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# Note and Comment

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# MICHIGAN LAW REVIEW

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## NOTE AND COMMENT

THE PERMANENT INTERNATIONAL COURT OF JUSTICE.—For the first time in history leading powers both great and small have been able to agree upon a plan for an international court of justice. The plan was formulated last summer by an advisory committee of jurists sitting at The Hague. Since then it has been submitted to the Council and the Assembly of the League of Nations and has been approved. It will come into operation as soon as the project has been ratified by a majority of the nations belonging to the League.[1]

The Permanent Court of International Justice, as it is called, will be more than a mere panel from which arbitration tribunals may be constituted from time to time, and it will be much less than a supreme court of the world. It will be more than a mere panel of arbitrators because it is to be a permanent institution established to develop and apply rules of law. It will

[1] The text of the project with a commentary by J. B. Scott may be found in Pamphlet No. 35 recently issued by the Division of International Law of the Carnegie Endowment for International Peace. Other data taken from current periodicals and press reports.

be less than a supreme court because, as approved by the League, it is to have no obligatory jurisdiction. The draft-scheme provides for organization, competence, and procedure. The procedure is to be very simple and in general much like the system already developed in arbitrations at The Hague. There will be written proceedings, consisting of the submission of cases, counter-cases, and, if necessary, replies, and also oral proceedings consisting of the hearing of witnesses, experts, agents, and counsel. Details of procedure are wisely left to be settled by the Court itself. Decisions are to be made by majority vote; the judgment must state the reasons upon which it is based; dissenting judges may have the fact of their dissent, but not their reasons, recorded in the judgment.

The matter of competence is more important. It was readily agreed that the Court should decide cases submitted by the parties under general or special convention. It was also agreed that in the absence of general or special convention, jurisdiction should be limited to disputes of a justiciable nature between states which the states themselves are unable to settle by diplomacy. Should jurisdiction within these limits be obligatory or voluntary? The advisory committee recommended obligatory jurisdiction in all controversies of a legal nature involving (a) the interpretation of a treaty, (b) any question of international law, (c) the existence of any fact which, if established, would constitute a breach of an international obligation, (d) the nature or extent of reparation to be made for the breach of an international obligation, and (e) the interpretation of a sentence passed by the Court. The recommendation was well received by the smaller nations. It was opposed by the great powers, however, and the project was finally approved with the obligatory feature eliminated. The five categories provide an admirable enumeration of the kinds of controversy which the Court is specially qualified to decide, but the submission of such controversies remains optional with the parties. The Court is to apply, in the order named, treaties, custom, general principles of law common to all civilized peoples, and the judicial decisions and juristic writings of the various nations. It is also required to give advisory opinions on questions referred to it by the League Council or Assembly.

The real difficulty, and one which threatened to prove insuperable, was the problem of the Court's composition. There are great powers and small powers, strong powers and weak powers, powers which are advanced in the civilization which is characteristic of the twentieth century and others which are backward. The great powers will never submit to any tribunal dominated by the small, weak, and backward. The lesser powers know all too well the dangers that inhere in the predominance of the great. How may a tribunal be constituted among the fifty or more nations of the earth which will satisfy the strong, safeguard the weak, be fairly representative, and yet be small enough to function as a court? This problem prevented agreement upon a plan before the world war. It threatened to disrupt the advisory committee in 1920. The committee's membership was divided equally between nationals of great and small powers. Members from the more powerful

states contended for permanent representation on the proposed court for the great powers. Members from the smaller states insisted upon equality. Elihu Root, in what may some day be regarded as the crowning achievement of his career, piloted the committee to a satisfactory compromise. Taking advantage of the existing League organization, and ably seconded by Lord Phillimore, Mr. Root proposed a small court elected by the concurrent vote of the League Council, in which the great powers are dominant, and the League Assembly, in which all powers are represented equally. This proposal was accepted and became the basis for the plan eventually adopted.

The Court will consist at the outset of fifteen members, eleven judges and four deputy judges. The members are to be elected from a list of candidates nominated by the national groups which constitute the panel of the so-called Permanent Court of Arbitration. Each national group may nominate two candidates. If the Council and Assembly fail to agree on fifteen members after three sittings, a small conference committee, called a Committee of Mediation, will attempt to agree upon candidates to be recommended for the unfilled positions. If this does not result in an election, the members already elected to the Court may fill the vacancies by selection from among the candidates who have received votes in either the Council or the Assembly. Election is for nine years and members are eligible for reëlection. While national political office is declared incompatible with a position on the Court, it seems to have been the opinion of the advisory committee that this should not disqualify members of national courts or legislative bodies. If a state which is party to a controversy submitted to the Court has no national on the Court, it is assured the right to name a judge who shall sit during the trial and disposition of that particular controversy. The Court will sit at The Hague.

The plan naturally makes a few concessions to the civil law countries for which the justification is none too obvious to lawyers trained in a different system. There are several features which seem open to criticism, notably the provision which makes French the sole official language and the method of nominating candidates. These, however, are after all secondary matters which may be amended as experience suggests. The project on the whole is a remarkable one and one that does credit to the sagacity and statesmanship of the jurists who labored on the advisory committee. This project alone, it is believed, would more than justify the retention of the existing organization of the League. E. D. D.

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PRICE REGULATION BY THE STATE AND INTERSTATE COMMERCE.—The litigation which has resulted from a recent attempt of the State of Indiana to regulate the price of coal should lead to a determination of the extent of three important but very general principles of police power. The first and most important of these, from the point of view of this discussion, is that the State has the power to regulate returns of businesses "affected with a public interest." In the first attack upon the Indiana law, it was held that the business of mining and selling coal under existing economic conditions

was within this class.[1] At this time, the commission created by the act had not entered upon the performance of its duties and several questions arising under sections of the bill concerning these duties were deemed premature. These sections, however, and subsequent orders of the commission pursuant thereto, have raised the question as to the extent of the remaining principles referred to. The first of these is that the State may do whatever is reasonably necessary to render effective a valid exercise of the police power. The other is that an otherwise valid exercise of the police power may be sustained, despite the fact that it incidentally interferes with interstate commerce, in the absence of conflicting Federal legislation. The language in which these principles have been stated in numerous cases, literally applied, would sustain the provisions of the Indiana law under discussion. It may be conceded at once, however, that they have never been applied to a situation closely analogous to that which arises under the coal law.

