RECENT CASES

BANKS AND BANKING—POWER TO PLEDGE ASSETS TO SECURE GENERAL DEPOSITS—An Arizona statute provided that a certain kind of security be placed by depositaries with the state treasurer before the latter might deposit public funds therein. The treasurer demanded from a particular bank security in addition to that required by the statute, and the bank complied by pledging its assets. The bank failed and its assignees in bankruptcy sought to have this pledge declared invalid. *Held,* that the bank was bound by its pledge. *Williams v. Earhart,* 273 Pac. 728 (Ariz. 1929).

In the absence of a statutory requirement to secure a deposit there has been a decided conflict as to whether a depositary might pledge its assets for this purpose. It is generally conceded that a bank has the corporate power to borrow money and to pledge its assets as collateral for the loan,[1] and some courts perceive no distinction in this respect between a loan and a deposit—holding that the latter may with perfect propriety be secured by the bank's assets.[2] The same result is sometimes reached by regarding the right to secure deposits as a mere incident of the right to receive them.[3] Other courts, however, have definitely rejected the loan analogy, and in well reasoned opinions have decided that the power to pledge assets to secure a deposit cannot be sustained as an incidental power—that it is not a power necessary to carry on the business of banking.[4] Courts adopting this view conclude that when a statute requires public funds to be secured by the depositary in a defined manner there is thereby implied a prohibition against any other form of security, and that the pledge of the bank's assets is therefore invalid.[5] Courts favoring the former view, however, reach a conclusion in accord with that indicated by the principal case—that the statutory requirement merely defines the kind of security the public official is obliged to exact, and that he may demand and the bank may give any additional security whether it be a pledge of assets or whether it take some other form.[6] The opponents of "secret pledging" of assets present two strong arguments against this view. First, that it gives extra protection to the secured depositors at the expense of those unsecured,[7] and second, that it invites the public to deposit money upon a misrepresentation of the bank's

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[1] Auten v. U. S. Nat'l Bk. of N. Y., 174 U. S. 125, 19 Sup. Ct. 628 (1899); Citizens Bk. v. Bk. of Waddy, 126 Ky. 169, 103 S. W. 249 (1907).

[2] Williams v. Hall, 30 Ariz. 581, 249 Pac. 755 (1926); Page Trust Co. v. Rose, 192 N. C. 673, 135 S. E. 795 (1926).

[3] McFerson v. Nat'l Surety Co., 72 Colo. 482, 212 Pac. 489 (1923); Ward v. Johnson, 95 Ill. 215 (1880); MORSE, BANKING (6th ed. 1928) § 63.

[4] Commercial Bk. v. Citizens Trust Co., 153 Ky. 566, 156 S. W. 160 (1913). See also Divide County v. Baird, 55 N. D. 45, 54, 212 N. W. 236, 240 (1927).

[5] Divide County v. Baird, *supra* note 4; Note (1928) 22 ILL. L. REV. 449.

[6] Richards v. Osceola Bk., 79 Iowa 707, 45 N. W. 294 (1890).

[7] Commercial Bk. v. Citizens Trust Co., *supra* note 4 at 573, 156 S. W. at 163.

financial condition.[8] The answer that has been offered to the first argument is that a solvent corporation has the same right as an individual to prefer one creditor over another or to secure one while leaving others unsecured.[9] While the second objection—that based on public policy—has been said to be unfounded,[10] and has been evaded,[11] it has not been satisfactorily answered, and although the view indicated in the principal case is that held by a majority of the courts, nevertheless there seems to be much force in the contention that it tends to safeguard the public patron of a bank at the expense of the private citizen who deposits his savings therein.

COMMERCE—RECONSIGNED LOCAL SHIPMENTS SUBJECT TO THROUGH RATE—A rate of 34 cents per hundredweight, which had been approved by the Interstate Commerce Commission, existed between Paragould, Ark., and Marshall, Texas. At the same time the local rate in Arkansas from Paragould to Texarkana was 20.5 cents, and the local rate in Texas from Texarkana to Marshall was 8 cents. The defendant for the purpose of taking advantage of the combined local rates, which he paid, consigned goods to a consignee at Texarkana who reconsigned them to him at Marshall where the goods arrived in their original packages and under the same seals as when put on the cars at Paragould. *Held*, that the carrier could recover the balance due under the interstate rate. *Marshall Mfg. Co. v. Texas and P. Ry. Co.*, 29 F. (2d) 660 (C. C. A. 5th, 1928).

In a case arising before the passage of the *Transportation Act of 1920*[1] similar shipments had been held to be made interstate and the shipper was not permitted to take advantage of the intermediate local rates which in the aggregate were less than the interstate rate.[2] It was argued that the amendment[3] to the *Interstate Commerce Act*[4] took the principal case out of that rule because the interstate rate being greater than the sum of the two local rates was unlawful under the provisions of the statute. But the *Inter-*

[8] Divide County v. Baird, *supra* note 4 at 56, 212 N. W. at 241.

[9] Richards v. Osceola Bk., *supra* note 6 at 712, 45 N. W. at 296; Cameron v. Christy, 286 Pa. 405, 411, 133 Atl. 551, 553 (1926).

[10] Cameron v. Christy, *supra* note 9 at 410, 133 Atl. at 553.

[11] Page Trust Co. v. Rose, *supra* note 2 at 676, 135 S. E. at 797 where the court said: "Whether a sound public policy forbids such transfer . . . must be determined by the general assembly, and not by this court."

[1] 41 STAT. 474 (1920), 49 U. S. C. 1 (1926).

[2] Baltimore, etc. Ry. Co. v. Settle, 260 U. S. 166, 43 Sup. Ct. 28 (1922), holding that consigning and reconsigning does not make the shipments intrastate when there is the intention from the begining to make a through interstate shipment.

[3] 41 STAT. 480 (1920), 49 U. S. C. 4 (1) (1926) "It shall be unlawful for any common carrier subject to the provisions of this Act . . . to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act."

