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RECENT IMPORTANT DECISIONS

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AUTOMOBILES—LIABILITY OF PRIVATE AUTOMOBILE DRIVERS TO GRATUITOUS PASSENGERS.—The defendant invited the deceased to ride in the defendant's automobile to a neighboring town to attend a meeting. On the return trip and while the defendant was driving around a corner at about forty miles an hour, the car skidded on loose gravel and went over an embankment killing the deceased. In an action by the administratrix of the deceased's estate it was *held*, for the defendant on the ground that there was no evidence of gross negligence or wanton injury on the part of the defendant. *Blood v. Austin* (Wash. 1928) 270 Pac. 103.

There is a conflict of authority as to the right of a person who is injured while riding gratuitously in a private automobile to recover from the driver. The majority of cases hold the driver liable if the accident be the result of his active negligence. *Paiewousky v. Joffe*, 101 N.J. L. 521, 129 Atl. 142; *Dickerson v. Connecticut Co.*, 98 Conn. 87, 118 Atl. 518, annotated in 40 A. L. R. 1338. The principal case supports the minority view that no recovery can be had unless gross negligence or wanton injury is established. The leading case in support of this view is *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N.E. 168, in which the court refused to overrule the preceding authority of *West v. Poor*, 196 Mass. 183, 81 N.E. 960, or to abolish the distinction between degrees of negligence which grew up in the law of bailments. All decisions which support the minority view are of jurisdictions which expressly recognize degrees of negligence, *Saxe v. Terry*, 140 Wash. 503, 250 Pac. 27; *Massaletti v. Fitzroy, supra*, and thus they allow recovery for misconduct that is of a less serious nature than wilful misconduct. Other jurisdictions now refuse to recognize a distinction between ordinary and gross negligence, *Milwaukee & St. Paul Ry. v. Arms*, 91 U. S. 489; *Denver Ry. v. Peterson*, 30 Colo. 77, 69 Pac. 578; 18 HARV. L. REV. 536, and maintain that there is either an absence of due care under the circumstances which is negligence, or that entire want of care which would raise a presumption of conscious indifference to the consequences, the latter being wilful misconduct rather than a degree of negligence. Such jurisdictions necessarily avoid the question of the principal case and allow recovery if negligence is established. *Mayberry v. Sivey*, 18 Kan. 291. It is submitted that of the two views that of the majority is the better considered for "the law should require of all persons including those who render gratuitous services reasonable care of life and person." *Mayberry v. Sivey, supra.* The rule is most clearly stated in *Dickerson v. Connecticut Co., supra* that a guest entering an automobile takes it and the driver as they are, but the driver owes the duty to refrain from doing any negligent act by which the danger to the passenger is increased or a new danger created. Thus if the injury were caused by a latent defect of the machine the guest could not recover, but if the driver knew of the defect his failure to inform the guest exposed him to a new danger and if injury resulted the driver would be liable. *Joyce v. Brockett*, 237 N. Y. 561, 143 N.E. 743. Some courts have

distinguished between a guest and a licensee and have held that as regards the latter the driver owes no duty other than to refrain from acts wilfully injurious. *Lutvin v. Dopkus*, 94 N. J. L. 64, 108 Atl. 862. It was there held that where the passenger solicited the ride there could be no recovery for injury caused by the driver's negligence, but it is submitted that as regards gratuitous passengers in an automobile there is no basis for distinguishing between the case of the driver asking the passenger and the case of the passenger asking the driver and obtaining his consent. *Munson v. Rupker*, 148 N.E. 169; HUDDY, THE LAW OF AUTOMOBILES, 6th. ed. sec. 678. The doctrine of joint enterprise is inapplicable to cases similar to the principal case, 4 WISC. L. REV. 173, but contributory negligence of the guest will of course preclude recovery, 40 A. L. R. 1341.

AUTOMOBILES—MASTER AND SERVANT—OWNER'S LIABILITY FOR "FAMILY CAR."—Plaintiff was injured by an automobile driven by defendant's married daughter, but owned jointly by defendant and his son-in-law and registered in defendant's name. The son-in-law and daughter did not live with defendant's family, and at the time of the accident other members of defendant's family (though not defendant himself) were in the car, going to attend a wedding. *Held*, there was no evidence in the record of any servant or agent relationship between defendant and the driver, and a verdict for plaintiff was set aside. *Iles v. Palermino* (Me. 1928) 142 Atl. 867.

The owner's liability for accidents involving the "family car" may be conveniently grouped into three classes: (1) A bare majority of the courts, including Maine, adhere to strict principles of agency. *Pratt v. Cloutier*, 119 Me. 203, 110 Atl. 353. That other members of the owner's family may also be in the car is not controlling on the question of agency, and the interpretation in the principal case that the driver was on a mission of her own, with other members of defendant's family as her guests, and consequently that no agency relation existed, seems a reasonable one and in accord with authority. (2) In a slightly smaller number of states the "family purpose doctrine" has developed, holding the owner liable if at the time of the accident the automobile was being negligently driven, with his consent, by a member of his family. But it is difficult to see how the principal case could be brought within this doctrine, because of the fact that the driver was married, not living in her father's household, and could hardly be considered a member of his family. *Cannon v. Bastian*, 1 Harr. (Del.) 533, 116 Atl. 209. (3) Statutes in some states make the owner civilly liable for the negligence of *anyone* driving the car with his consent, express or implied (such consent being presumed under the Michigan statute if the car is driven by "his father, mother, brother, sister, son, daughter, or other immediate member of the family." P. A. Mich. 1927, Act No. 56, sec. 29). A liberal interpretation of a former similar statute was shown in *Mittelstadt v. Kelly*, 202 Mich. 524, 168 N.W. 501, where one joint-owner was not held liable for the negligence of the other joint-owner (even though they were father and son, and technically within the letter of the statute), on the ground that "the legislature did not intend to make one part owner liable for the negligence of a co-owner or his agent or employee." Equally applicable would this reasoning seem to be in the principal case:

the phrase "or other immediate member of the family" impliedly presumes consent only if the daughter is a member of defendant's immediate family, and as indicated above, she was not. But were it decided that the presumption did apply, it might be rebutted, for the 1927 amendment, *supra,* does not make the presumption conclusive as did the statute which it superseded. For a valuable analysis of the general problem, with citation of cases, see "Vicarious Liability and the Family Automobile," 26 MICH. L. REV. 846.

BILLS AND NOTES—ALTERATIONS BY THIRD PARTIES—EFFECT OF N. I. L.—Plaintiff was payee in certain notes. Defendant, plaintiff's agent but not a party to the notes, materially altered them. Some of them were non-negotiable, containing provisions making the promise to pay conditional; but others were negotiable. *Held,* in a suit to recover damages for fraudulent conduct of the agent, plaintiff was entitled to no damages in respect to any of the notes because he could still recover on them, from the makers, according to their original tenor. *Owosso Sugar Co. v. Arntz,* (Mich. 1928) 221 N.W. 179.

An article *supra,* p. 196, traces English developments on alteration of negotiable instruments. American courts have always held that alterations by a third party, or by an unauthorized agent, are mere spoliations, not voiding the instrument. *Kellogg Co. v. Huston T. R. Co.,* 6 F. (2d) 313; *Ballard v. Franklin Life Ins. Co.,* 81 Ind. 239. But, the N. I. L. adopts, in sec. 124, the precise words of sec. 64 of the English Bills of Exchange Act: "Where a negotiable instrument is materally altered without the assent of all parties liable thereon, it is avoided, * * *." 2 Comp. Laws of Mich. 1915, sec. 6165. It would seem then that the N. I. L. has overthrown what was the American rule and adopted the English one, that an alteration by whomsoever made voids the instrument. Dean Ames certainly believed so. 16 HARV. L. REV. 260. But an examination of the cases decided since the adoption of the N. I. L. fails to bear out this belief. *Jeffrey v. Rosenfeld,* 179 Mass. 506, 61 N.E. 49, (1901), the first case touching this point after the N. I. L., frankly acknowledged that the statute seems to change the rule, but expressed no opinion on the point, indicating that courts might read in "altered *by a party,*" rather than recognize the statute as making a change. (The Illinois and South Dakota statutes say expressly, "altered *by the holder.*") But, aside from the *Jeffrey* case, no authority has been found even suggesting that the American rule might have been changed by the N. I. L. Courts invariably state and apply the rule prevailing before the statute, without even citing it. *Columbia Groc. Co. v. Marshall,* 131 Tenn. 270, 174 S.W. 1108; *Gould v. Gould,* 99 Wash. 204, 169 Pac. 324; *Bowman v. Berkey,* 259 Pa. 327, 103 Atl. 49; *Vanderford v. Farmer's & Mechanic's Bank,* 105 Md. 164, 66 Atl. 47; *Bank of Flat River v. Walton,* 187 Mo. App. 621, 173 S.W. 56; *Griffin v. Shamburger,* Tex. Civ. App. 1924, 262 S.W. 144; *Kellogg Co. v. Houston T. R. Co., supra,* (24 MICH. L. REV. 62 suggests that the note in this last case may have been made before the N. I. L. was adopted in Texas, so the court correctly omitted any reference to sec. 124. But, it is to be noted that the court cited and applied the N. I. L. on other questions involved in this same suit.). The principal case is simply another one to be added to this list. In view of this line of authority, courts will probably never hold that sec. 124 has changed

the American rule. And, inasmuch as the doctrine that alterations void an instrument completely is a harsh one no matter where it is applied, the American rule seems preferable to the English one because it does not apply that doctrine to alterations for which the holder is not morally responsible. But it would seem that courts should at least cite sec. 124 and give some explanation for not following what is the clear import of its words, rather than treat the case as though no such statute existed.

