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Note and Comment

Edson R. Sunderland
University of Michigan Law School

Edwin D. Dickinson
University of Michigan Law School

Horace LaFayette Wilgus
University of Michigan Law School

Willard T. Barbour
University of Michigan Law School

Victor H. Lane
University of Michigan Law School

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NOTE AND COMMENT

THE WRIT OF PROHIBITION—PROCEDURAL DELAY.—A disheartening recrudescence of procedural red-tape is found in a recent decision of the Supreme Court of Ohio. A contest arose over the jurisdiction of the Public Service Commission to fix telephone rates in Cleveland. The Commission was engaged in a determination as to the reasonableness of a schedule of rates filed by the telephone company, when a petition was filed in the Common Pleas Court for an injunction against the charging of rates other than those fixed by a city ordinance.

Believing that under the statute the Public Service Commission had exclusive jurisdiction over the subject of rates, and that the assertion of jurisdiction by the Common Pleas court was a usurpation, the telephone company applied to the Supreme Court for a writ of prohibition to the Court of Common Pleas. The writ was denied on the ground that the case was not a proper one for its use. *State ex rel. Cleveland Telephone Co. v. Court of Common Pleas*, (Ohio, 1918), 120 N. E. 335.

Three judges held that the writ should not issue. Two, WANAMAKER and JONES, J. J., believing that professional concern over *remedy* should yield to public interest in *relief*, wrote vigorous opinions sustaining the use of the writ as the only adequate method of quickly settling a serious conflict in jurisdiction over rates.

The case was one peculiarly and strikingly within the spirit and intent of the common law doctrines relating to the writ of prohibition. Jurisdiction being fundamental, inferior courts should be promptly and authoritatively informed of any usurpation. The matter goes to the very heart of judicial action, lies at the threshold of litigation and is readily determin-

able in advance of the merits of the case. No other question lends itself so readily to preliminary determination by a superior court. In none is a prompt decision so signally beneficial to all parties and to the public.

But the court was deaf to all such considerations, and rather than depart a hair's breadth from the technical restrictions upon the use of the writ which it strove to establish with a zeal worthy of a better cause, it was entirely willing to force the parties to a hearing in the Common Pleas, then to an appeal to the Court of Appeals and finally to a second appeal to the Supreme Court, in order that they might again present to it the identical question which was already before it and which had been fully argued by the parties.

The majority of the judges in effect hold that the writ will not issue to a court of general jurisdiction such as the Common Pleas, because that Court is competent to pass upon its own jurisdiction. It was admitted that the statute gave the Supreme Court express authority to issue the writ. This would be unnecessary unless the courts of general jurisdiction were to be subject to the writ, for lesser tribunals could be controlled by the Common Pleas courts. Obviously the authority was conferred upon the Supreme Court in order to give it a centralized control over all tribunals of the state. And this is strictly in harmony with the theory underlying the writ. As said by the Supreme Court of South Carolina, in *Ex parte Bradley*, 9 Rich. L. 95, "The process of prohibition arises from the fact that the supreme authority commits the administration of justice to a variety of tribunals, which creates a necessity that a superintending power shall exist, and be exerted upon fit occasion, to restrain each within its prescribed orbit, and so prevent intolerable confusion and disorder."

Other courts have taken an attitude very different from that shown in the case under review, such as the Court of Appeals of New York, which said in *Quimbo Appo v. The People*, 20 N. Y. 531, 542: "The writ was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of the remedy ought not, I think, to be abridged, as it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed."

As a matter of fact, there is no general rule forbidding the use of the writ of prohibition against courts of general jurisdiction. The books are full of cases where the writ has issued to such courts. *People v. Superior Court*, 100 Cal. 105; *Maslean v. Wayne Circuit Judge*, 52 Mich. 257; *State ex rel. v. Benton*, 12 Mont. 66; *State ex rel. v. Superior Court*, 12 Wash. 677; *State ex rel. v. Ross*, 122 Mo. 435; *People ex rel. v. Court of Common Pleas*, 43 Barb. (N. Y.) 278. As said by the Supreme Court of New Mexico in *Lincoln-Lucky Min. Co. v. District Court*, 7 N. Mex. 486, "Our district courts are not technically 'inferior' courts, but are relatively inferior to this superintending tribunal, and in the exercise of its 'relative' power this court can properly issue the writ to them."

The insistent demand of the day is for the elimination of unnecessary procedural delays in litigation. As between a quick means and a slow

means of accomplishing the same result, the quick method—other things equal—should be chosen. Procedural regularity is only a means to an end, and should never be accorded any independent value. The great merit of the common law has been its flexibility in meeting new demands and changed conditions, and courts which would rather be orthodox than useful are not true to its liberal spirit.

A striking instance of the progressive attitude toward remedial rules—perhaps extreme, but certainly cheering to a long suffering public,—forming a startling contrast to the Ohio case under consideration, is found in the Michigan doctrine relative to the use of another extraordinary writ,—mandamus. In this state mandamus will issue to compel the vacating of an injunction improperly issued, *Tawas, etc., R. R. C. v. Circuit Judge*, 44 Mich. 479, or the vacating of an order appointing a receiver, *Port Huron, etc., R. R. Co. v. Circuit Judge*, 31 Mich. 456, in cases where delay will result in serious injury. In the *Tawas Case* the court said: "In granting this remedy courts are always disposed to confine it to cases where there is no other adequate specific remedy. But the existence of a remedy of another nature which is not adequate furnishes no reason for refusing it, if the necessity of justice requires it. Mandamus * * * is from its very nature a remedy that cannot be hampered by any narrow or technical bounds."

In these mandamus cases the court, impressed with the need for a speedy adjudication by the court of last resort, used the writ as a substitute for a summary appeal. In the prohibition case in Ohio there was the same or a greater need for a speedy adjudication, and the writ of prohibition offered a perfectly suitable means for getting it, but the court, with a splendid opportunity before it to show an enlightened appreciation of its obligation to serve the public could not get out of the rut of technicality. The case is illustrative of a reactionary judicial attitude which fails to see that the modern world has no patience with procedural red tape, but is interested in procedural rules solely as a means for making the courts more efficient agencies for judicial administration. E. R. S.

