Yale Law Journal

Volume 32
Issue 1 *Yale Law Journal*

Article 12

1922

RECENT CASE NOTES

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ACCORD AND SATISFACTION—LIABILITY OF THE DEBTOR ON AN EXECUTORY ACCORD.—The defendant agreed to purchase certain galvanizing equipment from the plaintiff. Before the plaintiff had completed the work thereon according to the agreement, the defendant requested the cancellation of the order. The plaintiff refused, but offered to accept two thousand dollars in satisfaction of the unliquidated claim in return for the defendant's promise to pay such sum. The defendant duly accepted the plaintiff's offer but later refused to pay as agreed. The plaintiff sued on the new agreement. *Held,* that the plaintiff could recover. *Meaker Galvanizing Co. v. McInnes* (1922, Pa.) 116 Atl. 400.

In the instant case, the court dealt with the old contract as having been broken by the defendant, not as having been rescinded before breach, and therefore the new agreement was an accord. Even after bilateral contracts became enforceable, courts were reluctant to enforce bilateral accords. "Upon an accord no remedy lies." *Lynn v. Bruce* (1794, C. P.) 2 H. Bl. 317. This statement is still repeated, although it is now incorrect. *Bell v. Pitman* (1911) 143 Ky. 521, 136 S. W. 1026; Leake, *Contracts* (6th ed. 1912) 643. Even though no court has expressly repudiated this statement, the decisions are almost universally inconsistent with it. *Nash v. Armstrong* (1861) 10 C. B. (N. S.) 259; *Very v. Levy* (1851, U. S.) 13 How. 345; *Moers v. Moers* (1920) 229 N. Y. 294, 128 N. E. 202; (1920) 30 YALE LAW JOURNAL, 98. A sufficient consideration is as essential in an accord as in any other contract. *Partridge Lumber Co. v. Phelps-Burruss Lumber Co.* (1912) 91 Neb. 396, 136 N. W. 65. In an accord the determining factor is whether it was the intention of the parties that the new promise, or performance of that promise, should operate as a discharge of the pre-existing claim. An executory accord which provides that actual performance of the new agreement shall operate as a discharge will not bar an action on the old contract. *Hosler v. Hursh* (1892) 151 Pa. 415, 25 Atl. 52; (1917) 26 YALE LAW JOURNAL, 789. In such a case, the creditor could elect to sue on the accord. *Hunt v. Brown* (1888) 146 Mass. 253, 15 N. E. 587; 3 Williston, *Contracts* (1920) 3170. Where it is clearly shown, however, that the parties intended instantly to discharge the former contract, the new executory agreement is a complete defense to an action on the original claim. *Good v. Cheesman* (1831, K. B.) 2 Barn. & Adol. 328; *Nassoiy v. Tomlinson* (1896) 148 N. Y. 326, 42 N. E. 715. In the instant case, the court said that an agreement to accept a smaller sum in satisfaction of a claim for a larger sum is an accord, so far revocable as not to bar suit on the original contract until satisfied by actual and complete performance. Although this statement seems untenable, the decision is sound.

BANKS AND BANKING—GUARANTY FUND—CERTIFICATES OF DEPOSIT ISSUED BY CASHIER FOR PERSONAL BENEFIT NOT PROTECTED.—The plaintiff was a holder in due course of certificates of deposit for which no funds had been deposited, the certificates having been issued by the cashier of the bank for his personal benefit. The bank became insolvent and the plaintiff brought an action to recover the amount of the certificates from the depositors' guaranty fund. Kan. Gen. Sts. 1915, ch. 11, art. 2. *Held,* that the plaintiff could not recover. *Fourth Nat. Bank v. Wilson* (1922, Kan.) 204 Pac. 715.

Statutes establishing depositors' guaranty funds to insure bank depositors against losses are constitutional. *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 31 Sup. Ct. 186; *Assaria State Bank v. Dolley* (1911) 219 U. S. 121, 31 Sup.

Ct. 189. Under such statutes every bank must make an initial contribution to the guaranty fund and pay annual assessments proportionate to its deposits. When a bank becomes insolvent the state assumes control and out of the guaranty fund completely discharges the claims of the depositors. Kan. Gen. Sts. 1915, ch. 11, secs. 596-598. The state then becomes a preferred creditor for the amount paid to the depositors, having a prior lien on the bank's assets. *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.* (1912) 33 Okla. 535, 126 Pac. 556; *contra, Anderson v. Baskin & Wilbourn* (1917) 114 Miss. 81, 74 So. 682. Deposits "otherwise secured" are not guaranteed under these acts. Kan. Gen. Sts. 1915, ch. 11, sec. 600; *Austin v. First Nat. Bank* (1918, Tex. Civ. App.) 205 S. W. 839 (deposit secured by a bond); *American State Bank v. Wilson* (1922, Kan.) 204 Pac. 709 (certificate of deposit endorsed personally by bank president.) Money loaned to a bank and not credited to the depositor's current account is not considered as a deposit, and therefore is not protected. *Iams v. Farmers' State Bank* (1917) 101 Neb. 778, 165 N. W. 145 (bank paid a bonus to secure the money); *Lankford v. Schroeder* (1915) 47 Okla. 279, 147 Pac. 1049; *contra, Farrens v. Farmers' State Bank* (1917) 101 Neb. 285, 163 N. W. 318 (bank director made deposit to help bank meet its obligations). A deposit may be effected by giving to one bank credit, subject to check or draft, in another bank. *American State Bank v. Wilson, supra.* But, as the instant case indicates, money or the equivalent of money must be placed in or at the command of the bank in order to satisfy the statute. Hence a bona fide purchaser of a certificate of deposit which has not been issued under such circumstances has no better claim on the guaranty fund than the original payee. It seems that the statute impairs the negotiability of certificates of deposit and this interpretation may have the effect of making them less acceptable in commercial dealings.

