

Michigan Law Review

Volume 19 | Issue 1

1920

Note and Comment

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Recommended Citation

Alan W. Boyd, Edson R. Sunderland, Edwin C. Goddard, Edgar N. Durfee & Ralph W. Aigler, *Note and Comment*, 19 MICH. L. REV. 73 (1920).

Available at: <https://repository.law.umich.edu/mlr/vol19/iss1/6>

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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE \$2.50 PER YEAR.

35 CENTS PER NUMBER

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NOTE AND COMMENT

JAMES H. BREWSTER.—Thousands of alumni and former students of the Law School will learn with deep regret of the sudden death of Professor Brewster in Denver, Colorado, on October 7, 1920.

Professor Brewster was born in New Haven, Connecticut, April 6, 1856, the son of Rev. Joseph and Sarah Bunce Brewster. He was educated at the Hopkins Grammar School and New Haven public schools and was graduated with the degree of Ph.B. from Sheffield Scientific School, Yale, 1877, and from the Law School of the same University with the degree of LL.B. in 1879. From 1883 to 1897 he practiced law in Detroit at which place, on June 28, 1888, he was married to Miss Frances Stanton. In 1897 he was made Professor of Law at the University of Michigan, and from 1903 until the severance of his connection with the Law School in 1910 as a result of ill health, he was Editor-in-Chief of this Review. His well-known book, BREWSTER ON CONVEYANCING, was the result of his work and lectures on that subject in the Law School. After recovering, in a measure, his health, Professor Brewster taught for a time in the Law School of the University of Colorado. For several years, however, he had been in the active practice of his profession in Denver.

Former students of Professor Brewster will remember him for his broad interests, his geniality, and kindness. As a teacher of law, he was remarkable in his clearness of thought and expression. Members of the student editorial board of this Review during the period covered by his editorship, who came into much closer contact with him than did the student body generally, owe him a great deal for his stimulating personality and scholarship.

PRICE REGULATION UNDER THE POLICE POWER.—A recent Indiana law providing for the regulation of prices at which all coal moving in intra-state commerce in the state may be sold, has just received the sanction of the District Court of the United States for the District of Indiana.¹ The case arose upon a bill of complaint filed by one of the operating companies to enjoin the commission created by the Act from entering upon any of its duties. Several aspects of the bill were deemed by the court to be premature but the vital point in controversy was adjudicated, namely, as to whether or not the state has any power at all to regulate profits arising from the industry. In denying the injunction and dismissing the bill the court added one more to the already large number of "businesses affected with the public interest" of which phrase the Supreme Court of the United States has said, "We can best explain by examples."² Inasmuch as the opinion was rendered by a court consisting of two circuit judges and one district judge it would seem to be entitled to almost if not quite as much weight as though rendered by a Circuit Court of Appeals.

The phrase "business affected with the public interest" was first used in this country in an opinion delivered by Chief Justice Waite in the case of *Munn v. Illinois*,³ decided in 1876, holding that the business of storing grain in elevators was so affected and is there quoted from an old treatise⁴ of Lord Chief Justice Hale. As applied in that and succeeding cases it has seemed to mean no more than this, that there are certain classes of businesses which may be regulated by the state to a greater extent than others to which the term "purely private" has been applied. No precise test has so far been laid down by the Supreme Court by means of which the limits of these two classes can be distinguished. The attitude thus far steadfastly adhered to by the Court may be illustrated by the following quotation from its most important recent decision upon the point, *German Alliance Insurance Co. v. Lewis*.⁵ After reviewing at length the cases following *Munn v. Illinois*, *supra*, the court commented upon the group as a whole as follows: "The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation. * * * "The underlying principle is that business of certain kinds holds such a peculiar

¹ *American Coal Mining Co. v. The Special Coal and Food Commission of Indiana*, et al, ——— Fed. ——— (Sept. 6, 1920).

² *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389.

³ 94 U. S. 113.

⁴ *DE PORTIBUS MARIS*, I HARG. L. T. R. 78.

⁵ 233 U. S. 389.

relation to the public interest that there is superinduced upon it the right of public regulation." In order to arrive at a conclusion, as to the nature of this "peculiar relation," which will constitute a basis for formulating a reliable test as to when it exists, it is important to review briefly the historical development of governmental price regulation.

Businesses of all descriptions were regulated during the Middle Ages and later during our own colonial period and in the early years following the formation of the constitution with scarcely a thought as to the basis upon which the power of regulation rested, certainly without the existence of the power being questioned. The assizes of longbows, books and beer barrels during the reigns of Henry the Seventh and Henry the Eighth, and the various Statutes of Laborers are not unfamiliar nor are the colonial statutes regulating interest on money, wages, bread, ferriage, mill tolls, wharfage and various other services and commodities.⁶ One suggestion may be gleaned from a study of this mass of regulation which sheds some light upon the modern regulatory tendencies and upon the nature or the peculiar relation already referred to. For the most part regulation, even in the Middle Ages, extended only to necessities of life and this because competition as a protection for the consumer was inadequate and distrusted.⁷ The subsequent development of competition as an active force resulted in the *laissez-faire* policy of economics particularly characteristic of the first half of our national existence⁸ and regulatory statutes ceased because there was no need for them. Logically, therefore, it would seem that should competition again become inadequate the natural consequence would be the reappearance of regulatory statutes in order to supplement it. During the inactive interim, however, the absence of these statutes became so universally accepted that their reappearance raised a question as to the power of the state to enact them, a power which was once unquestioned. Accordingly the necessity arose of protecting the public where it is deemed necessary without revolutionizing the social order. The court proceeded to meet this necessity in *Munn v. Illinois*, *supra*, with the phrase "business affected with the public interest." Businesses so affected are subject to the control of the state to the extent that the returns derived from their pursuit can be limited. Businesses not so affected may be regulated in other ways where their conduct affects health or safety for instance, but their profits may not be directly curtailed.

