

RECENT CASE NOTES

ADMINISTRATIVE LAW—SCHOOL DISTRICTS—DETACHING TERRITORY—REVIEW OF ACTION OF BOARD.—After a hearing of the petition of some of the property owners affected, the board of county commissioners detached certain territory, which several years before had been consolidated with district 47, and again constituted it as school district 58. A state statute provided for an appeal from the board's action to the district court, on the ground that it was "against the best interests of the territory affected." Upon the appeal, two members of the board testified that they had voted for the separation because they believed that district 58 had never been legally consolidated with district 47. *Held*, that this evidence was properly received. *In re School Dist. No. 58* (1919, Minn.) 173 N. W. 850.

The universal rule is that the validity of a verdict cannot be attacked because of the motives of the jurors. 4 Wigmore, *Evidence* (1905) sec. 2349. Nor can the motive of legislators, in passing acts within their power, be inquired into by the courts. *Dayle v. Continental Ins. Co.* (1876) 94 U. S. 535, 24 L. ed. 148. The same rule has been extended to purely legislative acts of municipal corporations. 2 McQuillin, *Municipal Corporations* (1911) sec. 703; *Soon Hing v. Crowley* (1885) 113 U. S. 703, 5 Sup. Ct. 730. But a qualification has been made where fraud was involved in the passage of the ordinance. *Kansas City v. Hyde* (1906) 196 Mo. 498, 96 S. W. 201. The creation of new districts by the board of county commissioners was a legislative act. *Cf. Farrel v. County of Sibley* (1917) 135 Minn. 439, 161 N. W. 152. The principal case extends the qualification stated above so as to admit evidence not only of fraud, but also of erroneous views of the law acted upon by members of the board. See *Common School Dist. 85 v. Renville Co.* (1918, Minn.) 170 N. W. 216, 217.

AGENCY—UNDISCLOSED PRINCIPAL—WARRANTY IN DEED—EFFECT OF STATUTE ABOLISHING SEALS.—The defendant's son conveyed to the plaintiff a parcel of land which contained ten acres less than specified in the deed. The plaintiff sought to recover from the defendant, as undisclosed principal, for a breach of warranty in the deed on the theory that the existing state statute, which abolished seals, had done away with all distinction between ordinary written contracts and specialties. *Held*, that the plaintiff was not entitled to recover for breach of warranty, with a dictum that he could have recovered in quasi-contract. *Downer v. Whitecotton* (1919, Mo. App.) 212 S. W. 378.

It is generally held, in construing statutes of this nature, that merely the formality of the seal is dispensed with and that they do not change the rules of law respecting an instrument required at common law to be sealed. 8 R. C. L. 939; *Sanger v. Warren* (1897) 91 Tex. 472, 44 S. W. 477. However, the Minnesota court has held that the result of a statute abolishing seals is to do away with all the differences theretofore existing between simple contracts and specialties. *Streeter Co. v. Janu* (1903) 90 Minn. 393, 96 N. W. 1128; *Efta v. Swanson* (1911) 115 Minn. 373, 132 N. W. 335. Before the enactment of such statutes, the general rule at common law was that an undisclosed principal was not liable on a covenant in a sealed instrument. *Willard v. Wood* (1890) 135 U. S. 309, 10 Sup. Ct. 831; *Briggs v. Partridge* (1876) 64 N. Y. 357. In the instant case, although the court intimated that the statute had abolished all distinction

between specialties and simple contracts, at least as far as the liability of an undisclosed principal was concerned, yet it held that an undisclosed principal was not liable because not mentioned in the instrument. But in simple contracts, it is not necessary that he be mentioned in the instrument. *Darrow v. Horne Produce Co.* (1893, D. Ind.) 57 Fed. 463; *Byington v. Simpson* (1883) 134 Mass. 169. However, in the instant case it was said that recovery would be allowed in quasi-contract. Such recovery was allowed before the statute abolishing seals was enacted. *Moore v. Granby Mining Co.* (1883) 80 Mo. 86. Had the court followed the Minnesota rule in the present case, the measure of damages would have included the expense to the plaintiff of defending the title against his vendee, to whom the plaintiff had made the same warranty that the defendant made, whereas in quasi-contract only the value of the land could be recovered.

CONFLICT OF LAWS—STATUTORY CONSTRUCTION—FORUM *v.* ENACTING JURISDICTION—CONCURRENT STATE LAWS CREATING AN INTERSTATE TOLL-BRIDGE CORPORATION.—A corporation was organized under the laws of New Hampshire with authority to construct a toll-bridge between Cornish, N. H., and Windsor, Vt., and to collect certain specified tolls. Subsequently, the legislature of Vermont confirmed the rights of the grantees, granting "the same rates of toll which are granted to them by the action of the legislature of New Hampshire." In *Turnpike Co. v. Peru* (1917) 91 Vt. 295, 100 Atl. 679, this grant was construed not to authorize the collection of tolls from motor vehicles. Thereafter, the corporation brought an action in New Hampshire to recover tolls for motor traffic "arising" in Vermont. Held, that the Vermont decision should be disregarded and the toll charges upheld. *Proprietors of Cornish Bridge v. Fitts* (1919, N. H.) 107 Atl. 626.

In the principal case the law of Vermont was assumed to be primarily applicable to the contract as such. It may be inferred, therefore, that the liability to toll, if any, became complete by virtue of acts occurring in that state. The case did not, however, require a determination of this point, inasmuch as the principles of contract law, whatever the jurisdiction, could afford but one relevant rule concerning the validity of the toll, namely, that a corporation whose mode of contracting is prescribed by the law of the incorporation may contract in no other mode than that thus prescribed. *Bank of Augusta v. Earle* (1839, U. S.) 13 Pet. 519; *St. Louis V. & T. H. Ry. v. T. H. & I. R. R.* (1892) 145 U. S. 393, 12 Sup. Ct. 953. The plaintiff, however, was incorporated under the laws of both New Hampshire and Vermont, and the laws of both states prescribed toll charges. The requirements of both laws must be satisfied unless the case admitted of a severance of the corporate personalities created by the respective states for the purpose of predicating legal consequences in each state. Such a severance, irrespective of any theory concerning the single or dual character of the product of a dual incorporation, was clearly inadmissible in the principal case, since the joint authorization of both the incorporating states was indispensable to the power of the corporation with respect either to charges of toll or to exemptions from such charges. *Covington & C. Bridge Co. v. Kentucky* (1894) 154 U. S. 204, 14 Sup. Ct. 1087; *Chesapeake etc. Canal Co. v. Baltimore & O. Ry.* (1832, Md.) 4 Gill & J. 1; *Fisk v. Chicago, R. I. & P. Ry. Co.* (1868, Sup. Ct. N. Y.) 4 Abb. Pr. N. S. 378; *Cleveland & Pittsburg Ry. v. Speer* (1867) 56 Pa. St. 325; *New Orleans, M. & T. Ry. v. Miss.* (1884) 112 U. S. 12, 5 Sup. Ct. 19. A divergence on this point between the states would, it seems, in the absence of congressional action, result in the closing of the bridge to motor traffic. The constitution of the United States protects against such a divergence resulting from separate legislative amendment. *Covington & C. Bridge Co., supra*. Constitutional limitations, however, do not meet the case of a divergence,

