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NOTES

BAILMENTS—INJURY TO, OR LOSS OF, PROPERTY BAILED WHILE IN POSSESSION OF BAILEE—RIGHT OF BAILEE TO RECOVER AS AGAINST THIRD PERSONS.—The law seems to be well-settled, both in this country and in England, that a bailee of personal property may recover for injuries to, or loss of, such property while in his possession caused by the acts of persons other than the owner of the property. There seems to be no doubt but that a bailee is entitled, by an appropriate action, to protect his interest, whether it be a mere custody or posses-

sion or a greater interest, against the wrongful acts of persons other than the owner of the property.[1] "Where a suit is brought by a bailee against a third person for loss or injury to the subject of the bailment, the former's right to damages is not limited to his special interest in the property, but the current of authority appears to hold that the bailee is entitled to damages commensurate with the full value of the property taken or the degree of injury sustained."[2] While this rule is well-established, it has had an interesting history, especially in England. This appears to be due to the reasons underlying the existence of the rule; these will be considered with respect to the English cases.

The early law did not trouble itself with the complicated theories as to the nature and meaning of ownership and possession.[3] The earliest known use of the word "owner" was in the year 1340; and earliest known use of the word "ownership" was in 1583.[4] Normally and regularly the person who was in possession of a chattel was the owner.[5] There were no inquiries as to the right to own or as to the method in which the fact of possession had arisen.[6] The early law was concerned with a concrete and notorious fact—possession and its loss.[7] It has been said that this state of the law was not inconvenient in a rude state of society in which cattle were the most important sort of movable property.[8] Cattle-stealing was the principal form of wrongful taking of property.[9] "Of law there was very little, and what there was depended almost wholly upon the party himself to enforce."[10] Cattle-lifting could only be dealt with by speedy pursuit; a recovery depended upon raising hue and cry, and giving immediate pursuit."[11] Possession, in this procedure, was not merely sufficient, but it was essential.[12]

So to this primitive condition of society is traced the origin of the rule which maintained itself to later times, that, if chattels were intrusted by the owner to another person, the bailee, and not the bailor, was the proper person to sue for their wrongful appropriation by a third person.[13] "It was only natural . . . that in the early cases the person in possession, and he only, should sue for injury to chattels."[14]

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1 DOBIE, HANDBOOK ON THE LAW OF BAILMENTS AND CARRIERS (1914) 27, 63.
2 BAILMENTS, 3 R. C. L. 127.
3 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1909) 69.
4 2 HOLDSWORTH, *loc. cit. supra* note 3.
5 2 HOLDSWORTH, *loc. cit. supra* note 3.
6 2 HOLDSWORTH, *loc. cit. supra* note 3.
7 2 HOLDSWORTH, *loc. cit. supra* note 3.
8 2 HOLDSWORTH, *op. cit. supra* note 3, at 70.
9 HOLMES, THE COMMON LAW (1881) 165.
10 HOLMES, *loc. cit. supra* note 9.
11 2 HOLDSWORTH, *op. cit. supra* note 3, at 70.
12 HOLMES, *op. cit. supra* note 9, at 166.
13 *Loc. cit. supra* note 12.
14 Note, 25 HARV. L. REV. 655.

It was probaby for this reason, also, that in the early common law the liability of the bailee to the bailor was absolute.[15] This is said to be only fair in view of the very favorable position the bailee had in respect to third persons.[16] "The original reason for the rule was, however, lost sight of . . . more attention came to be paid to the right of the owner to possess. . . . The right of the bailee to sue as if he were owner came to look a little anonymous; and his strict liability was supposed to be the reason why he was thus allowed to sue. It was doubtless for this reason, more than historical, that his strict liability so long continued. It was not modified with the extensions of the rights of the bailor . . ." [17] Gradually the rights of the bailor, as against persons other than his bailee, were extended, but not at the expense of the bailee. While in possession he still had all the rights of an owner as regards third persons.[18] The law in England today appears to be well-settled to the effect that a bailee in possession is entitled to recover against a third person wrongdoer, whether the bailee sues in an action on the case for damages or whether he sues in trover.[19] What he receives above his own interest he receives to the use of his bailor; and he is obligated to account to the latter for this balance.[20] It was decided in *Lotan v. Cross* [21] that the bailor, who had gratuitously permitted another person to use a chaise, could maintain trespass for a direct injury to the chattel by a third person; the *legal* possession of the bailor was considered sufficient to enable him to maintain the action. But if the bailment is for a fixed term the bailor is not entitled to maintain trespass or conversion against a third person for an injury to or wrongful taking of the bailed chattel;[22] yet, he is entitled to maintain case against the third person who negligently injures the chattel while it is in the possession of the bailee for a term.[23] In case of a gratuitous bailment of a chattel, either the bailor or the bailee is entitled to maintain trover against a wrongdoer who deprives the bailee of possession of the chattel,[24] "and whichever first obtains damages, it is a full satisfaction." [25]

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15 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1909) 278.

16 3 HOLDSWORTH, *op. cit. supra* note 15, at 279.

17 *Loc. cit. supra* note 16.

18 *Loc. cit. supra* note 16.

19 See The Winkfield [1902] P. 42, reviewing many cases.

20 See The Winkfield [1902] P. 42.

21 2 Camp. 464, 170 Eng. Rep. 1219 (1810).

22 See Hall v. Pickard, 3 Camp. 187, 170 Eng. Rep. 1350 (1812).

23 Hall v. Pickard, *op. cit. supra* note 22.

24 See: Nicolls v. Barstad, 2 C. M. & R. 659, 150 Eng. Rep. 279 (1835), per Park, B.; Eastern Construction Company, Limited, v. National Trust Company, Limited, [1914] A. C. 197, 210, per Lord Atkinson.

25 Per Baron Parke, in Nicolls v. Barstad, 2 C. M. & R. 659, 660, 150 Eng. Rep. 279, 280 (1835).

Probably beginning with the efforts of Chief Justice Holt, in *Coggs v. Bernard,*[26] the liability of a bailee ceased to be absolute in all cases. How did this affect the rights of the bailee as against third persons, if at all? It is well-settled, under the English decisions, that a bailee is obligated to account to his bailor, where the bailee recovers the full amount of damages to, or the full value of, the chattel bailed as against a wrongdoing third person. "But whether the obligation to account was a condition of his right to sue, or only an incident arising upon his recovery of damages, is a very different question, though it is easy to confound one view with the other." [27] Long before Lord Holt made his efforts to classify the obligations of a bailee to his bailor, the English Court of Common Pleas said: ". . . clearly, the bailee, or he who hath a special property shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over." [28] As late as the 1860's we find the bailee's right to recover full damages and his obligation to account to his bailor again affirmed in the English cases, although it is under such circumstances that he would not be liable to his bailor for the wrong of the third person who converts the bailed chattels or injures them.[29] In *Burton v. Hughes,*[30] decided in 1824, the plaintiff, a bailee of some furniture, had placed the bailed chattel in a house occupied by one *C.*, who became a bankrupt. *C.'s* assignees seized the furniture. The furniture had been loaned to the plaintiff under a written agreement. It was held that the plaintiff was entitled to maintain trover against the assignees, without having to produce the written agreement defining the conditions of the plaintiff's interest, the effect being "that the right of the bailee, in possession, to sue could not depend upon the fact or extent of his liability over to the bailor," [31] the agreement defining his interest and liability being excluded from discussion.

Thus the bailee was probably absolutely liable [32] to his bailor, because he was the only person who could sue; and the bailee was answerable to his bailor for the same reason. Long after the liability of the ordinary bailee was definitely modified we see that the English

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26 2 Ld. Raym. 909 (1703).

27 The Winkfield, *op. cit. supra* note 20, at 58.

28 Heydon and Smith's Case, 13 Co. Rep. 67, 69, 77 Eng. Rep. 1476, 1478 (1611).

29 See: Turner v. Hardcastle, 11 C. B. (N. S.) 683, 708 142 Eng. Rep. 964, 974 (1862), per Chief Justice Earl; Swire v. Leach, 18 C. B. (N. S.) 479, 144 Eng. Rep. 531 (1865).

30 2 Bing. 173, 130 Eng. Rep. 272 (1824).

31 Per Collins M. R., in The Winkfield, *op. cit. supra* note 20, at 56, 57.

32 See the following articles considering the early liability of bailees: Beale, *The Carrier's Liability: Its History,* 11 HARV. L. REV. 158; Arterburn, *The Early Liability of a Bailee,* 25 MICH. L. Rev. 479. In the latter article Professor Arterburn said: "We have had two diametrically opposed views urged as to the first liability of the ordinary bailee. Justice Holmes and numerous other authorities

courts have said the bailee could recover full damages because he was answerable over to his bailor. But in 1892 the Judges of the Queen's Bench, in *Claridge v. South Staffordshire Tramway Company*,[33] rejected this reasoning. There the plaintiff, an auctioneer, was in possession of a horse, for the purpose of selling it, with the privilege of using it until it was sold. While the horse was being driven by the plaintiff's servant along a highway, it was injured as a result of the defendant's negligence. The plaintiff sued to recover the full amount of the depreciation in the value of the horse due to the injury. It was held that the bailee was not entitled to recover beyond the extent of his own loss, since he was under no liability to his bailor for the injury to the horse; he was not guilty of negligence, and he was not considered an insurer. In 1902 the Court of Appeal, in *The Winkfield* case, overruled the *Claridge* case, holding that in an action against a third person a bailee in possession [34] is entitled to recover full damages, although he would have a good answer to an action by his bailor for damage to, or loss of, the chattel bailed. The reasoning of the court was that, in actions of trover and trespass at the suit of the possessor, possession is good as against a wrongdoer and the latter is not entitled to set up the *jus tertii* unless he claims under it; and, to quote: "His [the bailee's] obligation to account to the bailor is really not *ad rem* in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer . . . . As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor." This decision restores the orthodox doctrine of the earlier English cases.

It has been argued that to allow a bailee to recover full damages might result in injustice to his bailor, either because the bailee might abscond after a recovery of damages, or because he might compromise with the wrongdoer without bringing suit; and it is said that "Surely it is not law that by such satisfaction of judgment or other settlement a person with a mere special property can take away any right of the general owner. And yet this is what the dicta in the cases indicate." [35] This argument is not supported by analogy. What the bailee recovers

take the view that the liability in the first instance was absolute in case of all bailees. Professor Beale is the exponent of the opposing view, that the liability was qualified to such an extent that it amounted in fact only to negligence liability."

33 [1892] 1 Q. B. 422.

34 It was assumed that the bailee was in possession at the time of the loss, the parties having proceeded on this assumption and the point was not raised until appeal.

35 Note, 25 HARV. L. REV. 655.

above the injury to his interest he recovers as trustee for his bailor. This is admitted in all the cases. In the law of Trusts, one dealing with a trustee is not bound to see that money paid in discharge of the trust is properly appropriated.[86] One dealing with an administrator in good faith is protected as against subsequent wrongful acts of appropriation by the administrator, although the letters of administration are subsequently revoked.[87] Neither will a collusive agreement between the bailee and the third person wrongdoer operate to defeat the rights of the bailor. In *Welch v. Mandeville* [88] it was held that a nominal plaintiff, suing for the benefit of his assignee, was not entitled, by a dismissal of the suit under a collusive agreement with the defendant, to create a valid bar against any subsequent suit for the same cause of action.

The two reasons set forth in *The Winkfield* case would seem to support the rule allowing the bailee to recover the full amount of the injury to or loss of the bailed property. The duty of bailee to account to his bailor at the termination of the bailment, the fact that the property is in his possession and under his care, and the rule that a third person wrongdoer is not entitled to set up the *jus tertii* unless he claims under it are important considerations in fixing the respective rights of the bailee and the bailor. The bailee could be required to join his bailor as a party to the action against the third person, and so remove any doubt as to the bailee accounting to the bailor. The whole matter could then be settled in one suit. This would make it easier to adjust the respective interests of the bailee and the bailor than to allow each an action to secure compensation for the injury to his interest.

Nicholas T. Tsiolis.

DAMAGES—INJURIES TO PERSONAL PROPERTY—INJURIES TO AUTOMOBILES.—The purpose of this note is to discuss the rules of compensatory damages pertaining to injury to personal property less than its destruction. It is found advisable for an orderly development to mention briefly the measure of damages when a chattel is completely destroyed.

The measure of damages when personal property is completely destroyed is the market [1] value of the property at the time and place of

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86 Thomassen v. Van Wyngaarden, 65 Iowa 687, SCOTT, CASES ON TRUSTS (2nd ed.) 101 (1885).

87 Schulter v. Bowery Savings Bank, 117 N. Y. 125, N. E. (1889).

88 1 Wheat. 233, 4 L. ed. 231 (1816).

1 The rule has been stated to be the reasonable value at the time of the loss. DAMAGES, 17 C. J. § 182.

To determine the reasonable value resort is ordinarily to be had to the market value. DAMAGES, 17 C. J. § 197.

destruction plus interest[2] from the time of destruction. This rule admits of many exceptions and limitations. For example in some cases where the property has no market value or has a special value to the owner, this value is taken as the measure of damages and not the market value.[3] Also, interest is often denied for various reasons.[4] But the rule stated has been applied to such an extent that it can be said to be the general rule. The rule seems just. A chattel can be sold for money and can be bought with money. At the time of its destruction a chattel would have brought the owner a certain sum on the market at the place where it was destroyed. Since its destruction has prevented its sale the one who destroyed it should pay this value. On the other hand, if the owner had no intention of selling the chattel, the market value would still be proper, for with this money he could go into the market and replace the destroyed article with a similar one. Since this money is not available to the owner until satisfaction of the judgment an allowance for the delay,—interest,—would seem proper.

One rule of damages which many of the courts apply when property is only partially destroyed is a logical extension of this idea. The rule often applied is that the measure of damages is the difference in the market value of the chattel immediately before and after injury.[5] This, on principle, is the same rule applied as in the event of destruction, the only difference being that properly enough allowance is made for the fact that the owner still has a residue at a market value.

