# RECENT CASES

AGENCY—DOCTRINE OF RESPONDEAT SUPERIOR—LIABILITY OF PRINCIPAL IN TORT ACTION WHERE AGENT IS NOT AT FAULT—Infant was struck and injured by automobile truck owned by corporation and driven by its employee. Infant and father bring an action against corporation and its employee for the personal injuries to the child and for the expenses and losses caused thereby incurred by the father. The basis of the action was that the employee was liable for his negligent act, and the corporation was responsible for its servant's negligence. The lower court charged the jury that if defendant employee was, at the time of the accident, acting in the scope of his employment, and was guilty of the negligence which was the proximate cause of the injury, then the corporation would be responsible as master for his acts, and that it was their duty to decide whether or not defendant employee was engaged in the work of the defendant corporation at the time of the accident. The jury returned a verdict holding the defendant corporation liable, but finding that there was no cause of action against defendant employee. Defendant corporation appealed on the ground that the verdict and judgment entered thereon were contrary to law. *Held,* that judgment was reversed, since the verdict in favor of the driver being by necessary implication a declaration by the jury that he had not been actionably negligent, the verdict against defendant corporation was inconsistent, as a matter of law, its liability being based solely on the acts of its employee. *Hummers et al. v. Public Service Electric & Gas Co. et al.,* 151 Atl. 383 (N. J. 1930).

This case is both interesting and important because it is apparently a reversal by the New Jersey court of the theory upon which it had previously based its decisions. For a discussion of the general principles involved, see comment on *Bennett v. Eagleke,* 148 Atl. 197 (N. J. 1930) in (1929) 78 U. OF PA. L. REV. 904.

CONSTITUTIONAL LAW—RETROACTIVE "GUEST ACT"—A CAUSE OF ACTION IN TORT AS A PROPERTY RIGHT—In 1927, the Connecticut Assembly passed the so-called "Guest Act"[1] whereby in case of accident the driver of an automobile was not liable to a guest for negligence. In 1928, the plaintiff, a guest in a car, was injured by the negligence of the defendant driver. In 1929, the "Guest Act" was held invalid because the governor had not signed the act within the prescribed period after the adjournment of the assembly. Thereafter a validating act[2] was passed, giving full effect to the "Guest Act" as of the time it was passed in 1927. *Held,* that plaintiff can recover for defendant's negligence, since the validating act could not have such retroactive effect as to impair plaintiff's

[1] Public Acts of Conn. 1927, Ch. 308. This act as prospective legislation was held constitutional in Silver v. Silver, 280 U. S. 117, 50 Sup. Ct. 57 (1929). See (1930) 78 U. OF PA. L. REV. 556.

[2] Public Acts of Conn. 1929 (Sp. Sess.) cc. 1-5.

property right in his cause of action. *Siller v. Siller et ux.*, 151 Atl. 524 (Conn. 1930). *Pozniak v. Evtushek*, 151 Atl. 526 (Conn. 1930).

Neither the Federal Constitution[3] nor most of the State constitutions[4] expressly forbids retroactive legislation. The general rule, however, is said to be that the deprivation of property by retroactive legislation is in violation of the "due process" clause,[5] which is found in all constitutions. Courts, however, are by no means agreed on just what is "property"[6] within the prohibitions of the "due process" clauses. This conflict is especially manifest where, as in the instant case, the right involved is the right to redress for a tort.[7] Some courts hold that such a cause of action is property within the constitutional limitation,[8] others that it is not property,[9] still others distinguish between torts to the person and torts to property.[10] Courts in resorting to the word "property"[11] conceal the real *ratio decidendi*, the exact nature of which is only determinable from an investigation of the cases. There is one line of cases which might be termed the "amnesty cases". All these deal with situations where, in the course of the Civil War, torts had been committed by soldiers for which subsequent legislation attempted to prevent recovery. Most courts, including the United States Supreme Court, held such legislation valid on the ground that a right of recovery of this kind is not property.[12] The underlying reason, however, seems to be that the courts thought the public benefit from such legislation outweighed the indi-

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[3] *Ex post facto* laws are forbidden, U. S. CONST., Art. 1, § 9, cl. 3 and Art. 1 § 10, cl. 1; but this prohibition is limited to criminal legislation, Calder v. Bull, 3 U. S. 386 (1789).

[4] There are express prohibitions of retroactive laws in the constitutions of Colorado, Georgia, Idaho, Missouri, Montana, New Hampshire, Ohio, Tennessee, and Texas. See Note (1926) 35 YALE L. J. 478, 482 n. 16.

[5] U. S. CONST. 14th Amend., ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

[6] Smith, *Retroactive Laws and Vested Rights* (1926) 5 TEX. L. REV. 231.

[7] Womach v. St. Joseph, 201 Mo. 467, 100 S. W. 443 (1907); see Dunlop v. Tol. Ry., 50 Mich. 470, 474 (1883); *cf.* International Co. v. Edmundson, 222 S. W. 181 (Tex. 1920) (plea of privileged communication); Plummer v. Northern Pac. Ry., 152 Fed. 206 (C. C. W. D. Wash. 1907) (plea of contributory negligence). But *cf.* Carson v. Gore-Meenan Co., 229 Fed. 765 (D. Conn. 1916).

[8] Angle v. Chicago Ry., 151 U. S. 1, 14 Sup. Ct. 240 (1894) (inducing breach of contract); Johnson v. Jones, 44 Ill. 142 (1867) (illegal arrest and false imprisonment); Griffin v. Wilcox, 21 Ind. 370 (1863) (false imprisonment); Kay v. Pa. Ry., 65 Pa. 269 (1870) (personal injuries); see Dash v. Van Kleeck, 7 Johns. 477, 494 (N. Y. 1811).

[9] Drehman v. Stifle, 75 U. S. 595 (1869) (forcible entry and detainer); Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763 (1889) (trespass de bonis asportatis); Wall v. Chesapeake Ry., 290 Ill. 227, 125 N. E. 20 (1919) (death); Bailey v. School Dist., 108 Wash. 612, 185 Pac. 810 (1919) (personal injuries).

[10] Ettor v. City of Tacoma, 228 U. S. 148, 33 Sup. Ct. 428 (1913).

[11] For interesting discussions on whether such a right is a chose in action, *cf.* Elphinstone, *What Is a Chose in Action* (1893) 9 L. Q. REV. 311, with Williams, *Is a Right of Action in Tort a Chose in Action* (1894) 10 L. Q. REV. 143.

[12] Hess v. Johnson, 3 W. Va. 645 (1869); Drehman v. Stifle; Freeland v. Williams, both *supra* note 9. *Contra:* Johnson v. Jones, *supra* note 8; Griffin v. Wilcox, 21 Ind. 370 (1863); Terrill v. Rankin, 2 Bush 453 (Ky. 1867).

vidual harm that might result.[13] Closely related to these cases are what might be called the "ratification cases". These deal with legislative attempts to relieve officials from personal liability for acts done without authority.[14] The United States Supreme Court upholds such legislation on the theory that an act which a legislative body may at one time authorize an official to perform, may be ratified by that body after the act has been performed.[15] Thus no longer does that Court base its decision upon the mere assertion that a cause of action in tort is not property. A third line of cases is the "statutory-rights cases". These arise under situations where liability in tort is incurred because of a statute, and subsequently retroactive legislation is passed denying such liability. As in the other two groups of cases, courts in reaching a desired conclusion say that the right of recovery is[16] or is not property.[17] The real basis of decisions denying recovery, however, seems to be that since liability was created by legislative discretion because of supposed public benefit, it can similarly be done away with by legislation.[18] From this general survey it appears that the validity of such retroactive legislation is not to be based upon a hard and fast rule,[19] but rather should be made to depend on the nature of the particular set of facts before the court.[20] In the instant case, when the plaintiff was injured, he immediately acquired a cause of action which was based on fundamental common law principles.[21] No special public purpose would be served in making the act retroactive which would outweigh the possible harm it might do to the plaintiff and others in his situation. Also, it can hardly be very seriously maintained that the public has relied upon the "Guest Act", as originally passed in 1927, in such a way as to necessitate that the validating act should be given retroactive effect.

CONTRACTS—THIRD PARTY BENEFICIARIES IN PENNSYLVANIA—A contractor's surety bond given to the County of Northampton as obligee, provided that the contractor and surety were bound to the Commonwealth of Pennsyl-

[13] "In plain English public policy regards that the plaintiff and other loyal citizens, whose rights of person and property had been outraged, should submit to the loss rather than that the country should suffer the 'ills untold' which were arrested by 'the Amnesty Act'." Franklin v. Vannoy, 66 N. C. 145, 153 (1872).

[14] Generally, such retroactive legislation is upheld, Tiaco v. Forbes, 228 U. S. 549, 33 Sup. Ct. 585 (1913); Charlotte Ry. v. Welles, 260 U. S. 8, 43 Sup. Ct. 3 (1922); *cf.* Forbes Boat Line v. Board of Com'rs, 258 U. S. 338, 42 Sup. Ct. 325 (1922). *Contra:* Hubbard v. Brainard, 35 Conn. 563 (1869).

[15] Charlotte Ry. v. Welles, *supra* note 14 at 11, 43 Sup. Ct. at 4.

[16] Ettor v. Tacoma, *supra* note 10.

[17] Bailey v. School Dist.; Wall v. Chesapeake Ry., both *supra* note 9: McSurely v. McGrew, 140 Iowa 163, 118 N. W. 415 (1908).

[18] See Collet v. Alioto, 290 Pac. 438, 440 (Cal. 1930).

[19] "Constitutional principles must leave some play to the joints of the machine." Forbes Boat Line v. Board of Com'rs, *supra* note 16 at 340, 42 Sup. Ct. at 326.

[20] "It is true also that when rights are asserted on the ground of some technical defect or contrary to some strongly prevailing view of justice, courts have allowed them to be defeated by subsequent legislation and have used various circumlocutions," *ibid.*

[21] Dickerson v. Connecticut Co., 98 Conn. 87, 118 Atl 518 (1922); Note (1925) 74 U. OF PA. L. REV. 86.

vania for the use of the county and any other person interested. It also provided that anyone furnishing materials to the contractor should have the right to intervene and be made a party in an action instituted by the county, subject however to the priority of the claim and judgment of the county, or upon the failure of the county to start an action, to bring action in his own name. Plaintiff furnished materials to the contractor who failed to pay for them, and plaintiff brought an action on the bond against the surety. *Held,* that plaintiff could maintain the action. *Portland Sand & Gravel Co. v. Globe Indemnity Co.,*[1] 151 Atl. 687 (Pa. 1930).

