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NOTES

ZONING ORDINANCES—CONSTITUTIONALITY.—One of the earliest ordinances devoted to the proper and orderly distribution of types of enterprises in a city—in other words the regulation of "uses"—is found in a decree promulgated by the Emperor Napoleon Bonaparte in the year 1810. In this country, after certain preliminary measures, similar comprehensive zoning laws were enacted in order to curb the indiscriminate erection of business buildings and factories in regions of cities in which quietude comprised one of the important factors in the value of residence therein. Zoning ordinances came thereafter to be the rule and not the exception, until those wishing to establish a new business in a district began to feel the constrictions of the situation, even as those already settled had felt the oppression and injustice of the former situation. It was then that someone, wishing to thrust aside this law which thwarted his business yearning, raised, with temerity, the constitutionality of the enactment. Let us see some objections which may be raised under that defense and note their effect in combating the proponents of zoning legislation.

In this country, contrary to the rule prevailing in England, an act can be held constitutional, only provided that it either does not violate any superior constitution, or is within the powers delegated or reserved to the legislative body. The power of the city council is derived from the state powers and is expressed in the corporate charter granted by the state. Among the potentialities of the sovereign government is the capability of legislating for the welfare of its citizens. This is termed the police power. Practically all zoning ordinances in the United States are ministrations of the municipality through its police power, which must first have been granted to it by the central commonwealth government.

Does this type of legislation properly belong under the police power? First, let us see what such an ordinance includes. The definition is stated by an expert witness in Kansas City v. Fred Leibi, et al.,1 to be: "An assembling of the uses of lands for their various purposes in given areas and an attempt to anticipate expansion, and in order to bring about a greater stability, and an ascertainment of this the uses of the property in a rational way throughout the city; placing of limiting lines throughout the city in different areas; classifying their use into, principally, industrial areas, commercial areas, and residential areas; and again subdividing those areas into further smaller units for dif-

1 Kansas City v. Fred Leibi, et al., 252 S. W. 404 (Mo. 1923).
ferent uses that would be applicable within its activities . . . and thereby preventing the very great losses that have occurred in most American cities by the need of shifting from one area to another, due to unnecessary or untimely invasion of contrary uses."

Logically, then, the zoning ordinance is primarily intended to promote the better health, safety, morals, and general welfare of the members of the community. Consequently, if the ordinance is to be upheld at all, it must involve a valid use of this power, under a specific delegation from the state. Most states have passed enabling acts authorizing the cities expressly to pass such zoning ordinances as they see fit. In some states the sanction of the council's action must be sought in the Home Rule Acts. Whichever is made the basis for the enactment, it is plain that, if the provisions of the act are followed, the ordinance cannot be overthrown upon the mere basis of lack of power. The objections which counteract its validity must be those available against any enactment under the police power. They are, then, the following: That it is unreasonable; that it has no relation to public health, safety, morals, or welfare; that it is discriminatory or arbitrary; that the police power is not validly exercised; that it is an inequitable enactment, and such like objections. But, even so, these available must be of such towering strength as to topple over the strong presumption that the ordinance is a valid exercise of the legislative power. The presumption always exists until firmly rebutted by its adversaries.

All these criticisms as well as some in addition have been raised at one time or another in regard to the validity of zoning ordinances. In some instances one or another of these has prevailed against the law and the opponents won their battle, but usually this seeming victory was met by a sagacious change of tact and an amendment or a re-drafted ordinance mended the weakness.

Zoning flourished until over forty states of the union encouraged such laws by 1926. The constitutionality of the legislation was regularly assailed, and the legislation, in most instances, just as regularly upheld. From the decisions have evolved certain more or less definite principles which apply to this type of ordinance. First and foremost, the 14th Amendment to the Federal Constitution was not designed to

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and does not curb the regulatory nature of the state police power.\(^7\) Hence, any doubt on that ground as to the constitutionality of any given enactment must ultimately be resolved in favor of the legislation. Moreover, "When the subject matter is within the police power of the state its regulation is within the power of the legislature, but whether it is within the police power is a judicial question for the courts."\(^8\)

Once granted that the contemplated zoning lies within the domain of the police power, thereafter it can only be attacked as an unauthorized and unwarranted exercise of such power. It must be conclusively and affirmatively proved that such is the case, for there is always a presumption that the enactment is valid;\(^9\) and its invalidity must be clearly shown.\(^{10}\) Courts have expressly laid down the doctrine that zoning is a legal invocation of the police power. In *Lincoln Trust Co. v. Williams*\(^{11}\) McLaughlin, J., says: "Municipalities in the exercise of the police powers may regulate the conduct of an individual and the use of his property."

The regulation or classification of properties according to uses seems to be at least impliedly authorized by such courts. But, coming a step closer, a leading California case\(^{12}\) involves this conclusion: Where the question of whether or not a particular business can be conducted in a residential district without causing undue annoyance to persons living therein is involved, being one upon which reasonable minds may differ, the court will not interfere with the act of the municipal corporation in forbidding such business. In this case the taboo on the maintenance of a brick-kiln in a residential district was upheld by the Supreme Court of the United States. From the same state comes a comparatively late case embodying a rather concise and yet complete statement of the considerations which such a piece of legislation may undergo in order to be pronounced in further force. The court says in part: "In determining the validity of zoning ordinances courts are required to

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8 See 3rd. Dec. Dig., vol. 6, p. 593; People v. Gordon, 113 N. E. 864 (Ill. 1916); City of Helena v. Miller, 114 S. W. 237 (Ark. 1908); Ex Parte McCoy, 101 Pac. 419 (Cal. 1909).
10 Jacobson v. Mass., 197 U. S. 31 (1905); Munn v. Illinois, 94 U. S. 113 (1876). See also in this connection the famous cases of Fletcher v. Peck, 10 U. S. 87 (Mass. 1810), and Dartmouth College v. Woodward, 17 U. S. 625 (N. H. 1819).
11 Lincoln Trust Co. v. Williams, 128 N. E. 209 (N. Y. 1920).
12 Ex Parte Hadacheck, 132 Pac. 584, 586 (Cal. 1912).
determine, in addition to the need thereof, whether or not they are arbitrary and discriminatory and have any reasonable tendency to promote public health, safety, morals, and general welfare.”

At the same time, however, the courts abhor judicial supervision of the municipal government, and steadfastly refuse to overthrow their enactments unless the defect in the law is made clearly to appear, to an extent that it cannot possibly be upheld. Some courts have swung so far in their leniency as to declare that the ordinance will be upheld if there could have been a valid basis for its enactment. The majority, though, confine their reasoning to certain definite channels, involving rather precise objections which may be employed to thwart the municipal government. The law must have no relation to public health, welfare, and morals, or must be unreasonable, and this must be plainly apparent upon an examination of the situation presented. If the invalidity of the law is relied on, this, likewise, must be made clearly manifest. However, before investigating these various obstacles in detail which have been sought to be interposed in the path of classification ordinances, let us refer to the conclusion drawn by Mr. Metzenbaum, successful counsel for the city in Euclid Village v. Ambler Realty Co.:

“The zoning ordinance can successfully meet the requirement of being reasonable in its application to any particular condition or situation, and unless it is enacted for the purpose of protecting the public safety, health or welfare, it cannot be expected to meet with the approval of the courts.”

