RECENT CASES

CONSTITUTIONAL LAW—EFFECTIVENESS OF AN AFFIRMATIVE U. S. SUPREME COURT DECISION AS A JUDICIAL PRECEDENT FOR A DECISION RENDERED BY THE N. J. COURT OF ERRORS AND APPEALS IN A SIMILAR TYPE CASE.—Complainant sought to restrain the defendants from selling and advertising for sale, or offering for sale in their stores products made by them for a lower price than that fixed for resale, by virtue of Chapter 58, P.L. 1935, p. 140 (N.J. St. Annual 1935, sec. 217-13 to 217-17). The Court of Chancery held the act unconstitutional. On appeal, *Held*: Reversed. The N. J. Court of Errors and Appeals is bound by the decision of the U. S. Supreme Court, since rendered, which held a similar act to be constitutional. *Johnson & Johnson v. Weissbard,* 121 Eq. 585, 191 Atl. 873 (E&A 1937).

On Dec. 7, 1936, the U. S. Supreme Court established, so far as the Federal Constitution is concerned, legislative power to validate contracts by which the producer or owner fixes the resale price of commodities sold under his trademark, brand, or name (subject to certain conditions in respect of competition with commodities of the same general class produced by others, and excepting sales in closing out the stock of the commodity), and to make contractual stipulations fixing the resale price, effective as against a third person not a party to the contract, at least if he knew or was chargeable with knowledge of the contract at the time he purchased the commodity.[1]

Previous to this decision the courts were in practical agreement that in the absence of statute such a resale price stipulation could not be made effective as against one not a party to the contract. Such a stipulation was held to be void as obnoxious to the public interest and repugnant to the absolute title conveyed.[2] There was, too, a conflict of author-

1. Old Dearborn Distributing Co. v. Seagram-Distillers Corp. (McNeil v. Joseph Triner Corp.), 299 U.S. 183, 57 S. Ct. 139, 106 A.L.R. 1476 (1936). This case involved the constitutionality of the Illinois statute. (SMITH, HURD ILL. STATS., c. 121½, sec. 188 *et seq*).

2. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 Sup. Ct. Rep. 376 (1911); Garst v. Hall & L. Co., 179 Mass. 588, 55 L.R.A. 631, 61 N.E. 219 (1900); Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 51 L.R.A. (N.S.) 522, 137 Pac. 144 (1913).

ity, absent statute, upon the question of the validity of such a contract stipulation itself even as between the parties to it.[3]

Thus, the fair trade statutes of the type involved in the *Old Dearborn Distributing Co.* case, *supra,* if constitutional, have enlarged the powers of the producer or owner in permitting him to fix and maintain the resale price of "identified" commodities sold under his trademark, brand, or name.

For our purposes, it is worthy of note that the N. J. Court of Errors and Appeals felt itself bound to follow the U. S. Supreme Court's decision in the *Old Dearborn Distributing Co.* case, in spite of the fact that the question involved was a purely local one and did not violate the U. S. Constitution.

In the case of *Bourjois Sales Corp. v. Dorfman,*[4] the N. Y. Court of Appeals said: "We thought the case of Doubleday, Doran & Co. to be a clear case of unauthorized restriction upon the disposition of one's own property and unconstitutional within former decisions of the U. S. Supreme Court. That court has taken a different view in the case above mentioned, *Old Dearborn Distributing Co. v. Seagram Distillers Corp.* The complaint in this appeal now before us is in no way different from that before the Supreme Court under the Illinois Act, so that we feel

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3. Cases supporting the view that contracts to control prices are invalid as being in undue restraint of trade: Dr. Miles Medical Co. v. John D. Park & Sons Co., *supra,* followed without discussion in Kellogg Toasted Corn Flake Co. v. Buck, 208 Fed. 383 (1913); Stewart v. W. Rawleigh Medical Co., 58 Okla. 344, L.R.A. 1917 A, 1276, 159 Pac. 1187 (1916).

Cases supporting the view that contracts to control prices may be valid: Grogan v. Chaffee, 156 Cal. 611, 27 L.R.A. (N.S.) 395, 105 Pac. 745 (1909); Garst v. Harris, 177 Mass. 72, 58 N.E. 174 (1900); Robert H. Ingersoll & Bro. v. Hahne & Co., 89 N.J.Eq. 332, 108 Atl. 128 (1918). In this last case, Lane, V.C., held that "the practice of a manufacturer, who makes and sells an article not the subject of monopoly the price of which has been standardized through extensive advertising, of affixing a notice under the terms of which purchasers are forbidden to resell at less than the standard price without removing the manufacturer's marks and guarantee, is not offensive to public policy, or the Sherman or Clayton Acts. Chapter 107 of the laws of 1916 validating such contracts was a proper exercise of the police power of the state and not offensive to any provisions of the constitution of the U. S. or of this state." For an excellent discussion of resale price control and a comprehensive compilation of cases pro and con, see 7 A.L.R. 449, 493.

4. 273 N.Y. 167; 7 N.E. (2nd) 30 (1937).

it to be our duty to submit our own judgment to the rulings of the Supreme Court on the constitution of the U. S. and the interpretation of its own decisions".

