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The contributions of the student editors in this issue have been written under the supervision of individual members of the law faculty. Publication of signed contributions from any source does not signify adoption of the views expressed either by the LAW REVIEW or its editors collectively.

In the February issue of the LAW REVIEW at page 158, Jerome R. Hellerstein, author of the article on "Picketing Legislation and the Courts," is described as a member of the Bar, New York City. Mr. Hellerstein has not yet been admitted to the Bar, but is connected with a law firm there. The editor is entirely responsible for the error.

NOTES AND COMMENTS

Public Utilities—Power to Compel Railroads to Provide Union Stations.

Prior to the Transportation Act of 1920 it was established that the states had authority to compel two or more railroads to join in the construction and operation of union passenger stations.¹ Such

¹ Mayor & Aldermen of Worcester v. Norwich & W. R. R. Co., 109 Mass. 103 (1871); Railroad Com'n v. Alabama G. S. R. R. Co., 185 Ala. 354, 64 So. 13 (1913); Note L. R. A. 1915 D 98; (1923) 10 Va. L. Rev. 238. Of course, the authority of the state had to be properly exercised. Louisville & N. R. R. Co. v. Railroad Com'n, 191 Fed. 757. (C. C. M. D. Ala. 1911).

authority was found either in the general power to regulate public service corporations, an aspect of the police power, or the reserved right of the state to change the charters of railroads, or both.² Commonly the fact that the carriers concerned were engaged in interstate as well as intrastate commerce was not even mentioned.

North Carolina arrived at the usual result. The corporation commission of this state is empowered by statute³ to require railroads to join in providing union passenger depots. In three cases arising before 1920 the North Carolina Supreme Court supported the validity of the statute, although in none of the cases was the authority of the state to compel the erection of union stations specifically considered and sustained against an attack on that authority by the railroads concerned in the particular case.⁴

The Transportation Act of 1920⁵ did not in terms give the Interstate Commerce Commission power to order railroads engaged in interstate commerce to erect and operate union stations, nor did it take such authority from the state commissions. The question arose almost at once whether such a transfer of authority was included in the meaning of certain sections of the act.⁶ A North Carolina

² *Railroad Com'n v. Alabama G. S. R. R. Co. and Mayor & Aldermen of Worcester v. Norwich & W. R. R. Co.*, both *supra* note 1; see *Chicago, R. I. & P. Ry. Co. v. State*, 90 Okla. 173, 217 Pac. 147, 149 (1923).

³ N. C. CODE ANN. (Michie, 1931) §1042.

⁴ In *Dewey v. Atlantic Coast Line*, 142 N. C. 392, 55 S. E. 292 (1906), the commission had ordered the construction of a union depot on a certain site. The order was contested, not by the railroads, but by property holders whose interests were adversely affected. The court, in sustaining the validity of the order, pointed out the above statute, and added that the power of the Legislature to enact a statute of this character had been established by previous decisions, citing *Corporation Com'n v. Atlantic C. L. R. R. Co.*, 139 N. C. 126, 51 S. E. 793 (1905), which involved the construction of track scales; and *Corporation Com'n v. Seaboard A. L. Ry. Co.*, 140 N. C. 239, 52 S. E. 941 (1905) involving a spur siding. The validity of the statute received further support by the court's language in *Griffin v. Southern Ry. Co.*, 150 N. C. 312, 64 S. E. 16 (1909), wherein a citizen sought to restrain a railroad from operating trains in a street so as to reach a union station. In *Corporation Com'n v. Seaboard A. L. Ry. Co.*, 161 N. C. 270, 76 S. E. 554 (1912), the commission had ordered two railroads to establish a union depot; appeal was then taken; the lower court rendered judgment dismissing the whole proceedings; the state on relation of the commission appealed; and the supreme court granted a new trial on the ground that the lower court had improperly admitted evidence concerning the adverse effect of the station on a neighboring town. This decision is founded on an assumption of the validity of the statute, for if the commission had no power to order the erection of the union station, dismissal would have been proper.

⁵ 41 STAT. 456 (1920).

⁶ Among the provisions discussed in decisions on the point are the following: The act gave the Interstate Commerce Commission authority in the event of shortage of equipment, congestion of traffic, or other emergency to require

decision⁷ contributed substantially to the development of the law on this point.⁸ The North Carolina Corporation Commission in 1914 ordered the Southern Railway Company and the Atlantic Coast Line Railroad Company to erect a union station at Selma. No appeal was taken from the order. The Southern, however, asked the commission for indulgence by reason of its greatly decreased earnings due to the depression of 1914. The commission by letter granted the indulgence until conditions should improve. In 1922 the commission again ordered the railroads to build the station. The supreme court held that the railroads could be compelled to proceed with construction of the station pursuant to the order of 1914. The court pointed out that the Transportation Act of 1920 does not expressly or by clear implication grant to the Interstate Commerce Commission power to require the erection of union passenger stations; further that the Interstate Commerce Commission had made no order in the

railroads engaged in interstate commerce to make common use of terminals, including main-line tracks for a reasonable distance outside terminals. 41 STAT. 476 (1920), 49 U. S. C. §1 par. 15 (1926). It forbade such railroads to make any extension, construction, acquisition or abandonment of a line without a certificate of convenience and necessity from the Interstate Commerce Commission. 41 STAT. 477 (1920), 49 U. S. C. §1 par. 18 (1926). After the issue of the certificate the railroad was authorized, "without securing approval other than such certificate," to proceed with the construction or abandonment. 41 STAT. 478 (1920), 49 U. S. C. §1 par. 20 (1926). The Interstate Commerce Commission was empowered to require or authorize a railroad to extend its lines, provided the commission found that the extension was reasonably required in the interest of public convenience and necessity, and that the expense involved would not impair the ability of the carrier to perform its duty to the public. The commission was also given power to require or authorize a railroad to provide itself with safe and adequate facilities for performing its "car service," if the commission found that the expense would not impair the ability of the carrier to perform its duty to the public. 41 STAT. 478 (1920), 49 U. S. C. §1 par. 21 (1926). The act defined the term "car service" to include "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property," etc. 41 STAT. 476 (1920), 49 U. S. C. §1 par. 10 (1926). "Railroad" was defined to include among other things all the road and also all switches, spurs, tracks, terminals, and terminal facilities of every kind. 41 STAT. 474 (1920), 49 U. S. C. §1 par. 3 (1926). It was provided that the commission could, under certain circumstances, require the use of the terminal facilities, including main-line tracks for a reasonable distance outside of such terminal, of one carrier by another. 41 STAT. 479 (1920), 49 U. S. C. §3 par. 4 (1926). For an excellent argument to the effect that none of these provisions necessarily relates to union passenger stations see argument of counsel in *Railroad Com'n v. Southern Pac. Co.*, 264 U. S. 331, 44 Sup. Ct. 376, 68 L. ed. 713 (1924).

⁷ *Corporation Com'n v. Southern Ry. Co.* 185 N. C. 435, 117 S. E. 563 (1923).

⁸ See, for example, the discussions of this case in *Los Angeles Passenger Terminal Cases*, 100 I. C. C. 421, 428 (1925); *Atchison, T. & S. F. Ry. Co. v. Railroad Com'n*, 209 Cal. 460, 288 Pac. 775, 779 (1930); (1930) 4 TUL. L. REV. 467.

matter of this station, therefore the right of the state to act is preserved by the Transportation Act itself.⁹

The holding that states still have authority to order interstate roads to erect union stations was diluted by emphasis on the point that the order being enforced in this case was made in 1914, long before the passage of the Transportation Act.¹⁰

However, during the same year the Supreme Court of Oklahoma sustained an order of the Oklahoma Corporation Commission made in 1922 requiring four railroads all engaged in both interstate and intrastate commerce to unite in the erection and maintenance of a union depot.¹¹

The opposite result was reached in a California decision forming a link in a long course of litigation. In 1916 civic organizations of the city of Los Angeles filed complaint before the California Railroad Commission against three railroads, seeking the establishment of a union depot. The commission in 1921 ordered the construction of a union terminal depot. Certiorari proceedings were brought by the roads to review the orders. The California Supreme Court made an exhaustive examination of the provisions of the Transportation Act, including provisions revealing its scope and purpose, and concluded that authority in the matter of union terminal stations of railroads largely engaged in interstate commerce had been transferred from the states to the Interstate Commerce Commission. The orders of the state commission were annulled.¹²

The case was then taken to the United States Supreme Court on certiorari.¹³ Just what that court decided long remained doubtful. On the face of its opinion there was some reason to believe that

⁹ "Nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act." 41 STAT. 477 (1920), 49 U. S. C. §1 par. 17 (1926).

The court further reasoned that when the Esch-Cummins bill, which became the Transportation Act, was being debated on the floor of the House, an amendment designed to give the Interstate Commerce Commission control of union depots was proposed, was opposed by Chairman Esch on the ground that the matter was one for the police power of the states, and was defeated; that thereby Congress showed its intent that the matter be left to the states.

¹⁰ The court likewise suggested a distinction between union terminal depots and other union depots, thus distinguishing the California case, *infra* note 12.

¹¹ Chicago, R. I. & P. Ry. Co. v. State, 90 Okla. 173, 217 Pac. 147 (1923).

¹² Atchison, T. & S. F. Co. v. Railroad Com'n, 190 Cal. 214, 211 Pac. 460 (1922).

¹³ Railroad Com'n v. Southern Pac. Co., 264 U. S. 331, 44 Sup. Ct. 376, 68 L. ed. 713 (1924).

the Court decided that the Interstate Commerce Commission had authority over union depots of interstate railroads to the exclusion of the state commission.¹⁴ Such an interpretation of the decision was in fact made.¹⁵ However, the opinion was likewise open to the construction that the Court merely required as a condition precedent to the validity of an order by a state commission for the erection of a union station involving substantial and expensive extensions and abandonments of main tracks or lines of interstate carriers, a certificate by the Interstate Commerce Commission authorizing the attendant necessary extensions and abandonments,¹⁶ supported by a finding that the expense would not impair the ability of the carriers to perform their duty to the public.¹⁷ At any rate, the judgment of the Cal-

¹⁴ The court begins by saying that the question was whether the state commission had "power to require" the three roads "to build an interstate union depot in the city of Los Angeles." Again it says, "Our only question here is whether the power to direct a new union station with its essential incidents is committed exclusively to the Interstate Commerce Commission under the Act of 1920." 264 U. S. at 341, 44 Sup. Ct. at 377, 68 L. ed. at 717.

¹⁵ Note (1924) 37 HARV. L. REV. 888, note 15a reads, "Since this note went to press the United States Supreme Court has sustained the position of the Supreme Court of California that under the Transportation Act the Interstate Commerce Commission has exclusive jurisdiction to order the construction of a union terminal station by interstate roads," citing this case.

¹⁶ The court said, "We think, however, that means of control over installation of such new union stations for interstate carriers is given to the Interstate Commerce Commission in amended paragraphs (18 to 21) of §402 (Transportation Act). They provide that no interstate carrier shall undertake the extension of its line of railroad, or the construction of a new line of railroad,—unless and until the Commission shall certify that public convenience present or future requires it, and that no carrier shall abandon all or any portion of its line or the operation of it without a similar certificate of approval. Such a certificate is, we think, necessary in the construction of a new interstate union station which involves a substantial and expensive extension of the main tracks or lines of interstate carriers who theretofore have maintained separate terminals." 264 U. S. at 344, 44 Sup. Ct. at 378, 68 L. ed. at 718. The court further indicated that a certificate by the Interstate Commerce Commission was required, "as a condition precedent to the validity of any action by the carriers or of any order by the State Commission." 264 U. S. at 346, 44 Sup. Ct. at 379, 68 L. ed. at 719.

¹⁷ The ambiguity of the decision is illustrated by its closing paragraphs. "We are advised by statements at the bar that, after the California Supreme Court handed down its decision in this case, the City of Los Angeles filed a petition with the Interstate Commerce Commission asking for an order to provide, maintain and use a union station; that a hearing followed and that, pending the decision of this court, the matter is held under consideration.

"For the reasons given, we think the course taken by the City of Los Angeles was the correct one. Until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of §402 of the Transportation Act, the respondent railways cannot be required to provide a new interstate union station and to extend their main tracks thereto as ordered by the State Railroad Commission." In short, the court first says it was a correct course to petition the Interstate Commerce Commission for an order to provide the station. Then it intimates that the Interstate Commerce Commission is to act only on the

ifornia court was affirmed.¹⁸

Meanwhile the city of Los Angeles had petitioned the Interstate Commerce Commission asking that the commission direct the railroads to provide the union station. After the decision of the United States Supreme Court, the commission made its decision.¹⁹ The commission held that it had no authority under the Transportation Act to require the erection of the station, but that it had authority to determine, and it did determine, that public convenience and necessity required the attendant abandonments, extensions, and joint use of lines, and that the expense would not impair the ability of the railroads to perform their duties to the public. However, the commission issued no certificates since the matter had to go back to the state commission, where the plans for the depot on which the present findings were based might be materially altered.

The California commission then reopened the matter, and again ordered the three railroads to provide the union station in accord with a plan essentially the same as that it had submitted in the original hearing before the Interstate Commerce Commission. The order was to become effective after an order by the Interstate Commerce Commission authorizing the construction, extensions and abandonments involved. The state commission and the city of Los Angeles then petitioned the Interstate Commerce Commission for such further orders as would be necessary to render effective the order of the California commission. The city asked that the railroads be required to provide the union station. The Interstate Commerce Commission again decided that it had no authority to require the construction of the station, but did grant certificates as to attendant joint use of terminal tracks and abandonments and extensions of lines.²⁰

The city of Los Angeles thereupon brought a mandamus action in the Supreme Court of the District of Columbia to compel the extensions and abandonments necessitated. Could the Interstate Commerce Commission order that the station be provided, or merely authorize attendant extensions? The language is open to either interpretation. For a discussion of the ambiguity of this decision see the concurring opinion of Eastman in *Los Angeles Passenger Terminal Cases*, 142 I. C. C. 489, 498 (1928).

¹⁸ Note the interpretation of this case in *Corporation Com'n v. Southern Ry. Co.*, 197 N. C. 699, 701, 150 S. E. 335 (1929); and in Note (1925) 39 A. L. R. 1372. Subsequent to this decision the Supreme Court of North Carolina sustained an order of the state commission requiring the building of a new union depot to replace an old one, but no question was raised as to the authority of the state commission to make such an order as to interstate roads. *Corporation Com'n v. Southern Ry. Co.* 196 N. C. 190, 145 S. E. 19 (1928).

¹⁹ *Lps Angeles Passenger Terminal Cases*, 100 I. C. C. 421 (1925).

²⁰ *Los Angeles Passenger Terminal Cases*, 142 I. C. C. 489 (1928).

Interstate Commerce Commission to consider the evidence for the purpose of determining whether it should order the railroads to build the station. From a judgment dismissing the petition appeal was taken to the Court of Appeals of the District of Columbia. This court was of the opinion that the Interstate Commerce Commission did have authority to order the erection of the station, and reversed the lower court.²¹

On certiorari to review the judgment, the United States Supreme Court settled what had theretofore been a debatable question; namely, what it had decided in its previous opinion²² in this litigation. It said,²³ "The only issue there presented to this Court, was whether it was necessary to secure from the Interstate Commerce Commission its approval of the construction of a union station and the relocation of the connecting tracks proposed. The point in that case was the necessity for the acquiescence by the Interstate Commerce Commission in respect to a union passenger station. We held such a certificate to be necessary before a union station or connecting lines of interstate carriers could be lawful. That is all we held."²⁴

Having concluded that its previous opinion left undecided the question whether the Interstate Commerce Commission had authority to require the erection of union stations, the Court answered the question in the negative, on the ground that if Congress had intended to grant such far-reaching authority affecting numerous cities in all parts of the country it would have done so specifically. The Court of Appeals of the District of Columbia was accordingly reversed.²⁵

The next move of the railroad companies was to petition the California Supreme Court to review the second order of the California commission requiring the erection of the station. The United States Supreme Court having held that authority to order the erection of the depot had not been transferred to the Interstate Commerce Commission, the California court held it was still in the state commission.²⁶ On appeal the United States Supreme Court af-

²¹ U. S. *ex rel.* City of Los Angeles v. Interstate Com. Com'n, 34 F. (2d) 228 (App. D. C. 1929).

²² *Supra* note 13.

