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Note and Comment

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NOTE AND COMMENT

SAFEGUARDING THE CRIMINAL DEFENDANT.—Every now and then a new attack is made somewhere in the United States upon the rule prohibiting comment before the jury upon the fact that the defendant in a criminal case has not testified as a witness in his own behalf. At the present time an effort of this kind is being made in the Michigan legislature, and the introduction of the bill drew quite a little storm of protest from the State press as a dangerous inroad upon our ancient guarantees of personal liberty and security. In fact, however, it directly touches nothing more ancient than a statutory privilege which dates from the year 1861. By the Public Acts of that year the disability of parties to actions to testify as witnesses in this State was removed, but it was expressly provided that defendants in criminal cases could not be compelled to testify, but might do so or not at their own pleasure. (Act No. 125, §2). In 1881 an amendment to this statute was passed providing, as to the defendant in a criminal case, that "his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." (Pub. Acts, 1881, No. 245). And this is the form it retains in the Judicature Act. (Ch. 17, §64).

Conceiving this statute to be merely a legislative interpretation of the constitutional provision that "No person shall be compelled in any criminal case to be a witness against himself" (Const. 1850, Art. VI, §32; Const.

1909, Art. II, §16), the legislature is considering the proposal of a constitutional amendment to permit such comment. And this is probably necessary, for judicial opinion seems to incline toward the view that comment upon a failure to testify is a violation of this provision against compulsory self-incrimination. COOLEY, CONST. LIM. (7th Ed.) 447; *People* v. *Tyler*, 36 Cal. 522; *State* v. *Cameron*, 40 Vt. 555; *Commonwealth* v. *Harlow*, 110 Mass. 411; *Commonwealth* v. *Scott*, 123 Mass. 239. Only in Maine, it appears, has such comment been expressly held to be compatible with this constitutional privilege. *State* v. *Bartlett*, 55 Me. 200, 217; *State* v. *Banks*, 78 Me. 490. The New Jersey cases are not germane because in that State the constitution does not have a similar provision. *Parker* v. *State*, 61 N. J. L. 308.

The wisdom of the rule prohibiting comment upon a defendant's failure to testify is a matter which may well be questioned. In the first place, there is an artificiality and lack of candor in the ostrich-like refusal to admit the existence of a perfectly obvious fact. As the Supreme Court of New Jersey says, the inference which follows from a failure to testify "is natural and irresistible. It will be drawn by honest jurymen, and no instructions will prevent it. Must a court refrain from noticing that which is so plain and forcible an indication of guilt?" *Parker* v. *State, supra.*

But a more serious objection is that the rule destroys a perfectly reliable and legitimate means for aiding the jury to reach a just verdict. Fleeing from arrest, giving contradictory or improbable accounts of the matters in issue, refusing to account for the possession of stolen property,—all these are acts which suggest inferences as to guilt which are conceded to be proper for the jury to consider. Conduct at the trial in refusing to give testimony which could ordinarily be damaging only if the defendant were guilty, is an act equally suggestive of inference. If the conduct of the defendant before the trial is available, why should his conduct at the trial be deemed too dangerous and unjustly prejudicial for the jury to consider? The rule evinces an astounding lack of confidence in the jury.

This much is clear, that the rule here considered has nothing to do with due process of law, and is not guaranteed to the citizens of the several States by the United States Constitution. It is at most a mere special application of a more general rule, namely, against self-incrimination, and even this latter rule is merely one of expediency and "has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law." *Twining* v. *New Jersey*, 211 U. S. 78, 113. And it is also clear that in England and her colonies, where the guarantees of the common law are held in as high regard as with us, no such rule as that prohibiting comment on failure to testify is recognized. *Regina* v. *Rhodes* [1899] 1 Q. B. 77; *Kops* v. *Regina* [1894] App. Cas. New South Wales, 650, affirming Id., 14 N. S. Wales L. Rep. 150.

It is also interesting to note that the large and influential Law Reform Committee of the New York Bar Association, in a report made in December, 1914, unanimously recommended the enactment of legislation similar to that now proposed in the Michigan legislature.