THE LUSITANIA—DESTRUCTION OF ENEMY MERCHANT SHIPS WITHOUT WARNING.—On February 4, 1915, the German government proclaimed a war zone including the waters surrounding Great Britain and Ireland, and gave warning that every enemy merchant ship found within the zone would be destroyed. The proclamation anticipated that in the execution of measures of destruction it would not be "always possible to avert the dangers threatening the crews and passengers." A memorial issued at the same time warned neutral powers "not to continue to entrust their crews, passengers, or merchandise to such vessels." This extraordinary program was justified principally as a measure of retaliation for Great Britain's alleged violations of the law of nations in the conduct of the war against Germany. (See AM. JOURN. INT. LAW Suppl. (1915), Vol. IX, Special Number, pp. 83 ff., 129-141, 149, 155).

The tragic consequences of this policy of retaliation reached an early

climax on May 7, 1915, in the sinking of the *Lusitania*. The famous Cunard liner, one of the largest passenger ships in the world, was torpedoed by a German submarine off the south coast of Ireland, while bound from New York to Liverpool with 1,959 persons on board, and sunk with a loss of over 1,198 souls, including 124 American citizens.

Some issues of fact and law arising out of the *Lusitania* tragedy are considered in an opinion handed down on August 23, 1918, by the United States District Court for the southern district of New York. (*The Lusitania*, 251 Fed. 715.) Numerous suits having been commenced against the Cunard Steamship Company, owner of the *Lusitania*, the Company filed a petition in the District Court for limitation of liability. The record included a mass of testimony taken before the Wreck Commissioner's Court in London in 1915, as well as the depositions and testimony of a considerable number of passengers, members of the crew, and experts, taken in relation to this proceeding. The Court granted the petition and dismissed the claims without costs.

The significant facts, concisely stated, are as follows: an unarmed, enemy merchant ship, carrying a cargo which included a quantity of absolute contraband, carrying over one thousand noncombatant passengers of whom many were citizens of neutral states, was torpedoed and sunk on the high seas without warning, without making any provision for the safety of those on board, and as part of a deliberately preconceived plan of which belligerents and neutrals had received formal notice.

The Court reviews the evidence in regard to equipment, cargo, personnel, the navigation of the ill-fated vessel, and the circumstances of its destruction, and concludes that the charge of negligence in these respects cannot be successfully maintained against the petitioner. The allegation that the commanding officer was negligent in failing to comply with every detail of the Admiralty advices for avoiding submarines is also dismissed as unfounded. "The fundamental principle in navigating a merchantman," says the Court, "whether in times of peace or of war, is that the commanding officer must be left free to exercise his own judgment." What was required of the commanding officer was "that he should seriously consider, and as far as practicable, follow the Admiralty advices, and use his best judgment as events and exigencies occurred; and if a situation arose where he believed that a course should be pursued to meet emergencies which required departure from some of the Admiralty advices as to general rules of action, then it was his duty to take such course, if in accordance with his carefully formed deliberate judgment." (251 Fed. 728).

Even conceding negligence on the part of the petitioner, the Court finds other reasons, which are of greater present interest, for disposing of any question of liability. "It is an elementary principle of law that, even if a person is negligent, recovery cannot be had, unless the negligence is the proximate cause of the loss or damage." (251 Fed. 732.) "There is another rule, settled by ample authority, viz. that, even if negligence is shown, it cannot be the proximate cause of the loss or damage, if an independent illegal act of a third party intervenes to cause the loss" (251 Fed. 732.)

Did an independent illegal act of a third party intervene to cause the loss in this case? The question is readily answered in the affirmative, after a preliminary reference to two general principles that have been recognized many times by the courts of England and the United States. In the first place, international law forms part of the law of the land, and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as any question of right depending on it is duly presented for determination. See *The Scotia* (1871), 14 Wall. 170, 187; *Hilton v. Guyot* (1895), 159 U. S. 113, 163; *The New York* (1899), 175 U. S. 187, 197; *The Paquete Habana* (1900), 175 U. S. 677, 700; *Kansas v. Colorado* (1902), 185 U. S. 125, 146; (1907), 206 U. S. 46, 97; *The Queen v. Keyn* (1876), L. R. 2 Ex. D. 63, 154; *West Rand Central Gold Mining Co. v. The King* (1905), L. R. 2 K. B. D. 391, 406; *The Zamora* (1916), L. R. 2 A. C. 77. In the second place, to ascertain international law resort may be had to the customs and usages of civilized nations, and, as evidence of these, to the works of commentators and jurists. See Kent, *Com.*, 12th ed., I, 19; *Hilton v. Guyot* (1895), 159 U. S. 113, 163, 214; *The Paquete Habana* (1900), 175 U. S. 677, 700; *Triquet v. Bath* (1764), 3 Burr. 1478, 1481; *The Queen v. Keyn* (1876), L. R. 2 Ex. D. 63, 154, 202; *Macartney v. Garbutt* (1890), L. R. 24 Q. B. D. 368; *West Rand Central Gold Mining Co. v. The King* (1905), L. R. 2 K. B. D. 391, 401. The writings of the publicists, as well as the prize regulations of the principal maritime powers, support the conclusion that the destruction without warning of an unarmed merchant ship is in contravention of an established rule of the law of nations, and is, therefore, in the case of *The Lusitania*, an independent illegal act of a third party intervening to cause the loss. "The fault, therefore, must be laid upon those who are responsible for the sinking of the vessel, in the legal as well as moral sense. It is therefore not the Cunard line, petitioner, which must be held liable for the loss of life and property. The cause of the sinking of the *Lusitania* was the illegal act of the Imperial German government, acting through its instrument, the submarine commander, and violating a cherished and humane rule observed, until this war, by even the bitterest antagonists." (251 Fed. 736.) It is recognized that reparation for such a wrong must be enforced by a higher tribunal: "But while, in this lawsuit, there may be no recovery, it is not to be doubted that the United States of America and her Allies will well remember the rights of those affected by the sinking of the *Lusitania*, and, when the time shall come, will see to it that reparation shall be made for one of the most indefensible acts of modern times." (251 Fed. 736.)

