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Article 3

Notes and Comment

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Aliens: Naturalization of alien enemies.—Section 2171 of the Revised Statutes of the United States provides that: "No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty, with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States." In time of peace this section is, of course, unimportant. The first application of the section, at least in the case of the present war, was in *Matter of Meyer, 100 Misc. (N. Y.) 587 (1917)* in which the applicant for citizenship had long before April 6th, 1917, declared his intention of becoming a citizen, and on the date of the declaration of a state of war between the United States and Germany he made application to be admitted to citizenship. The court held that since the applicant was a German subject he came within the section above quoted and that he could not be admitted. His application was not denied, however, but was merely postponed until the close of the war.

It is interesting to note that when this section was originally enacted in 1813,[1] it contained also the following provision: "But persons resident within the United States, or the Territories thereof, on the eighteenth day of June, in the year one thousand eight hundred and twelve, who had before that day made a declaration, according to law, of their intention to become citizens of the United States, or who were on that day entitled to become citizens without making such declaration, may be admitted to become citizens thereof, notwithstanding they were alien enemies at the time and in the manner prescribed by the laws heretofore passed on that subject." Thus this section enabled persons who before the war had made the preparatory declaration to become citizens in the same manner as if war had not intervened.[2] Of course this part of the section was only applicable to the War of 1812, between the United States and Great Britain, and is now rendered obsolete. No such provision allows the naturalization to-day of an alien enemy who has merely made the necessary declaration of an intention to become a citizen.

Fred S. Reese, Jr., '18.

Bills and Notes: Negotiability: Effect of provision for extension of time of payment.—The Negotiable Instrument Law provides that "An instrument to be negotiable must conform to the following requirements: * * * (3) Must be payable on demand or at a fixed or determinable future time,"[1] and that, "An instrument is payable at a determinable future time within the meaning of this act, which is expressed to be payable: (1) At a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happen-

[1]Act of July 30, 1813, ch. 36, 3 Stat. L. 53.
[2]*Ex parte* Newman, 2 Gall. (U. S. C. C.) 11 (1813).
[1]Code Supp. of Iowa, 1913, sec. 3060a1; Brannan's Neg. Inst. Law, Tit. I, Art. I, sec. 1, subd. 3.

ing be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."[2] In the case of *Cedar Rapids Nat. Bank v. Weber, 164 N. W. (Ia.) 233 (1917)*, it was held that a provision in a note, otherwise negotiable, by which all the parties, "including sureties, indorsers, and guarantors" consented "to extensions of time on this note," rendered the note non-negotiable, as being uncertain as to the time of payment within the meaning of the above sections. The court held that the effect of the provision was binding upon all parties to the note, especially the maker, payee and holder.

It being a rare conincidence to have two notes with identically the same provisions for extensions of time, there has arisen a conflict of authority, more apparent than real, respecting the effect of such provisions upon negotiability.

If the instrument gives the party primarily liable the right to indefinitely extend the time of payment the note is rendered non-negotiable for uncertainty as to the time of payment.[3] However, it seems to be the general rule that a provision for a definite or limited extension at the option of the party primarily liable does not affect the negotiability of a note.[4]

But where the provision of the note makes it optional with the holder and not the maker to extend the time of payment, there is a conflict of authority as to the effect of such a provision upon the negotiability of the note. The case of *First National Bank v. Buttery*[5] ably presents the view that the negotiability of a note is not destroyed by a provision granting the holder the option of indefinitely extending the time of payment, and this view finds considerable support in other jurisdictions.[6] *Smith v. Van Blarcom*[7] is one of the leading cases supporting the contrary doctrine to the effect that where the holder has an option to indefinitely extend the time of payment, the note is rendered non-negotiable for uncertainty. Where the holder is given only an option to make a definite or limited extension the note is generally held negotiable.[8]

In some jurisdictions, the effect of a provision for an extension of time is made to turn upon whether such an extension may be or is to be made before maturity, or whether it is to be made at or after maturity.[9] If before maturity, then the note is said to be non-

[2]Code Supp. of Iowa, 1913, sec. 3060a4; Brannan's Neg. Inst. Law, Tit. I Art. I, sec. 4.

[3]Citizens Nat. Bank v. Piollet, 126 Pa. St. 194 (1889); Rosville State Bank v. Heslet, 84 Kan. 315 (1911); Union Stockyards Nat. Bank v. Bolan, 14 Idaho 87 (1908); Woodbury v. Roberts, 59 Ia. 348 (1882); Daniel on Negotiable Instruments, sec. 47.

[4]*Supra*, note 3; Anniston L. & T. Co. v. Stickney, 108 Ala. 146 (1895).

[5]17 N. D. 326 (1908).

[6]City Nat. Bank v. Goodloe-McClelland Comm. Co., 93 Mo. App. 123 (1902); Nat. Bank of Commerce v. Kenney, 98 Tex. 293 (1904); Longmont Nat. Bank v. Lonkonen, 53 Colo. 489 (1912); Note, 125 Am. St. Rep. 201; Note, Ann. Cas. 1914 B, 210.

[7]45 Mich. 371 (1881). See also Woodberry v. Roberts, 59 Iowa 348 (1882); Glidden v. Henry, 104 Ind. 278 (1885); Second Nat. Bank of Richmond v. Wheeler, 75 Mich. 546 (1889); Note, 17 Ann. Cas. 55; Note, 31 L. R. A. 234.

[8]Capron v. Capron, 44 Vt. 410 (1872); State Bank of Halstad v. Bilstad, 136 N. W. (Ia.) 204 (1912); but see Miller v. Poage, 56 Ia. 96 (1881).

[9]First Nat. Bank v. Stover, 155 Pac. (N. M.) 905 (1916).

negotiable for uncertainty as to the time of payment.[10] If the extension is to occur after maturity it is held not to affect negotiability, for the note becomes non-negotiable by operation of law at maturity.[11]

In the principal case, the provision in the note was as follows: "All parties to this note, including sureties, indorsers, and guarantors, hereby severally waive presentment for payment, notice of non-payment and protest, and consent to extensions of time on this note." In reference to this provision the court said: "We gather from the great weight of authority that, where the provision of the note amounts to an agreement by the parties to the note for an extension to an indefinite time, the negotiability of the note is thereby destroyed. The language of the note in suit contains a provision by which the maker, payee, sureties, indorsers and guarantors consent to an extension of time of payment. This language is binding upon the payee, the holder, and the maker. *If the maker demands an extension of time, by the terms of the instrument the payee has consented thereto.*"[12] Mueh has been written dealing with like provisions, but nowhere has there been taken a clear distinction between provisions for an extension, that is, where the parties agree that an extension *may* be made, and provisions to extend, where the extension itself is made by the language of the provision.

The provision in the note of the principal case would clearly not of itself effect an extension, but was an agreement that an extension might be made. The question then arises whether in such a circumstance it shall make the time of payment so uncertain as to cause the note to be non-negotiable. The court held that the language in the principal case made it mandatory or binding upon any party, including the holder, to grant the other an extension if demanded. Is it the necessary result of the language of the provision to say that the payee or holder was bound to grant an extension if demanded? If the language is construed literally, this question may perhaps be answered in the affirmative. If that is the conclusion reached, then the note would be non-negotiable within the scope of the rule that if the instrument gives the party primarily liable the right to indefinitely extend the time of payment, the note is rendered non-negotiable for uncertainty as to the time of payment. But in construing this and similar provisions the intent of the parties who framed the instrument must be looked to. The courts are uniform in their holding that such provisions are inserted for the express purpose of preventing those who are secondarily liable from being released by an extension without their consent.[13] And, with this purpose in mind, it is not difficult to construe the language used as including only parties who are secondarily liable, who are the sureties, indorsers and guarantors,—

[10]Rosville State Bank v. Heslet, *supra*, note 3; Matchett v. Anderson Foundry & Mach. Works, 29 Ind. App. 207 (1902); Union Stockyards Nat. Bank v. Bolan, 14 Idaho 87 (1908); Stitzel v. Miller, 250 Ill. 72 (1911); Missouri-Lincoln Trust Co. v. Long, 31 Okla. 1 (1911); De Groat v. Focht, 37 Okla. 267 (1913).

[11]Stitzel v. Miller, *supra*, note 10; Navajo County Bank v. Dolson, 163 Cal. 485 (1912); Bank of Whitehouse v. White, 191 S. W. (Tenn.) 332 (1917); First Nat. Bank v. Stover, *supra*, note 9; Coffin v. Spencer, 39 Fed. 262 (1889).

[12]Italics are the writer's.

[13]First Nat. Bank v. Buttery, *supra*, note 5.

the general phrase, "All parties to this note," being limited to the enumerated classes of parties which follow.[14] If this view is the proper one, the result would be that neither the maker nor holder would have the right to extend the time of payment, and the negotiability of the note would not be affected. Even though the construction be broadened to include the maker (a person presumably primarily liable), yet such an inclusion is merely to avoid any question as to the actual position the maker might hold with reference to the instrument; for as between the parties, the maker may be primarily or secondarily liable.[15] While this construction would give the option to the payee or holder to extend the time of payment, yet as pointed out above, there is respectable authority to the effect that this does not destroy the negotiability of the instrument.

Frederic M. Hoskins, '19.

Carriers: Rights and duties of passenger having a defective ticket.—As to just what are the rights and duties of a passenger presenting an invalid or defective ticket as evidence of his right to ride upon a carrier's vehicle, the courts of this country have been in considerable confusion. In *Creech v. Atlantic Coast Line R. Co., 93 S. E. (N. C.) 453 (1917)*, the plaintiff had purchased a ticket over a certain road to Selma, S. C. He changed to another road over which his ticket was not good, but upon explaining the circumstances, the conductor offered to have it changed by one of the ticket agents along the line. This was done, and the ticket returned to the plaintiff, who later changed to another branch of the same road. When the ticket was presented to the conductor upon this line it was refused and plaintiff was told that he was on the wrong line, it appearing that the agent, in making the change in the ticket, had given the first conductor one for Thelma instead of Selma, S. C. Upon the plaintiff's refusal to again pay his fare, and after explaining the circumstances with the request that the conductor telegraph in order to ascertain the true facts, the plaintiff was ejected from the train. In a suit to recover the damages caused thereby, the court held that the agent making the mistake was acting for the defendant, which was responsible for such damage as was caused by the wrongful ejection.

It is well settled that a common carrier of passengers has power to make and enforce reasonable rules and regulations as to the carriage of its patrons and for the general transaction of its business.[1] Therefore, a common carrier may lawfully require its passengers to procure tickets, where it has furnished convenient facilities for that purpose,[2] and to exhibit and surrender them to designated agents when required to do so.[3] If there is a failure to observe the rules, the carrier may refuse service or impose other penalty, and in the case of failure to

[14]Borough of Millerstown v. Bell *et al.*, 123 Pa. 151 (1889).

[15]Bldg. & Engineering Co. v. Northern Bank of N. Y., 206 N. Y. 400 (1912).

[1]Evans v. Memphis & Charleston R. R. Co., 56 Ala. 246 (1876); Standish v. Narragansett S. S. Co., 111 Mass. 512 (1873); Barker v. Central Park, N. & E. R. R. R. Co., 151 N. Y. 237 (1896).

[2]Evans v. Memphis & Charleston R. R. Co., *supra*, note 1; Louisville & Nashville R. R. Co. v. Commonwealth, 102 Ky. 300 (1897).

[3]Downs v. N. Y. & N. H. R. R. Co., 36 Conn. 287 (1869); Van Dusen v. Grand Trunk Ry. Co., 97 Mich. 439 (1893).

procure a ticket, it may impose a higher rate or even refuse to carry without a previous compliance with the rule.[4]

But, where the passenger has already entered the vehicle and has endeavored to comply with the rules, and because of error or negligence on the part of someone, he presents a defective ticket as evidence of his right to travel, the cases are in conflict as to what his rights and duties are. Two situations are apt to arise, (1) where the mistake or negligence is that of the carrier or its agents, (2) where the mistake or negligence is that of the passenger. In the first case, the rules supported by the majority of the more recent cases seems to be that the passenger can stand upon his contract with the company as actually made and not as evidenced by the ticket; that he may refuse to pay the fare wrongfully demanded, may assert his rights as a lawful passenger, and, if ejected, may sue the company for such damages as result from the act of its agent in ejecting him.[5] The theory of these cases is that the actual contract made between the carrier's agent and the passenger gives the right to transportation, even though the face of the ticket presented as evidence of that contract may not in any true sense express the terms of the real contract. Inasmuch as the character of the ticket which the passenger receives is entirely within the control of the carrier, these cases say that the passenger has a right to presume that the ticket correctly expresses the contract, and he is not required to see that the agent selling it has given him the proper evidence of his right to transportation. The act of the agent is the act of the principal, and, therefore, the wrongful ejection being caused by the carrier itself, it should be liable for all damages caused in consequence of it.

On the other hand, there are a considerable number of well reasoned cases holding the contrary view, to the effect that the ticket as between the passenger and the conductor is conclusive evidence of the contract made with the agent issuing it,[6] and if the passenger is aboard the carrier's vehicle contrary to its provisions, he must pay his fare or leave the train, and failing to do either, he may be ejected with the use of as much force as is necessary. In these states, if the ejection is wrongful, the only remedy the passenger has is for breach of contract, caused by the act of the first agent, unless there has been the use of excessive force. This rule is justified chiefly upon the grounds of public policy in preventing breaches of the peace, and upon the impossibility of operating railways upon any other principle, having regard for the safety of those who travel, and also for the protection

[4]Reese v. Pennsylvania R. R. Co., 131 Pa. 422 (1890); Pease v. D. L. & W. R. R. Co., 101 N. Y. 367 (1886).

[5]Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381 (1892); Southern Kansas R. R. Co. v. Rice, 38 Kan. 398 (1888); Cherry v. Chicago & A. R. R. Co., 191 Mo. 489 (1905); Ferguson v. Missouri Pac. Ry. Co., 144 Mo. App. 262 (1910); Norman v. East Carolina Ry. Co. 161 N. C. 330 (1913); Teddars v. Southern Ry. Co., 97 S. C. 153 (1913); Cincinnati, N. O. & T. P. Ry. Co. v. Harris, 115 Tenn. 501 (1905); Gulf, C. & S. F. Ry. Co. v. Rother, 3 Tex. Civ. App. 72 (1893).

