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NOTES ON RECENT MISSOURI CASES

INSURANCE AGENCY—RIGHT OF AN AGENT TO RENEWAL COMMISSIONS. *Locher v. New York Life Ins. Co.*[1] Plaintiff was employed by defendant to solicit life insurance under a contract, which in the beginning covered a period of one year, but which was thereafter renewed from year to year. Defendant agreed to pay plaintiff as compensation for his services, among other things, commissions on all renewal premiums, paid on account of policies originally procured by plaintiff for a stated number of years after the writing of the policies. Plaintiff breached the agreement, and was accordingly discharged. After his dismissal, certain renewal premiums were paid on policies that he had originally secured for defendant, and he claimed a right to commissions on these premiums in spite of the fact that his agreement had been terminated as a result of his wrongful conduct and breach of the same. The St. Louis Court of Appeals denied plaintiff's right to recover, basing its decision on the *fact* that the contract *expressly limited* the obligation to pay the commissions to such time as the contract should

1. (1919) 200 Mo. App. 659, 208 S. W. 862.

be in force and operation. The court also intimated by way of *dictum* that renewal commissions, falling due after the ending of the employment ought not as rule to be recovered, even tho the contract is silent on this point. It was suggested that the parties could not be supposed to have intended that commissions should continue to come to the agent after he has ceased to act in such capacity.[2]

There can be no question as to the soundness of the actual decision in the case. If the agreement was that the commissions should cease with the agency, there was no possible basis for plaintiff's recovery.[3] But the *dictum* in the case apparently generalizes, and lays down a broad rule, and for this reason would seem to be worthy of some consideration.

An agent might sue for commissions accruing after the ending of his agency either under a contract employing him at will, or under one that employed him for a specified length of time. If the contract is of the last mentioned type, it is possible that it might have come to an end in one of the following ways: by its own terms (i. e. by the lapse of the time specified), by the rightful discharge of the agent, or by the wrongful discharge of the agent. In the case of the rightful discharge of the agent, the discharge might have been due to no deliberate breach of the contract on his part, but to an unforeseen incapacity arising, which prevented his doing the work required of him under the agreement. It is proposed to discuss the cases falling within the various assumptions, *where the contract is silent as to the effect of the ending of the agency*

2. The extent of the *dictum* is rather obscure; the court, however, does intimate that if the contract of agency is one at will that under those conditions the agent might perhaps have a right to collect commissions that fall due after the termination of the employment. 208 S. W. 862, 1. c. 867. Aside from this possible exception the court seems to feel that an agent ought not to recover commissions accruing after the ending of the agency. "The courts in construing agreements like the one we have before us, proceed on the notion that the compensation to be received by the agent from year to year thru commissions on renewal premiums, is associated with the continuance of his agency and is partly earned by services subsequent to the procurement of the risk, not solely by its procurement; the purpose being to bind him to steady work in behalf of the company." 208 S. W. l. c. 865. "The authorities are overwhelming that such provisions, *standing alone*, deprive the agent of any right to commissions on renewal premiums paid after the termination of the agency." *id.*

3. It would seem that the court might well have decided the case also on the ground that the defendant had deliberately breached his contract of employment by entering the employ of a rival during the period covered by his contract with defendant; 208 S. W. 1. c. 865. This would have been an easy way to have disposed of the case. See note 9 *infra*.

on the right to renewal commissions, and to determine the state of the law governing in each instance.[4]

It has been held that where the contract of employment is one at will, the agent has a right to renewal commissions that fall due after the termination of the agency.[5] It was said that the commission is earned as soon as the policy is written, time of payment alone being postponed until the renewal premium is paid, and made contingent on this last event; that the commission is analogous to salary earned by securing the policy. Under this line of decisions, continuation of the agent in the employ of the company has nothing to do with the right to the commission; that depends alone on the payment of the renewal premium.

