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NOTES

ABUSES OF MILITARY POWER AND ITS PUNISHMENT.—With the dawn of peace brushing over a war-torn world the people of the United States and all warring powers are confronted with the problem of the punishment of the abusers of military powers. As man has progressed along the road of civilization it has appeared to him that wars have been and are being waged more humanely. Today, contrary to practices employed in earlier times when wars were waged, prisoners are not sold into slavery and the property of the vanquished nation is not confiscated by and apportioned among the victors. But, upon a closer examination, it appears that the character of war has changed. Modern scientific improvements have made wars national programs involving the entire population of the nation, as against the type of war waged in the days when chivalry prevailed. Today, not as then, do we have standard armaments and professional soldiers of fortune to do our

fighting. Instead we find secret weapons and defenses a common-place thing in the scheme of twentieth century warfare and a system which engulfs and makes an active part of the war of every citizen, from the tiller of the soil to the industrial magnate. It would seem that man has been misled by some will o' the wisp subterfuge concerning the humaneness of war in our times.

The abuses of military powers are many, but for our consideration we will concern ourselves with only a few of the more outstanding infamies. Among these are the killing and robbery of defenseless prisoners of war, the violation of a flag of truce, or the commission of any acts of treachery or perfidy.[1]

The punishment of the abuses of military powers mentioned above fall under the following general rule: The principles of international law can be enforced by the separate nations and the means are immaterial.[2] It is inferrable from this that either nation engaged in the war may punish such acts whenever and in whatever manner possible. To illustrate this point a German case which happened during the last war should be cited.[3] During World War I, complaints were made by the British to the high German authorities against a non-commissioned officer in charge of prisoners of war, charging that he consistently mistreated British prisoners of war. He was removed from his command, court-martialed, and sentenced by the German Military Authorities. Our own Supreme Court has taken a similar view when it said "court-martials are lawful tribunals." [4] To point out the fact that a victor nation may punish abuses of military powers we cite [5] — "In regard to the application of the laws of war to enemies in arms, and their operation under a state of military government and martial law, it will have been seen that classes of persons who in our law *may become subject* to the military commissions are the following: *1.* Individuals of the enemy's army who have been guilty of illegitimate warfare or other offenses in violation with the laws of war."

The question immediately comes up for consideration: Is the individual soldier committing acts contrary to the rules and customs of war to be held liable for such acts when he is acting upon specific command of a superior officer? We need not go far, as far only as our own courts of justice, to see that the general rule answers this question in the negative.[6] This answer is no more than reasonable, for if a mili-

[1] Winthrop's Military Law and Precedents, 2nd Ed., Vols. 1 and 2, p. 839 and following.

[2] Blackstone's Commentaries on International Law, Vol. 1, p. 78; VanDeventer v. Hancke, Transvool (1903) Sup. Cit. 401; Jager v. Atty. General Natal, L. R. (1907) App. 326.

[3] German War Trials, British Parliament, (C. D. 1450), 1921, p. 8.

[4] Graften v. U. S., 206 U. S. 333 (1907).

[5] Winthrop's Military Law and Precedents, 2nd Ed. Vols. 1 and 2, p. 838.

[6] Tucker v. Alexandroff, 183 U. S. 424 (1901); Riggs v. State, 3 Caldwell 85 (Tenn.) (1866).

tary regime were to be founded on the basis that the individual soldier, at all times, had to suffer with his commanding officer for the commission of wrongful acts authorized by the officer, then the discipline among the individual soldiers would be very lax and no form of order — righteous or otherwise — would be properly carried out.

There is, however, an exception to the general rule for a subordinate who acts in conformity with orders which he knows involve a military or civil crime or misdemeanor is liable to punishment as an accomplice.[7]

An altogether unique situation presented itself in the following case.[8] When an officer in the army of the United States committed an offense against a native of the Philippines nothing could be done. The offense was against the laws of war but since peace had been made he could not be tried by a military commission. The U. S. courts could not try him because the offense took place in the Philippines. The Philippine courts couldn't try him because he was a part of the U. S. Army of Occupation. No court martial had any jurisdiction over him because he had left military service. It appears, therefore, that any criminal procedure against members of the armed forces who have been allegedly committing acts in violation of the laws of war must be brought during the actual progress of the war, before hostilities have ceased.

After having considered all the possibilities of punishing abusers of war powers, it seems that the only iron-clad policy that can be had must be attained by treaty. A very good example of the achievement of such methods is found in the following commentary:—The principle that individuals belonging to the armed and naval forces of the adversary are responsible under the criminal law for offenses against the laws and customs of war and may be tried and punished for such acts was first recognized in 1919 at the Treaty of Versailles between Germany and the Allied and Associated Powers. The treaty declared Germany "recognizes" the right of the Allies to bring before military tribunals persons having committed acts in violation of the laws and customs of war. This clause applied notwithstanding any prosecution before a tribunal in Germany and further required Germany to hand over all persons accused of having committed such acts.[9]

Eugene C. Wohlhorn.
Norbert S. Wleklinski.

COMPENSATION OF A RESIGNING EXECUTOR, ADMINISTRATOR OR TRUSTEE.—Generally, where an administrator or executor is removed, or resigns before complete administration it is a matter of judicial dis-

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7 British Retaliatory Orders in Council of 1807, pp. 13-15.

8 24 Ops. Attorney-General 570.

9 Garner: International Law and the World War, § 581.

cretion as to whether compensation shall be allowed, and in what amount, within statutory limits. Compensation has been denied.[1] Courts have exercised their discretion by apportioning compensation between successive administrators or executors.[2]

An executor who claims compensation although he has resigned his trust before fully administering the estate should present the court with facts which will enable it to exercise its discretion rationally and the allowance to him should never be liberal because a large allowance might prove detrimental to the estate itself, or unjust to its successor in administration.[3]

In the case of *In Re Peercy*,[4] where a successor had been appointed as administrator for a person who failed to keep accounts, and mingled the proceeds of the estate with his own funds, the court brought out the fact that the former administrator was not entitled to the statutory commision but,. to a part thereof as the court might apportion to him upon due consideration of the rights of successive administrators.

The question of allowance of compensation to executors or administrators who have resigned or been removed is frequently one primarily of statutory construction. Thus, a statute regulating settlement of the estates of deceased persons and allowing executors or administrators, as compensation "commissions upon the whole of the estate, accounted for" by them and requiring them to take into possession all of the estate, real and personal, has been held to apply only to those cases where the administration is complete and the estate finally settled. Where it allows compensation to an executor at the rates established; upon the whole value of the estate, it does not mean that the rate of compensation may be allowed to a succession of administrators of the same estate, since if this were true the estate might be consumed thereby; so that in such a case (where an administrator resigns or is removed, leaving the administration incomplete) it is the duty of the probate court to apportion the compensation.[5]

In Massachusetts, an executor was held not entitled to compensation (it being held that there was nothing to show that the court has erroneously disallowed compensation), where he was removed for not rendering an account to the probate court, as required by law, and an administrator *de bonis non* appointed, although the executor had rendered services in collecting rents and endeavoring to make a sale of the real estate.[6]

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1 Hermann's Estate, 226 Pa. 543, 75 Atl. 731 (1910).

2 Re Owen, 32 Utah 469, 91 Pac. 283 (1907); Brossman v. Fox, 52 App. D. C. 143, 284 Fed. 923 (1922).

3 Cherry v. Jarratt, 25 Miss. 221 (1852).

4 168 Cal. 750, 145 Pac. 88 (1914).

5 Ord. v. Little, 3 Cal. 287 (1853); In Re Puncy (Citation 4).

6 Brooks v. Jackson, 125 Mass. 307 (1878).

In cases of resignation or removal of an administrator or executor the question has sometimes arisen as to whether compensation may be allowed prior to the completion of administration. It has been held that the removed administrator is not entitled to compensation until the estate is finally settled. It seems that a public administrator, regularly appointed by the court, is entitled, in proceedings authorized by law for his removal not only reimbursement for his proper and necessary costs and expenses, but also compensation for services rendered.[7]

Where a testamentary trustee resigns for personal reasons, leaving the trust to be executed by others, the allowance of compensation and its amount are discretionary with the court,[8] and if compensation is allowed it must be measured by a different rule from that which the law applied when the trusts have been fully executed, and the trustee accepts the compensation awarded him, if any is awarded, as one of the terms or conditions of his discharge.[9]

On application of executors and testamentary trustees for leave to resign, the court if it permits the resignation can impose a condition that the trustee's commissions upon the principal of the trust shall be waived.[10] The general rule that commissions are not allowable to a trustee out of the corpus of the trust estate until final determination of the trusts and distribution of the assets has been held not to apply where the trustee is discharged upon his own request or agreement with the *cestui que* trust.

In the case of successive administrators, executors, or trustees, the compensation should be apportioned, each being entitled to compensation adjusted to the rights of the others.[11] The circumstances attending the removal may, however, be such as to deprive the trustee of the right to compensation on the corpus of the estate.[12] Furthermore, a trustee by resigning may deprive himself of commissions on the corpus of the estate.[13] It was held, however, that a testamentary trustee does not forfeit his right to commission for receiving the principal of the trust estate merely because he brings an action for leave to account and to resign the trust, when during the pendency of the action, and before leave to resign is granted, the trustee dies, since his action amounts to nothing more than an expression of his will to resign and he is still in office at the time of his death.[14]

In other cases, questions have arisen of a distinctive and varied nature. Where a testamentary trustee, prior to his removal from

[7] Re Jones, 166 Cal. 147, 135 Pac. 293 (1913).
[8] Re Strong, 19 Cal. 663, 51 P. 1078 (1898).
[9] Re Allen, 96 N. Y. 327 (1884).
[10] Re Curtis, 15 Misc. 545, 37 N. Y. S. 586 (1896).
[11] Re Leavitt, 8 Cal. App. 756, 97 P. 916 (1908).
[12] Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333 (1916).
[13] Re Williams Gurgh Trust Co., 72 Misc. 595, 131 N. Y. S. 989 (1911).
[14] Lensly v. Bogert, 87 Hun. 137, 33 N. Y. S. 975 (1895).

office on account of conviction of a criminal offense, had voluntarily paid the life beneficiary the entire income from the estate [15] it was held that the surrogate court had no jurisdiction to direct commissions to be paid to such removed trustee by his successor, but that, if any right to payment of commissions upon the income existed, the same right be asserted in another forum, broad enough to enforce its decree.

In *Haord v. Bradbury*,[16] under a statute providing that upon petition of a trustee of an express trust, a court having jurisdiction may accept his resignation and discharge him from the trust upon such terms as the rights of the persons interested in the trust may require, it was held that where a trustee files his resignation and a successor is appointed, his claim for compensation is a matter properly included in his report so that an adjudication on such a report was final, as regards the rights to issue execution thereon.

William O'Connell.

JURISDICTION OF EQUITY TO PROTECT PERSONAL RIGHTS.—In recent years, personal rights have assumed a more important and recognized place in the field of law. It appears that there is a growing tendency on the part of courts of equity to repudiate the theory that equity has jurisdiction to protect and enforce only property rights, and expressly to recognize the doctrine that personal rights stand on at least as high a plane as property rights, and often cannot be adequately protected except in a court of equity.

