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Notes

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NOTES

BILLS AND NOTES — FORGERY — FRAUDULENT IMPERSONATION.— Despite the efforts of the codifiers to make the *Uniform Negotiable Instruments Law* so clear and definite that the conflicts would be done away with, the courts are still divided in construing the defense of fraudulent impersonation. This is shown by the result of the recent case of *Cohen v. Lincoln Sav. Bank of Brooklyn.*[1] In this case a check for $4,500 was indorsed in blank by *E* and given to an agent with authority to buy a condemnation award. The agent indorsed the check specially, by writing over the blank indorsement, "Pay to the order of Harry Wolter," and delivered the check to a person who was represented to him by third persons to be the owner of record of the award. Neither *E* nor the agent had had previous dealings with either Wolter or the imposter, except at the closing of the sale. The imposter sold the check to an innocent purchaser, who presented it and received payment. The bank which of course debited *E's* account is now sued to recredit *E's* account. The court held that the loss fell on the bank, because the imposter's signature was a forgery. Only where the physical presence of the imposter is combined with antecedent dealings with maker of check and intention of the maker of check to deal with visible person will a *bona fide* holder of a check be entitled to recover from the maker of the check.

In regard to fraudulent impersonation cases, the question as to who must bear the loss as between a drawer who delivers a check to an imposter and one who cashes it, may arise in various ways. In its simplest form the drawee bank has paid it upon the indorsement of the imposter and charged it against the drawer's account, or between the drawer and holder in due course, who has bought through the imposter's indorsement. Again the drawee may seek to recover back the amount from the party to whom it paid the money.

The whole question depends on what kind of a defense the courts construe the delivery to an impersonator to be. If the courts consider the defense to be forgery then it is good against a *bona fide* holder; however, if the defense is fraud, then a *bona fide* holder is protected and the drawee is protected. All courts construe the maker or drawer to have a double intent. "First, he intends to make the instrument payable to the person before him or to the person writing at the other end of the line, in case the negotiation is by correspondence.[2] Second, he intends to make the instrument payable to the person whom he believes the stranger to be." [3] The courts by the great weight of authority hold the first to be the controlling intent except where the named payee

1 276 N. Y. 399, 10 N. E. (2d) 457 (1937).

2 Urinola v. Twin Falls Bank & Trust Co., 37 Idaho 332, 215 Pac. 1080 (1923).

3 BRANNAN, NEGOTIABLE INSTRUMENTS LAW (5th ed.) 310.

was already known to the maker or drawer or endorser,[4] or was more particularly identified in some way. For instance, the last exception is illustrated by the case of *Mercantile National Bank v. Silverman*,[5] where the check was made out to the supposed payee, and his official title added, "Lt. Col. Coast Artillery Corps." The imposter cashed it, and it was charged to drawer's account. The court held that the designation of payee by his official title distinguished the case from other cases of fraudulent impersonation and the drawee bank must bear the loss. In other words, the second intent controlled. The difference in these cases may in part be due to variations in the amount of care taken by the parties in regard to the identification of the imposter, or whether the payee was purely fictitious or was a real person.

It must be noted in these fraudulent impersonation cases that the drawer believes the imposter to be a real person to whom he delivers the instrument or to whom he writes in case of negotiation by correspondence; hence the rule [6] that an instrument made payable to a nonexistent person is in legal effect to bearer does not apply since that rule only applies when the fictitious character of the payee is known to the drawer.

The general rule where the drawer delivers a check to an imposter, as payee, supposing him to be the person whom he has falsely represented himself to be, is that the imposter's subsequent indorsement of the check is regarded as genuine so far as *bona fide* subsequent holders are concerned.[7] The leading case supporting the minority rule is *Tolman v. American Nat. Bank*.[8] There, the impersonator received the check and indorsed the name of the person falsely impersonated, sold it to a person who collected from the drawee bank. The court held that the drawee bank had to bear the loss, saying: "It is a manifest fallacy to say that the drawee carried out the intention of the drawer. The fact that the person falsely impersonated was looked up and found responsible showed the true intention of the drawer, and this was a typical case of forgery." The court said further that the courts supporting the other rule lose sight of the distinction between real and fictitious persons. In the latter case there is no one to inquire about.

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4 Rossi v. Nat. Bank, 71 Mo. App. 150 (1897).

5 132 N. Y. S. 1017 (1911), *affirmed*, 210 N. Y. 567, 104 N. E. 1134.

6 N. I. L. § 9 (3).

7 United States v. Nat. Exchange Bank, 45 Fed. 163 (E. D. Wis., 1891); Meridian Nat. Bank v. First Nat. Bank, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450 (1893). See, also, cases cited in Annotation, 22 A. L. R. 1228, 1230.

8 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877, 84 Am. St. Rep. 850 (1901). See, also: Western Union Tel. Co. v. Bi-Metallic Bank, 17 Colo. App. 230, 68 Pac. 115 (1902); Harmon v. Old Det. Nat. Bank, 153 Mich. 73, 116 N. W. 617, 17 L. R. A. (N. S.) 514, 126 Am. St. Rep. 467 (1908).

The theory most often used to support the majority rule is that the drawee by paying to the imposter carries out the real intent of the drawer at the time of delivery, though the intention had its origin in fraud. The reasoning behind giving protection to drawees is that in delivering the check to an impersonator, the drawer increased the bank's ordinary risk, and also that the person whom the drawer intended to pay has been paid.[9] To strengthen this reason or as a substitute for the theory of actual intent some courts uphold the majority rule by using the theory of negligence or estoppel, which can be more broadly stated as the doctrine that as between two innocent persons the one whose act caused the loss should bear that loss.[10] In these cases there need be no express negligence, but mere mistake will be enough.[11] The latter theory is better than the actual intent theory, for it obviates ascribing an intent to the drawer to deliver to an imposter, when in fact the drawer is not entirely satisfied with the imposter's identity, and in fact had another intent. Thus these two theories are supplementary and clinch the case for the majority rule, to which is added Section 23 of the *Negotiable Instruments Law,* which states that a person may be "precluded from setting up the defense of forgery," and this preclusion arises from the theory of estoppel.

Another way that an imposter may work is by assuming to be an agent of the payee. In this circumstance the cases have no difficulty in arriving at the conclusion that the loss falls on the drawee and not on the drawer, in the absence of negligence on the part of the drawer.[12] Here it is obvious that the drawer can have no intent to deliver to the person before him.

In conclusion, then we may say that the courts ascribe a double intent to the drawer when he delivers the check to an imposter. He intends to deliver the check to the person before him and also to deliver to the person named in the check. The courts generally consider the first intent controlling, except where the named payee was already known to the drawer or was more particularly identified in some way. But the New York court, in *Cohen v. Lincoln Sav. Bank of Brooklyn,* added a further restriction to the application of the first intent by saying that antecedent dealings must exist between the imposter and drawer before that first intent may be said to be controlling. This restriction is not mentioned by other courts, nor is it expressly mentioned

9 Montgomery G. Co. v. Manufacturers' Liability Ins. Co., 94 N. J. Law 152, 109 Atl. 296 (1920); McCornack v. Central State Bank, 203 Iowa 833, 211 N. W. 542 (1926).

10 Land Title & T. Co. v. Northwestern Nat. Bank, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717 (1900); Gallo v. Brooklyn Sav. Bank, 199 N. Y. 222, 92 N. E. 633, 32 L. R. A. (N. S.) 66 (1910).

11 United States v. Nat. Exchange Bank, *op. cit. supra* note 7.

12 City of St. Paul v. Merchant's Nat. Bank, 151 Minn. 485, 187 N. W. 516 (1922). See, also, cases cited in Annotation, 22 A. L. R. 1228.

in previous decisions in New York, although the court maintains that such restriction was implicit in the facts of those previous cases. It is surprising that a New York court would thus impede the negotiability of commercial paper by this extension of the defense of forgery. The logic and desirability seem to be against this decision, and no doubt other courts will not follow this decision to restrict a rule which the modern courts tend to uphold almost unanimously.

Frank J. Lanigan.

EVIDENCE—PRIVILEGE AGAINST SELF-INCRIMINATION.—The Fifth Amendment to the Constitution of the United States provides, among other things, that: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." A similar provision is incorporated into the constitutions of all the states of the Union except Iowa and New Jersey.[1] These two states having no express provisions in their constitutions regarding the privilege against self-incrimination the question arises as to whether this privilege is granted in some other form, the Fifth Amendment, as do all the provisions of the Bill of Rights, applying only to the Federal Government.

In New Jersey the privilege exists as a part of the common law of the state.[2] In Iowa, although there is no constitutional provision with regard thereto, the privilege is considered to be fundamental, and it has been said by the supreme court of Iowa that the privilege is secured by the due process clause of the constitution.[3] However the Supreme Court of the United States has held that the privilege against self-incrimination is not one of the privileges and immunities of citizens of the United States which the Fourteenth Amendment to the Federal Constitution forbids the states to abridge, and, also, that it does not fall within the protection of the *due process of law* clause of that Amendment.[4]

There is considerable conflict of opinion in this country with regard to one phase of the privilege against self-incrimination, and that is with regard to the admissibility in evidence of the results of a physical examination of one accused of crime when such examination was not voluntarily consented to. Some of the states hold such evidence to be

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1 32 ILL. L. REV. 117, n. 1; 18 KY. L. J. 18, 19.

2 State v. Zdanowicz, 69 N. J. Law. 619, 55 Atl. 743 (1903); State v. Miller, 71 N. J. Law. 527, 60 Atl. 202 (1905).

3 State v. Height, 117 Iowa 650, 91 N. W. 935 (1902); Duckworth v. District Court of Woodbury County, 220 Iowa 1350, 264 N. W. 715 (1936).

