ANNOUNCEMENT


NOTES

The Law School—In the fall of 1926 the Provost and Trustees of the University established the University Placement Service, under the Directorship of Professor Clarence E. Clewell, with offices at 3400 Walnut Street.

It was believed that important advantages from the creation of such a service would flow to the general alumni, by aiding them to secure positions or to improve them; and to industries and professions, locally and nationally, by aiding them in the selection of their personnel from alumni whose credentials indicate they are qualified for the position under consideration, and whose recommendation has the sanction and expressed approval of the school from which they graduated, and which knows their ability and personality.

It was recognized that, both from the point of view of the graduate seeking a position and of the office seeking the lawyer, placement work within the legal profession (as also in the case of the medical profession and highly technical engineering positions) involves a high degree of intimacy with personal and confidential factors, best obtained by fixing final responsibility for all recommendations of law graduates in the office of the Dean of the Law School, to whom inquiries, when directed to the University Placement Service, would be referred. The effort which the Law School has for many years made to aid graduates in establishing themselves in practice, and to aid offices and corporations in recruiting their associates, is being carried on, under this regime, by Dean Mikell, his Assistant, Layton B. Register, the Law School's representative on the University Placement Service Committee, by the Law Faculty, and by the University Placement Service, with the same degree of caution and personal interest as in the past, but with the additional advantages which derive from being a branch of the very efficient and far-reaching University Placement Service, whose valuable records and wide contacts are at the disposal of the Law School.

The possibilities of usefulness of this service, already well re-
alized by the students of the Law School, have not as yet been so fully appreciated by the Bar. The work, it is believed, should not be limited solely to bringing the June graduate's need of a position to the attention of the law office, but should extend to the furnishing of reciprocal help when the lawyer sought and the lawyer seeking a new association are men of older experience. Both types of service require for their development that members of the Bar shall more frequently communicate their needs in these respects, so that well-qualified candidates, expressly sanctioned and approved by the Dean's office, can be obtained.

Inquiries may be addressed either to the Dean's office, 3400 Chestnut Street, or to the Director of the University Placement Service, 3400 Walnut Street, Philadelphia.

William E. Mikell,
Dean.

LIABILITY TO TRESPASSERS AND LICENSEES OF ONE MAINTAINING ELECTRIC WIRES IN A DANGEROUS CONDITION ON PREMISES OF A THIRD PARTY—A recent New York decision raises once more the interesting question as to the right of recovery of a trespasser who is injured by coming in contact with defectively insulated wires belonging to a person other than the landowner. This note purports to investigate that problem confining itself to those cases wherein the defendant permitted electric wires to exist in a dangerous condition, of which he knew or should have known. The fault of the defendant, then, is assumed and the inquiry is in what manner his liability is limited by the relation of the parties to the landowner. In order to determine the extent of this liability, it will be necessary to distinguish the various situations that may arise. The plaintiff may be either a trespasser or a licensee, and in either category we must further distinguish

2 Note on Terminology: The term landowner is used to designate one in the possession of land, whether it be as owner of the fee or under a lesser right. It includes all against whose possession the trespass is an offense. The term trespasser is used to designate one who is neither suffered nor invited to enter the premises. It includes all who come upon the premises without right. The term bare licensee is used to designate one whose presence is not invited, but tolerated. It includes that class of persons aptly described as "tolerated intruders." The term actual licensee is used to designate one whose presence is not invited, but permitted. It includes that class of persons who fall short of being invitees, but yet are more than tolerated intruders. The term paid licensee is used to designate an actual licensee who pays for the privilege of coming upon the land. The term invitee is used to designate one who is invited to come upon the premises, either expressly or impliedly.


3 The writer has not found it useful to distinguish between different types of licensees in this connection. Furthermore, cases applying to plaintiffs who are invitees have been ignored, inasmuch as the liability of the landowner, and consequently of one maintaining wires over the landowner's premises, is unquestioned.
between adults and infants. The defendant may be a trespasser, a bare licensee, an actual licensee, a paid licensee or an invitee. Thus it immediately becomes apparent that a proper investigation of this problem involves a consideration of twenty different factual situations. Much of the confusion that has arisen in this field of tort law is directly traceable to the failure of courts and writers to recognize the differences existing between these various groups. With this classification in mind we shall proceed to an analysis of the cases.

**Cases in Which the Plaintiff is a Trespasser**

In all of the cases in this section, the plaintiff is a trespasser, either adult or infant, and the defendant belongs to one of the five groups mentioned above.

I. Where the defendant is a trespasser, it seems to be the law and sound law that he is liable to a plaintiff who is also a trespasser, whether infant or adult. There is very little authority on the point where the plaintiff is an adult.\(^4\) However, where the plaintiff is an infant, there are several decisions\(^5\) holding the defendant liable. The theory of the decisions attaches little weight to the fact that the plaintiff is a juvenile, but rests principally on the proposition that the defense that the plaintiff is a trespasser is not available to the defendant who is himself a trespasser. In Guinn v. Delaware and Atlantic Telephone Co.,\(^6\) the leading case dealing with this situation, the court said:

"The test of defendant's liability to a particular person is whether injury to him ought reasonably to have been anticipated. . . . The general rule is that a person is liable for those results of his negligence which are reasonably to be anticipated; the exemption of the landowner from liability as to trespassers and licensees is necessary to secure him the beneficial use of his land, but no reason exists for extending this exemption to the case where the rights of the defendant have not been interfered with."

A lone New Hampshire case\(^7\) denies that the defendant is liable. The decision is placed on the ground that the case falls into the "attractive nuisance" class and since New Hampshire does not follow the "attractive nuisance" doctrine,\(^8\) the plaintiff cannot recover. The

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\(^4\) See Birmingham Ry. v. Cockrum, 179 Ala. 372, 60 So. 304 (1912).
\(^6\) Supra note 5.
\(^8\) For exhaustive note on this doctrine, see (1925) 36 A. L. R. 34.
fallacy in placing the case in that category is apparent, since such an approach ignores the important distinction that the defendant was himself a trespasser in locating on land belonging to a third party.

II. The fact that the defendant is a bare licensee rather than a trespasser should not alter his liability. He cannot by any stretch of the imagination claim to stand in the position of the landowner. However, there is an almost complete absence of decisions on this point. No cases have been found bearing on the situation where the defendant is a bare licensee, and the plaintiff is a trespasser. There is one decision holding the defendant liable to an infant trespasser. The basis of the court's decision was that the defendant could foresee the presence of trespassers, and the defendant himself having no proprietary interest could not complain that the plaintiff was a trespasser. Clearly such considerations would apply equally well to an adult trespasser.

III. Considering next the situation in which the defendant is an actual licensee, the law is unsettled and the decisions are conflicting. Some courts assimilate the licensee to the landowner, others do not. It is difficult to draw any general conclusions. When the plaintiff is an adult trespasser, Georgia, Maryland, and Michigan have held that the defendant stands in the position of the landowner and owes no duty to trespassers. However, opposed to these authorities stands the well-considered case of *Humphrey v. Twin State Gas & Electric Co.*, the opinion of which very forcefully criticizes the other view:

"Traced to its source, the rule exempting a landowner from liability to a trespasser injured through the condition of the premises is found to have originated in an over-zealous desire to safeguard the right of ownership as it was regarded under a system of landed estates, long since abandoned, under which the law ascribed a peculiar sanctity to rights therein. . . . A trespass is an injury to the possession; and as it is only he whose possession is disturbed who can sue therefor, so it should be that he alone, could assert the unlawful invasion when suit is brought by an injured trespasser. One should not be allowed 'to defend an indefensible act' by showing that the party injured was engaged in doing something which, as to a third person was unlawful."
The same diversity of opinion exists when the plaintiff is an infant trespasser. Decisions in six jurisdictions hold the defendant liable, on the theory that regardless of his position as licensee, he owes a duty of care to all persons whose presence on the premises he may anticipate. Several of the cases emphasize the fact that the defendant is dealing in a highly dangerous substance and hold that especially because of this factor he must take reasonable precautions to safeguard all persons who he can foresee may be injured. But none of these cases turn on the fact that the plaintiffs were children rather than adults, except in the sense that the trespasses of children are more foreseeable. However, there are decisions in three other jurisdictions allowing an infant to recover which do rest peculiarly on the "attractive nuisance" doctrine.