The contribution of the Middle Ages then is this: That where competition is inadequate to protect the consumer against extortion in securing the necessities of life, there is precedent for governmental intervention and the "peculiar relation" may be said to exist. It remains to be determined whether the modern instances in which regulation has been upheld have actually given effect to this old principle without acknowledgement.

Although the doctrine of "business affected with the public interest" was launched in *Munn v. Illinois* and was the real basis for the decision, there

⁶ 3 HEN. VII, Cap. 13; 25 HEN. VIII, Cap. 15; 35 HEN. VIII, Cap. 8; MASS. REV. LAWS 1648; FREUND ON POLICE POWER, p. 382.

⁷ ROGERS, SIX CENTURIES OF WORK AND WAGES, p. 139.

⁸ 28 HARV. L. REV. 84.

was much in the opinion in that case that gave aid and comfort to the opponents of any and all government regulation. The element of monopoly was stressed and a certain vague analogy to the common carrier suggested so that it seemed possible to confine the "anomaly" within comparatively narrow limits. In *Budd v. New York*,⁹ another grain elevator case, the doctrine was affirmed without extension. In *Brass v. North Dakota*,¹⁰ which followed, however, the reactionaries who sought to check the development of the doctrine should have been slightly disillusioned. This case has been frequently cited as modifying *Munn v. Illinois* to the extent of holding the monopolistic feature unnecessary. The following language, quoted from the opinion, discloses that this conclusion is slightly inaccurate although the result is perhaps the same. "When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals, or associations, in cities of one size and in some circumstances, it follows that such power may be legally asserted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided regulations in every case and overlooked differences in the facts that call for regulation, but as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota." The case may be cited, however, as the beginning of the end for all attempts to limit the doctrine by artificial distinctions.

Munn v. Illinois contains the first of a series of dissenting opinions which has been continued in all of its successors, each striving to repudiate or at least to limit the doctrine advanced, by means of distinctions which the majority of the court have consistently disregarded. It has been maintained that it is necessary that the property be devoted to a public use, that there be some public grant or franchise or some analogy to the innkeeper or carrier or some right upon the part of the public to demand service. In the opinion rendered in the case of *German Alliance Insurance Co. v. Lewis* in which the business of fire insurance was held to be affected with the public interest the repudiation of the artificial distinctions which was begun in the *Brass* case was conclusively effected. The court admits that cases can be cited which support the attempted distinctions but says further: "The distinction is artificial. It is indeed but the assertion that the cited examples embrace all cases of public interest. The complainants explicitly so contend, urging that the test that applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which necessarily, it is contended, can only apply to property and not to personal contracts. The distinction, we think, has no basis in principle, (*Noble State Bank v. Haskell*, 219 U. S. 104); nor has the other contention that the service which cannot be demanded cannot be regulated."

The artificial distinction having been finally cast aside in the case last

⁹ 143 U. S. 517.

¹⁰ 153 U. S. 391.

cited the court proceeded to leave the phrase "business affected with the public interest" unrestricted except for the various examples which were given, but made no progress toward a definition of any sort. So far as previous indications are to be relied upon, therefore, from the point of view of the Supreme Court, the principal case will merely add another to the list of businesses so effected and the court will presumably continue on its way with no attempt to clarify the underlying principle upon which the doctrine rests, or to provide a reliable test in accordance with which the fate of future exercises of the regulatory power may be determined in advance. The district court, however, in the principal case attacked the question with more temerity and suggested what seems to be a reliable test, besides illuminating considerably the basis upon which regulatory power rests.

The court recognizes the old artificial distinctions to a certain extent by dividing all examples of regulation into two classes, one of which includes all public utilities and all cases in which there is a public franchise involved or a public service performed; the other, a number of apparently unrelated cases in which none of these elements appear. It is obvious that the real difficulty in defining the phrase "business affected with the public interest" is encountered in attempting to find a common basis upon which cases of the latter class may be said to rest since the public nature of the first class has long been conceded to be a sufficient basis for regulation. The court finds the basis for the regulation of the second class in the "power of the people to restrict the theretofore existing circle in which a person had his life and the one within which he had his property, to bring these down narrower on account of the conditions that were found to be oppressive to the people." In other words, underlying all these cases there is a common characteristic, namely, that by virtue of economic conditions or whatnot certain businesses have been placed in an advantageous position enabling those engaged in their pursuit to oppress the public, and the latter is not without remedy. In the latter class the court placed married women surety laws, usury statutes despite the historical explanation, and the coal industry under its present circumstances. Having set up the two classes the court says that when the same evil is found to exist in both classes, inasmuch as the regulation in both cases is based upon the same police power, the same remedy should be applied and that since regulation of prices has long been the known remedy for preventing extortion in the first class it should be applied to the same evil when it is found to exist in the second class.

The possibility of reconciling all cases of regulation upon the basis of the relation of the industries involved to the possibility of oppression was suggested by Freund²¹ several years ago and seems to achieve all that the district court achieved by dividing the instances of regulation into two classes. It is true that the public utilities, for instance, are affected with the public interest because they have received public franchises. They are also affected with the public interest in the same manner that the coal industry is so affected in that they ordinarily occupy a position of economic advantage

²¹ FREUND, POLICE POWER, p. 388.

which they can use to oppress the public. Possessing the same advantage without the public franchises, if that were possible, the utilities would still be affected with the public interest in the same manner as the second class of cases set up by the court. As Freund²² suggests upon the theory of the necessity of businesses bearing a relation to the possibility of oppression in order that they may be regulated it is possible on the one hand to account for existing legislation without conceding legislative power with regard to any and all commodities which may be selected, and on the other hand to allow for new applications of this power. If this relation to the possibility of oppression is an acceptable test, there remains a single awkward question as to the court's right of review where the legislature has in effect declared the oppression to exist.

