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Notes

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NOTES


CONSTITUTIONAL LAW—RELIGIOUS LIBERTY AND FREEDOM OF CONSCIENCE—SCHOOL REGULATIONS.—No doctrine of American Constitutional law is guarded more jealously than that of freedom of religion and liberty of conscience. Ever since the birth of our nation various sects have scrutinized legislative acts for possible infringements upon religious liberty. Time after time courts have been called upon to determine whether this or that particular legislation encroaches upon the rights of some one of our citizens. Quite frequently, the doctrine of religious liberty is invoked to review school board regulations. Oft-times well meaning regulations have been thrust into courts as a violation of some person’s constitutional rights. Of recent note is the salutation of the American flag by school children. The widespread fear of Communism, Facism and Socialism caused many school boards to pass regulations requiring students to salute the flag and recite the pledge. One particular religious sect, called Jehovah's Witnesses, conscientiously object to this practice as being contrary to their religion. Under their instigation the question has been brought up during the last few years in numerous courts. The facts in all these cases are substantially alike. The school board passes a rule requiring all school teachers to have the children salute the flag and recite the pledge in unison. The petitioners refuse to do so because their parents warn them that it is wrong and forbidden by God’s commandments. To sustain their position they quote from the Bible, Exodus, chapter 20, verses 4 and 5:
Exodus, chapter 20:

4. "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.

5. "Thou shalt not bow down thyself to them, nor serve them, for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me."

Despite the fact that state laws require them to attend a public school or some other approved school, petitioners, upon their refusal to salute, are expelled. Although the aid of the court was besought the supreme courts of Massachusetts,\(^1\) New Jersey,\(^2\) Georgia,\(^8\) and California\(^4\) and the Suffolk County court of New York\(^5\) denied them relief. These courts maintained that the exercise was purely patriotic and could in no way be construed as a religious practice. The expulsion of the children was likewise ratified, reasoning that since the school was free and maintained by the state, the children could enjoy the privilege of attending only by conforming to the regulations and customs of that school, and if they disapproved of the custom they should withdraw and enter some other school. These various state courts based their decisions upon Hamilton v. University of California\(^6\) decided by the United States Supreme Court in 1934. Here plaintiffs were students at the University of California. They objected to the two year military training course saying that war and military training were repugnant to the tenets and discipline of their church. The Supreme Court, however, upholding the right of the school to expel them, said that the state did not force them to go to the University of California, even though they were unable to afford a different college; hence the boys' right to stay at the University depended upon compliance with its requirements. This decision led the state courts to uphold the regulation requiring salutation of the flag as reasonable and proper. More recently, however, the question has arisen in Pennsylvania.\(^7\) This time the case is in the District Federal court. The United States District court refused to follow the state decisions and propounded a distinction between the flag case and the military training case. The honorable judge points out that there is no law compelling students to go to the University whereas state law does require these children to attend school. He concluded therefore that the decision

\(^1\) Nicholls v. Mayor and School Committee of Lynn, 7 N.E. (2d) 577 (Mass. 1937).


\(^3\) Leoles v. Landers, 192 S. E. 218 (Ga. 1937).

\(^4\) Gabrielli v. Knickerbocker, 82 Pac. (2d) 391 (Cal. 1938).

\(^5\) People v. Sandstrom, 3 N. Y. S. 1006 (1938).

\(^6\) 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343 (1934).

does not control the case, and that it was a violation of petitioners' constitutional rights to prohibit them from attending public schools—particularly so since they cannot afford to attend any other. The Court said: "We are aware that a number of courts have reached a contrary conclusion. (Names cases cited in footnotes 1-4). In each of these cases it was held that the salute to the flag could have no religious significance. In so holding, however, it appears to us that the courts which decided these cases overlooked the fundamental principle of religious liberty to which we have referred; namely, that no man, even though he be a school director or a judge, is empowered to censor another's religious convictions or set bounds to the areas of human conduct in which those convictions should be permitted to control his actions, unless compelled to do so by an overriding public necessity which properly requires the exercise of the police power. Furthermore it appears that the courts in these cases largely relied on Hamilton v. Regents of University of California, 293 U.S. 245, 55 S. Ct. 197, 79 L. Ed. 343, in which the Supreme Court held that a regulation of the University of California making military training compulsory for all students did not unduly infringe the liberty of students who were opposed to war and military training on religious grounds. That decision, however, was placed upon the ground that, although the right to entertain the beliefs, to adhere to the principles, and to teach the doctrines on which these students based their objections to military training, is included in the religious liberty of the individual, that liberty had not been infringed by the regulation in question, since the objecting students were not required by law to attend the university, and interest of public safety to require its citizens to prepare for its defense by force of arms was paramount to their right to religious liberty."

Continuing further in his opinion the judge said: "In the case before us the attendance of the minor plaintiffs at defendants' school is, as we have seen, required by law. Furthermore their refusal to salute the flag does not prejudice the public safety. Consequently Hamilton v. Regents of University of California, supra, does not support the validity of the regulation here involved. On the contrary that regulation, although undoubtedly adopted from patriotic motives, appears to have become in this case a means for the persecution of children for conscience sake. Our beloved flag, the emblem of religious liberty, apparently has been used as an instrument to impose a religious test as a condition of receiving the benefits of public education. And this has been done without any compelling necessity of public safety or welfare."

However, despite the stand taken by the District judge, the Supreme Court of the United States has denied, appeals in Leoles v. Landers and Hering v. State Board of Education. The hearing was denied for

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lack of a substantive federal question. This would seem to indicate that the Supreme Court does not believe any constitutional right has been violated.

