Chicago-Kent Law Review

Volume 29 | Issue 2 Article 6

March 1951

Discussion of Recent Decisions

R. O. Detina

A. Katz

E. F. Nowak

B. Berger

A. L. Wyman Jr.

CHICAGO-KENT LAW REVIEW

PUBLISHED DECEMBER, MARCH, JUNE AND SEPTEMBER BY THE STUDENTS OF CHICAGO-KENT COLLEGE OF LAW, 10 N. FRANKLIN ST., CHICAGO, ILLINOIS
Subscription price, $3.00 per year Single copies, $1.00 Foreign subscription, $3.50

VOLUME 29 MARCH, 1951 NUMBER 2

DISCUSSION OF RECENT DECISIONS.

BILLS AND NOTES—RIGHTS AND LIABILITIES ON ENDORSEMENT OR TRANSFER—WHETHER OR NOT ENDORSEMENT OF A NEGOTIABLE INSTRUMENT BY AN IMPOSTER PAYEE SERVES TO PASS TITLE TO A HOLDER IN DUE COURSE—Following the modern trend of authority, the rights of a holder of a negotiable instrument, in Illinois, have again triumphed over those of the drawer. In the recent case of *Greenberg* v. *A. & D. Motor Sales, Inc.*,[1]

1 341 Ill. App. 85, 93 N. E. (2d) 90 (1950).

the Appellate Court for the First District was presented with a fact situation which revealed that the defendant, a corporate dealer in used automobiles, was offered an opportunity to purchase a used car from one who was unknown to it. He represented himself to be the owner of the automobile, one Wallace Gross, when in fact he had no interest therein. Relying on this representation, as well as on a driver's license produced by the imposter, defendant accepted the offer and delivered its check, payable to "Wallace Gross", drawn on a local bank, to the purported vendor. That person then endorsed the instrument, using the name of the payee, and presented the check to the plaintiff at the latter's currency exchange. Plaintiff discounted the instrument only after first communicating with the defendant by telephone, receiving confirmation as to the identity of the imposter and being assured that the instrument would be honored by the drawee bank upon proper presentation. Prior to the time permitted for presentation of the check to the drawee for payment, defendant discovered the automobile was owned by one other than the person to whom it had delivered its check and ordered the instrument returned as bearing a forged endorsement. Plaintiff brought an action on the check, alleging the issuance thereof by the defendant to one purporting to be the named payee, followed by plaintiff's purchase thereof from such payee in good faith, for value, and without notice of any defect in the payee's title. The defendant, relying on Section 43 of the Illinois Negotiable Instruments Act,[2] asserted that no title passed because of the forgery. The trial court held the defense inapplicable, particularly since the defendant did not deny issuance of the instrument to the person who purported to be the named payee, and rendered judgment in favor of the plaintiff. The Appellate Court, on review, affirmed the decision, applying the so-called "imposter" rule, one well known in the law relating to commercial transactions.

The principal contention of the drawer, advanced in cases of this type, has been that the endorsement of the imposter is a forgery under which no title can pass as against the drawer. In order that there be a forged instrument, however, the signature or endorsement must have been made by one other than the person intended by the drawer as the party entitled to receive payment. It is obvious, therefore, that the intention of the drawer becomes the true issue in each of these cases. In that regard, the general rule adhered to by the majority of the courts is that where the drawer delivers a check, draft, or bill of exchange to an imposter as payee,

[2] Ill. Rev. Stat. 1949, Vol. 2, Ch. 98, § 43, declares: "Where a signature is forged or made without authority, it is wholly inoperative, and no right to retain the instrument or to give a discharge thereof, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

supposing that he is the person he has falsely represented himself to be, the imposter's endorsement in the name by which the payee is described is regarded as a genuine endorsement, both as between the drawer and drawee[3] and as to subsequent holders in due course.[4]

On the issue of intent, if it appears that the drawer has dealt with the imposter, in his physical presence, and has personally delivered the instrument to him, as in the case under discussion, it has generally been held that it would not be unreasonable to conclude that the drawer intended the person of the imposter to be the real payee.[5] If, however, the imposter was not physically before the drawer, but has induced delivery of the instrument to himself through the employment of an intermediary agency, such as correspondence,[6] a few of the courts have concluded that the probable intent was to make the person named the real payee, rather than the person of the imposter.[7] The additional fact that the drawer had previously known one bearing the name used in the instrument has been of significance in leading to the same conclusion.[8] Furthermore, where the

3 Continental Bank v. U. S., 161 F. (2d) 935 (1947); Union Bank v. Security Bank, 8 Cal. (2d) 303, 65 P. (2d) 355 (1937); Goodyear Rubber Co. v. Wells Fargo Bank, 1 Cal. App. (2d) 694, 37 P. (2d) 483 (1934); Hartford Indemnity Co. v. Middleton Bank, 126 Conn. 179, 10 A. (2d) 604 (1939); Uriole v. Twin Falls Trust Co., 37 Ida. 332, 215 P. 1080 (1923); U. S. Cold Storage Co. v. Manufacturer's Bank, 343 Ill. 503, 175 N. E. 825, 74 A. L. R. 811 (1931); Cooper v. Peoples Savings Bank, 219 Ill. App. 447 (1920); Karoly v. Globe Savings Bank, 64 Ill. App. 225 (1896), but the statement is dicta; Hoge v. First National Bank, 18 Ill. App. 501 (1886); Metzge v. Franklin Bank, 119 Ind. 359, 21 N. E. 973 (1889); Meridian National Bank v. First National Bank, 7 Ind. App. 322, 33 N. E. 247 (1893); Halsey v. Bank of New York, 270 N. Y. 134, 200 N. E. 671 (1936); Seaboard National Bank v. Bank of America, 193 N. Y. 26, 85 N. E. 829 (1908).

4 Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471 (1886); Burrows v. Western Union Telephone & Telegraph Co., 86 Minn. 499, 90 N. E. 1111, 58 L. R. A. 433 (1902); Land-Title & Trust Co. v. Northwestern National Bank, 196 Pa. 230, 46 A. 420, 50 L. R. A. 75 (1900); Heavey v. Commercial National Bank, 27 Utah 222, 75 P. 727 (1904); Jamison v. Heim, 43 Wash. 153, 86 P. 165 (1906).

5 Meyer v. Indiana National Bank, 27 Ind. App. 354, 61 N. E. 596 (1901); Emporia Bank v. Shotwell, 35 Kan. 360, 11 P. 141 (1896); Halsey v. Bank of New York, 270 N. Y. 134, 200 N. E. 671 (1936); Merchant's Bank v. Metropolis Bank, 7 Daly (N. Y.) 137 (1877); First National Bank v. American Exchange Bank, 49 App. Div. 349, 63 N. Y. S. 58 (1905); Montgomery Garage Co. v. Liability Insurance Co., 94 N. J. L. 152, 109 A. 296, 22 A. L. R. 1224 (1920); Hockett Co. v. Simmonds, 84 Ohio App. 467, 87 N. E. (2d) 739 (1949).

6 That idea is expressed in Boatsman v. Stockmen's National Bank, 56 Colo. 450, 138 P. 764 (1914), and in Metzge v. Franklin Bank, 119 Ind. 350, 21 N. E. 973 (1889), but both hold that the intermediary agency employed had no effect on the drawer's intent to deal with the person of the imposter.

