RECENT CASES

BILLS AND NOTES—ACCOMMODATION INDORSER—EFFECT OF RECEIVING VALUE FOR LOAN OF NAME—Defendant indorsed three notes totalling $26,667 at the request of the plaintiff payee so as to facilitate their negotiability. Plaintiff agreed to pay the defendant $1,667 for the indorsements by crediting that amount on one of the notes as having been received by him. Suit was brought on two of these notes by the plaintiff payee against the defendant indorser. *Held,* that defendant was an accommodation indorser and suit could not, therefore, be maintained. *Carr v. Wainwright,* decided by C. C. A. 3rd Circuit, U. S. Daily, Sept. 9, 1930, at 2116.

Leading text authorities seem agreed that at common law to constitute one an accommodation party, the loan of credit upon the instrument had to occur without any consideration moving to him.[1] Cases which arose prior to the adoption of the *Uniform Negotiable Instruments Law* in the various states also enunciated this principle.[2] Neither the text writers nor the cases, however, indicate whether the principle that there must be an absence of consideration referred to consideration for the instrument or to consideration for the loan of the name. Almost immediately after the appearance of the *Negotiable Instruments Law,* the section which defines who shall be deemed an accommodation party[3] was assailed[4] because of the ambiguity and uncertainty created by the words, "without receiving value therefor" and their omission was recommended.[5] It was anticipated that the question as to whether value could not be given for the loan of the name or merely for the instrument which had not arisen prior to the *Negotiable Instruments Law* would arise following its adoption.[6] It was urged, moreover, that one could receive value for the lending of his credit or name and remain an accommodation party.[7] One of the framers of the *Negotiable Instruments Law,* in defining this section maintained that no uncertainty existed concerning it and seemed to indicate that one could not be an accommoda-

[1] 1 PARSONS, NOTES AND BILLS (1871) 183; 2 RANDOLPH, COMMERCIAL PAPER (1888) § 472; BYLES, BILLS (8th ed. 1891) 131; 1 DANIEL, NEGOTIABLE INSTRUMENTS (4th ed. 1891) § 189; TIEDEMAN, COMMERCIAL PAPER (1889) § 158; NORTON, BILLS AND NOTES (2d ed. 1896) 173. But see NORTON, *op. cit. supra* (4th ed. 1914) 236 n. 23.

[2] Greenway v. Orthwein Grain Co., 85 Fed. 536, 537 (C. C. A. 8th, 1898); Miller v. Larned, 103 Ill. 562, 570 (1882); Peale v. Addicks, 174 Pa. 543, 34 Atl. 201 (1896); First Nat. Bk. of Vienna v. Engebretson, 28 S. D. 185, 193, 132 N. W. 786, 790 (1911).

[3] UNIFORM NEGOTIABLE INSTRUMENTS LAW, § 29.

[4] Ames, *The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 248.

[5] *Supra* note 4, at 248; Ames, *The Negotiable Instruments Law. A Word More* (1901) 14 HARV. L. REV. 442, 445; McKeehan, *The Negotiable Instruments Law (A Review of the Ames-Brewster Controversy)* (1902) 50 AM. L. REG. (n. s.) 449, 509; Mack, *Some Suggestions on the Proposal to Enact the "Uniform Negotiable Instruments Law" in Illinois* (1907) 1 ILL. L. REV. 592, 597. In the Illinois Law this phrase is omitted from the section defining an accommodation party, ILL. REV. STAT. (Cahill, 1925) 1668, § 49.

[6] *Supra* note 5.

[7] Ames, *supra* note 5, at 455; McKeehan, *supra* note 5, at 509. The illustration given by Dean Ames fits the instant case exactly.

tion party if consideration were received for the use of the name.[8] The *Negotiable Instruments Law* fails to express with sufficient clarity which of the two views it adopts. The phrase "without receiving value therefor" has had judicial construction prior to the instant case[9] and as in this decision was construed to refer to value for the negotiable instrument and not value for the use of the name or the loan of credit.[10] This view was at an earlier time accepted[11] in interpreting a similar section of the *English Act* defining an accommodation party.[12] The principal case points out, moreover, that as a matter of construction, the grammatical antecedent of "value therefor" must be the word "instrument" and not "for the lending of his name" which does not precede but follows "value therefor." The decision in the instant case being sound both in point of logic and as a matter of business policy should, added to the few former cases holding similarly, create a sufficient body of authority to assure a uniform interpretation of this section of the statute.

CONFLICT OF LAWS—WORKMEN'S COMPENSATION—Plaintiff, employee of a Massachusetts corporation which was building a road in New York, was injured while working in the employer's sand pit in Canada where all of the employee's work was to be performed. The employee was a resident of Canada. *Held,* that the injuries were not compensable under the *New York Workmen's Compensation Law.*[1] The test in all cases is the place where the employment is located. *Cameron v. Ellis Construction Co.,* 169 N. E. 622 (N. Y. 1930).

When it is remembered that the rise of the *Workmen's Compensation Acts* is comparatively recent and that principles in the field of conflict of laws are but now assuming a definite form, it is not surprising to note the varying results which have been reached in different courts, when, under a Compensation Act, recovery is sought in the state of employment for an injury suffered beyond the borders of that state.[2] Where the statute has, in express terms, provided for

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[8] Brewster, *A Defense of the Negotiable Instruments Law* (1901) 10 YALE L. J. 84, 86; Brewster, *A Rejoinder to Dean Ames* (1901) 15 HARV. L. REV. 26, 32; McKeehan, *supra* note 5, at 509. The entire series in the Ames-Brewster-McKeehan Controversy is collected in BRANNON, NEGOTIABLE INSTRUMENTS LAW (3d ed. 1919) 418 *et seq.*

[9] The McGhee Inv. Co. v. Kirsher, 71 Colo. 137, 204 Pac. 891 (1922); Gruber v. Klein *et al.,* 102 Conn. 34, 127 Atl. 907 (1925); Morris County Brick Co. v. Austin, 79 N. J. L. 273, 75 Atl. 550 (1910).

[10] Mr. McKeehan's prediction that proper care in interpretation would avoid difficulties was correct and Dean Ames' fear of the consequences of allowing the disputed phrase to remain in the section was not fulfilled.

[11] Cohen, *Letter on the Negotiable Instruments Law* (1901) 15 HARV. L. REV. 38.

[12] BILLS OF EXCHANGE ACT, 45 and 46 Vict. c. 71, § 28 (1882).

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[1] N. Y. CONS. LAWS (1923) c. 67; see GOODRICH, CONFLICT OF LAWS (1927) 202-206.

[2] It has been suggested that the tendency of the law has been toward the territorial rather than the personal, Gould v. Ins. Co., 215 Mass. 480, 102 N. E. 693 (1913); GENERAL SURVEY OF CONTINENTAL LEGAL HISTORY (1912) 80-83. In this field the tendency has been to the contrary, see *infra* notes 3, 5, 6.

recovery regardless of the *situs* of the injury, the literal words have been followed and an award made;[3] the words of the act have likewise been followed when they have restricted the application to injuries inflicted within the state.[4] It is under acts which, as that of New York in the instant case, do not expressly state the extent of their application, that the division of opinion arises. In those states having an optional act, that is, one in which the parties may or may not elect to be subject to its provisions, the great majority permit recovery whether the employment be wholly or partially within or without the state,[5] upon the theory that the duty to compensate in case of injury becomes an element in the contract of employment. However, in those states having a compulsory act[6] awards are usually restricted to cases in which the work outside of the state borders has been at least incidental to an employment within the state.[7] Inasmuch as in jurisdictions with such compulsory acts, the duty to compensate cannot logically be considered an element of the contract,[8] and a construction of the words of the act to cover all injuries whether within or beyond the state appears impossible, this distinction, in the latter category, seems sound. There are, however, distinct disadvantages in letting the employee look to his remedy only in the state where he was injured. It may be difficult to secure service upon the employer;[9] the modern employer with employees throughout the country will experience difficulty and uncertainty in the ascertainment of and conformity to the laws to which he is subject; and the judicial machinery of one jurisdiction is often ill-adapted for enforcement of another's law. A consideration of these

[3] Quong Ham Wah Co. v. Industrial Comm., 184 Cal. 26, 192 Pac. 1021 (1920); Hagenback and Wallace Co. v. Peppert, 66 Ind. App. 261, 117 N. E. 531 (1917) (the right being contractual accompanies the employee wherever he goes and abides with him till contract of service is ended); STORY, CONFLICT OF LAWS (8th ed. 1883) 375.

