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Notes and Comment

Alien Enemy: Status of alien enemy as litigant: Partnership containing alien enemy as plaintiff.—The recent case of *Rodriguez v. Speyer Brothers*, [1919] A. C. (Eng.) 59, presents a very interesting development in the common law of England with reference to the rights of an alien enemy litigant. In that case the plaintiffs were members of a partnership composed of two British subjects, two American citizens, and a citizen of Germany there residing. Upon the outbreak of war between Great Britain and Germany the firm of Speyer Brothers was *ipso facto* dissolved.¹ Speyer Brothers thereupon commenced to wind up its affairs and instituted this action to collect a debt due to the partnership. The defendant set up as a defense the fact that one of the partners was an enemy alien then residing in Germany. The House of Lords held, by a majority of one, that the rule that an alien enemy, resident in the enemy's country, cannot bring an action during the continuance of the war, is not unqualified and will not be applied in a class of cases manifestly not within the mischief at which the rule was aimed, or where to prevent an alien enemy to become a party to an action as plaintiff would do much more harm to British subjects, or to friendly neutrals than to the enemy. In thus applying a rule of reason, the court relied upon two decisions which had already made incursions into the general rule. In the first of these cases² the plaintiffs were an English company and a German company, and the action was brought for the infringement of a patent of which they were the joint owners. Under an agreement made before the outbreak of the war, the English company was to have the sole right of bringing actions for the protection of patent rights. It was held that to deny the English company the right to prosecute this action would be to deny the right to a British subject to bring an action for his own benefit. In the language of the court: "To hold that the doctrine of disability applies to a case in which an enemy alien cannot during the war reap any benefit from the action and where the action is really for the benefit of the other partners, would, I think, involve a misconception of the principle and extent of the rule, and before the Trading with the Enemy Amendment Act, 1916, might have inflicted very serious loss upon British subjects. In these cases the substance of the matter must be looked at." In the second of these cases,³ the action was brought by the

¹The outbreak of war *ipso facto* dissolves all partnerships of which a non-resident alien enemy is a member. The attitude in which partners become placed as antagonist enemies not only renders impossible such amicable communication as is necessary to the carrying on of partnership business, but is obviously inconsistent with it, the objects and ends of partnerships being generally the joint application of the skill, labor, and enterprise of all the partners as well as their funds. *McAdams v. Hawes*, 9 Bush (Ky.) 15 (1872); *Small v. Lumpkin*, 28 Grat. (Va.) 832 (1877).

²*Mercedes Daimler Motor Co. and Daimler Motoren Gesellschaft v. Mausdlay Motor Co.*, 31 Times L. R. (Eng.) 178 (1915).

³*Rombach v. Gent*, 31 Times L. R. (Eng.) 492 (1915).

receiver of a partnership, one of the members of which was a non-resident enemy alien. The court said: "The receiver brought the action under the protection of the court. It was true that he had to join his two partners, but it was the receiver's action in substance and it was impossible to say that it was brought for the benefit of a firm, one of whom was an alien enemy."

In the United States there is no doubt that, as a general rule, an alien enemy cannot bring an action as plaintiff, though he may, of course, be made a defendant.⁴ But it should be borne in mind that this disability applies only to non-resident alien enemies. The test of the right to sue which has universally been adopted is residence, and not *nationality*, where the alien is, and not what he is.⁵ In *Clark v. Morey*⁶ a case which has been widely cited in support of this proposition, Chief Justice Kent said: "Aliens resident in the United States at the time of war breaking out between their own country and the United States, or who came to reside in the United States after the breaking out of such war, under an express or implied permission, may sue and be sued, as in time of peace; and it is not necessary, for that purpose, that such alien should have letters of safe conduct, or actual license to remain in the United States, but a license and protection will be implied, from their being suffered to remain, without being ordered out of the United States by the executive." This distinction is expressly incorporated in section 2 of The Trading with the Enemy Act.⁷

Whether the 3d paragraph of subsection b of section 7 of The Trading with the Enemy Act⁸ is a reaffirmation of the general rule of com-

⁴*Speidel v. Barstow Co.*, 243 Fed. 621 (1917); *Hungarian General Credit Bank v. Titus*, 182 App. Div. (N. Y.) 826 (1918); *Panne v. Soler*, 167 N. Y. Supp. 901 (1917); *Bell v. Chapman*, 10 Johns. (N. Y.) 182 (1813); *Crawford v. The William Penn*, 1 Pet. C. C. (Eng.) 106 (1815); *Mumford v. Mumford*, 1 Gall. (U. S.) 366 (1812); *Hanger v. Abbott*, 6 Wall. (U. S.) 532 (1867); *Caperton v. Bowyer*, 14 Wall. (U. S.) 216 (1871); *Levy v. Stewart*, 11 Wall. (U. S.) 244 (1870).

⁵*Speidel v. Barstow*, *supra*, note 4; *Tortoriello v. Seghorn*, 103 Atl. (N. J.) 393 (1918); *Clarke v. Morey*, 10 Johns. (N. Y.) 70 (1813); *Krachanake v. Acme Mfg. Co.*, 95 S. E. (N. C.) 851 (1918); *State ex rel. Constanti v. Darwin*, 173 Pac. (Wash.) 29 (1918). A recent case which shows that this principle is still being misapplied is *Ozbolt v. Lumberman's Exchange*, 204 S. W. (Tex.) 252 (1918). It appeared that the plaintiff resided in Hungary. The Court said: "The mere fact that the plaintiffs reside within the borders of a hostile government does not show that they are alien enemies. * * * The term residence is not synonymous with citizenship."

⁶*Clarke v. Morey*, *supra*, note 5.

⁷40 U. S. State. at Large 411, which reads as follows: "That the word 'enemy' as used herein shall be deemed to mean, for the purposes of such trading and of this act—

(a) Any individual, partnership, or other body of individuals of any nationality resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

⁸"Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war except as provided in section ten hereof * * *"

mon law is a moot question. The courts have generally ignored it, and as the signing of a peace treaty is now imminent, such a question must now be regarded as practically academic. However, in any future struggles, we would, before Congress took any action defining our relation with the enemy, be once more dependent upon the principles of common law, and legislation would probably follow the common law. Upon this view, a determination of what the attitude of our courts would be upon a problem of the kind presented in the principal case is important.

The rule is founded in public policy and seems to have its origin in two considerations: Firstly, that the subject of a country at war with us is in this country, unless he be here with the express or implied permission of the executive, *ex lege*, and that he cannot come into the courts of our country to sue any more than could an outlaw come into the courts of England to sue: and secondly, that the courts of this country will give no assistance to proceedings which, if successful, would be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money, goods, or other resources available to individuals in the enemy state. The answer to our problem must turn on a broad issue of principle. Is the rule which prevents an enemy alien from suing in our courts a fixed rule of law, or merely the expression of a public policy which does not apply to a particular instance if that instance discloses no mischief from the point of view of public policy? The following language is a persuasive argument for the latter proposition:⁹ "A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, can not possess the same binding authority as decisions which deal with and formulate principles which are purely legal. * * * In England, at least, it is beyond the jurisdiction of her tribunals to mould *stereotype national policy*. Their function is * * * not necessarily to accept what was held to have been the rule of policy a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of public policy for the *then present time*."

Does public policy demand that we deny access to our courts to a partnership, most of the members of which are legal citizens, but one of whom is a non-resident alien enemy? We think not. It must be remembered that, when a debt due to the firm is collected, no partner has any definite share of interest in that debt; his right is merely to have the money so received applied, together with the other assets, in discharging the liabilities of the firm and to receive his share of any surplus there may be when liquidation has been completed. Under these conditions, it is entirely possible that, when the debts of the partnership are paid, there will be no surplus remaining to be divided among the partners. But should the existence of a surplus make a difference in the result? Again the answer must be no. If the contention is made that to permit alien enemies resident abroad to sue in our courts, would be to lend aid and comfort to the enemy, the answer is that either the court or the government, through the alien enemy

⁹Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Co., (1894) A. C. (Eng.) 535, 553.

custodian, may so act as to prevent any property coming into the possession of the enemy.¹⁰ There are, on the other hand, strong arguments in favor of permitting the partnership to sue. To debar loyal citizens from enforcing their just claims is very apt to work serious hardships. Business life in war times takes on a shifting character and the close of a long and costly war may find the partnership unable to enforce claims which might easily have been collected at the outbreak of the war. The possibilities are so obvious as to require no further elaboration. The keystone of the alien enemy rule must be taken to be the fear that the enemy will, by means of a successful prosecution of suit, be supplied with sinews of war. Remove this keystone and it almost seems as if the whole structure must come toppling over. The method of procedure above suggested does more than this. It is a matter of common knowledge that the alien enemy custodian invested all the income accruing from enemy property within his custody in government bonds. Surely this is a far more equitable and desirable result than the one reached by summarily denying a partnership access to the machinery of the law merely because one of the members is a non-resident enemy alien. The argument gathers additional strength when it is remembered that resident alien enemies were accorded unrestricted access to the courts.

It is rather unfortunate that we have so little case law bearing directly upon the proposition here involved. In *Speidel v. Barstow*¹¹ two of the plaintiffs were non-resident alien enemies and two of the plaintiffs were resident alien enemies. The court held that the cause of action was indivisible and that as two of the partners were non-resident alien enemies, the action must be stayed during the continuance of the war. In opposition to this, we have the case of *Posselt v. Despard*¹² which it is submitted is the correct rule on principle and should be universally adopted throughout the country. In that case one of the plaintiffs was a resident alien enemy and the other plaintiff a corporation which was a subject of, and resident in Germany. In that case the court adopted the test of public policy above suggested and arrived at the conclusion that plaintiff must be allowed to proceed. These are the only American cases which may be said to directly involve the proposition herein discussed. But a few more cases should be cited to show that our courts are having some difficulty in digesting in entirety the principle that a non-resident alien enemy may never be a plaintiff. Thus we have several cases¹³ in which, pending the decision on appeal, the original plaintiff became a non-resident alien enemy. The courts permitted the judgment to be affirmed despite the rule that a state of war suspends an action during the continuance of the war.¹⁴ We have another type of cases of which *Hoskins & Hughes v. Gentry*¹⁵ is illustrative. The non-resident enemy

¹⁰*Posselt v. D'espard*, 100 Atl. (N. J.) 893 (1917).

¹¹*Spidel v. Barstow*, *supra*, note 4.

¹²*Posselt v. D'espard*, *supra*, note 10.

¹³*Birge-Forbes Co. v. Heye*, 248 Fed. 636 (1918).

¹⁴*Speidel v. Barstow Co.*, *supra*, note 4; *Plettenberg, Holthaus & Co. v. Kalmon & Co.*, 241 Fed. 605 (1917); *Vorhaus v. City National Securities Co.*, 167 N. Y. Supp. 736 (1917); *Taylor v. Albion Co.*, 168 Pac. (Cal.) 348 (1917); *Clemmitt v. Insurance Co.*, 76 Va. 355 (1882).

¹⁵63 Ky. 285 (1865). See also *Stumpf v. Brewing Co.*, 242 Fed. 80 (1917).

plaintiff was a merely nominal party who could not control the suit or collect the judgment. It was said that this could afford no ground for dismissing the suit. In still another group of cases,¹⁶ the court calls attention to the fact that the alien enemy custodian will prosecute the suit if his attention is called to it. It is submitted that the court in these cases might have accomplished the same result by decreeing that the proceeds of the judgment be paid over to the alien enemy custodian. These cases show the growing inclination to break away from the rigorous rule of common law which is becoming irksome.

While it is conceded that the preponderance of authority down to this date has tended to the treatment of the rule as a rule of ordinary law, and not as a mere expression of a public policy, the courts have been by no means unanimous. It is therefore respectfully submitted that as a matter of principle which is supported by eminent authority on both sides of the ocean, the time is now ripe to entirely break away from the rule, or at least to confine its application to the situation where a single non-resident alien enemy is suing. It is further submitted that, under Anglo-Saxon conceptions, the law is not a merely mechanical instrument, but a means of working out exact justice, taking all the circumstances involved into consideration. In this view, the rule that a non-resident alien enemy cannot sue should always be tempered by the rule of reason. If the facts of a particular case warrant the joinder of a non-resident alien enemy plaintiff and no harm can result to the sovereign from so doing, it is urged that there is no reason for prohibiting such a course of procedure.