7 Western Union Telegraph Co. v. Bimetallic Bank, 17 Colo. App. 229, 69 P. 115 (1902); Cohen v. Lincoln Savings Bank, 275 N. Y. 399, 10 N. E. (2d) 457 (1937); Tolman v. American National Bank, 22 R. I. 462, 48 A. 480 (1901); Simpson v. Denver Ry. Co., 43 Utah 105, 134 P. 883 (1913).

8 Rossi v. National Bank, 71 Mo. App. 150 (1897). An illustration of this distinction, drawn from the law of sales, may be found in Cundy v. Lindsay, 3 A. C. 459 (1878).

drawer has added a special description to the name of the payee,[9] or has added a title thereto,[10] the courts have been of the opinion that it was not the imposter that was intended as the proper party to receive payment, but the person of that description or title.

While most courts are content to construe the rights of the parties after having determined the drawer's probable intent, at least one court has proceeded one step farther. Having concluded that the drawer did not intend the imposter as payee, that court proceeded to suggest that the "imposter" rule had no application to the circumstances of the case before it, leading to a denial of recovery as against the drawer.[11] The statement, however, would seem unnecessary and probably accomplishes little in view of the fact that the same result would be reached by a determination of the controlling issue of intent.

An argument often utilized to bolster certain of these decisions is that the drawer, having been negligent in failing to require sufficient identification of the imposter, is therefore estopped to deny validity of the holder's title. The latter, having been entirely innocent throughout the transaction, has been said to be under no duty to the drawer to determine the genuineness of the imposter's signature.[12] While one case rests solely on this theory of negligence or estoppel,[13] it would seem that the proper theory to apply would be the "imposter" rule.[14]

Can it be said, in retrospect, that the Negotiable Instruments Act of Illinois is adequate to cope with the illustrated problem? The Appellate Court, in the instant case, said that Section 43, which had been relied on

[9] But see Bryant v. McGowan, 151 Pa. Super. 529, 30 A. (2d) 667 (1943), where the court found the words added to the name used were merely descriptive, the payee being described to be "Mrs. Catherine Nelson, as unremarried widow of Chas. Nelson."

[10] In Mercantile National Bank v. Silverman, 7 Hun. (N. Y.) 317, 132 N. Y. S. 1017 (1911), the payee was described as "Lieutenant Colonel Frederick Marsh." The court found no intent to deal with the imposter, the drawer having had previous acquaintance with a person of the name used.

[11] Mercantile National Bank v. Silverman, 7 Hun. (N. Y.) 317, 132 N. Y. S. 1017 (1911).

[12] McHenry v. Old Citizen's National Bank, 85 Ohio St. 203, 97 N. E. 395 (1911), treated the drawer as estopped to deny validity of the imposter's endorsement. In Hockett Co. v. Simmonds, 84 Ohio App. 467, 87 N. E. (2d) 739 (1949), however, the negligence of the holder in due course in accepting the instrument after regular banking hours was said to affect his right of recovery. The Minnesota case of Montgomery Ward & Co. v. Central Co-op. Ass'n, 201 Minn. 425, 276 N. W. 731 (1937), also treated the negligence of the drawer as sufficient to preclude a denial of the validity of the imposter's endorsement.

[13] Montgomery Ward & Co. v. Central Co-op. Ass'n, 201 Minn. 425, 276 N. W. 731 (1937).

[14] Ryan v. Bank of Italy Nat. Trust & Sav. Ass'n, 106 Cal. App. 690, 289 P. 863 (1930); Santa Maria v. Industrial City Bank, — Mass. —, 95 N. E. (2d) 176 (1950).

by the defendant,[15] had no application to the circumstances presented.[16] Forgery being thereby ruled out as a defense, there would seem to be no other section in the statute which could have direct application. As a result, the court was forced to fall back on common law doctrines with all the varying distinctions thereon which call for interpretation.[17] Fortunately, the precise situation contained the important fact of physical presence before the drawer, making it possible to apply the majority or so-called "imposter" rule with ease. But what of the future when an intermediary agency is drawn into the picture? Will the Illinois court then add to that class of cases which draw fine distinctions of fact? Now that the court has seen fit to declare the "imposter" rule to be applicable, would it not be advantageous for the legislature to aid this progressive step by an appropriate amendment or addition to the statute? If the purpose of the statute is one designed primarily to codify the law so as to afford protection to the holder in due course, such an amendment or addition would, without question, serve that end.

R. O. DRTINA

HUSBAND AND WIFE—ACTIONS—WHETHER, IN VIEW OF ENACTMENT OF MARRIED WOMEN'S ACTS, A WIFE MAY MAINTAIN AN ACTION FOR LOSS OF CONSORTIUM BASED ON NEGLIGENT INJURY CAUSED TO HER HUSBAND—In the case of *Hitaffer* v. *Argonne Company, Incorporated,*[1] the United States Court of Appeals for the District of Columbia was presented, for the first time since the passage of the Married Women's Act for that district,[2] with the situation of a wife attempting to recover an alleged loss of consortium[3] brought about by defendant's negligence producing injury to her husband. The husband, an employee of defendant, had been seriously injured while at work. He applied for, and received, full compensation for his injuries. Thereafter, the wife filed the instant action, relying on the ground that the defendant's negligence had deprived her of her husband's aid, assistance and sexual relations. The lower court dismissed the action on defendant's motion for summary judgment and plaintiff

15 Ill. Rev. Stat. 1949, Vol. 2, Ch. 98, § 43. The text thereof is set forth in note 2, ante.

16 341 Ill. App. 85 at 90, 93 N. E. (2d) 90 at 92.

17 Further discussion of the "imposter" rule may be found in 18 B. U. L. Rev. 148, 3 Col. L. Rev. 71, 34 Harv. L. Rev. 76, and 68 U. of Pa. L. Rev. 387. See also Brannon, Negotiable Instrument Law Anno., 6th Ed., 349-58.

1 183 F. (2d) 811 (1950), cert. den. 340 U. S. 852, 71 S. Ct. 80, 95 L. Ed. 39 (1950).

2 D. C. Code 1940, § 30-208.

3 Bouvier, Law Dict., Rawle's 3d Rev., defines consortium as the "right of the husband and wife respectively to the conjugal fellowship, company, co-operation and aid of the other."

appealed. The Court of Appeals, in an unprecedented decision which examined into and rejected every major contrary decision bearing on the subject, reversed the holding and said the complaint stated an actionable case. To reach that decision, the court examined every reason advanced to support the unanimous refusal pronounced in other jurisdictions to permit a suit of this character and declared every reason so examined to be unsound.

