RECENT CASE NOTES

BROKERS—DUTY OF REAL ESTATE BROKER TO PRINCIPAL—DOUBLE EMPLOYMENT.—The plaintiff, assignee of a broker employed to sell defendant's realty, sued for the agreed commission. The vendor alleged that the broker, by secretly representing the vendee, had been guilty of fraud. The evidence showed that after the making of the oral contract of sale but before it was written and enforceable, the broker, without the vendor's knowledge, took a commission from the vendee for reselling the property to a third person at a higher price. The lower court allowed recovery and the defendant appealed. *Held*, that the judgment be affirmed. *Locbel v. Jerolemon* (1925, N. J. Sup. Ct.) 128 Atl. 609.

The real estate broker ordinarily need not execute a sale, though commissioned "to sell", in order to earn his commission. *Stengel v. Sergeant* (1908) 74 N. J. Eq. 20, 68 Atl. 1106. A condition precedent to his right to commission is merely that he produce a purchaser. *Stemler v. Bass* (1908) 153 Calif. 791, 96 Pac. 809. *A fortiori*, if he secures a written contract of sale his obligation to the vendor terminates. *Fairly v. Wappoo Mills* (1895) 44 S. C. 227, 22 S. E. 108. Or, if he is commissioned to sell at a fixed price, it is not fraudulent to accept at any time a commission from the vendee for resale, as the vendor's interests are predetermined and would be unaffected. *Gilliland v. Jaynes* (1912) 36 Okla. 563, 129 Pac. 8; *Kinsland v. Grimshawe* (1907) 146 N. C. 397, 59 S. E. 1000. But it is a fair inference in the instant case that the broker was under an obligation to secure the purchaser who would pay the highest price. Therefore, the question before the court was whether or not this obligation to the principal was performed when the oral agreement of sale was made. This problem is raised but not decided in *Dickinson v. Updike* (1901, N. J.) 49 Atl. 712. The broker would lose his commission by doing anything inconsistent with the faithful discharge of his obligations to his principal. *Ebert v. Haskell* (1914) 217 Mass. 209, 104 N. E. 556; *Brown v. Hurt* (1917) 198 Mich. 276, 164 N. W. 386. This rule applies although the principal is not damaged thereby. *Quinn v. Burton* (1907) 195 Mass. 277, 81 N. E. 257. And he subjects himself also to suit by his principal for the extra profits. *Kershaw v. Schafer* (1913) 88 Kan. 691, 129 Pac. 1137. Here, however, when the oral contract of sale was made, the broker had performed in good faith the entire service expected of him. Even assuming that the agency continued, the broker had thereafter no privilege to advise a breach of the agreement, for, it would seem, he was under the duty of any third party not to induce the breach of a contract, even though it is unenforceable. *Cumberland Mfg. Co. v. Dewitt* (1913) 120 Md. 381, 87 Atl. 927; *Vaught v. Pettyjohn & Co.* (1919) 104 Kan. 174, 178 Pac. 623; *contra: Davidson v. Oakes* (1910) 60 Tex. Civ. App. 269, 128 S. W. 944; *Sonnenberg v. Hajek* (1921, Tex. Civ. App.) 233 S. W. 563. Being under a duty not to interfere with the oral contract, there would seem to be no reason left to forbid him to deal with the property for the buyer, regardless of whether the agency might be said to have terminated.

CONTRACTS—OUSTER OF JURISDICTION—AGREEMENT TO LITIGATE IN FOREIGN COURT ONLY HELD INOPERATIVE.—The plaintiff, a resident of the United States, and the defendant, a resident of Germany, contracting together, agreed to litigate disputes by German law and in German courts only. This action was brought for anticipatory breach of contract. The lower court dismissed the complaint on the ground of lack of jurisdiction. The

plaintiff appealed. *Held*, that the order be reversed. *Sudbury v. Ambi Verwaltung Kommanditgesellschaft Auf Aktien* (1925, 1st Dept.) 213 App. Div. 98, 210 N. Y. Supp. 164.

The instant case is but one of the many which hold that an agreement which ousts a court of jurisdiction is not a bar to an action commenced in that court. 3 Williston, *Contracts* (1920) sec. 1725; see *Insurance Co. v. Morse* (1874) 87 U. S. 365. This rule seems to have sprung originally from the jealous desire of the courts to protect their jurisdiction. See *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.* (1915, D. C. N. Y.) 222 Fed. 1006, 1008; Hale, *Law Making By Unofficial Minorities* (1920) COL. L. REV. 451. The fact that justice was administered mainly "to transfer land and money" to the king may have been an important motivating force. *Cf.* Bolland, *The General Eyre* (1922) 18. The contracts included within this rule fall into two distinct groups: (1) those with an agreement to arbitrate, and (2) those with an agreement to settle disputes in certain courts only. Until recently agreements to arbitrate were not specifically enforceable, on the ground that they undertook to oust the courts of jurisdiction. 3 Williston, *op. cit.* sec. 1719. Legislation, however, is now effecting a salutary change. N. Y. C. P. A., 1925, sec. 1448; Sturges, *Commercial Arbitration* (1924) 34 YALE LAW JOURNAL, 480; Grossman, *Trade Security Under Arbitration Laws* (1925) 35 YALE LAW JOURNAL, 308. As regards agreements to submit disputes to certain courts only, some English courts have broken away from the old rule by holding them agreements to arbitrate within the meaning of the Arbitration Act. *The Cap Blanco* (1913, L. R.) 48 Pro. Div. 130; *Lloyd S. S. Co. v. Grisham Life Ins. Co.* [1903] 1 K. B. 249. And the same technique has been employed in a lower New York Court. *Kilvin Engineering Co. v. Blanco* (1925, N. Y. Sup. Ct.) 125 Misc. 728. But it is submitted that this is a strained interpretation of the arbitration acts. In New York in the case of arbitration agreements the courts have retained a large amount of control. They can upset the arbitrators' award if "clearly unreasonable". *In re Burke* (1908) 191 N. Y. 437, 84 N. E. 405. And have jurisdiction where "[1] the making of the contract or [2] the submission, or [3] the failure to comply therewith" are in issue. Cahills' N. Y. Cons. Laws, 1923, ch. 2, sec. 3; (1925) 35 YALE LAW JOURNAL, 369. It is obvious that there is no such control in case of an agreement to submit to a particular foreign court. In addition, while agreements to arbitrate will relieve the congestion of litigation, the same is not true of the other type. Nevertheless, from the standpoint of allowing the greatest possible freedom of contract consistent with public policy the result of the New York case and the English cases seems desirable. *Cf. Mittenthal v. Mascagni* (1903) 183 Mass. 19, 66 N. E. 425, and the opinion of Mr. Justice Holmes in *Daley v. People's Bld'g Assoc.* (1901) 178 Mass. 13, 59 N. E. 452. It is submitted that this strained interpretation of the arbitration acts is a strong indication that the archaic rule upheld in the instant case is no longer satisfactory; but it is believed that the desired result might better be accomplished by a direct overruling.

EXECUTORS AND ADMINISTRATORS—CONSTRUCTION OF NON-CLAIM STATUTE. —Upon becoming of age, the plaintiff discovered that his deceased guardian had misappropriated a fund held in trust for him. The administrator had filed his final account making no mention of the trust fund. The plaintiff brought this action against the administrator on the claim. The lower court gave judgment for the defendant. *Held*, (one judge *dissenting*) that the judgment be affirmed, on the ground that the claim was not filed within

six months after publication of notice to creditors as required by the statute of non-claim. *Davis v. Shepard* (1925, Wash.) 237 Pac. 21.

