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Contributors to the November Issue/Notes

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CONTRIBUTORS TO THE NOVEMBER ISSUE

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NOTES

BORDER LINE TREES.—Frequent reference is made in legal parlance to the "border line" cases. The term is most often used in a figurative sense to describe those cases in which it is difficult to determine whether a definite rule of law should apply and the case might well be decided in either way. This is not the application of the term here, for the subject of the article suggests a real or factual application of the term, "border line."

Trees, though they seem at first a seemingly insignificant topic, on study assume quite a substantial place in the law of real property. And in the case of trees or shrubs growing on or near property lines they are often the source of much litigation. They are a part of the family quarrels that frequently go so far as to get into the courts and come under the general classification of "back yard fence" cases. Though poetically speaking "only God can make a tree," nevertheless frequently the work of an abundant and provident Creator can be undone in a very realistic manner through the consequences of litigation over border line growth.

It must be confessed at this point that the research entailed in gathering the forthcoming material was begun with a certain slight prejudice because of the seeming insignificance of the subject matter. Many interesting points, however, were brought out in the development of the subject and these together with a history of the law of a border line tree harking back to the time of Aristotle and his philosophy generated the enthusiasm of which the present article is born.

Many shrubs may grow on or near a boundary line. The tree is the most frequent subject of border line controversy. Trees that belong to

the boundary line type are of two kinds; those that are on the line separating adjoining property owners and those that are entirely on the property of one landowner but effect the property rights of a next door neighbor. The first class does not raise the problems that the latter does. When a tree or shrub is on the division line it is the common property of the adjoining landowners. So held in *Lennon v. Terrall*.¹ And in *Weisel v. Hobbs*,² it was held that such a tree growing on the line, which had been braced and protected by the joint work of both landowners, was the property of both and could not be unreasonably destroyed by either.

Where, however, a tree is entirely on the property of one owner it presents a different situation. At one time in English law, in the seventeenth century particularly, there was a question in such instance as to who was the owner. The English case of *Waterman v. Soper*³ indicated that a tree planted in the soil of one landowner and whose roots extended also into the land of another was the common property of both. Lord Holt in giving his opinion in the case said: "If A plants a tree on the extremest limit of his land and the roots extend into the land of B it is the common property of both."

The historical reason for such a decision which is generally not the rule today is found in the reasoning of the Roman law jurists in the third century, whose views had their influence on later English courts. According to the Roman law of the third century, if a tree set in the land of Titius takes root in the land of Maevius it belongs to Maevius, if root in both it is common property. The reasoning applied by the Roman jurists for determining the ownership to such a tree by the location of the roots rather than by the position of the trunk was adopted from the doctrine of form and substance of Aristotelian philosophy of the fourth century B. C. According to Aristotle the tree is composed of earth and water. These comprise the substance of which the tree is formed (form). Since the tree is no more than a composite of substance it should belong to the one from whose soil the substance is taken. It was to Aristotle that the Roman jurists of the third century turned in order to decide controversies on principle and in accordance with reason. Bracton in his *Institutes*⁴ voiced the reasoning of Aristotle in the following: "For reason does not permit that a tree belong to anyone else than to him in whose land it has struck root." The case of *Waterman v. Soper*⁵ is an instance in English law of such Graeco-Roman influence.

The bulk of English case law is to the contrary, however, and is based on the Germanic notion of *seisin* which was one of the chief premises of common law reasoning. Thus, Titius who "planted the tree is

¹ 260 Mich. 100, 244 N. W. 245 (1932).

² 294 N. W. 448 (Nebr., 1940).

³ 1 Ld. Raym. 737, cf. Anon, 2 Rolle, 255 (1697-98).

⁴ 1569 Ed. fol. 10.

⁵ 1 Ld. Raym. 737, cf. Anon, 2 Rolle, 255 (1697-98).

seised of the trunk, which is the main thing, no matter where the roots may stray, and he cannot restrain the roots from thus wandering."⁶ Perhaps one of the first English cases that maintained this doctrine was that of *Masters v. Pollie*.⁷ This case held *contra* to the Roman law and held that since the main part of the tree was in the soil of the plaintiff, the residue of the tree belongs to him also.

The case of *Holder v. Coates*⁸ represents the present preferable English rule. In this country as well, a tree standing solely on the land of one belongs to that landowner alone, as decided in such early American cases as *Lyman v. Hale*,⁹ *Dubois v. Weaver*,¹⁰ and *Skinner v. Wilder*.¹¹ The California Civil Code, section 833, provides that trees whose trunks stand wholly on the land of one owner belong exclusively to him, *Butler v. Zeiss*.¹²

If a landowner has such exclusive ownership of a tree growing on his land near the boundary line of a neighbor it follows logically that he is the owner of all the fruit of the tree whether on branches overhanging his own or his neighbor's land. The title to the apples depends on the title to the tree. In the case of *Skinner v. Wilder*,¹³ the fruit tree in question was entirely on the land of the plaintiff, six feet from the defendant's property. The court held that the defendant was liable in trespass or trover for picking, carrying away and converting the apples on branches overhanging his property. As regards the owner of the tree, he has, by his title to the apples, the privilege to enter on the land of his neighbor to pick them, *Norris v. Baker*.¹⁴ The case of *Hoffman v. Armstrong*¹⁵ upheld the right of one who had been authorized by the owner of a tree to enter and pick the fruit. The defendant was held liable for assault and battery for thus forcibly preventing the plaintiff from entering on defendant's land to pick the fruit.

Up to this point we have considered only the rights of the owner of the tree, his exclusive title to the tree and its fruit and the right to enter to pick the fruit. Consideration must be given to the property owner on whose land no tree stands, but whose property rights are affected by the encroachments of branches and roots of a tree belonging to his neighbor. And in this regard we find two varying views. Some

⁶ Taken from Professor Roscoe Pound's Article, Origin of Civil and Common Law Rules, 31 Harv. L. Rev. 1049-53.

⁷ 2 Rolle, 141 (1620).

⁸ Moody and M. (1827).

⁹ 11 Conn. 177, 27 Am. Dec. 728 (1836).

¹⁰ 25 N. Y. 123 (1862).

¹¹ 38 Vt. 115, 88 Am. Dec. 645 (1865).

¹² 63 Cal. App. 73, 218 P. 54 (1923).

¹³ 38 Vt. 115, 88 Am. Dec. 645 (1865).

¹⁴ 1 Rolle Rep. 394, 81 Eng. Rep. R. 559 (1616) as cited in Lemmon v. Webb, 3 Ch. (Eng.) 1 (1894).

¹⁵ 46 Barb. (N. Y.) 337 (1866) and affirmed in 48 N. Y. 201, 8 Am. Rep. 537 (1872).

cases deny to a landowner any right to abate overhanging limbs. *Hoffman v. Armstrong*¹⁶ was a variation of the common law maxim: *Cujus est solum, ejus est usque ad coelum*. This case held that this maxim had no application to overhanging limbs and hence would preclude any action of the owner to abate them. A landowner was not sole owner to the sky, but his right to the air was subject to his neighbor's interest in his tree.

In *Bliss v. Ball*¹⁷ it was held that the shade of trees was not an actionable injury, that it was a mere *damnum absque injuria*. It was also held that there must be a similar application in regard to the extension of boughs and roots, that they constituted no actionable wrong. It seems to be the rule generally, however, that a landowner may sever the branches of a neighbor's tree that overhang his property, and is not required to give notice to the owner of the tree of such severance. It was so held in *Mills v. Brooker*.¹⁸ This case also held that although one was privileged to sever the branches he was not entitled to the fruit on such branches. But it was intimated in the case that an owner might not be justified in entering on the land of his neighbor to recover the fruit from the branches so severed. But if one so privileged to sever cuts too far he may commit a trespass as in *Loverock v. Webb*.¹⁹

If an owner of a tree himself so trims his tree that the trimmings fall on the land of an adjoining property owner to that owner's damage he is liable, as in *Lambert v. Bessey*,²⁰ where severed thorns were the cause of the injury. From these cases covering the severance of branches, a principle may be evolved that generally a landowner has the right to sever such portions of the branches of a tree whose trunk is on the adjoining property as extend into his property, but if he cuts beyond the boundary he commits a trespass.

Stronger cases of actionable injury are frequently made out from damage caused by encroaching roots rather than from overhanging limbs. Ruptured drains for example are often due to the inroads made by roots. A comparison of the cases covering injuries from roots indicates two different views as to the remedy. Some cases place all the burden on the injured plaintiff and leave him to his remedy at law, *viz.*, cutting the roots to the boundary line. An example of this ruling is the case of *Michalson v. Nutting*.²¹ Here A and B were adjoining landowners. A poplar tree grew on A's land and the roots extended into B's land, damaging B's drain and disturbing the foundation of B's house. B filed a bill for an injunction which was dismissed. For remedy of

¹⁶ 46 Barb. (N. Y.) 337 (1866) and affirmed in 48 N. Y. 201, 8 Am. Rep. 537 (1872).

¹⁷ 99 Mass. 597, 98 (1868).

¹⁸ 1 K. B. 555, 9 B. R. C. 256 (1919).

¹⁹ 30 B. C. 327, 70 D. L. R. (1921).

²⁰ T. Raym. 421, 467, 83 Eng. Rep. 220, 244 (1868).

²¹ 275 Mass. 232, 175 N. E. 490 (1930).

injury due to roots the courts were inclined to leave the injured plaintiff to his action at law for damages or his common law privilege of abating, without recourse to equity. The court said in the case: "The plaintiffs have not presented such a strong and mischievous case of pressing necessity, that they are entitled to the extraordinary writ of injunction; nor have they demonstrated that they availed themselves of their legal remedy, *viz.* of cutting to the boundary line. The reason for burdening the plaintiff with an action at law for damages or with his common law privilege of abating instead of enjoining the defendant, is stated in the case of *Hickey v. Michigan Central Ry. Co.*:²² "The common sense of the common law has recognized that it is wiser to leave the individual to protect himself, if harm results . . . than to subject the owner, *i. e.*, of the tree, to the annoyance, and the public to the burden of actions at law, which would be likely to be innumerable and in many instances vexatious." Other cases maintaining the same ruling are *Bliss v. Ball*,²³ *supra*; *Lemmon v. Webb*,²⁴ *supra* and *Harndon v. Stultz*.²⁵

Contrary to the *Michalson v. Nutting* ruling is the decision in *Shevlin v. Johnston*,²⁶ where defendant, who maintained a row of eucalyptus and cottonwood trees whose shoots sprouted up in plaintiff's crops, was ordered to abate the nuisance. Against the equitable ruling defendant contended that the plaintiff must resort to an action at law for damages. Defendant's contention was overruled. In accord with this ruling are *Ackerman v. Ellis*,²⁷ *Buckingham v. Elliott*,²⁸ *Brock v. Connecticut and P. R. Co.*,²⁹ *Gostina v. Ryland*,³⁰ and *Stevens v. Moon*.³¹

What has been said in regard to border line trees applies also to a border line hedge, often planted for instance to serve as a windbreak. One who cuts too far in trimming a hedge may be guilty of trespass, the same as for trees as in *Wegener v. Sugarman*.³²

As regards a hedge of eucalyptus trees *Anderson v. Weiland*³³ held that the adjoining property owners were cotenants and that one might not cut down the trees and thus destroy their value as a windbreak. The Connecticut court in *Cooke v. McShane*³⁴ considers a hedge as more than the absolute possession of a single property holder, treating it as

²² 96 Mich. 498, 55 N. W. 989, 21 L. R. A. 729, 35 Am. St. Rep. 621 (1893).

