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# Note and Comment

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# MICHIGAN LAW REVIEW

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## NOTE AND COMMENT

REPEALS BY IMPLICATION—PROHIBITION IN MICHIGAN.—At the November election of 1916 the people of the state of Michigan ratified the following amendment to the constitution of that state: "The manufacture, sale, giving away, bartering or furnishing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors, except for medicinal, mechanical, chemical, scientific or sacramental purposes shall be after April thirty, nineteen hundred eighteen, prohibited in the State forever. The Legislature shall by law provide regulations for the sale of such liquors for medicinal, mechanical, chemical, scientific and sacramental purposes."

As is known by every resident of Michigan and as may be surmised by parties outside, the adoption of the amendment was preceded by a great deal of discussion, not always free from acrimony. And the debates did not cease with the election, for at the forthcoming session of the legislature the necessary legislation to carry the amendment into effect was to be considered. There were "bone dry" advocates, there were supporters of a liberal policy, and there were proponents of various intermediate schemes. Every intelligent follower of public events in Michigan knew full well that for a long time it was questionable as to what plan would be adopted by the legislature, and more than one bill was introduced and considered.

On May 2, 1917, there received the approval of the Governor Act No. 161 called commonly the Damon Act, which provided in Sec. 1, that "It shall be unlawful for any person to bring or carry into or receive or possess within this State any vinous, malt, brewed, fermented, spirituous or intoxicating liquors except for medicinal, mechanical, chemical, scientific or sacramental purposes." Section 2 provided that "All laws of this State pertaining to search for, seizure of, and complaints, warrants and proceedings relative to such liquors shall be applicable under this Act," etc. By Section 4 it was provided that "Any person who, himself or by his clerk, agent or employee, shall violate * * * this act, shall be deemed guilty of a misdemeanor", etc. Section 6 of the Act declared that "The provisions of this act shall take effect and be in force on and after May one, nineteen hundred eighteen."

This act might properly be called a "bone-dry" act, and obviously its passage by the legislature was a victory for the advocates of that sort of measure.

At the time this act was passed there was pending in the legislature another bill which was enacted into law, the approval of the Governor bearing date of May 10, 1917. This Act, No. 338, known as the Wiley Act, was entitled "An Act to prohibit the manufacture, sale, keeping for sale, giving away, bartering or furnishing any vinous, * * * liquors", etc. By Section 2 of this act it is made "unlawful for any person, directly or indirectly, himself or by his clerk, agent or employe, to manufacture, sell or keep for sale, give away, barter, furnish or otherwise dispose of any vinous * * * liquors." The Wiley Act consists of sixty-one sections obviously designed effectively to prohibit the manufacture sale, etc., of intoxicating liquors, except for medicinal, etc., purposes; to regulate the manufacture, sale and possession thereof for such excepted purposes; to provide for enforcement and penalties for violations; to prohibit certain advertising; to prescribe the duties of officers and carriers; to prescribe rights of action; and to appeal all acts in conflict therewith. The sixty-first section provided that the "provisions of this act shall take effect and be in force on and after May first, nineteen hundred eighteen."

It should be observed that this latter act makes it unlawful *to manufacture, sell or keep for sale, give away, barter, furnish or otherwise dispose of* intoxicating liquors, while the Damon Act covered the *bringing and carrying into the state, the receiving and possessing of* intoxicating liquors; that the two acts were passed by the same legislature and approved less than ten days apart; and that both were to be effective according to their terms on May 1, 1918.

On August 1, 1918, officers, without a warrant, entered the premises of one Marxhausen, searched for and seized a large quantity of intoxicating liquors, some in the dwelling house. The liquors so seized were conveyed to the county building, and shortly thereafter a complaint was filed charging Marxhausen with a violation of the so-called Damon Act, above referred to. The Supreme Court, upholding the trial court, held (1) that the search and seizure was unlawful and that the beverages should be returned to their owner and (2) that the Wiley Act had superseded and repealed by implication the Damon Act, so the information was rightly quashed. *The People of the State of Michigan* v. *Marxhausen*, decided February, 1919.