The case suggests more fundamental problems which the Court, of course, could hardly be expected to consider. It is familiar learning, for example, that the history of war law is a record of unsuccessful protests against the use of new and unusual instruments of destruction. Can the international society, as at present constituted, hope to outlaw submarine warfare any more effectually than it has outlawed the cross-bow, the machine gun, the high explosive shell, war in the air, or a hundred other devices for the more efficient and economical extermination of mankind?

Again, an important part of the law of war has been founded upon a distinction between combatants and noncombatants. Can the distinction be preserved in modern warfare? Finally, it has been considered that one of the most beneficial developments of the past century has consisted in a more accurate definition of the rights and duties incident to neutrality. Can the status of neutrality survive? In short, is there any middle course between a more adequate organization of the society of nations on the one hand and the perpetuation of anarchy on the other? There must come to all who grasp the full significance of the destruction of the *Lusitania* a reinvigorated faith in the statesmanship of those leaders here and abroad who are urging the substitution of international organization for international anarchy.

E. D. D.

LIABILITY OF CORPORATIONS FOR SLANDER.—S. entrusted by the president and general manager of a corporation with the business of obtaining a settlement from plaintiff for a mistakenly supposed shortage in his accounts with the corporation, falsely orally charged him with embezzlement. This charge was made to R., president of another corporation for which the plaintiff was working at the time, and as a step toward getting a settlement by the plaintiff. On the request for a directed verdict, by the defendant, the legal question was presented whether a corporation is liable for slander spoken by the agent of the corporation in the course of his business and in the scope of his authority, and without direction to use, or ratification of the use of, the words spoken, by the directors or chief officers of the corporation. *Held*: the corporation is so liable. *Buckeye Cotton Oil Co. v. Sloan*, (1918, U. S. Dist. Ct. Tenn.), 250 Fed. 712. The court says: "We perceive no sound reason why the liability of a corporation for the act of its agent should differ in an action for slander from that in actions for libel, or other torts, and cannot agree with the view expressed in *Southern Ice Co. v. Black*, (1916), 136 Tenn. 391, 189 S. W. 861, Ann. Cas. 1917 E. 695.

It is only within recent years that a corporation's liability for slander, as for other torts, has become settled in the United States. TOWNSEND, LIBEL AND SLANDER (3d. Ed. 1877), §265, said there could be no agency in slander; and since a corporation can act only through agents, it would follow that it could not be guilty of slander.

ODGERS, LIBEL AND SLANDER, (1st. Ed. 1881) said: "A corporation will not, it is submitted be liable for any slander uttered by an officer even though he be acting honestly for the benefit of the corporation and within the scope of his duties, unless it can be proved that the corporation expressly ordered and directed that officer to say those very words: for slander is the voluntary and tortious act of the speaker. NEWELL, DEFAMATION, (1st Ed. 1890), p. 361 says substantially the same. No cases are cited by any of these authors. but in 1897, the Queens Bench Division of the High Court of Ontario, in *Marshall v. Railroad Co.*, 28 Ont. 241, by ARMOUR, C. J., says as to one of the counts, "We are all agreed that slander will not lie against a corporation," and would not permit argument on the point. This was a suit

by a workman, discharged under a slanderous charge, by the road master who had authority to hire and discharge an employe.

On the other hand in *Dodge v. Bradstreet* (1880) 59 How. Pr. (N. Y.) 104, and in *Buffalo Lubricating Oil Co. v. Standard Oil Co.* (1886), 42 Hun. (N. Y.) 153, it was held that a corporation could be a party to a conspiracy to slander, and be liable for such slander. MORAWETZ, PRIVATE CORPORATIONS (2d. Ed. 1886), par. 727, said a corporation can "be held responsible for libel or slander published by its authority." He cites sixteen cases,—all libel or malicious prosecution cases, but no slander cases. Corporations were held liable for malicious prosecution in the United States as early as 1853, in *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439, WILGUS, CORPORATION CASES, 1296, but in England not till 1900, in *Cornford v. Carlton Bank, Ltd.*, 1 Q. B. 22 C. A. As early as 1858, corporations were held liable for libel by the United States Supreme Court in *Philadelphia, etc., R. R. Co. v. Quigley*, 21 How. 202; and in the same year by the English Courts in *Whitfield v. South Eastern Ry. Co.*, El. Bl., & El. 115, 96 E. C. L. 115.

ODGERS, LIBEL & SLANDER (5th Ed. 1911) leaves out the statement quoted above, and puts nothing in its place as to *Slander*. NEWELL, DEFAMATION, (3d. Ed. 1914), also leaves out the above statement and says a corporation is liable for libel if the publication is made by authority, or ratified, or made by one of the corporation's "agents or servants in the course of the business in which he was employed. And the same is true as to slander." He points out correctly that the late cases are not in accord: some holding that the use of the words must be authorized or ratified, officially, to make the corporation liable, as in *Behre v. National Cash Register Co.* (1897), 100 Ga. 213, 62 Am. St. R. 320, 27 S. E. 986. Alabama, (*Republic Iron Co. v. Self*, 192 Ala. 403, 68 So. 328, L. R. A. 1915 F. 516); Kentucky (*Pruit v. Goldstein Millinery Co.*, (1916), 169 Ky. 655, 184 S. W. 1134,—a partnership case, but citing several Kentucky corporation cases); Massachusetts, (*Kane v. Boston M. L. Ins. Co.*, (1908), 200 Mass. 265, 86 N. E. 302); Michigan, (*Flaherty v. Maxwell Motor Co.*, (1915), 187 Mich. 62, 153 N. W. 45); and Tennessee, (*Southern Ice Co. v. Black, supra*) follow this doctrine.

