RECENT CASE NOTES

AGENCY—WARRANTY OF AUTHORITY—EFFECT OF FORM OF ACTION IN SUIT AGAINST AGENT.—The defendant, representing himself to be the agent of a certain corporation, induced the plaintiff to audit the corporation's books. The defendant was without authority. The lower court sustained the plaintiff's action of contract, and the defendant excepted on the ground that he was not responsible in contract. *Held*, that the exceptions be sustained, since an action of tort is the proper remedy against an agent contracting without authority. *Mendelsohn v. Holton* (1925, Mass.) 149 N.E. 38.

In all jurisdictions an agent is responsible in an action of deceit where he represents that he has authority, knowing his statements to be false. *Pasley v. Freeman* (1789, K. B.) 3 T. R. 51; 1 Mechem, *Agency* (2d ed. 1914) sec. 1365. That deceit should lie when there is no mala fides, but where the language is spoken negligently, has been suggested. Smith, *Liability for Negligent Language* (1901) 14 HARV. L. REV. 184; *contra:* Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415, 436. Where the misrepresentation of authority was honestly made, recovery has very generally been allowed, although the theories of recovery have differed greatly. Formerly Massachusetts, New York, and many other jurisdictions imposed responsibility by substituting the agent on the contract itself in place of the principal he attempted to represent. *Palmer v. Stephens* (1845, N. Y. Sup. Ct.) 1 Denio, 471; *Hatch v. Smith* (1809) 5 Mass. 42, 52. A few jurisdictions seem to retain the rule today. See (1911) 34 L. R. A. (N.S.) 513, 525, note. New York, however, later adopted the principle already recognized in England, that the agent's responsibility was founded in contract, on an implied warranty. *Baltzen v. Nicolay* (1873) 53 N. Y. 467; *Collen v. Wright* (1857, Exch.) 8 El. & Bl. 647. While Massachusetts grounds his responsibility in tort on the theory of a false warranty. *People's Nat. Bk. of Boston v. Dixwell* (1914) 217 Mass. 436, 105 N. E. 435. This action is said to be in the nature of deceit, even though the agent bona fide believes he has authority. *Magaw v. Beals* (1922) 242 Mass. 321, 136 N. E. 174. Since *Pasley v. Freeman, supra*, "fraud" and "deceit" have connoted a dishonest motive or at least knowledge of the falsity. Williston, *Liability for Honest Misrepresentation, supra*. It seems, however, that the Massachusetts notion of "deceit" as used in the warranty cases is more consistent with the original concept of the action. 1 Williston, *Sales* (2d ed. 1924) sec. 194. As to the damages obtainable under the three theories of recovery, it is obvious that where the contract is said to be the agent's own, his damages will be limited to the value of performance, unless the case falls within the doctrine of *Hadley v. Baxendale* (1854) 9 Exch. 341. But where the action sounds in contract but is based on a breach of an implied warranty, the damages will be allowed to embrace, as in a tort action, all the injury resulting from his want of authority. *Farmer's Co-op. Trust Co. v. Floyd* (1890) 47 Ohio St. 525, 26 N.E. 110; *Taylor v. Nostrand* (1892) 134 N. Y. 108, 31 N. E. 246. Where the case comes up under a code abolishing forms of action it should be sufficient if the plaintiff states operative facts constituting a cause of action. Clark, *The Complaint in Code Pleading* (1926) 35 YALE LAW JOURNAL, 259, 282; *Conaughty v. Nichols* (1870) 42 N. Y. 83. On the other hand, some states rigidly require a theory in the pleadings. *Chicago, T. H. & S. E. R. Co. v. Collins* (1924, Ind.) 143 N. E. 712. In such a state prudence would dictate that the action be brought according to the orthodox notion of recovery existent in that state.

ALIENS—DEPORTATION PROCEEDINGS—NAMING THE WRONG DEFENDANT IN WARRANT OF ARREST HELD NOT TO INVALIDATE PROCEEDINGS IF FAIR HEARING GIVEN.—A Chinese woman was arrested, and after a hearing a warrant of deportation was issued against her. She petitioned for a writ of habeas corpus on the ground that she was not the person named in the warrant of arrest upon which the proceedings were based. It appeared that she was the person wanted, but that, through an error, the warrant of arrest described another person of the same name. From a judgment denying her petition she appealed. *Held*, that the appeal be denied, since after a fair hearing the appellant was found to be subject to deportation. *Wong Shee v. Nagle* (1925, C. C. A. 9th) 7 Fed. (2d) 612.

A final decision of the Labor Department on the facts in a question of deportation is conclusive upon the courts when the hearing is fairly conducted. *United States v. Wong Lai* (1921, C. C. A. 9th) 270 Fed. 57. But the fairness of such a hearing is not dependent upon the same factors as is a trial at law. *White v. Chan Wy Sheung* (1921, C. C. A. 9th) 270 Fed. 764; *Moy Yoke Shue v. Johnson* (1923, D. C. Mass.) 290 Fed. 621 (ordinary rules of evidence do not govern); *Ex parte Lee Soo* (1923, N. D. Calif.) 291 Fed. 271 (decision may be against the weight of the testimony); *Chin See v. White* (1921, C. C. A. 9th) 273 Fed. 801 (inclusion in the record on appeal of letters not produced at the hearing held not improper, "since bad faith will not be imputed to an executive officer"); *Hee Fuk Yuen v. White* (1921, C. C. A. 9th) 273 Fed. 10 (proceedings based on examination by one doctor held proper though the statute required the examination to be by two doctors). By holding that the proceedings are not criminal the defendant is deprived of his right to a jury trial. *In re Chow Goo Pooi* (1884, C. C. D. Calif.) 25 Fed. 77. This subordination of legal form to efficiency of action, so long as substantial justice is done, seems a salutary rule for an administrative body. Civil service commissions follow a similar theory. *Coolidge v. Bruce* (1924, Mass.) 144 N. E. 397 (charges against officer not to be construed with strictness of an indictment or complaint); *Dickey v. Civil Service Commission* (1925, Iowa) 205 N. W. 961 (substantial, not formal, compliance with statute deemed sufficient). In justice, however, this simplification should be available in favor of the defendant as well as in favor of the government. There is no reason why formal defects in the defendant's case should be fatal to his claim. The practice, however, is to the contrary. *Ex Parte Cheung Sum Shee* (1924, D. C. Calif.) 2 Fed. (2d) 995 (alien wives refused habeas corpus because of failure to get visas); *United States ex. rel. Young v. Stump* (1923, D. C. Md.) 287 Fed. 192 (Chinese, though of admissible class, refused admittance because of failure to procure required certificate in advance); *Yuen v. Johnson* (1924, D. C. Mass.) 299 Fed. 604 (status of Chinese merchants, subjects of Great Britain, held provable only by certificates issued by British government). Administrative boards should be allowed more freedom in their procedure than courts of law, but the benefits of that freedom should be accorded to the individual as well as the state.

ALIENS—IMMIGRATION—AMERICAN-BORN CHINESE WOMAN MARRYING CHINESE CITIZEN NOT ADMITTED UPON TERMINATION OF MARITAL RELATION.—The petitioner, a Chinese woman born in the United States, emigrated to China and there married a Chinese citizen. After her husband's death she sought to enter at an American port, but was denied admission under the Immigration Act of 1924 (43 Stat. at L. 153) on the ground of ineligibility to citizenship. *Held*, on habeas corpus proceedings, that, being of an excluded race and by her marriage an alien, she was not eligible to

admission. *Ex parte* (*NG*) *Fung Sing* (1925, W. D. Wash.) 6 Fed. (2d) 670.

Under the Fourteenth Amendment all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States. Congress is without power to restrict the effect of birth. *United States v. Wong Kim Ark* (1898) 169 U. S. 649, 703, 18 Sup. Ct. 456, 478. But one may by his own voluntary act expatriate himself. Act of July 26, 1868 (15 Stat. at L. 223). Congress may validly provide that marriage to an alien shall effect expatriation. *Mackenzie v. Hare* (1915) 239 U. S. 299, 36 Sup. Ct. 106. Under the existing law such is the effect of the marriage of an American-born woman to an alien ineligible to citizenship. Act of Sept. 22, 1922, sec. 3 (42 Stat. at L. 1022). Women so expatriating themselves could formerly regain their American citizenship by returning to the United States upon termination of the marital relation. Act of March 2, 1907, sec. 3 (34 Stat. at L. 1228). Section 7 of the Act of 1922 repealed this provision. The petitioner contended that her power to resume American citizenship under the Act of 1907 had vested and could not be taken away by the Act of 1922. But grant of citizenship to aliens is "a matter of favor and not of right". *United States v. Ginsberg* (1917) 243 U. S. 472, 37 Sup. Ct. 422; *Petition of Connal* (1925, E. D. N. Y.) 8 Fed. (2d) 374. The present law apparently attempts to put such expatriated women, seeking admission to the United States, as nearly as possible on the same footing as other aliens. Section 13 (c) of the Act of 1924 provides that no alien ineligible to citizenship shall be admitted to the United States. Under Rev. Sts. sec. 2169, as enlarged by the Act of Feb. 18, 1875 (18 Stat. at L. 318) those eligible to citizenship are "free white persons, aliens of African nativity, and persons of African descent." This bars the brown and yellow races of Asia. *Ozawa v. United States* (1922) 260 U. S. 178, 43 Sup. Ct. 65; *United States v. Bhagat Singh Thind* (1923) 261 U. S. 204, 43 Sup. Ct. 338. Thus the petitioner in the instant case was properly excluded. It may be thought that the result is unfortunate and that Congress had no intention to deprive an American-born woman of her privilege of resuming citizenship at the termination of the alien marriage. If so, the statute should be amended. That contention is weakened, however, by the fact that the law would not operate to exclude a white or negro woman in the petitioner's position. Section 12 (a) of the Act of 1924 provides that immigrants actually born in America who have lost their citizenship shall be considered as having been born in the country of which they are citizens. The President's proclamation of June 30, 1924, naming the quotas for immigration, issued in pursuance of sec. 12 (c) of the Act of 1924, declares a nominal quota of 100 for eligible aliens born in China. A white or negro woman in the petitioner's position could, it seems, gain admission under that quota and ultimately acquire citizenship by the usual course. Thus the petitioner was discriminated against by the law, even though born in the United States, because of the race of her father and of her husband. For a general discussion, see Parker, *The "Ineligible to Citizenship" Provisions of the Immigration Act of 1924* (1925) 19 AM. JOUR. INT. LAW, 23.