The court's construction and interpretation of the word "property" is sometimes the guiding factor in this type case. The Restatement of Trusts [1] defines property as, "The term 'property' denotes interests in things and not the things themselves." The Indiana courts [2] have construed property as, "Word 'property' in its legal sense means valuable right or interest in thing, rather than thing itself." Other authorities [3] have stated that "property" does not mean physical object itself but certain rights over object, and is the right to possession, use, and disposition of thing in such manner as is not inconsistent with law. "Property" is entirely the creature of the law. There is no form or color or visible trace by which it is possible to express the relation which constitutes property. It belongs not to physics but to metaphysics, and is altogether a creature of the mind. It is nothing more than the exclusive right of possessing, enjoying, and disposing of a thing.

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15 Re Bevuir, 17 Misc. 486, 41 N. Y. S. 268 (1896).
16 156 Ind. 30, 59 N. E. 31 (1901).

1 Restatement of Trust, § 2 (c).
2 Meek v. State, 185 N. E. 899, 205 Ind. 102 (1933).
3 Words and Phrases, Vol. 34.

It is interesting to note the distinction of—"What is a property right?", in a review of English and American cases. In reviewing the English case of *Sports & General Press Agency, Limited, v. Our Dogs' Publ. Cl., Limited,*[4] and comparing this case and other English cases with the majority of American cases it is clear to see that there is a clear split of judicial opinion regarding what constitutes a property right. The facts .vere as follows in the leading English case: "The plaintiffs, the Sports & General Press Agency, Ltd., were a publishing company carrying on business in London, and the defendants, who carried on business in Manchester, were the publishers and proprietors of Our Dogs, a weekly illustrated journal devoted solely to dogs. One Thomas Fall, bought from the Ladies' Kennel Association, "the sole photographic rights in connection with" a dog show organized by the association. Fall then sold his rights to the plaintiff. The defendant's agent had bought a ticket to the show and proceeded to take pictures of the dogs over the violent objections of the plaintiff and the representatives of the Ladies' Kennel Association. The defendant had been warned previously and had also been warned at this particular time against taking pictures of the dog show.

In deciding the case, Judge Horridge. held that: "in my view, therefore, the plaintiffs have no right of property which the defendants have knowingly infringed." The English judge held that the "sole exclusive right to take pictures" was not a property right.

The court made other remarks which are quite interesting in a discussion of property rights. The court stated in its dictum as follows: "If any person were to be in a position, for example from the top of a house, to photograph the show from outside it, the association would have had no right to stop him. In my judgment no one possesses a right of preventing another person photographing him any more than he has the right of preventing another person giving a description of him, providing the description is not libellous or otherwise wrongful. These rights do not exist. As, therefore, the Ladies' Kennel Association had no exclusive right to take photographs I do not think they could grant, as property, the exclusive photographic rights as they purported to do."

An American case of *Pittsburgh Athletic Co. v. KQV Broadcasting Company*[5] held contra to the remarks made by the English judge. In this case the Pittsburgh baseball team's play-by-play description was being broadcast by a company having the "exclusive right to broadcast, play-by-play, descriptions or accounts of the games played by the 'Pirates' at this and other fields." The General Mills Company and the National Broadcasting Company had given a very valuable

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[4] Sports & General Press Agency v. Our Dogs Publ. Co., L. R. (1916); 2 K. B. 880.

[5] Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 Fed. Supp. 490 (1938).

consideration for this right. The defendants arranged to get a play-by-play description of the game through stationing spotters at various advantageous places outside the baseball park and broadcasting from outside the park. Suit was brought to enjoin the defendants from this practice and the court granted an injunction. The court held as follows: "This right the defendant interferes with when it uses its broadcasting facilities for giving out the identical news obtained by its paid observers stationed at points outside Forbes Field for the purpose of securing information which it cannot otherwise acquire. This, in our judgment, amounts to unfair competition, and is a violation of the property rights of the plaintiffs."

It would seem in the English case that the court kept in its mind the fact that the defendant bought a ticket and because of his ticket he had a property right in the dog show as opposed to the owner. In the English case of *Hurst v. Picture Theatres,*[6] the court discussed this very problem of ticket and property right with regard to the rights of one to buy a ticket and see an entertainment performance. In this case the court held that a spectator in a theater, properly dressed and well behaved, had a propery right to remain.

The decision in the majority of United States' courts is contra as evidenced by the case of *Capital Theatre Co. v. Compton.*[7] Here the court held: "In the absence of some statutory regulation or restriction to the contrary, places of amusement and entertainment stand on the same basis as any other private business, and are under the sole control of the proprietor or manager, who may admit or exclude whomsoever he chooses. Nor is the rule affected by the fact that the patron is the holder of a ticket. The ticket does not confer right to enter or remain in the theater if the holder is not disorderly or otherwise objectionable."

From a review of these cases it seems clear that the court's decisions are based upon the definition of what is a property right. The English courts hold that the holder of a ticket has a property interest. In the United States, the courts hold that the holder of a ticket has no property right and is in fact a mere licensee. It is the property owner who is to determine as to the use of his property and the persons permitted to use the property. It is the landlord and owner, rather than the outside party, that holds the property interest.

Although the courts have been reluctant to admit that equity had jurisdiction to enforce or protect merely personal rights, and have usually discovered at least a nominal property right on which to base the granting of equitable relief, there are a few cases in which the courts have had the courage openly to repudiate the doctrine that

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[6] Hurst v. Pictures Theatres, 1 K. B. 1 (1915).

[7] Capital Theatre Co. v. Compton, 246 Ky. 130, 54 S. W. 2d 620 (1932).

only property rights will be protected, and to assert the jurisdiction of a court of equity to protect personal rights also.[8]

An unusual case of the exercise of equitable power to protect personal rights is *Ex parte Warfield*,[9] in which it was held that an injunction in favor of a husband, who had brought an action for partial alienation of his wife's affections, could be granted to prevent the defendant from writing to, speaking to, or talking with her, or from visiting the house where she stayed, in order to prevent him from exercising undue influence over her; and for violating such an injunction the defendant was punished for contempt. The court said: "Formerly, it seemed to be the rule that courts would only interfere where some property right or interest was involved, but now it seems the writ will be applied to an innumerable variety of cases, in which really no property right is involved. While in some of the cases the courts appear to adhere to the old rule, yet when we look at the case it is difficult to see any question of a property right, but a vain endeavor on the part of the court to adhere to the old doctrine, while it reaches out for the protection of some personal right."

Regarding the right of privacy, the dissenting judge in the case of *Schuyler v. Curtis* [10] stated: "I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one's person." Other cases such as *Roberson v. Rochester Folding Box Co.*,[11] holding that the unauthorized publication of one's likeness by another person, for advertising purposes, would not support a suit for an injunction on the theory that it was an invasion of a "right of privacy," are not decided, apparently, on the theory that equity will not protect personal rights, but on the ground that there is no right of privacy which justified the granting of the injunction.

It seems from a review of the cases that there are two reasons why courts differ regarding equity jurisdiction in personal right cases. It is frequently asserted doctrine that equity has jurisdiction only to enforce or protect property rights, and has not jurisdiction where merely personal rights are involved. Some courts hold strictly to this view, although the swing of the law is to a more liberal and practical point of view. The other factor causing a divergence of opinion is the court's construction of what is a property right. If the court gives a broad liberal construction of the term "property" it can be seen that the courts holding for enforcement of only property rights have an opportunity here to classify the right as a "property right" in order to do more complete justice.

Robert A. Oberfell.

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8 American Law Report, Vol. 14, p. 300.

9 Ex parte Warfield, 50 S. W. 933, 76 Amer. St. Rep. 724 (1899).

10 Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22 (1895).

11 Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902).

MICHIGAN STATE LAWS ON DOWER AND CURTESY, WITH RESPECT TO DEATH DUTIES.—The Michigan Inheritance Tax laws,[1] in Section 7.562, Section 2, cover the subject, as follows: "*Exemptions and Limitations — Transfer to Husband or Wife* — First, (b) Where the transfer is to a husband or a wife such transfer of property of the clear market value of $30,000 shall be exempt from all taxation under this act. In event no property is transfered to any minor child or children, the widow shall be entitled to an additional exemption of $5000 for each such child to whom no property is transferred.

"*Tax Rate on Excess; Widow's Allowance* — Second, In case the clear market value of the property transferred to each individual of the persons included in the classes specified in paragraph One (above) hereof exceeds the exemption specified in paragraph One, such exemptions shall first be exempted therefrom; where the clear market value of such property shall not exceed $50,000 before deducting such exemptions the transfer of such property in excess of the exemptions herein provided, and up to $50,000 shall be taxed under this act at the rate of 2 percentum of the clear market value thereof" (from here I shall tabulate the remainder)

Clear Market Value	*Tax Rate* (for excess over exemptions)
$ 50,000...............$250,000	4%
250,000............... 500,000	5%
500,000............... 750,000	6%
750,000	8%

"Provided; that portion of the property so transferred so (to) each individual of the persons included in the classes specified in paragraph One hereof, which consists of real estate, shall be taxable at three-quarters (3/4) the rates specified in this act. In determining the tax payable under this act, the property subject to tax shall be deemed to consist of real and personal property in the proportions that the clear market value of such real property and such personal property, respectively, bear to the clear market value of the total property so transferred.

"The exemptions of — paragraph One of section two of this act shall apply and be granted to each beneficiary's interest therein, and not to the entire estate of a decedent. No deductions or exemptions from such tax shall be made for any allowance granted by the order of any court for the maintenance and support of the widow or family of a decedent pending the administration of the estate when there is income from such

[1] Mich. Stat. Anno., 1936-1943.

estate accruing after death, which is available to pay such allowance, or for a longer period than one year, or for a greater amount than is actually used and expended for the maintenance and support of such widow or family for one year."

To compare the tax rate of widows or widowers with the regular tax rate, I shall go on:

"Third — (a) Except as hereinafter provided, in cases other than those specified in paragraph two hereof, the tax shall be at the rate of 10 percentum of the clear market value of the property transferred not exceeding $50,000. (b) Upon all in excess of $50,000, and up to $500,000, 12 percentum. (c) Upon all in excess of $500,000, 15 percentum."

In tracing the history of Michigan's "Dower and Curtesy Policy," with respect to death duties, we find that the act as it stands now is much more complicated than it has been in the past.

In the 1929 Public Acts, No. 35, under the present Clause two, the tax rates were 1, 2, 4, 6, and 8% respectively, instead of 2, 4, 5, 6, and 8%, as they are now. Under Clause Three (a) the rate was 5% instead of 10%, and under (b), 10% instead of 12%, as at present. In other respects the section was the same as the above.

In the 1923 Public Acts, No. 257, under the present clause One (b) the exempt transfer was only to a wife, rather than to a husband *or* wife, as at present, and the amount so exempted only less than $10,000, rather than $30,000, as at present. There was no provision that when no property was transferred to any minor child or children the widow was entitled to the present additional exemption of $5,000 for each child to whom no property was transferred. Under Clause two this act did provide for the deduction of the exemption from the $50,000, but taxed the entire $50,000 at the rate of 1 percentum; then, from $50,000 to $250,000 at the rate of 2% of the clear market value thereof; from $250,000 to $500,000 at the rate of 4% of the clear market value thereof, etc. as in the 1929 act. No provision was made for taxing real property at 3/4 of its value. Under Clause three, the rate was the same as in the 1929 act.

