RECENT CASE NOTES

CORPORATIONS — MUNICIPAL CORPORATIONS — ESTOPPEL — NUISANCE—RAILROAD CROSSING.—A railroad built stub tracks on its private "right of way" through a city in 1910, the railway crossing several streets at grade. By law the privilege to cross the streets must be secured from the common council of the city, but this was not secured. Congestion of freight made necessary additional yards and side-tracks, the construction of which was commenced in May, 1916, also without securing the privilege to cross the intersecting streets. On July 31, the council granted this privilege and the company increased its operations and expended $5,000 during the next week. On August 7, the council rescinded its vote, and sought an injunction to restrain the building of the new tracks and to force the removal of those laid. *Held,* that the injunction should not be granted because the city was estopped to ask removal of tracks already laid, and because "equity" and the solution of the freight problem demanded the completion of those proposed. *City of Flint v. Grand Trunk Ry.* (1919, Mich.) 174 N. W. 147.

When a city acquiesces in the exercise of an apparent privilege to build and maintain tracks on a street and operate on them for some time, with considerable outlay and expense, it may be estopped to deny the railroad's privilege. See 3 Dillon, *Municipal Corporations* (5th ed. 1911) sec. 1242. If the city has no power to grant such a privilege, it is perhaps a different matter. *Cf. Ashland v. Chicago & N. W. Ry.* (1900) 105 Wis. 398, 80 N. W. 1101. A few cases seem to deny the possibility of estoppel, but there was no great reliance on the conduct of the city. *Morris & Essex R. R. v. Newark* (1855) 10 N. J. Eq. 352; *Sacramento v. Pacific Gas & Electric Co.* (1916) 173 Calif. 787, 161 Pac. 978. In one the order to tear up the tracks had been issued only to force the traction company to accept a "franchise" it did not like. *Bangor v. Bay City Traction Co.* (1907) 147 Mich. 165, 110 N. W. 490. The instant case is an application of the usual rule, therefore, but it presents an additional fact in that the trial court found the crossings to be a public nuisance and dangerous to life. The decision of the upper court that the city had no right to deny the privilege disposes of this so far as the obstruction of the streets and the ordinary unpleasantness is concerned, for consent ends that as a nuisance. *Spokane Street Ry. v. Spokane Falls* (1893) 6 Wash. 521, 33 Pac. 1072. But the court failed to discuss the possibility that the danger to life might still remain a nuisance, and the tone of the opinion indicates that it is not so considered in spite of the finding of the court below. The case is best supported on the theory that physical property capable of lawful uses cannot be demolished because used unlawfully, but that the procedure is to restrain the unlawful use. See 2 Dillon, *op. cit.,* 688; *cf. Chicago v. Union Stock Yards & Transit Co.* (1896) 164 Ill. 224, 45 N. E. 430 (carrying cattle through city); *cf. St. Louis R. R. v. Kirkwood* (1900) 159 Mo. 239, 60 S. W. 110. In the instant case the danger to life can be obviated best, not by injunction, but by ordinances requiring safety devices, the company doubtless being under a liability of having such duties imposed upon it.

EVIDENCE—POST-TESTAMENTARY DECLARATIONS.—Application for the probate of a will was contested on grounds of forgery. Declarations of the testator that he had made a will for the benefit of the proponent were admitted to prove that the propounded will was genuine. *Held,* that the admission was proper. *In re Johnson's Estate* (1920, Wis.) 175 N. W. 917.

Three theories of the admissibility of post-testamentary declarations have been advanced by Professor Wigmore: first, since such declarations do not fall within any exception to the hearsay rule, they are not admissible; second, a special exception to the hearsay rule should be made in order to admit them; third, it is a recognized exception to the hearsay rule that they are admissible to show the state of mind of the testator at the time they were made, then by logical inference, from belief to the act itself, they are admissible to prove the act. See Wigmore, *Evidence* (1904) sec. 1736; see also 4 Chamberlayne, *Evidence* (1913) sec. 2654. More exactly, the steps in the process of inference are from utterance to the then present belief, from that belief to belief at the time of the act, and thence to the act itself. Therefore, by this theory, they are analogous to pre-testamentary statements, and it is submitted that no distinction should be made between them as to admissibility. Many cases have upheld the first theory. *In re Kennedy's Will* (1901) 167 N. Y. 163, 60 N. E. 442; *Throckmorton v. Holt* (1900) 180 U. S. 552, 21 Sup. Ct. 474. Of course, the declarations may be admissible to show the state of mind even though the above inferences are not permitted to be drawn therefrom. *Cf. Mangle v. Parker* (1908) 75 N. H. 139, 71 Atl. 637. Such a limitation, however, excludes much relevant evidence, and frequently the best or only evidence of an act of the testator. Therefore it is suggested that the second theory be adopted, and that the declarations be admitted as a special exception to the hearsay rule. This view has been upheld by many cases. *Cf. Schnee v. Schnee* (1900) 61 Kan. 643, 60 Pac. 738; *cf. In re Saunders' Will* (1919) 177 N. C. 156, 98 S. E. 378; *cf. Sugden v. Lord St. Leonards* (1876, Eng.) 1 P. D. 154. Professor Wigmore's third theory unquestionably is logically sound, but its acceptance would practically mean the breakdown of the hearsay rule, if the reasoning is carried to its logical conclusion, because a state of mind is just as much evidence of any act as of a testamentary act. Furthermore, there is no direct authority to support this view. The conclusion of the principal case, that if post-testamentary declarations are admissible to prove the contents of a lost will, then they are equally admissible to prove that the propounded instrument was genuine, because conforming in content to the testator's intent, seem sound. But it has been held *contra*. *Cf. McDonald v. McDonald* (1895) 142 Ind. 55, 41 N. E. 336.