In order to prevent reducing to a nullity the power to regulate prices, the law attempts to insure an available supply of coal at the prices fixed by empowering the commission to apportion among the operators the amount necessary for domestic purposes, except for manufacturing, and to require each to produce and offer for sale each month his proportion of the whole, with forfeiture of the license provided for by the act as a penalty for disobeying the orders of the commission, and a severe penalty for mining coal without a license. The validity of this portion of the act was successfully attacked in *Vandalia Coal Co.* v. *The Special Coal and Food Commission of Indiana*,[2] the District Court of the United States for the district of Indiana holding that these sections of the act constituted a direct interference with interstate commerce, inasmuch as coal severed from the ground becomes an article of commerce and the owner of the commodity has a right, so far as the State is concerned, to sell and to contract to sell his entire output to citizens of other States, and that this right cannot be interfered with by compelling the sale of a certain amount in the State. The court also indicated that, aside from the interstate commerce question, the State has no power to compel the production and sale of coal by imposing the alternative of quitting business.

Before the principle relating to interstate commerce can become involved, there must obviously be an otherwise valid exercise of the police power which affects interstate commerce incidentally. So here, the question as to the validity of compulsory production and sale, enforced through the alternative of compelling a cessation of the business of mining, must be determined in favor of the State before it becomes worth while to consider the effect on interstate commerce. In view of the evident purpose of these sections of the act to make price regulation a benefit rather than a detriment to the people of the State, their validity would seem to depend on the application of the second principle: whether they can be said to be reasonably necessary to make effective a valid exercise of the police power.

[1] American Coal Mining Co. v. Special Coal and Food Commission of Indiana, —— Fed. —— (D. C. Ind., Sept. 6th, 1920). Discussed in 19 MICH. L. REV. 74.

[2] —— Fed. —— (D. C. Ind., Nov. 27th, 1920).

Examples of the applications of this principle which seem to bear directly upon the present problem are to be found in the cases of *New York ex rel. Silz* v. *Hesterburg*,[3] and *Sligh* v. *Kirkwood*.[4] In the former, a law providing a punishment for the possession of imported game during the closed season was held valid in order to protect the local game, admittedly a valid exercise of the police power. In the latter, a Florida statute prohibiting the shipment of unripe citrus fruits out of the State, in order to protect the citrus fruit industry of the State, was upheld. These cases illustrate the principle.

Conceding that the business of mining and selling coal is "affected with a public interest," so that prices may be regulated,[5] the valid exercise of the police power exists. To sustain these measures, it must be shown that they are reasonably necessary in order to render price regulation effective. It requires little imagination to predict the result of a measure providing merely for the regulation of the price of coal, with no means of compelling the sale of coal at that price. Coal in the particular State would simply disappear from the market, either going to States where the seller is not compelled to accept reasonable prices for his product, or, where possible, being stored until the law is recognized as an economic impossibility, and prices, of necessity, rise to their old level. Nearly three hundred years ago Parliament passed a law[6] providing for the regulation of the price of coal in London, and included the following remedy for an anticipated result: "And if any ingrosser or retailer of such coal shall refuse to sell as aforesaid, that then the said Lord Mayor and aldermen and justices of peace respectively are hereby authorized to appoint and impower such officer or officers or other persons as they shall think fit to enter into any wharf or other place where such coals are stored up; and in case of refusal taking a constable to force entrance, and the said coals to sell or cause to be sold at such rates as the said Lord Mayor and aldermen and justices respectively shall judge reasonable, rendering to such ingrosser or retailer the money for which the said coals shall be so sold, necessary charges being deducted." Certainly there is some ground to support the conclusion of the legislature as expressed in the act, that the measures are reasonably necessary to the accomplishment of the principal purpose of the act, and the Supreme Court has said,[7] "If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did."

If the requirement of compulsory production and offer for sale, enforced through the alternative previously referred to, can be sustained under this principle, a power of the State, valueless alone, becomes valuable, and the State has a means of protecting its people from extortion on the part of

[3] 211 U. S. 31.

[4] 237 U. S. 52.

[5] For the purpose of this discussion, it is assumed throughout that the first case involving the law was correctly decided and that the Supreme Court will affirm the power of the State to regulate the price of coal.

[6] 16 & 17 CAR. II, c. 2 (1661). Also 2 W. & M., c. 7 (1690), and 7 & 8. WM. III, c. 36, (1696).

[7] Munn v. Illinois, 94 U. S. 113; Antoni v. Greenhow, 107 U. S. 769.

those controlling the supply of a necessity. Is the part of the power which makes the whole worth utilizing, being sustainable as an exercise of the police power, to be rendered invalid because the entire production of coal within the State cannot be shipped in interstate commerce if the act is enforced, without subjecting the operators to the penalty of retiring? The only principle which seems to offer any hope for the act is the third of those already referred to, that an otherwise valid use of the police power is not invalid although it interferes with interstate commerce, provided the interference is incidental and there is no Federal law conflicting.

The basis upon which the legislature proceeds is a recognition in the act[8] that the coal deposits of the State are sufficient to supply all legitimate demands of intra- and interstate commerce for decades to come, and any intention of prohibiting the sale or transportation of coal in interstate commerce is disavowed. The evil which the law seeks to combat is not the shortage of supply, but extortionate charges. The purpose is not that the State should obtain a larger supply of its coal than before, at the expense of other States, but that the regulation of prices may not become futile by driving the commodity away from the local markets. The interference is incidental, therefore, at least in the sense that it is not the primary purpose of the act.

Moreover, if the statement of the legislature concerning the deposits of the State is to be taken at face value, the quantum of interference may not be great. It is easily conceivable that in many instances individual operators might be unable to dispose of their entire output in interstate commerce, however much they might desire to do so. However, there may be numerous other cases where the operator could dispose of his entire production in interstate commerce if he were free to do so. Here there would be an undoubted interference.

What is the meaning of the term "incidental" as used in cases where the principle has been laid down? The cases in which some form of the proposition has been stated are innumerable, but few of them are of any value in the present discussion, and none is closely analogous. Two very small groups of cases approach the question from opposite sides, but there is a wide gap between, and somewhere in that gap lies the solution of this problem. In the one group are such cases as *Geer* v. *Connecticut*;[9] *New York ex rel. Silz* v. *Hesterburg, supra; Hudson Water Co.* v. *McCarter*,[10] and *Sligh* v. *Kirkwood, supra.* In the other are *West* v. *Kansas Natural Gas Co.*,[11] *Haskell* v. *Kansas Natural Gas Co.*,[12] *Corwin* v. *Indiana, etc., Mining Co.*,[13] and perhaps *Leisy* v. *Hardin*[14] and *Schollenburger* v. *Penna.*[15]

[8] Act Creating a Special Coal and Food Commission of Indiana, Section 10.
[9] 161 U. S. 619.
[10] 209 U. S. 349.
[11] 221 U. S. 229.
[12] 224 U. S. 217.
[13] 120 Ind. 575.
[14] 135 U. S. 100.
[15] 171 U. S. 1.