The flood of litigation is similar to that which arose out of the reading of the Bible in public schools a few years ago. Court after court was called upon to enjoin school boards from requiring teachers to read King James’ version of the Bible in classrooms. Courts have split upon its constitutionality. The majority, however, have upheld the school boards saying that the mere reading of the Bible without note or comment is not teaching religion nor is it giving preference to any particular religious sect. They based their decisions upon the ground that a teacher has the duty to teach children the principles of morality and that no better book could be used than the Bible filled with moral lessons. The minority objects that reading a Bible is discriminatory in that it gives preference to one sect and creates an impression that the chosen version is correct and the others are false. Even though a child may leave the room the practice is objectionable since it makes a person feel his religion is merely tolerated and brands him with a religious stigma. In *Herold v. Parish Board of School Directors* the court remarked: “And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious matters. The Constitution forbids that this shall be done.”

Although these two regulations have caused much excitement their problem is not unique. School boards’ regulations and actions have been quite frequently contested. In *McDowell v. Board of Education of City of New York* the plaintiff, a Quakeress, was teaching school in New York. Called before the school board she exclaimed that she was opposed to the war with Germany, hated all wars, would not urge her pupils to support war or to perform Red Cross services and did not believe that a teacher had a duty to train children in war measures. As a result she was dismissed as being incompetent and inefficient. Bringing this action she maintains that she was dismissed because of her religion which is a violation of her constitutional right. The Supreme Court of

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12 136 La. 1034, 68 So. 116 (1915).

13 172 N. Y. S. 590 (1918).
New York held that a teacher had a duty to inculcate in her pupils principles of justice and patriotism and a respect for our laws, that the refusal of this teacher to do so was a violation of that duty, that because of her religious beliefs she was not capable of performing her duty and concluded that the board was justified in dismissing her as incompetent and inefficient. The court apparently got around a very delicate situation by some close reasoning. Being dismissed because her religious beliefs made her incompetent and inefficient and not because of her religious beliefs in themselves appears to be a very fine distinction. In view of the crisis, however, the decision was desirable from the standpoint of public policy.

No less interesting and unusual is *Commonwealth v. Herr*. An act prohibiting teachers from wearing any dress, insignia, emblem, or mark which would indicate that the teacher is a member of a particular religious sect was passed. The court held that such an act was a reasonable regulation by the legislature and was not violative of the Constitution. The United States Supreme Court had already determined in *Reynolds v. United States* that the government cannot interfere with opinions and beliefs but may govern the practices and actions. Legislatures, furthermore, can prescribe the manner of dress teachers in public schools should wear and bar all things which may destroy the non-sectarian character of the school.

On the other hand, where graduation exercises were held in various churches and ministers and priests were asked to say non-sectarian prayers the court refused to grant a mandamus compelling the school board to discontinue the practice. Mere attendance of graduation exercises once a year, the court reasoned, could not be said to be compelling persons to attend a place of worship. Invoking non-sectarian prayers, moreover, is not a violation of constitutional rights since such prayers are invoked in numerous governmental functions as for instance the opening of Congress. The court did, however, state that although no legal rights were affected nevertheless because of the ill will and sensitiveness among the people the board would be wise in discontinuing the procedure.

Compelling a student to attend a place of worship, however, has been held to be repugnant to his constitutional rights in *Miami Military Institute v. Leff*. The Miami school had sent out a catalogue to the defendant, a Hebrew, who later sent his son there. Although about $375 had been paid by the father, the school sued for the balance $325—the tuition for the entire year. The boy about ten days after school opened was expelled. Plaintiff school bases its right of recovery upon the contract. The son was expelled because he refused to attend Christian

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14 229 Pa. 132, 78 Atl. 68 (1910).
15 98 U. S. 145, 25 L. Ed. 244 (1878).
16 State v. District Board of Joint School District No. 6, 162 Wis. 482, 156 N. W. 477 (1916).
17 220 N. Y. S. 799 (1926).
churches in the village. The catalogue stated that students were required to attend in full military dress. Although the defendant’s son did not object to attending the daily religious exercises on campus he refused to attend church in the village. The school told him that if he did not attend either a Jewish Synagogue which was fourteen miles away, or go to the Presbyterian Church he would be expelled. The boy stood his ground and was dismissed. After disallowing the plaintiff’s claim the court awarded damages to defendant for wrongful dismissal of the youngster. The court held that compelling the boy to go to a Christian church was discriminatory and contrary to his constitutional right.

A question which may become increasingly alive in view of large governmental spendings in the field of education is whether school books and supplies paid by public funds may be furnished to pupils of sectarian schools. Two cases dealing with the question have reached opposite conclusions. *Smith v. Donahue* 18 evolved an act giving the school board the right to use public funds to furnish school supplies to pupils attending schools of the city of Ogdensburg. The board in pursuance to this power provided text books and supplies to pupils in parochial schools as well as public schools. Taxpayers bring suit upon the theory that the act is unconstitutional since the state Constitution forbids public funds to be used to aid, directly or indirectly, sectarian and private schools. The defendants contend that they were supplying the children and not the schools. Holding that furnishing supplies to pupils attending parochial schools was indirectly aiding the school and therefore repugnant to the constitution, the court decided against them. A similar act and a similar constitutional provision gave rise to the controversy in *Borden v. Louisiana State Board of Education*. 19 Here the court upheld the board. An opposite conclusion from the New York court, namely, that these books were supplied to the children regardless of which school they attended, was reached. The furnishing of books tended to reduce illiteracy thus accomplishing the purpose of the act and such provision could not be said to be aiding sectarian schools contrary to the constitution. In arriving at this conclusion the court stated: “In our opinion, which is the view of the majority of the court, these acts violate none of the foregoing constitutional provisions. One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, which-

18 195 N. Y. S. 715 (1922).
19 168 La. 1005, 123 So. 655 (1929).
ever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries."

