TRADING IN COMMODITY FUTURES—A NEW STANDARD OF LEGALITY?

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DURING the early months of 1924 the Uhlmann Grain Company, a large grain brokerage establishment, opened a branch office in the town of Carrollton, Missouri.[1] One E. S. McDonough, who had been hired by the Company to open and take charge of this branch, proceeded to Carrollton and took office space in the basement of the Flowers Hotel. He equipped his headquarters with a table for telegraph instruments, a large blackboard on which to mark up grain quotations of the principal mid-western exchanges, chairs for the benefit of clients and potential clients who might be interested in the course of events indicated by the blackboard, and, for his own use, a roll-top desk and a typewriter. The Uhlmann Company then leased from the American Telephone and Telegraph Company a private wire connecting the Carrollton branch with a larger office of the Company in Kansas City, Missouri, over which the Kansas City office relayed to Carrollton the grain quotations.

Carrollton, a town with a population of about 3200 people, is situated in a grain farming area. Most of the inhabitants gain their living as farmers or small tradesmen. In this probably not too sophisticated vicinage McDonough started to build himself a clientele by soliciting the citizens to augment their incomes through speculation in grain futures. He found willing listeners, to whom he revealed something of the nature of grain speculation and the then existing "spread" in prices between Winnipeg and Chicago. This "spread," he explained, presented a golden opportunity for making "some easy money" by buying on one exchange and selling on the other.

Some fifty people thought this an attractive scheme, and accordingly empowered McDonough to deal in grain futures on their account. Some of them put up cash margins, some gave notes, some were accommodated on no margin at all. Some of them were reasonably well-to-do, but at least one of them McDonough knew to be already heavily obligated to the local bank. Various occupations were represented, the customers including in their number farmers and farmers' wives, a real estate man, a printer, a coal-dealer, a physician, a laundryman and his wife, an

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1. The ensuing statement of facts is taken from the Transcript of Record, Dickson v. Uhlmann Grain Co., 288 U. S. 188 (1933).

undertaker, an insurance agent, a clothing merchant, and the proprietor of a country store. Many seem to have left all control over the operations to McDonough. Initial losses aroused some apprehension, but McDonough assured them that this was but a temporary fluctuation, and that eventually "we were bound to win and make a potfull of money." The losses continued, and the Uhlmann Company sent the customers letters of consolation ending on a note of hope. Anxious to recoup their losses, several customers went to Chicago to see if Mr. Fred Uhlmann, the president of the Company, would consent to accept their notes and keep them in the market. They succeeded in their purpose, and received fresh assurances that things must soon change for the better. But the hoped-for swing in the market did not materialize, and in November the Company closed out the Carrollton accounts, appropriated the margins, and paid such losses as the margins would not cover. It then discontinued the Carrollton branch, and McDonough moved away, leaving forty-six people indebted to the Company in the sum of $63,891.88, which represented money advanced by the Uhlmann Company to pay the Carrollton losses, and a commission of one quarter of a cent per bushel dealt in on the exchange.

The result of these transactions, unexpected and disillusioning as it was, aroused sufficient resentment against the Uhlmann Grain Company to make difficult the collection of its Carrollton claims. On December 12, 1924, the Company brought suit in the United States District Court for the Western District of Missouri against the five largest debtors.[2] The case was defended on the ground that the debts arose out of gambling transactions, and were illegal and unenforceable under the statutes of Missouri. After repeated postponements a consolidated trial was finally had before District Judge Reeves, who entered judgment for the defendants on March 8, 1929.[3] Almost three years later this judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit.[4] On February 6, 1933, the Supreme Court of the United States, in an opinion by Mr. Justice Brandeis, reversed the decision of the Circuit Court of Appeals, and held the transactions invalid under the laws of Missouri.[5] Mr. Justice Butler filed a dissenting opinion, which was concurred in by Mr. Justice Stone and Mr. Justice Cardozo.

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2. Some of the smaller debtors were sued in the state courts.

3. Uhlmann Grain Co. v. Dickson (W. D. Mo. 1929) (unreported).

4. Uhlmann Grain Co. v. Dickson, 56 F. (2d) 525 (C. C. A. 8th, 1932). The opinion of the court was written by Judge Gardner. Judge Van Valkenburgh filed a concurring opinion. The late Judge Kenyon dissented.

5. Dickson v. Uhlmann Grain Co., *supra* note 1. The case is noted in (1933) 81 U. of Pa. L. Rev. 881.

The Relation of the "Intent Test" to Future Trading on Exchanges

No one who is acquainted with the origin and development of the judicial attitude toward speculation in commodities can escape the conclusion that the courts have signally failed to cope adequately with the problems involved.[6] Speculative contracts in the form in which they are now cast were first sought to be enforced just after 1850. Not long before this time the attitude of judges and legislators toward wager contracts in general had changed from one of suspicious and hesitant tolerance to one of active condemnation.[7] But the forms of contract used by speculators in stocks or produce did not prove amenable to the application of such rules as had been devised for determining whether or not a contract was a wager;[8] on their face these contracts simply purported to represent agreements for the purchase or sale of a given amount of unspecified stock or commodities to be delivered and paid for at a future date.[9] If such a contract meant what it said, there

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6. *Cf.* Patterson, *Hedging and Wagering on Produce Exchanges* (1931) 40 YALE L. J. 843; Legis. (1932) 45 HARV. L. REV. 912.

7. The mere fact that a contract was a wager did not make it unenforceable at common law. Jones v. Randall, 1 Cowp. 37 (1774); see 3 WILLISTON, CONTRACTS (1920) § 1667. But the courts would not enforce wagers the subject-matter of which was contra bonos mores. Da Costa v. Jones, 2 Cowp. 729 (1778); see Eltham v. Kingsman, 1 B. & Ald. 683, 687 (1818); 3 WILLISTON, CONTRACTS § 1667. In England the statute of 8 & 9 VICT. c. 109, § 18 (1845) made all wagers unenforceable. Hampden v. Walsh, 1 Q. B. D. 189 (1876). A few early American cases enforced or recognized the validity of wager contracts. Morgan v. Pettit, 4 Ill. 529 (1842); Smith v. Smith, 21 Ill. 244 (1859); Waddle v. Loper, 1 Mo. 636 (1826); Walker v. Armstrong, 54 Tex. 609 (1881); *cf.* Ridgely v. Riggs, 4 Harr. & J. 358 (Md. 1818); Gilchreest v. Pollock, 2 Yeates 18 (Pa. 1795). And occasionally an American court has refused to enforce a wager solely on the ground that the particular subject-matter was opposed to public policy. Bunn v. Riker, 4 Johns 426 (N. Y. 1809); Hickerson v. Benson, 8 Mo. 8 (1843); *cf.* Harding v. Walker, Fed. Cas. No. 6,050a (Terr. Ark. 1828). But generally in the United States, either by statute or at common law, wagers have been not only unenforceable but illegal and void. Irwin v. Williar, 110 U. S. 499 (1884); Waterman v. Buckand, 1 Mo. App. 45 (1876); see 3 WILLISTON, CONTRACTS § 1668.

8. The orthodox test of a wager has been thus stated in the RESTATEMENT OF THE LAW OF CONTRACTS (Am. L. Inst. 1932) § 520: "A bargain in which a promisor undertakes that, upon the existence or happening of a condition he will render a performance (a) for which there is no agreed exchange, and (b) which does not indemnify or exonerate the promisee or a beneficiary of the bargain for a loss caused by the existence or happening of the condition is a wager and is illegal." *Cf.* Gardner, *An Inquiry into the Principles of the Law of Contracts* (1932) 46 HARV. L. REV. 1, 32. A contract for the future sale and purchase of commodities would not on its face be a wager, so the courts were faced with the additional problem of determining what the contract was. This additional problem led to the establishment of the "intent test."

9. This is the form in which future dealings on commodity exchanges are always carried on. From future contracts of this type should be sharply differentiated "sales to arrive" and "sales for deferred delivery," which are present sales of specified goods. Future contracts on exchanges are always contracts for the sale of unspecified goods, and generally can be fulfilled by the delivery of any one of a number of different grades at the option

was no question about its validity,[10] but it was perfectly obvious that the parties could, by waiving delivery and settling on the basis of the difference between the price stipulated in the contract and the market price at the time delivery came due, disguise a wager on the course of market prices behind a contract innocent upon its face.[11] It must have been such reasoning which led the Court of Common Pleas in 1852 to establish the test of "intent of the parties to deliver" as determinative of the validity of a future contract.[12] As later stated by Mr. Justice Matthews,

" . . . a contract for the sale of goods to be delivered at a future day is

of the seller. A stipulated scale of relative values for the different grades serves as the basis of settlement if delivery is actually made. *Cf.* Legis. (1932) 45 HARV. L. REV. 912, n. 2.

10. It was at one time doubted in England whether a sale of unspecified goods for future delivery was valid if the seller neither owned such goods at the time of contracting nor had any means of fulfilling the contract except by purchase from a third party. See Lorymer v. Smith, 1 B. & C. 1, 3 (1822); Bryan v. Lewis, Ryan & Moody 386 (1826). But it was finally held that future sales would not be declared invalid for this reason. Hibblewhite v. M'Morine, 5 M. & W. 462 (1839). An American court had already come to the same conclusion. Dodge v. Van Lear, Fed. Cas. No. 3,956 (D. C. 1837); *cf.* Gilchreest v. Pollock, *supra* note 7. American courts have always followed the *Hibblewhite* case, except in Georgia, where the seller's lack of ownership at the time of contracting was at first held fatal. Warren, Lane & Co. v. Hewitt, 45 Ga. 501 (1872); Thompson Brothers v. Cummings & Co., 68 Ga. 124 (1881). But Georgia now follows the orthodox rule. Forsyth Manufacturing Co. v. Castlen, 112 Ga. 199, 37 S. E. 485 (1900).

11. It may be well to note here a distinction which the courts have sometimes attempted to draw between "speculation" and "gambling." It is obvious that people may and do seek to profit by fluctuations in price even where actual transfers of property are involved. It is only necessary to mention speculation by outright purchase of stock as distinguished from margin transactions, or speculation in real estate. The buyer may have no use for the property whatsoever, and his only interest in it may be the interest he would have in any property which he might sell for more than he would have to pay. Why are such transactions any the less "gambling" than ordinary bets? The only obvious difference is that in the former case the method of gambling employed necessitates putting up enough capital to acquire title to the property in the price fluctuations of which the gambling is being carried on. In the case of a mere bet the only capital required is that with which to pay the wager. It is clear that this is a real distinction, insofar as the necessity for actual transfers of property operates to restrict speculation to people who are financially responsible, and insofar as the actual purchases and sales help to stabilize and render liquid the market. And the orthodox test of a wager is satisfied, since, however little use the purchaser may have for the property intrinsically, he clearly has a legal "interest" in it, and is not required to render a performance to the other party to the contract for which there is no agreed exchange. At all events, the courts have sometimes suggested this to be the line between "legitimate speculation" and "mere gambling." The central issue in determining the legality of future contracts, as will presently be more fully explained, is whether speculation by trading in *contract rights* to goods is to be regarded as trading in goods themselves, or whether the mere contract interest, which the holder may or may not intend to perfect into a property interest, is insufficient to avoid the wager classification. See pp. 89-90, *infra*.

12. Grizewood v. Blane, 11 C. B. 526 (1852). This appears to be the first decision recognizing the "intent test."

valid . . . when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of such a contract, the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void." [13]

Possibly no rule of law has ever met with such immediate and unanimous approval as did the "intent test." Common law courts without exception have always declared it to be the true and only criterion of the validity of future contracts,[14] and it has been written into the statute law of almost every state.[15] Yet the test, logical as it was in its origin, and simple to apply in cases where but two parties are involved, has proved totally inadequate in its application to speculation as it is now managed on the floors of the great exchanges. The confusion and

13. Irwin v. Williar, *supra* note 7, at 508-09.

14. The *Grizewood* case was approved in Barry v. Croskey, 2 J. & H. 1 (1861); and the rule that it established has been adopted by the House of Lords. Universal Stock Exchange v. Strachan, [1896] A. C. 166. American courts adopted the "intent test" from the outset. Irwin v. Williar, *supra* note 7; *In re* Chandler, Fed. Cas. No. 2,590 (N. D. Ill. 1874); *In re* Green, Fed. Cas. No. 5,751 (W. D. Wis. 1877); Justh v. Holliday, 2 Mackey 346 (D. C. 1883) (the loser in this case was General Custer of Indian fame); Pickering v. Cease, 79 Ill. 328 (1875); Rumsey v. Berry, 65 Me. 570 (1876); Gregory v. Wendell, 39 Mich. 337 (1878); Williams v. Tiedeman, 6 Mo. App. 269 (1878); Cassard v. Hinman, 1 Bosw. 207 (N. Y. Super. Ct. 1857); Yerkes v. Salomon, 11 Hun 471 (N. Y. Sup. Ct. 1877); Brua's Appeal, 55 Pa. 294 (1867); Marshall v. Thruston, 3 Lea 740 (Tenn. 1879); Noyes v. Spaulding, 27 Vt. 420 (1855); Barnard v. Backhaus, 52 Wis. 593 (1881). Noyes v. Spaulding and Cassard v. Hinman, both *supra,* seem to be the only decisions preceding those which arose from the outburst of speculative activity during and following the Civil War. See GOLDSTEIN, MARKETING: A FARMERS PROBLEM (1928) 124, n. 467. The "intent test" would have been robbed of all effect if it had been held, as did one early case, that the parol evidence rule prevents the introduction of parol evidence to prove the illegal intent of parties to a written contract fair on its face. Porter v. Viets, Fed. Cas. No. 11,291 (C. C. N. D. Ill. 1857). But this case has never been followed, and it is now universally held that the mere language and form of the contract do not govern if the illegal intent in fact exists. Irwin v. Williar, *supra* note 7.

15. The statutes are collected and analyzed in Legis. (1932) 45 HARV. L. REV. 912. On the question whether the Cotton Futures Act, 39 STAT. 476 (1916), 26 U. S. C. § § 731-52 (1926) or the Grain Futures Act, 42 STAT. 998 (1922), 7 U. S. C. § § 1-17 (1926) abrogate or modify the "intent test" see pp. 94-102, *infra.* Six southern states have recently adopted statutes which are apparently designed to legitimatize all trading on established exchanges. See Legis. (1932) 45 HARV. L. REV. 912, 920; *cf.* Note (1927) 40 HARV. L. REV. 638, 641. But the phraseology of these statutes offers loop-holes through which a discerning court can profess to see a purpose not to alter the "intent test." *Cf.* Legis. (1932) 45 HARV. L. REV. 912, 920. The Mississippi court has already shown itself to be discerning and has robbed the statutes of all force. Alamaris v. Jno. F. Clark & Co., 145 So. 893 (Miss. 1933). See also Hutchinson v. Brown, 169 S. E. 848 (Ga. App. 1933). The Texas courts are in conflict upon the effect of the statute. See Erwin v. White, 54 S. W. (2d) 867 (Tex. Civ. App. 1932); Morgan v. Rose, 62 S. W. (2d) 1022 (Tex. Civ. App. 1933).

uncertainty which have resulted have been largely due to the failure of the courts to recognize that future contracts on exchanges imperatively demand the development of rules ancillary to the "intent test"; their determination to find in it unadorned a complete answer to all possible situations has involved them in a maze of fictions, and has frequently forced them to close their eyes to facts obviously destructive of their premises of decision.[16]

A brief description of the nature of exchange dealings will make this clear.[17] Let us take the case of one of the Carrollton defendants who authorized McDonough to purchase for him 5000 bushels of November wheat on the Chicago Board of Trade. McDonough wired the order to the Kansas City office, which relayed it to the principal office of the Uhlmann Company in Chicago. A representative of the Company then went on the floor of the Board of Trade, of which the Uhlmann Company is a member, and purchased the wheat at the market price from some other broker or brokers. The selling broker did not know or care whether the Uhlmann Company was dealing on its own account or for a principal, and the Uhlmann Company shared his indifference in this particular, for a rule of the exchange required all brokers to contract on the floor as principals.[18] The brokers exchanged slips as memorials of the trade, and, after the Board had closed for the day, the Uhlmann Company and the selling broker sent confirmations to each other. The Uhlmann Company and all other brokers likewise sent reports of all their day's trading to the clearing-house, which then assumed the obligations that other brokers had assumed to the Uhlmann Company and the Uhlman Company's obligations to other brokers. Thus at the end of the day the individuality of parties to the contracts made in the pit was lost, and the clearing-house stood as seller to all parties who had bought, and as buyer to all parties who had sold. The Uhlmann Company, as a large brokerage house, doubtless had executed many orders for purchase and sale of November wheat, of which the Carrollton order was one. If all the orders for purchase of November wheat ex-

16. *Cf.* Note (1927) 40 HARV. L. REV. 638, 639. Examples of this attitude are the cases holding that the great proportion of trades on exchanges which are settled without delivery is not evidence of the intent of the particular parties. See, e.g., Roundtree v. Smith, 108 U. S. 269, 276 (1883). Compare also the Illinois cases holding that a broker "wins" when a customer "loses" despite clear evidence that, since the broker merely executed the client's contracts on the exchange, he could not possibly have "won." Pearce v. Foote, 113 Ill. 228 (1885); Kruse v. Kennett, 181 Ill. 199, 54 N. E. 965 (1899).

