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RECENT CASE NOTES

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ADMINISTRATORS—JURISDICTION TO APPOINT—ADMINISTRATION OVER ESTATE OF THE LIVING.—An administrator had been appointed by authority of statute over the estate of a person who had been unheard from for more than 21 years. The defendant bank paid this administrator the balance due the absentee, who later returned and sued the bank. On his death the plaintiff was appointed administratrix and continued the suit. The lower court held that payment to the first administrator had discharged the debt to the absentee. *Held,* that the judgment be affirmed. *Hamilton v. Orange Savings Bank* (1924, N. J. L.) 124 Atl. 62.

Under the ordinary statute authorizing appointment of an administrator upon adjudication of death, the jurisdictional fact is death. Administration on the estate of one living is absolutely void and may be attacked collaterally by the supposed deceased or by third parties. *Jochumsen v. Suffolk Savings Bank* (1861, Mass.) 3 Allen, 87; 1 Woerner, *Am. Law of Administration* (2d ed. 1899) sec. 208; COMMENTS (1918) 27 YALE LAW JOURNAL, 943, 944. The rule apparently originated in early *dicta.* See *Allen v. Dundas* (1789, K. B.) 3 T. R. 125, 129, 130; *Griffith v. Frazier* (1814, U. S.) 8 Cranch, 9, 23. The New York statute expressly requires the surrogate to decide whether the absentee is dead. 2 Rev. Sts. 1867, ch. 6, secs. 23, 26. But a "finding of death" was held to give jurisdiction over the estate of one living. *Roderigas v. Savings Institution* (1875) 63 N. Y. 460. This seemingly unwarranted construction of a typical statute marked the first attack upon the rule. In a later suit between the same parties a "finding of death on evidence" was held necessary. *Roderigas v. Savings Institution* (1879) 76 N. Y. 316. The first Roderigas decision has been largely condemned. *Devlin v. Commonwealth* (1882) 101 Pa. 273; (1876) 10 AM. L. REV. 787. It received favorable comment in the jurisdiction of the instant case where a third party's collateral attack failed. *Plume v. Savings Institution* (1884) 46 N. J. L. 211. The question was finally settled by a holding of the United States Supreme Court that a statute of that type conferred no jurisdiction over estates of the living. *Scott v. McNeal* (1894) 154 U. S. 34, 14 Sup. Ct. 1108; see also *Fridley v. Savings Bank* (1917) 136 Minn. 333, 337, 162 N. W. 454, 455. For a criticism of *Scott v. McNeal* as initiating the modern interpretation of "due process" under the 14th Amendment of the Federal Constitution, claimed to be an unwarranted extention of theory, see Smith, *Decisive Battles of Constitutional Law: XV The Revolution* (1924) 10 A. B. A. JOUR. 505, 506. To alleviate a rule harsh to innocent third parties many statutes have been enacted expressly authorizing courts, on proof of unexplained absence for a certain number of years, to issue administration papers valid though the absentee is alive. Under these statutes absence for the stated period, not death, is the jurisdictional fact. Pa. Stat. Law, 1920, secs. 8407-8422; Mass. Gen. Laws, 1921, ch. 200, pp. 2178-2180. Although attacked under the "due process" clause of the 14th Amendment, the majority of these statutes have been upheld. *Cunnius v. Reading School District* (1905) 198 U. S. 458, 25 Sup. Ct. 721; *Nelson v. Blinn* (1908) 197 Mass. 279, 83 N. E. 889; *contra*: *Clapp v. Hong* (1904) 12 N. D. 600, 98 N. W. 710 (notice insufficient). In such statutes apparently lies the solution of the disposition of the estates of absentees. The court in the instant case, following the *Roderigas* and *Plume* decisions, has reached a seemingly just result by an apparently strained interpretation of a statute similar to that of New York. It would seem better to let the evil of *Scott v. McNeal,* if evil there be, be remedied by appropriate legislation along the line of the Pennsylvania statute.

ARBITRATION AND AWARD—APPRAISAL AND ARBITRATION CONTRASTED.—The defendant deposited stock in escrow to be held for the plaintiff upon the condition that on the happening of certain contingencies the defendant was to have the right to purchase the stock at a fair value to be determined by three arbiters, one to be chosen by each of the parties and the third by the two so chosen. The contingency arose but the third arbiter was not selected. The plaintiff now asks the court under the New York Arbitration Law, N. Y. Laws, 1920, ch. 275, sec. 4, which provides for court appointment, to make the appointment. The lower court held such an appointment appropriate and the defendant appealed. *Held,* that the judgment be reversed, the Arbitration Law not applying because there was no agreement for submission to arbitration. *In re Fletcher* (1924) 237 N. Y. 440, 143 N. E. 248.

At the time of submission to arbitration a present controversy between the parties to the contract is essential. *Toledo S. S. Co. v. Zenith Transp. Co.* (1911, C. C. A. 6th) 184 Fed. 391; *Irwin v. Hoyt* (1913) 162 Iowa, 679, 144 N. W. 584. An agreement to submit may only look forward to the possibility of there being a controversy. *Dworkin v. Caledonian Ins. Co.* (1920) 285 Mo. 342, 226 S. W. 846. But an agreement for an appraisal or valuation is to avoid a controversy. *Omaha Water Co. v. Omaha* (1908, C. C. A. 8th) 162 Fed. 225; *Sebree v. Board of Education* (1912) 254 Ill. 438, 98 N. E. 931. That this distinction is still important under modern statutes, as at common law, is illustrated by the principal case. Arbitrators must follow quasi-judicial procedure. *Curran v. City of Philadelphia* (1919) 264 Pa. 111, 107 Atl. 636 (notice of meetings); *Dworkin v. Caledonian Ins. Co., supra* (hearing testimony); *Hills v. Home Ins. Co.* (1880) 129 Mass. 345 (presence of arbitrators). Appraisers are free to act on their own knowledge and experience. *Omaha Water Co. v. Omaha, supra; Thompson v. Newman* (1918, Calif. D. C. A. 1st) 171 Pac. 982. Action will not lie against an arbitrator personally for negligence or fraud. *Hoosac Tunnel Dock Co. v. O'Brien* (1884) 137 Mass. 424; *Hutchins v. Merrill* (1912) 109 Me. 313, 84 Atl. 412. But it does lie against an appraiser. *Turner v. Goulden* (1873) L. R. 9 C. P. 57. The power of arbitrators, when not confirmed by rule of court, can be revoked by either party before an award has been made. *Martin v. Vansant* (1917) 99 Wash. 106, 168 Pac. 990; *First Ecclesiastical Soc. of New Britain v. Besse* (1923) 98 Conn. 616, 119 Atl. 903. The power of an appraiser is irrevocable. *Palmer v. Clark* (1871) 106 Mass. 373, 389. An award in arbitration supersedes the original cause of action. *Billmyer v. Hamburg-Bremen Fire Ins. Co.* (1905) 57 W. Va. 42, 49 S. E. 901; *Johnsen v. Wineman* (1916) 34 N. D. 116, 157 N. W. 679. But an appraisal is not conclusive unless so stipulated, and suit may be brought on the original demand. *Nelson v. Betcher Lumber Co.* (1903) 88 Minn. 517, 93 N. W. 661. The New York Arbitration Law does not affect the distinctions between arbitration and appraisal, and is applicable only to the former. It merely makes arbitration agreements legal and irrevocable.