BUSINESS TRUSTS—PARTNERSHIP LIABILITY OF SHAREHOLDERS—POWER TO AMEND TRUST AGREEMENT.—The defendants were shareholders in a company organized in the form of a business trust, under the terms of which the legal title to all property and the exclusive management and control of the business were given to the trustees, who had authority neither to bind the shareholders nor to act as their agents. The shareholders reserved the power to amend the trust agreement in a meeting. The plaintiffs sued on a contract signed by the trustees. *Held,* that the shareholders were individually liable, as the association was not a trust. *McCamey v. Hollister Oil Co.* (1922, Tex. Civ. App.) 241 S. W. 689.

In a business trust the liability of the shareholders as partners depends on whether under the terms of the trust agreement the trustees may be considered as the agents of the shareholders. Judah, *Possible Partnership Liability Under the Business Trust* (1922) 17 ILL. L. REV. 77, 78; Sears, *Trust Estates as Business Companies* (2d ed. 1921) 108. It is well settled that the trustee of the ordinary trust, such as the trust created by will, is not an agent of the *cestui que trust,* and that the latter is not liable for the torts or debts incurred in the administration of the estate. Scott, *Liabilities Incurred in the Administration of Trusts* (1915) 28 HARV. L. REV. 725, 736. When the beneficial owners of property under a trust agreement have supervision and control over the acts of the so-called trustee, it is not a true trust and the beneficiaries are liable as principals, even though the trust agreement expressly stipulates against such liability. *Industrial Lumber Co. v. Texas Pine Land Association* (1903) 31 Tex. Civ. App. 375, 72 S. W. 875; Wrightington, *Unincorporated Associations* (1916) 47. The English courts have been liberal in allowing the beneficiaries to exercise control as long as the actual management of the business was carried on by the trustees. Thus no partnership liability was imposed where the shareholders had power under the trust agreement to hold meetings, elect trustees, make rules for the conduct of the business, or

terminate the business altogether. *Smith v. Anderson* (1880) L. R. 15 Ch. Div. 247; *Cox v. Hickman* (1860) 8 H. L. Cas. 268. Massachusetts, where the theory of the business trust has perhaps been more full developed than anywhere else, on the other hand, is prone to hold the least control by the beneficiaries, especially if they act together in a meeting, to create a partnership. Thus the power to remove and elect trustees or to amend or terminate the trust agreement by vote at a meeting is fatal to the existence of a true trust. *Frost v. Thompson* (1914) 219 Mass. 360, 106 N. E. 1009; *Dana v. Treasurer* (1917) 227 Mass. 562, 116 N. E. 941; *Howe v. Chmielinski* (1921) 237 Mass. 532, 130 N. E. 56. The power merely to consent individually to an alteration or a termination of the trust does not make the association a partnership. *Williams v. Inhabitants of Milton* (1913) 215 Mass. 1, 102 N. E. 355; *Crocker v. Malley* (1919) 249 U. S. 223, 39 Sup. Ct. 270. Other courts, adopting the same test, are less strict in imposing partnership liability on the beneficiaries. *Rhode Island Hospital Trust Co. v. Copeland* (1916) 39 R. I. 193, 98 Atl. 273; *Home Lumber Co. v. Hopkins* (1920) 107 Kan. 153, 190 Pac. 601; but see *Simson v. Klipstein* (1920, D. N. J.) 262 Fed. 823. Business trusts, however, have been held "unincorporated associations" within the terms of the Bankruptcy Act and "associations" under the Revenue Acts of 1916 and 1919. Act of Sept 8, 1916 (39 Stat. at L. 789); Act of Feb 24, 1919 (40 Stat. at L. 1057); *In re Association Trusts* (1914, D. Mass.) 222 Fed. 1022; *Malley v. Howard* (1922, C. C. A. 1st) 281 Fed. 363, reversing *Hecht v. Malley* (1921, D. *Mass.*) 276 Fed. 830; COMMENTS (1919) 28 YALE LAW JOURNAL, 690. It is submitted that the instant case reaches a correct conclusion, since the power to amend the trust agreement placed the control of the business substantially in the hands of the shareholders and made them principals.

CARRIERS—CUMMINS AMENDMENT—NON-LIABILITY OF TERMINAL CARRIER FOR DAMAGE OCCASIONED ON CONNECTING LINES.—The plaintiff made an interstate shipment routed over three connecting lines. The usual through bill of lading was issued by the initial carrier. Damage was caused by the negligence of the intermediate carrier and action was brought against the terminal carrier. *Held,* that in the absence of special contract, the terminal carrier was not liable for loss caused by a connecting carrier. *Oregon-Washington Ry. and Nav. Co. v. McGinn* (1922, U. S.) 42 Sup. Ct. 332.

