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CONDITIONAL SHARE SUBSCRIPTIONS

An orthodox method of legal research by one who undertakes to investigate a legal problem has been the study of a mass of cases, which are believed to contain related data, in an attempt to reveal the legal principles upon which the courts were relying in deciding such cases. Others, dubious as to the pre-existence of a system of legal principles by which courts purporting to follow "the common law" are controlled, are accustomed to examine such related fact situations in an effort to ascertain their legal consequences as decreed by the courts, and thus to develop or induce a generalization (or principle) with respect to *typical* fact situations which will constitute a reasonably accurate prediction of how future courts will react to such typical fact situations. In the following comment an attempt has been made to

present such typical fact situations as recur in the field of "Conditional Share Subscriptions" and the actual reactions of courts thereto. It is believed that this will prove to be a more useful and, in the end, a simpler presentation of the subject than could be accomplished by talking in terms of pre-existent, inherently self-explanatory general principles.

Conditional subscriptions for shares of the authorized capital stock of corporations have provided a fruitful source of litigation. With policies possibly favoring one type of condition and disfavoring another,[1] the differing parties who may bring[2] actions and against whom actions may be brought, and the wholly distinct considerations involved in subscriptions for shares in corporations to be formed and in corporations already in existence,[3] it is almost inevitable that much confusion is to be found in the cases.

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[1] "Conditional subscriptions to the stock of corporations are unusual, and often operate to defeat subscribers who become such absolutely and upon the faith that all the stock is equally bound to contribute to the hazards of the enterprise. It misleads creditors and is a fruitful source of litigation and disaster. Tending to the ensnarement of creditors and contrary to a sound public policy, conditional subscriptions to corporate shares ought not to be encouraged." Paducah & M. Ry. Co. v. Parks, 86 Tenn. 554, 560, 8 S. W. 842, 844 (1888).

[2] Entirely different rules may govern an action on a share subscription, depending upon whether the action is instituted by the corporation itself or by its receiver in insolvency. "Whatever may be the rule in regard to giving notice as a preliminary step to making a call as between a corporation which is a going concern and a subscriber to its stock, it is clear that after the company has failed and its assets have been placed in the hands of a receiver who has been directed by the court to bring suit for the purpose of collecting any amount due by any person, thus including unpaid stock subscriptions, a petition in a suit so brought by the receiver to recover the entire amount of unpaid subscriptions is not subject to demurrer on the ground it does not allege that notice has been given to the subscriber of the compliance by the corporation with the condition of the subscription." Cox v. Hardee, 135 Ga. 80, 89, 68 S. E. 932, 936 (1910). See also *infra* note 36.

[3] The reasons for a policy of disfavoring conditional subscriptions in a corporation to be formed would not necessarily apply where the corporation was extant at the time the subscription was made. In Pennsylvania such a distinction is recognized where quasi-public corporations are involved. Conditions inserted in offers to subscribe for shares in corporations not yet formed are there held to be invalid, and the subscription offer when later accepted by the corporation is held to be unconditional and binding on the subscriber. Where the corporation is extant, however, the conditions are recognized as binding on both parties. Boyd v. Peach Bottom Ry., 90 Pa. 169 (1879). But in an early case in New York it was held that if the conditions affect the routes of turnpikes or railroads, the subscription, although it involved an extant corporation, was void and unenforceable by the corporation. The court also suggested that such a conditional subscription would be unenforceable against the corporation by the subscriber. The Troy & Boston Ry. Co. v. Tibbits, 18 Barb. 297 (N. Y. 1854).

Conditions recognized by the courts fall into two general divisions: express and implied. The express conditions are in turn subdivided into conditions precedent and conditions subsequent.[4] A share subscription containing a condition precedent may be described as a subscription whereby, in the absence of a waiver or estoppel,[5] the subscriber does not become a shareholder, for the purpose of allowing the corporation to recover the price of the shares, until there has been performance or fulfillment of the stipulated condition. In the case of a condition subsequent, the subscriber does become a shareholder prior to the performance of the condition, but subsequent non-performance of the condition gives him a right of action against the corporation for its failure to perform the condition.[6]

This comment will be concerned with an analysis of the legal relations arising out of conditional subscription cases from the standpoint of who is bringing the action and the type of condition involved. The cases considered have, for the most part, been decided within the past twenty years and it is believed that all the cases since about 1907 on the matters here discussed are included in this paper.

I. CONDITIONAL SUBSCRIPTIONS [7] FOR SHARES IN EXISTING CORPORATIONS.

A. *Where the subscription contains an express condition that it is not to be binding, i. e., the shares not to be paid for, unless other subscriptions for a designated number of shares are obtained.*

1. Where the action is instituted by the corporation against the subscriber.

The case of *Nowlin v. Memphis Corporation* [8] involved this familiar type of condition.[9] In this case, two years after such a

[4] Conditions subsequent in subscriptions are sometimes referred to as subscriptions on special terms. 1 THOMPSON, CORPORATIONS (3d ed. 1927) § 712.

[5] The courts do not seem to follow any definite "principle" of waiver or estoppel. When, in certain circumstances the defendant is not permitted to set up his condition as a defense, the courts label the fact situation as "waiver" or "estoppel." What these situations are can only be determined by an examination of the cases. See cases cited *infra* notes 11, 12, 31, 32.

[6] See Bobzin v. Gould Balance Valve Co., 140 Iowa 744, 749, 118 N. W. 40, 42 (1908).

[7] The word "subscription" is used in this division of the comment to refer to a fact situation constituting a written contract between a corporation and an individual (herein called the "subscriber") for the future creation of shares of a specified class and number of such corporation in such person, upon the fulfillment of stated conditions.

[8] 161 Ark. 294, 255 S. W. 1092 (1923).

[9] The action was brought on a non-negotiable note. Seemingly it makes no difference whether a corporation sues on a note or on a subscription con-

subscription was made, the corporation brought an action on it against the subscriber. Just prior to the action the corporation's privilege to sell additional shares was revoked.[10] It failed to prove that the designated number of subscriptions was secured. The corporation was not permitted to recover, the court labelling the fact situation in this case a condition precedent.

The condition in a subscription that it is not to be binding unless other subscriptions for a designated number of shares are obtained may be waived.[11] An acquiescence in corporation affairs to the extent of signing for a crypt in the corporation's mausoleum was held not to be a waiver of the instant condition.[12] Where the required number of shares had not been subscribed for, purchase money already paid was recovered by the subscriber.[13] In this last case, had the corporation become insolvent prior to the subscriber's action, the question of his status as compared with that of general creditors would have been raised. Jurisdictions strongly favoring creditors [14] might well defer the subscriber's rights to those of creditors. Whether such a subscriber would be given a preference over shareholders is debatable.

2. **Where the action is instituted on behalf of corporate creditors, *i. e.*, by a receiver or trustee in bankruptcy against the subscriber.**

Illustrative of this situation is the case of *Foote v. Greilick*.[15] The subscription list in that case read as follows:

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tract, except, possibly, in the matter of burden of proof of consideration. The assignee of a corporation note with knowledge would seem to stand in the corporation's shoes. Phillips v. Matthews, 205 Ala. 480, 88 So. 641 (1920).

[10] The effect of the revocation of the corporation's privilege to sell shares was not discussed.

[11] *Cf.* Alexander v. North Carolina Sav. Bank and Trust Co., 155 N. C. 124, 71 S. E. 69 (1911).

[12] Stuart v. Mausoleum Co., 190 Misc. 906, 179 N. Y. Supp. 73 (1st. Dept. 1919); Alexander v. N. C. Bank, *supra* note 11.

[13] Stuart v. Mausoleum Co., *supra* note 12. This comment does not purport to deal generally with the class of cases where the action is instituted by the subscriber against the corporation.

[14] In re Fechheimer Fishel Co., 212 Fed. 357 (C. C. A. 2d, 1914). This case did not involve conditional subscriptions but it throws light on the attitude of this court toward creditors. *S* owned $50,000 of the capital stock of the *X* corporation. He sold his shares to the corporation and received for them the corporation's note for $50,000. The corporation was solvent at this time and it was authorized by statute to purchase its own shares. When the corporation later became insolvent, *S*'s rights under the note were postponed to those of other corporate creditors. If *S* had received payment for his shares at the time he turned them over to the corporation, the transaction undoubtedly would have been valid.

[15] 166 Mich. 636, 132 N. W. 473 (1911); *cf.* Seubert v. Scott, considered in text at note 20.

Name	Number of shares taken	
1. *A*	30	
2. *B*	50	
3. *C*	30	
		Provided full $6,000 is taken
4. *D*	50	" " " " "
5. *E*	25	" " " " "
6. *F*	20	" " " " "

The par value of each share was $10. Action was brought by the trustee against the defendant, *A*. From the above list it would seem to be clear that the subscriptions of *A*, *B*, and *C* were absolute, whereas those of *D*, *E*, and *F* were conditional on $6,000 being taken. The appellate court, however, remanded the case that a jury might determine whether the former subscriptions were conditional, and in so doing apparently was not inclined to favor the trustee's cause.

B. *Where the subscription contains an express condition other than the type mentioned in A.*

1. Where the action is instituted by the corporation against the subscriber.

No case decided in the present century has been found involving a state of facts where a corporation, not having performed its condition nevertheless brought suit.[16] Such an action might be maintained on the theory that the corporation had a cause of action against the subscriber although the subscriber would in turn have a cause of action against it for failure to perform the condition.[17]

2. Where the action is instituted by or on behalf of a creditor or creditors of the corporation, as by a receiver or the corporation's trustee in bankruptcy, against the subscriber.