If the contract can be ended at the will of the employer, a construction of this kind seems to be reasonable. It is hardly proper to assume that the agent would stipulate for the payment of commissions at a future date, which might well fall beyond the period of the agency, if the obligation to pay the same was to depend on the existence of the agency at the time of payment. Such a stipulation would amount to no obligation at all being assumed by the principal, because he would be free to escape it by discharging the agent without incurring any liability of any kind. For this reason it is believed that the agent has a right to the commissions under this state of facts. It is urged that the parties must have intended that the commissions should be paid regardless of the continued existence of the agency, for if they did not intend this, then the agent was bargaining not for a contractual right, but for a right depending merely on the good will of his employer.[6]

4. This note is not concerned with cases where there is an express provision that the commissions shall either cease with the ending of the agency, or continue after that event; as has already been suggested the express provision of the contract, if there is one, will control. The problem presented for analysis is the soundness of the following quotation taken from the case under discussion: "The right of an agent to commissions on renewals collected, or falling in after the end of his agency, can rest only on *express* terms in his contract, or be necessarily drawn from an interpretation of that contract as a whole." 208 S. W. 1. c. 866.

5. *Hercules etc. Soc. v. Brinker* (1879) 77 N. Y. 435 (the decision of the New York Court of Appeals, in this case is a reversal of the decision of the court below without opinion; the lower court had denied the agent's rights to renewal commissions after the termination of the employment. For this reason the case is unsatisfactory); *Heyn v. N. Y. etc. Co.* (1908) 192 N. Y. 1, 84 N. E. 725. *Mich. etc. Co. v. Coleman* (1907) 118 Tenn. 215, 100 S. W. 122, 1. c. 127. In the case last cited it was said: "The agent's commissions on first premiums and his percentage on renewal premiums are both regarded in the light of compensation to him for his services in obtaining policies for the company and thereby building up its business."

6. "This (i. e. a construction other

The rule permitting the agent to recover as above stated is not universal, and there are some decisions, and some *dicta* to the effect that the agent cannot get commissions that accrue after the end of the agency.[7] This holding is usually based on the ground that it was not the intention of the parties that the principle should continue liable to pay the commissions after the agent has left his employ. The courts that hold this way seem to feel that it is hardly conceivable that a principal would be willing to continue paying commissions under such conditions.[8]

Where the contract is for a stated period, and that period has expired, the situation ought to be dealt with in the same way as the situation in a case where the employment is at will and has been ended. The agent should have a right to commissions on renewal premiums paid after the termination of the agency. That must have been the intention of the parties, and what the agent bargained for. If he did not do this, then he was not bargaining for money, but for money if his employer wanted to retain him in his employ, and he wanted to remain in it.

than that urged by the writer) would be a harsh, and unjust construction of the contract, and would place the plaintiff at the mercy of the defendant." *Heyn v. Ins. Co.* note 5 *supra.*

7. *Fidelity etc. Co. v. Washington etc. Co.* (*dictum*) (1912) 193 Fed. 512; *Scott v. Travelers' etc. Co.* (*dictum*) (1906) 103 Md. 69, 63 Atl. 377; *Andrews v. Travelers' etc. Co.* (1902) 24 Ky. L. R. 844, 70 S. W. 43; *King v. Raleigh* (*dictum*) (1903) 100 Mo. App. 1, 70 S. W. 251. It is doubtful whether the statement in this case ought to be characterized as standing for the proposition that an agent cannot where the contract is silent in this respect recover commissions that accrue after the end of the agency. The contract in this case expressly provided against any such right, and it appears to the writer that what the court said about an agent's having no rights to the commissions is to be confined to the cases where there is such a provision against the same. *Ballard v. Travelers' etc. Co.* (1896) 119 N. C. 187, 25 S. E. 956; *North Carolina etc. Co. v. Williams* (1884) 91 N. C. 69, 49 Am. Rep. 636.

8. Sometimes there are other reasons given for the denial of the right. It has been said that the commissions are compensation associated with the continuance of the agency, and are partly earned by services subsequent to the procurement of the risk. See to this effect *King v. Raleigh* and *North Carolina etc. Co. v. Williams, supra,* note 7. See also note 2.

