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NOTES.

CARRIERS—"ACT OF GOD"—IS NEGLIGENCE THE PROXIMATE CAUSE?—EFFECT OF CARMACK AMENDMENT—A recent decision[1] of the Supreme Judicial Court of Maine is of more than passing interest. For, although it lays down no new principle of law on this subject, yet by the application of another principle it achieves a result which, if followed, is bound to have a tremendous effect. Goods had been shipped over the defendant line, on a bill of lading which exempted the carrier from liability for loss caused by an Act of God. Through negligence they were delayed and so reached Dayton, Ohio, in time to be damaged in the flood of a few years past. Without more, this presents the question which of two well-

[1] Continental Paper Bag Co. v. Me. Cent. Ry. Co., 99 Atl. 259 (Me. 1916).

known views as to liability is to be followed. But this occurred since the Carmack Amendment,[2] and so it was necessary to consider at least a part of that—being an interstate shipment.[3] Was the cause of the damage the Act of God, or the negligence of the carrier? If the latter, obviously it could not exempt itself and so would be liable.

That there are conflicting decisions on this point the court recognized. Could it make a free choice, or was there one view that it was bound to take? The court came to the conclusion that it was compelled to follow the ruling of the Federal courts on this question. For since there is a Federal statute covering the subject it is removed from the sphere of state action,[4] and the prime object of the Carmack Amendment being to secure a uniform rule of responsibility as to interstate commerce,[5] the law as administered in the Federal courts and affected by the Acts of Congress had to be followed.[6] Accordingly it was held that the defendant was not liable. On the authority of this case then, hereafter when the shipment is interstate the rule laid down in *R. R.* v. *Reeves*[7] must be followed. Is this result desirable?

One of the earliest cases in this country was *Morrison* v. *Davis*,[8] which laid the foundation for the Federal rule. There the court was confronted with the task of deciding whether the carrier's negligence was the proximate cause, or the Act of God. The result is based largely on the test of foresight. Could the carrier have foreseen that the goods would be overwhelmed by such a casualty, as a result of its negligence? The answer is in the negative—and rightly so. The negligent act is then viewed as merely one of a series of antecedent events, necessary no doubt to enable the Act of

[2] Act of June 6, 1906, Chap. 3591, Sec. 7, pars. 11 & 12; U. S. Stat. at Large, p. 595.

[3] The part applicable reads: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss; damage or injury to such property *caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass*, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; Providing, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

[4] Nor. Pac. Ry. v. State of Wash., 222 U. S. 370 (1911).

[5] A. T. & S. F. Ry. v. Harold, 241 U. S. 241 U. S. 371 (1916).

[6] Ga., Fla. & Ala. Ry. v. Blish Milling Co., 241 U. S. 190 (1916); Cinn., *etc.*, Ry. v. Rankin, 241 *id.* 319 (1916).

[7] 10 Wall. 176 (U. S. 1869), that the Act of God is the proximate cause; not the negligence.

[8] 20 Pa. 171 (1852).

God to accomplish the given result, but not proximate in the eyes of the court.[9] This line of reasoning has been widely followed, and at one time probably represented the weight of authority.[10]

But granting that this is a justifiable result from the test used, is that the correct test? Proximate cause may also be determined by the natural and probable sequence of events following the negligent act; and admittedly the exact damage need not be foreseen.[11] That it is the natural result, in the sense that it occurs in the ordinary course of nature, no one will deny; as to its probability there is more doubt. But in *Green-Wheeler Shoe Co.* v. *Chi., R. I. & P. Ry.*,[12] the court answered this doubt by a very logical reply. Its reasoning was that, though the carrier could not foresee that particular act, yet it could foresee that the time of its liability would be extended, and that accordingly the chance of accident was just so much more possible. On reasoning such as this, an accident being more possible if not probable, and the result being natural, the carrier was held liable. While in result this Iowa case accords with the cases opposed to the Federal view, yet the reasoning is different. The leading case in holding the carrier liable is still *Michaels* v. *N. Y. Cent. Ry.*[13] According to a later case,[14] the rationale of the New York rule (so-called) is, that a carrier is always liable unless it can prove the loss was caused by an Act of God, or the public enemy—or there is a specific contract exemption. To avail itself of such defense, it must show freedom from fault at the time. A technical construction of this would perhaps lead to a conclusion that the negligence was a bar to a certain defense, rather than a proximate cause in itself. Yet a consideration of the later cases, supposedly based on this one, show that the courts holding the carrier liable, do so on the ground that its negligence is the proximate cause.[15] Indeed, it is probable that at the present time and aside from the effect of the Maine case, the majority rule is that holding the carrier liable.

Assuming that the Carmack Amendment makes this result necessary, is it a wise one? Text-writers—like the courts—are divided on this subject, some following the Federal view,[16] while others

[9] St. Louis, *etc.*, Ry. v. Commercial Ins. Co., 139 U. S. 223 (1890), applied to an exempted liability—a fire.