Under some statutes the probate court may, in its discretion, before the final settlement of the administrator's account, allow a claim which was not filed within the prescribed period after the first publication of notice to creditors. *State v. Ross* (1916) 133 Minn. 172, 157 N. W. 1075; *Brown v. Forsche* (1880) 43 Mich. 492, 5 N. W. 1011; *Allen v. Conklin* (1897) 112 Mich. 74, 70 N. W. 339 (recovery allowed in equity after final settlement of the estate, where the decedent had fraudulently misappropriated the trust fund). Under other statutes certain claims are given priority, such priority being lost by failure to present the claim within the prescribed time. *Harvester Co. v. Algie* (1917) 101 Kan. 654, 168 Pac. 876; *Wolfe v. Knapp* (1905) 127 Iowa, 479, 103 N. W. 369. An unpreferred claim not filed within the prescribed time is barred unless special circumstances are shown. *Ball v. James* (1916) 176 Iowa, 647, 158 N. W. 684 (where evidence of claim was discovered after period for filing had expired). A few statutes allow recovery from the distributees. *In re McAusland* (1916, D. C. N. J.) 235 Fed. 173 (New Jersey statute construed). Some statutes of non-claim are absolute in barring all claims against the decedent's estate which were not filed within the prescribed period. *Butterworth v. Brodemeyer* (1916) 89 Wash. 677, 155 Pac. 152; *Davis v. Cramer* (1918) 133 Ark. 224, 202 S. W. 239; *Hamil v. Flowers* (1913) 184 Ala. 301, 63 So. 994; *National Bank v. Hotchkiss* (1911) 49 Colo. 593, 114 Pac. 310 (except as to subsequently discovered assets of the estate). Where the cause of action has been fraudulently concealed, the limitation of action statutes (although absolute in terms) are generally held not to run until the discovery of the fraud. *Morgan v. Tener* (1877) 83 Pa. 305; 2 Wood, *Limitations* (4th ed. 1916) sec. 275; COMMENTS (1925) 34 YALE LAW JOURNAL, 432. Some courts have held that the legislature, in framing a statute of non-claim in absolute terms, must have intended that it should be subject to the same construction (in case of fraud) as the limitation of action statutes. *Bank v. Fairbank* (1869) 49 N. H. 131; *cf. Wickes v. Walden* (1911) 161 Ill. App. 3; see *Newberry v. Wilkinson* (1912, C. C. A. 9th) 199 Fed. 673, 689 (Washington statute of non-claim construed). This analogy, however, was not necessarily in point with the instant case, as the Washington limitation of action statute (Rem. Comp. Sts. 1922, ch. 3, sec. 159, subd. 4) expressly provides for fraud, while the statute of non-claim (Rem. Comp. Sts. 1922, ch. 3, sec. 1484) makes no mention of fraud. On the other hand, it seems possible that the policy of settling estates finally at some given time may give way to the desirability of affording protection to one in the situation of the defrauded plaintiff.

FUTURE INTERESTS—POWERS OF APPOINTMENT TO A CLASS—INTESTACY DECLARED UPON DEFAULT OF APPOINTMENT.—The testator gave his property to trustees for the benefit of his wife for life, then for his son for life, and upon the latter's death for such persons as the son should appoint, the appointment to be confined to "any relation or relations of mine of the whole blood". There was no gift over in default of appointment. This action was brought by the son upon a summons asking whether a release of the power would create a partial intestacy so that the wife and son would take the property as next of kin, subject to their life interests. *Held*, that an intestacy would be created. *In re Coombe* [1925] 1 Ch. 210.

Where there is a power to appoint to or among a certain class of persons but no express gift to the class and no gift over in default of appointment, the courts, where the power has not been exercised, have nevertheless generally distributed the property in equal shares to those members of the

designated class who were living at the time the power should have been exercised. *Hazard v. Bacon* (1920) 42 R. I. 415, 108 Atl. 499; 32 YALE LAW JOURNAL, 742; Gray, *Powers in Trust* (1911) 25 HARV. L. REV. 12; *Brown v. Higgs* (1801, Ch.) 8 Ves. 561; *Re White's Trusts* (1860, Ch.) Johns. 656; Farwell, *Powers* (3d ed. 1916) 528; Sugden, *Powers* (8th ed. 1861) 688–692. The result is sometimes reached by implying a gift to the members of the class in default of appointment. *Milhollen's Adm'r v. Rice* (1878) 13 W. Va. 510; *Rogers v. Rogers* (1859, Tenn.) 2 Head, 660. And sometimes by regarding the power as held in trust to be exercised for the benefit of the members of the designated class. *Brown v. Higgs, supra; Waterman v. New York Life Ins. & Trust Co.* (1922, 2d Dept.) 204 App. Div. 12, 197 N. Y. Supp. 438. Whatever the theory, the result is the same and, until recently, has been quite uniformly reached. Late English cases, however, have insisted that the rule is not absolute and that the distribution is not to be made unless there is a clear indication of an intent to benefit the members or some of the members of the class regardless of appointment. *In re Weeke's Settlement* [1897] 1 Ch. 289; *Re Hall* (1899, Ch.) 1 Ir. R. 308; *cf. Re Llewellyn's Settlement* [1921] 2 Ch. 281. This view has met with some unfavorable criticism. Farwell, *op. cit.* 529; Gray, *op. cit.* 13–18. The court in the instant case held that "relations of the whole blood" constituted too large and indefinite a class to permit of finding an intention to benefit the objects irrespective of the exercise of the power. Other courts, however, have construed somewhat similar expressions as designating a definite and certain class. *Brunsden v. Woolridge* (1765, Ch.) Amb. 507 ("poor relations" construed to include only those who are objects of charity); *In re Caplin's Will* (1865, Ch.) 2 Dr. & Sm. 531 ("friends and relations" construed as next of kin). But any such narrowing of the denotation of the terms of the will is *pro tanto* a rewriting of the instrument, and a trust intent inferable only when the instrument is so rewritten, seems a manifest fiction. From the will, as originally written, it seems impossible to infer an intention to benefit any particular persons—in other words, there would be an intestacy upon the non-exercise of the power.

INTERNATIONAL LAW—EFFECT IN FOREIGN COURTS OF CONFISCATION BY UNSUCCESSFUL INSURGENTS.—During the Carranza-Villa war, an officer of the Villa army, which controlled a large area in Mexico, confiscated the plaintiff's ore and sold it to the defendant. The plaintiff recovered damages for conversion of the ore. The court of Civil Appeals, reversing judgment because of error in admission of testimony, held that the seizure and sale "conveyed title" to the defendant, evidently on the grounds that Villa's faction was a *de facto* government and that our courts would not review acts of a foreign government toward its citizens within its territories. *Held,* on appeal, that as the Villa faction was ultimately unsuccessful, its confiscations would not be recognized as acts of a government, and being wrongful, did not divest plaintiff of ownership. *Cia. Minera Ygnacio Rodriguez Ramos, S. A. v. Bartlesville Zinc Co.* (1925, Tex.) 275 S. W. 388.

