Notes and Comment

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Notes and Comment

Accord and Satisfaction: Payment of Smaller Sum.—In the case of Sigler v. Sigler, 158 Pac. (Kans.) 864 (1910), the defendant, the maker of a note, employed one Wilson to go to the plaintiff, the holder of the note and purchase the same for only a fraction of its face value. Wilson made some false statements concerning the defendant’s financial condition, but, as the plaintiff was better acquainted with the facts than Wilson was, the court found that there was no such misrepresentation as to amount to fraud. The case then resolved itself into the question whether a debtor can secure an accord and satisfaction with a sum smaller than the debt, through the employment of an undisclosed agent. The court answered in the affirmative.

It has long been the almost universal rule that, where a debt or demand is liquidated and certain and is due, payment by the debtor of a lesser sum and receipt by the creditor, even though it be agreed by both parties to be in full satisfaction thereof, acts only as a discharge pro tanto of the debt. The reason for the rule is based on hard logic rather than on common business understanding and fairness. The legal reason for this result is that the debtor does nothing he was not already obliged to do and thus there is no consideration for the discharge. The harshness of such reasoning has long been recognized in the courts. They seize upon the least possible excuse to find consideration to give validity to the discharge.

In several states the legislatures have remedied the situation by giving validity to all written discharges. There surely ought to be

1 Pinnel’s Case, K. B. (Eng.) 3 Coke, Pt. V, 117a (1600); Foakes v. Beer, L. R. 9 App. Cas. 605 (1884); Leeson v. Anderson, 99 Mich. 247 (1894); Mason v. Campbell, 27 Minn. 54 (1880); Varney v. Conery, 77 Me. 527 (1885); Fuller v. Kemp, 138 N. Y. 231 (1893). Contra: Ford v. Hubinger, 64 Conn. 129 (1894); Clayson v. Clark, 74 Miss. 499 (1896); and semble, Fyev. Hubble, 74 N. H. 358 (1907).

2 Brown v. Kern, 21 Wash. 211 (1899); Weis v. Marks, 206 Pa. St. 513 (1903); New York State Bank v. Fletcher, 5 Wend. (N. Y.) 85 (1830); Gordan v. Moore, 44 Ark. 349 (1884); Clark v. Abbott, 53 Minn. 88 (1893).

3 Payment of a debt before it is due: Weis v. Marks, supra, note 2; Baldwin v. Daly, 41 Wash. 416 (1906). Payment by a third person under no obligation to pay the same, when accepted in full satisfaction is binding: Goodnow v. Smith, 18 Pick. (Mass.) 414 (1835); Jackson v. Pennsylvania Railroad Co., 66 N. J. L. 319 (1901); Leavitt v. Morrow, 6 Oh. St. 71 (1856); Snyder v. Pharo, 25 Fed. Rep. 398, 401 (1885); 2 Parsons, Contracts (8th ed.) 688; Fowler v. Smith, 153 Pa. St. 639 (1893); Clark v. Abbott, supra, note 2. Acceptance of a note endorsed by sureties for part of the debt in satisfaction of the whole: Mason v. Campbell, supra, note 1; Varney v. Conery, supra, note 1; Fuller v. Kemp, supra, note 1. Acceptance of a smaller sum where the debtor agrees not to go into bankruptcy: Brown v. Kern, supra, note 2. Where the bond is lost, part payment when received in satisfaction is good: Brenner v. Herr, 8 Pa. St. 106 (1848). So also in the case where the debtor borrowed money from his banker, giving the latter to understand that this sum was to be received in satisfaction of a bond and mortgage on his premises for a greater amount: Dalrymple v. Craig, 149 Mo. 345, 360 (1889).

4 For a list of states and sections of the statutes giving validity to written discharges, see Corpus Juris, Accord and Satisfaction, sec. 43.
some mode in which one can dispose of that which is his own, as his
generosity or his best interests may prompt.

Under the state of facts in the principal case, namely, where the
payment was made by the agent of the debtor, the existence of such
agency not having been disclosed, and the creditor having believed
he was dealing with a third person, was the court warranted in finding
an accord and satisfaction of the debt? As we have seen by the
exceptions mentioned in the preceding paragraph, payment by a
third person of a sum less than the amount of the debt, when received
in full satisfaction is accord and satisfaction. Does the mere fact
that the payor was the agent of the debtor as undisclosed principal
destroy the validity of such an accord and satisfaction? This
question should in all justice and fairness be answered in the negative.
The creditor has been satisfied. He has received what in his judg-
ment he thought the claim was worth, or what he cared to accept
in place of his claim.

It is urged that, according to the rules of agency, the act of the
agent is the act of his principal, and that consequently in the principal
case, the payment by Wilson was the same as if the defendant
himself had paid part of the debt in satisfaction of the whole, and,
thus, the general rule, that the payment of a lesser sum is a valid
satisfaction and release \textit{pro tanto} only, applies. A reply to this
contention can be found in the rule of agency that an undisclosed
principal is entitled to avail himself of the contract which his agent
made, even though the other party had no knowledge of the existing
relations\textsuperscript{6}; and that one who contracts with the agent of an undis-
closed principal acquires a right to elect the agent as being the other
party to the contract, when the principal is later disclosed.

The creditor has received what in his judgment he thought his
chose in action was worth. He was satisfied by a payment not at the
hands of the debtor. The fact that the debtor furnished the consider-
ation for this satisfaction rather than the agent ought not in
fairness to destroy the validity of this satisfaction.

There is little authority on this precise question. Chitty states
the law as follows: "If the defendant and the party from whom the
satisfaction proceeded, stood in the relation of principal and agent,
such satisfaction would be a good bar for the defendant"\textsuperscript{6} citing
\textit{Thurman v. Weld}\textsuperscript{7}. The only case in this country exactly in point
is an early Vermont case\textsuperscript{8} which holds \textit{contra} to the principal case.
It would seem that the court in the Sigler case, with so little authority
to bind it, wisely adopted the rule of reason and justice in holding
the payment to constitute an accord and satisfaction.

The court further justified its decision under section 126 of the
Negotiable Instruments Law\textsuperscript{9} which enumerates the various ways

\textsuperscript{6}Gray v. Herman, 75 Wis. 453 (1890); 2 Parsons, Contracts (8th ed.), 688;
\textsuperscript{2}Chitty, Contracts (11th ed.), 1133.
\textsuperscript{7}Shaw v. Clark, 6 Vt. 597 (1834).
\textsuperscript{8}Sec. 5372, Kansas General Statutes, 1909.
in which negotiable instruments may be discharged, among which is the case "when the principal debtor becomes the holder of the instrument at or after maturity in his own right". It held that unless there be some principle of law which forbids the debtor to purchase his own debt, the maker clearly became the owner in his own right.

A. A. Atwood, '17.

Constitutional Law: Constitutionality of Bulk Sales Statutes.—By a unanimous decision in Klein v. Maravelas, the New York Court of Appeals has recently declared the Bulk Sales Law constitutional. The decision of the case in the Supreme Court at Special Term, which declared the same statute unconstitutional, was discussed in a previous issue of The Quarterly. From the Special Term decision an appeal was taken to the Appellate Division which affirmed the lower court's decision but certified the question as to the constitutionality of the Bulk Sales Law to the Court of Appeals.

In its opinion the Court of Appeals expressly overrules the case of Wright v. Hart which was relied upon by the two lower courts as the basis for their decision. In coming to its conclusion the court, per Cardozo, J., said: "A very similar law was enacted in 1904. In Wright v. Hart ([1905] 182 N. Y. 330) we held it to be unconstitutional. We think it is our duty to hold that the decision in Wright v. Hart is wrong. The unanimous or all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws. At the time of our decision in Wright v. Hart, such laws were new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour (Wright v. Hart, supra, at p. 342). The fact is that they have come to stay, and like laws may be found on the statute books of every state. Back of this legislation, which to a majority of the judges who decided Wright v. Hart seemed arbitrary and purposeless, there must have been a real need. We can see this now, even though it may have been obscure before. Our past decision ought not to stand in opposition to the uniform convictions of the entire judiciary of the land. The present statute is similar in essentials to the one condemned in 1905. In details it may be distinguished from the earlier one, but the details are in reality trifling. We cannot without a sacrifice of candor rest our judgment upon them. We think we ought not to do so. We should adopt the argument and the conclusion of the dissenting judges in Wright v. Hart and affirm the validity of the statute on which the plaintiff builds his rights."

Frank B. Ingersoll, '17.

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1219 N. Y. 383 (1916).
1 Miss. (N. Y.) 458 (1916).
2 CORNELL LAW QUARTERLY 28.
4 182 N. Y. 330 (1905).
Contracts: Consideration.—In Teele v. Mayer, 173 App. Div. (N. Y.) 869 (1910), the plaintiffs rendered services in the examination of the books of two railroad companies under a contract made between them and the defendant, acting in his capacity as president of both roads. After a slight examination of the books, the plaintiffs refused to go on with the work unless the defendant would personally become responsible for payment. The defendant acceded to this demand, and the plaintiffs went on and completed the work. The companies did not pay for the services and the defendant was sued upon his promise. The court, in reversing the decision for the plaintiffs, held that the plaintiffs, in their agreement with the defendant, did no more than their contract with the railroad companies called for, and, therefore, their continuance of the work was no consideration for the promise of the defendant.

The result reached by the Appellate Division is consistent with the New York view as previously stated, and is accepted in the majority of American jurisdictions. The performance or promise to perform an existing contract is not a good consideration for a promise by a third party. But there are a number of cases contra.

In Currie v. Misa the following definition of consideration is given:

“A valuable consideration in the eye of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other.” Other similar definitions have been given by various writers and judges. Consideration may be either some benefit to the promisor or detriment to the promisee. But the tendency has been to consider only the last element, namely, “detriment to the promisee,” and to ignore the notion of a “benefit to the


2 Johnson’s Adm’r v. Sellers’ Adm’r, 33 Ala. 265 (1858); Havana Press Drill Co. v. Ashhurst, 148 Ill. 115 (1893); Peelman v. Peelman, 4 Ind. 612 (1853); Ford v. Garner, 15 Ind. 298 (1868); Reynolds v. Nugent, 25 Ind. 328 (1865); Ritemour v. Mathews, 42 Ind. 7 (1873); City of Newton v. Chicago, Rock Island & Pacific Railroad, 66 Iowa 422 (1885); Putnam v. Woodbury, 68 Me. 53 (1878); Sherwin & Co. v. Brigham, 39 Ohio St. 137 (1883); Wimer v. Worth Township, 104 Pa. St. 317 (1885); Hanke v. Barron Bros., 95 Tenn. 275 (1895); Kenigsberger v. Wingate, 31 Texas 42 (1868).

3 L. R. 10 Exch. 153, 162 (1875).

4 Consideration is something done, foreborne, or suffered, or promised to be done, foreborne, or suffered, by the promisee in respect of the promise.” Anson, Law of Contract (11th ed.), 100. “Any act or forbearance induced by the promise.” Harriman, Contracts (3d ed.), 43. “That which moves from the promisee, or to the promisor, at the latter’s request, in return for his promise.” Clark, Contracts (3d ed.), 133.

5 “A benefit to the party promising, or a loss to the party to whom the promise is made.” Cook v. Bradley, 7 Conn. 57 (1828); Hamer v. Sidway, 124 N. Y. 538 (1891).
promisor.” This view has been advocated by authoritative writers. The principal case was decided on this ground. There was no detriment to the promisee because he was doing no more than he was legally bound to do.

That is as far as the American courts, with a few exceptions, go. But the promisor may have had some interest in the performance of the contract. He may have received some benefit from it. If he has received some benefit, there is good consideration. This latter view is the rule in England and has been adopted in Massachusetts.

In Abbott v. Doane the court said, “If A has refused or hesitated to perform an agreement with B, and is requested to do so by C, who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A thereupon undertakes to do it, the performance by A of his agreement, is a good consideration to support C’s promise.” This view is supported by Pollock and Langdell, but has been attacked by Clark and Harriman. It was adopted by the New York Appellate Division in Manetti v. Dooge, ignoring apparently Arend v. Smith, where the New York Court of Appeals applied the general rule.

A distinction has been suggested between actual performance of, and a promise to perform, a contract duty with a third person. This distinction was recognized by a dictum in Merrick v. Giddings, where James, J., said: A promise made in consideration of the doing of an act which the promisee is already under legal obligation to a third party to do is not binding, because it is not supported by a valuable consideration. On the other hand, if the promise is made in consideration of a promise to do that act then the promise is binding, because not made in consideration of the performance of a subsisting obligation to a third person, but upon a new consideration moving between the promisor and promisee.” But the distinction has been denied by Anson and has not been accepted by the courts. On principle no such distinction can be maintained.

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1Williston, 8 H. L. R. 27; Ames, 12 H. L. R. 519; Langdell, Summary of Contracts, sec. 64.
2Supra, notes 1 and 2.
3Supra, note 3.
4Shadwell v. Shadwell, 9 C. B. (n. s.) (Eng.) 159 (1860); Scotson v. Pegg, 6 H. & N. (Eng.) 295 (1861).
5Abbott v. Doane, supra, note 3.
6Supra, note 3.
7Contracts (3d ed.), 161.
8Summary of Contracts, sec. 84.
9Contracts (3d ed.), 160.
10Contracts (2d ed.), 68.
11Supra, note 3.
12Supra, note 1.
13Pollock, Contracts (1st ed.), 158; Langdell, Summary of Contracts, sec. 84; and 14 H. L. R. 496; Professor Williston, in 8 H. L. R. 27, says that Pollock changed his views in later editions of his work, but this is denied by Professor Langdell in 14 H. L. R. 496.
14Supra, note 3.
The principal case is correct on authority and principle, if one applies the definition of consideration in its restricted sense as a detriment only. But if one were to apply the classic definition that consideration may be either a benefit to the promisor or a detriment to the promisee, the result of the English and Massachusetts doctrine is correct. If the promisor contracts and receives a benefit, that benefit should be sufficient consideration to support the promise, and it should make no difference that the act of the promisee, which was beneficial to the promisor, was one that the promisee was already legally bound to do. In Abbott v. Doane, supra, the promisor was an officer, stockholder, and creditor of the corporation, and the court found a benefit accruing to him, which was consideration for his promise. In the principal case the promisor was an officer and stockholder, and it is believed that the New York court might have found some benefit derived by him which would constitute good consideration for his promise.

Wm. E. Vogel, '19.

Contracts: Misrepresentation of Market Value.—There seems to be some diversity of opinion in the courts to-day as to whether a statement of market value is a statement of fact or whether it is merely a statement of opinion, or what is called "dealer's talk". In Griesa v. Thomas, 161 Pac. (Kan.) 670 (1910), the plaintiff was endeavoring to enforce a contract for the sale of catalpa trees, for the purchase of which he had induced the defendant to contract by making fraudulent statements as to the market value of the trees. The court held in accordance with the well established rule that, where an unfamiliar kind of property is involved and its market value is not easily ascertained, representations as to its market value are statements of fact and not of opinion.

However, divergence of opinion arises where the facts are similar to those given above except that the goods are not unfamiliar and their market value could be learned by the use of reasonable diligence. The weight of authority in the United States is undoubtedly that under these circumstances the contract cannot be avoided. There is, however, a little authority to the contrary and it would seem to be based on at least equally good legal and logical grounds.

