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Note and Comment

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NOTE AND COMMENT

THE APPAM CASE.—On March 6 last the Supreme Court handed down a unanimous decision in the appeals taken in the libel suits filed against the *Appam* and cargo in the District Court of the United States for the Eastern District of Virginia, affirming the decree of restitution entered by that court.

On February 1, 1916, the *Appam*, a British merchantman captured upon the high seas on January 15 by the German cruiser *Moewe*, arrived in charge of a prize master and crew at Hampton Roads, Virginia, after a voyage nearly twice as long as that to the nearest German port. The prize master's commission authorized him to take the vessel to the nearest American port and to lay her up. The German Ambassador in a letter of February 2, notified the Secretary of State of the vessel's arrival and of the intention of the commanding officer "to stay in an American port until further notice." (Cf. 10 AM. JOUR. INT. LAW (Supp., Oct., 1916), 387).

The modern practice of nations in dealing with prizes is for the captor to take them for condemnation before a prize court sitting in his country. It was formerly the custom for belligerents to bring prizes into neutral ports, although it was clearly recognized that such entry, except under special treaty stipulations to that effect, was accorded the belligerent not as of right, but as a privilege at the discretion of the neutral. DAVIS, OUTLINES OF INT. LAW, 261-262; MOORE, INT. LAW DIG., 983; WOOLSEY, INT. LAW, 267; HAUTE-

FEUILLE, DES DROITS ET DES DEVOIRS DES NATIONS NEUTRES EN TEMPS DE GUERRE MARITIME, 352. The whole trend of modern practice has been, however, to limit this entry very strictly to certain well-defined cases. "The modern practice of neutrals prohibits the use of their ports by the prizes of a belligerent, except in cases of necessity; and they may remain in the ports only for the meeting of the exigency. The necessity must be one arising from the perils of the seas, or need of repairs for seaworthiness, or provisions and supplies. * * * In the list of necessities, the general danger of a passage, from the vigilance or superiority of the enemy, it would seem, should not be included, although no decision on that precise point is known." WHEATON, INT. LAW (ed. Dana), 486-487 note; cf. also 2 OPPENHEIM, INT. LAW (2d. Ed.), 395-396; HALL, TREATISE ON INT. LAW, 623; DAVIS, op. cit., 261-262; MOORE, INT. LAW DIG., 982, 985. Such has also been the practice of the United States. MOORE, op. cit., 936, 937, 938. The modern attitude on this question is very clearly shown by the close restrictions of the provisions of Articles 21 and 22 of The Hague Convention XIII of 1907, adopted by a large majority of the nations, although not in force in the present war. The *Appam*, therefore, as not being according to the well-substantiated facts entitled thereto under any of the above exceptions of necessity, had, it is submitted, no right under the general principles of International Law to entry into a neutral American port.

The German Government rested its claim, however, upon what were conceived to be the special privileges conceded to her by the provisions of Article XIX of the Prusso-American Treaty of 1799, as renewed in 1828. Cf. Letters of Feb. 2 and Feb. 22, 1916, from German Ambassador to Secretary of State, in 10 AM. JOUR. INT. LAW (Supp., Oct., 1916), 387, 391; also telegram from German Government, *ibid.*, p. 390.

This treaty, originally negotiated in 1785, was entered into in 1799 and renewed in 1828 by Prussia and the United States; and although there is in theory ground for the contention that treaties made by a component state of the German Empire prior to the formation of the latter are not binding upon the Empire, this Treaty has been frequently recognized as valid and rights claimed and obligations performed under it. (Statement of the German Foreign Secretary before the Reichstag, May 31, 1897.) Its validity was officially recognized by Prussia at the outbreak of the Civil War in 1861, by the United States and the North German Confederation in the Franco-Prussian War of 1870-1871, in the Lusitania Note of May 13, 1915, and in the Frye case in 1915. (Based on KRAUEL, EIN VOELKERRECHTLICHER STREITFALL, in KOHLER, ZETSCHRIFT FUER VOELKERRECHT for January, 1916, pp. 11-19.) In *Terlinden v. Ames*, 184 U. S. 270, the Supreme Court recognized the continuous validity of treaties made by the United States and the component states of the German Empire, the political departments of both countries having previously decided such question in the affirmative. The *Appam*, therefore, as a German prize seeking entry into a neutral American port, was entitled to the enjoyment of such rights and privileges of entry and of such only as are granted and contemplated by the provisions of Article XIX of that Treaty.

The Treaty with Prussia was one of a series of commercial treaties made by the United States with the leading maritime states of Europe—with France in 1778, with Holland in 1782, with Sweden in 1783, with England in 1794. In these treaties, except that with Holland, the reception of prizes in the ports of the neutral is regulated by provisions of the same general tenor, the differences being in the main in phraseology. On August 28, 1801, President Jefferson wrote to Gallatin about the French Treaty, "The treaties give a right to armed vessels, *with their prizes*, to go where they please (consequently into our ports), and that these prizes shall not be detained, seized, nor adjudicated, but that the armed vessel may depart as *speedily as possible, with her prize*, to the place of her commission. * * * These stipulations admit the prizes to put into our ports in cases of necessity, or perhaps of convenience, but no right to remain if disagreeable to us; and absolutely not to be sold." MOORE, *op. cit.*, VII. 936. It would seem, then, that the interpretation put by the Secretary of State upon Article XIX as providing only temporary asylum for prizes under convoy by the captor vessel is in strict accord, not only with the general practice of the United States, but also with the interpretation officially put by the Government upon similar treaty provisions from the beginning. Cf. Letters of March 2 and of April 7, 1916, from Secretary of State to German Ambassador, in *AM. JOUR. INT. LAW*, X, Supp., Oct., 1916, pp. 393-395, 401-403. The German Government protested against this "especially strict interpretation" of the Treaty, urging the facile contention that the modern practice of naval warfare should modify the strict terms of the stipulation so as to permit entry of unconvoyed prizes in conformity with modern methods of sending prizes to the home port under a prize crew. German Memorandum of March 16, 1916, in *AM. JOUR. INT. LAW*, X, Supp., Oct., 1916, pp. 397-399. A treaty is in essence a bargain whereby the contracting parties seek to accommodate their aims and interests in such fashion as will secure to each the greatest amount of advantage possible. Provision is balanced against provision, and it is submitted that no unilateral extension of the strict terms of any provision can be admitted under the general principles of treaty construction (cf. WOOLSEY, *INT. LAW*, pp. 185-186), a restriction of all the greater force when it is borne in mind that the provision thus proposed to be extended in the face of an acceptance of over a century under the possibility and the right of abrogation on a year's notice at any time the strict provisions of the treaty should prove unsatisfactory, was in itself originally a modification of the practice, if not of the rule, of International Law, a practice whose aim and purpose have been but fortified and strengthened in the later development of that science.

