Notes and Comment

Attorney and Client: Action for Compensation by Attorney upon Discharge by Client: Quantum Meruit or Contract?—In two recent decisions, Martin v. Camp, 219 N. Y. 170 (1916), and Kushner v. Ferris, 219 N. Y. 192 (1916), the Court of Appeals of New York has held that, where a client has employed an attorney to prosecute certain claims, and has agreed to pay the attorney for his services a percentage of the amount recovered, and subsequently discharges the first attorney and employs a new one, who conducts the litigation to a favorable outcome, the discharged attorney has a right of action against his client in a case where the attorney is without fault; but that the action is upon a quantum meruit, and cannot be maintained upon the contract. In the case of Martin v. Camp, supra, the attorney's claim was barred by the statute of limitations, and the question as to whether the suit was on the contract or upon a quantum meruit need not necessarily have been determined. However, in the Kushner case that question came squarely before the court.

This precise question has been before the Court of Appeals but once before. The court in its present examination of the question seems to have overlooked some important points, and to have construed away an express legislative enactment. The basis for the apparently erroneous decision in the Kushner case lies in a mistaken assumption as to what the previous decisions of the court have held. It is unquestionably established that a client may at any

1Marsh v. Holbrook, 3 Abb. App. Dec. (N. Y.) 176 (1869). In this case the plaintiff, an attorney, entered into a contract with the defendant to prosecute the defendant's suit. His fee was to be $5000, if he succeeded in the case. Subsequently the defendant settled the litigation, and the plaintiff sued on his contract of employment. The defendant sought to limit plaintiff's recovery to a quantum meruit by offering evidence to show the value of the attorney's services. This evidence was excluded. The Court of Appeals held that the plaintiff could at least recover pro rata on his contract. James, J., in the course of his opinion said: "The defendants by their agreement with the plaintiff were not debarred from discontinuing said action, but in doing so, they only terminated said action, they did not put an end to their contract with the plaintiff. I think the rule is, that where performance is prevented or arrested by one party, the other has the election either to treat the contract as rescinded and recover upon a quantum meruit the value of the services rendered, or to sue upon the contract and recover for what has been done, at the stipulated price, and for loss, in profits or otherwise, sustained by the operation." The learned judge further states that "Since the adoption of the code (in which sec. 474 of the Judiciary Law then appeared) there is nothing to prevent an attorney from agreeing with his client as to the amount and terms of his compensation." Woodruff, J., with whom Mason, J., concurred, said: "Whether the plaintiff was not entitled to recover the whole contract price, it was not necessary to consider, as he has not appealed from the judgment." Murray and Hunt, JJ., also concurred, except that they were further of the opinion that there was substantial performance by the plaintiff, and that he would be entitled to recover the whole contract price. Grover and Daniels, JJ., dissented.

2Sec. 474 of the Judiciary Law.
time, and without any cause, discharge his attorney. This doctrine is well established in the general law of agency. The principal has the power to terminate his agent's activity at any time and without any cause; and the relation of client and attorney is that of principal and agent. A statute in this state provides that the relation between attorney and client is contractual and the authorities and text writers also agree that it is. From the cases which hold that the client has the power to discharge his attorney, and thus terminate his activity, the court in the Martin case concludes that he has the right to terminate the contract for compensation; and that it follows that if the client has this right, he cannot be made to respond in damages for exercising this right. If the premise were correct, the conclusion would necessarily follow. But is the premise sound? Does it follow that because he may terminate the relationship, i.e., the authority of the attorney to represent him, he has the right so to do, thereupon relieving himself from liability in an action for damages for breach of contract? In the law of agency it is a well recognized principle that where the agent has been employed for a definite time at a definite compensation, the principal has the power to terminate the agent's authority so that his acts will no longer bind him, but that he does not have the legal right so to do, and, where the contract of agency is bilateral, the principal must respond to the agent in damages for the breach of the contract of agency. Whether the contract between attorney and client for compensation is contingent upon success, or is for a specified fee, it would appear that normally the contract is bilateral, and for a definite time, i.e., until the litigation is concluded.

The cases in New York do not establish any right on the part of the client to terminate at will the agreement for compensation. The client may terminate the contract for compensation in certain instances where the contract "is restrained by law" as provided for in the latter part of sec. 474 of the Judiciary Law. For instance, he may terminate the contract for compensation and throw the attorney back to a recovery upon a quantum meruit, if he settles his case before a decision is reached. This portion of the statute is based upon public policy which encourages settlements. But where the attorney is discharged, and afterward a second attorney prosecutes the claim to judgment, the authorities relied upon in the principal cases do not establish the position that the court takes that such discharge precludes an action on the contract. It is true that dicta to this effect appear in previous cases, which is probably due to the failure of the court to differentiate a power from a right.

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3 Andrewes v. Haas, 214 N. Y. 255 (1915), and cases cited therein.
5 Judiciary Law, sec. 474; Marsh v. Holbrook, supra, note 1.
6 See supra, note 4.
7 Alworth v. Seymour, 42 Minn. 526 (1890); Huffcut on Agency (2d ed.), sec. 64, and cases there cited.
8 Andrewes v. Haas, supra, note 3; Matter of Snyder, 190 N. Y. 66 (1907).
The confusion seems to have had its beginning in the case of *Trust v. Repoor*, 15 How. Pr. (N. Y.) 570 (1856). In this case Hoffman, J., in the course of his opinion states that a client "has the right to discharge his attorney at any time, with or without cause." This statement is purely dictum, but was adopted by Earl, J., as the authority for his dictum in *Tenny v. Berger*, where he states that a "client may discharge his attorney, arbitrarily, without cause, at any time, and is liable to pay him for only the services which he actually rendered up to the time of his discharge." This statement was not necessary to the decision in the case, and *Trust v. Repoor*, cited as authority for it, is not authority for two reasons: first, it was merely a dictum, and secondly the case did not limit expressly the right of recovery of the attorney to a *quantum meruit*, although this inference might be drawn from the opinion.

In *Martin v. Camp*, supra, the court referred to its previous decision in *Marsh v. Holbrook*, saying that the question whether an attorney should recover damages as for breach of contract or upon a *quantum meruit* was discussed, and that while two of the judges thought the attorney should recover the full contract price, that point was not decided, as the attorney did not appeal. This review of *Marsh v. Holbrook* is misleading, giving the impression that the actual decision went only so far as to allow a recovery on the *quantum meruit*, when in fact the point decided was that the recovery was upon the contract for damages, and not upon a *quantum meruit*. The defendant offered evidence as to the reasonable value of the attorney's services, and this evidence was excluded. The referee allowed the attorney a *pro rata* of the contract price based upon the amount of work actually done, when the attorney abandoned the part of his complaint claiming reasonable value and said he relied only on the special agreement. In affirming this allowance the court of necessity held the attorney was not limited to a *quantum meruit*, but that the action was for breach of the special contract. Whether in such a case the measure of damages should be the entire contract price, instead of a *pro rata* portion thereof, based upon the relation of the work done to that contemplated, was the question that was not decided.

The court in the Martin case cites three other authorities. *Andrewes v. Haas*, Matter of *Dunn*, and *Johnson v. Ravitch*. An examination of these cases will reveal that this question was not involved in any of them, and whatever the court said in relation to it is dicta. If the above analysis is correct, at the time that the Martin case came before the court there was precedent that the client had the *power* to terminate his attorney's authority, but not the *right* to do so. The court proceeds then to make an exception,

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93 N. Y. 524 (1883).
10 Odger v. Delvin, 45 N. Y. Super. Ct. 631 (1819), and Gustine v. Stoddard, 23 Hun (N. Y.) 99 (1880), were also cited, but neither of these cases are in point.
11 Supra, note 3.
1205 N. Y. 308 (1912).
and this exception is made law by the decision in the Kushner case.

Whether the agreement for compensation is for a fixed sum, or contingent upon success or for a percentage of the proceeds, and the suit is carried to a conclusion, the statute would seem to demand that the agreement control, and that the measure of damages is the contract price. If the client terminates the relation, not to end the litigation but merely through caprice, and gets another to carry on the proceedings, what principle of law or of public policy necessitates an interference with the agreement as to fees? The amount recoverable when complete performance is prevented may be a matter for difference of opinion, but this is a problem of damages. Where the fee is contingent and the attorney sues before the litigation is ended, it might be too speculative to measure the damages by any calculation based upon the contingent fee. But if the suit is brought after the litigation is successfully terminated, whether by settlement or judgment, there is a definite basis for calculation.

Contracts for contingent fees are lawful in New York. The fact that the fee is very much larger because of its contingent character has not led the courts to hold that it is unconscionable. The courts have recognized the right of the attorney to be compensated for his risk where he completes his services according to the contract. If the client at any time before the completion of these services may rightfully terminate the contingent agreement, he may wait until the attorney has made a successful outcome of the litigation seem certain, decide that he is paying his attorney too much, secure another attorney to finish the litigation at a small cost, and compel the first attorney to take the reasonable value of his services rendered, without any reference to the risk that he took of getting nothing. This is practically holding that an attorney can not contract for the value of his risk, impliedly overruling the previous cases holding that he may so contract.

But whatever principle may be adopted in determining the measure of damages in cases of this character, even if in all cases the court thinks the measure should be only the reasonable value of the attorney's services actually rendered, still does it follow that the action must be upon the theory of a quantum meruit instead of on the contract? In New York it makes no difference so far as the statute of limitations is concerned, whether recovery is on one theory or another, but in states where a different period of limitation of actions is applied as between actions on implied contracts and actions on express contracts, or, as between contracts in writing and those not in writing, the distinction is often vital.

The holding in the two principal cases seems to go a long way toward nullifying sec. 474 of the Judiciary Law. This statute, originally sec. 258 of the Code of 1848, was passed in order to allow

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15 Matter of Fitzsimmons, supra, note 15.
an attorney to contract for his services in place of having its value
determined by a statutory fee bill.\textsuperscript{17}

If the holding in the two principal cases is correct, the inquiry
arises as to when the compensation of an attorney may be governed
by express agreement. These two cases say in effect only when he
has fully performed his services as called for under the contract.
But if the client has the power not only to terminate the relation,
but also the right to terminate the agreement as to fees, why has he
not this right after the services have been rendered? If it is a right,
is there any limitation as to when the right is to be exercised, and if
there is, what is the reason for any such limitation? Why not limit
the attorney to a quantum meruit after the services have been com-
pleted, and disregard the agreement? The evident answer is that
sec. 474 forbids it. But if the contract is a good and binding contract
at one stage, why is it not just as good and binding at another?
The answer that the client has the power to terminate it is not
satisfactory. He must also have the right, and the right does not
necessarily follow from the power, as is shown by the agency cases
cited.\textsuperscript{18} Previous cases have recognized the power. The principal
cases give the right. No impelling necessity seems to require this
extension; it puts an unnecessary limitation on sec. 474, and works
a hardship on the attorney. A more satisfactory result and one that
seems to be correct on principle is arrived at in some other jurisdic-
tions.\textsuperscript{19}

\textit{Geo. W. Dunn, '18.}

\textbf{Carriers: Duty to Protect Passengers from Wrongful Act of Third
Person.}—In Fennell v. A. T. \& S. F. Ry. Co., 158 Pac. (Kan.) 14
(1916), the plaintiffs were colored people, man and wife. They
were in a station awaiting the arrival of one of defendant's trains,
which, it was proved at the trial, was due ninety minutes later,
although at the moment plaintiffs were ignorant of the schedule
time. A town marshal came to the door of the station and after
some conversation with defendant's agent, ordered the plaintiffs
to move on, saying that no train was due until the next day. The
plaintiffs offered to purchase tickets but the marshal forcibly ejected
them from the station, during all of which time the agent stood pas-
sively by. As a result of their abusive treatment the plaintiffs
received injuries for which this action is brought. It is claimed that
the agent should have protected them from the violence of the
marshal. The court summarily disposes of the question thus:
"But assuming, without deciding, that the plaintiffs were entitled
to the protection of passengers waiting in the depot to take a train,
we find no sufficient basis in reason or in precedent for holding that

\textsuperscript{17} Rooney v. Second Ave. R. R. Co., 18 N. Y. 368, 370 (1858), citing Ward v.
\textsuperscript{18} Supra, note 4, and see especially the quotation from the opinion, note 1, supra.
\textsuperscript{19} Myers v. Crockett, 14 Tex. 257 (1855); Moyer v. Cantieny, 41 Minn. 242
(1889). For a collection of cases see 6 C. J. 724, notes 9 and 10.
it was the duty of the agent to venture upon any dictation to or any interference with one so distended with his little brief authority as was the star actor in this scene of expulsion."

Rather more than ordinary care is required from a carrier in protecting its passengers from ill treatment by third persons. In some jurisdictions the highest degree of care is demanded and the slightest negligence is ground for liability. But it is always held that the carrier is no insurer against such occurrences; its duties are relative and contingent, not absolute and unconditional. The universal rule is well stated in Button v. S. & N. Ala. Rd. Co., as follows: "While not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his (the carrier's) duty to provide ready help sufficient to protect the passengers from assaults from every quarter from which they might reasonably be expected to occur, under the circumstances of the case and the condition of the parties."

In the principal case the situation is complicated by the fact that the wrongdoer was vested with some degree of public authority. The servants of a carrier are not ordinarily bound to place themselves in opposition to or question the authority of officers engaged in taking a passenger into custody. But if they have notice that the arrest is wrongful, inquiry should be made and, if justified, they should interfere in behalf of the passenger. Here the marshal's mistreatment of the plaintiffs was so evidently for no reasons other than race prejudice and self-importance that the agent's failure to interfere seems to amount to negligence.

The principal case is disposed of without consideration of the question as to whether or not the plaintiffs were, in fact, passengers. It is not necessary that the person shall have actually boarded the carrier's conveyance before the relation of passenger and carrier, with the peculiar rules governing that relation, exists. One who goes to a station within a reasonable time before the departure of a train, and there, by purchase of a ticket or otherwise, manifests his intention to take passage, is entitled to all the rights and privileges of a passen-

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5Hutchinson on Carriers, sec. 987.
The plaintiffs were at defendant's depot ninety minutes before train time which does not seem to be more than a reasonable time to be permitted to remain in the waiting room.

It is submitted that the learned court erred in its holding that the agent was not bound to interfere with the marshal acting in his official capacity, inasmuch as the agent had notice that the marshal's course of action was without color of authority.

Donald H. Hershey, '18.

Constitutional Law: Naturalization: Who is a White Person?
A Filipino whose paternal grandfather was a full-blooded Spaniard, but whose mother and paternal grandmother were native Filipinos, petitioned for naturalization. The Federal court in *In re Lampitoe*, 232 Fed. 382 (1916), refused the petition, holding that he was not within the statute that permits the naturalization of "white persons."

This decision raises two interesting questions. What ethnological stocks are to be considered "white" within the statutory meaning? Conceding that a certain racial stock is non-white, what admixture of white blood is necessary to make the progeny "white"?

