Cornell Law Review

Volume 3
Issue 3 *March 1918*

Article 3

Notes and Comment

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Accord and Satisfaction: Disputed or unliquidated claim as affected by an offset claimed by the debtor.—Scott, J., writing the prevailing opinion in *Frank v. Vogt, 178 App. Div. (N. Y.) 833 (1917)*,[1] held that there was no accord and satisfaction where merchandise was sold and delivered under an express contract of sale, and the vendor in payment therefor sent a check "in full" for the agreed purchase price minus a deduction of 5%, the deduction being justified by the claim that the goods were not up to the agreed quality, which check was accepted and used by the vendor. In the language of the court: "That defendant, when he sent the check, wrote that he was sending it as full payment does not affect the question. He could not by paying an amount admittedly due in any event, foreclose plaintiffs from claiming that more was due, nor yet subject them to the risk of postponing the payment of the whole claim, until defendant's relatively small counterclaim could be judicially liquidated. To hold otherwise would result, in many cases, in permitting a debtor to coerce his creditor into making an unjustified deduction from his bill."

By the weight of authority, an assertion of an offset or damages arising out of the same transaction on which a claim is based, will render such claim unliquidated, even though the primary claim itself is undisputed except in respect of the damages or offset asserted.[2] However, there is strong authority in New York and elsewhere of which the instant case is an example which is seemingly squarely in conflict with that rule.[3] Yet even in New York there are decisions in accord with the weight of authority,[4] so the question may to some extent be regarded as still open.

The jurisdictions that are in accord with the weight of authority take the view that there is no material difference between a dispute involving the primary claim itself, and a dispute involving an offset against the claim; that there is a dispute, whatever may have given rise to it.[5] The instant case, and others analogous, reason that, as at least part of the claim is admitted, and ouly so much is paid as is admitted to be due, there is no consideration to satisfy the disputed balance.

In its final analysis, the question resolves itself into an inquiry as to whether a disputed offset arising out of the same transaction on which

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[1]Reversing Frank v. Vogt, 97 Misc. (N. Y.) 674 (1916).

[2]Ostrander v. Scott, 161 Ill. 339 (1896); Tanner v. Merrill, 108 Mich. 58 (1895); Uvalde Asphalt Paving Co. v. New York, 99 App. Div. (N. Y.) 327 (1904); Hull v. Johnson, 22 R. I. 66 (1900).

[3]Klinefelter v. Granger, 152 App. Div. (N. Y.) 896 (1912); Windmuller v. Goodyear Tire and Rubber Co., 123 App. Div. (N. Y.) 424 (1908); Demeules v. Jewel Tea Co., 103 Minn. 150 (1908).

[4]Jackson v. Volkening, 81 App. Div. (N. Y.) 36 (1903), affirmed without opinion in 178 N. Y. 562 (1904); St. Regis Paper Co. v. Tonawanda Co., 107 App. Div. (N. Y.) 90 (1905), affirmed without opinion in 186 N. Y. 563 (1906); Fuller v. Kemp, 138 N. Y. 231 (1893); Ravenswood Paper Mill Co. v. Dix, 61 Misc. (N. Y.) 235 (1908); Brewster v. Silverstein, 78 Misc. (N. Y.) 123 (1912).

[5]Hull v. Johnson, *supra*, note 2.

the primary claim is based renders the whole claim unliquidated. It is difficult to see how a claim, any part of which is in dispute, can be liquidated within the rules governing accord and satisfaction, for as said in *Nassoiy v. Tomlinson*,[6] unless it appears how much is due, the demand is not liquidated, even though it appear that something is due.

It hardly seems correct to say that the payment of a balance due after deducting a variable offset goes only in consideration of that part of the primary claim which is admittedly due. In the instant case no separate and distinct part is admitted to be due, for that which defendant offered was in full payment of the whole claim and not to any individual part thereof. It should be immaterial as to how the debtor computed the amount which he offers in satisfaction of the claim, except perhaps in so far as it tends to show a *bona fide* dispute, yet the courts substantially ground their reasoning thereon.

And even if the conclusion is reached that the debtor has admitted a certain sum to be due, yet he undoubtedly denies that the full claim is due, for his reserved admission that there is but a part due is in itself pregnant with denial of any greater liability. And by the weight of authority, if one of two specific sums is admitted to be due but there is a dispute as to which is the correct amount, the claim is to be considered unliquidated within the meaning of that word in its application to the doctrine of accord and satisfaction.[7]

Frederic M. Hoskins, '19.

Descent and Distribution: Right of inheritance from adopted child.—In *Brewer v. Browning, 76 So. (Miss.) 267 (1917)*, an infant died unmarried and without issue. The infant had been adopted some years before by a family named Rule. Mr. Rule died intestate some time after the adoption and the adopted child inherited from him a large amount of property. After the infant's death, her property was claimed by her natural brothers and sisters and by her adoptive mother. Several other questions were involved in this action, but only this question will be considered here. The Mississippi statute regulating adoption has the following clause: "* * * * and thereafter [after decree of adoption by the court] the petitioner shall have and exercise over such person so adopted all such power and control as parents have over their own children."[1] In a former decision of a case arising between the same parties, the court had held that the natural brothers and sisters would take the property.[2] In the principal case, the former decision was repudiated, and the adoptive mother was held to be entitled to the property which the deceased had inherited from the adoptive father; this result was said to be "more consistent with justice," and to best harmonize with the public policy in encouraging adoption.

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[6]148 N. Y. 326 (1896).

[7]Greenlee v. Mosnat, 116 Iowa 535 (1902); Treat v. Price, 47 Neb. 875 (1896); Nassoiy v. Tomlinson, *supra*, note 6.

[1]Hemingway's Ann. Miss. Code, sec. 299.

[2]Fisher v. Browning, 107 Miss. 729 (1914).

Since adoption was unknown at common law and is made possible only by statute,[3] the question as to the right of the adoptive parent to inherit from the adopted child when the latter dies unmarried and without issue is largely one of statutory interpretation. The different wording of the statutes, however, does not alone account for the conflicting decisions in the various jurisdictions.

In many states it has been held that in the absence of a clause in the statute expressly providing for inheritance by the adoptive parents, property held by the child, no matter from what source acquired, will descend to the natural parents or other blood relatives, rather than to the adoptive next of kin.[4] This result is reached by a very strict construction of the statutes relating to adoption; the courts refuse to change the common law in any way not expressly ordered by statute. This rule would seem to obtain in a majority of jurisdictions.

Other states hold that the relationship of parent and child is established by the adoption; that the adoptive parents take the place of the natural parents in every way, and therefore inherit all the child's property.[5]

Still other jurisdictions make the criterion the original source of the property. If acquired from the natural parents, it goes to the blood relatives; if acquired from the adoptive parents, it goes to the adoptive next of kin.[6]

It would seem that the rule giving all the property to the adoptive parent or the adoptive next of kin would be the correct one, if the view were taken that the adoption not only creates the relation of parent and child between the parties to the adoption, but also destroys that relation between the child and the natural parents. But as the law exists, recognizing the adopted child's relationship to its blood kin for the purpose of inheriting from them, an unfair result is sometimes reached by applying such a rule.[7] On the other hand, the refusal of the courts in many states to recognize the existence of the family

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[3]Spencer, Dom. Rel., sec. 464.

[4]White v. Dotter, 73 Ark. 130 (1904); Russell v. Jordan, 58 Colo. 445 (1915); Estate of Namauu, 3 Haw. 484 (1873); Baker v. Clowser, 158 Ia. 156 (1912); Reinders v. Koppelmann, 68 Mo. 482 (1878); Edwards v. Yearby, 168 N. C. 663 (1915); Daisey's Estate, 15 W. N. C. (Pa.) 403 (1884); Commonwealth v. Powel, 16 W. N. C. (Pa.) 297 (1885); Murphy v. Portrum, 95 Tenn. 605 (1895); Hole v. Robbins, 53 Wis. 514 (1881). In Heidecamp v. Jersey City St. Ry. Co., 69 N. J. L. 284 (1903), it was held that the adoptive parents were not entitled to sue as the next of kin under the Death Act.

[5]Estate of Jobson, 164 Cal. 312 (1912); Humphries v. Davis, 100 Ind. 274 (1884), over ruling Barnhizel v. Ferrell, 47 Ind. 335 (1874); Paul v. Davis, 100 Ind. 422 (1884); Dunn v. Means, 48 Ind. App. 383 (1911); Calhoun v. Bryant, 28 S. D. 266 (1911); *In re* Havsgord, 34 S. D. 131 (1914). This is the rule in Minnesota by Gen. St. Minn., Sec. 7156. In Carpenter v. Buffalo Electric Co., 213 N. Y. 101 (1914), it was held that the adoptive parents were the proper parties to sue as next of kin under the Death Act.

[6]Swick v. Coleman, 218 Ill. 33 (1905), decided under express statutory provision. Lanferman v. Vanzile, 150 Ky. 751 (1912); MacMaster v. Fobes, 226 Mass. 396 (1917), decided under express statutory provision; Upson v. Noble, 35 Oh. St. 655 (1880).

[7]Wagner v. Varner, 50 Ia. 532 (1879); Humphries v. Davis, *supra*, note 5; Clarkson v. Hatton, 143 Mo. 47 (1897).

relationship between the child and the adoptive parents for the purpose of inheritance from the child disregards the spirit of the adoption statutes, and at times works an unfair result to the adopting family.[8]

Certainly an equitable qualification on either rule, though one which is not always easily applied, is that established by statute in some states, that the property shall descend to the family from which it came.[9] In its decision that, at least in the case of property received from the adoptive family, the rights of that family to inherit should be held superior to that of the blood kin, the court in the principal case seems to have reached a just result. It is submitted that the provisions of the Massachusetts statute are most satisfactory,[10] which provide that property acquired by the adopted child through his own efforts shall go to his adoptive family, and that property which has come to him from either family shall be inherited by that family.

Richard H. Brown, '19.

Divorce: Effect of statute forbidding remarriage.—*Woodward v. Blake, 164 N. W. (N. D.) 156 (1917)*, presents the question of interpretation of statutes forbidding the remarriage of divorced persons; and *Hall v. Industrial Commission, 162 N. W. (Wis.) 312 (1917)*, the question of what effect shall be given such statutes in a foreign jurisdiction. In the North Dakota case the statute read: "The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons, except that neither party to a divorce may marry within three months after the time such decree is granted." The court held that a marriage contracted within the state by a divorced person less than three months after the decree was granted was not void and could not be assailed collaterally upon the probate of such person's estate. The opinion is based upon the reason that since the legislature had, in numerous other statutes, expressly declared certain marriages void and others voidable, the intent to make this the one or the other was not clear and since marriage is regarded with favor by the law, statutes should not be so construed as to make a marriage null unless the language of the statute makes the legislative intent clear and unequivocal. Upon this basis of decision, the inference may be drawn that the court would not have held the marriage voidable.

Statutes prohibiting remarriage after divorce, but silent as to the effect of disobedience, are either directory or mandatory. If deemed directory, the marriage is usually held valid, or at most voidable; if mandatory, the marriage is void.[1] The question is one of legislative intent and the holdings of the various courts are conflicting, due partly to the different wording of similar statutes.