BILLS AND NOTES—LIABILITY OF PAYEE OF CHECK DRAWN BY AGENT FOR PRIVATE PURPOSES IN NAME OF PRINCIPAL.—P gave a general power of attorney to T, who drew a check on P's bank, signed by him as P's attorney, but in payment of a debt of his own. In a suit by P against the payee, *held*, P could not recover, since defendants had no knowledge of any irregularities in the transaction. *Reckitt v. Barnett*, [1928] 2 K. B. 244.

The majority of the court were of the opinion that the power of attorney gave T apparent authority to draw such checks as the one in question, and that the defendant was not chargeable with knowledge or notice of the agent's fraud. But a strong dissenting opinion insists upon restricting the authority given by the power of attorney, in the absence of clear and unequivocal permission, to acts done in furtherance of the principal's business; on this view, since the defendant had the means of knowing that the check was given for the attorney's private debt, P should recover. Since the case drew no controlling distinction between trustees and agents, the question raised may be stated: Is the transferee of a negotiable instrument prevented from being a holder in due course by the presence on the instrument of words of procuration indicating a fiduciary relation between the transferror and his principal, plus knowledge that the instrument is given in payment of the personal debt of the fiduciary? The English rule is that of the majority holding in the principal case. Scott, "Participation in a Breach of Trust," 34 HARV. L. REV. 449, 465. The American cases, though they can not be reduced to uniformity, generally take the opposite view: that the purchaser is bound to make inquiry as to the propriety of the holder's conduct whenever the circumstances are such as to make it evident that the transaction is for the personal benefit of the fiduciary. *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N.E. 759, L. R. A. 1916F 1059; 26 R. C. L. 1351. *Cahan v. Empire Trust Co.*, 274 U. S. 473, 71 L. ed. 1158, reversing 9 F. (2d) 713, seems to tend toward the English view, but the case is not squarely in point, inasmuch as the defendant bank, which paid checks drawn by the principal's son on an unlimited power of attorney, had no knowledge that the son was misappropriating his father's money and no notice other than what was given by the form of the checks. An excellent discussion, favoring the imposition of liability on banks accepting personal deposits of fiduciaries, is found in Merrill, "Banker's Liability for Deposits of a Fiduciary to his Personal Account," 40 HARV. L. REV. 1077. A distinction, which the courts do not make, might be suggested between cases: (1) where a check is drawn by a fiduciary for his own benefit in favor of the payee; and (2) where a check, made payable to a firm or corporation, is endorsed by an officer or agent thereof, and transferred in payment of the agent's debt. There is more reason for holding the payee liable in the first

type of case, than the transferee in the second, because, authority to originate negotiable paper being much more generally restricted than authority to endorse, the transferee has more reason to suspect the transaction than the payee.

BILLS AND NOTES—NEGOTIABILITY—INSTRUMENT COMMONLY GIVEN FOR PURCHASE PRICE OF AUTOMOBILE.—Suit was brought on an instrument whereby the buyer of an automobile promised to pay a certain sum as part of the purchase price, and the seller retained title until the whole of the purchase price should be paid. The instrument contained, in addition to stipulations as to reasonable use and repairs, a promise on the part of the buyer to insure the automobile for the benefit of the seller. *Held,* that by such transactions in Michigan, title passes to the buyer, that the instrument constitutes a promissory note and chattel mortgage, that the terms of the mortgage are incorporated into the note, which is therefore non-negotiable because of the promise to effect insurance. *First State Bank v. Russel,* 244 Mich. 298, 221 N.W. 142.

The Negotiable Instruments Law of Michigan (2 Compiled Laws 1915, sec. 6042) provides that "An instrument to be negotiable must contain an unconditional promise or order to pay a certain sum of money." A slight margin of cases hold that a promise to pay taxes or insurance on property mortgaged as security for the note, makes the amount payable uncertain, and so renders the note non-negotiable under the above provision. *Hubbard v. Wallace,* 201 Iowa 1143, 208 N.W. 730; *Farquar v. Fidelity Ins. etc. Co.,* Fed. Cas. No. 4676; *Bright v. Offield,* 81 Wash. 442, 143 Pac. 159; *Vancouver Nat. Bank v. Starr,* 123 Wash. 58, 211 Pac. 746; *Kerr v. Staufer,* 217 N.W. 211; *Walker v. Thompson,* 108 Mich. 686, 66 N.W. 584; *Chapman v. Steiner,* 5 Kan. App. 326, 48 Pac. 607. Most of these cases also say that such a note carries too much luggage. The contrary view, holding these instruments negotiable, is impressive, both because it is supported by a substantial number of cases, and because it applies the tests for negotiability in a more practical way. These courts reason that the promise to effect insurance or pay taxes is a collateral undertaking which relates only to the preservation of the security, and does not affect the principal obligation of the note at all, except to aid in its fulfillment. *Fidelity Trust Co. v. Mayhugh,* 268 Fed. 712; *Hunter v. Clark,* 184 Ill. 158, 56 N.E. 297; *Thorpe v. Mindeman,* 123 Wis. 149, 101 N.W. 417; *Des Moines Sav. Bank v. Arthur,* 163 Iowa 205, 143 N.W. 556; *Garnet v. Meyers,* 65 Neb. 280, 91 N.W. 400. Far from being too much luggage, such a promise is desirable luggage, since it tends to facilitate collection and create additional confidence in the instrument. *Farmer v. First Nat. Bank of Malvern,* 89 Ark. 132, 115 S.W. 1141; *Thorpe v. Mindeman, supra.* The decision in the principal case on this point, both in reason and authority, might well have been the other way. Besides, the court might have attacked the negotiability of the note on much surer ground, since it contained a provision that if the holder should deem himself insecure for any reason, the whole sum was to become immediately due and payable. *Puget Sound Bank v. Paving Co.,* 94 Wash. 504, 162 Pac. 870; *Reynolds v. Vint,* 73 Or. 528, 144 Pac. 526.

CONFLICT OF LAWS—TORT OBLIGATIONS—LIABILITY FOR INJURY IN ONE STATE UNDER STATUTE OF ANOTHER STATE.—The plaintiff, while motoring in

Massachusetts with one Sack who had rented the car from the defendant in Connecticut, received an injury which was caused by the negligent operation of the car by Sack. A Connecticut statute makes the lessor of an automobile liable for damage caused by the negligence of the lessee. Massachusetts imposes no such liability upon lessors of automobiles. *Held*, the plaintiff could recover. *Levy v. Daniels' U-Drive Auto Renting Co.* (Conn. 1928) 143 Atl. 163.

The general rule is that the law governing the creation and extent of tort liability is that of the place where the tort was committed, GOODRICH ON CONFLICT OF LAWS, p. 188, while the law governing the creation and extent of contract liability is, with certain exceptions not here involved, that of the place where the contract was executed. *Ibid.* p. 228 *et seq.* Thus the plaintiff's right to recovery rests solely upon the nature of the obligation of the defendant. The court in holding the defendant liable said, "The statute made a part of the contract of hiring the liability of the defendant sought to be enforced. The statute did not create the liability; it inserted the provision in the contract in case the defendant voluntarily rented the car." It is not to be denied but that in consideration of the price of hiring the defendant could have promised Sack that he would compensate any person injured by Sack's negligence, and such promise would be enforcible by the plaintiff under the doctrine of *Lawrence v. Fox*, 20 N. Y. 268. However, such was not the case here because no such special contract was alleged. It is submitted that the court has employed a mere fiction to justify its result, for the statutory liability was not as a matter of fact part of the contract. Statutes of many states hold the owner of a car liable for the negligence of any one who drives the car with the owner's permission. 2 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW, p. 1318. Thus if the car were loaned free of charge there could be no consideration to support a contract, but the liability would still exist because of the statute. These statutes are everywhere upheld as a reasonable exercise of the police power. *Stapleton v. Independent Brewing Co.*, 198 Mich. 170, 164 N.W. 520; *Seleine v. Wisner*, 200 Iowa 1389, 206 N.W. 130. It is submitted that there is no material difference in effect between those statutes and that of the principal case, and the result reached by the Connecticut court could not have been intended, as Connecticut is not concerned with the exercising of its police power beyond the state borders. Also the very fact that there is statutory liability relieves the parties of the necessity of contracting for it if they desire it, nor is it to be supposed that the defendant could escape his liability by expressly contracting against it. In such a case it would be obvious that the liability could not be part of the contract, but it is equally clear that the liability would still exist. Employees have received compensation under Compensation Acts of the state where employment was entered into for injuries sustained outside the state, *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, such decisions often being justified by the contract theory of the present case. But where the act is compulsory, as is the statute before us, the difficulty of this theory is apparent because of the lack of mutual assent. 21 MICH. L. REV. 449. Whatever be the true justification of the result reached in these cases, it is submitted that the relation of employer and employee is not analogous to that of automobile lessor and third parties. There is an in-

stance of the law creating a contract to be found in *De Nicols v. Curlier,* [1900] A. C. 21. There A and B were married in France with no express contract regarding property. They moved to England and in the settlement of matrimonial property it was held the law of France applied on the basis that "a contract operating by force of law (the marriage in France) is as complete and obligatory as an express contract." The doctrine of that case is not followed in America, *Saul v. Creditors,* 5 Mart. N. S. (La.) 569; *La Selle v. Woolery,* 14 Wash. 70, 44 Pac. 115 and the doctrine is questioned in DICEY'S CONFLICT OF LAWS, 4th. ed. p. 563, 567 and also in GOODRICH ON CONFLICT OF LAWS, p. 279. Whatever be the merits of that decision, it is not analogous to the principal case because there is more chance in the English case that as a matter of positive fact the parties did consent by the marriage that their property should be governed by the law of France. Thus it would seem the plaintiff in the principal case is limited to an action *ex delicto,* and the law of Massachusetts should have been applied.

