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Note and Comment

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NOTE AND COMMENT

EPITHETICAL JURISPRUDENCE AND THE ANNEXATION OF FIXTURES.—If we begin with all the facts of a controversy and proceed inductively to determine the rights of the parties litigant, we thus arrive at a jurisprudence of rights, whereas, if we reason deductively from a rule, a definition, or a maxim of law to its application in the facts of our case, we can at best attain only a jurisprudence of rules, which has been so aptly characterized as an epithetical jurisprudence. The subject of fixtures is one in which we have great difficulty in applying the inductive method because the courts have been slower in approaching the subject scientifically in this field of the law than in others.

In the recent case of *Hanson* v. *Voss*, (Minn., Dec. 12, 1919), 175 N. W. 113, the court decides that "if the holder of a ground lease erects an apartment building and installs a gas range and a door-bed in each flat and thereafter forfeits the lease, these articles will pass as fixtures to the owner of the realty, if no rights of a third party are infringed and there is no agreement to the contrary." The law of the case is well stated in the syllabus, and is in accord with the weight of authority, and the opinion has the least possible

discussion of definition of fixtures and of annexation. It would seem that this court has done its best to escape from the older mechanical reasoning and comes out right because it does not proceed deductively from a definition to its application in the particular instance, but by the inductive approach to the rights of the parties on the basis of all the facts. The court says, "the manner of annexation is not decisive but only one of the several facts to be taken into account." This is in refreshing contrast to the earlier cases with their labored grammatical interpretations of the word "annexation." The historical route over which the courts have traveled to reach this rational law is perhaps worth retracing.

In an *Anonymous Case,* Y. B., 21 Hen. VII, 26, pl. 4, (1506), a furnace fixed to the freehold descended to the heir. In *Herlakenden's Case,* 4 Co. 62a, 63b, (1589), wainscoting nailed to the wall went to the heir. In this case the court said, "be it annexed to the house by the lessor or lessee it is parcel of the house." In *Squier* v. *Mayer,* Freem. C.C. 249, (1701), it was decided that a furnace fixed to the freehold and hangings nailed to the wall went to the executor. The reason for these contradictory decisions is easy to see. During the sixteenth and seventeenth centuries, in all questions of property law, the concept of seisin is uppermost in the minds of the courts. Now it is evident that if there is affixing of the material of the chattel to the realty, either by accession or by annexation, the holder of the realty is seised of the fixture. As the mind of the court is thus fixed on the annexation, the intention of the party who annexes is ignored. Indeed, in the *dictum* in *Herlakenden's Case, supra,* the court said that the intention of the lessor or lessee had nothing to do with the decision. It is a matter of some surprise that the courts did not avail themselves of the precedent in Roman law in regard to "immovables by destination," which had existed since the time of Labeo (see citation given later). Bracton apparently followed the classic Roman law in this. He says *horreum frumentarium novum, * * * in praedio Semphronii positum, non erit Semphronii* (lib. 2, c. 2, Section 4, fol. 10). Bracton is here talking of accession and not of annexation, to be sure, but the crib destined for storing grain is described as movable because of this destination and not as an immovable, although it is firmly affixed to the soil of Sempronius. The courts of this period were certainly well versed in the Roman law, as we know from Lord Holt's celebrated excursus on bailments in the case of *Coggs* v. *Bernard,* 2 Ld. Raymond, 909 (1701). Sir Nathan Wright, who presided over the chancery court and gave the opinion in *Squier* v. *Mayer,* was a contemporary of Lord Holt, but the Lord Keeper is apparently blinded here by the concept of seisin, so that he fails to see the possibility of help from the Roman source. The common law concept of seisin seems to have the same effect on him that it had on Lord Holt in *Heydon* v. *Heydon,* 1 Salk. 392, (1693), where Holt decides that partners are seised as joint tenants, and ignores the holding as tenants in partnership, just as here the Lord Keeper sees the annexation but misses the evidences of intent. The only reason that the court in *Squier* v. *Mayer* reaches a conclusion contrary to that of the *Anonymous Case* of 1506 (supra), and of *Herlakenden's Case* (supra) is that it interprets the facts differently. There

is no hint that the court considers at all the intention of the parties. It is possible that we have here a premonition of the decision in *Wiltshear* v. *Cottrell* (post) in which attachment by gravity alone is held not to be annexation. It will be observed, too, that as half these cases were decided one way and half the other, on the same state of facts, the deductive procedure by the definitional route has brought us to the right conclusion in only fifty per cent of the cases.

During the eighteenth century the courts that followed these cases as precedents would come out on one side or the other according to whether the physical nexus were more or less intimate. This practically reduced the law on the subject to a nullity as the only question was one of physical fact. Even Lord Mansfield who begins to swing toward the test of intention as being the more significant, speaks of the "reason of the things," first, and the "intention," second; and by the "reason of the thing" he apparently means that they have become annexed to the inheritance. He calls them "accessories." *Lawton* v. *Salmon*, 2 H. Bl. 259 note (K. B. 1782).