Under the 1919 act, the property was not taxable under the act unless it was personal property to the clear market value of $2000 or over, and when the transfer was to a wife it was not to be taxable unless it was personal property to the clear market value of $5000, in which cases the entire transfer was to be taxed at the rate of 1%. In other cases the rate was to be 5%:

In one Michigan case[2] the constitutionality of Public Acts 1903, No. 195, Sections 1 and 2, providing that transfers to lineal heirs of

[2] In Re Estate of Fox, 154 Mich., 5; 117 N. W. 558 (1908).

personal estate of less than $2000 shall be exempt from the inheritance tax while, if the estate be $2000 or more, it shall, in its entirety, be subject to the same, was questioned, on the ground that it was unjust discrimination. The court held that there was no unjust discrimination, since it treated all persons within the same class alike.

This same case was reversed at a later time, on other grounds.[3] The Michigan Inheritance Tax Act was largely copied from a similar New York statute, and adopted a certain form, from the New York statute, to be followed by the probate judge. This form indicated that in determining the amount of personal property subject to tax, mortgage debts should be deducted from the realty. Held; this form was not controlling in interpreting the Michigan statute, where the intent clearly appeared that mortgage debts should be deducted from the personalty (This opinion superseded the earlier one.)

The Attorney General of Michigan (in 1923) stated in one opinion [4] that under the statute, the proceeds of a life insurance policy made payable to a trust company, though for the benefit of the insured's wife and children, passes to the estate of the assured, and is burdened with the inheritance tax.

In a leading Illinois case [5] (on the matter of interpretation of the wording of statutes) the decision harmonized with practically all the direct authority. The point was that the low rates applicable to the "husband of the daughter" are also intended for the widower of a daughter, although the daughter predeceased the testator. Likewise in New Jersey,[6] where the court construed the phrase "husband of a daughter" as describing one holding the relation of having married the daughter; it was declared that there did not appear to be any sound reason why the exemption should extend to the wife or widow of a son, but simply to the husband of a living daughter; and the court said that since the statute had not added any limitations, the relationship of husband for purposes of description should persist. The same was held in one New York case.[7] In another (later) New York case even the husband's remarriage during the testatrix's lifetime was held not to bar the exemption.[8] Concerning this last question — In an earlier Pennsylvania case [9] a collateral inheritance tax exemption in favor of the "wife or widow" of a son was held not to inure to the benefit of such a widow who remarried before the testatrix died; the court held that the exemption claimant was not the wife of the testa-

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[3] In Re Estate of Fox, 159 Mich., 420; 124 N. W. 60 (1909).

[4] Op. Atty. Gen., 1923, '24, pp. 331, 332 (Mich.)

[5] People of the State of Illinois v. Noble E. Snyder et al., 353 Ill., 184; 187 N. E. 158 (1933).

[6] Clay v. Edwards, 84 N. J. L. 221; 86 Atl. 548 (1913).

[7] In Re Woolsey, 19 Abb. N. C. (N. Y.) 232 (1887).

[8] In Re Ray, 35 N. Y. Supp. 481; 13 Misc. 480 (1895).

[9] Commonwealth of Pennsylvania v. Powell, 51 Pa. 438 (1866).

tor's son, for he was dead, nor his widow, for she was again married, and declared that the word "widow" was so entirely and exclusively descriptive of an unmarried condition, having once been married, that any other sense would be figurative; but the court did concede that if the property *had* passed to the widow, and she had married before the settlement of the estate, it could not be pretended that this would divest her of her right of exemption.

Vincent H. Meli.

REMEDIES OF LOWER RIPARIANS AGAINST INDUSTRIAL AND MUNICIPAL POLLUTION OF STREAMS IN INDIANA.—That any of the Indiana stream pollution statutes can be successfully invoked by aggrieved lower riparians, with respect to either industrial or municipal pollution, appears to be ruled out by the very language of the statutes involved, as well as cases cited in the annotations. Title 35, Sec. 201 Burns' Ind. St. Anno., 1933, would appear to be inapplicable because it provides that complaints to the State Board of Health, pursuant to the provisions of the Act, shall be made by a "common council, board of health of any city or town, or board of county commissioners of any county, or the trustee of any township in the state. . . ." The fact that only municipal authorities are named in the Act as being competent to file complaints thereunder seems to suggest by implication that private persons are incompetent to petition the Board. So held in *City of Frankfort v. Slipher, infra.*

Likewise, as a matter of statutory construction, the State Stream Pollution Control Board Act,[1] supplementing Title 35, Sec. 201 *et seq.* Burns' Ind. St. Anno., 1933, and repealing Title 68, Sec. 501-16, inclusive, offers little encouragement to downstream victims of stream pollution. This Act merely creates an administrative board known as the "Stream Pollution Control Board of Indiana," and proceeds to define its powers and duties. The Board is given jurisdiction to control and prevent "pollution in the waters of this state with any substance which is deleterious to the public health or to the prosecution of any industry or lawful occupation. . . ." But it must be noted that there is no express provision in the Act relating to the filing of complaints by persons adversely affected by upper riparian pollution. On the other hand, the Board is given sweeping powers to initiate its own investigations and issue orders pursuant thereto.[2] It does not appear that the Board's assistance has at any time been invoked by a private litigant.

Title 10, Sec. 2506 of the Indiana Criminal Code provides in part:[3] "It shall be unlawful for any person, firm, or *corporation* to throw, run,

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1 Title 68, § 517, Burns' Ind. Stat. Anno., 1943 Replacement.
2 Title 68, § 521 et seq., Burns' Ind. Stat. Anno., 1943 Replacement.
3 Title 10, § 2506, Burns' Ind. Stat. Anno., 1942 Replacement.

drain, or otherwise deposit into any of the waters of this state . . . any dye stuff, acid, coal tar, oil, log wood, or any by-products or derivatives of any such, or any other poisonous substance, *which of itself is deleterious to the public health* or to the prosecution of any kind of industry . . . or lawful occupation . . ." The word *corporation* as used in the foregoing paragraph apparently comprehends municipal corporations as well as private corporations, its meaning being clarified in Sec. 2509 of the same title. But a more serious question is raised in the construction of ". . . or *any other* poisonous substance which of itself is deleterious to the public health . . ." Does the word *poisonous* comprehend the discharge of sewage by municipal corporations into streams and rivers? Probably not, although no cases have arisen on this point within the last twenty years. In summarizing, then, the statutory remedies available to lower riparians against industrial and municipal pollution, it is the writer's belief that so far as the offending municipalities are concerned, this is *no* statutory remedy. With respect to offending industries, the adversely affected riparian *prima facie,* could have criminal action taken to abate the nuisance under Title 35, Sec. 2507 of the Indiana Criminal Code.[4] There are no annotations or citations to this effect, however. So to recover damages, the riparian must in any event look beyond the statutes.

In dealing with the problem of municipal pollution of streams, the Indiana courts have not tried to distinguish between the liability of such corporations acting in a governmental, as opposed to a proprietary, capacity. In *City of Valparaiso v. Moffitt* [5] the city was held liable for maintaining a nuisance by disposing of the city sewage in a stream flowing through plaintiff's property and rendering such property unfit for use. The subsequent case of *City of Richmond v. Test* [6] denies liability under the same circumstances on the theory that the city had utilized the only practicable means at hand for dispatching its sewage. Although this case constituted a radical departure from the rule in *City of Valparaiso v. Moffitt, supra,* the facts involved were analogous and the the Appellate Court have no reason why the earlier case should not be controlling. *City of Valparaiso v. Hagen et al,*[7] following the Richmond case, reflected the inclination of the Indiana Supreme Court to adhere to the rule in the Richmond case as laid down by the Appellate Court, to the further discredit of *City of Valparaiso v. Moffitt, supra.* The Hagen case was in the nature of an injunction suit brought by lower riparians to preclude the City of Valparaiso from discharging sewage into Salt Creek. Held, injunction denied. Taking cognizance of the practical exigencies of the situation, the Court said: "The sewage must be dispatched or the city abandoned. . . The facts present a case

[4] Burns' Ind. Stat. Anno., 1942 Replacement.

[5] 12 Ind. App. 250 (1894).

[6] 18 Ind. App. 482 (1897).

[7] 153 Ind. 1062, 54 N. E. 1062 (1899).

wherein the principle of the greatest good to the greatest number must be permitted to operate and private interest yield to the public good. . ."

Superseding the purport and effect of the preceding authorities, however, is the comparatively recent case of *City of Frankfort v. Slipher.*[8] This is the most recent case in Indiana bearing directly on the question of municipal pollution of water courses and the applicability of statutes thereto. The *Slipher* case is cited and followed in *Northern Indiana Public Co. v. Vesey*[9] and *Zabst v. City of Angola*[10] insofar as its conclusions apply. So it must be observed that *City of Frankfort v. Slipher, supra,* is controlling in Indiana today. It was an action for damages brought by a lower riparian growing out of the pollution of Prairie Creek by the alleged unlawful deposit of sewage therein. The City of Frankfort appealed from a judgment in the plaintiff's favor. The city conceded that a private individual has no right to pollute a stream to the injury of lower riparians, but contend that (1) a different rule obtains with respect to municipal corporations, citing *City of Valparaiso v. Hagen*[11] and *City of Richmond v. Test;*[12] also, that (2) Title 8, Sec. 125-35, inclusive, Burns' Stat. 1926, Acts 1909 p. 60 (now Burns' Ind. Stat. Anno., 1933, Title 35, Sec. 201 *et seq.*) provided a statutory remedy of which appellee must fully avail himself before maintaining the present action. In affirming the trial court's judgment directing the City of Frankort to pay damages of $3962.07, the Appellate Court disposed of the appellant's first contention by noting the fact that in the instant case the appellant, by the expenditure of a reasonable sum of money, *could have* financed the construction of a sewage reduction plant, rendering said sewage inoffensive and innocuous to lower riparians. That this was not done was held to constitute actionable negligence on the part of the city. The fact that the *alternative* method of sewage disposal was here available to the appellant appears to be controlling, and distinguishes this case from *City of Valparaiso v. Hagen, supra,* the latter case being further distinguishable from the instant case in that it was an injunction suit rather than one for damages. Appellant's second contention was disposed of by a judicial construction of Title 8, Sec. 125 *et seq.*, Burns' 1926 Stat. (now Burns' Ind. Stat. Anno., 1933, Title 35, Sec. 201 *et seq.*) wherein the Appellate Court said: "The statute is *not* available to an individual landowner like this appellee, who suffers a special injury different from that suffered by the public. The individual landowner must seek relief through the courts, as did appellee in the instant case. . . ."

[8] Frankfort v. Slipher, 88 Ind. App. 356 (1928); Rehearing denied Oct. 5, 1928; Transfer denied, Dec. 7, 1928.

[9] 210 Ind. 338, 200 N. E. 620 (1936).

[10] 99 Ind. App. 111, 190 N. E. 891 (1934).

[11] 153 Ind. 337, 54 N. E. 1062 (1899).

[12] 18 Ind. App. 482, 48 N. E. 610 (1897).

