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## NOTES.

ACTIONS—WHAT CONSTITUTES A SUIT—PENNSYLVANIA ACT OF JUNE 8, 1893—ACTIONS BETWEEN HUSBAND AND WIFE—Just what is a suit by a wife against her husband? It is pretty well settled under the statutes and decisions of our various States, what classes of actions are maintainable by a wife againse her spouse and *vice versa:* but as to what constitutes a suit or action, there is quite a diversity of opinion and not a little questionable reasoning.

The Married Persons' Property Act of 1893,[1] in Pennsylvania, provides that a married woman "may not sue her husband except in a proceeding for divorce, or in a proceeding to protect or recover her separate property, etc." In the case of *Harwood* v. *Harwood*[2] recently decided by the Supreme Court of Pennsylvania, the husband had given his wife a judgment note for $3,000. By virtue of the warrant of attorney contained in the note, she entered up judgment against him on the Court's docket. The Court held

[1] Pa. Act June 8, 1893, P. L. 344, Section 3.
[2] 235 Pa. 532 (1912).

that this was not a suit and therefore not prohibited by the Act of 1893. Says Mr. Justice Stewart, "This qualification was simply a retention of so much of the disability imposed by the common law as was thought necessary to protect the peace of the domestic relation." But by what standard shall a Court of Justice be guided in determining what will and what will not preserve domestic tranquillity? Only by the particular circumstances of each individual case. No hard and fast rules can be laid down. Let us take this very case. The Court says in substance that the mere entering up of judgment against one's husband for three thousand dollars is not an act calculated to disturb the peaceful relations of the home. But there would seem to be a contradiction of this attitude in the very fact that the case is now before the Supreme Court for determination, having been fought through the lower Courts. And the very report of the case shows that "subsequently (*i. e.*, after entering up the judgment) she separated from him."

The legislature saw fit to allow a wife to sue her husband in only two specified instances, of which this was not one. Why should the Court, by putting a forced construction upon what is a suit, extend the permission to a case which the Act of Assembly does not embrace? The Court, in our principal case, says, "The conclusion is irresistible that when the legislature declared that a married woman 'may not sue her husband,' the prohibition had regard to adverse proceedings where the party complained against by legal process is brought into a Court of justice to answer. A voluntary confessed judgment is not adverse, and therefore not within the prohibition." This line of reasoning is, at least, questionable in the light of some of the cases that have attempted to define a suit.

The leading case on this phase of the situation in America is *Cohens* v. *Virginia* in the United States Supreme Court.[3] There, Chief Justice Marshall summarizes the legal conception of a suit. "What is a suit? We understand it to be the prosecution or pursuit of some claim, demand or request. In law language, it is the prosecution of some demand in a Court of justice. . . . The instruments whereby this remedy is obtained are a diversity of suits and actions which are defined to be the lawful demand of one's right. . . . They are all cases where the party suing claims to obtain something to which he has a right."[4] An Illinois authority[5] has it that "the meaning of the word 'suit' in a legal sense is an attempt to gain an end by legal process." In that case, one of the points to be determined was whether the issuing of execution upon a judgment was a "suit," and the Court decided that it was. There would be difficulty in finding a case more nearly like our

[3] 6 Wheaton 264 (1821).

[4] Cohens v. Virginia, 6 Wheat. 264, at P. 407.

[5] Dobbins v. First National Bank, 112 Ill. 553 (1885) at P. 566. Vanderveer v. Conover, 16 N. J. Law, 487 (1838).

principal case than this and yet the conclusions reached are logically contrary.

The better opinion seems to be that the term "suit" is a very comprehensive one applying to any proceeding in a Court of Justice by which an individual pursues that remedy which the law affords him.[6] There are numerous instances in the books of proceedings which are technically, and upon good legal reasoning, known as "suits," but which are not necessarily adverse and frequently are not so in fact. It has been held that the application of a poor debtor before a Master in Chancery to be admitted to the poor debtor's oath (a statutory proceeding in Massachusetts in the nature of bankruptcy), is a civil suit.[7] A petition for partition of lands and subsequent proceedings have been held a suit.[8] Condemnation proceedings have repeatedly been held "suits" under various statutes;[9] as have also proceedings to establish a drain,[10] and petitions for the laying out of highways.[11] An application to a probate Court for an assignment of dower to a widow is a "suit" within the statute of limitations of Alabama.[12] Surely such an action is not "adverse." The case of *Haven v. Hilliard*[13] in Massachusetts determined that "a proceeding in the Probate Court, seeking the proof and establishment of a will of lands, is a suit at law." Mandamus,[14] *certiori*,[15] and *habeas corpus*[16] are all suits at law.

*J. F. N.*

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BANKS—IS A BANK A HOLDER IN DUE COURSE OF PAPER DEPOSITED?—What is the relation between a bank and its depositor? Is it one of debtorship, or of agency? These questions are primarily for the jury to determine from the evidence adduced. Either relation may exist; the former is the more frequent. Oftentimes, however, the parties have no express agreement and there is nothing to determine their status other than the circumstances surrounding the deposit. When money is deposited, there is very seldom room for doubt, except in those few isolated cases of an express bailment of a specific sum of money. When the doubt does arise, it is in that class of cases

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[6] See Words and Phrases, Vol. 7, Page 6769 and cases there cited, and also 37 Cyc. 523, note 22.

[7] In the Matter of William A. Jenckes, 6 R. I. 18 (1859).

[8] Callen v. Ellison, 13 Ohio St. 446 (1862).

[9] City of Marion v. Granby, 68 Iowa, 142 (1885); Searl v. School District No. 2, 124 U. S. 197 (1887).

[10] In re The Jarnecke Ditch, 69 Fed. 161 (1895).

[11] Hyde Park v. Wiggin, 157 Mass. 94 (1892); Dunn v. Town of Pownall, 65 Vt. 116 (1893).

[12] Farmer v. Ray, 42 Ala. 125 (1868).

[13] 40 Mass. 10 (1839) at P. 19.

