Michigan Law Review

Volume 3 | Issue 6

1905

Note and Comment

Michigan Law Review

MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE, $2.50 PER YEAR, ... 35 CENTS PER NUMBER

NOTE AND COMMENT

STATUTE REQUIRING EXAMINATION AND LICENSE AS PREREQUISITES TO OWNERSHIP OR MANAGEMENT OF A DENTAL OFFICE UNCONSTITUTIONAL.—A statute of the state of Washington provides, not only that any person or persons seeking to practice dentistry within the state shall be examined and licensed by the state board of dental examiners, but also that the same requirement shall be imposed upon any person or persons who own, operate or manage a dental office, or place for the practice of dentistry within the state. This statute, so far as it provides for an examination and license as prerequisites for the practice of dentistry within the state, has been held by the Supreme Court of the state to be a proper exercise of the police power and to be constitutional. See *State ex rel. Smith* v. *Board of Dental Examiners*, 31 Wash. 492, 72 Pac. Rep. 110; *In re. Thompson* (Dec. 22, 1904), 78 Pac. Rep. 899; *State* v. *Sexton* (Feb. 18, 1905), 79 Pac. Rep. 634; *State* v. *Brown* (Feb. 18, 1905), 79 Pac. Rep. 638. But the requirement of an examination and license for the owner or manager of a dental office was successfully challenged in the recent case of *State* v. *Brown*, 79 Pac. Rep. 635, on the ground that it was an interference with individual rights not justified by any public necessity. The court suggests "that the police power may curtail the rights of the individual in so far as, and no farther than, the free exercise thereof is calculated to infringe upon the rights of others"; that "ordinarily a natural and constitutional personal right or privilege may be limited only

when its free exercise threatens or endangers the moral or physical well being of others or their property," and holds that, while reasonable restrictions as to qualifications may properly be imposed as to professions or callings whose exercise by ignorant and unskilled persons would put in jeopardy the rights or well being of those who might seek their aid, such personal restrictions cannot properly be imposed ordinarily as conditions precedent to the owning and managing of property. The public necessity for such restrictions cannot arise out of the mere fact of ownership and management. "Does the police power," says the court, "authorize the enactment of a statute making this requirement? We feel constrained to hold that it does not. It is solicitude for the physical well being of the public, or that portion that may need dentistry work, which justifies that part of the statute providing for the examination and licensing of those who desire to 'treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof.' To perform such work with safety and proper regard for health and comfort, the operator must possess technical knowledge and skill peculiar to the study and practice of dentistry. Can the same be said of one desiring to own, run or manage a dental office? We think not. To own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist." By way of illustration, the court suggests that if a man legally licensed as a dentist should die, leaving his dental office and equipment to his wife, then she, if unable through lack of technical learning to comply with the statute, would, if the part of the statute under consideration is valid, by continuing to own the property for any appreciable time, become liable to criminal prosecution. And the court very properly concludes that neither the police nor any other power can, under the law, be invoked to bring about such a result.

The decision in this case is certainly a wholesome one, as it must help in some degree to check the growing tendency to create state examining boards for purposes that cannot be justified as a proper exercise of the police power. It is a well understood fact that such boards are frequently created solely for political purposes. The Washington court in a recent case, *In re Aubry* (Dec. 20, 1904), 78 Pac. Rep. 900, passed upon substantially the same question, when it declared a statute unconstitutional that required horseshoers to pass an examination and secure a license before exercising the calling. The Illinois Supreme Court and the Appellate Division of the New York Supreme Court had previously reached the same conclusion in considering similar statutes. *Bessette* v. *People*, 193 Ill. 334, 62 N. E. Rep. 215, 56 L. R. A. 558; *People* v. *Beattie*, 96 App. Div. (N. Y.) 383, 89 N. Y. Supp. 193. But it may be suggested, as bearing upon the other side of the question, that the New York Court of Appeals, by a divided court, has sustained a statute which provides for the creation of a board for the examination of plumbers, and which prohibits any person from exercising the calling of a master plumber without an examination before such board and a certificate as to his competency. *People* v. *Warden of the City Prison*, 144 N. Y. 529, 39 N. E. Rep.