Aside from the fact that today a municipality might interpose as a defense its inability to obtain priorities for the erection of a sewage disposal plant, the foregoing analysis of *City of Frankfort v. Slipher, supra,* would suggest that as the law now stands in Indiana, lower riparians *can* maintain actions against municipalities for injuries resulting from stream pollution. Such complaints, under the reformed code pleading in this state, could be framed to recover accrued damages in addition to equitable relief by way of injunction. Offending municipalities are usually given a reasonable time in which to construct sewage disposal plants or take other affirmative action before the injunction sought becomes effective. But in any event legal damages are recoverable.

Turning now to the question of industrial pollution of streams, which presents a clearer case, — a long line of Indiana decisions [13] culminating in *West Muncie Strawboard Co. v. Slack* [14] uniformly hold that industrial pollution of water courses is enjoinable as a public nuisance,[15] and, in addition, lower riparians have consistently been allowed to recover legal damages in such instances.[16] The only divergence of opinion is found in methods to be used in computing damages,[17] but that is essentially a problem in damages, and is not germane to the purpose of this paper.

The essentiality of the offending industry has been accorded little consideration in the courts of this state. See *Indianapolis Water Co. v. American Strawboard Co.,*[18] and cases cited thereunder.

By way of conclusion, then, it may be said that as is now the case with municipalities, lower riparians suffering from industrial pollution have an approved remedy of injunction, in addition to legal damages accrued up to the time the suit is brought.

David S. Landis.
Norbert S. Wleklinski.

RESTRAINT ON ALIENATION OF PROPERTY.—Where the owner of property creates a trust under which the income is payable to a beneficiary for life and it is provided that the interest of the beneficiary shall not be transferable by him and that his creditors shall not be permitted to reach it, the question arises whether these direct restraints on aliena-

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13 Weston Paper Co. v. Pope, 155 Ind. 394, 56 L. R. A. 899 (1900); Muncie Pulp Co. v. Martin, 23 Ind. App. 558 (1899); Indianapolis Water Co. v. American Strawboard Co., 53 F. 970 (1893).

14 164 Ind. 21 (1904).

15 164 Ind. 21 (1904).

16 164 Ind. 21 (1904).

17 Maddox v. International Paper Co. et al., 47 F. Supp. 829 (1942).

18 53 F. 970 (1893).

tion are valid? Naturally the question also arises; are the courts in the United States to recognize a spendthrift trust in that direct restraints on alienation of property are created through spendthrift trusts?

It has been the policy of English courts to refuse to recognize a spendthrift trust. The case, *Brandon v. Robinson* [1] is a good example of the position taken by the English courts. In this case, the testator left real and personal property in trust to pay the income to his son for life and on his death, to pay the principal to his next of kin. He further provided that the income should be paid into his own son's hands. The son later became bankrupt and the assignee in bankruptcy brought suit in equity to reach his interest in the trust. Lord Eldon in giving the opinion of the court stated in part that there was no doubt the property may be given to a man until he shall become bankrupt, it is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate, and as has been observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy is over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alienate it. If that condition is so expressed as to amount to a limitation reducing the interest short of a life estate, neither the man, nor his assignees *can have it beyond the period limited.* Therefore the interest of the beneficiary should terminate on his bankruptcy. The case *Graves v. Dolphin* [2] substantiates the decision of the court in the above case.

The English view is maintained by the courts in Rhode Island, Alabama, Kentucky and New Hampshire. In *Tillinghast v. Bradford,*[3] Judge C. J. Ames summarizes the position taken by Rhode Island courts when he stated,

"It is quite clear that it was the intention of the testator to make an alimentary provision for his son during life, which should give him all the advantages of an estate in fee, without the legal incidents of such an estate—alienability, unless by will, and subjectiveness to the payment of the son's debt. Such restraints, however are so opposed to the nature of property—and, so far as subjectiveness to debts is concerned, to the honest policy of the law—as to be totally void, unless, which is not the case here, in the event of its being attempted to be aliened, or seized for debts, it is given over by the testator to someone else. This has been the settled doctrine of the court of chancery, at least, since *Brandon v. Robinson* [4] and in application to such a case as this is so honest and just that we would not change it if we could. Certainly no man should have an estate to live on, but

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1 18 Ves. 429 (1811).

2 I Sim. 66 (1826).

3 5 Rhode Island 205 (1856).

4 5 Rhode Island 205 (1856).

not an estate to pay his debts with. Certainly property available for the purpose of pleasure or profit should be also amenable to the demand of justice."

The Alabama courts, in *Rugley v. Robinson*[5] held that spendthrift trusts are invalid as against the right of creditors. In this case, property was given for the benefit of A and his family during A's lifetime and there was an express provision that it should not be subject to the payment of any debt he may owe. Held that A should share equally with the family and that except as to the property which was to be used by A and his family in specie, A's interest could be reached in equity by his creditors.

In New Hampshire, the courts have held that restraints on the alienation of an interest absolutely owing to the beneficiary of a trust are invalid, at least as far as the rights of creditors are concerned. A recent case, *Brahmey v. Rollins*[6] is an excellent example of this. This case arose out of a trust which had been created by the defendant's former husband. By its terms she was to receive five thousand dollars annually but upon condition, the condition that the said annuity shall not be assigned, alienated, or pledged in any manner or subject to attachment or any indebtedness. The plaintiff obtained a judgment and brought a creditor's bill to obtain payment of the money and the court allowed recovery, and held the right of creditors to reach property owned by their debtors "is a public regulation of property private control."

The state of Kentucky is one of the few jurisdictions which allow restraints on the alienation of legal interests. These cases however allow only restraints against the voluntary alienation as was seen in the case *Sparrow v. Sparrow*.[7] The court held here that the testatrix had a right by her will to prohibit absolutely the sale of her property for any period of time not beyond the limitation placed upon final alienation and distribution of her estate. Kentucky courts refuse to allow limitation on the creditors. In *Smith v. Smith*[8] the court said in part that no man can hold as his own and enjoy property free from the claim of creditors. The creditors' rights are conferred by law and therefore cannot be set aside by the will of the testator.

The late Professor John Chipman Gray in his book on Restraints on Alienation further strengthened the case against any restraint on alienation of property. He said in part he believed that the English doctrine was a wholesome one, fit to produce a manly race, based on sound morality and wise philosophy. He went on to say that the rapid growth of the new doctrine allowing spendthrift trusts was due

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5 10 Ala. 702 (1844).

6 87 New Hampshire Rep. 290; 179 A. 186 (1935).

7 171 Kentucky Rep. 101; 186 S. W. 904 (1916).

8 24 Kentucky Law Rep. 2261; 73 S. W. 1028 (1903).

to the influence of the opinion of Mr. Justice Miller in *Nichols v. Eaton*; [9] to the spirit of the times which looked with complacency on the failure to pay debts both public and private; to the reaction against the doctrine of *"laissez faire,"* of sacredness of contract, and of individual liberty, which were prevalent during the greater part of the nineteenth century; to the spirit of paternalism, which is the fundamental essence alike of spendthrift trusts and of socialism. Mr. Gray was particularly indignant at the decisions of courts who permitted the beneficiary of a trust to retain what is necessary for his support. It is interesting to note that Mr. Austin Scott in his "Law of Trust" [10] advocates that the amount involved in the trust should be limited to the amount necessary for the support of the beneficiary. He disagrees with Mr. Gray in that respect.

In the past forty years however spendthrift trusts have either been upheld by decision or established by statute in many jurisdictions, with some modification. Justice C. J. Morton in a leading Massachusetts case, *Broadway National Bank v. Adams* [11] stated the attitude of courts of that state when he said,

"It is argued that investing a man with apparent wealth tends to mislead his creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and the extent of his estate especially in the commonwealth where all wills and most deeds are, spread upon the public records."

The state of California adopted spendthrift trusts with some modification. The court stated in *McColgan v. Walter Magee* [12] that a spendthrift trust may be created in the rents and profits of realty if the beneficiary is restrained from disposing of his interest only during life or a term of years; but where a trust is created to receive rents and profits, and no valid direction for accumulation is given, the surplus beyond what is necessary for the education and support of the person for whose benefit the trust is created, is liable for the claims of his creditors. The court concluded by stating that spendthrift trusts, inalienable by the beneficiary, and inaccessible to his creditors during his life or for a term of years are valid in California.

Spendthrift trusts were held valid in Mississippi through the case *Mitchell v. Choctaw Bank,*[13] also in *Lampert v. Haydel* [14] a Missouri

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[9] 91 U. S. 716; 23 Law Edition 254 (1875).
[10] Scotts Law of Trust, Vol. I, § 152, p. 749.
[11] 133 Mass. 170 (1882).
[12] 172 California Rep. 182; 155 P. 995 (1916).
[13] 107 Miss. Rep. 314; 65 S. 278 (1914).
[14] 96 Mo. Rep. 439; 9 S. W. 780 (1888).

case in which the state of Missouri went on record as favoring such trust but the claims of the wife and children of the beneficiary for support must be given consideration. In other words the spendthrift trust is valid against all claims of creditors except the claims above mentioned. The state of Georgia courts hold that if the beneficiary falls within the classes marked out in section 108-114 of the Georgia code, his interest may be made inalienable by the instrument creating the trust. However in the case *Maxwell v. Rice* [15] a trust was created for one who was apparently within the classes specified within the code but the court held the creditors would be allowed to reach the beneficiary's life interest. The case *Sinnot v. Moore* [16] sheds further light on the subject. The courts held here that the beneficiary must abide by the terms of the trust and not assign it to anyone. In the light of the two decisions and the statute one must infer that a spendthrift trust may be created on condition that the beneficiary may be reached by creditors but can not assign the trust to anyone.

The Illinois courts have adopted Spendthrift Trusts as was seen in the case *Congress Hotel v. Martin* [17] where the courts held that an owner of property having the necessary qualifications may dispose of his property by will as he may see fit, with such limitations as he may choose to impose not contrary to law. They went on to say that the trustee can refuse to turn over any of the trust money to the debtors of the beneficiary. But income from a spendthrift trust may be reached by a wife in payment of alimony.[18]

Maine joined the group of states which uphold the validity of spendthrift trusts. The case *Roberts v. Stevens* [19] serves to prove the aforesaid validity. Briefly the court held the interest not subject to the claims of the creditors and dismissed a creditor's bill.

Maryland's courts state that spendthrift trusts which secure income and principal against creditors are valid but one may not create a trust in his own favor, *Johnson v. Stringer*.[20]

Other states which uphold such trusts are Oregon—*Mattison v. Mattison*,[21] South Carolina—*Lynch v. Lynch*,[22] this case it might be mentioned was very important in that the decision was adopted by the United States Supreme Court. Judge Dennis stated that in most

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15 10 Ga. App. Rep. 643; 73 S. E. 550 (1912).

16 113 Ga. Rep. 908; 39 S. E. 415 (1901).

17 230 Ill. App. 619; 143 N. E. 838 (1924).

18 223 Ill. App. 549 (1922).

19 84 Maine Rep. 325; 24 A. 873 (1892).

20 158 Maryland Rep. 315; 148 A. 447 (1930).

21 53 Oregon Rep. 254; 100 P. 4 (1909).