The leading Pennsylvania case on third party beneficiaries, *Blymire v. Boistle,*[2] which decided that a creditor beneficiary could not recover, contained this significant *dictum,*[3] "Where one person contracts with another to pay money to a third, or to deliver over some valuable thing, and such third person is thus the only party in interest, he ought to possess the right to release the demand, or to recover it by action." This intimation that a donee beneficiary could enforce the promise if it was made for his benefit primarily, has been quoted with approval by Pennsylvania courts on several occasions,[4] but no general tendency to incorporate it into the law of Pennsylvania manifested itself until the case of *Brill v. Brill,*[5] in which a donee beneficiary[6] was permitted to recover on a contract made for his benefit.[7] The court in that case said,[8] "If . . . the promise to pay to the third party is not for the benefit primarily of the other party to the contract but for that of the third party himself, the latter has a legal or equitable interest in the contract which enables him to enforce rights thereunder." The principle of law thus laid down was the basis of the decision in the case of *Tasin v. Bastress*[9] which was decided soon afterwards, but the court in the later case of *Greene County v. Southern Surety Co.*[10] re-

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[1] The bond in this case was given in accordance with the Act of May 11, 1911, P. L. 244, which does not give materialmen the statutory right to maintain an action. It must not be confused with bonds given under the Act of May 31, 1911, P. L. 468, amended by the Act of May 16, 1921, P. L. 650, PA. STAT. SUPP. (West, 1928) § 19207, which does give materialmen the statutory right to maintain an action. See Corbin, *Third Party Beneficiaries in Pennsylvania* (1928) 77 U. OF PA. L. REV. 1, 19.

[2] 6 Watts 182 (Pa., 1837).

[3] *Ibid.* 184.

[4] See Kountz v. Holthouse, 85 Pa. 235, 237 (1877); Adams v. Kuehn, 119 Pa. 76, 85 (1888).

[5] 282 Pa. 276, 127 Atl. 840 (1925).

[6] Although this appears to be a case of creditor beneficiary rather than donee beneficiary, the court treated it as the latter. See Note (1928) 76 U. OF PA. L. REV. 594, 602.

[7] In the early cases in which a beneficiary was permitted to recover, the court always added an additional basis for recovery besides that of intention to benefit the third party. For a discussion of the various grounds of recovery, see Note (1928) 76 U. OF PA. L. REV. 594.

[8] Brill v. Brill, *supra* note 5 at 279, 127 Atl. at 841.

[9] 284 Pa. 47, 130 Atl. 417 (1925).

[10] 292 Pa. 304, 141 Atl. 27 (1927).

fused to accept it. Although the decision in *Greene County v. Southern Surety Co.*[11] is sound[12] even under the rule of *Brill v. Brill*,[13] the court, reviewing the cases in a laudable attempt to evolve a definite statement of the law, came to the conclusion that a donee beneficiary could recover only when the consideration for the promise was the transfer of money or property to the promisor, or where unusual circumstances were present.[14] In the principal case it was not necessary for the court to decide whether this was a correct statement of the Pennsylvania law. The court permitted the plaintiff to maintain his action because the contract expressly gave him the right to sue thereon. It is obvious, that as to such a contract, it is immaterial whether the third party is a donee or creditor beneficiary, since in each case his right to maintain an action arises from the express stipulation in the contract. While the principal case has not clarified the law as to whether a beneficiary for whose benefit a contract is made can maintain an action upon the contract, its practical importance is great, in that it indicates a manner of insuring the beneficiary's right to maintain an action.

CONSTITUTIONAL LAW—STATUTORY GRANT OF PRIVILEGE OF ANCILLARY ADMINISTRATION LIMITED TO RESIDENTS—Claimant, a resident of New York, had a claim against decedent for injuries received in an automobile accident in Vermont. Decedent was a resident of New York and executors were appointed there. Claimant seeks an injunction from New Jersey court restraining defendant New Jersey bank from transferring certain shares of its stock, held in the name of decedent, until claimant could obtain ancillary letters, for purpose of enabling her to bring an action against the estate as permitted to creditors under a New Jersey statute.[1] *Held, inter alia,* that the statute granted right to ancillary administration only to resident claimants. *Potter v. First National Bank of Morristown et al.*, 151 Atl. 546 (N. J. 1930).

In the recent case of *Douglas v. New York, N. H. & H. R. Co.*,[2] the United States Supreme Court upheld the right of a state to make a distinction between privileges granted residents and those accorded non-residents where such differentiations were based upon "rational considerations". There, a statute limiting

[11] *Supra* note 10.

[12] The bond in this case was intended primarily for the benefit of the county, and to insure the proper completion of the work.

[13] *Supra* note 5.

[14] The inclusion of the phrase, "Or where unusual circumstances are present," indicates that the court did not succeed in its effort to bring certainty to the law of third party beneficiaries.

[1] 3 N. J. COMP. STAT. (1910) p. 3823, § 29: . . . if any executor or administrator of a non-resident decedent shall neglect for a space of sixty days after the death of such decedent to make application in this state for letters testamentary upon or in respect to such decedent's estate, then upon the application of any person alleging himself to have any debt or legal claim against such decedent . . . the surrogate may issue letters of administration to such person as he may select . . ."

[2] 279 U. S. 377. 49 Sup. Ct. 355 (1929).

the right to sue a foreign corporation in the New York courts for personal injuries received outside the state to residents of New York was held not in violation of the *Federal Constitution*.[3] Limits to the "rational considerations" which may justify such discriminaton in favor of residents are indicated, however, by such a case as *Blake v. McClung*,[4] where a Tennessee statute giving priority to residents over non-residents in the distribution of assets of an insolvent foreign corporation was held a violation of the same constitutional provision.[5] Apparently, a preference as to the essential substantive right to recover is prohibited,[6] but a preference merely as to the instrumentality or procedure by which an admitted right may be enforced will be supported if apparently justified by considerations of public policy.[7] In most jurisdictions, a non-resident claimant, equally with residents, may claim under ancillary administration where such administration has actually been granted.[8] The statute in question, as interpreted by the court, merely provides that non-residents may not institute proceedings for such administration, but must look to the domiciliary administration or to some jurisdiction where ancillary administration exists on the estate. No question of priority as to a substantive right being presented,[9] the rule in *Douglas v. New York, N. H. & H. R. Co.* applies and the privilege may be refused to non-residents where principles of policy seem best served thereby. Here, there are ample reasons for such preference: (1) the purpose of ancillary administration in such a case being to enable residents more conveniently to press their claims[10] —non-residents being able to claim with equal convenience against the domicil-

[3] U. S. CONST., Art. IV, § 2. In the *Douglas* case, "manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that, broadly speaking, it is they who pay for maintaining the courts concerned" were the "rational considerations" cited as leading to this result.

[4] 172 U. S. 239, 19 Sup. Ct. 165 (1898); Note (1929) U. OF PA. L. REV. 1001.

[5] *Ibid.* 258, "If such legislation does not deny . . . privileges and immunities of citizens, it is difficult to perceive what legislation would effect that result."

[6] Blake v. McClung, *supra* note 4; *In re* Standard Oak Veneer Co. 173 Fed. 105 (E. D. Tenn. 1909); Amer. and British Mfg. Co. v. International Power Co., 173 App. Div. 319, 159 N. Y. Supp. 582 (1916). See Corfield v. Coryell, 4 Wash. C. C. 371, 380; Fed. Cas No. at 551.

[7] Douglas v. New York, N. H. & H. R. Co., *supra* note 2; Loftus v. Pennsylvania R. Co., 107 Ohio St. 352, 140 N. E. 94 (1923).

[8] McKee v. Dodd, 152 Cal. 637, 93 Pac. 854 (1908); Hopper v. Hopper, 125 N. Y. 400, 26 N. E. 457 (1891); Bird v. Key, 8 Baxt. 366 (Tenn. 1875); 2 WHARTON, CONFLICT OF LAWS (3d ed. 1905) 1376. Some early cases refused to allow non-residents to claim under the ancillary administration: Williamson v. Furbush, 31 Ark. 539 (1876); Barry's Appeal, 88 Pa. 131 (1878) (holding that non-resident may not so claim if his domicile is the same as that of decedent).

[9] But under the older cases holding that a non-resident may not claim under ancillary administration even where it is already in existence (*ibid.* note 8) there would, if the domiciliary estate were insolvent, be such a priority and Blake v. McClung would apply.

[10] Hensley v. Rich, 191 Ind. 294, 132 N. E. 632 (1921); Hunt v. Fay, 7 Vt. 170 (1835).

iary estate, there is no necessity for it where, as here, there are no resident claimants,[11] and (2) a divided administration, with its attendant expense, is to be avoided wherever possible.[12]

CORPORATIONS—NECESSITY OF PROPER MOTIVE IN DEMAND BY SHAREHOLDER FOR INSPECTION OF CORPORATE RECORDS—Petitioner, a shareholder in the corporation of which respondents are the officers, demanded that he be allowed to inspect all the books, accounts and papers of the corporation. The demand was refused and petitioner seeks a writ of mandamus to compel respondents to allow him an inspection at any reasonable time. Respondents, in answer, allege that petitioner's desire to inspect is prompted by an improper purpose. There was a demurrer to this answer on the ground that a state statute gives an absolute right of inspection to shareholders[1] and that, consequently, the motive for an inspection could not be inquired into. *Held,* that demurrer be overruled, as good faith and a proper motive are essential before a shareholder can secure the aid of a mandamus to compel the corporate officials to allow him to inspect the records. *Dines et al. v. Harris,* 291 Pac. 1024 (Colo., 1930).

The examination of corporate books and records by a shareholder was allowed at common law only when the shareholder proved that his desire to inspect was prompted by a proper motive.[2] The determination of what constituted a proper purpose or motive was subject to the discretion of the court in each particular case.[3] In general, however, English courts held that an inspection would be allowed only when there was a specific dispute or controversy concerning the corporation in respect of which dispute the examination became necessary.[4] In the United States the courts were not so rigid, the general rule

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[11] *In re* Gennert's Estate, 96 App. Div. 8, 89 N. Y. Supp. 37 (1904); GOODRICH, CONFLICT OF LAWS (1927) 412; 2 WHARTON, *op. cit. supra* note 8, 1376.

[12] *In re* Estate of Washburn, 45 Minn. 242, 47 N. W. 790 (1890); Goodrich, *op. cit. supra* note 11, 413.

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[1] COLO. COMP. LAWS (1922) § 2267 "It shall be the duty of the directors or trustees of every corporation, . . . to cause to be kept . . . correct books of account of all its business, and any stockholders in such corporation shall have the right, at all reasonable times, to inspect and examine all the books, accounts and papers of the corporation . . ." A majority of the states have similar statutes, see N. Y. CONS. LAWS ANN. (Supp. 1930) c. 60, § 10. In Pennsylvania the right is given by the constitution and is limited to railroad and canal corporations, PA. CONST. art. 17, § 2.

[2] People v. Walker, 9 Mich. 328 (1861); State v. Einstein, 46 N. J. L. 479 (1884); King v. Merchants Tailors' Co., 2 B. & Ad. 115 (1831); HIGH, EXTRAORDINARY LEGAL REMEDIES (3d ed. 1896) § 310; 6 THOMPSON, CORPORATIONS (3d ed. 1927) § 4552.

[3] State v. Middlesex Banking Co., 87 Conn. 483, 88 Atl. 861 (1913); Klotz v. Pan-American Match Co., 221 Mass. 38, 108 N. E. 764 (1915).