The effectiveness of the test suggested by Freund and the District Court of Indiana can best be determined by its application to new instances of the exercise of the police power which have not been passed upon by the Supreme Court. Such an instance is the recent Montana law undertaking to regulate prices of commodities of all descriptions "from coal to diamonds, from the babe's first swaddling clothes to the corpse's shroud." The law was passed upon by the District Court of Montana in *Holter Hardware Co. v. Boyle*²³ and was held to be unconstitutional upon the ground that many purely private businesses were included within its scope, the court admitting, however, that "businesses affected with a public interest" were a proper subject of regulation. The court made no attempt to draw a line between the two sorts of businesses, but said in effect merely that the legislature had gone too far. It is obvious that two factors are essential in order to enable those engaged in any particular business to oppress the public. In the first place, the industry must involve a necessity of life or at least a product of great importance to the welfare of the community, and in the second place competition in the industry must be inadequate to protect the consumer. Otherwise regulation is useless and undesirable. It will be noted that these same characteristics were the basis of most of the regulation of the Middle Ages. It is also clear that no declaration of the legislature can force these characteristics upon any business in which they are wholly lacking. The attitude of the courts toward the finding of facts by the legislature as indicated in the passage of a regulatory act has been said to be that of an appellate court toward a finding by the jury. If there are any facts at all to support the decision it will not be disturbed. In the light of the test suggested therefore, the distinction between the Indiana and Montana laws is clear and the decision in each case may be supported. It is a matter of common knowledge that both of the characteristics necessary to afford the opportunity for oppression are present in the coal industry today. It is a prime necessity of life and at present there is a shortage of supply. Therefore the "peculiar relation" exists. The business is "affected with the public interest." On the other hand, the scope of the Montana law obviously includes a number of commodities which

²² FREUND, *POLICE POWER*, p. 388.

²³ 263 Fed. 134.

can in no way conceivable under present economic conditions become instruments for oppression,—weapons with which their wielders can “bludgeon the public.” As the Supreme Court has repeatedly said, however, businesses which are today purely private may tomorrow, through a now inconceivable change of conditions, enter the “public interest” class.

Inasmuch as the Supreme Court has steadily extended the scope of the phrase “business affected with the public interest” without committing itself to any definition or test it is perhaps unlikely that it will now alter this policy. Nevertheless, the test suggested by Freund and by the district court in the Indiana case seems logical, fits all applications of the power which have been sanctioned by the Supreme Court and seems both enlightening and reassuring as to the extent to which the doctrine will be carried. A. W. B.

APPEALS BY THE STATE IN CRIMINAL CASES.—Many state constitutions provide that no one shall be placed twice in jeopardy for the same offense. Hence, after an acquittal by a jury the State cannot prosecute an appeal for the purpose of securing a reversal. But an appeal ordinarily serves two very distinct purposes. It not only questions the correctness of the judgment below as a basis for affirming or reversing it, but it operates as a means for enabling the higher court to lay down rules of decision to be followed in subsequent cases. This is the characteristic common law method for the development of the law, and unless cases can be appealed the law can never be authoritatively expounded. To secure this exceedingly important result in criminal cases many States have by statute provided for appeals by the State for the sole purpose of determining questions of law.

It is quite obvious that when such an appeal is taken on a question of law after a verdict of not guilty, the decision of the appellate court can have no direct effect in that case. The double function normally performed by an appeal changes to the single function of declaring the law without affecting the question of present liability.

Now this opens an excellent opportunity for a technical attack on the validity of the whole proceeding. Every new step in legal administration has to run the gauntlet of that considerable number of judges who are instinctively inclined to consider novelty and unconstitutionality as synonymous terms. The statute under discussion calls for a decision in a case no longer pending in the full and ordinary sense. The controversy between the parties, so far as it is to be determined and fixed by the judgment, is entirely over. The presence or absence of error is an academic question in that particular case. Why, then, should a court bother itself further? Why not stop the whole proceeding and refuse to take any chance of committing the judicial impropriety of passing on a “moot” case?

In *State v. Allen* (Kan., 1920) 191 Pac. 476, this question is quite vigorously argued on both sides. But the reactionary element was in the minority, and the State of Kansas has placed itself in the list of States which recognize that courts can serve the people in new ways and still survive. The minority opinion is an excellent example of that extreme judicial conservatism so familiar to the student of legal history, though curiously enough it

fails to cite the one conspicuous authority which squarely supports its conclusion. That authority is *United States v. Evans* (1907) 30 App. D. C. 58, affirmed on certiorari in 213 U. S. 297 (1909). In that case the United States Supreme Court held that deciding an appeal for the purpose of establishing a rule of law to be observed in subsequent cases was not an exercise of judicial power. The decision is illustrative of the curious tendency of the United States Supreme Court to be very conservative and technical in regard to formal and procedural matters while showing the most enlightened liberality in determining many questions involving substantial rights. It is in line with the astonishing decision in *Slocum v. New York Life Ins. Co.* (1913) 228 U. S. 364, which held invalid a statute providing for the entry of a judgment notwithstanding a verdict where the court erroneously failed to direct a contrary verdict on motion made at the trial, and with such cases as *Insurance Co. v. Hallock* (1869) 6 Wall. 556, holding a writ without a seal absolutely void on collateral attack.

