NOTES

PROXIMATE CAUSE AND INTERVENING VOLUNTARY ACTION—The responsibility of a negligent actor for the voluntary human action which he stimulates has been the subject of much litigation, increasingly so in recent years. In *Horton v. Telephone Company*,[1] it is said that "The spontaneous action of an independent will is neither the subject of regular, natural sequence, nor of accurate precalculation by us. In other words, so far as concerns my fellow beings, their acts cannot be said to have been caused by me, unless they are imbeciles or act under compulsion or under circumstances produced by me which gave them no opportunity for volition." In answer to this it has been said [2] that "voluntary action can be caused, but not directly caused, by another than the actor. It cannot be accurately precalculated, but it can be inaccurately pre-estimated, which is sufficient for indirect proximate cause."

Before the question of legal cause arises it must be clearly established that the defendant has been guilty of some negligence or other breach of duty toward the plaintiff. Once this has been proved, it becomes necessary to determine the extent of his liability for resulting consequences.[3]

The problem of indirect proximate causation, involving the intervention of voluntary human action between the defendant's act and the plaintiff's injury, arose in a recent Washington case.[4] The plaintiff, nearing a street intersection in her automobile, heard the approach of a fire truck. In obedience to a city ordinance, she immediately parked her car parallel to the right-hand curb, to clear the street. The defendant's coal truck, coming at right angles to the fire engine, was negligently driven past the street line, and stopped at the center of the intersection. The driver of the oncoming fire engine, realizing that a collision was imminent, swerved suddenly to the right, to avoid hitting the coal truck, and crashed into the plaintiff's car. Plaintiff brought suit to recover for the personal and property damage suffered. The trial court ruled as a matter of law that the plaintiff was not guilty of contributory negligence and submitted the question of the defendant's negligence, and whether or not that negligence was the cause of the accident, to the jury. Judgment on a verdict for the plaintiff was affirmed.

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[1] 146 N. C. 429, 439, 59 S. E. 1022, 1026 (1907), quoting WHARTON, NEGLIGENCE, 138 (1878).

[2] J. A. McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 168, n. 66 (1925).

[3] Hoag v. R. R., 85 Pa. 293 (1877). This case laid down the generally accepted rule of reasonable probability of injury as the proper test of negligence. See Prof. F. H. Bohlen, "The Probable or Natural Consequences as the Test of Liability in Negligence," 49 U. OF PA. L. REV. 79 (1901).

[4] Hadley v. Scott, 241 Pac. 26 (Wash., 1925).

A study of the numerous views, rules and suggestions of the various theorists points out the existing inconsistencies of opinion in regard to this subject.

Professor Bohlen considers the proof of negligence a matter of paramount importance; after that has been established, he attaches no importance to the probability or foreseeability of the result, which is proximate if the consequences flowed in unbroken natural sequence from the act. He says:[5] "Liability is to be determined by the natural consequences, those resulting from the operation of ordinary natural laws, animate or inanimate." An intervening action such as would break the causal chain must be independent, self-created, not itself a product and result of the wrongful act.[6] In the instant case, natural laws of cause and effect operated to produce the harm, and no new action or force, sufficient to break the causal connection, intervened. These natural laws of cause and effect include the known tendency of human beings to act in particular ways under particular circumstances.

Professor Beale is an advocate of definite rules by which to determine the extent of liability. He considers the study one of force and risk, and concludes that "the force created, to be proximate, must have: (a) remained active itself or created another force which remained active until it directly caused the result; or, (b) create a new active risk of being acted upon by the active force that caused the result."[7] He broadly asserts that a defendant is responsible for all human action which he stimulates.[8] He classifies expectable human action as dependent, and thus included within his first classification, as to force. The courts, however, generally consider voluntary action by another than the defendant as being independent. In the instant case, while the defendant stimulated human action, he did not actually create a new force, but merely diverted an existing one which was already in motion; hence it seems that the case does not come within Professor Beale's first classification.

In his second classification, as to risk, considered in conjunction with other of his statements, Professor Beale seems to say in effect that if the defendant's active force has come to rest in such a dangerous position that it creates a new risk or increases an existing one, and the foreseen intervening force operates harmfully on the condition created by the defendant, causing damage, the harm thus resulting is proximate to the act, providing, however, that the defendant's force has not come to rest in a position of apparent safety.

Under this second classification, proximate causation can be established in the instant case, for, while the defendant's force had

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[5] F. H. Bohlen, *ibid.*, p. 161.

[6] *Cf.* Oil City Gas Co. v. Robinson, 99 Pa. 1 (1881); Hogsett v. Bunting, 139 Pa. 363, 21 Atl. 31 (1890).

[7] Joseph H. Beale, *The Proximate Consequence of an Act*, 33 HARV. L. REV. 633, 658 (1920).

[8] *Ibid.*, p. 646.

come to rest, he left outstanding an increased risk that the situation which he had produced would be operated upon by the intervening force (the fire-truck), to the detriment of others. This risk remained outstanding until the intervening force was applied, and the result was direct damage to the plaintiff.

Opposed to Professor Beale in principle, we find Professor Edgerton, who refuses to reduce the law of proximate causation to definite rules, claiming that their adaptability to the subject is impossible. While Professor Beale and Professor Edgerton approach the subject from diametrically opposite angles, the results, in the application of their theories to the cases, are quite uniform. Both would extend liability to a high degree, though their methods in doing so are dissimilar.

Professor Edgerton suggests [9] as a guide the vague standard that a legal cause is a "justly attachable cause," and that juries should, in determining the extent of the defendant's liability, be instructed by the court on that basis. This view has been criticised [10] on the ground that such a policy would make juries lawmakers and not fact-finders; furthermore, it may be urged that a court would be left with its conscience as its guide, and the bar with none.

At the time Jeremiah Smith wrote upon the subject, he regarded the attempts to make definite rules as "resulting in propounding rules which are demonstrably erroneous." [11] He is content that the "defendant's tort must have been a substantial factor in producing the damage complained of." [12] It is enough if it is a substantial cause of the causative antecedents. He attaches no importance to the foreseeability of the result, requiring only that the defendant's wrong be a substantial element in subjecting the plaintiff to loss or damage through the operation of a final force.

The defendant's act in the instant case is a "justly attachable cause" of the plaintiff's injury, and it is evident that the negligence of the coal truck-driver was a very substantial factor in bringing about the injury. It is therefore submitted that the case was rightly decided under the views of Smith and of Professor Edgerton.

The most recent treatise on the subject is that of Professor J. H. McLaughlin.[13] He suggests that, of the voluntary acts of others stimulated by the defendant, only those appreciably probable at the time of the defendant's act are proximate to it.[14] In formulating

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[9] Henry W. Edgerton, *Legal Cause*, 72 U. OF PA. L. REV. 211 (1924).

[10] *Supra*, note 2, p. 195.

[11] Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 317 (1912).

[12] *Ibid.*, p. 309. This view bears a striking resemblance to that of Professor Bohlen.

[13] *Supra*, note 2, p. 149.