[14] In re Sloan, 5 New Mex., 590 (1891); Mayor of Roodhouse v. Briggs, 194 Ill., 435 (1902) at P. 437.

[15] Kendrix v. Kellogg, 32 Ga. 435 (1861) at P. 437.

[16] Holmes v. Jennison, 39 U. S. 540 (1840).

concerning a deposit of negotiable paper. If time paper is deposited, the ordinary presumption is that it constitutes a bailment for collection, even though the bank permits the depositor to draw against the amount with which he is credited.[1] The real difficulty lies in those cases where there is a deposit of demand or matured paper. In the absence of an express agreement, which is so frequently lacking, the first resort is to the indorsement of the depositor. If the check or draft is indorsed "for collection" or "for collection and credit" the presumption is that the relationship is one of agency for collection and that a debt does not arise until the collection is made.[2] There are many other circumstances which are equally determinative, as for instance, charging interest for collection,[3] charging interest on money loaned before collection,[4] or the entry of bills, drafts or checks as such and not as cash.[5] Any one of these conditions is, of itself, sufficient basis for the presumption that a bailment exists.

On the other hand, it is quite frequently the case that the indorsement is in blank and the amount of the check, draft or bill is entered in the pass-book as cash, with the privilege of drawing against it immediately. In the absence of an express understanding to the contrary, the Courts presume, in a majority of the jurisdictions where this question has been passed upon, that the parties stand in the position of debtor and creditor and that title to the paper passes immediately.[6] Opposition to this presumption, however, is not inconsiderable.[7] The fact that the bank, by real or tacit agreement, can charge back against the account of the depositor if the check or draft is not paid upon presentation, is looked upon as stamping the transaction immediately as a bailment. The right of the depositor to draw against the paper is considered a mere gratuitous loan, signifying nothing. So much

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[1] Giles v. Perkins, 9 East. 12 (1807); Scott v. Ocean Bank, 23 N. Y. 289 (1861).

[2] Commercial Bank v. Armstrong, 39 Fed. Rep. 684 (1889); Ayres v. Farmer's Bank, 79 Mo. 421 (1883); National Bank v. Hubbell, 117 N. Y. 384(1889).

[3] Shipsey v. Bowery National Bank, 59 N. Y. 485 (1875).

[4] Thompson v. Giles, 2 B. & C. 422 (1824).

[5] Thompson v. Giles (*supra*); Bailie v. Augusta Saving Bank, 95 Georgia, 277, 280 (1895).

[6] Metropolitan National Bank v. Loyd, 90 N. Y. 530 (1882); Cragie v. Hadley, 99 N. Y. 131 (1885); Riverside Bank v. Woodhaven etc. Co., 34 N. Y. App. Div. 359 (1898); King v. Bowling Green Trust Co., 129 N. Y. Suppl. 977 (1911); Denton National Bank v. Kemney, 81 Atlantic Rep. 277 (Md., 1911); Downing v. National Exchange Bank, 96 N. E. Rep. 403 (Ind., 1911); Fourth National Bank v. Mayer, 14 S. E. Rep. 891 (Georgia, 1892); Soffert v. National Bank of Republic, 175 Ill. 432 (1898); Hoffman v. First National Bank, 46 N. J. L. 604 (1884); Federal Courts apparently in accord, see Burton v. U. S., 196 U. S. 283, 297 (1904); Bolles, Banks and Their Depositors (1887), p. 59.

[7] Armour Packing Company v. Davis, 118 N. C. 548 (1896); *In re* State Bank, 56 Minn. 119 (1894); Balbach v. Freylinghausen, 15 Fed. Rep. 675 (1883) (probably overruled by Burton v. U. S., *supra*); Louisiana Ice Co. v. National Bank, 1 McGloin, 181 (Ind. 1881); Morse on Banking (1888), Vol. 2, §586, citing several of the above cases which cite as their authority previous works of the same author; Scott v. Ocean Bank (*supra*) is wrongly stated by several of these Courts to be in support of their contention.

emphasis has been placed upon the power of the bank to charge back on the account of the depositor, a power which is said to be inconsistent with a transfer of title, that, when it is lacking, one of these same Courts has held that with the mere deposit title passed to the bank.[8] But inasmuch as the bank could recover, in the absence of negligence on its part, against the depositor on his indorsement, to the amount advanced in the meantime, or could return the check and sue on the original implied contract, the fact that the parties have substituted this simple and more satisfactory expedient should not be sufficient to warrant changing the presumption from that of debtorship to one of agency.[9] It should be remembered that these various presumptions arise from the insufficiency of evidence of real understanding between the parties, and that they are, no matter how strong, of no consequence if an express contract can be proved.

Perhaps in no other State is the presumption of debtorship, under the above facts, more frequently and unqualifiedly invoked than in New York. As a consequence, it is generally known as the New York rule, although as stated previously, it is by no means limited to that jurisdiction. It is rather remarkable that the case almost invariably cited in support of the rule states it in a dictum.[10] Probably the earliest case on the subject, in speaking generally of the nature of a deposit, whether of money, drafts or checks, treats the matter as a foregone conclusion not even requiring citations.[11]

In a recent case,[12] in the appellate division of the Supreme Court of New York, the rule was applied without any very great hesitation to facts that were rather unusual; the depositor opened his account with the bank with the check in question, and the check was drawn by him to the order of the bank on another banking institution. The trial judge directed a nonsuit in an action by the depositor against the bank for refusing to honor a check to the amount of the check deposited. The defendant had with proper diligence attempted to collect the first check; when the payee refused cash, a certification was accepted; on the next day the payee bank closed its doors. The majority of the Court held that the defendant was a "holder" within the second section of the Negotiable Instruments Law, which states that a certification of a check secured by a holder discharges the maker. There was a dissenting opinion on the grounds that the defendant had, under the circumstances, used all care that could be required of it.

