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COMMENT ON RECENT CASES

CONFLICT OF STATE LAWS CONCERNING THE CAPACITY OF MARRIED WOMEN TO CONTRACT—DO THE RULES IN CONFLICT OF LAWS OR THE FULL FAITH AND CREDIT CLAUSE AND ACT OF CONGRESS SUPPLY THE RULE OF DECISION?—*Union Trust Co.* v. *Grossman* (1918), 35 Sup. Ct. Rep. 147, 245 U. S. 412 (Holmes, J., writing the opinion), was argued and decided in the lower federal courts, taken up to the federal Supreme Court, and there argued and decided, on the sub silentio usual local-law theory of the conflict of

laws as between the states, viz., that the full faith and credit clause of the federal constitution,[1] and the act of Congress passed in pursuance thereof,[2] impose no judicial duty on the federal Supreme Court in the conflict of laws as between the states except the duty to follow the decisions of the state courts or to declare general jurisprudence under *Swift* v. *Tyson* (1842), 16 Pet. 1.[3] Does that sub silentio local-law theory of the conflict of laws as between the states rest upon a sound view of the federal duty of hospitality enjoined upon each state towards causes of action acquired under the local law of a sister state by the full faith and credit clause and act of Congress? The case cited illustrates the matter concretely.

While Hiram Grosman and wife, domiciled in Texas, were in Illinois only temporarily, the wife gave to the Union Trust Company her continuing guaranty of her husband's note. The trust company sued her in a federal district court in Texas, recovered judgment, which was reversed by the circuit court of appeals, and this reversal was affirmed by the federal Supreme Court on certiorari. The court decided that the wife's guaranty was void by the local law of Texas (lex domicilii), for want of capacity in the wife to make it, because the local law of Texas has not yet gone so far as to enable a married woman to bind herself or her separate estate to secure her husband's debts. The court assumed, but did not expressly find, that the local law of Illinois (lex loci contractus) has gone that far, at least in the case of married women domiciled in Illinois. The court's assumption is in accord with the

1. Art. 4, sec. 1, clause 1: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

2. Now R. S. U. S., secs. 905, 906. After prescribing the mode of proving the public acts, records and judicial proceedings of one state in a sister state, the act of Congress (R. S., sec. 905) prescribes their effect in another state as follows: "And the said records and judicial proceedings, so authenticated, shall have such faith and credit [i. e., effect] given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." And see R. S., sec. 906, last sentence.

3. A decision of the federal Supreme Court in the conflict of laws like the one in hand is classified under what is commonly called "commercial law or general jurisprudence" under *Swift* v. *Tyson*. But that phrase does not alter the fact that there are only two sovereign sources of law in this country, viz., the state and the United States. Every rule of law must flow from one or the other of these two sovereign sources. The anomaly of commercial law or general jurisprudence under *Swift* v. *Tyson* is that it is supposed to flow from all the states speaking with one voice through the federal Supreme Court, but binds federal judges only. It does not bind state judges, nor does it bind the people of any state. No man can conduct any of his affairs under it and agreeably to it, unless he can forecast with certainty that litigation, if and when it comes, will come in some federal court and not in any state court. If the legislature of any state declares a rule different from a rule of commercial law or general jurisprudence under *Swift* v. *Tyson*, then thereafter that state legislative rule binds federal judges the same as state judges and the people of the state. See the dissenting opinions of Holmes, J., and Pitney, J., in the admiralty case of *Southern Pacific Co.* v. *Jensen* (1917), 244 U. S. 200, 222, 249, 250.

fact, for sec. 6 of the Illinois Husband and Wife Act of 1874 so declares. The court suggests that possibly an Illinois court might have held the wife's guaranty void if the suit had been in an Illinois court. On this point the opinion says:

"The contract being a continuing one of uncertain duration, the plaintiff had notice that, in case of a breach, it probably might have to resort to the defendant's domicil for a remedy. In such a case very possibly an Illinois court might decide that a woman could not lay hold of a temporary absence from her domicil to create remedies against her in that domicil that the law there did not allow her to create, and therefore that the contract was void."

It seems clear, however, that an Illinois court, and any court outside of Illinois called upon with all materials before it to find the local law of Illinois as a matter of fact, would have to say that the wife's guaranty was valid under the local law of Illinois, though she was domiciled in Texas and in Illinois only temporarily when she gave it. This is not because of any decision of the Illinois Supreme Court construing sec. 6 of the Illinois Husband and Wife Act of 1874, extending it to married women in Illinois only temporarily, but domiciled in another state, but because of a decision of the Illinois Supreme Court in the conflict of laws declaring broadly that

"As between the law of the place where a contract is made and the law of the place where the married woman is domiciled, her capacity to make a contract is governed by the former and not the latter": *Forsyth* v. *Barnes* (1907), 228 Ill. 326.[4]

4. In that case the rule was applied to a judgment note made in Ohio by a married woman domiciled in Illinois while in Ohio only temporarily. Her domicil in Illinois was presumed from the fact she was sued in Illinois. The judgment note was valid by the local law of Illinois (lex domicilii), but the court found it was invalid by the local law of Ohio (lex loci contractus), on a presumption that the English common law concerning married women was in force in Ohio when the note was given. In *Wilson* v. *Cook* (1912), 256 Ill. 460, followed in *Hobbs* v. *Hobbs* (1917), 277 Ill. 163, the Illinois Supreme Court decided that the Illinois statute forbidding parties divorced by an Illinois court to marry again within one year after the decree, and declaring such marriages void, invalidates in Illinois marriages without the state within the year as against parties to the marriage who come into Illinois and try to maintain there the relation of husband and wife. The decision was put on the ground that the statute declared the comity of the state towards such marriages without the state when the parties thereto try to maintain the relation of husband and wife in Illinois; and not on the ground that the lex domicilii determines capacity to marry. The decision is federally correct. The full faith and credit clause and act of Congress do not compel a state against its will to allow privileges and immunities acquired in another state under its local laws to be exercised and enjoyed within its limits. The privileges and immunities clause (Art. 4, sec. 2) covers that, requiring each state to allow the citizens of every other state to exercise and enjoy within its limits only those privileges and immunities which the local law of the state allows its own citizens to exercise and enjoy. The federal constitution does not grant and secure any federal right to carry the local law of one state into another state and live under it there. "While in Rome you must do as the Romans do." The relation of husband and wife, or master and slave, to go back to ante-bellum days, if lawfully entered into in one state under the local law of that state, cannot be carried into another state and exercised and enjoyed there against the will of the latter state. If the local law of a state allows a man to have as

Without deciding whether the local law of Illinois (lex loci contractus) or the local law of Texas (lex domicilii) determined the married woman's capacity to make the contract, and assuming that the local law of Illinois (lex loci contractus) determined her capacity; and hence that the plaintiff had acquired a cause of action under the local law of Illinois; the court decided that Texas courts, state or federal, were justified in refusing to enforce it because its enforcement in Texas against a married woman domiciled there is inconsistent with the policy of the local law of Texas denying the capacity of married women domiciled in Texas to bind themselves or their separate estates for their husband's debts. The opinion says:

"But when the suit is brought in a court of the domicil there is no room for doubt. It is extravagant to suppose that the courts of that place will help a married woman to make her property there liable in circumstances in which the local law says that it shall be free, simply by stepping across a state line long enough to contract."