22 161 South Carolina Rep. 170; 159 S. E. 26 (1931).

all of the United States the spendthrift has been sustained. This was to protect the donor's right of property and the right to choose the object of his bounty.

Finally some states have failed to adopt a statute or rule with regards to spendthrift trusts. In this classification falls, Wyoming, Utah, South Dakota, New Mexico, Nevada, Colorado and Florida.

Theodore M. Ryan.

THE EFFECT OF A SOLDIER'S WIFE'S SUBSEQUENT MARRIAGE WHILE THE SOLDIER IS STILL ALIVE.—An interesting problem in domestic relations is found in the following situation. Mr. A and Miss B were married. Mr. A was called into the armed forces and was sent overseas. Later Mrs. A received an official telegram from the War Department which informed her that her husband, A, was killed in action. Later, Mrs. A met Mr. C and became his wife by a ceremonial marriage. After this second marriage, Mr. A returned home very much alive thus showing that the War Department telegram was false. Upon finding his wife married to Mr. C, A committed suicide. Two questions are at once presented: (1) What is the status of Mrs. A and Mr. C while A is still alive? and (2) What is the status of Mrs. A and Mr. C after A has killed himself? Because it contains elements abounding in our numerous war marriages of today, the problem presented for discussion is one that seems certain to frequently recur for adjudication during the post war years. Because of the public interest inherent in marriage, courts in future adjudication will be called upon to make subtle distinctions in distinguishing relations that were meretricious in origin from those whose inception, although void because of an existing impediment, were honestly entered into by participants of our armed forces.

In our case there are several important assumptions that we deem imperative. The first is that the telegram from the war department, reporting A killed in action, is officially cognizable in our courts. In the instant case, we take judicial notice of the telegram from the war department. The second is that both parties to the second or subsequent marriage entered into that relationship in all good faith. As there is no evidence to the contrary, we shall assume this to be true.

Semper praesumitur pro matrimonio has long been a universal maxim of the law of domestic relations, and courts have been ever reluctant to rebut this presumption. Schouler, in his *Marriage, Divorce, Separation and Domestic Relations,* formulates the general principle: "It will be presumed that where parties live openly together as husband and wife for many years, a prior marriage of one of them to a third party has been dissolved by death or divorce." [1]

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1 Paragraph No. 1252.

An Illinois Court recently proclaimed the extent of these marital presumptions in adjudicating *In re Estate of Panico* when it said: "It is true that where a valid marriage is shown, a presumption exists that the status of that marriage continues and it is also the law that in the absence of evidence to the contrary, a first marriage will be presumed to have been terminated by death or divorce prior to the time of a second marriage by one of the parties because the law presumes that the parties in contracting a marriage, and in subsequently cohabiting, were innocent of immorality or crime, and that there was no legal impediment to its consummation, but such a presumption is not conclusive. The second marriage being shown, the law raises a strong presumption in favor of its legality, and casts the burden upon the one attacking the second marriage of proving that one of the parties to the second marriage had not been divorced from his or her former spouse before the second marriage. In other words, the law is so positive that it requires a party who asserts the illegality of a marriage to take the burden of proving it, notwithstanding it involves the proof of a negative. And the presumption is not overcome by mere proof of a prior marriage, and that one of the parties thereto had not obtained a divorce, because the other party to such prior marriage may have obtained such divorce, thus terminating the marriage." [2]

A court in our jurisdiction stated the problem succintly in *Jones v. Millikin:* "The law presumes innocence, not guilt, morality, not immorality; marriage not concubinage. It follows that there is a presumption that the second marriage is valid and that all obstacles thereto, if any, had been removed. That presumption is not overcome by a presumption that a former marriage, once shown to exist, continues. The presumption in favor of a second marriage is not conclusive. However, one attacking such marriage has the burden of proving its invalidity." [3]

As the above court pointed out such a presumption in favor of the second marriage is not conclusive and *Schouler* further states this in his authoritative work: "Nor is a new marriage entered into by one spouse in good faith and in full but erroneous belief that the other spouse is dead, valid even after the lapse of the statutory absence; such parties are not free to marry again, but only relieved of the worst consequences, although one party honestly believes the other to be free to marry. Some of the harsher features of the old law have been softened in our own legislation and statutes are not uncommon which possibly extend facilities for divorce from the old relation, and in any event protect the offspring of a new marriage contracted erroneously, but in good faith, by parties who had reason to believe a former spouse dead." [4]

An example of progressive legislation, mentioned by *Schouler,* that protects the children begotten of the subsequent and void marriage is

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2 268 Ill. App. 585 (1923).

3 42 Pac. (2) 467, 96 Colo. 279 (1935).

4 Marriage, Divorce, Separation & Domestic Relations, Paragraph No. 1128.

a Massachusetts statute that reads: "If a marriage is declared void by reason of a prior marriage of either party, and the court finds that the second marriage was contracted with the full belief of the party who was capable of contracting the second marriage that the former husband or wife was dead, or that the former marriage was void, or that a divorce had been decreed leaving the party to the former marriage free to marry again, such finding shall be stated in the decree, and the issue of the second marriage, if born or begotten before the second marriage was declared void, shall be the legitimate issue of the parent capable of contracting the marriage." [5] Here we see an admirable legislative cushioning of one of the consequences that naturally follows the rebutting of the presumption of the validity of the second marriage where children are involved.

It would appear then, that when A returns the presumption of the validity of the second marriage is rebutted, and the status of B and C is, while A is alive, rendered illicit. Further, unless their relationship has the aid of a comparable statute as quoted above, their children would be tainted with illegitimacy. This, fortunately, is not the situation because A, by taking his own life, makes it possible to legally recognize B and C's continued cohabitation after A's death. As there's nothing to indicate that B and C had a new ceremony of marriage after A's death, we must assume that there was no further ceremony but merely continued cohabitation.

Authorities are to be found in dealing with the above situation. *Corpus Juris* makes the statement: "Where parties to an agreement and relationship which, but for the existence of an impediment would have constituted a valid marriage continue in the relationship in good faith, upon the removal of the impediment the law will establish between them a valid common law marriage." [6]

A. L. R. is equally clear: "The general rule is that, if parties desire marriage and do what they can to render their union matrimonial, but one of them is under a disability, their cohabitation thus matrimonially meant, and continued after the disability is removed, will, in law, make them husband and wife from the moment that such disability no longer exists, although there are no special circumstances to indicate that the parties expressly renewed their consent or changed their mode of living after the removal of the impediment." [7]

Learned authors on the law of domestic relations align themselves closely to the encyclopedic rule. *Schouler* continues: "Where a marriage entered into in good faith by one is void on account of a previous marriage of one of the parties, it may be validated by the removal of the impediment and the continued cohabitation of the parties and statutes

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[5] General Laws of Massachusetts, Chap. 207, § 17.

[6] 38 Corpus Juris 1320.

[7] 104 A. L. R. 12.

have been passed in many states validating marriages made where the parties live together after the removal of an impediment, but these statutes do not apply to illicit cohabitation nor make marriage contracts not intended by the parties." [8]

Bishop in language closely following A. L. R. says: "If the parties desire marriage and do what they can to render their union matrimonial, yet one of them is under disability, as where there is a prior marriage undissolved their cohabitation, thus matrimonially meant, will, in matter of law, make them man and wife, from the moment when the disability is removed; and it is immaterial whether they knew of its existence or its removal or not, nor is this a question of evidence." [9]

Jurisdictions are numerous which adhere strictly to the general rule. A Michigan Court in deciding a comparatively recent case, *Hess v. Pettigrew,* held: "While there is some difference of reasoning and ruling, the decided weight of authority is that where parties engage upon a contract of marriage, which is void because one has a living spouse, which is unknown to one or both, uninterrupted cohabitation and reputation after removal of the impediment will produce a valid common law marriage although the fact of the impediment will produce a valid common law marriage although the fact of the impediment or of its removal may not have been known to either. The principal reasons upon which the rule rests are that the initial relationship was intended to be matrimonial, not illicit and consent to present marriage evidenced by the ceremony continues from day to day and becomes effective as a present taking in marriage on removal of the impediment." [10]

As there was no second ceremonial marriage subsequent to A's death, much would depend upon the recognition of common law marriages in Colorado. If we are to follow the authorities, the relationship of B and C following A's death, presuming they continued cohabitation and underwent no new ceremony would be one of common law marriage. We need not consider the alternative because Colorado courts have long given legal recognition to common law marriages. *Klipfel v. Klipfel,*[11] *Smith v. People,*[12] and *Peters v. Peters,*[13] are but a few of the leading cases in which legal status has been given to such marital relationships.

Colorado courts, in situations comparable to our instant case, where one of the parties was under a previous disability, have adhered strictly to the general rule in establishing a valid common law marriage after the impediment has been removed. In the leading case *Poole v. People,*

8 Marriage, Divorce, Separation & Domestic Relations, Paragraph No. 1129.

9 1 Bishop; Marriage, Divorce & Separation, Paragraph No. 970.

10 247 N. W. 90, 261 Mich. 618 (1933).

11 92 Pac. 26, 41 Colo. 40 (1907).

12 170 Pac. 959, 64 Colo. 290 (1918).

13 215 Pac. 128, 73 Colo. 271, 33 A. L. R. 24 (1923).

that has served as a legal beacon, the court said: "If parties desire marriage, and do what they can to render their union matrimonial, but one of them is under a disability, their cohabitation thus matrimonially meant and continued after the disability is removed will, in law, make them husband and wife from the moment that such disability no longer exists."[14]

Davis v. People[15] was similar to our case in which a man in 1918, believing himself free to marry, entered into marriage relationship with his second wife and lived with her until 1927 and during those years the parties held themselves out to be man and wife and believed themselves to be such, but as a matter of fact, the impediment to their marriage was not removed until 1921. Nevertheless, the court held the relationship, though invalid at its inception, was valid as a common law marriage from 1921 because of the continuance of relationship after removal of impediment in 1921.

In *Mock et al v. Chaney*[16] the court again substantiated the previous and well established principle, that a marriage invalid at its inception, because of an existing impediment, became a valid common law marriage from the date of the dissolution of such impediment where a continuation of marital relations was shown.

The Colorado viewpoint is further stated by the court in *Poole v. People, supra,* when it laid down the rule that, "Upon the dissolution of the subsisting marriage by death or by a competent decree of divorce, an intended marriage contracted in good faith by a party thereto prior to the removal of the disability, is rendered valid and binding by the continued cohabitation of the parties to such union, as the original intention to become husband and wife is presumed to continue so as to effectuate a valid common law marriage."[17]

Aside from our jurisdiction but decidedly on the point is a statute from Massachusetts, in which the legislature, again asserting the interest of society in the marriage relationship, has given validity to a marriage that occurs under situations similar, if not exactly parallel, to ours. The statute reads: "If a person, during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsquent marriage contract with due legal ceremony and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the for-

[14] 52 Pac. 1025, 24 Colo. 510 (1898).
[15] 264 Pac. 658, 83 Colo. 295 (1928).
[16] 87 Pac. 538, 36 Colo. 60 (1906).
[17] 52 Pac. 1025, 24 Colo. 510 (1898).

mer marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents." [18]

Here we see an ameliorative effort on the part of the legislature, applied to a situation that seems destined to appear more frequently in the future. By passage of such a statute, other states could do much to bring order to a condition that otherwise would require involved and embittered adjudication.