²³ Interstate Com. Com'n v. Los Angeles, 280 U. S. 52, 71, 50 Sup. Ct. 53, 74 L. ed. 163 (1929).

²⁴ Compare this language with statements of the court in its previous decision as to the question then before it, *supra* note 14.

²⁵ For a review of this case see (1930) 4 TUL. L. REV. 467.

²⁶ Atchison T. & S. F. Ry. Co. v. Railroad Com'n, 209 Cal. 460, 288 Pac. 775 (1930).

firmed the judgments.²⁷ The Court said,²⁸ "This Court has held that the State Commission could not require the construction of the proposed station, and the relocation of connecting tracks, without the approval of the Interstate Commerce Commission. That approval has been given. This Court has also decided that the Interstate Commerce Commission has not been empowered to require the building of the station. That commission has not attempted to exercise any such authority." The power of the state commission to make the order involved was upheld.

Fifteen years of litigation of this single controversy has thus established the proposition that neither a state body nor the Interstate Commerce Commission may require railroads engaged in interstate commerce to erect a union station with the resultant necessity of making extensive and costly relocation of tracks. Action by both bodies is necessary. First a state body must order the erection of the station in accord with state law. As a condition precedent to the validity of the state order, the consent of the Interstate Commerce Commission must be secured.

The writer has found no case not connected with this controversy directly passing upon the authority of a state body to order the erection of a union depot since the first decision of the United States Supreme Court in this litigation, made in 1924.

It is possible to criticize the course taken by the United States Supreme Court in this litigation. Why did not the Court, when the controversy was first before it, say plainly that authority to order the construction of the depot was properly asserted by the state commission, but that as a condition precedent to the validity of its order a certificate authorizing track relocations must be secured from the Interstate Commerce Commission? The ensuing years of litigation and delay might thus have been avoided. Probably the answer is that at that time no such result was in the mind of the Court. From the language of the decision it appears likely that if the Court had given a definite opinion on the matter it would have said that authority to require the railroads to provide the depot was in the Interstate Commerce Commission. It was in the conflict of litigation that the ultimate solution was shaped. That litigation is reviewed above in some detail so that the shaping may be seen. The result justifies the

²⁷ *Atchison, T. & S. F. Ry. Co. v. Railroad Com'n*, 283 U. S. 380, 51 Sup. Ct. 553, 75 L. ed. 1128 (1931).

²⁸ 283 U. S. at 390, 51 Sup. Ct. at 555, 75 L. ed. at 1136.

toilsome and expensive means. Both interstate and intrastate interests are affected by the erection of a union depot by railroads engaged in intrastate and interstate business. The development of a city, city planning, city transportation, convenience of residents, property values, and intrastate transportation are all involved. On the other hand, interstate transportation is affected. Convenience to interstate travel, the financial burden on interstate railroads, the possible effect on interstate rates, etc., are all to be considered.²⁰ There is need for the judgment of the state and the Federal bodies.

FRANK W. HANFT.

Constitutional Law—Power of Legislature to Prevent Waste of Natural Resources.

A California statute¹ prohibits the unreasonable waste of natural gas. Plaintiffs are producers of gas and oil. The state, acting through its director of natural resources,² secured an injunction restraining plaintiffs from an alleged unreasonable waste of natural gas. Plaintiffs, urging that the statute is unconstitutional,³ now seek to restrain the Superior Court from enforcing the injunction order. *Held, inter alia*, that the statute, if construed as regulating the correlative rights of surface owners, represents a valid exercise of the state's power.⁴

The power to prevent the waste and exploitation of natural resources is generally derived from the police power of the state.⁵ The enactment of statutes designed to preclude the dissipation of timber, gas, oil, subterranean waters, and the like, has been held a valid exercise of the police power.⁶ Although such statutes have

²⁰ Note the matters considered by the Interstate Commerce Commission in Los Angeles Passenger Terminal Cases, 100 I. C. C. 421, 434 and subsequent pages.

¹ The Oil and Gas Conservation Act of California, STAT. CAL. 1915, c. 718, p. 1404; 1917, c. 759, p. 1586; 1919, c. 536, p. 1165; 1921, c. 912, p. 1724; 1929, c. 535, p. 924. Section 8b prohibits the "unreasonable waste of natural gas."

² Section 14b authorizes suit by the director of natural resources to enforce the prohibition.

³ As violating due process of law, as impairing the obligation of contracts, and as denying the equal protection of the laws.

⁴ *Bandini Petroleum Co. et al. v. Superior Court of State of California in and for Los Angeles County, et al.*, 52 Sup. Ct. 103, 76 L. ed. 123 (1931). The litigation giving rise to the instant decision is reviewed in NOTE (1931) 20 CAL. L. REV. 203.

⁵ 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1319.

⁶ *Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 Sup. Ct. 118, 65 L. ed. 276 (1920) (statute prohibiting, under certain conditions, use of natural gas for products where the heat from burning the gas is not fully utilized for other

been frequently assailed upon the grounds that they abrogate due process of law,⁷ that they deny the equal protection of the laws,⁸ that they permit the taking of property without just compensation,⁹ that they grant special privileges and immunities,¹⁰ and that they impair the obligation of contracts,¹¹ their constitutionality has, for the most part, been sustained.¹² In relatively few instances have statutes of this nature been declared unconstitutional.¹³

purposes); *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. 811 (1907); *People ex rel. Stevenot v. Associated Oil Co.*, 211 Cal. 93, 294 Pac. 717; 211 Cal. 348, 296 Pac. 273; and 297 Pac. 536 (1931) (statute to prevent waste of petroleum gas); *Townsend v. State*, 147 Ind. 624, 47 N. E. 19 (1897) (statute prohibiting use of natural gas in "flambeau lights"); *In re* Opinion of the Justices, 103 Me. 506, 69 Atl. 627 (1908) (court declared as constitutional statute to preserve natural water supply by regulating cutting of trees); *Windsor v. State*, 64 Atl. 288 (Md. 1906) (statute regulating taking of oysters); *Eccles v. Ditto*, 23 N. M. 235, 167 Pac. 726 (1917) (statute providing for repairing or plugging of artesian wells to prevent waste); *Quinton Relief Oil & Gas Co. v. Corporation Commission*, 101 Okla. 164, 224 Pac. 156 (1924) (statute empowering corporation commission to make rules to prevent wasteful utilization of natural gas); *Julian Oil and Royalties Co. v. Capshaw et al.*, 145 Okla. 237, 292 Pac. 841 (1930) (statute prohibiting waste in production of crude oil or petroleum and empowering commission to make rules to prevent waste); *Oxford Oil Co. et al. v. Atlantic Oil & Producing Co. et al.*, 16 F. (2d) 639 (N. D. Tex. 1926). *Contra*: *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 Pac. 993 (1922) (statute prohibiting burning of gas without fully utilizing heat for other purposes).

⁷ *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729 (1900) (statute prohibiting escape of gas into air for more than two days after it shall have been struck); *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. ed. 369 (1911) (statute prohibiting artificial drawing of mineral waters for purpose of extracting carbonic gas); *Walls v. Midland Carbon Co.*; *Ex parte* Elam; *Townsend v. State*; *Opinion of Justices*; *Windsor v. State*; *Eccles v. Ditto*, all *supra* note 6; *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326, 87 N. E. 504 (1906) (statute prohibiting extraction of mineral waters under certain circumstances); *F. C. Henderson, Inc. v. Railroad Commission of Texas et al.*, U. S. DAILY, March 10, 1932, at 46.

⁸ *Lindsley v. Natural Carbonic Gas Co.*, *supra* note 7; *Walls v. Midland Carbon Co.*; *Townsend v. State*; *Opinion of Justices*, all *supra* note 6; *Hathorn v. Natural Carbonic Gas Co.*, *supra* note 7. See *State v. Carson Carbon Co.*, 162 La. 781, 111 So. 162, 165 (1927) (information for taking excessive amounts of gas from well in violation of statute).

⁹ *Townsend v. State*; *Opinion of Justices*, both *supra* note 6; *Commonwealth v. Tewksbury*, 11 Met. 55 (Mass. 1846) (statute prohibiting removal of sand, gravel and stones from seashore); *Eccles v. Ditto*; *Oxford Oil Co. et al. v. Atlantic Oil & Producing Co. et al.*; *contra*: *Gas Products Co. v. Rankin*, all *supra* note 6.

¹⁰ *Ex parte* Elam; *Townsend v. State*, both *supra* note 6.

¹¹ *Walls v. Midland Carbon Co.*; *Oxford Oil Co. et al. v. Atlantic Oil & Producing Co. et al.*, both *supra* note 6.

¹² Cases cited *supra* notes 7 to 11 inclusive; note (1923) 24 A. L. R. 307; note (1927) 51 A. L. R. 279.

¹³ *Gas Products Co. v. Rankin*, *supra* note 6; *St. Germain Irrigation Ditch Co. v. Hawthorne Ditch Co.*, 32 S. D. 260, 143 N. W. 124 (1913) (statute providing that all waters of state belong to public, and are, with certain exceptions,

The courts which uphold the constitutionality of the statutes under consideration advance either or both of two theories in support of the state's power of regulation. The first of these is the broad proposition that natural resources are a common heritage; that the citizens of the state as a whole have a distinct interest in the conservation of these resources; consequently, that the state has rights superior to those of the private owner in the matter, and that any prevention of "public" waste is a legitimate and beneficial exercise of the police power incident to state sovereignty.¹⁴ The second theory is based upon a narrower proposition, and one which is applicable only when the particular resource under consideration is of such a character that one landowner may exploit it to the detriment of adjoining landowners who also have access to the resource. The theory is essentially this: by prohibiting the waste of the common resource by one of the landowners, the state is simply adjusting the correlative rights of surface owners and preserving the equilibrium of private property rights by recurring to the maxim, *Sic utere tuo ut alienum non laedas*.¹⁵ Some of the courts apparently consider both of these theories in reaching a decision, but lay stress upon the one or the other.¹⁶

In any consideration of the power of the legislature to regulate the use of natural resources, the importance of property rights is, of course, fundamental. Property in the resource sought to be conserved may be vested in the state by virtue of actual state ownership of the land upon which the resource is found; or, the property right may be vested absolutely in a private owner, as where, at common law, the owner of the soil owned to the sky and to the depths;¹⁷

subject to appropriation); *Huber v. Merkel*, 117 Wis. 355, 94 N. W. 354 (1903) (statute prohibiting waste of water from artesian well).

¹⁴ *Commonwealth v. Trent*, 77 S. W. 390 (Ky. 1903) (statute to prevent waste of gas); *Windsor v. State*, *supra* note 6. See *East Jersey Water Co. v. Board of Public Utility Commissioners et al.*, 98 N. J. L. 449, 119 Atl. 679, 680 (1923) (state board may fix rates charged by corporation taking water from streams and selling it).

¹⁵ *Ohio Oil Co. v. Indiana*; *Lindsley v. Natural Carbonic Gas Co.*, both *supra* note 7; *Walls v. Midland Carbon Co.*, *supra* note 6; *Manufacturers' Oil Co. v. Indiana Oil Co.*, 57 N. E. 912 (Ind. 1900) (statute prohibiting use of artificial means to increase flow of gas from well); *Hathorn v. Natural Carbonic Gas Co.*, *supra* note 7; *People v. New York Carbonic Gas Co.*, 196 N. Y. 421, 90 N. E. 441 (1909); *Oxford Oil Co. et al. v. Atlantic Oil & Producing Co. et al.*, *supra* note 6.

¹⁶ *Townsend v. State*; *Opinion of Justices*; *Eccles v. Ditto*, all *supra* note 6; *People v. New York Carbonic Gas Co.*, *supra* note 15.

¹⁷ *Cujus est solum, ejus est usque ad coelum et ad inferos*. CO. LITT. 4.

or, as a third concept, the property in the resource itself may be vested in the state for the benefit of the citizens, although the resource is found only upon privately owned lands, and is "not capable of private appropriation or ownership except under regulations that protect the general social interest."¹⁸ No one would challenge the power of the state to conserve, for example, timber standing on state-owned lands, for here the state is simply regulating its own property. But when the state attempts, through legislation, to restrict the cutting or destruction of timber standing on privately owned lands,¹⁹ or to impose restrictions upon the extraction of gas and oil by the owner of the lands under which they are found,²⁰ there is inevitably a certain invasion of private property rights. If any rule may be gleaned from the cases which uphold the constitutionality of the statutes under consideration, it is that where an undue depletion of natural resources is imminent, private rights must make concessions to other private rights or to the rights of the state to conserve for the benefit of all.²¹

Legislation to avert the waste of natural resources may take either of two forms: (1) the legislature may enact a statute which defines what will constitute waste and specifically prohibits it;²² (2) the legislature may declare against waste in general terms, and create an administrative agency to which it delegates the powers of investigation and supervision.²³

¹⁸ Pound, *The End of the Law* (1914) 27 HARV. L. REV. 195 at 234: "Recently a strong tendency had arisen to regard running water and wild game as *res publicae*; to hold that they are owned by the state, or better, that they are assets of society which are not capable of private appropriation or ownership except under regulations that protect the general social interest." That the ownership of game is in the state until it is reduced to actual possession, and that mere ownership of the land upon which the game is found is not a sufficient reduction to possession, see 27 C. J. 942, §2. That an analogy (though perhaps not a sound one) has been drawn between the ownership of animals *ferae naturae* and gas and oil in place, see *Townsend v. State*, *supra* note 6; Veasey, *The Law of Oil and Gas* (1920) 18 MICH. L. REV. 445, 466.

¹⁹ As proposed in Opinion of Justices, *supra* note 6.

²⁰ For a discussion of the title to oil and gas in place, see Veasey, *The Law of Oil and Gas*, *supra* note 18. Regardless of whether the common-law rule of absolute ownership, or the so-called Indiana rule of qualified ownership is followed, it would seem that legislative restriction upon the extraction of gas and oil must involve some interference with private rights.

²¹ Pound, *The End of the Law*, *supra* note 18: "It [the tendency to regard running water and game as *res publicae*] means that in a crowded world the social interest in the use and conservation of natural media has become more important than individual interests of substance."

²² As in: *Ohio Oil Co. v. State*, *supra* note 7; *Ex parte Elam*; *Windsor v. State*, both *supra* note 6.

²³ As in: *Quinton Relief Oil & Gas Co. v. Corporation Commission*; *Julian Oil and Royalties Co. v. Capshaw et al.*; *Oxford Oil Co. et al. v. Atlantic Oil*

In North Carolina, the legislature has delegated to the Department of Conservation and Development the general power to promote the conservation of natural resources of the state by "investigation, recommendation and publication."²⁴ The state has enacted, of course, laws which restrict to a certain degree the private appropriation of game and fish;²⁵ but there has been found no legislation in this jurisdiction which specifically defines and prohibits the wasteful use by land owners of resources such as timber and subterranean waters.

In the principal case, the United States Supreme Court, adopting the California court's interpretation of the statute involved, expressly put the decision upon the ground of the adjustment of the correlative rights of surface owners rather than the broader ground of the prevention of public waste. The decision is in line with authority and attains, it is believed, a result clearly consonant with the industrial welfare of the state.

WM. ADAMS, JR.

Corporations—Disregard of Corporate Entity—Liability of Stockholders in Bank Holding Company.

The defendant, a bank president, organized a corporation to hold his shares of bank stock and handle other personal business. The corporation's every transaction was directed and controlled by the defendant, and its entire capital stock of ten dollars was owned by the defendant and his two sons. On the failure of the bank, *held*, that the corporation was a mere agent of the defendant, who was the real owner of the bank stock and therefore individually liable thereon.¹

Instead of disregarding the separate legal entity of the corporation, as is usually done in such cases,² the court in the first instance & Producing Co. *et al.*, all *supra* note 6. See *State v. Carson Carbon Co.*, *supra* note 8, at 165. See *F. C. Henderson, Inc. v. Railroad Commission of Texas*, *supra*, note 7. As to what powers the legislature may delegate to an administrative agency in the exercise of the police power, see 1 COOLEY, *op. cit. supra* note 5, at 228 *et seq.*; see also *State v. Dudley*, 182 N. C. 822, 109 S. E. 63 (1921).

²⁴ N. C. CODE ANN. (Michie, 1931) §6122 (e) (2).

²⁵ Game law: N. C. CODE ANN. (Michie, 1931) §2079 *et seq.*; fish and fisheries: N. C. CODE ANN. (Michie, 1931) §1865 *et seq.*

¹ *Corker v. Soper*, 53 F. (2d) 190 (C. C. A. 5th, 1931).

