6-1941

Year Book of the Selden Society, Volume 5, Part 2 (June 1941)

VOLUME V PART II

THE YEAR BOOK
OF THE
SELDEN SOCIETY

JUNE, 1941

UNIVERSITY OF SOUTH CAROLINA
SCHOOL OF LAW

THE YEAR BOOK

OF THE

SELDEN SOCIETY

VOL. V JUNE, 1941 PART II

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Published Twice Yearly by the Selden Society, University of South Carolina Law School

ASHLEY PRINTING COMPANY COLUMBIA, SOUTH CAROLINA

THE YEAR BOOK

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SELDEN SOCIETY

VOL. V JUNE, 1941 PART II

The Fair Labor Standards Act of 1938

L. W. PERRIN, SR.*

The Fair Labor Standards Act was the capstone of a series of acts to establish a new social structure in the industrial world of the United States. It embodies many of the provisions to be found in other laws passed by the Congress in setting up this new order, such as the Walsh-Healey Act, the Wagner National Labor Relations Act, etc., and as a result considerable confusion has resulted. However, this confusion is not as real as at first might appear. We find only a reiteration of some of the same principles enunciated in the earlier acts. They are all designed to improve the situation of the laborers of this Country and to make easier the organizations work among the employees.

In Section 2 we find the Declaration of Policy as follows:

"(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the

* This paper was adapted by Mr. Perrin of the Spartanburg Bar for publication in the Yearbook from his address on this subject to the South Carolina Bar Association at its recent meeting in Camden, S. C.

orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

After giving certain definitions providing for the appointment of an Administrator and Industry Committees we come to Sections 6 and 7 of the Act which give us the real meat of the legislation. Section 6 provides the minimum wages that can be paid by an employer whose goods enter or may enter into interstate commerce, and Section 7 provides for the maximum hours that an employer may work an employee, without the payment of time and a half for all overtime. It is rather significant to note that while the theory of the legislation is that the hours of work should not exceed 40 hours per week, still an employer is permitted to work his employees a greater number of hours if he is able and willing to pay time and a half for overtime. This is nothing more or less than an enforced increase in wages. I do not intend by this statement to express any opinion as to the wisdom of this requirement.

The Supreme Court of the United States in the *Opp Cotton Mills, Inc., et al. v. Administrator of the Wage and Hour Division of the Department of Labor*, in Vol. 85, L. Ed., page 407, and in *United States of America v. Darby Lumber Company*, 85 L. Ed., page 395, has definitely settled the issue of the constitutionality of the Act. The Court in the last mentioned case has this to say:

"The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required. *Nash v. United States*, 229 U. S. 373, 377; 57 L. Ed. 1232, 1235; 33 S. Ct. 780."

The Administrator has issued a number of bulletins, giving his interpretations and regulations, which have been changed and enlarged upon from time to time. To keep up with the regulations alone would require the time of an expert. Some of these regulations and interpretations are so finely drawn as to leave serious doubt in the minds of the average practi-

tioner whether such interpretation will be sustained by the Courts. With little or no precedent to guide him, and in the face of the pronouncement by our Supreme Court in a recent decision that it would not be bound by the doctrine of Stare Decisis, where the reasoning of the Court in such precedent did not appeal to the reasoning of the present Court, the present day lawyer is sorely put to it to correctly and safely advise a client to disregard any ruling of the Administrator.

To illustrate my point I will give you a concrete example:

Section 541.3 of Part 541 of the Regulations provides specifically under what conditions certain professional employees would be exempt from the Act. In the proviso in Section 541.3 (B) we find "that this subsection (B) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or *any of their branches* and who is actually engaged in the practice thereof."

A corporation operating in this State had in its employ two trained nurses who had received a valid license to practice their profession from the proper Board in South Carolina authorized by Statute to issue such licenses. This service was rendered by the company for the benefit of their employees without any expense to the employees. These nurses had charge of the first aid room at the plant and performed their work just as they would have done if you had them in your home and for the same pay, with the sole exception that they were required to exercise a greater degree of discretion than in a private home where they would be more directly under the supervision of the doctor.

With this state of facts and under the provisions of Section 541.3 (B), I advised that in my opinion such nurses would not be covered by the Act. I submitted the matter to the State Administrator and was advised by him that in his opinion I was correct. About ten days later I received a letter from him reversing himself. Upon submitting the matter to the Office of the Solicitor of the Wage and Hour Division in the Department of Labor, I was advised that "nursing is not a recognized branch of the medical profession, etc," and for that reason the Division could not modify their interpretation of the regulations previously given.

It is my firm conviction that it was never the intention of the Congress that such a narrow construction should be placed

on the verbiage used in the Act. The result of such construction could very easily cause a discontinuance of this service to the employees and the loss of their jobs to the nurses, as the cost of putting on extra nurses would be prohibitive.

Another interesting example is that of a Village Policeman in one of the industrial villages of the State. Under the Statute law of our State a manufacturing plant can apply to the Sheriff of the County in which the plant is located for the appointment of a Deputy Sheriff or Village Policeman. Under the provisions of the Statute such policeman, if approved by the Sheriff, is appointed by him and is subject to the direction and control of the Sheriff in the performance of his duties. The Statute, however, provides that the manufacturing plant requesting such appointment shall pay the wages or salary of such Village Policeman. Some of the field representatives of the Wage and Hour Department have ruled that village policemen are subject to the Act solely because of the fact that the wages of such policemen are paid by the corporation. However, a casual reading of the Statute governing such matters should clearly convince any one that as between the corporation and the village policeman the relationship of employer and employee does not exist. The Village Policeman is by Statute made the employee of the Sheriff of the County in which he is appointed and all of his acts and doings are subject to the direction and control of the Sheriff. The only act which the corporation performs is to pay him his salary and that is required of it by the Statute. Neither the Sheriff nor his deputies or rural policemen are covered by the law and therefore, it occurs to me that any ruling which rules that said Village Policeman is an employee of the corporation is incorrect.

The weakness of the law so far as my observation has proven rests in the administration rather than in the law itself. It is tremendously expensive to employ field inspectors and representatives and as a result it has been necessary in many cases to employ men inexperienced in the performance of their duties and without any technical legal knowledge. Where discretion and the construction of the law are so necessary to accomplish the purposes and aims of the Act, the enforcement officers should be carefully selected so as to work as few hardships as possible in the absence of a wilful intent on the part of the employer to violate the law.

The inspectors who are sent out to the various plants of

the State go into a plant and where they find a violation of the Statute, even though entirely technical, are often exceedingly arbitrary in the demands made upon the employer. I am sure that it is not the intention of those in authority who are responsible for the administration of this Act to work a number of these injustices but, a greater amount of discretion should be permitted to such administrators to distinguish between a wilful and technical violation of some provisions of the Act, and on occasion to waive said violation in order that justice might be done. I could give you many instances where this discretion would have been in order but it would needlessly prolong this paper.

There is only one other phase of the Act which I would like to call your particular attention to and that has regard to the Child Labor provision. The Act provides that no producer, manufacturer or dealer shall ship or deliver for shipment in interstate commerce, or abroad, any goods produced in an establishment situated in the United States in which, within 30 days prior to the removal of the goods from the establishment, any oppressive child labor was employed.

I find in a service discussing the workings of this law, the following:

"A firm which does not employ individuals under the age of 18 will have no concern with this problem. Those, on the other hand, who employ persons under 18 years of age for any work, at any time or in any capacity, must be aware of the effect that the child labor provisions may have on their entire organization, as well as on all merchandise sold or produced by them. The full impact of the child labor provisions on violators cannot be exaggerated. Even minor and casual work done by one child in oppressive child labor may contaminate the merchandise produced by a plant in which hundreds of people work. Thereafter such 'hot goods' will find the channels of interstate commerce completely blocked and the gates of trade closed to them."

Please keep in mind that it is not essential that oppressive child labor should have been used in the production of the goods; the prohibition applies if such labor was employed in any capacity in the establishment.

Jurisdiction to Tax Intangibles

ANDREW BURNET MARION

The past few years have witnessed many startling changes in the field of Constitutional law resulting from the overthrow of judicial precedent and the blazing of new trails of legal thought by the Supreme Court of the United States. It is quite apparent that something akin to a revolution in constitutional interpretation has been in progress, the effects and results of which may be only interpreted by some legal historian yet unborn. Perhaps in no phase of constitutional law has there been a greater uncertainty and inconsistency as to the application of the basic principles involved as in the field of taxation of intangible personal property. Within the last fifteen years the Supreme Court has apparently permitted a complete reversal on the fundamentals of double taxation of intangibles.

The purpose of this paper is to review a few of the leading cases indicating the changes which have taken place and the tendency views of the present court rather than any presumptive interpretation as to the present status of the law involved.

To answer the question as to what constitutes the basis for jurisdiction to tax intangibles several theories have been produced over the years. The original theory of the basis of jurisdiction is expressed in the common law doctrine of *mobilia sequuntur personam* ("personalty follows the person") which has always been concededly a fiction employed for the convenience of the courts.[1] This fiction as a basis for taxation of tangible property was dispensed with early in American jurisprudence,[2] nevertheless it has persisted to appear as a factor to be considered in intangible tax cases. The second theory consists in bestowing upon intangibles an essentially fictitious situs for taxation analogous in principle to the actual situs of tangible personal property and real property. The result of the application of this theory has been similar to that of *mobilia sequuntur personam* in that

1. Annotations, 123 A. L. R. 184, 86 A. L. R. 742.
   Hawley v. Malden (1913), 232 U. S. 1, 58 Law Ed. 477.
   Bladgett v. Silberman, (1927), 277 U. S. 1, 72 L. Ed. 749.
2. Union Refrig. Transit Co. v. Kentucky, (1905), 199 U. S. 1, 50 L. Ed. 150.
   Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058.

situs has usually been determined as at the domicile of the owner, the fundamental difference being in the analogy to real and tangible personal property. As already suggested, the difficulty lies in determining where the situs can be for property having no corporeal existence. The adoption of this theory naturally precludes taxation at more than one place. The third distinct theory is that apparently now in current favor, the "benefits and protections theory." The doctrine that any jurisdiction may tax which offers any protection to the relationship of the parties involved, or from which the parties of the relationship receive any benefit is necessarily the fundamental doctrine of double taxation, appealing in its logic but difficult in application. These views are further complicating by divergences of opinion as to the applicability of the Fourteenth Amendment and differences as to the very nature of intangible property.

With this brief outline of the theories which have been employed, an examination of the cases will reveal the vicissitudes of opinion by which the present stage of more or less uncertainty has been reached. Shortly after the turn of the century the leading case of *Blackstone vs. Miller*[3] was decided in which Justice Holmes declared for the majority of the court that taxation by two states on different principles abridged no rule of constitutional law. The facts of this case reveal Blackstone domiciled in Illinois to whom a New York bank owed a debt in the form of a bank deposit. On Blackstone's death, Illinois taxed the entire estate and New York taxed the transfer of the deposit from the New York Trust Company to the estate in Illinois. The United States Supreme Court upheld both taxes. We quote this significant language of Mr. Justice Holmes: "No doubt this power on the part of two states to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted also that one state should be seen taxing on the one hand according to fact and power and on the other at the same time according to the fiction that in successions after death mobilia sequuntur personam and domicile governs the whole." Justice Holmes based his holding of double taxation on the grounds that the laws of the two states must necessarily be invoked to enforce the obligation. New York could tax as the law of the

3. 188 U. S. 189, 47 L. Ed. 439.

domicile of the debtor gave the debt validity. Justice Holmes considered since it was well settled the law of the domicile determined succession, the entire estate was brought under the law of Illinois consequently the entire estate was taxable there. *Blackstone vs. Miller* was a clear expression of the views of the court on that important question and later cases followed it as a well settled rule.[4]

Before the deluge of opposition overwhelmed the *Blackstone case,* this doctrine was attempted to be applied to tangible property. However in both *Union Refrigeration Co. vs. Kentucky*[5] involving a property tax and *Frick vs. Pennsylvania,*[6] an excise tax the Court held that a state had no power to tax tangible property permanently located out of state; the state having no jurisdiction over the property, the tax violated the Fourteenth Amendment. The fiction of *mobilia sequuntur personam* would not be applied in case of tangibles as it would produce an obvious injustice. Interestingly enough even in the *Union Refrigeration case* Justice Holmes resisted the application of the due process clause while concurring in the result.