through judicial construction, of complementary state laws which were intended to be uniform. *Railroad v. McClure* (1871, U. S.) 10 Wall. 511. The court in the principal case was therefore constrained either to follow the Vermont decision, contrary to its own opinion, as an authority for New Hampshire law, or to declare that the Vermont court had misconstrued the Vermont law, or to concede the existence of a legislative divergence between the states which must be productive of infinite complications. The second alternative was properly chosen. The widely recognized rule that the court of the forum should follow statutory constructions adopted by the highest courts of the enacting state is a principle, not of constitutional law, but of the conflict of laws. *Wiggins' Ferry Co. v. Chicago & A. Ry.* (1882, C. C. E. D. Mo.) 11 Fed. 381; *Johnson v. N. Y. Life Ins. Co.* (1903) 187 U. S. 491, 23 Sup. Ct. 194; *Eastern Bldg. & Loan Ass'n v. Williamson* (1903) 189 U. S. 122, 23 Sup. Ct. 527. Like all principles of conflict of laws it need not be followed to a practical result repugnant to the policy of the forum. *Gelpcke v. Dubuque* (1864, U. S.) 1 Wall. 175. Cf. *Jessup v. Carnegie* (1880) 80 N. Y. 441; cf. *Auld v. Cant* (1914) 216 Mass. 381, 103 N. E. 933; cf. *Fred Miller Brewing Co. v. Capital Ins. Co.* (1900) 111 Iowa, 590, 82 N. W. 1023. To have followed the ordinary rule in the principal case, would have involved either a renunciation of the court's function in construing its own law, or the practical nullification of a part of that law. Moreover the decision which it was asked to follow obviously turned upon a misconstruction of the law of the forum, and was therefore seriously discredited as evidence of the law of the foreign state.

CONTRACTS—ANTENUPTIAL AGREEMENTS TO BEQUEATH—GIFTS.—By an antenuptial agreement, the testator promised to leave by will to his wife a share of his estate equal to that to be left by will to each of his children by a former marriage. The wife promised to accept such a provision in lieu of all her claims, as widow, on the estate. After the marriage a will was drawn according to the antenuptial agreement. During his lifetime, the testator made large gifts for the purpose of diminishing his wife's expectancy. After his death, the executors of his will brought a bill in equity to enjoin the widow from petitioning for a widow's allowance. Held, that the injunction should not be issued. *Eaton v. Eaton* (1919, Mass.) 124 N. E. 37.

It is well settled that antenuptial agreements to alter the interest which the parties would have in the property of each by the law of the marriage status are valid, if both parties exercise good faith. *Kroell v. Kroell* (1905) 219 Ill. 105, 76 N. E. 63; *Rankin v. Schiereck* (1914) 166 Iowa, 10, 147 N. W. 180. And if the deceased spouse has performed his part of such an agreement, it will be enforced specifically against the surviving spouse. *Paine v. Hollister* (1885) 139 Mass. 144, 29 N. E. 541; *Thompson v. Tucker-Osborn* (1897) 111 Mich. 470, 69 N. W. 730; cf. also (1919) 28 YALE LAW JOURNAL, 709. However, in the absence of a contract or statute, a husband is privileged to give away, during his lifetime, all of his personal property, without the consent of his wife, and for the purpose of preventing her from acquiring any portion of it. *Trabbic v. Trabbic* (1905) 142 Mich. 387, 105 N. W. 876; *Roberson v. Roberson* (1905) 147 Ala. 311, 40 So. 104. Furthermore, a husband is privileged to make reasonable gifts during his lifetime, even though duty bound by an antenuptial contract to leave all of his property to his wife. *Dickinson v. Seaman* (1908) 193 N. Y. 18, 85 N. E. 818. But in the instant case the gifts were not reasonable and were inconsistent with the exercise of good faith. Therefore, it is believed that the decision is sound. For similar protection of a widow's dower rights against fraudulent conveyance by her husband in contemplation of marriage see (1919) 28 YALE LAW JOURNAL, 701.

CONTRACTS—RESTRAINT OF TRADE—USE OF TRADE NAME.—The plaintiffs, manufacturers of motion picture films, engaged the defendant, an actor of almost no experience, to work for them on contracts from year to year. Each yearly contract provided that he should act under the name of Stewart Rome while employed by the plaintiffs, but that he should never use that name when not acting for them. After three years with the plaintiffs, during which time he became famous as the actor, Stewart Rome, the defendant left for war service. On his return he was engaged by a rival firm and immediately proceeded to act under the name of Stewart Rome. The plaintiffs brought this action to restrain him from using that name. *Held*, that an injunction should not be granted. *Hepworth Manufacturing Co. Ltd. v. Wernham Ryott* (1919, Eng. Ch.) 121 L. T. Rep. 226.

The decision in the instant case was based on the ground that the contract was void as an illegal restraint of trade. Contracts not to use a firm name have been loosely classed as not in restraint of trade. *Vernon v. Hallam* (1886) 34 Ch. D. 748. But it is clear that the purpose and the effect of such a contract is to restrain trade, whatever the device used. The real holding is that it is not an *illegal* restraint of trade. The same seems to be true of the instant case. The question is whether such a restraint is illegal. The accepted rule is that a contract in partial restraint, like that in the instant case, must be unreasonable before it will be held illegal. *Maxim-Nordenfeldt Gun Co. v. Nordenfeldt* [1893] 1 Ch. 630, [1894] A. C. 535; *Harrison v. Glucose Sugar Refining Co.* (1902, C. C. A. 7th) 116 Fed. 304. Similar considerations lie at the root of the rules on agreements to obtain contracts from the government. See (1919) 28 YALE LAW JOURNAL, 502. Certain kinds of contracts are held reasonable or unreasonable "as a matter of law." Covenants not to use a firm name, mentioned above, are one class almost analogous to that in the instant case. But it is evident that the defendant's covenant, not being made to protect a sale of good-will, is not sufficiently similar to justify a classification with such contracts; for in the instant case, unless the defendant uses the name Stewart Rome, it will be of no benefit to anyone, whereas, in the sale of good-will, the name is in constant use. Another type of contract, similar to the one in the instant case, is that of the physician's assistant not to practice in the vicinity of the physician who has instructed him. Such contracts are held valid, probably in order not to discourage such instruction. *Freudenthal v. Espey* (1909) 45 Colo. 488, 102 Pac. 280. In the instant case, the employer has incurred expense in training the actor, in marketing the productions, in advertising, and in building up a reputation for the actor. The question is, therefore, whether the actor shall be kept free from a condition of servitude or the employer shall be protected in his investment. If the instant case be followed, the training of actors might be discouraged, since the employers would not be protected, as are the doctors in the above mentioned cases. Nevertheless, the principal case has taken what seems the preferable view. It is to be noted that the defendant's contract, unlike the physician's assistant, prevented the use of the name Stewart Rome anywhere.