The determination of political questions lies within the realm of the political department of the government, whether of the executive or legislative branch, and that decision is not subject to review by the courts. Cf. MOORE, *op. cit.*, V. 241-242, and cases there cited. The Supreme Court in *Jones v. United States*, 137 U. S. 202 (SCOTT, *CASES*, p. 40), held that the determination of sovereignty by the political department was binding upon the judges, other officers, and citizens. Cf. other cases there cited. Other

cases are *The Prize Cases*, 2 Black, 665; *Fifield v. Ins. Co.*, 47 Pa. St. 166, 172 in Scott's Cases; also *Kennett v. Chambers*, 14 How. 38, where it was held that the decisions on foreign relations made by the political department were binding upon the country. (SCOTT, CASES, p. 728, 729.) The court held in *re Cooper*, 143 U. S. 472, 502-505 (MOORE, op. cit., V. 744), that there could be no judicial review of the action of the political department upon such questions, basing its opinion upon *Williams v. Suffolk Ins. Co.*, 3 Sumner, 270, and other cases there cited. In *North American Commercial Co. v. United States*, 171 U. S. 110, the court recognized the arbitral award and the correspondence of the government as binding upon it. In the matter of the interpretation of treaties the courts are bound by the known decisions of the political department; and this principle is more clearly seen where the interpretation put upon the treaty by the political department has been set forth in the course of diplomatic reclamation. In *Foster v. Neilson*, 2 Pet. 253, "the court refused to go into the merits of the treaty, holding itself bound by the decision of the political department of the government. * * * We think, then, however individual judges might construe the Treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed.'" SCOTT, CASES, pp. 75-76. Nor can the Supreme Court enforce a treaty, if the government decides to disregard it. *Botiller v. Dominguez*, 130 U. S. 238, and other cases there cited, in MOORE, op. cit., V. 243. In the principal case Waddill, J., said, "The weight that should be given to the opinion and ruling of the secretary of state * * * in construing the Prussian treaty, need not be dwelt upon * * * further than to say that it has special significance as a decision and ruling of the executive branch of the government, having to do with international matters, invoked by the German government, in this very matter." 234 Fed. 396. The interpretation put upon the Prussian Treaty by the Secretary of State was, therefore, binding upon the courts. Since by that interpretation the *Appam* had no right to entry under the circumstances, such entry constituted a violation of American neutrality; and the courts, called upon in the libel suits to take cognizance of the case, had to proceed to judgment accordingly.

"When a captured vessel is brought or voluntarily comes *infra praesidia* of the neutral power, that power has the right to inquire whether its own neutrality has been violated by the capture, and if so it is bound to restore the property." *La Estrella*, 4 Wheaton 298; *La Amistad de Rues*, 5 Wheaton 385; *Talbot v. Janson*, 3 Dallas 157; *Betsey Cathcart*, Bee. 292." HALL, INT. LAW, p. 625; cf. also HAUTEFEUILLE, op. cit., I. 360-361. In the past, it is true, but two main classes of such cases have come up for adjudication, captures in neutral territory, and captures by vessels fitted out in neutral ports (cf. HALL, op. cit., pp. 624-625; *La Santissima Trinidad*, 7 Wheaton 283); but it is submitted that it is the fact of the violation of neutrality—and not the manner of the violation, which is conceived to be a question of quite secondary importance—which entails the penalty. The Vice-Admiralty Court at Halifax held in the case of *The Chesapeake* that "for a

belligerent to bring an uncondemned prize into a neutral port to avoid recapture [as seems to have been the motive in the principal case] is such a grave offense against the neutral state that it ipso facto subjects the prize to forfeiture, and * * * the vessel should be restored to the owners on the payment of costs." MOORE, *op. cit.*, VII. 937. The holding of the court was, therefore, in line with the rulings and practice of over a century.

Although the Supreme Court did not in the opinion handed down in the principal case expressly recognize that the interpretation put upon the Treaty by the political department of the government in the course of diplomatic reclamation was binding upon the courts, it is submitted that that principle governed in arriving at the decision.

H. C. S.

ENJOINING AN ELECTION AT THE SUIT OF TAXPAYER.—It is commonly stated that equity has not power to enjoin an election. MCCRARY, *ELECTIONS*, 3rd Ed. §351. This statement cannot be taken without some qualification. When the election is being held under a valid law, the requirements of which are observed, there can be no doubt but that the injunction should be refused. The question in such a case is a political one and equity will not interfere to decide questions which are truly of a political nature. *Morgan v. Wetsel County Court*, 53 W. Va. 372, 44 S. E. 182; *Oden v. Barber*, 103 Tex. 449, 129 S. W. 602. But in cases where the election is to be held under an unconstitutional law, most of the cases hold that equity has jurisdiction to enjoin. *Mayor, etc. of Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247; *Connor v. Gray*, 88 Miss. 489, 41 So. 186 (*semble*); *contra, Illinois v. Galesburg*, 48 Ill. 485. The question in such a case is certainly a judicial one and is capable of being tried by a court of equity.

In a recent case, *Power v. Ratliff* (Miss. 1916), 72 So. 864, which was a combination of two suits to enjoin the submission to the vote of the people of a prohibition law and a law providing for the appointment of game wardens, the relief was denied. In both suits the plaintiffs contended that the constitutional amendment which allowed a referendum was void because not regularly passed. It was stated in the dissenting opinion that the amendment was clearly invalid because of the method of its adoption and this is tacitly admitted in the prevailing opinion, which however did not consider this point. The majority opinion disposes of the case upon two grounds: one, that these particular plaintiffs have not sufficient interest in the result to complain; two, that equity has no jurisdiction to grant the relief demanded. Having disposed of the first point, the decision on the second is unnecessary and is hence mere *obiter dictum*.

However, the question of jurisdiction is an interesting one. It is of course, well settled that equity will not enjoin the passing of an act by the legislature even though the act would be clearly unconstitutional if passed. *McChord v. Louisville and N. R. Co.*, 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289; *New Orleans Water Works Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518. This position is taken in order to prevent judicial interference with the functions of the legislature; there is also

an efficient remedy after the legislation is passed. This objection does not apply to an injunction against the submission of a measure under a referendum law. There is no interference with the functions of a coordinate branch of the government. The legislature has already completed its action. The submission of a measure to vote of the people cannot be regarded as an act of the legislature. The referendum vote is the act of the people and not of the legislature: there is no political objection to enjoining such an election if the provision under which the election is held, is unconstitutional. An injunction against the election in the principal case would prevent an illegal, useless and expensive act without jarring the fine mechanism of our tri-branched system of government. If no political question is involved in the granting of the injunction it is difficult to see why a court of chancery cannot enjoin an illegal election.