CONFLICT OF LAWS—VALIDITY OF TRUST OF MOVABLES.—Defendant, an investment company incorporated in Massachusetts, as settlor, executed with plaintiff, a New York corporation, a declaration of trust in which plaintiff was named trustee. One provision was that all questions concerning the validity of the trust should be determined solely by the law of Massachusetts. The res consisted in shares of the capital stock of various corporations and the beneficial interest was divided into "collateral trustee shares" which were represented by certificates. Both plaintiff and defendant had specified duties in the administration of the trust. Creditors of the investment company questioned the validity of the trust, asserting that it violated the New York rule against perpetuities as applied to personal property. In this suit for instructions it was *held,* that the trust was valid whether tested by the law of New York or Massachusetts, but the court said by way of dicta that the law of Massachusetts should govern as that is the domicil of the settlor and since the expressed intent of the parties should be given effect. *Liberty National Bank & Trust Co. v. New England Investors Shares* (D. C. Mass. 1928) 25 F. (2d) 493.

The question as to what law governs the validity of a trust in personal property created by an instrument *inter vivos* has been the cause of much confusion. An additional difficulty is presented in the principal case by the fact that the subject matter is not tangible personal property but is made up of shares of stock in various corporations. Today, however, when we are coming to recognize that shares of stock are merged in the certificate of stock so that ownership of the certificate is necessary to ownership of the share, it would seem that we can fairly treat the shares, when represented by certificates, as tangible property. See sec. 1, Uniform Stock Transfer Act. *Direction der Disconto-Gesellschaft v. United States Steel Corp.,* 267 U. S. 22, 45 Sup. Ct. 207, 69 L. ed. 495. COOK, CORPORATIONS, 8th ed. sec. 485. The general rule in regard to a transfer of tangible personal property is that the law of the situs of the property governs. *Cammell v. Sewell,* 5 Hurl. & Norman 728; *Green v. Van Buskirk,* 5 Wall. (U. S.) 307, 18 L. ed. 599; *Cooper v. Philadelphia Worsted Co.,* 68 N. J. Eq. 622, 60 Atl. 352. The rule as

stated in GOODRICH ON CONFLICT OF LAWS, sec. 147, includes both the creation and transfer of interests, which would seem to include the declaration of trust as well as the more ordinary means of transfer. See also THE AMERICAN LAW INSTITUTE'S RESTATEMENT OF CONFLICT OF LAWS (tentative draft) secs. 275-285. As to testamentary dispositions, both that in trust and the absolute disposition, the law is quite well settled that the law of the domicil of the testator at the time of his death, must control. GOODRICH ON CONFLICT OF LAWS, secs. 152 and 161. The court in the principal case stated that if the validity of testamentary trusts should be governed by the law of the testator's domicil, this trust created by an instrument *inter vivos* should be subject to the law of the settlor's domicil. No authority was given for this conclusion, however, except the dicta in two New York cases and the time worn fiction that personal property has no locality, but follows the person of the owner, though the more probable reason for the doctrine in regard to testamentary dispositions is that of convenience. It is believed that the sounder rule in the case of trusts created *inter vivos* is that the validity of such a trust should be governed, as in the case of the absolute transfer *inter vivos*, by the law of the situs of the property, that is the jurisdiction which has actual control of the goods. *Curtis v. Curtis*, 185 App. Div. 391, 173 N. Y. S. 103; *Robb v. Washington & Jefferson College*, 185 N. Y. 485, 78 N.E. 359; *Van Grutten v. Digby*, 31 *Beav.* 561, 32 L. J. Ch. 179. See also GOODRICH ON CONFLICT OF LAWS sec. 152; THE AMERICAN LAW INSTITUTE'S RESTATEMENT OF CONFLICT OF LAWS (tentative draft) sec. 315. The problem should be simplified by understanding that a declaration of trust is the equivalent of an actual transfer of the property and not merely a contract for its conveyance, nor an act of administration of the trust. It is believed that the court in the principal case failed to recognize this when it treated the agreement to settle all questions concerning the validity of the trust by the law of Massachusetts as a sufficient ground for the disposition of the case. The law governing the validity of a simple contract in some states depends on the intention of the parties, and the law controlling the administration of a trust is generally said to be that which the parties intend, but it is difficult logically to see how they may affect the execution of the trust, a transaction analogous to a transfer of property. But see *Wyse v. Dandridge*, 35 Miss. 672, 72 Am. Dec. 149; *Mercer v. Buchanan*, 132 Fed. 501; *In re Fitzgerald*, [1903] 1 Ch. 933, for expressions to the contrary.

CONTRACTS—ACCEPTANCE OF AN OFFER FOR A UNILATERAL CONTRACT.—The defendant held a mortgage on plaintiff's property and offered to allow plaintiff $780 provided the mortgage were paid before a certain date. Plaintiff entered into a contract with a third party to sell the land free of the mortgage, and before the stipulated date knocked at defendant's door ready to pay the balance. In answer to defendant's query he replied, "It is Petterson. I have come to pay off the mortgage." The defendant replied that he had sold the mortgage, but plaintiff gained entrance and tendered the agreed amount. From a judgment for plaintiff, defendant appealed. *Held*, that the defendant had revoked the offer before any acceptance forming a binding contract had been

made and judgment was reversed accordingly. Lehman and Andrews, J. J. dissented. *Petterson v. Pattberg,* 248 N. Y. 86, 161 N.W. 428.

While this four to two decision seems to have reached a result in accord with the weight of authority the dissenting opinion has many arguments in its favor. It is well settled that an offer for a unilateral contract is always revocable at least before the performance requested has been partially completed. LANGDELL'S SUMMARY OF THE LAW OF CONTRACT, sec. 4; 6 R. C. L. p. 609, and some of the cases there cited; *Shuey v. United States,* 92 U. S. 73, 23 L. ed. 697. Beyond that lies conflict. A substantial minority of the courts, supported by the CONTRACTS RESTATEMENT (Am. L. Inst.) sec. 45, have held that once performance has been entered upon, or part of the act requested has been performed, the offeror becomes bound until the offeree has had an opportunity to complete performance. (A reasonable time in the absence of a specified period.) *Brackenbury v. Hodgkin,* 116 Me. 399, 102 Atl. 106; *Los Angeles Traction Co. v. Wilshire,* 135 Cal. 654, 67 Pac. 1086; *Vigo Agricultural Soc. v. Brumfield,* 102 Ind. 146, 1 N.E. 382; *Zwolaneck v. Baker Mfg. Co.,* 150 Wis. 517, 137 N.W. 769. There is, however, a difference of opinion as to the underlying theory. Some place the result on the ground of estoppel, others upon a subsidiary offer to hold the main offer open for a reasonable length of time in consideration of the offeree's beginning performance. 27 HARV. L. REV. 644; ASHLEY ON CONTRACTS, sec. 30; 23 HARV. L. REV. 159; 5 MINN. L. REV. 94. While in this case the performance asked is not continued performance yet the principle underlying the cases above might reasonably be extended as will be suggested. In reaching the decision in this case the majority necessarily held that the act requested had not been completed when the plaintiff stated that he was there ready to pay off the mortgage. Kellogg, J. in writing the opinion said that the result would be the same, in his opinion, if the revocation had not been communicated to the plaintiff until after formal tender by him. This is supported by WILLISTON ON CONTRACTS, sec. 60b. The CONTRACTS RESTATEMENT, sec. 45, prepared by Mr. Williston and five advisors, states that if part of the performance is given or *tendered* by the offeree the offeror is bound by a contract, conditional upon the completion of the performance within the time stated. The latter view seems more reasonable, because under the former an offer for a unilateral contract might amount to no more than a request for an offer, for until an acceptance of tender by the offeror there could be no contract. Likewise, in a unilateral contract the consideration for the offeror's promise is said to be the requested act. If the offeror's acceptance of tender is required to make the act complete it would seem that part of the consideration for the offeror's promise, comes from the offeror himself. It seems more logical to say that the offeror has received the necessary consideration to make a binding promise when the offeree has done all that is required of *him.* The CONTRACTS RESTATEMENT, sec. 12, states that "an offer is a promise." (For a discussion of whether an offer is always a promise see 22 ILL. L. REV. 567; 22 *id.* 787; 23 *id.* 95; 23 *id.* 301). In the present case the offer would be a promise to release the mortgage upon payment (or tender, under one view) of the amount requested. If *payment* is required it results in great unfairness to the offeree for he is led to perform as far as it is possible for him to perform, in reliance upon a promise that is illusory. The

offeror does not have to accept payment, and through no fault of the offeree the promise in the main offer never becomes binding. Would it not be fairer to say that the words, "I agree to accept $780 less" form the nucleus for an implied promise that if the offeree tendered payment, the offeror would accept it? What then, would amount to sufficient tender? Technically, the word means formal tender, as made by the plaintiff, Petterson, after revocation, but inasmuch as formal tender is seldom made in business transactions except to lay the foundation for a later assertion of rights springing from refusal of tender, there is much merit in the contention of the dissenting justices. If formal tender be required, the offeree would have to approach the offeror at an unexpected moment or the result reached under the rule requiring the completed act would follow in nearly every case. Logically, perhaps, we should not object to this, but there is an equitable reason for the favoritism shown the offeree in unilateral contracts. The offeree has acted, almost always to his detriment, relying on the offer of the offeror. When the offeree has gathered together the required amount and is ready and willing to perform, and notice of this is brought to the offeror, why should the latter be heard to complain because his offer became irrevocable? This case would seem even stronger than those in which a continuing performance has been started, for the length of time which the offer remains irrevocable is only momentary and less hardship results to the offeror. It is not then surprising that two of the justices found that the plaintiff had performed all that was required of him, before the revocation.