A corollary to the rule against comment is involved in the recent and much discussed case of *Caminetti, et al.* v. *United States,* 37 Sup. Ct. 192, decided Jan. 15, 1917. In that case the defendant took the stand and testified as to events up to a certain point, but he stopped short there and refused to testify further. This failure to testify to subsequent events was put before the jury by an instruction from the court as evidence for their consideration. It was contended on behalf of the defendant that this was error, under the federal statute (Act of March 16, 1878, 20 Stat. 30, c. 37) which had been held to prohibit comment on a failure to testify. *Wilson* v. *United States,* 149 U. S. 60. The Supreme Court of the United States held, affirming the Circuit Court of Appeals below, that when the defendant took the stand he voluntarily relinquished his privilege of silence together with the immunity from comment thereon, and could not stop his testimony at any point he saw fit "without subjecting his silence to the inferences to be naturally drawn from it." The same point had previously been decided the other way by two United States Circuit Courts of Appeals. *Balliet* v. *United States,* 129 Fed. 689, 64 C. C. A. 201; *Myrick* v. *United States,* 219 Fed. 1, 134 C. C. A. 619. The decision in the *Diggs* case is in harmony with the generally accepted view. WIGMORE, EVID., §2273(4), and note.

E. R. S.

THE SCOPE OF THE MANN ACT.—As was to be expected in view of the well-settled doctrine of the Supreme Court that the constitutional grant of power to regulate interstate commerce includes power of control over transportation of persons as well as property, it was held in *Hoke* v. *United States,* 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. 281, that the WHITE SLAVE TRAFFIC ACT of 1910 (36 Stat. 825), usually referred to as the MANN ACT, was constitutional. State legislation covering the same ground, it has been held, has been displaced. *State* v. *Harper,* 48 Mont. 456, 138 Pac. 495.

Wide differences as to the interpretation of the ACT early arose. That commercialized vice was intended to be reached was indicated by the name given to the ACT by Congress itself and by the report accompanying the introduction of the ACT into the House of Representatives. This view seems to have been adopted by Judge POLLOCK in the United States District Court in an unreported case. See 12 MICH. L. REV. 156. The terms of the ACT, however, quite clearly do not so limit its operation. By §2 it is provided "That any person who shall knowingly transport or cause to be transported * * * in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose * * * shall be deemed guilty of a felony," etc. In three cases attracting wide attention it was held that the offense was committed by transportation of a woman in interstate commerce simply for the gratification of personal desire and pleasure, no phase of commercialized vice being present. *Johnson* v. *United States,* 215 Fed. 679, 131 C. C. A. 613; *Diggs* v. *United States,* and *Caminetti* v. *United States,* 220 Fed. 545. The latter cases have been recently affirmed by the Supreme Court, the Chief Justice and Justices

McKENNA and CLARKE, however, dissenting. *Caminetti, et al.* v. *United States,* 37 Sup. Ct. 192.

Speaking of the interpretation of written law BLACKSTONE says, "As to the *effects* and *consequence,* the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by PUFFENDORF, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit." 1 BLACK. COMM. *60. "The same common sense accepts the ruling, cited by PLOWDEN, that the statute of First Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire; 'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." *United States* v. *Kirby,* 7 Wall. 482, 486. And in *Church of The Holy Trinity* v. *United States,* 143 U. S. 457, it was held that the importation by the accused of an alien under contract to serve as rector of a church was not punishable under a statute making it an offense to import aliens "under contract or agreement to perform labor in the United States," it being conceded that the act upon which the prosecution was based was clearly included within the language of the statute. The dissenting Justices in the principal case, being of opinion both from external and internal evidences that the legislative purpose was to cover only commercialized vice, sought to apply the principle of these holdings. The complete blamelessness of the physician, of the officer making the arrest of the mail carrier, and of the church, in the instances referred to would seem to make out a situation differing vitally from that of the defendant who has transported a woman in interstate commerce for the purpose of fornication or adultery.

To the argument that under the interpretation of the Act adopted by the Supreme Court opportunities for blackmail may be vastly increased, it may perhaps be suggested that even so the wholly innocent traveller has nothing to fear. If a man in his peregrinations chooses to provide himself with female society to while away the tedious hours of travel it is not entirely unreasonable to expect him to assume such risks, even granting that relations between him and his companion may never actually have passed beyond the purely platonic. R. W. A.