In a dictum on which the court relied it is stated that the validity of confiscations by an insurgent government depends entirely on its survival, since the legal effects of "all such acts perish with it". See *Williams v. Bruffy* (1877) 96 U. S. 176, 186. That case, however, decided only that it was no defense in an action on a debt that the debtor's property had been confiscated by the Southern Confederacy. In fact, it was intimated that the confiscation would have been a good defense to an action by a bailor suing his bailee for conversion of the confiscated goods. See *ibid.* at 187. Furthermore, the court in that case seems to have had in mind a rule only

for the courts of the country in which the revolution had occurred, and to have based its discussion more on domestic policy than on rules of international law. *Cf. Stevens v. Griffiths* (1884) 111 U. S. 48, 4 Sup. Ct. 330; *Nankivel v. Omsk All-Russian Government* (1923) 237 N. Y. 150, 142 N. E. 569. In at least two cases our courts have given effect to "assessments" by a Mexican *de facto* government. *Oetjen v. Central Leather Co.* (1918) 246 U. S. 297, 38 Sup. Ct. 309; *Ricaud v. American Metal Co.* (1918) 246 U. S. 304, 38 Sup. Ct. 312. It is true that one reason for these decisions was that political recognition had later been extended to the government in question; but it was not decided that absence of political recognition precluded giving effect to the confiscations; and the decision of the state court in the *Oetjen* case, which was handed down before political recognition had been accorded, was to the effect that a confiscation for war purposes by a *de facto* government passes title to the goods. *O'Neill v. Central Leather Co.* (1915) 87 N. J. L. 552, 94 Atl. 789. Even in a court of a country where a revolution took place this rule has been followed. *Lemkuhl v. Kock*, Transvaal L. R. [1903] T. S. 451. This rule seems sounder than that of the instant case in that it recognizes the realities of the situation. There is really no reason why our courts should not give effect to all acts of unrecognized *de facto* governments which are not contrary to our mores and which do not materially weaken our foreign policy. See *Sokoloff v. National City Bank* (1924) 239 N. Y. 158, 165, 145 N. E. 917, 919; *Russian Reinsurance Co. v. Stoddard* (1925) 240 N. Y. 149, 147 N. E. 703; COMMENTS (1925) 35 YALE LAW JOURNAL, 98, 101; Angell, *Sovereign Immunity —The Modern Trend ibid.* 150. It by no means follows that all confiscations by bandits would have to be given effect, since, in the absence of recognition by the political departments, the court may receive evidence to prove the *de facto* character of the insurgent régime. *O'Neill v. Central Leather Co., supra.*

INTERNATIONAL LAW—INTOXICATING LIQUORS—INTERPRETATION OF "ONE HOUR'S TRAVEL" CLAUSE IN SEARCH AND SEIZURE TREATY WITH GREAT BRITAIN.—The defendants, master and crew of a British vessel, were charged with violation of the Volstead Act. At the time of the arrest, the vessel lay further from the Florida coast than she could travel in one hour. There was evidence that liquor had been unloaded into "contact" boats from shore. The district court charged the jury that although there was no proof of the speed of any particular boat used or intended to be used, the defendants were subject to arrest under the terms of the treaty with Great Britain if such "contact" boats as were ordinarily used in that locality could reach the vessel in one hour. The defendants were convicted and moved for a new trial because of this charge. *Held*, that the motion be overruled. *United States v. Henning* (1925, D. C. Ala.) 7 Fed. (2d) 488.

Since the treaty with Great Britain (43 Stat. at L. 1761) reasserts the freedom of the high seas outside the three-mile limit and merely concedes to the United States certain specific "rights" (privileges) thereon of search and seizure, it is implied that the terms of these concessions should be narrowly construed. The treaty specifically states that "the rights conferred . . . shall not be exercised at a greater distance from the coast . . . than can be traversed in one hour by the vessel suspected . . . ", or in case it is intended to use another vessel for transshipment ashore, "the speed of such other vessel . . . shall determine the distance from the coast". Art. 2, sec. 3. The broad interpretation given to this provision in the instant case is contrary to the implications of several recent cases. *The Over the Top* (1925, D. Conn.) 5 Fed. (2d) 838 (one ground for dismissing libel being failure to show speed of "contact" boat

in circumstances similar to those under which it was seized); *The Pictonian* (1924, E. D. N. Y.) 3 Fed. (2d) 145 (leave given to amend to show speed of particular boat used). As a purely practical matter, the court's interpretation doubtless would be a material aid in the enforcement of prohibition. It is submitted, however, that the decision is contrary to the express terms of the treaty, which requires evidence of the speed of a specific vessel.

INTERNATIONAL LAW—MEANING OF "RESIDENT" IN TRADING WITH THE ENEMY ACT.—The plaintiff, a German subject, lived in the United States for seven years prior to May 1917, when he went to Germany to settle an estate. The Alien Property Custodian seized funds belonging to him as enemy-owned property, under the Trading with the Enemy Act of 1917 (40 Stat. at L. ch. 106, p. 411), which defines an enemy as one "resident within enemy territory during the war". The plaintiff after his return brought suit under section 9(a) of the Act, providing for the recovery by non-enemies of seized property. *Held*, that the complaint be dismissed since the plaintiff's physical presence in Germany made him a "resident" within the meaning of the Act. *Stadtmuller v. Miller* (1925, D. C. S. D. N. Y.) Not yet reported.

"Residence" is a term of many connotations; but in international law and the construction of statutes relating thereto it has generally meant more than mere physical presence. Enemy character for prize purposes has been determined by "commercial domicile", the maintenance of a place of business in enemy territory. *The Venus* (1814, U. S.) 8 Cranch, 253. For other purposes, it has been construed as the equivalent of domicile. *In re Schneider* (1908, C. C. 2d) 164 Fed. 335 (naturalization); *De Bouchel v. Candler* (1924, N. D. Ga.) 296 Fed. 482 (divorce); *Anderson v. Pifer* (1925) 315 Ill. 164, 146 N. E. 171 (eligibility to vote). Some courts have said that "residence" means a fixed abode for the time requisite for the particular purpose in question. See *Brisenden v. Chamberlain* (1892, C. C. 4th) 53 Fed. 307, 311; *Penfield v. Chesapeake, Ohio & S. W. R. R.* (1890) 134 U. S. 351, 357, 10 Sup. Ct. 566, 569. So that where there was no fixed abode, there was no "residence". *Ibid; Barney v. Oelrichs* (1891) 138 U. S. 529, 11 Sup. Ct. 414. The Attorney General gave this construction to the term "residence" in the Trading with the Enemy Act. Meares, *Trading with the Enemy Act* (1924) 78, 81. At least two courts have thought domicile essential. *Vowinckel v. First Fed. Trust Co.* (1925, C. C. A. 9th) No. 4574 (not yet reported) and *Kahn v. Garvan* (1920, S. D. N. Y.) 263 Fed. 909, 915. The court in the instant case, in holding transient presence sufficient to constitute "residence" has, it is believed, given too narrow and unusual a construction to the term. The Treaty of 1799, revived by Article XII of the Treaty of 1828, accords citizens of either country "residing" in the other nine months within which to remove their property without molestation. A high authority has criticized as violative of the spirit of the Treaty the interpretation of the Supreme Court confining this protection against seizure to persons physically within the United States, the author stating that the Treaty, like all the others of that time, was designed to protect against premature seizure the private property of all citizens of the enemy state, regardless of their physical location. Moore, *International Law and Some Current Illusions* (1924) 1, 20. See *Stoehr v. Wallace* (1921) 255 U. S. 239, 251, 41 Sup. Ct. 293, 298.