EVIDENCE—EXPERT TESTIMONY—BASIS.—The plaintiff sued to recover damages for blindness, alleged to have been caused by an electrical flash which was the result of the defendant's negligence. A certain physician had examined the plaintiff after this suit was instituted, but had never treated him. He was permitted to testify, as an expert witness, that the plaintiff was totally blind in his left eye, basing his opinion, in part, upon the statements which the plaintiff had made to him. *Held*, that the admission of this evidence was error. *Bell v. Milwaukee Electric Ry. & Light Co.* (1919, Wis.) 172 N. W. 791.

The weight of authority requires that the facts upon which an expert's opinion

is based shall be stated or appear in evidence before his opinion is given. *Raub v. Carpenter* (1902) 187 U. S. 159, 23 Sup. Ct. 72; *Williams v. Philadelphia Rapid Transit Co.* (1917) 257 Pa. St. 354, 101 Atl. 748. The basis for this rule is that the jury will thus be enabled to determine whether or not the facts upon which the opinion is predicated are correct, and to permit other experts to pass on the same facts. But it has been indicated that the rule rests upon an incorrect theory and usurps the province of cross examination. See (1917) 26 YALE LAW JOURNAL, 502. Most jurisdictions exclude, as hearsay evidence, statements to a physician during an examination if made in order that he will be able to testify. 3 Wigmore, *Evidence* (1905) sec. 1721. However, an opinion partly based on the statements of the injured person as to present symptoms is generally admitted. 1 *ibid.*, sec. 688. But not if based entirely on such statements, when they are made out of court. *People v. Ebanks* (1897) 117 Calif. 652, 49 Pac. 1049. It is submitted that the conclusion reached in the principal case is not desirable. It is probably the result of combining the rule requiring the facts upon which the expert opinion is based to be stated, with the rule excluding, as hearsay evidence, statements made during an examination to a physician for the purpose of securing his testimony. But the latter rule did not apply, because such statements, when given as the foundation of an opinion, do not have hearsay quality. *Chicago, R. I. & P. Ry. v. Jackson* (1917, Okla.) 162 Pac. 823. The strict enforcement of the rule of the principal case would practically prohibit expert testimony in such cases, because the statements of the patient, as to present symptoms, at least, are a necessary element of the expert's opinion.

EVIDENCE—FOOTPRINTS—WHEN ADMISSIBLE TO PROVE IDENTITY.—In a trial for murder the county attorney was permitted to testify that he had seen footprints near the scene of the killing, that he had requested the defendant to show him his boots, and that, in his opinion, the tracks were made by the defendant's boots. *Held*, that the evidence was too indefinite and its admission was error. *Burkhalter v. State* (1919, Tex. Cr. App.) 212 S. W. 163.

Footprints are a species of "identity evidence." When offered to show that an act must have been done by some human being, there can be no doubt as to their admissibility. *State v. Daniels* (1904) 134 N. C. 641, 46 S. E. 743; see *Leonard v. State* (1907) 150 Ala. 89, 93, 43 So. 214, 216. But when offered to show that an act must have been done by a particular human being, the rule of admission narrows. At best, such evidence requires an indirect mode of inference, since "rarely can one circumstance alone be so inherently peculiar to a single object." 1 Wigmore, *Evidence* (1904) sec. 411. An actual measurement of both shoe and footprint or a physical comparison by super-position is usually required. *Bal-lenger v. State* (1911) 63 Tex. Cr. Rep. 657, 141 S. W. 91; *State v. Harrold* (1866) 38 Mo. 496. The opinion of the witness as to the identity is inadmissible. *Dubose v. State* (1906) 148 Ala. 560, 42 So. 862; *State v. Green* (1893) 40 S. C. 328, 18 S. E. 933; but see *State v. Ancheta* (1915) 20 N. M. 19, 27, 145 Pac. 1086, 1088. When the witness is the maker of the shoes his opinion is admissible on the ground, it would seem, that it is expert testimony. *Newton v. State* (1912) 65 Tex. Cr. Rep. 87, 143 S. W. 638. There is a conflict of authority as to when the procurement of such evidence violates the defendant's immunity from self-incrimination. When the defendant voluntarily submits to the comparison, as in the principal case, there is clearly no violation. *Webb v. State* (1914) 11 Ala. App. 123, 65 So. 845; *State v. Sirmay* (1912) 40 Utah, 525, 122 Pac. 748. But when he is coerced or ordered to submit to the comparison, the evidence has been held inadmissible. *Elder v. State* (1915) 143 Ga. 363, 85 S. E. 97; see *State v. Sirmay, supra*, 536. However, the better view is that the immunity from self-incrimination extends only to testimonial utterances. *State v. McIntosh* (1913)

94 S. C. 439, 78 S. E. 327; *State v. Graham* (1876) 74 N. C. 646; *State v. Thompson* (1912) 161 N. C. 238, 76 S. E. 249; see (1918) 27 YALE LAW JOURNAL, 412; see also (1919) 28 *ibid.*, 703.

NEGLIGENCE—CERTIFIED PUBLIC ACCOUNTANTS.—The defendants were certified public accountants and as such audited the books and accounts of a certain company. The plaintiff purchased stock in the company, relying upon the defendant's audit, which was shown to him by a third party. The plaintiff and this third party were both strangers to the contract of accounting between the defendants and the company. The defendants had been negligent in their audit and the plaintiff suffered loss thereby, as the stock was in fact worthless, contrary to the figures of the defendant's audit. The plaintiff sued in an action of trespass for the damages resulting to him from this negligence. *Held*, that the plaintiff could not recover because the defendants were not liable to anyone not a party to the contract for the accounting. *Landell v. Lybrand* (1919, Pa.) 107 Atl. 783.