The phrase "white persons" has been in our naturalization laws since 1790, except for a brief period from 1873 to 1875 when it was omitted from the revised statutes by mistake. When it was first adopted three peoples inhabited American territory, the American aborigines, European colonists and their descendants, and African negroes and their descendants. Of these peoples the Europeans alone were moved by the migratory impulse. The aborigines were merely occupying the land of their fathers, and the negroes immigrated, not of their own free will, but by force. Therefore, there can be little doubt that the framers of our first naturalization law contemplated no further possible sources of naturalized citizens than these. To them, the phrase "white persons" meant only that, of these three peoples, the negroes and the Indians should not be privileged to become citizens. With the extension of American territory to the Pacific coast and the resultant trans-Pacific traffic, new problems arose. Chinese immigration was early thought to be fraught with peril to our culture, and the courts seized upon the limitation of naturalization to "white persons" as one means of coping with this yellow peril, but since the passage of the Act of May 6, 1882, specifically excluding Chinese from naturalization, the question as to...


1An American Indian is not a white person. *In re Burton*, 1 Alaska 111 (1910); *In re Camille*, 6 Fed. 256 (1880). Compare *In re Rodriguez*, 81 Fed. 337 (1897), where a Mexican of Indian ancestry was admitted to citizenship, but this is seemingly as a result of treaties. See also U. S. v. Perryman, 100 U. S. 235 (1879), where a negro was held to be not a white person within the meaning of a statute that required white persons stealing from Indians to repay double the value.


2*In re Ah Yup*, 5 Sawyer. (U. S.) 115 (1878).
whether they are “white” persons loses its importance. However, the reasons, good or bad, that debar the Chinese from naturalization apply with equal force to their allied racial stocks, and the courts have refused to naturalize Japanese, Burmese, or Filipinos, on the ground that they are Mongolians. Hawaiians also are ineligible for naturalization. The great problem as to what races are “white” will arise with increased immigration from the portions of southern and southwestern Asia where dark aboriginal peoples have been overborne by successive waves of Caucasian invaders and an inextricable mingling of blood has resulted. That the courts will be liberal in their interpretation is foreshadowed by the few cases that have arisen. Inhabitants of Asia Minor who are generally conceded to be of mixed Semitic origin are held to be “white persons.” So also are Parsees, and high-cast Hindus of Aryan descent.

How much white blood is necessary in one of mixed blood to entitle him to the privilege of naturalization is an open question. Certainly one who has one-half or more non-white blood cannot be said to be “white.” No case has arisen under the naturalization laws where the applicant has had less than one-half non-white blood, so for light on this problem it is necessary to search the cases concerning other statutes in which racial distinctions are drawn. These cases vary from decisions holding that the slightest preponderance of white blood makes one “white,” to a dictum that “white” in legislation

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\begin{enumerate}
\item In re Hong Yen Chang, 84 Cal. 163 (1890); In re Gee Hop, 71 Fed. 274 (1895).
\item In re Yamishita, 30 Wash. 234 (1902); In re Buntaro Kumagai, 163 Fed. 922 (1908); In re Saito, 62 Fed. 126 (1894).
\item Matter of San C. Po, 7 Misc. (N. Y.) 471 (1894).
\item In re Alverto, 198 Fed. 688 (1912); accord, principal case.
\item In re Kanaka Nian, 21 Pac. (Utah) 993 (1889).
\item In re Najour, 174 Fed. 734 (1909); In re Halladjian, supra, note 1; In re Mudarri, 176 Fed. 465 (1910); In re Ellis, 179 Fed. 100 (1910); Dow v. U. S., 226 Fed. 145 (1915).
\item In re Mozundar, 207 Fed. 215 (1913).
\item In re Alberto, supra, note 6; In re Camille, supra, note 1; In re Knight, 171 Fed. 299 (1909); Felix v. State, 18 Ala. 720 (1851), where a person having one-half negro blood was held not to be a negro.
\item See principal case. Accord, In re Alfredo, supra, note 6; In re Reynolds, Fed. Cas. No. 11, 719 (1879), where the status of such a person was held to be determined by that of the father.
\item Such statutes are chiefly those forbidding certain kinds of testimony against white persons, those forbidding marriage between negroes and whites, those confining the right to vote to white persons, and those providing separate schools for white persons. It should be borne in mind that the interpretation of such statutes depends to a large extent on the purpose with which they were passed. As an example of the extent to which a court will go in following the alleged intent of the framers of such statutes see People v. Hall, 4 Cal. 399 (1854), where a Chinaman was held to be within a statute forbidding any “Black or Mulatto person, or Indian” from testifying against a white man.
\item The modern “Jim Crow” laws are of little value in this connection since they are directed against “colored persons.” This term is not a racial distinction. It refers to those having any appreciable taint of negro blood. See State v. Treadway, 126 La. 300 (1910).
\item Jeffries v. Ankeny, 11 Oh. 372 (1842); Lane v. Baker, 12 Oh. 237 (1843); Monroe v. Collins, 17 Oh. St. 665 (1867).
\end{enumerate}
of the slave period meant without any colored blood.\textsuperscript{14} The general distinction, however, seems to be that if one has more than one-fourth non-white blood he is not "white."\textsuperscript{15} If he has less than one-fourth non-white blood he is "white."\textsuperscript{16} As for quarter-bloods themselves, they are seemingly not "white."\textsuperscript{17} As the reasons that lead the courts to draw the color line where they do in statutes such as these\textsuperscript{18} would seem to apply with much force to the naturalization statute, one cannot be far wrong in presupposing that the courts will follow the line of cases suggested when the question of the naturalization of those of mixed blood finally arises.\textsuperscript{19}

L. I. Shelley, '17.

\textbf{Domestic Relations: Effect of Removal of Disability upon Matrimonial Conduct.---}The question of the creation of a true marital status after removal of a disability which has made the previous matrimonial conduct illicit has recently arisen in two cases, \textit{Smith v. Reed, 89 S. E. (Ga.) 815 (1910)}, and \textit{In re Biersack, 159 N. Y. Supp. 519 (1910)}. In the former case the applicant was the daughter of Ellen Jones and William Williams, who were married in Wales in 1859. Williams came to this country and was followed by his wife and daughter in 1863. He left his wife and daughter in New York in 1865 and went away. In 1871 he married a widow in Georgia who did not know that Williams had another wife living. The defendant, born before the death of first wife, was the child of this second marriage. The first wife died in 1890 and Williams and the widow he married continued to live together until the death of the latter in 1907. Williams died in 1911. The question concerned the legitimacy of the defendant and this depended upon whether there was a valid marriage between Williams and the widow.

Counsel for the applicant contended that, if Williams had a living wife when he entered into a ceremonial marriage with the mother of the defendant, the attempted marriage was void and his living with her was an illicit relation and so continued even after the death of

\textsuperscript{14}Du Val v. Johnson, 39 Ark. 182 (1882). This dictum seems to be without foundation in any adjudicated case.

\textsuperscript{15}Walker v. Brockway, 1 Mich. N. P. 57 (1869); Van Camp v. Board of Education, 9 Oh. St. 406 (1859); Jones v. Commonwealth, 80 Va. 538 (1885).

\textsuperscript{16}Bailey v. Fiske, 34 Me. 77 (1852); People v. Dean, 14 Mich. 406 (1866); Williams v. School District, Wright (Oh.) 578 (1834); Thacker v. Hawk, 11 Oh. 376 (1842); Anderson v. Millikin, 9 Oh. St. 568 (1859); McPherson v. Commonwealth, 28 Gratt. (Va.) 939 (1877).

\textsuperscript{17}Jones v. Commonwealth, supra, note 15; Walker v. Brockway, supra, note 15; sembl, Johnson v. Norwich, 29 Conn. 407 (1890); contra, Gray v. State, 4 Oh. 353.

\textsuperscript{18}See note 12. A feeling that the non-white races are inferior is the basis both of these discriminatory statutes, and of the racial test in the naturalization law. If a certain proportion of white blood is sufficient to give one of mixed blood the status of the superior race under these statutes, that proportion should be sufficient to make an alien desirable as a citizen.

\textsuperscript{19}But note that in the cases cited the white strain was the white American strain descended from the supposedly pure European stock. Would this reasoning hold if the white strain was the admittedly impure and mixed Asiatic stock?
the first wife and until a formal ceremony of marriage should be performed after that event. The court affirmed the judgment of the lower court, based upon a charge to the jury that if Williams continued to live with defendant's mother after the death of the first wife, the second marriage was valid.

The decision seems to accord with the better view but there is some conflict of authority on the subject. Where a person marries, having a husband or wife living, it is everywhere held that the marriage is absolutely void. But if the parties continue their matrimonial conduct after the removal of the impediment there is a difference of opinion as to the effect that such removal has on the matrimonial conduct as evidence of a valid marriage. With respect to the good faith of the parties the cases may be grouped into three classes.

The first class consists of those cases where the matrimonial conduct of the parties entering into a marriage contract while under an impediment was known to both parties to be illicit. Here it is generally held that a new contract of marriage must be shown after removal of the impediment, although the English and New York views seem to be to the contrary. In the second class of cases both parties desire marriage and contract in good faith, neither knowing of the existence of the impediment. In such a case lawful marriage will, in all jurisdictions, be presumed at once upon removal of the impediment.

The conflict arises in the third class where one party knows of the impediment but conceals it from the other who, in good faith, enters into the marital relations with him under a void marriage. The principal case comes within this class.

One line of cases holds that marriage is presumed from the time of the removal of the impediment, if cohabitation continues, while other jurisdictions require proof of facts to support a presumption of a new marriage. A leading case supporting the latter view is Collins v. Voorhees. The essential facts in that case are practically

1. White v. White, 82 Cal. 427 (1890); Rose v. Rose, 67 Mich. 619 (1888); Clark v. Barney, 103 Pac. (Okla.) 598 (1909).


3. Robinson v. Ruprecht, 191 Ill. 424 (1901); Manning v. Spurch, 199 Ill. 447 (1902); Land v. Land, 206 Ill. 288 (1903); Teter v. Teter, 88 Ind. 494 (1883); Schuchart v. Schuchart, 61 Kans. 597 (1907); Lufkin v. Lufkin, 182 Mass. 476 (1903); Eaton v. Eaton, 66 Neb. 676 (1902); Chamberlain v. Chamberlain, 68 N. J. Eq. 736 (1904).

4. Stein v. Stein, 66 Ill. App. 525 (1896); Blanchard v. Lambert, 43 Iowa 228 (1876); Donnelly v. Donnelly, 8 B. Mon. (Ky.) 113 (1847); Bush v. Supreme Tent, 81 Mo. App. 562 (1899); Townsend v. Van Buskirk, 33 Misc. (N. Y.) 287 (1900); In re Wells, 123 App. Div. (N. Y.) 79 (1908); In re Terwilliger's Estate, 63 Misc. (N. Y.) 479 (1909); Adger v. Ackerman, 115 Fed. 124 (1902); De Thoren v. Att'y General, L. R. 1 App. Cas. 686 (1876).

5. Cartwright v. McGown, 121 Ill. 338 (1887); Randlett v. Rice, 141 Mass. 385 (1886); Howland v. Burlington, 53 Me. 54 (1865); Voorhees v. Voorhees, 46 N. J. Eq. 411 (1890); Collins v. Voorhees, 47 N. J. Eq. 315 (1890); Hunt v. Appeal, 86 Pa. St. 294 (1874); Severa v. Beranek, 138 Wisc. 144 (1909).

6. 47 N. J. Eq. 555 (1890) (see dissenting opinion of Garrison, J., id, 315).
identical with those of the principal case, except that the impediment was removed by divorce instead of by death. The court held that the subsequent cohabitation of the parties and their reputation as husband and wife must necessarily be understood as having had their origin in the first marriage and could not be treated as presumptive evidence of a second marriage at a later date. In a strong dissenting opinion, Garrison, J., contended that on grounds of public policy "all matrimonial conduct shall, if possible, be referred to a matrimonial status. If at the time of the commencement of matrimonial conduct and reputation, there is impediment to the application of this doctrine, the rule of public policy is not thereby defeated; it remains in abeyance to be imposed at the first moment when conduct and capacity shall so co-exist as to render it possible." It would seem that this is the better view, as it should be inferred that the matrimonial consent was interchanged as soon as the parties were enabled by the removal of the impediment to enter into the contract. Bishop expresses this doctrine in the following language: "If the parties desire marriage, and do what they can to render their union matrimonial, yet one of them is under a disability—as where there is a prior marriage undissolved—their cohabitation, thus matrimonially meant, will in matter of law make them husband and wife from the moment when the disability is removed, and it is immaterial whether they knew of its existence or its removal, or not, nor is this a question of evidence." A few cases have held the husband estopped to deny his marriage with one who becomes his wife in good faith, if cohabitation has continued after the impediment has been removed. This doctrine has received scant attention from the courts, as it seems preferable to decide the question on the ground of the creation of a true marital status after removal of the disability.

In *In re Biersack*, supra, the plaintiff, Louise Biersack, married one Bachman in 1902. Six days later he deserted her and believing him dead she entered into a common law marriage with one Kruse in 1904. At that time common law marriages were invalid in New York, but the statute was amended in 1907, the effect of which made common law marriages valid after January 1, 1908. A child was born in 1907. The plaintiff and Kruse lived together as husband and wife after the removal of the legal impediment. The court held that from that time they were husband and wife and that such subsequent marriage legitimated the child. The decision is in accord with the New York law that marriage is presumed from the time of the removal of the impediment.

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7Campbell v. Campbell, note 2, supra; De Thoren v. Att'y General, note 4, supra.
8I Bishop, Marriage and Divorce, sec. 970.
9Purcell v. Purcell, 4 Hen. & Munf. (Va.) 507 (1810).
10CORNELL LAW QUARTERLY 48.
11North v. North, 7 Barb. Ch. (N. Y.) 241 (1842); Geiger v. Ryan, 123 App. Div. (N. Y.) 722 (1908); Rose v. Clark, 8 Paige (N. Y.) 574 (1841); see also New York cases cited in note 4, supra.
The first case in the New York reports is *Fenton v. Reed.*12 There the plaintiff was the lawful wife of one Guest in 1785. Then Guest left the state and remained away until 1792, when it was reported that he died abroad. Plaintiff married Reed in 1792 and in the same year Guest returned to this country, where he remained until his death in 1800. Plaintiff continued to cohabit with Reed until 1806 when he died. No marriage took place between plaintiff and Reed after the death of Guest, the only evidence of marital purpose being that which might be derived from the continuance of their former conduct. The court held that there was strong evidence from which marriage might be presumed. In New York it has been consistently held that parties who enter into a marital relation under a disability become husband and wife as soon as the disability is removed, if cohabitation continues,13 even though the first union was known to both parties to be illicit.14

*Harvey I. Tutchings, '18.*

**Libel and Slander: Recovery of Punitive Damages.**—The question as to when punitive damages or smart money are allowed in actions for libel and slander is raised and the law thereon summarized in *Tim v. Hawes,* 160 N. Y. Supp. 1096 (1916), decided recently by the Appellate Term of the Supreme Court in the first department. The defendant in speaking of the plaintiff, a lawyer, said, “He does not practice law because he has been disbarred.” It appears that the relations between the parties had always been pleasant and that the words were spoken thoughtlessly, with a mere lack of ordinary prudence. The court sustained an exception to a charge that if the words were spoken in a wanton or reckless manner in disregard of the plaintiff’s character and reputation in the community, and without proper regard for his rights, they might award punitive damages, on the ground that the trial justice failed to submit the question of malice to the jury and that there was an insufficient explanation as to what the basis for awarding punitive damages was. Mr. Justice Shearn, speaking for the Appellate Term said: “The basis of punitive damages is actual malice. Actual malice cannot be presumed but must be proved as a fact in the case by a preponderance of the credible evidence. Actual malice may be established as follows: (1) By proving actual ill will. In addition to the ordinary methods of proving ill will, the words complained of may of themselves afford the proof when, for example, an attack is couched in such venomous language and so plainly exhibits hatred as to warrant an inference of actual ill will. (2) By proving such gross negligence and carelessness as indicates a wanton disregard of the rights of others. (3) When the words complained of are proved as a fact to be false, if they are of a heinous, atrocious or extreme character, that, too, is evidence of actual malice.”

