Notes and Comment

Bills and Notes: Guaranty as an Indorsement.—In Mangold & Glandt Bank v. Utterback, 160 Pac. (Okla.) 713 (1916), the defendant executed his note to the Denver-Laramie Realty Company in payment for certain shares of stock. The payee wrote on the back of the note the words “Payment guaranteed. Protest waived”, under which it signed the name of the company, and transferred the note to the plaintiff. At its maturity the defendant failed to pay it and the plaintiff brought suit. The defendant claimed that he was induced to sign the note through certain false and fraudulent representations on the part of the company. The lower court held in favor of the defendant, whereupon the plaintiff appealed, claiming that, as it was a purchaser of the note in due course, the defense set up by the defendant was not available. The appellate court reversed the judgment, holding that the guaranty on the back of the instrument was a commercial indorsement, and the plaintiff a purchaser in due course against whom defenses good between the original parties could not be set up.

It is a fundamental rule in the law of negotiable paper that a bona fide purchaser, or holder in due course, takes free from all defenses good between prior parties of which he had no notice. But whether or not such a writing as that in the principal case constitutes an indorsement that will make the transferee a holder in due course, is a question upon which there is considerable diversity of opinion. The numerical weight of authority is undoubtedly in accord with the principal case. One of the leading cases supporting this view is Dunham v. Peterson, where a guaranty of payment written on the back of a negotiable note and signed by the transferor was held to constitute a commercial indorsement. The court said, "the indorser may enlarge his liability without destroying the right of his indorsee to protection as an innocent purchaser. By waiving demand and notice he changes a conditional liability into an absolute one. * * * He may incur more liability, or less liability, or no liability at all; and yet the purchaser may be an indorsee, and protected as such;" and also, "the only argument against the proposition * * * is that, by expressing the contract of transfer which is always implied from the mere fact of indorsement,

1First National Bank v. Slaughter, 98 Ala. 602 (1892); Poorman v. Mills, 39 Cal. 345 (1870); Yocum v. Smith, 63 Ill. 321 (1872); Comstock v. Hier, 73 N. Y. 269 (1878); see also N. Y. Negotiable Instruments Law, sec. 96.
35 N. D. 414 (1860).
4Daniels seems to think that this is the better view, holding “that the transferor combines the liability of indorser and guarantor.” See 2 Daniels, Negotiable Instruments (6th ed.), sec. 1781.
the negotiator has manifested a purpose to destroy the negotiable character of the paper."

On the other hand there is a very respectable line of cases supporting the contrary view, viz., that such a writing does not constitute an indorsement and that the transferor can be regarded in no other light than as a guarantor. In Central Trust Co. v. Wyandotte First National Bank, the Supreme Court of the United States held that the words, "we hereby guarantee the payment of the within note at maturity," written above the signature of the guarantor, not to be a commercial indorsement, upon the ground that the guaranty fully expressed the contract between the payee of the note and the subsequent transferee, and that such contract, being an express one, could not be converted into an indorsement.

In New York the cases are in conflict. Some have held that a guaranty of payment rendered the guarantor liable to the payee and to every subsequent holder as a joint and several maker. This view seems to have been discarded and the majority of cases now hold in harmony with the view taken by the United States Supreme Court. There are some early cases, however, which seem to support the contrary view.

We find, therefore, two distinct lines of authority, both of which are supported by good argument. The cases in accord with the principal case base their holding on the ground that, when a signature is placed upon the back of a negotiable instrument and words of guaranty of payment and waiver of protest written above it, the signer becomes an indorser with enlarged liability. An indorser, i.e., one who simply writes his name upon the note, is a conditional guarantor, and, therefore, according to these cases, the mere fact that he adds words of guaranty and waiver of protest above his indorsement does not change his character as an indorser, but simply increases his liability from a conditional one to an absolute one. The contrary view is supported on the ground that the guarantor has made a special contract, the terms of which being filled up, fully express the agreement between the parties, and consequently cannot raise an implication of another contract than the one expressed.

The Negotiable Instruments Law does not deal directly with the question but does say that, where a person places his signature upon an instrument otherwise than as maker, drawer or acceptor, he is

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5Omaha National Bank v. Walker, 5 Fed. 399 (1881); Belcher v. Smith, 7 Cush. (Mass.) 482 (1851); Edgerly v. Lawson, 176 Mass. 551 (1900); Tuttle v. Bartholomew, 12 Metc. (Mass.) 452 (1847); Miller v. Gaston, 2 Hill (N. Y.) 188 (1842); Lamourieux v. Hewit, 5 Wend. (N. Y.) 307 (1830); Small v. Sloan, 14 N. Y. Super. Ct. 352 (1857); Brown v. Curtiss, 2 N. Y. 225 (1849); Cooper v. Dedrick, 22 Barb. (N. Y.) 516 (1856); Ireland v. Floyd, 42 Okla. 609 (1914); Snevily v. Ekcl, 1 Watts & S. (Pa.) 203 (1841); Central Trust Co. v. Wyandotte First National Bank, 101 U. S 68 (1879).

6Supra, note 5.

7Hough v. Gray, 19 Wend. (N. Y.) 202 (1838); Prosser v. Luqueer, 4 Hill (N. Y.) 420 (1842).

8See New York cases, supra, note 5.

9Leggett v. Raymond, 6 Hill (N. Y.) 639 (1844); Prosser v. Luqueer, supra, note 7; see dictum in McLaren v. Watson, 26 Wend. (N. Y.) 425 (1841).
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deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. This does not solve the difficulty, however, as the question whether the guarantor has sufficiently manifested his intention still remains unsettled.

W. J. Gilleran, '18.

Contracts: Notice of Acceptance of Offer of Guaranty.—In Northern National Bank v. Douglass, 160 N. W. (Minn.) 193 (1916), the defendants had signed a guaranty promising to pay at maturity all debts owing to the plaintiff by a certain lumber company, provided they did not exceed the sum of $3,000. The debt upon which the alleged liability of the defendants rested was evidenced by a note made out in the name of the plaintiff. The defendants never had received any notice regarding the existence of the debt. The court held that the act of the defendants in signing the guaranty was a mere offer of guaranty, and that they were not bound, because there had never been any notice of acceptance on the part of the plaintiffs.

A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is offered by the guarantor, there must be an acceptance by the other party to complete the contract. The difficulty arises in the attempt to determine what constitutes an acceptance of this offer; whether it is accepted by the doing of the act called for (the giving of the credit, etc.) or whether in addition notice has to be given to the guarantor when the act has been done, so that he may know the extent of his liability. The majority of the American jurisdictions stand for the rule that reasonable notice must be given.

This rule is purely of American origin. No notice was necessary under the English common law. The rule can be traced to a dictum by Chief Justice Marshall in Russell v. Clark, when he said, "Had it been such a contract [of guaranty] it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of their engagements." Later in Edmonston v. Drake there is another dictum by the same judge. "It would indeed be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions (which is an important principle

1 N. Y. Negotiable Instruments Law, sec. 113.
2 Lawson v. Townes, 2 Ala. 373 (1841); McCullum v. Cushing, 22 Ark. 540 (1861); Geiger v. Clark, 13 Cal. 580 (1859); Bushnell v. Church, 15 Conn. 406 (1843); Clafin v. Briant, 58 Ga. 414 (1877); Sears v. Swift & Co., 66 Ill. App. 496 (1896); Milroy v. Quinn, 69 Ind. 406 (1879); Carman v. Elledge, 40 Ia. 409 (1875); German Savings Bank v. Roofing Co., 112 Ia. 184 (1900); Bank of Illinois v. Sloc, 35 Am. Dec. (La.) 223 (1840); DeCremer v. Anderson, 113 Mich. 578 (1897); Hill v. Calvin, 5 Miss. 231 (1834); Taylor v. Shouse, 73 Mo. 361 (1881); Kellogg v. Stockton, 26 Pa. 460 (1857); Acme Manufacturing Co. v. Reed, 197 Pa. 539 (1900); Mayfield v. Wheeler, Geiger Co., 37 Tex. 256 (1872); Wilkins v. Carter, 84 Tex. 438 (1892); Oaks v. Weller, 13 Vt. 106 (1841); Lee v. Dick, 10 Pet. (U. S.) 482 (1836); Adams v. Jones, 12 Pet. (U. S.) 207 (1838); Davis Sewing Machine Co. v. Richards, 115 U. S. 524 (1885).
3 Pope v. Andrews, 9 Car. & P. 564 (1840); Morrell v. Cowan, 7 Ch. D. 151 (1877); Oxley v. Young, 2 H. Bl. 613 (1796).
47 Cranch (U. S.) 60 (1812).
in the law and usage of merchants) if a merchant should act on a letter of this character and hold the writer responsible without giving notice to him that he had acted upon it.” The question was first presented to the court for decision in Douglass v. Reynolds,6 in which Mr. Justice Story said: “A party giving a letter of guaranty has a right to know whether it is accepted and whether the person to whom it is addressed means to give credit upon the footing of it or not.” This doctrine has since been followed by the Supreme Court in Lee v. Dick,6 Davis v. Wells,7 and Davis Sewing Machine Co. v. Richards.8 The legal reason given for the rule is that the so-called guaranty is a mere offer and is not a contract until the party making the offer is notified of its acceptance, when the minds of the parties meet. As was said in Louisville Manufacturing Co. v. Welch,9 “The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; it is deemed essential to an inception of the contract.” It seems proper that the offeror should be notified whether or not his offer has been accepted, that he may know his responsibility, and so regulate his course of conduct toward the principal debtor that he may not suffer loss.

In Massachusetts the rule is thus stated:10 “It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done and in such a case the doing of the act constitutes an acceptance of the offer. Where the promise is in consideration of an act to be done it becomes binding upon the doing of the act, so far that the promisee cannot be effected by a subsequent withdrawal of it, if within a reasonable time afterwards he notifies the promisor.” This is now the rule in that State.11 The federal rule is that the notice of acceptance is necessary for the inception of the contract, while in Massachusetts the doing of the act gives rise to the contract, but, if notice is not given within a reasonable time afterward, the contract is discharged.

A third rule is adhered to in a number of cases.12 These jurisdic-

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6Supra, note 1.
7Supra, note 1.
8Pet. (U. S.) 113 (1833).
9104 U. S. 159 (1881).
11Italics are writer's.
13Lenox v. Murphy, 171 Mass. 370 (1898); Lascelles v. Clark, 204 Mass. 362 (1910); Cumberland Manufacturing Co. v. Wheaton, 208 Mass. 425 (1911).
14London etc. Bank v. Parrott, 125 Cal. 472 (1899); Bank of Newbury v. Sinclair, 60 N. H. 100 (1880); Wilcox v. Draper, 12 Neb. 138 (1881); Lininger & Metcalf Co. v. Wheat, 49 Neb. 567 (1896); Crittenden v. Fiske, 46 Mich. 70 (1881); Powers v. Bumratz, 12 Oh. 273 (1861); Douglas v. Howland, 24 Wend. (N. Y.) 35 (1840); Union Bank v. Coster's Ex'trs, 3 N. Y. 203 (1850); Manry v. Waxelbaum Co., 108 Ga. 14 (1899); Yancey v. Brown, 3 Sneed (Tenn.) 89 (1855); Whitney & Schuyler v. Groob, 24 Wend. (N. Y.) 82 (1840); Smith v. Dann, 6 Hill (N. Y.) 543 (1844); Case & Co. v. Howard, 41 La. 479 (1875); Wadsworth v. Allen, 8 Grat. (Va.) 174 (1851); Smider v. Chinn, 112 Ind. 293 (1887); Platter v. Green, 26 Kan. 252 (1881); Marsh v. Putney, 56 N. H. 34 (1887).
tions, in accordance with the English rule, hold that no notice of acceptance is necessary. The first statement in American courts to this effect was by Cowen, J., in Douglass v. Howland.13 "I am aware that there is a class of cases which hold that under a contract guaranteeing a debt yet to be made by another, the guarantor is not liable without notice that the guaranty has been accepted and acted upon. Indeed, they go further: if notice of accepting the guaranty be not given within a reasonable time no debt whatever arises. I will only say, that these cases have no foundation in English jurisprudence where the adjudications are numerous and clear the other way."

These states place a contract of guaranty upon the same basis as any unilateral contract, in which no notice of acceptance is necessary to create the contract. "The rule as to notice in contracts of guaranty was unknown to the common law, yet it is sought to engraft it on our jurisprudence as a common law doctrine, to attach conditions to the contract of guaranty, which are not applied to other contracts. When a proposition of guaranty of one party is accepted by the other, this makes a complete contract."14 In a number of the decisions upholding the general rule it has been said that the doctrine stated by Cowen, J., has not been followed in New York and is contra to the earlier cases of Stafford v. Low15 and Beekman v. Hale.16 But an examination of these New York cases, referred to as holding that notice is necessary, shows that the supposed offer of guaranty in each one was merely an overture, and not a real offer of guaranty. Later New York cases show that no notice of acceptance is necessary.17

The federal rule is not to be preferred. Notice of acceptance should not be necessary for the inception of the contract. Such a rule may work great hardship in a number of cases. As the offer of guaranty is a mere offer, it may be withdrawn at any time before notice of acceptance. A guarantee could never be sure after advancing the goods or money on the credit of the guarantor, that his notice of acceptance would be received by the guarantor before the guarantor had an opportunity of withdrawing the offer.

Wm. E. Vogel, '19.

Contracts: Restraint of Trade: Agreement Not to Engage in Business, Unconnected with Sale of Business or Plant.—In Pearson v. Duncan & Son, 73 So. (Ala.) 406 (1916), the defendant agreed with a town to discontinue his ice business for a period of five years, or so long as a certain plant should be operated by the town, or by an

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13 Supra, note 12.
14 Wilcox v. Draper, supra, note 12.
15 16 Johns. (N. Y.) 67 (1819).
16 17 Johns. (N. Y.) 134 (1819).
individual as a home plant, and not to associate himself in any way with another individual, firm, or corporation for the purpose of handling ice in the town or adjacent territory. This agreement itself contained no provision for the sale of the defendant's business. It was held that the contract was an unreasonable restraint of trade and void as against public policy.

Usually an agreement not to engage in business is a part of a contract for the sale of the business and is entered into for the purpose of protecting the vendee in the use of that which he acquires. Such an agreement is often one in which a purchaser buys out a competitor; but this is not the situation in the case in question. Here the promise does not buy out a competitor, but simply bought off a possible competitor. There is very good reason for holding such contracts as this illegal, even where they are limited both as to time and place. They are often, as in the Tuscaloosa Ice Manufacturing Co. v. Williams, entered into merely for the purpose of stifling competition and the community loses entirely the output of the plant which goes out of business, a result which is not always contemplated in contracts which involve the sale of a business.

There are at least two important classes of cases involving agreements not to engage in business, unconnected with the sale of a business. One class is where a business man buys off a competitor. The other class is composed of those contracts of employment in which the employee agrees not to engage in a competing business after the termination of his period of service. The courts are more favorable to the second class than to the first and uphold them, when the restraint upon the employee after he has left his employer is no more than is reasonable for the protection of the latter. What is reasonable for the employer's protection depends on the nature and extent of the business involved and the extent of the restriction imposed. Where the restraint is over a territory no greater than that over which the employer's business extends, the contract is valid.

1127 Ala. 110 (1899).

2For a discussion of this question see Clemons v. Meadows, 123 Ky. 178 (1906), where one of two competing hotel proprietors bought off the other, although the principal reason given by the court for holding the contract illegal in this case was that a hotel is a quasi-public business. See also Oliver v. Gilmore, 52 Fed. 562 (1892), and Chapin v. Brown Bros., 83 Iowa 156 (1891). But in Indiana it has been held legal to contract not to deal in liquors, on the ground that it is not against good public policy to discourage the liquor business. Harrison v. Lockhart, 25 Ind. 112 (1865); Studabaker v. White, 31 Ind. 211 (1866).