*Geer* v. *Connecticut* and *New York ex rel. Silz* v. *Hesterburg* deal with statutes enacted for the protection of game, a valid exercise of the police power. In the first case, a statute forbidding the shipping of game out of the State during certain seasons of the year was sustained. The second has already been discussed. In both the objection was made that the statutes directly interfered with interstate commerce. In both the statutes were sustained because the interference was held to be incidental.

In *Hudson Water Co.* v. *McCarter,* a New Jersey statute forbidding the piping of water out of the State was sustained as a valid exercise of the police power and an incidental interference with interstate commerce. In *Sligh* v. *Kirkwood,* a Florida statute already discussed was sustained on the ground that the protection of the citrus fruit industry of the State was a valid exercise of the police power and that the interference with interstate commerce was incidental.

All of these can be differentiated from the case of coal. The game and water cases can be distinguished on the ground that the owner in both cases has but a qualified property right. *Sligh* v. *Kirkwood* can be differentiated on the ground that it is within the power of the State to say that unripe fruit is not a legitimate article of commerce.

A discussion of *West* v. *Kansas Natural Gas Co.* sufficiently covers the principle for which the other group stands. The State of Oklahoma had passed an act prohibiting the piping of oil and gas out of the State for the purpose of conserving the supply for its own people. The Supreme Court of the United States held (three justices dissenting) that the act was a direct interference with interstate commerce and invalid. The following propositions were quoted with approval: "No State, by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof. No State, by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on." This case limits the principle upon which the coal law depends. However advantageous it may be to the people of a State to retain within its borders a natural resource, it cannot be done. Between the two groups of cases there seems to be a wide gap, and it is believed that the Indiana law will fall somewhere within that gap. In order to be sustained it must be differentiated from the second group of cases. Two distinctions at once suggest themselves. The primary purpose of the Oklahoma law was to prohibit the exportation of the resource. The primary purpose of the Indiana law is to make price regulation a benefit and not a detriment to the people of the State. Then, too, there is an obvious distinction in the quantum of the interference. The Oklahoma interference was complete. The Indiana interference may be very slight.

In *New York ex rel. Silz* v. *Hesterburg,* Justice Day distinguished the case at bar from *Schollenburger* v. *Penna.,* where a law prohibiting the importation of oleomargarine, a legitimate article of commerce, was held invalid, though for the purpose of protecting the welfare of the people of the State,

on the ground that in the latter case the interference was the direct purpose of the act, whereas in the former the purpose was the protection of the local game and the interference was incidental. The language of the court, both in this case and in *Sligh* v. *Kirkwood,* seems to indicate that the term incidental refers, not to the quantum of the interference, but to the primary purpose. If this is the test to be applied, the Indiana law is clearly distinguishable from the Oklahoma law. From the legalistic standpoint, the question would seem to be rather doubtful, with no case directly in point or very close. Language is to be found in the two widely divergent groups of cases which mark the bounds within which the question falls, tending to support the law on the one hand and perhaps to declare it invalid on the other. Inasmuch as the Supreme Court found sufficient merit in the Oklahoma law to result in a split, there would seem to be at least a fighting chance for the Indiana law.

On the economic side, the case for the law may be summed up as follows: The starting point is: The State has the power to regulate the price of coal. In the absence of regulation a certain amount of coal is being supplied to the people of the State at extortionate prices. If the same amount of coal can be obtained at the reasonable price set by the State, the people will be greatly benefited and the people of adjoining States will not be harmed. If coal cannot be obtained at the price set by the State, the law will, of course, be extremely detrimental. Provided the State is to have the power of regulating prices at all, and provided it confines itself to the necessities of the case, why should it not be able to interfere with interstate commerce to that extent. The principle that an otherwise valid exercise of the police power can be sustained, though it incidentally interferes with interstate commerce developed when the conception of the police power was confined to health, morals and safety. Since then the police power has developed considerably beyond that conception. Logically, it follows that the principles which developed in the early conception of the police power and furthered the effectiveness of its exercise should not stand still, but should be extended into new fields when the necessity arises. A. W. B.

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VOLUNTARY PAROL TRUST WITH IMPLIED POWER OF REVOCATION.—In the recent case of *Russell's Executors* v. *Passmore,* 103 S. E. 652, in the Supreme Court of Appeals of Virginia, it appeared that the donor had made a voluntary transfer of certain bank stock about six months before his death. Several years later, the donee having died without making any disposition of the stock, the donor's infant children brought suit in the name of their guardian against the donee's executors to establish an alleged secret parol trust of the stock. There were two reputable witnesses who knew something about the transaction. One of them, who was present and participated in the initial transfer of the stock, testified that the stock was to be held "in the event of the donor's death" for the benefit of the donor's eldest son. The other witness, who was the donor's administrator and was present at his death, testified that the donor said a few hours before his death that the

stock was held by the donee for the benefit of the donor's children. There was also testimony by an employee of the donee that the donee had said a few months before his death that he had some money for the donor's children. And it appeared that on three occasions prior to his death the donee had made remittances for the donor's children. On the strength of this evidence, the court held that the original transfer was an executed gift in trust for the oldest son, that this gift was conditioned by an implied power of revocation, and that the original trust was later partially revoked and a different and enlarged trust created for the benefit of all the children.

The implied power of revocation in this case must be supported solely by the testimony of the witness who participated in the initial transfer. The donor's declaration a few hours before death, remittances made by the donee under circumstances which tended to indicate that they were intended for all the children and the employee's testimony as to the donee's admission a few months before death are all inadmissible to show such an implied power. They may be admitted to show that the stock continued to be held in trust, or that the original trust, if revocable, had been revoked and another created in its stead. But they are inadmissible to show that the initial transfer was intended to be revocable under the settled principle of evidence that statements made by the transferrer, after transfer of title, are not receivable as admissions against the transferee. *Tierney* v. *Fitzpatrick,* 195 N. Y. 433; 2 WIGMORE ON EVIDENCE, § 1085. It must be assumed, therefore, that a power of revocation was implied in reliance upon the testimony that the stock was to be held "in the event of the donor's death" for the benefit of the eldest son. The opinion makes it reasonably clear that the revocability of the original trust was based upon this testimony.