The zoning plan is not to be thought of as a panacea for all city ills; neither is it to be applied in the manner of “soothing syrup” to every conceivable municipal condition. “Moderation in all things” finds no exception in this method of municipal control. The courts have consistently held the ordinance must be reasonable in its application or this well-aimed objection will prevail against it. Even so, however, the courts have applied the preceding maxim to their own judicial

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13 Miller v. Board of Public Works, 234 Pac. 381 (Cal. 1925).
15 "If no state of circumstances could exist to justify a certain statute, then we may declare this one void, because in excess of legislative power of this State, but if it could we must presume it did." Munn v. Illinois, op. cit. supra note 10, at p. 132. Chicago R. R. Co. v. Railroad Commission, 280 Fed. Rep. 393 (Minn. 1922); Miller v. Board of Works, op. cit. supra note 13. And see Metzenbaum, op. cit. supra note 4, at pp. 76-77.
16 State v. City of Jackson, 133 So. 114, 116 (Fla. 1931); Gundling v. City of Chicago, 177 U. S. 183, 188 (Ill. 1900).
18 Euclid City v. Ambler Realty Co., 272 U. S. 365, 395 (Ohio 1926); Metzenbaum, op. cit. supra note 4, at p. 7.
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action and consequently have laid down the primary rule that "An ordinance is not unreasonable merely because particular judges may think that it goes further than is necessary or convenient." 19 And in fact one justice expressed the opinion that the law under consideration was not commendable; yet he could not declare it unconstitutional, since it did not violate any of the categories with which such a law must comply. 20 Moreover, because the courts will not supplant the legislature, 21 he was constrained to give effect to their promulgation. A further restriction on the power of the judiciary to defeat such legislation is involved in an Illinois decision, where it was decided that an ordinance would not be declared invalid as unreasonable if it was within the power of the municipal authority which enacted it, for the reason that the expediency and propriety of the act is not a subject for judicial inquiry. 22 A subsequent zoning ordinance case from the same state elaborated the question still more, in haec verba: "A court will not hold an ordinance void as unreasonable where there is room for a fair difference of opinion on the question, even though the correctness of the legislative judgment may be doubtful, and the court may regard the ordinance as not the best which might be adopted for the purpose." 23 In line with this viewpoint the courts, as a general rule, maintain the view that the ordinance must be plainly and palpably unreasonable before they will interfere with its operation. 24

In direct application to a particular type of zoning regulation, the United States Supreme Court delivered itself of the following opinion: "Regulations in regard to the height of buildings and in regard to their mode of construction in cities made by the legislature for the safety, comfort, or convenience of the people, and for the benefit of the property owners generally, are valid." 25 Generally, then, it is the tendency to sanction zoning measures under a consideration of their status as reasonable or unreasonable restrictions, and from that aspect a reasonable and valid use of the far-reaching police power. Yet this attitude does not give rise to a blind, unlimited affirmation of such regulations

19 19 R. C. L. 113, p. 809; Dobbins v. Los Angeles, 72 Pac. 970 (Cal. 1903); State v. Clifford, 128 S. W. 755 (Mo. 1910); Indiana R. R. Co. v. Calvert, 80 N. E. 961 (Ind. 1907).
20 American Wood Products Co. v. City of Minneapolis, 21 Fed. (2d) 440, 444, 445 (1927); and see note 64 A. L. R. 920, 923-4.
22 Daniels v. City of Portland, 265 Pac. 790, 792 (Ore. 1928).
for if the objection be of great weight it will overcome the sanctioning state of mind, even so. From the State of Oregon comes the precise statement of the rule in this connection. "When the legislative enactment is manifestly unreasonable and arbitrary . . . it becomes the duty of the judiciary to declare such act invalid." But one asserting its invalidity has the burden of proof.26

Necessarily, therefore, the decision whether a given zoning ordinance is or is not a reasonable one rests ultimately for its basis upon the provisions of the ordinance, its application and effect, and the adequacy of the proof in overcoming the presumption of sufficiency.

The whole foundation of the right to enact extraordinary measures for the regulation of the community is posited upon the theory that a government should have a capacity to enact such laws as will be conducive to the best general welfare of its citizens. The law-makers may interfere to a reasonable extent with practically any right of a citizen the exercise of which is inconsistent with public health, morals, and welfare. The right of property is by no means exempt from this power, as witness an opinion of Mr. Justice Day's, in which he says: "True it is, dominion over property springing from ownership, is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of public health, convenience or welfare . . . Certain uses of property may be confined to portions of the municipality other than the resident district . . . because of the impairment of the health and comfort of the occupants of neighboring property." 27

Classification laws, involving those elements, then are valid, but lacking this foundation they cannot be supported upon any ground. And where an objection is raised involving a denial of these interests, it devolves upon the courts to determine whether the exercise of the police power is really for the best interests of the public.28 The ordinances must have a real concern for public welfare and cannot be promulgated, so as to withstand objection, under mere color of public beneficence. The courts will declare invalid a law which is a mere pretense to protect public health, or which passes "entirely beyond the limits which bound the police power, and infringes upon rights secured by the fundamental law." 29 And where the contrary is set up, the judiciary will promptly abrogate the law. 30

26 Daniels v. City of Portland, op. cit. supra note 22.
27 Buchanan v. Warley, 245 U. S. 71, 74-75 (Ky. 1917).
29 Ex Parte Whitwell, 32 Pac. 870, 872 (Cal. 1893).
30 Dornberg v. City of Spokane, 215 Pac. 518, 519 (Wash. 1923); Thomas Cusack Co. v. Chicago, op. cit. supra note 17; Gundling v. City of Chicago, op. cit. supra note 16.
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Municipalities may not, under the guise of the police power, formulate and apply restrictions having no real relation to public welfare, since automatically the enabling element is withdrawn and the enactment must fall under attack, for the police power is confined to such reasonable restrictions as are necessary to public health, morals and safety, and to the public peace, order and general welfare, and ordinances under such power may be enforced though they interfere with the right of property.31 "An ordinance prohibiting all sales at auction within a prescribed portion of the business district . . . is unreasonable and void, as it can have no relation to health, comfort, morals, or welfare." 32

It is considered to be for the best interests of the municipal public that the council prohibit or regulate and classify uses injurious, or likely to be injurious, to the members of the city. Or, in the words of Justice Cooley, "A specific occupation or business may be excluded from a prescribed area in a municipality, or it may be required to be conducted within prescribed limits, where it injuriously affects the health, safety, comfort, or welfare of the community." 33

Some states have even gone so far, as in Maryland, to hold that, "Where an ordinance does appropriate private property to a public use, or if it does deprive owners of their property without compensation, then such an invasion of private rights cannot be sustained under the police power unless the exercise of these rights menaced the public health, safety, or morals." 34 This, in effect, says that, the proper conditions being present, such taking of private property without compensation is justified under the "health, morals and welfare" feature of the police power.