THE LIABILITY OF THE INITIAL CARRIER AFTER THE FINAL CARRIER BECOMES A WAREHOUSEMAN.—In England and a few of the United States the rule of *Muschamp* v. *Lancaster, etc., Ry. Co.,* 8 Mees. & W. 421, is followed, and a carrier which receives goods for transportation to a point beyond its terminus presumably assumes liability for through transportation. In most

of the States a carrier may assume liability beyond its own line by making a "through contract," but unless it does so the carrier receiving goods destined for a point not on its line is liable only for safe carriage over its own part of the route and for delivery to the succeeding carrier. As regards interstate transportation, Congress doubtless assumed complete control over the matter by the CARMACK AMENDMENT of 1906 (34 Stat. at L. 584, Ch. 3591) and provided therein that the initial carrier should be liable for "any loss, damage or injury to such property caused by it" or any connecting carrier. One of the results of the act referred to, as construed by the United States Supreme Court in *Adams Express Co.* v. *Croninger,* 226 U. S. 491, and other cases, was to make contracts limiting the carrier's liability valid, regardless of State rules to the contrary; and the courts of States whose laws had been more advantageous to the shipper were loath to extend its operation any further than they were obliged to by the decisions of the United States Supreme Court. See 15 MICH L. REV. 314. In like manner, the courts of States whose laws were more advantageous to the initial carrier have been reluctant to extend the effect of the provision rendering such carrier liable for acts of the connecting carrier further than the words of the act and the decisions of the Supreme Court of the United States have necessitated. The decisions of many of the State courts show a marked tendency to exclude from the operation of the CARMACK AMENDMENT all matters not expressly provided for in it; while the federal courts, on the other hand, have been inclined to make the amendment as a whole all-inclusive, and to extend its application broadly and freely. For example, some State courts, even after the *Croninger* case, held that limitations of of liability for *delay* were not within the scope of the CARMACK AMENDMENT and were governed by State rules, and, similarly, that the initial carrier was not by that amendment made liable for delay caused by a connecting carrier. *Gulf, C. & S. F. Ry. Co.* v. *Nelson,* (Tex. Civ. App. 1911), 139 S. W. 81. But the United States Supreme Court decided that delay in interstate transportation was covered by the amendment. *N. Y. & Norfolk R. R.* v. *Peninsula Exchange,* 240 U. S. 34, 36 Sup. Ct. 230. So, as some of the State courts sought to restrict the effect of the amendment by holding that a contract limiting the carrier's liability became amenable to State rules when the final carrier ceased to act as carrier and became a warehouseman, it has been held that the liability imposed by the amendment upon the initial carrier is terminated as soon as the carrier relation ceases. In *Norfolk & W. R. Co.* v. *Stuart's Draft Co.,* 109 Va. 184, the Virginia court declared that "the vicarious liability sought to be fastened upon the defendant [the initial carrier] is for the acts of the connecting carrier as carrier and not as warehouseman." And other courts have referred to this case with approval. *Louisville & N. R. Co.* v. *Brewer,* 183 Ala. 172, 62 So. 698; *Hogan Milling Co.* v. *Union Pacific R. Co.,* 91 Kans. 783. And in a very recent case the New York Supreme Court, citing the *Stuart's Draft* case and others, based its decision in part upon the proposition that "the initial carrier is not liable for any breach of duty on the part of the final carrier as warehouseman." *Dodge & Dent Mfg. Co.* v. *Pennsylvania R. R. Co.,* 162 N. Y. Supp. 549.