686, 27 L. R. A. 718. And that the business of plumbing is a proper subject for regulation under the police power is the conclusion of the Supreme Court of Minnesota, although in the recent case in which this conclusion is expressed, the statute under examination was declared unconstitutional because of its arbitrary basis of classification as to cities to which the act was to apply and because of an unjustifiable distinction between master plumbers and journeyman plumbers. *State* v. *Justus,* 90 Minn. 474, 97 N. W. Rep. 124. Further it has been held to be a proper exercise of the police power for the state to provide for the examination and licensing of barbers: *State* v. *Zeno,* 79 Minn. 80.

RAILROAD CONTROL OF THE TELEGRAPH BUSINESS.—A decision of the Supreme Court of the United States, recently rendered, has given to the railroads, already powerful enough to practically defy the national government, so vast an increase of power, that Congress might well endeavor to undo by legislation what has just been established by judicial decision. In this case, *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co.,* 25 Sup. Ct. Rep. 133, the court has construed the Act of 1866, which granted to telegraph companies "the right to construct, maintain, and operate lines of telegraph * * * over and along any of the military or post roads of the United States," as conferring such right subject to the consent of the railroad company owning the right of way constituting any such post road. It holds, in other words, that a telegraph company has no right of eminent domain enabling it to enter upon railroad property and appropriate a location for its poles, *in invitum,* even though its poles and wires do not interfere with the ordinary travel on such post road, thus satisfying the proviso in the act.

In this case the Western Union Telegraph Co. had occupied with its poles and wires the right of way of the Pennsylvania Railroad Co., under a twenty-year contract which provided that at the expiration of the period the telegraph company should, if notified in writing by the railroad company, remove its poles and wires from the railroad right of way. Such notice was in fact given, the railroad company having made a contract with the Postal Telegraph Co. to allow it to maintain a telegraph line upon its right of way. Whereupon, the Western Union Co., after fruitless efforts to effect a settlement, took the position that since Congress, by the Act of 1866, gave it the *"right"* to maintain and operate its lines along railroad rights of way, it could exercise the right of eminent domain; and it proceeded to bring itself within the statute, and instituted proceedings to estimate the compensatory damages to be paid to the railroad company.

The court, in denying the plaintiff the right to maintain and operate its telegraph line without the consent of the railroad company, declared that the case was controlled by two prior decisions, viz., *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1, and *Western Union Telegraph Co.* v. *Ann Arbor Railroad Co.,* 178 U. S. 239. But it is very difficult to see how these cases could be deemed authority for the position taken, as Mr. JUSTICE HARLAN points out in his dissenting opinion. The *Pensacola* case involved simply the question whether a telegraph company, authorized by contract

with a railroad company to erect and maintain a telegraph line along its right of way, could be deprived of that right by a state statute which attempted to confer exclusive privileges upon another company; and the court held it could not be deprived of such right. In the *Ann Arbor* case the only question was the right to the specific performance of a contract between the telegraph company and the railroad company, by which the former was granted the right to use the latter's right of way; and the court expressly held that the bill was not so framed as to raise the question of the right of eminent domain. In each of these cases the court said that the Act of 1866 did not confer upon telegraph companies "the right to enter upon private property without the consent of the owner, and erect the necessary structures for their business; but it does provide that, wherever the consent of the owner is obtained, no state legislature shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." But there is not a word in the Act of 1866 relating to the consent of the owner, nor did the question in either of these cases concern such consent. Of course the court is free to decide as it sees fit, but it hardly strengthens its position to attempt to base a decision on authorities which are not in point.

The chief purpose of the Act of 1866, as stated in the case of *United States* v. *Union Pacific Railroad Co.*, 160 U. S. 1, was to give the country the benefit of competition in the business of communication by telegraph, and to prevent any legislature, by statute, or any railroad company, by contract, from excluding any telegraph company from using the railroad right of way if it brought itself within the act. And yet, as Mr. JUSTICE HARLAN points out, the present decision gives the railroad power to do by mere inaction what it could not lawfully do by contract, and permits a railroad company to grant a monopoly while the state government cannot do so, and to invest a single telegraph company with the exclusive right to operate a telegraph system through the region where it runs. The legitimate outcome would seem to be the control by the railroads of the telegraph business, thus bringing under their power one more of the agencies upon which the industrial life of the nation depends.

