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# Note and Comment

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# MICHIGAN LAW REVIEW

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## NOTE AND COMMENT

THE LAW SCHOOL.—The year 1919-1920 opens with 336 sudents enrolled. These are classified as follows: Third year—85; second year—97; first year —149; special—5. As compared with 65 enrolled a year ago the present attendance is gratifying. Preliminary applications point to a large number of entering students in February.

We regret to announce the resignations of Professor Stoner who has accepted a position with the Detroit Pressed Steel Company of Detroit, Michigan; and of Professor Barbour who has accepted a call to the faculty of the Yale Law School; Professor Edwin D. Dickinson, A.B. Carleton, A.M. Dartmouth, Ph.D. Harvard, J.D. Michigan, has been added to the faculty. Professor Dickinson, who was an editor of this Review, has made an enviable reputation for himself in the field of International Law, a course which he will give in the Law School.

Courses for the year are assigned as follows: Dean Bates—Constitutional Law and Torts; Professor Lane—Evidence, Conflict of Laws, and Insurance; Professor Wilgus — Torts and Corporations; Professor Goddard — Agency, Bailments and Carriers, Public Service Companies, Wills, and Property IV; Professor Sunderland—Trial Practice, Common Law Pleading, Code Pleading, and Practice Court; Professor Holborok—Mining Law, Irrigation Law, Municipal Corporations, Domestic Relations, and Administration Law; Professor Drake—Property I, Damages, Partnership, Roman Law, and Jurisprudence; Professor Aigler—Property II, Property III, and Bankruptcy; Pro-

fessor Durfee—Equity, Mortgages, Suretyship and Quasi Contracts; Professor Waite—Criminal Law, Sales, Bills and Notes, and Patent Law; Professor Dickinson—Trusts and Public International Law; Professor Grismore—Contracts.

During the year Mr. James A. Veasey, General Counsel of The Carter Oil Company, will deliver a special series of lectures on Oil and Gas Law. These lectures will appear in the Review.

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THE SCINTILLA RULE OF EVIDENCE.—In analyzing the reasons why "trial by jury has declined to such an extent that it has come in many cases to be an avowed maxim of professional action,—a good case is for the court; a bad case is for the jury,"—JUDGE DILLON, in his LAWS AND JURISPRUDENCE, pp. 130-2, credits "the false principle known as the scintilla doctrine" with a large degree of responsibility.

The scintilla rule is essentially a medieval product. Scholasticism centered in logic, and the schoolmen contemplated everything in the glass of Aristotelian formulae. The syllogism was the great weapon of logical conquest, and the syllogism was deductive. It required a universal for its starting point. It exactly reversed the modern notion of looking to experience for data on which to build up general rules. It started with the general rule, which it derived abstractly. Once derived, it became, like the bed of Procrustes, the standard which experience must be forcibly made to fit. The doctor of laws in determining what cases should go to the jury, and the doctor of theology in deciding what souls should be saved, would apply an identical principle—conformity to a preconception. The fact that in either case the result might be unreasonable was of no consequence. It was heresy to deny the premise and folly to deny the conclusion.

The preconception on which the scintilla rule rests is that all questions of fact must go to the jury. And the reason for this is that it is a maxim of the common law that *"ad quaestionem facti non respondent judices."* The scholastic mind is satisfied with this reason. It is based on authority; it keeps practice subordinate to theory and thus maintains the medieval conception of the ascendency of the universal over the individual; it offers the infallible test of logic instead of the uncertain test of experience.

The essence of the scintilla rule is the total elmination of the question of the weight of the evidence from the consideration of the court. All relevant evidence should look alike, for the court, endowed only with a vision for the universal, can see in all evidence only a question of relevancy. It stands indifferent between the most convincing evidence on one side and the weight of a hair on the other. The court, being the instrumentality of logic, not common sense, is not expected or allowed to apply any rule but the rule of logic. Hence nothing is judicially absurd unless it is illogical, no matter how absurd it may be in its practical results.