Where *S* subscribed for shares in the *X* corporation provided he would be given a bonus in the form of common shares, it was held, in a suit by the trustee in bankruptcy, that the subscriber's duty to pay the agreed amount was not contingent upon his being granted the bonus.[18] A subscription on condition that the

[16] In the case of Farm Lands Development Co. v. Taft, 194 Iowa 481, 186 N. W. 431 (1922), the defendant, in addition to an absolute subscription for 500 shares, subscribed for 187½ shares upon condition that the "subscription shall only be binding in case the directors of said Farm Lands Development Co. decide that it is necessary to issue such additional stock. . . ." The board of directors later found it necessary to increase the number of shares and gave due notice. The corporation, the court decided, had fully performed its condition by passing "the necessary resolutions to sell additional stock and to amend the articles of incorporation and increase the authorized capital stock."

[17] See Bobzin v. Gould Balance Valve Co., *supra* note 6; 1 THOMPSON, *loc. cit. supra* note 4.

[18] Skillin v. Magnus, 162 Fed. 689 (D. N. Y. 1907). In Barber v. De-

subscriber shall be elected president of the corporation and shall be allowed to pay for his shares out of his salary was held not to be effective against the receiver "whatever the rights of the corporation might have been." [19] *Seubert v. Scott* [20] involved a suit brought by a judgment creditor of a corporation on the alleged unpaid balance of the defendant's subscription. The defense set up was the failure of the corporation to obtain a patent, the defendant's subscription expressly stating that it was not to be *paid* until the patent was procured. The court held the defense good. These decisions indicate that where the interests of corporate creditors are involved there is an apparent tendency of the courts to contrue as conditions precedent those which expressly stipulate against *payment* until the condition is performed, whereas conditions making no express reference to *payment* by the subscriber are more frequently construed as conditions subsequent.

II. CONDITIONAL SUBSCRIPTIONS [21] FOR SHARES IN CORPORATIONS TO BE FORMED.

A. *Where the subscription contains an express condition that it is not to be binding, i. e., the shares not to be paid for, unless other subscriptions for a designated number are secured.*

1. Action by the corporation against the subscriber.

This condition is one of the commonest to be found in share subscriptions. Its inclusion in the subscription agreement becomes of importance only in certain circumstances inasmuch as there is a common law rule that, in the absence of evidence pointing to a contrary intention, no subscription for shares in a corporation to be formed is enforceable by the corporation until the entire amount of the authorized capital stock set out in the subscription list, articles of association or certificate of incorporation has been subscribed.[22] Such implied condition may be

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Camp, 96 S. C. 432, 81 S. E. 155 (1914), S subscribed for a number of shares in a corporation providing he could pay in personal services. It is not clear from the case whether the condition was written or oral. The receiver was allowed to recover in *cash*.

[19] Spratling v. Westbrook, 140 Ga. 625, 79 S. E. 536 (1913).

[20] 39 S. D. 278, 164 N. W. 75 (1917).

[21] The word "subscription" is used in this division of the comment to refer to the fact situation whereby an individual (herein called the subscriber) executes a written document by the terms of which he agrees with some other party to take a certain number of shares in a corporation later to be formed.

[22] "This is no arbitrary rule; it is founded on a plain dictate of justice, and the strict principles regulating the obligation of contracts. When a man subscribes a share to a stock corporation, to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five

waived.[23] This general rule has been construed to have been changed by statute in several states,[24] and in those states, as in others later to be mentioned, the express incorporation of the instant condition into share subscriptions becomes important. The parties may, if they so desire, expressly or by implication provide that the subscription is to be paid even though the full amount of the authorized capital stock is not subscribed for.[25]

In the cases herein considered the parties either provided by the terms of their subscriptions that subscriptions to the full amount of the authorized capital stock were not required before the corporation could do business, or the cases arose in the states having statutes construed to be in derogation of the common law rule, or in states not purporting to follow this common law rule.[26]

It has been decided that when a subscription contains an express condition that it is not to be binding unless other subscriptions for a designated number of shares are secured, the subscriber is under no duty to pay the subsequently formed corporation unless the condition has been complied with [27] and that the condition is a condition precedent. Such a condition is not considered to have been fulfilled if the corporation knowingly accepts subscriptions which are necessary to make up the prescribed amount of capital stock from individuals not having the

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hundred are subscribed for and he can have no assurance which he is bound to accept that the remainder will be taken, he would be held, if liable to assessment, to pay a five-hundreth part of the cost of the enterprise, besides incurring the risk of an entire failure of the enterprise itself, and the loss of the amount advanced towards it." Stoneham Branch Railroad Company v. Gould, 2 Gray 277, 278 (Mass. 1854). Accord: Holliday v. Persons, 158 Ga. 742, 124 S. E. 353 (1924); *cf.* Flury v. Twin Cities Dairy Co., 136 Wash. 462, 240 Pac. 900 (1925).

[23] Appeal of Cornell, 114 Pa. 153, 6 Atl. 258 (1886). See cases collected in 16 Ann. Cas. 1253 (1910) annotation.

[24] Where the statute authorizes the organization of a corporation upon the subscription of a certain percentage of the amount of the proposed capital stock, the rule requiring that all the authorized capital shall be subscribed for does not apply. Alabama—Schloss v. Montgomery Trade Co., 87 Ala. 411, 6 So. 360 (1889); California—San Bernardino Invest. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487 (1895); Indiana—Fox v. Allensville Turnpike Co., 46 Ind. 31 (1874); Kansas—Hunt v. Kansas Bridge Co., 11 Kan. 412 (1873); Nebraska—Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279, 62 N. W. 480 (1895); New York—Schenectady Plank Road Co. v. Thatcher, 11 N. Y. 102 (1854); Ohio—Jewett v. Valley R. R., 34 Ohio St. 601 (1878); Oregon—Astoria Ry. v. Hill, 20 Or. 177, 25 Pac. 379 (1890); Wisconsin—Milwaukee Brick Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838 (1901).

[25] Stone v. Monticello Construction Co., 135 Ky. 659, 117 S. W. 369 (1909).

[26] Belton Compress Co. v. Saunders, 70 Tex. 699, 6 S. W. 134 (1887).

[27] Stone v. Monticello Const. Co., *supra* note 25. In this case the authorized capital stock of the corporation was $100,000. By the terms of the subscription the parties manifested an intention that it should be binding when subscriptions had been secured to extent of $80,000.

apparent ability to pay them.[28] The corporation, if it secures a subscription from an individual who is without means to pay it, has no valid defense if it merely alleges that it did not know the subscriber's financial state, provided it ought to have known it.[29] It has been said that the ability of an individual to pay his subscription is tested as of the time of the making of the subscription.[30]

The above condition may be waived.[31] Election to the office of director in a corporation seemingly amounts to an automatic waiver of the condition.[32]

This condition may be further restricted by providing that only persons of a certain class shall be privileged to subscribe for shares.[33] In construing such a condition, liberality has been shown in finding that the individual whose privilege to subscribe has been questioned possessed the necessary qualifications.[34]

2. Action by or on behalf of the creditors of the corporation against the subscriber.

The case of *Hollander v. Heaslip* [35] involved a suit by a receiver of an insolvent corporation against an individual who subscribed for five shares in the corporation. The subscription provided that no call could be made for payment for the shares until two hundred an fifty thousand dollars, or half the authorized capital

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[28] Stone v. Monticello Company, *supra* note 25.

[29] *Cf. ibid.*

[30] Heiskell v. Morris, 135 Tenn. 238, 186 S. W. 99 (1916). This rule does not seem inclusive enough. The condition should be considered fulfilled if the subscriber has the ability to pay at the time the controversy arises, even though he may not have been able to pay when the subscription was made.

[31] McConnaghy v. Monticello Construction Co., 135 Ky. 667, 117 S. W. 372 (1909). In Panhandle Packing Co. v. Stringfellow, 180 S. W. 145 (Tex. Civ. App. 1915), a condition in the subscription stated that it was not to be binding unless $150,000 was subscribed for and paid in before the certificate of incorporation was obtained. By taking steps to procure a certificate, signing an affidavit therefor, and being elected second vice president of the plaintiff corporation, the defendant's conduct was held to have amounted to a waiver of the condition. *Cf.* Enterprise Sheet Metal Works v. Schendel, 63 Mont. 529, 208 Pac. 933 (1922).

[32] McConnaghy v. Monticello Co., *supra* note 31.

[33] Poultry Producers of Southern California v. Nilsson, 197 Cal. 245, 239 Pac. 1086 (1925).

[34] *Ibid.* The subscription stated that shares were to be purchased by persons owning poultry "at the rate of one share for every thousand hens or *majority* (italics ours) fraction;—the minimum subscription . . . being one share." It was held that persons owning less than 500 hens were eligible subscribers for one share.

[35] 222 Fed. 808 (C. C. A. 5th, 1915). In this case the directors falsely represented that subscriptions for the required amount had been secured and the subscribers had paid a call. The court attached no importance to the payment of the call in such circumstances.

stock, had been subscribed. The subsequent insolvency of the corporation was due partly to the failure to secure the amount of capital stock required by the subscription. The court held that the trustee could not recover from the defendant on his subscription because the condition therein contained was never fulfilled. The court, however, took pains to point out, first, that there was no averment in the pleadings that creditors relied on the defendant's subscription in extending credit to the corporation, and secondly, that it was possible that the creditors had knowledge of the terms upon which the subscription was made. The inference may be drawn from this case that if the trustee had shown the court a plausible reason why the subscriber should not have been allowed to take advantage of his condition, the trustee might have been permitted to prevail for the benefit of creditors. Indeed, in some jurisdictions following the "implied condition" rule (*i. e.*, the common law rule that all of the capital stock of a corporation must be subscribed for before the subscriptions become binding on the subscribers), non-fulfillment of this implied condition is no defense as against creditors;[36] other courts seem quick to find a waiver of the condition on the part of the subscriber.[37] It would seem fair to assume that the tendency to favor creditors will be the same whether the problem arises in a jurisdiction following the "implied condition" rule or in a jurisdiction following what may be called the "express condition" rule.[38]

B. *Conditions relating to internal affairs of the corporation which do not expressly state that the subscription is not to be binding unless they are fulfilled.—Action by the corporation against the subscriber.*

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[36] "It is urged on behalf of some of the defendants, as a ground of defense, that all the stock of the Conewango and Clarion Railroad Company was not subscribed for. I think this would be a complete defense in an action by the corporation to recover unpaid subscriptions to its capital stock. But it does not follow that a defense, good between the subscriber to its capital stock and the corporation, is good in a suit between such subscriber and a creditor of the corporation." Hamilton v. Clarion, M. & P. R. R., 144 Pa. 34, 46, 23 Alt. 53, 54 (1891).