[4] King v. Merchants Tailors' Co., *supra* note 2; *In re* Burton Co., 31 L. J. Q. B. 62 (1861); BALLANTINE, CORPORATIONS (1927 § 164.

being that examination would be allowed if the purpose was relating to the shareholder's interest as such, and was not inimical to the interests of the corporation.[5] In many states statutes have been passed relating to the rights of a shareholder to inspect the corporate books and records. While these statutes vary slightly in phraseology, most of them are of the same import as the statute in the instant case. Courts are not in harmony as to the effect to be given these statutes. A number of courts have held that such statutes confer an absolute right of inspection, the motive or purpose of the shareholder being immaterial.[6] On the other hand many courts, as in the instant case, have held that the statutory right is subject to the implied limitation that it shall not be used for a vexatious or improper purpose.[7] This latter construction leaves open the question whether the shareholder still has the burden of proving a proper motive, as at common law, or whether the corporation now has the burden of disproving such motive. New Jersey stands alone in holding the statute merely declaratory of the common law;[8] elsewhere the effect given such statutes appears to have shifted the burden of proof to the corporation. An entirely different position has been taken by some courts, which have held that while the statute is undoubtedly absolute in its terms, it is inapplicable when a mandamus is applied for, as the issuance of a writ of mandamus is inherently discretionary.[9] While the position taken by the courts which interpret the statute as giving an absolute right may in some cases result in injury to the corporation, as where shares fall into the hands of unscrupulous competitors, nevertheless the balance of convenience favors this interpretation in that it removes the right of the shareholder to examine the corporate records from the realm of speculation and renders it definite and certain. Equity can devise effective means for circumventing an improper *use* of information acquired through the exercise of this absolute privilege. It is, therefore, unfortunate that the court in the instant case reversed its former position[10] and definitely took the stand that the statute does not confer an absolute right.

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[5] Guthrie v. Harkness, 199 U. S. 148, 26 Sup. Ct. 4 (1905); Varney v. Baker, 194 Mass. 239, 80 N. E. 524 (1907); Phoenix Iron Co. v. Commonwealth, 113 Pa. 563, 6 Atl. 75 (1886).

[6] Johnson v. Langdon, 135 Cal. 624, 67 Pac. 1050 (1902); Venner v. Chicago City R. Co., 246 Ill. 170, 92 N. E. 643 (1910); State v. Werra Aluminum Foundry Co. *et al.*, 173 Wis. 651, 182 N. W. 354 (1921); 4 FLETCHER, PRIVATE CORPORATIONS (1918) § 2823; 6 THOMPSON, *op. cit. supra* note 2, § 4526.

[7] Foster v. White, 86 Ala. 467, 6 So. 88 (1888); Theile v. Cities Service Co., 115 Atl. 773 (Md. 1922); see Note (1927) 6 ORE. L. REV. 285.

[8] State v. National Biscuit Co., 69 N. J. L. 198, 54 Atl. 241 (1902). *Uniform Business Corporation Act* § 35, cl. 4 provides that the shareholder shall have a right to inspect the records for a reasonable purpose only. This act has been adopted by Idaho and Louisiana.

[9] Eaton v. Manter, 114 Me. 259, 95 Atl. 948 (1915); People v. American Press Association, 148 App. Div. 651, 133 N. Y. Supp. 216 (1912).

[10] In Jameson v. Hanawalt, 67 Colo. 153, 186 Pac. 717 (1919) where the facts were almost identical to the facts of the instant case the court used the following language, "The demurrer to the return was properly sustained. A stockholder's purpose in examining the books is not to be enquired into."

INSURANCE—IMPOSSIBILITY AS AN EXCUSE FOR FAILURE TO GIVE NOTICE OF DISABILITY—A clause in a life insurance policy provided that if, after payment of the first premium and before default in any subsequent premium, insured should give notice and proof of total disability, the insurer would pay the ensuing premiums and also pay to the insured a stipulated monthly sum. The insured became insane after payment of first premium and before any default, and since neither the relatives of the insured nor the beneficiary under the policy were aware of the existence of the policy, no notice was given until after the date for payment of the next premium. *Held,* that the failure of notice is excused, and insured may recover under the clause. *Rhyne v. Jefferson Standard Life Insurance Co.,* 154 S. E. 749 (N. C. 1930).

Insurance companies have always attempted so to draw their policies that most of the acts required of the insured shall be conditions precedent to the existence of liability, rather than conditions subsequent to an already accrued liability. To achieve this end the companies maintain corps of highly skilled attorneys who draw the policies, while the insured has no voice in the matter, but is presented with an already prepared contract. Recognizing this fact the courts have developed as a rule of construction that, wherever the words of a policy are ambiguous, such ambiguity will be most strictly construed against the insurer.[1] By its very wording it is evident, and it has been so held, that this rule can have no application to situations similar to that in the principal case, since there is nothing ambiguous to be construed, the contract clearly stating that no liability shall accrue before notice of the disability is given to the insurer.[2] It is well settled that the payment of premiums is a condition precedent to any right of the insured and will not be excused by reason of impossibility of performance.[3] Therefore it has been said that clauses providing for payment of the premiums by the insurer upon notice of the disability of the insured merely offer a further method of payment which should still be regarded as a condition, and that hence impossibility should be no excuse for failure to make payment in this way.[4] The majority of cases are however clearly in accord with the principal case.[5] One cause for this line of decisions is a strong disinclination on the part of courts to allow forfeitures of policies because of some technicality when the loss has actually been suffered.[6] Thus a general rule has been formu-

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[1] National Bank v. Ins. Co., 95 U. S. 673 (1877); Moulor v. American Life Ins. Co., 111 U. S. 335, 4 Sup. Ct. 466 (1884); VANCE, INSURANCE (2d ed. 1930) § 257; 1 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929) § 188.

[2] Gamble v. Accident Assurance Co., 4 Ir. R. C. L. 204 (1869).

[3] New York Life Ins. Co. v. Alexander, 122 Miss. 813, 85 So. 93 (1920); 3 COUCH, *op. cit. supra* § 581.

[4] New England Mutual Life Ins. Co. v. Reynolds, 217 Ala. 307, 116 So. 151 (1928). *Contra:* Levan v. Metropolitan Life Ins. Co., 138 S. C. 253, 136 S. E. 304 (1927).

[5] Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783, 297 S. W. 847 (1927); Metropolitan Life Ins. Co. v. Carroll, 209 Ky. 522, 273 S. W. 54 (1925); Marti v. Midwest Life Ins. Co., 108 Neb. 845, 189 N. W. 388 (1922); VANCE, *op. cit. supra* § 85.

[6] Hayes v. Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135 (1903). But *cf.* Courson v. New York Life Ins. Co., 295 Pa. 518, 145 Atl. 530 (1929).

lated to the effect that when the very loss insured against has occurred, all subsequent acts required of the insured will be considered as conditions subsequent and thus be excused by impossibility of performance.[7] In effect, the decision in the principal case is pure judicial legislation, in contraventon of the expressed intent of the parties to the contract,[8] but it is legislation which attacks the innate injustice of a contract which, by its technicalities, would deprive of indemnity one who has suffered the very injury against which he believed himself to be insured.[9]

LANDLORD AND TENANT—PRIVITY OF ESTATE—LIABILITY FOR RENT OF UNDISCLOSED PRINCIPAL OF ASSIGNEE—Lessees, holders of a lease wherein they covenanted to pay taxes and rent in a specified manner, and which gave them the right to assign or sublet, assigned the lease to *G*. The lessee reserved certain rent for itself, providing for a re-entry if default should occur therein, and *G* covenanted to pay the taxes and rent payable to lessor. For defaulted taxes and rentals the lessors sued "those having the use of the property", who, it was averred, were undisclosed principals of *G*. The affidavit of defense, raising questions of law, denied liability, on the grounds that defendants were undisclosed principals not in privity of estate with plaintiff, and that the assignee named in the assignment could alone be proceeded against. *Held* (Von Moschzisker, C. J., and Kephart, J., dissenting), that judgment for defendants be reversed with a *procedendo*, for "a question was raised which could not be disposed of on an affidavit of defense raising the legal question suggested."[1] *Ottman v. Nixon-Nirdlinger*, 301 Pa. 234 (1930).

The rule is well established at common law that an assignee of the leasehold takes upon himself both the burdens and the benefits of all those covenants in the lease which run with the land.[2] A covenant to pay rent,[3] and one to pay taxes,[4]

[7] Peele v. Provident Fund Society, 147 Ind. 543, 44 N. E. 661 (1896); McNally v. Phoenix Ins. Co., 137 N. Y. 389, 33 N. E. 475 (1893); *cf.* Comstock v. Fraternal Accident Ass'n, 116 Wis. 382, 93 N. W. 22 (1903).

[8] Whiteside v. N. Am. Accident Ins. Co. of Chicago, 200 N. Y. 320, 93 N. E. 948 (1911).

[9] See Woodmen Accident Ass'n v. Pratt, 62 Neb. 673, 87 N. W. 546 (1901).

[1] Principal case, at page 243, Sadler, J., says: "We withhold our views of the controlling principles of law, since their application will depend upon the facts found. It must be kept in mind that judgment was here entered summarily for want of a sufficient statement. If the agency on behalf of the undisclosed principals averred in the statement is proved, then an assumption of liability on their part may result. A mere statement of a conclusion that such relation exists is not sufficient." The court was evidently hampered by a scarcity of facts. The majority opinion *in toto*, however, seems clearly to indicate that if the agency were in fact proved, the defendants would be liable.

[2] Hannen v. Ewalt, 18 Pa. 9 (1851) (ground rent); Negley v. Morgan, 46 Pa. 281 (1863); Fennell v. Guffey, 155 Pa. 38, 25 Atl. 785 (1893); (royalties); WOODFALL, LANDLORD & TENANT (19th ed. 1912) 300; 1 WOOD, LANDLORD & TENANT (2d ed. 1888) §§ 331, 337.

[3] Fennell v. Guffey, 139 Pa. 341, 20 Atl. 1048 (1891); Fennell v. Guffey, *supra* note 2; 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 56 (d).

[4] Com. Bldg. Asso. v. Robinson, 90 Md. 615, 45 Atl. 449 (1900); TRICKETT, LANDLORD & TENANT (2d ed. 1929) § 371; 1 TIFFANY, *loc. cit. supra* note 3.

are among those covenants which so touch and concern the land that they may be said to run therewith. This personal liability of the assignee to the lessor is grounded in the doctrine of privity of estate, and is alien to those rules arising from the relation of privity of contract.[5] Therefore this liability continues only so long as does the privity of estate.[6] Further, although the lessee, as in the instant case, reserves additional rent to himself, or provides for a re-entry on breach of a condition by the assignee, the transaction is still an assignment, and not a sublease, *cæteris paribus*.[7] Granted these elementary rules, the problem of the principal case narrows down to this: What is the full meaning and nature of privity of estate; and, is an undisclosed principal, whose authorized agent has become assignee, in privity of estate with the lessor? The many Pennsylvania cases on the subject agree in defining privity of estate as the actual or beneficial enjoyment of the premises, or the *right to possession and enjoyment*.[8] This enjoyment may take the form of the assignee's deriving material gain and benefit from his position, as where he sublets the property with a profit to himself.[9] So, in *Wickersham v. Irwin*[10] it was held that where the assignee, in pursuance

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[5] Berry v. M'Mullen, 17 S. & R. 84 (Pa., 1827); Wickersham v. Irwin, 14 Pa. 108 (1850); Lowry v. Atlantic Coal Co., 272 Pa. 19, 115 Atl. 847 (1922); 1 WOOD, LANDLORD & TENANT (2d ed. 1888) § 329; see 1 WASHBURN, REAL PROPERTY (6th ed. 1902) § 682.