² In these cases the agency is used as a reason for disregarding the corporate entity, and not as an end in itself. *Jackson v. Thomas Investment Co.*, 46 F. (2d) 252 (C. C. A. 5th, 1931) (action against corporation on a note made by individual). Student commentators have persistently assailed the use of the disregard theory where a "valid legal basis" could be used. (1917) 31 HARV.

recognized its existence as a corporation in order to hold that it, as such, was the agent of the defendant. The situation, however, would have warranted the usual disregard of the corporate entity. There are, roughly, three cases³ in which a court will "pierce the veil⁴ of corporate entity":⁵ (1) where it is used to perpetrate a fraud,⁶ (2) where it is the mere "agent," "adjunct," or instrumentality"⁷ of an individual⁸ or another corporation,⁹ and (3) where it is used

L. REV. 894; (1928) 77 U. OF PA. L. REV. 808; (1930) 78 U. OF PA. L. REV. 908; (1930) 78 U. OF PA. L. REV. 1027. But it seems that, after all, an absolute disregard is the more modern view. Furthermore, it can hardly be denied that by this time the disregard theory has established itself as a "valid legal basis."

³Besides the fact that there are other miscellaneous situations that would not fall distinctly within any of these three groups, the groups themselves necessarily overlap, and often one case will fall into any one or all of the three. However that may be, we have as a constant here the fact that a recognition of the corporate entity would conduce to an inevitable result. (1925) 39 HARV. L. REV. 652; Note (1925) 10 MINN. L. REV. 598.

⁴It has been protested that corporate entity is not a "veil" or "fiction," but a legal fact. BALLANTINE, CORPORATION LAW AND PRACTICE (1930) 25; Note (1926) 60 AM. L. REV. 19; Note (1929) 37 YALE L. REV. 283; (1928) 77 U. OF PA. L. REV. 808; (1925) 10 MINN. L. REV. 598.

⁵Courts seem to be more disposed to apply the disregard doctrine in tort cases than in contract cases. It is consequently interesting that in North Carolina a bank stockholder's liability is contractual. *Smathers v. Bank*, 135 N. C. 410, 47 S. E. 893 (1904).

⁶*Rice v. Sanger Brothers*, 27 Ariz. 15, 229 Pac. 397 (1924) (action on an account incurred by co-partners under the guise of a corporation); *National Mortgage Loan Co. v. Hurst*, 120 Neb. 37, 231 N. W. 519 (1930) (action by subsidiary to foreclose mortgages); *Minifie v. Rowley*, 187 Cal. 481, 202 Pac. 673 (1921) (action against individual on note executed by corporation); *First National Bank v. Trebein*, 59 Ohio St. 316, 52 N. E. 834 (1898) (attempt to defraud creditors). But actual fraud need not be shown, it being sufficient that a recognition of the entity would conduce to an inequitable result. *Winban Estate v. Hewlett*, 193 Cal. 675, 227 Pac. 723 (1924) (corporation organized for sole purpose of handling owner's property). The soundness of such a rule may be reasonably questioned, since some inequitable results occur in all cases where the stockholders are solvent and the corporation insolvent. The very essence of the corporate theory is limited liability. (1925) 39 HARV. L. REV. 652; (1925) 10 MINN. L. REV. 598.

⁷These terms are of little assistance in determining when the corporate entity should be disregarded. They serve more as a description of the court's finding than as a means of reaching a certain result.

⁸*Jackson v. Thomas Investment Co.*, *supra* note 2; *Knight v. Burns*, 22 Ohio App. 482, 154 N. E. 345 (1926) (individual set-off in action by corporation); *Varni v. Anglo American Land Co.*, 103 Cal. App. 326, 284 Pac. 520 (1930) (incorporation for transaction of personal business). The mere fact that the corporation has only one or a few stockholders theoretically does not affect the question of disregard. (1930) 78 U. OF PA. L. REV. 908; Note (1912) 12 COL. L. REV. 496. But it can hardly be doubted that actually it bears materially on the question. The Maryland court, and seemingly that of Alabama, have held that the fact that it was a one man corporation was alone sufficient to disregard it. *Swift v. Smith*, 65 Md. 428, 5 Atl. 534 (1886); *Steiner Land and Lumber Co. v. King*, 119 Ala. 168, 24 So. 35 (1898).

⁹*Jefferson County Burial Society v. Cotton*, 133 So. 256 (Ala. 1930) (tort action for negligence of subsidiary); *Platt v. Bradner Co.*, 131 Wash. 573, 230

for the purpose of evading a statute¹⁰ or an existing legal obligation.¹¹

An application of the third case to the instant situation raises the increasingly important question whether a court, in its search for the real owner of bank stock, would go to the extent of ignoring the corporate entities of such corporations as Northwest Bancorporation,¹² Marine Midland Corporation,¹³ Wisconsin Bankshares Corporation,¹⁴ and BancoKentucky Company,¹⁵ whose sole pur-

Pac. 633 (1924) (contract of sale with subsidiary); *Old Ben Coal Co. v. Universal Coal Co.*, 248 Mich. 486, 227 N. W. 794 (1929) (garnishment against subsidiary). (1912) 12 COL. L. REV. 496; (1926) 60 AM. L. REV. 19.

¹⁰ *United States v. Barwin Realty Co.*, 25 F. (2d) 1003 (E. D. N. Y. 1928) (transfer of property to corporation without consideration to evade tax law); *State ex rel. Johnson & Higgins Co. v. Stafford*, 117 Ohio St. 576, 159 N. E. 829 (1927) (evasion of state law as to insurance licenses); *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. ed. 458 (1910) (evasion under Hepburn Act); *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (C. C. E. D. Wis., 1905) (evasion under Elkins Act); *Palmolive Company v. Conway*, 43 F. (2d) 226 (W. D. Wis. 1930) (evasion of income tax through subsidiary); *Lowenstein v. British American Mfg. Co.*, 300 Fed. 853 (D. Conn. 1924) (evasion of usury law); Note (1930) 16 CORN. L. Q. 90. North Carolina corporations are embraced within the usury laws just as natural persons; therefore, the usury question could not arise. See Commissioners v. A. C. L. R. Co., 77 N. C. 289, 292 (1877); Note (1930) 9 N. C. L. REV. 189.

¹¹ *Beal v. Chase*, 31 Mich. 490 (1875) (incorporation to evade covenant in a contract); *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813 (1896) (same); *Moore & Handley Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 So. 41 (1888) (same); BALLANTINE, CORPORATION LAW AND PRACTICE (1930) 28; Note (1912) 12 COL. L. REV. 496. Courts are not as disposed to disregard here as when the incorporation is to evade a statute.

¹² Incorporated in Delaware, Jan. 24, 1929. On Feb. 16, 1931, it had controlling interest in 122 banks and 11 investment companies. Has an authorized capital of \$300,000,000. On Dec. 31, 1930, it had 12,757 stockholders and resources of \$471,866,502. MOODY'S MANUAL, BANKS AND FINANCE (1931) 1991.

¹³ Incorporated in Delaware, September 23, 1929, with a charter of perpetual duration. As of December 31, 1930, it controlled 16 banks and had total resources of \$586,092,571 and an authorized capital stock of \$100,000,000. MOODY'S MANUAL, BANKS AND FINANCE (1931) 2195.

¹⁴ Incorporated in Wisconsin, December 10, 1929. As of December 31, 1930, it controlled 53 national and state banks, trust and investment companies and had total resources of \$327,568,441 and an authorized capital stock of \$100,000,000. MOODY'S MANUAL, BANKS AND FINANCE (1931) 2163.

¹⁵ Incorporated in Delaware, July 16, 1929, to control national and state banks primarily in Kentucky, Ohio, and Indiana. Other similar corporations are: National Republic Bancorporation, incorporated in Delaware and controlling banks chiefly around Chicago. MOODY'S MANUAL, BANKS AND FINANCE (1931) 1505; The Mellbank Corporation, said not to be an affiliate of Mellon National Bank, and controls banks in the Pittsburgh area. See MOODY'S MANUAL, BANKS AND FINANCE, Advance Parts (1932) 1706; Transamerica Corporation, incorporated in Delaware and controlling banks through control of other holding companies. This latter is a very complicated and enormous structure and would afford more difficulty in reaching the individual stockholders, since more than one legal entity would have to be disregarded. It was at one time proposed that Transamerica Corporation should relinquish control of banks. MOODY'S MANUAL, BANKS AND FINANCE, Advance Parts, (1932) 1161. But since that time the Giannini interests, which are opposed to this change, have returned to control.

pose is to hold and own stock in financial institutions.¹⁶ Such a step would not be surprising in view of the frequency with which courts have ignored the existence of such large corporations as those affiliated with or controlled by railroad companies.¹⁷ It would be a collateral rather than a further lineal step for a court to treat a bank holding corporation as an association of individuals, who in that case would be liable *pro rata*¹⁸ should any of the controlled banks fail. The step¹⁹ is for this reason all the more probable.²⁰ And once this probability becomes common knowledge, the purchase of stock in these corporations might be considerably curtailed, especially in times such as at present, when bank failures have become a common occurrence.

FRANK P. SPRUILL, JR.

¹⁶ In this they closely approximate the corporation in the instant case.

¹⁷ *United States v. Lehigh Valley R. R.*, 254 U. S. 255, 41 Sup. Ct. 104, 65 L. ed. 253 (1920); *United States v. Reading Co.*, 253 U. S. 26, 40 Sup. Ct. 425, 64 L. ed. 760 (1919); *Chicago, Milwaukee, & St. Paul Railway v. Minneapolis Civic & Commerce Association*, 247 U. S. 490, 38 Sup. Ct. 553, 62 L. ed. 1229 (1918); *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (E. D. Wis. 1905).

¹⁸ The fact that it is *pro rata* indicates the impossibility of identifying certain of the stockholders of the holding company with certain of the controlled banks. It would thus practically preclude the use of the agency basis which was used in the instant case. However, it seems that that fact would in no way impair the use of the disregard theory here.

¹⁹ There is a possibility of a legislative step here. A statute conceivably might provide that all stockholders of bank holding companies are liable *pro rata* on their stock, adopting as a basis the judicial theory of disregarding the corporate entity. Something of this nature is found in the public utility field of N. Y. LAWS §110, where the public service commission and the transit commission are given jurisdiction and certain control of transactions between "affiliated interests." A bill was proposed in the United States House of Representatives (H. R. 5324) on December 10, 1931, providing, among other things, that no corporation should dominate the affairs of an interstate railroad without the approval of the Interstate Commerce Commission. A North Carolina statute provides that "no officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank, etc." (Italics writer's). N. C. CODE ANN. (Michie, 1931) §221 n. It seems that the only justification for such legislation would be the disregard theory.

²⁰ This probability recently has reached a very material stage. There has been filed in the United District Court for the western district of Kentucky a bill in equity against Mr. Paul C. Keyes, receiver of the defunct National Bank of Kentucky, to enjoin him from assessing the stockholders of the Banco-Kentucky, *pro rata*, on the stock which that company owned in the National Bank of Kentucky. MOODY'S MANUAL, BANKS AND FINANCE, Advance Parts (1932) 1450. Till now no answer has been filed to the complaint, as successive extensions have been obtained either by agreement of counsel or orders of the court. The decision of the court in this matter may or may not decide our particular question, since the suit may be either abandoned or dismissed on procedural grounds. It is interesting that Mr. Keyes states that "I have in every proper and necessary manner reserved the right to proceed against the stockholders of the Banco-Kentucky Company in connection with an assessment levied against the shareholders of the National Bank of Kentucky." If Mr. Keyes' position is upheld by the court, our probability will have become a fact.

Extradition—Sufficiency of Charge in Warrant.

A rendition warrant was issued in North Carolina upon a Virginia requisition¹ based on an affidavit and a warrant charging that the accused "did unlawfully utter two worthless checks." The requisition was challenged² on the ground that there was no allegation of an intent to defraud. It was held³ that there was not a "substantial charge" of crime sufficient for extradition under the Uniform Criminal Extradition Act.⁴

The elements of the offense charged are (1) the uttering of an instrument for the payment of money, (2) knowing of its worthlessness, and (3) with the intent to defraud.⁵ The Virginia court has held that "the gravamen of the offense is the fraudulent intent."⁶ At common law an indictment must allege all the elements of the crime charged.⁷ Some states have departed from the strictness of this rule,⁸ and the American Law Institute Code of Criminal Procedure provides that the indictment is sufficient if it charges the offense "by stating so much of the definition of the offense, either in terms of

¹ Interstate extradition is provided for by Art. 4, §2, of the Constitution of the United States. The procedure is regulated by 1 STAT. 302 (1793), 18 U. S. C. A. §662 (1926); *Munsey v. Clough*, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. ed. 515 (1905); *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. ed. 544 (1885); *In re Veasey*, 196 N. C. 662, 146 S. E. 599 (1929); *Chase v. State*, 93 Fla. 963, 113 So. 103 (1927).

² On habeas corpus, the requisition may be attacked on two grounds: (1) that it does not substantially charge the crime; (2) that accused is not a fugitive from justice. *Roberts v. Reilly*; *Munsey v. Clough*; *Chase v. State*; *In re Veasey*, all *supra* note 1; *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. ed. 542 (1884); *Ex parte Pelinski*, 213 S. W. 809 (Mo. 1919); *Chandler v. Sipes*, 103 Neb. 111, 170 N. W. 604 (1919); *In re Waterman*, 29 Nev. 288, 89 Pac. 291 (1907), 11 L. R. A. (N. S.) 424 (1908); *People v. Police Com'r.*, 100 App. Div. 483, 91 N. Y. S. 760 (1905); *State v. Edwards*, 192 N. C. 321, 135 S. E. 37 (1926); *In re Holly*, 154 N. C. 163, 69 S. E. 872 (1910); *Ex parte Brown*, 38 Okla. Cr. R. 124, 259 Pac. 280 (1927); *Ex parte Todd*, 12 S. D. 386, 81 N. W. 637, 47 L. R. A. 566 (1900); *Ex parte Ponzi*, 106 Tex. Cr. R. 58, 290 S. W. 170 (1927).

³ *In re Hubbard*, 201 N. C. 472, 160 S. E. 569 (1931).

⁴ N. C. CODE ANN. (Michie, 1931) §4556. The proceeding is practically the same as provided in the Federal statute. 9 UNIFORM LAWS ANN. (1930 Supp.) 105. The words "it shall be the duty," in 1 STAT. 302 (1793), 18 U. S. C. A. §662 (1926), were not used as mandatory, "but impose only a moral duty arising from the compact between the states." *Kentucky v. Dennison*, 24 How. (U. S.) 66, 16 L. ed. 717 (1861). The purpose of state statutes on extradition is to impose upon the governor the duty to properly execute the Federal Constitution and laws thereunder. *Ex parte Smith*, 22 Fed. Cas. No. 12,968 (C. C. D. Ill. 1843).

⁵ VA. CODE ANN. (Michie, 1930) §4149 (44).

⁶ *Turner v. Brenner*, 138 Va. 232, 121 S. E. 510 (1924).

⁷ 2 BISHOP, NEW CRIMINAL PROC. (2d ed. 1913) §523.

⁸ CODE OF CRIMINAL PROC. (Am. L. Inst. 1928) Tentative Draft No. 1, p. 450.

the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged."⁹ The constitutionality of this provision was upheld by the New York court.¹⁰

At common law the same degree of particularity was not required in a warrant as in an indictment.¹¹ The court, in the instant case, disclaims all intentions of referring to a warrant "all the technicalities of an indictment or information." The North Carolina court requires even less particularity in a warrant for the purpose of binding over than in a warrant for purpose of trial.¹² The instant case seems to fall more in the former category.¹³ However, the court says that even in a warrant all the essential elements must be set forth, and, further, that this is required by the Uniform Criminal Extradition Act.

It is submitted, (1) that the warrant is sufficient, under the American Law Institute Code, to give the "court and the defendant notice of what offense is intended to be charged," (2) that it might reasonably be held sufficient under the doctrine requiring less particularity in a warrant than in an indictment, and (3) that it might be sufficient under the rule laid down by the North Carolina court requiring less particularity in a warrant for purpose of arrest than for purpose of trial.

JAMES O. MOORE.

Gaming Laws—Legalized Race Track Betting.