THE NEED OF UNIFORM LAWS GOVERNING "CONDITIONAL SALES."—The almost hopeless confusion in the cases regarding so-called conditional sales and the number and bewildering variety of constructions put by courts of different states upon these contracts practically identical in form and designed to accomplish the same purpose, afford a striking instance of the need of uniform legislation upon commercial subjects. A recent case in which the matter is carefully discussed is *Freed Furniture, Etc., Co.* v. *Sorenson* (1905) Utah, 79 Pac. Rep. 564. Plaintiff and defendant had both sold and delivered furniture on the "installment plan" to one Fairchild. Fairchild executed and delivered to plaintiff notes specifying the amounts and dates of the installment payments to be made, reciting among other things that the notes were given for the furniture "this day sold to" said Fairchild, and that it was agreed that the "ownership, title and right of possession" of said property should

not pass from plaintiff to said Fairchild until the notes had been paid in full, and that upon default by the maker in respect of any of the terms of the contract the plaintiff might take possession and sell said goods, and from the proceeds pay the balance due on the notes, "holding the residue, if any, subject to the disposal of the maker" of said notes. These notes and contracts were not recorded. Subsequently Fairchild executed chattel mortgages covering all of this furniture to secure his debt to defendant. These mortgages were duly recorded and on default in payment thereof, defendant took possession of the furniture, and caused it to be sold at auction, and purchased it at such sale. Plaintiff brought this action to recover the furniture specified in his notes. The case turned on the question as to whether, notwithstanding the fact that the parties described the transaction as a sale, with title expressly reserved to the vendor, it was not in legal effect an absolute sale with mortgage back. The argument in favor of this view was based upon that clause in the contract whereby the purchaser agreed *unconditionally* to pay the full price, and upon the stipulation permitting the vendor, in default of payment, to take possession of and sell the goods, applying the proceeds to the reduction of the amount due and "holding the residue if any there shall be subject to the disposal of" the vendee. Had this contention been allowed, the title of defendant who had recorded his mortgage must have been held paramount, inasmuch as the plaintiff's contract had not been recorded in accordance with the chattel mortgage statute. The Supreme Court, however, sustained the ruling of the trial court to the effect that the transaction was to be construed according to the "ruling intention of the parties" (*Heryford* v. *Davis,* 102 U. S. 235, 26 L. Ed. 160) as determined by the contract as a whole and not by detached provisions read alone, and that so construed the transaction was a conditional sale and valid; and judgment for the plaintiff was affirmed.

This is in accordance with early common law doctrine, *Mires* v. *Solebay,* 2 Mod. Rep. 242, and the clear weight of recent authority. *Lippincott* v. *Rich,* 19 Utah 140, 56 Pac. 806; *Van Allen* v. *Francis,* 123 Cal. 474, 56 Pac. Rep. 339; *Perkins* v. *Mettler,* 126 Cal. 100, 58 Pac. 384; *Russell* v. *Harkness,* 4 Utah, 197, 7 Pac. Rep. 865, affirmed as *Harkness* v. *Russell,* 118 U. S. 663, 7 Sup. Ct. Rep. 51. And this rule is generally applied to sustain the conditional vendor's title as against the vendee's attaching creditors; *Bean* v. *Edge,* 84 N. Y. 510; *Perkins* v. *Mettler,* 126 Cal. 100, 58 Pac. Rep. 384; *Nichols* v. *Ashton,* 155 Mass. 205, 29 N. E. 519; the vendee's distraining landlord; *Tufts* v. *Stone,* 70 Miss. 54, 11 S. Rep. 792, and, in the absence of conflicting statute, quite generally, even, as against the vendee's bona fide purchasers. *Cottrell* v. *Carter,* 173 Mass. 155, 53 N. E. Rep. 375; *Lansing Iron Works* v. *Wilbury,* 111 Mich. 413, 69 N. W. Rep. 667. See *Harkness* v. *Russell, supra,* and MECHEM ON SALES, § 599, where a large number of cases is collected.

