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NOTES.

THE LAW SCHOOL—THE ORDER OF THE COIF.—On May 16, 1912, four members of the Class of 1912 were authorized by the National Secretary of The Order of the Coif to formally organize a chapter of that society in the University of Pennsylvania Law School.

The Order of the Coif is an honorary legal society. Its purpose as expressed in its constitution is "To foster a spirit of careful study and to mark in a fitting manner those who have attained a high grade of scholarship." With this aim in view, only those members of the graduating class of law schools where it exists, who attain high scholastic standing, are eligible for election to membership in the respective chapters of The Order of the Coif.

The national organization was originally founded as Theta Kappa Nu, but as it began to grow, it was thought desirable to adopt a name which would differentiate it from Greek letter fraternities, and which would also indicate its legal character; and for that reason "The Order of the Coif" was selected,—a name famous in English

legal history. The English Order of the Coif was composed of the sergeants-at-law to whom constant reference is made in the law reports.

The American order has now twelve chapters, as follows: Northwestern, Chicago, Wisconsin, Michigan, Missouri, Nebraska, Illinois, Iowa, Leland Stanford, Western Reserve, Virginia, and the University of Pennsylvania. Its badge is a key, similar in general shape to the Phi Beta Kappa key, but with the corners clipped, bearing upon its face a head, showing the wig with the symbolic coif. The original coif was a hood of white lawn; but after wigs came into fashion, completely covering the coif, a piece of white lawn on the top of the wig represented the coif.

The local chapter of the order has not yet been formally organized; but its organization will be perfected very shortly. Graduates of the Law School who would have been eligible to membership had the society existed at the date of their graduation, are eligible to election as members of the local chapter, as are also the members of the Faculty of the Law School.

The charter members of the local chapter are William A. Schnader, Frederick Lyman Ballard, Everett H. Brown, Jr., and L. Pearson Scott.

ADOPTION—EFFECT ON INHERITANCE.—The laws of Vermont[1] provide that, on an adoption, the same rights, duties, and obligations and the same rights of inheritance shall exist between the parties as though the person adopted had been the legitimate child of the adoptive parent, except that the person so adopted shall not be capable of taking property expressly limited to the heirs of the body of the adoptive parent. The question arose, in a recent case,[2] whether such adoption establishes the relationship of parent and child with all the consequences of that relationship, including the right of inheritance from the adoptive parent by the issue of the adopted child. And the court held that it did, interpreting the statute according to the meaning of the term adoption in the civil law.

The doctrine of adoption was unknown to the Common Law of England, and in this country in states whose jurisprudence is based exclusively on that system.[3] It has, however, been recognized by the civil law from the earliest days of its existence, and on the provisions of that law, the statutes adjusted in the different states of the Union have been founded. By the civil law before the time of Justinian, the effect of adoption was to place the person adopted in the same position he would have held had he been born a son of the

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[1] Rev. Laws of Vermont 1880, Secs. 2536-2541.

[2] Batchelder v. Walworth, 82 Atl. 7 (Vt. 1912).

[3] Ross v. Ross, 129 Mass. 243 (1880), which gives a historical sketch of the law; Morrison v. Sessions, 70 Mich. 297 (1888).

adopter. It sometimes happened under this law, however, that a son lost the succession to his own father by being adopted, and to his adoptive father by a subsequent emancipation. To remedy this, Justinian provided, in his code, that the son given in adoption to a stranger should be in the same position to his own father as before, but gained by adoption the succession to his adoptive father if he die intestate.[4] "Augustus did not adopt Tiberius who succeeded him in the empire, till Tiberius had adopted his nephew Germanicus; and the effect of this was that Tiberius became the son, and Germanicus the grandson, of Augustus at the same time."[5]

The leading American case, which applies the principles of the civil law, is Vidal v. Commagere.[6] The court interpreted the word "adoption" (in a case where a child was adopted by a special act of the legislature) and declared "that, as by the common acceptation of the word, the relationship of parent and child with all the consequences of that relationship is understood, * * * as such was its acceptation among the civilians, we cannot say that the legislature used the word in a more restricted sense, in a sense not understood in common parlance, and not known in any system of laws."

The statutes[7] which exist in our various states have generally been interpreted in the light of the civil law. The authorities unite in affirming that, for all purposes of inheritance *from* the adoptive parent, the adopted child becomes and is the lawful child of such adoptive parent save in so far as the statute authorizing the adoption may otherwise provide. His children inherit by representation the estate of his deceased adoptive parent as if they were grandchildren.[8] He has, under the intestate laws, all the rights of a child born in lawful wedlock.[9] He stands in the same position as a child born of the date of his adoption in jurisdictions where the birth of a child, subsequent to the making of a will, operates as a revocation of that will.[10]

With respect to inheritance by the adoptive father from or through the adopted child, there is some confusion of opinion. The weightier view, and in line with the civil law as herein expressed, is, that on the death of such child his estate goes to his blood relatives. "The statute, in so far as it changes the general course of descents and the distribution of intestate property, and ignores all

[4] Sandais Jushman, 113, 115, 119.