A. L. Sherry, '19.

Constitutional Law: Amendments to the Federal Constitution: Adoption by referendum.—It has been the contention of opponents of the National Prohibition Amendment that a referendum on the adoption of the amendment would be necessary if demanded by the inhabitants of the states whose constitutions contain provision for such procedure. This claim is disposed of by the Supreme Court of Oregon in the case of *Herbring v. Brown*, decided April 29, 1919.¹ Herbring brought a proceeding in mandamus, to compel Brown, the Attorney-General of Oregon, to prepare a ballot title for a referendum of the legislative joint resolution ratifying the amendment. The court decided that mandamus would not issue, on the ground that the Oregon Constitution² does not make legislative resolutions the subject of referendum.

The distinction between "resolutions" and "acts" or "ordinances" is generally recognized,³ although the exact question here decided seems not to have arisen on many previous occasions. *Hopping v. Council of City of Richmond*⁴ is cited in accord. In *State ex rel. Berry*

¹⁶*Nord-Deutsche Insurance Co. v. Dudley Co.*, 169 N. Y. Supp. 303 (1918); *Rothparth v. Herzfeld*, 179 App. Div. (N. Y.) 865 (1917).

¹Not yet reported.

²"The people * * * reserve power at their own option to approve or reject at the polls any act of the legislative assembly." Art. IV, Sec. I, Oregon State Constitution.

³*C. & N. P. R. R. Co. v. Chicago*, 174 Ill. 439 (1898); *State v. Delesdenier*, 7 Tex. 76 (1851).

⁴170 Cal. 605 (1915).

*v. Superior Court*⁵ it was held that the constitutional provision for an initiative on bills and laws gave no right to insert into a proposed statute a long preamble consisting largely of argument in favor of the measure. A legislative resolution, which is ordinarily only an expression of legislative opinion, would not in most cases be oppressive to the people; but an attempt to pass a legislative measure in the form of a resolution might make the resolution subject to a referendum, especially where a local matter is treated.⁶

The court in the principal case does not pass upon the propriety of a referendum under the Federal Constitution, but it seems that this would be doubtful. The Constitution provides two alternative methods for ratification of amendments: by the legislatures of three-fourths of the states, or by conventions in three-fourths of the states.⁷ It seems quite clear that the naming of these methods excludes all others. The older writers praised the method of amendment as making changes comparatively easy, yet guarding against hasty and ill-considered alterations.⁸ But since the adoption of the Eighteenth Amendment, there has been some evidence of a feeling that the ratification of amendments by state legislatures does not always correctly express the wishes of the people, and a change in the method of ratification has been advocated by some writers.⁹ Precedent for amendment by popular vote is found in the Australian Constitution.¹⁰ It is not inconceivable that the feeling that the legislatures have not, in the ratification of the Eighteenth Amendment, followed the will of those whom they represent, may result in an attempt to change the old method of ratification.¹¹

Richard H. Brown, '19.

Constitutional Law: Taxing power: Federal police regulations.—The validity of the Harrison Narcotic Drug Act¹ was attacked in *United States v. Doremus*, 249 U. S. 86 (1919). This statute requires persons handling certain narcotic drugs to register with the Collector of Internal Revenue and pay an annual tax for a license. The sale of the drugs is also stringently regulated. It is, of course, a fact, that the statute was enacted to regulate the sale of drugs to "drug addicts" and with a view to the suppression of the drug habit. The defendant

⁵92 Wash. 16 (1916).

⁶*Hopping v. City of Richmond*, *supra*, note 4.

⁷"The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress;" Constitution of the United States, Art. V.

⁸Story on the Constitution, sees. 1826-1831.

⁹22 Law Notes 221.

¹⁰Sec. 128.

¹¹It is reported through the newspapers that the Supreme Court of Washington has held that a referendum may be had on the Prohibition Amendment. The Washington Constitution, Art. II, Sec. 1 (b) provides that a referendum "may be ordered on any act, bill, law or any part thereof."

¹³8 Stat. at Large 785.

claimed that the act was an attempt to exert the police power reserved to the states, rather than a revenue measure, and was therefore void. The District Court had adopted this view.² The Supreme Court, over-ruling the District Court's decision, held the statute constitutional, saying that the regulatory provisions of the law could not be said to have no reasonable relation to the collection of the revenue, and that this could be the only objection to the validity of the statute.

The principal case is of especial interest at the present time, because of its bearing upon the question which is certain to go to the Supreme Court as to the constitutionality of the tax on the employment of child labor, inserted in the War Revenue Bill.³ The object of the remainder of this note will be an endeavor to set forth the view taken by the United States Supreme Court of the validity of statutes which are ostensibly revenue measures, but which actually have some other moral or economic purpose.

The only constitutional limitations upon excise taxes are that they shall be levied for a public purpose and that they shall be geographically uniform.⁴ It is well-settled that Congress may levy taxes in aid of the exercise of other powers conferred upon it by the Constitution; this is perhaps most clearly illustrated by the case of *Veazie Bank v. Fenno*,⁵ which upheld a prohibitive tax upon the circulation of state bank notes, designed to drive the notes from circulation. The tax was upheld on the ground that it was a reasonable means of providing a national currency.

In general, the courts will not inquire into the motive or purpose which an excise statute may have, in addition to the raising of revenue.⁶

It is, however, recognized that there may be revenue acts which would have to be held unconstitutional, even though they violated no express constitutional provision, on the ground that they would be destructive of "fundamental rights which no free government could consistently violate."⁷ Moreover, regulations may be introduced which have no reasonable relation to the collection of the revenue, and which violate some constitutional provision. Such regulations are ineffective. Thus, in *United States v. Dewitt*,⁸ the Supreme Court held unconstitutional a clause in a revenue measure, forbidding the sale of mixed naphtha and illuminating oils, no tax being imposed upon these oils; the provision was said to be of too remote and uncertain relation to the collection of revenue to be upheld. The courts will, however, go to considerable lengths in upholding regulations which may be connected with revenue measures. This is well illustrated by the principal case. One clause of the Harrison law prohibits the sale of the drugs by physicians to anyone save in the course of their profession, even after the payment of the fee, and it was argued that this provision, at least, could have no relation to the collection of revenue.

²*United States v. Doremus*, 246 Fed. 958 (1918).

³Act of Feb. 24, 1919, Title XII.

⁴*Knowlton v. Moore*, 178 U. S. 41 (1900).

⁵8 Wall. (U. S.) 533 (1869).

⁶*McCray v. United States*, 195 U. S. 27 (1904).

⁷*McCray v. United States*, *supra*, note 6, at p. 63.

⁸9 Wall. (U. S.) 41 (1869).

Four members of the court adopted this view, but the majority decided that the clause was valid, as it would tend to prevent the dealing in drugs by anyone who might obtain them from physicians, and later dispense them to drug addicts without paying a license fee.

In view of the authority of the principal case, there would seem to be no reason why the Child Labor Tax should not be upheld, if treated wholly as a tax law.⁹ If so, Congress will have accomplished through its taxing power, what the Supreme Court (divided five to four) declared that it could not do under its power to regulate interstate commerce. It must be admitted that an extension of the exercise of the taxing power in this direction is resulting in the building up of a system of federal police regulations at the expense of the police power of the states.¹⁰

Richard H. Brown, '19.

Criminal Law: Receiving stolen goods.—If X by means of fraudulent representations induces A to lend him money, credit for which is transmitted through ordinary banking channels for deposit in X's account, and X cashes his check against his account and gives the money to Y, Y knowing of the theft, is Y a receiver of stolen goods? This is the question in the case of *People v. Hanley*, 185 App. Div. (N. Y.) 667 (1919), and the majority of the court answer in the negative.

It is a fundamental proposition that to sustain an indictment for receiving stolen goods, the goods received must be the goods stolen. In the case of *Rex v. Walkley*,¹ the thief had exchanged the stolen notes of £100 each, for notes of a smaller denomination, and had given these to the accused. The court held that he was not guilty, saying that if the prisoner never received into his possession either of the £100 notes, *i. e.*, the notes actually stolen, he must be acquitted. In *United States v. Montgomery*,² the possession of gold coin for which stolen gold dust had been exchanged at the mint, was held not to be the possession of stolen property, although it was conceded by way of argument that if the dust had been made into coin the change of form would not have changed its identity, and the possession of such coin would be the possession of stolen property. In line with this *dictum* is the decision in *Commonwealth v. White*.³ In that case after the larceny and before the accused received the stolen bonds, they were fraudulently altered by erasures and additions. This change in the character of the stolen property was held to be no defense to the charge of receiving stolen goods.

It seems, then, that change of character is immaterial, so long as the property remains in substance the same property which was stolen; but if the stolen property is exchanged for other property, the

⁹On this question, see "Constitutional Aspects of the Child Labor Profits Tax," by A. M. Hamburg, 4 National Tax Association Bulletin 167.

¹⁰It is reported through the newspapers that the Child Labor Profits Tax was declared unconstitutional by District Judge Boyd.

¹4 Carr. & Payne (Eng.) 132 (1829).

²3 Sawyer (U. S.) 544 (1875).

³123 Mass. 430 (1877).

crime of receiving stolen goods does not attach to the receipt of the proceeds of the theft.

It is interesting to consider just what it was in the principal case that X stole. It was not actually any specific money, for A did not part with money in specie. He gave his certified check to a Philadelphia bank, which wired a credit to its New York correspondent, which in turn credited X's bank with the amount, and that bank credited X's personal account opened expressly for the purpose of receiving such credits. What, then, did X steal? The transmitting banks acted as the agents of A and it was not until the consummation of the bookkeeping transaction of credit and debit between the last transmitting bank and X's bank that control of the credit passed from A. At that point the relation of debtor and creditor arose between X's bank and X, and at that time the larceny of a sum of money evidenced by a credit was complete. To hold otherwise would be an excess of refinement. The case of *People v. Moran*⁴ holds it to be unnecessary in order to complete the crime of larceny by false pretenses that the thief himself obtain the property; it is sufficient if through his false and fraudulent representations it be obtained by another on his account. This is exactly what happened in the principal case.

Shearn, J., in his dissenting opinion in the principal case argues that although when the money was in the bank legal title to it was of course in the bank, yet when it was paid over the counter to X it was not X's money, but A's, and the appropriation of it by X was larceny; that therefore the very money which was stolen was the money afterward turned over to Y. He cites as analogous the case of *People v. Lammeris*,⁵ which, however, seems rather authority for the conclusion reached above that the larceny was complete when the money was deposited in X's bank. The defendant in that case was a county treasurer. The money on deposit for the county belonged to the bank as debtor of the county. Defendant, in his capacity of treasurer, made out a check on that account for which he procured a bank draft to the order of B, and gave the draft to B in payment of a personal debt. The defense contended that it was the draft which was misappropriated and that there was no larceny. It was held, however, that there was a larceny of the money which the draft represented. To reach this result the court resorted to a fiction, viz., that when defendant fraudulently procured the draft to be made out and appropriated it to his own use, the effect was the same as if he had received the money for the treasurer's check and had then appropriated the money to his own use and with it purchased the draft. The case does not support the position that X committed larceny when he received the money from his bank. Whatever fraud X committed was in the procuring of the deposit credit. There was no fraud in his obtaining the money from the bank, for the bank was his individual debtor as to that.

It is submitted that the crime of larceny was consummated when the credit was entered to X's account in the books of the bank, and

⁴43 App. Div. (N. Y.) 155 (1899); affirmed without opinion, 161 N. Y. 657 (1900).

⁵164 N. Y. 137 (1900).

that the money received by Y was not the stolen property, but the avails thereof, and that Y therefore is not guilty of the crime of receiving stolen goods.

Mary H. Donlon, '20.