In passing it would be interesting to note that if the former case is correct what would be the status of the F. E. R. A. and the N. Y. A.? Here colleges and schools provide jobs for needy students who are paid by the Federal government. Since the jobs often consist of work beneficial to the school, could objection be made upon constitutional grounds? Certainly it has proved to be an aid to many schools.

Objection to regulations however which safeguard the health and well being of citizens upon religious grounds have been overruled. Although petitioners could not show specifically how they were affected some have tried to defeat vaccination laws as being unconstitutional and void because of interference with religious liberty. The courts which dealt with that particular problem unhesitatingly denied that any religious liberty was attacked and said that mere opinions—if any did exist—would have to give way to the paramount right to safeguard and protect the health and well being of school children.20

Reviewing the cases discussed it can be said that courts have been careful to examine any regulation which might be open to objection upon religious grounds, but before the court will overthrow a regulation of the board evidence must clearly show that it is a violation of one's liberty of conscience. Where a violation has been detected they will never hesitate to safeguard this greatest doctrine of them all—the one our forefathers risked their lives and fled from Europe to establish.

_Carl Doozan._

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**Corporations—Hybrid Securities—Intent of Controlling Stockholder as Criterion Whether Issue Bore Cumulative Dividends.**—In the recent case of _Warburton v. John Wanamaker Philadelphia_,1 the Supreme Court of Pennsylvania based its decision upon the unique proposition that the state of mind of the controlling stockholder of a corporation can be the determining criterion as to whether an issue of securities bears cumulative or non-cumulative dividends. The settlor, John Wanamaker, owning virtually all the stock of the defendant cor-

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1 329 Pa. 5, 196 Atl. 506 (1938).
poration, had cancelled a $1,000,000 claim against the corporation in exchange for 10,000 shares of "preferred stock" which he placed in trust for his daughters. The "preferred stock" was to "receive annual dividends of Six (6) per cent, and not more to be declared by the Board of Directors." The "recipient of the interest to be derived" from the stock was expressly denied the rights to vote, inspect corporate books, demand an accounting, participate in excess profits, exercise control in the management, or to have "any interest direct, or indirect," in the corporation. On liquidation, the "preferred stock" was subsequent to common, and had no right of participation in any excess. The certificate further provided that "after six months from demise of John Wanamaker the within stock shall begin to bear interest." On one year's notice by the trustee, the corporation was required to purchase at least $50,000 worth of the stock annually until the entire issue had been redeemed. In some of the preliminaries 2 to the issue of the "preferred stock" the term "6% non-cumulative preferred capital stock" had been used. But in the final documents 3 the issue was referred to solely as "preferred capital stock." The letter written by Wanamaker creating the trust 4 provided that "as the interest is declared . . . by action of the Board of Directors . . . it is to be divided equally, between my daughters, during their life time, annually, in semi-annual payments." If the corporation purchased the stock, the proceeds were to be invested in legal securities in trust to pay the income to the daughters. After their death, the principal "with any accrued interest thereon, not distributed" was to be paid to specified remaindermen. The corporation being about to declare dividends on the common stock after having declared none on the "preferred stock" for four years, the surviving daughter instituted suit to secure payment of the passed "dividends." A dividend on common stock was declared during the course of the suit. Upon this agreed statement of facts, the Supreme Court of Pennsylvania held that the issue was not non-cumulative, and that the corporation must pay the amount in arrears and six per cent dividends on the shares outstanding irrespective of whether the directors declared dividends or not.

Primarily to effectuate the individual purposes of the majority stockholder, the Court thus pierced the veil of John Wanamaker's "incorpor-  

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2 The request to the directors to call a stockholders' meeting, the waiver of notice, the oath of the judges, the return of the judges, and the ballots cast by the stockholders. The latter three documents recited the terms of the certificate and every one was signed by all three stockholders, including Wanamaker, the settlor.

3 The resolution adopted by the board of directors, the minutes of the stockholders' meeting, the return to the secretary of state, and the certificate of stock itself.

4 The certificate had been issued with regard to this letter, the minutes of the stockholders' meeting stating that the shares were to be issued to the trustee "as directed by John Wanamaker and . . . in accordance with the terms and conditions of a letter of instructions from John Wanamaker."
rated business self" in an unusual style of corporate disregard. For the technique utilized in rendering the decision was similar to that used in construing a will. Undoubtedly, the settlor's control of the corporation, the issuance of the certificate to discharge a debt bearing regularly accruing interest, and his clear desire to provide a life income for his daughters were the factors leading the court to stress the settlor's intent rather than the preliminary documents. Although courts have hitherto resorted only to the resolutions and plans preceding and authorizing the issue in order to determine whether the certificate contained the whole agreement, the instant decision is sound. In the absence of an express limitation in the certificate itself, it has uniformly been held that preferred stock dividends which are fixed in amount and not dependent upon net earnings are cumulative. The poor position of the holder of non-cumulative stock justifies this presumption. Under the increasingly accepted view, the holder of non-cumulative stock loses all rights to dividends not declared during that year even though there were net earnings for that year. And it is almost impossible to force the directors of the corporation to declare dividends on non-cumulative stock in absence of an abuse of discretion. A contrary decision, therefore, would have enabled the directors, by refusing to declare dividends, to prevent the beneficiary from receiving the contemplated benefits under