[5] Lord Mackenzie on the Roman Law, p. 131.

[6] 13 La. Ann., 516 (1858); to same effect is Gray v. Holmes, 57 Kan. 217 (1896).

[7] Pennsylvania Acts in point are: Act of May 4, 1855; Act of April 2, 1872; Act of May 19, 1887.

[8] Power v. Hafley, 85 Ky. 671 (1887); Gray v. Holmes, *infra*.

[9] Rowan's Estate, 132 Pa. 299 (1890); Buckley v. Frasier, 153 Mass. 525 (1891).

[10] Hilpire v. Claude, 109 Ia. 159 (1899); Flannigan v. Howard, 200 Ill. 366 (1902).

merit on account of blood, should be strictly construed. * * * Moreover, it is a statute primarily for the benefit of the adopted child."[11]

M. G.

CORPORATIONS—REVOCABILITY OF VOTING TRUSTS.—A recent decision in Pennsylvania, Comm. *ex rel.* Clark v. Roydhouse[1] appears to settle the law in that state in regard to the so-called voting trusts,—agreements among a majority of the stockholders to transfer their stock to a common trustee. In this case the agreement, whose object was "to protect and promote the individual interests of stockholders parties to the agreement," required the trustee to pay the dividends received directly to the holders of trust certificates and to vote the stock as directed by a committee appointed by the majority of them. The agreement was to remain in force for five years. At the instance of a party to it the agreement was declared invalid on the ground that under these facts it was not coupled with any beneficial interest in the trustee and hence revocable. The decision is in sharp contrast with Boyer v. Weslitt,[2] where an agreement of this sort was upheld on the ground that it contained all the elements of an active trust and that there was a beneficial interest in the trustee. In Pennsylvania, then, the rule seems to be that there is nothing contrary to public policy in the existence of voting trusts *per se,* but that under the general principles of the law of trusts, where such an agreement amounts to a dry trust, it will not be sustained.[3] In the case last cited the beneficial interest consisted in rights of management in the trustees and a complete control of the business policy of the corporation, including the power to purchase the interest of any contracting party at a valuation.

The law of voting trusts is of extremely modern origin. Up to 1891, it is said, no case was reported from the court of last resort of any state.[4] However, with the increasing complications arising from the extension of corporate bodies in number of stockholders and complexity of management, the desire for stability of control and a consistent business policy became more necessary and consequently the number of voting trusts and the litigation attendant

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[11] Upson v. Noble, 35 Ohio St. 655 (1880); Hale v. Robbins, 53 Wis. 514 (1881), *contra:* Humphries v. Davis, 100 Ind. 369 (1884); in some states this contingency is provided for by statute; see Swick v. Coleman, 218 Ill. 33 (1905).

[1] 82 Atl. 74 Pa. (1911).

[2] 227 Pa. 398 (1910).

[3] The same idea is shown in Vanderbilt v. Bennett, 6 C. C. (Pa.) 193 (1889), where the court declared such a dry trust void as against public policy and a statute, adding that even had it been good, it would have been revocable at will.

[4] Professor Simeon E. Baldwin, 1 Yale Law Journal, 1, 14 (1891).

thereon has greatly increased. The courts are at utter variance on the subject and there are almost as many theories advanced as there are cases reported.[5] It is submitted, however, that the view taken in the Pennsylvania cases cited represents, as nearly as any one theory can be said to do so, the trend of the law.[6]

In every case involving a voting trust that has been upheld the court must first decide that such an agreement is not forbidden by public policy. Public policy is a vague principle at best and it is not surprising to find it moulded by the courts into an unlimited number of reasons and objections. It seems, in accordance with the majority of the cases, that voting trusts when made *bona fide* are not contrary to public policy. There is no moral wrong in the making of such an agreement, but only in its violation. There seems to be no distinction between the case where the majority of stock is owned by one man or by many acting as one. It is well said in a Massachusetts[7] case that "the combination of common interests is necessary and constantly taking place. It is as legitimate for a majority of stockholders to combine as for other people." It has always been objected that the power to vote cannot be disassociated from the ownership of stock. Many statutes disregard this right, as where it is provided that the person entitled to vote at corporate meetings must be a registered owner of stock at a fixed time before meeting. If he transfers in the interim he may still vote.[8] It has been said that the minority stockholder is excluded from combining with the majority and that his right to have the corporation run by the majority is violated in that it is actually run by a majority of the majority, which may be a minority of the whole. It is answered that the only right of the minority stockholder is to insist that the control of the majority shall not be used for fraud and oppression, and as long as that right remains unviolated it is no concern of his how the power of the majority is distributed among themselves.[9] There is no space here to go further into the arguments for and against the public policy beneath voting trusts. We can only intimate the policy of the courts in upholding it and viewing the right of control as a separate property right capable of alienation.