[4] 24 STAT. 380 (1887) prohibiting charging more for a short haul than for a long haul over the same line.

state Commerce Act imposes a duty on the carriers subject to its provisions to publish rates[5] and prohibits a carrier from charging or receiving any greater or less or different rate.[6] This provision has been strictly applied, the policy of the courts being that the rate must stand as published in order to carry out the Congressional purpose to prevent unjust discrimination.[7] When once a rate is filed with the Interstate Commerce Commission and published it becomes the legal rate and is conclusive as between the carrier and the shipper until the Commission makes a change.[8] The carrier is prohibited from departing therefrom, and if the shipper refuses to pay the rate as published the carrier may sue for its recovery.[9] The court therefore held the rate published for the interstate shipment was the only legal rate and applied even though it violated the provision against charging more for a through rate than the aggregate of the intermediate tariffs. The same has been held where the published rate violated the long and short haul clause of the Act.[10] This decision is another illustration of how the courts apply the published rates approved by the Interstate Commerce Commission as conclusively controlling in cases arising between the carrier and the shipper.[11]

CONSTITUTIONAL LAW—INJUNCTION UNDER SHERMAN ACT—SELLING AND INSTALLING PIPE-ORGANS IS NOT INTERSTATE COMMERCE—Plaintiff, a foreign corporation, contracted to sell and install certain pipe-organs. Plaintiff maintained an open shop both as to manufacturing and installing, and had its own men do all of the work required by its contracts. Defendants, certain labor organizations, conspired to maintain a boycott against plaintiff's products and installation. Plaintiff sought a preliminary injunction on the ground that defendants were engaged in a conspiracy in restraint of interstate commerce, by reason of the *Sherman Act*,[1] as amended by the *Clayton Act*.[2] *Held*, (one judge dissenting) that the installation is not a part of interstate commerce. *Aeolin Co. v. Fischer*, 29 Fed. (2d) 679 (C. C. A. 2d, 1928).

The sole question presented was whether the defendants were restraining

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[5] 34 STAT. 586 (1906), 49 U. S. C. 6 (1) (1926).

[6] 34 STAT. 587 (1906), 49 U. S. C. 6 (7) (1926).

[7] Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 163, 43 Sup. Ct. 47, 49 (1922).

[8] Louisville & N. R. R. Co. v. Maxwell, 237 U. S. 94, 35 Sup. Ct. 494 (1915); Keogh v. C. & N. W. Ry., *supra* note 7; Pillsbury Flour Mills Co. v. Great Northern Ry. Co., 25 F. (2d) 66 (C. C. A. 8th, 1928).

[9] Penna. Ry. Co. v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893 (1912); Norfolk & W. Ry. Co. v. Emmons Coal & Mining Co., 287 Fed. 168 (D. C. Pa., 1923).

[10] Beaumont, S. L. & W. Ry Co. v. Magnolia Provisions Co., 26 F. (2d) 72 (C. C. A. 5th, 1928).

[11] See in general Robinson, *The Filed Rate in Public Utility Law* (1928) 77 U. OF PA. L. REV. 213.

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[1] 26 STAT. 209 (1890), 15 U. S. C. § 1 (1928).

[2] 38 STAT. 730 (1914) 15 U. S. C. § 26 (1928).

interstate business, for only in that event would the right to an injunction arise.[3] Two opposing lines of decisions confronted the court. On the one side were the holdings of the Supreme Court to the effect that selling and installing lightning-rods,[4] selling and installing railroad switch-signals,[5] and redelivering fabricated steel from its agent to the vendee, in the state seeking to regulate, after previous delivery from outside to the agent,[6] are examples of local, intrastate business. On the other side were Supreme Court holdings that selling and delivering a picture and frame, to be assembled in the state of delivery,[7] selling and installing an ice-machine,[8] and selling and installing printing presses[9] are wholly interstate transactions. Just where the line exists has never been clearly determined, and each case must depend on all its relevant factors. The court in the principal case, adopting a dissenting opinion in a recent federal case,[10] suggested that the distinction was "between shipping into a state raw materials, there to be manufactured into a deliverable form, and assembling within a state an article requiring skill to set up, of which a sale had been made in interstate commerce."[11] In the *Ice-Machine* case the suggested point of differentiation was ". . . whether the service to be done in a state as the result of an interstate commerce sale was essentially connected with the subject-matter of the sale; that is, might be made to appropropriately inhere in the duty of performance."[12] Also in that case the court distinguished the *Signal-Switch* decision on the ground that further duties involved there were "inherently" intrastate. In final effect, then, the test would seem to be: how intimately connected with the sale itself is the act sought to be characterized as local? While some of the record in the principal case tends to show that some of the plaintiff's business of installing would be "construction" (and so intrastate), most of it points to a mere process of assembly, and it is therefore felt that on a full record[13] the Supreme Court would class this case in the interstate group.[14]

[3] Moore v. N. Y. Cotton Exch., 270 U. S. 593, 46 Sup. Ct. 367 (1926); Geddes v. Copper Co., 254 U. S. 590, 41 Sup. Ct. 209 (1921).

[4] Browning v. Waycross, 233 U. S. 16, 34 Sup. Ct. 360 (1914).

[5] General Ry. Signal Co. v. Virginia, 246 U. S. 500, 38 Sup. Ct. 360 (1918). No reasons for this decision were given, except to announce that it was within the principle of the Lightning-Rod case, *supra* note 4.

[6] Dozier v. Alabama, 218 U. S. 124, 30 Sup. Ct. 649 (1910).

[7] Kansas City Steel Co. v. Arkansas, 269 U. S. 148, 46 Sup. Ct. 59 (1926).

[8] York Co. v. Colley, 247 U. S. 21, 38 Sup. Ct. 430 (1918).

[9] Duplex Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1921).

[10] Cone v. Machine Co., 20 Fed. (2d) 593, 597 (C. C. A. 6th, 1927).

[11] Principal case, at 680. Thus they distinguish between actual construction and the mere assembly of the already constructed parts.

[12] *Supra* note 8, at 24. The language of the court here flatly disapproves the Lightning-Rod case, *supra* note 4, but indicates that this decision expressly excepted the situation which now was up for consideration.

