

## Recent Case Notes

ACCOUNTANTS—RESPONSIBILITY FOR NEGLIGENCE IN CERTIFYING BALANCE SHEET.—The defendants, a firm of public accountants, who were hired by a certain corporation to audit its books, negligently certified a balance sheet showing the net worth of the corporation as over a million dollars, whereas in fact it was insolvent at the time. The plaintiff, relying on the balance sheet, loaned money to the corporation. In allowing recovery for the resulting loss, the court held, two judges dissenting, that the defendants owed a duty of due care to all who might reasonably be expected to rely on such certified balance sheets. *Ultramares Corporation v. Touche*, 243 N. Y. Supp. 179 (App. Div. 1st Dep't 1930).

The generalization is commonly made, although frequently criticized,<sup>1</sup> that one who negligently performs a contractual duty owed another, is not liable for resulting injuries to a stranger to the contract.<sup>2</sup> A consideration of the present status of this doctrine of privity, however, indicates that the once sweeping rule is gradually being abandoned. Those engaged in a "common calling" were early held responsible for injuries occasioned by negligence regardless of privity of contract.<sup>3</sup> The same result has sometimes been reached when the contract involves a public duty in addition to the contractual duty.<sup>4</sup> And, under the "dangerous instrument" doctrine, little now remains of the original immunity of a manufacturer, contractor, or vendor if his negligence results in an injury to life or limb.<sup>5</sup> Yet liability for a purely financial loss, such as results from commercial certificates negligently made, has been imposed regardless of privity of contract in only a few specialized types of cases. In the United States a telegraph company is liable to the recipient of a message for negligence in the transmission though the message was paid for by the sender.<sup>6</sup> And certain jurisdictions hold a title abstractor liable to a third party who, he know, would rely upon his certificate.<sup>7</sup> But the attempt of *Cann v. Willson*<sup>8</sup> to extend the dangerous instrument doctrine to the case of financial injury

<sup>1</sup> See Labatt, *Negligence in Relation to Privity of Contract* (1900) 16 L. Q. REV. 168; Comment (1921) 30 YALE L. J. 607.

<sup>2</sup> See *Winterbottom v. Wright*, 10 M. & W. 109, 115 (1842).

<sup>3</sup> *Pippin and Wife v. Sheppard*, 11 Price 400 (1822); Bohlen, *Affirmative Obligations in the Law of Torts* (1905) 53 AM. L. REG. 209, 219.

<sup>4</sup> *Woodrury v. Tampa Water Works Co.*, 57 Fla. 243, 49 So. 556 (1909) (failure to maintain adequate water supply under contract with city). *Contra*: *German Alliance Insurance Co. v. Home Water Co.*, 226 U. S. 220, 33 Sup. Ct. 32 (1912) (majority view).

<sup>5</sup> For a comprehensive discussion, see Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees* (1929) 45 L. Q. REV. 343.

<sup>6</sup> *Western Union Telegraph Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4 (1889). The English rule is otherwise, but that the question is now academic in England see POLLOCK, *LAW OF TORTS* (11th ed. 1920) 560.

<sup>7</sup> *Anderson v. Spriesterbach*, 69 Wash. 393, 125 Pac. 166 (1912). Compare a recent case, *Cole v. Vincent*, 242 N. Y. Supp. 644 (App. Div. 4th Dep't 1930), where knowledge in the abstractor of the third person's identity was held immaterial.

<sup>8</sup> 39 Ch. D. 39 (1888).

to one relying upon a certificate of appraisal negligently made was overruled by *Le Lievre v. Gould*.<sup>9</sup> The only outstanding authority in support of the instant decision is *Glanzer v. Shepard*,<sup>10</sup> in which a New York court recognized as a basis of liability the fact that the certificates of a public weigher influence and are intended to influence the conduct of third parties.<sup>11</sup> In both this and the instant case the decisions accord with the practical necessities of modern business which is becoming increasingly dependent upon the statements of experts and professionals as a means of economic control. The public accountant, long recognized as belonging to a skilled class and liable to his client for negligence in the exercise of his profession,<sup>12</sup> now pursues what, by economic necessity amounts to a public calling.<sup>13</sup> Although the result of the instant case might better have been reached by legislation calculated to afford an opportunity to public accountants to make the necessary rate adjustments to the new risks imposed,<sup>14</sup> the end, once achieved, must be approved.

ACTIONS—THE DECLARATORY JUDGMENT AS AN ALTERNATIVE REMEDY.—Two recent cases represent somewhat divergent attitudes toward the use of the declaratory judgment as an alternative remedy. In *Zoecher v. Agler*, 172 N. E. 186 (Ind. 1930), the plaintiffs as taxpayers sought a declaratory judgment to determine the constitutionality of a statute under which an assessment had been made by the Indiana state board of tax commissioners. The lower court found the plaintiffs entitled to declaratory relief and the upper court sustained the propriety of the form of action. In the Pennsylvania case of *City of Williamsport v. Williamsport Water Co.*, 150 Atl. 652 (Pa. 1930), the plaintiff city had in 1920 entered into a consent judgment with the defendant corporation whereby it was agreed that the city "may and shall" take over the defendant's waterworks at a stipulated price. The consent of the city electors was a prerequisite to the transfer. After

<sup>9</sup> [1893] 1 Q. B. 491 (building inspector's certificate). Similarly no liability was imposed in: *Humphrey v. Bowers*, 45 T. L. R. 297 (1929) (yacht inspector's certificate); *Love v. Mack*, 93 L. T. (N. S.) 352 (1905) (appraiser's certificate); *National Iron & Steel Co. v. Hunt*, 312 Ill. 245, 143 N. E. 833 (1924) (steel expert's certificate); *Kahl v. Love*, 37 N. J. Law 5 (1874) (tax collector's certificate); *National Savings Bank v. Ward*, 100 U. S. 195 (1879) (lawyer's abstract of title); *Gordon v. Livingston*, 12 Mo. App. 267 (1882) (grain inspector's certificate); *Thomas v. Guarantee Title & Trust Co.*, 81 Ohio St. 432, 91 N. E. 183 (1910) (abstract of title certificate). But cf. *Pearson v. Purkett*, 15 Pick. 264 (Mass. 1834).

<sup>10</sup> 233 N. Y. 236, 135 N. E. 275 (1922). Cf. *Doyle v. Chatham & Phenix National Bank*, 253 N. Y. 369, 171 N. E. 574 (1930). Directly opposed to the instant case is *Landell v. Lybrand*, 264 Pa. 406, 107 Atl. 783 (1919), criticized in (1919) 29 YALE L. J. 234.

<sup>11</sup> Compare statement to the same effect in the instant case, 243 N. Y. Supp. at 182. Compare also ILL. REV. STAT. (Cahill, 1927) c. 110a, § 7.

<sup>12</sup> *East Grand Forks v. Steele*, 121 Minn. 296, 141 N. W. 181 (1913).

<sup>13</sup> As to the importance of the business to the public in the determination of a common calling, see *Arterburn, The Origin and First Test of Public Callings* (1927) 75 U. OF PA. L. REV. 411. See also *Lay, Business Policy as Related to Accounting* (1929) 4 ACC. REV. 121; *Davies, The Changing Objectives of Accounting* (1929) 4 ACC. REV. 94, 106.

<sup>14</sup> Cf. dissent in instant case 243 N. Y. Supp. at 186; (Aug. 1930) J. OF ACC. 87; (1919) 29 YALE L. J. 234. Title abstractors have been made liable to third parties in some states by statute. See Note (1925) 34 A. L. R. 67.

the judgment had been entered, the electors voted down the project. In 1927 a new resolution to take over the waterworks was approved by the electors. The water company contested the city's right to buy at the consent judgment price and the plaintiff brought an action to determine its rights. The lower court dismissed the proceedings. It was held on appeal that the declaratory form of action could not be invoked to determine the validity of a past judgment but that the adverse vote of the electors had terminated the city's right to take over the water plant.