BANKS AND BANKING—COLLECTION ITEMS—BANK OF DEPOSIT HELD TO HAVE PREFERRED CLAIM FOR AMOUNT OF DRAFT SENT DIRECT TO DRAWEE.—The plaintiff bank, payee of a draft drawn by one of its depositors, forwarded the draft directly to the drawee bank. The drawee remitted as payment its own draft on a third bank. Payment thereon was refused for lack of funds. Thereafter the drawee bank failed. The lower court refused to grant the plaintiff bank a preferred claim against the assets of

the drawee. *Held*, on appeal, that judgment be reversed since the drawee was an agent for collection and remittance, and held the proceeds in trust for the plaintiff. *Bank of Poplar Bluff v. Millspaugh* (1925, Mo. App.) 275 S. W. 579.

Although it does not affirmatively so appear, the court treated the draft in the instant case as restrictively endorsed "for collection and remittance". A bank holds commercial paper so endorsed, when deposited for collection purposes, as trustee. See *Lippitt v. Thames Loan and Trust Co.* (1914) 88 Conn. 185, 202, 90 Atl. 369, 375; Scott, *Cases on the Law of Trusts* (1919) 64, note. But it is usually held that the relation of debtor and creditor arises upon actual collection. See *Hecker etc. Milling Co. v. Cosmopolitan Trust Co.* (1922) 242 Mass. 181, 185, 136 N. E. 333, 334, 24 A. L. R. 1148, 1150 (with note). Where, however, the bank collects after its known insolvency, it holds the proceeds under a constructive trust. *Lippitt v. Thames Loan and Trust Co., supra*; *Clark Sparks & Sons v. American Nat. Bank* (1916, S. D. Ga.) 230 Fed. 738. The present case follows a prevalent view that the collecting bank is also trustee of the proceeds if it has been specifically directed to remit to the principal. *Murray v. North Liberty Savings Bank* (1923) 196 Iowa, 729, 195 N. W. 354; *People v. Iuka State Bank* (1923) 229 Ill. App. 4; *State Bank v. First Bank* (1916) 124 Ark. 531, 187 S. W. 673. But the common banking practice is to mingle collection proceeds with general funds, despite endorsements for remittance. See *Lippitt v. Thames Loan and Trust Co., supra*, at 204, 90 Atl. at 376; see *Hecker etc. Mill. Co. v. Cosmopolitan Trust Co., supra*, at 186, 136 N. E. at 335; see also NOTE (1922) 21 A. L. R. 680, 681. The inference would seem to be, therefore, that in banking circles such endorsements are not understood as forbidding mingling. See *Freeman's Nat. Bank v. National Tube Wks.* (1890) 151 Mass. 413, 418, 24 N. E. 779; Scott, *op. cit.* at 68, note; see also Stone, *Some Legal Problems in the Transmitting of Funds* (1921) 21 COL. L. REV. 507, 514. Since both endorser and endorsee are members of the banking profession, words used should have only the meaning understood in that profession. Stone, *op. cit.* at 509. In the present case, such an interpretation is strengthened by the fact that the plaintiff bank actually accepted a draft in remittance. See *Union Nat. Bank v. Citizens Bank* (1899) 153 Ind. 44, 53, 54 N. E. 97, 100; *cf. Sayles v. Cox* (1895) 95 Tenn. 579, 583, 32 S. W. 626, 627. But if the privilege to mingle exists, no specific *res* for the so-called trust can be found. *Smith & Co. v. Montgomery* (1923) 209 Ala. 100, 95 So. 290; *Commonwealth v. Tradesmen's Trust Co.* (1915) 250 Pa. 378, 95 Atl. 577. Many courts, in holding that a trust exists, gloss over this difficulty. See *Spokane and Eastern Trust Co. v. United States Steel Prod. Co.* (1923, C. C. A. 9th) 290 Fed. 884; *Holder v. Western German Bank* (1905, C. C. A. 6th) 136 Fed. 90; *State Bank v. First Bank, supra.* Some courts make the whole banking fraternity habitually and consciously guilty of breach of trust by declaring explicitly that the mingling was wrongful. *Plano Mfg. Co. v. Auld* (1901) 14 S. D. 512, 86 N. W. 21; *First Nat. Bank v. Dennis* (1915) 20 N. M. 96, 146 Pac. 948; *cf. Hecker etc., Mill. Co. v. Cosmopolitan Trust Co., supra*, at 186, 136 N. E. at 335. Other courts hold, and more soundly, it is submitted, that because of the custom of mingling, only a debtor-creditor relation exists. *Central Trust Co. v. Hanover Trust Co.* (1922) 242 Mass. 265, 136 N. E. 336; *United States Nat. Bank v. Glanton* (1917) 146 Ga. 786, 92 S. E. 625; *Gonyer v. Williams* (1914) 168 Calif. 452, 143 Pac. 736; see also NOTES (1923) 72 U. PA. L. REV. 56. But it seems impossible to regard a drawee as an agent to collect from itself. A more realistic view would be that in such a case the draft was sent not for collection but for payment. *People v. Merchants and Mechanics Bank of*

Troy (1879) 78 N. Y. 269; *Indig v. National City Bank* (1880) 80 N. Y. 100. For the transaction by mail is substantially equivalent to a presentation over the counter. *People v. Merchants and Mechanics Bank of Troy, supra,* at 273. On such a construction the claim of the forwarding bank in the instant case would be for the return of the original instrument from the drawee as bailee, unless it preferred to prove its claim on the second instrument; but in neither event would the plaintiff have a preferred claim against the defendant.

CARRIERS—RESPONSIBILITY CONTINUES WHERE GOODS DAMAGED IN TRANSIT ARE RETURNED TO SHIPPER FOR REPAIR.—Goods, damaged in transit, were returned by the carrier to the shipper (apparently still the owner) under an agreement whereby the shipper was to recondition the goods and redeliver to the carrier to enable the latter to complete the contract of carriage. By the agreement, the shipper expressly reserved the privilege of substituting other like articles for the identical ones returned to him. The bill of lading was not surrendered. After reconditioning, the shipper tendered delivery of the identical goods which the carrier refused because his warehouse was filled to capacity. Subsequently the goods, while still in the shipper's warehouse, were destroyed by fire. The shipper sued the carrier for the value of the goods. From a general verdict and judgment for the plaintiff, the defendant appealed. *Held,* (two judges *dissenting*) that the judgment be affirmed, since the contract of carriage continued in force, and constructive possession of the goods was still in the carrier. *Curtis Tire Co. v. Goodrich Transit Co.* (1925) 230 Mich. 593, 203 N. W. 522.

The extraordinary responsibility of a common carrier under a contract of carriage arises upon the delivery of the goods with the full relinquishment of control by the shipper. *Barron v. Eldredge* (1868) 100 Mass. 455. If an agent of the shipper is in charge of the goods, responsibility extends only to losses caused by the carrier's negligence. *Evans v. Rudy* (1879) 34 Ark. 383. The heavier responsibility, once begun, continues until completion of the contract of carriage. *Yazoo & M. V. R. R. v. Blum* (1912) 102 Miss. 303, 59 So. 92. Or until the exercise by the owner (consignor or consignee as the case may be) of his power of terminating the bailment upon which the contract of carriage rests. *Ryan v. Great Northern Ry.* (1903) 90 Minn. 12, 95 N. W. 758. The owner can, of course, exercise this power only if the carrier's lien for charges is discharged. *Western Transportation Co. v. Barber* (1874) 56 N. Y. 544; 2 Hutchinson, *Carriers* (3d ed. 1906) sec. 864. A retaking by the owner, even for a temporary purpose, if he takes in the capacity of owner, will suspend the carrier's responsibility until a rebailment to him. *Barron v. Mobile & Ohio Ry.* (1911) 2 Ala. App. 555, 56 So. 862. But the carrier's responsibility continues, if, during the course of shipment, he delivers the goods to his own bailee or agent, though with the consent of the owner. *D'Utassy v. Southern Pac. Co.* (1916, 1st Dept.) 174 App. Div. 547, 161 N. Y. Supp. 222. The instant case raises the question whether the owner can retake his own goods as bailee of the carrier so as to preserve the carrier's responsibility. That an owner can become sub-bailee of his own goods has been recognized. *White v. Webb* (1842) 15 Conn. 302; *Roberts v. Wyatt* (1810, C. P.) 2 Taunt. 268; *Benjamin v. Stremple* (1851) 13 Ill. 467. But on the facts of the instant case it does not appear that the shipper (owner) took the goods as bailee of the carrier. In all bailments the identical goods must be redelivered. *Farquhar v. McAleny* (1891) 142 Pa. 233, 240, 21 Atl. 811, 812; *Wetherell v. O'Brien* (1892) 140 Ill. 146, 150, 29 N. E. 904; *Powder Co. v. Burkhardt* (1877) 97 U. S. 110. When the person receiving

the goods has the privilege of returning either the same goods or other goods of the same kind, the obligation is in the nature of a debt payable in kind. Story, *Bailments* (8th ed. 1870) sec. 439. With reference to the goods received he has all the rights of ownership. *Sturm v. Boker* (1893) 150 U. S. 312, 329, 14 Sup. Ct. 99; *Lonergan v. Stewart* (1870) 55 Ill. 44. Such being the situation in the instant case, it would seem that the shipper took as owner and, as the dissent insisted, that the case could have been decided in favor of the defendant as a question of law. Moreover, as a matter of policy, the instant decision seems to go too far in holding the carrier for the loss of goods not in its custody and, in the light of the shipper's privilege of substitution, not even appropriated to the contract of carriage.