Counsel for the defendant argued that the bank became a mere agent to collect and that when it secured the certification it was not a "holder" within the act. An attempt was made to

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[8] Security Bank v. Northwestern Fuel Co., 58 Minn. 141 (1895).
[9] Bolles, Modern Law of Banking (1907), Vol. 1, p. 210.
[10] Cragie v. Hadley (*supra*).
[11] Commercial Bank v. Hughes, 17 Wend. 94 (1837).
[12] Lyons v. Union etc. Bank, 135 N. Y. Suppl. 119 (1912)

distinguish this from prior cases because of the fact that the plaintiff deposited his own check. The whole Court, however, thought that this distinction was immaterial. The only practical difference would be in the amount of security on the paper, but this was not considered important enough to warrant a qualification of the rule. On the other hand, the fact that the check was entered as cash in the depositor's pass-book and that the plaintiff had all the rights of an ordinary depositor were deemed sufficient to warrant the application of the presumption, notwithstanding the other facts.

In only one of the cases here cited were the facts approximately similar to those in this case.[13] There the depositor sold a bill of lading, with a draft attached, drawn by him on the consignee, to a bank and was credited for the amount in his account. But, unfortunately the case was dismissed without discussion, the effect of the decision being that a debt was created instantly. There seems to be no substantial reason for altering the rule because of this difference; the depositor is liable on the check in either event, as an indorser or as a maker. This change places no additional burden upon the bank. While it is true that where the check is of the depositor's making, there will be no indorsement to help determine the character of the transaction, nevertheless, this would only be another reason for leaving the consideration of the agreement to the jury guided by the presumption that ordinarily prevails. Other jurisdictions which have not been so unhesitating in applying this presumption might balk at a case of this character, but the above decision would seem to be nothing more than a logical outcome of the New York rule.

*J. S. B.*

CONFLICT OF LAWS—TAXATION—INHERITANCE TAX—It is uniformly held, either from express words in the statutes or by judicial construction, that an inheritance tax is payable with respect to all realty within the jurisdiction without regard to the domicile of the late owner,[1] but with respect to no realty outside the jurisdiction even when the owner was a resident of the State laying the tax.[2] This, it is submitted, is clearly the correct con-

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[13] Fourth National Bank v. Mayer (*supra*).

[1] Callahan v. Woodbridge, 171 Mass. 595 (1898,) applying Ch. 15, §1, of Revised Laws of Massachusetts—"All property *within the jurisdiction* of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will . . . . shall be subject to a tax of five per cent. of its value, for the use of the Commonwealth."

[2] The Collateral Inheritance Tax of Pennsylvania, Act of May 6, 1887, P. L. 79, reads as follows: "All estates, *real or personal*, of every kind whatsoever, situated within this State, whether the person or persons dying seized thereof be domiciled within or without the State, and *all other such estates situated in another State*. . . . when the person or persons dying seized thereof shall have their residence within this Commonwealth . . . . . shall be subjected to a tax . . . ." The Supreme Court in Bittinger's Est., 129 Pa. 338 (1889), held that this act could only subject realty within the State to taxation notwithstanding the wording "all such estates situated in another State." The Court said that the legislature had exceeded its power in attempting to fix such liability on realty beyond its jurisdiction.

clusion on principle; it follows from the well-established doctrine of international law that the descent of real property is governed by the *lex rei sitae*,[3] whether an inheritance tax be treated as imposing a liability on the property itself[4] or simply on the right to inherit.[5] There is a conflict whether the doctrine of equitable conversion may be invoked to subject realty in another State to the tax: Illinois,[6] New York[7] and Massachusetts[8] have refused, but Pennsylvania has allowed it where the conversion has been immediate and by the imperative direction of the testator.[9]

The principle that the succession to personalty is governed by the law of the domicile[10] has not produced the uniformity which has resulted from the application of the correllative rule of realty. This result follows from the tendency to abandon the maxim *Mobilia sequuntur personam*, and to hold that the succession to a tangible chattel may be taxed wherever the property is found.[11] Some jurisdictions cling to the fiction above referred to, others look to the actual location of the property, and still others combine both principles. The first view has been adopted in England where it is held that all personal property of a domiciled decedent is taxable wherever situated,[12] but no property of a non-resident, even though it is within the jurisdiction.[13] The domicile of the decedent is the criterion in each case, and the situation of the property immaterial.

Other jurisdictions have adopted the actual location of the property as a test, generally on the ground that such a rule is based on a fact not a fiction, and that the property receives the

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[3] Harrison v. Harrison, 7 L. R. 8 Ch. 342 (1878); U. S. v. Crosby, 7 Cranch, 115 (1812); Dicey, Conflict of Laws, 2nd Ed. Rule 141.

[4] Bittingers Est., 129 Pa. 338 (1889).

[5] State v. Dalrymple, 70 Md. 294 (1888); Kingsbury v. Chapin, 196 Mass. 533 (1907); Plummer v. Coler, 178 U. S. 125 (1899). The view that an inheritance tax is not strictly on the property itself, but on the right of succession to it, is very generally accepted. It rests on the proposition that the privilege of inheritance is derived from the State, and that the State may tax this privilege as it does a corporate franchise. An important result of this view is that personalty not otherwise subject to a property tax, as United States bonds in Plummer & Coler, *supra*, may be made liable to an inheritance tax.

[6] Connell v. Crosby, 71 N. E. Rep. 350 (Ill., 1904).

[7] Matter of Offerman, 25 App. Div. 94 (N. Y., 1898); Re Sutton, 3 App. Div. 208 (N. Y., 1896).

[8] McCurdy v. McCurdy, 197 Mass. 248 (1908).

[9] Williamson's Est. 153 Pa. 508 (1893); Re Handley, 181 Pa. 339 (1897) holds that a direction to sell after twenty years will not work a conversion for this purpose. Nor will a discretionary power, although ultimately exercised. Drayton's App., 61 Pa. 172 (1869).

[10] Dicey, Conflict of Laws, 2nd Ed. Rule 183; Bruce v. Bruce, 6 Bro. P. C. 566 (1790); Doglioni v. Crispin, L. R., 1 H. L. 301 (1866).