Declaratory judgment proceedings are now generally favored when the plaintiff has no other immediate remedy.<sup>1</sup> There is, however, some tendency, particularly noticeable in Pennsylvania, to refuse such petitions if the plaintiff might equally well have sought other relief.<sup>2</sup> This tendency finds justification only when a specific statutory remedy would have been available.<sup>3</sup> Certainly a petition for a declaratory judgment need not be treated as an extraordinary remedy.<sup>4</sup> In the *Zoercher* case, the use of

<sup>1</sup> *Post v. Metropolitan Casualty Ins. Co.*, 227 App. Div. 156, 237 N. Y. Supp. 64 (4th Dep't 1929); *Washington-Detroit Theatre Co. v. Moore*, 229 Mich. 673, 229 N. W. 618 (1930); *Girard Trust Co. v. Tremblay Motor Co.*, 291 Pa. 507, 140 Atl. 506 (1928); see Borchard, *Declaratory Judgments* (1929) 3 CINN. L. REV. 24, 27; Comment (1927) 36 YALE L. J. 403, 407. In this type of case, the plaintiff is attempting to establish the non-existence of a jural interest claimed by the defendant, the declaration usually being in negative form. See Borchard, *The Declaratory Judgment—A Needed Procedural Reform* (1918) 28 YALE L. J. 1, 8, 114.

<sup>2</sup> Appeal of Kimmell, 96 Pa. Sup. Ct. 488 (1930); *Stenzel v. Kronick*, 283 Pac. 93 (Cal. App. 1929); (*Leafgreen v. La Bar*, 293 Pa. 263, 142 Atl. 224 (1928); *Dempsey's Estate*, 288 Pa. 458, 137 Atl. 170 (1927); *Kaaa v. Waiakea Mill Co.*, 29 Hawaii 122 (1926); *Loesch v. Manhattan Life Ins. Co.*, 128 Misc. 232, 218 N. Y. Supp. 412 (Sup. Ct. 1926), *aff'd*, 220 App. Div. 828, 224 N. Y. Supp. 845 (1st Dep't 1927), criticized, Comment (1927) 36 YALE L. J. 403; *Ladner v. Siegel*, 294 Pa. 368, 144 Atl. 274 (1928). See *Taylor v. Haverford Tp.*, 299 Pa. 402, 406, 149 Atl. 639, 641 (1930); *Sterrett's Estate*, 150 Atl. 159, 162 (Pa. Sup. Ct. 1930). But *cf.* *Baumann v. Baumann*, 222 App. Div. 460, 226 N. Y. Supp. 576 (1st Dep't 1928, noted in (1928) 38 YALE L. J. 111; *Oldham v. Moodie*, 94 Cal. App. 88, 270 Pac. 688 (1928); *Malley v. American Indemnity Co.*, 297 Pa. 216, 146 Atl. 571 (1929); *National City Bank v. Waggoner*, 230 App. Div. 88, 243 N. Y. Supp. 299 (1st Dep't 1930); *Sheldon v. Powell*, 128 So. 258 (Fla. 1930) (statute providing procedure for releasing legacy held not exclusive remedy). A reason for the tendency in Pennsylvania may be its doctrine that the declaratory judgment should only be granted when the plaintiff can show the necessity of a speedy determination of the issues. *List's Estate*, 283 Pa. 255, 129 Atl. 64 (1925). And this necessity will not be found present if there is other adequate remedy. See *Dempsey's Estate*, *supra* at 460, 137 Atl. at 171.

<sup>3</sup> See *N. E. Marine Eng. Co. v. Leeds Forge Co.*, [1906] 1 Ch. 324 (declaratory judgment refused as petition for revocation available to determine validity of patent); Borchard, *op. cit. supra* note 1, at 4, 10; Comment (1927) 36 YALE L. J. 403, 406; (1928) 37 YALE L. J. 386; Lummus, *Declaratory and Interpretative Judgments in Massachusetts* (1929) 14 MASS. L. Q. 1. Although the N. Y. Civil Practice Act provides that the court has the power to declare rights and other legal relations "whether or not further relief is or could be claimed", the dissenting justice in *National City Bank v. Waggoner*, *supra* note 2, argued that since the plaintiff might have sought coercive relief he was not entitled to a declaratory judgment.

<sup>4</sup> Borchard, *op. cit. supra* note 1, at 114 n. 175. But *cf.* *Sheldon v. Powell*, *supra* note 2.

any of the alternative procedures available to the plaintiffs<sup>5</sup> might have involved a relative degree of "disturbance and unrest" and a needless expenditure of time and money, to no added advantage. And in the *Williamsport* case, had the plaintiff been compelled to institute an action for specific performance, or for execution of the old judgment, the very spirit and purpose of the Uniform Declaratory Judgment Act would have been frustrated.<sup>6</sup> In fact, the court virtually declared the rights of the petitioners, although it gave no convincing reason for its refusal to issue a formal declaratory judgment.<sup>7</sup> Perhaps the reactionary attitude on the part of the formerly liberal Pennsylvania court may be traced to an unwarranted fear of overburdening the judiciary.<sup>8</sup>

**AIR LAW—INVASION OF AIR SPACE ABOVE PRIVATELY OWNED LAND AS TRESPASS.**—The defendant had constructed an airport some fourteen miles from the city of Cleveland in a locality which, although sparsely settled, was devoted entirely to farming and residential purposes. The plaintiff, owner of a 135 acre estate adjoining the defendant's premises, applied for an injunction against the operation of the airport as a nuisance and against the repeated flights over his land as trespasses. The court denied the injunction against the operation of the airport and held that flights above the minimum 500 feet set by the Federal Air Commerce Regulations<sup>1</sup> pursuant to the Air Commerce Act of 1926<sup>2</sup> were not trespasses. Injunctions were granted against unnecessary raising of dust, dropping of circulars, and all flights below 500 feet even when made in taking off or landing. *Swetland v. Curtiss Airports Corp.*, 41 F. (2d) 929 (N. D. Ohio 1930).

<sup>5</sup> The question of unconstitutionality might have been raised as a defense against enforcement proceedings, by application for an injunction, or in a suit to recover payments made under protest.

<sup>6</sup> See UNIFORM DECLARATORY JUDGMENT ACT, § 12; cf. Sunderland, *A Modern Evolution In Remedial Rights—The Declaratory Judgment* (1917) 16 MICH. L. REV. 69, 76; Kariher's Petition (No. 1), 284 Pa. 455, 471, 131 Atl. 265, 271 (1927); Miller v. Miller, 149 Tenn. 463, 480, 261 S. W. 965, 970 (1924); Sheldon v. Powell, *supra* note 2, at 262.

<sup>7</sup> The court assigns no other reason for its decision that the Declaratory Judgment Act cannot be used to elucidate judgments than that it cannot be used to elucidate judicial decrees, and cites *Ladner v. Siegel*, *supra* note 2, where on a totally dissimilar state of facts the court says at 375, 144 Atl. at 276: "Construction of a decree cannot be given until the question comes regularly before the court in proceedings requiring construction and application to acts alleged to have been done or omitted under it." But cf. *Back's Guardian v. Bardo*, 234 Ky. 211, 27 S. W. (2d) 960 (1930).

<sup>8</sup> Total digested number of petitions for declaratory judgments in the Pennsylvania Supreme and Superior Courts were: 1916-1927, 5; 1924, 4; 1928, 8 (after the Uniform Declaratory Judgment Act had been found constitutional); 1929, 5; 1930 (Jan.-July), 11. For further evidence as to the possibility of the Declaratory Judgment "overburdening" the judiciary, compare REP. TO COMM. ON UNIFORM STATE LAWS (July, 1929, unpublished) question 4.

<sup>1</sup> AIR TRAFFIC RULES § 74(g).

<sup>2</sup> AIR COMMERCE ACT, 44 STAT. 2119 (1926), 49 U. S. C. A. § 171 (Supp. 1929). The instant court held that the state statute, Laws of Ohio (1929) No. 96, p. 28, while itself setting no minimum altitude, expressed the intent to adopt the federal regulations.

The court in the instant case definitely affirms the opinion of legal writers,<sup>3</sup> the statements of lower courts in this country,<sup>4</sup> and decisions of European courts<sup>5</sup> that a landowner's sovereignty in the air space is subject to a right of flight.<sup>6</sup> It has been said that such a judicial determination of the point was necessary to free aerial navigation from the taint of technical illegality.<sup>7</sup> Prior to the era of flying, the maxim *cujus est solum ejus est usque ad coelum*<sup>8</sup> prevailed both in the common<sup>9</sup> and civil<sup>10</sup> law as a convenient legal formula to protect the landowner from permanent obstructions above the surface.<sup>11</sup> When flying became a fact, however, the absurdity of a literal application of the maxim was apparent.<sup>12</sup> And as the adjustment of the rights of aviators and landowners became necessary, regulatory statutes were passed clearly based on the assumption that the landowner has no sovereignty above what is necessary for the enjoyment of the surface.<sup>13</sup> These statutes may perhaps be interpreted and justified as an exercise of the police power.<sup>14</sup> But the instant decision appears to rest on a denial of the literal truth of the ancient maxim, and a consequent contention that Section 10<sup>15</sup> of the Air Commerce Act did not seek

<sup>3</sup> POLLOCK, LAW OF TORTS (13th ed. 1929) 361; ZOLLMAN, LAW OF THE AIR (1930) c. 1; DAVIS, AERONAUTICAL LAW (1930) c. 2; Bogert, *Problems in Aviation Law* (1921) 6 CORN. L. Q. 271, 293.