CONSTITUTIONAL LAW—CRIMINAL STATUTES—INDEFINITENESS OF TERM, "CURRENT RATE OF WAGES PER DIEM IN THE LOCALITY" AS WANT OF DUE PROCESS.—The General Construction Company sued to enjoin the Commissioner of Labor from enforcing a penal statute providing an eight-hour day for persons employed by or on behalf of the state and for payment of "not less than the current rate of *per diem* wages in the locality". A fine of not less than $50 or more than $500 a day, or imprisonment for not less than three or more than six months was imposed for its violation. From a decree for the plaintiff the defendant appealed. *Held,* (Justices Holmes and Brandeis concurring in result) that the decree be affirmed on the ground that the terms "current rate" and "locality" are too indefinite. *Connally v. General Const. Co.* (1925, U. S.) 46 Sup. Ct. 126.

Too great "indefiniteness" will cause a criminal statute to be declared unconstitutional, on the ground that the criminality cannot be determined *ex post facto* by a jury without denying due process of law. *Tozer v. United States* (1892, C.C.E.D.Mo.) 52 Fed. 917; (1923) 32 YALE LAW JOURNAL, 291. Quite naturally the courts differ in their interpretation of the same terms. Thus "unjust and unreasonable charge" has been held both definite and indefinite. *United States v. Russel* (1920, E.D.La.) 265 Fed. 414 (held definite); *Small v. American Sugar Ref. Co.* (1925) 267 U. S. 233, 45 Sup. Ct. 295 (held indefinite). Likewise the phrase, "speed greater than is reasonable". *Mulkern v. State* (1922) 176 Wis. 490, 187 N.W. 190 (held definite); *Hayes v. State* (1912) 11 Ga. App. 371, 75 S.E. 523 (held indefinite). Nevertheless, there are guides to the framing of a constitutional statute. Thus if a statute is merely declaratory of the common law, it is usually held sufficiently definite. *State v. Lawrence* (1913) 9 Okla. Cr. 16, 130 Pac. 508 ("grossly disturbs the public peace"); *State v. Dixon* (1917) 138 Tenn. 195, 196 S.W. 486 ("without good cause . . . fail to provide for his wife"); *Keefer v. State* (1910) 174 Ind. 588, 92 N.E. 656 ("maintain any public nuisance"). But the illusory nature of this test from the point of view of the offender is well illustrated by the case of *Pitcher v. People* (1867) 16 Mich. 142, where the court was troubled by the meaning of common law "robbery". On the other hand, the courts follow the general rule that a greater definiteness will be required where the penalty is severe. See *United States v. Pennsylvania Ry.* (1916) 242 U. S. 208, 237, 37 Sup. Ct. 95, 105, ("normal requirements" too indefinite in view of $5000 per day penalty). Much of the uncertainty, however, can be avoided by the legislature's designating an executive officer or a commission to give content to an "indefinite" term—*e.g.*, to declare the "current rate" for the "locality". *Chicago & N.W. Ry. v. Dey* (1888, C.C.S.D. Iowa) 35 Fed. 866; *cf. Buttfield v. Stranahan* (1904) 192 U. S. 470, 24 Sup. Ct. 349. In the instant case, however, this would in effect entail the creation of a wage regulation board, which might be considered undesirable. It is

not surprising that the Supreme Court was divided since similar statutes have been considered "definite" by state courts. *Ryan v. City of New York* (1904) 177 N. Y. 271, 69 N.E. 599 ("prevailing rate" and "locality"); *State v. Tibbetts* (1922, Okla. Cr.) 205 Pac. 776 ("current rate" and "locality").

CONTRACTS—ILLUSORY CONTRACTS—CONSIDERATION UNAFFECTED BY STIPULATION FOR SATISFACTION IN COMMERCIAL SERVICE CONTRACTS.—The plaintiff, a jobber, and the defendant, a manufacturer, entered into an agreement for the marketing of the defendant's product. The plaintiff promised to carry a stock thereof sufficient to supply its trade requirements, to coöperate in and to promote their sale, and in all respects to perform to the satisfaction of the defendant. The defendant's sole promise in return was for "sales coöperation". The contract also accorded to the defendant the power to cancel the agreement and all unfilled orders without notice, if the plaintiff failed to perform to the defendant's satisfaction. Asserting that its relation with the plaintiff could no longer be "amicable and coöperative", the defendant terminated the agreement and refused to ship orders already on hand. For this refusal the plaintiff brought this action. The lower court directed a verdict for the defendant on the ground that no contract was shown. The plaintiff appealed. *Held*, that the judgment be reversed since a binding contract was shown; that the consideration for the plaintiff's promises was to be found in the defendant's implied undertaking to fill orders on the terms specified in the contract; and that the power of cancellation did not invalidate the consideration, since the power was conditional upon honest dissatisfaction. *Mills-Morris Co. v. Champion Spark Plug Co.* (1925, C. C. A. 6th) 7 Fed. (2d) 38.

The implying of the undertaking of the defendant in the instant case is in accordance with the well settled rule where all the other terms of a contract are set out and the technical promise alone is lacking. *Ehrenworth v. Stuhmer & Co.* (1920) 229 N. Y. 210, 128 N. E. 103. The question remains, however, whether the power of the defendant to cancel upon dissatisfaction renders his promise illusory. When one party contracts to perform to the satisfaction of the other, if adequacy of performance is dependent on taste or on judgment upon matters peculiarly within the knowledge of the promisee, the promisee is the sole judge of satisfaction. *Zaleski v. Clark* (1876) 44 Conn. 218 (sculptor to make a bust). But where questions of common knowledge only are involved, such as mechanical fitness or commercial value, the promisee must be reasonable in his dissatisfaction. *Boiler Co. v. Gardner* (1886) 101 N. Y. 387, 4 N. E. 749 (repair of boiler). In either class of cases the dissatisfaction must be genuine and expressed in good faith. *Diamond v. Mendelsohn* (1913, 1st Dept.) 156 App. Div. 636, 141 N. Y. Supp. 775. Where, as in the instant case, an employment contract contains a power of cancellation conditional upon "personal" dissatisfaction, the condition is generally enforced literally. *Kramer v. Wien* (1915, 1st Dept.) 92 Misc. 159, 155 N. Y. Supp. 193 (traveling salesman agreeing to perform "to the entire personal satisfaction" of the employer). *Contra*, where the undertaking is to perform "in a satisfactory manner". *Hanaford v. Stevens* (1916) 39 R. I. 182, 98 Atl. 209 (traveling salesman). The reason for literal enforcement, as stated in a case involving a sales agency contract, is that proof of the reasonableness of dissatisfaction as to such personal qualities of the agent as "efficiency, initiative, and business experience" is next to impossible. *Isbell v. Anderson Carriage Co.* (1912) 170 Mich. 304, 313, 136 N. W. 457, 460. Such literal enforcement, however, does not leave the defendant's performance dependent on his mere whim, since unless actually dissatisfied, he is

bound to perform whatever duties he has undertaken. *Bridges v. Home Guano Co.* (1924) 33 Ga. App. 305, 125 S. E. 872. This condition precedent to cancellation is a sufficient limitation on his freedom of action to provide the necessary mutuality of consideration in the contract. *Hogue-Kellogg Co. v. Baker* (1920) 47 Calif. App. 247, 190 Pac. 493; *Casinghead Gas Co. v. Osborn* (1921) 269 Pa. 395, 112 Atl. 469. This was the only question before the appellate court, and whether the facts showed actual dissatisfaction on the defendant's part would remain to be determined upon a new trial. Contractual obligation may seem in cases such as the present to be near the vanishing point; but the frequency of such contracts attests their commercial usefulness; and since they are within the technical requirements of consideration, they should undoubtedly be upheld. *Cf. Casinghead Gas Co. v. Osborn, supra.*

CONTRACTS—STIPULATION AGAINST EFFECT OF FRAUD HELD INOPERATIVE.—The defendant, knowing the sub-surface conditions to be other than as represented by drawings given out as a basis for bids for a sewer construction, appended a note to the contract in effect denying responsibility for such representations. On discovering the true conditions, the plaintiff, within a reasonable time, rescinded on the ground of fraud and obtained a judgment for the cost of labor performed and materials furnished. *Held,* that the judgment be affirmed since the provision in the contract was inoperative to deprive the plaintiff of any claim against the defendant for conscious misrepresentations. *Passaic Valley Sewerage Com'rs v. Holbrook, C. & R. Corp.* (1925, C. C. A. 3d) 6 Fed. (2d) 721.

