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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Comments

### INTERGOVERNMENTAL IMMUNITIES FROM TAXATION

The rising cost of national, state and local government enhanced by widespread unemployment, and accompanied by a decrease in taxable incomes, has indicated during the past few years that an imperative need exists for a re-adjustment of major tax exemptions with a view toward their possible elimina-

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tion.<sup>1</sup> This re-examination of necessity must find its way into the maze of governmental instrumentalities, which have grown up in the last few decades, and which, due to the far-reaching construction placed upon the decision laid down in *McCulloch v. Maryland*,<sup>2</sup> have become insulated from would-be attempts at taxation. An appreciation of this statement is readily seen when one considers the phenomenal growth of governmental agencies since the advent of the New Deal. Since March, 1933, some twenty government owned or government chartered corporations have been created. Such corporations as Electric Home and Farm Authority,<sup>3</sup> Federal Subsistence Homestead Corporation,<sup>4</sup> Emergency Housing Corporation,<sup>5</sup> Federal Deposit Insurance Corporation<sup>6</sup> and the Tennessee Valley Authority,<sup>7</sup> as well as others which have sprung from the agricultural, home building, and financing programs, have invaded the field of private enterprise, with the result that the current problem of legislators is to seek avenues of escape from the "immunity doctrine."

To understand the nature of the problem affecting these legislators it is necessary to analyze the basic doctrines upon which exemptions have grown. Our attention is of necessity drawn at the outset to considerations of the foundation case of this doctrine, *McCulloch v. Maryland*, in which Chief Justice Marshall, holding invalid a discriminatory tax by the State of Maryland against the Bank of the United States, asserted that "the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; . . ." and that "the States have no power, by taxation or otherwise, to *retard, impede, burden*, or in any manner *control*, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government."<sup>8</sup> (Italics supplied).

This case, of course, applied only to the state's relations to the federal government, and it was not until 1870 that this doctrine was applied *e converso* in *Collector v. Day*,<sup>9</sup> where an attempt by Congress to impose a tax upon the salary of a judicial officer of a state was successfully blocked, when Mr. Justice Nelson boomeranged the doctrine of federal immunity by reasoning that, "if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the

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1. Note (1931) 41 YALE L. J. 1237.

2. 4 Wheat. 316 (U. S. 1819).

3. Electric Home and Farm Authority Executive Order No. 6514, Dec. 19, 1933.

4. Pub. L. No. 67, 73d Cong., 1st Sess. (1933) § 208.

5. Executive Order No. 6470, Nov. 29, 1933.

6. 48 STAT. 168 (1933), 12 U. S. C. § 264 (Supp. 1935).

7. 48 STAT. 58 (1933), 16 U. S. C. § 831 (Supp. 1935).

8. *McCulloch v. Maryland*, 4 Wheat. 316, 431, 436 (U. S. 1819).

9. 11 Wall. 113 (U. S. 1870).

States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation?"<sup>10</sup>

In the period between the decisions in *McCulloch v. Maryland*<sup>11</sup> and *Collector v. Day*,<sup>11a</sup> other decisions were rendered by the Court which expanded the immunity doctrine originally asserted by Mr. Chief Justice Marshall. Such familiar cases as *Dobbins v. Commissioners of Erie County*<sup>12</sup> (in which it was held that a state could not tax the salary of a federal officer), *Weston v. Charleston*<sup>13</sup> (in which state attempts to tax United States stock owned by individual citizens was held to be a burden on the power to borrow money on the credit of the United States), *Bank Tax Case*,<sup>14</sup> *Bank of Commerce v. New York City*,<sup>15</sup> *United States v. Baltimore & Ohio R. R.*,<sup>16</sup> *Union Pacific R. R. v. Peniston*,<sup>17</sup> and *Pollock v. Farmers' Loan & Trust Co.*,<sup>18</sup> all point toward a general scheme of expansion of the immunity doctrine with its reciprocal feature. The case of *South Carolina v. United States*<sup>19</sup> was the first to vary from the beaten path set by the fundamental doctrines of these early cases.

10. *Id.* at 127.

11. 4 Wheat. 316 (U. S. 1819).

11a. 11 Wall. 113 (U. S. 1870).

12. 16 Pet. 435 (U. S. 1842).

13. 2 Pet. 449 (U. S. 1829).

14. 2 Wall. 200 (U. S. 1864). Here a tax laid by a state on banks, on a

valuation equal to the amount of their capital stock paid in, or secured to be paid in, was considered as a tax on the property of the institution, and when the property consisted of stocks of the federal government, the law laying the tax was void.

15. 2 Black 620 (U. S. 1862). This case held that a tax on the capital stock of a bank was a tax on the property in which the capital was invested, and therefore such part of the capital as was invested in United States bonds must be excluded from assessment. Professor T. R. Powell, in his most enlightening article, *Indirect Encroachment on Federal Authority By The Taxing Powers of the States* (1919) 32 HARV. L. REV. 902, 914, stated: "It is clear that in *Bank Tax Case* and *Bank of Commerce v. New York City*, the Supreme Court meant to protect Federal securities from state taxation in any form. A court could hardly be expected to do otherwise while the Civil War was raging and the government at Washington needed all the support to its credit that was available. It was no time for nice discriminations between burdens and denials of bounties. A few years later, however, when the conflict between the states had ended, a majority of the Supreme Court allowed a state to impose a tax on the privilege of being a corporation and measure the amount by assets which included United States bonds." *Society for Savings v. Coite*, 6 Wall. 594 (U. S. 1868).

16. 17 Wall. 322 (U. S. 1872). This case is important for deciding that a municipal corporation is a portion of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues.

17. 18 Wall. 5 (U. S. 1873), presents a question as to the validity of a tax by a state upon the real and personal property as distinguished from its franchises, of the Union Pacific Railroad, a corporation chartered by Congress for private gain, and whose stock is all owned by individuals, but which Congress assisted by donations and loans. The tax was held valid.

18. 157 U. S. 429 (1895). The Court failed to sustain a tax upon income derived from the interest on bonds issued by a municipality, and decided that it was a tax upon the power of the state and its instrumentalities to borrow money and therefore was repugnant to the Constitution of the United States. *Cf. Willcuts v. Bunn*, 282 U. S. 216 (1931).

19. 199 U. S. 437, 454 (1905) presents the question as to whether persons

The "handwriting on the wall" was seen by Mr. Justice Bradley in his dissenting opinion in *Collector v. Day*,<sup>20</sup> when he predicted that the mischievous consequences of state immunity would cause the Court no end of difficulties in enumerating the functions of the state government which would be free from interference by the federal government. His prediction was borne out in 1905, by the Court's announcement in the *South Carolina* case,<sup>21</sup> that the principle of immunity was subject to a limitation and protected only the *essential* or *strictly governmental* functions of a state, a distinction marking a division between these functions and instrumentalities, and those of a *commercial* or *proprietary* nature.

The *South Carolina* case involved an attempt by the State of South Carolina to cast about its liquor activities the cloak of tax immunity. This was met by the argument that sustaining such an immunity would pave a clear path for the states to enter into the field of private enterprise, and thus remove many of the federal government's most profitable sources of revenue. The Supreme Court has never announced any modification of the South Carolina doctrine, and many times has declared it to be the law.<sup>22</sup> Also, many times since that

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who are selling liquor are relieved from liability for the internal revenue tax by reason of the fact that they are merely agents of a state which has taken charge of the business of selling liquors. The economic theory in back of this case is well expressed where the Court says, "Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down."

20. 11 Wall. 113, 129 (U. S. 1870).

21. *South Carolina v. United States*, 199 U. S. 437 (1905).

22. A case squarely in point is *Ohio v. Helvering*, 292 U. S. 360 (1934), in which the state of Ohio moved to file a complaint invoking original jurisdiction of the Supreme Court to enjoin the Commissioner of Internal Revenue from levying and collecting excise taxes on the state wholesale and retail liquor distributors. The motion was denied, on the ground that this was a private business and not a governmental function; that the police power as applied to business is to regulate it, and not to engage in it. Justice Sutherland applied the novel argument that, "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." Cf. *Brush v. Commissioner*, 300 U. S. 352 (1937). An interesting question in light of the statement made by Justice Sutherland (above) would be as to its application to a tax on a federal project like the T. V. A., where power is sold by the federal government in competition with private dealers.

*Helvering v. Powers*, 293 U. S. 214 (1934) is another case in which *South Carolina v. U. S.*, 199 U. S. 437 (1905), was cited as the ruling case. The Powers case determined that municipal rendition of public utility services represents proprietary activity, and therefore still subject to a tax. Cf. *Brush v. Commissioner*, 300 U. S. 352 (1937).

It should be noted in passing that Justice Sutherland in commenting on what are state governmental functions in *Brush v. Commissioner*, at 371, explained that, "Governmental functions are not to be regarded as non-existent because they are held in abeyance, or because they lie dormant, for a time. If they be by their nature governmental, they are none the less so because the use of them has had a recent beginning." Cf. this statement with the state-

decision, the Supreme Court of the United States has said that the immunity of a state or its instrumentalities from taxation by the federal government was absolutely equal and reciprocal to the exemption of the federal government and its instrumentalities from taxation by the states,<sup>23</sup> but *no case* has ever expressly stated that the doctrine of *South Carolina v. United States* applies to the United States and its instrumentalities. Of course, at the time this decision was rendered, the federal government had not as yet engaged in the corporate activities which have become so widespread in the last decade, but this is no basis for the Court to disregard the *reciprocity feature* of the immunity doctrine as it should apply to questions of taxing the activities of the new federal enterprises.<sup>24</sup>

It has been argued by some students of this question that the principle of *South Carolina v. United States* can, from its nature, only apply to state immunity from federal taxation, because the United States is a government of enumerated powers, and therefore, anything the United States government does, must, of necessity, be governmental and therefore immune from state taxation. The states have unlimited powers except as curtailed by the United States Constitution, and, therefore, can engage in either private or governmental activities.<sup>25</sup>

It was believed by many, however, that this distinction between federal powers and state powers could not stand in view of the language of Mr. Justice Stone in *Metcalf & Eddy v. Mitchell*, and in *United States v. State of California*. In the former he asserted that "the very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of a state government, and in a similar manner to limit the power of the states to tax the instrumentalities of the federal government. . . . Just what instrumentalities of either a state or the federal government are exempt from taxation by the other can not be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other."<sup>26</sup> (Italics supplied).

ment in *United States v. California*, 297 U. S. 175, 185 (1936), which stated that governmental activities are those "activities in which the states have *traditionally engaged*." (Italics supplied.)

23. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 521 (1926); *Willcuts v. Bunn*, 282 U. S. 216, 225 (1931); *Indian Motorcycle v. United States*, 283 U. S. 570, 577 (1931); *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393 (1932); *Fox Film Corp. v. Doyal*, 286 U. S. 123, 128 (1932); *United States v. California*, 297 U. S. 175, 184 (1936).

24. Note (1932) 22 VA. L. REV. 98. See *Stoke, State Taxation and the New Federal Instrumentalities* (1936) 22 IOWA L. REV. 39, 42; and *Morrison, Some Recent Decisions on the Law of Taxation* (1934) 22 CALIF. L. REV. 277.

25. *Stoke, State Taxation and the New Federal Instrumentalities* (1936) 22 IOWA L. REV. 39, 43.

26. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 521 (1926).

In the latter case it was stated that "the constitutional immunity of state instrumentalities from federal taxation . . . is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by *either* of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power . . . which would be unduly curtailed if *either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it.*"<sup>27</sup> (Italics supplied).

Thus, it seemed if the principle of inter-governmental immunity from taxation were fully reciprocal—and this could only be true if the limitation of *South Carolina v. United States* applied to the immunity of both governments—it would follow that if the United States can tax the instrumentalities of the states which are not essentially governmental, the states can also tax instrumentalities authorized by the United States which are likewise not essentially governmental.<sup>28</sup> It should be noted, however, that both of these cases involved only the application of the federal tax to an enterprise operated by the state.

It remained for 1939 to find the Court dealing squarely with this problem as applied to an enterprise carried on by the national government and accepting the above suggestion that, since it is a government of enumerated powers, whatever it legally may undertake must be considered the performance of a governmental function. That, however, coupled with a reexamination of the basis for the doctrine of immunity resulted in denial of immunity to employees engaged in the national undertaking, since no actual interference with the activity of the national government was found to exist.<sup>29</sup>

"In its application of the rule developed from *McCulloch v. Maryland* . . . the Supreme Court has varied between a doctrinal approach which tends to condemn the tax falling in any degree upon a government instrumentality, and an economic analysis which may condone the tax whose burden upon the function is slight."<sup>30</sup> Recent decisions indicate a departure from the strict application of the doctrinal approach, and show an adoption of the economic approach as

27. *United States v. California*, 297 U. S. 175, 184 (1936).

28. See *State ex rel. Baumann v. Bowles*, 115 S. W. (2d) 805 (Mo. 1938), holding that the Missouri income tax levied on the salary of an employee of the Farm Credit Administration, a federal agency, was valid. In answer to whether the doctrine of *South Carolina v. United States*, 199 U. S. 437 (1905), applied to federal agencies, the Court said, "If the immunity of state and federal instrumentalities is equal, it would seem to follow, under the ruling in the *South Carolina* case, *supra*, that a federal agency engaged 'in a business which is of a private nature' would not be immune from state taxation." In application to the Farm Credit Administration, the Court determined it could be taxed because the business of the agency was of a private nature, and its activities were not those of the traditional federal government activities.

29. *Graves v. New York ex rel. O'Keefe*, 59 Sup. Ct. 595 (1939).

30. *Developments In the Law: Taxation—1933* (1934) 47 HARV. L. REV. 1209.

a basis for determining the validity of the tax.<sup>31</sup> It is not the purpose of the present writer to trace the varying trends of the Court since *McCulloch v. Maryland* as applied to the immunity problem, but rather to set forth the important cases of recent years in which the Court has indicated an adoption of the economic approach.