[14] *Supra*, note 2, p. 175.

his rules, his purpose seems to be to advance reasonable and logical guides which, if adopted, could be reconciled to the greater majority of actual decisions. He recognizes the importance of probability and foreseeability, in the minds of the courts. After rejecting the view that only probable or foreseeable results are proximate, and admitting the proximity of all direct results, he reasons that an active force may carry proximate causation to an unforeseen result, and draws from this reasoning the conclusion that it is entirely consistent to hold that the intervening force or voluntary action, and not the result, is what should be appreciably probable.[15] Professor McLaughlin deals directly with the point involved in the instant case. He says:[16] "There should be no difference between the defendant's responsibility for forces which he actually sets in motion with his own hands and those which he should appreciate are likely to take effect upon the situation he produces. (For instance, an expressman who carelessly leaves a fragile package where a heavy object is likely to fall on it should be in no better position than if he had dropped the package.) If a defendant is driving an automobile negligently, he should be liable for improbable damage that is done before it comes to rest. If, by reason of such negligence, it moves or comes to rest in such a manner that a second moving car (an independent intervening force) is likely to strike it, the defendant should be responsible for the damage done by the force of the second car in the collision. If the second car does not strike the defendant's, but the driver may be and is thereby caused to swerve suddenly (voluntary action stimulated by the defendant) the defendant should be responsible for the force of such second car in making such deviation.[17] The defendant has appreciably increased the probability that the force of the second car will have effective operation to the damage of others. In no case is it necessary that the ultimate result be probable so long as no improbable independent intervening force or improbable voluntary action is encountered."

When the theories herein discussed are applied to the cases and the results obtained compared with the courts' decisions, the comparison exhibits a broader tendency on the part of the text writers—that is, when an inconsistency appears, the case is generally

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[15] *Supra*, note 2, p. 179.

[16] *Ibid.*

[17] Fraser v. Flanders, 248 Mass. 142, 148 N. E. 836 (1924); Boggs v. Jewel Tea Co., 263 Pa. 413, 106 Atl. 781 (1919). The remarkable case of Holmsburg v. Villhaune, 158 Minn. 442, 197 N. W. 849 (1924), is in accord. There the plaintiff was going south after dark; he stopped his car on the right side of the road; as a car from the south passed the plaintiff the defendant coming up behind the plaintiff, jammed on his brakes. His car skidded, bumping the car from the south, one hundred and fifty feet from the plaintiff, and continued to skid until it hit the plaintiff's car, bouncing plaintiff's car ahead. The defendant's car stopped at right angles to the road, and thirty seconds later one Anderson in the next car from the north suddenly swerved right and hit plaintiff's car and the plaintiff.

decided for the defendant. This is more true of the views of Edgerton, Smith and Beale than of Bohlen[18] and McLaughlin.

The inconsistencies in the courts themselves make it impossible to ascertain any general standards or rules by which they invariably proceed. Certain tendencies are, however, evident, and can be used to show the general state of the law.

Some few opinions call only for causation in fact, which is *causa sine qua non;* if the harm would not have happened but for the act, then the act in fact caused the damage.[19]

It has been held that the intervention of an independent person breaks the causal chain, irrespective of the foreseeability of the intervention or the result.[20]

In some cases of intervening action caused by the defendant, it has been held that the defendant's act was not the legal cause of the intervention and its results.[21]

A greater number of decisions have laid much stress upon the probability or foreseeability of the results or of the intervening factors. Sometimes the court requires a very precise sort of foreseeability and a high degree of risk.[22] Frequently, however, a very slight degree of risk or a very general sort of foreseeability satisfies a court, and it is not essential that the exact nature of the intervening forces or the result be foreseeable.[23]

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[18] Professor Bohlen's view can be better reconciled to the cases if his rules as to negligence be considered in conjunction with those in regard to the extent of the defendant's liability. A great many cases could have been more logically decided on the grounds that the defendant was guilty of no negligence toward the plaintiff. Jones v. Fort Dodge, 185 Iowa 600, 171 N. W. 16 (1919).

[19] Jones v. State, 122 Me. 214, 119 Atl. 577 (1923); Williams v. Producing Co., 80 W. Va. 683, 93 S. E. 809 (1917).

[20] Queen v. Ledger, 2 F. & F. 857 (Eng., 1862); Lang v. N. Y. C. R. R., 255 U. S. 455 (1921); Hammett v. R. L. & P. Co., 202 Ala. 520, 81 So. 22 (1918); Curran v. Ry., 289 Ill. 111, 124 N. E. 330 (1919); De Camp v. Sioux City, 74 Iowa, 392, 37 N. W. 971 (1888); Jones v. Fort Dodge, *supra*, note 18; Stone v. B. & A. Ry., 171 Mass. 536, 51 N. E. 1 (1898).

[21] Commonwealth v. Moore, 121 Ky. 97, 88 S. W. 1085 (1905); Commonwealth v. Campbell, 7 Allen 541 (Mass., 1863); Marvin v. Ry., 79 Wis. 140, 47 N. W. 1123 (1891). These cases are noted by Professor Beale as being in conflict with his rules.

[22] Seith v. Electric Co., 241 Ill. 252, 89 N. E. 425 (1909). The defendant negligently left a live wire in the street. A policeman knocked it with his club against the plaintiff. The act of the policeman was held not foreseeable. Sarber v. Indianapolis, 72 Ind. App. 594, 126 N. E. 330 (1920); Cavanaugh v. Coal Co., 131 Iowa 700, 109 N. W. 303 (1906); Horan v. Watertown, 217 Mass. 185, 104 N. E. 464 (1914); Perry v. Lime Co., 219 N. Y. 60, 113 N. E. 529 (1916); Hurton v. Telephone Co., 146 N. C. 429, 59 S. E. 1022 (1907); Moody v. Gulf Refining Co., 142 Tenn. 280, 218 S. W. 817 (1920); Donald v. Coal Co., 86 W. Va. 249, 103 S. E. 55 (1920). See L. R. A. 1915 E. 479, for cases *contra* to Perry v. Lime Co., and Horan v. Watertown.

[23] Scott v. Shephard, 2 Wm. Bl. 892 (Eng., 1772). The majority of the court were of the opinion that the intervening acts were involuntary, and hence the causation direct. If the action be taken as voluntary, it is foreseeable that a squib would be cast about. Clark v. Chambers, L. R. 3 Q. B. D. 327 (1878).

Upon examination of the cases, it would seem that the tendency of the courts is to extend rather than to limit the liability. Language in some comparatively recent cases goes far toward holding that if the conditions show elements of negligence, the negligent person may be responsible for the result.[24]

A marked change in economic conditions during the past two decades has presented difficult problems in proximate causation. The ever-increasing predominance of motor trucks and automobiles has overcrowded our streets and highways, and rendered more probable unpredictable accidents caused by careless and negligent drivers. To meet these conditions, it seems essential to extend the liability of the wrongful actor beyond the confines of former rules, which, while possibly suitable at the time of their inception, are too narrow for modern law.

The discord among theorists is a result of honest efforts to submit workable tests, any one of which is broad enough to cope with modern conditions. The courts have not been slow in adopting a similar attitude favoring extended liability. In defense of the lack of definiteness and certainty in the courts' procedure, it is submitted that, if it be an evil, it is a lesser one to justly attach a legal injury to a wrongful act by indefinite, flexible and unsettled rules than it is to unjustly separate the harm from its cause by the use of technical formulæ.

The defendant, in the instant case, was justly held responsible for the harm indirectly resulting from his negligence; the decision is justified by the leading text writers of the day and is in accord with the broadening tendency of modern authority.