It follows that, very generally, industries and business may be located and the recipient section classified, certain establishments prohibited from operating or locating in certain sections; others from setting up in still other zones, all provided that such distribution bears some relation to the communal "health, safety, public convenience or comfort or general welfare." 35

Another invalidating criticism of a classification ordinance is that it is in its application arbitrary and discriminatory and therefore cannot be given effect for the general welfare, but in its largest view would only go to the advancement of a special class. The Alabama Supreme

34 Goldman v. Crowther, 128 Atl. 50 (Md. 1925).
35 Metzenbaum, op. cit. supra note 4, at p. 69, § H, and cases cited.
Court gives a compact summary of this objection in these words: "Ordinances may be condemned as arbitrary, unreasonable, discriminatory, and not uniformly burdening those in the same class." 36 Necessarily, all zoning ordinances, as all boundary-defining laws, partake to some degree of arbitrariness. So, too, taken from a highly individualistic viewpoint, they are discriminatory, since no two portions of land are similarly situated, nor will the law have exactly the same effect on each. Nevertheless, this element, in a well-applied ordinance, is not of sufficient gravity to outweigh the reasonableness and beneficence of the law. As was said by Mr. Justice Field, of the United States Supreme Court: "Special burdens are often necessary for general benefits... Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good." 37

If there be a reasonable inference of the freedom from the nature of an arbitrary fiat, i. e., unless there can be no reasonable difference of opinion but that the ordinance is arbitrary and inequitable, the legislative expression must be given full effect. 38 Here, again, is shown the impregnable character of the presumption which accompanies and protects the zoning enactments of the municipal body. The ordinance must be shown strongly to be clearly arbitrary and unreasonable. The general rule is embodied in a decision of the State of Illinois, wherein it is said that "Classification is primarily for the Legislature, and only becomes a judicial question when the legislative action is clearly unreasonable." 39

In several cases, the absolute exclusion of all but certain named industries from a residence district, although seemingly discriminatory and arbitrary, has been upheld. 40 It would seem, then, that the degree of discrimination must be of such seriousness as practically to amount to a denial of the owner's status as a member of the public or to involve the aspect of individual legislation directed at his rights. In such case it would be highly inequitable to enforce the legislator's whim, nor could it be supported as a proviso for general welfare.

The common attitude of courts in general on the subject has been expounded by Mr. Alfred Bettman, of the Ohio Bar, in these words: "The true principle would seem to be that, if the districting in general

36 Town of Guntersville v. Wright, 135 So. 634 (Ala. 1931).
38 State v. City of Jackson, op. cit. supra note 16.
40 See Ex Parte Quong Wo, 118 Pac. 714 (Cal. 1911); Brown v. City of Los Angeles, 192 Pac. 716 (Cal. 1920). See also Alfred Bettman, Constitutionality of Zoning, 37 Har. L. Rev. 850.
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cannot be shown to have disregarded the reasonable dictates of equality, it should be upheld. Here, as elsewhere, in the realm of the due-process and equality clauses, general considerations and not particular instances should govern, and here, as elsewhere, there is no escape from questions of degree.  

As has been stated heretofore several times, the power of zoning is derived from and dependent on the general police power. An ordinance may be assailed from the standpoint of its source of sanction. A successful showing that the ordinance in question extends beyond the general regulatory power of the government renders it, ipso facto, of no force and effect, whereupon it becomes the duty of the judiciary so to declare it.

However, in accord with the general attitude toward police power regulations, provided first of course that every charter provision necessary to give them legal existence has been complied with, the tribunals are very reluctant to declare a promulgation of the city to be outside the pale of its jurisdiction.

Consequently, many cases from a great number of states attest the validity of general zoning provisions as within the municipal police power. Likewise many special types of ordinances have been upheld, at least from the standpoint of being a valid exercise of that capacity.

Not all use prohibitions have found favor in the eyes of the judiciary as laudable ministrations of the policing quality. A few ordinances, not varying essentially in principle from those sustained in other jurisdictions, have been abrogated by the state courts of last resort. In Minnesota, where zoning laws have been notably turbulent, an enactment prohibiting the owner of land from erecting a store building upon his property within a residential district was not upheld as a legitimate invocation of the police power. A similar ordinance was denounced in West Virginia, as also was one in Colorado. It is generally conceded that an attempt to describe set-back or building

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41 Bettman, op. cit. supra note 40.
42 State v. City of Jackson, op. cit. supra note 16.
43 Fourcade v. San Francisco, 238 Pac. 934 (Cal. 1925).
44 Reinman v. Little Rock, op. cit. supra note 17; R. B. Construction Co. v. Jackson, 137 Atl. 278 (Md. 1927) (An ordinance contemplating that within a certain district there should be reserved on each lot one side yard at least a foot wide was adjudged a valid use of the police power in an attempt to improve the condition of light and air).
45 State ex rel. Lachtman v. Houghton, 158 N. W. 1017 (Minn. 1916). And see People v. City of Chicago, 103 N. E. 609 (Ill. 1913).
46 State ex rel. Austin v. Thomas, 123 S. E. 590 (W. Va. 1924).
47 Willison v. Cooke, 130 Pac. 828 (Colo. 1913).
lines, unless involving a comprehensive plan of zoning, is very unsubstantial and shaky on a foundation of police power sanction.\textsuperscript{48} Ordinances based upon a mere endeavor to obtain some aesthetic effect are likewise very generally held ineffective.\textsuperscript{49}

In conclusion upon this subject of the constitutionality of zoning ordinances, the rule to be drawn from the adjudicated cases seems to be aptly stated thus: “A municipal corporation under its authority of the police power may regulate any trade, occupation or business, the unrestrained pursuit of which might affect injuriously the public health, morals, safety or comfort, and in the exercise of this power particular occupations may be excluded from certain parts of the city or may be required to be conducted within certain limits.”\textsuperscript{50}

Or, as further condensed by Teideman, “The police power is properly confined to the determined enforcement of the legal maxim ‘sic utere tuo ut alienum non laedas.’”\textsuperscript{51}

From all this a conclusion is evolved which practically justifies the use of the zoning ordinance in the proper government of our cities in their rapid and intensive growth. To put it tersely, “The right to impose reasonable restrictions as to the nature and use of buildings in a city is unquestionably within the police or regulating power.”\textsuperscript{52} The Supreme Judicial Court of Massachusetts summarizes the basis of zoning thus: “The right to enjoy life and liberty and to acquire, possess and protect property are secured to everyone under the Constitution of Massachusetts and under the Constitution of the United States. These guaranties include the right to own land and to use and improve it according to the owner’s conception of pleasure, comfort or profit, and of the exercise of liberty and the pursuit of happiness. . . . These rights are in general not absolute and unqualified. Liberty is regulated by law to the end that there may be equal enjoyment of its blessings by all.”\textsuperscript{53}

\textit{Francis W. Brown.}

\textsuperscript{48} Fruth v. Bd. of Affairs, 84 S. E. 105 (W. Va. 1905); Eubank v. Richmond, 226 U. S. 157 (Va. 1914).
\textsuperscript{49} People v. City of Chicago, \textit{op. cit. supra} note 45; 19 R. C. L., pp. 834–835.
\textsuperscript{50} See Hadacheck v. Sebastian, \textit{op. cit. supra} note 33.
\textsuperscript{52} Note, 13 Har. L. Rev. 405, citing Watertown v. Mayo, 109 Mass. 315 (1872).
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DAMAGES FOR FRIGHT—NEGLIGENCE—ASSAULT.—In Comstock v. Wilson 1 the plaintiff's testatrix was a passenger in plaintiff's car when it collided with an automobile operated by defendant. The collision caused some noise or "grating sound." The left fender of plaintiff's car was loosened from the running board. The plaintiff's testatrix stepped from plaintiff's automobile and started to write down defendant's name and license number. While doing so, she fainted and fell to the sidewalk, fracturing her skull. All this occurred within a few minutes after the accident. She lived about twenty minutes after the fall. Plaintiff, claiming that the death of testatrix was the result of defendant's negligence, recovered judgment for $5,000 against defendant in the trial court. The trial judge submitted to the jury as a question of fact, whether the alleged negligence of defendant was the proximate cause of the death of plaintiff's testatrix. He refused the defendant's request to charge that "if the jury find that the deceased at the time of the collision sustained only shock or fright, without physical injury, they must find for the defendant." Defendant appealed to the Supreme Court, Appellate Division, and this court certified the question as to whether or not it was error for the trial court to refuse defendant's request to charge. The Court of Appeals held it was not error to refuse defendant's request and affirmed the judgment of the lower court.