[11] Erdman v. Martinez, 184 U. S. 578 (1901); Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1890); Allen v. National State Bank, 92 Md. 509 (1900); Greves v. Shaw, 173 Mass. 205 (1899); Est. of Romaine, 127 N. Y. 80 (1891).

[12] Re Ewin, 1 Cromp. & J. 151 (1830); Atty. Gen. v. Napier, 6 Exch. 217 (1850).

[13] Thomson v. Advocate General, 12 Clarke & F. 1 (1845).

protection of the State. So in North Carolina, it is held that the tax is payable on personal property of a non-resident situated within the State, but not on property of a resident lying without the State.[14] The same result is reached in Iowa under a statute providing that all property within the jurisdiction of the State, whether belonging to inhabitants of the State or not, shall be subject to the tax.[15] Vermont goes even further than North Carolina and Iowa and holds that the words "within the jurisdiction of this State" in the statute means within the probate jurisdiction. Consequently, it has been decided that a debt due a resident from a non-resident is not taxable,[16] although the general rule is that a debt is taxable at the domicile of the creditor.[17]

Other States have taken the view that the succession depends partly on the law of the domicile and partly on the law of the situs, and have proceeded to levy the tax according to both principles.[18] It is not uncommon for Courts to say in such cases that as regards the property of a non-resident within the State, the tax is on the property itself, while on property outside the State, it is on the right of succession.[11] It is submitted that this is an unnecessary distinction. Even if the tax is on the right of inheritance and not on the property itself, nevertheless, the transfer of the property, although ruled by the law of the domicile, takes place through the consent of the State in which it is situated, and that State should be allowed to exact a tax in return for the consent or privilege thus granted.

Under such a system, double taxation necessarily follows if other States in which the deceased was domiciled, or in which the property had an actual situs, employ either of these systems of laying the tax. This result is clearly shown in a recent Illinois case.[19] The testator died domiciled in Illinois; part of his personal estate consisted of stocks and bonds of non-Illinois corporations in a safe deposit box in California. The defendant, as administrator *c. t. a.*, paid the inheritance tax on this property as required by California law, and after paying legacies, etc., prepared to turn over the balance with the rest of the estate to a Chicago trust company as directed by the will. In due course, an appraisal was ordered by the Illinois Court having jurisdiction to determine the amount of the inheritance tax, and in this appraisal, the personalty on which a tax had already been paid in California was included. The county Court approved the assessment and ordered payment; an appeal was taken to the Su-

[14] Alvany v. Powell, 2 Jones Eq. (N. C.) 51 (1853); State v. Brevard, Phill. Eq. (N. C.) 141 (1867).

[15] Weaver v. State, 110 Iowa, 328 (1899).

[16] Re Joyslin, 56 Atl. Rep. 281 (1903).

[17] State Tax on Foreign Held Bonds, 15 Wall. 300 (1872).

[18] Re Bronson, 150 N. Y. 1 (1896); Millikens Est., 206 Pa. 149 (1903); Frothingham v. Shaw, 175 Mass. 59 (1900); Mann v. Carter, 74 N. H. 345 (1906).

[19] People v. Union Trust Co., 99 N. E. Rep. 377 (Ill., 1912).

preme Court where the judgment below was affirmed. The Court said that "while personal property is still governed by the law of the domicile of the owner and not by the law of its situs, the basis of that determination rests on comity, and so one State may tax personal property according to the law of the domicile and another according to the law of the situs, and there is no objection to a law which lays an inheritance tax according to both principles, although this may result in double taxation, and consequently, legatees entitled to personal property on which an inheritance tax was paid in the State of the situs cannot complain because payment of a second inheritance tax in the State of the domicile was enforced."

The extent to which this double taxation will be carried depends in a great measure on how far Courts will go in ascribing a local situs to foreign-owned property. In New York, it has been held that deposits in a local bank, provided they are not merely *in transitu*, are subject to the tax even though the money is not used in business within the State.[20] So also with bonds of a foreign corporation deposited in the State for safe keeping,[21] although it is contrary to the general rule that the physical evidence of such indebtedness should give a situs for taxation.[22] On the other hand, it has been held that a debt due a resident by a nonresident, although reduced to concrete form, is not taxable if the evidence of it is not within the State.[23] Under the Vermont rule above referred to, such a debt would be taxable as subject to administration within the State. Other States seem less inclined to give a local situs to foreign-owned personalty. Thus in Pennsylvania, it has been decided that United States bonds, foreign owned, but deposited within the State for safe keeping, cannot be made liable for the inheritance tax,[24] nor can bank deposits of foreign residents in local savings banks.[25]

There is no constitutional objection to double taxation,[26] nor can a serious theoretical objection be made to the system which causes it; it may well be said that the devolution of personal property takes place according to the law of the domicile and because of the consent of the law of the situs. Its extent, therefore, can only be limited by the sense of fairness of legislative bodies. The framers of laws making such taxation possible, in most cases, probably intended to make them as inclusive of all of a decedent's personalty as possible,[27] but a recent tendency

[20] Re Houdayer, 150 N. Y. 37 (1896).
[21] In re Whiting, 150 N. Y. 27 (1896).
[22] State Tax on Foreign Held Bonds, 15 Wall. 300 (1872).
[23] Re Phipp, 77 Hun. 325 (1894).
[24] Orcutt's App., 97 Pa. 179 (1881).
[25] Allen v. Phila. Saving Fund Soc., 14 Phila. 408 (1879).
[26] Blackstone v. Miller, 188 U. S. 189 (1902).
[27] *In re* Whiting, 150 N. Y. 27 (1896). The Court in construing the inheritance tax said that "the legislature intended . . . . to repeal the maxim *Mobilia sequuntur personam* so far as it was an obstacle, and leave it unchanged so far as it was an aid to the imposition of a transfer tax upon all property in any respect subject to the laws of this State."

may be noted in several States to adopt a more equitable adjustment.[23]

*S. A.*

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CONTRACTS IN RESTRAINT OF TRADE—GOOD WILL—INJUNCTION—In the sale of the good will of a semi-professional establishment, it was recently decided[1] that the vendor impliedly covenants not to re-enter or compete in any way with the vendee in the territory which his business previously covered. For the purposes of this discussion, it is sufficient to state that the Court based its decision on the distinction between the sale of the good will of a commercial enterprise and that of a professional concern, holding that in the latter instance the vendor tacitly consents not to re-establish himself in the vicinity of the old business, for to do otherwise would be in derogation of the vendee's rights.