This sketchy outline of the rule and its purpose leads now to a more detailed study of its limitations and its application. The market value must be ascertained as of the time of the injury. Thus the difference between what the damaged goods cost the plaintiff and their market value after injury has been held not to be a proper measure of damages.[6] Evidence of the cost price is admissible, provided evidence of the length of time the chattel had been used and its condition before injury is also given.[7] The market value must be ascertained as of the place

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2 DAMAGES, 17 C. J. § 182. See discussion of interest *infra*.

3 DAMAGES, 17 C. J. § 197; Note, 10 NOTRE DAME LAWY. 66.

4 DAMAGES, 17 C. J. § 146.

5 Stone v. Codman, 32 Mass. (15 Pick.) 297 (1834); Texas & P. Ry. Co. v. Meeks, 74 S. W. 329 (Tex. 1903); City of Houston v. Reichardt & Schulte, 86 S. W. 74 (Tex. 1905); General Fire Extinguisher Co. v. Beal-Doyle D. G. Co., 110 Ark. 49, 160 S. W. 889, Ann. Cas. 1915D, 791 (1913); Weil v. Hagen, 161 Ky. 292, 170 S. W. 618 (1914); Galveston H. & S. A. Ry. Co. v. Levy, 45 Tex. Civ. App. 373, 100 S. W. 195 (1907); Byars v. James, 208 Ala. 390, 94 So. 536 (1923); Davis v. Marks, 203 Ky. 477, 262 S. W. 613 (1916); Blanke v. United Rys. Co. of St. Louis, 213 S. W. 174 (Mo. 1919); Coleman v. Levkoff, 128 S. C. 487, 122 S. E. 875 (1924); Church Mfg. Co. v. Am. Sec. Bank, 130 Wash. 575, 228 Pac. 518 (1924).

6 General Fire Extinguisher Co v. Beal-Doyle D. G. Co., *op. cit. supra* note 5.

7 Watson v. Loughran, 112 Ga. 837, 38 S. E. 82 (1901); Colorado Midland Ry. Co. v. Snider, 38 Colo. 351, 88 Pac. 453 (1907); Behm v. Damm, 91 N. Y. S. 735 (1905).

of the injury. If there is no market value at that place, the market value at the nearest market and the cost of transportation to that market may be shown.[8] It seems that this transportation charge is to be added to, or subtracted from, the foreign market value, according to the circumstances of the case. For example, suppose a quantity of logs is destroyed by fire at the place where they are cut. The logs are cut for the purpose of marketing them. They are valuable only for the money they would bring. They must be transported to a mill before they have any actual value. Therefore, when the market price at the nearest mill (or other market place) is shown, the cost of transportation must be deducted from that sum.[9] On the other hand, the property may be valuable for its use at the place where it is destroyed. If no market value exists at that place, the chattel must be replaced by one purchased in the nearest market. This cost of transportation must be added to the market value at the nearest market to obtain the value at the place of injury.[10]

In ascertaining the market value of the chattel after injury, where outside markets must be resorted to, the cost of transportation will always be subtracted from the market value at the foreign market. The transportation charges are only added to the foreign market value on the theory that something valuable for its use must be replaced. The damaged chattel being something in hand, the theory will never apply.

Interest in tort cases is often denied on the theory that until judgment is rendered, or until judicial demand, the defendant had no means of knowing what he should pay.[11] The weight of authority is to the effect that in cases of injury to personalty, since definite rules govern the measure of damages, interest from the time of the injury is a matter of right.[12] In several states where it is not a matter of right, the jury may consider the circumstances and, at its discretion, allow a sum for the delay the plaintiff has suffered in obtaining his money.[13]

In a few cases where the above rules are applied certain expenses may also be considered by the jury. These allowable expenses are limited to those which are a natural and proximate result of the injury or those necessarily incurred in a reasonable effort to prevent avoidable consequences.[14] But expenses cannot be recovered where the loss is already covered by the general measure of the difference in

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8 DAMAGES, 17 C. J § 197, notes 6 and 7.

9 Union Pac. R. Co. v. Williams, 3 Colo. App. 526, 34 Pac. 731 (1893).

10 McGilvra v. Minneapolis, etc., R. Co., 35 N. D. 275, 159 N. W. 854 (1916).

11 1 SEDGWICK ON DAMAGES (9th ed.) § 299.

12 DAMAGES, 17 C. J. § 144, note 72.

13 DAMAGES, 17 C. J. § 144, note 75.

14 DAMAGES, 17 C. J. § 132.

market values before and after the injury. Thus expenses in renting a car to replace a damaged one cannot be allowed because the recovery under the general rule theoretically enables him to have replaced the damaged car as of the time of the injury.[15] Expenses of towing a wrecked automobile to a place of safety would seem proper, but evidence of this could undoubtedly be considered in determining the market value of the wreckage as of the place of the injury. Expenses reasonably incurred in preventing increased loss such as drying a quantity of wet rice to prevent its rotting,[16] or removing chattels from a flooded cellar,[17] are proper additional damages, as reasonable expenses incurred in avoiding the consequences of the defendant's wrong.

The rule that allows a recovery for reasonable expenses incurred in avoiding the consequences of another's wrong,[18] requires a slightly different application of the above principles where the chattel injured is an animal. If a horse is injured, medical care and rest will often prevent the animal's death. But in addition to preventing its death, it usually renders the animal substantially more valuable than it was just after its injury. Since the expense of this care is chargeable to the defendant he is entitled to any positive benefits derived therefrom. Therefore if the horse after recovery is as good as before injury the reasonable cost of treatment is the measure of damages. If after recovery the horse is less valuable than before injury the measure of damages is the reasonable cost of treatment plus the difference between the market value before the injury and after recovery.[19] The reasonable value of the use of the animal while recovering from its injury is proper also under this measure of damages because the owner is necessarily deprived of this use.[20]

Since the owner cannot recover for consequences which he could with reasonable efforts avoid, if he fails to take such reasonable steps, he is limited in his recovery to an amount equal to what his loss would

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15 Pugh v. Queal Lumber Co., 193 Iowa 924, 188 N. W. 1 (1922); Madison-Smith Cadillac Co. v. Wallace, 181 Ark. 715, 27 S. W. (2d) 524 (1930).

On principle, recovery for difference in market value before and after injury where the chattel is only partially injured, is the same as recovery for full value when destroyed, and in the latter case no allowance can be made for loss of use. Barnes v. United R. & Electric Co., 140 Md. 14, 116 Atl. 855 (1922); Johnson v. Thompson, 35 Ohio App. 91, 172 N. E. 298 (1929).

It seems that the contrary rule, allowing recovery for use, stated in Gilwee v. Pabst Brewing Co., 195 Mo. App. 487, 193 S. W. 886 (1917), is unsound because it provides for double recovery.

16 Davis, Federal Agent v. Standard Rice Co., 293 S. W. 593 (Tex. Civ. App. 1926).

17 City of Mason v. Small, 108 Ga. 309, 34 S. E. 152 (1899).

18 DAMAGES, *loc. cit. supra* note 14.

19 1 SEDGWICK, *op. cit. supra* note 11, § 437.

20 See cases cited in DAMAGES, 17 C. J. § 185, note 45.

have been if he had taken such reasonable action.[21] Hence the rules set out above will apply in practically all cases of injury to animals.

Quite similar to the rule that measures the damages in cases of injury to animals by the reasonable cost of treatment, is the rule adopted by some courts which measures the damages to an injured chattel which can be repaired by the cost of repairs.[22] The rule can hardly be attributed to the theory of "avoidable consequences." When an automobile, for example, is injured in a collision, the injury is complete, and repairs could not prevent additional harm. One possible explanation of the rule is that as a matter of fact the chattel is often repaired rather than replaced, and the cost of repairs is the actual loss of the plaintiff. Another is that the market value depends on the cost of repairs and direct evidence of this cost would be more accurate than a market value which is computed on this cost.

Where this measure is used, the cost of towing to a garage [23] and the value of the use [24] during repairs are proper elements of damage.

The cost of repairs is the cost of putting the chattel in as good a condition as it was before injury.[25] If the chattel cannot be placed in as good a condition as it was before the injury, the difference in the market value before injury and after repairs is also a proper element of damages.[26]

Although the above rules are often applied to determine damages when an injured chattel can be repaired, in many cases the general rule of difference in market values before and after injury is applied. This difference in attitude as to the proper measure of damages is

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21 SEDGWICK, *op. cit. supra* note 11, at § 226 b., note 205.

22 DAMAGES, 17 C. J. § 183.

23 Luckel v. De Vor, 17 S. W. (2d) 1097 (Tex. Civ. App. 1929).

24 The use is determined by the reasonable net rental value of the automobile with the lessee bearing the expense of driver and upkeep. Southern Ry. Co. v. Kentucky Grocery Co., 166 Ky. 94, 178 S. W. 1162 (1915).

The reasonable time necessary for repairs is the period for which the value of the use is allowed. Rosenstein v. Bernhard & T. Auto Co., 192 Iowa 405, 180 N. W. 282 (1920).

25 The actual cost of repairs may be used in evidence, but it must be supplemented by testimony that such was the reasonable worth of the repairs. Volkmar v. Third Ave. R. Co., 28 Misc. 141, 58 N. Y. S. 1021 (1899); Zellmer v. McTaigue, 170 Iowa 534, 153 N. W. 77 (1915); Louisville & N. R. Co. v. Mertz, 149 Ala. 561, 43 So. 7 (1907).

26 Schomoker v. French, 7 S. W. (2d) 177 (Tex. Civ. App. 1928).

The question of interest when the cost of repairs is the measure of damages has not been answered by many courts. In New York interest is denied. New York Polyclinic Med. School, etc. v. Mason-Seaman Transp. Co., 155 N. Y. S. 200 (1915). In Connecticut interest is allowed from the date of loss. Smith v. Waterbury & Milldale Tramway Co., 99 Conn. 446, 121 Atl. 873 (1923). It would seem that the soundest rule is that stated in The Mollie Scully, 52 Fed. (2d) 239 (1931), which gives interest from the time the bills for repair were paid.

particularly marked in cases of injuries to automobiles.[27] An examination of the cases shows that either rule is acceptable to most courts depending on circumstances. In many states the courts have declared the difference in market value to be the proper measure of damages but that evidence of the cost of repairs is admissible in determining these values.[28] In New York it seems that the plaintiff may sue on either theory.[29] The same rule applies in Minnesota, but the plaintiff cannot sue for repairs and show depreciation in value.[30] Often the courts merely state that the damages are to be ascertained by the cost of repairs.[31] Sometimes it is stated that if by repairs the automobile could not be placed in as good a condition as before injury, the difference in market values is the proper measure.[32]

A sound distinction in the two modes of recovery has been drawn by the California court. It has held that whichever compensates at the lesser cost is the proper measure.[33] The Texas court has held that the cost of repairs cannot be recovered if it exceeds the depreciation, but it seems that the plaintiff can recover the depreciation value though it exceeds the cost of repairs.[34]

One line of cases has allowed recovery of the cost of repairs as long as it does not exceed the market value before injury.[35] There seems to be no sound basis for this limitation. If recovery for repairs is based on the theory of avoidable consequences, the limitation placed on recovery is that the expense be incurred in a reasonable attempt to reduce the loss; and even though this expense exceed the original value it might nevertheless be reasonable.[36] On the other hand, if the cost of repairs is merely an alternative method of computing damages, damages under it should not be allowed as high as the market value before injury. The only sound limitation is that damages under it must not exceed those under the other method—the difference in market

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27 See annotations: 4 A. L. R. 1350 (1919); 32 A. L. R. 706 and 711 (1924); 78 A. L. R. 910 and 917 (1932).

28 Campbell v. Johnson, 284 S. W. 261 (Tex. Civ. App. 1926); Southern R. Co. v. Kentucky Grocery Co., *op. cit. supra* note 24.

29 Patane v. State, 114 Misc. 713, 186 N. Y. S. 225 (1921); Howe v. Johnston, 220 App. Div. 170, 221 N. Y. S. 516 (1927).

30 Allen v. Brown, 198 N. W. 137 (Minn. 1924).

31 Chambers v. Cunningham, 5 Pac. (2d) 378, 78 A. L. R. 905 (Okla. 1931).

32 Helin v. Egger, 121 Neb. 727, 238 N. W. 364 (1931); Langham v. Chicago, R. I. & P. R. Co., 201 Iowa 897, 208 N. W. 356 (1926).

33 Olds & Stoller v. Seifert, 81 Cal. App. 423, 254 Pac. 289 (1927); Menefee v. Raish Improv. Co., 178 Cal. App. 785, 248 Pac. 1031 (1026). See, also, Cook v. Packard Motor Car Co., 88 Conn. 590, 92 Atl. 413, L. R. A. 1915C, 319 (1915).

34 White v. Beaumont Implement Co., 21 S. W. (2d) 559 (Tex. Civ. App. 1929).

35 Langham v. Chicago, R. I. & P. R. Co., *op. cit. supra* note 32; O'Donnelly v. Stapler, 34 Ga. App. 637, 131 S. E. 91 (1925).

36 2 SEDGWICK, *op. cit. supra* note 11, § 438.

value before and after injury.[37] Sometimes the cost of repairs is held to be the correct measure of damages because the automobile has a real value to the owner and must therefore be restored to him to properly compensate him.[38] To limit recovery to the "market value before injury" in such a case would clearly defeat the purpose of compensating the owner for the real value of the automobile.

Robert B. Devine.

MORTGAGES — FORECLOSURE BY ACTION — SALE — RECEIVERSHIP AFTER SALE.—The question to be considered in this note is the right of a mortgagee of real property to have a receiver appointed for the property after a foreclosure sale and during the period of redemption. It is generally recognized throughout the United States that a court of equity has the power to appoint a receiver for mortgaged property after a foreclosure sale to preserve the estate or to protect the rights of the mortgagee.[1] However, the courts look upon this power as one which they should exercise with great caution, and there are many divergent views among the different states as to what grounds the mortgagee must present to be entitled to have a receiver appointed. Some of these conflicting views can be explained by the fact that many of the decisions are governed by statutory provisions of the state in question.