There is another question involved in the *Power* case, namely what interest is sufficient upon the part of the plaintiff to entitle him to an injunction against an election. The first bill was brought by two taxpayers. The submission of the voters was to be at a regular election and so the additional expense and the additional tax burden on the plaintiffs was insignificant. That a taxpayer is entitled to an injunction against an illegal election has been affirmed in: *Mayor, etc. of Macon v. Hughes*, supra; *De Kalb County v. City of Atlanta*, 132 Ga. 727, 65 S. E. 72; and denied in *Roudanez v. New Orleans*, 29 La. Ann. 271; *McAlister v. Millwee*, 31 Okla. 620, 122 Pac. 173, 40 L. R. A. N. S. 576. The principal case is clearly distinguishable from *Fletcher v. Tuttle*, 151 Ill. 41, in which case the court denies equitable relief to secure to the plaintiff his right to vote and be voted for. The rights insisted upon in the *Fletcher* case are political ones and whether equity should protect these rights depends in a large degree upon whether such rights are regarded as being civil as well as political as in the leading case of *Ashby v. White*, 2 Ld. Raym. 938, 950. There is a conflict as to whether the latter case is law in this country—the state courts are at variance on this point. Surely in those jurisdictions which recognize the doctrine of *Ashby v. White*, equity should protect the right to vote. The doctrine of the *Fletcher* case, however, has no application to the principal case.

It was pointed out in *People v. Galesburg*, supra, that in the case of an invalid election of officials, there is an adequate remedy at law, i. e., by resorting to the common law writ of quo warranto. But such a writ does not take care of the situation in the *Power* case. Moreover even where the election is of officials, the writ would not prevent the imposition of taxes to pay for the expenses of the election. Some of the courts intimate that equity should not enjoin the election, but only enjoin the payment of expenses of the same. But why wait? It would be safer and more sensible to enjoin the election in the first instance. The court in the *Power* case intimates that if the proposed election authorized bond issues, or directly affected plaintiffs' property rights, it would consider that the plaintiffs were in a position to complain. But there are property rights involved; in particular instances, the additional tax resulting from the expenses of the

illegal election might be considerable. It is true that Judge Cooley said in *Miller v. Grandy*, 13 Mich. 549, that a single taxpayer has no right to complain until the amount is assessed against him. The learned judge bases his argument upon public policy; the public welfare demands that a whole assessment should not be enjoined. It is inconceivable that he would apply the rule to such a case as the principal one. Surely it does not interfere with the public welfare to enjoin an election which is useless at the best. Even if each taxpayer would have a remedy at law for the recovery of taxes which he was wrongly forced to pay, equity should grant an injunction to prevent multiplicity of suits. This point is developed in *Mayor, etc. of Macon v. Hughes*, supra. This much cannot be doubted: that equity has jurisdiction to enjoin an election which is clearly illegal; that it can do so at the suit of a taxpayer without doing violence to the theories upon which equity grants relief; and that in so doing a desirable result is obtained without interfering with political affairs.

T. E. A.

WHAT SERVICE GIVES JURISDICTION IN PERSON.—On March 6th, 1917, the Supreme Court of the United States, in the case of *McDonald v. Mabee*, reversing the decision of the Supreme Court of Texas, in 175 S. W. 676, held that a judgment in foreclosure proceedings in which the defendant was served only by publication did not merge the cause of action so as to bar a suit on the original notes for the balance unpaid by the sale of the mortgaged property on the foreclosure, although the statute of the state declared such service sufficient to give jurisdiction in personam, and the defendant was a citizen of the state and bound by the law so far as it was constitutional. The only case in the United States squarely sustaining the Texas decision on similar facts, so far as the writer is aware, is the often cited case of *Henderson v. Staniford* (1870), 105 Mass. 504, 7 Am. Rep. 551, in which it was held that action on the original cause was barred by the plaintiff recovering a judgment in a suit in California, where the parties resided, and in which the defendant was served only by publication. The court said that if the service so made was defective the defendant could waive the defect, and did so by urging the judgment as a defence. It is no doubt true that a defendant can waive service by appearing in the suit, as is done every day; but this defendant did and proposed no such thing; and no appearance by him even if made could cure the defect unless such appearance were entered before judgment, so as to confer jurisdiction on the court to render the judgment. That a judgment recovered by such service was no bar, and was not available as a defence against a new action on the original cause, had, at the time this decision was rendered, been held in other states. *Whittier v. Wendell* (1834), 7 N. H. 257; *Middlesex Bank v. Butman* (1848), 29 Me. 19. Thus considered, the decision of the Supreme Court of the United States in *McDonald v. Mabee* would seem to affirm a doctrine sufficiently clear on principle to require neither proof nor precedent to support it, were it not for the decisions to the contrary cited. But these decisions are not so contrary as they seem; for they were rendered

on the assumption that such a service gives jurisdiction, and it is in that regard that the present case is of the greatest interest.

The notion has persisted in many quarters that statutes may enable courts to acquire jurisdiction to give judgments in personam against persons who have neither appeared nor been served with personal notice within the jurisdiction to appear and defend, whereby to put them in default. There are the cases of *Lucas v. Wilson* (1881), 67 Ga. 356, and *Hulbert v. Thomas* (1887), 55 Conn. 181, 10 Atl. 556, 3 Am. St. Rep. 43, in which judgments rendered on such service were affirmed in the Supreme Court because the requirements of the statute had been complied with, no inquiry being raised as to whether or not the statutes were constitutional. Then there are such cases as *Nelson v. Chicago, B. & Q. Ry. Co.* (1907), 225 Ill. 197, 80 N. E. 109, in which it was held that judgment against a corporation on such service was good because such was the service provided by the statute, and the defendant by citizenship is bound by the laws of the state. The facts are that the defendant was an Illinois corporation, agreeing to be bound by such service by consenting to be a corporation under that law, and therefore bound by the agreed method of service. The same would be true if it were a foreign corporation and accepted the permission given by the state to do business in the state on condition of consenting to accept service of that sort. The same would be true of a natural person who gives a judgment note, providing that if not paid when due the payee may appoint an agent to appear and confess judgment against the maker to the amount of the note, interest, and costs. Such a judgment is valid, not because the legislature could legalize such a method of service, but because the party has expressly agreed to be bound by such service. It has been suggested that the same logic applies to natural persons, that by consenting to be citizens of the state they agree to be bound by its laws; but that is not true, they are citizens whether they will or no. We were not consulted as to whom we would choose for parents or where we preferred to be born, assuming that we could have made a legal choice at that time. Even Mr. Justice Field's concession in *Pennoyer v. Neff* (1877), 95 U. S. 714, 735, that a statute of a state providing that non-residents doing a partnership business in the state should be bound by indirect service, has since been repudiated, because such legislation denies equal protection of the law. *Fleazner v. Farnson* (1915), 268 Ill. 435, 109 N. E. 327.