There was introduced into the 1931 General Assembly of North Carolina the Buncombe County Racing Bill.¹ This bill passed the House, but was defeated in the Senate.² It would have created a racing commission for Buncombe County with power to grant to any North Carolina corporation, created for the purpose of promoting

⁹ CODE OF CRIMINAL PROC. (Am. L. Inst. 1930) Proposed Final Draft §159.

¹⁰ *People v. Boydanoff*, 254 N. Y. 16, 171 N. E. 890 (1930).

¹¹ 1 BISHOP, CRIMINAL PROC. (2d. ed. 1913) §187.

¹² *State v. Gupton*, 166 N. C. 257, 80 S. E. 989 (1914); *State v. Davis*, 111 N. C. 729, 16 S. E. 540 (1892); *State v. Norman*, 110 N. C. 484, 14 S. E. 968 (1892); *State v. Jones*, 88 N. C. 671 (1883); *State v. Bryson*, 84 N. C. 780 (1881).

¹³ . . . "but extradition is a mere proceeding in securing arrest and detention." *In re Strauss*, 197 U. S. 324, 331, 25 Sup. Ct. 535, 49 L. ed. 774 (1905).

¹ H. B. No. 791, introduced by Mr. Reed.

² *Raleigh News and Observer*, March 14, 1931.

the breeding of horses or dogs, a franchise to operate a race course for running races of horses or dogs. The bill provides that a corporation so enfranchised would be authorized to operate pari-mutuel machines, and that it would be legal for persons to patronize these machines. The act was to apply only to Buncombe County, and that county was to be exempt from such provisions of the state gaming laws, criminal³ and civil,⁴ as might conflict with the act.

The criminal gaming laws, to which the exemption apparently was intended to apply, prohibit betting on a "game of chance," and operation of a gambling device. No North Carolina case has been found which involved a criminal prosecution for betting on a horse race. The Supreme Court has held that in a game of chance, luck as opposed to skill, is the predominant element.⁵ Where the statute is directed against betting on a game, a bet placed on a horse race is usually held in other states to be a violation,⁶ but an oral bet on a horse race does not violate a prohibition against betting on a game of chance.⁷ Although there is an element of chance in the outcome of a racing bet, there is a large element of skill in placing the bet. When the bet is not an oral one, but is made by means of the pari-mutuel,⁸ there is introduced a larger element of chance in that the odds may change before the race is run, and the amount which may be won is thus more uncertain than in an oral bet. Accordingly, it has been held that pari-mutuel betting is a game of chance, whereas oral betting would not be.⁹

The gambling laws of the states are comprehensive, and many expressly make it a criminal offense to bet on a horse race. North Carolina prohibits lotteries and betting on and operation of games of

³ N. C. ANN. CODE (Michie, 1931) §§4427-4435.

⁴ N. C. ANN. CODE (Michie, 1931) §§2142-2149.

⁵ *State v. Gupton*, 30 N. C. 271 (1848), "—the universal acceptance of a 'game of chance' is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance."

⁶ *Ellis v. Beale*, 18 Me. 337 (1841); *Wade v. Deming*, 9 Ind. 35 (1857); *Dyer v. Benson*, 69 Ga. 609 (1882); *People v. Weithoff*, 51 Mich. 203, 16 N. W. 442 (1883). *Contra*, *Com. v. Shelton*, 8 Gratt (Va.), 592 (1851); *State v. Rorie*, 23 Ark. 726 (1861).

⁷ *Harless v. U. S.*, 1 Morr. 169 (Iowa, 1843).

⁸ Substantially, the pari-mutuel system is one in which each bettor lays a fixed sum on the horse he selects, and all the money is distributed at the conclusion of the race among those backing the winning horses. Thus, the greater the pool and the smaller the number of tickets sold on the winning horses, the larger the winnings.

⁹ *Tollett v. Thomas*, (1871) L. R. 6 Q. B. 514.

chance, and its statutes designed to effectuate these prohibitions are complete. It is, however, doubtful whether its statutes outlaw betting on races.

Laws which expressly legalize race track betting have been enacted in several states. Kentucky makes it lawful to bet within the enclosure of a licensed race meeting.¹⁰ Maryland legalizes bets made at licensed meetings other than in Baltimore City.¹¹ Illinois specifies the pari-mutuel system as lawful betting at a licensed meeting,¹² and Nevada also legalizes the pari-mutuel.¹³ In 1925 Utah authorized pari-mutuel betting,¹⁴ but repealed the act in 1927.¹⁵ Kansas allows betting at races for a period of two weeks per year for each track.¹⁶ Montana allows patrons of races to contribute entrance fees and divide the purse among such patrons for certain periods each year.¹⁷ In 1924 Arizona defeated at the polls a measure which would authorize pari-mutuels,¹⁸ and in 1927 California in like manner defeated a measure designed to license betting on horse racing.¹⁹ A bill similar to that defeated by the North Carolina Senate was introduced in South Carolina and was passed by the House in 1931, but was defeated by the Senate this year.²⁰

The states that authorize betting usually create betting commissions which license the racing associations and prescribe rules.²¹ The number of racing days and the time of year in which meets may be held are either provided by statute or determined by the commissions.²² The North Carolina bill provided that the franchise fee

¹⁰ KY. STAT. (Carroll, 1930) §1328a.

¹¹ MD. ANN. CODE (Bagby, 1924) Art. 78B.

¹² ILL. ANN. STAT. (Callahan, 1925-1931 Supp.) c. 38, §316 (10).

¹³ NEV. COMP. LAWS (1929) §10201.

¹⁴ LAWS OF UTAH (1925) c. 77 §6.

¹⁵ LAWS OF UTAH (1927) c. 6.

¹⁶ KAN. REV. STAT. ANN. (1923) c. 21, §1510.

¹⁷ MONT. SESSION LAWS (1929) c. 103. Cf. *State v. Ak-Sar-Ben Expos. Co.*, 118 Neb. 851, 226 N. W. 705 (1929).

¹⁸ ARIZ. SESSION LAWS (1925) p. 559.

¹⁹ CAL. CODE (Stat. and Amend. 1927) p. lxxxvi.

²⁰ S. B. 847; H. B. 920.

On March 3, 1932, The Massachusetts House of Representatives defeated a pari-mutuel bill, *U. S. Daily*, March 4, 1932.

²¹ NEV. COMP. LAWS (1920) §6218; KY. STAT. (Carroll, 1930) §3390a-2; MD. ANN. CODE (Bagby, 1924) Art. 78B. In Illinois the duties are in the Director of Agriculture. ILL. ANN. STAT. (Callahan, 1925-1931 Supp.) c. 38, §316 (2).

²² Illinois: Races on week days; between 12 noon and 7 in afternoon; not more than 51 racing days per track each year; May 1 to Oct. 31.

Kentucky: April 1 to Dec. 1; not before sunrise; not after sunset.

Nevada: Association may hold one or more meetings; meetings not to exceed 30 days racing; no Sunday racing.

should be five thousand dollars for a minimum period of five years, and one thousand dollars for each additional year, and that the association should also pay for each day of racing ten per cent of the gross receipts from operations of that day. These sums were to be for the use of Buncombe County. In Maryland, county and state governments receive certain payments.²³ Nevada receives one-sixth of ten per cent of the amount involved in pari-mutuels, and this sum goes to the highway fund.²⁴ Illinois appropriates its share for an "Agricultural Premium Fund," to be used for the payment of prizes at agricultural fairs.²⁵ The commission which the associations may charge patrons of the pari-mutuels is restricted by statutes to ten per cent in Nevada,²⁶ and six and one-half per cent in Illinois.²⁷

Attitudes toward legalized betting naturally are varied. One argument for the Buncombe County bill was that it would produce a substantial revenue for that county.²⁸ Opposition, led by the press and by the churches, defeated the bill.²⁹ In one state an opinion³⁰ is expressed that, "The racing interests are doing a great deal of harm. . . . They are meddling in governmental affairs. . . . Wherever race tracks are operated crime is abundant. The effect is especially detrimental upon the young people." In another state, "For this state and its people, they being liberal in their views, the pari-mutuel law is satisfactory. . . . Where the community bets on pari-mutuels they believe it is proper to bet on anything else." A third state, "Through the operation of this system it is possible for the race tracks to turn over to the state substantial payments which serve in holding down the tax rate. . . ." From another state, "You will not find the low classes of people there at any time, but usually

Maryland: not more than 2 meetings to an association; to be awarded by the commission.

²³ MD. ANN. CODE (Bagby, 1924) Art. 78B, §8. License fee of \$6,000 for each day of racing; also 15 per cent of net revenue.

²⁴ NEV. COMP. LAWS (1929) §6223; association to take 10 per cent out of moneys from sale of pari-mutuels, 1/6 of which shall be paid to racing commission and by it to state treasurer and paid into highway fund.

²⁵ ILL. ANN. CODE (Callahan, 1925-1931 Supp.) c. 38, §316 (4); license fee of \$2,500 for each racing day; also fee of 20 cents per person entering enclosure on paid admission.

²⁶ *Supra* note 24.

²⁷ *Supra* note 25. §316 (10).

²⁸ *Raleigh News and Observer*, March 12, 14, 1931.

²⁹ *Supra* note 28.

³⁰ These opinions were obtained by means of letters sent to residents in Illinois, Kentucky, Maryland, and Nevada.

the crowd is made up of what is supposed to be our best citizens." "The effect upon the child would have to come through the parents inasmuch as children are not allowed to wager at race tracks in Illinois." "The courts have refused to declare oral betting illegal, and were there not the pari-mutuel system, there would be betting nevertheless, but the state could not exact any revenue from unsupervised betting." A New York statute forbids betting at race tracks.³¹ Betting at the tracks is there done secretly. A criticism is made that those who know a "bookie" can bet but a stranger cannot.³²

When the Buncombe County bill was before the General Assembly its constitutionality was questioned by the press.³³ It would seem doubtful whether the act would not be such an unreasonable discrimination between persons in different localities as would violate the constitutional requirement of equal protection of laws.³⁴ There is also a question whether an act that allows an immunity to corporations which operate in Buncombe County while corporations doing the same acts in another county may violate the law is not in contravention of the North Carolina constitutional prohibition against granting exclusive or separate emoluments or privileges.³⁵ The North Carolina Constitution also forbids the General Assembly to pass by the partial repeal of a general law a special act relating to "the abatement of nuisances."³⁶ If the general gaming law were held an enactment to abate the nuisance of gambling, then the proposed bill would be invalid on that ground alone.

E. M. PERKINS.

Injunctions—Illegal Expenditure of Public Funds.

Petitioner, a citizen and taxpayer, invoked the original jurisdiction of the Supreme Court of South Carolina to enjoin the state treasurer from paying certain vouchers or checks issued to members of the General Assembly as expense money, in accordance with a 1931 appropriation therefor, on the ground that such payments were violations of constitutional limitations on compensation. *Held*,

³¹ N. Y. CONS. LAWS (Cahill, 1930) c. 41, §991.

³² *Reflections In and Upon Saratoga* (1926) 117 Independent 179.

³³ *Supra* note 28.

³⁴ See *State v. Fowler*, 193 N. C. 290, 136 S. E. 709 (1927). Statute which made punishment for violation of prohibition law in five counties different from that prescribed by general law, held unconstitutional.

³⁵ N. C. CONST., Art. I, §7.

³⁶ N. C. CONST., Art. II, §29.

temporary restraining order dissolved and the petition dismissed, because petitioner failed to show that the expenses were personal as distinguished from official.¹

Equity is generally conceded to have jurisdiction at the suit of a taxpayer to enjoin the illegal expenditure of the funds of a municipality, or of a local political body, as distinguished from those of a state.² Several recent decisions have purported to extend this jurisdiction to "public funds," but the funds actually involved were those of county³ and school districts.⁴ The stock explanation is that the taxpayer's interest in the funds of a local government unit is direct and immediate, analogous to a stockholder's interest in a private corporation.⁵ Thus, the courts have enjoined payment of salary to a *de facto* city officer,⁶ payment of election expenses,⁷ payment of individual obligations of village council members,⁸ the issuance of county road bonds,⁹ and the unwarranted use of school buses.¹⁰

A taxpayer of the United States, on the other hand, is denied the right to enjoin the improper expenditure of federal funds. His interest is thought to be too minute and indeterminable, and the effect upon future taxation too remote, to warrant judicial interference.¹¹

If the expenditure of funds belonging to a state is sought to be enjoined, the courts disagree. The minority give varied reasons for refusing relief: the practice is not permitted by public policy as it might lead to the suspension of all departments of the state government;¹² it violates the necessary relations between coordinate branches of the government;¹³ a taxpayer has no special interest giving him

¹ Scroggie v. Scarborough, 160 S. E. 596 (S. C. 1931).

² Crompton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070 (1879); Note (1918)

10 Rose's Notes 1257; Note (1912) 36 L. R. A. (N. S.) 1.

³ Harding v. Board of Sup'rs of Osceola Co., 237 N. W. 265 (Iowa 1931); McAlpine v. Dimick, 326 Ill. 240, 157 N. E. 235 (1927).

⁴ Schmidt v. Blair, 203 Iowa 1016, 213 N. W. 593 (1927).

⁵ Merrimon v. Paving Co., 142 N. C. 539, 55 S. E. 366 (1906); Asplund v. Hannett, 31 N. M. 641, 249 Pac. 573 (1926), 58 A. L. R. 573 (1929); DILLON, MUNC. CORP. (5th ed. 1911) §1580.

⁶ Johnson v. City of Milwaukee, 147 Wis. 476, 133 N. W. 627 (1911).

⁷ McAlpine v. Dimick, *supra* note 3.

⁸ Pierce v. Hagans, 79 Ohio St. 9, 86 N. E. 519, 36 L. R. A. (N. S.) 1 (1908).

⁹ Harding v. Board of Sup'rs. of Osceola Co., *supra* note 3; for other case types, see Note (1912) 36 L. R. A. (N. S.) 1.

¹⁰ Schmidt v. Blair, *supra* note 4.

¹¹ Frothingham v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. ed. 1078 (1923).

¹² Jones v. Reed, 3 Wash. 57, 27 Pac. 1067 (1891); Note (1916) 3 VA. L. REV. 382.

¹³ Asplund v. Hannett, *supra* note 5.

capacity to sue—the action must be brought by the attorney-general;¹⁴ and a state cannot be sued in any of its courts without its express consent.¹⁵ The majority sees nothing but a threatened illegal payment calling for preventive action.¹⁶ Thus, the courts have enjoined payment of a legislative appropriation for a sectarian hospital,¹⁷ the leasing of state-supported convicts,¹⁸ and the investigation of practices of a Zionist sect by a legislative committee under a void statute.¹⁹

The North Carolina court allows a taxpayer the remedy of an injunction to restrain the misappropriation of municipal funds,²⁰ but he must first exhaust his means of obtaining redress within the corporation,²¹ except where the municipality is under the control of the guilty parties themselves.²² Because of an early case North Carolina has been classed as doubtful or unsettled as to injunctions to restrain a state officer from squandering public moneys.²³ But there is a strong dictum in a recent case: "The plaintiff has . . . (an) interest as a citizen and taxpayer in seeing that the funds, in which the public has an interest, should not be diverted to an illegal purpose, or squandered for unauthorized purposes."²⁴

It is submitted that this dictum should become law. The question is not the relative importance of the particular taxpayer's prospect of individual harm. Instead, in view of the increasing complexity of governmental finance, the question should be whether the public interest in the safeguarding of public funds could not better be protected by a test of the propriety of the expenditure in question by the anticipatory, preventive, and summary action of an injunction proceeding, brought by the individual taxpayer in behalf of all others in his class. The risk of delay in keeping governmental obligations should not outweigh the desirability of such a

¹⁴ *State ex rel. Jeuneman v. Superior Court*, 157 Wash. 429, 289 Pac. 28 (1930).

¹⁵ *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425 (1895).

¹⁶ *Gaston v. State Highway Department of South Carolina*, 134 S. C. 402, 132 S. E. 680 (1926); *Collins v. Martin*, 302 Pa. 144, 153 Atl. 130 (1931); *Stong v. Milliken*, 76 Colo. 515, 233 Pac. 154 (1925); *Note* (1929) 58 A. L. R. 588; *Note* L. R. A. 1915D 178.

¹⁷ *Collins v. Martin*, *supra* note 16.

¹⁸ *Green v. Jones*, 164 Ark. 118, 261 S. W. 43 (1924).

