RECENT CASE NOTES

BANKRUPTCY—SALES FREE FROM LIENS—SUBROGATION OF SURETY.—One Brown was surety on notes of one Thompson. The notes were reduced to judgment and secured by attachment liens on land about a year before Thompson was adjudged a bankrupt, and Brown as surety paid part of the judgments. The trustees in bankruptcy sold the land free from liens under a compromise agreement with other judgment creditors, to which arrangement the surety was not a party. The grantee of the land now seeks to enjoin further prosecution of equity suits by the surety for the enforcement of the liens. *Held,* that the surety was subrogated to the rights of the creditors under the attachment liens and was not estopped to enforce them against the land by reason of the sale free from incumbrances. *In re Thompson* (1923, W. D. Pa.) 288 Fed. 385.

The present Bankruptcy Act makes no express provision for the sale of the bankrupt's assets free from liens. Because such a proceeding is often desirable in order to simplify and speed up administration of the bankrupt estate, it was early held, in reliance upon decisions under prior acts, that the courts might authorize sales free from liens, rendering to mortgagees and lienors their respective priorities in the proceeds. *In re Pittelkow* (1899, E. D. Wis.) 92 Fed. 901; *In re Keet* (1903, M. D. Pa.) 128 Fed. 651; *In re Union Trust Co.* (1903, C. C. A. 1st) 122 Fed. 937. But it must first appear that the sale free from liens will probably result in substantial benefit to the unsecured creditors without prejudicing the lienors. See *In re Harralson* (1910, C. C. A. 8th) 179 Fed. 490; *In re Progressive Wall Paper Co.* (1915, N. D. N. Y.) 222 Fed. 87. And sufficient notice must be given to all parties vitally concerned so that they have a full opportunity to be heard. See *In re Kohl-Hepp Brick Co.* (1910, C. C. A. 2d) 176 Fed. 340. At common law upon his satisfaction of the amount due, a surety is by the right of subrogation entitled to all the means held by the creditor for enforcing payment of that particular claim. *State Bank v. Smith* (1898) 155 N. Y. 185, 49 N. E. 680; *Huffmond v. Bence* (1891) 128 Ind. 131, 27 N. E. 347; *Lidderdale's Ex'rs v. Robinson's Ex'r* (1827, U. S.) 12 Wheat. 594; Spencer, *Suretyship* (1913) sec. 140. And in state court proceedings, such subrogation is conditioned on payment of the entire amount due. *Stamford Bank v. Benedict* (1843) 15 Conn. 437; *Musgrave v. Dickson* (1896) 172 Pa. 629, 33 Atl. 705; Spencer, *op. cit. supra,* secs. 134, 136. The Bankruptcy Act, however, specifically provides that a surety paying in whole or in part shall be subrogated to that extent to the rights of the creditor. Sec. 57 (i). Where there is a valid attachment lien against specific property, it seems that the lienor should have, in the event of a sale free from incumbrances, a prior claim against the proceeds to which the surety should be subrogated *pro tanto.* In that way only could the power of sale free from incumbrances be exercised without departure from the letter of the Act. But as in the instant case, the sale to which the surety was not a party should not affect his rights.

CARRIERS—DEPENDENT SERVICES—GRANT OF EXCLUSIVE PRIVILEGE.—The plaintiff granted a taxi company the exclusive privilege of soliciting trade at its depot. The defendants, competing taxi operators, continued to await passengers on the plaintiff's property. Plaintiff sought to enjoin defendants from entering upon the station grounds for the purpose of securing fares. *Held,* (two judges *dissenting*) that the injunction should not be granted. *Kansas City Terminal Ry. v. James* (1923, Mo.) 251 S. W. 53.

Two of the majority judges based their decision upon Art. 12, sec. 23 of the Missouri constitution prohibiting "discrimination in charges or facilities in trans-

portation . . . . between transportation companies and individuals." But this provision applies only to discrimination between users of the railroad as a carrier. *Skaggs v. Kansas City Terminal Co.* (1916, W. D. Mo.) 233 Fed. 827; *Old Colony R. R. v. Tripp* (1888) 147 Mass. 35, 17 N. E. 89; *contra: Kalamazoo Hack & Bus Co. v. Sootsma* (1890) 84 Mich. 194, 47 N. W. 667. The other three judges adopted a minority view that the exclusive contract is void as against public policy. *State v. Reed* (1898) 76 Miss. 211, 24 So. 308; *Palmer Transfer Co. v. Anderson* (1909) 131 Ky. 217, 115 S. W. 182. The dissenting opinion is in accord with the great weight of authority that if the service under the exclusive contract is adequate for the public, the exclusion of competitors is reasonable regulation. *Donovan v. Penn R. R.* (1905) 199 U. S. 279, 26 Sup. Ct. 91; *N. Y. Cent. & H. R. R. R. v. Ryan* (1911, Sup. Ct.) 71 Misc. 241, 129 N. Y. Supp. 55; *Trompson's Express Co. v. Mount* (1920) 91 N. J. Eq. 497, 111 Atl. 173. But even in jurisdictions adopting this view, competitors will not be enjoined if the exclusion is clearly harmful to the public interest. *Philadelphia & Camden Ferry Co. v. Johnson* (1923, N. J. Ch.) 121 Atl. 900. It seems that the railroad is under no duty to permit taxicab owners to come on its premises except as its duty of public service requires it. Wyman, *Public Service Corporations* (1911) sec. 472. And it has been held that the travelling public is best served when only one responsible company solicits business at a railway station. *N. Y., N. H. & H., R. R. v. Scovill* (1898) 71 Conn. 136, 41 Atl. 246; *contra:* Wyman, *op. cit. supra,* sec. 485. The desirability of exclusive service should be determined with reference to local conditions, and is a matter peculiarly adapted for regulation by a public service commission. *United Commercial Travellers v. Marshal Bros. Livery* [1918 E] Pub. Ut. Rep. (Mo.) 391; *Rose v. Pub. Ser. Com.* (1914) 75 W. Va. 1; 83 S. E. 85.

CORPORATIONS—PROMOTERS' CONTRACTS—ACCEPTANCE OF BENEFITS BY CORPORATION AN ADOPTION.—The plaintiff delivered building materials pursuant to a contract with the promoters of the defendant club before its incorporation. After incorporation, the club through its president gave a note to cover the amount due for the materials. About a month prior to the final delivery of all the material the corporation acquired title to the lots upon which the deliveries had been made. The plaintiff subsequently filed a materialman's lien against this property, and sued to foreclose the lien. *Held,* that the corporation adopted the contract and that the plaintiff could foreclose his lien for the amount of the note. *Breckenridge City Club v. Hardin* (1923, Tex. Civ. App.) 253 S. W. 873.