Domestic Relations: Annulment of marriage.—Section 1744 of the New York Code of Civil Procedure provides that: "An action to annul a marriage heretofore or hereafter contracted, on the ground that one of the parties had not attained the age of legal consent, *or the age under which the consent of parents or guardians was required by the laws of the state where the marriage was contracted*, may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person." The words italicized, were added by the Laws of 1916. The first reported application¹ of this section, as amended in 1916, seems to be in *Bays v. Bays*, 105 Misc. (N. Y.) 492 (1918). The plaintiff was twenty years of age, and engaged in independent employment. The defendant was thirty years old. On August 29th, 1916, the parties left their home in Cortland, N. Y., early in the morning and went to Pennsylvania. In that state it is provided by statute² that, "No person within this Commonwealth shall be joined in marriage, until a license shall have been obtained for that purpose," etc., and "If any of the persons intending to marry by virtue of such license shall be under 21 years of age, the consent of their parents or guardians shall be personally given before such clerk," otherwise such license will not issue. The plaintiff in answer to the questions in the license blank as to his age, stated that he was twenty-one and took the oath that the facts set forth in his application were true. Before plaintiff made the application he told defendant that he had the written consent of his father to the marriage and showed her some paper purporting to be the signed consent of his father, but stated that as he was nearer twenty-one than twenty, he would not show the paper to the clerk. Having thus obtained the license the parties were married in Pennsylvania and returned home on the same day to Cortland, N. Y., where they continued, for six months, to reside as husband and wife. Plaintiff, becoming dissatisfied, separated from his wife and now brings this suit for annulment on the ground that he had not at the time of the marriage attained the age of twenty-one under which the consent of the parents or guardians was required in the state of Pennsylvania.

The facts thus stated bring the case within the letter of section 1744 as amended in 1916, and the question is—is the statute mandatory, conferring on the plaintiff the relief sought as a matter of strict legal right, or may a court in the exercise of its equitable powers, inquire into the circumstances and deny judgment where the party does not

¹In *Greenberg v. Greenberg*, 97 Misc. (N. Y.) 153 (1916), this same point was not involved. Though plaintiff based his right of recovery on section 1744 of the New York Code of Civ. Proc., as amended in 1916, the marriage had been contracted in this state and the court held that this amendment applied only to marriages celebrated in foreign states where the age of legal consent had not been provided for, and not to marriages celebrated in this state where the age of consent was 18 as before the amendment.

²Laws of 1895 (No. 123) as amended by Laws of 1903 (No. 175).

come into court with clean hands. Davis, J., in deciding this case, does not regard the statute as mandatory and denies the relief sought.

The American cases have generally recognized the rule that the validity of a marriage, both in respect to the form and mode of its celebration, and in respect to the capacity of the parties thereto, depends upon the law of the place where the marriage is celebrated,³ rather than upon the law of the domicile. However, some of the cases while recognizing this general rule, have made an exception thereto if the marriage, though valid where celebrated, is contrary to the distinctive public policy of the domicile of the parties.⁴

A few cases⁵ have departed from this general rule, that the validity of a marriage depends upon the law of the place where the marriage is celebrated, the reason being given, that marriage is something more than a mere contract, and that it establishes a status which is the subject of the law of the domicile. Those cases, however, ignore the fundamental distinction between the contract and the status. The initial validity of a contract is one thing, and the right to dissolve it for causes arising after it has been established is quite another. Thus a divorce which assumes the previous existence of a marriage status and declares that it shall henceforth be dissolved, depends upon the law of the domicile.⁶ If this decree be rendered by a court having jurisdiction over the status, the result is to put an end to the status for the future without affecting its existence in the past. In decreeing an annulment on the other hand, the court decides whether or not such a status was ever created, and the proper judge for determining this question would seem to be the state which created it. Although every state can regulate the status of its own citizens, yet in the absence of express words, we cannot infer a legislative intent to contravene the *jus gentium* under which the validity of a marriage contract is referred to the *lex loci contractus*. Such an intent cannot be attributed to the legislature unless it is clearly and unmistakably expressed in the statute,⁷ and this is true even where the parties domiciled in this state visit another jurisdiction for the sole purpose of contracting a marriage forbidden by our statutes.⁸ Werner, J., in his dissenting opinion in *Cunningham v. Cunningham*,⁹ says that annulment cannot be granted in such cases except by judicial legislation. In fact the cases following the general rule almost all admit, that if expressly provided for by legislation, a court may have the power to invalidate a marriage contracted in another state.¹⁰ So whatever may be the

³Reid v. Reid, 73, Misc. (N. Y.) 214 (1911); Donohue v. Donohue, 63 Misc. 111 (1909); Van Voorhis v. Brintnall, 86 N. Y. 18 (1881); Thorp v. Thorp, 90 N. Y. 602 (1882); Moore v. Hegeman, 92 N. Y. 521 (1883); Campbell v. Crampton, 2 Fed. 417 (1880).

⁴43 L. R. A. (N. S.) 355; *Cunningham v. Cunningham*, 206 N. Y. 341 (1912), would not recognize the validity of a marriage celebrated in New Jersey, because "repugnant to our public policy and legislation."

⁵*Mitchell v. Mitchell*, 63 Misc. (N. Y.) 580 (1909); *Kinnier v. Kinnier*, 45 N. Y. 535 (1871).

⁶2 Bishop, Marriage, Divorce and Separation, sec. 130.

⁷*Van Voorhis v. Brintnall*, *supra*, note 3.

⁸*Thorp v. Thorp*, *supra*, note 3; *Moore v. Hegeman*, *supra*, note 3.

⁹*Supra*, note 4.

¹⁰*Van Voorhis v. Brintnall*, *supra*, note 3.

better view on the question of jurisdiction for the annulment of marriage, the present amendment has overcome that difficulty in such a case as the one before us.

The words of this statute, however, are not mandatory. It does not in so many words say that the decree *shall* be given under certain conditions, but that: "An action to annul * * * *may* be maintained * * *." The principle is well recognized that unless a statute expressly prohibits or prescribes something, it will not be construed as mandatory and the court will not be compelled as matter of right to grant the relief asked for.¹¹ The question as to whether courts sitting in matrimonial cases, may apply equitable principles in giving relief, is not entirely settled in this state, although the tendency is to follow the rules and maxims of equity in administering the law. It seems that while the entire jurisdiction in matrimonial cases is conferred and regulated by statute, yet the court in the exercise of that jurisdiction, unless controlled by positive enactment, proceeds as a court of equity.¹² In various cases it has been held that where a marriage is not void but voidable, a court will deny a plaintiff relief where he fails to come into court with clean hands.¹³ That was the decision of the Appellate Division in *Stokes v. Stokes*,¹⁴ and though later reversed in the Court of Appeals¹⁵ on other grounds, that court still admits that there might well be extreme cases where the position of the parties is so inequitable that a court of equity will refuse to interfere.

Davis, J., considers that the circumstances in *Bays v. Bays* present such an extreme case. Plaintiff was twenty years of age and defendant ten years his senior. In one day, they had left their home in New York, had gone to Pennsylvania where they were married and returned to their New York home. In order to obtain a marriage license in Pennsylvania, the plaintiff had made a false affidavit as to his age. It is evident from such a case as this, that the intent of the legislature was not to make this provision mandatory and encourage an evasion of the statutory regulations concerning marriage, but rather to give a remedy in this state for parties who had become residents of this state, but who were residents of another state at the time of their marriage. To grant relief in every case coming under this section without regard to equitable principles, "would be to hold that by the exercise of discretion in the selection of the place to have the ceremony performed, it is not only possible but very easy under our laws for those legally entitled to marry, to enter into a 'trial marriage' or to establish a relation of legalized concubinage for an indefinite period. The authority and sanction of the courts should not be given to a doctrine so abhorrent to the well-recognized sanctity of the marriage status."¹⁶

Dorothea Koch, '20.

¹¹*Berry v. Berry*, 130 App. Div. (N. Y.) 53 (1909).

¹²*Berry v. Berry*, *supra*, note 11.

¹³*Tait v. Tait*, 3 Misc. (N. Y.) 218 (1893); *McCarron v. McCarron*, 26 Misc. (N. Y.) 158 (1899); *Taylor v. Taylor*, 63 App. Div. (N. Y.) 231 (1901); *Hall v. Hall*, 139 App. Div. (N. Y.) 120 (1910).

¹⁴128 App. Div. (N. Y.) 838 (1908).

¹⁵198 N. Y. 301 (1910).

¹⁶*Bays v. Bays*, 105 Misc. (N. Y.) 492, 500 (1918).

Domestic Relations: Adoption.—The case of *Ball v. Brooks*, 173 N. Y. Supp. 746 (1918), was an action by plaintiff as executrix of the estate of John Ball against the executors of the estate of one Mrs. Le Gacy to establish a contract of adoption which involved a promise to leave property to plaintiff's testator on Mrs. Le Gacy's death. The plaintiff asks that the alleged contract between Ball and Mrs. Le Gacy be specifically performed and that the property of the defendant's testator be transferred to her as executrix of Ball's estate. The contract was made prior to 1873 in which year the first general adoption act was passed by the New York Legislature. The court held the contract could not be enforced because adoption was invalid in the absence of legislative authorization.

Adoption was practiced by the Assyrians, Babylonians, Egyptians, Athenians, Spartans and Hebrews.¹ By the Roman law according to the Institutes of Justinian only males could adopt and the adopter had to be older by eighteen years than the person adopted.² There were two kinds of adoption practiced by the Romans. The first was adrogation. By this was meant that Roman citizens, who were free and independent could be adopted by a special enactment of the *comitia cūriata* in each instance. Adrogation could also be effected by will. The effect of adrogation was that the person adrogated lost his independence and became subject to his foster parent. The property of the child passed to the adrogator. The second method of adoption was called *adoptio*. By adoption was meant the passing of a person who was not independent from one family to another.³ Before Justinian's time this manner of adoption was accomplished by the father fictitiously selling his son three times, but under the later imperial judicial system this clumsy method was abolished and all that was required was merely a declaration before a magistrate, both the foster parent and the adopted person being present. Under the earlier law the effect of adoption was that the adopted person passed under the power of the adopting parent, but according to Justinian adoption conferred no paternal power at all of itself. Justinian gave the adopted child the right to inherit from his natural parents as well as from his foster parents, whereas, before, the right to inherit did not extend to the natural parents.⁴

Adoption was practised in a somewhat different way among the primitive Germans and in the Frankish period. The adoption of a son was allowed only to parents without an heir already, or to others with the consent of all their issue. It was effected by handing over the child to the foster parent who then gave him arms or did some other act or acts to show that he recognized him as his son. The child thereupon became a member of the household of the adopting father. By the modern law of Germany a relation is established which is like that existing between natural parents and children but

¹Hockady v. Lynn, 200 Mo. 456 (1906).

²Institutes, I, II, 4 Moyle.

³Two things were required to constitute a legal adoption: "First, the paternal power of the natural father had to be extinguished; second, the paternal power of the adoptive father had to be constituted." 2 Sherman, Roman Law in the Modern World, 83-91.

⁴2 Sherman, Roman Law in the Modern World, p. 83-91.

without producing all the legal consequences of the natural relation or breaking all the ties of the adopted child with its natural family. Before the German Civil Code was enacted, the natural father had charge of the administration and profits of the property of a minor adopted child. But sec. 1757 of the Code provides, "By the adoption of a child, the child acquires the legal status of a legitimate child of the adopter." Sec. 1757 has withdrawn from the adopting parents all rights of inheritance in the property of the adopted child;⁵ but the child is left the right in accord with the earlier law, to inherit both from its blood kindred and from its adopting parents but not from the latter's kindred.^{6 7} The Swiss Code, secs. 264-269, has substantially the same provisions as the German Code as to inheritance. The adopter must be at least forty years old and without legitimate issue. The adopting parent must be at least eighteen years older than the child adopted.

Adoption was early practised in France. It, however, fell into disuse at an early period. But under the Revolution, it was revived and entered into the law. The requirements of adoption were limited to the drawing up of an authenticated deed. By this means alone, without any exact conditions, the person adopted acquired the rights of a natural son. Adoption was irrevocable by the foster parent but could be renounced by the child.⁸ The French Civil Code, sections 348, 350, allows the child to inherit from both the natural and foster parents.