BILLS AND NOTES—REFERENCE TO EXTRINSIC CONTRACT AS AFFECTING NEGOTIABILITY.—In a suit by the holder in due course against the acceptor of two customers' acceptances, unpaid at maturity, the defense set up was that the acceptance was rendered conditional and the instrument non-negotiable by the words "As per Reolo, Inc., contract" which immediately followed the expression "accepted for payment." The lower court refused to give instructions which assumed the instrument to be negotiable and, in effect, held that the acceptance was conditional. *Held,* that the judgment be affirmed. *International Finance Corporation v. Calvert Drug Co.* (1924, Md.) 124 Atl. 891.

Sec. 3 of the N. I. L. provides that, "An unqualified order or promise to pay

is unconditional within the meaning of this act, though coupled with . . . a statement of the transaction which gives rise to the instrument." Sec. 141 provides that, "An acceptance is qualified, which is . . . conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated." Some courts, by strict construction as in the instant case, interpret the phrase "as per" in the sense of "subject to" or "according to" and hold the paper non-negotiable by applying the latter section. *Continental Bank v. Times Pub. Co.* (1917) 142 La. 209, 76 So. 612. *A fortiori* does this result follow where these phrases are expressly used. *Klots Throwing Co. v. Manufacturers' Co.* (1910, C. C. A. 2d) 179 Fed. 813; (1918) 27 YALE LAW JOURNAL, 559; 30 L. R. A. (N.S.) 40, note. Other courts apply sec. 3 of the act and hold such instruments negotiable. *National Bank v. Wentworth* (1914) 218 Mass. 30, 105 N. E. 626; *International Fin. Corp. v. Northwestern Drug Co.* (1922, D. Minn., 4th) 282 Fed. 920. Extrinsic evidence is not admissible to show an instrument negotiable or non-negotiable. *Waterbury-Wallace Co. v. Ivey* (1917, Sup. Ct. App. T.) 99 Misc. 260, 163 N. Y. Supp. 719. The tendency of the courts is to construe commercial instruments having on them a memorandum or reference to dealings between the parties as negotiable, if they in other respects have all the characteristics of negotiability. *Waterbury-Wallace Co. v. Ivey, supra; cf.* COMMENTS (1924) 33 YALE LAW JOURNAL, 302. The question of notice, as dealt with in secs. 52 and 56 of the N. I. L., seems to receive scant attention in most of these cases. It would seem that in the absence of other suspicious circumstances, this phrase is not such an irregularity as to put the holder on inquiry. In one instance, however, it has been held to charge the holder with notice of what fair inquiry would have disclosed. *Snelling Bank v. Clasen* (1916) 132 Minn. 404, 157 N. W. 643. Greater circulation of commercial paper tends to lower interest rates and stability of circulation makes for efficiency in handling business affairs. If negotiability is a socially desirable end, an instrument should be held negotiable where two interpretations are equally possible. See NOTES (1923) 36 HARV. L. REV. 321.

CONTRACTS—CHARITABLE SUBSCRIPTIONS—CONSIDERATION.—An agreement was executed whereby each subscriber "agreed with the other subscribers" to pay a certain sum of money for the benefit of the plaintiff League, and the latter "agreed to use all money received for benefit of league." Defendant's intestate subscribed $15,000. Relying on these subscriptions, plaintiff incurred obligations. In a suit to recover the amount of the subscription, the lower court held the promise enforceable. *Held,* that the judgment be affirmed. *Eastern States Agricultural and Industrial League v. Vail's Estate* (1924, Vt.) 124 Atl. 568.

Charitable subscriptions were originally held mere gratuities, revocable at will. *Bridgewater Academy v. Gilbert* (1824, Mass.) 2 Pick. 578. This view still obtains in England. *In re Hudson* (1885) 54 L. J. Ch. 811. The American courts have, however, receded, perhaps out of regard for a desire to give greater stability to institutions largely dependent on public donations. 48 L. R. A. (N. S.) 784, note. As a result of this desire various technical reasons have been advanced for holding the subscriber. COMMENTS (1922) 8 CORN. L. QUART. 57; see *Barnes v. Perine* (1854) 12 N. Y. 18, 24. It is generally held, as in the principal case, that work done or money expended in reliance on a subscription constitutes consideration, where the promisor ought to have foreseen that such action would take place, and the promisee reasonably believes it to be desired. *Y. M. C. A. v. Estill* (1913) 140 Ga. 291, 78 S. E. 1075; Anson's *Contracts* (Corbin's ed. 1919) 124, note; 1 Williston, *Contracts* (1920) sec. 116. Some courts have enforced the promise in such cases on the ground of "promissory estoppel." *Simpson College v. Tuttle* (1887) 71 Iowa, 596, 33 N. W. 74. Courts again find consideration in the mutual promises of the subscribers. *Christian College v. Hendley* (1875) 49 Calif. 347.