The rule in England, Scotland and Ireland appears to be settled in favor of a recovery for physical injuries resulting from nervous shock caused by the wrongful act of the defendant without actual impact. 2 The American authorities are in conflict on this question. In a number of jurisdictions, recovery for nervous shock without impact has been denied. The reasons assigned by the courts for denying recovery in this class of cases are: (1) mere fright produced by negligence is not recognized by the law as the foundation of an action; 3 and since fright is not itself a cause of action, none of its consequences are; (2) the injuries resulting from fright are considered by law as too remote; 4 and (3) it is contrary to public policy to allow recovery in such cases. 5

In the law of assault, liability for fright without impact has always been recognized. But the wrongful act of defendant in assault is quite different in nature from that of a defendant in the law of negligence.

1 177 N. E. 431 (N. Y. 1931).
5 Ewing v. Pittsburgh, etc., R. Co., 147 Pa. St. 40 (1892); Ward v. West Jersey, etc., R. Co., 65 N. J. L. 383 (1900).
At the time when liability in trespass for an assault was first imposed the interest in freedom from mental disturbances was not recognized as worthy of legal protection. "Even today it [this interest] is, save in exceptional cases, given only an indirect recognition and protection." The interest recognized in assault is an interest in freedom from being put in apprehension of a touching offensive to a reasonable sense of personal dignity. The apprehension must be of an intentional touching. There is no liability in law of assault for unintentionally causing the most reasonable apprehension of loss of life or limb. Therefore liability in assault was not imposed because freedom from this particular form of mental disturbance was regarded by early common law as so peculiarly desirable as to require its legal recognition and protection. "Its [liability in trespass for an assault] existence can be explained only as a result of the fact that, whatever may have been the purpose underlying the introduction of the writ of trespass, it lay only where the plaintiff was seeking compensation for the grievance caused him by some breach of the King's peace, and so was used as a means of punishing such offenses." 

The problem involved in the law of negligence is quite different. A resort to the law of assault will not assist in solving the problem. While many forms of mental disturbance are provable in aggravation of damages and can be recovered where defendant has violated some legally protected interest of the plaintiff, the problem is quite different where the liability of the defendant depends upon the fact that he has caused some form of emotional disturbance to the plaintiff and it is here that the courts have disagreed upon the question as to whether a recovery is desirable.

Negligence *per se* is not actionable, but negligence causing physical injury is actionable. The courts did not seem to have any difficulty in holding a defendant liable where his conduct was careless and resulted in a physical injury through the medium of a nervous shock;

6 Torts, Treatise No. 1 (a) Supporting Restatement No. 1, p. 64.
7 Torts, *op. cit. supra* note 6.
8 Torts, *op. cit. supra* note 6, at p. 65.
10 That recognition is given to the interest in privacy, a very intangible interest, see Samuel D. Warren, Louis D. Brandeis, The Right To Privacy, 4 Har. L. Rev. 193.
and neither did they have any difficulty in holding a defendant liable in damages for a nervous shock produced intentionally but where there was no impact. Recovery for fright or nervous shock has been denied regardless of however manifest in physical consequences, unless, as Dean Pound points out "the causal nexus was vouched for by an intention to injure or by some physical impact at the time the fright or mental suffering was culpably produced." Dean Pound says that this was a practical rule, growing out of limitation of trial by jury, the difficulty of proof in cases of injuries manifested subjectively only, and the backwardness of our knowledge with respect to the relations of mind and body. With the rise of modern psychology, the difficulty of proving an injury of this type and the extent of such injury, has been removed. But, as Dean Pound points out, a legal conception had come into being, viz., the right of physical integrity as including integrity of the physical person but not mere peace of mind, which the courts treated as self-sufficient. This conceptual attitude is rapidly disappearing. The courts are coming to look upon a nervous shock as an affection of the physical person, not the mental.

The right to be secure from nervous shock is a right that should be recognized with the right to be secure from bodily injury. When the nervous shock is accompanied with physical injury, damages are allowed in the majority of cases for the fright. The ability of a jury or the court to estimate the amount to be recovered for the fright should be the same whether there is physical injury or not. The argument that fictitious claims may be fabricated has no more strength than it would have in cases where there has been a physical injury, there being the same privilege of employing expert testimony to refute any false claims as is done in cases of physical injury.

Thomas E. Coughlan.


13 Pound, Interpretations of Legal History, p. 120.

14 Pound, op. cit. supra note 13.

15 Pound, op. cit. supra note 13.

JUDGMENT—FEDERAL COURTS—TERRITORIAL EXTENT OF JUDGMENT LIENS IN INDIANA.—The decision handed down by the Supreme Court of the United States in the case of Rhea v. Smith brought into question the validity of the Indiana statutes with reference to the territorial extent of judgment liens of the federal courts. In that case the plaintiff purchased land at an execution sale on a judgment rendered in the federal district court in Missouri. The defendant claimed as a purchaser of the same land from the original owner subsequent to the rendition of the judgment, of which no transcript had been filed, but prior to the execution sale. On certiori it was held that the judgment be reversed, since the Missouri statute was in conflict with the Act of Congress of 1888, and final judgment was given for the plaintiff in the case. This Act of 1888 provides that judgments and decrees rendered in a circuit or district court of the United States within any state, shall be liens on property throughout such state, in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state. The Missouri statutes on this point provide that federal judgments shall be liens in any county upon the filing of the transcript of the judgment in the state circuit court of that county but makes judgments rendered by any court of record liens in the county for which the court is held without the filing of a transcript. The Supreme Court held that this statute was in conflict with the Act of 1888, in that it was an unjust discrimination against the federal courts, making their judgments a lien on property only when recorded, while judgments of state circuit courts were liens on the property in the county in which they were rendered, ipso facto.

The Indiana statutes on this point seem to be open to the same criticism. In Section 659 of Burn's Indiana Annotated Statutes, 1926, the legislature provided that all final judgments in the supreme and circuit courts for the recovery of money or costs, shall be a lien on real estate and chattels real liable to execution in the county where judgment is rendered. This statute does not make the filing of the judgment a prerequisite to the creation of the lien, and therefore makes the lien attach automatically on the rendition of the judgment. In Section 664 it is provided that any person interested may file or cause to be filed, in the office of the clerk of any circuit court of this state a copy of any judgment rendered by the district or circuit courts of

1 274 U. S. 434, 71 L. Ed. 1139 (1926).
the United States in and for the District of Indiana, and when so filed shall be a lien. This seems to be in conflict with the Act of 1888, in that it discriminates unfairly against the judgments of the federal courts.

It would seem, therefore, that these Indiana statutes are ineffective. What then is the status of judgment liens of federal courts in Indiana? Since the statutes of Indiana do not conform to the Act of 1888, the procedure in effect before the passage of that act is the procedure that will now govern. Before that time the judgments of both state and federal courts created liens on property coextensive with their jurisdictions. However, since federal courts had jurisdiction over many counties, states began to pass statutes making registry of federal judgments a prerequisite to their becoming a lien, in all counties except the county in which the judgment was declared. On the other hand, judgments of county courts did not have to be so recorded in order to become liens. To overcome the confusion necessarily arising from this diversity of practice, the Act of 1888 was passed. Where state statutes were in conflict with this act, then the old rule of coextension still applies. And therefore, since it seems that the Indiana statutes are in conflict with the act, the rule of coextension applies in this State, making the judgment of a federal court a lien on all the real property within its jurisdiction ipso facto.