That puts the decision on the familiar judicial rule in the conflict of laws saying that a cause of action acquired under the local law of a sister state will not be enforced by another state when its enforcement there is inconsistent with the policy of the local law of such other state asked to enforce it: Dicey, "Conflict of Laws," ed. 2, p. 34, General Principle II (B); *Pope* v. *Hanke* (1894), 155 Ill. 617; *Nonotuck Silk Co.* v. *Adams Ex. Co.* (1912), 256 Ill. 66.

The court stated the question before it thus: "The main question is which law is to prevail?" The decision made the local law of Texas prevail. It is important to notice just how the local law of Texas prevailed and exactly what part of it prevailed.

The local law of Texas did not prevail through the medium of an application of any rule for the selection of one of two or more conflicting local state laws. The court expressly declined to select and apply the local law of Texas (lex domicilii) rather than the local law of Illinois (lex loci contractus) to determine the capacity of the married woman to make the contract. If the court had selected and applied the local law of Texas (lex domicilii) to determine her capacity to make the contract, that would have ended the case, because by that law she had no capacity to

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many wives as he can get, the man who takes advantage of such local law in the state where it is in force has no federal right to carry his harem into another state and maintain it there against the state's will. If the local law of a state allows an uncle and niece to marry, then uncles and nieces who take advantage of such local law in the state where it is in force have no federal right to go into another state and exercise and enjoy the relation of husband and wife there against the will of the state. The Fourteenth Amendment does not alter this law; and the Illinois ruling to that effect in *Hobbs* v. *Hobbs,* supra, is correct. But if the relation of husband and wife lawfully exists in one state under its local law, and B there alienates the wife's affections, the husband has a federal right to sue B, in another state, and the latter state cannot refuse to entertain the suit, because by its own local law the plaintiff was not a husband and had no wife whose affections could be alienated. The lex fori concerning husband and wife has nothing to do with it.

make the contract; hence the contract was void; and hence the plaintiff had no cause of action at all that it could enforce anywhere. And there would have been no occasion for the application of the judicial rule in the conflict of laws that the court did apply to decide the case, viz., a cause of action acquired under the local law of a sister state will not be enforced by another state when its enforcement there is inconsistent with the policy of the local law of such other state asked to enforce it.

The court did not decide that the lex domicilii and not the lex loci contractus determined the married woman's capacity to make the contract. The court avoided that question by assuming for the purpose of disposing of the case that the lex loci contractus determined her capacity; and hence that the plaintiff had acquired a cause of action under the local law of Illinois. Under the legal theory under which the case was decided the only part of the local law of Texas that prevailed was the judicial rule in the conflict of laws saying Texas will not enforce a cause of action acquired under the local law of a sister state when its enforcement in Texas is inconsistent with the policy of the local law of Texas; and it prevailed in the Texas federal court as general jurisprudence under *Swift* v. *Tyson*. That is a judicial rule in the conflict of laws declaring the comity or hospitality of Texas towards causes of action acquired under the local law of a sister state refusing to enforce them in Texas. It is a rule of decision, not of the merits of the controversy between the parties, but of the question of the state's comity or hospitality: *Converse* v. *Hamilton* (1912), 224 U. S. 243, 261; *Christmas* v. *Russell* (1886), 5 Wall. 290. This instant decision resulting from that rule is not res judicata of the merits of the controversy between the parties because the matter adjudged was not the merits of the controversy but the comity or hospitality of the state of Texas, refusing to let the controversy into the state for fear it would disturb too much the peace and quiet of Texas law denying to married women domiciled in Texas capacity to bind themselves or their separate estates in Texas to secure their husband's debts. Under the legal theory on which the case was decided, and on principle, this judgment cannot be entitled to full faith and credit in any other state; and any local law or usage in Texas attempting to make the judgment res judicata in Texas ought to be held wanting in due process of law under the Fourteenth Amendment as condemning a party without a hearing when the party has a cause of action acquired under the local law of a sister state.[5]

5. The case was in a federal district court in Texas. A state legislative act cannot prescribe the jurisdiction of a federal court, *Barrow Steamship Co.* v. *Kane* (1898), 170 U. S. 100, and, of course, a state judicial rule cannot do it. The federal district court rendered judgment for the plaintiff on the merits, which was reversed and the case remanded. Under the remanding order, presumably the federal district court will dismiss the suit, not for want of jurisdiction, but for want of Texas comity or hospitality to enforce the cause of action, unless the federal district court interprets the opinion of the federal Supreme Court as deciding that the lex domicilii determines

The plaintiff did not rely on the full faith and credit clause and act of Congress and the case was disposed of as if they had no application and did not exist. Let us bring them in and test this decision by them. Can the decision stand the test? The question may be stated broadly thus: Can a state refuse to enforce a cause of action acquired under the local law of a sister state because its enforcement there is inconsistent with the policy of its own local law, without violating the federal duty imposed upon each state by the full faith and credit clause and act of Congress? On authority the answer is, No.

It is decided, that a state asked to enforce a judgment of a sister state rendered on a civil cause of action cannot inquire into the local law of the state under which the original cause of action arose, and refuse to enforce the judgment because such local law under which the original cause of action arose is inconsistent with the policy of the local law of the state asked to enforce the judgment: *Fauntleroy* v. *Lum* (1908), 210 U. S. 230.[6]

It is decided, that the full faith and credit clause and act of Congress extend to causes of action acquired under the statute law of a sister state the same as to judgments of a sister state: *C. & A. R. Co.* v. *Wiggins Ferry Co.* (1887), 119 U. S. 615; *Pa. Fire Ins. Co.* v. *Gold Issue M. & M. Co.* (1917), 243 U. S. 93, and cases cited on p. 97.