<sup>4</sup> See *Johnson v. Curtiss N. W. Airplane Co.*, [1928] U. S. Av. Rep. 42 (D. C. Minn. 1923); *Commonwealth v. Nevin and Smith*, 2 Pa. D. & C. 241, [1928] U. S. Av. Rep. 39 (1922); ZOLLMAN, CASES ON AIR LAW (1930) 1-11.

<sup>5</sup> See LOGAN, AIRCRAFT LAW MADE PLAIN (1928) 16.

<sup>6</sup> See *Smith v. New England Aircraft Co. Inc.*, 170 N. E. 385 (Mass. 1930). Here the facts and judgment of the court resembled the instant case, but the issue was limited by the pleadings to flight over the plaintiff's property at 100 feet; this was held a trespass but was not enjoined. See also (1930) 30 COL. L. REV. 579; (1930) U. OF PA. L. REV. 902; Note (1930) 1 AIR L. REV. 272.

<sup>7</sup> ZOLLMAN, *op. cit. supra* note 3, at 26.

<sup>8</sup> For the supposed origin and history of this maxim see Bouvé, *Private Ownership of Airspace* (1930) 1 AIR L. REV. 232; Kuhn, *The Beginnings of an Aerial Law* (1910) 4 AM. J. INT. LAW 109.

<sup>9</sup> CO. LITT. § 4a; 1 BL. COMM. 733.

<sup>10</sup> FRENCH CIVIL CODE, art. 552, par. 1; GERMAN CIVIL CODE (Loewy's translation) § 905 and note.

<sup>11</sup> See Note (1926) 42 A. L. R. 945 for list of cases. See also DAVIS, *op. cit. supra* note 3, at 33 *et seq.*

<sup>12</sup> ZOLLMAN, *op. cit. supra* note 3, at 15; HAZELTINE, THE LAW OF THE AIR (1911) 74; REP. OF HOUSE COM. ON AIR COMMERCE ACT OF 1926, H. R. 572, March 17, 1926, at 13; REP. OF BRIT. AERIAL TRANSPORT COM. (1918) 146 L. T. 105; Bouvé, *op. cit. supra* note 8, at 249. But *cf.* Hines (of plaintiff's counsel in the instant case), *Home vs. Aeroplane* (1930) 16 A. B. A. J. 217.

<sup>13</sup> See, in addition to FEDERAL AIR COMMERCE ACT, *supra* note 2, BRITISH AIR NAVIGATION ACT, 10 & 11 GEO. V. c. 80 (1920); FRENCH and GERMAN CODES, *supra* note 10; UNIFORM STATE LAW FOR AERONAUTICS (adopted by twenty states and Hawaii) § 4; Freeman, *Survey of State Aeronautical Legislation* (1930) 1 AIR L. REV. 61.

<sup>14</sup> See *Smith v. New England Aircraft Co. supra* note 6, at 391.

<sup>15</sup> This section declares the air space above the minimum safe altitudes of flight prescribed by the Secretary of Commerce to be navigable and subject to a public right of freedom of interstate and foreign commerce.

to "create" but merely to enact the right of flight as it existed at common law.<sup>16</sup> Accordingly the minimum height regulation, by setting an arbitrary limit to this freedom of navigation, is seen as a protection rather than a curtailment of the landowner's property rights. Since, however, flight below 500 feet in taking off and landing is specifically excepted from the minimum height restriction by the Air Traffic Rules, the landowner's protection from such flights must be derived solely from his common law right. The court makes it clear that this right amounts only to a freedom from interference with effective possession of the surface, and that a reasonable altitude in taking off and landing, although here set at 500 feet, must vary with the circumstances. A similar principle, it is believed, must control all such flying as is not subject to the Federal regulations in those jurisdictions where no minimum height is set by statute.<sup>17</sup> Whether in such jurisdictions damage resulting from the noise of a plane, as for example, the frightening of stock, would be prima facie evidence of unreasonably low flying remains to be adjudicated. The instant decision presents a commendably flexible basis for the solution of the more difficult air problems that must arise when it becomes necessary to establish airports nearer to, or perhaps within, city limits.

**BANKS AND BANKING—EFFECT ON HOLDER IN DUE COURSE OF DISHONOR OF CERTIFIED CHECK.**—The plaintiff banks were induced by forged telegrams sent by Waggoner, the President of the Telluride Bank, but purporting to come from the plaintiffs' correspondent, to pay \$500,000 to the Chase National Bank to the credit of the Telluride Bank. On the same day Waggoner demanded payment at the Chase Bank of a check which had been signed in blank by the cashier of the Telluride Bank and which Waggoner had filled in as to amount and made payable to himself in the presence of the Chase Bank. When payment was refused, Waggoner indorsed the check in blank and took it to the defendant bank which refused to cash it but credited it to the account of the Telluride Bank, then indebted to the defendant on past due notes. On the next business day the defendant had the check certified by the Chase Bank and then specifically applied it to the payment of the notes. The following day the check was cleared but before 3 P.M., in accordance with the rules of the Clearing House, the Chase Bank notified the defendant of the fraud and demanded credit for the amount of the check, which was refused. Subsequently the Telluride Bank was declared insolvent. The plaintiffs sought equitable relief in the form of an accounting against the defendant as constructive trustee. They alleged that when the defendant received the check it had knowledge "as to the manner in which the check had been issued" and that at or prior to certification the defendant knew that the Telluride Bank was insolvent and "did not own such a large amount of money." The court denied the defendant's motion to dismiss the complaint and on appeal the order was affirmed, two judges dissenting. *National City Bank of New York v. Waggoner (Central Hanover Trust Company impleaded)*, 243 N. Y. Supp. 299 (App. Div. 1st Dep't 1930).

Under the construction placed by the majority of the instant court upon

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<sup>16</sup> See principal case at 934 and 938. See also Logan, *The Nature of the Right of Flight* (1930) 1 AIR L. REV. 94. But cf. Marshall, *Some Legal Problems of the Aeronaut* (1923) 6 ILL. L. Q. 50, 57.

<sup>17</sup> As to whether intrastate commercial flight is within the province of the Federal regulations, see *Neiswonger v. Goodyear Tire & Rubber Co.*, 35 F. (2d) 761 (N. D. Ohio 1929); Newman, *Aviation Law and the Constitution* (1930) 39 YALE L. J. 1113.

the plaintiffs' allegations as to knowledge, the defendant could not have been a holder in due course inasmuch as it definitely knew of the fraudulent scheme when it received the checks.<sup>1</sup> Subsequent certification by the drawee could thus have had no effect, since even after certifying a check the drawee may cancel certification or recover payment made under it from a holder who had acted in bad faith at the time he took the instrument.<sup>2</sup> But, according to the dissenting members of the court the allegation concerning the defendant's knowledge at the time it received the check was insufficient to charge the defendant with constructive notice of the fraud prior to certification, and hence the defendant was then a holder in good faith.<sup>3</sup> Nor, the minority asserted, were the allegations sufficient to charge constructive notice at the time of certification because the certification, which would have contradicted any suspicions that might otherwise have put the defendant on inquiry, was also alleged. Finally, granting this interpretation of the complaint, any notice received by the defendant after certification would have been immaterial, since the defendant was then a holder in good faith and even for value in that it held past due notes from the depositor when it received the check for credit.<sup>4</sup> This interpretation, however, seems to disregard the New York rule that certification by the drawee does not prevent recovery even from a holder in due course if the check has been certified by mistake, provided the holder's position has not been altered to his injury and the rights of third parties have not intervened.<sup>5</sup> Furthermore it would seem that it would be the proceeds of the check upon their receipt rather than the check itself which would be applied to the satisfaction of the past due notes. Yet it is conceded that the defendants know of the fraud before the receipt of the proceeds had been completed under the Clearing House rules, so the defendant could not be considered a holder for value. Hence the conclusion reached by the majority of the court as to the sufficiency of the allegations would appear sound even though a construction of the complaint be adopted which accords with the views of the dissenting judges.