Since there is a presumption in favor of marriage, the courts have construed strictly statutes merely prohibitory upon both parties,

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[8]See comment in 39 Am. St. Rep. 228.

[9]Jones & Add. Ill. Stat. Ann., sec. 198; Mass. Rev. Laws, ch. 154, sec. 7; Howell's Mich. Stat. (2d ed.), sec. 10972.

[10]*Supra*, note 9.

[1]Bishop, Marriage, Divorce and Separation, sec. 423.

holding them to be merely directory and a marriage of one of the parties within the prescribed time valid.[2] Another form of prohibitory statute forbids the marriage of the guilty party to the divorce during the lifetime of the other party,[3] more particularly where the divorce was granted for adultery,[4] and sometimes have an additional clause that persons so marrying shall be guilty of bigamy,[5] or making such marriage a felony.[6] Marriage in violation of this class of statutes has generally been held to be invalid.[7]

The New York courts hold that the marriage of the guilty party to a divorce action for adultery, contrary to a prohibitory statute, is void.[8] But, under a statute declaring that "every person having a husband or wife living" who shall marry again shall be adjudged guilty of bigamy, they have adopted the peculiar doctrine that, for the purpose of this statute, one marrying contrary to the prohibitory statute is regarded as having a husband or wife living.[9]

It is to be noted in this connection that the only statutes on this subject in some states, forbid remarriage during the time allowed to appeal from the judgment decreeing divorce and until the determination of such appeal if taken. Under this form of statute, a remarriage of one the parties is generally held void, the courts in most instances holding that the decree of divorce is not complete and does not take effect until the end of the prescribed period.[10]

In the Wisconsin case, the plaintiff secured a divorce in Illinois under a statute which provided that neither party could marry unless with each other, within one year, and declared such a marriage void and provided punishment by imprisonment for violation. The plaintiff and another resident of Illinois were married in Indiana in compliance with the laws of that state within the year, then later went to Wisconsin and lived as husband and wife until the death of the husband for which the plaintiff now made claim for damages. The Wisconsin court held the marriage invalid, on the ground that Wisconsin, having a statute similar to the one in Illinois which made marriage invalid whether contracted within the state or without, had

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[2]Conn v. Conn, 2 Kan. App. 419 (1895); *contra*, Warter v. Warter, 15 Prob. Div. (Eng.) 152 (1890); Mason v. Mason, 101 Ind. 25 (1884), marriage voidable, but see for effect if decree of divorce is opened; State v. Yoder, 113 Minn. 503 (1911), marriage voidable but sufficient for prosecution for bigamy.

[3]West Cambridge v. Lexington, 1 Pick. (Mass.) 505 (1823); Elliot v. Elliot, 38 Md. 357 (1873).

[4]Commonwealth v. Lane, 113 Mass. 458 (1873); Cropsey v. Ogden, 11 N. Y. 228 (1854).

[5]White v. White, 105 Mass. 325 (1870); Williams v. Oates, 5 Ired. (N. C.) 535 (1845).

[6]Calloway v. Bryan, 51 N. C. 569 (1859); State v. Sartwell, 81 Vt. 22 (1908).

[7]See notes 3, 4, 5, and 6 for cases holding marriages invalid; *contra*, Adams v. Adams, 2 Ches. Co. Rep. (Pa.) 560 (1885); Park v. Barron, 20 Ga. 702 (1856), marriage not void for statute doesn't say so, but may be prosecuted for bigamy.

[8]Cropsey v. Ogden, *supra*, note 4.

[9]People v. Faber, 92 N. Y. 146 (1883).

[10]Griswold v. Griswold, 23 Col. App. 365 (1913); Dudley v. Dudley, 151 Ia. 142 (1911); Wilhite v. Whilhite, 41 Kan. 154 (1889), interpreting the Oregon statute; Eaton v. Eaton, 66 Neb. 676 (1902); McLennan v. McLennan, 31 Or. 480 (1897); State v. Fenn, 47 Wash. 561 (1907).

the same declared public policy with reference to prohibited extra-territorial marriages. The court declared also that the Illinois statute must be deemed imported into the plaintiff's divorce decree and that a statute of Wisconsin required that its courts give full faith and credit to divorce decrees rendered in other states.

This case presents the question of what extra-territorial effect such statutes have. The simplest case arising in this connection is the effect of a marriage contracted in a foreign jurisdiction when the question is determined by the courts of the domestic forum. Where the statute merely prohibits the marriage it will generally be held good though contracted in another state, since the statute is deemed merely directory and a marriage within the state would be good.[11] If a marriage under such statute, when contracted within the state, is held void, there seems to be a conflict as to the effect that will be given a marriage contracted in a foreign state contrary to the prohibition. The general rule is that the "*lex loci contractus*" governs and a marriage valid in the state where contracted is good everywhere,[12] and this applies even where the parties are married in the foreign state to avoid the statute.[13] This rule is based on the ground of comity and the general rules of contract. Exceptions are made to this rule, however, when such marriage is contrary to natural laws or to the public policy of the domestic forum.[14] Thus it is sometimes held that the legislative intent is to declare the early marriage of divorced parties contrary to the public policy of the state and a marriage outside the state will be held void.[15] Some courts make a distinction as to the formalities and the essentials of the marriage contract, holding that in the former the "*lex loci contractus*" governs; in the latter the "*lex domicilii.*"[16] Under this doctrine, prohibitory statutes are held to affect the capacity of the parties which is one of the essentials of the contract and will make a foreign marriage invalid.[17] Again where the courts hold that the statute has the effect of suspending the decree of divorce, a marriage contrary to it will be bigamous and come within the first exception to the general rule as being contrary to natural laws. Not all of the courts have, however, recognized the general rule that the "*lex loci contractus*" governs, some holding that to give effect to a marriage in a foreign state in violation of its own statutes would be to make its own laws on the subject of no effect.[18]

[11]Crawford v. State, 73 Miss. 172 (1895); *contra*, Lee v. Lee, 150 Ia. 611 (1911); Phillips v. Madrid, 83 Me. 205 (1891); Frame v. Thorman, 102 Wis. 653 (1899).

[12]Bishop, Marriage, Divorce and Separation, sec. 838; Est. of Wood, 137 Cal. 129 (1902); West Cambridge v. Lexington, *supra*, note 3; State v. Shattuck, 69 Vt. 403 (1897).

[13]Medway v. Needham, 16 Mass. 157 (1819); *contra* under different statute, Whippen v. Whippen, 171 Mass. 560 (1898).

[14]Wilson v. Cook, 256 Ill. 460 (1912); State v. Fenn, *supra*, note 10; Lanham v. Lanham, 136 Wis. 360 (1908).

[15]Wilson v. Cook, *supra*, note 14; Succession of Gabisso, 119 La. 704 (1907); Pennegar v. State, 87 Tenn. 244 (1888); Lanham v. Lanham, *supra*, note 14.

[16]Brook v. Brook, 9 H. of L. Cases (Eng.) 193 (1861).

[17]See Story, Conflict of Laws (8th ed.), sec. 124; Williams v. Oates, *supra*, note 5.

[18]Warter v. Warter, *supra*, note 2; Williams v. Williams, *supra*, note 5; Est. of Stull, 183 Pa. St. 625 (1898); Pennegar v. State, *supra*, note 15.

The Wisconsin case goes a step farther and in a choice between the recognition of the law of divorce of one state and the law of marriage of another, recognizes the law of the state granting the divorce. This presents the question of the effect of such statutes when determined by the courts of a state other than that passing the statute. In general, it may be said that the same rules apply as where the domestic court decides.

In New York a statute forbids the marriage of the guilty party to a divorce action for adultery, during the lifetime of the other party.[19] While a marriage within the state contrary to the prohibition has been held void,[20] and also to be bigamous,[21] yet it has been held that a marriage in a foreign state is valid on the ground that the legislature did not intend that the statute should have any extra-territorial effect.[22] This rule has been applied where the foreign marriage was to evade the statute[23] and where the statute of the state where the marriage was contracted provided that where either of the parties had a "former husband or wife living" at time of such marriage, the same would be invalid.[24]

There seems to be a tendency of the courts to hold statutes merely prohibitory and doubtful of meaning, to be directory or to make the marriage voidable, especially where the impediment is such as might not have been known by both parties, and when public policy does not dominate.[25] Two conflicting aspects of public welfare confront the courts in the interpretation of these statutes; one is that annulment often affects the rights of innocent parties and bastardizes the issue, while, on the other hand, to hold such a marriage valid abrogates the whole effect of the statute. Where the former aspect has been present in the first instance of interpretation of such statutes, the courts apparently have been influenced to hold that of the two, this phase of public welfare dominated. In many jurisdictions, the issue of invalid marriages are legitimated by statute, and it would seem that in these jurisdictions the tendency would be to hold the marriage invalid.[26] It seems hardly plausible that the legislatures intended nothing by this legislation and the holding of some courts that such statutes are intended to so restrict the effect of the decree of divorce as to make one or both parties incapable of marriage, does not seem unreasonable.

Granting, as some courts do, that a marriage in violation of a prohibitory statute is void, what extra-territorial effect shall such statutes have? These statutes seem to be a valid attempt on the part

[19]Sec. 8 of Dom. Rel. Law, amended by Laws of 1915, Ch. 266, in effect Apr. 12, 1915, to allow remarriage of the parties to the divorce action. See sec. 1450 of Penal Law for solemnization of unlawful marriage as a crime.

[20]Cropsey v. Ogden, *supra*, note 4, holding also that the statute has retroactive effect.

[21]People v. Faber, *supra*, note 9.

[22]Van Voorhis v. Brintnall, 86 N. Y. 18 (1881). But see Earle v. Earle, 141 App. Div. (N. Y.) 611 (1910).

[23]Thorp v. Thorp, 90 N. Y. 602 (1882).

[24]Moore v. Hegeman, 92 N. Y. 521 (1883).

[25]Schouler, Domestic Relations, sec. 14.

[26]See L. R. A. 1916 C for cases under such statutes, and also Est. of Stull, *supra*, note 18. But see State v. Yoder, *supra*, note 2, where marriage held voidable.

of the legislatures to govern the marital status of its own citizens, but it is difficult to see what value such legislation can have, if the parties may merely go outside the state to marry. The rule laid down by an English case that the forms of the marriage contract are governed by the "*lex loci contractus*" and the essentials by the "*lex domicilii*",[27] seems more logical, at least where the parties intend to return to the domestic forum to live. As stated in an overruled New York case,[28] "No other rule will enable a state to make its own laws of marriage and divorce effectual and place the relation beyond the legislation of others." On the other hand, without statutes to protect the innocent victims of invalid marriages, much injustice will be done.

The doctrine of the Wisconsin case attacks the problem from the view point of the foreign state and says a statute prohibiting the remarriage of divorced persons becomes a part of every decree of divorce granted in such state, and this being so, it should be given full faith and credit in another state as any other judgment would be. Then if such statute was determined by that state to make a marriage contrary thereto void, it should be held so in all other jurisdictions.[29]

Ralph L. Emmons, '18.

Estoppel: Property left in the possession of another by the owner. —In the case of *Alexander v. Busch, 166 Pac. (Okla.) 900 (1917)*, one Smith executed and delivered to the Cushing State Bank his note and chattel mortgage, Alexander signing as surety. In order to protect his interests, Alexander took possession of the goods which are here sought to be replevied by one Sanders, who had been the owner thereof for a long time prior to the execution and delivery of the note and mortgage. As it did not appear from the evidence that Sanders had

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[27]Brook v. Brook, *supra*, note 16.