[6]Mosher v. St. Louis, I. M. & T. R. R. Co., 23 Fed. 326 (1885); Pennsylvania R. R. Co. v. Connell, 112 Ill. 295 (1884); Bradshaw v. South Boston R. R. Co., 135 Mass. 407 (1883); Western Maryland R. R. Co. v. Stocksdale, 83 Md. 245 (1896); Frederick v. Marquette H. & O. R. R. Co., 37 Mich. 342 (1877); Shelton v. Erie R. R. Co., 73 N. J. L. 558 (1907); McKay v. Ohio River R. R. Co., 34 W. Va. 65 (1890).

of the company from fraud. In some of these cases, the court bases its conclusion upon the additional ground that the passenger was also negligent in not ascertaining beforehand whether or not his ticket properly stated the contract made with the agent.[7] The conductor cannot decide from the mere statements of the passenger, in the absence of the counter evidence of the agent, just what the actual contract of carriage might have been. Such a doctrine, it is claimed, would not only be casting upon the conductor the duty of entering upon a judicial investigation, but would oftentimes compel him to make a decision, which, if erroneous, would result in loss to the company, as in most cases the passenger could not be located after he had left the train.

In the second class, where the passenger is solely at fault, the cases are pretty well settled that the conductor has the right to demand payment of the fare in case the ticket is insufficient upon its face.[8] Such a rule, in view of the fact that the insufficiency is the fault of the passenger, would appear to be a just one, as he should not be heard to complain of a hardship which he has brought upon himself.

The authorities in New York State apparently support the view that the passenger must abide by the rules of the carrier, even though the carrier's servant is at fault, and if he can produce no valid ticket, must pay the fare or submit to ejection. In *Townsend v. N. Y. Central & H. R. R. R. Co.*[9] the plaintiff had purchased a ticket but boarded a train which went only half way to his destination. The conductor took up the ticket, and at the end of the run, the plaintiff got off and boarded another train in order to complete his journey. When the conductor demanded his ticket, he was informed that it had been taken up by the other conductor, and upon plaintiff's refusal to pay a new fare, he was ejected. The Court of Appeals held the ejection proper and refused to allow recovery for the resulting damage. In an earlier case,[10] the same court remarked, "A passenger should see to it, if he prefers not to pay in the cars, that he has a proper voucher. If he does not, he cannot complain if the conductor, in obeying the regulations of his company, puts him off the train." About thirty years later, in *Monnier v. N. Y. Central & H. R. R. R. Co.*,[11] the court, dividing four to three, took the same attitude. There the plaintiff, because of the fault of the carrier, had failed to procure a ticket. The conductor demanded an excess fare, which plaintiff refused to pay, and was consequently ejected. The court overruled the decision of the lower court to the effect that the plaintiff could maintain an action for assualt and battery, saying "The simple duty of the conductor is to execute and enforce all reasonable rules and that of the passenger is to obey them. If there is some fact or omission

[7]Robb v. Railway Co., 14 Pa. Super. Ct. 282 (1900); Weaver v. Rome, W. & O. R. R. Co., 3 T. & C. (N. Y.) 270 (1874). See other New York cases cited *infra*, notes 9 and 10.

[8]Downs v. N. Y. & N. H. R. R. Co., *supra*, note 3; Carpenter v. Washington & G. R. R. Co., 121 U. S. 474 (1887); Maxson v. Pennsylvania R. R. Co., 49 Misc. (N. Y.) 502 (1906); Pittsburgh, C. C. & St. L. Ry. Co. v. Daniels, 90 Ill. App. 154 (1899); Trezona v. Chicago Great Western Ry. Co., 107 Ia. 22 (1898).

[9]56 N. Y. 295 (1874); but see same case in 6 T. & C. (N. Y.) 495 (1875).

[10]Elmore v. Sands, 54 N. Y. 512 (1874).

[11]175 N. Y. 281 (1903).

behind the rules not apparent upon the face of the transaction the passenger must resort to some other remedy for his grievance besides the use of force against the conductor * * * *." Five years later, in a case[12] where the passenger was ejected because of a defective ticket caused by the mistake of the agent, recovery was allowed, but chiefly because of the fact that the conductor knew the rights of the passenger under the defective ticket, the court distinguishing the case from the *Monnier* case upon that ground. Although there are some decisions of the lower courts which seem to tend toward the rule of the principal case,[13] still the above decisions of the highest court indicate that the rule in this state is to contrary.

Logically, it would seem that where the fault of the carrier's agent is the cause of the passenger's predicament in having a defective ticket, he ought to be allowed to stand upon his rights as a lawful passenger. It is one thing to allow a company to make reasonable rules for the operation of its road, and another to require compliance therewith when such compliance is made impossible by the carrier itself. The only justification of the contrary rule is that it is practical and necessary for the efficient management and control of railroads. Either rule is bound to cause loss and inconvenience to the carrier or the passenger, but it is submitted that the carrier, inasmuch as it is the cause of the mistake, should bear the inconvenience rather than the passenger.

W. J. Gilleran, '18.

Choses in Action: Assignment of part of a single cause of action.—In *Carvill v. Mirror Films, Inc., 178 App. Div. (N. Y.) 644 (1917)*, the defendant contracted to employ the plaintiff for a period of one year. After the plaintiff had worked for three weeks, for which he had received compensation, the defendant discharged him without cause. Thereupon the plaintiff assigned to one Jones, "all the damages which have accrued to me or may accrue up to March 6, 1916, [a period of six weeks] reserving to myself all damages which may accrue after said date." In the case at hand the defendant set up the assignment to Jones and the recovery by him in the Municipal Court of New York of $600. Judgment was rendered in favor of the defendant on the ground that there can be but one suit upon a single cause of action and a party cannot by assignment give the right to others to sue severally for their shares.

Generally the common law courts have refused to recognize the validity of the partial assignment of a chose in action made without the assent of the debtor thereto,[1] for the reason that it is the right of the debtor to pay his debt *in solido*, and not to be harassed by a series of actions on the same obligation.

On the other hand, equity does not ordinarily recognize as an objection, the fact that part only of an entire demand has been made

[12]Parish v. Ulster & Delaware R. R. Co., 192 N. Y. 353 (1908).

[13]Elliott v. New York Central & H. R. R. R. Co., 53 Hun (N. Y.) 78 (1889); Buck v. Webb, 58 Hun (N. Y.) 185 (1890); Townsend v. N. Y. C. & H. R. R. R. Co., 6 T. & C. (N. Y.) 495 (1875).

[1]Potter v. Gronbeck, 117 Ill. 404 (1886); VanSchoick v. VanSchoick, 76 N. J. L. 242 (1908); Gibson v. Cooke, 20 Pick. (Mass.) 15 (1838).

the subject of an assignment, even though the debtor has not given his consent,[2] the courts of equity having the power to compel all necessary parties to be brought into court, that the status of all may be determined in a single action.

It may well be doubted, however, that even in equity, the assignor would be deemed an indispensable party, if to make him a party were impossible, as for instance, where he is beyond the jurisdiction of the court, or to make him a party would defeat the jurisdiction of the court, equity having under similar circumstances dispensed with the presence of one whose presence would be required if practicable to bring him in.[3]

In the so-called "code states" whether the enforcement of the partial assignment were at law or equity would seem to be material only as bearing on (1) the method of trial, that is, whether before the court or before a jury, (2) whether the suit could be maintained in a court having no equitable jurisdiction, for example, a municipal court, and (3) the essential parties to the litigation.

If equity can dispense with the presence of the assignor, where his presence is impossible to obtain or would defeat the jurisdiction of the court, it would seem that the same might be done under the code and the Municipal Court of New York might proceed to judgment without the assignor being a party and without affecting his rights. If it is impossible to regard it as an action at law, the Municipal Court should not entertain jurisdiction.

In the principal case, the majority of the court held that the debtor could not be deemed to have waived his right to have the obligation the subject of one action only inasmuch as the Municipal Court is without equitable jurisdiction, the pleadings in the case were oral, and it did not appear until the trial that the assignment had been partial. These facts cannot, however, change the true character of the assignment and when it appears on the trial to have been partial, the court should refuse to proceed, or if it does not appear, it will be the fault of the defendant. It does not seem that the plaintiff who has not been a party to any vexatious litigation should have his rights prejudiced by the failure of the defendant to ascertain the extent of the assignment or by the failure of the court and the parties to that suit to comprehend the limited jurisdiction of the court. And at any rate, it is difficult to understand how any judgment of the Municipal Court can be held to determine the character of the assignment as legal and therefore entire, and bind the assignor in his absence through a failure to join him as a party.

The rule that there can be but one action on an entire obligation is for the benefit of the debtor and may be waived by him.[4] It would seem that the debtor had waived it in the Municipal Court by his failing to point out that the assignment was partial. As he would certainly know on trial, it seems a weak argument to say that, as the pleadings were oral, he could not know that the assignment was partial.

Olive J. Schmidt, '18.

[2]Kingsbury v. Burrill, 151 Mass. 199 (1890); Bank of Harlem v. Bayonne *et al.*, 48 N. J. Eq. 246 (1891); Peugh v. Porter, 112 U. S. 737 (1885).

[3]Payne v. Hook, 7 Wall. (U. S.) 425 (1868); Chadbourne *et al.* v. Coe, 51 Fed. 479 (1892).

[4]Fourth National Bank v. Noonan, 14 Mo. App. 243 (1884).

Constitutional Law: Fourteenth Amendment: Segregation ordinances.[1]—By unanimous decision, the United States Supreme Court held the Negro Segregation Ordinance of the City of Louisville unconstitutional in the case of *Buchanan v. Warley*, decided November 5th, 1917, and not yet reported. The ordinance sets forth that it was adopted "to prevent conflict and ill-feeling between the white and colored races, * * * to preserve the public peace and promote the general welfare * * *," and it provides *inter alia* that it shall be "unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of assembly by white people than are occupied as residences, places of abode, or places of assembly by colored people." By section 2 white persons are in like manner forbidden to move into a colored block. Section 4 contains a saving clause for interests vested at the time of approval of the ordinance, and for all negro servants in white families. Buchanan, a white man sued for specific performance of a contract for the sale of real estate situated in the city. The defendant had agreed to purchase it, however, upon the express condition that he be able to use it for residential purposes. The defendant by way of answer, pleaded that he was a colored man and that the property in question was situated in a white block, which would preclude him from using it for residential purposes as stipulated. The plaintiff replied putting the constitutionality of the ordinance in issue by alleging that it violated the Fourteenth Amendment of the Federal Constitution, in that it was a deprivation of *his* private property without due process of law. The United States Supreme Court, reversing the decision of the Supreme Court of Kentucky,[2] construing the ordinance to be a reasonable and salutary exercise of the police power, held that its effect "was to destroy the right of the individual to acquire, enjoy and dispose of his property," without due process of law.

Laws enforcing segregation of persons and businesses on the ground that they tend seriously to menace the public health, safety or morals, have been upheld in a number of cases. Thus persons having contagious diseases may be segregated under our quarantine laws,[3] and houses of ill-fame may be restricted to certain districts.[4] Thus laundries may be excluded from the residential districts;[5] slaughter houses,[6] and fertilizing plants[7] kept entirely out of the city; cow stables and dairies likewise;[8] selling liquor may be confined to certain districts;[9] storing rags may be forbidden in the thickly populated

[1]For a history and discussion of Segregation ordinances, see 11 Col. L. R. 24, 3 Va. L. R. 304, and 1 Va. L. Reg. (N. S.) 330.
[2]Buchanan v. Warley, 165 Ky. 559 (1915).
[3]Compagnie Francaise v. Board of Health, 186 U. S. 380 (1902).
[4]L'Hote v. New Orleans, 177 U. S. 587, (1900).
[5]*Ex parte*, Quong Wo, 161 Cal. 220 (1911); In re Hang Kai, 69 Cal. 149 (1886); Barbier v. Connolly, 113 U. S. 27 (1885).
[6]Cronin v. People, 82 N. Y. 318 (1880).
[7]Fertilizer Co. v. Hyde Park, 97 U. S. 659 (1878).
[8]Fischer v. St. Louis, 194 U. S. 361 (1903).
[9]Grumbach v. Lelande, 154 Cal. 679 (1908).

areas;[10] farming prohibited within city limits;[11] and in Idaho sheep grazing is forbidden within two miles of a house.[12]

Furthermore, certain legislation based upon the distinction between whites and blacks, where there is no discrimination between the two races, has been upheld. Thus negroes may be compelled to occupy separate coaches or compartments on the vehicles of common carriers, ("Jim Crow Laws")[13] or to attend separate schools,[14] there being no vested right to ride on any particular part of the carrier's vehicles or to attend any particular school, as long as equality of accommodation is provided. Any tendency leading to the amalgamation of the races may be discountenanced by legislation.

Segregation has been attempted in several states, and has been variously disposed of. North Carolina has declared such an ordinance void upon the ground that the city had no power under its charter to enact it.[15] A Circuit Court of the United States held an ordinance of the city of San Francisco providing that all Chinese within the city should move into a named district, or leave the county, absolutely void, as an arbitrary and illegal enactment.[16] Maryland held a Baltimore negro segregation ordinance void in that it interfered with contract obligations and property rights already in existence at the time the ordinance took effect, but held the ordinance otherwise constitutional.[17] Virginia upheld such an ordinance as a valid and salutary exercise of the police power.[18] Georgia has had some noteworthy experiences in this direction. In 1915, she held the ordinance in issue void on the ground that it forbade a white man to use his own property as his residence, with an intimation that it was beyond the power of the city of Atlanta to enact such an ordinance.[19] The city then amended the ordinance so that it was a reproduction of that adopted by the city of Louisville under discussion in the present case. This ordinance was held constitutional in the case of *Harden v. Atlanta*[20] (decided August 31, 1917) on the ground that it served to "uphold the integrity of each race, and to prevent conflicts between them resulting from close association," a view in which the Supreme Court of the United States refuses to indulge.

By its decision in the principal case the Supreme Court of the United States evinces a clear determination to hold void and unconstitutional any law whose operation amounts to a deprivation of property, and whose sole basis is that of race difference. Laws segregating the races in cities differ from those segregating the sick, or prostitutes, or those segregating unwholesome businesses, in that

[10]Commonwealth v. Hubley, 172 Mass. 58 (1898).
[11]Summerville v. Pressley, 33 S. C. 56 (1889).
[12]Bacon v. Walker, 204 U. S. 311 (1907); Bown v. Walling, 204 U. S. 320 (1907).
[13]Louisville, etc. R. Co. v. Miss., 133 U. S. 587 (1890); Plessy v. Ferguson, 163 U. S. 537 (1896); Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388 (1900); West Chester & P. R. Co. v. Miles; 55 Pa. 209 (1867).
[14]Bertonneau v. Board of Directors, Fed. Cas. No. 1, 361 (1878); Cory v. Carter, 48 Ind. 327 (1874); People v. Gallagher, 93 N. Y. 438 (1883).
[15]State v. Darnell, 166 N. C. 300 (1914).
[16]*In re* Lee Sing, 43 Fed. 359 (1890).
[17]State v. Gurry, 121 Md. 534 (1913).
[18]Hopkins v. City of Richmond, 117 Va. 692 (1915).
[19]Carey v. City of Atlanta, 143 Ga. 192 (1915).
[20]93 S. E. (Ga.) 401 (1917).

segregation in the latter cases is for the protection of health or morals. On the other hand, the court seems to think that the laws segregating the races in cities differ from those segregating the races on railroads or in schools in that segregation in the latter cases does not take the property of those segregated, while in the former it does. The court refused to acquiesce in the proposition that the ordinances in question are for the mutual benefit of the two races, or that they are the solution of problems arising from feelings of race hostility. These ends, the court said, "cannot be promoted by depriving citizens of constitutional rights and privileges." The ordinance in question was evolved in view of the shortcomings of the previous ordinances, and was made as near proof against attack on constitutional grounds as such legislation can be. It would seem, therefore, that the Supreme Court has definitely put itself on record as opposed to all legislation looking to the segregation of the races in our cities.