Even though the plaintiff is not the promisee, and the consideration moves from a third party, this contract, made expressly for the benefit of the beneficiary, has been held to create in him an enforceable right to the payment of the money. *Seaver v. Ransom* (1918) 224 N. Y. 233, 120 N. E. 639; *contra: Cottage Street Church v. Kendall* (1877) 121 Mass. 528. It has been held that the promise of the beneficiary to make the desired application of the fund supplies the necessary consideration for the subscriber's promise. *Foreign Missions v. Smith* (1904) 209 Pa. 361, 58 Atl. 689. The promise of the payee, if not express, is readily implied from its acceptance of the pledge. Some courts hold that the benefit accruing from the meritorious application of the fund furnishes legal consideration. *Universalist Church v. Pungs* (1901) 126 Mich. 670, 86 N. W. 235. Strong "moral obligation" has sometimes been advanced as the ground for upholding the pledge. *Caul v. Gibson* (1846) 3 Pa. 416. These various theories advanced by the courts for enforcing the subscriber's promise indicate a strong tendency to arrive at a pre-determined but favorable conclusion, irrespective of definitions of the term "consideration."

EMINENT DOMAIN—COMPENSATION FOR IMPROVEMENTS BY CONDEMNOR NOT ALLOWED.—The plaintiff railroad company purchased in good faith from a tenant for life what it believed to be the fee and erected thereon a passenger station and other buildings. The defendant was later judicially determined to be the owner. In condemnation proceedings to acquire the fee, the lower court allowed the value of the improvements to be included in the measure of compensation. *Held,* that the judgment be reversed. *New York, Ontario & Western R. R. v. Livingston* (1924, N. Y.) 144 N. E. 589.

A life tenant, even though he believes himself to be the owner in fee, is generally not entitled to reimbursement from the remainderman for permanent improvements. *Jacobs v. Steinbrink* (1914, 2d Dept.) 164 App. Div. 715, 149 N. Y. Supp. 337; *Shelangowski v. Schrack* (1913) 162 Iowa, 176, 143 N. W. 1081; (1924) 24 COL. L. REV. 435; *contra: Harriett v. Harriett* (1921) 181 N. C. 75, 106 S. E. 221. But in a suit in equity for mesne profits by the true owner, one occupying under color of title is allowed the value of his improvements. *Wakefield v. Van Tassell* (1905) 218 Ill. 572, 75 N. E. 1058. In most states the same result is reached by the "Betterment Acts." *Bloom v. Straus* (1902) 70 Ark. 483, 72 S. W. 563; see (1923) 33 YALE LAW JOURNAL, 100. Some courts have granted relief in an affirmative action. *Bright v. Boyd* (1841, C. C. D. Me.) 1 Story, 478; 2 Story, *Equity Jurisprudence* (11th ed. 1873) sec. 1237. Where, as in the instant case, a public agency, with the power of eminent domain, enters lawfully on the land and improves it in good faith, it may exclude the value of the improvements in proceedings brought thereafter to condemn hostile rights. The technical punitive rule of fixtures is disregarded as inconsistent with the public use and the principle of "just compensation." *Searl v. School District* (1890) 133 U. S. 553, 10 Sup. Ct. 374; *Chicago, P. & St. L. Ry. v. Vaughn* (1903) 206 Ill. 234, 69 N. E. 113. Similarly, where the entry is trespassory but under an honest claim. *Greve v. St. Paul & Pacific R. R.* (1879) 26 Minn. 66, 1 N. W. 816. Where the owner is unknown, good faith may be established by the intent to bring proper proceedings in the future. *Chase v. Jemmett* (1892) 8 Utah, 231, 30 Pac. 757. Inaction by the owner with knowledge has been held to be acquiescence in the entry. *McClarren v. School District* (1907) 169 Ind. 140, 82 N. E. 73; *contra: Meriam v. Brown* (1880) 128 Mass. 391. But some courts go much further than the instant case and allow the public agency the value of its improvements even where there it has wilfully or violently trespassed. *Justice v. Nesquehoning R. R.* (1878) 87 Pa. 28; *Santa Fe Ry. v. Richter* (1915) 20 N. M. 278, 148 Pac. 28; *contra: St. Johnsville v. Smith* (1906) 184 N. Y. 341, 77 N. E. 617; *Virginia R. R. v. Nickels* (1914) 116 Va. 792, 82 S. E. 693; (1900) 14 HARV. L. REV. 72.

GOODWILL—DUTY OF SURVIVING PARTNER TO ACCOUNT TO ESTATE OF DECEASED PARTNER.—In a proceeding to settle executors' accounts the plaintiff guardian of infant remaindermen objected that defendants, executors and trustees, failed to include in their accounting of deceased's assets the value of his interest in the goodwill of a stock brokerage firm of which he was a partner at the time of his death. *Held,* that the value of the goodwill should have been included. *In re Brown* (1924, Surro. Ct. N. Y.) N. Y. L. JOUR., Vol. 71, no. 93.