John M. Crimmins.

AUTOMOBILES — Conditional Sales — Automobile Sale and Transfer Acts.—Does a compliance with the provisions of an Automobile Sale and Transfer Act, in selling a car, operate to give notice to an intending subsequent transferee of an interest in the car described in the bill of sale of the car? Or is it necessary in order to protect the seller under a conditional sales contract that he also record his conditional sales contract? Thus the question is presented as to whether the Automobile Sale and Transfer Acts, in the scope of their operation, supersede the Chattel Mortgage Recording Acts.

Apparently the first decision on this question was handed down by the Supreme Court of North Carolina in Carolina Discount Corporation v. Landis Motor Co.1 In this case the owner of the car mortgaged it to the Carolina Discount Corporation and the mortgagee failed to record this mortgage as required by the statute in regard to chattel mortgages. Later the original owner sold the car to the defendant, representing it to be free from all encumbrances. The mortgagee

1 129 S. E. 414 (N. C. 1925).
sought to recover the car claiming that the Automobile Registration Act repealed the statute requiring the recording of chattel mortgages. The court, after a perusal of these two statutes, decided that the scope of operation of the Chattel Mortgage Recording Statute is not affected by the Automobile Sale and Transfer Act, and that all chattel mortgages and conditional sale contracts on motor vehicles must be registered in the county in which the mortgagor resides, and in case the mortgagor resides out of the state, then in the county where the said motor vehicle is situated, in order to obtain immunity against the creditors and subsequent purchasers for value from the mortgagor.

Following this decision the Supreme Court of Minnesota, in considering the purpose of the enactment of the Automobile Registration Acts, said: "Doubtless the law in question was enacted as a means of a more efficient and certain method of taxation, and as an aid in the prevention and detection of crime, and not for the purpose of putting the proof of title to personal property upon a higher plane than the title to real estate, which may now be established by the ordinary proofs in actions to determine adverse claims. We are of the opinion that the statute was passed exclusively for the benefit of the state and that it, as a registration act, has no application to creditors and vendees of the person who holds the certificate of registration."  

In the case of Nelson v. Viergiver the Supreme Court of Michigan was of the same opinion. One Hubbard bought a motor truck on a conditional sale. Possession of the truck was turned over to Hubbard. The defendant, the sheriff levied on the truck to satisfy an execution in his hands. The plaintiff repleived it. The plaintiff insists he was entitled to judgment because Hubbard, in an application to the secretary of state according to the Automobile Registration Act, stated that he held possession under a "conditional sale lien" and such application was notice to the creditor that he was not the owner of the truck. The court held that the act, providing for the issuance of certificates of title of motor vehicles by the secretary of state, does not amend or supersede the statute requiring conveyances intended to operate as mortgages of goods and chattels to be recorded.

Thus in the year 1925 we have three notable decisions giving a definite and certain viewpoint as to the purpose for which these acts were enacted. The Supreme Court of Ohio, in 1926, gave rise to a conflict by handing down a decision contra to the aforementioned adjudicated cases. The defendant, the Warren State Bank, loaned money on a car and filed the bill of sale received therefrom. Helwig, the plaintiff, bought the car, thinking it free from all encumbrances, and

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2 Amick v. Exchange State Bank, 204 N. W. 639 (Minn. 1925).
8 203 N. W. 164 (Mich. 1925).
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filed his bill of sale. Helwig contended that the bill of sale should have been filed as a chattel mortgage in the office of the county recorder. The bank claimed that the filing of the bill of sale was notice to the whole world of the rights of the holder and whoever became a holder of an interest in the automobile described in such bill of sale took title thereto subject to the rights of the bank. The abridged decision of the court was: "Under the construction we give the Automobile Sale and Transfer Acts of Ohio, the title of the defendant was superior." The court thereby decided that the registration act superseded the chattel mortgage recording statute.

With this Ohio decision in mind it might be well at this point to consider the purpose for which these two statutes were enacted. The Ohio Chattel Mortgage Recording Statute is a civil statute designed to regulate the manner of creating and perfecting liens. It was enacted some 85 years before the Automobile Sale and Transfer Act and at that time automobiles had not been invented. Section 6310-10, of the General Code of Ohio, requiring title of an automobile to be registered with the secretary of state, is a penal statute. It inflicts a penalty for failure to register title within three days after said title has changed hands. Besides being an efficient method of taxation, the purpose of this statute was to make easier the tracing of stolen cars and the punishment of offenders. When this act was adopted the evil of the theft of automobiles was so acute that the Legislature doubtless felt justified in resorting to extreme measures to remedy the evil. It is obvious that these two statutes, enacted at widely different dates, refer to widely different subjects. However, the statutes do not necessarily conflict, in so far as they affect civil rights and liabilities; rather they are pari materia. For a later statute to repeal a former statute it is necessary that while also effecting the result for which it was enacted, it completely effects the result which the legislature had in view when they enacted the former statute. Although these statutes run along parallel lines, they do not effect a result which would make the latter supersede the former.

In Metropolitan Securities Co. v. Warren State Bank the Supreme Court of Ohio handed down a clear cut decision as to relative scope of operation of each of these statutes. It modified the earlier decision of Helwig v. Warren State Bank by deciding that bills of sale intended

5 Metropolitan Securities Co. v. Warren State Bank, 158 N. E. 81 (Ohio 1927).
6 Willey v. Willey, 23 Ohio Law Rep. 305.
7 Metropolitan Securities Co. v. Warren State Bank, op. cit. supra note 5.
as conveyances intended to operate as a mortgage should be recorded in the office of the county recorder. In this case one Snyder executed bills of sale to the Warren State Bank for money loaned him on three cars. The bank filed the bills of sale according to the requirements of Section 6310-10, Ohio General Code. Later Snyder gave three chattel mortgages on the cars to the Metropolitan Securities Co., who recorded the chattel mortgages in compliance with Section 8650, Ohio General Code. Snyder disappeared and each party now claims ownership of the three cars. We have, therefore, two mortgagees, one who filed his bill of sale, the other recorded his chattel mortgage. Was the filing of the bill of sale sufficient to give notice to the subsequent mortgagee of the bank’s rights to the three cars? The court held that the bills of sale were given as security for a debt and they are “conveyances intended to operate as a mortgage,” and therefore the proper subject for filing in the office of the county recorder. The Metropolitan Securities Co. complied with Section 8650, requiring the recording of chattel mortgages, and was therefore entitled to the cars.

In the case of Commercial Credit Co. v. Schreyer the Supreme Court of Ohio overruled the decision of Helwig v. Warren State Bank. The majority of the court were of the opinion that the Automobile Registration Act of Ohio is a penal statute which was not intended to affect the validity of contracts, or titles, or rights of property. It was not designed to repeal or interfere with the statutes relating to conditional sales, chattel mortgages, or the uniform law of sales in transactions relating to motor vehicles. Its provisions apply only to the statute relating to the sale of chattel property by making special procedure to govern the transfer of title to motor vehicles.