12*Johns.* (N. Y.) 52 (1809).
13See note 11, *supra.*
The fiction that malice is essential to every action for libel has long since been exploded. It is settled in New York,1 at least, that proof of malice is not necessary for the recovery of actual damages except where the libel is privileged. Where an article is published which is libelous per se, malice is conclusively presumed to exist for the purpose of awarding compensation. However, where the injured party seeks to recover exemplary or punitive damages, that is, a sum in addition to that necessary to make him whole, as a balm for his injured feelings, as a punishment to the guilty party and to deter others from offending in a similar manner, the malice implied by law drops out of sight and the burden is upon the party asking such damages to prove malice by competent evidence. 2 “The term ‘malice’ in its broad sense imports that state of mind or feeling which prompts an individual to do an act whereby another is or may be injured wrongfully and intentionally, without just cause or excuse * * * *.”3

The law as to the kind of malice sufficient to justify smart money has been brought into serious confusion by the varied and loose expressions of the courts. As remarked by Mr. Justice Gaynor:4 “The jumble in some modern textbooks on slander and libel concerning malice, actual malice, malice in law, malice in fact, implied malice and express malice (all derived from judicial utterances, it is true) is a striking testimony of the limitations of the human mind.” While all courts are agreed as to the necessity of malice as a basis for awarding exemplary damages, in some states5 it is held that express malice must be shown, while in others6 implied malice is considered sufficient. Implied malice in an action for libel has been defined as a “presumption drawn by the law from the simple fact of publication.”7 That malice is sufficient for the award of compensatory damages. It results from the unjustified publication of matter tending to injure the character of another. Express malice, it is said, “consists in a libelous publication from ill will or some wrongful motive, implying a willingness to injure in addition to the intent to do the unlawful act.”8 There is some authority to the

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4Ullrich v. N. Y. Press Co., supra, note 1; an example of such loose expressions may be found in Lewis v. Chapman, 16 N. Y. 369, 372 (1857) which case is criticised in Schuyler v. Busby, 68 Hun (N. Y.) 474, 478 (1893).
7Krug v. Pitass, 163 N. Y. 154 (1900).
8Krug v. Pitass, supra, note 7.
effect that these terms do not adequately express the distinction between the malice necessary for the award of compensatory and punitive damages. The true distinction is that for the award of the former, malice will be presumed, while to recover the latter, malice must be established by evidence.

Cohalan v. New York Press Company, the latest opinion of the New York Court of Appeals on the question, lays down the rule that "the plaintiff must establish the fact of actual malice and must do so by a fair preponderance of evidence," in order to justify an award beyond mere compensation. The leading case upon the subject in New York is Samuels v. Evening Mail Association. That case decided that proof of the falsity of the libel was evidence of malice sufficient to warrant a recovery of exemplary damages in the sound discretion of the jury. If the defendant gave evidence tending to show that there was in fact no actual malice, the question was not to be withdrawn from the jury but they were to consider whether the malice was of such a character as to entitle the plaintiff to exemplary damages. The Samuels case stands for the proposition that upon proof of the falsity of the libel, the jury are justified in inferring express malice from the publication. The theory under which this express malice is worked out appears in a recent case where it is stated that the malice referred to in the language apparently is legal malice, but that if this legal malice is of such a character as to constitute actual malice, exemplary damages may be awarded. There is no presumption of malice in the sense that a legal significance is attached to certain evidentiary facts of a probative value. The falsity of the libel must appear from all the evidence in the case. There must be proof of the falsity of the libel, of its character and of the circumstances surrounding its publication before express malice may be inferred which will entitle the plaintiff to punitive damages.

Since in actions for defamation there is no fixed measure of damages, the amount of recovery rests with the jury alone, with a duty in the court to set it aside where the verdict appears passionate, perverse, partial or corrupt. Thus, where the jury were improperly

11 Hun (N. Y.) 288 (1876). The dissenting opinion of Davis, J., in the Supreme Court was adopted as the majority view in 75 N. Y. 694 (1878). This decision has been approved in the following cases: Warner v. Press Pub. Co., 132 N. Y. 181, 184 (1892); Crane v. Bennett, 177 N. Y. 106 (1904); and the cases cited supra, note 2; but see contra, Krug v. Pitass, supra, note 7. The latter decision does not mention the Samuels case and is therefore not regarded as overruling it. The Crane case, supra, regards the decision in the Krug case as correct on its facts but says that it is not to be extended and that broad statements made by the court which are contrary to the prevailing doctrine are to be treated as dicta.
12 Bresslin v. Star Co., 166 App. Div. (N. Y.) 89 (1915); see also Houston Chron. Co. v. Quinn, 184 S. W. (Tex.) 669 (1916), where recovery was worked out upon an analogous theory.
13 Shute v. Barrett, 7 Pick. (Mass.) 81, 84 (1828); Wadsworth v. Treat, 43 Me. 163, 166 (1857); Coleman v. Southwick, 9 Johns. (N. Y.) 44, 52 (1812).
instructed on the question of exemplary damages, such error was held vital to the verdict, it not being within the power of the court to know what portion of the damages awarded constituted compensation and what punitive damages, and the verdict was accordingly set aside.15

What are the elements of actual malice? Such malice, according to the authorities,16 may be shown by evidence of (1) personal ill will, or (2) wanton or reckless conduct in the publication or (3) the use of words which, being false, are of such a character as to establish a degree of wrongdoing calling for punishment. Let us suppose the following situation: A, the publisher of a newspaper, is interested in the B Insurance Company. In order to harm D, a director of the C Insurance Company, against whom A has a personal grudge, an article is published imputing to D disgraceful and immoral complicity in an insurance swindle and charging him with culpable if not criminal misconduct in the management of the business. That would constitute evidence of personal ill will and it would seem that ill will might be imputed from the accusation of criminal misbehavior alone. As to the second class of evidence it has been held,17 where a publisher of a weekly paper, before publishing a libel, circulated about the plaintiff's neighborhood a "dodger" calling attention to the forthcoming article, that the jury was warranted in finding recklessness and carelessness sufficient to justify an award of punitive damages, in the absence of evidence showing inquiry before publication. Illustrations of the third form which actual malice may take would be inappropriate here and are easily imagined. Whether the words used must be heinous, atrocious or extreme in character in order to establish the degree of wrongdoing calling for punishment is conjectural. The principal case appears to correctly state the law as previously laid down in New York.

On principle the question may be viewed from two angles. Taking into consideration the sensationalism of the modern press and the increased tendency to overstep the proper limits in publication, it would seem that in actions for libel implied malice might well be held sufficient for the recovery of punitive damages. Such a rule, by making recovery easier, would doubtless induce greater care on the part of our publishers. On the other hand, if the view be taken that the doctrine of exemplary damages is really an anomaly, "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine,"18 it would seem that a strict rule of recovery requiring proof of express malice should be followed. The guilty party in addition to civil liability exposes himself to criminal prosecution and before inflicting the double punishment adequate evidence of actual malice should be given. The latter would seem to be the better view. Leonard G. Aiersted, '17.

16Armory v. Vreeland, supra, note 15 and the cases cited therein. See also Newell on Slander and Libel, p. 1020.
17Young v. Fox, 26 App. Div. (N. Y.) 261 (1898), aff'd, 155 N. Y. 615 (1898).
Master and Servant: Workmen's Compensation: Admissibility of Hearsay Evidence in Proceedings before Workmen's Compensation Board: Findings Based on Hearsay Only.—The effect of section 68 of the Workmen's Compensation Law of New York in regard to hearsay evidence is the subject of controversy in the Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435 (1916). This case was an appeal from an order affirming the decision and award of the Workmen's Compensation Commission for compensation for the death of the claimant's husband, which was occasioned, as it is alleged, by injuries received while he was in the employ of the defendant company as a driver of one of its ice wagons. The commission made certain findings of fact upon which it based its award. One of these findings was that the death was caused by the slipping of the decedent's ice tongs which caused a cake of ice to fall, striking him in the abdomen. Nobody saw the accident. Three witnesses testified that they were present at the time and place when, it was alleged, the decedent was injured, and that they saw no accident and no cake of ice fall. The finding of the commission was based solely upon the testimony of witnesses who related what Carroll told them as to how he was injured. The question was thus squarely raised whether hearsay evidence is admissible in proceedings before the Workmen's Compensation Commission and, if admissible, whether the commission is justified in basing a finding entirely upon such testimony.

It was held in the Appellate Division, in the third department, by a divided court that section 68 wholly abrogated the substantive law of evidence in such proceedings and that the commission had power to receive the hearsay evidence and base its findings upon it.

This decision was reversed by the Court of Appeals in the principal case, Seabury, J., and Pound, J., dissenting. The prevailing opinion per Cuddeback, J., held that, while section 68 admits such hearsay evidence and allows the commission to hear it, and removes the limits of admissibility set by the common law and statutory rules of evidence, yet in the end there must be a residuum of legal evidence to support the claim before an award can be made; that there must be in the record "some evidence of a sound, competent and recognizedly probative character to sustain the findings and award made." Seabury, J., dissented, stating that "The distinction sought to be made between admitting such evidence and basing an award upon it seems to me to be unreasonable and not to find support in anything contained in section 68." Pound, J., dissented on the ground that the evidence here was admissible and legal and was of probative

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1Section 68 of the Workmen's Compensation Law reads as follows:
"Section 68. Technical rules of evidence or procedure not required. The commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties."

force and, as such, its weight was for the commission as triers of fact, their decision thereon being final.

In the absence of any such statute as section 68 it must be admitted as settled that such evidence is not admissible. However, it is conceded by all the judges of the Court of Appeals that such evidence is admissible in proceedings before the Workmen's Compensation Commission, but the effect of such evidence unsupported by any other evidence is where the division occurs.

Just what is meant by the prevailing opinion is somewhat difficult to interpret. It says that the evidence is admissible but that in the end there must be a residuum of legal evidence. For what purpose, then, is the hearsay to be introduced? If it is to be admitted merely to bolster up other evidence, what in addition to the hearsay is necessary that there may be sufficient evidence upon which to base a finding? The court attempts to answer this question by quoting from Mr. Justice Woodward's dissenting opinion in the court below: "There must be in the record some evidence of a sound, competent and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by the court." This, however, does not answer the question directly. Must this "residuum" be direct evidence? If so, then the admission of the hearsay is of no value and unnecessary. If, on the other hand, all that the "residuum" must be is circumstantial evidence, then it would seem that the hearsay is being recognized as having probative character, since it may be necessary in connection with other circumstantial evidence to sustain the finding. If, therefore, it is recognized as being of a sound, probative character and is competent, it comes within the definition of the court as to what the "residuum" must be.

It would seem, furthermore, that in the prevailing opinion no distinction is made between hearsay admissible at common law, such as dying declarations, and hearsay which is inadmissible at common law. The question remains whether hearsay of any kind would be sufficient to make up the "residuum." If hearsay evidence admissible at common law be sufficient to form the "residuum" in any case, the division line between what is and what is not a legal "residuum" is not between the hearsay evidence as a whole and other kinds of evidence, but must be made in the field of hearsay evidence itself. The Court of Appeals, in spite of section 68, seems to retain the dividing line at just the place it was before the section was passed, interpreting that section to affect admissibility only. In view of that section should not the dividing line now be drawn elsewhere?

It will hardly be admitted that all hearsay is of a probative character. Some is unquestionably without any possibilities of probative character, while on the other hand there are a great many exceptions to the common law hearsay rule. Just where the line is to be drawn is a problem and it is submitted that whether or not such hearsay testimony should be enough to sustain a finding of fact by the com-

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mission should be determined by the character of the evidence introduced. It is the writer's opinion that section 68 intends that some kinds of hearsay evidence barred at common law and having possibilities of probative character should be sufficient to sustain a finding but that other kinds, having no possibilities of probative force, should not be sufficient.

In the principal case the evidence upon which the finding was based was such as is admissible in the law courts of Massachusetts. It is recognized in Massachusetts as being legal evidence fit to go to a jury. Such evidence is recognized as an exception to the hearsay rule also in the federal courts. In the light of these decisions it would certainly seem that the evidence here submitted had possibilities of probative force and as such should have been deemed sufficient to sustain the finding and award.

F. B. Ingersoll, '17.

Public Service Commission: How Far the Orders of the Commission are Reviewable on its Findings of Fact.—In the People ex rel. N. Y. & Queens Gas Co. v. McCall, 219 N. Y. 84 (1916), the Court of Appeals has finally established the status of the Public Service Commission in so far as its orders on its findings of fact are reviewable by the courts. The Public Service Commission Law gives the commission authority to order gas companies to make reasonable improvements and extensions. Under this statute the commission ordered the relator to extend its gas mains and services to supply with gas an outlying district of the city. The Appellate Division set aside the order as unreasonable, but the Court of Appeals in overruling this decree held that the lower court did not "have the power to determine that the extension *** was unreasonable in the sense that it was an unwise or inexpedient order, but only that it was unreasonable if it was an unlawful, arbitrary or capricious exercise of power."

This decision establishes a basis for reviewing the orders of the commission on its findings of fact entirely different from that often practised by the courts. Formerly the court under certiorari proceedings would go into the facts of the particular case and if the evidence preponderated against the determination made by the commission, the court would nullify the order as unreasonable. In other words it virtually substituted its own judgment for that of the commission by declaring the order unreasonable because it would not, upon the same facts, have made a similar order.

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2Insurance Co. v. Mosley, 75 U. S. 397 (1869).
3Public Service Commission Law (Consolidated Laws, 1910, chapter 48), section 66.
NOTES AND COMMENT

But in the principal case the Court of Appeals has begun to follow the rule laid down by the United States Supreme Court in its review of the orders of the Interstate Commerce Commission, which seems more in accord with sound legal reasoning and with the usefulness of the commission for all practical purposes. The federal courts hold that findings of fact made within the scope of the administrative functions of the commission are not susceptible of judicial review. But the courts do have the power to pass upon the orders of the commission when such orders are violative of the constitution, when the statutory powers conferred upon the commission have been exercised in such an arbitrary manner as to virtually transcend the authority conferred, although they may not technically appear to do so. The court confines itself to the ultimate question of whether the commission has acted within its power. The court will not consider the wisdom or expediency of the order or even whether on the same testimony it would have reached the same conclusion.