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26 See, however, Wolf v. Ford, supra note 14.


28 Hurd v. Phoenix Co., 30 Del. 332, 106 Atl. 286 (1918); Stedwell v. Chicago, 297 Ill. 486, 130 N. E. 729 (1921); Ghera v. Central Illinois Public Service Co., 212 Ill. App. 48 (1918) (In this case the Illinois Court specifically decided that unless the facts constituted an "attractive nuisance," the infant could not recover); Zuidersich v. Minnesota Utilities Co., 155 Minn. 293, 193 N. W. 449 (1923); see Mayfield Water & Light Co. v. Webb's Admr., 129 Ky. 395, 111 S. W. 712 (1908). For an interesting comment on the last case, see (1911) 72 CENT. L. J. 121, 122. Washington, though it applies the "attractive nuisance" doctrine generally, seems reluctant to extend it to these cases. In this regard see Grave v. Washington Water Power Co., supra note 14; cf. however Clark v. Longview Public Service Co., infra note 31. An early Kansas case, Consolidated Power Co. v. Healy, 65 Kan. 798, 70 Pac. 884 (1902), allowed a child to recover, resting its decision on the "attractive nuisance" doctrine. However, a later case, Edwards v. Kansas City, supra note 14, which involved the same situation, rested its decision on the broader ground that a licensee owes a duty of care to all persons whose presence on the premises he can foresee.

29 An investigation of the cases in which the defendant is an actual licensee and the plaintiff is an infant trespasser, reveals another sidelight on this question in two jurisdictions. In Johnson v. City of St. Charles, 200 Ill. App. 184 (1916), and in Shannon v. Kansas Power Co., 287 S. W. 1031 (Mo. App. 1926), the court held that where the defendant allows wires to remain in a position other than that contemplated by the license, his property right is inferior to the plaintiff's right of action. Therefore the defendant cannot set up the fact that the plaintiff was a trespasser, because as to the defendant, he was not a trespasser. This view is particularly applicable to those cases where an electric wire has fallen from its normal position and is dangling in mid-air or else is sagging close to the ground.
Three courts, on the other hand, absolutely protect the defendant licensee even though the plaintiff is an infant. Georgia holds no liability, without assigning reasons. New Hampshire denies a recovery because it does not follow the "attractive nuisance" doctrine. However, that state is out of line with most jurisdictions, since it holds that the defendant is not liable even when he is a trespasser. Maryland, as has already been pointed out above, denies a recovery when the plaintiff is an adult and, since it does not recognize the "attractive nuisance" doctrine, consistently holds that the defendant is not liable when the plaintiff is an infant.

Considering all the cases in which the defendant was an actual licensee and properly evaluating them, it would seem that there is a slight weight of authority in favor of holding him liable to a plaintiff trespasser. Certainly the better reasoned opinions are to that effect.

IV. Where the defendant is a paid licensee, and the plaintiff an adult trespasser, a North Carolina decision holds the defendant liable, principally because the fact that the plaintiff is a trespasser will not bar him from recovery.

On the other hand in the only case in which the plaintiff is an infant trespasser, Texas holds the defendant not liable, on the theory that he stands in the same position as the landowner. In that jurisdiction, unless an "attractive nuisance" case is made out, the plaintiff cannot recover.

The dearth of cases dealing with this situation makes it difficult to draw any definite conclusions, other than to say that the paid licensee occupies a more favored position in the law than an actual licensee. The paid licensee practically stands in the same position as the landowner, since he is a lessee of that space through which his wires travel.

V. Where the defendant is an invitee, on the land primarily for his own benefit, such as a power supplier, and the plaintiff is an adult trespasser, there is an even split of authority. Kentucky and New

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22 For comment see (1921) 31 YALE L. J. 102.
23 Supra, p. 507.
24 Supra note 11.
25 Grube v. Mayor of Baltimore, 132 Md. 355, 103 Atl. 848 (1918).
28 Cf. note 19 supra—explaining how two jurisdictions hold that a licensee loses his license when his wires are not exactly where allowed by license.
York hold the defendant not liable, the theory being that since the plaintiff was a trespasser, he had no right to be where he was when the injury happened, and therefore the defendant did not have to anticipate his presence. On the other side stand Missouri and Washington. Under the Missouri view, the defendant is liable to trespassers when trespassers have been there before, and the defendant can anticipate that they will be there again. Under the Washington view, the defendant is liable to anyone—trespasser, licensee or invitee—whose presence on the premises he can foresee. This is the broadest and most modern view of all, and is undoubtedly indicative of the trend of the decisions.

Where the plaintiff is an infant trespasser, there exists a similar conflict of authorities. Three courts hold the defendant liable whenever the presence of the trespassers could have been anticipated. Cases in three other states make the plaintiff's recovery dependent on the "attractive nuisance" doctrine. In two jurisdictions, the defendant's freedom from liability is the same as that of the landowner.

Two opposing forces are seen at work in all the cases in this section. On the one hand, it is difficult to deny that an invitee stands substantially in the position of the landowner. On the other hand, it is undoubtedly true that the exemption of the landowner from liability to trespassers is a relic of a "system of landed estates" which no longer exists, and of a comparatively simple economic state of society which is replaced today by one of rapidly increasing complexity. For this very good reason, many courts have refused to extend the landowner's exemption to anyone else. Though all the cases are necessarily recent, the most recent undoubtedly evidence a tendency to adhere to the latter principle.

conservative jurisdiction. It apparently refuses to allow an infant trespasser to recover against an actual licensee—unless the facts constitute an "attractive nuisance." See Mayfield Water & Light Co. v. Webb's Admr., supra note 18.


f Key West Electric Co. v. Roberts, 81 Fla. 743, 89 So. 122 (1921); Robbins v. Minute Tapioca Co., 236 Mass. 387, 128 N. E. 417 (1920).
Cases in Which the Plaintiff Is a Licensee

In all of the cases in this section, the plaintiff is a licensee, either infant or adult, and the defendant belongs to one of the five groups discussed in the previous section.

I. Though there are few cases in point, the law would seem to be well settled that a trespasser is liable to an adult or infant licensee. Where plaintiff is an adult licensee, California holds the defendant liable on the theory that the plaintiff was rightfully on the land whereas the defendant was wrongfully on the land. This accurately states the relative rights of the parties. Opposed to this view, is an aberration of the Kentucky Supreme Court which holds the defendant not liable on the theory that the defendant stands in the same position as the landowner. It is obvious that such a position can be supported only on the most specious reasoning, for a trespasser manifestly has no proprietary interest whatsoever.

Where the plaintiff is an infant licensee, Massachusetts and Missouri hold the defendant liable on two separate theories. Massachusetts bases liability on the ground that the plaintiff is on the land in the owner’s right, and the defendant, whether rightfully or wrongfully on the land, is responsible for his failure to take care. Missouri predicates liability on the ground that the presence of a bare licensee can be anticipated. Of the two views, the latter appears to be preferable.

II. As to the situation where the defendant is a bare licensee, and the plaintiff is a licensee, either infant or adult, no cases have been found. On principle no distinction in liability should exist between this situation and the one where the defendant is a trespasser inasmuch as a bare licensee is only a tolerated intruder.

III. Where the defendant is an actual licensee, and the plaintiff an adult licensee, most of the jurisdictions in which the question has arisen hold the defendant not liable because the defendant stands in the same position as the landowner. However, this does not warrant the conclusion that such is generally the law.

Licensee is used in this section in a loose sense. The term includes those who have hitherto been referred to as bare licensees and actual licensees. It does not include paid licensees, invitees or employees.

Davoust v. Alameda, 149 Cal. 69, 84 Pac. 760 (1906).


Williams v. Springfield Gas, etc., Co., 274 Mo. 1, 202 S. W. 1 (1918).

Rodgers v. Union Light Co., 123 S. W. 293 (Ky. 1909); Hafey v. Dwight Mfg. Co., 240 Mass. 155, 133 N. E. 107 (1921); New Omaha, etc., Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89 (1905); Greenville v. Pitts, 102 Tex. 1, 107 S. W. 50 (1908).