The first such theory followed elsewhere appears to be one predicated on the premise that the material elements of consortium are the only elements on which a recovery can be had. From this point, courts have deduced two reasons for concluding that the wife cannot recover for loss of consortium. The first of these reasons rests on the ground that, while a husband is entitled to the services of his wife, the wife in turn has no such right to her husband's services, without which right she is not entitled to recover.[4] A typical case in which this reasoning was said to control is to be found in the Indiana case of *Boden* v. *Del Mar Garage* where the court argued that there was "no authority in law which gives her a right to recover for loss of consortium alone and it is expressly held in this state that she cannot recover . . . And the cause of action which the husband has against one who has negligently injured him is presumed to fully compensate him for all losses sustained, and this includes the loss of support for his wife and family."[5]

The other line of cases, illustrating the second reason, based on a materialistic conception of consortium, reject the wife's right to recover on the ground that any interference with the husband's duty of support, which may fairly be said to be the converse of the wife's duty to render services, is fully compensated for in the action brought by the husband, at least in so far as his ability to support his wife has been diminished as a result of his injury. It follows therefrom that to allow the wife to recover for loss of consortium in addition would result in a double recovery.[6]

[4] Boden v. Del Mar Garage, 205 Ind. 59, 185 N. E. 860 (1933); Brown v. Kistleman, 177 Ind. 692, 98 N. E. 631 (1912); Stout v. Kansas City Terminal Ry. Co., 172 Mo. App. 113, 157 S. W. 1019 (1913).

[5] 205 Ind. 59 at 70, 185 N. E. 860 at 863. Some courts have held that the Married Women's Acts have given the wife the right to the fruits of her own services and, as a result, the husband is no longer entitled to her services. If this reasoning is sound, the conclusion, reached by these courts, quite properly follows that the husband may no longer maintain an action for the loss of that aspect of consortium: Marri v. Stamford Street Ry. Co., 84 Conn. 9, 78 A. 582 (1911); Harker v. Bushouse, 254 Mich. 187, 236 N. W. 222 (1931); Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. (2d) 611 (1945).

[6] Giggey v. Gallagher Transportation Co., 101 Colo. 258, 72 P. (2d) 1100 (1937); Patelski v. Snyder, 179 Ill. App. 24 (1913); Eschenbach v. Benjamin, 195 Minn. 378, 263 N. W. 154 (1935); Gambino v. Manufacturers Coal & Coke Co., 175 Mo. App. 653, 158 S. W. 77 (1913).

Pointing to fallacies inherent in this major line of cases, the court in the instant case made the following statement: "The difficulty with adhering to these authorities is that they sound in the false premise that in these actions the loss of services is the predominant factor. This distinction lacks precedent. It is nothing more than an arbitrary separation of the various elements of consortium devised to circumvent the logic of allowing the wife such an action."[7] Continuing, the court also said: "Consortium, although it embraces within its ambit of meaning the wife's material services, also includes love, affection, companionship, sexual relations, etc., all welded into a conceptualistic unity. And, although loss of one or the other of these elements may be greater in the case of any one of the several types of invasions from which consortium may be injured, there can be no rational basis for holding that in negligent invasions suability depends on whether there is a loss of services. It is not the fact that one or the other of the elements of consortium is injured in a particular invasion that controls the type of action which may be brought but rather that the consortium as such has been injured at all."[8] In this manner, the court dismissed that line of reasoning.

Another series of cases, while giving recognition to the existence of other and sentimental elements implicit in the word "consortium," have, for one or more reasons, nonetheless, refused to allow the wife to recover. These reasons proceed on a variety of grounds. It has been said that the injury to the wife, not being direct, is not compensable; that such injuries, being too remote, are incapable of ascertainment; that no recovery for loss of consortium has ever been allowed without a showing of loss of services, any injury to the sentimental elements acting only in aggravation of damages; and that the Married Women's Act have given no new cause of action to the wife.[9] The court in the present case, answering these varied arguments, clearly establishes the inconsistency of this line of thought by calling attention to the fact that courts which have looked with favor on these theories have, nevertheless, allowed the husband to recover

[7] 183 F. (2d) 811 at 813.

[8] Ibid., p. 814.

[9] For cases in this category, see Boden v. Del Mar Garage, 205 Ind. 59, 185 N. E. 860 (1933); Feneff v. New York Central & Hartford Ry. Co., 203 Mass. 278, 89 N. E. 436 (1909); Gambino v. Manufacturers Coal & Coke Co., 175 Mo. App. 653, 158 S. W. 77 (1913); Stout v. Kansas City Terminal Ry. Co., 172 Mo. App. 113, 157 S. W. 1019 (1913); Goldman v. Cohen, 30 Misc. 336, 63 N. Y. S. 459 (1900); Smith v. Nicholas Building Co., 93 Ohio St. 101, 112 N. E. 204, L. R. A. 1916E 700, An. Cas. 1918D 206 (1915); Howard v. Verdigris Valley Electric Co-operative, Inc., 201 Okla. 504, 207 P. (2d) 784 (1949); Kosciolek v. Portland Ry., L. & P. Co., 81 Ore. 517, 160 P. 132 (1916).

where the wife's injury has been due to the defendant's negligence. Decisions of the latter type would make it apparent that the validity of an argument to the effect that the injury is too remote and indirect to allow a recovery is made to turn on the sex of the injured party.[10]

In still other cases, courts have refused to protect the wife's interest in such an action as this on the theory that the wife's interest in the marital relation is not a property right, derived from bargain and sale, but rather lies in an area into which the courts should not intrude, except when necessity dictates that the wilful wrongdoer be punished, such as in cases based on criminal conversation or alienation of affections. These courts have theorized that the reason for allowing suits of that character lies in the fact that the recovery is granted more as a form of punishment than with thought of compensation to the injured party.[11] Again, in denying the efficacy of such reasoning, the instant court stated: "The civil side of the court cannot permit an award of punitive damages except as incidental to an actionable civil wrong."[12] The comment so made effectively rebuts the argument that suits of the type here under consideration can be, and are to be, maintained solely for the purpose of punishing the wrongdoer.

The court deciding the instant case did not merely rely on inadequacies in the opposing arguments. Having shown the inconsistencies in the aforementioned contrary theories, it turned to affirmative factors supporting a recovery by the wife. In that regard, the court said that "logic, reason and right are in favor of the position we are now taking. The medieval concepts of the marriage relation to which other jurisdictions have reverted in order to reach the results which have been handed to us as evidence of the law have long since ceased to have any meaning. It can hardly be said that a wife has less of an interest in the marriage relation than does the husband or in these modern times that a husband renders services of such a different character to the family and household that they must be measured by a standard of such uncertainty that the law cannot

[10] Along much the same line, it might be noted that courts have allowed the husband to recover, in suits based on criminal conversation, even though the husband has condoned the conduct and no loss of services has occurred, the recovery being based on sentimental elements alone. The fallacy of forbidding a similar suit to the wife should be equally obvious. The injury to the sentimental areas of consortium would be the same whether the injury arose from an intentional act, as is required in actions for criminal conversation or alienation of affections, or from negligent injury.

[11] See Brown v. Kistleman, 177 Ind. 692, 98 N. E. 631 (1912); Goldman v. Cohen, 30 Misc. 336, 63 N. Y. S. 459 (1900).