Contracts in total or partial restraint of trade were originally held void[2] as against public policy. This was based on the theory that no man could bind himself so as to deprive the sovereign of his services. Subsequently, the Courts recognized the validity of such agreements when the restraint was only partial, the party being bound as to such stipulations of time and space reasonable in their nature and founded upon adequate consideration.[3] Today the Courts freely extend relief by injunction where the restriction as to time or place is no more than is fairly and reasonably necessary for the proper protection of the covenantee.[4] This principle applies with the same force when the transaction is for the sale of a professional business[5] as distinguished from one in the nature of a trade.

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[23] The Legislature of Massachusetts has provided that personal property of a resident lying without the State shall be exempt from the collateral inheritance tax if the personalty is subject to a like tax in the State of its location. If the latter tax is less than would have been due in Massachusetts, the difference may be collected. It is also provided that personalty of a non-resident within the State which is liable to a similar tax in the State of the decedent's residence shall only be required to pay an excess *if* that like exemption is made by the laws of such other State in favor of estates of a citizen of Massachusetts. Acts of 1907, Chap. 563, § 3: A similar exemption as regards personalty of a non-resident within the State has been enacted in Connecticut. Public Acts of 1903, Chap. 63, §2, amending General Statutes, §2367–2377. This amendment is interpreted and applied in Gallup's App., 76 Conn. 617 (1903).

[1] Brown v. Benzinger, 84 Atlantic Rep. 79 (Md., 1912).

[2] Dyers Case, 2 Herr, 5 fo. 5 pl. 26 (1415); Ipswich Tailors Case, 11 Rep. 53 (1614).

[3] Mitchell v. Reynolds, 1 P. Wms. 181, 1 Sm. L. C. 430 (1711), Lord Mansfield: "In all restraints of trade where nothing more appears, the law presumes them bad, but if the circumstances are set forth, that presumption is excluded and the Court is to judge of those circumstances and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained."

[4] Milk v. Dunham, 1 Ch. 576 (1891); Diamond Match Co. v. Roeber, 106 N. Y. 473 (1887); Guerand v. Dandelet, 32 Md. 561 (1870).

[5] Austen v. Boys, 2 De G. & J. 635 (1858); Van Marter v. Babcock, 23 Barb. (N. Y.) 633 (1857); Davis v. Mason, 5 T. R. 118 (1793); *contra:* Haldeman v. Simonton, 55 Iowa, 144 (1880).

Good will in general means that reputation which attaches to a man's business[6] and may be the subject of a sale.[7] True, the vendor cannot derogate from his own grant,[8] yet there is nothing to prevent him from re-entering the field of competition unless the agreement stipulates otherwise.[9] In all such instances, however, the vendor must act bona fide and must not wilfully injure or, by personal solicitation, defeat the rights of his vendee.[10]

The question then arises, to what extent the vendor may re-establish himself in the community without interfering with the vendee to whom he has assigned the good will of his prior business. It is at this point that some Courts have drawn a distinction between the good will of a trade and that of a profession, alleging that in the former, the good will attaches more to the nature of the business itself, while in the latter it adheres to and follows the person.[11] But injunctions were granted either because the vendors had agreed to leave the field of their practice, the natural inference from which being they would not return,[12] or because the vendors had been guilty of such wilful acts that the contract between the parties would have been rendered worthless without some interference by equity. In the principle case, there was an agreement to sell the business, personal effects and good will of a chiropodist's establishment and nothing was said one way or the other about the vendor returning to the neighborhood and

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[6] "Probability that the old customers will resort to the old place," per Lord Eldon in Cruttwell v. Lye, 17 Vesey, 334 (1810).

[7] Potter v. Commissioners, 10 Ex. 147 (1854).

[8] Labouchere v. Dawson 13 L. R. Eq. Cas. 322 (1872).

[9] Nantinjian v. Boornayian, 25 R. I. 151 (1903); Porter v. Gorman, 65 Ga. 11 (1880); Findlay v. Carson, 97 Iowa, 537 (1896); Cottrell v. Babcock Co., 54 Conn. 122 (1886); Chinton v. Douglas H. R. V., 1 Johns, 174 (1859); Newark Coal Co. v. Spangler, 54 N. J. Eq. 354 (1896); Williams v. Farrand, 88 Mich. 473 (1891); Smith v. Gibbs, 44 N. H. 335 (1862); Pearson v. Pearson, 27 Chan. Div. 145 (1884); Trego v. Hunt, L. R. Appeal Cases, 7 (1895), where it was said: "A man who has sold the good will of his business may do much to regain his former position and yet keep on the windy side of the law. The common law has always been jealous of any interference with trade. It was a lighter matter to interfere with freedom of contract and avoid covenants under seal. Courts of Equity could not, of course, enforce even in a modified form and within reasonable limits an agreement express or implied, which the law would have held void on the ground of public policy, nor could they treat the mere non-observance of such an agreement as fraudulent or inequitable. And so it has resulted that a person who sells the good will of his business is under no obligation to retire from the field. Trade, he undoubtedly may, and in the very same line of business. If he has not bound himself by special stipulation and if there is no evidence of the understanding of the parties beyond that which is to be found in all cases, he is free to carry on business wherever he chooses. . . . . . He may set up where he will."

[10] Jennings v. Jennings, 67 L. J. Ch. 190 (1898); Ranft v. Reimers, 200 Ill. 386 (1902); Myers v. Kalamazoo Buggy Co., 54 Mich. 215 (1884); Newark Coal Co. v. Spangler, 34 Atl. Rep. 932 (1896).

