



1939

## Constitutional Law

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a citizen didn't have the right to take his appeal to a Court of Justice.

Many illustrations of the need for such a law are found in the administration of the Wagner-Labor Act,—undoubtedly the President hopes to improve that by his new appointment to the Board, but that simply accentuates the fact that the question is still one of men and not of law. The passage of this act would protect the citizen—men may change, but the guaranty of justice does not. Its defeat means a surrender of principles upon which this country was founded. Every Man is entitled to his day in Court—before a regular judicial tribunal.

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### CUSTOMS AND COMMERCE COMMITTEES

Chicago, Illinois — Membership of the Committee on Commerce and the Committee of Customs Law of the American Bar Association was announced today by Jacob M. Lashly, of St. Louis, Missouri, President of the Association.

The Committee on Commerce is headed by Oscar C. Hull, Chairman, of Detroit, Michigan, and the other members are Thurlow M. Gordon and George S. Leisure, of New York; Nathan William MacChesney of Chicago; and Jesse R. Smith of Washington, D. C.

The Customs Committee is: Albert MacC. Barnes of New York City, Chairman; Frederick W. Dallinger and Thomas M. Lane of New York City; Joseph R. Jackson of Washington; and George R. Tuttle of San Francisco.

The Committee on Commerce studies existing and proposed Federal and State laws pertaining to or affecting interstate or foreign commerce. The second committee has in its charge consideration of legislation affecting customs.

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### NOTICE TO MEMBERS

Individual nominations for a member of Bar Board to be elected in December can be filed with your secretary not later than December 10th. Petitions must be signed by not less than ten members.

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### LAW BOOKS

Have an inquiry from a member who wants to purchase Volumes 134 to 200 inclusive of the Pacific Reporter. Advise the Editor.

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### CONSTITUTIONAL LAW

Constitutional Law — Presumption and Construction in Favor of Constitutionality — Distribution of Governmental Powers

and Functions.—Action for an injunction to restrain the State Auditor and Treasurer from dispensing with a \$35,000 appropriation provided for under the Recodification Act. (N. D. Laws 1939, c. 110, § 9). The basis of the suit is that such Act is unconstitutional and void in imposing on the court judges duties other than judicial in nature, and conferring powers in violation of Section 96 of the state constitution. The forum in determining the powers of the Supreme Court on this issue, was composed of five district court judges, sitting as the Supreme Court. Held, the court failed to obtain a verdict, so the Act was affirmed as constitutional by operation of law. Application was granted in part. The majority of the court felt that Section 9 of the Recording Act (Providing for the printing of the report of the commission) imposed on the Supreme Court administrative powers not connected with the functions of the judiciary, and that therefore the Act was unconstitutional. The minority admitted that Section 9 was void, but held that it did not affect any duties directed to be done under the remainder of the Act. *State ex rel. Mason v. Baker, State Auditor, et al.*, 288 N. W. 202 (N. D. 1939).

A statute must, if possible, be construed as constitutional. *Wood v. Byrne*, 60 N. D. 1, 232 N. W. 303 (1930). It must be sustained unless invalid beyond a reasonable doubt. *State ex rel. Cleveringa v. Klein*, 63 N. D. 514, 249 N. W. 118 (1933); *Baird v. Gray*, 63 N. D. 640, 249 N. W. 718 (1933). When a statute is capable of two constructions, one of which would render it valid, and the other invalid, the construction which would uphold it must be adopted. *McCarty v. Goodman*, 39 N. D. 389, 167 N. W. 503 (1918). Here two of the judges are of the opinion that the act is within the constitution, and cannot therefore be declared unconstitutional. Section 89 of the North Dakota Constitution as amended (N. D. Laws 1919, Art. 25, p. 503) provides that in no case shall any legislative enactment be declared unconstitutional, unless four of the five judges of the Supreme Court shall so decide. *Daly v. Beery*, 45 N. D. 287, 187 N. W. 104 (1920); *Wilson v. Fargo*, 48 N. D. 447, 186 N. W. 263 (1921). Two other states also have statutes requiring a greatly increased majority in the Supreme Court to declare a law unconstitutional. The Constitution of Ohio (1912) Art. IV, Sec. 2, provides that no law shall be held to be unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges. A concurrence of six of the seven members of the Supreme Court is necessary to declare a law unconstitutional. *Barker v. Akron*, 98 Ohio St. 446, 121 N. E. 646 (1918); *State v. Smith*, 102 Ohio St. 591, 159 N. E. 564 (1921); *Royal Green Coach Co. v. Public Utilities Commission*, 110 Ohio St. 41, 143 N. E. 547 (1924); *State ex rel. Bryant v. Akron Metropolitan Park District*, 120 Ohio St. 464, 166 N. E. 407, 66 A. L. R. 1460 (1929). The Nebraska Constitution, Art. V, Sec. 2, provides in part: “. . . the supreme court shall consist of seven judges . . . no legislative act shall be held unconstitutional, except by the concurrence of five of the seven judges. . .” The constitutionality of the North Dakota amendment is not assailed here, nor is it denied that the question of its

feasibility is debatable. The cases construed under it are merely considered in an attempt to determine the results which have been accomplished. It is found that since the amendment thirty-five cases have come before the Supreme Court for an interpretation as to constitutionality. Thirty of these cases were held to be constitutional by the necessary majority of the judges; twenty were so decided by the unanimous decision of the court. Contrawise, four of the five cases which were invalidated by the decision of the court were done so unanimously. Only three instances are on record in North Dakota in which a law has been upheld by reason of a failure to obtain the necessary concurrence of the judges. *Daly v. Beery*, 45 N. D. 287, 178 N. W. 104 (1920); *Wilson v. Fargo*, 48 N. D. 447, 186 N. W. 263 (1921); *State ex rel. Sathre v. Board of University and School Lands*, 65 N. D. 682, 262 N. W. 60 (1935). In effect then, eighty-six per cent of the acts which have been construed have been upheld as constitutional, by opinion of the court. This leaves, out of a total of thirty-five cases, only eight per cent which have failed to obtain the necessary concurrence, and have passed by operation of this amendment. The amendment, therefore, is not a threat to the presumption of constitutionality. Rather, it is meritorious in furthering that presumption. The effect of the amendment is to limit the powers of the court to declare a law unconstitutional. So far nothing of extraordinary importance has been accomplished by requiring this increased majority in the court on questions of constitutionality. *Cushman, Constitutional Decisions by a Bare Majority of the Court*, 19 Mich. L. Rev. 771 (1920). But, the amendment may be defended on several grounds. It takes the power of invalidation out of the hands of one or two individuals, it operates as a substantial check upon the exercise by the courts of the power to invalidate laws; thereby fewer statutes will be declared unconstitutional, it tends to increase the popular confidence in the court, and stimulates new respect for its decisions on constitutional questions.

KENNETH M. KNUTSON,  
Second Year Law Student.

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### TRUST RECEIPT

Trust Receipt — Chattel Mortgage, Conditional Sale, Bailor-Bailee Relationship. — An automobile manufacturer transfers title to an acceptance corporation of a number of cars. These cars are then delivered to a retailer who in turn gives a so-called trust receipt to the corporation which specifies that the cars belong to the corporation with power to the retailer of merely displaying them with no authority to sell until the purchase price is remitted to the holder of the "trust receipt." Attached to the "trust receipt" is a promissory note in favor of the corporation. The retailer makes a sale of one of the cars and deposits the money in the bank and writes a check to the corporation. In the meantime the retailer dies and the bank refuses to honor the check,