The business community has increasingly capitalized the psychological phenomenon of habit-forming—i.e. of "going back to the old place." Foreman, *Conflicting Theories of Goodwill* (1922) 22 COL. L. REV. 638; Mechem, *Elements of the Law of Partnership* (2d ed. 1920) sec. 127; (1919) 17 MICH. L. REV. 345. But however valuable in swelling profits, goodwill is held not an asset of a partnership unless it has market value. Lindley, *Partnership* (8th ed. 1912) 507, 508. Where the goodwill tends to be independent of persons and attach to products, trademarks, etc. its transferable value is clear. *President Suspender Co. v. MacWilliam* (1916, C. C. A. 2d) 238 Fed. 159. But where it is personal reputation, it may be worthless in fact apart from the person who built it up. *In re Caldwell's Estate* (1919, Surro. Ct.) 107 Misc. 316, 176 N. Y. Supp. 425; see *Rutan v. Coolidge* (1922) 241 Mass. 584, 136 N. E. 257. Until recently professions have been generally held to have no saleable goodwill. *Arundell v. Bell* (1883) 52 L. J. Ch. 537 (solicitor); *Slack v. Suddoth* (1899) 102 Tenn. 375, 52 S. W. 180. But as goodwill of professions is actually bought and sold, courts have come to protect it and thus add to its factual value. *Tichenor v. Newman* (1900) 186 Ill. 264, 57 N. E. 826; *MacFadden v. Jenkins* (1918) 40 N. D. 422, 169 N. W. 151; see *Cowan v. Fairbrother* (1896) 118 N. C. 406, 24 S. E. 212. And courts impose on the vendor of the goodwill of a profession a duty not to compete with the vendee, since all but the nominal value of such a purchase consists in removing the vendor's competition. *Brown v. Benzinger* (1912) 118 Md. 29, 84 Atl. 79; *Foss v. Roby* (1907) 195 Mass. 292, 81 N. E. 199. Once the fact of saleable value of the goodwill was found, by the old rule it belonged to the surviving partner. *Hammond v. Douglas* (1800, Ch.) 5 Ves. 539; *Lewis v. Langdon* (1835, Ch.) 7 Sim. 421. But now it must be accounted for by the surviving partner with other assets belonging to the partnership as distinct from the partners. *Slater v. Slater* (1903) 175 N. Y. 143, 67 N. E. 224; *Hill v. Fearis* [1905] 1 Ch. 466; *Brooklyn Trust Co. v. McCutchen* (1914, E. D. N. Y.) 215 Fed. 952. If the sale is of the goodwill, other than that of a profession, in the absence of contrary agreement the vendor may compete with the vendee in every way except by soliciting old customers. *Trego v. Hunt* [1896, H. L.] A. C. 7; L. R. A. 1918 F, 1179 note; *contra: Cottrell v. Babcock* (1886) 54 Conn. 122, 6 Atl. 791 (solicitation allowed); *Gordon v. Knott* (1908) 199 Mass. 173, 85 N. E. 184 (Mass. rule that vendor may not compete). But if the "sale" is "involuntary," the vendor may solicit old customers. *Green v. Morris* [1914] 1 Ch. 562 (forced sale by trustees for benefit of creditors). So if it is known that the surviving partner intends to thus compete after the sale, the market value of the partnership goodwill may be gone. Lindley, *op. cit.* 512. Especially if a "sale" on the death of a partner be held an "involuntary sale." See *Hutchinson v. Nay* (1903) 183 Mass. 355, 67 N. E. 601; but see *Costa v. Costa* (1915) 222 Mass. 280, 110 N. E. 309. But he is under no duty to retire from business to preserve this asset. *Trego v. Hunt, supra.* The partnership goodwill being so easily dissipated, the rule fairer to the parties seems to require the survivor to account for its value as of the time of the death. *Costa v. Costa, supra;* but see *contra: Hutchinson v. Nay, supra.* The instant case is sound in recognizing the value of a commodity in which the economic community trades. *Hill v. Fearis, supra;* see (1924) N. Y. L. JOUR., Vol. 71, no. 141. But as a practical matter, in the absence of insurance, a duty to pay for this goodwill may financially embarrass a firm which may lack the requisite ready money.

INSURANCE—TORTS—DUTY OF INSURANCE COMPANY ON RECEIPT OF APPLICATION.—The deceased applied for life insurance and paid the first premium. The company delayed in acting on the application and further delayed in delivering the policy. In the interim the applicant died. His administrator and the beneficiary each sued separately in tort. From a ruling sustaining demurrers each plaintiff appealed. *Held,* that the complaint of the administrator stated a cause of action, but that that of the beneficiary did not. *DeFord v. New York Life Ins. Co.* (1924, Colo.) 224 Pac. 1049.

Under the policy, its delivery to and receipt by the applicant were made conditions precedent to effectiveness. Such stipulations are usually literally construed. Vance, *Insurance* (1904) 161, 167, 169; Patterson, *The Delivery of a Life Ins. Policy* (1920) 33 HARV. L. REV. 198, 220. But this action was not on the policy. A duty, said to be in tort, arising from the semi-public nature of the business and from common concepts of "fair dealing," was found for the insurance company either to issue a policy within a reasonable time or to reject the application and return the money. *Boyer v. State Farmers' Mut. Hail Ins. Co.* (1912) 86 Kan. 442, 121 Pac. 329; *Duffie v. Bankers' Life Assoc.* (1913) 160 Iowa, 19, 139 N. W. 1087; but see *Page v. Nat. Auto. Ins. Co.* (1922) 109 Neb. 127, 190 N. W. 213; *contra: Interstate Business Men's Assoc. v. Nichols* (1920) 143 Ark. 369, 220 S. W. 477. See also (1919) 3 MINN. L. REV. 53. This duty was found owing to the deceased and hence survived to his administrator. *Duffie v. Bankers' Life Assoc., supra.* But it has been held that such a tort action will not survive. *Bradley v. Federal Life Ins. Co.* (1920) 295 Ill. 381, 129 N. E. 171. This is true of a tort action for personal injuries, but an action in tort for injury to the personal estate does, in general, survive. *Columbian Nat. Life Ins. Co. v. Lemmons* (1923, Okla.) 222 Pac. 255; 3 Schouler, *Wills, Executors and Administrators* (6th ed. 1923) 2081, *et seq.* Due to a statute permitting the survival of such actions, the question did not arise in the instant case. Colo. Rev. Sts. 1908, sec. 7258. The beneficiary had no standing as the suit was not on the policy. But it has been argued that since the substantial loss falls on him, he should be allowed to sue in tort on the interference with his expectancy. COMMENTS (1920) 29 YALE LAW JOURNAL, 673, 677; but *cf.* (1919) 28 *ibid.* 507. Any apparent difficulty as to survivorship may be obviated by basing the duty on an implied promise to issue a policy or reject the application and return the money within a reasonable time. The consideration is the application at the agent's solicitation and payment of the premium. See *Columbian Nat. Life Ins. Co. v. Lemmons, supra.* However we find the duty, in tort or in quasi-contract, there is "no real distinction." See *Stearns v. Merchants' Life and Casualty Co.* (1917) 38 N. D. 524, 530, 165 N. W. 568, 570. The decisions impose a duty on the insurance company. If it should not be labelled "tort" or "quasi-contractual," such difficulties as arise from applying the attributes of tort or quasi-contractual actions, might be obviated.

