RECENT CASE NOTES

ADMIRALTY—JURISDICTION—PUBLIC VESSEL OF FOREIGN GOVERNMENT ENGAGED IN TRADE.—The plaintiff, the owner of certain cargo alleged to have been damaged by the charterer of the carrying vessel, on a voyage from Montevideo, Uruguay, to New York, sued out a libel in New York against the vessel. She was owned by the Chilean government, but was chartered by that government to a private charterer for commercial purposes. In the charter-party, it was provided that an officer of the Chilean navy was to remain in command, and that the Chilean government reserved certain cargo space; it was also alleged that the return cargo was to be carried for the Chilean government. *Held,* that the vessel was immune from process, being a public vessel of a foreign government. *The Maipo* (1918, S. D. N. Y.), 252 Fed. 627.

This is the first time the American courts have had to deal with the immunity from process of a public vessel not operated wholly by the government but by a private charterer and engaged entirely in trade. In the leading British case on the subject, the vessel was owned by the King of Belgium, was in entire charge of government officers, and carried the mails as well as private cargo, and it was held that the subordinate use of the vessel for carrying merchandise did not deprive her of her privilege as a public vessel. *The Parlement Belge* (1880) 5 P. D. 197. Lord Justices James, Baggallay and Brett intimated that to bring a public vessel within the local jurisdiction "it must be maintained . . . that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes." But the force of that qualifying distinction is much weakened by the fact that the assertion by the foreign government that it is a public vessel in its control cannot be questioned by the court of the *forum.* If the vessel were not in government control or declared so to be, the inference is that the immunity from local jurisdiction might be lost. In the instant case, Judge Mayer emphasized the factors that the government had possession and control of the vessel by its naval officer and that the vessel was used for a public purpose in the emergency of this war to enable the Chilean shippers to export and import by a government vessel. In view of the increasing degree of governmental participation in the business of transportation, the question will soon arise whether the immunity from jurisdiction extended to public vessels should not be withdrawn from vessels owned by a government but chartered to private charterers, entirely in their control and wholly engaged in commercial enterprises. See (1918) 27 YALE LAW JOURNAL, 1082. The problem will become delicate if the foreign government under such circumstances should assert the immunity of the vessel.

BILLS AND NOTES—IRREGULAR INDORSER—PAROL EVIDENCE NOT ADMISSIBLE UNDER N. I. L.—A negotiable promissory note signed by a church corporation as maker and payable to the plaintiff's order was before delivery signed in blank by the defendants. The note was not paid at maturity and was duly protested. The defendants offered evidence to show that at the time the note was delivered it was agreed between the plaintiff and the defendants that they were not to be liable to him. *Held,* that under the Negotiable Instruments Law, secs. 63 and 64, the liability of the defendants was absolutely fixed as that of indorsers. *Cramer v. West Bay City Sugar Co.* (1918, Mich.) 167 N. W. 843.

Prior to the adoption of the N. I. L. the greatest confusion existed in the cases dealing with the irregular indorser. The English courts apparently held him not liable at all. *Steele v. McKinlay* (1880) L. R. 5 A. C. 754. In some American states he was held to be "presumptively" a joint maker; but there was no agreement whether the "presumption" was "conclusive" or "merely *prima facie*." In others he was presumed to be a guarantor. Other states had still different rules. See note to *Cromwell v. Hewitt* (1869) 40 N. Y. 491; also Norton, *Bills and Notes* (4th ed.) 188-189. The N. I. L. provides as follows: "Sec. 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." "Sec. 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules: 1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. 3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee." This language seems clear enough in all reason, but the expected complete uniformity has not resulted. However, a large majority of the states which have passed upon the subject have agreed in reaching the result arrived at in the principal case, *viz.*, that oral agreements of the parties are irrelevant in determining the liability of the irregular indorser. Unfortunately, at least so far as uniformity is concerned, the New York Court of Appeals has taken the view that these provisions of the N. I. L. do nothing more than create "presumptions" as to the obligations of the irregular indorser—the presumptions differing as to details from those which existed before the act was passed. Thus the door is still open in New York for evidence as to the actual agreement of the original parties. *Haddock, Blanchard & Co. v. Haddock* (1908) 192 N. Y. 499, 85 N. E. 68. One or two other states have taken a similar view. *Hunter v. Harris* (1912) 63 Or. 505, 127 Pac. 786; *Mercantile Bank of Memphis v. Busby* (1908) 120 Tenn. 652, 113 S. W. 390. The English Bills of Exchange Act is regarded as making the irregular indorser liable to the payee as an indorser, *Glenie v. Bruce Smith* [1908] 1 K. B. 263. So far as abstract justice is concerned much may be said for the view taken by the New York courts; however, it is hard to justify it in view of the clear language of the statute. It also fails to carry out the plan to secure uniformity in commercial law. Moreover, the statutory provision itself, as applied to the case in hand, may well be justified as a practical rule, on the ground that in most cases the real agreement of the parties is that the irregular indorser shall be liable to the payee, and that whatever injustice may be done in the few cases where this is not so is more than counterbalanced by the opportunities which the permission to introduce extrinsic evidence gives to dishonest defendants to escape from the results of their agreements. To this may be added the saving of time and expense, both to the litigants and the public, by the elimination of a trial of the issues raised by the extrinsic evidence if it be admitted.