It is decided, that the refusal of a state to enforce a cause of action acquired under the statute law of a sister state because its enforcement is inconsistent with the policy of the local law of the state asked to enforce it violates the full faith and credit clause and act of Congress. Statements to the contrary in *Finney* v. *Guy* (1903), 189 U. S. 335, 346, and *Allen* v. *Alleghany Co.* (1905), 196 U. S. 458, 466, and perhaps in other cases, must be regarded as obiter and overruled: *Converse* v. *Hamilton* (1912), 224 U. S. 243.[7]

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the married woman's capacity to make the contract, when judgment on the merits should be rendered for the defendant. But, as above shown, that is not a permissible interpretation of the opinion of the federal Supreme Court. Under decisions hereinafter cited, if the plaintiff hereafter should sue the married woman in Illinois or any state other than Texas and recover judgment, state and federal courts in Texas could not refuse to enforce such judgment without violating the full faith and credit clause and act of Congress. Under the remanding order I suppose the plaintiff has a right to reconstruct its case on the federal foundation of full faith and credit.

6. In that case a Missouri court inadvertently rendered judgment on a contract made in Mississippi, plainly void under the gambling laws of Mississippi; it was a Mississippi court that was asked to enforce the Missouri judgment. The Mississippi court inquired into the original cause of action and rendered judgment for the defendant, which was reversed.

7. A Minnesota receiver of a Minnesota corporation sued in a Wisconsin court to enforce the defendant's liability as a stockholder in the Minnesota corporation arising under Minnesota statutes. The Wisconsin court, conceding the plaintiff had a cause of action under the Minnesota statutes, dismissed the suit because the enforcement of the cause of action in Wisconsin is inconsistent with the local law of Wisconsin concerning the liability of stockholders in Wisconsin corporations. On writ of error under

In the case in hand, as above shown, the court assumed the plaintiff had a cause of action acquired under the local law of Illinois. That Illinois local law was statute law. Hence, on authority, the decision that state or federal courts in Texas were justified in refusing to enforce it because its enforcement in Texas is inconsistent with the policy of the local law of Texas cannot stand the test of the full faith and credit clause and act of Congress. Under that test the local law of Texas concerning the capacity of married women to contract had nothing to do with the case; the local law or usage of Illinois governed.

It is decided that a local state legislative rule of comity or hospitality, the same as a local state judicial rule, refusing to enforce a cause of action acquired under the local law of a sister state, violates the full faith and credit clause and act of Congress and is void: *Christmas* v. *Russell* (1866), 5 Wall. 290.[8]

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the full faith and credit clause and act of Congress the Wisconsin court was reversed. The court by Van Devanter, J., said:

> "What the law of Wisconsin may be respecting the relative rights and liabilities of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration.
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> "Besides, it is not questioned that the Wisconsin court in which the receiver sought to enforce the causes of action with which he had become invested under the [Minnesota] laws and proceedings relied upon, was possessed of jurisdiction which was fully adequate to the occasion. His right to resort to that court was not denied by reason of any jurisdictional impediment, but because the Supreme Court of the state was of opinion that as to such causes of action, the courts of that state 'could, if they chose, close their doors and refuse to entertain the same.'
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> "In these circumstances we think the conclusion is unavoidable that the laws of Minnesota and the judicial proceedings in that state, upon which the receiver's title, authority, and right to relief were grounded, and by which the stockholders were bound, were not accorded that faith and credit to which they were entitled under the constitution and laws of the United States."

8. That was a case in a Mississippi federal court to enforce a Kentucky judgment against a resident of Mississippi. The defendant relied on a Mississippi statute, saying no action shall be maintained in Mississippi on a judgment of another state against a person who was a resident of Mississippi at the time of the commencement of the action, if the action was barred by any statute of limitations of Mississippi. The court declared the statute was not a statute of limitations "in any sense known to the law"; and hence it could not be a statute prescribing a rule of decision of the merits. If the statute prescribed a rule of jurisdiction for Mississippi courts, it could not affect the jurisdiction of the Mississippi federal court in which the suit was filed: *Barrow Steamship Co.* v. *Kane* (1898), 170 U. S. 100. The court evidently classified the Mississippi statute as prescribing a rule of comity aimed at the cause of action as arising in another state. The statute was held repugnant to the full faith and credit clause and act of Congress. The defendant also relied on the judicial rule of comity applied in *Hilton* v. *Guyot* (1895), 159 U. S. 113, to a French judgment, which says a court of one state may refuse to enforce a judgment of a sister state if the court of the state asked to enforce it finds the judgment was obtained by fraud of the party, though the local law of the state where the judgment was rendered says the judgment cannot be re-examined there for fraud. The court held this judicial rule of comity repugnant to the full faith and credit clause and act of Congress.

Reference here must be made to an idea recently introduced and applied by the federal Supreme Court. That idea seems to be that a state may disable itself to perform its federal duty of full faith and credit if the state does it by a legislative act prescribing a "rule of jurisdiction" and not a "rule of decision" for its courts.

In *Anglo-American Provision Co.* v. *Davis Provision Co.* (1903), 191 U. S. 373, one Illinois corporation sued another Illinois corporation in a New York court on an Illinois judgment for money. The suit was dismissed by the New York court because of a New York statute that allowed an action by one foreign corporation against another foreign corporation only when the cause of action arises in New York. On writ of error the federal Supreme Court affirmed the dismissal, holding the New York statute did not violate the state's duty of full faith and credit because it prescribed a rule of jurisdiction and not a rule of decision; and the federal constitution does not require a state to provide a court jurisdictionally able to perform the state's federal duty of full faith and credit. The court distinguished *Christmas* v. *Russell,* supra, on the ground that the Mississippi statute held federally void in that case prescribed a rule of decision. See notes 8, 9, 10 and 5. In *Fauntleroy* v. *Lum* (1908), 210 U. S. 230, the suit was in a Mississippi court to enforce a Missouri judgment for money. Applying a Mississippi statute saying gambling contracts shall not be enforced by any court of Mississippi, the Mississippi court went below the Missouri judgment to the original cause of action, found that it arose on a void gambling contract, and rendered judgment on the merits for the defendant. The federal Supreme Court reversed the decision, holding that the Mississippi statute as applied by the Mississippi court prescribed a rule of decision different from the one prescribed by the full faith and credit clause and act of Congress, and hence was unconstitutional and void. The court held *Anglo-American Provision Co.* v. *Davis Provision Co.,* supra, inapplicable, because the New York statute in that case prescribed a rule of jurisdiction. The court concedes the distinction between a rule of jurisdiction and a rule of decision is a thin distinction when employed as a test of federal constitutionality under the full faith and credit clause. *Chambers* v. *B. & O. R. Co.* (1907), 207 U. S. 142, seems apposite in this connection as it was used to support two recent Illinois decisions to be next cited. In that case a widow whose husband, a citizen of Pennsylvania, had been killed in Pennsylvania, sued in a court of Ohio, to enforce a cause of action acquired under the Pennsylvania death statute. The Ohio court dismissed the suit because of a statute of Ohio saying that no action shall be brought in Ohio courts under the death statute of another state except where the person killed was a citizen of Ohio. The Ohio statute was challenged only for repugnancy to the privileges and immunities clause of the federal Constitution (Art. 4, sec. 2, clause 2). The federal Supreme Court decided the Ohio statute did not encounter that clause. The court