In the first cases that came before it involving the CARMACK AMENDMENT, the United States Supreme Court said that the provision of that amendment making the initial carrier liable for defaults of connecting carriers operated to make such connecting carriers the agents of the initial carrier, and intimated that its effect was to apply to all interstate shipments over several lines the English rule as to through contracts. In *Atlantic Coast Line* v. *Riverside Mills,* 219 U. S. 186, the court said: "In substance Congress has said to such carriers: 'If you receive articles for transportation from a point in one State to a place in another, you must do so under a contract to transport to the place designated'." And in *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, it was said that "under the CARMACK AMENDMENT, wherever the carrier voluntarily accepts goods for shipment to a point on another line in another State, it is conclusively treated as having made a through contract." And the same conclusion was reached by the Alabama court in *Louisville & N. R. Co.* v. *Brewer,* supra, in which the court, referring to the CARMACK AMENDMENT and the English rule, said that "the true effect of said amendment is to bring all interstate shipments, the stipulations of bills of lading to the contrary notwithstanding, under the operation of the rule." Had the effect of the amendment been no more than to bring all interstate transportation under the operation of the English rule as to through contracts, it might well have been decided that the initial carrier was absolved from all further liability as soon as the final carrier ceased to be a carrier with reference to a particular shipment. It had been held in Illinois, which is one of the states where the English rule prevails, that even under that rule the initial carrier was not liable for a mis-delivery by the connecting carrier after the latter had ceased to be a carrier and had become a warehouseman. *Illinois Central R. Co.* v. *Carter,* 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527. The liability in England was apparently not so restricted. *Crouch* v. *Great Western Ry Co.,* 6 W. R. 391. But Congress went further, and defined "transportation" to include "all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of the property transported;" and it seems, from this definition and the broad language of the act, that Congress intended by the CARMACK AMENDMENT to make the initial carrier liable for any loss, damage, or injury until the interstate shipment is completed, and that goods shipped are still in interstate commerce, even though the final carrier has become a warehouseman. So it was held, with reference to the termination of contracts limiting liability, by the Supreme Court of the United States. *Cleveland, C. C. & St. L. Ry. Co.* v. *Dettlebach,* 239 U. S. 588; *Southern R. Co.* v. *Prescott,* 240 U. S. 632; *Western Transit Co.* v. *Leslie Co.* (1917) 37 Sup. Ct. 133. And the Kentucky court, in *Nashville, C. & St. L. Ry. Co.* v. *Dreyfuss-Weil Co.,* 150 Ky. 333, 150 S. W. 321, reached the same conclusion with regard to the termination of the liability of the initial carrier. It would seem that if the provisions of the original contract are still in force as against the shipper after the carrier relation has ended, they ought also to continue to be binding on the initial carrier.

It must be concluded, therefore, that the proposition advanced in *Dodge & Dent Mfg. Co.* v. *Pennsylvania R. R. Co.*, supra, viz. that the responsibility of the initial carrier is at an end when the final carrier becomes a warehouseman, cannot be supported as to interstate shipments. And this conclusion is strengthened by an examination of the authorities cited in support of it. In *Wien* v. *New York Central & H. R. R. Co.*, 166 App. Div. 766, the New York court held that the initial carrier was not liable for loss incurred by the shipper as the result of the connecting carrier's mistake and failure to return the shipment promptly after the consignee had refused to accept the goods and the consignor had ordered their return. The decision was put on the ground that the later negotiations between the consignor and the final carrier amounted to a new contract, and that the CARMACK AMENDMENT entitled the shipper to recover from the initial carrier for defaults only in the performance of the original contract, regarded as a through contract. Whether or not this decision was correct, it is not authority for the proposition advanced in the principal case, since the question there involved is not whether the initial carrier is liable for a default by the connecting carrier in the performance of a new contract made by it, but whether the original contract was still subsisting. Nor is the decision in the *Stuart's Draft* case, supra, and the other cases mentioned above as approving it, authority for the broad doctrine that the initial carrier is relieved of all further responsibility as soon as the final carrier becomes a warehouseman. However positive the dicta in those cases may be, the decisions themselves involved the question, not whether the initial carrier was liable *at all* after the final carrier had ceased to act as such, but whether it was liable thereafter *as a carrier;* in other words, what those cases decided was that the CARMACK AMENDMENT did not impose carrier liability on the initial carrier for a loss or injury to goods occurring while they were held by the succeeding carrier as a warehouseman. It has often been held that under that amendment the initial carrier may make any defense which might be made by the connecting carrier in whose hands the injury occurred. *Riverside Mills* v. *Atlantic Coast Line,* 168 Fed. 987; *Brinson & Kramer* v. *Norfolk Southern R. Co.,* 169 N. C. 425, 86 S. E. 371; *Burke* v. *Gulf, C. & S. F. Ry. Co.,* 147 N. Y. Supp. 794. The natural corollary of that proposition is that where the liability of the connecting carrier is that of a warehouseman, the liability of the initial carrier is also that of a warehouseman; and it seems obvious that a decision that the initial carrier is not held to the strict accountability of a carrier after its agent, the final carrier, has become a warehouseman, is by no means equivalent to a holding that its responsibility has entirely ceased.