The decisions in the Massachusetts and Nebraska cases are squarely in point. However the Nebraska case is comparatively an old one in this field, and the Massachusetts court has shown a distinctly conservative attitude on this entire problem. Cf. Robbins v. Minute Tapioca Co., supra note 34. The Ken-
This is made more apparent by a consideration of the cases in which the plaintiff is an infant licensee. In this situation, there are decisions in six jurisdictions holding the defendant liable, and none to the contrary. Most of these decisions base liability on the ground that the defendant can anticipate that injury will happen to persons who are rightfully on the land, such as licensees. Another view is that since the defendant is dealing in a very dangerous substance, he owes a high degree of care to that part of the public who are rightfully on the land. Pennsylvania holds the defendant liable because the plaintiff licensee is in the same position as the landowner. The theory of all these decisions would apply equally well to the case where the plaintiff is an adult.

IV. Where the defendant is a paid licensee and the plaintiff an adult licensee, a single New York case holds the defendant liable on the ground that his conduct amounted to gross negligence. Where the plaintiff is an infant licensee, Indiana holds the defendant liable on the theory that since the landowner would have been liable under the circumstances, the defendant is liable.

Since a paid licensee is in a sense a lessee of the space he occupies, it might be argued that he should owe no greater duty of care than the landowner. Certainly he owes as great a duty and a modern court might very well refuse to extend the historic exemption of the landowner to this other class.

V. Where the defendant is an invitee, on the land primarily for his own benefit, such as a power supplier, and the plaintiff is an adult licensee, two jurisdictions hold the defendant liable because he can

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Nelson v. Bradford Lighting Co., 75 Conn. 548, 54 Atl. 303 (1903); Fort Wayne Traction Co. v. Stark, 74 Ind. App. 669, 127 N. E. 460 (1920); Thompson v. Tilton Electric Co., 77 N. H. 92, 88 Atl. 216 (1913). (In Devost v. Twin State Gas Co., supra note 7, the principal case is distinguished as one where the plaintiff was not a trespasser and was rightfully where he was); Meyer v. Menominee Light Co., 151 Wis. 279, 138 N. W. 1008 (1912).


Terre Haute, etc., Traction Co. v. Sanders, 80 Ind. App. 16, 136 N. E. 54 (1922). (Defendant power company licensed the right to erect wires and poles from a railroad who owned a right of way. The public had used the right of way for years. Plaintiff's thirteen year old intestate son was walking along the right of way when he saw the end of a broken wire dangling near the ground. He grasped it and was killed. Held: Plaintiff's intestate was a licensee, and defendant was liable for its negligence. "While a mere licensee goes upon the lands of the licensor at his own risk and takes the premises as he finds them, the licensor has no right to create a new danger while the license continues.")

anticipate the presence of licensees. One jurisdiction holds the defendant not liable on the theory that the defendant stands in the position of the landowner who owes no duty to the plaintiff under such circumstances.

Where the plaintiff is an infant licensee, an isolated case holds the defendant not liable, because under the particular facts, the defendant could not anticipate the presence of licensees.

From these few cases, it can be deduced that the tendency is to hold a defendant who is an invitee liable to a licensee be he either adult or infant, when his presence can be anticipated.

Conclusion

The rule of law, which is so well settled that it may be said to be axiomatic, that a landowner is not liable to trespassers or licensees save to refrain from wilfully or wantonly injuring them, has undeniably played an active part in the decisions. This rule, which arose at a time when the courts were engaged in the policy of actively favoring the landed interests has so stamped itself upon Anglo-Saxon law that our problem cannot be considered without recognizing that the liability of the defendant is somewhat dependent on how close his status approaches that of a landowner.

Where the defendant is a trespasser or a bare licensee, he has no property right that can be said to be subject to protection, and the cases have so held. Directly in line is the recent case mentioned in the beginning of this note. The court there refused to hold the landowner liable to an infant trespasser, but did not hesitate to fasten liability on an electric company that was treated as a bare licensee, when it permitted wires to exist in a dangerous condition on the landowner's premises.

As soon as the defendant falls into the classes of actual licensee or paid licensee or invitee, the problem is not so easily settled and the decisions are anything but harmonious. Many courts have great difficulty in finding a logical distinction between the position of such persons and that of the landowner. However, it seems that the courts are now, in the main, loath to apply the rule exempting landowners

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48 Pennebacker v. San Joaquim, etc., Power Co., 158 Cal. 579, 112 Pac. 459 (1910) (There is a strong dissenting opinion).
49 Sheffield v. Morton, 49 So. 772, 161 Ala. 153 (1909). Criticized in 72 CENT. L. J. 121, 122 (1911). (A ten year old child going upon a bluff in an uninclosed lot, frequented by the public in large numbers, could not be considered a trespasser by an electric company, which had strung its wires on the bluff where it was not the owner of the land, but must be considered as upon the lot by the implied license of the owner. However, defendant is not liable, because the child's presence could not be anticipated, when the child climbed to a spot difficult of access and came in contact with the wire.)
50 Supra note 1.
from liability to a defendant unless he actually is a landowner. This wise recognition of the relative value of a human life and a technical property right is a testimonial to the progressiveness of a much-criticised system of jurisprudence.

C. Polis.


LIABILITY FOR INDUCING BREACH OF CONTRACT TO MARRY—Prefatory observations of most writers on the law of marriage define the general attitude of the common law on the subject as that of an ardent protector, perhaps, as any one who is familiar with the memorable trial of Mrs. Bardell against Pickwick will attest, sometimes too ardent a protector. However, in view of a second and conflicting tendency that clearly exists in this field of the law, to interfere as little as possible, this is only a partial truth. In no other single instance is this conflict of policies more clearly manifested than in the treatment of the question of the liability of one who successfully instigates another to breach an existing contract to marry.

Courts have uniformly held that the law can offer no remedy to one who has been damaged by another's statements which have induced a breach of promise, however malicious and morally reprehensible the defendant's conduct may have been in procuring such breach, provided the statements were not slanderous. In this connection, the phraseology of Cooley in his work on Torts, has been used as a basis for whatever argument there has been on the subject. This now famous passage declares:

"The prevention of a marriage by the interference of a third person, cannot, in general, in itself, be a legal wrong. Thus if one, by solicitation, or by the arts of ridicule or otherwise, shall induce one to break off an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct."

However, a recent New Jersey case, Minsky v. Satenstein, clearly announces a different rule. Briefly, the doctrine advanced is that an action lies against a stranger who maliciously procures another to breach a contract to marry. The adjudication is of prime importance because it at once brings into question the validity of the hitherto accepted reasons in support of the older rule. So strongly is the

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2 Cooley, Torts (3d ed. 1906) 494.

3 143 Atl. 512 (N. J. 1928).
problem linked with precedent, however, that any discussion would be futile unless the action for inducing breach of contract, with all its ramifications, be retrospectively scrutinized, so that its applicability to contracts to marry will fully appear in the light of the decided cases. The origin of the general action of tort for procuring a breach of contract is to be found in the ancient action brought by a master against a person enticing away a servant. To create a right of action the defendant must have resorted to violence in the act and must have wilfully and maliciously interfered with the existing master and servant relationship. The Statute of Laborers in 1349, eliminated the requisite of violence, so that an action existed for the mere enticing of one's servant. It must be remembered that these were trespass actions, and that the existing relation of master and servant created the duty on the part of others to abstain from acts injurious to the maintenance of the relationship. So deeply enrooted in the common law were these early limitations on the action that many of our states for a long time felt themselves bound by them, and in a few states they probably restrict the action on the case for inducing breach of contract, to this day. 