[13] The force of the majority's holding is somewhat weakened by the emphasis placed by the court on the paucity of facts in the record and affidavits, on the plaintiff's burden to show that it was within the statute, and the reluctance to reverse the lower court's discretionary decree.

[14] For a collection of state decisions on the point involved herein, see: note (1918) 11 A. L. R. 614, 616.

CONTRACTS—APPROVAL OF PROMISEE AS A CONDITION—The lessee covenanted to insure "in the Law Fire Office or in some other responsible insurance office to be approved by the lessor . . ." A policy in the Atlas Company, of admitted financial responsibility, was tendered. The lessor refused to approve and brings an action for breach of covenant. *Held,* (one judge dissenting) that the lessor had a right to disapprove. *Tredgar v. Harwood,* [1929] A. C. 72.

A contract to perform to another's satisfaction is valid and enforceable.[1] Under such a clause, the mere expression of satisfaction by the promisee is not the criterion by which the promisor's performance is to be judged.[2] If such were the case, the promise would be flagrantly illusory.[3] The promisee's judgment must be exercised fairly and honestly,[4] and not as a mere afterthought or fictitious defense. His verbal expression is by no means conclusive, at least in so far as the jury finds that it does not reveal a state of true dissatisfaction existing in his mind.[5] In New York[6] and a minority of other states[7] the courts are inclined to go one step further. The word "reasonable" is construed into the contract, more or less in defiance of the intention of the parties. This has the effect of shifting the seat of judgment from the promisee to the jury, who are the ultimate judges of what is reasonable. Such a construction seems artificial and unfair to the promisee. At best, it should be strictly limited to cases where the subject matter of the contract is devoid of the element of personal taste.[8] The principal case seems correct in applying the "honest" dissatisfaction test to a contract of insurance, and, while opposed in theory to the New York decisions, has the important virtue of being a truthful interpretation of the intention of the parties, as clearly expressed in the contract.

CORPORATIONS—LIABILITY OF INNOCENT PURCHASERS OF PARTIALLY PAID-UP STOCK TO CORPORATE CREDITORS—In an action by creditors of a corporation against stockholders for unpaid balances of the price of the stock, *held,* that those stockholders who purchased their stock in the open market for value and without knowledge that the corporation had not been paid the par value are not liable. *Gray Const. Co. v. Hyde,* 222 N. W. 675 (S. D. 1928).

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[1] 1 WILLISTON, CONTRACTS (1920) 74; CORBIN, *Conditions in the Law of Contracts* (1919) 28 YALE L. J. 738, 763.

[2] Williams v. Hirshorn, 91 N. J. Law 419, 103 Atl. 23 (1918); Jessup & Moore Paper Co. v. Bryant Paper Co. 283 Pa. 434, 129 Atl. 559 (1925).

[3] CORBIN, *op. cit. supra* note 1, at 762. But see Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387, 4 N. E. 749 (1886).

[4] Mitchell v. Minnig, 68 Pa. Super. 306 (1917).

[5] Singerly v. Thayer, 108 Pa. 291 (1885); Inman Manufacturing Co. v. American Cereal Co. 124 Iowa 737, 100 N. W. 860 (1904).

[6] Greenburg v. Lumb, 129 N. Y. Supp. 182 (1911).

[7] Thomas Haverty Co. v. Jones, 185 Cal. 285, 197 Pac. 105 (1921). But see Hall v. Webb, 66 Cal. App. 416, 226 Pac. 403 (1924).

[8] Pennington v. Howland, 21 R. I. 65, 41 Atl. 891 (1891) (portrait); Hanaford v. Stevens & Co., 39 R. I. 182, 98 Atl. 209 (1916). See Van Demark v. California Home Extension Association, 43 Cal. App. 685, 185 Pac. 866 (1919).

Corporate shareholders are not co-owners of the assets of the corporation. The title to the property owned by the corporation rests in the corporate entity.[1] The shareholders are generally said to hold choses in action against the corporation.[2] Practically all stock certificates contain a clause that the stock is transferrable only on the books of the corporation. It has been held, therefore, that a sale of the stock, before the transfer on the books of the corporation, amounts only to an equitable assignment and that the innocent assignee is liable for any unpaid balances; this seems to have been the older view.[3] Other courts, seeing an apparent analogy between stock certificates and negotiable paper, or, more accurately, an analogy between innocent purchasers of stock certificates and holders in due course, have held that an innocent purchaser is not liable for unpaid balances.[4] Stock certificates are not negotiable paper.[5] It has been held that the corporation is estopped from denying the recital on the face of the certificate that the one to whom the stock was issued is the owner thereof, and that, since the rights of creditors are obtained by subrogation to the rights of the corporation,[6] the creditor cannot recover from the innocent purchaser.[7] But by providing that the stock is to be transferred only on the books of the corporation, the corporation seems to have limited the right of a purchaser to rely on this statement. Nor is this slight boon to speculation required by the modern commercial world in a case in which an investigation on the books of the corporation would disclose the true facts.[8] The principal case, therefore, is believed to be following an unnecessary and illogical trend.

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[1] Williamson v. Smoot, 7 Mart. 31 (La. 1820); Mickles v. Rochester Bank, 11 Paige 118 (N. Y. 1844); see Spurlock v. Mo. Pac. Ry., 90 Mo. 200, 207, 2 S. W. 219, 221 (1886).

[2] Denton v. Livingston, 9 Johns 96 (N. Y. 1812); Slaymaker v. Bank of Gettysburg, 10 Pa. 373 (1849).

[3] Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727 (1884); Mechanics Bank v. N. Y. Ry., 13 N. Y. 599 (1856); Young v. So. Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202 (1886).

[4] Feehan v. Kendrick, 32 Idaho 220, 179 Pac. 507 (1918); Coleman v. Howe, 154 Ill. 458, 39 N. E. 725 (1895); Berry v. Rood, 168 Mo. 316, 67 S. W. 644. See 1 COOK, CORPORATIONS (8th ed. 1923) § 50.

[5] Stock certificates contain no words of negotiability; they are not promises payable in money; the corporation has placed a definite restriction on the transferability of the certificate by providing that the legal title is to pass only upon a transfer upon the books of the corporation. See Mechanics Bank v. N. Y. Ry., *supra* note 3 at 623, 627.