4 Twining v. New Jersey, 211 U. S. 78 (1908).

inadmissibile; some say it is admissible; while others attach various conditions and restrictions to the admissibility thereof.[5]

Wigmore, in his exhaustive work on Evidence,[6] relates the history of the privilege, the causes which led to its introduction, and the purposes which it is to serve, and points out the fact that all the confusion on the subject arose from erroneous dicta in the case of *Boyd v. United States.*[7] Wigmore says that looking at the history of the privilege, it having arisen to rectify the evils resulting from the "inquisitorial method of putting the accused upon his oath," and also at its policy, which is "to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's confessions," it is only *testimonial compulsion* that falls within the privilege. He sums up his conclusions as follows: "The privilege protects a person from any disclosure *sought by legal process against him as a witness.*" [8]

Therefore, according to Wigmore and the decisions of the courts of a number of the states, the results of an involuntary physical examination of the accused are admissible, the compulsion used in such cases not being *testimonial compulsion.* However, the fact remains that such matter is construed as falling within the privilege in some states, and hence it is not admissible therein.

Relatively recent innovations give rise to new questions with regard to this particular phase of the privilege against self-incrimination. One of these is the polygraph or lie-detector. Apparently there are only two criminal cases in the United States in which an appellate court has passed upon the admissibility into evidence of the results of the application of the lie-detector.[9] However, in neither of these cases did any question with regard to the privilege against self-incrimination arise as the tests were voluntarily submitted to. It is interesting to note that the results of the tests were rejected in both cases,—in the case of *Frye v. United States,*[10] because the lie-detector had not as yet passed out of the experimental stage, and in the case of *State v. Bohner,*[11] for the same reason and for the additional reason that the test had not been made in the presence of the prosecution so that they would have had an opportunity to use it had the result been different. In commenting upon the latter case Wigmore says: "The latter reason is sound, for the test should be so taken as to be available in evidence

5 24 ILL. L. REV. 487.

6 4 WIGMORE ON EVIDENCE (2nd ed. 1923) §§ 2250, 2263, 2264, 2265.

7 116 U. S. 616 (1885); 4 WIGMORE ON EVIDENCE (2nd ed. 1923) § 2264.

8 4 WIGMORE ON EVIDENCE (2nd ed. 1923) § 2263.

9 Frye v. United States, 54 D. C. App. 46, 293 Fed. 1013 (1923); State v. Bohner, 210 Wis. 651, 246 N. W. 314 (1933).

10 *Op. cit. supra* note 9.

11 *Op. cit. supra* note 9.

regardless of the result; but the former reason is not tenable, for the instrument named has demonstrated its utility in the hands of an expert . . ." [12]

The lie-detector being scientifically accurate in the hands of an expert, would the use thereof over the protestations of the accused violate the privilege against self-incrimination? It is submitted that it need not because "even if the 'association word' method of detection were used, the reaction words would not be testimonial." [13] However, since the lie-detector records a definite reaction whether the subject talks or remains silent is the privilege thereby violated? [14] It seems that it is not, if we adhere strictly to the theory of the privilege as set out by Wigmore, *i. e.,* protection from any disclosure sought by legal process against one as a witness. In such case, again, the compulsion is not testimonial. The use of the lie-detector is a kind of physical examination of the accused, and the results admissible as such.

Assuming, for the sake of argument, that such use of the lie-detector is equivalent to the extraction of statements from the lips of the accused, the objection thereto would fail for the reason above set out that such compulsion is not testimonial—not by process of law or its equivalent.[15] In such case the question becomes one of an untrustworthy confession, which is wholly distinct from and unconnected with the privilege against self-incrimation.[16] Thus, so far as this privilege is concerned the use of the lie-detector is unobjectionable in those jurisdictions which follow Wigmore's view of the matter. "However, the use of the deception test might result in defeating the purpose of the privilege in that the prosecution would rely on the result of the test and not seek other sources of evidence." [17]

Another instance in which a question as to the violation of the privilege against self-incrimination might arise is with regard to the increasing use of devices to determine whether or not one is or was intoxicated at a certain time. Although such devices are in the experimental stage, it is quite probable that their use may become highly developed and commonplace. In those states that adhere to Wigmore's theory of the privilege, the evidence so obtained will, in all probability, be admissible. As to what the other states might hold in such a situation, it is difficult to say. Doubtless, many of them will hold the evidence inadmissible if they cling to their present theories regarding the subject.

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12 WIGMORE ON EVIDENCE, SUPPLEMENT TO SECOND EDITION (1934) n. 2, p. 438.

13 37 HARV. L. REV. 1138.

14 WIGMORE ON EVIDENCE, SUPPLEMENT TO SECOND EDITION (1934) p. 1022.

15 4 WIGMORE ON EVIDENCE (2nd ed. 1923) § 2265.

16 4 WIGMORE ON EVIDENCE (2nd ed. 1923) § 2266.

17 37 HARV. L. REV. 1138.

PAYMENT—MISTAKE OF LAW.—Generally, money paid under mistake of law cannot be recovered. This rule, though sustained by the great majority of the state courts in the past,[1] has been criticised frequently.[2] In 1802, in the famous case of *Bilbie v. Lumley*,[3] where the question was whether money paid under a mistake of law could be recovered, Lord Ellenborough refused relief. In that case, quasi-contractual recovery of money paid upon an insurance policy, under the mistaken belief that there was no legal defense, was denied because the mistake was one of law. This conclusion was rendered in direct repudiation of several earlier decisions both at law [4] and in equity,[5] where the relief for mistake of law had been granted. Lord Ellenborough later changed his mind, when the precedents were brought to his attention, as was evidenced by the subsequent holding in *Perrott v. Perrott*.[6] Regardless of the reversal of the *Bilbie* case, its decision was adopted in many American jurisdictions, with the exception of two states,[7] without question of the soundness of its doctrine, and was also taken up in England.[8]

The reason most generally given for the rule, is that offered by Lord Ellenborough: "Every man must be taken to be cognizant of the law." [9] This presumption has been responsible for denying recovery of money paid under mistake of law, and has been severely censored and commented upon by many learned justices.[10] "It is true that this so-called

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1 Clarke v. Dutcher, 9 Cow. 674 (1824) (excess rent paid by tenant); New York City Employees' Retirement System v. Elliot, 267 N. Y. 193, 196 N. E. 23 (1935); Standard Oil Co. of Ky. v. Gramling, 160 So. 725, (Ala. App. 1935); Jordan v. Johns, 79 S. W. (2d) 798 (Tenn. 1935); State v. Perlstein, 79 S. W. (2d) 143 (Tex. Civ. App. 1934); Black v. Mosher, 11 Cal. App. (2d) 532, 54 Pac. (2d) 492 (1936); Andrews v. National Oil Co., 204 N. C. 268, 168 S. E. 228 (1933) (money paid for goods in excess of that received); Austin v. Dunn, 176 Wash. 453, 29 Pac. (2d) 740 (1934) (mistake as to amount of land paid for); Gem Building & Loan Ass'n of Newark v. Town of Belleville, 117 N. J. Law 59, 186 Atl. 466 (1936).

2 KEENER, QUASI-CONTRACTS (1893) 85-122; WOODWARD, LAW OF QUASI-CONTRACTS (1913) 35; 3 WILLISTON, CONTRACTS (1920) § 1574.

3 2 East 469 (1802).

4 Hewer v. Bartholomew, Cro. Eliz. 614, 78 Eng. Rep. 855 (Q. B. 1597) (recovery of money paid under mistake of law in action of account).

5 Lansdowne v. Lansdowne, 2 Jac. & W. 205, 37 Eng. Rep. 605 (Ch. 1730) (cancellation of partition agreement made under a mistake of law).

6 Perrott v. Perrott, 14 East 423, 104 Eng. Rep. 665 (K. B. 1811).

7 Ray v. Bank of Ky., 3 B. Mon. 510 (1843); Northrop's Executors v. Graves, 19 Conn. 547, 50 Am. Dec. 264 (1849).

8 Brisbane v. Dacres, 5 Taunt. 143 (1813) (by a divided court, it was decided that an officer who made payment of prize money to a superior, both parties mistakenly believing that the law required this, could not obtain restitution).

9 Bilbie v. Lumley, *op. cit. supra* note. 3.

10 Per Lord Mansfield, Jones v. Randall, Cowp. 37 (1774); Martindale v. Faulkner, 2 C. B. 719 (1846); Montrion v. Jeffries, 2 Car. & P. 113, 116 (1825) (The court said: "God forbid that it should be imagined, that an attorney, or a counsel, or even a judge, is bound to know all the law.").

rule has been declared by courts in general terms, and it is a popular derivative of the maxim that 'ignorance of the law excuses no man'; but this application of the maxim is fallacious, and there is no such rule of exclusion from relief at law or in equity of suitors who seek to have some legal act declared void upon the ground that it was done through mistake of law." [11] It has also been said that to permit recovery would lead to promiscuity and indiscrimination. However, it seems that it would not lead to great uncertainty, as recovery for mistake of fact is allowed in most jurisdictions today.[12] One would not be be more induced to commit fraud or injustice if there was an allowance for a mistake of law as well as one of fact.[13] It would be as easy for one to feign ignorance of fact as one of law. There does not appear to be a valid reason for the maintenance of the rule, except perhaps, the poor precedent set up by Lord Ellenborough.