Mr. Justice Stone sounded the keynote to this new approach when he asserted in *Metcalf & Eddy v. Mitchell* that "the limitation upon the taxing power of each, so far as it affects the other, must receive a *practical construction* which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it. . . ." <sup>32</sup> (Italics supplied).

This practical construction as set out above was given effect in *Willcuts v. Bunn*, when a realistic attempt was made to consider a tax from the point of view of its *actual effect*, whether *immediate* or *remote*, upon essential state functions. This case decided that the profit derived from the sale of municipal bonds could properly be subjected to the federal income tax, in the absence of a showing that *any appreciable burden* was thereby cast on the state's borrowing power. Here, Chief Justice Hughes deviated from any doctrinal approach to the problem involved, when he asserted that, "if the tax now in question is to be condemned, it must be because of *practical consequences* and not because purchases and sales by private owners of state and municipal bonds are a part of the State's action in borrowing money" and, further that if such a tax would not be sustained, "it must clearly appear that a *substantial burden* upon the borrowing power of the State would actually be imposed."<sup>33</sup> (Italics supplied).

As a result of this case (*Willcuts v. Bunn*), serious doubt was raised as to whether the Court would again adhere to its reasoning in a case like *Macallen Co. v. Massachusetts*,<sup>34</sup> where it was held that a state could not impose a tax

31. *Id.*

32. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 523, 524 (1926). See *McCulloch v. Maryland*, 4 Wheat. 316, 436 (U. S. 1819), where Chief Justice Marshall says: "The result is a conviction that the States have no power, by taxation or otherwise, to *retard, impede, burden*, or in any manner *control*, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." (Italics supplied). *Cf.* with *Union Pac. R. R. v. Peniston*, 18 Wall. 5, 36 (U. S. 1873), in which Justice Story said: "It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the *nature* of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the *effect* of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does *hinder* the efficient exercise of their power." (Italics supplied).

33. *Willcuts v. Bunn*, 282 U. S. 216, 229, 231 (1931).

34. 279 U. S. 620, 629 (1929). The doctrinal immunity approach reached its logical conclusion in the majority opinion of Justice Sutherland, when he



upon domestic corporations by including in their income, interest derived from government bonds held by it. The Court in the *Macallen* case adhered to the maintenance of the doctrinal immunity and deliberately rejected the test of practical effect, when it considered that such a tax would be a burden upon the government's borrowing power.

Helping to blaze the trail for an economic approach has been the case of *Fox Film Corporation v. Doyal*,<sup>35</sup> which held that a state could tax income derived from copyrights, and thus directly overruled *Long v. Rockwood*,<sup>36</sup> which held otherwise as to patents. It should be noted that this was an unanimous opinion, and furthermore that it has left the Supreme Court relatively free to distinguish the enjoyment of a federal privilege from the exercise of a governmental function. This latter distinction has already made its significance felt, for it has been made the basis for refusing to extend the immunity from state excise taxation to federal power and warehouse licenses.<sup>37</sup>

As a result of many of the decisions previously mentioned, a majority of the Court appeared to be in full readiness to accept the economic approach to tax immunity, and therefore, it was not particularly surprising when the Court at its last term rendered the decision in *Helvering v. Therrell*,<sup>38</sup> which sustained the right of the United States to tax state employees whose business was to aid in liquidating insolvent corporations by virtue of a state statute. The significance of this case lies in the fact that the opinion was handed down by Mr. Justice McReynolds, one of the staunchest conservatives on the Court, and particularly because the Justice approved the language of *Burnet v. Jergins*,

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said that "the controlling principle, constantly to be borne in mind, is that the state cannot tax the *instrumentalities* or *bonds* of the United States, or, what is the same thing, the income derived therefrom, directly or indirectly—that is to say, *it cannot tax them in any form.*" (Italics supplied). Cf. Justice Stone's dissent, in which Holmes and Brandeis concurred, at p. 637.

35. 286 U. S. 123 (1932). See *Educational Films Corp. v. Ward*, 282 U. S. 379, 395 (1931). Justice Sutherland again disclosed the philosophy of the doctrinal approach in his dissent in the *Educational Films* case, when he said; "And, although it may be conceded that a tax measured by income derived from copyrights *does not impose a burden* upon the exercise of a vital power of the federal government, as it would in the case of federal bonds, it is, nevertheless, a tax falling upon income which is exempt in virtue of an implied prohibition of the federal Constitution." (Italics supplied).

36. 277 U. S. 142 (1928).

37. See *Broad River Power Co. v. Query*, 288 U. S. 178 (1933) (licensed under the Federal Water Power Act); *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17, 23 (1934) (licensed under the United States Warehouse Act). In the latter case, Justice Stone asserted: "It can no longer be thought that the enjoyment of a privilege conferred by either the national or a state government upon the individual, even though to promote some governmental policy, relieves him from the taxation by the other of his property or business used or carried on in the enjoyment of the privilege or of the profits derived from it."

38. 303 U. S. 218 (1938). This case would seem to have added significance in view of the fact that Justice McReynolds could have disposed of the case on the very narrow point that the state wouldn't be harmed by such a tax, directly or indirectly, since the salaries which were taxed came out of the corporate assets and not out of state funds.

which stated that "the subject of the tax is so *remote* from any governmental function as to render the *effect* of the exaction inconsiderable as respects the activities of the city."<sup>39</sup> (Italics supplied).

A more far reaching change in the Court's outlook with respect to the general problem of immunity was indicated by the case of *Helvering v. Mountain Producers Corporation*,<sup>40</sup> which upheld by a 5 to 2 decision, the right of the federal government to levy an income tax on the profits from the sale of oil and gas by a lessee of state lands. Chief Justice Hughes, on behalf of the Court which had steadily become imbued with the soundness of the economic approach, gave this approach its fullest impetus when he declared: ". . . we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to *substance* and *direct* effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the *effect* upon the government is other than *indirect* and *remote*."<sup>41</sup> (Italics supplied).

As a result of this above language the Chief Justice on behalf of the Court expressed the conviction that the rulings in *Gillispie v. Oklahoma*<sup>42</sup> and *Burnet v. Coronado Oil & Gas Company*<sup>43</sup> were out of harmony with correct principles

39. 288 U. S. 508, 516 (1933). Here the Court upheld a federal tax upon the receipts of the lessee of oil lands which belonged to the city of Long Beach, California.

40. 303 U. S. 376 (1938). The language of this case would seem to overrule in effect each of the following cases: *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 225 (1928) (in which it was held that a state tax imposed on dealers in gasoline for the privilege of selling gasoline and measured at so many cents per gallon of gas sold, is void under the federal Constitution as applied to sales to instrumentalities of the United States, such as the Coast Guard Fleet and a veterans' hospital); *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931) (which held a tax on the sale of a motor cycle which was manufactured by the plaintiff could not be subject to a tax when the sale was to the police department of a municipality); *Graves v. Texas Co.*, 298 U. S. 393 (1936) (holding that a tax on the storage or withdrawal from storage, of gasoline sold to the federal government was a tax on something so essential to the sale that it was tantamount to a tax on the sale itself and therefore void). Cf. *Liggett & Meyers Tobacco Co. v. United States*, 299 U. S. 383 (1937), holding that a tax on the manufacture of tobacco sold to a state for free distribution in a State Hospital would be valid.

41. 303 U. S. 376, 386, 387 (1938).

42. *Gillespie v. Oklahoma*, 257 U. S. 501 (1922), held that an income tax on profits secured from sale of oil and gas secured by a lessee of Indian lands—the Indians being wards of the federal government—was void.

43. *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 398 (1932), held that a lease of state school lands by the state to the oil company was an instrumentality of the state for the purpose of carrying out her duty in respect of public schools, and that to tax the income of the lessee arising therefrom

and accordingly that they be, and that henceforth they were to be considered *overruled*. This set at rest a great deal of criticism which had been hurled at the latter two decisions, and relieved the Court from having to continue making such thin distinctions as were found in the cases of *Burnet v. A. T. Jergins Trust Company*,<sup>44</sup> *Marland v. United States*,<sup>45</sup> and *Indian Territory Illuminating Oil Company v. Board of Equalization*.<sup>46</sup>

This decision indicated that the majority of the Court was prepared frankly to turn its back on earlier cases which had always been regarded as of doubtful soundness and without any actual foundation in the Constitution upon which to rest, and to look carefully to the economic effect of the tax in each case presented.

This process was given greater impetus by the last important tax case of the 1937 Supreme Court term,<sup>47</sup> in which the Court upheld the application of the federal income tax to employees of the Port of New York Authority in an opinion that appeared to clear the way for the repudiation of many earlier decisions and marked a very definite limitation on the application of the intergovernmental immunity doctrine. Mr. Justice Stone's opinion went back to the progenitor case of *McCulloch v. Maryland*,<sup>48</sup> the misapplication of whose dictum—"the power to tax involves the power to destroy" is responsible for the present form of this doctrine, to show that Mr. Chief Justice Marshall was there dealing solely with a state tax that clearly discriminated against "the exercise by Congress of a national power", and while not purporting to overrule such cases as *Dobbins v. Erie County*<sup>49</sup> or *Collector v. Day*,<sup>50</sup> asserted that any constitutional restriction raised by implication upon the taxing power granted to Congress should be narrowly limited. "When enlargement (of immunity) proceeds beyond the necessity of protecting the state, the burden of the immunity is thrown

would amount to an imposition upon the lease itself and therefore void. (It was in this case that Justice Stone, dissenting, asked that *Gillespie v. Oklahoma* be overruled.) Realizing the narrowness of the *Gillespie* case, the Court declared its intention to limit the *Gillespie* decision *closely to its facts*.

44. 288 U. S. 508 (1933). See note 42, *supra*, for facts. Distinguished from the *Gillespie* and *Coronado* cases on the grounds that in the latter two cases the sovereign was acting as trustee of an express trust of the lands leased. This was a differentiation without an economic basis.

45. 3 F. Supp. 611 (Ct. Cl. 1933), *cert. denied*, 290 U. S. 658 (1933). Held that a tax on profit from resale of leases of Oklahoma oil lands was valid. It was asserted that this was distinguishable from the *Gillespie* and *Coronado* cases on the ground that the tax in the *Marland* case was not a tax on the operations.

46. 288 U. S. 325 (1933), sustaining a state property tax on oil which was the produce of land leased from an Indian, although mixed with oil from other properties. This case was distinguished from *Jaybird Mining Co. v. Weir*, 271 U. S. 609 (1926), holding a similar tax invalid, the distinguishing factor being that the Indian's royalty percentage had been segregated before the tax was levied.

47. *Helvering v. Gerhardt*, 304 U. S. 405 (1938).

48. 4 Wheat. 316 (U. S. 1819).

49. 16 Pet. 435 (U. S. 1870).

50. 11 Wall. 113 (U. S. 1870).

upon the national government with benefit only to a privileged class of taxpayers."<sup>51</sup> It was then asserted that certain "guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function" must be observed, the first of which is the exclusion from immunity of "activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury";<sup>52</sup> the other "forbids recognition of the immunity when the *burden on the state is so speculative and uncertain* that if allowed it would *restrict the federal taxing power without affording any corresponding tangible protection to the state government*. . . ."<sup>53</sup> (Italics supplied).

Concurring in a separate opinion and recognizing that it would be extremely difficult, if not impossible, to reconcile the doctrine asserted in *Collector v. Day* and later cases with the principles applied in upholding the tax in the instant case, Mr. Justice Black called for a complete reexamination by the Court of the entire subject of intergovernmental tax immunity. Whether or not prompted by this demand, the Court embraced the next opportunity, which presented itself in two cases on March 27, 1939, to make a substantial (though not exhaustive) reexamination of this doctrine.

In the case of *Graves v. New York ex rel. O'Keefe*,<sup>54</sup> again speaking through Mr. Justice Stone, and again as in the *Gerhardt* case with Justices Butler and McReynolds dissenting, the Court sustained the application of New York's state income tax to the salaries of employees of the Home Owners' Loan Corporation. This case presented almost the exact counterpart of *People ex rel. Rogers v. Graves*,<sup>55</sup> decided in 1937, and sustaining the immunity of a government owned corporation employee's salary from a state income tax. That case and *Collector v. Day* were expressly overruled in an opinion vigorously reasserting the principle so recently set forth in the *Gerhardt* case. It was recognized that since the national government is one of enumerated or delegated powers, all of its activities must be placed in the category of the performance of governmental functions and all must stand on a parity with respect to their constitutional immunity from taxation. The only basis for any claim of such immunity was clearly asserted to be the prevention of actual and undue interference by one government with the governmental activities of the other, and there can be no

51. 304 U. S. 405, 416 (1938).

52. Referring to such cases as *South Carolina v. United States*, 199 U. S. 437 (1905), and *Ohio v. Helvering*, 292 U. S. 360 (1934).

53. 304 U. S. 405, 420 (1938).

54. 59 Sup. Ct. 595 (1939). On the same day in an opinion by Mr. Justice Black, the case of the *State Tax Commission of Utah v. Van Cott* was decided, involving the application of Utah's income tax to the salary of an attorney for the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation. Complete reliance was placed on the *O'Keefe* decision, eliminating the doctrine of intergovernmental immunity as a bar to application of the tax, and the case was sent back for further consideration by the Utah court of the state statute involved.