It has been held that a contract made on behalf of a non-existent corporation is a nullity. *Hudson v. Portland Ry.* (1923, Or.) 211 Pac. 897. And that an attempted ratification by the company after incorporation cannot give it validity, since it would relate back to a time when no principal was in existence. *Bagot Tyre Co. v. Clipper Tyre Co.* [1902] 1 Ch. 146; *contra: Stanton v. New York Ry.* (1890) 59 Conn. 272, 22 Atl. 300. It is also urged that it would enable the promoters to prejudice the rights of future stockholders. *Reiff v. Nebraska Co.* (1921, C. C. A. 8th) 277 Fed. 417. In England and Massachusetts a new contract is required to make the corporation liable. *Howard v. Patent Co.* (1888) L. R. 38 Ch. 156; *Whiting v. Barton* (1910) 204 Mass. 169, 90 N. E. 528. And the acceptance of benefits will then create at most a quasi-contractual obligation. *Lumsden v. Shipcote Co.* [1906] 2 K. B. 433. By the majority American view, however, the corporation may adopt the promoters' contract. *Morgan v. Bon Bon Co.* (1917) 222 N. Y. 22, 118 N. E. 205; (1918) 18 COL. L. REV. 275. Or treat it as a continuing offer which the corporation may accept. *Hackbarth v. Wilson Lumber Co.* (1923, Idaho) 212 Pac. 969. An acceptance of the benefits of the contract with knowledge of the incidental burdens constitutes an adoption. *Morgan v. Bon Bon Co., supra.* But the corporate liability dates only from the time of the

adoption. *McArthur v. Times Printing Co.* (1892) 48 Minn. 319, 51 N. W. 216; 1 Fletcher, *Cyclopedia Corporations* (1917) sec. 152. A few states impose liability from the time of the original contract either on the ground of estoppel or as a novation. *Packer v. Frank* (1922, Sup. Ct.) 119 Misc. 398, 196 N. Y. Supp. 289; *Weatherford v. Granger* (1894) 86 Tex. 350, 24 S. W. 795; *Harrill v. Davis* (1909, C. C. A. 8th) 168 Fed. 187; *contra: Fuller v. Stout* (1917) 66 Okla. 15, 166 Pac. 898. And the execution of a note in recognition of the promoters' contract has been held to constitute such a novation. *Paxton v. First National Bank* (1887) 21 Neb. 621, 33 N. W. 271. Otherwise where the corporation merely purchases lots upon which materials had been delivered. The promoters cannot charge with a mechanic's lien property afterwards acquired by the corporation. *Tryber v. Girard Co.* (1903) 67 Kan. 489, 73 Pac. 83. But a new contract made by the corporation after the work is finished, and with knowledge of all the facts, may support such a lien. *Waddy Creamery v. Davis Mfg. Co.* (1898) 103 Ky. 579, 45 S. W. 895.

DAMAGES—MALICIOUS PROSECUTION—AWARD OF EXCESSIVE EXEMPLARY DAMAGES BY JURY.—The plaintiff left the defendant and married after having illicit relations with him over a period of years. On her refusal to return, the defendant prosecuted her for swindling and had her arrested as a fugitive from justice. The plaintiff was discharged and brought an action for malicious prosecution. The jury rendered a verdict for two thousand dollars compensatory, and eight thousand dollars exemplary damages. The defendant appealed, alleging that the verdict was excessive. *Held,* that the verdict was not excessive. *Foster v. Bourgeois* (1923, Tex. Civ. App.) 253 S. W. 880.

The general rule allowing exemplary or punitive damages, where the defendant's conduct is wanton or malicious, proceeds on the theory of punishment or example. Inasmuch as it allows a plaintiff to recover more than he has lost, it has been subjected to much adverse criticism. 3 Parsons, *Contracts* (9th ed. 1901) 187; Hartmann, *Exemplary Damages a Deformity in Our Law* (1918) 2 MARQUETTE L. REV. 57. In contract cases such damages are awarded only in actions for breach of promise of marriage, where there are circumstances of humiliation or abruptness. *Thorn v. Knapp* (1870) 42 N. Y. 474; see *Trout v. Watkins Livery Co.* (1910) 148 Mo. App. 621, 130 S. W. 136. A few jurisdictions refuse to allow damages in excess of compensation in any case, in the absence of statute. *Fay v. Parker* (1872) 53 N. H. 342; *Ellis v. Brockton Pub. Co.* (1908) 198 Mass. 538, 84 N. E. 1018. In at least one jurisdiction so-called punitive damages are limited to the expense of suit, and hence are really compensatory. *Malley v. Lane* (1921) 97 Conn. 133, 115 Atl. 674. It has been suggested that the award of exemplary damages, being in the nature of a fine, places a defendant in double jeopardy, when the wrong for which he is being sued is also a crime. Marr, *The Punitive Damages Heresy* (1917) 2 So. L. QUART. 1, 10. And it has been held that they cannot be assessed in such cases. *Anderson v. Evansville Brewing Assoc.* (1912) 49 Ind. App. 403, 97 N. E. 445; *contra: Wirsing v. Smith* (1908) 222 Pa. 8, 70 Atl. 906. It has also been held that to compel a witness to testify to matters which would make him liable to exemplary damages violates the privilege against self-incrimination. *Wilson v. Union Tool Co.* (1921, S. D. Calif.) 275 Fed. 624; *contra: Southern R. R. v. Bush* (1898) 122 Ala. 470, 26 So. 168. The amount of exemplary damages is ordinarily for the jury. *Rogers v. Bigelow* (1915) 90 Vt. 41, 96 Atl. 417. But the verdict may be set aside if so excessive as to indicate undue passion or prejudice. *Louisville & Nashville Ry. v. Roth* (1908) 130 Ky. 759, 114 S. W. 264; Bauer, *Excessive Exemplary Damages* (1918) 52 AM. L. REV. 11. In the instant case the court might well have done this. Even the possible legitimate indignation of the jury does not seem to justify such large damages.

EVIDENCE—COMPARISON OF HANDWRITING—ADMISSIBILITY OF RELEVANT HANDWRITING WHEN PREJUDICIAL.—The defendant was prosecuted for uttering a forged check, and at the trial the sole issue was whether the signature on the forged check was in the defendant's handwriting. The state, over objection by the defendant's counsel, was permitted to put in evidence other forged checks alleged to have been written by the defendant for the purpose of comparison. *Held,* (one judge *dissenting*) that even genuine handwriting should not be used for the purpose of comparison if it tends to establish irrelevant or prejudicial matter. *State v. Lyle* (1923, S. C.) 118 S. E. 803.

