CURRENT DECISIONS

BILLS AND NOTES—POST-DATED CHECKS—EFFECT OF TRANSFER BEFORE THE DUE DATE.—The defendant delivered a check on March 6th and dated it March 7th, with the understanding that it should not be presented for payment until that date. It was, however, negotiated to the plaintiff for value without notice on the 6th. On the 7th the defendant ordered payment stopped. An action was then brought on the check. *Held,* that the plaintiff should recover. *American National Bank v. Wheeler* (1919, Calif. App.) 187 Pac. 128.

The court in the principal case correctly treated the check as fully negotiable though post-dated. For a discussion of the status of post-dated checks, see COMMENT (1920) 29 YALE LAW JOURNAL, 321.

CONSTITUTIONAL LAW—INCOME TAX—STOCK DIVIDENDS AS INCOME.—In January, 1916, the Standard Oil Company of California, which then had surplus and undivided profits almost equaling the par value of its outstanding capital stock, issued additional shares of its capital stock to the amount of fifty per cent of that outstanding and transferred from its surplus account to its capital stock account an amount equivalent to the par value of the stock so issued. The plaintiff, having paid under protest, an income tax computed upon the par value of 18.07 per cent of the stock so issued (the percentage which the government computed had been earned since March 1, 1913, the date taken as approximating that of the adoption of the Sixteenth Amendment), brought suit against the collector of internal revenue to recover the amount so paid. *Held* (four Justices *dissenting*), that the plaintiff should recover since Rev. Act, Sept. 8, 1916, ch. 463, sec. 2a, 39 Stat. L. 756, attempting to levy a tax upon stock dividends without apportionment according to population is unconstitutional, such "dividends" not being income and hence not within the Sixteenth Amendment. *Eisner v. Macomber* (1920) 40 Sup. Ct. 189.

See ARTICLE, *supra,* p. 735.

CONSTITUTIONAL LAW—FULL FAITH AND CREDIT TO JUDGMENTS OF OTHER STATES.—The defendants by their wrongful acts in Alabama had caused the death in that state of the plaintiff's intestate, for which the plaintiff obtained judgment in the courts of that state. The judgment not having been paid, the plaintiff brought the present action in Illinois upon it. An Illinois statute provided that "no action shall be brought in this state to recover damages for a death occurring outside of this state." The Supreme Court of Illinois sustained a plea to the jurisdiction. *Held,* that the judgment was erroneous as a violation of Article 4, section 1 of the federal Constitution. *Kenney v. Supreme Lodge, etc., Loyal Order of Moose* (April 19, 1920) U. S. Sup. Ct. Oct. Term, 1919, Nos. 269 and 303.

The decision of the Illinois Supreme Court in this case was severely criticised and the present view of the Supreme Court advanced in (1919) 28 YALE LAW JOURNAL, 264. As was there pointed out, to adopt the view of the Illinois court meant the nullification of the full faith and credit clause, in effect, and was directly contrary to the decision of the Supreme Court in *Fauntleroy v. Lum* (1908) 210 U. S. 230, 28 Sup. Ct. 641. The Supreme Court has so held in the principal case, and limited an earlier decision, opposed in its dicta, at least, to its particular facts. See *Anglo-American Provision Co. v. Davis Co.* (1903) 191 U. S. 373, 24 Sup. Ct. 92, (1919) 28 YALE LAW JOURNAL, 267, note 6a.

CONTRACTS—CONSIDERATION—ACTS DONE IN RELIANCE UPON A PROMISE.—The decedent left an informal document, which was ineffective as a will because not witnessed. In this paper the intestate cut off the defendant, his brother, with a legacy of ten dollars. After this document was found all of the heirs and the distributees of the estate mutually agreed to carry out the wishes of the intestate and to consider the document as his last will and testament. In pursuance of this agreement, three of the heirs moved from their own home to the homestead of the decedent and carried on the farm and milk route of the decedent, one of the heirs giving up his own business to do so. Subsequently the defendant refused to carry out the agreement on the ground that their signatures had been obtained by misrepresentation, and the other heirs sued for specific performance. *Held,* that the plaintiffs should have specific performance. *Capen v. Capen* (1920, Mass.) 125 N. E. 692.