[4] NEV.: NEV. STAT. (1911) c. 183, § 3; PA.: 1915 P. L. 736, § 1, PA. STAT. (West, 1920) § 21916.

[5] Pettiti v. Pardy Const. Co., 103 Conn. 101, 13 Atl. 70 (1925) (wholly without); Hulswit v. Escanaba Co., 218 Mich. 331, 188 N. W. 411 (1922) Bird, J., at 333, "It would hardly be consistent to hold that by reason of the contract relation, the act would apply to services partially performed outside, but would exclude cases where the services were entirely performed outside of the state." *Acc.:* McGuire v. Phelan-Sherly Co., 111 Neb. 609, 197 N. W. 615 (1924) (wholly outside); Grinnell v. Wilkinson, 39 R. I. 447, 98 Atl. 103 (1916); *Contra:* Union Bridge Co. v. Ind. Comm., 287 Ill. 396, 122 N. E. 609 (1919); Gould v. Ins. Co., 215 Mass. 480, 102 N. E. 693 (1913).

[6] In these jurisdictions, where the foreign employment is but incidental to the main employment, recovery will be permitted. Matter of Post v. Burger & Gohlke, 216 N. Y. 544, 111 N. E. 351 (1916) (injury in N. J. in employment incidental to that in N. Y.); Madderns v. Fox Film Corp., 205 App. Div. 791, 200 N. Y. Supp. 344 (1923); *aff'd*, 237 N. Y. 614, 143 N. E. 764 (1924).

[7] Altman v. N. D. Comm. Bureau, 50 N. D. 215, 195 N. W. 287 (1923) (no recovery though premium was calculated on payroll of total number of employees in and out of state); Smith v. Heine Safety Boiler Co., 224 N. Y. 9, 119 N. E. 878 (1918) in connection with which see Smith v. Heine Boiler Co., 119 Me. 552, 112 Atl. 516 (1921); see Union Bridge Co. v. Ind. Comm., *supra* note 5.

[8] Angell, *Recovery Under Workmen's Compensation Acts for Injury Abroad* (1918) 31 HARV. L. REV. 619; GOODRICH, *locus cit. supra* note 1.

[9] See Verdicchio v. McNab & Harlin Mfg. Co., 178 App. Div. 48, 164 N. Y. Supp. 290 (1917); BRADBURY, WORKMAN'S COMPENSATION (2d ed. 1914) 52.

difficulties suggests the conclusion that, in these states, the adoption in their statutes of provisions covering injuries occurring within or without the state would permit a fuller accomplishment of the fundamental purpose of the acts.[10]

CONSTITUTIONAL LAW—POLICE POWER—ÆSTHETIC CONSIDERATIONS APPLIED TO BILLBOARDS—The Indianapolis board of park commissioners passed an ordinance which prohibited the construction and ordered the destruction of all billboards near parks. This ordinance was adopted under a statute which provided that park commissioners could regulate, abate, and forbid buildings or "devices" near parks, but that no lawful business should be abated without compensation. The plaintiff advertising company applied for an injunction against the enforcement of the ordinance, and raised among other points the constitutional objection that the ordinance took property solely for æsthetic purposes. *Held,* that the ordinance was invalid because compensation was not granted as required by the statute. The constitutional objection, however, was overruled. *General Outdoor Advertising Co. v. City of Indianapolis, Department of Public Parks,* 172 N. E. 309 (Ind. 1930).

Courts have for many years refused to compel citizens to give up property rights solely for the attainment of æsthetic objects even though the public as a whole would have benefited thereby.[1] Under these decisions it has been generally argued that "æsthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."[2] It was anticipated that this attitude of law toward beauty would change.[3] The principal case is the most recent one that demonstrates the new and growing attitude. The court reached its conclusion of overruling the constitutional objection by saying that it was necessary for the protection of public health that æsthetic tastes be protected. Former decisions have treated æsthetic objects only as an auxiliary consideration when there was some other separate and reasonable relation to safety, health, morals, or general welfare.[4] The method of reasoning in the principal case, therefore, marks a new step in the advancement of police power in regard to billboards. No new principle of law is applied but there is

[10] As to the constitutional power of the legislatures to enact such provisions, see Matter of Post v. Burger and Gohlke, *supra* note 6 at 549, 111 N. E. at 352, and citations *supra* note 3. If no recovery is available in the state of employment, recovery may usually be had under the law of the state of injury, Douthwright v. Champlin, 91 Conn. 524, 100 Atl. 97 (1917) (contract in Mass., recovery in Conn.); Smith v. Heine Boiler Co. (Me.) *supra* note 7.

[1] Passaic v. Paterson Bill Posting Co., 72 N. J. L. 285, 62 Atl. 267 (1905); Isenbarth v. Bartnett, 206 App. Div. 546, 143 N. E. 765 (N. Y. 1923); Bryan v. City of Chester, 212 Pa. 259, 61 Atl. 894 (1905).

[2] Passaic v. Paterson Bill Posting Co., *supra* note 1, at 287.

[3] Chandler, *The Attitude of The Law Toward Beauty* (1922), 8 A. B. A. J. 470.

[4] St. Louis Poster Adv. Co. v. St. Louis, 249 U. S. 269, 39 Sup. Ct. 274 (1919); Ayer v. Commissioners on Height of Buildings, 242 Mass. 30, 136 N. E. 338 (1922); Sign Works v. Training School, 249 Ill. 436, 94 N. E. 920 (1911).

presented a new definition of the relation between public health and æsthetic considerations. Police power is not an unalterable thing but changes within constitutional limitations to meet new conditions.[5]

HUSBAND AND WIFE—POSTNUPTIAL CONTRACTS OR GIFTS—EFFECT OF SUBSEQUENT MISCONDUCT—Plaintiff purchased real estate with own earnings and took deed jointly in the name of himself and of defendant, his wife, with the intention that it should be used as their home. Plaintiff later obtained an absolute divorce against defendant for subsequent adultery and now prays that she be ordered to convey to plaintiff her right, title, and interest in the aforementioned premises. *Held*, that defendant convey the property to plaintiff. *Osborne v. Osborne*, 40 F. (2d) 800 (Ct. of App. D. C. 1930).

The majority of the comparatively few cases on point uphold the view that subsequent misconduct does not entitle the innocent spouse to set aside or avoid a postnuptial transfer or gift which is valid in its inception, which contains no express provisions that subsequent misconduct shall nullify it, and which is not fraudulently induced.[1] In comparatively recent years, however, a new view and consequent change in the law has developed, of which the instant case is a culmination. The principles by which this new and directly opposite conclusion of the law is reached, on facts similar to the instant case, are (1) that the continued fidelity of the wife is an implied condition to the conveyance[2] and consequently her misconduct causes a failure of consideration,[3] and (2) that because of the confidential relationship of the parties, the subsequent misconduct of the wife gives rise to a constructive trust in favor of the husband.[4] And although prior to the instant case there has been but one decision resting squarely on either of the above theories,[5] there are numerous *dicta*[6] as well as arguments of text authorities which support these principles.[7] The instant

[5] Cook v. Burnquist, 242 Fed. 321 (1917); The People v. Stokes, 281 Ill. 159, 187 N. E. 87 (1917).