In a recent Indiana case [2] a mortgagee obtained a judgment foreclosing a mortgage on real estate, and he purchased the land at the foreclosure sale. The purchase price was insufficient to satisfy the debt. He then sought to have a receiver appointed to collect the rents and profits of the property during the period of redemption and apply them to the satisfaction of the debt. It appeared that the mortgagor was insolvent and that he was in possession of the property at the time. The court held that the mortgagee was not entitled to have a receiver appointed. The Indiana redemption statute gave the mortgagor the right to possession of the property during the year of redemption.[3] Since the mortgagor occupied the premises, the court would not ap-

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37 Notes 33, 34, *supra.*

38 Henderson v. Park Central Motors Service, 138 Misc. 183, 244 N. Y. S. 409 (1930).

1 Hass v. Chicago Building Society, 89 Ill. 498 (1878); Merritt v. Gibson, 129 Ind. 155, 27 N. E. 136 (1891); Robertson v. Roe, 203 Iowa 654, 213 N. W. 422 (1927); Boyd v. Benneyan, 204 Cal. 23, 266 Pac. 278 (1928); Nolte v. Morgan, 86 Kan. 823, 122 Pac. 886 (1912); National Fire Ins. Co. of Hartford, Conn. v. Broadbent, 77 Minn. 175, 79 N. W. 676 (1899).

2 Federal Land Bank of Louisville v. Schleeter, 193 N. E. 378 (Ind. 1934).

3 IND. ANN. STAT. (Burns, 1926) § 831. This statute provides: "The owner of the real estate or interest therein, sold as aforesaid, shall be entitled to the possession of the same for one (1) year from the date of such sale."

point a receiver on the ground that he was insolvent and the land was not an adequate security for the debt. The court distinguished between this case and one in which a tenant of the mortgagor occupies the premises. In the latter instance it had been held in *Merritt v. Gibson*[4] that the mortgagee was entitled to have a receiver appointed on showing that the lands were inadequate to secure the debt and that the mortgagor was insolvent.

In Illinois the decisions of the Supreme Court set forth the same grounds for the appointment of a receiver as in the Indiana cases, except that it is not necessary that the property be in the possession of a tenant of the mortgagor, to have a receiver appointed. In *Hass v. Chicago Building Society*,[5] speaking of the grounds for the appointment of a receiver at the time the mortgage is being foreclosed, the court said: "We find the decided weight of American authority to be in favor of the proposition that the court may, even when the mortgage does not by express words give a lien upon the income derived from such property, appoint a receiver to take charge of it and collect the rents, issues and profits arising therefrom. Such action will not be taken, however, unless it be made to appear the mortgaged premises are an insufficient security for the debt, and the person liable personally for the debt is insolvent, or at least of very questionable responsibility." In considering the objection that the receiver in this case was appointed by the lower court after the foreclosure sale of the mortgaged property the court said: "The necessity for the appropriation of the rents to the payment of the mortgage debt may frequently not appear until after both decree and sale. The amount due is often a matter of dispute, and can only be determined by the decree, and what the property will sell for can only be ascertained with certainty from the result of the judicial sale. If an appropriation of the rents on the indebtedness is justified by the surrounding facts before sale, we see no good reason why the same and more weighty facts existing after sale may not warrant a similar procedure." Since this case the Illinois Supreme Court has consistently held that where a deficiency decree has been rendered in favor of a mortgagee, and the mortgagor is insolvent, the mortgagee is entitled to have a receiver appointed to collect the rents and profits during the period of redemption and apply them to satisfy the deficiency.[6]

The Supreme Court of Iowa has not taken such a liberal view of the matter. In *White v. Griggs*[7] it was held that the inadequacy of the

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[4] *Op. cit. supra* note 1.

[5] *Op. cit. supra* note 1.

[6] Roach v. Glos, 181 Ill. 440, 54 N. E. 1022 (1899); First National Bank v. Illinois Steel Co., 174 Ill. 140, 51 N. E. 200 (1898); Prussing v. Lancaster, 234 Ill. 462, 84 N. E. 1062 (1908).

[7] 54 Iowa 650, 7 N. W. 125 (1880). Accord: American Investment Co. v. Farrar, 87 Iowa 437, 54 N. W. 361 (1893).

security to meet the mortgage debt, and the insolvency of the mortgagor were not sufficient grounds in themselves to permit the court to appoint a receiver to collect the rents and profits during the period of redemption. The mortgagor had the right to the possession of the premises during the period of redemption. Furthermore, since the mortgage did not expressly give the mortgagee a lien upon the income from the property, the court held that he had no more interest in the crops growing thereon than he had in crops growing on land not mortgaged to him. In *Robertson v. Roe* [8] it was held that where the crops on the land were spoiling and the mortgagor held the land for purposes of speculation, in addition to the inadequacy of the security and the insolvency of the mortgagor, these were sufficient grounds for the court to interfere and appoint a receiver for the redemption period. Likewise, where the mortgage expressly creates a lien on the rents and profits and authorizes the appointment of a receiver the court will make the appointment upon a showing of the inadequacy of the security and insolvency of the mortgagor.[9]

The decisions of the Supreme Court of California are very similar to those in Iowa. In *West v. Conant* [10] a mortgagee purchased the mortgaged premises at a foreclosure sale and sought to have a receiver appointed for the period of redemption. The mortgagor was insolvent, and a deficiency decree had been rendered against him. Despite the fact that a California statute gave the purchaser at a foreclosure sale the right to the rents from the property or the reasonable value of them during the period of redemption, the court held that the mortgagee-purchaser was not entitled to have a receiver appointed. The decision was based upon the right of the mortgagor to the possession of the premises during the period of redemption. However, in *Montgomery v. Merrill*,[11] where the mortgage specifically covered the rents and profits, and the mortgagor was insolvent, it was held that the mortgagee was entitled to have a receiver appointed to collect the rents and profits during the redemption period and apply them to the satisfaction of a deficiency decree.

In *Nolte v. Morgan* [12] the Supreme Court of Kansas held that it was proper for the lower court to appoint a receiver for mortgaged property after foreclosure sale and during the period of redemption on the grounds that the property was in a bad state of repair and uninsured. However, the receiver could not use the rents and profits col-

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8 *Op. cit. supra* note 1.

9 Walters v. Graham, 190 Iowa 481, 180 N. W. 305 (1920).

10 100 Cal. 231, 34 Pac. 705 (1893); cited with approval in Boyd v. Benneyan, *op. cit. supra* note 1.

11 65 Cal. 432, 4 Pac. 414 (1884) (cited with approval in Boyd v. Benneyan, *op. cit. supra* note 1).

12 86 Kan. 823, 122 Pac. 886 (1912).

lected to pay taxes on the property. Likewise, in *First National Bank v. Kansas Grain Co.*[13] it was held that the income collected by the receiver could not be applied to the satisfaction of a deficiency judgment. These decisions were based on a Kansas statute authorizing the court to appoint a receiver to prevent waste, and further providing that "the income during said time [the period of redemption], except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution, or the owner of its legal title."[14]

In *National Fire Ins. Co. of Hartford, Conn. v. Broadbent*[15] the Supreme Court of Minnesota recognized the right of a mortgagee to have a receiver appointed after foreclosure sale and during the period of redemption. However, it was held that the inadequacy of the security and the insolvency of the mortgagor were not in themselves sufficient grounds to justify the court in appointing a receiver. In addition to these grounds it was necessary to show that a receiver was needed to preserve the mortgage security and to prevent waste.

In deciding on what grounds a receiver will be appointed the courts do not seem to place any importance on whether the state in question is a *title* state or a *lien* state. This may be of some importance where an application is made to have a receiver appointed at the time the mortgage is being foreclosed. In states where the mortgagee has the legal title and has the right to obtain possession of the premises upon default a court of equity will usually deny him the right to have a receiver appointed and will leave him to his legal remedy. In states where the legal title is in the mortgagor until foreclosure sale a court of equity will appoint a receiver on behalf of the mortgagee when the security is inadequate and the mortgagor is insolvent.[16] However, where the application for a receiver is made during the period of redemption this would not seem to have any controlling effect. In both groups of states the legal title is in the mortgagee where he purchases the premises at the foreclosure sale. The right to have the receiver appointed would depend more upon the interpretation that the court gives to the statute creating the period of redemption.

Another matter of importance to be considered in determining whether a receiver will be appointed is the existence or nonexistence of a clause in the mortgage expressly pledging the rents and profits of the land and authorizing the court to appoint a receiver on default. The decisions are not uniform on the interpretation of such a clause. It seems clear that the appointment of a receiver is within the discretion of the court and the presence of this clause will not in itself justify

13 63 Kan. 343, 65 Pac. 676 (1901).

14 LAWS 1893, c. 109, § 24.

15 *Op. cit. supra* note 1.

16 JONES ON MORTGAGES (7th ed.) § § 1520, 1521.

the court in appointing a receiver where no other equitable grounds are shown. However, the clause is taken into consideration and in such cases it is not necessary to show as strong equitable grounds to induce the court to action as where the mortgage does not contain the clause. Thus, in *Oakford v. Robinson* [17] the court said: "The rents and profits of the land, as well as the land, were pledged by the mortgage for the security and payment of the amount due the appellee. This authorized the appointment of a receiver, in the discretion of the court, without regard to the solvency of the mortgagor. 8 Amer. & Eng. Ency., page 234; 2 Jones on Mortgages, Sec. 1516. And such appointment was lawfully made though by a decree subsequent to the original decree. . . . By the appointment of the receiver the appellants obtained an equitable lien on the rents and profits of the land during the statutory period allowed for redemption, if necessary, for the full payment of any deficiency in the security. In support of this view, see 1 Jones on Mortgages, Secs. 773, 774 and 775; 2 Jones on Mortgages, Sec. 1536; High on Receivers, Secs. 643 and 644; Beach on Receivers, Sec. 532."[18]

In Iowa, where the inadequacy of the security and the insolvency of the mortgagor are not of themselves sufficient grounds for the appointment of a receiver during the period of redemption, if in addition the mortgage expressly pledges the rents and profits and authorizes the appointment of a receiver, the court will make the appointment.[19]

Some courts, however, take the view that such a provision is of no effect on the ground that it contravenes the public policy of the state as expressed in the redemption statute, or that the parties cannot by their consent confer jurisdiction upon the court where it would not otherwise have jurisdiction. In a recent Indiana case,[20] after considering previous decisions, the court stated: "In none of the cases does the court seem to have given any consideration to the question of whether there were provisions for the appointment of a receiver in the mortgage, but such provisions can be of no controlling force, since it is well-settled that conditions in a mortgage tending to limit or defeat the right of redemption are void. Wilson v. Carpenter (1878) 62 Ind. 495; Turpie v. Lowe (1888) 114 Ind. 37, 15 N. E. 834."[21]

In conclusion, the decisions of the various states may be classed into two general groups. In the first group of states the courts will appoint a receiver for mortgaged property to collect the rents and profits during

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17 48 Ill. App. 270, 273 (1892).

18 Quoted with approval in First National Bank v. Illinois Steel Co., *op. cit. supra* note 6.

19 *Op. cit. supra* note 9.

20 *Op. cit. supra* note 2, at 379.

21 See, also, Baker v. Varney, 129 Cal. 564, 62 Pac. 100, 79 Am. St. Rep. 140 (1900); Hazeltine v. Granger, 44 Mich. 503, 7 N. W. 74 (1880).

the period of redemption where it is shown that the land is an inadequate security for the debt, and that the mortgagor is insolvent. In some of these states where a statute gives the mortgagor the right to possession during the period of redemption it must be shown that the mortgagor does not personally occupy the land, but that it is occupied by a tenant. In the second group of states it is necessary to show not only that the land is an inadequate security for the debt, and that the mortgagor is insolvent, but also that there is danger of waste being committed or of irreparable damage being caused to the premises.

John A. Berry.

NEW TRIALS—INADEQUACY OF DAMAGES—USE OF THE ADDITUR—TRIAL BY JURY.—The five to four decision of the United States Supreme Court in the recent case of *Dimick v. Schiedt* [1] focuses our attention on the power of courts, where the damages which have been assessed by the jury are inadequate, to condition the granting of the plaintiff's motion for a new trial on that ground on the defendant's failure to consent to an increase of the damages to a specified sum, or failure to pay that sum to the plaintiff within a certain time. The specific question considered in the principal case was whether, if the defendant had given his consent, and the new trial had been denied, such denial deprived the plaintiff of his right to trial by jury on the question of damages guaranteed to him by the Seventh Amendment to the Constitution of the United States. The question was answered in the affirmative by the majority, speaking through Mr. Justice Sutherland, and in the negative by the minority, speaking through Mr. Justice Stone. This case possesses unusual significance in that it is the first federal court case dealing with the problem, although there are numerous federal cases dealing with the closely analogous problem of the *remittitur*. As early as 1822, in the case of *Blunt v. Little*,[2] Mr. Justice Story asserted the power of the federal courts to condition the granting of a new trial on the ground of excessive damages on the failure of the plaintiff to remit a certain portion of the damages awarded. This power has never been questioned from that date to this.[3]

It is provided in the Seventh Amendment to the Constitution of the United States that "no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." The argument runs that since the scope and

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1 55 S. Ct. 296 (1935).

