Leading Law Review Articles

The purpose of this section is to suggest to Ohio attorneys and law students leading law review articles which, it is believed, will be helpful or interesting. Its nature is that of a limited and somewhat detailed index, or guide, to current legal periodical literature. The digests are intended to suggest the content of the articles so that the practicing attorney having need of or desiring certain material may ascertain, or have brought to his attention, the general content of a particular article. No attempt, however, has been made to treat the articles exhaustively; for detailed treatment, the reader is referred to the original.

No pretension to exhaustiveness is made in the selection of articles listed below; nor do the articles selected necessarily reflect the views of the editorial staff.

THE "ACTUAL CONTROVERSY" IN DECLARATORY ACTIONS. By John A. Schroth, Jr., 20 Cornell Law Quarterly 1 (December, 1934).

The recent Act of Congress authorizing the courts of the United States to grant declaratory judgments, in its opening words, limits the declaratory action to "cases of actual controversy." This is expected to sustain the constitutionality of the Act, and the purpose of this article is to ascertain just what the meaning of that phrase is.

Both the United States Supreme Court and various state courts (particularly Michigan) have made the presence or absence of an "actual controversy" the test, first, of the constitutionality of a declaratory judgments act, second, of the justiciable nature of a particular declaratory action. Surveying the various doctrines which have been advanced by the courts pertaining to the propriety of declaratory judgments, the author finds that the cases show that the declaration may be employed in four types of actions. In the first place, it may generally be substituted for, or used as a supplement to, an executory action. Secondly, the declaratory action in its negative form is available to a prospective defendant against the party in whose favor a cause of action, in the ordinary sense, has accrued. Thirdly, it may be employed to resolve actual, antagonistic disputes over jural relationships before a wrong has been committed. Finally, the declaration will be granted in order to quiet doubtful legal situations if the matter can be cast in the form of an "actual controversy."

In general, the courts have refused to declare rights in case of doubt, as contradistinguished from cases of controversy. It is the contention of the author that this limitation of declaratory actions to cases of "actual controversy" is a wholly unnecessary and pernicious curtailment of the declaratory judg-

ment's usefulness. The beneficent, flexible use of this proceding demands an abolition of the "actual controversy" requirement and a recognition of the true nature of the action as a kind of bill to remove clouds from all legal relationships analagous to the equitable doctrine of quia timet.

Both statutory phraseology and judicial precedents stand in the way of this clear-cut solution. In view of this, the writer suggests a redefinition of "controversy," along the lines recently announced by the Supreme Court of Tennessee, to accomplish by indirection the removal of the requirement of a controversy and to effect extension of the declaratory judgment, as a flexible means of preventive justice, to determine doubts arising from potentially adverse interests at the time they arise.

Is THERE MINORITY CONTROL OF COURT DECISIONS IN OHIO? By Edwin O. Stene, 9 University of Cincinnati Law Review 23 (January, 1935).

The author, a political scientist, takes issue with the Ohio attitude expressed in the phrase "minority control" of court decisions in Ohio on constitutional questions, pointing out that, politically, constitutionality is not determined by a minority, and places the onus of responsiblity for the Ohio attitude on the Supreme Court of the state.

Section 2, Article IV of the Ohio Consttiution as adopted in 1912 provides: "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void." The general sentiment of the bench and bar, Judge Jones of the Ohio Supreme Court has stated, deplores this provision which permits judicial control over constitutional questions by a "minority vote."

The reasons advanced for the Ohio attitude, (1) that the provision is not democratic, (2) that it increases the power of lower courts with resulting lack of uniformity, (3) that it leaves the constitution dangerously unprotected, are examined and rejected. The 1912 Constitution, the writer believes, expressed a new spirit which aimed at limiting the powers of the state supreme court in the feeling that that court had given insufficient weight to the principles of the presumptive validity of acts of the legislature and that it had insufficiently reflected the popular will in matters of policy. The Ohio situation, he contends, is very largely the fault of the Supreme Court itself in failing to recognize this new spirit, and such confusion as might necessarily have resulted has been aggravated by its attitude.

A NEW FEDERAL CIVIL PROCEDURE. By Charles E. Clark and James W. Moore, 44 Yale Law Journal 307 (January, 1935).

In this and an article to appear later in the same publication Dean Clark and his co-author consider the historical background of procedural reform in the federal courts and suggest what seem to them its teachings as to the direction and the form the change which is now possible should take.