[10] Denny v. N. Y. Cent. Ry., 13 Gray 481 (Mass. 1859); Daniels v. Ballantine, 23 Ohio St. 532 (1872); Hunt v. Mo., K. & T. Ry., 74 S. W. 64 (Tex. 1903).

[11] Ill. Cent. Ry. v. Siler, 229 Ill. 390 (1907); Hill v. Winsor, 118 Mass. 251 (1875); McKee v. Harrisurg Traction Co., 211 Pa. 47 (1905).

[12] 130 Ia. 123 (1906).

[13] 30 N. Y. 564 (1864).

[14] Bibb Broom Corn Co. v. A. T. & S. F. Ry., 94 Minn. 269 (1905).

[15] Wald v. Pittsburgh, *etc.*, Ry., 162 Ill. 545 (1896); Hernsheim v. Newport News & M. V. Co., 18 Ky. Law 227 (1896), a case of exempted liability: Pruitt v. Hannibal & St. Jo. Ry., 62 Mo. 527 (1876).

[16] 1 Thompson, Negligence, Sec. 74; Schouler, Bailments (Ed. 1905), Sec. 348; Hale, Bailments & Carriers, p. 361.

prefer and justify the New York view.[17] On purely logical reasoning there is something to be said for both views—since they proceed on different theories in judging proximate cause. But from a standpoint of business expediency and protection of shippers, it seems that on the whole the New York view is preferable. Not that it cannot be carried to an extreme that would be burdensome to the carrier. But if administered wisely it is more just to the shipper and places the loss where it belongs. Under the Federal rule the carrier can delay the shipment and escape liability simply because the damage is conveniently done by an "Act of God." The tendency of late has been against such a result—in fact, the court in the Maine case admits that the majority of jurisdictions are probably *contra* to the view it adopts. And it is unfortunate that this salutary holding should now be changed simply because a Federal Act is so worded as to be involved whenever the shipment is interstate. It is doubtful if Congress realized that this result would follow the Carmack Amendment; if it did and intended that the Federal rule should be enforced throughout the country, it is to be regretted, since so many courts of unquestioned standing have adopted the contrary and more advantageous view.

R. T. B.

Constitutional Law—State Tax on Foreign Insurance Companies—"Interstate Commerce"—"Doing Business"—The extent to which a state may tax a foreign corporation doing business within its borders has always been a subject of contention between the various states and the Federal Government; and while the numerous decisions of the Supreme Court upon the various phases of this problem have firmly established a number of fundamental rules, in many close cases there is still a substantial element of doubt as to what the decision will be. This doubt is due to the difficulty of applying well-established principles rather than to any uncertainty as to what principles are to be applied.

It is now settled, beyond peradventure of doubt, that no state is bound to recognize a foreign corporation *as such;* nor is any state bound to permit such a corporation, as such, to enter the state and transact business therein, except with such limitations and upon such conditions as the state may choose to impose.[1] This conclusion is possible because Article IV, Section 2 of the Constitution, which provides that, "The citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states," does

[17] Hutchinson, Carriers (2d Ed.), Sec. 200; Ray, Negligence of Imposed Duties (Freight Carriers), p. 175 ff.

[1] Augusta Bank v. Earle, 13 Pet. 519 (U. S. 1839); Pembina Milling Co. v. Penna., 125 U. S. 181 (1889).

not apply to artificial persons such as corporations.[2] A state may, therefore, impose a tax upon a foreign corporation for the privilege of transacting business within the state, provided that such tax does not operate as an interference with foreign or interstate commerce,[3] nor as an unjust discrimination between different foreign corporations of the same class, after they have been admitted to do business within the state.[4] It is, however, a very difficult problem to say just what does amount to an interference with interstate commerce. The courts themselves have indicated an uncertainty and a disagreement upon this subject which has tended to confuse rather than clarify the situation. There are, however, certain well-settled principles as to what constitutes an interference with interstate commerce which may serve as guideposts toward reaching an accurate conclusion in any new cases which may arise.

In *Paul* v. *Virginia*,[5] it was decided that the issuing of a policy of insurance was not a transaction of interstate commerce; and a corporation whose sole business is the issuance of policies of insurance and the performance of other transactions incident thereto is not engaged in interstate commerce so as to be immune from regulation by any state into whose jurisdiction it may come. It therefore follows that a state may impose any conditions which it sees fit upon a foreign insurance corporation desiring to do business within the state for the privilege or franchise of doing such business, just as in the case of other types of strictly private foreign corporations.[6] Accordingly, it has been repeatedly affirmed that a tax on the gross earnings or receipts within the state of a foreign corporation, not engaged in interstate commerce, is a proper exercise of the taxing power, as it is a tax on the privilege of doing business within the state, measured by the volume of business done therein.[7] But a state may not, under the guise of a tax on the privilege of doing

[2] Paul v. Va., 8 Wall. 168 (U. S. 1868). It should be noted, however, that a private corporation is included under the designation of "person" in the Fourteenth Amendment, Section 1. Pembina Milling Co. v. Penna., *supra*, n. 1.