The issue is succinctly stated in an early Indiana case: "To deprive the better informed, more enterprising, and more cautious party of the benefit of his contract on account of misrepresentations of the correctness of which the other party ought to judge for himself, 

1 Conlan v. Roemer, 52 N. J. L. 53 (1889); Bacon v. Frisbie, 15 Hun 26 (1878) (reversed on other grounds in 80 N. Y. 394); Picard v. McCormick, 11 Mich. 68 (1862).
2 Foley v. Cowgill, 5 Blackf. (Ind.) 18 (1838); Cronk v. Cole, 10 Ind. 485 (1858); Graffenstein v. Epstein & Co., 23 Kan. 443 (1889); Lilienthal v. Suffolk Brewing Co., 154 Mass. 185 (1891); Pearce v. Carter, 3 Houst. (Del.) 385 (1867).
3 Seaman v. Bearer, 15 Misc. (N. Y.) 616 (1896); Maxted v. Fowler, 94 Mich. 106 (1892), in which it was also stipulated that the party making fraudulent statements must realize that the other party is relying upon them; Stoll v. Wellborn, 56 Atl. (N. J.) 894 (1903).
would tend more to encourage ignorance, sloth, and recklessness than
to discourage dishonesty." This quotation furnishes the argument
for calling statements of market value mere opinions. Another
argument was pointed out by Justice Brewer, while a member of the
Supreme Court of Kansas, in a case which held that to consider
statements of market value statements of fact would encourage on
the part of one who had made a disadvantageous contract "mis-
construction of words, misrecollections and willful falsehoods," at
least as much as the vendor is encouraged to do similar acts under
the contrary rule. The fact that Justice Holmes pointed out, while a member of the Supreme Judicial Court of Massachusetts,
that that court at least had no "disposition to extend the decisions
in favor of vendors' representations beyond the limit to which they
have gone," may indicate that the court felt the rule concerning
these statements was a little too strict for modern conditions.

Statements of market value are upheld as statements of fact in
a New York Supreme Court case, on the following grounds,
as stated by the court in its opinion: "As demand fixes the
price, the statement of a fact tending to show that the article
in question can be sold for a certain sum is a most important element
in determining its value, and a careful and prudent person believing
such a statement to be true would be justified in the opinion and belief
that the property was worth at least the amount which another was
ready and willing to pay for it." In New Jersey the court has
satisfied itself by saying that a statement of market value is a state-
ment of fact.

Frank G. Royce, '19.

Contract: Statute of Frauds: Promise to Answer for the Debt,
Default or Miscarriage of Another.—The case of Voska, Foelsch &
Sidlo, Inc. v. Ruland, 172 App. Div. (N. Y.) 616 (1916), presents
an interesting phase of the important question as to when a promise
by a third person to a creditor to pay the debt of the debtor is within
the Statute of Frauds. In that case a corporation, of which the
defendant was a stockholder and vice-president, was engaged in
renovating a building and entered into a contract with the plaintiff
for certain marble work. The corporation became dilatory in making
payments and at a time when it was indebted to plaintiff for about
$2100, plaintiff became apprehensive that the corporation would
default in making final payments and decided to withdraw its work-
men and quit the work. Because he had so many of the corporation's
bonds and could afford no delay, the defendant, requesting plaintiff
to go ahead and complete the work, made the following oral promise
to plaintiff: "I guarantee you that you will get every dollar coming
to you for all the work, and if the corporation is not going to give
you a check, I am going to give you my personal check." Thereafter,

3Seaman v. Becar, supra, note 3.
4Stoll v. Welborn, supra, note 3.
in reliance on defendant's promise, plaintiff completed the work and furnished materials to the value of about $415. In an action against the defendant on his promise, it was held that as to the work already performed at the time of the promise, the promise was an oral agreement to answer for the debt of another and was unenforceable under the Statute of Frauds, even if supported by a sufficient consideration, but that the oral promise to pay moneys thereafter to be earned was not within the statute and was enforceable against the promisor, being an independent promise founded upon a sufficient consideration. This result is a departure from New York authority.

It is fundamental that the promise, to be within the statute, must be collateral to the primary debt which continues to exist, and that the promise is not within the statute if it is original. It is universally held that the promise to pay the debt of another is original; (a) where the promise runs to the debtor only and not to the creditor, [2] where there never in fact was any primary debt at all; for example, C says to B, "Let A have these goods and I will pay you"; [3] (c) where, once existing, the primary debt has ceased to exist at the date of and by virtue of the promise; for example, A owes B money and C says to B, "Release A and I will pay you." [4]

But suppose the promisor has promised the creditor to pay the debt of A and the debt as A's debt also continues to exist. Then under what circumstances will the promise be original, and under what circumstances will it be collateral? The early rule was that an oral promise to pay the debt of another was always collateral and within the statute whenever the promise to pay the debt of another was always collateral and within the statute whenever the primary debt continued to exist concurrently with the promise. When this simple and easy test was discarded, it became the rule that the promise to pay another's debt might in some cases be original, even though the primary debt continued to exist.

To clear up the doubt raised by the presence of such continued liability of the debtor, it was decided in Leonard v. Vredenburgh [5] that the promise was original if "it was founded on a new or further consideration of benefit or harm moving between the promisor and the creditor-promisee". But since the consideration must necessarily be "new" or "further" to support the new promise, and since consideration is always either a harm to the promisee or a benefit to the promisor, the rule laid down by this case seems rather broad and dangerous, making it almost possible to say that a promise, good at common law between the new parties, was good in spite of the statute. [6]

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1See sec. 31, N. Y. Pers. Prop. Law.
2Barker v. Bucklin, 2 Denio (N. Y.) 45 (1846). As to when the creditor can sue the promisor in such case, see Lawrence v. Fox, 20 N. Y. 268 (1859).
4Goodman v. Chase, 1 Barn. & Ald. (Eng.) 297 (1818); American Wire & Steel Bed Co. v. Schultz, 43 Misc. (N. Y.) 637 (1904).
59 Johns. (N. Y.) 29 (1811).
6The Leonard case was evidently not followed in Smith v. Ives, 15 Wend. (N. Y.) 182 (1836), which held that where a promise is made to guarantee the payment of a note, forbearance to sue the debtor is not a new consideration which would take the case out of the statute.
Correction of the error of the Leonard case was attempted in *Mallory v. Gillett*, which held that the "new consideration" should move to the promisor and be beneficial to him. This decision thus excluded from the class of original promises all those, the consideration for which was merely a detriment to the promisee. The rule laid down by this case was further narrowed and restricted by *Brown v. Weber*, per Grover, J., in which it was decided that a promise might still be collateral, even though the new consideration moved to the promisor and was beneficial to him; that the existence of these facts alone would not make the promise original, but that the further inquiry would remain, whether such promise was independent of the original debt or contingent upon it, i.e., if the promisor was primarily liable, independently of the default of the debtor, the promise was original, but if he was liable only in case of the default of the debtor, the promise was collateral and within the statute.

In *Ackley v. Parmenter* the court, following the rule of *Mallory v. Gillett*, said that the feature which imparted to the promise the character of an original undertaking was a new consideration moving to the promisor and beneficial to him. The court did not even mention *Brown v. Weber* and the limitation which that case put on the rule of *Mallory v. Gillett*. The promise in the Ackley case was not dependent and contingent upon the default of the debtor but was an independent, absolute promise to pay. But since there was no new consideration moving to the promisor and beneficial to him, the promise was correctly held not to be original and thus the rule of *Brown v. Weber* was not necessarily involved.

This was the state of the law upon this question when *White v. Rintoul* was decided. Finch, J., writing for the court, reviewed the foregoing cases in an endeavor to clear up the whole question and declared that these cases had ended in establishing the following doctrine: "Where the primary debt subsists and was antecedently contracted, the promise to pay is original when it is founded on a new consideration moving to the promisor and beneficial to him and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor." In this case the promise was held to be collateral and within the statute on the ground that the consideration therefor was not beneficial to the promisor, and the court mentioned as an added reason the fact that the promise was contingent upon non-payment by the debtor and that the promisor was not under an independent duty of payment irrespective of the debtor's liability.

Just what did the Court of Appeals, speaking through Finch, J., mean by the portion of the opinion above-quoted? Taking into consideration the previous case of *Mallory v. Gillett* and the limitation placed thereon by *Brown v. Weber*, the only reasonable construction of Judge Finch's words is that, to stamp as original a promise to pay the debt of another where the primary debt continues to exist,
there must be two factors, viz., (a) a new consideration moving to the promisor and beneficial to him, and (b) an absolute and independent promise to pay, and not merely a promise to pay if the debtor does not. For example, B is building a house for A, a mortgagor, and threatens to quit, and C, the mortgagee, says to B, "Finish the work, and I will pay you." In this case the added security to the mortgagee-promisee and his interest in seeing the work completed is a new consideration moving to and beneficial to him and the promise is such that B could look to either A or C for payment, and the liability of neither would be dependent on the liability of the other, i.e., in the words of Judge Finch, the promisor, C, has come under an independent duty of payment irrespective of the liability of the principal debtor, A; the promise is original and is an agreement to pay the promisor's own debt. But suppose that C's promise to B is in this form: "Finish the work and I will pay you if A does not." In such a case the consideration is the same as above, but C does not come under an independent duty of payment irrespective of A's liability, but the liability of C is contingent on the default of A, i.e., the promise is collateral and is an agreement to answer for the debt of another and is within the statute.

Thus, when a new, beneficial consideration is shown, the whole matter then turns on the question whether the promise can be interpreted as "I will pay you" or "I will pay you if he does not." The test is whether the person sought to be charged is primarily and independently liable or only liable upon the contingency of the debtor's default. The precise language used is not always significant. It is the character of the obligation sought to be assumed and the intention of the parties and the circumstances surrounding the transaction which are controlling.12

Judge Finch's language in a later case13 shows that the foregoing is the true meaning of the doctrine laid down by him in White v. Rintoul. In the later case he decided that the promise was original because both features were present, viz., the new consideration moving to the promisor and beneficial to him, and the promise in the form, "I will pay you," bringing the promisor under an independent duty of payment irrespective of the liability of the principal debtor. While all the cases since have been in accord as to the necessity of and as to the true meaning of "a new consideration moving to the promisor and beneficial to him", it is a remarkable fact that some cases have failed correctly to construe the language of White v. Rintoul and thus have failed to demand the presence of the second feature which makes the promise original, i.e., the promise in the form, "I will pay you." Some cases, however, have recognized the rule that

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12Almond v. Hart, 46 App. Div. (N. Y.) 431 (1899), in which it was held that "I will see you paid" was equivalent to "I will pay you," and the promise was held to be original because of the presence of the other necessary feature,—the new, beneficial consideration.

both features are necessary. Consequently where the promise was in the form, "I will pay if he does not", this second feature was not present and the promise was held to be collateral and within the statute. In other cases the courts have assumed that the question whether the promise is original depends on the existence of the first feature only,—the new, beneficial consideration. In nearly all of these cases, however, the promise was in the form, "I will pay you", and, therefore, the result reached was correct although the method of reaching the result was incorrect. Of course, if there is no new consideration moving to the promisor and beneficial to him, the promise is not original.

In view of the construction here given to the doctrine of White v. Rintoul, it is submitted that the learned court in the principal case was in error in holding that the promise to pay for the work performed subsequent thereto was original. In the first place, it is difficult to see why the court drew a distinction between the promise in regard to work already performed and in regard to work thereafter to be performed. Clearly the promise was to pay the entire contract debt of the corporation whenever that debt should or had come into existence, and while the feature of a new, beneficial consideration, namely, the interest which the promisor, as stockholder and vice-president, had in seeing the contract completed, was present, yet the second feature, the promise in the form, "I will pay you", was absent. The promise was clearly in the form, "I will pay if the corporation does not", and was, therefore, not an original promise, but an oral agreement to answer for the debt of another and unenforceable under the statute. Several cases in which the facts were similar to those of the principal case, but where the promise was in the form, "I will pay you", have held that the contractor can recover not only for work done and materials furnished subsequent to the making of the new promise, but also for that which has been done and furnished prior thereto. Since these cases attempted no distinction as to the time of the performance of the work, no distinction should have been made in the principal case, but where the entire promise should have been held to be collateral and, therefore, unenforceable under the statute, since the oral promise was in the form, "I will pay if the corporation does not".

While the court correctly held that the promise to pay for the

antecedent work was conditional and collateral and an agreement to pay the debt of another, it then attempted to justify its distinction as to the work performed subsequent to the promise by citing *Raabe v. Squier*. In that case the owners of a building made the following oral promise to the sub-contractor: "That if plaintiff would go ahead and deliver the rest of the material they would see him paid therefor; that if the contractors [debtors] did not pay, they [defendants] would take it out of the amount going to the contractors and would pay the plaintiff." The promise related only to indebtedness thereafter to be created, as all previous indebtedness had been fully paid by the contractors. Since this case can be brought within the doctrine of *White v. Rintoul*, as that doctrine is here construed, *Raabe v. Squier* furnished no precedent for the position taken by the court in the principal case. In *Raabe v. Squier* the promise, "I will see you paid", is equivalent to "I will pay you", upon the authority of *Almond v. Hart*. The words which followed the promise were merely explanatory of the method by which the payment was to be effected. Thus, these words did not change the form of the promise which, due to the presence of the necessary new and beneficial consideration, was an original promise within Judge Finch's definition, and it was correctly held that the oral promise was not within the statute. The promise in the principal case being in the form, "I will pay if the corporation does not", the court should not have relied on *Raabe v. Squier*.

It is, therefore, submitted that the definition of an original promise laid down by Grover, J., in *Brown v. Weber* and by Finch, J., in *White v. Rintoul* was not correctly construed by the court in the principal case, and that it should have been held that the entire oral promise was collateral and, therefore, unenforceable under the Statute of Frauds.

Fred S. Reese, Jr., '18.

**Contract: The Effect of War.—** A distinctly novel legal situation was presented by the comparatively recent case of *Watts, Watts & Co., Ltd. v. Unione Austriaca di Navigazione*, 224 Fed. (D. C., E. D., N. Y.) 188 (1915), affirmed 229 Fed. (C. C. A.) 136 (1915). A libel was filed by the Watts Company, an English corporation, against the Austrian corporation, to recover the contract price of coal supplied to the respondents' steamers before the outbreak of the war. The respondent admitted the indebtedness, but defended on the ground that the ordinances of Austria prohibit the payment by Austrian subjects to enemy subjects of any money during the existence of war between their countries. In dismissing the libel without prejudice, Veeder, J., held: "From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment by one belligerent subject to his enemy during the continuance of war. This court in the exercise

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19148 N. Y. 81 (1895).
20 Supra, note 10.
of jurisdiction founded on comity, may not ignore that state of war, and disregard the consequences resulting from it."  

Similar questions as to the effect of war upon the rights and remedies of contracting parties have arisen in several recent state and federal cases, and may be considered in several aspects, namely, the effect of war upon (1) the contract relations of parties who are citizens of belligerent states; (2) the contract relation of parties, citizens of friendly states; (3) remedies in the courts of belligerent and neutral states.

(1) Contracts Between Belligerent Parties

Under the continental view trading with the enemy during war is permitted unless expressly prohibited; under the English view it is prohibited unless expressly permitted. The American view\(^2\) is substantially identical with the English view, and recognizes that one of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the subjects of the states at war.\(^3\) Under the English Trading with the Enemy Act\(^4\) it is a punishable misdemeanor for any British subject to trade with the enemy after August 4, 1914. The Trading with the Enemy Proclamation of September 9, 1914, as amended October 8, 1914, defines comprehensively what constitutes the offense.