As a general rule, a trust once completely and validly created, whether by a simple declaration of trust or by transfer in trust, and whether gratuitous or for consideration, cannot be revoked unless a power of revocation has been reserved. *Viney* v. *Abbott,* 109 Mass. 300; *Ewing* v. *Warner,* 47 Minn. 446; 1 PERRY ON TRUSTS [6th ed.], § 104. There seems, however, to have been a slight reaction at some points from the liberality with which voluntary trusts were formerly enforced. Following *Ex parte Pye,* 18 Ves. 140, there was at first an inclination to torture imperfect gifts into declarations of trust and enforce them as such. *Morgan* v. *Malleson,* 10 Eq. 475. But this inclination was soon repudiated, and it became well settled that an imperfect gift will not be given effect as a declaration of trust. *Cardoza* v. *Leveroni,* 233 Mass. 310; SCOTT'S CASES ON TRUSTS, 151, note. In a few instances voluntary trusts which are formally perfect have been held revocable. In the so-called savings bank trust cases, instead of regarding a deposit in a savings bank in the depositor's name in trust for another as an irrevocable trust, courts have frequently treated it as a tentative trust or trust with implied power of revocation. *In re Totten,* 179 N. Y. 112; *Walso* v. *Latterner,* 143 Minn. 364; 4 MINN. L. REV. 56. See SCOTT'S CASES ON TRUSTS, 224, note. Compare *Cazalis* v. *Ingraham,* 110 Atl. (Me.) 359; 19 MICH. L. REV. 356. This anomalous result seems to be justified, however, if it can

be justified at all, by factors which are more or less peculiar to savings bank deposits in trust. See *Beaver* v. *Beaver,* 117 N. Y. 421, 430-1. Voluntary transfers in trust have been treated as revocable in a number of cases. There have been cases of voluntary settlement or gift in trust without express power of revocation in which the court has seemed to place upon the beneficiary the burden of proving that the donor intended to make the gift irrevocable. See *Couts* v. *Acworth,* 8 Eq. 558; *Everitt* v. *Everitt,* 10 Eq. 405; *Garsney* v. *Mundy,* 24 N. J. Eq. 243; *Rick's Appeal,* 105 Pa. 528. These cases were cases of unusual hardship, however, in which the donor might have been relieved without recourse to so dubious a principle. Compare *Massey* v. *Huntington,* 118 Ill. 80. It has sometimes been said that the omission from a voluntary disposition in trust of a clause reserving a power of revocation raises a presumption that it was omitted by mistake. See *Russell's Appeal,* 75 Pa. 269; *Aylsworth* v. *Whitcomb,* 12 R. I. 298. But such statements are believed to be unsound on principle and opposed to the weight of authority. See *Sands* v. *Old Colony Trust Co.,* 195 Mass. 575; *Souverbye* v. *Arden,* 1 Johns. Ch. 240.

It may be urged, of course, with some plausibility, that the evidence in the instant case, although meager, indicated more than anything else an intention to make a gift in trust for the eldest son at the donor's death in case the donor died without revoking. This construction appeals to the present writer as a very dubious one. Why imply a power of revocation in an executed gift to one to be held "in the event of the donor's death" in trust for another? Nothing is more certain than death. The qualifying clause is an appropriate way of indicating the time at which the beneficiary's interest is to commence. Why attribute to it any greater significance? Compare *Massey* v. *Huntington,* 118 Ill. 80; *Viney* v. *Abbott,* 109 Mass. 300. Probably the case should be viewed as another manifestation of a somewhat curious reluctance to commit irrevocably one who has made a voluntary declaration or transfer in trust. So regarded the principle of the decision seems clearly objectionable. The only authority cited by the Court, *Sterling* v. *Wilkinson,* 83 Va. 791, was really a case of imperfect gift which the court could not perfect after the donor's death, and anything said about implied power of revocation seems to have been mere dictum. Everyone would agree at the present day that equity has taken a sound position in refusing to give effect to imperfect gifts. But has not the pendulum swung too far when revocability is implied as readily as in the instant case? It would be unfortunate if pawnship equity should be permitted to impair the stability of gifts in trust. R. E. G.

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ANIMALS—DAMAGES BY TRESPASSING CHICKENS.—P alleged he had a large feed barn, filled with grain, and a garden with growing vegetables, on his lot surrounded by a lawful fence four and one-half feet high, over which some of D's 400 chickens crossed from her adjoining lot, and destroyed grain and vegetables to the value of $600. The trial court sustained D's demurrer. Reversed. *Adams Bros.* v. *Clark* (1920), — Ky. —, 224 S. W. 1046.

The court says: "By the common law of England the owner of domestic animals, including fowls, was required to keep them on his own premises, and was liable for their trespass on the lands of another." This common law, as it was in 1607 (4 James 1), was the common law of Virginia, and later, when the State of Kentucky was formed, by constitutional provision became the common law of that state.

The court also said that while a statute provided "no recovery could be had for the destruction of property [by trespassing animals], unless it was surrounded by a fence four and one-half feet high, so close that cattle could not creep through," applied to *cattle*, and had not changed the common law as to fowls. Also, that the storing of grain on P's premises was not an attractive nuisance and an invitation to D's chickens to enter and eat thereof.

A pathetic argument was made on behalf of the chicken owner that she was trying to bring down the high cost of living for her family by engaging in the chicken industry. The court, however, thought the plaintiff's efforts to bring down the high cost of living of his family by raising garden truck was equally commendable, and he should not be expected to feed his neighbor's chickens also.

The court cites several cases involving horses, cattle, and hogs. The only *fowl* cases cited are *State* v. *Bruner* (1887), 111 Ind. 98, to the effect that a *fowl* is an *animal* within the statutes relating to cruelty to animals; and *McPherson* v. *James* (1896), 69 Ill. App. 337, holding that the owner of *turkeys* is liable for damages in trespass on a neighbor's unfenced property, although not for a penalty for allowing them to stray, under statute naming certain domestic animals, but not turkeys.

That a fowl is an animal within cruelty and similar statutes is generally held. *Holcomb* v. *Van Zylen* (1913), 174 Mich. 274, Ann. Cas. 1915 A 1241, with note.