[6] The assignee may destroy the privity of estate by an assignment over and a transfer of possession to a subsequent assignee, Cohen v. Todd, 130 Minn. 227, 153 N. W. 531 (1915); Goss v. Brick Co., 4 Pa. Super. Ct. 167 (1897) (reviewing earlier Pennsylvania cases); Lowry v. Coal Co., *supra* note 5.

But where the assignee "expressly assumes" the covenants in the lease he still continues liable to the lessor although he has effectually terminated his privity of estate, for he is still bound, by his contractual obligation, to the lessor, Lopizich v. Salter, 45 Cal. App. 446, 187 Pac. 1075 (1920); Johnston v. Messinger, 226 Ill. App. 397 (1922); 5 ELLIOTT, CONTRACTS (1913) § 4574. This doctrine apparently can only apply to those jurisdictions which allow a third party beneficiary to sue upon a contract, 1 TIFFANY, LANDLORD & TENANT (1910) § 158 (bb).

[7] Lloyd v. Cozens, 2 Ashmead 131 (Pa., 1830); 2 PRESTON, CONVEYANCING (3d ed. 1825) 124; see Co. LITT. * 316a.

[8] Thorough discussions hereon are found in Negley v. Morgan, *supra* note 2, and Wickersham v. Irwin, *supra* note 5.

Actual possession of the *locus in quo* by the assignee is unnecessary, Weidner v. Foster, 2 Penrose & Watts 23 (Pa., 1830); Hannen v. Ewalt, 18 Pa. 9 (1851); and the assignee is liable though he never entered the premises, Fennell v. Guffey, *supra* note 2.

[9] "When the assignee of a leasehold estate executes a lease of the premises, reserving a larger rent or containing covenants more advantageous to the lessor than those found in the original leasehold, he reserves to himself a benefit derived under the original lease and his privity of estate is thus continued," McClaren v. Citizens' Oil Co., 14 Pa. Super. Ct. 167, 174 (1900).

[10] 14 Pa. 108 (1850). The other side of the situation is presented by Berry v. M'Mullen, *supra* note 5, where it was held that the defendant was liable to the lessor although he had had the legal title taken in the name of another, since the defendant had the "equitable title" and the beneficial enjoyment of the premises.

The assignee in the principal case is in a position not unlike that of the donor in the Wickersham case. But under the doctrine of Johnston v. Messinger, *supra* note 6, the assignee also would be liable to the lessor.

of a parol gift, had transferred the possession of the premises to the donee, he was not liable to the lessor on a broken covenant since he now had no beneficial enjoyment of the property. Surely, the principal who controls with an unseen hand the nominal assignee has the beneficial enjoyment of the premises, and any benefit derived from the assignment is in fact his. The agent is but the human conduit through which flow the profits to the unseen principal. The fact that the agent holds "legal title" (*i. e.* the cluster of rights and liabilities that pass with the assignment) is *res nullius momenti*, mere form and shadow;[11] for at most the agent holds it merely "in trust" for the principal who disburses the expenses.[12] This reasoning leads to the conclusion that the principal, since he receives the beneficial enjoyment of the property under the assignment, is in privity of estate with the lessor, and therefore liable on the lessee's covenants which run with the land. This result is not at variance with the archaic rule, that, since a sealed instrument may be enforced only against those who appear as parties on its face, an undisclosed principal is not liable thereon.[13] That rule is based on the relation of privity of contract, whereas in the situation under discussion it is privity of estate that creates the liability.[14] However, the result of the principal case does conflict with the rule that an undisclosed principal is not liable for rent where his agent takes a sealed lease in his own name.[15] Since the lessor and lessee are in privity of estate as well as in privity of contract,[16] the arguments set down above in reference to an assignee's undisclosed principal should apply equally well to the undisclosed principal of the lessee. Where the instant case is accepted as law it should be regarded as abrogating the rule which absolves the lessee's undisclosed principal from liability for rent. The holding of the instant case is highly desirable since by application of settled rules it fastens the burden of liability on him who justly should bear it.

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[11] Such was the reasoning in Berry v. M'Mullen, *supra* note 5, and the holding and whole spirit of that case rules the instant case. The position of the principal in the instant case is virtually that of the defendant in the Berry case (see note 10, *supra*).

[12] CLARK, EQUITY (1919) § 252; see Borcherling v. Katz, 37 N. J. Eq. 150, 157 (1884); Rothermel v. Nirdlinger, 12 Pa. D. & C. 606, 609 (1929); 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 422; also vol. 2, §§ 589, 959; vol. 3, § 1049; 1 PERRY, TRUSTS (7th ed. 1929) §§ 127, 206.

[13] Mahoney v. McLean, 26 Minn. 415, 4 N. W. 784 (1880); 1 WILLISTON, CONTRACTS (1920) § 296; 2 MECHEM, AGENCY (2d ed. 1914) § 1734.

[14] In the principal case Sadler, J., penetrated to the core of the problem when he said (page 241): "If any liability exists it must arise from the proof of a privity of estate rather than of contract." And again, "the unnamed principal, in actual possession, or having the beneficial enjoyment, may be held, and his interest may be established by evidence entirely apart from the document of title."

[15] Lenney v. Finley, 118 Ga. 718, 45 S. E. 593 (1903); Borcherling v. Katz, *supra* note 15.

[16] 1 WOOD, *op. cit. supra* note 5, § 337; see Ghegan v. Young, 23 Pa. 18, 20 (1854). It is because of his privity of contract that the lessee still continues liable for rent which assignee fails to pay, and this even though the lessor has meanwhile been receiving due rent from the assignee, Schehr v. Berkey, 166 Cal. 157, 135 Pac. 41 (1913); MacFarland v. Mayo, 65 Okla. 28, 162 Pac. 753 (1916); Ghegan v. Young, *supra;* 2 UNDERHILL, LANDLORD & TENANT (1909) § 650.

MANDAMUS—RIGHT TO COMPEL COURT TO APPROVE DEPUTY APPOINTED PURSUANT TO AN ILLEGAL CONTRACT—A statute[1] provided that the sheriff had the right to appoint deputies by and with the approval of the county court. Plaintiff, a candidate for the office of sheriff, agreed that if elected he would allow *X* the privilege of selecting ten deputies, in consideration of *X's* political support. Plaintiff was elected, and, pursuant to the agreement, submitted the name of *Y* to the defendant, judge of the county court, for approval. *Y* was ignorant of plaintiff's agreement with *X*. Defendant learned of the agreement, and refused to approve *Y's* appointment solely for that reason. Plaintiff then petitioned for a writ of mandamus. *Held* (3 judges dissenting), that the writ should issue, since the defendant, in approving an appointee, may not look beyond the proposed candidate's personal qualifications for the office. *Fox v. Petty*, 30 S. W. (2d) 945 (Ky., 1930).

While the writ of mandamus will not issue to review an exercise of discretion,[2] it may be used to compel an inferior tribunal to exercise its discretion, although the particular manner in which such discretion shall be exercised will not be controlled.[3] However, the writ properly issues when the discretion has been exercised on some ground not legally tenable.[4] It is conceded that the requirement of approval by the county court in the instant case, vests in that body a discretionary power.[5] The real difficulty arises in the application of the yardstick to this power. The majority opinion limits the scope of the power to a consideration of the personal qualifications of the appointee; and it decides that the fact that the appointee was selected in an illegal manner does not *ipso facto* make him any the less qualified.[6] If the purpose of the statute was to vest in the defendant a discretionary power of approval, so that only well-qualified deputies would be appointed,[7] it is very difficult to comprehend how the decision in the instant case furthers that purpose. On principle, a strong argument might be made to the effect that a deputy so selected would be as undesirable in office as a deputy whose personal qualifications were objectionable. Added to the fact that the courts should not back-

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[1] KY. STAT. (Carroll, 1922) § 4560.

[2] Wilbur v. U. S., 281 U. S. 206, 50 Sup. Ct. 320 (1930); Crocker v. Justices of Superior Court, 208 Mass. 162, 94 N. E. 369 (1911).

[3] State *ex rel.* Clarke v. West, 272 Mo. 304, 198 S. W. 1111 (1917); People *ex rel.* Desiderio v. Connolly, 238 N. Y. 326, 144 N. E. 629 (1924); Reese v. Pollard, 248 Pa. 617, 94 Atl. 246 (1915). The writ will not issue unless the legal right to it is clearly established, Quernheim v. Asselmeier, 296 Ill. 494, 129 N. E. 828 (1921); HIGH, EXTRAORDINARY LEGAL REMEDIES (3d ed. 1896) § 9.

[4] See cases cited *supra* note 3.

[5] The court is in accord on this point, Day v. Justices of the County Court, 3 B. Mon. 198 (Ky., 1842); Dassey v. Sanders, 17 Ky. L. Rep. 972, 33 S. W. 193 (1895). In State *ex rel.* Reid v. District Judge, 41 La. Ann. 73, 74, 5 So. 648 (1889), the court says: "The sanction of the judge is required by law. He is vested with a legal discretion in such matter, and, after he has exercised it, he cannot be required to undo what he has undone, and act to the very reverse."

[6] Principal case, at 946, 947.

[7] See Applegate v. Applegate, 4 Metc. 236, 237 (Ky., 1863).

handedly enforce such an agreement[8] as was entered into in the instant case, there is the fundamentally sound legal basis upon which the writ of mandamus may be refused. The discretion of the defendant is not limited by the statute; he has exercised it in a manner consistent with the purposes of the statute; therefore, mandamus will not issue to review his exercise of that power. The ends to be attained by agreements of this sort are too often reached without the agreement itself becoming judicially known to the court; hence, it would seem wise, when such agreements are disclosed, to adopt the suggestion of the dissenting opinion, that "the courts should decree the taking of no step necessary to the execution of such agreements."[9]

MORTGAGES—STATUS OF PRIOR DEBT UNDER MORTGAGE CLAUSE SECURING ALL INDEBTEDNESS—Defendant husband executed a note. Thereafter he joined with his wife, the other defendant, in executing a second note secured by a joint mortgage which further secured "any claims that may come into the hands of the said mortgagee, or his assigns, by purchase or otherwise, against said mortgagors or either of them." Plaintiff procured both notes and the mortgage by assignment and seeks to foreclose the mortgage on the first note. *Held* (four judges dissenting), that plaintiff is not entitled to foreclose, on the ground that public policy does not permit the subjection of the wife's interest in the property to a liability not intended by her. *Sullivan v. Murphy et al.*, 232 N. W. 267 (Iowa, 1930).