Adoption in some form also exists in Austria, Italy, Spain and Japan by their codes.⁹

Thus adoption was a part of the civil law but was never known to the common law of England. In England adoption in the sense of the transfer of parental rights and duties in respect of a child or another person and their assumption by him was never recognized by the law.¹⁰ The common law has not been changed by statute in England.¹¹ Following the English common law there is no adoption recognized by the common law in the United States.¹²

In the middle of the nineteenth century the states began to pass general statutes permitting adoption. Massachusetts was the first state to pass such an act in 1851. Its object was to change the succession of property and to create relations of paternity and affiliation not existing before.¹³ Massachusetts has been followed by the other states until we have some sort of adoption recognized in every state in the union.

⁵It reads, "The adoption of a child is no foundation of a right of inheritance for the adopter."

⁶Sec. 1764 of the Civil Code provides, "The rights and duties arising out of the relation between the child and its relatives are not affected by the adoption of the child, in so far as the law does not otherwise provide."

⁷4 Continental Legal History Series 660-661.

⁸3 Continental Legal History Series 217-219.

⁹2 Sherman, Roman Law in the Modern World, p. 83-91.

¹⁰Humphreys v. Polak, [1901] 2 K. B. (Eng.) 385, 390.

¹¹17 Halsbury, Laws of England 111.

¹²*In re Thorne*, 155 N. Y. 140 (1898); *Abney v. De Loach*, 84 Ala. 393 (1887); *Morrison v. Estate of Sessions*, 70 Mich. 297 (1888); *Carroll v. Collins*, 6 App. Div. (N. Y.) 106 (1896); *Ballard v. Ward*, 89 Pa. 358 (1879).

¹³*Ross v. Ross*, 129 Mass. 243 (1880).

The first general adoption act in New York was passed in 1873.¹⁴ The act provided that "a child when adopted should take the name of the person adopting, and the two henceforth should sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation excepting the right of inheritance and except as to the limitations over of real and personal property under deeds, wills, devises and trusts * * *." This act was amended by the laws of 1887 and gave the right of inheritance to children legally adopted.¹⁵ These acts were incorporated in the original domestic relations law enacted in 1896 which became with some modifications a part of the Consolidated Laws of 1909, and at present constitute sections 110-118 of the Domestic Relations Law.¹⁶ An unusual provision was added in 1915 whereby the adoption of adults was permitted.¹⁷

Before the act of 1873, however, there were in force various special statutes in New York which authorized particular charitable institutions in this state to place children committed to their care with persons who consented to take them by adoption, and in such a case a formal instrument was executed to express and carry out the intent of the parties.¹⁸ By these acts no right of inheritance was given unless expressly so stated in the statute. However, the infant was for all intents and purposes in the same situation as a natural child of the parents, except for legal rights as heir or next of kin, by being received in the family and treated as a child by the family.¹⁹

As these special statutes became frequent, the legislature by the act of 1873 legalized all these adoptions and prescribed a uniform method of adoption for the future.²⁰ The act of 1873 expressly provides that "nothing herein contained shall prevent proof of the adoption of any child heretofore made according to any method practised in this state from being received in evidence nor such adoption from having the effect of an adoption hereunder." This saving clause has no application to adoptions which were not authorized by these special statutes.²¹

The alleged adoption in the principal case took place before 1873,

¹⁴Laws of 1873, Ch. 880.

¹⁵Laws of 1887, Ch. 703.

¹⁶Ch. 19.

¹⁷Sec. 110 Domestic Relations Law. This section was amended by the Laws of 1917, Ch. 149, limiting the right of inheritance of an adult adopted in accordance with the act as it stood in 1915 so as not to apply to alter estates or trusts or devises in wills made or created before Apr. 22, 1915.

¹⁸For example, such a statute was passed in 1849, Laws of 1849, Ch. 244, incorporating the American Female Guardian Society.

¹⁹Carroll v. Collins, *supra*, note 12. Simmons v. Burrell, 8 Misc. (N. Y.) 388. (1894).

²⁰Simmons v. Burrell, *supra*, note 19.

²¹Carroll v. Collins, *supra*, note 12.

A concrete example of how these statutes affected adoption may be illustrated as follows: suppose a child was adopted in 1860 according to a special statute then in force. By this adoption the status of the child was for all purposes the same as if a natural child but without the right of inheritance. Simmons v. Burrell, *supra*, note 19. The act of 1873 legalized this adoption, and the effect of the saving clause was that this adoption was of the same legal effect as if the methods there laid down had been fully complied with. By the act of 1887, the right of inheritance was given to adopted children, so the child adopted by the special act of 1860 had the right to inherit. Simmons v. Burrell, *supra*, note 19.

was not made under the provisions of any special statute in force at that time and so was not legalized by the act of 1873 for it was not within the scope of the saving clause and, therefore, the act of 1887 allowing inheritance could not be invoked by the plaintiff in this case. It follows that specific performance was rightly denied.

Charles Warren Little, '20.

Evidence: Criminal prosecution: Proof of other offenses as part of a scheme.—In *Haley v. State*, 209 S. W. (Tex.) 675 (1918), a prosecution for the murder of one Williams, the state proceeded upon the theory that deceased's death was a part of the accused's general plan to rid himself of all obstacles to the continuance of his illicit relations with the wife of the deceased. Evidence offered in support of this hypothesis, to the effect that the prisoner's wife was poisoned ten months previous to the commission of the murder charged, was rejected on the ground that it was not proved that the accused had committed this crime. There had been no indictment nor other proceedings against the defendant for the murder of his own wife, nor was such charged in his indictment as a part of a plan to murder Williams.

It is a well recognized rule of criminal procedure that on the trial of a person accused of a crime proof of a distinct, independent offense is inadmissible.¹ This principle is a natural consequence of our indulgence of the well established presumption of the prisoner's innocence until his guilt is proved. To permit the jury to be confused by a variety of issues, and to be improperly influenced to decide the issue before them solely upon an unjust assumption of defendant's probable criminality; and to countenance the damaging of the defendant's interest incident to the surprise caused, and the departure from the issue framed by the indictment, would not accord with our system of justice. A modification of this rule, however, allows the admission of evidence of motive which suggests the doing of the crime charged, notwithstanding it tends to prove or does prove another crime.² This is especially important where this motive embraces and the evidence of it discloses a common scheme or plan. The principal case is illustrative of the above practice. To prove that the murder charged was committed by the defendant, a motive for its commission was shown in the existence of a general plan whereby the defendant was to continue unobstructed his illicit intimacy with the deceased's wife. It was in substantiation of this plan that evidence of the poisoning of his own wife was offered.

The grounds of the court's refusal to admit the evidence in the principal case would seem unsustainable in New York.³ The Texas

¹State v. Riggs, 39 Conn. 498 (1872); People v. Ascher, 126 Mich. 637 (1901); Janzen v. People, 159 Ill. 440 (1896); State v. Lapage, 57 N. H. 245 (1876); People v. Sharp, 107 N. Y. 427 (1887); People v. Greenwall, 108 N. Y. 296 (1888); People v. McLaughlin, 150 N. Y. 365, 386 (1896); People v. Molineux, 168 N. Y. 264 (1901).

²Mayer v. People, 80 N. Y. 364 (1880); Hope v. People, 83 N. Y. 418 (1881); People v. Everhardt, 104 N. Y. 591 (1887); People v. Williams, 58 Hun (N. Y.) 278 (1890); People v. Murphy, 135 N. Y. 450 (1892); People v. Shea, 147 N. Y. 78, 99 (1895); People v. Peckens, 153 N. Y. 576 (1897).

³People v. Dimick, 107 N. Y. 13, 32 (1887).

court limited the application of this exceptional principle to the instance where the evidence offered of another offense clearly proved it. This doctrine is undoubtedly safer and more careful of the prisoner's interests than that adopted by the New York courts, which permits the submission of the facts of another wrongdoing to the jury for whatever value they may contain or be assigned. Although New York would seem to be out of line with the weight of authority in this regard,⁴ its practice cannot be said to result dangerously to the accused. Theoretically, at least, he is adequately protected if the jury is carefully instructed to consider facts of this nature only in inferring therefrom a general plan, the object of which would show clearly a motive to commit the crime charged.

A vast number of decisions announce this rule of evidence with its equally well established exception, but one may question what the pleadings must contain in order that the court may permit its application. Is it analogous to the evidence rule which denies proof of negligence by offering instances of similar negligent acts, unless the negligence *alleged* is that of selecting incompetent employees? New York authority would probably say not.⁵ It may be mentioned that no case in this jurisdiction has either affirmed or denied the problem to be one of pleading. The cases correctly recognize that so long as the evidence is admissible in proof of motive, which in turn would disclose a plan or scheme, including in its scope the act for which the defendant is indicted, no question of pleading should intervene.⁶

Motive is the inducement to the commission of a crime, while intent is the mental state of determination to commit that particular crime. Motive is a natural element in a crime but it is not indispensable, and, unlike intent, need not be proved to obtain a conviction. Inasmuch as it is not a necessary ingredient to be alleged in establishing a cause, it would seem to follow that the facts proving it need not be alleged. When motive becomes important, therefore, not as an indispensable element to secure a conviction, but as a means to the identification of the accused with the crime, the facts constituting it would obviously not be required to be alleged. All that is necessary is that they be proved.⁷ With the establishment of motive as the object in view, logic would seem to justify a rule, then, that does not demand in the indictment the allegation of the prior offense which is sought to be proved.

In the few cases where the objection to the evidence of other offenses is based on the injustice of being compelled to meet a fact not made in the indictment, it has been denied or sustained solely on grounds of evidence.⁸ If the attempt is made to give evidence of a crime independent and distinct from the principal one, clearly the objection would be valid, for the evidence would not be relevant. But where

⁴People v. Frank, 28 Cal. 507, 518 (1865); Commonwealth v. Robinson, 146 Mass. 571, 581 (1888); State v. Hyde, 234 Mo. 200 (1911); Baxter v. State, 91 Oh. St. 167, 171 (1914); Swan v. Commonwealth, 104 Pa. St. 218 (1883).

⁵People v. McKane, 143 N. Y. 455 (1894).

⁶Cases in note 2, *supra*.

⁷People v. Bennett, 49 N. Y. 137 (1872); People v. Fitzgerald, 156 N. Y. 253 (1898).

⁸Cases, notes 1 and 2, *supra*.

there is such a connection between the crimes that they appear to be part of a plan, it should not be rejected because there is no allegation that this plan existed and that this crime was part of it. The defendant need not be advised of the facts to be used against him in proof of the motive which instigated him in the commission of the offense for which he is charged. It is this preliminary step only which this doctrine seeks to accomplish.⁹ This being so, the defendant is not required to face two crimes, for it is evident he might easily acquit himself of one act although he was unable to disprove another which has been offered in evidence to build up a probable motive assignable to him. Motive may be proved but in no sense does the defendant stand convicted thereby. For instance, in the principal case the poisoning of Mrs. Haley by the defendant would tend to show a motive that would justify the jury in believing that the defendant committed the crime charged. But he is in no worse position than if he admitted a statement made by himself that he was amorous of the deceased's wife, and certainly it cannot be said that this should be alleged. In either situation the presumption of guilt may be overthrown by countless means at the disposal of the defendant, and he need go no further than the facts immediately connected with the offense charged. One may reasonably conclude, therefore, that the question is one of evidence alone; and if the facts properly justify the admission of the evidence to indicate a general plan, in proof of a reasonable motive connecting the defendant with the indictment laid, it is unnecessary to allege the motive or the facts upon which it is based.

Eugene F. Gilligan, '19.