¹⁹ *Greenfield v. Russel*, 292 Ill. 392, 127 N. E. 102 (1920).

²⁰ *Stratford v. City of Greensboro*, 124 N. C. 127, 32 S. E. 394 (1899).

²¹ *Merrimon v. Paving Co.*, *supra* note 5.

²² *Murphy v. Greensboro*, 190 N. C. 268, 129 S. E. 614 (1925).

²³ *Galloway v. Jenkins*, 63 N. C. 147 (1869); *Note* L. R. A. 1915D 184.

²⁴ *State v. Scott*, 182 N. C. 865, 109 S. E. 789 (1921).

test where the question appears serious enough to warrant a restraining order or temporary injunction. The attorney-general may intervene. Perhaps a statute, as the Declaratory Judgment Act,²⁶ might require him to appear.

The principal case is unique. The conflict was between the highest court in the state and the legislature. Their coördinate status made the question one of no inconsiderable delicacy. South Carolina, as to state funds, having previously overruled an earlier decision²⁶ and joined the majority in favor of jurisdiction,²⁷ here had to take jurisdiction for granted. It would appear, however, that the court maintained interdepartmental courtesy only by subterfuge.

NAOMI ALEXANDER.

Injunctions—Threats of Infringement Suits as Unfair Competition.

The president of the plaintiff corporation had withdrawn from a like position with the defendant in Cleveland, taking with him advertising cuts and files of correspondence to be used along with his complete knowledge of the defendant's business in establishing his own company on the Pacific Coast. For a period of two years the defendant continued to warn the customers of the plaintiff that they were liable to suit for infringement of the defendant's patents. No action was taken, however, and plaintiff brought this suit for an injunction against further circulation of the notices. *Held*, injunction denied. No bad faith or malice shown.¹

In another and contemporaneous case the defendant kept up a line of fulminations against the customers of the plaintiff alleging that patents were infringed and that suits were about to be brought against the makers and users of the infringed articles. The companies were competitors in the Oklahoma oil fields, but no suit was brought within a reasonable time. *Held*, because of the allegations of bad faith, motion to dismiss for failure to state a cause of action overruled.²

One of the most familiar injunction cases in a trade quarrel is that in which one competitor sets out to cut a rival's throat by driving away his customers with false threats of patent infringement suits.

²⁵ N. C. CODE ANN. (Michie, 1931) §628h.

²⁶ *Butler v. Ellerbe*, *supra* note 15.

²⁷ *Gaston v. State Highway Department of South Carolina*, *supra* note 16.

¹ *Oil Conservation Engineering Co. v. Brooks Engineering Co.*, 52 F. (2d) 783 (C. C. A. 6th, 1931).

² *Dehydro, Inc. v. Tretolite Co.*, 53 F. (2d) 273 (N. D. Okla. 1931).

In this situation it is now well established, in the federal courts at least, that the doctrine of *Emack v. Kane* will be applied and the injunction granted.³ But the courts are careful to see that the process is not used to suppress a legitimate infringement claim or one made in good faith.⁴ The basis upon which most cases ultimately turn is the presence or absence of bad faith.⁵ There are a number of state cases, however, which arbitrarily hold that because a libel may be redressed at law, equity will not deal with the matter.⁶

³ 34 Fed. 46 (C. C. N. D. Ill. 1888); *Racine Paper Goods Co. v. Dittgen*, 171 Fed. 631 (C. C. A. 7th, 1909); *A. B. Farquhar Co. v. National Harrow Co.*, 102 Fed. 714 (C. C. A. 3d, 1900) (party enjoined from use of circulars and infringement notices in bad faith, without intention to sue and for the purpose of breaking up a competitor's business and destroying his property); *Maytag Co. v. Meadows Manufacturing Co.*, 35 F. (2d) 403 (C. C. A. 7th, 1930); *Sun Maid Raisin Growers of Calif. v. Avis*, 25 F. (2d) 303 (N. D. Ill. 1928); *Flynn & Emrich Co. v. Federal Trade Commission*, 52 F. (2d) 836 (C. C. A. 4th, 1931). *Contra*: *Kidd v. Horry*, 28 Fed. 773 (C. C. E. D. Pa. 1886); *Baltimore Car Wheel Co. v. Beamis*, 29 Fed. 95 (C. C. D. Mass. 1886).

⁴ *Virtue v. Creamery Package Co.*, 179 Fed. 115 (C. C. A. 8th, 1910) (the owner of a patent has good right to warn infringers, or persons believed to be such, of his rights); *A. B. Farquhar Co. v. National Harrow Co.*, *supra* note 3 (the owner of a patent may, by letters and circulars, warn others against infringement of his monopoly, and assert his intention to protect his rights by suit).

⁵ *Alliance Securities Co. v. De Vilbiss*, 41 F. (2d) 668 (C. C. A. 6th, 1930) (that the defendant presumed too much in the notices he sent to the customers of an infringer is no ground for an injunction unless it can be shown that the notices were sent maliciously and in bad faith); *Maytag Co. v. Meadows Manufacturing Co.*, *supra* note 3 (equity has jurisdiction of a suit to enjoin a substantial and continuing injury to a manufacturing business caused by circulation of false statements that the product is an infringement of patents and threatening suit in bad faith for the purpose of injuring the trade of a competitor and without intention to sue); *Celotex Co. v. Insulite Co.*, 39 F. (2d) 213, (D. Minn. 1930) (fight between rival manufacturers of plaster board; one had circularized the trade with threats of patent infringement suits which were not brought; injunction denied for want of sufficient showing of bad faith); *Sun Maid Raisin Growers of Calif. v. Avis*, *supra* note 3 (infringement notices not followed by suit indicates bad faith that will warrant an injunction); *Clip Bar Manufacturing Co. v. Steel Protected Concrete Co.*, 209 Fed. 874 (E. D. Pa. 1913) (former unsuccessful suit against other parties in another circuit is not such evidence of bad faith as will justify an injunction); *Virtue v. Creamery Package Co.*, *supra* note 4; *A. B. Farquhar Co. v. National Harrow Co.*, *supra* note 3; *Computing Scale Co. v. National Computing Scale Co.*, 79 Fed. 962 (C. C. N. D. Ohio 1897); *Kelly v. Ypsilanti Dress Stay Mfg. Co.*, 44 Fed. 19 (C. C. E. D. Mich. 1890).

⁶ *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492, 19 S. W. 804, 16 L. R. A. 243 (1892) ("For unbridled use of the tongue or pen the law furnishes a remedy. In view of these considerations a court of equity has no power to restrain a slander or libel, and it can make no difference whether the words are spoken of a person or his property.") *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69 (1873) (defendant claiming a patent which did not exist was destroying the plf's business by threatening customers with infringement suits; held, the jurisdiction of a court of equity does not extend to cases of libel or slander); POMEROY, *EQUITABLE REMEDIES* (2d ed. 1919) §629 ("A libel oc-

It is important, therefore, to ascertain what constitutes bad faith. Some cases hold that a failure to sue within two years after starting a series of notices shows bad faith.⁷ Others that such failure standing alone is not conclusive.⁸ When the patentee has been for some reason unable to sue, he may continue to warn infringers though no suit is brought.⁹ A showing of competent legal advice that the plaintiff's article is an infringement coupled with inability to carry the financial burden of litigation,¹⁰ or even the latter standing alone,¹¹ will go far to rebut the effect of evidence that would tend strongly to show bad faith. An especially strong case for relief is made when the plaintiff can show that the defendant has been invited, or given ample opportunity to sue in the defendant's own district.¹² That a party has brought and lost a suit on the merits of a patent in one circuit is not alone sufficient to warrant an injunction against infringement notices in another circuit.¹³ Nor will these notices be enjoined while the validity and title to the patent are still uncertain.¹⁴

It has been held that a libel of the plaintiff's product,¹⁵ credit,¹⁶ or business standing,¹⁷ will not alone be enough to warrant injunctive relief. But where a trade libel is part of a scheme of unfair competition or of an attempt to induce customers to breach existing contracts, the injunction will generally be issued.¹⁸

When, as in the first of the principal cases, the plaintiff is a former employee of the defendant, out for all the business he can get, the court should consider the former relationship of the parties as bearing upon the question of good faith. Clearly the plaintiff whose

occupies much the same position as a crime in considering the remedy of injunction. Equity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may appear to be").

⁷ *Sun Maid Raisin Growers of Calif. v. Avis*, *supra* note 3.

⁸ *Flynn & Emrich Co. v. Federal Trade Commission*, *supra* note 3.

⁹ *Alliance Securities Co. v. De Vilbis*, *supra* note 5.

¹⁰ *Flynn & Emrich Co. v. Federal Trade Commission*, *supra* note 3.

¹¹ *Alliance Securities Co. v. De Vilbis*, *supra* note 5.

¹² *Racine Paper Goods Co. v. Dittgen*, *supra* note 3.

¹³ *Clip Bar Manufacturing Co. v. Steel Protected Concrete Co.*, *supra* note 5.

¹⁴ *Mitchell v. International Tailoring Co.*, 169 Fed. 145 (C. C. S. D. N. Y. 1909); *Computing Scale Co. v. National Computing Scale Co.*, *supra* note 5 (injunction will not be granted pending the outcome of the patent suit).

¹⁵ *Marlin Arms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163 (1902).

¹⁶ *Willis v. O'Connell*, 231 Fed. 1004 (S. D. Ala. 1916); *Citizen's Heat, Light, & Power Co. v. Montgomery Light & Water Power Co.*, 171 Fed. 553 (C. C. M. D. Ala. 1909); *Raymond v. Russell*, 143 Mass. 295, 9 N. E. 544, 58 Am. Rep. 137 (1887).

¹⁷ *Willis v. O'Connell*, *supra* note 16; *Citizen's Heat, Light, & Power Co. v. Montgomery Light & Power Co.*, *supra* note 16.

¹⁸ *American Malting Co. v. Kietel*, 209 Fed. 351 (C. C. A. 2d, 1913).

own acts narrowly skirt the border of questionable conduct should carry the burden of strict proof of bad faith on the part of the defendant.

The apparent disagreement between the two principal cases is due to the fact that the first was tried upon the merits, with the result that the plaintiff failed to establish his contentions. The second went off upon a virtual demurrer to an allegation of bad faith.

ALLEN LANGSTON.

Municipal Corporations—Validity of Bond Issue—Recital in Bond as Estoppel.

The town of Union issued bonds which were bought by an innocent purchaser for value. The bonds contained a recital that everything had been done to make these bonds valid obligations of the town. In fact, no election authorizing the issue had been held as required by the state constitution, and the issue exceeded the constitutional limitation of indebtedness. *Held*, that the city was not estopped by the recitals to deny the validity of the bonds, and they were void in the hands of the purchaser.¹

Much litigation has arisen concerning the effect of recitals as estopping a municipality from denying the validity of its bonds. The point which has given rise to the greatest difficulty is whether the municipal corporation has the authority to issue the bonds. A public corporation has no inherent power to issue bonds.² It is a unit of the state government, and such power must be obtained by legislative or constitutional enactment.³ It is clear that if a public corporation has no power to issue bonds, a recital in its bonds that such power exists can in no way bind the municipality,⁴ for "to hold otherwise would be to invest a municipal corporation with full legislative power, and make it superior to the laws by which it was created."⁵ It is equally clear that recitals in bonds that all legal re-

¹ Bolton v. Wharton, 161 S. E. 454 (S. C. 1931).

² Dixon County v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. ed. 360 (1883); Seward County v. Aetna Life Ins. Co., 90 Fed. 222 (C. C. A. 8th, 1898); Hewitt v. Normal School District, 94 Ill. 528 (1880).

³ Dixon County v. Field, *supra* note 2; Wittkowsky v. Jackson County, 150 N. C. 90, 63 S. E. 275 (1908); 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §883.

⁴ Aspinwall v. Davies County, 22 How. (U. S.) 364, 16 L. ed. 296 (1859); Anthony v. Jasper County, 101 U. S. 693, 25 L. ed. 1005 (1879); Duke v. Brown, 96 N. C. 127, 1 S. E. 873 (1887); 2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §933.

⁵ Waite, C. J. in Katzenberger v. Aberdeen, 121 U. S. 172, 177, 7 Sup. Ct. 947, 949, 30 L. ed. 911, 913 (1887).

quirements have been complied with will estop corporations from denying their validity on account of some irregularity.⁶

Many state courts, though perhaps the minority, have narrowly construed the statutes conferring upon municipal corporations the power to issue bonds. They hold that when the statute prescribes certain conditions to be complied with in issuing bonds, absolute compliance is a condition precedent to the vesting of authority in the city.⁷ Thus, if some irregularity is present, no power is conferred, and a recital that all required conditions have been complied with does not estop a municipality from denying the validity of the bonds.⁸ So, where the required notices concerning an election have not been published,⁹ or the proper majority of voters at an election has not been obtained,¹⁰ or the issue in question exceeds the constitutional or statutory limitation of bonded indebtedness,¹¹ a recital by the proper officials that these conditions have been complied with does not estop the municipality.

The federal courts, on the other hand, have construed the enabling statutes more broadly, holding quite uniformly that when a statute authorizes a public corporation to issue bonds in compliance with certain conditions, power is then vested in the corporation, and recitals as to performance of conditions will work an estoppel.¹² Thus, if the statute confers plenary power on the corporation to issue bonds upon certain conditions or limitations, and it is either expressed or implied that the municipal officials are to determine when those conditions have been complied with, a recital purporting compliance with those conditions will estop the corporation from show-

⁶ *Knox County v. Aspinwall*, 21 How. (U. S.) 539, 16 L. ed. 208 (1858); *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579 (1875); *Dixon County v. Field*, *supra* note 2; *Commissioners of Wilkes County v. Call*, 123 N. C. 308, 31 S. E. 481 (1889); *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 734, 32 S. E. 922 (1899).

⁷ *Supervisors of Marshall County v. Cook*, 38 Ill. 44, 87 Am. Dec. 282 (1865); *Bank of Decorah v. Township of Doon*, 86 Iowa 330, 53 N. W. 300, 41 Am. St. Rep. 489 (1892); *Evans v. McFarland*, 186 Mo. 703, 85 S. W. 873 (1905).

⁸ *Gould v. Town of Sterling*, 23 N. Y. 456 (1861); *People v. Jackson County*, 92 Ill. 441 (1879); *Lippincott v. Town of Pana*, 92 Ill. 27 (1879); *Heard v. Calhoun School District*, 45 Mo. App. 660 (1891).

⁹ *Veeder v. Town of Lima*, 19 Wis. 298 (1865).

¹⁰ *Cogwin v. Town of Hancock*, 84 N. Y. 532 (1881).

¹¹ *McPherson v. Foster*, 43 Iowa 48, 22 Am. Rep. 215 (1876).

¹² *Knox County v. Aspinwall*, *supra* note 6; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287, 16 L. ed. 664 (1860); *Coloma v. Eaves*, *supra* note 6; *Marcy v. Township of Oswego*, 92 U. S. 637, 23 L. ed. 748 (1875).

ing that there has been some irregularity in the issue.¹³ However, if the enabling statute expressly refers to some public record as a means for information as to the existence of the essential facts, then the purchaser is charged with notice of the record, and a recital can create no estoppel.¹⁴

These cases usually come to the federal courts on the grounds of diversity of citizenship. The federal courts have not considered themselves controlled by the state decisions on the subject. Instead, they have construed the question as one of general commercial law in which they are not bound to follow the state decisions, but are free to form an independent judgment.¹⁵

The instant case seems to adopt the minority state rule that the enabling statute does not vest power in the town until all the required conditions have been met, though the case apparently was decided correctly on other grounds.¹⁶ The federal rule seems to be

¹³ *Coloma v. Eaves*, *supra* note 6 (where recital that majority of electors had authorized the issue estopped city from denying that fact); *Humboldt Township v. Long*, 92 U. S. 642, 23 L. ed. 752 (1875) (where recital that proper notices of election had been given estopped township); *Venice v. Murdock*, 92 U. S. 494, 23 L. ed. 583 (1875) (where recital that written assent of two-thirds of resident taxpayers had been obtained estopped town); *Marcy v. Township of Oswego*, *supra* note 12 (where recital that issue did not exceed statutory limitation of indebtedness estopped township); *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. ed. 689 (1899) (where recital that issue did not exceed constitutional limitation and that fact was not a matter of record accessible to purchaser, estopped county). If the total issue does not appear on the face of the bond, then, since the purchaser cannot determine whether the issue exceeds the constitutional limit, the city may be estopped. *Chaffee County v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. ed. 1040 (1892).