Contracts with an alien enemy are valid as an exception to the general rule, where a license, express or implied, has been granted.\(^5\) In Clarke v. Morey\(^6\), Chancellor Kent held that alien enemies having a license to reside in the United States would have the implied license to trade and consequently to sue or be sued. Opposed to the American doctrine stood the early English decision of Alciator v. Smith.\(^7\) But this decision seems to have been departed from recently and the American view adopted by the English courts\(^8\) in interpreting the Aliens Restriction (No. 2) order, dated August 10, 1914. Contracts of necessity, such as made by prisoners of war, constitute another exception.\(^9\)

In the case of contracts entered into before the outbreak of war, the obligation of such contracts, both executory and executed, is not dissolved or impaired, but the remedy is only suspended until the

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\(^1\)Appeal now pending before U.S. Supreme Court (No. 503, Oct. Term, 1916).
\(^2\)The William Bagaley, 5 Wall. (U. S.) 377, 405 (1866); U. S. v. Lapène, 17 Wall. (U. S.) 601 (1873).
\(^3\)The Meshona, 17 Supreme Court Reports (Cape of Good Hope) 135 (1900).
\(^4\)The Meshona, 17 Supreme Court Reports (Cape of Good Hope) 135 (1900).
\(^5\)The Meshona, 17 Supreme Court Reports (Cape of Good Hope) 135 (1900).
\(^6\)The Meshona, 17 Supreme Court Reports (Cape of Good Hope) 135 (1900).
\(^7\)The Meshona, 17 Supreme Court Reports (Cape of Good Hope) 135 (1900).
\(^8\)The Meshona, 17 Supreme Court Reports (Cape of Good Hope) 135 (1900).
\(^9\)The Meshona, 17 Supreme Court Reports (Cape of Good Hope) 135 (1900).
war is terminated, when the mutual obligations of performance and the rights of action are revived.\textsuperscript{10} As expressed in the Watts case, \textit{supra}, "the contract is merely suspended during the war. The alien enemy is not \textit{civitius mortuus}; he is merely in a state of suspended animation." But contracts made before the outbreak of war will be totally abrogated, not merely suspended, if of such a character as to be incapable of suspension. Partnership contracts are of this nature and war dissolves the relationship for practical reasons, since its proper performance necessitates uninterrupted intercourse with the enemy during war.\textsuperscript{11} This qualification is operative generally in cases where time is of the essence, \textit{e.g.}, in the case of contracts of insurance,\textsuperscript{12} or where the parties cannot on the conclusion of peace be made equal, for the doctrine of revival of contracts suspended by war is based on equitable considerations. This exception, it would seem, is sufficiently comprehensive to cover practically all cases beyond the single case of executory contracts wholly performed on one side and requiring only the payment of money on the other. In the majority of cases, therefore, war has the effect of dissolving pre-existing contracts, and in all cases makes void from its inception contracts entered into during war.

The reason for this prohibition of commercial intercourse was explained in an early case\textsuperscript{15}: "In the law of almost every country the character of alien enemy carries with it disability to sue. \textasteriskcentered * \textasteriskcentered If the parties who are to contract, have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; the whole of such commerce is attempted without its protection and against its authority."

But, it seems, the doctrine has a more substantial basis than the mere historical reason growing out of a procedural anomaly,—the want of an ability to sue. Measures restricting commercial intercourse are intended, obviously, to prevent the economic enrichment of the enemy, just as military measures contemplate weakening him physically. Sound public policy requires, therefore, that contracts, which are of the essence of trading, be suspended or invalidated. An appreciation of the essentially \textit{economic} character of their object, would confine the operation of restrictive measures strictly to purely commercial transactions, and leave unaffected non-commercial contracts (\textit{e.g.}, marriage) which have no tendency, directly or indirectly, to increase the enemy's resources.


\textsuperscript{12} N. Y. Life Ins. Co. v. Statham, 93 U. S. 24, 32 (1876); collection of authorities in Abell v. Ins. Co., 18 W. Va. 400, 433 (1881); Moore's Int. Law Digest, 244 ff.

\textsuperscript{15} The Hoop, \textit{supra}, note 5.
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A different view is presented in a recent English prize court decision\(^4\) wherein it is declared that war interdicts all intercourse between the citizens of belligerents, "even intercourse which cannot fitly be described as commercial". This seems to be an extension of the doctrine of non-intercourse based apparently on the general language contained in the Proclamation of September 9, 1914, prohibiting British subjects "to enter any commercial, financial, or other contract or obligation with or for the benefit of an enemy." While several early American decisions\(^5\) offer support to such an interpretation, the tendency of the later cases\(^11\) is in the direction of limiting the doctrine to commercial transactions whose performance is manifestly inconsistent with a state of war.

(2) Contracts Between Parties Not Alien Enemies

As outlined above, it appears that a state of war has the effect of suspending or invalidating pre-existing contracts between belligerent parties. It may operate similarly to discharge pre-existing contracts between parties not the citizens of hostile states, but for an entirely different reason. In the former case, it is because of illegality; in the latter, because of impossibility.

Impossibility, arising after the consummation of an absolute contract, generally does not discharge the obligation to perform.\(^17\) This is equally true of circumstances short of impossibility, e.g. unexpected difficulty, inconvenience or added expense. But the general rule applies only where the obligation of the contract is unqualified and unconditional.\(^18\) Three classes of apparent exceptions, as distinguished from cases where Act of God or *vis major* is said to excuse, are recognized\(^19\), namely, (1) legal impossibility arising from a change in law;\(^20\) (2) non-existence of the specific thing or circumstances essential to performance;\(^21\) or (3) incapacity for personal service.\(^22\)

Whether a state of war excuses performance of a pre-existing contract under the second exception is, according to the modern

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\(^4\)The Panariellos, 32 T. L. R. 459 (1915); see also Robson v. Premier Oil Co., L. R. 1915, 2 Ch. D. 124.
\(^5\)The Julia, 8 Cranch (U. S.) 181 (1814); The Rapid, *ibid.* 155, declaring (p. 161): "If they meet, it is only in combat. War strips man of his social nature * * *"); Brown v. U. S., *ibid.*, 110; see Baty and Morgan, "War, Its Conduct and Legal Results", pp. 284, 296.
\(^7\)Paradine v. Jane, Aley 26 (1647); Ry. Co. v. Hooper, 160 U. S. 514, 527 (1885); Huffcut's Anson on Contracts, chap. 4.
\(^8\)Hills v. Sughrue, 15 M. & W. 253 (1846); Avery v. Bowden, 5 E. & B. 714 (1855).
\(^9\)Baily v. DeCrespigny, L. R. 4 Q. B. 178, 185 (1869); Wald's Pollock (8th ed.), p. 436.
\(^12\)Spalding v. Rosa, 71 N. Y. 40 (1877).
tendency, a matter of construction of the particular contract to determine the intention of the parties. The statement of the New York Supreme Court in the recent case of Marsk Realty Co. v. Churchills is to this effect and the decision is manifestly sound.

In contracts between parties, the citizens of friendly states, consummated during war, impossibility arising out of war exonerates the promisor, since the intention of the parties expressed in the contract or imputed by law governs, and the ordinary risks of war are presumed naturally to have been with the contemplation of the parties.

(3) Remedies

The effect of war upon the substantive rights of contracting parties, which has been heretofore considered, is comparatively well-settled. The remedial rights of an enemy citizen in the courts of a hostile belligerent have been considered recently in a series of cases arising under the English Aliens Restrictions Act of August 5, 1914, and have been comprehensively defined. In an able opinion delivered by Lord Reading, C. J., the Court of Appeal decided: (1) the capacity of an alien enemy to sue was restricted by the statute under interpretation to those complying with its provision. It was also clearly pointed out that provisions of the Hague Convention did not operate to abrogate the doctrine that the alien's right of action was suspended during war. (2) Whatever be his disability to sue, he was liable to be sued. It followed that the alien could appear and be heard in defense; that if judgment proceeded against him, he had recourse to an appeal, but that he might not initiate an appeal until after the conclusion of hostilities.

The status of belligerent parties in the tribunals of a neutral has apparently never, until recently, been the subject of judicial consideration. Because of the dearth of precedent and the disparity of view which has developed, hostile belligerent parties occupy a rather anomalous position in our courts at present. As an inevitable consequence of the European War many cases pending at its outbreak were dismissed without prejudice because the issues presented questions which had become purely moot and academic. In other cases jurisdiction was declined. In the case of The Athanasios the opinion was expressed obiter dicta that "there is no compulsion upon a court of admiralty to entertain such a suit [between Greek and Canadian parties], and it is advisable to decline jurisdiction for

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26Art. 23, sec. 6, of chap. 1, sec. 2, 1907.
29228 Fed. 558 (1915).
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political reasons.” This is manifestly a legitimate exercise of the
discretionary functions of courts of admiralty.30

The ruling in the Watts case, supra, was followed, in respect to
the jurisdictional question involved, in the case of The Kaiser
Wilhelm II.31 Referring to the Watts case, Haight, J., was of
opinion that no reasonable basis of distinction existed in principle
between the two cases.

Contrasted with the holdings in the above case, is the recent
decision of the New Jersey Court in Compagnie Universelle v. U. S.
Service Corporation.32 The facts were substantially as follows:
A German company contracted, before the war, to construct for a
French company a wireless station. The performance of the agree-
ment was prohibited by the subsequent laws and ordinances of
both France and Germany. On a bill for specific performance to
convey the land the question arose as to the propriety of a neutral
court exercising jurisdiction. Held, that there is no more appropriate
tribunal elsewhere, as the land is situated in New Jersey, and hence
the reason for usually declining discretionary jurisdiction is
wanting.

There is thus presented a decided diversity of judicial opinion
as to the propriety of the neutral court entertaining a suit between
belligerents.33 The federal view is sought to be supported by a
common law of nations, of which the enactments and decrees are
but declaratory. As indicated in an earlier paragraph, the trading
with the enemy proclamations are promulgated by municipal
authority, and bind only the citizens of the local jurisdiction. The
fortuitous circumstance that they are uniform in the several countries
does not make them a part of international law. These essentially
municipal regulations, it is submitted, can have no extra-territorial
effect, for the acceptance of this doctrine implies the yielding of
American sovereignty to that extent. It follows from a recognition
of this view that the recent decision in Taylor v. Konchaki,34 which
gave effect to the terms of the French moratorium, is manifestly
unsound. The error of the courts adhering to the view adopted in
the principal case is apparent when the foreign restrictions are viewed
as penal enactments, to which courts exercising jurisdiction on
grounds of comity can give no effect. Undoubtedly it was intended
that the restrictive decrees should prohibit only voluntary payments
to enemy subjects, and were not meant to apply to involuntary
payments decreed by a competent court. The adoption of the
preferable New Jersey doctrine does not militate against the strict
maintenance of neutrality, for the right to maintain suits is extended
impartially to all belligerents. “The neutral nation is a friend of

10The Belgenland, 114 U. S. 355 (1885).
13This question is indirectly involved in the case of The Appam, 234 Fed.
(D. C., E. D., Va.) 389 (1916); see Diplomatic Corresp. of Dept. of State, reprinted
1456 N. Y. L. J. 813 (1916); note 30 Har. L. R. 390, February, 1917.
both belligerents and comity requires that the doors of its courts be open, if their subjects have wrongs to be righted."

Alex. M. Hamburg, '16.

Corporations: Liability of Original Stockholder after Transfer of Stock.—In Chilson v. Cavanagh, 160 Pac. (Okl.) 601 (1916), the trustee in bankruptcy of an insolvent corporation sought to recover from an original stockholder of the company an amount alleged to be unpaid on his shares sufficient to equalize the total assets and liabilities of the corporation. The court found that a lease, in exchange for which the stock had been given, was substantially worth the par value of the shares so that it could not be claimed that the stock was issued without consideration. The defendant was sued as the person to whom the stock was originally issued and not on the ground that he was the owner and holder of it at the time of the commencement of the action. The Oklahoma Constitution provided, in substance, that no corporation should issue stock except for money, labor done, or property actually received to the amount of the par value of the shares. The following statement of law was made: "The liability thus imposed upon one who, by accepting corporate stock, as an original shareholder, obligates himself to pay the corporation therefor in money or its equivalent is a continuing one, at least as far as creditors of the corporation in good faith are concerned, and is not discharged by mere transfer of such stock to an innocent holder, otherwise one who had contributed little or nothing to the capital stock of a corporation might obtain shares of its stock, dispose thereof profitably, and entirely escape liability to corporate creditors."

It would seem from the language of the court that it is inclined to view the subscription to stock as a contract by the subscriber to pay the full value thereof and that, therefore, the liability exists after a transfer has caused the relationship of stockholder to cease. But may not the view be equally well taken that by accepting stock the subscriber merely agrees to assume the relation of a stockholder to the corporation and that, when such relationship comes to an end, his liability ceases? Is not the liability which attaches to a stockholder inseparable from the ownership of the stock? One of the essential attributes of a corporation is its capacity to perpetuate itself through the transfer of its shares from one person to another. And, as remarked in Visalia R. R. Co. v. Hyde: "If the original stockholders stand under different relations to the company from their assigns, the corporation itself loses some of its attributes by the substitution or else becomes introduced into more complicated relations." It would seem clear also that, where a corporation has issued stock as fully paid there cannot be a contract obligation to

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27 170 Cal. 632 (1895). The contract idea is espoused in Hood v. McNaughton, 54 N. J. L. 425 (1892), where it is said that the subscriber cannot recede without the consent of the company.
pay full value, since there is an express agreement to the contrary. The view in the principal case was undoubtedly influenced by the desire of the court to render the constitutional provision an effective remedy against the evil intended to be cured by it, namely, stockwatering.

The authorities are not in accord upon the matter. If by the words "mere transfer" the court in the principal case intended to include a formal transfer, its opinion would seem to be against the weight of authority in this country, which holds that a stockholder's liability for unpaid subscriptions does not continue after a transfer to a bona fide holder, except where the transfer is made with the intent of defrauding creditors of the corporation. This general doctrine is subject to limitations, however. (1) The transfer must be to a solvent person, as a transfer to an irresponsible person would be a fraud upon creditors. The stock subscriptions are assets of the corporation and, where corporate liabilities are incurred, such assets are pledged as security to those lending credit to the corporation. A transfer to an irresponsible party would impair that security and should be held not bona fide, even where the transferrer does not do so to avoid his liability. (2) Where the transfer is made while the corporation is insolvent, the transferrer is not discharged even though there was no actual intent to defraud creditors. After insolvency there cannot be any legitimate traffic in the shares. Thus, a sale of stock without consideration while the corporation was insolvent was held fraudulent as to creditors. But where at the time of the sale the corporation was solvent, a sale, though not upon valuable consideration, to a responsible person and not with the intent of escaping liability operated to divest the transferrer of his liability. (3) It follows, of course, that the transfer of shares of stock in an insolvent corporation or in view of the anticipated insolvency of the corporation to a person incapable of responding to the liability imposed upon him by the transfer does not discharge the original stockholder.

In England the doctrine prevails that stock of a failing corporation may be transferred to an irresponsible person.

3Henderson v. Mayfield Woolen Mills, 153 Ala. 625 (1907); Parkhurst v. Mexican Southeastern R. Co., 102 Ill. App. 507 (1902); McConney v. Belton Oil & Gas Co., 97 Minn. 190 (1906); Rochester & K. F. Land Co. v. Raymond, 158 N. Y. 575 (1899); Cole v. Adams, 19 Tex. Civ. App. 507 (1898); Rich v. Park, 177 S. W. (Tex.) 184 (1915); and see a valuable note in 93 Am. St. Rep. 349. But in Wolcott v. Waldstein, 97 Atl. (N. J.) 951 (1916), incorporators to whom stock was originally issued without payment were held liable despite a subsequent transfer.