J. D.

Defendant placed a barrier across a roadway, and another removed it to adjoining footpath; plaintiff using the footpath in the dark ran into it and was injured. Wise v. Dunning [1902], 1 K. B. 167 (1901); Burk v. Creamery, 126 Iowa 730, 102 N. W. 793 (1905); Lane v. Atlantic Works, 111 Mass. 136 (1872) (a typical application of Professor McLaughlin's tests); Fotter v. Moseley, 185 Mass. 563, 70 N. E. 1040 (1904); Carr v. Auto Supply Co., 293 Mo. 562, 239 S. W. 827 (1922); Tuttle v. R. R., 66 N. J. L. 327, 49 Atl. 450 (1901); Brower v. R. R., 91 N. J. L. 190, 103 Atl. 166 (1918); Guille v. Swan, 19 Johns. 381 (N. Y. Sup. Ct., 1822); Eckert v. L. I. Ry., 43 N. Y. 502 (1871); Wagner v. Ry., 232 N. Y. 176, 133 N. E. 437 (1921). In the case last cited, Judge Cardozo says: "It is enough that the act intervening, whether impulsive or deliberate, is the child of the occasion. Continuity in such circumstances is not broken by volition." Professor McLaughlin would qualify the statement by demanding that the child be legitimate. *Cf.* Woodcock v. Hallcock, 127 Atl. 380 (Vt., 1925).

[24] Walmsley v. Rural Ass'n, 102 Kan. 139, 169 Pac. 197 (1917). See Dalton v. Tea Co., 241 Mass. 400, 404, 135 N. E. 318, 320 (1922); Fraser v. Flanders, 248 Mass. 62, 67, 142 N. E. 836, 838 (1924).

THE CHRYSLER FIRE AND THEFT POLICY—The Chrysler plan of blanket insurance is a direct outgrowth of the common practice of time-payments on automobiles, financed by independent finance companies. That necessitates insurance of each car against fire and theft, an expensive procedure, which increases the final price to the purchaser. Under the Chrysler plan all financing of the time-payment purchases is done by the corporation itself, which is thereby able to charge considerably lower rates than would finance companies. The same necessity for the insurance of the cars exists, but in place of insuring each one separately, a blanket policy on all cars is taken out at a much lower rate. This policy of insurance, the subject of this discussion, is taken in the Palmetto Insurance Company of South Carolina, and purports to insure "the Chrysler Sales Corporation and/or whom it may concern" against fire and theft of all cars manufactured during a given period, this insurance to be for the term of *one year after the car is sold to the retail purchaser.* The contract is made in Detroit, Michigan, with the resident agent of the Palmetto Company, and states that it is to be performed in that state. The original policy is kept by the Chrysler Corporation in Detroit. When a car is sold to a retail purchaser, the dealer notifies the Chrysler Corporation of the sale, and the Chrysler Corporation notifies the agent of the Palmetto Company, who sends direct to the purchaser a "certificate of insurance." [1]

The purchaser pays no insurance premium to the Palmetto Company, all premiums being prepaid by the Chrysler Corporation, at the Detroit office. There is no deduction from the retail price of the car if the purchaser refuses to accept the insurance, and if insurance is placed on the car in some other company, the Palmetto insurance becomes excess insurance.

The Chrysler retail dealers in Maine sold cars under this plan and reported the sales to Detroit; certificates of insurance were then sent to the purchasers. The Insurance Commissioner of Maine made public statements that these dealers were violating the laws of Maine, and threatened to bring suit against them for fines, as pro-

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PURCHASER'S ORIGINAL COPY.

Under Policy #9657 of the Palmetto Company, issued to the Chrysler Corporation and/or for account of whom it may concern, the car of.....
Address.....Description of car.....is insured against.....from.....to.....for amount .....

This insurance may be transferred by the holder mailing notice of transfer with the certificate to insurer, said insurance continuing for the unexpired term of the first insured.

This certificate must be signed by the authorized agent at Detroit, Michigan.

vided by statute.[2] A bill was brought to enjoin the Commissioner,[3] and an injunction was refused.[4]

The theory of the Insurance Commissioner was that the Michigan contract was not a contract of insurance; that therefore the Chrysler salesmen, when selling cars, were incidentally soliciting insurance without licenses. The plaintiff contended that the Michigan contract was a completed contract of insurance, and that therefore the dealers could not be insurance solicitors. The court held the Michigan contract not an insurance contract, but an agreement for future insurance, since no *person* was insured by the contract at the moment it was made, so that the dealer soliciting the sale of the car solicits also the sale of the insurance for it. He furnishes the name of the purchaser, no insurance is in effect until the car is sold, and the certificate states that the purchaser agrees "that its terms shall embody all agreements then existing between himself and the company." At first glance, the decision seems theoretically sound, although practically unfortunate, but it is submitted that it can be criticized on the ground that the doctrine of "personality" does not lead to the conclusion reached by this court, namely, that a contract of insurance, to be a contract, must insure a person from the beginning.

There is a common dictum in the law of fire insurance, that the contract is a contract between persons and not something which attaches to property.[5] This dictum is the fundamental reason for the decision in this case: "Plainly the theory of the plaintiff is that this insurance is something which attaches to and follows the automobile upon its course in the market, as though a part or accessory. . . .

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[2] "The insurance commissioner may issue a license to any person to act as an agent of a domestic insurance company upon his filing with the commissioner a certificate from the company or association, or its authorized agent, empowering him to act; and to any resident of the state to act as an agent of any foreign insurance company which has received a license to do business in the state . . . upon his filing such certificate. . . . If any person solicits, receives or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent and thus procures risks and receives money for premiums, he shall be punished. . . ." Me. Rev. St., c. 53, § 121 (1916).

[3] The case was taken into the federal court under § 266 of the Judicial Code, which provides for a court of a circuit judge and two district judges to hear cases which ask for injunctions against state officers, on the ground that the statutes which they are attempting to enforce are unconstitutional. The plaintiff claimed that the Maine statute was unconstitutional as violating the "due-process" clause, as interfering with interstate commerce and as impairing the obligation of contract.

[4] Chrysler Sales Corporation v. Spencer, District Court of the United States for the District of Maine (So. Div.), December 19, 1925.

[5] Lynch v. Dalzell, 4 Bro. P. C. 432 (Eng., 1729); Andes Co. v. Fish, 71 Ill. 620 (1873); Bartling v. Ins. Co., 154 Iowa 335, 134 N. W. 864 (1912); Swaine v. Ins. Co., 222 Mass. 108, 109 N. E. 108 (1915); Kase v. Ins. Co., 58 N. J. L. 34, 32 Atl. 1057 (1895); Germania Co. v. Ins. Co., 144 N. Y. 195, 39 N. E. 77 (1895); Lumber Co. v. Ins. Co., 4 Pa. Super. 100 (1897); King v. Ins. Co., 45 Pa. Super. 464 (1911).

This idea is erroneous for at least two reasons. . . . (2) the legal concept of insurance is that it does not attach to property but to persons," citing *Carpenter v. Providence Co.*,[6] where Mr. Justice Story[7] quotes Lord Hardwicke.[8] The court argues that in the contract in this case, no one is insured; that the Chrysler Corporation is expressly not insured, as the insurance does not begin until the car is sold by them; that the purchaser is unknown in the contract; that therefore no *person* is insured and there is no contract of insurance. An examination of the cases which have given rise to the dictum above quoted, will show that they are not authority for the decision in the instant case.

In *Lynch v. Dalzell*,[9] a contract of fire insurance was issued to X and expressly made non-assignable. X assigned the contract to Y and after loss Y sued on the policy. It was held that Y could not recover; that the contract did not insure the house, but insured X only, as that was the expressed intention of the parties.

