any right or privilege, or upon the performance of any act whatsoever, not taxed by the state" in the absence of special legislative authority.

Now let us consider some of the cases holding parking-meter ordinances valid. In *Owens v. Owens*⁸ a city ordinance of Columbia, South Carolina providing for the maintenance of mechanical parking-meters automatically registering the expiration of the time limit for parking, for which a fee is charged, was held not to be invalid on the ground that the city's purpose was to raise revenue under the guise of obtaining funds for the enforcement of a police regulation, since there was no evidence to establish that the revenue collected would be in excess of the expenses of maintaining the parking-meter system. Also it was held not to violate the due process clause of the Federal Constitution, nor did it deny a traveler or an abutting property owner equal protection of the law under the state constitution. The ordinance the court further held, was valid as a proper regulation of

⁵ See 196 N. W. (2d) 352 where the case was affirmed on appeal (Feb. 18, 1941) with slight modification i. e. the court should have held that the city was imposing improper charges for parking vehicles and disposing of the revenue therefrom without lawful authority.

⁶ 194 La. 615, 194 So. 566 (1940).

⁷ 194 La. 625, 194 So. 569 (1940).

⁸ 193 S. C. 260, 8 S. E. (2d) 339 (1940).

the privilege of parking automobiles on the streets, as against the contention that it sought to impose unlawfully a license on the use of the streets.

In *Ex Parte Harrison*⁹ it was held that a parking-meter ordinance of a home-rule city (Lubbock) prohibiting the parking of automobiles in designated congested areas without a deposit of 5-cents in the meter, was not a tax but rather a "license fee" properly chargeable under the police powers of the city. It was also held that the said ordinance was within the general charter powers of the city, and was not violative of the city's contractual authority over its streets. Judge Christian, speaking for the court, said: "There is no doubt of the power of the city to regulate the privileges of parking in the interest of the public safety and good order * * * The power to regulate parking implies the power to exact a fee of sufficient amount to cover the expenses of maintaining the regulation. The regulative measure is not invalidated because incidentally the city's receipts of moneys are increased."

Let us consider the case of *Harper v. City of Wichita Falls*¹⁰ in which the court of appeals of Texas affirmed a decision denying the plaintiff, a jeweler, a temporary writ of injunction against the enforcement of a certain parking-meter ordinance passed by a home rule city (Wichita Falls). The city caused a parking-meter to be erected directly in front of his store. The plaintiff contended that the parking-meter ordinance was invalid on the ground that the ordinance was a zoning ordinance within the meaning of a state statute, and was void for failure of the city to publish prior notice of its passage, as required by the provisions of the statute; that there was no proper relation between the erection and operation of the parking-meters and the authority vested in the city by its charter and statutes for the control of its public streets; that the charges made for parking-meter service were in excess of the amount which would be reasonable for the actual maintenance of the same; that the plaintiff had lost \$700.00 profits in his business as the result of the maintenance of the said meters which was properly chargeable as depreciation in the market value of his leasehold interest in his place of business. The plaintiff also asserted that the parking-meter ordinance was unreasonable and arbitrary. Plaintiff further contended that the meter unlawfully interfered with ingress and egress to his property, and unreasonably interfered with the inherent right of private citizens of free use of the city streets, and constituted a revenue-raising scheme not enacted for traffic regulation and bearing no relation to the regulation of traffic.

The court, however, stated that it could not be said that the parking-meter ordinance had no proper relation to traffic, or that the city contemplated or intended that it should be a tax measure. The court

⁹ 135 Texas Crim. Rep. 611, 122 S. W. (2d) 314 (1938).

¹⁰ 105 S. W. (2d) 743 (1937) Ct. of Civ. App. (Texas).

held that the fee was merely to defray the expenses of operation of its administration. The court further observed that although every citizen, including owners and non-owners of abutting property have the primary right to use the city streets for purposes of travel, and, as an incident thereto, the right of ingress and egress to and from property abutting on the streets for the purpose of loading and unloading passengers, merchandise, and other commodities from vehicles, the ordinance did not by its terms deny citizens such right. The court also observed that parking-meter charges may operate to plaintiff's advantage to lessen the occupancy of the parking space in front of his business by others than his customers.

