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Note and Comment

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NOTE AND COMMENT.

JAMES BARR AMES.—Hardly shall one name another American lawyer whose death would be as widely felt as will be that of James Barr Ames. He passed away on January eighth in the sixty-fourth year of his age.

He was endowed by nature with rare gifts which he devoted most unselfishly and earnestly to the advancement of the science of law. For more than thirty-five years he had been a teacher of law, and in that important work he exercised an influence for good upon thousands of his pupils which cannot be adequately measured. Moreover, while he never practiced law, he had won the entire respect of the profession by reason of his preëminent rank as a scholarly lawyer. He was a man of innate courtesy and was personally so attractive that one meeting him but casually was drawn to him as to a sympathetic friend. He was genuinely modest and yet, when difference of opinion arose, he was kindly—if sometimes impulsively—firm in his advocacy of principles which he was convinced were right. He was an inspiring teacher and possessed the admirable faculty of making his pupils think for themselves.

In addition to his professorship he had for the last fifteen years held the responsible office of Dean of the Harvard Law School, and in both vocations

he had shown such industry, patience, kindness and helpfullness as to inspire the faculty and students of his school with respect and gratitude.

Always a most industrious and profound student of the history of the common law, he published some of the results of his studies in the form of essays that will live long after his grateful pupils have themselves passed away. He also compiled and edited valuable collections of cases on the subjects of torts, pleading, bills and notes, partnership, trusts, suretyship, admiralty and equity jurisdiction. It is doubly regrettable that the burden of his cares as dean and teacher not only probably shortened his useful career, but also prevented the accomplishment of a greater amount of literary work.

For about twenty years he had been a member of the American Bar Association, and was of course, always actively interested in questions concerning legal education that were discussed at meetings of the association. For several recent years he also rendered efficient service to the cause of uniformity of legislation as a member of the Conference of Commissioners on Uniform State Laws.

His work has been well done and will live, but he will probably be best remembered by all who knew him for what he was, rather than for what he did.

J. H. B.

NECESSITY AND EFFECT OF A THEORY.—That it is advisable for a plaintiff to proceed upon a definite theory will be conceded; and the reasons are obvious. Is it necessary, however, for him to do so? And having adopted one, is he bound by it and must he recover, if at all, upon the one adopted? Selecting a particular instance, can he proceed upon the theory that the defendant is liable in tort and hold him for a breach of contract? In *Cockerell* v. *Henderson et al.*, — Kansas —, 105 Pac. Rep. 443, decided November 11th, 1909, it is held that a plaintiff may in his pleading adopt one theory and recover upon another. The syllabus in that state is prepared by the court and states the law of the case; and we quote from it as follows:

"In a civil action, which may be founded upon either contract or tort, the plaintiff is not required to state upon which he relies as the basis of the action, and generally, *if he should make such a statement and be mistaken, the statement would be immaterial.* (Italics ours.) All that the plaintiff is required to do is to state facts constituting his cause of action, in ordinary and concise language, and without repetition."

The decision is based upon the code provision abolishing the forms of action. The petition set forth five causes of action, substantially the same, and arising out of the sale of capital stock in a certain company; one was based upon the alleged sale of stock to plaintiff, and four upon sales to others who had assigned to plaintiff; the allegations as to each were substantially the same and in substance as follows:

"That the stock had no value whatever at the time of issuing the same to the palintiff and his assignors; that he and said assignors severally were induced to purchase the same by the fraudulent representations of the defendants; that the aggregate amount of such capital stock sold to the plaintiff and assignors was $5,000, which amount the plaintiff asked to recover

with interest." It was also alleged that defendants appropriated to their own use and benefit the several sums paid as the purchase price for said stock. The case came on for trial upon the petition and a general denial. "A jury was empaneled to try the case and the plaintiff introduced his evidence, and at the close of his evidence the defendants demurred thereto on the ground that it was not sufficient to sustain any judgment in favor of the plaintiff. The demurrer was sustained and to reverse the ruling the plaintiff appealed. During the trial in the court below a controversy arose between the court and plaintiff's attorney as to whether the action was based upon contract or tort, the court indicating that the plaintiff should elect upon which theory he would try the case; this the attorney for the plaintiff refused to do and stated "that he relied only upon his petition," and much space was given to the discussion of this question in the briefs on appeal. The supreme court, in reversing the case, said:

"This discussion and controversy seem quite irrelevant; the only proper consideration being whether the petition states facts constituting a cause of action, and whether the evidence was sufficient to justify the submission of the case to the consideration of the jury. * * * The questions involved in such a case are: (1) Whether the alleged representations were made. (2) Were they false? (3) Were they intended or calculated to induce the transaction? (4) Was the plaintiff, without negligence on his part in failing to inquire or observe, misled to his prejudice? (5) Did he rely upon the false representations as true, and was he induced thereby to enter into the transaction? If these questions are answered favorably to the plaintiff—and it is the province of the jury to answer them—*the plaintiff is entitled to recover, on the theory either that the statements were warranties, or that they were fraudulently made.*" (Italics ours).