3It has been held legal for a traveler for lace merchants to bind himself not to travel over certain ground for any other firm in the same trade after the termination of his period of employment with the plaintiff, Mumford v. Gething, 7 C. B. (N. S.) (Eng.) 303 (1859); for a traveling salesman for manufacturers of ink and mucilage doing a very extensive business to contract not to enter the service of any business competitor for three years from such time, Carter v. Alling, 43 Fed. 208 (1890); for a traveler who solicited orders for manufacturers of antiseptics to contract not to solicit orders from those who had been customers of his first employer, Mills v. Dunham, L. R. (1891) 1 Ch. (Eng.) 576; for an assistant to a surgeon and apothecary not to go into a competing business within ten miles of the place where his employer was engaged, Hastings v. Whitley, 2 Exch. (Eng.) 611 (1848), or within seven miles of such place, Sainter v. Ferguson,
Where there are two or more districts named in the contract within which the employee may not engage in a certain line of business, and the restriction is reasonable with respect to one of the districts, but not with respect to the other or others, the court will enforce that part of the contract which restrains him from working in the reasonable area, but not that part which restrains him from working in the other district or districts. A similar rule has been applied where there is a restraint on selling two sorts of articles, which is reasonable as to one but not as to the other. Where the restriction is not merely upon entering a competing business, but upon entering any sort of business without the consent of the employer, the contract is void, even where it is understood that such consent will be given unless the employer deems that the business which the defendant thinks of entering competes with his own.

An agreement to keep out of business which forms part of a contract for the sale of a business should be held valid and not to be an unreasonable restraint of trade, when the restriction is reasonable in extent, on the ground that such restriction is necessary for the protection of the vendee. Likewise a contract by an employee not to engage in a competing business after the termination of his period of employment should be held valid when necessary for the protection of the

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7 C. B. (Eng.) 716 (1849); for an assistant to a surgeon not to practice within ten miles for fourteen years after his period was over, Davis v. Mason, 5 D. & E. (Eng.) 118 (1799), or within twelve miles, Fox v. Scard, 33 Beav. (Eng.) 327 (1863); for an employee of a bank not to enter any other bank within two miles for two years, National Provincial Bank of England v. Marshall, L. R. 40 Ch. Div. (Eng.) 112 (1888); for an attorney's clerk not to engage in a competing business within twenty-one miles for twenty-one years after his period of service with the original employer was over, Dendy v. Henderson, 11 Exch. (Eng.) 194 (1855); and for the apprentice of a linen draper not to engage in a competing business within a half-mile of the plaintiff's house, Chesman v. Nainby, 2 Ld. Raym. (Eng.) 1456 (1726). Contracts of employment have been held to be an unreasonable restraint of trade and void on the ground that the restriction was unreasonably extensive where a town traveler and collecting clerk for a coal merchant agreed not to engage in a competing business for nine months, there being no restriction as to place, Ward v. Byrne, 5 M. & W. (Eng.) 548 (1839); where a clerk and traveling salesman for brewers contracted not to deal in ale brewed at Burton except that made by the plaintiff for two years, Allsopp v. Wheatcroft, L. R. 15 Eq. Cas. (Eng.) 59 (1872); where a canvasser for a clothing and supply store agreed to keep out of that line of business within twenty-five miles of London, Mason v. Provident Clothing and Supply Co., Ltd., L. R. (1913) App. Cas. 724; and where a school teacher contracted not to teach French and German in Rhode Island for one year after he left the school of the plaintiff, Herreshoff v. Boutineau, 17 R. I. 3 (1890). In Sternberg v. O'Brien, 48 N. J. Eq. 370 (1891), the court refused to issue an injunction to restrain defendant from working for a competing house, although the contract with the former employer was legal, on the ground that the defendant, who had been a bill collector for the complainant, could not occasion the latter material damage by working for a competitor.

Contra to the English cases, supra, with respect to a physician's assistant is Mandeville v. Harman, 42 N. J. Eq. 185 (1886), holding that a contract by such an assistant not to practice in a certain city was void, on the ground that the plaintiff, who was very skilful, did not need the protection attempted to be afforded by the contract.

Rogers v. Maddocks, L. R. (1892) 3 Ch. (Eng.) 346.
Perls v. Saalfeld, L. R. (1892) 2 Ch. (Eng.) 149.
employer. But there is no one who merits the protection attempted to be afforded by a contract whereby the promisee simply buys off a possible competitor, and such a contract should be held void even when narrowly restricted both as to time and place.

Charles V. Parsell, Jr., '19.

**Criminal Law: Libel of a Deceased Person.**—In *State v. Haffer*, 162 Pac. (Wash.) 45 (1916), the court sustained a conviction for violation of a statute which provided that "every malicious publication by writing, printing, * * * * or otherwise than by mere speech, which shall tend to expose the memory of one deceased to hatred, contempt, ridicule, or obloquy" should be a misdemeanor.1 The matter complained of was published in the defendant's newspaper and had reference to George Washington.

At common law it was held a crime to intentionally libel a deceased person because of the tendency of such libel to rouse the friends and descendants of the deceased to take revenge and thereby cause a breach of peace. If, therefore, at the time of the publication there was living no person who was born prior to the death of the defamed person and no descendant of the deceased who would be injured by the libel, there was held to be no libel.2 At common law an indictment charging such a crime is defective if it does not aver that there were descendants of the party libeled still living, and that the libel was published with intent to instigate them to a breach of the peace.3

The principal case applies, therefore, a statutory extension of the common law doctrine. Criminal libel is a matter of statute in by far the greater number of American states. Statutes similar to the one in force in Washington have also been enacted in many other states and are consequently capable of the same interpretation. Twelve states have laws couched in substantially the same terms as the Washington statute, making criminal any malicious publication "tending to blacken the memory of one who is dead."4 New York is among these twelve.5

In none of these states has the question come squarely before the courts as to the interpretation of these statutes. That prosecutions similar to that in the Haffer case have not been more numerous is

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1*Rem. & Bal. (Wash.) Codes and Stats.*, sec. 2424.
3*Chitty, Criminal Law* (5th ed.), p. 913 note.
5*N. Y., Penal Law*, sec. 1340.
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probably due more to considerations of public policy than to any legal obstructions that may be in the way. It is a question whether prosecutions for criminal libel accomplish what they are intended to. The practicability of such actions becomes all the more doubtful when carried to the extent of the Haffer case. Do not such prosecutions tend to create martyrs and give free advertising to certain radicals and extremists? Instead of suppressing objectionable matter, do they not give additional publicity and make the situation worse? Will not such actions tend to restrict legitimate historical criticism? It is probable that such considerations as these have kept such actions out of the courts almost entirely, but it is hard to see how any court could have come to a conclusion different from that reached by the Washington court, in view of the terms of the statute.

Harry H. Hoffnagle, '17.

Domestic Relations: Effect of Foreign Divorce: Last Matrimonial Domicile.—In Perkins v. Perkins, 113 N. E. (Mass.) 841 (1916), the parties were married in Massachusetts and had their domicile there. The husband deserted the wife and went to Georgia where he acquired a bona fide domicile and was granted a decree of divorce upon constructive service. The wife had no actual notice of the pendency of the Georgia suit. When the husband later returned to Massachusetts, the wife instituted a suit for divorce in that state, and the court obtained personal jurisdiction of him. The husband pleaded the Georgia decree in bar, but the court refused to recognize it, being influenced largely by the fact that the wife did not have actual notice of the pendency of the Georgia action. It was held that there was, therefore, no reason for recognizing the Georgia decree on the ground of comity. The court held furthermore that it was not bound to recognize the foreign decree under the full faith and credit clause of the constitution and cited Haddock v. Haddock, Atherton v. Atherton, and Thompson v. Thompson. The court, referring to the Atherton and Thompson cases, made the following statement: "Thus courts of the state of the matrimonial domicile, at the petition of one spouse retaining that domicile and innocent of any marital wrong, stand upon a firmer ground than the courts of any other state in respect of jurisdiction over the marriage status." This is a statement of the last matrimonial domicile theory, one of the two theories which are advanced as having been announced by Atherton v. Atherton, supra, and followed by Thompson v. Thompson, supra. Haddock v. Haddock, supra, has often been cited also as standing for the last matrimonial domicile theory. In this connection two questions are to be distinguished. First, what jurisdictional facts must be present to entitle a decree of divorce to recognition in another state under the full faith and credit clause of the constitution,

1 Hilton v. Guyot, 159 U. S. 113 (1895).
2 201 U. S. 562 (1906). This case and the principal case involve the same facts.
3 181 U. S. 155 (1901).
4 226 U. S. 551 (1913).
and in particular, what is the significance of the last matrimonial domicile as a jurisdictional fact in this connection? Second, what jurisdictional facts will lead to the recognition of a foreign divorce on grounds of comity, irrespective of the full faith and credit clause, and in particular what effect has the fact that the decree was rendered in the jurisdiction of the last matrimonial domicile, in determining whether it will be recognized on grounds of comity? The present discussion will be confined, in the main, to the first of these questions.

The second theory that is advanced, as the one on which *Atherton v. Atherton*, supra, was decided, is that, since the domicile of the husband is in law the domicile of the wife, unless she has had an opportunity to acquire a separate domicile because of the husband's wrong,\(^5\) constructive service is effective to bring her before the court in the jurisdiction of the husband's domicile.\(^6\) This theory may be briefly stated as the constructive presence theory; that is, the constructive presence of the wife at the domicile of the husband. This doctrine is in accordance with the fundamental principle of jurisdiction that, once it is shown that the defendant is domiciled in the state, service by publication is equally as effective as actual personal service. Both theories have found support in subsequent decisions.

In *People v. Baker*\(^7\) the New York court raised the issue sharply as to the effect of a foreign divorce. In that case the parties were married in Ohio, but established their matrimonial domicile in New York. Subsequently the wife left, it does not appear whether for cause or not, and acquired a domicile in Ohio, where she obtained a divorce upon constructive service. The husband remarried in New York and was indicted for bigamy. He set up the Ohio decree as a defense, but the New York court refused to recognize the Ohio decree, and declared that it remained for the Supreme Court of the United States to decide whether it was compelled to recognize such foreign decrees. The New York court used the following language: "As we look at this case, it presents this question: Can a court, in another State, adjudge to be dissolved and at an end, the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceeding there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State?"

In *Atherton v. Atherton*, supra, the wife had left Kentucky, the state of the matrimonial domicile, and had taken up her residence in New York. The New York court found that she had left her husband for good cause and had acquired a separate domicile in New York State. It therefore allowed her to institute an action for divorce. The husband appeared and pleaded in bar a Kentucky decree. The New York court refused to recognize the Kentucky decree and the case was carried to the United States Supreme Court. That court held that the New York court was bound to recognize the Kentucky

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\(^5\) Bishop, Marriage, Divorce and Separation, secs. 1713, 1714 and 1715.

\(^6\) Suter v. Suter, 72 Miss. 345 (1894).

\(^7\) 76 N. Y. 78, 82 (1879).
decree in accordance with the full faith and credit clause. But in *Haddock v. Haddock*, supra, the federal Supreme Court held that the New York court was "not" bound to recognize the Connecticut decree rendered in favor of the husband upon the constructive service of the wife. In that case the husband had deserted his wife in New York, the state of the matrimonial domicile, and had gone into Connecticut where he had acquired a *bona fide* domicile. The Haddock case does not purport to overrule the Atherton case. Instead it puts the following interpretation on that case: "So also it is settled that where the domicile of a husband is in a particular State, and that State is also the domicile of matrimony, the courts of such State having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other States by virtue of the full faith and credit clause." Thus the Haddock case appears to adopt the view that the domicile of the husband is in law the domicile of the wife, as the one on which the Atherton case was decided.

The following quotation from the Atherton case might be advanced in favor of either theory: "In this case, the divorce in Kentucky was by the court of the State which always had been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife." This quotation should be interpreted, however, with the fact in mind that the opinion was written by Mr. Justice Gray, who cited *Burlen v. Shannon*, which had been decided by him while Chief Justice of the Supreme Judicial Court of Massachusetts and which distinctly held that where the wife deserted the husband in Massachusetts, and he thereafter established a domicile in Illinois, then his domicile in law was her domicile, and that constructive service upon her was effective for the purpose of obtaining a decree which must be recognized by the courts of other states. It seems certain that the above quotation from the Atherton case should be interpreted as approving the rule of *Burlen v. Shannon*, rather than as stating the doctrine of the last matrimonial domicile theory. The constructive presence theory is in accord with the established Massachusetts rule. The Atherton case also cited *Hunt v. Hunt* which holds to the same effect. The Hunt case was approved in *People v. Baker*.

The Supreme Court, in the Atherton case, accepted the finding of the Kentucky court that the wife's departure amounted to a desertion. Of course if the court put its decision on the ground that juris-

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8 At p. 571.
9 At p. 171.
10 15 Mass. 439 (1874).
12 217 N. Y. 217 (1878).
13 Supra, note 7.
diction was vested only in the court of the matrimonial domicile, it would be immaterial whether the wife left for cause or without cause. This contention can only be sustained by taking an extreme view of the matrimonial domicile theory, to the effect that the only jurisdiction that is competent to render a divorce is the jurisdiction of the last domicile of matrimony. This view is the one adopted by the Pennsylvania courts and it will be discussed later. The less extreme last matrimonial domicile theory is the one expressed by the principal case. It is that the matrimonial domicile is retained for purposes of jurisdiction only by the spouse who is innocent of martial wrong. The following quotation from the opinion in the Atherton case seems to negative the idea that it was decided on the last matrimonial domicile theory: "The wife not being within the State of Kentucky, if constructive notice, with all the precautions prescribed by the statute of that State, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the State in which she was found; and by the very fact of suing her there he would admit that she had acquired a separate domicile, (which he denied), and would disprove his own ground of action that she had abandoned him in Kentucky."  

The Haddock case on its facts does not advance the last matrimonial domicile theory, nevertheless certain later opinions have interpreted it as standing for that theory. The following interpretation was put upon the Haddock case by the Thompson case: "The New York court refused to give credit to the Connecticut judgment, and this court held that there was no violation of the full faith and credit clause in the refusal, and this because there was not at any time a matrimonial domicile in the State of Connecticut, and therefore the res—the marriage status—was not within the sweep of the judicial power of that State." 

In the Haddock case, itself, the court stated the proposition before it in this language: "These subjects being thus eliminated, the case reduces itself to this; Whether the Connecticut court, in virtue alone of the domicile of the husband in that State, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other States in and by virtue of the full faith and credit clause of the Constitution. In other words, the final question is whether to enforce in another jurisdiction the Connecticut decree would not be to enforce in one State, a personal judgment rendered in another State against a defendant over whom the court of the State rendering the judgment had not acquired jurisdiction. Otherwise stated, the question is this: Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a State to persons within its jurisdiction, * * * * *." 

The Haddock case decided on its facts therefore that "a personal judgment rendered in another State against the defendant over whom the court of the State rendering the judgment has not acquired
"jurisdiction" is not binding on the courts of other states. This seems to be an express answer to the question raised by People v. Baker, supra. The Atherton case did not purport to answer that question, but it was decided upon its own exact facts. It does not follow from the holding in the Haddock case that if the court of Connecticut had once acquired jurisdiction of the parties, by the establishment of a matrimonial domicile within the state, it would retain jurisdiction to render a personal judgment against the defendant who had left the state, except in the case of a guilty wife, under the constructive presence theory. The whole tenor of the opinion is to the contrary. The very exhaustive opinion is summed up with this statement: "It indubitably follows, therefore, * * * that the contention is without foundation * * * that, by the law of the several States, decrees of divorce obtained in a State with jurisdiction alone of the plaintiff are, in virtue of the full faith and credit clause of the Constitution, entitled to be enforced in another State as against citizens of such State."124 The court concludes by holding that, while not questioning the efficacy of the Connecticut decree in that state, it was not binding in New York.

The decision of the state courts, involving the last matrimonial domicile theory, rendered prior to the Atherton and Haddock cases will next be considered. In Pennsylvania a peculiar rule prevails to the effect that jurisdiction for divorce purposes can only be conferred upon its courts where the matrimonial domicile of the parties is in the state. The earliest decisions also held that the cause for divorce must have occurred within the state. This last rule was abolished by statute. The leading case is Colvin v. Reed.13 In that case the parties established their matrimonial domicile in Pennsylvania, and soon afterwards the wife deserted the husband. He left Pennsylvania and established a bona fide domicile in Iowa and obtained a divorce upon constructive notice. The Pennsylvania court refused to recognize the Iowa decree and on the death of the husband gave the wife dower in the lands he had owned in Pennsylvania. The court considered the question whether the husband's domicile in Iowa was in law the domicile of the wife. It held, contrary to the New York and Massachusetts courts, that the wife was able to acquire a separate domicile even though she was the party at fault. It referred to the general rule making the domicile of the husband the domicile of the wife, and added: "But the unity of person created by the marriage is a legal fiction, to be followed for all useful and just purposes, and not to be used to destroy the rights of either, contrary to the principles of natural justice, in proceedings which, from their nature, make them opposite parties." The court then defined the domicile necessary to confer jurisdiction as the actual domicile of both the parties or the domicile where they last cohabited. The court held finally that the husband had an adequate remedy in the courts of Pennsylvania.