The principle laid down in Pennsylvania has been recognized in a number of decisions.[10] A few cases[11] have held that an irre-

[5] In Warren v. Prim, 66 N. J. Eq. 353 (1904), there were five opinions, all differing in their theory, were given.

[6] Mr. Jesse W. Lilienthal, in 10 Harv. Law Rev. 428; Mr. Edward Avery Harriman, 13 Yale Law Journal, 109.

[7] Holmes, C. J., in Brightman v. Bates, 175 Mass. 105, 110 (1899).

[8] People v. Robinson, 64 Cal. 373 (1884).

[9] 13 Yale Law Journal, 113.

[10] Note to Morel v. Hoye, 16 L. R. A. (N. S.) 1136 (1908).

[11] Griffith v. Jewett, 9 Ohio, Dec. Reprint, 627 (1899); Schwartz v. Ohio Ry., 6 Ohio C. C. 415 (1892).

vocable power to vote the stock cannot be given and that the agreement is good though revocable. Though the language used is broad enough to cover cases of an active trust, yet the facts of these cases show only a duty to vote as directed and passively hold the stock. Thus the rule is the same as that laid down by Boyer v. Nesbitt.[12] A few cases admit the right of a transferee of the certificates to have the agreement invalidated.[13] In these cases also the trustees had no active duties. As to what constitutes an active trust opinions vary. We have seen the Pennsylvania theory. In the association the mere duty of voting has been held to make the trust an active one irrespective of any duties of management.[14] It would seem in such cases that ordinary principles of contract law should govern, and we are in sympathy with a decision holding that a pledge of personal credit and financial responsibility to raise funds to support the enterprise is valid consideration. It has been held that where the only consideration is the mutual promise of the stockholders any member may revoke at will. It is difficult to reconcile this with general contract law, yet to hold otherwise would make every voting trust valid, as there is in every case at least this much consideration. It seems, moreover, that although this is not the express ground of our principal case, it is at least a result of it.

Only two points in regard to the law of voting trusts may be said to be generally admitted. Where the object of the trust is illegal *per se,* as for example to procure some undue advantage for the majority over the minority, it will be set aside.[16] Where the voting trust results from an agreement between stockholders and creditors preserving the lien of the latter, and serving to keep the corporation off the rocks of bankruptcy, it will generally be upheld.[17] It would seem that such contracts are within a very essential policy and in all respects made upon a valid consideration.

C. H. S., Jr.

INJUNCTION—RIGHT TO RESTRAIN THE SALE OF LETTERS.—Several phases of the question of property in letters were dealt with in a recent case.[1] The executor of Mrs. Eddy, of Christian Science

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[12] Boyer v. Nesbitt (*supra,* note 2).

[13] White v. Thomas Tire Co., 52 N. J. Eq. 178 (1894); Clowes v. Willes, 60 N. J. Eq. 179 (1900).

[14] Note 7, *supra.*

[15] Smith v. San Francisco Ry.. 115 Cal.. at p. 603 (1897).

[16] Kreissl v. Distilling Co., 61 N. J. Eq. 5 (1901); Shepany Voting Trust Cases, 60 Conn. 553 (1893); Hafer v. N. Y. Co., 9 Ohio, Dec. Reprints, 470 (1899); Com. v. Russell, 48 N. J. Eq. 208 (1891); Fennesy v. Ross, 5 App. Div. N. Y. 342 (1896).

[17] Shelmerdine v. Welch, 8 C. C. (Pa.) 330 (1890); Mobile Ry. v. Nicolas, 98 Ala. 92 (1893).

[1] Baker v. Libbie, 97 N. F. 109 (Mass. 1912).

fame, brought a bill to restrain an auctioneer of manuscripts from publishing and selling certain autograph letters of his testatrix. They possessed no literary merit, but were merely friendly letters written to a cousin about the commonplaces of life. The two requests in the bill thus raised the question of the existence and the extent of the proprietary right of the writer of private letters, having no literary value.

There is no doubt that this right does exist. While in the earliest cases the letters did possess literary value,[2] yet the right now covers all letters, whether of literary value or not.[3] The literary value may increase their market value, but does not create the property right in the writer. Certain it is that this right gives to the writer not only the right of publication, but also the negative right of restraining their publication by the correspondent or any third party. And the authorities are agreed in granting injunctions to restrain such unlawful publication,[4] in the absence of any special circumstances showing a different relation between the parties than that presented in the normal case.[5] This conclusion, as pointed out by the court, is supported not only by the authorities but by reason as well. For every man is entitled to the fruits of his labor, whether physical or mental, and the substance of the letters is the result of some mental effort, no matter how small. The defendant was, therefore, restrained from publishing the letters.