MUNICIPAL CORPORATIONS—COMPENSATION FOR SPECIAL POLICE SERVICE.—The defendants, owners of collieries, fearing violence to their safety-men during a strike, executed a requisition on the local police authority for special police service in the form of a stationary garrison on their premises. The requisition contained a schedule of rates for the pay and maintenance of the men so supplied, and an agreement to pay accordingly. In a suit upon this agreement, judgment was rendered for the plaintiff. *Held,* (one judge *dissenting*) that the judgment be affirmed. *Glamorgan County Council v. Glasbrook Brothers, Ltd.* (1924, C. A.) 40 T. L. R. 448.

Contracts which have as consideration the performance of a pre-existing legal duty are not usually enforced; but performance in excess of what that duty requires is generally held good consideration. Corbin, *Pre-existing Duty and Consideration* (1918) 27 YALE LAW JOURNAL, 362; 1 Williston, *Contracts* (1920) sec.

132. In the latter situation, as in the instant case, there is, however, a question which cannot be properly considered in terms of contract law, *i. e.* whether or not it is illegal or against public policy to make a charge for special police service rendered on request. Moreover it is doubtful whether the duty of the state to render police protection is a pre-existing legal duty within the meaning of that rule. *Cf. Fowler v. City of Cleveland* (1919) 100 Ohio St. 158, 126 N. E. 72. It has been considered that to allow public officers to make special charges would always be bad policy. 1 Hawkins, *Pleas of the Crown* (Leach's ed. 1788) c. 68, sec. 4. This *ratio decidendi* has prevented public officers from obtaining rewards for service done in the course of duty. *Cf. Somerset Bank v. Edmund* (1907) 76 Ohio St. 396, 81 N. E. 641; *Rogers v. McCoach* (1909, Sup. Ct. Spec. T.) 66 Misc. 85, 120 N. Y. Supp. 686. But where the officer has gone beyond the scope of his official duty a recovery has been allowed. *Smith v. Fenner* (1918) 102 Kan. 830, 172 Pac. 514; *Miners' Wholesale Grocery Co. et al. v. Jennings* (1924, Okla.) 224 Pac. 192; L. R. A. 1918E, 351, note. By analogy it may be argued that payment may be had for rendering special police service, without collision with what has been considered good policy. Where the police service is primarily for the benefit of the individual, the person requesting the service pays for it. *Cf. Tannenbaum v. Rehum* (1907) 152 Ala. 494, 44 So. 532; 2 Dillon, *Municipal Corporations* (5th ed. 1911) sec. 720 and note (police services at theatre). Statutes have expressly sanctioned and provided for charges in this zone of police protection. (1890) 53 & 54 Vict. c. 45, sec. 23 (1). (But see Carmichael, *The County and Borough Police Acts* (1900) 301 to the effect that an agreement by a corporation to pay fees as a condition precedent to performance is *ultra vires*.) Ohio Gen. Code, 1921, sec. 5893 (police for Chautauquas); *ibid.* sec. 9154 (police for railroads); N. Y. Consol. Laws, 1909, ch. 64, sec. 105 (police for signal and telegraph companies); *ibid.* ch. 35, sec. 193 (police for fairs); *ibid.* ch. 35, sec. 47 (police for corporations maintaining parks, play-grounds, etc.). But in the ordinary zone of police protection where the interests of the public are more apparent, payment for services is inconsistent with prevalent ideas of the functions of the state. Between these two extremes is a half-way zone, in which the instant case lies. Although the quartering of police forces in a mine for the duration of a strike seems to be a performance in excess of the normal duties of the police, *query*, whether it is good policy to have the police authority in such a position that they can refuse to act unless an agreement to pay them is first made.

PLEADING—ALTERNATIVE ALLEGATIONS AS TO SUBJECT MATTER.—In a suit for reformation of a lease, the lessee alleged that "because of mutual mistake or mistake of the lessee and fraud of the lessor" the lease did not embody a previous oral agreement. The lower court ruled on a motion to dismiss the complaint as not stating a cause of action that the allegation was not defective although made in the alternative. *Held*, (one judge *dissenting* in part) that the judgment be affirmed. *Kass v. Garment Center Realty Co., Inc.* (1924, 1st Dept. N. Y.) 209 App. Div. 647, 205 N. Y. Supp. 94.

Under strict common law pleading allegations of causes of action or of defenses in the alternative were held bad. *Cook v. Cox* (1814, K. B.) 3 M. & S. 110; Stephen, *Pleading* (Williston's ed. 1895) 426; NOTES (1919) 33 HARV. L. REV. 244. Under the modern codes, pleading in the alternative is generally not permitted. *McCrossin v. Noyes Bros. and Cutler* (1919) 143 Minn. 181, 173 N. W. 566. This strict rule has been abrogated by statute or code, or by rule of court, in England and in at least six jurisdictions in this country. THE ANNUAL PRACTICE (1924) Order 19, Rules 4, 24; Conn. Prac. Book (1922) 282, sec. 174; Ky. Code Civ. Prac., 1900, art. 113, sec. 4; 2 Mass. Gen. Laws, 1921, ch. 231, sec. 37; 1 Mo. Rev. Sts., 1919, sec. 1254; N. J. Comp. Sts. (1st supp. 1911-