It has also been said that the agent cannot recover the commissions for the reason that his power is not coupled with an interest. This was said in the case under review and also in *Ballard v. Travelers' etc. Co.* and in *North Carolina etc. Co. v. Williams, supra,* note 7. It would seem to be entirely obvious that there is no power coupled with an interest in a case of this kind, but that does not settle the matter one way or another. If the commissions are the equivalent of salary earned when the policies are written then they are due regardless of whether or no the agency is revocable or not. See *Mich. etc. Co. v. Coleman, supra,* note 5. There the court admitted that there was no power coupled with an interest, but nevertheless held that the commissions were recoverable on the theory last mentioned.

So far as is known there are no cases that deal with this exact situation, but the opinion is hazarded that an agent would be permitted to recover the commissions if the court to which the question was presented approved of the decisions that allow commissions to an agent in a case of an employment at will. But if the court did not approve of those holdings, the agent's recovery would be denied.

Where the employer ends the agency by discharging the agent for cause, there is no right to commissions that accrue thereafter, if the breach of the agreement by the agent has been due to his deliberate default.[9] It does not make any difference that the agent would have had a right to such commissions if he had not been discharged, because the right to the same depends on the contract's being alive; the agent has by his breach made it possible for the principal to rescind the same rightfully, and for this reason the agent is not in a position to assert his right. After all, the agent is obligated to perform his side of the agreement for the principal, and this performance is the compensation that the latter is to get for the payment of the later accruing commissions, and if this compensation is not received, it is but just that the agent should be denied all further rights under the contract. No man, who is substantially in default ought to be permitted to sue on his contract.[10]

It has been suggested that it might happen that the agent's services might be dispensed with by the principal for a cause not due to an intentional default on the part of the former. Suppose that the agent becomes sick, ought he under these conditions to lose his right to renewal commissions falling due after this event? Or to take an analogous case, suppose that the agent dies, ought his estate to lose the commissions? These questions are practically of first impression so far as the rights of insurance agents are concerned, but there are rules that are fairly well developed in the field of master and servant, which ought to furnish a

9. *Burleson v. Northwestern etc. Co.* (1890) 86 Cal. 342, 24 Pac. 1064; *Phoenix etc. Co. v. Halloway* (1883) 51 Conn. 310; *Frankel v. Mich. etc. Co.* (1901) 158 Ind. 304, 62 N. E. 703; *Armstrong v. National etc. Co.* (1908) 112 S. W. (Tex.) 327; *Walker v. John Hancock etc. Co.* (1910) 80 N. J. Law 342, 79 Atl. 354.

10. *Hale v. Brooklyn etc. Co.* (1890) 120 N. Y. 294, 24 N. E. 317, might be interpreted as a decision *contra* to the generally prevailing rule, given above. In that case the agent severed his connection with the company during the term of the contract with the consent of the latter, and the court held that unless the company proved that the agent's resignation involved his releasing the company from its obligation to pay after accruing renewal commissions that the agent could recover them. It might be suggested that the acceptance of the agent's resignation amounted to a rescission of the agreement, and as a result the agent's contractual rights of all kinds were wiped out. The court rejected this notion.

working analogy, if the commissions are to be regarded as the equivalant of salary earned when the policy is written, in which light it is deemed they should be regarded.

If a servant agrees to work for his master for a definite time, and the salary, or wages for the work to be done, is to be paid in a lump sum at the end of the term, and the servant is incapacitated thru unforeseeable illness to complete the work, it is held that there can be no recovery from the master upon the contract for the work that he has done. The reason for this is that the agreement is entire and not severable. If this is the case no wages are due the servant until the whole of the work bargained for has been furnished to the master, and consequently all relief under the contract must be denied the servant. The master's obligation to pay is conditional on the servant's performing all the work, and of course the rule would be the same where the failure to perform by the servant was due to his death instead of to his illness.[11] A decision of this kind, while it seems hard on the servant, is right and is consistent with contract law. A court has no right to divide an entire promise, and to say that it shall be proportionally performed for part performance by the promisee.