[6] Williams v. Taylor, 99 Md. 306, 57 Atl. 641 (1904); Leighton v. Leighton Lea Ass'n, 74 Misc. 229, 131 N. Y. Supp. 561 (1911); Hawkins v. Donnerberg, 40 Ore. 97, 66 Pac. 691 (1901).

[7] Foreman v. Bigelow, 4 Cliff. 508 (U. S. 1878); Johnson v. Lullman, 15 Mo. App. (1884); Brown v. Wright, 48 Utah 633, 161 Pac. 448 (1916).

[8] But see Lanier v. Bank, 11 Wall. 369, 377 (U. S. 1870); *In re* British Farmers Co., 7 Ch. D. 533, 537 (1878) *aff'd* 3 App. Cas. 1004 (1878) *sub nom.* Burkinshaw v. Nicolls (watered stock).

CRIMINAL LAW—CONSPIRACY—CONVICTION OF PARTIES—The defendant and his father were jointly indicted for conspiring together and with diverse other persons to cheat and defraud the prosecutors. The father did not appear. The defendant was convicted and sentenced but appealed on the ground that his father might be acquitted. The father then died. *Held*, that the judgment was valid despite the death of the father. *Commonwealth* v. *Bonnem*, 10 Super. Adv. 225 (Pa. 1928).

A criminal conspiracy has been defined as "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means."[1] The essence of the crime is the combination or agreement between the parties, and the offense is complete even though no overt act has been committed in pursuance of the confederacy.[2] So by the very nature of the crime it follows that it cannot be committed by less than two persons.[3] On an indictment of several persons for conspiracy, however, it is sufficient for conviction if the conspiracy is proved between any two of them, though the remaining defendants all be acquitted.[4] But one defendant jointly indicted with others cannot be convicted if all the others have been acquitted.[5] Nevertheless, if all the co-conspirators jointly indicted with the defendant have died, the defendant may be convicted.[6] Generally a conspirator indicted jointly with others may be tried separately, in the discretion of the court, as when his co-conspirators have not been arrested, and he may then be convicted even before the trial of those not yet taken.[7] A defendant may be convicted on an indictment charging a conspiracy with named persons and with persons unknown to the grand jury, even though the persons named have been acquitted.[8]

[1] Shaw, C. J., in Commonwealth v. Hunt, 4 Metc. 111, 123 (Mass. 1842). Accord: People v. Blumenberg, 271 Ill. 180, 183, 110 N. E. 788, 789 (1915); Commonwealth v. Richardson, 42 Pa. Super. 337, 341 (1910), *aff'd*, 229 Pa. 609, 79 Atl. 222 (1911). But see State v. Glidden, 55 Conn. 48, 70, 8 Atl. 890, 892 (1887).

[2] State v. Setter, 57 Conn. 461, 18 Atl. 78 (1889); Commonwealth v. Stovas, 45 Pa. Super. 43 (1910).

[3] State v. Jackson, 7 S. C. 283 (1876); CLARK & MARSHALL, THE LAW OF CRIMES (2d ed. 1912) 136.

[4] Breese v. U. S., 203 Fed. 824 (C. C. A. 4th, 1913); People v. Miles, 123 App. Div. 862, 108 N. Y. Supp. 510 (1908), *aff'd*, 192 N. Y. 541, 84 N. E. 1117 (1908).

[5] State v. Buchanan, 5 Harr. & J. 500 (Md. 1823); Commonwealth v. Brown, 23 Pa. Super. 470 (1903); Regina v. Manning, 12 Q. B. D. 241 (1883); *cf.* Rex v. Thorpe, 5 Mod. 221, 223 (Eng. 1695). But when one of two defendants has been granted immunity as a state witness, the other may be convicted. Rex v. Duguid, 21 Cox C. C. 200 (Eng. 1906); see Weber v. Commonwealth, 72 S. W. 30, 32 (Ky. 1903).

[6] People v. Nall, 242 Ill. 284, 89 N. E. 1012 (1909); Regina v. Kendrick, 5 Q. B. 49 (1843).

[7] People v. Richards, 67 Cal. 412, 7 Pac. 828 (1885); Commonwealth v. MacKenzie, 211 Mass. 578, 98 N. E. 598 (1912). But when a mere severance has been granted to those jointly indicted, judgment against any one conspirator should be deferred until a verdict of guilty has been rendered against another of them. Casper v. State, 47 Wis. 535 (1879).

[8] Jones v. U. S., 179 Fed. 584 (C. C. A. 9th, 1910); Commonwealth v. Edwards, 135 Pa. 474, 19 Atl. 1064 (1890).

The crime of conspiracy being a joint offense, the courts would never grant a new trial to one defendant found guilty without granting the same right to all the other parties found guilty.[9] Today, however, this rule is only applied when two defendants alone are indicted for the crime.[10] A consideration of the above rules shows that one defendant may be convicted of conspiracy, providing the failure to convict his co-conspirators does not remove the basis for the charge against the former. Thus the decision in the instant case is unimpeachable, inasmuch as the death of the father does not disprove the existence of a conspiracy with the defendant.

CRIMINAL LAW—CONSTITUTIONALITY OF STATUTE RELEGATING INSANITY PLEA TO SPECIAL TRIAL—A California statute[1] provided that in criminal trials a defendant who wished to plead insanity must do so specially, along with a plea of not guilty. It further provided that the jury should first try the issue of not guilty, conclusively presuming the defendant to be sane in so doing, and then, if the defendant were found guilty under such plea, to thereafter try him on the issue of insanity. The defendant, convicted of murder, contended that the statute violated the due process clause of the federal Constitution. *Held,* that the statute is constitutional. *People v. Troche,* 273 Pac. 767 Cal. (1928).