[3] Home Ins. Co. v. N. Y., 134 U. S. 594 (1889); Horn Mining Co. v. N. Y., 143 U. S. 305 (1892); Com. v. N. Y., L. E. & W. R. Co., 129 Pa. St. 463 (1889).

[4] Henderson v. London, *etc.*, Ins. Co., 135 Ind. 23 (1893).

[5] 8 Wall. 168 (U. S. 1868).

[6] Note 3, *supra*.

[7] Society for Savings, *etc.*, v. Coite, 6 Wall. 594 (U. S. 1867); Southern Association v. Norman, 98 Ky. 294 (1895); Raymond v. Ins. Co., 196 Ill. 329 (1902); Fargo v. Auditor-Gen., 57 Mich. 598 (1885); People v. Home Ins. Co., 92 N. Y. 328 (1883); W. U. Tel. Co. v. Mayer, 28 Ohio St. 521 (1876). Compare also Pittsburgh Life and Trust Co. v. Young, 90 S. E. 568 (N. C. 1916), where it was held that a tax on the gross receipts *in the state* of a foreign insurance company included premiums paid by policyholders within the state by mail directly to the home office of the company in another state; and Mutual Life Ins. Co. v. Ohio, 79 Ohio St. 305

business within the state, levy a *property* tax on the gross income of a foreign corporation received within the state during the preceding year, because the power of a state to tax property is limited to property within its borders, and the gross income received by a foreign corporation is not necessarily property within the state. Such a property tax on gross income of a foreign corporation is unconstitutional as the taking of property without due process of law.[8] In order for a state to tax a foreign corporation for the franchise of doing business within the state, it is also necessary that the corporation should actually carry on business within the state. An isolated or occasional sale or other business transaction is not sufficiently a "doing business" within the state so as to subject a foreign corporation to a franchise tax.[9] Also, a foreign corporation whose entire assets are invested in the stock of a domestic corporation, and whose sole income is derived therefrom, is not "doing business" within the state.[10]

The problem as to what extent a state may tax a foreign corporation, engaged in interstate commerce, is a more difficult one. The general rule, of course, is that a state may not tax interstate commerce; from which it follows as a corollary that a state may not tax a foreign corporation for the privilege of carrying on interstate commerce within its borders, as such a tax would be a direct burden upon interstate commerce.[11] But a distinction has been drawn between corporations organized to carry on interstate commerce and having a quasi-public character, and corporations organized to conduct strictly private business; and while in case of the former, a state may not tax the corporation for the privilege of conducting its business within the state, in case of the latter the state may tax the corporation for such privilege, although it is engaged, in part, in interstate commerce as incidental to its general business. Such a tax is not considered a tax on the privilege of engaging in interstate commerce, but a tax on the privilege of doing

(1909), where it was held that a tax on the gross amount of premiums *received in the state* did not include premiums sent by policyholders within the state by mail directly to the home office of the company in another state.

[8] Del., *etc.*, R. R. Co. v. Penna., 198 U. S. 341 (1905); Louisville & J. Terry Co. v. Ky., 188 U. S. 385 (1903); N. Y. Life Ins. Co. v. Bradley, 83 S. C. 418 (1909).

[9] Cooper Mfg. Co. v. Ferguson, 113 U. S. 727 (1885); Kilgore v. Smith, 122 Pa. St. 48 (1888).

[10] People v. Kelsey, 101 N. Y. App. 205 (1905).

[11] McCall v. Cal., 136 U. S. 104 (1890); Norfolk, *etc.*, R. R. Co., 136 U. S. 114 (1890); Crutcher v. Ky., 141 U. S. 47 (1891). A state may, however, tax a domestic corporation engaged in interstate commerce for the privilege of being a corporation. Kansas City Ry. v. Kansas, 242 U. S. 227 (1916); Cornell Steamboat Co. v. Sohnur, 235 U. S. 549 (1915).

a strictly private business within the state, although the conduct of such business may in fact involve interstate commerce.[12]

But although a state may not tax a foreign corporation for the privilege of engaging in interstate commerce, it may tax the property of such corporation which is actually within the state, although such property is being used in interstate commerce,[13] provided the "payment of the tax be not made a condition precedent to the right to carry on the business, but its enforcement is left to the ordinary means devised for the collection of taxes." [14] An important distinction is also drawn between the property employed to carry on interstate commerce, which may be taxed, and the property which forms the commerce, which may not be taxed while actually in transit.[15] This does not mean, however, that a state may not tax property which has been a part of interstate commerce or which is designed to become a part of such commerce at a future date.[16] It is now a well-settled principle that a state may not tax a foreign corporation on its gross receipts, as such, received within the state from interstate commerce, because a tax on such gross receipts is, in effect, a direct burden on interstate commerce, which cannot be justified as a property tax, because gross receipts are not now considered by the courts as part of the taxable property of a corporation.[17] But a property tax, strictly speaking, frequently bears a close resemblance to a tax on gross receipts, which fact has been productive of a certain degree of confusion in the law. The value of the property of a business or industrial concern is closely co-related with the earning powers of such property as represented by the gross receipts of the business; and as the gross receipts of a corporation increase or diminish, so also may the value of the property which contributed to those receipts be said to increase or diminish. Therefore, in taxing a foreign corporation upon the basis of the property which it owns within the state, it is permissible for the state to consider the property as a productive agency, whose value is proportional to and