Although the decision in the instant case rests upon peculiar facts,[1] the case suggests the problem of what effect the courts will give to a mortgage clause purporting to secure *all claims* when the indebtedness in controversy was contracted prior to the execution of the mortgage. It is well settled that mortgages to secure future advances are valid.[2] A definite statement of the amount secured is not necessary,[3] nor is the amount of consideration expressed material.[4] It has also been held that a mortgage to secure future advances

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[8] The authorities are unanimous in holding such agreements void, as being contrary to public policy. For cases so holding, see Meguire v. Corwine, 101 U. S. 108 (1880); Glass v. Harwell, 40 Ga. App. 400, 149 S. E. 722 (1929).

[9] See dissenting opinion in principal case, at 949.

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[1] The facts showed that defendant mortgagors had no intention in giving mortgage to secure payment of first note, but the intention of defendant wife that the mortgage should be security only for the second note not having been expressed or shown to the mortgagee, such intention or mistake in signing the mortgage could not have been shown in evidence, 5 WIGMORE, EVIDENCE (1923) §§ 2414 (a), 2415 (a). It is effective in the instant case only because the facts were taken from unobjected stipulations having the effect of testimony in the record.

[2] Note (1913) 62 U. OF PA. L. REV. 556; see *infra* notes 3 and 4.

[3] Shirras & others v. Caig, 11 U. S. 34 (1812); Stoughton v. Pasco, 5 Conn. 442 (1825).

[4] Anglo-Californian Bank v. Cerf, 147 Cal. 384, 81 Pac. 1077 (1905); Miller v. Lockwood, 32 N. Y. 247 (1865).

may be extended to cover prior indebtedness by agreement of the parties,[5] and that a mortgage executed after the date of a note will become a part of the contract if such appears from all the circumstances to be the intention of the parties.[6] It would logically follow, applying the principle that a mortgage given to secure an unascertained debt is sufficient if it contain such facts as will lead an interested party to ascertain the real state of the mortgage by inquiry of the parties to it,[7] that a mortgage to secure all indebtedness should be so enforced. Moreover, since the courts do not explicitly deny this conclusion and since they hold that such a clause will cause the mortgage to be a security for future indebtedness,[8] it might reasonably be expected that a prior indebtedness would be included within the effect of the mortgage clause. Most of the few cases on point, however, reach an opposite result when a prior debt is at issue, holding that such words do not express the intention of the parties[9] or that the indebtedness must arise from dealings directly between the mortgagor and mortgagee.[10] It would seem, therefore, that while the enforcement of such a condition might be upheld,[11] the court should be satisfied that the intention, as expressed by the mortgage terms and attendant circumstances,[12] is clearly to secure any previously contracted claims.

MUNICIPAL CORPORATIONS—COLLATERAL ATTACK ON RECORDS OF CITY COUNCIL—EFFECT ON MUNICIPAL BONDS—The holder of municipal improvement bonds sought to enforce a lien attached to defendant's property, alleged to have arisen by virtue of an assessment of the City Council. The property owner defended on the ground that the proceedings of the council were void because of the absence of a quorum when the assessment was levied, and prayed by cross-bill that he be granted a decree cancelling the same as a cloud on his title. The records of the City Council showed a quorum to have been present. *Held* (one justice dissenting), that records such as these, required to be kept by law, are conclusive upon all the world as long as they stand as records, and can only be impeached in a proceeding instituted directly for that purpose. *Penton v. Brown-Crummer Investment Co.*, 130 So. (Ala., 1930).

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[5] Farabee v. McKerrihan, 172 Pa. 234, 33 Atl. 583 (1896).
[6] Spesard v. Spesard, 75 Kans. 87, 88 Pac. 576 (1907).
[7] 1 JONES, MORTGAGES (8th ed. 1928) § 426.
[8] Corn Belt Sav. Bank v. Kriz, 207 Iowa 11, 219 N. W. 503 (1928); Exchange Trust Co. v. Hitchcock, 249 Mass. 547, 144 N. E. 373 (1924); Wall v. Boisgerard, 19 Miss. 574 (1848).
[9] Lashbrooks v. Hatheway, 52 Mich. 124, 17 N. W. 723 (1883); Belton v. Farmers' & Merchants' Bank, 186 N. C. 614, 120 S. E. 220 (1923); *cf.* Fleming v. Georgia R. R. Bank, 120 Ga. 1023, 48 S. E. 420 (1904); Upton v. Bank, 120 Mass. 153 (1876).
[10] Lashbrooks v. Hatheway, *supra* note 9. But *cf.* First National Bank v. Byard, 26 N. J. Eq. 255 (1875).
[11] See Lamoille County Sav. Bank v. Belden, 90 Vt. 535, 539, 98 Atl. 1002, 1004 (1916).
[12] Parol evidence is competent to apply a written contract to its proper subject matter, Jones v. Guaranty & Ind. Co., 101 U. S. 622 (1879); Moses v. Hatfield, 27 S. C. 324, 3 S. E. 538 (1887); 1 JONES, MORTGAGES § 434.

It has long been settled that the decree of a court is not subject to a collateral attack,[1] at least where its records are valid on their face and show a proper exercise of jurisdiction.[2] This rule has by analogy been applied to the records of municipal corporations; and it is quite generally held as in the instant case that such records, too, may only be attacked in a proceeding instituted directly for that purpose,[3] mandamus being the accepted method of accomplishing this.[4] In most of the cases decided prior to the principal case and asserting this rule that municipal records cannot be collaterally attacked, the object of the attack was to explain, enlarge, or contradict some portion of the record.[5] There might well be a difference in a case like the instant one where the object is not to vary or alter the records, but to attack their very existence[6] on the basis of the accepted doctrine that acts done by a municipal corporation in the absence of a quorum are totally void.[7] But we find, with one possible exception,[8] that the few decisions and text writers considering this problem have not indicated that any such distinction should be drawn.[9] There

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[1] A collateral attack may be defined as any attempt to impeach a decree or a judgment or a public record in a proceeding which has not been instituted for that express purpose, People v. McDonald, 264 Ill. 514, 517, 106 N. E. 501, 503 (1914); Morrill v. Morrill, 20 Ore. 96, 101, 25 Pac. 362, 365 (1890); BALLENTINE, LAW DICTIONARY (1930) 230.

[2] McGoon v. Scales, 9 Wall. 23 (U. S. 1869); Miller v. Thompson, 209 Ala. 469, 96 So. 481 (1923); *In re* Gottesfeld, 245 Pa. 314, 91 Atl. 494 (1914); 1 BLACK, JUDGMENTS (1902) § 245 *et seq.*, VAN FLEET, COLLATERAL ATTACK ON JUDICIAL PROCEEDINGS (1892) 29.

[3] Shank v. Ravenswood, 43 W. Va. 242, 27 S. E. 220 (1897); Bartlett v. Eau Claire County, 112 Wis. 237, 88 N. W. 61 (1901); 2 DILLON, MUNICIPAL CORPORATIONS (5th ed., 1911) § 556; 2 McQUILLAN, MUNICIPAL CORPORATIONS (2d ed., 1928) § 651.

[4] Samis v. King, 40 Conn. 298 (1873); Gaither v. Green, 40 La. Ann. 362, 365, 4 So. 210, 212 (1888); 2 McQUILLAN, *op. cit. supra* note 3, § 658; see 2 DILLON, *op. cit. supra* note 3, § 553, in connection with dissenting opinion of Church, C. J., in Boston Turnpike Co. v. Pomfret, 20 Conn. 590, 602 (1850).

[5] Cases *supra* note 3; also Mathis v. Runnel Co., 66 Fed. 494 (C. C. A. 5th, 1894) (variance in date); State v. Simmons, 40 La. 758, 5 So. 29 (1888) (variance in vote); Mayhew v. Gay Head, 13 Allen 129 (Mass., 1866) (variance in vote).

[6] By analogy to the familiar parol evidence rule, 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2400 *et seq.*

[7] State v. Porter, 113 Ind. 79, 14 N. E. 883 (1887); Commonwealth v. Garvey, 217 Pa. 425, 66 Atl. 652 (1907); Wescott v. Scull, 87 N. J. L. 410, 96 Atl. 407 (1915); 2 DILLON, *op. cit. supra* note 3, § 541.

[8] City of Benwood v. Wheeling R. R. Co., 53 W. Va. 465, 476, 44 S. E. 271, 275 (1903), "The attendance of a quorum is a condition precedent to everything. Until then there is an absolute incapacity to act in any way on any matter . . . Until it comes into existence it cannot proceed nor make any record of its proceedings . . . Their action being absolutely void may be ignored or attacked in any proceeding."

[9] Shank v. Ravenswood, *supra* note 3; 2 McQUILLAN, *loc. cit. supra* note 3. Quoting from the latter, "Records imperatively required by law, made by the proper officers, are conclusive of the facts stated therein, not only upon the corporation but upon all the world as long as they stand as records. Their accuracy can only be contradicted or impeached in proceedings instituted directly for that purpose."

is, and it seems should be, a strong presumption in favor of the regularity of public records kept in due form,[10] and thus to prohibit, in a purely collateral attack, an inquiry into the constitution of a council meeting where the record shows the meeting to have been properly constituted certainly seems to be based on a salutary principle. The obvious effect of this decision on the defendant will be to force him to take an additional and possibly troublesome step[11] in order that he may defend the bondholder's suit; but, assuming that he will so act, what will be the result as to the plaintiff bondholder? The existence of his lien is based entirely upon the validity of the assessment of the council,[12] yet he will not be either a necessary or proper party to the proceedings by which such assessment is attacked.[13] The dissenting opinion in the principal case[14] felt that this left the plaintiff without relief, but while it is true that he would thus be deprived of his action against the land owner, he would still be able to enforce his bonds against the municipality.[15] In view of these considerations it seems that the court might properly have acted upon the defendant's petition, within its equitable powers, to prevent a multiplicity of suits[16] and to remove the cloud from his title.[17] On the other hand, the decision can scarcely be criticized for following the satisfactory legal rules applicable, under which the rights of all—City Council, landowner, and bondholder—are adequately protected.

NEGLIGENCE—UNINTENTIONAL MISREPRESENTATION AS A BASIS FOR LIABILITY WITHOUT PRIVITY OF CONTRACT—An indenture of trust, executed by a corporation, recited the corporation's intention to issue bonds secured by specified collateral, which bonds should be authenticated by the defendant as trustee. The defendant failed to ascertain whether the collateral deposited corresponded to that required in the trust agreement, authenticating the bonds on securities of a different nature which proved worthless, to the injury of the plaintiff and other purchasers of the bonds. *Held*, that the defendant was liable for its negligent

[10] Pilcher v. City of Dothan, 207 Ala. 421, 93 So. 16 (1922); 2 MCQUILLAN, *op. cit. supra* note 3, § 647. The clerk of the City Council in the instant case was under a statutory duty to keep the records in question, ALA. POL. CODE (1923) § 1915.

[11] This method is to petition the council to alter their records to conform to the truth; or, failing that, to bring mandamus against the City Clerk. On right of council to alter records, see Note (1919) 3 A. L. R. 1308; on mandamus, see citations *supra* note 4.