Notwithstanding the weight of authority by which this rule is upheld, and its logical development from the early common law rule, that generally the parties may determine by agreement between themselves as to when the title to specific or ascertainable property shall pass, it may well be doubted whether as applied to bona fide purchasers it is based upon reason or justice. It has been squarely repudiated by the courts of Illinois. *Murch* v. *Wright,*

46 Ill. 487; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664. And in *Andrews* v. *Colorado Savings Bank*, 20 Col. 313, 36 Pac. Rep. 902, under an unrecorded contract somewhat similar to those in the principal case, the title of the vendor was held not good as against that acquired by a chattel mortgagee. In Pennsylvania, also, contracts of the kind in question, unless put in the form of bailment with option to the bailee to purchase (*Rowe* v. *Sharpe*, 51 Pa. St. 26) would not establish title in the vendee, good as against creditors and innocent purchasers. *Haak* v. *Lindermann*, 64 Pa. St. 499; *Morgan-Gardner El. Co.* v. *Brown*, 193 Pa. St. 351. *Aultman* v. *Silha*, 85 Wis. 359, 55 N. W. Rep. 711, and *Heryford* v. *Davis*, 102 U. S. 235, sometimes cited as also holding contrary to the general rule, are clearly distinguishable.

Finally, in more than half of our states there are statutes regulating this matter, most of which provide that in order to prevent the creation of superior rights in creditors of, or purchases from, the conditional vendee, the vendor must record his contract. See MECHEM ON SALES, § 603 and notes and MORRILL ON CONDITIONAL SALES, where the substance of these statutes is given. But there is an unfortunate lack of uniformity in the detail of these statutes and in the construction put upon them in different jurisdictions.

The whole situation, then, regarding conditional sales is extremely unsatisfactory. In states where the prevailing judicial rule is recognized, persons dealing with conditional vendees can never be secure, while manufacturers and merchants doing an interstate business are compelled to steer an uncertain course between a bewildering and shifting variety of judicial decisions and statutes, in which a misstep may mean the loss of the entire subject-matter of the sale. It would seem that a provision, that unless the contract be in writing, and acknowledged and recorded in the manner usually provided for chattel mortgages, it shall be invalid as against creditors and bona fide purchasers, might well be added to the draft for a uniform "Sale of Goods Act" now before the Commissioners on Uniform State Laws. This whole subject is fully and clearly treated in MECHEM ON SALES, §§ 558-650.

JURISDICTION OF EQUITY OVER VOID INSTRUMENTS.—That before a party is entitled to equitable protection from a claim against which he has a good defense at law, he must show his legal remedies to be inadequate, is a familiar and fundamental principle. Court decisions show that its application is not always easy.

In the recent case of *Ritterhoff* v. *Puget Sound Nat. Bank of Seattle* (1905), — Wash. —, 79 Pac. Rep. 601, it was sought to enjoin the defendant from transferring or asserting demand upon a pretended promissory note in its possession, to which the plaintiffs' names were forged. It appeared that demand of payment had been made, that the plaintiffs owned considerable property and that one of them was an invalid. In affirming a decree granting the injunction the court said, that, though there was a complete legal defense to the note, and testimony could be perpetuated under the statutes, yet this remedy was not so adequate as to bar equitable relief.