The following, however (with much better reason), hold the corporation liable for slander spoken by an agent or servant in the course of his employment, and in the scope of his authority, the same as for other torts: Arkansas, (*Waters Pierce Oil Co. v. Bridwell*, (191), 103 Ark. 345, 147 S. W. 64, Ann. Cas. 1914 B 837, contrary to what is said in *Lindsay v. Railroad Co.*, (1910), 95 Ark. 534, 129 S. W. 807; Minnesota, (*Roemer v. Brewing Co.*, (1916), 132 Minn. 399, 157 N. W. 640, L. R. A. 1916 E 771); Mississippi, (*Rivers v. Yazoo R. R. Co.*, (1907), 90 Miss. 190, 43 So. 471, 9 L. R. A. (N. S.) 931); Missouri, (*Fensky v. Casualty Co.*, (1915), 264 Mo. 154, 174 S. W. 416, Ann. Cas. 1917 D 963); New York, (*Kharas v. Barron C. Collier, Inc.*, (1916), 157 N. Y. S. 410, overruling *Eichner v. Bowery Bank*, (1897), 24 App. D. 63); North Carolina, (*Sawyer v. Railroad Co.*, (1906), 142 N. C. 1, 54 S. E. 793, 115 Am. St. R. 716, Ann. Cas. 440); Ohio, (*Citizens Gas Co. v. Black*, (1917), 95 Oh. St. 42, 115 N. E. 495, L. R. A. 1917 D

559): South Carolina, (*Hypes v. Southern Ry. Co.*, (1902), 82 S. C. 315, 64 S. E. 395, 26 L. R. A. (N. S.) 873, 17 Ann. Cas. 620); Texas (*South-western Telegraph Co. v. Long*, (1916),—Tex. Cri. App.—, 183 S. W. 421); and *Grand Union Tea Co. v. Lord*, (1916, E. Dist. Va.), 231 Fed. R. 390.

There seem to be no English cases directly holding a corporation liable for slander, but in *Citizens Life Assurance Co., Ltd., v. Brown*, (1904), A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 T. L. R. 497, 53 W. R. 176, 6 B. R. C. 675, the Privy Council rules that a corporation is liable for *libel*, "Although the servant may have had no actual authority, express or implied, to write the libel complained of, if he did so in the course of an employment which is authorized." The leading English authors state the corporation's liability for torts in terms broad enough to include liability for slander by an agent in the course of his employment, and within the scope of his general authority, but cite no cases of slander. See ODGERS, *LIBEL and SLANDER*, 5th Ed., p. 592; CLERK and LINDSELL, *TORTS*, Canadian Ed. 1908, pp. 60-63; POLLOCK, *TORTS*, 9th Ed. 1912, pp. 61-63; SALMOND, *TORTS*, 4th Ed. 1916, pp. 60-64; HALSBURY'S *LAWs OF ENGLAND*, Vol. 5, Companies, 1910, p. 309; HAMILTON'S *COMPANY LAW*, 2d. Ed., 1901, p. 121, Canadian Ed., 1911, pp. 108-9; LINDLEY, *COMPANY LAW*, 6th. Ed. 1902, p. 257 et seq.; PALMER, *COMPANY PRECEDENTS*, Vol. I, 1912, p. 38.

There have been several Scotch cases, and in *Finburgh v. Moss' Empires, Ltd.*, (1908), S. C. 928, it was expressly ruled that "an employer (a corporation), is liable for a verbal slander uttered by his servant in the course of the servant's employment and for the benefit of the employer." The court relies upon *Barwick v. English Joint Stock Bank*, (1867), L. R. 2 Ex. 259, (a case of fraud), and *Citizen's Life Assurance Co., Ltd., v. Brown, Supra*. In *Aiken v. Caledonian Ry. Co.*, (1913), S. C. 66, where the cases are reviewed, the judges insist that "for the benefit of the employer," are important on the question of liability,—not necessarily meaning that the employer should reap some benefit from the use of the words, but the facts alleged and proved should show "that the verbal slander complained of is a slander that should be held in law to be imputable to the principals, so as to justify the issue that it was a slander uttered by them, by or through their servant." See also *Mandelston v. North British Ry.*, (1917), S. C. 442, to same effect.

H. L. W.

RE-WRITING THE STATUTE OF FRAUDS: PART PERFORMANCE IN EQUITY.—One of the most striking examples of judicial legislation is that process whereby courts of equity, from the end of the seventeenth century onwards, have in no small measure re-written the Statute of Frauds. Exception was added to exception until the doctrine known as "part performance" became firmly established. The doctrine was not evolved consistently and the basis of some applications of it is obscure. One who follows Sir Edward Fry's admirable but futile attempt (Fry, *SPECIFIC PERFORMANCE* (ed. 5) §§ 580, ff.) to systematize the variant decisions of the English courts must feel doubtful whether any single theory will explain all the intricacies of part per-

formance. Mr. Pomeroy sought to support the doctrine upon the all-embracing principle of fraud (Pomeroy, *CONTRACTS* (ed. 2) §§ 103, 104), but unless it be fraud to fail to carry out a promise deliberately made when another has acted upon it, this explanation fails.

The Statute of Frauds (1677) was scarcely installed in the statute book, when LORD JEFFRIES, C., in *Butcher v. Stapely*, (1685), 1 Vernon 363, constructed an exception. Under a contract of sale the purchaser was let into possession and the Lord Chancellor declared that "inasmuch as possession was delivered according to the agreement he took the bargain to be executed" and the statute did not apply. No reason is disclosed for this holding, unless it be that a contract executed upon one side is not within the contemplation of the statute: a dogma that cannot seriously be maintained. Subsequent decisions, however, followed *Butcher v. Stapely* with alacrity and it has long been settled law in England and most American jurisdictions that the receipt of possession from vendor or lessor takes the case out of the statute in favor of the vendee or lessee. AMES, *CASES EQUITY*, 279, n. 1. and cases cited. It is difficult to see what principle of equity underlies this exception and efforts to support it rationally have been singularly unhappy. Cf. JESSEL, M. R. in *Ungley v. Ungley*, L. R. 5 Ch. D. 887, 890; COOLEY, J., in *Lamb v. Hinman*, 46 Mich. 112, 116. Modern judges have been inclined to recognize that the exception of possession is exceedingly arbitrary and rests upon nothing more than authority and history. See the remark of Lord BLACKBURNE in *Madison v. Alderson*, L. R. 8 App. Cas. 467, 489, and WELLS, J., in *Glass v. Hulbert*, 102 Mass. 32-34. Indeed a number of American courts have declined to admit that mere possession is sufficient, 16 MICH. L. REV. 154, 155.