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<sup>1</sup> *National City Bank of Seattle v. Titlow*, 233 Fed. 838 (W. D. Wash. 1916); *American National Bank v. Kerley*, 109 Ore. 155, 220 Pac. 116 (1923), 32 A. L. R. 262 (1924).

<sup>2</sup> *Wilson v. Mid-West State Bank*, 193 Iowa 311, 186 N. W. 891, 21 A. L. R. 229 (1922); *Fidelity Trust Co. v. Baker*, 60 N. J. Eq. 170, 47 Atl. 6 (1900).

<sup>3</sup> *State v. Emery*, 73 Okla. 36, 174 Pac. 770 (1918), 6 A. L. R. 234 (1920); N. Y. NEGOTIABLE INSTRUMENTS LAW (Cahill, 1923) § 95.

<sup>4</sup> *American Surety Co. v. Palmer*, 240 N. Y. 63, 147 N. E. 359 (1925); N. Y. NEGOTIABLE INSTRUMENTS LAW (Cahill, 1923) § 51; *cf.* *Colorado National Bank v. Western Grain Co.*, 118 So. 588 (Ala. 1928); (1929) 77 U. OF PA. L. REV. 690. See *Title Guarantee & Trust Co. v. Haven*, 196 N. Y. 487, 495, 89 N. E. 1082, 1085 (1909).

<sup>5</sup> *National Reserve Bank v. Corn Exchange Bank*, 171 App. Div. 195, 157 N. Y. Supp. 316 (1st Dep't 1916); *Mt. Morris Bank v. 23rd Ward Bank*, 172 N. Y. 244, 64 N. E. 810 (1902). But *cf.* *Riverside Bank v. First National Bank of Shenandoah*, 74 Fed. 276 (C. C. A. 2d, 1896); *National Bank of Commerce v. Baltimore Commercial Bank*, 141 Md. 554, 118 Atl. 855 (1922). See note (1924) 29 A. L. R. 140; Note (1930) 43 HARV. L. REV. 631; (1923) 32 YALE L. J. 733.

CONDITIONAL SALES—EFFECT OF CONTRIBUTORY NEGLIGENCE OF VENDEE AUTOMOBILE DRIVER UPON RECOVERY BY CONDITIONAL VENDOR.—The plaintiff, the assignee of a conditional vendor of a motor car, after default by the vendee sued the defendant, a third party, to recover for damages to the car resulting from a collision in which both the defendant and the vendee were negligent. The trial court held, *inter alia*, that the vendee's contributory negligence precluded recovery by the plaintiff. Upon appeal the judgment was reversed on the ground that by the terms of the Uniform Conditional Sales Act conditional sales were to be classed as bailments, and that the negligence of the vendee was therefore not to be imputed to the plaintiff. *Commercial Credit Corp. v. Satterthwaite*, 150 Atl. 235 (N. J. 1930).

The instant court makes its decision automatic by arbitrarily labelling the transaction involved a bailment, rather than attempting a factual analogy to other methods of credit extension. Under these it has been uniformly held that the creditor, whether conditional vendor,<sup>1</sup> chattel mortgagee,<sup>2</sup> or land mortgagee,<sup>3</sup> has a valid right of action against a third party, similar to that of the debtor<sup>4</sup> for damage to the subject matter of the credit transaction, caused by the negligence of the third party. Although it is said that the actions of creditor and debtor are separate and independent,<sup>5</sup> in certain situations the acts of one will effect the other's right of action. Thus, recovery by either against the negligent third party will bar recovery by the other,<sup>6</sup> and a compromise by one party has likewise affected the other's right to sue.<sup>7</sup> It has even been held that when the possessor of a chattel so uses it as to render it subject to confiscation, such confiscation will be effective against the innocent "title holder."<sup>8</sup> The instant court might have found in this line of cases sufficient precedent as to debtor-creditor interdependence to warrant an imputation of the vendee's

<sup>1</sup> *Ryals v. Seaboard Air-Line Ry.*, 158 Ga. 303, 123 S. E. 12 (1924); *United Iron Works v. Hurley Mason Co.*, 71 Wash. 275, 128 Pac. 209 (1912); *cf. Louisville & N. R. R. v. Miller*, 209 Ala. 378, 96 So. 322 (1923).

<sup>2</sup> *Carter v. Haynes*, 269 S. W. 216 (Tex. Civ. App. 1927); *Wylie v. Ohio*, etc. R. R., 48 S. C. 405, 26 S. E. 676 (1897).

<sup>3</sup> *Burrill National Bank v. Edminster*, 119 Me. 367, 111 Atl. 423 (1920); *Gooding v. Shea*, 103 Mass. 360 (1869).

<sup>4</sup> (a) Conditional vendee: *Louisville & Nashville R. R. v. Duncan*, 16 Ala. App. 520, 79 So. 513 (1918); *Stotts v. Puget Sound Traction, Light, & Power Co.*, 94 Wash. 339, 162 Pac. 519 (1917), L. R. A. 1917D, 214; *cf. Peterson v. Chess*, 92 Wash. 682, 159 Pac. 894 (1916) (vendee had retaken possession). (b) Chattel mortgagor: *Gover v. Central Vermont Ry.*, 96 Vt. 208, 118 Atl. 874 (1922); *Wilkes v. Southern Ry.*, 85 S. C. 346, 67 S. E. 292 (1910), 21 Ann. Cas. 79 (1911). (c) Land mortgagor: *Logan v. Wabash Western Ry.*, 43 Mo. App. 71 (1890); *Van Dyke v. Grand Trunk Ry.*, 84 Vt. 212, 78 Atl. 958 (1911), Ann. Cas. 1913A 640.

<sup>5</sup> *Gooding v. Shea*, *supra* note 3, at 363.

<sup>6</sup> *Lord, Stone & Co. v. Buchanan*, 69 Vt. 320, 37 Atl. 1048 (1897). See *Carolina, C. & O. Ry. v. Unaka Springs Lumber Co.*, 130 Tenn. 354, 381, 170 S. W. 591, 598 (1914).

<sup>7</sup> *Chicago, Rock Island & Pacific Ry. v. Earl*, 121 Ark. 514, 181 S. W. 925 (1916); *Harris v. Seaboard Air Line Ry.*, 190 N. C. 480, 130 S. E. 319 (1925). But *cf. French v. Osmer*, 67 Vt. 427, 32 Atl. 254 (1895).

<sup>8</sup> *Pennington v. Commonwealth*, 127 Va. 803, 102 S. E. 758 (1920) (confiscation allowed). This is apparently the minority view. *Cf. Flint Motor Car Co. v. State*, 204 Ala. 437, 85 So. 741 (1920); *State v. Davis*, 55 Utah 54, 184 Pac. 161 (1919). And see (1920) 30 YALE L. J. 91.

negligence to the vendor. It is true that such a holding would have opposed the dictum of the only other court which has considered the identical problem.<sup>9</sup> Yet, by refusing a defendant an otherwise available defense in order to protect a vendor engaged in the business of instalment selling, the instant court shifts what appears to be a legitimate risk of the vendor's business to third parties, who will be forced to pay either damages or higher liability insurance rates.<sup>10</sup>

CONSTITUTIONAL LAW—INCOME TAX ON ROYALTIES FOR THE USE OF COPYRIGHTS.—The State of Wisconsin levied a tax upon certain income of an author derived from contracts with publishing houses. Under these contracts the author received compensation for the assignment to the publisher of his right to secure copyrights and for the assignment of copyrights already secured. The author contended that the state tax on income derived from copyright royalties was invalid, as a tax on a federal instrumentality. On appeal, the Tax Commission ruled that the state could levy the tax in question since the income taxed was not royalty but gain accruing to the author as "the result of his investment of his labor." *Appeal of Ross*, U. S. Daily Sept. 2, 1930, at 7.