In *Re Opinion of the Justices*¹¹ the court said, "A municipality cannot be authorized to turn this plan of using parking-meters into a business for profit over and above the expenses involved in proper regulation of the public use."

In the case of *Hendricks v. Minneapolis*¹² it was held that although the parking-meter ordinance of a city (Minneapolis) would fail as a "revenue measure" if the receipts exceeded the cost of enforcement and regulation it would not fail as a tax if it remained within these limitations.

The plaintiff property owner in *Clark v. Newcastle*¹³ sought to enjoin as a public nuisance a parking-meter on the public street in front of his property. The plaintiff contended that it was illegal and void. The injunction was refused. The court held that a municipality may validly install a system of parking-meters upon its streets and charge a fee for parking, so long as the amount charged bears a reasonable relation to the service rendered and the cost thereof but that the system cannot be sustained if it is a "revenue measure."

In *City of Columbus v. Ward*¹⁴ the court said: "Such an ordinance does not unreasonably interfere with or restrict any easement that abutting property owners have of access to their property."

In *Kimmel v. City of Spokane*¹⁵ it was held that the Supreme Court would not go behind legislative declaration in City ordinance (Spokane); that its purpose is regulatory, in the absence of evidence tending to show that such ordinance is really a "revenue measure."

Finally we come to the case *County Court of Webster County v. Roman*¹⁶ wherein it was held that a state statute authorizing an unincorporated town "to regulate * * * the parking of vehicles upon any designated streets" authorized the town (Addison) to provide for the

¹¹ 297 Mass. 559, 8 N. E. (2d) 179 (1937).

¹² 207 Minn. 151, 290 N. W. 428 (1940).

¹³ 32 Pa. D. and C. 371.

¹⁴ 65 Ohio App. 522, 31 N. E. (2d) 142 (1940).

¹⁵ 7 Wash. Rep. (2d) 372, 109 P. (2d) 1069 (1941).

¹⁶ Supreme Court of Appeals of West Virginia, 3 S. E. (2d) 631 (1939).

installation of parking-meters on its streets. "There can be no serious denial," Judge Hatcher speaking for the court said, "that parking-meters are a means of regulating parking." The court rejected the plaintiff's contention that the ordinance set up an unlawful system of indirect taxation saying, "The present arrangement goes little, if any further than to provide payment for the meters and their service. The arrangement is analogous to the exaction of tolls for the maintenance of public highways and bridges."

Here we have a fairly complete analysis of the cases dealing with the problem of the validity of parking-meter ordinances. It must be borne in mind that while the weight of authority seems to be that such ordinances are valid, it is by no means conclusive. As has been shown, the law-makers must be very careful not to make parking-meter ordinances a "revenue measure." So long as the amount collected for parking does not unreasonably exceed the expense of installation, operation and maintenance of the system, the courts will usually uphold the ordinances. If this requirement is fulfilled, it has been generally held that the installation of parking-meters in designated zones is a reasonable exercise of the police power conferred on the municipality by the legislature.¹⁷

Alfred W. Trueax.

USE OF WRIT OF CERTIORARI TO REVIEW ORDERS OF ADMINISTRATIVE TRIBUNALS IN COLORADO.—With the ever increasing number of administrative tribunals, both in federal and state governments, the acts, procedure and judgments of those bodies have assumed an importance commensurate in part at least with their numerical growth. With many of the historical arguments of unlawful delegation of powers, both legislative and judicial, having been answered by the courts in a manner most encouraging to the proponents of administrative law it seems almost certain that the number of important administrative bodies will increase rather than diminish in the years to come. Whether governmental expediency demands a further expansion of such bodies is not material today because they have been bred and nurtured by sympathetic legislatures and courts and have become so much a part of our governmental and judicial systems that it appears doubtful if such administrative tribunals will ever be removed from our governmental system. What has been said of the federal administrative tribunals applies with equal force to the various state boards and commissions

¹⁷ See also in this connection the following cases: *Ex Parte Duncan*, 179 Okla. 355, 65 Pac. (2d) 1015; *Gilsey Buildings Inc. v. Incorporated Village of Great Neck Plaza*, 11 N. Y. Supp. (2d) 604 (Sup. Ct. N. Y., Nassau Co, 1939); *State v. Goldberg*, 61 R. I. 461, 1 Atl. (2d) 101 (1938).

for the states have not allowed the federal government an exclusive monopoly on the establishment and maintenance of administrative bodies.