As late as the latter half of the nineteenth century the English court decided that a heavy building, attached to the earth *only* by its *weight*, was, as a matter of definition, not legally annexed. The court said, "we are bound by the authorities to consider such an erection as a mere chattel." *Wiltshear* v. *Cottrell*, 1 E. & B., 2 Q. B. 674, (1853). This seems to establish, or confirm, the doctrine that attachment by gravity alone is not annexation. In the next year, however, the New York Court in *Snedeker* v. *Waring*, 10 N. Y. 170, 175, (1854), said, "a thing may be as firmly fixed to the land by gravitation as by clamps or cement." Thus far, the New York Court follows the English case in its grammatical method of interpretation of the word "annexation," but comes to a diametrically opposite conclusion, i. e., that a material *nexus*, is not necessary, if we have the invisible, intangible, force of gravitation to hold the chattel to the realty. Dean Pound has called attention to the fact that in the period succeeding our American Revolution the Anglophobia of the times sometimes got into our courts. Either because of his prejudice or because the court recognized that the Roman law would strengthen the decision, which was in direct conflict with that of the English Court in *Wiltshear* v. *Cottrell*, he quoted the rule from Labeo that the court had missed in the case of *Squier* v. *Mayer*, *supra*. Ulpian says that, *Labeo generaliter scribit ea, quae perpetui usus causa in aedificiis sunt, aedificii esse.* Dig. 19, 1, 17. This is the basis of the rule in modern French law relative to immovables by "destination." Cf. Code Napoleon, Section 524; also Bracton l. c. *supra*. Cf. also La. Civ. Code, Section 468.

It may be remarked in passing that, although the word "destination" of the French Code seems to cover the same ground as "intention" in English law, there are some important distinctions between them Fixtures in English law can include only inanimate objects, while pigeons in their cotes, rabbits in their warrens, fish in fish ponds, may be *immeuble par destination.* Also in French law no one can make a fixture except the owner. See Code Napoleon, annotated by Blackwood Wright, Section 524, note (q).

This quotation from Labeo carries us back to the Golden Age of Roman law. Ulpian was one of that great coterie of philosophic jurists of the third century of the Christian era, and Labeo, whom he quotes, belonging to the Age of Augustus, was one "in whom a wider culture had instilled a love of general principles." The New York Court, in *Snedeker* v. *Waring*, by adopting the Roman law principle into our system, has brought our law into conformity with justice. By comparing the English case of *Wiltshear* v. *Cottrell* and the American case of *Snedeker* v. *Waring*, both belonging to the middle of the nineteenth century, with the cases of the sixteenth and seventeenth centuries, quoted above, it will be noted that the late cases come out just as the earlier ones, half right and half wrong, on exactly the same state of facts, so long as we reason deductively from the definition of "annexation," giving to the word in the one case the strictly literal meaning of annexation; i. e., a physical interlocking of the particles of matter, and in the other, the holding together by an intangible force. But just as soon as the court realizes that the real question to be decided is not the grammatical meaning of a word but what should be the rights of the parties under all the facts in the controversy, we arrive at conclusions in accordance with justice and fair dealing. The facts to be considered are in general:

(1). The physical relations of the things, i. e., the nature of the annexation (see all the old cases cited above).

(2). The intention of the parties; to be determined, (a) by the relations of the parties, whether landlord and tenant (the ordinary case); mortgagor and mortgagee, *Holland* v. *Hodgdon*, Exch. Ch. L. R. 7 C. P. 328 (1872); vendor and vendee, *Dustin* v. *Crosby*, 75 Me. 75, (1883); simple tort feasor or one acting with the purpose of condemning the property, *Justice* v. *Nesquehoning Valley Ry. Co.*, 87 Pa. 28 (1878). (b) by the nature of the thing, i. e., whether trade fixture or not, *Squire* & *Co.* v. *Portland*, 106 Me. 234, (1909). (c) by the custom of the locality. Gas stoves, realty, *Bank* v. *Realty, Corp.*, 137 App. Div. (N.Y.) 45, (1910); also the principal case. Gas stoves, personalty, *Hook* v. *Bolton*, 199 Mass. 244, (1908). The New York Court in deciding *Bank* v. *Realty Corp.* said, "It is a matter of common knowledge [in King's County] that heating and cooking form a part of the necessary and permanent equipment of a tenement house; that they are not ordinarily supplied by tenants, and there is evidence in the record of such custom." Following a similar course of reasoning, the Massachusetts court in *Hook* v. *Bolton, supra,* quotes from a previous Massachusetts' decision to the effect that "the tendency of the modern cases is to make this a question of the intention with which the machine was put in place. *Hopewell Mills* v. *Taunton Savings Bank*, 150 Mass. 522 (1890).

If the courts would only pay due heed to this suggestion of the Massachusetts court and forget the age-long grammatical litigation of the word "annexation," it would go far toward attaining just decisions in the majority of cases, and would free our reports of much useless lumber in the citation of ancient precedents. In every instance the question is not what the name of a legal concept *is,* but what can the parties legally do. What the courts have done is certainly law, and is more significant than what the courts have

said about the nature of a legal concept. By seeking first a definition and then proceeding by the formal grammatical method of the sixteenth century, we reach the goal of justice in about half the cases. If we ask first, what the rights of the litigant parties are, and then inquire, what are the facts of the controversy; including, *first*, the physical relations of the things, then, the character of the parties, the nature of the thing, and the custom of the locality, in order to satisfy the reasonable expectation and legal intention of the parties to the controversy, we increase the coincidence of law and justice by nearly a hundred per cent. In the interest of the efficient administration of justice, the modern scientific method seems to have decided advantages. J. H. D.