LIMITATION OF ACTIONS—GRAVAMEN OF ACTION DETERMINATIVE AS TO WHICH PERIOD OF LIMITATION APPLIES.—The plaintiff purchased a ticket entitling him to enter the defendant amusement company's park, and while therein was kicked by a horse belonging to the present plaintiff in error

who was impleaded with the amusement company. Under N. Y. C. P. A. 1921, sec. 49, an action to recover damages for personal injury resulting from negligence must be commenced within three years. Under sec. 48 an action upon a "contract obligation or liability express or implied" must be commenced within six years. Almost four years after the cause of action accrued the plaintiff sued, basing his complaint on the contract. The plaintiff in error moved to dismiss the complaint and, the motion being denied, appealed. *Held*, (two judges *dissenting*) that the gravamen of the action being negligence the three year period of limitation applied, and that the decision be reversed. *Hermes v. Westchester Racing Assoc.* (1925, 1st Dept.) 213 App. Div. 147, 210 N. Y. Supp. 114.

The application of the earliest statutes of limitation depended upon the nature of the writ and the form of action brought. See *Coke on Littleton*, sec. 115a. In some jurisdictions the form is still held to control. *Avery v. Miller* (1890) 81 Mich. 85, 45 N. W. 503; *Cockrill v. Butler* (1897 C. C. E. D. Ark.) 78 Fed. 679. In most jurisdictions, however, it early became the rule that the cause of action and not the form of the remedy would control. See Wood, *Limitations* (4th ed. 1916) sec. 57a. Since statutes of limitation have as their purpose the prevention of injustice when time has destroyed the evidence, the form of action would seem to be immaterial. *Cf. Wood v. Carpenter* (1879) 101 U. S. 135. Despite the existence of facts that would ground an action in contract, the gravamen of the action has in many cases been held to be negligence and the limitation period appropriate to actions for negligent injury applied. *Marty v. Somers* (1917) 35 Calif. App. 182, 169 Pac. 411 (malpractice); *Webber v. Herkimer & M. Street Ry.* (1888) 109 N. Y. 311, 16 N. E. 358 (common carrier); *Krebenios v. Lindauer* (1917) 175 Calif. 431, 166 Pac. 17 (employment); *Kelly v. Western U. Tel. Co.* (1897) 17 Tex. Civ. App. 344, 43 S. W. 532 (mental anguish for non-delivery of death notice); see also (1925) 25 COL. L. REV. 977; (1919) 1 A. L. R. 1313. There appears to have been little attempt made to define the term "gravamen", but it is submitted that it is nothing else than the group of material facts—the cause of action. See *Frazier v. Georgia R. R.* (1897) 101 Ga. 70, 74, 28 S. E. 634. But, admittedly, the cause of action in the instant case, as in many of those cited above, is both a breach of contract and a negligent personal injury. The consistent preference that the courts show for the shorter limitation periods appropriate to negligent injury must then be explained on other grounds than the legalistic classification of the cause of action. Since claims for personal injuries resulting from negligence are based on fortuitous occurrences wherein the legal responsibility of the defendant is often very doubtful, prompt action by the parties to identify and trace the persons who have happened to witness the transaction is more than usually important. Such considerations, it is believed, are behind the present statutes of limitation. But the fortuitousness of the occurrence is unaltered by the fact that it may happen to constitute a breach of contract. So it would seem that the election by the courts of the shorter limitation period is eminently sound. On the facts of the instant case as pleaded, however, it is impossible, as the dissent pointed out, to see how there could be any question of a breach of contract by the plaintiff in error, who was merely the owner of the fractious horse.

PUBLIC OFFICERS—REMOVAL "FOR NEGLECT OF DUTY"—DISTINCTION BETWEEN OFFICIAL AND INDIVIDUAL ACTS.—The defendant, a sheriff, while purporting to restore peace in a pool room, struck a crippled onlooker with his pistol and threw him into the street. The governor removed the sheriff from office under the Kentucky constitution which provided for removal "for neglect of duty". The sheriff appealed. *Held*, (two judges *dissenting*)

that the governor's decree be cancelled on the ground that the sheriff had not neglected any official duty, but had acted only as an individual. *Holliday v. Fields* (1925) 210 Ky. 179, 275 S. W. 642.

There are, of course, many obvious distinctions between "official" and "individual" acts. Throop, *Public Officers* (1892) sec. 367; see *Commonwealth v. Chambers* (1829, Ky.) 1 J. J. Marsh. 108, 160. Thus the grounds for removal in the following cases, under the typical "neglect of duty" statutes, seem clearly to be neglect of "official" duties. *State v. Teeters* (1922) 112 Kan. 70, 209 Pac. 818 (non-enforcement of liquor laws); *Coffey v. Superior Court* (1905) 147 Calif. 525; 82 Pac. 75 (permitting gambling); *Freas v. State* (1925, Okla.) 235 Pac. 227 (permitting games of chance). On the other hand, in the instant case, it is by no means clear that hitting the onlooker was merely an individual act. The court, in so deciding, relied largely on a case which held that a county judge, drunk in his office during business hours, was not drunk as an official, but as an individual. *Commonwealth v. Williams* (1880) 79 Ky. 42; see *Craig v. State* (1892) 31 Tex. Cr. App. 29, 19 S. W. 504. Hence it would seem that, under this part of the Kentucky constitution, an officer could never act officially and wrongly simultaneously. This is, in effect, the same theory which gave rise to the doctrine that the state is not responsible for the torts committed by its servants while performing governmental acts. *Cf. Jewett v. New Haven* (1871) 38 Conn. 368; *Lewis v. State* (1884) 96 N. Y. 71. And had its historical basis in the theory that "the king can do no wrong." Borchard, *Government Liability in Tort* (1924) 34 YALE LAW JOURNAL, 1, 2, 255. The weakness in practice of such theory is the result of a tendency to consider gross violations of duty as personal, not official acts, and to confuse "scope of authority" (construed as "legal authority") with "scope of functions", and thus to create an extreme *ultra vires* theory. Deming, *Haftung des Staates Aus rechtswidrigen Handlungen seiner Beamten* (Frankfurt, 1879) 40–44. Many statutes providing for the removal of officers, are, like the constitution in the instant case, so worded as to necessitate deciding whether the act was "official" or merely "individual". Gen. Sts. Minn. 1913, sec. 5724; see *State v. Megaarden* (1901) 85 Minn. 41, 88 N. W. 412; Heminway's Miss. Code, 1917, sec. 2815; *Pruitt v. State* (1917) 116 Miss. 33, 76 So. 761. But a more satisfactory statute would seem to be of the type which provides for removal for "unfitness" or "cause" or some similar term which breaks down the artificial distinction. 1 Civ. Code, S. C. 1912, sec. 695; *State v. Sanders* (1920) 118 S. C. 498, 110 S. E. 808 (adultery rendered a sheriff unfit for that office); Rev. Sts. Me., 1857, ch. 7, sec. 15; *State v. Leach* (1872) 60 Me. 58 (recorder of deeds removed for making a false oath). In the instant case the holding did not preclude removal, for the court in a dictum said that the defendant might be indicted for "malfeasance in office", a statutory ground of removal which involved a jury trial. But it would seem more desirable to hold with the minority that since the sheriff purported to act as an official the single act of hitting the individual should not be separated from the official activity.