In *Sadler's Co. v. Badcock*,[10] a contract of insurance was issued to X, who was the lessee of certain property. Before the policy expired, X's lease ran out and Y became lessee. After loss, Y sued, and the court denied recovery. Lord Hardwicke said, *inter alia*: "To whom, and for what loss, are they to make satisfaction? Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and it therefore must mean insuring the person from damage." This statement means that the *satisfaction* of the loss must be made to a person and not to the property, but nowhere is there anything which justifies a statement that there is no contract if no person is insured *eo instanti*.

Columbia Insurance Co. v. Lawrence,[11] and *Carpenter v. Providence Co.*,[12] the leading American cases following the doctrine of Lord Hardwicke, are both cases of mortgagor and mortgagee. X takes out a contract of insurance on his house and mortgages the house to Y; the house burns and Y sues. In both cases it was held that the mortgagee cannot recover; that the insurance does not attach to the property, but runs to X in person. In the former case, Mr. Justice Story says: "We know of no principle of law or equity by which a mortgagee has a right to claim the benefits of a contract underwritten for the benefit of the mortgagor."[13] These two cases

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[6] 16 Pet. 495 (U. S., 1842).
[7] *Ibid.*, p. 503.
[8] In Sadlers' Co. v. Badcock, 2 Atk. 554, 556 (Eng., 1743).
[9] *Supra*, note 5.
[10] *Supra*, note 8.
[11] 10 Pet. 507 (U. S., 1836).
[12] *Supra*, note 5.
[13] *Supra*, note 11, p. 512.

have frequently been cited and followed,[14] but always for the one principle for which they stand, *viz.*, that between mortgagor and mortgagee, a contract of insurance for the benefit of the mortgagor does not enure to the benefit of the mortgagee.

These are the authorities on which this court relies. It is submitted that the so-called "doctrine of personality" in fire-insurance contracts, which is based on the cases discussed above, is that in the ordinary agreement for insurance, the intention is that the contract shall be personal, and that the court will presume such intention if not expressly so stated; that therefore the contract will not run with the property, but only to the person insured so long as he shall have his interest in the property. This is as far as the cases go; they seem to be no authority for the doctrine of the instant case—that the contract is intended to be personal from the beginning, even though there be express intention to the contrary.

Although the general rule is that the insured must have an insurable interest at the time that the contract is made,[15] to prevent the contract being a wager and therefore void, it is possible, by analogy to the marine insurance cases,[16] to insure property in which the insured, at the time of making the policy, has no interest, if he will subsequently acquire such interest.[17] The only requirement is that

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[14] Gleason v. Bank, 13 Fed. 719 (C. C., 1882); The Sidney, 23 Fed. 88 (D. C., 1885); Northern Trust Co. v. Snyder, 76 Fed. 34 (C. C. A., 1896); Farmer's L. & T. Co. v. Penn Plate-Glass Co., 103 Fed. 132 (C. C. A., 1900), aff'd 186 U. S. 434 (1902); Va.-Car. Chemical Co. v. Ins. Co., 108 Fed. 451 (C. C., 1901); *Re* Norfolk Lumber Co., 112 Fed. 759 (D. C., 1902); Healey Ice Machine Co. v. Green, 181 Fed. 890 (C. C., 1910); *Re* Balsier, 215 Fed. 135 (D. C., 1914); Hall v. Ins. Co., 279 Fed. 892 (D. C., 1921); *Re* San Joaquin Valley Packing Co., 295 Fed. 311 (C. C. A., 1924); St. Paul Ins. Co. v. Scheuer, 298 Fed. 257 (C. C. A., 1924).

In The City of Norwich, 118 U. S. 468 (1885), the Court says: "If a mortgagor insures a property mortgaged, the mortgagee has no interest in the insurance. . . . So where property is sold, the insurance does not follow it. . . . In other words, the contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred," citing Lynch v. Dalzell, *supra*, note 5, and Sadlers' Co. v. Badcock, *supra*, note 8.

[15] Howard Ins. Co. v. Chase, 5 Wall. 509 (U. S., 1866); Andes Co. v. Fish, *supra*, note 5; Morrison v. Ins. Co., 234 Mass. 453, 125 N. E. 698 (1920); Cross v. Ins. Co., 132 N. Y. 133, 30 N. E. 390 (1892); Moving Picture Co. v. Ins. Co., 244 Pa. 358, 90 Atl. 642 (1914); Farmer's Mutual Co. v. Turnpike Co., 122 Pa. 37, 15 Atl. 563 (1888).

[16] The leading cases sanctioning the "to whom it may concern" marine policies are Hooper v. Robinson, 98 U. S. 528 (1879), and Sturm v. Boker, 150 U. S. 312 (1893). In Hagan v. Ins. Co., 186 U. S. 423 (1901), the Court decided that the party need not have any particular person in view as the ultimate beneficiary; if he intended the policy to cover the interest of any person to whom he might sell the property, that will be enough.

[17] Henshaw v. Ins. Co., Fed. Cas. No. 6387 (C. C., 1848); Lane v. Ins. Co., 12 Me. 44 (1835); London Sun Co. v. Merz, 64 N. J. L. 301, 45 Atl. 785 (1900); Sutherland v. Pratt, 11 M. & W. 296 (Eng., 1843). So farmers and warehousemen can insure the contents of their barns or warehouses over long periods of time. In many cases the goods insured are wholly future goods. Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527 (1876); Farmer's Assn. v. Kryder,

the insured have an interest at the time that loss occurs.[18] The automobiles to be manufactured by the Chrysler Corporation come within this rule, and the court made no comment on this phase of the contract, evidently considering it too well settled to merit consideration.

This policy is expressly not a contract for the insurance of the Chrysler Corporation. It can be supported as a contract of insurance if construed as a contract for the benefit of a third party. This presents two difficulties: first, that it may be a contract under seal; secondly, that the third party beneficiary is unascertained in the contract.

At the common-law, no one but the parties to a sealed instrument could bring any action on it.[19] This rule has been changed by statute in a number of jurisdictions, while in others the courts have relaxed its application.[20] Yet many jurisdictions still hold to the common-law view, and would prevent the third party suing.[21]

There are a few cases which frankly sanction suits by unascertained beneficiaries.[22] There seems to be no logical difference between the case where A promises B to pay C, a stranger, and where A promises B to pay such person as B shall select. If it be conceded that this is a contract for the benefit of a third party, there is no reason for rejecting it because the third party is unascertained. It is true there is no precedent for a fire-insurance policy of this type,[23] but this is a new case, the result of new commercial ideas, solely for the benefit of the consumer, and every effort should be made to uphold it, if possible.

It is also argued that the contract must be made with some definite person, because the insurer relies as much on the personal qual-

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5 Ind. App. 430, 31 N. E. 801 (1892); Morotock Ins. Co. v. Cheek, 93 Va. 8, 24 S. E. 464 (1896).

[18] Hanover Co. v. Orr, 56 Ill. App. 62 (1894); Peabody v. Ins. Co., 20 Barb. 339 (N. Y., 1855).

[19] Willard v. Wood, 164 U. S. 502 (1896); Harms v. McCormick, 132 Ill. 104, 22 N. E. 511 (1889); Boyden v. Hill, 198 Mass. 477, 85 N. E. 413 (1908); Styles v. Long Co., 67 N. J. L. 413, 51 Atl. 710 (1903); Case v. Case, 203 N. Y. 263, 96 N. E. 440 (1911); DeBollé v. Ins. Co., 4 Whart. 68 (Pa., 1839).