EFFECT OF AN AGREEMENT BY ONE PERSON TO SUPPLY ANOTHER'S "REQUIREMENTS" OF A GIVEN COMMODITY.—The cases show that the kind of agreement indicated by the heading of this note has become an established part of business usage. In normal times such an agreement is likely to be carried out to the entire satisfaction of both parties, without question, but, in a period of changing business conditions and abnormal price fluctuations such as we have witnessed during the last few years, nice questions of interpretation are likely to arise, as is well illustrated by the recent case of *Oscar Schlegel Mfg. Co.* v. *Peter Cooper's Glue Factory*, (1920) 179 N. Y. S. 271.

The defendant agreed to supply the plaintiff with its "requirements of 'Special BB' glue for the year 1916" at nine cents per pound, deliveries to be made as ordered by it. The plaintiff was a jobber and, as defendant well knew, bought only for re-sale to the trade. When it received an order for glue it sent a requisition to the defendant which filled it. Similar contracts had been entered into by the parties for each of the four years immediately preceding the contract in question. During that time the price of glue had remained stable, and plaintiff had secured orders for from sixty to seventy barrels, of 500 pounds each, per year. During the latter part of the year 1916, the price of glue went steadily upward from nine to twenty-five cents per pound. The plaintiff, evidently not averse to doing a little profiteering, having increased its sales force from eight to eighteen, pushed the sale of glue to such an extent—sometimes apparently by offering it at a substantial reduction from the prevailing market price—that it succeeded in getting orders amounting, for the year, to three hundred and forty barrels. Defendant shipped one hundred and thirty barrels but refused to supply the balance, and when sued, resisted a recovery on two grounds, viz., (1) that the agreement was not binding for want of mutuality. (2) that in any event the word "requirements," properly interpreted, meant simply that defendant was to supply glue to an amount substantially equivalent to what had been ordered by the plaintiff during the preceding year. Both points were resolved against the defendant by a divided court.

It seems quite obvious that in the proper interpretation of the word "requirements," as used in the agreement, is to be found the correct solution of both of the problems suggested by the defendant. According to the usual definition given by standard dictionaries the word may be used in either

one of two distinct senses. It may mean (1) the act of requiring or demanding, (2) something required or needed. If the word is to be interpreted in the sense first indicated, then it is clear that the agreement is not a contract for want of a sufficient consideration to support the seller's promise. If the buyer agrees to take only what he requires in the sense of what he 'demands' or calls for, his promise is wholly illusory, since it amounts to no more than saying that he will do what he will do. See *American etc. Co.* v. *Kirk*, 68 Fed. 791; *Teipel* v. *Meyer*, 106 Wis. 41; *Cold Blast Transp. Co.* v. *K. C. Bolt and Nut Co.*, 114 Fed. 77. But if it is to be interpreted in the second sense to mean that the buyer will take from the seller what he needs, then there is consideration, for if he buys what he needs from the seller, he necessarily gives up the right to buy elsewhere and consequently suffers a legal detriment. Following the principle which says that a "contract, if capable of two equally reasonable interpretations, should be given that interpretation which will tend to support it," (Lurton, J., in *Lima Locomotive etc. Co.* v. *National etc. Co.*, 155 Fed. 77) the courts have quite generally upheld such agreements. *Minnesota Lumber Co.* v. *Whitebreast Coal Co.*, 160 Ill. 85; *T. W. Jenkins & Co.* v. *Anaheim Sugar Co.*, 247 Fed. 958, and cases therein cited. Courts have at times assumed that, because of a supposed requirement of mutuality, this result would follow only in a case where the agreement is made in connection with an established business, having needs capable of reasonably definite pre-estimate; and have held that the agreement is unenforcible where, as in the principal case, the buyer buys for re-sale only and is in such a position as to make it uncertain whether or not he will need any of the commodity at all. *T. W. Jenkins Co.* v. *Anaheim Sugar Co.*, 237 Fed. 278, commented on in 15 MICH. L. REV. 441, reversed 247 Fed. 958; *Crane* v. *Crane & Co.*, 105 Fed. 869. The same supposed requirement has in a few cases been relied upon as a basis for the holding that the buyer impliedly promises to continue his business for the period during which the contract, by its terms, is to continue in force—the theory being that if he continues in business he will need a quantity of the commodity, and thus there will be present the requisite mutuality: *Hickey* v. *O'Brien*, 123 Mich. 611; *Wells* v. *Alexandre*, 130 N. Y. 642; *Loudenback Fertilizer Co.* v. *Tenn. Phosphate Co.*, 121 Fed. 298. Such decisions are clearly erroneous. All that the phrase "mutuality of obligation" can legitimately be held to mean in this connection is, that to make a bilateral agreement enforcible as a contract, each side must furnish a consideration. In accord with the principal case on this point are the following: *T. W. Jenkins Co.* v. *Anaheim Sugar Co., supra; Ramey Lumber Co.* v. *John Schroeder Lumber Co.*, 237 Fed. 39; *McKeever etc. Co.* v. *Canonsburg Iron Co.*, 138 Pa. St. 184; *Western Macaroni Mfg. Co.* v. *Fiore*, 47 Utah 108. The anomalous decisions just referred to have apparently resulted from a belief on the part of some courts that they were necessary to prevent a gross injustice being perpetrated upon the seller. They have thought that without the requirement of mutuality, as they interpreted it, the seller would be wholly at the mercy of the buyer. Disregarding the obvious argument that the seller entered into the agreement with his eyes open, which after all is not an answer to the position taken, there seems

to be another means of accomplishing the result aimed at—the protection of the seller—which is perfectly consistent with the fundamental principles of contract law.