55. 299 U. S. 401 (1937).

basis for implying such exemption for the government or any of its agencies "from tax burdens which are unsubstantial or which courts are unable to discern. . . . It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax . . . it is in order to consider the nature and effect of the alleged burden. . . ." <sup>56</sup>

Proceeding upon the principle thus asserted it was pointed out that the tax was non-discriminatory, not in form or substance a tax on the Home Owners' Loan Corporation or its property, or to be paid out of its funds or those of the government, but a tax laid upon the income of an employee which becomes the private property of the taxpayer and is paid from his private funds. In making this analysis the Court asserted that "the theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable . . . and the only possible basis for implying a constitutional immunity . . . is that the *economic burden* of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions."<sup>57</sup> It being determined that the purpose of the immunity is only to prevent undue interference with one government by imposing upon it the tax burdens of the other, and not to confer benefits on the employees or to give an advantage to government by enabling it to engage employees at salaries lower than paid by other employers for like services, the Court found no unconstitutional burden to exist in this case, and expressly repudiated the doctrine of "implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities",<sup>58</sup> as adhered to from 1870 with the decision of *Collector v. Day* to the decision of *Helvering v. Gerhardt*<sup>59</sup> in 1938.

If any indirect burden is cast upon government in the form of increased costs for salaries by a non-discriminatory general tax upon incomes of employees, it must be considered merely a normal incident of the operations of the national and state governmental systems within the same territory.

A concurring opinion by Mr. Justice Frankfurter, emphasizing that exactions by one government which *discriminate against* or *obviously interfere* with the operations of the other are the only ones that come within the actual decision in *McCulloch v. Maryland*, and admonishing the Court always to base its determinations upon a fair conception of the Constitution rather than upon some earlier unwarranted interpretation "encrusted" upon it, indicates the possibility of other changes yet to come, and adds a new and vigorous voice to the numerous assertions of Justices Holmes, Brandeis, Stone and Black that the doctrine of *stare decisis* finds small place in the field of constitutional law.

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56. 59 Sup. Ct. 595, 598 (1939).

57. *Id.* at 598.

58. *Id.* at 601.

59. 304 U. S. 405 (1938).

The taxation of government securities was not involved in these most recent cases, but that the principles therein asserted will find application to that situation appears open to very little doubt. The assertion that "the theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable,"<sup>60</sup> would seem to clear the way for interpreting the provision in the Sixteenth Amendment authorizing a tax on incomes "from whatever source derived" to mean *from whatever source derived*. The extent to which Congress may in the future attempt, or be permitted, to provide exemption is a matter for later consideration.

Underlying all of the cases on tax immunity of governmental instrumentalities has been two conflicting policies—one, to protect each government from undue interference with the exercise of its powers, and the other, to preserve as far as possible all available sources of revenue. The Supreme Court in its final acceptance of the economic approach is tending toward a happy solution of this conflict. It will now be able to apply an elastic standard whereby the fundamental powers of the governments will remain intact, and yet the revenue departments of both governments will be freed from previously created obstacles to the imposition of their taxes with respect to large and increasing sources of revenue.

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St. Joseph, Missouri

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VENDOR AND PURCHASER—RISK OF LOSS—RIGHT TO PROCEEDS OF  
INSURANCE POLICY

All courts agree that the risk of loss by damage or destruction of real property which is the subject of a specifically enforceable contract should fall upon the one who is the owner of the property at the time the loss occurs. Further, if the parties to such an agreement stipulate in the contract that the property shall be in the same condition at the time named for conveyance as it was at the time of the bargain, the risk of loss will remain on the vendor until the time of conveyance.<sup>1</sup> In absence of such a stipulation, however, the courts and writers find difficulty in determining, for this purpose, who is the owner of the property at the time of the loss.

The rule adopted by England and a majority of the American courts is that the loss falls on the purchaser from the time that a binding, specifically performable contract for the sale of the real property is entered into.<sup>2</sup> The

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60. 59 Sup. Ct. 595, 598 (1939).

1. *Goddard v. Bebut*, 40 Ind. 114 (1872); *Rhomberg v. Zapf*, 201 Iowa 928, 208 N. W. 276 (1926); *Hawkes v. Kehoe*, 193 Mass. 419, 79 N. E. 766 (1907); *Lord v. Sherer Dry Goods Co.*, 205 Mass. 1, 90 N. E. 1153 (1910); *Green v. Kelly* 20 N. J. L. 544 (Sup. Ct. 1845); *Brownell v. Board of Education*, 239 N. Y. 369, 146 N. E. 630 (1925).

2. *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 So. 419 (1895); *Roach v. Richardson*, 84 Ark. 37, 104 S. W. 538 (1907); *Kaufman v. All Persons*, 16 Cal. 13

courts of Missouri, too, have adopted this view.<sup>3</sup> This result is reached by the application of the doctrine of equitable conversion, which doctrine, in turn, is seemingly a result of the superior assurance afforded a purchaser in equity, by way of specific performance, of getting the specific land for which he has contracted. To rationalize, however, the various courts have developed and adopted theories, by which they describe the operative effect of equitable conversion, which shifts the burden of loss from the vendor to the purchaser at the inception of the contract: first, Equity regards as done that which ought to be done;<sup>4</sup> second, the vendor is the trustee of the land for the purchaser, with the purchaser owning the beneficial interest;<sup>5</sup> third, the vendor holds the legal title to the land as security for the purchase money, as in a mortgage transaction;<sup>6</sup> fourth, in Equity, the land is considered to have been converted into the purchase money in the hands of the vendor, and the purchase money into land in the hands of the purchaser.<sup>7</sup>

Although the decisions are almost uniform in this country, as to result, the writers disagree as to the proper basis for the rule. Professor Vanneman<sup>8</sup> believes that there should be no mechanical rule, such as is reached by the "ownership" approach of the doctrine of equitable conversion, but that better

App. 388, 117 Pac. 586 (1911); *Hough v. City Fire Ins. Co.*, 29 Conn. 10 (1860); *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796 (1900); *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477 (1872); *Thompson v. Norton*, 14 Ind. 187 (1860); *O'Brien v. Paulsen*, 192 Iowa 1351, 186 N. W. 440 (1922); *Marks v. Tichenor*, 85 Ky. 536, 4 S. W. 225 (1887); *Brewer v. Herbert*, 30 Md. 301 (1869); *Skinner & Sons' Ship-Bldg. & D. D. Co. v. Houghton*, 92 Md. 68, 48 Atl. 85 (1900); *Hamilton v. Dwelling House Ins. Co.*, 98 Mich. 535, 57 N. W. 735 (1894); *McGinley v. Forrest*, 107 Neb. 309, 186 N. W. 74 (1921); *Cropper v. Brown*, 76 N. J. Eq. 406, 74 Atl. 987 (Ch. 1909); *Sewell v. Underhill*, 197 N. Y. 168, 90 N. E. 430 (1910); *Sutton v. Davis*, 143 N. C. 474, 55 S. E. 844 (1906); *Woodward v. McCollum*, 16 N. D. 42, 111 N. W. 623 (1907); *Gilbert v. Port*, 28 Ohio St. 276 (1876); *Dunn v. Yakish*, 10 Okla. 388, 61 Pac. 926 (1900); *Ins. Co. v. Updegraff*, 21 Pa. 513 (1853); *Reed v. Lukens*, 44 Pa. 200 (1863); *Brakhage v. Tracy*, 13 S. D. 343, 83 N. W. 363 (1900); *Northern Texas Realty & Const. Co. v. Lary*, 136 S. W. 843 (Tex. Civ. App. 1911); *Maudru v. Humphreys*, 83 W. Va. 307, 98 S. W. 259 (1919); *Paine v. Meller*, 6 Ves. 349 (Ch. 1801); *Poole v. Adams*, 10 L. T. 287, 12 W. R. 683, 33 L. J. 639 (V. C. K. 1864).

3. *Snyder v. Murdock*, 51 Mo. 175 (1872); *Walker v. Owen*, 79 Mo. 563 (1883); *Ranck v. Wickwire*, 255 Mo. 42, 61, 164 S. W. 460 (1914); *Moseley v. Northwestern Nat. Ins. Co.*, 109 Mo. App. 464, 84 S. W. 1000 (1905); *Manning v. North Br. & Merc. Ins. Co.*, 123 Mo. App. 456, 99 S. W. 1095 (1907); *Mahan v. Home Ins. Co. of New York*, 205 Mo. App. 592, 226 S. W. 593 (1920); *Standard Oil Co. v. Dye*, 223 Mo. App. 926, 20 S. W. (2d) 946 (1929).

4. *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477 (1872); *McGinley v. Forrest*, 107 Neb. 309, 186 N. W. 74 (1921).

5. *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796 (1900); *Manning v. North British & Merc. Ins. Co.*, 123 Mo. App. 456, 99 S. W. 1095 (1907).

6. *Loventhal v. Home Ins. Co.* 112 Ala. 108, 20 So. 419 (1895); *McRae v. McRae*, 78 Md. 270, 27 Atl. 1038 (1893); *Standard Oil Co. v. Dye*, 223 Mo. App. 926, 20 S. W. (2d) 946 (1929).

7. *Skinner & Sons' Ship-Bldg. & D. D. Co. v. Houghton*, 92 Md. 68, 48 Atl. 85 (1900).

8. Vanneman, *Risk of Loss, in Equity, Between the Date of Contract to Sell Real Estate and Transfer of Title* (1924) 8 MINN. L. REV. 127.

results would be obtained by adopting a contract theory. The determining factor, he says, should be the intention of the parties, and the court, to determine this intention, should ask: At what time did the vendor intend to sell? What did the purchaser intend to take? What would have been the reaction of the parties if the risk of loss had been called to their attention? Vanneman discredits the ownership theory in that all of its aspects presuppose a specifically performable contract; and he further questions whether any such specifically performable contract should any longer exist when the consideration bargained for by the purchaser is totally or partially destroyed. Most of the few courts which do not follow the majority rule employ this contract theory, and assume an implied agreement that the property will be in the same condition at the time for performance as it was at the time of the making of the contract.<sup>9</sup> Under this treatment of the problem, the fact that one or the other of the parties is in possession is merely evidence of the intention of the parties to the contract.<sup>10</sup>

Professor Williston<sup>11</sup> submits that the risk of loss should be put on the one who is in possession, whether it be the vendor or the purchaser. He bases his contentions on the following reasons: first, it is better to let the loss lie where it falls; second, the party in possession should care for the property at his own peril; third, negligence of a vendor in possession is difficult to prove; fourth, the difficulties involved in the application of the English rule where the vendor has the property insured. It has also been urged that possession should determine upon whom the burden of loss should fall, by analogy to the rule in the case of chattels.<sup>12</sup> But the distinction between chattels and realty in this respect is clear.<sup>13</sup> In the first place, a contract for the sale of chattels is not ordinarily specifically performable at the instance of the purchaser,<sup>13a</sup> while a specifically performable contract does afford the purchaser a superior assurance of getting the land in equity. Secondly, from the nature of bare possession of another's chattel, there is no inclination on the part of the possessor, from his interest to protect the chattel from loss; whereas, with realty, the one in possession ordinarily will exercise care because of his interest in his chattels which are con-

9. *Gould v. Murch*, 70 Me. 288 (1879); *Wells v. Calnan*, 107 Mass. 514 (1871); *Hawkes v. Kehoe*, 193 Mass. 419, 79 N. E. 766 (1907); *Wilson v. Clark*, 60 N. H. 352, 353 (1880); *Elmore v. Stephens-Russell Co.*, 88 Ore. 509, 171 Pac. 763 (1918); *Good v. Jarrard*, 93 S. C. 229, 76 S. E. 698 (1911); *Ashford v. Reese*, 132 Wash. 649, 233 Pac. 29 (1925).

10. *Good v. Jarrard*, 93 S. C. 229, 76 S. E. 698 (1911).

11. Williston, *The Risk of Loss After an Executory Contract of Sale in the Common Law* (1895) 9 HARV. L. REV. 106, 111-130; 2 WILLISTON, CONTRACTS (1920) §§ 927-953.

12. *Appleton Elec. Co. v. Rogers*, 200 Wis. 331, 228 N. W. 505 (1930).

13. Pound, *Progress of the Law, 1918-1919—Equity* (1920) 33 HARV. L. REV. 813, 826.

13a. *Hubbard & Perry v. Home Ins. Co. of New York*, 205 Mo. App. 316, 222 S. W. 886 (1920), held that the making of a contract to sell hay which had been insured by defendant company did not work a change of interest so as to void the policy of insurance.



tained in the buildings. Thirdly, possession alone is not material with respect to passing or the existence of either legal or equitable title to land. So why should it be material to the incidents of equitable title?

There is practically no authority for the rule that the burden of loss should fall on the one in possession, and only one case clearly bases its decision on that point.<sup>14</sup> This view has, however, with slight variations, been adopted by the Commissioners on Uniform State Laws,<sup>15</sup> Professor Williston having drafted this particular section. This statute has been adopted in only two states.<sup>16</sup>

Under other theories, some place the time at which the loss shifts at the future date of passing title, as stipulated in the agreement,<sup>17</sup> while others relieve the vendor of the risk of loss only when the title is actually conveyed.<sup>18</sup>

It must be observed that, as a specifically performable contract is a condition precedent to the doctrine of equitable conversion, on which the rule of risk of loss is based, if the vendor fails in his title,<sup>19</sup> or if vendor fails to perform conditions of the agreement,<sup>20</sup> or if for any other reason the agreement is not specifically enforceable at the instance of the vendor, the burden of loss does not shift to the purchaser, but remains on the vendor.

14. *Appleton Elec. Co. v. Rogers*, 200 Wis. 331, 228 N. W. 505 (1930).

15. UNIFORM VENDOR AND PURCHASER RISK ACT, 9 U. L. A. (Supp. 1938) 235: "Section 1. Risk of Loss. Any contract hereafter made in this State for the purchase and sale of realty shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:

"(a) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid;

"(b) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid."

16. N. Y. REAL PROPERTY LAW, § 240a; S. D. Laws 1937, c. 258.

17. LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) 58-65.

18. *Stone, Equitable Conversion by Contract* (1913) 13 COL. L. REV. 369, 385-387; *La Chance v. Brown*, 41 Cal. App. 500, 183 Pac. 216 (1919); and see cases cited note 9, *supra*.