The syllabus, the language of the opinion, and the facts of the case justify the conclusion that the court is of the opinion that a plaintiff is not required to adopt a definite theory, is not bound by the one he adopts, that he may found his action upon contract and recover upon a tort and this too, even though he should state that he was proceeding for a breach of contract. Many authorities could be cited in support of the proposition that a plaintiff cannot be turned out of court if the facts alleged and proved entitle him to recover upon any theory; on the other hand many more could be cited to the effect that he can recover only upon the theory adopted. *Cockerell* v. *Henderson et al.* goes so far as to hold that in a civil action which may be founded upon either contract or tort it is not necessary for the plaintiff to rely upon a definite theory and that it would be immaterial if he should state that he relied upon contract when in fact he relied upon a tort for recovery. In our opinion it would be difficult to cite much authority in support of this proposition. Granted that the code requires only that the plaintiff shall "state the facts constituting his cause of action, in ordinary and concise language, and without repetition," it is submitted that the defendant is entitled to know what use the plaintiff seeks to make of his facts and in this sense to prepare to meet them. To permit a plaintiff to establish a liability against

a defendant as for a tort in the face of the plaintiff's statement, though a mistaken one that he seeks to hold him for a breach of contract, would be a manifest injustice.

Mr. Pomeroy, whom no one will accuse of underestimating the effect of the code, says, in § 558 of his CODE REMEDIES: "It is settled by an almost unanimous series of decisions in various states, that if a complaint or petition in terms alleges a cause of action *ex delicto,* for fraud, conversion, or any other kind of tort, and the proof establishes a breach of contract, express or implied, no recovery can be had, and the action must be dismissed, even though by disregarding the averments of tort, and treating them as surplusage, there might be left remaining the necessary and sufficient allegations, if they stood alone, to show a liability upon the contract." And again, in § 561, the same author says: "In addition to the general doctrine, that a party should be truly and fully apprised of the nature of the claim set up against him, there is a special reason why a plaintiff cannot recover for a breach of contract when the cause of action stated in the record is for deceit or any other tort. In many actions of tort the defendant may be taken on a body execution, issued upon the judgment; while a simple breach of contract never exposes him to that liability. If, therefore, a cause of action on contract could be proved and judgment thereon recovered when one for tort was alleged, the record might show a case for arrest on final process, although the issues actually tried involve no such consequence."

Among the cases supporting the doctrine stated by Mr. Pomeroy is the leading one of *Supervisors of Kewaunee County* v. *Decker,* 30 Wis. 624. In this case the plaintiff board of supervisors sought to recover money alleged to belong to the county and to have been converted by the defendant while he was clerk of the board. Counsel for defendant, supposing the action to be one in trover, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. It seems that counsel for the plaintiff practically conceded that the complaint was intended to be one in tort for conversion but at the same time insisted that if not good as a complaint of that kind it was sufficient as a complaint for money had and received. and being sufficient for that purpose, they contended that the demurrer was not well taken. The court below overruled the demurrer and the defendant appealed. The opinion of the supreme court was by DIXON, C. J., who, in reversing the order of the court below, overruling the demurrer, among other things, said:

It would certainly be a most anomalous and hitherto unknown condition of the laws of pleading, were it established that the plaintiff in a civil action could file and serve a complaint, the particular nature and object of which no one could tell, but which might and should be held good, as a statement of two or three or more different and inconsistent causes of action, as one in tort, one upon money demand on contract, and one in equity, all combined or fused and molded into one count or declaration, so that the defendant must await the accidents and events of trial, and until the plaintiff's proofs are all in, before being informed with any certainty or definiteness, what he is called upon to meet. The proposition that a complaint, or any

single count of it may be so framed with a double, treble, or any number of aspects, looking to so many distinct and incongruous causes of action, in order to hit the exigencies of the plaintiff's case or any possible demands of his proofs at the trial, we must say, strikes us as something exceedingly novel in the rules of pleading. We do not think it is the law, and, unless the legislature compels us by some new statutory regulation, shall hereafter be very slow to change this conclusion."