²³ 99 Mass. 597, 98 (1868).

²⁴ 3 Ch. (Eng.) 1 (1894).

²⁵ 124 Iowa 440, 100 N. W. 329 (1904).

²⁶ 56 Cal. App. 563, 205 P. 1087 (1922).

²⁷ 81 N. J. L. 1, 79 A. 883 (1911).

²⁸ 62 Miss. 296, 52 Am. Rep. 188 (1884).

²⁹ 35 Vt. 373 (1862).

³⁰ 116 Wash. 228, 199 P. 298, 18 A. L. R. 650 (1921).

³¹ 54 Cal. App. 737, 202 P. 961 (1921).

³² 104 N. J. L. 26, 138 A. 699 (1927).

³³ Cal. App., 55 P. 2d 1242 (1936).

³⁴ 108 Conn. 97, 142 A. 460 (1928).

a unit. The mere fact that a border line hedge is entirely on one side of the line does not give that property owner the right to treat it as he would a tree so standing or to trim it down beyond such a height as not to leave a sufficient fence. According to the general statutes of Connecticut, section 5129, where a hedge is on the boundary line and forms a division fence, either landowner is privileged to trim, but must leave one foot of the hedge on his land which can not be less than four and one half feet high, *Robinson v. Clapp*.³⁵

Very briefly then in review, border line growth, usually trees, may be on the division line or entirely on one side thereof. One who plants a tree on his property is the owner of such and has the exclusive right to the fruit. His ownership is not so absolute and unqualified that it need not recognize the property rights of an adjoining landowner who may maintain an action for injury and damage sustained, and even prevent on his own property the further development of nature's growth. Nature too, therefore, like men, is not without restraint and for its vagrant encroachments, individuals affected thereby may have recourse to the courts for the rendering of redress.

Leo L. Linck.

EMINENT DOMAIN — PROPERTY SUBJECT TO APPROPRIATION — QUANTITY TAKEN — EXCESS CONDEMNATION. — The Constitution of Ohio provides:¹ "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that to be actually occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvements made." A statute of Ohio provides that ² "When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, defining the purpose of the appropriation, setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated."

It follows, *a fortiori*, that a city is required, not only to define specifically the purpose of the appropriation in its legislation, but it is incumbent upon the city to sustain such requirement by proof of its necessity, since the power granted to a municipality to appropriate excess property in furtherance of a public use is only granted when the excess is needed for that use.³ The use of property to obtain the possible income or profit that might inure to a city from its ownership and control would not be

³⁵ 65 Conn. 365, 380, 32 A. 939, 29 L. R. A. 582 (1895).

¹ Art. 18, § 10.

² Ohio General Code, § 3679.

³ City of East Cleveland v. Nau, 124 Ohio St. 433, 179 N. E. 187 (1931).

a public use and a city cannot take property for such a purpose.⁴ The taking of land from one person, either through taxation or through eminent domain, for the purpose of giving it to another, is not for a public purpose, and is contrary to the basic and essential principles of free government. Thus, private property cannot be taken ostensibly for a public purpose and then diverted to a private use, and legislation so designed or framed as to permit this result is invalid.⁵

In deciding whether expropriation of private property is for a public use, and so not violative of the 14th Amendment, the Supreme Court has appropriate regard to the diversity of local conditions, and considers with great respect legislative declarations, and in particular judgments of state courts, as to the uses considered to be public in the light of local exigencies.⁶

City of Cincinnati v. Vester,⁷ sets out three theories for taking an excessive amount of land: The "Remnant" theory, proceeds upon the ground that by taking only such parts of the land as are needed for street purposes, fragments of lots would remain of such sizes and shapes as to render them separately valueless, with the result that the city would be required to pay for the whole, although it took only a part, and with the further result that, because of the lack of such value, the city would thereafter be deprived of collecting taxes on this property. The "Protective" theory is that if the city owned the adjacent land, it could sell it under restrictions that would preserve the beauty of the street, and thus facilitate the increase in the value of the surrounding property. The "Recoupment" theory is that the city would be able to recover for money spent on the improvement by selling the excess land at their increased values.

The extent of excess condemnation is limited by the necessities of the particular public purpose or use for which the land is sought to be condemned. Accordingly, it is held that no more property of a private individual, nor any greater interest therein, can be condemned and set apart for public use than is absolutely necessary.⁸ And when the legislature has not defined the extent and limit of the appropriation of private property to be taken for a public use, the authorities charged with the duty are restricted to such property, in kind and quantity, as may be reasonable and necessary for the purpose designated.⁹

A state legislature may authorize the taking of land upon or riparian rights in a navigable stream, for the purpose of improving its naviga-

⁴ In Re Opinion of Justices, 204 Mass. 607, 91 N. E. 405 (1910).

⁵ Commonwealth v. Salisbury Land Co., 215 Mass. 371, 102 N. E. 619 (1913).

⁶ *City of Cincinnati v. Vester*, 281 U. S. 439, 50 S. Ct. 360, 74 L. Ed. 950 (1930).

⁷ 281 U. S. 439, 50 S. Ct. 360, 74 L. Ed. 950 (1930).

⁸ *Young v. Gurdon*, 169 Ark. 399, 275 S. W. 890 (1925).

⁹ *Jennings v. State Highway Commission*, 183 N. C. 68, 110 S. E. 583 (1922).

tion, and if a surplus of water is created, incident to the improvement, it may be leased to private parties under authority of the state; but so far as land is taken for the purpose of the improvement, either for the dam itself or the improvement, or for the overflow, or so far as water is diverted from its natural course, or from the use to which the riparian owner would otherwise be entitled to devote it, such owner is entitled to compensation.¹⁰

Where the state has an easement for the purposes of building a canal and subsequently abandons the canal, the easement is terminated and the right to repossession of the land reverts to the owner of the freehold. Such reversion, however, did not carry with it the ownership of the materials used in the construction of the locks, etc., upon the canal. Those structures never having been intended as annexations to the freehold, and having been rightfully erected, may be removed by the state upon such terms as may, under the circumstances of the case, be equitable,¹¹ and owners of land abutting on a canal, incidentally benefited by the water it affords, or its facilities for drainage, have no property interest in those incidental benefits, and cannot, on such ground, enjoin the abandonment of the canal, or claim compensation therefor.¹² But, where a railroad purchases the easement from the Canal Company and lays tracks, such action cannot be enjoined by the owners of the freehold but they are entitled to any additional damages that may accrue.¹³

Statutes authorizing the exercise of the power of eminent domain are in derogation of the common law and their provisions with respect to the interests to be taken are to be strictly construed.¹⁴ Where statute authorizes the appropriation of private property for public purposes, the discretion of determining the quantity of ground required for such purpose is vested in the municipal corporation; and where, in making the appropriation, this discretion has been exercised by the municipal authorities in good faith, their action is final,¹⁵ and the fact that money available for land taken for a public park was insufficient did not necessarily invalidate the taking.¹⁶

The basic rule is that private property cannot be taken for private use with or without compensation.¹⁷

¹⁰ *Kaukauna Co. v. The Green Bay & Mississippi Canal Co.*, 142 U. S. 254, 35 L. Ed. 1004, 12 S. Ct. Rep. 173 (1891).

¹¹ *Corwin v. Cowan*, 12 Ohio St. 629 (1861).

¹² *Vought v. Columbus, H. V. & A. R. Co.*, 58 Ohio St. 123, 50 N. E. 422 (1898).

¹³ *William S. Hatch v. The Cincinnati and Indiana Railroad Co.*, 18 Ohio St. 92 (1868).

¹⁴ *Warm Springs Irrigation District v. Pacific Live Stock Co.*, 270 Fed. 560 (1921).

¹⁵ *The Iron R. Co. v. City of Ironton*, 19 Ohio St. 299 (1869).

¹⁶ *Flagg v. Moses*, 230 N. Y. S. 179 (1928).

¹⁷ *Berwind-White Coal Mining Co. v. U. S.*, 9 Fed. 2d 429 (1925):

"It necessarily follows that property cannot constitutionally be taken by eminent domain except for the public use, that no more property can be taken by eminent domain than the public use requires, since all that might be appropriated in excess of the public needs would not be taken for the public use. . . . If an easement will satisfy the public needs, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require. . . . It is universally recognized that a grant of the powers of eminent domain will not be extended by implication, and that when an easement will satisfy the purpose of the grant the power to condemn the fee will not be included in the grant unless it is so expressly provided."¹⁸

Anthony M. Bernard.

IS A MAN CARING FOR HIS OWN FORTUNE "IN BUSINESS?"—In the computation of the Federal Income Tax, the taxable net income is determined by subtracting from the gross income certain deductions allowed by statute. Section 23 of the Internal Revenue Code provides: "In computing net income there shall be allowed as deductions: (a) Expenses. (1) In General. All the ordinary and necessary expenses paid during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation actually rendered; . . ."¹ It can be seen that before making a deduction it must first be "ordinary and necessary" to a "trade or business." This article deals with the problem of whether or not a man handling his own private holdings of securities and realty can be said to be conducting a trade or business within the meaning of the statute. This question was raised in *Higgins v. Commissioner of Internal Revenue*.²

In that case, the petitioner brought *certiorari* to review a decision of the Circuit Court of Appeals affirming an order of the Board of Tax Appeals. The Board had determined tax deficiencies against the petitioner. Higgins had a private fortune of something more than thirty-five million dollars. He lived in Paris, France; and by cable, telephone, and mail kept in close touch with an office he maintained in New York where he employed several persons to look after and care for his holdings. About two-thirds of his holdings were in real estate, the other one-third in stocks and bonds. In 1932 the petitioner spent approximately \$76,000 in the maintenance of his New York office, and in 1933 approximately \$74,000. The Board of Tax Appeals ascertained that during both years two-thirds of these amounts were allocable to the

¹⁸ Nichols on Eminent Domain, § 150.

¹ 26 U. S. C. A. § 23.

² 312 U. S. 112, 61 S. Ct. 475 (1941).

realty holdings. The Board allowed as deductions from gross income only the amounts of expense chargeable to the real estate; the remainder it disallowed. The basis of the Board's holding was that the caring for one's own securities does not constitute a business. The petitioner contended that the regularity and extent of his operations differentiated him from the small investor.

The Supreme Court held that, "To determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case." Even if such a vague criterion of the nature of a business is to be accepted, it seems that the board's finding is unsupported by the facts as reported. In allowing such a distinction to be drawn between the deductibility of the expenses in the operations of realty holdings and security holdings, the court places a peculiar premium on a piece of real estate as an investment. In the *Higgins Case*, the petitioner's employees "kept records, received securities, interest and dividend checks, made deposits, forwarded weekly and annual reports and undertook generally the care of the investments of the owner." It is this writer's opinion that the performance of such work is as much a "business" if it involves stocks and bonds as it would if it involved real estate. If a single proprietor is engaged in the occupation of caring for and taking the income from his own stocks and bonds, is he any less engaged in "business" than if he owned a fleet of trucks or a factory or a store which he hired someone else to operate for him? In the latter instances, there would be no question about his deducting the manager's salary from his own gross income. The Court admits of rulings favorable to the petitioner but denies their determinative value. In previous years the government has acquiesced in the deduction of like expenses.

