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NOTE AND COMMENT

POWER OF THE U. S. SUPREME COURT TO ENFORCE JUDGMENTS AGAINST STATES.—In the year 1460, when the perogatives of sovereignty or at least of the Crown were asserted in England much more vigorously than they are today, "the Counseill of the right high and mighty Prynce Richard Duc of York, brought into the Parliament Chambre a writyng conteignyng the clayme and title of the right, that the seid Duc pretended unto the Coronas of Englund and of Fraunce, and Lordship of Irelond, and the same writyng delyvered to the Right Reverent Fader in God George Bishop of Excestre, Chaunceller of Englund, desiryng hym that the same writyng myght be opened to the Lordes Spirituelx and Temporelx assembled in this present Parlement, and that the seid Duc myght have brief and expedient answeere thereof." Whereupon the lords, apparently embarrassed by this extraordinary manifestation of confidence in them, declared "that the said writyng shuld be radde and herd, not to be answered without the Kyngs commaundement, for so moche as the mater is so high, and of soo grete wyght and poyse." When four days later the petition was again urgently presented "therupon incontyent all the seid Lordes Spirituelx and Temporelx went to the Kyngs high presence, and therunto opened and declared the seid mater, by the mouth of his said Chaunceller of Englund." The King was

graciously pleased to command the lords that they should "serche for to fynde in asmuch as in them was, all such thyngs as myght be objecte and leyde ayenst the cleyme and title of the seid Duc." And though the King's command could scarcely be regarded as indicating a judicial inquiry, the lords in their extremity "sent for the Kyngs Justices into the Parlement Chambre, to have their avis and Counsell in this behalf, * * * * sadly to take avisament therin, and to serche and fynde all such objections as myght be leyde ayenst the same, in fortelyng of the Kynges right." Duke of York's Claim to the Crown, 5 Rot. Parl., 375, 1 Wambaugh's Cas. Const. Law, I.

Four and one-half centuries later the "sovereign state" of Virginia sued the "sovereign state" of West Virginia to recover a sum of money alleged to be due upon the agreement of West Virginia to assume its proportionate share of the debt of the old state of Virginia. The suit was brought in the Supreme Court of the United States, which after prolonged consideration rendered judgment for the plaintiff. No execution or other compulsory process was issued, however. But now after delays for various reasons and pretexts urged by West Virginia the court is compelled to face the problem of what if any compulsory powers it may exercise to enforce the judgment. In its opinion rendered April 22 of this year, the Supreme Court, when confronted with task of compelling, as did Parliament and the King's Justices of old, finds the matter apparently "too high." *Virginia v. West Virginia*, U. S. Supreme Court No. 2 Original, Oct. Term, 1917.

No wonder the court is embarrassed. For the question is one which involves difficulties of theory and policy, and can scarcely be settled by legal principles and rules alone. At least though the case would be clear if between private parties, must not the court consider whether the character of the parties as well as circumstances may alter cases?

The latest move in this extraordinary litigation which has now been before the Supreme Court eight times, is an application by Virginia for process in the nature of mandamus to compel the legislature of West Virginia to exercise its power of taxation to raise money wherewith to pay the judgment, West Virginia having no property subject to execution, unless it be that used for government purposes. There is no express qualification or limitation of the grant of jurisdiction in "controversies between two or more states" to the Supreme Court. Unquestionably a grant of "jurisdiction" includes, in cases between private parties, power not only to adjudicate, but to issue compulsory process to enforce orders, judgments and decrees. *Wayman v. Southard*, 10 Wheat, 1, 2, 3; *Bank of U. S. v. Halstead*, 10 Wheat, 57; *Please v. Rathbun Jones Co.*, 228 Fed. 279; *Knox Co. v. Aspinwall*, 24 How. 384. But the grant of jurisdiction to the Supreme Court in controversies between states and that in cases between private parties is in the same clause and in language identical in legal significance.

How then can it be claimed that the grant in the first class of cases, is less complete and comprehensive than that in the second? West Virginia answers that it is because, as a State, her governmental powers cannot be controlled or limited. But this position rests upon a theory of complete

sovereignty, and admittedly our states are not completely sovereign. Does the power contended for fall within that portion of the state's sovereignty reserved to it, or is it not rather by the very grant referred to within that portion surrendered to the federal government. There is no express limitation upon this grant of jurisdiction, no modification of the universally conceded legal signification of the term jurisdiction, and none can be implied unless it be by appeal to the character of the parties. But it is singular that in so important a matter as this, the Constitution should delegate power to the federal government by employing, unqualified and unrestricted a legal term of well defined meaning, if in fact it was intended to limit that power to less than the usual significance of the term employed.