The correct rule, both on principle and authority, seems to be that under the CARMACK AMENDMENT the delivering carrier is the agent of the initial carrier in all matters relating to the delivery of the goods and their preservation or disposition after arrival at destination (*Burkenroad Goldsmith Co.* v. *Ill. Cent. R. Co.,* 138 La. 81, 70 So. 44); that so long as the relation of carrier and shipper subsists, whether on its own or connecting lines, the liability of the initial carrier is a carrier liability; and that when the final carrier becomes a warehouseman the responsibility of the initial carrier

does not cease, but that its liability thereafter is that of a warehouseman only. And these observations apply as well to interstate shipments made after the CUMMINS AMENDMENT of 1915 (38 Stat. at L. 1196) as before, since the provision of the CARMACK AMENDMENT applicable to this situation is retained verbatim in the later act. W. H. S.

IMPAIRMENT OF THE OBLIGATION OF CONTRACT.—The United States Supreme Court has again indicated its astuteness to hold a decision of a State court to be a "law impairing the obligation of contracts," wherever it can find that the decision was in fact reached by giving effect to some subsequent legislation. Each of two street railway companies in Detroit was granted the privilege of occupying additional streets, by ordinances which contained stipulations binding each company to accept a single fare for transportation "over any of its lines in said city" and also to sell tickets at a certain reduced rate. The plaintiff in error, the Detroit United Railway, acquired and united under one organization the two street railway corporations referred to above and also certain suburban lines operating under village and township grants, contractual in their nature, but which franchises did not require that these suburban lines sell tickets at the same rate as was required by the city of Detroit from those street railways mentioned above, now a part of the Detroit United Railway system. Afterwards, by an act of the legislature, the territory in which these suburban lines were operating was annexed to the City of Detroit, the act providing that the annexed territory should be subject to all the ordinances and regulations of the city, with exceptions not now material. It was the contention of the State and of the City of Detroit that the provisions in the ordinances, which contained stipulations regarding fares, and which were assented to by the predecessors of the Detroit United Railway, were intended to be applicable throughout the city as it might from time to time be enlarged, and that the Detroit United Railway, as successor to these companies, is bound by the limitations of those ordinances as to all its lines within the city, not only as its limits existed at the time of passage of the ordinances, but also as to the lines it owns in the territory which was subsequently annexed to the city. The Supreme Court held that the giving of such effect to the annexation act would amount to an impairment of the obligation of contract. *Detroit United Railway* v. *People of the State of Michigan,* and *Detroit United Railway* v. *City of Detroit,* 37 Sup. Ct. 87.

This decision reversed the Supreme Court of the State of Michigan, as that tribunal had determined the issues favorably to the city and State. *People* v. *Detroit United Railway,* 162 Mich. 460, 139 Am. St. Rep. 582, 125 N. W. 700, 127 N. W. 748; *Detroit United Railway* v. *City of Detroit,* 173 Mich. 314, 139 N. W. 56.

A consideration of these two Michigan cases discloses that the decisions were founded upon a construction of the ordinances requiring the predecessors of the Detroit United Railway to charge a single fare for transportation between any two points on their lines within the city limits. The Michigan court considered that in entering into this contract the parties had borne in

mind the power of the State to increase or diminish the territory of a city and that the words "city limits" were used with reference to what the boundaries of the city might be in the future. This construction is upheld by *St. Louis Gaslight Co.* v. *City of St. Louis*, 46 Mo. 121; *Town of Toledo* v. *Edens*, 59 Iowa 352, 13 N. W. 313; McQUILLIN, MUN. ORDINANCES, §218. The decision in the two Michigan cases is in harmony with *Indiana R. Co.* v. *Hoffman*, 161 Ind. 593, 69 N. E. 399, and *Peterson* v. *Power Co.*, 60 Wash. 406, 111 Pac. 338, 140 Am. St. Rep. 936, the facts and questions involved in these decisions being very similar to the two principal cases.

The contract clause of the Federal constitution is not directed against all impairment of contract obligation. It does not reach mere errors committed by a State court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a Federal question. *Cross Lake Club* v. *Louisiana*, 224 U. S. 632, 639, 56 L. Ed. 924, 32 Sup. Ct. 577, and cases there cited. And on this point the jurisdiction of the Federal Supreme Court was questioned by respondents in error. However, the court did not consider that the decisions of the State courts turned upon the mere meaning of the contracts founded upon an acceptance of the terms of the ordinances; but that the decisions were reached only through a consideration of the combined effect of those ordinances and the acts of the legislature of Michigan, which thereafter extended the city limits. And when the State court, "either expressly or by necessary limitation, gives effect to a subsequent law of the State whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law." *Cross Lake Club.* v. *Louisiana*, supra. It has also been held in *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, 17 L. Ed. 520, and in many cases which have followed the doctrine set forth in that case, that if the contract when made was valid by the laws of the State as then expounded and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent decision of its court. See WILLOUGHBY, CONST., 922.