2 Fed. Cas. No. 1,578 (1822).

3 See, for example, Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642 (1885); Arkansas Valley Land and Cattle Co. v. Mann, 130 U. S. 69 (1888); Kennon v. Gilmer, 131 U. S. 22 (1888); Gila Valley R. Co. v. Hall, 232 U. S. 94 (1913).

meaning of the Seventh Amendment is to be determined by the appropriate rules of the common law established at the time of the adoption of the Constitution,[4] and since those rules did not recognize a power in the trial judge to increase either absolutely or conditionally the amount fixed by the verdict of a jury (with certain exceptions),[5] that, therefore, the granting of a new trial conditionally, as in the principal case, is violative of plaintiff's constitutional right to a jury trial. In view of the fact that the argument might be applied with equal force that the *remittitur* deprives the defendant of trial by jury on the question of damages, it is interesting to note the disposition that Mr. Justice Harlan once made of the conditional new trial in a case of *remittitur*. He wrote:[6] "The practice which this court approved in *Northern Pac. R. Co. v. Herbert* [116 U. S. 642 (1885)] is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It can not be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury, and grants a new trial, where the damages are palpably or outrageously excessive. . . . But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require the plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint. Nothwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case." [7]

It should be noted that the majority in the principal case doubted whether the use of the *remittitur* would be sanctioned if a case in-

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[4] See Thompson v. State of Utah, 170 U. S. 343 (1897). For the same reason, federal courts have no power to grant motions for judgment *non obstante veredicto*. Young v. Central S. R. Co. of New Jersey, 232 U. S. 602 (1914).

[5] These exceptions were, according to Mr. Justice Sutherland, in the principal case, pp. 297, 298: (1) In actions of mayhem, to increase the damages awarded the plaintiff, *super visium vulneris;* (2) To increase the damages awarded under a writ of inquiry; and (3) In actions where the amount of the plaintiff's injury was certain, *e. g.*, debt, to increase the damages awarded plaintiff.

[6] Arkansas Valley Land and Cattle Co. v. Mann, *op. cit. supra* note 3, at 74.

[7] See, also, Gila Valley R. Co. v. Hall, 13 Ariz. 270, 112 Pac. 845, 847 (1911), *aff'd*, 232 U. S. 94 (1913).

volving its use were to come up for review for the first time today, but considered that in view of the fact that the validity of its use had been determined for over a hundred years, and as there was some authority indicating its use to some extent prior to the time the Constitution was adopted, that its use would continue to be upheld.[8] The majority, moreover, felt that there existed, as a matter of fact, a distinction between the *remittitur* and, what we may term, the *"additur."* [9] In the principal case Mr. Justice Sutherland said: "Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess. . . . and that the remittitur has the effect of merely lopping off an excrescence. But, where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict."

Most of the states have no constitutional prohibition against the retrying of facts found by a jury otherwise than according to the rules of common law [10] so, it would seem, that there would be no real objection if the party prejudiced by the granting of the conditional new trial has given his consent to the *additur*. A careful review of the cases dealing with the matter, however, shows that its use has been infrequent, and, in some jurisdictions, it is used only to remedy the omission in the verdict of calculable items of damage.[11] In other jurisdictions, it is used to correct generally inadequate verdicts.[12]

In support of the decision in the principal case are to be found several decisions of state courts. It is to be observed, however, that in some of these cases verdict was found for the defendant, or the plaintiff was allowed merely nominal damages, while in the principal case the verdict was for the plaintiff. For example, in *Goldsmith v. Detroit, J. & C. Ry.*[13] there was a verdict for the defendant. The plaintiff's motion for a new trial was conditioned on the failure of the defendant to consent to the entry of judgment for the plaintiff in the sum of $300. The defendant having given his consent, the motion was overruled. On appeal by the plaintiff, the lower court was re-

8 The use of the *remittitur* is no longer allowable in England. Its use was upheld in Belt v. Lawes, 12 Q. B. D. 356 (1884); but the doctrine of this case was repudiated in Watt v. Watt [1905] A. C. 115.

9 See Correction of Damage Verdicts by Remittitur and Additur, 44 YALE L. JOUR. 318.

10 But see W. VA. CONST., art. III, § 13.

11 See, for example, E. Tris Napier Co. v. Gloss, 150 Ga. 561, 104 S. E. 230 (1920); Anderson v. Jenkins, 99 Ga. 299, 25 S. E. 648 (1896).

12 Gaffney v. Illingsworth, 90 N. J. L. 490, 101 Atl. 243 (1917).

13 130 N. W. 647 (Mich. 1911).

versed.[14] Similarly, *Lorf v. City of Detroit*[15] was a case where the plaintiff was given nominal damages only, and the conditional new trial procedure was disapproved of on appeal by the plaintiff. In *Bradwell v. Pittsburg & W. E. R. Ry. Co.*[16] verdict was for the plaintiff for 6¼ cents and the denial of plaintiff's motion for a new trial on the defendant's consent to an *additur* of $400 was held erroneous. It would seem then that the state courts agree with the majority in the principal case that the trial court cannot compel the plaintiff to accept the increase against his will. If the plaintiff will not accept the increase, and would rather take his chances with another jury, then there is no alternative to a new trial. The reason given for the rule is that given by Mr. Justice Sutherland in the principal case. "It was equivalent to the trial court himself assessing the damages. This is the province of the jury."[17]

On the other hand, the practice has been approved in a large number of cases, where the defendant failed to give his consent, with the result that the new trial was granted. For example, in *Marsh v. Minneapolis Brewing Co.*[18] there was a verdict for plaintiff, and it was held that it was within the reasonable discretion of the trial court to condition the granting of a new trial on the defendant paying plaintiff $175. Likewise, in *Bernard v. City of North Yakima*[19] where the jury found for the plaintiff in the sum of $15, a new trial, unless defendant consent to an increase in the damages awarded to $700, was sanctioned, the court saying that the defendant was not prejudiced, because he could either accept or reject the condition.[20]

One of the leading cases on the subject is *Gaffney v. Illingsworth*.[21] In that case, which was a personal injuries action, the plaintiff received a verdict for $190.25. Rules to show cause were taken by both plaintiff and defendant, and, upon argument, a new trial was awarded plaintiff on the question of damages unless the defendant, within ten days, paid the plaintiff $480.50. The defendant failed to make the payment, and the plaintiff's rule became absolute. On appeal, it was held that the order was proper and rested in the sound discretion of the

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14 See, also, Werner v. Bryden, 84 Cal. App. 472, 258 Pac. 138 (1927); Shanahan v. Boston & N. St. Ry. Co., 193 Mass. 412, 79 N. E. 751 (1907).

15 145 Mich. 265, 108 N. W. 661 (1906).

16 139 Pa. St. 404, 20 Atl. 1046 (1891).

17 Per Bird, J., in Goldsmith v. Detroit, J. & C. Ry., *op. cit. supra* note 13, at 648. But there are cases holding that a new trial may be denied on *remittitur* against the defendant's objection. Pendleton Street R. Co. v. Rahmann, 22 Ohio St. 446, 450 (1872). See Annotation, 53 A. L. R. 779, 784.

18 92 Minn. 182, 99 N. W. 630 (1904).

19 80 Wash. 472, 141 Pac. 1034 (1914).

20 See, also, Ford v. Minneapolis St. Ry. Co., 98 Minn. 96, 107 N. W. 817, 8 Ann. Cas. 902 (1906).

21 *Op. cit. supra* note 12.

trial court. The trial court failed to discuss whether or not the order denied defendant trial by jury, but based its decision on the analogous procedure of the *remittitur*.[22]

The Wisconsin procedure is illustrated by the case of *Risch v. Lawhead*,[23] where, in a personal injuries action, a verdict was returned for $3,000, in favor of the plaintiff. The trial court ordered that judgment be entered on the verdict for $4,000, the smallest sum which an unprejudiced jury would award, unless the defendant filed within 10 days a notice to accept a new trial. Judgment was entered for the last mentioned sum on the failure of the defendant to accept the new trial. On defendant's appeal, it was held that while the order was erroneous in that it failed to require the plaintiff's consent, still the defect was cured by the plaintiff taking judgment on the amended verdict, and that the defendant was not prejudiced. Attention is called to the fact that the trial court increases the verdict to the smallest sum which an unprejudiced jury would award, and that it is reiterated that it is the plaintiff who is denied trial by jury if he fails to give his consent to the *additur*.

New trials are expensive and tend to prolong litigation. It is, therefore, important that legal research should be devoted to methods of obviating new trials. It is for this reason that the device of the *remittitur* and its counterpart the *additur* commend themselves to our consideration. The *remittitur* is seemingly firmly established in our jurisprudence, and it is to be hoped that the *additur* will become more popular. It is obvious that as long as the courts will not allow its use without the consent of the plaintiff, its use must be restricted to occasion when the plaintiff does not object. It is difficult to understand why, if the *remittitur* is allowed contrary to the wishes of the defendant, by parity of reasoning, the *additur* is not allowed contrary to the plaintiff's wishes. But be that as it may, it is clear that, even within the narrow limits hereinbefore mentioned, the *additur* is a desirable procedure to prevent the necessity of new trials on the ground of inadequacy of damages.

John L. Towne.

PHYSICIANS AND SURGEONS—WEIGHT AND SUFFICIENCY OF EVIDENCE—QUESTIONS FOR JURY.—As a general rule, in an action against a physician or surgeon for malpractice in the treatment of a patient, the opinions of medical experts, who have heard the testimony as to the manner in which the case was treated, are admissible in evidence

22 *Cf.* Clausing v. Kershaw, 129 Wash. 67, 224 Pac. 573 (1924).
23 211 Wis. 270. 248 N. W. 127 (1933).

on the question as to whether or not the treatment was proper.[1] Equally well-settled is the rule that an expert cannot give his opinion, from all the evidence in a case, as to whether or not there was malpractice, since that is the very question which the jury are to determine for themselves.[2] Admitting the soundness of these two rules, in what classes of cases is expert medical testimony essential to the proof of malpractice or other negligence? What weight is to be given to the testimony of experts in malpractice cases? The answers to these questions form the basis of a large amount of judicial discussion in cases involving malpractice or other negligence on the part of physicians and surgeons. It is the purpose of this note to briefly review a few of the more typical cases regarding these matters with the view of attempting to formulate a more or less definite answer to the above interrogatories.

In the recent case of *Gabrunas v. Miniter* [3] the defendant physician was a specialist in ear and throat cases. In operating on the plaintiff he failed to remove a bean that had become lodged in the latter's ear. There was no direct medical testimony that the defendant did not possess or exercise the required skill or care in examining the plaintiff's ear and in failing to remove the bean. The Supreme Judicial Court of Massachusetts was of the opinion that this was a case where expert medical testimony was not essential to the proof of negligence. The court reasoned that, even in the absence of expert testimony, the jury, from the evidence that the defendant when examining the plaintiff's ear saw the bean in the canal outside the drum but did not remove it and from their own common knowledge and experience, could have found that the defendant failed to exercise the care and skill required of him as a specialist.

Presenting a clearer picture of the difficult question the court is ofttimes asked to rule upon in actions for malpractice is the case of *Toy v. Mackintosh.*[4] This was an action to recover damages for alleged negligence on the part of the defendant dentist in allowing a tooth to fall into the plaintiff's throat while the latter was under an anaesthetic during an operation performed for the extraction of several teeth. The plaintiff claimed that the tooth, which fell, became lodged in his lung resulting in a cough, dizziness, numbness in the right arm and leg and other bodily ailments from which he claimed to be suffering as a result of the defendant's negligence. He offered no dental or medical testimony to show whether the symptoms which it appeared he had could have been caused by the tooth. The court held that the jury was not obliged to believe the expert testimony of four medical men called by the defendant, that to allow the tooth to fall into the plaintiff's throat

1 Wright v. Hardy, 22 Wis. 334 (1867).
2 Hoener v. Koch, 84 Ill. 408 (1877).
3 193 N. E. 551 (Mass. 1935).
4 110 N. E. 1034 (Mass. 1916).

was consistent with due care, even though such testimony was uncontradicted. But it also thought that although the jury was at liberty to disregard the expert testimony for the defendant that the tooth had nothing to do with the plaintiff's condition after the operation, yet in determining whether hemiplegia, aphasia, and the plaintiff's weakened condition could have resulted from the alleged negligence of the defendant, not being a matter of common knowledge but depending on affirmative proof, with the burden on the plaintiff, they were not justified in finding such connection, in the absence of expert testimony to that effect offered by the plaintiff.

Perhaps the most frequent cases involving malpractice arise out of surgical operations when the surgeon or attendant leaves a sponge or other foreign substance in the incision after it has been closed. In *Samuels v. Willis* [5] the testimony of a number of physicians for the defendant that the best of surgeons sometimes left a sponge or other foreign substance in the bodies of their patients was held not to be determinative on the question of the defendant's negligence or malpractice. The court held, that the question of whether the defendant physician exercised the care which ordinarily prudent and skilled physicians who practice in the same locality usually exercise under the same or similar circumstances, was for the jury to determine. In discussing its decision the court said that because all men are sometimes careless does not release any man from the legal consequences of his careless act.

In *Ault v. Hall* [6] the defendant surgeon performed an operation in which it was necessary to employ surgical sponges. The counting of these sponges before and after the operation was left by the defendant to a nurse especially provided for that purpose. Due to the negligence of the nurse in failing to keep an accurate count, one of the sponges was left in the wound after it had been closed. The system of counting the sponges was declared to be a reasonable one by the court, nothing appearing from the record to show that the sponge could not have been easily discovered by the surgeon if he himself had made a search for it after the incision was closed. The court held that the removal of the surgical sponge was a part of the operation itself, and that the defendant's failure to remove it before the wound was closed was prima facie evidence of negligence and that it was a question for the jury to determine whether all was done that reasonable care and skill required.

The case of *Walker Hospital v. Pulley* [7] is an authority for the proposition that jurors are competent and capable, without the aid of

[5] 118 S. W. 339, 19 Ann. Cas. 188 (Ky. 1909).

[6] 104 N. E. 518 (Ohio 1928).