There is very little in the records of the constitutional convention or other contemporary material, to throw light upon the question. Chief Justice WHITE's opinion deals very satisfactorily with this phase of the matter citing Elliott's Debates, and The Federalist, No. 81, as tending to show that "jurisdiction" in its full legal significance was granted to the Court in these controversies. The history of the particular clause of the Constitution involved, may be traced in 1 Farrand, Records of the Federal Convention, 28, 244, 247, 298; 2 *ibid.* 146, 147, 157, 173, 186, 425, 601.

The fact that during the colonial period differences between the Colonies though determined by a committee of the Privy Council, were enforced either by royal decree or legislation by Parliament is not persuasive, for our entire governmental machinery under English rule was totally different from that existing after the Declaration of Independence. For the omniscience of Parliament, there was substituted a distribution of powers, in which the matter in dispute, seems to be definitely assigned to the Supreme Court. See *Rhode Island v. Massachusetts*, 12 Peters, 657, 739, et seq. and historical authorities cited in the margin of the opinion in the instant case.

Under the Articles of Confederation (Art. IX) disputes between the states were to be determined by a special commission or court to be appointed in each case by consent if possible, if not by congress, and the judgment, which was to be "final and conclusive," was to be "transmitted to congress, and lodged among the acts of congress for the security of the parties concerned." As was to be expected this bungling method was very unsatisfactory in practice, and the dissatisfaction with the results obtained and the significant omission under the Constitutional scheme of any provision for Congressional participation argue that the intention of the Federal Convention was to give that complete power to the Supreme Court, which the legal meaning of "jurisdiction" implies.

The case of *Kentucky v. Dennison*, 24 How. 66, unquestionably lends support to the West Virginia contention; but that case involved a phase of the slavery question which was already a cause of dangerous ferment, and was decided by a court dominated by the extreme states' right theories of Taney, C. J., and four other appointees of President Jackson. From a legal view-point the decision is an indefensible confession of judicial impotence, and while the case has never been overruled, it is perhaps signifi-

cant that in the present opinion the Chief Justice does not so much as refer to it. (See an article by W. C. Coleman, 31 HARV. LAW REV., 210.) It must be admitted that statesmen of our early constitutional period, including such staunch nationalists as Hamilton expressed doubt occasionally as to the power of the federal courts to enforce judgments (See *The Federalist*, No. 81) but this never became the accepted view of the courts, except perhaps in the unfortunate line of cases just referred to. Over against them must be set the unquestionable shift of the center of power toward the nation, which economic conditions, the Civil War, and the Civil War amendments, have accomplished. It is idle to deny that constitutional law is made in this way.

Finally we have a long line of cases beginning with *New York v. Connecticut*, 4 Dall. 1, and running to *Arkansas v. Tennessee*, 246 U. S.—in which the jurisdiction over controversies between states was freely exercised. It is true that as the states in all these cases voluntarily gave effect to the judgments, compulsion was not required, but that very fact argues that the court's judgments were regarded as more than mere arbitral pronouncements. In *South Dakota v. North Carolina*, 192 U. S. 286, the court clearly asserted its ability to enforce a money judgment against a state, a step, however, which it became unnecessary to take because of subsequent developments. It should be noted, too, that four justices dissented, WHITE, C. J., writing the dissenting opinion. But the latter's opinion in the present case must be taken as greatly modifying, if not a rejection of, his former view.

Moreover in *Van Hoffman v. Quincy*, 4 Wall. 535, and many other cases the Supreme Court has not hesitated to approve of the compulsion exercised by the judicial power upon municipalities to enforce the levy of an authorized tax to pay judgments "rendered in consequence of a default in paying the indebtedness." And while the difference between the municipal and the state legislatures must be recognized, never the less the former as well as the latter exercises state governmental power.

While the step asked for by Virginia is opposed by many practical difficulties, and is by no means free of doubt as to the soundness of its legal theory, yet on the whole the wording of the constitutional grant of jurisdiction and the logic of the situation point strongly to the existence of the power claimed. And this seems to be the view of the Court for it declares: "In so far as the duty to award that remedy is disputed merely because authority to enforce a judgment against a State may not affect state power, the contention is adversely disposed of by what we have said."

The suggestion of the Chief Justice that Congress may have power to enforce the obligation of West Virginia is interesting, but cannot be adequately discussed within the space here available. The basis for such proposed action is the constitutional requirement that agreements between states can be given validity only through the consent of Congress, from which flows a general supervisory power in Congress, which under the doctrine of *McCulloch v. Maryland*, 4 Wheat. 316, may be exercised by an appropriate legislation. There is much strength in this position, but in any proposed

legislation for this purpose, care would have to be exercised to avoid interfering with judicial functions, or impairing already vested rights. Perhaps a general law drawn to provide a method of enforcing judgments against states, and confining itself to "remedy," would afford the solution.