Doubtless judicial power was not exercised in exactly this way at the common law. But it is clear that one of the important duties of appellate courts has always been the exposition of the law through decisions upon points arising in the course of litigated controversies, and if the State is so desirous of securing the exercise of this function that it is willing to enjoy it even though it has to dispense with the normally concurrent function of affirming or reversing the judgment, why should the courts refuse to do that much merely because they find themselves unable to do more? These statutes authorizing the determination of points of law are rather common and have been accepted practically without question for many years by a substantial number of our state courts. In Ohio such an act has been in force since 1869 (L. 1869, p. 310); in Indiana since 1852 (R. S. 1852, 381); in Iowa at least since 1860 (R. S. 1860, Sec. 4926). In these States and in many others the practice is well settled and commonly used. See *State v. Laughlin* (1908) 171 Ind. 66; *State v. Arnold* (1895) 144 Ind. 651; *State v. Willingham* (1905) 86 Miss. 203; *State v. Gilbert* (1908) 138 Iowa 335; *State v. Ward* (1888) 75 Iowa 637; *State v. Frisbee* (1912) 8 Okla. Cr. 405; *Commonwealth v. Bruce* (1881) 79 Ky. 560; *State v. Du Laney* (1908) 87 Ark. 17; *State v. Speer* (1916) 123 Ark. 449. *State v. Miller* (1913) 14 Ariz. 440, seems to be the only instance of a State court refusing to sustain the validity of such a statute, due, apparently, to its being somewhat overawed by the action of the United States Supreme Court in the *Evans Case*.

The practice has obvious advantages. Vital questions of law may otherwise be wrongly decided with no adequate means for setting them right. As the majority in *State v. Allen* (*supra*) observe, the practice authorized by the statute was criticised "not on account of any practical evil consequences which might be apprehended, but by reason of a somewhat extreme application of an abstract theory." That criticism of this technical kind did not appeal to the court is an encouraging indication that, in spite of occasional relapses, American appellate courts are generally alive to their duties and responsibilities in making the judicial department of the government responsive to the demands of a developing social order.

E. R. S.

WILLS.—REVOCATION BY OTHER WRITING.—The right to dispose of property by will is a creation of the positive law. *In re Tyner's Estate*, 97 Minn. 181. It is not a natural right and hence is effective only when exercised in strict accord with the provisions of the law. *Crain v. Crain*, 17 Tex. 80. So accustomed are we to disposal of property by will that we may not be surprised to find some courts even regarding this right as one of the "inherent incidents of human existence," as a "right absolute," which legislatures cannot "unreasonably regulate to destroy," nor "courts deal with in any spirit of mere discretion." *Ball v. Boston*, 153 Wis. 27. Whether or no, as recent writers have concluded, wills as we employ them were first developed in Rome, certain it is that the right to dispose of property by will has been of very gradual development at the common law, and has been and is almost wholly regulated by statute. Until STAT. 32 HENRY VIII, c. 1, there could be no real will of realty, though by means of uses equity had opened a way to accomplish much the same result. This first great statute of wills merely gave the power, but did not prescribe the form of the writing. It was not until the Statute of Frauds in 1660 that any special form of execution was required, and then only in the case of the disposition of real property. In this statute, too, we find for the first time fixed requirements for the revocation of a will, viz., by some other will, or by some other writing, or by designated acts upon the will the testator desires to revoke. As to these requirements, and their curious extension by the courts, even contrary to the statute, see 17 MICH. L. REV. 331. The third great wills act in England, 1 VICT. c. 26, 1837, made no changes in the provisions for executing or revoking wills that need be specially noted till later. Both statutes make specific requirements; under each no will or revocation can be effective which does not comply with the statute. A man may always change his mind, but he cannot make that change effective upon the legal disposition he has made of his property at death except he follow some one or more of the ways prescribed in the statute. As 1 VICT. c. 26 dates from 1837, it is not strange that the statutes of the states in the United States are quite as likely to follow the earlier statute of 1660 as this one of 1837.

The New York Statute as to revocation of wills follows the English Statute of 1660 as to the designated acts of change or destruction to the will, but it follows the Statute of 1 VICT. in requiring the "other writing" declaring such revocation to be executed with the same formalities with which a will must be executed. The Statute of Frauds made no requirements as to how the "other writing declaring the same" should be executed. Under each statute the sufficiency of a writing expressing an intent to revoke a will has often come before the court.

In the recent New York case of *In re McGill's Will* (Court of Appeals, July 7, 1920), 128 N. E. 194, the court of last resort affirmed the intermediate courts (see 177 N. Y. Suppl. 86, 181 N. Y. Suppl. 48) admitting to probate a will which the testatrix evidently desired to revoke. Indeed she died happy because she thought she had done so. "But to revoke or cancel a written will, compliance must be had with the statute." The court found that the following note did not comply. "Dr. O'Kennedy—Dear Friend: Please

destroy the will I made in favor of Thomas Hart." The note was signed by the testatrix, and on the back were the signatures of two witnesses. They testified that they signed at the request of testatrix, signing on the back because there was not room on the front. The note was handed to Dr. O'Kennedy when he was in hospital, and he was not discharged from the hospital and did not go to his safe where the will was until after the death of the testatrix, and then he did not destroy it.

Revocation is not purely a question of intent. There must also be an effective act. *Hoitt v. Hoitt*, 63 N. H. 475. This note showed a clear intent to revoke the will. Was it a sufficient "other paper" to comply with the statute? The court held not. It merely showed an intent that Dr. O'Kennedy should destroy the will, and no doubt such a destruction following such an intent of the testatrix would have been a revocation within the statute. There are few American cases that may be regarded as on all fours with the principal case. *Tynan v. Paschal*, 27 Tex. 296, is clear to the point that a letter by the decedent to his attorney directing him to destroy the will does not *ipso facto* work a revocation of it. It does not show an intent by this letter to effect an immediate revocation of the will, but instead an intent that it be revoked by destruction by the attorney under direction of the testator. This doctrine the New York case approves.