At the present time the courts are of the opinion that the Chattel Mortgage Recording Statutes and the Automobile Registration Acts are two entirely different classes of statutes enacted for entirely different purposes. The Automobile Registration Acts do not, within the scope of their operation, supersede the Chattel Mortgage Recording Statutes. Therefore, it is necessary for a person holding a bill of sale intended as a chattel mortgage to file it with the county recorder in order to protect himself from rights of creditors and subsequent purchasers. The latest adjudicated case on this subject is King-Godfrey Inc. v. Rogers, decided by the Supreme Court of Oklahoma, May 24, 1932. This case is in line with the preceding decisions. It will be of interest to a student of the law to see what the courts of other states will hold in the future as, in the present era of conditional sales, it is a question that will arise frequently.

Thomas Gately.

10 166 N. E. 808 (Ohio 1929).
11 11 Pac. (2d) 935 (Okla. 1932).
TORTS—NEGLIGENCE—ACTION BETWEEN MEMBERS OF A "JOINT ENTERPRISE."—Assuming that A and B are engaged in a so-called "joint enterprise," involving the use of an automobile, is A entitled to maintain an action against B for injuries sustained due to the negligence of B in driving the car during the continuance of the enterprise? This question has been considered in a few recent cases. In the case of *Williamson v. Fitzgerald and McConnell* ¹ this particular point was discussed at length by the court even though it held that under the particular facts of the case the parties were not engaged in a "joint enterprise." The plaintiff, the two defendants, and a friend of the plaintiff arranged to take a trip from Stockton to San Francisco to see a show. The plaintiff was the owner of the car used, but the defendants paid the expenses of the trip. One of the defendants did the driving. Due to a failure to use ordinary care by the defendant, who was driving, the automobile tipped over and the plaintiff sustained serious injuries. The plaintiff recovered a judgment in the Superior Court and the defendant appealed. In a decision upholding the judgment of the lower court, primarily on the grounds that this was not a "joint enterprise," Thompson, J., stated that even if this had been a "joint enterprise" the plaintiff's right to recover would have been no less absolute. The major part of his opinion is devoted to this point. To quote in part, "The doctrine of imputed negligence is applicable to a member of a joint enterprise or common adventure when one member of the enterprise is sued by another thereof for injuries sustained through the negligent operation of an automobile which is being used in the course of the enterprise. The doctrine of joint enterprise is peculiar to the subject of contributory negligence and has no application to actions brought by one joint adventurer against another to recover injuries due to the latter's negligence." (Italics supplied.) ¹

*O'Brien v. Woldsen* ² is a case directly in point. Mrs. O'Brien, the plaintiff, and Mrs. Woldsen, the defendant, left Spokane on a pleasure trip, with the intention of meeting Mr. Woldsen in Seattle. Each of the ladies was to pay her own expenses, but Mrs. Woldsen was to furnish the car and Mrs. O'Brien was to buy the gasoline for the automobile. Due to negligence on the part of the defendant who was driving, the plaintiff was seriously injured. The court, in a decision written by Main, J., held that even though this was a "joint enterprise" the negligence of the defendant could not be imputed to the plaintiff so as to bar recovery. "When the action is against a third person each member of the joint enterprise is a representative of the other and

¹ 2 Pac. (2d) 201, 205 (Cal. App. 1931).
² 270 Pac. 304, 305 (Wash. 1928).
the acts of one are the acts of all if they are within the scope of the enterprise. When the action is brought by one member of the enterprise against another, there is no place to apply the doctrine of imputed negligence. To do so would be to permit one guilty of negligence to take refuge behind his own wrong."

In *Collins v. Collins*, under similar facts establishing a "joint enterprise" and the injury of one of the parties because of the negligence of the other, the court also held that the defendant was not absolved on the theory of mutual enterprise. District Judge Burgess did not elaborate on the pertinent question but based his decision on a previous Wyoming case, *Ryan v. Snyder*. This latter case alone, however, does not justify such a summary dismissal of the matter since this action was decided on the grounds that the plaintiff and defendant were not engaged in a "joint enterprise." On the particular point in question the decision contains only *dicta* quoting from *Wilmes v. Fournier*. Thus, these Wyoming decisions are of little value. In *Bushnell v. Bushnell*, the plaintiff, while riding in an automobile driven by her husband, was injured when the car ran off the road due to the husband's (defendant) negligence. In deciding the case in favor of the plaintiff, Maltbie, J., said: "However it might have been were the plaintiff suing a third party for injuries due to his negligence in concurrence with that of her husband, here, where she was charging him directly with responsibility for injuries due to his own failure in duty, there was no place for any imputation of his want of care to her, and the sole issues were those having to do with his negligence and her own contributory negligence. The doctrine of joint enterprise was wholly inapplicable to such a situation." In *Harber v. Graham* the following instruction to a jury was held to be error: "If the jury find that the plaintiff and the defendant were engaged in a common enterprise at the time of the accident, then, regardless of any question of negligence, the defendant is entitled to a verdict."

As Professor Rollison points out, the dearth of decisions on this exact point is probably explainable by the fact that "in the majority of cases there exists the negligence of a third person who can be sued without any remorse in conscience." In the article cited the author quotes from *Wilmes v. Fournier* as follows: "The fact whether there is a joint enterprise is one of importance in the class of cases

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8 260 Pac. 1089 (Wyo. 1927).
4 29 Wyo. 146, 211 Pac. 482 (1923).
5 180 N. Y. Supp. 860, 111 Misc. 9 (1920).
6 131 Atl. 432, 434 (Conn. 1925).
cited, when the action is against a third person; but, as between themselves, I know of no rule of law that throws a mantle of protection over the tortious acts of an associate in a joint enterprise or in a partnership."

Cases to the contrary are *Frisorger v. Shepse*,\(^\text{10}\) *Farthing v. Hepinstall*,\(^\text{11}\) and *Lawrason v. Richard*.\(^\text{12}\) The last case is *contra* only by implication since the facts were not held to constitute a "joint enterprise." These cases are criticized in *Berlin v. Koblas*.\(^\text{13}\) In his opinion, Dibell, J., points out that these cases, proceeding as they do on the theory that the associates are so identified that the act of one is the act of the other, fail to apply the general rule that "a person in his relations to others, whether through a contract or independently of one, is liable if his personal negligence results in an injury." The justice adds that every person has a common law duty or obligation to so conduct himself as not to injure others. To allow protection to one member of a "joint enterprise" even though negligent to a fellow-member would be to abrogate this rule.

Some courts have sought to base the "joint enterprise" doctrine upon a relationship analogous to that of a partnership. Quoting from a California case: "The tendency of modern decisions is to regard the right of joint adventurers, as between themselves, as governed practically by the same rules that govern the relation of partnerships."\(^\text{14}\) In the conduct of a partnership business, each partner owes the other a duty to use due care.\(^\text{15}\)

Other courts hold that the doctrine is based on the control which, theoretically, each has over the other. Thus it may be considered as being analogous to a principal and agent relationship.\(^\text{16}\) It is well settled that an agent is required to use ordinary care, in conducting his principal's business, and a failure to do so, which causes the principal injury, constitutes negligence for which the agent is responsible.\(^\text{17}\)

In the application of the "joint enterprise" doctrine the courts in speaking of the power of control often leave it uncertain as to whether

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\(^{10}\) 251 Mich. 121, 230 N. W. 926 (1930).

\(^{11}\) 243 Mich. 380, 220 N. W. 708 (1928).

\(^{12}\) 129 So. 250 (La. 1930).

\(^{13}\) 236 N. W. 307 (Minn. 1931).


\(^{16}\) Harber v. Graham, *op. cit. supra* note 7; Farthing v. Hepinstall, *op. cit. supra* note 11.