17. Excellent treatises on this general subject are BAER AND WOODRUFF, COMMODITY EXCHANGES (1929); EMERY, SPECULATION ON THE STOCK AND PRODUCE EXCHANGES OF THE UNITED STATES (1896); HOFFMAN, FUTURE TRADING UPON ORGANIZED COMMODITY MARKETS IN THE UNITED STATES (1932). See also (1931) 155 ANN. AM. ACAD. *passim*.

18. (1924) RULES OF THE BOARD OF TRADE OF THE CITY OF CHICAGO, Rule XIV, § 1, Rule XXII, § 11.

ceeded the orders of sale, the clearing-house would notify the Uhlmann Company that it was "long" on November wheat to the extent that purchases exceeded sales. This same proceeding was gone through at the end of every day of trading, until the final day upon which delivery of November wheat could be made. As the orders fluctuated from day to day, the Uhlmann Company might be alternately "long" and "short" on wheat. But, as the end of November drew near, the Carrollton purchaser and other customers of the Company who did not care to deliver or receive actual wheat "closed out" their deals, i.e. the Carrollton purchaser sold 5000 bushels of November wheat, and, similarly, the other customers sent in selling orders equivalent in amount to their previous buying orders and vice-versa. If all the Uhlmann Company's customers closed out, the Company would be left neither "long" nor "short" with the clearing-house, and no wheat would be delivered on any of the contracts. If any customer had actually wanted to receive wheat, he would not have closed out, and the Company would have been left to that extent "long" with the clearing-house, which would have made actual delivery.[19]

In the case of the Carrollton purchaser, wheat was at a lower price when he closed out than when he bought, and hence he lost the difference. That same amount was lost by the Uhlmann Company to the clearing-house, and, since the Company had contracted on the Board as principal, it had to pay that loss.[20] It was to protect itself against such forced payments that the Company had required a margin of its clients, and against these payments the margin was applied.[21] The amount by

19. Similarly, a customer with actual wheat to deliver would not close out his selling order, and he would make delivery through his broker to the clearing-house. As a matter of fact wheat is very seldom delivered under future contracts on exchanges. Less than 0.6% of the May, 1924, wheat futures on the Chicago Board of Trade were fulfilled by delivery. (1924) REP. GRAIN FUTURES ADMINISTRATION 46. Actual wheat is for the most part dealt in on the "cash grain" market, where it is bought and sold in specified lots.

It will be observed that the clearing-house operates as a bookkeeping device to enable brokers and their clients to liquidate their contracts with facility. Before the advent of the clearing-house the same result was obtained in a rather more cumbersome way through the use of "set-offs" and "rings." An example of the use of the former device may be found in the situation where A has sold a given quantity of grain to B, and B has later sold the same amount to A. The cross-transactions cancel, and no delivery is necessary. A "ring" is the slightly more complicated device used where A has sold to B, B to C, C to D, and D to A. Since the wheat would simply travel the circle from A and back to A, all the trades can be cancelled and settled on differences. Brokers formerly closed out their transactions by forming "rings" or negotiating "set-off" contracts on the floor. The clearing-house obviates the difficulties attendant on these proceedings.

20. Clearing-houses exact margins from the brokers, just as do the brokers from their clients.

21. The margin put up by the customer serves the added function of providing funds available to the broker to put up as a margin with the clearing-house. See Transcript of Record, 89.

which the Company's payments to the clearing-house on account of the Carrollton trades exceeded margins received in Carrollton, plus a commission, was the sum for which the Company sued the Carrollton defendants.

It should now be plain that the test of "intent of the parties to deliver and receive" requires some elaboration and definition of terms before it can be satisfactorily used to determine the legality of the transactions just described. In the first place, who are "the parties" whose intent is to be considered relevant? Certainly at first, and doubtless ever since in theory, the courts have looked to the intent of the principal parties to the contract—the responsible buyer and seller. But who were the principals in the Carrollton transactions? Clearly the defendants were principals, and it may be assumed for the moment that they did not intend to deliver or receive, but the law requires that *both parties* to the contract shall share the evil intent in order to invalidate the contract.[22] The Uhlmann Company was not the other principal, for it was acting as broker.[23] The other principals were, then, at first the clients of the brokers with whom the Uhlmann Company had dealt on the Exchange, and, subsequently, the clearing-house. Should the Carrollton defendants have shown the intent of these other clients of brokers, of the clearing-house, or both? If the original sellers to the Carrollton buyers had not intended to deliver, would the contract be purged when adopted by the clearing-house with legal intent? And would a contract valid in origin be tainted when assumed by a clearing-house having an illegal intent? [24]

22. The rule is always so stated. See 3 WILLISTON, CONTRACTS (1920) § 1670; RESTATEMENT OF THE LAW OF CONTRACTS (Am. L. Inst. 1932) § 523. In the absence of statute it is universally held that the evil intent of one party, when unknown to the other, will not invalidate the contract. Roundtree v. Smith, *supra* note 16; Browne v. Thorne, 260 U. S. 137 (1922); Clarke v. Foss, Fed. Cas. No. 2852 (W. D. Wis. 1878); Edwards v. Hoeffinghoff, 38 Fed. 635 (C. C. S. D. Ohio 1889); Flowers v. Bush & Witherspoon Co., 254 Fed. 519 (C. C. A. 5th, 1918); Jacobs v. Hyman, 286 Fed. 346 (C. C. A. 5th, 1923); Griffin v. Payne, 24 P. (2d) 370 (Cal. App. 1933); Scanlon v. Warren, 169 Ill. 142, 48 N. E. 410 (1897); Pixley v. Boynton, 79 Ill. 351 (1875); Quinn Smith Co. v. Litvin, 24 P. (2d) 425 (Wash. 1933). But it has been held in this situation that the party who intended not to deliver or receive cannot enforce the contract. Higgins v. McCrea, 116 U. S. 671 (1886).

23. This is true despite the fact that a broker contracts as principal on the exchange, for he is on the same side of the contract with his principal, i.e. he buys when the principal buys, and vice-versa. The rule should, logically, look to the buying and selling principals. As to the clients, the brokers are agents; as to each other, they are principals. Wilhite v. Houston, 200 Fed. 390 (C. C. A. 8th, 1912); Scandinavian Import-Export Co. v. Bachman, 195 App. Div. 297, 186 N. Y. Supp. 860 (1st Dep't 1921).

24. It has been held that a contract which is valid in origin does not become invalid if the parties subsequently agree to settle on differences. Sprunt v. Hurst-Streator Co., 180 Fed. 782 (C. C. D. S. C. 1910); Nash-Wright Co. v. Wright, 156 Ill. App. 243 (1910); see 3 WILLISTON, CONTRACTS § 1674. Possibly a contract originally invalid may be validated if the parties later agree actually to deliver and receive. *Ibid.* It has been so held in

This problem caused the courts no little difficulty when they were first confronted with the task of applying the "intent test" to exchange dealings. For almost all of the litigation which has taken place has been between customer and broker, with the customer attempting to establish the illegality of the dealings,[25] and usually the customer has made no effort to show the intent of the party with whom his broker dealt on the exchange or of any assignee of such a party. Consequently, for over a decade after 1875 the lower federal courts were deciding cases against the customer on the ground that there was no evidence of illegal intent on the part of the other *principal* to the contract.[26] The Supreme Court so held the first time it encountered a suit on a speculative contract.[27] The Missouri courts espoused this attitude so enthusiastically and consistently [28] as to elicit from the state legislature a most stringent anti-gambling statute,[29] the operation of which will later be dealt with in some detail.[30] And in England it has always been held that the failure of the customer to show the intent of the party with whom his broker

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Pennsylvania. Anthony v. Unangst, 174 Pa. 10, 34 Atl. 284 (1896). But whether these rules should be applied where the contract is assigned is at best doubtful. There is a total absence of authority. Under the doctrine ultimately applied by the courts to exchange transactions, the question has become unimportant. See p. 72, *infra*.

25. The commonest type of litigation is that represented by the *Uhlmann* case, i.e. a suit by a broker to recover advances and commissions from a customer. Under some state statutes there has been considerable litigation instigated by customers to recover margins applied by brokers to losses on the exchange. In either case the customer is attempting to establish illegality. In two cases where the customer sued to recover *profits* made on the exchange, it was held that the broker could not set up illegality as a defense. Forster v. Hill, 215 Fed. 73 (C. C. A. 6th, 1914); Norton v. Blinn, 39 Ohio St. 145 (1883). But *cf.* Morris v. Morton, 75 Fed. 912 (C. C. A. 6th, 1896) (opinion by Judge Taft). Litigation involving the principals on both sides of an exchange contract has been extremely rare, as have also suits on future contracts made outside the exchange. See notes 41 and 44, *infra*.

26. Clarke v. Foss, *supra* note 22 (affirmed by the Circuit Court in an unreported decision by Judge Duncan); Gilbert v. Gaugar, Fed. Cas. No. 5,412 (C. C. N. D. Ill. 1878); Lehman v. Strassberger, Fed. Cas. No. 8,216 (C. C. N. D. Ala. 1875); Kirkpatrick v. Adams, 20 Fed. 287 (C. C. W. D. Tenn. 1884); Hentz v. Jewell, 20 Fed. 592 (C. C. S. D. Miss. 1881); Bennett v. Covington, 22 Fed. 816 (C. C. E. D. N. C. 1884); Bangs v. Hornick, 30 Fed. 97 (C. C. D. Minn. 1887); Ward v. Vosburgh, 31 Fed. 12 (C. C. E. D. Wis. 1887).

27. Roundtree v. Smith, *supra* note 16.

28. Cockrell v. Thompson, 85 Mo. 510 (1885); Kent v. Miltenberger, 13 Mo. App. 503 (1883); Teasdale v. McPike, 25 Mo. App. 341 (1887); Taylor v. Penquito, 35 Mo. App. 389 (1889). This view is apparently not yet quite dead in Missouri. *Cf.* Gordon v. Andrews, 222 Mo. App. 609, 617, 2 S. W. (2d) 809, 814 (1927). An early North Carolina case is to the same effect. Williams, Black & Co. v. Carr, 80 N. C. 295 (1878).

29. This statute, passed in 1889, now appears in Mo. REV. STAT. (1929) § § 4324-29. It renders a future contract void if *either* party thereto intends neither to receive nor to deliver. Connor v. Black, 132 Mo. 150, 33 S. W. 783 (1896).

30. See pp. 85-87, *infra*.

dealt is fatal to his plea of illegality,[31] and, in consequence, it may be said that there the customer cannot, as a practical matter, set up illegality as a defense to an action against him by his broker.[32]

In the United States, however, this view has been completely abandoned, and it is now universally held that if the broker shares or merely knows of the intent of his customer to settle on differences, the contract as between them is invalid.[33] The theories upon which this rule has been based are diverse and not always satisfactory,[34] but certainly

31. Thacker v. Hardy, 4 Q. B. D. 685 (1878); Forget v. Ostigny, [1895] A. C. 318; Weddle, Beck & Co. v. Hackett, [1929] 1 K. B. 321. The language of these cases is occasionally confused, and it has been thought that they rest on the basis that, in England, wagering contracts are only unenforceable, and not illegal, and that therefore the broker can recover on his contract of employment with his client. See Harvey v. Merrill, 150 Mass. 1, 9-10, 22 N. E. 49, 51 (1889). Some support for this distinction is found in the opinion of Lindley, J., who presided at the trial in Thacker v. Hardy, *supra*. But that this can hardly be considered the true basis of the English rule is clear from the opinions delivered in the Court of Appeal in the *Thacker* case, and that of Swift, J., in Weddle, Beck & Co. v. Hackett, *supra*. The ground of these decisions is rather that, since the party with whom the broker deals on the exchange was not shown to have had any illegal intent, the contract made by the broker for the customer must be valid, and that therefore no agreement between the broker and the customer that the former would so deal as never to require the latter to take delivery could impair the broker's right of indemnity on the exchange contract.

32. But in litigation between principals the English courts will not enforce contracts where mutual illegal intent is shown. Universal Stock Exchange v. Strachan, *supra* note 14.

33. Pearce v. Rice, 142 U. S. 28 (1891); Springs & Co. v. Carpenter, 154 Fed. 487 (C. C. A. 4th, 1907); Parker v. Moore, 115 Fed. 799 (C. C. A. 4th, 1902); James v. Haven & Clement, 185 Fed. 692 (C. C. A. 5th, 1911); Williamson v. Majors, 169 Fed. 754 (C. C. A. 5th, 1909), *cert. den.*, 215 U. S. 597 (1909); Andrews v. George M. Shutt & Co., 44 F. (2d) 337 (C. C. A. 5th, 1930); Bailey & Graham v. Phillips, 159 Fed. 535 (C. C. S. D. Ga. 1907); Waldron v. Johnston, 86 Fed. 757 (C. C. S. D. Ga. 1898); Parker v. Moore, 125 Fed. 807 (C. C. D. S. C. 1903); Cobb v. Prell, 15 Fed. 774 (C. C. D. Kan. 1883); Riordon v. McCabe, 341 Ill. 506, 173 N. E. 660 (1930); Pardridge v. Cutler, 168 Ill. 504, 48 N. E. 125 (1897); Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 762 (1897); S. M. Weld & Co. v. Austin, 107 Miss. 279, 65 So. 247 (1914); Fareira v. Gabell, 89 Pa. 89 (1879); see Lamson Brothers & Co. v. Turner, 277 Fed. 680, 684 (C. C. A. 8th, 1921); Gettys v. Newburger, 272 Fed. 209, 221 (C. C. A. 8th, 1921); J. E. Hood & Co. v. McCune, 235 S. W. 158, 160 (Mo. App. 1921); *cf.* Lehman v. Feld, 37 Fed. 852 (C. C. S. D. Miss. 1889).