The principle that the states cannot tax federal instrumentalities<sup>1</sup> was greatly extended when the Supreme Court of the United States held invalid a state tax upon income derived by a lessee from the sale of oil and gas received under leases of Indian lands.<sup>2</sup> More recently the same court held invalid the levying of a similar tax upon income derived from royalties for the use of patents.<sup>3</sup> The patentee in that case retained the patent rights in his own name, merely licensing the use of the patents by a manufacturing company. The Tax Commission distinguished the instant case from the patent case by declaring that the tax in question was on the income accruing to the author under his contracts with the publishing companies, rather than from the copyrights,<sup>4</sup> which, by the contracts, became the property of the publishers. By such a legalistic device the Commission avoided a further extension of the already over-worked doctrine of federal instrumentalities. The copyright laws, in securing to authors the exclusive right to their writings for the statutory period,<sup>5</sup> fully satisfy the constitutional provision aimed to encourage literary effort.<sup>6</sup> To grant the further encouragement sought in the instant case would discriminate unfairly in the author's favor as against those who earn their income by less exalted means. Furthermore, it is difficult to regard the tax in question as

<sup>9</sup> See *Lacey v. Great Northern R. R.*, 70 Mont. 346, 354, 225 Pac. 808, 811 (1924), 38 A. L. R. 1331, 1337 (1925).

<sup>10</sup> See LECTURES ON INSURANCE (Insurance Society of N. Y., 1922) 63.

<sup>1</sup> See 2 COOLEY, TAXATION (4th ed. 1924) § 606.

<sup>2</sup> *Gillespie v. Oklahoma*, 257 U. S. 501, 42 Sup. Ct. 171 (1922) (per Holmes, J.—The Oil Company is "an instrumentality used by the United States in carrying out [its] duties to the Indians"). This decision was largely based on *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 36 Sup. Ct. 453 (1916) (state tax on value of an Indian oil lease invalid).

<sup>3</sup> *Long v. Rockwood*, 277 U. S. 142, 48 Sup. Ct. 463 (1928), *aff'g* 257 Mass. 572, 154 N. E. 182; see (1927) 26 MICH. L. REV. 120. But see (1928) 28 COL. L. REV. 1100.

<sup>4</sup> A similar argument was used to no avail by the Commissioner of Taxation in *Long v. Rockwood*, *supra* note 3, Petitioner's Brief, p. 33.

<sup>5</sup> See 35 STAT. 1080 (1909), 17 U. S. C. A. (1927) §§ 23, 24.

<sup>6</sup> Constitution of the United States, Art. 1, § 8.

a serious impairment of the operation of the federal government such as the federal instrumentalities doctrine was designed to eliminate.<sup>7</sup>

**CONTRACTS—IMPLIED AGREEMENT TO BEAR EQUALLY PREMIUM COSTS OF JOINT LIFE INSURANCE POLICY.**—Two brothers took out a joint life insurance policy payable to the survivor. At the end of six years, during which period premium costs were borne equally, one brother refused to continue his share of the payments; the other, to keep the policy alive, continued to pay the full amount. Upon the death of the defaulter, the survivor collected the proceeds and sued the deceased's estate to recover one half of the premium costs. The lower court held for the claimant on the ground that the facts gave rise to an implied contract to share the premium costs equally, and on appeal the decision was affirmed. *In re Montgomery's Estate*, 299 Pa. 452, 149 Atl. 705 (1930).

In the clear absence of an express contract, the instant court could have allowed recovery only upon the theory of a contract implied in fact or a quasi-contract.<sup>1</sup> Contracts implied in fact are said to differ from express contracts only in the method of proof<sup>2</sup> and to arise under circumstances which show a mutual intent to contract.<sup>3</sup> While such contracts have been implied principally in cases of services performed,<sup>4</sup> money loaned at request,<sup>5</sup> and the like, they may also arise wherever the "circumstances demand the conclusion of a contract to account for them."<sup>6</sup> The facts of the instant case, however, would not seem to compel the implication of a contract.<sup>7</sup> Furthermore, since the equitable doctrine of contribution is generally limited to cases of joint obligations,<sup>8</sup> and since, the present policy being unilateral,<sup>9</sup> there was no obligation to pay the premiums, it is difficult to find authority by which the court could have imposed upon the defaulter a quasi-contractual duty to contribute.<sup>10</sup> Likewise, where a policy beneficiary has been held to a quasi-contractual duty of restitution to one who has voluntarily advanced the premiums, it has been on the recognized

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<sup>7</sup> See COOLEY, *op. cit. supra* note 1, at § 606; GRAY, LIMITATIONS OF TAXING POWER (1906) § 753.

<sup>1</sup> On the difficulty of distinction between these two, see *Kellum v. Brownings' Adm'r*, 231 Ky. 308, 21 S. W. (2d) 459 (1929); *Highway Commissioners v. Bloomington*, 253 Ill. 164, 170, 97 N. E. 280, 284 (1912); 3 PAGE, CONTRACTS (2 ed. 1920, Supp. 1929) c. 13, 14; ANSON, CONTRACTS (Corbin's ed. 1919) 543; KEENER, QUASI-CONTRACTS (1893) c. 1.

<sup>2</sup> See *Raymond v. Sheldon's Estate*, 92 Vt. 396, 397, 104 Atl. 106, 107 (1918).

<sup>3</sup> See *Hertzog v. Hertzog*, 29 Pa. 465, 468 (1857).

<sup>4</sup> Cf. *Collins v. Lewis*, 111 Conn. 299, 149 Atl. 668 (1930). See also *Reitmyer v. Cox Bros. & Co.*, 264 Pa. 372, 107 Atl. 739 (1919).

<sup>5</sup> Cf. *Couts v. Winston*, 153 Cal. 686, 96 Pac. 357 (1908).

<sup>6</sup> See *Hertzog v. Hertzog*, *supra* note 3, at 469.

<sup>7</sup> Cf. *Robinson v. Hayes' Estate*, 207 App. Div. 718, 202 N. Y. Supp. 732 (3d Dep't 1924); *Butler v. Peters*, 62 Mont. 381, 205 Pac. 247 (1922), 26 A. L. R. 560 (1923).

<sup>8</sup> *Exchange Mutual Indemnity Ins. Co. v. Zurich General Accident, Fire and Life Ins. Co.*, 122 Misc. 386, 202 N. Y. Supp. 720 (Sup. Ct. 1924); *Andrews v. Murray*, 33 Barb. 354 (N. Y. 1861); 2 ELLIOTT, CONTRACTS (1913) 760, (1923 Supp.) 360.

<sup>9</sup> Cf. VANCE, INSURANCE (2d ed. 1930) 260.

<sup>10</sup> See the valuable discussion of quasi-contractual obligations in KEENER, *op. cit. supra* note 1.

equitable principle of preventing "unjust enrichment."<sup>11</sup> Although there appears no technical "unjust enrichment" in the present situation, nevertheless, by virtue of the claimant's payment of the full premium rates,<sup>12</sup> the deceased, until his death, had actually received the full benefit as an expectant, conditional beneficiary. Accordingly it seems probable that the court was influenced in finding an implied contract as a basis for recovery rather by the equities of the case than by any established legal justification.

**CORPORATE TRUSTEES—RESPONSIBILITY FOR NEGLIGENCE IN CERTIFYING BONDS.**—An automobile finance corporation issued bonds under a trust indenture, each bond being certified by the defendant bank as trustee as one of a series described in the indenture. The indenture recited that the trustee should authenticate the bonds, "provided, however, there shall be delivered and pledged with the trustee" as collateral security the "notes of dealers, of purchasers of motor vehicles, or other first lien mortgages." The indenture also contained an esculatory clause to the effect that receipt by the trustee of an affidavit from the president of the corporation vouching for the collateral security would afford full protection for all action taken on the faith thereof. Without receiving affidavits as to the character of the security deposited, the trustee authenticated the bonds. Upon the bankruptcy of the finance corporation it was discovered that the security posted with the trustee failed to conform to the requirements of the indenture and was valueless. In a suit by a bondholder to recover from the trustee the amount paid for the bonds, the New York Court of Appeals, reversing the lower court, held that since the defendant had not received any affidavit as to the character of the collateral, the plaintiff might recover for the defendant's negligence in accepting security which did not conform to that required by the indenture. *Doyle v. Chatham Phenix Bank*, 171 N. E. 574 (N. Y. 1930).