REAL PROPERTY—EQUITABLE RELIEF GRANTED WHERE IMPROVEMENT MADE BY MISTAKE ON LAND OF ANOTHER.—The defendant built upon a lot which both he and the plaintiffs thought belonged to the defendant. About five years later the plaintiffs discovered that fifty feet of the lot belonged to them and sued for an accounting. *Held*, that the plaintiffs should either convey their land to the defendants upon receipt of the value of the land unimproved, with a reasonable rental for its use, or pay the defendants the value of the improvements. *Ryan v. Cincinnati Model Homes Co.* (1925, Ohio C. P.) 25 N. P. (N. S.) 574.

The rightful owner of land was, at common law, entitled to improvements or betterments made thereon by mistake, on the theory that they became "a part of the freehold". Sedgwick & Wait, *Trial of Title to Land* (2d ed. 1886) sec. 690. An action of quasi-contract cannot be maintained. *Webster v. Stewart* (1858) 6 Iowa, 401. The courts of equity, however, influenced by the civil law, required the owner of land who sought relief to make compensation for the improvements as a condition precedent to granting such relief. *Rzeppa v. Seymour* (1925) 230 Mich. 439, 203 N. W. 62; 3 Pomeroy, *Equity Jurisdiction* (4th ed. 1918) sec. 1241. Relief has also been granted in equity at the suit of the improver in a few cases. *Bright v. Boyd* (1841, C. C.) 1 Story, 478. (1843, S. C.) 2 Story, 605; *Union Hall Assoc. v. Morrison* (1874) 39 Md. 281; *Hatcher v. Briggs* (1876) 6 Or. 31; *contra: Schroll v. Klinker* (1846) 15 Ohio, 152; *Anderson v. Reid* (1899) 14 App. D. C. 54; see Woodward, *Quasi-Contracts* (1913) sec. 187, and cases cited. Relief, it is often said, is granted the improver to prevent unjust enrichment of the owner. *McKelway v. Armour* (1854) 10 N. J. Eq. 115. But it has been pointed out that enrichment is sometimes not unjust, for a "volunteer should get no pay", if, as is often the case, he is an "officious intermeddler". *Winthrop's Adm'rs v. Huntington* (1828) 3 Ohio, 327. And the improvements may be unwelcome. See *McCoy v. Grandy* (1854) 3 Ohio St. 463, 466. Relief has been refused where the owner did not know of the improvement. *Friel v. Turk* (1924, Ch.) 95 N. J. Eq. 425, 123 Atl. 610. But where the improvements have been made by mutual mistake induced by a third party, the improver has in equity been permitted to recover. *Pearl Township v. Thorp* (1903) 17 S. D. 288, 96 N. W. 99. Where the mistake is mutual, it would seem that relief to the improver should always be given, for there is unjust enrichment without "officious intermeddling". *Magnolia Construction Co. v. McQuillan* (1923) 94 N. J. Eq. 736, 121 Atl. 734. This whole class of cases merge into the encroachment cases, in which the granting of an injunction requiring removal of the encroaching structure is within the discretion of the court. *Crocker v. Manhattan Life Co.* (1901, 1st Dept.) 61 App. Div. 226, 70 N. Y. Supp. 492; *Schwartz v. Holycross* (1925, Ind. App.) 149 N. E. 699; *contra: Marcus v. Brody* (1925, Mass.) 149 N. E. 673; *Pile v. Pedrick* (1895) 167 Pa. 296, 31 Atl. 646; see (1921) 14 A. L. R. 831, note; (1923) 33 YALE LAW JOURNAL, 205. Persons improving land under color of title may recover under the Occupying Claimant or Betterment Acts in most states. *Griswold v. Bragg* (1880, C. C. D. Conn.) 48 Fed. 519.

REAL PROPERTY—GIFTS CAUSA MORTIS OF LAND.—Prendergast conveyed land to his daughter just before a serious operation. He recovered, and with the daughter's consent returned to the land and controlled it as before. After his death, the daughter claimed the land under the conveyance. The other heirs brought an action to set aside the conveyance, alleging that it was a gift *causa mortis*, which had been revoked by the recovery of the grantor. The lower court held the conveyance valid, and the plaintiffs appealed. *Held*, that the judgment be affirmed on the ground that land could not be the subject of a gift *causa mortis*. *Prendergast v. Drew* (1925) 103 Conn. 88, 130 Atl. 75.

A few cases have intimated that a gift *causa mortis* of land might be made. *Cf. Pluche v. Jones* (1893, C. C. A. 5th) 54 Fed. 860; *McCarty v. Kearnan* (1877) 86 Ill. 291; *Peck v. Rees* (1891) 7 Utah, 467, 27 Pac. 581. The case of *Curtiss v. Barrus* (1885, N. Y.) 38 Hun, 165, sustained such a gift; but the instant case is in accord with the almost universal view to the contrary. *Wentworth v. Shibles* (1896) 89 Me. 167, 36 Atl. 108; *In re Heiser's Estate* (1913, Surro. Ct.) 85 Misc. 271, 147 N. Y. Supp. 557 (not citing *Curtiss v. Barrus, supra); Mascarel v. Mascarel's Ex'rs* (1906) 3

Calif. App. 501, 86 Pac. 617 (code provision). The reason is probably to be found in the history of the doctrine. It was taken from the Civil Law. See *Fiero v. Fiero* (1874, N. Y.) 5 Thomp. & C. 151, 152; 2 Blackstone, *Commentaries* *514. The Ecclesiastical Courts of England, which had exclusive jurisdiction over the administration of a decedent's personalty, but no jurisdiction over land, derived many of their rules of decision from the Civil Law. 3 Blackstone, op. cit. *95, *109. Originally a gift *causa mortis* could be accomplished only by manual delivery of possession of the chattel. See *Chase v. Redding* (1859, Mass.) 13 Gray, 418, 420. Later the doctrine of gifts *causa mortis* was extended in chancery to include bank notes and bonds. See *Chase v. Redding, supra; Bradley v. Hunt* (1832, Md.) 5 Gill. & Johns. 54, 58. Constructive delivery is now allowed where manual delivery of the subject matter of the gift is not practicable. *Foley v. Harrison* (1911) 233 Mo. 460, 136 S. W. 354; *Waite v. Grubbe* (1903) 43 Or. 406, 73 Pac. 206. The fact that a gift of land requires a deed of conveyance doubtless prevented the extension of the doctrine to land. A gift *causa mortis* is revocable by the donor before death. See *Bunn v. Markham* (1816, C. P.) 7 Taunt. 224, 231. A deed, however, is irrevocable, and takes effect upon delivery. *Moore v. Downing* (1919) 289 Ill. 612, 124 N. E. 557; *Hathaway v. Payne* (1865) 34 N. Y. 92 (where a deed delivered pending death of the donor was held to pass property upon delivery, the death being considered not a condition precedent, but a mere question of time). In *Stiebel v. Grosberg* (1911) 202 N. Y. 266, 95 N. E. 692, however, it was held that a deed could be delivered to the grantee subject to a parol condition precedent. A few cases have sustained a gift *causa mortis* of personalty by deed, where the donor died from the impending peril. *Meach v. Meach* (1852) 24 Vt. 591 (the court recognizing that objections might be taken to the holding on the ground that a deed is irrevocable); *Kenistons v. Sceva* (1873) 54 N. H. 24; *Powell v. Leonard* (1861) 9 Fla. 359. *Quaere*, whether a gift *causa mortis* of a chattel by deed would be set aside if the donor should live? *Cf. Tate v. Hilbert* (1793, Ch.) 2 Ves. Jr. 111, 120. If so, there would seem to be a fair analogy in favor of holding the doctrine of gift *causa mortis* applicable to land.