19. *Phinzy v. Guernsey*, 111 Ga. 346, 36 S. E. 796 (1900); *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477 (1872); *Eppstein v. Kuhn*, 225 Ill. 115, 80 N. E. 80 (1906); *Calhoon v. Belden*, 3 Bush 674 (Ky. 1868); *Dickinson v. Wright*, 56 Mich. 42, 22 N. W. 312 (1885); *Ranck v. Wickwire*, 255 Mo. 42, 164 S. W. 460 (1914); *Kinney v. Hickox*, 24 Neb. 167, 38 N. W. 816 (1888); *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216 (1894); *Smith v. McCluskey*, 45 Barb. 610 (N. Y. 1866); *Bechtel v. Dakota Nat. Bank*, 35 S. D. 191, 151 N. W. 887 (1915); *Christian v. Cabell*, 22 Gratt. 82 (Va. 1872); *Corrodus v. Sharpe*, 20 Beav. 56 (Ch. 1855).

20. *Chappell v. McKnight*, 108 Ill. 570 (1884); *National Fire Ins. Co. v. Three States Lumber Co.*, 217 Ill. 115, 75 N. E. 450 (1905); *Nunngesser v. Hart*, 122 Iowa 647, 98 N. W. 505 (1904); *O'Brien v. Paulsen*, 192 Iowa 1351, 186 N. W. 440 (1922); *Douglas Co. v. Union Pacific Ry.*, 5 Kan. 615 (1870); *Page v. Loeffler*, 146 La. 890, 84 So. 194 (1920); *Ranck v. Wickwire*, 255 Mo. 42, 164 S. W. 460 (1914).

Incidental to the question of risk of loss, is the problem of who, as between the vendor and purchaser, is entitled to the proceeds of a policy of insurance taken out by the vendor, which insures him against damage to or destruction of the property which is the subject of the contract of sale. The matter of insurance presents no problem in those states which place the burden of loss on the vendor. But in those jurisdictions which hold that the loss falls on the purchaser from the time of the inception of the contract for sale, the problem is most important, and presents some difficulty. The leading English case is that of *Rayner v. Preston*.<sup>21</sup> There it was decided that, although the risk of loss was on the purchaser, he had no claim to the insurance money paid to the vendor on a policy of indemnity. The decision was based on the theory that the policy was a personal contract of indemnity between the vendor and the insurer, and though the principles of equitable conversion placed the risk of loss as to the property on the purchaser, no right was thereby conferred on him as to the proceeds of the insurance policy.

A strong dissenting opinion was written in that case by Lord Justice James,<sup>22</sup> in which he argued that the purchaser should be allowed to recover the proceeds of the insurance policy from the vendor. As a basis for his dissent, James urged that the doctrine of equitable conversion created a trust estate, with the vendor as trustee for the benefit of the purchaser, the equitable owner. Following from that, it appears that any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property, that right and that benefit he likewise takes as trustee for the beneficial owner. Further, it was contended by James, that the contract of insurance is not a mere collateral contract, such as a wagering agreement, but is rather a contract under which a right will arise only when there is a loss to the land. The trustee received the insurance money as a result, and as the actual amount, of the damage to the property. The majority opinion disallowed the trust contention, saying that the vendor was a trustee only of the land itself, and as the insurance policy was not a part of the property sold, the purchaser should not get the money any more than he would the rents accruing between the time of the making of the contract, and the time of the conveyance.

Missouri,<sup>23</sup> and a majority of the American courts,<sup>24</sup> have departed from

21. 18 Ch. D. 1 (1881).

22. *Ibid.*

23. *Standard Oil Co. v. Dye*, 223 Mo. App. 926, 20 S. W. (2d) 946 (1929). *Mahan v. Home Ins. Co.*, 205 Mo. App. 592, 226 S. W. (1920) (dictum), denies recovery by the vendor, insured, of the insurance money, on the ground that he had parted with all interest. This case indicates that the purchaser would be allowed recovery from the insurance company in this situation, and is cited by the court in *Standard Oil Co. v. Dye* as so holding. Also see *Manning v. North British & Merc. Ins. Co.*, 123 Mo. App. 456, 99 S. W. 1095 (1907) (dictum).

24. *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765 (1895); *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796 (1900); *Brady v. Welsh*, 200 Iowa 44, 204 N. W. 235

the rule of *Rayner v. Preston*, and allow the purchaser either to recover the proceeds received by the vendor on a policy of insurance, or to apply that amount toward the satisfaction of the purchase price, owing from the purchaser to the vendor. Missouri, as do most of the courts, so holding, arrives at that result by application of the trust theory advanced by James in his dissent in *Rayner v. Preston*.<sup>25</sup>

A recent Missouri case<sup>26</sup> places much reliance on the frequently cited case of *Skinner & Sons' Ship-Bldg. & D. D. Co. v. Houghton*.<sup>27</sup> It was there pointed out that, in view of the prevailing view which places the burden of loss on the purchaser, the denial to the purchaser of the right to recover the insurance money would be to arrive at a decision which would be most unjust. Where the loss falls on the purchaser, the vendor will receive as purchase money the full compensation for which he contracted to part with the property, and to allow him, the vendor, also to receive the insurance money would be to unjustly enrich him to that amount. Also, in such a case, the insurance company should be able to refuse payment to the vendor, he having suffered no loss from which indemnity may be required.<sup>28</sup> The conclusion reached, then, in *Rayner v. Preston*, would place the full loss on the purchaser, denying him the full consideration for which he had contracted, and at the same time, would relieve the insurance company from a risk which it contracted to assume, and for which it had received premiums in compensation therefor.

Williston,<sup>29</sup> in referring to the prevailing view placing the risk of loss on the purchaser, says that to allow the purchaser to recover the insurance money is to sacrifice the fundamental principles of insurance law, in an attempt to correct the operation of one bad rule by another. However true that may be, it is submitted, in view of the fact that the law in most jurisdictions does place the risk on the purchaser,<sup>30</sup> that however inconsistent with other equitable principles it may be to allow the purchaser to receive the insurance money, the result reached is certainly more equitable, and operates with less hardship than would a contrary rule.<sup>31</sup>

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(1925); *Mattigly v. Springfield Fire & Marine Ins. Co.*, 120 Ky. 768, 83 S. W. 577 (1904); *Skinner & Sons' Ship-Bldg. & D. D. Co. v. Houghton*, 92 Md. 68, 48 Atl. 85 (1900); *Standard Oil Co. v. Dye*, 223 Mo. App. 926, 20 S. W. (2d) 946 (1929); *McGinley v. Forrest*, 107 Neb. 309, 186 N. W. 74 (1921); *Millville Aerie, No. 1836, F. O. E. v. Weatherby*, 82 N. J. Eq. 455, 88 Atl. 847 (Ch. 1913); *Peck v. Hale*, 11 Ohio App. 418 (1919); *Gilbert v. Port*, 28 Ohio St. 276 (1876); *Ins. Co. v. Updegraff*, 21 Pa. 513 (1853); *Reed v. Lukens*, 44 Pa. 200 (1863); *Brakhage v. Tracy*, 13 S. D. 343, 83 N. W. 363 (1900).

25. 18 Ch. D. 1 (1881).

26. *Standard Oil Co. v. Dye*, 223 Mo. App. 926, 20 S. W. (2d) 946 (1929).

27. 92 Md. 68, 48 Atl. 85 (1900).

28. *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. 385, 397 (N. Y. 1836); *Castellain v. Preston*, 11 Q. B. D. 380 (1883). See *Mahan v. Home Ins. Co.*, 205 Mo. App. 592, 226 S. W. 593 (1920). See, also, cases cited, note 31, *infra*.

29. 2 WILLISTON, CONTRACTS (1920) § 942.

30. See cases cited, note 1, *supra*.

31. Nor can it be said that these decisions operate as a hardship on the insurance companies. For, to a great extent, such a situation as this is gen-

Vance<sup>32</sup> points out that business usage substitutes the insurance money for the property, despite the rule that the two are not legally connected, and urges that this meaning of the transaction in the market place should also be its meaning in the court room. Pound<sup>33</sup> assails that contention, arguing that the insurance money is certainly not a part of the *res* bargained for, hence no trust relation may exist in regard to it. He also discredits the theory that the vendor is the trustee of the insurance money for the benefit of the purchaser, on the basis that in most cases the insurance is carried in the name of the vendor, individually, while a trustee, under established insurance law, has no insurable interest. This reasoning seems to lose sight, however, of the fact that the adoption of the trust theory by the courts is merely an attempt to rationalize the effect, in equity, of the existence of a specifically performable contract, and the consequent operation of the doctrine of equitable conversion.

A minority of the American courts deny to the purchaser the right to recover the insurance money, refusing to adopt the theory that the vendor is the trustee, for this purpose, of the property for the benefit of the purchaser.<sup>34</sup> Most of these cases base their decisions on the view of *Rayner v. Preston*,<sup>35</sup> that the contract of insurance is a collateral and personal contract, and operates only by way of indemnity to the vendor individually, and is not to be regarded, for this purpose, either as the property itself, or as being, in any way, connected therewith.

It is interesting to note that the English Parliament, heeding the inequitable results reached by the application of the rule adopted by the English courts, has enacted a statute which changes the rule completely, making all insurance money payable, in such a case, to the purchaser, to the extent to which the loss falls on him.<sup>36</sup>

erally provided for in insurance policies. Such policies contain a clause which provides the entire policy shall be void if any changes other than death of the insured take place in the interest, title, or possession of the subject of the insurance, whether by process or judgment, or by voluntary acts of the insured, or otherwise. The courts have almost universally held that a contract to sell land works such a change of interest in the property as to make these clauses applicable. So the insurance companies may easily avail themselves of the protection, to which they have a right, of knowing by whose hands the insured property is controlled. *Moseley v. Northwestern Nat. Ins. Co.*, 109 Mo. App. 464, 84 S. W. 1000 (1905); *Manning v. North British & Merc. Ins. Co.*, 123 Mo. App. 456, 99 S. W. 1095 (1907); *Skinner & Sons' Ship-Bldg. & D. D. Ins. Co. v. Houghton*, 92 Md. 68, 48 Atl. 85 (1900).

32. Comment (1924) 34 YALE L. J. 87, 88-91.

33. Pound, *Progress of the Law, 1918-1919—Equity* (1920) 33 HARV. L. REV. 813, 829.

34. *White v. Gilman*, 138 Cal. 375, 71 Pac. 436 (1903); *Zenor v. Hayes*, 228 Ill. 626, 81 N. E. 1144 (1907); *King v. Preston*, 11 La. Ann. 95 (1856); *Marion v. Wolcott*, 68 N. J. Eq. 20, 59 Atl. 242 (Ch. 1904); *Brownell v. Board of Education*, 239 N. Y. 369, 146 N. E. 630 (1925).

35. 18 Ch. D. 1 (1881).

36. LAW OF PROPERTY ACT, 12 & 13 GEO. V, c. 16, § 105 (1922); LAW OF PROPERTY ACT, 15 GEO. V, c. 20, § 47 (1925).

Difficulty is encountered in those jurisdictions in which the risk of loss is held to fall on the purchaser, in those cases where the purchaser holds, instead of an executory contract for sale, an unexercised option for the purchase of the real property. Where the option has been exercised prior to the time the loss occurs, it is clear that the loss falls upon the purchaser, there being a specifically enforceable contract, which gives rise to the doctrine of equitable conversion and its attendant consequences.<sup>37</sup> In those cases, however, in which the option is unexercised at the time of the loss, but the optionee attempts to exercise the option subsequent to the loss, with the purpose in mind of applying to the price the amount of insurance money paid or owing to the optionor, the courts have been somewhat troubled. The usual contention of the optionee in such a case is that the exercise of the option causes the entire transaction to relate back to the time of the inception of the option contract, and thus operate as a binding contract of sale from that time. This argument is based on an analogy to the rule, which is the weight of authority in England and in this country, that is applicable to those cases in which the optionor dies, and thereafter the option is exercised by the optionee. In such cases, the weight of authority seems to be that the purchase money goes to the next of kin as personalty, the courts holding that the contract relates back to the time of the giving of the option, equitable conversion either taking place at, or relating back to, that time.<sup>38</sup> In England and a great majority of the American courts, however, no weight is given to this contention in the insurance proceeds cases, and the optionee is given no right to the insurance money.<sup>39</sup> In the leading English case of *Edwards v. West*,<sup>40</sup> recovery was denied an optionee who had exercised the option subsequent to a fire, on the ground that equitable conversion applies only when the option is exercised, and cannot relate back to an earlier date. In that case, Justice Fry refused to extend the relation back theory, which applies in case of the death of the optionor, to such a case as this. The decision was based on the theory that a specifically enforceable contract did not exist until the option was exercised. When there is a contract capable of being specifically enforced, the property comprised in that contract is deemed to belong to the purchaser, and the purchase money is deemed to belong to the vendor, both as of the date of that contract—neither earlier nor later—because those two things ought to be done. But there is no obligation to have

37. *Standard Oil Co. v. Dye*, 223 Mo. App. 926, 20 S. W. (2d) 946 (1929).

38. *Haughwout v. Murphy*, 22 N. J. Eq. 531 (1871); *Kerr v. Day*, 14 Pa. 112 (1850); *Siter, James & Co.'s Appeal*, 26 Pa. 178 (1856); *Newport Water Works v. Sisson*, 18 R. I. 411, 28 Atl. 336 (1893); *Farrar v. Winterton*, 5 Beav. 1 (Ch. 1842). *Contra*: *Inghram v. Chandler*, 179 Iowa 304, 161 N. W. 434 (1917); *Smith v. Loewenstein*, 50 Ohio St. 346 (1893).