There are very few cases holding that the owners of trespassing fowls are liable for the damages they do; most of the cases are those holding that the person on whose property they trespass has no right to kill them. *Johnson* v. *Patterson* (1840), 14 Conn. 1 (poisoning trespassing chickens, defendant liable); *Matthews* v. *Fiestel* (1853), 2 E. D. Smith, N. Y. 90 (poisoning trespassing geese); *Clark* v. *Keliher* (1871), 107 Mass. 406, 409 (no right to kill trespassing chickens); *Reis* v. *Stratton* (1887), 23 Ill. App. 314; *State* v. *Porter* (1893), 112 N. C. 887 (killing trespassing pigeons is cruelty to animals); *State* v. *Neal* (1897), 120 N. C. 613 (trespassing chickens could be impounded at common law, and needlessly killing them is cruelty to animals); *James* v. *Tindall* (1913), 27 Del. 413.

In *Taylor* v. *Granger* (1896), 19 R. I. 410, it was held that *case* instead of *trespass* was the proper action where a city negligently allowed the pigeons from one of its parks to fly over and defile plaintiff's premises and annoy him by the noise. In *Lapp* v. *Stanton* (1911), 116 Md. 197, an allegation in an action of trespass that defendant's game chickens continually trespassed on plaintiff's premises, roosted in his shed and on his new wagons and plows, etc., to his damage, was held to be sufficient on demurrer.

It was early held in Missouri, Iowa, and many other states that the common law relating to trespassing cattle was not suited to their condition, and was not in force in those states. *Gorman* v. *Pacific R.*, 26 Mo. 441; *Wagner* v. *Bissell*, 3 Ia. 396. In such states there are fencing statutes that affect the subject materially. See note 3, BL. COMM. 211 [Lewis's Ed.].

In *Evans* v. *McLalin* (1915), 189 Mo. App. 310, where a farmer's chickens were alleged to have trespassed and destroyed a neighbor's crops, a demurrer was sustained, and the owner of the chickens was held not liable. This is based on the statute, and although directly in conflict with the principal case, admits the common law to be as ruled in that case.

In *Keil* v. *Wright* (1907), 135 Ia. 383, an injunction was asked against the owner of chickens which repeatedly trespassed on plaintiff's premises and destroyed his crops. The defendant denied the facts, and claimed that, since he was solvent, an action at law would be an adequate remedy. The trial court found for the plaintiff and granted the injunction. In the supreme court the defendant, in argument, urged that "chickens were commoners" and had a right to roam at will without being considered trespassers. The court refused to rule on this, since it was not pleaded nor considered by the trial court, and so affirmed the decision of that court. Six years later, in *Kimple* v. *Schafer* (1913), 161 Ia. 659, relying on the *Keil* case, plaintiff asked an injunction to restrain the defendant from permitting his 200 chickens to trespass on plaintiff's land and eat the oats he had planted there to such an extent that he was obliged to resow it two or three times. The defendant pleaded that "chickens were free commoners, and that the owners of cultivated land must fence against them"; that plaintiff had no lawful fence enclosing his land; and that his remedy, if any, was impounding or suing for damages. The court, by Deemer, J., affirms the *Keil* case and holds that an injunction will lie to prevent domestic animals from trespassing. He also says that at common law the owner must keep his domestic animals at home; that trespass would lie for failure to do so; that the animals could be impounded; that these rules were early held inapplicable in Iowa; that the matter was now regulated by statute, in reference to several kinds of domestic animals; that nothing had been done as to chickens, except in cities, indicating that in the country chickens are free commoners, and they, turkeys, ducks, geese, peacocks, and guinea hens have been so considered from the beginning of the state; that it is much easier to fence poultry out than to fence it in; and that until the legislature made it obligatory the court would not adopt a rule requiring the owner to fence them in, nor enjoin him from permitting them to escape.

In all these cases it is assumed that the common law allowed an action for damages, or distress damage feasant, for injuries done by trespassing domestic animals. This is undoubtedly true as to horses, cattle, sheep, and hogs. Yet by the laws of Ine (c. 690), if a ceorl's close "be unfenced and his neighbor's cattle stray in through his own gap, he shall have nothing from the cattle; let him drive it out and bear the damage; but if there be a beast which breaks hedges and goes in everywhere, and he who owns it

will not or cannot restrain it, let him who finds it in his field take it out and slay it, and let the owner take its skin and flesh, and forfeit the rest." Ll. 40, 42. The Welsh law was similar. I THORPE'S ANCIENT LAWS AND INST. 127.

In the year books of Ed. II (1307-1326) there are numerous cases of replevin for cattle taken damage feasant, indicating that it was a common remedy at that time; and in *Boyden* v. *Alspath* (1308), Y. B. 2 Ed. II, 87, pl. 29, a trespassing ferret might be taken damage feasant; also a greyhound. *De la More* v. *Thwing* (1308), Y. B. 2 Ed. II, 176, pl. 98a. In 1481, Y. B. 20 Ed. IV, fo. 10b, where D had common in 200 acres of land adjoining P's land, and D's beasts entered P's unenclosed land without D's knowledge, being driven there by wild dogs, and did damage, Brian, C. J., and Littleton, J., held D was liable in trespass for the damage done, and the fact that the wild dogs chased the cattle there made no difference. A hundred years later the law was stated the same, relying on this case. *Dyer*, 372, pl. 10 (1581). It seems the law has been thus since that time as to trespassing cattle, those dangerous to crops. There seem to be no *chicken* cases in England.

In the Welsh law above referred to it was said: "The owner must make his garden so strong that beasts cannot break into it; and if it be broken into there can be no redress, *except for the trespass of poultry and geese.*" 1 THORPE, 127, note.

In *Boulton's Case* (1597), 5 Co. 1046, it was stated that one was not liable for making a dove-cot from which the pigeons trespassed on the neighbor's land. This, however, was said to be contrary to Y. B. 4 H. VI, pl. 10, and 27 Ass., pl. 6; and in *Dewell* v. *Sanders* (1619), Cro. Jac. 492, 79 Eng. Rep. 419, Doderidge, Croke, and Houghton, JJ., agreed that if pigeons come upon my land I may kill them, and the owner has no remedy. Montague, J., held *contra*, for the owner has a property in the pigeons. In *Taylor* v. *Newman* (1863), 4 B. & S. 89, 122 Eng. Rep. 343, the *Dewell* case was affirmed. And in *Webb* v. *McFeai* (1878), 22 Jour. Juris. (Sc.) 669, the owner of a carrier pigeon was held to have no remedy when it was killed by D's cat, both the pigeon and the cat trespassing on neutral ground at the time. So in *McDonald* v. *Godfrey* (1890), 8 Pa. Co. Ct. 142, the plaintiff had no remedy for the killing of his canary, on his own premises, by the defendant's trespassing cat.