It is obvious that the N. J. Court of Errors and Appeals used the "follow the master" reasoning of the N. Y. Court of Appeals in deciding the case before it, as a justification for its own decision, because it incorporated the above extract in its own opinion and it too decided the case before it not on its merits, but purely on the basis that since the U. S. Supreme Court had decided this type of statute constitutional, it must do so likewise.[5]

It is fundamental law that where the U. S. Supreme Court has declared a certain type of law unconstitutional, all state courts are bound by its decision. But where the U. S. Supreme Court declares that a law is constitutional, the state courts are not obliged to follow its decision when adjudicating a similar statute before it which is attacked as being in violation of the state constitution, and which involves a question purely local and intrastate.[6]

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5. Where the provisions of the national and state constitutions on any subject are identical the state courts usually acquiesce in the decisions of the national courts interpreting and applying such provisions, Hammond Packing Co. v. State, 81 Ark. 519, 100 S.W. 407 (1907); Sperry and H. Co. v. State, 188 Ind. 173, 122 N.E. 584 (1919); State v. Ardoin, 51 La. Ann. 169, 24 So. 802 (1899); although such provisions are not binding on the state courts, but are merely persuasive authority. Rothschild & Co. v. Steger & Sons Piano Mfg. Co., 256 Ill. 196, 99 N.E. 920 (1912); State v. Aime, 62 Utah 476, 220 Pac. 704 (1923); State v. Buchanan, 29 Wash. 602, 70 Pac. 52 (1902).

See generally AMERICAN JURISPRUDENCE, vol. II, sec. 105. For a practical rationalization as to why the State Courts generally follow the U. S. Supreme Court even though not required to do so, see 106 A.L.R. 1486, in which, briefly, the annotator reasons that when the provisions of the respective constitutions are essentially the same the weight of the state court's decision as a judicial precedent is seriously impaired, and practical commercial considerations would seem to militate against adherence to or assent by state courts to a view of their own constitutional provisions at variance to that taken by the Supreme Court of the corresponding provisions of the Federal Constitution.

6. *In re* Morgan, 26 Colo. 415, 58 Pac. 1071 (1899); Watson v. State, 109 Neb. 43, 189 N.W. 620 (1922); People v. Budd, 117 N.Y. 1, 22 N.E. 670 (1889). And in Parsons v. Federal Realty Corp., 105 Fla. 105, 143 So. 912 (1932); it was held that a State court is not bound by the construction placed upon a statute of the State by a Federal court even though that court is the Supreme

In 1926 the U. S. Supreme Court passed on the constitutionality of a zoning ordinance enacted in Euclid, Ohio, and held that it was within the police power of the state to pass such a statute, as it safeguarded public health, safety, and general welfare.[7] But the N. J. Court of Errors and Appeals in the cases of *State ex rel Finkel v. Irvington*[8] (1927) and *State ex rel G. and G. Realty Co. v. Scott*[9] (1927) decided that the case of *Ignaciunas v. Nutley*[10] was controlling, and declined to adopt the reasoning of the Federal Supreme Court. In the *Ignaciunas* case, *supra,* a building permit was refused to the owner of a lot in the town of Nutley on the ground that a zoning ordinance prohibited the erection of a store building to be used for store purposes. The court held such ordinance to be void under the U. S. Constitution 14th Amendment as violative of the rights of private property guaranteed by the Federal and State Constitutions.

Thus we cannot avoid the conclusion that there was a fundamental difference of view between the Federal Supreme Court and the N. J. court as regards constitutional power to restrict property owners from developing their property as they desired.

We therefore see that the N. J. Court of Errors and Appeals has the right to disagree with the Federal Supreme Court and has, in the past, exercised this prerogative. Notwithstanding, in deciding the validity of the Fair Trade Act, *supra,* the court saw fit not to decide the case before it on its merits, but to follow blindly and unquestioningly the decision of the Federal Supreme Court in the *Old Dearborn Distributing Co.* case, *supra.* In this, it is submitted, there was error. It cannot be maintained that a decision of the Federal Court sustaining a state statute is binding on another state court when the same question subsequently arises there under a similar statute. It is the unquestionable duty of the state court to examine the statute and decide according to its *own* interpretation of the state constitution.[11]

Court of the U. S.

7. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
8. 5 Misc. 537, 137 Atl. 922.
9. 5 Misc. 518, 137 Atl. 922
10. 99 N.J.Law 389 (E. & A. 1923).
11. AMERICAN JURISPRUDENCE, vol. II, sec. 105.

CONTEMPT—APPLICATION OF STATUTE OF LIMITATIONS TO CRIMINAL CONTEMPT IN EQUITY.—The respondents were charged with contempt for having submitted fraudulent affidavits in answer to a bill of complaint filed for the appointment of a receiver. They moved the court dismiss the petition upon the ground that the respondents are entitled to urge as a bar the analagous application of the Statute of Limitation. since more than two years have elapsed between the filing of the affidavit and the commencement of this proceeding.[1] *Held*—Statute has no application to the present proceeding. In re *Jibb v. Stapatsky*, 121 Eq. 531 (Ch. 1937)

Contempts are classified as civil and criminal. In a civil contempt the proceeding is a remedial step in a cause interpartes and if the contemnor be imprisoned it is only until he performs some required act beneficial to the other party; criminal contempts are offenses against organized society and are punishable as such in a proceeding at law which, while it may be administered by the court in which the contumacious conduct occurred is no part of the private litigation therein.

Here the act complained of is an affront to the dignity of the court and an attempt to improperly influence the court in the due administration of justice in which case the imprisonment is for a definite term, the contemnor cannot by performance liberate himself, and hence the contempt is criminal and the punishment punitive.[2]

In a prosecution for a criminal contempt the defendant is entitled to all of the substantial rights of persons accused of crime. One of such substantial rights of the defendant is freedom from prosecution after the prescribed limitation period. The proceeding is one of the strictest right, and must be governed by the legal rules that obtain in the trial of criminal causes.[3]

There is no doctrine better settled in this state than that which

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1. Motion based on Statute (2 COMP. STAT. 1910, p. 1870, par. 152) which provides: "No person or persons shall be prosecuted, tried or punished for any offense not punishable with death unless the indictment therefor shall be found within two years from the time of committing the offense or occurring the fine or forfeiture."