[1] Kinzey v. Kinzey, 115 Mo. 496, 22 S. W. 497 (1893); Dixon v. Dixon, 23 N. J. Eq. 316 (1873); Finlayson v. Finlayson, 17 Ore. 347, 21 Pac. 57 (1889); see Evans v. Carrington, 2 De G. F. & J. 481, 490 (1860) (separation settlement).

[2] See Evans v. Evans, 118 Ga. 890, 892, 45 S. E. 612, 613 (1903); (1927) 27 COL. L. REV. 608.

[3] Moore v. Moore, 278 Fed. 1017 (Ct. of App. D. C. 1922); see Evans v. Evans, *supra* note 2; Dickerson v. Dickerson, 24 Neb. 530, 39 N. W. 429 (1888); Johnson v. Johnson, 122 Wash. 117, 124, 210 Pac. 382, 384 (1922).

[4] See Brison v. Brison, 75 Cal. 525, 528, 17 Pac. 689, 690 (1888).

[5] Moore v. Moore, *supra* note 3, decided on the principle of an implied condition.

[6] Evans v. Evans, *supra* note 2; Dickerson v. Dickerson; Johnson v. Johnson, both *supra* note 3; Brison v. Brison, *supra* note 4.

[7] On implied condition: (1922) 71 U. OF PA. L. REV. 81; (1927) 27 COL. L. REV. 608. *Contra:* (1923) 7 MINN. L. REV. 350. On constructive trust: 1 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929) § 209. "Whenever two persons stand in such relation that confidence is necessarily imposed by one, and the influence growing out of that fact is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be

case should be followed, at least in cases involving meretricious conduct, for reasons of justice[8] and of the sound public policy of supporting healthy marital relations, both of which purposes will be advanced by the doctrine adopted by this court.

INDEPENDENT CONTRACTOR—INJURY TO CUSTOMER DURING REPAIRS TO STORE—LIABILITY OF OWNER—Owner employed independent contractor to repair store. Store open during repairs. Due to negligence of contractor's employee, customer was injured. Customer sued owner. *Held,* that owner is liable. *Lineaweaver v. Wanamaker,* 299 Pa. 45, 149 Atl. 91 (1930).

It is well settled law that an employer cannot escape liability for the negligence of an independent contractor or his employees when he owes a duty which the courts term "nondelegable."[1] This duty may arise from a contractual relation,[2] from a statute[3] or charter,[4] or, in most jurisdictions, from the common law.[5] While a common law duty, in conjunction with charter or statutory requirements, has in rare cases been held to be the basis for liability,[6] Penn-

permitted to retain the advantage." Certainly in cases of postnuptial transfers or gifts it would be no more than equitable to apply the rule of abused confidence to the subsequent misconduct of the instant case as well as to prior misconduct. And although the relationship of husband and wife does not raise a presumption of the invalidity of a gift, Note (1930) 78 U. OF PA. L. REV. 754, yet see Turner v. Turner, 44 Mo. 535, 539 (1869), "A wife in whom her husband reposed the strictest confidence might well be calculated to exert an influence on his mind and obtain the title to property in her own name." Also see FRENCH CIVIL CODE § 299.

[8] Such a decision may seem unfair to the wife in cases where she has maintained a home for her husband while he has earned the money to purchase the property which he then conveys to her. Yet as it would be too difficult for the law accurately to make such distinctions, it is submitted that justice will be arrived at more effectually by a consistent following, for either spouse, of the rule of the instant case rather than by an adhering to the old rule. It must always be remembered that the wife has deliberately placed herself in such a position by her own misconduct.

[1] Luce v. Halloway, 156 Cal. 162, 103 Pac. 886 (1909); Paltry v. Eagen, 200 N. Y. 83, 93 N. E. 267 (1910); Sebeck v. Plaudeutsche Volkfert Verein, 64 N. J. L. 624, 46 Atl. 631 (1900); 2 MECHEM AGENCY (2d ed. 1914) § 1918; 1 THOMPSON NEGLIGENCE (1st ed. 1901) § 665.

[2] Francis v. Cockrell, L. R. 5 Q. B. 184, 501 (1870); 1 THOMPSON, *op. cit. supra* note 1, § 995.

[3] Weber v. Buffalo R. Co., 20 App. Div. 292, 47 N. Y. Supp. 7 (1897); 1 THOMPSON, *op. cit. supra* note 1, § 667.

[4] Chattanooga R. R. Co. v. Whitehead, 89 Ga. 190, 45 S. E. 44 (1892); 1 THOMPSON *op. cit. supra* note 1, § 669.

[5] Pooler v. Lumber Co., 113 Me. 426, 94 Atl. 754 (1915); Woodman v. Metropolitan R. R., 149 Mass. 335, 340, 21 N. E. 482 (1889); Dean v. St. Paul Union Depot Co., 41 Minn. 360, 43 N. W. 54 (1889); Corrigan v. Elsinger, 81 Minn. 42, 83 N. W. 492 (1900) (exactly parallel to case under discussion); 1 THOMPSON, *op. cit supra* note 1, § 668.

[6] Improvement Co. v. Rhoads, 116 Pa. 377, 9 Atl. 1064 (1897); Gilmore v. P. R. R., 154 Pa. 375, 25 Atl. 774 (1893); Norbeck v. Philadelphia, 224 Pa. 30, 73 Atl. 179 (1909); Reichard v. Bangor Borough, 286 Pa. 25, 132 Atl. 803 (1926); Scott v. Erie City, 297 Pa. 344, 147 Atl. 68 (1929).

sylvania in the past has very carefully confined itself to calling "nondelegable" only those duties which find their origin in statutes or in the charters of the corporations engaged in undertakings in which the public is said to have an interest, thus holding liable for the negligent acts of independent contractors railroads,[7] turnpike companies,[8] and in recent years municipal corporations.[9] The instant case holds nondelegable the duty of the storekeeper to protect his customers from unreasonable risks when he allows his store to remain open during repairs. This is purely a common law duty;[10] and Pennsylvania courts now stand committed to the proposition that common law duties equally with those founded on statutes and charters may be nondelegable.[11] How far this principle may be carried is conjectural. Since common law duties of reasonable care are no less important than those founded upon other considerations, the present decision marks the advent into Pennsylvania of a humanly sound and logically common sense principle of legal liability.

INTOXICATING LIQUORS—MANDATORY FORFEITURE UNDER THE NATIONAL PROHIBITION ACT TO PROTECT INNOCENT THIRD PARTIES—The accused was arrested under the National Prohibition Act for illegal transportation of intoxicating liquor.[1] Instead of proceeding under that statute, which protects innocent lienors and owners, the vehicle was summarily forfeited under the Internal Revenue Statute for removing and concealing spirits with intent to defraud the government of the tax.[2] *Held,* that arrest and seizure for illegal transportation constitutes an election to proceed for forfeiture under the Prohibition Act. *Richbourg Motor Company, Intervener, Petitioner, v. United States,* 281 U. S. 528, 50 Sup. Ct. 385 (1930).

The evolution of the forfeiture laws from the turmoil of these two inconsistent statutes has been retarded by opposing juristic factions,[3] one upholding enforcement at the price of arbitrary forfeiture under the Revenue Statute,[4]

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[7] Philadelphia W. & B. R. R. v. Hahn, 22 W. N. C. 32 (1888).

[8] Improvement Co. v. Rhoads, *supra* note 6.