The decision leaves the student at a loss as to what is or what is not a business. In *Flint v. Stone Tracy Company*,³ the Court said that "Business is a very comprehensive term and embraces everything about which a person can be employed." In that case, the question was as to whether a corporation was engaged in business so as to be subject to an excise tax levied on corporations engaged in business. In the *Higgins Case*, the Court refuses to accept such a criterion as "... not controlling in this dissimilar inquiry." From this it is apparent that there is a broad difference in what is a "business" when the government is attempting to tax an enterprise because it is a business and when it will allow a deduction of an expense of an enterprise because it is a business. The Court refuses to recognize *Kales v. Commissioner*,⁴ wherein the taxpayer, maintaining an office for the same purpose as did Higgins, was allowed to deduct the expenses of her office. The Court draws a similarity between the concept of business in the principal case and in the case of litigation expenses of a trustee in securing income for a ward; such

³ 220 U. S. 107, 31 S. Ct. 342 (1910).

⁴ 101 F. (2d) 35 (1939).

expense in the latter case being held not deductible as a business expense.⁵ Such a similarity seems hardly applicable.

The importance of the decision must have been recognized by a great many people. In the drafting of the Revenue Act of 1942 one of the proposed amendments was that section 23 (a) (1) should read after "taxable year," "in conserving and conducting the business affairs of the taxpayer." Apparently the proposal was voted down in the Congressional joint committee meeting.⁶ Such an amendment would obviously eliminate the effect of the decision. In view of the uncertainty now in determining allowable deductions, there should be some statutory or judicial definition of what a "business" is. The *Higgins Case* offers no satisfactory answer.

Richard F. Swisher.

PRE-TRIAL PRACTICE IN PENNSYLVANIA.—Prior to the adoption of Rule 16 of the Rules of Civil Procedure for the District Courts of the United States, there was a great need for a practical system of pre-trial conferences. It was felt that many time-consuming discussions in court could be avoided and the length of trials thus shortened, if parties met before the trial to settle issues and facts. Such conferences have been used in several American cities, but adoption by the United States Supreme Court in 1938 of the pre-trial conference rule presented the first wide-spread application. Because this procedure is relatively new in Pennsylvania, it is necessary that some comprehensive, well annotated reference be used. The Pennsylvania Procedural Rules Service, by Goodrich and Amram, has served as a guide in this note.

It is to be noted that Rule 212 of the Pennsylvania Supreme Court follows almost to the letter the Federal provision for pre-trial practice, Rule 16 of the new Federal rules. The text of the Pennsylvania rule follows:

"In any action the court, of its own motion or on motion of any party, may direct the attorneys for the parties to appear for a conference to consider:

- (a) The simplification of the issues;
- (b) The necessity or desirability of amendments to the pleadings;
- (c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (d) The limitation of the number of expert witnesses;
- (e) The advisability of a preliminary reference of issues to a mas-

⁵ Van Wart v. Commissioner, 295 U. S. 112, 55 S. Ct. 660 (1935).

⁶ Prentice-Hall Tax Service (1941) Vol. IV, Executive Sheets, Report 44.

ter for findings to be used as evidence when the trial is to be by jury;

(f) Such other matters as may aid in the disposition of the action.

"The court may make an order reciting the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and limiting the issues for trial to those not disposed of by admissions or agreements of the attorneys. Such order when entered shall control the subsequent course of the action unless modified at the trial to prevent manifest injustice.

"The court may establish by rule a pre-trial list on which actions may be placed for consideration as above provided, and may either confine the list to jury actions or to non-jury actions, or extend it to all actions."

The first point in the Pennsylvania rule worthy of note is the lack of formal pre-requisites or involved pleading necessary to request a pre-trial conference. Because of the voluntary nature of the hearing and also, the lack of any litigation on the point, we cannot immediately determine just how attendance of all parties at the conference may be compelled. Our authors suggest that a party failing to attend may subject himself to summary punishment for contempt under an old act of the legislature.¹ The motion for the pre-trial conference must set out the reasons for such meeting and the order permitting the conference will act as a stay of proceedings when signed by the court.²

It is within the power of a pre-trial conference court to consolidate issues to be tried or to divide one issue into several. While such action may not be approved by one of the parties, it may be done by the court without the consent of the parties. In the matter of amendments the rule is quite the same. Both parties may suggest amendments to the pleadings, but it is within the discretion of the court to grant them. Concerning the limitation of issues by the court we see an interesting new point in trial procedure. The pre-trial court may determine the number of issues by the admissions and agreements of the parties. In the matter of admissions the court has within its power the right to order an issue stricken from the number to be presented at the trial. As to agreements of both parties concerning issues, the power of the court need not be invoked to remove such points from the pleadings.

One section of the rule covers the reference of issues to a master for findings to be used as evidence. The authors point out that such action in the pre-trial conference requires the consent of both parties

¹ Act of June 16, 1836, P. L. 784, § 23; 17 P. S. § 2041.

² See forms of motion and order in Goodrich-Amram, §§ 212-3, 212-4.

because it limits the right of the parties to present to the jury the evidentiary facts upon which the master's findings are based.³ In the trial of the case following the conference any objection to a ruling of the pre-trial court may be considered and a rule upon its findings granted.⁴

It has been attempted in this note to acquaint the reader with a new field in civil procedure. A further analysis of the rule is difficult at present because of its relative newness in the Commonwealth. The excellent treatment by the authors of our cited authority deems it worthy of further study by the practicing attorney and student.

Charles G. Hasson.

STATUTORY CONSTRUCTION — INDIANA DELINQUENT TAX STATUTE. — Plaintiff seeks a writ of mandamus to compel the auditor and treasurer of Marion county to sell the plaintiff certain lots located in Marion county for two dollars each, the price which the plaintiff bid at what the plaintiff alleges to be a delinquent tax sale. The plaintiff alleges that it was the duty of the auditor and treasurer to sell the plaintiff the property under the state statute.¹ The lots in question had been offered for sale at the regular delinquent tax sale in 1936 and 1937 but no bid was received equal to the taxes, penalties and interest due upon them and consequently in accordance with the statute they had not been sold. The same lots were listed as lots to be sold April 11, 1938 at 10:00 o'clock A. M., within the hours prescribed by law and continued from day to day until sold. Plaintiff appeared at the office of Treasurer November 14, 1938 and asked to bid on a number of lots advertised in the 1938 notice. The parties went to the door of the court house and bid two dollars each on the lots in question. The tax liability far exceeded this amount and the bids were refused. On these facts the realtor seeks a writ of mandamus to compel the Treasurer to sell the lots. Judgment for defendant.²

The court's decision in this case was predicated on its construction of Indiana statutes in regard to the sale of property for delinquent taxes.

The realtor relies on the state statute which states, "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interests and penalty by the treasurer of the proper county for any two (2) successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest and penalty pro-

³ Goodrich-Amram, § 212-8.

⁴ Ibid. § 212-11.

¹ Burns Ind. Stat. Ann. § 4-2204 (1933).

² Ralston v. State, 34 N. E. 2d 930 (Ind. App. 1941).

vided by law, then such county treasurer shall at the next regular tax sale of lands or (for) delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales." ³

The court rules that in order to have the proper construction to the statute on which the realtor relies, one must read all of the statutes pertaining to delinquent tax sales together with and in harmony with the basic principles of this type of legislation.

Regarding the basic principles of which the court speaks, Mr. Cooley's work ⁴ is quoted: "The sale must be a public sale with opportunity for open competition. This is a universal requirement; and it may seriously be questioned whether the legislature possesses the power to provide for extinguishing the owner's title by a secret or private sale. The sale itself is a proceeding to perfect a statutory forfeiture. The legislature probably has authority to declare a forfeiture of property taxed for delinquency in making payment; but in such an Act the sovereign power of the state is pushed to the very limit, and it is believed that a statute which falls short of such a declaration and leaves the title still in the owner, could not provide for divesting him of it by means of administrative proceedings secretly taken and of which neither actual nor constructive notice was to be given to him. A public sale is the usual and proper course; and this, in order to constitute any protection to the owner, must be so made as to invite competition."

But, it is now necessary to quote the court's interpretation of the statute involved in order that one may properly follow the court's rationalization and interpretation. "Section 259 which applies to the regular annual sales, provides for adequate notice by posting and publication, the wording of the notice being prescribed. In the original Act the date of the sale was fixed as the second Monday in February 'and continuing from day to day thereafter until all are offered.'" In 1937 the date was changed to the second Monday in April and the word "offered" was changed to "sold." Acts 1937, c. 63 par. 1; par. 64-2202 Burns' 1933 (Supp.) par. 15807, Baldwin's 1937 Supp. The next section has always read: "On the day mentioned in the notice, the county treasurer shall commence the sale of such lands and shall continue the same from day to day until so much of each parcel assessed or belonging to each person assessed, shall be sold as will pay the (delinquent) taxes, interest and charges thereon, . . ." Section 260.

From sales made pursuant to these sections there is the right to redeem.

"Section 222 provides that property upon which taxes have accumulated in excess of the assessed value and which has been offered at not

³ Burns Ind. Stat. Ann. § 64-2204 (1933).

⁴ 3 Cooley on Taxation, par. 1424 (4th ed., 1924).

less than two public tax sales without bid in the amount of such taxes, may be sold at any time 'at public sale to the highest bidder' after giving notice of such sale as under par. 259. There is no provision for redemption.

"Section 224 permits the treasurer, when land has been offered for sale for three years with no bid for the accumulated taxes, to certify the facts to the prosecuting attorney with an order to sue all parties interested as in foreclosure cases and under par. 225 the property is sold as on execution to the highest bidder for cash. Of course, the action itself and the sale are upon notice. There is no express provision for redemption.

"Section 261 relied on herein reads as follows: 'Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest and penalty by the treasurer of the proper county for any two (2) successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest and penalty provided by law, then such county treasurer shall at the next regular tax sale of lands or (for) delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales.'"⁵

With this background, the court now finds for the defendant based on the following reasoning, "It is to be noted first that every sale except under § 261 requires notice. This requirement was probably omitted because the sale must be made at the 'regular tax sale' for which specific notice is prescribed. But that notice says nothing about bids for less than the amount of the accrued taxes. So there is no actual notice of the offering at the high bid but only the constructive notice given by the statute itself."

"The 'regular tax sale' may be started on the day advertised and continued from day to day until all lands advertised are sold. But there is no specific provision for such 'day to day' sales in § 261. The right to continue may be inferred only from the fact that the 'regular tax sale' may be so continued.

"(2) Both sections require auction sales, the former in express terms and the latter by implication from the fact that it is a public sale to the 'highest bidder.' The word 'highest,' considered grammatically, implies at least two lower bids or bidders. Perhaps the author of the section was not a strict grammarian. But, in any view, the word indicates that there shall be competitive bidding.

"Such competition might reasonably be expected on the first day of the regular tax sale which usually is well attended. It is not to be expected after the advertised lots have all been offered which in most

⁵ Ralston v. State, 34 N. E. 2d 930 (Ind. App. 1941).

counties is accomplished within an hour or two on the first day. . .”⁶ The court goes on to show that in their opinion the sale in question was not a public sale — at least in the sense that it was not competitive and only one prospective buyer was present. Also, in support of their theory, the court cites an Iowa case with favor, which case is decided the same as the principal cases under similar facts.⁷

Having reviewed the court’s decision and the court’s reasoning, let us turn to an objective analysis of this decision by a survey of what actually has been decided and a speculation as to the possible and probable merits and demerits of the decision.