[11] Dwight v. Hamilton, 113 Mass. 175 (1873); Munsey v. Butterfield, 133 Mass. 492 (1882); Foss v. Roby, 195 Mass. 292 (1907); Townsend v. Hunt, 37 Miss. 681 (1859).

[12] Beatty v. Coble, 142 Indiana 329 (1895).

re-entering the field. The vendor did come back, but in starting a new business conducted himself in such a manner as to destroy any good will which the vendee may have purchased. Yet the Court seemed to take the attitude that the mere act of returning was sufficient ground for their interference. It is submitted that the authorities upon which they base their decision[13] do not warrant such a conclusion.

Whether or not a man engaged in the occupation of a chiropodist can be said to be pursuing a profession seems of little importance, since the Court assumed for the purposes of the decision that there were sufficient characteristics and features involved in the work to warrant the distinction from a trade.

The decisions in direct point are few[14] and though the relief granted here is in accordance with the results of similar cases,[15] it is submitted that the reasoning of the Court is not borne out by the weight of opinion. The result, though a just and equitable one, opens up a wide latitude in which unwarranted conclusions may often be reached.

*W. A. W., 2nd.*

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LEGAL ETHICS—QUESTIONS AND ANSWERS—Two more questions in legal ethics were answered by the New York County Lawyers' Association Committee on Professional Ethics, at its meeting of October 31st, 1912:

QUESTION:

May I know whether in the opinion of your Committee it would be unprofessional for an attorney, who is the counsel for an association, to send out letters to a number of its members suggesting employment upon an annual retainer?

ANSWER:

In the opinion of the Committee it is desirable that such solicitation of business should be discouraged; the Committee deems it unprofessional.

QUESTION:

Over a year ago a client, whom we had represented for some time, introduced to us a Mr. X, who requested us to represent him in various matters. Our relations continued on a pleasant basis for a period of several months, during which time we undertook litigation in various Courts for X.

About three months ago, we informed X that we would no longer be able to act as his attorneys, unless he paid us for our services. Mr. X, who originally paid us a retainer of $200, agreed that we were entitled to receive a sum of several times that amount for services performed to the then date, and stated that he would arrange to let us have a check in a few days.

Since that time, Mr. X has studiously avoided our office and ignored all communications. We appear as attorneys for him in a number of litigated

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[13] Bagly & Rivers Co. v. Rivers, 87 Md. 401 (1898); Yeakley v. Gaston, 50 Texas Civil App. 405 (1908): in this case the good will had not been sold and what the Court said in regard to covenants not to re-enter being implied was *dictum*.

[14] Angier v. Webber, 14 Allen, 211 (1867), in which case there was an express covenant.

[15] Dwight v. Hamilton, *supra*.

matters. We do not desire to continue to represent a client of this type. We have requested him to have other attorneys substituted in our place, but he has paid no attention to our requests. We wish to drop all of his matters, but we do not wish to be accused of having been unfaithful to the trust originally reposed in us as attorneys by this client.

We would appreciate advice from you as to the manner in which we should proceed in order to be permitted to cease acting as his attorneys.

ANSWER:

Upon the facts as stated, the Committee does not consider that the attorneys are required by any professional obligation to continue to represent the client; it is of the opinion that a peremptory notice to the client that after a certain specified date, sufficiently far away to enable him to secure and substitute new attorneys, they will not act as his attorneys, is proper. This answer, however, does not deal with the attorney's legal right to compensation upon taking such course, nor with the legal procedure essential thereto.

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PARTNERSHIPS—LIABILITY FOR TORT—MARSHALLING ASSETS—The right of a creditor holding a joint and several claim against the members of an insolvent firm, to share in the partnership and individual assets under concurrent general and separate assignments, was fully recognized in a recent, highly interesting New York case.[1] A judgment recovered in a tort action against "Girard N. Whitney and James V. Geraghty, co-partners, doing business under the firm name and style of Whitney and Kitchen," was held conclusive evidence of a creditor's claim, and binding as such on the assignee, who was directed to pay dividends on it from both the firm and individual assets.

The recovery of a judgment, whether in tort or upon a contract, establishes a debt which the defendant is under obligation to pay, the law implying a promise or contract on his part to pay it.[2] And this is true whether the judgment is recovered against the co-partners before assignment, or against the co-partners and the assignee after assignment.[3] Such debt being properly established, the only question of importance to be considered in connection with the marshalling of assets, is whether it is joint or joint and several.

The joint and several liability of co-tort-feasors and the attendant right, upon recovery of a judgment, to complete satisfaction by levy upon both the joint and several property is as old as the common law itself; and practically as old as the first recognized partnership is the doctrine that upon the commission of a tort by the partnership or by any single member—within certain limitations—the individuals comprising such partnership

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[1] *In re* Peck, 99 N. E. Rep. 258 (N. Y., 1912).

[2] Gutta Percha Co. v. Mayor of Houston, 108 N. Y. 278 (1888). But see Louisiana v. Mayor of New Orleans, 109 U. S. 285 (1883), holding that a judgment recovered upon an action in tort cannot be considered as a contractual obligation within the meaning of that clause of the Federal Constitution which prohibits the various States from passing any law "impairing the obligation of a contract."

[3] Ludington's Petition, 5 Abb. N. C. 322 (N. Y., 1878). The same is true in cases of bankruptcy. Collier on Bankruptcy, 4th Edit., page 449.

become co-tort-feasors, and as such, jointly and severally liable. The standing of a claim based upon such tort in the event of insolvency and subsequent assignment was the question confronting the Court in *In re Peck*.[4] Since the burdens incident to joint and several liability may, for our purposes, be considered similar whether arising under an express contract or by operation of law,[5] and since by far the greater number of adjudications on the subject have resulted from a contractual liability, it would seem that a study of this class of cases will best enable us to understand the decision in the principal case.