MASTER AND SERVANT—LENDING SERVANT.—The defendants contracted to do haulage for the ministry of munitions in discharging a vessel into railway wagons, and lent to the ministry a man to shunt wagons. The man negligently set certain wagons in motion, thereby closing the space between two of the wagons, which resulted in the injury of the plaintiff. He sued for damages. *Held*, that the plaintiff should recover. *Poulson v. John Jarvis & Sons, Ltd.* (1919, Ct. App.) 26 Times L. R. 160.

It was early established that when the servant of one man is lent to or hired by another, the duty to respond in damages for the servant's negligence is imposed on the one who had control of the servant's work. *Sadler v. Henlock* (1855, Q. B.) 4 E. & B. 570. Where there have been no express regulations in the contract of hire, this control has been inferred from certain special facts. *Norris v. Kohler* (1869) 41 N. Y. 42 (ownership of instrumentalities); *Wyllie v. Palmer* (1893) 137 N. Y. 248, 33 N. E. 381 (particular nature of work requiring supervision); *Hardy v. Shedden Co.* (1897, C. C. A. 6th) 78 Fed. 610 (circumstances of employment, such as distance from original master); *Kelly v. Mayor, etc. of New York* (1854) 11 N. Y. 432 (existence of a contract requiring original employer to do work). These evidential facts have in some cases been given the effect of presumptions and sometimes regarded as almost conclusive. Other facts have been held to be conclusive. *Whitney & Starrette Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242 (selection and payment by one of

the parties); *Quarman v. Burnett* (1840) 6 M. & W. 499 (custom, as in case of liveryman); see Huffcut, *Agency* (2d ed. 1901) 280. Nevertheless it has been generally recognized that if it can be shown where the actual direction of the work in fact lay, the above tests will be disregarded. *Green v. Sansom* (1899) 41 Fla. 94, 25 So. 322. The English cases have kept nearer the elementary principle that the control should be determined from all the facts in each case, and only occasionally applied standardized tests based on certain special facts. *Cf. Rourke v. White Moss Colliery Co.* (1877) 2 C. P. D. 205. The instant case indicates a tendency to revert to the original underlying principle, of which some American jurisdictions have never lost sight. *Cf. Driscoll v. Towle* (1902) 181 Mass. 416, 63 N. E. 922. And the American cases seem to be tending towards the re-simplification which the leading case typifies. *Cf. Danville Light, Power & Traction Co. v. Baldwin* (1917) 178 Ky. 184, 198 S. W. 713; *cf. Campbell v. New York, New Haven & H. R. R.* (1917) 92 Conn. 322, 102 Atl. 597.

MORTGAGES—INSTALLMENT MORTGAGES—DEFAULT IN PAYMENTS.—The mortgagee conveyed land to the defendant taking an installment mortgage which gave the mortgagee, on default of any of the installments, the option of declaring the whole debt due and of foreclosing at once under a power of sale contained in the mortgage. The defendant defaulted and gave notice of future inability to pay. Thereupon, by agreement between the parties the defendant remained in possession and no foreclosure proceedings were instituted. The plaintiff brought a bill to enforce a mortgage given subsequently by the defendant on his crops. *Held,* that the plaintiff could have no relief because the mortgagee had a landlord's lien which took priority by statute. *Hughes & Tidwell Supply Co. v. Carr* (1919, Ala.) 83 So. 472.