It must be made clear, first of all, that the decision of this case will be *stare decisis* only for cases coming under said section 261.

The court in substance has held that for one to qualify under section 261 there must be a public sale. The court’s definition of a public sale in construing the statute is that the sale must be competitive. That is, as a pre-requisite to a valid sale under section 261 there must be at least two bids made on the property and these bids must be made by two separate persons. Apparently, the price offered is immaterial under this section — but the price sold must be the result of competitive bidding or an auction. But, suppose that the sale is public in the sense that there has been proper notice — many people are present but there is only one bid. In such a case, there would be no sale for the court seems to have construed “highest bidder” grammatically—which “implies at least two lower bidders or bids.” By and large, it may be said that to qualify as a purchaser under section 261 the party must have made the purchase at an auction, “A public sale of land or goods, at a public outcry, to the highest bidder.”⁸

Speaking of notice, as a pre-requisite for a valid sale, the court points out that the only requirement of notice in section 261 is where that section says that the sale in question must be made at the next “regular tax sale,” and the regular tax sales require notice. However, one might point out that even if there was notice making the sale public, there would be no valid sale unless there was competitive bidding as previously discussed. Further, it should be pointed out that probably if there was no notice but really competitive bidding at a “regular tax sale” there would be a valid sale since section 261 does not specifically require notice. Also, the spirit of the law seems primarily to favor merely a public sale to the highest bidder. Thus, the problem of notice loses much of its importance under section 261.

The right to continue this sale from day to day is implied from the fact that a “regular tax sale” is so continued. Thus, the court con-

⁶ *Ralston v. State*, 34 N. E. 2d 930 (Ind. App. 1941).

⁷ *Butler v. Delano*, 42 Iowa 350 (1876).

⁸ *Black’s Law Dictionary*.

strues the statute in section 261 when they use the term "next regular tax sale" to imply the requisites of the regular tax sales as set out in section 259. By this construction the court has embodied into section 261 the principles set forth in section 259 except where section 261 expressly limits or extends the principles of section 259 or where the principles of section 259 are not applicable to section 261. This type of construction of statute is in favor as it serves to give more unity and comprehension to the decisions. Also, legally the right to make such construction comes from the theory that when the legislature uses the phrase "regular tax sale" in section 261 they should naturally be referring to their own section on regular tax sales which is section 259. So, the legislature undoubtedly means that sections 259 and 261 should be read together. Had they not have so meant they should not have referred one in section 261 to "regular tax sales" which principles are embodied in section 259.

Thus, from the viewpoint of statutory construction, one may say that the court properly read together all of the sections on delinquent tax sales to arrive at a proper construction of section 261. Legally, then, one can say that the court has a sound basis for its decision. Now, as to the social aspects of the case and its probable trends, one is at once aware that this decision is designed to aid the property holder whose taxes are delinquent. The court gives him every opportunity to redeem his property by requiring that a sale under section 261 be in the nature of a public auction with competitive bidding. This makes it impossible for the landowner to lose his property at a private sale of which he has no notice.

Thus, the decision seems to set the precedent that no land may be obtained under section 261 of the delinquent tax sales statute in Indiana except through competitive bidding at a public auction. This decision then serves to afford no "loop holes" by which unscrupulous persons may obtain landowner's property through private delinquent tax sales or secret negotiations with the county authorities. Consequently, this decision should be heralded as one within the spirit of the legislator and the basic concepts of delinquent tax sales.

James H. Neu.

THE OHIO MUNICIPAL DEBT LIMITATION.—The need for cities to spend funds for relief during hard times and to spend for improvements when little revenue is available often causes a higher rate of borrowing on the part of municipalities. This borrowing is in most states limited by debt statutes. The present writing will deal generally with debt limitation, the statute in Ohio, the concept of what is indebtedness, and in particular with the recently adopted Ohio Code section permitting vil-

lages, towns, and cities to exceed the debt limit under certain conditions and by designated ways and means. One of the problems discussed will be an apparent conflict between the code section setting the limit of net indebtedness and the newer code section which provides the method for partly lifting the restriction.

Many states limit municipal debts to an amount based on a percentage of the assessed valuation of the taxable property.¹ In a concise article by James W. Deer,² there are given three general ways in which a political subdivision seeks to evade these debt limitations: (1) a separate corporation may be established which assumes the debt in place of the state; (2) where income producing property is purchased by the state it may be stipulated the income only is the fund for payment; (3) a purchase may be ultimately consummated by the state through rental installments, no installments exceeding the debt limitations. These methods can be used by cities or villages as a means of evasion. However, each of these methods was held invalid by the Supreme Court of Ohio as stated in the case of *State ex rel. Public Institutional Building Authority v. Griffith*.³ Suppose a municipal corporation would through the creation of a separate corporation obligate itself to that corporation. The procedure would entail a subterfuge and would be invalid since a debt presumably greater than the limit set by statute, would finally have to be paid by the municipality to the fictitious corporation. Under Ohio's new strict statute requiring a six-five percent vote in favor of exceeding the ten mill limit, the purchase of income producing property whereby the income only would be the fund for payment, would require the approval of those citizens voting. Suppose again, a municipality should attempt to pay the amount of a bond issue in the form of rental installments, once more approval must be had through an election because the total rental installments might exceed the ten mill limit.

It is easily seen that a solution was needed. To alleviate the burden on Ohio courts of declaring illegal these various methods and those also which would crop up in the future, to avoid the debt limitation, the legislature passed a new statute permitting citizens to vote on the proposition of exceeding the limit set.

THE OHIO STATUTE

The power of limiting municipal debts is granted the legislature under Article XVIII, section 16 of the Ohio Constitution adopted in 1851 and under Article XVIII, section 13, of the constitution adopted in the

¹ 13 states have statutory limitations, while 31 have constitutional debt limitations. See: Institute of Municipal Law Officers, Report No. 36 (1938).

² 8 Michigan Law Review 1330; see also: 6 Ohio State Law Journal, pp. 297 to 308.

³ 135 O. S. 604, 22 N. E. 2d 200 (1939).

year 1912. Such limitations apply to all cities and villages whether they are operating under a charter or otherwise.⁴ Section 2293-14 of the Ohio General Code limits the net indebtedness created or incurred by a municipal corporation without a vote of the electors to one percent of the total value of all property in such municipal corporations as listed and assessed for taxation. It also says that the indebtedness shall never exceed five percent of all the taxable property in any event.⁵

There are exceptions in calculating net indebtedness to the above limitation. Some of these are as follows: bonds or notes issued in anticipation of the levy or collection of special assessments either in original or refunded form, county bonds issued in anticipation of the levy or collection of township taxes, notes issued in anticipation of the collection of current revenues, notes issued for emergency purposes, bonds issued to pay final judgments, bonds held in any sinking fund and other indebted retirements, bonds issued heretofore for payment of obligations caused by floods, epidemics or other forces of nature, bonds to meet revenue deficiencies under General Code, section 8391, bonds issued for the construction, improvement or extending of water works or municipally owned steam railroads and rapid transit systems to the extent that the income from such utility or railroads and rapid transit systems is sufficient to cover cost of all operating expenses, and interest charges on such bonds, and to provide a sufficient amount for retirement or sinking fund to retire such bonds as they become due, bonds issued under General Code section 1259, or under order of the director of health, bonds of excess condemnations or mortgage bonds issued under Article XVIII, section 11 and 12 of the Ohio Constitution, and other notes or bonds issued unsecured by the general credit of the municipality, all bonds issued prior to January 1, 1922. The limiting section then simply restricts a municipality's indebtedness in all but the above excepted circumstances to ten mills on each \$1.00 of taxable property, if no election to go above the ten mills is held.

All property "as listed and assessed for taxation," within the meaning of General Code section 2293-14, is the only property which may be regarded as security for such indebtedness.⁶ It is stated in the case of *State v. Brown*,⁷ that it is the value of all taxable property appearing on the tax lists in effect at the time when the bonds or notes are delivered and the indebtedness incurred which determines the allowable indebtedness of a municipality under the statute, and not the value as shown by the lists in effect when the proceedings for the issuance of the bonds or notes were commenced.

⁴ *Phillips v. Hume*, 122 O. S. 12, 170 N. E. 438 (1930).

⁵ Statute effective Aug. 10, 1927.

⁶ *State v. Brown*, 125 O. S. 171, 180 N. E. 707 (1932).

⁷ Statute effective Aug. 10, 1927.

WHAT IS INDEBTEDNESS

After considering the restriction on municipal indebtedness, and the time when the indebtedness should be determined, it is proper to investigate the meaning of the word "indebtedness" as construed by some courts and the method of determining it. One court defines indebtedness as "an obligation of which there is not present means of payment."⁸ Indebtedness also is, in respect to municipalities, "an agreement of some kind by the municipality to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement."⁹ "A city cannot pledge revenues from any source whatever without creating indebtedness."¹⁰ For practical purposes and under liberal views of most courts "indebtedness" is meant net indebtedness.¹¹ As to the method of determining net indebtedness in Ohio, the General Code section 2293-13 clearly states that the net indebtedness of any subdivision shall be the difference between the par value of the outstanding and unpaid bonds and notes of the subdivision, and the amount held in the sinking fund and other indebtedness retirement funds for their redemption, and an indebtedness shall not be deemed to have been incurred until the delivery of the bonds or notes under contract of sale.

HOW TO EXCEED THE TEN MILL LIMIT

When a municipality desires to increase its debt over and above the ten mill limitation of section 2293-14 an election is permitted by the newly passed section 2293-23 taking effect on May 25, 1939. This section sets down a definite form of ballot to be used in an election to overrule the ten mill limit. It says "if sixty-five percent of those voting upon the proposition vote in favor thereof, the taxing authority of such subdivision shall have authority to proceed under General Code sections 2293-25 and 2293-29, with the issue of such bonds and the levy of a tax above the ten mill limitation, sufficient in amount to pay the interest on and retire such bonds at maturity." Bonds issued under the new section, for the purpose of enabling municipal corporations to purchase, construct, improve or expand municipally owned water, electric or gas works, systems or services, shall require the vote of sixty percent of those voting upon the proposition; and bond issues for the purpose of providing funds with which to pay a final judgment or judgments rendered against a subdivision in an action for personal injuries, or based on other non-contractual obligations, shall require only the affirmative vote of the majority of those citizens voting on the proposition.

⁸ First National Bank v. Jackson, 199 Ky. 94, 250 S. W. 795 (1923).

⁹ Williamson v. City of High Point, 213 N. C. 96, 195 S. E. 90, 94 (1938).

¹⁰ Barnes v. Lehi City, 74 Utah 321, 279 P. 878 (1929).

¹¹ See: 6 McQuillin, Municipal Corporations, § 2396 (2d ed., 1940).

The new section 2293-23, has a distinctive effect on section 2293-14. It makes it possible for a municipality with the consent of sixty-five percent of those citizens voting on the proposition to exceed the ten mill limitation of section 2293-14. Also, as set out above, where bonds in regard to a municipal public utility and bonds regarding the payment of final judgments against the city are involved, only sixty percent and a majority vote approval are required, respectively. As an example of the strict requirement of the percentage needed, the case of *Whitacre v. Waggoner*,¹² serves as an exact example. In that case the question was whether \$44,000 of bonds would be issued for erecting a school building after the federal government had granted the board of education \$36,000 of Public Works Administration funds upon the bond issue of \$44,000 being approved at the election. The corrected returns were 419 for, and 226 against the appropriation. Sixty-four and a fraction percentage in favor was held not enough to authorize issuance. There had to be sixty-five percent in favor thereof.