The distinction between tangible and intangible property taxation was again clearly drawn in *Blogett vs. Silberman,*[7] in which it was held U. S. bonds, shares of stock, promissory notes located in safe deposit boxes in New York were subject to a Connecticut succession tax while the cash money in the safe deposit box was not taxable as the cash had the status of tangible property.

While the rumblings of discontent could perhaps be detected in prior cases,[8] the real conflict was produced when the court expressly overruled *Blackstone vs. Miller, supra,* in *Farmers Loan and Trust Co. vs. Minnesota,* (1930),[9] in which the court held that double taxation violated the Fourteenth Amendment.

4. Kidd v. Alamba, (1903), 188 U. S. 730, 47 L. Ed. 669; Buck v. Beach, (1906), 206 U. S. 392, 51 L. Ed. 1106; Board of Assessors v. Comptair National D'Escompe, 191 U. S. 388, 48 L. Ed. 232; Cream of Wheat v. Grand Forks, (1920), 253 U. S. 325, 64 L. Ed. 931.
5. 199 U. S. 1, 50 L. Ed. 150.
6. 268 U. S. 473, 69 L. Ed. 1058.
7. 277 U. S. 1, 72 L. Ed. 749.
8. R. I. Hospital vs. Dougton, 270 U. S. 69, 70 L. Ed. 475, (State could not tax stock of foreign corp. held by non-resident solely because corp. did business there.
   Safe Deposit and Trust Co. v. Virginia, 280 U. S. 83, 74 L. Ed. 180. (Va. could not levy property tax on trust in Maryland because beneficiary in Va.)
9. 280 U. S. 204, 74 L. Ed. 371, 65 A. L. R. 1000.

Here the decedent Taylor was domiciled in New York. Several bonds and other credits were located in the Trust Company in Minnesota. The court held the situs of the intangibles was in New York and there only would they be taxed. Justice McReynolds writing the opinion of the court undoubtedly decided the case largely on the basis of sound policy, as indicated in saying, "The inevitable tendency of that view is to disturb good relations among states and produce discontent." Justice McReynolds took the view that intangibles were property only in the hands of the creditor, and could be taxed only at the creditor's domicile. It was suggested that intangibles had a possible situs in four places: the creditor's domicile, the debtor's domicile, where the instruments are physically located, and where they have become an integral part of localized business. By analogy the court held that there was no such substantial difference from tangibles[10] to justify the harsh and oppressive discrimination against intangibles. The court therefore had decided that the intangibles were property only in the hands of the creditor consequently their only situs could be at the creditor's domicile, a tax elsewhere being a violation of the due process clause of the Fourteenth Amendment. Justice Stone concurred in the result giving expression to the benefits and protections theory he was later to more clearly enunciate. Justice Stone took the view that this being an excise or privilege tax on the transfer, "the privilege must be enjoyed by state imposing it." Minnesota law did not afford sufficient protection to give basis for tax on the transfer as New York law really governed the contract. Justice Stone opposed the view that intangibles could be localized at one situs and that double taxation would in all cases violate the Fourteenth Amendment. Mr. Justice Holmes again dissented consistently upholding his multiple protection of law theory announced in the *Blackstone case,* saying, "If the law of Minnesota is necessary to the existence of anything beyond a piece of paper to be transferred then Minnesota may demand payment for the privilege that could not exist without its help." It is seen that fundamentally Justices Stone and Holmes agree on the valid basis of the tax but differ more widely in its application. Holmes' view was still that the validity of the debt depended on the law of the domicile of the debtor and a tax there was constitutional however con-

10. Notes 5 and 6, supra.

trary to enlightened policy. "A good deal has to be read into the Fourteenth Amendment to give it any bearing on this case," he stated.

A few months later *Baldwin vs. Missouri*[11] further solidified the opinion of the *Farmers Loan case.* Here the decedent was domiciled in Illinois and bank deposits, bonds, notes were physically present in Missouri. Justice McReynolds applied his previous view, holding the situs of the intangibles were at the domicile of the creditor and not in Missouri for the purpose of taxation. Again the Fourteenth Amendment was invoked by the majority and again resisted by the dissenting Justice Holmes joined by Justice Stone.

Interesting to South Carolina lawyers is the case of *Beilder vs. South Carolina Tax Commission*[12] altho it adds little to the previous cases. Beilder was domiciled in Chicago, Illinois. The Santee Lumber Company, South Carolina Corporation, owed him a large sum of money on which South Carolina tried to tax a succession tax on this transfer. Again it was held the domicile of the debtor has no jurisdiction to tax, and here no business situs was shown in relation to the intangibles owed the non-resident.

The case following shortly thereafter of *First National Bank vs. Maine*[13] gives one of the clearest expressions of the doctrine announced in the *Farmers Loan case.* Here Maine was denied jurisdiction to tax the stock of a Maine Corporation held by one Haskell domiciled in Massachusetts. Justice Sutherland, holding only one state could constitutionally tax the same intangible clearly expressed the "situs" theory: "Due regard for the process of correct thinking compels the conclusion that a determination fixing the local situs of a thing for purpose of transferring it in one state carried with it an implicit denial that there is a local situs in another state for purpose of transferring the same thing there." Here the *Union Refrigerating, Frick, Baldwin,* and *Beilder cases,*[14] *supra,* are followed again applying the same rule both as to tangibles and intangibles. Again Justices Stone, Holmes and Brandies dissented arguing the practical solution of double taxation was through reciprocal legislation, not by stretching

11. 281 U. S. 586, 74 L. Ed. 1056.
12. 282 U. S. 1, 75 L. Ed. 131.
13. 284 U. S. 312, 76 L. Ed. 313.
14. Notes 5, 6, 11, 12, respectively.

the Fourteenth Amendment to an unwarranted extreme. In the language of the dissent, "The capital objection to it is that the due process clause is made the basis for withholding from a state the power to tax interests subject to its control and benefited by its laws." This case gives one of the clearest expressions of the cleavage in views of the various members of the court at that time. It is to be noted that throughout, from the first case to the final overthrow, there was vigorous opposition to the single tax situs by those considered among the ablest legal minds this country has produced. Also to be observed is the fact that while changes have occurred, the individual justices have persistently adhered to their own individual views; the changes being largely due to changes in the personnel of the court.

One exception to the attempted well ordered system of taxation by the creditor's domicile alone was admitted in allowing taxation by the state in which the intangibles had a so-called "business situs." The jurisdiction to tax intangibles at their business situs was recognized at an early date;[15] and followed in a number of cases,[16] which had not been overthrown by the *Farmers Loan case.* Consequently, when *Wheeling Steel Corporation vs. Fox*[17] was presented to the court, both counsel conceded the validity of the "business situs" theory. Apparently, it was considered that when "business situs" was established it precluded taxation by the domiciliary state. Here the court took a significant step forward in determining the existence of a "Commercial situs," that is, the place at which the real principal business of the corporation was conducted, irrespective of the state of incorporation. The implication here was that the jurisdiction of the commercial situs might tax all the intangibles of the corporation,[18] but the holding was here limited by interpretation of the statute to be only those intangibles "as upon the facts and law accord-

15. New Orleans v. Stempel, 175 U. S. 309, 44 L. Ed. 174 (1899).
16. State Assessors v. Comptoir Nat. D'Escompte, (1903), 191 U. S. 388, 48 L. Ed. 232; Metro. L. Ins. Co. v. New Orleans, (1906), 205 U. S. 395, 51 L. Ed. 853; Liverpool Ins. Co. v. Board of Assessors, (1910), 221 U. S. 346, 55 L. Ed. 562; Board of Assessors v. N. Y. L. Ins. Co., (1910), 216 U. S. 517, 54 L. Ed. 597. Also Annotations, 104 A. L. R. 806, 123 A. L. R. 194.
17. 298 U. S. 193, 80 L. Ed. 1143.
18. Later specifically held in First Bank Stock Co. v. Minn., 301 U. S. 234.

ing to the course of business may be within the jurisdiction of the state."

Two cases decided shortly thereafter indicated the growing tendency toward double taxation, although both involved income tax which offers perhaps more appealing grounds for double taxation. In *Cohn vs. Graves*,[19] Justice Stone speaking for the court, it was held New York could tax the income of its citizens derived from land located in New Jersey. This view was justified on the grounds that the different taxes were levied on separate and distinct taxable interests, while the double taxation which had been prohibited was that involving the same kind of tax on the same property interest or same transfer. Interestingly enough, Justice Stone, who wrote that opinion, later referred to it himself as not applying the rule of the *Farmers Loan, Baldwin cases, supra,* with strict logic.[20] Shortly after the *Cohen case,* the court in *Guaranty Trust Company vs. Virginia*[21] held that Virginia could tax the income of a resident beneficiary of a trust located in Maryland, although Maryland could at the same time tax the funds from which the payments were made, and the Fourteenth Amendment was not violated thereby. While these cases might have caused a few to pause and wonder,[22] the doctrine of a single tax situs for a specific intangible remained apparently firmly fixed.

Now came the turning point. In 1939, the Supreme Court in *Curry vs. McCandless*[23] completely shattered the lines of thought which had flourished during the past decade. The case is significant in its holding and even more significant in language employed by the Court, again through Justice Stone. Here the decedent settlor of the trust, in which he reserved the right to change the beneficiary and to dispose of trust estate by last will, was domiciled in Tennessee. The trust was located and administered solely in Alabama by an Alabama trustee. The case was appealed from the Tennessee

19. 300 U. S. 313, 81 L. Ed. 671.
20. See Curry v. McCandless, 307 U. S. 357, 83 L. Ed. 1339, 123 A. L. R. 162.
21. 305 U. S. 18, 83 L. Ed. 16.
22. See also Burnet v. Brooks, 288 U. S. 318, 77 L. Ed. 845, (U. S. could levy inheritance tax on intangibles located in U. S., altho owned by non-resident).
First Bank Stock Corp. v. Minn., 301 U. S. 234. (Commercial situs could tax all intangibles of corp. Right of others to tax reserved).
23. 307 U. S. 357, 83 L. Ed. 1339, 123 A. L. R. 162.

Supreme Court where it was conceded only one state could tax the succession on the death of the settlor. The United States Supreme Court entirely reversed this view holding there was a taxable interest in both states, and both could tax the whole succession. Justice Stone committed somewhat of an understatement in referring to the single tax situs of intangibles as a "doctrine of recent origin" which had "received support to the limited extent to which it was applied" in the *Farmers, Baldwin, First National Bank cases, supra.* Justice Stone further stated that doctrine had never been urged "to extent now pressed", a difficult statement to understand in that the language of the court effectively overturns the doctrine referred to almost in its entirety. It is significant to note, however, that the *Curry case* did not specifically overrule any case as the *Farmers Loan case* had done with *Blackstone vs. Miller.* There is, however, no doubt that the basis for taxation was entirely reversed in Justice Stone's expression of the "benefits and protection" theory. One of the substantial bases for this theory is a divergence in view from the opinions in the *Farmers Loan* and *First National Bank cases, supra,* as to the very nature of intangible property itself. The Court in the case of the *Bank vs. Maine*[24] took the view that intangibles were property which in the nature of things should have but one location for taxation. Justice Stone however defines intangibles as "such rights are but relationships between persons. They can be made effective only through control over and protection afforded to those persons whose relationships are the origins of the rights. Obviously as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived." Thus Justice Stone effectively disposes of the fiction of situs of intangibles. The opinion further makes a clear distinction between tangibles and intangibles in applying the benefits and protections theory, to wit: "When we speak of jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy fruits of his ownership and power to reach effectively the interests protected for the

24. Note 13, supra.

purpose of subjecting them to a payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others."[25] To revert to the facts of the case, it was held Tennessee could tax the entire estate as the decedent's power to dispose of the intangibles by her last will was a "potential source of wealth which was property in her hands from which she was under the highest obligation in common with her fellow citizens of Tennessee to contribute to support of the government whose protection she enjoyed." Alabama, it was held, clearly had jurisdiction to tax the trust based on the physical presence of the estate in Alabama and the legal ownership by the trustee in Alabama. It is important to note that the court expressly states the Fourteenth Amendment is no bar to double taxation, regardless of how unfortunate the result may be. The statement, "She necessarily invoked the aid of law of both states, and her legatees, before they can secure and enjoy benefits of succession, must invoke the law of both," is almost identical with the words of Justice Holmes in *Blackstone vs. Miller, supra.* This opinion prevailed only over vigorous dissent adhering consistently with the former view of the court in the *Farmers Loan* and *First Bank vs. Maine cases, supra.* The dissent asserted that the estate was taxable only in Alabama as there alone was the situs of the trust.