[12] Pembina Milling Co. v. Penna., *supra*, n. 1. Horn Mining Co. v. N. Y., 143 U. S. 305 (1891); N. Y. v. Roberts, 171 U. S. 658 (1898); Baltic Mining Co. v. Mass., 213 U. S. 68 (1913).

[13] Pullman Car Co. v. Penna., 141 U. S. 18 (1891). A property tax laid on property without the state is illegal either as a deprivation of property without due process of law, or as a direct burden upon commerce. W. U. Tel. Co. v. Kansas, 216 U. S. 1 (1910); Pullman Co. v. Kansas, 216 U. S. 56 (1910).

[14] Postal Tel. Co. v. Adams, 155 U. S. 688 (1895).

[15] Coe v. Erroll, 116 U. S. 517 (1886). As to what constitutes actual transit, see General Oil Co. v. Crain, 209 U. S. 211 (1908); Susquehanna Coal Co. v. South Amboy, 228 U. S. 665 (1913).

[16] Brown v. Houston, 114 U. S. 622 (1885).

[17] Fargo v. Mich., 121 U. S. 230 (1887); Phila. S. S. Co. v. Penna., 122 U. S. 326 (1887); Galveston, *etc.*, Rwy. Co. v. Texas, 210 U. S. 217 (1908).

fluctuates with the receipts of the corporation to which it contributes. A state may, therefore, levy a tax upon the property, within its borders, of a foreign corporation, although the amount of the tax is dependent upon the gross receipts of the corporation within the state, it being considered that the gross receipts, in such case, are simply an index, or measure, of the value of the property.[18] Although the rule is clear, it is often difficult, as a practical matter, to distinguish the two forms of tax; but where, from the facts, the court is convinced, in any particular case, that the state is attempting to tax the gross receipts of a foreign corporation engaged in interstate commerce, under the guise of a tax upon its property, it will declare the tax illegal. The recent decisions of the Supreme Court indicate a pronounced tendency on the part of the court to look behind forms and to ascertain what was the real intention of the state in assessing the tax, and upon what the tax operates as a matter of fact, rather than to formulate any stereotyped rules to govern all cases. If the tax is, in effect, an indiscriminatory property tax, it will be upheld, though in the form of a tax on gross receipts; while on the other hand, if, in effect, it is a tax on the gross receipts derived from interstate commerce, or on the privilege of engaging in interstate commerce within the state, it will be repudiated.[19]

E. L. H.

INSURANCE—RIGHT OF BENEFICIARY—TERMINATION OF CONTINGENT RIGHT OF CHILD—IS BENEFICIARY'S RIGHT TESTAMENTARY OR CONTRACTUAL?—It is a common proviso in a policy of life insurance payable to the wife of the insured, that in the event of her death before the insured, it shall be payable to her children. Where the contingency occurs, by the death of the wife before the insured, in which children does the interest vest? Does it vest in all those living at the time the policy is issued; that is to say, are the representatives of a child who has predeceased the mother entitled to share; or does it vest solely in those surviving the mother? If there are three children living at the date of issuance of a policy containing such a clause and one child dies, followed by the death of the mother, are the proceeds divisible between the two surviving children or will the issue or personal representative of the deceased child be entitled to a share? Two distinct lines of cases are found in the reports construing such policies of insurance. One line

[18] Maine v. Grand Trunk Co., 142 U. S. 217 (1891): Postal Tel. Co. v. Adams, 155 U. S. 688 (1895): U. S. Expr. v. Minn., 223 U. S. 335 (1912); Baltic Mining Co. v. Mass., 231 U. S. 68 (1913).