The word, "requirements," as used in the agreement, is capable of and demands further interpretation to determine the extent of the obligation of the buyer and the seller respectively. In other words, does the word, "requirements," connote that the buyer will take and the seller will furnish *any* quantity, however large or small, that the buyer may need in any conceivable contingency which may arise; or does it indicate a quantity variable within certain somewhat indefinite but nevertheless real limits,—the quantity purposely being left indefinite by the parties because of the uncertainty due to normal fluctuations in needs. Either use of the word would seem to be legitimate. It does not require any stretch of the imagination to see that when the seller agrees to furnish to another, who is engaged in a business with which the former is familiar, "his requirements," he has in mind a quantity capable of fairly definite pre-estimate. The word may be intended as the equivalent of the statement of a definite quantity qualified with the words "more or less," which it is held merely provide against slight and accidental variations. *Hills* v. *Edmund Peycke Co.*, 14 Cal. App. 32; *Geiger* v. *Kaesiner*, 148 Ill. App. 529; *Santa Paula Commercial Co.* v. *Parkhurst-Davis Mercantile Co.*, 86 Kan. 328; *Little Rock Cooperage Co.* v. *Gunnels*, 82 Ark. 286.

Obviously no *a priori* rule can be laid down for determining in a particular case which interpretation is the correct one. This must depend upon the apparent intention of the parties to be deduced from all the circumstances surrounding the transaction. If it appears that the obligation was reasonably understood to be unlimited, there is no valid reason why it should not be enforced in that way, but, on the other hand, if it was not so understood, then justice and common sense alike demand that it be not so enforced. As is said in POLLOCK ON CONTRACTS (3rd Am. Ed.) 308, 309, "We must look to the state of things as known to and affecting the parties at the time of the promise, including their information and competence with regard to the matter in hand, and then see what expectation the promisor's words, as uttered in that state of things, would have created in the mind of a reasonable man in the promisee's place and with the same means of judgment." Viewed from this angle the conclusion of the majority of the court in the principal case would seem to be erroneous. If all the circumstances are taken into account it is difficult to suppose that the plaintiff could reasonably have believed that the defendant intended to bind itself to supply an unlimited quantity. For a case apparently taking the view here suggested see *T. W. Jenkins Co.* v. *Anaheim Sugar Co.*, 247 Fed. 958, 962 (semble). On this basis the result in such cases as *Hickey* v. *O'Brien*, *Wells* v. *Alexandre*, and *Loudenback Fertilizer Co.* v. *Tenn. Phosphate Co.*, cited *supra*, becomes intelligible. Where the facts show that the buyer is to make a special effort to push the sale of the seller's product then such a limitation on the seller's obligation obviously should not and does not exist. See *New York Central Iron Works* v. *U. S. Radiator Co.*, 174 N. Y. 331. G. C. G.

CONFLICT OF LAWS—THE LAW CONTROLLING THE VALIDITY OF A MARRIED WOMAN'S CONTRACT.—The case of *Poole* v. *Perkins* (Va.), 101 S. E. 240, involves that troublesome question of whether the validity of a contract is to be ruled by the law of the place where made, or by that of the place of performance.

Mrs. Poole joined with her husband in the execution and delivery in Tennessee, where they were domiciled, of a promissory note to the order of Perkins, also domiciled in Tennessee, the note being payable in Virginia.

By the law of Tennessee the contracts of married women could not be enforced against her. By the law of Virginia she was bound by them.

It is a little difficult to determine whether the court, in concluding that the law of the place of performance should control, does so intending to announce the broad rule that what is the applicable law is to be determined by discovering what was the intention of the parties as to the law to be applied, or whether it does so intending to announce that the general rule is, that the validity of a contract is to be determined by applying the law of the place fixed for performance.

There is abundance of authority from courts having the highest regard of the profession, on both sides of these questions. The aim therefore will be, not so much to attempt a discussion of the cases *pro* and *con*, as to briefly present the question in the light of general principles.

It may well be said that the ultimate aim in the administration of civil justice, is to effectuate the intention of parties interested. So one essaying the solution of the question of what law should be applied in determining the validity of a contract, regard should doubtless be had for this principle.

In the case under discussion there is no evidence of what was the intention of the parties, aside from the facts that their contract was actually created, so far as it may be said to have been created at all, in Tennessee, and that it provided for payment in Virginia. Apparently, except for the fact that the state line between the two states ran through it, Bristol in Tennessee and Bristol in Virginia were one town. The note was made and delivered in the Tennessee part of the town while payment was provided for at the bank which happened to be in the Virginia part of the town; this being done as a mere matter of convenience, with no particular thought of what was the law of either state upon the capacity of a married woman to contract.