At least two states have consistently denied the principal case by decision,—Connecticut [14] and Kentucky.[15] In the former State, a leading case was *Northrup's Executors v. Graves*,[16] where the court said: "The mind no more assents to the payment made under a mistake of the law, than if made under a mistake of facts; the delusion is the same in both cases; in both, alike, the mind is influenced by false motives." And in the latter State, a similar view has been acted upon in the great majority of the cases. In City of *Covington v. Powell* [17] the judge held: "Upon the whole. . . . whenever, by a clear and palpable mistake of law or fact, essentially bearing upon and affecting the contract, money has been paid, without cause or consideration, which, in law, honor, or conscience, ought not to be retained, it was, and ought to be recovered back." Even in England there has been some disposition to rebel against the old rule laid down by Lord Ellenborough.[18]

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11 King v. Doolittle, 38 Tenn. (1 Head) 77 (1858).

12 KEENER, *op. cit. supra* note 2, at p. 23; Mobile County v. London & Lancashire Ins. Co., 173 So. 99 (Ala. App. 1937); Metropolitan Life Ins. Co. v. Mundy, 167 So. 894 (La. App. 1936).

13 5 COL. L. REV. 367 (1905).

14 Northrop's Executors v. Graves, *op. cit. supra* note 7; Stedwell v. Anderson, 21 Conn. 139, (1851) (a party, who had paid money under a mistake as to his rights and duties, which he was under no legal or moral obligation to pay, and which the party receiving it had no right, in good conscience, to retain, might recover it back, in an action at law, whether the mistake was one of fact or law); Gilpatric v. City of Hartford, 98 Conn. 471, 120 Atl. 317 (1923) (incorrect apportionment of tax due to mistake of law by state treasurer).

15 Ray v. Bank of Ky., *op. cit. supra* note 7; Bruner v. Stanton, 43 S. W. 411 (Ky. 1897) (liquor license fee paid under invalid ordinance); Supreme Council Catholic Knights of America v. Fenwick, 169 Ky. 269, 183 S. W. 906 (1916) (mistakenly paying insurance premiums).

16 Northrop's Executor's v. Graves, *op. cit. supra* note 7.

17 City of Covington v. Powell, 2 Metc. (Ky.) 226 (1859).

18 Rogers v. Ingram, L. R. 3 Ch. D. 351 (1876); Daniel v. Sinclair, 6 A. C. 181 (1881); Stanley Bros., Ltd., v. Corporation of Nuneaton, 107 L. T. R. 760 (1912).

Thus, it is seen that these three jurisdictions have led in the recognition of the short-comings of the *Bilbie* case, and have dared to encroach upon its holding.

Recently, moreover, several states have made legislative attempts to eliminate the distinction between a mistake of law, and one of fact. At present, at least six jurisdictions, Montana, California, Oklahoma, North Dakota, South Dakota, and Georgia, have modified the rule by enactment.[19] With the exception of Georgia, the statutes are practically identical.[20] Before the statute, Georgia held that money paid under a mistake of law might be recovered; but, money paid in ignorance of the law could not be regained. This court elucidated on the distinctions in *Culbreath v. Culbreath*:[21] "Ignorance implies passivity; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues diligence, which is commendable." The distinction reached in this case has been accepted and approved generally by the State in its legislative movement, as is evidenced by its statute. The court of South Carolina has also drawn a distinction between mistake and ignorance of law, granting relief for mistake, and denying it when the payment was due to ignorance.[22]

There are certain exceptions and limitations to the general rule denying recovery for money paid under mistake of law.[23] The *Restatement of the Law of Restitution* [24] states the rule:

"A person who conferred a benefit upon another because of an erroneous belief induced by a mistake of law that he is under a duty so to do, is entitled to restitution as though the mistake were one of fact if: (a) the benefit was conferred by a state or sub-division,[25] or (b) the benefit was received on behalf of a court which has control over its disposition,[26] or (c) the mistake was as to the law of a State in which

19 CAL. CIV. CODE (Deering, 1931) §§ 1576, 1578; MON. REV. CODE (Choate 1921) § 7486; N. D. COMP. LAWS ANN. (1913) § 5855; S. D. COMP. LAWS (1929) § 822; OKLA. STAT. (Harlow, 1932) § 9423; GA. CODE ANN. (Michie, 1926) § 37-204; Hadley v. Farmers' Nat. Bank of Okla., 125 Okla., 250, 257 Pac. 1101 (1927); City of Petaluma v. Hickey, 90 Cal. App. 616, 266 Pac. 613 (1928). Contra: In re Estate of McIlrath, 276 Ill. App. 408 (1934); Miners' & Merchants' Bank of Nanty-Glo Case, 313 Pa. 118, 169 Atl. 85 (1933).

20 With the exception of Georgia, the other statutes are very similar.

21 Culbreath v. Culbreath, 7 Ga. 64, 50 Am. Dec. 155 (1849).

22 Lawrence v. Beaubien, 2 Bailey (S. C.) 623, 23 Am. Dec. 155 (1831); Hutton v. Edgerton, 6 S. C. 485 (1875).

23 Ex parte James, L. R. 9 Ch. 609 (1874); Moulton v. Bennett, 18 Wend. (N. Y.) 586 (1836) (payments to attorney by adversary's client).

24 RESTATEMENT OF THE LAW OF RESTITUTION (1937) § 46.

25 Demopolis v. Marengo County, 195 Ala. 214, 70 So. 275 (1915) (money paid under a void appropriation); Heidt v. U. S., 56 Fed. (2d) 559 (C. C. A. 5th, 1932).

26 United States v. State Bank, 96 U. S. 30, 35 (1887) (Justice Swayne held that the United States could not hold the money of an innocent party, which had

the transferor neither resided nor did business, except a mistake of law in the payment of taxes,[27] or (d) the mistake was as to the validity of a judgment subsequently reversed.[28] Money paid for taxes, as pointed out above, is held to be an exception, and recovery is denied.[29] In a recent Pennsylvania decision it was held that the Federal Government was not entitled to money mistakenly refunded to a taxpayer by reason of a mistake of law.[30] Recovery has also been allowed where the plaintiff benefited the defendant, anticipating a return which was not made because the agreement was found to be void or unenforceable.[31] The courts have accordingly permitted restitution when money was paid for a purpose which could not be carried out or where the transferor did not get a return that he expected to get.[32]

It is frequently asserted that equity will not grant relief for a pure mistake of law;[33] but, the courts generally give relief for such mistakes on principles similar to those that they apply in a mistake of fact. The courts of equity justify their assertion on the same grounds as

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gone into its treasury by means of fraud. He said: "An action will lie whenever the defendant has received money which the defendant is obliged by natural justice and equity to refund."). The theory behind allowing recovery for money paid to a public officer under mistake of law, is that persons dealing with such officers are right in assuming that the officers are acquainted with the law.

27 Osincup v. Henthorn, 89 Kan. 58, 130 Pac. 652, 46 L. R. A. (N. S.) 174 (1913) (mistake as to law of descent in state other than that of the residence of both parties); Bank of Chillicothe v. Dodge, 8 Barb. 233 (1850) (complainant living in Ohio discounted instruments payable to defendant, a New York person, the instrument being void in New York); Miller v. Bieghler, 123 Ohio St. 227, 174 N. E. 774 (1931) (Ohio parties exchanged land, and there was a mistake as to Texas title). The courts generally allow recovery on the basis that the mistake as to foreign law is a mistake of fact.

28 Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969 (1933); Golde Clothes Shop v. Loew's Buffalo Theatres, 236 N. Y. 465, 141 N. E. 917 (1923); B. & O. Ry. Co. v. United States, 279 U. S. 781 (1927).

29 Prescott v. Memphis, 154 Tenn. 462, 285 S. W. 587 (1926); New Orleans v. Jackson Brewing Co., 126 La. 121, 110 So. 110 (1926); Coleman v. Inland Gas. Corp., 231 Ky. 637, 21 S. W. (2d) 1030 (1929). See: 7 COL. L. REV. 601; 45 HARV. L. REV. 501.

30 U. S. v. Hart, 12 F. Supp. 596 (1935).

31 General Paint Co. v. Kramer, 68 Fed. (2d) 40 (C. C. A. 10th, 1933) (an oral contract was found to be within the Statute of Frauds); Bedell v. Oliver H. Bair Co., 104 Pa. Super. Ct. 146, 158 Atl. 651 (1932); Shaw v. Board of Education, 38 N. Mex. 298, 31 Pac. (2d) 993 (1934).

32 Wayne County Produce Co. v. Duffy-Mott Co., 244 N. Y. 351, 155 N. E. 669 (1927) (payment of undue war tax). Contra: Kazwell v. Reynolds, 250 Ill. App. 174 (1928); Heckman Co. v. I. S. Dawes & Son, 12 Fed. (2d) 154 (1926).

33 Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174, 1 Am. Lead. Cas. 700 (1828); Taylor v. Buttrick, 165 Mass. 547, 43 N. E. 507 (1896); Mitchell v. Holman, 30 Ore. 280, 47 Pac. 616 (1897); Williams v. Gillespie, 291 N. Y. S. 513 (1937); Breit v. Bowland, 100 S. W. (2d) 599, 92 S. W. (2d) 110 (Mo. App., 1937); Bowen v. Pursel, 109 N. J. Eq. 67, 156 Atl. 649 (1931); Finnell v. People's Bank, 182 S. E. 888 (W. Va. 1935).

courts of law, by saying that everyone is presumed to know the law.[34] In *Hunt v. Rousmanier's Administrators* [35] a letter of attorney to execute a bill of sale of a ship was taken by a creditor from a debtor, under the impression that it was valid as security. The debtor died, and as the letter of attorney was revoked by death, the security was invalidated. It was held that mistake of the parties as to the legal effect of the instrument was no grounds for relief. In their effort to grant relief, and prevent great injustice by the enforcement of the general doctrine, the courts have declared that a mistake as to the title to property, as to the existence of certain particular rights, as to the law of another state or country, or even as to the duties or obligations imposed by an agreement, were really mistakes of fact and not law, and thus did not constitute a bar to relief.[36] Some courts set forth a distinction between ignorance and mistake of law, correcting the latter, but denying aid for ignorance while others even refuse to distinguish between mistakes of fact and law.[37]

There has been no question about granting relief against a mistake of law where the mistake was accompanied with unequitable conduct of the other party such as fraud, misrepresentation, and threats amounting to duress.[38] In its great attempt to relax the general rule denying recovery, courts hold that upon receipt of money paid in mistake of

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34 See: 2 POMEROY, EQUITY JURISPRUDENCE (4th ed.) § 842; 1 STORY, EQUITY JURISPRUDENCE (14th ed.) § 173. In Jordan v. Stevens, 51 Me. 78, 81 Am. D. 556 (1863), the court said: "The ground on which the doctrine rests is this, that it is impossible to uphold the government, and so to maintain its administration as to protect public and private rights, except on the principle that the rights and liabilities of every one shall be the same as if he knew the law."