39. *Caldwell v. Frazier*, 65 Kan. 24, 68 Pac. 1076 (1902); *Boston & Me. R. R. v. Bartlett*, 3 Cush. 224 (Mass. 1849); *Gamble v. Garlock*, 116 Minn. 59, 133 N. W. 175 (1911); *Trumbull v. Bombard*, 171 App. Div. 700, 157 N. Y. Supp. 794 (3d Dep't 1916); *Gilbert v. Port*, 20 Ohio St. 276 (1876); *Newton v. Newton*, 11 R. I. 390 (1876); JAMES, OPTION CONTRACTS (1916) § 512.

40. 7 Ch. D. 858 (1878).

them done at an earlier date than that of the contract which is constituted and created by the exercise of the option. The conversion cannot, according to principle, relate back to an earlier date than that of the contract which gives rise to it.

So, clearly, the loss is on the optionor, there being no specifically performable contract from the date of which the equitable conversion might operate. The loss being on the optionor, the optionee has no interest in, nor claim to, the insurance money received by or due to the optionor. After the loss, however, the optionee may exercise the option, accepting the terms of the option contract as they existed before the loss, and pay the full purchase price stipulated in the contract. It is for him to determine if the bargain, in view of the loss, is still worth his while.

A few American jurisdictions, however, allow the optionee to exercise the option to buy subsequent to the loss, and then have the amount of the insurance money received by the optionor applied on the purchase price.<sup>41</sup> The courts arriving at such a conclusion base their decisions on the theory that the contract relates back to the time of the giving of the option. Under such reasoning, there is a specifically enforceable contract at the time the loss occurs, which puts the risk of loss on the optionee if he exercises his option. Hence, under the general doctrine of equitable conversion, the optionee is entitled to the proceeds of the insurance received by, or due to, the optionor. This principle never operates at a hardship on the optionee, as it is his right either to exercise or leave the option, whichever is more profitable to him. It seems difficult to follow the reasoning of these cases, whether they with situations in which the optionor has died or in which a loss has occurred. The better doctrine, both in principle and authority, would seem to be that which denies to the optionee any right of recovery as to the insurance money in these cases where the loss has occurred prior to the exercise of the option.

Of course, in neither the contract nor the option cases will the question of the right to the insurance proceeds ever arise in the forms herein considered if the policy contains a provision voiding it in the event of a change of interest or one making the proceeds payable to the vendor and purchaser as their interests appear, or as the loss appears. Under the first possibility the insurance company, by the terms of the policy, is discharged from liability by virtue of the change of interest resulting from the contract between the vendor and the purchaser,<sup>42</sup> while under the second the disposition of the proceeds of the effective insurance policy has been contracted for. Likewise the risk of loss may be placed by the contract.<sup>43</sup> An alert and competent lawyer, representing either the vendor or purchaser, can and should easily anticipate and

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41. *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765 (1895); *Peoples Street Ry. v. Spencer*, 156 Pa. 85, 27 Atl. 113 (1893).

42. See cases cited note 31, *supra*.

43. See cases cited note 1, *supra*.

avoid all the difficulties noted herein by the simple devices of providing for all of the mentioned contingencies in the contract of sale and by notifying the interested insurance company in advance of the contemplated change of interest, so that its consent to the change may be obtained.

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#### CONFLICT OF LAWS AS TO PRESUMPTIONS AND BURDEN OF PROOF

It is generally said that whatever law may determine the substantive rights of litigants, the procedure of the trial must follow the rules of the forum.<sup>1</sup> The merit of the conception here expressed is obvious. Not only is it appropriate for the courts which as a branch of a sovereign government protect the rights and enforce the obligations of the parties before them to act in their own manner, but it would be highly inconvenient for them to adopt the procedure of other tribunals.<sup>2</sup> The field of adjective law is one of great intricacy and nicety and few men master more than one system. On the other hand it is to-day quite universally conceded that the choice of the forum should not determine the result of the litigation.<sup>3</sup> Depending upon the basic theory of conflict of laws which is adopted, it may be said that there should be uniform enforcement of the rights created by the law in force where the facts of the controversy occurred, or that it is desirable that all forums regard the fact of the same foreign law as the decisive element in the case. But even with these objectives in mind the application of the rule is not as clear as might be desired and too often it is obscured by simple faith in the efficacy of its statement in terms of "substance" and "procedure".<sup>4</sup>

It has been shown that the distinction between "substance" and "procedure" was first attempted in cases interpreting the language of the Statute of Frauds—i. e. was the obligation void or merely unenforceable.<sup>5</sup> Problems of choice of law were not recognized until fairly recently. It is not surprising that concepts already developed should have been utilized in solving the new questions, despite the quite different function to be performed. Furthermore, the trend of the common law toward exclusiveness—considered by civil law lawyers

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1. 3 BEALE, *CONFLICT OF LAWS* (1935) § 595; GOODRICH, *CONFLICT OF LAWS* (1927) § 84; RESTATEMENT, *CONFLICT OF LAWS* (1934) § 595; STUMBERG, *CONFLICT OF LAWS* (1937) c. 6; Note (1932) 78 A. L. R. 883.

2. Cook, "Substance" and "Procedure" in the *Conflict of Laws* (1933) 42 YALE L. J. 333.

3. Note (1932) 80 U. of PA. L. REV. 911.

4. McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933; Cook, *loc. cit. supra* note 2.

5. Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311.

to be founded upon the provincialism of a small, unified island nation—worked through this doctrine to limit the effect of the foreign law by enlargement of the concept of procedure. The influence of an industrial civilization, plus the important consideration that conflict of laws problems in the United States, at least, most commonly involve merely the laws of sister states and not those of a foreign country based on a foreign system of laws, has led to the rationalization of the rule suggested above and to a consequent desire to restrict the definition of procedure.

Professor Stumberg writes, “. . . from the point of view of Conflict of Laws, procedural rules are those which concern methods of presenting to a court the operative facts upon which legal relations depend; substantive rules, those which concern the legal effect of those facts after they have been established.”<sup>6</sup> Under definitions essentially in accord with this, the clear weight of authority has regarded the issues of burden of proof and the existence, character, and effect of presumptions to be drawn from the evidence to be matters of procedure.<sup>7</sup> A distinction is commonly drawn between “conclusive presumptions,” which are said to be rules of substantive law,<sup>8</sup> and all others, which, though clearly varying in nature and effect, are treated alike in questions of conflict of laws. If the problem cannot be solved by simple reliance on the arbitrary use of the words “substance” and “procedure” it would seem further analysis is desirable.

Presumptions are most commonly classified according to the effect they have upon the litigation. Thus, a given presumption may be simply legal authorization for a conclusion depending upon proved facts. In practice this tends to be presented in such questions as whether the evidence is sufficient to “take the case to the jury” or “to uphold the verdict”. Or the presumption may be regarded as inevitably leading to the conclusion from the proved facts in the absence of contradictory proof. Further, there is difference of opinion as to the effect of the presumption after the rebutting evidence has been received. Whert explanation has been offered, is there any longer room for an inference which might otherwise reasonably bridge the gap from basic fact to conclusion? If it still retains evidentiary value, is it sufficient to shift the burden of proof by a preponderance of the evidence to the rebutting litigant? And finally, the “presumption” may be conclusive, which means that in the instant case the true fact is immaterial and that as a matter of policy liability or non-liability follows.

A different classification on the basis of “logic” and “policy” has been suggested, a classification which runs across the one above. Professor Chafee

6. STUMBERG, *CONFLICT OF LAWS* (1937) 128.

7. 3 BEALE, *CONFLICT OF LAWS* (1935) §§ 595.2, 595.3; GOODRICH, *CONFLICT OF LAWS* (1927) § 84; RESTATEMENT, *CONFLICT OF LAWS* (1934) § 595; STUMBERG, *CONFLICT OF LAWS* (1937) 131; Note (1932) 78 A. L. R. 883.

8. Note (1918) 18 COL. L. REV. 354; RESTATEMENT, *CONFLICT OF LAWS* (1934) § 595, comment c.



illustrates<sup>9</sup> with instances of the presumption that a letter mailed has been received (a presumption based upon experience and demonstrable probabilities) and the presumption that if goods are handled in transit, by several carriers, any damage was caused by the conduct of the last carrier (a rule of convenience which cannot be shown to correlate with observation). The Supreme Court of New Hampshire expressed this approach when, in *Precourt v. Driscoll*,<sup>10</sup> it held that the Vermont rule placing on the plaintiff the burden of pleading freedom from contributory negligence should be applied to a cause of action arising from facts occurring in Vermont. "Neither legislation nor judicial rule may convert conjectures into rational inferences, or give to presumptions which they establish the character and quality of evidence." It was felt that the burden of affirmatively proving or disproving contributory negligence affected more than "the orderly presentation of evidence"; it was "incorporated with the substantive law" of Vermont requiring negligence in the defendant and care in the plaintiff. The court pertinently observed that the difficulty was not obviated by the fact that the rule as to burden of proof simply had the effect of a presumption which could be overcome by the introduction of evidence. If the evidence were not introduced the contrary New Hampshire rule contended for would have the effect of canceling from the case the element of the plaintiff's care, essential by Vermont law. "The presumption is no more a rational inference than a conclusion that evidence of the plaintiff's care shows the defendant's negligence, or even that a cause of action is probably good because suit has been brought."

There is much to be said for the proposition that a presumption which has no "core of reason," if in force at the "place of wrong," should be applied by the foreign forum in which the tort action is tried. Conversely, if it is but a logical inference, founded on experience, the forum should be free to depend on its experience in according the inference such weight as was there customary. The analysis has practical defects, however. To the extent that the inference is concededly reasonable, there is not likely to be any conflicts question. But if there is room for doubt, who is to determine whether a presumption is logical or arbitrary? It would seem that it must ultimately be the forum deciding the question as one of "qualification," but it is fairly certain that presumptions and burdens of proof differing from those applied by the forum to its domestic controversies are not likely to be regarded as based upon sound probabilities of fact. In most cases, then, the suggested rule would lead to the application of the foreign law. This may be desirable. The forum need take cognizance of the foreign presumption only when pleaded (and in most jurisdictions, proved),<sup>11</sup>

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9. Chafee, *The Progress of the Law, 1919-1921: Evidence* (1922) 35 HARV. L. REV. 302

10. 85 N. H. 280, 157 Atl. 525 (1931), 78 A. L. R. 874 (1932), noted in (1932) 16 MINN. L. REV. 586, and (1932) 80 U. OF PA. L. REV. 911.

11. STUMBERG, CONFLICT OF LAWS (1937) 157. Cf. MO. REV. STAT. (1929) § 806.

and it should not be very inconvenient to apply it. Granted that one who seeks relief from the tribunal of any state must prove his facts to the satisfaction of that tribunal and no other, there is considerable danger that difference in presumptions may in actual practice lead to a difference in result apart from the weight of the evidence actually introduced.<sup>12</sup>

According to the *Restatement of Conflict of Laws*, the law of the forum should govern presumptions and inferences to be drawn from evidence and all matters falling within the description "burden of proof". It is said that a different situation exists where by the law of the place of wrong (using a tort case for purposes of illustration) proof of freedom from contributory negligence is regarded as a condition of the cause of action itself.<sup>13</sup> Presumably the decision in *Precourt v. Driscoll* would be reconciled under this principle. The exception seems too difficult to use; the reasoning of the New Hampshire court suggests the inevitability of integration between the rule of presumption and the cause of action. The exception may be a concession to the reporter's concern over the validity of the general rule.<sup>14</sup>

The Missouri decisions present an interesting study in judicial uncertainty. A number of opinions voice the general rule of substance and procedure, but the first case to raise the issue here discussed was *Hiatt v. St. Louis-San Francisco Ry.*,<sup>15</sup> an action arising from a grade crossing accident in Arkansas. Statutes of that state provided that anyone there operating a railroad should be liable for the damage so caused; i. e., should be liable for damage resulting from failure to maintain a lookout in the operation of the trains and that the burden of proving the maintenance of the lookout should be on the operators of the railroad,<sup>16</sup> and that contributory negligence should not be a defense by the railroad unless it exceeded in degree that of the railroad but should only diminish the amount recovered.<sup>17</sup> It was thought that these statutes had been construed by the Supreme Court of Arkansas to raise a presumption of negligence on the part of the railroad which it would have to rebut by a preponderance of the evidence. The Supreme Court of Missouri held that such a presumption changed the substantive law and was properly applied to the trial in the latter state. This decision was approved and followed in *Ramey v. Missouri Pacific R. R.*<sup>18</sup>

It is apparent that the presumption has no "core of reason". Indeed, un-

12. This point is well illustrated in Cook, *op. cit. supra* note 2, at 353ff.

13. RESTATEMENT, CONFLICT OF LAWS (1934) § 595, comment *a*. Cf. *Southwestern Ry. v. Robertson*, 7 Ga. App. 154, 66 S. E. 535 (1909). See also STRUMBERG, CONFLICT OF LAWS (1937) 133.

14. 3 BEALE, CONFLICT OF LAWS (1935) § 595.3.

15. 308 Mo. 77, 271 S. W. 806 (1925). For a case holding according to the generally accepted view, see *Jones v. Chicago, St. P., M. & O. Ry.*, 80 Minn. 488, 83 N. W. 446 (1900).

16. ARK. DIG. STAT. (Crawford & Moses, 1921) § 8568.

17. *Id.* at § 8575.

18. 323 Mo. 662, 21 S. W. (2d) 873 (1929).

less some justification of public interest in and control over the operation of railroads can be advanced for it, its application is probably an unconstitutional deprivation of the railroad's property. (As interpreted, this presumption was given the weight of evidence even after contradicting evidence had been presented.) Whatever the policy which dictated it, the presumption clearly does more than order the presentation of evidence.