In the instant case the court held that by the default in the payment of the installment the mortgage was discharged of its condition and the mortgagee's estate became absolute as of the day of the delivery of the mortgage, subject only to the mortgagor's equity of redemption. *Cf. Thompson & Co. v. Union Warehouse Co.* (1895) 110 Ala. 499, 18 So. 105; *cf. Dennis v. McEntire Mercantile Co.* (1914) 187 Ala. 314, 65 So. 774. It does not appear that the mortgagee exercised his power to declare the entire debt due. Generally the holder of a power must exercise it to derive benefit therefrom. Where an offeree is given a power by acceptance to impose duties on the offeror and create correlative rights in himself, he must exercise this power within the prescribed time, or, if no time is specified, within a reasonable time if he wishes to derive the benefits from it. See Corbin, *Offer and Acceptance* (1917) 26 YALE LAW JOURNAL, 169, 183; see also Corbin, *Conditions in the Law of Contract* (1919) 28 YALE LAW JOURNAL, 739, 763. So also in the case of an option. See Corbin, *Option Contracts* (1914) 23 YALE LAW JOURNAL, 641. And an option alone is not a "vested interest" within the rule against perpetuities. To "vest" the "interest," actual exercise of the option-holder's power is necessary. COMMENT (1919) 29 YALE LAW JOURNAL, 87, 90. In the case of gift it is presumed that the donee has exercised his power of acceptance. But it can be shown that he did not. See COMMENT (1920) 29 YALE LAW JOURNAL, 549. Where the contract of a promissory note provides that on default of any installment of interest the holder may at his option declare the whole debt due, this power must be exercised within a reasonable time after default, or it lapses, and the note is not due. *Crossmore v. Page* (1887) 73 Calif. 213, 14 Pac. 787. In the case of mortgages where power is given to declare the whole debt due on default in payment of part of the principal or of interest, foreclosure merely as to the installment due seems to destroy the power to declare the whole debt due or foreclosure for it. See *Brand v. Smith* (1894) 99 Mich. 395, 399, 58 N. W. 363. If tender is made before such declaration the option is thereby extinguished.

Trinity County Bank v. Haas (1907) 151 Calif. 553, 91 Pac. 385. Thus it would seem that under a sound interpretation such a power as was given by the mortgage provision in question must be exercised to derive the benefit from it. A mortgage may provide that on default of any payment title is to become absolute or it may provide that the mortgagor may at his option declare the whole amount due and foreclose for it. The court in the instant case seems in error in failing to make any distinction between the two.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INFANTS.—The defendant's servant, while operating an automobile in the course of his employment, negligently ran over and injured the plaintiff's eleven-year-old son, from which injuries the son died. The plaintiff then brought an action for the wrongful death. *Held,* that the plaintiff should not recover, because his son had been guilty of contributory negligence. *Ferrand v. W. H. Cook & Co.* (1919, La.) 83 So. 362.

The plaintiff sued the defendant for an injury to her four-year-old son, caused by the negligent operation of one of the defendant's trains. The defendant endeavored to prove contributory negligence. *Held,* that the plaintiff should recover, because the child could not be guilty of contributory negligence. *Ryan v. Louisiana Ry. & Nav. Co.* (1919, La.) 83 So. 371.

The law of contributory negligence applies equally to infants and adults, except where a child is too young to be capable of exercising judgment or discretion. But the age, judgment, intelligence, and in some cases the experience, of the particular child must be taken into account in determining his negligence. See *Karpeles v. Heine* (1919) 227 N. Y. 74, 124 N. E. 101, 102, (1919) 29 YALE LAW JOURNAL, 234 (effect of employment of an infant on his contributory negligence). It is generally held that a child of six years or under, is incapable of contributory negligence. *Chicago City Ry. v. Tuohy* (1902) 196 Ill. 410, 63 N. E. 997; see *Great Southern R. R. v. Snodgrass* (1918, Ala.) 79 So. 125, 127; *contra, DiMaio v. Yolen Bottling Works* (1919) 93 Conn. 597, 107 Atl. 497. A statute classifying specified acts as contributory negligence in law has been construed to apply to a boy less than seven years of age. *Erie R. R. v. Hilt* (1918) 38 Sup. Ct. 435, (1918) 27 YALE LAW JOURNAL, 1095. Whether or not a child between seven and fourteen years is guilty of contributory negligence is a question of fact for the jury. See *Johnson's Adm. v. Rutland Ry.* (1919, Vt.) 106 Atl. 682, 684. It would seem that a child over fourteen is presumed to be capable of using some degree of reasonable care for his own protection. See *Sherris v. Northern Pac. Ry.* (1918) 175 Pac. 269, 270, 55 Mont. 189, 194. It is submitted that a practical test to determine an infant's contributory negligence is to require the use of that degree of care which would commonly be exercised by the average child of his age, intelligence, and experience. An objective test which is sometimes employed requires of infants that degree of care which is commonly exercised by the average child of his age. *Cf. Roberts v. Ring* (1919, Minn.) 173 N. W. 437; see 1 Shearman & Redfield, *Law of Negligence* (6th ed. 1913) 174. It seems, however, that the subjective test is the better because infants differ so much more than adults in their subjective selves. The instant cases represent the existing law and seem sound. On the doctrine of imputing the parents' negligence to the child, see (1914) 23 YALE LAW JOURNAL, 553; (1915) 24 *ibid.,* 259.

NEGLIGENCE—PHYSICIANS AND SURGEONS—DEGREE OF CARE.—In an action for alleged malpractice in an operation, the court instructed the jury that it was the defendant's duty to exercise such reasonable skill and care as an ordinarily skillful and careful surgeon is accustomed to exercise under like circumstances. The defendant took exceptions to the instruction. *Held,* that the exception

should be overruled, because the instruction fixed a proper standard of care and skill. *Krinard v. Westerman* (1919, Mo.) 216 S. W. 938.