[12] 183 F. (2d) 811 at 816. See also Johnson v. Luhman, 340 Ill. App. 625, 92 N. E. (2d) 486 (1950).

estimate any loss thereof . . . Under such circumstances it would be judicial fiat for us to say that a wife may not have an action for loss of consortium due to negligence."[13]

It was not without some judicial support for the view so expressed. The North Carolina Supreme Court, in the case of *Hipp* v. *E. I. Dupont DeNemours Company*,[14] had held that a wife possessed a right to recover for a loss of consortium occasioned by a negligent injury to her husband, only to reverse itself, however, a short time later. Dissenting justices in two other jurisdictions have pointed up the inadequacies in the stand taken by the majority view,[15] but the most recent support for the proposition sustained herein is to be found in the case of *McDade* v. *West*.[16] It is true that the judges of the Georgia Appellate Court considering that case were equally divided on the question of whether or not a wife should be allowed such a recovery,[17] but three of the judges subscribed to the view that the "wrong" is a direct wrong to the valuable interests of the wife, whether intentional or not, the damage for which the husband cannot sue, and in these days of enlightment, her rights should be recognized and enforced."[18]

Far more important than the limited extent of acceptable authority is the eminently sound reasoning which underlies the present decision. It is axiomatic that the law, insofar as is possible, should give a remedy for every violated right. It is also a well accepted proposition that, since the adoption of the Married Women's Acts, both the husband and wife have equal rights before the law, at least in all other areas.[19] Keeping these statements in mind, it is only necessary to recognize the conceptualistic

[13] 183 F. (2d) 811 at 819. This attitude has been reflected by others. See Vernier, American Family Law (Stanford University Press, Stanford University, California, 1935), Vol. 3, § 158; Lippman, "The Breakdown of Consortium," 30 Col. L. Rev. 651 (1930); Holbrook, "The Change in the Meaning of Consortium," 22 Mich. L. Rev. 1 (1923); and note in 9 Ind. L. J. 182.

[14] 182 N. C. 9, 108 S. E. 318, 18 A. L. R. 873 (1921). The case was overruled by the decision in Hinnant v. Tidewater Power Co., 189 N. C. 120, 126 S. E. 307, 37 A. L. R. 889 (1925).

[15] See dissenting opinion of Bond, J., in Bernhardt v. Perry, 276 Mo. 612, 208 S. W. 462 (1919), and that of Scudder, J., in Landwehr v. Barbas, 241 App. Div. 769, 270 N. Y. S. 534 (1934).

[16] 80 Ga. App. 481, 56 S. E. (2d) 299 (1949).

[17] The division necessitated affirmation of a trial court refusal to permit recovery.

[18] 80 Ga. App. 481 at 486, 56 S. E. (2d) 299 at 302.

[19] This was, of course, not true under the common law because of the disabilities which attached to the woman at the time of marriage. Bl. Com., Book 3, § 143, states: "We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least to the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury." Such reasoning is, of course, no longer applicable in view of modern statutes on the subject.

unity which is a part and parcel of the word "consortium" to appreciate the validity of the court's findings in the instant case. Consortium, although consisting of several distinct rights running in favor of the husband and wife, is, in and of itself, a completely independent right. The proper recognition of consortium as an independent right leads to a further recognition that an injury to any one of the several component parts of the right of consortium constitutes a proper ground upon which recovery may be had. The refusal of the majority of the courts to recognize this basic fact has been the greatest stumbling block, heretofore, in the path of allowing a recovery in cases of this nature. It should, now, be removed.

There is, however, one danger that must be avoided. The danger of allowing a double recovery is, without question, a strong possibility; but it is one that can be avoided. The possibility of a double recovery may be circumvented by appropriate instruction confining the jury to a consideration solely of those elements of consortium which are claimed injured by the defendant's conduct. If, for example, the husband has already recovered adequate damages to compensate for the loss of his ability to support his wife, jury consideration may be limited to the remaining injured and uncompensated portions of the wife's right to consortium. True, it may be difficult to measure, in monetary terms, the extent of the injury suffered by the invasion of these other elements, but this should not constitute ground for refusing to allow a recovery. If the damage is certain, the fact that the extent of the damage is uncertain is not enough to bar a recovery.[20]

The desirability of having courts in other jurisdictions follow the path marked out by the present case is self-evident. It has been said that a "rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience."[21] So apt is this statement to the present situation that, with the clear and forceful opinion of the court in the instant case to guide them, it should be expected that other courts will follow suit and abandon earlier views. Those views, seen from the standpoint of modern enlightment, represent at best nothing more than archaic custom.

A. L. WYMAN, JR.

[20] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931).

[21] Cardozo, The Growth of the Law (Yale University Press, New Haven, Conn., 1946), p. 136.

MASTER AND SERVANT—SERVICES AND COMPENSATION—WHETHER OR NOT AN EMPLOYEE IS ENTITLED TO UNEMPLOYMENT COMPENSATION BENEFITS FOR THE PERIOD WHEN THE PLANT IS CLOSED FOR VACATION—The final toot of the factory whistle, signalling the cessation of plant operations for a vacation period, and the subsequent exodus of employees to their local unemployment compensation offices, has produced a flurry of decisions evaluating the right of such workers to share in the benefits provided under various state unemployment compensation acts. Representative of these cases are the two Michigan decisions in *Renown Stove Company* v. *Michigan Unemployment Compensation Commission*[1] and *Hubbard* v. *Michigan Unemployment Compensation Commission*.[2]

In the first of these cases, the employer laid off the employees for an indefinite period. They immediately began drawing upon their unemployment benefits but, as the employer had designated the time between July 5 and July 18 as vacation time and had issued "pay" for this period, the employer protested against the simultaneous issuance of benefits. After administrative action had confirmed the employees' right to the benefits, the employer appealed to the Supreme Court of Michigan. That court, after investigating the underlying sentiment which stimulated the enactment of unemployment compensation legislation and finding that "the objective sought to be gained is protection against evils incident to involuntary unemployment and the fostering of social and economic security by the payment of benefits to individuals who have suffered loss of pay resulting from involuntary unemployment,"[3] declared that certain of the employees were incapacitated from receiving benefits for the stated period but that others were entitled thereto. The court found that the legislative purpose had been codified in a provision of the Michigan statute which disqualified an individual for benefit in any week with respect to which he received payments in the form of "vacation with pay".[4] To discover whether the checks disbursed by the employer constituted a "vacation with pay," the court had recourse to the union contracts under which the employees were working and discovered that, under one contract, the period "from July 5, 1948, to July 18, 1948" was expressly designated as a vacation period.[5] The contract covering the rest of the employees provided that the vacation was to be taken at a time to be mutually agreed

1 328 Mich. 438, 44 N. W. (2d) 1 (1950).

2 328 Mich. 444, 44 N. W. (2d) 4 (1950).

3 328 Mich. 438 at 439, 44 N. W. (2d) 1 at 3.

4 Mich. Comp. Laws 1948, § 421.29(1)(d)(2).

5 Certain of the employees in the Renown Stove Company case were members of the International Stove Mounters' Union. The contract with that union contained the clause in question. Its members were the ones held disqualified as to benefits.

upon but permitted the employees to receive from forty to eighty hours' pay in lieu of a vacation.[6]

Employees covered by the first contract were held incapacitated from receiving unemployment benefits for they had received a "vacation with pay" within the meaning of the statute. Those under the latter contract were held to have an option to take a vacation, the exercise of which could not be dictated by any arbitrary and unilateral action on the part of the employer. As the checks tendered to these employees could not be connected with the period in dispute, they were permitted to recover provided they met other eligibility tests laid down by the statute.