CONFLICT OF LAWS—HEIR'S COMPULSORY PORTION—RIGHTS OF ITALIAN HUSBAND IN WIFE'S PROPERTY IN FRANCE.—The wife of an Italian subject, who had acquired a domicil *de facto* in France, left all of her property by will to her mother. Her husband brought an action in France against his mother-in-law for the recovery of a life-estate in one-third of the wife's property in France, basing his claim upon the provisions of the Italian Code relating to the heir's

compulsory portion. *Held,* (1) that his contention was not well-founded with respect to the immovable property, inasmuch as the rights therein were controlled by the law of the *situs* and the French law did not confer upon the surviving husband or wife a right to a compulsory portion; and (2) that he was entitled to the enjoyment during his life of one-third of the wife's movable property in accordance with the provisions of the Italian law. *Tisserand v. Pellegrino* (1917, Tribunal civil de Nice) 44 CLUNET, 1792.

See COMMENTS, p. 181.

CONFLICT OF LAWS—WORKMEN'S COMPENSATION ACT—EXTRATERRITORIAL INJURY.—An employer doing a general contracting business in the Northwest, but with general offices in Minnesota, made in that state a contract with a workman to go to another state to work. While so employed the workman was killed by an accident arising out of and in the course of his employment. His dependents in Minnesota claimed compensation in that state under the state Compensation Act. *Held,* that the claimants were entitled to recover under the Minnesota law. *State ex rel. Maryland, etc., Co. v. District Court* (1918, Minn.) 168 N. W. 177.

The decision is placed by the court upon the ground that the Minnesota act was intended to compensate for injuries, whether intraterritorial or extraterritorial, incurred as incidental to a business "localized in the state." For a discussion of the problems involved in this and similar cases, see (1917) 27 YALE LAW JOURNAL, 113; (1918) *27 ibid.* 707.

CONSTITUTIONAL LAW—CLASS LEGISLATION—STERILIZATION OF THE MENTALLY DEFECTIVE IN STATE INSTITUTIONS.—A Michigan statute authorized the management of any publicly maintained institution for the insane and feeble-minded to render incapable of procreation any individual confined there who had been adjudicated by the proper court to be a proper subject for such treatment. The superintendent of an institution applied for a writ of *mandamus* to compel such adjudication in respect of an inmate of his institution. *Held,* that the statute was unconstitutional as denying equal protection of the laws, and that no writ should issue. *Haynes v. Lapeer Circuit Judge* (1918, Mich.) 166 N. W. 938.