The degree of care and skill required of physicians and surgeons is not the highest possible, but only that which is reasonable and ordinary. *Howard v. Grover* (1848) 28 Me. 97, 48 Am. Dec. 478. Without a special contract they can never be considered as warranting or insuring a cure. *Craig v. Chambers* (1867) 17 Oh. St. 253. That no cure was effected does not raise a presumption of negligence. *Dye v. Corbin* (1906) 59 W. Va. 266, 53 S. E. 147. Nor does an honest mistake or error of judgment in cases of reasonable doubt and uncertainty operate to place physicians and surgeons under a duty to pay damages. *Leighton v. Sargent* (1853) 27 N. H. 460, 59 Am. Dec. 388. But such a duty does arise if injury results from the want of skill as well as from negligence in the application of skill. *Long v. Morrison* (1860 14 Ind. 595, 77 Am. Dec. 72. In determining the standard of care and skill which the law requires, the state of scientific knowledge at the time must be considered. *Bigney v. Fisher* (1904) 26 R. I. 402, 59 Atl. 72; *Kalloch v. Hoagland* (1917, C. C. A. 6th) 239 Fed. 252. The doctrines of his school must also be regarded, if the defendant belongs to one of a number of distinct and differing schools of practice. *Ennis v. Banks* (1917) 95 Wash. 513, 164 Pac. 58 (allopath); *Spead v. Tomlinson* (1904) 73 N. H. 46, 59 Atl. 376 (christian science healer). Within these limitations, the authorities are split on what constitutes ordinary and reasonable care. According to what appears to be the better view it is such care and skill as is possessed generally by members of the profession in similar localities. *Dorris v. Warford* (1907) 124 Ky. 768, 100 S. W. 312. But a respectable number of cases hold that the test is what is ordinary and reasonable care in the same locality or vicinity. *Hesler v. California Hospital Co.* (1918) 178 Calif. 764, 174 Pac. 654; *DeBruine v. Voskuil* (1918) 168 Wis. 104, 169 N. W. 288. The objection to the latter doctrine is that it does not furnish a fair criterion where the medical profession of the particular neighborhood in question is below the average in knowledge, skill, or care. The principal case seems sound in taking the former view and fixing the degree of care as that used "under like circumstances."

PLEADING—LIMITATION OF ACTIONS—AMENDMENTS STATING NEW CAUSE OF ACTION.—The plaintiff brought an action based on a statute for personal injuries. His original petition was filed within the statutory period and alleged ultimate facts which showed that he was engaged in interstate commerce at the time of the injury. After the statutory period had expired, the plaintiff was allowed to amend so as to state a cause of action under the federal Employer's Liability Act. The defendant then moved to strike the amendment upon the ground that it stated a new cause of action, which was barred by the statute of limitations. *Held,* that this motion should be overruled, because the amendment only amplified the allegations of the original petition. *Lammers v. Chicago Great Western Ry.* (1919, Iowa) 175 N. W. 311.

It is generally conceded that an amendment will be considered as filed when the original petition was filed unless a new cause of action is stated. *Birmingham Ry. L. & P. Co. v. Jung* (1909) 161 Ala. 461, 49 So. 434; *United States v. McCord* (1914) 233 U. S. 157, 34 Sup. Ct. 550. But the courts are in hopeless confusion as to when a new cause of action is stated. The majority hold that an amendment states a new cause of action, when it changes the basis of the action from a common-law to a statutory liability, or *vice versa. Union Pacific Ry. v. Wyler* (1895) 158 U. S. 285, 15 Sup. Ct. 877; *Allen v. Tuscarora Valley Ry.* (1910) 229 Pa. 97, 78 Atl. 34. A minority hold that an amendment which shifts from a legal to an equitable remedy, or from tort to contract,

states a new cause of action. *Hackett v. Bank of Calif.* (1881) 57 Calif. 335, *Gates v. Paul* (1903) 117 Wis. 170, 94 N. W. 55. See COMMENT (1918) 27 YALE LAW JOURNAL, 1053; *cf.* (1919) 28 *ibid.*, 693. Various other tests have been laid down to determine the identity of the causes of action. Would the same evidence support both of the pleadings? *Scoville v. Glasner* (1883) 79 Mo. 449; *Whalen v. Gordon* (1899, C. C. A. 8th) 95 Fed. 305. Is the measure of damages the same in each case? *Hurst v. Detroit City Ry.* (1891) 84 Mich. 539, 48 N. W. 44. Are the allegations of each subject to the same defences? *Goddard v. Perkins* (1838) 9 N. H. 488; *Phoenix Lumber Co. v. Houston Water Co.* (1901) 94 Tex. 456, 61 S. W. 707. All of the above suggested *criteria* seem to deal with the method of stating the cause of action rather than with the underlying substantive right. It would seem that the test which has the proper basis is whether or not a judgment upon the original pleading would bar an action upon the amendment, or *vice versa*. *Reheme v. Clinton* (1879) 2 Utah, 230; *Van Patten v. Waugh* (1904) 122 Iowa, 302, 98 N. W. 119. It is submitted that the sole inquiry should be whether or not the plaintiff, in his amendment, is still seeking redress for the violation of the same primary right set out in his original petition. Using this as a test the result reached in the instant case is clearly correct.