[28]Marshall v. Marshall, 2 Hun. (N. Y.) 238 (1874).

[29]"An Act On the Subject of Marriages in Another State or Country in Evasion or Violation of the Laws of the State of Domicile," was approved by the Conference of Commissioners on Uniform State Laws in August, 1912, and recommended for adoption in all the states. It provides:

"Sec. 1. *Be it enacted, etc.*, That if any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.

"Sec. 2. No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void."

Sec. 3 of the act puts certain restrictions upon the issuing of marriage licenses to parties mentioned in sec. 2, and sec. 4 provides penalties for violation of the provisions of sec. 3, and also a penalty for one who knowingly celebrates such a marriage.

This uniform act has been adopted by five states: Illinois, Louisiana, Massachusetts, Vermont and Wisconsin. It would seem that the Commissioners should go a step further and recommend a statute protecting the rights of innocent parties to such invalid marriages and children born of the same, since the inability to reach this result by holding such marriages invalid, has apparently kept some courts from laying down the doctrine codified in this statute.

done anything more than merely leave the disputed property in the possession and under the control of Smith, Sanders successfully maintained his suit, as these circumstances were deemed insufficient to create an estoppel as against the true owner.

On the other hand, in *W. P. Fuller & Co. v. Adams, 166 Pac. (Wash.) 623 (1917)*, where a mother allowed her son to use personal property in a business conducted in his own name, she was estopped to claim the property was merely loaned to him as against a creditor of the son. The creditor garnisheed the property in the hands of the sheriff, the property in question remaining in the sheriff's hands at the conclusion of chattel mortgage foreclosure proceeding, and it was held that the creditor could reach the property in this way, though it belonged to the mother.

It is clear law that the mere possession and control of personal property in another than the owner thereof will not estop the true owner from asserting his title as against a person who has dealt with the possessor as owner on the faith of his possession.[1] Moreover, it is immaterial that the person dealing with the one in possession may have acted in good faith,[2] for it has always been a fundamental doctrine that, in general, one cannot convey a better title to personal property than that which he himself possesses, or, to quote from *Lemp Brewing Co. v. Mantz*,[3] "The application of the doctrine that 'whenever one of two innocent persons must suffer by the acts of the third, he who has enabled such third person to occasion the loss must sustain it,' must be founded on something more than the bare possession of personal property * * * *"

A different proposition is presented, however, where the true owner has clothed the person assuming to dispose of the property with the apparent title to it. In such a case, the true owner is estopped to assert the fact of his ownership as against one dealing in good faith with the person in possession.[4]

Such an estoppel was worked out as against the owner who left his property in the possession of another for a period of a year, with permission to use the same, and an innocent third party took a mortgage on the property.[5] Likewise, where the owner of a wagon permitted the name and occupation of another to be painted on the wagon and such other person sold the wagon to a purchaser acting in good faith, he was not permitted to claim the property as against such purchaser.[6]

It appears that two things must concur in order to create the aforementioned estoppel, that is, (1) the owner must clothe the person assuming to dispose of the property with apparent title to or authority

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[1]10 R. C. L. 777; Kershaw v. Merritt, 194 Mass. 113 (1907); Lemp Brewing Co. v. Mantz, 120 Md. 176 (1913).

[2]Barnard v. Campbell, 55 N. Y. 456 (1874).

[3]*Supra*, note 1.

[4]National Bank v. Logan, 74 N. Y. 568 (1878); Avery & Sons v. Collins, 62 Tex. Civ. App. 313 (1910); Delfosse v. Metropolitan National Bank, 98 Ill. App. 123 (1901); Smith v. Clews, 105 N. Y. 283 (1887).

[5]Davis v. Wewoka First National Bank, 6 Ind. Ter. 124 (1905).

[6]O'Connor v. Clark, 170 Pa. 318 (1895).

to dispose of it, and (2) the person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the facts wherein he placed his faith are not true. If these two elements are present, they are sufficient to prevent the true owner from laying claim to what is actually his own property.[7]

Mere possession of itself such as was present in *Alexander v. Busch* is insufficient but possession coupled with the earmarks of ownership, as in *W. P. Fuller v. Adams*, and the parting with value or the extension of credit by an innocent third person will always create an estoppel against the true owner.

Olive J. Schmidt, '18.

Evidence: Presumptions: Survivorship in common disaster.—The question as to the survivorship of persons who perish in a common disaster was presented in *Matter of Hammer, 101 Misc. (N. Y.) 351 (1917)*. The decedent, his wife and daughter, an infant, perished when the steamship Lusitania was sunk on May 7, 1915. At the time of his death the decedent carried two policies of insurance upon his life. In each of these policies the insurance company promised to pay the insured the amount of the policy, "or upon receipt * * * * of due proof of the prior death of the insured, to his wife, the beneficiary, with the right to the insured to change the beneficiary * * * *" If any beneficiary died before the insured, the interest of such beneficiary was to vest in the insured. There was no evidence in the case to show which of the persons was the survivor. The court held, that there is no presumption of survivorship in a case where a number of persons perish in a common disaster, and declared, that the fact of such survivorship is assumed to be unascertainable, and disposed of the property rights as if death had occurred at the same time. The court said, "As there is no evidence to prove such survivorship, and as under the facts as stated there can be none, the death benefit must be disposed of as though both husband and wife had died at the same instant, in which event there was no interval between the death of the husband and the wife during which the death benefit could have vested in the wife." The personal representatives of the decedent were awarded the amount of the policies.

When two or more persons perish in a common disaster or calamity, practically all the common law authorities are agreed, that there is no presumption that all died at once.[1] Nor is there a presumption that one person or persons survived the others.[2] At the civil law there were various presumptions of survivorship based on strength, age and

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[7]Porter v. Parks, 49 N. Y. 564 (1872).

[1]Middeke v. Balder, 198 Ill. 590 (1902); Russell v. Hallett, 23 Kans. 276 (1880); Johnson v. Merithew, 80 Me. 111 (1888); Cowman v. Rogers, 73 Md. 403 (1891); Newell v. Nichols, 75 N. Y. 78 (1878); Wing v. Angrave, 8 H. L. Cases 182 (1860).

[2]Young Women's Christian Home v. French, 187 U. S. 401 (1903); U. S. Casualty Co. v. Kacer, 169 Mo. 301 (1902); 51 L. R. A. 863, and cases there collected.

sex. A few early English cases recognized such a doctrine,[3] and it is still retained in California and Louisiana by statute.[4]

The question of survivorship when persons perish in a common disaster arises most frequently in the distribution of property of a decedent. In the first place, the courts have been confronted with the problem where there are no written instruments involved. A husband and wife may have perished together in the same disaster and the question arises as to the distribution of the property of the husband. According to the statutes in most states the wife is entitled to a certain share of the husband's property. Now the representatives of both the parties are striving for the property; the representatives of the husband claiming that they are entitled to all of the property because the wife never lived after the husband, and, therefore, no interest vested in her. On the other hand the representatives of the wife claim a proportionate share of the property under the statute. The decision depends upon the question of survivorship of one or the other. If the wife died before the husband the representatives of the wife will fail, while if the husband died before the wife the representatives of the wife will get their statutory share of the property. Professor Whittier, in an article on "Problems of Survivorship"[5] has pointed out the correct solution of such a case, "Survivorship must be proved by the party asserting it." The claimant upon whom the burden of proof lies must establish his own chain of title but he does not have to disprove the title of his opponent. In the problem presented here the burden of proof would be upon the representatives of the wife to show the survivorship of the wife. They will be unable to discharge that burden and, therefore, will fail. Or the case may be one in which the intestate and nearest of kin perished together, the contest being between the representatives of the nearest of kin and the representatives of the intestate.[6] In such a case the burden of proof would be upon the representatives of the next of kin to show the survival of the next of kin.

Secondly, the question of distribution under written instruments is presented. The instruments most commonly involved are (1) wills, and (2) insurance policies. In the construction of wills there is frequently a preliminary problem of construction to be considered. If the language of the will makes a gift to a legatee depend upon that legatee surviving the testator or another, is the gift to the legatee dependent upon the condition precedent of survivorship, or is there a gift to him to be defeated only upon the happening of a condition subsequent? Where the language of a specific gift is unambiguous, construed in connection with the entire will, and is in form a condition precedent, effect is given to such language, and in the absence of proof

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[3]Taylor v. Diplock, 2 Phill. (Eng.) 261 (1815); In Matter of Selwyn, 3 Hagg. Ec. (Eng.) 748 (1831).

[4]Cal. Code of Civ. Proc., sec. 1963, sub. 40; Civil Code of La., arts. 936–939.

[5]16 Green Bag 237.

[6]*In re* Green's Settlement, L. R. 1 Eq. 288 (1865); Smith v. Croom, 7 Fla. 81 (1857); Russell v. Hallett, *supra*, note 1; Johnson v. Merithew, *supra*, note 1; Stinde v. Goodrich, 3 Red. Sur. (N. Y.) 87 (1877).

of survivorship the gift will fail. In *Wing v. Angrave*,[7] the property was left by a wife to her husband, "and in case my said husband shall die in my lifetime, to William Wing." Husband and wife perished in the same shipwreck. This condition was construed literally by the House of Lords, and it was decided that the prior death of the husband was the only circumstance by which Wing could take the property, and that the wife had provided for this circumstance alone. Wing had to show the performance of the condition on which his title depended, namely, the death of the husband in the wife's lifetime. He was unable to prove the survivorship of the wife, and, therefore, an intestacy was created. However, the United States Supreme court has gone far toward the opposite result in order to prevent an intestacy. In *Young Women's Christian Home v. French*,[8] the testatrix disposed of her property first for the benefit of her husband and son, adding, "in the event of my becoming the survivor of both my husband * * * * and of my son * * * * * I then give * * * * all my property * * * * * to the Young Women's Home * * * * *" The husband died first. The testatrix and her son were lost in a steamer collision. The Home could not prove the performance of the condition, literally interpreted. But the court declared, that from the whole will, the intention of the testatrix was to dispose of all her property and showed its desire to so construe the instrument as not to create an intestacy. This case closely approximates making a will for the testatrix, but if words creating a condition precedent may reasonably be interpreted to mean a condition subsequent in a particular will, the result is logical and just. This case has been generally followed in America.[9]

Many of the courts, when confronted with the problem involved, have decided that there is no presumption of survivorship or instantaneous death, but have disposed of property rights as though there were.[10] Their argument appears to be this: There is no presumption that death occurred at the same time. Neither is there any presumption to the contrary. But there exists a necessity of disposing of the property rights. In *Newell v. Nichols*[11] it was said, "It is not impossible for two persons to die at the same time, and when exposed to the same peril under like circumstances, it is not as a question of probability very unlikely to happen. At most the difference can only be a few brief seconds. The scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of property depends upon it, and hence in the absence of other evidence the fact is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time." So the practical consequence is the

[7] *Supra*, note 1
[8] *Supra*, note 2.
[9] Dunn v. New Amsterdam Casualty Co., 141 App. Div. (N. Y.) 478 (1910).
[10] Newell v. Nichols, *supra*, note 1; Russell v. Hallett, *supra*, note 1.
[11] *Supra*, note 1.

same as if the law presumed all to have perished at the same moment. Such an effect is attempted to be justified by some courts on the ground that it is a "rule of distribution" and not a presumption of fact. But the two do not differ.