Most jurisdictions, by statute or judicial decision, allow comparisons of handwriting with any writing admitted or proved to be genuine. *Turnure v. Breitung* (1921) 195 App. Div. 200, 186 N. Y. Supp. 620; *Lyon v. Lyman* (1831) 9 Conn. 55; 62 L. R. A. 817, note; (1921) 34 HARV. L. REV. 788. Genuine writings even when otherwise irrelevant are admissible for such comparison. *University of Illinois v. Spalding* (1901) 71 N. H. 163, 51 Atl. 731; *Williams v. Williams* (1912) 109 Me. 537, 85 Atl. 43; (1921) 30 YALE LAW JOURNAL, 524; *contra: Sulzby v. Palmer* (1916) 194 Ala. 524, 70 So. 1. But such evidence is restricted to actual juxtaposition of the two writings for the purpose of identifying the author of the disputed writing. *Travis v. Brown* (1862) 43 Pa. 9; 3 Chamberlayne, *Modern Law of Evidence* (1912) sec. 2214a; 4 Wigmore, *Evidence* (2d ed. 1923) sec. 1992. Generally the admission of a writing as a standard of comparison is at the discretion of the trial judge. *Williams v. Williams, supra.* But the decision is reviewable on appeal. *Brantley v. State* (1922, Fla.) 94 So. 678. Specimens of handwriting already part of the record or in the case for other purposes are always available for comparison. *Stokes v. United States* (1895) 157 U. S. 187, 15 Sup. Ct. 617; *Webb v. Bryant* (1923, Ala.) 96 So. 907; 9 Ann. Cas. 451, note. This is true though the specimen contains prejudicial matter. *People v. Bibby* (1891) 91 Calif. 470, 27 Pac. 781; *Fry v. State* (1919) 86 Tex. Cr. 73, 215 S. W. 560. But a specimen not in the record, though relevant, may be excluded when others are available, if it contains matter prejudicial to the other party. *Gambrill v. Schooley* (1902) 95 Md. 260, 52 Atl. 500; 63 L. R. A. 427, note. The same rule has been applied where other specimens are not available. *Hatch v. State* (1879) 6 Tex. Cr. App. 384; *Cox v. State* (1909) 162 Ala. 66, 50 So. 398; see *Mississippi Lumber Co. v. Kelly* (1905) 19 S. D. 577, 104 N. W. 265; but *cf. Gambrill v. Schooley, supra.* This view seems sound, as the danger of an unfair selection and of raising collateral issues is particularly strong where a writing contains prejudicial matter. And the exclusion of such evidence is in line with holdings in analogous cases. Thus the number of specimens may be limited. *Crane v. Dexter* (1893) 5 Wash. 479, 32 Pac. 223. And where the writing was made under circumstances creating a prejudicial inference it is inadmissible. *People v. Creegan* (1898) 121 Calif. 554, 53 Pac. 1082 (possible inference of other forgeries). In the instant case there were other available standards for comparison and the court soundly excluded the offered writing.

INJUNCTION—TRESPASS TO LAND—BALANCE OF CONVENIENCE.—The defendant owned minerals underlying certain land owned by the plaintiff. The only practical method of mining the mineral was to strip the surface which was practically worthless except for pasturage. The lower court enjoined the defendant from stripping the surface. The defendant appealed. *Held,* that as the defendant's loss would be incomparably greater than the plaintiff's damage, the injunction should not have been granted. *Barker v. Mintz* (1923, Colo.) 215 Pac. 534.

Some courts have expressly refused to follow the doctrine of the instant case because it allows a wrong-doer to compel innocent persons to sell their property rights at a valuation, which is equivalent to giving a private individual the power

of eminent domain. *Lynch v. Union Institution* (1893) 158 Mass. 394, 33 N. E. 603; *Goodson v. Richardson* (1873) L. R. 9 Ch. App. 221. Others have refused on the ground that equity as a matter of course should grant an injunction against the threatened invasion of a clear property right. *Longton v. Stedman* (1914) 182 Mich. 405, 148 N. W. 738; *Mobile & Ohio Ry. v. Zimmern* (1921) 206 Ala. 37, 89 So. 475; *Moss v. Jourdan* (1922, Miss.) 92 So. 689; *Felsenthal v. Warring* (1919) 40 Calif. App. 119, 180 Pac. 67; 5 Pomeroy, *Equity Jurisprudence* (4th ed. 1919) sec. 1922. It has been suggested that the adoption of this doctrine would lead to a difficulty in predicting the action of courts of equity. NOTES (1922) 36 HARV. L. REV. 211. But notwithstanding the above objections, it seems well recognized that equity will in some cases of continuous trespasses refuse to grant an injunction. *Crescent Mining Co. v. Silver King Mining Co.* (1898) 17 Utah, 444, 54 Pac. 244; *McCann v. Chasm Power Co.* (1914) 211 N. Y. 301, 105 N. E. 416. Some courts have also "balanced the convenience" in nuisance cases. *Madison v. Ducktown Copper Co.* (1904) 113 Tenn. 331, 83 S. W. 658; *Bliss v. Anaconda Mining Co.* (1909, C. C. D. Mont.) 167 Fed. 342; *contra: Meux Brewery Co. v. City of London Elec. Light Co.* [1895] 1 Ch. 287; *State, ex rel. Hopkins, v. Excelsior Powder Mfg. Co.* (1914) 259 Mo. 254, 169 S. W. 267. A distinction has been made between nuisances and continuing trespasses in that the former are mere interferences with property while the latter amount to a deprivation. NOTES (1922) 36 HARV. L. REV. 211. But a nuisance is as much a continued invasion of a clear legal right as a trespass, and is *pro tanto* a deprivation of property. Where the general public interest is involved the courts are less willing to grant injunctions. *Frost v. Los Angeles* (1919) 181 Calif. 22, 183 Pac. 342 (supply of water by city); *Schwarzenbach v. Oneonta Power Co.* (1911) 144 App. Div. 884, 129 N. Y. Supp. 384, *affirmed* 207 N. Y. 671, 100 N. E. 1134 (overflow of water necessary to supply light and power); (1922) 31 YALE LAW JOURNAL, 330; (1920) 18 MICH. L. REV. 703; *contra: Mobile & Ohio Ry. Co. v. Zimmern, supra.* It is not always realized that in applying the doctrine of the "balance of convenience" courts not only compare the relative loss and gain to the parties in this litigation, but consider also the effect upon the community at large. Society as a whole loses if the defendant is compelled to produce his ore at a great cost while the gain to the plaintiff is only slight. The same rule of policy has often led courts to deny specific performance of covenants in cases where changed conditions caused by the lapse of time make strict performance socially undesirable. *Bochterle v. Saunders* (1913) 36 R. I. 39, 88 Atl. 803 (agreement to remove dwelling house not enforced); *Curran v. Holyoke Water Power Co.* (1874) 116 Mass. 90 (compliance with agreed boundary line not compelled); *Chicago & Alton R. R. v. Schoeneman* (1878) 90 Ill. 258 (covenant to build bridge not enforced).