4Rider v. Morrison, 54 Md. 429, 444 (1880); Nathan v. Whitlock, 9 Paige's Ch. (N. Y.) 152 (1841); and see 2 Morawetz, Corporations, sec. 858.

5Morawetz, Corporations, sec. 166.

6Ward v. Joslin, 100 Fed. 676 (1900); McConney v. Belton Oil & Gas Co., supra, note 3.


8Welch v. Sargent, 127 Cal. 72 (1899); Rider v. Morrison, supra, note 4; Nathan v. Whitlock, supra, note 4; Burt v. Real Est. Exch., 175 Pa. St. 619 (1896); Rich v. Park, supra, note 3; Bowden v. Johnson, 107 U. S. 251 (1882); see also 26 A. & E. Encyc. of Law, p. 1035; 2 Morawetz, Corporations, sec. 858.
a "man of straw", even though the sole purpose of the sale is to avoid the stockholder's liability for unpaid subscriptions, where the transfer is an absolute one. Such out-and-out transfer releases the transferrer from liability to creditors and to the other stockholders.

The basis of the doctrine that a bonâ fide sale releases the transferrer is that there is a complete novation by which the transferee steps into the shoes of the transferrer, acquiring his rights and liabilities. It is obvious, therefore, that if the person to whom the stock is transferred has no notice when he purchases it that it is not fully paid, the transferrer still remains liable. The transferee cannot assume an obligation of which he had no knowledge. It is also held that, where stock is purchased in good faith and without notice in the open market, such stock is to be deemed fully paid and purchasers in good faith protected, even though there is nothing on the face of the stock certificates to indicate that they are fully paid. The reasons given for the rule are that it encourages the transfer of personal property, favors the quasi-negotiability of stock and discourages secret liens and constructive notice.

The general rule would appear to require that in order to discharge the transferrer, a formal transfer upon the books of the corporation be made or any other formalities necessary to a complete transfer be complied with. The creditor is entitled to hold him liable whose name appears upon the corporate books as the owner of the stock and, until such transfer is entered, no substitution takes place. If there is a failure to so register a transfer, the liability does not shift to the transferee, unless the corporation has waived performance of the required formalities in some manner. Thus, where a corporation failed to provide a register and a transfer in it was made essential to pass title, performance of its rules was held to have been waived.
One should not overlook the fact, however, that though the transfer is valid as between the parties and creates equitable rights in favor of the vendee, it may be ineffectual to relieve the vendor from liability for unpaid subscriptions. Where there is a complete transfer, it would seem that an argument such as was made in the principal case to the effect that an original stockholder whose shares were not paid up might dispose of them profitably, thus avoiding liability, would be negligible, since another liability, that of the transferee, is substituted therefor.

In New York it is provided by statute that the stockholder shall be liable for unpaid subscriptions to his stock, if suit is brought against him within two years after he has ceased to be a stockholder. If an action is not brought within that time he ceases to be liable to corporate creditors.

Leonard G. Aierstok, '17.

Elections: Student Voting.—The cases of Seibold v. Wahl, 159 N. W. (Wis.) 546 (1916), Gross v. Wahl, id., 549, Ashbahr v. Wahl, id., 549, and Wadsworth v. Wahl, id., 550, illustrate the conditions and circumstances under which students of a college may be allowed to vote in local elections of the city in which the college is located. On March 21, 1916, four law students of the University of Wisconsin attempted to vote at the primary election held in the city of Madison, and, upon being prevented by the inspectors of the election, they commenced separate actions to recover damages for such refusal. Each of the students was twenty-one years of age, unmarried, owned no property and paid no taxes, and came to Madison to attend the law school, not knowing where he would go after graduation, but declared that Madison was his present residence within the meaning of the Wisconsin statutes. The parents of the student in the Wadsworth case, supra, resided in Kentucky and he spent the last Christmas vacation there, but intended to remain in Madison during the next summer. Save the $250 he earned as editor of the Badger, the rest of his expenses were paid by his father. The order sustaining the demurrer to his complaint was affirmed. The student in Seibold v. Wahl, supra, registered in the University as being from Camp Douglas, Wisconsin, the home of his parents, who also paid part of his expenses while in college. The order overruling the demurrer to his complaint was reversed. The registration list of the university showed that Gross, the plaintiff in Gross v. Wahl, supra, was from La Forge, Wisconsin. He had spent the last summer vacation at his parents' home in that place. He had taught school, however, in another county for three years and had voted there. He borrowed part of the money to pay expenses from his father and earned the rest. The order overruling the demurrer to his complaint was affirmed, as he was held to be entitled to vote. The other student, in Ashbahr v. Wahl, supra, came from Oregon, where he had taught school and


\[\text{Stock Corporation Law, sec. 59; Laws 1909, ch. 61.}\]
voted at a different place than that where his parents reside. He
registered in the university as of Madison, but had not spent his
vacations there. He was entirely self-supporting. The court
held that he had gained a voting residence. From the facts of
these four cases it seems that the circumstances which made the last
two students eligible to vote were: (1) financial emancipation as
evidenced by their independent self-support, and (2) political emana-
pation as shown by the prior acquisition of a residence separate
from that of their parents and the exercise of the right to vote at
the place of that residence. It is to be noted that no distinction is
made between students whose parents live outside of Wisconsin and
those who live within that state.

Naturally the individual state statutes govern the cases within
the particular state, but the purpose and effect of the Wisconsin
statutes1 appear to be merely for the direction and guidance of the
election boards in their determination of conditions necessary for
one to acquire a voting residence. The statutes apparently do not
change the general legal principles regarding residence. These
principles are set out by Winslow, Ch. J., in one of the cases as
follows:2 "To acquire a voting residence in an election district one
must have made it his fixed habitation; (1) for no merely temporary
purpose; (2) without present intention of removal elsewhere or to
return to his former abode for residence purposes; and (3) with
intention of returning to such habitation whenever absent therefrom.
The purpose is not necessarily temporary because it is expected
to end at some time more or less remote in the future. Practi-
cally all human purposes have this quality. * * * Two general
propositions may be laid down, viz., if the student, * * * being
separated from his father's family and earning his own way wholly
or substantially, * * * removes to the college town, these
are persuasive circumstances more or less conclusive tending to show
an acquirement of a voting residence there: if on the other hand,
he have a father or mother living, who maintains a family residence
in another town, to which residence the student returns in vacation
time, and if such parent supports the student wholly or substantially,
these are quite persuasive circumstances tending to show that there
has been no change of voting residence, especially if the student
registers or describes himself as of such family residence."

A conflict exists among the American jurisdictions as to what

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1Wisconsin Statutes; Laws of 1915, Ch. 651:
"2d. That place shall be considered and held to be the residence in which his
habitation is fixed, without any present intention of removing therefrom, and to
which whenever he is absent, he has the intention of returning."
"3d. A person shall not be considered or held to have lost his residence who
shall leave his home and go into another state or county, town or ward of this
state for temporary purposes merely, with an intention of returning."
"4th. A person shall not be considered to have gained a residence in any town,
ward or village of this state into which he shall have come for temporary purposes
merely."
"9th. The mere intention to acquire a new residence, without removal, shall
avail nothing; neither shall removal without intention."
2Siebold v. Wahl, supra.
intent is necessary to acquire a new voting residence. The earlier and more strict view is illustrated in Fry's Election Case where students who "support themselves, are emancipated from their father's families, have left the home of their parents, and never intend to return and make it a permanent abode," yet are held not to have the right to vote at the place in which the college is situated because, having come there "for no other purpose than to receive a collegiate education, and intending to leave after graduating, they have not lost their home domicile. * * * Emancipation from their father's family and independent support, and leaving the home belonging to their parents, have not forfeited their own domicile. The father's house is not necessarily their home, but the place is where it is." The court's reasoning is strained on the face of it. If one, who is sui juris, does not lose his domicile at a particular place by leaving it, with the intention never to return to it as a place of abode, how can a domicile be lost? If it is admitted that an intention of abandonment accompanies the fact of removal from particular place, a loss of domicile in that place necessarily follows. The difficulty in these cases is to prove a bona fide intent on the part of the student to renounce his former domicile. Several state courts have followed Pennsylvania in applying Vattel's definition of domicile or settlement as being "the habitation fixed in any place, with the intention of always staying there," to residence, by holding that the intention to remain in a place permanently or for some indefinite time is essential. The lower courts of Pennsylvania have refused to follow this strict rule, although the constitution of that state was changed in order "to conform to the decision of the Supreme Court rendered by Agnew, J., in Fry's case," supra.

In contradistinction to the rule requiring an intent to make a permanent residence, other courts have said that, "it is not necessary * * * that there should be an intention to remain permanently at the chosen domicile: it is enough if it is for the time the home of the voter to the exclusion of other places." Judge

4Kelly, Ex'r. v. Garrett, Ex'r., 67 Ala. 304 (1880); Vanderpoel v. O'Hanlon, 53 Is. 246 (1880); State v. Daniels, 44 N. H. 383 (1862).
4Hall v. Schoenecke, 128 Mo. 661 (1895); Welch v. Shumway, 232 Ill. 54, 86 (1908).

Vattell, Law of Nations, Bk. 1, c. 19, sec. 218.
"Sometimes it [residence] is defined as the permanent place of abode. But this is not accurate; for, while a certain degree of permanency is essential, absolute permanency is not required." Lower Oxford Contested Election, 1 Chester Co. Rep. (Pa.) 253, 254 (1875). And a student "may intend to go elsewhere when his studies are over: but, if he has no other home while present at the institution, if he has no fixed place to which he intends to go when his undergraduate period is over," if he elects to become a citizen of that place, he has a right to vote. In re Lower Merion Election, 1 Chester Co. Rep. (Pa.) 257, 259 (1880).

Supra, note 7.

Supra, note 5; Shaeffer v. Gilbert, 73 Md. 66 (1890); Berry v. Wilcox, 44 Neb. 82 (1895); Matter of Barry, 164 N. Y. 18 (1900). Ch. 46, sec. 66 of Ill. Statutes (Jones & Add., Sec. 4791) provides that a "permanent abode is necessary to
Irvine, in the well considered Nebraska case of Berry v. Wilcox,\textsuperscript{10} points out that "the older cases and some of the modern ones require as an essential element the animus manendi, and construe this term as meaning an intention of always remaining," but other courts have combatted this construction of the term and, after quoting Putnam v. Johnson and Dale v. Irwin,\textsuperscript{11} he continues, "These authorities, we think, present the law in its true aspect. The fact that one is a student in a university does not of itself entitle him to vote where the university is situated, nor does it prevent his voting there. He resides where he has established his home, the place where he is habitually present. * * * The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It is not necessary that he should have the intention of always remaining, but there must co-exist the fact and the intention of making it his present abiding place, and there must be no intention of presently removing." Dicey\textsuperscript{12} supports this contention. He says: "The term animus manendi, or intention of residence, is intended to include the negative state of mind which is more accurately described as 'the absence of any present intention not to reside permanently in a place or country.'" The Wisconsin court in the principal cases, supra, has followed this view.

The cases thus far considered have arisen under constitutions providing that one must be a resident or inhabitant of the state and district for a certain period in order to be qualified to vote. These words thus employed "mean substantially the same thing"\textsuperscript{13}. Some eighteen states, however, have followed New York by expressly providing in their constitutions that: "For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence * * * while a student in any seminary of learning. * * * *").\textsuperscript{14} The mischief against which these sections are aimed has been said to be "the participation of an uninterested body of men in the control through the ballot box of municipal affairs in whose further conduct they have no interest, and from constitute a residence," but the courts have interpreted this not to mean "an abode which the party does not intend to abandon at any future time," for this "would be a definition too stringent for a country whose people and characteristics are ever on the change. No man in active life, in this state can say, wherever he may be placed, this ever shall be my permanent place of abode." Dale v. Irwin, 78 Ill. 170, 181 (1875). And in Welch v. Shumway, supra, note 5, it is held, that a student is entitled to vote if he "regards the place where the college is situated as his home, even though he may at some future time intend to remove, if he has no positive and fixed intention as to where he will locate when he leaves."

\textsuperscript{10} Supra, note 9.

\textsuperscript{11} Supra, note 9.

\textsuperscript{12} The Conflict of Laws (Am. ed.), p. 81, note 2.

\textsuperscript{13} Cooley, Constitutional Limitations (7th ed.), p. 903.

the management of which by the officers their ballots might elect, they sustain no injury." These provisions have been interpreted in a number of cases. "The accepted rule seems to be that the effect of such a constitutional provision is not to disqualify a student from gaining a residence at the seat of the institution he is attending, but to render his presence or absence from the institution primarily without effect as to his political status." Thus, if one acquires a voting residence at the place where the college is located before he attends the school, such attendance will not disqualify him from voting. But mere presence at the school together with a declaration of intention to become a resident, although such intention is declared in a letter to the mayor of the town and to the board of supervisors, is not sufficient to entitle him to become an elector. Nor will the attendance at a seminary which requires that a student must renounce "all other residences, or homes save that of the seminary itself give a voting residence." But where a student voted in Virginia, moved to New York, wrote a letter ordering his name taken off of the registration list in Virginia, applied to be received as a postulant in the ecclesiastical diocese of New York, and entered a seminary in Yonkers, it was held that he had changed his legal residence and could vote in Yonkers. Judge Finch, in the leading New York case of Matter of Goodman, stated the rule to be, that the facts to establish a change in the legal residence of a student "must be wholly independent and outside of his presence in the new district as a student, and should be very clear and convincing to overcome the natural presumption" against such a change. In a later case it was pointed out that "unless the rule laid down in the Goodman case is rigidly enforced the constitutional provision will be nullified." And although "it may be urged that the enforcement of this rule will render it well nigh impossible for a student to establish a residence in a seminary of learning, [yet] the very obvious answer is that the letter and spirit of the constitution contemplate such a result." Since there are no unequivocal facts, independent of the attendance at the University of Wisconsin, in any of the leading cases, supra, it follows that none of the plaintiffs would have been allowed to recover under the New York view, although no general rule can be laid down which will cover all cases.

From a consideration of the cases dealing with this question of
qualifications of electors it is apparent that the American courts in general have failed to distinguish between the term residence, as used in the constitutions, and domicile. The two terms in their general and technical meanings are not synonymous. "That there is a wide distinction between domicile and residence, is recognized by the most approved authorities." Domicile in its technical sense "always signifies a country or territory subject to one system of laws." "Domicile, therefore, means more than residence. A man may be a resident of a particular locality without having his domicile there. He can have but one domicile at one and the same time although he may have several residences." Residence implies personal presence, but domicile does not, as is evidenced by the familiar condition of a person non sui juris (for example, infants or married women) having a domicile in one state or country where they do not actually reside. The English courts recognize the true distinction between the two terms. In Walcott v. Botfield it is pointed out that the question of residence "is entirely distinct from that of domicile, which is often wholly independent of actual residence." Thus, an Englishman may be a resident of France and still retain his domicile in England. But a person could not be a resident of one of the United States and have his domicile in another because of the provision in the fourteenth amendment to the Federal Constitution which declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside." Minor, in his Conflict of Laws, says that "This provision establishes for the states of the Union the rule that a citizen of one state who abandons that state and goes to another to reside permanently, thereby ipso facto loses citizenship in the former state and acquires it in the latter, regardless of his intentions or wishes." And he suggests that "owing to this principle, the American courts are more prone than others to use the terms residence and citizenship as synonymous with domicile." But it is submitted that this explanation, while apparently logical, is not real, because some of the cases declaring residence to be equivalent to domicile were decided long before the fourteenth amendment was adopted, and it is referred to in few, if any, of the cases decided since 1866.