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the trust. Nor would the re-investment of any earnings of the corporation accrue to the benefit of the daughters since the beneficiary was expressly excluded from participating in any excess profits and was subsequent to common stock on liquidation.\(^3\) And should the trustee, in order to secure an annual income by investment in legal securities, require the corporation to repurchase the shares, the corporation could devote the income thus retained from the beneficiary for the purpose of retiring the principal without paying either "interest" or "dividends." Clearly, the so-called preference of the certificate is virtually non-existent if held not to carry a guaranteed six per cent annual dividend. Moreover, it is by no means clear that the imposition of the word "non-cumulative" upon the terms of the certificate would have eliminated ambiguity. For the question would then arise whether the right to dividends is lost forever upon failure of the directors to declare dividends for that year or whether there is a charge upon the earned surplus of the corporation contingent upon there having been net earnings for that year.\(^4\) Although the Pennsylvania court proceeded upon the tacit assumption that holders of non-cumulative stock lost all rights to dividends not declared during that particular year, it is uncertain, in view of the widespread criticism of this theory,\(^5\) whether such a decision would have been rendered if the stock in fact had been non-cumulative.

Despite judicial reluctance to force a corporation to declare dividends,\(^6\) the decree in the instant case that the corporation "pay to the plaintiff" is in accord with prior decisions in Pennsylvania requiring the corporation to pay accumulated dividends where the corporation has already declared a dividend on common stock without paying off the arrearages on the preferred.\(^7\) The court thus treated the accumulated "dividends" as a debt in the nature of interest on a debenture bond. Although most courts agree that accumulated dividends do not constitute debts of the corporation,\(^8\) the attitude of the court in this particular case, nevertheless, is justified. The combination of the recurrent use of the term "annual . . . interest," the fixity in amount of "interest," the denial of the right to vote or to participate in excess profits,

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13 Compare the anomalous capital structure of the Green Bay and Western Railroad having common stock containing priorities over one issue of debenture bonds. Dewing, FINANCIAL POLICY OF CORPORATIONS 9, n. b. (1926).


15 See Lattin, op. cit. supra, note 10, and articles and comments cited therein; Hicks, op. cit. supra, note 14.

16 See note 12, supra.


and the option in the holder to impose a due date upon the shares and so obtain ultimate payment of a definite amount, seems to give the certificates the characteristics of a bond.\textsuperscript{19} And to contend that a person having no "interest direct, or indirect" in the corporation is a stockholder therein would be contrary to usual notions of what constitutes a stockholder. Nor does regard for the financial structure of the corporation require that contrary treatment be accorded to the particular certificate. Should the accumulations become too heavy for the corporation, scaling down of arrearages could be effectuated through reorganization.\textsuperscript{20} And even if the case had involved the rights of competing creditors, the terms of the certificate would seem to demand identical treatment.\textsuperscript{21}

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\textsuperscript{19} As to when a hybrid security may be classified as a bond, see note 5 U. of Chi. L. Rev. 308 (1938).

\textsuperscript{20} As to the degree which cumulative stockholders are protected against scaling down of arrearages on their stock in reorganization, see note 4 U. of Chi. L. Rev. 645 (1937).

\textsuperscript{21} Cook v. Equitable Building & Loan Ass'n, 104 Ga. 814, 30 S. E. 911 (1898) ("stock" bearing 6\% interest payable semi-annually with option in purchaser, on 90 day notice, to request repurchase, held to create debtor-creditor relation); Burt v. Rattle, 31 Ohio St. 116 (1876) (non-participating, non-voting preferred stock guaranteeing semi-annual dividends, with redemption at specified date and secured by mortgage, held, holders were creditors, not stockholders); Best v. Okla. Mills Co., 124 Okla. 135, 253 Pac. 1005 (1927) ("preferred stock" payable on due date with accumulated dividends, having proviso that corporation shall not create any mortgage or other lien on assets of company without permission of preferred stockholders, non-participating, and having vote only on default, held, a bond); Savannah Real Estate, Loan & Building Co. v. Silverberg, 108 Ga. 281, 33 S. E. 908 (1899) (cumulative non-participating, non-voting preferred stock, dividends payable semi-annually and having due date, held, creates a debtor-creditor relation); see also Wright v. Johnson, 183 Ia. 807, 167 N. W. 680 (1918) (non-participating cumulative non-voting "preferred stock" redeemable at option of holder, held, a certificate of indebtedness). \textit{But cf.:} Hazel Atlas Glass Co. v. Van Dyk & Reeves, Inc., 8 Fed. (2d) 716 (C. C. A. 2d, 1925), \textit{cert. denied, sub nom.,} Van Dyk v. Young, 269 U. S. 570 (1925) ("preferred stock" redeemable at due date, cumulative dividends payable annually, no voting rights unless three dividends passed, held, holders were not creditors); Ellsworth v. Lyons, note 18, supra (holders of "preferred stock" drawing six per cent "interest" or "dividends," payable semi-annually and redeemable at due date, held, not creditors since they could exercise management control at all times and were to be paid only "after payment of all debts and liabilities"); Spencer v. Smith, 201 Fed. 647 (C. C. A. 8th, 1912) (non-participating and non-voting "preferred stock" redeemable at due date, having cumulative dividends payable quarterly, and secured by mortgage on the corporate property, held, not to create debtor-creditor relationship); Elko Lamoille Power Co. v. Commissioner of Internal Revenue, 50 Fed. (2d) 595 (C. C. A. 9th, 1931) (seven per cent cumulative dividends payable semi-annually on non-voting preferred stock redeemable on demand held, not deductible as interest for purposes of taxation).
NEGOTIABLE INSTRUMENTS—LIABILITY OF DRAWER ON INSTRUMENT FORGED BY AGENT UNDER STATUTE INCREASING SCOPE OF BEARER INSTRUMENTS—N. I. L. 9 (3).—Interesting problems emanate from amendments made by the different states to uniform laws which have been adopted by the several states. The interest arises from the question whether the change made by a particular state is a salutary one, in view of its inevitable result of making non-uniform a uniform act; and in the additional question of whether it is so salutary that every other state should follow the example and adopt the same change.