In his article above referred to, Professor Whittier offered the contentious method as a solution of all kinds of cases. In the ordinary cases this method would apply very well, although the claimants upon whom the burden of proof lay, would fail. But will this solve a case where trustees under a will have brought a suit to have the will construed, the only proof being offered by the trustees? Does the burden of proof in such a case rest upon a claimant?

The second class of cases involving written instruments includes contests over the proceeds of insurance policies, the insured and the beneficiaries or some of them, having perished in the same disaster. These cases have been dealt with by some courts in two different respects; (1) where there is a right in the insured to change the beneficiary, and (2) where there is no such right. Where there is no right to change the beneficiary, the beneficiary gets a vested interest in the contract when it is made.[12] This vested right is subject, however, to be divested by the prior death of the beneficiary. The representatives of the beneficiary have only to show the death of the beneficiary, and their own survivorship, in order to be entitled to the proceeds of the policy. The representatives of the insured would have to prove the survivorship of the insured in order to prove title. But the principal case was decided as though there were a different aspect of the case when the insured has reserved the right of changing the beneficiary. It decided that no interest was vested in the beneficiary, since there was a right to change that beneficiary, that the beneficiary merely had a contingent interest; a mere expectancy. Although this rule has been laid down in a number of cases,[13] and has been followed by the text writers,[14] it is submitted that the better view is that the beneficiary should have a vested interest in the policy, subject to be divested by the happening of certain conditions. The view reached in the decisions cited can not be considered as authority because it was not necessary for the result, there having been a change of beneficiary in every case before the death of the insured. And in *Cowman v. Rogers*,[15] the Maryland court arrived at the conclusion that the interest was a vested one, subject to be divested. In that case the right to change the beneficiary had not been exercised, so that it is analogous to the principal case. If the rule of the Maryland court had been applied in the principal case the representatives of the wife would have received the proceeds of the policies.

William E. Vogel, '19.

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[12]Cowman v. Rogers, *supra*, note 1; 3 Am. & Eng. Ency. Law (2d ed.) 980, and cases there cited.

[13]Cited in 3 Am. & Eng. Ency. Law (2d ed.) 990; also cases in Joyce on Insurance, sec. 741.

[14]Joyce on Insurance, sec. 741; Vance on Insurance, secs. 135–136.

[15]*Supra*, note 1.

Evidence: Statutory prohibition against physicians giving evidence: Construction of the New York Statute.—In *Klein v. The Prudential Insurance Co. of America, 221 N. Y. 449 (1917)*, the plaintiff was suing as the beneficiary of a life insurance policy taken out by her deceased husband. If the policy was to be held ineffective it was necessary for the defendant to show that the deceased was in bad health on February 14, 1913. The physician who attended the deceased was allowed to testify that the deceased was sick at this time and that he attended him. The plaintiff had also submitted to the defendant a certificate of her husband's death in which she stated that his illness began on February 12. He died on February 20. In answer to the question as to the cause of his death the plaintiff referred to a certificate of the attending physician which the plaintiff also submitted to the defendant company. The questions involved were as to the admissibility of the doctor's testimony and his certificate.

The court, in affirming a verdict for the defendant, held that section 834 of the Code of Civil Procedure[1] did not render inadmissible the simple statements of the doctor that he had attended the insured at a certain time and at that time the insured was sick. In so holding the court followed *Patten v. United Life and Accident Insurance Association*,[2] which is very clearly a precedent for such a decision.

In deciding that the doctor's certificate was admissible, the court apparently considered that no question as to the scope and effect of section 834 was presented. With reference to this phase of the matter Judge Chase says, "Her [plaintiff's] reference therein [i. e. in her own certificate] to the certificate of the hospital physician made such certificate admissible in evidence as an admission against her for what it was worth.[2a] If it appears therefrom to have been based in whole or in part on hearsay evidence or on confidential communications made to him by the deceased and the plaintiff desired to prevent its being considered in evidence, she should have objected to it on that ground or have made a motion to strike it from the record. The receipt of the proofs of death under the circumstances disclosed by the record was not error."[3]

The Court of Appeals has held in *Davis v. The Knights of Labor*[4], that section 834 extends to and renders inadmissible certificates as to cause of death filed by attending physicians with the Board of Health. It is submitted that in the principal case the court simply decided that the question as to the effect of this section on the admissibility of the physician's certificate was not properly presented and that, even if it was error to admit the certificate, it was a harmless

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[1]"A person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity and which was necessary to enable him to act in that capacity. * * *"

[2]133 N. Y. 450, 453 (1892).

[2a]If evidence covered by section 834 takes the form of an admission it is admissible as such. Buffalo Loan and Trust Co. v. Knights Templar Assoc., 126 N. Y. 450 (1891).

[3]Klein v. Prudential Insurance Co., 221 N. Y. 449, 454 (1917).

[4]165 N. Y. 159 (1900).

error and not such as would warrant reversal. The court indicates this when it says, "In any case the evidence that the applicant was sick on the day before he was taken to the hospital appears almost, if not entirely, beyond controversy by testimony other than that of the attending physician."[5]

To bring a case within the provisions of section 834 the existence of the relation of physician and patient must appear, the information sought to be excluded must have been obtained as a result of this relationship, and the objection must be made at the time the evidence is offered and should be based specifically upon the provisions of this section.

It must be determined from the facts in each particular case whether the relation of physician and patient there existed. The chief consideration is whether the person to whom the information related believed, and had reason to believe, that he was confiding as patient to a physician.[6] When one who is sick unto death is in fact treated, even against his will, by a physician he becomes the patient of that physician.[7] The same rule applies in the case of a man who is unconscious or unable to speak for himself. The fact that the information related to a person not a party to the action at bar does not take it out of the statute.[8] The burden of showing that the relation of patient and physician existed is upon the one making objection to the evidence.[9]

The courts have not limited the operation of this section strictly to that information gained by the physician which was "necessary for him to act in that capacity," but have, in effect, excluded all information as to the physical condition of the patient obtained as a result of the professional relationship.[10] It is not necessary that the information be conveyed to the physician by word of mouth. The statute applies to what the physician observes, no matter how prominent and noticeable the particular physieal characteristics of the patient may be.[11] The physician may, however, testify as to the physical condition of a former patient, but such testimony must be based wholly on the information gained subsequent to the time when the relation of patient and physician existed.[12] The burden is upon the party objecting to show that the information in question was

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[5]*Supra*, note 3.

[6]People v. Murphy, 101 N. Y. 126 (1886); People v. Sliney, 137 N. Y. 570 (1893); People v. Hoch, 150 N. Y. 291 (1896); People v. Koerner, 154 N. Y. 355 (1897); People v. Kemmler, 119 N. Y. 580 (1890).

[7]Meyer v. Knights of Pythias, 178 N. Y. 63 (1904).

[8]Matter of Myer, 184 N. Y. 54 (1906); Edington v. Mutual Life Insurance Co., 67 N. Y. 185 (1876).

[9]People v. Schuyler, 106 N. Y. 298 (1887).

[10]Nelson v. Village of Oneida, 156 N. Y. 219 (1898); Renihan v. Dennin, 103 N. Y. 573 (1886).

[11]Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281 (1880); Grattan v. Metropolitan Life Ins. Co., 92 N. Y. 274 (1883); Edington v. Mutual Life Ins. Co.,.67 N. Y. 185 (1876); Dilleber v. Home Life Ins. Co., 69 N. Y. 256 (1877).

[12]Edington v. Aetna Life Ins. Co., 77 N. Y. 564 (1879); Fisher v. Fisher, 129 N. Y. 654 (1892); People v. Austin, 199 N. Y. 446 (1910).

obtained by the physician while professionally attending the person to whom the matter relates.[13]

Objection to the admission in evidence of confidential information confided by a patient to a physician should not be based upon any general ground but counsel should specify that he is resting his objection upon the provisions of section 834.[14] The reason for this appears to be that the prohibition is wholly statutory. At common law a physician could testify as to confidential information given him. It has been held that where matter coming within section 834 has been admitted without objection the question of its competency cannot be raised by a motion to strike it out.[15] The objection should be made at the time the evidence is offered.

The statute applies to both civil and criminal cases. In actions to invalidate a will it can be used to prevent physicians who have attended the testator from testifying as to his capacity to make a will.[16] In an action by a physician against a patient to collect fees, the physician ean testify only as to the making of the contract for services and cannot describe the patient's physical condition or go into detail in any way in regard to the services rendered.[17] The statute is used widely in actions on insurance policies where the physical condition of the insured at a certain time is a question in issue. In an action for damages for personal injuries the plaintiff may use the section to prevent the examination of physicians who have attended him.[18] If the physician is called as a witness for the plaintiff, either in the same trial or in a former trial of the same cause of action, that constitutes a waiver of the provisions of section 834.[19] If plaintiff has been examined by more than one physician and calls one of them as a witness, that constitutes a waiver as to the other physicians.[20] If, however, the physicians examined the plaintiff at different times the calling of one is not a waiver as to the others.[21] The statute does not, however, prevent the physician from relating information where such information does not refer to the plaintiff's physical condition, but to the manner and cause of the accident.[22]

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[13]Griffiths v. Metropolitan Street Ry. Co., 171 N. Y. 106 (1902); Patten v. United Life and Accident Assoc., 133 N. Y. 450 (1892); People v. Austin, *supra*, note 12; People v. Schuyler, *supra*, note 9.

[14]Hoyt v. Hoyt, 112 N. Y. 493 (1889).

[15]*Supra*, note 14. See also People v. Bloom, 193 N. Y. 1 (1908); where it was held that testimony of a physician not objected to when the patient was plaintiff in a civil action for damages for personal injuries could not be objected to when patient was being tried on an indictment for perjury.

[16]Renihan v. Dennin, 103 N. Y. 573 (1886); Matter of Coleman, 111 N. Y. 220 (1888); Loder v. Whelpley, 111 N. Y. 239 (1888); Matter of Myer, 184 N. Y. 54 (1906); Matter of Newcomb, 192 N. Y. 238 (1908).

[17]MacEvitt v. Maass, 64 App. Div. (N. Y.) 382 (1901).

[18]Feeney v. Long Island R. R. Co., 116 N. Y. 375 (1889); Sloan v. N. Y. Central R. R. Co., 45 N. Y. 125 (1871); Jones v. Brooklyn, B. & W. E. R. R. Co., 3 N. Y. Sup. 253 (1888), aff'd without opinion 121 N. Y. 683 (1890).

[19]McKiney v. Grand Street, P. P. & F. R. R. Co., 104 N. Y. 352 (1887).

[20]Morris v. N. Y. O. & W. R. R. Co., 148 N. Y. 88 (1895).

[21]Barker v. Cunard Steamship Co., 91 Hun (N. Y.) 495 (1895), aff'd without opinion 157 N. Y. 693 (1898).

[22]Green v. Metropolitan Street Ry. Co., 171 N. Y. 201 (1902).