The question presented therefore, upon this theory of determining the applicable law, is one of whether the fact that the law of the place of performance, if applied, will establish validity, while the law of the place of making, if applied, will defeat all obligation, is in itself sufficent to require the conclusion, really as a matter of law, that the parties intended the application of the law which would give validity. Apart from the matter of judicial authority, to conclude that the parties intended validity rather than invalidity is not to draw a long bow. But it is not to be overlooked that it is one thing to say that, and quite another to say, that the note was made payable in Virginia because they appreciated that the law of that state upheld such contracts while the law of the state of Tennessee did not. In the opin-

ion of the writer it is doubtful whether any case can be found declaring the law to be, that the fact alone, that the law of one jurisdiction will enforce the contract while the law of the other will refuse enforcement, is sufficient to require the conclusion that the parties intended that the law of one rather than the other, should rule their act. Numberless cases justify the admissibility of this fact as evidentiary, but none so far as the writer has discovered, holds that it will outweigh the natural presumption that one expects his acts and conduct to be judged by the law of the place where he acts. The three cases in 91st, 93rd and 95th of Virginia reports, referred to in the opinion on this question, all involve the principle as applied in usury cases where a definite rule has grown up permitting the parties to contract for the rate obtaining in either jurisdiction.

Professor Beale points out, 23 HARV. LAW REV. 260, that to allow individuals to choose the law by which they will be bound is opposed to our system of jurisprudence. Law is an imposition by the state, using its legislative arm upon all persons within its jurisdiction, and such persons cannot choose not to be bound by it. They cannot *will* that they shall not be subject to its operation, nor that their conduct shall not be controlled by it. It is no answer to this argument to say that they do so choose when they go from one jurisdiction to another to consummate their act in order to secure the application of the law of that jurisdiction. In this sense every person doing any voluntary act may be said to choose the law determining the consequences of his act, because he might do it somewhere else. It is one thing to say that one may secure the application to his act of the law of a particular jurisdiction by going there and doing the act, and quite another to say that he may act in one jurisdiction, and by willing that the law of another shall control the consequences of his act, escape the consequences of the application of the local law.

"This intention," says Mr. Dicey in referring to the intention which sometimes influences the determination of the proper law, "is a quite different thing from the intention which, in the absence of fraud, or the like, must always exist that a contract may be valid; it is a different thing also from the intention that a contract made in fact under the law of one country, shall, as to its validity, be governed by the law of some other country. This is clearly a result that cannot be affected by the will of the partied." DICEY ON CONFLICT OF LAWS, 555.

Mr. Wharton, in speaking to exactly the same question as that involved in the case under discussion says, "The capacity of parties to contract is one of those matters which relates to the question of whether, in a legal sense, any contract has been brought into existence, and its governing law should be determined by a fixed rule, not dependent upon the will of the parties; and as a matter of fact, while the courts have not always agreed upon the rule, they have seldom referred the ultimate question of the governing law in this respect, to the intention of the parties." WHARTON ON CONFLICT OF LAWS, 904.

Mr. Minor, in his "CONFLICT OF LAWS," uses this language, "The design

or purpose of the parties to enter into a valid contract, standing alone, can never suffice to validate a contract prohibited by the law, nor to invalidate a contract not legally prohibited. * * * The question therefore, where the validity of the contract is under investigation, is not what law do the parties intend shall govern a particular element, but what law shall actually govern it." MINOR, CONFLICT OF LAWS, p. 401. Mr. Minor then proceeds to show that a contract may fail because the things done, where done, do not create a contract, or because to perform the contract in the place provided for performance is not permitted by the law of that place, or because the consideration for the contract involves the doing of something in a jurisdiction where, to do the thing is prohibited. In other words the question may relate to the matter of creation of the contract, or to its performance, or to its consideration, and the controlling law is to be determined by determination of the situs of that element of the contract involved.

It is an easy conclusion that the matter of "capacity" of a party to make a particular contract relates itself, not to the performance, nor to the consideration, but to the creation of the contract. Without capacity the party cannot create.

The fact that the act in performance of the contract is ruled by the law of the place of the act in performance, and the act which furnishes the consideration for the contract, is ruled by the law of the place of that act, is but a supporting argument for the contention that the act of making shall be ruled by the law of the place of the act of creation.

The court in its opinion in the case being discussed, gives countenance to the doctrine that "where the contract is made in one place and is to be performed in another, not only may the law of the latter be properly called the (law of) the locus contractus, but that it ought in all respects, except as to the formalities and solemnities and modes of execution, to be deemed the rule to govern such cases." The serious objection to such a conclusion, involving as it does the proposition that if the place where the contract is actually executed differs from the place of performance, then the place of making is the place of performance, is its wide departure from fact. It suggests the homely adage that "one can't make a calf's tail a leg by calling it one". No emphasis can be put on words used, sufficient, or so placed, as to make Virginia the place of making of the contract, when every act having to do with its coming into existence is done in Tennessee, all the parties at the time were there and there domiciled. The universally recognized rule in the law of contracts is that the contract is made in that place where the last step is taken to make it a binding obligation, the contract in question was fully created in so far as it had any existence, long before there was anything having reference to it done, or to be done, in Virginia, and no step at any time was taken in Virginia having anything to do with its creation. If the contract was ever born, no more misleading statement could be made than to say that its birth-place was Virginia.