124 At p. 604.
1355 Pa. 375, 379 (1867). In accord, Reel v. Elder, 62 Pa. 308 (1869); Platt's Appeal, 80 Pa. 501 (1876); Fyock's Estate, 135 Pa. 522 (1890).
A rule similar to that of Pennsylvania was adopted by some early Massachusetts cases. In *Hopkins v. Hopkins* the parties had their matrimonial domicile in New York where the alleged adultery was committed by the wife. The husband acquired a domicile in Massachusetts but the Massachusetts court refused to take jurisdiction to grant a divorce to him. It held that the only proper court to entertain such suit was the court of the jurisdiction of the matrimonial domicile. The case has been overruled on its exact facts, and later Massachusetts cases, with the exception of the principal cases, have disregarded the last matrimonial domicile theory.

The next cases to be considered are those interpreting or simply following the Atherton and Haddock cases. *Hammond v. Hammond* presented the same facts as the Atherton case, there being no possible question, however, of the wife’s desertion of the husband in Vermont. The Vermont court granted the husband a divorce upon constructive notice to the wife. The New York court recognized the Vermont decree, holding that it was bound by the Atherton case. It interpreted the Atherton case as decided on the theory that the domicile of the husband is the domicile of the wife. The court makes its decision even more certain by citing *Hunt v. Hunt*. *Callahan v. Callahan* again presented the facts of the Atherton case. The court recognized that it was bound by the Atherton case and accordingly recognized an *ex parte* Ohio decree which had been granted to the husband, but it interpreted the Atherton case according to the last matrimonial domicile theory. It held according to the finding of the New York court in the Atherton case, that the wife had acquired a separate domicile in the state of New York. It therefore regarded the Kentucky decree as binding extraterritorially solely on the ground that Kentucky was the jurisdiction of the last matrimonial domicile.

In *Ackerman v. Ackerman* the New York court was presented with the exact facts of the Haddock case. It simply held in accord with that case that it was not bound by an *ex parte* decree. *Gooch v. Gooch* presented the facts of the Haddock case. The court held that, where the wife had remained in the matrimonial domicile and was free from fault, the court of the state of the matrimonial domicile was not bound by an *ex parte* divorce. However, the court did not attack the foreign decree as to its effect in dissolving the marital status, but refused to give it effect to disturb the property rights of the wife. *Toncray v. Toncray* also interpreted the Haddock case according to the last matrimonial domicile theory, and while it recognized a foreign decree in so far as it effected the dissolution

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17*Supra*, note 11.


2038 Okla. 300 (1913).

21123 Tenn. 476 (1910).
of the marriage, it nevertheless granted the wife permanent alimony. 

**Hicks v. Hicks**\(^2\) presented the facts of the Haddock case. The court, however, did not refer to the Haddock case and did not question the binding effect of an *ex parte* divorce granted in another state, providing the proceedings were regular. It is not clear whether this decision was upon grounds of comity.

The case putting the most extreme interpretation on the Haddock case is **Montmorency v. Montmorency**. The matrimonial domicile of the parties was in Mexico. The husband abandoned the wife and she thereupon moved into Texas and sued for a divorce. The court entertained her suit. It referred to the Haddock case and held that that case did not make all divorce suits actions *in rem*. It held instead, assuming to interpret the Haddock case, that the marriage status is such a *res* as confers on the court jurisdiction *in rem*, so as to enable it to grant a decree binding on all of the states. It held also that, since the husband was at fault, the matrimonial domicile remained with the wife, and that by a legal fiction the husband was also. Furthermore it held that the wife was able to take the marriage status with her into another jurisdiction and thus confer upon the court of the new jurisdiction the power to grant a decree that would be binding extraterritorially. This form of the matrimonial domicile theory does not have the practical merits of the Pennsylvania theory, nor does it accord with the fundamental rule of the common law that the domicile of the husband is the domicile of the wife, which rule has been qualified only to the extent of allowing her to acquire a separate domicile because of his wrong. Obviously the domicile of the husband does not follow the domicile of the wife, nor has it ever been held before that it could be made to because of the fact that the husband was in the wrong.

In **Brugviere v. Brugviere**\(^2\) the parties had their matrimonial domicile in California. The husband deserted the wife and obtained an *ex parte* divorce in Nevada. The California court cited the Haddock case and held that it was not bound to recognize the Nevada decree. The court interpreted the Haddock case as holding that a husband who abandons his wife without cause and goes into another state takes with him enough of the *res* so that a judgment rendered in the new state would be valid in that state but not enforceable in other states, because it is not a judgment in *rem*. It would seem that this is all that the Haddock case holds. In other words any divorce action is one *quasi in rem*, so that a court having jurisdiction of one of the parties can render a decree binding in that jurisdiction; but a divorce action is not an action *in rem*, as that action was defined in **Pennoyer v. Neff**\(^2\) so as to be binding on all jurisdictions.

\(^{269}\) Wash. 627 (1912). Miller v. Miller, 89 Kan. 151 (1913), recognized a foreign divorce in compliance with a statute (Laws of 1907, c. 184) which required that a foreign decree of divorce be given the same effect in the state as a domestic one. Gildersleeve v. Gildersleeve, 88 Conn. 689 (1914), recognized a foreign divorce on the ground of comity.

\(^{211}\) 39 S. W. (Tex.) 1168 (1911).

\(^{212}\) 72 Cal. 199 (1916).

\(^{241}\) 95 U. S. 714 (1877).
Upon the question of the jurisdictional effect of the place of the last matrimonial domicile in divorce cases the law is in much confusion. Prior to the decisions in *Atherton v. Atherton*, supra, and *Haddock v. Haddock*, supra, the question of the place of the last matrimonial domicile seems to have been generally disregarded by the state courts so far as any direct discussion of it is concerned. Pennsylvania, on the other hand, consistently held that jurisdiction could only be had for divorce purposes in the domicile of matrimony. The early rule of the Massachusetts courts in accord with Pennsylvania was not followed by later Massachusetts decisions rendered prior to the Atherton and Haddock cases. These two latter cases have both been advanced as standing for the last matrimonial domicile theory. Upon its facts the Haddock case does not rest upon that doctrine. Nevertheless it has been cited as authority for the last matrimonial domicile theory by several cases as set forth above. However, the interpretation put upon it by *Brugiere v. Brugiere*, supra, seems to be the correct one, namely, that it does not stand for the last matrimonial domicile theory. The Atherton case has been cited as standing for the last matrimonial domicile theory and also as standing for the constructive presence theory. It seems clear that it was decided upon the constructive presence theory. Because of the conflict in the interpretation of these two federal cases by later cases the law is in much confusion. It can only be completely cleared up by a decision of the Supreme Court of the United States expressly deciding the jurisdictional effect of the last domicile of matrimony in divorce cases.

*Herbert Mason Olney, '18.*

**Evidence: Exhibition of Child to Show Resemblance to Putative Parent.**—The question whether it is permissible in a bastardy proceeding to exhibit a child three months old to the jury for the purpose of showing resemblance to its alleged father was raised in *Flores v. State*, 73 So. (Fla.) 234 (1916). Objection was interposed to the admission of such evidence on the ground that its effect might unduly influence the jury. The lower court held that the child could be exhibited, but on appeal this decision was reversed. In reaching its decision the court said that, while in some cases it might be proper to exhibit a child in evidence, in this case the child was too young to permit the possibility of such grave consequences being determined against the defendant upon an imaginary, fancied or notional general resemblance; and that it would place the defendant at a disadvantage which he could not readily overcome.

There are three views on this subject, each of which is supported by more or less authority. The earliest view, and the one which at

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2For a discussion of the recent statutory departure from the last matrimonial domicile rule in Pennsylvania, see "Recent Divorce Legislation in Pennsylvania as Tested by Federal Principles of Jurisdiction"; Wm. D. Crocker; 65 Pa. L. R. 338.

Supra, note 26.
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present seems to be supported both by the English courts and the majority of American jurisdictions, favors allowing an exhibition of the child for this purpose regardless of its age. It is argued by the courts supporting this doctrine that, generally speaking, the child will resemble the parent in some feature, attitude or action and that such evidence should be considered for what it is worth, that the immaturity of the infant and the relative improbability of a very young child having any perceptible resemblance to its parent affects the weight of the evidence rather than its admissibility. The difficulty with this rule is that all very young children resemble each other, and peculiarities of form, feature and personal traits during the first few months are continually changing. The probative value of such evidence is slight and out of proportion to its influence upon the jurors, exciting their imaginations and arousing their sympathies for the unfortunate child and mother.

A second group of states hold the evidence inadmissible without regard to the age of the child. This holding is based partly upon the claim that such evidence is of so vague, uncertain, and fanciful a character in all cases that the dangers which result through its admission more than outweigh any benefit to be derived, and partly upon the difficulty of getting into the record the factors which the jury have considered in arriving at their verdict, so that it can be ascertained upon appeal whether this evidence was sufficient to support the verdict. The latter ground seems to place too little confidence in the judgment of the trial court and an undue emphasis upon appeals. The first ground seems too broad and in some cases to exclude evidence of considerable probative force as for example, where the child has passed beyond the stage of mere infancy and its...


2Kelley v. State, 133 Ala. 195 (1901); Brantley v. State, 11 Ala. App. 144 (1914); Land v. State, 84 Ark. 199 (1907); In re Jessup, 81 Cal. 408 (1899); Shailer v. Bullock, 78 Conn. 65 (1905); Higley v. Bostick, 79 Conn. 97 (1906); McCalman v. State, 121 Ga. 491 (1904); Sims v. State, 14 Ga. App. 28 (1915); Jones v. Jones, 45 Md. 144 (1876); Young v. Makepeace, 103 Mass. 50 (1869); Scott v. Donovan, 153 Mass. 378 (1891); People v. White, 53 Mich. 537 (1884); People v. Wing, 115 Mich. 698 (1893); Smith v. Hawkins, 47 So. (Miss.) 475 (1908); Gilman v. Ham, 38 N. H. 103 (1856); State v. Danforth, 73 N. H. 215 (1905); Gaunt v. State, 50 N. J. L. 499 (1888); State v. Woodruff, 67 N. C. 80 (1891); Warlick v. White, 76 N. C. 175 (1877); State v. Horton, 100 N. C. 443 (1888); Crow v. Jordon, 49 Ohio St. 655 (1892); Rex v. Hughes, 22 Ont. L. R. 344 (1910); Anderson v. Aupperle, 51 Ore. 556 (1908); Commonwealth v. Pearl, 33 Pa. Super. Ct. 97 (1907); State v. Patterson, 18 S. D. 251 (1904); Cannon v. Cannon, 7 Humph. (Tenn.) 410, 411 (1846).


4Land v. State, supra, note 2.

5Robnett v. People, 16 Ill. App. 299 (1885); LaMatt v. State, ex rel. Lucas, 128 Ind. 123 (1890); State v. Brathvode, 81 Minn. 501 (1900); Ingram v. State, ex rel. McIntosh, 24 Neb. 33, 37 (1888); State v. Neel, 23 Utah 541 (1901); Hanawalt v. State, 64 Wis. 84 (1885).

6State v. Neel, supra, note 5.
general features have become more or less permanent so that a resemblance is clearly cognizable.

The third view allows the exhibition of the child provided he is in the opinion of the trial court old enough to possess settled features or other corporal resemblances. This is the view advocated by Wigmore,\textsuperscript{7} followed in the principal case, and by the most recent decisions on this question. While it is possible for the court's discretionary powers to be abused and almost impossible to make this abuse apparent to a reviewing court, courts should be presumed to have discharged their duties, and valuable evidence should not be excluded because of the possibility, in rare cases, of mistake or abuse.

It would seem that the first two views are being abandoned and that the courts are now following the thoroughly practical and logical doctrine announced in the principal case.

John R. Schwartz, '18.

\textit{Insurance: Sale of Property by One Co-Tenant: Interpretation of the Clause Against Alienation.}—Having in mind the vast amount of insurance litigation which has encumbered the calendars of the courts during the last half of the nineteenth century, it seems strange that at this late date any phase of the subject should have escaped judicial decision, but the case of Firemen's Insurance Co. v. Larey, 188 S. W. (Ark.) 7 (1916),\textsuperscript{1} presents a question unique in the law of insurance. Where a fire insurance policy is issued to tenants in common, will a sale by one of these tenants of his share of the property, avoiding the policy as to him, likewise avoid it as to the innocent owner? The court holds that it will not.

Blocker and Larey were tenants in common, each owning an undivided half in two store buildings, which were leased to third parties. On April 1, 1915, Blocker insured these buildings for one year for $600, policy payable to Blocker and Larey, a single premium being named therein. It seems that the agent was personally acquainted with both Blocker and Larey, and knew of the relation in which they stood to the property. Larey was at the time ignorant of the insurance, but later ratified Blocker's act. The policy contained the usual provision that it should be void "if any change * * * take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard)."

Blocker sold his interest in the property to Mrs. Duke, and on May 15, 1915, the agent cancelled the policy because of this sale. The buildings burned on June 12, 1915, and Larey for the first time learned of Blocker's sale to Mrs. Duke and of the cancellation of the policy. He sued on the policy, and recovered $300 as the measure of his interest.

\textsuperscript{7}Wigmore, Evidence, sec. 166.
\textsuperscript{1}This case is the subject of a short note in 16 Col. L. R. 691. The conclusion there reached is that the court erred in its decision that there was no increase of risk, but it seems that the writer overlooked a distinction, which is attempted to be shown in the present note, between the introduction of a stranger to a partnership and to a tenancy in common.
From an examination of the leading digests and textwriters it seems that this is a case of novel impression.² There are decisions as to the effect upon a joint policy containing a clause against alienation, of a sale by a co-tenant to his co-tenant, a partner to his partner, or a partner to a stranger, but an analysis shows that the question here, while it bears a surface similarity, is distinct from any of these.

A fire insurance company is with reason inquisitive as to the character and temperament of the persons to whom it issues policies, and takes care to remain aloof from individuals who are ignorant or careless as to danger from fire or who have cultivated a taste for arson. Not only does a company refuse to insure such a person directly, but the clause above quoted, avoiding the policy on change of interest, title, or possession, is inserted for the protection of the insurer against the substitution of irresponsible persons in place of the parties with whom it originally contracted. In order that the insured may not be unduly inconvenienced or restricted in disposing of his property, a provision is usually added that the policy shall remain valid if the consent of the insurer to the change is secured. But, through carelessness or inadvertence, many cases arise in which there has been a prohibited change without the company's consent, and the courts have been called upon to decide how strictly they would construe such a provision. If the risk is not increased by the change, the reason for the clause fails. The question then is, do the courts hold that the clause also fails?

When one partner sells his interest to a stranger, it is generally held that the policy is avoided in its entirety,³ because here there is an increase of risk. Usually the new partner will come into possession of the partnership property in common with the other associates, and this is one of the very risks against which the clause was intended to guard, for the responsibility of the new member of the firm is not guaranteed by the fact that he is associated with other persons whom the company was willing to insure.

But even supposing that there is no change of possession, the policy should still be held avoided. For, if the court holds that it is entirely valid, despite the prohibitory provision, obviously a person whom the company never insured is being allowed to recover, and here again is a violation of the clause.

To the alternative course of holding the policy avoided only as to the interest of the retiring partner, and valid as to the interests of the remaining members of the firm, there is a fatal objection based on the peculiar attributes of partnership title. The property as a whole is the property of the firm, each partner having a general interest in every bit of the partnership possessions, subject to an equal interest in every other partner; but having a separable interest only in the firm profits and the surplus remaining after a partnership accounting and settlement of the firm obligations. The rights of the partnership creditors are superior to this interest of the individual

²See, however, Michigan, post, note 6.
³See note 5, post.
partners. If the court holds the policy still valid as to the remaining partners, and allows recovery for their interest in the property destroyed, it is confronted with two difficulties. First, the proceeds must, from their nature and from the rights of the partnership creditors, become firm property, and go to pay firm debts or swell the firm profits or surplus, and thus the new partner is equally benefited with the original ones. Secondly, even if it were absolutely certain that the other firm assets were sufficient to pay the firm obligations, since the individual partners have no separable interest in the firm property, the value of their shares cannot be computed while the association is a going concern.