1915) 1215, art. 170, rule 53; (but compare Hankin, *Alternative and Hypothetical Pleadings* (1924) 33 YALE LAW JOURNAL, 365, 373); N. M. Sts. (codification of 1915) 1200, art. 4141, sec. 75. By statute it seems that three states have permitted criminal indictments to be in the alternative. Ala. Crim. Code, 1907, secs. 7149, 7150; Minn. Gen. Sts. 1913, art. 9138; Tex. Complete Sts. 1920, Crim. Proced. sec. 473. Pleading in the alternative as to subject matter appears to have been sanctioned in ten states by judicial decision. *Sloss-Sheffield Co. v. Pilgrim* (1915) 14 Ala. App. 346, 79 So. 301; *Pacetti v. Ga. Ry.* (1909) 6 Ga. App. 97, 64 S. E. 302; (but see *Roebling's Sons Co. v. Southern Power Co.* (1914) 142 Ga. 464, 83 S. E. 138); *Farmers' Bank of Arispe v. Arispe Mercantile Co.* (1908) 139 Iowa, 246, 117 N. W. 672; *Coleman v. Teddlie* (1900) 106 La. 192, 30 So. 99; *Dick v. Hyer* (1916) 94 Ohio St. 351, 114 N. E. 251; *Chicago, R. I. & P. Ry. v. McIntire* (1911) 29 Okla. 797, 119 Pac. 1008; *Turney v. Southern Pacific Co.* (1904) 44 Or. 280, 75 Pac. 144; *City of San Antonio v. Potter* (1903) 31 Tex. App. 263, 71 S. W. 764; *Rasmussen v. McKnight* (1883) 3 Utah, 315, 3 Pac. 83. See *Williams v. United States* (1891) 138 U. S. 514, 11 Sup. Ct. 457, and 1 Bates, *New Pleading Practice, Parties & Forms* (1923) 475. The majority of the New York decisions on this subject are in accord with the instant case. See note in *Munn v. Cook* (1890, N. Y.) 24 Abb. New Cas. 314-357; *Mutual Life Ins. Co. v. McCurdy* (1907, 1st Dept.) 118 App. Div. 815, 103 N. Y. Supp. 829; *contra: Cohn v. Graber* (1922, 1st Dept.) 201 App. Div. 264, 194 N. Y. Supp. 233. An analogous situation is presented in respect to joinder of parties in the alternative. *Eames v. Mayo* (1919) 93 Conn. 479, 106 Atl. 825; see (1924) 33 YALE LAW JOURNAL, 328. Application of the rule forbidding alternative pleading as to subject matter often operates harshly, as the plaintiff cannot thus allege with certainty facts known peculiarly to the defendant. See note to *Munn v. Cook, supra,* at p. 332, 333; Hankin, *op. cit. supra,* at p. 368. The instant case properly follows the more liberal tendency of its own jurisdiction and applies a rule which ought to be more generally available under modern pleading codes. See Hankin, *op. cit. supra;* (1923) 33 YALE LAW JOURNAL, 109.

PLEADING—ELECTION OF REMEDIES—RATIFICATION.—Plaintiff discontinued an action at law to recover damages for fraud whereby he had been induced to sell and convey land, after defendant had pleaded the statute of limitations and the case had been placed upon the calendar. In a subsequent suit for rescission, the lower court decided that there had been no election of remedies or ratification of contract such as would bar the present action. *Held,* that the judgment be affirmed. *Schenck v. State Line Telephone Co.* (1924) 238 N. Y. 308, 144 N. E. 592.

The violation of a primary right may give rise to several substantive secondary rights and more than one procedural right. *Cf. Friederichsen v. Renard* (1917) 247 U. S. 207, 210, 38 Sup. Ct. 450, 451; Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817, 829. Where the choice is between procedural rights merely, courts have no difficulty in allowing either or both, in some cases even to judgment, but with only one satisfaction. *American Process Co. v. Florida White Pressed Brick Co.* (1908) 56 Fla. 116, 47 So. 942. Where substantive secondary rights are, however, inconsistent, courts are not agreed as to what constitutes a final choice of one barring recourse to another. Nor can a common principle upon which the rule might depend be agreed upon. See Hine, *Election of Remedies* (1913) 26 HARV. L. REV. 707. That there may be an election of remedies, two or more substantive secondary rights must exist. *Henry v. Herrington* (1908) 193 N. Y. 218, 86 N. E. 29; *Bristline v. United States* (1916, C. C. A. 9th) 229 Fed. 546; *cf. Segerstrom v. Holland Piano Mfg. Co.* (1923) 155 Minn. 50, 192 N. W. 191. If the substantive right has not been decided in one action, courts should permit pursuance of the other. *Cf. United States v. Oregon Lumber*

Co. (1922) 260 U. S. 290, 303, 43 Sup. Ct. 100, 104; *Lampen v. Kedgewin* (1676, C. B.) 1 Mod. *207; ———— *v. Campbell* (1771, K. B.) 3 Wils. 240. And after the statute of limitations has operated to bar the first action, it cannot be said that there was a choice. *Tullos v. Mayfield* (1917, Tex. Civ. App.) 198 S. W. 1073; see *United States v. Oregon Lumber Co., supra,* at pp. 299, 304, 43 Sup. Ct. at pp. 102, 104; *contra: Stokes v. Wright* (1917) 20 Ga. App. 325, 93 S. E. 27. Compromise and settlement of suit is certainly election. *Knowles v. Dark & Boswell* (1924, Ala.) 99 So. 312. Where a suit is vexatious, or merely experiments with the remedies afforded, then the bringing of the first suit ought to be held an election. *Cf. Sanger v. Wood* (1818) 3 Johns. Ch. 416, 421. Where a transaction is voidable for fraud, as in the instant case, it may be rescinded, and the parties put in *statu quo,* or affirmed, and an action brought to recover damages for the fraud. On the theory that the abandonment of a suit for rescission is an affirmance of the contract, a subsequent suit for damages is allowed. *Cohoon v. Fisher* (1897) 146 Ind. 583, 45 N. E. 787. But on the ground that a man may not take contradictory positions, many courts say that an action for damages resulting from fraud is so inconsistent with a subsequent action for rescission that it cannot be maintained even though the first action be abandoned before judgment; the contract having been ratified, it could not thereafter be disaffirmed. *Cohoon v. Fisher, supra.* But why is not an abandonment of an action to recover for fraud a disaffirmance if the signification of the will to ratify is expressed only by the will to sue? The rule of election of remedies usually operates against the one entitled to the redress, and should be applied with a view toward enabling him to recover.

PRACTICE—DISCOVERY—INHERENT POWER OF LAW COURT TO ORDER EXAMINATION.—In an action of book account for flooring furnished and laid, the lower court granted the plaintiff authority to examine the flooring before trial with experts of his own choice. *Held,* that the court had no inherent authority to order such examination. *O'Reilly v. Superior Court* (1924, R. I.) 124 Atl. 1.