In a companion case, *Graves vs. Elliott,*[26] on almost identical facts, the trust estate was located in Colorado and the decedent domiciled in New York. The opinion in brief stated both states could tax the transfer at death on the basis of the *Curry vs. McCandless case.* Chief Justice Hughes again dissented applying the same rules to intangibles as to tangibles, and arguing that the majority view was simply pushing the ancient doctrine of *mobilia sequuntur personam* to an unwarranted extreme. It is respectfully submitted, however, that none of the justices adhering to the single situs theory have been able to answer the calculating logic of Justices Holmes and Stone as to the nature of intangible property and its taxability wherever the relationships are afforded "benefit

25. Sancho v. Humacoa Shipping Co., 108 Fed. (2) 159, later case, follows this view disallowing taxation of tangibles permanently located out of jurisdiction.
26. 307 U. S. 383, 83 L. Ed. 1356.

and protection" under the laws of the jurisdiction.

It will be noted that all of the cases previously discussed have been excise taxes on the transfer of intangibles. In *Newark Fire Insurance Company vs. Board of Assessors*[27] the court makes an indication of its view as to double taxation of intangibles in property taxes. Here New Jersey levied a tax on all the capital stock of a New Jersey corporation, which was resisted on the ground that the stock had acquired a "business situs" in New York. An evenly divided court held New Jersey could levy such a tax, four justices[28] contending the burden of proof that the stock had acquired a business situs elsewhere not being met. In writing this opinion Justice Reed stated the conclusion made it unnecessary to decide whether this was actually a property tax and whether the stock was taxable in New Jersey if a business situs was acquired elsewhere. The remaining four justices[29] on the basis of *Cream of Wheat Company vs. Grand Forks*,[30] decided before the doctrine of the *Farmers Loan case* was conceived, decided that the power of a state over a corporation of its own creation was a sufficient basis for taxation and furthermore that the "situs" was a fiction here immaterial. In view of the past performance of the court any prophecy as to the future holding of the court is an extremely hazardous undertaking but it is submitted that the opinion of the latter four justices above seems to represent more fully the present tendency as expressed in *Curry vs. McCandless* and *Graves vs. Elliott.* We further hazard the opinion that when the court is forced to squarely decide the issue of double taxation by a property tax of intangibles reserved in Justice Reed's opinion, the court will uphold the double taxation as a logical sequence to the excise taxation in *Curry vs. McCandless* and *Graves vs. Elliott, supra.*

It is interesting to note that the opposition has apparently fully capitulated to the majority and accepted *Curry vs. McCandless* as a correct doctrine. In *Massachusetts vs. Missouri*[31] where the decedent was domiciled in Massachusetts and the trust was located in Missouri, Justice Hughes, one of the confirmed dissenters in *Curry vs. McCandless,* here held that

27. 307 U. S. 313, 83 L. Ed. 1312.
28. Mr. Justices Reed, Butler, Roberts, and Chief Justice Hughes.
29. Mr. Justices Frankfurter, Stone, Black, Douglas. (Justice A. McReynolds dissented).
30. 253 U. S. 325, 64 L. Ed. 931.
31. 308 U. S. 1, 84 L. Ed. 3.

the *Curry case* was clearly applicable in allowing both states to tax. The significant point of this decision is that the court decided that no justifiable controversy was presented unless the assets of the estate were insufficient to pay taxes in both states, as was the situation with the Hedy Green estate in *Texas vs. Florida.*[32]

In *Pearson vs. McGraw*[33] the court rendered another enlightening decision. Here the decedent was domiciled in Oregon with the trust in Illinois. Six months before death and in contemplation of death he directed the trustee to sell bonds and convert into Federal Reserve notes, all of which remained out of Oregon. In answer to the argument that the Federal Reserve notes constituted tangible property, Justice Douglas held that the sale of bonds and purchase of notes was all one transaction of death, which constituted a taxable event, regardless of whether the converted property was tangible or intangible, and hence the tax did not contravene the Fourteenth Amendment. Whether Federal reserve notes were tangible or intangible property was not decided, but Justice Stone concurring took the view that they were to be treated as intangibles, *Blodgett vs. Silberman*[34] not having gone so far as to decide the point. Justice Stone also pointed out that in his opinion *Baldwin vs. Missouri*[35] should be specifically overruled.

The most recent declaration of the Supreme Court on the jurisdiction to tax is found in *State of Wisconsin vs. J. C. Penney and Company,*[36] with which *Wisconsin vs. Minnesota Manufacturing and Mining Company*[37] is a companion case. Here the tax involved is a levy on corporations on the privilege of declaring dividends out of income derived in the state. The Wisconsin court held the statute was unconstitutional[38] as to foreign corporations, Wisconsin being without jurisdiction to levy such a tax. The defendant was Delaware Corporation with principal offices in New York. The United States Supreme Court, reversing the state court, held the privilege

32. 306 U. S. 398, 83 L. Ed. 817, 121 A. L. R. 1179.
33. 308 U. S. 313, 84 L. Ed. 293.
34. Note 7, supra.
35. Note 11, supra.
36. 85 L. Ed. 222, (Ad. Ap. No. 4, 1940), 130 A. L. R. 1237
37. 85 L. Ed. 230, (Ad. Ap. No. 4, 1940).
38. 289 N. W. 677, 126 A. L. R. 1344. Annotation on State report. Since overruled, of little value. Annotation on U. S. case, 130 A. L. R. 1237.

of doing business in Wisconsin supported the tax although contingent on events happening out of the state, that is, the declaration of dividends by directors in New York, as the tax was based on transactions within the state, the income being derived from business in Wisconsin. Examining the language of the opinion, we may ferret out of the sequipedilian verbiage of the learned Justice Frankfurter a clear indication that the "benefits and protection" theory is the basis for taxation of intangibles regardless of the element of double taxation.[39] Justice Frankfurter expresses the rule thus: " 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritorriality' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. That test is whether property was taken without due process of law or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple and controlling question is whether the state has given anything for which it can ask return." The foregoing statement is as clear expression of that theory as this author has been able to find.

The fine logic of Justices Holmes, Stone, Douglas and Frankfurter in formulating the theory that the jurisdiction to tax is based on the existence of service rendered by the state, it is submitted, has yet to be answered on a satisfactory basis of argument on constitutional principles. While on practical grounds of policy, the argument by Justices McReynolds and Hughes in *Farmers Loan and Trust Company vs. Minnesota* and cases previously discussed is appealing as a convenient method of avoiding an unfortunate result, on sound logic we must advert to the doctrine of *Curry vs. McCandless,* for a clearer application of constitutional principles. This view is nevertheless yet subject to severe and able criticism.[40] It is inadvisable to lay down any rule but in the broadest general terms as the recently adopted doctrine is apparently still in a state of flux. With the rule as expressed by Justice Frank-

39. Note: Cases annotated after Curry v. McCandless may be out of step with present view. In re Dorrance, 3 A. (2) 682, decided shortly before Curry v. McCandless and rather inconsistent with it, is annotated 127 A. L. R. 387, subsequent to Curry case. Annotation, 123 A. L. R. 189.

40. "Must We Carry Our Stocks and Bonds in Our Pockets," Floyd Dix, 15 Ind. L. J. 373.

furter in the recent *Wisconsin vs. Penney case,* the difficulty will lie not in expression of principle but in its application, which will largely rest on the facts of the particular cases. It will be recalled that in the *Farmers Loan and Trust Company case,* Justice Stone concurring and Justice Holmes dissenting were rather close in their views as to the law involved but diverged widely on its application to the fact to reach opposite conclusions.

As a result of *Blackstone vs. Miller,* many states in order to avoid the consequences of double taxation adopted reciprocal statutes exempting taxation on intangibles taxed in another state at the creditor's domicile for purposes of inheritance tax.[41] Those statutes still remaining on the books now return to importance as a result of the recent cases discussed above. The South Carolina Supreme Court recently avoided double taxation of income[42] by interpreting the statute referring to "residents" as meaning not merely those residing in South Carolina but those domiciled therein.

With the Fourteenth Amendment eliminated as restriction on double taxation, the way seems clear for broader fields of taxation by conflicting jurisdictions in the field of death taxes, intangible property taxes and income taxes, subject to limitation by statutory regulation. It must be remembered that the recent line of cases have not specifically overruled any prior decisions. It remains to be seen in future decisions by the Supreme Court on presentation of new situations the extent to which the doctrine of benefits and protections afforded by the state as a basis for taxation will be applied.

41. 15 Ind. L. J. 373, 394, supra, note 40,: The following states do not levy an inheritance tax on intangibles of non-residents decedents: Delaware, Florida, Maine, Massachusetts, N. Y., N. J., R. I., Tenn., Va. Following can levy such a tax: Ala., Ariz., Ark., District of Columbia. Kansas, Kentucky, Louisiana, Minnesota, Mo., Mont., N. C., Oklahoma, South Dakota, Utah, Washington. Nevada has no estate tax. All others have reciprocal statutes. N. B. for South Carolina reciprocal statute see proviso Section 2480, Vol. II, 1932 Code.

42. Phillips v. S. C. Tax Commission, 12 S. E. (2) 13, 195 S. C. 472. Footnote: This general subject has been subject of many law review articles, many of which are now outmoded by the present tendencies. Of the more recent articles worthy of note are as follows: 15, Ind. L. J. 373, Op. Cit. note 40 and "Jurisdiction to Tax Intangibles," 13 So. Cal. 537.

The Status of the Catawba Indian

ROBERT DOSTER AND J. A. GASQUE

The Catawba Reservation—seven miles from Rock Hill, S. C., is one of the few Indian Reservations which is not under control of the Federal Government, but is instead wholly regulated by its State Government. Six hundred barren and unproductive acres comprise the reservation, which affords a home for almost three hundred Catawbas. This poor tract is a far cry from the happy hunting grounds of a nation once the proud owners of a vast and fertile region.

The fact that the Catawbas live upon a reservation provided by the State of South Carolina takes them out of the general status of the Indians in the United States. Generally the U. S. controls Indian affairs under the Commerce Clause of the Constitution (Article I, Section 8, Clause 3). This clause states that "Congress shall have power to regulate commerce .... with the Indian tribes." The fact that the State regulates Indian affairs in South Carolina does not usurp any federal power, for it has been held in many cases that until the Federal Government exerts a power granted it by the Constitution, the state may exert that power.[1] And so far Congress has done nothing in a material way for the welfare of the Catawba Indian. Therefore, the State of South Carolina can pride itself on having done more for the Indian than has Uncle Sam, for the State provides the sum of $9285.00 per year plus the six hundred acres of rocky land. This figure includes school and administrative expenses and provides after these costs approximately $24.00 a year for each individual's support. And further, the State exempts the Catawba from taxation.

However, for these benefits, and exemptions, the Indian (as is befitting all contracts) pays a price. He is called a "Ward of the State," cannot vote and has none of the rights or privileges of citizenship in this state.

In looking back to ascertain how the Catawba reached his present status, we find that at about 1840 almost all of the Catawbas in South Carolina were destitute, living a hand to mouth existence, having leased out what lands they had previously lived upon. Usually the leases were for a period of

1. Barnwell v. S. C. Hy. Dept., 82 Law Ed 734.

ninety-nine years, and as such, left only a right in the land to have the annual rents for their support. This right would be extinguished eventually by lapse of time as their title was never regarded as more than a mere right of occupancy, subject to the control of the Legislature.