The court went further, and said that, connected with this intangible right, is the right to copy or secure copies of the letters within a reasonable time, saying: "Otherwise the author's right of publication may be lost." Though there seems to be no authority for this proposition (nor is there any against it), this is probably not going too far, as it does not appear that this detracts from whatever right of property the recipient may have in the paper on which the letter is written.

There still remains, however, the question as to whether the author's rights, positive and negative, are limited to publication, or whether they permit him also to prevent a transfer of the letters by the recipient. The question is a difficult one, because of the small number of cases on the point. The case of Pope v. Curl,[6] suggests that "it is only a special property in the receiver, possibly the prop-

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[2] Pope v. Curl, 2 Atk. 341 (1741)). Here the letters were written by Alexander Pope. In Thompson v. Stanhope, 12 Ambler, 737 (1774), the letters involved were Lord Chesterfield's famous letters to his son.

[3] Gee v. Pritchard, 2 Swanston, 402 (1818); Folsom v. Marsh, 2 Story, 100 (U. S. C. C. 1842).

[4] There is a valuable collection of authorities in the opinion of our principal case.

[5] As an instance of these the court cites the case of letters by an agent to or for his principal and others, where the conditions indicate that this property in the form or expression is in another than the writer.

[6] *Supra.*

erty of the paper may belong to him." This would seem to allow alienability. The case of Oliver v. Oliver [7] decided that the recipient of a letter has sufficient property in the paper upon which it is written to entitle him to maintain detinue for it against the sender into whose hands it has come. But it would be very difficult to imply a right to sell from this decision. The case of Grigsby v. Breckenridge [8] decided that the property of the recipient in the letter implies the right to keep it or destroy it, or to dispose of it in any other way than by publication. This would certainly give him the right to sell. But the case of Rice v. Williams'[9] holds that the receiver of private letters has not such an interest therein that they can be made the subject of a sale without the owner's consent.[10] So it would seem there is authority for a ruling either way on this question.

The court decided that in the absence of some special limitations imposed either by the subject-matter of the letter,[11] or the circumstances under which it is sent,[12] the right of the recipient is one of unqualified title in the material on which it is written. From this it follows that he can sell it to another. His ownership in the letter is absolute, subject to the author's paramount rights of publication. The court, therefore, refused the injunction as to a sale of the letters, there being present none of the special circumstances referred to.

It would seem that the conclusion reached in the principal case is correct in principle. Upon the sending of the letter the writer retains property in the ideas expressed therein, but passes on to the recipient property in the paper. The inability of the recipient to publish the letter does not put any limit on his property in the paper, nor does a sale of the letter infringe the right of property in the author in his ideas; for that property in the ideas, it is believed, was never intended to do more than protect the author from unauthorized publication. It cannot mean that the author and the recipient alone are entitled to a knowledge of the ideas expressed in the letter. A common law copyright is infringed only by publication; yet even in the absence of publication the ideas might be transferred from one to another. If this be the extent of the author's property in his ideas, a mere sale of the letters would not constitute an infringement of it.

P. V. R. M.

[7] 11 C. B. N. S. 139 (1861).

[8] 2 Bush, 480 (Ky. 1867).

[9] 32 Fed. 437 (1887).

[10] Here there was a contract for the sale of sixty thousand letters written to the vendors of a voltaic belt to a physician. The case was also decided on the ground that the contract was void as against good morals. It was, therefore, really not necessary to decide that a recipient cannot sell a letter without the owner's consent.

[11] Letters of extreme affection and other fiduciary communications are cited by the court as examples of this.

[12] Such as a confidential relation existing between the parties, out of which would arise an implied prohibition against any use of the letters.

LEGAL ETHICS.—The New York County Lawyers' Association Committee on Professional Ethics has recently embarked upon a new and interesting line of work. It has announced to the members of the bar of New York County that it stands ready "to advise inquirers respecting questions of proper professional conduct." The answers to questions submitted for its consideration are published for circulation among the bench and bar of New York City. The committee, through the courtesy of its chairman, Charles A. Boston, Esq., has extended to the LAW REVIEW the privilege of publishing, from time to time, the inquiries submitted and answers thereto,—a privilege of which the LAW REVIEW is glad to take advantage.

Following are three questions recently propounded to the committee:

"1. Is an attorney entitled to retain moneys in payment of disbursements when said moneys were received by him in another matter in which he appeared as attorney for the same client, and assuming that the client has not agreed to allow the attorney to retain same?

