RECENT CASES

Bills and Notes—Conditional Delivery—Admissibility of Parol Evidence—The plaintiff, indorsee of a promissory note, sued the defendants as accommodation indorsers. The defendants offered to prove by parol evidence a contemporaneous oral agreement with the maker, of which the payee bank had notice, that the note should not become operative until indorsed by certain others, which never occurred. *Held:* Evidence properly admitted to show conditional delivery. *Towle-Jamieson Co. v. Brannan*, 205 N. W. 699 (Minn., 1925).

The rule is well settled that parol evidence is not admissible to vary or contradict the terms of a negotiable instrument. 1 Daniel, Negotiable Instruments, § 80 (6th ed. 1913). Thus it has been held that, even as between the immediate parties, evidence may not be admitted to show an agreement not to enforce payment, or to limit the liabilities of the parties; *Wood v. Surrells*, 89 Ill. 107 (1878); *Remington v Detroit Mfg. Co.*, 101 Wis. 307, 77 N. W. 178 (1898); or that the instrument was not to be negotiated, but renewed; *Waddle v. Owen*, 43 Neb. 489, 61 N. W. 731 (1895); *Heist v. Hart*, 73 Pa. 286 (1873); or that it was to be payable to someone other than the person named therein as payee; *Draper v. Rice*, 56 Iowa 114, 7 N. W. 524 (1881); *Strachan v. Muxlow*, 24 Wis. 21 (1869); or that the date of maturity was different from that expressed on the face of the note. *Crooker v. Hamilton*, 3 Ga. App. 190, 59 S. E. 722 (1907); *Mallory v. Fitzgerald*, 69 Neb. 312, 95 N. W. 601 (1903). In one recent case, evidence introduced to show an agreement as to what was to be done with a note after delivery was excluded by the court, on the ground that the agreement was not a condition precedent to the obligation on the note, and, the note being valid, the terms could not be varied. *Silliman v. Dobner*, 205 N. W. 696 (Minn., 1925).

Parol evidence, however, may always be introduced in an action between the immediate parties or those taking with notice to show that no obligation ever arose from the writing. *Norman v. McCarthy*, 56 Colo. 290, 138 Pac. 28 (1914); *Niblock v. Sprague*, 200 N. Y. 390, 93 N. E. 1105 (1911). Hence the rule first mentioned is not so broad as it would at first seem, and the problem in each case narrows down to whether the contemporaneous agreement is one which does, in effect, vary the terms of the instrument, or one which shows that the instrument purporting to be a contract is in fact no contract at all.

Thus, extrinsic evidence is admissible against an original party or one having notice, to show a lack of consideration; *Independent Brewing Assn. v. Klett*, 114 Ill. App. 1 (1904); *Aldrich v. Whitaker*, 70 N. H. 627, 47 Atl. 591 (1900), (unless defendant is an accommodation party; *N. I. L.*, § 29); or a failure of consideration; *Holmes v. Farris*, 97 Mo. App. 305, 71 S. W. 116 (1902); *Faux v. Fitler*, 223 Pa. 568, 72 Atl. 891 (1909); or that the note was merely evidence of an advancement made by the payee to the maker, both parties intending the note not to be binding; *Storey v. Storey*, 214 Fed. 973 (C. C. A., 1914); *Brook v. Latimer*, 44 Kan. 431, 24 Pac. 946 (1890); *Bond v. Vandergrift*, 128 N. Y. Supp. 1078 (1911). *Contra: Dickson v. Harris*, 60 Iowa 727, 13 N. W. 335 (1883); *Billings v. Billings*, 64 Mass. 178 (1852); *Estate of Winzinreid*,

165 Wis. 63, 160 N. W. 1064 (1917); or that the note was given as collateral security for other liability; *Lippincott v. Lawrie*, 119 Wis. 573, 97 N. W. 179 (1903).

There was some uncertainty before the *Negotiable Instruments Law*, as to whether it might be shown that the delivery of a note was conditional; *Henshaw v. Dutton*, 59 Mo. 139 (1875); but the general rule seems to have been well established that parol evidence indicating that the note was to become operative only on the occurrence of a condition did not vary or contradict the terms of the instrument, since, if there had been no valid delivery, no obligation ever arose. *Corbin v. Sistrunk*, 19 Ala. 203 (1851); *Watkins v. Bowers*, 119 Mass. 383 (1875); *Burke v. Dulaney*, 153 U. S. 228 (1893). Section 16 of the *N. I. L.* merely codified that existing rule. *Selma Savings Bank v. Harlan*, 167 Iowa 673, 149 N. W. 882 (1914); *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831 (1906); *Seattle National Bank v. Becker*, 74 Wash. 431, 133 Pac. 613 (1913).