35 *Op. cit. supra,* note 33.

36 United Commercial Travelers v. McAdam, 61 C. C. A. 22, 125 Fed. 358 (1903); Shanklin v. Ward, 291 Mo. 1, 236 S. W. 64 (1921) (court of equity relieved one from the consequences of a mistake of title, even though the mistake was one of law); Ossincup v. Henthorn, *op. cit. supra,* note 27. Accord: Conn., Ill., Ind., Me., Mass., Miss., Mo., N. H., N. Y., Ohio, Tenn., Wash., and Eng.

37 Turner v. Washington Realty Co., 128 S. C. 271, 122 S. E. 768 (1924); Lane v. Holmes, 55 Minn. 379, 57 N. W. 132, 43 Am. St. Rep. 508 (1893) ("The rule itself distinguishing mistake of law from mistake of fact is founded on no sound principle."). Accord by statute: Cal., Mont., N. D., S. D., Okla., and Ga.

38 Boyle v. Maryland State Fair, 150 Md. 333, 134 Atl. 124 (1926) (relief given where mistake of law is accompanied with fraud); Employers' Re-Insurance Corp. v. Going, 161 Tenn. 79, 26 S. W. (2d) 126 (1930) (relief given where mistake of law is brought about by representations of the other party); Holm v. Bramwell, 67 Pac. (2d) 114 (Cal. App., 1937); Tway v. Southern Methodist Hospital & Sanitorium of Tuscon, 62 Pac. (2d) 1318 (Ariz., 1937) ("Voluntary payments cannot be recovered, especially where there is no doubt of indebtedness of payor to payee, and when payment is made without mistake, in absence of fraud, duress, and coercion, and when payment should have been made in equity and good conscience."); Gibson v. General American Life Ins. Co., 89 S. W. (2d) 1070 (Tex. Civ. App., 1936); Peterson v. First National Bank, 162 Minn. 369, 203 N. W. 53 (1925) (where one, without blame, makes a mistake of law and fact, and the adverse party takes an unconscionable advantage, equity will relieve the mistaken party).

law, which under the circumstances it would be inequitable to retain, equity will declare a constructive trust in favor of the payer.[39] In few jurisdictions has it been held that restitution of money paid under a pure mistake of law, or in ignorance of the law, will be allowed, where in good conscience the payee has no right to retain it.[40] Equity will always relieve against a mistake of law where an advantage has in any way been taken of one's ignorance of law to mislead him, where there has been some relation of trust and confidence which has been abused, or where certain necessary information has been refused and withheld, and the advantage inures to the wrongdoer, even though no fraud was intended.[41] Where one of the parties is in a position of authority enabling him to exert some influence upon the other, who in ignorance of his legal rights and privileges makes a payment, recovery has been allowed.[42]

A change of position acts so as to bar a recovery of money paid under a mistake of law. If the payee has so changed his position as to be unable to restore it without greater detriment than he would have incurred had the payment never been made, recovery is denied,[43] unless the mistake was due to the defendant's own fault.

Pomeroy states the general rule:[44] "Whenever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities or other relation, either of property or contract or personal status, and enters into some transaction in the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analagous to, if not identical with, a mistake of fact."

David Gelber.

39 Frick v. Cone, 290 N. Y. S. 592 (1937); In re Turley's Estate, 289 N. Y. S. 704 (1937); Curtis v. McKain, 94 S. W. (2d) (Tex. Civ. App., 1937).

40 Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 Atl. 302 (1925); Greene v. Taylor, 184 Ky. 739, 212 S. W. 925 (1919); McCarty v. Mobley, 14 Ga. App. 225, 80 S. E. 523 (1914).

41 Morris v. Morris, 247 N. Y. S. 28 (1932) ("Equity will relieve against mistake of law to avoid unjust enrichment, or where mistake has been induced by other party's misrepresentation, or where advantage has been taken of one's ignorance, or relation of trust exists which has been abused.").

42 Manhatten Milling Co. v. Manhatten Gas & Electric Co., 115 Kan. 712, 225 Pac. 86 (1924).

43 Lindley v. United States, 59 Fed. (2d) 336 (C. C. A. 9th, 1932); Hullett v. Cadick Milling Co., 90 Ind. App. 271, 168 N. E. 610 (1927); Pelletier v. State National Bank, 117 La. 335, 41 So. 640 (1906); Wilson v. Barker, 50 Me. 447 (1862); Stadmiller v. Shirmer, 248 Mass. 244, 142 N. E. 905 (1924). But, the change of position is not available as a defense where a public utility is involved, as the rates are fixed by statute. See: Strawberry Growers' Selling Co. v. American Ry. Exp. Co., 31 Fed. (2d) 947 (C. C. A. 5th, 1929); *Right of Interstate Carriers to Collect Undercharges* (1935) 45 YALE L. J. 142.

44 *Op. cit. supra* note 34.

TORTS—CONTRIBUTION—INSURANCE COMPANIES. — The questions involved in a treatment of this subject will arise in a factual situation somewhat like the following. Suppose A and B are driving along the highway so engrossed in their surroundings as to forget the rules of the road, and as a result of their concurrent negligence, they collide. C, a third party, is injured as a result of this collision, and sues to recover the damages so incurred. C sues A, whose insurance company, X, completely satisfies the resulting judgment. B is insured in the Y insurance company. Now what remedies has X, A's insurance company, as against B or B's insurance company, Y?

A logical treatment of this subject requires first, a determination of the existence or non-existence of the right of contribution between tortfeasors, which will involve a treatment of why the law has and has not entertained the doctrine, and why and when it should entertain it; second, having determined the instances in which the right of contribution will be allowed, it will treat of the question of the subrogation of such right to that insurance company that has satisfied the entire claim against its insured, such doctrine of subrogation seeming to be almost a conclusion consequent to the determination of the existence of the contributive right itself; and finally, the further consideration that such insurance company might be allowed to proceed not only against the fellow tort feasor, but, if he have insurance, the right to proceed directly against his insurer.

The long lines of cases dealing with this question would seem to indicate that there is a hopeless divergence of opinion as to whether or not a tortfeasor, jointly or severally liable, has any remedy in case he completely satisfies a judgment rendered against him, or against him *and* his fellow tortfeasor. It is hard to see why courts would not allow such contribution, and indeed, there is a general progression toward accepting the doctrine. The courts are increasingly aware, or are being made aware, of the inequality resulting from adherence to the old rule absolutely denying contribution. The occasions for the application of this doctrine in tort cases will undoubtedly increase in number and variety. Therefore it would be well to indicate the divisions and classes in which and outside of which contribution will and will not be allowed.

"Contribution may be defined as the payment by each or any of several having a common liability because of loss suffered, or in money necessarily paid by one of the parites in behalf of the others. The doctrine is not founded on contract, but comes from the application of principles of Equity to the condition in which the parties are found in consequence of some of them, as between themselves, having done more than their share in performing a common obligation." [1]

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[1] CONTRIBUTION, 13 C. J. 821.

The general rule applicable to tortfeasors is stated as follows: "Where one of several wrong-doers has been compelled to pay the damages for the wrong committed, the general rule is that he cannot compel contribution from the others who participated in the commission of the wrong." [2] The courts have made exceptions to this general rule.

A historical treatment of the subject will tend to show a strict adherence to judicial precedent, without an exploration into the reasons for the denial of the doctrine, and the stability and reasonableness of these reasons themselves. *Merryweather v. Nixon,*[3] is the oldest case cited in support of the general rule. Lord Kenyon said: "If A recover in tort against two defendants and levy the whole damage on one, that one cannot recover a moiety against the other for his contribution." The basic reasons advanced for the doctrine are that the law will not adjust differences between wrong-doers, but will leave them as it finds them; that such adjustment of differences would tend toward the encouragement of tortious conduct; and no man can make his own misconduct the ground for an action in his favor, for where the fault is mutual, the law will leave the case as it finds it.

The harshness, inequality, and practical injustice which would follow and which has followed the strict application of this doctrine, has led to judicial and statutory relaxation. This is only right. Furthermore, there are additional reasons why this rule should have exceptions. One of the most apparent would seem to be the opportunity and inducement which the situation offers for a collusive agreement between one of the tortfeasors and the injured person, a possibility which the law will not anticipate, but which it cannot afford to overlook in its attempt at the furtherance of human welfare.

The result is that equity, in which, because of the non-existence of the legal remedy, the doctrine of contribution must find its source, taking cognizance of the situation, has propounded those situations in which the doctrine will not be enforced by application of the maxim, "He who comes into equity must do so with clean hands." There is left to statutory pronouncement the duty of saying explicitly in what cases it might, should, and will be entertained.