The English common-law rule, which is followed in a few American jurisdictions, holds the initial carrier liable for damage occurring anywhere before the shipment reaches its destination, on the theory that the connecting carriers are its agents. *Watson v. Ambergate, Nottingham, and Boston Ry.* (1852, Q. B.) 15 Jur. 448; *Ill. Match Co. v. Chicago, R. I. and P. Ry.* (1911) 250 Ill. 396, 95 N. E. 492; *Allen and Gilbert-Ramaker Co. v. Canadian Pac. Ry.* (1906) 42 Wash. 64, 84 Pac. 620. Under the general American rule, however, a carrier is liable at common law only for loss caused by its own negligence. *Mich. Cent. Ry. v. Myrick* (1883) 107 U. S. 102; 4 *Elliott, Railroads* (3d ed. 1922) sec. 2160. The Cummins Amendment requires the initial carrier to issue a through bill of lading, and makes it responsible for all loss or damage en route. Act of March 4, 1915 (38 Stat. at L. 1196); 4 Elliott, *op cit.* sec. 2171; *Atlantic Coast Line Ry v. Riverside Mills* (1911) 219 U. S. 186, 31 Sup. Ct. 164. It has been suggested that the bill of lading required by the Amendment raises a partnership relation between the connecting roads and makes them equally liable. See *Moore v. Southern Ry.* (1922, N. C.) 111 S. E. 166 (dissenting opinion); *McGinn v. Oregon-Washington Ry. and Nav. Co.* (1920, C. C. A. 9th) 265 Fed. 81 (reversed by the instant case). The principal case indicates that the Cummins Amendment makes succeeding carriers in effect agents of the initial carrier, leaving the common-law liability of the terminal carrier unchanged. Accord,

Moore v. Southern Ry., supra; Karnofsky Bros. v. Delaware and Hudson Ry. (1922, Pa.) 117 Atl. 783. Legislation making the terminal carrier liable for damage caused anywhere en route, with remedy over against the negligent road, would be beneficial.

CARRIERS—LIMITATION OF LIABILITY—DIVERSION OF GOODS CARRIED AT OWNER'S RISK.—The plaintiff shipped goods over the defendant's railway from Llandudno to Bolton via Manchester. The goods were carried at the owner's risk under a contract which relieved the defendant "from all liability for loss, damage, misconveyance, misdelivery, delay, or detention" not due to the wilful misconduct of the defendant's servants. The plaintiff suffered damage by reason of the negligence of one of the company's employees in diverting the goods at Manchester, and sued in tort. *Held,* that the plaintiff could recover. *Neilson v. London & Northwestern Ry.* [1922, C. A.] 1 K. B. 192.

By statute English carriers may limit their common-law liability as insurers for loss or damage arising from any cause but wilful misconduct, provided they offer the consignor the lower of two rates. Railway and Canal Traffic Act (1854) 17 & 18 Vict. c. 31, sec. 7; *Gunyon v. Ry.* [1915] 2 K. B. 370. The American rule is now substantially the same. Before the Carmack Amendment to the Interstate Commerce Act (34 Stat. at L. 584, 595) great confusion existed in the American law on this subject. In some states a carrier was permitted to limit its liability for anything except wilful misconduct. *Zimmer v. N. Y. C. & H. R. Ry.* (1893) 137 N. Y. 460, 33 N. E. 642. In a few states carriers were expressly prohibited from limiting their liability in any way. *Southern Ry. v. Harris* (1918) 202 Ala. 263, 80 So. 101; *Head v. Pacific Express Co.* (1910) 60 Tex. Civ. App. 169, 126 S. W. 682; Ky. Const. sec. 196. But in the majority of states limitations could be made, though the carrier could not be exonerated from liability for damage due to its own negligence. *Baltimore & Ohio Ry. v. Doyle* (1906, C. C. A. 3d) 142 Fed. 669. Where such special contracts may be made, their terms, so far as valid, determine the rights of the parties, and are construed strictly against the carrier. *Michigan Cent. Ry. v. Owen* (1921) 256 U. S. 427, 41 Sup. Ct. 554; *Ross v. Maine Cent. Ry.* (1915) 114 Me. 287, 96 Atl. 223. The Carmack Amendment, in so far as interstate shipments are concerned, supersedes all state legislation. *Missouri K. & T. Ry. v. Harriman* (1913) 227 U. S. 657, 33 Sup. Ct. 397; *Adams Express Co. v. Croninger* (1913) 226 U. S. 491, 33 Sup. Ct. 148. In all of the states except New York (where a contract limiting liability for negligence is upheld) the rule is that a carrier may make a contract with the shipper limiting its liability, provided such contract does not exempt the carrier from responsibility for loss or damage arising from its own negligence or that of its servants. *Western Union Tel. Co. v. Lapenna* (1921, Ind.) 133 N. E. 144; *American Fruit Distributors of Calif. v. Hines* (1921, Calif.) 203 Pac. 821; *Southern Ry. v. Barbee & Co.* (1920) 190 Ky. 63, 226 S. W. 376; but see *Hance Bros. v. American Ry. Express Co.* (1921, Sup. Ct.) 116 Misc. 653, 190 N. Y. Supp. 530; *Jones v. Wells Fargo Co.* (1914 Sup. Ct.) 83 Misc. 508, 145 N. Y. Supp. 601. This strict rule has been nullified to all practical purposes, however, by permitting a carrier to limit the amount recoverable to an agreed valuation in case of loss or damage arising even through negligence. *Pierce Co. v. Wells Fargo & Co.* (1915) 236 U. S. 278, 35 Sup. Ct. 351; *Lusk v. Durant Nursery Co.* (1920) 77 Okla. 288, 188 Pac. 104; (1917) 26 YALE LAW JOURNAL, 611; see *Union Pacific Ry. v. Burke* (1921) 255 U. S. 317, 41 Sup. Ct. 283. Thus in so far as their power to impose limitations on their common-law liability is concerned, American and English carriers are governed by substantially similar rules. In the principal case the court refused to construe "misconveyance," and held that there was no misdelivery or delay within the meaning of the contract. It is not clearly appreciable how the doctrine of strict construction of

the printed terms of a carrier's contract will justify interpretations clearly outside the ordinary meaning and intent of the specific words used. See Daish, *Liability of Common Carriers Under the Act to Regulate Commerce* (1916) 25 YALE LAW JOURNAL, 341; Perkins, *Judicial Relaxation of the Carrier's Liability* (1917) 3 IOWA L. BUL. 195; 4 *ibid.* 21, 86.