The purpose of this note is to show the result of a change adopted in Illinois, Idaho, and Montana, of section nine, subsection three of the Negotiable Instruments Law. The Uniform Act reads as follows:

IX. “The instrument is payable to bearer:

'(3) When it is payable to the order of a fictitious or non-existent person, and such fact was known to the person making it so payable'.

The variation adopted by the three states consists in the following additions:

IX. “The instrument is payable to bearer:

'(3) When it is payable to the order of a fictitious or non-existent or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee'.

It is unnecessary to dwell long on the result of the first change, namely "or living person not intended to have any interest in it." This seems merely to be a statement in these three acts of the general law built up in decisions interpreting this section of the Negotiable Instruments Law. It is, simply, a codification, we might say, of the interpretative law arising from the act. Many cases have decided that where an instrument is drawn to an actual existing person, but one who is not intended by the person making the instrument payable to have any interest in the instrument, the payee is fictitious in the eyes of the law, and the instrument is a bearer instrument under the Negotiable Instruments Law.

Under the second change, namely, "or known to his employee or other agent who supplies the name of such payee", the law has been more seriously affected. The typical case to which this change in the statute applies is where a large business has an agent or officer draw its

1 UNIFORM NEGOTIABLE INSTRUMENTS LAW.
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checks for it, or where it has one agent to supply the names of payees, and another agent or officer to execute its checks to those payees; and, one of these agents fraudulently draws checks or supplies names of payees, later forges the indorsement of the payee, and cashes the check for his or her own benefit. The question arises whether the bank cashing such check is liable for paying out on a forged instrument, or whether the company, whose agent perpetrated the defalcation, is liable on the grounds that the knowledge of the agent that the payee was fictitious or not intended to have an interest in the instrument is imputed to the company, and therefore the instrument, because of this knowledge of the company, is a bearer instrument under section 9 (3) of the Act. This is not only the typical case, but practically the only case in which the problem becomes acute, and, as we shall see, is the case responsible in Illinois for the legislative change in the statute. The cases involving this problem may be divided into three classes at common law:

I. Where the agent who perpetrates the fraud is authorized by the company to execute instruments for the company, and thus his knowledge of the fictitious payee or person not intended to have an interest is imputed to the company.

II. Where the company has been negligent, and this negligence is considered to determine the liability of the company for the acts of the agent, although the agent is not authorized to execute instruments for the company.

III. Where the agent who perpetrates the fraud is not authorized by the company to execute instruments for the company, and thus his knowledge of the fictitious character of the payee or person not intended to have an interest is not imputed to the company.

I. Under the first class of cases under the formerly existing law, the innovation in this particular section of the statute will have little effect, since it is well settled that where an officer of a company is authorized to execute instruments for the company, any such instrument made out to a fictitious payee, or to a person not intended to have any interest therein, will be held to be payable to bearer, and a bank paying out money on such an instrument will not be liable. This question is decided more on a question of agency than negotiable instruments. The authorized officer is acting within his authority when he makes out checks, and the company cannot deny liability when he perpetrates fraud by use of his recognized authority.

II. The second class of cases is obviously an attempt by the courts to reach an equitable decision, by mitigating the harshness of the law holding banks liable for paying out under forged instruments. They introduce the question of negligence on the part of the plaintiff drawer, whose agent fraudulently procured money from the bank knowing the payee to be fictitious. In *Fletcher American National Bank v. Crescent Paper Company*, it was held error for the court to charge the jury that the drawer was not required to examine the indorsements on the checks to ascertain if they were genuine. The law requires a depositor to exercise due care in examining his account and vouchers to know whether or not the balance shown to his credit is correct, and he is charged with whatever knowledge he would have acquired by making such an examination in a reasonably careful manner. In this case, by delegating the examination to the delinquent clerk, the employer was chargeable with knowledge of whatever information would have been disclosed to an honest clerk by reasonably careful examination and this was a question for the jury. The fraudulent knowledge of the clerk was not held imputed to the employer. In *Osborn v. Corn Exchange National Bank*, it was held that plaintiffs were barred by negligence, when they failed to examine returned vouchers or to investigate the fact that the swindling clerk was living extravagantly and when they did not report to the bank at once after the discovery of the forgeries. However, in *United States Cold Storage Company v. Central Manufacturing District Bank*, it was held that “Negligence of the drawer of a check is immaterial, unless it is such as directly and proximately affects the conduct of the bank, in the performance of its duties.” And in *Crawford v. West Side Bank*, it was held that the question of negligence cannot arise unless the depositor has, in drawing his check, left blanks unfilled, or by some affirmative act of negligence, facilitated the commission of a fraud by those into whose hands the check may come.

I submit that the change in the Illinois statute will do away with the necessity of bringing up the question of negligence of the company in cases of this type, since under the statute the knowledge of the unauthorized clerk supplying the name of a payee to the instrument will be imputed to the company, and the company will thereupon be liable on the instrument which will be a bearer instrument if the payee is fictitious or a person not intended by the agent to have an interest in the instrument.