In the English courts it is quite clearly established that legislation providing for less than personal notice to confer jurisdiction in personam is valid, and will be given effect. Thus there is the leading case of *Douglas v. Forrest* (1824), 4 Bing. (13 E. C. L.) 686, an action on a Scotch judgment against a Scotchman, in which it was held that a service consisting only of calling him in open court, at separate terms, to appear and calling in public in the market-square of Edinburgh and at the sea-shore after he had gone to India, was sufficient to give the court jurisdiction to render judgment against him in personam which would sustain an action of debt in England, because the service was according to the law of Scotland, to which the de-

defendant owed allegiance. Again, in *Bocquet v. MacCarthy* (1831), 2 Barn. & Ad. (22 E. C. L.) 951, it was held that a statute of a British colony providing that in all actions against an absent party process might be served by delivering the same to the king's attorney, without requiring him to forward it to the party, was not so repugnant to the principles of natural justice as to prevent the English court maintaining an action of debt on a judgment rendered by a court of the colony against a citizen of the colony on such a service. The same has been held in an Irish court of a French judgment of France: *Maubourquet v. Wyse* (1867), 1 Ir. Rep. C. L. 471.

But the writer has always maintained that these decisions do not express the accepted law of the United States, and that here no state can confer on its courts jurisdiction to render judgments in personam on any less service than personal service on the party to be charged, and that within the confines of the state. This view is supported by the decisions of the Supreme Court of the United States, first in the case of *Webster v. Reid* (1850, 11 How. (52 U. S.) 437, in which plaintiff claimed title to land by sale under execution on a judgment recovered for service of the commissioners appointed to partition the half-breed Indian lands, 119,000 acres. The commissioners not being paid for their services sued "The Owners of the Half-Breed Indian Lands," had process served by publication according to the law of the territory, took judgment for the amount of their services, had execution levied on all the lands, had them sold, and Reid claimed title by virtue of such sale. The court held the judgment and sale void, and Mr. Justice McLean in giving the opinion of the court said: "These suits were not a proceeding in rem against the land, but were in personam against the owners of it. *Whether they all resided within the territory or not does not appear, nor is it a matter of any importance.* No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor an attachment or other proceeding against the land until after the judgments. The judgments, therefore, are mere nullities and did not authorize the executions on which the land was sold." The observation that the rule is the same as to citizens and non-residents is worthy of particular note; and the same sentiment was emphatically repeated by Mr. Justice Field in *Pennyroyer v. Neff* (1877), 95 U. S. 714. But because the defendant in that case happened to be a non-resident, many persons have said the decision might have been different had the defendant been a citizen of the state, basing their opinions on the English decisions above referred to, and the notion that the state may provide some substitute for personal service in the case of its own citizens. This qualification has been most explicitly denied in the Supreme Court of California in *DeLaMontanya v. DeLaMontanya* (1896), 112 Cal. 101, 44 Pac. 345, 53 Am. St. 165, 32 L. R. A. 82, holding void a decree for alimony and custody of children against a citizen of the state on service by publication according to the requirements of a statute declaring that such service should be sufficient to give jurisdiction in personam; and similar rulings have been made in other states: *Rahar v. Rahar* (1911), 150 Iowa 511, 129 N. W. 494, Ann. Cas. 1912D, 680; *Moss v. Fitch* (1908), 212

Mo. 484, 111 S. W. 475, 126 Am. St. 568. In *Smith v. Grady* (1887), 68 Wis. 215, 31 N. W. 477, it was held that a judgment against a citizen of Ontario rendered on service on the debtor personally in the state of Wisconsin, in compliance with the laws of Ontario was not entitled to respect sufficient to prove a claim against the estate of the defendant therein in the probate courts of Wisconsin. In *Grubel v. Nassauer* (1913), 210 N. Y. 149, 103 N. E. 1113, it was held that an action was not maintainable on a judgment rendered by a court of the German Empire against a citizen of Germany on service according to the law of that country, after he had sailed to America.¹

¹ In *Wilson v. Seligman* (1892), 144 U. S. 45, 12 Sup. Ct. 541, after return of execution unsatisfied against a corporation, an order was made on motion, according to the provisions of the statute of the state, that execution issue against the stockholders, including defendant as one, and notice of this motion was personally served on him outside of the state; he did not appear, and on default an order was made finding him to be a stockholder and liable for the judgment, and awarding execution against him. The statute required "sufficient notice in writing to the persons sought to be charged." On this order action was brought against the defendant in this case, and judgment for defendant was affirmed on writ of error to the Supreme Court of the United States. GRAY, J., * * * "In the case at bar the defendant never resided in Missouri, and was not served with process within the state, either upon the original writ against the corporation or upon the motion for execution against him. He denies that he was a stockholder; and the question whether he was one was not tried or decided in the controversy between the plaintiff and the corporation, nor involved in the judgment recovered by one of those parties against the other. Under the statute of Missouri, and upon fundamental principles of jurisprudence, he is entitled to legal notice and trial of the issue before he can be charged with personal liability."

Amsbaugh v. Exchange Bank of Maquoketa (1885), 33 Kan. 100, 5 Pac. 384, was an action on two judgments rendered against defendant in the circuit court of Jackson County, Iowa, on process served there on defendant's wife at the house where he had resided, a week after his departure with intent never to return. He left November 4, and the processes were served November 12 and 14 following. Judgment for plaintiff reversed on error, because judgments were void. The court held that a judgment rendered on such service was not entitled to any respect in any other state even if the service was according to the law of the state where it was rendered; because defendant had abandoned his residence before process was served, and therefore was beyond the jurisdiction.

Ross v. Fitch (1908), 212 Mo. 484, 111 S. W. 475, 126 Am. St. 568, was a decree for divorce, alimony, and custody of children, on process served only on defendant personally in another state, according to the law of this state; and sale of land on execution thereon. The divorce purchaser at the sale sued to clear the title. GRAVES, J. "To our mind the legislature had no intent of giving the service in section 592 a broader scope than that of publication, but was simply providing another method of accomplishing the same thing; *i. e.*, giving some kind of a notice that the court had seized the res, whether that res was property or the marriage status, and would proceed to determine the rights of the parties in and to the res.* * * We repeat that, whatever may be the holdings elsewhere, our court places the acquisition of jurisdiction upon which a personal judgment can be rendered upon the fact of personal service of the party with process in this state. In other words, no process issued by the courts of this state and served upon the party defendant in another state can be the basis of a personal judgment. And this is true whether the party in fact is a citizen of this state or of another state."

In rendering the opinion in the case of *McDonald v. Mabee*, Mr. Justice HOLMES makes a concession not heretofore admitted by the Supreme Court of the United States, that something a little short of personal service might constitute due process of law, within the protection of the constitution. This concession may be due to the fact that there are to be found on the statute books of nearly all the states provision for service of process by leaving a copy at the residence of the defendant with some member of the family of suitable age and discretion. Mr. Justice HOLMES says: "Perhaps in view of his technical position and the actual presence of his family in the state a summons left at his last and usual place of abode would have been enough. * * * It is going to the extreme to hold such power gained by service at the last and usual place of abode." The writer is not aware of any case in which the constitutionality of a statute providing for acquisition of jurisdiction by such mode of service has yet been sustained. J. R. R.