The problem and solution in the second case ran parallel to the first. The company there, in the face of a refusal of the union to agree to a vacation plan,[7] closed the plant for a fixed period. The union contract provided for "compensation in lieu of a vacation" at the employee's option, entitling him to payment whether or not he availed himself of a respite from work. In the light of such a contract, the court held that the employees became involuntarily unemployed when the employer closed the plant and were, therefore, eligible to receive unemployment compensation benefits.[8]

The inherent purpose of the various unemployment compensation acts is one designed to alleviate the physical and economic suffering likely to be visited upon an individual who loses the security guaranteed by his weekly pay check through involuntary unemployment.[9] It follows, therefore, that an applicant should not be entitled to unemployment benefits where, although he has been forced to leave the work harness for a period of time, he has received remuneration for that period. Where an employee is forced, by an imposition of the employer's will, to take a vacation but receives an amount of money from the latter, the character of that payment will have much to do with whether or not compensation is allowable. If the sum can be termed "wage" or "salary" or, whatever its designation, is connected with the layoff period, additional compensa-

6 These employees were members of the International Molders and Foundry Workers Union.

7 Vacation periods had formerly been staggered throughout the year but the employer, in the interest of increased plant efficiency, sought a simultaneous vacation period for all help. The union indicated a preference for a continuation of the former plan.

8 The union contract conferred vacation benefits only on those who had worked for a stated minimum period. As to the right of a new employee, one who had not been employed for a sufficient time to receive a paid vacation, to seek unemployment compensation benefits when temporarily forced out of work by a vacation shutdown of the plant pursuant to the union contract calling for paid vacations, see Claim of Rakowski, 276 App. Div. 625, 97 N. Y. S. (2d) 309 (1950).

9 American Central Mfg. Corp. v. Review Board of Indiana Employment Security Division, — Ind. — at —, 88 N. E. (2d) 256 at 258 (1949).

tion should not be obtainable.[10] On the other hand, if the remuneration has no nexus to the vacation period, the party should be entitled to benefits provided other statutory requirements are satisfied. In order to determine the nature or character of the payments, then, the employment contract itself must be subjected to scrutiny.

Where the contract requires the granting of a vacation period but the right of the employer to specify the period of such work holiday has been retained by him, or where the employer and employees have designated a specific non-work period, cases prior to the instant decisions have been unanimous in denying to the employee the privilege of simultaneous receipt of both unemployment benefits and vacation compensation.[11] Obviously, such a result is correct and proper. The issuance and delivery of pay checks in such situations can have no other office than to provide remuneration for the layoff period. As the employee receives a payment from his employer which is definitely connected with the period of unemployment, he has no right to additional compensation. The reasoning of the Michigan court in the first cited case, at least as to those individuals employed under the first contract mentioned, is so obviously right that the decision, in this respect, provides little more than added weight to the existing law.

The other contracts involved in the instant cases, however, did not force the employees to take a respite from work. On the contrary, the employment agreements allowed them the choice of working for the full year with the right to receive "compensation in lieu of a vacation." Under this situation, the Michigan court found that a forced layoff, even though accompanied by the issuance of checks, did not deprive the employees of unemployment benefits for the work holiday. It was reasoned that since the employer had contracted away his right to declare a vacation period, the payments received by his employees could have no connection with the period of unemployment and had to be treated as some form of bonus. Such being the case, there was a period of involuntary

[10] The drafters of the various state acts have expressed the idea in different, yet not contradictory, language. Some define the term "employment" expressly as including periods of vacation with pay, or leave with pay: Burn's Ind. Stat. Ann. 1933 (1951 Replace.), § 52-1532(a)(f). Others describe "total unemployment" as that period with respect to which no wages are payable and during which no services are performed. The word "wages," in turn, is defined to cover every form of remuneration, including salaries, commissions, and bonuses: N. H. Rev. Laws 1942, Ch. 218, § 1, para. N(1) and P. In Illinois, the terms "unemployment" and "wages" carry similar definitions: Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 218(k) and § 218(g).

[11] Kelly v. Administrator, Unemployment Compensation Act, 136 Conn. 482, 72 A. (2d) 54 (1950); American Central Mfg. Corp. v. Review Board of Indiana Employment Security Division, — Ind. —, 88 N. E. (2d) 256 (1949); Wellman v. Riley, Com'r of Labor, 95 N. H. 502, 67 A. (2d) 428 (1949); Hamlin v. Coolerator Co., 227 Minn. 437, 35 N. W. (2d) 616 (1949).

unemployment without the required contractual compensation, thereby permitting access to payments under the state statute.

Even where the employee receives no check from the employer for the vacation period, he may still be precluded from unemployment benefits. The unemployment insurance acts generally prevent the payment, or in some jurisdictions the immediate payment, of benefits where the unemployment is produced by the employee's conduct in voluntarily leaving work without good cause.[12] Clearly, where the closing of the plant is brought about by the arbitrary action of the employer alone, this segment of the law cannot negate the employee's right to benefits. Where, however, a union contract exists which consents to the closing of the plant for vacation purposes, statutory sections of the kind in question may become operable. It has been held, for example, that if the individual, acting through his union negotiators, voluntarily consents to a leave of absence, he is not entitled to benefits notwithstanding the fact that under the union contract he would not be entitled to any idle-time payment from the employer.[13] Reasoning of that character ought to be equally applicable to those instances where the employee consents to the work stoppage for the purpose of enjoying a vacation.

Notice should also be taken of another general requirement to be found in unemployment insurance laws, one which requires that the individual must be available for work in order to be eligible for benefits.[14] One aspect of the decision in the Connecticut case of *Kelly* v. *Administrator, Unemployment Compensation Act*,[15] a case involving a situation wherein the employer closed the plant for a short holiday period and tendered payment to the employees pursuant to the employment contract, indicates that a denial of benefits would be proper upon the basis that the workers were unavailable for work. That result was achieved on the ground that, according to the court, no one could be found who would hire the employees for the balance of the holiday period, considering the time it would take to process a registration of the idle employees for work during that week. The court commented upon the fact that it could "hardly be said that they were in the labor market for so short a period."[16] Inasmuch as the Connecticut statute treats an individual as not being unemployed if he receives a payment by way

[12] See, for example, Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 223(a).

[13] Moen v. Director of Division of Unemployment Security, 324 Mass. 246, 85 N. E. (2d) 779, 8 A. L. R. (2d) 429 (1949); Mattey v. Unemployment Compensation Board of Review, 164 Pa. Super. 36, 63 A. (2d) 429 (1949); In re Buffelen Lumber & Mfg. Co., 32 Wash. (2d) 205, 201 P. (2d) 194 (1948).

[14] Ill. Rev. Stat. 1949, Vol. 1, Ch. 48, § 222(c).

[15] 136 Conn. 482, 72 A. (2d) 54 (1950).

[16] 136 Conn. 482 at 486, 72 A. (2d) 54 at 56.

of compensation for loss of wages from his employer,[17] and as payment clearly existed under the facts of that case, it would appear that the rationale adopted was both unnecessary and unfortunate. The fact of unemployment ought not be affected by the assumption that, at the end of the "vacation" period, the employee might be recalled to work. For that matter, it is not entirely impossible that another employer might seek employees even for so short a period. Anyway, the statutory test merely requires that the employee demonstrate that he is "available," that is that he will accept comparable work in the locality if it is offered to him. It is doubtful, then, if the Connecticut court would fall back on this rationale if the employer, without the employee's acquiescence, were to cease operations for a "vacation" period without tendering pay, yet promised to resume activity at the end of the period. Too much reliance, therefore, should not be placed on that decision.