III. I have left to the last the third type of case, since in that lies the target at which the statute was aimed, and in that is seen a com-

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5 193 Ind. 329, 139 N. E. 664 (1923).
7 218 Ill. App. 28 (1920).
9 343 Ill. 503, 175 N. E. 825, 74 A. L. R. 811 (1931).
10 100 N. Y. 50, 2 N. E. 881 (1885).
complete reversal of the law brought about by the statute. The results in this type of case, before the statute, were responsible for the passage of the statute. The rule before the change in the statute is well settled. The case of United States Cold Storage Company v. Central Manufacturing District Bank 11 gives the common factual situation and represents the law in Illinois as well as represents the general law on the subject. I should note that I concentrate on the Illinois case, because no cases were found on the point in the other states having the same additions in their statutes. In the Cold Storage case, Meister, an agent of the plaintiff had the duty of supplying data to those having authority to draw checks, of supplying the names of payees, and the reasons for making checks to those payees. He did not have the authority to execute the checks. He procured checks to be drawn in favor of living persons, by giving data, and showing the propriety of having the checks issued to these payees. He then took the checks, indorsed the names of the respective payees, and cashed the checks for his own benefit. It was held that, "the intention of the employee is not imputable to the employer so as to render applicable the rule that checks drawn in favor of actual persons without intention of delivery to such persons are payable to bearer." And it held that "the general rule that notice to an agent while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal, is subject to an exception when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act." There are several other cases to the same effect. 12

The effect of the change in the statute is to completely reverse this general rule on the point, and to impose on the drawer the liability upon an instrument where the drawer's agent supplied the names, regardless of the agent's authority, and to relieve the bank from an almost impossible investigation to discover whether the indorsements are forgeries. The purpose of the act is well stated in a pamphlet issued by the American Bankers Association. The pamphlet was written by Mr. Paton, counsel for the Association, and peculiarly enough, the intent of the legislature in passing the act, was garnered by the court by reference to this pamphlet in the Houghton Mifflin case which I shall refer to later. 13

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The pamphlet is quoted: "This amendment, drafted in the office of the general counsel and approved by the association, enlarges the definition of bearer paper, by including instruments payable to fictitious persons, "Where the employee or other agent has knowledge of the fiction." Under the existing definition, a drawer of a check having no knowledge of the fiction cannot be held responsible for the act of his agent who supplies the name of the fictitious payee. The person mistakenly signing such check believes it is payable to a real person and expects it to be transferred by genuine indorsement. In point of fact, transfer by genuine indorsement is impossible and this places an unfair burden upon the paying bank or a bona fide holder.

"The purpose of the amendment is to place the responsibility upon the drawer of an instrument for the acts of his agent who names a fictitious payee without the drawer's knowledge. This is accomplished by treating such instrument as bearer paper transferable by delivery."

To understand the reason behind the change it is necessary to know the difference between "to order" and "to bearer" instruments in respect to negotiability. A "to order" instrument can only be negotiated by an endorsement by the payee plus delivery, whereas the "to bearer" instrument is negotiated by delivery only. If the statute, therefore, changes an apparently "to order" instrument to a "to bearer" no endorsement is necessary and since delivery alone is sufficient to pass title the forgery of the payee's name is immaterial.

The cogent efficacy of the addition made in the statute in 1931 was not to be really tested until 1938 when the case of Houghton Mifflin Company, v. Continental Illinois National Bank and Trust Company, was decided. Plaintiff in this case had for many years been engaged in the business of publishing books in Chicago and in connection with its business had carried on a checking account with defendant bank. Plaintiff's bills had been paid by checks drawn on this account; and the salesmen employed by it from time to time had been paid by checks drawn thereon. This suit was based upon the payment by defendant bank of twenty checks for one hundred dollars each, which plaintiff contends were paid upon forged endorsements of the respective payees and wrongfully charged to its account. Checks were drawn and executed by three of the plaintiff's agents, Lane, Pierce, and Allen, who were specially authorized to execute checks. All checks, however, were prepared by Elizabeth Scott, a bookkeeper employed by plaintiff, whose duty it was to keep records of financial transactions of plaintiff at its Chicago office, to receive bills payable and to make out checks in payment thereof and in payment of salaries and commissions of salesmen. She was not authorized to sign checks in behalf of the plaintiff. Each check was payable to order of a particular salesman who was in the employ of the

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plaintiff and the checks were executed by Pierce, Allen, and Lane upon representations made to them by Elizabeth Scott that the salesmen to whose respective orders the checks were drawn were entitled to be paid the sums indicated by the checks. After the execution of the checks they were delivered back to Elizabeth Scott to be delivered in the usual course of business by her to the respective payees named therein. She did not do this, but on the contrary first indorsed on each of the checks the name of the payee, then her own, then cashed the checks at defendant bank, appropriated the proceeds to her own use and has since disappeared. When the checks were drawn, no one was entitled to the amount. Indorsement of Elizabeth Scott was without authority and has not been approved by any of the payees. The total amount taken was $1400. The plaintiff’s suit was for recovery of the sum thus charged to it, and the trial court being of the opinion that the bank was liable on undisputed facts entered judgment for the plaintiff and defendant appealed. The Supreme Court held that the bank in this case was not liable because of the new statute. This clearly is the direct opposite result of the Cold Storage case, and it is a question whether the change is advisable. This is still a matter of opinion to be made on study of the above presentation of the results to date of the statute.

I submit that the change is certainly sound under the old legal and equitable standard that as between two innocent persons, he who puts a third person in a position to perpetrate a fraud should be the one to be held liable as against he who in no wise could have raised a hand, nor had any way of knowing what the defrauder was doing.

The company could find another arrangement by which to have its checks made out, but if it insisted on having a particular clerk make them out, and if it relied on the clerk’s designations, then certainly it ought to be bound by the checks made out by its hireling, as against the bank, who in no sense can control the actions of the clerk, or the process of drawing the checks of the company. Law is built and improved by the experience of the centuries. It strives ever to attain a greater degree of justice. In this commercial age, where division of labor is even introduced into the field of the execution of negotiable instruments, it should appear that this change is an advisable one to mitigate a law that had become too harsh in its impossible demands upon the banks.