POWER OF A NATIONAL BANK TO FOUND A PENSION FUND FOR EMPLOYEES.—Within the last decade in the United States there has been a marked increase in the profit sharing plans, the pension plans, and the general welfare work done by business corporations for their employees. Whether this has been due more to beneficent motives than to pure business foresight it is evident that many business men consider such investments good ones for a corporation from a purely financial viewpoint. "The pension plan attaches the employees to the service and decreases the liability of a strike * * * it makes more certain the continuance of efficient men in the lines of work with which they are familiar * * * the incentive to good conduct is greatly increased." F. A. VANDERLIP, quoted in SQUIER, *OLD AGE DEPENDENCY IN THE UNITED STATES*. Ch. III. Although there has been considerable debate concerning economic aspects, it does not appear that the question whether such work is ultra vires the ordinary business corporation has been much before the courts.

In *Heinz v. National Bank of Commerce* (1916), 237 Fed. 942, the Federal Court of Appeals had to determine whether a national bank had the power to provide a pension fund for its officers and employees. The shareholders had authorized the directors to create such a fund, but it was contended by the plaintiff, a shareholder who asked an injunction against the payment of a lump sum agreed upon in lieu of the pension granted to a retiring president of the bank, that the bank was wholly without power to found such a fund, and hence as the provision was ultra vires and void, the contract to pay the agreed sum was without consideration. In reaching its conclusion the court considered that the judgment of the stockholders and directors, though not conclusive, was entitled to some weight on the question whether such action was within the implied powers of the bank. It recognized that such plans were deemed good business policy in effecting an increase in the character of the service and the loyalty of the employees, and held that the power to create such a fund as a business detail was

included in the clause of the National Banking Act "and all such incidental powers as shall be necessary to carry on the business of banking."

It is well settled that the test of whether a power is impliedly granted to an ordinary business corporation is whether it is one reasonably incident to and necessary to the carrying out of the express powers granted. THOMPSON, CORPORATIONS, §2108, and cases cited, and where the exercise of the power is unchallenged by the state and not prohibited by its charter or the corporation laws of the state, if it has a reasonable tendency to aid in the accomplishment of one or more of the corporate purposes it will be held *intra vires*. *Colo. Springs Co. v. Am. Pub. Co.*, 97 Fed. 843, 38 C. C. A. 433. It need be necessary only in the sense of being appropriate, convenient, and suitable—including a right of reasonable choice of the names to be employed. *Ohio Nat. Gas Co. v. Capital Dairy Co.*, 60 Oh. St. 96, 53 N. E. 711; *Flaherty v. Portland etc. Society*, 99 Me. 253, 59 Atl. 58; *State v. Hancock*, 35 N. J. L. 537; *Malone v. Lancaster Gas etc. Co.*, 182 Pa. St. 309, 37 Atl. 932; 3 THOMPSON, CORPORATIONS, §2110 and cases cited. In *Jacksonville etc. Ry. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515, it was said: "This doctrine ought to be reasonably and not unreasonably understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon those things which the legislature has authorized ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*." See *Att'y Gen. v. Great Eastern Ry.*, 5 App. Cas. 473. That the modern tendency of the great majority of courts is in this direction, see 1 COOK, CORPORATIONS, §3 and cases cited.

National banks are corporations of limited capacity having no powers except such as are given them expressly or by necessary implication by the Acts of Congress passed in relation to such banks. *Calif. Nat'l Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198; *Nat'l Bank v. Townsend*, 139 U. S. 67, 35 L. Ed. 107; *Bailey v. Farmer's Nat'l Bank*, 97 Ill. App. 66: 7 C. J. 807. The statute provides that national banking associations may exercise "all such incidental powers as shall be necessary to carry on the business of banking." U. S. REV. STAT., §5136 (7). These incidental powers so granted have been interpreted to mean those incidental to the things authorized by the Banking Act and not such as are incidental to the banking institutions generally. *Seligman v. Charlottesville Nat. Bank*, 21 Fed. Cas. No. 12,642, 3 Hughes 647. It is evident, however, from the decisions construing this clause, that the courts do not understand that this limitation is to be so interpreted as to prevent a national bank from operating according to recognized good business principles unless it is very clear that such was intended to be prohibited. The courts will not prevent a national bank from being a good business man except on clear grounds. Accordingly although the Banking Act expressly prohibits a national bank from purchasing or dealing in the stock of other corporations (*National Bank v. Hawkins*, 179 U. S. 364, 43 L. Ed. 1007; *Calif. Nat'l Bank v. Kennedy*, 167 U. S. 462, 42 L. Ed. 198), yet such prohibition has been construed to apply to dealing in the sense of speculation, and it has been held that a national bank may loan money on stock as security (*Calif. Nat'l Bank v. Kennedy*, *supra*) or take such stock

as a compromise to avoid apprehended loss. *Nat'l Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448. Also that a national bank may enter into a contract with the promoter of a building corporation subscribing for stock in the corporation, which the promoter agreed to repurchase later, where the contract was made as a part of a transaction looking to the securing of adequate and suitable banking offices. *Nashville Nat'l Bank v. Stahlman*, 178 S. W. 942, 132 Tenn. 367. A national bank may purchase and hold only such real estate as is necessary for its immediate accommodation in the transaction of its banking business (U. S. REV. STAT. §5137), but under this statute such bank has been held to have the power to erect a building for its own use, and in so doing is not limited to the construction of a building to be used solely for its banking quarters (*Brown v. Schleier*, 118 Fed. 981, 55 C. C. A. 475), but may erect a larger building than it requires and rent the space it does not occupy. *Wingert v. National Bank*, 175 Fed. 739.

Cases involving the implied power of corporations to provide for pension funds, insurance plans, and such welfare work are relatively few. An implied power will be ascribed to a corporation employing labor to incur expense on account of injuries to their employees in the line of their employment, *Toledo etc. Ry. Co. v. Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484. And, it seems, to establish funds for hospitals for the benefit of sick and injured employees. *Eckman v. Ry. Co.*, 169 Ill. 312, 48 N. E. 496; *Pittsburg etc. Ry. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290; *Pittsburg etc. Ry. Co. v. Cox*, 55 Oh. St. 497, 45 N. E. 641; *Vickers v. Chicago etc. Ry. Co.*, 71 Fed. 139; *Ringle v. Penn. R. Co.*, 164 Pa. St. 529, 30 Atl. 492. So also they may organize relief associations with a provision for a stipulated sum to be paid the family in case of the death of an employee in service. *Harrison v. Midland Ry. Co.*, 144 Ala. 246, 40 So. 394; *Maine v. C., B. & Q. Ry. Co.*, 109 Iowa 260, 70 N. W. 630; *State v. Pittsburg Ry. Co.*, 68 Oh. St. 9, 67 N. E. 93; *Beck v. R. R. Co.*, 63 N. J. L. 232. It is not ultra vires for a corporation to use its funds to establish a free library and free books for its employees. *Steinway v. Steinway & Sons*, 40 N. Y. Supp. 718, 17 Misc. Rep. 43.