The finality of an administrative tribunal's order depends to a great extent upon the statute creating the body and upon the rules of procedure of the particular jurisdiction. In this paper we shall examine briefly the review of administrative orders by a writ of certiorari in Colorado.

Perhaps the use of certiorari to review the orders of an administrative body can best be seen in the appeals taken from orders of the Colorado State Board of Medical Examiners. This board, created entirely by statute, represents a typical administrative board of any state vested with both quasi-legislative and quasi-judicial power. What may be done in regard to its decision would seem to apply to the decisions of any number of other boards of the same type in any of the various states as the medical board represents a cross section of the manifold administrative boards in existence today.

A Colorado statute gives district courts the power to review certain acts of the board: "The action of the state board of medical examiners in refusing to grant or in revoking a license to practice medicine may be reviewed by the district court by the writ of certiorari under the code of civil procedure."¹

Superficially read the provision would seem to guarantee the right of a judicial review to any petitioner. With such apparent safeguards as a review by a judicial body of the acts of an administrative agency it would seem that the individual petitioner has ample checking power on the capricious or arbitrary action of the boards and has adequate appellate power. Theoretically, perhaps this is true but often the workings in practice manifests a situation quite different than one supposes to be the case. Does a petitioner who has an adverse ruling by the board have adequate grounds to protect his interests under the provisions of the Colorado statutes that give district courts the power to review decisions of the state medical board by writs of certiorari?

That the various American jurisdictions vary materially as to the right to and the scope and grounds for a writ of certiorari is not to be doubted. The Colorado rule on this point is well settled and supported by a myriad of reported cases as well as set forth in the statute books.² The Colorado rule has been stated to be that the writ of certiorari will serve to review only the jurisdictional objections to a board's actions or a gross abuse of discretionary power. How the rule actually works in practice can best be seen in adjudicated cases and it is to these that we turn our attention.

¹ Colorado Statutes Annotated (1935). Vol. 4, Chapter 109, No. 13.

² Colorado Statutes Annotated (1935). Vol. 1, Rules of Civil Procedure, No. 106.

In *Thompson v. State Board of Medical Examiners* the district court judge said: "I understand that I have no right to pass upon the merits of the case or the sufficiency of the evidence. From the return it appears to me that the petitioner had a fair trial and that the action of the board should be confirmed and the writ of certiorari dismissed and discharged."³

Three years later in *State Board of Medical Examiners v. Noble* the exact point again came up and the court on appeal said: "The medical board had jurisdiction of the subject and of the person and clearly did not exceed its jurisdiction or abuse its discretion. On a review of its action by writ of certiorari, those are the only questions to be considered. Whether its decision on the merits is right or wrong is not within the issue."⁴

A leading case on the subject of review from administrative orders in Colorado is *Dilliard v. State Board of Medical Examiners*. In this case the Supreme Court of Colorado affirmed a decision of the district court that had refused on a writ of certiorari to disturb a revocation order issued by the board. The court said: "The district court had no power to review the action of the board except for excess of jurisdiction or abuse of discretion. * * * So, under our Code, no act of any tribunal within its jurisdiction and not greatly abusive of its discretion, however erroneous it may be, can be reversed upon certiorari. Courts can consider the evidence for no purpose except to see whether the board exceeded its jurisdiction or abused its discretion. They may look at the evidence to see whether the facts proved come within the terms of the act, because otherwise they sometimes could not tell whether the court had jurisdiction or abused discretion, but they can go no further."⁵

From the *Dilliard* case it seems to be settled law in Colorado that the evidence considered in the board hearing cannot be considered for any reason on appeal save to see if the jurisdiction was exceeded or an abuse of discretion resulted. It cannot be weighed or considered for any other than those two reasons. From that famous case it is interesting to note that on appeal the upper court is powerless to reverse the board's judgment despite a manifest erroneous conclusion if the board did not abuse its discretion and acted within its jurisdiction. The opportunity presented to a petitioner to prove abuse of power of the board, judging from the reported cases in which the appellate court has sustained the board's revocation order, seems to be almost infinitesimal.