also said the Ohio statute prescribed a rule of jurisdiction. Of course the case is not an authority that the Ohio statute does not encounter the full faith and credit clause and act of Congress, because no such point was raised at the bar or considered by the court. In *Daugherty* v. *American McKenna Process Co.* (1912), 255 Ill. 369, a suit to enforce a cause of action acquired under the death statute of New Jersey was dismissed because of a recent amendment of the Illinois death statute saying, "No action shall be brought in this state to recover damages for a death occurring outside of this state." The statute was held to prescribe a rule of jurisdiction not violative of the state's duty of full faith and credit. In *Walton* v. *Pryor* (1917), 276 Ill. 560, the same statute was extended and applied to dismiss a suit for damages for death under the Federal Employers' Liability Act where the death occurred in Missouri; and as so extended and applied to a cause of action arising under federal law in a sister state the statute was held to be federally constitutional, because prescribing a rule of jurisdiction.

One way to answer a thin distinction is by another distinction equally thin, but more correct in point of application. The state statutes sustained as federally constitutional in the foregoing cases did not prescribe rules of jurisdiction but rules of decision, not of the merits of controversies, but of the question of the comity or hospitality of the state towards the enforcement of causes of action acquired under the local law of a sister state; or, as in the Illinois case of *Walton* v. *Pryor,* under federal law in a sister state. The state statutes in the cases cited are federally unconstitutional because prescribing rules of state comity or hospitality repugnant to the federal duty enjoined upon each state by the full faith and credit clause and act of Congress.[9]

9. Comity, as used in the conflict of laws, is not the comity of the courts, but of the state or nation. It is one of the many anomalies of our judicial power inherited from England that it extends to declaring such comity. See *Hilton* v. *Guyot* (1895), 159 U. S. 113, 164, 165, 166; but this judicial power does not exclude the legislative power to declare the comity of the state or nation.

As respects the comity of the United States towards the enforcement of rights acquired under the laws of foreign countries, is it true that the power to declare the comity of the United States towards such rights is reserved to the states to be exercised by their courts and legislatures subject to no federal supervision or control except under the grant of the treaty-making power? It seems to be so supposed, and presumably the judicial rule of comity declared and applied in *Hilton* v. *Guyot* towards the enforcement of a French judgment in a case in a federal court between a citizen of France and citizens of the United States and New York would be classified as general jurisprudence under *Swift* v. *Tyson,* binding only federal judges. But it does not seem any more difficult to find a delegation of the power to the United States by implication from several grants of power to the United States and the prohibitions on the states, taken together, than it was to find an implied delegation of power to Congress to incorporate a bank; to make paper money legal tender, or to exclude and deport aliens. It is fairly possible to say the power is a federal judicial power lodged in the federal courts, even if it is thought not fairly possible to say the power is a legislative power lodged in Congress. State judicial and legislative power, to declare the comity or policy of the nation towards foreign countries, seems a very peculiar anomaly under the federal constitution.

But it makes no difference whatever, as related to their federal constitutionality under the full faith and credit clause, whether the state statutes in the cases cited prescribed rules of jurisdiction or rules of decision, whether on the merits or on the comity or hospitality of the state. Any rule of jurisdiction may be classified as a rule of decision, because a court always has jurisdiction to determine its own jurisdiction and a rule of jurisdiction is but a rule for the decision of that question. There is no process, legislative, executive or judicial, and no scheme for the classification of legal rules, by which a state can make the jurisdiction of every one of its courts turn on the character of the cause of action as arising under the Constitution, laws or treaties of the United States, without violating the declaration of the supremacy of the constitution, laws and treaties of the United States, and their binding force on the judges in every state, anything in the Constitution or laws of any state to the contrary notwithstanding (Art. 6, clause 2). The reasons that authorize Congress to make the jurisdiction of federal courts turn on the federal character of the cause have no application to the jurisdiction of state courts. The refusal of a state, whether by affirmative act or simple non-feasance, to do its federal duty is not an exercise of any constitutional power reserved to the states respectively by the Tenth Amendment. It is secession. It may be so wholesale as to be beyond the reach of the federal judicial power, though not because it is constitutional. But it was not wholesale at all in the instances cited. The state legislatures that passed the state statutes in the cases cited acted unwittingly and inadvertently, evidently not seeing or intending the necessary practical operation and effect of the statutes to deny private rights secured and protected by the Constitution and laws of the United States. The state courts held bound and limited by the statutes were established as courts of original, general jurisdiction by other state constitutional or statutory provisions. The statutes were aimed at and hit causes of action solely because arising in other states under local or federal law. Of course the federal constitutionality of such state statutes falls within the range of the federal judicial power as a justiciable question. It is pertinent to notice that it is decided that a transitory cause of action arising under the local statute law of a state may be enforced in a sister state even though the statute creating the cause of action provides that the action be brought in local domestic courts. *Tenn. Coal Co.* v. *George* (1914), 233 U. S. 354.[10]

10. There is nothing in the full faith and credit clause and act of Congress that compels a state to entertain a suit for the enforcement of a cause of action acquired under the local law of a sister state when the facts plainly show that the plaintiff is exercising his right to choose the forum vexatiously or oppressively for an unjust end, as, e. g., to deprive the defendant of his means of defense and so pervert and defeat justice. In *Logan* v. *Bank of Scotland* (1906), 1 K. B. 141, 148, the English court of appeal thought the New York statute in *Anglo-American Provision Co.* v *Davis Provision Co.*, supra, as applied in a New York case cited, did not fall within that principle. The same New York statute was involved in *Barrow Steamship Co.* v. *Kane* (1898), 170 U. S. 100. There is no precedent

It is decided, that a state court violates the full faith and credit clause and act of Congress when it makes an erroneous selection of one of two conflicting local state laws in a case in one state for the enforcement of a cause of action acquired under the local law of another state. *Royal Arcanum* v. *Green* (1915), 237 U. S. 531. In this case Green, a New York member of the Royal Arcanum, sued the society in a New York court for a decree declaring an increased assessment invalid and enjoining its collection as to him. The Royal Arcanum's defense was that the increased assessment was valid under Massachusetts statutes incorporating the society and a Massachusetts decision declaring the effect of the statutes in Massachusetts. The New York court refused to select and apply the Massachusetts law relied on and selected and applied New York law, holding the increased assessment invalid as to Green. The full faith and credit clause and act of Congress having been duly relied on in the New York court by the Royal Arcanum, the federal Supreme Court held the question of the selection of one of the two conflicting state laws was a federal question, giving the court jurisdiction, selected and applied Massachusetts law, and held the increased assessment valid as to Green, thus reversing the New York court. In this connection *Kryger* v. *Wilson* (1916), 242 U. S. 171, may be noticed. The plaintiff sued in a North Dakota court to enforce rights acquired as vendee in a contract made and to be performed in Minnesota for the purchase and sale of land in North Dakota. The plaintiff asked the North Dakota court to select and apply a Minnesota statute concerning the cancelation of such a contract; but the court refused to select and apply the Minnesota statute, and selected and applied a North Dakota statute on the same subject. This was complained of in the federal Supreme Court. Speaking by Brandeis, J., the court said:

"The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancelation of the contract is governed by the law of the situs instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned."