H. M. B.

PRIVILEGE OF ENEMY ALIENS TO MAINTAIN ACTIONS.—In his *History and Practice of Civil Actions*, Lord Chief Baron Gilbert (p. 205) states that alienage is a disability which must be pleaded to the action, "because it is forfeited to the King, as a reprisal for the damages committed by the Dominion in enmity with him. In 1 Hale's Pleas of the Crown, (p. 95) it is said "That by the law of England debts and goods found in this realm belonging to alien enemies belong to the King, and may be seized by him," Y. B. 19 E 4, 6, is cited to that effect. The provisions of c. 30 of Magna Charta clearly imply that such confiscation was appropriate under the common law. In case the Crown neglected to seize the debts due the alien enemy the creditor was, upon the termination of the state of war, entitled to sue. *Antoine v. Morshead*, 6 Taunt. 237.

The severe rule of the common law was early broken into by the courts. In Y. B., 32 Hen. 6, 23 (b) 5, it is indicated that if an enemy alien came into England under the King's permission he could maintain an action in the King's court for the tortious taking of goods from his house. And since *Wells v. Williams*, 1 Ld. Raym. 282, 1 Lutw. 35, 1 Salk. 46, the law has been considered as settled that an enemy alien within the realm by permission could maintain actions, the necessities of trade and commerce having mollified the too rigorous rules of the old law and taught the world more humanity. Even a prisoner of war could maintain an action on a contract for services as a sailor. *Sparenburgh v. Bannatyne*, 1 Bos. 1 Pul. 163. At least one judge, however, went on the ground that the plaintiff was no longer an alien enemy. The enemy plaintiff must plead his permissive presence. *Sylwester's Case*, 7 Mod. 150. The rule of pleading seems to have been later settled otherwise. *Casseres v. Bell*, 8 T. R. 166, holding that the plea must negative the facts which would enable the plaintiff to maintain the action. Cf. *Boulton v. Dobree*, 2 Camp. 163. An enemy alien commorant in the enemy country cannot maintain an action. *Le Bret v. Papillon*, 4 East 502.

The course of the English law was reviewed in a very learned opinion by Lord Reading, C. J., in *Porter v. Freudenberg*, 1915, 1 K. B. 857, where it was held that actions against enemy aliens whether resident or commorant in the enemy country are unaffected. In *Schauffenius v. Goldberg*, 1916, 1 K. B., 284, it was held that a German subject interned in England could prosecute an action in court. Judge Younger said: "There has been a gradual and progressive modification in the rules of the old law in their restraint and discouragement of aliens. It is, as I have already indicated, not the nationality, but the residence and business domicile of the plaintiff that are now all important. If these are in enemy country a plaintiff may not sue, whatever his nationality, even if he be a friend. If these

are in friendly or neutral territory, he may sue, even if he be an enemy born. *Prima facie* all persons resident in this country are entitled to have access to the Courts, and, although it may still be that an alien enemy plaintiff resident here must also show that he is here with the license, actual or implied, of the King, still even so, as has been held by Sargant, J., in *Princess Thurn and Taxis v. Moffitt*, (1915), 1 Ch. 58, the registration which the plaintiff has effected is sufficient evidence of such a license." Internment was deemed no revocation of the licence.

The view expressed by Judge Younger that if the residence and business domicile of the plaintiff are in a friendly or neutral country the courts are open to him, does not seem to be settled by authoritative rulings. To allow a subject of an enemy country so domiciled to use the processes of the court would seem to open the door to assistance to the enemy, for the only prevention of communication between such plaintiff and his home country would be the more or less uncertain control of the sea and other means of travel. See the opinion of Yeates, J., in *Russel v. Skipwith*, 6 Binn. 241. In support of the view expressed by Judge Younger may be cited the dictum of Lord Lindley in *Janson v. Driefontein Consolidated Mines Ltd.* (1902) A. C. 484, 505, and the undisposed of case, *In re Mary Duchess of Sutherland*, 31 T. L. R. 248, 394. See, however, *Van Uden v. Burrell*, 1916, S. C. 391.

The leading case in the United States is *Clarke v. Morey*, 10 Johns 69, in which Chief Justice KENT stated the law essentially as indicated above. The disability of alienage it is there laid down, is confined to two cases: "(1) Where the right sued for was acquired in actual hostility; * * * * (2) where the plaintiff, being an alien enemy, was resident in the enemy's country." Recent New York cases announcing the same rule are *Rothbarth, et. al. v. Herzfeld*, 179 App. Div. 865; *Arndt-Ober v. Metropolitan Opera Co.*, (Apr. 5, 1918) 169 N. Y. Supp. 944.