[20] Torpev v. Jahn, 177 Ill. App. 85 (1913); Tapscott v. McVey, 83 N. J. L. 747, 85 Atl. 343 (1912). In Pennsylvania, the decisions are in confusion, although late decisions seem to indicate that the third party may sue. Brill v. Brill, 282 Pa. 276, 127 Atl. 840 (1925).

[21] Notably New York and Massachusetts. Of course in these states certain sealed contracts for third parties, such as life insurance policies, are exempted by statutory provision.

[22] Whitehead v. Burgess, 61 N. J. L. 75, 38 Atl. 802 (1897); Smead v. Sterns, 173 Iowa 174, 155 N. W. 307 (1916).

[23] In the following two cases there were fire insurance policies for the benefit of third parties. In neither of them was the contract discarded as improper. Franklin v. Ins. Co., 43 Mo. 491 (1869); Vanalstyne v. Aetna Co., 14 Hun. 360 (N. Y., 1878). The latter case would probably be decided differently today, due to the decision in Case v. Case, *supra*, note 19, unless there was a statute in 1878 permitting such a contract. There seems to be no record of it.

ifications of the insured as on the physical qualities of the risk. This, however, is not accurate, since perpetual fire policies were common, and in them the insurer agrees to insure such person as shall have the ownership of the property at the time of the loss.

The discussion so far has been purely academic; it is important to mention that under the decisions in Michigan a creditor beneficiary can never sue, while there is a possibility (though doubtful) that a donee may have an action in equity. The decisions are conflicting,[24] and it is doubtful whether either type may have an action, so that this particular contract, being governed by Michigan law, is not actionable, even under the third party beneficiary theory. But similar contracts can readily be made in other jurisdictions where a third party may sue, and in such jurisdictions this contract should be construed as a policy of insurance.[25]

P. W. A.

THE CREATION OF A SPENDTHRIFT TRUST—The tendency at common law for centuries has been to discourage restraints upon alienation,[1] and it has become a firmly rooted rule that where one holds title in fee or a life estate, he may not enjoy the benefits flowing therefrom without the attendant burden of liability to his creditors.[2] The incidents attaching to a legal title apply also to an absolute equitable interest[3] and hence the doctrine of the so-called spendthrift trusts, an institution peculiarly American, has never found favor in England. The nearest approach that has been made to it in England

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[24] In Palmer v. Bray, 136 Mich. 85, 98 N. W. 849 (1904), the Court granted a donee beneficiary a right in equity. In Preston v. Preston, 205 Mich. 646, 172 N. W. 371 (1919), the court held that under 3 Comp. Stats. 1919, § 12361, the donee had a right. But in the same case on rehearing, 207 Mich. 681, 175 N. W. 266 (1919), and in Clark Memorial Association v. Colman's Estate, 222 Mich. 599, 193 N. W. 219 (1923), the court refused to discuss the statute, and the inference seems clear that the donee has no equitable right. Edwards v. Thoman, 187 Mich. 361, 153 N. W. 806 (1915), emphatically decides that a creditor beneficiary has no right. It is not certain which type the ultimate purchaser would be in this case. Certainly the Chrysler Corporation is not giving him the insurance, and by a process of elimination, he would probably be a creditor beneficiary.

[25] The court, in the course of this opinion, expresses its disapproval of the doctrines advanced in Palmetto Co. v. Conn, —— Fed. (2d) —— (D. C., (1925), and Palmetto Co. v. Beha, —— Fed. (2d) —— (D. C., 1925), discussed in 74 U. OF PA. L. REV. 415 (1926).

It expresses approval of and quotes as authority Chrysler Corp. v. Smith, —— Fed. (2d) —— (D. C., 1925).

[1] GRAY, RESTRAINTS ON ALIENATION, § 4 (1895).

[2] Brandon v. Robinson, 18 Ves. Jr. 429 (Eng., 1811), where Lord Eldon said: "If property is given to a man for his life, the donor cannot take away the incidents to a life estate." 2 COKE, LITTLETON, 30 (Thomas, 1827); 2 Min. Inst., 283, 284 (3d ed., 1882); LEWIN, TRUSTS, 111 (12th ed., 1911).

[3] 1 PERRY, TRUSTS, § 386(a) (1911).

is the separate use trust, which has become engrafted upon the common law, as an invention of the courts of equity for the protection of married women.[4] But so averse are the courts of England to the doctrine of inalienability that, even in this exceptional situation, unless the intention of the settlor to restrict the beneficiary's power of alienation is unequivocally expressed, the proceeds from such trust will be liable to attachment by the beneficiary's creditors.[5] The English rule has been accepted by some of our states, the view taken being that the power of alienation is a necessary incident to ownership, and that an institution which permits a person to avail himself of the fruits of ownership, and yet to be free from liability to his creditors, is essentially immoral and contrary to public policy.[6] However, the rule of the vast majority of states is that the power of alienation is not a necessary incident to ownership, and hence that the settlor of a trust may so dispose of his property that it will not be exposed to the demands of the creditors of the beneficiary in whom he has placed equitable title.[7] Furthermore, it is unnecessary, in the creation of a spendthrift trust, for the settlor to specify that it is his intention that the beneficiary shall not have the power of alienation, or that the beneficiary is a spendthrift, but if it is clear from the instrument that the intention of the settlor was to put the property beyond the power of the beneficiary to alienate, that intention will prevail.[8]

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[4] LEWIN, *supra,* note 2, p. 986, *et seq.* Tullett v. Armstrong, 4 Myl. & Cr. 377 (Eng., 1840). See Jackson v. Hobhouse, 2 Mer. 483, 487 (Eng., 1817).

[5] LEWIN, *supra,* note 2, p. 972.

[6] Taylor v. Harwell, 65 Ala. 1 (1880); Gray v. Obear, 54 Ga. 231 (1875); Pace v. Pace, 73 N. C. 119 (1875); Tillinghast v. Bradford, 5 R. I. 205 (1858). In his preface to RESTRAINTS ON ALIENATION, Gray says, "One of the worst results of spendthrift trusts, it is true, is the encouragement it gives to a plutocracy, and to the accumulation of a great fortune in a single hand, through the power it affords to rich men to assure the undisturbed possession of wealth to their children, however weak or wicked they may be." See comment in 11 COL. L. REV. 765 (1911). For a treatment of the subject of restriction upon voluntary and involuntary alienation, see FOULKE, RULES AGAINST PERPETUITIES, ETC., §§ 8-10 (1909).

[7] In the leading authority for this rule, it was said, *inter alia,* "Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives without pecuniary return, who gets nothing of the property value from the donee, may not attach to that gift the incident of continued use of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self protection, should not be permitted to do so, is not readily perceived." Nichols v. Eaton, 91 U. S. 716 (1875). Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946 (1898); Waldo v. Cummings, 45 Ill. 421 (1867); Smith v. Towers, 69 Md. 77, 14 Atl. 497 (1888); Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882); Lampert v. Heydel, 96 Mo. 439, 9 S. W. 780 (1888); Rife v. Geyer, 59 Pa. 393 (1868).

[8] Seymour v. McAvoy, *supra,* note 7; Wallace v. Foxwell, 250 Ill. 616, 95 N. E. 985 (1911); Roberts v. Stevens, 84 Me. 325, 24 Atl. 873 (1892); Winthrop v. Clinton, 196 Pa. 472, 46 Atl. 435 (1900). See 1 UNDERHILL, WILLS, § 529 (1900).