The scintilla rule is seldom followed by modern courts. THOMPSON says it is "hardly mentioned by any court but to be repudiated." TRIALS, Sec.

2246, note. Here and there a court has adhered to it literally. *Holtzclaw v. Moore* (Tex. Ct. of Civ. App.) 192 S. W. 582; *Chicago and Erie RR. Co.* v. *Hamerick*, 50 Ind. App. 425. Kentucky adheres to it but admits its absurdity. *Farmers' Bank* v. *Birk*, 179 Ky. 761. In South Carolina the rule is followed in name but repudiated in substance by defining a "scintilla" to mean such evidence as is sufficient to warrant a reasonable jury in rendering a verdict upon it. *Dutton* v. *Atl. Coast Line RR. Co.*, 104 S. C. 16.

Most courts lay down some rule as to the *weight* of evidence which will justify sending a case to the jury, and while the wording of the rules varies widely, in substance they all amount to this, that the evidence must have sufficient weight to make a verdict in accordance with it reasonable. Most commonly it is said that the case is for the jury if *reasonable minds* could differ in regard to it. *Virgilio* v. *Walker*, 254 Pa. 241; *Carolina, C. & O. Ry. Co.* v. *Stroup*, 239 Fed. 75; *Aiken v. Atl. Life Ins. Co.* (N. C. 1917) 92 S. E. 184; *Bank of Cortland* v. *Maxey*, 102 Neb. 20; *Conway v. Monidah Trust*, 51 Mont. 113; *Sartain* v. *Walker* (Okl. 1916) 159 Pac. 1096; *Brown* v. *Thomas*, 120 Va. 763. Some cases say the test is whether the jury could find the fact sought to be proved without acting *unreasonably in the eye of the law. Wilcox* v. *Internat. Harv. Co.*, 278 *Ill.* 465; *Stewart* v. *Ill. Cent. RR. Co.*, 201 *Ill.* App. 187. Some require the evidence to be such that the jury might *lawfully* find in accordance with it. *Thiesen* v. *Gulf, F. & A. Ry. Co.* (Fla., 1918), 78 So. 491. Some say the evidence must be *sufficient to sustain* the case. *Cromwell* v. *Chance Marine Const. Co.*, 131 Md. 105. Some courts send the case to the jury if there is any *substantial* evidence. *Treble* v. *Am. Steel Foundries* (Mo. 1916) 185 S. W. 179. Other courts say the evidence must be such as to *warrant* the jury in finding a verdict, *Zeigrist* v. *Speer*, 29 Del. 437; *McAlinden* v. *St. Maries Hospital Assn.*, 28 Ida. 657; or must *authorize* the jury to so find, *Moore* v. *Dixie Ins. Co.*, 19 Ga. App. 800. In New York a verdict may be directed when the evidence is such that a contrary verdict *must*, not merely *may*, be set aside. *Getty* v. *Williams Silver Co.*, 221 N. Y. 34. In the federal courts and in some states the rule is that if the evidence is of so conclusive a character that the court would *feel bound to set aside* a verdict in opposition to it, then a verdict should be directed. *Canadian Northern Ry. Co* v. *Senske*, 201 Fed. 637; *Kalish* v. *White*, 36 Cal. App. 604; *Meyer* v. *Houck*, 85 Iowa, 319; *Baxter* v. *Brandenburg*, 137 Minn. 259.

Such being the principle underlying the scintilla rule and the state of the law regarding it, it is rather interesting and surprising to find the supreme court of Ohio, in an opinion published in September of the present year, standing pat on the scintilla rule in its crudest form. In *Clark* v. *McFarland* (Ohio, 1918) 124 N. E. 164, it appeared that a will had been admitted to probate by the order of the proper court. This order was by statute declared to be *prima facie* evidence of the due execution and validity of the will. A contest was then brought, and since the contestant failed to present any substantial evidence of invalidity, the trial court directed a verdict for the defendant. On appeal the judgment was reversed on the ground that a mere scintilla of evidence was enough to send the case to the jury even in the

face of an order of probate declared by statute to be *prima facie* proof of validity. Not only was the case on its merits a very extreme one in which to apply the rule, but two prior decisions of the Court of Appeals of Ohio were thereby overruled. A dissenting opinion by JONES, J., in which no other judge concurred, argued that the statute referred to made the scintilla rule inapplicable to will contests, but did not question the propriety of the rule as a general principle of law. Evidently the Ohio Supreme Court feels irrevocably committed to this all but obsolete doctrine, and a statute will probably be necessary to get rid of it. E. R. S.