*Domicile and residence are not synonymous. The domicile is the home, the fixed place of habitation; while residence is a transient place of dwelling. Bartlet v. City of N. Y., 5 Sandf. (N. Y.) 44 (1851); Black's Law Dict., Domicile; and in New York v. Genet, 4 Hun (N. Y.) 487, 489 (1875) it is said: "The domicile is the habitation fixed in any place with the intention of always staying there, while simple residence is much more temporary in its character." Long v. Ryan, 30 Gratt. (Va.) 718 (1878); Mitchel v. U. S., 21 Wall. (U. S.) 350 (1874).*  
*Story, Conflict of Laws (8th ed.), sec. 41.*  
*Kay, 534; 543 (1854); see also Bell v. Kennedy (1868) L. R., 1 H. L. Sc. 307, 320.*  
*At p. 60.*  
*Note, p. 61.*  
*Opinion of the Justices, supra, note 9; State v. Daniels, supra, note 4; Dougherty v. Snyder, 15 S. & R. (Pa.) 84 (1826).*
Perhaps the only explanation of such construction of residence is that it met the exigencies of the situation and protected the local polls from an invasion of voters who were thought to be unconcerned in local affairs. This whole subject of residence and domicile is confused and difficult and it is enough to add that the courts are now recognizing that there is a broad "distinction between domicile in a legal and technical sense by which one's civil status and the rights of persons and property are determined, and residence required by the constitution as a qualification for the exercise of political rights." It may not be out of place to point out the discrimination against students in the constitutional provisions, which, to a student at least, seems to be unfair and uncalled for, especially as regards all elections not purely local in character. A Methodist minister who goes to a parish for a period of two years with the knowledge that he will be transferred at the end of that time is allowed to vote in the parish. The same person would not have that privilege if he entered a seminary for a six year period. A day laborer twenty-one years of age who goes on a construction job which may or may not be permanent becomes an elector at the place of his work. Surely he is no better qualified, nor has any greater interest in public affairs, than he would be if he had entered a university instead. Conditions are different today from those existing in 1846 when the provision was adopted in the New York constitution. Then the college course was from three to four years; now with the increasing requirements of the professional courses, it is from four to eight years. Also it is not flattering, to say the least, for students to be put in the same general group with inmates of almshouses and prisons, as is done in these constitutional provisions. But because of the difficulty and impracticability of allowing students to vote in national elections and preventing them from so doing in municipal ones, the remedy must be sought in another direction. One which immediately suggests itself, if it be assumed that it is not desirable that students vote in the college town, is for the various states to allow them to vote while away at school as absentee electors. This could be done by enlarging the provision in the New York and other constitutions which permit "absent electors in actual military service" to vote by mail. The application of this provision was very well illustrated in the last election when the men at the Mexican border voted by mail. A tendency towards extending this principle is seen by one of the amendments of the New York constitution proposed by the 1915 convention, which provided for registration of certain absent electors. 

O. R. Clark, '18.

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28In Thorndike v. City of Boston, 1 Metc. (Mass.) 242 (1840), Shaw, Ch. J., says: "The questions of residence, inhabitancy or domicile are attended with more difficulty than almost any other which are presented for adjudication."
30Cesna v. Myers, Smith 60, as cited in McCrary, supra, note 24.
32Art. II, sec. 1.
34Art. II, sec. 4, 1915 proposed constitution.
Evidence: Opinions as to Age.—In State v. Koettgen, 99 Atl. (N. J.) 400 (1916), the defendant was indicted for maintaining a disorderly house, under a statute making the habitual sale of intoxicating liquors in a house to minors such an offense. To support this indictment the state produced witnesses who gave their opinions as to the ages of persons frequenting the house, such testimony being based solely upon their appearance. This evidence was not objected to at the time it was introduced, but subsequently the defendant's attorney moved to strike it out. The court denied the motion, and rendered judgment on a verdict returned against the defendant. On appeal, the Supreme Court held it was error to admit this evidence, because it consisted of opinions only and, since age was a fact capable of direct proof, it did not come within the category of things provable by opinion testimony. The court, however, affirmed the judgment of the lower court on the ground that the objection to the testimony came too late. White, J., concurred in the result reached by the court, but adopted the opinion of the lower court, holding that the opinion evidence was admissible.

Although dictum, the language of the court in regard to the admissibility of opinion evidence as to age presents two interesting problems, viz., is such evidence admissible when based solely upon appearances, and is it, when standing alone, sufficient to support a conviction?

The general rule in regard to testimony by witnesses is that it must be confined to facts. However, there are well recognized exceptions. Upon all questions of science and skill, persons specially instructed in the particular act or science to which the question relates may give their opinions. Another exception admits the evidence of common observers, testifying to the results of their observations in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to the jury. Under this rule it has been held that a man may give his opinion as to another's imbecility, or intoxication. So, also, there are cases holding that it is not error to admit opinion testimony as to the age of a person, when such testimony is founded on the appearance of that person as observed by the witness. In the case of Poulter v. State the defendant was charged with perjury for having falsely represented his age, and in order to determine the real

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1 Perry v. Graham, 18 Ala. 822 (1851); Largent v. Central R. R. Co., 40 Cal. 272 (1870); Morse v. State, 6 Conn. 9 (1825); Musick v. Latrobe, 184 Pa. St. 375 (1898).
2 Staples v. Steed, 167 Ala. 241 (1910); Hammond v. Woodman, 41 Me. 177 (1856).
5 People v. Eastwood, 14 N. Y. 362 (1856); People v. Gaynor, 33 App. Div. (N. Y.) 98 (1898).
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age of the accused, testimony by witnesses as to their opinion of his age was held to be admissible. It must be noted in the Poulter case that the opinion was not founded upon appearance alone, but also upon acquaintance with the accused. This fact, however, would seem to affect the weight of the evidence rather than its admissibility.

In other cases where the age of the defendant was a material issue, the court held opinion evidence to be admissible when the witness was first allowed to describe the appearance of the person and then to give his opinion as to the age of that person. And in all cases, in order to render opinion evidence admissible, it must not only be relevant and necessary, but it must appear that the observer has had sufficient opportunity for drawing the inference which he states, and the capacity necessary to make it.9

In view of the cases mentioned above and on principle it would seem that opinion evidence as to a person's age based solely upon appearances ought to be admitted as competent evidence, and that, therefore, the dictum in the principal case was wrong. Wigmore10 thinks that such evidence ought to be received in every case, and that "any other rule would be pedantically overcautious". Age is beyond a doubt approximately indicated by the appearances of a person, and it is only in extreme cases, where the age is very close to the border line, that the defendant would be prejudiced by having age estimated from appearances. The better rule, it would seem, would be to admit the evidence, and then allow the jury to give it such weight as it may be entitled to.

In respect to the second query, viz., as to whether the opinion testimony standing alone is sufficient to warrant a conviction, the answer is more difficult and the authorities scarce. The rule that the defendant must be proved guilty beyond a reasonable doubt has been construed to mean that the guilt of the accused does not have to be proved to a mathematical certainty, as otherwise circumstantial evidence would never convict. In Commonwealth v. O'Brien, the defendant was indicted for selling intoxicating liquors to a minor. The only evidence on the question as to whether or not the girl was a minor was a description of her appearance by a witness, and a statement of his opinion that she was not over thirteen years old. Nevertheless, a verdict of guilty was rendered against the defendant, and on appeal the verdict was affirmed. This would seem to indicate

8State v. Douglass, supra, note 6; Commonwealth v. O'Brien, 134 Mass. 198 (1883).
11Wigmore, Evidence (1st ed.), sec. 222.
13Winter v. State, supra, note 6; Carlton v. People, 150 Ill. 181 (1894); State v. Gleim, 17 Mont. 17 (1895); Commonwealth v. Webster, 5 Cush. (Mass.) 295 (1850), at page 320.
14Supra, note 8.
that opinion evidence as to age, standing alone, is insufficient to support
a conviction, as the mere fact that the witness described the minor
prior to giving his opinion should not be considered as materially
increasing the weight of such testimony, as the opinion in any case is
founded upon the appearances as observed by the witness. If the
opinion fixed the age very near the statutory age, it might be held
that all reasonable men should entertain a doubt, and that a convic-
tion could not be sustained.

W. J. Gilleran, '18.

Libel and Slander: Construction to be Placed upon Alleged Libelous
Remarks.—In King v. Pillsbury, 99 Atl. (Me.) 513 (1917), the defend-
ant wrote a letter to the father of the young woman to whom the
plaintiff was paying attention. The letter contained this statement:
"Did you know that Albert King is a damaged goods chap? I
write this for your daughter's sake." At the trial extrinsic evidence
was introduced to show that the words were in substance an allegation
that the plaintiff was afflicted with syphilis. The trial court; further-
more, charged the jury that as a matter of law the words in question
were susceptible of that construction and that it was a question of
fact for the jury to decide whether such interpretation was actually
put upon them. On appeal this charge of the court was held to be
correct and a verdict for the plaintiff was affirmed.

The rule to be applied to the construction of words which admit of
two interpretations, one innocent and one defamatory, is well settled.
The rule is that the words are held to be defamatory, if they are
reasonably susceptible of that interpretation and if they were actually
given that meaning by the person who heard them or read them in the
particular case. Words are to be taken in their natural meaning
and according to common acceptation. The meaning which the user
of the words intended to convey is immaterial where malice is not in
issue.2

In most respects the courts agree also as to the method by which
the above rule should be applied and the decision reached in each
particular case as to whether the words used are innocent or defama-
tory. When the alleged libel is clear and unambiguous, the question
of its actionability and whether the words are reasonably susceptible
of the meaning attributed to them by the innuendoes is for the court.3
When the alleged libel is ambiguous and fairly capable of two mean-

3Williams v. McKee, 98 Tenn. 139 (1897); Dowie v. Priddele, 216 Ill. 553 (1904); Gerald v. Inter-Ocean Pub. Co., 90 Ill. App. 205 (1900); Kilgour v. Evening Star Co., 96 Md. 16 (1902); Shanks v. Stumpf, 23 Misc. (N. Y.) 264.
ings, one defamatory and the other harmless, and no extrinsic evidence is introduced, the question as to the meaning of the words and the sense in which they were understood is for the jury.4

The case of King v. Pillsbury, however, illustrates a situation in which the province of court and jury is not fully determined. Here we have an action for libel where the meaning of the expression depends on extrinsic evidence and the court held that the question whether it is capable of the meaning imputed to it is for the court to decide; whether it actually had such meaning to the reader in connection with the context and the surrounding circumstances is for the jury. Quinn v. Prudential Life Ins. Co.5 however, holds that "where any doubt exists as to the meaning of a publication, so that extrinsic evidence is needed to determine whether it is actionable, it is then a question for the jury, under proper instructions from the court." In other words, according to this latter case the whole matter is one for the jury. In this contention the Quinn case is sustained by two Michigan cases and an Indiana case.6

The weight of authority is with King v. Pillsbury.7 The view of the matter taken by the great majority of the courts is pointed out in Richardson v. Thorpe.8 "If the words are capable of being used in the sense charged in the innuendo the question whether or not they were so used is for the jury; for notwithstanding whether they are capable of that construction is a question of law, whether that was the sense in which they were used was for the jury as a question of fact." It is quite clear that as a general rule in this country where the language of the alleged libel or slander is ambiguous and capable of two meanings, one defamatory and one innocent, the whole matter will be left to the jury, unless extrinsic evidence is introduced to show that one or the other meaning should be taken, in which case the court will determine whether such interpretation would be a reasonable one under the circumstances. This appears to be the rule in New York also.9

The rule that alleged libelous and slanderous words should be given a reasonable construction and meaning, in accordance with the generally accepted significance of the words under the particular circumstances of each case, has an interesting history. The first

5116 (Iowa) 522 (1904).
873 N. H. 532
rule we have on the subject was that of mitiori sensu, i.e., that, where an innocent meaning could possibly by any gymnastics of reasoning be put upon the words, that innocent meaning should be the proper one to attach to them. Here are a few examples of the rule of mitiori sensu: "Bear witness, mistress, that he hath stolen my hair cloth." This was held not actionable, for there was no direct affirmation of stealing. "Thou art a lewd fellow; thou didst set upon me by the highway, and take my purse from me; and I will be sworn to it." Held, not actionable, for there is no charge of robbery or felony, for the defendant might have taken the purse in jest or for some other cause. "You have committed burglary in breaking his house and stealing his goods." Held, not actionable, for breaking a house may be a trespass and not a felony.

The rule of mitiori sensu broke down during the latter part of the seventeenth century and the tendency of the courts then was to interpret alleged libellous language in malam partem. This is illustrated by the remarks of Lord Holt in the case of Baker v. Pierce. "Where words tend to slander a man and take away his reputation, we should be for supporting actions upon them for it tends to preserve the peace." Out of this conflict of theory has come the present rule of reasonable interpretation. The reason for this change is best summed up by the court in Bloss v. Tobey. "Judicial opinions as to the manner of construing alleged libellous words have varied at different times. At one time before the period of Lord Holt words were to be taken in mitiori sensu, afterwards in malam partem where the sense would bear it. This, it was said, was because men were litigious in the first period and the court thought proper to discourage actions for slander and in the second because men's tongues were ill governed and it was proper and necessary to restrain them. * * * Out of the conflicting opinions of the two periods, before spoken of, during one of which the decisions took their cast from the desire of discouraging, and during the other of encouraging such suits, has grown the modern practice, which being more just and reasonable, it is to be hoped will be more stable, viz., that words alleged to be defamatory shall be taken in their natural sense and meaning and shall not be distorted to support any particular system."

Harry H. Hoffnagle, '19.

Parent and Child: Liability of a Father for Expense of an Operation on a Child Living Away from Home.—If a minor child lives away from home with its parents' consent and supports itself, upon what theory, if any, may the parents be charged for necessaries furnished

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10Odgers, Libel and Slander, p. 111.
11Burry v. Wright, Yelverton 126 (1609).
14Ld. Rayd. 959 (1724).
15Mass. 320, 327 (1824).
the child by a third person? In Wallace v. Cox, 188 S. W. (Tenn.) 611 (1916), the parents moved out of town; their two daughters remained, residing at the Y. W. C. A. and earning their own living. One of the daughters was taken sick, and in a telephone conversation the father gave consent to the other daughter to have a minor operation performed, he not believing that an incision was necessary nor knowing the name of the plaintiff surgeon. The father’s consent was not communicated to the surgeon until after he had performed a serious operation, an incision being necessary. The surgeon testified that he looked to the defendant parent for his pay. The Tennessee court held that there was no emancipation sufficient to relieve the parent, and that the law implied a promise on his part to pay for the operation.

As to the nature of the emancipation of a child by which a parent is freed from liability for necessaries furnished the child, there are conflicting views. In Porter v. Powell,1 similar on its facts to the principal case, the court defined emancipation to include four separate elements, namely, (1) care, (2) custody, (3) control and (4) service. Freedom from all of these would be a general emancipation, but freedom from only a part of these parental rights would be a limited emancipation. A parent having these several rights may waive one without waiving another. Freedom from service does not waive the right to care, custody and control, so far as the same can be exercised consistently with the right waived. The Iowa court said: “The obligation of parents to support their minor children does not arise alone out of the duty of the child to serve. If so, those who are unable to render service because of infancy, sickness, or accident—who, most of all others, need support—would not be entitled to it.” Similarly, it has been held recently in Minnesota2 that a father is liable on an implied promise for an operation on an infant son who is working, receiving and spending his own wages and paying his board at home. The reason given is that complete emancipation cannot be inferred from the fact that the parents assented that their infant son should hire out and collect and spend what he earns. That a minor child should leave home for temporary employment, even though he might receive the proceeds for his own use, is not so uncommon an occurrence as to authorize an inference of any change in the ties that bind parent and child.3 The test to be applied to determine whether there has or has not been emancipation to relieve a parent from liability for necessaries furnished his child is that of the preservation or destruction of the parental and filial relations.4 In an early Connecticut case5 the court said: “whatever might be the effect of such an agreement, as between the son

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179 Ia. 151 (1890). See also Cooper v. McNamara, 92 Ia. 243 (1894); Dunks v. Grey, 3 Fed. 862 (1880); Kubic v. Zemke, 105 Ia. 269 (1898).