On June 19, 1934, the signature of the President made effective the act conferring upon the United States Supreme Court the power to make rules for federal civil actions at law, and to unite federal law and equity procedure. (28 U.S.C.A., 723 b, 723 c. (1934)) The power thus granted to the Court affords an unusual opportunity for introducing effective measures of reform

in law administration into our most extended court system and of developing a procedure which may properly be a model to all the states. The manner in which this opportunity is met may furnish a real test of the ability of the profession, bench and bar, to meet the needs of an increasingly complex social organization for efficient and workable court machinery.

Three important problems to meet which new and carefully drawn rules must be framed if thoroughly modern procedure is to result are suggested. The first concerns trials to the court without a jury and the technicalities complicating review. The second is the problem of evidence and the need of a uniform and unified federal system of rules of evidence (as exists in admiralty cases) instead of the general rule, with exceptions, that state rules of evidence govern. The third arises in connection with recent statutory and court trends towards a coalescence of law and equity and the need of abolition of the vestiges of the division of law and equity procedure and adoption of a completely unified system with one trial and one appeal.

In the second article the authors expect to deal with the form the proposed new rules should take.

LEGAL THEORIES OF MONEY. By P. J. Eder, 20 Cornell Law Quarterly 52 (December, 1934).

The expressed purpose of this article is to fill a hiatus in our legal literature by supplying a brief survey of the whole law of money. In view of its importance and the legal interest attaching to recent changes in monetary systems, it is startling to learn that in England and the United States no complete book has ever been published on the subject of the law of money and that, with the exception of the recent output of papers on the gold clause, only a few articles have appeared, discussing, generally, merely isolated questions.

Excluding consideration of the historical, economic, and political aspects, the writer distinguishes and examines separately the functions of money recognized by the courts, which he classifies as: (1) money as a medium of exchange; (2) money as a measure of value, or more accurately, as a common denominator of value; (3) money as a medium of discharge or satisfaction of obligations and specifically as a medium of payment of debts. While in practice these three functions are often interwoven, they are, nevertheless, in law separate and distinct, and rules properly applicable in the solution of problems under one function are not necessarily valid for the other functions.

Doctrines which are based upon the theory of the first function are those of title and recovery, and of the validity or invalidity and effect of transactions based on current, but illegally issued, money. The second function of money, serving as a common denominator of value, is a much broader one, comprehending most of the current constitutional issues. Written before the "gold clause" decisions, this section closes with a query as to the validity of the resolution there involved. The third function of money concerns primarily the use of credit and elicits no particular comment from the author.

Recent legislation has not clearly recognized the distinction between these functions, and by that failure has presented not only difficulties of interpretation but also new constitutional and legal problems. The writer concludes with comment on such legislation and consideration of the legal theory of money

therein embodied, which, he believes, is inconsistently and incompletely expressed.

REAL DEFENSES AND THE NEGOTIABLE INSTRUMENTS LAW. By Thomas F. Green, Jr., 9 Tulane Law Review 78 (December, 1934).

Dividing the common law real defenses to negotiable instruments into three classes, e.g., (1) those clearly referred to in the Act, (2) those clearly not referred to, and (3) those which may be included in the ambiguous language used in the Act, Professor Green considers the extent to which the Negotiable Instruments Law, as interpreted by the courts, has changed or left available the common law real defenses of the last category, namely, (1) illegality such as made the instrument void, (2) fraud in the factum, (3) physical pressure in obtaining the signature.

While the statements of the draftsmen of the Act and the wording of Section 57 indicate that the intention was to do away with this trio of real defenses, all three may possibly be construed to be covered by Section 55.

The courts, however, have been practically unanimous in holding that illegality which by earlier statute makes the instrument void and fraud in the factum remain real defenses. The author reports that no cases were found on duress consisting of physical pressure, but in view of the decisions as to the other two defenses, contends that in the interests of uniformity, no decision except that the Negotiable Instruments Law has codified the majority common law rule is possible. This would make all defenses enumerated under class (3) above real defenses under the Negotiable Instruments Law.

In conclusion, the author offers an outline of real defenses available in jurisdictions which have enacted the unaltered Act.

COMMON LAW JUDICIAL TECHNIQUE AND THE LAW OF NEGOTIABLE INSTRUMENTS—TWO UNFORTUNATE DECISIONS. By Frederick K. Beutel, 9 Tulane Law Review (December, 1934).

Issue is taken with a dictum of Mr. Justice Roberts that the federal courts are bound to follow decisions of the state courts in interpreting the Negotiable Instruments Law of the state whose law is involved in the particular case.