[9] Norbeck v. Philadelphia, *supra* note 6; Reichard v. Bangor Borough, *supra* note 6; Scott v. Erie City, *supra* note 6.

[10] Reid v. Linck, 206 Pa. 109, 55 Atl. 849 (1903); Bloomer v. Snellenburg, 221 Pa. 25, 69 Atl. 1124 (1908); Roff v. Niles-Bement-Pond Co., 269 Pa. 298, 112 Atl. 459 (1921).

[11] See also Truby & Truby v. Nolan, 86 Pa. Super. 270 (1926).

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[1] 41 STAT. 305, 315 (1919), 27 U. S. C. § 40 (1928).

[2] REV. STAT. § 3450 (1878), 26 U. S. C. § 1182 (Supp. 1928).

[3] For discussions and distinctions from both viewpoints, *cf.* Black, *Some Prohibition Forfeiture Cases—The Doctrine of Vicarious Liability* (1930) 78 U. OF PA. L. REV. 518, with Buckley, *Forfeiture of Vehicles for Unlawful Movement of Liquor: Under the National Prohibition Act—Under the Revised Statutes* (1924) 4 B. U. L. REV. 183.

[4] Payne v. United States, 279 Fed. 122 (C. C. A. 5th, 1922); United States v. 385 Barrels, 300 Fed. 565 (S. D. N. Y. 1924).

the other, headed by Mr. Justice Stone, struggling to safeguard the interests of innocent third parties under the National Prohibition Act.[5] A temporary settlement of the conflict by holding the Revenue Statute impliedly repealed by the Prohibition Act[6] lasted only until a Congressional clarifying act[7] inspired the famous *Ford Coupe Case*,[8] which increased the confusion by declaring both statutes operative. A conviction for illegal transportation was then declared an election by the government to proceed for forfeiture under the Prohibition Act.[9] Mandatory procedure under the holding of the principal case would seem to protect innocent parties in all cases where transportation is involved, but actually the remedy is still contingent on conviction, which is a condition precedent to forfeiture.[10] Thus the rule, actually only changed from *conviction bars election* to *election barred if conviction*, withholds protection in a large group of cases.[11] Although the instant case has already been followed on its facts by a Circuit Court of Appeals,[12] forfeiture has been upheld under harsher statutes where proceedings for illegal transportation failed.[13] A better holding,

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[5] United States v. Brockley, 266 Fed. 1001 (M. D. Pa. 1920) (National Prohibition Act construed liberally to protect innocent owners as well as lienors); United States v. Sylvester, 273 Fed. 253 (D. Conn. 1921); McDowell v. United States, 286 Fed. 521 (C. C. A. 9th, 1923); United States v. Milstone, 6 F. (2d) 481 (Ct. of App. D. C. 1925).

[6] Section 35 of the National Prohibition Act, providing that "all provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency," should be construed in the light of the rule that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty. United States v. Yuginovich, 256 U. S. 450, 41 Sup. Ct. 551 (1921).

[7] ". . . that all laws . . . in force when the National Prohibition Act was enacted, shall be and continue in force, . . . except such provisions of such laws as are *directly in conflict* with any provisions of the National Prohibition Act." (Italics ours.) AN ACT SUPPLEMENTAL TO THE NATIONAL PROHIBITION ACT, 42 STAT. 223 (1921), 27 U. S. C. § 3 (1926), *aff'd*, United States v. Remus, 260 U. S. 477 (1923).

[8] United States v. One Ford Coupe, 272 U. S. 321, 47 Sup. Ct. 154, 47 A. L. R. 1025 (1926) (the separate opinion of Mr. Justice Stone, concurring in part, was applied by him in the principal case); *cf.* dissenting opinion of Butler, McReynolds and Sutherland, JJ., *ibid.* 335, and cases cited, *ibid.* 343n.

[9] Port Gardner Investment Company v. United States, 272 U. S. 564, 47 Sup. Ct. 165 (1926) (Mr. Justice Stone again separately concurred in part); Commercial Credit Co. v. United States, 276 U. S. 226, 48 Sup. Ct. 232 (1928) (Mr. Justice Stone was not present).

[10] United States v. Slusser, 270 Fed. 818 (S. D. Ohio 1921); The Squanto, 13 F. (2d) 548 (C. C. A. 2d, 1926); *cf.* United States v. One Fageol Truck, 17 F. (2d) 373 (C. C. A. 9th, 1927).

[11] United States v. One Packard Motor Truck, 284 Fed. 394 (E. D. Mich., 1922) (driver escaped arrest); United States v. Milstone, *supra* note 5 (car abandoned); United States v. Walker, 41 F. (2d) 538 (D. Tenn. 1930) (seizure by state officers). *Contra:* United States v. Story, 294 Fed. 519 (C. C. A. 5th, 1923).

[12] United States v. One Whippet Sedan, 41 F. (2d) 496 (C. C. A. 7th, 1930).

[13] Aulksne v. United States, 50 Sup. Ct. 467 (1930) (review denied), for discussion of which, see Williams, *Forfeiture Laws* (1930) 16 A. B. A. J. 572; United States v. One Mack Truck, 41 F. (2d) 849 (M. D. Pa. 1930) (Not in act of transportation).

it is felt, would have expressly barred all election where transportation was involved,[14] without suggesting the loose inference that the strength of the bar is measured by the success of procedure.[15]

JUDGMENT—RECOVERY FOR PERSONAL INJURIES AS BAR TO ACTION FOR PROPERTY DAMAGE—EFFECT ON INSURER SUBROGATED UNDER POLICY—After insured had recovered from defendant for personal injuries, insurer, having reimbursed insured for demolished car, sued defendant for the damage to the car. *Held,* (one judge dissenting) that the right of action for the property damage was entirely in insurer and was not merged in insured's judgment for personal injuries. *Le Blond Schacht Truck Co. v. Farm Bureau Mut. Automobile Ins. Co.*, 171 N. E. 414 (Ohio 1929).

Although the assertion has consistently been made that a cause of action cannot be split,[1] courts have been in irreconcilable conflict in determining just what constitutes a cause of action where personal and property torts have resulted from a single act of negligence. This has been caused by antipodal viewpoints in approaching the problem.[2] England[3] and a few American states[4] have regarded the primary right invaded as the determining factor, maintaining as distinct causes of action the separate torts resulting from the single act. That the right of bodily security is fundamentally different from the right to keep property intact is argued by pointing to the facts that entirely different periods of statutory limitation are applied to each, and that claims for property torts may be assigned while this is not true of personal torts.[5] The majority of American jurisdictions[6] do not deny this, but, prompted by the desire to mini-

[14] Other laws held inapplicable where transportation involved and no conviction possible. United States v. One Packard Motor Truck, *supra* note 11; United States v. Milstone, *supra* note 5; Commercial Credit Co. v. United States, 33 F. (2d) 228 (C. C. A. 9th, 1929).

[15] "It is unnecessary to say whether, if for any reason the seizure cannot be made or the forfeiture proceeded with, prosecution for any offense committed must be had under the National Prohibition Act rather than other statutory provisions." Stone, J., in principal case at 507.

[1] 2 BLACK, JUDGMENTS (2d ed. 1902) § 734; 2 FREEMAN, JUDGMENTS (5th ed. 1925) § 596 (complete list of cases in notes).

[2] Brunsden v. Humphrey, 14 Q. B. D. 141 (1884) (Coleridge, C. J., dissenting). This is the leading case on the subject and illustrates very well the two antithetical approaches to the question.