INSURANCE—DEATH IN BATTLE WITHIN "ACCIDENTAL" CLAUSE.—The defendant issued a policy providing for double indemnity if death should result directly from "external, violent, and accidental" means. The insured was drafted into the United States Army and met death in battle. *Held,* that a judgment in favor of the beneficiary be affirmed. *Great Southern Life Insurance Co. v. Churchwell* (1923, Okla.) 216 Pac. 676.

The few cases on the point tend to accord with the instant case. *State Ins. Co. v. Allison* (1920, C. C. A. 5th) 269 Fed. 93; *contra: Martin v. People's Life Ins. Co.* (1920) 145 Ark. 43, 223 S. W. 389. "Accidental" in insurance policies has frequently been defined as "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected." *Barry v. United States* (1888) 131 U. S. 100, 9 Sup. Ct. 755; *Aetna Ins. Co. v. Little* (1920) 146 Ark. 70, 225 S. W. 298. But it has been held that death resulting

even from an intentional assault upon the insured is "accidental." *Kascoutas v. Federal Ins. Co.* (1921) 193 Iowa, 343, 185 N. W. 125. Unless the insured was the aggressor. *Meister v. Fire Assurance Corp.* (1919) 92 Or. 96, 179 Pac. 913. And so where a mob hanged the insured. *Fidelity Co. v. Johnson* (1894) 72 Miss. 333, 17 So. 2. The above definition must therefore be limited at least to means unexpected from the point of view of the insured. But some cases fall outside even of this limitation as it has been held that voluntary exposure to known danger does not necessarily preclude the insured from recovery, as where the insured engaged in an altercation with a drunkard while voluntarily trying to oust him from a hotel. *Lovelace v. Travellers' Assoc.* (1894) 126 Mo. 104, 28 S. W. 877. And where the insured embarked on a ship later sunk by a submarine. *Woods v. Standard Ins. Co.* (1918) 166 Wis. 504, 166 N. W. 20. And where the insured enlisted. *State Ins. Co. v. Allison, supra.* And where the insured, a volunteer in the state militia, exposed himself to sniping strikers while treating a wounded man. *Interstate Assoc. v. Lester* (1919, C. C. A. 8th) 257 Fed. 225. It seems, therefore, more in harmony with the cases to suggest that no injury may be deemed "accidental" if any intentional or reckless act of the insured contributed directly to the result, or if it was of such a nature as to have been definitely foreseen by him as it occurred. Exactly how far the insured may go in voluntary exposure is not determinable on the cases. But the instant case is well within the authorities.

INSURANCE—PAYMENT OF PREMIUMS WITH STOLEN FUNDS—RIGHT TO INSURANCE MONEY.—The insured took out a policy on his life payable to his wife and paid most of the premiums with money stolen from the plaintiff. The plaintiff sued the wife to recover the insurance fund paid her at her husband's death. The defendant demurred to a complaint setting up these facts. Under Ga. Civ. Code, 1910, sec. 2498, a direction by the insured that the money be paid "to his personal representative, or to his widow, or to his children or to his assignee" cannot be defeated. *Held,* (two judges *dissenting*) that the demurrer be sustained. *Bennett v. Rosborough* (1923, Ga.) 116 S. E. 788.

Where all the premiums on a policy made payable or assigned to the wife of the insured have been paid with stolen funds, the wife is treated as a volunteer and the insurance money is impressed with a trust in her hands. *Holmes v. Gilman* (1893) 138 N. Y. 369, 34 N. E. 205; *Shaler v. Trowbridge* (1877) 28 N. J. Eq. 595; Vance, *Insurance* (1904) 407. And if only a part of the premiums have been so paid the *cestui* has been held to get a *pro tanto* share in the proceeds. *Dayton v. Claflin Co.* (1897) 19 App. Div. 120; 45 N. Y. Supp. 1005; *contra: Hubbard v. Stapp* (1889) 32 Ill. App. 541 (lien for premiums paid with such funds). A somewhat analogous situation is presented where an insolvent husband uses part of his assets to insure his life for the benefit of his wife. Some courts regard the transaction as a fraudulent conveyance, and as against general creditors, allow the wife nothing. *Lehman v. Gunn* (1899) 124 Ala. 213, 27 So. 475. Other courts give the wife the entire proceeds of the policy where only a moderate portion of the earnings of the insured were paid in premiums. *Central Bank v. Hume* (1888) 128 U. S. 195, 9 Sup. Ct. 41. See Williston, *Can An Insolvent Insure His Life For The Benefit of His Wife?* (1891) 25 AM. L. REV. 185. Many statutes have adopted an intermediate view allowing the wife the proceeds of the policy less the premium paid during insolvency. Ohio Rev. Gen. Code, 1921, sec. 9394; Minn. Gen. Sts. 1913, sec. 3465; Hurd's Ill. Rev. Sts. 1919, ch. 73, sec. 199. Where the insured has reserved the power to change the beneficiary, under the Bankruptcy Act, sec. 70a (3), the trustee can exercise the power and deprive the wife of the cash surrender value of the policy. *Cohen v. Samuels* (1917) 245 U. S. 50, 38 Sup. Ct. 36; see

(1918) 27 YALE LAW JOURNAL, 403; (1922) 31 *ibid.* 325. But the statute in the instant case seems to make the exercise of such power personal to the insured. Perhaps, then, a strict construction of its language warrants the decision. But, as pointed out by the dissent, while the intent of the legislature to exempt the proceeds of the policy from the claims of general creditors is clear, an intent to bar any equitable claims to some or all of the specific proceeds is decidedly doubtful. See *Bank of Steward County v. Mardre* (1914) 142 Ga. 110, 82 S. E. 519; *Dell v. Varnedoe* (1918) 148 Ga. 91, 95 S. E. 977. A recent case under such a statute reached a result contrary to the instant case. *Mass. Bonding Co. v. Josselyn* (1923, Mich.) 194 N. W. 548.

INTERNATIONAL LAW—TAXATION OF PROPERTY OF A FOREIGN SOVEREIGN.—The Board of Supervisors of Jefferson County, Kentucky, instituted proceedings to assess tobacco purchased in the state by the French Government to be sold in France under the tobacco monopoly of that government, but temporarily held up by the war in a Kentucky warehouse. The French Government, claiming to own the property in a public and not a private capacity, protested against the assessment. *Held*, that the assessment was improper, as the decision of a foreign government that property is owned in a public capacity is conclusive. *French Republic v. Board of Supervisors of Jefferson County* (1923, Ky.) 252 S. W. 124.