The court was convinced that the legislative intent was that the Wiley Act should cover the entire field of liquor legislation. To the argument that that act was obviously designed to prohibit the merchandizing of liquor while the Damon Act applied to personal use, the court replied by pointing out that the latter was not limited to prohibition of personal use, for Section 4 of that act provides: "Any person who, himself or by his *clerk, agent,* or *employe* shall violate any of the provisions of this act," etc. "Clearly", said the court, "if the legislature by the Damon Act solely designed to prohibit and prevent the personal use of intoxicating liquors there would be no occasion to use the words *Clerk, Agent,* or *Employee.* The use of these words in the fourth section of the act, the penal section, eliminates the argument that the Damon Act was designed to cover and apply only to a field not contemplated by the Wiley Act." In this conclusion the court failed to attend to the words of the Damon Act. Section 1, as pointed out above, made it unlawful "to *bring* or *carry into* or *receive* or possess within this State" any liquors. It must be perfectly obvious that at least the "bringing" and "carrying" into the state might be by "agent" or "employee" or even by a "clerk." The use of the last word perhaps affords some basis for a view that merchandizing was covered by the Damon Act. It is, however, a very slender foundation for a conclusion that the two acts covered the same field.

The court quotes from and cites a number of cases establishing the undoubtedly sound rule as expressed in *Shannon* v. *People,* 5 Mich. 85, "That where a subsequent statute covers the whole ground occupied by an earlier statute, it repeals by implication the former statute, though there be no repugnance." This rule is applicable, however, only when the later statute *"covers the whole ground".* That the Wiley Act did not bear such relation to the Damon Act would seem clear upon the most casual reading. Further and more careful reading and reflection serves only to strengthen such conclusion. That the seven judges present (OSTRANDER, J., was absent)—the report of the case states that it was "before the full bench"—should have agreed in the conclusion is remarkable.

The part of the opinion dealing with the question of search and seizure complained of is an able and thorough consideration of the question of unreasonable searches and seizures. R. W. A.

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THE "SOURCE OF LAW" IN THE PANAMA CANAL ZONE.—A case just decided in the Supreme Court of the United States, coming to that court from the Canal Zone, shows the great difficulties under which our courts labor when they are called on to interpret and administer the law in our extra-continental possessions. The courts have apparently had the most difficulty in amalgamating the Roman law and the common law in cases involving questions of delictual liability. In the case of *Fernandez* v. *Perez* (1906), 202 U. S. 80, the procedural question was presented as to the validity of an action on the case for the wrongful levy of an attachment brought in the United States District Court for the District of Porto Rico. A decision of the point involved a discussion of the relation of torts to crimes in the Spanish law. Such a discussion was presented in 6 MICH. L. REV. 136, 149, (1907).

In *Panama Railroad Company, Plaintiff in Error* v. *Theodore Bosse,* U. S. Sup. Ct. March 3, 1919, the plaintiff in the lower court had been injured by a motor omnibus, negligently driven by a chauffeur of the Panama Railroad Company at an excessive rate of speed through a crowded street in the

Canal Zone. Suit was brought in the District Court of the Canal Zone. The defendant argued, (1) that the common law liability of the master for his servant could not be applied to this accident in the Canal Zone, (2) that there can be no recovery for physical pain. The lower court decided for the plaintiff on both these points, and this decision was affirmed by the United States Supreme Court.

Using "source" in the sense of the instrumentality through which or the persons by whom the rule of law is formulated, there are several questions that naturally arise as to the "source of the law" of this case; namely, is it found in the law of the old jurisdiction of Columbia or Panama, in the common law, in an amalgamation of the two, or, finally, may the law have come from some other source? If the lower court had requested a brief from counsel as to what the Panama law was on the doctrine of *respondeat superior,* that question might have been settled at the beginning of the litigation, and, at the final hearing, the Supreme Court would not have been reduced to clever guessing as to the meaning of the several articles of the Civil Code which deal with compensation for losses by illegal act.

An executive order of the President of the United States, issued on March 8, 1904, had said, "The law of the land, with which the inhabitants are familiar, * * * will continue in force in the Canal Zone." This was construed to keep in force the Civil Code of the Republic of Panama, and it was argued that the Civil Code as construed in civil law countries "does not sanction the application of the rule of *respondeat superior* to the present case". It would seem that the phrase "with which the inhabitants are familiar" ought to apply to those who inhabited the Panama Zone at the time of the issuance of the President's order: *i. e.,* in March, 1904, and not, as the Supreme Court suggests, to the inhabitants at the present time who are "only * * * the employees of the Canal, the Panama Railroad, and the steamship lines and oil companies permitted to do business in the Zone under license." The *present* inhabitants are, as the court says, familiar with the common law rule, but the suggestion that the President's order applies to such inhabitants and not to those natives dwelling there in 1904, when the Zone was first taken over, adds to rather than decreases our bewilderment as to the relation of the common law rule to the civil law provisions.