A stipulation in a contract disclaiming responsibility for misrepresentations of the disclaiming party himself is no defense to an action of deceit based on such misrepresentations. *Pearson v. Dublin* [1907, H. L.] A. C. 351. Or to a suit for rescission. *United States v. Atlantic Dredging Co.* (1920) 253 U. S. 1, 40 Sup. Ct. 423 (construction contract); *Bent v. Furnald* (1911) 159 Ill. App. 552 (sale of personal property); *Jordon v. Nelson* (1920, Iowa) 178 N. W. 544 (sale of real property). And an express warranty by a seller himself excluding any other warranties will not destroy the buyer's power of rescission for fraudulent misrepresentations by the seller's agent. *Jones v. Minks* (1914) 188 Ill. App. 45; see (1921) 10 A. L. R. 1472, note. The general rule is, however, qualified in the case of insurance contracts in that provisions making policies incontestable for misrepresentations by the insured are generally upheld if they allow to the insurer an interval after issue during which he can contest for fraud. *Missouri State Life Ins. Co. v. Cranford* (1923) 161 Ark. 602, 257 S. W. 66. At least one court has upheld such a provision even in the absence of such interval of contestability. *Union Cent. Life Ins. Co. v. Fox* (1901) 106 Tenn. 347, 61 S. W. 62; *contra: Reagan v. Union Mut. Ins. Co.* (1905) 189 Mass. 555, 76 N. E. 217. But insurance contracts in this, as in many other respects, are probably exceptional. The decision in the instant case seems sound in following the rule uniformly applied in other than insurance cases; for it ought not to be possible to make conscious misrepresentations and then contract out of responsibility for harm resulting from the other party's reliance thereon. The honest course in such circumstances is to refrain from making any representations at all or, having made them, to disclose their falsity. And although the plaintiff be careless in his reliance, as between fraud and negligence, the law should penalize the former. *Wilcox v. American Tel. & Tel. Co.* (1903) 176 N. Y. 115, 68 N. E. 153; *Warder, Bushnell & Glassner Co. v. Whitish* (1890) 77 Wis. 430, 46 N. W. 540.

CONTRACTS—INTERPRETATION OF TERMS—ADMISSIBILITY OF EVIDENCE OF TRADE USAGE—NECESSITY OF PLEADING TRADE USAGE.—The plaintiff contracted to sell goods—"delivery June, July, August". A part was shipped and paid for in May, but the remainder was not shipped until September 4th, after the defendant had cancelled the remainder of the order on the ground that delivery was overdue. In this action brought upon the defendant's refusal to receive the goods, the defendant, without pleading the usage, was permitted to show that in the trade in which the parties were engaged "delivery June, July, August" meant in about equal installments in each of those months. The plaintiff's request for an adjournment to obtain evidence in rebuttal was denied. Judgment was for the defendant. *Held*, upon appeal (two judges *dissenting*) that the judgment be reversed, since the requested adjournment should have been granted. Two of the judges put the reversal on the additional ground that evidence of the trade usage was inadmissible since the meaning of the phrase in question was fixed as a matter of law by five previous decisions. *Clifton Shirting Co. v. Bronne Shirt Co.* (1925, App. Div. 1st Dept.) 209 N. Y. Supp. 709.

Words in a contract are to be interpreted with regard to the circumstances in which they were uttered. *Batcheldcr v. Batcheldcr* (1914) 220 Mass. 42, 107 N. E. 455; 2 Williston, *Contracts* (1920) sec. 618; Holmes, *Theory of Legal Interpretation* (1899) 12 HARV. L. REV. 417. When the words can be ascribed to one of the parties they are to be given the meaning that would be put on them by a reasonably intelligent man in the position of the party addressed. *Rickerson v. Hartford Fire Ins. Co.* (1896) 149 N. Y. 307, 43 N. E. 856; 2 Williston, *op. cit.* sec. 603. Otherwise the standard is that of a reasonably intelligent man in the circumstances common to both parties. 2 Williston, *op. cit.* sec. 607. Membership in a trade or other vocation is but one of the circumstances to be considered. See *Kauffman v. Raeder* (1901, C. C. A. 8th) 108 Fed. 171, 185; *International Finance Corp. v. Calvert Drug Co.* (1924) 144 Md. 303, 312, 124 Atl. 891, 894. Likewise private understandings between the parties as to the meaning of words used. *Lehigh etc. Coal Co. v. Wright* (1896) 177 Pa. 387, 35 Atl. 919. But in some situations, to prevent fraud, such private understandings are excluded from consideration by the parol evidence rule. *Hebberd v. Metal Lath Co.* (1914, App. Div. 1st Dept.) 150 N. Y. Supp. 72; 2 Williston, *op. cit.* secs. 631–633, 638, 639. But proof of membership in a trade or profession is always admissible. *Miller v. Germain Seed & Plant Co.* (1924) 193 Calif. 62, 222 Pac. 817. Parties are presumed to contract with reference to established usages of the trade in which they are both engaged and such usages, because of their notorious character, can be shown without danger of fraud. *Union Ins. Co. v. American Fire Ins. Co.* (1895) 107 Calif. 327, 40 Pac. 431. They will be excluded from consideration in interpreting the terms of the contract only where the writing itself clearly shows the intent of the parties to exclude them. *Nicoll v. Pittsvein Coal Co.* (1920, C. C. A. 2d) 269 Fed. 963; (1921) 30 YALE LAW JOURNAL, 761; COMMENTS (1923) 33 *Ibid.* 172; 2 Williston, *op. cit.* secs. 650, 656. The usage may be proved even though the rule of law applicable to the case be different when the usage is shown. *Barrie v. Quinby* (1910) 206 Mass. 259, 92 N. E. 451; 2 Williston, *op. cit.* sec. 651, 653. *Contra*, if the contract with the usage embodied would be unenforceable for illegality. *Franklin Sugar Refining Co. v. Kane Milling Co.* (1923) 278 Pa. 105, 122 Atl. 231; 2 Williston, *op. cit.* secs. 655. Only a few phrases have a meaning fixed by law. Thus in a deed, "to A and his heirs" is given such a fixed meaning, due to the need of certainty as to estates created as evidence in public land records or title deeds. *Carlica*

v. Ellsberry (1907) 82 Ark. 209, 101 S. W. 407. And so with the phrase "pay to A or order" when used in commercial paper, since a label is needed that will divulge at a glance the negotiable character of the instrument. *Interstate Trust Co. v. United States Nat. Bank* (1919) 67 Colo. 6, 185 Pac. 260. In such cases proof of a contrary trade usage would be inadmissible. But similar reasons for fixity of meaning do not exist in the case of ordinary contracts; and to construe words therein in a fixed sense seems like a return to the days of "strict law". Wigmore, *Evidence* (2d ed. 1923) sec. 2461. If the parties are chargeable with notice of valid usages when contracting, it would seem that they should be chargeable with notice thereof at trial without specially pleading them. *Warren v. Lebam Mill & Timber Co.* (1924) 129 Wash. 565, 225 Pac. 628; *McDonald v. Union Hay Co.* (1919) 143 Minn. 40, 172 N. W. 891; *contra: Palmer v. Humiston* (1913) 87 Ohio St. 401, 101 N. E. 283. And even if the facts of the instant case disclose a variance it would still seem that the trial court was within its discretionary power in determining that the plaintiff was not, in the particular case, taken by surprise. N. Y. C. P. A. 1921, sec. 434; Rules, C. P. 166.

CORPORATIONS—TRUSTS—DEPOSIT OF FUNDS TO MEET INTEREST PAYMENT ON BONDS HELD TO CREATE A TRUST FOR COUPON HOLDERS.—The receivers of the defendant company obtained an order directing the Central Union Trust Company, as fiscal agent of the defendant, to pay over to the receivers certain moneys deposited by the defendant with the trust company to be paid by it to the holders of interest coupons from defendant's bonds upon presentation of such coupons to the depositary by the holders. The trust company was trustee under the original indenture which provided that "any moneys at any time deposited with the trustee . . . for the payment of interest" on the bonds should be held by the trustee in trust for the coupon holders. On the other hand, the indenture provided that the defendant should receive interest on such moneys as on a general deposit. It also specifically excepted "current assets", defined to include "cash in bank", from the lien conferred by the indenture. The defendant by the terms of the bonds promised to pay interest thereon "at its office or agency in the borough of Manhattan". The appointment of the trust company as defendant's fiscal agent was subsequent to the indenture. Defendant's vouchers covering the deposits in question were directed to the trust company, "trustee". *Held*, on appeal, that the above order be reversed since the trust company held the funds as trustee and not as fiscal agent. *Steel Cities Chemical Co. v. Virginia-Carolina Chemical Co.* (1925, C. C. A. 2d) 7 Fed. (2d) 280.