It does not appear that the validity of a national bank pension fund established under the implied powers of the bank has been passed upon before in this country. In England a pension granted pursuant to the resolution of a bank's stockholders authorizing the directors to pay a certain half-yearly pension to the family of a deceased president was held intra vires. *Henderson v. Bank*, Law Reports, 40 Ch. Div. 170. In considering the question the court deemed evidence that among banking men the granting of such pensions was considered good business practice of some importance as showing it was a business detail a choice of which was permissible. In *Beers v. New York Life Ins. Co.*, 20 N. Y. Supp. 788, the New York Supreme Court held that the trustees of a mutual life insurance company did not have the power to agree to pay a retiring president a salary for life in consideration of past services rendered by him. The above case is easily distinguishable from the principal case in that in the former there was no provision for the pension until after the whole service of the pensioner was over and the pension was not authorized by the stockholders of the company.

On consideration of the trend of modern decisions to the effect that, where the state does not object, a corporation will not be prevented from carrying on its business details according to good business principles unless such is clearly ultra vires, and also giving some weight to the growing opinion among business men that the founding of such a pension fund is a good financial investment for a corporation, it would seem clear that the decision of the principal case is correct.

H. S. K.

RECOVERY IN QUASI-CONTRACT FOR BENEFITS PROCURED BY FRAUDULENT MARRIAGE.—The plaintiff had gone through forms of marriage with the defendant's intestate, honestly believing she was marrying him, while he knew that he had a living wife and therefore could not marry. They lived together as man and wife until his death, and it was not until after such death that she learned that he had a prior wife still living. In a suit for money advanced and services rendered, she was given a verdict for both claims. *Held*, that the judgment on such verdict should be affirmed. *Sanders v. Ragan* (N. C. 1916), 90 S. E. 777.

No question was raised as to the money advanced, the advance presumably being regarded as evidence of a genuine contract of loan. The appeal was concerned only with the recovery for the services. It is apparent that the services were rendered in the mistaken belief that the status of the plaintiff imposed upon her a duty toward the defendant's intestate; and since, if her status had been what she believed it to be, she would have owed such services to her husband, her mistaken belief which induced her to render the services was a mistake of fact which affected not merely the policy of what she should do, but rather her legal duty as a wife. The plaintiff's case was made still stronger by the fact that her ignorance of her true status was the result of the husband's fraudulent misrepresentations. To so induce a person to enter into a void marriage was an actionable wrong for which the wrongdoer was liable in an action for fraud and deceit. However, that right of action in tort died with the tort-feasor; and after the tort-feasor's death, the plaintiff could recover, if at all, only in assumpsit for the value of the services rendered. Accordingly, the court deciding the principal case allowed recovery in assumpsit on the ground that the defendant's intestate had been unjustly enriched at the plaintiff's expense.

When money not justly due has been paid under a plain mistake of fact, which money would have been actually due if the facts had existed as believed, recovery has been generally allowed. *Stuart v. Sears*, 119 Mass. 143; *Lane v. Pere Marquette Boom Co.*, 62 Mich. 63, 28 N. W. 786; *Simms v. Vick*, 151 N. C. 78, 65 S. E. 621, 24 L. R. A. N. S. 517. And it seems, in the absence of adjudication on the question, that if the element of fraud were absent in the principal case, recovery should be allowed on such facts for services rendered, in the same way that recovery of money was allowed in the cases cited supra. But in the case under discussion, fraud is at the very basis of the mistake. The general rule is that when one by fraud induces another to pay him money not justly due, the person so wronged

may bring either an action in tort or contract, the former asking damages on the ground of deceit, the latter asking restitution of benefits unjustly obtained by means of deceit. *Minor v. Baldrige*, 123 Cal. 187, 55 Pac. 783; *Donovan v. Purtell*, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. N. S. 176; *Johnson v. Seymour*, 79 Mich. 156, 44 N. W. 344. When the wrongdoer has by his fraud procured a benefit in the form of services, there would seem to be equal reason for permitting restitution as an alternative remedy for the tort, and this has been permitted in numerous cases; though, by reason of the fictitious forms of pleading in general assumpsit, some courts have been led to make an invidious distinction between the claim for money had and received and that for labor or for goods. WOODWARD, LAW OF QUASI-CONTRACTS, §§273-277-281.

Upon the precise problem involved in the principal case it may be stated that the authorities are plainly in conflict. WOODWARD, LAW OF QUASI-CONTRACTS, §§184, 282; KEENER, QUASI-CONTRACTS, 318. After a discussion of this conflict in decisions the court in the principal case concluded that services rendered in reliance upon the fraudulent misrepresentations of the defendant's intestate should be treated in the same way as money paid under any species of fraud, and accordingly allowed recovery in assumpsit as stated above. This view on the same state of facts is supported by both textwriters and authorities. WOODWARD, LAW OF QUASI-CONTRACTS, §§184, 282; KEENER, QUASI-CONTRACTS, 318; *Fox v. Dawson's Curator*, 8 Martin (La.) 94; *Higgins v. Breen*, 9 Mo. 493. Similarly, a slave has been allowed to recover for services rendered in the mistaken belief that he was not free, such mistake being the result of fraudulent misrepresentations made by his former master; *Kimney v. Cook*, 4 Ill. 232; *Hickam v. Hickam*, 46 Mo. App. 496; and a girl who worked as a member of the family was allowed to recover in *Boardman v. Ward*, 40 Minn. 399, 42 N. W. 202, 12 Am. St. Rep. 749.