It would make no difference in our case if the subsequent marriage had been originally a common law marriage instead of a ceremonial one because such a valid union is as legally potent as a statutory one in our jurisdiction. The answer to our problem, then, following a great preponderance of authorities, both learned and encyclopedic, in addition to previous Colorado decisions in similar situations, seems to lead us to the inevitable conclusion that B and C, following A's death, have conducted themselves in such a manner as to make a vailid common law marriage out of their relationship. Since such marriages have long been recognized by Colorado courts, no new ceremony was necessary between B and C and from the date of the removal of the impediment to their marriage, their marital status is valid for all purposes. It is to be covered with the same protective mantles that the law grants other valid marriages.

Francis J. Paulson.

THE LEGAL RESULT OF MISTAKE OF FACT IN THE FORMATION OF AN OFFER.—A mistake has been defined in the *Restatement of Law of Contracts* as a "state of mind that is not in accord with the facts." [1] From this statement we can see that when the contract was made there was not a meeting of the minds.

In many cases a mistake of fact will avoid the contract, as set out in *Bigham v. Madison* [2] where the court ruled that "it is not necessary that fraud be shown in order to obtain relief from a contract. Innocent and mutual mistake alone are sufficient grounds for rescission and other relief." However, the rule laid down here cannot be said to be the set rule for some courts hold *contra.*

To affect the validity or legal effect of an agreement, a mistake of fact must be as to a fact which is mutual. That is, the mistake must

[18] General Laws of Massachusetts, Chap. 207, § 6.

[1] Restatement of Contracts, § 500.

[2] 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267 (1879).

be as to fact which enters into and forms a basis of the contract. To support this contention, the case of *Ontario Paper Company v. Neff* [3] states that where the freight rate in a contract to carry goods on a ship was based on a mutually mistaken belief as to the capacity of the ship, such mistake was held a good defense to an action for breach of the contract. The mistake must be of the essence of the contract, the *sine qua non,* or, as it is sometimes expressed, the efficient cause of the agreement. It must be such that it controls the conduct of the party. In the case of *Miles v. Stevens* [4] the court said "the contract was invalid because of mistake as to whether a law would be passed which would increase value of land sold."

A mistake of fact could be said to take place when some material fact which really exists is unknown, or some essential fact is supposed to exist which does not actually exist. *In re Welton's Estate* [5] was a case which held that "mistake of fact giving rise to right of recovery exists either when some fact which really exists is unknown, or when some fact is supposed to exist, which really does not exist."

"A mistake, sufficient to justify the reformation of a contract, must be the mistake of both parties, and not that of one only," was held in *Dougherty v. Lion Fire Insurance Company* [6] by a New York court. In *Barrell v. Britton* [7] it was held "to entitle party to contract to have it reformed for 'mistake,' mistake must be mutual, and mistake by both parties must be in reference to the same matter."

In many agreements we find the terms named by the parties are so ambiguous that the so-called personality of the contract may be material as evidence of the person to whom the offer has been made. However, it is always possible for either the offeree or the offeror to show that owing to some peculiar circumstance of the case the other party did or acted as a reasonable man would have done, understood the words in a different sense than the one meant. Hence if X says "blue" when other people would say "green" and Y knows that by "blue" X means "green" then the word "blue" must be interpreted as meaning "green" when the offer is construed. For words have no inherent sanctity in themselves, but are merely labels by which we identify things. The same is true of names. If X always addresses Y as Z then Y can accept X's offer even though in terms it is addressed to Z. However, even though X addresses his offer to Y, Y cannot accept it if he knows X meant Z when he said Y.

The effect of making or accepting a written offer is set out in the Restatement which says,[8] "One who makes a written offer which is ac-

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[3] 261 F. 353 (1919).
[4] 3 Pa. St. 21, 45 Am. Dec. 621 (1919).
[5] 253 N. Y. S. 128, 144, 141 Misc. 674 (1931).
[6] 84 N. Y. S. 10, 41 Misc. 285 (1903).
[7] 148 N. E. 134, 135, 252 Mass. 504 (1925).
[8] Restatement of Contracts, § 870.

cepted or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation. Therefore A, supposing a document presented to him by B is a receipt, signs it. It is in fact a promise to pay a sum for which B has previously offered to settle a claim. B acts in good faith and makes no misrepresentation. There is a contract unless A is guilty of no negligence in supposing the document to be a receipt. This can be further set out in the case of *Griggs v. Griggs* [9] where the court said "a grantor's failure to read deed which he signed and to understand what he was conveying is 'negligence' and not 'mistake,' as respects grantor's right to reform deed."

A mistake must be as to an existing or past fact. The coming into existence of any future fact must at the time of contracting have been understood to be assumed by both parties. The view has been taken, however, that there is no distinction between a contract made in view of facts merely in contemplation and dependent upon future events or contingencies over which the parties have no control. In *Miles v. Stevens* [10] the contract was held invalid because of mistaken belief that a law would be passed which would have increased the value of land to be sold.

The subject-matter of a contract is very important in deciding what the parties believed they were contracting for. If a man can show that without any fault of his own, he has entered into a contract of a nature different to anything he intended, it is not difficult to see that the element of consent is entirely wanting in such a transaction. Whatever the real intention of a man may be if he so conducts himself that a reasonable man would believe that he is consenting to the terms proposed by the other party, and the other party upon this belief enters into the contract with him, then the man thus conducting himself so, would be equally bound as if he first intended to agree to the other party's terms.

All those who enter into a contract must believe that they can perform it and that it is to his own interest to do so, and likewise for the other party. However, if this belief is false, the error will not avoid the contract although non-performance by one side may relieve the other from his liabilities under the contract.

A mistake as to the subject-matter of a contract will only avoid in three cases.[11] (a) If the manifestations of intentions of either party are uncertain or ambiguous and he has no reason to know that they may bear a different meaning to the other party from that which he himself attaches to them, his manifestations are operative in the formation

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[9] 197 S. E. 165, 167, 213 N. C. 624 (1938).

[10] 3 Pa. St. 21, 45 Am. Dec. 621 (1846).

[11] Restatement of Contracts, § 71.

of a contract only in the event that the other party attaches to them the same meaning. (b) If both parties know or have reason to know that the manifestations of one of them are uncertain or ambiguous and the parties attach different meanings to the manifestations, this difference prevents the uncertain or ambiguous manifestations from being operative as an offer or an acceptance. (c) If either party knows that the other does not intend what his words or other acts express this knowledge prevents such words or other acts from being operative as an offer or an acceptance.

We can therefore see that in the formation of a contract mutual assent alone is not enough to have a good and binding agreement. It is true that the parties are bound by the meaning of a writing made by them as properly interpreted, even though one of them is ignorant and mistaken of the contents. Yet in many contracts which the courts have held to be valid agreements and command the parties to perform the contract, there never was a "meeting of the minds" between the parties. "Meeting of the minds" as set out in *Imperial Water Co. No. 1 v. Imperial Irrigation District* [12] means a definite proposal made by the one side which was unqualifiedly accepted by the other. A New York court held [13] a "meeting of minds" involving not only a common understanding of contract terms but also of identity of the parties is essential to a contract.

Courts today hold that the intention of the parties when they formed the contract to be the basis for relief. If there was not a meeting of the minds of the contracting parties, then there cannot be a contract between them, for they were thinking of things different than their contract stated. In *Housman Steel Co. v. N. P. Severin Company* [14] the court held "to constitute a binding contract" the minds of the parties thereto must meet upon the essential terms of the contract. This may be further set out in *Fernon v. Prudential Insurance Company* [15] where it was held "to make a contract there must be among other things a meeting of the minds of the contracting parties regarding the something at the same time."

Thomas F. Bremer.

THE STATUTE OF FRAUDS WITH RELATION TO ORAL CONTRACTS OF EMPLOYMENT.—The first Statute of Frauds was enacted in England in 1677. The official title for this was, "An Act for the Prevention of Frauds and Perjuries." The statute citation: Statute 29, Chas. II, chapter 3. A copy of this statute is found in *Williston's Cases on*

[12] 62 Cal. App. 286, 217 Pac. 88 (1923).
[13] Harding v. Knapp, 8 N. Y. S. 2d 224, 226 (1938).
[14] 45 N. E. 2d 552, 554; 316 Ill. App. 585 (1942).
[15] 162 S. W. 2d 281, 283, 284, ... Mo. ...... (1942).

Contracts.[1] The purpose of the statute is adequately expressed in the following words of *Corpus Juris Secundum,* "The purpose of the statute is to prevent fraud and purjury in the enforcement of obligations depending for their evidence on the unassisted memory of witness by requiring certain enumerated contracts and transactions to be evidenced by a writing signed by the party to be charged." [2]

There have been two States, of the United States, that have enacted the English statute, as such, but all of the States have enacted statutes containing in substance, the same provisions.

For an example, take the State of Michigan which has the following statute:

> "Agreements, invalidity of certain kinds in absence of a signed writing. Sec. 2. In the following cases specified in this section, every agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized, that is to say:
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> 1. Every agreement that, by its terms, is not to be performed in one (1) year from the making thereof;
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> 2. Every special promise to answer for the debt, default or misdoings of another person;
>
> 3. Every agreement, promise or undertaking, made upon consideration of marriage, except mutual promises to marry;
>
> 4. Every special promise made by an executor or administrator, to answer damages out of his own estate;
>
> 5. Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate." [3]

From the statute above it is readily seen that a great number of every day contracts come under one of the five subsections. The topic of this paper is but one section under subdivision number one, i. e. How are oral contracts of employment affected by the ruling that all such contracts not to be performed in one year must be in writing?

Since we are concerned with subdivision one there arises the question as to the reason this section is found in the statute. Answering this in the words of *American Jurisprudence*: "The object of the statute is to prevent fraud and perjury in setting up verbal agreements not to be performed within a year; it grew out of a purpose to intercept the frequency and success of actions based on nothing more than loose verbal statements or mere innuendos." [4]

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[1] A Selection of Cases on the Law of Contracts. By Samuel Williston. p. 415.

[2] Vol. 37, Corpus Juris Secundum, p. 513.

[3] Michigan Statutes Annotated, by J. M. Henderson. Vol. 19, chap. 261; sec. 26.922.

[4] 49 American Jurisprudence, p. 383.

Since it is not at all unusual that a contract of employment be oral, just what effect has this section of the statute? Has it accomplished what it was intended to?

Contracts of employment, that have been adjudicated upon the question of performance in one year were usually brought into court with one of the following questions most prominent; When was the employment to start? How long was the employment to continue? Could the contract be performed in one year?

In an 1882 case, where a fifteen year old boy orally contracted to work for the defendant until he, the boy, was twenty-one in return for schooling, a watch, and a horse, the defendant broke this agreement. The boy sued the defendant for damages for breach of the contract; the defendant pleaded the statute of frauds. The court in the following words held this contract void, because it was evident from the facts that this oral contract was intended to run more than a year and that it was not in writing. "On the trial the plaintiff proved a verbal contract to the effect of that specially declared upon. This was void under the statute of frauds . . ." [5]

From the above case we see the court, from the evidence, found an oral contract made for a period of six years, thus bringing it within the statute of frauds and making it void.