2. Gompers v. Buck Stove and Range Co., 221 U.S. 418, 31 S.C. 492, 55 L. Ed. 797, 34 L.R.A. (N.S.) 874 (1911).

3. *In re* Baer, 13 Misc. 148 (Sup. Ct. 1935).

declares that, where there is concurrent jurisdiction for the same cause of action, if the legal remedy has become barred by the lapse of time, the equitable remedy will also be held to be barred.[4]

The defendants in this case, in their prayer for dismissal of the complaint set up as a bar to this action the statute of limitations in which the legislature has prescribed the "reasonable time" within which the prosecution must be commenced. In examining the authorities it is found that the time limitation principle is applied by some on the theory that the Statute of Limitations directly applies, and by others on the theory that the statute applies by analogy.[5]

The court in the principle case erred in assuming jurisdiction, for, on the basis of statute and authority, the defense interposed by the respondents should have been allowed as a bar to the maintenance of this action.*

CONVERSION—WRONGFUL LEVY AND SALE OF GOODS OF ANOTHER. —Defendant, creditor, recovered a judgment against a third party, A, for debt due; and caused an execution to be issued and a levy made upon certain goods claimed to be owned by the plaintiff, but which the

4. Administrator, Etc. of Smith, Deceased, v. Wood and others, 7 Misc. 881 (Ch. 1887); Alling v. Alling, 52 N.J.Eq. 92 (Ch. 1893); Partidge v. Wells, 30 N.J.Eq. 176 (Ch. 1878); Goodwin v. Mayor, etc. of City of Millville, 75 N.J.Eq. 270, 71 Atl. 674 (E. & A. 1908); Clark v. Van Cleef, 75 N.J.Eq. 152, 71 Atl. 260 (Ch. 1908).

5. In a decision handed down by the United States Supreme Court in Gompers v. U. S., 34 Sup. Ct. 693, 238 U.S. 604 (1914) in dismissing the contempt proceedings reversing the judgment of the lower court on the ground that the offenses were committed beyond the period of the statute of limitations and in fact applying by analogy the statute, the Court said: "The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government."

Beattle v. The People, 33 Ill. App. 651, applies the statute; State v. Phipps, 24 Pac. (2nd) 1073; (Wash. 1933) applies the statute; Pate v. Toler, 79 S.W. (2d) 444 (Ark. 1935) applies the statute.

* NOTE: Recently the Vice Chancellor's decree was reversed by a unanimous court.—121 N.J.L. 531 (E. & A. 1938).

defendant thought belonged to A. The sheriff made a sale of "all the right, title, and interest of A" in the goods to a stranger. The goods were never removed from the possession of the plaintiff. *Held*: if A had no interest in or title to the goods, the sale was a nullity; and a plaintiff never lost possession of the goods, trover would not lie. *Potash Stores, Inc. v. Bay Development Corp.*, 118 N.J.L. 243, 192 Atl. 379 (Sup. Ct. 1937).

By the Common Law Rule it has been held that goods were not in *custodia legis* unless the sheriff be in actual possession. Since then, cases have held that to be guilty of a conversion the defendant must have constructive possession[1] or the actual possession required under the Common Law Rule.[2] Neither actual manual taking[3] nor asportation[4] are essential elements of conversion. It is generally held that it is not necessary to conversion that the motive or intent with which the act was committed should be wrongful,[5] or wilful or corrupt.[6] Mistake, ignorance, or even belief that the goods belonged to the defendant does not constitute a defense in trover.[7]

What is important to decide is whether or not the defendant has exercised dominion over the goods in exclusion of or in defiance of the owner's rights. If he has, then there is a conversion.[8]

In *Woodside v. Adams* it was decided that to constitute a conversion of goods there must be some repudiation of the owner's rights by

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1. BLACK'S LAW DICTIONARY (2nd Ed. 1910).: "Possession not actual but assumed to exist, where one claims to hold by virtrue of some title, without having the actual occupancy, as, where the owner of a tract of land, regularly laid out, is in possession of a part, he is constructively in possession of the whole."

2. Western Maryland Dairy v. Maryland Wrecking & Equipment Co., 146 Md. 318, 126 Atl. 135 (1924)

3. Rogers v. King, 151 Ala. 628, 44 So. 655 (1907); Pease v. Smith, 61 N.Y. 477 (1875).

4. Allen v. Bicknell, 36 Me. 436 (1853); Hammond v. Sullivan, 99 N.Y.S. 472, 112 App. Div. 788 (1906)

5. West Jersey Railway Co. v. Trenton Car Works, 32 N.J.L. 517 (E. & A. 1866); Allen v. Fromme, 195 N.Y. 404, 88 N.E. 645 (1909); Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617 (1861); Edwards v. Jenkins, 214 Cal. 713, 7 Pac. (2d) 702 (1932).

6. Haddix v. Einstman, 14 Ill. App. 443 (1883).

7. Moore v. Andrews, 203 Mich. 219, 168 N.W. 1037 (1918).

8. Mahaney v. Walsh, 44 N.Y.S. 969, 971, 16 App. Div. 601 (1897).

the defendant, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel.[9]

By Chief Justice Beasley's words in *Atkinson v. Hires,* the fact that the court held this not to be a conversion was that plaintiff failed to show more than his interest was sold and possession delivered.[10] By fair implication, it seems that had this been shown then it would have been held to be a conversion.