CONFLICT OF LAWS—STATUS—LEGITIMATION BY ADOPTION.—A, an unmarried man, domiciled in California, died there intestate owning land in Illinois. B, the son of A, born and domiciled in California, was illegitimate at birth, but had been publicly acknowledged by his father and received into his family. The California Supreme Court held that this constituted legitimation by adoption, as provided for in the California Civil Code, 1872, sec. 230. *In re McNamara's Estate* (1919) 181 Calif. 82, 183 Pac. 552. In an action to quiet title to the Illinois land, the two sisters of A contended that Illinois should disregard the California proceedings, and that B was not the lawful child of A. *Held,* (one judge *dissenting*) that B's status was determined by the law of California, and that he was entitled to the land. *McNamara v. McNamara* (1922, Ill.) 135 N. E. 410.

The descent of realty is governed by the *lex rei sitae,* and the status of the person depends on the law of the domicil. *Calhoun v. Bryant* (1911) 28 S. D. 266, 133 N. W. 266. Legitimation and adoption, when legal and effective at the domicil, confer a status which is generally recognized elsewhere. *Green v. Kelley* (1918) 228 Mass. 602, 118 N. E. 235; *contra, Williams v. Kimball* (1895) 35 Fla. 49, 16 So. 783; see *Irving v. Ford* (1903) 183 Mass. 448, 67 N. E. 366; 65 L. R. A. 177, note. A refusal on the part of a state to recognize and grant legal rights in conformity with a status conferred by the foreign domicil does not constitute a violation of the full faith and credit clause of the federal constitution. *Hood v. McGehee* (1915) 237 U. S. 611, 35 Sup. Ct. 718. Recognition of such a status is based entirely on grounds of comity, and will be refused when contrary to public policy, or when the proceedings in the foreign state are so repugnant to good morals that they should not be sanctioned. See *Olmsted v. Olmsted* (1908) 190 N. Y. 458, 83 N. E. 569. The Illinois law providing for legitimation and adoption differed from that of California in that it allowed legitimation only by marriage between the parents, but, as was pointed out in the opinion in the instant case, the legislation in both states was grounded upon the same principles of public policy. Hurd's Ill. Rev. Sts. 1919, ch. 17, sec. 15. Recognition of the rights of the child in the principal case was desirable on grounds of comity and sound on principles of private international law.

CONTRACTS—OPTIONS UNDER SEAL—REVOCATION.—The defendant gave to the plaintiff's testator an option under seal containing the usual formal recitals of consideration. After the testator's death but before the expiration of the option the plaintiff tendered the purchase price and demanded a conveyance. In a suit for specific performance the plaintiff demurred to the defendant's answer that the promise was without consideration. *Held,* that the plaintiff could not obtain relief. *Hartford-Connecticut Trust Co. v. Devine* (1922) 97 Conn. 193, 116 Atl. 239.

Because of the principle that equity will not aid a volunteer, there is a tendency to hold that an option without consideration is revocable even though under seal. *Gordon v. Darnell* (1880) 5 Colo. 302; *Smith & Downs v. Reynolds* (1880, C. C. D. Colo.) 8 Fed. 696; *Davis v. Petty* (1898) 147 Mo. 374, 48 S. W. 944; *Storch v. Duhnke* (1899) 76 Minn. 521, 79 N. W. 533; Waterman, *Specific Performance* (1881) 247; but see 6 L. R. A. (N. S.) 403, note. It has been suggested, however, that the doctrine denying specific performance is based on an erroneous idea that the contract lacks mutality. As a matter of fact, it is not

the *option* which is being enforced but the contract to sell the consideration for which is the purchase price. COMMENTS (1908) 2 ILL. L. REV. 463; Holland, *Mutuality of Options* (1909) 7 MICH. L. REV. 484. Even in equity the majority view is that an option under seal is irrevocable. *O'Brien v. Boland* (1896) 166 Mass. 481, 44 N. E. 602; *Willard v. Tayloe* (1869, U. S.) 8 Wall. 557; McGovney, *Irrevocable Offers* (1914) 27 HARV. L. REV. 644. The decreasing importance of the private seal is shown by the fact that several states have passed statutes either abolishing its use or making it only presumptive evidence of consideration. Corbin, *Cases on Contracts* (1921) 477, note; see Crane, *The Magic of the Private Seal* (1915) 15 COL. L. REV. 24. But the tendency to reduce consideration itself to a mere formality, as the giving of a peppercorn, shows that formality is not obsolete. Ames, *Two Theories of Consideration* (1899) 12 HARV. L. REV. 515; 13 *ibid.* 29, 42; see Lorenzen, *Causa and Consideration in the Law of Contracts* (1919) 28 YALE LAW JOURNAL, 621. Ordinarily the power of exercising an option passes to the administrator or executor of the option-holder. *McCormick v. Stephany* (1898) 57 N. J. Eq. 257, 41 Atl. 840; Fry, *Specific Performance* (5th ed. 1911) 101; cf. *Rease v. Kittle* (1904) 56 W. Va. 269. 49 S. E. 150. But if the option is revocable, death of the option-holder operates as a revocation. *Sutherland v. Parkins* (1874) 75 Ill. 338; 13 C. J. 298. The decision in the instant case is a good example of judicial legislation which aims to do away with the common-law effect of a seal because the court considers it antiquated. A seal added to an offer does not create immunity from revocation. Would the court go so far as to hold that a seal added to a promise would not create a duty? In the absence of a controlling statute, it seems that one ought to be able to rely on a promise made under seal.