[3] *Ibid.*

[4] Clancy v. McBride, 338 Ill. 35, 169 N. E. 729 (1929); Smith v. Fisher Baking Co., 147 Atl. 455 (N. J. 1929); Reilly v. Sicilian Asphalt Paving Co., 170 N. Y. 40, 62 N. E. 772 (1902); Wilson, *Writs v. Rights: An Unended Contest* (1920) 18 MICH. L. REV. 255.

[5] See Reilly v. Sicilian Asphalt Paving Co., *supra* note 4, at 44, 62 N. E. at 773.

[6] King v. Chicago M. & St. P. R. Co., 80 Minn. 83, 82 N. W. 1113 (1900); Fields v. P. R. T. Co., 273 Pa. 282, 117 Atl. 59 (1922); Sprague v. Adams, 139 Wash. 510, 247 Pac. 960 (1926). See Clark, *Joinder and Splitting of Causes of Action* (1927) 25 MICH. L. REV. 393, 428.

mize litigation,[7] and preferring practical advantages to technical accuracy, so long as the result is consonant with the requisites of justice,[8] view the act of negligence as the determining factor and permit a single action to be brought, with the separate rights named as items of damage.[9] A desirable result is thus achieved,[10] but unfortunately only at the expense of clarity and uniformity.[11] However, in the principal case, the plaintiff insurer has had no day in court and the vexatious litigation criticism is not pertinent. Moreover, it is believed that practical disadvantages would attend the adoption of the majority American view in this situation.[12] Hence the court in the instant case decided accurately, although it is to be regretted that the conclusion was peremptorily reached, for a thorough, well reasoned opinion, suggesting procedural modification, would help considerably to point the way to a logical assimilation of the divergent groups.

LANDLORD AND TENANT—RECOVERY OF DAMAGES FOR INJURY TO TENANT'S PROPERTY CAUSED BY BREACH OF LANDLORD'S AGREEMENT TO REPAIR—Lessor, having received notice to repair defective roof in accordance with his covenant, failed to do so, after warning lessee not to repair, and lessee's goods were damaged by incoming rain. *Held*, that lessee could recover for damage to his goods. *Gabai v. Krakovitz*, 98 Pa. Super Ct. 150 (1929).

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[7] See Lloyd, *Actions Arising Out of Injury to Both Persons and Property* (1912) 60 U. OF PA. L. REV. 531, 544. In this exposition of the problem the consideration of the taxpayer is suggested as having an important bearing on the *result* desired, but the means of effecting it, employed by the American courts, is not openly affirmed. See also (1928) 6 N. C. L. REV. 345.

[8] See King v. Chicago M. & St. P. R. C., *supra* note 6, at 89, 82 N. W. at 1114.

[9] It is obvious that this test is not conclusive in every situation for it stands uncontested that two suits may be brought when different persons are injured or when the property damaged is not owned by the injured possessor.

[10] It would seem much simpler to enact procedural remedies compelling the plaintiff to adjust all of his claims, arising out of a single act of negligence, in one suit. This would accomplish the desired end and at the same time preserve the uniformity of the substantive law.

[11] Underwriters at Lloyd's Ins. Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 455 (1913) (cited as authority in the principal case) accepts the American view of Kimball v. L. & N. R. Co., 94 Miss. 396, 48 So. 230 (1908) and then on the strength of the *dictum* of King v. Chicago M. & St. P. R. Co., *supra* note 6, at 89, 82 N. W. at 1114 permits recovery. The confused situation in Mississippi, where a man with a single right may assign one and retain one for himself, illustrates the unfortunate result of the American view.

[12] Judge Ross, in the dissent of the instant case, supports the American view, arguing that the insurance company may protect itself by interpleading in the insured's suit for personal injuries. This suggestion seems to be predicated on either the hope for Utopian co-operation between client and company or the desire to force insurance companies to preserve Argus-eyed vigilance to defend their pocketbooks. The result, it is believed, would be indirectly to impose financial burdens on those from whom such burdens are intended to be taken by the contended view.

The confusion in the cases dealing with the problem of the principal case,[1] and the hyper-fine distinctions made therein, call for classification. One line of cases, following the general rule of damages in actions *ex contractu,* rigidly asserts the landlord's non-liability for injury to the lessee's property caused by breach of the landlord's covenant to repair.[2] Such damages, it is said, are too remote, and not within the contemplation of the parties at the time of entering the agreement; or, again, they are consequential and indirect.[3] No special astuteness is necessary to observe the fallacy of such reasoning.[4] It is also argued that recovery, if any, is to be based on the contract to repair, and the contract alone. Further, these cases abound with the feeling and periphrases that the tenant is in contributory fault—although not expressed *ipsis verbis*—in remaining in possession with knowledge of the defect;[5] they hold it to be the tenant's duty to make repairs and charge the cost thereof to the landlord.[6] The result of the principal case,[7] apart from the special fact of the landlord's warning to the lessee, is followed in another array of cases,[8] some of which deny that remaining on the premises with knowledge of the defect tinges the tenant's conduct with negligence,[9] or that the tenant is under a *legal* duty to repair.[10] The landlord's liability may be grounded in negligence, the contract to repair being a matter of inducement from which arises the

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[1] As to personal injuries to tenant, see (1927) 14 VA. L. REV. 61. The courts should make no difference between the two, 1 TIFFANY, LANDLORD AND TENANT (1910) § 87.

[2] Bowling v. Carroll, 122 Ark. 23, 182 S. W. 514 (1916); Hendry v. Squier, 126 Ind. 19, 25 N. E. 830, 9 L. R. A. 798 (1890); *cf.* Rumberg v. Cutler, 86 Conn. 8, 84 Atl. 107 (1912); Guynn v. Tremont Hotel Co., 75 Ind. App. 647, 129 N. E. 336 (1921).

[3] Cases cited *supra* note 2.

[4] The problem is: are these damages too remote? Merely to call them remote is to talk magic. To affirm what one seeks to prove, proves nothing. Further, it does not seem that such damages are remote, for the lessee contracted to have the hole in his roof repaired, not for æsthetic reasons, but to protect his property.

[5] Rose v. Butler, 69 Hun 140, 23 N. Y. Supp. 375 (1893); see Cook v. Soule, 56 N. Y. 420, 423 (1874). In Cohen v. Krumbein, 28 Ga. App. 788, 113 S. E. 58 (1922), the court applied the rule of comparative negligence.

[6] *Aliter* where the tenant cannot make repairs for economic reasons or otherwise, Buck v. Rodgers, 39 Ind. 222 (1872).

[7] But even under this view notice of the defect to the landlord is a condition precedent, and the landlord has a reasonable time within which to make repairs, Bowling v. Carroll, *supra* note 2; 1 TAYLOR, LANDLORD AND TENANT (8th ed. 1904) § 330; (1925) 160 LAW TIMES 316.

[8] Chamber v. Belmore Co., 33 Cal. App. 78, 164 Pac. 404 (1917); Miller v. Sullivan, 77 Kan. 252, 94 Pac. 266 (1908); Mason v. Howes, 122 Mich. 329, 81 N. W. 111 (1899); Rife v. Reynolds, 137 Mo. App. 290, 117 S. W. 652 (1909); Security Co. v. Kallis, 102 Misc. 693, 169 N. Y. Supp. 566 (1918); Ingram v. Fred, 243 S. W. 598 (Tex. Civ. App. 1922).

[9] Mason v. Howes, Ingram v. Fred, *supra* note 6. *A fortiori,* this is true where the landlord, after notice, has made an additional promise to repair, Kreppelt v. Greer, 218 S. W. 354 (Mo. 1920); Miller v. Sullivan, *supra* note 6. This fact plus the lessor's warning to the lessee appears to be the *ratio decidendi* of the principal case. For analogous situations in the law, see Bohlen, STUDIES IN THE LAW OF TORTS (1926) 447.