Although discovery is an equitable rather than a common law incident, physical examination of parties was frequently ordered at common law. *Le Barron v. Le Barron* (1862) 35 Vt. 365; 2 Bishop, *Marriage, Divorce and Separation* (1891) sec. 1298 (allegation of impotency in divorce cases); *In re Blakemore* (1845) 14 L. J. Ch. 336; 1 Coke, *Littleton* (1853) *8b; Reg. Brev. Orig. (1687) 227 (writ *de ventre inspiciendo* to forestall fraudulent claims of heirship); 3 Blackstone, *Commentaries* *331 (plea by defendant of death of plaintiff and appearance of one claiming as plaintiff); *ibid.* (in cases involving the age of an infant); *Case of Abbott of Strata Mercella* (1591) 9 Co. Rep. 31a; 3 Blackstone, *loc. cit. supra* (appeal of mayhem). Some courts now deny the power to order physical examination of the plaintiff in actions for personal injuries, on grounds of lack of precedent at common law. *Larson v. Salt Lake City* (1908) 34 Utah, 318, 97 Pac. 483; *Stack v. N. Y., N. H. & H. R. R.* (1900) 177 Mass. 155, 58 N. E. 686. The majority of jurisdictions, however, recognize the discretionary power to order such examination as an expansion of the settled principles formerly applied in the above cited instances. *Schroeder v. C. R. I. & P. R. R.* (1877) 47 Iowa, 375; *City of So. Bend v. Turner* (1901) 156 Ind. 418, 60 N. E. 271. Statutes authorizing physical examination in personal actions have been declared constitutional. *Lyon v. Manhattan Ry.* (1894) 142 N. Y. 298, 37 N. E. 113; *McGovern v. Hope* (1899) 63 N. J. L. 76, 42 Atl. 830. But at common law production and inspection of documents was generally not allowed. *Anonymous* (1702, K. B.) 3 Salk. 362; see *Habershon v. Troby* (1799, K. B.) 3 Esp. 38. Nor examination of real property in suits of this nature. *Turquand v. Guardians of Strand Union* (1840, Exch.) 8 Dow. 201; *Newham v. Tate* (1838, C. P.) 1 Arn. 244; 4 Wigmore,

Evidence (2d ed. 1923) sec. 2221; *contra: Clark v. Tulare Lake Dredging Co.* (1910) 14 Calif. App. 414, 112 Pac. 564. Courts of equity, therefore, granted discovery in aid of actions pending at law. *Singer v. Bowne* (1912) 81 N. J. Eq. 157, 85 Atl. 449; 2 Daniell, *Chancery Pleading and Practice* (6th ed. 1894) sec. 1817; 24 L. R. A. 183, note. Common law courts were granted the power to order the inspection of documents by statute. (1851) 14 & 15 Vict., c. 99, sec. 6. Later the power to order examination of real and personal property was granted. (1854) 17 & 18 Vict., c. 125, sec. 58. In this country such statutes are generally not held to abrogate the powers of equity courts to grant discovery. *Starkweather v. Williams* (1898) 21 R. I. 55, 41 Atl. 1003; *Reynolds v. Fibre Co.* (1902) 71 N. H. 332, 51 Atl. 1075. Although the instant case may be supported by precedent, the cases denying the power to order examination of documents and real property seem to afford a better foundation than the somewhat doubtful authority of the physical examination cases on which the court relies. In states where law and equity are combined under the code, the examination in question may more readily be supported. *N. Y. Report of Commissioners on Practice and Pleading* (1848) 75. Although it is believed that the modern tendency is thus to support examinations of this nature, it is unfortunate that in Rhode Island law and equity, while administered from the same tribunal, have distinct procedure. R. I. Gen. Laws (1923) ch. 323, sec. 4626, 4627, ch. 337, ch. 339.

SALES—CONVERSION—RESALE BY VENDOR AFTER SUIT FOR PURCHASE PRICE.—The defendant vendor in a previous action recovered judgment against the plaintiff for the purchase price of goods under N. Y. Laws, 1911, ch. 571, sec. 144 (1):—(Uniform Sales Act, sec. 63 (1)). Pending that action, the defendant, relying on his vendor's lien, resold the goods. The buyer then sued for conversion and his complaint was dismissed. *Held,* that the judgment be reversed. *D'Aprile v. The Turner-Looker Co.* (1924, 4th Dept.) 209 App. Div. 223.

Where a vendee has broken a contract for the sale of personal property, the Uniform Sales Act gives the vendor three remedies. He may acquire a right to payment of the full purchase price while still retaining possession of the goods. Sec. 63 (1); *Kawin & Co. v. American Colortype Co.* (1917, C. C. A. 7th) 243 Fed. 317; see *American Aniline Products, Inc., v. D. Nagase & Co. Ltd.* (1919, 1st Dept.) 187 App. Div. 555, 176 N. Y. Supp. 114. He may realize on them as goods of the buyer, in part satisfaction of his right to the price. Sec. 60 (1); *Cohen v. Curtin* (1919, Sup. Ct. App. T.) 107 Misc. 622, 177 N. Y. Supp. 246. Or he may rescind the sale and sue for damages caused by the breach. Sec. 61 (1); *Rylance v. James Walker Co.* (1916) 129 Md. 475, 99 Atl. 597. The theory of these sections is not clear, for under sec. 60, the seller is expressly allowed to retain any profit on the resale, a fact difficult to reconcile with the intention otherwise, to treat the goods as the buyer's. See 2 Williston, *Sales* (2d ed. 1924) sec. 553. The court in the instant case regarded the provision that profits on a resale remain with the seller as making a resale under sec. 60 impossible, once judgment for the price had been recovered and "title" vested in the buyer. This can hardly be the intention of the Act, for sec. 60, just as sec. 63, proceeds wholly on the assumption that the goods—subject only to lien—are the buyer's and that the price is due. *Pabst Brewing Co. v. E. Clemens Horst Co.* (1916, C. C. A. 9th) 229 Fed. 913. Thus a resale while suit for the price is pending, may, under proper pleadings, be set up and result in corresponding reduction of the judgment. *Urbansky v. Kutinsky* (1912) 86 Conn. 22, 84 Atl. 317; *Phillips v. Stark* (1921) 186 Calif. 369, 199 Pac. 509; see *Schepp Co. v. Far Eastern Mfg. Co.* (1918, Sup. Ct. App. T.) 168 N. Y. Supp. 636. That the buyer refused to do this in his prior action is a poor reason for allowing him to maintain the present action, unless the resale was not effected with reasonable judgment within

sec. 60 (5). *Cf. Guthrie Co. v. Thompson* (1923) 89 Okla. 173, 214 Pac. 716. It seems preferable to treat a resale under sec. 60 wholly as a realization on security. *Gaines Bros. v. Citizens' Bank* (1921) 84 Okla. 265, 204 Pac. 112 (resale "to fix damages"); *Woolworth Co. v. Covington Bros. & Co.* (1921) 191 Ky. 67, 229 S. W. 48 (resale "for account of buyer"). To permit the pleadings in a preceding action for the price to turn a reasonable resale into a conversion, is to risk removing the goods from commerce during the entire pendency of the litigation. *Cf. Schuenemann v. Wollaeger* (1920) 170 Wis. 616, 176 N. W. 59. The clause which reserves possible profits to the seller, while inconsistent, is unlikely to work serious injustice, as buyers rarely refuse performance on a rising market.