In applying section 834 to criminal cases the most troublesome situations arise when the state sends a physician to examine the accused as to his sanity or condition in other respects. If it can be shown that the relation of physician and patient arose between the state physician and the accused then the statute may be used to prevent the physician from giving the results of his examination.[23] In murder cases the physician who attended the deceased just before his death may give the results of his examination of the deceased.[24]

Where the patient himself is a witness he can no more be compelled to disclose confidential information than can the physician.[25] The provisions of section 834 may be waived in accordance with the provisions of section 836 of the Code of Civil Procedure.

Harry H. Hoffnagle, '17.

Husband and Wife: Alienation of affections: Plaintiff's husband the pursuing party.—Where a wife brings action against another woman for alienating the affections of the plaintiff's husband, is it a necessary part of the cause of action that the defendant shall have done some affirmative act tending to alienate the affections of the husband? This question is answered in the affirmative in the case of *Loper v. Askin, 178 App. Div. (N. Y.) 163 (1917)*. It must appear, in the language of the court, "that the woman defendant was the pursuer, not merely the pursued. She does not become liable because she may have accepted the admiration of plaintiff's husband."[1] This view is clearly the one supported by New York authority,[2] and has been adopted by the great majority of courts in which the question has arisen,[3] on the theory that the defendant should not be blamed for the husband's wrongful act.

A different view was taken in the case of *Hart v. Knapp*.[4] In that case, which was an action for the alienation of the affections of the plaintiff's husband, it was shown that the defendant had been guilty of adultery with the husband. The defendant was held liable for alienation of affections, even although the husband was the seducer. This position has also been taken by Vermont.[5] The theory upon which these cases were decided seems to be that there are two grounds upon which an action for alienation of affections may be maintained; first, for alienation by persuasion or allurement, in which case loss of *consortium* must be proved; second, for alienation by adultery, in

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[23]*Supra*, note 6.

[24]Pierson v. People, 79 N. Y. 424 (1880).

[25]Dambmann v. Metropolitan St. Ry. Co., 55 Misc. (N. Y.) 60 (1907).

[1]At p. 164.

[2]Warner v. Miller, 17 Abb. N. C. (N. Y.) 221 (1885); Churchill v. Lewis, 17 Abb. N. C. (N. Y.) 226 (1886); Buchanan v. Foster, 23 App. Div. (N. Y.) 542 (1897); Whitman v. Egbert, 27 App. Div. (N. Y.) 374 (1898).

[3]Waldron v. Waldron, 45 Fed. 315 (1890); Ash v. Prunier, 105 Fed. 722 (1901); Scott v. O'Brien, 129 Ky. 1 (1908); DeFord v. Johnson, 152 Mo. App. 209 (1911); McKenna v. Algeo, 51 Atl. (N. J.) 936 (1902); Stewart v. Hagerty, 251 Pa. 603 (1916).

[4]76 Conn. 135 (1903).

[5]Miller v. Pearce, 86 Vt. 322 (1913).

which case loss of *consortium* is conclusively presumed.[6] This latter ground practically amounts to allowing the wife to maintain an action for criminal conversation, which is not generally permitted.[7] It is only on this ground that the view of *Hart v. Knapp* can be explained; yet the court in that case expressly refused to decide the latter question, declaring that a distinction existed between the two cases.

Were actions by the wife for criminal conversation allowed, it would seem that the view in *Hart v. Knapp* would be correct; for it has been held that the fact that the wife was the persuading party is no defense to an action for criminal conversation brought by the husband,[8] though it may serve to mitigate damages.[9] The gist of such action is the defilement of the marriage bed and it would make no difference who the persuading party was. But if the action is for alienation of affections, the same rule should not be applied; for if the defendant has done no act to steal away the love of the plaintiff's spouse, there is no wrongful act upon which an action may be based; this would be true, whether the husband or wife was plaintiff. There might be adultery without alienation of affections.[10]

It would appear, therefore, that the view of the principal case is correct, and that the result in the cases taking the other view has been reached through a confusion of the action for alienation of affections with the action for criminal conversation.

Richard H. Brown, '19.

Insurance: Mutual Benefit Companies: Right to amend by-laws. —The question as to the right of a mutual benefit insurance company to amend its by-laws has again been litigated in the case of *Tusant et al v. Grand Lodge, A. O. U. W., 163 N. W. (Ia.) 690 (1917)*. The plaintiffs had been members of the defendant order for over thirty years. In 1911, in order to put the association upon a substantial basis, an amendment to the by-laws was passed, dividing the membership into two classes, the younger members of the order being included in Class B and the older men in Class A. Class B was placed upon a self-paying basis and at the same time the rate of assessment for those in Class A was raised and the members required to pay their own death losses without aid from the younger members of the order. In 1916, those of the older men who remained were peremptorily required by another amendment to either maintain their insurance by paying the Class B rate for men of their age, or to continue to pay the same assessment but submitting to a scaling down of their certificate to an amount commensurate with such rate as shown by the mortality tables. The plaintiffs refused to obey the amendment, and in a suit to enjoin its enforcement, the court, conceding the right to make

[6]Miller v. Pearce, *supra*, note 5, at p. 328.
[7]6 Ann. Cas. 665, and cases there cited.
[8]See cases cited in Hart v. Knapp, *supra*, note 4, at p. 140.
[9]Hoggins v. Coad, 58 Ill. App. 58 (1895); Ferguson v. Smethers, 70 Ind. 519 (1880); Sieber v. Pettit, 200 Pa. 58 (1901).
[10]This seems to be recognized in a later Vermont case, Nieberg v. Cohen, 88 Vt. 281, 287 (1914).

reasonable amendments and regulations to preserve the life of the order, held the association to be without power to make such an amendment as the one in question, and, therefore, the action of the defendant in purporting to deny to the plaintiffs the benefits of a going concern and of new membership was a violation of their "substantial rights."

The decision was undoubtedly correct, and, although upon the same facts there would seem to be little conflict, it presents the problem as to when such organizations may change, in respect to the increase of assessments or decrease of benefits, their contractual obligations as evidenced by their constitution, by-laws and certificate of insurance. Whether or not there is an express reservation of the right to change and amend the by-laws, it is generally conceded that a mutual benefit association may enact such by-laws as are reasonably necessary for the government and regulation of the order.[1] But where the contract contains a general reservation of the power to change and amend, the cases are in great conflict as to just how far such a reservation extends. In *Thomas v. Knights of Maccabees*,[2] the certificate contained the provision that the member "will comply with the laws of the order now in force or that may hereafter be adopted," and also a clause to the effect that the rate of assessment would not be changed as long as the plaintiff was a member in good standing. The rate was later raised and suit was begun to enjoin its collection. The Supreme Court of Washington held that such a change could be made under the general reservation, remarking that "there being no contract in the commercial sense, but a mutual promise of every member to pay the certificate of every other member, there can be no vested right in any provision of the contract, either express or implied, that is not subject to and controlled by the duty of the member to pay the cost of his own insurance, for under no construction of a mutual contract can he demand more than he is willing to give." And in the Massachusetts case of *Reynolds v. Royal Arcanum*,[3] where the same general reservation was made, and a subsequent amendment was adopted increasing the assessment, or at the member's option, reducing the benefits, the court held that the association could amend its by-laws in a *reasonable* way to accomplish the purposes for which the association was organized. The United States Supreme Court,[4] in considering whether a similar change was an impairment of the contract, held that it was not, being necessary for the continuance of the company, and because "there was no vested right to a continuation of a plan of insurance which experience might demonstrate would result disastrously to the company and its members." The majority of the cases[5] seem to be in accord with the rule of the cases referred to above,

[1]Niblack on Mutual Benefit Societies, sec. 11; Bacon, Life and Accident Insurance, sec. 115.

[2]85 Wash. 665 (1915).

[3]192 Mass. 150 (1906).

[4]Wright v. Minnesota Mutual Life Ins. Co., 193 U. S. 657 (1904).

[5]Schmierer v. Mutual Reserve Fund Life Ass'n, 153 Cal. 208 (1908); Fullenwider v. Supreme Council, R. L., 180 Ill. 621 (1899); Champion v. Hannahan, 138 Ill. App. 387 (1908); Williams v. Supreme Council, C. M. B., 152 Mich. 1

to the effect that a general reservation of the power to change and amend the by-laws does authorize a subsequent change, in respect to assessments and benefits, which may be reasonably necessary to carry out the purposes of the association.

There are cases, however, which hold differently.[6] In a recent Texas case,[7] where the assessments were increased, the court considered this to be a violation of the contract, upon the ground that "the reservation * * * * of the general power to amend its constitution and by-laws * * * *, relates only to the member's duties and obligations as such, and does not authorize a radical change in the terms of his insurance contract as was attempted to be made by the raised assessments. This being true, it is immaterial that the appellee may have occupied the position of insured and insurer, and whether the increase in the rate of appellee's assessments was reasonable or necessary to continue the financial existence of the corporation."

In New York, in the much cited case of *Wright v. Knights of Maccabees*,[8] there was a general reservation and a provision that the plaintiff should continue to pay at the same rate as long as he was a member in good standing, similar to the provision in the *Thomas* case. The right to pay at the old rate was held to be a vested right, immune from change by amendment, in the absence of a specific reservation to that effect. The question was submitted again to the Court of Appeals in the case of *Green v. Royal Arcanum*.[9] At the time Green joined the defendant order, his rate of assessment was $1.86 per month. In 1898, it was raised to $3.16, to which the plaintiff consented. Seven years later, the assessment was again raised to $6.87 per month, and for some time Green paid under protest. In 1910, he tendered $3.16, the amount to which he had assented, and which amount the defendant refused to accept. Green then sued to enjoin his suspension from the order, and the court held that a general reservation of the right to amend does not authorize a subsequent increase of the rate of assessment or reduction of the amount of benefits as fixed by the contract.

It is difficult to find a principle upon which the cases may be reconciled, other than that the change must be a reasonable one. Under the Washington view, as illustrated by the *Thomas* case, it would seem that any change would be reasonable if necessary to sustain the life and carry out the purposes of the order. Other cases hold that the change is reasonable, only when it does not impair the contract by infringing a substantial, or as some courts call it, "vested"

(1908); Trisler v. Mutual Reserve Fund Life Ass'n, 128 Mo. App. 497 (1907); Conner v. Supreme Commandery, G. C., 117 Tenn. 549 (1906); United Benevolent Ass'n v. Cass, 54 Tex. Civ. App. 628 (1909); Knights of Pythias v. Mims, 241 U. S. 574 (1916).

[6]Smythe v. Supreme Lodge, K. P., 198 Fed. 967 (1912); Ericson v. Supreme Ruling, F. M. C., 105 Tex. 170 (1912); Pearson v. Knight Templars, 114 Mo. App. 283 (1905); Strauss v. Mutual Reserve Fund Life Ass'n, 128 N. C. 465 (1901); Supreme Lodge, K. P. v. Mims, 167 S. W. (Tex.) 835 (1914).

[7]Ericson v. Supreme Ruling, F. M. C., *supra*, note 6.

[8]196 N. Y. 391 (1909).

[9]206 N. Y. 591 (1912).

right which the member has by virtue of his certificate and the original constitution and by-laws.