[10] "It was not the duty of the tenant to cause the repairs to have been made," Vandergrift v. Abbott, 75 Ala. 487, 491 (1883). *Accord:* Spencer v. Hamilton, 113 N. C. 49, 18 S. E. 167 (1893).

affirmative duty[11] to take care.[12] Shading away into both these contrary poles is found still a third view, which holds it to be the tenant's duty to make those repairs which are "trifling" and charge them to the landlord.[13] The view of the second group of cases mentioned above, allowing recovery for special damages, seems the preferable one, for such reverent tenderness towards the landlord who has brought about the whole difficulty by committing a breach of his contract, diverts liability from its proper channel, shielding itself behind threadbare legal formulas.

PRACTICE OF LAW—DRAFTING OF WILLS AND TRUST DECLARATIONS—ACTIVITIES OF BANKS AND TRUST COMPANIES—Proceedings were instituted by the Idaho Bar Association for an order on defendant Trust Company to show cause why it should not be cited for contempt of court, in that it held itself out as qualified to draft wills and trust declarations, and was thus, in violation of statute, practicing law, without a license. *Held*, that such activities constituted the practice of law, and were therefore, prohibited by statute, if carried on without license. *In re Eastern Idaho Loan and Trust Co.*, 288 Pac. 157 (Idaho 1930).

While it has been uniformly held that the "practice of law" is not a natural right,[1] but a privilege or franchise,[2] bestowable at the discretion of the state and subject to state control,[3] the statutes which confer this privilege are not uniform in the terminology used[4] to designate the privilege thus granted; and even in those which use the expression "practice of law,"[5] there is no precise concept of

[11] This duty is a non-delegable one, so that the landlord is liable for the negligence of an independent contractor in making repairs, (1929) 77 U. OF PA. L. REV. 119.

[12] Baron v. Liedloff, 95 Minn. 474, 104 N. W. 289 (1905), (injury to person); see 3 SHEARMAN & REDFIELD, LAW OF NEGLIGENCE (6th ed. 1913) § 708a; RESTATEMENT OF THE LAW OF TORTS (Am. L. Inst. 1929) § 227. This would seem to harmonize with two well established principles of law; the one, that a contract may so bring two people together as to create a duty of care in the one towards the other—Marshall v. R. R., 11 C. B. 655 (1851); the other, that affirmative action is asked of those that receive a consideration. As to the latter, see the masterly article by Bohlen, *Basis of Affirmative Obligations in the Law of Torts* (1905) 53 U. OF PA. L. REV. 209.

[13] Johnson v. Inman, 134 Ark. 345, 203 S. W. 836 (1918); Woodward v. Jones, 15 Misc. 1, 36 N. Y. Supp. 775 (1896). Where, however, the tenant is unable to make repairs, the courts should follow Buck v. Rodgers, *supra* note 6.

[1] Cohen v. Wright, 22 Cal. 293, 317 (1863); *In re* Durant, 80 Conn. 140, 147, 67 Atl. 497, 590 (1907); *In re* Goldstein, 220 App. Div. 107, 220 N. Y. Supp. 473 (1927); *In re* Ellis, 118 Wash. 484, 203 Pac. 957 (1922).

[2] *In re* Collins, 188 Cal. 701, 206 Pac. 990 (1922); *In re* Thatcher, 190 Fed. 969 (N. D. Ohio 1911); *In re* Popper, 193 App. Div. 505, 184 N. Y. Supp. 406 (1920).

[3] *In re* Bailey, 50 Mont. 365, 146 Pac. 1101 (1915).

[4] ILL. REV. STAT. (Cahill, 1925) c. 13, p. 1 ("practice as attorney or counsellor at law"); MD. ANN. CODE (Bagby, 1924) Art. 10, § 1 ("practice the profession or perform the services of an attorney"); DEL. REV. CODE (1915) 3734, § 10 ("practice as attorneys" in court).

[5] PA. STAT. (West, 1920) § 851; N. Y. CONS. LAWS (Cahill, 1930) c. 41, § 270; N. J. COMP. STAT. (Cum. Supp. 1925) § 52-214 p.

what amounts to such practice of law. The term undoubtedly includes more than mere activity before a court of record.[6] It has been defined by the United States Supreme Court[7] as covering all professional activity in "legal formalities"; the difficulty, however, is to enumerate such formalities. By way of distinction, it has been suggested that documents which the average business man could competently draw, should not be included,[8] but courts have held it within the *exclusive* province of a licensed attorney to engage in the business of drawing bills of sale and mortgages,[9] of negotiating for the release of a prisoner,[10] or of preparing papers of incorporation.[11] The principal case is consistent with these decisions, for whatever may be one's personal rights[12] to perform legal services, when such performance amounts to a business,[13] no valid reason excepts it from the ban on unlicensed practitioners. Although, in support of a contrary view, it has been argued that history and custom sanction the activities of conveyancers, title companies, and trust organizations,[14] and though these practices by laymen for remuneration have been judicially noticed and upheld as lawful,[15] still it is impossible to ignore the obvious fact that these statutes regulating admissions to the Bar were, for the most part, passed to prevent such usurpations by the unlicensed. The decision of the principal case, however, is of importance not only with regard to licensing statutes, which exist in practically all the states,[16] but is significant in the light of the notorious fact that, although corporations being unable to possess the fundamental qualifications of the profession,[17] are incapable of being admitted to the practice of law,[18] yet Banks and Trust Com-

[6] Commonwealth v. Barton, 20 Pa. Super. 447 (1902); *In re* Duncan, 83 S. C. 186, 189, 65 S. E. 210, 211 (1909).

[7] Savings Bank v. Ward, 100 U. S. 195, 199 (1879).

[8] Dunlap v. Lebus, 112 Ky. 237, 65 S. W. 441 (1901).

[9] People v. Alfani, 227 N. Y. 334, 125 N. E. 671 (1919).

[10] *In re* Duncan, *supra* note 6. *Contra:* Bird v. Breedlove, 24 Ga. 623 (1858).

[11] In Matter of Pace, 170 App. Div. 818, 156 N. Y. Supp. 641 (1915). See as to preparation of contract and bond, Ely v. Miller, 7 Ind. App. 529, 34 N. E. 836 (1893).

[12] *In re* Eastern Idaho Loan and Trust Co., 288 Pac. 157, 159 (1930).

[13] People v. Alfani, *supra* note 9.

[14] For a full discussion of this view, see Note (1920) 68 U. OF PA. L. REV. 356.

[15] People v. Title Guarantee and Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919) (although generally regarded as sustaining the view contrary to that in the principal case, it is to be noted that the court strictly limits its decision to the facts which disclosed that the defendant had only drawn one or two documents, and these acts were incidental and not *ultra vires* to the Trust Company's charter. In distinguishing People v. Alfani, *supra* note 9, the court intimates that an increase in such activities, or performing them as a business would lead to an opposite decision).

[16] THORNTON, ATTORNEYS AT LAW (1914) § 69.

[17] Good moral character and satisfactory education are the minimum requirements. *In re* Duncan, *supra* note 6; Note (1914) 28 A. L. R. 1140.

[18] THORNTON, ATTORNEYS AT LAW (1914) § 35; *In re* Cooperative Law Co., 198 N. Y. 479, 92 N. E. 15 (1910); State v. Merchants Protective Corp., 105 Wash. 12, 177 Pac. 694 (1919).

panies are universally engaged in activities, which the principal case terms the "practice of law." It is evident that the effect of the doctrine of the principal case, wherever approved, will be to deprive such institutions of what now constitutes a considerable portion of their business.