The third course open, and the one usually adopted, is to hold the policy void, and, if occasionally this works hardship, it is due to the negligence of the insured in not securing the company’s consent, and the court has no authority to say after the loss that the company would have accepted the new member, had application been made in time.

When we turn now to the sale by one partner to his co-partner of his interest in the firm property insured, there being a joint policy on the entire property, it seems that a different result should be reached, for no new party has been introduced and there has been no increase of risk. This last statement has been controverted in a few cases, and is always warmly denied by the insurer on the ground that the company might not have contracted with the partnership but for the guarantee afforded by the membership of the withdrawing individual. That this argument is purely specious in the vast majority of cases is apparent. "The only evidence of their confidence in either [partner], is the fact that they contracted with all; and the theory is rather fanciful than sound, that they may have intended to conclude a bargain with rogues, on the faith of a proviso that an honest man should be kept in the firm to watch them."4 "The alienation here contemplated is a sale by the insured to a party not insured,"5 and to hold that a sale between partners was intended to avoid the policy is usually to force an unnatural interpretation of the clause. For one reason or another some courts have reached an opposite result and the conflict upon the point is irreconcilable, but the weight of authority is to the effect that the policy remains valid in its entirety.6

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5Lockwood v. Middlesex Co., 47 Conn. 553, 564 (1880). This was a case of a sale by a tenant in common to his co-tenant, but the principle is applicable to sales between partners, and the same idea is constantly expressed in the partnership cases.
6It has seemed that the simplest classification of the authorities upon the different points dealt with in this note, would be to arrange them, in a single footnote, by states. But to enable the reader to find the cases upon a single point, the following table is offered, denoting the jurisdictions under which such cases will be found. The question is understood to be as to recovery upon a policy covering the property transferred, and containing a clause against alienation, where the vendor has neglected to have the insurer assent to the change. "Stranger", of course, refers to any stranger to the original policy.

Cases where:
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(1) A partner sells his interest in the partnership property to a stranger. (a) Valid. Virginia, on peculiar facts. (b) Void. United States; California; Missouri.

(2) A stranger is admitted as a partner to an interest in the property insured. (a) Valid. United States; Florida, but here not yet admitted to ownership; Iowa; Ohio. (b) Void. United States; Connecticut; New York; North Carolina; Texas.

(3) An individual owner sells an undivided interest in the property insured to a stranger, thus becoming a tenant in common. Void. Michigan.

(4) A tenant transfers his interest to a co-partner. (a) Valid. Alabama; Colorado; Georgia, but under unusual circumstances; Illinois; Iowa, in a case of dissolution; Louisiana; Massachusetts; Mississippi; Nebraska; New Hampshire; New Jersey; New York; Ohio, though here there was no alienation clause; Pennsylvania, on peculiar facts; Texas; Virginia. (b) Void. Illinois, on peculiar phraseology of alienation clause; Indiana, same; Iowa; Minnesota; Missouri, in a case of dissolution; Pennsylvania; Vermont, though here there was no clause against alienation; Wisconsin.

(5) A tenant in common sells his interest to his co-tenant. (a) Valid. Connecticut; Ohio. (b) Void. Pennsylvania.

For an anomalous decision, see the Maine case, infra.

Following is a list of cases, arranged by jurisdictions. Only that part of the alienation clause is given which is of direct importance.

**United States.** Policy to be void, "If the said property shall be sold or conveyed." Insured took in two partners. The court charged the jury that under such a clause the whole property must be conveyed if the policy was to be avoided. Held, valid. Scanlon v. Union Fire Ins. Co., 4 Biss. (U. S.) 511 (1869). Policy on partnership goods to be void "if the property be sold or transferred, or any change take place in title or possession." Void, because the firm took in a new partner. *Dicta,* that transfers between partners would be valid if possession were not changed. Only distinction from the Scanlon case, supra, is in the difference in the phraseology of the two clauses. Drennen v. London Ass. Corp., 20 Fed. 657 (1884). Reversed, on the ground that as a matter of law no new partner had been taken in. 113 U. S. 51 (1884), and 116 U. S. 451 (1885). Policy to be void "as to any property hereby insured which shall pass from the insured to any other person." Plaintiff transferred the goods to a partnership, of which he was a member. Void. Royal Ins. Co. v. Martin, 192 U. S. 149, 164 (1903). *Alaska.* Policy on partnership goods to be void if the property be "sold or conveyed, or the interests of the parties therein changed." One partner sold his interest to his co-partner. Policy remains valid. Burnett & Martin v. Eufaula Ins. Co., 46 Ala. 11 (1871).

**California.** Policy upon partnership property was to be void upon conveyance of the property. One partner sold his interest to a stranger. Void. Shugart v. Lycoming Fire Ins. Co., 55 Cal. 408 (1889).

**Colorado.** The policy contained a condition against transfer of the insured property. Transfer between partners. The court said that it was "inclined to hold" that this was not a breach of the condition. Valid. Sun Fire Office v. Wich, 6 Colo. App. 103, 120 (1895).

**Connecticut.** Policy was to be void if the house insured was "alienated, by sale or otherwise." One tenant in common sold his interest to his co-tenant. Valid. (See supra, note 5). Lockwood v. Middlesex Ass. Co., 47 Conn. 553, 564 (1880). Policy on goods owned by the plaintiff was to be void if the property was sold or transferred or if there was any change in title or possession. Plaintiff went into partnership with a stranger, putting the goods into the business. Void. Malley v. Atlantic Fire Ins. Co., 51 Conn. 222, 250 (1883).

**Florida.** Policy issued to a partnership was to be void if the property be "sold or transferred, or any change take place in title or possession." The partners took in a stranger as a partner, but by the agreement he was to have no interest in the firm property but only in the profits. Valid. Hanover Fire Ins. Co. v. Lewis & Sons, 28 Fla. 209, 237 (1892).

**Georgia.** A policy on partnership property was to become void if any lien attached to the property, or if there was any change in title or possession. One
partner agreed to sell his interest to the other, title not to pass until the purchase money was paid. Loss occurred before full payment was made. Valid. Georgia Home Ins. Co. v. Hall, 94 Ga. 530 (1894).

Illinois. A policy upon partnership property was to be void "in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein" (the italics are the writer's). One partner sold his interest to the other. Void. Dix v. Mercantile Ins. Co., 22 Ill. 272, 277 (1859). A policy to a partnership was to be avoided by "sale or transfer, or any change of title or possession." A contract of sale from one partner to the others was partly executed at the time of the loss. Policy still valid. Allemania Fire Ins. Co. v. Peck, 133 Ill. 220, 230 (1896). These cases may be distinguished because of the express mention in the Dix case of an "undivided interest," and also because other questions were involved in that case. Nevertheless, this and the succeeding Indiana case are often cited in support of the rule that a sale between partners avoids the policy. This is to ignore the unusual and express clause.

Indiana. Policy on a building owned by a partnership was to be void if there were "any sale, transfer, or change of title of any property * * * or any undivided interest therein" (the italics are the writer's). One partner sold to an other. Void. Hartford Ins. Co. v. Ross, 23 Ind. 179 (1864). Note the express clause as to undivided interests.

Iowa. Plaintiff took a policy on his own goods, conditioned to be void if they were alienated. He sold them to a partnership of which he was a member. The court held that as long as he retained an insurable interest the policy remained valid pro tanto. (This seems an extreme case.) Cowan v. Iowa Ins. Co., 40 La. 551 (1875). A policy on partnership goods was to be void if "title of the property is transferred, incumbered, or changed." One partner sold to the others. Court considers the word "changed" is broad enough to avoid the policy. Hathaway v. State Ins. Co., 64 Ia. 229 (1884). Accord, Oldham v. Anchor Fire Ins. Co., 90 Ia. 225 (1894), and Jones v. Phoenix Ins. Co., 97 Ia. 275 (1896), where one partner dropped out, and the change of possession was enough to avoid the policy. Policy on partnership goods was to be void if any change took place in "interest, title, or possession." The partners agreed to dissolve the firm, and divided the goods, which were destroyed before dissolution was completed. The court held the policy valid, for, though the physical possession was changed, until actual dissolution the possession by one partner was the possession of the firm. Runkle v. Hartford Fire Ins. Co., 99 Ia. 414 (1896). This case certainly seems contra in spirit to the three preceding cases, for it is the change in physical possession, and not in legal possession, which may be objectionable and increase the risk.

Louisiana. Policy on partnership goods was to be void "in case of any transfer, either by sale or otherwise." One partner sold to another. Valid. Dermani v. Home Ins. Co., 26 La. Ann. 69 (1874).

Maine. Plaintiff got insurance on an undivided half of certain buildings. The policy was to be void "when the title to any property insured shall be changed." Partition. The court holds this such a change of title as will avoid the policy. That it was not strictly an alienation, but that plaintiff insured a half interest in the entire property, while he tried to recover for an entire interest in half the property, and this was a material change. Barnes v. Union Mutual Fire Ins. Co., 51 Me. 110 (1863). This seems the height of refined reasoning.

Massachusetts. Policy on partnership goods was to be void if "said property shall be sold." One partner sold to the other. Policy still valid. There is no reason for restricting sales between partners. Powers v. Guardian Ins. Co., 136 Mass. 108 (1883).

Michigan. Policy on building was to be void if there was any "sale, transfer, or change of title." The owner mortgaged an undivided third to a stranger by a deed absolute in form. Policy avoided in entirety, for the whole title was insured, and this interest was changed. West. Mass. Ins. Co. v. Riker, 10 Mich. 279 (1862). This case is distinguishable from the principal case only on the question of divisibility. McIlvain v. West. Ins. Co., 1 Mich. N. P. 118 (1869), is another case where a single owner sold an undivided half of the property, and it is assumed without argument that the policy became void in its entirety.

Minnesota. Policy was to be void upon change of ownership of the property insured. The question was not directly involved, but *dicta* that a sale by one
partner to the others would avoid the policy. Brigham v. Wood, 48 Minn. 344 (1892).

**Mississippi.** Policy on partnership goods to be void if “any change takes place in the title or possession.” One partner sold to the other. Policy still valid. Ins. Ass’n v. Holberg & Klaus, 64 Miss. 51 (1886).

**Missouri.** Policy on partnership goods was to be void upon “any transfer or change of title.” Dissolution, and the goods were divided. Policy avoided, if parties held shares separately and distinctly. Dreher & Bumb v. Aetna Ins. Co., 18 Mo. 128 (1853). Policy on partnership goods to be void if “property be sold or transferred, or any change take place in title or possession.” Partner sold to stranger. Void. Card v. Phoenix Ins. Co., 4 Mo. App. 424 (1877).

**Nebraska.** Policy to be void “if property be sold or transferred or any change takes place in title or possession.” Partners sell to partner. Still valid. Phoenix Ins. Co. v. Holcombe, 57 Neb. 622, 627 (1899). Accord, where policy was to be void if the property be “sold or transferred.” German Ins. Co. v. Fox, 96 N. W. (Neb.) 652 (1903) (never officially reported).

**New Hampshire.** Apparently there was a provision in the policy covering partnership property that it should be void upon alienation of the property. Sales between partners do not constitute alienation. (Not the main question involved.) Pierce v. Nashua Fire Ins. Co., 50 N. H. 297 (1879).

**New Jersey.** Policy was to be void if there was a transfer of interest by sale or otherwise. Partner sold to partner. *Dicta,* that it would remain valid; held, there was a waiver. Combs v. Shrewsbury Ins. Co., 34 N. J. Eq. 403, 411 (1881).

**New York.** Whatever may have been the New York rule previous to 1865, it was definitely settled in the case of Hoffman & Place v. Aetna Fire Ins. Co., 32 N. Y. 405 (1865), where a policy on partnership goods was to be void if the property was “sold or conveyed,” and one partner sold to the other, that sales between partners did not avoid such a policy. This case reviews the previous cases, and distinguishes or overrules those apparently contra. In accord in result are the following cases: Tallman v. AtI. Ins. Co., 29 How. Pr. (N. Y.) 71 (1865), where the policy was to be void upon “any sale, transfer, or change of title”; Dresser v. United Firemen’s Ins. Co., 45 Hun (N. Y.) 298, 301 (1887), aff’d 122 N. Y. 642 (1890), where policy was to be avoided “by the sale or transfer, or any change in title or possession” of the property, and there was a dissolution of the partnership, one partner taking all the property; Roby v. American Ins. Co., 120 N. Y. 510 (1890); Keeney v. Home Ins. Co., 71 N. Y. 396 (1877); Loeb v. Firemen’s Ins. Co., 38 Misc. (N. Y.) 107 (1902). Policy to be void if the property be “sold or transferred, or any change in title or possession.” Insured took in a partner. Void. Germania Fire Ins. Co. v. Home Ins. Co., 144 N. Y. 195 (1894).

**North Carolina.** Policy on goods and building was to be void “if the title to the property be transferred or changed in any way.” Insured took in a partner, selling to him one-half of the stock of goods insured. Policy void, not only as to goods sold, but also to remaining goods and the building, for the same carelessness would affect them all. Biggs v. N. C. Ins. Co., 88 N. C. 141 (1883).

**Ohio.** One partner sold property to the others. Question was as to whether assignment of policy was valid, and the court held that so long as the transfer was between the partners there was no increase of risk; valid. West v. Citizens Ins. Co., 27 Oh. St. 1, (1875), especially page 10. The owner of certain insured goods took in a partner. A policy on the property was held not to be avoided, because the prohibition was against “sale or transfer” of the property, and not against “change of title.” As long as plaintiff keeps a substantial interest, he can recover for his own loss. Blackwell v. Ins. Co., 48 Oh. St. 533 (1891). A policy was issued to tenants in common, to be void upon change in “occupation, location, title, interest, or possession” of the property. Two co-tenants sold to the other. Policy still valid in the latter’s hands, and he can recover for the entire loss. Royal Ins. Co. v. Sockman, 15 Oh. Cir. Ct. 105 (1896).

**Pennsylvania.** Policy on firm goods to be void if property be alienated “by sale or otherwise.” One partner sold to the other, and now both sue. Void, because of alienation. Case is complicated by the procedural question. Finley v. Lycoming Ins. Co., 30 Pa. 311 (1858). Accord; clause “if property be sold or transferred, or any change take place in title or possession.” Girard Ins. Co.
The same argument applies to cases of sales between tenants in common, both having been parties to the policy in question, but we are again confronted with the same conflict. 7

Turning now to a discussion of the theory of the principal case, it might seem that, since the same principles control the validity of a policy in cases of sales between co-tenants and between partners, the effect of a sale from a co-tenant to a stranger, as in the Arkansas case, should be similar to that of a sale by a partner to a stranger, noted above, and the policy considered void. If the transfer involves a change of actual possession and there is no saving clause, this is true, for the possible carelessness of a new occupant of premises increases the risk, irrespective of any question of title or interest. The language of the principal decision is too broad in that it does not recognize this possible exception.

But on the facts of the case it seems that the Arkansas court was unquestionably right, for it is to be noted that there was no such change of possession, since the same tenants remained in occupancy of the buildings during the entire period in question. It does not seem that a mere transfer of the title of one of the co-tenants to a stranger effects an increase of risk as in the case where a partner sells to a stranger. For there is unity of title between partners, and, as has been shown above, this is the sole reason for the rule that the introduction of a new member to the firm will avoid a joint policy even as to the other associates. Because there is no unity of title between tenants in common, the same result should not be reached.

v. Hebard, 95 Pa. 45 (1880). Policy on firm goods was to be void if there was a sale, etc., unless the policy was assigned with the company's consent. It was so assigned to a third party; thereafter one partner sold his interest to the other. Held, the policy was not avoided, because by company's consent it had been put out of the partner's power to fulfill the condition which would protect from forfeiture. The Finley case, supra, approved as the general rule. Buckley v. Garrett, 47 Pa. St. 204, 210 (1864). Policy to be void if title be "sold, transferred, or changed." Insured died, and one of his devisees bought entire property upon partition sale. Void. Dornblaser v. Sugar Valley Ins. Co., 20 Pa. Super. Ct. 536 (1902).