The defendants in the instant case did not endeavor to vary or contradict the terms of the note by showing that their liability was different from that indicated on the face of the note. They sought instead to prove that they were not liable upon it at all, because the note had never been delivered to the payee as a binding obligation. It would seem, therefore, that the evidence was properly admitted.

CONSTITUTIONAL LAW—EXTENT OF FEDERAL TAXING POWER—FUTURE TRADING ACT—Under protest, the plaintiff paid a tax imposed by § 3 of the *Future Trading Act* of 1921, 42 Stat. 187, providing for a tax of twenty cents on every bushel of grain involved in certain options for contracts of purchase or sale of grain. Claiming the section is unconstitutional, the plaintiff now seeks to recover the sum thus paid. *Held:* § 3 is unconstitutional. *Trusler v. Crooks*, 46 Sup. Ct. 165 (U. S., 1926).

Other sections of this act have been declared unconstitutional. *Hill v. Wallace*, 259 U. S. 44 (1922). In that case there was a strong dictum that § 3 was constitutional. In reliance thereon, the lower court held for the defendant, in 300 Fed. 996 (D. C., 1924). Not very convincingly, Mr. Justice McReynolds now explains that the court was not indulging in dictum, but was rather limiting the decision then announced to the sections then under consideration. Though perhaps unexpected, the decision nevertheless seems justifiable. The court finds that the tax comes within the doctrine of the *Child Labor Tax Case*, 259 U. S. 20 (1922), that when a revenue act is "on its face" intended as a regulatory measure and not to raise revenue, it will be held invalid when such regulation is outside the powers of Congress. The consideration for such options for many years has been invariably one dollar per thousand bushels. Since the tax is twenty cents per bushel, its practical effect is to prohibit all such options. Clearly no revenue could ever be expected under a levy that destroyed the thing taxed, and the court is thus left with the only alternative of declaring that the tax must have been intended as a regulation. This view does not, it is submitted, deny the rule laid down in the *Child Labor Tax Case, supra*, that the court cannot infer *solely* from the heavy burden of the tax that a prohibition was really intended, for here

there was another element—the total destruction by the tax of the thing taxed. Moreover, as the court points out, this section is intimately related to sections already held invalid. Certainly the view of the lower court would make it difficult to explain how this section passed judicial scrutiny when the accompanying sections could not.

CONSTITUTIONAL LAW—SALE OF TICKETS—REGULATION BY STATE—The Pennsylvania Act of 1919, P. L. 1003, Pa. St. 1920, § 20197, amended by the Act of 1921, P. L. 997, Pa. St. Supp. 1924, § 20197, forbids the sale of steamship tickets without a license and stipulates the following qualifications: that the applicant be of good moral character, have the authorized agency for three or more companies, pay an annual fee of fifty dollars, and be bonded against fraud or misrepresentation in the sum of $1000. Convicted under this statute, the defendant appealed on the ground that it contravenes the commerce clause of the Federal Constitution. *Held:* The statute is constitutional. *Commonwealth v. Disanto,* 285 Pa. 1, 131 Atl. 489 (1925).

This decision reverses Com. v. Disanto, 85 Pa. Super. 149 (1925), which has already been discussed. See 74 U. OF PA. L. REV. 93 (1925). In holding that the statute imposes no direct burden upon foreign commerce and that it is a reasonable regulation within the police power of the state, the instant case is in accord with the views there suggested.

CONSTITUTIONAL LAW—VALIDITY OF THE UNIFORM DECLARATORY JUDGMENTS ACT—Petitioner, whose title to certain mineral property had been questioned by the proposed lessee, asked for a judgment as to his property rights under the *Uniform Declaratory Judgments Act* of 1923, P. L. 840, Pa. St. Supp. 1924, §12805a. All interested parties were joined. From a decree declaring that the petitioner possessed a fee absolute in an undivided one-third of the minerals, the proposed lessee appealed attacking, *inter alia,* the constitutionality of the Act. *Held:* The Act is constitutional. Decree reversed on the merits. *Kariher's Petition (No. 1)*, 284 Pa. 455, 131 Atl. 265 (1925).