Also on point is *White v. Andrew* where the court said: "Upon certiorari the court could review the board's action only upon a ques-

³ 59 Colo. 549, 141 P. 436 (1915).

⁴ 65 Colo. 410, 177 P. 141 (1918).

⁵ 69 Colo. 575, 196 P. 866 (1921).

tion of jurisdiction or great abuse of discretion. There was nothing, therefore upon which the district court could reverse or modify the board's action, and the judgment of dismissal was right."⁶

Still another affirmation of the general rule is found in *State Board of Medical Examiners v. Brown* where the court said: "The review extends only to a determination, from the record alone, of the question whether the inferior tribunal regularly pursued its authority and thereupon pronounced judgment accordingly. We have several times held that a cause heard on certiorari could not be considered on its merits."⁷

In *Doran v. State Board of Medical Examiners* we find the court in almost identical language stating the rule to be: "This and other courts have repeatedly held that the object of certiorari is not to settle or determine disputed facts but to investigate and correct errors of law of jurisdictional nature and under the Code of Procedure, abuse of discretion."⁸

Perhaps the outstanding case on this point in the jurisdiction is *Spears v. State Board of Medical Examiners*.⁹ This bitterly contested litigation went from the state examining board to the district court to the state Supreme Court to the federal Supreme Court where it was dismissed.¹⁰ Spears, a Denver chiropractor, had his license revoked for unprofessional and dishonorable conduct and then by a writ of certiorari to the district court had the order of the board annulled and from this order the board took an appeal to the state Supreme Court which reversed the district court and affirmed the board's order of revocation. The Supreme Court said: "Such finding, by the medical tribunal, even if erroneous, that respondent's conduct was unprofessional and dishonorable does not constitute a failure upon its part regularly to pursue its authority, nor was it an abuse of discretion. In no event was it, or could it be, other than a mistake in its finding of facts or an erroneous conclusion from those facts, and we cannot even say it was a mistake in either. By all of our cases on certiorari, the reviewing court may not enter upon the merits and has not the power to correct a mistake of fact or an erroneous conclusion from the facts made by the inferior tribunal."¹¹

Of the manifold number of cases reported there are few where a petitioner has successfully been able to prove an abuse of discretionary power by the board and have their revocation order annulled. The outstanding case on this point is *Sapero v. State Board of Medical Examiners*.¹² Sapero, a Denver doctor, had been ordered by the board

⁶ 70 Colo. 50, 197 P. 564 (1921).

⁷ 70 Colo. 116, 198 P. 274 (1921).

⁸ 78 Colo. 153, 240 P. 335 (1925).

⁹ 79 Colo. 588, 247 P. 563 (1926).

¹⁰ 48 S. Ct. 158 (1928).

¹¹ 79 Colo. 558, 247 P. 563 (1926).

¹² 90 Colo. 568, 11 P. (2) 555 (1932).

to cease the practice of medicine and had taken an appeal by a writ of certiorari to the district court which had affirmed the revocation order. He then took a writ of error to the state Supreme Court which held that the board, though acting from honest and altruistic motives, had abused its discretion, and sent the case back to the board with instructions to dismiss the proceedings. In this case the court, following the rule pertaining to a review of the evidence as set forth in the Dilliard case, reviewed the evidence to aid them in their determination as to whether the board had abused its power.

In summary we are guided to an irresistible conclusion by the reported cases and that is that although there are statutory provisions for an appeal and judicial review from an administrative board's orders and that theoretically the grounds for judicial review are adequate, in actual practice it becomes most difficult if not impossible to prove an abuse of discretionary power or excessive jurisdiction of a board composed of highly respected members of the medical profession. That it has been done is not to be disputed but that the fate of those who are called to account before such administrative bodies is in the hands of persons who, because of personal, political or professional reasons, are not immune from acting arbitrarily or capriciously and from whose decision there is little hope of successful appeal seems equally clear. Such is the price we pay for governmental expediency under a government of administrative tribunals.

Francis J. Paulson.