By the authentication of a bond the trustee under a corporate indenture certifies only that the bond is genuine and that it is within the number authorized by the trust indenture.<sup>1</sup> Under such a certification attempts to extend the responsibility of the trustee to an implied guaranty of the sufficiency of the security have uniformly failed.<sup>2</sup> But where the indenture provides, as in the instant case, for authentication only upon certain conditions, the trustee is usually held responsible for the accurate fulfillment

<sup>11</sup> *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 73 Pac. 833 (1903) (one of five contingent beneficiaries paid the premiums on the default of the assured; he was allowed to recover the advancements from the other beneficiaries who claimed their interest in the proceeds); *Morgan v. Mutual Benefit Life Ins. Co.*, 132 App. Div. 455, 116 N. Y. Supp. 989 (4th Dep't 1909), *aff'd*, 197 N. Y. 607, 91 N. E. 1117 (1910) (assignee of policy under void assignment who paid the premiums given an equitable lien on the proceeds to secure his advances); 2 JOYCE, INSURANCE (2d ed. 1917) 1862; 1 POMEROY, EQUITY JURISPRUDENCE (3d ed. 1905) 676.

<sup>12</sup> For comparison of joint and ordinary life rates see HUEBNER, LIFE INSURANCE (1925) 118.

<sup>1</sup> *Tschetinian v. City Trust Co.*, 186 N. Y. 432, 79 N. E. 401 (1906); *McCauley v. Ridgewood Trust Co.*, 81 N. J. L. 86, 79 Atl. 327 (1911); JONES, CORPORATE BONDS & MORTGAGES (1907) § 287a.

<sup>2</sup> *Byers v. Trust Co.*, 175 Pa. 318, 34 Atl. 629 (1896) (mortgage a second mortgage); *Bauernschmidt v. Maryland Trust Co.*, 89 Md. 507, 43 Atl. 790 (1899) (security inadequate); *Bell v. Title Trust & Guarantee Co.*, 292 Pa. 228, 140 Atl. 900 (1928) (unrecorded mortgage).

of such conditions.<sup>3</sup> Owing to the use of trust terminology, however, and to the peculiar situation of the corporate trustee midway between a stakeholder and an ordinary trustee, courts have been troubled to find a basis for such responsibility.<sup>4</sup> One theory advanced is that the right of the bondholders rests upon a breach of an implied duty owed by the defendant trustee to the bondholders as cestuis.<sup>5</sup> It has also been suggested that the trustee may be held responsible in tort for deceit.<sup>6</sup> The instant case expressly repudiates the "trust" theory on the ground that no trust relationship existed at the time of the "unauthorized act." Likewise it disposes of the "deceit" theory for the reason that intentional fraud, which is absent in the principal case, is an essential element of such an action. But having determined that the action of the defendant was "unauthorized" according to the terms of the indenture, the court proceeded to hold it responsible in tort for negligent misrepresentation. The grounding of the decision upon a general theory of negligence, however, raises the possibility of an extension of a corporate trustee's duties beyond those intentionally assumed under the terms of the indenture.<sup>7</sup> Unless the relationship of the parties makes it advisable to impose upon the trustee a broad duty of due care, it would seem preferable to have predicated liability upon a breach of an implied contract<sup>8</sup> between the trustee and the bondholders, or between the trustee and the corporation for the benefit of the bondholders.<sup>9</sup>

GARNISHMENT—PROTECTION OF GARNISHEE AGAINST DOUBLE LIABILITY ON FOREIGN JUDGMENT.—The plaintiffs as creditors of the principal debtor, a citizen of Haiti, obtained judgments in both Haiti and Connecticut for money due on business done in Haiti. Garnishee process was served on the defendant insurance company in both places for money due to the assignee in bankruptcy of the principal debtor on a fire insurance policy. In the Connecticut action the plaintiffs entered a demurrer to a plea of double liability based upon the defendant's absolute liability for the debt in Haiti. The Supreme Court of Connecticut overruled the demurrer and held for the defendant. *Parker, Peebles & Knox v. National Fire Ins. Co.*, 150 Atl. 313 (Conn. 1930).

<sup>3</sup> *Conover v. Guarantee Trust Co.*, 88 N. J. Eq. 450, 102 Atl. 844 (1918), *aff'd*, 89 N. J. Eq. 584, 106 Atl. 890 (1918). *Cf. Rhineland v. Farmers' Loan & Trust Co.*, 172 N. Y. 519, 65 N. E. 499 (1902) (non-delivery by corporation of required affidavits).

<sup>4</sup> See Posner, *Liability of the Trustee under the Corporate Indenture* (1928) 42 HARV. L. REV. 198, 200.

<sup>5</sup> *Rhineland v. Farmers' Loan & Trust Co.*, *supra* note 3; *Conover v. Guarantee Trust Co.*, *supra* note 3.

<sup>6</sup> *Mullen v. Eastern Trust & Banking Co.*, 108 Me. 498, 81 Atl. 948 (1911) (over-issue of bonds).

<sup>7</sup> See *Green v. Title Guaranty & Trust Co.*, 223 App. Div. 12, 16, 227 N. Y. Supp. 252, 257 (1st Dep't 1928); *Harvey v. Guarantee Trust Co.*, 134 Misc. 417, 425, 236 N. Y. Supp. 37, 51 (Sup. Ct. 1929); *cf. Ultramares Corp. v. Touche*, 243 N. Y. Supp. 179 (App. Div. 1st Dep't 1930), noted (1930) 40 YALE L. J. 128.

<sup>8</sup> *Cf. Patterson v. Guardian Trust Co.*, 144 App. Div. 863, 129 N. Y. Supp. 807 (3d Dep't 1911); See *Rhineland v. Farmers' Loan & Trust Co.*, *supra* note 3, at 538, 65 N. E. at 505.

<sup>9</sup> The relation of debtor-creditor between the corporation as promisee and

It is generally agreed that the garnishee should not be placed in any worse position by the garnishment than he occupied as the debtor of his creditor.<sup>1</sup> Thus Chancellor Kent early held that a garnishee might plead a judgment of any state or English Colony against himself as garnishee in bar to a claim by the principal debtor to the original debt.<sup>2</sup> In the United States, however, the variance in state laws as to the situs of a debt<sup>3</sup> often subjected a garnishee to a risk of double liability.<sup>4</sup> The United States Supreme Court, recognizing through the fiction *mobilia sequuntur personam* that a debt may be transitory, later required a state to give full faith and credit to a judgment of garnishment in another state.<sup>5</sup> But as foreign powers are not required to recognize garnishee orders, since they are discretionary and governed by the *lex fori*, there may arise another risk of double liability.<sup>6</sup> The English courts refuse to grant a garnishee order if there is a risk of liability to a second judgment properly recoverable in a foreign nation,<sup>7</sup> though by a recent decision the rule is limited to situations where the risk of double liability is real and not speculative.<sup>8</sup> The Supreme Court of Arizona inaugurated this doctrine in this country in a situation similar to the present case<sup>9</sup> and it has been approved by an eminent text-writer in the field of conflict of laws.<sup>10</sup> Considered in the light of the desirability of encouraging our increasingly important foreign business, the present decision is a highly acceptable and far-reaching precedent. It protects domestic banking and insurance companies engaged in business in foreign countries from deliberate mulcting by warring litigants and at the same time only forces the plaintiffs to pursue their remedies where properly recoverable. Furthermore, it prevents the garnisher from securing an unwarranted preference over the creditors of the bankrupt debtor.

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the bondholders as beneficiaries would seem to be sufficient even in New York to support such a contract. Cf. *Lawrence v. Fox*, 20 N. Y. 268 (1859).

<sup>1</sup> *Lancashire v. Corbetts*, 165 Ill. 592, 46 N. E. 631 (1897). See *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 491, 32 Atl. 663, 672 (1895); 2 SHINN, ATTACHMENT AND GARNISHMENT (1896) § 707.

<sup>2</sup> *Embree & Collins v. Hanna*, 5 Johns. 101 (N. Y. 1809).

<sup>3</sup> Note (1926) 26 COL. L. REV. 605, 607.

<sup>4</sup> See GOODRICH, CONFLICT OF LAWS (1927) 128.

<sup>5</sup> *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625 (1905); *Chicago, Rock Island & Pacific Ry. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797 (1899). The courts have readily used this principle to cover differences in state garnishment statutes with respect to service of process and exemption laws. *Baltimore & Ohio Ry. v. Hostetter*, 240 U. S. 620, 36 Sup. Ct. 475 (1916); *Williams v. St. Louis & S. W. Ry.*, 109 La. 90, 33 So. 94 (1902). The danger of double liability in different states is now the same as in a single state, where only the garnishee's negligence and fraud in not properly protecting the rights of the principal debtor exposes him to such a danger. *Bayer v. Lovelace*, 204 Mass. 327, 90 N. E. 538 (1910); SHINN, *op. cit. supra* note 1, at §§ 708, 714, 717, 718, 719, 720.