What is the basis of this equitable pronouncement? "Equity is equality"; and a joint judgment debtor, coming into equity claiming contribution, having paid the full amount of the judgment against both of them, asks that his fellow tortfeasor be made to bear part of the burden imposed on him, *not* because of his own negligence alone, but because of their concurrent negligence, and because he has been made to bear the brunt of a judgment, part of which at least is in the nature of a penalty. If his plea will not be heard, has he not in effect been

2 CONTRIBUTION, 13 C. J. 828.
3 8 T. R. 186, 16 R. R. 810 (1799).

made liable for the other's negligence, or unduly liable for his own share? Has he not been made to pay for that for which he is not fully responsible?

"But," the law replies, "He who comes into equity must do so with clean hands." And equity in reply can point to those cases where, when the hands of the plaintiff were in truth not clean, he found, not relief in equity, but deserved rebuke. No, rather would equity say to the law that a petitioner ought not to be ousted before his plea is heard, but let there first be an investigation into the merits of his plea, into the facts surrounding the tort, for the purpose of determining whether or not he has done that which will be held to constitute unclean hands.

What would be done to a claim for contribution where the claimant's hands were unclean is indicated in many cases, one of which is *Avery v. Central Bank of Kansas City*.[4] In this case A and B were wilful wrongdoers, and their fraud involved moral turpitude. A paid all the damages resulting from the wrong, and then sued B. The damages paid by A consisted in returning to the Bank money received from it in payment for shares of its stock. A put back all the money for the stock he and B had sold the bank, but received for his money only half of the shares in return, B's heirs retaining the other shares. The court held A was not entitled to contribution from B, because of the moral turpitude involved in the commission of the tort, both on the part of A and on the part of B. In this case the joint wrongdoer was benefited by the court's refusal to enforce contribution against him, even though he too was guilty of moral turpitude.

With moral turpitude may be bracketed such negligence as would bar contributive recovery, gross negligence, for this would almost approach the objection of unclean hands. Thus, in *Jacobs v. Pollard*[5] the court said: "Wrongdoers cannot have redress or contribution against each other upon being held liable for the unlawful act, *but* this rule is confined to cases where the person claiming redress *knew or must be presumed to know the act to be unlawful.*" (Italics are mine.)

A further application of this rule in *Griffiths v. National Fireproofing Company*[6] resulted in a most equitable ruling, the court there saying: "Where one does an act which produces an injury, and the other does not join in the act, but is thereby exposed to liability and suffers damage, the law will inquire into the real delinquency and place the ultimate liability on him whose fault was the primary cause of the injury." So one who has been made liable on a vicarious basis, can seek recovery from him whose active fault was the cause of the injury.

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4 221 Mo. 71, 119 S. W. 1106 (1909).

5 10 Cush. 287, 57 Am. Dec. 105 (1852).

6 310 Ill. 331, 141 N. E. 739 (1923).

These cases indicate how far the investigation into the merits of the plaintiff's plea might be carried before he would be denied any relief.

Minnesota and Wisconsin have gone very far in extending the exceptions to the present general rule, and the following cases will serve to show what progress in that direction would ultimately lead the courts to embrace.

In *Ellis v. Chicago and Northwestern R. R.*,[7] the leading case on contribution in the state of Wisconsin, the court firmly stated that in cases of freedom from moral turpitude, contribution will be allowed. Thus, in the same State, in the case of *Mitchel v. Raymond*,[8] where action was brought by the passenger in one car against the driver of another car which collided with the one in which he was riding, the driver of the passenger's car being made a party defendant, and each defendant having been proved negligent, proximately causing the injury, neither guilty of gross negligence, the driver transporting the plaintiff was held liable to contribute one-half of the judgment secured by the plaintiff against the driver of the other car.

Therefore we can conclude that we have two instances in which contribution should be granted, *i. e.*, when the petitioner is free from moral turpitude in the doing of the act, and when there is furthermore a freedom from negligence so gross as to preclude recovery.

Wisconsin also carries this doctrine into the field of insurance, allowing the subrogation of the contributive right from one of the tortfeasors to his insurer. Thus, in the case of the *Western Casualty and Surety Company v. The Milwaukee General Construction Company*[9] it was held that in an action to recover from the defendant one-half of the amount paid in settlement of damages caused by the concurring negligence of the Western Casualty and Indemnity Company's insured, (one Clas) *and* the Milwaukee General Construction Company, when the casualty company had paid off its policy holder's liability, a decision of the trial court sustaining a demurrer by the Milwaukee General Construction Co., was error, the Supreme Court on appeal declaring, that the court should entertain the Casualty Company's cause for contribution when there was freedom from moral turpitude on the part of that company's insured. The right was established; its subrogation was recognized.

Exactly in line with this train of thought is a Minnesota case, *Underwriter's at Lloyds of Minneapolis v. Smith*,[10] wherein the court said: "The rule that courts will not allow contribution between wrongdoers is subject to many exceptions." An automobile passenger was injured in

7 167 Wis. 392, 167 N. W. 1048 (1918).
8 181 Wis. 591, 195 N. W. 855 (1923).
9 251 Wis. 491, 213 Wis. 302, 251 N. W. 491 (1933).
10 166 Minn. 388, 208 N. W. 13 (1926).

a collision caused by the negligence of both drivers, and recovered on judgment against one of the drivers whose insurer paid, the court said that "the insurer is entitled to contribution from the other; one compelled to respond in damages for negligence may enforce contributions from others jointly liable. Where the ground of liability is simply the negligence of each while engaged in lawful undertakings, the one compelled to respond in damages may enforce contribution from the others." Here the insurer is suing the insured's joint tortfeasor for contribution on the ground that the insured had the right of contribution against the defendant, and, since the insurer has paid, it is entitled by subrogation to the rights of the insured. The appeal from the trial court's decision sustaining demurrer allowed, decision reversed and remanded.

In California, where the right of contribution is not recognized, there is consequently no right of action in the indemnitor insurance company which satisfies the plaintiff's judgment against the joint tortfeasor insured as against the other joint tortfeasors.[11]

So also in a recent case in the state of Ohio, that is, the case of *United States Casualty Company v. Indemnity Company of North America*,[12] the doctrine of contribution received no recognition, and when the plaintiff's attorney tried to establish a co-surety relation between the insurers of two joint judgment debtors, the court held that no such relation actually or technically existed, and since this was the only basis for the plaintiff's plea for contribution, he must fail. "The joint judgment obtained does not reach back to make the companies cosuretors, and what they were not in the beginning, the judgment does not make them now." Judge Williams dissented, and with a strong contrary opinion seemingly based on the primary question of the right of contribution and the subsequent determination of whether or not that right could be said to exist in the insurer. His views on the subject were sympathetic with the Minnesota and Wisconsin decisions cited above.

A recent case in North Carolina might be cited to indicate the unwillingness of the law to take the necessary steps to do something about the settlement of these differences. In the case of *Lumberman's Mutual Casualty Company v. The United States Fidelity and Guaranty Co.*[13] the court said that "where the injured person recovered judgment against both of the drivers of the automobiles involved in collision," *even* "a statute contemplating contribution between the joint tortfeasors and the joint judgment debtors," gives the insurer on one liability policy no right of action against the insurer of the other automobile for one-half of the amount of the damage paid. Here it is ad-

11 Adams v. White Bus Lines, 50 Cal. App. 82, 195 Pac. 290 (1921).
12 129 Ohio St. 391, 195 N. E. 850 (1935).
13 188 S. E. 634 (N. C. 1936).

mitted the contributive right would have been enforced, but the court would not, in the absence of statute, hold that such right was subrogated to the insurer upon payment of the insured's responsibility. The insured's right of contribution was held not to be subrogated to his insurer.

The conclusions to be drawn from this survey would seem apparent. In the absence of moral turpitude and gross negligence, a person held liable to respond in damages for the entire amount of injury caused by his negligence concurrent with that of another should be allowed to recover from that other some compensatory amount. This doctrine of contribution should continue to find wider and wider application in the equitable adjustment of unequal burdens placed on wrongdoers who are free from gross negligence and moral turpitude. The right of contribution resulting from such law (created preferably by statute in view of many of the courts' unwillingness to take decisive progressive steps in the absence of such statutes) ought to be subrogated (again by statute where necessary) to the rights of the insurer who has satisfied the claim of the joint judgment debtor. In the event of the inability of the joint judgment debtor to pay because of his insolvency, the indemnitor should have the power to reach the joint judgment debtor's insurance company, if not directly, at least on the basis of a creditor's rights analogy, regarding such policy as an asset of the debtor's and as such, subject to recovery by a creditor, which such indemnitor would, in fact, be. This third and last step is admittedly but a consequence of the prior determination of the existence of the contributive right, and the extension of the application of the doctrine of subrogation.

John A. O'Leary.

TORTS—EXCEPTIONS TO THE RULE OF ABSOLUTE LIABILITY FOR DAMAGE CAUSED BY A DANGEROUS INSTRUMENTALITY.—In *Perry v. Can. Headwear Co.*[1] the parties being tenants of the same landlord, occupied the third and fourth floors respectively. On a Saturday about noon the defendant went into the wash room on his premises, and there discovered a leak in the wooden water tank above the bowl. After making an unsuccessful attempt to contact the landlord, who, according to the lease, was responsible for repairs, the defendant attempted to shut off the water supply running to the bowl, and because of the condition of the old plumbing accomplished his purpose only by the use of a wrench on the intake valve above the water tank. He then flushed the toilet to empty the bowl. Upon inspection a half hour later, when, as yet, there was no water in the wooden bowl, the defendant concluded

1 This case is commented on, 7 FORTNIGHTLY L. JOUR. 72.

his own plumbing was successful. However, returning after the week-end, the plaintiff found his premise, consisting mostly of perishable goods, damaged by a great supply of water. Investigation showed it had seeped through from the water-closet of the defendant. A plumber was called immediately who remedied the leak by replacing washers in the intake valve and in the wooden bowl, and the evidence established that the destruction of the washer in the valve was undoubtedly due to the use of the wrench by the self-appointed plumber, the defendant. The plaintiff's two-fold theory of action was, first, negligence in failing to use reasonable precaution to prevent the escape of water, not only because of the defective condition of the plumbing but also because of the defendant's unsuccessful efforts to act as a plumber, and, secondly, the principle of *Rylands v. Fletcher*.[2] Held, that there was reasonable precaution in the defendant's action of Saturday noon by personally attempting to repair the plumbing, and more important, for the sake of this comment, that the plumbing was a natural use of the premise and that the doctrine of this famous English case—that is, absolute liability for the escape of water if it is being put to a nonnatural use — is inapplicable.