Royal Arcanum v. *Green,* supra, decided that the federal Supreme Court is concerned with that question on writ of error to a state court when the full faith and credit clause and act of

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that I know of where a court of one state applied the above principle of vexatious choice of the forum to refuse to entertain a suit to enforce a cause of action acquired under the local law of another state. Of course, its application of the principle is subject to review by the federal Supreme Court. The idea seems to be that the plaintiff's right to choose the forum is absolute. But there is no right unqualified by the rule, so use your own as not to injure another. The purpose of the full faith and credit clause is expressly declared to be "to establish justice" (Preamble of U. S. Const.).

Independently of the federal right of full faith and credit, and leaving it out, the federal Supreme Court may be constrained to declare these state statutes void under the privileges and immunities, due process and equal protection prohibitions of the Fourteenth Amendment, or under some other clause, as e.g., interstate commerce, clearly involved in the Illinois case of *Walton* v. *Pryor.* But all that is outside the scope of this note, which is confined to the federal right of full faith and credit.

Congress are relied on in the state court. In *Kryger* v. *Wilson* the plaintiff did not rely on them but relied on the due process clause in the Fourteenth Amendment and on the obligation of contracts clause. Under the decisions [See, e. g., *Manhattan Life Ins. Co.* v. *Cohen* (1914), 234 U. S. 123; *Pa. R. Co.* v. *Hughes* (1903), 191 U. S. 477], the correct answer to the plaintiff was that the federal question whether the North Dakota court selected and applied the right law was not before the federal Supreme Court,—though it is very hard to see why the federal question was not necessarily involved and passed upon by the state court.[11]

11. Under the full faith and credit clause, the North Dakota court's selection of the lex situs rather than the lex loci contractus, as the rule of decision was correct. The plaintiff was seeking to enforce a vendee's "equity" in North Dakota land arising out of his contract to purchase made and to be performed in Minnesota. The self-evident truth has been declared over and over again by the federal Supreme Court, repeating an observation of Story in his "Constitution" and "Conflict of Laws," that the full faith and credit clause does not *enlarge* the pre-existing or existing sovereignty of any state. No state had any pre-existing or has any existing sovereignty to prescribe the law that governs the creation, extinction, or succession inter vivos and after death, of titles, "legal" or "equitable," to immovables (land) in another state. The pre-existing and existing sovereignty of the state of the locality or situs over that subject was and is complete and exclusive of every other state. This want of pre-existing and existing sovereignty in each state is consistent with the acknowledged pre-existing and existing sovereignty of each state to give a remedy to enforce "equities" in land in another state arising out of contract, trust or fraud, when the local law of the sister state of the locality or situs of the land classifies "equities" in land within its limits as personal, transitory rights. Under the full faith and credit clause, the question whether a transaction in one state creates an "equity" in land in another state can be decided only by the lex situs, never by the lex loci; the part of the local law of a state classified as "equity," the same as the part classified as "law," stops at the frontiers of the state. The full faith and credit clause cannot be judicially allowed to operate to *enlarge* the reserved sovereignty of any state, whether the case before the court is for the enforcement of a judgment of another state, or a cause of action acquired under the "statute law" or "local common law" of another state. The whole of its allowable operation and effect is to *diminish* or *cut down* the pre-existing sovereignty of each state touching the enforcement by each state of private rights acquired under the local law of a sister state. The clause itself shows the private right acquired must be a personal, transitory right, annexed to and traveling with the person entitled and the person bound as they go from one state to another, and not a merely local right. The full faith and credit clause and the act of Congress passed in pursuance thereof cut off the pre-existing sovereignty of each state to determine for itself, according to its own notions of its own particular policy and interest, the "comity" of the state towards the enforcement of private, personal, transitory rights acquired under the local law of a sister state, by prescribing a new, general, uniform, federal rule of "comity" between the states, binding on each state and on every individual in each state, and so better securing and protecting such private rights. See *Wisconsin* v. *Pelican Ins. Co.* (1888), 127 U. S. 265, and *Huntington* v. *Attrill* (1892), 146 U. S. 657, holding that the federal right of full faith and credit does not extend to the local *criminal* law of another state, i.e., a criminal cause of action acquired under the local criminal law of a state, whether for a fine, imprisonment or capital punishment, cannot be enforced by the United States or by any other state; only by the state whose local criminal law was violated. The reason is that the rule of sovereignty, that crime is local and no sovereign will enforce the criminal law of another sovereign, remains as a rule of

In the case in hand, if the plaintiff had relied on its federal right to full faith and credit to have the Texas federal district court select and apply the local law of Illinois (lex loci contractus) to determine the capacity of the married woman to make the contract, the federal Supreme Court could not have avoided deciding whether the lex loci contractus or the lex domicilii determined her capacity to make it. The court said, *Miliken* v. *Pratt* (1878), 125 Mass. 374, which is directly against the court's decision, Gray, C. J., writing the opinion,

> "Went to the verge of the law in holding a Massachusetts woman liable in Massachusetts on a contract that she could not have made there, because made by a letter in Maine, although her person remained always within the jurisdiction of Massachusetts."

In that case a Massachusetts married woman by a letter written in Massachusetts, and delivered through the post-office in Maine, made a continuing guaranty of her husband's debts. The court held the contract was made and to be performed in Maine. The married woman had capacity to make it by the local law of Maine (lex loci contractus), but not by the local law of Massachusetts (lex domicilii), as the two state laws stood when the contract was made. The full faith and credit clause and act of Congress were not relied on at the bar or referred to by the court, and judgment was rendered on the merits against the woman under judicial rules in the conflict of laws. The Massachusetts court selected and applied the local law of Maine (lex loci contractus) to determine the married woman's capacity to make the contract. The federal Supreme Court cannot mean to say the Massachusetts court went to the verge of the law in selecting and applying the lex loci contractus rather than the lex domicilii to determine the married woman's capacity to make the contract. It must mean to say that the Massachusetts court went to the verge of the law in refusing to apply the judicial rule of comity that a court of one state will not enforce a cause of action acquired under the local law of another state when its enforcement there is inconsistent with the policy of its own local law. As already shown, the full faith and credit clause and act of Congress as applied to a case like *Milliken* v. *Pratt,* delete that judicial rule of comity as between states.