Probably to prevent the multiplication of arbitrary exceptions the principle was introduced that the alleged act of part performance must be of such a nature that it would in and of itself indicate unequivocally the existence of some contract concerning the particular land in question; parol evidence might then be admitted to show the nature of that contract. (Sir WILLIAM GRANT, M. R., in *Frame v. Dawson*, 14 Ves. 386.) Lord SELBOURNE sought to give a truly equitable flavor to this principle by adding that, once such an act is established, the enquiry must be directed to the respective equities of the parties. In his view the matter must have passed beyond the stage of mere contract through the altered situation of one of the parties produced by acts done in reliance upon the contract. "The choice is between undoing what has been done * * * and completing what has been left undone." *Maddison v. Alderson*, *supra*. Obviously this will depend upon striking a nice balance. But Lord SELBOURNE's theory holds small comfort for a plaintiff in a common type of case. If A promises B that if B will take care of him for the rest of his life he (A) will leave Blackacre to B, a complete performance by B will not justify specific performance. The performance by B does not point unequivocally to any contract concerning Blackacre. The unfortunate position of such a plaintiff has led some courts to give relief despite the statute; the theory upon which this is most readily justified may be shortly described as that of 'irreparable injury.' This theory has been attributed to Lord CORTEN-

HAM (Cf. *Mundy v. Jolliffe*, 5 Mylne & Craig 167), though it is doubtful if he ever applied it to a case of the type under discussion; it seems to underlie the well-known case of *Rhodes v. Rhodes*, 3 Sand. Ch. 279, which is the leading authority in this country against the doctrine of *Maddison v. Alderson*. It must be evident that the theory of Lord COTTENHAM, thus applied, is inconsistent with that of Lord SELBOURNE. The tendency of the more recent decisions seems to be in the direction of respecting the statute; *Rhodes v. Rhodes*, for example, would probably not be followed in New York today. *Russell v. Briggs*, 165 N. Y. 500. Moreover there is observable a healthy effort to support such exceptions as remain upon some sound equitable basis.

Unfortunately this is not true of all courts. A number of recent decisions of the Supreme Court of Michigan have dealt with part performance without disclosing any principle of decision. In *Fowler v. Isbel* (1918) 168 N. W. 414, BROOKE, J., relied upon *Friend v. Smith*, 191 Mich. 99, and in *Bromeling v. Bromeling* (1918) 168 N. W. 431 KUHΝ, J., observed that *Ruch v. Ruch*, 159 Mich. 231, had settled the question. *Ruch v. Ruch* appears to invoke the doctrine of fraud by the somewhat vague statement that the Statute of Frauds is not a shield to protect fraud. *Friend v. Smith* cites a long line of Michigan cases, a number of which are not in point. (e. g., *Twiss v. George*, 33 Mich. 253, *Taft v. Taft*, 73 Mich. 502, in neither of which was the statute pleaded.) Those which are pertinent to the present discussion exhibit two common characteristics: (1). They discuss in great detail the evidence presented, and rest content therewith. It is of course eminently proper that the court should satisfy itself that an oral contract is well established by the evidence; but upon no principle of equity can a contract be enforced merely because it is properly proven. Yet simply because the evidence was taken to establish the contract, specific performance was granted in *Fairfield v. Barbour*, 94 Mich. 152; *Welch v. Whelpley*, 62 Mich. 15, and *Russell v. Russell*, 94 Mich. 122. (2). In the second place, there is no adequate discussion of the principles underlying part performance nor is reference made to the decisions of other jurisdictions wherein such principles might be found. In *Pike v. Pike*, 121 Mich. 170, it is said that if a contract is "substantially executed it is taken out of the statute." In *Kinyon v. Young*, 44 Mich. 339, COOLEY, J., concedes that to make out his case the complainant must show "such acts of part performance as will justify its (the contract's) enforcement notwithstanding the failure to comply with the statute of frauds in making it." He seems, however, to feel it unnecessary to define what part performance is, to justify it by equitable theory, or to cite any adjudication upon the point. Further, after admitting that the "acts (i. e., of part performance) are not as conclusive as could be desired," he assents to the conclusion of the lower court that "there have not only been acts of part performance but that the contract has been completely performed * * * and nothing remains to make out the case of the complainant." Where Judge COOLEY led the way, his successors readily followed; and though counsel from time to time have endeavored to lure the court into a discussion of familiar cases decidedly by courts of other states and England, the judges have declined the invitation. This would be well enough if the court had once for

all examined the problem of part performance in its equitable aspects and determined upon some theory which it proposed to maintain. In such an inquiry it is submitted that a consideration of the classic cases would do no harm. The policy of the court has been otherwise. If there exist carefully reasoned decisions in Michigan dealing with this problem, the Supreme Court at its last term did not call attention to them. It is not pretended that *Fowler v. Isbell* and *Bromeling v. Bromeling*, *supra*, are erroneously decided or that the result does not make for 'justice;' but it is justice without law. It may be desirable to repeal the Statute of Frauds, though that is scarcely the function of a court of equity. It may even be desirable that new exceptions should be introduced by the courts, but if this is to be done, may one not hope that the court will somehow gain a perspective larger than is afforded by the 'equities' of any particular case? Is it too much to ask that the profession be given something more than a series of decisions on "the facts?"

W. T. B.

CONTRACT OF INFANT—EVIDENCE, COMPETENCY OF WITNESS UNDER SURVIVORSHIP STATUTE.—Two questions are presented by the case of *Signaigo v. Signaigo*, (Mo. 1918), 205 S. W. Rep. 23: *First*, the enforceability of the contract of an infant, fully performed by her, to live with a man and his wife as their adopted child so long as they should live, in consideration that the infant should have all the property of the foster parents upon their death; and *Second*, the competency of the consenting mother of the infant to testify in support of the infant's claim.