34. The later cases make no attempt at a theoretical justification of their position, but simply assume that the intent of the broker and his customer controls. A few cases have found or assumed that the other principal on the exchange intended no delivery, and have denied the broker relief on the ground that he knowingly executed an illegal contract. Irwin v. Williar, *supra* note 7; Embrey v. Jemison, 131 U. S. 336 (1889); Metropolitan National Bank v. Jansen, 108 Fed. 572 (C. C. A. 8th, 1901); *In re* Green, *supra* note 14; Pope v. Hanke, 155 Ill. 617 (1894). Other cases have found that, whatever might have been the intent of the party with whom the broker dealt, the broker agreed to see that his customer would not be required to deliver or receive, and have therefore held or implied that the broker in fact dealt with his customer as a principal. Pearce v. Rice, *supra* note 33; Alex Hyman & Co. v. Hay, 277 Fed. 898 (C. C. A. 5th, 1922); Ware v. Pearsons, 173 Fed. 878 (C. C. A. 8th, 1909); Flagg v. Baldwin, 38 N. J. Eq. 219 (1884); Harvey v. Merrill, *supra*

no one can question the necessity of the conclusion if the "intent" rule is to be retained. The endless legal complications which would attend a serious effort to apply the "mutual intent test" to contracts which are assigned freely between a multitude of parties on the exchange, the disappearance of any consensual element whatsoever between the initial principals, and the enormous difficulties of proving the intent of a principal whose identity alone is difficult of discovery, all contribute to the intrinsic absurdity of requiring that the intent of both (or all) principals be shown. The truth of the matter is that the modern grain speculator, if he may be called a wagerer, has ceased to bet against anyone in particular. The other principal completely loses his identity. Any practicable rule must therefore be framed in terms of the two parties who actually deal together—the broker and his customer.

But while the American courts may be said to have dealt satisfactorily with the problem of defining "the parties" whose intent is to be considered material, they have been far from successful in developing any intelligible concept of "intent to deliver," and their confusion in this particular has resulted in the woeful uncertainty which characterizes their disposition of speculation cases.[35] This uncertainty arises out of a failure to distinguish between making a contract with the intent and understanding that its terms requiring delivery are fictitious and not to be observed, and, on the other hand, an intent to assign the contract, so that the assignor will not be required to deliver or receive, or an intent to make a second contract which may be set off against the first so that delivery will be unnecessary under either contract. The vast majority of exchange transactions are entered into with an absolutely uniform and easily definable intent. The parties intend at the outset to make

note 31; see Thompson v. Williamson, 67 N. J. Eq. 212, 219, 58 Atl. 602, 605 (1904). The likelihood that in these cases the "agreement" amounted to anything more than a statement by the broker to the customer that the latter, by setting off counter-transactions, could avoid delivery, is very slight. See p. 74, *infra.* Possibly the most logical justification of the rule as now applied is in the cases where the court finds that the customer authorized the broker to make only a gambling contract. On such a finding, recovery may be denied the broker on the theory that a valid contract would be unauthorized. Phelps v. Holderness, 56 Ark. 300, 19 S. W. 921 (1892); Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713 (1887); Hill v. Johnson, 38 Mo. App. 383 (1889); David Dows, Jr. & Co. v. Glaspel, 4 N. D. 251, 60 N. W. 60 (1894). But the factual likelihood of such a limited authority is scanty. Apparently it is the rule in Georgia that the "mutual intent" need not be on both sides of the contract, but only mutual to the parties beween whom litigation arises. Hutchinson v. Brown, *supra* note 15.

35. This uncertainty has led many brokerage houses to adopt the policy of writing off as uncollectible debts claims for commissions and advances which customers refuse to pay, and to make no effort to collect through litigation. The difficulty of collection, of course, tends to foster strict margin requirements, and to reduce greatly the amount of business done on credit. This result is probably salutary, insofar as the customers usually are allowed to use only what money they have, and are given less opportunity to lose money they do not have.

a contract which, standing alone, unqualifiedly requires that delivery of the subject-matter be made. And each party agrees that, if he neither assigns that contract nor enters into a counter-transaction, he will be required to deliver or receive as the case may be. But in almost all exchange dealings both parties do in fact intend, to the extent of their initial contracts of purchase or sale, to enter into later contracts which, by the process of transfer between brokers on the exchange, will render unnecessary delivery under either set of contracts. The issue is very simple: Is a future contract valid where made by the parties with the understanding that, standing alone, it absolutely requires delivery, if the parties do intend to dispose of their contract rights by assignment or to make counter-transactions so that they personally will never be required to deliver or receive?

Several significant factors are to be observed about the circumstances which have now been indicated. In the first place, the mechanism of the modern commodities exchange is now so constituted that contract rights in grain have become, within the limits of the exchange, highly negotiable. This negotiability is now accomplished, not by the assignment of rights under existing contracts,[36] but, through the mechanism of the clearing-house, by making other contracts.[37] The result is that rights in grain pass freely from hand to hand by a system of cancellation, and it is a simple matter to get "in" or "out" of the market at will.

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36. The old methods of "ringing-out" and "setting-off" involved an element of assignment. *Cf.* note 19, *supra.* Thus in a case where A has sold to B, and B to C, B cancels his two trades by assigning his contract of sale to A, and his contract of purchase to C, making allowance for any difference in price between the two trades.

37. The operation of the clearing-house likewise involves an element of assignment, but the assignment does not directly accomplish the cancelling purpose. As pointed out pp. 68-70, *supra,* both ends of every contract, whether or not it is eventually closd out, are assigned to the clearing-house. The cancelling process can be illustrated by a simple diagram:

(a) A sells to B
at the end of the day, after assignment to the clearing-house (CH)
(b) A sells to CH (c) CH sells to B
subsequently
(d) A buys from C
(e) B sells to D
at the end of the day
(f) CH sells to A (g) CH buys from C
(h) B sells to CH (i) CH sells to D
subsequently
(j) C buys from D
at the end of the day
(k) C buys from CH (l) CH buys from D

It will be observed that (b) and (f) cancel, likewise (c) and (h), (g) and (k), and (i) and (l). Thus all trades are cancelled out, although A never dealt directly with D, nor B with C.

The function of the broker is to put this exchange mechanism at the disposal of his customer. But, in order to make possible this swift and automatic assignment and cancellation process, it is essential that the broker subject himself to the liabilities of a principal so far as relations with other brokers are concerned. Thus no broker needs to look beyond the credit of the broker he is dealing with,[38] but each must himself rely upon the credit of his own principal. Yet the prompt acquisition and disposal of contract rights which the broker's unqualified liability makes possible has in effect rendered obsolete the "intent test" as originally conceived, for that test was framed for application to contracts which mature between the original parties thereto, unaffected by the formation of later contracts.

Likewise it should be noted that, while there undoubtedly is a real agreement between the initial parties to a contract that, by itself, it shall require delivery to be made,[39] yet the intent of either party to execute a cancelling contract is independent of that of the other in this respect, for a counter-transaction with a third person will serve the same purpose. Thus the nice distinctions which have been drawn[40] between the "undisclosed intent of one," "disclosed intent of one," "mutual intent," and "agreement or understanding" are obsolete and meaningless as applied to exchange dealings.[41] As long as the understanding is that the first contract standing alone requires delivery, its enforceability by either party, if any test is to be set up, should depend on that party's individual intent, disclosed or undisclosed, for that alone is of significance.

Lastly, it is plain that the question of intent between broker and

38. Since the clearing-house system has come into use, a broker need pay little attention to the credit of the broker with whom he deals, because the clearing-house assumes all trades. Brokers are required to post margins with the clearing-house, and formerly put up margins with each other directly.

39. The exchange rules under which brokers contract always require such an agreement. Sometimes it has been suggested that, because of these rules, contracts between brokers are valid, whereas those between broker and customer may not be. See 3 WILLISTON, CONTRACTS § 1671. But this argument seems to be based upon the mistaken notion that the rule requires physical delivery to be made on all contracts entered into, whereas in truth it only requires delivery on contracts which have not been cancelled before delivery comes due. Furthermore, the "confirmation" sent to the customer after his order has been executed always states that delivery is contemplated, in the same sense as has just been indicated. The rules, therefore, bind neither customer nor broker to deliver if either executes a counter-transaction, and the question of legality is the same in both cases.

40. See 3 WILLISTON, CONTRACTS § 1673; Patterson, *supra* note 6, at 856-863.

41. These distinctions are, of course, of relevance in cases involving future contracts entered into apart from exchanges. Such litigation still occurs, but very infrequently. For examples, see McLure v. Wilson, 292 Fed. 109 (C. C. A. 4th, 1923); McVean v. Wehmeier, 215 Mo. App. 587, 256 S. W. 1085 (1923); Yontz v. McVean, 202 Mo. App. 377, 217 S. W. 1000 (1920); Taylor v. Sebastian, 158 Mo. App. 147, 138 S. W. 549 (1911); Waterman v. Buckland, 1 Mo. App. 45 (1876); Bigelow v. Benedict, 70 N. Y. 202 (1877); Eichleay v. Antonoplos, 164 Atl. 343 (Pa. 1932); Grizewood v. Blane, *supra* note 12.

customer is the same as that between brokers. Just as do the exchange brokers who contract as principals, so do the broker and his customer contemplate that a single future contract can only be settled by delivery. And just as brokers trading on their own account generally intend to set off counter-transactions against their original contracts, so do the broker and his customer. It is, of course, theoretically conceiveable that a broker might guarantee his customer against being forced to deliver or receive under any circumstances, but why should either party desire such an arrangement when, by making countertransactions, escape from the necessity of delivery is certain? Both between brokers and between broker and customer, the same central issue recurs: Is an agreement that delivery shall be required unless a counter-transaction is made, coupled with an intent to make a counter-transaction, valid or invalid?[42]

Much of what has now been said was clearly understood by the Kentucky Supreme Court in *Sawyer, Wallace & Co. v. Taggart*,[43] de-

42. To clarify the thought at this point, it will be well to discuss briefly another way in which the same general thought has been expressed. It is clear that, under the exchange system of trading, the customer in effect has an *option* of requiring the delivery to be made. Hence the question has sometimes been raised whether a single contract which the parties understand to require delivery *at the option of either* is valid. But this is not quite the actual situation in exchange dealing. The clearing-house always requires that every contract which has not been closed out be completed by actual delivery. Nor, under the system which preceded the clearing-house, would brokers usually have been willing to settle an open contract on differences. Of course the same result is achieved by the execution of a counter-transaction, and by choosing to make or not to make a counter-transaction a party in effect can exercise an option to require delivery under the first contract. And, off the exchange, it is wholly conceivable that such an option contract might be made. Accordingly, it is sometimes stated that a future contract is valid if either party thereto can require that delivery be made. Sampson v. Camperdown Cotton Mills, 82 Fed. 833 (C. C. D. S. C. 1897); Hill v. Levy, 98 Fed. 94 (E. D. Va. 1899); Clarke v. Foss, *supra* note 22; see United States v. New York Coffee & Sugar Exchange, 263 U. S. 611, 619 (1924); Harvey v. Merrill, *supra* note 31. A North Carolina statute establishes this as the test of validity. N. C. CODE ANN. (1931) § 2144. On the other hand, it has occasionally been expressly held that a mere option of either party to require delivery will not validate the contract if neither intends to require delivery. Riordan & Co. v. Doty, 50 S. C. 537, 27 S. E. 939 (1897); Universal Stock Exchange v. Strachan, *supra* note 14. See First National Bank of El Paso v. Miller, 235 Ill. 135, 85 N. E. 312 (1908). *Cf.* Bryant v. Western Union Telegraph Co., 17 Fed. 825 (C. C. D. Ky. 1883).

The conceptual validity of this test has been attacked on the ground that the assumption that either party may at his option enforce delivery begs the very question at issue, since neither party can enforce delivery unless the contract is valid. See Patterson, *supra* note 6, at 865. But this criticism is based upon a misapprehension of the test. When it is said that either party may *require* or *enforce* delivery, it is not meant that either can go to law and persuade a court to order delivery or award damages, but that *according to the terms of the contract and the understanding of the parties* either may require delivery. As long as "require" is used in the latter sense, there is no fallacy of assuming validity in stating the test.

43. 14 Bush 727 (Ky. 1879).

cided in 1879, and that court held that an intent to make a counter-transaction does not invalidate the initial contract. But most courts have failed to appreciate, or have concealed their understanding, that the answer to this question is fundamental in determining the validity of almost all future contracts. For some reason, contracts between brokers have fared better than those between broker and customer. Although the former are very infrequently litigated,[44] the question of their validity did arise in the leading case of *Board of Trade v. Christie Grain & Stock Co.*,[45] and it was there held by the Supreme Court of the United States that contracts made in the pit by brokers were valid, despite an intent to set off. The enforceability of the contract relations between broker and customer were expressly left undecided.[46] The Circuit Courts of Appeals for the Eighth and Tenth Circuits have applied the principles of the *Christie* case to suits between brokers and customers, and have ruled that the customer's intent to set off, communicated to the broker, does not prevent enforcement.[47] The Kentucky courts, after a temporary apostasy,[48] have recently returned to the doctrine announced in the *Taggart* case.[49] These cases [50] are, however, very distinctly the

44. Contracts between brokers or between the two real principals to an exchange contract were enforced in Clews v. Jamieson, 182 U. S. 461 (1901); Beall v. Board of Trade of Kansas City, 164 Mo. App. 186, 148 S. W. 386 (1912); Story v. Salomon, 71 N. Y. 420 (1877). Enforcement was refused in *In re* Chandler, *supra* note 14 (defendant trying to run a "corner"); J. B. Lyon & Co. v. Culbertson, 83 Ill. 33 (1876); Pickering v. Cease, 79 Ill. 328 (1875); Universal Stock Exchange v. Strachan, *supra* note 14.

45. 198 U. S. 236 (1905). The Chicago Board of Trade here sought to enjoin the defendant from using its quotations after violations of its regulations against bucketing. The defendant pleaded that the Board was itself a gambling institution and a bucket-shop. This contention was disapproved, and the validity of "setting-off" and "ringing-out" was affirmed. *Cf.* United States v. New York Coffee & Sugar Exchange, *supra* note 42; Legis. (1932) 45 HARV. L. REV. 912, 914, n. 17.

46. See Board of Trade v. Christie Grain & Stock Co., *supra* note 45, at 250.

47. Ponder v. Jerome Hill Cotton Co., 100 Fed. 373 (C. C. A. 8th, 1900); Cleage v. Laidley, 149 Fed. 346 (C. C. A. 8th, 1906); Gettys v. Newburger, *supra* note 33, *cert. den.*, 257 U. S. 649 (1921), writ of error dismissed, 260 U. S. 693 (1922); Lamson Brothers & Co. v. Turner, *supra* note 33; Solomon v. Newburger, 35 F. (2d) 328 (C. C. A. 8th, 1929); Lyons Milling Co. v. Goffe & Carkener, Inc., 46 F. (2d) 241 (C. C. A. 10th, 1931).

48. Beadles, Wood & Co. v. McElrath & Co., 85 Ky. 230, 3 S. W. 152 (1887).

49. W. R. Craig & Co. v. Johnson, 225 Ky. 440, 9 S. W. (2d) 110 (1928); *cf.* Bass v. Simon, 241 Ky. 666, 44 S. W. (2d) 587 (1931); Johnson v. John F. Clark & Co., 224 Ky. 598, 6 S. W. (2d) 1048 (1927). The rule in New Jersey is now similar. Clucas v. Bank of Montclair, 166 Atl. 311 (N. J. 1933); *cf.* Hoit v. Zyskind, 9 N. J. Misc. 561, 155 Atl. 136 (1931); Carpenter v. Kilborn, 162 Atl. 747 (N. J. 1932).