The prevention of procreation by criminals and imbeciles has been advocated for some time by scientists and societies. See 27 MEDICO-LEGAL JOUR. 134; Warner, *American Charities,* 133 f. Whatever may be said of the operation as a punishment for crime,—on which see Baldwin, *Whipping and Castration as Punishments for Crime* (1899) 8 YALE LAW JOURNAL, 371, 380 ff.; *State v. Feilen* (1912) 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 418 and note; and COMMENTS (1914) 23 YALE LAW JOURNAL, 363—the use of some such operation to prevent the propagation of imbeciles is highly desirable. For imbecility is an inheritable trait. Lombroso, *Crime: Its Causes and Remedies,* sec. 74; *Proceedings of National Conference of Charities and Correction* (1903) 245-253. And the mentally defective have a peculiar bent toward uncontrolled procreation. *Proceedings of National Conference of Charities and Correction* (1902) 154. To meet this statutes have been passed making it a crime—in substance—to obtain carnal knowledge of an imbecile, epileptic, etc., of the opposite sex, within the period of fecundity. (Ind.) Burns' Ann. St. 1914, secs. 2250, 2251. Exception is made in favor of husband or wife; but the issuance of a marriage license to persons of the restricted class is prohibited. *Ibid.* sec. 8365; but see *Franklin v. Lee* (1902) 30 Ind. App. 31, 62 N. E. 78. There seems to be no question as to the constitutionality of such statutes, nor as to their beneficial

effect. The only question is as to their adequacy. Some states have attempted to catch the evil at the source, passing statutes providing for the sterilization of inmates of public institutions. Conn. Pub. Laws 1909, ch. 209; (Ind.) Burns' Ann. St. 1914, sec. 2232. Such legislation has in some cases been held unconstitutional as hopelessly unreasonable in its classification. The argument is that the sub-class, the defectives-in-public-institutions, who are the only ones deprived of their liberty of procreation, are of all the defectives the last to require such deprivation: being under surveillance, and without access to the opposite sex. *Smith v. Board of Examiners* (1913, Sup. Ct.) 85 N. J. L. 46, 88 Atl. 963, followed by the principal case. But it is doubted whether the absurdity excoriated in the opinions exists in fact. Classifications have been sustained on the ground of facilitating administration. *Missouri v. Lewis* (1879) 101 U. S. 22; 25 L. Ed. 989. Certainly the administrative machinery for dealing with inmates of public institutions is the easiest both to create and to run effectively. It may fairly be urged, too, that the worst cases are most likely to be found in the institutions; and perhaps that the state has greater, more immediate responsibility for defectives thrown directly into the state's hands for care and restraint. And it is an unfortunate fact that "once an inmate, always an inmate"—i. e., always under restraint from procreation, is no rule of our institutions. It is believed that any fair investigation of the facts will show—Garrison, J., to the contrary notwithstanding, in *Smith v. Board of Examiners, supra,* at p. 55—that the insufficiency of institutional accommodation to meet the demand does result not only in the turning away from, but in the turning out of the institutions of many uncured and incurable defectives, to make room for more. Surely a law which secures the sterilization of such, while they are under control, before they are lost in the community, is far from showing that flat-footed unreasonableness in its classification which the courts have said is necessary to make them refuse enforcement. See *Booth v. Illinois* (1902) 184 U. S. 425, 22 Sup. Ct. 425.

CONTRACTS—ILLEGALITY—OUSTING COURT'S JURISDICTION.—An article in a bill of lading for maritime shipment from Bordeaux to New York provided that "all litigation arising from the interpretation of the execution of the present bill of lading shall be judged according to French law and by the court of the place indicated on the bill of lading, which court the shippers and the claimants formally declare they accept as competent." A libel was brought in the District Court for the Southern District of New York to recover for short delivery. *Held,* that "the provision . . . by which the Bordeaux court was made the sole forum must be construed as void in this jurisdiction." *Kuhnhold v. Compagnie Générale Transatlantique* (1918, S. D. N. Y.) 251 Fed. 387.

Our courts have been liberal in allowing parties to govern their contract by the system of law of their own choice. Whether the law by which the contract is held governed be that of the place of making, of the place of performance, of the flag, or that which will sustain the contract, the intention of the parties is very generally made the basis of the court's decision as to which law governs. *Home Land & Cattle Co. v. McNamara* (1906, C. C. A. 7th) 145 Fed. 17; *Lloyd v. Guibert* (1865, Ex. Ch.) L. R. 1 Q. B. 115; *Pritchard v. Norton* (1882) 106 U. S. 124, 1 Sup. Ct. 102. Now it seems evident that when a particular system is expressly chosen, the parties' intention can hardly be realized unless the court where suit is brought can adequately interpret the law of the chosen system. And it seems evident that the court best qualified to interpret accurately is a court of the country whose law is chosen to govern. Hence arise such contract provisions as that in the principal case—which, being valid by the law of