In view of the statement in the syllabus of the principal case that under the code all distinctive forms of civil action are abolished and which seems to be relied upon as a basis for the decision, we may be justified in quoting further from *Supervisors of Kewaunee County* v. *Decker* as follows: "We have often held that the inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be. * * * These distinctions continuing, they must be regarded by the courts now as formerly, and now no more than then, except under the peculiar circumstances above noted, can any one complaint or count, be made to subserve the purposes of two or more distinct and dissimilar causes of action at the option of the party presenting it. It cannot be 'fish, flesh, or fowl' according to the appetite of the attorney preparing the dish set before the court. If counsel disagree as to the nature of the action or purpose of the pleading it is the province of the court to settle the dispute. It is a question when properly raised which cannot be left in doubt, and the court must determine with precision and certainty upon inspection of the pleadings to what class of actions it belongs or was intended, whether of tort, upon contract, or in equity, and, if necessary or material, even the exact kind of it within the class must be determined."

Evidently should the plaintiff state that he relies upon contract and afterwards seek to recover upon tort, the Wisconsin court would not consider the statement immaterial even though it was mistakenly made.

In this comment we have not overlooked the fact that the demurrer sustained by the court below was interposed to the *evidence*; and it is admitted that *Supervisors of Kewaunee County* v. *Decker* recognizes a difference in the situation when the question arises after issue joined upon the merits and that presented when it arises upon demurrer to the complaint; and, hence, no criticism is offered respecting the conclusion reached in the case. Our purpose is only to challenge the sweeping statements of the syllabus and of the opinion.

T. A. B.

SUBROGATION TO A LIEN FOR ASSESSMENTS OR TAXES—CONSTRUCTION OF THE NEGOTIABLE INSTRUMENTS LAW.—The right of a person ever to claim subrogation to the rights of the state as respects a lien for taxes has been doubted, but whether such right has ever been denied independent of other consideration, such, for example, as the acceptance of something in lieu of cash, does not clearly appear. Such doubt was expressed in *Mercantile Trust Company* v. *Hart*, 76 Fed. 673, 22 C. C. A. 473, 35 L. R. A. 352, and in *Wallace's Estate*, 59 Pa. St. 401. In the former of these cases the tax collector, the county treasurer, accepted checks in payment of taxes due the

state of Colorado, the city of Denver, and the board of education of said city. The checks turning out to be worthless and their drawers insolvent, the tax collector, appellee, intervened in a suit brought by the complainant to foreclose a deed of trust, in the nature of a mortgage, and prayed that he might be subrogated to all the rights of the state of Colorado, the city of Denver, and the board of education of said city, as if said taxes had neither been paid nor receipted for, and that the lien declared in his favor might be adjudged to be superior to that of the mortgage bondholders, and that said lien might be satisfied out of the current income of the mortgaged property; in the latter of these cases, taxes due from a property owner had been advanced and paid by the collector of taxes, and subsequently the owner had confessed a judgment in favor of the collector for the taxes so advanced. The collector claimed the right to be subrogated to the lien of the state. The right to subrogation was denied in both cases. THAYER, J., in the former case intimated that it might well be doubted whether a person could ever claim subrogation to the rights of the state as respects a lien for taxes. Is the doubt thus suggested supported by the authorities? The precise question recently came under the review of the New York court of appeals in two cases: *Title Guarantee & Trust Company* v. *Haven et al.*, 89 N. E. 1082, case No .1; Id. 1085, case No. 2, and with that question was connected the proper construction of that provision of the negotiable instruments law, reading as follows: "The acceptor * * * admits the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument." N. I. L. § 64 (Mich.). Both questions are deemed of such general interest to the profession as to warrant special attention being drawn to their consideration in the cases last above cited. The facts material to be considered are these: The defendants were the owners of certain lands in the city of New York, acquired by devise, which were subject to a lien for assessments by the city of New York in the sum of $9,953.83 for regulating and grading an avenue. The owners agreed to sell said lands free and clear of all liens and incumbrances. Under the contract of sale, payment was to be made in three instalments. Before the last payment on the land, the assessments were paid by means of a check for the amount thereof, drawn upon the plaintiff, corporation, to the order of the collector of assessments and arrears of New York city. The defendants had no concern with said payment. The check purported to be signed by William O. Green, trustee, who had authority to draw checks against a deposit with the plaintiff to the credit of the estate of Andrew H. Green. The check was forged, but the plaintiff paid it, believing it to be genuine. There was no evidence as to the identity of the forger or that the defendants had any knowledge, until after the event, of the payment of the assessments by means of the check. After ascertaining the forgery, the plaintiff restored to the credit of the estate of Andrew H. Green, in its deposit account, the amount of the forged check, which had previously been charged against it. Upon these facts the plaintiff brought this suit (Case No. 2), praying judgment that upon the payment of the assessments the plaintiff became subrogated to the lien of the assessments upon the lands subject thereto, that such lien remains in