The New York Statute requires "some other writing of the testator declaring such revocation." The English Statute of Frauds reads "other writing declaring the same," and STATUTE 1 VICR. "some writing declaring an intention to revoke the same." It is not probable there was any legislative intent that these words should announce a different rule as to the intent that must appear in the writing. New York adheres to the letter of the statute and distinguishes between "declaring such revocation" of the New York Statute, and "declaring the same," and "declaring an intention to revoke the same" of the English statutes. Under the English Statute of Frauds it was held that a letter directing the destruction of the will amounted to "a present intention absolutely to revoke," "an absolute direction to revoke reduced into writing in the deceased's lifetime." "She died in the intention to revoke the will, and in the belief that it was revoked." *Walcott v. Ochterlony*, 1 Curt. 580 (1837). The English courts agree with the New York court that the words of the statute are imperative. *In the Goods of Turner*, L. R. 2 P. and D. 403, per Lord Penzance, with which compare *In re Evans' Will*, 98 N. Y. S. 1042. The statute specifies the acts which may work a revocation. There is no other way. If the statute requires a revocation an intent to revoke and a belief that the will is inoperative will not suffice. *Runkle v. Gates*, 11 Ind. 95. The courts cannot substitute for the plain requirement of the statute the desire or intention of the testator, even though he may suppose his desire accomplished, *Tice v. Shipton*, 113 Ky. 102, a case in which the testator supposed his will destroyed, but by fraud of a beneficiary the destruction was prevented. This is true even in cases where the beneficiary tells the testator the destruction is complete and he believes it. *In re Silva's Estate*, 169 Cal. 116. But in *Bailey v. Bailey*, 5 Cush. 245, Shaw, C. J., held that another paper expressing a wish that the will be destroyed, and executed as

wills are required to be executed, though it made no devise or bequest, was nevertheless testamentary in character, might be admitted to probate, and so did work a revocation of the will. The only difference between this case and *In re McGill's Will*, if difference there be, is found in the addition in the Massachusetts case of the words, "it is my wish that my estate be settled according to law." The language of Margaret McGill's note at least suggests the possibility that she intended a revocation only so far as her will was "made in favor of Thomas Hart." There were other provisions in her will, and why is the note then not testamentary? Compare *In the Goods of Durance*, L. R. 2, P. and D. 406; *In the Goods of Hay*, L. R. 1 P. and D. 53, and *In the Goods of Hicks*, 1 *ib.* 683. On the whole subject see the annotation in 3 A. L. R. 836, to the case of *Dowling v. Gilliland*, 286 Ill. 530. No doubt the courts do well to insist rigidly upon written wills and revocations. Parol evidence in the case of wills is dangerous, for the opportunity and temptation to perjury and fraud are great. As said by Ld. Ch. Talbot in *Brown v. Selwin*, Cas. temp. Talbot 240, and by many another judge in dealing with wills, "It is better to suffer a particular mischief than a general inconvenience." But one may well question whether the narrow interpretation of instruments executed with all the formalities required by the statute does not needlessly inflict a particular mischief where there could be no general inconvenience and make a statute intended to prevent fraud into an instrument of fraud. It would be no great strain to construe the note of Margaret McGill, executed as the law requires for a will, as indicating an intention to revoke the will at once without waiting for the destruction of the will by Dr. O'Kennedy. How can parol evidence that she so intended it, and was happy in the thought that she had accomplished her purpose, in any way defeat the purpose of the statutory requirement as to revocation of wills?

E. C. G.

NEBULOUS INJUNCTIONS.—Injunctive relief is sought against alleged wrongdoing which is merely incidental to the conduct of a legitimate business. The wrong is established and the court is satisfied that an injunction should issue. Yet some nice questions remain as to the scope and terms of the decree.

The restraint should not go farther than is necessary to protect the complainant's rights. The business should not be needlessly destroyed or embarrassed. If the defendant has asserted that it is impossible to conduct the business without the incidents complained of, (as he is likely to do in nuisance cases, with a view to securing a holding that there is no nuisance or that, though there be a legal nuisance, the balance of convenience forbids an injunction) strict logic might require that this be taken as a conclusive admission when it comes to settling the terms of the decree. In view, however, of the fact that "impossibility" is, in these cases, relative, and in view of the public interest involved, it is good sense, if not good logic, to give the defendant an opportunity to do what he has asserted is impossible, if there appears to be the slightest chance of success, and such seems to be the

practice. *Chamberlain v. Douglas*, 24 N. Y. App. Div. 582; *Anderson v. American Smelting Co.*, 265 Fed. 928.

At the same time, it will not do merely to enjoin the defendant from conducting his business as he has in the past, for he could fulfill this decree by varying some detail which would not at all remove the objectionable features. The court must, if possible, reach all wrongful practices of the sort complained of, must throw the defendant back within the lines of his legal privileges.

In cases where the circumstances are such that the rights of the parties can be defined in exact terms, this principle is easy to apply. Thus where defendant, who had no right to flow plaintiff's land, erected a dam which flowed the land to a depth of 15 inches, the decree ordered defendant to lower the dam fifteen inches. *Rothery v. N. Y. Rubber Co.*, 90 N. Y. 30. But in cases of nuisance and of unfair competition, it constantly happens that, although the court is convinced that defendant has gone beyond his privileges and has invaded the complainant's rights, it is impossible to define these rights and privileges in terms that are at all definite. In this situation, it has been a common practice to pass the difficulty to the defendant by a decree which is little more than an order to cease committing nuisances, or to cease unfair competition. In *Winchell v. Waukeshaw*, 110 Wis. 101, the decree restrained discharge of sewage into a river "unless same shall have first been so deodorized and purified as not to contain foul, offensive or noxious matter capable of injuring plaintiff or her property or causing a nuisance thereto." In *Northwood v. Barber Asphalt Co.*, 126 Mich. 284, the defendant was punished for violation of a decree enjoining the emission of fumes "in such quantities as to materially injure the health of plaintiffs or in any way interfere with the comfortable enjoyment of their homes." In *Collins v. Wayne Iron Works*, 227 Pa. 326, the decree of the lower court restrained the operation of power hammers, etc., "so as to render the premises of the plaintiff unfit for use and enjoyment as a residence by a reasonable and normal person." The fault in these decrees is obvious. As was said in the last case, in modifying the decree, "The entry of an injunction is in some respects analogous to the publication of a penal statute; it is notice that certain things must be done or not done, under a penalty to be fixed by the court. Such a decree should be as definite, clear and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it; and when practicable it should plainly indicate to the defendant all of the acts which he is restrained from doing, without calling upon him for inferences or conclusions about which persons may well differ." See also, *Ballantine v. Webb*, 84 Mich. 38.