[7] 74 Ind. App. 659, 127 N. E. 559 (1920), *rehearing denied*, 128 N. E. 933 (1920).

expert testimony, of reaching a conclusion as to whether or not there was negligence, where it is predicated on an omission which the common knowledge and experience of ordinary men would be able to discern as negligence. In this case the patient was suffering from necrosis of the femur and the surgeon made an incision in the bone. After treating the bone, the incision was packed with iodoform gauze for the purpose of drainage. The gauze was removed from time to time, the wound dressed, and new gauze inserted. The surgeon at all times knew that the gauze was in the wound and that the wound was healing and it was charged that he negligently permitted the gauze to remain in the wound and allowed the said wound to heal over it, thereby causing the injury complained of. The Appelate Court of Indiana, in deciding that the jury was capable of reaching a conclusion that the defendant was negligent without the aid of expert testimony, distinguished this case, where common knowledge and experience would dictate that it was plainly negligence on the part of a physician performing an operation to permit such a plainly visible thing as a piece of gauze to remain in the incision, from one in which negligence is predicated on the lack of skill or care with regard to a thing peculiarly within the knowledge of medical men. Thus it is seen that the ordinary layman is quite as competent as the most experienced surgeon in realizing the danger of such a purely routine procedure as that of removing gauze that is known to be in the wound or of counting sponges where the negligence is grounded on either one of these omissions.

Mayer v. Kipke[8] states that what constitutes ordinary care in a case involving knowledge peculiar to the medical profession "is to be determined by the testimony of those who know what it is, and not as a matter of common knowledge."

From a review of the foregoing cases, it is evident that only the members of the medical and surgical profession can determine what is the correct medical and surgical practice insofar as the matter lies within the realm of purely professional competence. When the question in the case does not require medical knowledge to solve, when it is not one of diagnosis (one concerning the manner in which a certain operation or method of treatment should have been performed), the jury, from the circumstances shown by the evidence and from their own common knowledge and experience, are competent to judge for themselves whether or not there was negligence or malpractice.

To say that expert medical testimony is essential when the case presents a question concerned with medical practice and peculiarly within the knowledge of medical men is only to partially answer the query presented at the beginning of this note. In order to exhaust

8 197 N. W. 333 (Wis. 1924).

the subject of investigation there presented it is necessary to determine the weight to be given to such testimony. The rule is that even the uncontradicted opinions of medical men in regard to the question of professional skill are not to be taken by the jury as conclusive but are to be weighed by it together with the other evidence in the case in determining whether a physician or surgeon is guilty of negligence or malpractice.[9]

John H. Logan, Jr.

TORTS—LIABILITY FOR INJURIES TO PERSONS AND FOR INJURIES TO PROPERTY BY DOGS.—The common law imposed no liability on the owner of a dog for *trespass* on account of the dog's entering upon the premises of another person. Four reasons[1] are generally given for this rule: (1) The difficulty or practical impossibility of keeping dogs under restraint; (2) The slightness of damage which their wanderings ordinarily cause; (3) The common usage of mankind to allow them a wide liberty; and (4) Their not being considered at law so absolutely the property of the owner as to be the subject of larceny.[2] Thus a different rule of liability was applied in the case of trespasses to real property by dogs from that applied in case of other domestic animals, such as horses and cattle.

The cases, both in England[3] and this country,[4] have established the rule at common law that there is no liability on the part of the owner of dogs for injuries to personal property committed by them

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9 Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701 (1869).

1 Read v. Edwards, 17 C. B. (N. S.) 245, 260, 261, 144 Eng. Rep. 99, 105 (1864).

2 This reason has been eliminated in many states by statute. LARCENY, 36 C. J. 740, 741, note 54, and cases cited.

In Mullaly v. People, 86 N. Y. 365, 366 (1881), the court said: "At common law the crime of larceny could not be committed by feloniously taking and carrying away a dog. Whart. Cr. Law (4th ed.) § 1755; 4 Bl. Com. 235; 1 Hale P. C. 510; Coke Third Inst. 109. And yet dogs were so far regarded as property that an action of trover could be brought for their conversion, and they would pass as assets to the executor or administrator of a deceased owner. Bac. Abr., Trover, D.; 1 Wms. Exrs. (5th Am. ed.) 775."

3 Read v. Edwards, *op. cit. supra* note 1 (In this case the court held that an action to recover damages could be maintained against the owner of a dog, who, knowing the animal to have a propensity for chasing pheasants and destroying game, permitted it to be at large, and it *broke and entered* the plaintiff's wood, chased and destroyed young pheasants which were being reared there under domestic hens.). See Brown v. Giles, 1 C. & P. 118, 171 Eng. Rep. 1127 (1823).

"No action lies for damage done by a person's dog, without the person's concurrence, or a knowledge of bad propensities in the dog, even where there is considerable actual damage, as sheep biting, etc." Note to Brown v. Giles, 171 Eng. Rep. 1128.

4 Murray v. Young, 12 Bush 337 (1876) (The plaintiff brought an action for damages due to the killing and injuring of a number of his sheep by the

while trespassing on another's premises, even when considerable damage is done, such as killing sheep, unless the owner had previous knowledge (*scienter*) of the propensity of the particular dog or dogs to do damage of the kind complained of. The strictness of this rule is well-illustrated in *O'Connell v. Jarvis* [5] where the plaintiff, a child who, while in his father's house, was bitten by the defendant's dog which had strayed into the house, was held not entitled to recover for the injury sustained. The theory of this decision was that the plaintiff, not being the owner of the premises, had no substantive cause of action to which to annex the aggravation of damages caused by the bite of the dog. If, however, the dog had bitten the owner of the premises, the reasoning in this opinion indicates that, in the absence of *scienter*, there would have been no liability; there would not have been liability for the trespass to realty, so there would have been no substantive cause of action to which to annex the aggravation of damages caused by the bite of the dog.

To remedy the hardship that was apparently thought to exist under the common law rule, statutes have been enacted in a number of jurisdictions placing the liability of the owner of a dog, for killing of or injury to certain kinds of domestic animals, on the ground of ownership independently of negligence or blamefulness.[6]

In a number of cases dealing with the liability of the owner or keeper of a dog for biting or otherwise injuring a person it does not appear as to whether the injury took place on the premises of the

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defendant's dogs. The court held that the gist of the action was the keeping of the dogs with knowledge of their propensity to be vicious and destructive—not negligence in keeping them.) Contra: Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567 (1878), wherein the court held that the owner of a dog was liable for the killing of the plaintiff's cow, while the dog was *trespassing* on the plaintiff's premises, although the owner of the dog had no previous knowledge of the dog's propensity to do this sort of property damage.

"The common law holds the owner of a dog accountable upon the ground of negligence for any injury committed by him, by biting the person or cattle of another and the like, if he knew or had notice that the animal was accustomed to such or similar mischief. But without proof of knowledge or notice of such propensities the owner is not liable." Auchmuty v. Ham, 1 Denio 495, 498 (1845).

[5] 13 App. Div. 3, 43 N. Y. S. 129 (1897).

[6] Auchmuty v. Ham, *op. cit. supra* note 4, interpreting and applying an early New York statute (1 R. S. 704 § 9).

The present New York statute, dealing with this subject, provides: "The owner of a dog which shall attack, chase, worry, injure or kill domestic animals or fowls shall be liable for double the damages caused thereby to the owner of such domestic animals or fowls. Such damages shall equal the value of the animals or fowls killed, or if not killed, the amount of the damages caused by the injury of such animals or fowls." N. Y. CONS. LAWS (Cahill's, 1923) c. 19, art. 7, § 119.

An English statute of 1906 provides: "The owner of a dog shall be liable in damages for injury done to any cattle [or poultry] by that dog; and it shall not

owner or keeper or elsewhere.[7] Regardless of this consideration, the owner of a dog is not generally held liable for its biting or otherwise injuring a person unless the owner had previous knowledge of its ferocious disposition towards mankind.[8]

In a few cases it has appeared, as a matter of fact, that at the time the dog bit or otherwise injured the plaintiff the dog was *trespassing* on premises of a person other than its owner where the plaintiff had a right to be at the time of the injury. Yet the owner of the dog was not held liable in the absence of proof of *scienter*.[9]

Where at the time the dog bites or otherwise injures a person the person is upon the premises of the owner of the dog, a number of situations have been presented in the cases. At the common law the fact that the person bitten or otherwise injured by a ferocious dog was a trespasser on the premises of the owner of the dog does not bar recovery for the injury.[10] While this is the general rule, the ques-

be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or to show that the injury was attributable to neglect on the part of the owner." 6 EDW. 7, c. 32 § 1 (1906).

7 Osborne v. Chocqueel [1896] 2 Q. B. 109; Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521 (1892).

8 Osborne v. Chocqueel, *op. cit. supra* note 7.

9 Sanders v. Teape, 51 L. T. (N. S.) 263 (1884); O'Connel v. Jarvis, *op. cit. supra* note 5.

10 Loomis v. Terry, 17 Wend. 496, 31 Am. Dec. 306 (1837); Sherfey v. Bartley, 4 Sneed 58, 67 Am. Dec. 597 (1856).

"According to the great preponderance of authority, in a suit for injuries by a vicious animal, the gist of the action is not negligence in the manner of keeping the animal, but keeping him at all with knowledge of his vicious propensity. According to these authorities one having such knowledge keeps such animal at his peril and must respond for any damage done by the animal, irrespective of negligence on his part. Some courts, however, hold that the gist of the action is negligence in failing to exercise due care in securely restraining the animal, a rebuttable presumption of such negligence being raised whenever the animal inflicts injury." THROCKMORTON'S COOLEY ON TORTS (1930) 493.

"In jurisdictions that hold the gist of the action is negligence, contributory negligence, in the ordinary sense, is a defense to an acton for an injury by a vicious animal, whereas in the jurisdictions that follow the majority rule, the plaintiff is not barred by the fact that he was guilty of some slight want of ordinary care but only if he was so negligent that it may be said that he brought the injury upon himself. That the person injured was at the time committing some trifling trespass upon the defendant's land is no defense, for the law will not suffer a man to defend his premises against mere trespasses by such dangerous means as ferocious animals." THROCKMORTON'S COOLEY ON TORTS (1930) 495.

Sandusky v. Bushey, 128 Atl. 513 (Me. 1925), is a good illustration of the application of the majority rule.

In Iowa, under a statute abrogating the necessity of proving *scienter*, it has been held that the plaintiff must show freedom from contributory negligence, in order to recover for injuries inflicted by a dog. See Sanders v. O'Callaghan, 82 N. W. 969, 970 (Iowa 1900), and cases cited.

tion arises as to whether it makes any difference if the plaintiff was an intentional trespasser as distinguished from his being an unintentional trespasser or a trespasser through mistake. In *Harris v. Hoyt*[11] the plaintiff had been invited to visit a friend in an apartment house. By mistake she opened the door leading into the defendant's apartment, and, while standing in common vestibule of the house, she was bitten by the defendant's dog. The court held that she was not a trespasser at the time she was injured,[12] as she was rightfully in the vestibule, and that the question of the defendant's negligence in keeping the dog under the circumstances was for the jury.[13] Yet in *Sherfrey v. Bartley*[14] where the plaintiff was, apparently, intentionally trespassing on the defendant's premises at the time his dog, which had a vicious propensity to injure or attack persons, injured her, the court held that

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11 161 Wis. 498, 154 N. W. 842, L. R. A. 1916C, 344 (1915).

12 The defendant argued that there was no duty owing to the plaintiff, on the theory that the question of liability was the same as that in case of a trespasser on land who is injured by reason of some defective condition on the premises. In some respects the two types of cases are similar. But different considerations enter into the question of liability of the owner of a dog for injuries to trespassers on the owner's premises from the considerations that enter into the question of liability of occupiers of premises for injuries to trespassers thereon due to the dangerous condition of the premises. There is a privilege at common law to keep a ferocious dog, under certain limitations; that is, it is not an indictable offense or actionable *per se* to keep such a dog, at the common law. In connection with the privileges of ejecting trespassers, it is considered unreasonable to permit ferocious animals to be at large on the premises where the presence of trespassers may be expected. While an owner of premises should, as a matter of fact, expect intrusions upon his premises, he is not bound to do so at law, for it is considered an unreasonable interference with the beneficial enjoyment of his premises to require him to do so. Yet, when the presence of trespassers upon a given area is reasonably expectable, the owner of the premises is under a duty not to change the condition of the premises so as to make them unreasonably dangerous to possible trespassers without giving adequate warning of the change. So if the presence of trespassers is reasonably expectable, it would be an analogous situation to permit a ferocious dog to be at large on the premises where such intrusions may take place.

13 This decision was governed by a statute abrogating the necessity of alleging and proving *scienter* on the part of the owner or keeper of a dog in an action for damages due to biting or injuries inflicted by the dog. Evidently the gist of the action under the statute is negligence. So it would be necessary, in such a case, to establish foreseeability of the injury, or general type of injury, before a person injured or bitten by the dog would be entitled to recover.

In construing a Maine statute of 1895, providing that "When a dog does damage to a person . . . his owner or keeper forfeits to the person injured the amount of the damage done, to be recovered in an action of trespass," the court said: "By this statute the damage done by a dog is made a trespass, since a trespass action is prescribed as the remedy. . . . Evidence of the character or disposition of the dog is not admissible." Carroll v. Marcoux, 56 Atl. 848, 849 (Me. 1903).

14 *Op. cit. supra* note 10.

the fact she was a trespasser would not bar recovery. It appeared that "neighbors were in the habit of going to the field to pick berries"; so it might be a reasonable deduction that the defendant should have reasonably expected the presence of trespassers in the field. This case might, therefore, be considered as being analogous to those cases wherein the occupier changes the condition of the premises after the presence of trespassers is reasonably expectable so as to create an unreasonable risk of harm towards them. In *Brock v. Copeland*[15] the plaintiff while trespassing upon the defendant's premises after the latter's vicious dog had been shut up for the night, but which, under some unexplained circumstances, had been let out, was injured by the dog. Since the plaintiff had imprudently gone onto the defendant's premises, the court held he could not recover for injuries inflicted by the defendant's dog. Two factors are involved in this decision. The court said that the plaintiff was at fault in going upon the premises after the dog had been shut up for the night. Then there was the privilege of keeping the dog, as a watchdog. In *Loomis v. Terry*[16] the defendant, who had per-

[15] 1 Esp. 203, 170 Eng. Rep. 328 (1794). Accord: Dictum in Sarch v. Blackburn, 4 Car. & P. 297, 172 Eng. Rep. 712 (1830).