full force as between the parties to the action, that the lien attached to the moneys received by defendants as the purchase price, which in equity represents the land, and that the plaintiff recover the amount of the assessments from the defendant.

The defendant resisted the plaintiff's claim, first, on the ground that, having paid the check, it was estopped, by the provision of the negotiable instruments law above quoted from disputing the validity of said check, and, second, that in no event could it be subrogated to the lien of the city for assessments, because subrogation as to such liens was discountenanced by the law. As to the first defense, the court held that the provision of the negotiable instruments law above quoted is merely declaratory of the common law and the common law rule that he who accepts a negotiable instrument, to which the drawer's name is forged, is bound by the act and can neither repudiate the acceptance nor recover the money paid, is the rule of the statute. *Price* v. *Neal,* 3 Burr. 1354; *National Park Bank* v *Ninth National Bank,* 46 N. Y. 77, 7 Am. Rep. 310. Neither rule has any application in behalf of one who has acquired the paper in the absence of any consideration therefor either present or past. The forged check in suit was not given in payment of any existing or antecedent indebtedness either on the part of the drawer, estate, or on the part of the forger. And so it was held that the provision of the statute, upon which defendant's first defense was based, "has nothing to do with the question." Consequently there was nothing in the law of commercial paper which constituted an obstacle to the plaintiff's recovery.

The theory upon which the plaintiff brought its suit was that the payment made by it, operated as between the defendants and the city, to discharge the city's lien which rested upon the defendant's land, that the lien under the circumstances was still alive for its benefit and, inasmuch as the defendants had conveyed away the land, the lien was transferred to and attached to the proceeds of the land in the hands of the defendants. The court disapproves those holdings referred to in the beginning of this note and declares them to be unsupported by authority. In support of its conclusion that the plaintiff is entitled to be subrogated to the lien of the city for the assessments discharged by its payment of the forged check, the court cites with approval: *Cockrum* v. *West,* 122 Ind. 372, 23 N. E. 140; *Sharp* v. *Thompson,* 100 Ill. 447, 39 Am. Rep. 61; *McNish* v. *Perrine,* 14 Neb. 582, 16 N. W. 837; *John* v. *Connell,* 61 Neb. 267, 85 N. W. 82; *Fiacre* v. *Chapman,* 32 N. J. Eq. 463. The case of *Emmert* v. *Thompson,* 49 Minn. 386, 52 N. W. 31, is of like effect.

It thus appears from what is apparently the great weight of authority that there is nothing in the nature of a lien for taxes or assessments or in the fact that such lien exists in favor of a sovereign taxing power to prevent the equitable doctrine of subrogation, when justice demands it. But there are limitations upon the right of subrogation. One who claims the right must make it appear that he has not officiously interfered with the affairs of the defendant. He must show as a condition precedent, that granting it would not prejudice the rights of innocent third parties.

In the case which is the subject of this comment, case No. 2, the lien of the city of New York was terminated as to the city by the payment of the assessments, nevertheless it could be regarded as still existent for the purpose of doing justice between the party who had paid them and the owners of the land. The land having been converted into money in the pockets of the defendants, the lien attaches to the money and is enforceable against it. The conclusion thus reached is predicated upon the assumption that the payment of the assessments was purely gratuitous and in no wise in discharge of any real or supposed obligation on the part of the estate of Andrew H. Green or of the unknown forger, but was brought about solely by the mistake induced by the forgery. Case No. 1, *supra,* is in all respects the same as case No. 2, *supra,* save that the taxes had been levied within the lifetime of the defendants' testatrix and were for her personal debts chargeable against her estate; wherefore the money represented by the forged check could not be regarded as having been applied to relieve the devised premises from the lien. This fact differentiates case No. 1 from case No. 2. The equitable doctrine of subrogation was held unavailable to the plaintiff under the facts in case No. 1. R E. B.