A LOOK AT STATUTORY CONSTRUCTION

There appears a conflict between parts of section 2293-14, where "bonds issued to pay final judgments shall not be considered in determining net indebtedness" and a part of section 2293-23, "where bond issues for the purpose of providing funds with which to pay final judgment" require approval in an election. In the former section final judgment bonds are not even considered and not limited by the ten mill section 2293-14, but in the latter section it is stated an election must be held and a majority of voters must approve before bonds may be issued to pay final judgments above the ten mill limitation of section 2293-14. In the one case final judgment bonds are not considered in calculating net indebtedness, in the other an election must be held to issue final judgment bonds over the ten mill limit of indebtedness, but under which ten mill level final judgment bonds are not limited by the former section.

Another example of inconsistency appears in comparing section 2293-14 which reads "bonds issued for the purpose of purchasing, constructing, improving or extending waterworks or municipally owned steam railroads and transit systems to the extent that the income from such utility or railroad is sufficient to cover cost of all operating expenses" shall not be considered in calculating net indebtedness, and a part of section 2293-33 which reads "bonds issued under the new sections for the purpose of enabling municipal corporations to purchase, construct,

¹² 133 O. S. 408, 14 N. E. 2d 22 (1938).

¹³ Addenda: Provisions of constitutional article XIII, § 6, regarding organization of cities and taxes and borrowing thereof, are not in any way abridged in such matters by Article XVIII, § 13, known as the Home Rule Amendment. (Cleveland v. Artl, 29 Abstracts 87.)

improve, or expand municipally owned water, electrical or gas works, systems or services shall require the vote of sixty percent of those voting on the proposition." Again, such bonds are not to be considered indebtedness in the former section, while in the latter, to exceed the limit of the former section (under which the bonds are not restricted) there must be an election with approval of sixty percent of those voting on the proposition. Cases may arise involving the problem; cases where a final judgment bond issue of one involving the purchase, construction or improvement or extension of municipal public utilities, is desired. The question would then arise whether the bond issue is limited to ten mills on-the-dollar indebtedness and if this is answered in the affirmative, whether an election must be held to exceed the ten mill limit. The solution of the problem, unless changed by the legislature will have to be solved by the courts as the cases arise.

William J. Syring.

TORTS—DUTY TO AID ONE NOT IMPERILED BY THE DEFENDANT'S FAULT.—Life today is a maze of practicalities. Business runs at top speed and the humanity of the individual is chaosed in the ever maddening maelstrom of mercantile life. Men tend to become smug, cold and domineering, forgetful of their fellows. Circumstances of competitive practice have made the self-centeredness of the individual his very livelihood. Christianity sought to turn man's attention from himself and divert it to his fellow men and their common Creator. But spiritual sustenance can not well sustain the body, and the mad race for comfortable and facile survival goes on. Charity as practiced by Christian contemplatives and esthetes is not the atmosphere of the modern world. And yet nothing it seems is more opportune today than the permeation of all human activity with the Christian principles of charity and moral justice and a legal recognition of such principles as a proper basis of adjudication.

In legal circles such ideas as the latter are left to the few alleged outmoded legal philosophers whose so called impractical theorizings and often varying opinions merit little survival value among the members of a profession that has fast come to be a large scale business. Many problems raised by moral issues distress the minds of lawyers and even tend to distort and confuse the minds of philosophers themselves. One such problem is the question of the *duty* of one man, without peril to himself, to aid another who is in imminent danger. Is there such a duty? Thus, is there a duty to rescue a small child lying on a track, a strangled and struggling drowning victim if one is perfectly able to do so? Should one stay the blind man whom he sees nearing the edge of a precipice or warn one who is about to enter a

powder magazine with a lighted torch? Can one idly stand by while another is in the grip of danger and incur no more than the condemnation and reproach of men? Would one so imperiled have a legal remedy, or is he simply a victim of circumstances? Philosophers and lawyers alike have left such issues undetermined. Philosophers, without determining a definite moral duty, counsel the higher law of charity; while lawyers taboo such questions because they smack of morals.

The instances cited are situations which involve merely the relation of one man to another. In such instances it is difficult to determine whether it is the legal duty of one man to aid another. There is a legal duty on one to aid another, where one person must look solely to another for the protection that the latter can capably afford. In such relationships of mankind there is a legal duty on the part of the one to aid the party imperiled.

These special relationships require, by their very nature, that the law impose a legal duty to render aid. Most elemental and fundamental of all human relationships is the family relationship. Duties in the family regard however do not extend beyond the definite limits of furnishing necessities. This duty, not recognized at common law, is now said to be "implied by law." The duty of parents, guardians, or those who by adoption or otherwise, have assumed the relation "*in loco parentis*" is made obligatory on them by statute, although not required by the common law, *People v. Pierson*.¹ Moral duty extends the care required of parents toward their children to more than the mere provision of necessities. There are more responsibilities attendant on the married state than merely supplying the bare necessities of life. Thus theologians would convict of moral guilt a husband or father who inactively and irresponsibly failed to do anything for an endangered wife or child. The common law recognized as due to the wife or child only what was owing in strict justice. e

The Montana court in the case of *Territory v. Manton*² seems to have gone further than the law and extended it beyond the mere provision of necessities. In this case the defendant was convicted for manslaughter for the murder of his wife. The two became intoxicated in a neighboring village and started home some miles away. As they neared the house the wife fell into the snow and was left to remain there. The Montana court here takes what seems to be a sensible attitude in declaring that the husband owed the legal *duty* to the wife, at least to take active steps to extricate her from her peril.

A special relationship that exists among men is that of master and servant, employer and employee and there are certain duties involved. The relation of master and servant arises because of the special capacity

¹ 176 N. Y. 201, 205, 68 N. E. 243 (1903).

² 7 Mont. 162, 14 Pac. 637 (1887).

in which the servant stands in regard to the master. In such capacity the master has exclusive control over the servant, and it is to the master solely that the servant can look for protection. It is incumbent on the master to provide a reasonably safe place to work, as in *Schaum v. Southwestern Bell Telephone Co.*,³ and *Chicago Northwestern Ry. Co. v. Ott*.⁴ The legal duty to provide a safe place to work has been incorporated into our legislation so that under our "Federal Employers Act" or under the "Safety Appliances Act" an employee has a cause of action for injury resulting from an improper place of work or because of a lack of safe and suitable appliances. Evidence of regulation of industry is seen in such instances as legislation intended to prevent the disease known as silicosis.

An employer is not liable to an employee for the negligence of a fellow servant or employee as in *Haraway v. Mance*,⁵ *Cummer Lumber Co. v. Silas*,⁶ *Reynolds v. Addison Miller Co.*,⁷ which cases represent the fellow servant rule. The employee is not without recovery, since government legislation requiring workmen's compensation insurance has taken care of the injured and disabled employee. It is the duty in justice of the state to care for the health and protection of its citizens, where the individual has been unable to make up for the deficiencies in society. In a way then the state is bound in justice to perform corporate works of mercy such as providing homes and institutions for the poor, aged and destitute; burying the dead; providing relief and succour to the poor and helpless; whereas as far as the individual is concerned, these works, though morally binding, are left to the personal charity of the donor.

At common law a master is not bound to provide medical attention to his servant, except there be an express stipulation to that effect; *Davis v. Forbes*,⁸ *Pittsburgh, Cincinnati, Chicago and St. L. Ry. Co. v. Sullivan*.⁹ A Kentucky case in 1931, *Stanley's Adm'r v. Duvin Coal Co.*,¹⁰ rules that one who voluntarily procures a physician for an injured employee is not liable for the negligence of the physician if selected prudently.

In the case of seamen the law approaches somewhat the enforcement of a moral obligation, perhaps because of the exigencies of the situation and the circumstances of seamanship. Thus the master of a ship is required to provide sufficient food for his men. Under American law he is required also to provide medical attention as in the case of

³ 336 Mo. 228, 78 S. W. 2d 439 (1935).

⁴ 33 Wyo. 200, 237 Pac. 238 (1925).

⁵ 183 Ark. 673, 56 S. W. 2d 879 (1933).

⁶ 98 Fla. 1158, 125 S. 372 (1930).

⁷ 143 Wash. 271, 225 Pac. 110 (1927).

⁸ 171 Mass. 548, 47 L. R. A. 170 (1898).

⁹ 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840 (1895).

¹⁰ 237 Ky. 813, 36 S. W. 2d 630 (1931).

Scarf v. Metcalf,¹¹ where an action lay against the master of a ship by a sailor whose injuries had been greatly exaggerated by the failure of the master to provide medical attention. And in *United States v. Knowles*¹² the court went on to determine that there was a further duty to make reasonable effort to rescue sailors who had been washed overboard.

Another relationship, unusual for its peculiar circumstances, regards legal imprisonment. Cases on the point are rare. In an English case, *Regina v. Edwards*,¹³ an indictment, for the failure of a mother to supply an infant with food, was held to be bad. The common law did not recognize the duty of parents to provide necessities for their children. But if the indictment had read that the party failing to provide food was imprisoning the other it was sufficient to show the duty to supply food.

The foregoing is a discussion of the certain relationships in which men are involved and some of the cases wherein the duty to render aid has been imposed by common law. In the strictly man to man relationship there is, according to theologians, an obligation in charity, equally binding as that in justice, to give aid. The law has in some instances given to a moral duty binding in charity the effect of a legal duty. For instance the German Civil Code in section 826 provides that "one who wilfully brings about damage to another in a manner running counter to good morals is bound to make reparation to the other for the damage." It is to be noted that the failure to give aid constitutes a *civil* offense, whereas according to the Dutch Penal Code, such failure, under similar circumstances, constitutes a criminal offense.

The only semblance, in our law, of an attempt to enforce a moral duty to render aid is in our statutes regarding hit and run drivers. These statutes require of a driver of an automobile, to stop and render assistance to another person who has been injured in an accident in which both were involved. Often human sympathies in these cases are in prominence, as in *People v. Thompson*¹⁴ where the victim was a child, who sustained injuries and died as a result of an accident, the defendant failing to stop and render aid following the accident, for which he was convicted. Would it be too much to require the same duty of assistance of the one who sees the babe on the track, or casually allows one to go into a powder magazine with a lighted fire or fails to warn the blind man who is approaching the edge of a precipice? The constitutionality of such legislation as the hit and run statutes has been determined, for example as in the case of *St. Clair v. Indiana*.¹⁵ But

¹¹ 107 N. Y. 211, 13 N. E. 796 (1887).

¹² 4 Sawyer (U. S.) 517 (1908).

¹³ 173 English Reports 640, 8 C. & P. 611 (1857).

¹⁴ 123 Cal. App. 726, 12 Pac. 2d 81 (1932).