In *Menard v. Goltra*,<sup>19</sup> the cause of action was one for wrongful death in Illinois. By the law of that state the plaintiff in all tort actions must prove the negligence of the defendant and the exercise of his own care. By the law of Missouri contributory negligence is an affirmative defense to be pleaded and proved. From the standpoint of conflict of laws the case was very inadequately tried by the defendant, who failed to plead the Illinois law both as to burden of proof and as to the humanitarian doctrine (which has been held to be a substantive question).<sup>20</sup> The court held that the Missouri rule of pleading and proving contributory negligence was properly followed, both because of failure to introduce the Illinois law and because it related "merely to matters of procedure." The law of the forum "controls as to the burden of proof, the competency of the witnesses and the weight of the evidence." The *Hiatt* case was not cited by counsel or court. The *Ramey* case was cited only in connection with the question of sufficient pleading of the foreign law.

In the *Missouri Annotations to the Restatement of Conflict of Laws* the question is pertinently asked,<sup>21</sup> would it have made any difference if, by the law of Illinois, proof of care by the plaintiff was regarded as a condition precedent to action? Conceivably, on this ground *Precourt v. Driscoll* could be distinguished, but it seems clear that the distinction was not in the minds of either court. *Precourt v. Driscoll* considered the issue of burden of proof to be a phase of the broader question of presumptions, pointing out that in effect the New Hampshire rule on contributory negligence (which was the same as that in Missouri) operated as a rebuttable presumption of due care, in which the presumption had the effect of evidence. The soundness of this observation precludes satisfactory distinction from the *Hiatt* and *Ramey* decisions. In the former much emphasis was laid upon the statutory foundation of the Arkansas law, but while it may emphasize the close relation between a statute of admittedly substantive law and a judicial interpretation thereof in terms of presumptions, there is no correlation between substance and procedure and statute and common law.

In 1931, the Springfield Court of Appeals wrestled with a different phase of our problem in *Jackson v. St. Louis-San Francisco R. R.*<sup>22</sup> A grade crossing accident had occurred in Oklahoma, whose constitution provides,<sup>23</sup> "The defense

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19. 328 Mo. 368, 40 S. W. (2d) 1053 (1931).

20. *Johnson v. Atchison, T. & S. F. Ry.*, 290 S. W. 462 (Mo. App. 1927); *Cox v. Terminal R. R. Ass'n of St. L.*, 43 S. W. (2d) 571 (Mo. App. 1931).

21. RESTATEMENT, CONFLICT OF LAWS, MO. ANNOT. (1937) § 595.

22. 224 Mo. App. 601, 31 S. W. (2d) 250 (1930).

23. OKLA. CONST. art. III, § 6.

of contributory negligence or assumption of risk shall, in all cases whatsoever, be a question of fact, and shall at all times be left to the jury." On the authority of *Hiatt v. St. Louis-San Francisco Ry.* and *Ramey v. Missouri Pacific Ry.*, it was held error to strike the plea of this law in the Missouri trial. This is a harder case. What Oklahoma had undertaken to do was to designate the tribunal which should determine essential issues in the litigation. One who brings his action in Missouri must submit his case to the triers of fact it designates. It is true that in many cases the rule will have the same effect as a presumption of due care. As previously stated, the presumption issue is frequently presented in questions of the sufficiency of the evidence to carry the case to the jury. The result is not inevitably the same, however.

The Oklahoma constitutional provision had been held not to violate the Constitution of the United States, the Federal Supreme Court observing<sup>24</sup> that "the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed." The Missouri court seized upon this as an expression of opinion that it was but a variation of the same theme to remove contributory negligence as a defense and to provide that it should be tried by a jury. As a matter of constitutional law it may be; as a matter of conflict of laws, it may not. It is not improbable that the people of Oklahoma hoped by this provision to increase the probability of recovery in tort actions,<sup>25</sup> but it is not for that reason binding upon sister states. The same sentiment might induce legislation disqualifying from jury service in tort actions all persons who had ever defended similar suits. It would hardly be contended that such legislation would be given extraterritorial consideration.

In this connection it might be profitable to digress a little way. The distinction between negligence as a matter of law, and negligence as a mixed issue of law and fact, is nearly as illusive as that between substance and procedure. The traditional approach may be stated as follows: Assuming that the place of alleged wrong is the place of both conduct and resulting injury, where the place of wrong determines resulting liability only by the application of a standard of conduct (i. e., that of a reasonably prudent man) to the particular facts, a foreign forum will apply that standard to those facts in its own way, indifferent to the result which might have been obtained if the action had been tried in the place of wrong.<sup>26</sup> But if, by the law of the place of wrong, men might

24. *Chicago, R. I. & Pac. Ry. v. Cole*, 251 U. S. 54 (1919).

25. Note (1931) 31 COL. L. REV. 158.

26. RESTATEMENT, CONFLICT OF LAWS (1934) § 595, comment *b*. Missouri cases: *Teitsort v. Illinois Cent. R. R.*, 322 Mo. 640, 15 S. W. (2d) 779 (1929); *Sing v. St. Louis-S. F. Ry.*, 30 S. W. (2d) 37 (Mo. 1930); *Connole v. East St. Louis & S. Ry.*, 340 Mo. 690, 102 S. W. (2d) 581 (1937); *Morris v. Chicago, R. I. & P. Ry.*, 251 S. W. 763 (Mo. App. 1923); *Johnson v. Atchison, T. & S. F. Ry.*, 290 S. W. 462 (Mo. App. 1927); *Cox v. Terminal R. R. Ass'n of St. L.*, 43 S. W. (2d) 571 (Mo. App. 1931), *aff'd*, 331 Mo. 910, 55 S. W. (2d) 685 (1932); *Boneau v. Swift & Co.*, 66 S. W. (2d) 172 (Mo. App. 1934).

not differ as to the inevitable result of applying that standard to those facts (i. e., negligence or due care as a matter of law) the foreign forum will accept that determination.<sup>27</sup> It is seldom that the issue is squarely presented. Decisions of the place of "wrong" that the specific conduct was tortious in law are usually followed elsewhere,<sup>28</sup> but if the question is left to the jury it is almost impossible to know whether weight has been given the foreign view or not. Occasionally there are available from the place of "wrong" decisions that the given conduct cannot as a matter of law be considered negligent or careful. In *Morris v. Chicago, Rock Island & Pacific Ry.*,<sup>29</sup> it was held that under those circumstances it was error to direct a verdict in a foreign trial. This would seem to be in accord with the *Jackson* case,<sup>29a</sup> and it would seem open to the same criticism. It should still be open to the state in which the action is brought to determine for itself what tribunal, judge or jury, should determine whether the facts met the standard. While authority requires that the conclusion of the place of "wrong" that reasonable men could not differ should be respected elsewhere, the determination lays down a rule of positive law as to specific conduct. A conclusion that reasonable men might differ does not; the only law in force is the basic standard, which is applied to the facts of the case.

It is interesting to note that the precise problem of the *Jackson* case was recently presented in Arkansas.<sup>30</sup> The supreme court of that state also held that the Oklahoma constitution should control.

Despite the inconsistency of *Menard v. Goltra*, there has been no intimation that the *Hiatt* and *Ramey* cases are not still good law. In *Oxford v. St. Louis-San Francisco Ry.*<sup>31</sup> and *Kirkdoffer v. St. Louis-San Francisco Ry.*,<sup>32</sup> the Arkansas presumptions were again before the supreme court. In both cases the trial courts had so instructed the jury that the railroad was presumptively negligent that the presumption was given the weight of evidence. On the ground that since the *Hiatt* and *Ramey* decisions the Arkansas court had changed its interpretation of its own statute, both cases were reversed. There was no intimation that the present Arkansas rule should not be followed. On the contrary, there was every indication that the rebuttable presumption which merely put on the railroad the burden of coming forward with evidence, and which was of no effect when evidence of care had been introduced, should be applied.

A somewhat analogous problem was presented in *Hartmann v. Louisville &*

27. RESTATEMENT, CONFLICT OF LAWS (1934) § 595, comment *b*. Missouri cases: *Newlin v. St. Louis & S. F. R. R.*, 222 Mo. 375, 121 S. W. 125 (1909); *Gersman v. Atchison, T. & S. F. Ry.*, 229 S. W. 167 (Mo. 1921); *Sing v. St. Louis-S. F. Ry.*, 30 S. W. (2d) 37 (Mo. 1930); *Rahm v. Chicago, R. I. & P. Ry.*, 129 Mo. App. 679, 108 S. W. 570 (1908); *Hill v. Illinois Terminal Co.*, 100 S. W. (2d) 40 (Mo. App. 1937).

28. RESTATEMENT, CONFLICT OF LAWS (1934) § 380.

29. 251 S. W. 763 (Mo. App. 1923).

29a. 224 Mo. App. 601, 31 S. W. (2d) 250 (1930).

30. *Mo. Pac. R. R. v. Holmes*, 124 S. W. (2d) 14 (Ark. 1939).

31. 331 Mo. 53, 52 S. W. (2d) 983 (1932).

32. 327 Mo. 166, 37 S. W. (2d) 569 (1931).

*Nashville R. R.*,<sup>33</sup> where a bill of lading limiting the liability of defendant carrier had been issued to the plaintiff in Illinois. By the law of that state the mere receipt of the bill did not destroy the possible cause of action against the carrier for injury to the goods shipped. It would have been a defense by the law of Missouri.<sup>34</sup> Having decided that the question was one of the contract between the parties, and that the law of Illinois as *lex loci contractu* should determine the substantive rights, the court held, in accordance with the weight of authority, that the Illinois rule was one of substantive law in that it determined what constituted an acceptance of this type of offer. A different result was reached in Massachusetts,<sup>35</sup> where the court regarded the contractual law of the states as the same and thought the issue was as to the inference of assent to be drawn from receipt and retention of the bill. This view has been adopted by the *Restatement*.<sup>36</sup>

Could reliance have been had upon Illinois interpretation of its own law on this point? Can reference ever be made to the law of the state whose concededly substantive law is to be followed for decision on the substantive or procedural character of its presumptions, burdens, and inferences? Despite the intimations of the *Restatement*, it does not seem possible. The question is one of qualification;<sup>37</sup> having decided that the forum shall determine procedural matters, there is no point in looking to the foreign law unless the forum has already determined that the rule at issue is substantive. Furthermore, such reference is likely to involve the forum in the endless circle of *renvoi*. The forum must classify legal principles according to its own concepts and to its own convenience.

JOHN P. HAMSHAW

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#### REQUIREMENT OF "MUTUALITY" IN CONTRACTS—ACTIONS AT LAW

Suppose that S and B enter into a contract whereby S agrees to sell and B agrees to buy all of the potatoes raised by S on his land during a specified time. Is such a contract "unilateral," and void for want of "mutuality?" In the case of *Edwards v. Offutt*,<sup>1</sup> a Missouri appellate court employed language which would cast doubt upon the validity of such an agreement. On the other hand,

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33. 39 Mo. App. 88 (1890).

34. *Id.* at 89, 90.

35. *Hoadley v. Northern Transportation Co.*, 115 Mass. 304 (1874).

36. *RESTATEMENT, CONFLICT OF LAWS* (1934) § 595, illustration 4.

37. For an interesting and acute summary of the several theories of the doctrine of "qualification" or "characterization", see Robertson, *A Survey of the Characterization Problem in the Conflict of Laws* (1939) 52 HARV. L. REV. 747.

1. 229 Mo. App. 496, 78 S. W. (2d) 140 (1934). The decision itself is not the subject of this discussion.

when one Saito of Hawaii contracted with a pineapple company of that territory to sell to it "all the merchantable smooth cayenne pineapples" that he might grow, the United States Circuit Court of Appeals for the Ninth Circuit, in construing the contract to obligate Saito as to sales from certain of his holdings but not others, apparently felt no hesitation on this score.<sup>1a</sup> Such a difference of opinion merits investigation.

It is said that "unilateral contracts mean contracts that lack mutuality."<sup>2</sup> What then is the meaning of the term "mutuality" as applied to bilateral contracts in actions at law? That good and sufficient consideration must be furnished by each of the promisors admits of no doubt, and in this sense, at least, there must be mutuality. But mutuality is used in another setting. It is sometimes said that there must be mutuality of obligation. It is the employment of this phrase which leads to much confusion at least in the language of the reported cases, for it may be employed to express the aforesaid necessity for consideration on each side,<sup>3</sup> or it may be intended to express the thought that in a bilateral contract both promises must be binding or neither is binding.<sup>4</sup> This is true of the language of the Missouri cases, and it is not always clear in which sense it is used,<sup>5</sup> some cases even going so far as to use it in both

1a. *Hawaiian Pineapple Co. v. Saito*, 270 Fed. 749 (C. C. A. 9th, 1921) (suit in equity).

2. *Laclede Const. Co. v. Tudor Iron Works*, 169 Mo. 137, 151, 69 S. W. 384, 388 (1902). The generally accepted present-day use of "unilateral" contract, however, is a contract in which only one party promises performance, the consideration being actually given by the promisee, and being something other than a promise. A bilateral contract, on the other hand, is one where each party *promises* some performance. For a more complete discussion of the usage of "bilateral" and "unilateral," see 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 13.

3. *Id.* at § 141; Note (1928) 3 ST. JOHN'S L. REV. 120.

4. 1 WILLISTON, CONTRACTS § 103E. For a collection of articles on other meanings given to the word, see *id.* at § 141, n. 4. As to the use of the term in equity, see 5 WILLISTON, CONTRACTS § 1433. For a further discussion of various uses of the term, see Patterson, "Illusory" Promises and Promisors' Options (1921) 6 IOWA L. BULL. 129, 209; SELECTED READINGS ON THE LAW OF CONTRACTS (Ass'n of Am. Law Schools, 1931) 401.