CORPORATIONS—PRELIMINARY STOCK SUBSCRIPTION.—The defendant signed a preliminary stock subscription agreement to take shares in the plaintiff corporation. After making the agreement, but before the corporation was formed, the defendant gave notice of the withdrawal of his subscription. *Held,* plaintiff could recover since there was a contract among the subscribers for the benefit of the corporation. *Coleman Hotel Co. v. Crawford* (Texas 1928) 3 S.W. (2d) 1109.

The weight of authority is to the effect that a signer of a preliminary stock subscription paper is merely an offeror and as such may revoke at any time up until the corporation comes into existence and accepts. *Bryant's Mill Co. v. Felt,* 87 Me. 234, 32 Atl. 888; *Richelieu Hotel Co. v. Mil. Encampment Co.,* 140 Ill. 248, 29 N.E. 1044; *Hudson Co. v. Tower,* 156 Mass. 82, 30 N.E. 465; *Muncy Traction Engine Co. v. Green,* 143 Pa. St. 269, 13 Atl. 747. BALLANTINE, PRIVATE CORP., 117. The courts differ in determining what acts will amount to an acceptance; in *Hawthorne Bottle Co. v. Cribbs,* 51 Pa. Sup. Ct. 555, it was held that the formation of the corporation constituted an acceptance of the offer. The majority rule is based upon the common contract principle calling for two or more parties and mutual assent in order to create a binding contract. THOMPSON, CORPORATIONS, 2d ed. sec. 511. The instant case declares that a subscriber is making a contract with the other subscribers for the benefit of the corporation. Apparently, such a construction would be of no use in a jurisdiction that refuses to recognize third party beneficiary contracts. Some states hold a subscriber bound on the theory that there is a contract among the mutual subscribers to keep the offer open—in effect making the stock

subscription into an irrevocable offer. *Minneapolis Threshing Machine Co. v. Davis,* 40 Minn. 110, 41 N.W. 1026. *Chicory Co. v. Lednicky,* 79 Neb. 587, 113 N.W. 245; *Hamilton Road Co. v. Rice,* 7 Barb. (N. Y.) 165. This doctrine, as well as that of the principal case, is weakened by the fact that it is not in accord with the actual intention of the parties—for it can hardly be said that a subscriber intends to contract with his co-subscriber. However, public policy may justify a view which holds the subscriber liable, since creditors and other parties are often deceived by relying upon certain subscriptions. But several late cases have accepted the majority view and hold that the subscriber is a mere offeror. *Canyon Creek Elevator Co. v. Allison,* 53 Mont. 604, 165 Pac. 753; *Jackson v. Sabie,* 36 N. D. 49, 161 N.W. 722; *Martin v. Cushwa,* 86 W. Va. 615, 104 S.E. 97.

CORPORATIONS—PROPERTY OF DOMESTIC CORPORATION WHOSE SHARES ARE OWNED BY ALIEN ENEMIES AS ENEMY OWNED PROPERTY.—At the outbreak of the war with Germany, the United States government seized certain docks, piers and vessels belonging to the plaintiff, a domestic corporation, whose entire capital stock was owned by a German corporation. Recently suit was brought against the United States to recover for the property so taken, and the court of claims upheld the action of the government, on the ground that it was a seizure of enemy owned property during the war. The Supreme Court reversed the decision and *held,* that the status of a corporation is not fixed by the stockholders' nationality and that the plaintiff being an American corporation, the seizure of its property was unlawful. *Hamburg American Line v. United States,* 48 Sup. Ct. 470.

The decision reaffirms the position taken in a similar case in 1925. *Behn Meyer & Co. v. Miller, Alien Property Custodian,* 266 U. S. 457, 45 Sup. Ct. 165. It thus appears that the Supreme Court prefers to apply the strictly logical conception of the corporate entity distinct and separate from the stockholders, even to situations arising out of the stress of wartime conditions. It is interesting to compare this decision with the leading case in England, *Daimler v. Continental Tyre and Rubber Company,* [1916] 2 A. C. 307, where the question was whether payment to an English corporation whose entire stock was owned by Germans would amount to trading with the enemy. The court of appeals held that the character of the corporation was not affected by the nationality of its stockholders, but the House of Lords reversed the decision and although the case went off on rather a technical point, the opinion indicates that the Lords thought the corporate fiction should be disregarded, that in a practical sense this corporation was owned and controlled by alien enemies, and should therefore be regarded as an enemy. Later English cases sustain this view. *The Hamborn,* [1919] A. C. 993, P. C.; *Re Badische Co., Bayer Co.,* [1921] 2 Ch. 331; The *St. Tudno,* [1916] P. 291; *Clapham Steamship Co. v. Handels,* etc., [1917] 2 K. B. 639. But the court in the principal case makes it plain that when Congress passed the Trading With the Enemy Act, it considered the difficulties certain to follow disregard of corporate identity, in the light of the *Daimler* case, and definitely adopted the policy of disregarding stock ownership as a test of enemy character. The prescribed plan was to seize the shares of stock when enemy owned rather than to take

over the corporate property, and this was done in several cases. *Stoehr v. Wallace*, 255 U. S. 239, 41 Sup. Ct. 293; *Garvan v. Marconi Wireless Tel. Co.*, 275 Fed. 486; *Columbia Brewing Co. v. Miller*, 281 Fed. 289. Of course, the court might have found ample authority for disregarding the corporate fiction of substantial justice demanded it. *State v. Standard Oil Co.*, 49 Oh. St. 137, 30 N.E. 279; *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247; *Donovan v. Partel*, 216 Ill. 629, 75 N.E. 334; 3 COOK, CORPORATIONS, 8th ed. sec. 663, 664. But the corporate entity should not be disregarded if the result can be reached on any other ground. 20 HARV. L. REV. 223. It tends to loose and indefinite rules of law for business transactions. *Gallagher v. Germania Brewing Co.*, 53 Minn. 214, 54 N.W. 1115. It threatens the loss of valuable features of corporate organization. *Moore and Handley Hardware Co. v. Tower Hardware Co.*, 87 Ala. 206, 6 So. 41. And since seizure of all enemy owned stock would prevent any benefit to the enemy just as effectively as seizure of the corporation's property, the Supreme Court very properly refused to upset established legal conceptions of corporate identity.

CRIMES—MEANING OF "HOUSE OF PROSTITUTION."—Defendant and his wife occupied a two room apartment in which the wife committed acts of prostitution with several men at the solicitation of the husband. Defendant was prosecuted under a statute imposing a penalty on a husband who permits his wife to be an inmate of a house of prostitution. *Held*, that a conviction under the statute was proper, the illicit acts of one woman being sufficient to constitute the apartment a house of prostitution. *People v. Barrett* (Cal. 1928) 270 Pac. 1010.

That a place where one woman receives men for illicit intercourse cannot be a brothel seems to be the common law as settled in the English case of *Singleton v. Ellison*, [1895] 1 Q. B. 607, 18 Cox C. C. 79; *R. v. Young*, 6 Can. Cr. Cas. 42, 14 Manitoba L. R. 58. *Singleton v. Ellison, supra*, was approved but distinguished in *Durose v. Williams*, 21 Cox C. C. 421, where it was held that a building in which a number of apartments were occupied and used by prostitutes, although no apartment was ever used by more than one woman, was a brothel. The principal case can not be brought within this distinction since apparently none of the other apartments in the building were used illegitimately. The most cited American decision on the question is *State v. Evans*, 27 N. C. 603, the theory of which is that a common bawdy house endangers public peace and morals, and therefore is of criminal cognizance, but that the place of business of a single prostitute can not become a house of prostitution within the purview of the common law, because the offense is moral only and subject to spiritual penances and supervision. *State v. Pyles*, 86 W. Va 636, 104 S.E. 100. A contrary view is expressed in *People v. Mallette*, 79 Mich. 600, 44 N.W. 962; and in *People v. Slater*, 119 Cal. 620, 51 Pac. 957. An Iowa decision distinguishes the cases where illicit acts are committed with a particular woman to whom the house or apartment belongs, and those where, as in the principal case, the acts are committed with a woman in a place subject to the control of another, such as her husband. The place of prostitution is considered a bawdy house in the latter situation. *State v. Gill*, 150 Ia. 210, 129 N.W. 821. This distinction seems unfounded since if the

conduct in one case is reprehensible it seems equally so in the other. Although a place devoted to the purposes of a single prostitute may not interfere with the public peace and morals in the same degree as does a common bawdy house, it may very probably interfere therewith to a degree from which the public is entitled to be protected. There would seem therefore good reason to consider such a place a house of prostitution under the laws appertaining thereto. It is said, however, that since statutes relating to bawdy houses are penal, they fall under the rule of strict construction, and the common law definition can not be enlarged upon. *State v. Pyles, supra.* This difficulty has been obviated by a city ordinance declaring a place used by a lone prostitute to be a bawdy house. *Fisher v. City of Paragould,* 127 Ark. 268, 192 S.W. 219.