In the principal case, the defendants owed the plaintiff no contractual duty. But courts realize that in some similar cases of negligence, a contractual duty is unnecessary to support an action; and have allowed recovery by third persons where the negligence was such that it was inherently dangerous, and the resulting damage was reasonably foreseeable by ordinarily prudent men. *Walcho v. Rosenbluth* (1908) 81 Conn. 358, 71 Atl. 566; see COMMENT (1918) 27 YALE LAW JOURNAL, 1068. The principal case seems to be in accord with the existing law, but its justice and expediency are questionable. It has been held that certified public accountants constitute a skilled professional class and are liable for negligence to one who employs them. *Smith v. London Assurance Corporation* (1905) 109 App. Div. 882, 96 N. Y. Supp. 820. Stock companies are accustomed to advertise, as an assurance of their good standing, that certain named public accountants have audited their books and accounts and have certified to their financial standing. Public expediency demands, aside from the criminal aspect, that accountants who have been guilty of fraud in such cases should be held liable to one who, relying in good faith upon their certified audit as they intended he should, bought stock and thereby suffered loss. Furthermore, it seems that public accountants, who are recognized as a responsible class in the business world, should be compelled to exercise due care in their audits, upon which, as can be reasonably foreseen, many strangers may act. And all the more so, because they have the election to contract or not. However, an attorney who acted in good faith has been held not liable to third persons in an action of tort for negligence. *Campbell v. Brown* (1876, C. C. W. D. Tex.) 2 Woods, 349. But an attorney cannot reasonably be expected to foresee that strangers will probably act on his advice, for experience shows otherwise. And this reasoning seems to apply also to cases of physicians, because a doctor prescribes for a particular patient and does not intend, nor is it reasonably probable, that third parties will rely and act upon his advice to this particular patient. But neither of these classes of cases conflicts with the proposition that public accountants should be held liable to third parties for negligence, when it is reasonably foreseeable that third parties may act upon their audits. And if the courts will not impose this duty to the public, then it is submitted that this is a case for legislative enactment.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EMPLOYMENT OF INFANTS.—The plaintiff was employed to run an elevator in violation of a statute which provided that no child under sixteen years of age should be employed or permitted to operate an elevator. The plaintiff was injured while so employed and sued for personal

injuries. The court charged the jury that if the plaintiff was guilty of contributory negligence, he could not recover. *Held*, that this instruction was erroneous, because an action for injuries arising in the course of such prohibited employment cannot be defeated by the plaintiff's contributory negligence. *Karpeles v. Heine* (1919, N. Y.) 124 N. E. 101.

The legislature contemplated a special danger to children working in industries because of the characteristics incident to their immaturity, and this was one of the chief purposes of forbidding their employment in industrial establishments. *Stehle v. Jaeger Automatic Mach. Co.* (1909) 225 Pa. St. 348, 74 Atl. 215. Many cases have held that where a child is injured while employed in an industry in violation of a statute, contributory negligence is no defence. *De Soto Coal Mining & Development Co. v. Hill* (1912) 179 Ala. 186, 60 So. 583; *Lenahan v. Pittston Coal Mining Co.* (1907) 218 Pa. St. 311, 67 Atl. 642; *American Car & Foundry Co. v. Armenitrait* (1905) 214 Ill. 509, 73 N. E. 766. If a statute prohibiting the employment of minors in dangerous industries not only creates a civil but also a criminal liability, the employment has been classed with ordinary acts of gross negligence, and the general rule applied that where the defendant is guilty of gross negligence, contributory negligence of the person injured is immaterial. *Leora v. Minn. St. P. & S. S. Marie Ry.* (1914) 156 Wis. 386, 146 N. W. 520. On the other hand, many cases have taken the moderate view that employment of a child under a certain age, in violation of a statute, is negligence in the employer and will exclude him from the defence of contributory negligence, unless it be shown that the child had experience and intelligence, notwithstanding his age, to enable him to appreciate and avoid the dangers of service. *Norman v. Virginia Pocahontas Coal Co.* (1910) 68 W. Va. 405, 69 S. E. 857; *Beghold v. Auto Body Co.* (1907) 149 Mich. 14, 112 N. W. 691; 12 L. R. A. (N. S.) 461, note. This is properly a question for the jury. *Sterling v. Union Carbide Co.* (1905) 142 Mich. 284, 105 N. W. 755; *Rolin v. Reynolds Tobacco Co.* (1906) 141 N. C. 300, 53 S. E. 891. Finally, the extreme view has been held that the rule requiring the plaintiff, in an action for negligence, to show due care on his part is the same in actions brought under a statute as at common law, unless the statute itself provides otherwise. *Taylor v. Carew Mfg. Co.* (1887) 143 Mass. 470, 10 N. E. 308. It has been held that Workmen's Compensation Acts do not affect such a statute as the one in the principal case. See (1919) 28 YALE LAW JOURNAL, 509. It would seem that the moderate view should be applied in most cases, except where the intent of the statute was to impose absolute liability for its violation, irrespective of contributory negligence.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—SOLDIER UNDER ORDERS.—The plaintiff, a private in the United States Army, was ordered to guard a bridge on the defendant's railroad. He was directed to walk up and down a four foot space between the two tracks, but, if a train approached, to step onto the track which remained clear. While he was on duty with these directions, a train approached. He stepped onto the other track, which appeared clear, and was hit by an express train coming from the other direction. He sued the railroad company for the injuries which resulted. The trial court held that he was guilty of contributory negligence in failing to step into the intermediate space instead of onto the other track, and withheld the case from the jury. *Held*, that this ruling of the court was erroneous. *Kelly et al. v. Pennsylvania R. R.* (1919, Pa.) 107 Atl. 780.

A soldier is liable to court martial for wilful disobedience of a lawful order or command of a commissioned or non-commissioned officer. A. W. 64, 65. Orders to commit treason or certain other kinds of crimes are, of course, unlawful and inoperative. *United States v. Greiner* (1861, U. S. D. Pa. E. D.) 4 Phila. 396. The same is true of orders issued without regularly constituted authority.

United States v. Carr (1872, C. C. S. D. Ga.) 1 Woods, 480. But the order in the instant case is clearly not unlawful on either of these grounds. It might be attacked as an example of bad judgment, but no cases have been found which hold an order illegal on that account. Proof of an order from a superior military officer is a defence to a criminal prosecution, unless that order be inoperative for the reasons mentioned above. *Clark v. State* (1867) 37 Ga. 191. It will excuse a violation of a municipal ordinance. *State v. Burton* (1918, R. I.) 103 Atl. 962, (1918) 28 YALE LAW JOURNAL, 61. *A fortiori* it is a justification in a civil suit. *Trammell v. Bassett* (1866) 24 Ark. 499. The better rule seems to be that even when the order was given without authority it is a good justification, unless palpably illegal or unauthorized. *McCall v. McDowell* (1867, C. C. D. Calif.) 1 Abb. 212. But good faith does not always excuse an inferior under direct orders. *Ferguson v. Loar* (1869) 68 Ky. 689. And where there is only a permission, or discretion is otherwise possible, good faith is immaterial. *Mitchell v. Harmony* (1849) 54 U. S. 115. But these findings do not affect the rule that where there is a direct lawful order there is no civil liability. As to the question of possible contributory negligence in the exact performance of an explicit command, no cases in point have been found. The inference seems strong, however, that no performance in obedience to a lawful order would bar recovery. Every consideration for the protection of the private soldier which has prompted the decisions holding him immune from criminal prosecutions and civil suits would oppose holding his performance of a military duty a bar to recovery from a negligent defendant. It should be noted that the court considered at some length the position of the plaintiff as an implied invitee on the defendant's bridge.