On the other hand, in *Ferrer* v. *Nelson* (1885), 15 Q. B. D. 258, Pollock, J., held that one was liable in case for overstocking his land with 1,500 pheasants so that 300 of them trespassed on plaintiff's premises and injured his crops. In *Hadwell* v. *Righton* (1907), 76 L. J. (K. B.) 891, where a bicyclist was injured by a fowl flying into his wheel, in the road, the court seemed to think that the owner of the chicken might have been liable if it had been trespassing at the time.

In *Boulton's Case*, above, it was held that overstocking D's ground with rabbits, which strayed on P's premises and did damage, did not make D liable, for P might kill them. This is contrary to the *Ferrer* case, above.

Compare *Stearn* v. *Prentice* (1918), 68 L. J. (K. B.) 422 (defendant not liable for the depredations of rats harbored in his boneyard).

It is generally held that one is not liable for the mere trespass of his dog, not known to be dangerous to persons; ordinarily, of course, a dog is not dangerous to crops. *Brown* v. *Giles* (1823), 1 Car. & P., 28 R. R. 769; *Woolf* v. *Chalker* (1862), 31 Conn. 121, 128; *Read* v. *Edwards* (1864), 17 Com. B. N. S. 245; *Sander* v. *Teape* (1884), Q. B., 51 L. T. N. S. 263; *Buchanan* v. *Sweet* (1908), 108 N. Y. S. 38; *Van Etten* v. *Noyes* (1908), 112 N. Y. S. 888; *Doyle* v. *Vance* (1880), 6 Vict. L. R. 87, *contra.*

Similar rulings have been made as to *deer, Keilway,* 30, Y. B. 10 Hen. VII, 6, pl. 12 (1495); *Brady* v. *Warren* [1900], 2 I. R. 632, 661; *State* v. *Ward,* 170 Ia. 185; and as to *bees, Brown* v. *Eckes,* 160 N. Y. S. 489; *Earl* v. *Van Alstine* (1858), 8 Barb. 630; *O'Gorman* v. *O'Gorman* [1903], 2 I. R. 573.

Of course, fowls may become a nuisance because of the dust, odor, or noise they cause. *Ireland* v. *Smith* (1895), 3 Sc. L. T. Rep. —, 33 Scot. L. R. 156; *Desmond* v. *Smith,* 9 GREEN BAG, 550, 41 Sol. J. 167.

It is submitted the common law, as set forth in the principal case, should be considered the correct rule, where damage is done by any such animals in the exercise of their well-known natural propensities, unless due to the intervening act of God or the independent act of some third party, or similar excuse. See "Responsibility at Common Law for Keeping Animals," THOMAS BEVEN, 22 HARV. L. REV. 465; ROBSON, TRESPASS BY ANIMALS.

H. L. W.

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FUTURE INTERESTS IN RECENT STATUTES AND CASES—REMAINDERS, DEVISES AND USES.—To the layman, or the beginner in the study of property law, the intricate sinuosities of *Shelley's Case* and *Archer's Case,* of contingent remainders and their destructibility, of indestructible executory devises and uses, springing and shifting, seem inexplicable, incomprehensible, and useless. But a longer estate than for the life of him who must perform the feudal services on which his tenure rested is a concept that would have seemed equally strange and impossible either to lay or legal mind when feudalism was in fullest flower. Pure feudalism had no room for future estates, but only for present holdings, based on present services, to be performed by the present tenant while he lived. An estate to A was not an estate for A to pass to another, either *inter vivos* or at death, but to keep, and only while he performed the personal services that went with it. When estates to A and his heirs came to be recognized the concept was still of a life estate to A, and "to his heirs" merely indicated that at the end of A's life the estate in natural course would go to him who should be his heir, and so on in indefinite succession. 15 COL. L. REV. 680.

It was a sign that feudalism was already beginning to crumble when it began to be suggested that an estate might be created carrying a present interest in A and a future interest in his heirs, and the development of the concept was a long process. It is more than possible that the rule in Shel-

ley's Case had never been if the first appearance of the principle now known by that name (in 1324) had not preceded by more than a century the recognition of the possibility of a destructible contingent remainder (in 1430). See Lord Macnaghten in *Van Grutten* v. *Foxwell* [1897], App. Cas. 658. For if the remainder to the heirs of A in *Shelley's Case* had been treated as a contingent remainder after A's death, and therefore destructible by A in his life, free alienability by A would have been secured without executing in him and adding to his life estate, as under the Rule in Shelley's Case, the remainder expressly limited to his heirs.

But feudalism and its fruits have long been gone. It might be supposed that the reason for the law having ceased, the law itself would have disappeared. Quite otherwise. Indeed, Lord Macnaghten's remark in the case referred to, that the subject "rarely comes up for discussion nowadays," is not justified by an examination of the recent reports. They are full of cases involving contingent remainders, *Shelley's Case, Archer's Case, etc.*, not merely in such a state as Illinois, where they are most exuberant and intricate; *Moore* v. *Reddel*, 259 Ill. 36; *Aetna Insurance Co.* v. *Hoppin*, 214 Fed. 928 (a 1914 Illinois case), but in many other states as well. The cases show we must say rather "the reason of the law having changed, the law has changed also," but curiously enough, almost always by statute, not by court decision. And the statutes hark back to the old phrases and terminology and the old rules, so that one can understand the language of the new rule only by a thorough study of the old cases. In England at least three attempts have been made to do away with the frailty of contingent remainders, and not yet is it completely gone. A comprehensive statute was enacted in 7 & 8 VICT., c. 76, s. 8, but it seems to have so affrighted the conveyancers, see 30 HARV. L. REV. 227 ff., that it was repealed and a new statute enacted the next year, 8 & 9 VICT., c. 106. This cured so little that thirty years later the Contingent Remainders Act of 1877, 40 & 41 VICT., c. 33, was enacted, which partly restored 7 & 8 VICT., but left some cases unprotected.