In an 1889 case, in which a contract to work was made orally the fifteenth of one month, the work beginning the first of the following month a question was raised as to the admissibility of this oral contract. The court held, that the contract was void, it was admissible to show evidence of work.[6] Also in 1934, in a similar case, deciding the same question the court said, "A contract though under the statute of frauds may be admissible if helpful in estimating damages . . ." [7]

In both of the foregoing cases the court upheld the decision of the lower court which was, declaring an oral contract for a year's services, that were to begin more than one day after the making of the contract, void, because it could not be performed in one year from the making thereof as provided by statute.

The general rule as for a year's services to begin more than one day after the making of the contract is set down in volume 27 of *American Lawyers Reports, Annotated,* in the following words. "An oral contract for a year's services, to begin more than one day after the contract is entered into, is invalid under that provision of the Statute of Frauds making invalid a contract not to be performed within a year." [8]

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[5] Morse v. Burroughs, 48 Michigan 520, 12 N. W. 684 (1882).

[6] Moore v. Capewill Horse-Nail Co., 76 Mich. 606, 43 N. W. 644 (1889).

[7] Vanderhuff v. Parker Bros. Co., 267 Mich. 672, 225 N. W. 449 (1934).

[8] American Lawyers Reports, Annotated, Vol. 27, p. 667. Also see cases in the following annotations for various states holding this rule.

There then arose in the courts a question as to how much writing is necessary to take an oral contract, to begin in the future, out of the Statute.

In 1914 a case was decided which involved this very question. "Looking only at the correspondence, one is left in serious doubt as to how long the service is to continue, and what salary is to be paid. These are important elements in the contract, and they must not rest in parol." [9]

Thus in the preceeding case it is seen that the contract of employment must contain the length of time that it is to run and the amount of money to be paid to the employee for any designated period of time. There are other points that should be included, but since they vary with each contract of employment there is no need to discuss them here. In general the contract should answer the questions; Where the employment is to take place? What type of work is expected? It has to answer the questions; When the work is to start? How long work is to continue? And at what rate employee is to be paid? This applies to all contracts of employment, and those that are to start in the future are required by law to be in writing.

The question now arises as to the status of contracts that are for a year's service to begin at once. The general rule, in the words of *American Law Reports, Annotated* volume 27 is as follows: "A verbal hiring for a year that is to commence coincident with the hiring—or, as some cases express it, a hiring to begin *in presenti*—is not invalidated by the provision of the Statute of Frauds making contracts not to be performed within a year invalid or unenforceable." [10]

In a 1913 Michigan case, in which the oral agreement being sued upon was one in which employment was to start the day of the making of the oral agreement and to be terminated at the end of one year, the court held the oral contract of employment valid in the following words, "We cannot agree with the contention that the statute of frauds has any application here. The only agreement submitted to the jury was one to be performed within one year." [11]

From this case it is seen that a contract for a year's employment to begin in the present is not invalid as to the Statute of Frauds. The reasoning is that it can be performed in a year's time.

This possibility of performance has validated many oral contracts that were on their face invalid. The essence of this rule is expressed in an 1896 Michigan case, "The mere fact that a contract may or may not be performed within the year does not bring it within the statute. The rule is that if by any possibility, it is capable of being completed

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9 Carroll v. Palmer Mfg. Co., 181 Mich. 280, 148 N. W. 390 (1914).

10 American Lawyers Reports, Annotated, Vol. 27, p. 663.

11 Galvin v. Detroit Steering Wheel and Windshield Co., 176 Mich. 569, 142 N. W. 742 (1913).

within a year, it is not within the statute, though the parties may have intended, and thought it probable that it would extend over a longer period, and though it does so extend." [12]

The general rule is reaffirmed in 1926. "This court has uniformly recognized the rule that a contract is not within the statute if, by its terms, it is capable or possible of performance within the year." [13]

In a 1938 case this question of possible performance again arose. The court citing the 1926 case held the oral contract to be valid on the theory of possible performance.[14]

The possible performance cases are decided upon the theory that a contract can by its terms be completed in one year, i.e. by its terms the contract does not intend the work to be carried over a period longer than one year from the date of the making of the contract.

In the foregoing discussion, the following questions have been answered. As to the effects of subsection one of the Statute of Frauds; requiring contracts that cannot be performed in a year are the following: One, all contracts that by their terms cannot be performed in one year are void. By "the terms" usually means those terms that specifically show that the contract must continue more than a year for the employee to reap all the benefits of the contract or that both parties intended to have the contract continue for a specific period more than a year.

The courts construe contracts of employment that are to begin more than one day after the making of the contract void if not in writing.

The courts make an exception to the statute when an oral contract, by its terms, can be performed within one year. This may seem very liberal at first glance, but it is not because the contract must be made in a way, so that if all its terms are complied with, it can be performed within a year from its making.

The statute, through the courts, has forced men, making written contracts for more than a year, to specify the salary and amount of time of employment by adjudicating partially written and partially oral contracts, with the amount and time in the parol contract, void because of the statute. In other words, to make a valid contract for more than a year, it must be in writing, and it must contain the compensation and specify the period of time the employment is to run.

Oral contracts that have no specific time for commencement have not been adjudicated in Michigan as far as is ascertainable by the writer, but for the states that have ruled on this point see 114 *American Law Reports, page 416 annotation No. 5.*

Lawrence E. B. Merman.

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[12] Smalley v. Mitchell, 110 Mich. 650, 68 N. W. 978 (1896).
[13] Southwell v. Parker Plough Co., 234 Mich. 292, 207 N. W. 872 (1926).
[14] Adolph v. Cookware Co. of America, 283 Mich. 561, 278 N. W. 687 (1938).

THE VALIDITY OF A CHATTEL MORTGAGE GIVEN ON A STOCK OF GOODS.—Whenever a person takes a chattel mortage on a stock of goods in trade, he immediately is involved in an interesting and technical legal situation which requires a thorough understanding in order that his security may be valid. For if the person is careless in drawing this type of mortgage or doesn't follow the statutory requirements to the letter, he will be left with a void instrument or at best a security which will be worthless as against innocent third persons.

The basic problem involved in case of chattel mortgages is the question of ostensible ownership. This in effect means that where a mortgage is given on personal property and the property remains in the hands of the mortgagor, the appearance is given to all third persons that the mortgagor still owns the property. This is rather deceiving to subsequent creditors of the mortgagor. For they rely on the property owned by the debtor to base their estimate of a proper risk for a loan to him. Thus when the personal property of the debtor is covered by a chattel mortgage and he retains control of it, third persons are misled as to the debtor's financial standing. Because of this situation the early common law was reluctant to allow personal property to be used as security unless the property was delivered into the possession of the mortgagee.

Now under the situation where the property sought to be used as security was a stock of goods of trade such as groceries, paint, supplies, etc., the objection of ostensible ownership and the other faults of personal property as security if left in the hands of the debtor are greatly magnified. This is because not only are goods left in the debtor's or mortgagor's hands, if the goods are mortgaged, but the stock of goods is being sold over the counter to purchasers with the mortgagee's permission. Thus the stock is being sold and replaced all the time. The important point then becomes just what is done with the proceeds of the sale of the goods.

In order to better understand the problems involved in the giving of a chattel mortgage on a stock of goods, a brief study of the early common law is helpful. Under the common law, a chattel mortgage given on a stock of goods was void unless the possession of the goods was retained by the mortgagee. In England one of the first cases on this subject was *Twyner's Case*.[1] The court held that if personal property was mortgaged and the goods were left in the mortgagor's hands with the power to sell them for his own benefit the mortgage was void. This was the rule until the stringent effect of it was changed by statute in England to allow the use of personal property as security.

In the United States the effect of common law was relieved by the enactment of recording statutes. Under these statutes personal property

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1 3 Coke 80, 76 Eng. Reprint 809 (1601).

could be pledged as security and the mortgagor could retain the property in his possession with perfect safety provided that the chattel mortgage was recorded. Thus the recording act allowed the recording to become a substitute for possession of the goods in the hands of the mortgagee. These statutes however were a protection only insofar as the mortgagor retained possession of the goods so covered as security. The mortgagee could allow the mortgagor to dispose of the goods and still keep the benefits of the recording acts. However, this is just the point which caused a great deal of difficulty. The recording statutes would not go so far as to protect the mortgagee if the power to dispose of the goods by the mortgagor was not carefully defined and controlled. The sale, the proceeds, and use of the goods must be carefully defined or the recording acts will not protect the mortgagee.

Under the situation where a chattel mortgage is given on a stock of goods and the mortgagor is left with the power to dispose of the goods, a study of the decisions from different states will show how the courts have dealt with the problem. For example, in *Mann v. Flower* [2] the Minnesota court said, "The agreement between Taylor, the mortgagor, and Flower, the mortgagee, made at the time the mortgage was executed, that the mortgagor should retain possession of the property, and sell and dispose of the same as his own in the ordinary course of his retail business, without accounting to the mortgagee for the proceeds of sales made by him, and without applying any portion of such proceeds to satisfaction of the mortgage debt, was conclusive of an interest to defraud the creditors of the mortgagor, and rendered the mortgage fraudulent and void as to them." The New York court held in *Southard v. Benner* [3] that if at the time of the execution of a chattel mortgage on merchandise it is understood between the parties that the mortgagor may sell the stock and use the proceeds in his business and the agreement is carried out, the mortgagor making the sales with the knowledge of the mortgagee, the transaction is fraudulent in law as against the creditors of the mortgagor.

In *Buckstaff v. Snyder* [4] the Nebraska court held that "where a chattel mortgage gave the mortgagor until default, the right to remain in possession of said goods and chattels and to sell and dispose of any of the stock in trade in the regular course of business, the chattel mortgage was conclusively fraudulent as to creditors of the mortgagor." Then in *Potts v. Harvey* [5] the court of New York held that where the mortgage gives the mortgagor the right to remain in

2 25 Minn. 500 (1879); see also Pierce v. Wagner, 64 Minn. 265, 66 N. W. 977 (1896).

3 72 N. Y. 424 (1878).

4 54 Neb. 538, 74 N. W. 863 (1898); see cases on Creditors' Rights, Hanna and McLaughlin, 3rd Ed., p. 153.

5 99 N. Y. 168, 1 N. E. 605 (1885).

possession and sell the goods but with no provisions as to accounting for the sale, is void as a matter of law even though the statute makes the question of fraudulent intent a matter of fact.

In the case of *Osborn v. Standard Secur. Co.*,[6] the Missouri court said, "if it appears on the face of a chattel mortgage that the mortgagor is to retain possession and have power to sell and dispose of the mortgaged property in the course of his business for his own benefit then the mortgage is fraudulent and void as to creditors and purchasers, because made to the use of the mortgagor, and will be so declared as a matter of law without regard to the intention of the parties."