While the liability of partners for firm debts is oftentimes spoken of as joint and several, this should be taken to mean only that a partnership creditor has recourse to the individual assets after the exhaustion of the partnership estate.[6] A firm creditor, at law, could levy his execution upon firm assets, or upon the separate property of a partner at his option: and if he obtained a lien on his separate property, he could enforce it although he thereby exhausted this estate and left the separate creditor with a claim against a penniless debtor. A different doctrine, however, was early established in equity, and Lord Cowper in *Ex parte Crowder*[7] laid down the now familiar rule that partnership property belongs to partnership creditors, and individual property to individual creditors. Lord Thurlow repudiated this doctrine,[8] but Lord Rosslyn succeeded in establishing it so thoroughly[9] that Lord Eldon,[10] although expressing preference for Thurlow's rule, declined to unsettle the doctrine adopted in the early cases and restored by his immediate predecessor. While the rule has been embodied in the bankruptcy statutes of England[11] and this country,[12] it has been rejected or modified by the equity Courts of Connecticut,[13] Vermont,[14] South Carolina[15] and Kentucky.[16]

So much for the rule applied where the creditor has a claim against either the firm or the separate partners. But suppose he has taken the precaution to obtain the obligation of the firm, and the several obligations of the partners for the same debt, or suppose

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[4] 99 N. E. Rep. 258 (N. Y., 1912).

[5] Morgan v. Skidmore, 3 Abb. N. C. 92 (N. Y., 1870). In England, taking judgment against one or more co-tort-feasors ends the right to take judgment against the remainder; *contra*, however, in America, Burdick on Torts, page 225.

[6] "The only foundation for the statement is that partnership creditors are allowed to come into equity to obtain payment from the estate of a deceased partner, which is not liable at law." Harriman on Contracts, §358.

[7] 2 Vern. 706 (1715).

[8] *Ex parte* Copland, 1 Cox Eq. 420 (1787).

[9] *Ex parte* Elton, 3 Ves. Jr. 238 (1796).

[10] *Ex parte* Kensington and Taylor, 14 Ves. 447 (1808); Dutton v. Morrison, 17 Ves. 193 (1815).

[11] Bankruptcy Act of 1883, §§ 43-59.

[12] U. S. Bankruptcy Act of July 1, 1898, § 5, (*d*), (*e*) and (*f*).

[13] Camp v. Grant, 21 Conn. 41 (1851).

[14] Bordwell v. Perry, 10 Vt. 292 (1847).

[15] Hutzler Bros. v. Phillips, 26 S. C. 136 (1886).

[16] Fayette Bank v. Kenny, 79 Ky. 133 (1880).

the law has stepped in and presented him with those obligations, as in the case of a partnership tort, certainly he ought to have the benefit of the caution which he has used, or the rights which the law has bestowed, as the case may be. The English Courts, however, early reached a different conclusion, and in one of the first reported cases, it was said to be settled that the advantage of a joint and separate creditor is no more than that he can elect whether he will be in the final instance a joint *or* separate creditor; and although it was admitted that "at law such a creditor may proceed against both debtors at the same time until his debt is fully satisfied, yet the equity of this Court inclines that all persons should have an equal satisfaction, and not one more than the other."[17] The rule against double proof has been so modified by statute that the remnant is practically of little consequence to partners or their creditors today.[18] The early English rule never found favor in this country either in equity proceedings[19] or under the Bankruptcy Act.[20] In some American jurisdictions, the English rule has been rejected because the reason usually given for it that those jointly and severally liable cannot be sued at one and the same time, but the creditor must make his election,[21] does not exist, inasmuch as the double remedy is permitted in suits at law.[22] This is true in but few States, however, so some other reason must be found to support the numerous decisions in other jurisdictions. And this reason is found in the simple principle which Lord Eldon admitted as true in all justice, but which he did not dare to establish as law, that a creditor ought to have "the benefit of the caution he has used." And this principle means that in every case where an action can be maintained on contract against an individual without joining with him the other persons composing the partnership or interested in the joint venture, there a separate and independent personal liability exists as against individual assets, and the person entitled to bring such action is likewise entitled to prove claims and draw dividends from both the firm and individual assets. And if this is true of marshalling the assets in equity where the separate obligation of the individual partner rests in contract, it ought to be no just ground of objection to compensation for a wrong that it would

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[17] *Ex parte* Bond and Hill, 1 Atk. 98 (1745); *Ex parte* Bevan, 10 Ves. 107 (1804).

[18] Lindley on Partnership, Eighth Edit., page 872. Sched. II, § 18, of the English Bankruptcy Act of 1883 provides for double proof in certain contract cases, but frauds and torts under which joint and several liability arises have been held not to be included in the words of the section. Lindley, *supra*. But in *In re* Parkers, 19 Q. B. D. 84 (1887) double proof was permitted where the firm misappropriated funds handed to it for investment by one of the partners who was trustee of the funds.

[19] *Ex parte* Nason, 70 Me. 363 (1880); National Bank v. Hall, 160 Mass. 171 (1893).

[20] *In re* Bigelow, Fed. Cases, 1397; Emery v. Bank, Fed. Cases, 4446.

[21] *Ex parte* Rowlandson, 3 P. W. 405 (1735).

[22] Turner v. Whitmore, 63 Me. 526 (1874).

result in a similar distribution. In the words of Rappallo in *Morgan* v. *Skidmore*[23] "if it is equitable where the partner has agreed to assume the individual obligation, it is equally equitable where the law compels him to assume it as a just compensation due to the party whom he has misled."

It would seem then, that the principle applied in *In re Peck* is fundamentally correct. The only question that might arise is whether or not the judgment creditor who had already been paid a dividend from the joint estate should have been allowed a dividend from the separate estate on the full amount of his judgment. *Ex parte Nason*[24] says "no" to this question. Since, however, the failure to prove against the individual estate was the result of the assignee's action, rather than the creditor's inaction, it is probably just that the creditor should not thereby be prejudiced.