Evidence: Declarations admissible as part of the *res gestae*.—*People v. De Simone*, 121 N. E. (N. Y.) 761 (1919), is the latest expression from the New York Court of Appeals on the question of admitting declarations as a part of the *res gestae*. It furnishes an illustration of the difficulty of formulating a statement which will avoid rather than add to the confusion which has grown up around this doctrine. De Simone was indicted and tried for murder for shooting Della Rosa on Thompson Street, New York City. The evidence showed that after the shots, the defendant ran south about 80 feet and then turned west on Houston Street, where he was apprehended by an officer after running a short distance. The witness, another officer, at the time he heard the shots was standing on Thompson Street, about 75 feet south from its intersection with Houston Street. His view north was obscured by a wagon. He immediately ran toward Houston street, and, when within about ten feet of it, some one in the crowd that had collected shouted: "He ran over Houston Street." He then turned on Houston Street and came to the place where the prisoner had been apprehended. A pistol was found near this place. The trial court admitted the shout: "He ran over Houston Street" as a part of the *res gestae*. The Court of Appeals held it competent, not as a part of the *res gestae*, but as a part of the relevant explanation and description of the acts of the witness, saying: "The main or

⁹Commonwealth v. Robinson, *supra*, note 4, pp. 577-579.

principal transaction being investigated and adjudged, through and by virtue of the trial, was the shooting, the circumstances and conditions attendant upon or surrounding it, and was it done by the defendant under those circumstances and conditions? In the investigation deeds and statements of the participants in the transaction, or of observers of it, which accompanied, emanated from, and were a part of it, could be detailed by witnesses who saw or heard them. Deeds and acts which explain, describe, or characterize the transaction as an accomplished act are to be distinguished from those which are a part of it and are forced or brought into utterance or existence by and in the evolution of the transaction itself, and which stand in immediate causal relation to it. The former are hearsay and not competent as evidence; the latter are of the *res gestæ* and are relevant and competent."

The attempted distinction between deeds and declarations of the participants, or observers, of the principal transaction being investigated, which accompanied, emanated from and were a part of it, and which explain, describe or characterize the transaction as an accomplished fact, and those which are a part of it, and are forced or brought into utterance or existence by it, and in the evolution of the transaction itself, and which stand in immediate causal relation to it, is far from clear.

Because of the different classes of cases to which the shibboleth *res gestæ* is applied, it is admittedly a difficult task to formulate an accurate statement which will embrace all. As said in a Georgia case:¹ "To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a numerous family." The clearest exposition of the subject in New York is found in *People v. Del Vermo*.² In that case the court enumerates three separate and distinct classes or groups of facts to which the description "part of the *res gestæ*" has been applied: (1) acts or declarations themselves issuable facts; (2) acts or declarations admissible as accompanying and elucidating equivocal acts; (3) declarations spontaneously uttered while under the influence of an exciting event.

Declarations falling within the first class are illustrated by conversation embodying the terms of a verbal contract,³ words of defamation, *etc.* No objection that these declarations are hearsay could be entertained. While the words said are in a literal sense "things done," or a part of the things done, their admission in evidence depends upon no exception to the hearsay rule.

Declarations within the second class, sometimes called "verbal acts,"⁴ must possess four characteristics: the utterance must accompany the conduct to which it is desired to attach some legal effect;⁵ the conduct characterized must be independently material to

¹Cox v. State, 64 Ga. 374, 410 (1879).

²People v. Del Vermo, 192 N. Y. 47 (1908).

³McDougall v. Hess, 68 N. Y. 62 (1877); Potts v. Hart, 99 N. Y. 168 (1885); Badger v. Badger, 88 N. Y. 546 (1882).

⁴Wigmore on Evidence, sec. 1772.

⁵People v. Davis, 56 N. Y. 95 (1874); Fugg v. Child, 13 Barb. (N. Y.) 246 (1852).

the issue;⁶ it must be equivocal;⁷ and the words must merely aid in giving significance to the conduct.⁸ Declarations made by one in possession of realty, which tend to characterize that possession as adverse or otherwise, constitute one illustration within this class. A witness telling of these declarations would be giving hearsay evidence, but it would be admitted as one of the exceptions to the hearsay rule of exclusion. Various other illustrations are collected in Wigmore on Evidence.⁹

In the third class, illustrated by *People v. Del Vermo, supra*, the declarations are hearsay, concern a material fact in the case, and nearly always come afterwards in point of time. They must, however, be spontaneous and follow an exciting event so closely as to preclude opportunity for the will of the speaker to mould or modify them.¹⁰ The admission of such declarations stand on a different ground from that which supports the other two classes. It is the element of spontaneity that is accepted to sufficiently guaranty their trustworthiness and excuse the absence of an oath and cross-examination.

Attempts to determine whether a declaration is, or is not spontaneous, from mere lapse of time, have not proved satisfactory. It is evident that the character of the exciting event and many other surrounding circumstances may vary the time within which the event will continue to dominate the reasoning faculties. Lapse of time is only one of the facts to be considered.

In *Greener v. General Electric Company*,¹¹ the deceased, who fell from a ladder, in reply to a question put to him by a fellow employee within a few seconds after the fall, said: "My feet is broke, the ladder bent over." In excluding the statement the court suggests that it was narrative because in response to an inquiry. The opinion cited with approval *People v. Del Vermo, supra*. But that a declaration was made in response to an inquiry cannot be made the sole test of spontaneity is evident from an inspection of *People v. Del Vermo*, where the murdered man, a few seconds after being stabbed, and in view of the fleeing murderer, said, in response to an inquiry as to what was the matter: "Del Vermo stabbed me with a knife." As already pointed out the same court held this declaration to be spontaneous. The time element was about the same in both cases. In both the declaration was in response to an inquiry. And yet some other factor, which is not made to appear in the opinions, lead to opposite conclusions. The *Greener* case unfortunately confuses the very clear exposition in the *Del Vermo* case by a reference, with approval, to the earlier case of *Wadele v. N. Y. Central R. R. Co.*¹² Some portions of the opinion in the *Wadele* case are misleading, and it may be the court was misled by them in the *Greener* case. In the *Wadele* case it was said:

⁶Wigmore on Evidence, sec. 1773.

⁷*Abeel v. Gelder*, 36 N. Y. 513 (1867); *Morss v. Salisbury*, 48 N. Y. 636 (1872).

⁸*Waterman v. Whitney*, 11 N. Y. 157 (1854); *Winters v. Judd*, 12 N. Y. Supp. 411 (1891).

⁹Wigmore on Evidence, secs. 1777-1784.

¹⁰*Kennedy v. R. C. & B. R. R. Co.*, 130 N. Y. 654 (1891).

¹¹*Greener v. General Electric Co.*, 209 N. Y. 135 (1913).

¹²*Wadele v. N. Y. Central R. R. Co.*, 95 N. Y. 274 (1884).

"The *res gestae*, speaking generally, was the accident. These declarations were no part of that—were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction, not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testified to them. Nothing was then transpiring or evident to any witness which could confirm the declarations or by which upon cross examination of the witness testifying, or by the examination of other witnesses, the truth of the declarations could be tested. * * * When the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of the contemporary declarations as a part of the transaction to explain the particular fact distinguish this class of declarations from mere hearsay. . . . There must be a main or principal fact or transaction; and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it."

In so far as the above quotation from the *Wadele* case announces that there must be a material transaction, and that declarations to be admissible under this exception to the hearsay rule must grow out of it, and derive credit from it, the statement is undoubtedly accurate. The declarations must be the result of the exciting event, and derive their credit from the excitement which, for the time, controls the deliberative faculties. But that the declarations must be exactly contemporary with the transaction is not accurate, as is pointed out in the *Del Vermo* case, *supra*. As is also pointed out by that case, the declarations need not qualify or explain the act of stabbing, *etc.* They may introduce the entirely new element of who did the stabbing, or as to how the main transaction came about. To say that the declarations must qualify and explain the main act is confusing the principles upon which spontaneous declarations are admitted, with those applicable to the second class of cases above discussed. In that class the element of spontaneity is not essential. The act is equivocal, and needs explanation. Declarations which tend to explain may be given. When dealing with spontaneous declarations, however, more often than not the main act is not equivocal. It needs no explanation. The declaration admitted does not explain or elucidate it, except in the sense that it is related to it because of its introduction of another fact in the same series of events.

Again, the exclusion of the statement because it was not capable of corroboration seems erroneous. The court says that there is no possible means of testing the truth of the declarations. The reason for accepting such statements as the one in this case, without requiring a verification, is that the excitement of the event is presumed to have forced the witness to utter a truth. It is made involuntarily, either against his will or without his will, and is consequently the statement

of a fact as the declarant observes it. The same state of evidence was present in *Greener v. General Electric Co.*, *supra*. There, no corroboration of the truth of the statement could be gotten, and it is possible that the court in that case took this into consideration when excluding the statement. It did not expressly state this as a ground of exclusion.

The rule in New York that the spontaneous declaration must be one made by the injured person is unfortunate. Admission under this rule is admittedly of hearsay matter. It is allowed because the reflective faculties are quiescent under the shock of a given event. If that event is such, then, as will still these reflective faculties, the ejaculation should be receivable in evidence whether it is made by the injured party or by a bystander. New York seems pledged to the other rule.¹³ This is *contra* to the general view.¹⁴ It would seem probable that this result is reached in New York by confusion with the verbal act doctrine, in which the requirement, that the statement be one made by the person doing the equivocal act, is proper. The ejaculation must have been made by one having personal observation of the event.¹⁵ It must have been made concerning relevant matter.¹⁶

To the above three divisions of the *res gestae* rule Wigmore adds two others. They are, (4) admission where the thing said or done shows a certain mental condition, and (5) the admissions made by co-conspirators and agents.

In cases where mental condition is material, admissions or acts evidentiary of this condition, are allowable in evidence.¹⁷ Admittance of declarations made just previous to death, by one whom it is charged committed suicide, to show his mental condition, presents a good illustration of this rule. There is one modification in New York to this general rule. Statements of pain are admissible in evidence, to show the suffering of the one making the statement, only when made to a medical practitioner.¹⁸ Evidence of involuntary sounds, such as sighs, groans, *etc.*, are admissible whether made to a lay witness or to a medical practitioner.¹⁹ Other requirements mistakenly impressed on this class belong to the other theories.

In these five distinct classes it will be observed that, (1) statements which are issuable facts are not hearsay, (2) declarations which qualify, elucidate, or explain the act in question have absolutely no application to any other of the four classes, and (3) the element of spontaneity is necessary to only the one class—and where the statement qualifies, elucidates, or explains the act, it need not be spontaneous to be allowed admittance.

The court in the principal case allowed the testimony as being

¹³*People v. Del Vermo*, *supra*, note 2; *Fleska v. N. Y. Central Ry. Co.*, 152 N. Y. 339 (1897).

¹⁴Wigmore on Evidence, sec. 1755.

¹⁵Wigmore on Evidence, sec. 1751.

¹⁶Wigmore on Evidence, sec. 1754.

¹⁷*Swift v. Mass. Ins. Co.*, 63 N. Y. 186 (1875); *Terwilliger v. L. I. R. R. Co.*, 152 App. Div. (N. Y.) 168 (1912); *Goldschmidt v. Life Ins. Co.*, 119 N. Y. Supp. 233 (1909).

¹⁸*Roche v. B. C. & M. R. R. Co.*, 105 N. Y. 294 (1887); *Davidson v. Cornell*, 132 N. Y. 228 (1892); *Reed v. C. I. & B. R. R. Co.*, 45 N. Y. 574 (1871).

¹⁹*Hagenlocher v. C. I. & B. R. R. Co.*, 99 N. Y. 136 (1885); *Roche v. B. C. & M. R. R. Co.*, *supra*, note 18.

explanatory of the actions of the witness. Was this testimony admissible under the verbal act doctrine? There are two possible things which would bar it; (1) the immateriality of the conduct which it characterizes, and (2) the fact that the statement was made by a bystander. It would seem that the statement was material. The thing that the words tend to qualify, or explain, was of importance in the apprehension of the murderer. The explanation of the witness' reason for running after the defendant gave significance to this act. But, though material, the statement should be refused admittance under this theory, as it was made by a bystander. It could be excluded under the spontaneous declaration theory, in New York, because it was made by a bystander. Also it might be urged that it was made too long after the shooting had occurred. This raises the question as to whether subsidiary acts, which are exciting in themselves, can give rise to spontaneous exclamations which are admissible under this theory. Cannot such events, not themselves the one upon which the case hinges (such as the hunt for the criminal in the case in hand), give rise to exciting conditions prompting exclamations which are admissible under the spontaneous declaration doctrine? The court seems, however, to have admitted the statement as being a statement which was an issuable fact. While this, the first class mentioned in the *Del Vermo* case, might be thought to be erroneously considered as *res gestæ* (as it is not hearsay), since it has so been classified, to now attempt to change it would give rise to confusion and doubt.