It does not follow from this, however, that the servant under the assumed facts would have no relief at all, and it might well be that he would have a right to sue in quasi-contract for the value of the services that he has actually rendered, or if he is dead that his estate would have such a right. There has been some benefit conferred on the master, and if the value of that exceeds the damage that has resulted from the servant's inability to finish his work, it would be just to allow a recovery to this extent. There are cases that would permit a recovery along these lines, and they are just and proper.[12] The only possible objection to permitting a recovery would be that the servant is in default, but this is due to his misfortune, and therefore ought not to preclude the giving of relief in an action where equitable principles are applicable, and in the face of the further fact that there has been actual benefit conferred on the master. It seems needless to say that the rule as above

11. *Cutter v. Powell* (1795) 6 T. R. 320. See also *Helm v. Wilson* (1835) 4 Mo. 41, 1. c. 46. "We hold the law to be, that where there is a special agreement the party who is to execute it must do so before he can recover anything." But see *contra Green v. Linton* (1838) 7 Porter (Ala.) 133, 31 Am. Dec. 707, where the court in a case of this kind held that the promise to pay wages at the end of the term could be apportioned, and the servant, who had become ill could recover on the contract for the work that he had actually performed prior to his illness.

12. *Fuller v. Brown* (1845) 11 Met. (Mass.) 440; *Wolfe v. Howes* (1859) 20 N. Y. 197. See also *Jennings v. Lyons* (1876) 39 Wis. 553. The older English decisions seem to deny a right even in quasi-contract, *Cutter v. Powell, supra*, note 11.

stated ought not to give the servant a right except in a case where his default is due to no fault of his own. If the servant has deliberately abandoned the contract he ought never to be permitted to recover in quasi-contract or any other kind of an action.[13]

Applying these rules to the agent's or his estate's right to recover renewal commissions, the commissions ought not to be recoverable on the contract itself. The consideration for the payment of the commissions is the performance by the agent of his side of the agreement up to the very moment that they are payable.[14] It ought to be, however, that if the agent has stopped performance of his contract because of accidental incapacity, that the principal should be liable for any unpaid benefit received from the original writing of the policy in an action of quasi-contract, less such sum as he may have been damaged by the agent's failure to render full performance of his side of the agreement. Perhaps there might be one difficulty in the way of the agent's recovery, and that would be that the value of such benefit could not be measured in dollars and cents, but aside from this, and if the amount can be ascertained, the right to relief seems clear.

Turning to the cases where the employer ends the agency wrongfully by an improper discharge of the agent, the commissions can be recovered. In a situation of this kind the courts have almost always held that the agent earns the right to renewal commissions when he first writes the

13. *Olmstead v. Beale* (1837) 19 Pick. (Mass.) 528; *Earp v. Tyler* (1881) 73 Mo. 617. *Contra*: *Britton v. Turner* (1834) 6 N. H. 481, 26 Am. Dec. 713. This case permitted the employee to recover on a *quantum meruit* in spite of a deliberate breach of the contract, and would seem to be a decision, which in an effort to "do equity" has encouraged a man to leave his employ when so inclined resting assured that he will be able to recover for the work that he has done less possible damage that he may have caused his employer.

There is a class of cases mid-way between the case of a deliberate breach by the employer and an accidental breach represented by cases where the employee has acted in good faith, and has endeavored to live up to the agreement, but has thru lack of ability failed to give satisfaction to his employer, who has discharged him, and been justified in so doing. Ought such a servant be entitled to recover the value of his services? There are some cases that have permitted him to do this, if he has acted in good faith. See Woodward, Law of Quasi Contract, sec. 174. See *Lindner v. Cape etc. Co.* (1908) 131 Mo. App. 680, 111 S. W. 600, *contra*, containing valuable discussion of Missouri decisions.

14. *Mills v. Union etc. Co.* (1899) 77 Miss. 327, 28 So. 954. In this case the executor of the deceased agent brought an action in equity to recover renewal commissions accruing after the death of the agent, his action being on the contract, and being brought after the renewal premiums were paid. The court was right, it is submitted, in denying relief. The action should not have been on the contract, but should have been brought for unjust enrichment.

policy. If this is the case, it follows naturally enough that the right cannot be destroyed by the principal's illegal attempt to wipe out the contract.[15]

J. L. PARKS.[16]

BILLS AND NOTES—PARTY SECONDARILY LIABLE—DISCHARGE. *Highleyman v. McDowell Motor Car Co.*[1] Plaintiff sued defendant, the McDowell Motor Car Company, on two promissory notes executed by O. L. Boss to the defendant and indorsed by the defendant to the plaintiff. Prior to this action plaintiff had brought suit on the same notes against Boss, the maker, but failed to recover, judgment being rendered for Boss in consequence of the finding of the jury that certain equities existed between Boss and the payee, the Motor Car Company, which discharged Boss, of which equities the plaintiff had knowledge when he purchased the notes. In the present suit against the Motor Car Company on its contract of indorsement the Kansas City Court of Appeals held the indorser liable, the judgment in favor of the maker in the previous suit not operating to discharge the Motor Car Company.