In the absence of any enlightenment from counsel in the case as to the actual character of the civil law on the point, the Supreme Court attempts to show that Articles 2341, 2347 and 2349 of the Panama Civil Code are, at least, not necessarily out of harmony with the common law doctrine of *respondeat superior,* and concludes that, "it would be a sacrifice of substance to form if we should reverse the decision." And further, "we are by no means sure that they (the native Courts) would not have decided as we decide." But, *"at all events"* (italics not the Court's) "we are of the opinion that the ruling was correct." In regard to the second point the opinion concludes with the statement that, "it cannot be said with certainty that the Supreme Court of the Zone was wrong in holding that under the Civil Code damages ought to be allowed for physical pain. *Fitzpatrick* v. *Panama Railroad Co.,* 2 Canal Zone Sup. Ct. Rep. 111, 129, 130."

The decision is certainly a wise one and it commends itself as in accordance with the well-established principles of the common law, but it leaves us just where the District Court of the Canal Zone started so far as concerns a definite answer to the questions above suggested. As a decision of our court of last resort it makes perfectly good law and the decision in the Court of the Canal Zone has already been followed as a useful precedent in the United States Circuit Court of Appeals. Cf. *Panama Railroad Co.* v. *Toppin,* 250 Fed. Rep. 989, but it is submitted that if the Courts of the Canal Zone could have determined at the beginning under what law they were acting, not every case varying in some details from the instant case on its facts would have to be carried to the Supreme Court of the United States for determination, and incidentally the perfectly innocent desire of the theorists might be gratified by the determination of whether the "source of the law" is the Modern Roman Law of Columbia or Panama, the Common Law of England or the good old doctrine of Cicero that *"lex nihil aliud nisi recta et a numine deorum tracta ratio, jubens honesta prohibens contraria"*.

It would seem that in this instance also the rule of the survival of the fittest in law is operating. Where the common law has come into conflict with the Spanish-Roman or Dutch-Roman law in the English or American dependencies the principles of the former have generally supplanted that of the latter. The English doctrine of "consideration" has proved superior to the modern Roman law doctrine of "cause" in Louisiana and Cape Colony, South Africa. 4 MICH. L. REV. 19, Cf. 20 LAW QUART. REV. 349. In the instant case also the common law principle is victorious, although we are not quite certain whether it has won because it was identical with the civil law principle or because the case was finally determined by our Supreme Court. It should be noted also that this victory of the common law is in the field of private law, not of public law, and thus seems out of harmony with Taylor's generalization (Cf. "THE SCIENCE OF JURISPRUDENCE", p. XV), according to which there is arising a composite law in these localities of mixed jurisdiction "whose outer shell is English public law, * * * and whose interior code is Roman private law." J. H. D.

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PATENT LAW—SECRET USE AS AFFECTING RIGHT TO A PATENT.—An unusually obvious piece of judicial legislation, of practical importance to the manufacturing world, was promulgated in the case of *Macbeth-Evans Glass Co.* v. *General Electric Co.,* 246 Fed. 695. The facts were that in 1903 Macbeth had invented a process for making glass. Since that time the plaintiff company, of which Macbeth was president, had been using that process. This use had, however, been "secret". In 1910 an employee of the plaintiff revealed the process to the Jefferson Glass Co., which at once began to use it, but on application of the Macbeth Co. the state court enjoined the Jefferson Co. from further use of the process and from disclosing it to others. *Macbeth-Evans Glass Co.* v. *Schnelbach,* 239 Pa. 76. The secret of the process was not revealed by the proceedings in this suit. It does not appear how the General Electric Co. acquired knowledge of the process; whether it did learn the secret of the Macbeth process, or evolved a similar process by its own independent efforts. Macbeth applied for a patent in 1913 and when it was issued the Macbeth Co., as his assignee, brought this suit for infringement. The General Electric Co. defended on the ground that Macbeth had lost his right to a patent, by his failure to apply for one reasonably soon after he had perfected his invention, and that, consequently, the patent issued to him was void.

The statutes provide that the first and original inventor may obtain a patent upon application, *unless* his invention has been in public use or on sale more than two years prior to his application, or unless he is proved to have abandoned the invention. *R. S.* 4886. These are the only exceptions stated. Macbeth was conceded to be the first and original inventor. It was admitted also that the invention had never been sold—although its products had been. Macbeth was obviously not proved to have abandoned his invention. On the contrary he was using it, and displayed a very vital interest in it. "The constant effort made to preserve the secret was inconsistent with intent to abandon the invention".