Edward Boyle.

Nuisance—Noise—Automobiles of Patrons of a Lawful Business.—Recent decisions tend to raise the question, in light of previous judicial utterances on the identical or akin subject matter, as to just how far the courts will go to suppress lawful businesses alleged to be nuisances because of the noises which surround them where they are dependent, entirely or in part, on the so-called “automobile trade.”
In *Hall v. Putney*,¹ where the defendant was engaged in the lawful business of vending non-intoxicating beverages, confections, and sandwiches from a root beer stand to which customers chiefly came in automobiles, it was held not a nuisance which would be enjoined at the instance of the plaintiffs, neighboring home owners, notwithstanding certain objectionable noises such as honking of horns, screeching of brakes, starting of engines, and closing of automobile doors. From all the record in the chancellor's findings it was shown that the stand was operated five months in the year doing a transient trade from 9:00 a.m. to 12:00 midnight, that the plaintiffs resided two hundred and fifty feet east of defendant's property, and that the root beer stand was situated on a 4-lane concrete highway. In reaching its conclusion, the Illinois court quoted from *First M. E. Church v. Cape May Grain & Coal Co.*²: "While defendant is entitled to the enjoyment of its property in pursuit of a lawful business, that business must be conducted with due regard to the well-recognized rights of surrounding property owners . . . The law takes care that lawful and useful business shall not be put a stop to on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or overrefined person."

Generally, noise³ which constitutes an annoyance to a person of ordinary sensibility to sound, so as to materially interfere with the ordinary comfort of life and to impair the reasonable enjoyment of his habitation to him, is a nuisance.⁴ And so it has been held that "if unusual and disturbing noises are made, and particularly if they are regularly and persistently made, and if they are of a character to affect the comfort of a man's household, or the peace and health of his family, and to destroy the comfortable enjoyment of his home, a court of equity will stretch out its strong arm to prevent the continuance of such injurious acts."⁵ And what would be a nuisance in one locality would not be in another.⁶ Noises may be a nuisance in a populous city which would not be in the country.⁷

A fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance is the reasonableness or unrea-

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¹ 291 Ill. App. 508, 10 N.E. (2d) 204 (1937).
² 73 N.J.E. 257, 67 Atl. 613 (1907).
³ In Gaunt v. Fynney, 8 L.R. Ch. Ap. 8 (1870), it was held that a nuisance by noise is emphatically a question of degree. Snyder v. Cabell, 29 W.Va. 48, 1 S.E. 241 (1886), held a skating rink near residences a nuisance when noise from skating materially interfered with the comfort and enjoyment of the inmates. And it was so held in Bishop v. Banks, 33 Con. 118, 87 Am. Dec. 197 (1865), that a nuisance may be produced by offensive sounds in prosecution of a lawful business (in this instance, the bleating of calves).
⁵ Appeal of Ladies' Decorative Art Club, 10 Sad. 150, 13 Atl. 537 (Pa. 1888).
⁶ *Joyce, op. cit. supra*, note 4, at § 184.
⁷ McCaffrey's Appeal, 105 Pa. St. 253 (1884).
sonableness of conducting the business complained of in a particular locality and in the manner under the circumstances of the case, and ordinarily, where the use made of the property or the conduct of the business is reasonable, no actionable nuisance is created against which relief may be had. The general rule is stated in *Ross v. Butler*, where, after declaring that a lawful business will not be put a stop to for some imaginary wrong, the court goes on, "But on the other hand, it does not allow anyone, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful business carried on in its vicinity. The maxim, *Sic utere tuo ut alienum non laedas*, expresses the well-established doctrine of law."

A review of authorities now indicates that noises may constitute a nuisance, that a business lawful in itself may because of peculiar circumstances become a nuisance, and now all that remains before one can attack the cases in point is to ascertain what tests of nuisances are applicable. In *Warren Co. v. Dickinson*, it was held that the determining factor in an alleged nuisance is not its effect upon persons who are invalids, affected with disease, bodily ills, or abnormal physical conditions, or who are of nervous temperament, or peculiarly sensitive to annoyances or disturbances. If not to them, to whom? A survey will show that the proper test is the one applied to the normal man—the man of ordinary habits and ordinary sensibilities. And the man of ordinary sensibility appears to be as much a will of wisp as the "ordinary, reasonable, and prudent man" of tort law!

Cases square on all four corners with *Hall v. Putney* are not numerous, but through a development of what one has and what one can draw by analogy from equivalent cases, it will be seen that the logical outcome is a purely common sense decision keeping in mind the progress of mankind in relationship to the rights of individuals.

In the principal case the plaintiffs vied for a favorable decision on the precedent set down by *Phelps v. Winch*. There the court held that

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8 Sussex Land Co. v. Midwest Refining Co., 294 Fed. 597 (1923); Baltimore v. 5th Ave. Baptist Church, 108 U. S. 317 (1883); Meeks v. Woods, 66 Ind. App. 594, 118 N. E. 591 (1918). In Klumpp v. Rhoads, 362 Ill. 412, 200 N. E. 153 (1936), an injunction against a gas station was refused because the facts of the case did not meet the test of, "when a business creates conditions which clearly render the appropriate enjoyment of the surrounding property impossible." *Pig'n Whistle Sandwich Shop v. Keith*, 167 Ga. 735, 146 S. E. 455 (1929). And in *Warren Co. v. Dickinson*, 195 S. E. 568 (Ga. 1938), it was asserted that where noise accompanies an otherwise lawful business, the question whether such a noise is a nuisance depends upon the nature of the locality, on the degree of the intensity of the sound, on times and frequency, and their effect, not upon peculiar and unusual individuals, but upon the ordinary, normal, reasonable persons of the locality.