¹⁵ 196 N. E. 683 (1935).

the law has rigidly held to strict legal interpretation in these issues. The court has gone so far as to convict a poor, destitute woman, who, in dire circumstances stole a loaf of bread from her uncle, a baker. In strict charity the woman ought not to have been convicted. The trial court acquitted her, but this decision was reversed by the higher court. Philosophers and theologians would stress a serious and binding obligation in charity in such cases, because there is a moral duty on the part of those more fortunate in life, "*in superabundantia vitae*," to give aid and succour to those less fortunate than themselves, who are destitute and in the direst of circumstances, "*in extremis vitae*."

No general moral duty exists in justice to save others from peril. There is a duty in charity, however, which morally not legally is just as binding as a duty in justice. This is where there is no danger entailed to the rescuer. But no one is obliged either in justice or in charity, if both parties are in danger, to give up his life or physical existence for even what theologians might be inclined to call our neighbor's spiritual welfare. But whereas there is no duty to endanger oneself, there is that privilege even to the point of sacrificing one's own life. Take the hypothetical instance of the two men adrift on a log in the open sea. Each owes the duty to the other not to force him from the log. If both remain they must succumb. If one submits himself to the waves he is privileged to do so without suicide. It is the highest form of *charity*. The principle applying is that to justify such a circumstance, the act (succumbing to the waves as here) must be good or at least indifferent. Some hold that acts are either good or bad, thus eliminating indifferent acts. In the second place the intention of the actor must be good, as e. g. the intention to save another's life. And lastly the good effect must not come directly from the bad, but must be contemporaneous with and flow indirectly from the bad. It is a recurrence of the principle that one may not do evil that good may result therefrom or that the end doesn't justify the means. This principle would have to be applied in such instances as where one, who to prevent another from committing suicide by poison, himself consumes the poison; the mountain scaler who cuts himself loose that his companion may thereby be saved; the virgin who leaps from a cliff to save her virginity or the doctor, who, in eradicating a noxious growth, e. g. cancer, must jeopardize the life of a pregnant mother and unborn fetus.

The courts do not enforce obligations of charity except in so far as they have been made legal duty binding in justice. The reasons for not recognizing obligations in charity are much the same as those given in the comment of the good Samaritan case in *Buch v. Amory Mfg. Co.*¹⁶ There was a possibility that those who passed by might be similarly overpowered by robbers, and theologians admit that there is no duty or obligation in charity where one's life is in danger. Thus

16 69 N. H. 257, 44 A. 809, 76 Am. St. Rep. 163 (1898).

in the present day it would be hardly binding, even in charity, to take in a stranger who comes to your home for lodging. It would be very imprudent to do so, especially in the interest of one's family. Secondly there is the determination as to whom you are going to place the duty upon. In the man to man relationship, can you single out any individual of the human race?

If among the varying so called moral codes a determination as to the existence of a moral duty can not be arrived at, how can it be demanded that lawyers base their decisions on the existence of a moral duty? The practice of law in its present state is too practical to be trammelled by moral problems. The law of contracts was once so hampered by the recognition of moral as valid consideration, but as Bishop remarks: "such a doctrine, carried to its legitimate results, would release the tribunals from the duty to administer the law of the land; and put, in the place of the law, the varying ideas of morals which the changing incumbents of the bench might from time to time entertain."¹⁷

The practical dispensation of justice would be thus interrupted by an attempt to base decisions on moral grounds. It would tend to make us a race of good Samaritans, a suggestion not to be condemned, but one recognized as highly impractical today.

Moral obligation implies a right in one and a duty owing in another. "The expression 'duty' properly imports a determinate person to whom the obligation is owing, as well as the one who owes the obligation. There must be two determinate parties before the relationship of obligor and obligee of a duty can exist," *McGee v. Norfolk*.¹⁸ The question becomes complicated when we consider a practical example. Several are picnicking on the bank of a river. One of their number is drowning in the middle of the stream. Any one of the number on the bank might easily save him. On whom are you going to pin the duty to rescue the drowning man. It would clearly be incumbent on life-guards if they were stationed there for that purpose.

"The duty must be owing from the defendant to the plaintiff, otherwise there can be no negligence, so far as the plaintiff is concerned; . . . and the duty must be owing to the plaintiff in an individual capacity, and not as one of the general public."¹⁹

In order that there be an actionable wrong the defendant must commit some wrongful act or there must be a failure on his part to perform a duty that he is required to do. A mere failure to do something that one is not required to do is not sufficient. This was brought out in the case

¹⁷ Bishop's Contracts, § 44, as quoted in Bohlen, "Cases on Torts, 2d ed., p. 314.

¹⁸ 147 N. C. 142, 146, 60 S. E. 912 (1908).

¹⁹ "Barrows on Negligence," p. 4.

of *Gautert v. Egerton*²⁰ where it was said that "no action will lie against a spiteful man, who seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held answerable for not protecting them against any danger which they might encounter whilst using the license."

The legal position in regard to moral obligation is very succinctly expressed in the case of *Kenney v. Hannibal and St. Joe R. R. Co.*,²¹ where in its insistence on the existence of a duty owing from the defendant to the plaintiff, the court says that the requirement of such a duty "excludes from actionable negligence all failures to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues. The moral law would obligate an attempt to rescue a person in a perilous position — as a drowning child — but the law of the land does not require it, no matter how little personal risk it might involve, provided that the person who declines to act is not responsible for the peril."

We have tried to bring out in these pages the maze of practicality of our business world and the impracticality and impossibility of adopting the moral law as a basis of legal practice because of the variance of ethical codes. We do not mean to disdain such an ideal, however. In matters touching moral issues such as the duty to give aid, the law implies a duty in certain special relationships of mankind, but in the man to man relationships not even a moral duty to give aid is incumbent, except in case of extreme circumstances for the supplying of necessities. Otherwise the higher law of charity counsels. There are isolated instances in which the law of the land has gone further than the moral law, as in the case of the German Civil Code and the Dutch Penal Code and evidences of it in our own hit and run statutes. The reason for the law's practical disdain of moral issues is their very impracticality and the failure to find a duty incumbent on the alleged defendant.

Because of the teeming tenseness and high pitch of human relationship it is to be wondered whether there can be any amelioration in a legal way of the more human and sympathetic relationships among men, such as we have considered. For the present we can only leave their consideration to the determination of that higher Judge who knows and understands the circumstances, looks at the heart, whose judgment is final and from whose court there is no appeal.

Leo L. Linck.

²⁰ L. R. 2 C. P. 371, 375.

²¹ 70 Mo. 252, 257 (1879).

TRUSTS—AS DISTINGUISHED FROM A DEBT WHERE INTEREST IS PAID.—Whether the relationship of the parties to an agreement is that of debtor creditor or trustee *cestui que* trust is often of great importance when such questions arise as: Who has title to the money involved? Does the plaintiff have a preferred claim? What is the degree of responsibility of the defendant? etc. Whether these questions will be answered in favor of one party or the other will depend upon the relationship established. We therefore find many cases involving the distinction between a debt and a trust and all of them are not in accord. The difficulty lies in the determination of the intent of the parties involved and the legal relationship actually created.

Scott on Trusts ¹ says: "Where a person is intended to have the beneficial and legal interests if he was intended to have the use of the money as his own and to be under a merely personal liability to the payor or to a third person a debt is created. Where it was intended that the beneficial interest in the money should remain in the payor or should pass to a third person a trust is created. Where the language of the parties does not clearly show their intention, all the circumstances must be considered in order to determine whether a debt or a trust was intended."

Restatement ² says: "The intention of the parties will be ascertained by a consideration of their words and conduct in the light of all the circumstances. Among the circumstances which may be of importance in determining the intention of the parties are: (1) The presence or absence of an agreement to pay interest on the money paid; (2) the amount of money paid; (3) the time which is to elapse before the payee is to be called upon to perform his agreement; (4) the relations between the parties; (5) the relative financial situation of the parties; (6) their respective callings; (7) the usage or custom in such similar transactions. If there is an understanding between the parties that the person to whom money is paid shall pay 'interest' thereon (at a fixed or at the current rate, and not merely such interest as the money being invested may earn) the relationship is practically always a debt and not a trust."

The Supreme Court of the United States in *Seymour v. Freer* ³ defined a trust in the words of Mr. Justice Swayne as follows: "A trust is where there are rights, titles, and interests in property distinct from legal ownership. In such cases the eye of the law carries with it to the holder absolute dominion, but behind it lie beneficial rights and interests in the same property belonging to another. These rights to the extent to which they exist are a charge upon the property, and constitute

¹ Scott on Trusts, § 12-2.

² Restatement of the Law — Trusts § 12.

³ 75 U. S. (8 Wall.) 202, 19 L. Ed. 306 (1869).

an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked."

Where the intent of the parties is not clearly expressed in the instrument or the agreement, the courts must determine from the facts presented the intent they manifest in law. Some courts adhere strictly to the rules of interpretation while others will respect the intent of the parties with little regard to the legal effect of their acts.

In *Pittsburgh National Bank of Commerce v. McMurray*⁴ A sent money to B for investment with the understanding that B was to pay interest thereon until invested. B deposited the amount in the bank, and afterwards becoming insolvent, absconded. A demanded payment from the bank which was refused and on the same day the money was paid by the bank to the sheriff by virtue of a writ of sequestration directed against B. In a suit by A against the bank to recover the amount of deposit the court held that the agreement to pay interest on the fund until invested, constituted B, the debtor of A, and not his trustee and hence the sum deposited in the bank was the money of B and not of A and that therefore A was not entitled to recover. The court said: "Undoubtedly the receipt by him (B) of the money for investment, *without more* (italics added) would have made him a trustee. The money would have been trust money, and if misapplied, could have been followed until it reached the hands of an innocent holder for value. But the agreement to pay interest necessarily implied the right to use the money. Interest is the price or consideration for the use of money. It follows that Gill (B) became the mere banker or debtor of the plaintiff's, subject to the duty of investing the money in a mortgage when a suitable opportunity should occur." The court here recognized something more than a mere loan when it said that B held the money "subject to the duty of investing the money in a mortgage when a suitable opportunity should occur." Yet it did not leave A in a better position than a general creditor.

We find a similar inclination of the court in *Old Colony Trust Co. v. Puritan Motors Corp.*⁵ where a provision for a deposit by an automobile dealer with a distributor, requiring that the dealer deposit \$500 with the distributor to guarantee performance of a contract did not create a trust fund. The court held that since the distributor had to pay interest he had the right to use the money and a debt was presumptively created. However, the court did not decide the case wholly on this basis as it said "If, however, we assume with claimant that a trust was created notwithstanding the obligation of the trustee to pay interest upon the *res* without the right to use it as his own subject to the agreement we

⁴ 98 Pa. 538 (1881).

⁵ 244 Mass. 259, 138 N. E. 321 (1923).

think that the decree that the claimant is not entitled to priority is right."

The above two cases were cited in *Doty v. Ghinger*,⁶ where it was decided that deposits made to guarantee the bank against loss in liquidation of notes discounted for a depositor are not trusts. The court said, "We cannot find in the agreement any evidence of an intention of the parties to create a trust, and a trust will not be imputed where none in fact was contemplated."

In *Poney v. Colonial Beacon Oil Co.*,⁷ the court held that money deposited by the lessee of a filling station with the lessor as security for which the lessee was to receive interest established a debtor creditor in fact was contemplated."

In *Dunlap Sand and Gravel Corp. v. Hospelhorn*,⁸ the court held that where money was deposited with a trust company as a bank, on interest, and the account was referred to as a deposit though the money was deposited there as security for performance of a contract and it had been arranged through the trust department there was no trust. The court stated that the provision for payment of interest was an important factor in determining its decision.