However, it must be admitted that the opposite view is also supported by eminent authorities. In the case of fraudulent marriage, recovery for services rendered was denied in *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721; and in *Payne's Appeal*, 65 Conn. 397, 32 Atl. 948, 48 Am. St. Rep. 215, 33 L. R. A. 418; a slave was denied recovery in *Franklin v. Waters*, 8 Gill (Md.) 322; and a girl who was told that she was an adopted daughter was allowed no compensation in *Graham v. Stanton*, 77 Mass. 321, 58 N. E. 1023. The chief reasons for denying relief in the cases of *Cooper v. Cooper* and *Payne's Appeal* were "(1) that the tort of inducing one to enter into a void marriage is essentially a personal injury to which the benefit obtained by the wrongdoer is merely incidental; and (2) that the value of the benefits obtained by the defendant is only a single item of consequential damages which cannot be separated from the wrong itself and made the sole basis of an action by the person wronged." WOODWARD, LAW OF QUASI-CONTRACTS, §282. These reasons are best disposed of by the same writer who says: "In answer to the first, it is submitted that if a wrongdoer is benefited at his victim's expense, to any extent whatever, the relative insignificance of such benefit, as compared with the injury suf-

ferred by his victim, affords no reason for denying to the latter the right to elect an action for restitution instead of an action for damages. As to the second, it may be pointed out that the plaintiff, in electing to sue for restitution, does not separate the consequential benefit to the defendant from the wrong committed by him. The very foundation of the action for restitution is the fraud of the defendant in inducing the plaintiff to enter into the void marriage; and the only essential difference between the action of assumpsit and that of deceit in such a case, is that in the former the plaintiff seeks to recover the value of the benefits resulting to the defendant, while in the latter he demands compensation for the damages resulting to himself."

It naturally follows that the value of all benefits conferred upon the plaintiff by the wrongdoer must be deducted from the value of the services rendered by the plaintiff, for the retention of a benefit is not unjust to the extent that such services have been paid for. The benefits conferred upon a plaintiff might be in some cases so great as to prevent any recovery for services. It should be noted in this connection that it is no more difficult for the jury to make the deduction when the action is in assumpsit than it is where the action is in tort for deceit.

H. G. G.

ÆSTHETIC PURPOSE AS A JUSTIFICATION FOR EXERCISE OF POLICE POWER.—Whether or not aesthetic considerations justify the exercise of the police power is a question which has already engaged the minds of the courts, and which we venture to say will more frequently be involved in their opinions as time passes. The recent case of *Thomas Cusack Co. v. Chicago*, 37 Sup. Ct. 190, sustained the constitutionality of the following ordinance of the city of Chicago: "It shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block or any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard is to be erected, constructed, or located." The same decision had been reached by the Supreme Court of the State of Illinois, *Thomas Cusack Co. v. City of Chicago*, 267 Ill. 344, 108 N. E. 340, Ann. Cas. 1916 C 488. In that opinion, wherein the ordinance is upheld as a reasonable exercise of police power, the court is careful to distinguish the facts from those involved in *Haller Sign Works v. Physical Culture School*, 249 Ill. 436, 94 N. E. 920, 34 L. R. A. N. S. 998. The statute in the latter case was held to have no relation to the safety, health, morals or general welfare of the public but to have been passed solely from aesthetic considerations, and was therefore considered invalid.

The Federal Supreme Court in its decision does not find it necessary to discuss the effect that it would give a statute which had been passed out of regard for aesthetic purposes, but adopts the finding of the state court that "fires had been started in the accumulation of combustible material

which gathered about such billboards; that offensive and insanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals." It is apparent however that these are not the only objections to billboards; they form convenient arguments for sustaining the validity of regulations passed under the police power, as a relation can be shown between the purpose of such statutes and the "health, morals, and safety of the public." If the ordinance in question had also provided, as is done in some cities, that billboards must be constructed of sheet-iron or some other non-inflammable materials, and that there must be a space of at least four feet between the lower edge and the ground (*St. Louis Gunning Advertising Co. v. St. Louis*, 235 Mo. 99, 137 S. W. 929) there would then be little danger from fire, the accumulation of waste matter would be lessened, and the danger of the use of such billboards as a scene of immoral practices and as a hiding place for criminals would be eliminated. The Federal Supreme Court would have then been called upon to determine whether the police power may be constitutionally exercised in the restraint of acts offensive to the aesthetic sense—a question which as yet it has not found necessary to decide. However conveniently and satisfactorily the decision may have been reached on the grounds assigned in the opinion, it would seem that the purpose prompting the passing of this ordinance was not so much the protection of adjoining owners from fires, criminals, etc., but rather to give them the power to refuse to permit billboards to be erected in close proximity to their residences if they found that such billboards were eyesores and as such impaired the enjoyment of their property or lessened the market value of the same.

The authorities on this question seem to be almost unanimous in holding that aesthetic considerations alone will not justify the exercise of the police power. *State v. Whitlock*, 149 N. C. 542, 63 S. E. 123, 128 Am. St. Rep. 670; *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. N. S. 735 with case-note; *Haller Sign Co. v. Physical Culture School*, 249 Ill. 436, 94 N. E. 920, 34 L. R. A. N. S. 998 with case-note.

The authorities are also clear on the proposition that private property cannot be taken under the power of eminent domain if the only public purpose is an aesthetic one. Where a harbor line was established solely in order that an expensive and sightly bridge might not be hidden from view by buildings placed on each side of it, the court held that this was not a public purpose for which lands could be taken. *Farut Steel Co. v. Bridgeport*, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590. Massachusetts passed a statute limiting the height of buildings in the neighborhood of Copley Square in Boston to ninety feet, but it was provided that compensation should be made to all those sustaining damages to their property by reason of the limitation of height of buildings prescribed by the act. The court in sustaining the statute stated: "It is argued by the defendants that the legislature, in passing this statute, was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land

against the will of the owner. But if the legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the lawmaking power might not determine that this was a matter of such public interest as to call for an expending of public money, and to justify the taking of private property." The power of eminent domain cannot be used for a private purpose, and "if the statute is merely for benefit of individual property owners," proposing to use the public funds to limit the height of adjacent buildings and thus increase the value of private property, it would unquestionably be an improper use of the power of eminent domain. See *Welsh v. Swasey*, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523, 23 L. R. A. N. S. 1160, affirmed in 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923; *Commonwealth v. Boston Adv. Co.*, 188 Mass. 348, 74 N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 494.

Taxes levied to secure funds for the erection of art museums, monuments, fountains, ornamental arches, and other purposes that would appeal only to the aesthetic sense have been upheld. If the object to be thus accomplished is considered so essentially public as to justify the exercise of the taxing power of the state, why could not it also be said that private property is taken for a *public* purpose, and therefore it may be condemned through the exercise of eminent domain, where the purpose of taking is "to preserve the architectural symmetry of Copley Square?"