10 195 S. E. 568 (Ga. 1938).

11 Bixby v. Cravens, 57 Okla. 119, 156 Pac. 1184 (1916).

an amusement park containing a dancing pavilion, box-ball alleys, refreshment booths, and parking spaces for automobiles was a nuisance in fact, the evidence showing that the surrounding residents were annoyed every night by the continual noise of rolling balls, jazz music, shouts, laughter, starting of automobiles, and the honking of horns. Again, in *Fincher v. Union*13 where plaintiff city sought to enjoin operation of a barbecue stand, the court held that the starting of engines, honking of horns, and the confusion of automobiles around the stand not sufficient justification for an injunction on the theory that the automobile is an omen of progress which should be judicially recognized. Almost the same view is taken in *Andrew v. Perry*,14 where the court refused to enjoin a hot dog stand holding that it is not every vexatious interference connected with business which will be enjoined. Therein the plaintiff had complained of noises made by autos of the patrons of the stand. "If one chooses to be in a congested center, and thus enjoy the many advantages of community life he must expect to experience some of the resulting unpleasantness. Mere inconvenience resulting from exercise of trade will not warrant a court stepping in and restraining such business upon the ground that it constitutes a nuisance." Although a root beer stand was enjoined in *Weber v. Mann*,15 the plaintiff complained of noises from operation of automobiles and obnoxious odors emanating from such operation. The jury found that such emanations did not constitute a nuisance, and upon enjoining the stand because of excessive lights did not make any finding whatsoever as to noises made by operation of automobiles.

However, in two cases, *Willson v. Edwards*,16 and *Deevers v. Lando*,17 the courts enjoined such stands where much of alleged nuisance arose out of the operation of automobiles. In the former, it was stated that while it was a matter of universal knowledge that the propelling of an automobile to and fro created considerable noise, nevertheless noises surrounding the refreshment stand would be enjoined because of excessive sounding of horns, starting and stopping of autos, racing of engines, and shifting of gears, but not as to the usual and ordinary sounds. It seems to be rather specious reasoning. In the latter, the court enjoined the operation of a barbecue stand located in a residential section for though a business of itself lawful is conducted in a neighborhood given over wholly to residences, if it renders enjoyment of it materially uncomfortable as to the noises and offensive odors produced, it shall be restrained as a nuisance.

Too, there can be found a special set of cases wherein gasoline stations and public and private garages have been sought to be enjoined

13 196 S. E. 1 (S. C. 1938).
14 216 N. Y. S. 537 (1926).
15 42 S. W. (2d) 492 (Tex. 1931).
16 82 Cal. App. 564, 256 Pac. 239 (1927).
because of a combination of factors, among which is included noises made by operation of automobiles. These cases generally have held such operation to constitute a nuisance where operated in a residential section, but have usually held them not to be nuisances in business sections of the community. The former view is sustained in the case of McPherson v. First Presbyterian Church where operation of a gas station opposite a church was enjoined because cars would have to drive in and that the noises from the starting of engines, racing of motors, shifting of gears, and other akin noises would disturb the neighborhood and comfort of the residents. In Lansing v. Perry plaintiff's prayer for injunction because noises from an auto sales room were materially disturbing was refused because sales room was located in a business section. It appears, then, that the locality of the lawful business is the most important of the determining factors.

In cases like this, one judge has said, the court is between Scylla and Charybdis—the right of private property . . ., and the rule followed in Parker v. Colburn that no man has an inherent right to maintain a lawful business in a manner so as it shall become a nuisance. It follows then, from a review of these cases, that courts are shifting uneasily from one swing of the pendulum to other, not certain with themselves how to properly ratio three determinate factors: the rights of a person to conduct a lawful business, the rights of his customer to operate motor vehicles, and the rights of neighboring residents to live in the vicinity comfortably and with full enjoyment of their property.

Is there anything to which the courts can fasten themselves in the solution of this problem? In Brown v. Easterday the court suggests that the increase of traffic is but the trivial inconvenience necessarily resulting from changes and improvements growing out of advancing civilization. These inconveniences are shared by the general public. If the courts tend to follow this criterion, it can easily be seen that they will be apt to lean backwards to protect proprietors of lawful businesses.

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18 120 Okla. 40, 248 Pac. 561 (1926).
19 In Huddleston v. Bartnett, 172 Ark. 216, 287 S. W. 1013 (1926), a garage in a distinctive residential district was prohibited where it showed that noises from the horns of automobiles, starting and stopping of engines, etc., created a nuisance. This was followed in George v. Goodovich, 288 Pa. 48, 135 Atl. 719 (1927), where a garage in a residential sector was enjoined because of the noises caused by racing engines, shifting of gears, banging of doors, etc. And in Lewis v. Berney, 230 S. W. 246 (Tex. 1921), a garage had been enjoined because of the odors and noise of automobiles stopping there.
21 In Texas Co. v. Brandt, 79 Okla. 97, 191 Pac. 166 (1920), it was held that unnecessary and unusual noises made by automobiles stopping and starting at a filling station and odors emitted by starting and stopping of automobiles not such a nuisance as would be enjoined. A public garage in the business section was not held a nuisance in Phillips v. Donaldson, 269 Pa. 244, 112 Atl. 236 (1920).
22 196 Cal. 169, 236 Pac. 921 (1925).
23 110 Neb. 729, 194 N. W. 798 (1923).