For the history and scope of declaratory judgments, see Borchard, *The Declaratory Judgment—A Needed Procedural Reform,* 28 YALE L. J. 1, 105 (1918); Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment,* 16 MICH. L. REV. 69 (1917). See also Borchard, *The Uniform Act on Declaratory Judgments,* 34 HARV. L. REV. 697 (1921).

In the case of *Anway v. Grand Rapids Ry.,* 211 Mich. 592, 179 N. W. 350 (1920), a statute providing for declaratory judgments was declared unconstitutional, on the ground that it cast a non-judicial duty upon the courts. As pointed out in *Kariher's Petition, supra,* the case was not a proper one for a declaratory judgment, and was decided upon the authority of *Gordon v. United States,* 2 Wall. 561 (U. S., 1864), 117 U. S. 702 (1885), and *Muskrat v. United States,* 219 U. S. 346 (1911), both of which involved moot cases. The court failed to see the distinction between such cases and declaratory judgments. The decision has been severely criticized. See 73 U. OF PA. L. REV. 100 (1923); 21 COL. L. REV. 168 (1921); 6 A. B. A. JOUR. 145 (1920);

7 *Ibid.* 141 (1921); 19 MICH. L. REV. 86 (1920); 5 MINN. L. REV. 172 (1921); 30 YALE L. J. 161 (1920) and note in 12 A. L. R. 52. The instant case is in accord with the great weight of authority. *Blakeslee v. Wilson*, 190 Cal. 213, 213 Pac. 495 (1923); *Brannan v. Babcock*, 98 Conn. 459, 120 Atl. 150 (1923); *State v. Grove*, 109 Kan. 619, 201 Pac. 82 (1921); *Board of Education v. VanZandt*, 109 Misc. 124, 195 N. Y. Supp. 297 (1922), *aff'd.* in 234 N. Y. 644, 138 N. E. 481 (1923); *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965 (1924).

The question of the validity of the Uniform Act which has now been adopted in six other states was first presented in *Miller v. Miller, supra*, where it was held constitutional. *Kariher's Petition, supra*, is the second and better considered case involving this Act.

Mr. Chief Justice von Moschzisker points out the wide difference between an advisory opinion, where the facts are imaginary, and a declaratory judgment, which can be given only where there is a real controversy, and which constitutes *res judicata*. He points out that where adverse litigants are present in court, and there is a real controversy between them, a final decision rendered in any form of proceeding of which the court has jurisdiction is a judgment, whether or not it is followed by execution. The argument that the whole theory of the declaratory judgment is an unallowable innovation he answers by citing many instances where courts are constantly making decisions under established procedural forms which are in effect declaratory judgments. Moreover, it is decided that the establishment of this new procedural form does not violate the due process clause of the Constitution, since the elements necessary to the protection of the interests of all parties are preserved. *Hagar v. Reclamation Dist.*, 111 U. S. 701 (1883); *Hurtado v. California*, 110 U. S. 516 (1883). Nor does it deny the right of trial by jury, since the Act itself (§ 8) provides for the submission to a jury of any issue of fact. Where a declaratory judgment statute did not contain such a specific provision, it was nevertheless construed as requiring a jury trial of questions of fact. *Miles v. Strong*, 68 Conn. 273, 36 Atl. 55 (1896).

The decision in *Anway v. Grand Rapids Ry., supra*, cast a cloud over the progress of the declaratory judgment. If any wisps of doubt remain, they should be cleared away by the opinion of the court in the instant case.

CRIMINAL LAW—INDEFINITE SUSPENSION OF SENTENCE—POWER OF COURT—The defendant pleaded guilty to a charge of violating the liquor laws and was sentenced to one year in the penitentiary. The court ordered that the execution of the sentence be stayed provided the defendant did not subsequently violate the liquor laws. *Held:* The suspension of the execution of the sentence was for an indefinite period and beyond the power of the court. *State v. Davis*, 277 S. W. 5 (Ark., 1925).