The court properly found consideration in the payment to be made to the defendant, in the mutuality of the promises, and in the various acts done by certain of the plaintiffs in reliance upon the promise of the defendants, although these acts clearly appear not to have been an inducing cause of the promise. See Corbin, *Does a Pre-Existing Duty Defeat Consideration?* (1918) 27 YALE LAW JOURNAL, 362, 366; see also the cases collected in Anson, *Contract* (3d Am. ed. by Corbin, 1919) sec. 127 and notes.

CONTRACTS—UNILATERAL CONTRACT—PAST CONSIDERATION—BROKER'S COMMISSION.—The plaintiff negotiated with the Aetna Explosives Company on behalf of the defendant, perhaps without authority, the result being that the defendant later contracted with that company to supply it with six hundred tons of sulphuric acid per month for twelve months at twenty-seven dollars per ton, specifically promising the Aetna Company in that contract to pay the plaintiff as broker a commission of one per cent, "said brokerage to be paid as payments of the price were received by the defendant." After a few small deliveries had been made, on which the commission was paid to the plaintiff, the Aetna Company got into financial difficulties; it agreed with the defendant to rescind the contract for acid and paid to the defendant the sum of $45,000 as consideration. *Held,* that the defendant was bound to pay the agreed commission on the agreed purchase price of the entire amount of acid, and not merely on the $45,000 received, whether the defendant had employed the plaintiff as broker or merely promised to pay for his services knowing that they had been rendered with expectation of pay from him. *Suter v. Farmers' Fertilizer Co.* (1919, Ohio) 126 N. E. 304.

See COMMENTS, *supra,* p. 767.

CONTRACTS—WRITTEN DOCUMENTS—PAROL AGREEMENTS.—The plaintiff sued on a written document signed by the defendant in which the defendant promised to pay for a book to be compiled by the plaintiff and delivered at a future date. Evidence was admitted to show that this document was accompanied by an oral agreement that it should become operative only when the defendant should notify the plaintiff of his willingness to have it become a contract, and that he had not thus notified the plaintiff. *Held,* that the plaintiff should not recover. *Massachusetts Biographical Society v. Howard* (1920, Mass.) 125 N. E. 605.

This is in accordance with the general rule. Although the document was not signed by the plaintiff and contained no express promise by him to perform the work specified, yet the court apparently assumed that such a promise should be implied in fact. *American Publishing Company v. Walker* (1901) 87 Mo. App. 503; *Sanford v. Brown* (1913) 208 N. Y. 90, 101 N. E. 797; *Doolittle v. Callender* (1911) 88 Neb. 747, 130 N. W. 436. The evidence relating to the oral agreement was clearly admissible, because it shows, not only that the document

was never an *operative fact* in itself but also that there was never any contract at all. See Corbin, *Conditions in the Law of Contract* (1919) 28 YALE LAW JOURNAL, 739, 764-68.

DAMAGES—CHARITABLE CORPORATIONS—DUTY TO PAY DAMAGES CAUSED BY THE NEGLIGENCE OF EMPLOYEE.—The defendant maintained a hospital having a regular schedule of charges, also taking free patients. The decedent, a pay patient known to be delirious, was left unguarded in a room with a window partly open. A nurse, after a short absence, found the window wide open and the patient dead upon the ground beneath. The decedent's administrator sued the defendant claiming that the latter was under a duty to pay damages because of negligence. *Held,* that he should recover. *Mulliner v. Evangelischer etc. Synod of North America* (1920, Minn.) 175 N. W. 699.

The court, after a review of the theories for holding or exempting a charitable corporation for the negligence of its employees, soundly held that the better reasoning and public policy required that they be held "liable." See in accord, *Roosen v. Peter Bent Brigham Hospital* (1920, Mass.) 126 N. E. 392; see (1918) 27 YALE LAW JOURNAL, 951. Hospitals conducted for gain are invariably held "liable." See *Meridian Sanatorium v. Scruggs* (1920, Miss.) 83 So. 532, 534. But charitable corporations were until lately held immune. See (1917) 26 YALE LAW JOURNAL, 791.

EVIDENCE—DYING DECLARATIONS—CREDIBILITY.—In a trial for murder the counsel for the state offered in evidence certain declarations of the decedent as dying declarations. The presiding justice directed the jury to retire while he heard the testimony of five witnesses as to the declarations of the decedent and the conditions under which they were made. Having decided that the declarations were admissible, the same witnesses were permitted to testify before the jury as to the condition of the decedent, his realization of impending death, and as to the declarations. *Held,* that such procedure was proper and that it remained for the jury to determine from all the circumstances the credibility of the declarations. *State v. Bordeleau* (1920, Me.) 108 Atl. 464.