DIVORCE—FULL FAITH AND CREDIT—EX PARTE DIVORCE IN SISTER STATE.—A husband removed from his matrimonial domicil in New Jersey and bona fide established his residence in Nevada where he lived for six months and then acquired an ex parte divorce decree against his wife. Jurisdiction over the wife was obtained by publication in accordance with the Nevada law and service of complaint and summons was made on her at her home in New Jersey. Subsequently the wife brought an action for divorce in New Jersey, and the husband set up the Nevada decree as a defense. *Held,* on principles of comity that the decree of the Nevada court would be treated as binding in New Jersey. *Schneider v. Schneider* (N. J. Eq. 1928) 142 Atl. 417.

It was because of the much discussed rule of *Haddock v. Haddock,* 201 U. S. 562, 26 Sup. Ct. 525, that "the mere domicil of one spouse within a state" is not sufficient to give jurisdiction so as to make a decree a judgment within the meaning of the "full faith and credit" clause of the constitution, that the husband was unable to call upon that clause to *compel* recognition of the Nevada decree. See THE AMERICAN LAW INSTITUTE'S RESTATEMENT OF CONFLICT OF LAWS, sec. 118. However, the decision of the Supreme Court in that case did not *prevent* recognition of a foreign ex parte divorce, and the great majority of the states have given recognition to such decrees on the basis of comity. See Peaslee, "Ex Parte Divorce," 28 HARV. L. REV. 457; Beale, "Haddock Revisited," 39 HARV. L. REV. 417. Before New Jersey adopted the national Uniform Annulment and Divorce Act (TERRY, UNIFORM STATE LAWS ANNOTATED 301) 2 N. J. Comp. St. 1910, pp. 2029-2032, 2041, 2042) the policy of that state was to give full faith and credit to an ex parte divorce decree pronounced by a sister state in which complainant was domiciled, provided the ground on which the decree rested was recognized in New Jersey and provided also that there had been constructive service on the defendant according to the laws of the sister state. Thus in *Felt v. Felt,* 59 N. J. Eq. 606, 45 Atl. 105, a decree of divorce was granted in Utah against defendant living in New Jersey. Petitioner had resided in Utah for less than two years. A New Jersey statute then as now required two years of residence before one could receive a decree of divorce in the forum. Nevertheless, and because the period of residence required by the law of Utah had been fulfilled, recognition was accorded to the decree. The Uniform Divorce Act as it appears in the New Jersey statutes provides in section 33, that "full faith and credit shall be given * * * to a decree of divorce * * * in another state * * * when the

jurisdiction was obtained in the manner and in *substantial* conformity with conditions prescribed in section 7 of this act. Nothing herein contained shall be construed to limit the power of any court to give such effect to a decree * * * as may be justified by the rules of international comity * * *." In substance section 7 provides that jurisdiction for an ex parte divorce in New Jersey may be acquired by publication if complainant is a bona fide resident, provided however, that no action shall be commenced for any cause other than adultery unless the complainant has been two years bona fide resident. The crucial question in the principal case is whether the operation of section 33 upon section 7 makes the two year residence requirement a declaration of policy of New Jersey to recognize no decree of divorce in a sister state (other than for adultery) in which complainant has not been a bona fide resident for at least two years. That such was the operative effect of the statute was held in *Thompson v. Thompson,* 89 N. J. Eq. 70, 103 Atl. 856, and in *Garrabrant v. Garrabrant,* 95 N. J. Eq. 136, 122 Atl. 848. The principal case holds squarely to the contrary. Recently the same court has had to deal with two other foreign divorce decrees. In *Robins v. Robins,* 142 Atl. 168, recognition was not accorded on the ground that residence in the foreign country was not bona fide. And in *Field v. Field,* (July 1928) 142 Atl. 644, the new interpretation of the divorce act as laid down in the principal case was solely relied upon to uphold the decree. From the face of the statute it is not clear that there was a legislative intent to change the authoritatively established policy that the *period* of bona fide residence is a matter appropriately reserved to the jurisdiction in which the decree is sought. *Felt v. Felt, supra.* Also the legislature seems to have contemplated that full faith and credit should be accorded to decrees rendered in accordance with the act even by a foreign jurisdiction that requires more than two years residence therein for jurisdiction of its courts; it is only consistent that a converse intent should also exist. Such considerations lead to the conclusion that the principal case was decided wisely.

EVIDENCE—SELF-INCRIMINATION—EXAMINATION OF DEFENDANT BY PHYSICIAN.—The defendant while in jail on a charge of statutory rape was examined by a physician sent by the state's attorney. Although the sheriff was in the room throughout the examination he did nothing to force the defendant to submit to it. The defendant made no objection to being examined, but he had not been informed of his rights, nor did he know whom the physician represented nor the purpose of the examination and the use to which the evidence thus obtained might be put. *Held,* (by three judges) the examination was involuntarily submitted to and the evidence thus obtained was inadmissible as in violation of the constitutional provision against self-incrimination. Three judges dissented, holding that the defendant voluntarily submitted. One judge did not vote and the other concurred only in the result of reversal. *People v. Corder,* 244 Mich. 274, 221 N.W. 309.

The Michigan constitution provides, "No person shall be compelled in any criminal case to be a witness against himself." Art. 2, sec. 16. Whether a physical examination of the accused is a violation of the privilege is the subject of much dispute. Probably no court would refuse to force a de-

fendant to uncover his face that a witness might identify him. The line seems to be drawn, however, at medical examinations of those parts of the body not usually exposed to view. Professor Wigmore says, "A medical examination is not a violation of the privilege, whether its object be * * * to ascertain disease * * *," WIGMORE ON EVIDENCE, 2d ed. sec. 2265, but he cites no authorities allowing an examination like that in the principal case to be given in evidence if objected to. In *State v. Struble,* 71 Iowa 11, 32 N.W. 1, and examination of the face and neck of the defendant while in jail and in the presence of the sheriff was held admissible. But in *State v. Height,* 117 Iowa 650, 91 N.W. 935, an examination of the private parts of the defendant was held inadmissible; the *Struble* case, *supra,* was not referred to and the involuntariness of the submission by the defendant to the examination was admitted by the state. Missouri has repeatedly held evidence inadmissible when thus procured. *State v. Newcomb,* 220 Mo. 54, 119 S.W. 405; *State v. Horton,* 247 Mo. 657, 153 S.W. 1051; *State v. Matsinger,* (Mo.) 180 S.W. 856. Missouri distinguishes between examinations of the exposed and unexposed parts of the body, as the former are properly received in evidence. *State v. Jones,* 153 Mo. 457, 55 S. W. 80. In the principal case the majority quote with approval and the minority with disapproval the extreme statement of the rule given in *State v. Horton, supra,* "When a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman's club, it requires something much more substantial than silence to justify an invasion of his constitutional right not to be compelled to furnish evidence against himself." Although this may have been mere dictum in that case, it was adopted and followed in the later Missouri decision. In a case with facts almost exactly parallel to the principal case the examination was held admissible, but no reasons are given in support of the decision. *Angeloff v. State,* 91 Oh. St. 361, 110 N.E. 936. This seems to be the only case holding this type of examination voluntary. Nevertheless the reasoning of the minority seems clear and convincing in the principal case. The difficulty of procuring convictions in this general class of cases without strong corroborative evidence may mean that the majority view, if finally adopted, will seriously impede such prosecutions. Michigan has allowed analogous evidence to be introduced, such as exhibiting scars, placing hands on marks on deceased's throat, *People v. Collins,* 223 Mich. 303, 133 N.W. 858, etc. At least the exclusion should be confined to cases within the scope of the principal case and not extended. As a constitutional objection is to be met, a statute can not obviate the difficulty. The words of Justice Brewer, dissenting, in *Union Pacific Ry. Co. v. Botsford,* 141 U. S. 250, 35 L. ed. 734 might well be applied to admit this kind of evidence. "The end of litigation is justice. Knowledge of the truth is essential thereto * * * truth and justice are more sacred than any personal consideration."

MUNICIPAL CORPORATIONS—DELEGATION OF POWER TO REMOVE A RESTRICTION.—The city council duly passed an ordinance dividing the city into residential and business districts. Section 3 read in substance that a permit "may" be issued for the erection or alteration of a building in a residence district for business purposes, provided that there be filed with the application the written

consent of the owners of three-fourths of the properties within a prescribed distance, and "provided further that the council shall after a public hearing so order." Defendants without permission sought to establish a funeral parlor in a residence district and in answer to the city's suit for an injunction contended that section 3 of the ordinance was an unconstitutional delegation of legislative power. *Held,* the injunction should be granted. *City of Stockton v. Frisbie & Latta et al.* (Cal. 1928) 270 Pac. 270.