The relation between a corporation and its bondholders is that of debtor and creditor, both as to principal and interest. The status of the bondholder is not raised to that of *cestui que trust* by a mere deposit of funds by the corporation for the purpose of paying the bondholders. *In re Interborough Cons. Corp.* (1923, C. C. A. 2d) 288 Fed. 334; 32 A. L. R. 932; *Noyes v. First Nat. Bank* (1917) 180 App. Div. 162, 167 N. Y. Supp. 288, *aff'd* (1918) 224 N. Y. 542, 120 N. E. 870. In the case of stockholders, however, a like deposit for the purpose of paying declared dividends will constitute a trust in which the corporation holds its claim against the depositary in trust for the stockholders. *In re Interborough Cons. Corp.* (1920, S. D. N. Y.) 267 Fed. 914; *Guidise v. Island Ref. Corp.* (1923, S. D. N. Y.) 291 Fed. 922. Yet the declaration of dividends alone creates with respect to such dividends a debtor-creditor relation only. *Lowne v. American Fire Ins. Co.* (1837, N. Y.) 6 Paige Ch. 482; *Hunt v. O'Shea* (1899) 69 N. H. 600, 45 Atl. 480. The distinction between the two situations seems

without reason. See *Guidise v. Island Refining Co., supra;* Grinnell, *Status of Funds Deposited for Payment of Interest on Bonds* (1925) 19 ILL. L. REV. 429. The two rules apparently grew up disjunctly. The "dividends rule" goes back to *LeRoy v. Globe Ins. Co.* (1836, N. Y.) 2 Edw. Ch. 656. The "coupon rule" was first announced in *Staten Island Club v. Farmer's L. & T. Co.* (1899, 2d Dept) 41 App. Div. 321, 58 N. Y. Supp. 460. That case held that the corporation might lawfully reclaim the deposit before actual disbursement since no trust was created by virtue of the deposit in favor of coupon holders and since, further, the coupon holders acquired thereby no rights in the deposited funds under the doctrine of *Lawrence v. Fox* (1859) 20 N. Y. 268. The *Staten Island* case has been followed in numerous later New York decisions, both state and federal. Elsewhere the question has apparently not arisen—probably because nearly all bond issues are made payable in New York City. Of course, the usual rule may be altered where there is a clear expression of intention by the depositor that the deposit shall constitute an irrevocable appropriation for the payment of the coupons. *Roger's Locomotive Works v. Kelly* (1882) 88 N. Y. 234. It is on this ground that the instant decision is put. But the provision for interest, if the original indenture is to be relied on to establish the trust, is clearly indicative of a privilege in the depositary of using the funds in question; and such a privilege is inconsistent with its holding the funds as trustee. See *Pittsburgh Nat. Bank of Com. v. McMurray* (1881) 98 Pa. 538, 540; *Ex parte Broad* [1884, C. A.] L. R. 13 Q. B. Div. 740, 746. If a trust arose—and the court so held—then the defendant was the trustee and the trust *res* was its claim against the trust company which it held for the benefit of the coupon holder. This must be understood as the substance of the instant decision. See *In re Interborough Cons. Corp.* (1920) 267 Fed. 914, 919. The instant case differs on its facts from that case in the provisions of the indenture, in the form of the voucher, and in the method of direct payment by the trust company to the coupon holders. But the method of payment, although relied on in part in the majority opinion, was, as pointed out by the dissent, only a bookkeeping arrangement, valueless by itself as evidence of a trust intent; and though the indenture provided that moneys deposited with the trustee should constitute a trust for the coupon holders, it also specifically exempted money in the bank from the lien given by the indenture. Therefore, in view of the dual role of the trust company, the language of the indenture can be relied on to spell out the trust only if the deposit was made with the trust company *as* trustee rather than in its other capacity as fiscal agent. The only evidence that the deposit was so made is the appellation, "trustee", in the voucher. The ground of distinction, therefore, seems rather tenuous; but the result is desirable and its achievement on so slight a ground may indicate the beginning of judicial attrition of the seemingly groundless distinction between deposits to pay dividends declared and deposits to pay interest coupons.

DOMICILE—VOTING PRIVILEGE OF STUDENTS—UNDER NEW YORK CONSTITUTION.—Several self-supporting students in a theological seminary at H, having severed by oath to the Catholic Church all connections with former residences and having formally abandoned their voting privileges there, petitioned to be registered as voters in H. The lower court granted the petition, finding them domiciled in H for voting purposes. *Held,* on appeal, that in view of the New York Constitution, art. 2, sec. 3, stating that for the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence while a student in an educational institution, the decree be reversed. *In re Blankford* (1925) 241 N. Y. 180, 149 N. E. 415.

English courts insist upon a definite intention to remain permanently as a condition of acquiring domicile. *Bell v. Kennedy* [1868] L. R. 1 H. L., Sc. 307. Most American courts, however, have defined domicile as requiring an intention to remain for an indefinite period. *Putnam v. Johnson* (1813) 10 Mass. 488, 501. In some instances a residence for a definite period, as for the completion of a college course, has been deemed sufficient to establish domicile for voting purposes. *Pedigo v. Grimes* (1887) 113 Ind. 148, 13 N. E. 700; *Welsh v. Shumway* (1907) 232 Ill. 54, 83 N. E. 549; McCrary, *Elections* (4th ed. 1897) sec. 98, note 5. All that these courts require is an intention to adopt the present place of abode as a residence, to the exclusion of all other places, even for a definite and determinable period. *Pedigo v. Grimes, supra,* at 153–154; *In re Lower Merion Election* (1878, Pa.) 1 Chester Co. Rep. 257, 258. A student retaining connections with his former residence does not, however, acquire a domicile for voting purposes in a university town. *Siebold v. Wahl* (1916) 164 Wis. 82, 159 N. W. 546; see also *In re Rice* (1875, N.Y.C.P.) 7 Daly, 22 (naturalization domicile). But where he has definitely severed these ties, becoming self-supporting and independent, with no intention of returning during vacations or when ill, and is living at the school for the period required to complete his course, intending to be a resident there, he acquires at common law a domicile for voting purposes, even though present for a definite and determinable period. *Berry v. Wilcox* (1895) 44 Neb. 82, 62 N. W. 249; *Welsh v. Shumway, supra.* Twenty-two states have constitutional or statutory provisions to the effect that "for the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence . . . while a student of any seminary of learning". *E.g.,* N. Y. Const., art. 2, sec. 3; N. Y. Laws, 1922, ch. 588, sec. 151. See Jacobs, *Law of Domicil* (1887) sec. 339, and note, for citation of many constitutional provisions. The word "residence" appearing in constitutions and statutes, especially in those regulating voting, is universally conceded to mean domicile. McCrary, *supra,* at secs. 97, 98; (1926) 35 YALE LAW JOURNAL, 508. Although these enactments have been construed to change the common-law requirement for voting domicile (see *People v. Osborn* (1912) 170 Mich. 143, 135 N. W. 921) they seem to be directed in general, as is the common-law rule, against students present merely to study and retaining connections with former residences. They are to prevent mere presence as students from conferring a voting domicile and are, in effect, merely declaratory of the generally recognized common-law rule. *In re Lower Merion Election, supra* (identical constitutional provision with New York); *Stewart v. Kyser* (1895) 105 Calif. 459, 39 Pac. 19 (identical constitutional provision); *Hall v. Schoenecke* (1895) 128 Mo. 661, 31 S. W. 97 (identical constitutional provision); *Matter of Cunningham* (1904, Clinton Co. N. Y.) 45 Misc. 206; Jacobs, *loc. cit. supra.* This was pointed out in the lower New York court decision of *In re Ward* (1892, Sup. Ct. Spec. T.) 20 N. Y. Supp. 606, and was implied in *In re Garvey* (1895) 147 N. Y. 117, 41 N. E. 439 (*Barry's Case*). For a history of the real meaning of these constitutional provisions see *Lower Oxford Contested Election* (1878, Pa.) 1 Chester Co. Rep. 253, 254 and *In re Ward, supra,* at 610, 611; but see *People v. Osborn, supra.* The court in the instant case should, therefore, have applied the common-law rule, under which it might have been held that a voting domicile was acquired. *Cf. In Re Garvey, supra.* In situations somewhat similar to those of students, soldiers, who are also included in the constitutional provisions, are not precluded from acquiring a voting domicile where they have a definite intention to become residents. *In re Cunningham, supra.* And also for

purposes of probating a will, a soldier is allowed a domicile. *Ames v. Duryea* (1871, N. Y. Sup. Ct. 4th Dept.) 6 Lansing, 155.

INSURANCE—PROOFS OF LOSS REQUIRED WITHIN STATED PERIOD EVEN AFTER WRONGFUL CANCELLATION OF POLICY BY COMPANY.—The defendant insurance company issued a policy of fire insurance payable, first, to the mortgagee, second, to the mortgagors. Later the mortgagee obtained a cancellation of the policy, the mortgagors being informed of this cancellation by the defendant's local agent after the destruction of the insured building. To a suit on the policy by the mortgagors, failure to furnish proofs of loss was raised as a defense. The plaintiffs contended that the defendant's cancellation operated as a waiver thereof. The lower court directed a verdict for the plaintiff and the defendant appealed. *Held*, (three judges *dissenting*) that the judgment be reversed since, the agent having no authority to cancel the policy, there was no waiver of the proofs of loss. *Gambino v. Northern Insurance Co. of N. Y.* (1925, Mich.) 205 N. W. 480.

The courts usually deal with the problem of the instant case as one of waiver. *Fisk v. Fire Ass'n of Philadelphia* (1916) 192 Mich. 243, 158 N. W. 947. These cases, however, actually involve the application of the well settled rule of insurance and contract law that repudiation by one party excuses fulfillment of conditions precedent by the other—in the instant case the furnishing of proofs of loss. See Vance, *Waiver and Estoppel in Insurance Law* (1925) 34 YALE LAW JOURNAL, 834, 849. Where there has been a repudiation, the rule has sometimes been stated that waiver of proofs of loss need not be in writing since non-waiver stipulations of the policy apply only to conditions to be performed *prior* to the destruction of the property. *Indian River State Bank v. Hartford Fire Ins. Co.* (1903) 46 Fla. 283, 35 So. 228 (repudiation by agent); *Improved Match Co. v. Michigan Mut. Fire Ins. Co.* (1899) 122 Mich. 256, 80 N. W. 1088 (repudiation by company). In fact, however, it is the repudiation that has made such performance unnecessary. The real question, clearly indicated by the dissenting judges in the instant case, is whether there has been such an overt act by the company as amounts to repudiation. It is generally held that an act of cancellation amounts to a repudiation. *Pauley v. Sun Ins. Office* (1916) 79 W. Va. 187, 90 S. E. 552. That it was such in the instant case seems clear since the defendant later defended on the ground of such cancellation. There is some doubt as to the necessity of notice of repudiation to the insured. Possibly none is necessary; but there is authority to the effect that the notice must be communicated. Anson, *Contracts* (Corbin's ed. 1919) 444. But where notice has been received, it would seem that, where there has been such an overt act by one party as the cancellation of the policy, the other party should be excused from further performance, regardless of the manner of communication. Thus notice of repudiation given to a third party is sufficient if it comes to the knowledge of the insured. *Merchants Ins. Co. v. Nowlin* (1900, Tex. Civ. App.) 56 S. W. 198. Consequently the dissenting view seems the sounder, since the question being actually one of repudiation rather than waiver, the lack of authority to waive in the agent is immaterial.