W. F. Chapman, '18.

Constitutional Law: Power to prohibit and regulate billboards.—Three recent cases, *Thomas Cusack Co. v. City of Chicago, 242 U. S. 526 (1917)*, *Gilmartin v. Standish-Barnes Co., 100 Atl. (R. I.) 394 (1917)*, and *Anderson v. Shackelford, 76 So. (Fla.) 343 (1917)*, show clearly the law of this country in regard to the right of a municipality to prohibit or regulate billboards. In the first case the United States Supreme Court affirmed the decision of the Illinois Court[1] holding constitutional a municipal ordinance providing that before any billboard of over twelve square feet in area could be erected in a residential district, the owners of a majority of the frontage on both sides of the street, in the block in which it was desired to erect the board, must consent in writing. In the second case the Rhode Island court held valid an ordinance regulating the size, manner of construction, and location of billboards. In the third case the Florida court held an ordinance regulating billboards to be unconstitutional.

These cases are not inconsistent. None of them indicates a departure from the doctrine that a municipality cannot regulate or prohibit billboards simply because they offend the aesthetic and artistic tastes of some members of the community. In *Passaic v. Paterson Bill Posting Co.*, the court said,[2] "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone that justifies the exercise of the police power to take private property without compensation." This represents the law on the subject throughout the country to-day.

In the *Cusack* case there was evidence that the object of the ordinance was to protect the public health, safety, and morals. It appeared that the legislation was entirely reasonable and calculated to attain the desired object. The same is true of the *Gilmartin* case. It was wholly upon this ground and not upon any aesthetic considerations that the ordinances were sustained as valid. In the *Anderson*

[1] 267 Ill. 344 (1915).
[2] 72 N. J. L. 285, 287 (1905).

case it appeared that the ordinance in question was passed for aesthetic reasons and it was held invalid and unconstitutional.

The *Cusack* case does not mean that the city has the right to prohibit the erection of these boards entirely in residential districts. In the case of the *City of Chicago v. The Gunning System*,[3] an ordinance similar to the one in the *Cusack* case was held to be unconstitutional because of lack of evidence to show that the purpose of the legislation was to advance public health and secure public safety. There have been several cases in New York similar to the *Cusack* case and the Court of Appeals has distinguished them from cases involving laws passed for aesthetic purposes,[3a] and held that they were in no way inconsistent with the general rule that aesthetic considerations could not be a ground for taking private property under the police power.[4]

Wherever ordinances regulating billboards have been upheld it has been on the ground that they were adopted to secure public safety, health, and morals. The billboard many times provides a place where the criminal may hide, where garbage and refuse accumulates and where immoral practices may be carried on. Wherever it is clearly shown that the object of the ordinance is to relieve these conditions and not to satisfy the artistic tastes of some of the community, it will be upheld.[5]

It seems that a regulation that the bottom of the billboard shall be a certain distance off the ground, or that the board shall be only of a certain height, or that it shall be made of certain material and so constructed as to prevent it from falling over, when such regulation is considered by the court to be reasonable, and there is evidence that it will add to the public safety, will be upheld.[6] A regulation requiring the consent of the common council before a billboard can be erected will be upheld.[7] So will a regulation requiring that in residential districts the written consent of a certain percentage of the property owners must be obtained before the board can be erected, provided that evidence is submitted showing that this regulation is reasonable and calculated to promote public safety.[8] But a regulation providing that the billboard be placed a certain distance from the street will not be held valid.[9] If this provision is included in an ordinance along

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[3]214 Ill. 628 (1905).

[3a]Note 7, *infra*.

[4]Note 2, *supra*. See also Crawford v. City of Topeka, 51 Kan. 756 (1893); State v. Whitlock, 149 N. C. 542 (1908); Curran Bill Posting Co. v. City of Denver, 47 Colo. 221 (1910); People *ex rel.* Wineburgh Adv. Co. v. Murphy, 195 N. Y. 126 (1909); People *ex rel.* Standard Bill Posting Co. v. Hastings, 77 Misc. (N. Y.) 453 (1912), aff'd without opinion, 153 App. Div. (N. Y.) 920.

[5]St. Louis Gunning Co. v. City of St. Louis, 235 Mo. 99 (1911); Kansas City Gunning Co. v. Kansas City, 240 Mo. 659 (1912); *Ex parte* Savage, 63 Tex. Cr. R. 285, 290 (1911); Horton v. Old Colony Bill Posting Co., 35 R. I. 507 (1914); Cream City Bill Posting Co. v. Milwaukee, 158 Wisc. 86 (1914); State v. Staples, 157 N. C. 637 (1911).

[6]Note 5, *supra*.

[7]City of Rochester v. West, 164 N. Y. 510 (1900); Gunning System v. City of Buffalo, 75 App. Div. (N. Y.) 31 (1902); Whitmier & Filbrick Co. v. City of Buffalo, 118 Fed. 773 (1902).

[8]City of Chicago v. Gunning System 214 Ill. 628 (1905); Thomas Cusack Co. v. City of Chicago, 242 U. S. 526 (1917).

[9]Note 4, *supra*.

with other provisions which would by themselves be valid, it will in most cases be held to invalidate the whole ordinance.[10] In some cases, however, an ordinance of this character has been held valid in all respects, it being thought that the purpose of the ordinance as a whole was to provide for the public safety.[11] An attempt to include in an ordinance regulating billboards, signs painted upon the walls of buildings, is invalid and invalidates the whole ordinance.[12] An attempt to prohibit billboards entirely in any particular locality or section is invalid.[13]

It may be thought that the courts have used the argument that the billboard is a danger to public safety, health, and morals simply as a means of arriving at a result, and that the real purpose of the courts, where these regulatory ordinances have been upheld, was to give effect to aesthetic tastes. A reading of the cases will not bear out this contention.

Harry H. Hoffnagle, '17.

Contracts: Performance of existing contract as consideration: Consideration in ante-nupital contracts.—In the case of *De Cicco v. Schweizer, 221 N. Y. 431 (1917)*, there was involved the vexed question as to whether any consideration is to be found in a transaction where A makes B a promise for B's performance of an existing contract obligation due to C, and there was also involved the question whether a promise made in contemplation of marriage must be supported by consideration. In that case, the defendant's daughter and an Italian Count were engaged to be married. *Thereafter*, the defendant and the Count executed "articles of agreement," in which it was recited that, whercas, the defendant's daughter "is now affianced to and is to be married" to the Count, the defendant promised to pay his daughter $2,500 annually. The daughter and the Count were married two days after the execution of the agreement. The yearly payments were regularly made for some years, and this action was brought by the assignee of the daughter and the Count to recover a payment which the defendant had refused to make. The case turned on the question whether there was any consideration for the promised payments and the Court of Appeals held that there was consideration.

If consideration is necessary to support an ante-nuptial primose to settle property or pay money, (a point to be discussed later), was there any consideration in the principal case? In the first place, it is settled in New York that neither the promise to perform nor the performance of an existing contract is consideration for the promise of a third person.[1] Therefore, in the principal case, the marriage of the daughter and the Count was not consideration for the defendant's promise, for the former, by marrying, were only doing what they were

[10]Note 4, *supra.*
[11]Note 5, *supra.*
[12]Anderson v. Shackelford, 76 So. (Fla.) 343 (1917).
[13]People v. Green, 85 App. Div. (N. Y.) 400 (1903); Bryan v. City of Chester, 212 Pa. 259 (1905); Commonwealth v. Boston Adv. Co., 188 Mass. 348 (1905).
[1]Robinson v. Jewett, 116 N. Y. 40 (1889); Arend v. Smith, 151. N. Y. 502 (1897); Carpenter v. Taylor, 164 N. Y. 171 (1900).

already legally bound to do and therefore suffered no legal detriment. Nor could the rule of the leading Massachusetts case[2] be here invoked, *viz.*, that where the promisor receives a benefit from the performance by the promisee of his contract with another, the promise will be enforced. There were no facts or inferences in the principal case to show that the defendant received any benefit from the marriage of his daughter. Nor is there any consideration in not breaking the pre-existing contract, because a person is not thereby giving up a "right," for though he has the *power*, he has no "right" to break a contract.[3]

In commenting on *Shadwell v. Shadwell*,[4] in which it was held that performance by B of an existing contract with C was consideration for a promise by A to B, Anson suggests that consideration may be found in B's abandonment of the right to rescind his contract with C.[5] But it is difficult to see how merely failing to rescind could be sufficient, unless there was proof that the willingness of C made recission possible, and, therefore, made refraining from it a detriment.

The court in the principal case considered the promise of A (the defendant) as made to both B and C (the Count and the daughter), because, though made in form to the Count, yet it induced the conduct of both, was intended for the benefit of the daughter and by her acting upon it she adopted it and became a party to it, entitled to enforce it.[6] The court thus reached the conclusion that A's promise was made to both B and C, and held that the abandonment by B and C of their right to rescind their contract was a sufficient consideration for A's promise. But even in such a case there should be some evidence that there was a mutual contemplation of recission and willingness to rescind and that A's promise was made for the purpose of inducing them not to rescind, or, even if they were not then contemplating recission, that A's promise was made to induce them never to exercise their right to rescind, if they should ever desire to do so. If, however, such proof were present, there would be no reason, on principle, why abandoning the right to rescind would not be consideration, since yielding that right is a legal detriment, *i. e.*, something that the promisee was not legally bound to do.

There was no direct proof in the principal case that abandoning the right to rescind was intended to be the consideration, and it is not a necessary inference that the promise was made for such purpose or that the promise induced the parties to go on with the contract. It is a natural inference that the promise was meant to be gratuitous and that the motive for it was the engagement of the daughter and her future happiness. It is also a natural inference that the parties were

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[2]Abbott v. Doane, 163 Mass. 433 (1895).

[3]Robinson v. Jewett, *supra*, note 1; Arend v. Smith, *supra*, note 1.

[4]9 C. B. (n. s.) 159 (1860). The facts of this case were similar in many respects to the principal case. The defendant's testator wrote to his nephew, the plaintiff, as follows: "My dear Lancey. I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life, etc." In an action by the nephew to recover, after his marriage with the lady named, the arrears of the annuity promised he was permitted to recover at law.

[5]Law of Contract, (Huffcut's 2nd Amer. ed.), p. 123.

[6]Gifford v. Corrigan, 117 N. Y. 257 (1889).

induced to fulfill their engagement by their mutual love and affection and not by the fact that if they would refrain from rescinding, they would be amply remunerated.

But perhaps it was justifiable to strain the facts and inferences to reach the conclusion that the parties to the contract did refrain from rescinding in consideration of the defendant's promise, for, as the court remarked, "The law favors marriage settlements and seeks to uphold them. * * * * It has enforced them at times where consideration, if present at all, has been dependent upon doubtful inference. It strains to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others."

But even where there is evidence that the parties did abandon their right to rescind in consideration of the promise, yet in cases involving marriage there is an additional difficulty. Suppose that B and C are engaged to be married and that both of them are willing to rescind because of incompatibility, and their later conviction that they are unsuited to each other, and that they would rescind but for the promise of A. Would not A's promise in return for such a restraint be void as against public policy?[7] On the other hand, if the mutual willingness to rescind were due to financial or similar difficulties, a promise by A would not be against public policy.

There is also a suggestion in the principal case that consideration for A's promise might be found in the mutual abandonment by B and C of their right to delay the marriage. This might well be consideration, but the facts do not disclose that the promise of the defendant contemplated this, or that because of the promise the marriage occurred at any other time than had been heretofore arranged. If it were the fact that the promise called for the marriage to be celebrated before the time agreed upon by the parties, there is doubt as to whether such an agreement accords with public policy, for it has been held that a contract to hasten an intended marriage is as obnoxious as a contract to bring about a marriage between strangers.[8]

Another pertinent question arises. How far will the Court of Appeals consider as a precedent the rule laid down in the principal case, that the refraiming from the right to rescind an existing contract is consideration for the promise of a third person? Suppose that a case arises where some third person makes a promise to induce the continuance of a building contract by the contractor and the owner. Will the court follow the principal case and hold that the refraining by the contractor or owner, or both, from the right to rescind is consideration? Or will the court hold that the rule now laid down is to be limited to cases whose facts are identical with those of the principal case?

One may concede, however, that it should be held in any case, if there is sufficient evidence thereof, that refraining or the promise to refrain from the right to rescind a pre-existing contract is considera-

[7]Morrison v. Rogers, 115 Cal. 252 (1896), in which it was held that a contract to promote the carrying out of an existing agreement of marriage is invalid as being contrary to public policy.

[8]Jangraw v. Perkins, 76 Vt. 127 (1903).

tion for the promise of a third person to either or both of the parties to the pre-existing contract.

It is argued in the concurring opinion in the principal case that in cases of this character, *i. e.*, marriage settlements and portions, no consideration is necessary to enforce the promise. The authority for this is found in *Phalen v. U. S. Trust Co.*,[9] where it was said, "The strict legal definition of consideration need not here be discussed, since marriage settlements have always been regarded as exceptions to the general rule upon this question." It is submitted, first, that consideration is necessary to support such promises, and, second, that there was a sufficient consideration in the *Phalen* case.

By the English custom of marriage settlements and portions, persons who are to be married, and their parents, enter into negotiations concerning the intended marriage and during these negotiations there are made not only the mutual promises to marry, but also promises by either or both of the persons to be married, or by their parents, to settle certain property upon or to pay a certain amount of money to either one of the persons to be married, usually the intended wife. Then during or after these negotiations, a formal agreement, called "marriage articles," is executed, which contains these promises. Thus the promise to make a settlement or pay a portion is made just as much a part of the contract to marry as are the mutual promises to marry, and the promise to make a settlement or pay a portion finds consideration in the promise to marry or the marriage. It has been held that a promise to marry or the marriage "is a consideration of the highest value,"[10] and will support a promise, even though made by a third person.[11]

At common law, all existing obligations between husband and wife were extinguished by the marriage,[12] and hence marriage settlements between them were unenforcible at law. For this reason, equity took jurisdiction of marriage settlements between husband and wife,[13] or settlements made by a third person,[14] even where the payment of money was promised.[15] But where a settlement contained executory covenants, equity required a consideration for them or it would not enforce them, for it was a rule of equity that voluntary covenants would not be enforced.[16] But this difficulty was seldom, if ever, encountered, for, as seen above, the arrangements for the marriage usually made the covenant to settle a part of the contract to marry, such covenant being supported by the promise to marry or the marriage, as consideration. Moreover, it has been held that equity will not compel the specific performance of a marriage settlement, unless

[9]186 N. Y. 178 (1906).