The general rule is that the governing body of a municipal corporation entrusted with police power by the state may not delegate its legislative and discretionary functions. McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed. ch. 10 sec. 395; 19 R. C. L. 798. The rule is clear, but a difficulty is met as to whether the delegation in any case is of a legislative power or of a mere administrative function. The courts have not agreed in passing upon the validity of ordinances granting permission to property owners to modify a restriction. McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed. ch. 10 sec. 398-99. Such ordinance provisions have been held an unconstitutional delegation of legislative power on the ground that they allow unjust discrimination, subject the property owner to the mercy of his neighbors, and permit private individuals to exempt portions of the city from what the council has deemed beneficial to the city's welfare. *State ex rel. Nehrbass v. Harper,* 162 Wis. 589, 156 N.W. 941; *State v. Withnell,* 78 Neb. 33, 110 N.W. 680; *Levy v. Mravlag,* 96 N. J. L. 367, 115 Atl. 350. Other cases are to the contrary. *City of Muskogee v. Morton,* 128 Okla. 17, 261 Pac. 183; *Myers v. Fortunato,* 12 Del. Ch. 374, 110 Atl. 847; *Chicago v. Stratton,* 162 Ill. 494, 44 N.E. 853; *U. S. ex. rel. Early v. Richards,* 35 App. D. C. 540; *Bldg. Insp. of Lowell v. Stoklosa,* 250 Mass. 52, 145 N.E. 262. Furthermore, the Supreme Court has held that a delegation of power to property owners to *impose* or *initiate* a restriction is violative of "due process" and the Fourteenth Amendment, *Eubank v. Richmond,* 226 U. S. 137, 57 L. ed. 156, although the same tribunal has decided that the delegation of the power to *remove* a restriction in a restricted area can not be objected to as want of "due process," *Cusack v. Chicago,* 242 U. S. 526, 61 L. ed. 473. The court in the principal case thought that the word "may" in section 3 was purposely used in a natural, permissive sense. This, together with the provision for a public hearing before the council, it held, clearly showed that the consent of the property owners was merely to advise the council with which body rested the final decision. The court in *Bldg. Insp. of Lowell v. Stoklosa, supra,* reached a similar result in construing a provision of an ordinance in the exact words of section 3 in the principal case. The other cases on both sides of the question appear to have arrived at decisions upon the assumption that the action of the property owners was final. It is submitted that the above ordinance and decision meet the objections of some courts that such a right in the property owners enables them to selfishly grant exemptions and weaken the effect of proper zoning laws. Also, since the final decision is placed in the council the courts may be less inclined to find an unconstitutional delegation of power. It is believed, however, that they do not answer the objections of courts which fear discrimination by the property owners' *refusal* so to consent.

PHYSICIANS AND SURGEONS—FAILURE TO BE PRESENT AT CHILD-BIRTH—TORT OR CONTRACT.—Defendant was engaged to attend plaintiff during her confinement. Because of delay in the commencement of labor, defendant gave plaintiff medicine and left at 8 P.M. promising to return in a couple of hours. At eleven the need for a physician became urgent but all attempts to reach defendant failed. At 1 A.M. another physician was secured, and the child was born at 3 A.M. but lived only an hour. Plaintiff claimed damages for the loss of the child, and for impairment of her health and her extreme suffering prior to the delivery. *Held,* the charge that the loss of the child was due to defendant's absence was not sufficiently proved. However, defendant having given medicine to accelerate labor, it was his absolute duty to remain where he could be reached, his leaving the plaintiff at a critical stage was a "culpable dereliction of duty," he was liable for the suffering caused and the fact that he was attending another patient did not excuse him. *Young v. Jordan,* (W. Va. 1928) 145 S.E. 41.

In actions against a physician for malpractice, recovery is universally allowed for all "derelictions of duty" and failure to use proper skill and care. *Dorris v. Warford,* 124 Ky. 768, 100 S.W. 312, 14 Ann. Cas. 602. That the courts in practically all of these cases reach just results can not be doubted, but the courts differ greatly as to the method by which the result should be reached. A vast majority of the cases have said that a recovery for malpractice may be had in either a contract or tort action. *Kuhn v. Brownfield,* 34 W. Va. 252, 12 S.E. 519, 11 L. R. A. 700; *Carpenter v. Walker,* 170 Ala. 659, 54 So. 60, Ann. Cas. 1912 D 863 and note. Some cases say that the action is normally *ex contractu,* but that an *ex delicto* action is permissible, *Longan v. Weltmer* 180 Mo. 322, 79 S.W. 655, 64 L. R. A. 969; others say that the action can not be maintained without proving a contract, *Finch v. Bursheim,* 122 Minn. 152, 142 N.W. 143; still others say that the action is based upon tort only, and not upon contract, *Frankel v. Wolper,* 228 N. Y. 582, 127 N.E. 913; *Re Pillsbury,* 175 Cal. 454, 166 Pac. 11, 3 A. L. R. 1396. Many courts say that the action is one of tort arising out of breach of contract, that is, that the contract creates a relationship out of which a duty arises, and that the violation of that duty is a tort. *Carpenter v. Walker, supra; Hales v. Raines,* 162 Mo. App. 46, 141 S.W. 917. A somewhat modern view is, that between the physician and patient there is a consensual relationship, often created by contract, but not necessarily so, and that when this relationship exists, the law imposes certain duties upon the physician for reasons of policy. A violation of these relational duties is actionable, and yet it is hard to say that it is either a tort or a contract. This view seems to have been advanced in 21 R. C. L. 379 without citation of authority, and it has recently been supported by several courts relying on R. C. L. *Parkell v. Fitzporter,* 301 Mo. 217, 256 S.W. 239, 29 A. L. R. 1305; *Hansen v. Pock,* 57 Mont. 51, 187 Pac. 282; *Loudon v. Scott,* 58 Mont. 645, 194 Pac. 488, 12 A. L. R. 1487. In support of this view it may be said that an action for malpractice need not be based upon contract, for it will lie where the service is rendered gratuitously, *Peterson v. Phelps,* 123 Minn. 319, 143 N.W. 793, or at the solicitation of, or under express contract with, a third person. *Viita v. Fleming,* 132 Minn. 128, 155 N.W. 1077, annotated in L. R. A. 1916 D 650. In the principal case the

court says that the physician had an "absolute duty to give the case close attention" and cites authorities taking divergent views as to the nature of the duty. In *Lathrope v. Flood,* (Cal. 1901) 63 Pac. 1007, in which the facts were similar to the principal case, the court said that under the circumstances, abandonment of the contract was negligence, but see *Chase v. Clinton County,* 241 Mich. 478, 217 N.W. 565, in which it is held that while failure to perform a contract with reasonable care and skill may be a tort as well as a breach of contract, an action sounding in tort can not be predicated on mere nonfeasance in the performance of the contract. For a complete discussion of this distinction see 12 L. R. A. (N. S.) 924. Where the physician was hired by the year, a failure to attend when called made him liable for breach of contract only, but if he undertook the case and then was negligent, plaintiff could sue in tort. *Randolph's Adm'rs. v. Snyder,* 139 Ky. 159, 129 S.W. 562.

PROPERTY—ESTATES BY THE ENTIRETY IN PERSONALTY—EFFECT OF MARRIED WOMAN'S ACTS.—A assigned his interest in a note payable to himself and his wife. After maturity, in a dispute as to the disposition of the proceeds of the note, the circuit court held that the note and proceeds constituted an estate by the entirety in A and his wife and directed payment to them clear of any claim of A's assignee. On appeal *held,* that under the Married Woman's Act tenancies by entirety were abolished in personalty (overruling a dictum to the contrary in *Dupont v. Jonet,* 165 Wis. 554, 162 N.W. 664) and the assignee was entitled to recover. *Aaby v. Kaupanger* (Wis. 1928) 221 N.W. 417.

Under common law there was a split of authority as to the existence of an estate by the entirety in personalty, although probably a majority of jurisdictions held there could not be such an estate. *Winchester-Simmons Co. v. Cutler,* 194 N. C. 698, 140 S.E. 622; 6 MICH. L. REV. 345. This conflict has not been resolved into uniformity by the Married Woman's Acts. It has been suggested, on the one hand, that since under the Acts the husband can not acquire absolute control of his wife's personalty, as he could at common law, the obstacle to tenancy by the entirety in personalty has disappeared. 19 MICH. L. REV. 879; 22 L. R. A. 594; see *Phelps v. Simons,* 159 Mass. 415, 34 N.E. 657. On the other hand the Married Woman's Acts may be considered to abolish previously existing tenancy by the entirety in personalty. Of such opinion was the court in the principal case, relying on *Wallace v. St. John,* 119 Wis. 585, 97 N.W. 197, which held such estates in realty abolished on the theory that the Act, by giving the wife separate property rights, destroyed that oneness of husband and wife which was the basis for tenancy by the entirety. But that tenancy by the entirety rested on marital unity has been doubted; the author of an article "Tenancy by Entirety in Michigan" in 5 MICH. ST. BAR J. *196 has developed the historical background to show that the estate was an anomaly in the common law, existing, perhaps, in spite of, rather than because of, any oneness of husband and wife. If such be the case, it seems that the Married Woman's Acts could have no effect on estates by the entirety. However, tenancies by the entirety do impose unnatural restraints on proprietary rights, defeat a general policy against survivorship, often prove subversive of the rights of creditors, and are centered in a maze of technicalities. 5 MICH. ST. BAR J. *282, 284. The principal case is an instance of the

injustice which recognition of the estate might work. If the lower court had been sustained, the assignee might have recovered personally against the husband for money had and received. But suppose the husband were insolvent? Or suppose that he had died, so that the entire estate vested in the wife by the right of survivorship, and his estate were insolvent? The Wisconsin court then did perhaps reach a salutary result through a common, but fortunate, misconception of the true basis of tenancy by the entirety. But other courts have taken the view that abolition of tenancy by the entirety is for the legislature, and that if the legislature had intended to abolish the estate it would have done so expressly. In these states tenancy by the entirety in personalty, if recognized under the common law, continues to exist under the Married Woman's Acts. Such seems to be the weight of authority. *In re Meyer's Estate (Appeal of Weiss)*, 232 Pa. 89, 81 Atl. 145; *Flaherty v. Columbus*, 41 App. D. C. 525; *Craig v. Bradley*, 153 Mo. App. 586, 134 S.W. 1081. Recognition that tenancy by the entirety in personalty is in general on the same plane as tenancy by the entirety in realty seems inevitable under the Married Woman's Acts. It is submitted that since the Acts afford the courts the means of doing so, they might well declare tenancies by the entirety abolished thereunder. As the same objections attend the estate in personalty as in realty, the court might well apply the same doctrine to both. See also *Aubry v. Schneider*, 69 N. J. Eq. 629, 60 Atl. 929; and 13 R. C. L. 1101, 1105.