It is generally held that a state legislature, by virtue of its police power, has the right to prescribe the methods of procedure to be followed in its courts, and that such regulations will not be considered as violating the due process clause provided that no substantial rights of its citizens are prejudiced thereby.[2] Thus statutes have been held valid which regulate continuances in criminal trials,[3] or which provide that a defendant will be proceeded against by information instead of indictment,[4] or which specify that the testimony of an infant of tender years need not be under oath.[5] But, on the contrary, a state legislature can not arbitrarily make the proof of one fact conclusive proof of another,[6] nor can it provide that the commission of an unlawful act may be proved by mere reputation of the wrongdoer alone.[7] Thus, in the last analysis, the validity of the procedural changes depends on the reasonableness of the regulation. In

[9] Commonwealth v. McGowan, 2 Pars. 341 (Pa. 1848); Regina v. Gompertz, 2 Cox C. C. 145 (Eng. 1846).

[10] Brown v. U. S., 145 Fed. 1 (C. C. A. 2d, 1905) (indictment for conspiracy with persons unknown); Feder v. U. S., 257 Fed. 694 (C. C. A. 2d, 1919) (indictment of two defendants alone).

[1] CAL. PEN. CODE (1927) § 1026.

[2] Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14 (1908); Garland v. Washington, 232 U. S. 642, 34 Sup. Ct. 456 (1913); Rogers v. Peck, 199 U. S. 425, 26 Sup. Ct. 87 (1905).

[3] State v. Hodgson, 66 Vt. 134, 28 Atl. 1089 (1893).

[4] Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111 (1883).

[5] People v. Sexton, 187 N. Y. 495, 80 N. E. 396 (1907).

[6] Vega S. S. Co. v. Consolidated Elevator Co., 75 Minn. 308, 77 N. W. 973 (1899).

[7] Hammond v. State, 78 Ohio St. 15, 84 N. E. 416 (1908).

the present case it was argued that the statute was unreasonable, and therefore invalid, because in effect the defendant went to trial with the necessary mental element of the crime conclusively presumed against him, in that he was unable to furnish evidence concerning the lack of such mental state until after the jury had tried the first issue and had rendered a verdict of guilty. Such a jury, it was contended, would thereafter be incapable of finding impartially whether or not the defendant in fact had the mental state necessary for the commission of the crime. However, as a legislature can require that insanity be specially pleaded,[8] there seems to be no legal objection to its prescribing the method in which such pleas will be tried, so long as the defendant at some stage of the trial is permitted to offer all the evidence he chooses which will tend to exonerate him.[9] Thus while it may be admitted that as a practical matter the statute in question may have the effect of prejudicing the defendant's rights, it is perhaps fortunate that the due process clause can not be invoked as a means of invalidating state legislation enacted to remedy an ever growing evil in the administration of the criminal law.

DIVORCE—LIABILITY OF HUSBAND'S ESTATE FOR ALIMONY—A wife obtained a decree of absolute divorce from her husband in the State of Nebraska, where she was domiciled and where he appeared and answered. The decree provided that the husband should pay her a certain sum per month "in lieu of her dower, as long as she lives or until she remarries." This is an action against the estate of the husband. *Held,* that the Pennsylvania Court must give full faith and credit to the decree but that it was not intended by the decree that the estate of the husband should pay alimony accruing after his death. *Watrous's Estate,* 10 Pa. Super. Adv. 309 (1928).

The estate of the husband is usually held to be liable to a divorced wife for alimony accruing before the death of the husband.[1] The generally adopted view, however, is that no alimony becomes due after his death.[2] In the case of a judicial separation, the woman, being still the lawful wife of the deceased, is entitled to dower, and of course there is no liability on the estate for maintenance.[3] A few courts seem to allow the obligation of the husband to pay alimony in an absolute divorce to survive the husband and his estate will become liable under certain conditions.[4] Under this view a mere provision that alimony shall be paid "so long as the wife shall live," or "until she re-

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[8] Bailey v. State, 209 Ala. 142, 95 So. 467 (1923); People v. Hickman, 268 Pac. 909 (Cal. 1928).

[9] People v. Connor, 142 N. Y. 130, 36 N. E. 807 (1894); Bennett v. State, 57 Wis. 69, 14 N. W. 912 (1883).

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[1] McIlroy v. McIlroy, 208 Mass. 458, 94 N. E. 696 (1911).

[2] Parsons v. Parsons' Estate, 70 Colo. 333, 201 Pac. 559 (1921); Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236 (1905).

[3] Wagner v. Wagner, 132 Mich. 343, 93 N. W. 889 (1903).

[4] *Ex parte* Hart, 94 Cal. 254, 29 Pac. 774 (1892); Fitzpatrick v. Fitzpatrick, 127 Minn. 96, 148 N. W. 1074 (1914).

marries," will be enforced against his estate after his death.[5] This view would seem to be clearly wrong in that alimony by its very nature is only intended to be an equivalent of the husband's obligation for support which arises in favor of the wife out of the marriage relation.[6] The fact that a woman who has divorced her husband absolutely, receives no dower,[7] is an additional justification for discontinuing alimony after his death.[8] Therefore the Pennsylvania Court would seem to be correct in applying the rule favored by the majority of jurisdictions, since the law in Nebraska as to the interpretation of such a decree was not clear.[9] Owing to the fact that alimony is much restricted in Pennsylvania,[10] such a claim as that brought forward in the principal case is unlikely to arise under Pennsylvania law.

EXTRADITION—INTERSTATE—PAROLED CONVICT ENTERING ANOTHER STATE BECOMES FUGITIVE FROM JUSTICE AFTER PAROLE IS REVOKED—Petitioner was paroled from the penitentiary in state *A* with express permission to reside in state *B* for one year. Within that time his parole was revoked and requisition was made by state *A* for his rendition. Petitioner was arrested on a warrant issued by the governor of *B* and applied for a writ of *habeas corpus. Held,* that petitioner is a fugitive from justice and subject to rendition to the demanding state under the Constitution[1] and laws[2] of the United States. Writ denied. *Ex parte Hamilton,* 273 Pac. 286 (Okla. 1929).

In the determination of this case two questions are presented. First, is the accused "charged . . . with . . . crime," and second, is he a fugitive from justice?[3] The term "charged" applies to persons convicted as well as to persons merely sought for the purpose of trial.[4] The aim of the Constitution is that the justice of the offended state shall be satisfied,[5] and so if a convict escapes, or violates his parole, the term of his imprisonment ceases to run and he may, after its nominal expiration, be brought back to complete his sentence.[6]

[5] *Ex parte* Hart, *supra* note 4.