SEARCHES AND SEIZURES—NO RETURN OF CONTRABAND GOODS ILLEGALLY SEIZED.—Books unmistakably obscene within the penal law were seized without a warrant. The defendants in a prosecution for violation of the penal law moved for a return of the books and suppression of the evidence. This motion was denied. *Held*, upon a motion for a reargument, that the ruling was correct. *People v. Pomerantz* (1925, Sup. Ct.) 125 Misc. 570, 211 N. Y. Supp. 767.

The court in the instant case treated the questions of suppression of the evidence and the return of the goods as involving the determination of a single issue. Obviously, the usual object of a petition for the return of goods illegally seized is to challenge the competency of the evidence. *State v. McDaniel* (1925, Or.) 231 Pac. 965. In jurisdictions where such evidence is admissible, the goods will, of course, not be returned before trial. Under the federal rule of exclusion of the evidence, many courts hold that the goods will be returned, whether contraband or not. *United States v. Madden* (1924, D. C. Mass.) 297 Fed. 679; *People v. Jakira* (1922, Gen. Sess.) 118 Misc. 303, 193 N. Y. Supp. 306. But some courts, while refusing to admit the evidence, require that there be a possibility of the defendant's possession being lawful before ordering a return of the goods. *State v. Mc Daniel, supra; State v. Andrews* (1922) 91 W. Va. 720, 114 S. E. 257. And where the possession of the goods would necessarily be criminal, its return will generally be denied. *State v. Ditmar* (1925, Wash.) 232 Pac. 321; *People v. Didonna* (1925, Spec. Sess.) 124 Misc. 872, 210 N. Y.

Supp. 135; *United States v. Rykowsky* (1920, D. C. Ohio) 267 Fed. 866. This seems illogical, for if the evidence is suppressed for all purposes, then, strictly, there is no basis for a determination that possession of the property would be in violation of law. *Cf. United States v. Burns* (1925, D. C. Fla.) 4 Fed. (2d) 131; see 4 Wigmore, *Evidence* (2d ed. 1923) sec. 2184; (1921) 21 COL. L. REV. 291. And the reason for the rule of exclusion—protection against unreasonable searches—is impaired. Where the goods seized are clearly dangerous to society, however, there should be no practical difficulty in determining this in advance of trial, and it would seem to be desirable to refuse to return such articles. See Atkinson, *Prohibition and the Doctrine of the* Weeks *Case* (1925) 23 MICH. L. REV. 748, 759. The refusal in the instant case may perhaps be justified on this ground. Whether, further, the evidence obtained by the illegal search should be excluded is still a controverted question. For a citation to differing views by writers upon this subject, see Atkinson, *supra* at 748, note. For a complete review of the state of the authorities up to May, 1925, see the same article at 764. Since that writing, two states listed as uncertain have adopted a definite position. Florida has adopted the federal rule. *Hart v. State* (1925, Fla.) 103 So. 633. Colorado refused to follow this rule, and held that the evidence unlawfully obtained was admissible. *Maccantonio v. People* (1925, Colo.) 236 Pac. 1019.

TORTS—DEATH BY WRONGFUL ACT—FATHER'S BREACH OF CHILD LABOR LAW BARS RECOVERY FOR DEATH OF SON.—The plaintiff, as administrator of his minor son's estate, sued the defendant for wrongfully causing the son's death. The son was killed while operating defendant's elevator, and the wrongful act complained of was defendant's employment of the minor in violation of the Child Labor Law. This statute also imposes a fine on any parent who permits his child to be employed contrary to the statute. The plaintiff recovered in the lower court. The Appellate Court reversed, treating the father's violation of the statute as contributory negligence. *Held*, on appeal, that the plaintiff's participation in the illegal employment bars his recovery. *Newton v. Ill. Oil Co.* (1925, Ill.) 147 N. E. 465.

It has been generally held in actions brought under wrongful death statutes that a parent's contributory negligence, not arising from breach of statute, defeats his recovery when he is sole beneficiary, whether the suit is brought in the parent's name as administrator or by a third person. *Bamberger v. Citizens' St. Ry.* (1895) 95 Tenn. 18, 31 S. W. 163; *Gunn v. Ohio Riv. R. R.* (1896) 42 W. Va. 676, 26 S. E. 546. Where some but not all the beneficiaries are negligent, the better rule is to bar recovery only as to those negligent. *Phillips v. Denver City Tram Co.* (1912) 53 Colo. 453, 128 Pac. 460; *Wolf v. Lake Erie & W. Ry.* (1896) 55 Ohio St. 517, 45 N. E. 703. Though it has been held that the negligence of one defeats recovery of all. *Toner's Adm'r v. South Cov. Ry.* (1900) 109 Ky. 41, 58 S. W. 439; *Darbrinsky v. Pennsylvania Co.* (1915) 248 Pa. 503, 94 Atl. 269. The principle underlying these decisions is that to award damages to a beneficiary guilty of contributory negligence would be to permit him to profit by his own wrong. *Wolf v. Lake Erie & W. Ry., supra; Star Fire Clay Co. v. Budo* 1920, C. C. A. 6th) 269 Fed. 508. But a growing minority of jurisdictions in this country has allowed recovery, even when the person suing was the sole beneficiary. *Warren v. Manchester St. Ry.* (1900) 70 N. H. 352, 47 Atl. 735; *Wymore v. Mahaska County* (1889) 78 Iowa, 390, 43 N. W. 264; *McKay v. Syracuse Rapid Tr. Ry.* (1913) 208 N. Y. 359, 101 N. E. 885. A breach of statutory duty has been held negligence *per se* in civil actions. *Watkins v. Naval Colliery Co., Ltd.*, (1912) L. R. App. Cas. 693; *Martin v. Herzog* (1920) 228 N. Y. 164, 126 N. E. 814. The court might have relied on this theory to deny recovery; it chose, however, to base its decision

on the ground that he who has participated in an illegal transaction cannot claim damages arising therefrom. The idea that plaintiff must not profit by his contributory fault underlies denial of recovery both when plaintiff's wrong is contributory negligence and when it is breach of statute. Since the former defense is breaking down, why should the courts continue to uphold the latter? *Cf. Minerly v. Union Ferry Co.* (1890, Sup. Ct.) 56 Hun, 113, 9 N. Y. Supp. 104; COMMENTS (1918) 27 YALE LAW JOURNAL, 1090. Under Ill. Laws, 1917, sec. 13, p. 517, the plaintiff in the instant case would be fined not more than twenty-five dollars for his violation of the statute. To deny him recovery for the death of his son, which occurred as much through defendant's wrongful act as through the plaintiff's, would be to cast the entire loss resulting from the joint fault upon the plaintiff, who is subject to a fine as well. See *Consolidated Traction Co. v. Hone* (1896) 59 N. J. L. 275, 277, 35 Atl. 899, 900. Such a result deprives both the Death Damage and Child Labor statutes of their force.