JUDGMENTS—FEDERAL COURTS—TERRITORIAL EXTENT OF JUDGMENT LIEN.—The Act of Aug. 1, 1888 (25 Stat. at L. 357) provides that federal judgments rendered within any state shall be liens on the debtor's property "throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a *court of general jurisdiction* of such state". The provi-

sion is applicable, however, only in such states as authorize the filing of federal judgments in the same manner as judgments "of the courts of the state". The Missouri statute (Mo. Rev. Sts. 1919, ch. 12, secs. 1554-6) provides that federal judgments shall be liens in any county upon the filing of a transcript of the judgment in the state circuit court of that county, but makes judgments rendered by any court of record liens in the county for which the court is held without the filing of a transcript. A judgment was rendered against W by the federal district court at Joplin, Jasper County. No transcript was filed in the state circuit court for that county—the only state court of general jurisdiction. W then sold land in Jasper County to the defendant and the defendant took possession. Under execution subsequently issued on the federal judgment the land was sold to the plaintiff. In a suit for possession the court gave judgment for the defendant and the plaintiff appealed. *Held,* (two judges *dissenting*) that the judgment be affirmed, since the federal district court was held not *for,* but *in,* Jasper County and the filing of a transcript of its judgment was therefore a condition precedent to a lien in that county. *Rhea v. Smith* (1925, Mo.) 272 S. W. 964.

Before the act of 1888, *supra,* federal judgment liens were held to be coextensive with the territorial jurisdiction of the court. See *Metcalf v. Watertown* (1894) 153 U. S. 671, 678, 14 Sup. Ct. 947, 950. It was thought that state judgment creditors would gain an unfair preference if the lien were restricted to the county in which judgment was rendered since it was believed that Congress had no power to require state officials to file federal judgments in other counties. See *Dartmouth Sav. Bank v. Bates* (1890, D. Kan.) 44 Fed. 546, 549. Such power, however, would seem fairly inferable under the full faith and credit clause. *Cf.* Cook, *The Powers of Congress Under the Full Faith and Credit Clause* (1919) 28 YALE LAW JOURNAL, 421, 432. The inconvenience resulting from the diversity of practice with reference to state and federal judgments and from the unavailability of the federal judgments in the county of the situs of the property led to the Act of 1888. See *Dartmouth Sav. Bank v. Bates, supra.* But the old rule of coextension obtains where there is no state conformity statute or where such statute does not comply with the terms of the federal act. *Lineker v. Dillon* (1921, N. D. Calif.) 275 Fed. 460. The conformity statute may require enrollment of federal judgments as a condition precedent to the creation of a lien in the county of rendition if it imposes a similar requirement in the case of state judgments. *In re Jackson L. & T. Co.* (1919, S. D. Miss.) 265 Fed. 389. It has been held otherwise, however, where the state judgment gives a lien in the county of rendition *ipso facto. Lineker v. Dillon, supra.* One court has met the difficulty by construing a somewhat ambiguous statute as requiring the recording of federal judgments only in counties other than that of rendition. *Land Co. v. Hustead* (1919) 263 Pa. 342, 106 Atl. 540. This is the position of the dissent in the principal case. The majority hold that the requirements of the act are met by putting federal judgments on the same footing as judgments of state courts which, like the federal courts, have jurisdiction over more than one county and which, like them, are not held *for* the county *in* which they sit—in other words, on the same footing as judgments of the state appellate and supreme courts. But by this holding federal judgments are made liens in a different manner than are judgments of the only state court of general jurisdiction, and for this there is no provision in the federal act. Furthermore, it results in an undesirable diversity in the practice as to state and federal judgments. While the court's position is a possible one, its propriety seems somewhat

dubious and it is to be hoped that the United States Supreme Court may soon have the opportunity to announce an authoritative construction of the federal act.

MARRIAGE AND DIVORCE—ALIMONY—JUDGMENT DEBT STATUTES—DECREE FOR PERMANENT ALIMONY NOT LIEN ON REAL PROPERTY FOR INDEFINITE FUTURE INSTALLMENTS NOT DUE.—The plaintiff purchased from the defendants property warranted to be free from liens. The wife of one of the defendants had previously obtained a decree of divorce providing for the payment of $80 per month as alimony, and for the support of minor children. The plaintiff sued for breach of warranty, alleging that such decree constituted a lien on the property conveyed to him. There were no allegations of past due and unpaid installments. The lower court dismissed the complaint. *Held*, that the judgment be affirmed. *Beesley v. Badger* (1925, Utah) 240 Pac. 458.

It is generally held that courts have power to make a decree for alimony a lien on the real estate of the husband. 2 Freeman, *Judgments* (5th ed. 1925) sec. 932. This lien will generally be valid even though the decree provides for the payment of alimony in installments for an indefinite period. *Murphy v. Moyle* (1898) 17 Utah, 113, 53 Pac. 1010; *Isaacs v. Isaacs* (1915) 117 Va. 730, 86 S. E. 105; *Gridley v. Wood* (1919) 215 Ill. App. 473; *contra: Mansfield v. Hill* (1910) 56 Or. 400, 107 Pac. 471, 108 Pac. 1007; *Casteel v. Casteel* (1882) 38 Ark. 477. In the instant case, the court held that where a decree providing for the payment of installments over an indefinite period is silent as to liens, there would be a lien for past due and unpaid installments by virtue of a statute making a money judgment a lien on property, but not for installments not yet due, because of the lack of certainty of amount. See *Enoch v. Walter* (1918) 209 Ill. App. 619. On the other hand, it has been held, where the decree was silent as to liens, that a decree providing for installments of the latter type takes precedence over a judgment subsequently docketed against the husband. *Buffalo Savings Bank v. Hunt* (1909, County Ct.) 64 Misc. 643, 118 N. Y. Supp. 1021. And that a trustee takes the property of a bankrupt subject to the lien for permanent alimony against the bankrupt, both as to installments in arrears and indefinite future installments. *Westmoreland v. Dodd* (1924, C. C. A. 5th) 2 Fed. (2d) 212. Thus it would seem that the mere fact of future indebtedness should not necessarily preclude the existence of a lien. It is also generally held that a mortgage to secure indefinite future advances is valid. 3 Tiffany, *Real Property* (2d ed. 1920) sec. 637. The rule to be applied to the case of a decree awarding alimony may properly be broader than one applied to an ordinary money judgment under the statute. For an award of alimony creates not merely a debt, but a debt in discharge of marital obligations. *Smith v. Smith* (1918) 81 W. Va. 761, 95 S. E. 199; *Cain v. Miller* (1922) 109 Neb. 441, 191 N. W. 704. Thus it may generally be enforced by attachment for contempt. *Smith v. Smith, supra; cf. Scott v. Scott* (1909) 80 Kan. 489, 103 Pac. 1005. Some courts, however, limit this remedy to cases where the decrees cannot be enforced in other ways. *Conklin v. Conklin* (1908, 2d Dept.) 125 App. Div. 280, 109 N. Y. Supp. 189; *Andrews v. Andrews* (1873) 69 Ill. 609. Under certain circumstances, the adequate protection of the wife's interests may necessitate the imposition of a lien on the husband's property. On the other hand, this is an encumbrance which it is impossible to remove, and should not be imposed in all cases as a matter of course. And it would seem to be a desirable policy to leave to the discretion of the judge granting the decree whether such a measure is necessary in the particular case. Cf. *Scott v. Scott, supra.* Obviously, this would be the

effect of the instant holding. Under this rule, it would be advisable for counsel to request that an award in the form of indefinite future installments be made a lien by the decree itself, if such a lien is desired.

PRACTICE—ANNULMENT OF MARRIAGE FOR DISEASE—COMPULSORY PHYSICAL EXAMINATION BEFORE TRIAL.—In an action to annul a marriage on the ground of concealment of disease, the plaintiff moved to compel the defendant to submit to a physical examination before trial. *Held*, that the motion would be granted unless the defendant waived her statutory privilege regarding testimony of physicians who had treated her. *Cowen v. Cowen* (1925, Sup. Ct. Spec. T.) 125 Misc. 755, 211 N. Y. Supp. 840.