While it is unnecessary for present purposes to trace the growth of the doctrine from its very earliest stages, it may be noted that the ancient actio indirecta of the time of Bracton, which in turn was derived from the actio iniuriarum of the paterfamilias in the Roman Law for the loss of services due to violence committed upon his servants (Justinian, Institutes, Book IV, tit. 4, § 3: 1 Britton (Nichols') 131 (1277)) furnished the basis of the old common law recovery by a master for loss of the use of a household servant. The common law action was "not based upon questions of contract, but upon proof of the relationship of master and servant," it was not a question of contract, but simply of an existing state of services and the loss of those services. Sayre, Inducing Breach of Contract (1923) 36 Harv. L. Rev. 663, 665; Wigmore, Interference with Social Relations (1887) 764, 765. The common law action was "not based upon questions of contract, but upon proof of the relationship of master and servant," it was not a question of contract, but simply of an existing state of services and the loss of those services. Sayre, op. cit. supra note 5, at 665. But see Walker v. Cronin, 107 Mass. 555, 567 (1871).

23 Edw. III (1349).

Supra note 6.

Thus in New York, it was held that as the English Statute of Laborers on which the early English cases based their decision, was not in force in that state, an employer could not recover against one who induces the breach of such a contract in the absence of some violence used, or other tortious means in procuring the servant to leave his employment. De Jong v. Behrman, 148 App. Div. 37, 131 N. Y. Supp. 1083 (1912); Daly v. Cornwall, 34 App. Div. 27, 54 N. Y. Supp. 107 (1898). This limitation remained in New York until very recent years when the rule in that state was made to conform to the majority doctrine. As illustrating the present attitude in New York, see Posner Co. v. Jackson, 223 N. Y. 325, 110 N. E. 573 (1918); Lamb v. Cheney, 227 N. Y. 418, 125 N. E. 817 (1920); Campbell v. Gates, 236 N. Y. 457, 141 N. E. 914 (1923). Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492 (1893) (holding that there must be force or fraud used by the third party in procuring the breach of contract); Brown Hardware Co. v. Indiana Stove Works, 69 S. W. 803 (Tex. Civ. App. 1902) (holding that the old rule that a party is liable in tort for enticing away another's servant does not extend beyond the strict relation of master and servant in menial service); Chambers v. Baldwin, 91 Ky. 121 (1891); Bourlier
The vast majority of jurisdictions including England, however, no longer consider themselves bound by these restrictive vestiges in the law. More recent decisions, pronouncing broad principles of tort liability, have united to form the general rule of responsibility ex delicto for maliciously procuring a party to a contract to breach it. First, but reluctantly and with a powerful dissent by Lord Coleridge, set forth in the important case of Lumley v. Gye, the doctrine has steadily grown, until it may now be considered that it is not only morally but legally wrong to maliciously induce another to breach his contract.

The rapidity with which the action has achieved importance and popularity has been aptly described by Professor Sayre:

"The most remarkable feature in the growth of this tort action is the surprising rapidity with which courts have adopted it, broadened it, and pared away restricting limitations. Conceived originally as a doctrine applicable . . . to a contract of purely personal services, the doctrine was broadened to include all contracts . . . with perhaps a few classes of cases arbitrarily excepted."
As the action for inducing breach of contract to marry falls not within the rule, but within the exception, if, indeed, it is not the sole exception, the reasons that have been advanced for such exception must now be closely examined. For, if in one breath we admit that the defendant’s conduct in such cases may be “contemptible and blamable” and in the next we declare that the plaintiff shall not maintain his action because his case falls within an arbitrary exception, we have a situation that is most disconcerting to him who seeks a remedy in the law. The courts have attempted to justify the exception, but with such a contrariety of reasoning as of itself urges a close examination into the validity of each one of the arguments and analogies advanced in the cases.

In Stiffer v. Boehmy, the court denied recovery on the ground that “though an action of the character mentioned is maintainable against one who meddles with the spouse of another” its basis is loss of consortium, and “such loss cannot arise in the case of a single man or woman.” The theory of the plaintiff’s case seems to have been completely misconceived. The plaintiff was not suing for loss of consortium, but solely for the malicious procuring of a breach of contract to marry. Such a suit is not even to be assimilated to an action for loss of consortium, but is based on the loss of the promised advantages of the marriage, and the same measure of damages should be used in such case as is customary in the ordinary breach of promise suit. Unless cogent reasons for excepting contracts to marry from the general rule were set forth, the court, it is submitted, should have held the defendant liable on the facts, in accordance with the general rule in actions on the case for inducing breach of contract.

Many cases rely on the passage already quoted above from Cooley. With reference thereto it is, however, to be noted that: (1) No authorities are cited to support the text. (2) The statement is taken verbatim from the first edition of Cooley published in 1879. This preceded the important English decisions of Bowen v. Hall (1881) and Temperton v. Russell (1893), both of which greatly extended the scope of the action on the case for inducing breach of contract. Indeed, Cooley wrote the first edition of his work long before the action had been generally understood and accepted. In view of these indubitable facts, the statement appears merely to be a

16 Cooley, loc. cit. supra note 2.
19 See cases supra notes 11 and 12.
20 Supra note 2.
21 Supra note 2.
22 I Cooley, Torts (1st ed. 1879) 236.
23 Supra note 12.
24 Ibid.
declaration of the general rule existing at that time, namely, that no action would lie in any case for inducing a breach of contract other than one of services, and the editor of the third edition apparently copied the statement, ignoring the fact that the general rule had changed in the meantime. He makes no mention of the case where the defendant's conduct is malicious. Taken literally, he would consider a malicious intermeddler in the same class as a parent bona fide advising a child. Certainly the cases are dissimilar, and to deny the right of action against a dutiful parent is not to deny it against the stranger who acts without color of justification. He admits that the defendant's conduct may be contemptible and blamable. In view of this admission, the burden should surely rest upon the one contending for an exception to the general rule of liability, to prove the existence of such exception. In all fairness it must be stated that the passage from the learned author is not only ambiguous but is clearly lacking in weight as an authority, except for the consideration that is due any statement by the learned jurist.

The most serious of the objections offered to the maintenance of the action is that it conflicts with rules of public policy and social expediency now too well settled to be brought into question. It is undoubtedly true that when human relations become "affected with a public interest" courts are inclined to limit the general rule and treat the situation as sui generis. As regards the particular problem under discussion, several specific reasons have been suggested in the cases for this attitude of general unwillingness to interfere.

It is urged that the action for breach of promise has never been in good repute, being too much abused by certain unscrupulous females, and that therefore it should not be extended. Accordingly, it is argued, as there is no precedent to be found for an action for inducing a breach of promise, it is well that there never shall be one. The criticism, however, is hardly applicable, as there is little analogy between a breach of promise suit and an action on the case for maliciously inducing another to breach his promise. Moreover, assuming that the criticism is applicable, its validity is doubtful, as it may well be questioned whether a common law action should be curtailed because of abuse by a few unscrupulous litigants. No action has been more abused than the action on the case for negligence—yet it would hardly be urged that it should therefore be abolished.

\[\text{In this connection see supra notes 4-6.}\]

\[\text{Brown, Breach of Promise Suits (1929) 77 U. of Pa. L. Rev. 474.}\]

\[\text{Cf. Gunn v. Barr, 1 D. L. R. 855 (Canada, 1925) in which case Harvey, C. J., at p. 856, says: "It is urged that there is no precedent to be found for an action for inducing the breaking of a promise, but it may be answered that there never is a precedent until one is made, but one naturally hesitates to make a new legal precedent at this stage of the history of the law on a point of such comparatively common occurrence. It may be noted, however, that it is only within the last twenty-five years that the broad principle has been definitely established that the inducing of the breach of contracts generally gives rise to a cause of action. . . ."}\]
It has also been argued that "to hold that a third party may be subject to answer in damages for advising or inducing an engaged person to break the engagement might result in a suit by every disappointed lover against his successful rival." Likewise, the fear has often been expressed that the allowance of such an action would subject every parent who advised his child to end an improvident engagement to an action for damages for loss of the marriage brought by the unworthy suitor. Both arguments reveal a complete misunderstanding of the essentials of the action. It is universally admitted that one who honestly believes the engagement to have been inconsiderately entered into, whether he be a parent or stranger, has full liberty to advise the party to break it, without fear of liability. And this, for the reason that malice is an essential ingredient of the tort along with the knowledge of the existence of the contract. If either of these elements be absent, no cause of action exists in any jurisdiction.