The question raised in this case has apparently never before been adjudicated by an American court. A foreign sovereign cannot be sued without his consent. *The Parlement Belge* (1880, C. A.) L. R. 5 P. Div. 197; (1922) 22 COL. L. REV. 595. And the public property of such sovereign has a like immunity. *Briggs v. Light Boats* (1865) 93 Mass. 157. But the principle is not extended to give complete immunity in matters of taxation. A foreign diplomat's hotel even if owned by his government is subject to property taxes in the absence of special reciprocal agreement. 1 Satow, *A Guide to Diplomatic Practice* (1917) 280; 4 Moore, *Digest of International Law* (1906) sec. 667. When a foreign legation occupies rented property, the owner is not exempt from taxes. *Parkinson v. Potter* (1885) L. R. 16 Q. B. Div. 152. Diplomatic officials are exempt from personal and customs taxes but not from local assessments for objects from which they derive benefits, as for the maintenance of lighting, and sewerage systems. 1 Twiss, *The Law of Nations* (1861) sec. 203; Odier, *Des Privilèges et Immunités des Agents Diplomatiques* (1890) 260, 268, and 292. In England they are not liable for parochial taxes. *Macartney v. Garbutt* (1890) L. R. 24 Q. B. Div. 368. But uniform rules are impossible because exemptions are granted out of courtesy and not of right. Heffter, *Le Droit International Public de L'Europe* (Bergson's trans. 1866) sec. 217. When a foreign diplomat acts in a private capacity he is usually subject to taxation. 1 Wharton, *Digest of International Law* (1886) 653; *Novello v. Toogood* (1823, K. B.) 1 Bar. & Cr. 554. In regard to the sovereign himself, the writers always make the distinction between acts done as a sovereign and acts done as a private individual. Grotius, *De Jure Belli Ac Pacis* (2 Whewell's ed. 1853) Lib. II, cap. XIV, I and II; Hall, *International Law* (7th ed. 1917) sec. 49. This distinction is of more practical importance when applied to the activities of a state to determine whether they are acts *jure imperii* or *jure gestionis*. Borchard, *Diplomatic Protection of Citizens Abroad* (1915) sec. 72; (1918) 27 YALE LAW JOURNAL, 1082. This question came frequently before the courts of all countries during and after the World War in connection with the large merchant fleets owned and operated by governments in purely commercial enterprises. Although the decisions disclose no uniformity, there is strong authority for granting immunity from local jurisdiction only when the vessel is engaged in public service. *The Pesaro* (1921, S. D. N. Y.) 277 Fed. 473. For a general discussion, see (1922) 34 REVUE INTERNATIONAL DU DROIT MARITIME, 1;

Weston, *Actions Against the Property of Sovereigns* (1919) 32 HARV. L. REV. 266. Such a distinction is useful and proper. The tendency of international law as revealed in the above mentioned ship cases is to follow the suggestion of Chief Justice Marshall to treat nations which enter the market place as if they were private traders. See *Bank of The United States v. Planters' Bank of Georgia* (1824, U. S.) 9 Wheat. 904, 907. The decision in the instant case can be justified on the ground that the property was only temporarily detained in Kentucky through the exigencies of war. But when foreign public property has a definite tax *situs* within the state, foreign governments should not claim such immunity.

MARRIAGE AND DIVORCE—ANNULMENT FOR FRAUD—BREACH OF PROMISE TO HAVE SECOND CEREMONY IN CATHOLIC CHURCH.—The plaintiff, a Catholic, and the defendant, a Protestant, were married in a Protestant Church. The wife had promised to have the marriage afterwards solemnized in a Catholic Church. She also had represented herself to be a widow, but in fact was a divorcee and knew that the plaintiff's faith forbade his marrying a divorced woman. There was no issue. Upon discovering the facts, the plaintiff ceased cohabitation and sued for annulment on the ground of fraud. The defendant demurred. *Held*, that the demurrer should be sustained. *Wells v. Talham* (1923, Wis.) 194 N. W. 36.

To secure an annulment of the marriage relation, it is said that the fraud must go to the *essentialia* of the relation. Schouler, *Domestic Relations* (6th ed. 1921) sec. 23. There is, however, no test of what are the *essentialia*. Misrepresentation of social standing or general personal characteristics or condition in life will not suffice. *Chipman v. Johnston* (1921) 237 Mass. 502, 130 N. E. 65; 14 A. L. R. 121, note. Nor will simple concealment of unchastity. Schouler, *loc. cit.* But annulment has been allowed where chastity was expressly made a condition. *Gatto v. Gatto* (1919) 79 N. H. 177, 106 Atl. 493 (incest by wife); (1920) 29 YALE LAW JOURNAL, 365. Or where the woman concealed pregnancy. *Reynolds v. Reynolds* (1862, Mass.) 3 Allen, 605. Similarly, for concealment of a clear menace to the health of the plaintiff or any offspring. *C.* ——— *v. C.* ——— (1914) 158 Wis. 301, 148 N. W. 865 (venereal disease); 5 A. L. R. 1013, 1016, note; *Davis v. Davis* (1919, Ch.) 90 N. J. Eq. 158, 106 Atl. 644 ("hereditary chronic tuberculosis"); *cf. Gould v. Gould* (1905) 78 Conn. 242, 61 Atl. 604 (epilepsy); (1919) 29 YALE LAW JOURNAL, 225. Or where the defendant concealed an intention not to assume the duties of the marital state. *Millar v. Millar* (1917) 175 Calif. 797, 167 Pac. 394 (refusal to have intercourse); *Anders v. Anders* (1916) 224 Mass. 438, 113 N. E. 203 (intention to desert at church door); L. R. A. 1916 E, 1274, note; (1916) 26 YALE LAW JOURNAL, 159. Annulments are more readily granted where the marriage has not been consummated, particularly when the plaintiff is of tender years and the defendant immoral. *Brown v. Scott* (1922) 140 Md. 258, 117 Atl. 114; (1922) 71 U. PA. L. REV. 85; NOTES (1922) 22 COL. L. REV. 662. Or when the plaintiff is led reasonably to believe that the ceremony was only a betrothal. *Ford v. Stier* [1896] 1 P. Div. 1. Or when a subsequent public or religious ceremony was promised. *Clark v. Field* (1841) 13 Vt. 460; *Rozsa v. Rozsa* (1922, Sup. Ct.) 117 Misc. 728, 191 N. Y. Supp. 868; *Rubinson v. Rubinson* (1920, Sup. Ct.) 110 Misc. 114, 181 N. Y. Supp. 28; (1920) 20 COL. L. REV. 708. The New York cases were decided under the liberal rule announced in that state that, since marriage is a civil contract, any fraud which is the legal cause of the marriage is operative. *DiLorenzo v. DiLorenzo* (1903) 174 N. Y. 467, 67 N. E. 63. That rule may perhaps be explained by the paucity of grounds for divorce in that state. See (1920) 20 COL. L. REV. 708; and *cf.* N. Y. C. P. A. 1921, art. 67, sec.