In this decision we see a modern exemplification of one of the six exceptions to the rule in *Rylands v. Fletcher* as set forth by Salmond in his book, "Law of Torts." American opinions as to what is a "natural" use of the land have followed this idea so that in Ohio steam-boilers have been held a "natural" use,[3] in Missouri, water pipes;[4] and it has even been held in a Minnesota case that a dam across a stream to obtain power for a mill was "not unnatural or unusual use, but the contrary." [5]

The Canadian court in the *Perry* case must have been considering as precedent the case of *Western Engraving Co. v. Film Laboratories Ltd.*,[6] when they qualified the word "plumbing" by the term "ordinary," in ruling that there was a natural use of the land. In the *Western Engraving Company* case the plaintiffs occupied the first floor of a premise, and the defendants, the Film Laboratories, the second. The work of the defendants consisted chiefly in washing moving picture films. This, of course, necessitated large quantities of circulating waters. An overflow of this water caused the damage for which the plaintiff sought relief. The rule of *Rylands v. Fletcher,* and not the exception as decreed in the *Perry* case, definitely covers this situation, for the use of the water and

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2 L. R. 3 H. L. 330 (1868).

3 Huff v. Austin, 46 Ohio St. 386 (1889).

4 McCord Rubber Co. v. St. Joseph Water Co., 181 Mo. 678, 81 S. W. 189 (1904).

5 City Water Power Co. v. The City of Fergus Falls, 113 Minn. 33, 128 N. W. 817 (1910).

6 [1936] 1 All E. R. 106.

the plumbing of this defendant was extraordinary and nonnatural, creating absolute liability.

Another of Salmond's exceptions to the rule in *Rylands v. Fletcher* states that the nonnatural user is not responsible for acts of a third party. A case with exactly the same factual situation, except that the defendant's wash-bowl overflowed because some party, not known, stuffed packing in the waste pipe and then turned on the water. This case, *Richards v. Lothian,*[7] holds that the rule of absolute liability for the escape of water does not apply for it was caused by the malicious act of a third party. So, also, *Box v. Jubb,*[8] an early English case, in which a third party emptied his reservoir into that of the defendant's, the court refused to decree liability because of the act of a stranger.

American cases are in accord with this exception; and the courts of all jurisdictions have held that the doctrine of *Rylands v. Fletcher* includes not only absolute liability for the escape of water, but also liability for nonnatural use of the premise because of the damage caused by dangerous instrumentalities, as explosives, electricity, as well as wild animals. In a New York case a landlord was repairing his premise and had, during the night, an iron grating around the place being repaired, and also had a night-watchman to guard the premise during the night. When the watchman was on the other side of the building, without negligence, a third person removed the iron railing and the plaintiff fell into the hole. Here the act of the stranger exempted the defendant from liability for he was held not responsible for these acts.[9] In another case, an amusement park was operating a roller-coaster, and some stranger, party not known, placed on the track some chips which caused the cars to be derailed, strike the plaintiff and cause the damage complained of. Liability was not absolute here because of the act of the third party.[10]

If the factual situation is such that the plaintiff consents to the admission upon the premise of the defendant of the dangerous instrumentality, another exception to the rule, avoiding absolute liability, can be shown. In *Richards v. Lothian* the court decreed that since the water was brought into the building for the benefit of both tenants, neither could object to its escape if no negligence could be shown. There was implied consent on the part of both parties. In the *Perry* case the court did not base its decision upon this exception, but may have considered it had not the exception, that plumbing was a natural use of the land, been in point. When one of these dangerous instrumentalities is brought on the land for the mutual benefit of the parties to the action, implied

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7 [1913] A. C. 263.

8 Ex. D. 76 (1879).

9 Wasson v. Pettit, 117 N. Y. 118, 22 N. E. 566 (1889).

10 See: Knotterus v. North Park Street R. R. Co., 93 Mich. 348, 53 N. W. 529 (1892).

consent is understood and must be rebutted by the plaintiff's evidence. *Ross v. Fedden,*[11] another English case, also involves two occupants of the same premise, one seeking damages for the injury caused by water seeping down from the mains of the upper occupant. This case held that there was implied consent. In *Richards v. Lothian* [12] it was said of the *Ross* case that, "the only ground taken by the plaintiff is that the plaintiffs and defendants being occupiers under the same landlord, the defendant being occupier of the upper story, contracted an obligation bringing them in favour of the plaintiff, the occupier of the lower story to keep the water in at their peril. I do not agree to that; I do not think the maxim: *'Sic utere tuo ut alienum non laedas'* applies." There is no such obligation as this between the respective tenants, the court goes on to suggest. However, both of these English cases, along with *Carstairs v. Taylor,*[13] hold that such a consent is given and is the basis of a defense for the defendant.

An interesting series of Kentucky cases have included this exception, in ruling on the dangerous instrumentality, electricity. In *Mangan's Administrator v. Louisville Electric Company* [14] the plaintiff's intestate was a customer of the defendant company and was injured by an electrical discharge from the defendant's wire. No negligence was shown and the rule of absolute liability was refused because of the mutual benefit of the parties in the reception and distribution of the electricity which showed consent on the part of the intestate to permit the wires to extend on the premise. Other Kentucky cases uphold this, one of which held that a lineman's administrator could not recover without showing negligence for there was consent on the part of the lineman to work around the dangerous instrumentality.[15] However, another case, *Owensboro v. Knox's Administrator,*[16] held that where the plaintiff's intestate was walking along the highway and was killed by a discharge from an uninsulated wire, absolute liability could be imposed for no implied consent was given.

Public Utilities have been given relief from this absolute liability rule under the exception that the dangerous instrumentality is a necessary pre-requisite to carrying out a legislative enactment. In *Blyth v. Birmingham Waterworks Company* [17] the water company had observed the directions of the Act of Parliament in laying down pipes, and is not responsible for water escaping when no negligence can be shown. So a gas company was excused from absolute liability when injury was

11 L. R. 7 Q. B. 661 (1872).
12 [1913] A. C. 263, 281.
13 L. R. 6 Ex. 217 (1871).
14 122 Ky. 476, 91 S. W. 703 (1909).
15 Kentucky Utilities Co. v. Searey, 168 Ky. 840, 181 S. W. 662 (1916). Accord: West Kentucky Coal Co. v. Key, 178 Ky. 224, 198 S. W. 724 (1917).
16 116 Ky. 451, 76 S. W. 191 (1903).
17 11 Ex. 781 (1856).

caused by escaping gas;[18] also, the doctrine of absolute liability was not applied to injury caused by a steam railway when the sparks from a boiler caused damage to a premise.[19] All relief in these cases was granted on the basis of legislative sanction given to the defendants to use these dangerous instrumentalities in a nonnatural manner. American utilities have been relieved under the same rule. *Hutchinson v. Boston Gas Light Company* [20] is a case in which because of the escape of gas from the defendant's mains, a combustion occurred, and the plaintiff was burned while trying to escape from the fire. No negligence was shown on the part of the company, and the Massachusetts court refused to apply the rule of *Rylands v. Fletcher* because the gas company had been given statutory authority to lay the mains. The New York court has gone even further, holding that where the government had given its sanction to the National Zoological Garden to house wild animals, the doctrine of absolute liability was refused where a plaintiff, injured by a wild beast, could not show negligence.[21] However, a recent Texas case refused to relieve a city of liability under this rule. In the case, *City of Brady v. Cox*,[22] a city had raised the level of a street above that of adjacent landowners and after a heavy rain the water flooded down upon the plaintiff's premise. The court held that even though statutory authority had been given the city to so improve the streets, "one diverting flood waters or impounding them on his premise is liable to his neighbor for damages caused thereby, regardless of negligence in constructing drains."

The best known and most frequently employed exception to the doctrine of absolute liability for the nonnatural use of land by harboring dangerous instrumentalities is if an Act of God intervenes. An early leading case considering this exception was *Nichols v. Marsland*.[23] The defendant was in possession of certain artificial pools formed by damming a natural stream. Although the embankments were considered well-constructed, a violent storm, of such magnitude that it was unforeseeable, flooded these artificial pools and all the water rushed onto the land of the plaintiff. Since no negligence was shown, the court refused to permit the *Rylands v. Fletcher* doctrine because of the act of God. So, also, in the case of *Nitrophosphate & Manure Co. v. London and St. Katherine Docks Co.*[24] the defendants were sued for the damage caused by an unusually high tide, owing to their retaining bank not being sufficiently high. Fry, J., stated that even though the tide was not unique, the fact that it was extraordinary was sufficient to place the

18 Price v. Metropolitan Gas Co., 65 L. J. Q. B. 126 (1895).
19 Vaughan v. Taff Vale Railway Co., 5 H. & N. 679 (1860).
20 122 Mass. 219 (1872).
21 Malloy v. Starin, 191 N. Y. 21, 83 N. Y. 588 (1907).
22 48 S. W. (2d) 511 (Tex. Civ. App. 1932).
23 L. R. 10 Ex. 255 (1875).
24 9 Ch. Div. 515 (1878).

ruling within the exception of the Act of God. Many American cases support these rulings. *Sutliff v. Sweetwater Water Co.*[25] a recent California case, held that where the water company had constructed a reservoir and during an unprecedented flood the walls of the reservoir gave way, the plaintiff must show negligence to enable him to recover. In *Perkins v. Vermont Hydro-Electric Corporation* [26] it was shown that the company was negligent in construction of the retaining wall to the reservoir but that the accident would not have happened but for an unprecedented flood. The exception applied to the case where the Act of God would have caused the injury irrespective of the negligence, but it is for the jury to determine whether the flood was of such magnitude as this.