TORTS—FALSE IMPRISONMENT—DAMAGES AGAINST B LIMITED TO DETENTION PRIOR TO ERRONEOUS COMMITMENT BY A UNDER LUNACY ACT.—The plaintiff, judicially committed to Dr. A.'s hospital for the insane, was granted, subject to recall, a leave of absence under judicial order giving to Dr. A. a privilege of retaking the plaintiff at any time his mental condition required it. During this leave Dr. B., a Commissioner of Lunacy, believing the plaintiff insane, detained him and advised Dr. A. to examine him. Dr. A., honestly believing the plaintiff's condition required it, recommitted him under authority of the original order. After nine years' detention the plaintiff escaped and brought this action against Dr. A. and Dr. B. The jury found that the plaintiff was sane at the time of recommitment and the court allowed recovery against Dr. A. for that period of detention only that was subsequent to the recommitment and against Dr. B. for that period and for the period of detention in the latter's office as well. The Court of Appeal reversed the judgment and the plaintiff appealed to the House of Lords. *Held*, that since no negligence or malice was shown the action was not maintainable against Dr. A., and that, as to Dr. B., damages must be limited to the detention prior to the recommitment, that act constituting an efficient intervening force. *Harnett v. Bond* (1925, H. of L.) 133 L. T. R. 482.

The English Lunacy Act of 1890, 53 Vict. ch. 5, sec. 330, provides immunity for all acts done thereunder unless malicious or negligent. Dr. A. in the instant case was clearly within that immunity; but the responsibility of Dr. B. is more difficult to determine. One who, without a warrant, restrains another not reasonably thought to be dangerous to himself or others, although reasonably thought to be insane, is responsible as in trespass for false imprisonment at common law. *Fletcher v. Fletcher* (1859, Q. B.) 1 El. & El. 420; *Sinclair v. Broughton* (1882, P. C.) 47 L. T. R. 170; *Look v. Dean* (1871) 108 Mass. 116. The responsibility in such actions extends to all harm directly resulting from the detention. *Standard Oil Co. v. Humphries* (1923) 209 Ala. 493, 96 So. 629 (mental anguish); *Bragg v. Hatfield* (1925, Me.) 130 Atl. 233 (miscarriage). And also to harm directly resulting from the foreseeable acts of third parties, where such acts are induced by the detention. *Childs v. Lewis* [1924, K. B.] 40 T. L. R. 870 (loss of employment); *Filer v. Smith* (1893) 96 Mich. 347, 55 N. W. 999 (newspaper account of arrest). But judicial commitment breaks the causal chain in false imprisonment cases so as to limit recovery to compensation for detention prior to such commitment. *Lock v. Ashton* (1848) 12 Q. B. 871; *Sinclair v. Broughton, supra; McCullough v. Greenfield* (1903) 133 Mich. 463, 95 N. W. 532. The act of recommitment by Dr. A. may perhaps be regarded as a judicial act by delegated authority so as to bring the case within this rule. Had the case arisen in this country,

however, the disability of judges to delegate certain powers might prevent such an interpretation. *Cf. Ocampo v. United States* (1914) 234 U. S. 91, 34 Sup. Ct. 712; *Briggs v. Reynolds* (1912) 176 Ill. App. 420. But in the instant case the commitment by Dr. A. was scarcely induced by the detention by Dr. B.; rather, by the notice and advice. At common law, in the absence of facts constituting malicious prosecution, trespass for false imprisonment was the only action for damages available for wrongful detention. See *Zinkfein v. W. T. Grant Co.* (1920) 236 Mass. 228, 230, 128 N. E. 24, 27. Whether a court would now entertain an action for harm resulting from the negligent notice and advice may be considered doubtful. But in any event it would seem by parity of reasoning that there should be the same limitation of responsibility as in the false imprisonment cases involving judicial commitments. *Cf. Lock v. Ashton, supra; Sinclair v. Broughton, supra; McCullough v. Greenfield, supra.* The security of the individual is qualified by the necessity of protecting the public from criminals and lunatics.

VENDOR AND PURCHASER—MARKETABLE TITLE—EFFECT OF CHANGE OF CONDITION AND LAPSE OF TIME ON RESTRICTIVE COVENANTS.—Original deeds to lots sold by Gouverneur Morris in 1848 out of a tract of land contained, *inter alia*, a covenant against the manufacture and sale of intoxicating liquors. In 1849, an agreement releasing the covenant was entered into by Morris, his grantees, and others. The plaintiff sold the lot to the defendant, the contract of sale containing no such covenant. The defendant rejected title as unmarketable, although it appeared that the neighborhood had greatly changed, and that the covenant had been disregarded for seventy-five years. *Held*, upon a submission of the controversy under N. Y. C. P. A. 1921, sec. 546, that the title was marketable. *Postley v. Kafka* (1925, 1st Dept.) 213 App. Div. 595, 211 N. Y. Supp. 382.

The release of the covenant was binding between the original parties. See 1 Tiffany, *Real Property* (2d ed. 1920) 295; *cf. Weinberg v. Sanders* (1923, 1st Dept.) 204 App. Div. 409, 198 N. Y. Supp. 121 (involving a lot in the same tract). But the covenant still operated as a restrictive covenant in favor of other owners of lots in the tract who did not join in the release. See *Coudert v. Sayre* (1890) 46 N. J. Eq. 386, 396, 19 Atl. 190, 194. A marketable title, necessary to the granting of specific performance of an ordinary contract to purchase land, is one that is free from reasonable danger of litigation. *Howe v. Coates* (1906) 97 Minn. 385, 107 N. W. 397, and cases cited; *Rife v. Lybarger* (1892) 49 Ohio St. 422, 429, 31 N. E. 768, 770. Restrictive covenants have been held to constitute an encumbrance. *Dethloff v. Voit* (1916, 1st Dept.) 172 App. Div. 201, 158 N. Y. Supp. 522. The covenant in the instant case probably became specifically unenforceable because of the changed condition of the neighborhood. *Columbia College v. Thatcher* (1882) 87 N. Y. 311. And because laches or abandonment of purpose may be inferred from the parties' inaction for seventy-five years. *Loud v. Pendergast* (1910) 206 Mass. 122, 92 N. E. 40; *Baldwin v. Trimble* (1897) 85 Md. 396, 37 Atl. 176; 4 Pomeroy, *Equity Jurisdiction* (4th ed. 1919) sec. 1702. Valid covenants, however, whose specific enforcement is improbable, have been held encumbrances. Maupin, *Marketable Title to Real Estate* (1921) 863. The court in some cases has refused to resolve the doubt since the parties were not before it. *Jeffries v. Jeffries* (1875) 117 Mass. 184. Judges may differ as to marketability. The title which is declared doubtful in one case may be forced upon a purchaser in another. *Mullings v. Trinder* (1870) L. R. 10 Eq. 449; see Fry, *Specific Performance* (6th ed. 1921) secs. 884–886. The result of the instant case seems desir-

able. There should be a rational doubt before a title is declared unmarketable. *Zelman v. Kaufherr* (1909, Ch.) 76 N. J. Eq. 52, 73 Atl. 1048; *Smith v. Reidy* (1921, Ch.) 92 N. J. Eq. 586, 113 Atl. 774; *cf.* the dissenting opinion of Pound, J. (Cardozo and Crane, J. J. concurring) in *Chesebro v. Moors* (1922) 233 N. Y. 75, 82, 134 N. E. 842, 844.