But it is said, that apart from the contention that intent of parties controls, and apart from the theory that the place of making is the place of per-

formance regardless of the place where the contract actually comes into being, there is still a hard and fast rule that where the place of making is different from the place of performance, the contract is ruled, as to its validity, by the law of the place of performance, and authorities sufficient in numbers to satisfy of the existence of almost any other rule of law can be found in support of the proposition. Certainly as respectable showing of authority can be found in opposition. Whence this confusion? It seems best accounted for by recognizing that there has been a failure to analyze the contract and note that its different elements, the making, the performance and the consideration, may each have its own situs differing from each of the others, and therefore each have its own law controlling it. Some court has rightly enough decided some time that a contract was void because the law of the place of its performance made it void, and some other court has adopted the decision as establishing the doctrine that the validity of a contract is ruled by the law of the place fixed for its performance. If the first case involved the question of the lawfulness of doing the act required for performance it might well conclude that the place where the act is to be done should furnish the answering rule. Whereas it would be absurd to contend that such a decision should furnish the rule for a case where the question of validity had no relation to the place or matter of performance.

Excellent discussions of the questions involved in the case examined, may be found in the following authorities; many of which are referred to in the opinion of the court:

Campbell v. *Crampton*, 2 Fed. 414; *Union National Bank* v. *Chapman*, 169 N. Y. 538, 57 L. R. A. 513, 88 Am. St. Rep. 614; *Burr* v. *Beckler*, 264 Ill. 230, L. R. A. 1916A, 1049. The reports of *Bank* v. *Chapman* and *Burr* v. *Beckler* in L. R. A. are accompanied with excellent notes. To these should be added the case of *Mayer* v. *Rothe*, 77 N. J. Law, 681, 26 L. R. A. (N. S.) 763, and note, and the text citations given *supra*. V. H. L.

THE LEGAL STATUS OF ABSTRACT BOOKS—LITERARY PROPERTY, IMPLIED CONTRACT OF SECRECY, UNFAIR TRADE.—A recent case before the Supreme Court of Washington raises some novel and interesting questions. A company engaged in the abstract business mortgaged its "records, books, plats." After suit was commenced to foreclose the mortgage, the mortgagor, who remained in possession, made photographic copies of the records and sold them to the defendant who had notice of the mortgage of the originals. The foreclosure resulted in a sale of the property, described as in the mortgage, to the plaintiff. Whether plaintiff knew at this time of the existence of the copies does not appear. Plaintiff is using the original records in the conduct of an abstract business and defendant is using the copies in competition with him. The action was brought to recover the copies. The court holds that it cannot be maintained because, assuming that the mortgage included the copies, the copies were not embraced in the sheriff's sale. It asserts, *obiter*, that the mortgagee might have enjoined the making of the copies, and it raises, but

declines to answer, some other questions concerning the rights of the parties. *Wintler Abstract Co.* v. *Sears* (Wash., 1919), 184 Pac. 309.

If it was procedurally impossible to treat the action as an equitable suit to compel surrender of the copies for destruction, the decision was clearly right. There would seem to be no theory which would support a common law possessory action. The doctrine of accession most nearly suffices but, while the case bears some analogy to those of young of animals, it is impossible to extend that doctrine to embrace reproductions by the hand of man, involving neither mutilation of the original nor confusion.

But what of other remedies? Ownership of things ordinarily involves no exclusive right to photograph or copy the things, though the exercise of the exclusive right of possession may make photographing or copying by others physically impossible. *Sports Press Agency* v. *"Our Dogs" Publishing Co.* [1916], 2 K. B. 880; *Flagg Mfg. Co.* v. *Holway,* 178 Mass. 83; *Keystone Type Foundry* v. *Portland Publishing Co.,* 186 Fed. 690. *A fortiori,* the limited interest of a mortgagee ordinarily gives no such exclusive right. But the subject of this mortgage was peculiar, and upon its peculiarity the mortgagee, and the purchaser under him, may well base a claim to protection from the dishonest acts of the mortgagor and his purchaser. There are three distinct theories which might plausibly be argued: (1) literary property, (2) implied contract, (3) unfair competition.

In the facts which constitute the subject matter of abstract books, no one, of course, can have any property. But, as a compilation of information, such books would seem to be within the doctrine of literary property. *Dart* v. *Woodhouse,* 40 Mich. 399; *Perry* v. *Big Rapids,* 67 Mich. 146; *Banker* v. *Caldwell,* 3 Minn. 94; *Vernon Abstract Co.* v. *Waggoner Title Co.,* 49 Tex. Civ. App. 144 (*semble*). In *Leon Abstract Co.* v. *Equalization Board,* 86 Ia. 127, a contrary conclusion was based on the fact that such books are not a "work of genius or the development of new thoughts or ideas" (dissenting opinion in *Perry* v. *Big Rapids, supra,* adopted by this court), and upon the fact that the manuscript was not designed for publication but was designed to be kept from publication. Both lines of reasoning are unsound. *Bleistein* v. *Donaldson Lithographic Co.,* 188 U. S. 239; *Prince Albert* v. *Strange,* 2 DeG. & Sm. 652. The Supreme Court of Washington, however, is committed to this view. *Booth Co.* v. *Phelps,* 8 Wash. 549.