No court has yet undertaken to lay down a rule which shall furnish a test of what is reasonable that will fit every case. And it seems that the law which ought to govern the review of the orders of the commission and which the principal case follows is best expressed by the Minnesota Supreme Court in State v. Great Northern Ry. Co.6 where the court says: "The order may be vacated as unreasonable if it is contrary to some provision of the federal or state constitution or laws, or if it is beyond the power granted to the Commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interests of both the public and the carrier, it is so contrary as to be beyond the exercise of a reasonable discretion and judgment."

Charles Abramson, '17.

Real Property: Adverse Possession: Property Subject thereto: Public Highways.—In Board of Supervisors v. Norfolk & Western Ry. Co., 89 S. E. Adv. Sheets (Va.) 951 (1916), the plaintiffs brought a suit in equity to compel the defendant railroad to change its approaches to a bridge to the same width as the old road and to make easy grades, or to restore the old highway as it had previously existed. Among the defenses interposed by the railroad company was the one that the plaintiff supervisors were barred from their action by lapse of time and laches. The court held this plea untenable, adopting the rule of N. & W. Ry. Co. v. Supervisors of Carroll County.7 The rule there stated is: "Public Highways belong to

4110 Va. 95 (1909).
5At pages 102 and 103.
the state, and the statute of limitations does not run against
the rights of the public therein, nor does the doctrine of laches apply.
As against the government, laches cannot be set up as a defense in
equity any more than the bar of the statute can at law. Time does
not run against the state, nor bar the rights of the public."

It has been widely recognized that there is a conflict of the authori-
ties as to whether the doctrine of adverse possession applies to
municipal corporations, i.e., towns and counties having charge of
the public highways. Where the conflict has been recognized there
is also diversity of opinion as to which way the weight of adjudications
tend. Some of the writers who have examined the authorities claim
that the majority are in favor of allowing the statute of limitations
to run against the public as against an individual, while others claim
the opposite. Many jurisdictions have in recent years changed
the rulings previously made on this question, and the decisions at
the present time will probably show that the greater number are
inclined to favor the rule as adopted in Board of Supervisors v. Norfolk

The courts which favor the rule that public highways shall not be
subject to adverse possession have taken considerable pains to give
the reasons upon which they have based their decisions. Probably
the most common reason why the statute of limitations should not
apply as a bar to the rights of the public in highways is that the same
active vigilance cannot be expected of the public as is known to
characterize that of a private person, always jealous of his rights

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3I Cyc. 878; 1 R. C. L. 736; 2 Corpus Juris 72; Meyer v. City of Lincoln, 33
Neb. 566 (1891) at page 570.

4Notably Iowa, Ohio, and Virginia.

The following jurisdictions hold in accord with Board of Supervisors v. Norfolk
and W. Ry. Co., infra: Harn v. Dadeville, 100 Ala. 199 (1893); Red
Bluff v. Wallridge, 15 Cal. App. 770 (1911); Allender v. Wilmington, 7 Penn.
(Del.) 48 (1906); Langley v. Augusta, 118 Ga. 590 (1903); Thiessen v. City of
Lewiston, 26 Idaho 505 (1914); Close v. Chicago, 257 Ill. 47 (1912); Hall v.
Breyfogle, 162 Ind. 494 (1903); Quinn v. Baage, 138 Iowa 426 (1908); Wallace v.
Cable, 87 Kans. 835 (1912); Zagane v. New Orleans, 128 La. 338 (1911); Lexing-
ton v. Hoskins, 96 Miss. 163 (1909); Columbia v. Bright, 179 Mo. 441 (1903);
Lydick v. State, 61 Neb. 309 (1901); Harrington v. Manchester, 76 N. H. 347
(1912); Board of Freeholders v. Sharpless, 83 N. J. L. 443 (1912); Driggs v.
Phillis, 103 N. Y. 77 (1886); New Bern v. Wadsworth, 157 N. C. 309 (1900);
Heddleston v. Hendricks, 52 Ohio St. 460 (1895); Barton v. Portland, 74 Ore.
75 (1914); Commonwealth v. Moorehead, 118 Pa. St. 344 (1888); Horgan v.
Jamestown, 32 R. I. 528 (1911); Crocker v. Collins, 37 S. C. 327 (1892); Raht v.
550 (1915); Hague v. Mill & Elevator Co., 37 Utah 290 (1910); Supervisors v.
263 (1905); Clifton v. Town of Weston, 54 W. Va. 250 (1903); and Nicolai v.
Davis, 91 Wis. 370 (1895).

The following jurisdictions hold contra to Board of Supervisors v. Norfolk & W.
Alling, 40 Conn. 470 (1873); District of Columbia v. Krause, 11 App. D. C. 398
(1897); Laundry Co. v. Louisville, 168 Ky. 499 (1916); Kelly v. Jones, 110 Me.
560 (1913); Winslow v. Nayson, 113 Mass. 411 (1873); Vier v. Detroit, 111 Mich.
646 (1897); New Harmony v. Krause, 93 Minn. 455 (1904); and Knight v.
Heaton, 22 Vt. 480 (1850).
and prompt to repel any invasion of them. Each individual feels but a slight interest in public rights of property and rather tolerates even a manifest encroachment, than seeks a dispute to set it right. This is based upon the old English maxim, *nullum tempus occurrit regi*, which is held to apply to the commonwealth in some states as it does in England to the Crown. It is argued that only when the state lays aside its sovereignty and places itself in the position of a contracting party, a natural person, may the state be subjected to the provisions of the statute of limitations. Then it is also said that the state is not the sovereign in this country, but the people who make it are sovereign, and the highways are the only property that the people of the state hold in their sovereign capacity. Therefore, since the officers of a state, county, or city are but servants of the people, the statute of limitations which is made to apply to the corporation does not apply to the people or their public rights. It furthermore seems logical to assume that, since a municipal corporation has no power to sell or alienate highways (simply holding them in trust for the public), adverse possession or a highway for the length of time required by statute should not afford a legal presumption that a grant of title to the highway has been made, but has been lost. The courts sometimes say that the sound reason for not allowing the doctrine of adverse possession to apply to highways rests in the public policy of reserving public rights from injury and loss by negligence of public officers. A continuing public nuisance is another ground upon which it is decided that no rights in highways can be acquired by long continued possession. These reasons against the subjection of highways to adverse possession have been responsible for the common law maxim, “Once a highway, always a highway.”

Where the rule that public highways shall be subject to adverse possession has been maintained, the courts have generally not been careful to assign the particular reasons for their holding. In a leading Massachusetts case the court said: "We can see no good reason why the presumption of a lawful origin derived from the continuance for forty years of an apparent encroachment upon a public way should not be regarded as a presumption of law, and conclusive in favor of the possession." No distinction is drawn between municipal corporations and natural persons in the operation of the statute of

7Commonwealth v. Alburger, 1 Whart. (Pa.) 468 (1836).
8Taylor v. Commonwealth, 29 Gratt. (Va.) 780 (1878).
9Burlington v. B. & M. R. Co., 41 Iowa 134 (1875).
14Runge v. Stoneberger, 2 Watts (Pa.) 23 (1833).
15Wolfe v. Town of Sullivan, 133 Ind. 331 (1893).
16Cutter v. City of Cambridge, 88 Mass. 20 (1863); see also Knight v. Heaton, *supra*, note 5.
The courts upholding this rule subjecting highways to adverse possession argue that a town or county has committees or commissioners whose special duty it is to see that highways are kept free from encroachments and, if they permit adverse possession for the statutory period, the town or county ought to lose all right thereto. It is admitted that the statute of limitations does not apply to the state or sovereignty, but it is said, "The principle has not been extended to municipal or public corporations." An early Ohio case, often cited by courts allowing adverse possession to apply to public highways, attempts to answer the sovereignty argument advanced by courts holding in accord with Board of Supervisors v. Norfolk & Western Ry. Co., supra. The Ohio court said: Immunity (from application of the statute of limitations) seems to be an attribute of sovereignty only. No case is found which exempts any other description of person, whether natural or artificial from the operations of the law; and none of the reasons for the exemption, apply with much force to municipal corporations. The law imposes upon them the duty of defending the interests which they are created to hold, and has conferred every power necessary to this end. When their land or franchises are of public character, the public which they represent are principally members of their own body, sufficiently vigilant to watch their own interests, and sufficiently powerful to defend them." While not openly declaring whether the statute of limitations does or does not run against the public, it has been held that under some circumstances justice demands that the public be estopped from asserting its rights to a highway against an individual adversely in possession. This doctrine has been contradicted on the ground that the statute of limitations is a mere legal estoppel. The decisions in the class of cases allowing highways to be subject to adverse possession are, apparently, based on reasons which are not as convincing as those advanced by courts holding the opposite view.

It appears, therefore, that on reason the jurisdictions upholding the rule of Board of Supervisors v. Norfolk & Western Ry. Co., supra, have much the better of jurisdictions holding contra. Furthermore, the courts holding contra have in some instances based their decisions on, or have cited, cases which have since been overruled by later cases in the same jurisdiction. It is also true that several of the cases making any attempt to declare sound reasons for allowing

17The case most often cited is City of Cincinnati v. Evans, 5 Ohio St. 594 (1853).
18Meyer v. City of Lincoln, supra, note 3, citing City of Wheeling v. Campbell, 12 W. Va. 36 (1877), which has since been disproved in Ralston v. Town of Weston supra, note 10.
19City of Pella v. Schotte, 24 Iowa 283 (1868).
20City of Pella v. Schotte, supra, note 19, at page 293.
21City of Cincinnati v. Presbyterian Church, 8 Ohio 299 (1838). This case as well as Cincinnati v. Evans, supra, note 17, has since been overruled by Heddleston v. Hendricks, supra, note 6.
22At page 310.
23Davis v. Huebner, 45 Iowa 574 (1877).
24Ralston v. Town of Weston, supra, note 10.
highways to be subject to adverse possession were decided in the early part of the nineteenth century. The theory upon which the very early Ohio case based its decision may be more or less correct, but its practical application would be difficult. Since that time vast changes have taken place in the economic and political development of the country. The vigilance of city authorities and county commissioners cannot reasonably be expected to prevent encroachments upon the public highway. The rule of law as adopted in Board of Supervisors v. Norfolk & W. Ry. Co. should be universally approved.

H. R. Lamb, '18.

Real Property: Ownership of Beds of Streams in New York State.—The case of Danes v. State of New York, 219 N. Y. 67 (1916), again raises the interesting question of the ownership of the beds of the streams of New York, and especially of the Mohawk and Hudson Rivers. In that case it was held that the bed of the Mohawk River belongs to the state, and that the owners of the uplands contiguous to such river, which have been taken for the barge canal, are not entitled to compensation for the land connected with the uplands under and to the center of the river.

It is a well recognized rule of law that a state owns the land beneath the navigable streams within its boundaries. To determine whether a stream is “navigable,” two rules have been advanced, viz., the common law rule and the civil law rule. The common law rule of England, as set forth in the celebrated treatise, “De lure Maris,” by Sir Matthew Hale, and in the leading English case, The Royal Fisheries of the Banne,1 was that a stream in which the tide ebbs and flows is navigable, and the bed of such stream belongs to the Crown, while a stream which is not under the influence of the tide is not navigable, and the riparian owners on each side thereof own the land to the thread of the stream, subject, however, to the public right of navigation thereon.2 Navigability, according to the civil law, was to be determined by the question of whether the stream was in fact navigable, i.e., navigable in the common sense of the term.3

When we look to see which rule has been followed in New York, we find that the common law rule has been applied to all the streams within the state, with the exception of the Mohawk River, the Hudson River above tide water, and the streams forming any portion of the

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1Davies' Rep., 149 (1660).
3Code Napoleon, secs. 559-561, which provided: “Islands formed in the bed of streams which are navigable or which admit floats, belong to the nation, if there is no title or prescription to the contrary. . . . Islands, forming in rivers and streams not navigable and not admitting floats, belong to the proprietor of the shore on that side where the island is formed; if the island is not formed on one side only, it belongs to the proprietors on the shore on the two sides, divided by an imaginary line drawn through the middle of the river.”
boundaries of the state. The courts of the state have applied the common law rule to the following rivers, holding that the beds thereof belong to the riparian owners: Battenkill River, Black River, Cattaraugus Creek, Chenango River, Chittenango Creek, Deer River, Genesee River, Moose River, Onondaga River, Oswego River, Racket River, Salmon River, Saranac River.

But the title to the bed of Wood Creek (in Washington County), having been excepted from the lands conveyed by the King of England by the so-called "Skeeneborough patent," and having been reserved as "a common highway for the benefit of the public," vested in the state upon the formation of our government.

Some doubt was cast upon the prevalence of the common law rule by a dictum of Senator Beardsley in Ex parte Tibbetts, which declared that the rule did not apply to our large fresh water streams. When the same case was again before the court it was stated that the common law rule, which authorizes the owners of the shores of rivers in which the tide does not ebb and flow to hold to the thread of the stream, was not applicable to the condition of this state in respect to its large rivers, navigable in fact, in which the tide does not ebb and flow; that the acts of the government, in asserting title to the beds of rivers after granting the lands upon the shores of such rivers, raised a strong presumption that the common law rule had never been adopted in New York; that especially was this true of the Mohawk River, since the government had claimed the right to and actually did dispose of the bed and islands of that river notwithstanding previous grants of the shores.

In Varick v. Smith, however, it was said that the Tibbetts case, supra, was restricted to and applicable only to the Mohawk River.

\[Note 1: \text{Matter of Commissioners of State Reservation, 37 Hun (N. Y.) 537, 547 (1885), holding that the bed of the Niagara River belongs to the state; see also Strawberry Island Co. v. Cowles, 79 Misc. (N. Y.) 279 (1913), which declared: "The court will take judicial notice that the Niagara River is a navigable stream and constitutes an international boundary. ... The State of New York is the owner in fee of the bed of the Niagara River."}

\[Note 2: \text{Shaw v. Crawford, 10 Johns. (N. Y.) 236 (1813).}

\[Note 3: \text{Munson v. Hungerford, 6 Barb. (N. Y.) 265 (1849).}

\[Note 4: \text{Seneca Nation of Indians v. Knight, 23 N. Y. 498 (1861).}

\[Note 5: \text{Chenango Bridge Co. v. Paige, 83 N. Y. 178 (1880).}

\[Note 6: \text{Ex parte Jennings, 6 Cowen (N. Y.) 518 (1826).}

\[Note 7: \text{Matter of Wilder, 90 App. Div. (N. Y.) 262 (1904).}

\[Note 8: \text{Starr v. Child, 20 Wend. (N. Y.) 149 (1838); Commissioners of Canal Fund v. Kempshall, 26 Wend. (N. Y.) 404 (1841); Powell v. City of Rochester, 93 Misc. (N. Y.) 227 (1916).}

\[Note 9: \text{DeCamp v. Thomson, 16 App. Div. (N. Y.) 528 (1897).}

\[Note 10: \text{Luce v. Carley, 24 Wend. (N. Y.) 450 (1840).}

\[Note 11: \text{Varick v. Smith, 9 Paige (N. Y.) 546 (1842); Fulton L., H., & P. Co. v. State of New York, 200 N. Y. 400 (1911).}

\[Note 12: \text{Morgan v. King, 30 Barb. (N. Y.) 9 (1855).}

\[Note 13: \text{Hooker v. Cummings, 20 Johns. (N. Y.) 90 (1822).}

\[Note 14: \text{People v. Pellet, 17 Johns. (N. Y.) 195 (1819).}


\[Note 16: \text{Wend. (N. Y.) 423 (1830).}

\[Note 17: \text{Wend. (N. Y.) 571 (1836).}

\[Note 18: \text{Supra, note 14.} \]
Subsequently, in the leading case of *People ex rel. Loomis v. Canal Appraisers*, it was expressly held that the Mohawk River is a navigable stream, the title to the bed of which is in the people of the state. This decision was placed largely upon the ground that the legislature, by its course of dealing with the river, had indicated its understanding that the title to the bed of the river was in the state, because in 1786 there had been an act authorizing the granting of lands under the navigable waters of the state, and in 1792 the legislature had granted a portion of the bed of the Mohawk River to the Western Inland Navigation Company. Judge Davies, who wrote the opinion, also gave as a further ground for the decision the inapplicability of the common law rule to the larger bodies of water and streams within the state.