It is generally conceded that courts have the power to suspend sentence or its execution temporarily or for a reasonable time in order to consider pending motions for appeals and new trials, or to review the judgment or proceedings supplemental to it. *Ex parte United States*, 242 U. S. 27 (1916); *Ragland v. State*, 55 Fla. 157, 46 So. 724 (1908); *People v. Reilly*, 53 Mich. 260, 18 N. W. 849 (1884). This seems to be a common law power always

exercised by the courts. 4 BL. COM. 394; CHITTY, CRIMINAL LAW, 758 (1816); 2 HALE P. C., 412 (Ed. 1847).

There is, however, a conflict among the decisions as to whether a court has power to suspend a sentence or stay its execution for an indefinite period. The majority view, in the absence of a statute to the contrary, is that courts are denied this right upon the grounds that the power to exercise discretion as to the enforcement of punishment provided by law and pronounced by the court is vested in the executive branch of the government and not in the judiciary; and this power, if exercised by the courts, would be a serious infringement upon the prerogative of the Governor to reprieve and pardon. *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459 (1907); *People v. Allen*, 155 Ill. 61, 39 N. E. 568 (1895); *State v. Sapp*, 87 Kan. 740, 125 Pac. 78 (1912). Suspension of sentence during the good behavior of the defendant is a suspension for an indefinite period. *Norman v. Rehberg*, 12 Ga. App. 698, 28 S. E. 256 (1913); *Spenser v. State*, 125 Tenn. 64, 140 S. W. 597 (1911); *Reese v. Olsen*, 44 Utah 318, 139 Pac. 941 (1914). The Federal rule is in accord with this view. *Ex parte United States, supra; United States v. Wilson*, 46 Fed. 748 (C. C., 1891).

A respectable minority, however, has held, either directly or indirectly, that a sentence may be indefinitely suspended by a court. *Commonwealth v. Dowdican*, 115 Mass. 133 (1874); *State v. Drew*, 75 N. H. 402, 74 Atl. 875 (1909); *People v. Ct. of Sessions*, 141 N. Y. 288, 136 N. E. 386 (1894). These courts base their decisions on an enlarged interpretation of the common law rule that the power to suspend belongs by common right to every tribunal invested with authority to award execution in a criminal case. It is, however, submitted that while a court has the power to enforce its own orders, it has not the power to refuse to do so permanently; and an indefinite suspension is the legal equivalent of an absolute and permanent refusal to execute sentence.

Undoubtedly, it is often desirable for a court to have a discretionary power of suspension, and, realizing this, many states have by statute vested such a power in the courts with varying limitations. By the weight of authority these statutes are constitutional. *Re Giannini*, 18 Cal. App. 166, 122 Pac. 831 (1912); *Ex parte Bates*, 20 N. M. 542, 151 Pac. 698 (1915); *State v. Malahan*, 65 Wash. 287, 118 Pac. 42 (1911). *Contra: Summerfield v. Moran*, 43 Nev. 150, 182 Pac. 927 (1919); see *State v. Dalton*, 109 Tenn. 544, 72 S. W. 456 (1902).

CRIMINAL LAW—JURISDICTION—OBTAINING MONEY BY FRAUD—TELEGRAPH COMPANY AS AGENT—The defendant sent a telegram from California to Hammond in Utah, falsely stating that the sender was Hammond's son, and asking him to telegraph the sender money in California. Hammond did so. The defendant was arrested, and is now tried in Utah for obtaining money by fraud. The defense is that, the telegraph company paid the money to defendant in California, the crime was there committed, and the court in Utah has no jurisdiction. *Held:* Utah has jurisdiction, because the telegraph company is defendant's agent to receive the money, and he therefore received it in Utah. *State v. Devot*, 242 Pac. 395 (Utah, 1925).

The general rule is that the crime of obtaining property or money under false pretenses is consummated where the property or money is obtained, rather than where the pretenses are made. *Burton v. United States*, 196 U. S. 283 (1905); *Graham v. People*, 181 Ill. 477, 55 N. E. 179 (1899); *State v. House*, 55 Iowa 466, 8 N. W. 307 (1881). But where, induced by false pretenses, one transmits money or drafts by mail, or goods by carrier, the postmaster or carrier acts as agent for the addressee, so that delivery to the postmaster or carrier is a delivery to him, and the venue is properly laid in the county in which the goods are so delivered. *Commonwealth v. Wood*, 142 Mass. 149, 8 N. E. 432 (1886); *Commonwealth v. Karpowski*, 167 Pa. 225, 31 Atl. 572 (1895).