The ecclesiastical courts administering the civil and canon law generally ordered personal examination in annulment and divorce cases. *Briggs v. Morgan* (1820, London, Consist. Ct.) 3 Phill. Ecc. 325; *Cumyns v. Cumyns*, (1812, London, Consist. Ct.) 2 Phill. Ecc. 10. And at common law such an examination during trial was directed fairly generally. *Orde v. Moreton* (1688, K. B.) 1 Bulst. 130 (to discover infant's age); *Case of the Abbott of Strata Mercella* (1591, C. P.) 9 Co. Rep. 24a (appeal of mayhem); *In re Blakemore* (1845, Ch.) 14 L. J. Eq. (N. S.) 336 (writ of *de ventre inspiciendo* to examine widow to protect rightful succession); 3 Blackstone, *Commentaries*, *331. To-day the power of the court to order a personal examination during trial in annulment cases is well recognized. *Devanbagh v. Devanbagh* (1836, N. Y.) 5 Paige Ch. 553; *Newell v. Newell* (1841, N. Y.) 9 Paige Ch. 25; *LeBarron v. LeBarron* (1862) 35 Vt. 365; *Anonymous* (1890) 89 Ala. 291, 7 So. 100; *Cahn v. Cahn* (1897, Sup. Ct. Spec. T.) 21 Misc. 506, 48 N. Y. Supp. 173; *Gore v. Gore* (1905, 3d Dept.) 103 App. Div. 168, 93 N. Y. Supp. 396; *Geis v. Geis* (1906, 1st Dept.) 116 App. Div. 362, 101 N. Y. Supp. 845; Wigmore, *Evidence* (2d ed. 1923) 2220; (1924) 33 YALE LAW JOURNAL, 444; (1892) 14 L. R. A. 466, note; *contra:* 2 WEST. L. J. 131. Likewise in personal injury cases. *Western Glass Mfg. Co. v. Schoeninger* (1908) 42 Colo. 357, 94 Pac. 342; *contra: Denver C. T. Co. v. Norton* (1905, C.C.A. 8th) 141 Fed. 599. In personal injury cases the court at its discretion has ordered a physical examination even before the trial. *Cook v. Miller* (1925) 103 Conn. 267, 130 Atl. 571; *cf. Welch v. Verduin* (1923, Sup. Ct.) 121 Misc. 545, 201 N. Y. Supp. 324 (under N. Y. Laws, 1893, Ch. 721, now N. Y. C. P. A. sec. 306). Examination before trial in annulment cases, however, was not allowed—presumably because of the court's reluctance to make such an order unless the trial showed an absolute necessity for it—a matter which could not be determined satisfactorily at a preliminary hearing. *Anonymous* (1901, Sup. Ct. Spec. T.) 34 Misc. 109, 69 N. Y. Supp. 547; 2 Bishop, *Marriage, Divorce and Separation* (1891) secs. 1298–1315. But it would seem that the same reasons exist also for not allowing examination before trial in personal injury cases. Where there has been previous examination of the party by competent experts whose evidence is admissible the court will not grant a motion asking for an examination. *Geis v. Geis, supra;* Cloud, *Physical Examination in Divorce Proceedings* (1901) 35 AM. L. REV. 700. This result was in effect reached in the instant case through the wording of the court's decision. The objection that the defendant's physicians might favor their former patient as much as possible in their testimony was met by the fact that plaintiff, if necessary, could obtain such an examination during the trial.

RECEIVERS—RESPONSIBILITY FOR MISMANAGEMENT—OBVIOUSLY INEVITABLE DEFICIT IN CONTINUING BUSINESS NOT CHARGEABLE TO RECEIVER.—In re-

ceivership proceedings, the creditors of the defendant corporation unanimiously requested that one Richards, because of special qualifications, be appointed receiver. After running the concern for four months, Richards discovered that further continuance except under deficit would be impossible. He continued operations, nevertheless, until a creditors' meeting two weeks later. Certain creditors brought exceptions to Richard's account, alleging mismanagement. From an order charging him with losses sustained during these two weeks, Richards appealed. *Held*, that under the circumstances this was too extreme a duty to impose upon a mere "arm of the court", and that the order be reversed. *Kennebec Box Co. v. O. S. Richards Corp.* (1925, C. C. A. 2d) 7 Fed. (2d) 290.

Until recent times a receiver's activities were confined to keeping a business as much as possible *in statu quo*, while the rights of the parties concerned were being settled. See *Booth v. Clark* (1854, U. S.) 17 How. 322, 331; High, *Receivers* (1876) sec. 1; Beach, *Receivers* (1887) sec. 5. The dependence of the present-day economic organization on the continued existence of railroads and other public utilities has altered the function of the receiver in many cases to that of reorganization. See *Guarantee Trust Co. v. Missouri Pac. R. R.* (1916, E. D. Mo.) 238 Fed. 812, 815; *Clark v. Bankers Trust Co.* (1917, 1st Dept.) 177 App. Div. 627, 638, 164 N. Y. Supp. 544, 551. The instant case exemplifies an extension of the idea of the receiver as reorganizer to the field of private corporations. *Cf.* Rosenberg, *Reorganization—the Next Step* (1922) 22 COL. L. REV. 14. A need arises, therefore, for receivers having a specialized business training and, in consequence, the scope of such receivers' authority will presumably be broadened. In one respect, following the general principles of agency, which seem to guide in receivership cases, this will mean a lessened opportunity for holding a receiver personally responsible. *Cf. Villere v. New Orleans Milk Co.* (1908) 122 La. 717, 48 So. 162; *cf.* however, *Byrnes v. Missouri Nat'l Bank* (1925, C.C.A. 8th) 7 Fed. (2d) 978. But for negligent mismanagement a receiver must, of course, remain personally responsible. Clark, *Receivers* (1918) sec. 815. In the case of corporate directors, one line of authority, while admitting a director's personal responsibility for negligence, has refused to extend it to errors of judgment, however absurd. *Spering's Appeal* (1872) 71 Pa. 11; *King v. Livingston* (1915) 192 Ala. 269, 68 So. 897; see Rogers, *Powers, Duties and Liabilities of Corporate Directors* (1915) 47 CHIC. LEG. NEWS, 382. Such holding seems due to unwillingness to pry into corporate affairs, and to the negligible amount of the formal salaries paid to directors. See Rhoads, *Personal Liability for Corporate Mismanagement* (1916) 65 U. PA. L. REV. 128. Another line of authority applies a stricter test, imposing responsibility for "unreasonable" errors of judgment. *Hun v. Cary* (1880) 82 N. Y. 65; *Warren v. Robison* (1899) 19 Utah, 289, 57 Pac. 287; *cf. Loan Society v. Eavenson* (1915) 248 Pa. 407, 94 Atl. 121; see Rhoads, *op. cit.* 137; Lynch, *Diligence of Corporate Directors* (1914) 3 CALIF. L. REV. 21. And there appears to be a statutory tendency towards the requiring of directors an insurer's responsibility. See N. Y. Cons. Laws, 1923, ch. 787, sec. 58; *cf. Wesp v. Muckle* (1910, 4th Dept.) 136 App. Div. 241, 120 N. Y. Supp. 976. While failure to distinguish business trusts from other trusts has left the matter uncertain, there are definite indications that the trustee of a business trust will generally be held responsible for unreasonable errors in judgment. *Cf. Ashley v. Winkley* (1911) 209 Mass. 509, 95 N. E. 932; *Holmes v. McDonald* (1907) 226 Ill. 169, 80 N. E. 714; *Haines v. Bankers Petroleum Co.* (1925, Tex. Civ. App.) 273 S. W. 940; see Sears, *Trust Estates as Business Companies* (2d ed. 1921) sec. 100. If the receiver's fault in the instant case is to be considered an error in judgment,

two reasons exist for applying the stricter test: First, that the size of the present-day receiver's salary amply warrants such a test. See Fletcher, *Cyclopedia of Private Corporations* (1918) sec. 2444. Second, that since the court cannot be sued, the creditor's remedy can only be against the receiver personally. These reasons also indicate the propriety of a strict test of negligence. The facts of the instant case obviously show an error of judgment or a border line case of negligence. Not to hold the receiver personally responsible, therefore, seems a tendency in the wrong direction. Any emphasis on the fact that the creditors urged the appointment of this particular receiver seems misplaced; there is slight, if any, analogy between the creditors' action here and the election by shareholders of a director or trustee.

SALES—CONTRACTS OF "SALE OR RETURN"—A RETURN MUST BE MADE AT SELLER'S PLACE OF BUSINESS.—The plaintiff vendor in New York City sold goods to the defendant vendee in St. Albans, Vt., under a contract of "sale or return". The defendant returned the goods by express. The package was lost in transit. The plaintiff obtained a judgment for the value of the goods and the defendant appealed. *Held*, (one judge dissenting) that the judgment be affirmed on the ground that the delivery should have been made to the seller's place of business. *Biow Co. v. Cohen* (1925, Vt.) 130 Atl. 589.

In a contract of "sale or return" the so-called "property" in the goods passes to the buyer on delivery, subject to being revested in the seller at the buyer's option. Sales Act, sec. 19, rule 3 (1); *Ferry & Co. v. Hall* (1914) 188 Ala. 178, 66 So. 104. The term "property" in goods has never been satisfactorily defined, although one result of "property" passing seems to be to transfer the risk of loss from seller to buyer. Both at common law and under sec. 46 (1) of the Sales Act, delivery to the carrier is deemed to be delivery to the buyer in the absence of a contrary intent or stipulation; and risk of loss in transit falls on the buyer. *State v. Peters* (1897) 91 Me. 31, 39 Atl. 342; *Smith Co. v. Marano* (1920) 267 Pa. 107, 110 Atl. 94. Nothing is said in the Sales Act as to what constitutes a "return" of goods; but in the common law states, where the buyer in one town returns to the seller in another, under a contract of "sale or return", the courts have disregarded the presumption that the risk of loss falls on the consignee when the goods are delivered to the carrier and hold that the return, to be effective, must be made at the seller's place of business. *White v. Perley* (1839) 15 Me. 470; *Johnson v. Curlee Co.* (1925, Okla.) 240 Pac. 632. The instant case reaches the same decision under the Sales Act. But the return of goods under a "sale or return" contract has been held to be a re-sale by buyer to seller. *Johnson v. Curlee, supra; Meyer v. Hodge* (1916) 91 Wash. 35, 157 Pac. 42. From this point of view, it is hard to see why the buyer's delivery to the carrier will not throw risk of loss in transit on the seller. Such was the contention of the dissenting opinion in the instant case. Under the common law, where the buyer rescinds for breach of warranty and elects to return the goods, the return must be made at the seller's place of business. *Milliken v. Skillings* (1896) 89 Me. 180, 36 Atl. 77. But under sec. 69 (3) of the Sales Act, in this circumstance, it has been held that a physical return of the goods to the seller is not necessary. *Lewenthal v. Lewenthal* (1919, 1st Dept.) 189 App. Div. 167, 178 N. Y. Supp. 252. Apparently the common law analogy appealed to the court in the principal case. The important point here, as in all commercial transactions, is to have a clear rule for determining where the risk of loss shall fall. And in formulating such a rule trade

usages should be looked to rather than legal precedent or analogy. In the instant case it is laid down that the return must be made to the seller's place of business where "no usage to the contrary is shown". This seems a satisfactory rule.