2. Is an attorney entitled to retain moneys expended for disbursements, which moneys were received in the same matter in which the disbursements were had?

3. Where the original matter in which the expenses are made is one involving a collection, and something is received by the attorney, is he entitled to retain what he has received on account of disbursements had therein?"

To these questions the committee replied:

"*Resolved,* That in the opinion of the committee in each case suggested, the attorney is entitled to retain the amount of money so expended for disbursements, but subject, in case of objection by the client, to a judicial determination of the reasonableness and propriety of the disbursements and the right of the attorney to so apply the moneys; but that the attorney should not make such an application of the withheld funds for his own purposes as to preclude or endanger their return in whole or in part if the question be determined against him by a competent court."

PROPERTY—POLLUTION OF WATERS AND WATER COURSES BY MINE OWNERS.—In Arminius Chemical Co. v. Landrum,[1] the Supreme Court of Virginia added its voice to the chorus of disapprobation which has greeted the case of Pennsylvania Coal Co. v. Sanderson[2] whenever courts other than those of Pennsylvania have been asked to apply the principles of that decision to cases before them. In the Virginia case the defendant companies were engaged in producing iron pyrites, the separation of which from the refuse at the mine required that the ore be washed with large

[1] 73 S. E. Rep. 459 (1912).
[2] 113 Pa. 126 (1886).

quantities of water. The water used in the washing became impregnated with sulphuric acid and solid matter. The water was permitted to flow into a stream, which in turn flowed through the plaintiff's farm land. The noxious substances in the water rendered it unfit for farm purposes and destroyed the fertility of some thirty acres of land. An action of trespass on the case being brought, the appellate court affirmed a judgment for the plaintiff on the ground that lower riparian owners are possessed of the right to have the stream flow to them substantially preserved in its original quantity and purity, and that no exception to this right exists in favor of upper mine owners whose mines are so situated that a pollution of the stream is a necessary incident to their operation.

The case of Pennsylvania Coal Co. v. Sanderson[3] has been the subject of so much controversy and criticism that it is unnecessary to repeat the facts or the decision in detail. After holding on three appeals that a right of action lay, the Supreme Court of Pennsylvania, on the fourth appeal, held that a lower riparian owner had no recourse against the owner of a mine further up the stream who pumped aciduated water from his mine and permitted it to flow into the stream so that it became unfit for domestic or other use. The mining of coal was held a natural use of the land, and the injury necessarily caused to a lower owner was *damnum absque injuria.* The ordinary rights of riparian owners had *ex necessitate* to give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal.

This case has not been followed in any other jurisdiction even in those where the mining interests rival those of Pennsylvania, *e. g.* Ohio[4] and West Virginia.[5] Even in Pennsylvania the case has been restricted to its exact facts,[6] and wherever the case has been cited elsewhere the courts have repudiated it in no uncertain terms. The other courts are unanimous in saying that the necessities of the mining business furnish the sole excuse for the Sanderson decision, and they decline to adopt any rule "whereby the necessities of one man's business can be made the standard by which to measure another man's rights in a thing which belongs to both."[7]

The reasons adverse to the Sanderson case as outlined in various cases are as follows: There exists at common law a right inherent in the ownership of property along a natural stream to have the water transmitted without sensible alteration in quality or unrea-

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[3] *Supra.*

[4] Columbus, Etc., Co. v. Tucker, 48 Ohio, 41 (1891).

[5] Day v. Louisville Coal and Coke Co., 60 W. Va. 27 (1907).

[6] Williams v. Union Imp. Co., 1 Pa. Dist. Rep. 288 (1892).

[7] Strobel v. Kerr Salt Co., 164 N. Y. 303 (1900); Coal Co. v. Ruffner, 100 S. W. Rep. 116 (Tenn., 1907).

sonable diminution in quantity.[8] Any act of others which tends to infringe this right is a trespass for which an action for damages will lie, and an injunction may issue if the acts are repeated. When the infringements are occasioned by actions of an upper riparian owner the maxim *"Sic utere tuo ut alienum non laedas"* is applied.[9] These rules are not to be relaxed even in favor of business interests engaged in developing the resources of the country.[10] This reasoning is especially applicable in America, in view of the constitutional provisions prohibiting the taking of private property for public uses without making just compensation. *A fortiori* if private property may not be taken for purely public uses it cannot be taken for private purposes.[11]

The reasoning of the court in the Sanderson case was that the rights of the lower riparian owner was to have the water come to him only as affected by the natural user of his property by the upper owner. This idea of "natural" user was borrowed from the opinion of Lord Cairns in Bylands v. Fletcher,[12] but it is submitted that an application of the true principles of Bylands v. Fletcher would have induced a different decision. Admitting that the mining of coal is a "natural" use of the land,[13] which is denied in some cases [14] none the less, the collection of large quantities of aciduated water, and the pumping of it from the bottom of the mine into a stream, are "non-natural" uses with the meaning of the words as used by Lord Cairns.