[10]Verplank v. Sterry, 12 Johns. (N. Y.) 536 (1815); Magniac v. Thompson, 7 Peters (U. S.) 348 (1833); Prewit v. Wilson, 103 U. S. 22 (1880).

[11]Wright v. Wright, 114 Iowa 748 (1901); Arnold v. Estis, 92 N. C. 162 (1885); Barr v. Hill, Add. (Pa.) 276 (1795).

[12]Butler v. Butler, 14 Q. B. D. 831 (1885).

[13]Johnston v. Spicer, 107 N. Y. 185 (1887).

[14]Wankford v. Fotherley, 2 Vern. (Eng.) 322 (1694); Halfpenny v. Ballet, 2 Vern. (Eng.) 373 (1699).

[15]Wankford v. Fotherley, *supra*, note 14.

[16]Pulvertoft v. Pulvertoft, 18 Ves. (Eng.) 84 (1811); Edwards v. Jones, 1 Myl. & C. (Eng.) 226 (1836); Jefferys v. Jefferys, Craig & P. (Eng.) 138 (1841); Burling v. King, 66 Barb. (N. Y.) 633 (1873).

the promise is founded on a valuable consideration.[17] This rule is recognized in those cases which hold that a mere promise *after the engagement* to settle a certain sum of money upon the intended wife is not binding without consideration,[18] or that a promise made *after* the marriage by a husband to settle property on his wife is void for want of consideration.[19] The *Phalen* case, *supra*, can be harmonized with these views, because in that case formal articles of marriage had been executed by the parties to the marriage and their respective parents, and there is a strong inference that the document conformed to the English custom and that the promise to settle property was part of the contract to marry.

In making the statement that no consideration is necessary to support a promise in a marriage settlement, the court in the *Phalen* case relied on two classes of English cases, which it is submitted, do not stand for that proposition. (1) Much reliance was placed on *Shadwell v. Shadwell*,[20] but in that case it was held that the performance of an existing contract obligation was consideration for a promise by a third person, a rule of law which, as seen above, has been squarely rejected by the New York courts.[21] (2) Many cases were cited in which there *was* consideration, that of marriage or the promise to marry, because the promise to make a settlement was embraced in formal marriage articles and was thus a part of the contract to marry.[22] In none of these cases was the promise to make a settlement made after the formation of a binding contract to marry.

There is also a third class of English cases in which, though there was no promise to make a settlement and no formal articles of marriage, there was a statement or representation by the parents of one of the parties to the marriage contract that a settlement would be made. This statement or representation was made before and actually induced the formation of the contract to marry.[23] In such cases equity enforced and gave effect to the representation, though oral, apparently on the ground of estoppel. *Laver v. Fielder*,[24] cited in the concurring opinion of the principal case, seems to hold that even if made after there is a binding contract to marry, such representations by a parent will be enforced in equity, if they induced the solemniza-

[17]Holloway v. Headington, 8 Sim. (Eng.) 324 (1837); Andrews v. Andrews, 28 Ala. 432 (1856); see also 21 Cyc. 1271 where it is said, "Marriage settlements being merely civil contracts, all defenses which could be properly set up against other contracts may be set up against them, such as * * * want of consideration."

[18]Chambers v. Sallie, 29 Ark. 407 (1874).

[19]Lloyd v. Fulton, 91 U. S. 479 (1875). As to a promise by a third person: "If the promise or covenant is made after marriage, it is, of course, voluntary, the marriage consideration being wanting." Eversley, Dom. Rel., (2nd ed.), p. 132. See also Randall v. Morgan, 12 Ves. (Eng.) 67, 73 (1806).

[20]*Supra*, note 4.

[21]*Supra*, note 1.

[22]Wankford v. Fotherley, *supra*, note 14; Jones v. Martin, 3 Anst. (Eng.) 882 (1796); Willis v. Black, 4 Russ. (Eng.) 170 (1827); Eardley v. Owen, 10 Beav. (Eng.) 572 (1847); McCarogher v. Whieldon, L. R. 3. Eq. 236 (1867); *In re* Brookman's Trust, L. R. 5 Ch. App. 182 (1869); Coverdale v. Eastwood, L. R. 15 Eq. 121, 130 (1872); Bennett v. Houldsworth, L. R. 6 Ch. Div. 671 (1877).

[23]Hammersley v. De Biel, 12 Cl. & Fin. (Eng.) 45 (1845); Prole v. Soady, 2 Giff. (Eng.) 1 (1859).

[24]32 Beav. (Eng.) 1 (1862).

tion of the marriage. This view seems erroneous, because if the parties are already engaged and bound by their mutual promises to marry, the law should presume that nothing but their mutual obligations induced the solemnization of the marriage. However, this case can be harmonized, since the facts can be interpreted in such a way as to make the parent's promise part of the contract to marry.

Fred S. Reese, Jr., '18.

Contracts: Rescission for mistake of fact: Error in substantis.—In *Cavanagh v. Tyson, Weare & Marshall Co., 116 N. E. (Mass.) 818 (1917)*, Cavanagh had contracted to drive piles for a pier to be built by the defendant. When the bid was made and accepted, Cavanagh believed that the material through which the piles were to be driven was mud and clay; on the acceptance of his bid, Cavanagh started work, and found a top layer of gravel which was not known to him to exist. Later, the written contract was formally executed without change. Cavanagh then continued the work, the driving becoming increasingly difficult, until finally it was discovered that there was, some distance below the surface, a layer of large stones placed there by a former contractor who had filled in the harbor at that point. Cavanagh refused to continue the work, which could not have been completed save at a great loss to him, and brought this action to recover for work already done. The defendant filed a cross-bill for breach of contract. Cavanagh, as a defense to this cross-action, pleaded that the contract was entered into under mutual mistake of fact, and that he should not be liable thereon. Cavanagh was not permitted to recover, and damages were allowed against him for breach of contract, on the ground that a mutual mistake of fact, to invalidate a contract, must be of a fact which is a material element in the minds of both parties when the contract was made; and that the character of the earth through which the piles were to be driven was not such an element.

No branch of the law of recission of contract for mistake is in more confusion than the rather ill-defined doctrine of recission for mistake as to the existence of a vital quality of the subject matter. In general, mistake as to the quality of the subject matter of a contract is no ground for recission.[1] But in a few instances, contracts have been avoided where it appeared that the parties had contracted under mutual mistake in regard to some material quality, the absence of which made the subject matter essentially different from that with regard to which the parties contracted; an esteemed writer has called this error *in substantia*.[2]

The leading case on this subject is *Sherwood v. Walker*.[3] In that case, a cow was sold, both parties believing her to be sterile; it was later found that she was with calf. The cow had been sold for eighty dollars; she was worth, for breeding purposes, one thousand dollars. The vendor refusing to deliver the cow, the vendee brought an action of replevin to recover her. Recovery was refused; the mistake, it

[1]Wheat v. Cross, 31 Md. 99 (1869); Hecht v. Batcheller, 147 Mass. 335 (1888); Wood v. Boynton, 64 Wis. 265 (1885).

[2]Brantly, Contracts (2d ed.), sec. 71.

[3]66 Mich. 568 (1887).

was said, went to the very nature of the thing sold.[4] "A barren cow is substantially a different creature than a breeding one. * * * * She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy."[5]

The question has frequently arisen with regard to contracts for the lease or sale of land. *Thwing v. Hall*[6] is a typical case. Land was sold to the defendant by the plaintiff, both parties believing that there was valuable timber on the land. Actually, the land had been denuded some time before. On learning the truth, the defendant refused to complete the contract; the plaintiff brought action to recover the purchase price; recovery was not allowed. The court said:[7] "The mistake * * * * was occasioned by the ignorance of both parties of a fact under the influence of which they entered into a contract that would not have been executed had they possessed full knowledge of the situation."[8] The rule has also been applied to contracts in respect to insurance policies after the death of the insured, where all parties supposed that he was still alive.[9]

Confusion has arisen between cases of the sort considered above, and cases where the mistake has been with regard to a non-material quality. A case where the mistake was of the latter sort is *Wheat v. Cross*.[10] A horse was sold to the defendant, both vendor and vendee believing the horse to be sound. The defendant later learned that the horse was sick, and refused to take it at any price; he was held

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[4]At p. 577.

[5]Other cases of sales illustrate the rule. In Harvey v. Harris, 112 Mass. 32 (1873), there was an auction sale of damaged flour of two grades, "original packages" and "repacked," the whole being arranged in tiers or lots; the plaintiff bought lots 9 and 10, both the plaintiff and the auctioneer believing that these lots consisted of repacked flour; really both lots were of flour in the original packages. The sale was held void; it is said by the court that the mistake was as to identity, but it seems quite clear that it was as to the existence of a material attribute. In Chapman v. Cole, 12 Gray (Mass.) 141 (1858), a gold piece worth ten dollars, issued by a private person in California, and passing current there at the value of ten dollars, was passed by mistake as a half dollar. It was held that the piece might be recovered by the first owner; since it was not money, the rules applicable to other chattels must be applied to it; and there had been a mistake as to identity avoiding the contract. Here also it would seem that the mistake was as to the existence of a material quality rather than identity. In Gompertz v. Bartlett, 2 El. & Bl. 849 (1853), it was held that where a bill of exchange was sold as a foreign bill, when contrary to the belief of both parties it was an inland bill and void for want of a stamp, the sale would be rescinded; it was said that the article was not of the kind which was sold.

[6]40 Minn. 184 (1889).

[7]At p. 186.

[8]Similar actions to rescind leases or sales have been allowed in the following cases: Mays v. Dwight, 82 Pa. 462 (1876), where there was believed to be an oil well on the land; Bluestone Coal Co. v. Bell, 38 W. Va. 297 (1893), where there was believed to be coal in the land; Irwin v. Wilson, 45 Ohio St. 426 (1887), where land was transferred in the belief that it was tillable; Miles v. Stevens, 3 Pa. 21 (1846), where land was sold in the belief that there was a harbor on it; Hoops v. Fitzgerald, 204 Ill. 325 (1903), where premises were leased on condition that two stories should be added to the building, and it was later found that the walls were too weak to stand the extra weight; Muhlenberg v. Henning, 116 Pa. 138 (1887), where land was leased in the belief that it contained marketable iron ore.

[9]Riegel v. Am. Ins. Co., 153 Pa. 134 (1893); Scott v. Coulson, (1903) 2 Ch. Div. 249.

[10]*Supra*, note 1.

liable for breach of contract, on the ground that the mistake was as to a fact wholly collateral, not affecting the essence of the contract. The view of *Wheat v. Cross* was taken in the dissenting opinion in *Sherwood v. Walker*.

Another view is presented by two Wisconsin cases.[11] In both these cases, bulls were sold for breeding purposes, and were later found to be useless for breeding. The sales were held valid, on the ground that there was no implied warranty that the animals would be fit for the purpose for which they were sold; the question of mistake seems not to have been considered; on principle, these cases do not seem to differ from *Sherwood v. Walker*.

Another distinction is made in *Kowalke v. Milwaukee El. Ry. & L. Co.*,[12] where the plaintiff was injured on the defendant's railway; she gave a release, believing at the time that she was not pregnant, though in fact she was; she later suffered a miscarriage as the result of the injury. An action to avoid the release on the ground of mistake was decided against her, on the ground that both parties had in mind the possibility of pregnancy, that the release was made in *conscious* ignorance, and that the parties took their chances in giving and taking the release. In other words, the transaction had an element of speculation, and the plaintiff could not be heard to say that she had made a bad bargain.

As to the correct criterion in this class of mistake, there is some difference of statement. It has been suggested that "There is no mistake in the legal sense as to the qualities of the subject-matter unless both parties affirmatively attribute to it characteristics it does not possess. If they are simply ignorant of its real nature the contract stands."[13] On this ground is distinguished the case in which a woman sold an uncut diamond for one dollar, both parties being in conscious ignorance of its real value; it was bought and sold as a *stone*. A later attempt to rescind the sale on the ground of mistake was defeated.[14] Another authority has said that to avoid the contract, the mistake must be "such that according to the ordinary course of dealing and use of language the difference made by the absence of the quality wrongly supposed to exist amounts to a difference in kind" and "common to both parties."[15] The question in every case of this sort should be "What was it with regard to which the parties contracted?" In *Sherwood v. Walker*, sterility was the material factor: a *sterile* cow was the contemplated subject matter; and it did not exist. In *Wood v. Boynton*, the subject matter was *a stone*, and the fact that the stone was worth more than was paid for it was merely collateral.

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[11]White v. Stelloh, 74 Wis. 435 (1889); McQuaid v. Ross, 85 Wis. 492 (1893).
[12]103 Wis. 472 (1899). Accord, Seeley v. Cit. Tract. Co., 179 Pa. 334 (1897).
[13]Brantly, Contracts (2nd ed.), sec. 71.
[14]Wood v. Boynton, *supra*, note 1.
[15]It has been suggested that the test is whether there would have been any contract at all had the truth been known with regard to the mistaken quality. In Hoops v. Fitzgerald, *supra*, note 8, the court said, at page 331: "The vital question in this matter is, first, was there a mutual mistake as to the condition of the walls of the building; second, was such a mistake so material to the making of the contract,—such an inducement to its execution,—that but for it the contract would not have been made."

Under either of these tests, however, it would seem that the principal case was rightly decided. The plaintiff was ignorant of the real nature of the soil; but the real nature of the soil was not the essential subject-matter of the contract. The mistake was really as to the difficulties of performance, but not as to the subject-matter, which was simply the driving of piles.

Richard H. Brown, '19.

Pleading: Variance: Proof of an express contract in an action upon an implied contract.—In *Scanlon v. John Gill & Sons Co., 166 N. Y. S. 742 (1917)*, the plaintiff brought an action for the reasonable value of work, labor and services rendered to the defendant at his special instance and request. The proof showed an express promise to pay the plaintiff the stipulated salary, with the defendant's breach in failing to pay anything for certain months. The plaintiff recovered a sum in excess of the contract price. The court reduced the judgment to the contract price, holding that the *quantum meruit* was the agreed price, and that there was no variance between the allegations and the proof.