CONTRACTS—CONSTITUTIONAL LAW—RECOGNITION OF MORAL OBLIGATIONS—INCREASED COMPENSATION TO CONTRACTORS BECAUSE OF WAR COSTS.—A statute conferred upon the Court of Claims jurisdiction to make awards to contractors for increased costs incurred in the performance of contracts entered into with the state prior to the entrance of the United States into the World War. N. Y. Laws, 1919, ch. 459, sec. 6. In 1915, the plaintiff made such a contract for the repair of certain highways. Pursuant to the above provision, he filed a claim for increased costs due to war conditions. *Held,* that increased cost of performance was not a basis for a legal claim or a claim based upon equity and justice, and the statute was therefore a violation of Article III, Section 28, of the New York Constitution, which forbids the legislature to "grant any extra compensation to any public officer, servant, agent or contractor." *Gordon v. State* (1922) 233 N. Y. 1, 134 N. E. 698.

The prohibition to make awards in the nature of a gift does not prevent the legislature from recognizing claims founded on a moral obligation or on principles of equity and justice. *People v. Westchester National Bank* (1921) 231 N. Y. 465, 132 N. E. 241; *Munro v. State* (1918) 223 N. Y. 208, 119 N. E. 444. Such claims fall into three classes: (1) Services or property voluntarily rendered to the state. *O'Hara v. State* (1889) 112 N. Y. 146, 19 N. E. 659; *Trustee of Exempt Firemen's Fund v. Roome* (1883) 93 N. Y. 313. (2) Compensation for damage sustained by reason of a public work authorized by the legislature, even though such damage be *damnum absque injuria. Oswego & Syracuse Ry. v. State* (1919) 226 N. Y. 351, 124 N. E. 8; *Lehigh Valley Ry. v. Canal Board* (1912) 204 N. Y. 471, 97 N. E. 964. (3) Compensation for injuries arising out of the negligence of the servants of the state. *Munro v. State, supra.* The court attempts to confine such cases to "circumstances where, in fairness, the state might be asked to respond where something more than a mere gratuity is involved." *People v. Westchester National Bank, supra.* On this principle, compensation to a public officer for expenses incurred by him in successfully

defending a proceeding to remove him from office is not such a moral obligation as the court will recognize. *Matter of Chapman v. City of New York* (1901) 168 N. Y. 80, 61 N. E. 108. A bonus for ex-service men or a pension for teachers in recognition of past services rendered pursuant to a contract for an agreed price have been held not to be founded on principles of equity and justice. *Matter of Mahon v. Board of Education* (1902) 171 N. Y. 263, 63 N. E. 1107. But every award not founded on a legally enforceable claim is purely a gratuity and stands only on the ground of a moral obligation. A survey of the cases shows that the difference between the kind of moral obligation the court recognizes and that which it disregards is one of degree. It is difficult to see less of a moral obligation when work is performed faithfully under burdensome conditions because of the compelling force of a contract, than when work is performed voluntarily without a contract. The moral obligation when there is increased cost and difficulty of performance, has influenced some courts to sustain a promise to pay a larger sum despite a pre-existing legal duty to render the same service for a smaller sum, even in the absence of a rescission. *Munroe v. Perkins* (1830, Mass.) 9 Pick. 298; *Linz v. Schuck* (1907) 106 Md. 220, 67 Atl. 286; *King v. Duluth, M. & N. Ry.* (1895) 61 Minn. 482, 63 N. W. 1105. In the instant case the court might well have considered the degree of hardship in the performance of the public contract, and, if severe, might have brought it within the class of cases which it has recognized as founded on principles of equity and justice.

DESCENT AND DISTRIBUTION—RECEIPT FOR ADVANCEMENT—HEIR NOT BARRED FROM FURTHER SHARE IN INTESTATE'S ESTATE.—During the lifetime of his ancestor, the heir at law received from the former a sum of money for which he gave a receipt, stating that he accepted it as his entire share of the estate. The ancestor died intestate. The heir sued to recover his portion of the estate. *Held*, that the heir was not barred from participating in the distribution of the residue of his ancestor's estate, the sum previously received by him being regarded only as an advancement. *Simonds v. Simonds' Estate* (1922, Vt.) 117 Atl. 103.

At common law the mere expectancy or chance of succession of an heir apparent to his ancestor's estate at the latter's decease could not be the subject matter of release. *Needles's Executor v. Needles* (1857) 7 Ohio St. 432. Equity, however, has generally enforced such a release on either of two grounds: (1) Since valuable consideration was given for the release, some courts have held that there was a binding contract which they would not permit to be violated. *Newsome v. Cogburn* (1860) 30 Ga. 291; *Eissler v. Hoppel* (1902) 158 Ind. 82, 62 N. E. 692. (2) Other courts have invoked the doctrine of estoppel. *In re Simon's Estate* (1909) 158 Mich. 256, 122 N. W. 544; *Coffman v. Coffman* (1895) 41 W. Va. 8, 23 S. E. 523. It is generally presumed that the ancestor, relying upon the agreement, has refrained from making a will which would have excluded the heir. *Boyer v. Boyer* (1916) 62 Ind. App. 73, 111 N. E. 952. In a small minority of jurisdictions the release is held invalid on the theory that property after death must pass either by devise or descent, and that the operation of statutes governing descent cannot be defeated by any contract attempting to control the distribution of an estate. *Needles's Executor v. Needles, supra; Ferenbaugh v. Ferenbaugh* (1922, Ohio) 136 N. E. 213; *Headrick v. McDowell* (1903) 102 Va. 124, 45 S. E. 804. The decision in the instant case, following earlier precedents in the same jurisdiction, is opposed to the great weight of authority. Thornton, *Gifts and Advancements* (1893) 540; 17 Ann. Cas. 725, note. For a discussion of an analogous situation involving the assignment of an heir's expectancy to a third person, see (1922) 31 YALE LAW JOURNAL, 662.