A landlord has no lien on the goods and chattels of his tenant for payment of rent except such as is given by the statutes.[11] The statute authorizing a distress for rent,[12] expressly limits the right of distress to the goods and chattels of the tenant, and no other person.

In the principal case there is neither a mortgagor-mortgagee question nor a distress for rent. The case deals with a judgment for rent past due on different premises, and the levying by a sheriff on goods claimed by the plaintiff, but the goods were in the store which A was running. A had apparently the right to possession but did not have title. A had no tangible interest in the goods which could be levied upon and sold. A was just managing the store for the plaintiff, to all appearances. The sheriff levied on the goods, and in spite of the plaintiff's telling him that the goods did not belong to A but to the plaintiff, he sold the interest of A. The court then proceeded to say that since A had no interest nothing was lost. The court has utterly disregarded the very basis of the process of levying.

Property once levied on remains in the custody of the law.[13] It is the duty of the sheriff to keep in his custody, and care for the property of which he has taken possession under any process of writ.[14] and

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9. 40 N.J.L. 417 (Sup. Ct. 1878), Accord, Frome v. Dennis, 45 N.J.L. 515 (Sup. Ct. 1883).

10. 43 N.J.L. 297 (Sup. Ct. 1881).

11. Woodside v. Adams, 40 N.J.L. 417 (Sup. Ct. 1878)

12. BLACK'S LAW DICTIONARY (2nd Ed. 1910): "Distress. The taking of a personal chattel out of the possession of a wrong-doer into the custody of the party injured, to procure a satisfaction of a wrong committed; as for non-payment of rent."

13. Adams v. Burns, 172 So. 75 (Fla. 1936).

14. McKay v. Harrower, 27 Barb. N.Y. 463 (1858); Wood v. Lowden, 117 Cal. 232, 49 Pac. 132 (1897); State v. Stidham, 31 Del. 8, 110 Atl. 680 (1920).

within certain limits to do all things necessary for its preservation,[15] until it can be disposed of in some lawful manner as by sale to satisfy the debt or by a return of the property to the owner.[16] A sheriff has the right to use all necessary force to protect his possession of property seized under process.[17]

This certainly is exercising dominion over the goods. An owner cannot deal with the goods in any manner unless he gives bond. Here the goods are taken by constructive possession out of the hands of the owner's control. He has lost the benefit of its use. Especially in a store, as here, would such failure to control be extremely harmful. The goods are on his shelf in full view of the customers, and he may not sell.

It was decided in *Leonard v. Maginnis* that a sheriff may levy on the interest of his execution debtor in personal property, and to make the levy effectual, may take the property into his custody. But if he levy on the property in which such debtor has no leviable interest, his taking is wrongful, though he assume to levy on only such debtor's interest.[18]

In *Stevens v. Somerindyke* it was held that a mere levy without removing the property, or in any other way interfering with it, is a trespass and sufficient to maintain the action of trespass.[19]

Where a third party sees that his goods are wrongfully levied upon, he may show by proper statutory notice that his property was wrongfully levied upon and thus have it proven,[20] or he may ignore all, and then sue the parties interfering with his rights in conversion. A judgment creditor, attachment plaintiff, or a stranger, who advises, directs, or assists an officer to seize property not belonging to the debtor, or who ratifies the sale of the property by the officer, is held liable to the owner for conversion.[21]

In order to decide this case in favor of the defendants, the court

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15. Briggs v. Taylor, 35 Vt. 57 (1892).

16. Boseli v. Doran, 62 Conn. 311, 25 Atl. 242 (1892); McKay v. Harrower, 27 Barb. N.Y. 463 (1858); Uphaus v. Roof, 68 Oh. St. 401, 67 N.E. 717 (1903).

17. Ansonia Brass, etc. Co. v. Babbitt, 8 Hun. 157, 74 N.Y. 395 (1878).

18. 34 Minn. 506, 26 N.W. 733 (1886).

19. 4 E.D. Smith N.Y. 418 (1855).

20. Rosander v. Knee, Sheriff, 271 N.W. 293 (Iowa 1937).

21. Libby v. Soule, 13 Me. 310 (1836); Phelps v. Delmore, 69 Hun. 18, 4 Misc. Rep. 508, 23 N.Y.S. 229 (1893)

has bent over backwards. No reason is given for nor support to its decision of what may happen if there is no interest to be levied upon and sold. It seems clear that this was more a decision of sympathy than an application of the law. The ruling in favor of the defendant is unsound, and leaves the field open for an unjust interference with the right of the individual to the use and enjoyment of his property preserved to him under the Constitution.

INJUNCTION—STANDING OF A MEMBER OF A PROFESSION TO SEEK RELIEF AGAINST UNLAWFUL PRACTICE.—Bill by two licensed chiropodists and the Chiropodists Society of the State of New Jersey to enjoin the defendant corporation from practicing chiropody without a license contrary to statute.[1] *Held* that the complainants cannot maintain this suit because: (1) an action under the statute will not lie as it was not enacted for their benefit; (2) the right to practice chiropody is not such a property right as will be protected by injunction; and (3) the complainants have not made out a sufficient case to justify injunctive relief on the ground that the defendant's unlicensed practice is a public nuisance. *Mosig v. Jersey Chiropodists, Inc.* (1937) N.J.Eq., 194 Atl. 248 (Ch. Ct.).