PROPERTY—SURFACE WATERS—OBSTRUCTION OF NATURAL FLOW.—The plaintiff and the defendant owned adjoining tracts of land. The plaintiff brought an action for alleged damages to his crops caused by the erection of an embankment on the defendant's land, whereby the surface water, which would naturally flow upon the land of the defendant, was sent back to the plaintiff's land. *Held*, that he should not recover. *Johnson v. Leazenby* (1919, Mo.) 216 S. W. 49.

Some courts, applying what is called the civil-law theory, hold that the lower owner is under a duty to receive surface water in its natural flow. *Shaw v. Town of Sebastopol* (1911) 159 Calif. 623, 115 Pac. 213; *Hoehn v. East Side Levee & Sanitary District* (1916, Sup. Ct.) 203 Ill. App. 48; *City Dairy Co. v. Scott* (1916) 129 Md. 548, 100 Atl. 295; *Crane v. Valley Land Co.* (1918, Mich.) 169 N. W. 18. The *real* common-law rule is the same as the civil-law rule. *Ewart v. Cochrane* (1861, H. L.) 4 Macq. 117; *Beer v. Stroud* (1890) 19 Ont. Rep. 10; see 3 Farnham, *The Law of Waters and Water Rights* (1904) sec. 889b. But other courts, as was done in the instant case, apply, under the misnomer of the "common-law" theory, the common-enemy rule. *Barkley v. Wilcox* (1881) 86 N. Y. 140, 40 Am. Rep. 519; *Gibson v. Duncan* (1915) 17 Ariz. 329, 152 Pac. 856; *Rutkoski v. Zalaski* (1916) 90 Conn. 108, 96 Atl. 365. That rule is that the lower owner has the privilege of building embankments to ward off water or filling and grading his land, regardless of the consequences to the property of the upper proprietor. *Walther v. Cape Girardeau* (1912) 166 Mo. App. 467, 149 S. W. 36; *Louisville N. O. & T. R. R. v. Jackson* (1916) 123 Ark. 1, 184 S. W. 450. There are some jurisdictions which make the reasonableness of the use the basis of determining whether or not the lower owner may obstruct surface waters. *Swett v. Cutts* (1870) 50 N. H. 439, 9 Am. Rep. 276; *Peterson v. Lundquist* (1908) 106 Minn. 339, 119 N. W. 50; see COMMENT (1902) 12 YALE LAW JOURNAL, 41. Still other authorities have suggested that the court in applying any of the rules should distinguish between rural and city property. *Cf. Levy v. Nash* (1908) 87 Ark. 41, 112 S. W. 173, 20 L. R. A. (N. S.) 155, note.

QUASI-CONTRACTS—CARRIAGE OF THE MAIL BY RAILROAD.—The plaintiff sued the United States to recover a balance claimed to be due for carrying mail through a series of years, basing its claim upon an implied contract arising from the fact that, having been compelled to carry the mail, its property had been taken

for public use without reasonable compensation therefor. The plaintiff had been paid an inadequate amount authorized by the statute as interpreted by the postal authorities. *Held,* that recovery should be denied. Brandeis, J., *dissenting. New York, New Haven and Hartford R. R. v. United States* (1919) 40 Sup. Ct. 67.

The plaintiff, postmaster in a village situated on the defendant's railroad, carried the mail bags four times a day for several years from the station to the post-office. The agents of the defendant knew that the plaintiff thought this was part of his official duties. On learning that the railroad was paid according to contract for the services which he was rendering, the plaintiff ceased the carrying and sued for the value of his services. *Held,* that he should recover. *Blackwood v. Southern Ry.* (1919, N. C.) 100 S. E. 610.

In the first case the court decided that the statute governing the compensation to be paid for carrying the mail justified the interpretation put upon it by the postal authorities. And the plaintiff voluntarily accepted and performed the service with knowledge of what the United States intended to pay, and of the method used to estimate compensation. Further, it was not required by law to carry the mail. See *Eastern R. R. v. United States* (1889) 129 U. S. 391, 395, 9 Sup. Ct. 320, 321. Had the United States, after the rendition of the service, made an express promise to pay an additional sum, such promise would not be binding. *Cf. Roscorla v. Thomas* (1842) 3 Q. B. 234; *cf. Davis v. Morgan* (1903) 117 Ga. 504, 43 S. E. 732. Since it could not be held on an express promise subsequently made, *a fortiori* it could not be held on one implied in fact or on a quasi-contractual duty imposed by law without consent. But in the second case there was nothing which tended in any way to show that the plaintiff was working for any liquidated amount. Both cases seem correct, and illustrate the difference between services performed for a definite amount, no matter how small, and those rendered without a definite compensation in view.