However, as is so forcibly pointed out in the dissenting opinion, the instant case does not properly fall under the above rules. It differs from the cases cited above in that the sender gives the telegraph company title to the money, not as agent for the sendee, but absolutely, and the company merely obligates itself to pay an equivalent amount to the sendee, rather than the identical money delivered to it by the sender. In other words, the relation so created is not one of agency, but that of an independent contractor. *Eureka C. M. v. Western Union Tel. Co.*, 88 S. C. 498, 70 S. E. 1040 (1911). Under this theory, the defendant would not obtain the money until it was actually delivered into his hands, in California, and hence Utah would have no jurisdiction. This would seem to be the better view in such cases since it eliminates the fiction of agency, which should not usually be employed to give a court jurisdiction in criminal cases.

DIVORCE—FRAUD IN SECURING DECREE—EFFECT OF DEATH—The plaintiff obtained a decree of divorce from the defendant. After the plaintiff's death, the defendant brought a motion to set aside the judgment, proving that there was no service of process, and that plaintiff's affidavit for publication of summons was false. *Held:* The decree could be set aside even though one party was dead, by a motion to set aside the judgment. *Fowler v. Fowler*, 190 N. C. 536, 130 S. E. 315 (1925).

The majority of jurisdictions hold that a divorce decree may be set aside even after the complainant's death, where it was obtained by fraud on the part of the complainant, or without due service of process. *Lima v. Lima*, 26 Cal. App. 1, 147 Pac. 233 (1914); *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831 (1881); *Bay v. Bay*, 85 Ohio 417, 98 N. E. 109 (1912). Pennsylvania follows this rule. *Boyd's Appeal*, 38 Pa. 241 (1861); *Fidelity Ins. Co. Appeal*, 93 Pa. 242 (1880); *Gambe v. Gambe*, 22 Pa. C. C. 23 (1868). Two states have held otherwise—that an action for divorce is purely personal, and that upon the death of either party the subject matter of the action is eliminated and a decree of divorce cannot be thereafter set aside. *Lieber v. Lieber*, 239 Mo. 1, 143 S. W. 458 (1911); *Dwyer v. Nolan*, 40 Wash. 459, 82 Pac. 746 (1905).

Among the states allowing the decree to be set aside, there is some diversity as to the procedure. Some hold that the remedy is by a new action to set aside the decree, since the original action was terminated by the death of one party, and that any rights affected by the decree could not be consid-

ered on motion, because the proper parties interested in the property were not made parties. *Dallas v. Luster*, 27 N. D. 450, 147 N. W. 95 (1914); *Clay v. Robertson*, 30 Okla. 758, 120 Pac. 1102 (1912). California holds, in accord with the principal case, that a decree obtained without due service may be vacated on a motion in the original cause, because the decree affects the property rights as effectively as though they were the paramount object of the action, and hence the court had jurisdiction of those rights, and may on motion reconsider their decree. *Lima v. Lima, supra.* Pennsylvania is also in accord, holding that the lack of due process rendered the whole proceedings void *ab initio*, and that the decree may be set aside on a motion to vacate the decree. *Gambe v. Gambe, supra.*

The decision in the principal case is clearly in accord with the majority rule in respect to the right to set aside the decree. As to the mode of procedure, while it is largely a matter of the practice of the particular state, it is submitted that where the decree is void a motion to set it aside is a proper remedy.

FIXTURES—TITLE TO RAILS—ABANDONMENT OF EASEMENT—The defendant purchased land over which ran a right of way for the use of a tramway. Inasmuch as the tramway had not been used for a long time, the defendant removed the rails upon the assumption that the right of way had been abandoned. This was an action of detinue for the rails. *Held:* Judgment for plaintiff. *Talley v. Drumheller*, 130 S. E. 385 (Va., 1925).