A somewhat different theory was advanced in *Smith v. City of Rochester* as a ground for denying the application of the common law rule to the Mohawk River and to that portion of the Hudson River above tide water. The court, per Ruger, J., said, "The titles granted to the original settlers in the Hudson and Mohawk valleys, as construed by the rules of the civil law prevailing in the Netherlands, from whose government they were derived, did not convey to the riparian owners the beds of navigable streams. Upon the surrender of this territory, the guaranty assured by the English authorities to its inhabitants of the peaceable enjoyment of their possessions, simply confirmed the right already possessed, and the beds of navigable streams, never having been conveyed, became, by virtue of the right of eminent domain, vested in the English government as ungranted lands, and the State of New York, as a consequence of the Revolution, succeeded to the rights of the mother country. As to the lands under these rivers (Mohawk and Hudson), the people of this state have, from the earliest times, asserted their title, however acquired, and have assumed to convey and grant them like other unappropriated lands belonging to the State."

This same theory was adhered to in *Fulton L. H., & P. Co. v. State of New York*, which recognized the law to be settled that the beds of the Mohawk and that part of the Hudson above the ebb and flow of the tide belong to the state. The law was also thus recognized in *Williams v. City of Utica*, in which the court mentioned both of the theories above set forth.

Hence, in view of the decisions of the foregoing cases and of the principal case, it is now well settled that the bed of the Mohawk River belongs to the state and not to the riparian owners. While there have been no cases narrowly involving the question of the

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223 N. Y. 461 (1865).
2292 N. Y. 463 (1883).
22Supra, note 14.
22217 N. Y. 162 (1916). The court recognized that the bed of the Mohawk River belongs to the state, but held that the plaintiffs had title to the land in question through an express and direct original grant of the bed of the river from George the Second. For a similar holding upon a similar state of facts, see Lewis v. City of Utica, 159 App. Div. (N. Y.) 160 (1913).
ownership of the bed of the Hudson above tidal influence, the courts have repeatedly declared that that portion of the Hudson is navigable and that the bed of the river belongs to the state, and these declarations may be regarded as stating the existing law. As to that part of the Hudson where the tide ebbs and flows, it seems immaterial whether the common law rule or the civil law rule is applied, for under either rule the state would be held to be the owner of the bed of the river: under the common law rule because the tide ebbs and flows, and under the civil law rule because the river is navigable in fact. The common law rule has been applied, however, in Gould v. Hudson River R. R. Co., in which it was held that the Hudson River is navigable where the tide ebbs and flows, and that, as to such part of the river, the bed, below the ordinary high-water mark, belongs to the state.

Section 260 of the General Business Law allows the owners or lessees of lands bordering on the Hudson River, after compliance with the conditions of the statute, to cut and harvest the ice formed in that river between the center thereof and such adjoining lands. Since the right to take ice is an incident of the ownership of the bed of a stream; the legislature, by enacting this statute, must have regarded the state as the owner of the right to take the ice on the Hudson and, hence, as the owner of the bed of that river.

Thus we may draw the conclusion that it is the well settled law in New York that the common law rule of the ownership of beds of streams applies to all the streams within the state, except the Mohawk and Hudson, and rivers forming any portion of the boundaries of the state.

Fred S. Reese, Jr., ’18.

Real Property: Validity of Restraint on Alienation of Fee for a Limited Time.—In Francis v. Big Sandy Co., 188 S. W. (Ky.) 345 (1916), a father and mother conveyed to their son, by deed of gift, a tract of land, the deed purporting to convey to him a fee simple title in all respects, but there was the following restriction upon the right of alienation: “It being understood and agreed that the party of the second part shall not trade the same to any other person outside of the party of the first part’s bodily heirs for the term of twenty years.” Within this twenty-year period the son sold and conveyed certain mineral rights in the land to a person not a bodily heir of the father, the latter joining in the conveyance. Now, several years after the expiration of the twenty-year period, this action is brought by the son to recover the property so conveyed upon the ground that his attempted conveyance was void because of the restriction under which he held. The Kentucky court, in affirming the judgment for the defendant, held that such restraint was reason-


12 Barb. (N. Y.) 616 (1852).

L. 1895, chap. 953, sec. 1; L. 1909, chap. 25; chap. 20 of Consolidated Laws.

able and a valid restriction and that an alienation made in violation of the deed was voidable, not void.

It is not the purpose of this note to treat the question as to that part of the restriction which deals with restraining alienation to the bodily heirs of the father, but to limit itself to a discussion of the restriction of the alienation of the fee simple for a limited period.

It is submitted that this case, although in accord with the Kentucky doctrine as regards this question, is contra to the weight of authority.1 The basis for the rule followed by the majority of the courts is that any restriction upon the power of transfer of an estate in fee simple is repugnant to such an ownership. A grant of an estate in fee simple implies in its very nature the right to the absolute ownership of the land so conveyed, and to restrict the power of alienation, even for a limited period, is to deprive such an estate of one of its essential elements and inherent characteristics. If one has the right to impose such a restriction for several years, he might impose the restriction for fifty or even one hundred years, and it would be extremely difficult to draw the line between restraints for a reasonable period and those for unreasonable lengths of time.2 Furthermore, if what A holds is not alienable, the result is that A has and has not a fee simple at one and the same time, for A, holding a fee simple, holds an estate which he is not bound to let descend to his heirs but may sell or convey; and if the condition is that he must not sell or convey it in any way, but must allow it to descend, the estate does not answer the description of a fee simple.

Moreover, to permit such restrictions would seem to be against public policy, because it involves and entangles titles to real property, thereby leading to endless confusion and ceaseless litigation, which the law aims to prevent.

One exception, however, to this rule is to be noted, namely, the case of separate estates in married women. Where a separate estate is created in a married woman, a restriction on alienation is held to be valid.3 The reason for introducing separate estates for married women was to give to them an equitable interest in property apart from their husbands and free from their husband's control. Such estate, however, gave them but imperfect protection because they were still in danger of parting with their property under the influence or threats of their husbands. For this reason, the clause against

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1Murray v. Green, 64 Cal. 363, at 368 (1883); Fowler v. Duhme, 143 Ind. 248 (1895); Jones v. Port Huron Engine Co., 171 Ill. 502 (1898); Smith v. Kenney, 89 Ill. App. 293 (1899); Clark v. Clark, 99 Md. 356 (1904); Todd v. Sawyer, 147 Mass. 570 (1888); Moore v. Schuchette, 102 Mich. 612 (1894); Roosevelt v. Thurman, 1 Johns. Ch. (N. Y.) 220 (1814); Wool v. Fleetwood, 136 N. C. 460 (1904); Anderson v. Cary, 36 Ohio C. C. N. S. 473 (1903); Kepple's Appeal, 53 Pa. 211 (1866); Potter v. Couch, 141 U. S. 297 (1890); Ziller v. Langguth, 94 Wis. 507 (1896).

2Twitty v. Camp, Phil. Eq. (N. C.) 61 (1866).

3Baggett v. Meux, 1 Phil. Ch. (Eng.) 627 (1846); Hauser v. City of St. Louis, 170 Fed. 906 (1909). See also 28 L. R. A. (N. S.) 426 and note; Robinson v. Randolph, 21 Fla. 629 (1885); Fears v. Brooks, 12 Ga. 195 (1852); Travis v. Sitz, 185 S. W. (Tenn.) 1075 (1916).
alienation or anticipation, as it is called, was introduced. This exception to the general rule is applied in the case of Scruggs v. Mayberry, 188 S. W. (Tenn.) 207 (1916), in which the husband executed a deed by which he conveyed certain land to his wife, the deed providing that neither he nor his wife should have the right of selling it during their lives, but that the husband should retain the use and possession of the property. It was held that, a separate estate having been created in the wife by the direct conveyance to her, the absolute restraint on the power of alienation was valid but would have been void, had the interest conveyed been other than a separate estate. As pointed out by Professor Gray, "The well-recognized exception to the invalidity of restraints on the alienation of life interests which prevails in the case of the separate estate of married women, is perfectly consistent with the general doctrine which underlies this whole subject. That doctrine is, that it is against public policy to permit restraints to be put upon transfers which the law allows. But the common law does not allow married women to transfer their property. The separate estate which allows a transfer is the creation of equity, and it cannot be deemed against public policy for equity to permit its creation to be moulded by a clause against anticipation; for the tendency of such a clause is only to put the married woman where the common law has always put her." It is necessary, therefore, to restrain the wife from exercising the power of alienation during coverture in order to attain the benefit of the separate estate. A restraint of this kind is not effectual, however, while the woman is single.

What was the old rule and what now represents the minority view, viz., that restrictions on the power of alienation limited as to time are valid, is in accord with the Kentucky case and may be called, for convenience, the Kentucky doctrine. The reason for this rule is based largely upon a misconception of Large's Case. In this case A, seized of lands in fee, devised them to his wife until his son William should come of the age of twenty-two years, remainder as to part of such lands to his two sons, X and Y, the remainder as to the other part to two other of his said sons, upon the condition that "if any of his sons, before William shall come to the age of twenty-two, shall sell any part of the same, he shall forever lose the lands and the same shall remain, etc." One son, prior to the time when William reached twenty-two, leased the land devised to him. It was held that the

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4Gray, Restraints on Alienation, sec. 269.
5Robinson v. Randolph, supra, note 3.
6Large's Case, 2 Leon. (Eng.) 82 (1857); Oxley v. Lane, 35 N. Y. 340 (1866); Munroe v. Hall, 97 N. C. 206 (1887); Ex parte Watts, 130 N. C. 237 (1902); Re Weller, 16 Ont. App. 318 (1888); Cowell v. Springs Co., 100 U. S. (1879); Libby v. Clark, 118 U. S. 250 (1886), at p. 255; M'Williams v. Nisley, 2 Serg. & Rawle (Pa.) 507 (1816).
82 Leon. (Eng.) 82, supra, note 6.
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restraint there was good. This case is not authority for the proposition that a restriction or condition in the conveyance of a vested estate in fee simple against alienating for a limited time is valid, because the condition against alienation was a condition attached to a contingent remainder, which was not to vest until William reached twenty-two. The remainder might never vest at all and could never vest should William die before he reached the age of twenty-two. The interest of the son, therefore, being merely contingent,9 the non-alienation of such interest was a condition precedent to the vesting and the provision against alienation, until the time of vesting, was valid.

It would seem, therefore, that the Kentucky courts persist in following a rule based largely upon a misconception and a rule which is now generally abandoned in America.

J. R. Schwartz, '18.

Release: Fraud as Ground to set Aside a Release.—It is not an infrequent occurrence that after an injured party has signed a release of a claim for personal injuries due to negligence, where the liability of the other party is probable, the releasor discovers that his injuries are more serious than he anticipated, or that for other reasons the amount he has been allowed under the release is inadequate. He then seeks to set aside the release. The facts of each particular case must be carefully scrutinized to determine upon what ground the release may be avoided. Some cases may be resolved upon the ground of fraud, because of the fraudulent representations of the person securing the release, and such representations may be either as to the nature or the character of the injury sustained or as to the import or character of the paper signed. Often cases may be resolved upon the ground of mutual mistake of the parties; and some upon the ground of an innocent false representation upon the part of the person inducing the release.

Smith v. Rhode Island Co., 98 Atl. (R. I.) 1 (1916), is a recent example of a case where the contract of release was rescinded because of the fraudulent representation of the agent securing the release. In this case the plaintiff asked for rescission of the release upon the ground that the claim agent said to the plaintiff before he signed the release that Dr. Berry, the attending physician, had told him (the agent) that the plaintiff would be out at work in two weeks. It was found that Dr. Berry had not so stated, and that the agent knew that he had not. The court held that the misrepresentation made by the claim agent constituted fraud invalidating the release which the plaintiff signed, relying thereon.1

Accepting this finding by the jury that the agent made the false statement with knowledge of its falsity, the questions arise as to whether it was as to a material fact, and whether plaintiff had a right to rely and did rely upon it? When will the misrepresentation of a material fact constitute fraud? First, there must under the general rule, be an affirmative statement of some fact as distinguished from a concealment or failure to disclose, or from a mere expression of opinion. Secondly, the statement of that fact must have induced the person to whom it was made to enter into the contract. It is sometimes erroneously supposed that a misrepresentation cannot be made of a matter of opinion. However, when the statement, although relating to a matter of opinion, is the affirmation of a fact, it may be a fraudulent misrepresentation.\(^2\) It will be noticed that the fraudulent statement was here made by the defendant's agent in respect to the opinion of a third person. Granting that plaintiff would have a right to rely upon the professional opinion of the doctor himself, does he have the same right to rely upon the statements of the agent who is a non-professional person and whose interests plaintiff must realize are adverse to his own. If the fact is susceptible of accurate knowledge and the speaker may well be presumed to be cognizant of it, while the other party is ignorant, it may be relied upon, if an investigation is necessary to determine its validity, and such facts need not be exclusively within the other party's means of knowledge.\(^3\) This last rule is qualified; and the presumption that the injured party signed upon the false representation of the agent is precluded where the injured party has had reasonable opportunity to find out the extent of his injuries after the representations by the agent have been made and before signing the release.\(^4\) Moreover, if the representation is upon its face so improbable that the person to whom it is made should be put upon his inquiry, he cannot rely upon it as constituting fraud. Of course, the situation of the parties and the intelligence of the party defrauded must in all cases be taken into consideration.\(^5\)

A release may be set aside on the ground of fraudulent representation as to the character of the instrument itself. In this class of cases it might be more properly said that there was no release at all because the mind of the releasor never went out to a paper of that character. He thought that he was signing a paper of an entirely different character,\(^6\) or it may be that because of mental and physical weakness he cannot in reason be said to have known what he signed.\(^7\)

\(^{8}\) Alexander v. Brogley, 63 N. J. L. 307 (1899).  
\(^{9}\) Texas & P. Ry. Co. v. Hubbard, 105 S. W. (Tex.) 1058 (1914).
The most common case of fraud of this sort is where the character of the paper is misstated to the releasor, he believing that he is signing a receipt, or paper of like import. There is another class of cases where rescission is sought upon the ground of mutual mistake of both parties. In analyzing this class of cases caution is necessary, because facts which upon first sight appear sufficient to constitute a ground for rescission because of mutual mistake may be found to be without merit upon a closer examination. For example, in the case of Kowalke v. Ry. Co., plaintiff was injured by jumping from defendant's car in an emergency and the company's liability was probable. She was a woman of intelligence and the mother of three children and had passed by about a week the period of her menstruation. The company's physician and her own doctor visited her after the accident and learned that she was having a slight uterine hemorrhage. The question of her pregnancy was raised. She refused to submit to an examination and believed she was not pregnant. It is to be noticed that she was not ignorant of the fact that she was pregnant. The doctors were not sure that she was pregnant. Thereafter she joined with her husband in executing a release of all claims and demands. About two weeks later she suffered a miscarriage, and the plaintiff claimed rescission of the contract on the ground of mutual mistake. Rescission was not allowed. The doubtful fact is here material, and the plaintiff had the right to refuse to settle until that uncertainty was removed, or she might have settled everything else and expressly omitted from the settlement this specified contingency. What the plaintiff did was to make a settlement in terms complete, and the uncertainty is included among the other facts covered by the settlement. The parties are presumed to have intended the apparent effect of their acts. In order to invalidate a release because of mutual mistake the mistake must relate to a past or present fact material to the contract and not to an opinion respecting future conditions as results of present facts. Where the release given states the particular injuries compensated for and there were other injuries unknown to both parties, there is such a mistake of fact as will invalidate the release and equity will give relief against the use of the release to bar the claim for damages for the injury.