<sup>6</sup> *Martin v. Nadel*, [1906] 2 K. B. 26.

<sup>7</sup> *Ibid.*; cf. *Sea Ins. Co. v. Russia Ins. Co. of Petrograd*, 20 Ll. L. R. 308 (1924).

<sup>8</sup> See *Employer's Liability Assurance Corp. v. Sedgwick, Collins & Co.*, [1927] A. C. 95, 112.

<sup>9</sup> *Weitzel v. Weitzel*, 27 Ariz. 117, 230 Pac. 1106 (1924).

<sup>10</sup> GOODRICH, *op. cit. supra* note 4, at 130.

**MORTGAGES—POWER OF MORTGAGEE TO ACCELERATE DEBT UPON ACCIDENTAL INTEREST DEFAULT.**—The plaintiff held a \$335,000 ten-year mortgage on which the defendant corporation was owner of the equity of redemption. Interest, due quarterly, had been regularly paid on a diminishing principal for a period of two years. An acceleration clause provided that upon a twenty-day default in any interest instalment, the whole principal sum would become due at the option of the mortgagee. On June 2, the defendant's president, who had sole authority to do so, signed two checks for the instalment due July 1, the amount having been computed by his secretary. The following day he left on a hurried business trip to Europe. Upon receipt of notice from the mortgagee dated June 24, stating the amount of the coming interest payment to be \$4621.56, the secretary refigured the interest and found an error of \$401.87 in her previous computation. On the 30th she mailed the two checks, promising to send the balance on the president's return. The mortgagee accepted and deposited the checks. The secretary "completely forgot" to inform her employer of her error upon his return July 5. On the 22d, no demand for the unpaid balance having been made, service of summons and complaint to foreclose the mortgage apprised the president for the first time of his delinquency. Tender of the interest in default plus expenses and costs was refused. In a four to three decision, reversing the Supreme Court and the Appellate Division, the New York Court of Appeals granted foreclosure on the ground that "the interests of certainty and security in real estate transactions" require the enforcement of a covenant fair on its face, in the absence of fraud, bad faith or unconscionable conduct. *Graf v. Hope Bldg. Corp.*, 254 N. Y. 1, 171 N. E. 884 (1930).

It is ordinarily unnecessary to give notice of election to accelerate before bringing suit,<sup>1</sup> except in Wisconsin<sup>2</sup> and North Dakota.<sup>3</sup> Tender of the amount in default prior to any communication from the mortgagee electing to exercise his option will usually prevent acceleration.<sup>4</sup> But generally commencement of the action is regarded as a sufficient communication to render ineffective any tender of arrears of interest subsequent to service of summons and complaint.<sup>5</sup> In the instant case, the dissenting opinion,

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<sup>1</sup> *Bank of Commerce v. Scofield*, 126 Cal. 156, 58 Pac. 451 (1899) (suit one month after default); *Collins v. Nagel*, 200 Iowa 562, 203 N. W. 702 (1925) (three months).

<sup>2</sup> *Basse v. Galleger*, 7 Wis. 442 (1859) (two months). But a stipulation waiving notice is valid. *Grootemaat v. Bertrand*, 192 Wis. 519, 213 N. W. 294 (1927) (suit 40 days after default without prior notice).

<sup>3</sup> N. D. COMP. LAWS ANN. (Supp. 1925) § 8099a. The mortgagor is empowered to prevent acceleration by payment within the 30-day statutory notice period. But see *State Bank v. First National Bank*, 49 N. D. 611, 192 N. W. 967 (1923).

<sup>4</sup> *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736 (1909) (tender 20 days after default and two days prior to suit); *Trinity County Bank v. Haas*, 151 Cal. 553, 91 Pac. 385 (1907) (tender three months after default and six days prior to suit). *Contra*: *Swearingen v. Lahner*, 93 Iowa 147, 61 N. W. 431 (1894) (tender six months after default and three weeks prior to suit).

<sup>5</sup> *Ferris v. Ferris*, 28 Barb. 29 (N. Y. 1858); *Crawford v. Houser*, 115 Neb. 62, 211 N. W. 165 (1926); *Brown v. Kennedy*, 309 Mo. 335, 274 S. W. 357 (1925) (mortgagor fails to enjoin sale where tender made 17 days after published notice thereof); *Note* (1926) 41 A. L. R. 732. But cf. UNIFORM REAL ESTATE MORTGAGE ACT (1927) § 10, providing that foreclosure for principal shall cease upon tender of amount in default with costs.

although expressly recognizing the foregoing general rule, contends that the mortgagee's knowledge of the accidental character of the defendant's partial default followed by a hasty attempt to foreclose without first demanding the unpaid interest, brought his behavior within the category of "unconscionable" conduct. Where default has been positively induced by the mortgagee's misconduct the courts have regularly refused acceleration.<sup>6</sup> The state of mind of the defaulting mortgagor in itself has seldom been considered material.<sup>7</sup> The instant case raises the more difficult question whether the epithet "unconscionable" is applicable to the conduct of a mortgagee who seeks to benefit from a default fostered by mere inaction coupled with an awareness of the mortgagor's good intentions.<sup>8</sup>

The absence of harm to the mortgagee in this particular case enables the dissent to strengthen its position by a close analogy drawn from the frequent refusal to accelerate the mortgage debt on the ground of failure to pay taxes in cases where the overdue taxes were paid subsequent to suit but prior to sale of the mortgaged premises.<sup>9</sup> The dissent recognizes, however, the difference in the nature of the creditor's need with respect to the prompt payment of interest. And were the courts to weaken substantially the compulsion inherent in the mortgagee's power to accelerate a large debt several years by relieving the mortgagor from the full consequences of an ordinary interest default upon payment subsequent to election by notice or suit, debtors could neglect such obligations with impunity and thus practically defeat the purpose of the acceleration clause. If a decision for the defendant would lead to such a result the position of the majority is amply justified. The possibility of increased litigation, created by any departure from the strict rule making the intention of the mortgagor irrelevant, lends further support to that position. But in encouraging the use of the acceleration clause beyond its principal purpose of insuring prompt payments of interest, the effect may be to assist the fly-by-night mortgagee in obtaining a speculative profit in a rising money market or a bonus from a reinvestment whenever a technical slip by the mortgagor brings him within the penalty of his verbal bargain. Thus, it is as likely that the decision will offer an increased opportunity for speculation as that it will contribute to business stability.<sup>10</sup> But after all the wisest guess as to the consequences of the decision is perhaps that implicit in the position of the minority that the only issue was the doing of justice in the particular case.

<sup>6</sup> *Noyes v. Clark*, 7 Paige 179 (N. Y. 1838); *DeGroot v. McCotter*, 19 N. J. Eq. 531 (1868).

<sup>7</sup> *Warwick Iron Co. v. Morton*, 148 Pa. St. 72, 23 Atl. 1065 (1892); *Spring v. Fisk*, 21 N. J. Eq. 175 (1870); *Pizer v. Herzig*, 120 App. Div. 102, 105 N. Y. Supp. 38 (1st Dep't 1907); *Ferris v. Ferris*, *supra* note 5.

<sup>8</sup> *Cf. Petterson v. Weinstock*, 106 Conn. 436, 138 Atl. 433 (1927) (mortgagee, bringing suit without demand or notice on day following expiration of grace period, denied foreclosure on ground of unconscionable conduct and hardship to defendant even though total default in first interest payment was occasioned by mortgagor's mistake). Although directly in point, this case is not cited in the majority opinion, the dissent, or the briefs of counsel.

<sup>9</sup> *Noyes v. Anderson*, 124 N. Y. 175, 26 N. E. 316 (1891); *Germania Life Ins. Co. v. Potter*, 124 App. Div. 814, 109 N. Y. Supp. 435 (1st Dep't 1908). *Contra: Hockett v. Burns*, 90 Neb. 1, 132 N. W. 718 (1911); *Weiner v. Cullens*, 97 N. J. Eq. 523, 128 Atl. 176 (1925). *Cf. Trowbridge v. Malex Realty Corp.*, 198 App. Div. 656, 191 N. Y. Supp. 97 (1st Dep't 1921); (1928) 37 YALE L. J. 672; (1922) 22 COL. L. REV. 266.