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JUVENILE COURTS AND PRIVILEGED COMMUNICATIONS. — In the case of *Lindsey* v. *People*, (Colo., 1919) 181 Pac. 531, the Supreme Court of Colorado has held that Judge Lindsey of the Juvenile Court of Denver could not refuse to testify as to a communication made to him by a child who was at the time of the communication suspected of crime and against whom proceedings were later taken in the Juvenile Court. The decision was by a vote of four to three, and a vigorous dissenting opinion was written by Justice Bailey and concurred in by Justices Scott and Allen.

The case arose under the following circumstances: a man had been killed and his wife was suspected of murdering him; their twelve-year-old son was also under suspicion. The boy went to Judge Lindsey's chambers in the Juvenile Court to consult the Judge about the case and, after being assured by the Judge that any statement made to the latter would be confidential and that no disclosure of the same could be forced from the Judge, the boy made a statement as to the circumstances of the killing of his father. The wife of the deceased was later tried for the murder of her husband, and the boy testified in her behalf. The prosecution then sought to show that the boy had made a statement to Judge Lindsey which was inconsistent with his testimony at the trial, and called upon the latter to testify as to the statement made to him by the boy under the circumstances above detailed. Judge Lindsey declined to disclose the information he had thus received, on the ground that the communication was privileged; he persisted in his refusal after the trial court had ordered him to answer, and was found guilty of contempt of court and fined. The Supreme Court upheld the judgment of the court below.

It is admitted in both the prevailing and dissenting opinions that the case is one of first inpression; the dissenting opinion justifies the claim of privilege by pointing out analogies to other and similar situations in which the claim is clearly recognized; the majority opinion denies the privilege because no clear and unmistakable basis for it is contained in the various sections of the Colorado Statutes cited in the brief of the plaintiff in error. It is interesting that both opinions, in discussing the general question of privilege, rely on Wigmore on Evidence, § 2285, where the learned author states the rule as follows: "(1) The communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3)

the relation must be one which in the opinion of the community ought to be sedulously fostered; (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation." It seems perfectly clear that all of these requirements exist in the case at bar. Indeed the majority opinion tacitly admits that all of them exist except (4), as to which it says: "Considering the importance of the case on trial to the defendant as well as the people, and the rare instances in which courts are likely to be confronted with a similar situation, it appears to us beyond question that the benefit to be gained by the correct disposition of the litigation was * * * infinitely greater than any injury which could possibly inure to the relation by the disclosure of the communication." And it is really on this point that the dissent rests. The majority opinion goes on to demonstrate with metriculous refinement that the situation of the confidant in the present case is not precisely the same as that of an attorney dealing with a client, nor the same as that of a public officer dealing with confidential matters communicated to him officially (though on both of these points the distinctions made by the court are highly technical); the opinion also holds that no relation of confidence existed between Judge Lindsey and the boy under the provisions of the Juvenile Court Law because no petition had been filed and there was therefore no case pending against the boy.

The dissenting opinion, though suggesting the close similarity of the attorney-client and the officer-informer cases (on the latter point see the recent case of *State* v. *Tune*, 199 Mo. App. 404), bases its argument on the contention that the Juvenile Court is established by law for the carrying out of an important public duty, that it is absolutely essential to the proper carrying out of such duty that there be a high degree of confidence between the Judge and the children appearing before him, and that "anything which tends to destroy the trust of the child in the court * * * must necessarily nullify all possibility of good which otherwise might * * * be accomplished." It seems clear that the view of the dissenting opinion is correct, and that the privilege claimed by Judge Lindsey ought to be recognized.