27 Per Morrisey, C. J., in Homan v. Hall, supra note 1, at 73, 165 N. W. at 882.

28 "A few judges, during the infancy of the doctrine ventured the suggestion that 'malice' here means no more than knowledge of the existence of the contract. See Crompton, J., in Lumley v. Gye, 2 E. & B. 216, at 224. But subsequent decisions have clearly negatived any such idea. The question of malice is disposed of by modern courts without reference to proof of knowledge on the part of the defendant. Courts today take for granted that knowledge is a prerequisite for the tort just as fundamental as the infliction of damage; unless both these elements can be proved it is unnecessary even to consider the question of 'malice.'" Sayre, op. cit. supra note 5, at 675. Accord: Clark v. Clark, 63 N. J. L. 1, 42 Atl. 770 (1899). A few authorities still hold that, as the breaking of a contract is an unlawful act, one procuring such a breach "is causing an unlawful act, which is in itself unlawful" and this apart from any question of malice. Knickerbocker Ice Co. v. Baltimore Ice Co., 107 Md. 556, 69 Atl. 405 (1908).

29 Of course, there is the additional element of proximate causation. Unless proximate causation can be proved, no liability can arise. Wolf v. New Orleans Tailor-Made Pants Co., 113 La. 368, 37 So. 2 (1904). In 2 Cooley, op. cit. supra note 2, at 948, it is stated: "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." This statement of the law is taken from the earlier editions of the work and is inconsistent with the now well-recognized doctrine of Lumley v. Gye. The correct rule is stated by Schofield, The Principle of Lumley v. Gye and Its Application (1888) 2 Harv. L. Rev. 19, at 21 n.: "One effect of the decision in Lumley v. Gye is to give the plaintiff two causes of action, one in tort and the other in contract, for what may be substantially the same damage. As the causes of action are distinct and consistent, the plaintiff is not obliged to elect, and a recovery upon one cannot be a bar to an action upon the other, but the plaintiff is not entitled to double compensation, and, it would seem, in the absence of direct authority, that an actual recovery of damages in one action ought to be admissible in evidence to reduce damages in the other. Such damages is, to be sure, the direct act of the party who breaks the contract, but the defendant is chargeable therefor, upon the ground that he has done an act which was likely to result in a breach of contract, and consequent damage to the plaintiff, and he is liable for the probable consequences of his act, even though the wrongful act of another must intervene to cause the damage." But cf. Vicars v. Wilcocks, 8 East 1 (Eng. 1806); see Piggott, Torts (1885) 364-5.
As against the parent, or one standing in *loco parentis*, the inference of malice would probably never arise, the privilege of parents or persons standing in that relation being in the nature of an absolute right. Courts have been, and undoubtedly will be, willing to permit parental interference to be exercised to an almost unlimited extent, in order to avoid the consequences of improvident marriages.

In this connection, malice may be defined as "the lack of justification." What constitutes justification, in turn, is not to be determined by any formula or rule of thumb, but in each case is to be ascertained by a balancing of individual and social interests. Professor Sayre introduces a different test for the existence of malice, from the one above described. His theory is summed up in the following:

>[The true test of the tort lies], "in the policy of the law to accord to promises the same or similar protection as is accorded to other forms of property." [And] "if the true basis of the tort is the policy of the law to prevent the stealing of promised advantages, the necessary motive,—or, in the language of the books, the requisite 'malice'—must be the conscious intention to appropriate for oneself that which by law belongs to another,—something akin to the *animus furandi* of a thief."

The accuracy of this analogy, however, is doubted by the author himself, and he goes on to say that the tort is rather to be assimilated

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50 The principal case of Minsky v. Satenstein, *supra* note 3, holds that the right of parents to interfere is absolute. Where the right is absolute, motive, of course, is immaterial. *Addison*, *Torts* (8th ed. 1906) 24; see *Homan v. Hall*, *supra* note 1, at 865. "It must be taken to be a matter of course that parents, for instance, may freely advise and urge and threaten their sons or daughters, at all events in their earlier years. Doubtless a similar privilege extends, perhaps, with less force, to other close relatives and even to persons merely in *loco parentis*. But I should be of opinion that in all cases, possibly, excepting a father or a mother, the privilege is not absolute, but conditional on its being exercised without malice."


Where tortious means have been used to bring about the breach of contract, to the detriment of a party thereto, “just cause” cannot be set up as a defense. The use of illegal means clearly creates a cause of action in itself, under one of the well recognized heads of tort—such as slander, assault and battery, fraud, etc. *Pollock, Torts* (10th ed. 1916) 344; *Street, op. cit. supra*, note 31, at 346.


53 *Sayre, op. cit. supra* note 5, at 675.

to a conversion of the property of another to one's own use. The latter analogy seems more accurate. Certainly it seems that the requisite malice need not be an intent to appropriate the promised advantages, but may consist in a wanton destruction of the rights of another, or merely a malicious interference. The action is not fundamentally for appropriating property, if a contractual right is to be likened to tangible property at all, but for malicious interference causing damage or destruction. On the whole, it is submitted, it is impossible to satisfactorily define the circumstances under which the inference of malice will arise, and it should be left, it seems, to the determination of the court in each case whether there is sufficient justification for the interference.

In conclusion, it might be well to summarize the present condition of the law on the subject. With the exception of the principal case, Minsky v. Satenstein, no American or English case has been found that recognizes the action for inducing breach of contract to marry. It seems to be recognized as a well established exception to the general rule of liability for inducing a breach of other kinds of contracts. The courts have pared away all limitations and exceptions to the general rule, but have allowed this one to remain. The reasons given are (1) the action is based on loss of consortium, which right exists only in the marriage status; (2) text opinion—notably that in Cooley on Torts; (3) public policy. All three have been criticised above. An intentional injury here, as elsewhere, it is submitted, should be actionable, unless justified. Certain it is that an action against a malicious intermeddler, by one suffering from his mischief, is a legal adventure on which the plaintiff would embark with considerable sympathy. The cases reveal, instead of a logical analysis of the situation, only a great deal of vague vituperation on the direful results that it is thought would follow the recognition of the right of action.

M. L. G.

55 "Malice, as used in the books, means sometimes malevolence, sometimes absence of excuse, and sometimes absence of a motive, for the public good. If so 'slippery' a word... were eliminated from legal arguments and opinions, only good would result." Ames, How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor (1905) 18 Harv. L. Rev. 411, at 422.


57 In Mogul S. S. Co. v. McGregor, supra note 31, at 618 (1889) it is said: "The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell." See also Glamorgan Coal Co. v. South Wales Miners' Federation, [1903] 2 K. B. 545. At 574, Romer L. J. states, "... regard might be had to the nature of the contract broken, the position of the parties to the contract, the grounds for the breach, the means employed to procure the breach, the relation of the person procuring the breach to the person who breaks the contract, and I think also to the object of the person in procuring the breach."

58 Supra note 3.
Effect of Limitations Void for Remoteness Upon Prior Estates in Pennsylvania—Two recent decisions of the Pennsylvania Supreme Court\(^1\) make timely an analysis of this comparatively neglected problem.

The rule against perpetuities renders void any interest which may possibly not vest within some life in being and twenty-one years thereafter.\(^2\) It has no concern with, nor any effect upon, interests which are vested, or which must vest, within the allotted period. The general rule, as stated by Gray\(^3\) and Cheshire,\(^4\) is that the prior limitations become what they would have been had the limitation of the avoided future estates been omitted from the instrument; the rule against perpetuities operates merely to cut off the too remote limitations. The intentions of the testator are to be disturbed to no greater extent than is absolutely required by the rule.\(^5\) If the prior estate is a fee, followed by an executory devise over on a contingency void for remoteness, the prior estate becomes an indefeasible fee.\(^6\) If the prior estate is for life only or other limited period, it remains as it is;\(^7\) the property, after the termination of such estate, goes to the "person to whom property which has been invalidly devised or bequeathed goes," generally the heirs at law or the residuary legatees.\(^8\)

Of course, if in a will\(^9\) creating successive limitations there should be an express provision that, if some of the limitations fail, the rest shall fall along with them, effect would have to be given to that expressed intent of the testator. Moreover, it is conceivable that carrying into effect the prior estates alone, after the failure of the ulterior limitations, might work such injustice and be so manifestly contrary to the intention of the testator, as to make it incumbent on the court to imply such a provision. It is with reference to these situations that many dicta are to be found in the cases to the effect that the general rule may sometimes have to be qualified, the valid

\(^1\) Feeney's Estate, 293 Pa. 273, 142 Atl. 284 (1928); McCaskey's Estate, 293 Pa. 497, 143 Atl. 209 (1928).