The views of the courts in those jurisdictions which follow the majority rule are not in harmony as to what is requisite in an instrument to create a spendthrift trust. In the recent case of *Jones v. Harrison,*[9] the testator bequeathed to his son certain real estate in fee without restriction and also certain stocks and mortgages to be held in trust for his son, with the stipulation that the proceeds were payable to the son "direct." The Circuit Court of Appeals held that it was clear that the testator's intention was that his son should not have the power of alienation. The court said, "there is but a single item in its (the will's) language which expresses an intent of the testator to impose restrictions upon the beneficiary's interest. That is found in the use of the word 'direct' . . . " The court went on to say, "Looking to the circumstances . . . we find further ground in support of the restriction . . . If it was the intent of the testator that the property covered by the trust should be subject to the same liability (as that bequeathed absolutely), what possible object was there in creating the trust?"

A different attitude was taken by the District Court of Maryland in *Dudley's Estate,*[10] where similar facts were presented. The testator left his property in trust for his children, "the payments to be made by the trustees into the hands of him or her, as the case may be, personally." These words were held not to be a sufficient indication of the testator's intention to create a spendthrift trust. The court's attention was called to the case of *Smith v. Towers,*[11] where it was held that the words "into his own hands and not into another, whether claiming by his authority or otherwise," evinced the testator's intention to restrict the beneficiary's power of alienation. The court, however, refused to consider it analogous and said: "since it is contrary to the policy of the law to allow property to be fettered by restraints upon alienation, unless the language of the donor and founder of the trust be free from doubt, it must be held, so far as the language under discussion is concerned, that the estate of the bankrupt was clothed with the usual incidents of such property and passed to his trustee in bankruptcy." [12]

These two cases are illustrative of the two opposing attitudes assumed by the courts when deciding upon the sufficiency of an instrument to effect a restriction upon the beneficiary's interest. The view of the court in *Dudley's Estate* is that a spendthrift trust is

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[9] 7 Fed. (2d) 461 (C. C. A., 1925).

[10] 3 Fed. (2d) 832 (D. C., 1925).

[11] 69 Md. 77, 14 Atl. 497 (1888).

[12] See also L'Hommedieu v. Hommedieu, 131 Atl. 302 (N. J. Ch., 1925), where it was said: "A testator is empowered to direct the distribution of his estate as he shall see fit within the limits prescribed by law, by the unequivocal language of his last will and testament, and if he does not see fit to cut down the bequest therein made, he should be presumed to have given an unqualified interest or estate of that character." First Nat'l Bank v. Burns, 199 S. W. 282 (Mo., 1917); Pickens v. Dorris, 20 Mo. App. 1 (1885).

contrary to public policy, and hence should be discouraged, and, without very clear evidence of the testator's intention that the proceeds of the trust are to be inalienable, the creditor of the beneficiary will be permitted to attach the beneficiary's interest. This view is reminiscent of the English rule, and is strongly contended for by text writers.[13] The view taken by the court in *Jones v. Harrison* is that there is nothing contrary to public policy in an institution which enables a donor to make provision for one who, through his improvidence or other cause, is unable to properly protect himself,[14] and that every effort should be made to determine the testator's intention. Some courts have gone so far as to say that even though the instrument does not give evidence of an intention to create a spendthrift trust, nevertheless, if from the attendant circumstances a reasonable inference may be drawn that such was the object of the testator, that inference will govern the court,[15] and that the mere fact of creating a trust indicates distrust in the beneficiary and is evidence of an intention to impose a restriction upon alienation.[16]

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[13] FOULKE, *supra*, note 6, p. 153; GRAY, RESTRAINTS ON ALIENATION, preface.

[14] See, in accord on this point, Leavitt v. Bierne, 21 Conn. 1 (1850); Fisher v. Taylor, 2 Rawle 33 (Pa., 1829); Holdship v. Patterson, 7 Watts. 547 (Pa., 1838).

[15] *Cf.* Stambaugh's Estate, 135 Pa. 585, 19 Atl. 1058 (1890). In that case evidence of insolvency of the beneficiary at the time that the trust was created was admitted and this fact was held to be sufficient evidence of an intention to create a spendthrift trust. The court said, *inter alia*, at p. 597: "It is said, however, that we must search only for the intent of a testator within the four corners of the will. This is true, but, when we come to consider the will and interpret its meaning, we must do so in the light of all the circumstances by which the testator was surrounded when he made it, and by which he was probably influenced." This case represents a decided departure from the rules established by the earlier Pennsylvania cases. See Girard v. Chambers, 46 Pa. 485 (1864), where the testator's son was granted an income for life, but there was no expressed limitation upon the son's power of alienation. The court said, "There can be no doubt of the intention of the testatrix to secure the income of this fund to her son during his natural life. . . . The income . . . could have been secured to the son by provision against alienation, but this has not been done, and we are reluctantly obliged to defeat the intention of the mother . . . etc."

It seems that, up to the time of the decision of Stambaugh's Estate, a restriction upon alienation, to be effective, had to be expressed. In Holdship v. Patterson, *supra*, note 14, the interest from the trust was payable to the beneficiary's personal maintenance. In Shankland's Appeal, 47 Pa. 113, the provision, "without being liable to his debts", appeared. In Still v. Spear, 45 Pa. 168 (1863), interest was payable to the *cestui que trust* at the discretion of the trustee.

See a criticism of Stambaugh's case in Shoup's Estate, 31 Pa. Super. 162 (1906). For an exhaustive treatment and trenchant criticism of the Pennsylvania cases which established the doctrine of the spendthrift trust, see FOULKE, *supra*, note 6, p. 151 *et seq.*; GRAY, supra, note 1, p. 193 *et seq.* See also John Marshall Gest, *Practical Suggestions for Drawing Wills*, 55 U. OF PA. L. REV. 465, 494 (1907).

[16] Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339 (1905); Everitt v. Haskins, 102 Kan. 546, 171 Pac. 632 (1918); Higbee v. Brockenbrough, 191 S. W. 994 (Mo., 1917). Stambaugh's Estate, *supra*, note 15.

From the recent cases it would seem that the tendency of the courts is toward leniency in the requirements of an instrument to create a spendthrift trust.[17] The majority of these cases, however, do not hold that the fact of creating a trust is indicative of the testator's intention to prevent alienation, but if there is an expression upon the face of the instrument which may reasonably lead to the conclusion that the settlor intended to place safeguards about the beneficiary's interest, there is an inclination to favor the beneficiary.

Thus it would seem that despite the tendency of the common law to restrict the power of restraint upon alienation and despite the contentions of very respectable authorities that the doctrine of spendthrift trusts is a vicious one, the courts seem to look with more and more favor upon it. But in certain situations a contrary attitude is evidenced in legislation as where, out of sympathy for those peculiarly favored by the law, a limit has been placed upon the beneficiary's undisturbed enjoyment of his interest. In *Philadelphia v. Lockard* [18] it was held that the beneficiary's interest was not subject to attachment for the support of his wife and children. This anomaly was remedied in the *Wills Act* in Pennsylvania [19] which provided that the pro-

[17] In Hoffman v. Beltzhoover, 71 W. Va. 72, 76 S. E. 968 (1912), it was held that where the testator provided that the interest derived from the trust was for the sole use and support of his son during his life, a spendthrift trust was created.

In Cady v. Lincoln, 100 Miss. 765, 57 So. 213 (1911), the court was very liberal, holding that the testator intended to create a spendthrift trust where his will specified that the proceeds from certain property placed in trust were to be "applied to the support and maintenance" of the beneficiary.