We may compare a Massachusetts and an Illinois statute. The latter is not free from references to "supposed rules," and to "double possibilities," a much talked of and utterly repudiated term, but it is comparatively simple, and attempts in sweeping terms to resolve contingent remainders to present day needs, to make such a rule as we may suppose would have been adopted if defunct feudal institutions had never been. MASS. GEN. ACTS, 1916, c. 108, provides that "a contingent remainder shall take effect, notwithstanding any determination of the particular estate (Cf. 8 & 9 VICT., above), in the same manner in which it would have taken effect if it had been an executory devise or a springing or shifting use (Cf. 7 & 8 VICT., repealed by 8 & 9 VICT.), and shall, as well as such limitations, be subject to the rule respecting remoteness known as the rule against perpetuities, exclusively of any other supposed rule respecting limitations to successive generations or double possibilities." How impossible an understanding of the language of this statute, without a knowledge of the ancient estates and their history! To one who understands, the last clause shows an intent to bring the Massachusetts law

to the position contended for by Professor Gray in his attack on *Whitby* v. *Mitchell*, 42 Ch. 494, 44 Ch. 85, GRAY RULE AGAINST PERPETUITIES, Appendix K, and the lively dispute there referred to between the author and Mr. Charles Sweet, 30 HARV. L. REV. 226. The Massachusetts statute in effect abolishes contingent remainders, and resolves them, if they are limitations in a will, to executory devises; if in a deed, to springing or shifting uses. They are thus transformed, supposedly in accordance with the intent of the devisor or grantor, from destructible contingent remainders into indestructible devises or uses. Freedom of alienation is preserved by subjecting them to the same rule against perpetuities that was invented to check executory devises and springing and shifting uses, i. e., future estates cannot be limited to take effect beyond a life or lives in being and twenty-one years. This common law period is the rule in Massachusetts. *Minot* v. *Paine*, 230 Mass. 514 (1918); *Gray* v. *Whittemore*, 192 Mass. 367 (1916). If this period is too long to tie up land the remedy is for the legislature.

The Illinois statute referred to is REV. ST. 1874, c. 30, s. 6: "In cases where, by the common law, any person or persons might hereafter become seized, in fee tail, of any lands, tenements or hereditaments, by virtue of any devise, gift, grant or other conveyance, hereafter to be made, or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof, for his or her natural life only, and the remainder shall pass in fee simple absolute to the person or persons to whom the estate would, on the death of the first grantee, devisee or donee in tail, first pass, according to the course of the common law, by virtue of such devise, gift, grant or conveyance." Here again to one not steeped in the ancient law the language is meaningless. Its labored language in terms of the law of the past required the impossible. In Illinois primogeniture had been abrogated. Property could not "pass according to the course of the common law" to the eldest son, but must be distributed among all the heirs of the first taker. In 1 ILL. L. REV. 322 ff., Mr. Kales has well pointed out that the court has made over the statute by high-handed construction. *Moore* v. *Riddel*, 259 Ill. 36. As made over, it ties up the land for one generation at least as the feudal lords in vain tried to do by the Statute de Donis, for it gives a life estate to the first taker, with remainder in fee to persons not born perhaps till near the death of the life tenant. That makes it possible to tie up the Marshall Field estate for possibly seventy-five years from the death of the owner, a serious clog upon alienation in a country changing so fast as ours. There seems urgent need of a shortened period for the rule against perpetuities, but so firmly is the old law upon us that no courts and few statutes have cut down the period. New York, followed by Michigan and some other states, has fixed the limit at two lives in being. This has some things to commend it, though Mr. Gray finds in the increase of litigation in New York serious objections. GRAY, RULE AGAINST PERPETUITIES, Sec. 749 ff.

The clumsy Illinois statute doubtless was intended merely to abolish estates tail. This could have been done by giving to the life tenant an estate

in fee simple absolute, or with contingent remainder over to the heirs. Twice at least a fairly simple draft of a bill intended to do that has been submitted to the Illinois legislature, but the old law stands.

In the centuries old contest over future estates there have been two leading and conflicting ideas, intent and freedom of alienation, action and reaction on which have molded the law of future estates. To give effect to the intent of the testator Lord Mansfield pronounced his famous, or infamous, opinion in *Perrin* v. *Blake,* 1 W. Bl. 672, and precipitated the fierce and humorous contest so entertainingly described in 3 CAMPBELL'S LIVES OF THE JUSTICES, 305. In *Jesson* v. *Wright,* 2 Bligh 1, Lord Eldon emphasized freedom of alienation, and brought the rule back to a rule of law to be rigidly applied, even though defeating intent. He assumed to regard the general as distinguished from the particular intent, but would have done better to agree with Lord Redesdale in sticking to the law defeating intent. As Cockburn, C. J., put it in *Jordan* v. *Adams,* 9 C. B. (N. S.) 483, "the fatal words once used" the law "inexorably and despotically fixes on the donor" all the consequences of bringing his provisions within the rule, "although, all the while, it may be as clear as the sun at noonday that by such a construction the intention of the testator is violated in every particular." As to contingent remainders, the Massachusetts act very sensibly allows free play to intent for a period by preserving them from the destruction that might have been their fate at common law. Beyond that period the restrictions cannot operate; indeed, the limitations must not try to tie up beyond, or they are void in their inception. Such in a general way is the effect of the various provisions of the Michigan statutes, C. L. 1915, c. 220, and of such a code as that of Georgia, CODE of 1911, Sixth Title, c. 3.

The importance of the ancient rules and the history of their development have been touched upon. The digests show how constantly cases are before the courts, and seem to justify the statutes that have tried to modify the rules to suit present day needs, for Illinois, which has refused to make many changes, shows an unrest and dissatisfaction to such an extent as to give color to the claim that she has as many cases as all the other states together. The three latest bound volumes of the Illinois reports illustrate the fact that under the old rules one can hardly be sure what kind of a future estate he has in hand until the supreme court has pronounced, not once merely, but for the last time. Not only do the lawyers differ, which is to be expected if the opposing sides are to have counsel, and the judges disagree, which is not unusual, but the same court on consideration at different times of the same instrument is not unlikely to reach different conclusions. See, for example, *Cutler* v. *Garber,* 289 Ill. 200 (Oct., 1919), finding the future interests to be executory, which in 261 Ill. 378 had been held to be contingent remainders. Under the Massachusetts statute this would have made no difference. In 292 Ill. attention may be called to *Colc* v. *Cole,* in which, at page 170, the old doctrine of destruction of contingent remainders by merger is held to be still flourishing, and to *Bender* v. *Bender,* at page 363, where the contingent remainderman, there also a reversioner, is recog-