C. F. Reavis, Jr., '19.

Insurance: Construction of the contract.—"Active service" as construed in a life insurance contract means actual service before the enemy. This was held in *Redd v. American Central Life Ins. Co.*, 207 S. W. (Kan.) 74 (1918). The application for insurance read: "Active service in the army or navy, in time of war, shall invalidate said contract of insurance, unless a permit for such service shall have been applied for * * *." The insured enlisted in time of war as a private in the medical department of the army and while at a training camp died of pneumonia. He had neglected to notify the company of his enlistment, and it sets this up as a defense in an action to recover the insurance. The court seeks definition in the New Standard Dictionary and finds active service defined as "(1) In garrison or at sea in time of peace; (2) before an enemy in time of war," and in the New Century Dictionary as "the performance of duty against the enemy, or operations carried on in his presence." Adopting those definitions as its own, the court decides that the insured was not in active service. It is the opinion of Ellison, P. J., dissenting, that to carry the phrase "active service" to the extent suggested at the argument would require the soldiers to be in actual combat, and would strain the meaning to the point of absurdity. He points out that this would exclude members of the noncombatant branches of the service from any claim to active service. It is to be wondered at just what stage of the past war one entered active service under such a definition. Was it at the point of embarkation? The soldier would not be "before the enemy," but the marine danger might constitute the presence of the enemy so

as to satisfy the definition of the Century Dictionary. Would service on the other side of the Atlantic be classed as before the enemy, or must the trenches be entered? The aviation camps on this side are not "before the enemy," but the danger contemplated by the contract is surely present. The field for a variety of facts is large, and it is doubtful if the courts would pursue the definitions upon which the holding in this case was based to the logical conclusion suggested by Judge Ellison. Upon the facts of the present case there could well be a difference of opinion. Webster's Dictionary gives as one definition of active service, "service upon the active list." Issue could be taken with the other dictionaries relied upon in their definition of the phrase, in view of the varied popular usage. The army and navy distinguish between active duty and inactive duty, the latter referring to one having been enrolled but not called to a station and under discipline. A like distinction might be drawn between active and inactive service by similitude of words. The changed mode of living, the unaccustomed hardships, the possibility of compulsory submission to inexperienced medical care, should all be taken into consideration in determining the intent of the contracting parties. The contract is construed most strongly in favor of the insured, which is so well known a rule as to need no citation. The case is an addition in support of the long established principle.

L. W. Dawson, '19.

Master and Servant: Workman's Compensation Act: Liability of employer for injuries to a discharged employee.—In *Whalen v. Stanwood Towing Co.*, 186 App. Div. (N. Y.) 190 (1919), the captain of a tug-boat having been discharged for coming to work in an intoxicated condition, immediately returned to the boat to get his belongings, but instead of leaving soon after, he stayed for dinner and later left the boat. His body was subsequently found in the river. Claimant sought an award under the Workmen's Compensation Act.¹ The court held that, although after the discharge of deceased his employment within the contemplation of the Act continued a reasonable length of time to enable him to get his belongings, there being no proof that he fell from the boat, the evidence was insufficient to warrant compensation as for an injury resulting in the course of the employment.

The adjudged English and American cases on the Acts have laid down the general principle that a discharged employee is allowed a reasonable time within which to leave the premises, and that for the purpose of the Act the actual relationship of master and servant is not severed until such reasonable time for departure from the employer's premises has been afforded.² The character of an employee is not lost until such right has been exercised, and the employment continues while the workman is physically engaged in making his exit from the

¹Consol. Laws of N. Y., Laws of 1914, Chap. 41, secs. 10 and 24.

²*Barbeary v. Chugg*, 112 L. T. Rep. (Eng.) 797 (1915); *Lowry v. Sheffield Coal Co.*, 24 L. T. R. (Eng.) 142 (1907); *Pope v. Merrit and Chapman Derrick and Wrecking Co.*, 177 App. Div. (N. Y.) 69 (1917); *Booth v. Burnett*, 2 Cal. Ind. Acc. Com. 162 (1915).

place where he was employed.³ Thus, where a workman was excused from work by the superintendent because he had been drinking and when he started to leave fell, receiving injuries, it was held he was injured within the course of his employment.⁴ However, if after discharge the employee chooses to remain on the premises without the employer's consent, he assumes all risk of injury.⁵ There must be no loitering and unnecessary delays of any kind. Supposing there was evidence in the instant case that deceased fell from the boat, and not, as is possible, from the dock, compensation may have been properly denied on the ground of the unreasonable delay of the captain in staying for dinner.

It has been held that when an employee, after being suspended or discharged, goes to the place of accident in violation of orders,⁶ or in his own interests and not in the interests of his employer,⁷ or returns to the place of employment seeking reinstatement,⁸ he is not acting in the course of his employment and the employer is not liable for injuries sustained by the employee during this time. And so, too, where there has been a voluntary discontinuance of service prior to the injury, and the servant is injured while he unduly remains on the premises.⁹

Following the general doctrine, it is also established that discharged employees receiving injuries while going to get their tools,¹⁰ or pay,¹¹ or returning from getting them, are injured in the course of their employment and entitled to the protection and benefit of the statute. This also follows as a necessary incident to the term of the employment and although the actual relation of master and servant has ceased for the purpose of service, the duty under the act continues until the wages are paid and the employee has left the premises.¹² The same rules applicable to the conduct of the employee in leaving the premises in case of discharge apply when he returns to receive his pay, or upon leaving after obtaining it. Thus, it was held that an employee going in the usual manner for his pay to a place designated by the employer is performing a service within his employment and if he suffers injury, the case comes within the operation and effect of the statute.¹³

The general rule that if a workman is injured, by accident while going to or returning from his work by means over which the employer has no control, the employer will not be liable to him,¹⁴ seems to apply also where the workman has been discharged and returns for his pay. In *Ames v. N. Y. Central Railroad Company*,¹⁵ where deceased left the

³*Smith v. South Normanton Colliery Co.*, 1 K. B. (Eng.) 204 (1903).

⁴*Kiernan v. Friestedt Underpinning Co.*, 171 App. Div. (N. Y.) 539 (1916).

⁵*Greenberg v. Atwood*, 38 N. J. L. J. 54 (1915).

⁶*Smith v. South Normanton Colliery Co.*, *supra*, note 3.

⁷*Phillips v. Williams*, 4 B. W. C. C. (Eng.) 143 (1911).

⁸*Merrit v. North Pacific Steamship Co.*, 2 Cal. Ind. Acc. Com. 273 (1915).

⁹*Greenberg v. Atwood*, *supra*, note 5.

¹⁰*Molloy v. South Wales Colliery Co.*, 4 B. W. C. C. (Eng.) 65 (1910).

¹¹*Riley v. Holland and Sons*, (1911) 1 K. B. 1029; *In re Phillips*, 1 Bull. Ohio Ind. Comm. 49 (1913); *Nelson v. Belfast Corporation*, 42 Ir. L. T. (Eng.) 223 (1908).

¹²*Molloy v. South Wales Colliery Co.*, *supra*, note 10.

¹³*Hackley-Phelps-Bonnell Co. v. Industrial Comm.*, 165 Wis. 586 (1917).

¹⁴*Holness v. Mackay*, (1899) 2 Q. B. 319; *Nolan v. Porter and Sons*, 2 B. W. C. C. (Eng.) 106 (1909).

¹⁵178 App. Div. (N. Y.) 324 (1917).

premises of his employer and gained the public highway in safety, but thereafter went upon an elevated railroad conducted by same company for the purpose of catching the train to a certain point to obtain his pay, and while crossing the tracks was killed, the court held his employment was not on the line where the accident occurred, but that he was a mere trespasser and not entitled to compensation.

No specific time is set when an employee returning for his pay may be said to be within the course of his employment. What constitutes a reasonable time for such purpose is usually regarded as a question of fact depending on the particular circumstances of each case.¹⁶ Where an applicant was discharged on Wednesday and returned for her pay on Friday, which was the customary pay-day, and was injured while on the premises, the court held the injury arose out of and in the course of the employment. In the language of the court,¹⁷ "In the course of the employment' does not mean 'in the course of doing industrial work.' * * * It does not follow that employment has ceased when the industrial work of the workman has come to an end. Both the servant and the master may yet have duties to perform under the contract of employment which require the workman to come on the premises to enable them to be performed. * * * He does so in the course of his employment, and an accident which befalls him in his so doing arises out of and in the course of his employment."

It is apparent from these principles and illustrations that both the English and American courts are endeavoring to apply a broad meaning to the phrase "out of and in the course of the employment," and in so doing to carry out the intent of the legislative bodies to furnish protection and care for the workman.

Jacob Meadow, '20.

Principal and Agent: Collateral fraud by agent: Proximate cause.—In *Deyo v. Hudson*, 225 N. Y. 602 (1919), the plaintiffs were a law firm practicing in the city of Binghamton, where the defendants, a firm of stockbrokers, had a branch office, with Mitchell, as agent, in charge. Carver, the junior member of the plaintiff firm, opened an account at the defendants' branch office and speculated on margins, losing money belonging to the plaintiffs' clients. He confessed to the senior member of the firm, and his speculations were made good. The senior partner then interviewed Mitchell, the defendants' agent, and told him that they were considering retaining Carver in the firm, but could not do this if he continued to speculate in the defendants' office, and asked Mitchell to let them know if he returned to do any more trading, which Mitchell agreed to do. It appeared that at that very time Carver was trading at the office and that Mitchell not only aided him to conceal the fact but on one occasion positively stated to a member of the plaintiff firm, that he had not resumed trading.

¹⁶*Riley v. Holland and Sons*, *supra*, note 11.

¹⁷*Riley v. Holland*, *supra*, note 11. But see *Phillips v. Williams*, *supra*, note 7, where an employee was on the premises a few days after his discharge without intention of working, but with intent to settle a dispute about his pay, was held to be there solely for his own purpose and consequently could not recover compensation for an injury resulting at that time.

Plaintiffs sue in deceit to recover the loss that they have sustained through Carver's defalcations. There is no evidence that the defendants actually authorized their agents to make false representations to the plaintiffs, or that they subsequently ratified his acts, beyond the fact that they received the commissions paid by Carver without knowledge of the fraud practised.

The Court of Appeals, in a unanimous decision, held that such statements were not within the scope of Mitchell's employment; that the mere receipt of the commissions, without knowledge of the fraud, did not amount to a ratification; and that independently of these considerations, the false representations of Mitchell were not the proximate cause of the injury, and that, therefore, no tort action of deceit would lie.

Upon the first point, it may be regarded as a settled rule that the principal is liable in deceit for the fraudulent representations of the agent, if made within the scope and course of his employment. Where an agent is authorized to enter into relations with a third party, the principal is responsible for all representations made by the agent, which are intended to and do influence the actions of the *third party*, while acting in respect to those relations.¹ The rule would appear to be that the principal is liable only for representations concerning the subject matter of the agency, and that where the representations are concerning something which is not the subject matter of the agency, they are not within the scope and course of employment, and the principal is not liable.² There is an Indiana case,³ however, in which the court makes the following very broad statement: "Where a principal authorizes his agent to do a certain thing, he is answerable for and bound by the acts and representations of his agent in accomplishing that end, even though the agent is guilty of fraud in bringing about the result. Having given such authority, the principal is responsible for the fraudulent as well as the fair means used by the agent, if they are *in line of accomplishing the result.*"⁴ Under this rule the nature of the fraudulent representations is immaterial, as long as they are "in line of accomplishing the result." That would include the principal case, and make Mitchell's representations to the plaintiffs within the scope of his employment. The passage in question is, however, mere *dictum*, as the representations in the case actually were concerning the subject matter of the agency. No case has been found in which this very broad doctrine has been applied. It would therefore appear that the defendants should not be liable. The subject matter of the agency was the sale of stocks. Had the representations been concerning the stocks he was selling, and to the party who was buying them, no doubt the defendant would have been bound. As it was, however, they were of matters clearly outside the subject matter of the agency, and will not bind the principal.