[12] ". . . Council shall proceed by order or resolution to fix the amount of assessment against each lot," ALA. POL. CODE (1923) § 2199. "The Council of such city or town may transfer or assign such to contractor . . . or any other person," ALA. POL. CODE (1923) § 2200.

[13] Petition or mandamus brought by landowner.

[14] Brown, J., principal case at —.

[15] Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915 (1896); 2 MCQUILLAN, *op. cit. supra* note 3, § 655; 2 DILLON, *op. cit. supra* note 3, § 541, § 893.

[16] POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 260.

[17] ALA. CIV. CODE (1923) § 9905; 4 DILLON, *op. cit. supra* note 3, § 1590, 1 HIGH, INJUNCTIONS (4th ed. 1905) § 372.

misrepresentations. *Doyle v. Chatham & Phenix Nat. Bank*, 253 N. Y. 369, 171 N. E. 574 (1930).

The defendants, accountants engaged by a corporation to audit its books, prepared and certified a balance sheet reporting a net worth of over a million dollars at a time when the corporation was in fact insolvent. In reliance upon this report, the plaintiff accepted the corporation's application for a loan, advancing sums of money which were not repaid. *Held*, that the defendants were liable for their negligence in misrepresenting the financial condition of the corporation. *Ultramares Corporation v. Touche et al.*, 243 N. Y. Supp. 179 (App. Div. 1930).

The doctrine that a misrepresentation of an existing fact may constitute negligent conduct and be actionable as such[1] does not appear to be meeting with approval. Recent decisions—in jurisdictions other than New York and New Hampshire—are in accord with the overwhelming weight of authority that contractual privity between plaintiff and defendant is prerequisite to the existence of a duty upon the defendant to give information with reasonable care.[2] Many courts, realizing the desirability of a cause of action against the negligent informer, are willing to find this privity by regarding the plaintiff the third-party beneficiary of a contract between the defendant and another,[3] or by considering that other an agent of the plaintiff in consummating the contract with the defendant;[4] liability has also been based upon the "public calling"[5] of the defendant.[5] The reluctance of most courts to place redress for unintentional misrepresentation upon its true basis[6] may be attributed to the fear that liability will be carried too far.[7] Therefore, it is desirable that the elements constituting the cause of action for negligent misrepresentation be set forth explicitly—with a view, on the one hand, to allay the traditional fears of extended liability;[8] on the other, to allow for future development, in that "life has relations not capable always of division into inflexible compartments".[9] The *Ultramares* decision is based upon elements, previously set forth by Justice Andrews,[10] which may be analyzed as follows: (1) there must be knowledge, or its equivalent, (a) that

[1] 4 TORTS RESTATEMENT (Am. L. Inst. 1929) § 186; Edwards v. Lamb, 69 N. H. 599, 45 Atl. 480 (1899); Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275 (1922).

[2] New England Bond & Mortgage Co. v. Brock, 169 N. E. 803 (Mass. 1930); Peterson v. Gales, 191 Wis. 137, 210 N. W. 407 (1926); National Iron & Steel Co. v. Hunt, 312 Ill. 245, 143 N. E. 833 (1924).

[3] Shine v. Nash, 217 Ala. 498, 117 So. 47 (1928).

[4] Murphy v. Fidelity Abstract & Title Co., 114 Wash. 77, 194 Pac. 591 (1920).

[5] See Glanzer v. Shepard, *supra* note 1, and citations therein.

[6] That the true basis of liability is negligent conduct, see Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty* (1929) 42 HARV. L. REV. 733, which states that "great confusion has resulted, and improper analogies have been followed". *Cf.* Green, *Deceit* (1930) 16 W. VA. L. REV. 749.

[7] "The smallness of the compensation paid to the defendants for the services requested is in striking contrast to the enormity of the liability now sought to be imposed upon them", Finch, J., dissenting in the Ultramares case, at 186. *Accord:* Landell v. Lybrand, 264 Pa. 406, 107 Atl. 783 (1919).

[8] Huset v. Case Threshing Machine Co., 120 Fed. 865 (C. C. A. 8th, 1903).

[9] Cardozo, J., in Glanzer v. Shepard, *supra* note 1, at 241, 135 N. E. at 277.

[10] International Products Co. v. Erie R. R., 244 N. Y. 331, 155 N. E. 662 (1927)

the information is desired for a serious purpose, (b) that he to whom it is given intends to rely and act upon it, (c) that, if it be false or erroneous, he will because of it be injured in person or property; (2) the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience (a) the one has the right to rely upon the other for information, and (b) the other giving the information owes a duty to give it with care. However, in the *Doyle* case Justice Kellogg purports to restate certain of these elements, in a manner which suggests a comparison when set forth as follows: (1) There must be knowledge (a) that the informative statement is desired for a serious purpose, (b) that those for whom it is made intend to rely and act upon it, (c) that, if it be false, they may be injured.[11] It is to be observed that this is hardly a restatement, actually differing from Justice Andrews' requisites in the following respects: In (1), the "equivalent" of knowledge is not specified as sufficient; in (b), protection is allowed "those for whom it [the statement] is made", not merely "he to whom it is given"; in (c), the obvious point is knowledge that injury may result, not that it will result. Of these differences, the first appears to be a limitation of liability; the second and third, extensions. However, it is to be noted that Justice Kellogg is not formulating any new principles, but is correctly stating the present basis of liability for negligent misrepresentation in the state of New York: Actual knowledge of the prospective use of the information has existed in the cases which have allowed recovery;[12] that the information need not be given by the defendant to the plaintiff has also been recognized;[13] and it is manifest that the law of torts is concerned more with the probability than with the certainty of injury. The *Doyle* case is to be welcomed for its clarification of the subject at this time;[14] that the elements are set forth in broad terms is more a virtue than a fault.[15] As modern civilization grows more complex, reliance upon the accuracy of informative statements plays an increasingly necessary role. Therefore, it is to be hoped that this opinion will encourage courts to desert "the ancient citadel of privity".[16]

[11] Rule (2) as stated by Justice Andrews was restated verbatim by Justice Kellogg, and need not here be repeated.

[12] See Glanzer v. Shepard, *supra* note 1; International Products Co. v. Erie R. R., *supra* note 10. In New Hampshire it has been held sufficient that the defendant should have known that the plaintiff would rely, Conway Nat. Bank v. Pease, 76 N. H. 319, 82 Atl. 1068 (1912); but see Maxwell Ice Co. v. Brackett, Shaw & Lunt Co., 80 N. H. 236, 116 Atl. 34 (1921). Of course, in both New York and New Hampshire that the defendant should have known the falsity of the information has been held sufficient.

[13] Glanzer v. Shepard, *supra* note 1.

[14] The narrowness of the requisites set forth by Justice Andrews not only influenced the minority of the court in the Ultramares case, but had previously affected the holding in Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp., 245 N. Y. 377, 157 N. E. 272 (1927).

[15] For instance, rule (2) recognizes that the following circumstances may arise in the particular case before the court: the services of the defendant may have been rendered gratuitously; the plaintiff may have been contributorily negligent; the doctrine of *caveat emptor* may be applicable; the nature of the services rendered may also affect the case. Consideration of these problems is outside the scope of this comment. See Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty, supra* note 6; Jaillet v. Cashman, 235 N. Y. 511, 139 N. E. 714 (1923); Benoit v. Perkins, 79 N. H. 11, 104 Atl. 254 (1918).

[16] CARDOZO, THE GROWTH OF THE LAW (1927) 77.

PRACTICE—PENNSYLVANIA PLEADING—NECESSITY FOR PARTICULARITY IN EVALUATING SEPARATE ITEMS OF DAMAGE IN ACTIONS OF TRESPASS—In an action of trespass for wrongfully emptying refuse into a stream, the plaintiff sought damages for injury to his stream, dam, to the operation of his mill, to the harvesting of ice, and for depreciation in value of farming land. For these injuries a lump sum of $50,000 was demanded. On the basis that the damages should have been itemized, the defendant entered a rule for a more specific statement of claim. *Held,* that the statement of claim must be amended to particularize the damages. *Rumble v. Locust Mountain Coal Co.,* 13 D. & C. 476 (Pa. 1930) (Schuylkill County).

With its inception in an agreement of attorneys of the Philadelphia Bar in 1795 and the Statement of Claim Act of 1806, the movement in Pennsylvania to eradicate the legalistic technicalities of common law pleading and to introduce a procedure whereby issues would be definitely and concisely formulated, has been of persistent growth.[1] Though definiteness of allegation in the statement of the plaintiff's claim has been among the requisites of proper pleading under the acts of 1806,[2] 1887,[3] and 1915,[4] there has been a notable confusion among the cases as to the necessary particularity of damages in actions of trespass. However, an examination of these cases reveals that, although the results of some cases are irreconcilable, there is a tendency toward uniformity of result on similar fact situations. When the damages have been reduced to a certainty prior to suit, they must accordingly be itemized.[5] Likewise, when, though not reduced to a certainty before the institution of the suit, they are reasonably susceptible of particularization, the statement of claim will be bad on rule for a more specific statement or on motion to strike off.[6] On the other hand, when the

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[1] 1 AMRAM, PENNSYLVANIA PRACTICE (1930) 42 *et seq.* For a résumé of the original courts and practice in Pennsylvania see generally LOYD, EARLY COURTS OF PENNSYLVANIA (1910).

[2] 1806, 4 Sm. L. 326, § 5, PA. STAT. (West, 1920) § 17205.

[3] 1887 P. L. 271, PA. STAT. (West, 1920) §§ 17177 *et seq.*

[4] 1915 P. L. 483, PA. STAT. (West, 1920) §§ 17181 *et seq.*

[5] Collins v. Heibel, 2 Erie 149 (Pa. 1920); Bittner v. York, 34 York 173 (Pa. 1921); Bollinger v. Greenaway, 3 D. & C. 312 (Pa. 1922) (York); Diehl v. Stewartstown R. R., 6 D. & C. 269 (Pa. 1924) (York); Csapo v. Du Bois, 20 Northptn. 1 (Pa. 1925); Folz v. Zimmerman, 10 D. & C. 433 (Pa. 1927) (Phila. C. P. 5 ) (holding that lost emoluments must be itemized); Moser v. Fernsler, 23 Schuyl. 95 (Pa. 1927); see Hawes v. O'Reilly, 126 Pa. 440, 17 Atl. 642 (1889); Hyde Park Gas Co. v. People's Coal Co., 29 D. R. 841 (Pa. 1919) (Lackawanna); Snyderman v. Burns, 16 Del. 309 (Pa. 1923); Long v. McAllister, 275 Pa. 34, 118 Atl. 506 (1922) (values in action of deceit are necessary). *Contra:* Ellsworth v. O'Keefe, 26 D. R. 277 (Pa. 1917) (Phila. C. P. 5); Coup v. Fairchild, 29 D. R. 640 (Pa. 1917) (Northumberland); McDonald v. Spence, 4 Wash. 68 (Pa. 1924); Leibfried v. Wissler, 40 Lanc. 177 (Pa. 1926); see Delaney v. Chester, 26 D. R. 62 (Pa. 1916); Elliott v. Shipman, 10 Leh. 334, 335 (Pa. 1923).