\(^2\) Gray, Rule Against Perpetuities (2d ed. 1906) § 201 et seq.

\(^3\) Ibid § 247.

\(^4\) Cheshire, Modern Law of Real Property (1925) 477.

\(^5\) Slade v. Patten, 68 Me. 380 (1878); Gambrill v. Gambrill, 122 Md. 563, 89 Atl. 1094 (1914); Lovering v. Worthington, 106 Mass. 86 (1870); Rozell v. Rozell, 217 Mich. 324, 186 N. W. 489 (1922); Wood v. Griffin, 46 N. H. 230 (1865); Kalish v. Kalish, 166 N. Y. 308, 59 N. E. 917 (1901); Goodier v. Johnson L. R., 18 Ch. Div. 441 (1876).

\(^6\) Cody v. Staples, 80 Conn. 82, 67 Atl. 1 (1907); Bunting v. Hromas, 104 Neb. 383, 177 N. W. 905 (1920); Smith v. Townsend, 32 Pa. 434 (1859); Saxton v. Webber, 83 Wis. 617, 53 N. W. 905 (1892).


\(^8\) See Gray, op. cit. supra note 2, § 248.

\(^9\) This problem is generally met with in wills. It may arise, and is the same, in deeds of settlement. Carrier v. Carrier, 226 N. Y. 114, 123 N. E. 135 (1919).
and invalid limitations deemed inseparable, and fall together. The justification for any such qualification, let it be noted again, is the fulfillment of an expressed or very clearly implied intention of the testator. Cases of such genuine inseparability are rare. What the testator has explicitly stated as his desire, even though in conjunction with other objects, should have the utmost weight, and should not be, and generally is not, disturbed, except where it is extraordinarily clear that the intention of the testator would be better effectuated thereby. Accordingly, not only is the qualification, in most jurisdictions, most infrequently applied, but the general trend seems to be toward a further restriction of its application.

In Pennsylvania the law on this point appears to have undergone a peculiar development and produced some unusual and startling results. The Pennsylvania rule, as recently laid down by Mr. Chief Justice von Moschzisker, is as follows:

"... Does the general testamentary scheme under attack indicate a plan in which the dominant intent was not to create life estates particularly to benefit those who were to enjoy them, but to create such estates as incidental to and for the principal purpose of supporting remainders, which might not vest till a time beyond that allowed by law. If so, the whole scheme fails."

This test, even on first glance, appears to be a strange and vague way of expressing the general rule, with an unwarranted emphasis upon, and a peculiar turn given to, the qualification. This warrants an examination of the precedent on which it rests.

In Johnson's Estate, the first case in which this test is laid down, real estate was devised to trustees for a term of seventy-five years, during which they were to pay the income to testator's children and the legal descendants of those deceased, and at the end of the period were to sell the real estate and distribute the proceeds among testator's children or their legal descendants. The estate for seventy-

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20 See cases cited supra note 5.

21 The prior estates were destroyed in the following: Benedict v. Webb, 98 N. Y. 460 (1885); see Van Vechten v. Van Vechten, 8 Paige 120 (N. Y. 1840); Hewitt v. Green, 77 N. J. Eq. 358, 77 Atl. 25 (1910) (this decision has been weakened by that in McGill v. Trust Co., supra note 7); St. Amour v. Ricard, 2 Mich. 294 (1852) (this case was virtually overruled in Rozell v. Rozell, supra note 5); Eldred v. Meek, 183 Ill. 26, 55 N. E. 536 (1899); Lockridge v. Mace, 109 Mo. 162, 18 S. W. 1145 (1891) (the last two cases are opposed to the weight of authority, being decided in jurisdictions which, like Pennsylvania, apply the qualification in a peculiar fashion and with unusual readiness). The writer has been unable to find a case decided within the past ten years, applying the qualification, outside of Pennsylvania.

22 The development in Illinois seems to have been similar. See KALES, ESTATES FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS (1920) § 795 et seq.


24 185 Pa. 179, 39 Atl. 879 (1898).
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five years, although declared valid in itself, was held to fail with the
void gift at the end of the period, on the ground that the dominant
intent of the testator was to violate the rule by the distribution at the
end of the period, and that the particular estate was merely incidental
to, and a means to accomplish, the main illegal object. Such lan-
guage makes one pause and wonder wherein lies the utility of reaching
a conclusion on so hazy and speculative a problem, as to which estate,
the valid or invalid, was testator's chief or "dominant" concern. The
utility cannot lie in the better effectuation of testator's intent, because
the limitations are clearly separable. The proposition that the testator,
merely because what the court questionably calls his "dominant pur-
pose" has been frustrated, would have wanted another plainly avowed
desire, namely the payment of the income as specified for the period,
to be likewise set aside, is most difficult to sustain. In fact, the con-
trary seems almost incontrovertible, since, at the end of the period,
those who would have taken through the intestacy laws, would have
been the testator's sons or their legal representatives, the very persons
whose taking, at the end of the period, the court deemed testator's
main concern.

Johnston's Estate was dutifully followed in Gerber's Estate and in
Kountz's Estate on different sets of facts. In the former, the
estate was left to trustees to pay to testator's grandchildren and to
charities certain fixed annuities consuming only a fraction of the in-
come; the accumulated income and principal was to be divided equally
among the heirs of the testator's son, after the death of all of testator's
grandchildren and when his youngest great-grandchild shall have
reached twenty-two. The court held the bequests to testator's grand-
children and to the charities to fall with the void gift over, and testa-
tor's son took the entire estate absolutely. Thus the testator's deliber-
ate omission to leave anything to his son was completely overthrown.
Instead of foreseeing this, the court continued the quest for the "domi-
nant intent." The fact that the annuities consumed only one-fifth of
the income was hailed by the court as very significant that the purpose
of the creation of the particular estate was not to pay these annuities,
but merely to tie up the estate beyond the period allowed. The danger

Contra: Lyons v. Bradley, 168 Ala. 505, 53 So. 244 (1910); De Kay v.
Irving, 5 Denio 646 (N. Y. 1846); In re Wise [1896] 1 Ch. 281.

In Lawrence's Estate, 136 Pa. 354, 20 Atl. 521 (1890), the general rule
alone was declared. In Johnston's Estate, the court cited that case, confessed
to an absence of Pennsylvania authorities for its decision, but stated that there
must be an exception to the general rule where to let the prior estates stand
would not be in furtherance of testator's intent. For authorities the court de-
depended upon several New York decisions based upon peculiar New York stat-
utes, and upon Thorndike v. Loring, 15 Gray 391 (Mass. 1860), where the sole
purpose of a trust created for a period of 50 years, was to accumulate the in-
come for distribution, along with the principal, at the end of the period. See
GRAY, op. cit. supra note 2, § 249a.

196 Pa. 366, 46 Atl. 497 (1900).

inherent in the "dominant intent" formula becomes more apparent in this case. However, in *Kounts's Estate* the court goes even farther. Here the trustee was to pay the *entire* income of the estate to testatrix's children; and after their deaths and the lapse of ten years from the date when her youngest grandchild became of age, the whole estate was to be divided among the grandchildren. The court held the gift of the *entire* income to fail along with the void gift of the principal, declaring "that the chief purpose . . . was . . . to . . . place it beyond the power of either the children or grandchildren to interfere with the distribution" or to partake of the corpus until after the specified period. The result of the decision was to give the estate absolutely to the heirs at law—testatrix's husband and *children*—the very persons that testatrix was anxious should never touch the corpus, according to what the court had itself declared to be her "chief purpose"! In the face of the last two decisions it could not longer be argued that the Pennsylvania rule was being used to effectuate testator's intent. Rather it appears that the testator was being punished for his violation of the rule against perpetuities, by having his entire settlement destroyed.