The prevailing opinion is undoubtedly deserving of Justice Bailey's description of it as "highly technical in character, narrow in construction, and little calculated to give helpful if any assistance in the enforcement of the Juvenile Court Law." If the opinion had recognized the propriety of the privilege contended for, and had regretted that the extension of such privilege lay with the legislature and not with the court, its position might be more easily accepted, though still with misgivings. Such a view was suggested by the New Hampshire Supreme Court in the recent case of *White Mountain Freezer Co.* v. *Murphy*, 78 N. H. 398, where it was held that no privilege existed in respect of communications made to a labor commissioner (appointed under a statute providing for the arbitration of labor disputes) previous to a strike which became the subject of litigation. It is interesting to note that the New Hampshire legislature has since passed a statute (Laws 1917, c. 142, § 1) providing that such communications shall not be admissible

in evidence. But the majority opinion in the instant case does not even admit that the privilege ought to extend to such communications; it contends rather that the privilege should not exist, because it might tend to prevent the disclosure of facts which, the court felt, should have been disclosed in this particular instance. In this it ignores the considerations of public policy which have led to the almost universal recognition of all the phases of privileged communication, and also ignores the weighty reasons based on the peculiar requirement of confidence in the successful working out of the Juvenile Court Law. It is to be hoped that the Colorado legislature will soon repair the damage done by this decision. E. H.

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LIQUIDATION OF DAMAGES BY PRE-ESTIMATE.—A freshly minted phrase, if attractive in form, even though it connotes no new idea, will frequently have as extensive a circulation, even in our supreme courts, as would a real concept. In a contract for building two laboratories for the Department of Agriculture, the contractor had agreed that the United States should be entitled to the "fixed sum of $200, as liquidated damages * * * for each and every day's delay" in the completion of the buildings. The court decided that this was a stipulation for liquidated damage because it was the result of a "genuine pre-estimate" of the anticipated loss. *Wise* v. *United States* (May, 1919), Adv. O. 343.

The use of this term, "pre-estimate", as a new canon of interpretation for distinguishing liquidated damages from penalty, seems to belong to the last two decades, but during that time it has had a flourishing existence and a continual misapplication. In the case of the *Sun Pub. Assoc.* v. *Moore* (1901), 183 U. S. 642, a yacht was rented to be used for gathering news, the parties agreeing that "for the purpose of this charter the value of the yacht shall be considered and taken at seventy-five thousand dollars." The court "refused to consider evidence tending to show that the admitted value was excessive". In the case of the *United States* v. *Bethlehem Steel Co.* (1906), 205 U. S. 105, in a contract for the delivery of disappearing gun-carriages, it was agreed that "the amount of the penalty for delay in delivery" was to be $35 per day. It was decided that this was liquidated damages and not a penalty, but the court said that "the principle decided in that case (*Sun Pub. Co.* v. *Moore*) is much like the contention of the government herein". These two cases and an intermediate English case, *Clydebank E. and S. Co.* v. *Castaneda*, [1905] A. C. 6, have since been quoted as though they were precedents, for decisions in our Federal and State courts and in England; and the English court uses the phrase "a genuine pre-estimate", which has since been repeated so often, and is given as the reason for the decision in our instant case. This phrase has been used so often by the courts that it seemed best to the revising editors of the last editions of Sedgwick's treatises on the subject of Damages to add, after a presentation of various canons of interpretation, a section on "VALUATION AND PRE-ASCERTAINMENT." *Cf.* SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES, page 249, and SEDGWICK-BEALE, MEASURE OF DAMAGES, Section 420, a.