[19] Galveston, *etc.*, Rwy. Co. v. Texas, 210 U. S. 217 (1908); U. S. Expr. Co. v. Minn., 223 U. S. 335 (1912): Baltic Mining Co. v. Mass., 231 U. S. 68 (1913); Kansas City Rwy. v. Kans., 240 U. S. 227 (1916).

follows what may be called the Connecticut view, while the other line stands for what may be designated as the New York view.[1]

The Connecticut rule holds that upon the issuance of the policy a transmissible interest immediately vests in the children, and that if a child should die before the insured and then the wife should likewise predecease the insured, the interest of the deceased child would continue and pass by descent.[2] The process of reasoning which leads to this conclusion is based upon the proposition that a policy of insurance is testamentary in its nature and character and should be so construed. When considered with respect to the rights of those who claim to be beneficiaries, it should be regarded in the light of a testamentary provision rather than of a contract.[3] Upon the death of the mother before the assured her interest is extinguished and the contract of insurance stands between the company and the children as though she had never been a party to it. It is said that "the right of the children is more than a mere expectancy or naked possibility. It is a possibility coupled with an interest, which is transmissible to the heirs of the children."[4]

On the other hand, if the policy of insurance is to be regarded purely as a contract between the parties to the same, a different conclusion naturally follows, and in this lies the principal reason for the diversity of opinion on the part of the courts. Such is the New York rule, which holds that only those of the children as survive the mother can take, and the issue or personal representatives of a child who dies before her are excluded.[5] The rules which obtain regarding the vesting of estates created by will have no application, for a will is in no sense a contract and an insurance policy is. It should therefore be construed in accordance with the rules applicable to ordinary contracts. The child has simply a contingent interest in the property which was defeated by its death prior to that of the mother, and so no interest was transmitted either to its issue or personal representative. Upon the death of the mother, all interest in the policy vests immediately in the children then living.

[1] Richards, Insurance (3d Ed.), Sec. 67.

[2] Continental Insurance Co. v. Palmer, 42 Conn. 60 (1875); *In re* Estate of Conrad, 89 Iowa 396 (1893); Robinson v. Duvall, 79 Ky. 83 (1880); Voss v. Connecticut, *etc.*, Ins. Co., 119 Mich. 161 (1899); Michigan Mutual, *etc.*, Co. v. Basler, 140 Mich. 233 (1905); Glenn v. Burns, 100 Tenn. 292 (1897).

[3] Robinson v. Duvall, *supra*.

[4] Voss v. Connecticut, *etc.*, Ins. Co., *supra*.

[5] Lerch v. Freutel, 36 N. Y. Misc. 581 (1901); U. S. Trust Co. v. Mutual Benefit Life Ins. Co., 115 N. Y. 152 (1889); Walsh v. Mutual Life Ins. Co., 133 N. Y. 408 (1892); Davis v. N. Y. Life Ins. Co., 212 Mass. 310 (1912); Winsor v. Odd Fellows, *etc.*, Ass'n, 13 R. I. 149 (1880); Continental Life Ins. Co. v. Webb, 54 Ala. 688 (1875); Elgar v. Equitable, *etc.*, Co., 113 Wis. 90 (1902); Fidelity Trust Co. v. Marshall, 178 N. Y. 468 (1904); Succession of Roder, 121 La. 692 (1908).

In a recent case in Indiana, *Burnett* v. *Mutual Life Insurance Company*,[6] the problem arose for the first time before that court, and the so-called New York rule was applied. Neither the issue nor the personal representatives of a child who had predeceased its mother were entitled to any interest in the proceeds of the policy, but the whole vested in the children surviving at the death of the mother.[7]

The basis of the difference in the courts is between the rules governing where a contractual relation exists between the parties and those principles applicable to a case relating to the vesting of an estate created by a will. Under the New York view that the beneficiary's right is merely contractual, "children" is given its ordinary meaning; while under the Connecticut view that the right is testamentary and that the interest which vests in the children immediately upon the issuance of the policy is such as to be transmitted by the law of descent, "children" is made to include "grandchildren." It is true that in a certain sense, upon the issuance of the policy, an interest in, or right to, its continuance as an obligation does vest or, more properly, inure to the children. But it is submitted that it does not vest in the technical sense of the term as it is used in connection with estates created under testamentary devises. Properly, it seems to be a right of no higher quality than that it will be protected in favor of the children so long as there is a possibility of it eventually inuring to their benefit. While such a provision as here under consideration partakes of a testamentary nature in that it is to take effect after the death of the insured, it is after all purely a contract between the insured and the insurance company, and as such the beneficiary is seeking to enforce it. Greater strictness is

[6] 114 N. E. 234 (Ind. 1916).

[7] Such a provision in a life policy and involving the exact state of facts under consideration here, has not as yet been passed upon by a court of last resort in Pennsylvania. In Brown's Appeal, 125 Pa. 303 (1889), and Entwistle v. Travelers Ins. Co., 202 Pa. 141 (1902), the policies contained such a clause, but the children were all alive at the time of the death of the mother. The Supreme Court indicated that they viewed this clause as a contract to be construed as such and not as a testamentary disposition. The exact state of facts arose in Estate of Thorne, 50 Pittsburgh L. J. 233 (1903), where there were three children living at date of issuance of the policy, but one predeceased the mother. The Allegheny County Court held that the deceased child had a contingent interest which passed to his administrator and became absolute by the death of his mother. Another lower court decision, and the latest in which this question was involved, is Braddock v. Manhattan Life Ins. Co., 16 Pa. Dist. R. 127 (1906). Judge (now Justice) Von Moschzisker, after analyzing the New York and the Connecticut rule and showing that the question was still an open one in Pennsylvania, concluded that the heirs of the child who had predeceased its mother, were not entitled. There being no other children, the proceeds of the policy were payable to the personal representatives of the mother. The court accepted the New York rule and apparently had no knowledge of the Pittsburgh case decided three years before. The decision was not appealed from.