The first of the three aspects of the decision is valid. The statute in question was enacted under the police power for the benefit of the public. Provision was made for remedies by the state but no relief for the private individual or competitor was provided. The purpose of the act, therefore, was not to limit competition but to safeguard the public against untrained chiropodists. For this reason, since the act was not enacted for their advantage, complainants as chiropodists and competi-

1. "An act to regulate the practice of chiropody, to license chiropodists and to punish persons violating the provisions thereof." P. L. 1908, p. 391, 3 COMP. ST. 1910, p. 3338, § 63 *et seq.* as amended COMP. ST. SUPPS. 1924, 1930, § 127-63 *et seq.*

tors may not take advantage of its provisions by suing under it.[2]

In the second part of its decision the court was called upon to decide whether the right of a licensed chiropodist, or that of all chiropodists taken together, to practice is a franchise right or merely a license. A franchise, in its simplest sense, involves something in which the public as a whole is interested and which one could not do as a public right, a grant from the government being necessary.[3] A license, on the other hand, is the permission to do that which one naturally has the right to do, but which under the police power has been forbidden as a general right.[8] Therefore it allows the exercise of a privilege of common right but does not grant a privilege the exercise of which is tinged with a public character. It resembles a franchise only in that it is a permission by the state to do something which could not otherwise be done legally. Franchises generally are treated as property rights capable of being protected by injunctive relief while licenses are not.[4] The right to follow a profession or business falls into the vague and ill-defined area between the two. For some purposes it has been held to give rise to a franchise,[5] while for others courts have restricted it to a mere license.[6]

The court here held the license to practice chiropody is not a franchise. In so doing, it distinguished *Unger v. Landlord's Management Corporation*[7] and kindred cases[8] holding that a member of the legal pro-

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2. Public Service Railway Co. v. Reinhardt, 92 N.J.Eq. 365, 112 Atl. 850 (1921), *aff'd* 93 N.J.Eq. 461, 115 Atl. 747, 119 Atl. 878; Ky. St. Board of Dental Examiners v. Payne, 281 S.W. 188 (1926); Merz v. Murchison, 30 Ohio Circuit R. 646 (1908).

3. Bouvier, Law Dictionary. Black's Law Dictionary.

4. Pennsylvania Railroad Co. v. National Railway Co., 23 N.J.Eq. 441 (1873); Elizabethtown Gas-Light Co. v. Green, 46 N.J.Eq. 118, 18 Atl. 844 (1889); Walker v. Stone, 17 Wash. 578, 50 Pac. 488 (1897); Prettyman Inc. v. Fla. Real Estate Commission, 109 So. 442 (1926).

5. Frost v. Corp. Commission of the State of Okla., 278 U.S. 515 (1929); Rolde v. Sachs, 2 Wash. 373, 26 Pac. 865 (1891); Land Title Abstract & Co. v. Dworken, 129 Oh. St. 23, 193 N.E. 650 (1934); Fitchette v. Taylor, 191 Minn. 582, 254 N.W. 910 (1934); Paul v. Stanley, 168 Wash. 371, 12 P. (2) 401 (1932).

6. Merz v. Murchison, *supra*. State v. Green, 112 Ind. 462, 14 N.E. 352 (1887).

7. 114 N.J.Eq. 68, 168 Atl. 229 (1933).

8. *In re* O'Brien's Petition, 79 Conn. 46, 63 Atl. 777 (1906); Land Title Abstract Co. v. Dworken, *supra;* Paul v. Stanley, *supra;* Childs v. Smeltzer, 315

fession may maintain a bill to enjoin the unlawful practice of law, since the right to practice law is a franchise right. Though the court did not attempt to justify or explain this distinction several arguments could have been advanced. As a matter of legal history lawyers received franchise rights by virtue of what was originally the king's prerogative,[9] while chiropodists or doctors do not. Such a legalistic distinction loses sight of the fact that the court is a court of conscience[10] governed by equitable principles of justice, changing and moving forward with the times. A more valid basis for the distinction is that lawyers are officers of the court and as such are under a special duty to protect the legal profession, the courts and the administration of justice generally.[11] The cases are clearly distinguishable by this argument. However the *Unger* case did not base its decision on this point. The court, in that case, quoting *State v. Chapman*[12] maintained that "A calling, business or profession chosen and followed is property".[13] According to this view doctors have been held to have a property right.[14] These decisions seem to be based on more equitable principles of justice and should have been followed in the instant case.

The unlicensed practice of a profession has been viewed as a public nuisance.[15] Generally equity will not interfere at the suit of a private individual unless the nuisance causes special and serious injury to the complainant, distinct from that suffered by the public.[16] The court argues

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Pa. 9, 171 Atl. 883 (1934); Fitchette v. Taylor, *supra*.

9. POLLOCK and MAITLAND, HISTORY OF ENGLISH LAW 191, 224. GILBERT, HISTORY OF CIVIL ACTIONS.

10. NEWARK UNIV. LAW REVIEW.

11. Depew v. Wichita Retail Credit Ass'n, Inc., (Kan.) 42 Pac. 214 (1935).

12. State v. Chapman, 69 N.J.L. 464, 55 Atl. 94 (1903), *aff'd*, 70 N.J.L. 339, 57 Atl. 1133.

13. Barr v. Essex Trades Council, 53 N.J.Eq. 101, 30 Atl. 881 (1894); Slaughter House Cases, 16 Wall 36, 21 L. Ed. 394 (1872); Canvassa v. Off, 206 Col. 307, 274 Pac. 523 (1929).