[37] Appeal of Cornell, *supra* note 23.

[38] This exact result has been reached in a state which by statute had provided that the entire amount of the authorized capital should be subscribed before a corporation could do business. The court in Flury v. Twin Cities Dairy Co., *supra* note 22, said at 464, 240 Pac. 900: "The defense was that a part of the capital stock had been subscribed by a corporation, which, under the law, was not competent to make such a subscription. The court, while recognizing this as an applicable rule had the suit been by the corporation while a solvent going concern, held that it was not such in a suit by a receiver of an insolvent corporation to recover for the benefit of creditors."

In *Drake Hotel Co. v. Crane*,[39] a condition was inserted in the defendant's subscription that the hotel was to cost a certain amount.[40] The condition was not fulfilled. A statute existed which required 50 per cent of the authorized capital stock to be paid in before a certificate of incorporation could be obtained. It was held under such circumstances that the condition was ineffective and that the subscription must be treated as absolute. Where such a statute exists it is said that conditions are without effect as "every consideration of public policy . . . requiring at least 50 per cent of the stock to be paid for before a certificate of incorporation shall issue will apply with equal force to prevent the dissipation of the funds of the corporation. . . ." Under this statute, apparently even if the subscription had expressly provided that the subscriber was to be under no duty to pay unless the condition were complied with, such subscription would, even though the condition was not fulfilled, nevertheless have been enforceable by the corporation. Language in the opinion would indicate that the court would not have enforced such a condition even though the statutory requirement had been met. Under circumstances similar to those in the *Drake Hotel* case a subscriber was held even though no statute was involved.[41] The absence of the statute in the latter case would allow the subscriber to maintain an action against the corporation for breach of contract, whereas in the first case, in all probability, no such counter action would be available. In *Warren County Co-operative Association Co. v. Boyd*[42] the subscriber stipulated that a certain marketing plan was to be adopted by the corporation. The condition was never performed but, nevertheless, the subscriber was held to be under a duty to pay the corporation.

C. *Situations wherein the subscriber attempts to protect himself against possible loss of his investment by express conditions in the subscription.—Action by the corporation.*

S, a subscriber for shares in the proposed *X* corporation, had a condition written into his subscription that if the "hotel is leased, the lessee be bound for as long a time as to retire any

[39] 210 Mo. App. 452, 240 S. W. 859 (1922).

[40] Condition that the hotel cost $150,000. Held, the subscriber must pay although the hotel cost $200,000.

[41] Felker v. Monroe Hotel Co., 34 Ga. App. 56, 128 S. E. 212 (1925). The hotel in this case was to cost "not less than $100,000." How much the hotel actually did cost does not appear.

[42] 171 N. C. 184, 88 S. E. 153 (1916). The "finding" of a compliance with conditions is another example of the undesirable practice to which the courts resort in order to achieve what they conceive to be a desirable result. See also Snodgrass v. Zander, *infra* note 46, where a condition that the assets of a corporation total a certain amount was apparently ignored.

bonds that are issued." The hotel was leased but apparently the above provision was not put in the lease. The subscriber was held to be privileged not to pay the corporation on the ground of non-fulfillment of the condition.[43] Although other cases involving this type of condition were actually decided on other grounds, it would seem that the courts are willing to let the subscriber off whenever possible [44] and, according to one case, it is not necessary that the condition be known to the other subscribers [45] to allow this result.

D. *Miscellaneous situations.—Action by the corporation.*

Where a firm organized in one state was induced to move into another state and incorporate there, a condition in the subscriptions for shares in the proposed corporation that the assets were to "invoice not less than $6,000 at a reasonable cash value" and that the pay roll of the factory was to be $2,000 a month was, in effect, held to have been complied with although the evidence tended to prove that the assets were not worth over $2,500.[46] There seems to be a tendency on the part of the courts to find performance of conditions in subscriptions to so-called co-operative ventures or to treat them as conditions subsequent.[47]

CONCLUSIONS

I. CORPORATION ALREADY IN EXISTENCE.

A. *Condition providing that the subscription is not to be binding unless a specified number of shares are subscribed.*

This type of condition will be construed most strongly against the corporation and a waiver will not be readily found. When the corporation is insolvent its creditors seem to stand in no better position than the corporation.

B. *Miscellaneous conditions not expressly providing that the subscription is not to be binding unless the condition is complied with.*

The courts tend to hold the subscriber under a duty to pay

[43] New Neuces Hotel Co. v. Weil, 243 S. W. 731 (Tex. Civ. App. 1922); *cf.* Kingston v. Nichols, 221 Mich. 677, 192 N. W. 768 (1923).

[44] Merchants Supply Co. v. Hughes' Ex'rs, 139 Va. 212, 123 S. E. 355 (1924) (condition that competent man be taken into the corporation); Sherrod v. Duffy, 160 Mich. 488, 125 N. W. 366 (1910) (condition that creamery be satisfactory); Canyon Creek Elevator & Milling Co. v. Allison, 53 Mont. 604, 165 Pac. 753 (1917) (condition that committee approve of the enterprise).

[45] New Neuces Hotel Co. v. Weil, *supra* note 43.

[46] Snodgrass v. Zander & Co., 106 Ark. 462, 154 S. W. 212 (1913). See also the case of Natwick v. Terwilliger, 24 Wyo. 253, 160 Pac. 338 (1916).

[47] Poultry Producers of Southern California v. Nilsson, *supra* note 33; Warren Cooperative Ass'n v. Boyd, considered in text at note 42; *cf.* National Bank of the Republic v. Beckstead, 250 Pac. 1033 (Utah, 1926).

the creditors of an insolvent corporation, but *query* where the subscriber has expressly stipulated that the subscription is not to be *binding* unless the condition is fulfilled.

II. CORPORATIONS TO BE FORMED.

A. *Condition providing that the subscription is not to be binding unless a specified number of shares are subscribed.*

A compliance with or waiver of this condition is likely to be found, especially in favor of the trustee in insolvency.

B. *Condition relating to method of operating the enterprise.*

The subscriber is likely to be held on this type of condition.

C. *Conditions by virtue of which the subscriber attempts to protect himself against the loss of his investment.*

In the absence of full performance by the corporation, the subscriber is not likely to be held under a duty to pay his subscription.

D. *Miscellaneous conditions.*

No general conclusion is attempted as to these cases.

W. B. F.

QUO WARRANTO AND PRIVATE CORPORATIONS

In a recent Pennsylvania case,[1] the Attorney General *ex officio* brought quo warranto proceedings against the defendant corporation for violating an act[2] prohibiting the performance of worldly employment on Sunday. The defendant answered that quo warranto would not lie, and that the sole penalty was a fine of four dollars provided in the act. The demurrer of the state was sustained below, however, and a decree was rendered restraining the defendant from playing professional baseball on Sunday. On appeal, the judgment was affirmed, with two judges *dissenting*.

Can quo warranto be used to enforce a criminal law against a private corporation? Is a corporation liable thus to be enjoined from purporting to exercise corporate functions, or from engaging in some particular corporate activity, whenever it is guilty of some criminal act? Must the court issue such a restraining order whenever criminal conduct of a corporation is attacked by quo warranto proceedings? Some discussion of the history and nature of quo warranto proceedings would seem a prerequisite to an attempt to offer a satisfactory solution to such problems.

The writ of quo warranto[3] first came into prominence in early

[1] Com. v. American Baseball Club of Philadelphia, 138 Atl. 497 (Pa. 1927).

[2] Pa. Stat. (West, 1921) § 20252.

[3] "A writ of quo warranto is in the nature of a writ of right for the

medieval times, when it was so succesful a weapon in the hands of Norman Kings for curbing the power of the strong feudal barons. It was inevitable that the action of the king, in requiring all claimants of royal privileges to abandon their claims or substantiate them with documentary evidence, should create discontent, but it was not to be denied that such action was proper on the theory of the king's lawyers that every franchise [4] presumed a grant from the crown.[5] Indeed, this use of quo warranto became firmly established, and the writ was soon extended to forfeit franchises for abuse and non-use as well.[6] It is clear also that quo warranto was originally intended solely as a royal weapon, but later it seems that a private individual could make use of the writ by informing the proper royal officials.[7]

As early as the sixteenth century, however, the old common law action, cumbersome as were all the real actions, began to give way to the more simple procedure of the information in the nature of quo warranto,[8] and two centuries later the writ of quo warranto had become practically obsolete.[9] A statute, regulating the procedure of the already existing remedy, recognized that the information might be filed on the relation of a private individual.[10] The information of quo warranto, moreover, became identical in scope with the older remedy,[11] and the two

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King against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim." 3 BL. COMM. * 262; 7 COMYN, DIGEST (1822) 192.