The decision is in accord with the authorities. The court decides from all the circumstances under which the declarations were made, their contents, and form, whether or not they are admissible. The credibility of the declarations is, of course, a question for the jury and they may receive evidence of the situation in which the declarations were made. See 52 L. R. A. (N. S.) 152; 16 *ibid.,* 660; (1907) 16 YALE LAW JOURNAL, 432.

EVIDENCE—RES GESTAE—SPONTANEOUS EXCLAMATION THEORY.—One Yarborough was in charge of a turpentine camp composed almost wholly of negroes. One Bostick, known as "It," lived with a woman at a place conducted as a saloon. The woman was heard outside at night quarreling with someone, and Yarborough came up with a shot-gun and tried to take away this person's pistol. It went off and mortally wounded him. Within five minutes he said to the first white witness who came up, "Old It shot me." This was excluded, and the accused, Yarborough's cook, was convicted of murder, for he was said to have been chasing the woman to get back money of his which she had stolen. *Held,* that the conviction was error, because, *inter alia,* it was a *res gestae* statement and should have been admitted. *Johnson v. State* (1920, Tex. Cr. App.) 218 S. W. 496.

In the attempt to make more orderly the catchall of the exceptions to the hearsay rule, two theories have been advanced. The one is that the statement to be admissible must be substantially contemporaneous, and that the witness from his own observation of the circumstances shall be able in a measure to substantiate the truth of the declarant's statement. See Thayer, *Bedingfield's Case* (1881) 15 AM. L. REV. 71, 83. The other is the theory of Dean Wigmore,

that the statement need not be contemporaneous, but must be uttered under the stress of some startling occurrence, and within such a time after the occurrence that the excitement is still controlling the declarant and preventing any possible fabrication. 3 Wigmore, *Evidence* (1905) sec. 1747. It is clear that the statement in the above case is admissible under this latter theory, but it is hard to see how it meets the requirement of Dean Thayer's view. It seems obvious that a serious miscarriage of justice might take place if the statement were not admitted, and that in this case the spontaneous exclamation theory is preferable. For a note showing the confusion in the *res gestae* cases see (1914) 23 YALE LAW JOURNAL, 282.

HIGHWAYS—"RIGHT OF WAY"—SLEDS.—The plaintiff was injured in a collision between a double-runner plank sled, on which she was riding, and the defendant's buggy. The defendant, who was driving up the hill, failed to turn to the right of the beaten path on the icy road, although warned by the shouts of those at the foot of the hill and the approaching light on the sled. The plaintiff sued for damages. *Held,* that she should recover, because the coaster had an equal privilege with a horse-drawn vehicle to the use of the road, and the defendant was negligent in failing to turn out after the warning, although the plaintiff had been equally negligent in attempting the ride. *Roennau v. Whitson* (1920, Iowa) 175 N. W. 849.

The instant case in holding that the coaster had a privilege to use the road accords with the weight of authority that coasting on country roads is not a nuisance *per se*. See note 42 L. R. A. (N. S.) 865. But if the road is a much traveled public highway and the sled used carried several persons, it would seem otherwise. See *Reusch v. Licking Rolling Mills Co.* (1904) 118 Ky. 369, 372, 80 S. W. 1168; see *Eastburn v. United States Exp. Co.* (1909) 225 Pa. 33, 38, 73 Atl. 977, 979. Nor does the sound view on last clear chance stand in the way of recovery. See (1920) 29 YALE LAW JOURNAL, 542, 697.

INTERNATIONAL LAW—PRIZE—CARGO CONSIGNED TO ENEMY SUBSIDIARY OF AMERICAN CORPORATION.—The Vacuum Oil Company of New York shipped a quantity of oil f. o. b. to its Australian and German subsidiary corporations on a German vessel. The American corporation undertook by agreement with its subsidiaries to assume any loss arising from their failure to receive the cargo. The stock of the European subsidiaries was owned practically entirely by the parent company in the United States. The ship and cargo were seized as prize. The parent company sought restoration of the goods. *Held,* that the goods must be condemned, since the parent company was not the owner. *The Kronprinzessin Cecilie (Part Cargo ex)* (1919, P. C.) 121 Law T. Rep. 457.