TAXATION—GRANTEE OF CRANAGE AND WHARFAGE RIGHTS NOT TAXABLE AS "OWNER OR OCCUPANT."—The legislature passed an act permitting a municipality to assess "the owners or occupants of houses and lots intended to be benefited" by the paving of streets; an amending statute provided for the assessment of "property benefited." N. Y. Laws, 1882, ch. 410, sec. 878. The plaintiff, an assignee of exclusive cranage and wharfage rights granted by the city, claimed an assessment against its property was without authority since it was not the "owner or occupant" of a house or lot but of "incorporeal rights" only. The trial court found the assessment to be valid. *Held,* (one judge *dissenting*) that the judgment be reversed. *Knickerbocker Ice Co. v. City of New York* (1924, 1st Dept.) 209 App. Div. 434.

The interest of the plaintiff would ordinarily be denominated an assignable easement in gross. *Mayor of New York v. Law* (1891) 125 N. Y. 380, 26 N. E. 471; *contra: Cadwalader v. Bailey* (1891) 17 R. I. 495, 23 Atl. 20; see COMMENTS (1923) 32 YALE LAW JOURNAL, 813. Under some statutes authorizing the assessment of taxes on real estate, similar interests have been held taxable. *Newark v. State Board of Taxation* (1901) 66 N. J. L. 466, 49 Atl. 525 (right of way over a highway); *Amoskeag Co. v. Concord* (1891) 66 N. H. 562 (privilege of overflowing lands for water power). But where taxing statutes are more strictly construed a like interest has been held not taxable. *Hancock County v. Imperial Naval Stores Co.* (1908) 93 Miss. 822, 47 So. 177 (privilege of taking turpentine from trees). In New York a street railway having a right of way over a street is not considered the "owner or occupant of a house or lot" for purposes of taxation. *People, ex rel. Davidson v. Gilon* (1891) 126 N. Y. 147, 27 N. E. 282. Nevertheless, in the instant case, the plaintiff, although under a disability to convey the fee, had the privilege of occupying the premises, building a wharf there and excluding others if they did not tender reasonable charges. The plaintiff also had the power of making valid contracts for compensation for the use; and the right that another should not interfere with the plaintiff's use and not utilize the wharf without its consent. These relations would seem to constitute "ownership or occupancy" although not complete ownership. The portion of the "property" belonging to this plaintiff seems the greater and more valuable portion and ought to be taxable and assessable under ordinary taxing statutes. Under a similar New York statute taxing "land" and "real estate" such an interest has been held taxable. *Smith v. Mayor of New York* (1877) 68 N. Y. 552. The decision in the instant case can be supported only by giving the terms "owner" or "occupant" a narrow definition because of their previous history.

TAXATION—INHERITANCE TAX—POWER OF APPOINTMENT.—A testator, whose will was probated before the enactment of an inheritance tax law, left property in trust for the benefit of his children, with power of appointment in each. In the event that the power was not exercised, the property was to go to their issue in equal shares. The power was exercised, the appellants thereby receiving more

than such equal shares. It was contended by the appellants that if the power had not been exercised, there being three children, one-third would have been exempt from taxation as coming directly from the estate of the grandfather, and therefore that such amount should be untaxed. *Held,* that where additional benefits are received under a will as appointees under a prior will, the property passes under the first-mentioned will and is subject to the tax. *Matter of Taylor* (1924, 1st Dept.) 209 App. Div. 299.

In absence of statute expressly taxing property passing by power of appointment most courts applied the theory that the inheritance tax was on the transfer from the donor of the power, and could not affect property passing under a will with a power of appointment probated before but exercised after the enactment of the tax law. *Emmons v. Shaw* (1898) 171 Mass. 410, 50 N. E. 1033; *Matter of Harbeck* (1900) 161 N. Y. 211, 55 N. E. 850. Other courts have held that the tax was on the privilege of receiving, and that the appointee was bound to pay the tax on the value of the property when so received. *Fisher v. State* (1907) 106 Md. 104, 66 Atl. 661. By statute, however, most states have provided that the tax be imposed upon the exercise of the power as though the property belonged absolutely to the donee of the power. N. Y. Laws, 1922, ch. 430, sec. 220; Mass. Gen. Laws, 1921, ch. 65, sec. 2; Conn. Gen. Sts. 1918, ch. 66, sec. 1271; Gleason and Otis, *Inheritance Taxation* (3d ed. 1922) 171-177. The states are somewhat divided as to the imposition of a tax either where there has been an omission to exercise the power, or where the same person is appointed who would have received the property in default of its exercise. The New York statute provided that a tax be imposed in either case. N. Y. Laws, 1897, ch. 284. But the exercise of the power in such a case was held to be a nullity as it made no change in the devolution of the property and so not taxable. *Matter of Lansing* (1905) 182 N. Y. 238, 74 N. E. 882. This provision has consequently been omitted from the New York statute. N. Y. Laws, 1922, *supra.* It has been copied and retained, however, by some jurisdictions. Mass. Gen. Laws, *supra;* Conn. Gen. Sts. *supra.* But omitted by others. Ark. Acts, 1923, Act 438, sec. 1; Ind. Acts, 1921, ch. 275, sec. 7. The principal case may be distinguished from *Matter of Lansing, supra,* in that the appellants have received greater benefits due to the donee's exercise of the power of appointment. But it would seem fairer to limit the rule in the instant case to cases where there has been a substantial increase in the benefits, otherwise the tax might be greater than the excess benefit received.