Where there were several alien enemy plaintiffs some non-resident and some resident it was held that the suit, which was indivisible in nature, should be stayed during the continuance of the war. *Speidel v. Barstow Co.*, 243 Fed. 621. But in another case where there were two alien enemy plaintiffs one resident and the other non-resident the suit being for restrictive relief only, it was held that no stay would be granted, the court largely relying upon the now generally discredited statement of the President that the war was with the German government not the German people. *Posselt v. D'Espard*, 87 N. J. Eq. 571. If the defendant had been able to show that the non-resident plaintiff was the Kaiser or a member of his General Staff perhaps the conclusion might have been otherwise. As to the situation where the plaintiff is a corporation organized in this country but really owned and controlled by non-resident alien enemies, see *Fritz Schulz Jr. Co. v. Raimés & Co.*, 166 N. Y. S. 567, 16 MICH. L. REV. 45. Cf. *Daimler Co. v. Continental Tyre and Rubber Co.* (1916) 2 A. C. 307.

It is perhaps unnecessary to state that the class of aliens that may be permitted to resort to the courts may be enlarged or cut down by the legislative body.

R. W. A.

POWER OF THE STATE TO REQUIRE WORK ON ROADS.—That a state has inherent power to require every able-bodied man within its jurisdiction to labor on public roads near his residence without direct compensation, has been well established by custom and precedent, but whether a state is justified in exacting a contribution of property for public service on the roads is a question which has only recently come before the courts. In *Galoway v. State*, (Tenn., 1918), 202 S. W. 76, a statute requiring any person who owned a wagon and team to contribute the same for road work for a few days, and also to provide the necessary feed for each team, was held constitutional as regards the furnishing of the wagon and team, but unconstitutional as regards the requisition of the feed. In the only other case to be found directly involving the compulsory use in road work of animals and implements, the court arrived at a conclusion directly in conflict with that reached in *Galoway v. State*. See *Toone v. State*, 178 Ala. 70; 42 L.R.A. (N.S.) 1045.

From the Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads, and legislation to that end has been upheld almost without question. *Butler v. Perry*, 240 U. S. 328; 36 Sup. Ct. 258; 60 L. Ed. 672; COOLEY, TAXATION, 1128. The right of a state to enact and enforce such legislation has been considered as referable either to the power of taxation or to the police power. The correct view would seem to be that, although the burden assumes the form of labor, it is, nevertheless, in its essential nature, taxation, and it must be levied on some principle of uniformity. *Short v. State*, 80 Md. 392; *Galoway v. Tavares*, 37 Fla. 58; *Hassett v. Walls*, 9 Nev. 387. Cases may be found which are apparently in conflict with the above view, the courts treating the requisition of labor as a regulation imposed under the police power similar in character to military service and jury duty, but in most of these cases the court could have called the burden taxation without impairing their decision in any way, simply holding that the work required was not a tax of the particular kind prohibited by the Constitution. Thus in *Pleasant v. Kost*, 29 Ill. 490, it was held that the assessment of labor was not a tax within the constitutional provision declaring that taxes levied for corporate purposes shall be uniform as to persons and property within the limits of such body; in *Johnson v. Macon*, 62 Ga. 645, that it is not a poll tax within the constitutional provision relating to poll taxes; in *State v. Sharp*, 125 N. C. 628; 34 S. E. 264; 74 Am. St. Rep. 663, that working the roads is not a tax within the meaning of a constitutional provision requiring taxes to be levied *ad valorem* on property. See also *State v. Wheeler*, 141 N. C. 773, 53 S. E. 358, 5 L. R. A. (N. S.) 1139 and note.

These statutes requiring labor on the roads usually provide that the laborers should bring with them such tools and implements as the overseer should request. The North Carolina statute is typical of this general class of statutes. See Sec. 2720, Revisal of 1905. It appears that during the early history of this country while slaves were regarded as property, statutes often required owners to send their slaves to work the roads. *Galoway v. State*, *supra*, *Toone v. State*, *supra*. In Blackstone's time the custom was

prevalent of requiring the use of teams along with personal services. BLACKSTONE, COMMENTARIES, Bk. 1, p. 358. Thus, in whichever light we view the conscription of wagons and teams, whether as a tax or as a duty owed the state, the correctness of the decision in *Galoway v. State*, *supra*, seems unquestionable. See also *Goddard, Petitioner*, 16 Pick. (Mass.), 504, 28 Am. Dec. 259. The right to make compulsory use of timber, gravel and other materials in road work, taken from land outside the limits of the highway, must be distinguished from the requisition of tools and animals. The former is purely an exercise of the power of eminent domain, an unequal burden falling upon those individuals whose property is taken, and compensation must be made for the materials taken. *Posey Township v. Senour*, 42 Ind. App. 580. See note 42 L. R. A. (N. S.) 1045.