¹Haskell v. Starbird, 152 Mass. 117 (1890); Locke v. Stearns, 1 Metcalf (Mass.) 560 (1840); White v. Sawyer, 16 Gray (Mass.) 586 (1860); Sandford v. Handy, 23 Wend. (N. Y.) 260 (1840).

²Mechem, Agency, (2d ed.) sec. 1987, and cases cited.

³Wolfe v. Pugh, 101 Ind. 293 (1884).

⁴Italics are writer's.

The next point to be considered is whether the receipt of the commissions by the defendant would constitute a ratification of the fraud, they being received in the usual course of business and there being no actual knowledge of the fraud.⁵ This is a case where a third party is bringing suit against the principal, and should be distinguished from a case where the principal is suing the third party. The general rule in the former class of cases is that the receiving and retaining of benefits resulting from either the contract,⁶ or the tort,⁷ of the agent will not constitute such ratification as to make the principal liable, as long as he is ignorant of the representations of the agent, and the benefits appear to be the results of their normal business transactions. There is, however, in New York, a line of cases taking the opposite view, and holding that the principal, though ignorant of the fraud, is liable.⁸ The theory upon which these cases rest is that "the principal cannot enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation."⁹ There is also advanced the doctrine that whatever knowledge the agent possesses, is imputed to the principal, so that in reality the principal cannot be said to ratify without knowledge, since he possesses the knowledge of the agent. The soundness of this doctrine has been very much questioned, and it would not appear to be the correct view. The leading text writer on agency has said that "the general adoption of this view would practically abolish the entire element of knowledge in ratification, and is inconsistent with a large number of cases."¹⁰ The principal case, however, is even stronger for the defendant than those cited. It is not a case of direct fraud, such as misrepresentations by the agent to a vendee concerning land which he was authorized to sell. It is a case of *collateral* fraud—representations made to enable Carver, the junior partner to embezzle money so that he might continue his speculations in the defendants' office, to the resultant profit of the defendants. The cases most analogous to this situation are those involving the liability of the principal for collateral contracts. The principal has been generally held not liable by ratification on collateral contracts made by the agent, unless he knew of the contract. Thus in the New York case of *Smith v. Tracy*¹¹ where an agent was authorized to sell certain shares of stock, but was not authorized to make warranties, the principal was held not bound by the agent's warranties. In *Baldwin v. Burrows* the court held that "this responsibility for instrumentalities does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority, and not known to the principal at the time of receiving the proceeds, though such collateral contracts may have been the means

⁵For a general discussion of ratification without knowledge, see 15 Yale Law Jour. 331.

⁶See cases cited 1 Mechem, Agency, (2d ed.) p. 286, note 12.

⁷Fraud of Agent: Colvin v. Peck, 62 Conn. 155 (1892); Nichols v. Brum, 5 Dak. 28 (1888); Keefe v. Sholl, 181 Pa. 90 (1897). Assault by agent: Steinman v. Baltimore Laundry Co., 109 Md. 62 (1908). See also *supra*, note 6.

⁸Bennet v. Judson, 21 N. Y. 238 (1860); Krum v. Beach, 96 N. Y. 398 (1884); Green v. Des Garets, 210 N. Y. 79 (1913).

⁹Bennet v. Judson, *supra*, note 8.

¹⁰1 Mechem, Agency (2d ed.) p. 298.

¹¹Smith v. Tracy, 36 N. Y. 79 (1867).

by which the agent was enabled to effect the authorized contract. * * *¹² Also in the case of *Wheeler v. The North Western Sleigh Co.*,¹³ where an agent empowered to sell stock also contracted to sell a dividend which had been declared but not yet paid, the principal was not held liable for non-assignment of the dividend. It has even been held that the retention of the benefits by the principal after he has obtained knowledge of the unauthorized acts, does not amount to a ratification in certain cases.¹⁴ It would seem that there is at least as much reason for holding the principal not liable for collateral fraud as there is in the cases of collateral contracts. The liability of the principal for unauthorized acts must cease somewhere, and it would appear that the decision of the court in this case was the correct one, both on principle and in the light of decided cases.

The last point in the case is the question of causation. Was the fraud practised by Mitchell the legal cause of the injury to the defendant? The law upon this question of causation has always been in some confusion, and several theories have been advanced from time to time in the hope of clearing up the question and providing a fixed rule for the determination of future cases. A brief review of these theories may not be amiss.

The first conception of a legal cause was a *causa sine qua non*, the well-known "but for" rule. This test or rule makes the defendant's tort the legal cause of the plaintiff's damage if, but for the commission of the defendant's tort, the damage would not have happened. The rule when applied as a sole test of causation, is unsound.¹⁵ The fact that the damage would not have happened but for the commission of the defendant's tort does not invariably justify the conclusion that the tort was the legal cause of the damage. The converse of this proposition, however, is always true—that a defendant is not liable, unless it be true that, but for his tortious acts, the damage would not have happened.¹⁶

The second of these theories is the "last wrongdoer rule," to the effect that the legal cause of the damage is the last culpable human actor to be found in the chain of antecedents. This rule works out well in many instances, but is inconsistent with the theory of exhaustion, brought out in several cases,¹⁷ to the effect that a wrongful act may spend itself, the force set in motion being exhausted before the

¹²*Baldwin v. Burrows*, 47 N. Y. 199 (1872).

¹³*Wheeler v. The North Western Sleigh Co.*, 39 Fed. 347 (1889). See also *Condit v. Baldwin*, 21 N. Y. 219 (1860) and *Manning v. Gasharie*, 27 Ind. 399 (1866).

¹⁴The retention by the principal, after he has obtained knowledge of the unauthorized acts of his agent, of the benefits of the transaction, does not amount to a ratification in case the reason for their failure to return is that their identity is lost. *Schutz v. Jordan*, 32 Fed. 55 (1887); or that the property received has been disposed of so that it has become impossible or useless to return it. *Humphrey v. Havens*, 12 Minn. 196 (1867); or that it cannot now be returned without loss to the principal. *Bryant v. Moore*, 26 Me. 84 (1846).

¹⁵This rule, however, was applied in the charge to the jury in *Gilman v. Noyes*, 57 N. H. 627 (1876).

¹⁶*Taylor v. City of Yonkers*, 105 N. Y. 202 (1887); *Ayres v. Village of Hammondsport*, 130 N. Y. 665 (1891); *Grant v. The Pennsylvania and New York Canal and Railroad Co.*, 133 N. Y. 657 (1892).

¹⁷*Fleming v. Beck*, 48 Pa. 309 (1864).

happening of the damage. There are also cases involving two wrongdoers, both of whom may be sued by the injured party, and both being the legal cause of the damage. This rule has been criticised on the grounds just above stated.¹⁸

A third rule is the "substantial factor rule." Is the act of the defendant a substantial factor in producing the injury to the plaintiff? If so it is the legal cause. To be the substantial factor it is not necessary that it be the sole factor, nor even the predominant factor. It must continue up to the time of the injury to be a "practically active cause."¹⁹ This rule undoubtedly is a correct statement of the law, but is vague and general and correspondingly difficult of application.

The last and most widely accepted rule is the "probable consequence rule." A wrongdoer is liable for all injuries which are the natural or probable consequences, or, as some courts put it, "the reasonably foreseeable results" of his act. This is the view accepted by the courts of New York State,²⁰ not, however, without making certain arbitrary exceptions, notably in the case of damage resulting from fire, caused by the defendant's negligence.²¹ This, then, is the test to be applied in the instant case: Were the peculations and embezzlement of the plaintiffs' money the natural or probable result of the fraudulent statements made by Mitchell? If so, the act of Mitchell is the legal cause. The decisions of the courts as to what may or may not be the probable consequences of an act, fall into several divisions, governed by the following propositions.

In the first place, in the case of any distinct legal wrong, which *per se* constitutes an invasion of the rights of another, the law will presume that damage follows as a natural, necessary, and proximate result. Thus, action will lie for a battery, although no damages are shown.²² The same is true of trespass.²³ Also, damages resulting from a battery which might seem highly improbable, may be recovered for.²⁴ The second of these propositions is that where the act or omission is not a distinct wrong, actionable *per se*, and can only become a wrong to any particular individual through injurious consequences, it must appear from the evidence to have resulted therefrom according to the ordinary course of events.²⁵ Thus, in the case of *Fairbanks v. Smith* where the defendant was making a speech in the streets, and a pile of stones upon which some of the crowd were standing gave way, it was held that the injuries were not the natural result of the defendant's speech, and he was therefore not liable.²⁶

¹⁸See article by Professor Smith, 25 Harv. Law Rev. 112, 113.

¹⁹25 Harv. Law Rev. 103, 223, 303.

²⁰*Jex v. Straus*, 122 N. Y. 293 (1890); *Hall v. N. Y. Telephone Co.*, 214 N. Y. 49 (1915); *Lowery v. Western Mutual Telegraph Co.*, 60 N. Y. 198 (1875). It is also the view advocated by Sir Frederick Pollock, 1 Pollock, Torts, (10th ed.) p. 32. *Contra*, *Christianson v. Chicago, etc.*, R. R. Co., 67 Minn. 94 (1896); *Stevens v. Dudley*, 56 Vt. 158 (1883); *Isham v. Estate of Dow*, 70 Vt. 588 (1898).

²¹*Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210 (1860); somewhat modified by *Hoffman v. King*, 160 N. Y. 618 (1899).

²²*Cole v. Turner*, 6 Modern Rep. (Eng.) 149 (1704).

²³*Dougherty v. Stepp*, 1 Dev. & Battle (N. C.) 371 (1835).

²⁴*Vosburg & Putney*, 80 Wis. 253 (1891).

²⁵*Vicars v. Wilcocks*, 8 East (Eng.) 1 (1806); *Dubuque Wood and Coal Ass. v. Dubuque*, 30 Ia. 176 (1870); *Losee v. Clute*, 51 N. Y. 494 (1873).

²⁶*Fairbanks v. Smith*, 70 Pa. 86 (1871).

The third and fourth propositions have to do with a condition that is present in the principal case, *i. e.*, with the effect of an intervening act by a third party. They are as follows: If the original act was wrongful and would naturally, according to the ordinary course of events, prove injurious to some other persons, and injury occurs through the intervention of some other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. The leading case involving this set of facts is *Scott v. Shepherd*, the famous "squib case,"²⁷ where the defendant threw a lighted squib in the midst of a crowd of people, and each person threw it from him, in self defense, until it exploded, to the plaintiff's injury. The court referred back to the wrongful act as the cause, passing by the innocent acts of the other parties, although they were nevertheless a part of the causation of the plaintiff's injury. There is a long line of American cases to the same effect.²⁸ If, on the other hand, the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause.²⁹ Thus in *Lowery v. The Western Mutual Telegraph Co.*,³⁰ where the defendant by mistake wired \$5000, instead of \$500 from the plaintiff to B, his agent, and B absconded, it was held that B's act, not the defendant's, was the proximate cause, and that the defendant was not liable.

Applying these principles to the case at hand it will be readily seen that the fraud of the defendant's agent is not the legal cause of the plaintiff's injury. False representations are not *per se* an actionable wrong; there must be injury shown to make out a cause of action. The injury in this case, however, occurred in consequence of the distinct wrongful act of Carver, without which there would have been no loss to the plaintiff. The defendant, in such a case, should not be held to forsee a criminal act by a third party, in consequence of which his own act would become injurious.³¹ The case was correctly decided.

Lansing S. Hoskins '20.

Statute of Frauds: One year clause: Oral contract for a year's service to begin the following day.—In the case of *Prokop v. Bedford Waist and Dress Co.*, 105 Misc. (N. Y.) 573 (1919), the facts were that the plaintiff had been in the employ of the defendant for two weeks, on trial, and on Saturday, Sept. 22, before noon, the defendant said to the plaintiff, "I want a man for the whole year. You will have

²⁷*Scott v. Shepherd*, 3 Wils. (Eng.) 403 (1773).

²⁸*Guille v. Swan*, 19 Johns. (N. Y.) 381 (1822); *Henry v. Dennis*, 93 Ind. 452 (1883); *Vandenburgh v. Truax*, 4 Denio (N. Y.) 464 (1847); *Laidlaw v. Sage*, 158 N. Y. 73 (1899).