It was pointed out some years ago, cf. 9 MICH. LAW REV. 588, (1911), that these cases in the United States Supreme Court and in the Court of Appeals do not add anything to the principle of the law of damages nor do they add to our canons of interpretation of contracts as for liquidated damages or a penalty. The *Sun Case* is a simple case of estoppel on the contract of the parties, and the only question to be determined is whether or not the party is estopped. There is in the *Sun Case* an almost unique state of facts. The only case like it that has been observed by the writer is *Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 A. C. 332, and the estoppel is perfectly evident in either case. In a series of cases somewhat similar in character, arising under the HEPBURN ACT, it is argued most forcefully by Justice PITNEY, in a dissenting opinion, that one of the essential elements of estoppel is wanting and therefore the estoppel fails. Cf. *Boston and Maine Rd.* v. *Hooker*, 233 U. S. 134, also 15 COL. LAW REVIEW, 413.

On the other hand, the *Bethlehem Case*, the *Clydebank Case*, and others on the same state of facts, are to be interpreted under the long established canon of interpretation, that where the damages are very difficult of ascertainment they are to be considered liquidated. *Cf.* SEDGWICK-BEALE, MEASURE OF DAMAGES, Section 416; SEDGWICK, ELEMENTS OF THE LAW OF DAMAGE, 72.

In the use made of these cases it should be said that the courts have usually gone right, without however seeing why they have done so. The principle upon which the *Sun Case* was decided is *not* at all similar to the contention of the Government in the *Bethlehem Case*, because the facts of the two cases are widely different, and the citation of the two cases are precedent for cases in which the facts are on all fours with those in one case but not in the other, can lead only to hopeless bewilderment. It would seem wise for the courts to recognize this situation. J. H. D.

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THE REFERENDUM AS APPLIED TO PROPOSED AMENDMENTS OF THE FEDERAL CONSTITUTION.—That various aspects of the fight against the National Prohibition (the 18th) Amendment would result in litigation was to be expected. The attack at present seems to be based on the use of the provisions for referendum found in a dozen or more of the states the votes of which went to make up the necessary three-fourths. Three very recent decisions or expressions of opinion by state courts of last resort are in this respect extremely interesting.

In *Herbring* v. *Brown*, 180 Pac. 328, decided April 29, 1919, the Supreme Court of Oregon in a mandamus proceeding refused to order the Attorney General of that state to perform certain necessary functions prerequisite to the submission of the ratification of the 18th Amendment by the legislature to a vote of the people under the Referendum provision of the state constitution. On the other hand in *State ex rel. Mullen* v. *Howell*, 181 Pac. 920 (May 24, 1919), the Supreme Court of Washington in a similar proceeding ordered the Secretary of State to take the necessary steps for such submission. Finally, in Re Opinion of the Justices, 107 Atl. 673, (September, 1919) the Maine Supreme Court advised the Governor of that state that the ratifi-

cation of the 18th Amendment by the legislaure of Maine could not be referred to a vote of the people. Newspapers indicate other cases as pending.

In these three cases there are considered the two questions bound to rise in this connection. Does the language of Article V of the national constitution make the matter of ratification or rejection of proposed amendments a function of the *Legislature*, in the usual sense of that word? This, of course, is a federal question and until passed on by the United States Supreme Court must be considered as open. The second question is: Does the state provision for referendum cover the reference of acts of the legislature such as are consummated in ratifying a proposed amendment? This obviously is a local question, and the Supreme Court will not examine into the soundness of the conclusion of the state court. *Davis* v. *Ohio*, 241 U. S. 565.

An answer to the first question depends upon the proper construction to be given to Article V of the federal Constitution. This article which prescribes the method of amending the Constitution provides as follows: "The Congress whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention proposing amendments, which, in either case shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress;" etc. In the Washington case above referred to, the court concluded that *legislature* as used in this Article V, does not mean necessarily the legislative assembly, that it is legislative *power* rather than legislative *body* that is meant. In arriving at this conclusion the court relies very largely upon what seems to be a wholly mistaken construction of the decision by the United States Supreme Court in *Davis* v. *Ohio*, 241 U. S. 565.