The final exception, as set out by Salmond, is that if the injured party is a trespasser or if the injury would not have occurred but for the nonnatural use by the plaintiff of his property, the defendant will not be liable under the rule. In relation to the consideration of no liability because the person was a trespasser, the case *Postmaster-General v. Liverpool Corporation* exemplifies the rule.[27] The plaintiffs were claiming damage for the injury to their own telephone poles, lines, and cables. It was shown that there was no negligence on the part of the defendant, although a wire was exposed on the defendant's line which permitted the escape of electric current causing the injury complained of. The court stated that since the plaintiffs were guilty of laying their cable too close to the other cables, and on the property of the defendant, they cannot recover in this action. American cases on this point are numerous and covered by various doctrines. An interesting case showing the adoption of the exception is *Hughes v. Boston Maine R. R.*[28] A child of tender years found upon the premise of the defendant a torpedo with which he began to play. The point at which it was found was a place that the railway company knew many people passed and without objection. The torpedo exploded causing the injury. Liability of the defendant was refused because the intermeddling of the plaintiff without right was a trespass.

As to the second part of this exception, that if the plaintiff is also using his property unnaturally and, but for this there would have been no injury, utility companies have used this frequently. In *Eastern and South African Telegraph Co. Ltd. v. Cape Town Tramways Companies, Ltd.*,[29] the tramway company was held not liable for the disturbance of the working of the plaintiff's telegraph cables by electricity escaping from the wires. So, also, in the case of *Lake Shore and M. S. Railway*

25 182 Cal. 84, 186 Pac. 766 (1920).
26 177 Atl. 632 (Vt. 1934).
27 [1923] A. C. 587.
28 71 N. H. 279, 51 Atl. 1070 (1902).
29 [1902] A. C. 381.

Co. v. Chicago, Lake Shore and S. B. R. Co.[30] the fact that the electrical lines, high tension wires, caused disturbances to the plaintiff's telegraph wires, and that all the electrical conductors in proximity are caused to have similar electrical currents does not create absolute liability because of the nonnatural use of the land by the plaintiff and because statutory authority permitted the operation of the electrical line.

Many explanations have been conjured as to why the doctrine of absolute liability at one time met with such universal acceptance at first, at a later time there was a tendency to repudiate it, was, and then again there has been a tendency to accept it. Both philosophical and economical reasons have been set out to try to establish these changes. Professor Bohlen reasons that because the judges of England and this country came from a different strata of society during the nineteenth century that the opinions adopted by these jurists on opposite sides of the Atlantic should differ. In England, it was pointed out the judges were chosen from a highly organized society, from the dominating class of landowners, motivated with the intention to establish themselves above all the rest. Since the land itself meant so much to these men and since the natural resources were so fully developed, the controlling desire was to preserve wealth — hence absolute liability for its destruction. Opposed to this is the reasoning that the American judges come from the commercial and artisan classes, that they serve a pioneer country interested in exploiting the natural resources, and therefore the preservation of the land is not so paramount, but rather opportunity and chance is encouraged, so absolute liability is refused. Professor Bohlen's conclusion is that the recent trend of the American courts to adopt some of the rules of absolute liability and refuse to find any more exceptions to the rule of *Rylands v. Fletcher,* rests in the fact that today the American judges are not only being chosen from the dominating class of society, but the country is giving more value to the preservation of land, and the development of natural resources is secondary to conservation of them.

However, it can be pointed out that a consideration of the jurisdictions which have lately adopted the rule of absolute liability are from all sections of the country and engross all the ideas of land value. In *Shipley v. Associates*[31] the Massachusetts court followed the rule in *Rylands v. Fletcher* and a year later the Supreme Court of Minnesota adopted the rule.[32] Ohio has accepted it, Indiana rejected it, West Virginia accepted it, Kentucky refused it—which shows that neither the location nor the kind of work for which the jurisdiction is geographical-

30 48 Ind. App. 584 (1910).
31 106 Mass. 194 (1870).
32 Cahill v. Eastman, 18 Minn. 324 (1871).

ly fit alters the judge's decision.[33] Another opinion which has been presented as the basis for the rejection of the rule is that first in England and only of late in this country has the general security of the country been considered vastly important. Pioneer ideas and less crowded and primarily agricultural communities linger behind the idea that the general security of the country is so important. This idea seems to stimulate the reasoning that not class conflict but a gradual change in the economic situation which exerts a gradual indirect but constant pressure on the judistic idea of the economic basis of the rule.

Philosophically, the earl idea of the law-makers was to keep peace and this was the influence under which the Greeks and Romans labored in establishing their very influential principles. The Middle Ages found the jurists endeavoring merely to maintain the *status quo* of the existing society by enforcing reciprocal duties. It was under this influence that the doctrine of absolute liability was first introduced into the law. However, during the sixteenth and seventeenth centuries the historical and metaphysical schools of jurisprudence began to function, effecting a change on the attitude of the Roman Law and that of the Middle Ages concerning absolute liability. It was in the nineteenth century, mainly through the influence of Hegel and Kant, that these two schools united to form the motivating influence behind that legal thought.[34] With Kant's theory of autonomous human reason becoming paramount in the minds of the jurists of that time, the idea of no liability without fault would logically flow, for since man was responsible only to himself and no one else, his liability to another could be predicated only through fault. With this metaphysical-analytical theory forming the basis of judicial thought, but the precedent of *Rylands v. Fletcher* still confronting the jurists, the disappearance of the doctrine could be blotted from the records only by a flood of exceptions. This was attempted. More recently, however, when the fallacy of Kant's philosophy has become established, and it has been accepted that man has a duty not only to himself, but also to God and to his fellow-man, there has been a tendency to again adopt the rule of absolute liability in cases where the dangerous agencies causing the injury created an absolute duty toward every fellow-man. The Scholastic idea that the individual is a moral unit and hence a political unit having equal moral responsibilities to his fellow-man has promulgated the philosophical basis for a renewal of the rules of absolute liability.

Based on this rejuvenated philosophical idea and the economic theory that greater general security is desired, the courts, both of England

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33 Defiance Water Company v. Olinger, 54 Ohio St. 532, 44 N. E. 238 (1896); Weaver v. Thurmond, 68 W. Va. 530, 70 S. E. 126; Lake Shore R. Co. v. Chicago R. Co., 48 Ind. App. 584 (1910); Owensboro v. Knox, 116 Ky. 451, 76 S. W. 191 (1903).

34 POUND, INTERPRETATIONS OF LEGAL HISTORY 34.

and this country, have refused to limit the doctrine to adjacent land holders, and have extended it to many new situations of fact. Especially have statutory enactments extended these rules,—an Indiana statute [35] providing an absolute duty on the part of corporations, partnerships, or individuals to cut or eradicate Canadian thistle; and it would seem to follow that if this were not done there would be a civil liability to the person injured. Secondly, the statutes in some jurisdictions impose absolute liability for escape from one's premise by fire kindled thereon, under certain conditions, as, for example, fire communicated from railroad locomotives to property of others,[36] and for fires set during certain seasons of the year for the purpose of burning stubble.[37]

Other instances of statutes imposing absolute liability are: (1) A statute imposing absolute liability on the owner or keeper of a dog for biting a person;[38] (2) The Workmen's Compensation Acts (compensation being in no sense dependent on negligence of the defendant);[39] (3) The statutes providing that sales of goods in bulk shall be in fraud of creditors, though no fraud is in fact perpetrated;[40] and (4) Statutes imposing liability on owner of dog for injury done to cattle or sheep, irrespective of whether or not the owner knew of any mischievous propensity of the dog, or was negligent in keeping the dog.[41]

Probably the oldest theory of tort liability was that liability without regard to fault. It was a maxim of early law, chiefly applicable to physical tort, that "he that is damaged ought to be recompensed, the existence of blameworthiness was immaterial." [42] Examples of strict liability today, in addition to extra-hazardous user doctrine, are (1) One who enters upon land of another is liable in trespass, even though he honestly and reasonably believes the land is his own or he has a right of entry;[43] (2) He who attacks another's reputation does so at his peril; (3) Persons who exercise acts of ownership over chattels of another do so at their peril;[44] (4) Liability of the master for torts of the servant committed in scope of employment, where acts are not authorized by master, and even where expressly forbidden by him;[45] (5) Liability

35 Ind. Acts. (1937) 793.

36 Baltimore and Ohio R. R. Co. v. Kreager, 61 Oh. St. 312, 56 N. E. 203 (1899); THROCKMORTON'S COOLEY ON TORTS 705.

37 Seckerson v. Sinclair, 24 N. D. 625, 140 N. W. 239 (1913); THROCKMORTON'S COOLEY ON TORTS 705.

38 CONN. GEN. STAT. (1930) par. 3357.

39 HARPER, LAW OF TORTS § 207.

40 See: WINFIELD, THE LAW OF TORT 212.

41 N. Y. CONSOL. LAWS (Cahill's 1923) c. 19, Art. 7, par. 119; NEB. COMP. STAT. (1929) c. 54, Art. 6, par. 54-601; MONT. REV. CODE (1935) par. 3417-15.