In *Laurie v. Laurie*, 9 Paige 234, the Chancellor denied a motion for attachment for violation of a somewhat similar injunction, saying, "As defendant is bound to obey the process of the court at his peril, the language of the injunction should be so clear and explicit that an unlearned man can understand its meaning without the necessity of employing counsel to advise him." This is perhaps an unattainable standard, but a wholesome one to aim at. Of course it is not likely that any court would impose any serious

punishment upon a party who attempted in good faith to observe a decree, although it found that he had done so. Good faith is well recognized as a circumstance mitigating contempt. 22 Cyc. 1026. See *Northwest v. Barber Asphalt Co.*, *supra*. But no one would contend that this cures the ill. To enter an obscure decree and invite the defendant to throw himself upon the clemency of the court, is neither fair to the defendant nor to the complainant, nor is it a dignified way to administer justice. We do, however, in the unfair trade cases, find some courts taking the extraordinary position that uncertainty in the decree is of positive merit. In *Charles E. Hires Co. v. Consumers Co.*, 100 Fed. 809, 813, the Circuit Court of Appeals, Seventh Circuit, said, "(The court) is not called upon to decide whether a new label proposed for adoption would infringe."

"This is especially so here, where the infringement was deliberate and designed. In such case the court ought not to say how near the infringer may lawfully approximate the label of the complainant, but should place the burden upon the guilty party of deciding for himself how near he may with safety drive to the edge of the precipice, and whether it be not better for him to keep as far from it as possible." A decree was ordered enjoining defendant from using labels or bottles "calculated to deceive purchasers," etc. It has been sought to support this view with the familiar maxim that equity will not aid a wrongdoer (*Oneida Community v. Oneida Trap Co.*, 168 N. Y. App. Div. 769), but this is inappropriate as applied to a defendant who is not seeking affirmative relief but merely asking that the decree against him be made certain. If this position has any justification, it lies in the circumstance that in cases of this type the defendant has no "equity" to hew close to the line, and if he does not insist upon hewing close will have no difficulty in avoiding a contempt. Even in this type of cases, the practice is not uniform. *Coca Cola v. Gay Ola Co.*, 211 Fed. 942. And see NIMS, UNFAIR COMPETITION, § 367, ff. It would seem that, although the defendant may have no equity to ask the court to aid to "drive to the edge of the precipice," it is sound and convenient practice to give the defendant an opportunity to submit a proposed remedy which, if it is approved by complainant or is clearly within the defendant's rights, should be approved (that is to say, excepted from the general terms of the decree). When we turn from this type of case to cases of nuisance, incident to the prosecution of a legitimate business and difficult to eliminate without heavy expense and even jeopardy to the business, probably no one would question that the defendant has an "equity" to hew to the line, and is well entitled if not to a decree clearly marking out that line, at least to one which will not drive him "as far from it as possible."

How can the court best meet these demands? That depends very much upon the circumstances of each case, and no general rule seems possible. It may, however, be worth while to note some of the expedients which have been used. In the unfair trade cases, the courts have frequently given the defendant an opportunity to submit for its approval a scheme of reform, a new label, a new package, a new name, a new method. NIMS, UNFAIR COMPETITION, § 367. If the defendant "drives to the edge of the precipice," the court may well say that it is not prepared, at that stage of the case, to decide

the point, and that the defendant, if he wishes the stamp of approval, must withdraw to clearer ground. Cases where the defendant has an equity to hew to the line are not so easy to deal with. In some cases the best expedient will be what we might call an experimental decree. In *Collins v. Wayne Iron Works, supra*, the court modified the decree so that it enjoined operations between certain hours of the night, or at any other time save behind closed doors and windows, saying "At least such a measure of relief should be tried first." In *Babcock v. New Jersey Stockyard Co.*, 20 N. J. Eq. 296, there is a very interesting decree with three branches, one of which was a prohibition of the keeping of live hogs on the premises for more than three hours, reserving to the plaintiff the right to apply for a modification of the time, "which is adopted merely on conjecture." In other cases, although a nuisance is proved, it may be best to postpone relief till further information is gained in regard to means of improvement. This was done in another branch of the decree last mentioned, the point being referred to a commissioner, with leave to either party to move for action upon his report. In other cases it may be best to postpone relief while the defendant experiments with remedial measures. This was done in *Shelfer v. London Electric Co.*, [1895] 2 Ch. 388, and in *Anderson v. American Smelting Co.*, *supra*. Of course, if the balance of convenience runs the other way, it might be more equitable to render immediately a decree which would be certain to give relief, with leave to the defendant to apply for a modification upon a showing that there is another adequate and less onerous remedy. This was done in *Chamberlain v. Douglas, supra*, and in *Galbraith v. Oliver*, 3 Pittsburgh 78. These and probably other expedients are available. Equity boasts of the flexibility of its remedies. And if this phase of injunctive relief is given proper attention it would seem that we might wholly eliminate those decrees which give the defendant "no rule of conduct which the law had not before prescribed" (*Ballantine v. Webb, supra*), yet rumble the thunder of attachment.

E. N. D.

DECLARATORY JUDGMENTS.—That statutes designed to further the cause of social justice should have to stand the test of constitutionality is inevitable under our system. It is, however, unfortunate that judges generally speaking are strongly disposed to "view with alarm" any such statutes that depart in any marked degree from the beaten path. Unquestionably there is something about legal training and experience in law, particularly upon the bench, that tends to extreme conservatism. That our judges should be reasonably conservative in order that our fundamental liberties may be preserved and the law kept steady, though progressive, through passing waves of popular desire and prejudice no sensible man can deny. But there is a big difference between such healthy conservatism and distrust of new things simply because they are new. "I have known judges," said Chief Justice Erle, "bred in the world of legal studies, who delighted in nothing so much as in a strong decision. Now a strong decision is a decision opposed to common-sense and to common convenience." SENIOR CONVERSATIONS WITH DISTINGUISHED PERSONS [Ed. of 1880] 314. Such a decision was that of the New York court

in *Ives v. So. Buffalo Ry. Co.*, 200 N. Y. 271. It took, however, such a case to arouse the people and the bar and the judges, and since that decision legislation similar to that then declared unconstitutional has been almost uniformly upheld. Thus the law does ultimately grow.