It is not enough to prevent the jurisdiction of equity, that a mere legal remedy exists. It must appear that such remedy is as practical and efficient to accomplish the ends of justice as would be the equitable relief sought. *Irwin* v. *Lewis*, 50 Miss. 363. Nor, where rights may be endangered by, or vexatious results follow from, the lapse of time, is a legal remedy available only in the future, sufficient. In such cases if the party cannot "immediately protect or maintain his right by any course of proceedings at law," the court of chancery will grant its aid. *Martin* v. *Graves*, 5 Allen 601. Upon application of these principles, the jurisdiction of equity to restrain the transfer of negotiable instruments which have been fraudulently or illegally obtained, is plain. For, were such relief not granted, the rights of innocent third parties might attach and against them the defense could not be urged. BISPHAM'S EQUITY, Sec. 459. Likewise, it is now established that there is no ground for equitable interference if the instrument shows on its face that it is void. *Van Doren* v. *Mayor*, 9 Paige 388. But obviously a different situation is presented where, as in the present case, protection is sought from an instrument wholly void, yet bearing no evidence of its invalidity. It is of no value as the basis of a present action; the rights of third parties cannot attach; and yet, can it be said to be of no effect? To the world it is evidence of a valid claim against the party, involving his credit to the extent of its apparent value. It may be made a means of harassing him by demands and threats of suit. If the testimony whereby its falsity may be proven, be lost, it will become enforcible. And, though the testimony may be perpetuated, it cannot avail the party so much as would the oral testimony of the witness actually present in court. These are all inequitable circumstances, and while no one of them standing alone would be sufficient, yet taken together they form a proper ground for equitable jurisdiction. However, the exercise of such jurisdiction rests largely in the sound discretion of the court, and relief will be denied in doubtful cases. *Town of Venice* v. *Woodruff*, 62 N. Y. 462, HUTCHINS & BUNKER'S Cas. (2nd ed.) 794; *Vannata* v. *Lindley*, 198 Ill. 40, 64 N. E. Rep. 735. In the present case the court says: "Under the peculiar facts of this case,—respondents did not have any remedy at law as practical and efficient to the ends of justice and its prompt administration as their remedy in equity." That the circumstances properly warrant the relief given seems fully sustained by the authorities. *Hamilton* v. *Cummings*, 1 Johns. Ch. 517; *Town of Springport* v. *Teutonia Sav. Bank*, 75 N. Y. 397; *Smith* v. *Pearson*, 24 Ala. 355.

QUITCLAIM DEED AS AFFECTING THE QUESTION OF GOOD FAITH.—The doctrine that one claiming under a quitclaim deed is not a bona fide purchaser and can acquire no title as against the grantee in a prior unrecorded conveyance finds recent support in *Fowler* v. *Will* (1905), — S. D. —, 102 N. W. Rep. 598. The conveyance to the second grantee, which was first recorded, purported, the court says, "only to 'remise, release and quitclaim' his [the grantor's] interest in the premises" and such a deed "in no sense purports to convey title—not even by inference—and is not essentially a grant, in con-

templation of the statute." Many well known authorities are cited as sustaining the rule announced. CORSON, P. J., dissenting, cites *Moelle* v. *Sherwood*, 148 U. S. 21; *United States* v. *California &c. Land Co.*, 148 U. S. 31, and *Boynton* v. *Haggart*, 120 Fed. Rep. 819, 57 C. C. A. 304.

The deed involved in the principal case is the ordinary quitclaim deed. It is not one of those that may be said plainly to give notice by their terms of the doubtful character of the title—as, for example, where the grantor conveys "such interest only as he now has, whatever that may be, in the aforesaid lands" (*Va. & Tenn. Coal &c. Co.* v. *Fields*, 94 Va. 102), nor on the other hand is it one of those that, while quitclaim deeds in general form, yet purport by their terms to convey the whole estate in the real property particularly described (*Wilhelm* v. *Wilken*, 149 N. Y. 447), so that questions sometimes discussed in cases of this character are not involved.

The doctrine that the form alone of the ordinary quitclaim deed affects the purchaser under it with notice which prevents his being a purchaser in good faith while supported by recent decisions in many states, "does not," as Mr. JUSTICE FIELD says in *Moelle* v. *Sherwood*, "seem to rest upon any sound principle." That courts should deprive the grantee in such a deed of the protection of the recording acts, without regard to his actual good faith, and for the benefit of one who has negligently failed to record the evidence of his title, seems in accord neither with the spirit of the registry acts nor with the principles by which courts are ordinarily controlled. While quitclaim deeds are often obtained for speculative purposes the true test of their effect should be the fact of a purchase in good faith. *Merrill* v. *Hutchinson*, 45 Kan. 59, *Babcock* v. *Wells*, 25 R. I. 23.

Recent statutes in some states have abrogated the extreme doctrine that a grantee in a quitclaim deed is charged with bad faith as a presumption of law; in Maine, for example, it is provided (L. 1903 ch. 220) that conveyances of the right, title or interest of the grantor, if duly recorded, shall be as effectual against prior unrecorded conveyances, as if they purported to convey an actual title; and in North Dakota (L. 1903 ch. 152) that the fact that the first recorded conveyance of a subsequent purchaser for a valuable consideration is in the form of a quitclaim deed, shall not affect the question of good faith or be of itself notice to the grantee of any unrecorded conveyance.