At common law the indorser or drawer is, as a general rule, discharged if, by act of the holder, the maker or acceptor is discharged, or any right of the indorser or drawer against other parties to the instrument is impaired.[2] But this rule does not extend to cases where the

15. *Newcomb v. Imperial etc. Co.* (1892) 51 Fed. 725; *Wells v. National etc. Co.* (1900) 99 Fed. 222; *Aetna etc. Co. v. Nexsen* (1882) 84 Ind. 347, 43 Am. Rep. 91; *Lewis v. Atlas etc. Co.* (1876) 61 Mo. 534; *Sterling v. Metropolitan etc. Co.* (1888) 2 N. Y. Supp. 84, aff'd without opinion (1891) 130 N. Y. 632, 29 N. E. 150; *Richey v. Union etc. Co.* (1909) 140 Mo. 486, 122 N. W. 1030. In *Hepburn v. Montgomery* (1884) 97 N. Y. 617, it was held that the obligation of the insurance company to continue to pay renewal commissions was subject to the implied condition that it would continue in business for the term covered by the contract; and that the insolvency of the company resulting in its dissolution would excuse its receiver from further liability as to renewal commissions. The case is distinguishable from the cases cited above because of the implied condition. But is the implication warranted? Usually the insolvency of the employer does not excuse him from liability to his employees for a premature ending of the contract of employment. Should the fact that the employer in this case was a corporation change the rule?

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1. (1920) 216 S. W. (Mo. App.) 52.

2. *Ex parte Wilson* (1805) 11 Ves. Jun. 410, 32 English Reprint 1145; *English v. Darley* (1800) 2 Bos. & Pul. 61, 126 English Reprint 1156; *Gould et al v. Robson* (1807) 8 East 576, 103 English Reprint 463; *Smith v. Rice* (1858) 27 Mo. 505; *Couch v. Waring* (1832) 9 Conn. 261.

maker or acceptor is discharged by operation of law.[3] Thus, if the holder agrees with the maker to stay execution on a judgment against him for a specified period, such agreement will operate to discharge the indorser;[4] if the holder who has satisfied a judgment against the maker for the amount of the note later sues the indorser for a balance of interest due on the note and not included in the judgment, he cannot recover since he has voluntarily taken a judgment for a smaller sum, thereby discharging the maker and destroying the remedy of the indorser against the maker.[5] On the other hand it has been held that if the maker is discharged by the Statute of Limitations, the indorser is not discharged.[6] Nor does the discharge of the maker by virtue of a bankruptcy or insolvency act discharge parties secondarily liable.[7] In view of the foregoing, the decision in the case under review would seem beyond question as a common law proposition. The discharge of Boss by virtue of the judgment in the preceding suit would be ineffectual to discharge the Motor Car Company on its contract of indorsement.

Section 120, Clause 3, of the Negotiable Instruments Law, as recommended to the Legislatures of the various states and as adopted, without modification, by all but Illinois and Missouri,[8] provides that "a person secondarily liable on the instrument is discharged . . . (3) by the discharge of a prior party." This clause was one of the several subjects of the Ames-Brewster controversy with respect to the Negotiable Instruments Law, Dean Ames taking the view that Clause 3 included any discharge, whether by act of the holder or by operation of law, and Judge Brewster maintaining that by virtue of the rule of statutory construction that in statutory revisions restating the common law no change is presumed except by the clearest and most imperative implication, this clause applied only to discharges by the holder and excluded discharges by operation of law.[9] The few cases in which this

3. *Ex parte Jacobs* (1875) 10 L. R. Chan. App. Cases 211; *Phillips v. Solomon* (1871) 42 Ga. 192; *Guild v. Butler* (1877) 122 Mass. 498; *Post v. Losey* (1887) 111 Ind. 74. See also *MacDonald v. Bovington* (1792) 4 T. R. 825, 100 English Reprint 1323; *Nadin v. Battie* (1804) 5 East 147, 102 English Reprint 1025; Chitty on Bills, 10th Ed. p. 289; Story, Bills of Exchange, 2nd Ed., p. 558; Story on Promissory Notes, 7th Ed., p. 589.