It is important to determine just what the supreme court decided in that case. The Ohio legislature had passed an act redistricting the state for congressional representation. On proper petition under the Ohio referendum provision this act of the legislature was voted upon by the people and rejected. The Ohio Supreme Court in *State ex rel. Davis* v. *Hildebrant*, 94 Ohio St. 154, decided that the unfavorable vote had nullified the action of the legislature. The United States Supreme Court affirmed this decision. The contention of the losing side was based, in part at least, upon the wording of § IV, of Article I of the federal constitution which provides that "the times, places and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing senators." It was argued that the word legislature made the action of the state legislature in the redistricting Act final. This contention was rejected but the Washington court at least seems to have failed to appreciate that the basis of this rejection was the part of § IV, Article I, following the semicolon. At the time of the adoption of the constitution it was a common practice among the states to elect the representatives to the national legislative body at large. This practice continued in a number of states down to

1842. In that year, Congress provided, acting under the part of § IV of Article I, following the semicolon, for the election of congressmen by districts. 1 WATSON ON THE CONSTITUTION, 274. Under the Act of Feb. 7, 1891, Chap. 116, 26 Stat. 735, it was commanded that the existing districts in a state should continue in force "until the legislature of such state in the manner herein prescribed shall redistrict such state." By § IV of Chap. 5 of Act of Congress of Aug. 8, 1911 (37 Stat. 13), this was amended so as to provide that the redistricting should be made by a state "in the manner provided by the laws thereof." Mr. Chief Justice White in the Davis case said, "and the legislative history of this act leaves no room for doubt that prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to referendum which is now urged." See Cong. Rec., Vol. 47, pp. 3436, 3437, 3507. The only thing that the Supreme Court really decided in the Davis case seems to have been that there is nothing so far as the judiciary are concerned, about the initiative and referendum that destroys the republican form of government of the state which adopts such machinery in its lawmaking. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. The course, then, which the proposed redistricting in Ohio took seems to have been squarely in accord with the then provisions of Congress which in turn were expressly authorized by the latter half of § IV of Article I of the Constitution.

The argument that the word *legislature* as used in Article V of the Constitution means the legislative *body* derives some support from the view which seems to have prevailed very generally prior to the 17th amendment that United States senators could not constitutionally be elected by the direct vote of the people, the constitution providing expressly that senators should be elected by the "legislatures" of the several states. There can be no doubt that the word "legislature" had a perfectly well defined meaning to the framers of the constitution, and it would seem entirely clear that it was used in its then common sense. Terms of variable meaning according to circumstances as "commerce" and "due process of law" have been declared frequently not to have been used in a rigid sense; on the other hand a term such as "jury" is held to have been used in a fixed, non-elastic sense. The word "legislature" would seem more properly to fall within the latter class. See Winslow, C. J., in *Borgnis* v. *Falk Co.*, 147 Wis. 327, 348 *et seq.* See however, *Re Opinion of the Justices*, 107 Atl. 705 (1919), where the Maine court said that despite the word "legislature" in Art. 2, § 1, subd. 2, the state referendum could be invoked as to a state act affecting the manner of choosing electors.

In the Maine case, the court took the view that in voting upon proposed amendments to the federal constitution, a state legislature is not acting in any legislative capacity but that its action is directly pursuant to the expression of the will of the people as stated in Article V. It is pointed out that the people might conceivably have provided for a state vote to be cast by either house of the legislative body alone, or by the governor, or in any other way that might have been designated. This view finds support in *Dodge* v. *Woolsey*, 18 How. 331; *Eilingham* v. *Dye*, 178 Ind. 336; 2 WATSON ON THE CON-

STITUTION, 1310. See also 4 Elliott, Deb. 176, 177. *Cf. Re Opinion of the Justices,* 107 Atl. 705, *supra.*

The Oregon constitution providing for referring to a vote of the people "any act of the Legislative Assembly" is fairly typical of state referendum provisions. In Michigan it is declared that "Any bill passed by the legislature approved by the governor, except appropriation bills, may be referred," etc. The Nevada constitution provides for reference of any law *or resolution.* It is common knowledge that ratification of proposed amendments is by joint resolution, not by act or bill. In the Oregon case the court concluded that this was sufficient to make the referendum provision inapplicable. On the other hand, the Washington court dealing with a referendum provision essentially the same, held the referendum properly made use of.