QUASI-CONTRACTS—MISTAKE AS TO EXISTENCE OF A CONTRACT.—A Spanish concession to the claimant for the construction and operation of telegraphic lines in the Philippine Islands provided for reduced rates for all official messages, a tax to be paid to the government on all receipts from messages transmitted over these cables, and payment to the claimant by the government of an annual subsidy. The United States government, in taking over the Philippine Islands, never acted on these concessions. It agreed in 1899, through its Secretary of War, to use the cables at the "established" rates; it was charged the reduced rates provided for in the concessions. In 1905, the claimant *voluntarily* paid into the treasury of the Philippine government $23,000 as taxes on receipts computed under the concession requirements. The United States government never received nor demanded this money, nor did it pay any subsidy, as specified in the concession. The claimant filed a petition in the Court of Claims against the United States government to recover $440,000, the amount of subsidy provided for in the concession. *Held,* that recovery should not be allowed. *Eastern Extension etc. Co. v. United States* (1920) 40 Sup. Ct. 168.

In accord with the claimant's theory that there was a true contract implied in fact, the court based its decision chiefly on the lack of legal power in the government agents concerned in the transactions since 1899 to place the United States under contractual duties. However, these agents were empowered to send these messages. And though no contract existed in fact, yet it is submitted that a non-contractual right might have arisen in the instant case. The true basis of a right and duty in quasi-contract is the receipt of a benefit by the defendant which it is inequitable for him to retain. *Underhill v. Rutland R. R.* (1916) 90 Vt. 462, 98 Atl. 1017; see Corbin, *Quasi Contractual Obligations* (1912) 21 YALE LAW JOURNAL, 533. The claimants erroneously believed that

the United States was under contract to continue the subsidies and for that reason charged special reduced rates. If this mistake had been reasonable and had resulted in an uncompensated enrichment of the defendant, a recovery should have been allowed. *Cf. Turner v. Webster* (1880) 24 Kan. 38; see Thurston, *Cases in Quasi Contract* (1916) 119. But the court found no fault on the part of the United States, and it did not appear that the rates demanded and paid were not a reasonable return for the services. Hence the result is clearly correct, though the basis of the decision might better have been, not the absence of a contract duty *in fact,* but that, though a mistake existed in the plaintiff's mind, yet no duty would be implied *in law* because that mistake was found to have no reasonable basis, and to result in no unjust enrichment of the defendant. It would seem, however, that a recovery of the $23,000 might be allowed against the Philippine government, since this was paid under a mistake as to the existence of a contract.

RELEASE—FRAUD—RESCISSION—TENDER.—There were two contracts for the sale of two different allotments of stock of the same corporation. In the second it was stipulated as part of the consideration of the transfer that the defendant vendor should never be "liable," directly or indirectly, for any claim of any sort or description growing or arising out of either the first or the second sale of stock to the plaintiff vendee. The defendant had made certain fraudulent misrepresentations, concealments, and omissions in both transactions which induced the plaintiff to purchase. The plaintiff brought an "action in deceit and for breach of contract." The defendant pleaded the release. *Held,* that the plaintiff should not recover, because tender to the defendant of the consideration for the release was a condition precedent to the plaintiff's right of action. Gardner, J., *dissenting. Barbour v. Poncelor* (1919, Ala.) 83 So. 130.

A party has the power to avoid by rescission a release obtained from him by fraud. See Anson, *Law of Contract* (1919, 3d Am. ed. by Corbin) 258, note 2. Most courts hold that a tender of the consideration received for the release is a condition precedent to the defrauded party's bringing suit on the cause of action covered by the release. *Hill v. Northern Pac. Ry.* (1902, C. C. A. 9th) 113 Fed. 914; *Swan v. Great Northern Ry.* (1918, N. D.) 168 N. W. 657; *Gilmore v. Western Electric Co.* (1919, N. D.) 172 N. W. 111; *contra, Hogarth v. Grundy & Co.* (1917) 256 Pa. 451, 100 Atl. 1001; *cf. Baird v. Pacific Electric Ry.* (1919, Calif. App.) 179 Pac. 449. It has been held in such a case, however, that if not paid before suit, the amount of the consideration may be deducted from the plaintiff's verdict. *Franklin v. Webber* (1919, Ore.) 182 Pac. 819; *contra, Swan v. Great Northern Ry., supra.* This view would seem inapplicable where the consideration was something other than money. Some early cases distinguished between fraud in the procurement of the execution of a release, which they permitted to be attacked both at law and in equity, and fraud in the consideration for the release, against which equity alone would relieve. *Cf. Homuth v. Metropolitan St. Ry.* (1895) 129 Mo. 629, 31 S. W. 903. This distinction has been discarded by a federal court. See *Wagner v. National Life Ins. Co.* (1898, C. C. A. 6th) 90 Fed. 395, 404. And it seems that where the setting aside of a release upon the ground of fraud is sought in equity, a tender of the consideration given therefor need not be made before the action is commenced. See *Wangen v. Upper Iowa Power Co.* (1918, Iowa) 169 N. W. 668, 670. In the principal case the return of the stock purchased under the second contract was soundly held to be a condition precedent to any right of action in the plaintiff because consideration for the release was inseparable from the second contract of sale, and hence the whole had to be rescinded.

But it would seem that the plaintiff might properly retain the stock obtained under the first contract of sale.