[16] *Op. cit. supra* note 10. The rationale of the decision is as follows: "All necessary force to resist the entry, or eject the trespasser after he shall have intruded into the premises, is the utmost remedy which the law allows by the act of the party injured. But that is a different question. May a man knowingly keep on his premises a ferocious dog, in such a way that he will worry ordinary trespassers in the daytime, without giving notice of the fact? . . . The distinction between acts done by the owner to repel a trespass, he being present, and his taking measures for the general protection of his rights during his absence, appears to me to be very well considered by Dallas, J., in *Deane v. Clayton* . . . . In the former case he can fix himself the necessary measure of violence; in the latter, he can only provide the means with a measure of prudence adapted to his general purpose, and the trespasser must act at his peril. But the case before us is not one of a man keeping a dog for the necessary defense of his garden, his house, or his field, and cautiously using him for that purpose in the nighttime. . . . It is not the case of keeping a useful domestic animal, a mischievous bull for instance, in a remote pasture. . . . It is not like setting spring guns with public notice of the fact; for even that has been held warrantable as being necessary: *Ilott v. Wilkes,* 3 Barn. & Ald. 304. . . . Where a dog is lawfully kept for the purposes of protection, a trespasser can not maintain an action for an injury, if he come in the way of the dog: *Sarch v. Blackburn.* . . . There can be no doubt that, as against a trespasser, a man may make any defensive erection, or keep any defensive animal which may be necessary to the protection of his grounds, provided he take due care to confine himself to necessity. But it has been held that in these cases and the like cases, the defendant shall not be justified, even as against a trespasser, unless he gives notice that the instrument of mischief is in the way. That has been held of spring guns: *Bird v. Holbrook* . . . and it goes on the principle that secrecy is not necessary to the object, or, at least, not so necessary that the means may be used to the hazard of human life or human safety. . . . But what shall we say of a case involving human safety . . . where a fierce dog is kept without the semblance of necessity . . .?"

mitted a vicious dog to run at large on his premises, was held liable to a technical trespasser for injuries inflicted by the dog. It was argued that the general practice of entering upon another's land to hunt for wild animals would warrant a jury in finding a license to enter; but no evidence was given of that practice. While the court recognized the privilege of keeping watchdogs, it said that this would not aid the defendant because of the manner of keeping the dog and the fact that the injury took place in the daytime. In *Eberling v. Mutillod* [17] the plaintiff, a boy sixteen years old, had been in the business of delivering newspapers on the defendant's estate to him and his tenants for about a year; and on the day he was bitten by the defendant's dog he was going across the defendant's lawn on the regular route he had taken during the year, having entered through a gate which was open. The defendant argued that the plaintiff was a trespasser and that therefore he was not liable for the injury. It was held that, even if the plaintiff was a trespasser on the defendant's premises, he was entitled to recover damages for the injury, as he was not guilty of contributory negligence. The court, quoted from a Massachusetts case, *Marble v. Ross*,[18] as follows: " 'The unlawful character of his [the plaintiff's] act did not contribute to his injury or affect the defendant's negligence . . . It is true that, as a general rule, a trespasser who is injured by a pit or dangerous place upon the land of another, excavated or permitted for a lawful purpose, cannot recover damages therefor, because the owner of the land owes no duty to him, and therefore is not negligent as to him; but it is clear that the owner of land cannot wantonly injure a trespasser. . . . The law holds the keeper of an animal known to be danger-

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In Woodbridge v. Marks, 45 N. Y. S. 156 (1897), the plaintiff, at the time he was bitten by the defendant's dog, had gone on the defendant's premises, in the evening, in search of a man whom he understood was at work there; while passing around the rear of the defendant's house, he came within reach of the latter's dog, which was chained, and was bitten. The plaintiff argued that a vicious dog is analogous to spring gun, which may not be kept upon a man's premises, even as against a trespasser, without notice being given. The court, in holding that the defendant was not obligated to give notice, said: "But the analogy is not complete. A spring gun is more than likely to take human life. It is placed, not for the purpose of warning others off, but with the design to do them great injury, even if life is not taken should they come in contact with it. A dog is rarely so vicious or powerful that it would endanger a man's life. And the watch dog is used, not so much for the purpose of injuring an intruder, but rather as a means of warning and frightening him away. A dog gives notice of his presence and attack."

17 101 Atl. 519 (N. J. 1917).

18 124 Mass. 44 (1878) (This was an action for injuries caused by a vicious stag owned by the defendant. The plaintiff's intestate received the injuries, for which the action was brought, in the defendant's pasture, where he was at the time a trespasser. He knew at the time that the animal was kept in this pasture. It did not appear that the defendant kept the animal in the pasture for the purpose of keeping off trespassers.).

ous, which injures another, to the same degree of responsibility as in cases of wanton injury. . .'"

Under statutes increasing the stringency of the common law liability by making the owner or harborer of a dog liable, even though he has no reason to suspect that the dog has a propensity to bite or injure persons, it has been held that the fact that the plaintiff is a trespasser does not bar recovery.[19] Where a person enters upon another's premises, mistakenly supposing he has permission to do so, it has been held that he is entitled to recover for injuries inflicted by a ferocious dog of the owner of the premises. Thus in *Woolf v. Chalker* [20] the plaintiff, a traveling peddler, who had on previous occasions called at the defendant's house and traded with him, on the occasion of his last visit knocked at the outer door for admission and supposing he had permission to enter he passed through the entry into the sitting-room. Upon entering, he was attacked by a large and ferocious dog belonging to the defendant, who had knowledge of the vicious propensity of the dog to attack mankind. A judgment for the plaintiff was sustained on appeal. The court even doubted whether it would have barred the plaintiff from recovery had he willfully brought the injury on himself, in view of the stringent legislation in the state in the matter of injuries to persons and property inflicted by dogs. This case was decided under a statute abrogating the necessity of proving *scienter* in an action for injuries to persons or property. The court thought that the several statutes concerning injuries to persons and property by dogs were intended to impose a more absolute degree of liability than that existing at the common law.[21]

Under a statute providing that "A person who owns or keeps a vicious or other dangerous animal of any kind, and, by the careless management of the same, or by allowing the same to go at liberty, another, without fault on his part, is injured thereby, such owner or keeper shall be liable in damages for such injury," the "fault" referred to has been construed to be not that of being a trespasser, but that of being in some way instrumental in provoking or bringing about

19 Carroll v. Marcoux, *op. cit. supra* note 13.

20 31 Conn. 121, 81 Am. Dec. 175 (1862).

21 In Legault v. Malacker, 166 Wis. 58, 163 N. W. 476, 1 A. L. R. 1109 (1917), where the court was considering the extent of liability under a statute abrogating the necessity of establishing *scienter* in cases of injuries done by dogs, it said: ". . . while the statute abolishes the necessity of alleging and proving *scienter*, it does not impose an absolute liability. . . . on proof of the fact that a person has been bitten by a dog, a prima facie case of liability is made out against the owner or keeper; this prima facie case may be defeated if it appear either by the plaintiff's evidence or by the evidence introduced by the defendant that the plaintiff brought or helped to bring the dog's attack upon himself by provoking the dog, by lack of ordinary care, or by trespass of such a nature as is calculated to induce the attack."

the attack complained of.[22] The statute [23] in Connecticut, relating to damages to persons or property by dogs, provides: "If any dog shall do any damage to either the body or property of any person, the owner or keeper . . . shall be liable for such damage, except where such damage shall have been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort." The language of the exception is broad and comprehensive, as an abstract statement. Interpreted literally, it would include every kind of trespass or tort done to any person or property at the time of the injury by the dog to the person committing the trespass or tort. But the Connecticut court has not interpreted the statute literally; it has read into the statute a controlling condition that is in accordance with what the legislature undoubtedly intended to be embodied within the exception.[24] "The trespasses and torts which the framers of this exception had in mind were those which were committed upon the person or property of the owner or keeper, or his family, and other torts of like character, and which the dog, with his characteristic loyalty, would instinctively defend and protect, and those torts committed upon the dog which [are] . . . likely to excite a dog to the use of its natural weapons of defense." [25] This principle is applicable generally where the statutes have made exceptions.

If a trespasser is not without protection at the common law or under the statutes, *a fortiori* a licensee or an invitee would not be without protection. A person coming within either of these two classes would be in a more favorable position than a trespasser. A person who has been given permission or an invitation to come on the premises of the owner of a dog may be reasonably expected to avail himself of the permission or invitation. Hence, his presence on the premises is reasonably expectable. Where a person has a privilege to enter upon the premises of the owner of a vicious dog and is bitten or otherwise injured by the dog, the fact that he knew of the vicious propensity

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22 Conway v. Grant, 88 Ga. 40, 13 S. E. 803, 30 Am. St. Rep. 145, 14 L. R. A. 196 (1891).

23 CONN. GEN. STAT. (1930) § 3357.

24 Dorman v. Carlson, 137 Atl. 749, 750 (Conn. 1927). Accord: Kelley v. Killourey, 81 Conn. 320, 70 Atl. 1031, 129 Am. St. Rep. 220, 15 Ann. Cas. 163 (1908); Goodwin v. Giovenelli, 167 Atl. 87 (Conn. 1933).

Statutes abrogating the necessity of alleging and proving *scienter*, in cases dealing with injuries inflicted by dogs, have generally been held to embody implied exceptions. In some jurisdictions it is held that the defense of contributory negligence is an implied exception. Plumley v. Birge, 124 Mass. 57, 26 Am. Rep. 645 (1878); Quimby v. Woodbury, 63 N. H. 370 (1885). In these jurisdictions the defense that the plaintiff willfully incites or provokes the injury would be an implied exception to the liability that would follow if the statute is interpreted literally. A few jurisdictions refuse to recognize the defense of contributory negligence as an implied exception. See Kelley v. Killourey, *supra*.

25 Dorman v. Carlson, *op. cit. supra* note 24, at 750.

of the dog does not necessarily bar a recovery.[26] But such knowledge is to be considered, as a matter of fact, in determining whether or not the injured person voluntarily brought the injury on himself or failed to use due care for his own protection.[27] He is not necessarily precluded from recovery because he enters upon the premises with knowledge of such a dangerous risk thereon.

August P. Petrillo.

TORTS—MALICIOUS INDUCEMENT OF BREACH OF MARRIAGE PROMISE.—The doctrine recognizing a cause of action as existing in favor of the one party to a contract "caught on the hip," as it were, by the intentional interference of a third individual, who prevails upon the other party to the agreement to violate its terms, against such interloper is of comparatively recent origin. Let us digress for a moment to trace the history of the law so that a more complete understanding of this phase of the law may be had. Almost from the time of its inception, the early common law recognized the existence of a right of action in favor of one for an injury inflicted upon his servant by another, but "the action was confined strictly to cases where actual violence was used," [1] the recovery being grounded upon the injury and not upon the contract. Some time later the Ordinance of Laborers [2] introduced a system of compulsory labor to alleviate the deplorable conditions in business resulting from the great plague. This statute provided for the imprisonment of any worker who left his service without reasonable cause or license before his term was up, and also decreed the same punishment for one who should receive such fugitive servant in his employ. Furthermore, by virtue of this Statute, a right to an action of trespass arose in favor of the one who lost his servant against the one who enticed the servant away (and, incidentally, against the servant also), thus supplementing the action for damages for injuries to a servant. Such was the law down to the middle of the nineteenth century when the decision handed down by the justices on the Queen's Bench in the now famous case of *Lumley v. Gye* [3] gave the rule to the effect that maliciously to procure a breach of a personal contract constitutes a tort. The right to relief was somewhat restricted by this decision, but the fog was lifting, and it only remained

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26 Ahlstrand v. Bishop, 88 Ill. App. 424 (1899); Sylvester v. Maag, 155 Pa. St. 225, 35 Am. St. Rep. 878 (1892); Spellman v. Dyer, 71 N. E. 295 (Mass. 1904).

27 Spellman v. Dyer, *op. cit. supra* note 26.

1 Sayre, *Inducing Breach of Contract,* 36 HARV. L. REV. 663, 665.

2 23 EDW. III. (1349).

3 2 El. & Bl. 216, 118 Eng. Rep. 749, 1 Eng. Rul. Cas. 706 (1853).

for a later case, *Templeton v. Russell*,[4] to show the way, extending the doctrine of *Lumley v. Gye* so that it applied to all contracts regardless of their nature. The law formulated and promulgated by these cases is applied generally in the United States[5] and England today in actions involving the malicious procurement of the breach of a contract, if by the procurement damage was intended to result and did result to the person seeking redress. It might be noted in passing that a person liable to be injured by the machinations of another may have at his disposal two remedies: He may be able to enjoin any further action inducing the breach of the contract,[6] or he may wait until the breach has been procured and sue for damages.

But while this is the general rule, there is one class of cases where it does not apply at all, or, if it does, it is employed in an emasculated form, attended by exemptions and privileges which are very confusing. It is generally held in this country[7] that maliciously inducing breach of a marriage contract entails no liability. By way of exception to the general rule, no action lies for inducing breach of contract to marry. "The . . . exception is justified on the ground that the welfare of society is best promoted by allowing the largest liberty in the selection of spouses, and that no public benefit would be derived from a rule of law allowing an action by every disappointed suitor against his successful rival for inducing the plaintiff's fiancée to break her engagement."[8] Most states hold parents immune from liability for acts inducing such a breach; some states extend the exemption only to include relatives, friends, and rival suitors; a few states go so far as to include

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4 [1893] 1 Q. B. 715.