[4] "For franchises are special privileges conferred by government upon individuals, which do not belong to the citizens of a country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country, no franchise can be held which is not derived from a law of the state." Taney, C. J., in Bank of Augusta v. Earle, 13 Pet. 519, 595 (U. S. 1839); *cf.* State v. Bank, 5 Ark. 595 (1844).

[5] For the early history of quo warranto, see 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (1922) 88 *et seq.;* 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1899) 572 *et seq.;* 2 REEVES, HISTORY OF ENGLISH LAW (1869) 126-9.

[6] Rex v. Hertford Corp., 1 Salk. 374 (1699); Rex v. Bridge, 1 Wm. Bl. 46 (1749); see Peter v. Kendal, 6 B. & C. 703, 710 (1827); BLACKSTONE, *loc. cit. supra* note 3; 1 HOLDSWORTH, *op. cit. supra* note 5, at 89.

[7] See Jenks, *The Prerogative Writs in English Law* (1923) 32 YALE LAW JOURNAL 527; *cf.* 9 HOLDSWORTH, *op. cit. supra* note 5, at 236. But see Rice v. National Bank, 126 Mass. 300, 303 (1879); HIGH, EXTRAORDINARY LEGAL REMEDIES (3d ed. 1896) 554.

[8] See Darley v. Reg., 12 Cl. & Fin. 520, 537 (1845); 1 HOLDSWORTH, *op. cit. supra* note 5, at 230; 9 *ibid.* 237.

[9] *Quo Warranto Informations* (1915) 59 SOL. L. J. 595; 3 BLACKSTONE, *loc. cit. supra* note 3.

[10] (1710) 9 Anne, c. 20.

[11] Rex v. Sheperd, 4 Term. R. 381 (1791); Com. v. Murray, 11 Serg. & R. 73 (Pa. 1874); Lindsey v. Attorney General, 33 Miss. 508, 523 (1857).

have for all practical purposes become indistinguishable.[12] For, although there was a distinction originally, in that the writ was a civil action [13] while the information began as a criminal prosecution in which the defendant if guilty was ousted and fined,[14] nevertheless the fine soon became nominal, and the information in all but form was a civil action.[15]

Since private corporations are, at least in theory, created by the state, they are subject to attack by quo warranto proceedings under the proper circumstances.[16] Indeed, in the absence of statute, quo warranto is the exclusive means of restraining individuals from purporting to be a corporation, or restraining a corporation from engaging in some unauthorized activity.[17] But quo warranto has always been considered an extraordinary

[12] State v. West Wis. Ry., 34 Wis. 197 (1874); State v. Gleason, 12 Fla. 190, 208 (1868). *Contra:* State v. Ashley, 1 Ark. 279 (1839).

[13] See Rex v. Marsden, 3 Burr, 1812, 1817 (1765).

[14] State v. Ashley, *supra* note 12; 3 BLACKSTONE, *loc. cit. supra* note 3.

[15] Ames v. State of Kansas, 111 U. S. 449, 4 Sup. Ct. 437 (1884); Attorney General v. Sullivan, 163 Mass. 446, 40 N. E. 843 (1895); Klein v. Wilson, 7 F. (2d) 772 (D. N. J. 1925); Standard Oil Co. v. State of Missouri, 224 U. S. 270, 32 Sup. Ct. 406 (1912) (quo warranto proceedings declared civil, but fine upheld as representing either damages for breach of the contract with the state, or a proper *civil* penalty); Note (1912) 12 COL. L. REV. 548; BLACKSTONE, *loc. cit. supra* note 3. *Contra:* Donelly v. People, 11 Ill. 552 (1850). The information in the nature of quo warranto has been declared civil in England by (1884) 47 & 48 Vict. c. 61, § 15. In many of our states there are statutes providing that quo warranto proceedings may be brought as ordinary civil actions. People v. Buffalo Cement Co., 131 N. Y. 140, 29 N. E. 947 (1892); State v. Des Moines Ry. Co., 135 Iowa 694, 109 N. W. 867 (1906); State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697 (1900).

[16] The remainder of this comment will be limited to a consideration of the use of quo warranto against private corporations.

[17] Kosman v. Thomson, 211 N. W. 878 (Iowa, 1927); Andel v. Duquesne Ry., 219 Pa. 635, 69 Atl. 278 (1908); Clark v. Interstate Tel. Co., 72 Neb. 883, 101 N. W. 977 (1904); Stockton v. American Tobacco Co., 55 N. J. Eq. 352, 36 Atl. 971 (1897); Ann. Cas. 1916B 179, annotation. It should be noted, perhaps, that where a corporation's acts create a public nuisance, a bill in equity may be allowed to enjoin their continuance, without regard to the defendant's corporate capacity or whether such acts are authorized. Also, that toward the end of the eighteenth century quo warranto proceedings against private corporations were limited in England to cases of usurpation; to enforce a forfeiture for abuse of a franchise by a duly organized corporation it was necessary to proceed by *scire facias.* 9 HOLDSWORTH, *op. cit. supra* note 5, at 66; 2 KENT, COMM. * 313. In this country there were a few early cases where the writ of *scire facias* was used to forfeit a franchise of a corporation for abuse. State v. Moore, 19 Ala. 514 (1851); State v. Scott, 32 Tenn. 332 (1852); State v. Consolidated Co., 46 Md. 1 (1876) (statute); Green v. St. Albans Trust Co., 57 Vt. 340 (1885) (statute). Unless under statute, however, there have been no recent cases in this country where a writ of *scire facias* was used, or in which it was intimated that quo warranto was not the proper remedy for such a purpose.

remedy, and hence there are said to be important limitations on its use. Thus, where the relator is a private individual, the writ or information issues only in the discretion of the court.[18] And, in several jurisdictions, quo warranto proceedings against a private corporation may be brought only by the attorney general *ex officio*.[19] Furthermore, if the relator is not an "interested" party,[20] if the injury is of a "private" nature,[21] and generally if there is another "adequate" remedy,[22] quo warranto will not be permitted. It is obvious, however, that such terms as "interested," "private," and "adequate" have no inherent meaning, no significance other than what they have received by judicial interpretation, with the result that these apparent limi-

[18] State v. Cupples Power Co., 283 Mo. 115, 223 S. W. 75 (1920); Ohio Turnpike Co. v. Waechter, 15 Ohio Cir. Ct. 605 (1903); Attorney General v. Erie R. R., 55 Mich. 15, 20 N. W. 696 (1884); People v. Gas Light Coke Co., 205 Ill. 482, 68 N. E. 950 (1903); State v. Endowment Trust Co., 140 Ala. 610, 37 So. 442 (1904).

[19] Rex v. Corp. of Carmarthen, 2 Burr. 869 (1759); Rex. v. Ogden, 10 B. & C. 230 (1829); Sherwood v. Mammoth Vein Coal Co., 193 Iowa 365, 185 N. W. 279 (1921); Attorney General v. Adonai Shomo Corp., 167 Mass. 424, 45 N. E. 762 (1897); Thirteenth St. Ry. v. Broad St. Rapid Transit Co., 210 Pa. 10, 67 Atl. 901 (1907).

[20] State v. Union Hebrew Congregation, 309 Mo. 587, 274 S. W. 413 (1925) (action dismissed where relator's only interest was as a citizen of the state); State v. Point Roberts Co., 42 Wash. 409, 85 Pac. 22 (1906) (action dismissed where relators were fishermen claiming to be injured by defendant corporation's occupying more fisheries than authorized); Com. v. Allegheny Bridge Co., 20 Pa. 185 (1852).

[21] People v. Hillsdale & Chatham Turnpike Co., 2 Johns. 190 (N. Y. 1807) (quo warranto not proper when defendant failed to make compensation for land taken by eminent domain); People v. North Chicago Ry., 88 Ill. 537 (1878) (quo warranto not proper to test authority to extend railway and introduce steam engines, where relator is abutting landowner); State v. Atchinson Ry., 176 Mo. 687, 75 S. W. 776 (1903) (private injury where shipper paid illegal reconsignment charges); People v. Mutual Gas Light Co., 38 Mich. 154 (1878) (private injury where defendant laid pipe lines over relators' land).

[22] Gardner Trust Co. v. White Lead Corp., 157 N. E. 519 (Mass. 1927); People v. Consolidated Gas Co., 130 App. Div. 626, 115 N. Y. Supp. 393 (1st Dept. 1909); People v. Mutual Gas Light Co., *supra* note 21; State v. Atlanta Ins. Co., 200 Ala. 443, 76 So. 375 (1917) (quo warranto dismissed because act granting franchise provided remedy). But *cf.* Eutaw Power Co. v. Town of Eutaw, 202 Ala. 143, 79 So. 609 (1918) (remedy provided in act granting franchise not a bar to quo warranto). Some states hold that where a statute provides another remedy the effect is merely cumulative, and the use of quo warranto is not limited. Attorney General v. Booth, 143 Mich. 89, 106 N. W. 868 (1906); State v. Equitable Loan Ass'n, 142 Mo. 325, 41 S. W. 916 (1897). The frequency of statutes providing equitable remedies for shareholders and creditors, the parties most likely to be interested in the conduct of a corporation, probably explain the comparative scarcity of quo warranto cases against private corporations, particularly in recent years.

tations leave a court with considerable room for the exercise of its discretion in a doubtful case, even after the writ or information has issued.