The proceeding was one in equity for the partition among his heirs at law, of the lands of which David Signaigo died seized. Edna Amrein was made a party on her petition setting up a claim to the lands under the contract above referred to. It was conceded that deceased died intestate and without having taken any formal steps to adopt the said Edna; that she did live with the said David Signaigo and his wife from the time she was fourteen years old, that being the time of the making of the contract, until the death of the said David some nine years later, his wife having pre-deceased him but a few months, and that no steps had been taken to actually transfer the title of his property to the said Edna.

The first question would seem not difficult of solution through the application of general principles quite well recognized by the courts of Missouri. In but one case is the infant's contract invalid because he is an infant, and that is where the contract is palpably to his injury, a proposition too elementary for the citation of authorities. There is nothing which marks this contract as belonging to this class.

The dissenting opinion proceeds upon the theory that the contract is one for adoption only, and that the only possible parties to such a contract are the natural and the adopting parents. And apparently forgetting that traffic in human beings is now unlawful, regards the infant as only the "subject matter" of the contract, and concludes that what the child may actually do toward the making of such a contract, or in performance of its terms, cannot affect its legal status.

The contract as found by the jury whose findings were adopted by the court, was something more than one for the adoption of the child. By its terms it provided that she should live with Signaigo and his wife so long as they should live, and at their death should have all his, Signaigo's property. Such a contract, if fully performed by the infant, will be enforced in equity through a decree for specific performance: *Sharkey v. McDermott*, 91 Mo. 647; *Healy v. Simpson*, 113 Mo. 340; *Martin v. Martin*, 250 Mo. 539; *Crawford v. Wilson*, 139 Ga. 654; *Wright v. Wright*, 99 Mich. 170; *Odenbreit v. Utheim*, 131 Minn. 56; *Van Duyme v. Van Duyme*, 12 N. J. Eq. 142; *Van Tine v. Van Tine*, N. J. Eq., 15 Atl. 249; *Jordan v. Abney*, 97 Tex. 296.

And it certainly would be no defense to the enforcement of such a contract that the opposite parties had been guilty of a breach of their own undertaking by refusing to take the formal steps to adopt the infant: *Starnes v. Hatcher*, 121 Tenn. 330.

No question is raised as to the right of the child to take steps to enforce her rights under the contract, upon the theory that it is only a contract for her benefit and not one to which she is a party, and no discussion is given here of the question of her right so to do. The general rule would permit it. *Gandy v. Gandy*, 30 L. R. Ch. Div. 57.

The question of evidence arose upon an objection to the competency of the mother of Edna to testify in support of the claimed agreement, such objection being based upon the following statute:

"No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same, as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility: *Provided*, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided." REV. STAT. MO. 1909, § 6354.

The prevailing opinion allows the testimony of the mother upon the theory that this statute does not disqualify one as a witness because he is the survivor of two or more parties to a contract, if he actually were such survivor, nor because he may have an interest in the popular sense; if that interest be not such as would give rise to some right which the law would recognize, a financial or a pecuniary interest. That the only case in which a witness is disqualified is that one where the surviving party to a contract or cause of action is called to testify in his own favor, or in favor of one claiming under him.

This theory assumes that the language, "the other party to such contract or cause of action" is but descriptive of the person who may be disqualified, and disqualified only, if he is called to testify in his own favor, or in favor of one who claims through him. It is argued that the mother was not called to

testify in her own favor, nor was her daughter, in support of whose contention she was called to testify, claiming through her. The mother was not a party to the cause, she never had the interest which the daughter is seeking now to enforce, and the daughter therefore can not now be claiming through her.

It is clear upon general principles, that the "proviso" of the statute, being in derogation of its general purpose, which is to eliminate the common law doctrine of disqualification for interest, should bear a strict construction, if that be necessary to uphold the general purpose of the statute. The language here is so unambiguous however that it scarcely seems necessary to invoke this principle. It is universally recognized, that the interest which disqualifies, under the old rule disqualifying for interest, with a single exception, is a financial, pecuniary or proprietary interest. The single exception is in the case of husband and wife, an exception which seems to have had its roots in the doctrine, indorsed if not fathered, by Lord COKE, that the effect of marriage was to destroy the personality of the parties to it: GILBERT'S EVIDENCE, 133. A parent was not disqualified for the reason alone that his child was a party, whether called to testify for or against him. See, WIGMORE'S EVIDENCE, § 600; McNALLY'S EVIDENCE, 182. It was only because the witness stood in such relation to the controversy as that he might be advantaged pecuniarily or in some property right, that he was disqualified for interest. The conclusion is irresistible that one cannot testify in his own favor who has no interest to favor. No more can he testify in favor of one claiming through or under him except that other's right he is seeking to assert comes through or under the witness.

With this conclusion that the term "favor" as used in the statute, has reference only to favor having its stimulus in some pecuniary or proprietary interest, the conclusion results almost without argument, that the mother was not disqualified for this reason, for there is nothing upon which to base a claim that she ever had any such interest.

The dissenting opinion proceeds upon the theory that the mother was disqualified because a party to the contract, the opposite party to which was dead. The party, like the one interested, was at the common law disqualified. The statute removes that disqualification of the party because he is a party, as it does the disqualification of one interested because he is interested, save only that the disqualification still remains if the party is called to testify in his own favor and the opposite party to the contract or cause of action is dead or insane. The witness in this case was not called so to testify, for as previously shown, she had not then, and never had had, any interest to favor.

The case of *Crawford v. Wilson*, *supra*, is one in which a contract similar to the one involved in this *Signaigo* case was under investigation. The arrangement was first made with the grandmother, subsequently adopted by the mother and carried out by the child. The child brought the action and called the grandmother and mother to establish the contract. Objection to their competency was pressed under the CIVIL CODE OF TENNESSEE, § 5858, which is similar to the Missouri statute, and they were both held competent upon the theory of lack of interest.

BURDEN OF PROOF AND EXTENSIVE EVIDENCE IN ESTABLISHING WILLS.—Three recent cases may be grouped to illustrate the confused state of the cases on the establishment of wills. *Adams v. Cooper* (Ga. 1918), 96 S. E. 858, holds that the burden of proof on an issue arising upon the propounding of a will, in the first instance, is upon the propounder. When he has made out a *prima facie* case the burden of proof shifts to the caveator to prove the validity of the objections to the will. *Leahy v. Timon*, (Tex. 1918), 204 S. W. 1029, holds that, notwithstanding suspicious circumstances as to the making of a will, the burden of proof rests upon the contestants throughout. Both cases admit parol evidence as the proof by which the will is to be established or defeated, as does the case of *Ladd v. Whittedge* (Tex. 1918), 205 S. W. 453.