*H. W. W.*

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SURETYSHIP—DURESS UPON THE PRINCIPAL—The surety on a bond defended on the ground that she signed because of the threats made by the plaintiff, obligee in the bond, to prosecute her son-in-law for forgery of the plaintiff's name. It was held that the defendant could avoid liability by showing that the threats deprived her of the free exercise of her will, notwithstanding the duress was not imposed upon her and the threats were not made to her directly.[1]

The common law doctrine of duress is summed up in *Baker* v. *Morton*.[2] "Where a party enters into a contract for fear of loss of life, or for fear of loss of limb, or fear of mayhem, or fear of imprisonment, the contract is as clearly void as when it was procured by duress of imprisonment, which is where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, and the rule is that in either of those events the party arrested, if he was thereby induced to enter into a contract, may avoid it as one procured by duress." A statement of the doctrine in negative form is given by Blackstone.[3] "A fear of battery or being beaten, though never so well grounded is no duress, neither is the fear of having one's house burned, or one's goods taken away and destroyed, because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages."

Modern decisions hold that there is duress if the contract be procured by threats of a battery,[4] or, if there be an actual or

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[23] 3 Abb. N. C. 92 (N. Y., 1870).
[24] 70 Me. 363 (1880).

[1] Fountain v. Bigham, 235 Pa. 35 (1912).
[2] 79 U. S. 150, 158 (1870); Richardson v. Duncan, 3 N. H. 508 (1826).
[3] Book I, page 131.
[4] Love v. State, 78 Ga. 66 (1886); Foshay v. Ferguson, 5 Hill (N. Y.) 154 (1843); Central Bank v. Copeland, 18 Md. 317 (1862).

threatened destruction or detention of personal property or trespass to real property.[5] England[6] and Kentucky[7] still cling to the common law holding that there can be no duress of goods.

The reason the doctrine of duress was so restricted at the common law is seen when we discover that the standard or test by which duress was determined was that the threats or violence must have been of such sort as to overcome the mind of a courageous man and, according to Blackstone, a threat of a battery was not sufficient. This old test was faulty in two respects, (1) it afforded no protection to the weak or timid, (2) it overlooked the fundamental principle of contract law—that in order to create a binding contract there must be a free and willing consent by both parties to its terms. The recognition of these defects caused this test to break down and now the law of duress rests upon its rational basis of contract. There were two tests which appeared before the modern test was evolved, viz., there was duress, (1) if the threats were such as would overcome the mind of a person of ordinary firmness,[8] (2) "if the threats were such as would naturally overcome the mind and will of an ordinary man and if they overcame his."[9] The modern test is, "Was the person so affected by the threats or violence as to have been bereft of the power to give a free consent?"[10] Under this test, it is expected that it would be immaterial whether there was a threat of lawful or unlawful arrest or imprisonment and it is generally so held.[11]

"The general rule is that the defense of duress is open only to the party upon whom it is imposed, and that a third person who has become surety for the payment of the claim cannot avail himself of the plea unless he signed the obligation without knowledge of the duress."[12] There are two exceptions to that rule which are well settled, viz., where the relation of parent and child, or hus-

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[5] Oliphant v. Markham, 79 Texas, 543 (1891); Motz v. Mitchell, 91 Pa. 114 (1879); Spaids v. Barrett, 57 Ill. 289 (1876); Joannin v. Ogilvie, 49 Minn. 564 (1892). It has been held that there can be duress of goods where possession could have been regained by an action of repievin, Wilkerson v. Hood, 65 Mo. App. 491 (1896); Sasportas v. Jennings, 1 Bay (S. C.) 470 (1795) semble; *contra*, Bingham v. Sessions, 14 Miss. 13 (1846).

[6] Skeate v. Beale, 11 A. & E. 983 (1841).

[7] Hazelrigg v. Donaldson, 2 Met (Ky.) 445 (1859).

[8] Bosley v. Shanner, 26 Ark. 280 (1870); Hines v. Board of Commissioners, 93 Ind. 266 (1883).

[9] Morse v. Woodworth, 155 Mass. 233 (1891); Hartford Fire Ins. Co. v. Kirkpatrick, 111 Ala. 456 (1895).

[10] Galusha v. Sherman, 105 Wis. 263 (1900); Williamson-Halsell Frazier Co v. Ackerman, 77 Kan. 502 (1908); Nebraska Ass'n v. Klee, 70 Neb. 383 (1903); Adams v. Irving Nat. Bank, 116 N. Y. 606 (1889); Parmenteer v. Pater, 13 Ore. 121 (1885); Lauda v. Obert, 78 Texas, 33 (1891), and the principal case.

[11] Hartford Fire Insurance Co. v. Kirkpatrick (*supra*); Adams v. Irving Nat. Bank (*supra*); Williamson-Halsell Frazier Co. v. Ackerman (*supra*); *contra*, Gregor v. Hyde, 62 Fed. 107 (1894); Machine Co. v. Miller, 54 Neb. 644 (1898).

[12] The principal case; Hazard v. Griswold, 21 Fed. 118 (1884); Griffith v. Setgreaves, 91 Pa. 161 (1879).

band and wife exists.[13] The exceptions have, however, been liberally extended to other relationships.[14]

It is universally held that the threats need not be communicated directly to the person upon whom the duress is imposed.[15]

*I. B.*

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[13] Harris v. Carmody, 131 Mass. 51 (1881); McCormick Co. v. Hamilton, 73 Wis. 486 (1889); Mahon v. Smith, 47 Conn, 221 (1879).

[14] Grandson and grandmother, Bradley v. Irish, 42 Ill. App. 85 (1891); aunt and nephew, Sharon v. Gager, 46 Conn. 189 (1878); sister and brother, Schultz v. Catlin, 78 Wis. 611 (1891); father-in-law and son-in-law, Nebraska Ass'n v. Klee, 70 Neb. 383 (1903); brother and brother, Davis v. Luster, 64 Mo. 43 (1876).

[15] Schultz v. Catlin (*supra*); Bank v. Hutchinson, 62 Kan. 9 (1900); Giddings v. Bank, 104 Iowa, 676 (1898); and the principal case.