France and Germany—can hardly be wholly unreasonable. See Lorenzen, *Cases on Confl. L.*, 394 n. Our courts, however, have been jealous of any attempt to "oust their jurisdiction." The law is settled that a provision which attempts to fix as the sole *forum* another court in a domestic or in a foreign common law jurisdiction, will be disregarded by the court where suit is brought. *Prince Steam Shipping Co. v. Lehman* (1889, S. D. N. Y.) 39 Fed. 704; *Slocum v. Western Assurance Co.* (1890, S. D. N. Y.) 42 Fed. 235; authorities collected (1908) 8 COLUMBIA L. REV. 409. The chief consideration of policy in the earlier cases—which the later seem to follow without over-much consideration—seems to be a fear that the defendants may use such clauses to dodge, with persons and property, out of the chosen jurisdiction and so out of all liability. It may fairly be questioned whether this objection might not be met by holding such fraudulent removal, if proved in another jurisdiction, to waive compliance with that term of the contract; as is done, e. g., in the case of fraudulent removal to prevent notice of dishonor. *Cf. Williams v. Bank of the United States* (1829, U. S.) 2 Pet. 96. And it may be questioned, in any case, whether the injustice done plaintiffs in general by having their debtors skip the jurisdiction of the chosen *forum* is, over and after all, greater than the injustice done defendants by having suits slapped upon them, when unsuspecting and far from home, without adequate means of defence at hand. But when the foreign jurisdiction chosen by the parties is one of the civil law, an additional reason appears for sustaining the provision. New York may well be able to very fairly read the law of Massachusetts. *Cf. Loucks v. Standard Oil Co.* (1918, N. Y.) 120 N. E. 198, (1918) 28 YALE LAW JOURNAL, 67. Even in such cases difficulty is not unknown. But experience shows common law courts to be in the main utterly unable to fairly read and pass on the law of a civil law country. *Cf. Lando v. Lando* (1910) 112 Minn. 257, 127 N. W. 1125; *In re Johnson* [1903] 1 Ch. 821; *Bremer v. Freeman* (1857, P. C.) 10 Moo. P. C. 306. This is not strange; and the inability is mutual; the systems are too unlike in matter and method. To get the benefit of the provision, therefore, which the courts claim to be ready to allow,—*viz.*, choice by the parties of the governing law—the provision for determination of civil law in a civil law court should be respected. And doubly strong is this argument before a court of admiralty, where it has repeatedly been stated that under special circumstances the court will decline to exercise a jurisdiction which they undoubtedly possess, when justice appears much better obtainable by suit in a home port. See *The Belgenland* (1884) 114 U. S. 355, 366, 367. And common law courts have acted on a similar principle. *Mittenthal v. Mascagni* (1903) 183 Mass. 19, 66 N. E. 425. It is submitted that the facts of the present case, in the absence of fraud, might without straining be held to constitute such special circumstances. And the urging of such considerations is, it is further submitted, not untimely or unreasonable in view of the present tendency of our courts to forego their ancient fierce jealousy of letting any controversy escape their determination. The common law no longer nurses its feud against the courts of chancery and admiralty. Arbitration clauses, so long held void for this same reason of ousting jurisdiction, have been made legal in England by statute. Our own courts have been growing restive under the outworn rule of their illegality. See *Delaware Canal Co. v. Pennsylvania Coal Co.* (1872) 50 N. Y. 250, 258-9; *United States Asphalt Co. v. Trinidad Lake Co.* (1915, S. D. N. Y.) 222 Fed. 1006. It is believed that the case for respecting clauses such as that in the principal case is stronger than that for respecting a clause of arbitration. Indeed, as regards causes of action already existent at the time of the agreement, a contract to sue only in a foreign *forum* has already found recognition by the *forum* of attempted suit declining jurisdiction. *Gitler v. Russian Co.* (1908, N. Y.) 124 App. Div. 273, 108 N. Y. Supp. 793. Nor, in view of the above, is the reason clear which distinguishes against the future cause of action.