[6] Philadelphia Battery Co. v. Air Reduction Co., 274 Fed. 216 (E. D. Pa. 1921); Dietz v. Chemical Co., 29 D. R. 691 (Pa. 1920) (York); Waldbiesser v. Travaglini, 19 Northptn. 31 (Pa. 1923); Milakofsky v. Raff Co., 9 D. & C. 524 (Pa. 1927) (Phila. C. P. 5); Helenthal v. Geller, 13 D. & C. 329 (Pa. 1929) (Lancaster); see Atherton v. Clearview Coal Co., 267 Pa. 425, 110 Atl. 298 (1920); Grumley v. Pellegrino, 4 D. & C. 205 (Pa. 1923) (Elk). *Contra:* Erb v. Ely, 39 Lanc. 216 (Pa. 1924).

damages are entirely unliquidated and can with no justifiable definiteness be itemized, lumping of damages is usually permitted.[7] Tests of this nature, of necessity, place much discretion in the court, but this is not an undesirable result. In holding a statement bad for lack of particularity, the courts generally have merely cited Section 5 of the Act of 1915[8] which, without differentiating between actions of assumpsit and actions of trespass, requires a concise statement of all material facts. Conversely, in upholding the view that such particularity is not required, courts have held that this section is partially superseded by Section 13,[9] which provides that in actions of trespass the defendant need not in his pleadings answer averments of damage.[10] When it is recalled, however, that one of the basic purposes of definiteness in pleading is to enable the other party intelligently to prepare for trial,[11] it would appear that too much stress should not be placed upon this interpretation of Section 13 and that the plaintiff should be held, in conformity with the above formula as developed by the majority of Pennsylvania courts, and as seen in the present case, to that degree of particularity to which the facts of the case are reasonably susceptible.[12]

TORTS—DUTY OF OCCUPIER OF LAND TO WARN BUSINESS GUEST OF DANGER FROM CRIMINAL ACT COMMITTED ON THE PREMISES—Defendant bank's floorwalker directed plaintiff customer to a nearby window, although the former knew that a man standing a few feet away had threatened to blow up the bank if his request for money was refused. When bank police approached to apprehend the bomber, he discharged the bomb, wrecking the bank and injuring the customer. *Held,* that the bank owed a duty to the customer, as an invitee, to warn him of the danger. *Sinn v. Farmers' Deposit Sav. Bank,* 300 Pa. 85, 150 Atl. 163 (1930).

Generally speaking, early law recognized no affirmative duty to act for another's protection,[1] but it is now settled that an occupier of real estate is under an obligation to those who enter upon his premises, for purposes in which he has a business interest, to use reasonable care to prepare a safe place for them, or

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[7] Rogers v. Phila. Rapid Transit Co., 22 D. R. 41 (Pa. 1912) (Phila. C. P. 5); Delaney v. Chester; Collins v. Heibel, both *supra* note 5; McCaffrey v. Montgomery, 15 Del. 588 (Pa. 1921) (Washington); Griffith v Smith, 1 D. & C. 628 (Pa. 1921) (Bucks); McDonald v. Spence, *supra* note 5.

[8] 1915 P. L. 483, § 5, PA. STAT. (West, 1920) § 17185.

[9] 1915 P. L. 483, § 13, PA. STAT. (West, 1920) § 17193.

[10] Cases cited *supra* note 7.

[11] See Bollinger v. Greenaway, *supra* note 5 at 312 and 314; Diehl v. Stewartstown R. R., *supra* note 5 at 270; Moser v. Fernsler, *supra* note 5 at 97; Dietz v. Chemical Co., *supra* note 6 at 693.

[12] The problem here considered is distinct from that of averring special as distinguished from general damages. See Trevena v. Zimmerman, 30 D. R. 1072 (Pa. 1921); 3 SEDGWICK, DAMAGES (9th ed. 1912) § 1165a; 4 *ibid.* 1261.

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[1] Bohlen, *Affirmative Obligations in the Law of Tort* (1905) 53 U. OF PA. L. REV. 209, 214; *cf.* RESTATEMENT OF THE LAW OF TORTS, TENTATIVE DRAFT No. 4 (Am. L. Inst. 1929) §§ 192-193.

to make appearances conform to reality by warning of non-apparent dangers.[2] The historical development of these affirmative obligations in torts from the contract action of assumpsit,[3] indicates that this duty is based on a consideration or benefit to the occupier derived from his business interest in the invitee's presence,[4] though some authorities state, as does the court in the principal case, that the duty depends solely upon a tacit invitation,[5] thus confusing the reason for the privilege to enter with the basis for the duty of protection. Admitting that ordinarily[6] an occupier's duty of protection is discharged by warning his business guest of undisclosed dangers of which such occupier knows or should know, it is argued that there is no duty to protect an invitee from a criminal force that does not arise from a purpose incidental to the occupation of the premises. The argument is based on the holding by many courts that the participation of a criminal actor constitutes an "intervening cause",[7] but liability has generally been upheld where foreseeability of the type of criminal act committed is necessary to satisfy the duty.[8] One recent case has gone so far as to hold

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[2] It is often stated that the customer is "entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know," Indermaur v. Dames, L. R. 1 C. P. 274 (1866); *aff'd* L. R. 2 C. P. 311 (1867) (leading case); Bennett v. Railroad Co., 102 U. S. 577 (1880); Pauckner v. Wakem, 231 Ill. 276, 83 N. E. 202 (1907); Carleton v. Franconia Co., 99 Mass. 216 (1868); Bloomer v. Snellenburg, 221 Pa. 25, 69 Atl. 1124 (1908); RESTATEMENT, *op. cit. supra* note 1, § 213.

[3] Bohlen, *op. cit. supra* note 1.

[4] Bennett v. Railroad Co., at 585; Pauckner v. Wakem, at 279, 83 N. E. at 204; Carleton v. Franconia Co., at 219; Indermaur v. Dames, at 286, all *supra* note 2; Kapuscianski v. Phila. & R. Co., 289 Pa. 388, 391, 137 Atl. 619, 620 (1927); Goodrich, *Landowner's Duty to Strangers on His Premises—as Developed in the Iowa Decisions* (1921) 7 IOWA L. BULL. 76, 87; see (1929) 27 MICH. L. REV. 718; RESTATEMENT, *loc. cit. supra* note 2 (Comment a).

[5] Upp v. Darner, 150 Iowa 403, 407, 130 N. W. 409, 410 (1911); Robb v. Niles-Bement-Pond Co., 269 Pa. 298, 300, 112 Atl. 459, 460 (1921); 2 COOLEY, TORTS (3d. ed. 1906) 1259; WHARTON, NEGLIGENCE (2d ed. 1878) § 351. But see Goodrich, *op. cit. supra* note 4, at 65, 80.

[6] More substantial protective measures have been required of occupiers whose business interests usually require large groups of the public to gather upon the premises: Nordgren v. Strong, 149 Atl. 201 (Conn. 1930) (bathing resort); Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506 (1893) (theatre); Curran v. Olson, 88 Minn. 307, 92 N. W. 1124 (1903) (inn); Pittsburg, F. W. & Chicago Ry. Co. v. Hinds, 53 Pa. 512 (1866) (common carrier); RESTATEMENT, *op. cit. supra* note 1, § 218; 1 FETTER, CARRIERS (1897) §96.

[7] The Lusitania, 251 Fed. 715 (S. D. N. Y. 1918); Andrews v. Kinsell, 114 Ga. 390, 40 S. E. 300 (1901); Hullinger v. Worrell, 83 Ill. 220 (1876). But see RESTATEMENT, *op. cit. supra* note 1, § 194.

[8] Payne v. Moore, 196 Ky. 454, 244 S. W. 869 (1922); Jones v. State, 122 Me. 214, 119 Atl. 577 (1923); Garceau v. Engel, 169 Minn. 62, 210 N. W. 608 (1926); Brower v. N. Y. Central Ry. Co., 91 N. J. L. 190, 103 Atl. 166 (1918) (as in the principal case, it was held that the defendant's negligent act and the criminal act were concurrent causes); Hines v. Garrett, 131 Va. 125, 108 S. E. 690 (1921); Marshall v. Caledonian Ry. Co., 1 Sess. Cas. 5th Sec., 1060 (1899); RESTATEMENT, *op. cit. supra* note 1, § 184 (b) (Comment n). But see Nirdlinger v. Am. Dist. Tel. Co., 245 Pa. 453, 91 Atl. 883 (1914).

that the conductor on a common carrier was legally obligated not to flee when the opportunity presented itself but to stand his ground and aid a passenger who was grappling with an armed highwayman.[9] Such an extreme duty may be sustained on the principle that a member of the public has a *right* to the services of a public utility and the fact that the customer knows of the danger does not obviate further protective measures, since, in the case of a public utility, it could not be held that the customer, in order to protect himself, must forego use of the utility.[10] But in situations like that in the principal case, where a private occupier of land is involved, disclosure of the danger is all that the business guest can demand. Having entered under a mere *privilege* that arises solely out of the occupier's consent, he cannot object that a mere warning of undisclosed danger is insufficient because it requires him to leave the premises to avoid the danger. However,[11] even though the presence of the criminal actor may not have been anticipated in the instant case, the bank's knowledge of the hidden danger gave rise to an absolute duty to warn; such a duty cannot justly be tolled by any peculiarity in the source of the danger.

TORTS—DUTY OWED BY THE POSSESSOR OF LAND TO HABITUALLY TRESPASSING CHILDREN—Plaintiff sued for injuries incurred in rescuing his son, aged five, from a runaway freight car which had been started down defendant's inclined siding by the slight jar given it when the boy climbed upon it.[1] Plaintiff's evidence tended to prove that for thirty years children had played on cars standing on this unfenced siding without objection by defendant, and that the accident resulted from a failure to secure the car by other means than air brakes (which ordinarily hold for a short time only) when it was placed on the siding several hours earlier. *Held,* that the defendant's motion for a directed verdict was properly denied. *Christiansen v. Los Angeles & Salt Lake R. R. Co.,* 291 Pac. 926 (Utah 1930).

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[9] Terre Haute, Ind. & Eastern T. Co. v. Scott, 170 N. E. 341 (Ind. 1930).

[10] See RESTATEMENT, *loc. cit. supra* note 8 (Comment a).

[11] *Ibid.; cf.* Fleishmann Malting Co. v. Mrkacek, 14 Fed. (2d) 602 (C. C. A. 7th, 1926) (warning of general dangers not sufficient).

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[1] The "danger invites rescue" doctrine was conceded to be applicable under the facts of the instant case if negligence of defendant caused the boy's peril.

[2] Leading articles on the problem of a landowner's duty to trespassing children are: Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right* (1921) 69 U. OF PA. L. REV. 142, 237, 340, BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 156; Goodrich, *Landowner's Duty to Strangers on His Premises* (1922), 7 IOWA L. BULL. 65; Hudson, *The Turntable Cases in the Federal Courts* (1923), 36 HARV. L. REV. 826; Jeremiah Smith, *Liability of Landowners to Children Entering without Permission* (1898) 11 HARV. L. REV. 349, 434.