PROPERTY—COVENANT OF WARRANTY—CLOUD ON TITLE.—The plaintiff, having conveyed certain lands by a warranty deed to the defendant, sued to recover the purchase price. The defendant set up a counter-claim for breach of warranty of title, on the ground that a prior vendee of this land held an unenforceable deed for it. The defendant was aware of the existence of this deed at the date of the sale, but accepted her deed upon the representation of the plaintiff that the land was free from incumbrance. *Held*, that no recovery could be had on the counter-claim, since the unenforceable deed was only a cloud on the plaintiff's title and there was, therefore, no breach of the covenant of warranty. *Reed et al. v. Steven et al.* (1919, Conn.) 107 Atl. 495.

It is generally stated that a breach of a covenant of warranty of title does not occur until actual eviction of the grantee by one holding a title paramount. *Tropico Land & Improvement Co. v. Lambourn* (1915) 170 Calif. 33, 148 Pac. 206. When the grantee yields to the adverse claimant without suit, he has the burden of proving that the adverse title to which he yielded was valid and paramount. *McKellop v. Burton's Adm.* (1909) 82 Vt. 403, 74 Atl. 78. Hence the question naturally arises as to the effect of an eviction of the grantee in a law suit under a deed valid on its face, but in fact null and void. By the great weight of authority, which was followed by the court in the principal case, the mere existence of such a deed is not a breach of the covenant, and no recovery can be had for the expense of removing the cloud from the grantee's title. *Luther v. Brown* (1896) 66 Mo. App. 227. Nor can the grantee recover the expenses of a successful defence against such a deed. *Rittmaster v. Richner* (1900) 14 Colo. App. 361, 60 Pac. 189; *MacKenzie v. Clement* (1910) 144 Mo. App. 114, 129 S. W. 730. It seems, however, that an unsuccessful defence of an action on the deed does constitute a breach of the covenant. *Cf. Tropico Land & Improvement Co. v. Lambourn, supra.*

PROPERTY—PERSONALTY AND REALTY—MUSSELS AND SHELL-FISH.—The defendant removed a large quantity of mussels growing in a natural bed in a river whose bed was there owned by the plaintiff. The latter sued to recover damages for the taking, and in order to bring the case within a statute allowing treble damages for digging up any material which was a part of the realty, alleged that the mussels were such. *Held*, that the plaintiff could not recover, as mussels were not a part of realty within the meaning of the statute, and also, they being *ferae naturae*, the plaintiff had no "property" in them. *Gratz v. McKee et al.* (1919, C. C. A. 8th) 258 Fed. 335.

The question whether animals *ferae naturae* are realty or personalty depends first upon whether or not they are "property" at all. There are two views as to this: one, that they are the property of the state in its sovereign capacity until reduced to possession by an individual who then becomes the owner; the other that they are not owned by the state or any individual, but belong to the one who reduces them to possession. See *Geer v. Connecticut* (1896) 161 U. S. 519, 529, 539, 16 Sup. Ct. 600, 604, 608. These views can in part be reconciled; both the state and the individual have some of the incidents of "property." "Property" in the state seems to consist only in the power to make treaties as to the things in question and to regulate the conditions under which the individual's power of capture may be exercised. *Cf. United States v. Samples* (1919, W. D. Mo.) 258 Fed. 479; *cf. McCready v. Virginia* (1876) 94 U. S. 391. Generally, each individual has a privilege and power to become the owner by reducing the animal to possession. But some difficulty arises in determining whether animals whose situs is quasi-permanent fall under the head of realty or personalty. The few cases on this subject that have been found indicate such property is personalty. Mussels, like oysters, are shell-fish, and should have the same status. Cultivated oysters are treated as personalty in that they may be the subject of larceny. *People v. Morrison* (1909) 194 N. Y. 175, 86 N. E. 1120. And they may be converted. *Vroom v. Tilly* (1906) 184 N. Y. 168, 77 N. E. 24.

STATUTE OF LIMITATIONS—NEW PROMISE—BY NEWSPAPER PUBLICATION.—Pending final adjudication of the validity of a state act to regulate freight rates within the state, the defendant railroad charged the plaintiff higher rates than those fixed by the act. The act was later held valid and the defendant published a notice that it would make prompt payment of properly supported claims arising from the overcharge. The statute of limitations had run against the plaintiff's claim before publication of this notice. He presented his claim, but the defendant refused to pay. The plaintiff sued the defendant to recover the overcharge. *Held*, that he was entitled to recover because the promise by publication started a new period of limitation. *Big Diamond Milling Co. v. Chicago, M. St. P. Ry.* (1919, Minn.) 171 N. W. 799.

It is universally held that in order to start a new period of limitation the old debt must be acknowledged as presently existing. *Custy v. Donlan* (1893) 159 Mass. 245, 34 N. E. 360; *Russell & Co. v. Davis* (1891) 51 Minn. 482, 53 N. W. 766. There must, in addition, be an express promise to pay the debt or circumstances from which such a promise may fairly be implied. *Moore v. Bank of Columbia* (1832, U. S.) 6 Pet. 86; *Levy v. Popper* (1905) 106 App. Div. 394, 94 N. Y. Supp. 905. Furthermore, the new promise must identify the debt. *Anderson v. Nystrom* (1908) 103 Minn. 168, 114 N. W. 742; *Pierce v. Merrill* (1900) 128 Cal. 473, 61 Pac. 67. But the cases vary as to when this identity is established. *Cf. Thompson v. French* (1837, Tenn.) 10 Yerg. 452; *Belcher v. Tacoma Eastern Ry.* (1917) 99 Wash. 34, 168 Pac. 782. The authorities are

also divided as to whether the suit is "upon" the old debt or on the new promise. *Re Salmon* (1917, C. C. A. 2d) 249 Fed. 300; *Richardson v. Bricker* (1883) 7 Colo. 58, 1 Pac. 433; cf. COMMENT (1919) 28 YALE LAW JOURNAL, 817. The power of the debtor to make the new terms conditional, to become bound for part only of the old debt, and the fact that he is not liable for each installment until the set dates, when the new promise is to pay in installments, tend to prove that the action is "on" the new promise. Cf. *Batchelder v. Batchelder* (1868) 48 N. H. 23; cf. *Wiley v. Brown* (1894) 18 R. I. 615, 30 Atl. 464; cf. *Shaw v. Newell* (1851) 1 R. I. 488. The decision in the principal case seems sound and the result is satisfactory. For the effect of an addition by the legislature to the statutory period of limitation, see COMMENT (1919) 29 YALE LAW JOURNAL, 91.