On the first question, the burden of proof, the *Leahy* case seems sound. There is no real shifting of burden of proof. The party on whom it rests in the first instance always has the burden of establishing his contention by a preponderance of evidence. The other party succeeds if there is a balance; the weight need not be with him, though it must not be against him. The burden of proceeding often shifts. There is a conflict of authority as to whether this burden of proof in the first instance rests on the propounder of the will. Unless there is some presumption that a paper on its face purporting to be the last will and testament of the deceased is not what it purports to be it would seem that this burden should be, at the start and throughout, on the contestant. Good reasons can be offered for placing that burden on either party. But unless it is always on the propounder there seems no good reason for putting it upon him because there are suspicious circumstances, such as that the chief beneficiary has been in very confidential relations with the deceased. Even then the case is not like confidential relations *intra vivos*, where every transaction, between principal and agent, for example, seems unnatural and calls for explanation. In the case of wills suspicious circumstances may cause the court to scrutinize the will and the circumstances carefully, but not to change the burden of proof. In any event the case of *Adams v. Cooper*, seems wrong in recognizing a shifting of burden of proof. The conflict cannot be settled, and we may dismiss this phase of the cases by referring to previous notes: 13 MICH. L. REV. 63, 12 *ibid.* 423, 11 *ibid.* 513, 9 *ibid.* 169, 1 *ibid.* 423.

A more interesting and troublesome question is the admission of parol or extrinsic evidence in proving a will. Here we find some conflict, but a great deal more confusion, in the cases. At the common law wills, insofar as they might be made, might be and very commonly were oral. Even the 32 Henry VIII (1540) enacted that one might will or devise by will in writing, or otherwise, and this remained true until 29 Charles II (1677), when the Statute of Fraud required that wills should be in writing. The first rule of construction is that the intention of the testator governs, and since 1677 that intention must be in writing, in the manner prescribed by the statute, and the intention must be gathered from the language of this writing. Parol evidence, and this may cover extrinsic written evidence, cannot be introduced to add to, contradict or vary the contents of the within will. Many cases

say "contradict, add to, or explain" the contents. *Nevins v. Martin*, 30 N. J. L. 465. In applying these rules courts often overlook the fact that words are but symbols and have to be explained, and this always calls for some extrinsic evidence, no matter how simple and clear the language used. A bequest to John Smith is impossible of execution until extrinsic evidence shows who John Smith is. A devise of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ is an empty phrase until extrinsic evidence identifies that piece of land. It is not only wrong to say parol evidence is inadmissible to explain the provisions of a will, those provisions mean nothing until so explained. Indeed that a given writing is a will at all can be established, and is always established, more or less by parol.

The rigid rule in force before about 1800 supposed language had a fixed meaning, and that this meaning could be found in the instrument alone, in its four corners (Lord ELDON). So Lord HOLT thought the court could not have the will and travel in the affairs of the testator, and Lord COKE that the court should know by the written words of the will. By 1800 we find Lord COLERIDGE saying that a devise of Blackacre requires evidence to show what tract of land is Blackacre. All this is set forth at large and with ample illustration in WIGMORE ON EVIDENCE, sections 2470 ff., and in a monographic note in Ann. Cas. 1915 B 8. It is now generally admitted that extrinsic evidence is admissible to determine whether a given writing is a will; to determine the subjects and objects of bequests and devises; to show surrounding facts and circumstances so as to put the court in the position of the testator; to explain latent ambiguities; and to rebut a resulting trust. This last is of small consequence in this country, and the first three are so generally accepted and applied as to call for no special mention. They are illustrated in each of the cases under consideration, especially in *Ladd v. Whitedge*, *supra*, notwithstanding the court is "not so sure that any evidence was necessary." The argument of the court all relies on extrinsic evidence to show whether the Daniel Avery mentioned in the will was Sr. or Jr., and the court reaches its conclusion on this from evidence as to the relations of the testatrix to parties that would be affected by the interpretation. See also *Northrup v. Columbia Lumber Co.*, 186 Fed. 770; *Van Gallow v. Brandt*, 48 Mich. 642. The burden put upon the propounder of the will by the Georgia court in *Adams v. Cooper*, *supra*, calls for extrinsic evidence to attack as well as sustain the position of the propounder. That a statute is involved in no way affects this phase of the law, but only the purpose for which extrinsic evidence may be considered.

The interesting and conflicting and confusing cases on extrinsic evidence arise under the head of latent ambiguities, especially when the evidence showing such ambiguities indicates mistake on the part of the testator. There is no question that extrinsic evidence is admissible to show fraud or undue influence, because, say the courts, in such cases the instrument is not the will of the deceased, but the will of another imposed upon him. But when a mistake is shown it is equally certain the writing is not the will, and there is usually a fair inference that if the mistake were struck out the remainder is not the will as it would have been written by the testator, and therefore not

the will of the testator. The question is whether, extrinsic evidence having uncovered a latent ambiguity in the will (caused perhaps by a mistake) more extrinsic evidence may be received to remove the ambiguity (correct the mistake). In contracts *inter vivos* equity will set aside for fraud, and equally correct, a mistake by reforming the instrument so as to make it read as intended. After the death of the maker equity will set aside a so-called will for fraud, but it is said it will not reform a will for mistake. This is put upon the grounds that the only party to the instrument is dead, that there is no consideration to support the contestant, and that equity does not correct mistake unless it is mutual. But these objections are artificial and technical, and do not cover the merits. What is equity for? Why should it not correct a mistake which is not mutual in instruments that have no mutuality, which is not supported by consideration in writings in which consideration plays no part, in instruments made by a party who is now dead in the case of wills which have vitality only after the death of the maker? There is only one objection that is not purely artificial, and that is the danger of fraud if courts open wills to attack by extrinsic, and perhaps manufactured and false evidence, when the maker of the instrument, who alone, perhaps, knows the facts, is dead, and so many years have elapsed since the execution of the will that memory of witnesses is unreliable. *Nevins v. Martin*, 30 N. J. L. 465, where the witness was testifying as to the facts of the making of a will eighteen years before.