WHAT ARE THE RIGHTS OF THE VENDOR OF GOOD WILL?—Various attempts have been made to answer this question by defining the term "good will" and in this way determining what passes to the vendee and, *e converso,* what rights are left to the vendor. Lindley, however, says, "the term good will can hardly be said to have any precise signification." LINDLEY-EWELL, 2nd Ed., 439. Though indefinable the term is said to be divisible, as in the case of *Foss* v. *Roby* (1907), 195 Mass. 297 ,where it is said, following previous decisions, that in a commercial partnership the good will is largely local in character whereas in a professional partnership it follows the person not the place. The courts have attempted to answer the larger question by resolving it into a number of smaller ones based on the varying states of fact. May the vendor set up again in a similar business? Answered in the affirmative in *Churton* v. *Douglas* (1859), 1 Johns, 174, 188. May he advertise? Answered in the affirmative in *Cottrell* v. *Manufacturing Co.* (1886), 54 Conn. 138. May he solicit old customers? Answered in the negative in *Trego* v. *Hunt* [1896], 1 A C. 7. The decision in this last case has been frequently quoted as the English Rule The case of *Williams* v. *Farrand* (1891), 88 Mich. 473, had said the retiring partner might solicit old customers, though in this case only "the right, title and interest" had passed, good will not being expressly mentioned.

A recent Massachusetts case, *Marshall Engine Co.* v. *New Marshall Engine Co.* (1909), 89 N. E. 548, answers this question without reference to the so-called English Rule, above referred to, and also without appealing to any of the American cases which are spoken of as being directly opposed to the principle of the English Rule.

The facts of the Massachusetts case are somewhat complicated but the real defendant is one F. J. Marshall who, in September, 1902, sold to the plaintiff corporation, called the Marshall Engine Co., the "good will of the

business carried on by the vendor under the firm name of F. J. Marshall * * *" The plaintiff manufactured and sold several of the Marshall Perfecting Engines. Marshall also "on his own account and with his own funds did certain business in connection with the Marshall Perfecting Engine, * * * consisting of repairs, etc." On June 15, 1905, the plaintiff corporation was declared insolvent and a receiver appointed. Eight days later, F. J. Marshall caused the New Marshall Engine Co. to be incorporated in Massachusetts and continued under the name of this new company to manufacture the engines. The suit is brought in effect by the creditors of the plaintiff corporation (through the receiver of it) to enforce the rights secured by the corporation from Marshall in the purchase from him of the good will of the business then carried on by him. On the facts disclosed in the record the New Marshall Engine Co. is simply F. J. Marshall in another form.

The court decided that Marshall might be restrained from further interference with the interests of the Marshall Engine Co., following its own previous decisions to the effect that no competing business may be set up in derogation of the grant of the good will of a business upon the sale, it being found in this case that the defendant's actions were in derogation of his grant to the plaintiff company.

The phrase "derogation of the grant" used as a working formula for the decision of these cases was restored to its rightful place by the Massachusetts court only within the last decade. By the decision in the case of *Trego* v. *Hunt, supra,* the respondent [who had agreed that the good will of a partnership was vested in his partner] was enjoined "from applying privately, by letter, personally, or by a traveller, to any person who was, prior to the dissolution of the partnership, a customer of the firm of Tabor, Trego and Co., asking such customer to continue after the dissolution to deal with him, the respondent, or not to deal with the appellant." The decision by the House of Lords in this case, reëstablishing the authority of *Labouchere* v. *Dawson* [1872] L. R. 13 Eq. 322 and overruling *Pearson* v. *Pearson* (1884), 27 Ch. Div. 145, has been since quoted as a settled rule of law, stated by the Illinois court (Cf. *Ranft* v *Reimers* (1902), 200 Ill. 393), in the form, "the vendor of a good will is not entitled to canvass customers," the courts that decide these cases in the opposite way usually denying the validity of the rule of law. (For the conflicting decisions see 5 MICH. L. REV. 295). As late as 1902 we find the Massachusetts court saying that it is still an open question in that commonwealth whether one who has sold the good will of a business may solicit old customers, *Webster* v. *Webster,* 180 Mass. 316. It was not until the case of *Hutchinson* v. *Nay,* 187 Mass. 262, came before the Massachusetts court, in 1905, that this court began to recognize that there was a difference between the law which had been established in England and that established in Massachusetts, although the court does not state plainly that the difference consists in a change in the principle upon which these cases are decided. *Trego* v. *Hunt* answers in the negative the question "may the seller of the good will solicit old customers" and this decision has been taken as the pronouncement of a principle of law though it is really the answer on the state of facts in *Trego* v. *Hunt* of the entirely