1135. The instant case might well have adopted the results reached in New York without necessarily accepting their theory in full. The *mores* of a particular sect may be so acute in these matters as to leave the unfortunate mate a social outcast and with a blemish on his or her conscience. *Cf.* Sumner, *Folkways* (1906) secs. 414, 435, 437. And the legal power given a clergyman to solemnize marriages is an implicit recognition of the social value of protecting this interest where it exists. *Cf. Despatie v. Tremblay* [1921, P. C.] 1 A. C. 702.

MORTGAGES—DEFENSES AVAILABLE TO GRANTEE ASSUMING INVALID MORTGAGE.—The plaintiff, an owner of land on which the defendant supposedly held a mortgage, sold a portion of the land to X, who as part of the purchase price assumed and agreed to pay a proportionate sum of the mortgage. X entered into possession. The mortgage proved to be a forgery, and the plaintiff brought suit to cancel it. The defendant impleaded the assuming grantee, and when the latter failed to appear asked that against him the mortgage be foreclosed. *Held,* that as to that portion of the land granted to X, the plaintiff could not maintain the suit under 1 Bunn's Okla. Comp. Sts. 1921, sec. 466, requiring possession at the time of suit, and that since the assuming grantee was estopped to deny the validity of the mortgage, the plaintiff was also estopped. *Exchange Trust Co. v. Ireton* (1923, Okla.) 213 Pac. 309.

A grantee who assumes a mortgage as part of the purchase price is generally precluded from contesting the validity of the mortgage assumed. *Freeman v. Auld* (1870) 44 N. Y. 50; 3 Tiffany, *Real Property* (2d ed. 1920) 2571; 2 Jones, *Mortgages* (7th ed. 1915) sec. 74; L. R. A. 1917 C, 829, note. This rule in its origin related primarily to the mortgagor. The reasoning is that the debt being valid, the mortgaged property becomes the primary source for its discharge, and the grantee cannot throw back on the grantor the burden of paying the debt. *Foy v. Armstrong* (1901) 113 Iowa, 629, 85 N. W. 753; *Cummings v. Jackson* (1896) 55 N. J. Eq. 805, 38 Atl. 763. To the assuming grantee there is no want or failure of consideration. *Moulton v. Haskell* (1892) 50 Minn. 367, 52 N. W. 960. And although the grantor may have a personal defense to the mortgage debt, he has, by the terms of the grant, bargained for the power to bind his assuming grantee by ratifying the transaction. *Lee v. Stiger* (1879) 30 N. J. Eq. 610 (usury); *Davis v. Davis* (1912) 19 Calif. App. 797, 127 Pac. 1051 (statute of limitations); see *Farmers' State Bank v. Midland Savings & Loan Co.* (1919) 76 Okla. 245, 185 Pac. 94 (usury). Nor can the assuming grantee escape the estoppel which his grantor must bear where the mortgage was issued *ultra vires. American Waterworks Co. v. Farmers' Loan & Trust Co.* (1896, C. C. A. 8th) 73 Fed. 956. And of all the above the mortgagee is permitted by the cases to reap the benefit. The rules are based on the assumption that the mortgage, however defective, was given to secure a valid debt, which debt the mortgagor's grantee has assumed. It should have no application to a situation where the mortgage is a forgery and the supposed debt is non-existent. But a similar result has been reached even where a statute declares a usurious debt void. *Scanlan v. Grimmer* (1898) 71 Minn. 351, 74 N. W. 146; *Hiner v. Whitlow* (1899) 66 Ark. 121, 49 S. W. 353; Jones, *op. cit.* sec. 745. Where a statute is aimed at prohibiting such transactions, this result seems questionable, Tiffany, *op. cit.* at p. 2575 ("hardly conceivable"). Some cases hold that the mortgagee may recover from the mortgagor's assuming grantee but must hold the proceeds as trustee for the mortgagor. *Freeman v. Auld, supra.* In the instant case the statute may justify the decision, but to preclude the grantor from a defense because of rules against the grantee which have come into existence only in order to benefit the grantor is somewhat anomalous, as well as contrary to any reasonable construction of intention.

PROPERTY—MUTUAL MISTAKE IN SURVEYING BOUNDARY—EQUITABLE RELIEF AGAINST EJECTMENT SUIT ON PAYMENT OF COMPENSATION.—The defendant aided in a survey made by the complainant to determine the boundary line between their lands. The complainant then erected an apartment house on his land exactly to the line as fixed by the survey. It in fact encroached about one foot on the defendant's land. The defendant brought ejectment. The complainant then sought an injunction against the defendant's suit and a release to him of the disputed land. *Held,* that the relief be granted, provided that the complainant make equitable compensation for the value of the land. *Magnolia Construction Co. v. McQuillan* (1923, N. J.) 121 Atl. 734.

The recognition of a mistaken boundary line without knowledge of the mistake or fraud does not preclude the owner from claiming to the true line. *Patton v. Smith* (1902) 171 Mo. 231, 71 S. W. 187; *Montresso v. Kent* (1921) 96 Conn. 346, 113 Atl. 922. He may sue in trespass and recover damages suffered up to the time of suit. *McGann v. Hamilton* (1889) 58 Conn. 69, 19 Atl. 376; see *Stowers v. Gilbert* (1898) 156 N. Y. 600, 51 N. E. 282. When there is an encroachment which disturbs the surface he may also bring ejectment. *Purtle v. Bell* (1907) 225 Ill. 523, 80 N. E. 350. Or he may obtain a decree authorizing him to remove the encroachment. See *Hodgkins v. Farrington* (1889) 150 Mass. 19, 22 N. E. 73. By the better view the same is true when the encroachment is entirely below the surface. *Wachster v. Christopher* (1907) 128 Ga. 229, 57 S. E. 511; 11 L. R. A. (N. S.) 917, note; see COMMENTS (1917) 27 YALE LAW JOURNAL, 265. But the difficulties of execution where heavy foundation stones or buildings have been laid make the two latter remedies inadequate. See *Hahl v. Sugo* (1901) 169 N. Y. 109, 62 N. E. 135. Mandatory injunctions have therefore been issued placing the duty of removal on the trespasser. *Baron v. Korn* (1891) 127 N. Y. 224, 27 N. E. 804; 36 L. R. A. (N. S.) 402, note. See COMMENT (1922) 10 CALIF. L. REV. 169. There is however a growing tendency to refuse such injunctions as against innocent trespassers, where the injury to the latter would be greatly disproportionate to the benefit derived by the owner. *Coombs v. Lenox Realty* (1913) 111 Me. 178, 88 Atl. 477; *Lynch v. Union Institution* (1893) 159 Mass. 306, 34 N. E. 364; see also (1923) YALE LAW JOURNAL, 205. The New York courts have granted judgment in the alternative, the injunction to issue unless the owner is paid the value of the land taken. *Goldbacher v. Eggers* (1902, Sup. Ct.) 38 Misc. 36, 76 N. Y. Supp. 881, *affirmed* (1904) 179 N. Y. 551, 71 N. E. 1131. And the owner may be required to execute a release of the land on receipt of its value. See *Herrman v. Hartwood Holding Co.* (1920) 193 App. Div. 115, 183 N. Y. Supp. 402. The instant case even reaches the same result where the relief is asked by the innocent trespasser. The result is analogous to cases of accession or confusion of personal property, where an innocent trespasser may have the power to acquire legal title, if a return of the chattel itself would work an undue hardship. See *Wetherbee v. Green* (1871) 22 Mich. 311; *Eaton v. Langley* (1898) 65 Ark. 448, 47 S. W. 123. The doctrine in the principal case is properly limited to cases where an order to remove the offending structure would "shock the conscience of a civilized court."