TRUSTS—CHARITIES—CY PRES—PURPOSE DECLARED BY FOUNDER TO GOVERN DESPITE CHANGING BELIEFS.—In 1807 the Andover Theological Seminary was founded for the avowed purpose of educating ministers in the orthodox Trinitarian Congregationalist faith. In 1922 a plan for closer affiliation with the Harvard Divinity School was adopted. The Harvard School, though Unitarian at its inception, is now undenominational. The Andover Seminary, originally Trinitarian, by 1906 had also "become entirely undenominational". Under the plan adopted Harvard professors would instruct Andover students, although it was expressly required by the founders of the Seminary that all instruction should be given by strict Trinitarians. The Visitors of the Seminary issued a "decree" holding the plan of affiliation improper as deviating from the declared purposes of the founders. Proceedings were instituted to test the validity of this "decree". *Held*, that the plan for closer affiliation should be declared void. *Trustees of Andover Theological Seminary v. Visitors of Andover Theological Institution* (1925, Mass.) 148 N. E. 900.

When a charitable gift has become impossible of execution as specified, the courts, rather than decree a failure of the gift will, if a general charitable intent appears, direct the trust fund into some other channel under the familiar *cy pres* doctrine. *Bruce v. Maxwell* (1924) 311 Ill. 479, 143 N. E. 82; *Trustees of Rush Medical College v. Chicago University* (1924) 312 Ill. 109, 143 N. E. 434. But if no application of the fund be possible save what is forbidden by the terms of the gift, an intestacy will be declared. *McCran v. Kay* (1922) 93 N. J. Eq 352, 115 Atl. 649. Some courts say that the specified application must be "impossible" before the *cy pres* doctrine may be invoked. *Crawford v. Nies* (1916) 224 Mass. 474, 113 N. E. 408; *Newton v. Healy* (1923) 100 Conn. 5, 122 Atl. 654; *Curtis & Barker v. Central University of Iowa* (1920) 188 Iowa, 300, 176 N. W. 330 (fund left to Baptist college held forfeited by transfer of control to Reformed Church when retention of Baptist control was impracticable though not impossible). Other courts say that if the specified application be "undesirable, impracticable, or contrary to public policy", the *cy pres* application will be made. *Bruce v. Maxwell, supra* (fund left to build old men's home, insufficient to build practical home, used to aid existing home). But in most of the cases announcing this more liberal rule the fund is not yet in use and its application to the use designated in the gift would be a foolish waste. *Bruce v. Maxwell, supra; Christian v. Catholic Church* (1920) 91 N. J. Eq. 374, 110 Atl. 579. When, however, as in the instant case, the fund has already been applied to the purposes of the gift and the question is one of continuing policy in the execution of the trust, courts are more reluctant to depart from the strict terms of the gift. Of course, if a continuation of the policy specified by the testator becomes impossible, *cy pres* will, without question, be applied. Whenever changes in economic conditions or in accepted theological distinctions make the specified policy impractical and inefficient, there is a temptation, resisted in the instant case, to invoke *cy pres*. In such cases the courts apply the *cy pres* doctrine if it seems to them desirable to do so. *In re Queen's School* [1910] 1 Ch. 796 (primary object for school's establishment not feasible on existing scale without Board of Education's help—court modified scheme to obtain such help); *Inglish v. Johnson* (1906, Tex. Civ. App.) 95 S. W. 558 (girl's school not feasible—funds used for mixed school); *Lack-*

land v. Walker (1899) 151 Mo. 210, 52 S. W. 414 (money to be raised by "ground leases" of land left—form of lease changed because of growing unpopularity of "ground lease"); *Rector of St. James v. Wilson* (1913) 82 N. J. Eq. 546, 89 Atl. 519 (fund left to build new church—community depleted—fund used in support of existing church); see *MacKenzie v. Trustees* (1905) 67 N. J. Eq. 652, 61 Atl. 1027 (fund left for church to be named "Scotch Presbyterian Church of Jersey City" and to use no instrumental music—dictum that fund might be used to pay debts of other Presbyterian churches using instrumental music).

WILLS—JOINT WILLS—PROBATE REFUSED BECAUSE OF IMPROPER EXECUTION BY SURVIVOR DESPITE PROPER EXECUTION BY DECEASED.—An instrument, purporting to be the joint and mutual will of a husband and wife and devising the entire property of each to the survivor, was properly executed as to the husband, but the wife's signature was not attested in accordance with the statutory requirements. On the death of the husband before the wife, his heirs at law objected to its admission to probate. The lower court admitted it and the contestants appealed. *Held,* that probate be refused, since a contract to make a joint and mutual will was to be inferred from the mere existence of the instrument, and the invalid execution by the wife constituted a failure of consideration for the execution by the husband. *Martin v. Helms* (1925, Ill.) 149 N. E. 770.

Joint wills are generally considered as the separate wills of each party. *In re Diez* (1872) 50 N. Y. 88; *Lewis v. Scofield* (1857) 26 Conn. 452; 1 Schouler, *Wills* (6th ed. 1923) sec. 719. And on such a construction, the instrument in the instant case should have been admitted to probate. Some courts, as did the court in the instant case, infer from the mere attempted execution of a joint and mutual will, that a contract has been made to execute such an instrument. *Frazier v. Patterson* (1909) 243 Ill. 80, 90 N. E. 216, (1910) 27 L. R. A. (N.S.) 508; *Doyle v. Fischer* (1924) 183 Wis. 599, 198 N. W. 763; (1919) 32 HARV. L. REV. 296. But the better rule would seem to require something more to establish the contract. *Coveney v. Conlin* (1902) 20 App. D. C. 303; see *Wanger v. Marr* (1914) 257 Mo. 482, 165 S. W. 1027; *Rastetter v. Hoenninger* (1915) 214 N. Y. 66, 72, 108 N. E. 210, 211; (1919) 28 YALE LAW JOURNAL, 709; Schouler, *op. cit.* sec. 721. Granted, however, the existence in the instant case of such a contract, still the result does not logically follow. Contracts to make a will in favor of a promisee are enforceable as are other contracts. The remedy is an action for damages. *Frost v. Tarr* (1876) 53 Ind. 390. Or in a proper case, an action for specific performance. *Emery v. Darling* (1893) 50 Ohio St. 160, 33 N. E. 715. The remedy is available to the heirs of the promisee and against the heirs of the promisor. *Frazier v. Patterson, supra.* It is likewise available to those who would have been entitled to gifts over under the contemplated will. *Rastetter v. Hoenninger, supra.* If, then, the instrument in the instant case evidences a contract (as the court says it does) it would seem that any one entitled to an interest thereunder, whether husband, wife, or a third-party beneficiary under the contemplated will, could enforce the contract against the recalcitrant contractor or his heirs or personal representative; at least after the decease of the testator first dying. *Campbell v. Dunkelberger* (1915) 172 Iowa, 385, 153 N. W. 56; *Rastetter v. Hoenninger, supra.* The instrument, though failing as a will, would be a good memorandum under the statute of frauds, signed, as it was, by both parties to the contract. *Williams v. Williams* (1918) 123 Va. 643, 96 S. E. 749; *In re McGinley's Estate* (1917) 257 Pa. 478, 101 Atl. 807; *cf. Canada v. Ihmsen* (1925, Wyo.)

240 Pac. 927, 929. There could be no definitive breach by the wife before her death. *Lawson v. Mullinix* (1906) 104 Md. 156, 64 Atl. 938. Therefore, although the refusal of probate in the instant case be accepted, it would still seem that if she came into court tendering performance, she would be entitled to specific relief against the heirs of the deceased, the successful contestants in the present action. That her performance would now be nugatory because the husband, the only person benefitting under the terms of the contemplated will, is now deceased, should not affect that result; for performance on the date of the attempted joint will would, in the existing circumstances, have been equally nugatory. *Anderson v. Anderson* (1917) 181 Iowa, 578, 164 N. W. 1042; Schouler, *op. cit.* sec. 723. These facts do, however, impugn the soundness of the reason given for the instant decision, *viz.*, that the will, though validly executed by the deceased, should nevertheless be refused probate because of a failure of consideration. The exigency under which the deceased intended his wife to take has occurred—to wit, his death—and there is a paper extant, validly signed and attested, which purports to be his last will. Its status as his will is independent of any possible breach by the co-contracting party, just as the validity of a sale is independent of any breach by the buyer of his duty to pay the purchase money. The dictum apparently relied upon by the court, that joint and mutual wills, pursuant to contract, must take effect as to both parties or neither, had reference to a case wherein the contract contained terms justifying such a construction. *Peoria Humane Society v. McMurtrie* (1907) 229 Ill. 519, 522, 82 N. E. 319, 320. It is submitted that the instrument in the instant case should have been admitted to probate.