different question; namely, "May the vendor derogate from his grant"? which of course can be answered only in the negative. (Cf. *Hutchinson* v. *Nay, supra,* p. 265, where this statement of the question is attributed, apparently erroneously, to the case of *Webster* v. *Webster,* 180 Mass. 310). The Massachusetts court in the principal case makes it perfectly plain in what respect it differs from the English courts. In England "a competing business always can be set up by one who has sold his good will. * * * And a purchaser of good will gets nothing more than the right to have the vendor refrain from soliciting customers of the old firm." In Massachusetts on the other hand, "no competing business may be set up if it derogate from the grant of the good will of the old business." Furthermore in Massachusetts the question as to whether the acts of the vendor do or do not derogate from the grant is not a question of law to be settled by any specific "rule," but is in all cases a question of fact for the jury, the Massachusetts court reiterating in this particular the doctrine laid down in its own recent cases of *Foss* v. *Roby, supra,* (Cf. 6 MICH. L. REV. 93), and *Old Corner Bookstore* v. *Upham,* 194 Mass. 101. We have thus one more demonstration of the futility of rules of law as a means of settling these hard questions, and a further illustration of the tendency of the courts to throw the burden on the jury in the actual trial of the specific case. J. H .D.

ATTACHMENTS ON UNLIQUIDATED DEMANDS.—If the creditor should not have the aid of attachment to recover on unliquidated demands, why not? It is true that attachment as a security for the satisfaction of the judgment that may be recovered in an action pending or just commenced was unknown to the general common law of England, and existed only in a restricted form as a special custom of London and other places in the form of garnishment till it was introduced into the New England colonies by an early statute of Massachusetts, whence its utility commended it so that it was soon adopted in all the colonies. Therefore, it may be said that if there is no authority for attachment on unliquidated demands under the statute there is no authority at all—that the proceeding is purely statutory, and authority must be found in the statute for each case.

But this argument does not apply to the point now under discussion under any of the statutes so far as we are aware; for whether the statute permits attachment "in any action on contract," or "in any action for the recovery of money only," or "in any action for the recovery of damages," which are some of the most common statutory forms of expression, actions for unliquidated damages are as much included within the terms of the statutes as actions on liquidated demands. This argument, when applied to this class of cases works to the opposite conclusion. The argument when applied to this class of cases would be, that it is for the legislature to say what cases they will extend the new remedy, and it is not for the court to deny it if the legislature has given it, though inconvenience may follow. The fact is that this old stock argument against attachments and garnishments in all debatable cases never was much heard on this class of cases. Why then has not

the remedy been allowed on unliquidated demands generally? Should we not rather say, remedial statutes should be so construed as to advance the remedy?

The rule that attachment does not lie in aid of suits on unliquidated demands was first declared in the case of *Fisher* v. *Consequa*, 2 Wash. C. C. 382, Fed. Cas. No. 4816, by Justice WASHINGTON in the circuit court of the United States for the district of Pennsylvania, in 1809; and was occasioned by the fact that the statute under which the attachment issued in that case allowed the remedy only to recover a *debt;* and in disposing of the question Justice WASHINGTON said: "It must be admitted, that, according to a strict and literal construtcion of the act of assembly, the foreign attachment is confined to cases of debt. * * * What is a debt? In strict law language, it is a precise sum due by express agreement, and does not depend upon any after calculation to ascertain it. The remedy for recovery of it is by action of debt, and frequently by action of *indebitatus assumpsit.* But is this the only case within the mischief intended to be remedied by the law? * * * The uncertainty of the sum due, does not, in the common understanding of mankind, render it less a debt. A promise, whether express or implied, to pay as much as certain goods or labor are worth, or as much as the same kind of goods may sell for on a certain day, or at a certain market; or to pay the difference between the value of one kind of goods and another, creates, in common parlance, a debt; and the person entitled to performance does not speak of his claim as for damages, but for a debt, to the amount which he considers himself entitled to. But it is not every claim that, upon a fair construction of this law, or even in common parlance, can be denominated a debt. For, in the first place, the demand must arise out of a contract, without which no debt can be created; and the measure of the damages must be such as the plaintiff can aver by affidavit to be due; without which, special bail (which the defendant, by giving, may dissolve the attachment) cannot regularly be demanded. It follows from this that a foreign attachment will not lie for demands which arise *ex delicto,* or where special bail cannot be required." And therefore it was held that the attachment was proper in that case, which was for delivering tea inferior to contract.