EMPLOYERS' LIABILITY ACT—INJURY RECEIVED WHILE REPAIRING ENGINE WITHDRAWN FROM INTERSTATE SERVICE NOT COMPENSATIVE UNDER FEDERAL ACT—The plaintiff, an employee in the general repair shops of an interstate carrier, was injured while engaged in the repairing of an engine which had been temporarily withdrawn from interstate service. After two months the engine was again employed in interstate commerce. The plaintiff received an award under the state compensation statute (Calif. Sts. 1917, ch. 586) and the defendant appealed on the ground that the accident came within the scope of the Federal Employer's Liability Act of April 22, 1908 (35 Stat. at L. 65), because the plaintiff was engaged in interstate commerce at the time of the accident. *Held,* that the award should be affirmed. *Industrial Accident Commission of Calif. v. Payne* (1922, U. S.) 42 Sup. Ct. 489.

The instant case is an illustration of the difficulties incident to the application of the Federal Act. See *Payne v. Industrial Acc. Comm.* (1921, Calif.) 195 Pac. 81; *Hines v. Industrial Acc. Comm.* (1920) 184 Calif. 1, 192 Pac. 859. The Federal Act applies to employees engaged in interstate commerce to the exclusion of the various state compensation acts. *New York Central Ry. v. Winfield* (1916) 244 U. S. 147, 37 Sup. Ct. 546; COMMENTS (1916) 25 YALE LAW JOURNAL, 497. The test is whether the employee is, at the time the injury occurs, engaged in interstate commerce or work so closely related thereto as to be practically a part of it. See *Shanks v. Ry.* (1915) 239 U. S. 556, 36 Sup. Ct. 188; *C. B. & Q. Ry. v. Harrington* (1916) 241 U. S. 177, 36 Sup. Ct. 517. The cases fall into two classes, dependent on whether they deal with stationary or moving instrumentalities. In the first class the Federal Act has been allowed wide scope. *Pederson v. D. L. & W. Ry.* (1913) 229 U. S. 146, 33 Sup. Ct. 648 (employee carrying bolts to be used on a bridge for both interstate and intrastate trains); *Phila. B. & W. Ry. v. Smith* (1919) 250 U. S. 101, 39 Sup. Ct. 396 (cook for bridge-repairing gang); *Guida v. Pennsylvania Ry.* (1918) 183 App. Div. 822, 171 N. Y. Supp. 285 (laborer cleaning boilers used in the process of furnishing electricity to both interstate and intrastate trains); see also *Grybowski v. Erie Ry.* (1915) 88 N. J. L. 1, 95 Atl. 764; *Erie Ry. v. Szary* (1919, C. C. A. 2d) 259 Fed. 178. In the second class of cases the decisions are not in agreement. The Supreme Court decided in the instant case that the length of time taken for repair determines the engine's character as an instrument of commerce. A better test seems to be whether the withdrawal is temporary or permanent. *Koons v. Phila. & R. Ry.* (1921) 271 Pa. 468, 114 Atl. 262; *Louisville & N. Ry. v. Pettis* (1921, Ala.) 89 So. 201. The Supreme Court has held also that injuries received by employees while engaged in repairing engines which have been withdrawn for less than a week from a service indiscriminately interstate and intrastate and which are to be returned to the same service are not compensative under the Federal Act. *Minneapolis & St. L. Ry. v. Winters* (1917) 242 U. S. 353, 37 Sup. Ct. 170. This is contrary to the general rule. *Cook v. Southern Ry.* (1918) 109 S. C. 377, 96 S. E. 148; *Missouri, K. & T. Ry. v. Denahy* (1914, Tex. Civ. App.) 165 S. W. 529. The Supreme Court's interpretation of the Federal Act, however, is ultimately binding on all courts. *Seaboard Air Line v. Horton* (1914) 233 U. S. 492, 34 Sup. Ct. 635; *Montgomery v. So. Pac. Ry.* (1913) 64 Or. 597, 131 Pac. 507. On principle it is difficult to see why the stationary or movable character of the instrumentality should affect the application of the Act. See (1921) 31 YALE LAW JOURNAL, 96.

EQUITY—ORAL CONTRACT TO CONVEY LAND—SPECIFIC PERFORMANCE—PERSONAL SERVICES.—Under an oral contract the plaintiffs lived with, boarded, and cared for the defendant's testator, having sold their home and business in reliance upon his oral promise to give them his residence at his death. The plaintiffs sued for specific performance, there being no remedy at law for the loss of

business. The defendants pleaded the Statute of Frauds. *Held,* that the plaintiffs could not recover. *Burns v. McCormick* (1922) 233 N. Y. 230, 135 N. E. 273.