Lord Shand criticises the Sanderson case most ably in Young v. Banking Distillery Co.,[15] where he says: "While the enormous value of the mining interests in the district of Pennsylvania from which the case came might have formed a good reason for appealing to the legislature to pass a special measure to restrain any proceedings by interdict at the instance of surface proprietors and to confine them to a right to damages only for injury sustained; that value could in my opinion afford no good legal ground for allowing the proprietor of a mine to work his minerals for his own profit so as to destroy or greatly injure his neighbor's estate by subjecting it, by means of artificial operations, to the burden of receiving water

[8] Fletcher v. Smith, L. R. 2 App. Cas. 781, Eng. (1877).

[9] Lawson v. Price, 45 Md. 123 (1876); Tenn. Coal Co. v. Hamilton, 100 Ala. 252 (1893).

[10] Robinson v. Black Diamond Mining Co., 50 Cal. 461 (1875); Yuba County v. Cloke, 79 Cal. 239 (1899); Pennington v. Brinsop Hall Coal Co., L. R. 5, Ch. Div. 569 (1877).

[11] Townsend v. Norfolk Ry. Co., 105 Va. 22 (1906); Beach v. Sterling Iron Co., 54 N. J. Eq. 65 (1895); Shoffner v. Sutherland, 111 Va. 298 (1910).

[12] 3 H. L. 330 (1865).

[13] Iron Co. v. Kenyon, L. R. 11, Ch. Div. 783 (1876).

[14] Columbus, Etc., Co., v. Tucker, 48 Ohio, 41 (1891); Beach v. Sterling Iron Co., 54 N. J. Eq. (1895).

[15] 1 App. Case. 641 (1893).

enlarged in quantity and destroyed in quality without compensation or damages for the injury done."

The decision is also open to criticism from an economic viewpoint. No enterprise or business is profitable to the community as a whole which is unable to pay its own way. If therefore a coal mine cannot produce more wealth than it destroys it should not be operated. If it does produce a surplus of wealth there is no reason for removing the burden of the value destroyed from the persons who receive direct benefits in the shape of profits and placing them upon an individual to whom any benefit accruing comes merely because he is a member of society. In fact, the Virginia case holds that the benefits resulting to the plaintiff from an increase in the value of the rest of his land due to the increase in population attracted by the mines may not be taken into account in assessing the damages, and in this it follows other cases.[16]

L. P. S.

TRUSTS—ASSIGNMENT OF CHOSES IN ACTION.—Where several assignees of portions of a legatee's interest under a will are competing for payment, that one will have priority whose assignment was first brought to the knowledge of the trustee, though the assignment was actually made later than that to another claimant, if he took in good faith and without knowledge of the earlier assignment.[1]

The question involved is whether the assignee who was first in point of time, but not in giving notice to the trustee, is by that fact, and that alone, to be made subsequent in payment to the assignee whose claim was first brought to the trustee's attention. The ground on which the decision in the present case is based is that the first assignee in point of time has been negligent in not notifying the trustee, and has thus made it easy for the assignor to commit fraud on an innocent third person by a subsequent assignment to him of the same interest. Consequently, the assignor, and not the later assignee, who has no knowledge of the prior transaction, must stand the loss.

There are two general views on this subject; one—that of the present case, which obtains in England, Pennsylvania, and some other states; and the other—that priority in time of assignment controls, and notice to the trustee is not necessary to protect the assignee's rights. The leading case adopting the first theory is that of Dearle v. Hall,[2] decided in England in 1828. Brown was entitled to an annuity, which he assigned by way of collateral security to

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[16] Francis v. Schoelkopf, 53 N. Y. 152 (1873); Marcy v. Fries, 18 Kan. 353 (1877).

[1] Jenkinson v. New York Finance Co., 82 Atl. Rep. 36 (N. J. 1911).

[2] 3 Russ. 1.

Dearle; but neither of them notified the trustee. Later Brown sold the same annuity to Hall, whose inquiries did not bring to light the existence of the prior encumbrance, for the trustee was ignorant of it. Thus Hall knew nothing of Dearle's claim; and the court decided that, under these circumstances, Hall was entitled to the fund, as he had been the first to notify the trustee. The basis of the decision is stated by the court as follows: "Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possessions and ownerships remaining in a person who, in fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to choses in action, bonds, etc." The statement is elaborated by the following: "In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice." It has been suggested that it was not the possibility of fraud on innocent third persons which was thus made the foundation of the decisions, but rather a completion of possession and title, or a change in the trustee's relation, making him thenceforth hold for the assignee. Whether this uncertainty was warranted or not, the doubt was set at rest by the House of Lords in Ward v. Duncombe,[3] where it was stated that the underlying reason of the decision in the earlier case was the possibility of fraud, through the negligence of the first assignor in not notifying the trustee. Such has been the view ever since.