The court *might* have held that the so-called secret use of the invention by the Macbeth Co. for the ten years preceding the application was in fact a public use. This would have had the authority of *Perkins* v. *Nassua Card Co.*, 2 Fed. 451. In that case the invention was used in a factory employing a score of workmen, all of whom had keys to the building, and to which visitors were occasionally admitted. This was held to be a public use, such as would preclude the inventor from a patent, because "when the public have had means of knowledge they have had knowledge of the invention." So also, in *Eggbert* v. *Lippmann*, 104 U. S. 333, the invention of a type of corset-steel was held to have been in "public use" without further evidence than that the inventor's wife wore a pair of corsets containing such steels. (Compare also *Jenner* v. *Bowen*, 139 Fed. 556.) But the court did not choose to adopt this solution of the case. On the contrary, it was expressly assumed that the use of the invention had been a secret use. Still more convincingly might the court have held that the use by the Jefferson Co. and by the General Electric Co. was truly a public use. Neither the consent of the inventor (*Andrews* v. *Hovey*, 123 U. S. 267, 124 U. S. 694) nor the extent of the use (*Swain* v. *Holyoke Mach. Co.*, 109 Fed. 154) is material in the question of public use. But this simple solution also the court ignored. The case was deliberately made to turn upon the issue of "whether one who has discovered and perfected an invention can employ it secretly more than nine years for purposes only of profit, and then, upon encountering difficulty in preserving his secret, rightfully secure a patent."

Since the right to a patent had not been forfeited through public use nor abandonment of the invention, it must have been lost, if at all, in some other way. As the statute expressly mentions these two causes of forfeiture and no others, it might be supposed that only these were intended as causes of forfeiture; the maxim *expressio unius* might be supposed to apply. Even more indubitably might it be supposed that the emphasis placed on *public* use by the statute would preclude loss of right through secret use. The decisions prior to the one under discussion did proceed upon this supposition. Neither *secret* use nor public *knowledge* has been held a cause of forfeiture. Thus, in *Bates* v. *Coe*, 98 U. S. 31, 46, the court said, as a basis for rejecting certain evidence, "Inventors may if they can, keep their invention secret; and if they do for any length of time, they do not forfeit their right to apply for a patent, unless another in the mean time has made the invention and secured by patent the exclusive right to make, use and vend the patented improvement. Within that rule and subject to that condition, inventors may delay to apply for a patent." In *Parks* v. *Booth*, 102 U. S. 96, 105, the same judge repeated, "Inventors may, if they can, keep their inventions secret; but if they do not, and suffer the same to go into public use for a period exceeding what is allowed by the Patent Act, they forfeit their right to a patent." So also, in *Eggbert* v. *Lippmann*, *supra*, Mr. Justice MILLER, dissenting from the finding that a certain use had in fact been public, makes the apparently undisputed statement, that "the word *public* is therefore, an important member of the sentence" and a secret use will not preclude a patent. In *Eliabeth* v. *Paving Co.*, 97 U. S. 126, 136, it was held that not only was the word public important, but "use" was equally so, and that mere *public knowledge* of the invention, though for more than two years prior to the application would not affect the patent. There must, the court said, explicitly, be a *use* by the *public* before the court can imply either an abandonment of the invention or a loss of the right to a patent. The only authority in any way opposed to this interpretation is dictum. In *Kendall* v. *Winsor*, 21 How. 322, for instance, the decision was in favor of the patentee, but the court did say that one "may forfeit his rights as an inventor * * * by an attempt to withhold the benefit of his improvement from the public *until a similar or the same improvement shall have been made and introduced by others*". (Present writer's italics.) There is no evidence whatsoever in the Macbeth case that the invention was ever made by anyone but Macbeth.

Most of this authority was considered in the principal case. It was not overruled, but was declared somehow to accord with the proposition that a thoroughly secret, non-public use, without any proof of abandonment of the invention may deprive the inventor of his statutory right to a patent. Freed from restriction of this authority the court took the position that it would be out of accord with sound public policy to allow an inventor to maintain a virtual monopoly of his device by using it in secret for a number of years, and then to acquire a statutory monopoly for a longer period. Accordingly, the court read into the statute a provision that the right of a first and original inventor to a patent will be forfeited by secret use for purposes of profit. This interpretative legislation is quite in analogous accord with the decisions by which it has been settled that, as between rival applicants for a patent, the "first and original inventor" is not the one who first invented the device, but the one who first reduced the device to actual practice. *Automatic Weighing Mach. Co.* v. *Pneumatic Scale Co.*, 166 Fed. 288; *One-Piece Lens Co.* v. *Bisight Co.*, 246 Fed. 450. As the decision was virtually affirmed by the Supreme Court in refusing a writ of *certiorari*, 246 U. S. 659, and was cited with approval in *E. W. Bliss Co.* v. *Southern Can Co.*, 251 Fed. 903, 907, it will probably stand as the proper interpretation of the statute. J. B. W.