As applied to corporations, the most characteristic use of quo warranto is against individuals assuming the functions of a corporation without having complied with the statutory prerequisites to incorporation.[23] Similarly, it may be used where individuals have made fraudulent representations that they were qualified to be incorporated under certain statutes;[24] or to test the constitutionality of an act under which individuals purport to be incorporated or under which a corporation purports to have been granted a franchise.[25] The judgment in such cases, if for the state, is one restraining the defendants from purporting to be duly incorporated or from acting under the franchise in question, and the discretion of the court would seem fairly limited. But the large majority of cases in which quo warranto proceedings are instituted involve so-called "ultra vires" or "illegal" acts of duly organized corporations. Here the general rule, glibly stated, that "a corporation may be ousted for abuse or non-use of its franchise"[26] is of little practical value. For there is firmly imbedded in the decisions of the courts the premise that quo warranto is too extraordinary and drastic a measure to be sustained for an occasional, accidental, or trivial violation.[27] In such cases, it would seem that the discretion of the court may be exercised, first in deciding whether particular

[23] Green v. People, 150 Ill. 513, 37 N. E. 842 (1894); Smith v. State, 140 Ind. 343, 39 N. E. 1060 (1895); Attorney General v. Gay, 162 Mich. 612, 127 N. W. 814 (1910). In this country comparatively few cases seem to have arisen against individuals for illegally attempting to assume the position of a corporation, because of the ease with which individuals may be incorporated usually under general statutes or in some cases by special act. The usual procedure in cases where the existence of the corporation is questioned is to name as parties defendant the individuals purporting to be incorporated. See Ann. Cas. 1913A 570, annotation.

[24] People v. Larsen, 265 Ill. 406, 106 N. E. 947 (1914); State v. Senatobia Stationery Co., 115 Miss. 254, 76 So. 258 (1917); Floyd v. State, 177 Ala. 169, 59 So. 280 (1912).

[25] People v. Cal. Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926); People v. Gas Light Coke Co., *supra* note 18; Attorney General v. Perkins, 73 Mich. 303, 41 N. W. 426 (1889).

[26] See, Reed v. Canal Corp., 65 Me. 132 (1876).

[27] Com. v. Potter Water Co., 212 Pa. 463, 61 Atl. 1099 (1905); State v. Higby Co., 130 Iowa 69, 106 N. W. 382 (1906). "But we think that it may be safely stated as to the general consensus of the authorities that to constitute a misuse of the corporate franchise, such as to warrant its forfeiture, the ultra-vires acts must be so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so derange and destroy the business of the corporation that it no longer fulfills the ends for which it was created." State v. Minn. Thresher Mfg. Co., 40 Minn. 213, 226, 41 N. W. 1020, 1025 (1889).

acts are "ultra-vires" or only incidental to the powers granted by the articles of association or a relevant statute;[28] second, having decided that particular acts are "ultra-vires" or "illegal," in determining whether the proceedings shall be maintained, and, finally, in determining the penalty to be imposed.[29]

In cases where a corporation does acts, which, if done by individual persons would be unobjectionable, but which are beyond the scope of its corporate powers, whether the court will restrain the further performance of such acts, or leave the corporation unmolested depends on the importance which such infractions assume in the eyes of the court.[30] Where a corporation violates a statute or its articles of association, or fails to exercise an exclusive franchise, the main considerations are the extent and seriousness of the violation, and the effect that the judgment may have on the public welfare.[31] Such considerations

[28] First Nat. Bank v. State of Missouri, 263 U. S. 640, 44 Sup. Ct. 213 (1924) (restraining federal bank from establishing branch bank within state, as not being authorized by the national banking act, and thus violating a state statute).

[29] State v. International Harvester Co., 237 Mo. 369, 141 S. W. 672 (1911); Voorhees v. Walker, 227 Mich. 291, 198 N. W. 994 (1924); State v. Railway & Light Co., 13 Ohio Cir. Ct. 603 (1902); State v. Portland Natural Gas & Oil Co., 153 Ind. 483, 53 N. E. 1089 (1899).

[30] State v. Des Moines City Ry., *supra* note 15 (ouster from further exercise of expired trolley franchise); State v. Milwaukee R. R., 116 Wis. 142, 92 N. W. 546 (1902); Com. v. Northeastern Ry., 161 Pa. 409, 29 Atl. 112 (1894) (restraining railroad from operating street car lines); Ohio v. Ry., 53 Ohio 189, 41 N. E. 205 (1895) (ouster from control of canal lands held not to be included in grant of railroad franchise); State v. Columbus Electric Co., 104 Ohio 120, 135 N. E. 297 (1922) (enjoined from keeping tracks on part of street other than that provided in act granting franchise); People v. Utica Ins. Co., 15 Johns. 358 (N. Y. 1818) (restraining insurance company from engaging in banking business); Harris v. Miss. R. R., 51 Miss. 602 (1875) (slight deviation from charter route overlooked); State v. Minn. Thresher Mfg. Co., *supra* note 27 (occasionally entering into "ultra-vires" contracts not grounds for interference); People v. Lake St. R. R., 54 Ill. App. 348 (1894) (ouster denied where railroad expended money in good faith, thinking it had authority to build).

[31] State v. Public Drug Co., 41 S. D. 287, 170 N. W. 161 (1918) (dissolution for failure to file annual reports); People v. Buffalo Stone & Cement Co., *supra* note 15 (dissolution for failure to have capital stock paid in); Com. v. Potter Water Co., *supra* note 27 (corporation dissolved for continued practice of furnishing impure water); People v. Bank of Hudson, 6 Cow. 217 (N. Y. 1826) (continued insolvency of bank and assignment of property to trustees for creditors warrants dissolution); State v. Milwaukee Ry., 45 Wis. 579 (1878) (keeping company's books and principal place of business outside the state grounds for dissolution); People v. Toledo R. R., 280 Ill. 495, 117 N. E. 701 (1917) (ouster from particular franchise for failure to complete line within statutory period); State v. Madison City Ry., 72 Wis. 612, 40 N. W. 487 (1888) (failure to keep road in condition required by charter justifies ouster from trolley franchise); State v. Birmingham Waterworks Co., 185 Ala. 388, 64 So. 23 (1913) (failure to

also indicate why a judgment dissolving the corporation is so frequent in cases where a corporation enters into an agreement or combination in restraint of trade.[32] Furthermore, where there appears to be an attempt to work a fraud on the public, or where a corporation's articles of association are used as a cloak to aid in the perpetration of crime, the courts are aroused to the proper state of indignation, and do not hesitate to inflict the extreme penalty.[33] Finally, where the prohibited acts vio-

discharge duties would forfeit franchise); State v. Pipher, 28 Kan. 127 (1882) (ouster from franchise for failure to use for nineteen years); State v. Cincinnati R. R., 47 Ohio 130, 23 N. E. 928 (1890) (railroad restrained from discriminating in rates); State v. Merchants Exchange, 269 Mo. 346, 190 S. W. 903 (1916) (restrained from weighing publicly without being bonded as required by statute); State v. Railway & Light Co., *supra* note 29 (railroad enjoined from making charges above the legal rates); State v. Insurance Co., 49 Ohio 440, 31 N. E. 658 (1892) (foreign insurance corporation excluded from doing business within state for failure to have local organization required by statute); State v. Higby Co., *supra* note 27 (court refused to enjoin corporation from acting as trustee of express trust, even if illegal, on grounds of lack of importance); Voorheis v. Walker, *supra* note 29 (failure to file tax reports on time and to send in names of stockholders as required by statute not sufficient grounds for forfeiture); State v. Atchison Ry., *supra* note 21 (illegal reconsignment charges by railroad not of sufficient public importance to warrant interference); People v. Atlantic Ave. Ry., 125 N. Y. 513, 26 N. E. 622 (1891) (failure to run trains for five days and requiring more than statutory number of hours of labor from employees not grounds for ouster); State v. Baron, 58 N. H. 370 (1878) (failure to make returns required by statute did not merit dissolution); see People v. Kankakee River Co., 103 Ill. 491, 499 (1882) (ouster refused for failure to file papers, where the object of the statute requiring it had ceased).

[32] People v. North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834 (1890); State v. Gamble-Robinson Fruit Co., 44 N. D. 376, 176 N. W. 103 (1919); State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413 (1900); State v. People's Ice & Fuel Co., 246 Mo. 168, 151 S. W. 101 (1912); Attorney General v. Booth, *supra* note 22; People v. Live Stock Exchange, 170 Ill. 556, 48 N. E. 1062 (1897); State v. Central Lumber Co., 24 S. D. 136, 123 N. W. 504 (1909); State v. Standard Oil Co., 49 Ohio 137, 30 N. E. 279 (1892); State v. Portland Natural Gas Co., *supra* note 29 (injunction against particular acts of restraint); People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798 (1889) (defendant's demurrer overruled on ground that it could be prevented from carrying out one of the objects for which it was formed if tending toward monopoly); State v. International Harvester Co., *supra* note 29 (court felt required to pronounce judgment of ouster, but stayed execution of judgment which it felt would injure public).

[33] State v. St. Louis College of Physicians, 295 S. W. 537 (Mo. 1927); State v. American University of Sanipractic, 140 Wash. 625, 250 Pac. 52 (1926); (dissolution of college for granting degrees to unqualified students); State v. Business Men's Athletic Club, 178 Mo. App. 548, 163 S. W. 901 (1914) (dissolution of fraternal organization held to have used charter to evade law against holding prize fights); State v. Springfield African Social Club, 169 Mo. App. 137, 154 S. W. 458 (1913) (dissolution of fraternal organization conducting a gambling house); State v. Interstate

late a criminal statute for which ordinarily there would be another adequate remedy, the courts will still sustain quo warranto proceedings if they believe that the proper exigency exists and that the other remedy is not a sufficient deterrent.[34] It is submitted, therefore, that the result of particular quo warranto proceedings against a private corporation for alleged "ultra-vires" or "illegal" acts rests largely within the discretion of the court, and so should be consistent with the emotional pattern of the community.