Hence the Massachusetts court did not go to the verge of the law under the full faith and credit clause and act of Congress. And, under the full faith and credit clause, the Massachusetts court's selection and application of the lex loci contractus rather than the lex domicilii to determine the capacity of the married woman to make the contract seems the only allowable selection and application in the case before it. The privileges and immuni-

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sovereignty, prescribing the delegated sovereignty of the United States as respects each state, and the reserved sovereignty of each state as respects the United States and every other state. Sometimes the *Pelican* case is misinterpreted and erroneously extended to civil cases in the state and federal courts, as, e.g., in the dissent in *Fauntleroy* v. *Lum* (1902), 210 U. S. 230, 242-244.

ties clause of the federal constitution grants and secures to married women who are citizens of a state, as a federal right, the same right to make contracts in another state that the local law of such other state grants to married women there who are citizens of such other state. This federal right of the citizens of each state to make contracts and to carry on local trade and commerce in every other state the same as the state citizens there can be exercised and enjoyed without any corporeal ingress into another state, as by sending a letter, telegraphing or telephoning across state lines.[12] Under the full faith and credit clause and act of Congress, a married woman, citizen of one state, who exercises and enjoys her federal right to make a contract in another state to secure her husband's debts the same as married women there may do if they are citizens of such other state, cannot escape the burden of her contract when she is sued for its enforcement in another state, whether the state of her domicil or not. Hence on the whole case the Massachusetts court in *Milliken* v. *Pratt* reached the only result allowable under the federal constitution and laws. That result, viewed from the broader federal, rather than the narrower state outlook, holding the married woman to her contract made in another state and binding on her there under the local law there, is not devoid of the far-seeing wisdom of the statesman or the simple honesty of the common man. Suffice, however, that it is the result required by the constitution and laws of the United States. The federal Supreme Court's jettison of *Milliken* v. *Pratt* and its result in the case before it cannot stand the federal test of full faith and credit.

There seems to be an idea that the full faith and credit clause and act of Congress do not extend to causes of action acquired under the local law of another state evidenced by its judicial decisions in which there is no statutory ingredient, i.e., the "local common law" of another state. It is impossible to trace this idea to any decision of the federal Supreme Court. *Penna. R. Co.* v. *Hughes* (1903), 191 U. S. 477, does not so decide or intimate. In that case a horse was shipped from a point in New York to a point in Pennsylvania under a contract limiting the carrier's liability to $100. The horse was injured in Pennsylvania by the carrier's negligence. In an action for damages in a Pennsylvania court by the shipper against the carrier, the defendant asked the court to select and apply the local common law of New York under which the contract limiting the carrier's liability was valid. The court refused,

12. The privileges and immunities clause is a condensed, concise statement of at least the part of Art. 4 of the Articles of Confederation reading as follows: "To better secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, * * * shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively"; * * * see *Blake* v. *McClung* (1898), 172 U. S. 229, and cases cited.

and selected and applied the local common law of Pennsylvania under which the contract was void. Under the commercial law or general jurisprudence of *Swift* v. *Tyson* the contract was valid. On writ of error the federal Supreme Court simply decided it had no jurisdiction to review the Pennsylvania court's refusal to select and apply the local common law of New York, because the defendant did not claim any federal right in the state court to have that law selected and applied.

There can be no fair question that the full faith and credit clause and act of Congress extend to causes of action acquired under the local common law of another state the same as under the statute law of another state and judgments of another state. Whatever dispute there may be since Bentham and Austin as to whether judges "make" law or "discover and declare" law, there never has been any dispute and never can be any dispute that they always have made "records" in the sense of that word in the full faith and credit clause and act of Congress. Such "records" always have been used as evidence and the best evidence of what has been called since Bracton at least "lex et consuetudo," which is the "law or usage" of the act of Congress. In *Swift* v. *Tyson* (1842), 16 Pet. 1, 18, Story, J., said for the court: "In the ordinary use of language it will hardly be contended that the decision of courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws." They are "records." There is nothing to the idea that the full faith and credit clause and act of Congress do not extend to the local common law of another state just the same as to the statute law and judgments of another state.

It is not essential to support a writ of error from the federal Supreme Court to a state court under the full faith and credit clause and act of Congress in a case to enforce a cause of action acquired under the local law of another state that the federal validity of a legislative act of another state be drawn in question. The idea that it is, if anybody really entertains such idea at this date, must rest on expressions in opinions in a line of cases beginning with *C. & A. R. Co.* v. *Wiggins Ferry Co.* (1887), 119 U. S. 615. That seems to be the first case in which the court expressly declared the full faith and credit clause and act of Congress extend to the statute law of another state the same as to judgments of another state. The suit was in a Missouri court to recover damages for breach of a contract. The defendant railroad, an Illinois corporation, claimed the contract was void as being ultra vires its Illinois charter according to the legal effect of the Illinois charter in Illinois. The railroad put its Illinois charter in evidence, but introduced no other evidence of the local law or usage of Illinois touching the effect of the charter in Illinois. Having before it no evidence of the local law or usage of Illinois touching the effect of the charter in Illinois but the bare text of the charter, the Missouri court construed the text as best it could and found that the effect in Illinois of the Illinois charter under the local law or usage of