42 CLARK, LAW OF TORTS § 7.

43 Coke v. Sharpe [1911] 2 K. B. 837.

44 Fowler v. Hollins, L. R. 7 Q. B. 616, 639 (1872).

45 Limpus v. London General Omnibus Co., 1 H. & C. 526 (1862).

of husband for torts of his wife;[46] (6) Liability of a corporation for the acts of directors and other agents for conduct of its affairs;[47] (7) Liability of a partner for torts of his partner in and about the partnership business;[48] (8) Liability of owner, or keeper, of certain animals for damage done by them in straying onto another's land; (9) Liability in case of blasting where substances are thrown on another's premises; (10) Liability for excavating on one's own land, producing a subsidence in the surface of another's land, or in soil falling away from anothers' land; (11) Liability for harm due to an *absolute* nuisance (as distinguished from a nuisance due to negligence); and (12) In "Slander of Title" fault is not requisite to sustain an action against a stranger.[49]

Nothing unusually startling comes into the mind when considering these rules of absolute liability nor when considering the exceptions to them. The fact that it was a general doctrine of the early common law shows that it was readily understood and accepted that reciprocal duties existed among men. But in the nineteenth century there was the tendency to connect liability and fault as a general juristic doctrine, and Pound says, "all the historical common law liabilities without regard to fault were re-examined judicially and for a time there was a strong tendency to limit them. Thus liability for injuries by trespassing animals was limited in *Cox v. Burbidge* and more than one American court requires culpability or knowledge of a vicious propensity in such cases. One American court went so far as to require culpability even where there was a known vicious propensity in case the animal escaped in a way not reasonably to be anticipated. The limitation of employer's liability by the fellow-servant rule was a part of this movement." [50] In New Hampshire, Chief Justice Doe rejected the doctrine of *Rylands v. Fletcher* as running counter to the principle that liability must be based upon fault.[51] What would Justice Doe have decided in the case of absolute nuisance, liability of trespassing animals, etc.? Would he have held there was no liability in these instances if there were no fault? It was during this movement to which Dean Pound refers, that these many exceptions to the rule of *Rylands v. Fletcher* were decreed. Now that the tendency is again in favor of this rule of absolute liability, it will be interesting to see how the jurists adapt their prevailing ideas to these well-established and very reasonable exceptions.

John De Mots.

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46 Earle v. King's Cote [1900] 1 Ch. 203.
47 Citizens' Life Insurance Co. v. Brown [1904] A. C. 423.
48 Hamlyn v. Huston [1903] 1 K. B. 81.
49 See: Smith, *Tort and Absolute Liability* (II) 3 HARV. L. REV. 319, 320.
50 POUND, INTERPRETATION OF LEGAL HISTORY 110.
51 Brown v. Collins, 53 N. H. 442 (1873).

TRUSTS—WHO MAY EXECUTE A TRUST UPON THE DEATH OF THE TRUSTEE?—Trusts are matters of confidence reposed in the trustee, who is invested with legal title and control of the trust property. As was clearly explained in *Whittelsey v. Hughes*,[1] they must be executed by the person or persons to whom they are confided, consequently the duties of the office of trustee cannot be delegated by him to another unless the instrument creating the trust clearly confers such power upon him.

The question often arises concerning the proper person to occupy the position of the deceased trustee. The death of the trustee will not terminate the trust. The continuance of the trust is not dependent on the life of any particular trustee. Equity will supply a successor, for it will not allow a trust to fail for want of a trustee. In *Hitchock v. Board of Home Missions of Presbyterian Church* [2] the court adhered to the equitable maxim, "Equity will not allow a trust to fail for want of a trustee." According to the courts discussion, if no trustee is named, or the trustee named is non-existent or incompetent or refuses to accept the trust, chancery will supply a trustee, and the settlor's intent will be effectuated. Although the settlor generally makes provision for the appointment of a new trustee in case the first trustee dies, there are many instances in which the settlor has failed to so provide.

It is obvious that the legal title to the trust property which has been vested in the deceased trustee can no longer remain there, but it must be transferred to some one upon the trustee's death. It will not be allowed to remain in suspense.

According to the common law, the ownership of the trust property devolves upon the persons who would take the absolute property of the deceased. The case of *Baltimore Trust Co. v. Georges Creek Coal & Iron Co.*[3] discusses the general principle that trusts of real estate devolve upon the heirs of the deceased trustee, and trusts of personalty devolve upon the executor or administrator for the preservation of the title, until the appointment of a new trustee. It is well recognized that the heirs become the owner of real property and the personal representative the owner of personal property upon the death of the trustee.[4]

Although the common law relative to this particular is followed in many states, its meaning should not be misconstrued. Although the title to the property will immediately vest in the heirs and personal representative, nevertheless it generally remains there only for a short

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1 39 Mo. 13 (1866).
2 259 Ill. 288, 102 N. E. 741 (1913).
3 119 Md. 21, 85 Atl. 949 (1912).
4 Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918 (1899).

length of time. A petition for the appointment of a new trustee is filed with the court, which in turn will make provision for the appointment.

In several states, statutes modifying the common-law rule regarding the devolution of trust property have been enacted. These statutes vest the title to the trust property immediately upon the death of the sole trustee in the court having general equity jurisdiction and require the court to appoint a trustee to carry out the trust to its conclusion, and the statutes also prescribe when and how equity may appoint trustees. *Whitehead v. Whitehead* [5] is frequently cited in discussions concerning the statutes so enacted. In that case, the court stated that "on the death of the trustee the estate does not descend to his heirs or pass to his personal representatives, the executor of the will of a trustee does not succeed to the right to administer the trust, but title will vest in the court."

In determining the power of a trustee, the intent of the settlor is absolutely controlling. This fact is brought out in a recent decision which held that as the discretionary power of a trustee to apply the prinicpal of a trust fund for the benefit of the cestui is a matter of personal confidence, it cannot be exercised by a trustee appointed by the court upon the death of the original trustee. In *Whitaker v. McDowell* [6] the court's statement was to the effect that "where a power is a matter of personal confidence which is to be executed in the discretion of the trustee, it cannot be extended beyond the intention of the donor, and cannot be exercised by a trustee appointed by the court upon the death of the original trustee."

Where there are several trustees and one dies, it is preferable that the surviving trustees, who have knowledge of the trust and have been selected by the settlor, should administer the trust, rather than the administration should be continued by such survivors in common with the heirs or personal representatives of the deceased trustee. However, such heirs or personal representatives may have no special fitness for the task of carrying on the trust and it is only when the title can rest nowhere else that the trust devolves upon them. It has been held that the heir of the last survivor of several trustees to sell land cannot execute the trust or power of sale, because not pointed out in the instrument as one within the contemplation of the settlor. In *Ames Cases on Trusts* [7] it is stated that it must be understood that though the person in question is not indicated in the instrument as one to succeed to the trust, yet once having the legal title he must always hold the property subject to the trust.

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[5] 142 Ala. 163, 37 So. 929 (1904).
[6] 82 Conn. 148, 72 Atl. 938 (1909).
[7] P. 226, notes 1, 2.

It is interesting to note in this connection that it is well settled that the widow of a trustee is not entitled to dower in the trust property,[8] and the widower of a trustee has no rights of curtesy.[9]

As we have said before, equity will not permit a trust to fail. In an Illinois case, *French v. Northern Trust Co.*,[10] a will named a general trustee for the whole estate, to whom all property was devised, which property was to pass on the death of the testator to the executors and trustees of his will. A separate trust was created for a share, subject to supervisory power of a general trustee, with power to appoint a trustee and the executor declined to act. It was said in the opinion that "as equity will not permit a trust to fail for want of a trustee, the court properly appoints a trustee for the separate trust."

A recent Missouri case, *Clark v. Beal*,[11] held that an equity court had inherent authority to appoint a trustee to administer the trust estate arising under a will. The court declared that it had power to make a valid appointment of a successor to a deceased testamentary trustee. New York was a pioneer in the enactment of statutes relative to the execution of a trust after the death of a trustee. Under the statutes of this State, when an instrument does not provide for the termination of the trust on the death of the trustee, then upon the death of the trustee the further execution of the trust vests in the Supreme Court until a new trustee is appointed.[12] Michigan, on the other hand in a recent decision, *Oakland County v. Mack*,[13] shows the tendency to adopt the common law, in holding that legal title to real estate devolves on the trustee's heirs at his death, and the right of reverter or re-entry on condition broken also passes to his heirs, all impressed with a trust.

After studying the cases, we find, generally speaking, and except as it may be otherwise provided by statute, or by the trust instrument, upon the death of the trustee and pending appointment if any, of a new trustee the trusteeship devolves on the survivors, if any.[14] If there be no survivors it devolves on the heirs or representatives of the de-

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8 Barber v. Smiley, 218 Ill. 68, 75 N. E. 787 (1905); Miller v. Miller, 148 Mo. 113, 49 S. W. 852 (1899).

9 King v. Bushnell, 121 Ill. 656, 13 N. E. 245 (1887).

10 197 Ill. 30, 64 N. E. 105 (1902).

11 67 S. W. (2d) 114 (Mo. 1934).

12 Williams v. Fischlein, 129 N. Y. S. 129 (1911).

The New York statute provides: "On the death of the last surviving or sole surviving trustee of an express trust the trust estate shall not descend to his heirs nor pass to his next of kin or personal representatives; but in the absence of a contrary direction on the part of the person creating the same, such trust, if unexecuted, shall vest in the Supreme Court. . . ." N. Y. CONSOL. LAWS (Cahill's 1930) c. 51, § 111.

13 243 Mich. 229, 220 N. W. 801 (1928).

14 Jencks v. Safe Deposit & Trust Co. of Baltimore, 120 Md. 626, 87 Atl. 1031 (1913).