50. Sampson v. Camperdown Cotton Mills, *supra* note 42, and the cases there cited in accord, really have much the same effect as do the federal and Kentucky cases just cited, since the principle they approve would legitimatize exchange dealings. See also Fenner & Beane v. Olive, 147 So. 147 (Ala. 1933); Morgan v. Rose, 62 S. W. (2d) 1022 (Tex. Civ. App. 1933); Birmingham Trust & Savings Co. v. Currey, 175 Ala. 373, 57 So. 962 (1911); Stewart Brothers v. Beeson, 148 So. 703 (La. 1933); Kahn v. Schleisner, 166 Atl. 435 (Md. 1933).

exception rather than the rule. It is true that in only a few decisions has the intent to set off been expressly held invalid.[51] But the great majority of cases have construed mere statements by the customer that he did not intend to deliver or receive and so informed his broker, particularly when coupled with evidence that previous transactions between the same parties had been "settled without delivery," as sufficient to support the defense of illegality.[52] Yet these statements may indicate merely an intent to set off, and, as has been shown, the intent to set off is in fact almost invariably present. The courts have apparently not realized that such intent is not incompatible with intent to make a contract which requires delivery. And realization of the nature of the issue is almost as important as the answer itself, for the uncertainty which has resulted from failure to lay down an intelligible and predictable rule is most unfortunate.[53] It is curious that the courts should have over-

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51. Melchert v. American Union Telegraph Co., 11 Fed. 193 (C. C. D. Iowa 1882); Smith and Mann v. Bailey, 200 Mo. App. 627, 209 S. W. 945 (1919); Minzesheimer v. Doolittle, 60 N. J. Eq. 394, 45 Atl. 611 (1900). *Cf.* Riordon v. McCabe, *supra* note 33, in which it is expressly stated that an intent to set off is legal, but where the contract was nonetheless invalidated on the strength of evidence which proved nothing more than an intent to set off.

52. Embrey v. Jemison, *supra* note 34; Andrews v. George M. Shutt & Co., 44 F. (2d) 337 (C. C. A. 5th, 1930); Clark v. McNeill, 25 F. (2d) 247 (C. C. A. 6th, 1928); Chickasha Cotton Oil Co. v. Chapman, 4 F. (2d) 319 (C. C. A. 5th, 1925); Alex Hyman & Co. v. Hay, 277 Fed. 898 (C. C. A. 5th, 1922); Williamson v. Majors, *supra* note 33; Carpenter v. Beal-McDonnell & Co., 222 Fed. 453 (E. D. Ark. 1915); Waldron v. Johnston, 86 Fed. 757 (C. C. S. D. Ga. 1898); Mutual Life Insurance Co. of New York v. Watson, 30 Fed. 653 (C. C. S. D. Ga. 1887); Cobb v. Prell, 15 Fed. 774 (C. C. D. Kan. 1883); Melchert v. American Union Telegraph Co., *supra* note 51; *In re* Green, *supra* note 14; Huff v. State, 164 Ark. 211, 261 S. W. 654 (1924); Coughlin v. Ferro, 164 Wash. 90, 1 P. (2d) 910 (1931); Hutchinson v. Brown, *supra* note 15; White v. Turner-Hudnut Co., 322 Ill. 133, 152 N. E. 572 (1926); Weare Commission Co. v. People, 209 Ill. 528, 70 N. E. 1076 (1904); Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646 (1888); J. B. Lyon & Co. v. Culbertson, Blair & Co., 83 Ill. 33 (1876); Beadles, Wood & Co. v. McElrath, *supra* note 48; Gregory and McHardy v. Wendell and Clark, 39 Mich. 337 (1878); Alamaris v. Jno. F. Clark & Co., *supra* note 15; Price v. Barnes' Estate, 300 Mo. 216, 254 S. W. 33 (1923); Whorley v. Patton-Kjose Co., 90 Mont. 461, 5 P. (2d) 210 (1931); C. A. King & Co. v. Horton, 116 Ohio St. 205, 156 N. E. 124 (1927); Erwin v. White, *supra* note 15; Ware v. Burleson, 41 S. W. (2d) 338 (Tex. Civ. App. 1931); Allen v. Denman, 278 S. W. 899 (Tex. Civ. App. 1925); Barnard v. Backhaus, *supra* note 14; Topper Grain Co. v. Mantz, [1926] 2 D. L. R. 712; *cf.* Riordon v. McCabe, *supra* note 33.

53. The result has been that particular cases are decided on the basis of unimportant vagaries in the evidence. Of recent years most cases have turned upon the degree of proof that the customer's "intent not to deliver" was known to the broker. As shown, p. 76, *supra,* this is a question wholly without substance in the great majority of cases, for the broker and customer almost always contemplate the execution of counter-transactions. In cases where the broker and customer have been dealing together for a long time the customer is more likely to succeed in establishing his bad intent, for evidence that previous dealings between the particular parties have been settled without delivery is usually admissible, whereas evidence that exchange contracts in general are settled without delivery is gen-

looked the well-considered precedent which the *Taggart* case afforded from an early date. A flat answer to the question "Is an intent to set off legal?" would have rendered unnecessary practically all of this litigation.

Dickson v. Uhlmann Grain Company

In the light of the foregoing analysis of the legal aspects of speculation on commodities exchanges, the Supreme Court's disposition of the *Uhlmann* case may now be examined in some detail. The exchange contracts entered into by the Uhlmann Company as a result of the orders given by the Carrollton defendants were, with one immaterial exception,[54] executed on exchanges situated outside of Missouri. This was expressly recognized by Mr. Justice Brandeis, who then went on to state:

> "But there were two distinct agreements: that between customer and company, in which both parties acted as principals; and that between the company and brokers on the exchange, in which both of the parties there likewise acted as principals. It does not follow that because the contracts between the members of the exchanges were valid, those entered into by the company at Carrollton with Dickson and its other customers were valid also. Compare *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 249-250. See, also, *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49; *Riordon v. McCabe*, 341 Ill. 506, 512-15, 173 N. E. 660."[55]

With this there is no necessary disagreement. It is not quite clear whether, in speaking of the contract between the customer and the Company, the Court means the contract of agency, empowering the Company to enter into contracts of sale and purchase on behalf of the customer, or whether it is saying that there was a separate contract of sale and purchase between the customer and the Company, distinct from the exchange contract negotiated by the latter. If the former sense was the one employed, there is no gainsaying that there were "two distinct agreements." On the other hand, it seems doubtful if this is what was meant, for certainly the agency contract would be valid if the exchange contract were, since it would then be simply a grant of authority to make

erally excluded. The unfortunate consequences of the prevailing uncertainty are well illustrated by a case in which the court set aside as inconsistent special verdicts of a jury that no delivery was intended and that the intention was to comply with the rules of the Board of Trade. Mounger v. Wells, 30 F. (2d) 521 (C. C. A. 5th, 1929). This decision, of course, begs the central question of whether intent to set off is "intent not to deliver" within the common-law rule.

54. One of the defendants made one trade on the Kansas City Board of Trade, but on this he made a profit, and so it was not involved in the litigation. Transcript of Record, 48, 163, 167.

55. Dickson v. Uhlmann Grain Co., *supra* note 1, at 193-194.

valid contracts on behalf of the customer. If the latter sense is correct, there seems to be an immediate statement that the Uhlmann Company made future contracts on its own account with the defendants, and likewise entered into the exchange contracts solely on its own account and not on the customers' behalf. That this is probable seems clear from the Court's failure even to suggest that there might have been contracts between the customers and the brokers with whom the Uhlmann Company dealt on the exchange, and which the clearing-house would have adopted. The import of the cases cited bears out this conclusion.[56] Thus it would appear that Mr. Justice Brandeis has already stated his answer to the question which he now proceeds to state as fundamental to a determination of the case:

"Whether the customer, in his agreement with the company, ordered that contracts be entered into in his behalf on the exchange, is the serious issue of fact in the case at bar. If the customer did so order by his agreement, we should have to determine by the law of which state the defense of illegality is governed. If, as Dickson contends, and the trial court found, Dickson's agreement did not contemplate the execution of transactions on the exchange in his behalf, clearly the defense of illegality is governed by the law of Missouri. . . ." [57]

This brings the problem very rapidly to a focus. It is clear that the Court has perceived a possibility that the Carrollton defendants never authorized the Uhlmann Company to execute any contracts on their behalf on any exchanges, and that all they intended to do and reasonably expressed as their intention was to make future contracts directly with the Uhlmann Company itself as the other principal, which might or might not be legal according to the intent of these particular parties. This possibility involves the further hypothesis that the Uhlmann Company, for some reason of its own, executed exchange contracts on its own account contemporaneous with and exactly corresponding to the customers' ends of the contracts between the customers and itself. There is no denying that this is a theoretically possible situation. What does Mr. Justice Brandeis adduce to give it reality?

"There was evidence that the transactions out of which the indebtedness is alleged to have arisen were not in fact orders to enter into contracts on behalf of the defendants to purchase or sell for future delivery, but were devices knowingly employed by the company solely to enable them to gamble. They testified that they were assured by the local manager that they would never

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56. The citation to the *Christie* case refers, no doubt, to Mr. Justice Holmes' refusal to pass on the validity of future contracts with respect to the rights and obligations of the customers, while upholding the contracts between the brokers as principals. The *Harvey* case found a distinct agreement between broker and customer that the latter should not be required to deliver or to receive.

57. Dickson v. Uhlmann Grain Co., *supra* note 1, at 194.

have to receive or deliver any grain as a result of their speculations. And there is no lack of evidence to support a finding that in doing so the manager acted within the scope of his authority. It is admitted that no grain was actually delivered by or to the plaintiff's customers." [58]

In evaluating this evidence it must be recalled that it is not stated with the object of proving the transactions illegal or unenforceable, but solely as indicating that the exchange contracts entered into by the Uhlmann Company were not authorized by the customers. In no way does it support the latter conclusion. It has already been seen that future contracts on exchanges can be cancelled by counter-transactions so that no delivery occurs. The local manager could, with perfect truth, assure the customers that, by cancelling their exchange contracts through counter-transactions, they would never be required to receive or deliver. For the same reason the fact that no grain was ever delivered is no evidence of what Mr. Justice Brandeis is seeking to establish. All of this evidence is perfectly compatible with the assumption that the customers authorized the Company to execute exchange contracts on their account.

"The accounts of the defendants were carried on margin; and the extent of their purported obligations exceeded their financial capacity. It is clear that their purpose was solely to make a profit by reason of the fluctuations in the market price of grain; and that the plaintiff knew this." [59]

These facts likewise are good evidence that the defendants intended to execute counter-transactions, but wholly compatible with authority to execute exchange contracts on their behalf.

"The Carrollton office was equipped in a manner common to bucket-shops; its furnishings consisted of a desk, chairs, a typewriter, blackboard, and telegraph instrument." [60]

At this point the analysis is especially faulty. Probably all small brokerage offices are equipped in a similar fashion. No suggestion appears why this description fits bucket-shops better than brokerage offices. Certainly nothing that the Court anywhere states gives rise to suspicion that the Uhlmann Company was bucketing in any legitimate sense of the word.[61]

"The branch manager testified, as did the defendants, that he was active in soliciting business among the townspeople. Between 40 and 50 local residents

58. *Ibid.*

59. *Ibid.*

60. *Id.* at 194-195. This sentence is apparently taken from Judge Kenyon's dissenting opinion below. See Uhlmann Grain Co. v. Dickson, *supra* note 4, at 534.

61. See note 104, *infra*.

from widely divergent walks of life in no way connected with purchasing or selling grain became customers of the branch. Of the five defendants in the cases consolidated for trial, who were the plaintiff's largest customers at Carrollton, two were farmers, two were clothing merchants, and one was an ice dealer. These defendants, who were not in the grain business, who had never traded on a grain exchange, and who had no facilities for handling grain, purported to buy and sell in amounts up to 50,000 bushels in a single transaction. In a period of nine months the total number of bushels involved in the transactions of four of the defendants, according to one of the plaintiff's witnesses, was 2,360,000." [62]

Here, it would seem, is more argument by creation of atmosphere.[63] Certainly the ethics of the Uhlmann Company in soliciting business in such quantity from such customers are open to question. And, once more, the occupations and financial status of the customers clearly indicate that they were speculating and intended to close out their orders by counter-transactions. But, no more than the other evidence, does all this suggest that the customers did not authorize the execution of exchange contracts.

It will now be interesting to see what explanation the Court offers for the admitted fact that the Uhlmann Company did execute contracts on the exchange, corresponding exactly to, whether or not authorized by, the "orders" of the customers.

"The defendants undoubtedly knew that the company regularly entered into contracts on the exchanges corresponding to the transactions at Carrollton. But the evidence warrants the conclusion that the contracts on the exchange were entered into by the company to enable it to secure the data for the defendants' wagers and to provide the means for determining the defendants' gains and losses; and that both the plaintiff and the defendants so regarded the contracts on the exchanges. So far as concerned the obligations which they undertook, the customers were in the same position as if they had simply wagered against the company on the fluctuations in the prices of grain. Thus, the evidence supports the conclusion that the transactions between the defendants and the company were executed and performed wholly in Missouri; and the law of Missouri accordingly governs. . . " [64]

The exchange contracts are thus explained as negotiated to secure data for the wagers. This hypothesis must be analyzed in the light of a few additional facts. The Uhlmann Company, before these transactions occurred, was already a member of the Kansas City, Winnipeg and Chicago produce exchanges, and of the Chicago clearing-house associa-

62. Dickson v. Uhlmann Grain Co., *supra* note 1, at 195.

63. It is very probable, however, that the sentences last quoted are indicative of the underlying basis of the Court's decision. See pp. 102-104, *infra*.

64. Dickson v. Uhlmann Grain Co., *supra* note 1, at 195.

tion.[65] It owned a large grain elevator, and did considerable business in "cash grain." [66] Its customers on the future market, who lived in all parts of the country, provided it with 400 to 500 active accounts.[67] If it had never established an office at Carrollton, it would have had the right to receive and display quotations. For the privilege of relaying quotations to Carrollton, the Uhlmann Company paid the Chicago Board of Trade $7.50 per month.[68] The quotations received on the board there gave the price and amount of each transaction in wheat, corn, oats and rye executed on the floors of the several exchanges.[69] These quotations were quite distinct from the particular trades put through from Carrollton; they would have been relayed and posted if no trades had ever been sent in from the Carrollton office. It is clear that the defendants and the branch manager at Carrollton would have had ample data on which to base their "wagers" irrespective of the execution by the Uhlmann Company of exchange contracts corresponding to the "wagers" or "orders," as the case might be, of the defendants. Transactions of other parties on the exchange provided a continuous supply of quotations. The old type of bucket-shop in fact used such quotations, and never executed its customers' orders.[70] If the plaintiff had really been bucketing, it would not have found it necessary to execute exchange contracts, or to incur the expense of maintaining a private wire over which orders could be transmitted to the exchange.