¹⁴ *Dixon County v. Field*, *supra* note 2; *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. ed. 1065 (1889); *Sutliff v. Lake County Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. ed. 145 (1893). In these cases the amount of indebtedness was a matter of record specifically referred to by the enabling act; thus, if the total amount of the issue is on the face of the bond, the amount of indebtedness is a matter of law, and a recital can create no estoppel.

¹⁵ *Swift v. Tyson*, 16 Pet. (U. S.) 1, 10 L. ed. 865 (1842); *Brooklyn City, etc., Railroad Co. v. Nat. Bank of Republic*, 102 U. S. 14, 26 L. ed. 61 (1880); *Town of Venice v. Murdock*, *supra* note 13; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. ed. 424 (1882) (an Illinois case where the federal court specifically refused to follow the Illinois rule laid down in *Lippincott v. Pana*, *supra* note 8).

¹⁶ The bonds here exceeded the constitutional limitation of indebtedness, but the purchaser knew the total amount of the issue, and the amount of indebtedness was a matter of record accessible to the purchaser; thus, the case seems to fall within the line of decisions represented by *Dixon County v. Field*, *supra* note 2 and *Sutliff v. Lake County Commissioners*, *supra* note 14. Also a state statute authorized the issue of nothing but serial bonds. These bonds were clearly not of that type, so the purchaser had notice of the defect.

better, both from the standpoint of fairness and legal analysis. It protects the innocent purchaser who has virtually no way of finding out whether all the legal requirements have been met. It would seem that the loss should fall upon the corporation, whose agents have misrepresented the facts, so as to deceive third parties. Moreover, the adoption of the federal rule will materially increase the marketability of municipal bonds, for purchasers, being able to rely on recitals, will be protected from the possibility of having the bonds declared invalid because of some irregularity in the issue.¹⁷

ROBERT A. HOVIS.

Negotiable Instruments—Assignment as Indorsement Without Recourse.

The plaintiff was the holder in due course of certain notes indorsed to him by the defendant as follows: "For value received, I hereby sell, transfer, and assign all my right, title, and interest to the within note to J. C. Medlin." *Held*, the indorsement had a "similar import" to the words "without recourse," and the indorser was not liable to the holder.¹

The holding is distinctly in the minority.² The leading cases supporting the majority rule since the adoption of the Negotiable Instruments Law base their decisions on section 63, providing in substance that when one places his signature on a negotiable instrument he will be presumed to be an indorser unless he clearly shows an intention to be bound in some other capacity. Thus such an indorsement fails to indicate an intention not to assume an indorser's liability.³ This seems to be the correct result under the Negotiable In-

¹⁷2 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) §952. Weighed against these points is the danger of frauds being perpetrated by the local officials who are invested with such power to bind the municipality by recitals. As Mr. Dillon points out, such power should not be held to exist unless it is declared or clearly implied.

¹Medlin v. Miles, 201 N. C. 683, 161 S. E. 207 (1931).

²Copeland v. Burke, 59 Okla. 219, 158 Pac. 1162 (1916); Lenheart v. Romey, 3 Ohio Cir. Ct. R. 135, 2 O. C. D. 77 (1888); Behrens v. Kirkgard, 143 S. W. 698 (Tex. Civ. App. 1912); Citizens' National Bank v. Walton, 96 Va. 435, 31 S. E. 890 (1898); Markey v. Corey, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698 (1895); Sears v. Lentz & Bates, 47 Iowa, 658 (1877); Mayes Mercantile Co. v. Handley, 6 Ind. T. 357, 98 S. W. 125 (1901); Shelby v. Judd, 24 Kan. 118 (1880); Adams v. Blethen, 66 Me. 19, 22 Am. St. Rep. 547 (1876); Jacobs v. Gibson, 77 Mo. App. 244 (1898); see Gales v. Mahew, 161 Mich. 96, 125 N. W. 781, 785 (1910); Maine Trust Co. v. Butler, 45 Minn. 506, 48 N. W. 333, 334, 12 L. R. A. 370 (1891).

³Copeland v. Burke; Mayes Mercantile Co. v. Handley, both *supra* note 2.

struments Law unless the transferor can be said to have used the word "assign" in its common law sense.

The minority view seems to ignore section 63 of the Negotiable Instruments Law and decides the question on the contract of transfer alone.⁴ This naturally necessitates getting at the intent of the parties. It is doubtful whether the transferor usually means anything other than to transfer the instrument in the standard form, and that he uses words for that purpose which have become familiar to him in daily business.⁵ This view is strengthened by the fact that judges as well as text writers use "indorse" and "assign" interchangeably, or use "assign" when they mean "indorse," or vice versa⁶ But if it be conceded that the words were used for some special purpose, can it be said they show the indorser's intention not to assume an indorser's liability? The words clearly show an intent to pass what interest the transferor had. The minority view may be influenced by the legal effect of the assignment of a chose in action at common law, which merely passed to the assignee what interest the assignor

⁴ *Spencer v. Halphern*, 62 Ark. 595, 37 S. W. 711, 36 L. R. A. 120 (1896); *Hammond Lumber Co. v. Keasley*, 36 Cal. App. 431, 172 Pac. 404 (1918); *Medlin v. Miles*, *supra* note 1; *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847 (1906). (Ohio also ignores section 63 of the N. I. L., but has reached an opposite result from the minority, saying as against the maker the holder is a mere assignee subject to all equities of the market, but as against his, the holder's, assignor, he is an indorsee holding the instrument free from all equities.) *Carrus v. Ohio Contract Purchase Co.*, 30 Ohio 57, 164 N. E. 234, (1928).

Cases under the law merchant prior to the adoption of the N. I. L. seems generally to have treated the "assignor" as an indorser. The "assignment" passed title free from defenses and made the assignor liable as an indorser. *Jones City Trust and Savings Bank v. Kent*, 192 Iowa 965, 182 N. W. 409 (1921); *Farnsworth v. Berdick*, 94 Kan. 749, 147 Pac. 863 (1915); *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003 (1904).

⁵ It seems that if the assignor knew the legal affect of the phrase in the principal case, he would know that the uncontradicted phrase for this purpose is "without recourse." The learned judge in *Copeland v. Burke*, *supra* note 2, 158 Pac. at 1164, said: "The phrase 'without recourse' as employed in such business transactions is in every day use, and we can hardly conceive of a person engaged in business affairs of importance, as was defended in this case, who is not familiar with its use and meaning."

⁶ *Shaw v. N. Penn. Ry. Co.*, 101 U. S. 557, 25 L. ed. 892 (1880); *Farthing v. Dark*, Ill. N. C. 243, 16 S. E. 337 (1892); *Loftin v. Hill*, 131 N. C. 105, 42 S. E. 548 (1902); *Brooks v. Sullivan*, 129 N. C. 190, 39 S. E. 822 (1901); 2 STREET, FOUNDATION OF LEGAL LIABILITY (1906) 397; SWIFT, EVIDENCE (1810) §342; In *Hatch v. Barrett*, 34 Kan. 223, 8 Pac. 129, 134 (1885) the judge used the following sentence: "A negotiable promissory note, if payable to 'order' can be assigned free from all equities only by *indorsement* for there is no statute in this state that authorizes a negotiable promissory note payable to 'order' to be transferred free from all or any equitable defenses or claims except by *indorsement*."

had. It carried no guaranty of performance on the part of the debtor-assignor.⁷ Therefore, since the indorser used words of assignment, it is arguable that he must have intended them to have their common law effect. This argument is somewhat negated by the court's holding that plaintiff is a holder in due course since at common law the assignment of a chose in action did not cut off the equities of the debtor.⁸

On the whole it would seem that both upon sound reason and as a desirable commercial rule the majority rule is the better, whether the decision is based on the Negotiable Instruments Law or the contract of transfer. The proposed amendment to the Negotiable Instruments Law, however, adopts the view of the minority and of the instant case. The draftsmen, nevertheless, admitted that the choice is arbitrary and based on a desire for certainty rather than on any apparent advantage of the suggested rule.⁹

DALLAS McLENNAN.

Negotiable Instruments—Liability of Mentally Incompetent Indorser.

In an action against the indorsers of several notes, the jury found that one defendant was without sufficient capacity to manage his affairs at the time he indorsed. The notes were executed by a corporation, of which defendants were stockholders and directors, upon plaintiff's agreement to extend the time of maturity of an indebtedness due him by the company. *Held*, plaintiff's surrender of the right to reduce the debt against the corporation to judgment was sufficient consideration to support defendant's indorsement, although he was mentally incompetent at the time.¹

On the theory that the fundamental requisite of a contract is the assent of two minds, the transactions of persons *non compos mentis* have been considered, up until comparatively recent times, invalid.²

⁷ The assignment of a chose in action at common law carried only the implied warranty as in the sale of a chattel. I WILLISTON, CONTRACTS (1920) §445; Arant, *The Written Aspect of Indorsement* (1925) 34 YALE L. J. 144, 149.

⁸ I WILLISTON, CONTRACTS (1920) §433.

⁹ §13 of the tentative draft submitted at 1931 conference of Commissioners of Uniform State Laws.

¹ *Searcy v. Hammett*, 202 N. C. 42, 161 S. E. 733 (1932).

² In most cases such contracts have been termed "void," but it is doubtful if this view, under which there could be no ratification in a lucid interval and which would make the defence available to either party to the contract, would

Adjudication of insanity being considered notice to the world, contracts of an insane person under guardianship are usually said to be void,³ while those made before there has been any court action are only voidable.⁴

Although a few jurisdictions still hold executed⁵ contracts of insane persons to be void absolutely⁶ or voidable unconditionally,⁷ two widely recognized exceptions to the general rule obtain where: (1) the contract was made for necessities,⁸ or (2) the other party entered the agreement in good faith, for a fair consideration, without notice of the infirmity and before adjudication of insanity, and the contract has been so far executed in whole or in part that the parties cannot be restored to their original positions.⁹ Such a state of facts may be set up: (1) as an equitable defense to an action for avoidance of the contract,¹⁰ or relied upon to demand back the con-

be carried to its logical conclusion. What is usually meant is that such contracts are voidable, at the lunatic's option. See 1 WILLISTON, CONTRACTS (1924) §250 ff.

Negotiable instruments of insane persons are governed by the same rules that control their contracts. *Wadford v. Gillette*, 193 N. C. 413, 137 S. E. 314 (1927).

³ *Hellman Commercial Trust & Savings Bank v. Alden*, 206 Cal. 592, 275 Pac. 794 (1929); *Herman v. County Bank*, 291 S. W. 156 (Mo. 1927). But see *Reeves v. Hunter*, 185 Iowa 958, 171 N. W. 567, 569 (1919).

⁴ See *Fields v. Life Ins. Co.*, 170 Ga. 239, 152 S. E. 237, 238 (1930); *Wadford v. Gillette*, 193 N. C. 413, 420, 137 S. E. 314, 317 (1927); Note (1915) 24 YALE L. J. 345.

⁵ Purely executory contracts with insane persons are, in America at least, held to be unenforceable. See Note (1927) 46 A. L. R. 416; 1 WILLISTON, CONTRACTS (1924) §254; Note (1925) 25 COL. L. REV. 230.

⁶ *National Bank v. Tribble*, 155 Ark. 264, 244 S. W. 33 (1922); *Walker v. Winn*, 142 Ala. 560, 39 So. 12 (1905); *Edwards v. Davenport*, 20 Fed. 756 (1883); see Note (1927) 46 A. L. R. 416.

⁷ *Joiner v. Sales Corp.*, 158 Ga. 752, 124 S. E. 518 (1924) ("Fairness of the defendant's conduct cannot supply the plaintiff's want of capacity"); see Note (1927) 46 A. L. R. 416.

⁸ *Hosler v. Beard*, 540 Ohio St. 405, 43 N. E. 1040 (1896).

⁹ *Fitzpatrick's Administrator v. Citizen's Bank*, 231 Ky. 202, 21 S. W. (2d) 254 (1929); *Rath's Committee v. Smith*, 180 Ky. 326, 202 S. W. 501 (1918); *Copenrath v. Kienby*, 83 Ind. 18 (1882); see *Doty v. Mumma*, 305 Mo. 188, 264 S. W. 656, 657 (1924); *Wirebach v. National Bank*, 97 Pa. St. 543 (1881); Note (1925) 34 A. L. R. 1403; Note (1928) 41 HARV. L. REV. 536.

This rule might even apply where a guardian has been appointed. See *Reeves v. Hunter*, 185 Iowa 958, 171 N. W. 567, 568 (1919).

¹⁰ *McCarthy v. Bowling Green Co.*, 182 App. Div. 18, 169 N. Y. Supp. 463 (1918); *Merchants' National Bank v. Coyle*, 143 Minn. 440, 174 N. W. 309 (1919); *Cawby v. Kurtz*, 209 Ky. 275, 272 S. W. 746 (1925) (adjudication twelve years after the contract was made); *Ipock v. Atlantic & North Carolina Ry.*, 158 N. C. 445, 74 S. E. 352 (1912); see *Wells v. Wells*, 197 Ind. 236, 150 N. E. 361, 363 (1926); *Edwards v. Miller*, 102 Okla. 189, 228 Pac. 1105, 1107 (1924); *Pritchett v. Plater Co.*, 144 Tenn. 406, 232 S. W. 961, 969 (1921); *Memphis National Bank v. Sneed*, 97 Tenn. 120, 36 S. W. 716, 717 (1896).

sideration prior to a rescission;¹¹ (2) to overcome a plea of insanity and enforce the contract;¹² or (3) to render the lunatic liable to the extent of the benefits received by him.¹³ To permit the contract to be repudiated after the lunatic has, by virtue of an apparent capacity to contract, secured benefits which cannot be restored would be inequitable.¹⁴ Good faith of the other contracting party will not alone, however, prevail against a plea of insanity,¹⁵ and a holder in due course of a note, conclusively presumed to have notice of the status of the maker, stands in no better position than his indorser.¹⁶

The exception that a *bona fide* contract of an insane person is not voidable where the parties cannot be placed in *statu quo* is not usually effective where: (1) the lunatic has received no benefit

¹¹ McKone v. McConkey, 90 Okla. 290, 217 Pac. 383 (1923); Brown v. Cory, 9 Kan. App. 702, 59 Pac. 1097 (1900); see Fields v. Life Ins. Co., *supra* note 4. *Contra*: Anderson v. Nelson, 248 Mich. 160, 226 N. W. 830 (1929).

Similarly, restoration of the consideration as a condition precedent to rescission is, as a rule, required in cases of avoidance of contracts by infants. See 1 WILLISTON, CONTRACTS (1924) §238. But there seems to be a greater tendency to excuse the omission of such performance where it cannot be had. Collins v. Norfleet-Baggs, 197 N. C. 659, 150 S. E. 177 (1929).

¹² Hargraves v. Thornton, 142 Atl. 371 (R. I. 1928); Pichel v. Fair Store Co., 29 Ohio App. 322, 163 N. E. 511 (1928); Flach v. Gottschalk, 88 Md. 368, 41 Atl. 908 (1898); see Wadford v. Gillette, *supra* note 2, at 420; First National Bank v. Sarvey, 198 Iowa 1067, 198 N. W. 496, 497 (1924); North-Western Ins. Co. v. Blankenship, 94 Ind. 535 (1883).

¹³ First National Bank v. Fidelity Title & Trust Co., 251 Pa. 529, 97 Atl. 75 (1916); Ferguson v. Fitze, 173 S. W. 500 (Tex. App. 1914); Campbell v. Campbell, 35 R. I. 211, 85 Atl. 930 (1913); Bates v. Hyman, 28 So. 567 (Miss. 1900); Hosler v. Beard, 540 Ohio St. 405, 43 N. E. 1040 (1896).

¹⁴ See Note (1927) 46 A. L. R. 416.

¹⁵ Smith v. Thornhill, 12 S. W. (2d) 625 (Tex. 1928); Boyd v. Mulvihill, 61 Neb. 878, 86 N. W. 922 (1901); Lincoln v. Buckmaster, 32 Vt. 652 (1860); Sutcliffe v. Heatley, 232 Mass. 231, 122 N. E. 317 (1919); see Brewster v. Weston, 235 Mass. 14, 126 N. E. 271 (1920); Campbell v. Campbell, *supra* note 13, at 931; Nutter v. Des Moines Ins. Co., 156 Iowa 539, 136 N. W. 891, 892 (1912). *Contra*: Wolf v. Edwards, 106 La. 477, 31 So. 58 (1901) (rule peculiar to Louisiana, based on a statute).