The Declaratory Judgments Act of Michigan (Act No. 150, P. A. 1919) provided as follows: (Sec. 1) "No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of anyone claiming to be interested under a deed, will or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested." (Sec. 3) "When further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration, to show cause why such further relief should not be granted forthwith, upon such reasonable notice as shall be prescribed by the court in the said order." In the case of *Anway v. Grand Rapids Railway Co.*, decided Sept. 30, 1920, the Supreme Court of Michigan (Sharp and Clark, JJ., dissenting) held this act unconstitutional on the ground that it called upon the courts to exercise powers and perform duties not judicial.

The act under consideration was virtually a combination of Order No. 25, Rule 5, of the English Court Rules adopted in 1883, and Order No. 54a, Rule 1, of such rules adopted in 1893, under which the English courts have entered many declaratory judgments. Mr. Justice Fellows, speaking for the majority of the court in the instant case curiously brushes aside all consideration of the English cases and practice as having no bearing because "* * * as England has no written Constitution and the English courts but follow the mandates of Parliament the decisions of the English Courts are of no avail upon the question now under consideration." The fact is that the English practice is based not upon a mandate of Parliament but upon court rule. See Joyce, J., in *Northwestern Marine Eng. Co. v. Leeds Forge Co.*, [1906] 1 Ch. 324, 328. In other words, the English courts themselves concluded to undertake this "service to the people," as they have frequently expressed it. We are then driven to the conclusion either that the English courts do not know what is properly included under judicial power or they boldly cut loose from the beaten path of judicial action. It is of course incredible that English judges do not appreciate the nature and scope of judicial power, in truth the notion of judicial power and its field were familiar to English lawyers and courts long before this country had an independent political existence. When the framers of the Constitution made provision for "the judicial power" they did not coin a new term or express a novel idea. See 1 BLACK, COMM. p. 269. The court points out that there are similar statutes in Wisconsin (Chap. 242, Laws of 1919) and in Florida (No. 75, Laws of Florida, 1919). No reference is made to the recent New York act (see

WICKERSHAM, 29 YALE L. JOUR. 908), and the New Jersey Act of 1915 (New Jersey Laws, 1915, p. 184), applied in a striking manner in *Mayor v. East Jersey Water Co.*, 109 Atl. 121 (1919), is referred to only in connection with construction of wills, a matter regarding which that statute does not deal, and is dismissed with the observation that "this court has for many years construed wills in equity cases * * * without question." Without giving it as a reason for its decision the court throughout its opinion lays great emphasis upon the danger and impropriety of making the courts the "authorized legal advisers of the people." Mr. Justice Fellows says: "Before this court, with its membership of eight, takes up the work of advising three million people and before the legislature is called upon to increase the membership of this court so as to efficiently conduct this work, it is well that this court pause long enough to consider and consider fully, whether the act calls upon us to perform any duties prescribed by the Constitution or to exercise any power therein conferred." It is not uninteresting to observe that the English courts have not been overwhelmed with the task of advising in the way of declaratory judgments upwards of forty million people, and the Michigan Act had the same scope as the English Rules. On the contrary, in *Dyson v. Attorney General* [1910] 1 K. B. 410, where the defendant vigorously asserted the impropriety of making declarations of rights in cases of the type there under consideration on the score that there would be "innumerable other actions for declarations" the court refused to recognize such objections as valid, Farwell, L. J., saying, "* * * but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favor of providing a speedy and easy access to the Courts for any of His Majesty's subjects," etc.

The court refers to and quotes from many cases to show that it is established by overwhelming authority that courts are not exercising judicial functions in rendering advisory opinions to the executive or legislative branch, and also that for the same reason cases involving merely "moot" or hypothetical questions will be dismissed. The soundness of these positions may very well be conceded. The inquiry remains, does the Act under examination provide for proceedings leading to a judgment which is merely advisory? and does it call upon the court to express opinions upon purely hypothetical situations?

Bottom is struck only when one comes to the inquiry as to what is judicial power. There are many cases which have discussed the subject and many definitions have been essayed by courts and writers. Some of these definitions standing alone clearly would exclude cases looking to mere declarations of rights, sometimes other definitions found even in the same opinion would as clearly include such proceedings. *Muskrat v. United States*, 219 U. S. 346, upon which the court in the principal case relied very strongly, is a splendid example of this. Out of the mass of cases can there be found some dividing line, some test by which a new situation may be determined? It does not help any to say that if the conclusion is final judicial power has been exercised, for that begs the whole question.

Surely it must be clear that the essence of judicial power is the power to make *decisions*. But that does not take us far enough. What kinds of