The general rule is that when personalty is affixed to the soil it becomes part of the realty. But there is considerable conflict of authority as to whether this rule is applicable to railroad tracks laid upon an easement. Some jurisdictions hold that, as a matter of law, rails laid on land by virtue of an easement are fixtures, and that the general rule obtains. *Union Trust Co. v. Weber*, 96 Ill. 346 (1880); *Bedford, etc., Co. v. Oman*, 115 Ky. 369, 73 S. W. 1038 (1903); *Northern Pacific R. R. v. Carland*, 5 Mont. 146, 3 Pac. 134 (1884). Others, adhering to the general rule, regard the question of whether they have become fixtures as one of fact for the jury. *St. Louis & S. F. R. R. v. Beadle*, 6 Kan. App. 922, 50 Pac. 988 (1897); *Helena & L. Smelting Co. v. Northern P. R. R.*, 62 Mont. 281, 205 Pac. 224 (1922); *Van Keuren v. Central R. R.*, 38 N. J. L. 165 (1875). A contrary rule is applied in certain jurisdictions, where it is held that the intention of the parties, rather than the fact of affixation, is the determining factor in deciding whether rails are personalty or realty, even though annexed to the soil. Thus it is held that, when tracks are laid upon a right of way, the intention of the parties is not that the rails shall merge in the realty, but that they shall be incidental to the use of the easement, and hence that the owner of the right of way may, as in the instant case, remove them at will. *Wiggins Ferry Co. v. O. M. R. R.*, 142 U. S. 396 (1891); *Wagner v. Cleveland, etc. R. R.*, 22 Ohio 563 (1872); *Justice v. Nesquehoning, etc. R. R.*, 87 Pa. 28 (1878). In one case, the same conclusion has been reached by regarding rails as trade fixtures, and, as such, subject to that exception to the general rule. *Northern Central R. R. v. Canton Co.*, 30 Md. 347 (1869).

It is submitted that the rule which makes the intention of the parties the

criterion, in deciding whether a chattel affixed to the soil is to be regarded as a fixture, is an unjustified extension upon the common law rule. Clearly, when annexation has been effected, the character of the chattel merges with the realty, but this fact, even under the old rule, could work no hardship since by contract the right of removal could be retained when the annexation was intended merely to be temporary.

HUSBAND AND WIFE—VALIDITY OF SEPARATION AGREEMENTS—A husband and wife agreed to separate, the husband to execute a deed for his interest in their home to his wife, she to pay him $5000 to be raised by a mortgage on the dwelling, in which he agreed to join. The parties never separated. Suit by the wife six months later for specific performance. *Held:* Not granted. *Beck v. Beck,* 131 Atl. 520 (N. J. Eq., 1925).

The old common law rule was that separation agreements were not enforceable because they were considered contrary to public policy. See cases cited in 12 E. R. C. 814. These agreements are now generally upheld, on the ground that they are the better of two evils—divorce or separation. *Walker v. Walker,* 9 Wall. 743 (U. S., 1869); *Bailey v. Dillon,* 186 Mass. 244, 71 N. E. 538 (1905); *Singer's Estate,* 233 Pa. 55, 81 Atl. 898 (1911). *Contra: Hill v. Hill,* 74 N. H. 288, 67 Atl. 406 (1907). See 2 N. CAR. L. REV. 192 (1924). Some courts, with a view to the contractual incapacity of a married woman at common law, require the presence of a trustee in order to validate a contract between husband and wife. *Stephanson v. Osborne,* 41 Miss. 119 (1866); *Stebbins v. Morris,* 19 Mont. 115, 47 Pac. 642 (1896); *Poillon v. Poillon,* 49 App. Div. 341, 63 N. Y. Supp. 301 (1900). The better and modern rule is opposed, however, in view of statutes enabling married women to contract. *Jones v. Clifton,* 101 U. S. 225 (1879); *Bowers v. Hutchinson,* 67 Ark. 15, 53 S. W. 399 (1899); *Commonwealth v. Richards,* 131 Pa. 209, 18 Atl. 1007 (1889). But all courts concur in the view that such an agreement is valid only when made with regard to a separation which has already occurred, or which is to occur immediately, and not in reference to a possible future separation. *Fox v. Davis,* 113 Mass. 255 (1873); *Clark v. Fosdick,* 118 N. Y. 7, 22 N. E. 1111 (1889); *Commonwealth v. Richards, supra.*

And so, also, agreements to separate, if they are the result of mere mutual volition or caprice, or a reckless disregard of marital obligations and without any moving cause, will not be enforceable. *Boland v. O'Neil, supra; Stebbins v. Morris, supra.* But see *Daniels v. Benedict,* 97 Fed. 367, 379 (C. C. A., 1899). It is submitted that the decision in the instant case, therefore, is in accord with sound reasoning and public policy.