Bad faith, unfairness of the contract, or other evidence of fraud on the part of the other contracting party is clearly sufficient to render the contract voidable. See Atkinson v. McCulloh, 149 Md. 662, 132 Atl. 148, 152 (1926); 1 WILLISTON, CONTRACTS (1924) 250.

¹⁶ Wadford v. Gillette, *supra* note 2; Shipman Banking Co. v. Douglas, 206 Ill. App. 586 (1917); Ferguson v. Fitze; Hosler v. Beard, both *supra* note 13; Hicks v. Marshall, 8 Hun. 327 (N. Y. 1876); Dickerson v. Davis, 111 Ind. 433, 12 N. E. 145 (1887); see Brewster v. Weston, *supra* note 15, at 272; Brumley v. Chattanooga Speedway Co., 138 Tenn. 534, 198 S. W. 775, 777 (1917) (suit against imbecile indorser). *Contra*: Milligan v. Pollard, 112 Ala. 465, 20 So. 620 (1896); see Groff v. Stitzer, 77 N. J. Eq. 260, 77 Atl. 46, 47 (1910). In First National Bank v. Sarvey, 198 Iowa 1067, 198 N. W. 496 (1924), the defendant was required to show that the holder knew of the insanity.

Lunatics are not mentioned in the N. I. L. See BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926) 434-435.

from the consideration,¹⁷ (2) there was none given,¹⁸ or (3) it has been parted with by the lunatic during insanity.¹⁹

The problem in the instant case was that of finding a "fair and conscionable"²⁰ consideration, actually received by the defendant, to support his indorsement in spite of his insanity. As to whether an accommodation indorser of a note is so benefitted, the courts are divided, a slight majority failing to find valid consideration.²¹ On the theory that the insane person is to be protected in all cases except where actual loss by the other party resulting in direct gain to the incompetent would work an injustice, the result of the majority seems preferable. The outcome of the principal case is justifiable, however, due to the close relationship of the indorsers as stockholders and directors of the corporation making the note.

JAMES M. LITTLE, JR.

Procedure and Practice—Directed Verdict.

To the plaintiff's action on an insurance policy, the defendant pleaded fraud. There was conflicting evidence as to whether information had been withheld as to the insured's Bright's Disease. After the admission of all the evidence the court directed the jury to answer the issue of indebtedness in the negative. *Held*, such practice is correct "when the facts are admitted or established and only one inference may be drawn therefrom."¹

¹⁷ *Hellman Commercial Trust & Savings Bank v. Alden*, *supra* note 3; *Doty v. Mumma*, *supra* note 9; *Sutcliffe v. Heatley*, *supra* note 15; *Jordan v. Kirkpatrick*, 251 Ill. 116, 95 N. E. 1079 (1911); *Lincoln v. Buckmaster*, *supra* note 15; see *North Western Ins. Co. v. Blankenship*, *supra* note 12, at 545. *Contra*: *Sparrowhawk v. Erwin*, 30 Ariz. 238, 246 Pac. 541 (1926); *Edwards v. Miller*, *supra* note 10.

¹⁸ *Shipman Banking Co. v. Douglas*, *supra* note 16; *Fields v. Life Ins. Co.*, *supra* note 4; *Ferguson v. Fitze*, *supra* note 13.

¹⁹ *National Bank v. Tribble*, 155 Ark. 264, 244 S. W. 33 (1922); *Hudson v. Union Trust Co.*, 148 Ark. 249, 230 S. W. 281 (1921).

²⁰ *Wirebach v. National Bank*, 97 Pa. St. 543 (1881).

²¹ *Hughes v. Crean*, 178 Minn. 545, 227 N. W. 654 (1929); *Wirebach v. National Bank*, *supra* note 20 (action by holder in due course); *Van Patton v. Beals*, 46 Iowa 62 (1877). *Contra*: *First National Bank v. Fidelity Title & Trust Co.*, *supra* note 13; *Memphis National Bank v. Sneed*, *supra* note 10 (extension of time on former note, made by the present maker and indorsed by the lunatic when sane, held to be consideration).

Reduction of contingent liability has been held sufficient consideration in this state. *Wadford v. Gillette*, *supra* note 2.

¹ *Reinhardt v. Ins. Co.*, 201 N. C. 785, 161 S. E. 528 (1931). The report of this case does not bring out the facts as they are shown in the record. The record is in manuscript form and its confused state may have given rise to that difference.

In the majority of jurisdictions when the proponent, the party who has the burden of persuasion on an issue, has advanced proof on it so strong that reasonable minds could not help but find in his favor, the court will direct the jury to answer the issue for him.² Ostensibly the same rule is stated in the principal case under alternative phrasing.³ The cases, however, show that the invariable practice in this state, when the aforementioned stage of proof is reached, is to submit the evidence to the jury under a conditional peremptory ruling: "If you believe the evidence you must answer the issue 'Yes' or 'No' as the case may be."⁴ The reasons assigned for the local doctrine are that a direction for the proponent would be an expression of the judge's opinion on the facts contrary to statute⁵ and a belief that the credibility of the witnesses should always remain for the jury.⁶ It would seem from the ruling of the instant case that not only is it contrary to precedent in approving the absolute directed verdict,⁷ but also it is not one for conditional direction, since the evidence is capable of more than one inference.⁸

² *Sunderland, Directing Verdicts for Party Having Burden of Proof* (1913) 11 MICH. L. REV. 198 (excellent article explaining both majority and minority views and containing a collection of the leading cases); McCormick, *Presumptions and Burdens of Proof* (1927) 5 N. C. L. REV. 291; 5 WIGMORE, EVIDENCE (2d ed. 1923) §2495; 38 Cyc. 1575; An exception for this rule is directing for prosecution in criminal action.

³ The rule in the principal case is quoted from MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §574. In the cases there cited for the support of the rule, only the conditional peremptory instruction was given. The context seems to show that the rule is stated to define the circumstances under which this sort of ruling should be made.

⁴ *State v. Riley*, 113 N. C. 648, 18 S. E. 168 (1893); *Little v. R. R.*, 119 N. C. 771, 26 S. E. 106 (1896); *White v. R. R.*, 121 N. C. 484, 27 S. E. 1002 (1897); *Bank v. School Committee*, 121 N. C. 107, 28 S. E. 134 (1897); *Haltom v. R. R.*, 127 N. C. 255, 37 S. E. 262 (1900); *Forsythe v. Mill*, 167 N. C. 179, 83 S. E. 320 (1914); *R. R. v. Lumber Co.*, 185 N. C. 227, 117 S. E. 50 (1923); *Fertilizer Works v. Cox*, 187 N. C. 654, 122 S. E. 479 (1924).

⁵ N. C. CODE ANN. (Michie, 1931) §564; *Bank v. School Committee*, 121 N. C. 107, 28 S. E. 134 (1897) (construing this section of the Code); *R. R. v. Lumber Co.*, 185 N. C. 227, 117 S. E. 50 (1923). This objection is equally applicable to a directed verdict *against* the proponent.

⁶ *Mfg. Co. v. R. R.*, 128 N. C. 280, 38 S. E. 894 (1901); *R. R. v. Lumber Co.*, 185 N. C. 227, 117 S. E. 50 (1923); *Boutten v. R. R.*, 128 N. C. 337, 38 S. E. 920 (1901); *Crews v. Cantwell*, 125 N. C. 516, 36 S. E. 33 (1899); *Eller v. Church*, 121 N. C. 269, 28 S. E. 364 (1892).

⁷ *Wittowsky v. Wasson*, 71 N. C. 451 (1874); *Collins v. Swanson*, 121 N. C. 467, 28 S. E. 65 (1897); *Spruill v. Ins. Co.*, 120 N. C. 141, 27 S. E. 39 (1897) ("that the verdict should be directed against the party on whom rests the burden of proof is the essence of the rule.") *Cox v. R. R.*, 123 N. C. 604, 51 S. E. 848 (1898); *Crews v. Cantwell*, *Boutten v. R. R.*, both *supra* note 6; *Forsythe v. Mill*, *supra* note 4.

⁸ *R. R. v. Lumber Co.*; *Little v. R. R.*; *Fertilizer Works v. Cox*; *Cable v. R. R.*, all *supra* note 4.

The reasons supporting the local rule seem out-weighted by those advanced for the majority view. Legislative prohibition of directed verdicts in one instance was held unconstitutional "as an attempted legislative exercise of the judicial power to determine the legal sufficiency of the evidence to go to the jury."⁹ Other authorities have declared the judge to be the thirteenth juror as to credibility¹⁰ and have said that permitting uncontradicted testimony to go to the jury "will let the result of a litigation abide the cast of a die, or a game of chance."¹¹ It is suggested that if it is meant in the instant case to disregard precedent and to follow the seemingly preferable majority rule, that intention should have been couched in affirmative terms.

J. H. SEMBOWER.

Procedure and Practice—Suability of Unincorporated Associations—Representative Suits.

The Supreme Court of North Carolina has refused to sustain suits against unincorporated associations for the reason that such associations have no existence recognized by law and therefore cannot be made parties to an action.¹ By a dictum in *Tucker v. Eatough*² the Court stated that this defect could not be waived by appearance. The Court further stated, in substance, that a North Carolina statute³

⁹ *Thoe v. Ry. Co.*, 181 Wis. 456, 195 N. W., 407, 29 A. L. R. 1280 (1923). Commented on in (1924) 2 WIS. L. REV. 375 and (1924) 37 HARV. L. REV. 510.

¹⁰ *Wigmore, Proposed Senate Bill* (1925) 9 AM. JUD. SOC. REP. 61.

¹¹ *Seibert v. Erie Ry. Co.*, 49 Barb. 586 (N. Y. 1867).

¹ *Tucker v. Eatough*, 186 N. C. 505, 120 S. E. 57 (1923); *Nelson v. Relief Department*, 147 N. C. 103, 60 S. E. 724 (1908); *Citizens Co. v. Typographical Union*, 187 N. C. 42, 121 S. E. 31 (1924); *Jenkins v. Carraway*, 187 N. C. 405, 121 S. E. 657 (1924). An opposite result was reached by the Supreme Court of the United States in the case of *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 570, 66 L. ed. 975 (1922), principally on the ground that various federal statutes having recognized the existence of labor unions as entities, the union was capable of being sued as such. In *Tucker v. Eatough*, *supra*, the North Carolina Court did not follow this decision chiefly because there were no such statutes in North Carolina.

For a comprehensive treatment of the problem of suits by and against unincorporated associations, see *Sturges, Unincorporated Associations as Parties to Actions* (1923) 33 YALE L. J. 383.

Many states have passed statutes authorizing suits by and against unincorporated associations as legal entities. For a compilation and treatment of these statutes, see *Warren, CORPORATE ADVANTAGES WITHOUT INCORPORATION* (1929) 542.

² *Supra* note 1, at 508.

³ N. C. CODE ANN. (Michie, 1931) §457. The facts necessary to bring the suit within one or the other of these conditions must be alleged and proved. *Bronson v. Ins. Co.*, 85 N. C. 411 (1881).

which provides for representative suits, (1) where the question is one of common or general interest to many persons, (2) where the parties are so numerous that it is impracticable to bring them all before the Court, would *merely permit*⁴ representative suits by and against unincorporated associations at the option of the association.

Representative suits by and against unincorporated associations appear to come directly within the terms of the North Carolina statute in that all the members of the association have a common interest in the association property, and are usually too numerous⁵ to be made parties to a single action. Other jurisdictions permit suits of this nature under statutory provisions substantially the same as that of North Carolina,⁶ and often representative suits by and against unincorporated associations are sustained under the general equity powers of the court.⁷ The fact that unincorporated associations are not

Under this statute representative tax payers suits are allowed. *Murphy v. Greensboro*, 190 N. C. 268, 129 S. E. 614 (1925); *Jones v. Com'rs.*, 143 N. C. 59, 55 S. E. 427 (1906); *Vaughn v. Com'rs.*, 118 N. C. 636, 24 S. E. 425 (1896). Representative creditors' suits: *Bickley v. Green*, 187 N. C. 772, 122 S. E. 847 (1924); *Chatham v. Realty Co.*, 180 N. C. 500, 105 S. E. 329 (1920); *Bronson v. Ins. Co.*, *supra*; *Van Glohn v. DeRossett*, 81 N. C. 467 (1878); *cf. Thames v. Jones*, 97 N. C. 121, 1 S. E. 692 (1885) (parties plaintiff represent numerous class of heirs).

N. C. CODE ANN. (Michie, 1931) §3569 authorizes suits by and against trustees of religious associations and churches. For suits under this statute, see *Nash v. Sutton*, 109 N. C. 550, 14 S. E. 77 (1891); *Nash v. Sutton*, 117 N. C. 231, 23 S. E. 178 (1894). This section extended to include representative suits by and against members of unincorporated religious associations: *Windley v. McCliney*, 161 N. C. 318, 77 S. E. 226 (1912); *Dix v. Pruitt*, 194 N. C. 64, 138 S. E. 412 (1927). The statute applies only to religious associations. *Allen v. Baskerville*, 123 N. C. 126, 31 S. E. 383 (1898); *Thornton v. Harris*, 140 N. C. 498, 53 S. E. 341 (1906).

⁴Italics ours.

⁵For the names of about 750 unincorporated associations and the number of members belonging to each, see *The World Almanac and Book of Facts* (1932) 275.

⁶Parties plaintiff: *Platt v. Colvin*, 50 Ohio St. 703, 36 N. E. 745 (1893); *Giesh v. Anderson*, 77 Cal. 247, 19 Pac. 421 (1888); *Su Lee v. Peck*, 49 Nev. 124, 240 Pac. 435 (1925). Parties defendant: *Bronson v. I. W. W.*, 30 Nev. 270, 95 Pac. 354 (1908); *Payne v. McClure Lodge No. 539*, 115 S. W. 764 (Ky. 1909); *Florence v. Helms*, 136 Cal. 613, 69 Pac. 429 (1902).

⁷Parties plaintiff and defendant: *Herald v. Glendale Lodge No. 1289 B. P. O. E.*, 46 Cal. App. 325, 189 Pac. 329 (1920); *Liederkrantz Singing Soc. v. Germania T. V.*, 163 Pa. 265, 29 Atl. 918 (1894); *Smith v. Swormstedt*, 57 U. S. 288, 14 L. ed. 942 (1853); *Duvall v. Synod of Kansas of Presbyterian Church*, 222 Fed. 669 (C. C. A. 8th, 1915); *International News Service v. Associated Press*, 248 U. S. 215, 39 Sup. Ct. 68, 63 L. ed. 211 (1918); *Wilkinson v. Stitt*, 175 Mass. 581, 56 N. E. 830 (1900); *Carpenters Union v. Citizens Committee*, 333 Ill. 225, 164 N. E. 393 (1928). Parties plaintiff: *United B. of M. of W. Employees v. Kennedy*, 13 Del. Ch. 106, 115 Atl. 587 (1922); *U. S. v. Old Dominion Settlers*, 148 U. S. 427, 13 Sup. Ct. 650, 37 L. ed. 509 (1893); *Leviness v. Consolidated Gas, Electric Light & Power Co.*, 114 Md. 570, 80

recognized as legal entities presents no obstacle to such suits,⁸ especially in view of the terms of the North Carolina statute which apparently *expressly authorizes* them.

In some jurisdictions this defect of parties is waived if not raised in the trial court,⁹ and unincorporated associations may be estopped by their conduct to question their capacity to be sued.¹⁰ In analagous situations the issue of corporate existence if not raised by answer or demurrer is waived;¹¹ the objection that a suit is by or against a

Atl. 304 (1911); *Kennedy v. Roberts*, 140 Atl. 656 (Del. Ch. 1926); *Snow v. Wheeler*, 113 Mass. 179 (1873); *Birmingham v. Gallagher*, 112 Mass. 190 (1873); *Beatty & Ritchie v. Kurtz*, 2 Pet. (U. S.) 566, 7 L. ed. 521 (1829). Parties defendant: *American Steel & Wire Co. v. Wire Drawers Union*, 90 Fed. 598 (E. D. Ohio, 1898); *Wallace v. Adams*, 204 U. S. 425, 27 Sup. Ct. 363, 51 L. ed. 553 (1906); *Lanchester v. Thompson*, 5 Madd. 4, (Ch. 1820); *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009 (1914); *Pearson v. Anderson*, 28 Utah 495, 80 Pac. 307 (1905); *Davidson v. Holden*, 55 Conn. 103, 10 Atl. 515 (1887); *Van Houten v. Pine*, 36 N. J. Eq. 133 (1882); *Germain v. Bakery and Confectionery W. Union*, No. 9, 97 Wash. 282, 166 Pac. 665 (1917); *Warfield-Pratt-Howell Co. v. Williamson*, 234 Ill. 268, 84 N. E. 706 (1908).