While the addition of the instant cases to the body of existing law on the subject creates no conflict, and while both decisions appear sound, it is clear that all of the problems relating to payment of unemployment benefits for inactivity during vacation periods have not yet been solved.

A. KATZ

NEGLIGENCE — ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE — WHETHER OR NOT AN ARTIFICIALLY CREATED WATER-FILLED EXCAVATION CONSTITUTES AN ATTRACTIVE NUISANCE—The Supreme Court of Indiana, through the medium of the case of *Plotzki* v. *Standard Oil Company of Indiana,*[1] had presented to it, for determination, a problem of not infrequent occurrence but which has often created a good deal of perplexity. The case was one in which a parent sued to recover damages for the wrongful death of the plaintiff's eleven-year old son. The defendant had caused an excavation to be dug on certain realty owned by it within municipal limits, which excavation was unguarded and located about 150 feet from a public street. The hole was visible to pedestrians and was also frequented, to the knowledge of the defendant, by numerous children while at play. The floor of the excavation was unevenly graded, having drop-offs and hidden holes, some as much as eight feet in depth. The pit became filled with rain water which, becoming murky in character, concealed the hidden holes. The plaintiff's intestate waded in the pool so formed and was drowned when he fell into one of the holes. The plaintiff attempted to utilize the attractive nuisance doctrine as the

17 Conn. Gen. Stat. 1949, § 7508(4)(a).

1 — Ind. —, 92 N. E. (2d) 632 (1950). Emmert, Ch. J., and Gilkison, J., each wrote a dissenting opinion.

basis for her suit, but defendant demurred on the ground the facts did not state a cause of action. The trial court sustained the demurrer. Upon direct appeal, a majority of the judges of the Supreme Court affirmed the ruling, stating that a pool, pond, lake, stream or other body of water does not, by the overwhelming weight of authority, constitute an attractive nuisance. The majority also refused to agree that the presence of sharp drop-offs and deep holes in artificially constructed pools of water constituted traps or hidden dangers for which the defendant could be held liable.

The "turntable" doctrine, one later to acquire the name of "attractive nuisance," was originally formulated in this country in the case of *Sioux City & Pacific Railroad Company* v. *Stout*,[2] a case wherein an infant was permitted to recover damages for injuries sustained notwithstanding the fact that the infant was then trespassing. The court there stated it to be a question for the jury to determine as to whether or not the defendant's act in maintaining the instrumentality was likely to attract children. If so, a duty was thereby imposed on the property owner to prevent harm to infant trespassers; a duty not previously known in law. The doctrine so formulated has been defined, in *Pekin* v. *McMahon*,[3] to be one creating an obligation to use reasonable care where "land of a private owner is in a thickly populated or settled city adjacent to a public street or alley and he has upon it, or suffers to be upon it, dangerous machinery, or a dangerous pit or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years, incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class."[4]

One would normally assume that bodies of water, even though hazardous, would constitute such an allurement for children as to become attractive nuisances. Courts, however, have historically held that natural water hazards are not within the scope of the doctrine[5] although the reasons advanced have not been consistent. From absence of liability for natural water hazards, it has been an easy step to excuse the owner for the consequences flowing from an artificial accumulation of water. Legally speaking, the arguments may sound strange, but they bear evidence of expediency. Some learned courts have displayed a remarkably business-like viewpoint in holding that it would be impracticable to guard the

[2] 84 U. S. (17 Wall.) 657, 21 L. Ed. 745 (1874).

[3] 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114 (1895).

[4] 154 Ill. 141 at 148, 39 N. E. 484 at 485.

[5] Peers v. Pierre, 336 Ill. App. 134, 83 N. E. (2d) 20 (1949); Wood v. Consumers Co., 334 Ill. App. 530, 79 N. E. (2d) 826 (1949). See additional citations in 8 A. L. R. (2d) 1262.

water hazard.[6] In *Sullivan* v. *Huidekoper*,[7] for example, the court used colorful language to the effect that every "man who has been brought up with the freedom allowed to American boys knows that you might as well try to dam the Nile with bulrushes as to keep boys away from ponds, pools or other bodies of water."[8] For want of better reason to deny liability, some courts have been induced to disregard the value of life and have advanced a morbid consideration based on a mathematic proportion between the small number of deaths in relation to the large number of boys who visit ponds or bodies of water.[9] Others, acting as amateur psychologists, have indicated that it is the nature of boys to seek out bodies of water so that the expense of securing the same from invasion would be astronomical in comparison to the utility derived from such water.[10]

It has been an accepted fact, in a few jurisdictions, that water may be considered to be patently dangerous, but these courts have refused to transfer the burden of the duty of protecting the infant from the parent to the property owner on whose land the water is situated. These courts presuppose that it is the duty of the parent to acquaint the child with the patent danger of water and of the possibility of drowning therein.[11] Such a duty is regarded as preventative on the part of the parent rather than a curative one resting on the property owner. As candidly stated in the Minnesota case of *Stendal* v. *Boyd*,[12] if an owner "must guard an artificial pond on his premises, so as to prevent injury to children who may be attracted to it, he must, on the same principle, guard a natural pond; and, if the latter, why not a brook or creek, for all water is equally alluring to children?"[13]

Being aware of the danger which would be created by fixing unlimited liability on the land owner, courts have nevertheless devised a method

[6] Melandez v. City of Los Angeles, 8 Cal. (2d) 741, 68 P. (2d) 971 (1937); Sullivan v. Huidekoper, 27 App. Cas. 154, 5 L. R. A. (N. S.) 263 (D. C., 1906); Emond v. Kimberly-Clark Co., 159 Wis. 83, 149 N. W. 760 (1914).

[7] 27 App. Cas. 154, 5 L. R. A. (N. S.) 263 (1906).

[8] 27 App. Cas. 154 at 163-4.

[9] Barnhart v. Chicago, M. & St. P. R. R. Co., 89 Wash. 304, 154 P. 441, L. R. A. 1916D 443 (1916); Holland v. Lanarkshire Middle Ward Dist. Council, [1909] Sc. L. Rep. 1142.

[10] Cobb v. Lowe Mfg. Co., 227 Ala. 456, 150 So. 687 (1933); Emond v. Kimberly-Clark Co., 159 Wis. 83, 149 N. W. 760 (1914).

[11] Luallen v. Woodstock Iron & Steel Corp., 236 Ala. 621, 184 So. 182 (1938); Peters v. Bowman, 15 Cal. 345, 47 P. 113, 56 Am. St. Rep. 106 (1896); King v. Simon Bruck Co., 42 Cal. App. (2d) 586, 126 P. (2d) 628 (1942); McCall v. McCallie, 48 Ga. App. 99, 171 S. E. 843 (1933); McKenna v. City of Shreveport, 16 La. App. 234, 133 So. 524 (1931).

[12] 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597 (1898). The complaint had been sustained in 67 Minn. 279, 69 N. W. 899 (1897).