INSURANCE—INSURABLE INTEREST OF HUSBAND IN WIFE'S PROPERTY—The plaintiff took out, in his own name, a fire insurance policy on a barn belonging to his wife. *Held:* He had sufficient interest to permit recovery. *Wash. Fire Relief Assn. v. Albro,* 241 Pac. 356 (Wash., 1925).

Early in the law of fire insurance it was required that the holder of a policy have an interest in the property insured. Attempts to define that interest have

been a powerful stimulus to judicial ingenuity, but it is now rather generally accepted that the policy holder must stand in some jural relation to the property insured, although there is language in many cases, including the principal case, to the effect that a mere concern in the property is enough.

At common law, where the husband had the right of curtesy initiate in his wife's property, he unquestionably had an insurable interest in her property. In the states in this country when curtesy prevailed this was the rule. *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26 (1861); *Doyle v. American Fire Ins. Co.*, 181 Mass. 139, 63 N. E. 394 (1902); *Trade Ins. Co. v. Barracliff*, 45 N J. L. 543 (1883); *Webster v. Dwelling House Ins. Co.*, 53 Ohio, 558, 42 N. E. 546 (1895).

Where curtesy has been abolished, the rule is, as would be expected, that the husband no longer has an insurable interest in his wife's property, since he no longer stands in any jural relation to that property. *Planters' Ins. Co. v. Lloyd*, 71 Ark. 292, 75 S. W. 725 (1903); *Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. 428 (1889); *Clark v. Dwelling House Ins. Co.*, 81 Me 373, 17 Atl. 303 (1889); *Agricultural Ins. Co. v. Montague*, 38 Mich. 548 (1878); *Bassett v. Ins. Co.*, 85 Neb. 85, 122 N. W. 703 (1909).

It happens that the state of Washington has abolished curtesy. Laws Wash. 1875, p. 55, § 3. Thus it would seem at first blush that the decision in the principal case has turned directly against the tide of authority by allowing the husband an insurable interest where the legislature has abolished his curtesy right. The opinion proceeds on the theory, however, that an agency relationship existed, and that the husband was acting for the wife in insuring her property.

In seeking light from this quarter, the court in the instant case is in accord with a distinct tendency. The courts have frequently been ready to find an agency relationship even where the evidence was slight. *Hunt v. Mercantile Ins. Co.*, 22 Fed. 503 (C. C., 1884); *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533 (1873); *Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166, 71 N. W. 463 (1897); *Trade Ins. Co. v. Barracliff*, *supra; Harris v. York Mut. Ins. Co.*, 50 Pa. 341 (1865).

SALES—RIGHT OF INSPECTION—RELATION TO PASSAGE OF TITLE—Defendant manufacturer of Norfolk, Va., contracted to sell plaintiff a certain quality of staves and headings, shipment to be f. o. b. Norfolk, payment in thirty days. Shipments were made on plaintiff's order to customers in various places, and when the goods reached their destination, they were inspected and rejected as being of inferior quality. *Held:* The title which passed to the buyer at time of delivery of merchandise f. o. b. Norfolk was a conditional title, subject to right of inspection and rejection of merchandise at point of destination. *Struthers-Ziegler Co. v. Farmer's Mfg. Co.*, 206 N. W. 331 (Mich., 1925).

It is a general rule that where goods of a specific quality are ordered, which the seller undertakes to deliver to a carrier for delivery to the buyer at a distant place, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination. The title passes upon delivery to the carrier sub-

ject to this right, of which the purchaser may or may not avail himself. *Pope v. Allis,* 115 U. S. 363 (1885); *Pierson v. Crooks,* 115 N. Y. 539, 22 N. E. 349 (1889); *Fogel v. Brubaker,* 122 Pa. 7, 15 Atl. 692 (1888). The courts reason that it is not the duty of the purchaser to go to the point where delivery is made to the carrier for inspection of the articles before their shipment, for he has a right to rely on the good faith of the seller who has undertaken to fill his order according to its terms. The first practicable opportunity for such examination is at the time the goods reach the purchaser; and since there is no express provision as to the right of inspection, this would seem to be the time contemplated by the parties.