The Legislature at all times claimed and exercised the right to enact such laws regulating the control and disposition of these lands as in its judgment was for the best interest of the Indian. Since the Indians at that time were entirely unfitted to care for themselves in a white man's world, the State, in the nature of an experiment, entered into a treaty with the Catawbas in 1840 (ratified by the Legislature that same year) whereby the State agreed to buy for them land to the value of $5000.00 in North Carolina, and pay the Indians $2500.00 in cash upon their removal to that land. However, North Carolina was very much opposed to the settlement there of this group of nomads, and land for the Catawbas was never purchased in that State.

How the Catawbas obtained the land on which they are now settled must be inferred from a letter of Governor Hammond dated November 28, 1843:

"Unless they could be prevailed on to allow themselves to be removed beyond the Mississippi (evidently referring to the Act of Congress offering lands beyond the Mississippi to all Indians who would go there) . . . then I know of no better arrangement for the present than to continue the experiment now going on.

A farm has been purchased for them, on which nearly all now in the State have settled."

We can find no record of the farm referred to above, but since the Catawbas have not moved since that time, the Governor must have been alluding to the present tract of land on which they are now settled.

We find no other noteworthy mention of the Catawba Indians until April 7, 1888, when a letter from the Secretary of the Interior gives his opinion of their status. He reasoned that since Congress has never assumed its jurisdiction, and had never legislated for their Government in any respect whatsoever, the treaty of 1840 between the State of South Carolina and the Catawbas was valid. "It was not necessary under laws of that time for the State to obtain the consent of the U. S. to make valid any treaty between State and Catawbas,

as the lands had never been owned nor controlled by the U. S. . . . General Government never had the fee."

So we find that for the last hundred years these Indians have lived off whatever amounts the Legislature has seen fit to dole out from year to year. Their numbers have increased from the forty or fifty originally settled on the tract purchased for them, in 1840 or '42, to almost three hundred at the present time.

There are no South Carolina cases which might clarify the question of the eligibility of a Catawba Indian to exercise the right of suffrage, nor are there any on his status as a citizen. The only case we can find is that of *State, ex rel. Marsh vs. Managers of Elections for the District of York,*[2] which excluded an Indian (not a Catawba) from voting on the grounds that he was not a free, *white,* male, which attributes he must have had under the Constitution of 1829 in order to vote. This case is hardly applicable now since the State Constitution has been amended and since the enactment of the fourteenth amendment to the Federal Constitution.

Generally, however; the U. S. Indian, while on a reservation, receiving the care of the Government, has no right to vote in State elections, and is not regarded as a citizen of his local State. The Courts reach this conclusion through reasoning that since the Indian is a ward of the United States, he is not accountable for breach of State Law to State authorities, and since the Indian contributes nothing to the support of the State, being exempt from taxation, then he may not enjoy the rights and privileges of a citizen of the State.

The same result would probably be reached in South Carolina should the rights of suffrage and citizenship of the Reservation Indian be tested in the South Carolina Courts, for here, not only does the Indian fail to contribute to the State, but also is a very definite burden, since he is supported entirely by the State and not by the Federal Government as elsewhere.

The Catawba, by his very status as a ward of the State while on the reservation, labors under a terrific burden when he leaves his State—provided domicile; for upon his removal from State care (with intention to settle elsewhere), all rights of citizenship undoubtedly do accrue to him. He immediately

2. 1 Bailey 215.

loses all the exemptions and benefits that were his as a reservation Indian, and must take up his burden as a taxpayer; therefore it would be extremely illogical and harsh if he should not receive all the rights of a taxpayer and self-supporting resident. His status off the reservation would surely be the same as that of any other competent resident of the State since there is no statute limiting the rights of the non-reservation Indian. Any such statute so limiting his rights would undoubtedly be unconstitutional.

The catch comes, though, when a non-reservation Indian attempts to deal with the general public. Most people know that the reservation Indian is a ward of the State or Federal authorities, or that he is protected in some way, and are very wary about having any dealings with him whatsoever, either on or off the reservation. The majority of us look upon him as possessing the legal status of an incompetent or minor, and having no power to enter into any binding contracts. Much would be done to help the Indian make his individual way, if the Legislature would pass a bill granting non-reservation Indians full powers of citizenship. Such a bill would give him nothing which he does not have now, but would certainly clarify his status in the public mind in this state.

However, taking all factors into consideration, there is very little that the State itself can do for the Indian. South Carolina has never had the need nor the ability to spend a great deal of time and money on the study of Indian problems and on the care of the Indians themselves; she has too few within her borders. The problem of the Catawba logically rests with the Federal Government. Congress exerts and has exerted for years, control over almost all the Indians within the boundaries of the United States, getting authority directly from the Constitution. With this wealth of experience, the Federal Government should be able to provide for the Catawbas: the State has proven itself not fitted for the job.

The taxpayers of South Carolina have for years been contributing to the Federal Treasury money for the support of the United States Indians; but as yet, not a penny of this money has been used to take care of the Indian problem within their own State. Instead, Congress has consistently appropriated funds for Indians in other states, neglecting entirely its duty to the Catawbas.

Perhaps the Catawbas had their chance to avail themselves

of Government bounty when, in the middle of the nineteenth century, Congress offered to provide lands for all Indians who would remove themselves west of the Mississippi. Be that as it may, the problem still remains. South Carolina cannot properly provide for her Indian population; she, along with the other states, is paying the Government for Indian control and support. The Government uses this money to help all Indians, except those who do not on their own volition avail themselves of such aid—and the South Carolina Catawba. The Catawba wants and needs such aid, and it has not been given them.

Of course Congress cannot understand the native tongue of the Catawba, but we hope their cry for aid will strike humane ears in that body. But for the present we leave the Catawba, "Ward of the State."

Retrospective Effect of Departure from Precedent

MYRTLE HOLCOMB

Blackstone, after an expose on *stare decisis*, said, "Yet this rule admits an exception where the former determination is most evidently contrary to reason; much more so if it be clearly to the devine law. But even in such cases the *subsequent judges do not pretend to make a new law* but to vindicate the old one from former decisions manifestly absurd and unjust, but is declared that it is *not* the established custom of the realm, as has been erroneously determined."[1] It is a method of correction of archaic anachronisms and a filling of the gaps in case law. This general principle is still followed in this country and in England.[2]

The courts have established an exception to this rule where a constitutional section[3] or a statute has been construed in a given way by court of last resort, and contracts have been made or rights acquired thereunder, such vested rights will not be disturbed by the change in interpretation.[4] But, "in the construction of a statute of descents established by decisions of the courts at the time of a quitclaim deed by the heirs claiming under the statute becomes a part of the contract and must govern the rights of the parties as against a different construction thereafter adopted by overruling the

1. 18 N. C. L. Rev., 199.
2. 85 A. L. R. 254, Gr. N. Ry. Co. v. Sunburst Oil and Refining Company, 287 U. S. 358, Jackson v. Harris, 43 F. (2d) 513, Frankfort v. Fuss, 235 Ky. 143, Donohue v. Russell, 264 Mich. 217, Oliver v. Lynn Meat Co., 230 Mo. App. 1021, Eberle v. Koplar, Mo. App., 85 S. W. (2nd) 919, People, ex rel Rice v. Graves, 242 App. Div. 128, Mason v. A. E. Nelson Cotton Co., 148 N. C. 492, Nickoll v. Racine Cloak & Suit Co., 194 Wis. 298, 7 R. C. L. 1010, 14 Am. Jur., Sec. 130, p. 346, Vol. 14.
3. Great Northern R. Co. v. Sunburst Oil and Ref. Co., 287 U. S. 358, (1932).
4. Gelpcke v. Dubuque, 17 L. Ed. 520, Hasskett v. Maxey, 134 Ind. 182, Harris v. Jex, 55 N. Y. 421, Mason case, supra, note 1, Kelley v. Rhodes, 7 Wyo. 237, Halter v. Nebraska, 205 U. S. 34, Robinson v. Schenck, 102 L. Ed. 307, State ex rel May Dept. Stores Co. v. Haid, 327 Mo. 567, Storrie v. Cortes, 90 Tex. 283, Havemyer v. Iowa County, 101 U. S. 679, State ex rel Pitts v. Nashville Baseball Club, 127 Tenn. 292, People v. Ryan, 152 Cal. 364, State v. O'Neal, 147 Ia. 513, Taylor v. Ypsilante, 134 U. S. 60, Douglas v. Pike County, 148 N. C. 485, Odom v. State, 130 Miss. 643, Jones v. Woodstock Iron Co., 95 Ala. 651, People v. Maughan, 149 N. C. 253, Hill v. Brown, 144 N. C. 117, State v. Fulton, 149 N. C. 485, Schramm v. Steele, 97 Wash. 309.

former decisions."[5] "The true rule in such cases is held to be to give a change of judicial view in respect to a statute the same effect in its operation on contracts or existing contract rights that would be given to a legislative repeal or amendment, i. e., make it *prospective* rather than retrospective[6] in operation. It would have the same result in operation on contracts, etc., that would be given to a legislative repeal or amendment.

There is some authority that the exception to Blackstone's theory, effective in the majority of jurisdictions in this country, concerning vested property rights or contract rights—*should be the only exception* to the rule concerning the influence of overruling precedent;[7] whereas, in a few states, in instances of *unusual hardship* where personal liberties in a criminal case are involved or concerns vested realty rights,[8] the rigid rule has been *relaxed.* But, it has been held this principle should not be extended to an erroneous decision on general mercantile contrary to the accepted doctrine of recognized business methods[9]. Again, courts say the rule of exception applies with less force to constitutional cases than in ordinary litigations involving vested property rights.[10]

Where such important interests are grounded on a former ruling it should not be applied retrospectively for it is as undesirable as an *ex post facto law*, having the same effect. Some courts say where rights are acquired based on a former finding, it should not be overruled and the new decision applied retrospectively even though the former judgment was

5. 7 R. C. L., Sec. 36, p. 1010, 14 Am. Jur., Sec. 130, p 346, Haskett v Maxey, 134 Ins. 182, Donohue v. Russell, 264 Mich. 217, State ex rel Midwest Pipe & Supply Co. v. Haid, 330 Mo. 1093, People ex rel Rice v. Graves, 242 App. Div. 128, Bagby v. Martin, 118 Okla. 224, Outer Harber Wharf Co. v. City of L. A., 49 Cal. App. 490, State v. Greer, 88 Fla. 249, Haven v. McCarthy Bros. Co., 163 Minn. 339, Bank of Philadelphia v. Posey, 130 Miss. 825, S. R. Fowler and Son v. O'Ham, 176 N. C. 12, City of Sidney v. Cummins, 93 Ohio St. 328, Gillespie v. Wilson, 1010kl 62, McLaughlin v. McLaughlin, 44 R. I. 429.
6. U. S. Constitution, Article 1, Section 9; U. S. Constitution, Article 1, Section 10; U. S. Constitution, Article 1, Section 10, sub-section 1; S. C. Constitution, Article 1, Section 8.
7. Mason v. A. E. Nelson Cotton Co., 148 N. C. 492, People ex rel Rice v. Graves, 273 N. Y. S. 582.
8. Supra, note 7, People v. Ryan, 152 Cal. 364, State v. O'Neal, 147 Ia. 513.
9. People ex rel Rice v. Graves, 242 App. Div. 128, Mason case, supra,
10. 7 R. C. L., Section 36.

based on an erroneous interpretation of the law[11]. While Blackstone's rule is "almost universally" adhered to in this country[12], in Texas[13] a decision of the highest court of the state holding a given statute constitutional *will not be left in force, after a subsequent decision of the same court overruling the former decision* and holding the statute unconstitutional, as to contracts entered into before the latter decision was rendered. Under this interpretation, where the court overruled a past finding and holds a statute unconstitutional, such decision does not impair the right of contract entered into before the latter ruling was rendered[14].