PROPERTY—RIGHT OF OWNER OF LAND ABUTTING ON PUBLIC ROAD—HEAT, POWER, AND LIGHT LINES AS AN ADDITIONAL SERVITUDE—Complainant, the owner in fee of land crossed by a public highway, seeks to restrain the respondent, a franchised company, from erecting proposed electric lines for the transmission of heat, power, and light on the public road, claiming that this is an additional servitude upon his land. By the admitted facts this is a public purpose. *Held,* that this is not an additional servitude on complainant's land. *Crawford v. Alabama Power Co.,* 128 So. 454 (Ala. 1930).

A public highway may be used for any purpose for which it is dedicated without being an additional servitude upon the fee of the abutting owner.[1] Under this general rule of law the majority of courts hold that electric wires do constitute an additional servitude on the fee of the abutting owner, since they consider the public to have acquired merely a right of passage in the highway by the dedication, and that any use beyond this is a use for which the abutting owner is entitled to compensation.[2] However the minority hold *contra,* especially in the case of telegraph and telephone wires,[3] and justify their position on the following two questionable grounds: First, that streets are dedicated in the furtherance of communication, and any improved means of communication is held to have been contemplated,[4] therefore it is as much a proper use of the highway to send a message by electrical vibrations over the wire as by a letter in a mail pouch;[5] second, that the erection of telegraph and telephone wires is merely a new method of using the old easement which was granted contemplating

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[1] For discussion see Note (1929) 77 U. OF PA. L. REV. 793.

[2] For citation of authorities see, CURTIS, LAW OF ELECTRICITY (1915) §§ 284, 285; 2 ELLIOT, ROADS AND STREETS (4th ed. 1926) § 894; KEASBY, ELECTRIC WIRES (2d ed. 1900) § 89.

[3] For citation of authorities see, CURTIS, *op. cit. supra* note 2, §§ 284, 286; 2 ELLIOTT, *op. cit. supra* note 2, § 893; KEASBY, *op. cit. supra* note 2, § 90.

[4] "This as a matter of fact, is in most cases a very violent presumption, but to presume that the use of our highways by telegraph and telephone companies was contemplated when they were established, does still more violence to the facts." 2 ELLIOT, *op. cit. supra* note 2, § 894.

[5] Hobb v. Long Distance Tel. and Tel., 147 Ala. 393, 41 So. 1003 (1906). *Contra:* Eels v. American Telephone and Telegraph Co., 143 N. Y. 133, 38 N. E. 202 (1894); see Nicoll v. N. Y. & N. J. Telephone Co., 62 N. J. 733, 736, 42 Atl. 583, 584 (1899), wherein it says "the resemblance between this use and that ordinarily enjoyed under the easement merely goes beneath the words by which it may be described. In reality the electric current does not use the highway for passage. It uses the wire, and would be as well accommodated if the wire were placed in the fields or over the houses. The highway is used only as a standing place for the structures." See also Halsey v. R. R. Co., 47 N. J. Eq. 380, 393, 20 Atl. 859, 864.

the improved use.[6] In the light of this reasoning it is unconscionable even in jurisdictions adopting the minority view, to accept the reasoning of the court in the principal case wherein they say, "the same line of reasoning, therefore must be held applicable," [7] as this extends the original analogy of the telegraph and telephone to include heat, power, and light wires, while it entirely ignores the fact that there is no similarity between them insofar as a means of communication is concerned. Since it is a public purpose by the admitted facts, it would be more acceptable to say that on the grounds of public policy this is not an additional servitude,[8] rather than to rely upon fallacious logic.[9]

TAXATION—SITUS OF INTANGIBLES FOR TAX PURPOSES—The state of Missouri attempted to place an inheritance tax upon credits of a non-resident, consisting of cash deposited with several Missouri banks, United States coupon bonds physically present within the state, and certain notes, also within the state, most of which were executed by residents of Missouri and secured by liens upon lands in that state. The same credits had already been taxed by the owner's domiciliary state. *Held,* (Justices Holmes, Stone and Brandeis dissenting) that such credits had no taxable *situs* in Missouri and that the Missouri statute authorizing the tax contravened the "due process" clause of the Fourteenth Amendment. *Baldwin v. Missouri,* 50 Sup. Ct. 436 (U. S. 1930).

In this decision, the United States Supreme Court reiterates and strengthens its position taken in the recent case of *Farmers Loan v. Minnesota,*[1] advancing another step in the direction of the abolition of double taxation of intangibles. Prior to the *Farmers Loan* case, a tax on intangibles had been allowed in the state of the debtor's domicile,[2] in the state in which the tangible evidences of

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[6] Ala. Power Co. v. Christian, 216 Ala. 160, 112 So. 763 (1927). But see Eels v. American Telephone and Telegraph Co., *supra* note 5, at 140, 38 N. E. at 204, wherein it is stated, "this so-called new method is a permanent, continuous and exclusive use and possession of some part of the public highway itself, and, therefore, cannot be simply a new method of exercising such old public easement."

[7] Principal case at 457.

[8] See Hobb v. Long Distance Tel. and Tel., *supra* note 5 at 398; 41 So. at 1004; Halsey v. R. R. Co., *supra* note 5, at 383, 20 Atl. at 860, stating "the abutter's right is subordinate to that of the public, and so insignificant when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest" See also 2 ELLIOT, *op. cit. supra* note 2, (2d ed. 1900) at 417; KEASBY, *op. cit. supra* note 2, at 135.

[9] The case makes no mention as to whether the light is to be used to light the highway or not. If it is, there is ample authority to support the case on this ground. Meyers v. Hudson County Electric Co., 63 N. J. L. 573, 44 Atl. 713 (1899); Palmer v. Larchmont Electric Co., 158 N. Y. 231, 53 N. E. 1092 (1899); 2 ELLIOT, *op. cit. supra* note 2 § 895; KEASBY, *op. cit. supra* note 2 § 107.

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[1] 280 U. S. 204, 50 Sup. Ct. 98 (1930).

[2] Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277 (1903) (overruled by Farmers Loan v. Minnesota, *ibid.*). But *cf.* state tax on foreign-held bonds, 15 Wall. 300 (1872).

credits were physically present,[3] and in the state in which the credits were employed or arose out of a continuing business.[4] *Farmers Loan v. Minnesota*, though intimating that intangibles may acquire no *situs* apart from the owner's domicile unless they "have become integral parts of some local business,"[5] held merely that credits were not taxable at the debtor's domicile. But the present holding molds into law the *dictum* of the former case, inasmuch as the credits were physically present in the taxing state[6] and a portion secured by liens on realty therein.[7] The decision still leaves undecided whether credits having a "business *situs*" can again be taxed at the domicile of the owner.[8] But in view of the intimation of the court in *Safe Deposit Co. of Baltimore v. Virginia*,[9] it would not be surprising if, in the future, the application of the fiction *mobilia sequuntur personam* is limited to cases in which intangibles have not acquired a "business *situs*," in which latter event, a solution may be reached by an analogy to the case of tangible property.[10]

TENANCY BY THE ENTIRETY—EQUITABLE INROAD UPON THE RIGHTS OF SURVIVING TENANT—Husband murdered his wife and thereupon committed suicide. Wife's administrator brings a bill in equity to have husband's administrator declared a constructive trustee of one-half of certain bank deposits

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[3] Wheeler v. Sohmer, 233 U. S. 434, 34 Sup. Ct. 607 (1914); *cf.* Scottish Union and National Insurance Co. v. Bowland, 196 U. S. 611, 25 Sup. Ct. 345 (1905).

[4] Bristol v. Washington, 177 U. S. 133, 20 Sup. Ct. 585 (1900); State Board of Assessors v. Comptois National D'Escompe, 191 U. S. 388, 24 Sup. Ct. 109 (1903); Liverpool Ins. Co. v. Board of Assessors, 221 U. S. 346, 31 Sup. Ct. 550 (1911); See Powell, *Business Situs of Credits* (1922) 28 W. VA. L. J. 89.