The court in *Galoway v. State*, *supra*, has attempted to draw a distinction between exacting a contribution of the services of the wagon and horses and the appropriation of the feed, arguing that the former is merely an impressment for temporary service while the latter leaves nothing to be returned to the owner. The validity of this distinction is certainly open to question. The state can require a man's labor or the use of his tools and animals for a reasonable period, and this particular labor, and this particular use of his property during the period of service, are gone just as absolutely as any feed consumed by his horses. Further, if the burden imposed by the statute is considered in the nature of a tax, and it is submitted that it should be, there is absolutely no basis for declaring the appropriation of the feed unconstitutional. In the early days of our history, commodities were commonly received in payment of taxes, and at the present time the legislature may require taxes to be paid in money, labor or any other medium that it may see fit. *William's Case*, 3 Bland Ch. (Md.) 186, 255; *Libby v. Burnham*, 15 Mass. 144; *Lane County v. Oregon*, 7 Wall. 71; COOLEY, TAXATION, p. 15.

J. W. T.

EFFECTIVENESS OF ORAL CONTRACTS, WITHIN THE STATUTE OF FRAUDS.—In *Morris v. Baron and Co.*, (House of Lords, 1917), 87 L. J. R. (K. B.) 145, plaintiff and defendant had entered into a contract of sale and plaintiff, as vendor, had delivered part of the goods agreed upon. Delivery of the remainder would have been a condition precedent to any recovery by the plaintiff. This contract, however, was followed by a second one, not in writing, whereby plaintiff was absolved from delivering the rest of the goods, but by which he agreed that he would deliver them if the defendant should so request. Thereafter plaintiff brought this action for the "price" of the goods delivered. The defendant set up, by way of counterclaim, plaintiff's failure to deliver the rest of the goods as requested under the second contract. The court held that the second contract, although not in writing, absolved the plaintiff from having to deliver all the goods under the first contract, and therefore allowed him to recover for the goods delivered, but that, because it was not in writing, the defendant could not maintain his counterclaim for breach of it.

In *Noble v. Ward*, 35 L. J. Ex. 81, L. R. 2 Ex. 135, the defendant had contracted to buy goods from the plaintiff and was sued for his refusal to accept and pay for them. He defended on the ground that this contract had been rescinded by a later oral one substituted for it. The court held that because the second agreement did not conform to the requirements of sec. 17 of the statute of frauds it did not have the effect, as a matter of law, of rescinding the first one. This case was interpreted in *Morris v. Baron and Co.* as holding, at most, only that a variation by agreement not in writing would not be recognized, and that it should have been left to the jury to say whether the parties intended by their new oral contract to rescind the prior written one. It was distinguished from the principal one on the ground that the parties did intend by their second contract to rescind the first one, and that such rescission would be effective even though not in writing.

There is much conflict in the decisions as to whether a contract within the Statute of Frauds can be varied by oral agreement as to time of performance and kindred matters. *Neppach v. Oregon, etc.* R. R. 46 Ore. 374, 7 Ann. Cas. 1035, and cases there collected, (holding that the oral extension of time will be recognized as valid when it has been acted upon, at least.) Actual rescission of a contract by oral agreement is effective, even though the contract itself be one within the Statute. *Goman v. Salisbury*, 1 Vern. 240; *Proctor v. Thompson*, 13 Abbott N. C. (N. Y.) 340. So also, although the authority is scant, a contract in writing as required by the Statute can be rescinded by the substitution of an oral contract, if the parties intend to rescind thereby. *Goss v. Lord Nugent*, 5 B. and Ad. 58 (dictum); *Gilbert v. Hall*, 1 L. J. Ch. 15 (at least in equity); *Reed v. McGrew*, 5 O. 376; *Dearborn v. Cross*, 7 Cow. (N. Y.) 48. The court in the principal case evidently treated the second contract as evidencing an intent to abrogate the original contract.

The court also distinguished the principal case from *Noble v. Ward* on the ground that the statute under which that case was decided declared that a contract not in conformity with it should not be "allowed to be good," while the Sale of Goods Act, which governed *Morris v. Baron and Co.*, provided only that it should not "be enforced by action." This at once raises the question whether there is not an intent behind the Statutes broader than their literal wording might imply. The preamble of the original Statute might lead one to suppose that its object was to do away with certain oral contracts, "For prevention of many fraudulent practices which are commonly endeavored to be upheld by Perjury and Subornation of Perjury." This is the view of the court in *King v. Welcome*, 5 Gray (Mass.) 41. The action was in *quantum meruit* for services rendered, and the defense was that they were rendered under an oral contract not to be performed within a year, which plaintiff had broken. Although the Massachusetts statute provided only that no action should be brought on such a contract, the court held that, "So far as it concerns the prevention of fraud and perjury, the same objection lies to the parol contract, whether used for the support of, or in defense to an action. The gist of the matter is, that,