The same doctrine was definitely established in Pennsylvania in the case of Phillips's Estate (No. 3),[4] where it was said that "business transactions constantly require the assignments of choses in action;" and such would be greatly hampered if this method of protecting the assignees were not adopted,—an analogy being drawn to the case of sales of personal property, in which the vendee is required to take possession for the protection of subsequent purchasers. A similar position has been taken by the Federal courts, including the Supreme Court,[5] and by several states, amongst which are California,[6] Pennsylvania,[7] New Jersey,[8] Vermont[9] and Connecticut.[10] On the other hand there are a number of states where

[3] (1893) App. Cases, 369.

[4] 205 Pa. 515 (1903).

[5] Methven *et al.* v. Staten Island Light, Heat and Power Co., 66 Fed. 113 (1895); Spain v. Hamilton's Administrator, 1 Wall. 604 (1863).

[6] Graham Paper Co. v. Pembroke, 124 Cal. 117 (1899).

[7] Phillips's Estate, *supra.*

[8] Jenkinson v. New York Finance Co., *supra.*

[9] Ward & Co. v. Morrison and Trustee, 25 Vt. 593 (1853).

[10] Vanbuskirk v. Hartford Fire Ins. Co., 14 Conn. 141 (1841).

it is held that priority in the time of assignment gives priority in right, and the first assignee need not notify the trustee in order to protect himself. Among these may be mentioned New York,[11] Massachusetts [12] and Illinois.[13] The general view of these courts is that the subsequent assignee gets only what the assignor had to assign.

The doctrine of the case under discussion seems to be supported by the better reasoning. There is no effective way of preventing fraud under the other theory, and it can hardly be said to be an onerous duty to impose on the first assignee to require him to notify the trustee. This is certainly much better than to attempt to correct the evil by extending the recording system to include such cases. In the great majority of instances, it would be the natural thing for any assignee to inquire of the trustee as to the assignor's interest, and subsequently notify the trustee of the change in ownership. If notice is given the trustee, then a later assignee must take the risk, if he chooses not to investigate the assignor's title. A rule that rewards the careful and diligent, and at the same time largely eliminates opportunity to defraud, certainly has a presumption in its favor, and should receive careful consideration before being discarded. *L. C. A.*

TRUSTS—RESULTING TRUSTS—CONSTRUCTIVE TRUSTS.—In a controversy over the title of certain real estate, a husband, who made a voluntary conveyance to his wife through an intermediary, sought a decree for reconveyance, insisting that a trust arose in his favor by operation of law either as (1) a resulting trust, there being no consideration for the deed, or as (2) a constructive trust through failure to perform an oral promise to reconvey. The court denied the decree, holding (1) a resulting trust cannot arise in favor of a grantor in the absence of fraud, under a deed of conveyance expressing a money consideration with declaration to use of the grantee, and (2) that the evidence failed to establish the promise to reconvey, and even had it been established, the mere failure to perform it if originally made in good faith, is not fraud.[1]

In the first proposition the court was undoubtedly correct under the modern rule. Probably the best short statement of the old rule and the reasons for it and for the adoption of the modern rule is to be found in Perry—"Trusts and Trustees." "It was formerly said that if a man conveyed his estate to a stranger without consideration, or for a mere nominal one, a trust resulted to the owner on

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[11] Fortunato v. Patten, 147 N. Y. 277 (1895); approved in Niles v. Mathusa, 162 N. Y. 546 (1900).

[12] Putnam v. Story, 132 Mass. 205 (1882).

[13] Hawk v. Ament, 28 Ill. App. 390 (1888).

[1] Dawn v. Dawn, 82 Atl. Rep. 322 (N. J. 1912).