<sup>10</sup> The practice of mortgage investment houses in New Haven and New

PERPETUITIES—APPLICABILITY OF RESTRAINTS ON ALIENATION TO CHARITIES.—The plaintiff, as vendor, sought specific performance of a contract for the sale of real estate acquired by the following provisions of a will: "Where we live [live], house and land, to go to the Presbyterian Church of Salem, not to be sold, but for help in the future (for church and parsonage) as the town and church may need." In answer to the defendant's contention that the title was unmarketable, the plaintiff claimed that the restraint on alienation contained in the will was void. The court held the title unmarketable on the ground that the rule against perpetuities which renders a condition against all alienation void does not apply to charitable uses. *Trustees of First Presbyterian Church of Town of Salem v. Wheeler*, 149 Atl. 589 (N. J. 1930).

It is frequently said that gifts to charities are not subject to the rule against perpetuities.<sup>1</sup> Although a "perpetuity" has been defined as "an inalienable indestructible interest"<sup>2</sup> the rule against perpetuities is not a rule against the restraint of alienation but rather against the creation of remote contingent interests.<sup>3</sup> All devises must vest, if at all, within the period prescribed by this rule.<sup>4</sup> Thus although charitable trusts may be an exception to the general rule which forbids the creation of a "perpetuity," in that they may be of limitless duration<sup>5</sup> or restrain the alienation of property indefinitely,<sup>6</sup> it cannot be said that gifts to charities are not subject to the "rule against perpetuities" correctly viewed as a "rule against remoteness."<sup>7</sup> Since the gift in the instant case vested *in praesenti* the rule against perpetuities did not affect its validity or invalidity.<sup>8</sup> Though the result reached seems sound enough the misleading

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York points to the conclusion that, in circumstances such as existed in the Graf and Petterson cases, foreclosure would never be brought without first communicating with the mortgagor. This raises an interesting query as to the proper relation between the standards to be imposed by courts of equity and the general mores of the business community.

<sup>1</sup> *Mills v. Davison*, 54 N. J. Eq. 659, 35 Atl. 1072 (1896); *Decker v. Vreeland*, 170 App. Div. 234, 156 N. Y. S. 442 (2d Dep't 1915).

<sup>2</sup> GRAY, PERPETUITIES (3d ed. 1915) 472.

<sup>3</sup> Clark, *Unenforceable Trusts and the Rule Against Perpetuities* (1911) 10 MICH. L. REV. 31; Anderson, *The Modern Rule Against Perpetuities* (1929) 77 U. OF PA. L. REV. 862. Prof. Gray states: "A perpetuity could arise in two ways, *first*, by taking from the owner the power to alienate property; *secondly*, by allowing interests to be created *in futuro*. In the beginning these ideas were confounded; gradually they were differentiated; the *first* gave rise to the Rule forbidding restraints on alienation, the *second* to the Rule against Perpetuities." Gray, *Remoteness of Charitable Gifts* (1894) 7 HARV. L. REV. 406, 409.

<sup>4</sup> *Bascom v. Albertson*, 34 N. Y. 584 (1866); *Jansen v. Godair*, 292 Ill. 364, 127 N. E. 97 (1920); ZOLLMANN, AMERICAN LAW OF CHARITIES (1924) § 547.

<sup>5</sup> *Odell v. Odell*, 42 Mass. 1 (1865); *Camp v. Crocker's Adm'r*, 54 Conn. 21, 5 Atl. 604 (1886); ZOLLMANN, *op. cit. supra* note 4, at § 530.

<sup>6</sup> *Delaware Land & Development Co. v. First and Central Presbyterian Church*, 147 Atl. 165 (Del. 1929); ZOLLMANN, *op. cit. supra* note 4, at § 530.

<sup>7</sup> See 2 PERRY, TRUSTS AND TRUSTEES (6th ed. 1911) § 736; GRAY, *op. cit. supra* note 2, at § 591-597.

<sup>8</sup> See KALES, FUTURE INTERESTS (1905) 332.

and inaccurate use of this famous rule as a basis for the decision serves only to perpetuate the already sufficiently confused understanding of the rule.<sup>9</sup>

**WILLS—VALIDITY OF WILLS EXECUTED ON UNCONNECTED SHEETS.**—Twenty-eight sheets of note-paper, found in a sealed envelope within an unsealed envelope, were offered for probate as decedent's will. Each sheet was in her handwriting, and signed, numbered, and endorsed at the top; but each was a complete entity, and the ink varied throughout the sheets. The last page contained merely the clause of execution, decedent's signature, and an attestation by three witnesses. These witnesses testified that the papers presented for probate resembled the pile of note-paper to which decedent had referred as her will, but which they had not examined. The twenty-eight sheets were admitted to probate. On appeal it was held, one justice dissenting, that there was sufficient evidence to support the finding that the papers presented were the same as those executed by decedent as her will. *Appeal of Sleeper*, 151 Atl. 150 (Me. 1930).

The fact that a will is written on separate sheets does not alone invalidate it.<sup>1</sup> Nor need the subscribing witnesses examine all the sheets.<sup>2</sup> All the sheets, however, must have been present in the room at the time of execution, although their presence may be inferred from other circumstances.<sup>3</sup> Moreover in the absence of a substantial physical connection of the sheets, other evidence must exist that all the sheets were executed as one instrument.<sup>4</sup> Evidence of internal coherence or rhetorical unity, such as the passing over of sentences from one sheet to another, is sufficient<sup>5</sup> and in Pennsylvania is considered essential.<sup>6</sup> In some jurisdictions probate is allowed where the sheets are identified by the parol evidence of disinterested witnesses,<sup>7</sup> and elsewhere such extrinsic evidence is admitted to strengthen the intrinsic evidence of coherence.<sup>8</sup> In the instant case, the sheets, although enclosed in a sealed envelope, were properly regarded by the court as uncon-

<sup>9</sup> See Sweet, *The Monstrous Regiment of the Rule Against Perpetuities* (1906) 18 JUR. REV. 132; Warren, *Progress of the Law: Estates and Future Interests* (1921) 34 HARV. L. REV. 639, 647 *et seq.*

<sup>1</sup> *Bond v. Seawell*, 3 Burr, 1773 (1765); *Jones v. Habersham*, 63 Ga. 146 (1879); *Paglia v. Messina*, 169 N. E. 423 (Mass. 1930); *Gass v. Gass*, 3 Humph. 278 (Tenn. 1842); PAGE, WILLS (2d ed. 1926) § 238.

<sup>2</sup> *Bond v. Seawell*, *supra* note 1; *Owen v. Groves*, 145 Ga. 287, 88 S. E. 964 (1916); *Palmer v. Owen*, 229 Ill. 115, 82 N. E. 275 (1907).

<sup>3</sup> *Bond v. Seawell*, *supra* note 1; *Gass v. Gass*, *supra* note 1; *Ela v. Edwards*, 16 Gray 91 (Mass. 1860).

<sup>4</sup> *Maginn's Estate*, 278 Pa. 89, 122 Atl. 264 (1923); *In the Matter of Johnson*, 80 N. J. Eq. 525, 85 Atl. 254 (1912).

<sup>5</sup> *Palmer v. Owen*, *supra* note 2; *Ela v. Edwards*, *supra* note 3; *In the Matter of Johnson*, *supra* note 4; *In re Swaim*, 162 N. C. 213, 78 S. E. 72 (1913); *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73 (1910); PAGE, *op. cit. supra* note 1, at § 241.

<sup>6</sup> *Seiter's Estate*, 265 Pa. 202, 108 Atl. 614 (1919); *Maginn's Estate*, *supra* note 4; *Maginn's Estate*, 281 Pa. 514, 127 Atl. 79 (1924); *cf. Wikoff's Appeal*, 15 Pa. 281 (1850) (validity largely dependent on republication by codicil); (1924) 33 YALE L. J. 743.

<sup>7</sup> *Murphy v. Clancy*, 177 Mo. App. 429, 163 S. W. 915 (1914); *Cole v. Webb*, 220 Ky. 817, 295 S. W. 1035 (1927).

<sup>8</sup> *In the Matter of Johnson*, *supra* note 4; *In re Swaim*, *supra* note 5; *Gass v. Gass*, *supra* note 1.

nected.<sup>9</sup> There was no certain identification of the sheets by the witnesses and no intrinsic evidence of unity other than the numbering of the pages. The court, satisfied with the protection against fraudulent substitution afforded by the fact that the instrument was in decedent's handwriting, required only meagre proof that the sheets were executed at one time and as one instrument.

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<sup>9</sup> Cf. *Seiter's Estate*, *supra* note 6. But see (1920) 33 HARV. L. REV. 989.