It should be noted, what a court declares to be the law always was the law, until reversed on appeal or a subsequent court ruling, notwithstanding earlier decisions to the contrary[15]. Yet, the rule of *stare decisis,* (which Cardozo said[16] should be the *rule* rather than the exception but saw the necessity of flexibility even to the extent of abandoning precedent in given cases where it has been tested by experience and found lacking), should be elastic. South Carolina in *Elkin v. Southern Railway*[17] recognized the effect of strong and controlling circumstances which should be required to reverse rules of property embodied in a former holding. This case indicates the rule of precedent's strength as does *State v. Platt*[18] where the Court pointed out, later cases involving similar questions as the one at bar, were not sufficient to overthrow a decision regarding criminal practice which had stood over 100 years unchallenged. The Supreme Court of South Carolina has said where there are conflicting precedents, the latest will be followed[19]. The Court has taken judicial notice of the fact a decision cited by counsel had two justices concurring and two dissenting and a fifth concurring only in the result of the main opinion. The Court said it was not to be considered as judicial precedent. Hence, the weight of the

11. Halter v. Nebraska, 205 U. S. 34, Robinson v. Schenck, 102 Ind. 307, Bouvier, Vol. 2, p. 2118.
12. 7 R. C. L., Section 36, 14 Am. Jur., Section 130, p. 347.
13. Storrie v. Cortes, 90 Tex. 283.
14. Federal Constitution, Article 1, Section 10, applies to legislation and not court decisions.
15. Third Decennial Digest, Vol. 7, Section 100.
16. Nature of Judicial Process by Cardozo, Lecture IV, p. 149, 150.
17. 156 S. C. 390.
18. 154 S. C. 1.
19. Bruner v. Automobile Insurance Co. of Hartford, Conn., 165 S. C. 421.

Court one way or the other determines the importance of the case as pro futuro[20] as well as retrospectively.

In the case of *Davenport v. Caldwell*[21] the S. C. Supreme Court pointed out, the Probate Court is a court of limited jurisdiction, being an inferior court without power to hear a partition of land suit as it did in this case. The adoption of the Circuit Court of Probate Court's ruling did not cure the defect for the Lower Court had no jurisdiction of the subject matter. The judgment of the Circuit Court was reversed and the case was remanded, with instructions that the proceedings in the Court of Probate be dismissed so far as they related to the partition of real estate. While it was the custom of the local Bar to have partition cases decided in the Probate Court, that court did not have power to hear—but this was *not retroactive in effect.* In this same case the Court applied the statute of 1865[22] retroactively in that children born of slaves, whose parents lived together after the emancipation statute and were considered legitimate children capable of inheriting from each other as well as from their parents although a slave could own no property[23] being incapable of inheriting. According to Sheperd this case has not been cited on these points since.

In the case of *Walker v. State*[24] a contract valid under the laws of the state, as expounded at the date of the contract, *cannot be affected by any subsequent decision* of the courts altering the construction of such laws. This case has often been cited.[25] The same rule was adhered to in 1886 in *McLure v. Melton*[26] where it was held a contract which was valid under the law as set out at its date cannot be impaired by subsequent decisions. This is "a doctrine," the court said, "confined to cases of contract, and probably not even then, when it depended upon a single case, never recognized nor followed, and overruled at the first opportunity." This decision also

20. Mosley v. American National Insurance Co., 167 S. C. 112.
21. 10 S. C. 317, (1877).
22. 13 Stat. 269—Act to regulate the domestic relations of persons of color.
23. Ex Parte Boylston, 2 Strob. 41, Fable v. Brown, 2 Hill Eq. 378.
24. 12 S. C. 200.
25. 163 S. C. 251, 163 S. C. 254, 163 S. C. 278, 166 S. C. 490, 105 U. S. 180, 26 L. E. 1036, 127 U. S. 230, 32 L. E. 131, 8 S. C. R. 1060, 13 F. 301, 97 A. L. R. 445.
26. 24 S. C. 559.

has been cited frequently.[27] In *Piester v. Piester*[28] the Supreme Court of South Carolina adhered to the same rule supra and held not to have effected a change in the law, impairing "the obligation of contract, nor divesting any rights vested by the decision in *Edwards v. Saunders*[29] *which was simply an erroneous declaration of the law.*" This case has been quoted many times.[30]

Does South Carolina follow Blackstone on this important question of the effect of overruling precedent? The *Davenport case*[31] decided in 1877, applied the ruling pro futuro because of the *hardship* involved relative to the infirmities of many South Carolina titles to realty. In the *Piester case*[32], 1884, the court pointed out that a former decision on the point was *"simply an erroneous declaration of the law."* This is the rule of Blackstone "the subsequent judges do not pretend to make a new law but to vindicate the old one from former decisions which are manifestly absurd and unjust, but is declared that it is not the established custom of the realm, as has been erroneously determined." South Carolina follows so much of the rule.

But the American cases have established an exception to this principal, i. e., where contract rights or vested property rights are concerned the ancient English doctrine is not applied. Here, again South Carolina apparently falls in line as exemplified in the *Davenport case* concerning vested property rights as well as in the interpretation of a constitutional section and contract rights found in the *Piester case*, the *McLure case,* and the *Walker case,* I can find no case on any other part of the Constitution than contracts, nor can I find any case in South Carolina on interpretation of a statute. Does South Carolina follow the general rule concerning the prospective theory? With some reservations, we say, apparently yes.

27. 133 U. S. 380, 33 L. E. 660, 10 S. C. R. 407, 126 S. C 193, 141 S. C. 300, 173 S. C. 253, 24 F. (2nd) 523, 88 A. L. R. 258
28. 22 S. C. 139.
29. 6 S. C. 316.
30. 125 S. C. 354, 136 S. C. 318, 141 S. C. 299, 133 U. S. 283, 33 L. E. 662, 10 S. C. R. 408, 17 F. (2nd) 505, 174 F. 656, 76 A. L. R 410
31. Supra, note 21.
32. Supra, note 28.

THE YEAR BOOK

OF THE

SELDEN SOCIETY

VOL. V JUNE, 1941 PART II

J. C. HARE A. B. MARION

Editors

EDITORIAL

In the present issue the editors of the *Year Book* take pleasure in publishing articles by two eminent attorneys of the South Carolina Bar. Mr. Lewis W. Perrin of Spartanburg kindly adapted the address on The Fair Labor Standards Act he delivered to the South Carolina Bar Association in its recent spring convention in Camden for publication in the *Year Book.*

The paper by Mr. R. B. Herbert, Sr. was delivered at the recent annual banquet of Wig and Robe, the honorary scholastic society of the Law School.

At the request of several members of Wig and Robe, who were much impressed by its delivery, the editors obtained his article for the editorial section of the book. Incidentally both Mr. Perrin and Mr. Herbert are alumni of the University and each had during the past year a son enrolled in the Carolina Law School.

Both articles are published with pleasure and we wish to reiterate the staff of the *Year Book* welcomes criticism and contributions from members of the bar.

WIG AND ROBE

Recently initiated into Wig and Robe on the basis of scholastic excellence in Law School were the following juniors: Mr. Tom McCutcheon, Mrs. Fleming Mason, Mr. William Rhodes, Miss Eva Bryan Wilson and Mr. R. C. Liles. Mr. W. T. McGowan and Mr. John Henry Ellen were elected from the senior class. Mr. McCutcheon having the highest average will serve as Chief Justice and Mrs. Fleming Mason will serve as Clerk of Court.

The following have been members from the senior class during the past year: Messrs. Arthur M. Williams, Jr., Chief Justice; Andrew B. Marion, Clerk of Court; Matthew Poliakoff, J. C. Hare, and R. B. Herbert, Jr.

OFFICERS OF THE SELDEN SOCIETY

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The Mental and Spiritual Development of the Lawyer

R. BEVERLEY HERBERT, SR.

When I asked my son who brought me your kind invitation what I should talk about, he said you didn't want me to talk about how to get clients or to win cases. He may have been impressed by the fact that I have not been very successful of late in either. From this I understand you wish for a little while to forget about fees and retainers and suits at law and bills in equity and torts and contracts and all the other impedimenta of lawyers; that ere you suspend your shingles to the chilling breezes you would like to sit down around this board as friends and companions and gentlemen and scholars and think and talk about other things—things of the mind and spirit—things that in the strife and conflict of a law practice are too soon forgotten.

If I am correct in thinking that this is what you wish, and I think I am, then I meet you in that same spirit and will try to show as much courage as you have shown. I say to you in effect that while my life has been too much given to the material things, that while I have grubbed and delved and trafficked and traded, I am yet glad to put all these things aside and talk with you a few minutes, perhaps in not a very apt way, about things of the mind and of the spirit without which the life of a lawyer is no better, if indeed as good, as that of a well digger and a hod carrier or a fish monger. I think it was Scott who said a lawyer without history or literature is no more than a mechanic. So I shall talk about how to make a success at the bar in a mental and spiritual sense.

In order that you may not think we are getting into a too rarified atmosphere too suddenly, I hasten to remind you that after the manner of Judges and lawyers I have twisted your instructions to suit myself.

After all, what about you could possibly interest me so much as the fact that you are about to set out on a journey which I began more than forty years ago. With all my heart I am glad to have you tell me that for the moment at least you are not concerned about the material things in the practice

of law. In more than forty years at the bar I have not known of a single instance of a man who failed at the bar in a material sense until he had long since failed in most other respects. I have started out to practice law on three different occasions, first when I was admitted, next after a considerable illness and last after I had been out of the country for some months, and yet I have never practiced a month without making enough to live on, and by no chance can the least of you know as little law as I did during my earlier years at the bar.

So I tell you unhesitatingly that I am far more afraid you will dry up mentally and spiritually than that you will starve physically. Your sad fate is too apt to be that you will wax fat physically and possibly materially while you shrivel and shrink mentally and spiritually.

You are leaving this really good law school where you have been prepared to take part in a game, a very fascinating and absorbing game, so absorbing that you must have a care that you do not let it sap the very finest things in your nature.

You may tell me that you know that to eat and sleep, to make and spend or to make and save is not the chief end and aim of man and that what I am saying is only a common place but I ask you how many of us act on it.

More than twenty-three hundred years ago one of the wisest and best of men said to his companions:

> "Oh, Mortals, whither are you hurrying. What are you about. Why do you tumble up and down, O miserable wretches! like blind men. You are going the wrong way and have forsaken the right. You seek prosperity and happiness in a wrong place where they are not. Why do you seek this possession without. It lies not in the body. It is not in wealth, for how full of lamentation are the rich. It is not in power, for otherwise those who have been twice and thrice consuls would be happy; but they are not."

And he pointed out to them that only in the mind and in the spirit are to be found real peace and happiness and freedom there is not greater today than it was in the days of Socrates. and prosperity and yet the proportion of those who seek them

In our own day a great poet has written:

"How all too high we hold
The noise that men call fame
The dross that men call gold."

Yet how many of us who do lip service to this sentiment abate our quest for fame or our search for gold.

But how you may ask me may we come to these things of the mind and the spirit which are to give the freedom and security and peace and happiness which you tell us the material things will not give. Truly they are not to be bought in the market, "Nor place, nor power, nor pelf" will get them for you. They are earned by each man for himself. They are found like the treasures of the Divine promise—"Seek and ye shall find, knock and it will be opened unto you."

They are to be had by association with the truly great of all ages and the making of their thoughts your thoughts. Chiefly in the great books of the world you will find those great things of the mind and the spirit which you are to make your own.

Disraeli said:

"Nurture your mind with great thoughts. To believe in the heroic makes heroes."

You may think, my young friends, that there is no place for the heroic in the practice of law but you will not practice very long before you will find need for all the courage and strength you possess. And just here I am bold enough to make a prediction. Unless I am mistaken your life is not destined to be cast in the soft pattern of the years that have just past and for my part I do not view the change with any degree of regret. If I may refer to a personal experience, not many days ago I served on two committees and in each case we sat and argued as to whether we should make a real report or whether we should weazel out with some weak words. The time is coming fast when men must be men and you must prepare yourselves mentally and spiritually for that time.