CORPORATIONS, SHAREHOLDERS' RIGHT TO HAVE A DIVIDEND DECLARED AND PAID OUT OF SURPLUS.—In *Dodge* v. *Ford Motor Co.* (Mich. 1919), 170, N. W. 668, the questions were not new, and with one exception, the decision was not unusual, but the sums involved were enormous. The Motor Company was incorporated in 1903, under the general manufacturing incorporating act of Michigan (P. A. 232, 1903), for the manufacture and sale of automobiles, motors and devices incident to their construction and operation, with an authorized Capital Stock of $150,000—$100,000 then paid up, $49,000 in cash, $40,000 in letters patent issued and applied for, and $11,000 in machinery and contracts. In 1908 the stock was increased to $2,000,000 by the declaration of a stock dividend of $1,900,000. Plaintiffs own one-tenth of the stock.

By July 31, 1916, the Company had sold 1,272,986 cars at a profit of $173,895,416; it had paid regular dividends of 5% monthly, 60% or $1,200,000 per annum on its capital stock of $2,000,000, and in addition had paid special dividends of $1,000,000 in 1911; $4,000,000 in 1912; $10,000,000 in 1913; $11,000,000 in 1914; and $15,000,000 in 1915—$41,000,000 in five years. It had also accumulated a surplus in excess of Capital Stock of $14,745,095 in 1912; $28,124,173 in 1913; $48,829,032 in 1914; $59,135,770 in 1915; and $111,960,907 in 1916. Its assets were $132,088,219; and liabilities, other than Capital Stock and surplus, $18,127,312.

The selling price of the car was originally fixed at $900.00, but a policy of annually reducing this had been carried out until the price of $440 per car had been reached in 1914. This price was continued for the year 1915 in order to accumulate a larger surplus with which greatly to enlarge the Company's plant, and various investments for this purpose were made during the year. Approximately 500,000 were sold this year at the $440 price, and a net profit of nearly $60,000,000 made. The directors then proposed to reduce the price to $360 per car, although there was a greater demand at the former price than the Company could supply, and it was practically certain 600,000 cars, and with a like profit, could be sold during the year at the former price; in which case the new price would cut the net profits some $48,000,000.

Plans were perfected in 1915-1916, and were about to be carried out for substantially doubling the manufacturing plant at an estimated cost of $9,895,000 for buildings, $5,150,000 for equipment, and $11,325,000 for the construction of a smelter plant to make the iron used in the construction of the cars, the evidence showing that if this was done, the cost of the iron per car could be reduced about fifty per cent.

Plaintiffs brought suit to enjoin the carrying out of these projects, and to have a dividend of 50% of the accumulated profits declared and paid to shareholders. They contended:—(1) That the statute limiting the amount of Capital Stock with which a manufacturing company could be incorporated to $50,000,000 made it unlawful for a corporation to accumulate from profits, and use in its business, more than $50,000,000, and the balance over that must be distributed to shareholders. (2) That the building and operation of the smelter would be *ultra vires.* (3) That the reduction of the price of the car would make competition by others impossible, and thereby create a monopoly contrary to the anti-trust act; and, (4) That a failure to distribute a large part of the surplus as a dividend to shareholders, by the directors, was a breach of duty on their part.

The trial court held with the plaintiffs upon propositions (1), (2), and (4), and ordered the distribution of one-half of the surplus (after deducting the dividends already declared), as a special dividend to the shareholders, amounting to $19,275,385. The Supreme Court reversed the lower court upon all these propositions except (4), and held there was no monopoly created contrary to the Anti-trust Law as alleged in proposition (3). In ruling as the Supreme Court did upon the first three propositions, it followed substantially all the authority there is.

In affirming the decree of the lower court on proposition (4), the court relied mainly upon facts which showed clearly that more cars could be sold at the price of $440 than the Company could make, and that Mr. Ford exercised a dominating influence over the business and had confessedly adopted an attitude toward the shareholders that, having already received great gains, they should be content with them or their continuance; that the profits were too large; and that by a reduction in the price, these profits should be shared with the public.