5. *Laclede Const. Co. v. Tudor Iron Works*, 169 Mo. 137, 69 S. W. 384 (1902) (where it was said: "Mutuality of contracts means that an obligation must rest upon each party to do or permit to be done something in consideration of the act or promise of the other. . . ."); *Underwood Typewriter Co. v. Century Realty Co.*, 220 Mo. 522, 119 S. W. 400 (1909) (saying: "But mutuality, in its essence, is but a *phase*, strictly speaking, of the consideration that will support a contract."); *Hudson v. Browning*, 264 Mo. 58, 174 S. W. 393 (1915) (where it was said in effect that the contract was void because there was no mutuality of agreement such as made one promise a consideration for the other); *Martin v. Ray County Coal Co.*, 288 Mo. 241, 232 S. W. 149 (1921) (where it was said: ". . . the contract pleaded was not lacking in either consideration or mutuality."); *Gillen v. Bayfield*, 329 Mo. 681, 46 S. W. (2d) 571 (1932) (where the court in quoting from 13 C. J. 237 enumerates among other things as essential elements of a contract, legal consideration, mutuality of agreement, and mutuality of obligation); *Eaton v. The Wear Coal Co.*, 125 Mo. App. 194, 101 S. W. 1140 (1907); *Dickson v. Eames*, 134 Mo. App. 373, 114 S. W. 574 (1908); *Hirsch & Sons Iron & Rail Co. v. Paragould and M. R. R.*, 148 Mo. App. 173, 127 S. W. 623 (1910); *Warren v. Ray County Coal Co.*,

senses in the same opinion.<sup>5a</sup> The validity of the phrase as used in the latter sense seems more questionable. The cases in which only one of the promises is binding and enforceable are so numerous and varied that it may well be, and has been, argued that the rule, if there is such a rule, has been eaten up by its exceptions.<sup>6</sup> Whether, however, mutuality of obligation means only mutuality of consideration, or mutuality of binding promises, the crucial question remains one of consideration, since, as has been pointed out, the statement that both promises must be binding or neither is binding itself involves no other element than that of consideration.<sup>7</sup> It is the purpose here to analyze the type situation presented at the outset hereof for the presence or absence of consideration.

Looking now to the case under discussion, was there in fact sufficient consideration to support the mutual promises made? The most generally accepted idea of consideration at the present time is that it is the "exchange or price requested and received by the promisor for the promise".<sup>8</sup> In general, consideration need only circumscribe one's freedom of action, and neither the benefit to the promisor nor the detriment to the promisee need be actual, in the economic sense, as distinguished from legal. This was expressed in Missouri as early as 1843, when the supreme court said in *Marks v. Bank of Missouri*,<sup>9</sup> "It is unnecessary that the consideration should be adequate in point of actual value, the law having no means to decide upon this matter. If the least benefit or advantage be received by the promisor from the promisee, or a third person, or if the promisee sustain any, the least injury or detriment, it will constitute a sufficient consideration to render the agreement valid." Since that time, the cases have continuously drawn the same conclusion,<sup>10</sup> and there is no requirement that the respective undertakings or obligations shall be equal to or commensurate with one another.<sup>11</sup> If then, there is the least detriment to

200 Mo. App. 442, 207 S. W. 883 (1919); *Royal Brewing Co. v. Uncle Sam Oil Co.*, 205 Mo. App. 616, 226 S. W. 656 (1920); *Banner Creamery Co. v. Judy*, 47 S. W. (2d) 129 (Mo. App. 1932), although a suit in equity, in this sense the principle seems to be the same; *Cantrell v. Knight*, 72 S. W. (2d) 196 (Mo. App. 1934).

5a. See cases note 5, *supra*.

6. For an excellent discussion of the problem, see Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law* (1925) 25 COL. L. REV. 705; (1928) 28 *id.* at 997. But see Williston, *The Effect of One Void Promise in a Bilateral Agreement* (1925) 25 COL. L. REV. 857. Cf. Ballentine, *Mutuality and Consideration* (1914) 23 HARV. L. REV. 121; Corbin, *Non-Binding Promises as Consideration* (1926) 26 COL. L. REV. 550; Cook, *Williston on Contracts* (1939) 33 ILL. L. REV. 497, 505; Note (1926) 26 COL. L. REV. 724.

7. 1 WILLISTON, CONTRACTS § 103E.

8. *Id.* at § 100.

9. 8 Mo. 316, 319 (1843).

10. *Carr v. Card*, 34 Mo. 513 (1864); *Thompson v. McCune*, 333 Mo. 758, 63 S. W. (2d) 41 (1933), stating that loss or detriment to the promisee as well as a benefit to the promisor is valid consideration; *Cox v. A. P. Green Fire Brick Co.*, 230 Mo. App. 774, 75 S. W. (2d) 621 (1934).

11. *Warren v. Ray County Coal Co.*, 200 Mo. App. 442, 207 S. W. 883 (1919).



the promisor or the slightest benefit to the promisee in the situation in question, the contract should be enforced. Coming back to the facts hypothesized at the outset, clearly B's promise is a legal detriment to him if carried out, as well as a benefit to S, as B will be bound to buy whatever potatoes S may grow. S's promise, it would seem, is likewise a legal detriment to him, as he is bound to do one of two things, namely, raise potatoes and sell to B, or refrain from raising potatoes, either of which is a detriment. He has given up his right to raise potatoes and sell to someone else, and for this reason the contract should be considered a valid one.<sup>12</sup> In other words, S has an option to perform in either of two ways, either of which circumscribes the entire freedom of action possessed by him prior to entering into the above agreement, and hence his promise constitutes, or should constitute, a sufficient consideration to support B's undertaking. This is especially true in view of the fact that the courts say that it is their duty to enforce contracts, not to abrogate them.<sup>13</sup>

Such a case is, however, to be distinguished from the so-called "will, wish, or want" contracts, where one promise is actually illusory and, therefore, does not furnish a consideration for the other promise. Suppose, for example, that S agreed to sell, and B agreed to buy, as many potatoes as S might elect to sell to B, without a stipulation either express or implied, that S would sell only to B. In this situation, S has an option to sell or not to sell, either of which would be a performance of the agreement. Such a promise by S is not good consideration for B's return promise, for, if S elected not to sell, there would be no legal detriment to him, nor would there be a benefit to B, and yet he would have fully performed his promise according to its terms. This idea is clearly expressed by the *Restatement*,<sup>14</sup> where it is said: "A promise or apparent promise which reserves by its terms to the promisor the privilege of alternative courses of conduct is insufficient consideration if any of these courses of con-

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12. *Ramey Lumber Co. v. Schroeder Lumber Co.*, 237 Fed. 39 (C. C. A. 7th, 1916); *Imperial Refining Co. v. Kanotex Refining Co.*, 29 F. (2d) 193 (C. C. A. 8th, 1928); *Southwest Dairy Products Co. v. Coffee & Moore*, 62 F. (2d) 174 (C. C. A. 5th, 1932); *Burgess Sulphite Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367 (1902); *McMullan v. Dickinson Co.*, 63 Minn. 405, 65 N. W. 661 (1896); *Green v. Lovejoy*, 155 Minn. 241, 193 N. W. 173 (1923); *Edison Electric Illuminating Co. v. Thacher*, 229 N. Y. 172, 128 N. E. 124 (1920). See 1 WILLISTON, CONTRACTS §§ 104A, 141; Corbin, *The Effect of Options on Consideration* (1925) 34 YALE L. J. 571; Notes (1922) 7 CORN. L. Q. 147, (1926) 26 COL. L. REV. 724. Cf. *Scott v. Moragues Lumber Co.*, 202 Ala. 312, 80 So. 394 (1918), reaching the same result but on different grounds. See also *City of Holton v. Kansas Power and Light Co.*, 135 Kan. 58, 9 P. (2d) 675 (1932), although a suit in equity, the requisites of a valid contract are the same as in an action at law. For a discussion of this see 5 WILLISTON, CONTRACTS §§ 1418, 1425.

13. See *Underwood Typewriter Co. v. Century Realty Co.*, 220 Mo. 522, 525, 119 S. W. 400, 403 (1909).

14. RESTATEMENT, CONTRACTS (1932) § 79. To the same effect, see Corbin, *loc. cit. supra* note 12; Patterson, *loc. cit. supra* note 5; Notes (1929) 42 HARV. L. REV. 829, (1929) 28 MICH. L. REV. 76, (1929) 3 ST. JOHN'S L. REV. 276. Exceptions to this general rule are promises that are voidable because of infancy, insanity, fraud, *et cetera*.

duct would be insufficient consideration if it alone were bargained for." The Missouri decisions are consistent herewith in general, although for the most part they express it by saying that such a contract is unilateral or that it lacks mutuality because one party thereto is not bound, and neither is bound unless both are bound.<sup>15</sup>

At times, however, the Missouri courts have not given effect to the distinction suggested between the situation set out at the beginning of the discussion, and the last mentioned hypothetical situation. This may be seen most clearly by the case of *Cherry v. Chorn*,<sup>16</sup> involving a purported contract entered into on December 29, whereby defendant agreed to sell and plaintiff agreed to buy all of the stock which defendant might own in a certain corporation the following January 5 (later extended to January 9). The court, in affirming the judgment sustaining defendant's demurrer to the petition, held the contract void as lacking in mutuality because defendant did not undertake to deliver a definite quantity—that is, in effect, because defendant could sell all of his stock before that time, and thus would not be bound to sell any to plaintiff.<sup>17</sup> This, however, should not result in the contract being held invalid, as defendant had purported to bind himself either to sell to the plaintiff or refrain from owning any stock, either of which should constitute a sufficient consideration, in view of the fact discussed previously that the obligations of the parties do not have to be equal. Such decisions cannot well be reconciled in theory with cases such as *Dickson v. Eames*,<sup>18</sup> where defendant's testator executed certain notes to plaintiff, payable in a year, with an option to tender payment in six months and request the transfer of certain stock held by plaintiff. The plaintiff

15. *Halloway v. Mountain Grove Creamery Co.*, 286 Mo. 489, 228 S. W. 451 (1921); *Gillen v. Bayfield*, 329 Mo. 681, 46 S. W. (2d) 571 (1932); *Wright v. Fuel Oil Co.*, 114 S. W. (2d) 959 (Mo. 1938); *Jones v. Durgin*, 16 Mo. App. 370 (1885); *Campbell v. American Handle Co.*, 117 Mo. App. 19, 94 S. W. 815 (1906). See *Riddle v. Castner*, 202 Mo. App. 584, 587, 209 S. W. 127, 128 (1919); *White Oak Coal Co. v. Ed. E. Squier Co.*, 219 S. W. 693, 697 (Mo. App. 1920); *Saginaw Medicine Co. v. Dykes*, 210 Mo. App. 399, 405, 238 S. W. 556, 557 (1922).

16. 221 Mo. App. 1207, 299 S. W. 598 (1927).

17. Accord: *Hirsch & Sons Iron & Rail Co. v. Paragould & M. R. R.*, 148 Mo. App. 173, 127 S. W. 623 (1910). Plaintiff was to sell all of the rails they might have. The decision is somewhat weakened as defendant objected that the contract lacked mutuality in that plaintiff was not bound to have any rails, and also because defendant was bound to buy only as many as they wanted. However, the writer was unable to discover from the terms of the contract that defendant had any such option, and the court in sustaining defendant's objection apparently relied on the first ground stated. *Barnes v. Bragg*, 198 S. W. 73 (Mo. App. 1917); and see *Geo. W. Jennings, Inc., v. Hirsch Rolling Mill Co.*, 242 S. W. 1003, 1005 (Mo. App. 1922); *Edwards v. Offutt*, 229 Mo. App. 496, 78 S. W. (2d) 140 (1934). But see *Laclede Const. Co. v. Tudor Iron Works*, 169 Mo. 137, 152, 69 S. W. 384, 389 (1902), and *Laclede Const. Co. v. T. J. Moss Tie Co.*, 185 Mo. 25, 78, 84 S. W. 76, 93 (1904), for two decisions containing *dictum* to the contrary. Cf. *Tull v. Fletcher* 196 Mo. App. 573, 196 S. W. 436 (1917), which was a suit in equity, and the court cites the two preceding cases and apparently follows the *dicta*, without mentioning mutuality or consideration.

18. 134 Mo. App. 373, 114 S. W. 574 (1908).

agreed, upon such request having been made, either to transfer the stock or to keep the stock and surrender the notes. Failing such tender, on maturity of the notes plaintiff could either transfer the stock and enforce payment of the notes, or, in the alternative, retain the stock and surrender the notes. The court held that both parties were bound and that there was valid consideration, yet it will be observed that in this case each party could perform in more ways than one, any of which would constitute a good consideration. The basic principles involved are the same in both cases, the only difference being that in cases like the *Cherry* case one of the options consists of refraining from some act that the promisor would otherwise have a legal right to do, while in the *Dickson* case each option consists of the performance of some affirmative act. Although such a distinction may be made, it would seem to be one of form rather than of substance,<sup>19</sup> since refraining from doing an act may involve just as much limitation on one's freedom of action as affirmative performance.

The Missouri courts, as well as those in other jurisdictions, have, however, held valid numerous contracts very similar to that set out at the beginning of the discussion, where such contracts have involved a buyer's requirements rather than a seller's production. It is to be noted that in both situations an actual sale may never take place—the buyer may not have any requirements, just as the seller may not raise anything. For example, in *Royal Brewing Co. v. Uncle Sam Oil Co.*,<sup>20</sup> the contract provided that defendant would sell to plaintiff all of his (plaintiff's) requirements of fuel oil for one year. The court held the contract valid, saying that plaintiff's business was an established one, so that the quantity of oil needed could be estimated approximately, and thus one was bound to furnish and the other to buy, the quantity being reasonably estimated.<sup>21</sup> A like result has been reached in other jurisdictions on the theory of an implied promise by the seller to continue production or sales, or by the buyer to maintain his business and take its actual requirements, although either party may, in good faith, cease to have such output or requirements.<sup>22</sup> The result reached in these cases is satisfactory, but it does not seem that the validity of such contracts should be made to depend on an approximate ascertainment of the amount involved, or on an implied promise to continue in business.

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19. See also in this connection *Martin v. Ray County Coal Co.*, 288 Mo. 241, 232 S. W. 149 (1921), where plaintiff agreed to buy between one hundred and three hundred tons of coal per day from defendant and the court held the contract valid.