Texas. Policy on firm goods to be void if there be "any transfer by sale or otherwise." One partner sold to the others. Valid. Texas Ins. Co. v. Cohen, 47 Tex. 406 (1877). Dicta in accord; clause that policy should be void if there was change in interest, title, or possession. Delaware Ins. Co. v. Hill, 127 S. W. (Tex.) 283 (1910). Policy to be void if there be a change in interest, title, or possession. Assured took in two partners. Void, though he kept a lien. Mechanics Ins. Co. v. Davis, 167 S. W. (Tex.) 175 (1914).

Vermont. Language of the court indicates that the withdrawal of one partner from the firm so increases the risk that a policy is avoided, even without a clause against alienation. Dicta. Wood v. Rutland Ins. Co., 31 Vt. 552, 563 (1859).

Virginia. Policy on firm goods was to be void upon "any change in title or interest." One partner sold to the other. Valid. Virginia Ins. Co. v. Vaughan, 88 Va. 832 (1892). Policy on firm property was to be void upon "change of type, interest, title, possession, or occupancy." One partner died, and her devisee continued the business with the other partner. But this devisee had always managed the business as representative of the deceased. Policy still valid. Virginia Ins. Co. v. Thomas, 90 Va. 658 (1894).

Wisconsin. Policy on firm property was to be void if the property be "sold or conveyed." One partner sold to the other. Dicta, that this would avoid, but held that here there was waiver. Keeler v. Niagara Ins. Co., 16 Wis. 550 (1865).

7See supra, note 6.
when a co-tenant has sold his property to a stranger. The common
estate is composed of divisible interests, the value of each of which
may easily be estimated, and, therefore, if the court holds the policy
avoided only as to the interest in the property sold, they can still
estimate the loss to the remaining owner. And, even if the purchaser
is a person whom the company would not have insured, he cannot
in such a case benefit by the destruction of the common property,
for each tenant must recover upon his own title for the injury to
his own property, and the stranger can derive no benefit either
directly or indirectly on his co-tenant's title for his co-tenant's
loss. For these reasons the Arkansas decision seems correct upon
principle.

Kenneth Dayton, '17.

Principal and Agent: Liability of a Head of a Family for the
Negligent Use of His Automobile by Other Members of His Family.—
Van Blaricom v. Dodgson, 220 N. Y. 111 (1917), holds that, where an
adult son living with his family takes out for his own pleasure his
father's automobile, with his father's permission, the father is not
liable for the negligent driving of the son, because liability does not
arise from the family relationship alone, and because the relationship
of principal and agent does not exist in such use. The same ques-
tion is presented when the use is by a wife or by a minor child.

As to the liability of the head of the family, there is a clear difference
of view. The leading case supporting liability is Birch v. Aber-
crombie.1 The leading case contra is Doran v. Thomsen.2 The
preponderance of opinion holds that there is liability, the following
states being committed to that doctrine: Georgia,3 Kentucky,4
Minnesota,5 Missouri,6 Montana,7 South Carolina,8 Tennessee,9
Texas,10 Washington,11 also the one federal court
which has passed on the issue.12 Contra are: Alabama,13 New
Jersey,14 New York,15 New Jersey,16 Utah,17 and a lower court case in Pennsylvania.18

174 Wash. 486 (1913).
Griffen v. Russell, 144 Ga. 275 (1915), superseding two cases contra in the
lower courts: Schumer v. Register, 12 Ga. App. 743 (1913); and Harris v. Jones,
Stowe v. Morris, 147 Ky. 386 (1912).
Kaysor v. Van Nest, 125 Minn. 277 (1914).
240 (1912); Hays v. Hogan, 180 id. 237 (1914).
Winn v. Haliday, 69 So. (Miss.) 685 (1915).
Lewis v. Steele, 52 Mont. 300 (1916).
Davis v. Littlefield, 97 S. C. 171 (1914).
Birch v. Abercrombie, supra, note 1.
Parker v. Wilson, 179 Ala. 361 (1912).
Doran v. Thomsen, supra, note 2.
Farthing v. Strouse, 172 App. Div. (N. Y.) 523 (1916); Tanzer v. Read, 166
752 (1914); Schultz v. Morrison, 91 Misc. (N. Y.) 218 (1915). See anomalous
McFarlane v. Winters, 155 Pac. (Utah) 437 (1916).
227 Pa. 488 (1910), frequently cited as in accord with the Washington view, is
easily distinguished.
Leaning in the same direction, though not deciding the precise point, are: Massachusetts,9 Michigan,10 Iowa,11 and Virginia.12

It is admitted by the courts holding either view that liability cannot rest on the head of the family merely because of the family relationship, whether of husband and wife or of parent and child; that the liability must arise, if at all, from the relation of principal and agent. The question is, therefore, whether a member of the family, driving the machine for his own pleasure, is the agent of the head of the family and acting within the scope of the latter's business. In the one line of cases it is argued that it is self-contradictory to state that one driving for his own pleasure can be an agent for the owner and acting within the owner's business. In the other, it is argued that even though the driver is operating the machine for his own pleasure, yet the fact that such driving is permitted by the owner and is the very purpose for which the car was purchased, causes the relation of principal and agent to exist. Thus, in the Abercrombie case, the court said: "It seems too plain for cavil that a father who furnishes a vehicle for the customary conveyance of the members of his family, makes their conveyance by that vehicle his affair, that is, his business, and anyone driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or not, is his agent." And in criticism of Doran v. Thomsen22a the court said: "We think the opinion unsound in that it ignores the agency induced by the fact, independent of that relation [parent and child], that the daughter was using the machine for the very purpose for which the father owned it, kept it, and intended that it should be used. It was being used in the very furtherance of his ownership by one of the persons by whom he intended that purpose should be carried out * * * * There is no distinction, either in sound reason, sound morals, or sound law between her legal relation to the parent and that of a chauffeur employed for the same purpose."

On the other hand it was said in the Doran case that one man is an agent for another only when he is doing something for that other. The Washington view "makes the defendant's liability depend upon the object for which he purchased the machine. * * * * It

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9Smith v. Jordan, 211 Mass. 269 (1912). The court strongly intimated that if the son had been driving the car alone, and for his own pleasure, instead of with his mother, there would have been no liability. Likewise, Bourne v. Whitman, 209 Mass. 155, 172 (1911).
10Loehr v. Abell, 174 Mich. 590 (1913). This case is not precisely in point; the decision centers on statutory rather than common law liability. McNeal v. McKain, 33 Okla. 449 (1912), is frequently cited as in accord with the Washington view, but the court expressly pointed out that it was deciding a case, not where the son was riding alone for his own pleasure, but where he was carrying other members of the family.
11Reynolds v. Buck, 127 la. 601 (1905). The precise basis of this decision is the want of permission, but the language would seem to lean toward the New Jersey view. See discussion in Crawford v. McElhinney, 171 la. 606 (1915).
12Cohen v. Meador, 89 S. E. (Va.) 876 (1916). The evidence of general permissive use is not sufficiently clear.
22aSupra, note 22.
bases the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of the status as to third persons, that such usage must be in furtherance of and not apart from the master's service and control, and fails to distinguish between a mere permissive use and a use subject to the control of the master and connected with his affairs.”

However much sound policy there may be in the Washington view, the more accurate legal reasoning would seem to be with the New Jersey holding. It is difficult to see how a person driving a car for his own pleasure can be acting for another and representing another; rather, he is a mere licensee. That the car was being used for the very purpose for which it was purchased seems immaterial. If a father buys his son an orange to eat, his son is not his agent in the eating of it. If a father buys or lends his son a golf set, permits his son to use it, and the son carelessly drives a golf ball into a crowd, it would be difficult to hold the father liable for his son's negligence on the ground that the purpose for which the father bought the golf set was that his son should use it to play golf.

Analogy, too, would seem to favor the New Jersey view. Where the head of a family allows his son or his wife to use his horse and carriage for the driver's own pleasure, it is held that the former is not liable for the latter's negligent driving.23 Why should it be different with automobiles, especially since automobiles are not deemed dangerous instrumentalities per se like dynamite and ferocious animals?24 Moreover, when an owner permits his chauffeur to drive his car for the chauffeur's own pleasure, or a borrower for the borrower's own pleasure, the owner is not liable for the negligence of such driver.25 Why, then, should he be liable for similar driving by a member of his family, since the relation of principal and agent is admitted not to arise from the family relationship alone?

It is arguable that sound policy sanctions the Washington view. In many cases a judgment against a minor or a married woman would be valueless; the head of the family holds the purse-strings. But if to hold liability is to do violence to the law of agency such argument of policy should be addressed to the legislature and not to the courts. As said in the principal case: "The question whether one person is the agent of another in respect to some transaction is to be determined by the fact that he represents and is acting for him rather than by consideration that it will be inconvenient or unjust if he is not held to be his agent. If, contrary to ordinary rules, the owner of a car ought to be responsible for the carelessness of everyone whom

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23Shockley v. Shepherd, 9 Houst. (Del.) 270 (1891); Maddox v. Brown, 71 Me. 432 (1880); Brohi v. Lingeman, 41 Mich. 711 (1879); Bard v. Yohn, 26 Pa. 482 (1856); Way v. Powers, 57 Vt. 135 (1884).
24McNeal v. McKain, supra, note 20.
he permits to use it in the latter's own business, that liability ought to be sought by legislation as a condition of issuing a license rather than by some new and anomalous slant applied by the courts to the principles of agency."

But however much the jurisdictions may differ as to mere permissive use for pleasure, there are certain uses by members of the family on which there is unanimous agreement. First, when the person driving takes out the car without permission, express or implied, of the owner, there is no liability. Second, when the child entrusted with the automobile is of very tender age, or the wife is an unskilled driver, the owner is liable, not for the driver's negligence, but for his own negligence in entrusting his car to an incompetent driver, thus himself making the injury possible and in fact probable. Third, where the driver is taking out other members of the family (not including the owner), or family guests, with the knowledge of the owner, then there is liability because the driver becomes, for that purpose, the chauffeur of the owner and true agency exists.

W. D. Smith, '18.

Real Property: Community Property: Inheritance Tax.—The inheritance tax is "rested in its essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." It is the transmission itself and not the thing transmitted which becomes subject to the tax. In accordance with this principle, the case of In re Williams' Estate, 161 Pac. (Nev.) 741 (1916), holds that the wife's share of the community property, in case she survives her husband, is not subject to the inheritance tax; that her right in the community during coverture is not a mere expectancy but is a property interest, although subject to the husband's control; and, her right being a property interest, there is no such transmission or inheriting of the property as to subject it to the inheritance tax. The California courts, however, have arrived at the opposite conclusion.

Some explanation of the wife's interest in the community property during coverture may be found in considering what the community system intended to accomplish. Its avowed purpose was to remedy the common law defect of inequality of spouses, by making equal the property rights of the husband and wife. But how, under the

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2At p. 117.
3Knowlton v. Moore, 178 U. S. 41, 56 (1899).
4Matter of Davis, 149 N. Y. 539 (1896).
5Matter of Moffit, 153 Cal. 359 (1908).
California attitude of considering the wife's interest during coverture a "mere expectancy" and the husband's interest approximating absolute ownership, may the gross inequality thus occasioned be reconciled with the equality the community system in theory was to provide? The system has long been in vogue in Spain and Mexico, and it was but natural for our courts to turn to those jurisdictions for interpretations and precedents. But this involved translations, laborious and often inaccurate, and it is suggested by Abbott, J., in a dissenting opinion in Reade v. De Lea,\(^6\) that the courts made a fatal error in those translations. He instances the word "dominio" which in Guice v. Lawrence,\(^6\) a case relied on by the California courts, was translated to mean "ownership" and which should more correctly be translated "master," not only giving a more accurate interpretation, but also conforming thereby to the theoretical community system.

But, apart from the theory as to what the wife's interest should be, there are ample instances to show that she has more than a "mere expectancy." In the disposition of the community real estate her consent is generally required; especially where a gift or sale without valuable consideration is to be made.\(^7\) And in several states joinder of the husband and wife in the instrument of conveyance is necessary;\(^8\) otherwise a valid title is not conveyed.\(^9\) In the proceeds of such a sale the wife has the same interest as in the property before conveyance.\(^10\) In three states the wife has the right of testamentary disposition of one-half the community property,\(^11\) although restricted somewhat as to whom she may devise. One other state gives her this privilege, if the husband has abandoned her.\(^12\) If the husband becomes non compos mentis,\(^13\) or is absent for an extended period,\(^14\) the wife has usually the same powers of control, management and disposition as had the husband. It would seem, from these considerations, that the wife's interest is quite extensive, and it can hardly be said that she has only a mere expectancy and takes by inheritance only, as does the child from its parent.

An inspection of several of the great common law estates analogous to the community system may serve at this point. The estate by the entitätes resembles more nearly the community system than does any other. The Married Women's Acts have modified the common law estate to some extent, so that the husband and wife now hold substantially as tenants in common for their joint lives, with the

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\(^{10}\) N. M. Stats. of 1915, sec. 2767; Forbes v. Moore, 32 Tex. 195 (1869).

\(^{14}\) Timpelman v. Robb, 53 Tex. 274 (1880); Slator v. Neal, 64 Tex. 222 (1885); Wright v. Hays' Adm'r., 10 Tex. 130 (1853); Hall v. Johns, 17 Ida. 224 (1909); 60 Am. Dec. 205, note.
remainder to the survivor. Each one is entitled to one-half the rents and profits during the marriage, with power to dispose of or charge his or her moiety during the same period. In the two states where the question as to whether the wife's share is subject to an inheritance tax has arisen, the courts have held that the wife as survivor of the entirety need not pay an inheritance tax, for she takes in her own right, and not by transmission from her husband or under the intestate laws.

Dower is another analogous estate. Her dower estate in the lands of her husband is, with but one exception, held not subject to the inheritance tax.

In re Estate of Sanford gives as the reason that "The widow takes her dower interest in the estate of her deceased husband by operation of law; that she could not be deprived of it by his will; that it is something which belongs to her absolutely and independent of any right of inheritance or succession * * * ." A later case in the same jurisdiction may also be quoted. "Strictly speaking, the widow's share should be considered as immune, rather than exempt, from an inheritance tax. It is free, rather than freed, from such tax. * * * The share of realty and personality, which under our law go to the widow independent of any will or act of the husband, is not, so to speak, a part of his estate, and is no more liable to a succession tax at his death than is her individual property derived from her own ancestors and held in her own name, though the husband may have had the management and control of the estate during his life-time." A court of another state dealing with the question held that a widow's right of dower is not in succession to that of her husband upon his death, since she does not succeed, so far as her dower estate is concerned, to the husband's title by the intestate laws, but she derives it by virtue of her marriage and in her own right as wife, to be consummated in severalty to her upon her husband's death, and she takes it adversely to the inheritance from the husband.

Curtesy, though an estate held by the husband, is also an analogous estate to the wife's interest in the community property. In con-

16Schulz v. Ziegler, 80 N. J. Eq. 199 (1912).
17Hiles v. Fisher, 144 N. Y. 306 (1895).
18Palmer v. Treas. and Receiver General, 222 Mass. 263 (1915); Matter of Thompson, 85 Misc. (N. Y.) 291 (1914). In Matter of Klatzl, 216 N. Y. 83 (1915), discussed in 1 CORNELL LAW QUARTERLY 200, it was held that the one-half interest of the husband in an estate by the entireties, created by a conveyance from the husband to himself and wife, was subject to an inheritance tax on his demise. But because of the conflict of the opinions upon which the holding was based, great caution must be used in citing the case as an authority.
19Billings v. People, 189 Ill. 472 (1901).
20McDaniel v. Brykett, 120 Ark. 295 (1915); In re Estate of Sanford, 91 Neb. 752 (1912); Crenshaw v. Moore, 124 Tenn. 528 (1911); In re Estate of Strahan, 93 Neb. 828 (1913); Matter of Riemann, 42 Misc. (N. Y.) 648 (1904); Matter of Page, 39 Misc. (N. Y.) 220 (1902); In re Weiler's Estate, 122 N. Y. Supp. 608 (1910).
2191 Neb. 752,753 (1912).
22In re Estate of Strahan, 93 Neb. 828, 833 (1913).
23Italics are the author's.
24Crenshaw v. Moore, supra, note 19.
considering whether the husband's estate by the curtesy was subject to an inheritance tax. Thomas, J., in Matter of Starbuck,2 said: "Her intestacy was the condition of his taking, but not the source of his estate. * * * He took title upon her death intestate, but not by transfer thereby created. * * * She was capable of forestalling and preventing an estate, but could not make such a estate. She simply did not preclude the operation of law that matured it upon her death. * * * Its origin and continuance are due to the law, but not the law that appoints the inheritable property of an intestate to prescribed heirs. * * * The suggestion that the husband's estate is an incident to her death and intestacy, that is, dependent upon them, is true only in the sense that the estate is limited to vest upon the happening of such events." In accordance with this view the court held that curtesy was not subject to an inheritance tax, but then it went on to say, "If the Legislature has inadvertently omitted property that should be taxed, it should correct its error." This was done in the ensuing year by expressly including the estate by the curtesy as a taxable transfer.24

It, therefore, seems that upon principle and according to the weight of authority the wife's interest in the great common law estates and the analogous statutory estate under the community system is of such a nature that she takes her share in her own right and not through inheritance or succession from her husband nor under the intestate laws. Therefore the principal case was correctly decided in determining that the wife's share in the community property was not subject to the inheritance tax.