Courts have held that the possessor of land owes a duty of care to a trespassing child in three situations:[2] (1) where he knows the child is present,[3] (2) where children have habitually been present within a limited area with at least his passive toleration,[4] (3) where he has created a condition on his premises attractive especially to children and tempting them into a danger which their immaturity prevents them from discovering—the oft-termed "attractive nuisance" doctrine.[5] The instant decision seems correct in holding that the unopposed intrusion of children was sufficient to bring this case within the "tolerated intruder" doctrine, but that the "attractiveness" of the car was not sufficient to bring it within the "attractive nuisance" doctrine.[6] Concerning itself solely with a duty based upon past habitual use of the premises, the court then stated that the origin of this duty is the probability, known to the possessor, of children being present, making it necessary for him to consider their probable presence in regulating his own conduct.[7] Under such a theory the duty owing a child trespasser whose presence is known or anticipated because of former trespasses, is no different from that owing an adult trespasser under like circumstances, namely, a duty to use due care in performing acts which will probably increase the dangerousness of his position.[8] The extent of this duty has sometimes been roughly defined by saying that the possessor of land is liable to a trespasser for active negligence in doing a present act, but not for passive negligence in per-

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[3] Palmer v. Gordon, 173 Mass. 410, 53 N. E. 909 (1899); Palmer v. Oregon etc. R. R. Co., 34 Utah 466, 98 Pac. 689 (1908).

[4] Union Pac. Ry. Co. v. MacDonald, 152 U. S. 262, 14 Sup. Ct. 619 (1893); Young v. Clark, 16 Utah 42, 50 Pac. 832 (1897); see Fitzpatrick v. Penfield, 267 Pa. 564, 571, 109 Atl. 653, 656 (1920). That there is a duty in this situation is admitted even in jurisdictions where the "attractive nuisance" doctrine is rejected, as for instance Pennsylvania: Balser v. Young, 72 Pa. Super. 502 (1919).

[5] McKiddy v. Des Moines Elec. Co., 202 Iowa 225, 206 N. W. 815 (1926); Keffe v. Milwaukee etc. Ry. Co., 21 Minn. 207 (1875). *Contra:* Wheeling etc. R. R. Co. v. Harvey, 77 Ohio St. 235, 83 N. W. 66 (1907); Thompson v. Baltimore & Ohio R. R. Co., 218 Pa. 444, 67 Atl. 768 (1907).

[6] A standing freight car has been held not an "attractive nuisance," Buddy v. Union Terminal Ry. Co., 276 Mo. 276, 207 S. W. 821 (1918); Bogden v. Los Angeles Ry. Co., 59 Utah 505, 205 Pac. 571 (1922). *Contra:* Cahill v. Stone & Co., 153 Cal. 571, 96 Pac. 84 (1908). Nor is a moving train an "attractive nuisance," Swartwood's Guardian v. Louisville etc. R. R. Co., 129 Ky. 247, 111 S. W. 305 (1908).

[7] Hardy v. Missouri Pac. R. R. Co., 266 Fed. 860 (C. C. A. 8th, 1920); Ramsay v. Tuthill Bldg. Material Co., 295 Ill. 395, 129 N. E. 127 (1920); Hudson, *op. cit. supra* note 2, at 844; see principal case, at 931.

[8] Underwood v. Western etc. R. R. Co., 105 Ga. 48, 31 S. E. 123 (1898); Hojecki v. Philadelphia & Reading Ry. Co., 283 Pa. 444, 129 Atl. 327 (1925); Peaslee, *Duty to Seen Trespassers* (1914), 27 HARV. L. REV. 403; TORTS RESTATEMENT (Am. L. Inst., 1929) §§ 204-208. "Due care," however, means reasonable care under the circumstances known to the defendant, and if the probable presence of a child is one of these circumstances the degree of care required will be proportionately increased: see Dobbins v. Missouri etc. R. R. Co., 91 Tex. 60, 62, 41 S. W. 62 (1897).

mitting the premises to exist in their present condition.[9] Although in the instant case the injury seems in one sense to have resulted from a condition existing when the child entered, and not under defendant's control after the child came within the zone of danger, nevertheless the condition was one created by the defendant with knowledge that children would probably be imperiled by the potential danger of the insecurely fastened car. Consequently the decision of the court that this was active negligence within the duty owing a mere trespasser is of aid in accurately delimiting the rather indistinct line between actionable and non-actionable forms of conduct eventually resulting in injury to habitual child intruders.[10]

WILLS—CONSTRUCTION—DISTRIBUTION PER STIRPES OR PER CAPITA—Testator bequeathed his estate "to my sister *A* . . . ; to all the living children of my deceased half-brother *B* . . . —and to *C* . . . share and share alike." The three children of the testator's half-brother *B*, each claimed one-fifth of the estate. *Held* (one judge dissenting), that the three children constituted a class entitled to one-third of the estate. *In re Rauschenplatt's Estate*, 291 Pac. 432 (Cal. 1930).

When a testator names some beneficiaries individually and identifies others as a class by their relationship to a common ancestor, the question arises—do the members of the class share equally with the named beneficiaries, or do they take as a class a share equal to that of each named legatee? The classic rule of construction provided for distribution *per capita* irrespective of the degree of their relationship to the testator or of whether there was any relationship at all.[1] If, however, any part of the will evidenced a "faint glimpse" of an intention for stirpital distribution, it was heeded.[2] In the United States this mode of construction has had somewhat doubtful support.[3] It has been openly rejected by some courts[4] in construing wills in which the beneficiaries are the

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[9] Buch v. Amory Mfg. Co., 69 N. H. 257, 44 Atl. 809 (1897); Sharp Realty Co. v. Forsha, 122 Ohio St. 368, 171 N. E. 598 (1930); Ollis v. Houston etc. Ry. Co., 31 Tex. Civ. App. 601, 73 S. W. 30 (1903).

[10] Recovery was allowed in Ramsay v. Tuthill Bldg. Material Co., *supra* note 7 (sand in bin); Union etc. Co. v. Lunsford, 189 Ky. 785, 225 S. W. 741 (1920) (unprotected electric wires); Harriman v. Pittsburg, etc. Ry. Co., 45 Ohio St. 11, 12 N. E. 451 (1887) (unexploded signal torpedo); Balser v. Young, *supra* note 4 (lumber pile). Recovery was denied in Kelly v. Benas, 217 Mo. 1, 116 S. W. 557 (1909) (lumber pile); Hannan, Adm'r v. Ehrlich, 102 Ohio St. 176, 131 N. E. 504 (1921) (sand pit).

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[1] 2 JARMAN, WILLS (6th ed. 1910) §§ 1711, 1712.

[2] *Ibid.* 1712.

[3] See *In re* Leverich's Will, 135 Misc. 777, 783, 238 N. Y. Supp. 533, 538 (1929).

[4] Fraser v. Dillon, 78 Ga. 474, 3 S. E. 695 (1887); Ferrer v. Pyne, 81 N. Y. 281 (1880); Minter's Appeal, 40 Pa. 111 (1861).

testator's kin and the method of distribution set out by intestacy statutes[5] has been followed. Accordingly, where a named beneficiary and the parent[6] of the members of the class are related to the testator in the same degree, distribution is made *per stirpes;*[7] where the beneficiaries are all related in the same degree,[8] or the parent is included,[9] distribution is made *per capita.* Other courts purport to follow the older rule, but in fact reduce it to a nullity by requiring only very slight evidence of an intent to distribute in accordance with intestacy provisions.[10] There are others which follow the classic rule as a general principle[11] and allow of exception only upon explicit reference to the statutes.[12] However, the testator's failure to name individually all of the beneficiaries seems to negative an intention to treat them equally, and since the provisions of intestacy statutes admittedly follow the "natural disposition of mankind,"[13] an analogy to them would seem more nearly to accord with the testator's unexpressed intention. This is the conclusion reached by the court in the instant case,[14] and it seems essentially the correct one. But the

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[5] For the provisions made by such statutes, see INTESTATE ACT OF 1917, P. L. 429, §§ 7, 9.

[6] Stirpital distribution is substitutional, the children taking what the parent would take if living, and so is not accurately made where the parent is living. In cases where it has been made there has been a marked evidence in the whole of the context to treat the children as a class, Risk's Appeal, 52 Pa. 269 (1886); Dubois v. House, 294 S. W. 935 (Tex., 1927).

[7] Rivenett v. Bourquin, 53 Mich. 10, 18 N. W. 537 (1884); Vincent v. Newhouse, 83 N. Y. 505 (1881); Kline's Estate, 38 Pa. Super. 582 (1909); 2 SCHOULER, WILLS (Blakemore's ed. 1923) § 1036.

[8] Bailey v. Orange Memorial Hospital, 102 Atl. 7 (N. J. Eq. 1917); Scott's Estate, 163 Pa. 165, 29 Atl. 877 (1894).

[9] *In re* Morrison's Estate, 138 Cal. 401, 71 Pac. 453 (1903).

[10] Raymond v. Hillhouse, 45 Conn. 467 (1878); Vincent v. Newhouse, *supra* note 7.

[11] It has been argued that had the testator intended distribution as in intestacy he would not have made a will, see Mooney v. Purpus, 70 Ohio St. 57, 65, 70 N. E. 894, 896 (1904); but see Sipe's Estate, 30 Pa. Super. 145, 150 (1906).

[12] Distribution is generally made in accordance with the intestacy statutes if the testator has referred to "heirs," on the ground that as the statutes are necessary to determine the identity of the beneficiaries they may properly be used to find the portions which the beneficiaries shall take: Perkins v. Stearns, 163 Mass. 247, 39 N. E. 1016 (1895); Branch v. DeWolf, 38 R. I. 395, 95 Atl. 857 (1915); Collins v. Feather, 52 W. Va. 107, 43 S. E. 323 (1902); (1926) 75 U. OF PA. L. REV. 91. *Contra:* Records v. Fields, 155 Mo. 314, 55 S. W. 1021 (1900); *cf.* Rowley v. Currie, 94 N. J. Eq. 606, 120 Atl. 653 (1923).

[13] See Ferrer v. Pyne, *supra* note 4, at 284.

[14] The court in its majority opinion expressly championed neither rule of construction, but the argument of the dissenting judge for the classical rule shows that it was before the court, and this coupled with the fact that analogy to intestacy provisions is implicit in the decision warrant the inference that the court prefers this rule of construction as applied to the facts of the case.

classic rule of construction need not be entirely abandoned, for clearly analogy to intestacy statutes is not possible unless the beneficiaries are related to the testator. Where they are not, its application is helpful in construing vague language.[15] But when applied as a broad, general rule of construction, subject to exceptions, its usefulness becomes doubtful since so used it seems only to have added confusion to a field of law uncertain at best.

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[15] *In re* Kleeman, 61 Misc. 560, 115 N. Y. Supp. 982 (1908); Garnier v. Garnier, 265 Pa. 175, 108 Atl. 595 (1919).