Conceding that under the common law system of pleading it was possible for the plaintiff to prove an express contract under the common counts, the courts have not always made it clear under which of the counts the proof was admissible. This has led to some confusion of principles. It has often been said that where the contract has been fully performed on one side, and the only thing remaining was the payment of the money agreed upon by the other party, a recovery might be had for the contract price under the common counts.[1] And yet it is everywhere admitted that the common counts declare upon implied promises.[2] The reason why there is not a variance in such cases is largely historical. Before the development of the action of assumpsit, debt was the appropriate remedy for the recovery of money on an executed contract.[3] In such an action, however, the defendant was enabled to escape payment by wager of law, that is, producing eleven jurors to swear that he was a truthful man, and in order to avoid this the law invented a fiction. If a debt had been created, whether by express contract or otherwise, it was said that the law would imply a promise to pay that debt, and the plaintiff was permitted to sue in the new action of assumpsit for the breach of that promise.[4] Because the action in its origin was thought to sound in deceit, the defendant was not permitted to wage his law.[5] It will be noted that where the debt was created as the result of an express promise the action was not based upon that promise, but upon

[1]Felton v. Dickinson, 10 Mass. 287 (1813); Dermott v. Jones, 2 Wall. (U. S.) 1 (1864); Bank of Columbia v. Patterson's Adm'r., 7 Cranch (U. S.) 299 (1813); Combs v. Steele, 80 Ill. 101 (1875); Jewell v. Schroeppel, 4 Cow. (N. Y.) 564 (1825).

[2]Warbrooke v. Griffin, 2 Brownl. & G. (Eng.) 254 (1609); cases in note 1, *supra*.

[3]Speake v. Richards, Hob. (Eng.) 206 (1678); Rudder v. Price, 1 H. Bl. (Eng.) 547 (1791); Cases cited in Chitty on Pleading (2nd ed.), 101; 3 Bl. Com. (Lewis ed.) 1148.

[4]Gordon v. Martin, Fitz-G. (Eng.) 302 (1732); Warbrooke v. Griffin, *supra*, note 2; Slade's Case, 4 Coke (Eng.) 92 (1603).

[5]Ames, History of Assumpsit, 2 Har. L. Rev. 16.

the implied promise to pay the debt.[6] Under the *indebitatus* counts the plaintiff was allowed more latitude in pleading than in the declaration in debt or special assumpsit.[7] It was not necessary to set up the terms of the contract in detail, nor in fact to allege that there was any contract at all. It was alleged that the defendant was indebted to the plaintiff because of a certain transaction, *e. g.* for goods, wares and merchandise sold and delivered at the defendant's special instance and request, and that being so indebted, and in consideration thereof, defendant promised to pay a certain named sum of money. Then followed the allegation of breach.[8] If the contract was one of sale and delivery, there was no variance. The *quantum meruit* and *quantum valebant* counts frequently took the form of *indebitatus* counts, it being alleged that the debt was created by a promise to pay so much as the plaintiff should reasonably deserve, or so much as the goods or services were reasonably worth, and being so indebted, and in consideration thereof, defendant promised to pay, etc.[9] In another form the *quantum meruit* and *quantum valebant* counts were set out as promises to pay so much as plaintiff deserved, or so much as the goods or services were reasonably worth, in consideration of the rendering of the services or sale of the articles, without any reference to the debt.[10] In either form, however, the *quantum meruit* and *quantum valebant* counts do not seem to have been the appropriate counts under which to prove express contracts.

In few cases was there an actual promise to pay the reasonable worth of the goods. This promise was implied by law to do justice to the plaintiff, and arose out of the equities of the situation.[11] The rule has been laid down that where an express promise remains in full force the law will not imply one in the same field.[12] The right to bring *indebitatus assumpsit* for money due on an executed contract does not entitle the party to set aside the contract and sue on the *quantum meruit*.[13] But since the *indebitatus assumpsit* accomplishes the purpose, and can be used without alleging an indebtedness or a promise at variance with the actual promise, there is no need to resort to the *quantum meruit* and *quantum valebant* counts to let in proof of the express contract. It has been customary, however, to plead a number of the common counts,[14] including the *indebitatus* and *quan-*

[6]Bank of Columbia v. Patterson's Admr., *supra*, note 1; Jewell v. Schroeppel, *supra*, note 1; Mead v. Degolyer, 16 Wend. (N. Y.) 632 (1837); Clark v. Fairchild, 22 Wend. (N. Y.) 576 (1840); Schulze v. Farrel, 142 App. Div. (N. Y.) 13 (1910).

[7]3 Bl. Com. (Lewis ed.), 1148; Ames, History of Assumpsit, 2 Har. L. Rev. 57.

[8]1 Saunders, Pleading and Evidence (4th ed.), 137; 1 Chitty on Pleading, (2nd ed.), 335, 336.

[9]1 Saunders, Pleading and Evidence (4th ed.), 137; 2 Chitty on Pleading (2nd ed.), 5; Stephen on Pleading (Will. ed.), 43.

[10]1 Wentworth, Pleadings, 205; 1 Chitty on Pleading (2nd ed.), 6; 1 Saunders, Pleading and Evidence (4th ed.), 139.

[11]Ames, History of Assumpsit, 2 Har. L. Rev. 58.

[12]Charles v. Dana, 14 Me. 383 (1837); Kimball v. Tucker, 10 Mass. 192 (1813); Lawrence v. Hester, 93 N. C. 79 (1885); 1 Chitty on Pleading (2nd ed.), 334.

[13]Walker v. Brown, 28 Ill. 378 (1862).

[14]Tuttle v. Mayo, 7 Johns. (N. Y.) 131 (1810); Keyes v. Stone, 5 Mass. 391 (1809); Smith v. Sharpe, 162 Ala. 433 (1909); Stephen on Pleading (Will. ed.), 43.

tum counts, and for this reason it has seldom been necessary to determine under which of the counts the contract was admitted. The distinction should be observed, however. Although the evidence is proper under some of the common counts, which declare upon an implied promise, it does not follow that it is competent under any one of them, *e. g.*, a *quantum* count, and to allow it, as in the principal case, would seem to confuse legal principles.

To avoid the obvious variance between the allegation and the proof, it is said that the contract price is the *quantum meruit* or *quantum valebant*.[15] Admitting that the contract price is evidential as to the reasonable value,[16] some courts hold that it is not conclusive, and that the reasonable value may be found to be more or less.[17] Others hold that it may be less but never more.[18] In the cases cited in notes 17 and 18 the contract was not completed because of the default of the defendant. The principle in such cases is based on the recognition that a contract can only be rescinded by the joint will of the parties. The right is held to be not truly rescission, but the right to treat a wrongful repudiation by the other party as a complete renunciation of it.[19] The principle in those and in the present case would seem to be the same, the failure to pay here being the wrongful repudiation. In New York cases in which the plaintiff has been unable to finish the work, it has been held that the contract is not evidence as to the value. In *McAvery v. Pasquini*,[20] certain work was done under an uncompleted contract. The plaintiff claimed the difference between the contract price and the work left undone. It is to be assumed from this that the contract price would have been the *quantum meruit* if he had finished, which makes the case similar in principle to *Scanlon v. Gill & Sons Co.* It was held that the price named in the contract affords no criterion of value. It might have been admitted if the action had been brought for the contract price after the completion of the contract, but it is not evidence where the action is *quantum meruit*. *Non constat* but that the contract price was excessive. There are other New York cases in accord.[21] If the hold-

[15]Scanlon v. John Gill & Sons Co., 166 N. Y. S. 742 (1917); Fells v. Vestvali, 2 Keyes (N. Y.) 152 (1865); Rubin v. Cohen, 129 App. Div. (N. Y.) 395 (1908); Kronau v. Weisburg, 151 App. Div. (N. Y.) 355 (1912); Walsh v. Jenve, 85 Md. 240 (1897); Burgess v. Helm, 24 Nev. 242 (1898); Paschall & Gresham v. Gilliss, 113 Va. 643 (1912); Warren v. Glasgow & Western Exploration Co. Ltd., 160 Pac. (Nev.) 793 (1916).

[16]Reed v. Phillips, 5 Ill. 39 (1842); Adams v. Burbank, 103 Cal. 646 (1894); Scott v. Congdon, 106 Ind. 268 (1886).

[17]Derby v. Johnson, 21 Vt. 17 (1848); Philadelphia v. Tripple, 230 Pa. St. 480 (1911).

[18]Kansas City Automobile School v. Holcker-Elberg Mfg. Co., 182 S. W. (Mo.) 759 (1916); Southwestern Fruit and Irr. Co. v. Cameron, 16 Ariz. 87 (1914); Coe v. Smith, 4 Ind. 79 (1853).

[19]Mersey Steel & Iron Co. v. Naylor, 9 Q. B. D. (Eng.) 648, 671 (1882).

[20]23 App. Div. (N. Y.) 120 (1897); Hunt v. Tuttle, 125 Ia. 676 (1904); Forrington v. Powell, 52 Neb. 440 (1897); Wade v. Nelson, 119 Mo. App. 278 (1906).

[21]Clark v. Mayor, 4 N. Y. 338 (1850); Wyckoff v. Taylor, 13 App. Div. (N. Y.) 240 (1897); and see Mooney *et al.* v. Tork Iron Co., 82 Mich. 263 (1890). *Contra:* Pinches v. Swedish Lutheran Church, 55 Conn. 183 (1887); Aetna Iron Works v. Kissuth County, 79 Ia. 40 (1890); White v. Oliver, 36 Me. 92 (1853), in which cases the loss was deducted from the contract price, but they may be distinguished on the ground that the plaintiff was the one in default.

ing in *Scanlon v. Gill & Sons Co.* is based upon the principles here set forth, it would seem to be in conflict with these cases. If it is based upon the principle set forth at the beginning of this discussion,[22] the pleading should have declared upon an *indebitatus* for work and labor done, and not upon a *quantum meruit*. To hold that the reasonable value is just the contract price, creates an implied promise to cover exactly the same field as that covered by the express promise, without apparent reason, historical or otherwise, and is contrary to the rule stated previously.[23]

It is the rule in New York and other jurisdictions where the question has arisen that the plaintiff cannot allege an express contract and hold the defendant upon an implied contract, as the evidence does not tend to establish the cause of action.[24] This seems clearly correct.

It would seem that the common counts in assumpsit have no place in the reformed procedure. There is no longer wager of law to be avoided. They are not a plain and concise statement of the facts constituting the plaintiff's cause of action.[25] They do clearly offer an opportunity of concealing the plaintiff's true cause of action. Some courts have held them to be inappropriate.[26] But in the majority of code states it has been held that the plaintiff may plead the legal effect of the contract in the language of the common counts, instead of alleging the facts as they really exist.[27] Some courts deplore the system, but think it has gone too far to permit a change.

The legal effect of certain relations between the plaintiff and defendant may be such as to create a contractual obligation. But it would seem just as inappropriate under the reformed procedure as under the former system to allege the legal effect to be a promise to pay reasonable value, and permit a recovery on proof of a promise to pay a stipulated price, which may or may not be the reasonable value. If the use of the common counts is to be permitted, and the legal principles governing the use of these counts are to be so confused, the reformed procedure will doubtless need further reforming.

L. W. Dawson, '19.

Pleading: What constitutes an appearance in New York.—The case of *Jaworower v. Rovere, 98 Misc. (N. Y.) 377 (1917)*, presents the question of what constitutes an appearance in New York. The question arose on a motion to set aside the service of summons as defective, the plaintiff contending that the defendant had made a general appearance in the action which waived defects in the summons. The defendant made various motions, and obtained and

[22] *Supra*, note 4.
[23] *Supra*, note 12.
[24] Lamphere v. Lang, 213 N. Y. 585 (1915).
[25] N. Y. Code Civ. Proc., sec. 481.
[26] Bowen v. Emmerson, 3 Ore. 452 (1869); Hammer v. Downing, 39 Ore. 504 (1901); Kimball v. Lyon, 19 Colo. 266 (1893); Penn. Mut. Life Ins. Co. v. Conoughby, 54 Neb. 123 (1898).
[27] Allen v. Patterson, 3 Selden (N. Y.) 476 (1852); Publishing Co. v. Steamship Co., 148 N. Y. 39 (1896); Pioneer Fuel Co. v. Hager, 57 Minn. 76 (1894); Higgins v. Germaine, 1 Mont. 230 (1870); Carrol v. Paul's Ex'r, 16 Mo. 226 (1852); Green v. Gilbert, 16 Mo. 226, (1852). Cases in note 15, *supra;* Pomeroy, Code Remedies (4th ed.), 436, and cases there cited.

served on the plaintiff an order extending his time to answer, which papers were endorsed with the name and address of the defendant's attorney, who later signed a stipulation that the order extending time be vacated. The court held that the defendant had not appeared, stating that since the adoption of section 421 of the Code of Civil Procedure, the defendant does not generally appear in an action unless he serves a notice of appearance or a demurrer or answer, as prescribed by this section. The decision cites several cases in which similar papers were served and were held not to be an appearance.[1]

Appearance, as applied to defendants, has been defined as voluntary submission to the jurisdiction of the court after the action is commenced, in whatever form manifested.[2] Such appearance may be either general or special, the former being defined as absolute submission to the jurisdiction,[3] or any act which recognizes the same,[4] and made for any purpose other than to question the jurisdiction,[5] while the latter is made for the sole purpose of objecting to the jurisdiction of the court over the person of the defendant.[6] Appearance is also presumed to be general where the record fails to show it otherwise.[7] If special, it must be so stated.[8]

Under the old Code, section 130 governed, in a general way, the matter of a defendant's appearance.[9] By this section a defendant, in case a complaint was not served with the summons, could compel the service of the same by causing a notice of appearance to be given and demanding in writing a copy of the complaint, specifying the place where it might be served. The provisions of this section of the old Code are now incorporated into sections 419, 421, 422, and 479 of the new Code passed in 1876, section 421 being designated "new."[10] Under the old Code the decisions seem to have conformed to the general rules governing appearances, and any act of the defendant which indicated submission to the jurisdiction was presumed to be a

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[1]Couch v. Mulhane, 63 How. Pr. (N. Y.) 79 (1882), motion to open default; Valentine v. Myers' Sanitary Depot, 36 Hun (N. Y.) 201 (1885), motion to make definite and certain (discontinuance allowed here, however, because nothing else to do under the facts of the case); Noble v. Crandall, 49 Hun (N. Y.) 474 (1888), motion to vacate a judgment, the court intimating, however, that under some circumstances, service of notice of motion might still be considered an appearance; Wood v. Furtick, 17 Misc. (N. Y.) 561 (1896), motion to vacate a judgment attachment; Paine Lumber Co. v. Galbraith, 38 App. Div. (N. Y.) 68 (1899), and Couch v. Mulhane, *supra*, signing of stipulation accepting an extension of time to answer; Regelmann v. South Shore T. Co., 67 Misc. (N. Y.) 590 (1910), obtaining an order to show cause to vacate an injunction; Engels-Express Co. v. Ferguson, 79 Misc. (N. Y.) 40 (1913), indorsement by attorney of bond vacating an attachment.

[2]People v. Cowan, 146 N. Y. 348 (1895).

[3]Dell School v. Peirce, 163 N. C. 424, 429 (1913).

[4]See 4 C. J. 1316, for collection of cases.

[5]Linton v. Heye, 69 Neb. 450, 453 (1903), for general rule, and 4 C. J. 1316, for collection of cases.