14. State v. Chapman (dentist), *supra*; State v. McElhinney, 247 Mo. 592, 145 S.W. 1139 (1912); Sloan v. Mitchell, 168 S.E. 800 (1933); Butcher v. Maybury, 8 F. (2d) 155 (1925); Bley v. Board of Dental Examiners, 87 Cal. App. 193, 261 Pac. 1036 (1927).

15. State v. Smith, 43 Ariz. 131, 29 Pac. (2) 718 (1934); Puget Sound Traction Co. v. Grassmeyer, 102 Wash. Rep. 482 (1918).

16. Hinchman v. Patterson Horse R. Co., 19 N.J.Eq. 276 (1868); Van

that any special injury that might be sustained is incidental as arising from the fact of the competition rather than from the doing of the unlawful act. The rule is not so narrow. The sole income of complainant's business is derived from fees collected for services to his patients and any loss of these fees caused by a third party is a wrongful interference with property subject to be restrained by injunction, if the interference is in violation of positive law or otherwise without legal right.[17]

The result of the decision in this case is to allow the defendant corporation to unlawfully practice chiropody to the public's detriment until enforcement of the statute by the state authorities, often slow and cumbersome, is undertaken. Public policy militates against such a result. The legislature of the state considered the practice of chiropody to be of such public interest that they passed increasingly rigid statutes governing admission into the profession. The courts should do their part toward the accomplishment of the purposes of the statute by restricting the practice of chiropody to those duly licensed whether the bill to enjoin be brought by the state authorities or any other interested party.

MORTGAGES—ACCELERATION CLAUSE—EFFECT OF PAYMENT OF DELINQUENT TAXES ON RIGHT TO FORECLOSE.—The defendant executed to complainant a mortgage containing an acceleration clause providing that should taxes imposed on the premises remain unpaid for ninety days after falling due, the principal should become immediately due at the option of the mortgagee. Taxes for the first three quarters of 1935 fell due and remained in arrear for more than ninety days. However, all these taxes were paid on January 23, 1936. The only default by the mortgagor was the failure to pay taxes. On February 4, 1936, complainant filed to foreclose the mortgage. *Held*: A default

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Wagener v. Cooney, 45 N.J.Eq. 24, 16 Atl. 689 (1889); Van Marter v. First Nat'l Bank, 87 N.J.Eq. 500, 100 Atl. 892 (1917); Morrison v. Standard Oil Co., 105 N.J.Eq. 104, 147 Atl. 151 (1930), *aff'd*, 106 N.J.Eq. 281, 151 Atl. 906.

17. Puget Sound Traction Co. v. Grassmeyer, *supra*.

in taxes may be neutralized by payment before the bill is filed and the mortgagor is not entitled to foreclose. *Haase v. Moser,* 121 N.J.Eq. 344, 189 Atl. 638 (E. & A. 1937).[1]

The determination by the court that, taxes in arrear having been paid by the mortgagor before the bill was filed, the default is thereby banished, although of first impression in this State, is well supported by authority in other jurisdictions.[2]

The primary purpose of the acceleration clause in a mortgage is to protect the mortgagee from loss or impairment of his security.[3] That purpose is fulfilled by payment of the belated taxes before the filing of the bill.[4] All the rights intended to be protected are fully restored, and the mortgagee is indemnified against any possible prejudice or loss arising from the default.[5] At most, the non-payment of taxes is a "technical default,[6] and, if paid before commencement of the action, the mortgagee is in no wise injured, nor is his security impaired or diminished, but the parties are restored to their original position.[7]

Under such circumstances, the default of which the mortgagee seeks to avail himself would result in a forfeiture from which the Court of Equity has power to relieve.[8] The jurisdiction of Equity to grant relief in cases of forfeiture and penalties for breaches of covenants and conditions is well established, and the principle is everywhere recognized.[9] Since this relief in Equity against forfeitures rests upon the

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1. On appeal from, and affirming, the decision below in 120 N.J.Eq. 437, 184 Atl. 740 (Ch. 1936).

2. Noyes v. Anderson, 124 N.Y. 175, 26 N.E. 316 (1891); Ver. Planck v. Godfrey, 42 App. Div. 16, 58 N.Y.Supp. 784 (1899); Fleming v. Framing, 22 Okla. 644, 22 L.R.A. (N.S.) 360 (1908); Smalley v. Renken, 85 Iowa 612, 52 N.W. 507 (1892); Shaw v. Wellman, 13 N.Y.Supp. 527 (1891); Germania Ins. Co. v. Potter, 109 N.Y.Supp. 435 (1908); 1 WILTZIE ON MORTGAGES (4th Ed.) 96; 2 JONES ON MORTGAGES (8th Ed.) 1006; 41 CORPUS JURIS 853, par. 1038.

It may be noted that in the latter two cases here cited, the mortgagor was relieved although the overdue taxes were not paid until *after* the bill was filed.

3. Eberich v. Solomon, 112 Conn. 498, 152 Atl. 823 (1931).

4. Smalley v. Renken, *supra,* note 2.

5. Shaw v. Wellman, *supra,* note 2.

6. Germania Ins. Co. v. Potter, *supra,* note 2.

7. Ver Planck v. Godfrey, *supra,* note 2.

8. Noyes v. Anderson, *supra,* note 2.

9. Baldwin v. Van Vorst, 10 N.J.Eq. 577 (E. & A. 1856) at p. 580.

doctrine that the possessor of a legal right shall not be allowed to use it to work oppression or injustice, whenever a mortgagor can bring himself within this principle, it is the duty of the court to administer proper relief.[10] The mortgagee having been fully protected, the mortgagor is clearly entitled to the interposition of the Court's equitable power. To allow a forfeiture upon the facts of the instant case would work an injustice which Equity ought not to permit, even though the result is, in effect, an alteration of the terms of the contract.