That a joint resolution is not an act or a bill in the normal sense of the words must have been known to the makers of the various constitutions. See WILLARD, LEGISLATIVE HANDBOOK, Chap. 5. However, such situations would not seem appropriate for strict, technical constructions, and if *law* is made by a joint resolution it would seem a not unreasonable contention that the referendum provision should apply. Such was the view of the Supreme Court of California in *Hopping* v. *City of Richmond,* 170 Cal. 605. Where a joint resolution is used, as it often is, as an administrative measure of course there should be no reference unless such acts of the legislative body are clearly included. Even under the liberal view of the California case it would seem that the referendum would be inapplicable to votes on these proposed amendments, the action of the legislature not being properly legislative. See *Ellingham* v. *Dye, supra.*

Indeed it might reasonably be doubted as to whether the question of effective ratification of proposed amendments, the counting of the votes by the states, is really a judicial question. The section quaranteeing a republican form of government is a familiar instance of a constitutional provision held not to raise a problem for the *courts. Pacific Telephone Co.* v. *Oregon Supra.*

R. W. A.

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PRESUMPTIONS—BURDEN OF PROOF.—The case of *Gillett* v. *Michigan United Traction Co.* (Michigan, April 3rd, 1919), 171 N. W. 536, arose out of the following facts: Plaintiff, driving a Ford car with the curtains down, turned from the curb at the side of the street where he had stopped, to cross the interurban car tracks which ran through the center of the street in the city of Marshall, and as he drove his machine upon the track was struck by an interurban car and seriously injured. The evidence established beyond question, negligence of the defendant, by showing that the car was, at the time, exceeding the lawful rate of speed. The only question of fact in dispute was whether plaintiff was negligent in such manner as to have contributed to his injury. The case was taken from the jury upon the ground that the plaintiff had failed to discharge his burden of proving himself free from such negligence. In view of the case as presented to the supreme court its affirmation was required. There are one or two paragraphs of the affirming

opinion, however, which though in a sense *obiter,* may be considered worthy of note.

The theory upon which the case was taken from the jury was, that it was the duty of the plaintiff before driving upon the track, to have looked and listened for an approaching car. That had he done so he would have seen or heard the car which struck him, and to attempt to cross with that knowledge would be negligence, and if he failed so to look and listen he was negligent as matter of law. and in either case his action must fail.

The court's discussion is concerned mainly with the presumption of due care. One interesting phase of the opinion deals with the effect of the presumption of law upon the course of the trial. We recognize that there are two classes of such presumptions; the conclusive, permitting no attempt to show the non-existence of the fact presumed, and that which is disputable, requiring the finding of the fact presumed, in the absence of evidence tending to show that it does not exist, but permitting the introduction of such evidence to show that in the particular case, in spite of the presumption, it does not exist. That phase of the court's opinion here particularly referred to, is that which assumes, for the purposes of the court's discussion, that a rebuttable presumption of due care on the part of the plaintiff does obtain in certain cases until evidence tending to show its absence is given. In one paragraph the court says: "If uninfluenced by the presumption the jury reaches the conclusion that the evidence tending to show plaintiff's negligence, is not entitled to credit and should be disregarded, the presumption may then be considered as remaining in force so far as may be necessary to establish the fact that the deceased, (plaintiff), exercised proper care in all respects not expressly established by the evidence." In other words, though the evidence does "expressly establish" that plaintiff did not in certain respects exercise proper care, yet the presumption of due care is still operating in the case as to other phases of the question of due care, than such as are so "expressly established" by the evidence.

This question would, on first impression, seem to be purely academic, since if there is want of due care in the plaintiff in any respect which contributes to his injury, he must fail in his action, regardless of the degree of care he may have exercised in all other respects. The use made of it in the discussion of the court is to point out that if the evidence which goes to the jury tending to show want of due care in some definite particular, should still leave the jury ready to find due care in that specific feature of the transaction, that in such event the presumption would still operate requiring the conclusion of due care in all other respects than that to which the evidence introduced was relevant.