Federal Equity Rule, No. 38 (1912), 28 U. S. C. A. 21, provides that "when the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." For suits under this rule of federal procedure, see *International News Service v. Associated Press*, *supra*, (parties plaintiff and defendant); *In re Englehard & Sons Co.*, 231 U. S. 646, 34 Sup. Ct. 258, 58 L. ed. 516 (1914) (parties plaintiff).

⁸ In *Beatty & Ritchie v. Kurtz*, *supra* note 7, at 584, quoted (1922) 20 MICH. L. REV. 245, with reference to the right of parties plaintiff to maintain a representative suit, Mr. Justice Story speaking for the court said, "We do not perceive any serious objection to their right to maintain the suit."

⁹ Parties plaintiff and defendant: *Herald v. Glendale Lodge No. 1289 B. P. O. E.*, *supra* note 7. Parties plaintiff: *Agr. Ext. Club v. Hirsch*, 39 Cal. App. 433, 179 Pac. 430 (1919); *Franklyn Union No. 4 v. People*, 220 Ill. 355, 77 N. E. 176 (1906); *Huron Tribe No. 117, Improved Order of Red Men v. Mace*, 72 Ind. App. 678, 126 N. E. 437 (1920); *Security State Bank of Fort Worth v. Green*, 258 S. W. 606 (Tex. Civ. App. 1924). Parties defendant: *Zeigler v. Perry*, 37 Ga. App. 647, 141 S. E. 426 (1928); *Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 402, 83 N. E. 932 (1908); *Cahill v. Plumbers, etc.*, Local No. 93, 238 Ill. App. 123 (1925); *Whitmire v. Lawrence etc., Counties Mutual Benefit Asso.*, 286 S. W. 842 (Mo. App. 1926); *Solomon v. N. J. Indemnity Co.*, 94 N. J. L. 318, 110 Atl. 813 (1920); *Iron Moulders Union v. Allis Chambers Co.*, 166 Fed. 45 (C. C. A. 7th, 1908); *Deans v. Albany & Canal Line*, Fed. Cas. No. 3736 (1878).

¹⁰ Parties defendant: *Petty v. Bronswick*, 109 Ga. 666, 35 S. E. 82 (1900); *Brooks v. Owen*, 200 Ia. 1151, 202 N. W. 505 (1925); *Fitzpatrick v. Rutter*, 160 Ill. 282, 43 N. E. 392 (1895); *Reynolds v. St. Johns Lodge*, 171 La. 395, 131 So. 186 (1930); *Clark v. Grand Lodge of Brotherhood of Railroad Trainmen*, 43 S. W. (2d) 404 (Mo. 1931).

¹¹ *Rush v. Steamboat Co.*, 84 N. C. 703 (1881); *Daniels v. R. R.*, 158 N. C. 418, 74 S. E. 331 (1912); *cf. Hicks v. Beam*, 112 N. C. 642, 17 S. E. 490 (1893) (capacity of infant to sue if not raised on trial is waived).

partnership in the partnership name if not raised on trial is waived;¹² and where the name of the party does not indicate whether it is a corporation or a partnership, objection to the capacity of that party to sue or be sued is waived if not raised on trial.¹³ These decisions indicate that there is strong precedent for allowing unincorporated groups of individuals to sue or be sued where their capacity to be a party to the suit is not questioned on trial.

As has been noted, the members of most unincorporated associations are so numerous that it is impracticable to make them all parties to a single suit.¹⁴ Since North Carolina has refused to allow these associations to sue and be sued as such,¹⁵ the representative suit¹⁶ appears to be the only feasible method of bringing actions on behalf of and against unincorporated associations. In a representative suit a few members sue or defend on behalf of themselves and all other members of the association.¹⁷ It is necessary to allege and prove that the suit is a representative suit,¹⁸ the facts which make a representative suit proper,¹⁹ and it must appear to the court that the named parties to the suit fairly represent the association in question.²⁰ From this last it would seem to follow that where the asso-

¹² *Brewer v. Abernethy*, 159 N. C. 283, 74 S. E. 1025 (1912); *Kochs v. Jackson*, 156 N. C. 326, 72 S. E. 382 (1911); *Ortez v. Jewett & Co.*, 23 Ala. 662 (1853); *Moore v. Watts*, 81 Ala. 261, 2 So. 278 (1887); *Foreman v. Weil*, 98 Ala. 495, 12 So. 815 (1893); *Mitchel & Bro. v. Railton*, 45 Mo. App. 273 (1891); *Fowler & Wild v. Williams*, 62 Mo. 403 (1867).

¹³ *Brewer v. Abernethy*; *Kochs v. Jackson*, both *supra* note 12; *Continental Ins. Co. v. Richardson*, 69 Minn. 433, 72 N. W. 458 (1897).

¹⁴ *The World Almanac and Book of Facts*, *supra* note 5.

¹⁵ *Tucker v. Eatough*; *Nelson v. Relief Department*; *Citizens Co. v. Typographical Union*; *Jenkins v. Carraway*, all *supra* note 1.

¹⁶ Annotated note on the historical development of the equitable doctrine of representative suits, Note, Ann. Cas. 1913 C, 649, n. 654.

¹⁷ "A & B members of the X association, suing on behalf of themselves and all other members of the association vs C & D, members of the Y association as representing all other members of the association."

¹⁸ *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. ed. 1015 (1884); *Lanchester v. Thompson*; *Am. Steel & Wire Co. v. Wire Drawers Union*, both *supra* note 7.

¹⁹ *McArthur v. Scott*, *supra* note 18; *U. S. v. Old Dominion Settlers*; *Am. Steel & Wire Co. v. Wire Drawers Union*; *Lanchester v. Thompson*, all *supra* note 7.

²⁰ *McArthur v. Scott*, *supra* note 18; *Smith v. Swormstedt*; *U. S. v. Old Dominion Settlers*; *Am. Steel & Wire Co. v. Wire Drawers Union*; *Lanchester v. Thompson*; *Leviness v. Consolidated Gas, Electric Light & Power Co.*; *Van Houten v. Pine*, all *supra* note 7.

In *Wilkerson v. Stitt*, *supra* note 7, at 831, the court says, "The further contention is that the bill is faulty in not alleging that the plaintiffs are authorized to bring the suit, and that the defendants are not officers of, or authorized to act for, the Newbedford Cycle Club, . . . It is not a suit which must be brought by an officer, or under authority to do so. In such a suit the proper allegations as

ciation is defendant, service of process should be had on the named defendants. The judgment in a representative suit binds all members of the association represented, as regards the questions litigated and as regards their interest in the association property, in whatever state they reside.²¹ No case has been found which questioned the right of the named plaintiffs to enforce the judgment they have obtained, and it is believed that they may. Where the association is in fact defendant, execution on the judgment rendered against the named representatives may be levied against the common fund or the association property.²² This judgment, moreover, with its binding effect on all persons represented, is entitled to full faith and credit in both state and federal courts under the federal constitution.²³ Hence no person so represented, whether a named party to the suit or not, can relitigate the same question in the same or any other court in the United States.²⁴

to why all members of each class are not joined must be made in the bill, and the court must be satisfied at the hearing that those bringing the suit in behalf of all plaintiffs, and those against whom suit is brought as representing all defendants, fairly represent the members of the class in question."

Parties sought to be represented held not to have a common or general interest sufficient to warrant a representative suit: *City of Georgetown v. The Alexandria Canal Co.*, 12 Pet. (U. S.) 91, 9 L. ed. 1012 (1838) (parties plaintiff); *Ayres v. Carver*, 17 How. (U. S.) 594, 15 L. ed. 180 (1854) (parties defendant); *Hill v. Eagle Glass Mfg. Co.*, 219 Fed. 719 (C. C. A. 4th, 1915).

²¹ *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356, 41 Sup. Ct. 388, 65 L. ed. 673 (1921); *Hartford Life Ins. Co. v. Ibs*, 237 U. S. 662, 35 Sup. Ct. 692, 59 L. ed. 1165 (1915); *Hartford Life Ins. Co. v. Barker*, 245 U. S. 146, 38 Sup. Ct. 54, 62 L. ed. 208 (1917); *Wallace v. Adams*, 204 U. S. 425, 27 Sup. Ct. 363, 51 L. ed. 553 (1906); *Smith v. Swormstedt*; *Duvall v. Synod of Kansas of Presbyterian Church*, both *supra* note 7; *McClelland v. Rose*, 247 Fed. 721 (C. C. A. 5th, 1918); *Wabash R. R. Co. v. Koenig*, 247 Fed. 909 (C. C. A. 8th, 1921); *McGarry v. Lentz*, 9 F. (2d) 680 (S. D. Ohio, 1925).

²² *Hartford Life Ins. Co. v. Ibs*, *supra* note 21; *Smith v. Swormstedt*; *Frost v. Thompson*; *Pearson v. Anderburg*; *Davison v. Holden*; *Duvall v. Synod of Kansas of Presbyterian Church*, all *supra* note 7; *Bromley v. Williams*, 32 Beav. 177 (Ch. 1863); *Bushong v. Taylor*, 82 Mo. 660 (1884); *Oster v. Brotherhood of Locomotive Fireman & Engineers*, 271 Pa. 219, 114 Atl. 521 (1921); see *Maisch v. Order of Americus*, 223 Pa. 199, 72 Atl. 528 (1909).

²³ *Supreme Tribe of Ben Hur v. Cauble*; *Hartford Life Ins. Co. v. Ibs*; *Hartford Life Ins. Co. v. Barker*; *McClelland v. Rose*; *McGarry v. Lentz*, all *supra* note 21.

²⁴ *Wallace v. Adams*, *supra* note 21; cases cited *supra* note 23.

Where there is a diversity of citizenship between some of the named parties plaintiff and some of the named parties defendant this gives the federal courts jurisdiction, and, contrary to the general rule, the fact that some of the named or representative parties plaintiff and some of the named or representative parties defendant are residents of the same state, does not oust the federal courts of this jurisdiction. *Supreme Tribe of Ben Hur v. Cauble*; *McGarry v. Lentz*, both *supra* note 21; *Irwin v. Missouri Bridge & Iron Co.*, 19 F. (2d) 300 (C. C. A. 7th, 1927).

The writer has found no case in North Carolina in which the validity of a representative suit either by or against an unincorporated association has been raised. Some unincorporated associations, the striking example of which is the present day labor union, have thousands of members, are efficiently organized, acquire and hold valuable property and large sums of money, and conduct numerous undertakings in furtherance of the ends of the association.²⁵ The need for a practicable method of suit by and against such associations is self-evident. It is believed that the representative suit will accomplish this highly desirable result.

F. D. HAMRICK, JR.

Public Utilities—Fixing Minimum Rates.

The plaintiff was furnishing gas to the inhabitants of a town of 2,500 at a base rate of 60 cents per thousand cubic feet. Another company secured a franchise and filed with the State Public Service Commission a schedule with a base rate of 35 cents. After it had begun to operate, plaintiff filed a schedule with a base rate of 20 cents. The commission refused to ratify this schedule but ordered the plaintiff to sell with a base rate of 35 cents. Plaintiff sues to have ordered cancelled. *Held*, the commission has the power to fix a minimum rate, but in a field that will support but one utility a rate that interferes with the right of competition is unreasonable and void.¹

Property impressed with a public interest is subject to regulation under the police power. The constitutional guaranty of liberty of contract is not violated by fixing minimum rates,² even if the enforcement of such minimum rate abrogates contracts already in existence.³ Whether or not a public service commission has the power to fix

²⁵ See the language of Chief Justice Hughes in *United Mine Workers of America v. Coronado Coal Co.*, *supra* note 1, at 385, 388-9.

¹ *Great Northern Utilities Co. v. Public Service Commission*, 52 F. (2d) 802 (D. Mont. 1931).

² *Great Northern Utilities Co. v. Public Service Commission*, 88 Mont. 180, 293 Pac. 294 (1930) (the instant case in the state court); *Incorporated Town of Mapleton v. Iowa Public Service Co.*, 209 Iowa 400, 223 N. W. 476 (1929).

³ *Pinney & Boyle Co. v. Los Angeles Gas & Electric Corp.*, 168 Cal. 12, 141 Pac. 620 (1914), L. R. A. 1915C, 282 (any contract concerning rates entered into by a utility is subject to power of city to change rates); *Union Dry Goods Co. v. Ga. Public Service Corp.*, 142 Ga. 841, 83 S. E. 946 (1914); *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. ed. 887 (1903); *Portland R. Light & P. Co. v. Railroad Com.*, 56 Ore. 468, 105 Pac. 709, 109 Pac. 273 (1909); *Portland R. Light & P. Co. v. City of Portland*, 200 Fed. 890 (D. Ore. 1912).

minimum rates depends upon the statutes from which it derives its power.

Some statutes, as in the instant case,⁴ give the commission express power to fix maximum and minimum rates.⁵ But the statutes of most states merely make blanket provision for fixing "just and reasonable" rates,⁶ or contain some other provision equally as general in nature.⁷ There is a split of authority as to whether under these general provisions power to fix minimum rates is granted. Mr. Justice Brandeis writing the opinion in *Skinner & Eddy Corporation v. U. S.* held that since the common law did not recognize that a rate could be so low as to constitute a wrong, a grant of power to the Interstate Commerce Commission to fix "just and reasonable" rates did not confer power to fix minimum rates.⁸ However, the majority of American courts hold that power to regulate charges implies the power to fix both maximum and minimum rates.⁹ Considering the increasing importance of complete rate regulation this seems to be the better view.

Public utilities, being subject to regulation, have no constitutional right to engage in a competitive rate war.¹⁰ Such competition or the necessity for it would not arise if public utilities were effectively reg-

* MONT. REV. CODE (Choate, 1921) §3891 provides that "... no advance or reduction of existing schedules shall be made without the concurrence of the commission."

⁴ 24 STAT. 384 (1887) (as amended 41 STAT. 484 (1920), 49 U. S. C. A. §15 (1) (1926)).

⁵ N. C. CODE ANN. (Michie, 1931) §1066; D. C. CODE (1929) tit. 26, §24; WASH. COMP. STAT. (Remington, 1922) §10389; CAL. GEN. LAWS (Deering, 1923) Act 6389, §32.

⁶ For instance, IOWA CODE (1931) §6143, which provides that municipalities may "regulate and fix" rates.

⁷ *Skinner & Eddy Corp. v. U. S.*, 249 U. S. 557, 39 Sup. Ct. 375, 63 L. ed. 722 (1919). This decision led to the provision of the Transportation Act of Feb. 28, 1920 c. 91, 418, (49 U. S. C. A. §15 (1) (1926)) which expressly gives the Interstate Commerce Commission power to fix minimum as well as maximum rates.

⁸ *Incorporated Town of Mapleton v. Iowa Public Service Co.*, *supra* note 2; *Pinney & Boyle Co. v. Los Angeles Gas & Electric Corp.*, *supra* note 3; *Economic Gas Co. v. City of Los Angeles*, 168 Cal. 448, 143 Pac. 717 (1914), Ann. Cas. 1916 A, 931; *Public Service Com. v. Garfield*, P. U. R. 1916, B, 835; *Re St. Ry. Rates*, P. U. R. 1921 E. 13 (Com. has power to fix specific rates).

But the statutes of some states expressly prohibit the enforcement of a minimum rate. Mo. REV. STAT. (1929) §10456, construed in *Mo. Mutual Telephone & Telegraph Co. v. Osage County Farmers Telephone Co.*, P. U. R. 1919 E, 689; *Re Rochester*, P. U. R. 1915 A, 1095. See also I SPURR, GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATIONS (1924) 72.

¹⁰ *Incorporated Town of Mapleton v. Iowa Public Service Co.*, *supra* note 2.