So we come back for a moment—

You are to develope the intellectual and the spiritual.

You are to nurture your minds with great thoughts.

You are to get them from great books. What books are you to read? You may make up your own list, but I am glad to give you mine.

First, the Bible—and I say this aside from its religious con-

tent. You may believe the Garden of Eden was a cocoanut grove for a million years with monkeys throwing down cocoanuts. You may believe the Christ was a mythical character evolved by the church for the purpose of fusing the minds of men into a religious empire. You may believe that when the last breath leaves your body you will be as if you had never been. And after you have said all these things the Bible is still the greatest book in the world. For wealth of language for breadth of experience and depth of feeling it is unequalled by any other book. Its images and its language have permeated our entire existence and you, after the example of Abraham Lincoln and other great men, would do well to steep your minds in its wisdom. So I put it first.

Second: Next I would put Shakespeare, especially the tragedies which will give you a strength of mind and a culture in more compact form than any other literature.

I would follow these with Plato, Plutarchs lives, Dante and other great classics. But you may tell me these things don't interest you. I can encourage you by telling you they didn't interest me until I was much older than you, but I wish I had turned to them earlier than I did.

How will you read? I would urge on you a bedside table where you would keep one or more of these books and give to them not less than fifteen minutes in the morning or before going to sleep at night. Surely that is a small price to pay for the treasure you will receive and the time will come when these minutes will be the best part of your day. It will mean for you a lasting education.

And just a word of what has been called the camel plan of education. He who in his college days camel-like drinks at the fountain of knowledge and then believes he has enough without more to enable him to cross the desert of life. For him too often life is indeed a desert and before he reaches the end of his journey "he is duller than that fat weed that roots itself in ease on lethe wharf."

What of the lawyers who keep their minds bright and keen by such exercises as I am urging on you? They become the great ornaments of their profession. I think of James M. Beck, then leader of the Philadelphia Bar, presiding at the banquet of the American Bar Association in 1914 when we were thrilled by the ease and grace of his language. Shakespearean quotations seemed almost to be a natural part of his

speech. Twenty years later I came to Dr. Gibbes' home to go hunting and he met me at the door with the statement that someone was making a remarkable address on John Marshall and suggested that we listen to it. He didn't know who it was. I listened five minutes and told him that only one person in America could talk like that and he was old man James M. Beck and so it proved to be.

I think of Oliver Wendell Holmes whose culture was only equalled by his legal attainments and who was on his death bed at the age of more than ninety. Frankfurter, an old friend, was in the room with him and it was apparent that in a few minutes the aged jurist would be no more. Frankfurter's emotions got the better of him and he turned away for a moment but on hearing a movement from the bed he looked to see Holmes thumbing his nose at him. He was rendering his last and greatest opinion—that to a truly great man death is nothing.

And I think of that classic story beloved by lawyers everywhere and perhaps already known to you, of the old Boston lawyer famed for his legal and classical knowledge and still vigorous at more than ninety who was arguing his case before the Supreme Court and pressing a point with such ferocity that one of the justices who disagreed with him could no longer restrain himself and called out "Sir, that is not the law," whereupon the old man with complete dignity bowed low and said: "It was the law until your Honor spoke."

One word more. What I am proposing to you takes confidence and it takes courage. If you look upon yourselves as just common and ordinary, you will be just common and ordinary, but if you look upon yourselves as capable of the best you may attain the best. Courage and faith are a great part of the contest. You will recall Poe's poem about the knight who had ridden long in search of the land called Eldorado, until at last he met a phantom shadow, and

"Shadow," said he, "where can it be,
The land of Eldorado?"
"Over the mountains of the moon
Down the valley of the shadow
You must ride, boldly ride" the shade replied
If you seek for Eldorado."

BIOGRAPHY

James Louis Petigru

Jurist, Orator, Statesman, Patriot

MATTHEW POLIAKOFF

It is very appropriate in these trying times to turn our attention toward a great student of the law and a leader during times as critical as those we are now facing—James Louis Petigru, jurist, orator, statesman, patriot. He dedicated his life to the cause of righteousness and not self glory—even in the face of storms of public criticism, never yielding to public opinion if he thought it wrong, nor ever stooping to cheap politics.

He was born in 1789, when the nation was in its very infancy; and he lived until 1863, seeing our nation torn apart by Civil strife.

This eminent jurist was born in Abbeville District in May, 1789, near what is called the Calhoun Settlement. He was descended from a Huguenot family. His grandfather had been pastor of a Huguenot Church, and had established a French Colony at New Bordeaux. His father was a brave soldier in the Revolution. After such tuition as the son was able to obtain at home, he was sent to Dr. Waddell's Academy, at Wilmington, a school of high reputation in the State. There, he made great progress, and, in a few years, his master became anxious to secure him as assistant in the school. But the scholar was ambitious of another career. He went to Columbia and was admitted into the sophomore class of the South Carolina College. While there he supported himself by teaching in the Columbia Academy. He was graduated in 1809, taking the first honor of his class.

He resolved, after receiving his degree, to pursue the honorable profession of law, and was induced by his friends to try his fortune in St. Lukes Parish, Beaufort District. There he studied law for future advancement, and kept a school for present support. He was admitted to the Bar at Charleston in 1812. By the zealous support of such friends as Daniel E.

Huger and James R. Pringle—by the ardor, as he himself expressed it, of the one, and the energy of the other—he was elected, while yet unknown to the people, to the office of solicitor in the southeastern district. His practice was increasing at Coosawatchie, when he was induced, in 1819, to transfer his fortunes to the wider field afforded by Charleston. There, by the aid of the same friends who had before supported him, and still more by the raising reputation which had made his name known in the State, he became in 1822, attorney-general, succeeding Robert Y. Hayne in that important office. He rapidly rose to great sucess, to large emoluments and high distinction. He had been for many years regarded as the head of the South Carolina Bar, and could readily, at anytime, have found his way to the bench.

He was an illustrious chief among the members of his profession, and yet was not only a lawyer. His mind was thoroughly cultivated. His laborious life at the Bar prevented him from engaging much in merely literary pursuits, but few minds were better fitted to excel in them. If he had betaken himself to the professor's chair, and the lecture room, as he once thought of doing, he would have thrown around those charms unsurpassed anywhere for brilliant intellectual power.

As we have seen he was truly a great lawyer and student. Further, he was a statesman—not a mere politician. He manifested his statesmanship when the issue of nullification was presented. Knowing that one opposed to nullification would be very unpopular, he nevertheless opposed it with courage under difficult circumstances. In this alone he distinguished himself from a politician. He opposed secession, but preserved the respect of his fellow citizens.

James Petigru was also a valiant patriot. Just after he began the practice of law Port Royal was threatened by a British attack. He was among the first to volunteer his services.

It is interesting to note that in spite of the fact that he never changed his beliefs because of popular sentiment, and never bowed down to politicians, yet because of his ability and fortitude he held many public trusts. Among other offices too numerous to mention, he held the position of District Attorney for several years. He was called on to codify the laws of South Carolina, which task he completed in 1862.

His epitaph is very appropriate, as it expresses the virtues and qualities of this jurist, orator, statesman, patriot.

"Future times will hardly know how great a life
This simple stone commemorates
The tradition of his Eloquence, his
Wisdom and Wit may fade;
But he lived for ends more durable than fame,
His eloquence was for the protection of the poor and wronged,
His learning illuminated the principles of law—
In the admiration of his peers,
In the respect of his people,
In the affection of his family,
His was the highest place;
The just need
Of his kindness and forbearance,
His dignity and simplicity,
His brilliant glories and his unwearied industry,
Unwaved by opinion,
Unseduced by flattery,
Undismayed by disaster,
He confronted life with antique Courage
And death with Christian hope.
In the great Civil War
He withstood his people for his country
But his people did homage to
The man who held his Conscience higher than their praise;
And his country
Heaped her honors on the grave of the Patriot, to whom, living,
His own righteous self respect
Sufficed alike for Motive and Reward."

The Compensated Surety in South Carolina

WILLIAM L. RHODES, JR.

The first South Carolina case found by the Author which enunciated the doctrine that the surety is a favorite of the law is *Tinsley v. Kirby,* 17 S. C. 1. This case was decided in 1881, and involved an individual gratuitous surety on the bond of a constable, who had over-assessed a fine against the plaintiff. The suit was brought under a statute which provided that one who has been over-assessed by a constable shall be allowed to collect ten times the amount of his damages. In this case, the Court started its opinion as follows: "A rule never to be lost sight of in determining the liability of a surety is that he is a favorite of the law, and has a right to stand on the strict terms of his obligation, when such terms are ascertained. This is a rule universally recognized by the Court, and is applicable to every variety of circumstances."

The case of *Tinsley v. Kirby, supra,* was cited with approval in three subsequent cases,[1] the latest of which was decided in 1893. All of the cases which have upheld the rule of *strictissimi juris* promulgated in the *Tinsley case* have been cases involving a gratuitous rather than a compensated surety. There is no express mention made in these decisions of the matter of compensation, however, and the language used by the Court would indicate that the surety, however characterized, would still be considered a "favorite of the law." The fact should be borne in mind, however, that the compensated surety was not in general existence at the time of these decisions, and it is practically a certainty that the Judges who authorized these opinions, did not intend that their language should be applied to such a party as the present day compensated surety.

The case of *Walker v. Holtzclaw,* 57 S. C. 459, 35 S. E. 754, which was decided in 1899, specifically held that the rule of *strictissimi juris* found in *Tinsley v. Kirby, supra,* does not apply to a compensated surety. In this case, the suit was brought against Holtzclaw and his compensated surety, the American Banking and Trust Company, by the County

1. Pelzer, Rodgers & Co. v. Steadman, 22 S. C., 279; Kennedy v. Adickes, 37 S. C. 174, 15 S. E. 922; Sloan v. Latimer, 41 S. C. 217, 19 S. E. 491.

treasurer. Holtzclaw was a dispenser under the old South Carolina Dispensary System, and he had embezzled certain funds belonging to the County. The suit was brought on the basis of the bond being a statutory bond, while in fact the bond was not identically but substantially the same as that provided for in the statute. Upon a demurrer being interposed by the defendant on this ground, and its being sustained by the Trial Judge, the action of the Trial Judge was held to be in error, the Supreme Court saying, "Upon the hearing of the case it was argued that a surety is a favorite of the law, and it should be strictly construed in his favor. While this is true as a general rule, it has no application to a case like this, where the surety received compensation and the suretyship is in the line of its regular business. The allegations of the Complaint show that the defendants intended to execute the bond required by statute, and it was error to rule otherwise."

Walker v. Holtzclaw, supra, has been cited with approval in numerous cases, and the Court is equally as absolute in its statements that a compensated surety is not a favorite of the law as it was in its former general statement that "the surety is a favorite of the law." Therefore it should be noted that the cases which appear in this article for the purpose of illustrating the various liabilities of the compensated surety, are not decided on the basis of *strictissimi juris.*

The trend of the South Carolina Supreme Court has been to increase rather than decrease the liability of the compensated surety. So great has been the trend to increase the liability of the compensated surety in South Carolina that today the prevailing Authority is that the liability of the compensated surety is that of an insurer, which is certainly far distant from the original enunciation of this Court that "the surety is a favorite of the law." It was held in the case of *State Agricultural and Mechanical Society v. Taylor,* 104 S. C. 167, 88 S. E. 372, that a bond executed upon a consideration by a bonding company, to secure the performance of a building contract, is in effect a contract of insurance, and should be construed as such. The question involved in the *Taylor case, supra,* was the interpretation of a surety bond, and the language of the Court, speaking through Judge Watts was as follows: "The exceptions in a measure depend largely as to the law by which bonds of surety companies are to be construed. We are of the opinion that they should not be given

the strict construction that should be given one who was a surety as an individual, but the surety companies are in the business for profit or hire. The individual accommodates the individual by giving his surety for friendship or kindness and without profit. The surety company is in the business for gain, profit, and hire. They become sureties for the gainful premiums paid it, and in constructing their liability they occupy the same position as that of an insurance contract, which as a fact and matter of law it is." Thus, the opinion of Judge Watts in the above case is very explicit in placing the liability of the compensated surety as that of an insurer. The opinion of the *Taylor case* is cited as authority in a large number of South Carolina cases,[2] and there is no doubt but that the law in South Carolina is as stated in that case, i. e., that the liability of the compensated surety is that of an insurer.