Federic M. Hoskins, '19.

Real Property: Distress for Rent in the United States.—In re Spies-Alper Company, 231 Fed. 535 (1916), holds that under the law of New Jersey a landlord is entitled to distress upon the tenant's property for rent and taxes due.

Upon the status of the common law remedy of distress for rent due the American states are greatly at variance. In most states the remedy has been regarded as an unfair discrimination in favor of a particular class of creditors. In some states it has been abolished by statute; in others the courts have declared either that it has never existed or else that it has been abolished. Many of the other 2
states have supplanted distress by granting to the landlord a lien or right of attachment for the rent due. In ten states only is distress maintained under its old common law name, being enforced in these states by statutes which more or less modify the distress of the common law.

In some of these states where the landlord is still entitled by statute to the remedy of distress, the person entitled to the action is the person to whom the rent is due, regardless of whether or not being a common law right, is regarded as obsolete; Crocker v. Mann, 3 Mo. 472 (1834). In Montana, distress, not being applicable to the conditions of the country, was superseded by statutory remedies; Bohm v. Dunphy, 1 Mont. 333 (1871). In Oklahoma, distress, being considered inapplicable to local conditions, was abolished; Smith v. Wheeler, 4 Okla. 138 (1896).

Alabama, Civil Code (1907), secs. 4734-4739: in Arizona by Rev. Stats. (1913), sec. 3671, the landlord is granted a lien on all property placed or used on the demised premises, until the rent is paid, which he may seize, excluding the property of others even though found upon the premises, and he may hold or sell the property for the purpose of getting the rent, which may be payable in money, property or personal service: in Arkansas by Kirby's Rev. Stats. (1904), sec. 5032, the landlord is granted a lien upon the crops raised upon the premises for which he may have an action and attachment: District of Columbia, Code, Secs. 1229 and 1230: in Florida by Comp. Stats. (1914), sec. 2240, the landlord has a lien enforced by distress proceedings: in Georgia by Code (1911), sec. 3340, the landlord's lien is enforced by distress proceedings: Indiana, 3 Burns' Ann. Stats. (1914), sec. 3349: Iowa Code (1897), secs. 2992 and 2993: in Kansas by Gen. Stats. (1909), sec. 4713, it is provided that any rent due from farming land shall be a lien upon the crops: in Louisiana by Garland's Rev. Code of Practice (4th ed.), art. 287, p. 210, the landlord may obtain a writ of provisional seizure if he thinks the goods are about to be removed: in Maine by Rev. Stats. (1903), c. 93, sec. 45, where a lease of land is with rent payable, for purposes of erecting a mill or other buildings thereon, the buildings and interest of the lessee are subject to a lien and are liable to be attached for rent due: in Missouri by 2 Rev. Stats. (1909), sec. 7896, attachment is granted if the tenant has removed or intends to remove the goods from the premises: in New Mexico by Ann. Stats. (1915), sec. 3334, a lien is granted upon the property remaining in the house: in North Carolina, 1 Peltier's Rev. Stats. (1908), sec. 993, a lien is granted on crops raised on land leased for agricultural purposes: in Texas by Shannon's Code (1896), sec. 5399, any debt by note, account or otherwise, created for rent of land, is a lien upon the crops: in Texas by Comp. Laws (1907), sec. 5475, a lien is granted on all property not exempt from execution, for so long as the lessee may occupy: in Washington by Rem. & Ball's Codes and Stats. (1913), sec. 1188, the landlord is granted a lien on the crops.

Delaware, Code (1915), sec. 4553: Illinois, 4 Jones & Add.'s Stats., sec. 7054: Kentucky, Carroll's Stats. (1915), sec. 2299: New Jersey, Comp. Stats. (1911), 1939: Maryland, 1 Ann. Code, art. 53: Mississippi, Code (1906), sec. 2838: Pennsylvania, 2 Purdon's Digest, p. 2174, par. 1: South Carolina, Code (1912), sec. 3514. (In South Carolina distress was abolished in 1869, but was restored by statute in 1877); see Mobley v. Dent, 10 S. C. 471 (1878); Virginia, Ann. Code (1904), sec. 2787: West Virginia, Hogg's Ann. Code (1913), sec. 4134: Texas, 4 Sayles' Civil Stats. (1914), sec. 5479 (any person to whom rent is due may apply for distress).
he may have the reversion;7 while in other states, only the landlord or his agent is permitted to distrain.8 Executors or administrators in many states are also granted the right of distress for rent due the decedent by a tenant upon a lease for years,9 this being a direct reversal of the original English rule.10

And, as a further modification of the common law, statutes now declare that distress may be made for rent payable in crops and other chattels,11 as well as for rent payable in money.

Generally speaking all chattels found on the demised premises in possession of the tenants, and in some cases of the sub-tenant as well,12 are liable to distress. But, as exceptions to this general rule, however, the statutes have excluded from liability certain classes of property. While one state has allowed only beds, bedding and wearing apparel to be exempt,13 yet in the other states a far longer list is excluded, the most important of these exemptions being the property of a third party or a stranger,14 implements of trade,15 beasts of the field and labor,16 crops raised upon the premises,17

9Delaware, Code (1915), sec. 4579 (administrator or executor may distrain within six months from the time the rent becomes due): Kentucky, Carroll's Stats. (1915), sec. 2321: New Jersey, 2 Comp. Stats. (1911), p. 1939, par. 20: Mississippi, Code (1906), sec. 2838 (administrator or executor may distrain within six months): Maryland, 1 Ann. Code, art. 53, sec. 20 (guardians of minors may also distrain): West Virginia, Hogg's Ann. Code (1913), sec. 4734.
13Florida, Comp. Laws (1914), sec. 2238; but this provision was declared unconstitutional in the case of Cathcart v. Turner, 18 Fla. 837 (1882).
15Delaware, Code (1915), sec. 4321 (tools and fixtures necessary to trade up to the value of $75 and sewing machines belonging to seamstresses declared exempt): New Jersey, 2 Comp. Stats. (1911), p. 1939, sec. 3: Pennsylvania, 2 Purdon's Digest, p. 2175, par. 8 (sewing machines belonging to seamstresses are exempt).
16New Jersey, 2 Comp. Stats. (1911), p. 1939, sec. 3 (beasts of labor and sheep are to be exempt unless there be no other property). But for contrary provisions, see Delaware, Code (1915), sec. 4556: Pennsylvania, 2 Purdon's Digest, p. 2174, par. 3.
17West Virginia, Hogg's Ann. Code (1913), sec. 1653 (no growing crop liable
wearing apparel and any personal property up to a certain value which the tenant may choose, horses sent to a livery, rented and hired chattels, and goods sold to a bona fide purchaser prior to the distress.

As to the time during which distress may be made the statutes have imposed various restrictions, both as to the limit of time subsequent to the rent falling in arrear, and as to the time subsequent to the termination of the lease. In case of the removal of the goods from the premises without the consent of the landlord, prior to the rent having been paid, the general tendency of the statutes is to allow the landlord to follow and to seize the property thus removed.


18 Delaware, Code (1915), sec. 4321 (bibles, schoolbooks and other personal property of tenant to value of $75 are exempt): Illinois, 4 Jones & Add.'s Ann. Stats. (1914), sec. 5583 (bibles, schoolbooks, other personal property to value of $100, and if the tenant is the head of a family then to the value of $300, and wearing apparel are excluded): New Jersey, 2 Comp. Stats. (1911), p. 1939, sec. 24: Pennsylvania, 2 Purdon's Digest, p. 2175, pars. 4-7 (personal property to value of $300, bibles and school books): West Virginia, Hogg's Ann. Code (1913), sec. 1658 (personal property to the value of $200).

19 Delaware, Code (1915), sec. 4556: Maryland, 1 Ann. Code, art. 53, sec. 17.

20 Delaware, Code (1915), sec. 4321 (rented pianos, organs, and typewriters): Maryland, Ann. Code, art. 53, sec. 17: Pennsylvania, 6 Purdon's Digest, p. 6512, pars. 1, 2 (leased motors and dynamos are exempt provided the landlord be given notice within ten days from the time of their being placed upon the premises; leased soda water apparatus, sewing machines, etc., are also excluded).


22 Delaware, Code (1915), secs. 4555, 4578 (distress may be made while the premises and the title remain in the person to whom the rent accrues or his heirs, but no distress is allowed for more than two years after the rent falls in arrear): Illinois, 4 Jones & Add.'s Ann. Stats., sec. 7066 (distress may be made within six months from the time the term for which the premises were leased expires): New Jersey, 2 Comp. Stats. (1911), p. 1939, secs. 8, 17 (may not be made for more than one year's rent in arrear; the distress must be made within six months from the time the rent becomes due, or if the rent is to be paid in installments, within six months from the time the year's rent becomes due; the distress must be made within six months from the termination of the lease, if it be during the continuance of the landlord's title, or where the landlord's title also ceases, then thirty days from the end of the term): Mississippi, Code (1906), sec. 2852 (may be made after the determination of the lease but during the continuance of the landlord's title, and during the possession of the tenant from whom the rent is due): Virginia, Ann. Code (1904), sec. 2790 (may be made any time within five years from the time the rent becomes due): West Virginia, Hogg's Ann. Code (1913), sec. 4140 (may be made within a year after the rent is due whether the lease be ended or not).

23 Delaware, Code (1915), sec. 4557 (chattels may be distrained within 40 days of their removal): Illinois, 4 Jones & Add.'s Ann. Stats. sec. 7074 (where the tenant removes the crop so as to impair the lien of the landlord, the crops may
In respect to the making of the levy several states require as a preliminary an affidavit to be issued, by or on behalf of the landlord; whereupon a distress warrant must be issued by the court. Upon the strength of this warrant the sheriff, constable or other officer may make a levy, if necessary using force, upon any property not declared exempt. Many states require that the goods shall not be removed from the county or taken from the possession of the person making the distress, imposing penalties for such removal.

While originally the remedy merely enabled the landlord to seize the property found upon the premises and hold it as a pledge for the payment of the rent, yet by statute the sale of the property thus seized was authorized. And now in every state having the remedy similar legislation has been passed, whereby the landlord is granted the express right of having the property sold. While

be distrained before the rent falls due): Kentucky, Carroll's Stats. (1915), sec. 2307 (the landlord is permitted to follow the goods removed to another county): New Jersey, 2 Comp. Stats. (1911), p. 1939, secs. 14, 15 (chattels may be distrained within thirty days after their removal, and where the tenant willfully removes the goods, he is held liable for double their value): Maryland, 1 Ann. Code, art. 53, sec. 18; Mississippi, Code (1906), secs. 2848, 2850 (where the landlord thinks the tenant is about to remove the goods, he may attach the property, and where the goods have been removed, he may levy upon them wherever they may be found within thirty days of their removal): Pennsylvania, 2 Purdon's Digest, p. 2176, par. 13-15 (goods clandestinely removed may be distrained within thirty days): South Carolina, Code (1912), sec. 3514: Virginia, Ann. Code (1904), sec. 2791 (goods may be distrained within thirty days): West Virginia, Hogg's Ann. Code (1913), secs. 4137, 4139 (within thirty days).

Florida, Comp. Laws (1914), secs. 2240, 2241 (the warrant must contain the amount, quantity or value of the chattels to be levied): Georgia, Code (1911), sec. 5390: Kentucky, Carroll's Stats. (1915), sec. 2301: Maryland, 1 Ann. Code, art. 53, sec. 8 (the landlord is required to take an oath that the tenant is bona fide indebted to him for the amount claimed, before obtaining the warrant): Mississippi, Code (1906), sec. 2839 (the landlord is required, if necessary, to give an itemized account and enter into a bond for double the amount to be recovered): West Virginia, Hogg's Ann. Code (1913), sec. 4136: Texas, 4 Sayles' Civil Stats. (1914), sec. 5470 (landlord must give a bond).


Delaware, Code (1915), sec. 4561: New Jersey, 2 Comp. Stats. (1911), p. 1939, sec. 2 (the goods are not to be impounded in different places): Mississippi, Code (1906), sec. 2853.


See 3 Bl. Comm., chaps. 6-14.

Stat. 2 William & Mary, c. 5, sec. 1.

Delaware, Code (1915), sec. 4566: Florida, Comp. Laws (1914), sec. 2244 (upon an affidavit being filed the court shall issue a warrant summoning the defendant into court for trial, and if the verdict and judgment then be for the plaintiff and the property in whole or in part is not repleved, the goods shall be
the power to sell is incident to every statute, upon the manner and
type of sale the statutes are not in accord. In some of the states
the person making the distress is compelled, prior to the sale, to
give a notice of the distress to the tenant; some of the statutes
require that the property, if not replevied, be appraised, and
in some a sufficient advertisement and public notice of the time and
place of the sale must be made. The sale in a majority of the states
must be made by the sheriff or constable at a public sale, for so
much only as is necessary to satisfy the demand. The surplus, if
any, from such sale is in a few states returned to the owner, but in
a majority of the states is paid into the court for disposal by it. If
the first distress be not sufficient to satisfy the rent, a further
distress may be made for the residue.

sold; in some cases of agricultural distraints the property may, at request, be
delivered to the landlord: Georgia Code (1911), sec. 5390: Illinois, 4 Jones &
(1906), sec. 2845: Pennsylvania, 2 Purdon's Digest, p. 2177, par. 16: South

Delaware, Code (1915), sec. 4559: New Jersey, 2 Comp. Stats. (1911),
p. 1939, sec. 6: Maryland, Ann. Code, art. 53, sec. 9 (a statement of the amount
due must be affixed to the distress warrant): Mississippi Code, (1906), sec.
2845 (the officer making the seizure is required to give notice to the tenant):
South Carolina, Code (1912), sec. 3521: West Virginia, Hogg's Ann. Code (1913),
sec. 4141, (where the rent is payable in other form than money, a ten days
notice must be given.)

Delaware, Code (1915), sec. 4566 (property to be appraised by two freeholders
within five days of the distress): New Jersey, 2 Comp. Stats. (1911), p. 1939,
sec. 6 (property, if not replevied in ten days, on a two days notice to the tenant
may be appraised by three sworn appraisers): Pennsylvania, 2 Purdon's Digest,
p. 2177, par. 16: South Carolina, Code (1912), sec. 3521 (the appraisal may be
made five days after the distress, by two sworn appraisers): West Virginia, Hogg's
Ann. Code (1913), sec. 1656 (if the debtor so desire, the property may be appraised
by two disinterested householders): Maryland, Ann. Code, art. 53, sec. 11 (if the
distress is upon grain or other produce, the goods may be appraised by two
disinterested householders).

Delaware, Code (1915), secs. 4566, 4574 (six days notice of the sale required):
Florida, Comp. Laws (1914), sec. 2245 (there must be a ten days notice as in an
(1915), sec. 2309 (the advertising must be as for an execution sale): New Jersey,
2 Comp. Stats. (1911), p. 1939, sec. 6 (a five days public notice required): Missis-
sippi, Code (1906), sec. 2845: Pennsylvania, 2 Purdon's Digest, p. 2177, par. 16
(six days public notice required): South Carolina, Code (1912), sec. 3521 (adver-
sising to be as for an execution sale): Virginia, Code (1904), sec. 2794a: West
Virginia, Hogg's Ann. Code (1913), sec. 1655 (the officer making the sale is
required to post a public notice of the sale at least ten days before the sale).