the ground that the law would not presume a man to part with his property without some inducement thereto. This was in strict analogy to the common law, whereby if a feoffment was made without consideration the legal title only passed to the feoffee and a use resulted to the feoffor. . . . And the burden was put on the grantee to show the consideration, and upon failure of proof a use was presumed to the grantor, for the reason, as stated by Sir Francis Bacon, that when feoffments were made, it grew doubtful whether estates were in use or purchase, and as purchases were things notorious and uses were things secret, the Chancellor thought it more convenient to put the purchaser to prove his consideration than the feoffer to prove his trust, and so made intendment toward the use and put the purchaser to proof of his purchase." [2] But "this rule does not apply to modern conveyances and no trust is now held to result to the grantor, although he conveys the estate without consideration.' At the present day almost all conveyances are in form of deeds of bargain and sale and operate to pass the estate by virtue of the statute of uses, or of statutes in the several states prescribing the formalities necessary to convey lands. . . . In conveyances that are in form deeds of bargain and sale parol evidence cannot be received to control or contradict the statement of the consideration. . . . And where the deed contains the clause, as most deeds do, that the estate is had and held to the grantee his heirs and assigns, to his and their use and behoof, no trust can result, as it is a rule that when a use is declared no other use can be shown to result." [3] And certainly "voluntary conveyances to a wife or child were never within the rule that such gifts raised a resulting trust for the donor," for "if a feoffment was made to a wife or child no use resulted, for the consideration of blood was held good consideration and an advance or settlement was presumed." [4]

But the second proposition advanced by the court by way of dicta does not seem so well established under the facts of the principal case. It is undoubted that whenever a person acquires legal title to land by means of an intentionally false verbal promise to hold for a certain purpose as to reconvey to the grantor or convey to another, and he refuses to perform, a trust *ex maleficio* arises and equity will compel him to fulfill the trust by conveying according to his engagement.[5] There has been some diversity of opinion among the courts as to just what constitutes fraud in such a case. Some maintain that it must be fraud existing at the time the deed

[2] Perry Trusts and Trustees, 6th Ed., Vol. 1, Sec. 161.

[3] Idem, Sec. 162.

[4] Idem, Sec. 164.

[5] Hunt v. Roberts, 40 Me. 187 (1855); Hodges v. Howard, 5 R. I. 149 (1858); Hoge v. Hoge, 1 Watts, 163 (1832); Cameron v. Ward, 8 Ga. 245 (1850); Arnold v. Cord, 16 Ind. 177 (1861); Laing v. McKee, 13 Mich. 124 (1865); Nelson v. Worrall, 20 Iowa, 469 (1866).

is made,[6] and something more than a mere verbal promise afterward broken, otherwise the Statute of Frauds would be virtually abrogated.[7] This strict rule has been laid down as to conveyances by will as well as *inter vivos*, but the majority of the recent decisions do not insist on an actual fraudulent intention on the part of the legatee or devisee as necessary to the creation of a trust of this nature. In one case it was said "the fraud is in the refusal to pay the legacy; not in the promise, but in the breach," [8] and this view has been followed in many of the more recent English and American cases.[9]

There would seem to be a sound reason for this relaxation of the strict rule in cases of conveyance by will, for an adherence to it would tend in a great many instances to an evasion of the Mortmain Acts. To conclusively presume fraud from failure to perform a promise in reliance on which a conveyance *inter vivos* is made is reasonable, but it is not reasonable to presume fraud in a promisor who fails to perform when the law prohibits performance on his part. So in the case of a gift or secret trust for a charitable purpose, falling within the terms of the Mortmain Act in the jurisdiction, the courts have either to do away with the requirement of incipient fraud or allow the donee to take absolutely, in which case he could immediately convey to the charity. The first alternative is adopted and the acts preserved in their effectiveness. Of course no such reason exists for changing the general rule in cases *inter vivos*, but there seems to be a recognized exception to it in some jurisdictions, where it has been held that if the parties stand in a relation of confidence with each other, the fact that at the time of the conveyance and promise to reconvey there was no fraudulent intent on the part of the grantee is immaterial, and a constructive trust arises on failure to perform.[10] It is submitted that had the promise on the part of the wife been proved in the principal case, the case would fall within this exception and failure to perform would constitute sufficient fraud on which to raise a constructive trust in favor of the husband.

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[6] Grove v. Kase, 195 Pa. 325 (1900).

[7] Wheeler v. Reynolds, 66 N. Y. 227 (1876); Bennett v. Dollar Savings Bank, 87 Pa. 382 (1878); Gibson v. Dennis, 82 Ill. 304 (1876).

[8] Dissenting opinion, Staples, J., Sprinkle v. Hayworth, 26 Gratt, 384 (1875).

[9] *In re* Fleetwood L. R. 15 Ch. D. 594 (1880); *in re* Stead, 1 Ch. 237 (1900); Curdy v. Berton, 79 Cal. 420 (1889); *in re* Kelerman, 126 N. Y. 73 (1891); *in re* Maddock, 2 Ch. 220 (1902); Tennant v. Tennant, 43 W. Va. 547 (1897); Trustees of Amherst College v. Ritch, 151 N. Y. 282 (1897); O'Hara v. Dudley, 95 N. Y. 403 (1884).

[10] Ward v. Rabe, 96 N. Y. 414 (1884); Brisan v. Brisan, 75 Cal. 525 (1888); Gruhen v. Richardson, 128 Ill. 78 (1889).