The South Carolina cases are unanimous in the holding that whenever there is any ambiguity in a contract of suretyship written by a compensated surety, then any such doubt will be resolved against the surety company, (*Edgefield Manufacturing Co. v. Maryland Casualty Company*, 78 S. C. 73, 58 S. E. 969).[3] The interpretation of the language used is to be governed by the ordinary and normal meaning of such language, and the contract can not be construed one way as against the principal and another way as against the surety company (*Thomas Drug Store v. National Surety Company*, 104 S. C. 190, 88 S. E. 442).

In certain instances, the contract itself may be clear, yet the Court will adopt an application of the contract in one way towards a gratuitous surety, and in another way towards a compensated surety. In the two later cases, no point can be made that either the language of the contract or language of the Statute is ambiguous, but in applying the provisions of one or the other the Court reaches different conclusions, and makes different applications, depending upon the character of the surety. The roster of cases which are hereafter set out

2. Mass. Bonding & Insurance Co. v. Law, 149 S. C. 402, 147 S. E. 444. Simon v. Aetna Casualty & Surety Co., 151 S. C. 44, 148 S. E. 648. Barringer v. Fidelity & Deposit Co., 161 S. C. 4, 159 S. E. 373.
3. Note: Several cases are treated in this article involving insurance contracts rather than contracts of suretyship for the reason that the same law is applicable to both contracts of insurance and contracts of a compensated surety.

will indicate factually whether the principle involved deals with a matter of construction or application.

The case of *Plyler, Receiver v. U. S. Fidelity & Guaranty Co.*, 144 S. C. 105, 142 S. E. 45, is concerned with the interesting problem of whether or not a breach by the employer-obligee of the conditions agreed to in the employer's statement to the surety company, and which was used as the basis for the issuance of the bond, will release the surety from its liability on the bond. The contention of the surety company was that the obligee breached the conditions it subscribed to by failing to require all checks to be counter-signed by the President; in failing to notify the Bank that no check should be honored unless so countersigned; in failing to have principal's accounts examined at intervals as provided; and, in failing to demand a monthly report from the principal. Despite all of these breaches, which were certainly material, the Court held that the following charge of the Trial Judge was proper: "I charge you that even if the defendant in this case has shown departure from the contract between it and the Industrial Company, that alone will not discharge it from liability under its contract. It must show that it has suffered some injury or loss by reason of such departure from the contract, and if the defendant has failed to show by the preponderance of the evidence that it has suffered loss or injury by reason of any departure from the contract then I charge you that if you find that there has been a breach of the bond, your verdict must be for the plaintiff." This case, therefore, holds that a breach of the statement submitted by the obligee, which was used as the basis for the issuance of the bond, however material it might be, will not release the surety company from liability unless the surety company shows that it has suffered an injury therefrom. Although the Author was not able to find much additional authority in support of the "injury theory" announced in the *Plyler case*, a search through the cases indicates that this is still the sentiment in South Carolina. The case of *Pickens County v. National Surety Co.*, 13 Fed. (2nd) 758, which was decided in 1926, in the Fourth Judicial Circuit Court of Appeals, and which was based on the South Carolina cases, holds that a bonding company, insuring against failure of performance of contract for monetary consideration, must show that it has suffered injury by reason of the departure from strict terms of contract before

it can for that reason be discharged from liability, and that payments to contractor in advance of time specified are not such departure from or change in contract as will discharge the liability of a bonding company, in the absence of injury therefrom. The Author submits that this is a rather stringent doctrine to apply against the Surety Company, because in a great many cases such an injury would be very difficult to prove to the satisfaction of a local jury.

Another interesting feature of the liability of the compensated surety is the interpretation which the South Carolina Supreme Court puts on provisions in the contract of suretyship to the effect that notice of loss shall be given to the Surety Company within a certain specified time. In the case of *Edgefield Manufacturing Co. v. Md. Casualty Co., supra,* Mr. Justice Woods, writing the opinion of the Court, held that the stipulation in the policy that the insured should give immediate notice of an accident and full information concerning it and send the summons immediately to the Insurance Company meant that these things should be done with reasonable promptness under the circumstances, not that they should be done literally without lapse of time. In the *Edgefield case* it appeared that the officer of the insured company had been stricken by an epidemic of smallpox. Thereafter, Mr. A. S. Tompkins took temporary charge of the offices of the mill. In March, 1904, Mr. Tompkins was made aware for the first time that his company had casualty insurance by finding the policy among the papers of the company and on the same day gave the casualty company notice of the accident and offered to send to the company the summons served. Under these circumstances the Court held that the delay was excusable, because as soon as Mr. Tompkins found that there was a policy he gave prompt notice to the insurer.

The effect of the decision in the *Edgefield case* was somewhat restricted in the case of *Craig v. Insurance Co.*, 80 S. C. 151, 61 S. E. 423. This case held that when ten days was the time specifically set forth in the contract of insurance within which time notice of injury must be given, then the notice must be given in the time specified. This case is distinguished from the *Edgefield case* on the ground that there was no particular time stated in the provision of the *Edgefield case,* while in the later case there was a definite and specific time provided for within which the notice was to be given.

The decision of the *Craig case* has been affirmed in many later South Carolina cases. In the case of *Planter's Saving Bank of Greer v. American Surety Co. of New York*, 177 S. C. 363, 181 S. E. 222, in a suit on what is commonly known as a Banker's blanket bond, which contained a provision as follows: "At the earliest practicable moment and at all events not later than ten days after the insured shall discover any loss thereunder, the insured shall give the underwriter notice thereof"; the Court held that the above provision as to notice had to be complied with by the insured in order for the plaintiff to recover on the bond. The jury found that the notice was not given and the plaintiff was not allowed a recovery. Also, in the case of *Free v. United Life & Accident Insurance Co.*, 178 S. C. 317, 182 S. E. 754, it was held that an insurer was not liable under an accident policy requiring written notice of injury to be given insurer within twenty days after the date of accident, or as soon as reasonably possible, where the insured went to his work practically every day for a month after the injury, his place of business was near the office of the insurer's agent, and the insured did not claim that he was unable to notify the insurer until more than thirty days after the injury, notwithstanding the insurer's right was not prejudiced by the delay.

From the authority of the above cited cases, the Author feels justified in the conclusion that the notice provision in a contract of suretyship has to be complied with by the insured or obligee when the time so provided for is definite. A factual variation concerning notice provisions is reported in the case of *Farley v. American Surety Co.*, 182 S. C. 187, 188 S. E. 776. In this case the loss was discovered by the insured several years before he became cognizant of the fact that the officer responsible for the loss was under bond. The surety company set up the defense that notice was not given within the required ten days, and the court held that the notice did not begin to run until the insured or obligee found out that the loss which occurred was insured against, and that since notice had been given within ten days after that time, then the surety company was liable. This case cites the *Edgefield case* on the question of notice. The Courts says in its decision: "The Insurer should not be allowed to take advantage of a narrow and technical construction of the contract."

Another type of provision usually contained in contracts of

suretyship is that which expressly limits the liability of the surety company to losses discovered within a certain period of time. The case of *Chicora Bank v. U. S. Fidelity & Guaranty Co.*, 161 S. C. 33, 159 S. E. 454, was a case in which the Court was called upon to determine the liability of a surety company under a bond which contained a provision called a condition precedent to recovery, that the loss must be discovered within six months after the term for which the principal was bonded. The Court said, quoting with approval from 14 R. C. L. 1268, "It is well settled that where the liability of the insured is expressly limited in an indemnity or fidelity contract to losses discovered within a specified time, there is no liability unless the fraud, dishonesty, or negligence causing the loss not only occurs but is discovered within the time limit, and the mere fact that the discovery of a fraud during that period is prevented by the concealment thereof by the defaulter will not extend the period of indemnity. The insured is bound to discover the loss during the prescribed period, and if he fails to do so the insurance company is not liable."

The case of *Simon v. Aetna Casualty and Insurance Co.*, 151 S. C. 44, 148 S. E. 648, involved the question of waiver of forfeiture through the failure to return premiums paid on a surety bond. It was held in that case that the law as to waiver of forfeiture through the failure to return the premium paid is the same as in the case of a surety bond as in the case of an ordinary insurance contract. And it is well settled that in the absence of a provision in such contract having a contrary effect the failure to return the premium paid does not constitute waiver as a matter of law, but is evidence of waiver for the consideration of the jury.

There have been several occasions for the Court's interpretation of Sections 3056 and 3057 of the 1932 Code. These sections provide, respectively, for the relief of a surety from a bond and the execution of a new one. Section 3056 provides as follows: "When any of the sureties of any officer elected or appointed to any office shall, in writing, notify the proper officer, whose duty it is to approve the bond of such officer, that they desire to be relieved of their suretyship, it shall be the duty of the officer authorized by law to approve the same to require said officer to execute a new bond with surety, which, when approved, shall be as valid as the bond given on

the original election or appointment of such officer; and the sureties upon the prior bond shall be released from responsibility for all acts or defaults of such officer which may be done or committed subsequent to the approval of such new bond." And Section 3057 provides as follows: "When any officer shall be required to execute a new bond, with surety, as provided for in Section 3056, he shall proceed forthwith to execute such new bond, and submit the same for approval to the officer authorized by law to approve the same, and if he shall fail or neglect to so execute and submit such new bond, or fail or neglect to execute and submit a bond satisfactory to the officer authorized to approve the same within thirty days after having been required so to do, the said officer, as the case may be, shall forthwith report to the Governor of the State that such officer has been duly required, under the provisions of Section 3056, to furnish a new bond, and that such officer has failed so to do, and upon being so informed, and upon receiving a certified copy of all the papers relative to the case, it shall be the duty of the governor, by public proclamation, forthwith to declare the office held by such defaulting officer vacant, and such office so made vacant shall be filled in the manner so provided by law."

The first case which the Author was able to find construing the two sections of the Code just quoted is the case of *Mass. Bonding & Insurance Co. v. Law, et al.*, 149 S. C. 402, 147 S. E. 444. Briefly stated the facts of the case were as follows: The surety company was the surety on the bond of the county treasurer. Without any reason whatever stated by it, except its desire to be released from the surety, the surety company under Section 3056, gave notice to the county commissioners that it desired to be released from its bond. The commissioners refused the request. They took the position that the surety company had contracted with them to bond the county treasurer for the full period of his office, and in the absence of any good reason the bonding company had no right, either legal or moral, to demand the release from its suretyship and the cancellation of the bond. Following the refusal of the commissioners the matter went to the Supreme Court by petition of the surety company asking for a writ of mandamus, forcing the commissioners to require the county treasurer to execute a new bond as required by Section 3057, thereby relieving the surety company from further liability on the bond

executed by it. The Court held in that case that Section 3056 related *only* to accomodation sureties rather than sureties for compensation, and that a compensated surety would not be discharged or relieved without a reason while an accommodation surety might be so relieved. This case even went to such an extent in finding that the surety company could not be relieved of its surety under the statute until it left a doubt as to whether the surety company could be relieved from his contract of suretyship for good reason. The Author submits that the case cited above is one of the clearest examples of "judicial legislation" that can be found in our Reporters. The decision is not based upon the construction of the statute because the language is crystal clear in saying that it applies to, "any of the sureties of any officer." The Court is certainly making law, when it writes into the statute its interpretation of the intent of the statute in their holding that it applied only to the accommodation surety.