CONTRACTS—INNOCENT MISREPRESENTATION—DEFENSE TO ACTION AT LAW.—In an action for damages for breach of contract it was shown that in making the promise to buy certain corporate stocks and bonds the defendant relied, at least in part, upon an innocent misrepresentation made by the plaintiff. The sale of the securities was "the means by which to convey land with a factory and machinery"; the untrue representation was that "a right of way, which was a substantial factor of value in the real estate, was owned by the corporation." *Held,* that the innocent misrepresentation was a defense to the action. *Bates v. Cashman* (1918, Mass.) 119 N. E. 663.

See COMMENTS, p. 178.

GUARDIAN AND WARD—PURCHASE BY GUARDIAN FOR HIMSELF—RIGHT OF WARD TO ACCEPT BENEFIT.—Minor children owned real property in fee, subject to an unadmeasured dower interest of their mother. The plaintiff, who was the guardian of the children, purchased for himself the dower interest of the mother, receiving a quitclaim deed. Later the mother executed a quitclaim deed purporting to release the dower interest to the children. The latter, through a new guardian, brought ejectment against the plaintiff, who was in possession; whereupon he filed a bill in equity to restrain the ejectment suit, to have the dower admeasured and the widow compelled to convey to him the lands so set off, and to have the deed to the children declared void. *Held,* that the children were entitled in equity, through their present guardian, to elect to accept the benefits of the purchase by the first guardian, but that if they so elected, their estate must account to the plaintiff for the purchase price paid the mother. Ostrander C. J., and Bird, J., *dissenting* in part. *Johnston v. Loose* (1918, Mich.) 167 N. W. 1021.

The plaintiff based his claim to the dower interest on the fact that the statutes of Michigan relating to guardians merely forbade them to purchase the interests of the wards when offered at public or official sales and did not cover the case of a distinct interest—in the same physical object, to be sure—vested in some other person. The majority of the court replied that while the statutes did not cover the case, the general principles of the law of trusts as established by judicial decision forbade a fiduciary of any kind to derive a benefit of the sort which the plaintiff attempted to acquire in the principal case. This position is fully justified both by English and American precedents. The principle has been recognized for about 250 years; the leading case is *Keech v. Sandford* (1726) Sel. Ch. Cas. 61, known to English lawyers as the Rumford Market Case. Some of the leading cases are: *Holt v. Holt* (1671) 1 Ch. Cas. 190 (executor); *Rushworth's Case* (1676) 2 Free. 13 (mortgagee); *Taster v. Marriot* (1768) Amb. 668 (leasehold interest given to A for life, after his death to B absolutely; A secures an extension of the lease—he is a trustee of the extension for B); *Ex parte Lacey* (1802) 6 Ves. 625 (assignee in bankruptcy); *Featherstonhaugh v. Fenwick* (1810) 17 Ves. 298 (one partner obtains secretly a renewal of the lease of the partnership premises—he is trustee for the other partners in proportion to their shares); *Lees v. Nuttall* (1829) 1 Rus. & M. 53 (agent); *Smith v. Chichester* (1842) 1 C. & L. 486 (mortgagor); *Rose v. Hayden* (1886) 35 Kan. 106, 10 Pac. 554 (agent); *Rich v. Black* (1896) 173 Pa. St. 92, 33 Atl. 880 (agent). While cases applying the rule to guardians are not numerous, they are not totally lacking: *Sparhawk v. Allen* (1850) 21 N. H. 9. A distinction has been taken in some of the cases between the rule applicable to fiduciaries in the more strict sense of the term—trustees, executors, administrators, guardians, and agents—who are absolutely disqualified to take for their own benefit, and that governing persons who are fiduciaries only in a broader sense of the term—such as mortgagees, mortgagors, and partners—as to whom

there is merely a "rebuttable presumption of fact" that they acquired the benefit in question by an improper use of their position. See Walter G. Hart, *The Development of the Rule in Keech v. Sandford,* in (1905) 21 L. QUART. REV. 258. It should be added that Ostrander, C. J., disagreed with the majority only upon the question whether the estate of the children should reimburse the plaintiff for his outlay. While doubtless the children had by their mother's release acquired the complete fee simple at law to the land—her prior conveyance to the plaintiff having given him at most an equitable claim—in equity that does not determine who is entitled, and the view of the majority seems clearly right.