On the other hand, where there is a default of *interest*, which, under the terms of the mortgage, would accelerate the payment of the principal, a mortgagee is not required, even before his election to accelerate the principal, to accept payment of the overdue interest. This distinction is emphasized by the court in the instant case merely by way of dictum, but a reconciliation with the contrary rule established in regard to delinquent taxes is not impossible

A delay in payment of interest is not a "technical" breach which Equity may disregard. Payment before suit cannot cure the default as in the case of delinquent taxes. The right of the mortgagee to refuse payment of overdue interest even before his election to accelerate the principal is of uniform practise in this State.[11]

An acceleration clause in respect to interest payments differs in nature and object from a similar provision covering payment of taxes.[12] The stipulation in the mortgage for the whole debt to mature upon default in an interest payment is not in the nature of a penalty,[13] but

10. 10 R.C.L. 335, par. 84, 85.

11. O'Connor v. Meskill, 39 Atl. 1061 (Ch. 1898).

12. In each of three cases: Bergman v. Fortescue, 74 N.J.Eq. 266, 69 Atl. 474 (Ch. 1908); Wiener v. Cullens, 97 N.J.Eq. 523, 128 Atl. 176 (E. & A. 1925); and Newark Trunk Co. v. Clark, 94 N.J.Eq. 79, 118 Atl. 263 (Ch. 1922) are positive statements by the court refusing to acknowledge any essential difference between tax and interest stipulations. However, the Bergman and Wiener cases involve foreclosures where the taxes were not paid until after the filing of the bill, and in the Newark Trunk case, although payment of delinquent taxes was made prior to the commencement of suit, a default in interest was not paid until afterwards, and it is upon this ground that the decision permitting foreclosure rests. It is submitted that had the court before it the situation involved in the instant case, the distinction beween tax and interest stipulations would have been recognized.

13. 1 POM. EQ. JUR., par. 439; Brown v. Kennedy, 274 S.W. 357, 41 A.L.R.

is a stipulation for a period of credit on condition.[14] The agreement of the parties makes the extension of credit depend upon punctual payment of the interest at the times fixed for that purpose. Time is the essence of the contract. To permit the mortgagor to assert that delinquent interest payments must be accepted at any time before the election to foreclose, and thereby bar the mortgagee's option, would destroy the significance and efficiency of the limitation, although it is clearly expressed and is an essential part of the contract.[15] The object of the parties to secure prompt payment should not thus be defeated. The time limit is final, and failure of payment at the time stipulated cannot be excused.[16]

It is submitted, therefore, on the above conclusions, that the distinction drawn by the court in the instant case is well within the bounds of logical reasoning and judicial authority.

WILLS—REVOKING CLAUSE IN SUBSEQUENT WILL AS AFFECTING PRIOR WILL.—Testator executed his will in 1922. In 1928 he executed a second will which contained an express clause revoking the will of 1922. Later he destroyed the 1928 will. *Held*: the 1922 will is admissible to probate. In re *Block's Estate*, 15 N.J.Misc. 233, 190 Atl. 315 (Orph. Ct. 1937).

The controversy centers around the status of a prior will which is revoked by an express clause in a subsequent will which later will is itself revoked. When the common-law courts of England were presented with this situation they laid down the rule that the first will was left

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729 (Mo., 1925); Swearingen v. Lahner, 93 Iowa 147, 26 L.R.A. 765 (1894); Fant v. Thomas, 108 S.E. 847, 19 A.L.R. 280 (Va., 1921); 1 JONES ON MORTGAGES 1181, par. 76; 19 R.C.L. 492, par. 290.

14. Berla v. M. & L. Holding Co., 105 N.J.Eq. 592, 149 Atl. 164, *aff'd*, without opinion 107 N.J.Eq. 598 (E. & A. 1930).

15. O'Connor v. Meskill, *supra*, note 11.

16. Baldwin v. Van Voorst, *supra*, note 9.

unimpaired.[1] The ecclesiastical courts of England held that the prior will was revoked and only revived if the testator so intended.[2] The English Statute of Victoria settled the conflict thus arising by providing that the prior will was revoked and could only be revived by republication.[3] American jurisdictions have divided in their adoptions of the various rules,[4] but as a matter of policy should have given more weight to the rule under the Statute of Victoria.[5]

The crux of the entire problem hinges upon whether or not an express revocation by will is immediately effective. Under both the ecclesiastical and the Statute of Victoria rules it is so effective,[6] but

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1. "At common law the revocation of a subsequent will which revoked, either expressly or impliedly, an earlier will, left the earlier will unimpaired. The reason for the rule appears to have been that the revoking will was itself revocable and did not become final or absolute until the death of the testator." *In re* Diament's Estate, 84 N.J.Eq. 135, 92 Atl. 952 (Prerog. Ct. 1915), *aff'd*, 88 N.J.Eq. 552, 103 Atl. 199 (E. & A. 1918).

2. "The revocation of the first testament took effect at the execution of the second testament, and that the revocation of the later testament might operate as a revival of the prior testament; but that there would be no presumption either for or against the revival of such testament upon the revocation of the later testament; and that testator's intention as disclosed by the evidence, determined whether he wishes to revive such prior testament or not." PAGE ON WILLS at p. 709.