But, assuming that there has been an unauthorized change and, upon the refusal of the member to abide by it, a repudiation of the contract by the company, can the member maintain an action to recover damages as for a breach of the contract? Ordinarily, the absolute repudiation of a contract before the time for its performance gives an immediate right of action for damages.[10] In a number of the states recognizing this doctrine of anticipatory breach, it is applied as well to contracts of mutual benefit insurance as to any other contracts.[11] But in New York and a few other states,[12] it has been held that the doctrine of anticipatory breach does not apply to contracts of this nature. *In Kelly v. Security Mutual Life Insurance Co.*,[13] the New York court held that the plaintiff had no right to sue for damages before the time for performance by the defendant arrived. It was stated that the doctrine of anticipatory breach was confined in this state to contracts of a special character only, the court saying that "at least we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policy holders." This quotation, perhaps, explains the decision of the case, as the Court of Appeals has recognized the doctrine of anticipatory breach in various cases of a different nature,[14] and, if the *dictum* in an early case[15] is correct, would apply the doctrine of anticipatory breach to a case of repudiation by an old line insurance company of a similar policy of life insurance.

Although a few of the courts[16] recognize an increase in the assessment rate, or reduction of the amount payable under the certificate, as an unreasonable amendment, and therefore a breach of the contract such as to justify an immediate action for damages, the majority of jurisdictions avoid this result,—some courts by holding the change a reasonable one, and, therefore, no breach; others, by holding that, even though the change is unreasonable, the doctrine of anticipatory breach does not apply to actions upon contracts of this nature. The states which adopt this latter view, however, do allow an application to a court of equity for the reinstatement of the policy.

W. J. Gilleran, '18.

[10]Roehm v. Horst, 178 U. S. 1 (1899).

[11]Fort v. Iowa Legion of Honor, 123 N. W. (Ia.) 224 (1909); Makely v. Supreme Council, A. L. H., 133 N. C. 367 (1903); O'Niell v. Supreme Council, A. L. H., 70 N. J. L. 410 (1904); Conner v. Supreme Commandery, G. C., *supra*, note 5; Supreme Lodge, K. P. v. Mims, *supra*, note 6; Supreme Council, A. L. H. v. Black, 123 Fed. 650(1903); Supreme Council, A. L. H. v. Lippincott, 134 Fed. 824 (1905).

[12]Supreme Lodge, K. P. v. Knight, 117 Ind. 489 (1888); Kelly v. Security Mutual Life Insurance Co., 186 N. Y. 16 (1906); Porter v. Supreme Council, A. L. H., 183 Mass. 326 (1903).

[13]*Supra*, note 12.

[14]Burtis v. Thompson, 42 N. Y. 246 (1870); Howard v. Daly, 61 N. Y. 362 (1875); Ferris v. Spooner, 102 N. Y. 10 (1886); Windmuller v. Pope, 107 N. Y. 674 (1887); Nichols v. Scranton Steel Co. ,137 N. Y. 471 (1893).

[15]People v. Security Life Ins. and Annuity Co., 78 N. Y. 114, 125 (1879).

[16]See note 11, *supra*.

Nuisance: Right to enjoin construction of theatre and bowling alley.—In *Hamilton Corporation v. Julian*, 101 Atl. (Md.) 558 (1917), the defendant was erecting two buildings in a residential neighborhood, one to be used as a bowling alley, the other as a moving picture theatre. An injunction was granted against the completion of the buildings, it being held that they would be nuisances when completed. The rule followed is that where it can be plainly seen that acts, when completed, will certainly result in a grievous nuisance, and that irreparable injury will follow, the court will interpose.[1] The present case is considerably weaker than those cited in its support,[2] in four of which the defendant was establishing a manufactory with its attendant odors, smoke and the like, and in the other of which the defendant was raising fowls, dogs, and hogs on his premises.

The court in applying the rule to this case, says that bowling alleys and moving pictures, kept and conducted for profit, are not nuisances *per se*, but that they may become so in certain places when they create disturbance to the serious annoyance and physical discomfort of persons of ordinary sensibilities living in the neighborhood.

Although the common law view was for a time that a bowling alley was a nuisance *per se*,[3] the modern view is clearly settled otherwise.[4] The question more recently has arisen as to whether it may be a nuisance because of its locality, and the few decisions have not been altogether harmonious. In *Pape v. Pratt*[5] the bowling alley was already established, and the evidence tended to show that it was improperly conducted. The court held that this bowling alley was a nuisance. In a Massachusetts case[6] it was held that the defendant could carry on the business under a license, and that such license afforded full protection if its terms were complied with, although the plaintiff was admittedly disturbed. The terms of the license compelled the use of certain noise deadening cushions. The Illinois case[7] cited in the principal case enjoined the defendant from operating a bowling alley already established, both because it was an extension of a saloon, which brought it within a prohibited distance of a church, and because it was proven that the plaintiff was seriously disturbed. This is no more than authority that bowling alleys may become nuisances by reason of their *conduct* and their location. In *Shreveport v. Leiderkrantz Society*[8] it was held that a bowling alley was not a nuisance *per se*, and here, being properly conducted, it was not a nuisance even though in a residential district.

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[1]Adams v. Michael, 38 Md. 123 (1873).

[2]Dittman v. Repp, 50 Md. 516 (1878); Chappell v. Funk, 57 Md. 465 (1881); The Fertilizer Company v. Spangler, 86 Md. 562 (1898); Hendrickson v. Standard Oil Company, 126 Md. 577 (1915); Singer v. James, 130 Md. 382 (1917).

[3]Rex v. Hall, 2 Keb. (Eng.) 846 (1671); State v. Haines, 30 Me. 65 (1849).

[4]Harrison v. People, 101 Ill. App. 224 (1902); Bloomhuff v. State, 8 Blackf. (Ind.) 205 (1846); State v. Hall, 32 N. J. L. 158 (1867); State v. Noyes, 30 N. H. 279 (1855); Pape v. Pratt Inst. 127 App. Div. (N. Y.) 147 (1908).

[5]*Supra*, note 4.

[6]Levin v. Goodwin, 191 Mass. 341 (1906).

[7]Harrison v. People, *supra*, note 4.

[8]Shreveport v. Leiderkrantz Society, 130 La. 802 (1912).

The case in hand is the first case in which a theatre as such has been enjoined as a private nuisance. At common law it was held that playhouses, having been introduced with the laudable design of recommending virtue, and exposing vice and folly, were not nuisances *per se*, although they could become so through mismanagement.[9] It is probably because the success of such an enterprise depends to a large extent upon its popularity in the neighborhood that no cases have arisen prior to this. The case most similar is that of a schoolhouse. In *Harrison v. Good*,[10] the defendants were about to erect a schoolhouse in a residential district, and the plaintiff prayed for an injunction. The judge acknowledged the fact that it would be detrimental to the value of the plaintiff's property, but held that it was not a legal nuisance. Insomuch as blacksmith shops may be compared with theatres and bowling alleys the cases which have arisen concerning them are *contra* to the principal case.[11] In the case of *Morris v. Roberson*[12] a blacksmith shop located in a residential section was not enjoined, the court saying, "If a blacksmith shop is not *per se* a nuisance, then it must follow that, if it is operated as blacksmith shops ordinarily are, a nuisance is not created by the operation, because, if the ordinary operation of a blacksmith shop creates a nuisance, of necessity it results that such shop in itself is a nuisance." Such a rule is too broad. It could be equally applied to theatres and bowling alleys, and would nullify the effect of location upon the question of what constitutes a nuisance.

The test of a nuisance would seem to be whether the act complained of constitutes a reasonable use of one's property, which is determined by the injury to the plaintiff in the ordinary enjoyment of his property and the benefit to other people.[13] An injunction restraining the carrying on of a legitimate and lawful business should go no further than is necessary to protect the rights of the parties seeking the injunction.[14] The benefit to other people here is obvious. Both moving picture theatres and bowling alleys are a legitimate means of affording recreation and enjoyment to a large number of the public. In themselves they are free from any taint of immorality, and aside from the recreative feature, afford a material benefit, the one educating the mind of the public, the other the physical body. To be weighed with this is the alleged injury to the plaintiff. The only thing which would seem to make either enterprise a nuisance is noise or disturbance. Conceding that either one may be conducted in such a manner as to render it a nuisance, it is a question of fact as to

[9]People v. Baldwin, 1 Wheel Cr. (N. Y.) 279 (1823); 2 Hawkins, Pleas of the Crown, (7th ed.) 145.

[10]Harrison v. Good, 11 L. R., Eq. Cas. (Eng.) 338 (1871).

[11]Chambers v. Cramer, 49 W. Va. 395 (1901); Morris v. Roberson, 137 Ky. 841 (1910).

[12]*Supra*, note 11.

[13]This is not to say that after a nuisance is once determined there should be a balancing of injury and benefit so as to determine whether or not to enjoin it. The weight of authority is to the contrary. 5 Pomeroy, (3d Ed.) Equity Jurisprudence, sec. 530; Whalen v. Union Bag and Paper Co., 208 N. Y. 1 (1913); Hard v. The Blue Points Co., 170 App. Div. (N. Y.) 524 (1915).

[14]Chamberlain v. Douglas, 24 App. Div. (N. Y.) 582 (1898).

how much noise or other manner of nuisance it did make. Until the completion and operation such facts do not become apparent and are impossible of proof. There may be ground for a holding that a certain amount of noise is unavoidably incident to a bowling alley, so as to determine what the effect of this particular bowling alley will be, but the decision in *Shreveport v. Leiderkrantz Society, supra*, casts considerable doubt upon the correctness of such a holding. No such noise could be held to be necessarily incident to a moving picture theatre, however. The only other injury conceivable from well conducted establishments is that to the plaintiff's pride in knowing that a commercial proposition is being conducted near his residence. Such injury should not be taken into account.

If there were circumstances not appearing in the report which afforded special opportunities of knowledge as to what the result of such building will be, the holding may be sustained, but under principle the rule can hardly be said to be that such enterprises constitute nuisances *per se*, whenever erected in a residential district, however exclusive in character.

L. W. Dawson, '19.

Partnership: Right of managing partner to compensation.—In *Rains v. Weiler, 166 Pac. 235 (1917)*, the Kansas court held that a managing partner could recover his claim for salary beyond his share of the profits, on an implied contract.

Whether a managing partner is entitled to extra compensation has been the subject of much controversy and litigation. In theory, the law is more or less well established as follows: If there is a contract, by the terms of which the managing partner is to be allowed a stipulated sum for his services, the transaction is governed by the ordinary law of contract;[1] in the absence of such an agreement one partner is not entitled, in law or in equity, to extra compensation for his services and time while employed in the partnership business.[2] The reasons as stated by the courts for not allowing recovery in these latter cases are several: that the law never undertakes to measure and settle between partners their various and unequal services in the transaction of the firm affairs, as the attempt would be impracticable; that each partner in taking care of the joint property is caring for his own interest and performing his own duties and obligations, implied in, and constituting a part of the consideration for the others to engage in the partnership; that one partner may have advantages over another partner in one respect, as he may have numerous and powerful friends and the confidence of his fellow citizens to a high degree, while another partner may have advantages in another respect, as wisdom and sagacity in directing the general management of affairs and tact

[1]Paine v. Thacher, 25 Wend. (N. Y.) 450, (1841); Lassiter v. Jackman, 88 Ind. 118 (1882); Strattan v. Tabb, 8 Ill. App. 225 (1881); Weaver v. Upton, 29 N. C. 458 (1847).