Let us consider two cases in which the prior estates were permitted to stand. In *Whitman's Estate* the trustee was to pay the income to testator's daughter for life—then the principal was to be divided up for daughter's children, the male children to get their shares of the principal upon reaching twenty-one, the female children's shares to be held in trust for their lives, their children (testator's great-grandchildren) to get the principal of the shares. If the daughter died without issue, the estate was to go to Yale University. In a suit by the daughter to have the entire will declared void, the court held her life estate valid. An important factor was that this life estate supported both a valid remainder and a partially invalid one. To destroy the life estate would make it impossible, upon the occurrence of a *not too remote contingency*—the death of the daughter without issue—to carry out testator's clear desire to benefit Yale University. Where one estate does not precede the other, but the two are alternative in the sense that one of the two must vest in possession at the termination of the particular estate, their separability is more apparent. Moreover, as regards the remainder to the descendants, the rule was only partially violated, the remainder to the male children being valid. The transgression, it would seem, was so comparatively slight as not to call for any punishment.

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31 *Cf.* Quinlan v. Wickman, 233 Ill. 39, 84 N. E. 38 (1908); Moroney v. Haas, 277 Ill. 467, 115 N. E. 648 (1917).
In *Ewalt v. Davenhill*, the testator, who had been given by the will of his father a special power of appointment over real estate, devised it to trustees to pay the income therefrom to his children for their lives, remainder to their issue. The plaintiff was the grantee of one of testator's children, praying for a partition. The trusts for the lives of the children were held valid, notwithstanding the remoteness of the gift over. However, in *Crolius v. Kramer* the facts were essentially the same, yet the court held the beneficial life interests invalid, and gave the children the absolute title. The only difference in the facts of the two cases was that the latter case was an action for breach of contract brought by the children of testator, all of whom had joined in selling the property to the defendant, as opposed to a bill for a partition by the grantee of one of them. It would seem, therefore, that the determining influence in *Ewalt v. Davenhill* was the court's apprehension that a partition might materially depreciate the value of the interests of the children who still retained them. But then, such considerations have nothing to do with the testator's intention, with whether the limitations are separable or inseparable.

*Geissler's Estate* marks the extreme in the application of the test. The income was left to the testator's children for their lives, then to the grandchildren for their lives, remainder to the great-grandchildren. All the interests were held to fail. Of all the cases cutting down the prior estates, the transgression might be said to be the slightest here. The manner in which the court arrives at its decision indicates strikingly the extent to which the general rule has been submerged in Pennsylvania. After merely citing *Johnston's Estate*, *Gerber's Estate* and *Kountz's Estate*, the court concludes that, as a matter of course, the antecedent estates must fall.

In the recent case of *Feeney's Estate* the testator, after giving equal shares absolutely to six of his seven sons, gave another share in trust to pay the income to his other son for life, then to the latter's

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22 Pa. 385, 101 Atl. 756 (1917).
23 The remoteness of an appointment depends upon its distance from the creation and not from the exercise of the power. See *Gray*, op. cit. *supra* note 2, § 514.
24 Pa. 275, 123 Atl. 808 (1924).
27 *Ledwith v. Hurst*, 284 Pa. 94, 130 Atl. 315 (1925), again indicates that the deliberateness or the extent of the violation of the rule against perpetuities has some connection with the determination as to whether the prior limitations shall stand. The testator's widow and daughter were to receive the income from real estate for their lives, then the income was to be paid to daughter's issue and descendants without limit. Says the court, in holding the life estates of the widow and daughter to fail, "It is not easy to conceive of a more flagrant violation of the rule against perpetuities."
28 *Supra* note 1.
children for their lives, and the corpus to then go to the residuary legatees or their heirs. The residuary legatees were the six sons. The court held the life interests to the son and the son's children to fail with the void gift of the corpus, on the ground that "the will shows a paramount purpose to keep this part of the estate entire beyond the period allowed by law, and not to give William or his line any of the corpus." Thus this part of the estate went, according to the intestate laws, to the seven sons.

In the recent case of McCaskey's Estate, where, on the other hand, the dominant interest was construed to be to benefit those for whom the life estates were created, it is rather uncertain whether there was any violation of the rule against perpetuities at all.

The decision in Feeney's Estate is comprehensible only against the background of Pennsylvania decisions. Its wisdom and fairness are doubtful; and in it the workings of the "dominant intent" notion develop into abstruse mental gymnastics. Had the life estates of the son and his children been allowed to stand, that much of the testator's clear intent would have been carried out. The testator's other wish, that the corpus go to the other six sons or their heirs, would be approximately fulfilled, since, after the termination of the two life interests, the corpus would, by the intestate laws, pass to the seven sons or their heirs. True, that would mean that the descendants of the one son, to whom the testator did not choose to give a share of corpus, would take one-seventh of the corpus at that distant time, which the court considers contrary to testator's main intent. But the result of the court's decision is to let the son himself take one-seventh of the corpus immediately, and besides to destroy the life estates. This clearly seems to do greater violence to the testator's desires.

Giving the strictly alternative meaning to "or" in the phrase, "the residuary legatees or their heirs," the class which would take the corpus might not be ascertained, and so the gift to that class might not vest, until after lives in being and 21 years. Coggin's Appeal, 124 Pa. 10, 16 Atl. 579 (1889); Raleigh's Estate, 206 Pa. 451, 55 Atl. 1119 (1903); Price's Estate, 279 Pa. 511, 124 Atl. 179 (1924). See Gray, op. cit. supra note 2, §§110, 110a, 205a.

20 Act of 1917, P. L. 429 §7 (c), PA. STAT. (West, 1920) §§8357. Wills Act of 1917, P. L. 403, 409, §15 (c), PA. STAT. (West, 1920), §8325, to the effect that testamentary bounties which fail because contrary to law, "shall be included in the residuary devise or bequest, if any," was held not to apply in a case where the residuary bequest was unlawful in itself.

21 Supra note 2. In this case, the court also announced the interesting proposition that the court must appoint trustees named by the cestuis, provided they are competent. See Comment (1929) 42 Harv. L. Rev. 446.

22 The trustees were to pay to the testator's children the income for their lives. The male children were to get part of the principal of their shares upon reaching specified ages. The income of the daughters' shares, after latter's death, was to be paid to their children till they reached 21, when they were to get the principal. It was further provided that if any child should die during the period of the trust, leaving issue, the issue should take the income and principal in same manner as parent would have. The court decided that whether or not this last provision violated the rule was immaterial in view of its holding as to testator's dominant intent.
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It would seem that what was originally adopted as a mere qualification to the general rule, has been developed in Pennsylvania into a means whereby the court secures for itself a vast amount of discretionary power over the disposition of a decedent's estate under the circumstances in question. What the court finds to be the so-called "dominant intent" is determined by the court's discretion. While the separability or inseparability of the limitations, that is, the presumed intent of testator, has some weight, it seems to be distinctly subordinate to the court's own conception of convenience and fairness. Because of the discretion involved and because slight differences in facts lead to different results, no general rules regarding the application of the "dominant intent" test may with safety be laid down. However, two main influences seem to be behind the marked severity of the application: (1) The court's desire to wind up the estate; (2) The notion that the testator should be penalized for his violation of the rule against perpetuities. One unfortunate result of the present state of the law is that no case of this kind can be said to really be decided until it has been passed on, on appeal, by the Supreme Court.

L. G.

REVOCABILITY OF A MUNICIPAL BUILDING PERMIT—The issuance of municipal building permits is generally incidental to the greater power of zoning, and indeed is the usual method of carrying out the zoning ordinance. This zoning power is now sustained on the theory that it is a valid exercise of the police power. Whatever doubts as to the constitutionality of zoning formerly existed have been re-

\[supra\] note 15.

Whitman's Estate, \[supra\] note 19; Ewalt v. Davenhill, \[supra\] note 21. Note particularly Lilley's Estate, 272 Pa. 143, 116 Atl. 302 (1922), where the court's decision would seem to be in furtherance of testator's fairly-to-be-presumed intent. The trustees were to accumulate the income of a vast estate for 99 years, at the end of which period it was to be divided among the heirs of testator's nephews. There was a provision that a mining company which testator had controlled might work testator's own mining lands on a royalty basis. This was held to fail with the void limitation at the end of the period on the ground that it merely was a means whereby more income could be accumulated for distribution at the end of the 99 years.