The explanation offered in the opinion can hardly be accorded serious consideration. And for other reasons it is difficult if not impossible to conclude that the exchange contracts were not authorized by the customers. If it be assumed that the plaintiff did contract as a principal with the defendants, and that the exchange contracts were entered into solely on the plaintiff's account, it is clear that the exchange contracts served the plaintiff as a perfect "hedge" against its wagers with the customers. Whatever the Company might lose on a wager with a customer, it would win on the corresponding exchange contract, and vice-versa. Thus while it would be true, as the Court stated, that "the customers were in the same position as if they had simply wagered against the company," clearly the Uhlmann Company would be in exactly the same position it would have been in had it executed orders on the exchange under authority of the customers. In neither case would it make any difference to the Company which way the market went. In both cases the Company would be in the same contractual position

65. Transcript of Record, 30, 52.
66. *Id.* at 30, 57, 105.
67. *Id.* at 87.
68. *Id.* at 80.
69. *Id.* at 128, 135.
70. See note 104, *infra*.

relative to the clearing-house; in both the Company would have to put up a margin with the clearing-house and would have the same reasons for requiring margins from the defendants. What would it profit the Company to adopt the form for its transactions which the Supreme Court found that it did adopt? What would it profit the customers to require such a form, except that it would give them the opportunity to plead illegality as a defense in the event of litigation? If the Company, then, had nothing to gain from breaking exchange rules, exposing itself to a conviction for bucket-shopping under any interpretation of the usual statutes, and rendering it impossible to enforce the contracts with their customers in any court, what conceivable possibility is there that it should have done all this?

If the analysis of probabilities is abandoned and the record itself is examined, the answer is the same. The plaintiff was a large brokerage establishment with a wide range of business. It was not a fly-by-night outfit making a one-night stand in Carrollton. It is inconceivable that this sort of house could have entered into the sort of contracts the Court found, when it stood to profit nothing thereby and knew full well the risks to which such agreements would expose it. The testimony of the only defendant who testified in any detail on the issue of his intent and the nature of his agreement with the Uhlmann Company, and that of the only important witness for the defense who was not a party, includes nothing which suggests anything out of the ordinary course of speculation.[71] The defendants of course stated that they did not intend to deliver or receive actual grain,[72] and of course they did not so intend. They testified that McDonough told them that they would not have to deliver or receive grain,[73] but cross-examination developed that all they meant was that he had shown them that by "closing out" before delivery was due they could avoid delivery.[74] One defendant testified that he knew McDonough would execute his orders on the exchange, and so understood the contract.[75] He admitted knowledge of the device of "closing-out," and stated that he intended to and did use it.[76] Certainly none of this testimony supports, or is easily compatible with, the theory that the exchange contracts were not authorized by the customers.

The Court having in this manner arrived at the conclusion that Missouri law alone was applicable, the decision, so far as state law was

71. Part of the testimony for the defendants is reproduced in Judge Gardner's opinion in the Circuit Court of Appeals. See Dickson v. Uhlmann Grain Co., *supra* note 4, at 529-30.

72. Transcript of Record, 144, 148.

73. *Id.* at 147, 150.

74. Transcript of Record, 146, 152.

75. *Id.* at 151.

76. *Id.* at 152, 154, 156, 157 (testimony of defendant Amos Dickson). It was stipulated that all the defendants would give the same testimony. *Id.* at 158.

concerned, followed as a matter of course. The exchange contracts being held unauthorized, the validity of the agreements between the plaintiff and the defendants alone remained in question. If these contracts in fact existed, it was clear that they did not require either party to receive or deliver grain, and that neither party so intended. Under the Missouri statute, the bad intent of either party alone would have sufficed to invalidate the contracts; in fact, whatever intent existed was mutual. On the basis taken a judgment for the defendants was inevitable.

While it is easy to assert and support some dissatisfaction with the factual analysis which enabled the Court to decide a supposititious case,[77] the proper determination of the case on its true facts and in terms of settled doctrine is not free from difficulty. Some preliminary treatment of the statutes and decisions in Missouri will be necessary. As has already been shown, the Missouri courts originally subscribed to the rule that future contracts on exchanges would be enforced unless it could be shown that the intent of the principals *on both sides* of the contracts was that no delivery would be made.[78] As a result of the practical impossibility of proving the intent of both principals, speculative contracts were almost uniformly upheld.[79] Probably as a result of this attitude of the courts, the legislature of Missouri in 1889 adopted a new anti-gambling statute (the usual form of bucket-shop statute having been passed in 1887),[80] under which the intent of *either party* to a future contract not to make or take delivery was sufficient to render it illegal.[81] By this statute the innocent suffer with the guilty. But even

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77. See (1933) 81 U. OF PA. L. REV. 881, 882. *Cf.* State v. Christopher, 318 Mo. 225, 2 S. W. (2d) 621 (1927), where the facts seem to have been subjected to a strikingly similar misinterpretation.

78. See p. 71 and note 28, *supra.*

79. See cases cited note 28, *supra.* In two cases, however, the broker was denied recovery on the ground that the client had authorized him only to make an invalid contract. Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713 (1887); Hill v. Johnson, 38 Mo. App. 383 (1889).

80. The statute of 1887 now appears as Mo. REV. STAT. (1929) §§ 4316-4323.

81. Mo. REV. STAT. (1929) §§ 4324-29. The important section is 4324, which provides that "All purchases and sales . . . of the shares of stock or bonds of any corporation, or . . . grain or agricultural products whatever, either on margin or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold, and all buying or selling . . . of such property . . . when the party selling the same . . . does not intend to have the full amount of the property on hand or under his control to deliver upon such a sale, or when the party buying any of such property . . . does not intend actually to receive the full amount of the same if purchased, are hereby declared to be gambling and unlawful. . . " Section 4326 punishes the maintenance of a place where contracts violating Section 4324 are made.

The Missouri courts hold that under Section 4324 the evil intention of either party to a future contract, even if not communicated to the other party, invalidates the contract. Connor v. Black, 119 Mo. 126, 24 S. W. 184 (1893); Connor v. Black, 132 Mo. 150, 33 S. W. 783 (1896); State v. Cunningham, 154 Mo. 161, 55 S. W. 282 (1900); Price v.

this herculean measure did not invalidate all speculation. While Missouri contains one large commodities exchange, the Kansas City Board of Trade, a large proportion of Missouri speculation takes place on the Chicago Board of Trade, and most of the stock speculation on the New York Stock Exchange. Where foreign exchanges are used, negotiations between broker and customer in Missouri result in a contract executed outside the state. The Missouri courts held that the statute of 1889 had no extra-territorial application, and that the validity of such transactions was governed by the law of the state where the exchange was located.[82] For some reason, no Missouri litigants appear to have offered evidence of the law of a foreign jurisdiction in speculation cases, and so the Missouri courts have continued to indulge the presumption that the foreign law is the same as the common law of Missouri, under which the intent of both parties had to be shown.[83] The original rule that the intent of both *principals* to exchange contracts must be shown does not seem to have persisted,[84] but the Missouri courts have been slow to find that the broker knew of the customer's evil intent where the contracts were executed on a foreign exchange.[85]

The conclusion reached by the Missouri courts, that the validity of future contracts on exchanges is governed by the law of the place where the exchange is located, is in accord with the general rule.[86] The trans-

Barnes' Estate, *supra* note 52; McVean v. Wehmeier, *supra* note 41; Smith and Mann v. Bailey, *supra* note 51. The same result has been reached under a statute of Tennessee. McGrew v. City Produce Exchange, 85 Tenn. 572, 4 S. W. 38 (1887); see Guarantee Co. of North America v. Mechanics' Savings Bank and Trust Co., 183 U. S. 402, 417 (1902); Berry v. Chase, 146 Fed. 625, 628 (C. C. A. 6th, 1906); Williamson v. Majors, *supra* note 33, at 763. See also Patterson, *supra* note 6, at 857, n. 42; *cf.* McLure v. Wilson, *supra* note 41.

82. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516, 61 S. W. 617 (1901); State v. Gritzner, 134 Mo. 512, 36 S. W. 39 (1896); Gordon v. Andrews, *supra* note 28; Claiborne Commission Co. v. Stirlen, 262 S. W. 387 (Mo. App. 1924); J. E. Hood & Co. v. McCune, *supra* note 33; Atwater v. A. G. Edwards Brokerage Co., 147 Mo. App. 436, 126 S. W. 823 (1910); Gaylord v. Duryea, 95 Mo. App. 574, 69 S. W. 607 (1902).

83. See cases cited note 82, *supra.*

84. But *cf.* Gordon v. Andrews, *supra* notes 28 and 82.

85. See cases cited note 82, *supra.* The broker has not fared so well, however, in cases where he has sought to recover upon an account stated covering trades executed on exchanges both within and without Missouri. If the customer proves his own illegal intent, it is held that the illegality of the local transactions taints the whole account, and no recovery is allowed on the foreign trades. Price v. Barnes' Estate, *supra* note 52; Elmore-Schultz Grain Co. v. Stonebraker, 202 Mo. App. 81, 214 S. W. 216 (1919). It has been held that "puts" and "calls" are within the statute of 1889. Lane v. Logan Grain Co., 105 Mo. App. 215, 79 S. W. 722 (1904); see Elmore-Schultz Co. v. Stonebraker, *supra,* at 93-98, 214 S. W. at 220-221. *Contra:* Taylor v. Sebastian, *supra* note 41. See note 127, *infra.*

86. Mullinix v. Hubbard, 6 F. (2d) 109 (C. C. A. 8th, 1925); Ward v. Vosburgh, *supra* note 26; Lehman v. Feld; Lamson Brothers & Co. v. Turner, both *supra* note 33; Wilhite v. Houston, *supra* note 23; Jacobs v. Hyman, 286 Fed. 346 (C. C. A. 5th, 1923); Berry v.

actions here involved were executed in Illinois, Minnesota and Manitoba. Since nothing appears to show that the exchange contracts executed in these states were not authorized by the defendants, the Missouri statutes, as construed by the courts of that state, had no application.[87] Although the Missouri courts, like most state courts, assume the law of the foreign jurisdiction to be the same as their own common law,[88] the federal courts take judicial notice of the statutes and rules of decision in the various states.[89] There was therefore no necessity here to plead and prove the law of Illinois or of Minnesota. In the latter state, while it has not been specifically held that an intent to avoid delivery by executing counter-transactions is illegal, undoubtedly the courts would hold ordinary speculation illegal where, as here, it is clear from the occupations and financial status of the customers that they could have had no use for actual grain, and that the broker knew they had no intent to take delivery.[90] Although the latest decision of the Supreme Court of Illinois is not free from ambiguity in this particular, probably the result would be the same in that state.[91] Since the federal courts do not take judicial notice of the law of foreign countries,[92] in the absence of any evidence of the law of Manitoba it should be presumed to be like the common law of Missouri.[93] Probably under the law of Missouri these contracts would not have been enforced, although the cases are erratic.[94]

Chase, *supra* note 81; Williams, Black & Co. v. Carr, *supra* note 28; see Harvey v. Merrill, *supra* note 31, at 5. But *cf.* Williamson v. Majors, *supra* note 33. If the foreign law is strongly contrary to the public policy of the forum, it will not be applied. Flagg v. Baldwin, 38 N. J. Eq. 219 (1884); Pope v. Hanke, *supra* note 34; see Parker v. Moore, 115 Fed. 799, 802 (C. C. A. 4th, 1902). But in Missouri public policy does not prevent the enforcement of future contracts which are valid where made. Maxey v. Railey & Brothers Banking Co., 57 S. W. (2d) 1091 (Mo. App. 1933).

87. See cases cited note 82, *supra*.

88. *Ibid.*

89 Lamar v. Micou, 114 U. S. 218 (1885).

90. Fraser v. Farmers' Co-operative Co., 167 Minn. 369, 209 N. W. 33 (1926); Bolfing v. Schoener, 144 Minn. 425, 175 N. W. 901 (1920); Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862 (1891).

91. White v. Turner-Hudnut Co.; Weare Commission Co. v. People, both *supra* note 52; Pardridge v. Cutler; Jamieson v. Wallace, both *supra* note 33. The same result was reached in Riordon v. McCabe, *supra* note 33, but nevertheless the court stated that a mere intent to set off does not invalidate the contract. See *id.* at 512-517, 173 N. E. at 663-64.

92. Liverpool and Great Western Steam Co. v. Phenix Insurance Co., 129 U. S. 397 (1889); Dianese v. Hale, 91 U. S. 13 (1875).

93. Secoulsky v. Oceanic Steam Navigation Co., 223 Mass. 465, 112 N. E. 151 (1916); Linton v. Moorhead, 209 Pa. 646, 59 Atl. 264 (1904); see Panama Electric Ry. Co. v. Moyers, 249 Fed. 19, 21 (C. C. A. 5th, 1918); 5 WIGMORE, EVIDENCE (2d. ed. 1923) § 2536. See also the Missouri cases cited note 82, *supra*.

94. State v. Christopher, *supra* note 77; Price v. Barnes' Estate, *supra* note 52; Smith and Mann v. Bailey, *supra* note 51. *Cf.*, however, Edwards Brokerage Co. v. Stevenson; Claiborne Commission Co. v. Stirlen, both *supra* note 82. For the Manitoba law see Wood-

In all of these states the field of speculation is covered by bucket-shop and gambling statutes.[95] While, with the exception of Missouri, these statutes simply state the common law "intent test," decisions of the courts of these states are undoubtedly to be treated as constructions of the statutes, and therefore binding on the federal courts. It must be said, however, that in this field that rule has been but little observed. The decisions in the Eighth and Tenth Circuits upholding an intent to execute counter-transactions were rendered in cases which arose in states that have enunciated no such doctrine, and whose courts have refused to enforce speculative contracts on indistinguishable facts.[96] Mr. Justice Holmes, in the *Christie* case, paid scant attention to the law of Illinois.[97] And it is easy to honor state decisions at once in breach and observance by acknowledging the "intent test" as they state it, and then referring to Mr. Justice Holmes' oft-quoted remark that "a set-off is in legal effect a delivery." [98] In this particular situation, where the state decisions so often seem to be based upon an incomplete understanding of the facts, and where a more intelligent disposition involves no patent flouting of rules as expressed by the state courts, it is arguable that some sleight-of-hand is justifiable. On the other hand, it is plain that, if the Court in the *Uhlmann* case was determined to be very scrupulous about giving full effect to state decisions under gambling and bucket-shop statutes, and apart from any question of federal legislation, a disposition of the case favorable to the defendants is wholly defensible.

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ward & Co. v. Koefoed, 62 D. L. R. 431 (1921); *cf.* Maloof v. Bickell & Co., 50 D. L. R. 590 (1919).

95. ILL. REV. STAT. (Cahill, 1931) c. 38, § § 308-09, 317-18; MINN. STAT. (Mason, 1927) § § 10488-89, 10223-1, 10223-2, 10223-3; MO. REV. STAT. (1929) § § 4316-4329; see Legis. (1932) 45 HARV. L. REV. 912, 916-22.

96. For instance, in Cleage v. Laidley, *supra* note 47, the court looked to the pronouncement of the Supreme Court in the *Christie* case rather than to applicable decisions in Illinois and Missouri. Lamson Brothers & Co. v. Turner, *supra,* note 33, paid no attention to the Illinois decisions. Solomon v. Newburger, *supra* note 47, relied solely upon "decisions of this circuit, of the Supreme Court, and of the federal courts generally." The same was true in Lyons Milling Co. v. Goffe & Carkener, Inc., *supra* note 47, in which case apart from the Grain Futures Act, Illinois and Missouri decisions should have governed.

97. *Cf.* with the *Christie* case those cited note 91, *supra,* and Central Stock and Grain Exchange v. Board of Trade of the City of Chicago, 196 Ill. 396, 63 N. E. 740 (1902). The Illinois cases on speculative contracts have from the outset been very confused. Thus an Illinois statute which gave the "loser" of a bet a cause of action to recover his losses from the "winner" was construed to allow a customer to recover speculative losses from his broker, despite clear evidence that the broker "won" nothing. Pearce v. Foote; Kruse v. Kennett, both *supra* note 16; see Pelouze v. Slaughter, 241 Ill. 215, 227, 89 N. E. 259, 263 (1909). An amendment to the statute in 1913 intended to abolish this egregious misconstruction of the statute by exempting commission brokers from its operation was held unconstitutional as discriminatory. Miller v. Sincere, 273 Ill. 194, 112 N. E. 664 (1916).