[6]Hamburger v. Baker, 35 Hun (N. Y.) 455 (1885); Belden v. Wilkinson, 33 Misc. (N. Y.) 659 (1901). For instances of special appearance see 4 C. J. 1316.

[7]See 4 C. J. 1318, for collection of cases.

[8]Reed v. Chilson, 142 N. Y. 152, 155 (1894).

[9]See Carpenter v. N. Y. & N. H. R. R. Co., 11 How. Pr. (N. Y.) 481 (1855); Krause v. Averill, 66 How. Pr. (N. Y.) 97 (1883).

[10]See note in Throop's Code of Civ. Proc. 176.

general appearance, unless shown to be special.[11] The question to be solved then is whether section 421 of the new Code has substantially changed the old practice and requires a formal notice of appearance to be given, and what that formal notice shall state.

The case of *Krause v. Averill*[12] held that there is no change brought about by this section of the Code, but that the practice of making appearance is now the same, and that a substantial compliance with the provisions of section 421 is sufficient. In a later Court of Appeals case, *Reed v. Chilson*,[13] the defendant served a general notice of retainer, and counsel in his brief contended that the appearance was not sufficient, citing 421 of the Code and several of the cases cited in support of the decision in the principal case. The court held that a notice of retainer is a voluntary general appearance in an action, stating: "When a party does not intend to subject himself to the jurisdiction of the court, he must appear specially for the purpose of raising the question of jurisdiction * * * *. But if the defendant elects to come before the court and there try questions, he cannot afterwards deny jurisdiction." Other recent cases have also decided and indicated that section 421 does not change the former practice.[14] Some courts, however, as shown by the principal case and citations therein, have either overlooked the case of *Reed v. Chilson*, or have not considered that it decides the question of appearance. Thus there continues a conflict upon the question.[15]

There seem to be no cases laying down definitely what a notice of appearance must contain. The latter part of section 421 reads, "A notice * * * * so served must be subscribed by the defendant's attorney, who must add to his signature his office address with the particulars prescribed in section 417 * * * *" (concerning the office address of the plaintiff's attorney). Interpreting the section liberally, it would seem wholly immaterial what else a paper contains, whether a notice of motion, or notice of retainer. If any language in it, or its general tenor, purports to convey information to the plaintiff that the subscribing attorneys are representing the defendant in the cause, it should be held to be an appearance within the language of the section.

Ralph L. Emmons, '18.

Real Property: Mortgage of cemetery lot.—In *Kerlin v. Ramage, 76 So. (Ala.) 360 (1917)*, the plaintiff sought to recover for improvements which he had made on the defendant's cemetery lot, and prayed that a sale of the lot be decreed for the satisfaction of the debt, on the theory that he had an equitable lien or mortgage on the

[11]McKenster v. Van Zandt, 1 Wend. (N. Y.) 13 (1828); Quinn v. Tilton, 2 Duer (N. Y.) 648 (1853); Baxter v. Arnold, 9 How. Pr. (N. Y.) 445 (1854); Cooley v. Lawrence, 5 Duer (N. Y.) 605 (1855); Dole v. Manley, 11 How. Pr. (N. Y.) 138 (1855); Ayres v. Western R. R. Corp., 48 Barb. (N. Y.) 132 (1866).

[12]*Supra*, note 9.

[13]*Supra*, note 8.

[14]Phelps v. Phelps, 6 Civ. Proc. (N. Y.) 117 (1883), affirmed by Gen. Term in 32 Hun (N. Y.) 642 (1884). See Bell v. Good, 22 Civ. Proc. (N. Y.) 317 (1892); People v. Cowan, *supra*, note 2; Matter of White, 52 App. Div. (N. Y.) 225, 232 (1900).

[15]See Bell v. Good, *supra*, note 14.

lot. The court declared that a mortgage on one's cemetery lot may not be declared or enforced.

It is a general rule that the cemetery corporation or association acquires an estate in fee in lands to be devoted to burial purposes, and even where the deed contains a provision that the land is to be used only as a burying ground, the courts are unwilling to construe it as giving rise to an estate on condition.[1] But the powers of the corporation or association to use or alienate lands is restricted.[2] Thus it has been held that a cemetery has no power to mortgage lands which have been to some extent used for burial purposes.[3] But lands of a cemetery corporation in which interments have not been made and which have not been sold for burial purposes may be sold under mortgage foreclosure,[4] or they may be sold voluntarily by the corporation if the integrity of the cemetery is not interfered with.[5] Because the use to which cemetery lands may be put is restricted, they are often exempt from taxation, even in the absence of a statute specifically exempting them.[6]

There is some difference of opinion as to the character of the interest acquired by the purchaser of a burial lot. No formal deed is necessary to confer the exclusive right to a lot in a cemetery for burial purposes.[7] It is generally conceded that the lot-holder does

[1]Thornton v. Natchez, 129 Fed. 84 (1904); Methodist Protestant Church of Cincinnati v. Laws, 7 Ohio Cir. Ct. 211 (1893); City of Portland v. Terwilliger, 16 Or. 465 (1888); Congregation Shaarai Shomayim v. Moss, 22 Pa. Super. Ct. 356 (1903); Field v. City of Providence, 17 R. I. 803 (1892). In Rawson v. Uxbridge School Dist., 7 Allen (Mass.) 125 (1863), the court says: "A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated." See also Scovill v. McMahon, 62 Conn. 378 (1892), where the deed contained a provision that a fence should be erected around the cemetery. But in Gumbert's Appeal, 110 Pa. 496 (1885), it was held that a grant of land, for a nominal consideration, to church societies for the use and purpose of a church and churchyard is a grant for that special purpose, and when the purpose fails the grant of land reverts to the donor or his heirs.

[2]In La Societa Italiana Di Mutua Beneficienza v. San Francisco, 131 Cal. 169 (1900), the plaintiff was a benevolent society which provided for the burial of those of its members who were too poor to provide burial for themselves. It was held that the city of San Francisco held its cemetery lands in trust for public uses as a cemetery, and could not lawfully grant any part thereof to such a private corporation, even though the corporation intended to use the land for burial purposes. In Chew v. First Presbyterian Church of Wilmington, 237 Fed. 219 (1916), it was held that a church corporation holds its lands in trust for a religious or pious use, and as against lot owners in its cemetery is without power of alienation for secular uses, even under a subsequent general statute conferring power to convey property.

[3]Wolford v. Crystal Lake Cemetery Ass'n., 54 Minn. 440 (1893). See also Oakland Cemetery Co. v. Peoples Cemetery Ass'n., 93 Tex. 569 (1900), which holds that a cemetery association has no power to create debts on the faith of lands dedicated to burial purposes, and that the sheriff has no power to sell such lands under execution against it.

[4]Ross v. Glenwood Cemetery Ass'n., 81 App. Div. (N. Y.) 357 (1903).

[5]City of Tacoma v. Tacoma Cemetery, 28 Wash. 238 (1902).

[6]Mount Auburn Cemetery v. Cambridge, 150 Mass. 12 (1889). In Louisville v. Nevin, 10 Bush (Ky.) 549 (1874), it was held that a cemetery cannot be subjected to a sale to pay for improvements on streets adjacent thereto.

[7]Conger v. Treadway, 50 Hun (N. Y.) 451 (1888), aff'd 132 N. Y. 259 (1892); Union Cemetery Co. v. Alexander, 69 So. (Ala.) 251 (1915); Roanoke Cemetery Co. v. Goodwin, 101 Va. 605 (1903). But in Bryan v. Whistler, 8 B. & C. (Eng.) 288 (1828), it was held that a grant to the exclusive use of a vault in a church burying ground can not rest in parol.

not own a fee.[8] In some cases his interest has been held to be an easement,[9] and in others it has been held to be a license.[10] It has also been held to be analogous to the right of public worship in a particular pew of a church.[11] It can properly be treated as an easement only if it is created by grant. Where not created by grant, it is of necessity no more than a license.[12] Where the interest is an easement, it must be an easement in gross, since there is no dominant tenement. Easements in gross are not recognized in England.[13] Interests called easements in gross are recognized quite generally in this country.[14] In a few American jurisdictions they may be sold or assigned,[15] but in most of the states they are held to be mere personal rights, not subject to sale or assignment.[16] According to the latter view, an easement in gross would seem to be practically equivalent to a license.

Although this license is irrevocable by the licensor,[17] apparently the interest, whether an easement or a license, is subject to termination when public necessity requires.[18] Since in most jurisdictions the lot-holder gets only an easement or license, he does not acquire such an interest as will support an action of ejectment.[19] Besides for the

[8]See *infra*, notes 9 and 10. The following cases, however, hold that he may acquire a fee, New York Bay Cemetery Co. v. Buckmaster, 49 N. J. L. 449 (1887); *In re* Brick Presbyterian Church, 3 Edw. Ch. (N. Y.) 155 (1837); Pitcairn v. Homewood Cemetery, 229 Pa. 18 (1910); Boileau v. Mount Moriah Cemetery Ass'n., 10 Phila. (Pa.) 385 (1875).

[9]Richards v. Northwest Protestant Dutch Church, 32 Barb. (N. Y.) 42 (1859); Roanoke Cemetery Co. v. Goodwin, *supra*, note 7. The easement may be acquired by adverse possession, Hook v. Joyce, 94 Ky. 450 (1893).

[10]Dwenger v. Geary, 113 Ind. 106 (1887); Gowen v. Bessey, 94 Me. 114 (1900); Raynor v. Brown, 60 Md. 515 (1883); Partridge v. First Independent Church of Baltimore, 39 Md. 631 (1873); Page v. Symonds, 63 N. H. 17 (1883); Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 503 (1871); McGuire v. Trustees of St. Patrick's Cathedral, 54 Hun (N. Y.) 207 (1889); Kincaid's Appeal, 66 Pa. 411 (1870).

[11]Richards v. Northwest Protestant Dutch Church, *supra*, note 9; Buffalo City Cemetery v. City of Buffalo, *supra*, note 10. And see Tiffany, Real Property, sec. 314.

[12]Raynor v. Brown, Partridge v. First Independent Church of Baltimore, McGuire v. Trustees of St. Patrick's Cathedral, *supra*, note 10. But in Roanoke Cemetery v. Goodwin, *supra*, note 7, the court said that the lot-holder acquires a right in the nature of an easement, and in that case no formal deed was given. In McWhirter v. Newell, 200 Ill. 583 (1903) there was no formal deed, and the court held that he acquired a "license or easement."

[13]Rangeley v. Midland Ry. Co., 3 Ch. App. (Eng.) 306 (1868); Ackroyd v. Smith, 10 C. B. (Eng.) 164 (1850).

[14]Wagner v. Hanna, 38 Cal. 111 (1869); Willoughby v. Lawrence, 116 Ill. 11 (1886); Amidon v. Harris, 113 Mass. 59 (1873); Goodrich v. Burbank, 12 Allen (Mass.) 459 (1866); City of New York v. Law, 125 N. Y. 380 (1891); Poull v. Mockley, 33 Wis. 482 (1873).

[15]Amidon v. Harris, Goodrich v. Burbank, City of New York v. Law, Poull v. Mockley, *supra*, note 14.

[16]Wagner v. Hanna, Willoughby v. Lawrence, *supra*, note 14; Garrison v. Rudd, 19 Ill. 558 (1858); Boatman v. Lasley, 23 Ohio 614 (1873); Fisher v. Fair, 34 S. C. 203 (1890). And see Tiffany, Real Property, sec. 305.

[17]Gowen v. Bessey, *supra*, note 10.

[18]Page v. Symonds, *supra*, note 10.

[19]Stewart v. Garrett, 119 Ga. 386 (1904); Anderson v. Acheson, 132 Ia. 744 (1907); Hancock v. McAvoy, 151 Pa. 460 (1892). *Contra*, Wilkinson v. Strickland, 35 So. (Miss.) 177 (1903); and where he has a fee it has been held that he may maintain ejectment, New York Bay Cemetery Co. v. Buckmaster, *supra*,

lot-holder to maintain ejectment would be against public policy, as is very well pointed out in *Stewart v. Garrett*,[20] where the court says: "Within these hallowed precincts, no court would desire to send the sheriff with a writ of possession." The lot-holder may maintain trespass,[21] and this would seem to be the remedy where a stranger comes upon his lot for the purpose of removing the remains of those who have been interred there. A cemetery lot is not subject to sale upon execution,[22] and the holder's own power of sale is also limited.[23]

There are very few cases reported in which the lot-holder's right to mortgage his interest is involved. The New York rule evidently is that he may mortgage his lot before,[24] but not after,[25] interments have been made therein. In the few jurisdictions where it is held that he owns a fee, he of course has a mortgageable interest. Where he has an easement in gross, if the question arises in a jurisdiction where such an interest is regarded as assignable, he likewise has a mortgageable interest, since any interest in realty which may be sold or assigned may be mortgaged.[26] Where the interest is an unassignable easement in gross or merely a license, it is of course not mortgageable. But even where the character of his interest does not prevent the lot-holder from mortgaging his lot, he ought not to be allowed to do so on grounds of public policy if interments have been made in the lot. The disturbance of the dead which might follow a foreclosure of the mortgage is against public sense of decency. It would of course be clear that in a jurisdiction in which it is held that a cemetery corporation cannot mortgage lands which have to some extent been used for burial purposes, the lot-holder cannot acquire the power to do so when he purchases from the corporation, and makes interments in the lot.

Three of the judges in the principal case dissented on the ground that since the deed was absolute in form, the lot-holder took a fee, which could be mortgaged. The majority view, however, seems in accord with the general rule that even though the deed is absolute in form, the purchaser acquires no mortgageable interest.

Charles V. Parsell, Jr., '19.

note 8. In Hancock v. McAvoy, *supra*, the court says that ejectment will lie neither for a license, nor for a mere right of way, nor for an easement. To the effect that ejectment will not lie for an easement, see Wood v. Truckee Turnpike Co., 24 Cal. 474 (1864). In Black v. Hepburn, 2 Yeates (Pa.) 331, 333 (1798), which holds that ejectment will not lie for a mere privilege or incorporeal hereditament, the court said: "Ejectment will only lie for things whereof possession may be delivered by the sheriff."

[20] *Supra*, note 19.

[21] Bessemer Land and Improvement Co. v. Jenkins, 111 Ala. 135 (1895); Jacobus v. Congregation of the Children of Israel, 107 Ga. 518, (1899); Gowen v. Bessey, *supra*, note 10; Meagher v. Driscoll, 99 Mass. 281 (1868); Hollman v. City of Platteville, 101 Wis. 94 (1898).

[22] Derby v. Derby, 4 R. I. 414 (1856).

[23] In Schroder v. Wanzor, 36 Hun (N. Y.) 423 (1885), the plaintiff's husband purchased a cemetery lot, to be used as a place of burial for himself and plaintiff and their family. The lot had been improved by the plaintiff, and her parents and one of her sons had been buried there. It was held that the wife could maintain an action to restrain her husband from conveying the lot to a stranger.