PUBLIC SERVICE LAW—STATE REGULATION OF CONTRACTS BETWEEN MUNICIPALITIES AND PUBLIC UTILITIES.—A borough ordinance gave a railway the privilege of using its streets on condition that it keep them in repair from curb to curb. Upon failure to repair, the borough filed a complaint with the public service commission to compel performance of the obligation. The commission acting under Pa. Sts. 1920, secs. 18125-18127 empowering it to regulate rates, ordered the railway to repair only that portion of the street lying between the ends of the ties, on the ground that the original contract was an unjust burden upon

the operating company. The commission appealed from a decree of the superior court reversing the above order. *Held,* (one judge *dissenting*) that the appeal be dismissed as the statute gave the commission control over rate contracts only. *Borough of Swarthmore v. Public Service Commission* (1923, Pa.) 121 Atl. 488.

Municipalities as agents of the state may be authorized to make binding contracts with public service companies. See *Victoria v. Victoria Power Co.* (1922) 134 Va. 134, 114 S. E. 92; *Trenton v. New Jersey* (1923, U. S.) 43 Sup. Ct. 534. Such contracts cannot be changed by the municipality without impairing the obligation of contracts in violation of Art. I, sec. 10 of the Federal Constitution. *Minneapolis v. Minneapolis St. Ry. Co.* (1909) 215 U. S. 417, 30 Sup. Ct. 118. But the contract is said to be made subject to the police power of the state and within that power can be changed by the state without impairing the obligation of the contract. *Milwaukee Electric Ry. v. Wis. R. R. Commission* (1915) 238 U. S. 174, 35 Sup. Ct. 820 (against the utility); *South Glen Falls v. Public Service Commission* (1919) 225 N. Y. 216, 121 N. E. 777 (against the municipality); *Scranton v. Public Service Commission* (1920) 268 Pa. 192, 110 Atl. 775 (same); Burdick, *Regulating Franchise Rates* (1920) 29 YALE LAW JOURNAL, 589; (1920) 19 MICH. L. REV. 112. As against the municipality, the state is also said to have power as principal to revoke the contract of its agent, and substitute a new contract. *Sapulpa v. Okla. Nat. Gas Co.* (1920) 79 Okla. 196, 196 Pac. 224. This is true unless the grant of power is in unequivocal terms. *Helena v. Helena Light & Ry. Co.* (1922) 63 Mont. 108, 207 Pac. 337. On the other hand, at least one court has expressly refused to permit the state to disturb the contracts of its municipalities. *Lima v. Public Service Commission* (1919) 100 Ohio St. 416, 126 N. E. 318; and see to the same effect *Va. Western Power Co. v. Clifton Forge* (1919) 125 Va. 469, 99 S. E. 723, but apparently overruled by *Victoria v. Victoria Power Co., supra.* The same result has been reached by construing the power of the commission to regulate rates as subject to the consent of local authorities. *Quinby v. Public Service Commission* (1918) 223 N. Y. 244, 119 N. E. 433. But this decision has been strictly limited to street railways. *South Glen Falls v. Public Service Commission, supra.* Some states expressly prohibit irrevocable contracts with utilities. *Opelika Sewer Co. v. Opelika* (1922, M. D. Ala.) 280 Fed. 155. Others expressly reserve a power to modify such contracts. *San Antonio v. San Antonio Public Service Commission* (1921) 255 U. S. 547, 41 Sup. Ct. 428. The type of contract presented in the instant case has been regulated by state statutes even in the absence of any statutory reservation of power. *Worcester v. Street Ry. Co.* (1905) 196 U. S. 539, 25 Sup. Ct. 327. The apparent conflict with the general trend of authority seems to arise from the fact that the statute in the instant case delegating the power to regulate rates to the public service commission was not broad enough to include the regulation of this type of contract.

TORTS—WRONGFUL DEATH ACT—INTERPRETATION—DEATH IN SAME DISASTER OF PERSON ENTITLED TO SUE.—One Mrs. Baker and her husband were killed by the defendant's train in the same accident. The husband, however, lived two hours longer than the wife. They left no minor children. Her administrator brought this action for her wrongful death under Mo. Rev. Sts. 1919, sec. 4217, which provides for such action by an administrator "if there be no husband or wife, ..." The trial court overruled the defendant's objection that no cause of action was stated. The defendant appealed. *Held,* (one judge *dissenting*) that as the cause of action never vested in the husband within the meaning of the statute, the judgment should be affirmed. *Betz v. Kansas City Southern Ry.* (1923, Mo.) 253 S. W. 1089.

A right of action for wrongful death vests only in persons expressly named by statute. *Hill v. Shafty* (1923, Sup. Ct.) 121 Misc. 273, 201 N. Y. Supp. 729;

L. R. A. 1916 E, 118, note. By the weight of authority it vests immediately on death in the first surviving person in the order given in the statute. *Hammond v. Lewiston, A. & W. St. Ry.* (1909) 106 Me. 209, 76 Atl. 672; 30 L. R. A. (N. S.) 78, note. And on the death of such survivor, the right of action, in the absence of statute, does not accrue to his administrator. *Freie v. St. Louis-San Francisco Ry.* (1920) 283 Mo. 457, 222 S. W. 824; 24 L. R. A. (N. S.) 844, note. Nor does it vest in the next surviving person in the order named by statute. *Hammond v. Lewiston, A. & W. St. Ry., supra; Benoit v. Miami Beach Electric Co.* (1923, Fla.) 96 So. 158. In the instant case the survival of the husband was held not to be a survival within the meaning of the statute. This is in accord with the view that such statutes are remedial and to be liberally construed. *Patek v. Am. Smelting & Refining Co.* (1907, C. C. A. 8th) 154 Fed. 190. It overrides the view expressed previously in Missouri that the statute should be strictly construed because in derogation of the common law. *Chandler v. Chicago & Alton Ry.* (1913) 251 Mo. 592, 158 S. W. 35. And, as is pointed out by the dissenting opinion, this interpretation in effect adds a clause to the statute allowing the administrator to sue where, because of incapacity, the suit cannot be maintained by the person named in the statute. This result seems desirable, as it effectuates the purpose of the statute to create a cause of action where none existed at common law. See *Gilkeson v. Mo. Pac. Ry.* (1909) 222 Mo. 173, 121 S. W. 138; see Mo. Rev. Sts. 1919, sec. 7048. The difficulties raised by the instant case heighten the desirability of that class of statutes which give the right of action only to the administrator.