[5] *Supra* note 1 at 209, 50 Sup. Ct. at 101. Since the bonds in that case were physically outside the taxing state, it was unnecessary for the court to lay down the rule so broadly.

[6] In Wheeler v. Sohmer, *supra* note 3, a transfer tax on notes of a non-resident located in a safe deposit box in the state was sustained, even though made and secured by mortgages on realty in another state. It is interesting to note that Justice McKenna, though doubting the validity of a property tax, concurred on the grounds that it was a transfer tax. The facts of the principal case present a stronger argument for the validity of the tax since the credits were secured by liens on realty within the taxing state. Hence Wheeler v. Sohmer, though not specifically overruled, can apparently no longer be regarded as law.

[7] *Cf.* Savings and Loan Society v. Multnomah, 169 U. S. 421, 18 Sup. Ct. 392 (1898) where a tax on a non-resident mortgagee's interest in land lying within the state was sustained, even though by the law of the taxing state the mortgagee had only an equitable interest.

[8] Prior to Safe Deposit and Trust Co. v. Virginia, 280 U. S. 83, 50 Sup. Ct. 59 (1929), it was never doubted that the fact that intangibles may have a taxable *situs* elsewhere did not interfere with the right of the owner's domiciliary state again to tax them.

[9] *Ibid.*; Note (1930) 78 U. OF PA. L. REV. 532.

[10] See Nossaman, *The Fourteenth Amendment in its Relation to State Taxation of Intangibles* (1930) 18 CALIF. L. REV. 345.

held by husband and wife as tenants by the entirety, for the benefit of the wife's heirs. *Held,* that the petitioner is entitled to the relief sought. *Barnett v. Couey,* 27 S. W. (2d) 757 (Mo. 1930).[1]

It has been the settled law for centuries that a tenancy by the entirety, being founded on the legal unity of husband and wife, vests *per tout et non per my,* and the survivor takes the whole, not by the fact of survivorship, but by the original grant.[2] Even in the case of property held by one person, the better view is that a devisee, legatee, or heir who murders his testator, nevertheless acquires the legal title at the latter's death.[3] In such cases, however, courts usually apply equitable principles and hold the murderer a constructive trustee for the heirs of his victim.[4] Though the principle of constructive trust has often been thus applied where the wrongdoer actually obtains legal title to the property by his wrong,[5] the principal case and the two cited in accord with it[6] show a tendency to go further and apply the same principle to tenancies by the entirety even though, in legal theory, the death of one tenant gave the other no interest in the property that he did not possess before. The application of the equitable rule undoubtedly produces a just result in such a situation, but, clearly, it amounts to a repudiation of the common law principle that a tenant by the entirety takes the whole at the time of the grant and receives no accretion at the death of his spouse. In view of the abolition of tenancy by the entirety in many jurisdictions[7] and the weakening of them in others, it is of especial interest that in a jurisdiction which, like Pennsylvania, still gives this estate its full common law recognition,[8] the court in the principal case is willing to invalidate the concept where that concept prevents the application of well-established equitable principles.

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[1] Accord: Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927); Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (1918). *Contra:* Beddingfield v. Estell and Newman, 118 Tenn. 39, 100 S. W. 108 (1906).

[2] Stuckey v. Keefe, 26 Pa. 397 (1856); Co. LITT. 187b; 2 BL. COMM. *182; 2 KENT. COMM. *132.

[3] Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785 (1914); Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895); Shellenberger v. Ransom, 41 Neb. 646, 59 N. W. 935 (1894); Ames, *Can a Murderer Acquire Title by his Crime?* (1897) 36 AM. L. REG. (N. S.) 225.

[4] Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540 (1896); Ames, *op. cit. supra* note 3; 1 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929), 309; 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) 2411.

[5] Sorenson v. Nielson, 240 N. Y. Supp. 250 (1930); 1 PERRY, *op. cit. supra* note 4; 3 POMEROY, *op. cit. supra* note 4 at 2370; *ibid.* 2404.

[6] *Supra* note 1.

[7] Directly, by statutes turning tenancies by the entirety into tenancies in common, see Hoffman v. Stigers, 28 Iowa 302 (1869); indirectly, by married women's property acts, Donegan v. Donegan, 103 Ala. 488, 15 So. 823 (1894); Shapiro, *Estates by Entirety* (1913) 61 U. OF PA. L. REV. 476.

[8] Stifel's Union Brewing Co. v. Saxy, *et al.,* 273 Mo. 159, 201 S. W. 67 (1918); Beihl v. Martin, 236 Pa. 519, 84 Atl. 953 (1912); (1930) 78 U. OF PA. L. REV. 572.

TORTS—RAILROADS—DUTY TO CONTINUE A GRATUITOUS SERVICE—Plaintiff was injured by one of defendant's trains at a highway crossing where defendant voluntarily maintained a watchman. The watchman failed to give warning of the approach of the train. *Held,* that there was a breach of the duty owed to the plaintiff as one of the members of the public who had come to rely upon the services of the watchman. *Erie R. Co. v. Stewart,* 40 F. (2d) 855 (C. C. A. 6th, 1930).

When the presence of a watchman at a railroad crossing is required by statute [1] or by ordinance,[2] failure to observe the requirement is generally held to constitute negligence *per se.*[3] It is often stated that the duty owed to travellers who know of and rely upon the presence of the watchman at the crossing is the same when the watchman's services are voluntary, as when they are required by statute or by ordinance.[4] Such a statement is too broad however. The duty imposed by law continues until it is ended by law, whereas the duty arising from the voluntary maintenance of a watchman ceases upon the giving of reasonable notice of the watchman's withdrawal.[5] Subject to this qualification however, the duty remains. What is its basis? Clearly it does not arise out of statute, or out of contract. It is generally stated that the duty arises out of the assurance of safety which the absence of a signal from a watchman at a crossing where one has been regularly stationed gives.[6] This seems to be the correct explanation, and since there can be no assurance of safety towards persons who know nothing of the employment of the watchman, it follows that as to these, there is no duty to continue the service or give notice of its discontinuance. Thus limited, the duty is a reasonable one. It recognizes that the interest in freedom from bodily injury is more important than the slight inconvenience which notice entails. It imposes no harsh burden upon the railroad, particularly since the railroad's affirmative act has created the necessity of such notice.

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[1] Hover v. Denver & R. G. W. R. Co., 17 F. (2d) 881 (C. C. A. 8th, 1927).

[2] Schell v. DuBois, 94 Ohio St. 93, 113 N. E. 664 (1916).

[3] Thayer, *Public Wrong and Private Actions* (1914) 27 HARV. L. REV. 317.

[4] Dolph v. N. Y., N. H. and Hartford R. Co., 74 Conn. 538, 51 Atl. 525 (1902); Chicago & Alton R. Co. v. Wright, 120 Ill. App. 218 (1905); (1925) 74 U. OF PA. L. REV. 178.

[5] TORTS RESTATEMENT (Am. L. Inst. 1929) § 183 (f).

[6] Dolph v. N. Y., N. H. and Hartford R. Co., *supra* note 4; Rhode v. Chicago & Northwestern R. Co., 86 Wis. 309, 56 N. W. 872 (1893); 3 ELLIOT, RAILROADS (3d ed. 1921) § 1651; 2 SHEARMAN AND REDFIELD, NEGLIGENCE (6th ed. 1913) § 466. An analogous situation exists where a landlord makes gratuitous repairs for his tenant, and it is his duty to take care lest he should mislead his tenant into the belief that the work has been well done, and the premises made safe for use, BOHLEN, STUDIES IN THE LAW OF TORTS, (1926) 223, n. 28.