[24] Lantz v. Buckingham, 11 Abb. Pr. N. S. (N. Y.) 64 (1871), though in this case it did not appear whether or not there had been any burials.

[25] Thompson v. Hickey, 59 How. Pr. (N. Y.) 434 (1880).

[26] Massey v. Papin, 24 How. (U. S.) 362 (1860); Neligh v. Michenor, 11 N. J. Eq. 539 (1858). And see 2 Story, Eq. J. (13th ed.), sec. 1021.

Real Property: Parol contract of sale of standing trees.—In *West Lumber Co. v. C. R. Cummings Export Co., 196 S. W. (Tex.) 546 (1917)*, there was involved the question of whether a parol contract of sale of standing timber was unenforceable as being within the fourth section of the Statute of Frauds. The Texas court held, that where standing and growing timber on land is sold for the purpose of prompt severance, either within a specified time, or within a reasonable time, the subject matter of the contract is personalty and not realty, and an oral agreement for the sale thereof is not within the Statute of Frauds. This recent case is merely representative of one of the several views which the different American jurisdictions have adopted in solution of this very unsettled question.

The English courts' treatment of the problem has also been attended with confusion, but the result, as evidenced by the greater number of decisions, seems to be that when there is a sale or a contract to sell, as standing trees, with the purpose of vesting the property in the buyer before severance, it is a transaction for the sale of an interest in land, and, therefore, must be in writing to be enforceable.[1] The case of *Marshall v. Green*,[2] which has been severely criticized, has furnished what may be termed a limitation of this doctrine at the same time that it has introduced confusion into the law upon this question. The oral contract in that case provided that the standing timber to be sold was to be cut and removed by the purchaser "as soon as possible." It was held to be without the fourth section of the Statute of Frauds upon the ground that severance, immediate or within a reasonable time, was contemplated by the contract. The situation is thus distinguished from one where the trees are to remain a certain or unspecified time, in which instance a contract to convey them can only be enforced if in writing.[3] The consideration that has led to this holding is apparently that if the trees are to remain any length of time on the vendor's land they will derive nourishment from the soil, and it is this addition to them derived from the earth which makes the contract one concerning an interest in land. Any such shadowy, elusive differentiation has, fortunately, been eliminated by the Sale of Goods Act of 1893, and the situation put upon a sound basis. Section 62 of the Act provides, "Goods include all chattels personal other than things in action and money. The term also includes emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." *Jones v. Tankerville*[4] appears to be the only case decided since the passage of the Act which has applied the statute to an oral sale of growing timber. The court said, "Lastly, in determining the effect of such a contract at law the the effect of the Sale of Goods Act, 1893, has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale, whether by the vendor or purchaser * * * *." Evidently, then, the effect of the act has

[1]Scorell v. Boxall, 1 Y. & J. (Eng.) 396 (1827); Teal v. Auty, 2 Br. & B. (Eng.) 99 (1820).
[2]L. R. 1 C. P. D. 35 (1875).
[3]*Supra*, note 1.
[4]1909, 2 Ch. 440.

been to change the trend the decisions took formerly and strike out the subtleties and befogging qualifications that were companion to them. A sale of trees, to be severed at any time, present or future, under the contract, is a sale of personalty and a parol agreement is sufficient for its enforcement. Strangely enough this was the law in England in 1697.[5]

In the United States there are jurisdictions, following the English view, which declare that if the contract is one in which the parties intend a severance immediately or within a reasonable time, it is one for the sale of personalty; but if the trees are to remain any length of time, so that benefit will thereby be derived from the soil, an interest in land is conveyed which requires a written agreement.[6]

Again, there are a few states which have adopted a rule of common law similar to the broad doctrine adopted in England under the Sale of Goods Act, to the effect that a contract for the sale of standing trees which contemplates their severance does not convey an interest in land, and, therefore, need not be in writing.[7]

Finally, there is the view, which represents the weight of American authority, holding that an agreement for the sale of growing trees is one conveying an interest in land, and, consequently, cannot be enforced unless it is made with the formality demanded by the fourth section of the Statute of Frauds.[8] There is another situation which must be distinguished from those just stated. Where it is agreed in the contract that the vendor is to cut the trees and sell the product it is clear that a future sale of personalty only is contemplated by the parties.[9]

The Uniform Sales Act was advanced in an endeavor to settle all such differences as this question presents, and to make a uniform rule by which every jurisdiction would be guided. However, as only nine states[10] have adopted it to date, the old, confused common law tests are still applied in the majority of states. But what is the situation where it has been adopted? Section 76 of the Uniform Sales Act, being patterned on the English statute, defines "goods" as including "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." This provision,[11] as it is successively adopted in the various states, will ultimately

[5]1 Ld. Rym. (Eng.) 182.

[6]Smith v. Bryan, 5 Md. 141 (1853); Nettleton v. Sikes, 49 Mass. 34 (1844); Bostwick v. Leach, 3 Day (Conn.) 476 (1809); Byassee v. Reese, 61 Ky. 372 (1863); Cutler v. Pope, 13 Me. 377 (1836).

[7]Purner v. Piercy, 40 Md. 212 (1874); Banton v. Shorey, 77 Me. 48 (1885); Leonard v. Medford, 85 Md. 666 (1897); Claflin v. Carpenter, 45 Mass. 580 (1842).

[8]Green v. Armstrong, 1 Denio (N. Y.) 550 (1845); Wood v. Shultis, 4 Hun. (N. Y.) 309 (1875); Chick v. Sisson, 95 Mich. 412 (1893); Hostetter v. Auman, 119 Ind. 7 (1888); Garner v. Mahoney, 115 Ia. 356 (1902); Kileen v. Kennedy, 90 Minn. 414 (1903); Cooley v. Kansas City P. & G. Co., 149 Mo. 487 (1899); Drake v. Howell, 133 N. C. 162 (1903); Walton v. Lowrey, 74 Miss. 484 (1896); Fluharty v. Mill, 49 W. Va. 446 (1901); Bruley v. Garvin, 105 Wis. 625 (1900); Slocum v. Seymour, 36 N. J. L. 138 (1873); Burris v. Stepp, 162 Ky. 269 (1915); Corbin v. Durden, 126 Ga. 429 (1906).

[9]Smith v. Surman, 9 B. & C. (Eng.) 561 (1829).

[10]Arizona, Connecticut, Massachusetts, New Jersey, Maryland, New York, Ohio, Rhode Island and Wisconsin.

[11]New York Per. Prop. Law, sec. 156.

replace the present majority view by what has been the view of a small minority of our jurisdictions.[12] The change, however, seems to be both a reasonable and desirable one.

Eugene F. Gilligan, '19

Torts: Contributory negligence: Care required of passenger in vehicle.—In *Morris v. Chicago, B. & Q. R. R. Co., 163 N. W. (Neb.) 799 (1917)*, the plaintiff, by invitation, rode in an automobile driven by another and remained in it, with knowledge that it was approaching a dangerous railroad crossing. The invitee did not request the driver to stop, or to take other necessary precautions to avoid danger. The car was struck by a passing train, and plaintiff sustained personal injuries. The driver of the car was guilty of negligence. The plaintiff was not allowed to recover, the ground of the decision being that he was guilty of contributory negligence as a matter of law, because, even though he was not driving the car, it was his duty to look and listen for approaching trains, since he knew there was danger.[1]

The courts have not been able to agree upon the extent of the duty which rests upon a person who rides in a vehicle driven by another over whom he has no direct control.[1a] The cases can be divided into two groups. The first group charges the passenger with the absolute duty of keeping a lookout for his own safety, and does not permit him to trust to the care of the driver.[2] New York is among the jurisdictions which impose this absolute duty upon the passenger.[3] In all these cases the passenger could have observed and avoided the peril which injured him. In the second group of cases the passenger or guest is allowed to rely upon a driver whom he believes to be careful and competent.[4] A leading case in this group is *Howe v. Minn., St. P. & S. Ste. M. R. R. Co.*,[5] which held that the local rule, that it is negligence *per se* for one driving a conveyance on a highway not to "look and listen" for trains when approaching a railroad crossing, is not generally applicable to a mere passenger in a vehicle, who has no control over the driver or his management of the conveyance. The care required in such cases is well-expressed by Judge Mitchell: "We think that it would hardly occur to a man of ordinary prudence, when riding as a passenger with a competent driver, who he had no

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[12]*Supra*, note 7.

[1]For similar case just reported, see Hardie v. Barrett, 101 Atl. (Pa.) 75 (1917).

[1a]Becke v. Mo. Pac. Ry. Co., 102 Mo. 544 (1890); Bennett v. N. J. R. R. & T. Co., 36 N. J. L. 225 (1873); New York, L. E. & W. R. R. Co. v. Steinbrenner, 47 N. J. L. 161 (1885).

[2]Colorado & So. Ry. Co. v. Thomas, 33 Colo. 517 (1905); Indianapolis St. Ry. Co. v. Johnson, 163 Ind. 518 (1904); Miller v. Louisville, N. A. & C. Ry. Co., 128 Ind. 97 (1891); Lake Shore, etc., R. R. Co. v. Boyts, 16 Ind. App. 640 (1897); Whitman v. Fisher, 98 Me. 575 (1904); Lundergan v. N. Y. C. & H. R. R. R. Co., 203 Mass. 460 (1909); Sluder v. St. L. Transit Co., 189 Mo. 107 (1905); Dean v. Penn. R. R. Co., 129 Pa. 514 (1889); Dryden v. Penn. R. R. Co., 211 Pa. 620 (1905); Koehler v. Roch. & L. Ont. Ry. Co., 66 Hun (N. Y.) 566 (1893); Brickell v. N. Y. C. & H. R. R. R. Co., 120 N. Y. 290 (1890); Galveston, H. & S. A. Ry. Co. v. Kutac, 72 Tex. 643 (1889).

[3]*Supra*, note 2.

[4]2 Thompson, Negligence, sec. 1621, and cases there cited.

[5]62 Minn. 71 (1895).

reason to suppose was neglecting his duty, that he was required, when approaching a railway crossing, to exercise the same degree of vigilance in looking and listening for approaching trains that he would if he himself had the control and management of the team. And our conclusion is that a court cannot hold, as a matter of law, that a passenger having no control over the team or its management is guilty of negligence merely because he does not exercise the same degree of vigilance in 'looking and listening' on approaching a railroad crossing which is required of the one having the control and management of the team. It is a matter of common knowledge that under ordinary circumstances passengers do largely rely on the driver, who has exclusive control and management of the team, exercising the required care when approaching a railway crossing, and we do not think that the courts are justified in adopting a hard and fast rule that they are guilty of negligence in doing so."[6]

The courts should not go to the extent of holding a passenger who neglects to look and listen guilty of negligence as a matter of law. The question of negligence should be determined as a matter of fact. Due care should be required of the passenger, and what is due care depends on the circumstances of each particular case.

The question is related to the familiar one whether the negligence of the driver should be "imputed" to the passenger riding with him so as to preclude recovery on the part of such passenger. It seems to be well-settled in the majority of American jurisdictions that the negligence of the driver of the conveyance will not be imputed to a passenger, and that the passenger is responsible only for his own personal negligence.[7] But a few states still cling to the opposite view.[8] This doctrine of imputed negligence had its origin in England in the well known case of *Thorogood v. Bryan*.[9] Later cases, adhering to precedent, and giving no reasons as a basis for their holding, followed *Thorogood v. Bryan*.[10] Finally, in *The Bernina*,[11] decided in 1887, the "identity" theory upon which the earlier cases had been decided, was rejected, and *Thorogood v. Bryan* overruled. But the rule was recognized in some American jurisdictions and was not so easily rejected. It was early adopted in Pennsylvania,[12] Iowa,[13] Nebraska,[14] and Massachusetts;[15] but those decisions have now been

[6] *Supra*, note 5.

[7] Miller v. Louisville, N. A. & C. Ry. Co., *supra*, note 2; Nesbit v. Garner, 75 Iowa 314 (1888); State v. B. & M. R. R. Co., 80 Me. 430 (1888); Baltimore & Ohio R. R. Co. v. State, 79 Md. 335 (1894); Randolph v. O'Riordon, 155 Mass. 331 (1892); Follman v. Mankato, 35 Minn. 522 (1886); Alabama & Vicksburg R. R. Co. v. Davis, 69 Miss. 444 (1891); Dickson v. Mo. Pac. R. R. Co., 104 Mo. 491 (1891); Phillips v. N. Y. C. & H. R. R. R. Co., 127 N. Y. 657 (1891); Dean v. Penn. R. R. Co., *supra*, note 2; Little v. Hackett, 116 U. S. 366 (1885).

[8] Lake Shore & Mich. So. R. R. Co. v. Miller, 25 Mich. 274 (1872); Whitaker v. City of Helena, 14 Mont. 124 (1894); Carlisle v. Town of Sheldon, 38 Vt. 440 (1866); Prideaux v. City of Mineral Point, 43 Wis. 513 (1878).

[9] 8 C. B. 115 (1849).

[10] Cattlin v. Hills, 8 C. B. 123 (1849); Armstrong v. Lancashire & Yorkshire R. R. Co., L. R. 10 Exch. 47 (1875).

[11] 12 P. D. (Eng.) 58 (1887).

[12] Lockhart v. Lichtenthaler, 46 Pa. 151 (1863).

[13] Payne v. C. R. I. & P. R. Co., 39 Iowa 523 (1874).

[14] Omaha & R. V. R. R. Co. v. Talbot, 48 Neb. 627 (1896).

[15] Allyn v. Bos. & Alb. R. R. Co., 105 Mass. 77 (1870).

overruled, and those states now apply the general rule.[16] New York cases indicate that the doctrine of "imputed" negligence was never recognized in that State.[17]

The Wisconsin court limits the application of the doctrine of imputed negligence to private conveyances, holding that it does not apply to public conveyances. In *Prideaux v. City of Mineral Point*,[18] the court declared that when a person voluntarily enters a private conveyance, he trusts himself to its sufficiency and safety. His voluntary entrance is considered as an act of faith in the driver, and by implication of law, he accepts the driver as his agent to drive him. He is thus responsible for the acts of his agent. This decision has been followed in Wisconsin, and appears to be clear law in that jurisdiction.[19] The same rule has been adopted in Michigan,[20] Montana,[21] and Vermont.[22] In Texas the driver and passenger are considered as being engaged in a joint undertaking, making each responsible for the negligence of the other.[23] When the driver is the servant of the person sustaining the injury, then an application of the rule of *respondeat superior* imputes the negligence of the servant to the master and there can be no recovery.[24]

But the doctrine of the "identity" of passenger and driver of the conveyance upon which the cases appear to rest is not sound. There is no identity between driver and passenger. The acts of each one are entirely separate and distinct from those of the other. In the usual case the passenger has no control or authority over the conduct of the driver, and in no way participates in his acts. It is, therefore, submitted that those courts which still apply the doctrine of *Thorogood v. Bryan* persist in following a theory that has been rejected and repudiated in the very jurisdiction in which it originated, and which never had any foundation in sound principle.