[6] KEEZER, MARRIAGE AND DIVORCE (2d. ed. 1923) § 660.

[7] Barrett v. Failing, 111 U. S. 523 (1884).

[8] See Seibly v. Person, 105 Mich. 584, 63 N. W. 528 (1895).

[9] Walton v. Walton, 57 Neb. 102, 77 N. W. 392 (1898); Tatro v. Tatro, 18 Neb. 395, 25 N. W. 571 (1885).

[10] DANNEHOWER'S STURGEON, PENNSYLVANIA DIVORCE (2d ed. 1923) § 2087 *et. seq.*

[1] U. S. CONSTITUTION, Art IV, Sec. 2, cl. 2: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

[2] 1 STAT. 302 (1793), 18 U. S. C. § 662 (C. 1928).

[3] *Supra* note 1. See Note (1918) 18 COL. L. REV. 70.

[4] 2 MOORE, EXTRADITION AND INTERSTATE RENDITION (1891) § 530.

[5] HAWLEY, INTERSTATE EXTRADITION (1890) 110.

[6] Hollon v. Hopkins, 21 Kan. 638 (1879); Dolan's Case, 101 Mass. 219 (1869); *Ex parte* Carroll, 86 Tex. Cr. 301, 217 S. W. 382 (1919).

It is generally held that to be a fugitive from justice under the interstate rendition laws, it is not necessary that the person charged with having left the state in which the crime was alleged to have been committed, did so for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime against the laws, he leaves such state, and when sought to be subjected to its criminal process, is found within the territory of another state.[7] Prisoners who have violated their paroles by leaving the state of their conviction, have accordingly been extradited on requisition to the asylum state.[8] The principal case is unique on its facts in that the prisoner was given express permission to go into another state, and was but exercising that permission when his rendition was sought. As pointed out by the court, however, the journey to the other state was voluntary on the part of the petitioner and, in the absence of a recognition of compulsory process from the other state, it cannot be said that the demanding state waived its right to regain jurisdiction over him.[9] The asylum state is not concerned with the reason for the revocation of the parole,[10] and, therefore, the petitioner was correctly held subject to rendition.

NEGOTIABLE INSTRUMENTS—LIABILITY OF AN UNAUTHORIZED AGENT UNDER THE N. I. L.—Defendant without authority signed a promissory note in the name of a corporation, adding his own name as president. *Held*, under Section 20 of the *N. I. L.*, that the defendant is liable personally on the instrument. *New Georgia Nat'l Bank v. Lippman*, 249 N. Y. 307, 164 N. E. 108 (1928).

At common law, one who without authority signed the name of another to a written instrument, was not himself liable on the instrument,[1] although there was some authority to the contrary.[2] However, in most jurisdictions the unauthorized agent was held liable in an action of assumpsit, for breach of an implied warranty of authority,[3] and of course, if he had knowledge of the lack of authority, he could be held liable in a tort action for fraud and deceit.[4]

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[7] Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291 (1885); Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122 (1906); *In re* Voorhees, 32 N. J. L. 141 (1867).

[8] Hughes v. Pflanz, 138 Fed. 980 (1905); Drinkall v. Spiegel, 68 Conn. 441, 36 Atl. 830 (1896).

[9] *In re* Whittington, 34 Cal. App. 344, 167 Pac. 404 (1917); see Hess v. Grimes, 5 Kan. App. 763, 48 Pac. 596 (1897). But *cf. Ex parte* Youstler, 268 Pac. 32 (Okla. 1928).

[10] *Ex parte* Williams, 10 Okla. Cr. 344, 136 Pac. 597 (1913). *Contra: Ex parte* Wernhause, 202 Mo. App. 245, 216 S. W. 548 (1919).

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[1] People's National Bank v. Dixwell, 217 Mass. 436, 105 N. E. 435 (1914); Cole v. O'Brien, 34 Neb. 68, 51 N. W. 316 (1892); American Surety Co. v. Morton, 32 Okla. 687, 122 Pac. 1103 (1912).

[2] Dusenbury v. Ellis, 3 Johns 70 (N. Y. 1802).

[3] Collen v. Wright, 8 E. & B. 647 (Eng. 1857); Golden v. Ellwood, 299 Ill. 73, 132 N. E. 223 (1921); Haupt v. Vint, 68 W. Va. 657, 70 S. E. 702 (1911).

[4] Polhill v. Walter, 3 B. & Ad. 114 (Eng. 1832); McCurdy v. Rogers, 21 Wis. 197 (1866).

Section 20 of the *N. I. L.* provides, "Where the instrument contains, or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." There is a conflict both in the decisions[5] and of theoretical opinion[6] as to whether this section changes the common law rule as to the nature of an unauthorized agent's liability. But bearing in mind the general principle of statutory construction, that rules of the common law can be changed only by clear and unambiguous language, and not by inference,[7] it seems as a matter of principle that section 20 of the *N. I. L.* should not be construed as changing the common law rule in the case where the agent is unauthorized. Judge Cardozo, in writing the opinion in the principal case recognized the force of this argument, but based the decision on policy, because under this section the agent is relieved of common law liability in the case where he is authorized, and it accomplishes a just result to hold him liable on the instrument when he is not authorized. Moreover holding the agent liable on the instrument eliminates the difficult problem of the measure of damages involved when the agent is being sued for breach of his implied warranty of authority.

SET-OFF—RIGHT OF BANK TO SET OFF UNMATURED NOTES AGAINST DEPOSIT OF INSOLVENT—The plaintiff's intestate, who died insolvent, had a personal checking account with the defendant bank. The defendant held unmatured notes of the decedent, and claimed the right to set off the amount of the notes against the plaintiff's claim. *Held,* that the defendant was entitled to this set-off. *Sullivan v. Merchants' Nat. Bank,* 144 Atl. 34 (Conn. 1928).