The pivotal question therefore would seem to be whether or not the Michigan court's decision, in determining the obligation of the contract, did give effect to the subsequent act of the legislature. It is apparent that in determining whether or not the State court has given effect to any subsequent legislation so as to impair the obligation of the contract, the Federal court is not bound by the wording of the opinion of the State court, but may determine for itself whether or not effect was in fact given to subsequent legislation. "Otherwise, although it was the aim of the suit and effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee." *Louisiana Ry. & Nav. Co.* v. *Behrman*, 235 U. S. 164, 170, 59 L. Ed. 175, 180, 35 Sup. Ct. 62, and cases there cited.

The court thereupon went into a consideration of the cases on the merits, and being unable to accept the construction adopted by the Michigan court of the ordinances referred to above, it was of the opinion that the decisions reached by the State court could have been reached only by giving effect to the subsequent acts of the State legislature which made the annexed territory subject to the ordinances of the city, and thereby impaired the obligation of the contracts between the suburban lines and the villages and townships which granted the franchises. Justice CLARKE rendered a dissenting opinion in which Justice BRANDEIS concurred. These justices considered that "the passing of the valid extension act merely created a situation under which the implied condition *existing in the fare contract from beginning,* finds an application in the new territory. This is giving effect not to the terms of the act of the legislature, but to the terms of the contract with the city, and the most that can be said against the decision of the Supreme Court of Michigan is that it gives an erroneous construction of the contract." But this does not give rise to a Federal question within the rule of *Cross Lake Club* v. *Louisiana,* supra. W. L. O.

THE RIGHT TO RESCIND STOCK-DIVIDENDS ALREADY DECLARED.—The rule that cash dividends, once declared and published, become debts, irrevocable and absolutely due the shareholder, is so well-established as to hardly merit discussion. 7 COOK, CORPORATIONS, §541; 5 TAYLOR, CORPORATIONS, §568; MACHEN, MODERN LAW OF CORPORATIONS, §1358; MORAWETZ, CORPORATIONS, §445; CLARK & MARSHALL, PRIVATE CORPORATIONS, §517d. But in the recent case of *Staats* v. *Biograph Co.,* 236 Fed. 454 (C. C. A. 1916), the same question is raised as to stock dividends.

The corporation was capitalized for $2,000,000 with all but $1,000 of this stock outstanding, and for over a year there had been a surplus each month of over $1,000,000 though there was a regular annual dividend of 12%. At this stage the directors declared and published a scrip dividend of 50% of the outstanding capital to be paid for in stock or cash at the option of the directors. Before any scrip was actually issued the European war broke out and the directors, having well-grounded apprehensions as to the effect of the war on their business, voted to rescind the dividend. The plaintiff was a shareholder and sought to collect the dividend on his shares in the present action. The court affirmed the right of the directors to rescind the dividend and denied the plaintiff any recovery.

The court recognized the prevailing doctrine as to *cash* dividends, but excepted stock dividends from the rule. The only authorities cited to support the distinction were *Terry* v. *Eagle Lock Co.,* 47 Conn. 141, a dictum in *Dock* v. *Schlichter Jute Cordage Co.,* 167 Pa. 370, and MACHEN, MODERN LAW OF CORPORATIONS, §601. As the *Cordage Company* case is not in point and MACHEN cites *Terry* v. *Eagle Lock Co.* as his sole authority, we may consider that case alone. Doing so we find that the decision was based squarely on the laches of the plaintiff. Inasmuch as the case seems to be the only one in which the subject of the present discussion has been raised prior to