COMPETENCY OF A CHILD AS A WITNESS.—Appellant was convicted of rape on a child of the age of seven years. Upon the trial the appellant objected to the admission of the testimony of the prosecutrix against him for the reason that the evidence showed that the witness was only seven years of age, and as article 34, Penal Code, 1895, provided that no person could be punished for any offense committed before he or she arrive at the age of nine years, the witness could not take the oath subject to the pains and penalties of perjury, as required by the state constitution. After exception taken by appellant the prosecutrix was permitted to testify. *Held*, error, although BROOKS, J., filed a dissenting opinion. *Freasier* v. *State* (1904), — Tex. Crim. App. —, 84 S. W. Rep. 360.

The ancient rule of the common law appears to have been that no infant under the age of nine years could be sworn (*Commonwealth* v. *Hutchinson*, 10 Mass. 225; *State* v. *Edwards*, 79 N. C. 648); but the rule does not seem to have been well established, for in *Brasier's Case* (1779), 1 Leach C. C. (3rd ed.) p. 237, it was ruled that no testimony whatever can be received except upon oath, and that an infant though under the age of seven years may be sworn in a criminal case provided such infant, upon strict examination by the court, possess sufficient knowledge of the nature and consequences of an oath. If the rule as first stated was ever well established it has since fallen into disuse and become obsolete. Intelligence, ability to comprehend the meaning of an oath, and the moral obligations to speak the truth, and not age, are the tests by which the competency of a child to give testimony is determined. And when it appears that the witness is so qualified he should be admitted to testify, no matter what his age. *Wheeler* v. *U. S.*, 159 U. S. 523; *White* v. *State*, 136 Ala. 58; *Minton* v. *State*, 99 Ga. 254; *State* v. *King*, 117 Ia. 484; *State* v. *Wilson*, 109 La. 74; *Trim* v. *State*, — Miss. —, 33 So. Rep. 718; *State* v. *Scanlan*, 58 Mo. 204. And this is so even where there is a statute making infants not punishable with perjury. *Johnson* v. *State*, 61 Ga. 35. The tests as to competency vary; some courts holding that in addition to a competent amount of understanding, the witness must have received such a degree of religious instruction as will enable him to comprehend the moral obligations imposed upon him by the oath. *State* v. *Belton*, 24 S. C. 185; *State* v. *Michael*, 37 W. Va. 565. Others hold the witness competent if able to give intelligent answers although ignorant of God and the Bible. *White* v. *Commonwealth*, 96 Ky. 180; *State* v. *Levy*, 23 Minn. 104. By statute in some states it is provided that where an infant is of tender years and does not understand the nature of an oath, but has general intelligence, he may at the discretion of the presiding judge be permitted to testify, without being sworn. Michigan, C. L. 1897, § 10215. *People* v. *Walker*, 113 Mich. 367, New York, Code Crim. Pro. § 392; *People* v. *O'Brien*, 74 Hun. 264. The question of competency is for the trial court (*State* v. *Doyle*, 107 Mo. 36; *People* v. *Stouter*, 142 Cal. 146; *Castleberry* v. *State*, 135 Ala. 24); and will not be reviewed except in cases of an abuse of discretion, or a manifest misapprehension of some legal principle. *Peterson* v. *State*, 47 Ga. 524; *Ridenhour* v. *Kansas City Cable Ry. Co.*, 102 Mo. 270; *Shannon* v. *Swanson*, 208 Ill. 52.