WILLS—AFTER DEVISE OF FEE SIMPLE, SUBSEQUENT CLAUSE CREATING CONDITIONAL LIMITATION HELD VOID.—The testatrix in one paragraph of her will devised to the plaintiff an interest in land "absolutely and in fee simple". A subsequent paragraph provided that on the plaintiff's death without issue all portions of the estate willed to him were to go to the heirs of testatrix' father and mother, and that all rights given to the plaintiff by any clause of the will were not to vest except subject to those limitations and conditions. The plaintiff sued for a partition, which the lower court allowed. *Held*, on appeal, that plaintiff was entitled to partition, the attempted limitation being void on the ground of repugnancy. *Todd v. Stewart* (1925, Iowa) 202 N. W. 844.

In the interpretation of a will the intention of the testator is to be gathered from the whole instrument. Where two clauses appear inconsistent, they are to be construed, if possible, so that both may stand. *Smith v. Bell* (1832, U. S.) 6 Pet. 68; *Rogers v. Rogers* (1924) 312 Ill. 122, 143 N. E. 490. While the language of the clause giving to plaintiff an estate "absolutely and in fee simple" would, if standing alone, pass a fee simple absolute, the expressed intention of testatrix in the subsequent paragraph clearly should impose on that fee a condition and create a valid estate in the secondary donees by way of conditional limitation. *Hull v. Calvert* (1920) 286 Mo. 163, 226 S. W. 553; *Brightman v. Brightman* (1868) 100 Mass. 238. Where a fee is devised, coupled with an absolute power of disposal, any limitation over is void on the grounds of repugnancy. *Gannon v. Albright* (1904) 183 Mo. 238, 81 S. W. 1162; *Jackson v. Bull* (1813, N. Y.) 10 Johns. 19. But where, as in the instant case, a fee is granted with no absolute power of disposition mentioned, subsequent words of limitation should be valid. *McRee's Adm'r v. Means* (1859) 34 Ala. 349; *Booker v. Booker* (1844, Tenn.) 5 Humph. 505. An executory limitation over after a fee may be made to depend on any named contingency not obnoxious to the rule of perpetuities nor otherwise illegal. *Daniel v. Thompson* (1854) 53 Ky. 533 (death without lawful issue); *Chrystie v. Phyfe* (1859) 19 N. Y. 344 (dying "unmarried and without leaving a child"); *Bell v. Scammon* (1844) 15 N. H. 381 (death before a certain age and having no male issue). At common law, before the introduction of uses, any limitation over after a fee created by feoffment was void. 4 Kent, *Commentaries* (12th ed. 1884) 136; *Palmer v. Cook* (1896) 159 Ill. 300, 42 N. E. 796. After uses were devised, a fee could be mounted on a fee by way of shifting use. *Wyman v. Brown* (1863) 50 Me. 139; Sugden's Gilbert, *Uses*, 152. Shifting executory devises after gifts in fee have been recognized almost without dissent ever since the Statute of Wills. 2 Jarman, *Wills* (6th ed. 1910) 1432; Digby, *History of the Law of Real Property* (5th ed. 1897) 382. And shifting uses were familiar interests at a considerably earlier date. Gray, *Perpetuities* (3d ed. 1915) 118, 119. It is respectfully submitted that only one of the seven cases cited in the opinion of the principal case as sustaining its holding is actually in point; *viz.*, *Talbot v. Snodgrass* (1904) 124 Iowa, 682, 100 N. W. 500. That case, together with the one under discussion, is practically unsupported by any authority outside the state of Iowa. *Cf. Carllee v. Ellsberry* (1907) 82 Ark. 209, 101 S. W. 407. The will in the instant case was so involved that the court may have wished to construe it as simply as possible, or the policy underlying the decision may have been that of the early common law which refused to hold valid a contingent

future interest of a kind certain to impede the alienation of land. It is difficult to account for the holding on any other ground.

WILLS—DESCENT AND DISTRIBUTION—WILL VOID IF CHILD EN VENTRE SA MERE NOT MENTIONED OR PROVIDED FOR.—The New Jersey Wills Act provided that a will executed when the testator had no "issue living" should be voided by the subsequent birth of children if such children were not provided for or mentioned in the will. The testatrix executed a will two months before the birth of her child and died four days thereafter. *Held,* that the will was voided since there was no "issue living" at the time it was executed and no mention was made of the child subsequently born. *In re Haines' Will* (1925, N. J. Prerog. Ct.) 129 Atl. 867.

If a child, omitted from the will, was living when the will was made he takes nothing, but if born subsequently he is generally permitted to take as a pretermitted child. N. J. Wills Act, 1877, sec. 20, 21 (Comp. Sts. sec. 5865); Cahill's N. Y. Cons. Laws, 1923, ch. 13, sec. 26. This distinction would indicate the object of such statutes to be "to guard against such testamentary thoughtlessness and lack of vision as prevent a testator from contemplating the possibility of afterborn children". *McLean v. McLean* (1913) 207 N. Y. 365, 101 N. E. 178. If this be so, to apply the statute to the instant case would involve the assumption that the testatrix, two months before the birth of her child, might not have "contemplated the possibility of afterborn children". It has been suggested that the statute might be satisfied by considering the testatrix' condition as a sufficient "mention" to indicate intention to disinherit. *Cf. McCrum v. McCrum* (1910, 2d Dept.) 141 App. Div. 83, 125 N. Y. Supp. 717 (facts identical with instant case—lower court had found specific intent to disinherit). But the general rule is that an intention to disinherit must appear in the will and may not be shown by parol. *Re Estate of Jean Gerraud* (1868) 35 Calif. 336; *In re Patterson's Estate* (1925) 282 Pa. 396, 128 Atl. 100. And a number of jurisdictions have, therefore, reached the result of the instant case under similar statutes. *McCrum v. McCrum, supra; Pearce v. Carrington* (1909, Tex. Civ. App.) 124 S. W. 469; *In re Patterson's Estate, supra; Thompson v. Thompson* (1924) 229 Mich. 526, 201 N. W. 533. But none of these cases has considered the fact that the child *en ventre sa mere* is for many purposes considered as "born". The court in the instant case states that this fiction can only be applied when for the benefit of the child. It has, however, been applied where it did not work for the benefit of the child. *Holbrook v. Holbrook* (1920, 2d Dept.) 193 App. Div. 286, 183 N. Y. Supp. 728 (provision for a conditional gift to "surviving issue" held a "mention" of child born five months after testator's death so as to defeat inheritence by that child). Whether the child be classed as born before or after the date of the will should depend on the purpose of that classification. That purpose is here to require that children already born need not be expressly mentioned in order to show that they have been given due consideration. Where, as in the instant case, the existence of the child must have been appreciated by the testatrix when making the will it would seem more in accord with the testatrix' state of mind to consider the child "born" at that time. But this logical accuracy is probably precluded by the disinclination of courts to recognize a disinheritance not decisively expressed.