\(^{17}\) Mechem On Agency, § 1275; Garther v. Myrick, 9 Md. 118 (1856).
they mean an actual control and a failure to exercise it, or a theoretical power of control which, though not actually existent at the moment of the accident, seems to be considered as sufficient to impose a vicarious responsibility upon all of those who for the moment are considered as having control over the manner and means of executing the joint undertaking. Certainly, the word "agent" does not connote anything approaching the idea of an agency as that term is normally understood.

Where the contributory negligence of the associate who is in actual control of a means used to carry out a common undertaking is imputed to the plaintiff-associate who is suing a third person whose negligence contributed to the injury, the courts have shown a tendency, in denying the plaintiff recovery, to hold him to a higher degree of responsibility for his own safety than a defendant is usually held for responsibility in injury to third persons generally.

The courts that have given the widest scope of operation to the doctrine of imputed negligence where a "joint enterprise" is said to exist are those that have been the last to overthrow the doctrine of *Thorogood v. Bryan* 18 or else retain that doctrine. Probably, therefore, the "joint enterprise" doctrine represents an effort to salvage the doctrine of that case.

The conclusions to be drawn from this exception to the imputed negligence doctrine (of those engaged in a "joint enterprise") may be more far-reaching than is at first apparent. Is it not a subtle admission that the theoretical control that forms the basis of the doctrine is but a legal fiction; an indirect admission that in reality there is no control at all? If there be no control, what justification is there for the "joint enterprise" doctrine? Since no justification is evident, is not this doctrine only a concession or a peace offering to the equity of the principle that anyone riding in an automobile who is injured by the negligence of a third person and the contributory negligence of the driver should not be allowed to recover from said third person? But, since the "joint enterprise" doctrine does exist, the influence of *Thorogood v. Bryan* must still be felt, and the injustice of holding third persons responsible to anyone in the other car for accidents which would not have happened but for the contributory negligence of the driver is still a legal ghost that haunts our modern law of torts.

*Thos. L. McKevitt.*

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CORPORATIONS—SERVICE OF PROCESS ON FOREIGN CORPORATIONS IN OHIO—MANAGING AGENTS.—The question arises as to whether a corporation is to be considered in the same light as a natural person for the purpose of service of process. Fletcher, in Cyclopedia Corporations, answers this question as follows: 1 "It is a close question, and not debatable that a corporation is a 'person' within the meaning of the last clause of section 1 of the Fourteenth Amendment of the Federal Constitution, and it follows that it cannot be deprived of life, liberty or property without due process of law, and that it is entitled to the equal protection of the law in like manner as other persons in the same situation..." But as "due process of law" consists in the service of process, and since such service can be made only upon an agent, we must determine what agents are subject to service of process. In Ohio a summons against a corporation may be served upon the president, mayor, chairman, or president of the board of directors or trustees, or other chief officer; or if its chief officer is not found within the county, upon its cashier, treasurer, secretary, clerk or managing agent; or if none of such officers can be found, by a copy left at the office or usual place of business of the corporation with the person having charge thereof. In case the corporation is a railway company or water transportation company, service may be made upon any regular ticket or freight agent, or if there is no such, upon any conductor or motorman or upon the master of any vessel. 2 The law is fairly well settled as to what agents may be served in actions against domestic corporations. Since the state gave the corporation being, it may regulate its activities and specify definitely what agents may be served.

Where corporations organized and existing under the statutes of a state foreign to the one in which the corporations are acting must be served with process, the question is not so simple. Should the state in which a foreign corporation was organized determine what agents are capable of being served with process, and should all other states abide by that determination under the provisions of Article IV, section 1, of the Constitution of the United States, providing for full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, on the theory that the creation of a corporation and the designation of agents upon whom process may be served by the legislature of a state are public acts? Or should the state in which the corporation is doing business determine what agents

2 Ohio General Code (1926), § 11288.
can be served? These questions were answered by the United States District Court in Missouri, in 1928, when it held that each "state may prescribe exclusive method for service of process on foreign corporations doing business therein." 3

It is important to note that the corporation must be doing business within the state, to give the courts of that state jurisdiction over the foreign corporation at all. If one of the chief officers of a corporation of another state happens to be in the state for purely personal reasons, or for reasons not connected with the business of the corporation, he is not subject to service of summons on the corporation. 4 Thus the Ohio courts hold that where the president of a foreign corporation is in the state for the sole purpose of attending a convention, he is not doing business within the meaning of the statute. 5

Having established the fact that a state may lawfully determine the method of service of process upon foreign corporations doing business within its territory, we can inquire as to the methods employed towards that end in Ohio. Before a corporation of another state begins the transaction of business in Ohio, 6 it should apply to the Secretary of State of Ohio for permission to transact such business. The Secretary of State will require such foreign corporation to file in his office a statement under its corporate seal setting forth, among other things, the name of a person designated by the corporation upon whom service of process against the corporation may be made within the state. 7 If the foreign corporation has complied with this rule, the procedure in bringing suit against it is simply to find out from the Secretary of State who the designated agent is, and then to serve the agent with summons.

But it may sometimes, and in fact often does, happen that the corporation neglects to file such a statement. Sometimes the designated agent neglects to file the statement or leaves the state so as to be beyond the jurisdiction of the courts, or is discharged, or for some other reason cannot be served with process. In this event, the Gen-

3 Thompson v. National Life Ins. Co. of U. S. of America, 28 Fed. (2d) 877 (1928). An appeal from this decision was dismissed by the Circuit Court of Appeals, 28 Fed. (2d) 1020.
6 See Southwark Foundry v. Mach. Co., 48 Fed. (2d) 714 (1931), where the United States Circuit Court of Appeals in Ohio holds that "in Ohio process may be served by any one of designated statutory methods, upon foreign corporations within the state in any action upon which the corporation is exercising franchises within the state with its consent, such corporation then being amenable to suit within the state."
7 Ohio General Code (1926), § 179.
eral Code of 1926 provides that if the corporation has a "managing agent" in the state he may be served. This is the only way in which service can be had upon a foreign corporation in Ohio, aside from serving the designated agent.

The question is constantly arising as to who is a "managing agent" within the meaning of the statute. This question is of the utmost importance to the practicing attorney, for with the modern spread of chain stores, nation-wide gasoline and oil companies, and the general tendency to consolidate small domestic corporations into large foreign ones, and to merge the privately owned business with corporate enterprises, he is likely to find himself many times during his career either suing or defending a foreign corporation, and his ability to judge whether or not a particular individual is a managing agent of the foreign corporation will often determine the outcome of the case.

It is the opinion of the courts that section 11920 of the Ohio General Code should be liberally construed. This section acts as a double edged sword; it is intended to protect the rights of the foreign corporation, but it also serves to give the Ohio courts jurisdiction over the foreign corporation which has been doing business with the citizens of the state so as to enable such citizens to conveniently sue the foreign corporation. Were the statute to be interpreted too technically, the corporations of other states would be able to maintain a business in Ohio, without having anyone eligible to be served in the State, thereby avoiding suit in courts of Ohio and forcing the citizens of this State to bring suit in another state where service could be had on the corporation, which state of affairs would be manifestly unjust.

8 Ohio General Code (1926), § 11290. See also Maichok v. Bertha-Consumers Co., 25 Fed. (2d) 257 (1928), holding that a return of summons by sheriff showing service on managing agent in Ohio is a good return.