279 Iowa 151, 157.

3Lufken v. Harvey, 131 Minn. 238 (1915).

4Searsmont v. Thordike, 77 Me. 504 (1885).

5Lowell v. Newport, 66 Me. 78 (1876).

6Torrington v. Norwich, 21 Conn. 542 (1832).

7At page 548.
on the one part, and the parent, or other person, on the other, respecting the personal right of the son to retain or recover his earnings, in his own name, and for his own benefit, it does not release a child from the authority and control of the parent, nor the parent from the duty of maintaining and protecting the child. It neither destroys nor impairs the previous subordinate relation which the child sustained towards the parent, as a member of the family. Where a parent consents that a minor child may support itself, still, according to these views, for necessaries furnished the child the parent may be bound on a promise implied by law.\(^8\)

There are, however, contrary views. Of course, in those jurisdictions holding broadly that there is no common law duty on a parent to support a child, the parent would not in any event be liable on a promise implied by law for necessaries furnished the child by third persons.\(^9\). In a Missouri case,\(^10\) a minor son was given the right to his own earnings and the parent allowed him to leave home. He went to Oregon to work for himself. There he was taken ill. He told his doctor that he thought he could get money from his father to pay the doctor's fee. The father later wrote to the hospital, asking that the son be given attention and that he would send money. In an action against the father for the doctor's services, however, the court held that the father was only morally but not legally bound to pay the doctor for services rendered the son. The court said\(^11\) that "where the child who is physically and mentally able to take care of himself, has voluntarily abandoned the parental roof and turned his back to its protection and influence, and has gone out to fight the battle of life on his own account, the parent is under no obligation to support him." Where a minor daughter, living away from home with consent and supporting herself, purchased necessaries, without which she had not enough to make herself comfortable, an Illinois court held\(^12\) that the parent had a technical defense to an action for the goods sold the daughter; an express promise, or circumstances from which a promise may be inferred, would have to be proved before the parent was liable. In a recent North Carolina case\(^13\) an eighteen year old son was permitted to leave home to work for himself and receive and spend the earnings of his own labor. Upon such a state of facts the father was held to have released his parental control and was not liable for the care and maintenance of his child. It has been held that where an infant is only a few miles from home and is not in imminent peril,\(^14\) or there is no emergency,\(^15\) the father is not liable for necessaries furnished the infant. In an early New York case\(^16\) a father consented to his son's

\(^{8}\)DeWane v. Hansow, 56 Ill. App. 575 (1894).
\(^{9}\)Kelly v. Davis, 49 N. H. 187 (1870); Gordon v. Potter, 17 Vt. 348 (1845).
\(^{10}\)Brosius v. Barker, 154 Mo. App. 657 (1911).
\(^{11}\)At page 663.
\(^{12}\)Gotts v. Clark, 78 Ill. 229 (1875).
\(^{13}\)Holland v. Hartley, 171 N. C. 376 (1916).
\(^{14}\)Sassaman v. Wells, 178 Mich. 167 (1913).
\(^{15}\)Cooper v. McNamara, supra, note 1; Luikin v. Harvey, supra, note 3.
\(^{16}\)Johnson v. Gibson, 4 E. D. Smith (N. Y.) 231 (1855).
going to California and paid his fare, but the son received his own earnings and supported himself while away. The father was held not liable for necessary medical attention furnished the son during an illness. This case has been approved in an Appellate Division case where a minor sued for injuries received in the employ of the defendant company. The court held that the plaintiff, although a minor, was receiving his own wages and paying his own expenses, so that there was an emancipation by his parents, and he could recover damages on account of money expended for medical attendance and hospital charges, for they were his liabilities. In this latter group of cases, therefore, are shown circumstances under which there is no legal liability on a parent for necessaries furnished a child who is self-supporting.

From a consideration of the cases it would seem that the following facts might well be considered in determining whether a father can be held on an implied promise for necessaries furnished a partially emancipated child: (1) the nature of the emancipation (i.e., has there been freedom from services only, and not from care, custody and control?); (2) the exigencies of the situation in which the child has been placed (sickness is the typical case); (3) the distance the child is from the parent; (4) the sex and age of the child; and (5) the child's earning power. The Minnesota court grasped the situation when it said: "We think a gift to the son of his wages has about the same bearing upon the liability of the parent for necessaries that a gift of any other money would have." As stated in the principal case, the modern tendency among young men and women, not yet of full age, to earn a living frequently gives occasion for absence from home, and that fact should not readily be held to deprive them of a claim to support in time of need.

H. R. Lamb, '18.

Quasi-contract: Recovery by a Putative Wife for Services.—On September 20, 1913, W. W. Hinshaw attempted to unite in the bonds of matrimony with Mrs. K. O. Sanders although he already had a lawful wife. The second "Mrs. Hinshaw" occupied herself with the usual duties of a housewife until Hinshaw's death in 1915. At that time, she first learned of the existence of the other Mrs. Hinshaw. Upon discovering the true state of affairs, she sued Hinshaw's estate to recover compensation for the services she had rendered him, and also to recover the two hundred dollars she had presented to him to build a home. In Sanders v. Ragan, 90 S. E. (S. C.) 777 (1916), the court held she might recover though the benefits were conferred without expectation of remuneration.

The action in a case such as this may be brought either upon the theory of deceit or of quasi-contract. It is unquestionable that "Mrs. Hinshaw" had a good cause of action against Hinshaw in deceit before his death. Did this cause of action survive as an

18 In Lufkin v. Harvey, supra, note (3), at page 242.
action *ex delicto* which had enriched Hinshaw's estate? Some courts have held that such an action is purely personal, the deceit being the concealment of the incapacity to contract a valid marriage and the resulting damage being the entrance into the supposed marital state; that the essential injury lies in the degradation of the woman and in the mortification and humiliation she undergoes; that this injury is purely personal and the tort action for it does not survive the death of the defendant; and that the fact that she has conferred material benefits upon him in her supposed capacity as wife is merely an indirect and incidental result of the tort, and it is not sufficient to make the cause of action survive. However, it should be noticed that there are two elements of fraud in the case. There is, first, deceit as to the existence of a barrier to matrimony. This deceit is the means of inducing the plaintiff to enter the supposed state of matrimony. Thereafter, whether by words or by acts, the husband is continually and fraudulently representing that the marriage is valid, that the marital status exists. It is this second fraud that may properly be regarded as the direct inducement to the conferring of benefits. The courts which hold that these benefits are not the direct results of fraud have evidently overlooked this latter element of deceit. That they have done so is indicated by the attempt in *Payne's Appeal* to suggest an analogy between a woman falsely representing herself to be capable of contracting marriage and a woman representing herself to be white, though she were in reality a half-breed. It is very obvious that in the latter case the fraud would be consummated upon marriage, since the marriage would then be valid, though induced by fraud. But in the former case, the marriage is never valid, and the continuous representation that it is good is a continued fraud. In such a case benefits conferred in reliance upon the existence of the marital status are a direct enrichment of the wrongdoer's estate, and the action for them should survive his death.

The action under the circumstances of the principal case may be on the theory of quasi-contract. Quasi-contractual recovery is based upon the unjust enrichment of the defendant at the expense of the plaintiff, and therefore the action survives against the defendant's estate. Hinshaw's estate was unquestionably enriched because of the saving of expense through the services rendered by his victim and because of the money she donated. Was such enrichment unjust? Plainly it was induced by Hinshaw's fraud. When one is induced to act in a certain status, whether by the fraud or constraint of another, one may recover for benefits so conferred upon the other, if the status does not in fact exist. When a negro is induced by fraud to believe he is a slave or is compelled by force to act in that

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2 *Payne's Appeal*, 65 Conn. 397 (1895); Cooper v. Cooper, 147 Mass. 370 (1888); Price v. Price, 75 N. Y. 244 (1878); Grim v. Carr, 31 Pa. St. 533 (1858).

3 *Supra*, note 2.


5 *Hickam v. Hickam*, 46 Mo. App. 496 (1891). Distinguish *Franklin v. Waters*, 8 Gill (Md.) 322 (1849). In that case recovery was denied because the action was in its essence intended to try plaintiff's freedom, and another form was prescribed for such actions.
NOTES AND COMMENT

capacity, he may recover for the services rendered, although he could not recover had both he and his master honestly believed him to be a slave. A man condemned to hard labor under a void judgment may recover the value of his services from the lessee of the prison. When a guardian induces his ward to believe she is a member of his household, although in reality he is charging her estate with her expenses, she may recover the value of her household services. When one induces a railroad to transport goods under the impression it has contracted to do so, it may recover for the service. The majority of cases in which one has been induced by fraud to confer benefits under a supposed marital status follow this rule.

Cooper v. Cooper is the leading case against recovery under such circumstances. In that case the action was in quasi-contract to recover for services. But it is to be remarked that a later Massachusetts case allows recovery for moneys paid under a fraudulently induced belief in a marital status upon the theory that an equitable trust was created. It is submitted that any distinction between services rendered and money had and received is not justifiable. In either case the defendant has knowingly induced the plaintiff to confer upon him benefits to which he was not entitled. The better rule would allow recovery.

Real Property: Easements by Necessity.—The case of Gilfoyl v. Randall, 113 N. E. (III.) 88 (1910), shows that Illinois has come in line with the prevailing view with regard to the implied grant of a right of way when the land of the grantee is entirely surrounded by

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6Peter v. Steel, 3 Yeates (Pa.) 250 (1801).
7Livingston v. Ackeston, 5 Cowen (N. Y.) 530 (1826); Griffin v. Potter, 14 Wend. (N. Y.) 209 (1835); Urie v. Johnston, 3 P. & W. (Pa.) 212 (1831). Distinguish the following slave cases: Alfred v. Marquis of Fitz James, 3 Bap. (Eng.) 3 (1799), in which a negro brought from Martinique to England was not allowed to recover for services while in England in the absence of express contract. It does not appear he was ignorant of the fact that he was free on reaching England; the services may have been entirely gratuitous: Kinney v. Cook, 4 Ill. 232 (1841); recovery for services was allowed here, but the discussion was entirely confined to the question of plaintiff’s freedom; the action was apparently brought to try his freedom: Jarrot v. Jarrot, 7 Ill. (2 Gillman) 1 (1845); recovery for services was allowed, but to be nominal if the master held him in good faith.
8Patterson v. Crawford, 12 Ind. 241 (1859); Patterson v. Prior, 18 Ind. 440 (1862).
9Boardman v. Ward, 40 Minn. 399 (1889).
10Rumsey v. N. E. Ry. Co., 14 C. B. (n. s.) (Eng.) 641 (1863). The holder of an excursion ticket which did not entitle him to the transportation of baggage represented himself to hold an ordinary ticket.
11Hassar v. Wallis, 1 Salk. (Eng.) 28; Fox v. Dawson, 8 Mart. (O. S. La.) 94 (1820); Batty v. Greene, 266 Mass. 561 (1910); Higgins v. Breen, 9 Mo. 497 (1845). Contra, Payne’s Appeal, supra, note 2; Cooper v. Cooper, supra, note 2.
12Supra, note 2.
13Batty v. Greene, supra, note 11.
14Fraud is of course a necessary element of recovery. If both parties acted innocently, no recovery can be had though the status did not exist. Jarrot v. Jarrot, supra, note 7; Livingston v. Ackeston, supra, note 7; Griffin v. Porter, supra, note 7; Cropsey v. Sweeney, 27 Barb. (N. Y.) 310 (1858); Urie v. Johnston, supra, note 7.
that of the grantor and other private owners. In this case the defendant had no access to any road except over the land of the grantor or over the land of others. It was held that a way of necessity over the land of grantor existed here, as well as in cases where the land of the grantee is totally surrounded by the land of the grantor.

This case is in accord with the prevailing view. The early view in Illinois and in Maine was to the contrary. The Illinois case of Kuhlman v. Hecht held that if a party sells land not entirely surrounded by his own, but only adjoining the same, the purchaser acquires no right of way over the remaining land of the grantor, even though it lies between the land bought and the public highway. Gilfoy v. Randall overrules this earlier case. Apparently the only American case in accord with Kuhlman v. Hecht is Trask v. Patterson, an early Maine case, which is now overruled.

Originally the theory seems to have been that it was for the public good that there be an easement over the land of the grantor to a landlocked tenement. The view now is that the necessity does not create the way, but merely furnishes evidence as to the real intention of the parties. It is not to be presumed that one will convey land to another in such a manner that the grantee can derive no benefit from the conveyance. It is evident that if the grantee had no right of way to his land, he could not enjoy it. Therefore, the law presumes that it was the intention of the parties that the grantee should have access to his property over the land of the grantor.

There is no doubt that the theory applies where the grantee's land is wholly surrounded by the land of the grantor. The only question is whether a distinction should be made between this case and the case where the grantee's land is surrounded partly by the land of the grantor and partly by the land of others. It might be

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277 Ill. 570 (1875).

29 Me. 499 (1849).

Whitney v. Cummings, supra, note 1.


Sweezy v. Vallette, Fairchild v. Stewart, Collins v. Prentice, supra, note 1; Brown v. Kemp, 46 Ore. 517 (1905). In Nichols v. Luce, 24 Pick. (Mass.) 102 (1864), the court says: "Necessity is only a circumstance reverted to for the purpose of showing the intention of the parties, and raising an implication of a grant. It is not necessity which creates the way, but a fair construction of the acts of the parties."  

Collins v. Prentice, supra, note 1; Howton v. Frearson, 8 Term Rep. (Eng.) 50 (1798).

Fairchild v. Stewart, supra, note 1.

Brigham v. Smith, 4 Gray (Mass.) 297 (1855).
claimed that in the latter case, the grantee could contract for a right of way over the land of the other private owners. But it is true also that he could contract for a right of way over the land of the grantor in the first case. The courts evidently regard the situation as it exists at the time of the grant, and in either case it is obvious that at this time the grantee could not gain access to and hence use and enjoy his land without trespassing upon the lands of another. Hence, there is no ground of distinction between the two cases, and in both a way of necessity over the land of the grantor should be implied from the grant.

Charles V. Parsell, Jr., '17.

Real Property: Tenancy by the Entireties: Status in the United States.—The case of the Matter of Village of Holcomb, 97 Misc. (N. Y.) 241 (1910), holds that both husband and wife in a tenancy by the entireties are "freeholders" under a statute requiring the consent of a certain number of freeholders for the incorporation of a village. Recent decisions are constantly calling to the attention of the profession the conflict between the common law theory of tenancy by the entireties and the independent situation of women under the Married Women's Acts. Because of this conflict, it may be of interest to collect the authorities which show the status of the estate by the entireties in the various American jurisdictions and in England.

Frederic M. Hoskins, '19.