4. *Smith v. Rice* (1858) 27 Mo. 505.

5. *Couch v. Waring* (1832) 9 Conn. 261.

6. *Nelson v. First National Bank* (1895) 69 Fed. 798.

7. See cases in Note 2, *supra*.

8. The Illinois act omits Clause 3. See Hurd's Revised Statutes, 1917, Ch. 98, Sec. 137. The Missouri act adds to Clause 3, "except when such discharge is had in bankruptcy proceedings." See Revised Statutes, Missouri, 1909, Sec. 10090.

9. For the complete text of the Ames-Brewster controversy on this point, see Brannan, The Negotiable Instrumets Law, Third Edition, pp. 430-1; 444-5; 453; 528-30.

point has arisen under the N. I. L. seem to support the contention of Judge Brewster. In *Silverman v. Rubenstein*[10] it was held that a composition in bankruptcy against the maker of a promisory note would not operate to discharge the indorsers, the discharge being effected by operation of law and not by consent of the parties. The court did not, however, cite the N. I. L. In *Everding & Farrel v. Toft*,[11] the court stated, in a *dictum*, that Section 120, Clause 3, "only applies to a discharge by the act of the creditor, and does not include discharges by operation of law, for example bankruptcy, nor does it embrace a situation where after trial on the merits the note is in effect destroyed because of a vice which is inherent in the transaction." Had the Missouri case now under review been decided under Section 120, Clause 3, of the N. I. L., as generally adopted, it is a fair guess that practically every jurisdiction would have upheld the contention of Judge Brewster.

As already noted, the Missouri statute adds to Clause 3 the words "except when such discharge is had in bankruptcy proceedings," thereby making the section read: "A person secondarily liable on the instrument is discharged . . . (3) by the discharge of a prior party, *except when such discharge is had in bankruptcy proceedings.*" While the result reached by the court in the case under review is desirable, can the decision be supported on principle in view of the peculiar wording of the Missouri statute? It would seem doubtful. The court, in reaching its decision, contents itself with stating that "Clause 3 of said statute is merely declaratory of the common law theretofore existing, and the discharge therein mentioned does not mean a discharge by operation of law, but a discharge by some act or neglect of the creditor." It entirely overlooks the fact that the Missouri statute, after laying down in general words that a person secondarily liable on an instrument is discharged by the discharge of a prior party, adds a single and express exception—"except when such discharge is had in bankruptcy proceedings." By a well known principle of statutory construction, *expressio unius est exclusio alterius*, this exception affirms the application of the general words to all other cases not excepted and excludes all other exceptions.[12] Or, to put it as stated by Sutherland in his work on Statutory Construction: "The exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the lawmaker the thing excepted would be within the general words had not the exception been

10. (1917) 162 N. Y. Supp. 733.

11. (1916) 83 Ore. 1, 160 Pac. 1160.

12. *Bend v. Hoyt* (1839) 13 Pet. 263, at 271-2; *Arnold v. U. S.* (1892) 147 U. S. 494, at 499; *Equitable Life Assurance Soc. v. Clements* (1890) 140 U. S. 266; *Olive Cemetery Co. v. City of Philadelphia* (1880) 93 Pa. St. 129; *Brocket v. Ohio R. R. Co.* (1850) 14 Pa. St. 241, 243; *Sherwin v. Bugbee* (1844) 16 Vt. 439, at 445.

made."[13] Applying this principle to the case under review, the discharge of Boss, tho by operation of law, would discharge the indorser, since the discharge was not "had in bankruptcy proceedings." To avoid such an unfortunate result the court treated Clause 3 as if the exception with respect to bankruptcy proceedings had been omitted.