In equity it is well settled that part performance may take a parol contract for the sale of land out of the Statute of Frauds. COMMENTS (1915) 24 YALE LAW JOURNAL, 426. There are two theories as to the acts of part performance which are considered sufficient to take the contract out of the Statute. The first is embodied in the English rule which requires the acts to be unequivocally referable to the contract, the reason being that the actual contract may be proved if the acts of their own nature point to some contract concerning the land. *Maddison v. Alderson* (1883, H. L.) 8 A. C. 467; Fry, *Specific Performance* (6th ed. 1921) sec. 582. The cases granting relief where possession has been taken pursuant to the oral contract are decided upon this theory, but they are sometimes classed by themselves as an arbitrary exception to the Statute. See (1920) 29 YALE LAW JOURNAL, 462. The second theory is that which usually prompts equity to action, namely, the prevention of irreparable injury and fraud. 5 Pomeroy, *Equity Jurisprudence* (2d ed. 1919) sec. 2239. Cases involving the performance of personal services come under this theory. A few jurisdictions refuse to grant specific performance unless the acts satisfy both theories. See 1 Ames, *Cases in Equity Jurisdiction* (1904) 286, 287, notes. The court in the instant case, following the English rule, denied relief because the acts were not unequivocally referable to a contract concerning the land. The American courts seem to be evenly divided on this question. See Pound, *The Progress of the Law, 1918-1919* (1920) 33 HARV. L. REV. 929, 943. The better view seems to be that specific performance of such contracts should be granted on the ground of "equitable or constructive fraud," in that the plaintiff in reliance on the defendant's promise has so changed his position that he will be irreparably injured. *Taylor v. Holyfield* (1919) 104 Kan. 587, 180 Pac. 208; *Gladville v. McDole* (1910) 247 Ill. 34, 93 N. E. 86. For the same reason some courts grant specific performance of a contract to convey or devise land in those cases where the personal services rendered by a minor are construed as equivalent to adoption. *Steinberger v. Young* (1917) 175 Calif. 81, 165 Pac. 432; Pomeroy, *op. cit.* sec. 2248. Similar conditions have prompted certain courts to grant relief to a licensee who, relying upon a parol license, changes his position. *Rerick v. Kern* (1826, Pa.) 14 Serg. & R. 267; Clark, *Licenses in Real Property* (1921) 21 COL. L. REV. 757, 779. The Statute of Frauds was passed to prevent fraud, not to produce or protect it. The proper solution of the problem seems to lie in the adoption of the "equitable or constructive" fraud theory.

LIBEL—PUBLICATION DUE TO DISCLOSURE BY THE PLAINTIFF.—The defendant sent a sealed letter to the plaintiff, a boy of fourteen, unjustly accusing him of theft. The boy became frightened and showed the letter to his brother and father. The plaintiff sued for libel, and the defendant claimed that such disclosure by the plaintiff did not constitute sufficient publication to support the action. *Held,* that the plaintiff could recover. *Hedgpeth v. Coleman* (1922, N. C.) 111 S. E. 517.

In a civil action for libel, the defamatory words, in order to constitute the necessary element of publication, must be communicated to some person other than the one defamed. Odgers, *Libel and Slander* (5th ed. 1911) 157. A sealed defamatory letter addressed to the plaintiff does not meet this requirement. *Penry v. Dozier* (1909) 161 Ala. 292, 49 So. 909; *Warnoch v. Mitchell* (1890, C. C. W. D. Tenn.) 43 Fed. 428. It must also be proved that the publication was the intended or forseeable result of the defendant's act; there is no publication where the defendant is ignorant of the plaintiff's illiteracy, or of the fact that a

clerk usually opens the plaintiff's letters. *State v. Syphrett* (1887) 27 S. C. 29, 2 S. E. 624; *Sharp v. Skues* (1909, C. A.) 25 T. L. R. 336. Likewise one is free from liability if the plaintiff himself voluntarily and unreasonably exhibits the defamatory letter to a third person. *Lyon v. Lash* (1906) 74 Kan. 745, 88 Pac. 262; *Konkle v. Haven* (1905) 140 Mich. 472, 103 N. W. 850; *Sylvis v. Miller* (1895) 96 Tenn. 94, 33 S. W. 921. But it is uniformly held that there is a publication if the defendant intended or should have foreseen that under the circumstances some third person would read the letter. *Roberts v. Eng. Mfg. Co.* (1908) 155 Ala 414, 46 So. 752; *Allen v. Wortham* (1890) 89 Ky. 485, 13 S. W. 73; (1916) 25 YALE LAW JOURNAL, 246. In the last analysis, therefore, the underlying question appears to be one of causation. So, in the instant case, it seems to have been properly held that the disclosure was a natural and probable consequence of the defendant's act.

SALES—BUYER'S INSOLVENCY NO JUSTIFICATION FOR SELLER'S BREACH.—Upon the plaintiff's insolvency, the defendant entirely refused to perform his contract to furnish the plaintiff with building materials which were to be paid for as deliveries were made. The plaintiff had also failed to meet other debts which he owed to the defendant. The plaintiff sued for breach of contract. *Held,* that the plaintiff could recover. *Keppelon v. Ritter Flooring Co.* (1922, N. J. L.) 116 Atl. 491.