1 See, for example, Wright v. Knap, 150 N. W. (Mich.) 315 (1915); Demerse v. Mitchell, 154 N. W. (Mich.) 22 (1915); Matter of Klatzcl, 216 N. Y. 83 (1915); Matter of Goodrich v. Otego, 216 N. Y. 112 (1915); Behl v. Martin, 236 Pa. 519 (1912).

2 England. Estates by the entireties were abolished by the Married Women's Acts, and husband and wife now take as joint tenants or as tenants in common. Thornley v. Thornley, 1893 L. R. 2 Ch. Div. 229.

Alabama. Inasmuch as the Married Women's Acts have destroyed the common law unity of husband and wife, estates by the entireties are abolished and husband and wife take as tenants in common. Donegan v. Donegan, 103 Ala. 488 (1893).

Arizona. There seems to be no actual decision in point, but secs. 3848, 3850 of the Civil Code provide that land acquired by either spouse or by husband and wife after marriage, with some exceptions, shall be community property, thereby providing a substitute for and abolishing entireties.

Arkansas. A conveyance to husband and wife makes them tenants by the entireties and the survivor takes the whole. The Married Women's Acts did not modify the estate by entireties. McWhorter v. Green, 111 Ark. 1 (1914).

California. Husband and wife hold community property in this state and the common law doctrine of entireties was never in force here. Husband and wife may hold as joint tenants, tenants in common, or community owners. Civil Code, secs. 161, 164; Swan v. Walden, 156 Cal. 195 (1909).

Colorado. The common law applies in Colorado where there is no statutory provision to the contrary. Mill's Ann. Statutes, sec. 6992. There being no statutory provision to the contrary, and in the absence of judicial decision, it would seem that entireties still exist.

Connecticut.—The doctrine of entireties was never adopted in this state, but the circumstances ordinarily creating such an estate create a joint tenancy. Whittlesey v. Fuller, 11 Conn. 335 (1836). But the effect of an estate by the entireties may be created by a limitation to the husband conditionally on his surviving
his wife, and to the wife conditionally on her surviving her husband, and to both for their joint lives. Bartholomew v. Muzzy, 61 Conn. 387 (1892).

**Delaware.** The estate by entitites exists as at common law and was not modified or affected by the Married Women's Acts. Kunz v. Kurtz, 8 Del. Ch. 404 (1899).

**District of Columbia.** Estates by the entitites exist as at a common law and were not affected by the Married Women's Acts. Flaherty v. Columbus, 41 D. C. App. Cas. 525 (1914).

**Florida.** Estates by the entitites exist as at common law and were not affected by the Married Women's Acts. English v. English, 66 Fla. 427 (1913).

**Georgia.** It would seem that entitites were abolished in Georgia by secs. 3722 and 3723 of the Georgia Code which make all joint tenancies tenancies in common; but survivorship is allowed the husband in land deeded, jointly to him and his wife. Scott v. Causey, 89 Ga. 749 (1892).

**Idaho.** The common law estate by the entitites does not exist; all property acquired after marriage not within secs. 2676, 2679 of the Rev. Codes is community property. Kohny v. Dunbar, 21 Idaho 258 (1912).

**Illinois.** Estates by the entitites were abolished by the Married Women's Acts, and husband and wife hold as tenants in common, unless it is expressed that they are to hold as joint tenants, and even in joint tenancies, survivorship is abolished. Cooper v. Cooper, 76 Ill. 57 (1875); Lawler v. Byrne, 252 Ill. 194 (1911).

**Indiana.** An estate by the entitites is created by a conveyance to husband and wife, unless a contrary intent is expressed. Richards v. Richards, 60 Ind. App. 34 (1915).

**Iowa.** The common law estate by the entitites does not exist, because of a statute making all joint tenancies tenancies in common. Bader v. Dyer, 106 Iowa 715 (1898).

**Kansas.** Estates by the entitites do not exist under a statute abolishing all joint tenancies, for entitites are construed as a form of joint tenancy. Stewart v. Thomas, 64 Kan. 511 (1902).

**Kentucky.** If, in a conveyance to husband and wife, a survivorship is provided for, under sec. 2143, Ky. Stat., they take an estate by the entitites. If no survivorship is provided for, they take as tenants in common. City of Louisville v. Coleburne, 108 Ky. 420 (1900).

**Louisiana.** Real property which at common law would be held by the entitites is common or community property in Louisiana. Civil Code, secs. 2334, 2402.

**Maine.** Husband and wife take only as tenants in common, the Married Women's Acts having destroyed the common law estate by entitites. Appeal of Robinson, 88 Me. 17 (1895).

**Maryland.** The common law estate by the entitites still exists and was not affected by the Married Women's Acts. Marburg v. Cole, 49 Md. 402 (1878).

**Massachusetts.** The common law estate by the entitites is created by a conveyance to husband and wife as such, unless a contrary intention is expressed in the conveyance. Hoag v. Hoag, 213 Mass. 50 (1912); Woodard v. Woodard, 216 Mass. 1 (1913).

**Michigan.** The common law estate by the entitites is created by a conveyance to husband and wife, and divorce does not affect the nature of it. Appeal of Lewis, 85 Mich. 340 (1891). However, the original rule as to divorce has been changed by a statute which makes them tenants in common in case of divorce. Howell's Michigan Statutes, sec. 11497.

**Minnesota.** Estates by the entitites never existed in this state and husband and wife take as tenants in common, unless declared to take as joint tenants. Semper v. Coates, 93 Minn. 76 (1904).

**Mississippi.** A conveyance to husband and wife creates a tenancy in common unless it is declared an “entitity” or “joint tenancy”, under Mississippi Code of 1906, sec. 2770. Conn v. Boutwell, 101 Miss. 335 (1911).

Montana. The estate by entireties would seem to be abolished by a statutory provision providing that husband and wife or several persons to whom a conveyance is made shall hold in common, unless the conveyance is expressly declared to be to them as partners or joint tenants. Civil Code, secs. 4438, 4441.

Nebraska. The common law doctrine of entireties was never in force in this state, because the unity of husband and wife had been destroyed. They take as tenants in common or as joint tenants. Kerner v. McDonald, 60 Neb. 663 (1900).

Nevada. With some exceptions, lands acquired after marriage by husband and wife are community property, which, being a substitute for entireties, abolishes it. Rev. Laws of 1912, sec. 2156.

New Hampshire. A conveyance to husband and wife creates a tenancy in common, unless expressly declared to be a joint tenancy, for entireties were abolished by the Married Women's Acts. Clark v. Clark, 56 N. H. 105 (1875).

New Jersey. The rights of husband and wife as tenants by the entireties were modified by the Married Women's Acts, so that the estate now amounts in its essential features to a tenancy in common for the joint lives of the two, with remainder to the survivor. Schulz v. Ziegler, 80 N. J. Eq. 199 (1912).

New Mexico. Husband and wife may hold as joint tenants, tenants in common, or as a community. New Mexico Stats., secs. 2756, 2764. It is generally held in states having community property that entireties do not exist, for the community system is a substitute for entireties.

New York. A husband and wife take an estate by the entireties unless the contrary is expressed; but they are considered as tenants in common regarding the use and profits of the land for their joint lives. Bertles v. Nunan, 92 N. Y. 152 (1883); Stelz v. Shreck, 128 N. Y. 263 (1891); Hiles v. Fisher, 144 N. Y. 306 (1895); Price v. Pestka, 54 App. Div. (N. Y.) 59 (1900); Matter of Klatzl, 216 N. Y. 83 (1913); Smith v. Russell, 172 App. Div. (N. Y.) 793 (1916).

North Carolina. Tenancy by the entireties exists as at common law. A divorce changes such an estate into a tenancy in common. McKinnon v. Caulk, 167 N. C. 411 (1914).

North Dakota. There are no decisions in point, but secs. 5261 and 5265 of the Compiled Laws of 1913 limit the estates, held by several persons, to partnerships, joint tenancies, and tenancies in common, thereby seeming to exclude entireties.

Ohio. Survivorship in joint tenancies was abolished by statute, and no exception with respect to joint estates held by husband and wife exists, so that entireties are abolished. Wilson v. Fleming, 13 Oh. 68 (1844).

Oklahoma. Estates by the entireties never existed in this state and husband and wife take as tenants in common, unless stated to take a joint tenancy. Helvie v. Hoover, 11 Okla. 687 (1902); Hamra v. Fitzpatrick, 154 Pac. (Okla.) 665 (1916).


Pennsylvania. A conveyance to husband and wife creates a common law estate by the entireties, even though a contrary intention be expressed, the Married Women's Acts not having affected it. Hetzel v. Lincoln, 216 Pa. 60 (1906); Alles v. Lyon, 216 Pa. 604 (1907); Bleas v. Anderson, 241 Pa. 198 (1913).

Rhode Island. A conveyance to husband and wife, unless expressly declaring them to take by joint tenancy or providing for a survivorship, creates a tenancy in common. General Laws of R. I., Title 26, Chap. 252, sec. 1.

South Carolina. A conveyance to husband and wife will create a tenancy in common, unless it is otherwise specified; that is, they will take an estate by the entireties if a survivorship is provided for. Green v. Cannaday, 77 S. C. 193 (1907).
Sales: Risk of Loss when Vendor Retains Title as Security for Performance by Vendee.—In Rylance v. Walker Company, 99 Atl. (Md.) 597 (1910), it was held that the loss fell upon the vendor. The vendee ordered seventy coils of bolt rope to be shipped to Baltimore. The vendor had the bill of lading made out to "his order" and sent the same, properly indorsed by him, with a draft for the price of the rope attached, with directions to "turn over the bill of lading" to the buyer upon payment of the draft. The goods were shipped and the vendee notified of their arrival at Baltimore. The vendee refused to pay the draft, unless he could deduct therefrom a certain amount which he claimed to be due him by virtue of a former similar transaction. Because of the delay thus caused, the dock authorities stored the goods in a United States bonded warehouse, where they were subsequently destroyed by fire. Neither party had exercised any acts of ownership over the rope after its arrival at Baltimore.

The Court of Appeals of Maryland, having regard to section 43 of article 83 of the Maryland Code, which is identical with section 32 of the Uniform Sales Act, providing that "where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery," held that the vendor retained both the possession of, and the property in, the goods, and that there was no evidence

South Dakota. The Civil Code of 1913, sec. 101, provides substantially that the husband and wife may hold property as joint tenants or tenants in common, but makes no mention of entireties. The reasonable construction of this section in the absence of judicial decision would seem to be that entireties do not exist.

Tennessee. A conveyance to husband and wife cannot create a tenancy in common, but creates an estate by the entireties, which exists as at common law, unmodified by the Married Women's Acts. Blennett v. Hutchins, 133 Tenn. 65 (1915).

Texas. Husband and wife hold community property in this state; and, where community property is provided for, it is commonly held that entireties do not exist. Vernon's Sayles' Tex. Civ. Statutes, Art. 4622. Each spouse, in a conveyance to the husband and wife, takes an undivided share unless it falls within the community acts. Bradley v. Love, 60 Tex. 472 (1883).

Vermont. Estates by the entireties exist as at common law. Brownson v. Hull, 16 Vt. 399 (1844); Corinth v. Emery, 63 Vt. 505 (1891).

Virginia. Estates by the entireties are not created by a conveyance to husband and wife, unless a right of survivorship is provided for. Virginia Code, secs. 2430, 2431.


West Virginia. Husband and wife do not take an estate by the entireties, but as joint tenants, in a conveyance to them of an estate of inheritance. McNeeley v. South Penn Oil Co., 52 W. Va. 616 (1903). But if the estate granted is only a life estate, they take by entireties and the survivor takes the whole for the balance of his or her life. Irvin v. Stover, 67 W. Va. 356 (1910).

Wisconsin. The common law estate by the entireties does not exist in this state, and a conveyance to husband and wife, therefore, creates a joint tenancy. Bassler v. Rewoldinski, 130 Wis. 26 (1906).

to show that he reserved the property merely to secure performance of the contract by the buyer; and that, therefore, the loss fell upon the seller. Does this decision conform with the intended construction of the Sales Act?

As to the risk of loss, there is the accepted general rule that the risk follows the title. It is seen, however, that, regarding retention of title as security for performance by the vendee, this general rule is subject to two marked exceptions; first, in what are known as conditional sales, and, secondly, in shipments under bills of lading made out to the vendor himself or to his order.

Under conditional sales the vendee immediately gets the beneficial use and all enjoyment, as if he had bought the article outright and given a mortgage back to the vendor, in which case it is clear that the risk is upon the vendee. The consideration in such sales is paid for the delivery of the goods, with the right to acquire title by payment, so that although the subject of the sale is destroyed before title passes, the vendee has acquired all he has a right to and is liable for full payment of the price. The vendor has done all that he is obliged to do. This point has been subject to considerable discussion but the weight of authority seems to uphold the rule stated above and to place the risk of loss upon the buyer.

This principle applies also to sales in which title has been reserved in the vendor by means of the bill of lading. In conditional sales the title is expressly reserved; in the bill of lading cases the title is impliedly reserved by the form of the bill. The effect is the same in both cases,—upon the payment of the price agreed upon the vendee may acquire title. The beneficial interest in the goods vests in the buyer upon shipment. If in the meantime the goods enhance in value, such increase will be to the benefit of the buyer. So, also, if the value were to decrease, or the goods be totally destroyed, such loss should fall upon the buyer. The shipment is upon his order and for his sole benefit, and the risk of loss in such cases must also be his.

In England it will be noticed that the Sale of Goods Act does not expressly cover the facts of this case, but the common law sustains the view expressed above. Browne v. Hare is a case of very similar facts. There was a sale of ten tons of oil to be shipped “free on board” at Rotterdam. Part of the oil was shipped according to the contract and the bill of lading made the oil deliverable to “shippers’ order.” The vendor indorsed the bill to the vendee and forwarded it with a bill of exchange drawn on the vendee. On the following

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1 Terry v. Wheeler, 25 N. Y. 520 (1862).
2 Williston, Sales, p. 458.
3 American Soda Fountain Company v. Vaughn, 69 N. J. L. 582 (1903); La Valley v. Ravenna, 78 Vt. 152 (1904).
4 Chicago Railway Equipment Company v. Merchants’ Bank, 136 U. S. 268 (1889); Jessup v. Fairbanks, Morse & Co., 38 Ind. App. 673 (1906); American Soda Fountain Company v. Vaughn, supra, note 3; La Valley v. Ravenna, supra, note 3; Whitlock v. Auburn Lumber Company, 145 N. C. 120 (1907); Burnley v. Tufts, 66 Miss. 48 (1888).
5 3 H. & N. (Eng.) 484 (1858).
night the ship was wrecked, and the oil lost. The court made the distinction between the beneficial interest in the buyer and the mere title for security in the seller, and held the risk of loss to be upon the buyer.6

The New York decisions are in accord with the view expressed above, holding the buyer liable for loss when title is reserved merely as security. In Farmers' and Mechanics' Bank v. Logan7 the facts were similar. The court made the same distinction as to the beneficial interest and stated that, as any benefits arising in the meantime would fall upon the buyer, so too must any loss fall upon him. In the case of the National Cash Register Company v. South Bay Association the court, upon the destruction of a cash register sold under a conditional sale and before payment, held that "the plaintiff had nothing further to do; the title was retained merely as security for the unpaid purchase." Loss was placed upon the buyer.9

It is clear, therefore, that the Sales Act is declaratory of the common law, that where title is retained as security only the risk of loss is upon the buyer, the basis of such theory being that such transaction is in effect a sale with a mortgage given back. The risk should logically be upon the one holding the beneficial interest rather than the bare legal title. The Sales Act has expressly provided for it, and, apart from the statutes, the weight of authority supports the same result.