[2]Heath v. Waters, 40 Mich. 457 (1879); Ligare v. Peacock, 109 Ill. 94 (1884); McBride v. Stradley, 103 Ind. 465 (1885); Cameron, *et al.* Admin. v. Francisco, 26 Oh. St. 190 (1875); Smith v. Brown, 44 W. Va. 342 (1898).

as a salesman; that it is the duty of partners to devote themselves to the interests of the firm, no partner having the right to engage in any business which must necessarily deprive the partnership of a portion of his skill, industry, or capital, all of which he is bound to devote to the partnership. He is not, however, compelled to devote all of his time personally to the concern if there is no such agreement in the articles of partnership. A further reason is that the law presumes in the absence of agreement for compensation that each partner relies on the profit arising from his interest in the partnership business for his compensation.

In those cases in which the contract for a salary is express the decisions are uniform, but there is no uniformity as to the conditions under which a contract may be implied.

There is no express contract in the principal case, and the question arises as to what facts or conduct are sufficient to constitute an implied contract. Where one partner is requested or appointed by the others to act as manager, although no mention of salary is made, it has been held that a compensation is necessarily and equitably implied, and the other partners are considered as dealing with a stranger, the managing partner acting as an agent and not as a partner.[3] In cases where there is no request by the other partners, and one member of the partnership acts as manager and later demands that he be paid for his services difficulty arises. The general rule is that there can be no recovery,[4] and this is true in case of services rendered in the winding up of the partnership.[5] Where, however, the difference in extent or importance of services actually rendered by the various partners was not clearly contemplated by them when they entered into the partnership relation,[6] or where services rendered were special services, that is, those not generally performed by a partner, such as acting as a general clerk in a store,[7] or where, in winding up the affairs, the surviving partner renders services not strictly in settlement, compensation is allowed, although there was no agreement.[8] There is a tendency to allow extra compensation wherever it is possible to construe the services as extraordinary.[9] Some courts hold that where the other partners know and consent to one partner acting as manager, he can recover salary for such service.[10] The relation is sometimes considered one of agency.

If one partner is to give his services in lieu of furnishing original capital or money for partnership purposes, undoubtedly that partner should not be allowed compensation for those services. In a Missouri

[3]Bradford v. Kimberly, 3 Johns Ch. (N. Y.) 431 (1818); Lewis v. Moffett, 11 Ill. 392 (1849).

[4]Williams v. Pederson, *et. al.*, 47 Wash. 472 (1907); Lindsey v. Stranahan, 129 Pa. 635 (1889); see note 2, *supra*.

[5]Brown's Appeal, 89 Pa. St. 139 (1879); Dunlap v. Watson, 124 Mass. 305 (1878); Coursen v. Hamlin, 2 Duer (N. Y.) 513 (1853).

[6]Miller v. Hale, 96 Mo. App. 427 (1902).

[7]Godfrey v. White, 43 Mich. 171 (1880).

[8]Schenkl v. Dana, 118 Mass. 236 (1875).

[9]Thayer v. Badger, 171 Mass. 279 (1898); Zell's Appeal, 126 Pa. St. 329 (1889); Humphreys v. Hurtt, 20 Hun. (N. Y.) 398 (1880).

[10]Levi v. Karrick, 13 Ia. 344 (1862).

case, the court allowed recovery by one partner where the agreement was originally of that character, but one partner actually furnished labor to a greater value than the amount of capital put in by the others.[11] Where each contribute the same initial amount, and all equally meet any contingent expenses, and one partner manages the entire partnership business, the others doing nothing, although the courts do not allow recovery, it seems that the managing partner should be remunerated. If the courts thought the equities of the case warranted recovery (for quasi contract is nothing more than equitable relief in law courts) they could allow him to recover as on a promise implied in law.

The court in the principal case allows recovery on the ground that there was an implied contract, but in the opinion there is no hint as to what circumstances the court considered sufficient to constitute this implied contract, except, however, that it was a custom among miners in that district to give compensation where some of the partners in a project of this character devoted their entire time and effort to the business, while others took no part in it.

New York follows the general rule of allowing the managing partner compensation only where there is an agreement express or implied, or the services may be considered extraordinary.[12] The general rule that there can be no recovery of salary for acting in the partnership business has been enacted in the Uniform Partnership Act, which has been adopted in a number of the states.[13]

Jane M. G. Foster, '18.

Principal and Agent: Revocation of authority: Recovery of commissions.—In *Braniff v. Bair, 165 Pac. (Kan.) 816 (1917)*, an owner of realty gave a broker an exclusive agency to continue until Oct. 1 to effect a sale of such realty. The broker spent time and money in efforts to find a purchaser, but before he had found one, the owner withdrew the land from sale, and notified the agent. Shortly thereafter, and before Oct. 1, the broker procured a purchaser. The agent sued for his commissions. It was held that the owner was liable. The court said: "The general trend of authorities is that, if the agent proceeds in good faith to comply with the terms of the proposal or agreement like the one in question by advertising the property and spending time and effort to find a purchaser, these acts amount to an acceptance, and thereafter both parties are bound."

On principle an offer of a promise for an act can only be accepted, in a manner giving rise to a binding contract, by doing the very act

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[11]Gaston v. Kellogg, 91 Mo. 104 (1886).

[12]Bradford v. Kimberly, 3 Johns. Ch. (N. Y.) 431 (1818); Gilhooly v. Hart, *et al.*, 8 Daly (N. Y.) 176 (1878); Caldwell v. Leiber, 7 Paige (N. Y.) 483 (1839); Coursen v. Hamlin, 2 Duer (N. Y.) 513 (1853); Franklin v. Robinson, 1 Johns. Ch. (N. Y.) 158 (1814); Lyon v. Snyder, 61 Barb. (N. Y.) 172 (1871); Evans v. Warner, 20 App. Div. (N. Y.) 230 (1897).

[13]Uniform Partnership Act, sec. 18 (f): "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."

called for by the offer. Thus in *Biggers v. Owen*[1] a reward was offered for apprehending a criminal and procuring evidence sufficient to convict him. The plaintiff apprehended him, but did not get evidence sufficient to convict. The offer of a reward was then withdrawn. After such withdrawal the plaintiff went ahead and procured the necessary evidence. But it was held that he was not entitled to the reward, since the offerors could revoke the offer at any time before it was accepted. A part performance of the acts called for was not sufficient to bind the promisors. The same principle applies to the offer of a commission by a principal to an agent upon the doing of an act.[2]

It is inevitable that a strict application of this principle will often result in great hardship. Professor Ashley puts the following case: "A desires his safe moved from his old office to a new one. He asks B to do this act, and says he will pay him $25. When the safe has been carried to the door of the new building, A appears and tells B that he withdraws his offer, directing him to leave the safe there. Nevertheless B proceeds and completes the moving."[3] On what theory can A be held? He cannot be held on the ground that B has accepted the terms of the offer, for B has not done the act called for,—he has not moved the safe from one office to the other,—before the time of the revocation of the offer. In cases where the defendant has been unjustly enriched there may be recovery in quasi-contract. But the defendant in the principal case has not been unjustly enriched. Therefore no recovery may be had on the theory of unjust enrichment. Ashley suggests that in cases of this kind, the offeror should be estopped from revoking his offer before the completion of the work.[4] The problem does not seem to have bothered Professor

[1] 79 Ga. 658 (1887).

[2] The following cases hold that a principal without incurring liability may expressly or by a sale made by himself revoke a real estate agent's authority to sell his land, before the agent has completed the act of finding a purchaser: Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft, 177 Fed. 458 (1910); Rees v. Pellow, 97 Fed. 167 (1899); Milligan v. Owen, 123 Ia. 285 (1904); Tracy v. Abney, 122 Ia. 306 (1904); Sibbald v. The Bethlehem Iron Co., 83 N. Y. 378 (1881); Wylie v. The Marine National Bank, 61 N. Y. 415 (1875). In Siegel v. Rosenzweig, 129 App. Div. (N. Y.) 547 (1908), it was held that a real estate broker authorized by the owner of lands to offer them for sale on specific terms, has, like the owner himself, a right to rescind the agency and may do so even when he has procured a probable purchaser. Hence, having found a purchaser, he may agree that the purchaser shall deal directly with the owner in consideration of the payment of a commission by the purchaser. Such a contract does not rest upon an immoral consideration, and the broker may recover his commission from the purchaser on the completion of the sale.

[3] Ashley, Law of Contracts, p. 78.

[4] Ashley, Law of Contracts, pp. 86–88: "An offer remaining open is simply a statement by the offeror that he wishes a certain thing, and will continue in that state of mind. Upon such indication of intent, the withdrawal of the offer, after the offeree has accepted and started in to do the act in reliance thereon, will cause loss. This suggests estoppel *in pais*. The doctrine of consideration is not affected in any way. There is no promise until the consideration is performed, and the offeror can never be held to his proposed promise unless he receives the consideration, but nevertheless he cannot withdraw his offer. * * * * An estoppel simply limits the power of revocation, and there is no good reason why this should

Langdell. He says: "The true solution for both parties is to have a binding contract made before the performance begins by mutual promises."[5] Ashley's comment on this is: "This is much like replying to a question as to a specific for a certain poison 'Don't take the poison'."[6]

There has been much difficulty in dealing with cases involving this problem. In *Los Angeles Traction Company v. Wilshire*[7] the defendant agreed to pay the plaintiff a sum of money on the completion of its street railroad to a certain point. The plaintiff bought a franchise, and did considerable work on its track. The defendant then revoked his offer. It was held that the plaintiff was entitled to recover the stipulated sum agreed upon. The court said: "When the respondent purchased and paid upwards of fifteen hundred dollars for a franchise, it had acted upon the contract; and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character, and if appellant thereafter thought he discovered a ground for rescinding the contract, it was, as it always is, a necessary condition to the recission that the party should be made whole as to what he had parted with on the strength of the contract." It is not easy to see just what the court means by this; for on strict theory no obligation on the part of the promisor arose until the road was actually completed to the point named. The court in its desire to give the injured party the relief which it seemed to deserve was not particular about the legal reasoning it used. In the Minnesota case of *Stensgaard v. Smith*,[8] where a broker was given the exclusive agency to sell land and his authority revoked after he had spent money in advertising and had made other efforts to sell the land, the strict legal theory was applied, and recovery

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fully protected." An interesting case in which the dictrine of estoppel is applied to avoid defect of consideration is Ricketts v. Scothorn, 57 Neb. 51 (1898). Ricketts made a promissory note for $2000 and gave it to his granddaughter, Miss Scothorn, who was employed as a bookkeeper. When he gave it to her he said: "I have fixed out something that you have not got to work any more." Miss Scothorn immediately gave up her work and remained unemployed for a year. Ricketts died and Miss Scothorn brought an action on the note against his executor. The defendant pleaded want of consideration. The court said: "Having intentionally influenced the plaintiff to alter her position for the worse, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them." The executor was estopped to deny consideration for the note.

[5]Langdell, Summary of Contract, sec. 4.

[6]Ashley, Law of Contracts, p. 88, note 2. For a criticism of Ashley's views see 28 LAW QUAR. REV. 100. The reviewer says: "Both the plain man and the average lawyer will say that, whatever Prof. Ashley's logic may be, the law really cannot be so absurd as that; and they will be right, and, what is more, any rational court before whom such a question is moved will surely find a way to make them so."