3. The English Statute of Victoria provided that "no wwill or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." 7 WM. IV & I VICT., c. 26/22.

4. South Carolina is representative of the states which have adopted the so-called "common-law rule", Vermont of the ecclesiastical rule, and Michigan of the rule under the Statute of Victoria.

Some states have rules which vary from the three main rules. Kansas for example, upholds a combination of the ecclesiastical rule and the rule under the Statute of Victoria. Kansas Revised Statutes 22-242.

5. "Calculated as it is to subserve and enforce the tenor and spirit of our own legislation, and to give to our people the full benefit of the two hundred years' experience of the mother country, as embodied in the late act (Statute of Victoria) is it not the dictate of wisdom to begin in this State where they have ended in England? We think so." Harwell v. Lively, 30 Ga. 315 (1860).

6. See note 2 and 3.

under the so-called "common-law rule" it is not.[7] Since the ecclesiastical rule cannot be sustained by logic[8] the proper rule must be either the rule promulgated by the English common-law courts or the rule under the Statute of Victoria. The former is predicated upon the theory that wills being ambulatory a revoking clause in a will can never take effect if the will wherein it is contained is revoked.[9] New Jersey does not favor this rule.[10] The latter proceeds under the logic that an express revocation is immediately effective regardless of wherein it is contained.[11] It is herein submitted that this is the preferable rule in logic,[12]

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7. See note 1.

8. The ecclesiastical rule provides that the revoking clause be immediately effective; this being so the document is revoked. The rule further adds that it may be revived if the court finds that the testator so intended. Thus, mere intention upon the part of the deceased to make a will results in the will being valid. This is contra to the language and intention of all the statutes providing that a valid will may not be executed without observance of certain formalities and prescribed requisites. See the principal case for a good discussion of the faults in the ecclesiastical rule.

9. *In re* Diament's Estate, 84 N.J.Eq. 135, 92 Atl. 952 (Prerog. Ct. 1915), *aff'd*, 88 N.J.Eq. 552, 103 Atl. 199 (E. & A. 1918).

10. Randall v. Beatty, 31 N.J.Eq. 643 (Prerog. Ct. 1879), makes no distinction upon "whether the cause be judged by the rule of the English common law courts; or that of the ecclesiastical tribunals. . ."

Moore's case correctly and upon authority states that the preferable rule is that the revoking clause even in a testamentary document is immediately effective, but under a misapprehension the court states that it is constrained to follow the rule of Randall v. Beatty (which did not promulgate any rule) and that the rule in that case was the ecclesiastical rule. Moore's Case, 72 N.J.Eq. 371, 65 Atl. 447 (Prerog. Ct. 1907).

In re Diament's Estate, 84 N.J.Eq. 135, 92 Atl. 952 (Prerog. Ct. 1915) seems to belittle the so-called "common-law rule" stating that the rule in this case may be followed ". . . even though no force be given to the underlying principle of the common-law rule."

11. "It is because an express revocation is a positive act of the party, independent of the will which may happen to contain it, and operating instantaneously, and *per se*. As a clear consequence resulting from this principle, all prior wills are recalled or reversed,—the proper meaning of the word, *revoked*,—and must remain in this condition until revived, by republication." James v. Marvin, 3 Conn. 576 (1821).

". . . a clause in a subsequent will, which in terms revokes a previous will, is not an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, with-

and by the weight of authority in the United States[18] as well as in New Jersey.[14] The pertinent statute in New Jersey[15] should be construed as making such a revocation immediately effective,[16] a similar statute having been so construed in Michigan.[17] In the principal cases probate of the 1922 will should be denied.

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out regard to the testamentary provisions containing it." Colvin v. Warford, 20 Md. 357 (1863).

12. A revoking clause is not testamentary in character. "One of the tests of testamentary purpose is that its operation shall be posthumous." Sharp v. Hall, 86 Ala. 110, 5 So. 497 (1899). Such a clause not being testamentary in character it is immediately effective and is independent of the will wherein it happens to be contained. James v. Marvin, 3 Conn. 576 (1821).

13. Pickens v. Davis, 134 Mass. 252 (1883); James v. Marvin, 3 Conn. 576 (1821); Scott v. Fink, 45 Mich. 241 (1881); Simmons v. Simmons, 26 Barb. 68 (N.Y. 1857); Colvin v. Warford, 20 Md. 357 (1863); Harwell v. Lively, 30 Ga. 315 (1860).

14. Moore's Case, 72 N.J.Eq. 371, 65 Atl. 447 (Prerog. Ct. 1907). Here it was said that ". . . such a clause has no testamentary character. . ." but is intended ". . . to operate and take effect at once."

In re Schwieller's Estate, 95 N.J.Eq. 203, 122 Atl. 243 (Prerog. Ct. 1923). The court said in referring to a prior will that "it was immediately revoked."

15. 4 N. J. COMP. STAT. 1910, p. 5861, sec. 2: ". . . but all devises. . . shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator or by his directions in manner aforesaid, or unless the same be revoked or altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or more subscribing witnesses declaring such revocation or alteration."

16. ". . . the words of revocation though contained in a will, might be held to satisfy the statute as 'other writing', because such a clause has no testamentary character, and is not a testamentary disposition intended to take effect only at the death of the testator leaving the will unrevoked, but to operate and take effect at once." Moore's Case, 72 N.J.Eq. 371, 65 Atl. 447 (Prerog. Ct. 1907).

17. Cheever v. North, 106 Mich. 390 (1895).