Although the holding in the case here in question may be justified by virtue of the conflict of authority, it seems that the court too hastily dismissed the question by saying that there was no evidence to show that title was retained merely as security. What other object could possibly have been in view? The vendor's instructions were to turn over the bill of lading upon payment of the draft, thus clearly and almost conclusively indicating that reservation was merely for security. It is clear that the vendor would have given title upon performance by the vendee, namely, payment. In section 20 of the Uniform Sales Act is found another clear statement which would seem to apply to this case. That section states that "where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer upon shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract." It seems, therefore, that the holding in the principal case is contrary to the intended construction of the Sales Act and that the loss should have fallen upon the buyer.

Wayne C. Selby, '18.

6See also Mirabita v. Imperial Ottoman Bank, L. R. 3 Exch. D. (Eng.) 164 (1878).
774 N. Y. 568 (1878).
864 Misc. (N. Y.) 125 (1909).
9Accord, Comer v. Cunningham, 77 N. Y. 391 (1879).
Torts: Duty of One Repairing Automobiles to Look Out for Passing Cars.—In the recent case of *Humes v. Schaller*, 99 Atl. (R. I.) 55 (1916), the proof was that the plaintiff had got out of his automobile which had been stopped on a country highway, and was directing his attention to a punctured tire. He did not anticipate and guard against being hit by any passing cars. As a result of the careless driving of the defendant he was hit by the latter's car, although there was ample room to pass. The court held that the law does not require one in a situation of this kind to “anticipate and guard against being run over by an auto, having ample room to pass. In other words, that the law does not require an ordinarily prudent man to expect such carelessness.” The question was whether any care at all is required of one in the position of the plaintiff. A similar case is *Boick v. Bissell*, in which a teamster, who had seen the defendant approaching, was struck while engaged in binding on his load. It was held in this case that, as a matter of law, there was no negligence on the part of the plaintiff, and the case was sent to the jury. The attitude of the court was the same in *Nead v. Roscoe Lumber Company*, where the plaintiff was struck and injured by a passing wagon, while his horse was at a watering trough, and he stood three or four minutes engaged in tightening the cover at the rear of the cart, without looking behind him. In these cases the care imposed on the plaintiff would seem to be practically none at all, and it is to be asked if this is entirely reconcilable with the decisions holding that persons working or standing in city streets are required to use reasonable care under the circumstances. In a recent New York case a photographer, who stood on the curb of the street, taking a picture, with his head covered with a focussing cloth for five minutes, was held to be guilty of negligence as a matter of law, which precluded him from recovering for injuries received when a vehicle ran into him. As in the case in hand, the plaintiff used no care, depending upon the carefulness of the defendant in avoiding him. It seems that there is some analogy between a man thus standing with his head covered, so as not to see the defendant, and a man standing in the highway, looking down, regardless of passing cars. The one, devoting his entire attention to taking a picture, deliberately blinds his eyes; the other, devoting his entire attention to fixing a tire, theoretically blinds his eyes, so far as any other use is contemplated. In regarding the relative safety of their positions, that of the photographer was apparently the safer. In each case the plaintiff used no care, depending entirely upon that of the defendant. Does it not seem slightly irreconcilable that in one case the plaintiff’s lack of care barred his

180 Mich. 260 (1890).
3And see Kathmeyer v. Mehl, 60 Atl. (N. J.) 40 (1905).
5*Mastin v. The City of New York*, 201 N. Y. 81 (1911).
action, whereas in the other care was not required? In Lyons v. Avis, the jury were charged that it was the duty of one using the street for the purpose of mixing mortar and filling his hod with the same to use diligence, especially in looking out for teams. Here again some care is required as a matter of law, the question only going to the jury as to whether sufficient care was used. And so in other cases of a similar nature some care is required.

The only possible distinguishing feature appears to be that in a country road danger is less likely to exist, and that the care of an ordinarily prudent man would be very slight or practically negligible. But that the care of a reasonably prudent man should be less upon a country highway than in a crowded city street does not justify a holding that no care at all is to be required on the country road. The great extent of automobile traffic would seem to require of anyone standing in a road at least slight care regarding the movements of vehicles in the road.

L. W. Dawson, ’19.

Tort: Mutilation of a Will.—In the case of Dulin v. Bailey, 90 S. E. (N. C.) 689 (1916), the plaintiff brought an action in tort, alleging that after the death of one W. A. Bailey, the defendants conspired to deprive the plaintiff and others of the benefits of the decedent’s last will, by removing from the will the clause providing for the legacy to the plaintiff and the others and substituting other provisions for it. As a result a former will was admitted to probate. The plaintiff did not seek to attack the will thus admitted to probate, or to probate the will which she alleged to be a subsequent will, nor was she seeking to recover anything from Bailey’s estate; she brought an action of tort against those who has so altered and defaced the will as to deprive her of her legacy. The plaintiff alleged in her complaint that she did not attempt to establish the second will because she could not prove the entire contents thereof, as she would be required to do, under the rule obtaining in that state, in order to admit the will to probate. The court held that a demurrer to this complaint should have been overruled, citing two old English cases. The court further based its decision on the broad ground that the plaintiff, not being able to establish the entire contents of the destroyed will and therefore unable to prove it, should be allowed to recover of the defendants for the wrong done by the conspiracy and destruction of the clause in the will providing for a legacy to the plaintiff, and to recover as damages the amount of the legacy of which she was deprived.

Cases of this sort are extremely rare, probably because any alteration of an instrument by a third person is a mere spoliation and has

66 Hartfield v. Roper, 21 Wendell (N. Y.) 615 (1839); Barker v. Savage, 45 N. Y. 191 (1871); Williams v. Grealy, 112 Mass. 79 (1873); Dimuria v. Seattle Transfer Company, 50 Wash. 633 (1908).
67 In re Hedgepeth, 150 N. C. 245 (1909).
no legal effect whatsoever; and, in like manner, the alteration or mutilation of a will by a third person without the testator's consent is deemed a spoliation and is of no legal effect and the contents of the obliterated portion may be proved by extrinsic evidence.

Moreover, when the spoliation could be proved, an interested party would be more anxious to have the instrument corrected than to recover against the wrongdoer.

The English cases cited hardly seem precedents for the holding in this case. In the older of the two, *Tucker v. Phipps*, the action was against the executor for a legacy. It was claimed and admitted that the executor had suppressed the will so that it had never been probated; and because of this suppression, the plaintiff was allowed to recover the legacy, although the usual rule was not to allow a suit for a legacy against an executor before the probate of the will.

In the other case, *Barnesley v. Powel*, the plaintiff by a decree in chancery was released from the probate of a forged will, the probate having been obtained by fraud.

There is a Massachusetts case, *Thayer v. Kitchen*, almost directly in point. In this case the plaintiff sued in tort, claiming that the defendant had suppressed or destroyed the will of one Rolland, by which the plaintiff had been left a large legacy. It was held that the plaintiff had no cause of action in tort, even granting the truth of his allegations, for the reason that the probate court had power to pass upon all matters relating to wills, and because its decrees were binding on all other courts; but more especially because by statute it was provided that one who concealed a will should be confined until he produced or accounted for it; and if the probate court found that he had concealed a will, he was further made liable to a person for any injury which that person might have sustained through his failure to produce the will.

The court held that no remedy besides the statutory one could be given, saying, "Other relief will be refused where plain and adequate statutory redress is available."

Because of this statute, *Thayer v. Kitchen* cannot be said to be absolutely contra to the principal case. The decision in the principal case seems correct on the ground stated by the court: "Even if there had been no precedent, it would seem that, upon the principle of justice that there is 'no wrong without a remedy', the plaintiff is entitled to maintain this action, if, as she alleges, the defendants conspired and destroyed the subsequent will in which the legacy was left her. If she cannot prove the destroyed will because unable to

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2 Corpus Juris 1233; 36 Cyc. 897; cases there cited.
4 Collagan v. Burns, 57 Me. 449 (1867); Monroe v. Huddart, 79 Neb. 569 (1907); Matter of Gartland, 60 Misc. (N. Y.) 31 (1908); Page, Wills (1st Ed.), sec. 391.
6 Supra, note 2.
8 Supra, note 2.
prove the entire contents thereof, surely she is entitled to recover 
of the defendants for the wrong they have done her by the conspiracy 
and destruction of the will, and the measure of her damages will be 
the legacy of which she was deprived." This may be based upon 
the principle that an intentional doing of an act which is calculated 
to cause damage to another, and which causes such damage, if done 
without just cause or excuse, is an actionable tort. Both in this 
case and in Thayer v. Kitchen, there was not only an act calculated 
to cause damage and actually causing such damage, but the act was 
intended to cause the damage and was besides illegal. The North 
Carolina court has made a new application of the general principle 
stated above; in Thayer v. Kitchen, recovery was refused because the 
plaintiff had failed to establish in a probate court the fact that a will 
had been destroyed, which was a necessary step if he was to have 
an action for damages; but it seems probable that in the absence of 
statute recovery would have been given. North Carolina has a 
statute making the concealment or destruction of a will a misde-
meanor, though this statute was not mentioned in the principal case. 

It would seem that a tort action on the case, as allowed in the 
principal case, would in all cases be sufficient for the protection of the 
legatees; and the action would probably be allowed in all jurisdictions 
where a statute does not interfere, since the general tendency at 
present is to follow the principle laid down above, that the doing of 
an act likely to cause damage, and actually causing such damage, 
is a tort, if done without a good excuse or justification.

An exceedingly nice question, however, arises as to the amount 
and measure of damages. The court in the principal case states 
that "the measure of damages will be the amount of the legacy of 
which she [the plaintiff] was deprived"; but the legacy might not 
have been satisfied, even had the will been proved; for either the 
estate might have been insolvent, or the sum of all the legacies might 
have exceeded the assets of the estate. It would seem that the 
plaintiff, to prove damage, would have to prove the amount of the 
debts against the estate and the amount of each of the legacies; 
and if she could do this, she would have fulfilled the requirements for 
proving the will. This question was not raised in the principal case, 
which arose upon demurrer to the complaint; but the court suggests 
that a heavy burden of proof would rest upon the plaintiff. The 
matter is a difficult one, and it seems doubtful whether in the principal 
case the plaintiff could prove any actual damage.


Torts: Proximate Cause.—An instance of the difficulty encount-
ered in attempting to apply any of the numerous tests for legal 
causation is presented in Perry v. Rochester Lime Company, 219 N. Y. 
60 (1916). In the rear of defendant’s place of business ran the Erie

10Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. D. 598 (1889); Tuttle v. Buck, 
107 Minn. 145 (1909).

11Pell’s Revival of North Carolina of 1908, sec. 3510.
Canal from which the warehouse was separated by a narrow strip of land belonging to the state. Close to the warehouse but upon the public land the defendant maintained an unmarked wooden chest in which it was accustomed to store nitro-glycerin caps. The explosive was put up in small tin boxes, marked "Blasting caps, handle with care," which were packed in larger wooden boxes with loose sliding covers. As a rule the chest was kept locked but it was left open on the day in question. Such storage of explosives without a permit was a violation of city ordinances. Two of the plaintiff's intestate's boy friends, aged twelve and thirteen, were accustomed to play and fish in this locality and, coming there and finding the chest unlocked, abstracted one of the wooden boxes and carried it home. On the next day three boys, the eight year old plaintiff's intestate and the two original wrongdoers, experimented upon their find with the aid of a bonfire, which venture resulted in the violent death of the trio. The court affirms a judgment which denied defendant's liability on the ground that the defendant's wrong, the existence of which the court admits, was not the legal cause of the accident. The standard adopted as the test for causation is the "reasonable foreseeability" rule. It is held that the damage was not such as a reasonable man ought to be expected to foresee as a result of the negligence charged.

Through consideration of a vast number of cases legal scholars have attempted to frame a test by which courts and juries may be guided in tracing the chain of causation in a given instance. Those tests which are most commonly cited by the courts are, in brief, the "foreseeability" rule and the "probable consequence" rule, neither of which is legally sound, although they may serve to set the minds of the court or jury going in the right direction. What force has an instruction to the effect that a negligent person is responsible for "all the damage that a reasonable man ought to foresee as naturally resulting from his act?" Aside from its indefiniteness, this test is inaccurate. Could a defendant be expected to foresee, as a result of the negligent maintenance of a hole in the pavement, that a wagon would be broken as a result of dropping into the hole; that the driver would be dragged over the dashboard and that injuries would result to the driver from exposure during the time required to look up another horse, report the accident and go home? Yet the causal chain seems complete and the court so held.

Like criticism must be made of the "natural and probable consequence rule" which is usually stated thus: "The defendant is liable for all damages which were the natural and probable consequence of his negligence." A probability is something that is more likely than not to happen. As pointed out by Professor Jeremiah Smith, although the chances of a particular contingency's resulting from a negligent act may be only one in ten, yet the defendant would not be exonerated on the ground that his act was not the legal cause of the injury. A further exception to the "probable consequence" test must be made in the case of intentional injuries.

1Ehrgot v. City of New York, 96 N. Y. 264 (1884).
The defendant throws a stone at a group of individuals from a great distance, hoping that he can hit one of them, but not believing that he can possibly throw that far. One of the group is, in fact, injured by the missile. The defendant does not escape liability however improbable the damage may have been.

Professor Joseph W. Bingham submits that the legal duty to exercise care is imposed to the end that certain happenings may be avoided and suggests that the test for proximate cause is whether or not the injury was one of the happenings designed to be avoided. This is, however, merely a statement of the "foreseeability" rule in more inviting form. If a duty is imposed that certain happenings may be avoided, those happenings, as a matter of course, must be able to be foreseen, and we arrive at our starting point. Professor Jeremiah Smith concludes an able article in the Harvard Law Review by proposing that a negligent act is the legal cause of an injury if it was a "substantial factor" in producing that injury. The proposition is too indefinite to be of much value. It, too, is inaccurate when placed under scrutiny. In Miller v. Bammuller the plaintiff who was sitting on a step beside an open cellarway, was kicked by the defendant and fell into the opening which was negligently maintained by the defendant, and received the injuries complained of. It was contended that the maintenance of the cellarway was at least a concurrent cause of the injury, but the court held correctly to the contrary. The opening was a substantial factor in producing the injury but just as certainly was not a legal cause of it.

It is submitted that no standard has been or can be framed to meet the peculiar difficulties that the question presents; that it is for the jury to say in each particular instance whether or not the defendant ought in good conscience to be held for the consequences of his careless behavior without regard to some fallacious test. As a practical matter the jury would probably come to the same conclusion, rule or no rule, and no rule would seem to be preferable to a bad one.

In connection with the principal case, however, the foregoing argument is superfluous. The test used is the "foreseeability" standard, which is really too favorable to the defendant. But, using this standard, it is submitted that the court erred in affirming the judgment for the defendant. The defendant ought to have foreseen that just such a contingency would result from its promiscuous storage of such dangerous material. The predilection of the American boy for carrying off loose articles is too patent for comment. It does not appear that the boys knew the nature of the article at the time of the theft. To the contention that the defendant could not be expected to foresee that the plaintiff's intestate, a playmate, would be blown up, the well-known gregarious tendency of youth should be a complete answer. Although injury to this particular boy could not be anticipated, the defendant was, to borrow Prof. Bing-
ham's expression, an "inchoate wrongdoer" with regard to everyone in the community, and responsible to whomsoever might be injured.

The outstanding fault with the rules regarding legal cause that are in common use is that they are too narrow. Negligence may be the legal cause of an injury that was neither probable nor foreseeable.

*Donald H. Hershey, '18.*