9106 Wis. 472 (1899).

10For cases where rescission was sought upon ground of mutual mistake, see Chic. & N. W. Ry. Co. v. Wilcox, 116 Fed. 913 (1902); Borden v. Sandy River Co., 110 Me. 327 (1913); Ry. Co. v. Bennett, 63 Kan. 781 (1901); Seeley v. Citizen's Traction Co., 36 Atl. (Pa.) 229 (1897); Homuth v. St. Louis Ry. Co., 129 Mo. 629 (1895).


unknown at the time of the release. In these cases of so-called mistake care should be taken to determine whether the facts amount to merely a disappointed expectation. If the party gets in fact all that he contracted for, although not all that he expected or hoped for, no question of operative mistake is involved.

Rescission is sometimes sought upon the ground of innocent false representation on the part of the releasee, intended to be acted upon by the releasor and relied upon by him. These facts, if proved, are sufficient to set aside the release in equity. However, cases resolved upon the ground of innocent false representation are comparatively rare. In Great Northern Railway Company v. Fowler there was a clear mistake of fact as to the nature of the injury. Plaintiff was a brakeman on defendant company's road and was injured by reason of the company's negligence. Defendant's physician believed and informed plaintiff that the injury was only a scalp wound. It developed that plaintiff was so seriously injured that a serious operation on the skull was required and that the plaintiff would never be able to again resume work. The release was held to be subject to vacation and, upon principle, rightly so.

In this class of cases neither party has knowingly deprived the other of any legal right, but if the acts of the parties are allowed to stand the releasor has lost a valid legal right through no fault of his own, but by the innocent false representation of the releasee, who under such circumstances should not be allowed to deprive the releasor of his legal rights although he does so unknowingly. There is no particular difficulty in dealing with this class of cases, as they may be rescinded in equity for exactly the same reasons as any other contract induced by innocent false representation.


Sales: Conditional Sales Distinguished from Leases.—In Bramhall, Deane Co. v. McDonald, 172 App. Div. (N. Y.) 780 (1916), the plaintiff delivered to the defendant certain articles of kitchen and pantry equipment. The defendant agreed to pay as rent the sum of $180, the agreed value of the articles, $450 on the receipt of the goods and the remainder in equal installments to be paid monthly. The defendant also agreed to return the property at the expiration of the lease, but if at that time, the full rent having been paid, the defendant desired to purchase the property, she might do so upon paying to the plaintiff "the sum of $1.00 as the purchase price of same." The parties agreed that the instrument was to be deemed a "lease" and not a sale of the property. Action was brought upon this instrument to foreclose it as a lien upon chattels, under sec. 139 of the Municipal

\[\text{References:} \quad \text{Lumley v. Wabash R. Co., 76 Fed. 66 (1896); Railroad Co. v. Artist, 60 Fed. 365 (1894).}\]

\[\text{H. 136 Fed. 118 (1905).}\]


\[\text{Simon v. Goodyear Co., 105 Fed. 573 (1900); Twitchell v. Bridge, 42 Vt. 68 (1867).}\]
Court Act in force at the time in New York City, which provided that any instrument showing a conditional sale should be deemed to create a lien upon chattels which could be foreclosed. The question before the court, therefore, was whether this instrument was evidence of a conditional sale or a lease, upon the determination of which depended the plaintiff’s right to foreclose and the defendant’s right to set up a counterclaim for breach of warranty. The court held the agreement to be a conditional sale, thereby allowing the plaintiff to foreclose and the defendant to set up the counterclaim.

The question involved has caused the courts of this country a great deal of trouble. On principle, the distinction between a lease and a conditional sale is obvious. A lease contemplates only the use of the property for a limited time, and the return of it to the lessor at the expiration of that time. A conditional sale on the other hand, contemplates the ultimate ownership of the property by the buyer, together with the use of it in the meantime. In practice, however, due to the many attempts to evade conditional sales recording acts by drawing these agreements in the form of leases, the courts have experienced considerable difficulty. The large majority of cases are those in which the parties style themselves “lessor” and “lessee,” and the contract states that the property is “hired” or “leased,” and that the lessee shall make certain payments called “rent,” amounting in all to the real value of the property, upon the full payment of which, title to the property shall vest in the lessee. The majority of American jurisdictions hold such contracts to be conditional sales. In a contract of sale, whether absolute or conditional, it seems there must be an agreement, either express or implied, that the vendee will pay the purchase price. The mere fact that an instrument is called a lease is of little importance. The court is not bound by either the name or form of the agreement, but always looks to its purpose, that is, ascertains whether or not the ultimate intention was the vesting of property in the vendee or lessee.

1Williston, Sales, sec. 336.

2Parke, etc., Co. v. White River Lumber Co., 101 Cal. 37 (1894); Coors v. Reagan, 96 Pac. (Colo.) 966 (1908); Loomis v. Bragg, 50 Conn. 228 (1882); Hine v. Roberts, 48 Conn. 267 (1880); Staunton v. Smith, 65 Atl. (Del.) 593 (1906); Puffer v. Peabody, 59 Ga. 295 (1877); Murch v. Wright, 46 Ill. 487 (1868); Currier v. Knapp, 117 Mass. 324 (1875); Campbell v. Atherton, 92 Me. 66 (1898); Gerrish v. Clark, 64 N. H. 492 (1887); Cooper v. Philadelphia Worsted Co., 57 Atl. (N. J.) 733 (1904); Jacob v. Haefelein, 54 App. Div. (N. Y.) 570 (1900); Equitable General Providing Co. v. Eisenrager, 54 Misc. (N. Y.) 179 (1901); Singer Manufacturing Co. v. Cole, 4 Lea (Tenn.) 439 (1880); Whithcomb v. Woodworth, 54 Vt. 544 (1882).

3Union Stock Yards, etc., Co. v. Western Land Co., 59 Fed. 49 (1893); In re Galt, 120 Fed. 64 (1903).

4Cutler Mail Chute Co. v. Crawford, 152 N. Y. Supp. 750 (1915); In re Morris, 156 Fed. 597 (1907); Hervey v. Rhode Island Locomotive Works, 93 U. S. 664 (1876). In Union Stock Yards, etc., Co. v. Western Land Co., supra, note 3, the court said, “In a contract of conditional sale, the agreement may be masked so as to give it the appearance of an agreement to pay for the use. In such case, the court must ascertain the real intention of the contracting parties from the whole agreement, read in the light of all the surrounding circumstances.”
character of the instrument will not be changed simply because it contains a provision that the “lessor” shall have the right to repossess himself of the chattels, or for the insurance of the property for the benefit of the transferor, or a promise by the lessee to return the article on demand. It seems, also, that by the majority rule, the payment of a nominal sum over and above the “rent,” as in the principal case, before title will be conveyed, does not prevent the transaction from being classed as a conditional sale. It is always a question of law for the court to decide as to whether or not the contract is one of sale or lease.

The greatest difficulty is experienced when the agreement does not bind the so-called “lessee” to buy, but merely gives him an option, as in the principal case. The essential thing in these contracts, as in those where the agreement to buy is absolute, is the intention of the parties. The fact that the contract contains an option to purchase does not make it per se a conditional sale, nor, where the contract provides for the payment of a sum substantially equivalent to the real value of the property, does the fact that the buyer has only an option to become the owner preclude it from being construed as a conditional sale. There seems to be no good reason for holding that such contracts are not conditional sales, as the fact “that the buyer has the option of becoming the owner and thus a sale is not sure to take place, is of but small importance, for as a practical matter the buyer will always be willing to accept ownership when he has paid the price.” There are, however, some cases in which the sum to be paid is out of all proportion to the real value of the property, but in which there is an option in favor of the purchaser to buy for a certain sum. Such an agreement, it seems, would not be construed as a conditional sale.

The decisions in New York State seem to be in harmony with the holding laid down in the principal case. In New Jersey it has been

6 In re Angeny, 151 Fed. 959 (1907); Miller v. Steen, 30 Cal. 403 (1886); Hine v. Roberts, supra, note 2; Hays v. Jordan, 85 Ga. 741 (1890); Rosenbaum v. King, 114 Ill. App. 648 (1904); Bean v. Edge, 84 N. Y. 510 (1881).
7 Palmor v. Howard, 72 Cal. 293 (1887).
9 Herring-Marvin Co. v. Smith, 43 Ore. 315 (1903); Quinn v. Parke, etc., Machinery Co., 5 Wash. 276 (1892); Vette v. J. S. Merrill Drug Co., 117 S. W. (Mo.) 666 (1909).
10 Rosenbaum v. King, supra, note 5.
11 Cutler Mail Chute Co. v. Crawford, supra, note 4.
13 From Professor Bogert’s notes to sec. 1, Proposed Uniform Conditional Sales Act.
14 Cutler Mail Chute Co. v. Crawford, supra, note 4. See also the opinion in Coors v. Reagan, supra, note 4.
Also see New York cases cited in notes 2, 4, 5, and 11, supra.
held that where there is no provision as to the vesting of title in the vendee, the contract is not a conditional sale. In Pennsylvania the cases are by no means harmonious. In a late case a transaction similar to that in the principal case was held to have a double aspect, namely, that of a hiring or bailment and that of a conditional sale. In the earlier case of Ott v. Sweatman the court held that the important thing was not the name applied to the instrument, but its "essential character." Nevertheless, in many cases in which the so-called rent operated as the purchase price, the transaction has been regarded as one of bailment or lease rather than of conditional sale. In Cincinnati Equipment Co. v. Strang the transaction was held to be a lease, even though the goods were to become the property of the buyer on the payment of ten dollars in addition to the so-called "rent". In this case, the rentals amounted to several thousand dollars. In view of such a decision, says Professor Williston, little credit can be given to the statement of the Pennsylvania court that the important thing is the "essential character of the instrument." In another late case, upon facts almost identical with those in the principal case, the court held the agreement to be one of bailment and not of sale.

In some states there are statutes which class as conditional sales those leases which are substantially equivalent thereto. These statutes do not attempt to define just what characteristics a lease must have to make it equivalent to a conditional sale. Professor Bogert in his tentative draft of the proposed Uniform Conditional Sales Act includes in his definition of the term conditional sale, "any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and the bailor or lessor contracts that the bailee or lessee is to become, or is to have the option of becoming, or is obligated to become, the owner of such goods upon full compliance with the terms of the contract." The adoption of such a section would go a long way toward eliminating the difficulty which the courts have experienced in regard to this question.

To summarize, it would seem that the important criterion is the intention of the contracting parties, as evidenced by the instrument

19 215 Pa. St. 475 (1906).
20 Williston, Sales, page 528, note 67.
23 Professor in Cornell University College of Law, whose tentative draft of a Uniform Conditional Sales Act was presented to the National Conference of Commissioners on Uniform State Laws, at Chicago, in August, 1916.
itself and all the surrounding circumstances. That the amount of money to be paid under the contract is practically equivalent to the real value of the chattel and that the ultimate result of the transaction will probably be to vest the title to the property in the so-called lessee, though not conclusive, is strong evidence that the contract is one of conditional sale. The decision in each case must depend upon its particular facts.

W. J. Gilleran, '18.

Torts: Fraud: Is the Defendant's Honest Belief in the Truth of his Representations a Good Defense to an Action of Deceit? In Schlechter v. Felton, 158 N. W. (Minn.) 813 (1916), the plaintiff bought a small tract of land from the defendant, who represented it to contain a certain number of acres. Upon investigation after the purchase, which was in reliance upon this representation, the plaintiff found that the tract did not contain the number of acres represented, and brought action in deceit against the defendant to recover damages sustained by reason thereof. The court held that where the defendant has made a false representation of a material fact, susceptible of knowledge and relating to a matter in which he has an interest, and as to which he may be expected to have knowledge, and makes such statement unqualifiedly and as of his own knowledge, and with intent to induce action, he cannot be heard to say, after the statement has been acted upon by the plaintiff to his damage, that he honestly believed that the statement he made was true. The opinion seems to assume that the defendant had such honest belief, and it therefore involves the question of whether or not honest belief is a defence to an action for fraud. It is clear that the defendant's erroneous statement was one of fact, not one of opinion.

The action of deceit in its development went through various forms and stages, growing out of a great chaos of principles. The early stages were marked by great conflicts, not only as to the rules governing the action, but also as to their application. Not until 1789 did the confusion begin to merge into a definite form. At that time in the decision of the noted case of Pasley v. Freeman1 the action of deceit took one definite aspect and ever since it has not been doubted that one who makes a statement of fact which he knows to be false for the purpose, or apparent purpose, of inducing another to act, is liable for the damage caused by the action which he induced. From this decision has grown our modern conception of the action. There have grown up alongside, however, various conflicts of opinion. In this Minnesota case we have squarely presented one question of the kind, namely, in an action based upon false representations, is honest belief of the defendant in the truth of his representations a good defense?

The early English doctrine was that such belief was a good defense, it being based upon the principle that the plaintiff should have made proper investigation of any such statements made by the defendant.

13 T. R. 51 (1789).
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There were, however, some exceptions to be found, one of which is brought out in the case of Brownlie v. Campbell, in which it was held that if, when a man thinks it highly probable that a thing exists, he chooses to say that he knows it exists, that is really asserting what is false, it is positive fraud.