in a court of law and upon important interests, the party shall not avail himself of a contract resting in words only, as to which the memories of men are so imperfect, and the temptations to fraud and perjury so great." "Looking at the mere letter of the statute, the suggestion is obvious, that no action is brought upon this contract. * * * The difference, it is clear, is not one of principle." Accordingly the use of the oral contract even in defense was denied. So also in *Scotten v. Brown*, 4 Har. (Del.) 324, it was said, "The danger in this respect (false testimony) and the necessity of the rule which the statute prescribes, are equally strong, whether the suit is directly upon the contract, or the contract is sought to be proved incidentally and by way of defense." *Acc.*, *Bernier v. Cabot Mfg. Co.*, 71 Me. 506. A vendee in possession under an oral contract of sale can not set up the contract in defense to an action of ejectment. *Zeuske v. Zeuske*, 55 Ore. 65, Ann. Cas. 1912 A. 557, and cases there collected.

On the other hand, Blackstone's sole comment is that "The statute of frauds and perjuries (was) a great and necessary security to private property." COMMENTARIES, Bk. 4, *p. 440. If protection to property was the motivating intent of the Statute and its true justification, the distinction based on verbiage that is made in *Morris v. Baron and Co.* is eminently proper. This is the view, undoubtedly, of most courts. The opinion in *Gray v. Gray*, 2 J. J. Marshall (Ky). 21, thus expresses it, "The letter of the statute of frauds does not declare a parol contract for land void, it only refuses to give a remedy for the enforcement or breach of such a contract; but the contract itself may for the purpose of defense, be used as a shield to protect the defendant against unconscionable demands, and claims growing out of the contract." In accord with this doctrine, it is generally held that in a suit on the common counts a contract may be used in defense, even though it does not accord with the Statute. *Philbrook v. Belknap*, 6 Vt. 383; *Weber v. Weber*, (Ky.), 76 S. W. 507; *Laffey v. Kaufman*, 134 Cal. 391; *McKinney v. Harvie*, 28 Minn. 18; *Sims v. Hutchins*, 8 S. & M. (Miss.) 328; *Schechinger v. Gault*, 35 Okla. 416, (even though the Statute declares it "invalid").

This is not usually the rule, however, where the statute says that such a contract is "void." *Donaldson's Admr. v. Waters' Admr.* 30 Ala. 175; *Nelson v. Shelby Mfg. Co.*, 96 Ala. 515; *Scott v. Bush*, 26 Mich. 418; *Lemon v. Randall*, 124 Mich. 687; *Salb v. Campbell*, 65 Wis. 405. Neither is it the rule when the defendant is himself in default under the contract. In such cases, however, the inadmissibility of the contract is not due to the Statute but because the defendant's acts have rescinded it. *Jackson v. Stearns*, 58 Ore. 57; *Booker v. Wolf*, 195 Ill. 365; *Burlingame v. Burlingame*, 7 Cow. (N. Y.) 92; *Shute v. Dorr*, 5 Wend. 204 (on the double ground that it had been rescinded and that it was "void" under the N. Y. Statute); *Cf. Jellison v. Jordan*, 68 Me. 373 (apparently because of the Statute). In these cases the recovery is allowed, of course, not for breach by the defendant of the oral contract, but because of his implied promise arising out of unjust enrichment. Loss sustained by the plaintiff, not resulting in enrichment of the defendant, can not be recovered. *Gazzam v. Simpson*, 114 Fed. 71;

Dowling v. McKenney, 124 Mass. 478. It seems that contracts which do not accord with the Statute may nevertheless have an effect in showing the intent in an escrow. See *supra*, p. 569 ff. The fact that a contract is unenforceable because not in writing does not prevent its use to show value in actions of quasi-contract, *Murphy v. De Haan*, 116 Iowa 61; *contra*, because "void" by statute, *Sutton v. Rowley*, 44 Mich. 112; or to show the amount of rent due, *Evans v. Winona Lumber Co.*, 30 Minn. 515; *Steele v. Anheuser-Busch Assn.*, 57 Minn. 18; or to show damage resulting from tort by a third party, *Burruss v. Hines*, 94 Va. 413; or that a settled claim had a real basis, *Michels v. West*, 109 Ill. App. 418; or to show reason for money paid to defendant, *Coughlin v. Knowles*, 7 Met. (Mass.) 57. It is unnecessary to cite authority to the effect that parties unconnected with a contract can not collaterally attack it as "void." This is true even where the defendant's liability results only from performance by plaintiff of a contract which could not have been enforced because of the Statute. *Beal v. Brown*, 13 Allen (Mass.) 114. In suit for specific performance of a written contract to sell land the defendant was allowed to show that the plaintiff had orally contracted to re-sell the land to him. *Frith v. Alliance Investment Co.*, 49 Can. Sup. Ct. 384, Ann. Cas. 1914 D. 458. It is also very generally held that the Statute must be affirmatively pleaded as a defense, since the contract gives a legal right until advantage is taken of the Statute. *Crane v. Powell*, 139 N. Y. 379; *Citty v. Manufacturing Co.*, 93 Tenn. 276. As to the interpretation of the Statute, therefore, a statement from *Evans v. Winona Lumber Co.*, *supra*, is applicable. "This rule may not be logical—very likely it is not, as an original proposition; but that it is the rule established by the authorities there can be no doubt." J. B. W.