decisions? or decisions in what situations? Since law operates only in respect of *actual facts*, it would seem fair to say that judicial decisions must be in respect to controversies in *actual* as distinguished from hypothetical situations. Obviously these controversies must be with reference to rights, duties, or status in the legal sense, in other words, they must be justiciable. The advisory opinion cases, then, clearly fall on the side of non-judicial functions for they do not decide anything as to anybody's rights or duties in respect of actual facts. They are not *decisions* but *opinions*. "Courts do not speak through their opinions but through their judgments and decrees." *Heck v. Bailey*, 204 Mich. 54. The *Muskra*t case would seem clearly to fall into this class, for the case is essentially the same whether Congress asks the court to advise it as to whether an act is constitutional or not or Congress purports to authorize Mr. Muskrat to ask the court to rule on such question. The "moot" cases are equally clear. They are "moot" because there cannot be a *decision* in a controversy based on actual facts. Hence no judicial power can be exercised. The English Courts recognize this, and in *Glasgow Navigation Co. v. Iron Ore Co.* [1910] A. C. 243, the construction of a charter party was refused because as said by Lord Chancellor Loreburn, "It was not the function of a Court of Law to advise parties as to what would be their rights under a hypothetical state of facts." The case of *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, which Mr. Justice Fellows says cannot be distinguished from the one before the court, falls within this class, for the proceeding there provided for by the statute was the establishment of wills of *living* persons. It is of the essence of a will that it speaks from death, during the testator's lifetime it is nothing more than a paper with characters thereon as a deed or negotiable instrument before delivery. A request of a court to construe a contract *if it should be made* or to declare what *would be* the parties' rights thereunder would present a situation such as was passed on in the *Lloyd* case.

It is interesting and important to refer now to varying types of cases in which courts have proceeded to exercise their functions. The most common cases of course are those in which someone's rights have been invaded (whatever it is that amounts to that) and a wrong (in the sense in which the word is used in courts) has been committed. To this must be added the not unusual though less frequent cases wherein there has been a threatened invasion of someone's rights. The court in the principal case apparently would say that only in these types of cases is judicial power exercised.

It remains to be shown that courts do in a variety of situations proceed to judgment or decree where there has been no invasion or threatened invasion of rights, where they have proceeded and do proceed to final order without anything more in essence being accomplished than a declaration of the rights of the parties.

(a) There are multitudes of cases in which courts have entertained suits to quiet title or to remove clouds. Defects in chains of title give rise to such actions very frequently, and decrees are entered despite the fact that no one is really disputing the ownership of the complainant. They are thus in essence in a great many cases nothing but declarations of rights—ownership. It is not necessary to start a court in the exercise of its judicial power that

there be a controversy in the popular sense. Very many cases that proceed to final judgment with conceded propriety are amicable. The ordinary partition case is more often consented to than contested.

(b) Courts are every day entertaining bills for construction of wills, of trust instruments, and for direction of trustees. What are these but declarations? That the proceedings mentioned above are in equity is not any explanation, for courts of equity but exercise a part of the judicial power. The statement by Mr. Justice Fellows passing off the admitted exercise by chancery courts of the exercise of jurisdiction to construe wills that "such jurisdiction has been exercised without question" hardly appeals to one's intelligence as a differentiation.

(c) Closely allied to the suits to quiet title are the proceedings under the Torrens Acts to register title. There hardly can be found clearer instances of mere declarations of rights than in a large percentage of such cases. See *Robinson v. Kerrigan*, 151 Cal. 40. Destroyed Record Acts such as was upheld in *Title and Document Restoration Co. v. Kerrigan*, 150 Cal. 289, are instances of a rather special application of the principle of the Torrens Acts.

(d) The not uncommon statutes which provide for the determination of heirs without an order of distribution are another instance of a provision looking forward to a mere declaration of rights. While there is some difference in the language of the statutes as to whether such declarations are final (See 18 C. J. 876), no question has ever been raised as to the constitutionality of the statutes providing for such proceedings or as to the proceedings involving an exercise of judicial power. There is a Michigan statute (Comp. L., §§ 13937-41) of this sort under which Michigan courts for years have proceeded.

(e) That a state may constitutionally provide by statute for court proceedings to determine the validity of bonds proposed to be issued by irrigation districts was decided in *Crall v. Poso Irrigation District*, 87 Cal. 140, and in *Nampa, etc., Irrigation District v. Brose*, 11 Idaho 474. See further KINNEY ON IRRIGATION AND WATER RIGHTS, § 1420. In *Tregea v. Modesto Irr. Dist.*, 164 U. S. 179, there is a *dictum* expressing doubt as to whether such proceedings involve an exercise of judicial power, but nothing was decided on that point, and in *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, the court adhered to its earlier holding in the face of such *dictum*. The principal case is the first one to rely in the least upon that *dictum*.

(f) The Wisconsin statute (§ 2352) providing for an action to affirm a marriage and that "the judgment in such action shall declare such marriage valid or annul the same, and be conclusive upon all the persons concerned" is another example of a provision for a declaratory judgment. See *Kitzman v. Kitzman*, 167 Wis. 308.

(g) There are plenty of cases in the books where a stockholder has sued his corporation to enjoin its payment of a tax the claim being that the tax was invalid. See *Flint v. Stone Tracy Co.*, 220 U. S. 107; *Corbus v. Gold Mining Co.*, 187 U. S. 459; *Brushaber v. Union Pac. R. R. Co.*, 240 U. S. 10. In such cases it is common for the party vitally interested, the Government,

to appear only informally as *amicus curiae* for the purpose of insuring a correct determination of its rights. This type of proceeding is probably explained by Sec. 3224, REV. STATs. forbidding a direct action to restrain the collection of a tax.

In these cases the interests of the stockholder and the corporation are identical, there is no controversy, and the suit is merely a convenient form to secure a judicial ruling that the Government may or may not collect the tax. Under a more enlightened procedure the desired end would be accomplished by an action asking for a declaration of the rights and duties of the corporation as to such tax. So long as the suit is clothed in a familiar garb there is no objection, but if the legislature were to provide machinery whereby a corporation in such position might ask an authoritative ruling in a direct uncamouflaged proceeding, there would probably be a raising of judicial hands in horror at such Bolshevistic attempt (See opinion of Mr. Justice Fellows) to make the courts the "official advisers of the people."

(h) But the prettiest example of a case in which the final judgment is purely declaratory is to be found in the appeals by the state in criminal cases. See the discussion of this type of case *supra* 79. The objection to such proceedings is, in short, that they come after all is over. In the type of case under consideration, the principal case, the objection is that the court is asked to rule too soon.

Other instances might be cited, but the ones above may fairly be said to show the way.

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