In some cases there is more clearly a debtor creditor relationship though there is some resemblance to a trust as in *Price v. Dawson*⁹ when a seamstress turned money over to her employer to enable him to build a house on agreement that she was to receive five percent interest. There was held to be a debtor creditor relationship and not a trust. The court here was moved by a letter in evidence which expressed thanks to the seamstress for having *loaned* the money. This was thus a very strong case for a debtor creditor relationship but even though the court so held it declared that this was a "hard" case.

In *Wetherell v. O'Brien*,¹⁰ where plaintiff delivered money to a banker, her representative stating to him that she wished to leave it with him until he could invest it and he made out a savings deposit account and gave her a passbook, the court held that a debtor creditor relationship was established. This is a strong case for the debtor creditor relationship because plaintiff keeps control over money until she obtains an investment.

The problem also arose in *Tucker v. Linn*,¹¹ where the learned judge made a very complete analysis of the case. Here the master agreed with a servant to "keep" the latter's wages and pay a better interest than the

⁶ 166 Ind. 426, 171 A. 40 (1934).

⁷ 294 Mass. 86, 200 N. E. 891 (1936).

⁸ 172 Ind. 279, 191 A. 701 (1937).

⁹ 111 Mich. 279, 69 N. W. 650 (1896).

¹⁰ 140 Ill. 146, 29 N. E. 904 (1892).

¹¹ 57 A. 1017 (N. J., 1904).

bank. It was held that there was no trust but a debtor creditor relationship. His Honor looked into two cases, one cited by each of the opposing counsel in the case — the first was *Gutch v. Fosdick*¹² which had been decided by Chancellor McGill. The instrument involved in this case read as follows: "I hereby certify that I hold in trust for Francis E. A. Gutch the sum of four thousand dollars for which I agree to pay interest at five percent per annum and I promise to refund to her the said four thousand dollars on demand, \$4,000. J. Erwin." The chancellor in dealing with the language of the instrument says: "It is to be observed that by it Jacob Erwin declares that he *holds* \$4,000 in trust, not that he *owes* that sum and that he will *refund* it; not that he will *pay* it. The language is evidently selected with care to fully and consistently express a deposit in trust in contradistinction from a promised payment of a loan or indebtedness. The declarant does not owe; he holds in trust, considered independently of the words "in trust" the word "hold" implies a defensive possession, entirely consistent with that of trustee. The declarant is to pay interest while he thus holds but he is not to pay the principal sum. That he is to refund. The word "pay" importing indebtedness is applied only to the interest which springs from the use of the fund. When disposition of the fund itself is mentioned, the word refund is used in the sense of "restore": I fail to perceive how more apt words could be selected to express the idea of a pure deposit in trust. . ." The second case he considered was *Agens v. Agens*;¹³ here a bill was filed against an executrix to recover the amount of money represented by a duebill given by the deceased to the complainant which reads as follows: "\$29,536 96/100, Newark, N. J., May 29, 1877, Due Thos. Agens Twenty-Nine Thousand Five Hundred and Thirty-Six 96/100 dollars for cash deposited in trust with me Fredk. G. Agens." Chancellor van Fleet who decided the case held this was no trust but a pure indebtedness. Of these two cases Judge Stevenson says, "In this Gutch case and in the later case, the Agens case — these cases I have read — it seems to me the question is, does the language in those instruments, which sounds in equity properly construed create any equitable obligation or equitable relation? If so, then a court of equity may have cognizance. But if the real true meaning of the instrument is that it is simply a case of borrowing and lending then there can be no trust, it seems to me, and a court of law is the only court having cognizance of the case." Then in looking at the language used in the case before the court, his Honor said, " 'Keep' is the word that is proved here to have been used by Mr. Linn — 'Let me keep your wages, and I will pay you interest: better interest than you can get in the bank.' That does not indicate any trust relation. It does

¹² 48 N. J. E. 353, 22 A. 590, 27 Am. St. R. 473 (1891).

¹³ 50 N. J. E. 566, 25 A. 707 (1892).

not indicate that the employer is receiving the fund in trust to invest for the employee. Nothing of the kind. It indicates that the employer is borrowing money."

In *Bair v. Snyder County State Bank*¹⁴ the court held that a bank which had issued certificates of deposit could not, while the relationship of debtor and creditor existed, be trustee of its obligation to pay holder of certificates. Here of course the certificates were evidence of a debtor and creditor relationship and the control was in the holder of the certificate as in *Wetherell v. O'Brien*.¹⁵

The dissenting Justice Stone in *City of Canby v. Bank of Canby*¹⁶ states: "It is essential to a trust that the legal title be put in one, the trustee, for the benefit of another, the beneficiary. A trust implies two estates or interests — one equitable and one legal . . . Absolute control and power of disposition are inconsistent with the idea of a trust" citing *Hospes v. Northwestern Manufacturing and Car Co.*¹⁷ Then he goes on to say: "Is it not plain that here was given the absolute control of the money and power of disposition? It became part of the general funds of the bank." The facts were as follows: A donor deposited \$1,000.00 with a bank and provided for compounding of interest semi-annually for 110 years, at the end of which period deposit and accumulations were to be paid to the city. And he directed that if it should be impossible to carry out the agreement, the fund with accumulations should at once become payable to the city. The majority of the court held that the deposit and accumulation were a trust fund to which the city was entitled to preference upon the insolvency of the bank. The majority of the court based its decision on *Blummer v. Scandinavian American Bank*,¹⁸ where the plaintiff deposited a check with the bank for \$1,561.89 the bank gave him a receipt reciting that the proceeds of the check were to pay the mortgage which matured on December 1, 1921. It also contained a promise to pay plaintiff interest at six percent until the money was paid to the mortgagee. On August 20, 1920 the bank executed a certificate of deposit in the usual form in favor of plaintiff for \$1500 maturing December 1, 1921 with interest at 6% having an endorsement across the end thereof "To pay R. E. loan — loan 467." This certificate was placed on file. The bank failed and the plaintiff was allowed a preferred claim by the court on grounds that the money was left with it (bank) for a specific purpose, that is, to pay the mortgage and for that alone. The title remained in the plaintiff — the money having been received for a specific purpose, the relation of debtor and creditor did not exist, but rather that of trustee and *cestui-que* trust. The bank had no title to the money. Its obligation was de-

¹⁴ 314 Pa. 85, 171 A. 274 (1934).

¹⁵ 140 Ill. 146, 29 N. E. 904 (1892).

¹⁶ 192 Minn. 571, 257 N. W. 520 (1934).

¹⁷ 48 Minn. 174, 192 N. W. 1117, 15 L. R. A. 470, 39 Am. St. R. 673 (1892).

¹⁸ 169 Minn. 89, 210 N. W. 865 (1926).

financed by the terms of the agreement. It was a special deposit. The fact that the money was mingled with other funds is not controlling. He is a preferred creditor, plaintiff must have his property or its equivalent." The court then referred to one of its earlier decisions — *Village of Monticello v. Citizens State Bank*,¹⁹ in which case there was a contingency that the deposited fund should remain "until that time when it, with the interest additions thereto, together with the recessions of the cost of labor and material, will fully pay the entire cost of the building." The court says of this *Monticello Case*: "In substance and effect that case and the instant case are the same. Here the bank was to pay or 'contribute' at the rate of four percent per annum, compounded, semi-annually for a definite period of time or if the bank at any time found it impracticable on its part to carry on pursuant to the agreement to terminate its responsibility at its own discretion. There is nothing indicating the relationship of debtor and creditor except the payment of interest." Held that there was a trust relationship. Of the agreement in the *Canby Case* ²⁰ *supra* in the majority opinion Justice Olson said: "The language used to reach this result is not what an able lawyer would employ. The case illustrates the danger involved where a layman seeks to establish a trust. But courts have for their object and purpose the accomplishment of what is obviously the intention of the parties. We should not nor do we look for loopholes to destroy what men have honestly sought to accomplish nor do we by strict interpretation permit the overturning of written instruments even where faultily drawn, if from the same and from the surrounding circumstances we can find the clear intent and purpose of those who enter into such agreement."

In *Leo v. Pearce Stores Co.*²¹ the Federal District Court held that where by a Pool Participation agreement a certain percentage of employee's salary is withheld for purchase of stock — or upon his death the representative is entitled to the money at six percent interest there is no trust there being no reference to any trust and "there is no language indicating any intention that the money shall be kept as a separate fund or that its use by the defendant shall be restricted in any way. Indeed such a restriction is negative by the provisions relative to interest. This seems to be a rather strong case for a debtor creditor relationship since the money remained in the employer on an interest basis and the purpose was contingent rather than certain.

The case of *Seymour v. Freer*,²² that is, the definition quoted, was cited in *Frost v. Frost*,²³ where a mother turned over money to her son on the understanding that he would pay her interest thereon for life, and

¹⁹ 180 Minn. 418, 230 N. W. 889 (1930).

²⁰ 192 Minn. 571, 257 N. W. 520 (1934).

²¹ 54 F. 2d 92 (1931).

²² 75 U. S. (8 Wall.) 202, 19 L. Ed. 306 (1869).

²³ 165 Mich. 591, 131 N. W. 60 (1911).

that on her death the money should belong absolutely to him, a trust was created enforceable in equity. The court said, "A holding in trust involves possession, control, dominion, reinvestment and the legal title. In order to create a trust in the donor, a mere intention or promise to give in *futuro* is insufficient, there must be an act, or series of acts, which divest the donor of the equitable ownership, and vest such ownership in the donee."

In *Woodhouse v. Crandall*,²⁴ a tenant made a bank deposit on the express condition that it was to be held as security for the full performance of his lease, taking a receipt reciting that the bank was to pay the landlord out of the fund deposited whatever damages he might sustain by reason of the tenant's default and that after the expiration of a certain time; and on the condition named in the lease, the bank was to hold the whole sum to the credit of the landlord, to be paid him in certain installments. Held that the deposit was a special one, creating a trust fund, and that the bank was bound to keep it intact for purposes specified. The court distinguished *Wetherell v. O'Brien*, *supra*, stating that there they had a general deposit and no trust.

In *Genesee Wesleyan Seminary v. United States Fidelity Insurance Co.*,²⁵ the treasurer of a seminary was a banker and the seminary knew that the money was placed by the banker on deposit with himself in his own private bank and mingled indiscriminately with his own private funds. Held by Cardozo that there was a trust relationship, the presumption being that a fiduciary is not to deal for his own profits with the moneys of a trust, expending and wasting them to his own pleasure.

Two schools of thought are reflected in these decisions, the first is very reluctant to allow such an "incongruity" as interest to be paid by a trustee on money held in trust by him. The second looks first for the intent of the parties and once this is established it will not let rules of strict interpretation of an instrument overthrow this intent. The first view places little emphasis on the purpose of the parties but looks mainly at the acts done. The second places as much weight on the purpose as on the completed acts to arrive at the full intent of the parties and to determine their legal relationship. Where courts of the conservative type admit that one party did not merely intend to make a loan to the other purely as a general creditor they will not place him in a better position than that of a general creditor if the completed acts do not warrant a better position. This is clearly illustrated in *Pittsburgh National Bank of Commerce v. McMurray*,²⁶ and other cases indicated above. Where the more liberal courts encounter this situation they do place the party in a better position than that of general creditor. A

²⁴ 197 Ill. 107, 64 N. E. 292, 58 L. R. A. 385 (1902).