The writer contends that the common law doctrine of stare decisis as voiced in this dictum, following a dictum of Swift v. Tyson (that the federal courts are bound by the interpretation placed upon state statutes by courts of the state in which they are enacted) is unfortunate and should not be followed because: (1) the exception was originally founded upon the superstition that state courts know better the policy, intent, and meaning of state legislation than do federal courts sitting in the same state; (2) even if the doctrine is sound for local statutes, it is not so for the Negotiable Instrument Law, which is not a local statute but a codification of the whole body of the law of negotiable instruments for the entire United States; (3) the legislative policy expressed in the NIL was "to make uniform the law of negotiable instruments" and it is well established that the state courts do not consider themselves bound by their own decisions interpreting uniform laws when they are contrary to the weight of authority or the proper interpretation of the act; (4) if the dictum be followed, it forecloses to the one set of courts which have uniform

jurisdiction throughout the United States the power to act as a potent force in achieving uniform interpretation of uniform laws.

"The insidious destruction of the purpose and effect of the Negotiable Instruments Law" which results from continued application of this common law judicial technique approved in the objectionable dictum, instead of giving proper attention to the interpretation of the act, is illustrated by the unique line of cases which has resulted in four states holding that provision in a note that it is "subject to the terms of" a contract does not render it non-negotiable, contrary to the weight of authority and the apparent common sense meaning of the statute.

FEDERAL REGULATION OF MOTOR CARRIERS. By Paul G. Kauper, 33 Michigan Law Review 239 (November, December, 1934).

These two articles are part of a study of the economic position and legal status of the motor carrier, previous portions of which have appeared in earlier numbers of the Michigan Law Review. This portion of the study is devoted to consideration of constitutional limitations of the federal power to regulate motor carriers on the public highways.

By its federal aid road building program (inaugurated in 1916, one and one-third billion dollars had been expended in the following seventeen years) the federal government has made substantial contributions to the development of highway transportation in the United States. But while its generosity has helped to create the problems of motor carrier regulation, Congress has not undertaken to solve the problems of public regulation to which this development has given rise.

The first article points out the need of federal regulation because of the interstate commerce aspect and the disparity of local regulations. Discussing briefly the proposed Rayburn bill on which no action was taken, and touching upon code provisions, the balance of this article and the whole of the second are devoted to consideration of constitutional restraints on federal regulation.

The discussion of such limitations is divided into three parts: (1) limitations arising out of the due process clause on the power of the federal government to impose economic limitations (e.g., rate regulation, issuance of certificates of convenience and necessity); (2) limitations arising out of the due process clause on imposition of safety regulations (e.g., clearance lights, safety equipment, etc.); (3) limitations arising out of the states' ownership of highways and the states' police power on imposition of highway use regulations (i.e., those governing use and conservation of highways).

Treatment of the subject matter is detailed with considerable attention directed to the practical aspects. Specific instances are cited in which regulations promulgated by the federal government in connection with the operation of interstate motor carriers will, the author suggests, present some unique and difficult problems occasioned by the conflict between federal and state powers.

LAW—AN UNSCIENTIFIC SCIENCE. By Edward S. Robinson, 44 Yale Law Journal 235 (December, 1934).

A scorching, almost bitter, indictment of the legal profession is returned by a professor of psychology who believes that psychological and sociological data have not been sufficiently brought to bear upon the making and enforce-

ment of law, that there is a cultural lag in social control for which the legal profession is responsible.

Lawyers are social engineers, and the lag in the philosophy and practice of social adjustment is largely due to their fear of social innovation. The fundamental difference between the man of law and the man of science lies in their sense of responsibility to fact, and there is approaching a revolution of ideas which will transfer fidelity to fact to social problems.

The thought and philosophy of the legal profession is medieval, the writer thinks. Despite scientists who have made a genuine effort to apply the scientific method to the social world the social philosophy that is actually expressed in public policy is still that of the man of law. But as the gap between scientific and social thought becomes more and more obvious, we approach a time when legalistic theories of the social process will be given up.

The writer believes that the decay of the legal profession is well within the bounds of possibility for juristic thinkers confronted with a social problem have no ideas. But decay is not inevitable, he admits, lawyers may start to think instead of "retreating into the old jungles of legal dialectic, where obviously desirable social objectives become logical impossibilities."

The success of any publication depends on the extent of its circulation. Without it interest in the publication is lacking and advertisements are difficult to obtain.

To build up our circulation and put this Journal on a payable basis, we need your full cooperation and support.

We haven't been able to contact all our Alumni and therefore ask you to promote the growth of this Journal by calling it to the attention of other lawyers.

Your cooperation in this respect will be an added stimulus for the publication committee to exert their best efforts in developing the Law Journal to its fullest extent.

MORRIS L. MATTLIN,
Business Manager.