properly required in the construction of the terms of a contract, which have been chosen after negotiations and consideration of their effect by the parties and which are presumed to correctly describe their rights and liabilities; whereas in a will, which is solely the expression of the testator's intention, a more liberal rule of construction is adopted in order to prevent the defeat of his purposes. There is nothing in the contract of insurance as such, which would warrant a court in giving to the word "children" any other than its ordinary meaning. So interpreted, it excludes grandchildren—that is to say, children of a child who has predeceased its mother, the primary beneficiary, and necessarily leads to the conclusion that only those children take who survive their mother. Under this kind of insurance clause, where the aim is to protect the wife and children after the death of the insured, it seems more consonant with reason to say that when the contractual relation with the mother ceases by her death, they who were her children at this moment are the only ones whom it is intended to protect and should be the only ones to assert and enforce an interest as substituted parties in the place of their mother.

P. H. R.

PROPERTY—WILLS—DEPENDENT RELATIVE REVOCATION—GIFTS TO CHARITIES—The doctrine of dependent relative revocation of wills is one which from its very nature involves many difficulties in application. It is not surprising, therefore, that the cases show a great amount of uncertainty and of inconsistency. Arising, as it did, in the Court of Chancery at a comparatively early period,[1] this doctrine has exerted a profound influence on the courts both of England and of this country, and, while the tendency, particularly in the American courts, has been to limit its application as narrowly as possible without departing from established authority, still the doctrine vigorously persists. Stated broadly, the doctrine may be said to be, that where a testator revokes a will, wholly or in part, in reliance on a supposed state of facts and those facts are really non-existent, the revocation is inoperative because it was conditioned upon the existence of the supposed facts.

A recent case illustrating the tendency of the courts to restrict the operation of the doctrine is that of *Ely* v. *Megie*,[2] where the New York court refused to apply it. In that case the testator had by a codicil in 1909 left the residue of his estate to be divided among eight charitable associations. In 1911 he executed a second codicil, wherein he in terms revoked that part of the codicil of 1909, and substituted therefor, *inter alia*, bequests of $100,000 each to four of the original eight legatees, these legacies being expressly subject to

[1] Onions v. Tyrer, 2 Vern. 742 (1717).

[2] Ely v. Megie, 219 N. Y. 112, 113 N. E. 800 (1916).

abatement before the other bequests of the will and codicil. The trial justice found as facts that the testator's property had been largely increased between 1909 and 1911 by a bequest of over $1,000,000 left him by his brother, and that it was the testator's intention to modify the bequests of 1909 by limiting them to $100,000 and not wholly to revoke the earlier bequests. The testator having died before the expiration of two months, the bequests to charitable associations in the codicil of 1911 were invalid under the New York statute. It was urged that this was a proper case to apply the doctrine of dependent relative revocation so as to reinstate the codicil of 1909; but the court held that that codicil had been absolutely revoked in spite of the failure of the bequests in the revoking codicil.

The cases where the doctrine has been invoked seem to fall into the following classes:

(1) Where the earlier will or codicil has been destroyed by one of the physical acts allowed by the statutes. In these cases the act of destruction is an equivocal act, and the intention is properly a matter for inquiry, for such acts should have no validity unless coupled with an intent to revoke. But in applying the doctrine, the courts go further than this and inquire whether, there being an intention to revoke at the time, that intention is based on a supposed state of facts which do not in reality exist.[3]

(2) Where the revocation is by a later will or codicil expressly revoking the earlier one, but stating certain supposed facts as the reason for that revocation.[4] In such cases practically all jurisdictions agree in applying the doctrine. It is, however, subject to two important qualifications: first, that the revoking codicil must clearly state a reliance on a belief in the supposed facts, mere doubt not being sufficient;[5] secondly, that where the facts are such as to be peculiarly within the testator's own knowledge and for which he need not rely on information obtained from others, the doctrine has no application.[6]

(3) Where the testator has cancelled or obliterated a particular legacy or devise in a will and attempted to substitute another,, the substitutions being void because improperly executed. Here, again, it is well settled that the doctrine should be applied.[7]

(4) Where a revoking instrument is itself revoked, on the supposition that this will revive a former will.[8]

[3] Onions v. Tyrer, *supra;* Dancer v. Crabb, L. R. 3 P. & D. 98 (1873).

[4] Campbell v. French, 3 Ves. Jr. 321 (1797); Doe v. Evans, 10 A. & E. 228 (1839).

[5] Attorney-General v. Lloyd, 1 Ves. Sr. 32 (1747).

[6] Hayes v. Hayes, 21 N. J. Eq. 265 (1871); Appeal of Mendinhall, 124 Pa. 387 (1889).