In the recent Pennsylvania case, the contention of the dissenting opinions that quo warranto is never the proper remedy to enforce a criminal law against a corporation where there is another remedy provided by statute, is not persuasive, since the fine provided is obviously not a sufficient deterrent to the defendant corporation.[35] Nor is there any force in the analogy to the doctrine that equity will not enjoin a crime. On the contrary, both historically and analytically, quo warranto proceedings against private corporations would seem to be quasi-criminal proceedings to vindicate the state's control over one purporting to act under its authority. Moreover, it should be borne in mind that, consistently with the theory advanced above, acts may justify interference on the part of the state by injunction to prohibit the repetition of certain violations, which would not seem sufficient ground for dissolving a corporation.[36] Finally, it does not follow, as urged by the dissent, that with this case as

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Savings Investment Co., 64 Ohio 283, 60 N. E. 220 (1901) (dissolution of corporation issuing bonds under a scheme of chance); State v. Anthony Fair Ass'n, 89 Kan. 238, 131 Pac. 626 (1913) (dissolution of corporation organized to promote agricultural interests, which ran a race track where gambling was permitted); People v. Michigan Sanitarium, 151 Mich. 452, 115 N. W. 423 (1908) (dissolution of charitable hospital for carrying on business for profit); People v. Union Elevated Ry., 269 Ill. 212, 110 N. E. 1 (1915) (dissolution of corporation for fraudulent scheme for making a dishonest and fictitious increase of capital stock); State v. Citizens Light & Power Co., 172 Ala. 232, 55 So. 193 (1911) (dissolution of corporation organized as dummy to place stock of another corporation on market at fictitious increase in value).

[34] State v. Capital City Dairy Co., 62 Ohio 350, 57 N. E. 62 (1900), *aff'd* 183 U. S. 238, 22 Sup. Ct. 120 (1902) (dissolution where fine was provided for violation of statute regulating manufacture and sale of oleomargarine); State v. Gamble-Robinson Co., *supra* note 32; State v. Central Lumber Co., *supra* note 32 (dissolution for entering into agreements in restraint of trade, though statute provided criminal penalty); State v. French Lick Springs Hotel Co., 42 Ind. App. 282, 82 N. E. 801 (1907); State v. Jockey Club, 114 Ohio 582, 151 N. E. 709 (1926); State v. Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185 (1905) (violation of anti-gambling laws ground for quo warranto).

[35] See cases cited *supra* note 34.

[36] See Cannon City Club v. People, 21 Colo. App. 37, 50, 121 Pac. 120, 124 (1912); also cases cited *supra* note 29.

a precedent the state must in all fairness proceed by quo warranto against all other corporations, such as telegraph, telephone, newspaper, and trolley companies, which operate on Sunday. A court in the face of such a contention might well hold such industries necessities within the terms of the statute.

The objection, therefore, that quo warranto cannot be properly used to prevent corporations from committing criminal acts does not seem valid. But neither can it be maintained that a court is required to sustain quo warranto proceedings whenever a corporation is accused of criminal conduct. It would seem, rather, that such a result would be desirable only under circumstances where the offense is serious, and the existing penalty not a sufficient deterrent. It is doubtful whether other jurisdictions would consider playing professional baseball on Sunday in violation of a blue law enacted in 1794 so objectionable as to warrant proceedings in quo warranto.

ADMISSIBILITY OF BOOK ENTRIES IN NEW YORK

Historically, there are two rules by which account books may be admitted as an exception to the hearsay rule in New York. The "Shopbook" rule,[1] that the account books of a merchant or tradesman [2] who keeps no clerk are admissible when it is proved that they are his books, that his books are honestly kept, and that some of the items charged are correct, had its origin in the custom in the Dutch colony to admit such evidence in their arbitration courts.[3] This usage was strengthened by the "necessity" of relieving the difficulties of proof of the accounts of the small shopkeeper without a clerk and without the privilege of testifying in his own behalf.[4] The "business entries" rule came from the English exception to the hearsay rule,[5] whereby entries made in the regular course of business were admissible, when the entrant was dead. Such entries were admissible as a

[1] Vosburgh v. Thayer, 12 Johns. 461 (N. Y. 1815); Swan v. Warner, 197 N. Y. 190, 90 N. E. 430 (1910); *cf.* Shmargon v. Rosenstein, 192 App. Div. 143, 182 N. Y. Supp. 343 (3d Dept. 1920).

[2] The rule was later extended to include others than merchants and tradesmen. Foster v. Coleman, 1 E. D. Smith 85 (N. Y. 1850) (doctor); Rexford v. Comstock, 3 N. Y. Supp. 876 (Sup. Ct. 1888) (lawyer).

[3] "Merchants and traders might always exhibit their books in evidence, where it was acknowledged or proved that there had been a dealing between the parties, or that the article had been delivered, provided they were regularly kept with the proper distinctions of persons, things, year, month, and day." See DALY, HISTORICAL SKETCH OF THE JUDICIAL TRIBUNALS OF NEW YORK FROM 1623 TO 1846 (1855) 16, 1 E. D. Smith XXX; *cf.* Taggart v. Fox, 11 Daly 159 (N. Y. 1882); Rexford v. Comstock, *supra* note 2, at 877; 3 WIGMORE, EVIDENCE (1923) § 1518.

[4] Vosburgh v. Thayer, *supra* note 1.

[5] Price v. Lord Torrington, 1 Salk. 285, 2 Ld. Raym. 873 (1703); Merrill v. Ithaca & O. R. R., 16 Wend. 586 (N. Y. 1837).

type of past recollection recorded when they were verified in court by the entrant as having been correct at the time of making. While these rules have been modified, their historical distinctions are still preserved by the courts.

Although the impelling necessity for the shopbook rule ceased with the removal by statute of the parties' disability to testify in their own behalf, the rule survived as an exception to the hearsay rule.[6] Functionally, there is little remaining distinction between the two exceptions. The requirement of "no clerk" was so limited that the employment of assistants, even bookkeepers, did not exclude the accounts if the employees were not able to testify on behalf of the employer as to the account in issue.[7] Unfortunately, however, the courts recognize the analytical similarity to the original entry rule and require that the bookkeepers' absence be explained, or that they be made to testify as to their knowledge.[8] Otherwise, the shopbook rule, having met one archaic necessity, could be adapted to meet the modern one of providing evidence where so many persons contribute to the making of the books that it is not feasible to have them all testify.

The rules as to business entries, as formerly restricted, would be of very little assistance to the modern business establishment in proving its accounts. To fill the requirements for admission as past recollection recorded the entrant had to testify that he personally knew at the time of making the entry that it was correct, and not simply that he had entered the information given him accurately, even though the person giving the information to the bookkeeper testified that he had done so correctly.[9] Later, however, the testimony that the information was entered as given was sufficient verification if a different person could

[6] Tomlinson v. Borst, 30 Barb. 42 (N. Y. 1859). Similarly, the statute against the admission of testimony of a party to an action against the personal representative of deceased does not change the rule as to admissibility of shop books. Young v. Luce, 66 Hun. 631, 21 N. Y. Supp. 225 (2d Dept. 1892).

[7] "The clerk intended was one who had something to do with and had knowledge generally of the business of his employer in reference to the goods sold or work done, so that he could testify on that subject. It evidently means an employee whose duty it is to attend to the details of business and thus is able to prove an account and not one who from his isolated position as a book-keeper, can have but little means of knowledge personally as to the transactions done, or information relating thereto, except what is derived from others." McGoldrick v. Traphagen, 88 N. Y. 334, 338 (1882); Atwood v. Barney, 80 Hun 1, 29 N. Y. Supp. 810 (4th Dept. 1894); Smith v. Smith, 163 N. Y. 168, 57 N. E. 300 (1900) (wife not a clerk when acting under direction of husband).

[8] Shmargon v. Rosenstein, *supra* note 1.

[9] Gould v. Conway, 59 Barb. 355 (N. Y. 1871).

testify that the information given was true.[10] Such substantiation by the entrant can be dispensed with only if the evidence is within the "entries in the regular course of business" exception to the hearsay rule. This originally required that the entrant be dead,[11] but the interpretation of unavailability has been so broadened that absence from the jurisdiction,[12] at least, allows the introduction of the books without the testimony of the entrant. It is still uncertain how much further the New York courts are ready to modify the requirements of personal knowledge or unavailability to meet the needs of the complex business organization.

In *Litchfield Construction Co. v. New York City*,[13] the New York Court of Appeals held that time-books were admissible to prove payments for labor where the timekeeper could merely testify that the workers on the night shifts went to work, but could not testify as to the hours of work done. The decision expressly stated that this was no extension of the rule because a minor mistake in the exact number of hours would be immaterial in this case. They intimated that they might consider whether the principles and practical standards which had led to past relaxations of the antiquated rule might not lead to a broader statement of the field where relaxation is permissible.[14]

A later Appellate Division case, *N. Y., N. H. & H. R. R. v. Baldwin Univ. Consol. Co.*,[15] refused to relax the rule. It held that reports made up daily from time cards filled out by the workers and checked by the foremen were inadmissible when not testified to as correct by some person with knowledge of their truth. The court pointed out that, on the facts, the reports would not be admissible under *The Spica*.[16] In that case the federal court set forth the more liberal view as to admissibility, but held, on a fact situation practically the same as that of the New York case, that the accounts were erroneously admitted.

Since these New York decisions, the Federal Second Circuit Court of Appeals has interpreted the New York rule as consistent with a very liberal admission of original entries, pointing to the *Litchfield*[17] case as intimating this. This court held, in

[10] City of New York v. Second Ave. R. R., 102 N. Y. 572, 7 N. E. 905 (1886).

[11] Merrill v. Ithaca & O. R. R., *supra* note 5; Brewster v. Doane, 2 Hill 537 (N. Y. 1842).

[12] State Bank of Pike v. Brown, 96 App. Div. 441, 89 N. Y. Supp. 381 (4th Dept. 1904), *aff'd* 184 N. Y. 517, 76 N. E. 1109 (1906).