The later English doctrine is marked by the decision in the leading case of Derry v. Peek, which establishes the rule that unless the relation of the parties is such as gives rise to a duty to use care in ascertaining and stating the truth, recklessness or carelessness, however gross, in stating material facts does not amount to fraud; but that to render the misrepresentations actionable the statement must be made either with a knowledge of its falsity, or without knowing or caring whether it is true or false, and without any belief in its truth. The effect of this rule is that the honest belief of the speaker in the truth of his statement absolves him from liability regardless of the sufficiency of the grounds upon which his belief is based; an absence of reasonable grounds for his belief being regarded as inconclusive evidence of fraud. The principle established by this case still appears to be the law of England and it has found its way into America in practically the same form.

The general American rule is that, if the speaker honestly believes in the truth of his representations, he is not liable, an honest mistake or error in judgment being regarded as insufficient grounds on which to base a charge of fraud.

The cases are subject to a sharp distinction and many are so close that they may be construed to support either side of the question. A distinction lies between those cases in which the speaker has an actual belief in the truth of the precise representations which he makes, and those in which he states in effect that he knows, when he has in fact a mere uninformed belief. It is well settled that to support an action for deceit based upon a false representation, such representation must be either false to the knowledge of the party who makes it, or made as a positive assertion calculated to convey the impression that he has actual knowledge of its truth when in fact he has no such knowledge. In making out a case of the latter type it is not enough for the plaintiff to show that the statement was false, and was made negligently or without reasonable ground for belief in its truth. He must go further and show that the defendant did not have an honest belief in its truth.

As brought out in Derry v. Peek, supra, if the circumstances of the parties to the action are such that they give rise to a duty on the part

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14 App. Cas. 337 (1889).
Low v. Bouvier, (1891) 3 Ch. 82; Angus v. Clifford, (1891) 2 Ch. 449.
Tucker v. White, 125 Mass. 344 (1878); Kountze v. Kennedy, supra, note 5; Marsh v. Falkner, 40 N. Y. 562 (1869); Williams v. McFadden, 23 Fla. 143 (1887); Johnson v. Beeney, 9 Ill. App. 64 (1881).
Marsh v. Falkner, supra, note 6.
Wilman v. Mizer, 60 Ark. 281 (1895); Boddy v. Henry, 113 Iowa 462 (1901); Wilkins v. Standard Oil Co., 70 N. J. L. 449 (1904); Daly v. Wise, 132 N. Y. 306 (1902).
of the speaker to ascertain and know the truth of his representations, it is held in various cases that he is liable for any damage resulting from action which may be induced by his representations. Thus the Minnesota case is in accord with this principle, the circumstances being such that there was a duty upon the speaker to know how many acres the tract contained.

The basis for holding the speaker liable in deceit when he has a mere uninformed belief is that the speaker is conscious either that he knows or that he does not know the truth of what he states, and that, when conscious of his ignorance, he assumes to have knowledge, he acts in bad faith, and must be held to warrant the truth of his assertion and so is liable. New York is also in accord with this principle.

It seems, therefore, that the general rule is that the defendant's honest belief in the truth of his representations is a good defence to an action of deceit.

Wayne C. Selby, '18.

Torts: Liability for the Erection of a Spite Fence:—The case of Hibbard v. Halliday, 158 Pac. (Okla.) 1158 (1916), indicates the increased tendency on the part of the common law courts to view as pertinent the question of motive. The defendant in this action erected a brick wall on the edge of his property extending to the entire length and height of the plaintiff's dwelling, thereby shutting out his light and air which had hitherto been unobstructed. The erection of the wall did not benefit the defendant in the least but was erected by him for the sole purpose of spiting his neighbor. The court, in a short but excellent outline of the law pertaining to spite fences and its history, permitted the plaintiff to recover in tort for the damage he had suffered. The court accepted the reasoning that "no man can pollute the atmosphere or shut out the light of Heaven for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice against his neighbor." It was further pointed out that an owner of land has a right to make any reasonable use of his property and when employed for such use may rightfully injure another, but it was said that under the doctrine sic utere tuo ut alienum non laedas he may not use it for a wholly wrong purpose.

The English doctrine of the prescriptive right to ancient lights is not generally accepted in this country. Under the common law

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9 Ingalls v. Miller, 121 Ind. 188 (1889); Arnold v. Teel, 182 Mass. 1 (1902); Gerner v. Mosher, 58 Neb. 135 (1899); Hadcock v. Osmer, 153 N. Y. 604 (1897); Zinc Co. v. Bamford, 150 U. S. 665 (1893).
12 Cross v. Lewis, 2 Barn. and Cress. 686 (1824); an ancient light is a window which has been opened for twenty years and enjoyed without molestation by the owner of the house (1 Bouv. Inst., par. 1619).
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there was no tort liability for the erection of a spite fence. Thus a man could erect a wall or fence to any height to which his malice might prompt him and his motive for so doing would not be inquired into. This was the settled rule in this country until as late as 1888 when the famous case of Burke v. Smith was decided. In this case, which has been followed in at least three states, "the authority of precedents gave way to the paramount demands of justice as well as the decencies of civilized society." The question of motive was inquired into and, upon finding that the defendant erected the fence in question for the sole purpose of spiting his neighbor, it was held, Morse, J., writing the opinion, that the obstruction could be abated as a nuisance. Of course, in these cases there must be an actual injury to the plaintiff and, if the structure be of actual benefit to the defendant, the plaintiff cannot compel the defendant to provide light and air for him merely because he has failed so to provide for himself.

California, Maine, Massachusetts, New Hampshire and Washington have enacted statutes imposing liability for erecting spite fences. These statutes seem to be subjected to a strict construction. Such acts have been held to be a proper exercise of police power.

New York, however, still adheres to the old common law rule of no liability, and refuses to inquire into the motive of the defendant. The leading case on the subject in this state is Mahan v. Brown. It is to be hoped, however, in view of the attitude taken by some of the lower courts that when a new case arises, New York will also depart from the old common law rule and adopt the new rule as laid down in the Hibbard case and as first set forth in the Burke case.

Henry Klauber, '17.

Torts: Liability Under the Workmen's Compensation Acts for Injuries Resulting Out of the State.—The case of Grinnell v. Wilkinson, 98 Atl. (R. I.) 103 (1910), presents a question that has created a sharp conflict of authority in several jurisdictions. The plaintiff

6Supra, note 1.
7Norton v. Randolph, 176 Ala. 381 (1912); Flaherty v. Aloran, 81 Mich. 52 (1890); Peek v. Roe, 110 Mich. 52 (1896); Barger v. Barringer, 151 N. C. 433 (1909); Hibbard v. Halliday, 158 Pac. (Okla.) 1158 (1916).
8Norton v. Randolph, supra, note 7, at page 386.
10Rudnick v. Murphy, 213 Mass. 470 (1913).
11Cal. Civil Code, sec. 841 (1885); Maine Rev. L. 1902, c. 22, sec. 6; Mass. Stat. 1887, c. 348; New Hamp. Pub. St., c. 143, sec. 28, 29; Ballinger's Wash. Code and St., sec. 5433; for a strict application see Brostrom v. Laupke, 179 Mass. 315 (1901), where it was held not applicable to a fence situated from 3 to 10 feet from defendant's line.
12Lord v. Langdon, 91 Me. 221 (1889); Rideout v. Knox, 148 Mass. 368 (1889); Smith v. Morse, 148 Mass. 407 (1889); Karaseck v. Peir, 22 Wash. 419 (1900).
13Supra, note 4.
14See Pickard v. Collins, 23 Barb. (N. Y.) 444, 458 (1856); Adler v. Parr, 34 Misc. 482 (1901).
was employed by a contractor to work in the state of Rhode Island and, during the course of his master's employment, he was sent into the state of Connecticut and while there was injured. The trial court refused to allow a recovery against the master, basing their opinion upon the ground that the Workmen's Compensation Act of Rhode Island had no effect upon the employee while without the state. The holding of the lower court was reversed, the ground for such decision being that, under the compensation act of the State of Rhode Island, the relation of employer and employee is contractual, and the terms of the act are to be read as a part of every contract of service between those subject to its terms; that on principle and in reason, in view of the purpose of the act, it should be construed to include injuries arising out of the state as well as those arising within.

In a recent New York case, Matter of Post v. Burger & Gohlke, 216 N. Y. 544 (1916), a similar controversy was so decided, and the court in laying down the law said: "The act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory, that the employer shall pay as provided by the act for a disability or the death of the employee as therein stated. The duty under the statute defines the terms of the contract. * * * The purpose of the legislature would seem to require that the act be read into every contract of employment and provide compensation for every injury incurred while engaged in such employment without limitation." The tort view of cases arising under similar facts, and the one sustained by the courts of England, Massachusetts, Wisconsin, Michigan, and Minnesota, is to the effect that the plaintiff's cause of action in such cases is predicated upon his relation of servant to the defendant, and that the latter's obligation as master is one in tort.

As to tort actions the law is well settled that the liability is determined by the law of the place where the injury is inflicted without regard to the law of the forum or the law of the place where the contract was made. The plaintiff's case must stand upon the law of the place where the injury occurred.

The question now arises, Did the legislature indicate a purpose to make the terms of the act applicable to injuries received outside the state? And upon critical examination of the statutes, no such intent is found by these courts to be expressed. In the absence of unequivocal language to the contrary, it is not presumed that statutes respecting this matter are designed to control conduct or fix the rights of the parties beyond the territorial limits of the state.

1 Gould's Case, 215 Mass. 480 (1913); Johnson v. Nelson, 128 Minn. 158 (1915); Schwartz v. India Rubber Co., (1912) 2 K. B. 299; Hicks v. Maxton, (1907) 1 B. W. C. C. 130; Tomalin v. S. Pearson & Son, (1909) 100 L. T. 685; Michigan Industrial Accident Board, April, 1913; see Bradbury, Workmen's Compensation, 35.

2 Herrick v. Minneapolis, St. Louis Ry. Co., 31 Minn. 11 (1883); Northern Pacific R. R. Co. v. Babcock, 154 U. S. 190 (1894); Burns v. Grand Rapids & Indiana R. R. Co., 113 Ind. 169 (1887).
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The contract view is the one sustained by the New York Court of Appeals, and by the great weight of authority. It is urged in support of this view that the acts do not purport to provide compensation for a wrong. The compensation is given without reservation and wholly regardless of any question of wrongdoing of any kind.

Referring to the question of the extra-territorial effect of the acts, it would seem that the place where the accident occurs is of no more relevance than is the place of accident to the assured. In an action on a contract of accident insurance, or the place of death of the assured in an action on a contract of life insurance. The liability of the employer depends not upon any fault of his own or his servants, but upon the answer to the question whether by act or silence he has adopted the statutory terms.

The workmen's compensation acts are remedial in character and the provisions should be broadly construed. The legislatures intended to secure the injured workmen and their dependents from becoming objects of charity, and this danger is just as great where the injury occurs outside the state as within it.

If the opposite view were taken, as has been done by a few of the courts, the workman would be placed at a great disadvantage. In the course of his employment it would be dangerous for him to go without the state on his master's business, for, if there injured, there would be no recovery, and, if he refused to carry out his master's instructions, he would be placed in a position without employment. The acts should be construed in an equitable manner, and the same public policy that prompted the legislatures to pass such acts demands that they be broadly construed.

Edward O'Rourke, Jr., '18.

Trusts: Liability of Trust Estate for the Torts of the Trustee.—As a general rule, in America, the trust estate is not liable for the torts of the trustee. This rule is followed in the case of Thompson v. American Optical Co., 173 App. Div. (N. Y.) 123 (1916), where an action for damages was brought for a libel written by the attorney for the trustees. Plaintiff sought to hold the trust property. The court held that "after the property had been transferred to the trustees under whatever name the trustees did their business their acts would create no liability against the corporation."

3Supra, note 1.
Law courts are very reluctant in permitting trust funds to be impaired by the acts of trustees. A court of law regards the trustee as the legal owner of the trust estate, regardless of what that relation may be in equity, and as owner, he is liable for the torts committed by him or his agents with reference to the trust estate or fund.  

The question as to the liability of a trust estate for the torts of the trustee most frequently arises with regard to the negligence of the trustee in conducting a business; for example, where there is management of a railroad by trustees and the plaintiff is injured by reason of a defective rail; or in maintaining property left by a testator; for example, where the plaintiff is injured because of a defective sidewalk in front of the property. In the latter class of cases the courts say that, the legal title being vested in the trustee, the duty to use reasonable care to see that the property does not fall into disrepair devolves upon him in his personal capacity, and, if he fails to make proper repairs, it is a violation of the personal duty which the law imposes upon him as the owner of the property to keep it safe. Although the beneficiaries receive the profits and rents, yet they have no control over the trust property. If follows, therefore, that the trustee is personally liable for the violation of a personal duty.

As to those trusts which are more active in their nature; such as conducting a business or other enterprise, there is a diversity of opinion. Some courts hold that the estate is not liable for the torts of the trustee or his agents or employees. The reason for this view is that the trustee has full power and authority to properly execute the trust and that it is his duty to employ competent agents and employees who are his agents and not those of the trust estate. Other courts take the contrary view and hold that the trust estate may be reached as well as the trustee. As to the theory upon which liability is established, these courts differ. In a comparatively recent case the court said the general rule, that the trust fund is not liable for the torts of the trustee, applies only to passive trusts. Other cases establish liability upon the ground that the beneficiaries took part in the control and management of the business and that the trustee was under their supervision. Another case goes still further and holds that the trustees “stand in the shoes of the settlor” and therefore the estate is liable.

In England, if a trustee has acted with due diligence and reasonably, and has employed proper agents, the liability is borne by the

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6Miller v. Smythe, 92 Ga. 154 (1892); Cheatham v. Rowland, 92 N. C. 340 (1885); Wright v. Caney River Ry. Co., supra, note 5.
7Ireland v. Bowman, 130 Ky. 153 (1908).
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estate only; if recovery is had against the trustee, he is entitled to be indemnified out of the trust fund. There are some American jurisdictions which follow the English view and permit recovery against the trust fund on the ground that the trustee is acting as agent for the beneficiaries.

When a trustee makes a false representation with regard to the trust property, for example, that he will convey the property free from incumbrances, he is personally liable for such representation. He has no authority to make such warranties, representations, or statements unless he intends to bind himself.

Where a trustee pays the debts of his settlor with rents and profits which he held for the heirs of the settlor, he becomes personally liable to the heirs in conversion. "The estate, as an entity, is but a fund, an inanimate thing, incapable of becoming a party to such a conversion, and hence cannot be made liable for it to those whose money has been converted."

There is no question as to the liability of the trust estate for the torts of the trustee where the instrument creating the trust expressly and clearly provides that no liability or responsibility shall result to the trustee.