Insolvency merely relieves the vendor from his agreement to give credit; his duty of immediate performance becomes conditional upon tender of payment. *Pardee v. Kanady* (1885) 100 N. Y. 121, 2 N. E. 885. The existence of other circumstances, however, in addition to the fact of insolvency, may privilege the seller not to perform. For example, where the buyer gave notice to the seller of his insolvency and made no intimation of any intention to enforce the contract, the facts operated as an express abandonment. *Morgan v. Bain* (1874) L. R. 10 C. P. 15; *Hobbs v. Columbia Falls Brick Co.* (1892) 157 Mass. 109, 31 N. E. 756. Inability on the part of the buyer to perform his part of the contract at the time fixed for delivery privileges the seller not to perform. *Diem v. Koblitz* (1892) 49 Ohio St. 41, 29 N. E. 1124. A seller should not be prejudiced, and is therefore under no duty to accept the notes of the assignee for the benefit of the vendee's creditors in place of the vendee's notes. *Rappleye v. Racine Seeder Co.* (1890) 79 Iowa, 220, 44 N. W. 363. Nor is he required to hold the goods for an unreasonable time awaiting the decision of the vendee's receiver in bankruptcy to elect to perform the contract. *Sprague & Warner Co. v. Iowa Mercantile Co.* (1919) 186 Iowa, 488, 172 N. W. 637. The assignees of an insolvent buyer cannot adopt a contract in part where it calls for deliveries over a period of years. *Hanna v. Florence Iron Co.* (1918) 222 N. Y. 290, 118 N. E. 629. Yet it has been held that the seller must perform all conditions precedent to his right to payment. *Gibson v. Carruthers* (1841, Exch.) 8 M. & W. 321. It has been suggested that requiring the seller to make such expensive preparations is an unreasonable hardship if the buyer proves unable to pay. 2 Williston, *Contracts* (1920) sec. 880. Nevertheless, if the vendee's conduct in business discloses the ordinary evidences of insolvency (for example, if his commercial paper is being protested), the seller may exercise the right of stoppage *in transitu,* and may recall the goods unless tendered the purchase price. *Diem v. Koblitz, supra.* It has been argued that since he has this right, *a fortiori* the buyer's insolvency should excuse him from delivering the goods at all. See the dissenting opinion in *Gibson v. Carruthers, supra.* The federal rule is that bankruptcy is an immediate anticipatory breach. *Central Trust Co. v. Chicago Audit. Ass'n.* (1916) 240 U. S. 581, 36 Sup. Ct. 412. Although open to criticism, this rule is at least indicative of an indisposition to require a tender by the solvent party. 2 Williston, *loc. cit.* The decision in the instant case, however, to the effect that the

insolvency and the failure to pay antecedent debts owed to the seller does not privilege him to repudiate the contract, is undoubtedly correct.

SPECIFIC PERFORMANCE—FRAUDULENT MISREPRESENTATIONS OF VENDOR NO BAR.—The defendant, a purchaser of three tracts of oil land, having discovered that the vendor had overstated the production of the wells on the second tract, obtained a change in the contract extending the time of payment for one year. Subsequently the defendant discovered that the wells on the first tract were totally non-productive, and therefore refused to pay the balance due. The vendor sued for specific performance. *Held,* that specific performance should be granted. *Clark v. Wheatley* (1922, C. C. A. 6th) 281 Fed. 55.

At first sight the decision seems contrary to the rule that "actual fraud, in any of its phases, ... will *a fortiori* defeat the remedy of specific performance." Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 889. Nevertheless the conclusion of the court is correct and in accord with the weight of authority. The reasoning chiefly relied upon, however—that the defendant, knowing of the fraud as to one tract at the time of the "accord and satisfaction" should have known that he was being deceived as to the other tracts—seems unsound. There are four possible remedies for the parties where, in a case of this type, one fraudulently takes advantage of the other's lack of vigilance. The court admits that if the now defendant sued in deceit at law the question of his diligence in discovering the fraud would be of no moment. See *Pryor v. Foster* (1891) 130 N. Y. 171, 29 N. E. 123. There is a conflict as to the effect of the defendant's negligence where the plaintiff sues him for breach of contract, but there, too, "the better view . . . . is . . . . to deny him . . . . the privilege of excusing his own misconduct by the stupidity or credulity of the defrauded party." 3 Williston, *Contracts* (1920) sec. 1516. In equitable actions, even where the negligent plaintiff sues for affirmative relief (rescission), "the modern tendency is certainly toward the doctrine that negligence in trusting to a misrepresentation will not . . . . deprive the defrauded person of his remedy." 3 Williston, *op. cit.* sec. 1516; see *Campbell v. Fleming* (1834, K. B.) 1 Adol. & El. 40 (further fraud discovered after new agreement); Fry, *Specific Performance* (6th ed. 1921) sec. 741. Certainly then, where the wrongdoer sues to compel specific performance, as in the instant case, it is indeed remarkable for equity to aid a knave because his victim was a fool. See *Reynell v. Sprye* (1852, Ch.) 1 DeGex, M. & G. 658, 709; *Mather v. Barnes* (1906, C. C. W. D. Pa.) 146 Fed. 1000. And it seems that the defendant's delay in bringing suit for affirmative relief, after discovering the additional fraud, should not clean the plaintiff's hands when he asks the aid of a court of equity. But the reason, mentioned only incidentally by the court, that no damage resulted to the defendant from the fraud because the transaction as a whole was profitable, is the one on which the case can best be sustained, since this is usually held to vitiate the fraud as a defense both at law and in equity. Pomeroy, *op. cit.* sec. 898. However, there is a strong dictum that if the plaintiff is fraudulent, damage to the defendant is not necessary to enable him to resist specific performance. *Kelly v. Ry.* (1888) 74 Calif. 557, 16 Pac. 386. Connecticut has gone so far as to give the defrauded person the remedy of rescission—*a fortiori,* it is likely that fraud without damage would be a defense in that jurisdiction to a suit for specific performance. *Morrow v. Ursini* (1921) 96 Conn. 219, 113 Atl. 388. This rule, although both logical and just, is still in the hopeless minority; the overwhelming majority is with the instant case.