SCOPE OF THE DOCTRINE OF RYLANDS V. FLETCHER.—A study of the doctrine of *Rylands v. Fletcher*, L. R. 1 Ex. 265, logically resolves itself into two considerations: first the theoretical merits of the rule, and second, its scope. For a discussion of the first aspect of such an analysis, see 29 HARV. L. REV. 801; 2 COOLEY, TORTS, 1183-1187; BIGELOW, TORTS, 492. It is the purpose of this note to consider the scope of this "doctrine of absolute liability" as now applied by the English Courts.

In *Rylands v. Fletcher*, D had constructed a reservoir on his land, the water of which escaped, due to no negligence on his part, damaging P's property. It was held that D was liable, on the theory that "the person who brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so he is *prima facie* answerable for all the damage which is the natural consequence of its escape." In *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* [1914], 3 K. B. Div. 772, this principle was extended to apply where the defendant brings the dangerous agency upon land occupied by him under license.

However, an examination of all the important cases in point decided before 1917 indicates that the English Courts have been careful to limit, rather

than extend that doctrine. In *Nichols v. Marsland*, L. R. 10 Ex. 255, D had constructed and maintained with reasonable care certain artificial embankments, which were over-flowed due to an unusual storm, causing damage to P's property. The court held that P could not recover, asserting an exception to the rule of *Rylands v. Fletcher* where the damage is due to an act of God, or *vis major*,—such as an extraordinary rainfall, which it is practically, though not physically, impossible to resist. *Nugent v. Smith*, 1 C. P. Div. 423, 435-438, decided that a carrier might be protected from a loss occasioned by an act of God, if the loss could have been prevented by no reasonable precaution, even though it was not absolutely impossible to prevent it. Cockburn, C. J., said: "That a storm at sea is included in the term 'act of God' can admit of no doubt whatever." See also *Forward v. Pittard*, 1 T. R. 27, 33. *Carstairs v. Taylor*, 6 Ex. p. 216, *semble*, held that D was not liable for damage consequent to the gnawing of a hole by rats in D's water box, on the ground that such was a *vis major*.

A second limitation, where the damage is wrought by the act of a third person, is propounded in *Box v. Jubb*, 4 Ex. Div. 76. P sued for damages caused by the overflow of D's reservoir owing to the emptying therein of the water from the reservoir of a third party. Held, that D was not liable, the culpable act not being that of D, who was free from fault, but of a third party. This principle was affirmed in *Rickards v. Lothian*, 38 A. C. 263, 277, where the damage resulted from the stoppage of the drain to D's reservoir by some third party, D being guilty of no negligence.

On the theory that the reason for the rule is one of social and economic expedience, as pointed out in the opinion of Lords Cairns in *Rylands v. Fletcher*, many cases are held not to come within the reason, and hence not within the operation of the rule. Thus, *Smith v. Kenrick*, 7 C. B. 515, enunciated the doctrine that it is the right of each of the owners of adjoining mines to work his own mine in the manner which he deems most beneficial and convenient to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine; so long as such prejudice does not arise from the negligent or malicious conduct of his neighbor. See also *Wilson v. Waddell*, 2 A. C. 95; *Smith v. Fletcher*, 9 Ex. 64, *semble*. But he has no right by pumping or otherwise to be an active agent in sending water from his mine into an adjoining mine. *Baird v. Williamson*, 15 C. B. (N. S.) 376. In *Blake v. Woolf*, 2 Q. B. 426, the damage was caused by a leak in D's cistern, which was located on the floor above P. Held, that D was not liable, it being a reasonable user for him to bring a cistern on his premises in the way he had done, and he being guilty of no laches. According to the case of *Wing v. London General Omnibus Co.* [1909] 2 K. B. Div. 652, 666, in order for the doctrine of *Rylands v. Fletcher* to be applicable "it is for the plaintiff to prove that the defendant has committed a nuisance." On this ground the court held that P could not recover for injuries due to the reasonably careful operation of an omnibus by D, no evidence having been introduced to prove that the omnibus was so dangerous as to constitute a nuisance. Where a public interest demands the maintenance of a dangerous agency, such as a reservoir or water mains for