See COMMENT, *supra,* p. 772.

MALICIOUS PROSECUTION—REASONABLE AND PROBABLE CAUSE.—The complaint in an action for malicious prosecution charged that the defendant, without probable cause, by falsely testifying before the grand jury procured the indictment of the plaintiff upon which he was subsequently tried and acquitted. *Held,* that the plaintiff should recover. *Johnson v. Brady* (1920, Ind. App.) 126 N. E. 250.

The instant case seems sound and in accord with the weight of authority. The court based its decision upon the grounds that if the evidence showed that the defendant at no time believed the plaintiff to have been guilty of the alleged larceny, and if he caused the indictment of the plaintiff, it was without probable cause, and malice may be inferred. For the effect of a reversed judgment as evidence in malicious prosecution, see COMMENT (1920) 29 YALE LAW JOURNAL, 325. For a discussion of other phases of the problems involved in the instant case, see COMMENT (1916) 25 *ibid.,* 328; (1909) 18 *ibid.,* 433.

MARRIAGE AND DIVORCE—ALIENATION OF AFFECTIONS—ABATEMENT OF ACTION BY DEATH.—The plaintiff sued for the alienation of his wife's affections. Before the case was tried the plaintiff died and the lower court held that under section 4569 of Shannon's Code of Civil Procedure, which provided that actions for wrongs affecting the character of the plaintiff should abate by the death of either party, the action was abated. From this judgment the administrator of the plaintiff appealed on the ground that the suit should be revived in the name of the administrator. *Held,* that the judgment was correct. *Justice v. Clinard* (1920, Tenn.) 217 S. W. 663.

Both parties conceded that the action would abate at common law, so this case turns upon the interpretation of a particular provision in the Tennessee code. For an earlier interpretation that this statute covers actions for breach of promise of marriage, see *Weeks v. May* (1889) 87 Tenn. 443, 10 S. W. 771, 3 L. R. A. 212, note.

MARRIAGE AND DIVORCE—RIGHT TO HAVE A DIVORCE—CRUELTY.—A wife sued for divorce, alleging cruelty. Some of the facts presented to the court were that during the twenty-two months of married life, the defendant repeatedly called the plaintiff abusive names; had not accompanied her anywhere except upon two or three occasions, but spent his evenings with friends; and that he talked to her "just as little as he could get along with." His attitude toward her was one of cold and studied indifference; although he was thrifty and industrious and made adequate provision in material things. *Held,* that a decree of divorce should be granted. *Kreplin v. Kreplin* (1920, Wash.) 188 Pac. 14.

Whether the inference, that such "cruelty" was perpetrated as to create a right to have a divorce, is proper depends upon the existence of a variable aggregate of facts; for "what would be cruel to a delicate, sensitive woman might not be so to a brawling fishwife." *Button v. Button* (1920, Ore.) 188 Pac. 180. For an examination of different combinations of facts which have been held to constitute "cruelty," which operated to create a right to have a divorce, see COMMENT (1911) 20 YALE LAW JOURNAL, 581.

STATUTE OF FRAUDS—PAROL GIFT OF LANDS—ENFORCIBILITY.—The plaintiff brought a writ of entry. The defendant claimed a right to recover for improvements made, under a betterment statute, which allowed such claims where the land was occupied under a supposed legal title for more than six years. *Held,* that the defendant should not recover, because he had been in possession under the "license" of the plaintiff, with a *dictum* that one who has taken possession of land under a verbal gift from the owner and made permanent improvements thereon should have a decree of specific performance of the gift. *Phelan v. Adam* (1920, N. H.) 108 Atl. 814.

The *dictum* is in accord with the great weight of authority. See 5 Pomeroy, *Equity Jurisprudence* (2d ed. 1919) sec. 2250. The few jurisdictions which do not grant specific performance in such cases recognize the promisee's right to reimbursement for improvements and to a lien upon the land to secure payment of their value. *Cf. Glass v. Gaines* (1891) 13 Ky. L. Rep. 277, 17 S. W. 161. See *Coggins v. McKinney* (1919, S. C.) 99 S. E. 844, (1920) 29 YALE LAW JOURNAL, 357.