INSURANCE—CONSTRUCTION OF POLICY—"GAS ACCIDENTALLY ABSORBED OR INHALED."—The insured held in a mutual association an accident certificate which provided that there should be no liability for accidental death "from . . . gases or anything accidentally or otherwise taken, administered, absorbed . . . or inhaled." While asleep in a hotel room, the insured was asphyxiated by escaping gas. *Held,* (two judges dissenting) that the defendant association was not liable. *Jones v. Hawkeye Com'l Men's Assn.* (1918, Iowa) 168 N. W. 305.

The decision is confessedly made in the teeth of cogent authority to the contrary, which is well reviewed in the dissenting opinion of Weaver, J. The latter argues strongly that similar words of the exception have been repeatedly construed by courts of last resort not to include the present case; that such decisions should control, or if not, they should at least create a doubt as to the meaning of the exception; and that doubts should for obvious reasons be uniformly resolved in favor of the insured. Further, that when the insurer, as in the present case, qualifies the broad terms of an exemption clause, he is bound rigidly to the strictest limits of his expressed qualifications. Thus an exception of death by poison "in any way taken, administered, absorbed or inhaled" was held not to cover death from chloral taken by mistake for distilled water. *Metropolitan Accident Assn. v. Froiland* (1876) 161 Ill. 30, 43 N. E. 766; but *cf. Porter v. Preferred Accident Ins. Co.* (1905, N. Y.) 109 App. Div. 103, 95 N. Y. Supp. 682 ("voluntary and involuntary inhalation" held to cover asphyxiation while asleep). "Had it been intended to exclude all liability for death by poison, a simple statement to that effect would have" sufficed. Thus far the dissent. On the other hand, when the company does not qualify broad language, the courts have been very ready to construct expansive restrictions of their own. *Accident Ins. Co. of N. A. v. Crandall* (1887) 120 U. S. 527, 7 Sup. Ct. 685 ("self-inflicted injuries" and "suicide" held not to cover death of insured by own hand while temporarily insane); and see *Northwestern Mut. Life Ins. Co. v. Hazelett* (1886) 105 Ind. 213, 4 N. E. 582. The dilemma of the company in drawing a policy is apparent. Granted that it is desirable to prevent insurance companies from including in policies exceptions which defeat the reasonable expectations of the unwary insured; should this be done by affixing to words meanings quite at variance with and almost unrelated to their meaning in ordinary life? The courts have so done in this line of cases; and this same Iowa court has participated. *Riley v. Interstate Bus. Men's Acc. Assn.* (1916) 177 Iowa 449, 159 N. W. 203. Such action produces the dilemma of the court in the principal case. The majority claim, with full justice, that if the words here used do not except the accident which here occurred, no words in our language can except it. If the contract were between ordinary mortals, this would seem the only sane decision. For in contracting men use words as they are used in the world of men, and not as they have been construed by courts in a technical attempt to defeat an equally technical and unfair advantage

obtained by one of the parties. Where the contract is a technical one drawn by technicians it is doubtless more reasonable to hold them to the meaning of their terms as laid down by the courts. *Cf. Devine v. Devine* (1918, N. J. Ch.) 104 Atl. 370. Even then, it may become advisable to avoid absurdity by allowing language to carry the sense its words cry for. The action of the court in the instant case is bold. The authorities seem in sense and in law unsound. They are based on conscious or unconscious rebellion against letting an insured be tricked out of benefits which the courts believe he was justified in expecting. The court here disregards them; it refuses to let a hard case make bad law—in the hope that the legislature will act.

TAXATION—INHERITANCE TAXES—DEDUCTION OF FEDERAL ESTATE TAX BEFORE ASSESSING STATE INHERITANCE TAX.—A resident of New Jersey died testate leaving an estate upon which the federal estate tax was more than $1,000,000. The question arose whether this sum should be deducted from the appraisement of the estate in computing the state inheritance tax. *Held,* that the federal tax was to be deducted from the value of the estate in ascertaining for the purposes of state taxation "the clear market value of the property transferred." *In re Roebling's Estate* (1918, N. J. Prerog.) 104 Atl. 295.

A resident of Illinois died testate leaving an estate upon which a federal estate tax was assessed. *Held,* that in computing the state inheritance tax the federal tax was to be deducted as an expense of administration from the gross value of the decedent's property. *People v. Pasfield* (1918, Ill.) 120 N. E. 286.