The decision of the *Law case* was somewhat clarified in the case of *Spivey, Sheriff v. Fidelity and Deposit Co. of Maryland,* 162 S. C. 143, 160 S. E. 275. This was a case in which the surety company on the bond of an unfaithful Sheriff, appealed to the Board of County Commissioners to release it from liability and to require its principal to furnish another bond, under Sections 3056 and 3057 of the Code. The Board of County Commissioners complied with the request of the Surety, but the Sheriff refused to furnish another bond relying on the *Law case* for the authority that the surety company could not be relieved of its liability. The case was differentiated from the *Law case,* however, in that in the *Law case* there was not the slightest hint that the officer under the bond was not performing his office well and proper, while in this case there was a multitude of evidence that Spivey, the Sheriff, was unfaithful in the performance of the duties of his office. The Court, speaking through Chief Justice Blease, who also wrote the opinion in the *Law case* had this to say: "There was a contract on the part of the surety company, Mr. Spivey, and the County Commissioners of Jasper County. The contract was, as stated in the *Law case,* that the surety company would bond for the full period of Mr. Spivey's term in the office of Sheriff. But Spivey agreed in the contract that he would "well and truly perform the duties" of the office of Sheriff of Jasper County, and the surety company agreed that

Mr. Spivey would carry out that contract. The surety company had no right to be released from its contract, so far as the future was concerned, if Spivey "well and truly performed" the duties of his office. And the county commissioners had no right to relieve the surety company from its contract so long as Spivey complied with the conditions of his bond. The *Law case* went no further than that. Anything there appeared which would indicate that the Court intended to go further, and to hold that an unfaithful official might continue in his unfaithfulness because some surety company has trusted him enough to become his surety, if the language so indicated, was a very fortunate statement. We do not think, however, that any language would justify any reasonable conclusion to the effect that this court ever held, or intended to hold, that a faithless officer might continue to hold his office, because forsooth a surety company had signed his bond guaranteeing the faithful performance of his duties, and the County Commissioners had paid the premium on the bond." Therefore, in this later case, Chief Justice Blease restricts considerably the implications which might be drawn from the decision written by him in the *Law case*. This latter case, however was based also on what the Author contends was a misinterpretation of statute 3056: This case seems to have settled the law relative to the application of these two sections, however.

The scope of this article has not been such as to include the remedial rights available to the compensated surety. As far as the Author has been able to conclude, there exists no substantial difference between the remedial rights of a compensated and an uncompensated surety, and for this reason they have not been considered.

By way of summary, it may be said, that the attitude of the South Carolina Supreme Court may be generally regarded as follows:

1. A surety is a favorite of the law and the rule of *strictissimi juris* should be accorded him.

2. A compensated surety is not, however, a favorite of the law, and the doctrine of *strictissimi juris* is not to be applied in his favor; but its contracts are to be treated as contracts of insurance, which, according to familiar principles, are to be given that construction which is most favorable to the insured and the least favorable to the insurer, without, however,

giving any unnatural, strained, or artificial meaning to the language employed, but giving to such language their ordinary and popular meaning.

3. The Court will not, in the case of a compensated surety discharge or relieve such a surety because of a material variation in the principal contract, without a showing of injury or damage to the surety, qualified perhaps by limiting relief *pro tanto*, to the extent of prejudice sustained. This observation is not to be regarded as extending beyond the actual types of contract which have been treated in this article.

4. Where a provision, such as that calling for notice, is treated as a condition precedent, such condition must be complied with, as to the compensated and uncompensated surety alike, without regard to whether or not there has been prejudice or injury by reason of failure to comply with condition.

5. The Courts in reviewing a statute dealing with sureties may, never the less, despite any lack of indication in the statute as to what type of surety is involved, read into the statute a legislative intent to confine its provisions to one or the other type of surety.

6. The remedial rights of a compensated surety (indemnity, subrogation, etc.) are no different, apparently, from those of the ordinary gratuitous surety.

Duration of A Chattel Mortgagor's Equity of Redemption

EVA BRYAN WILSON

Suppose A gives to B a written chattel mortgage on a piano to secure the payment of a $50.00 note. The note is due and payable January 1, 1939, but is not paid. Two weeks after the note is due B secures peaceful possession of the piano and instead of selling to satisfy the mortgage keeps it until February, 1941, at which time he sells it to C, an innocent purchaser for value without notice, for $200.00. In March, 1941, A demands possession of the piano from B, and tenders to him the amount of the note plus interest. Tender is refused, B telling A he has sold the property. Thereupon A brings action against B for conversion.

What will be the result of A's action? The answer depends primarily upon the nature of B's interest of title to the chattel at the time of the alleged conversion. That, in turn, from the facts here, depends upon the effect of B's retention of possession for the period between his taking possssion and the time of sale—more than two years. That B had lawful possession of the chattel following the breach of condition is not to be doubted. The law is well settled that upon condition broken in a chattel mortgage, title passes to the mortgagee, subject to be defeated by the mortgagor's exercise of the equity of redemption, and that title carries with it the right of possession (a right which, incidentally, he seems to have from the time of execution of the mortgage, but which, in most, if not all, cases he relinquishes until breach of the mortgage).[1]

The possession of B, then, being lawful as an incident of his title, the question naturally arises: How long does A have to exercise the equity of redemption following the taking of possession by B? And if a definite time is limited to A, what is the effect upon B's title when the allowed time has elapsed?

The general belief as to a mortgagor's time for redemption, even after possession taken by the mortgage, seems to be reflected in Justice Cothran's opinion in *General Motors Acceptance Corporation v. Hanahan,* 146 S. C. 257, 143 S. E.

1. General Motors Acceptance Corporation v. Hanahan, 146 S. C. 257, 143 S. E. 257.

820, in which he says, "As long as the mortgagee is in possession, not having committed any act to the prejudice of the Mortgagor's equity of redemption, the mortgagor, within the statutory period of six-year limitation, may exercise that right." Under the facts in the case this statement was not necessary to the decision and may be regarded as dictum, but it seems to mirror a common belief that the six-year statute of limitation (Sec. 388 of the '32 Code of S. C.) governing the time within which an action may be brought to recover personal property is the applicable Statute in the case of a chattel mortgagor who desires to exercise his equity and thus recover possession from the mortgagee.

Why should not a chattel mortgagor have the same time to redeem as the mortgagee has to foreclose or otherwise assert his rights under the mortgage? In *Leland v. Morrison,* (92 S. C. 501, 75 S. E. 889), it is held that the life of a real mortgage being twenty years the mortgagor has as long a time to redeem as the mortagee has to foreclose, where the transaction takes the form of a deed absolute given as security. In *McGowan v. Reid,* (27 S. C. 262, 3 S. E. 337), it is held that the mortgagee's right to proceed under a chattel mortgage is not barred by reason of the fact that the note which it secures is barred, but that under what is now 387 of the 1932 Code, Section 2, provides: "An action upon a bond, or other contract in writing, secured by a mortgage of real property; an action upon a sealed instrument other than a sealed note and personal bond for the payment of money only whereof the period of limitation shall be the same as prescribed in the following section." (Which is twenty years) the chattel mortgage is enforceable for twenty years. Why, then, should not the mortgagor have twenty years within which to redeem? In fact, it is suggested again in the *General Motors Acceptance Corporation v. Hanahan,* (146 S. C. 257, 143 S. E. 820), case, that, "so long as the mortgagor's exercise of his right to redeem continues, the lien of the mortgage continues for the protection of the mortgagee"—which is another way of saying that the period for foreclosure or seizure by the mortgagee and the period for redemption are the same, whether the period in either case be regarded as six years or twenty. While the observations may state correct principles of law, they must nevertheless be considered in the light of a situation in which the mortgagee has actually taken possession. Does this

fact alter the application of the rule? On principle, it should not. But doctrines give way to statutory law. It becomes necessary, then, to determine whether existing statutes change the rule. Section 8714 of the Code of 1932 apparently has that effect.

Section 8714 provides as follows: "In all bills of sale of any plate, gold and silver, or goods and chattels whatsoever, by way of mortgage, with right of redemption upon performance the proviso in the said bill of sale, where the plate, gold and silver, or goods and chattels, are actually delivered unto the person to whom such bill of sale is made, and are in his actual possession (and not a delivery or seizing in form of law only), and shall continue in the same for the space of two years after the breach of the proviso in said bill of sale, without redemption thereof, the said goods or chattels so sold and delivered and possessed as aforesaid, though with right or equity of redemption, are hereby declared to be vested in the said person or persons to whom such bill of sale was made, and their executors, administrators, and assigns, to have and to hold to them, their executors, administrators, and assigns, as their own proper goods and chattels forever; excepting such person or persons having such right or equity or redemption be beyond the seas, or otherwise out of the limits of this State, all which persons shall have saved to them their equity of redemption, so as they prosecute the same within three years after the breach of the proviso of the bill of sale, and at no time thereafter."

This statute was enacted in 1712 by the General Assembly of the Province and has never been amended. It was not an English Statute made of force, but an original act.

The first case interpreting Section 8714 is *Pledger v. Mandeville,* (1 Brevard 286), decided in 1803. The action was for trespass by the defendant involving a slave which had been mortgaged to him by the plaintiff. The mortgage debt was not paid on the day appointed, but it was tendered within two years after the breach of the proviso. The affirmed decree of Circuit Judge is: "That the limitation act was intended to limit suits in equity for redemption of property mortgaged, or pledged, after the same has become forfeited at law, and that instead of an indefinite time for redemption which the mortgagor before had in equity to allow him only two years after the property should become absolute in the mortgagee at law,

to redeem in equity after which the thing mortgaged would be irredeemable in equity, and become absolute in the mortgagee forever, without trouble and expense of a suit in equity to foreclose, and that the clause in question could not be construed to give any right to the mortgagor, condition broken to claim the property mortgaged, upon the ground that a tender of the consideration money within two years after breach of the proviso, will discharge the qualified property of the mortgagee, and revest the absolute property in the mortgagor, without the necessity of a suit in equity, for the equity of redemption." Further on in the opinion the application of the act is limited to *written* bills of sale intended as mortgages. Of course the part of the opinion in regard to tender has been since modified by what is now Section 8718 of the Code, which provides that tender sufficient to pay the debt and the costs, if not accepted, will discharge the mortgage rendering it null and void, but the remainder of the decision has not been overruled.

Pledger v. Mandeville is followed by *Barlett v. Thymes*, (2 Hill Equity 171), decided in 1835. The later case states also that the Act of 1712 (8714) limits the right of the mortgagor to redeem his chattel to two years after the condition had been broken *when the mortgagee is in possession.* The Statute was not there held to be applicable because of the peculiar condition of the mortgage which allowed the mortgagee to retain possession of the slaves in question for the interest due on the debt.

In 1874, the decision of *Hogan v. Hall*, (1 Strob. Equity 322), was handed down by the court. An absolute bill of sale intended as a mortgage was given on the negroes in question to secure a note which Jones signed as surety. Jones paid the debt, took possession of the slaves which he and his representatives have had for a period of seven years or more. The affirmed decision of the Circuit Court is: "By the Act of 1712 where the mortgagee of chattels has possession of them, the mortgagor is barred of equity unless he redeems them within two years." The decision goes on further to say that the same is true even if the mortgagee does not have possession under the terms of the mortgage. Since his possession is rightful he may sell the chattel, or retain it until it was redeemed within the period the statute attaches and the title becomes irredeemable.

The last case in point is *Moseley v. Crocket*, (9 Rich., Equity

339), decided in 1857. The plaintiff executed to Crocket's intestate a bill of sale intended as a mortgage. The mortgagee was in possession of the slaves for at least four years after the condition was broken, but it is not clear how he obtained possession. Chancellor Dargan's interpretation of the effect of the statute is: "The equity of redemption was barred by the Act of 1712 that provides, that two years possession by the mortgagee of a chattel, after a breach of condition would operate as a bar to the equity of redemption."

In view of the language used by the court in the case of *Pledger v. Mandeville,* and in the other cases following it, the conclusion seems to be that possession of a chattel by the mortgagee for two years after the condition is broken gives the mortgagee an irredeemable title which can not be defeated by subsequent events—and that the mortgagee's title becomes absolute in the strict and original sense of the term and for all purposes.

The answer to the hypothetical case on which this paper is based, if we are to give Section 8714 its plain meaning and to adhere to the interpretations placed upon it, is that B having absolute ownership, free of equities, may successfully defend against A.