If the theory of literary property be admitted at all, the next question is whether there has been such a general publication as to destroy it. In *Vernon Abstract Co.* v. *Waggoner Title Co., supra,* it was held that furnishing abstracts to the general public was such a publication, the limited purpose of the publication being considered immaterial. The opposite is implicit in the Michigan and Minnesota decisions, and the case would seem to be much stronger than some of the cases of limited publication, *e. g.,* stage production of a play, *Tompkins* v. *Halleck,* 133 Mass. 32; or delivery to university classes of a lecture, *Caird* v. *Sime,* 12 App. Cas. 326.

Literary property can be transferred without any particular formality and, although sale of a manuscript or painting may be made with reservation of

the right of reproduction, such a sale may imply an assignment of that right. *Parton* v. *Prang*, 3 Cliff. 537. In view of the comparative uselessness of abstract books without the exclusive right of reproduction, the mortgage and the sheriff's sale of the books can easily be said to impliedly embrace the literary property. The right of user, as incident to the right of possession, may remain in the mortgagor until foreclosure, but this cannot embrace the right to make copies for use in derogation of the mortgage of the literary property. Plaintiff, then, is entitled to enjoin the use of the copies by the mortgagor or by any purchaser with notice, and is probably entitled to have the copies destroyed. *Prince Albert* v. *Strange, supra.*

If the theory of literary property fails, plaintiff may fall back on implied contract or trust. In the same way, some courts dealing with the right to prevent general use by a professional photographer of a portrait photograph, hesitating to recognize a right of privacy, have based relief on implied contract or breach of confidence. *Pollard* v. *Photographic Co.*, L. R. 40 Ch. Div. 345. Plaintiff's theory is that, in making the mortgage, the mortgagor impliedly promised not to make copies of the records to be used by himself or any one else in competition with the transferee of the originals. Here, again, the basis for implication is principally the comparative uselessness of the records if copies are at large. Our case is in many respects analogous to, if indeed it is not parcel of, the cases on trade secrets. A trade secret is any information valuable to a business enterprise which the possessor thereof withholds from the general public. Its legal protection depends entirely upon contract or trust, express or implied, and implications are freely indulged in this field, 44 L. R. A. (N.S.) 1160, note. In the usual case, the information is disclosed by the original possessor to an employee and the latter is charged with the obligation not to disclose or to use for himself such information. There the obligation is implied from the confidential nature of the disclosure. But the principle has been reversed where the original possessor of the information has sold the information to another. Here the implied obligation arises from the equity against derogating from one's own grant. *Pomeroy Ink Co.* v. *Pomeroy*, 77 N. J. Eq. 293. That is precisely our case, and it seems easy enough to make out the implied obligation of mortgagor to mortgagee. But the latter has lost all right to complain, having been paid by the foreclosure, and, on the other hand, no relief is adequate which does not reach the purchaser from the mortgagor. Can we connect the benefits and burdens of the implied contract with the plaintiff and defendant, respectively? It is submitted that the doctrine of *Tulk* v. *Moxhay* is adequate to the task. This doctrine applies to personal property as well as land, though in a large percentage of the cases which have come before the courts relief has been denied because the covenant was held to contravene public policy. *Murphy* v. *Christian Press Co.*, 38 N. Y. App. Div. 426. That "covenants" may be implied, is well settled. 45 L. R. A. (N.S.) 962, note. The covenant touches and concerns the records in a most vital way Though it creates a mere "easement of monopoly," it is easily distinguishable from *Norcross* v. *James*, 140 Mass. 188, in that monopoly, more or less extensive, is here of the very essence of

normal enjoyment. *A fortiori,* the case is within those authorities opposed to *Norcross* v. *James.* The benefit of the covenant, having been from the first so vitally connected with the records, would pass with the records without express assignment. JOLLY, RESTRICTIVE COVENANTS, 43. And see *Vulcan Detinning Co.* v. *American Can Co.,* 67 N. J. Eq. 243; *Pomeroy Ink Co.* v. *Pomeroy, supra;* both holding that the benefit of an implied obligation not to use or disclose trade secrets passes with the obligee's business. The burden of the covenant, at first personal, attached to the copies when made, and passed with the copies to the purchaser without notice. *Lewis* v. *Gollner,* 129 N. Y. 227. And see the trade secret cases where relief has been given third parties with notice. *Tabor* v. *Hoffman,* 118 N. Y. 30; *Pressed Steel Car Co.* v. *Standard Steel Car Co.,* 210 Pa. 464.

If it be thought that both these theories are pressed too far, the plaintiff falls back on the doctrine of unfair competition, as applied in *Associated Press* v. *International News Service,* 248 U. S. 215. The similarity of the cases, assuming that neither literary property nor implied contract can be made out here, is striking. The conspicuous difference, that there the parties were strangers, while here they are related through the mortgage and subsequent sales, makes our case the stronger. The formula of the *Press Case,* that one shall not "reap where he has not sown," needs only to be inverted—one shall not reap where he has bargained and sold his sowing. It may, of course, be doubted whether the court was justified in its application of this ethical principle, and it is quite certain that this ethical principle cannot be applied generally without overturning much settled law. See dissenting opinion of Brandeis, J., and note, 13 ILL. L. REV. 708. But the ethics of our case is at least as clear as that of the *Associated Press case.*

It may be admitted that this case taxes our legal dogmas, but it will be a reproach to the law if, when the plaintiff's case is properly presented, he cannot be given relief. E. N. D.