[13] 73 Minn. 53 at 55, 75 N. W. 735.

of allowing for some degree of liability where water is artificially gathered on the land, yet limiting the scope of that liability. The vehicle by which this has been accomplished has been through the introduction of an element of unusual danger existing about the water hazard. Such unusual danger has been considered to be an additional allurement, turning the presence of water into an attractive nuisance. In the Illinois case of *Peers* v. *Pierre,*[14] a case similar on its facts to the instant one, the court denied recovery by saying that the "weight of authority is to the effect that the attractive nuisance doctrine does not apply to ponds *where there is no unusual danger.*"[15] But it did refer to *Pekin* v. *McMahon,*[16] one of the leading cases in which liability has been established because of the presence of an unusual danger. The danger there took the form of a raft-like log floating on the pond. The extra hazard necessary has been satisfied by a floating sidewalk;[17] by floating sawdust in the pool;[18] by a spoil bank with sand adjacent to the pool;[19] and by a plank walk with access to a pumphouse.[20]

Absent such an unusual danger, recovery has generally been denied in the so-called "excavation" cases. In the Texas case of *Banker* v. *McLaughlin,*[21] however, an infant was drowned in an excavation filled with water. The excavation was located in a homesite, in close proximity to dwellings wherein lived numerous families with children. No unusual danger was evident beyond the presence of accumulated water, but the court was persuaded to allow a recovery, utilizing the attractive nuisance doctrine as the basis therefor. It stressed three points to justify the result. In the first place, the body of water served no practical purpose and possessed no value or utility. Second, the water hazard could have been abated or removed at a nominal cost. The third point turned on the landowner's knowledge of the presence of children on the premises. The accumulation of these three was said to be enough to impose liability. That decision marked a departure from prior Texas holdings, but the views so expressed have found favor in only a few other jurisdictions.[22]

The Indiana court, in the instant case, may be said to have resolved

[14] 336 Ill. App. 134, 83 N. E. (2d) 20 (1948).

[15] 336 Ill. App. 134 at 138, 83 N. E. (2d) 20 at 22. Italics added.

[16] 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114 (1895).

[17] Linnberg v. City of Rock Island, 136 Ill. App. 495 (1907). The same case, on subsequent appeal, appears in 157 Ill. App. 527 (1910).

[18] Coeur d'Alene Lumber Co. v. Thompson, 215 F. 8, L. R. A. 1915A 731 (1914).

[19] Best v. District of Columbia, 291 U. S. 411, 54 S. Ct. 487, 78 L. Ed. 882 (1934).

[20] Howard v. City of Rockford, 270 Ill. App. 155 (1933).

[21] 146 Tex. 434, 208 S. W. (2d) 843, 8 A. L. R. (2d) 1231 (1948).

[22] Peters v. City of Tampa, 115 Fla. 666, 155 So. 854 (1934); Altus v. Mullihan, 98 Okla. 12, 23 P. 851 (1924); Pigford v. Cherokee Falls Mfg. Co., 124 S. C. 389, 117 S. E. 419 (1923).

the problem correctly, if correctness is to be measured by the weight of authority. The fact remains, however, that it is undeniable that certain bodies of water are hazardous to children who may be attracted by them. It may be better, for that reason, to have these cases decided on their individual facts rather than by attempting to fit them into arbitrary categories. Certainly, the Indiana court has not contributed to that end, while the Texas court, although not deciding correctly in view of the weight of authority, has shown an adventurous spirit which might well stimulate thought.

If practicability is to be the keynote, in working out a definition of a water hazard as an attractive nuisance, would it not be more practicable to permit the jury, rather than a court on demurrer, to evaluate the several factors? It might be remembered that to be practical is not always to be wise. But, for that matter, to be legal is not always to be just. A happy medium, however, may lie at the point where legal and practical approaches unite in the just and equitable disposition of cases.

E. F. NOWAK

WILLS—CONSTRUCTION—WHETHER OR NOT A LEGATEE GRANTED AN ANNUITY BY WILL MAY ELECT TO TAKE THE CAPITAL SUM IN LIEU THEREOF—The problem before the court in the recent Illinois case of *In re Herrick's Estate*[1] turned about the question as to whether or not a legatee could elect to take the capital sum in lieu of an annuity which had been provided for her under the will of the testatrix. It appeared that the testatrix had received literature from the American Bible Society explaining a plan by which persons desiring to help the society, and to further its missionary work, might do so by purchasing annuity contracts from it. Under these contracts, the named annuitant would receive a stipulated certain amount for life with reversion of the principal, at the annuitant's death, going to the society. Testatrix had, during her lifetime, purchased several such annuities with the avowed intention of helping the society in its work. By her will, she directed her executor to purchase another annuity from the same society for the benefit of her cousin. The executor, after the death of the testatrix, which was soon followed by the death of the annuitant-legatee, petitioned the probate court for directions concerning the purchase of the annuity. Objection was made by the executor of the estate of the cousin. He claimed the principal sum in lieu of the annuity. On appeal from an order overruling the objection and directing the executor to pay the fund to the society, the circuit court reversed

[1] Sub nom. American Bible Society v. Chase, 340 Ill. App. 548, 92 N. E. (2d) 332 (1950).

the judgment. The Appellate Court for the Second District, passing on the question for the first time in this state, in turn reversed the circuit court and remanded the case to the probate court with direction to proceed as originally ordered.

Cases dealing with testamentary direction to purchase or provide an annuity generally fall into one of three classes. Under the first, the will contains an absolute direction to make the purchase. The second group includes cases where the will contains a gift over of the residue, after payment of the annuity, to a designated remainderman. The third treats with a direction to purchase an annuity from a named corporation for the benefit of a designated annuitant for life with the understanding that any unexpended portion of the principal is to remain in the hands of the corporation.

As to the first class, an uninterrupted line of English cases has held that a bequest of money to be used in the purchase of an annuity gives to the legatee an unqualified right to elect to take the money itself, so as to put the annuitant in a position where he can insist that the annuity shall not be bought.[2] There is consistency in this reasoning[3] for it is based on the accepted premise that, as the legatee may sell the particular object as soon as it has been bought for him, the law should not require the doing of a nugatory act.[4] The first American case, that of *Reid* v. *Brown,*[5] adopted much the same view. The action was one to construe a will directing the purchase of an annuity for the benefit of a named person but with a direction to give the money to certain designated charitable organizations in the event the beneficiary had predeceased the testator. The annuitant, who had survived, elected to take the principal as a lump sum in preference to the annuity which might have been purchased therewith. The court, holding that she had that right, stated that: "Where an absolute and unqualified annuity is given, with instructions to invest a sum sufficient to purchase the annuity, the annuitant may elect to take the capital sum instead of having it invested for the purpose of producing the annuity."[6]

The fundamental principle which underlies this view, one which treats

[2] Ford v. Batley, 17 Beav. 303, 51 Eng. Rep. 1050 (1853); Kerr v. Middlesex Hospital, 2 DeG., M. & G. 576, 42 Eng. Rep. 996 (1852); Stokes v. Heron, 12 Cl. & Fin. 161, 8 Eng. Rep. 1361 (1845); Dawson v. Hearn, 1 Russ. & M. 606, 39 Eng. Rep. 232 (1831); Bayley v. Bishop, 9 Ves. jun. 6, 32 Eng. Rep. 501 (1803); Barnes v. Rowley, 3 Ves. jun. 305, 30 Eng. Rep. 1024 (1797); Yates v. Compton, 2 P. Wms. 308, 24 Eng. Rep. 743 (1725). See also Jarman, Wills, 7th Ed., Vol. 2, p. 1109.