[13] 244 N. Y. 251, 155 N. E. 116 (1926).

[14] *Ibid.* at 272, 155 N. E. at 122.

[15] 219 App. Div. 578, 220 N. Y. Supp. 401 (1st Dept. 1927).

[16] 289 Fed. 436 (C. C. A. 2d, 1923).

[17] *Supra* note 13.

Mass. Bonding & Ins. Co. v. Norwich Pharmacal Co.,[18] that a tabulation of the amount of stamps used by a large concern was properly admitted, although the two shipping clerks who made the notation of the stamps used and the billing clerk who entered the notations in the ledger were not called, since, in the opinion of the trial court, the routine of entries guaranteed their trustworthiness and the probability that the clerks could add anything to the testimony was more than outweighed by the impracticability of calling them. The court relied on *The Spica*[19] as the basis of the liberal federal rule. Although they expressed the opinion that the New York courts would be in accord with their decision, they held that they were not bound by the New York rule if it did differ.[20]

These cases leave the New York rule uncertain on a question of great importance under present methods of doing business. Other states have shown an analogous development from a strict to a more liberal interpretation of similar rules.[21] Many jurisdictions permit the admission of book accounts without complete substantiation where the complexity of the organization renders practically impossible the calling of all involved in the make-up of the reports, and where the positive value of the testimony would be slight if such persons were called.[22] Until this step is taken, the position of the large organization in proving its accounts is as difficult as that of the small shopkeeper would have been in the early days without the shopbook rule. It seems probable that it will only be a question of time before New York definitely adjusts its rules to the needs of its complex industrial system.[23]

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[18] 18 F. (2d) 934 (C. C. A. 2d, 1927).

[19] *Supra* note 16.

[20] The court held that the CONFORMITY ACT [U. S. Comp. Stat. (1 Supp. 1923) § 1537] would permit an independent federal ruling under the "as near as may be" phrase since to exclude the evidence "would not be convenient for the administration of justice." *Cf.* Comment (1927) 36 YALE LAW JOURNAL 853.

[21] Miller, *Regular Entries, Books of Account, and the Iowa Statutes* (1922) 7 IOWA L. BULL. 88; (1922) 20 MICH. L. REV. 530; (1926) 24 MICH. L. REV. 721; (1923) 3 OR. L. REV. 154; (1927) 33 W. VA. L. Q. 305.

[22] Givens v. Pierson's Adm'x, 167 Ky. 574, 181 S. W. 324 (1916); Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry., 105 Neb. 151, 179 N. W. 503 (1920); Farmers Nat. Bank of Kingsley v. Pratt, 193 Iowa 406, 186 N. W. 924 (1922); State v. Cassill, 70 Mont. 433, 227 Pac. 49 (1924); State v. Martin, 102 W. Va. 107, 134 S. E. 599 (1926); State v. Wagner, 312 Mo. 124, 279 S. W. 23 (1925); Clover v. Neely, 116 Okl. 155, 243 Pac. 758 (1926); State v. Roach, 131 Atl. 606 (N. H. 1926).

[23] For a discussion of the general need for a change in the rules of proof to meet present conditions, see MORGAN AND OTHERS, THE LAW OF EVIDENCE (1927) c. 5; Ehrich, *Unnecessary Difficulties of Proof* (1923) 32 YALE LAW JOURNAL 436; 3 WIGMORE, EVIDENCE (1923) § 1530.

A NEW APPROACH TO LABOR PROBLEMS

A recent decision [1] by the New York Court of Appeals is replete with suggestions so novel with respect to labor law problems that a comparative study of the opinion with the language used by other courts in similar problems should prove interesting. The suit was brought to enjoin the defendant union from picketing the plaintiff's premises, and in dissolving an injunction issued by the Appellate Division, the court discussed as well the technique which would be proper in deciding whether a strike by workmen is lawful.

Although adhering to the conventional method of analysis by looking first at the object sought [2] and then at the means used

[1] Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927). Plaintiff opened a non-union restaurant employing only waitresses who denied union connections. After being employed, employment being at will, each waitress promised that she would withdraw if she joined a union. Plaintiff paid its waitresses $8 for full time, $5 for half time. The union scale of wages was respectively $15, and $10. The defendant union procured as members four of the waitresses out of the fourteen to sixteen employed, and at a preconcerted signal called a strike. The union waitresses left the premises, there being one incident of disorder at this time, and one other soon after. Thereupon picketing was begun, two union members patrolling the sidewalk in front of the restaurant carrying placards stating that a strike was in progress. There was no disorder in the picketing. This continued until the union was enjoined from "patrolling the sidewalk near the plaintiff's premises" and, as usual, from threats, intimidation, and violence. 216 App. Div. 663, 215 N. Y. Supp. 753 (1st Dept. 1926), reversing a decree for defendants in the special term of the Supreme Court. The Court of Appeals, per Andrews J. (Cardozo, C. J., Pound and Lehman J. J. *concurring*), in reversing the decree of the Appellate Division, held that the promise not to join the union was not a contract for lack of consideration, thus precluding a finding that a breach of contract was being induced; that there was no such indication of future disorder in picketing as to warrant an injunction, and that there were no other grounds for issuing an injunction. Crane J. *dissented* (Kellogg and O'Brien, J. J., *concurring* in dissent), agreeing with the statements of law contained in the majority opinion but differing as to the application of the law to the facts of the case.

[2] A strike to improve working conditions is everywhere recognized as lawful. See Comment (1921) 30 YALE LAW JOURNAL 280, 284. A strike to unionize a shop is generally upheld as lawful. National Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902); Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027 (1908); Kemp v. Division 241, 255 Ill. 213, 99 N. E. 389 (1912); LaFrance Co. v. Electrical Workers, 108 Ohio St. 61, 140 N. E. 399 (1923). But Massachusetts does not recognize the legality of a strike for a closed shop. Baush Co. v. Hill, 231 Mass. 30, 120 N. E. 188 (1918).

A strike to cause the discharge of a fellow employee is generally upheld. Kemp v. Division 241, *supra;* National Protective Ass'n v. Cumming, *supra; cf.* Greenwood v. Building Trades Council, 71 Cal. App. 159, 169, 233 Pac. 823, 827 (1925). But *cf.* DeMinico v. Craig, 207 Mass. 593, 94 N. E. 317 (1911); Giblan v. Amalgamated Union [1903] 2 K. B. 600; Comment (1921)

to accomplish the purpose,[3] its analysis is carried on in the light of premises seldom found in the decisions on labor problems.

The court says: "Another's business . . . may be attacked only to attain some purpose in the eye of the law thought sufficient to justify the harm that may be done to others," [4] and that "even if the end sought is lawful, the means used must be also." [5] But the question of justification is taken up in the much broader sense of economic justification between two social groups, rather than legal justification between individuals. The court faces and accepts the facts of modern industrial organization, and emphasizes the point that no valid analysis of the elements of the judicial problem can be made without recognizing the modern fact of labor combination.[6] Recognizing this, the court seeks for

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30 YALE LAW JOURNAL 280, 284-5; SAYRE, CASES ON LABOR LAW (1923) 311n.

[3] In a few states picketing is held to be unlawful *per se* as necessarily involving intimidation. Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909); Hardie-Tynes Mfg. Co. v. Cruise, 189 Ala. 66, 66 So. 657 (1914); Comment (1921) 30 YALE LAW JOURNAL 404, 405. In most states, however, peaceable picketing is legal, either by statute or decision. Wis. Laws 1923, c. 55; Ill. Rev. Stat. (Cahill, 1927) c. 22, § 58; Mass. Gen. Laws (1921) c. 149, § 24. And see SAYRE, *op. cit. supra* note 2, at 199 n. But on proof of very little disturbance the courts will enjoin picketing at the scene of the strike. Cooks' Union v. Papageorge, 230 S. W. 1086 (Tex. 1921); Jones v. Van Winkle Machine Works, 131 Ga. 336, 62 S. E. 236 (1908); Densten Hair Co. v. United Leather Workers, 237 Mass. 199, 129 N. E. 450 (1921); Comment (1927) 36 YALE LAW JOURNAL 557; *cf.* (1926) 99 CENT. L. JOUR. 383; (1923) 33 YALE LAW JOURNAL 215; Comment (1927) 12 CORN. L. Q. 226. Where, however, the violence and intimidation complained of takes place away from the picket line, the courts tend to be more lenient. Vulcan Detinning Co. v. St. Clair, 315 Ill. 40, 145 N. E. 657 (1924).

[4] Exchange Bakery & Restaurant v. Rifkin, *supra* note 1, at 263, 157 N. E. at 132.

[5] *Ibid.* 263, 157 N. E. at 133.

[6] *Cf.* Holmes, J., *dissenting*, in Vegelahn v. Gunther, 167 Mass. 92, 108, 44 N. E. 1077, 1081 (1896): "It is plain . . . from the most superficial reading of industrial history, that free competition means combination, and that the organization of the world . . . means an ever increasing might and scope of combination. It seems . . . futile to set our faces against this tendency. Whether beneficial on the whole . . . or detrimental, it is inevitable, unless the fundamental axioms of society and even the fundamental conditions of life, are to be changed." See HOXIE, TRADE UNIONISM IN THE UNITED STATES (1919) 232, in criticism of decisions having a contrary tendency to that of the instant case: "Thus, the law, built upon an individualistic basis, refuses to recognize that one group of workers in a union is vitally interested in the conditions of another group." But compare the foregoing attitude with the following in Schwartz & Jaffee v. Hillman, 115 Misc. 61, 67-8, 189 N. Y. Supp. 21, 25 (Sup. Ct. 1921): "they (the courts) must stand at all times as the representatives of capital, of captains of industry, devoted to the principle of individual initiative, protect property and persons from violence and destruction, strongly opposed to

justification by considering the conflicting interests of the various classes concerned.