Lawder Co. v. Mackie Grocery Co., 97 Md. 1, 54 Atl. 634 (1903), would seem to be opposed to the instant case, but the court distinguished the cases on the ground that in the former the payment was cash rather than on credit, and for this reason the right of inspection existed only until the seller's delivery to the carrier. It is submitted that this distinction is unsatisfactory; the provision that the sale is for cash or on credit affects only the passage of title, and is not a factor controlling the duration of the right of inspection.

No strict rule may be formulated as to the time and place of inspection of goods contracted to be shipped f. o. b. The form of the contract, the nature of the goods, the intention of the parties, etc., are the determining factors in each case. The decision in the instant case seems sound, inasmuch as there is nothing in the contracts inconsistent with the buyer's right of inspection at the point of destination.

WILLS—CONDITIONS—EFFECT OF PROVISION FOR FORFEITURE—The testatrix left a legacy to the defendant, and provided elsewhere in her will that if any legatee should contest it, his legacy would be revoked and would then become a part of the residue of her estate. The defendant opposed probate of the will in good faith and upon probable cause, but without success, and the plaintiff as executor petitioned the court for a ruling on the question as to whether the defendant had forfeited his legacy. *Held:* No forfeiture. *In re Keenan's Will,* 205 N. W. 1001 (Wis., 1925).

The classic attitude toward the problem involved in the present case is to distinguish between real and personal estate, and to regard a condition for forfeiture of a legacy in case of a contest, without any gift over, as being merely *in terrorem* and consequently ineffectual to deprive the contestant of his legacy. *Morris v. Burroughs,* 1 Atk. 399 (Eng., 1737); *Matter of Arrowsmith,* 162 App. Div. 623, 147 N. Y. Supp. 1016 (1914), aff'd 213 N. Y. 704, 108 N. E. 1089 (1915); *Fifield v. Van Wyck,* 94 Va. 557, 27 S. E. 446 (1897). Where, however, the testator has made a valid gift over, the contesting legatee will incur a forfeiture. *Cleaver v. Spurling,* 2 P. Wms. 526 (Eng., 1729); *Smithsonian Institution v. Meech,* 169 U. S. 398 (1898). This doctrine is not applied in the case of real estate, and a condition that a devisee who contests the will shall forfeit his devise is valid whether or not there is a devise over. *Cooke v. Turner,* 15 M. & W. 727 (Eng., 1846); *Hoit v. Hoit,* 42 N. J. Eq. 388, 7 Atl. 856 (1886); *Whitehurst v. Gotwalt,* 189 N. C. 577, 127 S. E. 582 (1925). *Cf.*

Sackett v. Mallory, 1 Metc. 355 (Mass., 1840). But *cf. Chew's Appeal*, 45 Pa. 228 (1863); *Cochran v. Cochran*, 127 Pa. 486, 17 Atl. 981 (1889).

A number of American jurisdictions have refused to recognize the distinction between realty and personalty, on the ground of its having no substantial foundation, and consider forfeiture clauses applying to legacies without a gift over as effective as those applying to devises. *Estate of Hite*, 155 Cal. 436, 101 Pac. 443 (1909); *Moran v. Moran*, 144 Iowa, 451, 123 N. W. 202 (1909); *Bradford v. Bradford*, 19 Ohio 546 (1869). See *South Norwalk Trust Co. v. St. John*, 92 Conn. 168, 174, 101 Atl. 961, 962 (1917). The tendency of the courts, however, is to hold that a beneficiary who contests with *probabilis causa litigandi* will not be visited with an application of the testator's forfeiture clause. *South Norwalk Trust Co. v. St. John, supra; Friend's Estate*, 209 Pa. 442, 58 Atl. 853 (1904); *Tate v. Camp*, 147 Tenn. 137, 245 S. W. 839 (1922). *Contra: Estate of Miller*, 156 Cal. 119, 103 Pac. 842 (1909); *Moran v. Moran, supra. Cf. Smithsonian Institution v. Meach, supra.* It is submitted that this view, with which *In re Keenan's Will, supra*, is in accord, properly safeguards the interest of a legatee or devisee who makes an honest and reasonable attack on a will which he believes not to be that of the alleged testator, without in any way thwarting the natural desire of the latter to withhold his bounty from one in whom frivolity or guile is the actuating motive for the contest.