H. B. Lermer, '17.

Vendor and Purchaser: Right of a Vendee in Possession to Acquire Outstanding Title.—Misamore v. Berglin, 72 So. (Ala.) 347 (1916), affirmed a decree of the lower court that a respondent be declared to hold a certain title that he had obtained in opposition to his vendor in trust for the latter. The complainant's mediate grantor claimed the property by inheritance and by quit claim deeds given him by two heirs. These deeds had not been recorded and could not be found. The respondent went into possession under an optional contract of purchase. Discovering the defect in the complainant's record title, the vendee induced the grantors in the quit claim deeds mentioned above to issue new quit claim deeds direct to him. These deeds were procured by misrepresentation and without consideration. The respondent had the deeds recorded and then set up a title in opposition to his vendor and attempted to sell portions of the land and to encumber it by mortgage. The Supreme Court, in affirming the decree of the lower court, held that the position of a vendee in possession is similar to that of a tenant. Like the latter he is estopped to deny the title of the person under whom he has been let into possession. The court also held that, since the title to the property had been obtained by the vendee through misrepresentation and fraud, the law would intercede and make him a

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8In re Raybould, (1900) 1 Ch. 199.
9Wisconsin Central R. R. Co. v. Ross, 142 Ill. 9 (1892); Jones v. Penn. Railroad, 19 Dist. of Columbia 178 (1890); Lamphear v. Buckingham, 33 Conn. 237 (1866).
10Fritz v. McGill, 31 Minn. 536 (1884); Riley v. Kepler, 94 Ind. 308 (1884).
11Evans v. Hardy, 76 Ind. 527 (1881).
constructive trustee of the title for his vendor. It appears that under the circumstances of the principal case the vendee was estopped to deny his vendor’s title, but since he had acquired the better legal title the real object of the action was to have the respondent declared a constructive trustee of the title for the complainant. The decree of the lower court to that effect was properly affirmed.

As to whether a purchaser is estopped to deny his vendor’s title there is an apparent conflict of authority. Coke says that one who accepts an estate from another is estopped to deny the latter’s title. There are many decisions laying the rule down in these broad terms. But it is certain that the rule is subject to qualification. The courts distinguish between the case of a vendee in possession under a contract to purchase and the case of a grantee to whom conveyance has been made. A mere vendee is considered to hold under his vendor and is estopped to deny the latter’s title. The principal case comes within this rule. But a grantee is deemed to hold adversely to his grantor. To quote Cyc., "A purchaser, after he has received a deed from the vendor, holds adversely to him and is not estopped to dispute his title; he is not precluded from acquiring and asserting as against him an adverse title." Averill v. Wilson holds that "No relation of landlord and tenant, not even in a qualified sense exists between a grantor and a grantee." The title of the grantor is extinguished by the conveyance. The grantee acquires the property for himself and there is no obligation to maintain the title of the grantor. He holds adversely to the grantor and is not estopped to deny his title or acquire any outstanding title. But a vendee in possession under a contract to purchase, before a conveyance is made, is pledged like a tenant, to maintain the title of his vendor. Printard v. Goodloe quotes with approval the holding in Winlock v. Hardy that, "a tenant cannot deny the title of his landlord, nor can a person who enters under a executory contract of purchase, deny the right of him under whom he enters; for he is a quasi tenant, holding only in virtue of his vendor's title and by his permission."

It further appears that a grantee cannot deny his grantor’s title for the purpose of avoiding his obligations under the contract of purchase. Bigelow lays down as the general rule, that a grantee is not estopped to deny his grantor’s title. However, the same authority states that a grantee is estopped to deny his grantor’s title so long as he claims under him alone. He points out "That a grantee cannot while holding possession under his grantor, dispute

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239 Cyc. 1614.
339 Cyc. 1619.
4Barb. (N. Y.) 180 (1848). See also Osterhout v. Shoemaker, 3 Hill (N. Y.) 513 (1842); Kenada v. Gardner, 3 Barb. (N. Y.) 589 (1848).
5Fed. Cas. No. 11, 171 (1847). See also Jackson v. Spear, 7 Wend. (N. Y.) 401 (1831); Ogden v. Walker, 6 Dana (Ky.) 420 (1838); 39 Cyc. 1614.
6Litt. (Ky.) 272, 274 (1823).
9Coakley v. Perry, 3 Ohio St. 344 (1854).
the grantor's title for the purpose of escaping entirely the payment of the purchase price of the property." It would seem that a grantee cannot deny his grantor's title unless by affirmatively proving a better title, and that even then he cannot escape payment of the purchase price, although he will be entitled to a set-off for whatever expense he may have incurred in acquiring the better title. He will be considered a constructive trustee of this title and will be required to convey it to his grantor. Thus, the grantor's title will be perfected and through his conveyance to the grantee the title of the latter will in its turn, be perfected.

In Robertson v. Pickrell the plaintiffs brought an action of ejectment against their grantees. The plaintiffs based their title on an invalid will. It was proven affirmatively by the grantees that they held the property under another and better title. The plaintiffs contended that the defendants who had entered into possession under the plaintiffs were estopped to deny their title. The court held that a grantee is estopped from disputing his grantor's title for the purpose of avoiding the purchase price. He cannot dispute it so long as he holds under it. But in general a grantee is not estopped from asserting a superior title where there has been an absolute conveyance. The court adopted the dictum in Blight's Lessee v. Rochester. In that case the court said, "The property having become by sale the property of the vendee, he has the right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises."

The rules under consideration are further illustrated by the case of Bush v. Marshall. In that case the vendor sued to foreclose a mortgage given him by his grantee, as part consideration for the purchase price of a piece of land deeded to the latter in fee simple by the plaintiff. When the deeds were given the plaintiff was in possession of government lands as a tenant by sufferance with the right of preemption. But it became expedient for him and others to give up this right and clear their title at public auction. The defendant bought up the government deeds ahead of his grantor. He set these up as giving him title to the property. The court held that, "Bush having obtained possession under Whitesides (his vendor) cannot, by the purchase of an outstanding title, defeat the claim of his vendor. Equity treats the purchaser as the trustee of his vendor. The vendee cannot disavow the vendor's title." The court ruled further that the grantee would only be allowed reimbursement for clearing the title. The case is commented upon by Bigelow and he points out and emphasizes the fact that the case does not hold that a grantee is estopped absolutely from setting up a better

10Bigelow, Estoppel (6th ed.), 3388.
11Kirkpatrick v. Miller, 50 Miss. 521 (1874); 39 Cyc. 1620; Wood v. Perry, 1 Barb. (N. Y.) 114 (1847).
12109 U. S. 608 (1883).
137 Wheat. (U. S.) 355 (1822).
146 How. (U. S.) 264 (1848).
title but that he is estopped from avoiding the purchase price. A grantee can affirmatively deny his vendor's title by setting up a better title. Even then he cannot avoid the contract under which he has entered into possession but will be deemed to hold the better title in trust for his grantor, being entitled only to a set-off for the expense he has incurred in obtaining the better title. It is submitted that the frequent statement of the rule that a purchaser is estopped to deny his vendor's title is too broad; that the frequent use of either this statement or its opposite without qualification, has led to an apparent conflict of authority; that upon analysis there is no real conflict.

The main point decided in the principal case is not that the vendee is estopped to deny his vendor's title, but that he is deemed to hold the better title in trust for his vendor. The court quotes Pomeroy to the effect that when the title to real property has been obtained through fraud the holder is deemed to hold the same in trust for the real owner. The trust is imposed against the will of the trustee and to prevent some fraud attempted by him. This is technically known as a constructive trust. "The specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts." Perry says, "The element common to this class of constructive trusts is that one person has obtained through an actual wrongful act the legal title to property equitably belonging to another." And the court found in the principal case that the vendee had obtained the quit claim deeds through misrepresentation. It should be noted that the misrepresentation was not practiced directly upon the complainant and that it was not of so positive a nature as would have given him an action at law for deceit. Pomeroy points out that, "Courts of equity by thus extending the principle of trusts * * * to all cases of actual or constructive fraud and breaches of good faith are enabled to wield a remedial power of tremendous efficacy in protecting the rights of property." From the authorities quoted and from other cases it appears that the rules here considered are New York as well as Alabama law.

H. Mason Olney, '18.

Wills: What Constitutes "Signing" by the Testator.—A question which is more novel than difficult, as to what constitutes a "signing" or "subscribing" of a will within the meaning of the statutes, is presented in the recent case of Matter of Severance, 96 Misc. (N. Y.) 384 (1916). The decedent who was a mechanic, but also a justice

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1849 Cyc. 1617, 1620.
17Cummings v. Powell, 97 Mo. 524 (1888); Cassin v. Nicholson, 154 Cal. 497 (1908).
of the peace, wrote his will on a printed will blank at the bottom of which was the usual dotted line, followed by the letters "L. S." in brackets. Instead of signing his name on this line, as is commonly done, he affixed near the end of it, so that the letters "L. S." were partially covered, a wafer seal, printed in colors, and containing this inscription: "Merry Christmas American Red Cross. 1912. Happy New Year." And written upon this seal in the handwriting of the testator were the letters, "C. S. Seal C. S." The question naturally arising is whether the decedent intended the inscription as his "seal" merely, and neglected to sign his name on the dotted line, or whether he intended it as his signature and a complete execution of the will.

It was first decided in England that the placing of a seal was of itself sufficient signing within the statute, but this was later declared to be a "very strange doctrine; for if it was so it would be very easy for one person to forge another man's will." 2 Lord Eldon in passing on the question in 1811 said: "Sealing without signing is not a sufficient execution of a will." 3 Later the English court said that "in such cases where it was held that sealing was not signing, the seals were not affixed by way of a signature." 4 Where a testator affixed his seal, and, putting his finger on the seal, said, "This is my hand and seal," the will was admitted. 5

It is the general rule in England and the United States, 6 as laid down by the cases 7 and writers, 8 that a will signed by a mark or cross is valid. The courts have been very liberal in construing what is such a mark or cross. They have admitted wills signed simply by the testator's initials; by this first name only; 9 by his name not

1Lemayne v. Stanley, 3 Lev. (Eng.) 1 (1693).
2Smith v. Evans, T Wils. (Eng.) 313 (1751).
3Wright v. Wakeford, 17 Ves. (Eng.) 454 (1811).
4Jenkins v. Gaisford, 3 Sw. & T. (Eng.) 93 (1863).
5In bonis Emerson, L. R. 9 Ir. 443 (1882).
6The courts of Pennsylvania in construing their Statute of 1883, taken directly from the English Act (29 Car. II, sec. 2), held that signing by mark was not sufficient. See Greenough v. Greenough, 11 Pa. 489 (1849). But in 1848 a statute was passed expressly permitting signing by mark. See Buford v. Buford, 29 Pa. 221 (1857); Knox's Estate, 131 Pa. 220 (1890); Plate's Estate, 148 Pa. 55 (1892).
7Goods of Bryce, 2 Curt. Ecc. (Eng.) 325 (1839); Baker v. Dening, 8 Ad. & El. (Eng.) 94 (1838); Smith v. Dolby, 4 Har. (Del.) 350 (1846); Ray v. Hall, 3 Strob. (S. C.) 297 (1843); Van Hanswyck v. Wiese, 44 Barb. (N. Y.) 494 (1865); Jackson v. Jackson, 39 N. Y. 153 (1865); Scott v. Hawk, 107 Ia. 723 (1898); Geraghty v. Kilroy, 103 Minn. 286 (1906); In re Bullivant's Will, 88 Atl. (N. J.) 1093 (1913); In re Pope, 139 N. C. 484 (1905); In re Alred, 86 S. E. (N. C.) 1047 (1915); Pool v. Buffum, 3 Orr. 438 (1869) (will made by a blind man). See also 40 Cyc. 1102; 36 Am. & Eng. Ency. of Law, 584, and 22 L. R. A. 370, for other cases.
8J. Jarman on Wills (6th ed.), p. 107; 1 Schouler on Wills (5th ed.), p. 365; 1 Redfield on Wills (4th ed.), p. 198; 1 Underhill on Wills, p. 254; Gardner on Wills, p. 183; Theobald on Wills (5th ed.), p. 27.
9Goods of Savory, 15 Jur. (Eng.) 1042 (1851); Blewitt's Goods, L. R. 5 Prob. Div. 116 (1880); Pilcher v. Pilcher, 84 S. E. (Va.) 667 (1915); also see Palmer v. Stephens, 1 Den. (N. Y.) 471 (1845), where initials were sufficient signing of a note; and Brown v. Bank, 6 Hill (N. Y.) 443 (1844), where numbers "1, 2, 8.4, 5, 6" were held to be a signature on a note.
10Knox's Estate, supra, note 6.
properly spelled;\textsuperscript{11} by a wrong or a fictitious name;\textsuperscript{12} or by the wrong name written by another person around the mark made by the testator.\textsuperscript{13} Even an illegible scrawl has been declared to be a sufficient signature.\textsuperscript{14} But in all such cases the testator must \textit{intend} the mark as a substitute for his name.\textsuperscript{15} If the testator started to write his name, and physical weakness prevented him from completing it, the scrawl\textsuperscript{16} or part of the name\textsuperscript{17} which he wrote will not be sufficient to execute the will, because of the lack of completed intent. The civil law, as interpreted in France and Louisiana, declares any subscription to be sufficient which will serve to identify the testator as the author of the testament.\textsuperscript{18}

Judge Mitchell, in the Pennsylvania case of \textit{Plate's Estate},\textsuperscript{19} aptly stated the law on this question when he said, "Exactly what constitutes a signing has never been reduced to judicial formula * * * * . Whatever the testator * * * was shown to have intended as his signature, was a valid signing, no matter how imperfect, or unfinished, or fantastical, or illegible, or even false, the separate characters or symbols he used might be, when critically judged."

Thus, if the testator in \textit{Matter of Severance}, supra, affixed the Red Cross Seal and initialed it \textit{animo testandi}, it would clearly be hard to rule that such was not "signing" or "subscribing" the will, in the sense prescribed by the statutes. The surrogate found the necessary intent to exist, basing his finding upon the facts that the paper was put in an envelope upon which the testator had written, "Last will of Chas. S. Severance," and that the disposition of the property was natural. Also, since the amount of the estate was small and the will was not contested, the court did not feel called upon to be too astute in searching for reasons to reject the will.

\textit{O. R. Clark, '18}.

\begin{footnotes}
\item Word v. Whipps, 28 S. W. (Ky.) 151 (1894); Boone v. Boone, 114 Ark. 69 (1914); Succession of Bradford, 124 La. 44 (1909).
\item Goods of Glover, 11 Jur. (Eng.) 1022 (1847); In Redding's Goods, 14 Jur. (Eng.) 1052 (1850).
\item Goods of Clarke, 1 Sw. & T. (Eng.) 22 (1858); Vernon v. Kirk, 30 Pa. 218 (1858); Bailey v. Bailey, 35 Ala. 687 (1860); Goods of Douce, 2 Sw. & T. (Eng.) 593 (1862); Rook v. Wilson, 142 Ind. 24 (1895).
\item Hartwell v. McMaster, 4 Redf. (N. Y.) 389 (1880); Sheehan v. Kearney, 82 Miss. 688 (1903); see also L. R. A. 1915 D 902 for other cases.
\item Everhart v. Everhart, 34 Fed. 82 (1888).
\item Plate's Estate, supra, note 6.
\item Knapp v. Reilly, 3 Dem. (N. Y.) 427 (1885); McBride v. McBride, 26 Gratt. (Va.) 476 (1875).
\item Succession of Bradford, supra, note 11, and French authorities cited therein.
\item Supra, note 6.
\end{footnotes}