PROPERTY—LEASEHOLD AS REAL ESTATE—"INTEREST IN LAND."—A corporation, having a 99 year lease on certain real estate, put out an issue of bonds secured by a mortgage on the lease. Plaintiff was named trustee of the issue. A statute provided for a specific tax on all mortgages and liens upon real property. The register of deeds refused to record the trust mortgage without the payment of this tax. Plaintiff paid under protest, and sued to recover the amount so paid. *Held*, that a mortgage on a leasehold interest for 99 years is a mortgage on real property within the meaning of the statute, and therefore subject to the tax therein imposed. *Fidelity Trust Co. v. Wayne County*. (Mich. 1928) 221 N.W. 111.

Of course, at common law, a leasehold interest is only a chattel real, that is to say, personalty. 1 TIFFANY, LANDLORD AND TENANT, p. 46; 2 BLACKSTONE COMM. 386. In several states, however, the legislature has classed leaseholds and realty together, for certain purposes. The Michigan recording statute (Comp. Laws 1915, Sec. 11721) uses the term "conveyance," and in Comp. Laws 1915, Sec. 11726, it is stated that "the term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created * * *, except wills, leases for a term not exceeding 3 years, and executory contracts for the sale or purchase of lands." It was held in *Crowse v. Mitchell*, 130 Mich. 347, 90 N.W. 32 that these provisions construed together brought conveyances of leaseholds within the recording statute. Comp. Laws 1915, Sec. 11691, providing that no covenant shall be implied in any conveyance of real estate, was held to embrace estates for years within the term "real estate." *De Grasse v. Verona Mining Co.*, 185 Mich. 514, 152 N.W. 242. Referring to these cases the court in the principal case argues that the legislature must also have meant to in-

clude leaseholds when it used the term "real property" in the mortgage tax statute. This result seems sensible, especially in the case of long term leases, which may easily exceed a life estate in duration. And the question will seldom arise except in the case of long term leases, since the short term lease has little or no mortgage value. Some courts, however, are reluctant to recognize the leasehold as realty, and hold that the inclusion of leaseholds in the recording statute does not have the effect of converting leaseholds into realty, nor does it affect the meaning of the term "real estate" as used in other statutes. *Orchard v. Wright, Dalton, Bell, Anchor Stove Co.* 225 Mo. 414, 125 S.W. 486; *Guy v. Brennan,* 60 Cal. App. 452, 213 Pac. 265; *Meyers v. Arthur,* 135 Wash. 583, 238 Pac. 899. Statutes and decisions on this subject in the various states are so conflicting that no generalization is safe. Many courts still cling to the common law conception of the leasehold. *Dyer v. Owens,* 204 Ky. 59, 263 S.W. 663; *DeKyne v. Lewis,* (N. J. 1927) 139 Atl. 434; *Nelson v. Radcliff,* 110 Neb. 54, 192 N.W. 958; *Waddel v. United Cigar Stores,* 195 N. C. 434, 142 S.E. 585. Illinois, on the other hand, is very liberal in holding estates for years real property. *People v. Shedd,* 241 Ill. 155, 89 N.E. 332; *Shedd v. Patterson,* 312 Ill. 371, 144 N.E. 5; *Knapp v. Jones,* 143 Ill. 375, 32 N.E. 382. It is perhaps safe to say that courts and legislatures are more and more inclined to regard at least long term leases as real property for certain purposes. Representative legislation may be found in Ohio Gen. Code 1926, sec. 8597; Mass. Gen. Laws 1921, ch. 186, sec. 1; Ga. Ann. Code (Park 1914), sec. 3685.

SALES—RESTAURANT AS A SELLER OF GOODS.—Plaintiff went into defendant restaurant and ordered a piece of pie. The pie, when served, contained a piece of glass which caused plaintiff great injury. He sued for damages on the ground of negligence. Defendant appealed from a verdict for plaintiff on the ground that no negligence was proved. *Held,* the transaction constituted a sale within the statute prohibiting the selling of deleterious or adulterated food, and defendant was liable. It was immaterial whether defendant purchased or manufactured the pie. *Clark Restaurant Co. v. Simmons* (Ohio Ct. of App. 1927) 163 N.E. 210.

The statute on which the court based its decision made the selling of adulterated food a misdemeanor, but a violation of the statute is negligence *per se, Portage Markets v. George,* 111 Oh. St. 775, 146 N.E. 283, and thus the plaintiff was entitled to recover if there was a sale within the meaning of the statute. The courts are in conflict as to whether a restaurant sells food or service. The common law view was that the furnishing of food at an eating house or restaurant is not a sale, but merely a service, and that the customer paid for the right to satisfy his hunger by a process of destruction. BEALE ON INNKEEPERS, sec. 169; *Merrill v. Hodson,* 88 Conn. 314, 91 Atl. 533, noted in 13 MICH. L. REV. 61; *Nisky v. Childs* (N. J. 1927) 135 Atl. 805, 50 A. L. R. 227. The view that there is a sale, has, however, been supported by sound authority. *Temple v. Keeler,* 238 N. Y. 344, 144 N.E. 635; *Friend v. Childs Dining Hall,* 231 Mass. 65, 120 N.E. 407, 5 A. L. R. 1100. The court in the principal case held that there was a sale, without citation of authority, and rested its decision on the fact that those who serve liquor are

continually being convicted of making a sale in violation of law. The question as to whether or not there is a sale, generally arises when one who is injured by adulterated food sues for damages from the breach of an implied warranty, since if there is no sale, there can be no warranty. 17 MICH. L. REV. 261. Thus the question of sale or no sale seems to be purely one of policy. In other words, should we give the plaintiff an additional remedy in order to spare him the necessity of proving negligence? (The doctrine of *res ipsa loquitur* does not apply where the injurious substance is not a necessary or integral part of the food, *Jacobs v. Childs Co.*, 166 N. Y. S. 798; see also 17 MICH. L. REV. 261, 263.) The doctrine of implied warranty is largely fictional. The law will sometimes impose a liability because of the circumstances of the transaction, regardless of any actual representation on the part of the seller. WAITE, SALES, 189. Thus those courts that desire to make restaurants insurers of the food they serve have said that there is a sale, and have implied a warranty of fitness, without greatly concerning themselves as to whether the elements of a sale are really present. For further discussions of this topic, see 26 MICH. L. REV. 461, 825.

TORTS—CONTRIBUTION BETWEEN JOINT TORT-FEASORS.—A third party sued the plaintiff and the defendant to recover for personal injuries sustained by said third party as a result of the concurrent negligence of the plaintiff and the defendant. Judgment went against the plaintiff and the defendant for thirty-five thousand dollars, of which plaintiff paid twenty-five thousand dollars and defendant paid ten thousand dollars. The present action is one by the plaintiff to compel contribution from the defendant to the amount of seven thousand five hundred dollars to equalize the burden. *Held,* that the plaintiff was not entitled to contribution. *Public Service Rwy. Co. v. Matteucci* (N. J. 1928) 143 Atl. 221.

The court of errors and appeals reversed the judgment of the supreme court which allowed the plaintiff contribution. *Public Service Rwy. Co. v. Matteucci,* 140 Atl. 442, noted in 27 MICH. L. REV. 110. The supreme court, admitting the general rule to be that there could be no contribution between joint tort-feasors, held that an exception existed where the wrongful acts of the defendants were merely negligent. The court of errors and appeals said, that although the defendants were merely negligent, they were none the less wrongdoers and tort-feasors; that even were the question an open one in the state the court would be inclined to refuse contribution; but that the rule had been settled in *Newman v. Fowler,* 37 N. J. L. 89, that there could be no contribution in such case. Counsel contended that the statement of the rule in that case was mere obiter, but the court said even if that were so it had been followed for over fifty years and they did not propose to depart from it. It is to be regretted that the court thus refused to adopt the rule which is believed to be more sound in principle and more equitable in application. For a recent case favoring contribution in a situation like the present see, *Goldman v. Mitchell-Fletcher Co.,* (Pa. 1928) 141 Atl. 231.

TORTS—INDUCING BREACH OF PROMISE—LIABILITY OF PARENTS.—Plaintiff alleged that defendants, parents of his fiancee, maliciously conspired to bring

about a breach of their daughter's contract to marry him, actually resulting in a breach thereof. On motion to strike out as not setting forth a cause of action, *Held,* the state is interested in the marriage relation; parents have a right to advise their children to break contracts to marry, nor can their motive in acting, of itself, make the act wrongful. *Minsky v. Satenstein et al.* (N. J. 1928) 143 Atl. 512.