SALES—SELLER'S REMEDIES—CANCELLATION OF ORDER—DAMAGES.—The defendant signed an order by which he agreed to purchase a set of books from the plaintiff book dealer. The order stated that it was not subject to cancellation. The books were to be delivered to any express company, expressage to be paid by the purchaser. The day after he signed the order, the defendant wrote a letter cancelling it. The plaintiff delivered the books to the express company and the defendant refused to accept them. It did not appear clearly whether the letter cancelling the order was received before or after delivery to the express company. *Held,* that the plaintiff should recover the contract price. *Lewis v. Scoville* (1919, Conn.) 108 Atl. 501.

The court said that title passed when the books were delivered to the express company regardless of the time when the letter of revocation reached the plaintiff. It assumed, therefore, that the plaintiff had an irrevocable power to pass title. *Cf.* Corbin, *Offer and Acceptance* (1917) 26 YALE LAW JOURNAL, 169. It was admitted, however, that this would not be the case if the goods were to be manufactured, because the damages might then be increased by such a rule. In direct conflict with the principal case, it has been held that the vendor's power to pass title ceased to exist on receipt of notice of revocation prior to appropriating the goods to the contract. *Consolidated Ribbon & Carbon Co. v. Crane Co.* (1913) 183 Ill. App. 392; *Phillips-Jones Co. v. Blackstock, Hale & Morgan* (1919, Ga. App.) 99 S. E. 48. The rule in the principal case has been defended. Williston, *Sales* (1909) sec. 562, and cases there cited. But in the cases there cited it seems that the goods were either appropriated to the contract prior to revocation, or the vendor, acting as so-called agent for the vendee, having already resold the goods, was allowed to recover the difference between the amount realized and the contract price. See *Magnes v. Sioux City Nursery & Seed Co.* (1900) 14 Colo. App. 219, 59 Pac. 879; *Ackerman v. Rubens* (1901) 167 N. Y. 405, 60 N. E. 750. Where the goods contracted for are of a peculiar nature and cannot be readily resold, there appears to be good reason to sustain the rule of the principal case, which amounts to specific performance. See Anson, *Contract* (3d Amer. ed. by Corbin, 1919) 446; Uniform Sales Act (1906) sec. 63 (3). But where standard goods are involved, the only basis for such remedy would be that if the contract was not enforced, the damages (being limited to the difference between the market price and the contract price) would be inadequate, leaving the vendor wholly without compensation for the overhead incurred in making the sale. The rule in the principal case goes to the other extreme, and tends to increase the damages caused, because the vendor in most cases could dispose of the goods at less sacrifice and expense than the vendee. It is doubtful whether the decision can be brought within the provisions of the Sales Act. See Uniform Sales Act (1906) secs. 17 and 19, rule 4 (1), which were not cited. An ideal rule of damages would take a middle ground, refusing what amounts to specific performance, but admitting recovery of all damage suffered, including the marketing-overhead.

TAXATION—ASSESSMENT FOR PAVING—BENEFIT TO PROPERTY—RAILROAD "RIGHT OF WAY."—The plaintiff city paved a street on which abutted land of the defendant railroad consisting of two lots, one directly abutting and the other adjacent to that. The defendant having refused to pay the special assessment laid on the property to cover the expense of paving, the plaintiff sued to enforce the same. *Held,* that the assessment could not be enforced, because the lots

were part of the defendant's "right of way" and as such were not benefited by the improvement of the street. *Johnston City v. Chicago & Eastern R. R.* (1919, Ill.) 124 N. E. 568.

As a general rule land used solely as a railroad "right of way" is held not to be benefited by the improvement of an adjacent street and cannot be assessed. *Village of River Forest v. Chicago & Northwestern Ry.* (1902) 197 Ill. 344, 64 N. E. 364; *Chicago, M. & St. P. Ry. v. City of Milwaukee* (1895) 89 Wis. 506, 62 N. W. 417; *People ex rel. Davidson v. Gilon* (1891) 126 N. Y. 147, 27 N. E. 282; *City of Highwood v. Chicago & Northwestern Ry.* (1916) 276 Ill. 98, 114 N. E. 585. If, however, special benefit can be shown, for example, greater facility in reaching the station or buildings on a part of the "right of way," the power to assess may exist. *City of Kankakee v. Illinois Central R. R.* (1913) 257 Ill. 298, 100 N. E. 996; see *Hammett v. Philadelphia* (1870) 65 Pa. 146; but *cf. New York & New Haven R. R. v. City of New Haven* (1875) 42 Conn. 279. But a probable increase in freight traffic and general business is not considered to be a special benefit to the "right of way." *City of Kankakee v. Illinois Central R. R.* (1914) 264 Ill. 69, 105 N. E. 734. When land belonging to the railroad may and can be used for other purposes than that of a mere "right of way," the power exists to assess it for the improvements to the adjacent street. *New York, New Haven & Hartford R. R. v. City of New Britain* (1881) 49 Conn. 40. The soundness of the instant decision hinges on the assumption made by the court that the parcels of land in question were part of the "right of way" and were restricted to or permanently intended for that use only.