Some of the courts which charge the passenger with the duty of keeping a lookout in every case, regardless of whether the circumstances were such that one might in ordinary prudence become absorbed in conversation or go to sleep, reject the doctrine of imputed negligence. But they reach a result which frequently coincides with the result of the imputed negligence rule. If a passenger, in reasonable reliance on his well-tried driver, non-negligently goes to sleep and the driver and the defendant are negligent, it matters little to the

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[16]Dean v. Penn. R. R. Co., *supra*, note 2; Nesbit v. Garner, *supra*, note 7, Hajsek v. Chic., B. & Q. R. R. Co., 5 Neb. (Unof.) 67 (1903); Randolph v. O'Riordon, *supra*, note 7.

[17]Phillips v. N. Y. C. & H. R. R. R. Co., 127 N. Y. 657 (1891); Robinson v. N. Y. C. & H. R. R. R. Co., 66 N. Y. 11 (1876); Dyer v. Erie R. R. Co., 71 N. Y. 228 (1877); Chapman v. New Haven R. R. Co., 19 N. Y. 341 (1859); Brickell v. N. Y. C. & H. R. R. R. Co., *supra*, note 2.

[18]43 Wis. 513 (1878).

[19]Otis v. Town of Janesville, 47 Wis. 422 (1879); Ritger v. City of Milwaukee, 99 Wis. 190 (1898); Olson v. Town of Luck, 103 Wis. 33 (1899); Lightfoot v, Winnebago Traction Co., 123 Wis. 479 (1905).

[20]Lake Shore & Mich. So. R. R. Co. v. Miller, *supra*, note 8.

[21]Whittaker v. City of Helena, *supra*, note 8.

[22]Carlisle v. Town of Sheldon, *supra*, note 8.

[23]Galveston, etc. R. R. Co. v. Kutac, *supra*, note 2; Johnson v. Gulf C. & S. F. Ry. Co., 2 Tex. Civ. App. 139 (1893).

[24]The Louisville, N. A. & C. R. R. Co. v. Stommel, 126 Ind. 35 (1890).

passenger whether he is put out of court because he went to sleep or because the driver was negligent. To bar him on either ground is equally erroneous.

William E. Vogel, '19.

Trials: Right of counsel to interrogate jurors and witnesses as to their personal interest in indemnity companies.—The question whether there was misconduct of counsel for plaintiff, because of questions touching a juror's or witness's personal interest in indemnity companies insuring defendant, arose in the case of *Cozad v. Raisch Improvement Co., 160 Pac. (Cal.) 1000 (1917).* In an action by an employee against his employer, plaintiff's counsel questioned the jury and witnesses concerning their personal interest in the indemnity company insuring defendant. Defendant claims the questions were asked solely for the purpose of apprising the jury of the fact that defendant was insured. There was no evidence that the case was actually being defended by the insurance company, that the insurance company would pay the judgment or that there was a lack of good faith in asking the question. The appellate court refused to reverse the judgment for plaintiff and held the questions competent and relevant for their respective purposes, viz., (1) of eliciting information as to whether a juror known to be a friend of the agent of the indemnity company was free from bias or prejudice; (2) to lay a foundation for impeachment of defendant's secretary by showing that he had not only made previous statements inconsistent with his testimony, but admitted to plaintiff the defendant's liability and stated his intention to make "a report to the indemnity company"; (3) to expose personal interest of one of defendant's witnesses.

It is well settled that it is improper for a jury to take into consideration the fact that defendant is insured.[1] Counsel may, on examining the jury, inquire whether they are interested in any accident insurance company, if it is done in good faith without any intent to bring the fact to the attention of the jury unnecessarily to prejudice the defendant's rights.[2] The reason is that it is necessary to secure to the client an impartial jury.[3] But some courts have gone farther and allowed counsel to ask whether any indemnity company has any connection with the defense[4] or, if counsel states that he understands defendant is indemnified and an insurance company will pay the

[1]Eckhart & Swan Milling Co. v. Shaefer, 101 Ill. App. 500 (1902); Emery Dry Goods Co. v. De Hart, 130 Ill. App. 244 (1906); Gore v. Brockman, 138 Mo. App. 231 (1909); Manigold v. Black River Traction Co., 81 App. Div. (N. Y.) 381, 384 (1903); Hordern v. Salvation Army, 124 App. Div. (N. Y.) 674, 676 (1908); Simpson v. Foundation Co., 201 N. Y. 479 (1911).

[2]Vindicator Consolidated Gold Mining Co. v. Firstbrook, 36 Colo. 498 (1906); Cripple Creek Mining Co. v. Brabant, 37 Colo. 423 (1906); Brusseau v. Lower Brick Co., 133 Ia. 245 (1907); Dow Wire Works Co. v. Morgan, 96 S. W. (Ky.) 530 (1906); Antletz v. Smith, 97 Minn. 217 (1906).

[3]Vindicator Consolidated Gold Mining Co. v. Firstbrook, *supra*, note 2; Goff v. Kokomo Brass Works, 43 Ind. App. 642 (1909); Dimmack v. Wheeling Traction Co., 58 W. Va. 226 (1905).

[4]Viou v. Brooks-Scanlan Lumber Co., 99 Minn. 97 (1906); Antletz v. Smith, *supra*, note 2; Spoonick v. Backus-Brooks Co., 89 Minn. 354, 358 (1903); Heydman v. Red Wing Brick Co., 112 Minn. 158 (1910).

judgment, the verdict will stand where exception is taken and the court orders the question stricken out and directs the jury to disregard it.[5] Other courts have held that the effect upon the jury is such as to require reversal.[6] In some instances a reversal has been ordered where it appeared from the verdict that the jury had been influenced by extraneous matter, and it was plain that the verdict was caused by such a question.[7] Whether the questions are asked in good faith is a matter that rests largely within the discretion of the trial court.[8]

By amendment to the New York Code of Civil Procedure in 1911[9] counsel are allowed to ask a juror, in actions for damages for injuries to person or property, whether he is a shareholder, stockholder, director, officer or employee or in any manner interested in any insurance company issuing policies for protection against liability for damages for injury to person or property in order to give him his right to the challenge to the favor as to such juror. In *Dulberger v. Gimbel Brothers*,[10] it was claimed that this amendment permitted simply a general question and not a particular inquiry as to any specific casualty company, but the court held that inquiry could be made as to a specific company. Recent decisions of the New York Court of Appeals strongly condemn the practice of introducing on the trial, evidence that defendant was insured and state in unmistakable terms that reversal will be granted where a verdict may have been influenced by such unauthorized evidence, notwithstanding the fact that the court directed the jury to disregard the evidence.[11]

As a practical matter in every such case if counsel is permitted to ask the jurors whether they are interested in any casualty company or in a specific company the average juror would have reason to think that an insurance company was involved in the case and the evil sought to be remedied would still exist. As was said in a Wisconsin case[12] "the line of demarcation between prejudicial and non-prejudicial remarks of this character cannot be readily drawn. Each case depends largely upon the circumstances by which they are elicited, and their probable effect upon the jurors." Plaintiff should have an impartial jury, and he should not be deprived of this right

[5]Faber v. Reiss Coal Co., 124 Wis. 554 (1905); Coolidge v. Hallauer, 126 Wis. 244 (1905); Home Telephone Co. v. Weir, 53 Ind. App. 466 (1913); Shaier v. Broadway Improvement Co., 22 App. Div. (N. Y.) 102 (1897), aff'd 162 N. Y. 641 (1900).

[6]Fuller v. Darragh, 101 Ill. App. 664 (1902); Manigold v. Black River Traction Co., *supra*, note 1; Hordern v. Salvation Army, *supra*, note 1; Loughlin v. Brassil, 187 N. Y. 128, 135 (1907); Rothenberg v. Collins, 161 App. Div. (N. Y.) 387 (1914); Kolacki v. American Sugar Refining Co., 164 App. Div. (N. Y.) 417 (1914).

[7]Williams v. Cantwell, 114 Ark. 542 (1914); Simpson v. Foundation Co., *supra*, note 1; Akin v. Lee, 206 N. Y. 20 (1912).

[8]People v. Ecton, 29 Cal. App. 478 (1916); Swift v. Platte, 68 Kan. 10 (1903); Netter v. Caldwell, 173 Ky. 200 (1917); Roach & Co. v. Blair, 190 Mich. 11 (1916); Viou v. Brooks-Scanlon Lumber Co., *supra*, note 4.

[9]Laws 1911, c. 206, now sec. 1180 New York Code of Civil Procedure.

[10]76 Misc. (N. Y.) 225 (1912); accord, Rinklin v. Acker, 125 App. Div. (N. Y.) 244 (1908).

[11]Simpson v. Foundation Co., 201 N. Y. 479 (1911); Akin v. Lee, 206 N. Y. 20 (1912).

[12]Faber v. Reiss Coal Co., *supra*, note 5.

because of a possibility that the jury might be prejudiced by the admission of such questions. If the questions are relevant and asked in good faith it seems unreasonable to say that they were improper because they might result unfavorably for defendant. Such a conclusion results from a balancing of equities, and the harm done to the defendant is a matter of degree.

Harvey I. Tutchings, '18.

Trusts: Validity of oral trusts in land.—Oral trusts are of two kinds, those relating to personalty, and those relating to land. Oral trusts in personalty are valid in all jurisdictions.[1] It is the purpose of this note to treat only a parol trusts in land, as to the validity of which there seems to be no unanimity of authority.

The Virginia court in *Fleenor v. Hensley, 93 S. E. (Va.) 582 (1917)*, holds that this species of trust is valid. The facts in this case may be summed up as follows: A agreed with B and C to purchase land of B at execution sale, to hold the land in trust for the wives of B and C, and to transfer it to them as soon as the purchase money was paid by them to A.

It is a mooted question whether at common law trusts in land could be raised by parol, but there seems to be no good reason for doubting that such trusts were valid.[2] However, by the seventh section of the English Statute of Frauds, 29 Car. II, c. 3, oral trusts in land were expressly declared void.

In the United States many of the decisions seemingly at variance, may be reconciled by consulting the statutes of frauds of the particular states. In those states which, like New York, have substantially adopted the seventh section of the English statute,[3] the courts hold that such trusts or the evidence of the existence of such trusts, must be in writing.[4] An exception to the rule exists where there is fraud, accident, undue influence or mistake in the original transaction which will warrant the interposition of courts of equity to compel the performance of the oral promise by fastening a constructive trust upon the conscience of the grantee.[5] The fraud in these cases must be positive, and the evidence of the trust *ex maleficio*, must be clear,

[1]Kilpin v. Kilpin 1 M. & K. (Eng.) 520 (1834); Matter of Carpenter, 131 N. Y. 86 (1892); Bostwick v. Mahaffy, 48 Mich. 342 (1882); Warburton v. Camp, 55 Super. Ct. (N. Y.) 290 (1888), aff'd. 112 N. Y. 683 (1889).

[2]See 1 Perry on Trusts, sec. 75.

[3]Section 242 of the Real Property Law of New York: "An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing."

[4]Kingsbury v. Burnside, 58 Ill. 310 (1871); McVay v. McVay, 43 N. J. Eq. 47 (1887); Pinney v. Fellows, 15 Vt. 525 (1843); Eagle Mining Co. v. Hamilton, 14 N. Mex. 271 (1907); Throckmorton v. O'Reilley, 55 Atl. (N. J.) 56 (1903); Hutchins v. Van Vechten, 140 N. Y. 115 (1893); Forster v. Hale, 3 Ves. Jr. (Eng.) 696 (1798), the leading English case.

[5]Ryder v. Ryder, 244 Ill. 297 (1910); Brock v. Brock, 90 Ala. 86 (1889); Rose v. Hayden, 35 Kan. 106 (1886); Goldsmith v. Goldsmith, 145 N. Y. 313 (1895); Newis v. Topfer, 121 Ia. 433 (1903).

definite and unequivocal.[6] The courts in some few states hold that an agent may be empowered to purchase land for his principal by an oral agreement, and that such agreement creates a valid trust in the land so purchased. These courts rest their decisions upon a breach of the relations of trust and confidence between the agent and principal.[7]

In all jurisdictions it seems that resulting or constructive trusts are enforced by the courts. These trusts arise, not by any words or agreement, but the law implied such trusts from all the circumstances of the case, as where a purchaser of land gives the entire or greater part of the purchase money. (A small part is not sufficient.)[8] If there is a parol agreement for a trust, and there are sufficient circumstances to create a resulting trust, the fact that such oral agreement exists does not take the transaction out of the category of resulting trusts.[9]

Among the states not adopting an express provision in their statutes of frauds similar to section seven of the English statute, there is a division of authority.[10] Some hold that such transactions come within another section of the statute, namely section four.[11] Other jurisdictions, however, like that of the principal case, hold oral trusts are valid and enforceable in courts of equity. Whether the declaration of trust must be contemporaneous with the making of the deed is a question which depends upon the particular jurisdiction. The decisions in these states may be classified under two heads; first, those which hold that a constructive trust is raised by law on account of the abuse of confidence placed in the one purchasing, and not through any oral agreement creating the relation of principal and agent,[12] and second, those which base their decision not on any constructive trust, but upon the oral agreement itself.[13] The principal case falls within this latter class.

Until recently the decisions in Virginia have been at variance. The rule laid down in the principal case was definitely established in *Young v. Holland*,[14] which has since been uniformly followed.[15] To establish such an express trust in realty, by parol evidence, the declaration must be unequivocal and explicit, and established by clear and convincing testimony.[16]

Jane M. G. Foster, '18.

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[6]Stambaugh v. Davis, 163 Ill. 557 (1896).

[7]Morris v. Reigel, 19 S. Dak. 33 (1904); Bryan v. McNaughton, 38 Kan. 98 (1887); Boswell v. Cunningham, 32 Fla. 277 (1893).

[8]Tillman v. Murrell, 120 Ala. 239 (1897); Dudley v. Dudley, 176 Mass. 34 (1899).

[9]Long v. Mechem, 142 Ala. 405 (1904).

[10]They are Connecticut, Delaware, Kentucky, North Carolina, Ohio, Tennessee, Texas, Virginia and West Virginia.

[11]Sherley v. Sherley, 97 Ky. 512 (1895).

[12]Johnson v. Hayward, 74 Neb. 157 (1905); Thompson v. Thompson, 54 S. W. (Tenn.) 145 (1899).

[13]Gardner v. Rundell, 70 Tex. 453 (1888); Owens v. Williams, 130 N. C. 165 (1902). But see Gaylord v. Gaylord, 150 N. C. 222 (1909).

[14]117 Va. 433 (1915).

[15]Shield v. Adkins, 117 Va. 616 (1915); *dictum* in Berry v. Berry, 119 Va. 9 (1916).

[16]Taylor v. Delany, 118 Va. 203 (1915).