SURETYSHIP—GUARANTY—ACCEPTANCE—NOTICE.—The defendant, by a writing "in consideration of the sum of one dollar and other valuable considerations, the receipt whereof is hereby acknowledged," guaranteed the prompt payment of all purchases up to the amount of \$25,000 made and to be made by the Rothacker Rubber Company from the plaintiff. The guaranty was expressed to be continuing and to be terminable only by notice by the guarantor. The plaintiff sued to recover the amount of unpaid purchases, which was less than the amount guaranteed. Held, that he could not recover, because there was no averment of notice of acceptance of the guaranty. *Ajax Rubber Co. v. Gam* (1919, Del. Super. Ct.) 105 Atl. 834.

Where a "guaranty" is merely an offer, not made at the request of the guarantor, notice is generally held necessary to bind the guarantor at all. *Davis Sewing Machine Co. v. Richards* (1885) 115 U. S. 524, 6 Sup. Ct. 173; *Balfour v. Knight* (1917) 86 Ore. 165, 167 Pac. 484. But where the "guaranty" embodies a complete contract, it is binding upon the guarantor without notice. *United States Fidelity & Guaranty Co. v. Riefler* (1915) 239 U. S. 17, 36 Sup. Ct. 12; *Great Western Mfg. Co. v. Porter* (1918) 103 Kan. 84, 172 Pac. 1018. Nor is notice held to be necessary where the "guaranty" is made upon the request of the guarantor. *Peck v. Precision Mch. Co.* (1917, Ga. Ct. App.) 93 S. E. 106. Likewise with a guaranty which, as in the principal case, recites consideration already received from the guarantor. *Davis v. Wells* (1881) 104 U. S. 159; *Emerson Mfg. Co. v. Tved.* (1909) 19 N. D. 8, 120 N. W. 1094. In view of these holdings, it is submitted that the principles of offer and acceptance in the formation of contracts underlie such cases. See Corbin, *Offer and Acceptance* (1917) 26 YALE LAW JOURNAL, 169, 173. A recent contract case is clearly analogous to the instant case. A contract—made for a consideration—to supply any quantity of flasks ordered by the customer at a certain price was held binding. *Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co.* (1919, Minn.) 173 N. W. 703. In the principal case the contract is that the defendant shall be secondarily liable for debts of the principal to the plaintiff up to a certain amount. Both situations have all the elements of a binding option. See COMMENT (1918) 28 YALE LAW JOURNAL, 65. And it is believed that the court erred in requiring notice to bind the defendant. For it seems that the furnishing of a "guaranty" upon request of the guarantor is an acceptance by the guarantor of the guarantor's offer, and that a valid contract is thereby formed. Cf. *Peck v. Precision Mch. Co.*, *supra*. And the recital of consideration paid is not merely evidence of consideration for the guarantor's promise, but also evidence of the offer which is thereby accepted. This is shown by the fact that (if there was some other consideration) no notice is required, although the particular recited consideration was not in fact given. See *Lawrence v. McCalmont* (1844, U. S.) 2 How. 426, 452; see *Bond v. Farwell Co.* (1909, C. C. A. 6th) 172 Fed. 58, 61. However, it has been held that such a "guaranty" is an offer for a unilateral contract to be

accepted by the advance of credit by the guarantee, and that notice is only a condition precedent to a *suit* against the guarantor. *Bishop v. Eaton* (1894) 161 Mass. 496, 37 N. E. 665; *Somersall v. Barneby* (1611, K. B.) Cro. Jac. 287; *Powers v. Bumcratz* (1861) 12 Oh. St. 273. This view seems sound wherever a "guaranty" is not an acceptance, for consideration received *at the time*, of an offer by the guarantee, as above indicated. Some cases have held that notice is necessary to bind a "guarantor," but not a "surety." *Homewood People's Bank v. Hastings* (1919, Pa.) 106 Atl. 308; *Hess v. Watkins Medical Co.* (1919, Ind. App. Ct.) 123 N. E. 440. But no satisfactory criterion for the classification of "sureties" and "guarantors" was advanced, and such a division seems superfluous and unsound.

TORTS—FRAUD AND DECEIT—LIMITATION OF ACTIONS—DAMAGES.—The defendant fraudulently concealed and misrepresented the actual facts which resulted in the death of the plaintiff's husband. As a result, the plaintiff did not sue during the period in which the wrongful death statute allowed an action. Having subsequently discovered the fraud of the defendant and that she had once had a good cause of action, the plaintiff sued in deceit for the resulting damages. *Held*, that she was entitled to recover, because the damages were not speculative and the limitation by the statute for wrongful death was no bar to an action in deceit. *Desmaris v. People's Gaslight Co.* (1919, N. H.) 107 Atl. 491.

The principal case was not governed by the wrongful death statute, because suit within two years after death is made a condition precedent by that statute to the right to recover. *Poff v. Telephone Co.* (1903) 72 N. H. 164, 55 Atl. 891; *De Martino v. Siemon* (1916) 90 Conn. 527, 97 Atl. 765. In this action of deceit the plaintiff had to prove that she had once had a claim under the wrongful death statute; that the defendants made false representations; that these prevented her from the action under the statute; and that she had suffered damages thereby. The plaintiff's damages were the value of the lost claim. See *Ochs v. Woods* (1917) 221 N. Y. 335, 341, 117 N. E. 305, 307; see *Urtz v. N. Y. C. & H. R. R. R.* (1911) 202 N. Y. 170, 181, 95 N. E. 711, 714. These damages were not speculative. *Alexander v. Church* (1885) 53 Conn. 561, 4 Atl. 103. The reason appears to be that the jury would determine and award the value of the lost claim, and not the amount of damages a jury hearing the original cause of action would have given. However, such damages have been held speculative, in what appears to be a very unsatisfactory decision. *Whitman v. Seaboard Air Line Co.* (1917, S. C.) 92 S. E. 861. It is not a condition precedent to the plaintiff's recovery in such cases that he investigate the truth of the defendant's representations; he is protected in relying on them without investigation. *Laird v. Keithley* (1918, Mo.) 201 S. W. 1138. The reasoning in the principal case seems sound, and the result reached is desirable and just. Other courts might well follow this case in order that such a statutory limitation may not be misused to work injustice.

TORTS—LIBEL—SECONDARY PUBLICATION.—One of two defendants claimed that he was liable only for secondary, and not primary, publication of a libel. An instruction was given that, if the jury found for the plaintiff, it should assess certain specified damages, including an item for injuries resulting from the original publication. *Held*, that the instruction was erroneous. *Sourbier v. Brown* (1919, Ind.) 123 N. E. 802.

In the instant case, secondary publication is used in a limited sense to mean the exhibition of an original libelous article. This term, however, is generally used to mean the distribution of copies of a libel. It seems well settled that

such distribution is considered a fresh publication, and that the publisher is guilty of making a new and distinct libel. *Woods v. Pangburn* (1878) 75 N. Y. 495; *Bigelow v. Sprague* (1886) 140 Mass. 425, 5 N. E. 144; Newell, *Slander and Libel* (3d ed. 1914) 299; cf. COMMENT (1917) 26 YALE LAW JOURNAL, 308. This same rule of law logically applies to the term as used in the instant case, although there is no direct authority. It has been held that in giving currency to libelous reports and publications, a party is as much responsible as if he had originated the defamation. *Staub v. Van Benthuysen* (1884) 36 La. Ann. 467. Inasmuch as a secondary publication is a fresh and distinct libel, which is in no way legally connected with the original libel, it follows that the maker of a secondary publication of libelous matter is not responsible for the results of the primary publication in which he did not participate. This point, it seems, has never been raised before, but is an obviously reasonable conclusion.