[7] Locke v. James, 11 M. & W. 901 (1843).

[8] Powell v. Powell, L. R. 1 P. & D. 209 (1866).

(5) Where the testator revokes a provision of his will by a later instrument which is properly executed, but which cannot take effect because of some matter *dehors* the instrument, as, *e. g.*, a mortmain act.[9]

The principal case falls within the last-described class. In this group of cases the courts almost always refuse to apply the doctrine. Where the testator has expressly stated his intention to revoke and has not stated any supposed facts in such a way as to condition his revocation thereon, the revocation is absolute and evidence of matters *dehors* the instrument is not receivable. On principle there seems to be little reason why, if the doctrine is a sound one, it should not be applied here as well as in those cases where it is held to apply, for the intention of the testator in case of a failure of his later disposition is no more a matter of conjecture than in other cases; but the line is clearly drawn by the authorities.

Within the last-named group of cases, however, the principal case represents a type as to which there has been some uncertainty; *viz.*, where the later instrument in terms revokes, but its effect is merely to cut down an earlier gift. The point seems to have arisen oftener in Pennsylvania than elsewhere, and in several decisions the Supreme Court of that state has taken the position that in such cases the later provision should be considered a revocation only *pro tanto* of the gift in the earlier instrument, and not an absolute revocation of it and a new gift, as the language would seem to indicate. So, where a testator revoked an earlier gift of a sum of money to a charity and left the sum to trustees, who should pay the interest to certain relatives during their lives and then pay the whole to the same charity, the court considered that the codicil merely postponed the time of payment, and held that there was no revocation, although the testator stated that he "annulled and revoked."[10] Likewise, where the testator revoked several bequests and directed that the sums so released should be added to the residue of his estate, and further directed that the residue be divided into seven instead of six shares as provided by the will, the court found no revocation of the former gift or part of the residue to a charity, but merely a cutting down of the share given.[11] These decisions, in a state whose cases [12] have gone as far as any to discredit the entire doctrine, are illustrations of the unsatisfactory state of the law on this subject.

The decision in the principal case seems not only to be in thorough accord with the strong tendency of the American courts,

[9] Tupper v. Tupper, 1 K. & J. 665 (1855); Hairston v. Hairston, 30 Miss. 276 (1855); Dunham v. Averill, 45 Conn. 61 (1877); Commrs. v. Scott, 88 Minn. 386 (1903); McIntyre v. McIntyre, 120 Ga. 67 (1904).

[10] Sloan's Appeal, 168 Pa. 422 (1895).

[11] Morrow's Estate, 204 Pa. 484 (1903).

[12] Emernecker's Estate, 218 Pa. 369 (1907); Melville's Estate, 245 Pa. 318 (1914).

but with the sound public policy which led to the enactment of the Statute of Frauds and the later wills acts in England and in this country. Where a testator has unconditionally stated his intention to revoke an earlier testamentary paper and accompanied it with a different disposition of his property, it is a matter of conjecture what he would have intended had he known that his later disposition would fail. When the courts attempt to determine that intention, serious difficulties are certain to follow. The policy of all our statutes has been to require testamentary papers to fulfill certain formalities, in order to do away with proof of wills by parol testimony. It is an inherent weakness of the doctrine of dependent relative revocation that it introduces parol testimony into all cases where it is applied, and it seems best, therefore, that it should be strictly limited in its operation.

W. W. S.

QUASI-CONTRACT — WORK AND LABOR — FRAUD — A difficult problem arises where compensation is sought for services rendered in the family relation. Express contracts under such circumstances are rare, and in the absence of a contract recovery is almost impossible. Nor will the law imply a contract of this sort. The rule is that services thus rendered will be presumed gratuitous.[1] The party seeking recovery is thus left to his quasi-contractual remedy. In many jurisdictions, however, the quasi-contractual action is restricted to cases in which a definite sum of money has come into the hands of the party sought to be charged; in these jurisdictions the party seeking repayment for his services is apparently without a remedy.[2]

In a jurisdiction where the quasi-contractual action is not so restricted,[3] other limitations must be taken into account. The presumption above mentioned, that the services were gratuitous, must be rebutted, and this, it seems, can be done only where fraud is shown to have been perpetrated.[4]

A great deal of work is doubtless performed with a vague expectation of future reward by persons more or less remotely related to the beneficiary—witness the extreme solicitude with which a galaxy of relatives attend the illness of a dying testator. When the anticipated return has not been realized, the resort is usually and necessarily to the action *ex quasi contractu*. It is, however, recognized that such actions are in the nature of an afterthought, the result of disappointed expectations. The lips of an

[1] Kingston v. Roberts, 137 S. W. 1042 (Mo. 1913).
[2] Graham v. Stanton, 177 Mass. 321 (1901).
[3] Blowers v. Southern Ry. Co., 74 S. C. 221 (1906).
[4] Peter v. Steel, 3 Yeates 250 (Pa. 1800).