Delaware, Code (1915), sec. 4556: Florida, Comp. Laws (1914), sec. 2245:
Georgia, Code (1911), sec. 5390: Kentucky, Carroll's Stats. (1915), sec. 2309;
New Jersey, 2 Comp. Stats. (1911), p. 1939, sec. 6: Mississippi, Code (1906),
(1913), sec. 1655.

Kentucky, Carroll's Code of Practice (1906), sec. 644: New Jersey, 2 Comp.
Stats. (1911), p. 1939, sec. 6 (the surplus is to be left in the hands of the sheriff):

Delaware, Code (1915), sec. 4568 (no second distress is allowed if the first
be without a sale, and if the goods are not sold within 60 days from the time of the
levy they are declared free from distress): New Jersey, 2 Comp. Stats. (1911),
p. 1939, sec. 21.
NOTES AND COMMENT

Prior to this sale, however, the tenant, if he so wish, is permitted in many jurisdictions to replevy the property distrained. In Georgia replevin is permitted only when the tenant takes an oath that the rent is not due and gives security as condemnation money, while in Virginia and West Virginia the officer may release the goods only upon a “forthcoming” bond. But in the other states the tenant may replevy by merely giving a bond for double the amount of rent due. As a further protection to the tenant the statutes impose certain heavy liabilities. In those cases where the rent may be excessive or where distress may be made for the rent not due, the person making such a distress is liable in damages to the tenant. Mere subsequent irregularities, however, in a majority of states, do not invalidate the action, nor make the landlord a trespasser, the only damages recoverable for such acts being those special damages which the tenant may have suffered by reason of such irregularity. The statutes of Maryland are the only exception to this last general statement.

D. R. Perry, '19.

Real Property: Highways: Moving of Buildings along Street.—In Missouri Pac. Ry. Co. v. Sproul, 162 Pac. (Kan.) 293 (1917), the plaintiff, being engaged in the business of moving buildings, contracted to move one across the defendant’s railroad tracks. He was given permission by the city, but in a proceeding by the defendant for an injunction the present plaintiff was forced to pay the cost of lifting the defendant’s telegraph wires, made necessary by the passage of the building. On appeal the court held, one judge dissenting, that the plaintiff could recover the sum paid out by him.

Georgia, Code (1911), sec. 5391 (where the officer retains possession of the goods, however, it is not necessary to give a bond).


Delaware, Code (1915), secs. 4558, 4571 (double damages are allowed for unreasonable distrain, and where there is no rent in arrears): Kentucky, Carroll’s Stats. (1915), sec. 2312 (double damages allowed): New Jersey, 2 Comp. Stats. (1911), p. 1939, sec. 11: Mississippi, Code (1906), secs. 2853, 2855 (double damages allowed): Pennsylvania, 2 Purdon’s Digest, p. 2174, par. 19: Texas, 4 Sayles’ Civil Stats. (1914), sec. 5483 (replevin is allowed within ten days from the time of the levy).

Delaware, Code (1915), secs. 4558, 4571 (double damages are allowed for unreasonable distrain, and where there is no rent in arrears): Kentucky, Carroll’s Stats. (1915), sec. 2312 (double damages allowed): New Jersey, 2 Comp. Stats. (1911), p. 1939, sec. 11: Mississippi, Code (1906), secs. 2853, 2855 (double damages allowed): Pennsylvania, 2 Purdon’s Digest, p. 2174, par. 19 (for excessive distress the landord must refund four times the amount in excess; see also p. 2182, par. 18, where damages are allowed when there is no rent in arrear): South Carolina, Code (1912), sec. 3520 (the landlord is liable to the tenant for all the damages suffered): West Virginia, Hogg’s Ann. Code (1913), sec. 4407.


Maryland, 1 Ann. Code, art. 53, sec. 16 (every distress for rent made contrary to the provisions shall be unlawful, and all sales made thereunder shall be void and illegal).
inasmuch as the moving of buildings was a proper and recognized use of the streets. In the absence of municipal or statutory regulation as to the moving of buildings, or as to the raising or removing of wires, where the interference was not unreasonable nor the expense considerable, such expense, should, it was held, be borne by the railroad company and not by the house-mover.

By authority and upon principle it would seem the holding in the principal case is completely justified. There are four kinds of cases involving the moving of buildings in the highway, namely, (1) where the situation is controlled by ordinance or statute, (2) where a hard and fast rule is applied to all cases, (3) where local custom is the criterion, and (4) where each case is decided according to its own particular equities.

(1) In some instances, as in Indiana Ry. Co. v. Calvert, the person who has been granted the right to string wires along or across the highway is required by municipal ordinance to raise or remove the wires at his own expense for the purpose of allowing buildings or other large objects to pass. A converse rule exists in Ohio where the house-mover is given permission to carry on his business and to lift or remove wires which obstruct him, provided he pays the expenses incurred. Other courts assert the municipality's authority to prohibit the moving of a building through the streets at all, but the more general regulation is one which recognizes such a use of the highway as a legitimate street use, yet requires the obtaining of a permit.

(2) The position taken by the courts in which a sweeping application is made of an unvarying, arbitrary principle is illustrated by the case of Western N. Y. & P. T. Co. v. Stillman. Here a trolley company operating under a franchise denied any obligation on its part to raise or remove its wires to permit the passing of the defendant's building. It was held that the property right of any such corporation was subject to the public right to the use of the street for all reasonable purposes, and, that in the absence of legislative enactment, an individual has a common law right to the reasonable use of the public streets and highways for moving his buildings along or across the same. Under this common law doctrine the right of the owner of a building to the reasonable use of the streets for moving the building is paramount to any privilege granted for the erection of poles and wires.

(3) The principal case itself affords a good instance of the type of cases which is controlled by custom. In considering this phase of the case the court said: "This rule [excluding house-moving as a right enjoyable by the public as a use of the street] is not in keeping with the view taken by this court in regard to the use that may be made of the streets, and especially where, as here, it is shown that

168 Ind. 321 (1907).
3 Eureka City v. Wilson, 1 Utah 67 (1897).
5 U.S. 456 (1910).
it is a use to which they are frequently and customarily devoted in a particular city or community. Very obviously the court is following the principle that whether the moving of a building along the street is a reasonable and proper use or not and one paramount to the rights of the owners of wires lawfully hung in the streets, depends upon custom and popular usage.

(4) In some other cases it has been held that, irrespective of whether a person can move a building through the streets by ordinance, common law, or local custom, the right must be exercised subject to equitable restrictions. The court in Telegraph Co. v. Wilt, where a person desired to move his building only across a street over which telegraph wires were placed, very readily recognized the moving of a building as a reasonable use of the street; but where, as in Fort Madison St. Ry. Co. v. Hughes, the house-mover demanded the privilege of so using a highway for a mile and a quarter, and a corporation had erected poles and wires for the operation of its cars along this street so that the moving would stop traffic for days, causing great loss and public inconvenience, the right to move was denied. The difficulties that attend any litigation on this matter are apparent from these two cases. A trolley company, for instance, has been granted the right to maintain poles and wires along the highway for the running of its cars. Such a franchise, it would seem, should be exercised subject to the public's reasonable use of that same highway, which would effect a limitation of the company's privilege. A person's right to move a building along a highway is absolute and not qualified with any liability to pay the expense of raising or removing wires rightfully placed across the street by another, if such moving is to be regarded as a public use of the street which is ordinary, usual, and reasonable. If the moving is reasonable, a person who has been given the right to place wires across the street must at his own expense see that these wires in no way interfere with the removal; if the removal is unreasonable, the house-mover must pay for all expenses incurred by others in temporarily foregoing their rights as a result of the exercise of an extraordinary privilege. In this manner the courts adopting this view, upon weighing the equities of each case, can throw the burden one way or the other by declaring the moving of buildings through the streets to be a reasonable or unreasonable use.

Upon consideration of the whole subject it would seem that a person's right under a franchise to erect poles and wires in the highway is secondary and subordinate to the primary use of the public and is only permissible when not incompatible with that primary object. However, a holding that the moving of buildings along

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7 At p. 295.
8 X Phila. (Pa.) 270 (1851).
9 137 Iowa 122 (1907).
10 Graves v. Shattuck, 35 N. H. 257 (1857); Toronto St. Ry. Co. v. Dollery, 12 Ont. App. 679 (1886); A. M. Richards Bldg. & Moving Co. v. Boston Electric Co., 188 Mass. 265 (1905); Day v. Green, 4 Cush. (Mass.) 433 (1849); Rice v. Whitby, 28 Ont. 598 (1867); Home Tel. Co. v. Moodie, 75 Ore. 117 (1915); South Western Tel. Co. v. Thompson, 142 S. W. (Tex.) 1000 (1912); Hudson & M. Tel. and Teleg. Co. v. Township Comm. of Linden, 80 N. J. L. 158 (1910);
the streets is under all circumstances to be considered a reasonable use of the street, should not be made.\textsuperscript{11} The circumstances of each case should decide the reasonableness of the use. A person making a reasonable use of his right of moving buildings through the street ought not to have imposed upon him the burden of raising or removing the wires of a company acting under a franchise from the city.

\textit{Eugene F. Gilligan, '19.}

\textbf{Real Property: Unconstitutionality of Act Abolishing Dower and Curtesy in New Jersey.}—In New Jersey by the act of March 3, 1915,\textsuperscript{1} dower and curtesy were abolished. This act affected only marriages subsequent to the time when it took effect.\textsuperscript{2} The case of \textit{Reese v. Stires}, which has not yet been reported, Chancellor Walker handed down a decision declaring the act unconstitutional on the ground that it violated Article 4, section 7, plactum 4, of the New Jersey Constitution which provides that "every law shall embrace but one object, and that shall be expressed in the title." The title of the Act in question was "An act directing the descent of real estates." The court held that the title did not express the object, in that dower and curtesy do not arise by descent. Subsequent to the above decision the legislature repealed the act abolishing dower and curtesy.

\textit{Herman B. Lermer, '17.}

\textbf{Sales: Transfer Induced by Impersonation.}—In \textit{Phelps v. McQuade, New York Law Journal, March 19, 1917}, the New York Court of Appeals holds that, where a buyer obtains goods by impersonation, he acquires a voidable title which will become absolute when passed to an innocent purchaser. One Walter Gwynne represented to the plaintiffs that he was Baldwin Gwynne, a responsible Cleveland man, thereby inducing the plaintiffs to sell him certain jewelry on credit, which he later sold to the defendant, a purchaser for value and without notice. Replevin was brought to recover the goods. In the Appellate Division\textsuperscript{1} the plaintiffs based their case on the contention that Gwynne's actions constituted larceny and that, therefore, he could pass no title. The Appellate Division in this connection distinguished between common-law and statutory larceny and the effects of each on the malefactor's power to make a valid transfer of his spoils.

At common law it was not larceny to obtain property by false pretenses, but the New York Penal Law makes it so.\textsuperscript{2} At common


\textbf{1Ganz v. Ohio Postal Tel. Cable Co.,} 72 C. C. A. 186 (1905); \textit{State v. Spokane,} 24 Wash. 53 (1907).

law one who acquired property by fraud took a voidable title that became absolute in an innocent purchaser. And, of course, the common law permitted a thief to pass no title at all in stolen property. The plaintiffs argued in the Appellate Division that, when the legislature extended the scope of larceny to include this kind of fraud, the change in nomenclature brought with it a change in the wrongdoer's power to transfer title. It was urged that, when one obtains property by false pretenses, he is a thief and gets no property in the stolen goods that can be transferred. But the court held that the statute had no effect on such collateral matters and that the old common law distinction was still in effect. This determination is affirmed by the Court of Appeals which also discusses the situation with more regard to the law of sales. The decision of the highest court is supported by authority. The leading English case on the point is *Cundy v. Lindsay.* In few other situations is found such nicety of legal hairsplitting. Where the buyer in a contract of sale impersonates another, the common statement is that two intentions are present in the mind of the seller, namely, primarily an intent to pass title to the person standing before him, the imposter, and only secondarily an intent to transfer the property to the responsible person the individual represents himself to be. On the other hand, where the negotiation is carried on entirely by correspondence, as was the case in *Cundy v. Lindsay,* it is usually said that the mind of the seller goes out to the imposter not at all and that the seller has but a single intention, namely, to transfer title to the goods to the person whose name is signed to the letter. This somewhat artificial distinction is generally recognized without question. If the imposter falsely represents himself to be the agent of another and thereby obtains goods, the situation is the same as in *Cundy v. Lindsay.* The seller has no intention whatever to transfer title to anyone but the supposed agent's principal and can recover the property, even though it is in the hands of an innocent purchaser.

An analogous line of cases appears in the law of negotiable instruments. Where a person secures a check drawn in favor of one whom he represents himself to be and forges an indorsement thereto, it is held that the drawer of the check intended it to be paid only to the person whose name appears upon it as payee and the bank is liable for paying it to the imposter. This view is precisely opposite to that maintained in the principal case with respect to sales.

The late Dean Clarence D. Ashley disapproved of the result reached in *Cundy v. Lindsay* and advocated the extension of the

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1 Supra, note 3.
2 App. Cas. 459 (1878).
3 Supra, note 3.
5 Supra, note 3.
8 Supra, note 3.
doctrine of the principal case to transactions where the parties deal by correspondence. His position was that there should be no difference between the situations where the parties are face to face and where, for instance, they talk over the top of a partition, or over a telephone or, finally, by letter. The reasoning is difficult to impeach but his premise is an arbitrary assumption that the rule in the principal case is the better one. It might be argued with equal propriety that Cundy v. Lindsay presents the preferable view and then by a course of reasoning inverse to that given above, that the principal case is wrong.

Since either rule has legal reasoning to support it, expediency and natural justice should dictate the adoption of one of them in all such cases of impersonations, whether effected by correspondence or in person, as the practical result is identical. Inasmuch the fault, if any, as between the two possible sufferers, seems to lie with the seller rather than with the innocent purchaser, the latter should be protected in all cases. From an abstract legal viewpoint Cundy v. Lindsay is better law, but practical experience would approve the extension of the rule of the principal case to embrace all frauds of like nature, whether effected by letter or personal suasion.

Donald H. Hershey, '18.

Tort: Causal Relation to Injury: Injury by Unlicensed Automobile.—In Fairbanks v. Kemp, 115 N. E. (Mass.) 240 (1917), the plaintiff sued to recover damages for the death of his intestate, who was run down and killed by the defendant's automobile. The defendant's husband had made an application for the registration of the car for the year 1915, the certificate of registration was issued to him, to take effect on January 1, 1915. On December 27, 1914, however, the husband died. The defendant, his widow, put the registration numbers on the car and used it, and on September 6, 1915, while she was operating the machine, the accident occurred. The facts as to the registration stated above made the license invalid, so that the automobile was not legally registered. The court held that this failure to register made the car a nuisance, and rendered the driver a trespasser on the highway, and that the defendant, who was violating the law in running the unregistered machine "was responsible to the plaintiff if her unlawful act directly contributed to the intestate's injury."

The determination of the rights and liabilities of the owners of unregistered automobiles and of unlicensed drivers has caused difficulty, and on the former point there is still some conflict. In Massachusetts the doctrine of the principal case is established by

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103 Col. L. R. 71. 11Supra, note 3. 12Supra, note 3.

1The action was under the Massachusetts statute (Acts of 1907, c. 375), providing for the assessment of damages for death with reference to the degree of the defendant's culpability. The court held that the negligent operation of an unregistered machine involved a higher degree of culpability than would the equally negligent operation of a registered machine, although the operation of the unregistered car did not necessarily make the owner liable for the maximum amount of damage allowed by statute.
a long series of decisions.\(^2\) It is the settled rule that the owner of an unregistered car is a trespasser on the highway, that he has no rights save not to be wantonly injured, and, if he injures anyone, he is liable regardless of negligence on his part. The Massachusetts rule is applied in Maine\(^3\) and seemingly in Pennsylvania,\(^4\) though in the latter jurisdiction there is some conflict;\(^5\) and the Canadian courts follow the same doctrine.\(^6\) While in Connecticut, after the courts had rejected the Massachusetts rule,\(^7\) it was adopted by statutory enactment.\(^8\) However, the rule followed in most jurisdictions, including New York, is contrary to that of the Massachusetts court. It is that the owner's rights are not impaired nor his civil liabilities increased by a failure to register.\(^9\) As to the failure of a driver to secure a license, Massachusetts applies the rule which seems to be universally accepted,\(^0\) that the tort rights and liabilities of the driver are not affected. The reason for this striking distinction in Massachusetts is that the Massachusetts statute forbids the operation of unregistered cars on the highway, while unlicensed drivers are not prohibited from operating machines.\(^2\) But statutes prohibiting the operation of unregistered cars have not led the courts in other states to adopt the Massachusetts rule.\(^3\)

The prevailing rule is in accordance with the doctrine that injury caused by violation of a statute is never actionable, except when the illegal feature of the act is the proximate or direct cause of the injury.\(^4\)

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\(^5\)Hemming v. New Haven, 82 Conn. 661 (1910).