While the right of set-off, in a court of law, is purely statutory,[1] it existed in equity long prior to the set-off statutes, and so it is granted there upon fundamental equitable principles.[2] Consequently, it is allowed in certain cases where legal set-off would be unavailable. When a creditor's debt to an insolvent is payable *in futuro,* and the insolvent's debt to the creditor is payable *in praesenti,* the authorities are in almost complete harmony in allowing a set-off.[3] The

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[5] That the unauthorized agent is liable: Pain v. Holtcamp, 10 F. (2d) 443 (1926); Ryan v. Hebert, 46 R. I. 47, 124 Atl. 657 (1924). *Contra:* Southern Supply Co. v. Mathias, 147 Md. 256, 128 Atl. 66 (1925); Haupt v. Vint, *supra* note 3.

[6] See BRANNON, NEGOTIABLE INSTRUMENTS LAW, (4th ed. 1926) 163.

[7] Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N. E. 766 (1889); Woollcott v. Shubert, 217 N. Y. 212, 111 N. E. 829 (1916); State v. Central Vermont R. R., 81 Vt. 459, 71 Atl. 193 (1908).

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[1] See United States v. Eckford, 6 Wall. 484, 488 (U. S. 1867).

[2] Collins v. Campbell, 97 Me. 23, 53 Atl. 837 (1902); Blake v. Langdon, 19 Vt. 485 (1847).

[3] Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148 (1892); Bradley v. Angel, 3 N. Y. 475 (1850).

theory of these decisions is that the creditor may waive the time of payment of his debt, both debts thus becoming present debts.[4] But where the creditor's debt is payable *in praesenti*, and the insolvent's debt is payable *in futuro*, the cases are at variance. The federal courts and a majority of the state courts allow a set-off in such a case, on the theory that insolvency renders all debts due, and furnishes equitable grounds for setting off the debts.[5] A very substantial minority of the jurisdictions, however, including Pennsylvania, refuses to permit a set-off in this situation.[6] These courts reason that the creditor has no claim at the time of insolvency, and to allow him to offset a claim arising after that time would be prejudicial to the rights of the general creditors, which have accrued in the meantime.[7] While much may be said in favor of both theories, it seems inequitable, when both obligations are absolute, to compel the creditor to pay his debt in full and receive only a pro rata share of the assets of the insolvent, in satisfaction of his claim. The fallacy of the minority rule lies in the failure to recognize that, in the eyes of equity, the creditor has a measurable claim, from the moment of insolvency.[8]

TORTS—RECOVERY FOR MENTAL SUFFERING IN CONNECTION WITH TRESPASS TO REALTY—Defendant, by means of attachment proceedings resorted to during lessee's temporary absence for that express purpose, evicted lessee, wilfully and maliciously from apartment occupied by her under tenancy. In action for this wrongful eviction the plaintiff stated the situation "caused me great mental distress and upset me terribly." *Held*, (one judge dissenting) that mental suffering, established as the proximate and natural consequence of the trespass to realty, is entitled to compensation. *Hargrave v. Leigh*, 273 Pac. 298 (Utah 1928).

That mere fright or mental suffering, without any physical injury resulting therefrom, can not be the basis of a cause of action is said to be well settled.[1] It has been generally thought that to deal with fright alone is to deal with a metaphysical condition in contradistinction to a physical condition; with something subjective, instead of objective, and entirely within the realm of speculation.[2] A growing number of courts have allowed recovery when there is injury

[4] Lindsay v. Jackson, 2 Paige 581 (N. Y. 1831).

[5] Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648 (1887); Pendleton v. Hellman Com. Trust & Sav. Bank, 58 Cal. App. 448, 208 Pac. 702 (1922); Nashville Trust Co. v. Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822 (1892).

[6] Fera v. Wickham, 135 N. Y. 223, 31 N. E. 1028 (1892); Blum Bros. v. Girard Nat. Bank, 248 Pa. 148, 93 Atl. 940 (1915); Kurz v. County Nat. Bank, 288 Pa. 472, 136 Atl. 789 (1927); (1927) 75 U. OF PA. L. REV. 101.

[7] Fera v. Wickham; Kurz v. County Nat. Bank, both *supra* note 6.

[8] See Clark, *Set-Off in Cases of Immature Claims in Insolvency and Receivership* (1920) 34 HARV. L. REV. 178, containing a very interesting discussion of this problem, and advancing the theory that insolvency is an anticipatory breach of the contract, giving the creditor an immediate claim.

[1] Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact* (1902) 41 AMER. L. REG. 141.

[2] Alabama Fuel and Iron Co. v. Baladoni, 15 Ala. App. 306, 320, 73 So. 205 (1916).

even though it arose from a mental condition, since in such cases the damages are quite as capable of being measured by a jury as if they had resulted from an impact or blow.[3] While the courts are convinced that the damages suffered when the only manifestation is fright are not capable of admeasurement by any standard known to the law they have not followed the theory in a number of instances. The action of assault recognizes a recovery for fright;[4] and where the fright is serious, substantial damages are recoverable.[5] In the action of seduction the chief element of damage is mental suffering, even though the courts generally base their decisions on a technical loss of service.[6] In breach of promise suits mortification and distress of mind are often the only elements for recovery.[7] In the principal case the court allowed a recovery for fright because it was accompanied by a wilful invasion of the plaintiff's home.[8] The purpose, it would appear, was to allow recovery and as long as a trespass to realty was involved there might be recovery for any damage that flowed in an unbroken chain of causation from the defendant's act. The case is illustrative of the desire of courts to allow recovery for mental suffering, but to so restrict the cases as to prevent fraudulent claims. It has been suggested[9] that in the light of the many exceptions the courts ought to throw aside fictions and regard mental suffering, standing alone, as an injury on which an action for damages may be based. It would seem that what is needed is a recognition by the courts that the problem is not exclusively one in the realm of damages, nor of prevention of fraudulent claims, but rather in finding a legally protected right and hence a duty not to violate the right. When the courts determine to protect such a right, they would seem logically, to have to extend the protection to every violation. Should they distinguish between intentional and unintentional violations they would be making the existence of a protected right depend upon the character of the defendant's actions.