The important question raised by these cases has already been passed upon in several states and is certain to arise in others. In Minnesota and Connecticut the deduction has been allowed. *State v. Probate Court of Hennepin County* (1918, Minn.) 166 N. W. 125; *Corbin v. Townshend* (1918) 92 Conn. 501, 103 Atl. 647. In New York the deduction has been denied. *In re Sherman's Estate* (1917) 179 App. Div. 497, 166 N. Y. Supp. 19; affirmed without opinion in 118 N. E. 1078. For a discussion of the relative merits of the two views, approving the former, see (1918) 27 YALE LAW JOURNAL, 1055. In the principal cases the nature of the federal estate tax is considered at length. The opinions point out that it resembles the old English probate duty and is a charge against the estate of the decedent, not a charge against the beneficial shares of the several legatees or distributees of the decedent. The constitutionality of such a tax is considered and affirmed in the Illinois case. State inheritance taxes, on the other hand, are commonly based upon the privilege of the beneficiaries to receive the decedent's property by will or intestate succession, and are measured by the value of the property so passing to them. Hence a probate duty chargeable against the decedent's estate is properly deducted, like debts and expenses of administration. This would seem to be clearly true in respect to the Illinois inheritance tax. It is not quite so obvious in the case of the New Jersey tax because the courts have construed that tax, at least in the case of non-resident decedents, as being a tax upon the transfer to the executor or administrator, not as a legacy tax on the succession of the beneficiaries. See (1918) 27 YALE LAW JOURNAL, 1055, at 1059. It is interesting to note that under the New York view the federal tax is ultimately deducted *pro rata* from the several legacies instead of being treated as an expense of administration deducible from the residuary estate. *In re Douglass' Estate* (1918, Surr.) 171 N. Y. Supp. 956.

TORTS—THREATENED PHYSICAL INJURY TO LAND—NO RECOVERY FOR DEPRECIATION IN MARKET VALUE.—The defendant corporation placed upon its own land a large pile of "strippings" (soft earth, quicksand and gravel) from a mine.

The ground on which the pile was placed sloped toward neighboring houses, one of which was that of the plaintiff. A portion of the material suddenly gushed out from the bottom of the pile, crossed the highway and carried away several of the houses for a distance of about fifty feet, but the plaintiff's property was not touched. The plaintiff claimed damages because the existence of the pile near his premises, with the danger of a recurrence of the slide, had substantially diminished their market value. He recovered a judgment in the court below. *Held*, that the judgment was erroneous, since the plaintiff had no cause of action until physical injury to his property occurs. *Johnson v. Rouchleau-Ray Iron Land Co.* (1918, Minn.) 168 N. W. 1.

See COMMENTS, p. 171.

TROVER AND CONVERSION—LIABILITY OF INNOCENT AGENT—TRANSFER OF NEGOTIABLE PAPER.—Negotiable instruments payable to bearer were stolen from the plaintiff. An agent of the thief delivered them to the defendants, who were bankers, and authorized their sale. The defendants sold them and after deducting their commission paid the proceeds to the agent, who paid them over to his principal. Throughout the transaction the defendants acted without notice, actual or "constructive," of the plaintiff's interest. The plaintiff brought an action for conversion. *Held*, that the acts of the defendants did not amount to a conversion. *Pratt v. Higginson* (1918, Mass.) 119 N. E. 661.

See COMMENTS, p. 175.

TRUSTS—RESULTING AND CONSTRUCTIVE TRUSTS—GRANTEE'S ORAL AGREEMENT TO HOLD LAND FOR PERSON PAYING PURCHASE PRICE.—The complainant's bill alleged that he paid the purchase price of certain real estate, the title to which was conveyed to the defendant, and that the latter expressly agreed and declared that she held the property in trust for him. *Held*, that the plaintiff had no enforceable equitable interest in the property. *Keown v. Keown* (1918, Mass.) 119 N. E. 785.