nized as having an interest which he may protect by suit. This latter is touched upon in *Du Bois* v. *Judy*, 291 Ill. 340, in which the court attacks as though they were new in the state the property problems of the case, stating in full the rule in *Shelley's Case*, defining remainders, and laying down the law as to the destructibility of contingent remainders which has hardly been doubted since *Chudleigh's Case*, 1 Co. 120a. In *Gray* v. *Shinn*, 293 Ill. 573 (June, 1920), the court feels called upon again to define contingent and vested remainders, and announces the well-known fact that a contingent remainder falls with the death of the life tenant before the vesting of the remainder, page 579, as it would not if Illinois had the modern statute, and Cf. *Lewin* v. *Bell*, 285 Ill. 227. At 293 Ill. 581, it is pointed out that there is no rule to prevent voluntary destruction of contingent remainders by a conveyance for that express purpose by the life tenant to a third person to bring about a merger. But should there not be such a rule, coupled with a rule against remoteness? It is for the legislature to say. Litigants seem to want it, for the interesting thing is not so much that the courts should again and again restate these elementary matters as though they were new and not centuries old, but that there should seem to be such repeated and persistent refusal to accept the rules. The court contents itself, as probably it must, with a restatement of the oft stated rules. Change in a rule of property so long acted upon should be made by the legislature, and then not retroactively, but Illinois refuses to change, though curiously enough agitation there has been more insistent than elsewhere. See 1 ILL. L. REV. 311. In addition to the above cases, see *Sellers* v. *Rike*, 292 Ill. 468, fully stating the Rule in Shelley's Case and rigidly applying it, though it overrides intent. *Noth* v. *Noth*, 292 Ill. 536, dealing with an executory devise and an expectancy; *McBride* v. *Clemons* (Ill., June, 1920), 128 N. E. 283, holding a limitation to be an executory devise and indestructible, and not a destructible contingent remainder; and *Biwer* v. *Martin* (Ill., October, 1920), 128 N. E. 518, applying the common law rule as to destruction of contingent remainders by merger, and the modified rule as to conveyance of such remainders by way of an estoppel or release. Cf. *Kenwood Trust & Savings Bank* v. *Palmer*, 285 Ill. 552, holding a contingent remainder cannot be the subject of sale, as it could be in Michigan and other states where it is alienable, descendible and devisable. *Graff* v. *Rankin*, 250 Fed. 150, may be cited as a recent case in which the Federal court applied the Illinois law to contingent remainders in a devise to one "Illinois Riggs and her lawful issue," with certain added limitations. Truly, this was an Illinois case, and the peculiar thing about many of the above cases is that if the Illinois law had been changed the questions in dispute would not have arisen.

In other states there still are, and no doubt always must be, cases on future interests, even in those that have done most to square the law with present day conditions and desires. In *Trull* v. *Tarbell* (May, 1920), 127 N. E. 541, the Massachusetts court construed interests as vested in preference to contingent. The Michigan statute as to perpetuities had to be construed in *Cary* v. *Toles*, 210 Mich. 30 (April, 1920), and *Woolfit* v. *Preston*, 203

Mich. 502 (Dec., 1918). The Michigan court is justified in its position in *In re Blodgett's Estate,* 197 Mich. 455, that full force may be given to intent, since the statute has relieved contingent remainders of their common law infirmities, and by proper restrictions has protected the public against the perpetuities that might result. The law favors vested estates, but will recognize others where the intent to create them is clear. It does not favor joint tenancies, but nevertheless permits them. The language to create contingent remainders must, however, be plain and unambiguous. *In re Shumway's Estate,* 194 Mich. 245. That such language may be held by a trial judge and by the Supreme Court to show clearly two perfectly opposite things appears in *Colby* v. *Wortley,* 205 Mich. 609. Expectant estates having been made descendible, devisable, and alienable, it matters less than formerly whether estates are vested or contingent, but there are still vital distinctions.

This note is already too long to permit further detailed notice of cases. The present importance in all jurisdictions of problems of future interests is suggested by the following list of very recent cases which the curious may examine. Alabama, *Deremus* v. *Deremus,* 85 So. 397 (Feb., 1920); Georgia, *Cock* v. *Lipsey,* 96 S. E. 628 (Aug., 1918); Kansas, *Moherman* v. *Anthony,* 188 Pac. 434 (March, 1920); Maine, *Real Estate, etc., Co.* v. *Dearborn,* 109 Atl. 816 (April, 1920); *Carver* v. *Wright,* 109 Atl. 896 (May, 1920); Maryland, *Hempel* v. *Hall,* 110 Atl. 210 (Feb., 1920); Mississippi, *City Savings Bank, etc.,* v. *Cortwright,* 84 So. 136 (April, 1920); Missouri, *Bramhall* v. *Bramhall,* 216 S. W. 766 (Dec., 1919); *Hartnett* v. *Langan,* 222 S. W. 403 (June, 1920); Nebraska, *Yates* v. *Yates,* 178 N. W. 262 (June, 1920); New York, *In re Tift,* 180 N. Y. S. 884 (Feb., 1920); *Montague* v. *Curtis,* 181 N. Y. S. 709 (March, 1920); *U. S. Trust Co.* v. *Perry,* 183 N. Y. S. 426 (July, 1920); Ohio, *In re Youtsey,* 260 Fed. 423 (March, 1916); Oregon, *Lee* v. *Albro,* 178 Pac. 784 (Feb., 1919); Pennsylvania, *Berkley* v. *Berkley,* 109 Atl. 686 (Feb., 1920); *In re McConnell's Estate,* 109 Atl. 846 (Feb., 1920); *In re Groninger's Estate,* 110 Atl. 465 (June, 1920); Rhode Island, *Aldrich* v. *Aldrich,* 110 Atl. 626 (July, 1920); South Carolina, *Home Bank* v. *Fox,* 102 S. E. 643 (March, 1920); Texas, *Crist* v. *Morgan,* 219 S. W. 276 (March, 1920); Virginia, *Turner* v. *Monteiro,* 103 S. E. 572 (June, 1920); *Prince* v. *Barham,* 103 S. E. 626 (June, 1920).

This brief study justifies the claim that the common law rules as to future interests are quite inconsistent with the legislative policy of England and the United States. Where the old rules have not been changed litigants are constantly objecting. In the states that have changed most appears comparative quiet. The lesson, if lesson there be, is that statutes should give freedom to intent in creating futures estates, and preserving them when created, but at the same time preserve freedom of alienation by cutting down, perhaps more than has yet been done, the period of perpetuities. With such statutes the Rule in Shelley's Case, *Chudleigh's Case, Purefoy* v. *Rogers,* and the rest, could be filed away as curios, and the law of real property and modern needs and desires could dwell together in harmony. E. C. G.