Compare Ewalt v. Davenhill, \[supra\] note 21, with Crolius v. Kramer, \[supra\] note 23.

The winding up of the estate is the obvious result of cutting down the valid life estates. It is generally, it will be noted, the one to whom the first life estate has been given who takes the property absolutely through the intestate laws, and it is perhaps the feeling of the court that he can be trusted to provide for his children, who generally would have been entitled to the second valid estate. This, however, does not altogether apply to Feeney's Estate, nor to Gerber's Estate, \[supra\] note 16.


\[1\] In this note the term "municipal" is used with reference to cities, towns, villages, townships and similar local governing bodies.
moved by the Supreme Court in *Village of Euclid v. Ambler Realty Co.* Nevertheless many associated problems still remain unsettled. Suppose that a landowner is required by ordinance to secure a permit before he can erect a building on his land. After securing the permit he enters into contracts for the erection of his building, purchases materials and partially completes the construction. Then the building permit is revoked. Can the property owner assert any right to proceed with the work or must he obey the revoking order?

Most state decisions very clearly hold that the power to revoke the permit is qualified and the Supreme Court of the United States would seem to have settled the problem in the same way. Several theories of the nature of the transaction have been advanced.

The theory that the permit holder has a vested right was first enunciated in the leading case of *City of Buffalo v. Chadeayne.* There a permit to build was given and the permit holder partially erected his building. The city then revoked the permit. The court refused to allow the revocation on the ground that by acquiring the permit and partially completing the building, the lot owner acquired vested rights to which he was entitled to protection. In *Dobbins v. Los Angeles* the Supreme Court of the United States also said that the permit holder acquired vested rights in the partially completed structure of which he could not be deprived without due process of law. Refusal to allow revocation has also been based on the fact that it works a hardship on the lot owner. Properly conceived, this is essentially the same thing as saying that the property owner has vested rights of which he cannot be deprived unreasonably, because the mere fact that a zoning ordinance works a hardship to a particular landowner is not sufficient to defeat its operation. For example, in *Hadacheck v. Sebastian* the effect of the zoning ordinance was to reduce the value of the land from $800,000 to about $60,000 and yet the Supreme Court of the United States upheld the ordinance.

What do the courts mean when they speak of "vested rights" in this connection? It would seem to mean no more than that the state's
control over private property is limited by certain considerations of fairness and reasonableness, or as Mr. Justice Sutherland said in Nectow v. City of Cambridge: 7

"The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, morals or general welfare."

Another theory advanced is that when the municipality has granted a permit and the lot owner makes contracts and starts erection on the strength of the permit, the municipality is estopped later to revoke the permit. 8 However, the municipality does not make a contract with the permit holder, but merely confers on him the right to use his property in a certain way. The permit is merely an administrative approval of a proposed building. While it might be argued that relying on the permit, the property owner changes his position, there is no representation by the government that it will not exercise the police power in the future to rezone. On the contrary, it is well settled that the state cannot bargain away its police power. 9

Some cases go even further and seem to hold that the municipality can revoke the permit at any time before completion of the building. The reasons for this view are thus expressed by the Arkansas court:

"The permit was merely the granting of a privilege, and did not constitute a contract between city and appellant. No vested rights were obtained by obtaining a permit, and none arose in the acquisition of property or preparations for the construction of the building. . . ." 10

However, the proposition that the right to revoke the permit cannot be exercised unreasonably any more than that the general power to zone itself can be exercised unreasonably, seems only too obvious. In the light of the holding of the Supreme Court of the United States

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7 48 Sup. Ct. 447, 448 (U. S. 1928).
8 Pratt v. City and County of Denver, 72 Colo. 51, 54, 209 Pac. 508, 509 (1921); see Keane v. City of Portland, 115 Ore. 1, 235 Pac. 677 (1925); cf. Hamilton v. City of Chicago, 227 Ill. App. 291, 299 (1923).
9 The cases are collected in 12 C. J. 912 § 423, where it is said: "The police power is a governmental function, and neither the state legislature, nor any inferior legislative body . . . can alienate, surrender, or abridge the right to exercise such power by any grant, contract, or delegation whatsoever."
in the *Dobbins* case, decisions to the contrary seem inexplicable, although the Ohio Court of Appeals decided precisely to that effect only a year ago.\(^{11}\)

It can be taken as sound law that there is some limitation on the power of the municipality to revoke a building permit. The question remains as to what acts on the part of the property owner the courts have held sufficient to give him what is generally described as a "vested right" to complete his building. Practically all courts have agreed that if no acts are done in reliance on the permit, it can be revoked at any time.\(^{12}\) Assuming of course that the permit is legally valid,\(^{13}\) merely securing a permit and entering into contracts for the building work has been held not enough to prevent revocation of the permit.\(^{14}\) The courts seem willing to say that anything beyond the entering into contracts will be enough to prevent the revocation of the permit. In some cases the opinions state that there were "expenses incurred," and held that enough.\(^{15}\) Most of the cases say that there had been some amount of construction before the revocation. "Beginning work,"\(^{16}\) "doing considerable work, expenditure of labor and materials,"\(^{17}\) are examples of what courts have held sufficient. In several cases the property owner had let contracts and had the foundations dug and the walls begun.\(^{18}\) In one case the permit holder had his building all completed except for the roof when the permit was revoked.\(^{19}\) When the building is completed there can be no longer any problem of revocation of a permit, and the analogous question that then arises is whether the municipality zone retroactively.

\(^{11}\) Cahn v. Guion, 160 N. E. 868 (Ohio 1927) where the court followed *State ex rel. Ohio Hair Products Co. v. Rendigs*, 98 Ohio St. 251, 129 N. E. 636 (1918) a nuisance case.

Massachusetts has a unique view, that the licensing authorities cannot revoke the permit without express power to do so, conferred by statute or ordinance, but holds that revocation can be effected merely by a change of ordinance or statute. *General Baking Co. v. Street Commissioners of Boston*, 242 Mass. 194, 136 N. E. 245 (1922); *City of Lowell v. Archambault*, 189 Mass. 73, 145 N. E. 269 (1924). Cf. Wasilewski v. Biedrachki, 180 Wis. 633, 192 N. W. 989 (1923).


\(^{13}\) Cuerck v. City and County of Denver, 78 Colo. 246, 242 Pac. 47 (1925).

\(^{14}\) Rehmann v. City of Des Moines; City of New York v. Herdje, both *supra* note 12.


\(^{16}\) *Dobbins v. Los Angeles*, *supra* note 4.

\(^{17}\) *Pratt v City and County of Denver*, *supra* note 8.


\(^{19}\) *Dainese v. Cooke*, *supra* note 4.
Supposing that the landowner has substantially changed his position, the problem whether the authorities may not rezone anyhow under certain circumstances seems to be subject to the same principles as the question whether the state can zone retroactively. Retroactive zoning is generally avoided, but the question remains as to whether the state has the power to zone retroactively. It would seem that it has, subject to the general limitations on all exercise of the zoning power, namely that it must be substantially necessary. In general it is obvious that there must be a much greater necessity to justify retroactive zoning than zoning as to future use. The fact that most zoning ordinances allow the administrative authorities to make exceptions to the general restrictions laid down, where they work a hardship, is evidence of this fact. The same general considerations apply to revocation of the permit where the owner has commenced to build on the strength of the permit. Furthermore, the granting of a permit and its revocation within a short period of time is some evidence of careless zoning, and also of the fact that there is no substantial necessity for the change. It would hardly seem possible that a community could change so quickly, within the space of a few months as to require a rezoning of a particular tract of land. Of course if it did change, then there would seem to be no constitutional objection to rezoning. In determining whether there has been such a change no definite test can be laid down beyond the general principle enunciated in the Euclid Village case, where Mr. Justice Sutherland said:

"Thus the question whether the power to forbid the erection of a building of a particular kind or for a particular use is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality."

E. H. B., Jr.

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22 The test of the Nectow case, *supra* note 7.
23 *Supra* note 2.