VERDICTS—JOINT TORT-FEASORS—APPORTIONMENT OF DAMAGES BY JURY.—In an action for damages against joint tort-feasors, the jury returned a verdict for the plaintiff for $4,000, $3,500 to be paid by one defendant and $500 by the other. The court entered judgment against each defendant for $4,000. The second defendant appealed from a refusal to order a new trial. *Held,* (three judges *dissenting*) that the attempted apportionment was properly disregarded as surplusage. *Hall v. McClure* (1923, Kan.) 212 Pac. 875.

At common law joint tort-feasors are equally liable for the full amount of the damages. Hence in the absence of a statute juries have no power to apportion such liability. *Lake Erie R. R. Co. v. Halleck* (1922, Ind. App.) 136 N. E. 39. Where the jury returns a separate verdict against each defendant, according to one view judgment may be entered against all defendants for the largest sum found against any one. *Halsey v. Woodruff* (1830, Mass.) 9 Pick. 555. In some states the verdict is declared regular and each defendant is required to pay the amount found against him. *Rhame v. City of Sumter* (1919) 113 S. C. 151, 101 S. E. 832. It has been suggested that the plaintiff and not the defendant might have such a verdict set aside. *Hooks v. Vet* (1911, C. C. A. 5th) 192 Fed. 314. In a few states the verdict is declared void and a new trial ordered. *Chrudinsky v. Evans* (1917) 85 Or. 548, 167 Pac. 562; see *McCalla v. Shaw* (1884) 72 Ga. 458. Nor are the courts in accord where the jury returns a general verdict followed by an attempted apportionment. On the theory that liability is several as well as joint, some states have the curious rule that the plaintiff must after such a verdict elect his defendant, enter a *nolle prosequi* as to the others, and take judgment for the amount found against him. *Warren v. Westrup* (1890) 44 Minn. 237, 46 N. W. 347; *Nashville R. R. Co. v. Trawick* (1906, Tenn.) 99 S. W. 695. Or as in the instant case, all attempt at apportionment is treated as surplusage and ignored. *Lake Erie R. R. Co. v. Halleck, supra; Pearson v. Arlington Dock Co.* (1920) 111 Wash. 14, 189 Pac. 559. By the minority view such a verdict is fatally defective. *Whitaker v. Tatem* (1881) 48 Conn. 520; *Glore v. Akin* (1908) 131 Ga. 481, 62 S. E. 580. But where punitive damages have been awarded against one defendant there may be separate judgments

according to the verdict. *Louisville Ry. v. Roth* (1908) 130 Ky. 759, 114 S. W. 264. A simple and practical remedy lies in the power of the court, on the return of a verdict attempting apportionment, to inform the jury of its error and request a corrected verdict. *Austin Ry. v. Faust* (1910) 63 Tex. Civ. App. 91, 133 S. W. 449; *Forslund v. Swenson* (1923, Neb.) 192 N. W. 649. The decision in the instant case follows perhaps the most rational of the first described courses, though it is unfortunate that the trial court did not apply the simple remedy last mentioned.

WILLS—CONTRACT TO BEQUEATH—LIMITATION OF DAMAGES TO THE VALUE OF THE CONSIDERATION.—The plaintiff was injured while in his uncle's employ. In consideration of his uncle's promise that his will would contain provision for plaintiff's life support, plaintiff promised to forbear to sue for compensation. On the uncle's death intestate, the plaintiff sued for breach of contract. The defendant appealed from a judgment of the lower court allowing recovery for an amount sufficient to support plaintiff for life. *Held,* (two judges *dissenting*) that the measure of damages should be limited to compensation for plaintiff's injury. *Frieders v. Frieders' Estate* (1923, Wis.) 193 N. W. 77.

The breach of a contract to make a will in a particular manner gives the injured party a right to damages at law, or, in the case of realty, to specific performance in equity. See *Gordon v. Spellman* (1918) 145 Ga. 682, 89 S. E. 749; Costigan, *Constructive Trusts* (1915) 28 HARV. L. REV. 237, 244; Gardner, *Wills* (1903) sec. 20. Harsh results to the deceased's estate may be a defense in equity but not to a recovery of damages. Costigan, *op. cit. supra,* at pp. 237, 245, note 18. But when the consideration is past, the plaintiff is limited to a recovery in *quantum meruit. Murtha v. Donohoo* (1912) 149 Wis. 481, 136 N. W. 158. In the instant case, the court purports to follow *Murtha v. Donohoo, supra,* failing to note that in that case there was a past consideration, whereas in this, there is a present one in the promise of forbearance to sue. See Anson, *Contracts* (Corbin's ed. 1919) sec. 131. And in the case of a definite promise based on present consideration, the courts have uniformly held that the measure of damages is the value of the thing promised. *Thompson v. Romack* (1916) 174 Iowa, 155, 156 N. W. 310; *Jefferson v. Simpson* (1919) 83 W. Va. 274, 98 S. E. 212; *cf. Noyes v. Noyes* (1916) 224 Mass. 125, 112 N. E. 850. In proposing what is really an exception to this fundamental rule of contract, the court in the instant case refers to the absence of the formality required by the Statute of Wills, and to the danger of fraud on the estate of the deceased. The confusion here is in treating a contract as a will. See COMMENTS (1918) 27 YALE LAW JOURNAL, 542. Danger of fraud is eliminated if evidence of the contract is clear and convincing. See *Kingsbury v. Kingsbury* (1923, Sup. Ct.) 120 Misc. 362, 198 N. Y. Supp. 512. This was amply satisfied in the instant case by the presence of two witnesses at the making of the contract. The court has undertaken to remake a contract contrary to established rules of law and to what the majority opinion itself recognizes as the justice of the instant case. *Cf. Krell v. Codman* (1891) 154 Mass. 454, 28 N. E. 578.