9 Cora Daw v. Ohio Valley Druggists Association, et al., 16 Ohio Dec. (n. p.) 568 (1906), which says in part that "It is the accepted rule that Rev. Stat. 5043, 5041 (not General Code §§ 11288, 11290) relating to service of summons on a corporation, are exclusive of each other" and that the latter provides the only mode of serving a foreign corporation with summons, aside from serving the designated agent.

10 Israel v. Champion Shoe Mach. Co., 3 Ohio Law Abs. 512 (1925), holding that "statute providing for service of summons upon the 'managing agent' of a foreign corporation, should be liberally construed in order to make it easier to obtain jurisdiction over such foreign corporation doing business within the state."

Wright, J., in The Baltimore & Ohio Ry. Co. v. The Wheeling, Parkersburg, and Cincinnati Trans. Co., et al., 32 Ohio St. 116 (1877), says: "The tendency of legislation and the policy of the law is to facilitate the obtaining of service upon foreign corporations. Their business brings them in such close connection with the people of our state, that it is desirable they should be made amenable to our laws as far as practicable, instead of having our citizens to seek other jurisdictions in which to enforce their rights."
"In general it may be said that he [the managing agent] is one having general supervision over the affairs of the corporation, or at least some part of it." 11 This does not mean one having control of any part whatsoever of the affairs of the corporation is subject to service against the corporation; to be subject to service the agent must have control of some substantial part of the corporate business of the corporation. 12 What is a substantial part, so as to constitute the controller thereof a managing agent is a question of fact to be determined by the evidence in each particular case. 13 Such an agent must actually be in control of the business of the corporation; he cannot merely be presumed to be so by any implication of law contrary to the intention of the parties. 14

As indicated above, service against foreign corporations in Ohio must be made upon either a designated or a managing agent. So where a corporation had designated an agent upon whom process could be served, and the sheriff served a summons on the person in charge of the usual place of business of the foreign corporation and made a return as upon "M. J. Riggs, superintendent of said company," the court held that this was not a proper service within the meaning of the statute and the service was quashed. 15 Whether the court would have held this service good had there been no designated agent and had there been evidence tending to show that Riggs was in fact a managing agent must be left to conjecture. But it is probable that it would have been held good under the rule laid down above that the section providing for service of process upon managing agents should be liberally construed, and that the sheriff would have been allowed to amend his return so as to read "managing agent" instead of "superintendent." 16 This conjecture is supported by Toledo Computing

11 10 Ohio Jurisprudence, 1240.
See also Bucket Pump Co. v. Eagle Iron and Steel Co., 21 Ohio Cir. Ct. 229, 230, 11 Ohio Cir. Dec. 418 (1900), which cites Anderson's Law Dictionary and Upper Mississippi Trans. Co. v. Whittaker, 16 Wis. 233 (1862), and holds that "managing agent" implies control of some part of the business of the corporation.
13 Masemann v. Atlantic Coast Line Ry. Co., 7 Ohio Law Abs. 245 (1929), which holds that the determination of this question depends upon the power vested in the agent as representative of the foreign corporation.
14 United States v. American Bell Tele. Co., 55 Ohio Fed. Dec. 558, 29 Fed. 17 (1886). But if he be a designated agent it is not necessary that he have such control.
15 State ex rel. v. King Bridge Co., 18 Ohio Cir. Dec. 147, 7 Ohio Cir. Ct. (N. S.) 557, 28 Ohio Cir. Ct. 147, (1906).
16 Israel v. Champion Shoe Mach. Co., op. cit. supra note 10 (syllabus 2). The opinion says in part: "... the company sent Westfall into the state to test
Scale Co. v. Computing Scale Co.,\textsuperscript{17} which holds that "A person who chiefly represents a corporation as agent for the sale of goods in a locality in the State and who maintains an office or store room where such goods are kept, is a managing agent, although he is paid only by commissions on sales made within his district." A superintendent would, no doubt, be the chief representative of his company within the district, and so could very probably have been held to be a managing agent if, in the opinion of the court, the equity of the case required it.

The theory underlying the various decisions on this subject seems to be one of agency.\textsuperscript{18} If the person served with process is a general agent (\textit{i.e.}, one having general control of the business of the foreign corporation) the service is good, but if he is a special agent (\textit{i.e.}, one having authority from the foreign corporation to do only a particular act, or particular acts), or a servant of the corporation, the service is not good. To illustrate: Where there "was a general 'superintendent' for the State at Cleveland, and two 'local agents' in the county of Madison; one of whom resided at London, in said county, and kept an office there, where he received and forwarded packages for the company, and did all the business of the company usually transacted in such receiving and forwarding offices," and service was made upon the agent at London alone, it was held that the service was good.\textsuperscript{19} This agent clearly was a general agent. But where the defendant, a corporation organized and existing under the laws of West Virginia, merely had an agent in Ohio to receive what was sent to him, and to remit back proceeds, the agent was held not to be a managing agent.\textsuperscript{20} This agent had no general authority to conduct the affairs of the corporation and so was a special agent. A kindred case is where the corporation sent one of its directors into Ohio to collect payments on subscriptions for lands of the corporation and that director was served with process. It was held that he was not a managing agent.\textsuperscript{21}

\textsuperscript{18} See note 13 \textit{supra}.
\textsuperscript{21} Amy B. Foote v. Central American Commercial Co., 26 Ohio Cir. Ct. 378 (1904).
In order to establish the fact that an agent is, or is not, a managing agent, the affidavit of the agent himself or of one of the chief officers of the defendant company is admissible as evidence. In *State ex rel. v. Standard Oil Co.*,\(^{22}\) the defendant corporation had a local agent in Lucas County who was served with summons against the corporation. The sheriff made a return that he had served A. the “managing agent of said company in Lucas County.” This was met by an affidavit by the vice-president of the defendant company, in which he stated that A. was not and never had been its managing agent, but was an agent in charge of a local station. It was held that, as there was nothing to show that A. was a managing agent, except the return, the court would rely upon the affidavit and quash service. It was held, in the same case, that “a return which recites that summons was served on B, ‘assistant cashier and treasurer of the company,’ is also open to a motion to quash, where met by an affidavit by B which removes the uncertainty as to whether he is the treasurer of the defendant company by stating explicitly that he is the ‘assistant cashier and assistant treasurer,’ and the return fails to show absence from the county of all the chief officers and other officers named in the statute\(^{23}\) upon whom service may be made, or that the summons was left with B at the usual place of business of the defendant corporation, he being the person in charge thereof.”

Where the service is made upon one not a designated agent nor a managing agent of the defendant foreign corporation one of three things may happen: (1) the sheriff may return the summons as “not summoned,”\(^{24}\) (2) the service may be set aside on motion,\(^{25}\) or (3) there may be a motion to quash service.\(^{26}\) But “a party upon whose pleading summons has been issued is not required, upon discovery that good service has not been made, to wait until the original summons has been returned ‘not summoned’ or some action has been taken by the court before causing an alias summons to issue, but may proceed at once to secure service upon another writ within the life of the original summons.”\(^{27}\)

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\(^{22}\) 15 Ohio Cir. Ct. (N. S.) 212.

\(^{23}\) Ohio General Code (1926) § 11288. This citation applies to domestic corporations, but the same rule would apply were the process against a foreign corporation served against the agent of a foreign corporation, in which case he could aver that he was not the managing agent of said company.

\(^{24}\) *State ex rel. v. Oil Co., op. cit. supra* note 22.


\(^{26}\) *State ex rel. v. Oil Co., op. cit. supra* note 22.

\(^{27}\) *State ex rel. v. Oil Co., op. cit. supra* note 22.