98. See Board of Trade v. Christie Grain & Stock Co., *supra* note 45, at 250.

Prohibition or Recognition?

Now that the fundamental issue has been made clear, what should be its answer? That answer should be framed with the realization that the legal validity of speculation as it is now carried on is at stake. If an intent to set off is held to render future contracts unenforceable and illegal, the result will be that substantially all the future contracts entered into on all the commodities exchanges of the nation are thereby invalidated. The question of law and policy is plain: Should the courts outlaw speculation on commodities exchanges?

The relation of the question to the orthodox test of what constitutes a wagering contract is not difficult of analysis.[99] Clearly speculation in commodity futures does not usually involve the purchase and sale of physical property. Just as clearly it does not consist in mere betting on fluctuations in the price of the subject-matter. The former is manifest from the insignificant percentage of contracts consummated by delivery;[100] the latter perhaps needs explanation. Speculation is not betting because delivery of actual goods can be required[101] on future contracts. It is for this reason that the future contracts are themselves an expression of, and to some extent a factor influencing, prices. The fact that the subject-matter can be required actually to pass under the contract is the very reason why the prices at which these contracts are made always conform closely to the best guesses of trained observers as to what the subject-matter will in fact sell for when delivery is due. So the difference between intent to set off on the one hand and intent to make a fictitious contract on the other is a real one, and the fact that a future contract standing by itself requires delivery, is of importance, even though any particular parties to a future contract intend to avoid delivery by setting off. Commodities exchange speculation, therefore, consists in the purchase and sale of contract rights in unidentified grain. A speculator makes no promise of a performance for which there is no agreed exchange; if he undertakes to deliver, he receives a promise to pay for what is delivered, and by delivering he can require full payment. If he promises to pay for a given amount of goods, he receives a promise to deliver that identical amount, and, by paying in full, he can enforce such delivery. He clearly has an "interest" outside of the contingency which determines whether he gains or loses, for he always has a contract right to trade money for goods, or goods for money. He may have no use for the goods intrinsically, but no more use has a speculator in Florida real estate for the land; both are curious only

99. See notes 8 and 11, *supra*.

100. See note 19, *supra*.

101. Again it is necessary to point out that "require" is used in the sense that the parties understand and agree that delivery may be required, not in the sense that the law will necessarily enforce the contract. See note 42, *supra*.

about the course of prices. Both make a deal which expresses and to some extent influences the prices which interest them. Now, however pernicious unbridled speculation by actual purchase and sale of real estate may be, no court has ever seen fit to impugn its contractual validity. Is there any basis for distinguishing speculation by purchase and sale of contract rights to goods?

Plainly, there are differences both of form and of substance. These differences arise out of the process of assignment and cancellation developed on commodities exchanges whereby actual physical transfer of the property traded in is substantially eliminated. No passage of title to goods is necessarily involved in future contract speculation, and contract rights pass by assignment rather than sale, whereas in real estate speculation, and in other forms not conducted on exchanges, there is actual physical transfer and title passes by a real sale. In other words, the exchange speculator's contract interest need not and generally does not ripen into a property interest. The great difference of substance is that speculation in futures requires much less capital than does speculation in property rights. The former requires only enough capital to cover the risk of fluctuation in price. Since no goods whatsoever are specified, there is no risk of damage to or destruction of the commodities—the only risk is that of price. The latter, of course, requires capital sufficient to negotiate transfers of title to specific property. It involves the risk of injury to or loss of the property while it is being "held for the rise." An ancillary difference is that, since contract rights in unspecified goods are fungible, trading is much more liquid than is trading in specified goods or realty. One need not be a judge of the quality of particular goods, for bargains are not struck with respect to particular goods. This simplicity of the mechanics and technique of exchange speculation, coupled with the small amount of capital needed, is, of course, responsible for the participation in exchange speculation of great numbers of "non-professionals."

Clearly, the issue is one which argument by legal precedent and analogy scarcely helps to solve. Speculation in futures may readily be likened to speculation by actual purchase and sale, and thus escape condemnation under the "wager" test. With equal ease, insistence can be made upon real differences between the two forms. The fundamental issue is one of policy and expediency, and it should be frankly encountered on that basis.

This is not the place to consider at length the economic and sociological arguments for and against speculation.[102] In its behalf, economists have consistently urged its tendency to bring the immediate

102. See treatises cited note 17, *supra*, and HUEBNER, THE STOCK MARKET (1922); ELY, OUTLINES OF ECONOMICS (5th ed. 1930) 633-35; 1 TAUSSIG, PRINCIPLES OF ECONOMICS (3d ed. 1921) 156-66.

rate of consumption into harmony with the prospect of future supply, and its consequent stabilizing effect upon prices. They have pointed out also the facilities which it affords to dealers and manufacturers for "hedging" [103] themselves against fluctuations in the value of their raw materials and finished wares, with consequent reduction in the cost of goods to the consumer. Against speculation is urged with equal vehemence and show of reason "the waste of much brains and energy on unproductive doings," and the demoralization of the community from excessive indulgence of the gambling spirit. No authoritative verdict has yet been rendered, and no attempt to balance the elements of good and evil will here be made. All that is now insisted upon is that commodities exchanges as they are now constituted are performing necessary economic functions. It may be that some other mechanism can be developed which will make possible price quotations based upon all available sources of information, and tend to keep present consumption in reasonable relation to future supply. It may be that grain-elevators, warehouses and mills will find a new device for protecting themselves

103. "Hedging" is a device used by millers, warehousemen and others the nature of whose business obliges them to buy and hold large quantities of actual commodities to protect themselves against fluctuation in the price of the commodities. For example, a miller who has bought 10,000 bushels of actual grain will sell an equal amount for future delivery. Any decline in the value of the actual grain he holds will be counter-balanced by a profit on his "short sale." Similarly, he will lose the chance of a speculative profit. For technical discussions of this subject, see HOFFMAN, HEDGING BY DEALING IN GRAIN FUTURES (1925); (1931) 155 ANN. AM. ACAD. 7, 27, 79. The hedger normally intends to close out his future contract by a counter-transaction, and therefore the question of the legality of his operations is, on conceptual grounds, the same as that of the legality of ordinary speculation. Nevertheless, some courts which condemn ordinary speculation have enforced or approved contracts entered into as "hedges." McCarthy Brothers Co. v. Equity Co-operative Association of Enid, 286 Fed. 171 (D. Mont. 1923); Edgeley Co-operative Grain Co. v. Spitzer, 48 N. D. 406, 184 N. W. 880 (1921); John Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164 (1905); see Bailey & Graham v. Phillips, 159 Fed. 535, 538 (C. C. S. D. Ga. 1907); Fraser v. Farmers' Co-operative Co., *supra* note 90, at 377, 209 N. W. at 37; Whorley v. Patton-Kjose Co., *supra* note 52, at 214; *cf.* Bolfing v. Schoener, *supra* note 90; Edward R. Bacon Grain Co. v. Reinecke, 26 F. (2d) 705 (N. D. Ill. 1928). Where, as in the federal Eighth Circuit, an intent to set off does not invalidate a contract, hedging is legitimate. See Lamson Brothers & Co. v. Turner, *supra* note 33, at 684; Lyons Milling Co. v. Goffe & Carkener, *supra* note 47, at 248; Sampson v. Camperdown Cotton Mills, *supra* note 42 at 836; *cf.* Medlin Milling Co. v. Moffatt Commission Co., 218 Fed. 686, 690 (W. D. Mo. 1915). The Supreme Court has approved the practice of "hedging" by way of dictum. See Board of Trade v. Christie Grain & Stock Co., *supra* note 45, at 249; Browne v. Thorne, *supra* note 22 at 140 ("hedging" prima facie lawful). But other courts have refused to recognize the legitimacy of "hedging," either because they felt the common-law rule allowed of no such exception, or because they thought that a statute dictated their conclusion. Falk v. J. N. Alexander Mercantile Co., 138 Miss. 21, 102 So. 843 (1925); State v. McGinnis, 138 N. C. 724, 51 S. E. 50 (1905); Erwin v. White, *supra* note 15; *cf.* State v. Clayton, 138 N. C. 732, 50 S. E. 866 (1905). For an excellent discussion of the legal aspects of "hedging," see Patterson, *supra* note 6.

against speculative risks which they do not wish to encounter. Possibly many of the vices inherent in the present exchange system will be eliminated by some such revolution of method. Still it remains apparent that these things are not yet, and that the commodities exchange remains closely related and necessary to the nation's commodity marketing system. The courts are confronted with a *fait accompli.* Shall they recognize it?

Every dictate of common sense and past experience indicates that they should. This is so, not because of any duty of the courts to bend before the prevailing current of business practice, but because of the limited sanction at their disposal. All that the courts can do is to decline to enforce such speculative contracts as are litigated, and occasionally to subject an ordinary broker to criminal penalties by misapplying a bucket-shop statute.[104] It needs no perspicacity to perceive the utter futility of these gestures. The courts have united in unqualified condemnation of speculation for eighty years, but can it be seriously contended that its course has been thereby substantially checked? The erratic and hostile attitude of the courts toward the exchanges has

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104. Bucket-shopping is absolutely distinct from ordinary speculation, and comprises several species of malpractice by brokers. Originally it consisted in a failure to execute customers' transactions on the the exchange at all. The "commission" paid by the customer in reality constituted "odds" in favor of the bucket-shop proprietor. *Cf.* Bryant v. Western Union Telegraph Co., *supra* note 42. The more modern procedure involves execution on the exchange of a customer's order, immediately followed by the execution of a countertransaction on the account of the house itself. In either case it will be observed that the bucket-shop takes a market position contrary to that of the customer, and, in substance, bets against him on its own account. See BAER AND WOODRUFF, *op. cit. supra* note 17, at 460, 467; HILL, GOLD BRICKS OF SPECULATION (1904); MEEKER, THE WORK OF THE STOCK EXCHANGE (2d ed. 1930) 460, 587; Legis. (1932) 45 HARV. L. REV. 912, 915, n. 19, 916, n. 25.

In spite of these very distinct characteristics of bucketing, the statutes prohibiting the practice have been drawn in general terms, and have condemned "keeping a place for the pretended buying and selling of grain," or "a place where contracts for the purchase and sale of commodities are entered into with no intention of fulfillment by delivery." See Legis. (1932) 45 HARV. L. REV. 912, 916 *et seq.* The courts have construed these statutes as enacting the common-law test of the validity of future contracts, and consequently, in most states, the proprietor of an office where ordinary speculation is carried on is liable to conviction for a criminal offence under the bucket-shop statute. See, e.g., Fenner v. Boykin, 3 F. (2d) 674 (N. D. Ga. 1925); Arthur v. State, 146 Ga. 827, 92 S. E. 637 (1917); Weare Commission Co. v. People, *supra* note 52; Soby v. People, 134 Ill. 66, 25 N. E. 109 (1890); State v. Christopher, *supra* note 77; State v. McGinnis, *supra* note 103. The New York statute regulating stock exchanges is carefully drawn, and expressly punishes trading against a customer's orders, which is the essence of modern bucketing. N. Y. PENAL LAW (1909) § 954, as added by LAWS 1913, c. 592; see People v. Ruskay, 243 N. Y. 58, 152 N. E. 464 (1926); People v. MacMasters, 246 N. Y. 592, 159 N. E. 664 (1927). Probably at common law and apart from any question of wagering a customer would not be held liable on orders which his broker bucketed. Stiebel v. Lissberger, 166 App. Div. 164, 151 N. Y. Supp. 822 (1st Dep't 1915), *aff'd,* 222 N. Y. 604, 118 N. E. 1078 (1918).

simply tended to lower the moral sense of the community by encouraging "welching." It is all very well for the courts to refuse to enforce frank "bets," but to decline legal sanction to an enormous section of business practice, much of which is carried on with serious and justifiable motives, is to undermine respect for business obligations and endanger commercial honesty.

The constant disapproval of the courts has in no way tended to develop other and less objectionable institutions for performing the functions now filled by the exchanges. There is little reason to believe that the state statutes on gaming and bucket-shopping have had, or that any similar laws can have, any more effect.[105] Probably the situation cannot be dealt with by mere prohibitory fiat, from whatever source it emanates. The results of the German attempt to outlaw dealings in grain futures suggest that prohibition, unconnected with constructive suggestions and provisions for the encouragement of alternative institutions, simply tends to drive speculators and dealers back to cruder, less efficient underground operations and to further endanger business morality.[106] And the recent trend of legislation in this country has been toward recognizing de jure the already de facto legitimacy of exchange operations, and bringing them under public supervision and control with a view to mitigating, if possible, their less desirable features.[107] In such steps the courts can assist through intelligent interpretation and application of regulatory laws.[108] But to persist in the pretence of

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105. Most state statutes, whether enacted for the purpose of invalidating gambling contracts or to punish bucket-shopping, have merely reiterated the common-law test. The statutes are collected and analyzed in Legis. (1932) 45 HARV. L. REV. 912.

106. See Emery, *Ten Years Regulation of the Stock Exchange in Germany* (1908) 17 YALE REV. 5.

107. Statutes which expressly declare the legitimacy of "hedging" are examples of this more recent approach. MINN. STAT. (Mason, 1927) § 10223-3; S. C. Acts 1928, no. 652. A curious Arizona statute validates "hedging" only when it is carried on between a party within and a party without the state. ARIZ. CODE (Struckmeyer, 1928) § 4680. The same was true under the TEXAS PENAL CODE OF 1911, § 543, since repealed. Lowrie v. J. N. Wisner & Co., 47 S. W. (2d) 636 (Tex. Civ. App. 1932); Mackay Telegraph-Cable Co. v. Bain, 163 S. W. 98 (Tex. Civ. App. 1913). And statutes recently passed in Arkansas, Georgia, Mississippi, North Carolina, Oklahoma, South Carolina and Texas, which appear to have been intended to legitimatize trading on established exchanges in accordance with their rules, exhibit the same tendency. See Legis. (1932) 45 HARV. L. REV. 912, 920. In New York state several salutary provisions regulating the activities of stock brokers have been enacted. N. Y. PENAL LAW (1909) § § 951-956, as added to by Laws 1913, cc. 253, 475, 476, 500, 592. Federal legislation along regulatory lines is found in the Cotton Futures Act, and the Grain Futures Act, both *supra* note 15. See pp. 94-102.

108. The courts have been most unwilling to construe statutes so as to effect any substantial departure from the "intent test." Thus in North Carolina a statute declaratory of this test which excepted from its operation dealing by manufacturers and wholesalers in the regular course of business was held not to validate "hedging." State v. McGinnis, *supra* note 103. The only effect allowed the statute was to put the burden of proof on

actually discouraging speculation by declining to enforce speculative contracts is to perpetuate a confused and futile policy.