²⁵ 219 N. Y. S. 820, 159 N. E. 720, 56 A. L. R. 964, 219 Am. Dec. 764 (1927).

²⁶ 98 Pa. 538 (1881).

good example of this is the *City of Canby v. Bank of Canby*²⁷ or *Blummer v. The Scandinavian American Bank*.²⁸

The philosophy behind the liberal view seems to be that in order to do justice to the parties involved, their intent must control whether the court in its interpretation must violate the rules of legal science or not. Mr. Justice Olson expressed this quite well in the *Canby Case*²⁹ when he said "We should not nor do we look for loopholes to destroy what men have honestly sought to accomplish nor do we by strict interpretation permit the overturning of written instruments even where faultily drawn if from the same and from surrounding circumstances we can find the clear intent and purpose of those who enter into such agreement."

All will agree that justice must be done but whether the legal rules of interpretation must be violated to reach this end is another matter. To intend to make a contract is one thing — to make a contract is something else. We must apply the law to the overt act to determine the true legal status of the parties. If this causes undue hardship to one or both of the parties involved, there are still possibilities of relief by seeking another remedy. In the *Blummer Case*,³⁰ for example, there was hardly more than a third party beneficiary relationship, but the liberal court felt that it would be placing one of the parties in an unjust position if it did not declare a trust relationship. If there was such an indication of an intended trust (and there actually seemed to be) why couldn't the party seek his remedy in equity by reformation of contract? Under the sound conservative view not the mere intent of the parties but as dissenting Justice Stone said in the *Canby Case*,³¹ "the *manifest* intention of the parties determines whether a trust or a debt is created by payment of money by one to the other."

John H. Verdonk.

ZONING — MUNICIPAL RELATION THROUGH POLICE POWER.— The general topic of zoning has grown from an obscure concept of public protection by regulation of private interests to a comprehensive subject growing larger as time goes on. Zoning ordinances function as municipal regulation of private real property without compensation. Their regulatory power is declarative of the policy of the law for the future; in other words their main purpose is to prevent unsocial conditions rather

²⁷ 192 Minn. 571, 257 N. W. 520 (1934).

²⁸ 169 Minn. 89, 210 N. W. 865 (1926).

²⁹ 192 Minn. 571, 257 N. W. 520 (1934).

³⁰ 169 Minn. 89, 210 N. W. 865 (1926).

³¹ 192 Minn. 571, 257 N. W. 520 (1934).

than correct them. To this end, zoning ordinances may be considered as "a classification of uses of land for building purposes and the uses to which the buildings erected thereon may be put."¹

At this point the zoning ordinance, as we know it today, must be distinguished from private and semi-private rules of the same nature. Zoning is a municipal function of the governmental variety as distinguished from a collective, non-governmental or mutual agreement having the same effect. Therefore, a series of covenants among land owners in a certain district is not a zoning ordinance. So too, a covenant running with the title to real property is a private rather than a municipal restriction.

The great problem in zoning is to find a sound basis in law for such regulations as may be necessary. On the one hand, we find the inalienable right of private property vested in each citizen and on the other, the policy of the law covering the protection and advancement of public welfare. The reconciliation of these two necessary features of sound government would result in chaos, unless some restriction were placed upon one or the other. American zoning law has approached the problem from the viewpoint of regulation of private interests without encroaching upon the constitutional guarantees of private ownership. The basis of our zoning law is the exercise of police power by a municipality.

POLICE POWER

The Federal Constitution declares that certain inherent powers are reserved to the states; one of these being police power. Under this heading comes the exercise of a regulatory power to enact laws limiting the field of individual action in the interest of society as a whole. The term has been frequently defined as "the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society."² This limitation is of a protective rather than a regulatory nature. Chief Justice Hughes said of the "organization of society" or power of the government: "The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity."³

Before proceeding further it is necessary to distinguish police power and other governmental functions. The power in question is not an exercise of eminent domain because compensation to the owner of property is not a part of the exercise of police power. The United States Su-

¹ McQuillin, *Municipal Corporations*, § 1026 (2d ed., 1940).

² 12 C. J. 904.

³ *Home Bldg. and Loan Assn. v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413 (1934).

preme Court has held that a prohibition on the use of property by the exercise of police power is not a taking or appropriation thereof for the public use and as such does not constitute an exercise of eminent domain.⁴ Of interest here also are the decisions that the exercise of power to restrain the use of property in a manner detrimental to the welfare of the community is within the police power and not eminent domain.⁵ Since the object of most laws enforced under police power is regulation rather than revenue, it is to be distinguished from an exercise of the taxing power. True, many zoning laws call for license fees, but their purpose is not to raise revenue. This distinction, while purely academic, is useful in ascertaining the extent of police power.

It is important to note that the police power is an attribute of a state's sovereignty and as such vests complete power in the state. This power may be delegated by the state for such purpose as the constitution of the state may set forth. In the absence of a constitutional restriction, police power may be delegated by the several state legislatures to the municipal corporations of the state and administrative bodies.⁶ This delegation is permissible under the general welfare provision charging the state with the health, safety, and public morals of its citizens. The general welfare clause enables a municipality to enact ordinances furthering the end sought by the state. Thus, municipalities may by ordinances exercise their police power to further the health, comfort, convenience, and general welfare of the people.⁷ Under the heading of public welfare will be found the ends sought by our municipal zoning ordinances.

PROBLEMS INVOLVED

The human element in the government of a political community presents the problem of imperfection. The law of zoning does not escape this malady; indeed, present day ordinances are subject to much adverse criticism. The root of this discord is to be found in the conflict previously spoken of, that is, the reconciliation of the rights of private property and the acknowledged need of protecting the welfare of the community. Litigation involving the protection of private property is based for the most part on the Fourteenth Amendment to the Constitution of the United States. The rule "nor shall any State deprive any person of life, liberty, or property, without due process of law" meets an apparent exception in the exercise of police power. This ex-

⁴ *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887).

⁵ 12 C. J. 905; *Scovill v. McMahon*, 62 Conn. 378, 26 A. 479, 21 L. R. A. 58 (1892).

⁶ *McQuillin, Municipal Corporations*, 2d ed., § 949, p. 99 citing the decisions of the several states, e. g. *Beiling v. Evansville*, 144 Ind. 644, 42 N. E. 621, 34 L. R. A. 272 (1896).

⁷ *Chicago v. Union Traction Co.*, 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666 (1902).

ception lies in the decisions holding that certain zoning ordinances do not constitute a "taking" under the due process clause.

In discussing the various situations in which zoning ordinances escape the limitations of the "due process" clause, it is well to note the following premise. "In accordance with the settled principle that no part of the Federal Constitution was intended to hamper a valid exercise of state police regulation, it is particularly established by overwhelming authority that the Fourteenth Amendment was not designed to interfere with, and does not interfere with, curtail, restrain, destroy, or take from the states the right duly and properly to exercise the police power."⁸

The leading case in this field was the *Hadacheck* suit⁹ involving the depreciation in value of a brickyard due to a California zoning regulation. Despite the fact that the owner lost hundreds of thousands of dollars, it was ruled not to be a taking of property. The reason given here and in other leading cases, especially the *Euclid Village Case*,¹⁰ is that the regulations bring about public welfare and, as such, are not unreasonable. Another far reaching result is found in a Minneapolis regulation forbidding the building of additions to factories or new factories in a given district.¹¹ This was ruled not to be a taking. Recent cases supporting the constitutionality of ordinances restricting funeral homes, oil tanks, filling stations, apartment houses and other business establishments¹² show a marked tendency to broaden the police power. One author has said that police power does not grow, for it is, at all times, complete.¹³

It is a well established principle in the law of real property that air rights above land are vested in the owner subject to certain easements. In this connection we see very positive decisions involving zoning ordinances controlling the height and size of structures. The United States Supreme Court justified such restrictions on the grounds of safety and public convenience.¹⁴ Perhaps the most doubtful cases involving rights in land are found in the regulation of building lines. Despite the apparent taking of property by such rules, it has been held constitutional to require buildings to be set back a given distance from the property line.¹⁵

⁸ 11 Am. Jur., Constitutional Law, § 261, citing authorities.

⁹ *Hadacheck v. Sebastian*, 239 U. S. 410, 36 S. Ct. 143, 60 L. Ed. 394 (1915).

¹⁰ *Village of Euclid, Ohio v. Ambler Realty Co.*, 47 S. Ct. 114, 272 U. S. 365, 71 L. Ed. 303, 54 A. L. R. 1016 (1926).

¹¹ *American Wood Products Co. v. City of Minneapolis*, 35 F. 2d 657 (1929).

¹² 16 C. J. S. Constitutional Law, § 703 (b).

¹³ Metzenbaum, J., *The Law of Zoning*, p. 61.

¹⁴ *Welch v. Swasey*, 29 S. Ct. 567, 214 U. S. 91, 53 L. Ed. 923 (1909).

¹⁵ *Gorieb v. Fox*, 47 S. Ct. 675, 274 U. S. 603, 71 L. Ed. 1228, 53 A. L. R. 1210 (1927).

COMPENSATION AND JUSTIFICATION

Earlier it was said that zoning was municipal regulation of private real property without compensation. This apparently is true, if compensation of the nature expected in the exercise of eminent domain be considered. However, if viewed in the abstract, zoning ordinances theoretically bring about a repayment to the individual affected. The New York Court of Appeals has stated that "compensation for such interference with and the restriction in the use of property is found in the share that the owner enjoys in the common benefits secured to all."¹⁶ Immediately the question comes up: Does the owner's share compensate him for his loss? If we consider the Hadacheck case¹⁷ the answer must certainly be far from affirmative. In other cases the restricted owner's share is greater, but only in rare instances is it nearly proportionate to his loss. The owner may be considered as making a gift to the general public. He gives away what he cannot use himself so that they as well as he may benefit. His duty resides in the golden rule of property: *Sic utere tuo ut alienum non laedas*.

If the problem at hand in a zoning restriction lacks the compensation feature considered, the apparent harshness of the ordinance may be justified by the application of the *damnum absque injuria* theory. By this is meant that since the injury to the public health, safety, morals, or general welfare is of a nature an injury *damnum absque injuria*, its cessation may be justified. The term demands definition, however, beyond a mere translation. The Indiana Supreme Court defined it as damage without legal injury or infringement of right.¹⁸ In this light, it can be seen that for such an injury no action will lie.¹⁹ The rights of the owner of property affected by this exercise of police power are subservient to those of the public. A California jurist said that "in such case individual constitutional rights must yield in favor of the general welfare."²⁰ It is to be noted however, that strictly speaking a law may not destroy or restrict any "right." The law rather redefines the right — in this case the individual property right in terms of the coexistent rights of others.

Charles G. Hasson.

¹⁶ *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. (N. S.) 735 (1909).

¹⁷ *Hadacheck v. Sebastian*, 239 U. S. 410, 36 S. Ct. 143, 60 L. Ed. 394 (1915).

¹⁸ *Cleveland, C., C. & St. Louis Ry. Co. v. Mumford*, 208 Ind. 655, 197 N. E. 826 (1935).

¹⁹ 2 Words and Phrases, 5th series, p. 190.

²⁰ *Ex parte Pedrosian*, 124 Cal. App. 692, 13 P. 2d 389 (1932).