5 "While there is some authority to the contrary, it is commonly held an actionable injury to cause another to violate his contract with a third person, without legal justification, or, as otherwise stated, where the breach is induced or caused maliciously, 'malice' having the meaning, in this connection, of the intentional doing of a wrongful act without justification or excuse." TORTS, 62 C. J. 1141.

The general rule is it is a legal wrong for one person to break up or interfere with contractual relations subsisting between other persons. Quinlivan v. Brown Oil Co., 29 Pac. (2d) 374 (Mont. 1934).

6 "While the mere interference with a lawful contract by a stranger thereto does not of itself give the injured person a remedy by injunction, which will be denied when full indemnity may be had at law, it is very generally held that an injunction will lie to restrain third persons singly or in combination from inducing the breach of a lawful contract by one of the parties thereto when it will result in irreparable injury to the other, irrespective of the fact that the defendant is solvent. Nor is it essential that the contract should be of such a nature that specific performance could be decreed." INJUNCTIONS, 32 C. J. 228.

7 See Comment, 5 So. CAL. L. REV. 151, 152, for the English and Canadian law on the subject.

8 THROCKMORTON'S COOLEY ON TORTS (1930) 740.

even strangers within the compass of its protection. No less an authority than Cooley extends the privilege to all persons.[9]

Among those states which recognize a cause of action for such a breach is New Jersey. In a recent case from that state[10] the defendant was held liable for damages for inducing a breach of marriage contract upon the ground that the malicious inducement to the breaking of a contract (where actual ill-will toward the plaintiff is exhibited) constitutes a cause of action. The plaintiff was engaged to marry one Joseph Gottman, and had lent large sums of money to him. The defendant learned of this, and, with the intention to induce Gottman to break his agreement and thus injure the plaintiff, sought to secure Gottman's love for herself. To this end, she took him into her home, provided him with necessaries and luxuries, traveled and cohabited with him, finally persuading him to abandon the plaintiff. As a result, the engagement was broken and the plaintiff lost part of the money she had lent by reason of Gottman's having been lulled into indolence through the defendant's generosity. Upon principle, this decision is correct; there is, however, much authority to the contrary.

The Supreme Judicial Court of Massachusetts in the case of *Conway v. O'Brien*[11] held differently, deciding that no action lies against a stranger for malicious interfering with, and procuring breach of, a contract to marry. The following appears in the opinion by Crosby, J.: "Upon grounds of public policy we are of opinion that this action cannot be maintained. Although marriage is a civil contract, it is a relation between the parties which intimately concerns the welfare of society and the state, and the parents and other relatives and friends of the contracting parties ought to be free to advise them without incurring a liability to be called upon to respond in damages where such advice results in the breach of the contract to marry . . . We are of opinion that the ends of justice will be best served by holding that no action of this kind can be upheld. To decide otherwise would be to open the door to unwarranted litigation, to promote unfortunate engagements and to encourage unjustifiable attacks upon any relative or friend who could respond in damages." (There was a strong dissenting opinion to the effect that mere intermeddlers should not share in the privilege extended to parents, guardians, and friends, in such cases.) A decision from the western coast, rendered two years later, is in accord. This was a Washington case,[12] and, according to the facts,

9 "The prevention of a marriage by the interference of a third person, cannot, in general, in itself, be a legal wrong. Thus if one, by solicitations, or by the arts of ridicule or otherwise, shall induce one to break off an existing contract of marriage no action will lie for it, however contemptible and blamable may be the conduct." 1 COOLEY ON TORTS (3rd ed.) 494.

10 Jacobs v. Schweinert, 168 Atl. 741 (N. J. 1933).

11 169 N. E. 491 (Mass. 1929).

12 Clarahan v. Cosper, 296 Pac. 140 (Wash. 1931).

the plaintiff was engaged to a girl in the respondent's employ, and at the time was making $150 a month. The respondent, learning of the engagement, increased the girl's salary to $250 a month, and, though he was married, became unduly attentive to the girl, showering her with flowers, taking her on automobile trips, with the purpose, as the respondent naïvely admitted, of inducing her to breach the marriage contract. In this the respondent was successful. The plaintiff sued him for damages, but was denied recovery on the ground that, generally, prevention of marriage by interference of a third person cannot in itself be a legal wrong. A third case holding the same rule is *Homan v. Hall*,[13] in which it was held that a fiancée cannot maintain an action for damages against a third party not based on slander, but solely because her betrothed was induced by the defendant (a stranger) to break his engagement. It was said by the court: "The right of engaged parties to ask the advice of their friends and the right of the friends to give advice have never been denied. To hold that a third party may be subject to answer in damages for advising or inducing an engaged person to break the engagement might result in a suit by every disappointed lover against his rival." The more recent case of *Ableman v. Holman*[14] holds to the same rule—that no action lies against a third party for inducing breach of a contract to marry. This rule has been strengthened by several unique cases. *Stiffler v. Boehm*[15] is one of these. The plaintiff sought damages for alienation of his fiance's affections, thereby inducing breach of contract to marry, but was denied recovery, regardless of the defendant's motive or malicious intent. As the court said: "An action of the character mentioned [alienation of affections] is maintainable against one who meddles with the spouse of another, where the relation of husband and wife exists, and its basis is the loss of consortium. But where no marriage was ever consummated, in the absence of a statute, such an action will not lie." A decision of like tenor but which goes further is that given in *Davis v. Condit*.[16] This case held that an affianced husband has no cause of action against one responsible for the seduction of his affianced wife, or for the alienation of her affections, or for debauching, making proper the breach by him of the marriage contract. The court stated: "The right to recover for alienation of affections or for criminal conversation is a right arising from the marital relation. It is not extended to a betrothal."

There is another class of cases which limit the privilege to the relations and intimate friends of either party to the engagement. A

13 102 Neb. 70, 165 N. W. 881, L. R. A. 1918C, 1195 (1917).

14 190 Wis. 112, 208 N. W. 889 (1926).

15 206 N. Y. S. 187 (1924) (Criticized in 34 YALE L. JOUR. 526.)

16 124 Minn. 365, 144 N. W. 1089, 50 L. R. A. (N. S.) 142, Ann. Cas. 1915B, 544 (1914).

leading case on the point that parents should enjoy the exemption is that of *Leonard v. Whetstone* [17] which maintained that parents' advice inducing their son to refuse to perform his contract to marry another is not an actionable wrong. In this case the defendants' son had contracted to marry the plaintiff. The former, husband and wife, conspired to wrong the latter and maliciously persuaded, commanded, and hired their son to break his contract, threatening him that if he did marry the plaintiff they would drive him from home, disown, and disinherit him. They paid a third party a large sum of money to take the son away where the plaintiff could not see, or communicate with, him, and falsely charged the plaintiff with being unchaste and with suffering an abortion. At the time of doing these things, they knew their son had been keeping company with the girl for three years without any complaint on their part, had engaged to marry her, and under such promise had seduced her, and that a child had been born to him and her. The court held that such acts were not sufficient to constitute a liability in the girl's favor against the parents for inducing breach of marriage promise, but that such parents might have been liable in an action for slander. The rule holding parents immune from liability for such inducement is general.[18] *Minsky v. Satenstein* [19] is but another expression of it. It was said in this case: "A contract to marry stands upon a different footing from the general commercial contract. In the former the state has an interest to see that the contract, when consummated by marriage, results in a union which will not only prove happy and lasting, but will fit well into the general social scheme. The protection of this interest of the state rests primarily with the parents of those contemplating marriage; therefore, it is generally recognized that parents have the right to advise their children whether they shall enter into contracts to marry, and also to advise the breach of such contracts already entered into, when in the judgment of the parents a marriage ought not to take place, and such advice or the result thereof is not actionable." This case also held that the motive of the parent in inducing the breach was of no importance. Missouri [20] holds to the general rule, as does New York,[21] the latter state extending the privilege to relatives and friends. An earlier case from New York, denying recovery for inducing breach of marriage contract, is to this effect: "Marriage is an institution upheld and favored by the state as creating a status upon which rests the structure

17 34 Ind. App. 383, 68 N. E. 197, 107 Am. St. Rep. 252 (1904).

18 "The parent of the promisor cannot be sued for damage resulting from the breach of promise [to marry] where the recovery is sought on the theory that the parent was guilty of a wrong in inducing the promisor to refuse to carry out the promise . . . " BREACH OF MARRIAGE PROMISE, 9 C. J. 342.

19 143 Atl. 512 (N. J. 1928).

20 Brownstein v. Bricker, 46 S. W. (2d) 958 (Mo. App. 1932).

21 Attridge v. Pembroke, 256 N. Y. S. 257 (1932).

of society. Parties before entering upon that status should not be hindered in securing information and advice from all sources so that they may become thoroughly informed of all facts and circumstances which might affect the desirability of their union. If this form of action be extended, anyone who may give advice of information to either of the contracting parties would do so at the peril of being sued for inducing the breach. A field would be opened to distressing litigation. Third parties would be reluctant to speak and their self-interest would counsel silence." [22] According to a still earlier New York case,[23] the mother of a minor daughter, who at first consented to her daughter's marriage with the plaintiff, was not liable to him in general damages for thereafter maliciously inducing her child to breach her promise to marry, where the breach was not induced by fraud or other tortious act. Mention might also be made at this point of the case of *Oakman v. Belden*,[24] insofar as it takes cognizance of a parent's privilege, even after the marriage of his child. According to the decision rendered, a parent may not, with hostile, wicked, or malicious intent, break up the relations between his daughter and her husband. He may not do this simply because he is displeased with the marriage, or because it was against his will, or because he wishes the marriage relation to continue no longer. But he may advise his daughter in good faith, and for her good, to leave her husband, if he, *on reasonable grounds,* believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him. It may turn out that the parent acted upon mistaken premises, or upon false information, or his advice may have been unfortunate; still if he acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband.

Finally, there is that class of cases which deny the privilege to those outside the immediate family. The dictum in *Minsky v. Satenstein* [25] would bring New Jersey within the rule. It was said in this case that a third party, not related as a parent to the party to the marriage contract, would probably be liable for any malicious interference therewith. The cases falling within this section are decidedly in the minority, though the better rule would be to hold an officious interferer, not related in any way with the person committing the breach, liable in damages to the promisee. On the other hand, if the refusal to grant compensation in damages in breach of marriage promise cases is based on the ground of public policy, as so many cases claim it is, there is no sensible reason for not denying recovery against all who induce such a breach, regardless of their status.

22 Ryther v. Lefferts, 250 N. Y. S. 699, 701 (1931).
23 Guida v. Pontrelli, 144 Misc. 181, 186 N. Y. S. 147 (1921).
24 94 Me. 280, 47 Atl. 553 (1900).
25 *Op. cit. supra* note 19.

In summing up, it should be noted that the plaintiff in such cases is not always without a remedy of some sort. If the breach has been obtained by false charges made by the inducer, the jilted party may have recourse to an action for slander.[26] Further, if the promisee has incurred expense in reliance upon the promise, he may be compensated. In *Guida v. Pontrelli* [27] it was suggested that the plaintiff could have recovered for expenditures made in anticipation of the marriage. But these "consolation prizes" do not arise out of every suit for reasons which are self-evident, and the disappointed party is usually left without a life-partner and without any right against the intermeddler. The general rule, admitting no relief, is sound from the point of view of public policy, but is paradoxical in regard to the theory that for every wrong there is a remedy.

Richard A. Molique.

WILLS—NECESSITY OF WORDS OF INHERITANCE IN A DEVISE TO CREATE A FEE IN THE DEVISEE.—In the case of *Jones v. Jones*,[1] recently adjudicated in the Court of Appeals of Ohio, the plaintiff, Clarence Jones, sought to have his title to an undivided interest in certain real property quieted. He based his claim upon the construction of the last will and testament of his father, Ellis O. Jones, deceased. The testator had three sons and a daughter, Laura. The defendants claim to have title to the property through the will of Laura, deceased. She had devised all the premises involved to the plaintiff (one of her brothers) and his son. A determination of the question necessarily involves the interpretation of sections 9 and 20 of the will of Ellis O. Jones. Section 9 reads as follows: "I give, devise, and bequeath to my daughter, Laura E. Jones, and to her heirs when she shall arrive at the age of twenty-two (22) years; my two brick buildings. . . " Section 20 provides: "Should either of my sons . . . or my daughter, die without issue, the share of the one dying shall go to the others, share and share alike, or their heirs." After attaining the specified age, Laura died testate without issue. The plaintiff claims that Laura held a defeasible fee in the premises, subject to be divested on condition that she die without issue, and that, having died without issue, the fee now vests by executory devise in the plaintiff. On the other hand the defendants contend that Laura held a fee simple title to the premises at the time of her death, and, having devised such premises to the defendants, the plaintiff has no interest therein. The

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26 Leonard v. Whetstone, *op. cit. supra* note 17; Homan v. Hall, *op. cit. supra* note 13; Minsky v. Satenstein, *op. cit. supra* note 19.

27 *Op. cit. supra* note 23.

1 192 N. E. 811 (Ohio App. 1933).

question then to be considered is what was the status of Laura's interest in the estate. Section 10580 of the Ohio General Code provides that a devise of real property operates to convey all the estate of the devisor therein if nothing appears in the will showing a contrary intention. Under this statute the court held that all that was necessary to create a fee simple title was to use the words "to my daughter, Laura Jones." However, item 20 of the will apparently intends that the title in Laura should be defeasible in so far as it specifies that if one of the children dies without issue, the share of the one dying should go to the others share and share alike. In view of this provision it seems that the plaintiff's claim should be maintained. Notwithstanding, the court concluded that if the testator intended to cut down Laura's estate, he would not have added, following her name in item 9, the words "and to her heirs." The court regarded these words of inheritance as an absolute expression of intent that the devisee should have a fee simple title, and affirmed the decision of the lower court for the defendants.