The decision follows previous Massachusetts cases in seeing nothing but the express oral trust, the enforcement of which is forbidden by the statute of frauds. The English law and that of some American states is to the contrary, taking the view that there is a "resulting trust" in favor of the buyer. *Dyer v. Dyer* (1788, Ex.) 2 Cox, 92; *Stock v. McAvoy* (1872) L. R. 15 Eq. 55; *Cook v. Patrick* (1891) 135 Ill. 499, 26 N. E. 658. As the cases just cited show, this so-called "resulting trust" is based upon a presumption of fact, "rebuttable" by evidence. *Cf.* (1918) 27 YALE LAW JOURNAL, 705. The result is that in the end, where evidence is introduced, it is really the express oral trust which is enforced. This seems clearly to violate the statute of frauds, and to this extent the Massachusett view seems sound. There is, however, another possibility which is usually entirely overlooked by the courts. In other parts of our law we have acted upon the general principle that, while one may set up the statute of frauds as an excuse for refusing to perform the obligations resulting from an express oral promise, if he does so he will not be permitted to enrich himself thereby in an unjust way. In consequence he is usually required to restore, either specifically or by way of money equivalent, that which he received in consideration for the oral promise. Keener, *Quasi-contracts*, 277; Woodward, *Quasi-contracts*, 147. It happens occasionally under this doctrine that the plaintiff actually obtains the same relief that he would have been entitled to had the oral promise been enforceable, but this is merely a coincidence and no reason for refusing to apply the general principle. Thus, if services are performed

under an agreement within the statute of frauds, the one performing them may recover their reasonable value in a quasi-contractual action. In some jurisdictions the agreed price may be used as evidence of the value of the services. *Scarisbrick v. Parkinson* (1869, Ex.) 20 L. T. N. S. 175; Keener, *op. cit.*, 290; *contra, Hillebrands v. Nibbelink* (1879) 40 Mich. 646. If the jury find the reasonable value to be the contract price—as is not infrequently the case—no one imagines that the contractual rather than the quasi-contractual duty is being enforced. Obviously this general principle applies to situations like that in the principal case. It is unconscionable that one who has paid nothing and who has acquired property upon an express oral agreement to hold it for others should be allowed both to break his promise and to keep the property. To compel surrender of the latter is not to enforce the express oral trust, for *non constat* that the terms of the oral trust are identical with the constructive obligation to convey to the one paying the purchase price. In some cases they would be, in others not. In any event, if they were identical, it would be a mere dramatic coincidence. In many states there are statutes which affect the matter. These are collected and discussed, together with the cases, in Ames, *Lectures on Legal History*, 431-434. *Cf.* also the Comment upon *Constructive Trusts Arising upon Breach of Express Oral Trusts of Land* (1918) 27 YALE LAW JOURNAL, 389, also CURRENT DECISIONS, *infra.*

WILLS—CONSTRUCTION—LEGACY TO "CHILD" OF TESTATOR'S SON DOES NOT INCLUDE ADOPTED CHILD.—The testator was survived by his son, S, who was married but without children. The will gave a legacy, upon the death of S, "to his child or children and their heirs," with a gift over to residuary legatees in case S left no child. After the testator's death S legally adopted a child. *Held*, that the legacy belonged to the residuary legatees. *In re Puterbaugh's Estate* (1918, Pa.) 104 Atl. 601.

It would seem that the court was justified under the circumstances in ascribing to the word "child" its primary and popular meaning. See *Lichter v. Thiers* (1909) 139 Wis. 481, 121 N. W. 153. Had the adoption been prior to the testator's death, the adopted child might in some circumstances have been construed as intended by the testator to be included within a legacy to "children." *In re Truman* (1905) 27 R. I. 209, 61 Atl. 598. An adopted child has been permitted to take under a devise to the "heirs at law" of the testator's daughter, even though the statute for adoption was enacted after the testator's death. *Smith v. Hunter* (1912) 86 Oh. St. 106, 99 N. E. 91. But the weight of authority is believed to be *contra*. *Wyeth v. Stone* (1887) 144 Mass. 441, 11 N. E. 729; *Brown v. Wright* (1907) 194 Mass. 540, 80 N. E. 612. Similarly, under statutes which avoid the lapsing of a legacy to a relative of the testator, when the legatee dies before the latter, there is a conflict of authority whether an adopted child can take the legacy given to his foster parent and so prevent the lapse. *Phillips v. McConica* (1898) 59 Oh. St. 1, 51 N. E. 445 (holding he does not); *Warren v. Prescott* (1892) 84 Me. 483, 24 Atl. 948 (holding he does).