In Millard v. Beaumont, 185 S. W. 547 (Mo., 1916), the testator bequeathed to H. M. certain property to be held by him during his life, but without the power of incumbrance or alienation. It was held that no trust was created and hence the restriction upon alienation void. *Cf.* Muir's Ex'rs v. Howard, 178 Ky. 51, 198 S. W. 551 (1917), where a life estate was bequeathed to the testator's son to be held by trustees, without power of alienation, and it was held that a spendthrift trust resulted.

In Eaton v. Lovering, 125 Atl. 433 (N. H., 1925), the testator put certain property in trust for his son, with the stipulation that the proceeds were to be expended for the son's benefit; it was held that the testator's intention was to create a spendthrift trust since, when the trust was created, he knew that his son was a spendthrift, and had a wife and daughter dependent upon him.

In Comm. Tr. Co. v. Bayles, 273 S. W. 759 (Mo. App., 1925), the will specified that payment of proceeds of the trust were payable "to the *cestui que trust* only." A spendthrift trust was held to have been created.

In *In Re* Walters, 278 Pa. 421, 123 Atl. 408 (1924), where proceeds of the trust were payable at the discretion of the trustees, a spendthrift trust was created. See also Perabo v. Gallagher, 241 Mass. 207, 135 N. E. 113 (1922); Matthews v. Van Clew, 282 Mo. 19, 221 S. W. 34 (1920); Coyle v. Donaldson, 90 N. J. Eq. 122, 105 Atl. 605 (1918); Frisbie's Estate, 266 Pa. 574, 109 Atl. 663 (1920); *In re* Stevens, 261 Pa. 479, 110 Atl. 159 (1920); Newport Trust Co. v. Chapell, 40 R. I. 383, 101 Atl. 323 (1917); White v. O'Brien, 251 S. W. 785 (Tenn., 1923); Adams v. Williams, 112 Tex. 469, 248 S. W. 673 (1923).

not hold that the fact of creating a trust is indicative of the testator's

[18] 198 Pa. 572, 48 Atl. 496 (1901). See 64 U. OF P. L. REV. 760 (1916).

[19] Wills Act, § 19, Pa. Stat. 1920, § 8330. See the Report of the Commission to Codify and Revise the Law of Decedent's Estates, p. 72 (1917), where it is said, "The Commissioners have been impressed with the evil arising from

ceeds of a spendthrift trust may be attached if the beneficiary fails to provide for his wife and children. In *Thackara v. Mintzer* [20] the beneficiary's interest was held not to be subject to attachment for the payment of alimony in arrears. In *Overman's Appeal,*[21] where one of the beneficiaries was the trustee and he wasted the estate, it was held that his share of the remaining estate was not liable for the devastavit. The courts, once recognizing the validity of spendthrift trusts, are helpless to mitigate the harm which may flow from them, as in the above cases. The remedy is in legislation.

C. I. C.

THE RELATION OF BANK AND BUYER UNDER A COMMERCIAL LETTER OF CREDIT—Where a buyer of goods procures from his bank the issuance of a commercial letter of credit naming his seller as beneficiary, and providing for payment to the latter on the fulfillment of certain conditions, it not infrequently becomes necessary to inquire into the relations of the bank and its customer (the buyer) and to determine the nature of their mutual obligation. Their agreement will, of course, govern, and by it, as usually arranged, the buyer promises to indemnify the bank for its payment to the seller, or *bona fide* purchaser of drafts drawn by the seller, provided that the latter has complied with the conditions held out as a prerequisite to his availing himself of the credit. A strict compliance is exacted of the seller in order that he may successfully demand payment.[1] If, for instance, the shipping documents which he tenders with his draft do not conform to the requirements of the letter of credit, it is well-established law that the bank may refuse to honor his drafts.[2] It

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the abuse of the doctrine of spendthrift trusts in this Commonwealth." The decision of the courts hold it legal for a testator in disposing of his own property to bequeath it in trust so that he shall not be liable for the debts of the beneficiary; but it is believed that this protection should not be accorded to prevent the application of the income of the beneficiary, and enable him to escape his marital and parental duties. See Act of 1921, P. L. 434, Pa. St. Supp. 1924, § 907a.

[20] 100 Pa. 151 (1882).

[21] 88 Pa. 276 (1878).

[1] For an extended discussion of the various theories as to the nature of the contract rights created by a letter of credit, see W. E. McCurdy, *Commercial Letters of Credit,* 35 HARV. L. REV. 539, 563 (1922). The prevailing American view is that the letter of credit is a direct contract between the issuing bank as promisor and the seller as promisee, supported by consideration moving from the buyer in the form of an agreement to reimburse and pay a commission. American Steel Co. v. Irving Nat. Bank, 266 Fed. 41 (C. C. A., 1920); Gelpcke v. Quentell, 74 N. Y. 599 (1878); Frey v. Nat. City Bank, 193 App. Div. 849, 184 N. Y. Supp. 661 (1920). *Cf.* Bank of Taiwan v. Gorgas-Pierie Mfg. Co., 273 Fed. 660 (C. C. A., 1921), 1 Fed. (2d) 65 (C. C. A., 1924).

[2] Arctic Ice & Coal Co. v. Southgate, 287 Fed. 48 (C. C. A., 1923); Lamborn v. Lake Shore Banking & Trust Co., 196 App. Div. 504, 188 N. Y. Supp. 162 (1921). *Cf.* International Banking Corp. v. Irving Nat. Bank, 283 Fed. 103 (C. C. A., 1922).

follows, then, that the bank which pays against insufficient documents cannot recover from the buyer, at whose instance the credit was issued.[3] And so the tendency of the courts has been to regard the buyer's obligation to reimburse the bank as quite coördinate with the bank's obligation to pay the seller, *i. e.*, to insist upon as strict a compliance by the bank in accepting or paying the seller's drafts as by the seller in tendering the requisite documents.[4] A desire to ease the burden put upon the bank is, however, found in the dictum of the court in *Bank of Montreal v. Rocknagel,*[5] to the effect that a bank which has paid against documents defective according to the requirements of the letter can nevertheless recover from the buyer if such facts existed as would have authorized the requisite recital of them in the documents.

The Supreme Court of Pennsylvania has assumed a somewhat different attitude toward the buyer-bank problem. In a recent decision[6] that court views the buyer as vesting the bank with a "discretionary power of acceptance" with respect to the seller's drafts, adding, as we should expect, that such discretion merely imports "the exercise of independent judgment, or the power of the officers of the bank to act without control, but it does not include an arbitrary or capricious judgment or an abuse of the power." The issuing bank would obviously not be protected when it makes an unauthorized payment of a draft. The opinion is novel in its clear-cut view of the relations of the buyer and the bank as not in all respects correlative with the obligations of the bank to the seller.

It is interesting to note that the court[7] discards the dictum of the Recknagel case,[8] holding that its doctrine would, by setting up the performance of the contract between customer and a third party (the seller) as a test of the performance of the customer and the

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[3] Bank of Montreal v. Recknagel, 109 N. Y. 482, 17 N. E. 217 (1888). For a case in which the mistake of the issuing bank in allocating to the buyer's account the draft of the seller on another person's account prevented a recovery by the bank against the buyer, see Munroe v. Bonanno, 16 App. Div. 421, 45 N. Y. Supp. 61 (1897).

[4] Pan-American Bank & Trust Co. v. Nat. City Bank, 6 Fed. (2d) 762 (C. C. A., 1925), discussed in 74 U. OF P. L. REV. 308; Toco v. Bank of Italy, 249 Mass. 267, 143 N. E. 905 (1924); Laudisi v. American Exch. Nat. Bank, 239 N. Y. 234, 146 N. E. 347 (1924).