From these cases it can be generally said that "where it appears either on the face of a chattel mortgage or by parol evidence, that the mortgagee has given the mortgagor power to dispose of the property mortgaged, and apply the proceeds to his own use, or to such use as he sees fit, the mortgage is void as to creditors and subsequent purchasers in good faith, without reference to the *bona fides* of the mortgage debt, or the honesty of the intention of the parties."[7] Not only do the above cases support this view but the following states do also: Arkansas, Colorado, Connecticut, Florida, Idaho, Illinois, Kansas, Minnesota, Mississippi, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

Another group of states hold that where the mortgagor remains in possession of the goods, and has the power to sell the mortgaged property, only a presumption of fraud arises, which, if not overcome by proof, will make the mortgage fraudulent and void. For example in *Davies v. Turner*[8] a chattel mortgage was given on a stock of goods. The mortgagor remained in possession and carried on the business as usual. There was no provision in the mortgage that the mortgagor should remain in possession. The entire transaction was carried out in good faith and the proceeds of the sales were applied to the conduct of the business. The court found that this evidence was sufficient to overcome the presumption of fraud. This view is also upheld in North Carolina and South Dakota.

There is a third line of authorities which hold under the same circumstances as above that the mortgage is not void nor does it raise a presumption of fraud. The whole question of the mortgages validity is a question of fact depending on the intention of the parties together with all the circumstances of the transaction. The following states uphold the rule: Indiana, Iowa, Kentucky, Maine, Mass., Michigan, New Jersey, New Mexico, Rhode Island, and South Carolina.

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6 222 Mo. App. 1186, 45 S. W. 2d 503 (1928).

7 73 A. L. R. 238.

8 120 F. 605 (1903).

In the earlier cases in Indiana, the courts followed the rule that where the mortgagor remained in possession of the goods with the power to sell and could use the proceeds for his own use or to such use as he saw fit, the mortgage was void as to subsequent creditors and innocent purchasers regardless of the intention of the parties or the status of the mortgage debt. But this rule has been changed by statute, in Indiana. This statute provided,[9] "The question of fraudulent intent in all cases arising under the provisions of this act, shall be deemed a question of fact. . . ." Thus in the case of *New v. Sailors* [10] the court said, "The question of fraudulent intent is a question of fact, and not of law. Therefore, until the contrary appears it will be presumed that a mortgagor who is permitted to retain possession of, and sell, mortgaged chattels, does so under an agreement to account as the agent of the mortgagee, and the proceeds will be regarded as applied to the liquidation of the mortgage debt, whether they have been actually paid over or not."

The court of Iowa, in *Meyer v. Gage Bros.*[11] said, "The special finding of the court determines that said mortgage was not fraudulent in fact. And the uniform holding of this court has been that the reservation by the mortgagor of the right to retain possession of the property and sell it in the ordinary course of business does not render the mortgage fraudulent in law."

The question which arises next is, regardless of the court's holding as to the mortgage with regard to subsequent creditors and innocent purchasers, what is the effect of the mortgage as between the parties? Generally, it is held that the mortgage is valid as between the parties regardless of mortgagor's retention of the goods with the power of sale and use of the proceeds to his own benefit. For example, in Texas in the case of *Trice v. American Trust and Savings Bank* [12] the court held that a statute declaring that a mortgage on any stock of goods daily exposed for sale shall be deemed fraudulent and void was intended to regulate assignments of goods for the benefit of creditors, was a mere declaration of the common law and as between the mortgagor and the mortgagee the instrument is valid.

A question has arisen in several cases as to whether a mortgage containing the power to sell and use the proceeds for the mortgagor's benefit would be void as against a trustee in bankruptcy? It has been seen above that such a mortgage may be void as against creditors depending on the jurisdiction and the proof offered in the case. To answer this new question, the Oklahoma court held in *Turk v. Kramer* [13] that where the mortgagor retains possession with power to sell

[9] Baldwin's Indiana Statutes Ann. 1934, § 8384.

[10] 114 Ind. 407, 10 N. E. 609 (1889).

[11] 65 Iowa 606, 22 N. W. 892 (1885).

[12] Texas Civ. App. 259 S. W. 993 (1924).

[13] 138 Okla. 35, 280 P. 266 (1929).

and the mortgagor is declared a bankrupt with a receiver appointed, the bankruptcy proceedings are, in effect a levy upon the bankrupt's property by his creditors, and the lien created by the mortgage being a claim not valid as against the creditors of the bankrupt, is not a lien against the estate and the rights of the receiver are superior to the rights of the mortgagee who has not obtained possession of the mortgaged property with the consent of the mortgagor before the bankruptcy preceedings.

There has been quite some litigation concerning the agreement which allows the mortgagor to retain possession of the property with the power to sell the goods. This litigation has arisen over the sufficiency and necessity of this agreement. For example in the case of *Fletcher v. Martin* [14] the court of Indiana held that "under the Indiana statute (*supra*) making fraud a question of fact, a provision in a mortgage authorizing the mortgagor to sell the mortgaged property and apply the proceeds to the payment of the mortgage debt did not of itself establish fraud; and that it was quite certain that the same principle governed where a parol agreement was made after the execution of the mortgage." Then Nebraska in the case of *Brinker v. Ashenfelter* [15] the court said "it is well settled that where, either by the terms of the mortgage or by a contemporaneous understanding, the mortgagor is permitted to sell the goods in the ordinary course of trade for his own benefit, such mortgage is fraudulent and void as to creditors."

The court of Missouri was very explicit when in the case of *Osborn v. Standard Secur. Co.*[16] it said, "The right given the mortgagor to remain in possession, with power to sell the mortgaged property in the ordinary course of business will not alone render the mortgage void; there must be the right to convert the proceeds of the mortgaged property to the mortgagor's own use. If the power to convert the proceeds of sale to the mortgagor's own use appears upon the face of the mortgage, then it is void by its terms. But if the power to convert the proceeds does not appear upon the face of the mortgage, but is in fact given by the mortgagee by agreement, with the mortgagor, outside the mortgage, the same consequence follows." Thus it would seem that whether the agreement giving the mortgagor the power to sell the goods was included in the mortgage or made by a separate agreement, the same result would follow; namely, that the mortgage is void, or in those jurisdictions where the question is one of fact concerning the validity of the mortgage, it may be void if the facts so warrant the finding.

In passing it is interesting to note what the judicial attitude is concerning an agreement whereby the mortgagor is to apply the

14 126 Ind. 55, 25 N. E. 886 (1890); 73 A. L. R. 261.

15 ...... Neb. ......, 95 N. W. 1124 (1901).

16 222 Mo. App. 1186, 45 S. W. 2d 503 (1928).

proceeds of the sale of the goods to the mortgage debt. Under the situation the mortgagor assumes either one of two positions. He either becomes the agent of the mortgagee, or he operates in his own right and is bound to apply the proceeds to the mortgage debt. For example the federal court held in the case of *In Re Hartman* [17] that the mortgagee could appoint the mortgagor his agent to take the proceeds of the sale of the mortgaged goods and apply them to the debt. Then in the case of *State ex rel Kenman v. Fidelity & D Co.*[18] the Missouri court held that where the mortgage provided that the mortgagor should remain in possession of the goods and have the power to sell them in the ordinary course of business with the provision that the proceeds should be accounted for and applied to debt; the mortgage was valid since it was not for use of the mortgagor. The Michigan court held in the case of *Anderson v. Cook* [19] that, "it was not conclusive of fraud that the mortgagee did not foreclose his mortgage by advertisement, but permitted the mortgagor, his son, to sell at private sale, and account for the proceeds which it appeared was done in that case. The mortgage being valid, it was said that the mortgagee was entitled to possession, and his security would not be destroyed by his failure to sell in the exact manner provided in the mortgage."

A question arises out of this last point, namely, if the mortgage provides for the possession of the goods to remain in the hands of the mortgagor with the power to sell the goods also in the mortgagor and the provision that the proceeds be paid to the mortgagee to reduce the debt, is the mortgage void if the mortgagor fails to pay the proceeds over to the mortgagee? There is a split of authority on this question. The Missouri court in *Hopkins v. Hastings* [20] held that a mortgage was not void because the mortgagor did not pay the proceeds of the sale of mortgaged goods which was so provided for in the mortgage. On the other hand the federal court in the case of *In Re Platts* [21] held that the mortgage was void where the mortgagor made no attempt to carry out the provisions of the mortgage which required him to account for the proceeds of the sale of goods daily and apply them to the satisfaction of notes secured by the mortgage.

In some of these chattel mortgages on stocks of goods the provision for applying the proceeds of the sale of the goods by the mortgagor is so worded that only a part of the proceeds are turned over to the mortgagee and the remaining portion is used by the mortgagor for his own use. The validity of such a mortgage depends upon the facts of the case and the circumstances of the transaction. In the case of

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17 185 F. 196 (1911).
18 94 Mo. App. 184, 67 S. W. 958 (1902).
19 100 Mich. 621, 59 N. W. 423 (1894); 73 A. L. R. 275.
20 21 Mo. App. 263 (1886).
21 110 F. 126 (1901).

for permitting, as it did, the mortgagor to remain in possession of the stock of merchandise and to make sales therefrom, without requiring him to account for but one-half of the proceeds of the sale therefrom, and for the further reason that, with the knowledge and implied consent of the mortgagee, the mortgagor was permitted to withdraw from the proceeds of the sale a sum of money, indefinite as to amount, for his support, and for the operating expenses of the business."

In another Indiana case, *Vermillion v. First National Bank*,[23] the *General Highways System v. Thompson* [22] the Indiana court held that the mortgage on a stock of goods was "void as to general creditors court held that a mortgage which provided that the mortgagor could sell the goods and use the surplus from the sale, above the expenses incurred or cost of replenishing the stock, should be applied to the mortgage debt was valid.

The Michigan court took a liberal view in the case of *Leland v. Collver*.[24] It held that a chattel mortgage was valid even though it provided that the mortgagor could sell the goods in the usual course of business and apply the proceeds in replenishing the stock and to support his own family.

These last cases bring up the question as to the provision in the mortgage concerning the sale of the mortgaged goods by the mortgagor and the use of the proceeds to replenish the stock. The courts split on this question; one group holding that such a mortgage is valid while the other holds such a mortgage invalid. Michigan [25] and Wisconsin [26] hold that such a mortgage is valid. Missouri also follows this view when in the case of *Liles v. Potter* [27] the court said, "the mere fact that the mortgagor is permited to use the proceeds of sales to keep the stock up to its present standard does not make the mortgage fraudulent as a matter of law." On the other hand New York [28] and Minnesota [29] hold such mortgages void. The courts in these states base their decisions on the ground that the property covered by the mortgage was not the property of the mortgagee nor was it to become so, but still the property became subject to the mortgage lien.

To show how the facts of each case determines the question in this problem the court of Missouri, which above held such a mortgage with the "replenishment" provision valid, turned around in the case

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22 88 Ind. App. 179, 155 N. E. 262 (1927); 73 A. L. R. 280. See also Bank of Atchison County v. Shackleford, 67 Mo. App. 475 (1896).

23 59 Ind. App. 35, 105 N. E. 530 (1914).

24 34 Mich. 418 (1876).

25 Re United Fuel and Supply Co., 250 Mich. 325, 230 N. W. 164 (1930).

26 Roundy v. Converse, 71 Wis. 524, 37 N. W. 811 (1888).

27 ...... Mo. App. ......, 206 S. W. 582 (1918).

28 Smith v. Cooper, 27 Hun. N. Y. 565 (1882).

29 Gallagher v. Rosenfield, 47 Minn. 507, 50 N. W. 696 (1891).