It will be observed that the court in this case gave a very liberal interpretation to the statute, and in fact stretched it to cover the case. Thus the law stood for ten years; when he case of *Clark* v. *Wilson* (1819), 3 Wash. C. C. 560, Fed. Cas. No. 2841, came before the same court and judge, under the same statute; and in this case the court held that the statute could not be extended to sustain an attachment in an action for damages for refusal to employ plaintiff's ship on a voyage to Montevidio at £670 per month or fraction thereof; and in referring to *Fisher* v. *Consequa* in that case, Justice WASHINGTON said: "The principle decided in that case was, that a demand arising *ex contractu,* the amount of which was ascertained, or which was susceptible of ascertainment by some standard referable to the contract itself, sufficiently certain to enable the pliantiff by affidavit to aver it, or a jury to find it; might be the foundation of a proceeding by way of foreign attachment, without reference to the form of action, or to the technical

definition of debt, the expression used in the law. * * * This then, is a case, in which unliquidated damages are demanded, in which the contract alleged as the cause of action affords no rule for ascertaining them, in which the amount is not, and cannot with propriety be, averred in the affidavit, and which is and must be altogether uncertain until the jury have ascertained it, for which operation no definite rule can be presented to them." This is the rule that has been declared since in the courts that have held attachment not to lie on unliquidated demands. Thus a rule laid down in giving a liberal construction to a narrow statute has been applied in giving a strict construction in the face of the express words of statutes which warranted no such limitation. The decisions on the question are very numerous, and in nearly or quite half of the states, a rule has been established as above stated without anything in the statute to warrant the limitation. In a few states it is squarely held that the fact that the demand sued on is not for liquidated damages is no objection to the attachment, since the judge can limit the amount to such sum as he deems reasonable.

In Michigan the rule laid down in the case of *Clark* v. *Wilson* was recognized but held not applicable, in the early case of *Roelofson* v. *Hatch,* 3 Mich. 277; and in the recent case of *Showen* v. *J. L. Owens Co.* (Oct. 4, 1909), — Mich. —, 122 N. W. 640, the court has again recognized the rule, and again held it inapplicable, sustaining an attachment in an action for damages for breach of warranty of machinery as sound and suitable for a purpose.

J. R. R.

WILL A MARRIAGE, BIGAMOUS IN INCEPTION, BECOME VALID AFTER THE DEATH OF THE UNDIVORCED SPOUSE?—In a recent decision the supreme court of Oklahoma held that a marriage, both parties to it knowing that the husband had a living and undivorced spouse, did not ripen into a valid common law marriage after the death of the undivorced spouse, though both parties knew immediately of the death and afterwards continued to live together as husband and wife and were so recognized in the community in which they lived. There appeared to be no divided repute in the community as to their relationship. *Clark et al* v. *Barney et al.* (1909), — Okl. —, 103 Pac. 598. The decision is based upon the ground that public policy forbids the recognition of such a marriage, as tending to place a premium upon a disregard of the sacred nature of the marital relation.

A continuation of a meretricious cohabitation raises no presumption of a legal marriage. Slight circumstances, however, are sufficient to show a change in the minds of the parties raising the presumption of marriage. BISHOP, MARRIAGE, DIV. & SEP., §§ 964 & 965. Supported by *Hyde* v. *Hyde,* 3 Bradf. Sur. 509; *Gall* v. *Gall,* 114 N. Y. 109. And this is so, although the circumstances fail to show when or how the change from concubinage to matrimony took place, if the circumstances show that such a change has taken place. *Caujolle* v. *Ferrié,* 23 N. Y. 90; *Badger* v. *Badger,* 88 N. Y. 546, 42 Am. Rep. 263.

The following cases have held that where a disability exists, if the parties desire marriage and do what they can to make the relation matrimonial,

cohabitation will make them man and wife from the time the disability is removed, whether they knew of the existence or removal of such disability or not. *Petit* v. *Petit,* 91 N. Y. Supp. 979; *Schuchart* v. *Schuchart,* 61 Kan. 597, 50 L. R. A. 180; *De-Thoren* v. *Atty.-General,* 1 App. Cas. 686; *State* v. *Worthingham,* 23 Minn. 528; *Teter* v. *Teter,* 88 Ind. 494; *Blanchard* v. *Lambert,* 43 Ia. 228, 22 Am. Rep. 245.