TORTS—NUISANCE—SUCCESSIVE ACTIONS.—The defendant had for ten years continuously operated a cement factory at a short distance from the plaintiff's home. Large quantities of dust had been blown, whenever the wind was in the proper direction, from the defendant's factory upon the land of the plaintiff, who sought to recover damages for the resulting personal inconvenience. The defendant admitted the nuisance, but claimed that since it was of a "permanent" nature, only one action could be brought, and that this action had been barred by the two year statute of limitations. Held, that the plaintiff was entitled to damages for the two year period previous to the bringing of the action, with a dictum that successive actions would be allowed. *Trinity Portland Cement Co. v. Horton* (1919, Tex. Civ. App.) 214 S. W. 510.

It has generally been held that wherever the conduct of a business has caused damage to individual rights and private property, and the cause of such damage was "permanent," only one action would lie, the damage being the decrease in the market value of the land affected. *Geer v. Durham Water Co.* (1900) 127 N. C. 349, 37 S. E. 474 (diversion of water). But where the cause of the damage was not "permanent," successive actions would be allowed, as on a nuisance, to recover the damages accruing between each suit, continuing damage being of the essence of a nuisance. *Platt Bros. & Co. v. Waterbury* (1907) 80 Conn. 179, 67 Atl. 508; *Turner v. Brooks & Sons* (1912) 151 Ky. 310, 151 S. W. 948 (rocks blasted into a river). The difficulty arises from the confusion of the cases as to the meaning of the word "permanent." Structures erected by public service corporations under charter from the state have been held to be "permanent." *Chicago N. S. St. Ry. v. Payne* (1901) 192 Ill. 239, 61 N. E. 467; cf. *Louisville & N. R. R. v. Lambert* (1908, Ky. Ct. App.) 110 S. W. 305. The New York court has held that structures erected under special sanction of the legislature were not properly nuisances, but wherever any structure, not erected under such legislative permission, caused damage, it was a nuisance and successive actions would lie. *Uline v. New York C. & H. R. R. R.* (1886) 101 N. Y. 98, 4 N. E. 536. This has been considered a leading case on the subject. Several courts, however, have adopted other standards, such as the physical character of the structure. Cf. *Troy v. Cheshire R. R.* (1850) 23 N. H. 83; cf. *Powers v. Council Bluffs* (1877) 45 Iowa, 652. However, there has been a tendency toward adopting the classification made in the New York case, even in those states which previously followed another rule. Cf. *Irvine v. Oelwein* (1915) 170 Iowa, 653, 150 N. W. 674. It seems that the better test is that of legislative license as applied by the New York court. The decision in the principal case demonstrates the ease with which it can be applied.

TRIAL—EXAMINING JUROR—INDEMNITY INSURANCE.—In an action for personal injuries brought by an employee against his employer, while examining the jury panel upon their *voir dire*, the counsel for the plaintiff asked each prospective juror whether or not he would be prejudiced by knowledge that the X company was an insurer against any injury to the defendant's employees. These questions were admitted over the objections by the opposing counsel, who appealed. *Held*, that this was a reversible error, since such conduct constituted a basis for an inference that defendant had indemnity insurance. *Arnold v. California Portland Cement Co.* (1919, Calif.) 183 Pac. 171.

It is well settled that in this class of actions a jury should not be allowed to consider the fact that the employer is insured against accidents to his employees. *Sawyer v. Arnold Shoe Co.* (1897) 90 Me. 369, 38 Atl. 333; *Herrin v. Daly* (1902) 80 Miss. 340, 31 So. 790. But as a basis for the examination of the jurors on the *voir dire*, evidence may be offered to show that an insurance company is interested in the outcome of the action. *Egner v. Curtis, Fowle & Paine Co.* (1914) 96 Neb. 18, 146 N. W. 1032; *Archer v. Skahen* (1917) 137 Minn. 432, 163 N. W. 784. For if a juror has a direct pecuniary interest in a company insuring the defendant against injury to his employees, he is subject to a challenge for cause. *Citizens' Light, Heat & Power Co. v. See* (1913) 182 Ala. 561, 62 So. 199. This information is also necessary to enable the counsel to use intelligently his peremptory challenges. *Foley v. Cudahy Packing Co.* (1903) 119 Iowa, 246, 93 N. W. 284; *Spoonick v. Backus-Brooks Co.* (1903) 89 Minn. 354, 94 N. W. 1079. All the courts recognize that evidence admitted for the sole purpose of providing a basis for the examination of prospective jurors is likely to be misused, and consequently it is universally required that the counsel's questions be asked in good faith. *Pekin, Stone & Mfg. Co. v. Ramey* (1912) 104 Ark. 1, 147 S. W. 83; *Camp v. Churchill* (1914) 186 Ala. 173, 65 So. 336. The instant case is in accord with the holdings of some courts which hold that the examination of the jurors must be so conducted as not to imply that defendant is insured against liability. *Odell v. Genesee Const. Co.* (1911) 145 App. Div. 125, 129 N. Y. Supp. 122; *Mithen v. Jeffery* (1913) 259 Ill. 372, 102 N. E. 778. It is submitted that the better view does not so restrict the counsel in his examination. *Swift v. Platte* (1903) 68 Kan. 10, 74 Pac. 635; *Viou v. Brooks-Scanlon Lumber Co.* (1906) 99 Minn. 97, 108 N. W. 891. For it is difficult to understand how a counsel could intelligently examine jurors, unless the fact as to the existence of liability insurance, the particular company writing it, its local agents, etc., are disclosed to the jury panel.

TRIAL—NEW TRIAL—IMPOSSIBILITY OF PROCURING RECORD OF TRIAL.—The appellants were convicted of a crime in the court below and took the usual proceedings to appeal. Due to the death of the court stenographer, a transcript of the proceedings could not be obtained. A motion was then made to the Supreme Court asking that a new trial be directed on the ground that they could not be heard on appeal from the judgment rendered. *Held*, that the court had no power to grant the motion. *State v. Ricks* (1919, Idaho) 180 Pac. 257.