To illustrate: if a witness were to testify that the plaintiff did not "look," but no witness was able to testify that he "listened," that the court would be justified in instructing the jury that if, after considering all the evidence bearing upon whether he did look, they should be satisfied that the preponderance of the evidence was in favor of the contention that he did, then the presumption that he "listened" would still operate and require the finding that he did listen. This view necessitates the conclusion that the introduc-

tion of evidence in opposition to the presumption of due care of such probative value as must carry it to the jury, does not necessarily eliminate the general presumption of due care in accordance with the rule as we find it generally expressed, but only has the effect of eliminating the presumption in so far as that phase of due care is concerned to which the evidence is directly relevant.

Presumptions of law exist for the convenience of making proofs and so expediting trials, and are founded in the common experience of men with certain specific facts or conditions. Such experience has shown that certain facts and conditions are so related as that they are generally found to be co-existent. Rules of law applicable to such cases have come into existence requiring that where certain of the facts or conditions so related are found to exist, the other or others of such facts or conditions shall be found to exist—either with or without the opportunity, in the party against whom the rule operates, to show that such other facts or conditions do not exist in the particular case, dependent upon the uniformity of experience with such relations of facts or conditions.

Where the presumption of due care obtains it is grounded in the theory, that in the presence of known danger men usually are careful to avoid it, but that since, nevertheless many do not, the presumption is not conclusive but rebuttable. In this case the plaintiff knew of the railway track and that to cross it involved a serious measure of danger. These facts being proved, a recognition of the presumption in this case requires the conclusion that plaintiff exercised due care, but permits evidence in opposition to that conclusion.

The general rule that the presumption disappears with the introduction of evidence in opposition to the conclusion it requires, if sufficient to go to the jury, is recognized by the court in its opinion and needs no citation of authority to support it. The case is novel however, so far as the writer has been able to discover, in holding that evidence of sufficient probative value to carry to the jury the question of whether the plaintiff was negligent in some particular, does not open the whole question of due care to be determined upon the evidence presented, the presumption disappearing entirely.

Is not the presumption one, not that he "looked" and that he "listened" or that he did any other particular thing essential to due care, but that he did all things essential to that due care? If this be true should it not be concluded that one having the burden of proving due care, against whom there is introduced evidence tending to show him negligent in a material element of his conduct should be required to establish due care by his evidence unassisted by the presumption? Any evidence, worthy of consideration by the jury, in opposition to the conclusion required by the presumption, if introduced by the plaintiff, would defeat the presumption of due care under the general rule. The presumption, by giving a probative value to facts which they would not have except for the rule, is an exceptional method of proof and ought not to be extended to allow proof by it of any other than the fact to be presumed, that of due care, and when the conclusion of due care is

impeached by evidence of such substance as to present a real question for the jury, the presumption disappears.

Again in this case the court makes an unfortunate use of the term "burden of proof". As already indicated, the plaintiff insisted that because there was no witness who was able to testify that he did not "look" and "listen", that it was to be presumed that he did both, even though there may have been evidence that he was negligent in other respects, sufficient to take the question of due care to the jury. The court in discussing this claim of plaintiff says: "There is no reason why an unsuccessful attempt to show the negligence of plaintiff in some particular respect, should place upon him the burden of proving by affirmative evidence that he used due care in all respects —a burden which did not rest upon him before the attempt was made."

The criticism of this statement is, that that particular burden, that of proving "that he used due care in all respects", is just the burden which plaintiff, under the rule in Michigan, does take upon himself when he brings his action and it does not leave him till the trial is ended. He must lift this burden or he fails in the action. *Detroit & M. R. Co.* v. *Van Steinburg*, 17 Mich. 99; *Guggenheim* v. *L. S. & M. S. R. Co.*, 66 Mich. 150. The case was tried upon that theory and the opinion in all other portions proceeds upon that theory. V. H. L.