[3] Scott, Trusts, Vol. 3, § 346, p. 1898. See also note in 41 Mich. L. Rev. 276.

[4] 2 Am. Jur., Annuities, § 33.

[5] 54 Misc. 481, 106 N. Y. S. 27 (1907).

[6] 54 Misc. 481 at 482, 106 N. Y. S. 27 at 27. See also Am. & Eng. Encyc. of Law, 2d Ed., Vol. 2, p. 399.

the annuity provision as no more than one providing for a transferable legacy, has been repeatedly followed in Massachusetts and New York.[7] In fact, the insistent refusal to follow the evident intention of the testator probably reached its peak in one New York case, that of *In re Cole's Estate,*[8] for the court there, in substance, stated the intention of the testator did not count as he should have known the law on the subject when he drew up his will. That attitude probably led to the passage of a statute in New York, one which forbids any right of election if there is a direction to purchase an annuity from an insurance company unless the will gives express recognition to such a right.[9] Despite this statute, a New York court, applying a strict construction thereto, has still permitted a right of election where the direction is one to purchase the annuity from some one other than an insurance company.[10]

In contrast, a larger number of American jurisdictions have refused to adopt the English view than have accepted it.[11] In the Ohio case of *Feiler* v. *Klein,*[12] for example, the court was faced with a similar problem arising under a direction in a will for the purchase of an annuity for the life of the beneficiary. It decided that the annuitant had no right to elect to take the principal in lieu thereof because it was said that the intention of the testator should control. When the will was construed as the court supposed the testator understood it, it revealed a purpose to lay out a fixed and certain amount in the purchase of the annuity but contemplated that the benefit thereof should accrue to the annuitant for life and not in one lump sum. In answer to the claim that the making of the purchase would be rendered nugatory by the annuitant's sale of the annuity contract, the court pointed out that the annuitant would find a

7 Parker v. Cobe, 208 Mass. 260, 94 N. E. 476 (1911); In re Cole's Estate, 219 N. Y. 435, 114 N. E. 785 (1916); In re Fisher's Estate, 261 App. Div. 252, 25 N. Y. S. (2d) 140 (1941); In re Proctor's Will, 235 App. Div. 6, 255 N. Y. S. 722 (1932); In re Fuller's Ex'rs, 227 App. Div. 801, 237 N. Y. S. 207 (1929); In re Bartuch's Will, 225 App. Div. 773, 232 N. Y. S. 36 (1928); In re Foster's Estate, 174 Misc. 933, 22 N. Y. S. (2d) 252 (1940); In re Oakley's Will, 142 Misc. 1, 254 N. Y. S. 306 (1931). See also In re Maybaum's Estate, 296 N. Y. 201, 71 N. E. (2d) 865 (1947).

8 219 N. Y. 435, 114 N. E. 785 (1916).

9 Thompson, Consol. Laws N. Y. 1939, Vol. 1, Ch. 13, § 47-b, Decedent Estate Law, states: "If a person hereafter dying shall direct in his will the purchase from an insurance company of an annuity, the person or persons to whom the income thereof shall be directed to be paid shall not have the right to elect to take the capital sum directed to be used for such purpose in lieu of such annuity except to the extent the will expressly provides for such right . . ."

10 See In re Fisher, 261 App. Div. 252, 25 N. Y. S. (2d) 140 (1941).

11 The problem appears to have arisen in only five states in addition to Massachusetts and New York. The opposite view is illustrated by In re Lawrence's Estate, 17 Cal. (2d) 1, 108 P. (2d) 893 (1941); Ketcham v. International Trust Co., 117 Colo. 559, 192 P. (2d) 426 (1948); In re Johnson's Estate, 238 Iowa 1221, 30 N. W. (2d) 164 (1947); Bedell v. Colby, 94 N. H. 384, 54 A. (2d) 161 (1947); Feiler v. Klein, 149 Ohio St. 237, 74 N. E. (2d) 384 (1947).

12 149 Ohio St. 237, 74 N. E. (2d) 384 (1947).

sale difficult as the face value of the contract would be uncertain. Except as an agreement might be worked out between the annuitant and the holder of the fund for a commutation thereof into, and payment of, its present worth, the majority reasoning is persuasive and reflects the sounder attitude that the intention of the testator should control.

The second class of cases deals with directions calling for the purchase of an annuity for life with a gift over of the residue to a designated remainderman. Again, the English decisions would seem to favor the right of the annuitant to elect to take the capital sum in lieu of the annuity, even to the disappointment of the remainderman's expectations,[13] but the American courts would appear to be in complete harmony on a rule to the effect that where there is a gift over the annuitant has no right of election.[14] Whatever the quality of the reasoning behind the English view, it would seem more nearly to be the intention of the testator, from the presence of the gift over, that the annuitant should have no more than a life interest. If the remainderman has a vested interest in the principal sum, or in the residue thereof, the annuitant certainly should not be allowed to destroy that interest.

Between these two views lies the third group, one into which the instant case falls. Herein are found the cases dealing with the purchase of annuities from a named company for the purpose of paying stipulated sums to the beneficiary for life but with the remainder, if any, staying in the hands of the company selling the contract. The first American case in this category also arose in New York. In the case of *In re Geis*,[15] the testator, who had been active in missionary work, made a will directing the purchase of annuities from certain missionary societies for the benefit of named legatees. These legatees claimed a right to elect to take the principal in lieu of the annuity provision but the court refused to permit any such election. The court considered it to be the intention of the testator that the beneficiaries were to receive what was, in essence, a life estate with a remainder over to the societies to receive the unexpended portions of the principal at the death of the annuitants, even though such purpose was not expressly stated. The purpose being, in reality, to make a gift to the societies of the residue after payment of the annuities, the annuitants were denied the right to destroy this vested interest in the principal. That holding has been followed in later cases arising in Ohio[16] and Maryland,[17] and is now accepted into the law of Illinois.

13 See Timins v. Stockhouse, 27 Beav. 434, 54 Eng. Rep. 170 (1858).

14 In re Oakley's Will, 142 Misc. 1, 254 N. Y. S. 306 (1931); In re Lejie's Estate, 181 Pa. 416, 37 A. 554 (1897).

15 167 Misc. 357, 3 N. Y. S. (2d) 770 (1938).

16 Feiler v. Klein, 149 Ohio St. 237, 74 N. E. (2d) 384 (1947).

17 The Maryland Court of Appeals, in Gilbert v. Finlay College, — Md. —, 74 A. (2d) 36 (1950), reached a similar conclusion on somewhat similar facts to the ones in the instant case.

When the particular plan of disposition utilized by the testator in the instant case is borne in mind, the results achieved are nothing if not eminently fitting. A testator, intent on providing a modicum of support for the natural objects of his bounty, but nothing more, ought to be assured that the unneeded portions of his estate will eventually inure to his favored charity without the necessity of interposing a trust to support the ultimate distribution. The instant holding provides that assurance.

B. BERGER