Some courts have held that without proof of actual marriage it will not be presumed from continued cohabitation and reputation that a relation, illicit in the beginning, has been changed to that of husband and wife. *Reading Fire Ins. Co.'s Appeal,* 113 Pa. 204; *Harbeck* v. *Harbeck,* 102 N. Y. 714; *Hunt's Appeal,* 86 Pa. 294; *Collins* v. *Voorhees,* 47 N. J. Eq. 555, 14 L. R. A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054. The above rule does not seem to be supported by the weight of authority, and it does not appear to work out justice to the parties, in case their intentions were to establish a legal relation. In *Lapsley* v. *Grierson,* 1 H. L. Cas. 498, it was said that the law presumes, in the absence of proof to the contrary that the conduct of man is lawful. If the last rule is followed the presumption must be that the conduct of the parties is unlawful and was so meant to be. The principal case is an illustration. The parties apparently meant to establish an honorable relation; they went through the marriage ceremony and allowed it to be understood in the community in which they lived that they were husband and wife; but the court refused to allow this intended relation to come into existence, even after all disability had been removed, and the intent of the parties remained clear. Such a rule certainly does not favor legitimacy and although based upon the ground of public policy it does not seem that public policy demands the results that must follow if this rule is adopted.

Cunninghams v. *Cunninghams,* 2 Dow 482, holds that an intention to assume the matrimonial relation, followed by undivided repute as to the relation in the community in which the parties reside will constitute a lawful marriage. The principal case denies this rule and adopts the one that if the original cohabitation is illegal it must remain so, and no circumstances can change it. This view forces the parties and their offspring into a degrading position against their will and intent.

At common law consent to the marriage relation may be implied from a subsequent acknowledgment of the parties or from proof of cohabitation or of general reputation resulting from the conduct of the parties. (Bouvier.)

The famous case of *Campbell* v. *Campbell,* (*Breadalbane Case*) L. R. 1 H. L. Sc. 182, is in accord with the above. In that case it was held that a relation, illicit in the beginning, could ripen into marriage by general repute and conduct. But to raise the presumption of marriage from cohabitation and reputation the reputation must not be divided and the cohabitation must be matrimonial from its inception. In this case the presumption that the cohabitation was matrimonial from its inception was not as strong as in the principal case for in the *Breadalbane* case there was no actual marriage before cohabitation, but the intent had to be implied from the conduct of the parties, while in the principal case there was actual marriage before cohabitation. See also: *Clayton* v. *Wendell,* 4 N. Y. 230, 235; *Barnum* v.

Barnum, 42 Md. 251; *Cunninghams* v. *Cunninghams*, 2 Dow 482; *Jones et al.* v. *Hunter et al.*, 2 La. Ann. 254; *Hamilton* v. *Hamilton*, 9 Clark & F. 327; *White* v. *White*, 82 Cal. 427, 7 L. R. A. 799. Contra. *Rose* v. *Rose*, 67 Mich. 619.

Badger v. *Badger*, 88 N. Y. 547, 42 Am. Rep. 263, is to the effect that a common law marriage will suffice to change a cohabitation which is illicit in its origin to one which is lawful. The principal case refuses this rule, and considers the relation of the parties to continue to be illicit, for if repute and intent are to count for anything the parties were certainly married at common law.

Judge ANDREWS, in *Hynes* v. *Mc Dermott*, 91 N. Y. 451, 459, 43 Am. Rep. 677, says, "The presumption of marriage, from a co-habitation, apparently matrimonial, is one of the strongest presumptions known to the law. When there is enough evidence to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence." This view is supported by *Caujolle* v. *Ferrié*, 23 N. Y. 90; *Badger* v. *Badger*, 88 N. Y. 546; *Gall* v. *Gall*, 114 N. Y. 109; *Matter of Mathews*, 153 N. Y. 443, 47 N. E. 901.

In *Yates* v. *Houston*, 3 Tex. 450, HEMPHILL, C. J., says: "Admitting that the original intercourse was illicit, with the knowledge of the parties, it is urging the presumption to an unreasonable extent to suppose that the unlawful character of the connection was unsusceptible of change, and that when all legal disabilities had ceased to operate they would voluntarily decline all the honors, advantages and rights of matrimony, and prefer an association disgraceful to both parties." See: *Peet* v. *Peet*, 52 Mich. 464, 18 N. W. 220; *Taylor* v. *Swett*, 3 La. 33, 22 Am. Dec. 156; *North* v. *North*, 1 Barb. Ch. 241; *Gibson* v. *Gibson*, 24 Neb. 394, 39 N. W. 450; *Donnelly* v. *Donnelly*, 8 B. Mon. 113; *White* v. *White*, 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276.

A. F. H. W.