The Grain Futures Act

In all that has been said heretofore it has been assumed that the validity of future contracts in grain is in no way affected by and in no way involves consideration of federal legislation. In 1922, however, Congress enacted the Grain Futures Act,[109] which establishes certain requisites for the validity of future contracts in grain, and subjects grain exchanges to some measure of federal supervision and control.[110] The

the party alleging invalidity of the contract, if the party seeking enforcement came within the "exception." Rodgers, McCabe & Co. v. Bell, 156 N. C. 378, 72 S. E. 817 (1911); Alex. Sprunt & Sons v. May, 156 N. C. 388, 72 S. E. 821 (1911); Eure v. Sabiston, 195 Fed. 721 (C. C. A. 4th, 1912). The statutes passed in Mississippi and other Southern states to legitimatize speculation pursuant to rules on exchanges contained ambiguous phrases which the courts of Mississippi have seized on as an excuse for holding that the "intent test" was in no way modified. Alamaris v. Jno. F. Clark & Co., *supra* note 15; *cf.* Hutchinson v. Brown, *supra* note 15. The situation in Texas may now be worse than it was before the "liberal" statute was enacted, for the former statute sanctioned interstate "hedging." See note 107, *supra*. Under the new statute all "hedging" may be illegal. Erwin v. White, *supra* note 15. *Contra*: Morgan v. Rose, *supra* note 15. Compare with the foregoing decisions the intelligent treatment accorded Section 954 of the NEW YORK PENAL LAW, punishing trading against a customer's orders, by the New York courts. On stock exchanges, the stock traded in actually passes from hand to hand on the day following the particular trade, i.e. delivery is actually made, and the trade is closed. Hence a house which desires to bucket its orders must execute counter-transactions on its own account the same day that the customer's order is executed. *Cf.* note 104, *supra*. A counter-order after actual delivery of stock on the customer's order does not nullify or cancel the customer's trade, and therefore it was properly held that transactions by a broker the day after the customer's order was executed, or later, did not violate the statute. People v. Ruskay; People v. MacMasters, both *supra* note 104.

109. 42 STAT. 998 (1922), 7 U. S. C. §§ 1-17 (1926). The Grain Futures Act superseded the Future Trading Act, 42 STAT. 187 (1921), which imposed a prohibitive tax of twenty cents per bushel on future contracts that did not meet its requirements, and which was held unconstitutional as an improper exercise of the taxing power. Hill v. Wallace, 259 U. S. 44 (1922); Trusler v. Crooks, 269 U. S. 475 (1926). The Grain Futures Act was framed as a regulation of interstate commerce, imposing criminal penalties for its violation. It was held constitutional in Board of Trade of Chicago v. Olsen, 262 U. S. 1 (1923).

110. Cotton exchanges are also under some measure of federal control by virtue of the Cotton Futures Act, *supra* note 15. See Legis. (1932) 45 HARV. L. REV. 912, 922; HUBBARD, COTTON AND THE COTTON MARKET (2d ed. 1928) 213-215. Section 21 of this act repealed the Cotton Futures Act enacted August 18, 1914, 38 STAT. 693 (1914), which had been held unconstitutional by Judge Hough on the ground that it was a revenue measure, and had originated in the Senate. Hubbard v. Lowe, 226 Fed. 135 (S. D. N. Y. 1915). The act now in force levies a prohibitive tax of two cents a pound upon all future contracts for the sale of cotton which do not conform to its provisions. Under the decision in Hill v. Wallace, *supra* note 109, the constitutionality of the Cotton Futures Act is a matter of doubt. Cf. Browne v. Thorne, *supra* note 22, at 139; Hutton v. Terrill, 255

relation of this statute to state laws concerning speculation is of great importance. As early as 1924 it was held by the Supreme Court of Kansas that the Grain Futures Act supersedes state laws insofar as the latter affect the validity of future contracts on exchanges which have been designated "contract markets" by the Secretary of Agriculture.[111] The same conclusion was subsequently reached by the Circuit Court of Appeals for the Tenth Circuit.[112] The Supreme Court of Ohio, however, has held that state gambling laws remain unaffected by the federal statute.[113]

The Uhlmann Company relied upon the Grain Futures Act in establishing its case before the District Judge, but the latter held that the Act did not cover "gambling" in futures, and that the Missouri law governed. The Circuit Court of Appeals disapproved this determination, and expressed agreement with the decisions in Kansas and in the Tenth Circuit. On appeal to the Supreme Court, Mr. Justice Brandeis stated, with reference to this question:

"The Grain Futures Act did not supersede any applicable provisions of the Missouri law making gambling in grain futures illegal. . .

"The federal act declares that contracts for the future delivery of grain shall be unlawful unless the prescribed conditions are complied with. It does not provide that if these conditions have been complied with the contracts, or the transactions out of which they arose, shall be valid. It does not purport to validate any dealings. Nor is there any basis for the contention that Congress occupied the field in respect to contracts for future delivery; and that necessarily all state legislation in any way dealing with that subject is superseded. The purpose of the Grain Futures Act was to control the evils of manipulation of prices in grain. Such manipulation, Congress found, was

Fed. 860 (S. D. N. Y. 1918) (holding that the Cotton Futures Act must be construed as a revenue measure). Since the act primarily seeks to standardize price differences between different grades of cotton, several state decisions holding that it does not supersede state laws governing the validity of dealing in futures seem clearly correct. Arthur v. State, *supra* note 104; Levi, Aronson & White v. Jones, 208 Ala. 104, 93 So. 733 (1922); *cf.* Layton v. State, 165 Ga. 265, 140 S. E. 847 (1927). Under the Alabama statute regulating future contracts, it is held that evidence that no delivery was made under a contract, and that the dealings were on margin, makes out a prima facie case of illegality, which is rebutted if it is shown that the contract met the requirements of the Cotton Futures Act. T. S. Faulk & Co. v. Fenner & Beane, 221 Ala. 96, 127 So. 673 (1930); Fenner & Beane v. Phillips, 222 Ala. 106, 130 So. 892 (1930); Fenner & Beane v. Olive, *supra* note 50.

111. State v. J. Rosenbaum Grain Co., 115 Kan. 40, 222 Pac. 80 (1924). Accord: Goffe & Carkener v. Henneberger, 132 Kan. 211, 294 Pac. 672 (1931).

112. Lyons Milling Co. v. Goffe & Carkener, *supra* note 47. Accord: Board of Trade v. Gentry (W. D. Mo.) (unreported); *cf.* Hoyt v. Wickham, 25 F. (2d) 777, 779-80 (C. C. A. 8th, 1928); Chamber of Commerce of Minneapolis v. Federal Trade Commission, 13 F. (2d) 673, 685 (C. C. A. 8th, 1926). In State v. Christopher, *supra* note 77, it was held that the Grain Futures Act does not apply to transactions which do not take place on "contract markets," even though a member of a "contract market" is a party to them.

113. C. A. King & Co. v. Horton, 116 Ohio St. 205, 156 N. E. 124 (1927).

effected through dealings in grain futures. See *Board of Trade v. Olsen,* 262 U. S. 1, 32. Many persons had advocated, as a remedy, that all future trading be abolished. Congress took a less extreme position. It set up a system of regulation and prohibited all future trading which did not comply with the regulations prescribed. But it evinced no intention to authorize all future trading if its regulations were complied with. Both the language of the Act and its purpose are clear; and they indicate the contrary. The Missouri law is in no way inconsistent with the provisions of the federal act. It does not purport to legalize transactions which the federal act has made illegal. It does not prescribe regulations for exchanges. Obviously, manipulation of prices will not be made easier, or the prevention of such manipulation be made more difficult, because the state has declared that certain dealings in futures are illegal and has forbidden the maintenance within its borders of places where they are carried on. Since there is nothing in the state law which is inconsistent with, or could conceivably interfere with the operation or enforcement of, the federal law, the statute of Missouri was not superseded. Compare *Savage v. Jones,* 225 U. S. 501, 533." [114]

Mr. Justice Butler, in his dissenting opinion, contented himself with stating, somewhat enigmatically, that:

"I do not disagree with the majority that the Federal Grain Futures Act has not superseded the statutes of Missouri applicable to these transactions." [115]

The Grain Futures Act does not, either in its entitling or its general content, purport to govern all sorts of transactions in grain. "Cash" transactions, sales of actual grain for deferred delivery, and some transactions negotiated off exchanges, are outside of its scope. Another federal statute establishes official grain standards and provides for inspection.[116] The Grain Futures Act covers only future contracts in grain executed by or through exchange brokers. Significant of its purpose is the declaration that future contracts in grain are "affected with a national public interest," that quotations of prices on exchanges are of importance to producers and consumers and facilitate the movement of grain in interstate commerce, that future contracts are used as price insurance by dealers and millers, and that regulation is imperative to prevent detrimental fluctuation in grain prices as a result of "speculation, manipulation, or control." [117]

The Act is so constructed that all future contracts in grain entered

114. See Dickson v. Uhlmann Grain Co., *supra* note 1, at 198-200.

115. *Id.* at 206.

116. The Grain Standards Act, 39 STAT. 482 (1916), 7 U. S. C. §§ 71-87 (1926); *cf.* The Cotton Standards Act, 42 STAT. 1517 (1923), 7 U. S. C. §§ 51-65 (1926). For a forceful exposition of the view that the warehousing of grain in terminal markets is closely related to future dealing and an integral part of the problem of control of exchanges, see GOLDSTEIN, *op. cit. supra* note 14, *passim,* especially 280.

117. Grain Futures Act, *supra* note 109, § 3.

into on exchanges are brought under federal supervision. It is made a misdemeanor to execute a future contract in grain except through a member of an exchange which has been designated by the Secretary of Agriculture as a "contract market," if such a contract "is or may be used for (a) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped, or received in interstate commerce for the fulfillment thereof. . . "[118] The Secretary of Agriculture is empowered to designate an exchange as a "contract market" only when the exchange is "located at a terminal market where cash grain of the kind specified in the contracts of sale of grain for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the differences in value between the various grades of grain . . . ," and when the governing board of the exchange provides for the making of certain reports to the Secretary, for the prevention of false market reports, manipulation and cornering, and for the admission to membership of cooperative associations of producers.[119] Mechanism is provided for designations and suspension and revocation of designations as "contract markets," and for the excluding from the privilege of dealing on such markets of individuals who have violated the Act.[120]

In considering the effect of this statute upon state statutes and rules of decision governing speculation in grain, two distinct questions should be considered: (1) does the Act legalize all contracts which comply with the terms of the Act? (2) to what extent does the Act "occupy the field" of dealing in grain futures to the exclusion and supersession of state statutes?[121]

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118. *Id.* § 4. The Act also permits "future contracts" where the seller is the owner or grower of the actual grain which forms the subject-matter of the contract, or where either party owns or rents the land on which the grain is to be grown. Contracts within the permission of this section are not true future contracts, but mere "sales to arrive," or "sales for deferred delivery." See note 9, *supra.*

119. Grain Futures Act, *supra* note 109, § 5. The constitutionality of the provisions requiring reports to the Secretary of Agriculture has recently been upheld. Bartlett Frazier Co. v. Hyde, 65 F. (2d) 350 (C. C. A. 7th, 1933), *cert. den.* by the Supreme Court, October 9, 1933.

120. *Id.* § § 8, 9. A commission composed of the Attorney-General and the Secretaries of Agriculture and Commerce is authorized to suspend exchanges from their designations as "contract markets" in case they fail to comply with the Act. The commission's orders are reviewable in the federal Circuit Courts of Appeals. The Circuit Court of Appeals for the Seventh Circuit on October 31, 1933, set aside an order of this commission made in 1932 suspending the Chicago Board of Trade for sixty days. See Wash. Evening Star, Oct. 31, 1933, at A-3.

121. The cases cited note 112, *supra,* hold that all contracts made through members of contract markets and executed on contract markets are exempt from the operation of

The first of these questions Mr. Justice Brandeis answered unqualifiedly in the negative. Despite the able opinion to the contrary of Judge Burch of the Supreme Court of Kansas,[122] analysis of the provisions of the Act undoubtedly supports the Justice's conclusion. The sole requisite of validity for ordinary future contracts which the Act establishes is that they be "made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market' . . . "[123] It is plain that all future contracts on important exchanges come within the sanction of this clause.[124] But it is also clear that many types of future contracts, distinct from orthodox speculation, which courts and economists have been at one in condemning may also be made through members of "contract markets." Contracts made with the purpose of "cornering" the market are not only void on common-law principles,[125] but are, undoubtedly, forbidden by the Sherman Anti-Trust Act.[126] "Puts," "calls" and "straddles"[127] have long been recognized as of doubtful legitimacy,[128] and have frequently been condemned by exchange rules.[129] The modern method of bucketing involves contracts executed by or through members of "contract markets."[130] The Act nowhere declares contracts of the foregoing type invalid, and all come within the sanction of the "contract market" clause. Yet it is unthinkable that Congress intended to legalize bucketing con-

state laws, and are enforceable if the terms of the Grain Futures Act have been complied with. If this is sound, it follows that the Act determines the validity of all future contracts, for it is declared to be unlawful to enter into future contracts which are not to be executed in this manner.

122. State v. J. Rosenbaum Grain Co., *supra* note 111.

123. Grain Futures Act, *supra* note 109, § 4. See note 112, *supra*.

124. All important grain exchanges in the United States have been designated "contract markets."

125. *In re* Chandler, *supra* note 14; Sampson v. Shaw, 101 Mass. 145 (1869); Raymond v. Leavitt, 46 Mich. 447, 9 N. W. 525 (1881); Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499 (1889).

126. United States v. Patten, 226 U. S. 525 (1913).

127. For a brief description of these forms of trading, which are commonly referred to as "indemnities," "privileges," or "options," see Legis. (1932) 45 HARV. L. REV. 912, 921, n. 41.

128. See ILL. REV. STAT. (Cahill, 1931) c. 38, § 308; OHIO GEN. CODE (Page, 1932) §§ 13069-70; Lane v. Logan Grain Co., *supra* note 85. Section 3 of the Future Trading Act subjected "options" to a prohibitive tax. See note 109, *supra*. This section of the Act was held unconstitutional in Trusler v. Crooks, *supra* note 109. It has been said that "options" may "serve a legitimate purpose as insurance against fluctuations, but are commonly used by small speculators who cannot finance ordinary trading." Legis. (1932) 45 HARV. L. REV. 912, 921, n. 41. The code submitted by the grain exchanges under the National Industrial Recovery Act forbids all indemnities to endure longer than the closing of the market the day following the sale of the indemnity. See N. Y. Times, Aug. 10, 1933, at 4.

129. See (1930) REP. GRAIN FUTURES ADMINISTRATION 14.

130. See note 104, *supra*.

tracts, or cornering.[131] There can be no doubt that Congress recognized that to lay down a complete set of rules governing the validity of all future contracts in grain would be a highly complex task; the Grain Futures Act was not intended to serve any such purpose.

The extent to which the Act "occupies the field" is at once a more significant and a more difficult question.[132] The effect of federal statutes on state laws in fields in which the federal and state governments possess concurrent powers of legislation has proved to be a question in the determination of which precedents are of little value. It is, however, well settled that the mere fact of federal enactment in a concurrent field does not necessarily involve supersession of all state legislation in that field.[133] Congress may "circumscribe its regulation and occupy a limited field." [134] The Supreme Court has repeatedly emphasized that a federal statute will not be held to supersede existing state legislation unless such intent on the part of Congress is clear.[135] But for all this, it is beyond dispute that, where a federal enactment indicates a specific purpose, or declares a definite policy, state statutes and rules of decision which in any way tend to obstruct such a purpose or defeat such a policy are superseded.[136]

It is clear from the language, legislative history, and the subsequent judicial interpretation of the Grain Futures Act that its purpose was to enunciate the principle that dealings in grain futures on exchanges have become of immense public importance, and to provide a mechanism for the supervision of such dealings and for the prevention of abuses in trading practices. These practices themselves are subjected to no legislative condemnation; it is their abuse which it is the aim of the Act to prevent. In many ways the Act must be regarded as recognizing the

131. The Congressional debates seem to demonstrate conclusively that the primary intention of Congress was to prevent manipulation of prices by future trading "operations," 62 CONG. REC. 9434, 12723. Apparently the authors of the bill felt that it neither legalized nor illegalized speculation. *Id.* at 9404, 9434. Throughout the House debates it is clear that no two Congressmen had the same conception of the meaning of "gambling" or "speculation," or of the distinction between the two. *Id.* at 9403-9450.