important party to the transaction are closed, and except in the case of fraud, the presumption is rigorously applied. It should, however, be noted that the presumption that the services thus rendered are gratuitous, like the more general presumption that work is to be paid for, is merely a presumption of evidence and not of law. An examination of the cases on the point, however, reveals the fact that it is an almost irrebutable presumption.[5]

A very doubtful situation is presented where services are rendered by A to B, both parties being under the erroneous impression that they are related. When the actual facts are brought home to A he seeks to recover the value of the labor he has bestowed upon B, which, he alleges, he would not have performed gratuitously had he been aware of the actual status of the parties. On the other hand, it is not at all clear that B would have received the services had he believed they were to be paid for. A distinction might, indeed, be drawn depending upon the nature of the services. Where it could be shown that the services were absolutely necessary, and, but for A's performance, B would have been compelled to employ a third party, recovery should be allowed. The question is more or less academic, as the precise point does not seem to have arisen.

In the usual case the question is entirely one of evidence, with a very strong presumption against the party seeking recovery. Upon him is the burden of establishing a contract, no quasi-contractual problem being at all involved. It is not at all easy to justify the exception made in this case to the general rule that all services are to be compensated, upon any legal or logical basis. The point has been made that the very existence of the family relation negatives any notion of payment; that the amenities of family life call for a great deal of work and labor, which, in ordinary social intercourse, must be paid for. "The family relationship," it has been judicially said,[6] "is presumed to abound in reciprocal acts of kindness and good-will, which tend to the mutual comfort and convenience of the members of the family and are gratuitously performed." The *raison d'être* as thus stated by the courts and quoted with approval by text-writers, hardly suffices to cover the case before mentioned, where the services are rendered under the mistaken impression that the parties are related. In such case the *intent* with which the services were given, which is stressed in the opinion quoted, would seem immaterial. The plaintiff would admit that at the time the services were performed there was no expectation of the payment sought to be recovered; but it would also be submitted that the action was a quasi-contractual one, and brought on the broad basis of substantial justice, irrespective of and possibly in the teeth of the actual intent. It may be pointed out in passing that in no case has friendship or the amenities of social life been allowed to overcome the

[5] Walker v. Taylor, 28 Col. 233 (1901).
[6] Disbray v. Durand, 54 N. J. L. 343 (1892).

general presumption of payment for services rendered, which the law has adopted.

It may therefore be stated that where relief is sought in quasi-contract on the ground of mistake of fact, the intent of the parties at the time the transaction took place should not be a decisive factor. The same is true with even greater force where it is shown that the labor has been secured by the imposition of fraud. A very recent case adopts just this line of reasoning. In *Sanders* v. *Ragan*,[7] recovery was sought against the estate of the deceased for services rendered by the plaintiff as his housekeeper. A ceremony of marriage had been performed, and the plaintiff believed she was the wife of the deceased, but on his death it appeared that he had been lawfully married to another woman who was still alive. The court permitted recovery, saying *inter alia:* "The action of assumpsit as stated, is dependent largely upon equitable principles, and in the absence of a special contract controlling the matter, it will usually lie where one man has been enriched or his estate enhanced at another's expense that in equity and good conscience call for an accounting by the wrongdoer." The court refused to apply as a test the intention of the parties. It cut through the contractual *form* of the action and adopted the logic of a similar case, in which it was stated that an implied promise does not always depend upon the existence of an intention in fact of the one to pay and the other to receive. "The law frequently affixes a promise to pay even contrary to the actual intention."[8]

Some of the courts, however, have denied recovery for services rendered under mistake of fact or even in cases of fraud on the ground that *payment was not intended.* In *Cooper* v. *Cooper*,[9] under facts analogous to those of the principal case, the court in denying recovery said: "The fact that she (the plaintiff) believed herself to be a wife, excluded the inference that the society and assistance of a wife which she gave to her supposed husband were for hire." The actual decision of the court can be justified under the Massachusetts doctrine which permits recovery in quasi-contract only where money has come into the hands of the tort-feasor, but it is submitted that the language used by the court clearly shows that such was not the ground for the decision.

It is submitted that the rule of law which considers work done in the family gratuitous, and the exception thereto which permits recovery in case of fraud, can be put upon a single basis. It may be stated that a party cannot recover for services thus rendered because of the absence of a contract, express or implied; normally he cannot recover in quasi-contract because no equity requires that

[7] 90 S. E. 777 (N. C. 1916).

[8] Hickham v. Hickam, 46 Mo. App. 504 (1891).

[9] 147 Mass. 370 (1888).

he be compensated. The family may be considered as embarked upon a mutual enterprise, and in aiding any particular member of the group one but aids himself. In the principal case no equity requires that a wife be paid for her services. These are bestowed in the mutual partnership out of the profits of which the law gave her, as wife, certain benefits. In so far as no such status existed, however, she should be entitled to at least the value of her services as employee.

B. W.