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[3] Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 50 N. W. 1034 (1892). For collection of cases between 1901-1920 see Throckmorton, *Damages for Fright* (1921) 34 HARV. L. REV. 260.

[4] Handy v. Johnson, 5 Md. 450 (1854); Hurst v. Carlisle, 3 P. & W. (Pa. 1831).

[5] Small v. Lovergan, 81 Kans. 48, 105 Pac. 27 (1909).

[6] Kendrick v. McCrary, 11 Ga. 603 (1852). Hord v. Sudderth, 111 N. C. 215, 16 S. E. 397 (1892) (does away with theory of loss of service and allows a woman to sue for her own seduction).

[7] See amusing analysis of situation Brown, *Breach of Promise Suits* (1929) 77 U. OF PA. L. REV. 474, 482.

[8] *Accord:* Moyes v. Gordon, 113 Md. 282, 14 N. E. 476 (1887); Fillebrown v. Hoar, 124 Mass. 580 (1878); *contra: Ford v. Schlessman*, 107 Wis. 479 83 N. W. 761; *cf.* Murray v. Mace, 41 Neb. 60; 59 N. W. 387 (1894) (allowing recovery for mental suffering where the unlawful acts are inspired by fraud or malice). The dissent in the principal case explains away the accord cases as being cases where the plaintiff is apprehensive of personal violence or where trespass is calculated to cause shame or humiliation, which elements were not present in the case.

[9] Levin, *Damages for Fright and Proximate Cause* (1919) 17 MICH. L. REV. 407.

WILLS—WORDS PASSING A FEE SIMPLE UNDER PENNSYLVANIA LAW—Testator's will read: "I . . . do give to my sister . . . the following properties (naming them): to collect the rents from them as long as she shall live." The heirs-at-law of the testator bring ejectment against the devisees of the sister's will, on the theory that under testator's will the sister took only a life estate, and that on her death title reverted to testator's heirs-at-law. *Held,* that under the testator's will the sister took a fee simple title, and title is in the devisees of her will. *Graham v. Gamber,* 10 Pa. Super. Adv. 502 (1929).

At common law, a devise of land without words of inheritance gave the devisee a mere life estate,[1] and this was the early rule in Pennsylvania.[2] This requirement of words of inheritance has been largely abolished by statutes, and the courts have generally held that under such statutes any words of gift pass a fee, unless a contrary intent is expressed.[3] Under such statutes, the first question to be decided is, did the words pass a fee. The Pennsylvania decisions seem to hold that if there be any doubt at all, a fee will pass[4] and this seems to be the rule in other jurisdictions.[5] When this question is determined the next problem is, do later words in the will cut the fee down to a lesser estate, or, as it has been expressed, qualify and explain the estate given.[6] The Pennsylvania rule is that it takes the clearest expression of intent to cut down or modify a fee already given.[7] This tendency to favor a fee, coupled with the rules of construction that the court will not presume that a testator intended to die intestate, which often results where the fee is cut down, and the "four corner" rule, render it extremely difficult to create an estate less than a fee in Pennsylvania, unless such words as "to A for life" are used.[8] In *Kidd's Estate,*[9] the devise read "to . . . wife . . . all my . . . estate . . .

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[1] 2 BL. COM. 108.

[2] Steele v. Thompson, 14 S. & R. 84 (Pa. 1826).

[3] 2 PAGE, WILLS (2d. 1926) §959. In Pennsylvania the Act of 1833, P. L. 249 § 9, reenacted by the *Wills Act,* Act of 1917, P. L. 403 § 12, PA. STAT. (West 1920) § 8320 abolishes the necessity of words of inheritance, to pass a fee by will. See, Schuldt v. Herbine, 3 Pa. Super. 65 (1896).

[4] See such typical cases as: Snyder v. Baer, 144 Pa. 278, 22 Atl. 897 (1891); Geyer v. Wentzel, 68 Pa. 84 (1871). In Moyer v. Rentschler, 231 Pa. 620, 81 Atl. 52 (1911) and in Hoxie v. Chamberlain, 228 Pa. 31, 76 Atl. 423 (1910) the court refused to sustain what seemed to be valid executory devises over, even assuming that the original gift passed a fee. It seems to take the strongest sort of language to create an estate less than a fee, as in McDevitt's Appeal, 113 Pa. 103 (1886).

[5] Grant v. Mullen, 138 Atl. 613 (Del. 1926), see note (1928) 26 MICH. L. REV. 822; *In re* Brown, 119 Kans. 402, 239 Pac. 747 (1925), see note (1926) 24 MICH. L. REV. 518; *cf.* Krause v. Krause, 113 Neb. 23, 210 N. W. 670 (1924), note (1925) 3 WIS. L. REV. 313.

[6] Shower's Estate, 211 Pa. 297, 60 Atl. 789 (1905).

[7] Cross v. Miller, 290 Pa. 213, 138 Atl. 822 (1927), commented on in (1928) 41 HARV. L. REV. 544; *cf.* Reiff v. Peppo. 290 Pa. 508, 139 Atl. 144, see note (1927) 76 U. OF PA. L. REV. 459. See Metzen v. Schopp, 202 Ill. 275, 67 N. E. 36 (1903).

[8] See Reynolds v. Crispin, 8 Sad. 252, 11 Atl. 236 (Pa. 1887) which lays down the rules of construction in these cases.

[9] 293 Pa. 21, 141 Atl. 644 (1928).

to hold and enjoy as she thinks best as long as she remains my widow, and to dispose of at her death among the children as she thinks best . . ." The court held that the widow took a fee, subject to defeasance if she remarry.[10] In view of the holding in *Kidd's Estate,* it would appear that the superior court was correct in the principal case, which does not present as difficult a problem as was before the court in *Kidd's Estate.*[11]

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[10] Thereby overruling, *sub silentio,* Cooper v. Pogue, 92 Pa. 254 (1879).

[11] The cases cited are but a fraction of all the Pennsylvania cases. All the cases are cited in CROWTHER, DESK BOOK OF PA. DECISIONS (1924) TIT. WILLS §§ 486, 490, and is brought up to date by supplements.