132. Upon this question the Congressional debates are not illuminating. Representative Newton of Minnesota did state that the bill would annul state laws regulating grain futures, and to this comment there was no rejoinder. 62 CONG. REC. 9429. There are some traces of a specific intention to protect "hedging," but they are not convincing. *Id.* at 9404.

133. Mintz v. Baldwin, 289 U. S. 346 (1933); Atchison, Topeka & Santa Fe Ry. Co. v. Railroad Commission of California, 283 U. S. 380 (1931); Carey v. South Dakota, 250 U. S. 118 (1919); Savage v. Jones, 225 U. S. 501 (1912).

134. Atchison, Topeka & Santa Fe Ry. Co. v. Railroad Commission of California, *supra* note 133, at 392.

135. See cases cited note 133, *supra.*

136. This is so even where the federal statute does not completely "occupy the field" if the state statute obstructs its operation within the limited field. See Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 10 (1888); Mintz v. Baldwin, 2 Fed. Supp. 700, 705 (N. D. N. Y. 1933), *aff'd,* 289 U. S. 346 (1933).

necessity and desirability of orthodox trading in grain futures. It recognizes the widespread use of exchange quotations in determining the price of grain in contracts involving producers and consumers. It recognizes the use of future contracts by millers and dealers to protect themselves against loss through price fluctuation by "hedging." It requires that "contract markets" conduct cash grain sales in sufficient volume to reflect prices accurately, a provision which is obviously for the purpose of promoting correlation between cash and future prices. This correlation is essential to successful "hedging."[137]

It seems to the writer that, if the Act is read with an eye to realities, one must come to the conclusion that its effect is to sanction and to protect from abuses ordinary speculation on exchanges. "Hedging" as it is now carried on depends for its success upon the continuance of a speculative market of some breadth.[138] Grain quotations are useless as price determinants unless the speculation from which they arise is of sufficient volume to reflect a concensus of informed opinion concerning the value of grain. Certainly it was most infelicitous to describe as "affected with a national public interest" a huge section of the nation's business, if there was no intent to recognize that business as legitimate so long as conducted free from the malpractices which it was the purpose of the Act to prevent. The language and spirit of the Act alike warrant the conclusion that its purpose is to regulate an important, necessary and legitimate branch of national activity.[139]

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137. See HUBBARD, *op. cit. supra* note 110, at 333-74; Legis. (1932) 45 HARV. L. REV. 912, 919, n. 31, 922, n. 47.

138. The precise extent to which "hedging" depends upon the coexistence of speculation is a matter of some doubt. Mr. Hubbard has estimated that, in normal times, purely speculative contracts comprise only some 25% of the total volume of trading on the cotton futures market. HUBBARD, *op. cit. supra* note 110, at 322, 433. If "hedging" really constitutes so large a fraction of the cotton futures market it may be that speculation is not always essential to successful cotton "hedging." But Mr. Hubbard admits that speculators frequently provide merchants with the means of shifting the risk of loss through fluctuations in price. *Id.* at 311. It is probable that, in the grain market, the amount of speculation relative to the total volume of market operations is higher than the estimate given by Mr. Hubbard, and that "hedging" contracts alone would not supply a broad enough market for "hedgers." *Cf.* HOFFMAN, *op. cit. supra* note 103; EMERY; HOFFMAN, both *op. cit. supra* note 17.

139. In view of the fact that the authors of the Grain Futures Act did not intend to legalize "gambling" or "speculation," it may be urged that the Act should be so construed as to leave the states free to impose such restrictions or prohibitions, in addition to those established by the federal Act, as they see fit. To this argument two answers may be given: (1) State statutes invalidating ordinary future contracts constitute a direct burden on interstate commerce. It is true that the contrary should logically follow from a decision of the Supreme Court upholding a state tax on the business of dealing in cotton futures. Ware & Leland v. Mobile County, 209 U. S. 405 (1908). But such a corollary would seem to have been overruled by Board of Trade of Chicago v. Olsen, *supra* note 109, which accepts as the basis of decision the declarations in Section 3 of the Grain Futures

If the above analysis of the scope of the Act is correct, the principles upon which the second question should be answered are fairly clear. State laws governing the legality of dealing in futures and the validity of future contracts should not be held superseded by the federal Act as long as they do not operate to obstruct and hinder orthodox speculation. No doubt the states may still penalize bucket-shops and invalidate bucketing contracts. Certainly contracts known to the parties to be made with a view to "cornering" the market may be denied enforcement. Probably the states may still forbid forms of future contracts which are of doubtful utility and legitimacy, such as "puts" and "calls." But statutes which, as construed by the courts, invalidate future contracts merely because one or both of the parties intends to execute counter-transactions should be held to be superseded by the Act, for such statutes in effect penalize ordinary dealing in futures, invalidate hedging, and obstruct the purpose of the federal statute. Were such statutes completely enforced, no exchange would have dealings in sufficient volume to reflect prices accurately. Hedging, in its present form, would no longer be possible. And the abuses against which the Act is directed would be much easier to perpetrate as a result of the infinitely reduced volume of trading.

It is difficult to determine the precise extent to which the *Uhlmann* case must be regarded as determinative of the foregoing questions. In view of the rest of the decision, all that it was necessary to hold was that the federal Act does not validate future contracts which are not made on "contract markets."[140] It seems unfortunate that more than this was said or implied without manifesting appreciation of the practical implications of the problem. The Missouri statute which was said to be in no way superseded by the Grain Futures Act is an example of the numerous state statutes declaring or reinforcing the common-law rule of "intent to deliver" which, if enforced, would render speculation impossible, hedging illegal, and subject all brokers to criminal liability. It is safe to say that 95% of the future contracts executed on the Kansas City Board of Trade, which has been designated a "contract market," violate the Mis-

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Act. *Contra*: Fenner v. Boykin, *supra* note 104. That the effective prohibition of "hedging" would greatly hinder the business of merchants, millers, shippers and warehousemen of grain there can be no doubt. The mere fact that no specified grain necessarily moves in interstate commerce when a future contract is made does not mean that the making of such contracts may not be essential to the moving of the grain crop as a whole. Even in the absence of federal enactment the state gambling statutes as ordinarily construed should be declared invalid, and the old decisions of the Supreme Court upholding such statutes on the basis of the state's police power in local matters should be overruled. The grain trade has outgrown them. (2) The proper functioning of the administrative machinery established by the Act, and the Act's expressed purpose and tenor, should outweigh expressions of opinion in Congressional debates.

140. Such was the decision in State v. Christopher, *supra* note 77.

souri statute, and that every broker in the state is a criminal under its terms. Yet Mr. Justice Brandeis said that "there is nothing in the state law which is inconsistent with, or could conceivably interfere with the operation or enforcement of the federal law. . ." [141] It is difficult to conceive of a statute which would more completely thwart the purposes of the Act than would the Missouri statute if enforced in all cases. It is to be hoped that the final word on this question remains to be spoken.

Conclusion

Analysis of the Supreme Court's determination of the *Uhlmann* case leads to the conclusion that, in order to grasp its true importance, it is necessary to look beyond the facts which have heretofore been considered legally significant. The apparent irrelevancy of many of the circumstances which were emphasized and the utter impossibility of establishing any logical relation between the factual premises and the conclusions drawn therefrom alike suggest that new currents of thought are flowing beneath the surface. Apparently it is from the facts detailed in the opinion which, viewed in the perspective of established concepts, seem most egregiously lacking in pertinency that the guiding considerations may be discovered.

It may be illuminating, therefore, to return to Carrollton and McDonough's newly opened office in the basement of the Flowers Hotel. Conceding all that economists have ever said in defense of speculation as a part of our national business machinery, it cannot be denied that that office was a plague and a pest to the community of Carrollton. McDonough adopted aggressive tactics in persuading a class of people whose capital was entirely inadequate to warrant their indulging in speculation to become customers of the firm. One of the defendants was induced to speculate although McDonough knew him to be already in debt to the local bank.[142] Apparently very few of the Carrollton customers started to speculate on their own initiative. Their action was in many instances due to prospects of "easy money" dangled before them by the branch manager.[143] Few of them had had any experience in dealing in grain or had access to the sort of information which is essential if trading in futures is to be pursued on any basis more intelligent than the turn of a coin. Some of them seem to have left the trading entirely

141. Dickson v. Uhlmann Grain Co., *supra* note 1, at 200. Mr. Justice Brandeis' traditional reluctance to find state action foreclosed by circumscribed federal legislation in a concurrent field may explain his care to insert this elaborate dictum into the opinion. Cf. Frankfurter, *Mr. Justice Brandeis and the Constitution* (1931) 45 HARV. L. REV. 33, 73-75.

142. Transcript of Record, 147-48.

143. See p. 63, *supra*.

under McDonough's control.[144] After initial losses occurred, the customers were egged on to continue speculating by renewed exhortations to the effect that eventual profits were inevitable.[145] The president of the Uhlmann Company flatly told several of the defendants that there would be no further losses.[146]

There can be little doubt that these factors weighed heavily in the Court's determination of the case. The impecunious and inexperienced character of the clientele, and the questionable tactics adopted by the plaintiff [147] certainly furnished strong moral and social grounds for refusing to enforce the contracts made in the particular case. But if such particular circumstances were indeed determinative, it is clear that pre-existing criteria of the validity of future contracts have been largely abandoned. On this new basis, it would seem that a court must inquire thoroughly into the methods of obtaining business pursued by the broker, the nature of the margin requirements, and the representations made to the customers concerning the state and probable course of the market, as well as considering carefully the financial status of the customers and the extent of their experience with dealing in futures.

This new technique for determining the validity of future contracts may be called the "standard of particular circumstances." It is clearly a technique designed to achieve justice conceived in terms of particular cases in litigation. In its favor, there can be no denying that to substitute a flexible rule based upon the attitude which a court or a jury may take toward the economic and moral factors involved in each case is a distinct step forward. The test of "intent to deliver" stood in no intelligible relation to the problem whatsoever. Logically applied, it invalidated all future contracts. As it worked out in practice, its effect was hit-or-miss. The "standard of particular circumstances" at least involves an attempt to evaluate and weigh the circumstances of each case in terms of social and economic welfare.

Clearly, too, some steps must be taken for the protection of the gullible and the inexperienced. The past eighty years have amply demonstrated that the general public is easily enticed into the field of

144. Transcript of Record, 152-55.

145. *Id.* at 144, 147.

146. C. T. Dickson, a defendant, so testified. *Id.* at 160.

147. The reasons which prompted the Uhlmann Grain Company to invade Carrollton are not difficult to surmise. The charge for providing main wires from exchanges to distant cities is necessarily considerable, but telegraph companies will furnish "loops" off the main wire to other points near the end at a comparatively small additional charge. Thus firms maintaining wires from New York to Boston commonly maintain branch offices on these "loops" at such cities as Lowell and Providence. There can be little doubt that the Uhlmann Company put in the "loop" to Carrollton in the hope of defraying some of the expenses incidental to maintaining the central wire from New York to Kansas City.

speculation. Men need some organized restraint upon their tendency to gamble as much as upon their inclination to drink. And brokers stand in need of regulation of their dealings with the public as much as do the merchants of securities. Both are fields in which the parties cannot safely be left responsible only to the law of offer and acceptance and their own consciences.

Yet, granting all this, the wisdom of regulating the methods of brokers and penalizing aggressive practices by utilizing the power of a court to refuse to enforce future contracts is doubtful. In the first place, experience has shown that it is highly ineffectual. People in general have sufficient respect for the obligation of contracts, and enough sense of shame in playing the "welcher" so that, by and large, they are reluctant to interpose the plea of illegality. Brokers have in great measure minimized the risk of repudiation by tightening up on their margin requirements and making discreet inquiries concerning the temperament of their customers. It is possible that this has operated to shut out some of those who have no business to speculate, but it is very doubtful if such an effect has been marked. Meanwhile the volume of speculation has increased apace, and the classes which engage in it have broadened remarkably.

Furthermore, it is not good for the business morals of the community to leave the sanction against ill-advised and eager trading practices to be imposed by repudiation of contract obligations. It leaves a customer who has good reason to feel that he has been unwarrantably dealt with at peril of incurring scorn and reproach if he pursues the only avenue of redress open to him. The benefits of the "standard of particular circumstances" would most often be received by those who least deserved to benefit by it, and who would be most prone to fashion sham defenses. It is undignified that those who do not regard their obligations should be the guardians of the public welfare. Penalties against unfair brokerage methods should be imposed by those who do not stand to profit by the imposition.

Most important of all, however, is the complex nature of the problem. If the "particular circumstances" are to be the test of legality, who is to be the judge thereof? Is the jury to take all the factors into consideration and determine whether the contracts in litigation were conscionable or unconscionable? Is the judge to decide as a matter of law that, on the basis of certain evidence if believed by the jury, the contracts are valid, and on the basis of other evidence the contracts are invalid? Which of the numerous circumstances that have been suggested as pertinent, such as solicitation, market representations, and financial status of the customer, are to be decisive? Clearly the "standard of particular circumstances" posits the development of a whole new body of law. If the development of this field of the law is left wholly to the courts, it will be more decades before men can discover what contracts are valid and why. In the meantime, the confusion and uncertainty which now prevail will persist, and litigation will increase. Trial of the cases will be even more protracted than it now is. Immense areas of collateral fact will be opened up. Perjurious and sham defenses will be encouraged. Plainly the standard is not one which the courts can develop with facility.

These considerations suggest that regulations governing the relations of commission brokers on exchanges with their customers and establishing standards of proper dealing should be left to the legislatures to formulate, and to administrative agencies to enforce. It is true that the framing of these rules will be a complicated and difficult task. What sort of penalities may most suitably be imposed is a question as yet unanswered. It is possible that statutes requiring the licensing of all commission brokers and providing for the making of reports covering the occupations and resources of customers, and their volume of trading and market experience would be the most feasible avenue of approach. Such licenses could be subject to suspension where it appeared that the broker was permitting his customers to trade out of all proportion to their resources, or was inducing custom by representing the state of the market in terms more colorful than cautious. Doing business without a license might be made a criminal offense, and it might well be provided that contracts made through an unlicensed broker should be void. Possibly solicitation of business should in itself be a ground for suspending licenses.[148] Such provisions would be more flexible in application and more easily enforced than statutes making the unfair trading practices themselves criminal offenses. Any such solution of the problem necessitates the creation of new administrative agencies, and the development of new administrative technique. But if the exchanges themselves cannot or will not effectively regulate the relations between broker and customer, government control seems inescapable.

Insofar as the decision in the *Uhlmann* case may bring these and related problems to the attention of legislators and the legal profession, it is to be welcomed. On the other hand, it is sufficiently clear that the facts of the case were misconstrued. It is conceivable that such misconstruction was a smoke-screen laid down in an effort to reach a result which the Court felt imperative under the circumstances, and yet difficult to achieve with due regard to precedent. The writer has sought to show both that the same result could have been reached without such a strained construction of the facts, and that the conception sub silentio of an entirely new standard of legality was ill-advised. Apart from either of these considerations, however, it is to be regretted that the

148. See Patterson, *supra* note 6, at 880; *cf.* Clark v. McNeill, 25 F. (2d) 247, 249 (C. C. A. 6th, 1928).

most probable effect of the decision will be to add confusion to uncertainty. Far too many cases have already been decided by judges who did not present an intelligible analysis of the test of "intent to deliver." In the wide field of commercial dealings characterized as "speculative," certainty and predictability in applying the law are of prime importance. The *Uhlmann* case does not help to clear the air.