²⁹*Vicars v. Wilcocks*, *supra*, note 25; *Knight v. Wilcox*, 14 N. Y. 413 (1856); *Lowery v. Western Mutual Telegraph Co.*, *supra*, note 20; *Hall v. N. Y. Telephone Co.*, 214 N. Y. 49 (1915); *Jex v. Straus*, *supra*, note 20; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47 (1888). But see *Fottler v. Moseley*, 185 Mass. 563 (1904).

³⁰*Lowery v. Western Mutual Telegraph Co.*, *supra*, note 20.

³¹*Lowery v. Western Mutual Telegraph Co.*, *supra*, note 20.

the whole year a job with me; you go ahead." The plaintiff continued work for the remainder of the forenoon and did some work in the afternoon. He remained in the defendant's employ until discharged, in March, 1918, and thereupon brought action for breach of his contract of employment.

There was some evidence that the year of labor was to begin immediately upon the making of the agreement. Had such been the fact, it is clear that the statute would not apply. The plaintiff had, however, alleged that work was not to begin under the contract until the following Monday. Disregarding Sunday as a working day, a question was thus presented whether an oral contract for services for a year, work to begin on the following day, was unenforceable under the Statute of Frauds; of which sec. 31, subd. 1, reads: "Every agreement * * * is void unless it be in writing, if such agreement: 1. By its terms is not to be performed within one year from the making thereof." The court in the principal case held that such a contract is not within the statute and assigned the following reasons: First, even granting that it were established that labor was to be performed for a full year from and including the day *after* the contract was made, still, the law in computing the time, would disregard the fraction of the day remaining and regard the following day as the *first* day of the contract.¹ Second, since under many contracts for labor, the work is to begin the following day, to hold a contract such as the above unenforceable would be to prohibit the enforcement of many oral contracts to labor for a year; a result, the court says, that was clearly not intended by the framers of the statute.

The authorities on the precise point in question are few and unsatisfactory. The question has arisen in only one state besides New York, but there are a few English cases. In *Cawthorne v. Cordrey*² there is an erroneous headnote to the effect that an oral contract for labor, to begin the next day and continue for a year, is within the statute. The case, however, reveals that it was decided on an entirely different ground. This headnote has been followed in later decisions which consequently cannot be given much weight. There were, however, some *dicta* in the *Cawthorne* case, which were not in harmony with the headnote and have been followed in later decisions. Willes, J., said in that case, "If a builder undertakes to build a house within a year, that means a year from the next day." And Byles, J., remarked, "If you adopt the reasonable rule which excludes fractions of a day, * * * there would be only 365 days."

The later English case of *Smith v. Gold Coast and Ashanti Explorers, Ltd.*,³ expressly approved these *dicta* in the *Cawthorne* case, above quoted, and the favorable comment thereon by Brett, J., in *Britain v. Rossiter*,⁴ and added that the question there suggested had now arisen for decision. The court then held that, "A contract for a year's service to commence on the day next after the day on which the contract

¹People v. New York Central R. R. Co., 28 Barb. (N. Y.) 284 (1858). "In the computation of time under a statute, the day from which a specified number of days is to be counted is to be excluded * * *"

²13 C. B. (N. S.) (Eng.) 406 (1863).

³1 K. B. (Eng.) 285 (1903).

⁴L. R. 11 Q. B. D. (Eng.) 123 (1879).

was made, is not an agreement which is not to be performed within one year from the making thereof, within the meaning of the statute," the court basing its decision on the rule that the law does not regard fractions of a day.

The first case in this country was that of *Dickson v. Frisbee*,⁵ where the court reached exactly the same result as did the case just stated, basing its decision on the same reasons. In New York the cases of *Levison v. Stix*,⁶ *Billington v. Cahill*,⁷ and *Jonap v. Preger*,⁸ were the only cases previous to the principal case. These were all decided upon the strength of the erroneous headnote in the *Cawthorne* case, following that rule.

The court in the principal case did not feel bound by any of the previous New York cases on the point involved. The result reached accords fully with modern contractual practices and is also within the spirit and intent of the statute. It is also in accord with the result reached in England and Alabama, the only other jurisdiction from which there have been cases reported on this point.

Section 20, of the New York General Construction Law, reads in part as follows: "In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning." Although this statute apparently has to do only with the computation of time, and is not directly applicable to the problem involved in the principal case, it is an illustration of the tendency in the law to disregard fractions of days. A further illustration of this same tendency is to be found in the decisions to the effect that a person becomes of age on the day before his twenty-first birthday.⁹

W. B. Daley, Jr., '20.

Unfair Competition: Application to news service.—The Associated Press is a coöperative association organized for the purpose of gathering news and transmitting it to the members of the association at cost. The International News Service is a corporation organized for the purpose of gathering news and transmitting it to any one who will pay for the service. The Associated Press brought suit in the District Court of the United States to restrain the International News Service from pirating news which it had gathered, first, by bribing employees of members of the association to divulge such news before publication, second, by inducing members of the association to violate its rules and by-laws and disclose the news before publication, and finally by copying news from the bulletins and early editions of Associated Press newspapers after publication. That the first two practices were clearly enjoined there was little doubt, but to give the injunction any real force, it was necessary for plaintiff to secure a favorable decision as to the last method as well as the first two, because the City of New York

⁵2 Ala. 165 (1876).

⁶10 Daly (N. Y.) 229 (1881).

⁷51 Hun. (N. Y.) 132 (1889).

⁸59 Misc. (N. Y.) 187 (1908).

⁹Spencer, Law of Domestic Relations, sec. 538

is the distributing center for practically all foreign news and much domestic news, and due to the time differentials between the east and west, news, although already published in New York, if copied early enough might be telegraphed or telephoned west and reach its destination while it was still early enough for newspaper purposes. Therefore, an injunction which failed to cover the third form of the defendant's predatory activities would fail to remedy the wrong at which it was directed. The District Court granted an injunction as to the first two practises, but left the third method to the outcome of an appeal to the Circuit Court of Appeals which ordered an injunction to be issued in conformity with the plaintiff's entire prayer.¹ The appeal to the Supreme Court² was solely upon the third point, namely, whether the defendant might rightfully be enjoined from copying the plaintiff's news after publication.

The defendant's contention was that after publication all property rights in uncopyrighted literary matter and particularly in news is lost, that the production is dedicated to the public and may be used by any one.³ In this view they seemed to have some support in decided cases. In *Chicago Board of Trade v. Christie Grain & Stock Company*⁴ the plaintiff had the exclusive right to collect produce exchange quotations. These they transmitted to persons under special contractual relations to them. The defendant induced one of these persons to disclose to him the quotations as they came over the ticker, and plaintiff asked the court to enjoin the defendant from obtaining the information by inducing a breach of contract. In *National Telegraph News Company v. Western Union Telegraph Company*,⁵ the facts were essentially the same. The court in both cases granted the injunction, their decision turning upon the fact that the imparting of information to one in contractual relations with the plaintiff did not constitute publication. Thus in the *Board of Trade* case the court said that the plaintiff did not lose "its property rights in quotations by communicating them to certain persons, even though many in confidential and contractual relations to itself" and in the second case, "where A furnishes news to its customers who are under contractual relations with it—it cannot thereby be said to have published such news." The implication from such statements is that where there is publication an injunction would not be granted. In the principal case, there was no element of inducement or breach of contract, there was no violation of property rights and there had been publication.⁶ The court, however, in affirming the decree of the Circuit Court of Appeals waved these considerations aside and placed their decision squarely upon the ground of unfair competition—"we need spend no time, however, upon the general question of property in news matter at

¹245 Fed. Rep. 244 (1917).

²248 U. S. 215 (1918).

³Holmes v. Hurst, 174 U. S. 82 (1899); Taft v. Smith, Gray & Co., 76 Misc. (N. Y.) 283 (1912); 13 Corp. Jur. 946, 976 and cases cited; Cooley, Law of Torts (2d. ed.) p. 417.

⁴198 U. S. 236 (1905).

⁵119 Fed. 294 (1902).

⁶For definition of publication as used in the present connection see *D'Ole v. Kansas City Star Co.*, 94 Fed. 840, 842 (1899); *Associated Press v. Intern'l News Service*, *supra*, note 1.

common law—since it seems to us the case must turn upon the question of unfair competition in business.”

Obviously, the question of what is unfair competition must be determined with particular reference to the character and circumstances of the business, but an examination of texts on the subject of unfair competition will disclose that the application of the doctrine in the principal case is novel to the doctrine as conceived by legal writers. Unfair competition has been regarded as an inherent, integral part of the general rules with regard to the infringement of trade marks and trade names. Thus in *Cyc.*⁷ the subject is treated merely as part of the general discussion of Trade Marks and Trade Names. Singer, on *The Law of Trade Marks and Unfair Trade*, is merely a digest of the laws of various countries with regard to the protection of Trade Marks, and Nims, on *Unfair Competition and Trade Marks*, is almost entirely a discussion of the law of trade marks. Where unfair competition is regarded as being something other than the infringement of trade marks its connection is disclosed by its definition, “Unfair competition consists in passing off or attempting to pass off upon the public the goods or business of one person as and for the goods or business of another.”⁸ Before the principal case, therefore, the conception of unfair competition was clearly defined as either an infringement of trade mark or in general such action as would enable one to deceive the public and pass off upon them one’s own goods under the representation that they were actually the goods of one’s competitor. Unfair competition, as thus defined, has no application to the principal case, but the court by seizing upon and emphasizing the force of the word “unfair” has basically altered the conception of the doctrine. Unfair competition by the interpretation given it actually means what its name indicates, and infringement of trade marks has been relegated to its proper position as merely one of the forms which this wrong may assume. Thus cases like *Lumely v. Gye*⁹ holding it actionable for one person to induce another to break his contract with a business competitor, might well be considered as illustrating and representing an application of the doctrine of unfair competition. In the famous case of the *Mogul Steamship Company v. McGregor*¹⁰ the plaintiff sought damages from the defendants for combining to cut prices unreasonably and thus drive him out of business. The decision of the court turned upon whether the defendants were actuated by motives of economic self-advancement or primarily by the desire to injure the plaintiff, in other words, was the competition fair or unfair. In *Tuttle v. Buck*¹¹ the defendant, a wealthy banker, in a spirit of animosity toward the plaintiff, a barber, set up and financed a competing shop to the damage of the plaintiff. The court was faced with the problem of granting reparation for injury where the acts were not wrongful and would clearly not be actionable if done by any one

⁷38 *Cyclopedia of Law and Proc.* 756.

⁸*ib.*, Nims, *Unfair Competition*, (2d ed.) p. 12-15, contains a list of definitions from adjudicated cases all to the same effect. See also Rogers, *Good Will, Trade Mark and Unfair Trade*, and Hopkins, *The Law of Unfair Trade*.

⁹2 E. and B. (Eng.) 216 (1853).

¹⁰(1892) App. Cas. (Eng.) 25.

¹¹107 Minn. 145 (1909).

else, the only wrongful element being the motive actuating the defendant. The action was sustained under the notion of unfair competition. "To call such conduct competition is a perversion of terms." It is to the field of decisions such as the above that the principal case has directed attention as explicable upon the underlying theory of unfair competition.

The courts of equity have always refused to define fraud and have consequently held in their hands a strong weapon against unconscientious dealing, and it is eminently fitting that a doctrine which by its very name makes unfairness of dealing its basis should similarly be free from narrow definition and so interpreted as to enable the courts to cope with unfair and parasitical business practices.

Mr. Nims, in his book on Unfair Competition says,¹² "It is now seen that these rights [to the fruits of one's labor] whether property or not, are entitled to protection and it very well may be that in the future, acts of unfair competition will be regarded neither as injurious to property nor as torts, strictly speaking, but rather as acts unfair to both the public and the plaintiff, hence inequitable and therefore actionable." *The International News Service v. Associated Press* has amply satisfied this prophecy and has at the same time given the courts the legal means of keeping pace with the ever increasing public demand for higher business ethics.

Benjamin Pepper, '20.

¹²P. 17.