LIABILITY OF TELEGRAPH COMPANIES FOR NEGLIGENCE IN TRANSMISSION OF INTERSTATE MESSAGES.—In the January number of the LAW REVIEW (18 MICH. L. REV. 248) was noted the case of *Western Union Tel. Co.* v. *Southwick,* 214 S. W. 987, holding that the Act of Congress, June 18, 1910, c. 300, Sec. 7, did not cover the question of liability of interstate telegraph companies for negligence. Consequently the question was held to be governed by the rule of the Texas state courts holding invalid printed stipulations on the telegram blank, limiting the liability of the company, for mistakes in transmission, to the price of the telegram, unless repeated, etc. Shorty after the *Southwick case,* the case of *Bowman & Bull Co.* v. *Postal Tel.-Cable Co.,* 124 N. E. 851, was reported, in which the Supreme Court of Illinois held similarly, a very able opinion of Thompson, J., covering the question thoroughly. On the other hand, the Supreme Court of Washington held, in *Rasher-Kingman-Herrin Co.* v. *Postal Tel.-Cable Co.,* 185 Pac. 947, that by the amendment of 1910 Congress covered the field of liability of telegraph companies on interstate messages. Close on the heels of these decisions,

however, came two decisions by the United States Supreme Court (*Postal Tel.-Cable Co.* v. *Warren-Godwin Lumber Co.*, decided December 8, 1919, and *Western Union Tel. Co.* v. *Boegli*, decided Jan. 12, 1920), holding that the amendment of 1910 covers the question of liability of telegraph companies doing interstate business, and hence superseded all rulings of state courts on the subject. In the former there was a Mississippi statute rendering void stipulations limiting liability for negligence; in the *Boegli Case* there was a law imposing a penalty for failure to deliver promptly interstate telegrams. As for the question which is decided in these two cases, we can not help thinking that the reasoning of the Illinois court in *Bowman & Bull Co.* v. *Postal Tel.-Cable Co., supra,* is sounder. The Act of 1910 nowhere mentions the question of liability; and the authority to establish different rates for different classes of messages, (e.g. repeated, unrepeated, etc.) would not seem to imply control over liability, as the essential difference between the classes of messages is one of service. However, all state rulings are now beside the point and the question can have no more than academic interest.

Now that the Supreme Court has held the matter of liability on interstate messages to be under Federal control, the question arises as to whether it will hold valid or invalid these stipulations for limited liability. The commentator in the January number of the MICHIGAN LAW REVIEW assumes that the court will hold them valid, basing his statement on an analogy to decisions already made as to liability of carriers of goods. In such cases the holding is that the carrier may limit its liability for negligence, by "fair, open, and just" agreements, to an agreed value. Due to the great discrepancies in rates, which appear to bear no relation to the cost of insurance, this amounts practically to an exemption from liability, when goods of great value are the subject of shipment (see 17 MICH. L. REV. 183, and previous comments cited therein). That the Federal courts will follow this trend finds support in the decision of the Interstate Commerce Commission in the case of *Cultra* v. *W. U. Tel. Co.*, (*Unrepeated Message Case*), 44 I. C. C. Rep. 670, and in *Gardner* v. *W. U. Tel. Co.*, 231 Fed. 405. In the former case the Interstate Commerce Commission said, "If as a matter of law, the rate charged and collected for an unrepeated message carries with it the same protection to the sender or recipient and imposes upon the telegraph company the same liability and degree of care as the rate for a repeated message, then the express authority of the Congress to maintain classifications of repeated and unrepeated messages, with the different rates attached thereto, is without significance or effect." However it must be remembered that there is a difference of service which accounts for the difference of rates, and hence the quotation is not strictly accurate. Telegram blanks usually carry a stipulation for insurance at a rate of two per cent for all amounts above fifty dollars (which is the limitation of liability for repeated messages); but this provision is useless, for aside from the excessive character of the charge, how is the sender to determine the amount of insurance to carry? He cannot know what sort of mistake the operator's negligence may lead to; it may even result in damage greater than the value of the goods referred to in the message. The excessive charge for insurance could be corrected by appro-

priate regulation of the Interstate Commerce Commission, but not so the conjectural nature of resulting damages. In this respect the problem of the liability of telegraph companies differs from that of carriers of goods, for in the case of the latter the value of the goods can be ascertained.

It would seem that stipulations limiting the telegraph company's liability for negligence should be held unreasonable, and yet the Supreme Court seems implicitly to incline the other way. In *Postal Tel.-Cable Co.* v. *Warren-Godwin Lumber Co., supra,* the court said, "as in terms the act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged * * *" Although this does not expressly hold the stipulation reasonable, it seems to imply as much; the case was "remanded for further proceedings not inconsistent with this opinion." R. G. D.