The court says, OSTRANDER, C. J., "A business corporation is organized primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among shareholders in order to devote them to other purposes." "It is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders, and for the primary purpose of benefiting others." All the judges concurred in the result.

H. L. W.

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STARE DECISIS—LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT.—Courts are charged with the duty of declaring the law. They are also required to decide cases. Either one of those functions might be performed with comparative ease if it were divorced from the other, but when the court is simultaneously obliged to do both, the difficulties are very apparent. To decide a case and at the same time to declare the law means that the court is required to generalize every legal proposition upon which it acts in making its decision. But judges are not omniscient. Who can so fully understand the logical implications and the latent possibilities of any rule of law that he can safely announce it as a perpetual guide for the future? This the judges are nevertheless expected to do, for if the law is to be available and certain, its rules must not only be fully formulated but consistently adhered to. The rule of *stare decisis* is a necessary judicial protection extended to the people.

But it is very obvious that the rule cannot be applied rigidly if the law is to keep pace with society as it changes its ideas of legal relations. More or less departure from precedent is constant and inevitable. The common law has for centuries effected such changes by "distinguishing" those cases which ought not to be governed by the canonized rule. In some cases the courts frankly announce their dissent from the old rule and state a new one. But more frequently they accomplish the same result by "distinguishing" the case before them from the case which announced the precedent. This preserves the appearance of consistency, and at the same time introduces a "variable" into the operation of the rule while preserving the rule itself with whatever value it may possess. In this way the rule is "administered" with a view to keeping its good features and eliminating its bad ones. Within limits the courts are thus able to accomplish the useful and difficult task of shooting so as to "hit it if it is a bear and miss it if it is a cow".

No rule has been "distinguished" away in more cases than the rule that cities are not liable for torts arising out of the performance of governmental functions. An interesting case has just been decided in Iowa. The city of Sioux City purchased an automobile for its police department. One day the authorized driver of the car was using it under the orders of his superior to haul policemen to their beats in different parts of the city, and he negligently caused it to run into the car in which plaintiff's testate was riding, resulting in her death. The court conceded the general rule and then successfully avoided its effect by holding that the hauling of policemen to their beats in an automobile was not necessary for the enforcement of peace and order, but was only a convenience for the policemen; therefore the act was not governmental but corporate, and the city was liable. *Jones* v. *Sioux City* (Iowa, 1919), 170 N. W. 445.

The process of "distinguishing" as a substitute for overruling is one which can be carried too far. At most it is a provisional evolutionary process, which ought to be eventually followed by a restatement of the rule itself. If this is not done the law becomes a mass of special instances buried in a jungle of specious argument and logical subtilty. The "distinguishing" process should only serve as a means for approximating the true rule. Employed for that purpose it preserves to the common law the vital element of adaptability which has always kept Anglo-Saxon legal conceptions responsive to the needs of a constantly changing social order.

In the instance here referred to, it might be asked whether the distinguishing process was not carried far enough to justify the court which announced the decision in restating the rule in the interests of a broader justice. The maritime law, which is operative in our country concurrently with the common law, has been held to require no such limitation on municipal liability as that here referred to. If a New York City fire-boat negligently rams a vessel while going to a fire, the city is liable for the damage, while a New York city fire-engine can negligently smash every vehicle on the street with perfect impunity.—*Workman* v. *New York City*, 179 U. S. 552. And if a Chicago city fire-boat while throwing water on a burning elevator carelessly allows the spray to damage a neighboring vessel, the city is liable, although if the water came from a fire-hydrant on shore the owner of the property injured by it would be without a remedy. *City of Chicago* v. *White Transportation Co.*, 243 Fed. 358, affirmed November 5, 1917, 245 U. S. 660.

In the *Workman Case, supra*, the Court, speaking through Justice WHITE, emphasizes the wrong and injustice which would result from a rule exempting a municipal owner of a fire-boat from answering in damages for injuries negligently done to private property, and confesses an unwillingness to countenance "the evil consequences growing from thus implanting in the maritime law the doctrine that wrong can be done with impunity". This revolt against the common law rule was vigorously assailed by four of the nine judges of the court in a long opinion based squarely on the doctrine of "*stare decisis*". But when the *Chicago Case* came up, seventeen years later, there was no effort made to reopen the question.

Legislation is inadequate as a corrective for the rule of *stare decisis*, and the courts should doubtless be constantly alive to the necessity of keeping the law flexible and also unencumbered with an unnecessary cloud of distinctions.

E. R. S.