\(^6\)Laws of Conn., 1911, c. 85, sec. 19; Stroud v. Water Com'rs, 90 Conn. 412 (1916).


\(^9\)Lindsay v. Cecchi, 26 Del. 133 (1911); Crossen v. C. & J. E. R. Co., 158 Ill. App. 42 (1910); see also supra, note 9.

\(^10\)Stats. 1903, c. 473; Stats. 1905, c. 311.


\(^12\)Platz v. City of Cohoes, 89 N. Y. 219 (1882).
The act of the defendant in violation of the statute was running his automobile on the highway without having registered it; the illegal feature of this act was the failure to register the machine; the act of operating the machine on the highway was not in itself alone illegal. The accident which occasioned the action would have occurred just the same, if the machine had been properly registered. The illegal feature of the defendant's act, therefore, had nothing to do with the injury, and the defendant should not be held liable.

The general rule may be justified on still another ground. Except in Massachusetts, the statutes providing for registration of automobiles are regarded as police regulations merely, and not as for the benefit of travelers on the highway. Unless passed for the benefit of the traveling public, injured users of the highway should not be allowed to base suits upon the statute. This is the general view. But in Massachusetts the view is the one mentioned in the principal case, that one purpose of the registration of cars is to enable injured parties to ascertain by whom they have been injured. On this theory the Massachusetts rule is tenable, although many courts hold that an injured party cannot recover under a statute passed for his benefit unless the harm done him is the harm which the statute aimed to prevent.16 In any event it does not seem that the intent of the legislature which prohibits the operation of unregistered machines differs from that of the legislature which provides a penalty for the failure to register, and there seems to be no reason for the different interpretations put upon such provisions.

Richard H. Brown, '19.

Trusts: Necessity of Notice to Cestui Que Trust of Existence of the Trust: Sufficiency of Evidence to Show Intention to Create a Trust.—What is the effect of making out a statement that securities are held in trust for A, when A does not know of the statement and the securities remain in the possession of the declarant? That question is involved in the case of Ambrosious v. Ambrosious, 239 Fed. 473 (1917), decided in the United States Circuit Court of Appeals. Ambrosious, apparently desirous of providing in some manner for the future welfare of his daughter, executed a paper which he entitled, "List of securities held by L. J. Salomon in Speyer & Co.'s vault in envelope marked 'Property of Z. H. Ambrosious'," and concluded with the words, "All these foregoing securities belong to my daughter, Marie Marjorie Ambrosious, and are held by me in trust for her during my lifetime ** ** **." The instrument was signed by Ambrosious. A press copy of this list was enclosed in a sealed envelope and given by the decedent to his mother, whom he told that it was a paper of value to his daughter, that he did not want her to know that she had anything and that the envelope was not to be opened until after his death. This was the only communication of any kind made by Ambrosious. Having hypothecated certain securities on the list, the decedent revised it, including therein those

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remaining, and heading and concluding this second list as he had the first. Some of these latter securities were sold or used for the decedent’s own benefit. Upon his death an envelope marked “Property of H. Z. Ambrosious, Aug. 29, 1912.” was found in his desk at Speyer & Co.’s. This envelope contained the two lists and some of the securities mentioned, together with other securities not mentioned in either list. It appears that the securities were never delivered to Salomon nor were they ever in Speyer & Co.’s vault. The envelope containing the press copy was opened upon his death. The district court found that Ambrosious intended to make a testamentary disposition of his property and that, if a trust had ever been intended, it had been revoked during the decedent’s lifetime. This decree was affirmed by the Circuit Court of Appeals on the ground that the evidence was insufficient to establish an intention to create a trust.

It is well settled, both in England1 and this country,2 that notice to the cestui que trust is not an element necessary to the creation of a valid trust. The presence or absence of notice, however, may be of controlling importance in determining whether a trust has been actually declared or not. This distinction is well illustrated by the language of the court in Milholland v. Whalen,3 a “savings deposit” case, where it is said that “it can, upon principle, make no possible difference whether the depositor communicates the fact of the deposit to the beneficiary or not (except in so far as the communication may be evidence of the intention with which the deposit was made) for the validity of the trust does not depend on the assent of the cestui que trust, but wholly upon the intention of the depositor and an apt declaration of the trust * * * * ” "The prevailing

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2Personal Property: Johnson et al v. Amberson, 140 Ala. 342 (1903); O’Brien v. Bank of Douglas, 17 Ariz. 203 (1915); Cahan v. Bank of Lassen County, 11 Cal. App. 533 (1909); Security Trust & Safe Deposit Co. v. Faryady, 9 Del. Ch. 306 (1912); Fowler v. Gowing, 152 Fed. 801 (1907); Clark v. Callahan, 105 Md. 600 (1907); City of Boston v. Turner, 201 Mass. 190 (1909); City of Marquette v. Wilkinson, 119 Mich. 413 (1899); Pleasants v. Glasscock, 1 Smedes & M. Ch. (Miss.) 17 (1843); Mize v. Bates County Nat. Bank, 60 Mo. App. 358 (1894); Janes v. Falk, 90 N. J. Eq. 468 (1892); Neilson v. Blight, 1 Johns. Cas. (N. Y.) 205 (1799); Van Cott v. Frenite, 104 N. Y. 45 (1887); Smith’s Estate, 144 Pa. 428 (1891); Williams v. Haskin’s Estate, 66 Vt. 378 (1894). A different doctrine prevails in Massachusetts where the trust is voluntary and the settlor retains possession and control of the property. In such a case notice is deemed essential. Boynton v. Gale, 194 Mass. 320 (1907). See, however, Gerrish v. Institution for Savings, 128 Mass. 159 (1886); Savings Institution v. Hathorn, 88 Me. 122 (1805).


Two interesting notes on this general subject will be found in 10 L. R. A. (N. S.) 616 and 12 A. & E. Ann. Cas. 167.

1Milholland v. Whalen, supra, note 2.
Turning now to the question of the decedent’s intention, the court in the principal case summed up the proposition as follows: “If the language in the paper of September 26, 1905 (the first list), constituted him a trustee for the complainant as to the securities therein mentioned, we think that the delivery of a copy of it in a sealed envelope to his mother to keep it for the complainant was sufficient evidence to support the trust.” In support of its decision that a trust was not intended it pointed out that no account was ever kept with the complainant of the income of the securities, that the securities were in his own name, that he sold some of those listed and used others as security for loans and that Ambrosious was a layman and probably unfamiliar with the legal meaning of what he wrote. His acts, it remarks, were “inconsistent with the character of a trustee.” Admitting this to be true, it is submitted that, taking into consideration the instrument drawn up by him and giving due weight to his act of delivering a copy thereof to his mother and his words at the time of such delivery, there was sufficient evidence of an intention to create a trust as to the securities mentioned in the first list. It would seem further that at that moment the trust became complete and irrevocable and that, therefore, the subsequent sales or uses of the securities, inconsistent with his character as trustee, could have no effect upon the trust but would render the trustee’s estate liable to the beneficiary for the principal and income of the securities withdrawn. There is no evidence in the instrument itself that he intended to pass any title, but his words upon delivery of a copy thereof to his mother indicate that he intended to confer a present benefit upon his daughter which for parental reasons he did not desire to inform her of. Those words are confirmatory of a prima facie intention to create a trust expressed in the instrument itself. It would seem logical to give the decedent’s expressions at or about the time of the delivery of the trust instrument more weight in determining his intention than the acts subsequently occurring. It is not so important that Ambrosious never delivered the securities to Salomon or placed them in the vault, since, if he was a trustee, he might have retained possession of them as such. And the fact that no account was kept with the complainant of the income of the securities is entirely consistent with his desire not to have his act communicated to the beneficiary. As a layman he might have had sufficient knowledge to know the legal meaning of what he wrote, although not sufficiently versed in the legal obligations of a trustee to know that his subsequent dealings with the trust property constituted a violation of the trust.

The case of Gown v. De Miranda, which is relied upon in the principal case, is distinguishable. The question in that case was whether the security sought to be recovered had been transferred by an instrument in the nature of a declaration of trust which was never

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4 Savings Institution v. Hathorn, supra, note 2.  
576 Hun (N. Y.) 414 (1894).
delivered to any one but was kept in the decedent's possession. The trust failed because of insufficient execution, and as evidence that the decedent considered the transaction incomplete the court relied upon the fact that the deceased had sold some of the securities. The court remarks: "In no case has it ever been held as yet that a party may, by transferring his property from one pocket to another, make himself a trustee. In every case where a trust has been established the party creating it has placed the evidence thereof in the custody of another, and has thereby shown that it was intended to be a completed act." In the principal case there is no question as to a sufficient execution, viz., the signing, acknowledging and delivery of the instrument. The whole question is as to the meaning to be given the language which the decedent used. Both cases involve the question of what the decedent intended, but they are dissimilar on the facts.

It is difficult to see why the transaction might not have been upheld as a trust on the theory above-outlined, especially if one draws an analogy to the so-called "savings bank trusts." A makes a deposit in trust for B, informs B's mother that he has done so, retains the pass-book and B has no knowledge of the trust until after the death of A. A makes various withdrawals from the fund before his death. These facts have been held to create a valid trust. In the principal case Ambrosious executed an instrument in the nature of a declaration of trust, delivered it to his mother with what would seem a sufficient declaration of his intention, the beneficiary had no notice of the trust until the death of Ambrosious and the securities were used for the decedent's own purposes. Upon principle there would seem to be no reason why a different result should be reached in the one class of cases than in the other. If the withdrawal can be reconciled with the trust in the one case, it should be held consistent therewith in the other.

Leonard G. Aierstok, '17.

Wills: Certainty of Devisee.—The question as to the certainty with which a devisee must be designated in a will is raised in the case of Summers v. Summers, 73 So. (Ala) 401 (1916). The suit was for the partition of lands among tenants in common. The defendant demurred to the bill upon the ground that the complaint failed to show that the parties were tenants in common of the lands in suit. The sufficiency of the complaint depended upon the validity of a provision in the will of the mother of the parties, whereby an interest in remainder in certain lands was devised to such children of the testator as should have cared for the life tenant as compensation or a reward for such services. There was no dispute as to who had taken care of the life tenant, but the plaintiff claimed the devise failed because the will did not sufficiently designate which of the

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6Mabie v. Bailey, 95 N. Y. 206 (1884); Macy v. Williams, 55 Hun (N. Y.) 489 (1890), aff'd, 125 N. Y. 767 (1891); for other cases see "The Creation of Trusts by Bank Deposits," by G. G. Bogert in 1 Cornell Law Quarterly 159, at p. 165. The authorities, however, are not in entire accord.
children should care for the life tenant. In the lower court the
defendant's demurrer was sustained, but on appeal the judgment
was reversed upon the ground that the devise in question failed
because of uncertainty, and that the uncertainty was not cured by
the fact that one of the several children did care for the life tenant
as provided by the will.

Only the opinion of Mayfield, J., dissenting, is reported. His
views seem to accord with the great weight of authority upon the
question.\(^1\) It is to be regretted that a majority of the court saw
fit to make no statement as to the course of reasoning which they
followed in reaching a conclusion seemingly out of harmony with the
usually accepted rule as announced by the courts in similar cases.
In every will the beneficiary must be identified or be capable of
identification with legal certainty.\(^2\) Whether identification is
made out must depend upon the facts of the particular case. It is
not essential that the beneficiary should be definitely ascertained
and known at the date of the will, or even at the time of the testator's
death. It is sufficient if he is so described that he can be ascertained
and known when the right accrues.\(^3\)

A leading case is *Stubbs v. Sargon*.\(^4\) Here there was a devise of
realty "to persons who shall be in co-partnership with me at the time
of my decease or to whom I shall have disposed of my business." It
was urged that the devise was void for uncertainty, but the court
held that it was good as to those persons to whom it was ascertained
the testatrix had disposed of her business in her lifetime. This case
has been consistently followed in this country.\(^5\) In *Dennis v. Hols-
apple*\(^6\) the will devised all the property of the testatrix to whomsoever
should take care of her and maintain, nurse, clothe and furnish her
with proper medical treatment at her request, such person selected
to have a written statement signed by testatrix to entitle her to the
estate. Here, as in the principal case, the plaintiff was the only
person who claimed the property devised, and the evidence showed
that at the time of the testatrix's death the plaintiff in all respects
answered the description of the beneficiary as set forth in the will.
The court held the devise good, saying "it is only when the will
violates, or is not in accord with, the well settled rules of law or is
utterly uncertain, that the carrying out of the disposition of the
estate thereunder is denied. The authorities fully affirm the rule
that it is not essentially necessary that the testator in his will name
the legatee or devisee in order to give effect to the bequest. It is
sufficient if he is so described therein as to be ascertained and identi-
fied." The fact that the plaintiff's claim in the case cited was

\(^{1}\) Redfield, Wills, p. 274; Schouler, Wills, secs. 573, 584-586, 592; Stubbs v.
Sargon, 2 Keen (Eng.) 255 (1837); Knowles v. Knowles, 132 Ga. 806 (1909);
Baltz v. Muskopf, 34 Ill. App. 625 (1889); Dennis v. Holsapple, 148 Ind. 297
(1897); Harriman v. Harriman, 59 N. H. 135 (1879); Hart v. Marks, 4 Bradf.
(N. Y.) 161 (1856); Holmes v. Mead, 52 N. Y. 332 (1873).

\(^{2}\) Gardner, Wills (2d ed.), p. 374.

\(^{3}\) Holmes v. Mead, *supra*, note 1, and other cases there cited.

\(^{4}\) 2 Keen (Eng.) 255 (1837).

\(^{5}\) *Supra*, note 1.

\(^{6}\) *Supra*, note 1.
evidenced by a written statement signed by the testatrix does not distinguish that case from the principal case, since the devisee is named with no more certainty in the one case than in the other.

In Harriman v. Harriman,7 upon a similar state of facts, the devise was held good. In this case there was a devise of the use, occupation and improvement of land for the support of a man and woman during their natural lives, with remainder in fee to such persons as shall take care of and support them in their old age. The court held the devise good on the principle that "a devise is never construed absolutely void from uncertainty but from necessity. If it be possible to reduce it to a certainty, the devise is good. A devise is held to be void for uncertainty only when after a resort to competent oral proof, it still remains a matter of mere conjecture what was intended by the instrument." In the New York case of Fiester v. Shepard8 the will provided that "the residue of my estate, if any there shall be, to be paid by my executor hereinafter named to the person who shall last take care of my father before his death." Here the claimant was paid as a nurse for taking care of the deceased, and the court construed the intention of testator as not to give the residue to a person who merely happened to be the last one to take care of the person named. Whether the clause was void for uncertainty was not decided, but the case was taken to the Court of Appeals on a procedural point and it was intimated that the clause was good.9

It is well settled that extrinsic evidence may be introduced to show the person and the thing intended by the testator, where such evidence does not result in making more or less of the will than its terms import.10 Here there seems to be no reason why extrinsic evidence should not have been employed in applying the description contained in the will to the individual who fulfilled the condition, and by thus identifying the devisee giving effect to the testator's intention. Because of the inherent difficulty in a case of this kind in designating the beneficiary with more definiteness, the courts should be very reluctant to declare such a provision void and thus defeat the testator's most commendable purpose.

Harvey I. Tutchings, '18.

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7 Supra, note 1.
826 Hun (N. Y.) 183 (1882).
92 N. Y. 251 (1883).
10 Jarmann, Wills (5th Am. ed.), 429; Stubbs v. Gargon, supra, note 1; Dennis v. Holsapple, supra, note 1; Harriman v. Harriman, supra, note 1; Smith v. Smith, 1 Edw. Ch. (N. Y.) 191 (1831); Burrill v. Boardman, 43 N. Y. 254, 258 (1871); Leonard v. Davenport, 58 How. Pr. (N. Y.) 384, 387 (1877); Holmes v. Mead, supra, note 1.