Illinois was to make the contract sued on intra vires, and not ultra vires, the defendant railroad; and hence found that the contract was not void but valid in Illinois under Illinois local law or usage. Though the defendant railroad's federal right of full faith and credit to have the Missouri court give the same effect in Missouri to its Illinois charter that it had in Illinois under Illinois law or usage was duly set up and claimed in the Missouri court, the federal Supreme Court dismissed the defendant railroad's writ of error. The ground of the dismissal was that the defendant railroad's claim that the Missouri court erroneously construed the Illinois charter under Illinois law or usage was not enough, under the circumstances, to convict the Missouri court of denying the defendant railroad's federal right to have its Illinois charter given the same effect in Missouri that it had in Illinois under Illinois law or usage, the Missouri court having nothing before it in the way of evidence of Illinois law or usage but the bare text of the Illinois charter. Presumably the court thought the Missouri court decided the case right or without reversible error. In point of authority, the court rested its order of dismissal on jurisdictional decisions under the contracts clause holding that a state judicial decision sought to be reviewed under the contracts clause, however much it may alter the law of the state as evidenced by previous state judicial decisions in existence when a contract was made, cannot constitute legislative action by the state under the contracts clause; and unless there is a state legislative act passed subsequent to the making of a contract that could impair the pre-existing contract, and unless the state decision sought to be reviewed really and in truth enforced such subsequent state legislative act so as to impair the pre-existing contract, then there is no jurisdiction in the federal Supreme Court to review the state decision. See *New Orleans Water Works Co.* v. *La. Sugar Ref. Co.* (1888), 125 U. S. 18; *Central Land Co.* v. *Laidley* (1895), 159 U. S. 103; *McCullough* v. *Virginia* (1898), 172 U. S. 102; *Cross Lake Shooting & Fishing Club* v. *Louisiana* (1912), 224 U. S. 632; *Ross* v. *Oregon* (1913), 227 U. S. 150. Jurisdictional decisions under the contracts clause plainly are not applicable under the full faith and credit clause and act of Congress. The court employed a false and misleading analogy. But the court did not say or fairly imply that the federal validity of a legislative act of another state must be drawn in question to enable it to entertain a writ of error to a state court under the full faith and credit clause and act of Congress. The meaning of this part of the opinion in *C. & A. R. Co.* v. *Wiggins Ferry Co.* has been variously, loosely and vaguely stated in subsequent opinions. See, e.g., *Allen* v. *Alleghany Co.* (1905), 196 U. S. 458; *Western Life Ins. Co.* v. *Rupp* (1914), 235 U. S. 261, 275, and cases cited; *Penn. Fire Ins. Co.* v. *Gold Issue Mining & M. Co.* (1917), 243 U. S. 93, 96, and cases cited. Whatever may be the correct way to state the rule, if there is any rule, which may be doubted, and whether it be a rule of jurisdiction or decision, and whether as a matter of fact the court really and in truth ever

does or ever can make any use of the rule consistently with justice to the party, except to fix the form of its final order as one of dismissal or affirmance, there can be no question the court never has decided, and never can decide, that the federal validity of a legislative act of another state must be drawn in question to support a writ of error to a state court under the full faith and credit clause and act of Congress in a case to enforce a cause of action acquired under the local law (statute law) of another state. The cases show clearly the practice of the court is all the other way.

The case at the head of this note is in no way exceptional but typical of most of the multitude of cases in our state and federal reports for the enforcement by one state of causes of action, other than judgments, acquired under the local law of a sister state, wherein counsel and court have solved the problems before them by judicial rules in the conflict of laws, classified as local common law or general jurisprudence under *Swift* v *Tyson,* as if the full faith and credit clause and act of Congress had no application and did not exist. The cases cited show that the practice in those cases always has been and is based upon a wrong constitutional theory of the applicable law and its judicial administration.

Now and not tomorrow is the time to begin to rely on the federal right of full faith and credit, and to establish equal and uniform justice throughout the United States agreeably to the full faith and credit clause and act of Congress in all cases to which they apply. Our federal constitution constantly is revealing to us from time to time our own littleness and its own greatness of view.

H. S.

FUTURE INTERESTS—INTERESTS SUBJECT TO A TERM—CONSTRUCTION—WHETHER SUBJECT TO A CONDITION PRECEDENT TO TAKE EFFECT IN POSSESSION.—In *Bush* v. *Hamill,* 273 Ill. 132, an undivided one-fourth was devised to Charles for a term of years till Eldon reached 21. Subject to this term the fee was devised to Eldon, in these words:

"In case my said grandson lives to attain the age of twenty-one years, it is my will that said undivided one-fourth of my real estate shall become his property in fee simple."

Then there was a gift over,

"In case my said grandson, Eldon Hamill, should die before attaining the age of twenty-one years."

The court discussed the question as to whether this gave Eldon a fee subject to a term, which fee was limited upon a condition precedent that Eldon must survive the age of 21 years, or was the fee an immediate estate in possession (often called vested) subject to a term, and liable merely to be divested.

The case is difficult, because the same contingency is expressed both as precedent in form and subsequent in form. It is clear that where a life estate is limited to "A," with a remainder to "B" if he

survives the life tenant, but if he dies in the lifetime of the life tenant then over to "C" in fee, we have a case where the contingency is expressed as both precedent in form and subsequent in form. In the case last put, however, the English courts seem clearly to have held that they would give effect to both forms of expression, and that the remainder, therefore, in "B" would be a contingent remainder, and destructible. *Doe* v. *Scudamore,* 2 Bos. & P. 289 (1800). It very clearly became settled, however, that in one case the courts would disregard the language which introduced the gift with a condition precedent in form. That was where the gift was to "A" for life, then to "B" if he attained the age of 21, but if he died under 21, to"C." In that case the gift to "A" was a vested remainder, subject to be divested. *Edwards* v. *Hammond,* 3 Lev. 132 (1683). This rule was subsequently extended to the case of a direct gift (without a preceding life estate) to "B" if he attain 21, and if he die under 21, to "C." In this case "B" had an immediate interest in possession, subject to be divested (Leake, "Digest of Land Laws," p. 239, 367). The same rule was also extended to the case of a gift to trustees for the benefit of "B," till he reached 21, and if he die under 21, to "C." In that case "C" had an unconditional fee, subject to the term in the trustees (Leake, "Digest of Land Laws," 366). The two last mentioned rules are clearly applicable to the limitations in *Bush* v. *Hamill,* and were formulated and applied by the court. It is important to observe, however, that the rules applied are exceptional, and are confined to the precise cases described. It would certainly wreck the whole course of construction in handling contingent future interests if the courts suddenly began to rule that whenever a contingency introducing a remainder after a life estate was expressed as both precedent and subsequent in form, the expression of the gift as precedent in form would be disregarded.

ALBERT M. KALES.

FORFEITURE AND RESTRAINTS ON ALIENATION—VALIDITY OF GIFT OVER ON FAILURE TO ALIENATE BY WILL.—The deed in question in *Wilson* v. *Wilson,* 268 Ill. 270, as the court construed the words, conveyed a fee to John Wilson with the following gift over:

"It is further provided that the above land is not to be transferred, but if said John Wilson and Julia Wilson, his wife, should die intestate (with no children), the above lands are to be the undivided property of my three youngest sons" (naming them).

Upon the death of John Wilson, without children and intestate, the court held that his fee descended one-half to his widow and the other half to his collateral heirs, subject to the widow's dower, and that the gift over was void.

The gift over was not, however, void because it was a fee on a fee by deed. The deed in question recited a valuable consideration of $1,000, and could, therefore, take effect as a bargain and sale under the Statute of Uses. A fee on a fee is valid by way

of shifting use. *Stoller* v. *Doyle,* 257 Ill. 369; ILL. LAW REV. VIII, 495. The gift over was void because it was a gift over in case John died without children and attempted to dispose of the fee inter vivos.