the instant case we will disregard that matter and consider the dicta which form the exclusive basis for the decision in *Staats* v. *Biograph Co.* After first recognizing the general rule as to cash dividends CARPENTER, J. proceeds to distinguish stock dividends from cash dividends in this relation on two grounds: first, the formalities intervening between the declaration of the dividend and the actual issue of the stock (stating that the whole matter is in fieri until the stock is actually issued); and, secondly, "such dividends do not materially affect the value of the stock. * * * It does not add to his (the shareholder's) ready cash, but it changes the form of his investment by increasing the number of his shares, thereby diminishing the value of each share, leaving the aggregate value of his stock the same. It is of no special importance whether the value be divided into few or many shares." The first point is not much dwelt on as it is too readily answered by pointing out that formalities also intervene before a cash dividend can become cash after it is merely declared, and that saying that it is "in fieri" is begging the question. Moreover, in *Terry* v. *Eagle Lock Co.* it was necessary that the stock issue be authorized by vote of the shareholders, while in the instant case the directors had authority in themselves to issue stock under the circumstances. The second ground has been riddled in the cases dealing with the respective rights of life-tenant and remainderman to the dividends on stock devised to them. It is the fallacious basis of the so-called "Massachusetts Rule" which, though adopted by the United States Supreme Court in *Gibbons* v. *Mahon,* 136 U. S. 549, has been repudiated in practically every state in the Union where the question has arisen, except Massachusetts, Illinois, Rhode Island, and Georgia, the last-named being constrained by statute. 7 COOK, CORPORATIONS, §555. Lord ELDON, in *Paris* v. *Paris,* 10 Ves. 185, says: "As to the distinction between stock and money, that is too thin; and if the law is that this extraordinary profit (50% stock dividend), if given in the shape of stock shall be considered capital, it must be capital if given as money." The logical framework of the doctrine quoted from *Terry* v. *Eagle Lock Co.* (which is sedulously followed by the court in the instant case) has been completely shattered by the masterly opinions of O'BRIEN, J., in *McLouth* v. *Hunt,* 154 N. Y. 179, and MARSHALL, J., in *Soehnlein* v. *Soehnlein,* 146 Wis. 330, as well as such typical cases as *Earp's Appeal,* 28 Pa. St. 368; *Ross' Appeal,* 83 Pa. St. 264; *Hite* v. *Hite,* 93 Ky. 257; *Thomas* v. *Gregg,* 78 Md. 545; *Pritchitt* v. *Nashville Trust Co.,* 96 Tenn. 472, and *People* v. *Glynn,* 114 N. Y. Supp. 460.

But in *Soehnlein* v. *Soehnlein,* supra, MARSHALL, J. says: "Little or no benefit can be derived from an extensive discussion of mere case law. The better way is to discover the essential principle involved, if that can be done, and for a rule, trace that principle to a logical result." Refer to the argument quoted from *Terry* v. *Eagle Lock Co.* and relied on in the instant case as the sole basis for making a different rule for stock dividends than for cash dividends. Is the right to a stock-dividend a mere "nominal right"? Why, then, the hundreds of expensive litigations between life-tenants and remaindermen to secure such dividends? Why was the instant suit brought? Why do our eminent financiers consider it worth while to cut their juicy

"melons," often without any vestige of surplus, if they be such unsubstantial fruit? A mere "nominal right" will hardly occasion such lavish expenditure of effort and treasure in this work-a-day world! Is it true that when the stock of a corporation having a capital of $1,000,000 and a surplus of $1,000,000 is increased to $2,000,000 and the additional $1,000,000 in stock distributed pro rata among its shareholders, that the par value of its shares drops to 50 or the market value from 200 to 100? We all know that is not true. The par value remains the same; the market value is controlled, as before, by earning power, value of control and the various currents of the market. The "nominal value" theory is pure mathematics; it has no place in the world of reality.

A stock-dividend declared out of surplus is *not* a mere dilution of stock; it does *not* confer a mere nominal right upon the shareholder. It is true that the property of the corporation is not increased or diminished by such a dividend. But its liabilities are increased pro tanto, and this liability is to the existing shareholders. It is a debt to the shareholder to the full extent that the cash dividend is a debt. The vice in the "nominal value" theory is that its proponents have identified the corporation and its shareholders in a relation where their rights and liabilities are separate, distinct and, to a certain degree, even inimical.

The instant case was a hard one for the corporation. The circumstances warranting the revocation of the dividend as a matter of business policy were so strong that the court was evidently impressed thereby. But these considerations of business policy would weigh even more heavily against the enforcement of a claim for a declared cash dividend. Indeed, the scrip was to be optional in form and the court allowed the choice of the stock-dividend as the least threatening horn of the dilemma, under the rule of *Robinson* v. *Robinson*. We regret that the grounds for this decision were not more carefully considered. E. B. H.