Art. 1, § 5, of the constitution of Texas provides that "all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury." The penal code enactment has already been given. Under these provisions it would seem, and the principal case holds, that the testimony of a child under nine years of age in a criminal case is incompetent, and a conviction based in whole, or in part, upon such testimony cannot be sustained. That a deplorable situation arises under this state of facts cannot be denied. It is equally true that the courts cannot give relief, but that any relief must come through legislative enactment or amendment of the constitution. The words are plain; there is no ambiguity of language and therefore the courts are given no opportunity to put any construction upon the language other than the meaning

apparent on the face of the instrument. *Lake Co.* v. *Rollins,* 130 U. S. 662, 670. The courts of Texas have apparently not been consistent in their decisions relative to the competency of children to testify under oath, for in *Reyna* v. *State* (1903), — Tex. Crim. App. —, 75 S. W. Rep. 25, and in *Click* v. *State* (1902), — Tex. Crim. App. —, 66 S. W. Rep 1104, children below the age of eight years were permitted to testify under oath. An examination of the statutes and constitutions of many of the states fails to disclose like statutory provisions except in Illinois, where it is provided (Starr & Curtis Ann. St. Vol. 2, p. 2825, ¶ 5) that all oaths shall be taken subject to the pains and penalties of perjury; that no person below the age of ten years shall be convicted of a crime or misdemeanor (Starr & Curtis Ann. St., Vol. 1, p. 1357, ¶ 462) and yet the testimony of children under this age is there received unchallenged. *Shannon* v. *Swanson, supra.*

COMPENSATION FOR PARTY WALLS AS BETWEEN SUBSEQUENT GRANTEES.—In the recent case of *Loyal Mystic Legion et al.* v. *Jones* (1905), — Neb. —, 102 N. W. Rep. 621, the facts were that a party wall had been erected under an agreement between the builders and their adjoining lot owner, which provided that the wall should be one-half upon the lot of each party and that the adjoining owner—the non-builder—"his heirs, executors, administrators or grantees" might use the wall for any building he "or his grantees may erect," provided that he "or his grantees before proceeding to join any other buildings to the said party wall and before making any use thereof or breaking into the same should pay or secure to be paid to said parties of the first part [the builders] or their grantees one-half of the actual cost of said party wall or so much thereof as shall be joined or used as aforesaid." This agreement having been executed, acknowledged and recorded, the lots were conveyed to others by the contracting parties and the question before the court was whether, when the wall was used by the present owner of the non-builder's lot, compensation should be made to the present owner of the builder's lot or to an assignee of the original builder. It was held that, as the contracting parties intended "that whoever became the owner of either lot should stand in the shoes of the makers of the party wall agreement, with respect to its provisions," the present second builder should compensate the first builder's successor in title.

In arriving at this conclusion, however, the principles of covenants running with the land are expressly disregarded by the court, reliance being placed upon the provision in the agreement that the money for the use of the wall should be paid to the builders or "their grantees," the court saying, "it is not necessary to say that the personal obligation to pay for the wall runs with the land in order to carry into effect the provisions of the contract under consideration." And particular emphasis is laid upon the fact that the present agreement names "grantees" instead of "assigns"—the latter term being said by the court to be appropriate to transfers of personalty rather than realty. But this latter distinction seems unnecessary in the consideration of such cases for the term "assigns" has been used from early times as applicable to

successors in title to realty. Moreover, there seems no greater difficulty in holding that such an agreement concerns the land and therefore may be a covenant running with the land, than in holding that the obligations imposed by the agreement may be enforced between these later grantees between whom there is no privity of contract. Several previous Nebraska cases cited by the court had established the doctrine that the burden of such a covenant might run with the land, though in *Cook* v. *Paul* (1903), 93 N. W. Rep. 430 it was held that the *benefit* was personal irrespective of the terms of the agreement—a conclusion opposed to that of the principal case. This opposition is especially interesting in view of the pains taken by the Commissioners in *Cook* v. *Paul* in their examination of the question; for they said: "as a rule of property, as well as of contract, forming an essential part of the law *whose foundations we are laying* in this comparatively new state, it is entitled to the most careful consideration and we shall endeavor to *settle it* in accordance with the weight of judicial opinion, at the risk of a seemingly prolonged review of the authorities." Now come the Commissioners in this last case and say that *Cook* v. *Paul* is "unofficial," and "we do not, therefore, consider it as in any way establishing the legal proposition contained in the opinion." *Cook* v. *Paul,* however, furnishes the text for a recent valuable discussion of the question as to the enforcement of the obligation to contribute to the cost of party walls, by or against grantees or successors in title, in 66 L. R. A. 673.