It must be admitted at once that this is a grave peril, and calls for the exercise of great caution. But shall the fear of wrong become an instrument of wrong? If the courts refuse to correct a mistake where the mistake and correction are not so clear as to leave no room for doubt in the mind of the court, why should it not be corrected when there is such clearness? The answer is that corrections are made, actually if not admittedly. Indiana in an early case, *Judy v. Gilbert*, 77 Ind. 96, refused to correct a description in a will reading "N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$," upon evidence that the testator never owned such land, but did own, and beyond a doubt intended to devise the "N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$." But in *Pate v. Bushong*, 161 Ind. 533, a will was in effect corrected by being applied to Section 29 instead of 28, and by striking out "W" in S. W. $\frac{1}{4}$ and then by parol showing which S $\frac{1}{4}$ was meant, a very artificial way to accomplish a very evident end. This overruled *Judy v. Gilbert*. Illinois has undertaken the impossible task of reconciling *Kurtz v. Hibner*, 55 Ill. 514, *Gingel v. Volz*, 142 Ill. 214, with *Whitcomb v. Rodman*, 156 Ill. 116. See *Huffman v. Young*, 170 Ill. 290 and *Hitchcock v. Board of Missions*, 259 Ill. 288, Ann. Cas. 1915 B 1, and extended note. For a similar reversal in Wisconsin see *Sherwood v. Sherwood*, 45 Wis. 357 and *Hanley v. Krajczyk*, 119 Wis. 352. Perhaps the leading case permitting correction is *Patch v. White*, 117 U. S. 210 in which a five to four vote upheld changing "lot 6, square 403," which testator never owned, to "lot 3, square 406," which he did own and intend to devise. As to corrections of mistakes in naming beneficiaries see annotation to *Siegley v. Simpson*, 73 Wash. 69, 47 L. R. A. N. S. 514.

None of these cases in terms admit that a court can correct a mistake

in a will, and many mistakes no doubt would not be corrected. But why not in any perfectly clear case? There is no good reason for exceptional treatment of mistakes in the description of the subject or object of the bequest, unless it be claimed that proof is clearer in these cases, and it is easy to limit the rule in this way. See *Whitehouse v. Whitehouse*, 136 Ia. 165, in which this distinction is followed. See also *Covest v. Sebert*, 73 Ia. 564. In *Adams v. Cooper*, *supra*, the claim was a mistake of fact as to the existence or conduct of heirs, which under the Georgia statute should be corrected. This is of course mistake *dehors* the will, leading to a disposition contrary to what might otherwise have been made. The danger of taking evidence in such cases is as great as in attacks upon the language of the will. The extrinsic evidence in *Leahy v. Turion*, *supra*, was permitted to enable the court to put itself in the position of the testator, but here too the danger of parol evidence is as great as in other cases in which the court refuses to take the risk.

The better modern rule seems to be that if by striking out a mistake (in description) enough remains, when read in the light of the surrounding circumstances, to identify the property intended, the remaining part will be given effect in accord with the manifest intent of the testator. For many cases *contra* see 40 Am. Rep. 289 and note, 50 Am. S. R. 279 and note, 6 MICH. L. REV. 520, 7 *ib.* 189. Many cases justify going further and giving effect to the manifest intention of the testator when the mistake (in description) is clear, and also the correction, though both depend on extrinsic evidence. *Patch v. White*, 117 U. S. 210. The effort of the Massachusetts court to escape from the narrow rule without plunging into dangerous waters is apparent in such cases as *Polsey v. Newton*, 199 Mass. 450, criticised in 7 MICH. L. REV. 189, *Bullard v. Leach*, 213 Mass. 117, criticised in 11 MICH. L. REV. 494, and *Doherty v. O'Hearn*, 214 Mass. 290.

The English cases of mistake have often turned on whether the will was read over to the testator and understood by him when it was executed. They had gone so far as to lay down a fixed rule that the fact that there had been no fraud, paper had been duly read over to a capable testator, or that its contents had been brought to his notice in any other way, at the time of the execution, should, when coupled with the execution thereof, be conclusive of his knowledge and approval of such contents. *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109. But the House of Lords refused to sanction any rigid rule, preferring to consider each case on its facts. *Fulton v. Andrew*, 7 H. L. 448. A number of English cases correct mistakes on no other apparent ground than that the correction is by consent of all parties interested. *Goods of Lady Gordon*, 17 P. D. 228, *Goods of Boehm*, [1891] P. 247. But extrinsic evidence as to whether a will was read over is subject to all the objections to extrinsic evidence, notwithstanding a reading over "creates a strong presumption that the testator knew." *Gregson v. Taylor*, [1917] P. 256. Evidence as to whether a will was read over to the testator is about as uncertain and unreliable, and opens the door as widely to fraud, as any form of evidence. Often extrinsic evidence admits no doubt of the testator's intent, *i. e.*, where he has attempted to dispose of all his property, but by a misdescription

has included a parcel he never owned, and has omitted one he did own but did not otherwise dispose of. *Patch v. White, supra*.

It is submitted that insofar as it is regarded to be safe to admit extrinsic evidence to show that a given paper was not the testator's will, or that it was induced by fraud or undue influence, it ought also to be safe by the same evidence to show mistake, and that within the same restrictions, it should be received not merely to show mistake but to enable the courts to make the correction. The courts profess not to be able to do this, and yet, as has been shown, for many purposes they actually do. See, for example, *Polsey v. Newton*, 199 Mass. 450. Compare *Declano v. Smith*, 206 Mass. 365, in which the court expressed a fear that to admit extrinsic evidence, in the absence of fraud, might cause reforming or remodeling every will to meet the demands of disappointed heirs of legatees. The fear seems groundless if the use of extrinsic evidence is properly restricted and safe guarded. In cases where the intent of the testator is clear beyond a doubt, and has been expressed as required by statute, the courts should be able to correct the writing so that it will express this clear intent.