[5] *Supra,* note 3, pp. 488, 494, 17 N. E. 219, 222. See Lamborn v. Lake Shore B. & T. Co., *supra,* note 2, p. 507, 188 N. Y. Supp., p. 164; Nat. City Bank v. Seattle Nat. Bank, 121 Wash. 476, 484, 209 Pac. 705, 707 (1922).

[6] Camp, Sherburne, Stockton and Continental Products Corp. v. Corn Exch. Nat. Bank, January 4, 1926. While in that case the buyer's agreement with the bank expressly gave the latter the right to exercise its discretion in accepting drafts, the language of the opinion of Kephart, J., indicates that the court based its decision upon the general duty of the bank to the buyer, apart from any express provision.

[7] Camp v. Corn Exch. Nat. Bank, *supra,* note 6.

[8] *Supra,* note 5.

bank, lead to a result counter to the established view that the contract involved in a letter of credit is separate and distinct from the sales contract between the buyer and the seller.[9] It is clear, too, as the court recognizes, that the application of such a rule might well make a decision turn upon facts not ascertained until after the draft has been accepted or rejected. The facility and despatch of commerce demand that the bank be in possession of all the facts necessary to determine its liability at the time when the documents are presented to it.

What will be the effect of the bank's "discretion" as to accepting the seller's draft? It should, clearly, mean that there may be situations wherein the bank will not be bound to pay the seller, but will not be prevented from a recovery against the buyer in the event that it does elect to pay. If, for example, as has been observed in a recent article,[10] the documents tendered by the seller do not conform to the exact requirements of the letter of credit because of the use of technical language but according to their meaning they represent a compliance in fact, the bank is acting within its rights if it refuses to pay the seller, since it is not expected to be so expert in any particular trade as to be versed in the peculiar terminology thereof; but there would be no abuse of its discretion if it decided to pay, in consideration of the seller's accommodation or its own commercial reputation. A right of indemnity against the buyer would therefore be a fair and logical consequence. It is thus evident that the bank's right against the buyer does not necessarily presuppose the seller's right against the bank.

One is now naturally led to inquire whether, when the seller complies with all the conditions of the credit, the bank's honoring of his drafts will in all cases entitle it to a recovery against the buyer. The current of authority would seem to imply that this question should be answered in the affirmative;[11] but whether so ironclad a rule should prevail is at least open to discussion. A recent New York case[12] affords an illustration of a difficulty to which its application leads us. There it was held that a bank issuing a letter of credit must pay the seller's drafts when accompanied by the proper documents even though it knew, or at least had reason to believe, after investigation, that the goods represented by them were defec-

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[9] American Steel Co. v. Irving Nat. Bank, *supra*, note 1; Bank of Taiwan v. Gorgas-Pierie Mfg. Co., *supra*, note 1; Frey v. Nat. City Bank, *supra*, note 1; Imbrie v. Nagase, 196 App. Div. 380, 187 N. Y. Supp. 692 (1921); Lamborn v. Lake Shore B. & T. Co., *supra*, note 2.

[10] Herman N. Finkelstein, *Performance of Conditions Under a Letter of Credit*, 25 COL. L. REV. 724, 735 (1925).

[11] Pan-American Bank & Trust Co. v. Nat. City Bank, *supra*, note 4; Tocco v. Bank of Italy, *supra*, note 4; Laudisi v. American Exch. Nat. Bank, *supra*, note 4; Philippine Nat. Bank v. Bowring, 204 N. Y. Supp. 327 (1924), aff'd 240 N. Y. 658, 148 N. E. 747 (1925).

[12] O'Meara v. Nat. Park Bank, 239 N. Y. 386, 146 N. E. 636 (1925).

tive.[13] The buyer would, as a natural consequence, be obligated to reimburse the bank although the goods he obtains may prove worthless; the result, moreover, is unfortunate for the bank as well, as pointed out in the strong dissenting opinion of Cardozo, *J.*,[14] since it is deprived of the full value of the security it has in the goods. It is submitted that it is in such a case as this that the doctrine of the bank's discretion in honoring drafts finds a most persuasive *raison d'être;* and its application would be doubly fortunate in that it would protect buyer and bank, at the expense of the seller alone (who is in fact often responsible for the defective quality or insufficient character of the goods).

While the doctrine thus carried out to its logical implications might do violence to the statement found in the cases [15] that the letter of credit is wholly independent of the sales contract, there is no reason to believe that it would run counter to the wholesome effect of that policy in not requiring the bank, when the draft is presented, to investigate and determine whether the goods are defective. Unless the bank knew, or had strong reason to believe, that the goods were not of the quality that the documents indicated, its honor of the seller's draft would seem to be within the exercise of a sound discretion.[16] The bank's liability remains fundamentally one based upon the letter of credit. The rule suggested by the Pennsylvania court is not, obviously, to be taken as subversive of the recognized principle that the bank is not liable for defects in the character or quality of the goods,[17] any more than it is hostile to the view of the courts which refuses to shoulder upon the bank any guarantee of the genuineness of the documents tendered with the drafts when it pays in good faith against them and they are valid on their face.[18] A bank which pays knowing the documents to be forged, or being in such a position as to be charged with notice of that fact, clearly should not be protected in making the payment.[19]

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[13] Where in such a situation the draft is presented by one who has bought it in good faith and for value, there would seem to be little doubt as to the issuing bank's obligation to pay.

[14] O'Meara v. Nat. Park Bank, *supra,* note 12, p. 401, 146 N. E. 641.

[15] *Supra,* note 9.

[16] Where, however, the bank knows that the documents, though correct in form, are in fact false or illegal, it would seem to be an abuse of its discretion for it to recognize them as complying with the letter of credit. Old Colony Trust Co. v. Lawyers' Title & Trust Co., 297 Fed. 152 (C. C. A., 1924).

[17] Basse v. Bank of Australasia, 90 L. T. R. 618 (Eng., 1904); Benecke v. Haebler, 38 App. Div. 344, 58 N. Y. Supp. 16 (1899), aff'd 166 N. Y. 631, 60 N. E. 1107 (1901).

[18] Woods v. Thiedemann, 1 H. & C. 478 (Eng., 1862); Ulster Bank v. Synott, I. R. 5 Eq. 595 (1871). *Cf.* Springs v. Hanover Nat. Bank, 209 N. Y. 224, 103 N. E. 156 (1913).

[19] *Cf.* Union Bank of Canada v. Cole, 47 L. J. C. P. (N. S.) 100 (Eng., 1877).

The attitude of the court in *Camp v. Corn Exch. Nat. Bank*,[20] cannot be said to be antithetical, at least in spirit, to any of the accepted doctrines which have come to govern commercial letters of credit, but rather represents an attempt to formulate a harmonious and practical working rule consistent therewith for the mutual benefit of bank and buyer. As long as the bank in honoring drafts keeps within the discretion ascribed to it, which would necessarily preclude the doing of acts known or reasonably likely to be prejudicial to the buyer, the latter will have no cause for complaint. On the other hand, the bank will not feel fettered by the restraint of any rule which might on some occasions necessitate an insistance upon what to the business world would seem academic technicality, and thus it will not incur the risk of impairing its reputation for swift response to demands made upon it under its letters of credit. In a period of our economic development which requires that extensive commercial transactions be attended with facility and speed, it would seem that the doctrine of the bank's discretionary power of acceptance may well have a persuasive voice in guiding future decisions of letter of credit cases.

J. H. W.

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[20] *Supra*, note 6.