The difficulty lies, of course, in the wording of the Missouri act. The addition of the exception with respect to bankruptcy to Clause 3 is not only unnecessary in view of the common law and particularly in view of Section 16 of the National Bankruptcy Act,[14] which covers the precise situation, but it renders it impossible for a court to reach a desirable result in an action against an indorser in just such a case as *Highleyman v. McDowell Motor Car Company* where the indorser had been discharged by operation of law otherwise than as a result of bankruptcy proceedings, without ignoring a well established principle of statutory construction, as was done in this case.

STANLEY H. UDY.[15]

CONFLICT OF LAWS—SPECIFIC PERFORMANCE OF CONTRACT CONTAINING STIPULATION THAT SAME SHALL BE GOVERNED BY THE LAWS OF ANOTHER STATE—PLEADING THE FOREIGN LAW. *Fidelity Loan Securities Company v. Moore.*[1] This was an action for the specific performance of a contract to purchase real estate, made by defendant. The land was situated in Texas, and the agreement contained a stipulation that in the event of a dispute, or of litigation to enforce the contract, that the laws of Texas, as interpreted by the courts of that State, should control the rights and obligations of the parties. The contract also, by its terms, was to be performed in Texas. The entire contract, including the stipulation, was set forth in the petition, but the plaintiff did not plead the laws of Texas, nor did it allege anything concerning such laws or their effect on the right to bring this action. Defendant demurred to the petition and the trial court sustained the demurrer. On plaintiff's appealing, the Supreme Court affirmed the judgment, *nisi*, holding that plaintiff's failure to plead the laws of Texas rendered the petition fatally defective.

In making the decision, the Supreme Court placed some stress on the fact that the laws of Texas were made a part of the contract by

13. 2 Lewis' Sutherland, Statutory Construction, 2nd Edition, p. 672.

14. See 30 Stats. at L. 544. Section 16 of this Act reads as follows: "The liability of a person who is co-debtor with, or guarantor, or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

15. Assistant Professor of Law, School of Law, University of Missouri.—Ed.

1. (1919) 217 S. W. 286.

direct reference, but the real reason for the decision was that the laws of Texas "constitute a part of the very cause of action, and should be pleaded as well as proven in the trial of the case." [2]

It is generally held, as in the instant case, that parties may stipulate that the laws of a foreign state shall control their rights and obligations under a contract. Such a stipulation will control under proper conditions, and the law will be applied if it is not contrary to the policy of the forum. In such a case the law of the forum "is material only as setting a limit of policy beyond which obligations will not be enforced there." [3] Accordingly, the law agreed on is the very basis of the cause of action and without it plaintiff must fail altogether.[4] It follows naturally enough from this, that the court has got to have the law agreed upon before it gives relief. It would seem, therefore, that the only question, so far as the case under review is concerned is, was the law of Texas before the court so as to enable it to give plaintiff specific performance? Certainly it was not there as a result of plaintiff's own efforts. If it was before the court it must have been there by virtue of some rule, which would permit the court to dispense with what might otherwise well have been deemed an essential allegation of the petition, and to indulge in some kind of a presumption, which in a loose sense of the word, might be said to be in aid of a defective pleading. Before considering this problem, and answering the question, it is proposed to consider the general matter of presumptions as to foreign law, and to then determine the propriety of substituting a presumption, if there be one as to that law, for a pleading of the same.

A line of decisions has established the rule that the common law is presumed to obtain in those states carved out of what was once English territory, or in those states wherein the common law was put in force by act of Congress. The courts of this State will in a case properly determinable according to the law of such a foreign state, there being no proof as to the nature of the same, presume that it is the same as the common law, as interpreted by the courts of Missouri.[5] This is the rule

2. (1919) 217 S. W. 286, p. 289.

3. See statement by Graves, J., in the principal case and authorities there cited. 217 S. W. 1. c. 288. The quotation is from the opinion of Mr. Justice Holmes, in the case of *Cuba R. Co. v. Crosby* 222 U. S. 1. c. 478, where the learned judge was discussing an analogous case.