The principle of *Lumley v. Gye,* 2 E. & B. 216, that a tort action will lie for inducing the breach of the employment relationship, has been generally extended according to the weight of American authority to include unjustifiable interference with contracts other than those of employment; however, the courts seem to be creating a distinct exception to this as applied to contracts to marry. *Leonard v. Whetstone,* 34 Ind. App. 383, 68 N.E. 197; *Homan v. Hall,* 102 Neb. 70, 165 N.W. 881; *Stiffler v. Boehm,* 206 N. Y. S. 187, 124 Misc. Rep. 55; *Abelman v. Holman,* 190 Wis. 112, 208 N.W. 889. The instant case points out the peculiar nature of the marriage contract, the public interest in it, the right and custom of parents and those in *loco parentis* to advise concerning it. Practically the same basis for distinguishing from ordinary contracts for these purposes was suggested in 25 MICH. L. REV. 89. An entirely separate recognition of the state's interest in the marriage relationship and the difference between marriage and business contracts is found in the cases which hold the parties' ill health, even though known at time of contract, to be an excuse for a breach. See *Grover v. Zook,* 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582; also 33 A. L. R. 1232. The New Jersey court refuses to go beyond the facts of this case and leaves the question open as to whether interference by a third person, other than a parent, would be actionable. But *Abelman v. Holman,* (*supra*), and *Homan v. Hall,* (*supra*), are authorities holding there is no action against such third persons. *Overhultz v. Row,* 152 La. 9, 92 So. 716; *Case v. Smith,* 107 Mich. 416, 65 N.W. 279; and *Davis v. Condit,* 124 Minn. 365, 144 N.W. 1089, although easily distinguishable, show how courts have, on one pretext or other, declined to interfere with the pre-marital relationship. The reasoning, though not the results, of several of these cases is criticized in 34 YALE L. JR. 526. See also 47 A. L. R. 442. The instant case, while refusing to protect the contract, specifically states that this does not preclude an action for libel or slander if the facts justify. This case arrives at the same result that the others on the subject have, but does so by much sounder reasoning; it is to be hoped that it will serve to clear up a confused point.

WATERS AND WATERCOURSES—WHAT LANDS ARE RIPARIAN.—A, the owner of a riparian tract, conveyed part to B, reserving to himself an irregular portion that nowhere touched the stream. A sold the latter to C who later acquired abutting land extending to the creek. C, claiming as riparian owner of the land which he took from A, sought to enjoin diversion of the water by B. *Held,* that C was not entitled to the relief sought, since the land he acquired from A was not riparian land. *Yearsley v. Cater* (Wash. 1928) 270 Pac. 804.

When non-riparian land, including land which has become such by severance from an originally riparian tract, is brought under common title

with contiguous riparian land, some difficulty is experienced in determining the extent of the riparian right. Two rules, and possibly a third, have been developed. California furnishes the leading cases for the doctrine that land once severed from the riparian tract can never regain the status of riparian land, and that non-riparian land can not become riparian by merging in ownership with adjoining riparian tracts. *Anaheim Union Water Co. v. Fuller,* 150 Cal. 327, 88 Pac. 978; *Boehmer v. Big Rock Irr. Dist.,* 117 Cal. 19, 48 Pac. 908. This rule seems to have been approved in Nebraska and Texas. See *Crawford Co. v. Hathaway,* 67 Neb. 325 at 354, 93 N.W. 781 at 790; *Watkins Land Co. v. Clements,* 98 Tex. 578 at 585, 86 S.W. 733 at 735; (but see 1 KINNEY ON IRRIGATION, sec. 464 for the contention that those cases lay down a rule extending the riparian right to the limits of each original forty acre government grant along the stream). The opposite view is supported by *Jones v. Conn,* 39 Ore. 30, 64 Pac. 855. It clearly reasons that the riparian right should be determined by the fact, rather than the source, of title. The court in the principal case saw fit to follow the California rule, denying that the land cut off from the stream resumed its riparian character when merged in title with contiguous land which was riparian. It is submitted that, so long as access to the stream is considered the basis of the riparian right, logically all the land having access thereto should be considered riparian regardless of when, or from whom, acquired. Such a rule also has its practical advantages in extending the water right to the greatest possible amount of acreage; at the same time other riparian owners are protected by the common law rule of reasonable user. This rule has apparently received the approval of the supreme court of Kansas. See *Clark v. Allaman,* 71 Kan. 206 at 245, 80 Pac. 571 at 585. As to the effect of a deed reserving the water right to the land severed from the stream see *Miller & Lux Inc. v. James,* 179 Cal. 689, 178 Pac. 716; see also 7 CAL. L. REV. 286. On the necessity for land being in the same watershed as the stream in which a riparian right is claimed see 20 MICH. L. REV. 123.

WILLS—ADEMPTION OF LEGACY IN CODICIL AS REVIVAL OF PROVISION IN WILL.—The testator by his will bequeathed $30,000 to his daughter. By the first codicil to it he directed his executors to transfer to this daughter certain stocks described "in lieu of the $30,000," adding "and mean that they shall be given to her in place of the $30,000." Upon the testator's death the named stocks were not found among the assets of the estate. The daughter claimed herself entitled to the $30,000. *Held,* that the codicil revoked the bequest of $30,000 and being specific as to the stocks was adeemed by the sale or disposal of them during the testator's life. *Owen v. Busiel* (Conn. 1928) 142 Atl. 692.

The contention of the legatee that the codicil was simply a direction to the executors as to the manner in which they should satisfy the legacy of $30,000 was not sustained. The court said that the words in their ordinary meaning indicated an intention to revoke the former legacy and substitute a new. The legatee also contended that the revocation was conditional upon the stocks being in existence at the time of the testator's death. This argument might be interpreted as based upon dependent relative revocation, or upon ademption as a form of revocation. As to the first, the doctrine of dependent

relative revocation has always been rather narrowly limited. 40 CYC. 1188; 33 HARV. L. REV. 337. It has been adopted in states where revival of a former will is not effected by a revocation of a later will, *Matter of Weston*, L. R. 1 P & D 633, 20 L. T. Rep. (N. S.) 330; *Sewall v. Robbins*, 139 Mass. 164; *Thomas v. Thomas*, 76 Minn. 237, 79 N.W. 104, or where the testator makes a new will revoking the old, mistakenly supposing that the new will was properly executed and effective, *Stickney v. Hammon*, 138 Mass. 116; *Barksdale v. Barksdale*, 12 Leigh (Va.) 535; *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685. In many states no will can be revived except by reexecution of the same, which has the effect of making revocation effective at the time it is made, for there is no revival by a revocation of the revoking instrument. *Lone's Estate*, 108 Cal. 588, 40 Pac. 771; *Kern v. Kern*, 154 Ind. 29, 55 N.E. 1004; *Francis v. Marsh*, 54 W. Va. 545, 46 S.E. 573. In states where revocation, like other testamentary provisions, is ambulatory, not becoming effective until the testator's death, (*Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685; *Randall v. Beatty*, 31 N. J. Eq. 643; *Bates v. Harking*, 29 R. I. 1, 68 Atl. 622) it might be claimed that the revocation was here revoked by ademption of the legacy in the codicil, and never became effective to destroy the legacy of $30,000. In these states, if ademption of the legacy operated to revoke the codicil entirely, the original legacy would remain effective at testator's death. Can it be said that ademption is revocation? In the case of total ademption the legatee takes nothing. This result would follow whether the legacy was revoked, or remained in force but failed because, being specific, there was nothing upon which the will could operate. This perhaps explains the indiscriminate use of the terms ademption and revocation. *Woolery v. Woolery*, 48 Ind. 523; *Adams v. Winnie*, 7 Paige (N. Y.) 97; but see *Carmichael v. Lathrop*, 108 Mich. 473, 66 N.W. 350. The usual Wills Act makes no provision for revocation in this manner, yet the courts all recognize ademption of specific legacies to be the law. Those classing ademption as a form of revocation base its validity upon a recognized exception to the Wills Act. *Adams v. Winnie, supra; Walton v. Walton*, 7 Johns. Ch. 258, 11 Am. Dec. 456. They say that the Wills Act was not intended to affect revocation by a change in conditions as under the common law, and class ademption with revocation by subsequent marriage and birth of a child. *White v. Winchester*, 6 Pick. (Mass.) 48; *Borden v. Borden*, 2 R. I. 96. Ademption bears certain characteristics apart from these, however. In the case of ademption it is possible by the sale or disposal of only part to adeem the legacy pro tanto while in the other cases the revocation is absolute. *Gillmer v. Gillmer*, 42 Ala. 9; *Hoitt v. Hoitt*, 63 N. H. 475, 3 Atl. 316; *Pickett v. Leonard*, 104 N. C. 326, 10 S.E. 466; *Law v. Law*, 83 Ala. 432, 3 So. 752; *Lovell v. Quitman*, 88 N. Y. 377, 42 Am. Rep. 254. Likewise they are historically different. At the old common law revocation was ambulatory in character, 40 CYC. 1212. At common law after an ademption had once been made a reconveyance had no effect, for the courts said the testator got a different estate. 40 CYC. 1209. See *Beck and Sewall v. McGillis*, 9 Barb. (N. Y.) 35. By statutes in many states the situation is now reversed and revocation is effective at once, (citations, *supra*) while ademption is ambulatory, *Woolery v. Woolery, supra; Brown v. Brown*, 16 Barb. (N. Y.) 569. Ademption is much more logically

explained on the ground that there is nothing in the testator's estate on which the will may operate. In the Busiel case there might be a difference as to the scope of ademption as compared with revocation. The codicil divides naturally into two parts, a revocation of the former legacy and the substituted legacy. While the two are closely interwoven it seems doubtful whether the ademption would affect both. As pointed out, ademption may operate to deprive the legatee of part of the gift only. If ademption is revocation how much of the property shall we say must be disposed of before the revocatory part of the codicil is also revoked, or is the revocation also revoked *pro tanto?* If ademption is not revocation this question would not have to be answered as the codicil remains a part of the will at the testator's death, effective as a revocation but not as to the gift because there is nothing in the estate which could pass by the terms of the legacy. In this case there is probably no injustice done as it appears that the testator by later codicils left more stocks to the daughter, no doubt to take the place of these.