To recur again to the question of whether or not under the police power a state might forbid objectionable billboards solely through the fact that they are offensive to the aesthetic sense, it will require no citation of cases to demonstrate the fact that an ordinance is constitutional which so limits my neighbor's right to use his property as not to offend my sense of hearing, e. g., an ordinance prohibiting manufacturing plants in a residence district; likewise an ordinance which protects my sense of smell, e. g., a prohibition against the location of a livery-stable within a residence-block; my sense of taste is also protected, e. g., an upper riparian owner cannot so pollute the water as to make it less fit for my use when it shall have descended to me. Inasmuch as property in a *res* is not an absolute right to use the *res* in any conceivable way, but a right to its use only in conformity with what is regarded as proper and reasonable under the limits fixed for us by our compact with society, why cannot society just as it has protected our sense of hearing, smell and taste, also guard our sense of sight from being disturbed by scenes that are as offensive to the eye as the forbidden noises are to the ear? FREUND, *POLICE POWER*, 182. The application of the maxim, "Sic utere tuo, ut alienum non laedas," is gradually but surely being extended, and restraints on the use of property are now being submitted to without question which formerly might have been successfully opposed as a deprivation of property without due process. As civilization advances, the social compact must bring us into a closer relation one with another and our rights must become more and more limited as they will more and more come in conflict with equal or higher rights of our neighbor. With the

progress of the people in education and refinement we may expect the appreciation of the beautiful to be increased, and we can agree with the view taken by the Massachusetts court in a later decision: "It may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the Fine Arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes." *Cochran v. Preston*, 108 Md. 220, 23 L. R. A. N. S. 1163, 129 Am. St. Rep. 432, 70 Atl. 113, 15 A. & E. Ann. Cas. 1048. The weight of authority, however, as well as the decision in that case, is opposed to permitting the exercise of the police power in restraint of the use of property upon mere aesthetic considerations, and until public opinion has changed so as to support or demand such a decision, we may expect the courts to hold that the owner's right to use his land for the erection of billboards is more to be protected than his neighbor's right to a view unimpaired by such obstructions.

W. L. O.

WHEN REMAINDERS ARE VESTED AND WHEN CONTINGENT.—A settlement was made upon C for life, then upon Ch C for life, and thereafter to the use "of the eldest son of the said C, wife of the said Ch C, who shall be living at the time of the decease of the survivor of them, the said C and Ch C" for life, and "from and after the decease of such eldest son, to the use and behoof of the next eldest son * * * who shall be living at the time of the decease of the son so dying." Held: That the sons of C took, under the settlement, successive vested estates for life and not contingent life estates, and that, accordingly, the limitations to such sons were not void for violating the rule against perpetuities. *In re Barbre's Settlement*, 85 L. J. Ch. 683.

There is a well known rule of law that if possible all remainders will be regarded as vested rather than contingent. *Webb v. Hearing*, Cro. Jac. 415. This rule or policy undoubtedly influenced this court in deciding the instant case as it did, and the only proper inquiry is whether it so influenced the court that the decision contravenes other and more definite rules of law. It has been said that "a remainder is vested in A, when, throughout its continuance, A, or A and his heirs, have the right to the immediate possession, whenever and however the preceding freehold estates may determine; a remainder is contingent, if, in order for it to come into possession, the full fulfillment of some condition precedent other than the determination of the preceding freehold estates is necessary." GRAY, RULE AGAINST PERPETUITIES. (3rd. Ed.) §101. This condition precedent, other than the determination of the preceding freehold estates, which must be fulfilled before a contingent estate becomes vested, may be either the ascertainment of who is to be the remainder-man, or the happening of an event which must transpire before there be any possibility of the contingent remainder coming into possession should the preceding freehold estate cease. In other words an uncertainty of (1) person or (2) event may make the remainder contingent. *Doe. d.*

Planner v. Scudamore, 2 B. & P. 289, 126 Eng. Rul. Cas. 1287; *Boraston's Case*, 3 Co. Rep. 19a, 76 Eng. Rul. Cas. 668; *Starnes v. Hill*, 112 N. C. 1, 9, 16 S. E. 1011.

There is a definition of what should constitute a vested remainder which—had it withstood criticism—would have made the decision of this case right beyond question. This is that provided there is a person in being, whether or not it be known just who he is, who would have an immediate right to the possession of the lands on the ceasing of the intermediate or precedent estate, his interest is vested. N. Y. REV. STAT., pt. 2, ch. 1, tit. 2, §13. Although this definition was sanctioned by Chancellor KENT, it is manifestly erroneous in not making necessary a certainty as to who the remainder-man is, and after some little recognition it has come to be regarded as erroneous. 4 KENT. COMM. (12th Ed.) 203; *Croxall v. Shererd*, 5 Wall. 268; *Kumpe v. Coons*, 63 Ala. 448; *Gindrat v. Western Ry.*, 96 Ala. 162, 11 So. 372; *Smith v. West*, 103 Ill. 332, (overruled in *Temple v. Scott*, 143 Ill. 290, 32 N. E. 366; *Chapin v. Crow*, 147 Ill. 219, 37 Am. St. Rep. 213, 35 N. E. 536; error admitted in *Smaw v. Young*, 109 Ala. 528, 20 So. 370). Yet some statutes still regard this rule as good.

There is some other seeming precedent for the court's decision. An English court has decided that, if the description can be interpreted as merely fixing the period at which the legatees shall take, the legacy is vested and not contingent. *Pearsall v. Simpson*, 15 Ves. 29, 33 Eng. Rul. Cas. 666. And an English court has said that where there is a limitation over which, though expressed in the form of a contingent limitation, is in fact merely dependent upon a condition essential to the determination of the interests previously limited, the court is at liberty to hold that, notwithstanding the words in form import contingency, they mean no more than that the person to take under the limitation over is to take subject to the interests so previously limited. In order for this rule of construction to be applied, the condition upon which the limitation over is dependent must involve no incident but what is essential to the determination of the interests previously limited. *Maddison v. Chapman*, 4 K. & J. 709, 3 De. G. & J. 536, 70 Eng. Rul. Cas. 294, 64 Eng. Rul. Cas. 30. Does the foregoing accord with the necessities of vested remainders? If it means no more than that the remainder necessarily will vest through the clearing up of the uncertainties at or before the preceding freehold estates for any reason determine, it may be regarded as correct; but if it means, as the court here took it to mean, that a description of a remainder-man is not a description at all, but mere surplusage provided it contains no incident other than those essential to the determination of the prior limitation by the death of the tenant, it is at the very least refusing to construe language used by the testator apparently for some purpose. Probably the former is the proper meaning of *Maddison v. Chapman*, supra, and the court in the instant case fell into error when construing it to apply to a condition which contained incidents not essential to every determination of the previous limitation. Manifestly in the instant case if the prior limitation had failed for any reason other than the death of the tenant, who would then take would be insolvable, because until such tenant died who should be

the eldest son of C *at the death* of the prior holder could not be determined.

Returning to GRAY's definition of a vested remainder, which may be taken as being as nearly final as any which has been promulgated, this remainder would be contingent for that in the event of some possible determinations of the particular estate there would be no one with an immediate right of possession. This is true if the testator meant by "living at the death" of the tenant of the particular estate what those words imply, rather than "living at the termination of the particular estate." If the court is at liberty to so change his words, where need they stop, and why need or should a person make a will? See 8 COL. L. REV. 245; 24 LAW QUART. REV. 301; 8 ILL. L. REV. 225, 309, 404, 639; 5 MICH. L. REV. 497. H. J. C.