It is to be observed from the preceding considerations that the presence of the *words of inheritance* was the determining factor in the court's decision. Had the testator failed to annex the words "and to her heirs," the court would undoubtedly have concluded that, in view of the contrary intent appearing in section 20 of the will, the devisee was to take only a life estate in the property. This leads us to a consideration of the importance in general of words of inheritance in a devise of real estate. The common law in England, in the conveyance of real etsate, required words of limitation in the donation or grant, to the creation of a fee. Without the word "heirs," general or special, no one could create a *fee* at common law by a *conveyance*.[2] When wills were introduced, they were regarded as a species of conveyance; the courts considered that a devise of land, by a tenant, operated as an appointment to uses, in the nature of a legal conveyance.[3] So, by analogy to the law of conveyances, words of limitation were required in devises to create a fee. But devises were introduced to the English law at a time where the feudal rigor had been much relaxed, and a more liberal rule of construction was applied than in case of deeds. Any expression which showed an intention to give the devisee an absolute estate operated to pass a fee.[4] Hence, "a devise to a man forever, or to one and his assigns forever, or to one in fee simple" [5]

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2 Hogan v. Jackson, 1 Cowp. 299, 305, 306, 98 Eng. Rep. 1096, 1100 (1775), per Lord Mansfield; 1 HILLIARD ON REAL PROPERTY (3rd ed.) 617; 2 BLACKSTONE'S COMMENTARIES (Lewis's ed.) 107.

3 Hogan v. Jackson, *loc. cit. supra* note 2.

4 1 HILLIARD, *op. cit. supra* note 2, at 622; 2 BLACKSTONE, *op. cit. supra* note 2, at 108, and English cases cited.

5 2 BLACKSTONE, *op. cit. supra* note 2, at 108, 109.

operated to transfer an estate of inheritance, though the devisor omitted the legal words of inheritance. It is now provided by statute, in England, that where real estate is devised without words of limitation,[6] the devise shall be construed to pass the fee simple, or the whole estate or interest, which the testator had power to dispose of by will in such property, unless a contrary intention shall appear by the will.[7]

In this country there seems to be an apparent conflict of authority as to whether words of inheritance are necessary to carry a fee by will, apart from a statute providing that words of limitation are not necessary to carry a fee. Some of the early cases state the rule to be that a devise to a person in general terms, without words of limitation, or any other words showing an intention to give more than an estate for life, shall pass no more than a life estate, unless it can be fairly inferred from other parts of the will that more than an estate for life is intended.[8] For instance, if the devisee is ordered to pay a sum of money to another person, it may be fairly inferred that a fee simple was intended, because otherwise the devise might turn out to be an injury rather than a benefit.[9]

In an early Pennsylvania case, *Clayton v. Clayton*,[10] there was a devise involved, giving an express estate for life to *S.*, and after her death the estate was to be divided among her children. The court

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6 "The marking out of the estate . . . is called *limitating* the estate." WILLIAMS ON REAL PROPERTY (6th ed.) 143, 144.

7 7 WILL. IV. AND 1 VICT. c. 26. The provisions of this statute have been in effect extended to conveyances *inter vivos*. See section 60 of THE LAW OF PROPERTY ACT, 1925, c. 20.

8 Clayton v. Clayton, 3 Bin. 476, 483 (1811); Mooberry v. Marye, 2 Munf. 453, 467 (1811); Barheydt v. Barheydt, 20 Wend. 576, 581 (1838). In the latter case the court said: "The general rule is undisputed, that a devise to *A.*, without words of limitation, such as 'and to his heirs,' carries with it only an estate for the life of the devisee. It was settled in analogy to the principles that govern the limitation of estates by deed at common law, which was the elder mode of transferring titles; but with this difference, that while in respect to deeds, the rule was uniform, and the fee never permitted to pass without words of inheritance; in regard to wills, they being often the product of an unskillful draftsman, upon the emergency of the occasion, it was held that an intent might be inferred from other provisions and expressions, supplying the want of such words. . . it has been long settled that a condition or direction imposed on a devisee to pay a sum of money, enlarges the devise to him, without words of limitation, into an absolute estate in fee. . . . The ground of this rule is, that unless the devisee were to take a fee, he might in the event be a loser by the devise, since he might die before he had reimbursed himself the amount of the charge upon him; and the rule applies in every case where a loss is possible."

Certain exceptions were recognized to the rule at common law requiring words of limitation in conveyances *inter vivos* to pass a fee. See 1 TIFFANY, REAL PROPERTY (2nd ed.) 46.

9 See cases cited in note 8.

10 *Op. cit. supra* note 8.

held that the children took only a life estate. There were no words of limitation in the will, or words from which a clear implication could be drawn that a fee was intended. The court emphasized the fact that if the children obtained a fee the heir of the testator would have been disinherited. In an early South Carolina case, *Hall v. Goodwyn*,[11] the judges of the Law Courts, sitting as an Appellate Court under the name of a Constitutional Court, said: "The rules for the construction of wills [which were said to be very well-established] . . . are,

"1. Where the testator makes use of any words of perpetuity, as, for instance, to 'give to one forever,' or 'to one and his assigns forever,' or 'to one in fee simple,' it will convey an estate of inheritance, although no technical words are used. . .

"2. Where the testator makes use of some word sufficiently comprehensive to embrace the interest which he has in the land as well as the land itself, as the word 'estate,' or some other word of equally extensive import. . .

"3. Where the land itself is clogged with some incumbrance, or the devisee with some duty connected with the devise, the performance of which is inconsistent with any less estate, or, in other words, where the express provisions of the will cannot be carried into effect without such construction, as where the payment of debts, legacies, and funeral expenses, accompanies the devise . . . because the charges may amount to more than the life estate would be worth. . .

". . . it may be considered as pretty well-settled, that unless a case comes within one of these rules, no greater interest will pass than a life estate, without technical words of inheritance . . ." Thus the court adopted the rules that had been established by the early English authorities. It was not especially solicitous to seize on any indication of an intention to give the devisee an estate in fee. In the absence of technical words of limitation there would have to be other words in the will from which a clear implication could be drawn that the testator intended to devise such an estate, before the court would conclude that it was devised. This is a rather rigid doctrine. Four years later, the Court of Appeals in Equity of South Carolina, in *Jenkins v. Clement*,[12] held that a general unqualified devise passed a fee, although no technical words of limitation were used in the will and no other words of perpetuity were used. The will in this case provided: "I devise my plantation at Willtown, called the Island River plantation, to my brother-in-law William Clement." There were no words of inheritance or of perpetuity in this devise. The court said: "It is well-

11 2 Nott & McC. 383, 385, 386 (1820).

12 1 Harper's Eq. 72, 14 Am. Dec. 698 (1824).

known that many of the judges in England have regretted the rigor of the rule which required words of inheritance or perpetuity to give a fee in devises of real estate. For it is notorious that the rule tended to defeat the intention of testator in nine cases out of ten. But the anxious desire of the law and the courts to watch over the interest of the heir at law introduced another rule, that the heir at law was never to be disinherited, but by express words or plain and necessary implication. That rule produced a perpetual struggle between the two principles, the duty of giving effect to wills of testators, and the desire to favor the heir at law, the main support of the landed aristocracy. Since the abolition of the rights of primogeniture . . . we have no such contending principles existing in our system." Soon after the last decision, the Legislature of this State remedied this difference of opinion, by passing a statute providing that no words of inheritance should be necessary to convey an estate in fee by a devise.[13]

In *Smith v. Berry*[14] the Supreme Court of Ohio adopted a very liberal rule, intending to give effect to what the court thought was the intention of the testator. The will provided: "... I do give unto my son, David Berry, one third part of all my land that I now have in my possession .... David Berry is to have his third part off the east side of my land .... I also give unto my son, Elijah Berry .... the middle third .... I also give my son, Joseph Berry, the last third which lies to the west . . ." The court held that Elijah took a fee under the will, reasoning that the word "all," used in the first instance, denoted an intention to devise a fee, and was only omitted in the devise to the other two sons because it was deemed unnecessary. Similarly, the willingness of the court to accept any plausible pretext to vest the whole estate in the devisee is found in *Robinson v. Randolph*.[15] In that case the will read: "I give to God my soul, and .... I ask his blessing on the following disposition of the property with which he has seen fit to intrust me. First, . . . the eighty acres, purchased by me from W. A. Patrick .... to my grandson, William Randolph Harney. Second, . . . the other eighty acres bought by me from said Patrick . . . to my daughter, Fanny. Sixth, . . . residue of my property . . . to my beloved wife Mary Ellen Randolph." It was held that the devisees under the first, second and sixth clauses of the will took a fee, although there were no words of inheritance. The court based its opinion on the significance of the word "property," saying that this word carried the fee or entire interest of the testator in the land. Certainly this is a most liberal construction, and illustrates the eagerness of the court to discover an intention to pass a fee. Al-

[13] This statute is considered in Peyton v. Smith, 4 McCord 476 (1828).
[14] 8 Ohio 365 (1838).
[15] 21 Fla. 630 (1885).

so, in *Tatum v. McLellan*,[16] a Mississippi case of 1874, the devise was: "Unto my wife . . . all my estate . . . . to hold the same during her natural life. . . . At her death . . . my entire estate . . . shall be sold." Then followed the provision: "My wife shall have full power to dispose of one-half of my estate arising from said sale aforesaid, in any manner and way she may see fit . . ." It was said that in view of the fact that a life estate was expressly conferred upon the wife, such must have been the intention of the testator and no greater estate passed. However, it is interesting to note that, in writing the opinion, the court was not unmindful of the provision giving the wife the right to dispose of one-half of the estate, and stated that if there had been a general devise, this power of disposition would have been operative to pass a fee, as it was a sufficient indication of intent that the devisee was to take absolutely.

Thus far we have considered the significance of words of inheritance under the common law rule governing a devise of real estate, and we have observed that the primary presumption, that only a life estate passed, was overcome only if the terms of the will disclosed an intention to give a larger estate. Under modern law, however, this presumption has been generally reversed for in many states statutes have been enacted which provide in substance that in the absence of words of inheritance, a devise in a will of lands, shall convey all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears from the will that the devisor intended to convey a less estate.[17] Professor Bordwell sums up the range of the doctrine as follows: "Similar provisions exist in thirty-one states[18] and in nine other states[19] there are like provisions expressly applicable to wills but also applicable to grants or deeds. In three other states[20] there is a like provision applicable to conveyances and it would seem a reasonable construction to make this include wills. In Arkansas and Indiana there is a like provision applicable to deeds but apparently none as to wills.[21] In Louisiana and New Mexico there is apparently no such

16 50 Miss. 1 (1874).

17 WILLS, 69 C. J. § 1502.

18 Listing: Alabama, California, Delaware, Idaho, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and Wyoming.

19 Listing: Arizona, Colorado, Illinois, Kentucky, Mississippi, New York, Texas, Virginia and West Virginia.

20 Listing: Florida, Georgia and Iowa.

21 In Indiana, the common law rule that a general devise of real estate, without defining the devisee's interest, gives only a life estate, remains in force. However, it has been modified by a statute, which provides that: "Every devise, in terms denoting the testator's intention to devise his entire interest in all his

provision. Connecticut, however, would seem to be the only state with common law traditions where there is no such provision applicable to either wills or deeds." [22] With reference to the utility of these statutes, the Supreme Court of Pennsylvania, in *In re Nevins' Estate*,[23] says: "A testator giving by will usually intends to give the whole of the subject named, as he legally does when he names personal property. The necessity for words of inheritance, to pass a fee in land, is an invention of the law,—a technicality in the way of the testator's usual purpose, which the statute meant to remove. But when the intent appears by the whole will to be otherwise, the statute is not to be invoked to defeat it."

Having noted the tendency of the law in regards to the presence and necessity of words of inheritance, the question arises what is the effect of a devise to which the words of inheritance are annexed, when there is contained in a succeeding clause of the will an expression that only a defeasible fee should pass? In other words, can the devise of an absolute estate be overcome if there appears in a subsequent provision an intention to pass a less estate? In the case of *Jones v. Jones* [24] the court decided that the words of inheritance constituted an expression of intent that the devisee should take a fee simple title, and the devise of a fee could not be cut down by a subsequent disconnected provision which, standing alone, unquestionably gave the legatee a determinable fee only. Precisely, the words of inheritance passed an absolute fee, and, regardless of the import of the disconnected testamentary provision, the devisee took a fee simple title. This opinion, while it has been followed in other jurisdictions,[25] represents the minority view or old rule.[26] According to the numerical weight of authorities,[27] the intention of the testator, if not inconsistent with the established rules of law or public policy, must govern, and this intention is to be gathered from the "four corners of the will." As was said

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real or personal property, shall be construed to pass all the estate in such property, including estates for the life of another, which he was entitled to devise at his death." IND. ANN. STAT. (Burns, 1914) § 3132. See Brookover v. Branyan, 185 Ind. 1, 112 N. E. 769 (1916); Keplinger v. Keplinger, 185 Ind. 81, 113 N. E. 292 (1916).

22 BORDWELL, STATUTE LAW OF WILLS, 191.

23 192 Pa. 258, 43 Atl. 996 (1899).

24 *Op. cit. supra* note 1.

25 See: In Re Wadsworth's Estate, 176 Minn. 445, 223 N. W. 783 (1929); First Nat'l. Bank v. Marre, 183 Ark. 699, 38 S. W. (2d) 14 (1931); Moffit v. Williams, 116 Neb. 785, 219 N. W. 138 (1928) (Rule stated in case involving deed).

26 WILLS, 69 C. J. § 1504.

27 See: Reiff v. Pepo, 290 Pa. 508, 139 Atl. 144 (1927); Fields v. Fields, 139 Ore. 41, 3 Pac. (2d) 771 (1931); Carroll v. Carroll's Ex'r., 248 Ky. 386, 58 S. W. (2d) 670 (1933); In Re Goodwin's Estate, 147 Misc. 114, 264 N. Y. S. 436 (1933).