The gift over is one on "intestacy." This usually means intestate as to the particular property which is the same as "without disposing of the property by deed inter vivos or by will at the first taker's death." We have, however, the very peculiar circumstance that John's fee is made expressly inalienable inter vivos in the very sentence which expresses the gift over. We are, therefore, bound to construe the word "intestate" with reference to the fact that the grantor has already declared "that the above land is not to be transferred" inter vivos by the first taker. The gift over, then, could not be read as taking effect if John failed to alienate by deed inter vivos or by will, because that would necessarily give to John the right to defeat the gift over by an attempted alienation inter vivos, which is directly contradictory to the language used that John is not to transfer the fee inter vivos. In order, therefore, to reconcile the declaration that John's fee is to be inalienable inter vivos and that there should be a gift over if he died intestate, we must give to the word "intestate" a meaning which it is quite capable of bearing without any great departure from the natural meaning of the word, viz: the failure to alienate the property in question by will. Hence, the gift over is in the event that John dies without children and without alienating the property by will. This is the same as a gift over if John dies without children and does attempt to alienate the property by deed.

Such a gift over is clearly void under such authorities as exist. *Holmes* v. *Godson,* 8 DeG. M & G. 152; *Gulliver* v. *Vaux* (set out in 8 DeG. M. & G. 167). In *Stewart* v. *Stewart,* 186 Ill. 60, the gift over was to take effect if the first taker did not dispose of the property inter vivos, which is the same as a gift over if he did attempt to dispose of the property by will. The gift over was held void.

The case presented in *Wilson* v. *Wilson* should be distinguished from the case where the gift over is upon the intestacy of the first taker, meaning without disposing of the property by deed or will. It should also be distinguished from the case where the gift over is if the first taker dies intestate (meaning without disposing of the property by deed or will) and without children or issue. The difficulties presented in those cases are considerable, but *Wilson* v. *Wilson* does not belong to either class, and the difficulties which attend holding the gift over void in them do not have to be overcome in supporting the result reached in *Wilson* v. *Wilson.*

ALBERT M. KALES.

FUTURE INTERESTS—PARTITION BY OWNERS OF.—*Richardson* v. *Van Gundy,* 271 Ill. 476, follows the settled rule in this state that where undivided interests in remainder, even though vested, are subject to be divested, no partition thereof can be had by any

of the remaindermen. In *Richardson* v. *Van Gundy* the remainder was the statutory remainder, created by the statute on entails. It was vested in the children of the life tenant, but it was subject to be divested pro tanto by the birth of other children. This was a sufficient divesting to prevent partition.

Bush v. *Hamill,* 273 Ill. 132, is quite a different case. There the life estate had terminated, and the undivided one-fourth of each of three children had come into possession. The remaining one-fourth was in a trustee for a term till Eldon reached 21, in trust for Eldon, with a legal fee, subject to the term in Eldon, but liable to be divested if he died under 21. In this state of the title the three children, who had indefeasible interests in possession, had a right to partition as against the one-fourth in which Eldon was interested. The fact that Eldon's one-fourth was subject to be divested did not limit the right of the others to partition. To the same effect is *Pitzer* v. *Morrison,* 272 Ill. 291. So in *Betz* v. *Farling,* 274 Ill. 107, children having a vested and indefeasible undivided interest in remainder, subject to a life estate in the testator's widow, were entitled to partition. The fact that the other undivided interest in the widow for life, with a further like estate in Rebecca and a vested remainder in her children which was, however, subject to be divested, did not prevent partition.

ALBERT M. KALES.

RIPARIAN RIGHTS ON LAKES—RIGHT OF ACCESS AND TO ACCRETIONS.—An interesting problem that might have been cast aside as being a purely academic one, was in fact litigated in the case of *Miller v. Commissioners of Lincoln Park,* 278 Ill. 400, 116 N. E. 178. The case arose on a bill to enjoin the Commissioners of Lincoln Park, in Chicago, from extending the park by reclamation of the submerged bed of Lake Michigan, opposite to property owned by complainant. Complainant originally owned to the water's edge of the lake. About twenty-five years ago, the strip of complainant's land along the lake was taken in condemnation proceedings for purposes of a park road and under circumstances indicating it was not the intention to acquire aught but the right to the road. This, the court held, left in the original owner a right to accretions from the lake and also the theoretical right of access from the water. The act of the park authorities, now, in filling in the portion of the lake beyond this road was complained of in the case now under discussion.

It was the theory of complainant that the acts complained of were in fact a violation of the rights which he had reserved in the lake by virtue of his ownership in fee of the shore, the condemnation proceedings having been effectual to give an easement to the town. In this theory, the court was disposed to sustain him. However, the court considered that acts violative of this right to accretion and this right of access had been committed at the time the road for which the strip was condemned, was constructed; the condemnation proceedings giving only an easement of the strip along the

shore, the acts of the park authorities in filling in part of the lake to complete the road, the strip condemned being inadequate, constituting an invasion of those rights for which redress might have been had at that time. This situation apparently appeared from the pleadings, and coupled with the fact, apparent from the pleadings, that twenty-five years had elapsed without action by complainant, a demurrer was fatal to the bill of complaint because of laches.

That the right to accretion was valuable there can be no doubt, but it would seem the right of access was of no special value so long as the road in part bordered on the water, the easement of the road doubtless carrying with it the right to access from the lake and thus giving that right to the general public as well: ILLINOIS LAW REV., IX, 572, 573. E. M. L.

SURFACE WATERS—RIGHTS OF LOWER OWNER.—The case of *Town of Nameoki* v. *Buenger,* 275 Ill. 430, 114 N. E. 129, reaffirms the rule in Illinois, that a lower owner may not improve his real estate if so to do, operates to obstruct the natural flow of surface water from the dominant estate and to throw it back on that estate: *Bradbury* v. *Vandalia Dist.,* 236 Ill. 42; *Pinkstaff* v. *Steffy,* 216 Ill. 406; *Barnard* v. *Comrs. of Highways,* 172 Ill. 39; *Groff* v. *Ankenbrandt,* 124 Ill. 51; *R. R. Co.* v. *Cox,* 91 Ill. 500; *I. & St. L. R. & Coal Co.* v. *Fehringer,* 82 Ill. 129; *Gormley* v. *Sandford,* 52 Ill. 158; *R. & Carrying Co.* v. *Deitz,* 50 Ill. 210; *Gillham* v. *R. Co.,* 49 Ill. 484; *Youngreen* v. *Shelton,* 101 Ill. App. 89; *R. Co.* v. *Elliot,* 34 Ill. App. 589.

It should be noted that in Massachusetts the right of a fee owner to use his land is held so sacred as to permit him to put thereon any kind of structure that he pleases, even if it interferes with drainage water from a dominant estate: *Gammon* v. *Hargadon,* 10 *Allen,* 106 (Mass.); *Bates* v. *Smith,* 100 Mass. 181. Evidently that is not the Illinois law.

E. M. L.