There is a sharp conflict of authority whether or not a new trial will be granted where the party has lost the benefit of regularly taken exceptions through no fault or negligence of his own. Those courts whose creation and jurisdiction depend entirely upon statute refuse a new trial, except under circumstances named in the statute. *Stenographer Cases* (1905) 100 Me. 271, 61 Atl. 782. Other jurisdictions, as in the instant case, deny such relief on the theory that the right to a new trial is purely statutory and is to be granted upon certain

conditions with which the appellant must strictly comply. *Etchells v. Wainwright* (1904) 76 Conn. 534, 57 Atl. 121. Some courts also seem to base the denial of a new trial in such cases on policy. *Cf. Bingman v. Clark* (1916) 178 Iowa, 1129, 159 N. W. 172. The majority view, however, in both civil and criminal cases, affords the appellant relief where the record necessary for a review of the case is lost or unobtainable. These courts allow a new trial as a matter of justice and as within the inherent or incidental powers of the court, not based upon a statutory provision. *Bailey v. United States* (1909) 3 Okla. Cr. App. 175, 104 Pac. 917; *Cf. Richardson v. State* (1907) 15 Wyo. 465, 89 Pac. 1027. A few jurisdictions have arrived at the same conclusion by a liberal construction of the statutory grounds for appeal. *Nelson v. Marshall* (1904) 77 Vt. 44, 58 Atl. 793. It seems that this might readily have been done in the principal case. In civil cases, much may be said in favor of the rule in the instant case, because it would not be equitable to transfer the hardship of the appellant to the appellee, in addition to compelling him to undergo the expense of a second trial. However, in criminal cases, both principle and policy support the majority doctrine. No property rights would be interfered with; the state is simply exacting punishment. It is submitted that it is a mockery of justice to deny the appellant any opportunity of relief on a mere technicality in a criminal case.

TRUSTS—CHARITABLE TRUSTS—TRUST FOR "BENEVOLENT PURPOSES" UNCERTAIN AND VOID.—A gift was made by will to trustees of a church in trust to use the income "for support of the church or such benevolent purposes as the trustees of said church shall direct." Held, that as the trustees had discretion to use for benevolent purposes which would include purposes not strictly charitable, the gift was not a charitable trust and was therefore void for uncertainty. *Smith v. Pond* (1919, N. J. Ch.) 107 Atl. 800.

The court correctly held that general discretion given a trustee to select any charity does not render the trust void. *Re Pardue* [1906] 2 Ch. 184; *Gill v. Atty. Gen.* (1908) 197 Mass. 232, 83 N. E. 676; see *Re Dulles* (1907) 218 Pa. St. 162, 167, 67 Atl. 49, also 12 L. R. A. (N. S.) 1177, note. *Contra, Bristol v. Bristol* (1885) 53 Conn. 242, 5 Atl. 687 (by a divided court); *Hadley v. Forsee* (1907) 203 Mo. 418, 101 S. W. 59; see also 14 L. R. A. (N. S.) 49, note. Its holding that where a non-charitable purpose is included with a charitable purpose the entire trust fails, since the trustees cannot be compelled, against the donor's intent, to apply the fund to the charitable purpose, likewise accords with the authorities. *Morice v. Durham* (1804, Eng. Ch.) 9 Ves. 399, 10 Ves. 522; *Minot v. Atty. Gen.* (1905) 189 Mass. 176, 75 N. E. 149; cases collected, 11 C. J. 330. The court was bound by previous authorities in New Jersey to hold that "benevolent" was more inclusive than "charitable," although it was strongly of the impression that in so doing it was frustrating the wishes of the testatrix. It would seem more in accord with the probable intention of testators to hold "benevolent," as here used, synonymous with "charitable," and this has been so held. *Suter v. Hilliard* (1852) 132 Mass. 412; *Fox v. Gibbs* (1893) 86 Me. 87, 29 Atl. 940; see *Re Hinckley* (1881) 58 Calif. 457, 507. But a result similar to that of the principal case has been reached in other cases. *Adye v. Smith* (1876) 44 Conn. 60; *James v. Allen* (1817, Eng. Ch.) 3 Meriv. 17, 36 Reprint, 7; see 7 C. J. 1140, 1141; also Sanger, *Remoteness and Charitable Gifts* (1919) 29 YALE LAW JOURNAL, 46.

WILLS AND ADMINISTRATION—EXECUTORS—SETTLEMENT OF ACCOUNT—ATTORNEYS' FEES.—An executor employed a firm of attorneys to prosecute an action to recover damages for the wrongful death of his testator. It was agreed that

the attorneys should receive a contingent fee of one-third of the amount recovered. Approximately \$82,000 was recovered, one-third of which the executor paid the attorneys. He then filed his account and instituted proceedings for its judicial settlement. Objections were raised by the beneficiaries on the ground that the sum paid for attorneys' fees was unreasonable. The surrogate appointed a referee who found \$15,500 to be a reasonable compensation. *Held*, that the executor should be credited with only that amount. Shearn, J. *dissenting*. *In re Meng* (1919, App. Div.) 176 N. Y. Supp. 290.

It is settled beyond dispute that an executor cannot bind the estate by his contract, although it was made in the interest and for the benefit of the estate. *Austin v. Munro* (1872) 47 N. Y. 360; *Platt v. Platt* (1887) 105 N. Y. 488, 12 N. E. 22. But he may bring an action for the wrongful death of the testator and, of course, is expected to employ counsel. A state statute provided, in the instant case, that "the reasonable expenses of the action may be fixed by the surrogate . . . and may be deducted from the recovery." The question arises as of what time this reasonableness is to be determined. In tort actions, the standard of reasonableness of a man's action is applied as of the time when the tort occurred, not on what are later found to be the facts. See Holmes, *The Common Law* (1881) 111. If the analogy is applied to cases like the instant one, it would seem that the reasonableness of the attorneys' fee must be determined as of the time when the contract was made, and not after recovery in the action. The majority of the court appears to have disregarded this point, which was made in the dissenting opinion. In this respect, it is believed that the decision of the majority was erroneous. It is agreed, however, that the estate was not bound by the contract. Contingent fees are usual in this class of cases, and fees even of more than thirty-three and one-third *per cent.* have been held to be reasonable in actions of the same nature. *Cf. In re Weber* (1918, Surr. Ct.) 102 Misc. 635, 170 N. Y. Supp. 293. Therefore, it is submitted that the contingent fee agreed upon in the principal case was reasonable at the time the contract was made, and that the surrogate should have been precluded, in the absence of fraud, etc., from holding otherwise. If the rule laid down in the present case is adopted, it would be difficult for an executor to protect himself in similar circumstances. A trustee may limit his liability on contracts made in behalf of the estate to the amount that he will be reimbursed from the estate. See (1915) 28 HARV. L. REV. 725, 739. This doctrine has been upheld in the case of a contract for the service of attorneys employed by a trustee. *Brackett v. Ostrander* (1908) 126 App. Div. 529, 110 N. Y. Supp. 779. But even if the doctrine were extended to include executors, there would be the practical difficulty of obtaining competent attorneys on such a basis of compensation. An estate in course of administration has not the credit and standing of a business trust. It would seem, then, for practical reasons, that the statute should be interpreted as indicated above.