TAXATION—CONSTITUTIONALITY—PUBLIC PURPOSE—BOUNTIES—SOLDIERS' BONUS LAWS.—An action was brought to test the constitutionality of the Soldiers' Bonus Law and to restrain its enforcement. The act provided for the payment of ten dollars for each month of service, with a minimum of fifty dollars to each person who served in the armed forces of the United States during the war with Germany and Austria and who, at the time of induction, was a resident of Wisconsin "as a token of appreciation of the character and spirit of their patriotic service." Provision was made for special taxes to raise funds for such payments. *Held,* that such taxation was for a public purpose and therefore valid. *State ex rel. Atwood v. Johnson* (1919, Wis.) 175 N. W. 589.

Bounty acts passed by states since the Civil War have been generally sustained as expenditures of public funds for a public purpose, but the grounds for the decisions have varied. Some decisions proceed upon the theory that the interests of a state involve the preservation of the federal government, which bounties aid by encouraging enlistments. *Winchester v. Corinna* (1866) 55 Me. 9; *Booth v. Woodbury* (1864) 32 Conn. 118. Others support bounties because the obligations of service fall equally upon those not called into active service. *Cass Township v. Dillon* (1864) 16 Oh. St. 38; *Coffman v. Keightley* (1865) 24 Ind. 509; *contra, Ferguson v. Landram* (1866, Ky.) 1 Bush, 548. Bounties have also been sustained on the ground that a draft was thereby averted. *Hilbish v. Catherman* (1870) 64 Pa. 154; *Taylor v. Thompson* (1866) 42 Ill. 1. Where persons sued to recover bounties voted after their enlistment, recovery was denied upon the ground that there was no contractual duty to pay them the bounty which had been offered. *Amity Township v. Reed* (1869) 62 Pa. 442; *Greenwood v. DeKalb County* (1878) 90 Ill. 600. But where only the constitutionality of the payment was considered, bounties for previous enlistment were held valid. *Laughton v. Putney* (1871) 43 Vt. 485; *Brodhead v. Milwaukee* (1865) 19 Wis. 624. A bounty for the purpose of rewarding meritorious service and stimulating patriotism is valid. *Opinion of the Justices* (1912) 211 Mass. 608, 98 N. E. 338. The principal case seems in accord

with the authorities. A similar result has been reached by the Supreme Court of Minnesota in a recent case. *Gustafson v. Rhinow* (1920, Minn.) 175 N. W. 903

TORTS—LIBEL—TRADE PUBLICATION—CAUTIONARY HEADINGS.—The defendants were publishers of a weekly commercial newspaper, in which there appeared a list of names and addresses of traders and others, against whom decrees in absence had been obtained in the small debt courts. The list was popularly known as "Stubbs' Black List," although it was headed by a statement that "in no case does publication of the decree imply inability to pay on the part of any one named or anything more than the fact that the entry published appeared in the court books." The plaintiff's name appeared in the list by mistake. He brought an action for damages, claiming that the false publication implied that he "was given to refusing or delaying payment of his debts and was not a person to whom credit should be given." *Held,* that he should recover. *Stubbs, Limited v. Mazure* (1919, H. L.) 122 L. T. Rep. 5.

The principal case was distinguished from a previous case where the facts were identical, except that the plaintiff in that case alleged the innuendo that he was insolvent. It was there held that, when read in connection with the explanatory note, the alleged libelous imputation was not reasonable. *Stubbs, Limited v. Russell* (H. L.) [1913] A. C. 386. The question as to the effect of such a cautionary heading does not appear to have arisen in this country. It has been held that a false publication in a commercial paper, without such a heading, that a judgment had been rendered against a trader was not libelous *per se* and that proof of special damage was a condition precedent to recovery. *Giacona & Son v. Bradstreet Co.* (1896) 48 La. Ann. 1191, 20 So. 706; *Woodruff v. Bradstreet Co.* (1889) 116 N. Y. 217, 22 N. E. 354. The discussions in these cases were based on the ground that such a statement did not imply insolvency. The courts evidently did not consider the other innuendo, that the one named was slow to pay. But where a statement was published that a corporation had been sued for an amount greater than its capital stock, it was held to be libelous *per se*. *Pacific Packing Co. v. Bradstreet Co.* (1914) 25 Ida. 696, 139 Pac. 1007. Similarly, where it was falsely stated that a partnership had been "attached." *McKenzie v. Denver Times Pub. Co.* (1893) 3 Colo. App. 554, 34 Pac. 577. It seems clear that to charge a business man with a tendency to avoid the payment of his debts is libelous. *Cf. Nichols v. Daily Reporter Co.* (1905) 30 Utah, 74, 83 Pac. 573. The same is true of placarding a false debt of a private individual. *Cf. Thompson v. Adelberg & Berman* (1918) 181 Ky. 487, 205 S. W. 558. As to privilege in publications by trading associations, see (1919) 28 YALE LAW JOURNAL, 608. The decision in the principal case is salutary in that it distinctly limits the power of a publisher to avoid liability for false statements by merely printing a cautionary heading at the top of what is in fact known and used as a "black list." Such a headnote, it is submitted, does not in fact lessen the injurious character of the publication.