[7]135 Cal. 654 (1902).

[8]43 Minn. 11 (1890).

refused. A later case[9] in the same jurisdiction allowed the broker to recover, and a rather unsatisfactory attempt was made to reconcile this conclusion with the decision in *Stensgaard v. Smith, supra.* In an Alabama case[10] it is remarked: "Even though an agreement is, when made, unilateral, if the party in whose favor the promise is made accepts its performance, or does any act in recognition of its implied or intended, though unexpressed, consideration, this supplies the element of mutuality and gives a right of action."

When a broker is given an agency to sell real estate, the courts at times seem eager to construe the contract so as to make it come within either one or the other of two classes of cases where there is no difficulty in allowing recovery. The first of these classes is where the contract is bilateral; the owner promises to pay the broker a commission in consideration of the broker's promise to make efforts and incur expenses in finding a purchaser.[11] The other class is where the contract is unilateral, but the owner promises to pay the broker, not in consideration of his finding a purchaser, but in consideration of his efforts to find one.[12] Some courts have said that where the consideration does not appear on the face of the contract, it may be found by implication,[13] or proved by parol.[14] But when a consideration is once found, the principal, though he has the power to revoke, does not have the right to revoke, and may become liable in damages if he does so.[15] In several cases analagous to the principal case the courts permit recovery and do not raise the question of consideration.[16]

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[9]Lapham v. Flint, 86 Minn. 376 (1902). The court in this case says: "The contract under consideration in Stensgaard v. Smith, *supra*, contained no express provision that the owner should pay the agent commission in case he should himself make the sale. The only question before the court in that case was whether the contract, upon its face, unaided by evidence or allegations in the complaint, expressed a mutuality of obligation; and it was properly held that it did not, because there was nothing in the contract to indicate any acceptance of the obligation, either in writing or by performance. But in the case before us, conceding that the contract, upon its face, is unilateral, and does not express mutuality of agreement, yet the complaint alleged that, after delivery of the contract, the respondent performed services in pursuance thereof, by listing and advertising the property, and endeavoring to sell it. This allegation is sufficient to support evidence of acceptance by the agent."

[10]Pullman Co. v. Meyer, 195 Ala. 397, 401 (1916). See also De Wolf Co. v. Harvey, 161 Wis. 535 (1915).

[11]Rowan & Co. v. Hull, 55 W. Va. 335 (1904).

[12]In the following cases the contract expressly provided that the consideration for the promise of the owner should be the efforts of the broker in attempting to find a purchaser: Kimmell v. Skelly, 130 Cal. 555 (1900); Maze v. Gordon, 96 Cal. 61 (1892); Crane v. McCormick, 92 Cal 176 (1891). In Long v. Herr. 10 Colo. 380 (1887) and Metcalf v. Kent, 104 Ia. 487 (1898) the court found this to be the consideration, though the contract did not expressly so provide. See also Hoskins v. Fogg, 60 N. H. 402 (1880).

[13]Goward v. Waters, 98 Mass. 596 (1868).

[14]Attix, Noyes & Co. v. Pelan, 5 Ia. 336 (1857). The contract recited a consideration of $1, but the court paid no attention to this.

[15]Cloe v. Rogers, 31 Okla. 255 (1912).

[16]Hardwick v. Marsh, 96 Ark. 23 (1910); Blumenthal v. Bridges, 91 Ark. 212 (1909); Harrison v. Augerson, 115 Ill. App. 226 (1904); Schultz v. Griffin, 5 Misc. (N. Y.) 499 (1893). From the Arkansas cases it appears that the rule in that state is that the broker will be allowed to recover where the agency is exclusive, and that employment for a definite time implies an exclusive agency.

The reasoning used in the principal case is somewhat like that which the California court uses in *Los Angeles Traction Company v. Wilshire*,[17] and cannot be said to be in accord with strict legal principle. Where it plainly appears that there was to be no commission under the express offer until the very act called for has been done, it would seem that the most satisfactory solution of the problem would be to allow the plaintiff to recover the reasonable value of his labor and services as having been performed at the implied request of the defendant.[18] There are of course many cases in which the owner authorizes several brokers and gives to none an exclusive agency. In such cases, it would ordinarily be unreasonable to find an implied request and no recovery should be allowed.

Where, however, a request should be implied, recovery would be allowed for expenses incurred. In the principal case, instead of allowing the plaintiff to recover his commissions, it would seem that the court should have allowed him to recover merely the reasonable value of his services, upon the theory of an implied request.

Charles V. Parsell, Jr., '19.

Wills: Witnessing through an interpreter.—The question as to whether a will can be made through the medium of an interpreter is presented in the case of *Hill v. Davis, 167 Pac. (Okla.) 465 (1917)*. The testatrix could speak and understand only the Creek language. Two of the three witnesses who purported to attest the execution could not speak and understand that language; one of the witnesses could speak and understand both languages. The declaration that the instrument was her will and the request that the witnesses sign their names thereto as such were made by the testatrix in the Creek language. This was understood by one of the witnesses and interpreted and repeated by him in English to the other two, the testatrix not understanding the English interpretation. The court, overruling a previous case in the same jurisdiction, held that the declaration and request to sign were made by testatrix to only one attesting witness, and the will was denied probate because the statute required two attesting witnesses.

It is surprising that there is a dearth of authority on a question of this kind which might have been expected to arise frequently. At first blush it would seem that there should be no objection to a will thus made because the use of an interpreter in business affairs is not an uncommon occurrence and the courts consider him an agent for both parties and that each party adopts the interpreter's words as the words of the other party. But upon consideration of the reasons for the strict provisions of the Statute of Wills, to prevent fraud and imposition, and the attitude of the courts toward the statute, it can be seen that the question is one not free from difficulty.

The question as to whether it is essential that there be a publication of the instrument as the will of the testator was unsettled in the early

[17] *Supra*, note 7.

[18] For a case which allows a real estate broker to recover in *quantum meruit* for the reasonable value of his services, see Glover V. Henderson, 120 Mo. 367 (1894).

part of the last century. By statute in New York in 1830 publication was required, while in England it was settled in 1837 that publication could be dispensed with.[1] Although the courts have said that only a substantial compliance with the statute is necessary and that no formal declaration or any particular words that the instrument is the will of the testator are required,[2] still they have from the first refused to be satisfied with anything that would not fully comply with the purposes of the statute, by which certain formalities are required in order to minimize opportunities for fraud.[3]

Although no formal assertion is necessary it is well settled that it is not sufficient that the witnesses have learned from other sources that the document which they are called to attest is a will, or that they suspect or infer from the circumstances that such is the character of the paper.[4] As was said in a leading New York case,[5] "The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they may not only know the fact, but that they may know it from him, and that he understands it and at the time of its execution * * * * designs to give effect to it as his will * * * *" Thus it has been held that acts or signs by the testator which were understood by the witnesses constituted a sufficient publication.[6] A will may be valid where the publication and request to sign is made through the intervention of a third person, but the court requires the communication by the third person to be made in the presence and hearing of the testator and of the witnesses so that the witnesses may know, of their own knowledge, that what was said or done by the third person on behalf of the testator was assented to by him.[7] Where the publication and request is made through an interpreter is it within the hearing of the testator and witnesses, where neither can understand what is being said to the other? Certainly the witnesses can not say of their own knowledge that the testator intends the instrument to be his will. And since the testator cannot understand what is being said to the witnesses he cannot assent since the assent pre-supposes that he knows what the interpreter is saying.

Where a third party stated that the instrument was the "will and agreement"[8] or the "will and deed"[9] of the testator, and both the testator and witnesses understood what he said, it was held there was no valid publication. Where an interpreter is employed how

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[1]Remsen v. Brinckerhoff, 26 Wend. (N. Y.) 325, 330 (1841).
[2]Lewis v. Lewis, 11 N. Y. 220 (1854); Gilbert v. Knox, 52 N. Y. 125 (1873).
[3]Remsen v. Brinckerhoff, *supra*, note 1; Lewis v. Lewis, *supra*, note 2.
[4]Lewis v. Lewis, *supra*, note 2.
[5]Lewis v. Lewis, *supra*, note 2.
[6]Lane v. Lane, 95 N. Y. 494 (1884).
[7]Harp v. Parr, 168 Ill. 459 (1897); Elkinton v. Brick, 44 N. J. Eq. 154 (1888); Coffin v. Coffin, 23 N. Y. 2, 15 (1861); Peck v. Cary, 27 N. Y. 2 (1863); McDonough v. Loughlin, 20 Barb. (N. Y.) 238 (1855); Thompson v. Stevens, 62 N. Y. 634 (1875); Burke v. Nolan, 1 Dem. (N. Y.) 436 (1882); *In re* Voorhis, 125 N. Y. 765 (1891); Troup v. Reid, 2 Dem. (N. Y.) 471 (1884); Gilbert v. Knox, *supra*, note 2; Matter of Holmberg, 83 Misc. (N. Y.) 245 (1913).
[8]Rutherford v. Rutherford, 1 Denio. (N. Y.) 33 (1845).
[9]Lewis v. Lewis, *supra*, note 2.

are the witnesses to know the instrument is a will and not a deed or some other document? They cannot infer it from the circumstances.[10] The witnesses have no assurance except the statement of the interpreter, and the verity of his act would seem to be entirely dependent upon his testimony, as to the truthful interpretation. It would seem to be no answer that the parties have made the interpreter their agent and both depended upon and adopted his words. The witnesses must attest the acts of the testator. Attestation is a mental act and where they cannot understand the testator, there is an absence of understanding which ought not to be supplied by the statements of a third party who may or may not be truthful. In the case of *Bell, Admr. v. Davis*,[11] which is expressly overruled by the principal case, reliance was placed upon the adoption of the testator's words by each party, but clearly the witnesses cannot attest of their own knowledge when they must depend upon the verity of a third party for the truthfulness of the interpretation.

This conclusion is supported by a strong dictum in *Stein v. Wilzinski*[12] which seems to be the nearest case in point. There the testator, a German woman, spoke broken English and understood English and one of the witnesses who was unacquainted with German asked her if the instrument was her will. She replied "Ja," which the witness understood because another witness appeared to ask the question in German and she answered the same way. It was held the publication was good. The court assumed the exact situation which is presented in the principal case and said it would fall far short of the requirements of the statute.

In some instances in New York[13], and particularly in a recent case in the Supreme Court,[14] the courts have used language which might be deemed sufficiently broad to give validity to a will witnessed through an interpreter, but the question presented in the principal case was not involved. In view of the purposes of the formalities of the statute it would seem that the holding of the principal case is correct. Although in some cases hardship might result, the formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition and as the right to make a will is statutory and not an inherent right, they must be at least substantially complied with and it is doubtful whether they are here.

Harvey I. Tutchings, '18.

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[10]Lewis v. Lewis, *supra*, note 2.
[11]155 Pac. (Okla.) 1132 (1916).
[12]4 Redf. (N. Y.) 441, 448 (1880).
[13]Lane v. Lane, *supra*, note 6; Matter of Hunt, 110 N. Y. 278 (1888).
[14]Perham v. Cottle, 98 Misc. (N. Y.) 48 (1916).