20. 205 Mo. App. 616, 226 S. W. 656 (1920).

21. Accord: *Rozier v. St. Louis & S. F. R. R.*, 147 Mo. App. 290, 126 S. W. 532 (1910); *Banner Creamery Co. v. Judy*, 47 S. W. (2d) 129 (Mo. App. 1932) (suit in equity); *Wood v. Saylor Tie and Timber Co.*, 67 S. W. (2d) 826 (Mo. App. 1934); *Cantrell v. Knight*, 72 S. W. (2d) 196 (Mo. App. 1934); see *Eaton v. The Wear Coal Co.*, 125 Mo. App. 194, 202, 101 S. W. 1140, 1142 (1907). But cf. *Hudson v. Browning*, 264 Mo. 58, 174 S. W. 393 (1915). For an annotation of similar cases in other jurisdictions, see Notes (1921) 14 A. L. R. 1300, (1923) 24 A. L. R. 1352, (1931) 74 A. L. R. 476.

22. 1 WILLISTON, CONTRACTS § 104A.

It may be argued, of course, that a court in refusing to give effect to such a contract as is here under discussion, is influenced by the apparent one-sidedness of the agreement.<sup>23</sup> Yet it is axiomatic that courts of law will not inquire into the adequacy of consideration.<sup>24</sup> Provided such a contract serves a useful social purpose and violates no rule of public policy, it would seem that the judicial inclination should be towards enforcement rather than abrogation.

In conclusion, then, it is submitted that the validity of contracts which leave to the promisor an option of performance in two or more ways, should be upheld, if, and only if, each course of conduct open to the promisor under the agreement furnishes a sufficient consideration for the corresponding obligation of the promisee. Although this necessarily excludes those cases where the promise of one party is truly illusory, it is further submitted that such a requirement of good and sufficient consideration is, in fact, fully met in the fact situation first presented.

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#### THE COMPENSATING USE TAX AND INTERSTATE COMMERCE

In *Henneford v. Silas Mason Co.*,<sup>1</sup> the plaintiffs, appellees, were engaged in the construction of a dam and brought machinery into the state of Washington purchased at retail in other states. The defendants, the Tax Commission of Washington, gave notice that the plaintiffs had become subject through the use of this property to a tax of two per cent of the cost, and made demand for payment. The Washington legislature had enacted a "compensating tax" of two per cent on the use of all personal property purchased at retail after May, 1935, based on the purchase price. It was passed along with a state sales tax and did not apply to the "use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States."<sup>2</sup> If the rate of such other tax was less than two per cent, the Washington use tax was to be measured by the difference. It was held that "the tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end." Nor was the tax "so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them."

This taxing statute was passed to protect local merchants, especially those

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23. See Note (1939) 52 HARV. L. REV. 836.

24. Cases cited notes 10 and 11, *supra*.

1. 300 U. S. 577 (1937).

2. Wash. Laws 1935, c. 180, tit. 3, 4.

near state lines.<sup>3</sup> Without this statute their customers would be inclined to go into adjoining states not having a retail sales tax to make their purchases.<sup>4</sup>

The plaintiffs maintained that this tax was a direct burden upon interstate commerce. Goods shipped in interstate commerce are subject to taxation without discrimination, as any other goods in that state, when they have reached their destination within that state.<sup>5</sup> The court held that the goods had "become part of the common mass of property within the state of destination" and there was no interference with interstate commerce. The court distinguished the principal case from *Baldwin v. G. A. F. Seelig, Inc.*,<sup>6</sup> on the ground that in the *Baldwin* case New York attempted to extend its statute into another state by determining the price to be paid for milk purchased outside New York. The Washington statute did not attempt to fix the price of out of state purposes. Out of state sellers were permitted to sell at any price they desired, but the use of such goods was subject to taxation after transit so as to share the burden with goods that were purchased within the state.<sup>7</sup>

The court refused to inquire into the motives behind this statute, citing *Magnano Co. v. Hamilton*<sup>8</sup> and *Fox v. Standard Oil Co.*,<sup>9</sup> where it was held that collateral purposes or motives in levying a tax within the state's lawful power are beyond scope of judicial inquiry. A tax will not be held invalid because it accomplishes objectives indirectly which it could not accomplish directly.<sup>10</sup> Each statute is not to be construed separately but other statutes are read in conjunction with it. When the highest court of a state holds that two or more statutes are to be read together the United States Supreme Court accepts this as conclusive.<sup>11</sup> Here the court considered the sales tax and use tax together and concluded that the purpose was to put all purchases, both in

3. *Pacific Tel. & Tel. Co. v. Henneford*, 81 P. (2d) 786 (Wash. 1938), cert. denied, 59 Sup. Ct. 483 (1939), involving purchase outside of Washington of specific order and standby equipment for plaintiff engaged in intrastate and interstate commerce. The equipment could not be purchased in Washington. The court said that since the purpose of the use tax was the protection of local merchants the tax was not applicable to articles not available within the state. The court further held the tax an unlawful burden on interstate commerce. In denying certiorari, the United States Supreme Court followed the state court as to the meaning of the state statute; therefore, the interstate commerce angle was not considered by the United States Supreme Court.

4. See (1937) 1 MD. L. REV. 263.

5. *Woodruff v. Parham*, 8 Wall. 123 (U. S. 1868); *American Steel and Wire Co. v. Speed*, 192 U. S. 500 (1904); *Brown-Forman Co. v. Kentucky*, 217 U. S. 563 (1910); *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450 (1918); *Sonneborn Bros. v. Cureton*, 262 U. S. 506 (1923); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249 (1933); *Edelman v. Boeing Air Transport, Inc.*, 289 U. S. 249 (1933); *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 (1934); *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169 (1935).

6. 294 U. S. 511 (1935).

7. See (1937) 10 So. CALIF. L. REV. 516.

8. 292 U. S. 40 (1934).

9. 294 U. S. 87 (1935).

10. See (1937) 35 MICH. L. REV. 1395.

11. *Gregg Dyeing Co. v. Query*, 286 U. S. 472 (1932).

state and out of state, on the same footing.<sup>12</sup> Plaintiffs further contended that the tax in question was not in fact a tax upon the use in Washington but upon the foreign sale. The basis for this contention was the statute which says that the use shall not be taxable if the chattel is received through any other means than a retail purchase. But the court took the position that, just because the legislature had seen fit to tax the use of chattels that had been bought, it did not make the tax one upon the sale. A state may select subjects of taxation.<sup>13</sup> It is not compelled to adopt an iron rule of equal taxation;<sup>14</sup> it may classify broadly the subjects of taxation if it does so on a rational basis.<sup>15</sup>

Considering the sales tax and use tax together, there is no discrimination. If a tax has been paid in another state, a set-off is allowed for that amount in Washington. In the end all purchasers have paid the same amount of tax.

In *Southern Pacific Co. v. Gallagher*,<sup>16</sup> plaintiff, a Kentucky corporation, carrying on intrastate, interstate and foreign commerce over its railroad system which extends through several states and connects with other systems, purchased tangible personalty, some of which was standard equipment and some was for improvements, replacements or extensions pursuant to previously drawn plans. Few, if any, of the supplies were stored very long. For construction on a large scale the goods were shipped to the California destination and installed immediately. No new rolling stock was involved. All of the purchases were used in interstate commerce. Plaintiff contended that the California use tax<sup>17</sup> as applied to these articles was a burden upon interstate commerce. The court held that there was a taxable moment when the property had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use-retention and exercise of a right of ownership, respectively, was effective. The interstate movement was complete. The interstate consumption had not begun. The court further said that there was no discrimination or tax upon operations in interstate commerce, but a tax upon a taxable event in the state apart from operation and therefore no interference with interstate commerce. The dissenting opinion was that this was a tax upon operations and a direct burden upon interstate commerce.

California's use tax is complementary to their sales tax.<sup>18</sup> The use tax applies the same rate as the sales tax for storage, use or other consumption in the state when purchased from any retailer. Payment under the sales tax exempts the goods under the use tax. A "retailer" is defined in the act as "every person engaged in the business of making sales for storage, use or other con-

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12. *Fox v. Standard Oil Co.*, 294 U. S. 87 (1935).

13. *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911).

14. *Bell's Gap R. R. v. Pennsylvania*, 134 U. S. 232 (1890).

15. *Ohio Oil Co. v. Conway*, 281 U. S. 146 (1930).

16. 59 Sup. Ct. 389 (1939).

17. Cal. Stat. 1935, c. 361.

18. Cal. Stat. 1933, c. 1020, as amended, Cal. Stat. 1935, cc. 351, 355, 357.

sumption;" "use" is the exercise of any right of ownership; and "storage" is any "keeping or retention." The California statute did not provide for credit of a tax paid outside the state as the Washington statute did, but the problem was not presented or decided in the California case. Also the personalty involved in the *Henneford* case was not connected with any agency of interstate commerce as in the *Southern Pacific Co.* case.

Plaintiff contended that the tax is a direct tax upon the privilege of using instrumentalities in carrying on interstate commerce and is an unconstitutional burden on commerce. Defendant contended that the tax is upon intrastate storage and use—namely, retention and installation.

A state is not permitted to tax the privilege of carrying on or operating in interstate commerce.<sup>19</sup> Plaintiff cited *Helson and Randolph v. Kentucky*<sup>20</sup> for the proposition that a tax on the use of supplies and equipment is a tax on commerce. Privileges may be closely connected with interstate commerce, and yet be regarded as far enough removed for the purposes of taxation.<sup>21</sup> The court considered in its decision here the goods which were immediately installed upon arrival, and concluded that there was an interval between the interstate transportation and the consumption in interstate operation, and that this interval was sufficient for the tax on storage and use to become applicable.

A tax upon installation, even though it does have the same effect as a tax upon consumption or operation, does not necessarily render it bad;<sup>22</sup> there must be a discrimination or such a tax on operation as to amount to a state interference. But plaintiff contended that the events here were so closely related as to be a part of interstate commerce. It was held that the taxable events were all intrastate and an analogy is drawn to *Puget Sound Stevedoring Co. v. State Tax Comm.*<sup>23</sup> The court distinguished *Ozark Pipe Line Corp. v. Monier*<sup>24</sup> in that the tax there was upon the right to do business and the taxpayer was engaged exclusively in interstate business; while in the instant case the tax was upon events outside of interstate commerce. Where there is intrastate or local activity as well as interstate commerce, the local activity may be taxed—the effect upon interstate commerce being too remote or incidental to invalidate the tax.<sup>25</sup>

19. Case of State Freight Tax, 15 Wall. 232 (U. S. 1872); *Telegraph Co. v. Texas*, 105 U. S. 460 (1881); *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 439 (1887); *Philadelphia & S. Steamship Co. v. Pennsylvania*, 122 U. S. 326 (1887); *Leloup v. Port of Mobile*, 127 U. S. 640 (1888).

20. 279 U. S. 245 (1929).

21. *Utah Power & L. Co. v. Pfof*, 236 U. S. 165 (1932); *Nashville, C. & St. L. Ry. v. Wallace*, 238 U. S. 249 (1933); *Coverdale v. Ark.-La. Pipe Line Co.*, 303 U. S. 604 (1933).

22. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1933).

23. 302 U. S. 90 (1937), holding invalid a tax on business of stevedoring, measured by a percentage of gross receipts from interstate business, but sustaining a similar tax on the intrastate business as an employment agency.

24. 266 U. S. 555 (1925).

25. *Southern Natural Gas Corp. v. Alabama*, 301 U. S. 148 (1937).

*Pacific Telephone and Telegraph Co. v. Gallagher*<sup>26</sup> involved the same questions as the *Southern Pacific Co.* case. The tax was applied to equipment and standby supplies purchased outside California by plaintiff, a telephone and telegraph company, engaged in intrastate and interstate commerce. The court in holding the tax valid, citing the *Southern Pacific Co.* case, said two rights of ownership were exercised in California—retention and installation—after the interstate journey ended and before the purchases became part of the telephone and telegraph system.

*Felt & Tarrant Mfg. Co. v. Gallagher*<sup>27</sup> presented the problem of making a foreign corporation the collecting agent for California under its use tax. Plaintiff is an Illinois corporation which manufactures and sells comptometers through agents in California. All orders are submitted to and approved by the plaintiff. The machines are shipped from plaintiff's shipping department in Illinois, and all payments are made directly to plaintiff. Offices are rented by plaintiff in California in its name; however, plaintiff has never qualified to do intrastate business. The use tax directs retailers maintaining a place of business in the state, and making sales of tangible personal property for storage, use or other consumption therein, to collect from the purchaser the tax imposed. The court, citing *Bowman v. Continental Oil Co.*,<sup>28</sup> *Monamotor Oil Co. v. Johnson*,<sup>29</sup> and the *Henneford* case, held that this was not a tax upon interstate commerce but upon property after it had come to rest in the state, thus being subject to a nondiscriminatory tax; and that compelling plaintiff to collect the tax imposed no unconstitutional burden upon interstate commerce or upon the plaintiff.

Other theories of taxation have been suggested to avoid exemption of out of state purchases.<sup>30</sup> However, with the constitutionality of the use tax established, it would seem the states have found a suitable means of preventing evasion of their sales tax by those buying in other states in order to avoid the local tax.<sup>31</sup> Thus, not only is the state treasury benefited but local merchants are protected as well from out of state competition by putting interstate sellers, at least indirectly, on an equal basis with them.<sup>32</sup>

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26. 59 Sup. Ct. 396 (1939).

27. 59 Sup. Ct. 376 (1939).

28. 256 U. S. 642 (1921).

29. 292 U. S. 86 (1934).

30. Lowndes, *State Taxation of Interstate Sales* (1935) 7 MISS. L. J. 223; Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1934) 12 N. C. L. REV. 99.

31. See (1937) 10 So. CALIF. L. REV. 516.

32. See (1937) 1 MD. L. REV. 263.