the purpose of supplying the public with water, it is held that the defendant is only liable when negligent. See the opinion of Bramwell, B., in *Nichols v. Marsland*, *supra*; *Green v. Chelsea Waterworks Co.*, 70 L. T. R. 547 (where the laying of the mains was authorized by an Act of Parliament); *Madras Railway Co. v. Zemindar*, 30 L. T. (N. S.) 770 (where the Indian tanks in question had existed from time immemorial).

As the above cases indicate, the doctrine of *Rylands v. Fletcher* has been limited and confined to such an extent that, in the words of Dean Thayer, 29 HARV. L. REV. 801, "if the two rules of law, namely the doctrine of *Rylands v. Fletcher* and the rule prevailing where the case is rejected and the defendant's liability depends on negligence, be compared in their practical result, the difference between the two in the actual protection given by the law to the injured person is not very great." In speaking of the same matter, Sir Frederick Pollock, in his book on the law of fraud in British India, comments: "In every case of the kind which has been reported since *Rylands v. Fletcher*, that is, during the last twenty-five years, there has been a manifest inclination to discover something in the facts which took the case out of the rule." But this apparent tendency to restrict and limit the doctrine promulgated in that celebrated case seems not only to have been checked and retracted, but to have been cast in the opposite direction. The restriction now seems to have been attenuated to such an extent as to hold the defendant liable where the damage is caused by an act of God. See the decision of House of Lords in *Corporation of Greenock v. Caledonian Railway Co.*, 117 L. T. 483, decided in Dec., 1917.

D, a municipal corporation, had constructed a pond on land acquired by them for purposes of a public park, by the diversion of a stream through enclosed culverts. Owing to a storm of unprecedented violence, the pond overflowed, and a great volume of water, which would have been carried off by the stream in its natural course, poured down and damaged P's property. In an action by P to recover therefor, D pleaded that the extraordinary rainfall was a *damnum fatale*, or act of God, which they could not have foreseen, and for the consequences of which they were not liable. D admittedly was guilty of no negligence. Held, that P could recover; it being considered that there was a duty on anyone who interferes with the course of a stream to provide a substitute adequate to carry off the water brought down by even extraordinary rainfalls, and he is liable for damage resulting from the deficiency of the substitute which he has provided for the natural channel. According to the reasoning of the court, such damage is not in the nature of *damnum fatale*, but is the direct result of obstructing a natural watercourse.

The decision in the principal case was based upon the adjudication in *Kerr v. Earl of Orkney*, 20 Sess. Cases 298. It was there held that P could recover for damages sustained through the bursting of a dam, consequent upon a very excessive rainfall. But this holding is no authority to sustain the position taken in the instant case, because there was an express finding that D was negligent in the construction of the dam. See the findings by Sheriff in note on p. 300. The Lord Ordinary in his opinion said

that "there is evidence in process that the same was in some respects insufficient and inadequate." And Lord Justice CLERK observed: "In this case the claimer cannot even plead great and unusual precautions. He had not the advice of a skilled engineer. * * * He had no proper plans formed by those competent to judge * * * etc." Furthermore, although the flood was great, it was not unprecedented. Such a rainfall might have been foreseen by ordinary prudence, for, as Lord Justice CLERK (p. 302) said, "an extraordinary fall of rain is a matter which in our climate cannot be called a *damnum fatale*." The words "in our climate" are significant.

It seems as if the principal case presented such facts that it clearly came within the rule of *Nichols v. Marland*, so that D should have been relieved of liability on the ground that the damage was caused by an act of God. The argument of Lord Wrenbury seems specious, that "assuming an act of God, such as a flood, wholly unprecedented, the damage in such a case results not from the act of God, but from the act of man in that he failed to provide a channel sufficient to meet the contingency of the act of God." Such an argument has no bounds, for it is not inconceivable that every construction, no matter how strong and durable, could be destroyed by some act of nature. According to this view, the fact that the damage was due to an act of God would seem to afford no excuse or defense. It would seem, too, that the interest of the public in the construction and maintenance of the bathing beach would warrant the holding that this was a reasonable use of the property, so that D would be liable only when he failed to exercise due care. See *Green v. Chelsea Waterworks Co.*, *semble*, *supra*.

For the condition of the American authorities in regard to the rule of *Rylands v. Fletcher* see the exhaustive article by Professor H. Bohlen, 59 U. of PA. L. REV. 298, 373, 423.
C. L. K.