"It [the union] may be as interested in the wages of those not members, or in the conditions under which they work, as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally. That they may prevail it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. . . . Both are based upon a lawful purpose. Resulting injury is incidental and must be endured." [7]

It is submitted that only by this recognition of the unions as important elements of the labor market to which an employer has access, rather than as officious intruders into a master-servant relationship, can a satisfactory method of approach be evolved.

Again, the court says:

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all schemes for the nationalization of industry, and yet save labor from oppression, and conciliatory toward the removal of the workers' just grievances."

[7] Exchange Bakery & Restaurant v. Rifkin, *supra* note 1, at 263, 157 N. E. at 132-3. Compare the language in Bolivian Panama Hat Co. v. Finkelstein, 127 Misc. 337, 215 N. Y. Supp. 399, 400 (Sup. Ct. 1925): "If, however, there is no strike whatever on the plaintiff's premises, if all employees are content and the union simply *acting for purposes of its own*, it has no right to interfere with the plaintiff's business by picketing." (Italics ours). And see Rentner v. Sigman, 126 Misc. 781, 783, 216 N. Y. Supp. 79, 81 (Sup. Ct. 1926): "A large part of the moving and answering papers relates to the industrial merits of the controversy . . . with which I have no concern. They are matters of social, not judicial cognizance."

A typical example of the usual procedure of considering the struggle between employer and employees as between isolated parties to a dispute is Mechanics Foundry & Machine Co. v. Lynch, 236 Mass. 504, 505-6, 128 N. E. 877, 877-8 (1920). In enjoining a strike to force reinstatement of an employee whom the strikers thought wrongfully discharged, the court said:

"Every person has the legal right to dispose of his own labor as he wishes. . . . The employer also has a right freely to contract, the right to select his employees, and to decide when to engage and discharge them. . . . If for any reason the employer sees fit to discharge an employee, he has that right and it cannot be taken away from him. . . . .

"While the individual employee may refuse for any cause to continue in the plaintiff's service, the defendants could not conspire and combine to quit . . . the plaintiff had a right in law to do what he did, and the combination . . . to bring about a strike for the cause alleged is unlawful in the end it sought. . . ."

It should be noted, however, that many states, unlike Massachusetts, would consider justifiable a strike for such a purpose. See *supra* note 2.

"Freedom to conduct a business, freedom to engage in labor, each is like a property right. Threatened and unjustified interference with either will be prevented." [8]

Although it is usual for courts to hold that an employer's expectancy to a free flow of labor is a "property right," [9] a similar attitude towards the laborers' privilege freely to dispose of their labor is less common.

The results of such an attitude would seem to be that, in the future, when a court must decide upon the legality of particular conduct on the part of either employers or workmen in a given dispute, its technique will consist, not of an attempt to weigh metaphysical legal relations, the existence of which has been assumed, but rather to consider as dispassionately as may be the conflicting interests of all groups involved.[10]

In this connection it is interesting to note what was said no longer than twelve years ago by three members of the court of another leading industrial state.

"The right of a labor organization to enforce a closed shop for the mere purpose of strengthening the labor organization in future contests with the employer is not competition, and is not of the same character or equal to the right of the individual to dispose of his labor at his own will." [11]

Another striking observation made in the principal case may be construed as a prophecy that the Court of Appeals will not

[8] Exchange Bakery & Restaurant v. Rifkin, *supra* note 1, at 265, 157 N. E. at 133.

[9] Courts have usually called the interest an employer has in a contract of employment a "property right." Statutes, enacted for the purpose of preventing the issuance of injunctions in labor disputes, and providing that the right to labor and make contracts shall not be considered a property right for the purpose of enjoining interference with it in the absence of irreparable injury, have been held unconstitutional. Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853 (1916); Gillespie v. People, 188 Ill. 176, 58 N. E. 1007 (1900). And see Mathews v. People, 202 Ill. 389, 401, 67 N. E. 28, 32-3 (1903): "It is now well settled that the privilege of contracting is . . . a property right. . . . Labor is property. To deprive the laborer and the employer of this right to contract with one another is to violate . . . the constitution of Illinois, which provides that 'no person shall be deprived of . . . property without due process of law'." *Cf.* Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 767, 53 Atl. 230, 234 (1902), in referring to the "probable expectancies" of employers with respect to a free flow of labor, and those of employees with respect to free access to employment opportunities: "The rights of both classes are absolutely equal in respect of all these 'probable expectancies'."

[10] Compare Gottlieb v. Matckin, 117 Misc. 128, 191 N. Y. Supp. 777 (Sup. Ct. 1921), where a strike tying up the milk supply of New York City was enjoined on the ground that public health was paramount to the interests of either party. See (1924) 8 MINN. L. REV. 323, 327-8.

[11] Cartwright, J., Dunn, C. J., Hand, J., *dissenting* in Kemp v. Division 241, *supra* note 2, at 266-7, 99 N. E. at 409. This seems also to be the atti-

consider itself bound to follow the *Hitchman Coal Company* case.[12] The Court makes clear that it will continue to deal with this labor problem with the same approach of unprejudiced analysis of the facts of the particular case. The Court said:

"Even had it been a valid subsisting contract, however, it should be noticed that, whatever rule we may finally adopt, there is as yet no precedent in this court for the conclusion that a union may not persuade its members or others to end contracts of employment where the final intent lying behind the attempt is to extend its influence." [13]

Consistency with the statement that the privilege to conduct a business, as well as that of laboring is "like a property right," the importance of economic justification and the acceptance of modern collective bargaining, will demand a careful study of the facts in each case before deciding that inducing a breach of contract shall be enjoined. The term of the contract, and the purpose of the employer and of the inducer will also be important factors. The case will not be decided by calling the act one of "inducing breach of contract," which in most jurisdictions would automatically mean an injunction.[14]

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tude of some courts to-day. Perhaps this view is traceable to the requirement of "competition" as a basis of justification for a strike. Justice Holmes long ago, in Vegelahn v. Gunther, *supra* note 6, pointed out that whether this be called true competition, or as he suggested, "free struggle for life," the same consideration should apply in determining the existance of a justification as in a case of competition in the narrow sense of the word.

[12] Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 (1917) holding that contracts terminable at will were to be protected against those inducing their breach.

[13] Exchange Bakery & Restaurant v. Rifkin, *supra* note 1, at 266-7, 157 N. E. at 134. As a rule, inducing the breach of a contract for special services, or for a definite term, is enjoined. Vail-Ballou Press v. Casey, 125 Misc. 689, 212 N. Y. Supp. 113 (Sup. Ct. 1925); see A. L. Reed Co. v. Whiteman, 238 N. Y. 545, 546, 144 N. E. 885 (1924); Comment (1927) 12 CORN. L. Q. 226; (1924) 33 YALE LAW JOURNAL 440; Comment (1921) 30 YALE LAW JOURNAL 618; *cf.* Brimelow v. Casson [1924] 1 Ch. Div. 302; Comment (1922) 32 YALE LAW JOURNAL 171.

As to contracts terminable at will, or on a few days' notice, there is a difference of opinion. The following cases hold that inducing a breach will be enjoined. Hitchman Coal & Coke Co. v. Mitchell, *supra* note 10; Patterson Glass Co. v. Thomas, 41 Cal. App. 559, 183 Pac. 190 (1919) (terminable with seven days' notice); McMichael v. Atlanta Envelope Co., 151 Ga. 776, 108 S. E. 226 (1921) (contracts terminable when employees joined the union); Callan v. Exposition Cotton Mills, 149 Ga. 119, 99 S. E. 300 (1919) (same). *Contra:* La France Co. v. Electrical Workers, *supra* note 2, holding that contracts terminable on two days' notice were at will, as two days did not set term, and refusing to enjoin inducing breach of such contracts. Allen, J., said at 93-4, 140 N. E. at 908: "It is difficult upon principle to see how persuading a man to do a thing, which he may do with perfect legality, can be illegal."

[14] See Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663,

The notion that labor activities are neither inherently nor prima facie "lawful" or "unlawful," is a very promising departure in method by the court in the instant case.

"Picketing without a strike is no more unlawful than a strike without picketing." [15]

This is the first expression of the Court of Appeals on a question on which there has been great confusion among the lower New York Courts.[16]

The "nature of the judicial process" in this case is indicative of the adoption of a new technique by the highest court of a leading industrial state.[17] It is submitted that further conscious development along this line, and a discarding of the stereotypes used for so long, will tend toward a more intelligent adjustment of these problems in modern industry.

694-6, contrasting the social desirability of men being able to keep up their standard of living with the desirability of freedom of contract: "to answer this deep-lying problem, involving momentous social consequences, by a mere rule of thumb that the defendant induced a breach of the plaintiff's contract, is hardly a method of determination calculated to produce justice."

[15] Exchange Bakery & Restaurant v. Rifkin, *supra* note 1, at 263, 157 N. E. at 132.

[16] See Comment (1927) 36 YALE LAW JOURNAL 557.

[17] This method of approach has long been the basis of the dissenting opinions of Justices Holmes and Brandeis. See Brandeis, J., *dissenting* in Bedford Stone Co. v. Journeyman Stone Cutters' Assn., 274 U. S. 37, 59, 47 Sup. Ct. 522, 529 (1927): "The plaintiffs are not weak employees opposed by a mighty union. . . . Together they ship 70 percent of all the cut stone in the country . . . Their organization is affiliated with the national employers' organization . . . standing alone, each of the journeymen's locals is weak . . . it is only by combining the 5000 organized stone cutters in a national union . . . that the individual stonecutter anywhere can protect his own job."