4. Graves, J., in the principal case 217 S. W. 1. c. 289. Wharton on Conflict of Laws, Third Edition by Parmele, sec. 772, and authorities there cited.

5. *Hazelett v. Woodruff* 150 Mo. 534, 51 S. W. 1048. *Rashall v. Ry. Co.* (1913) 249 Mo. 509, 155 S. W. 426. *Cherry v. Cherry* (1914) 258 Mo. 391 167 S. W. 539. *Wentz v. Ry. Co.* (1914) 259 Mo. 450, 168 S. W. 1166. *Orthwein v. Ins. Co.* (1914) 261 Mo. 650, 170 S. W. 885. See also notes 67 L. R. A. 3; 34 L. R. A. (N. S.) 268; 18 *Id.* 40.

even tho the common law on the subject may have been changed in Missouri. Thus in *Davis v. McColl*[6] we find the court deciding a question relating to negotiable instruments according to the common law, as it existed in Missouri prior to the adoption of the Negotiable Instruments Act.

On the other hand, there is a class of cases where the courts will not presume that the common law is in force in a foreign state. It is obvious, of course, that if the foreign law is proved that there is no room for a presumption at all, and that the law as proved will prevail,[7] Sometimes, however, there is no proof, but the court cannot make the presumption because of facts, of which it must take judicial notice. While courts do not take judicial notice of what the law of another state is on any given question, they do take such notice "of the system of law that is the basis of the jurisprudence of another jurisdiction."[8] If this is the case, then it must be that if the court knows that another state is not one where the common law ever prevailed, because of that state's origin, it cannot presume that the common law is in force there. Accordingly, Missouri courts will not presume that the common law prevails in a state which, before it became a part of the Union was not subject to the laws and jurisdiction of England, or was not made subject to the same by an act of Congress.[9] The reason for the rule is, as intimated, because the court cannot on any reasonable basis indulge in such a presumption in such a situation. The fact of the state's origin, which is known to the court, conclusively rebuts it.

Sometimes a question is properly determinable according to the law of a sister state, where the common law has never been in force but a statute in this State gives a similar right to that claimed by a plaintiff in his action. It has been held in this kind of a case that it will be presumed that the statutory law of the foreign state is the same as that of this State, there being no proof to the contrary.[10] This rule has been

6. (1914) 179 Mo. App. 198, 166 S. W. 1113; see also *Bank v. Commission Co.* (1909) 139 Mo. App. 110, 120 S. W. 648. And *Brown v. Worthington* (1912) 162 Mo. App. 508, 142 S. W. 1082.

7. Mathieson v. Ry. Co. (1909) 219 Mo. 542, 118 S. W. 9. *Ham v. Ry. Co.* (1910) 149 Mo. App. 200, 130 S. W. 407.

8. Wharton on Conflict of Laws, Third Edition by Parmele, sec. 781 *et seq.* The quotation is from Wharton at this point.

9. *Flato v. Mulhall* (1880) 72 Mo. 522; *Sloan v. Torry* (1883) 78 Mo. 623; *Wiseheck v. Glass* (1891) 46 Mo. App. 209; *Clark v. Barnes* (1894) 58 Mo. App. 667.

10. *Madden v. Ry. Co.* (1917) 192 S. W. 455; *Lee v Ry. Co.* (1906) 195 Mo. 490, 92 S. W. 614; *Wyeth v. Lang Co.* (1893) 54 Mo. App. 147; *Barhydt v Alexander* (1894) 59 Mo. App. 188.

severely critized, and has been said to be the equivalent of taking judicial notice of a foreign statute.[11]

It having been shown that the court can, in certain cases, enumerated above, presume that the law of the foreign state is the same as that of the forum, the next question to be determined is: ought the court to make the presumption, if the petition of the plaintiff contains no allegation upon which the fact, if presumed, can be based? A presumption, according to Professor Thayer, is a process whereby a fact is taken for granted; given a certain state of facts, the law holds that another fact will follow from the former without proof; in other words, the ultimate fact, which is the one that it is desired to establish, will be presumed to exist. This assumption is made either because the law, by reason of some policy, believes that the fact ought to be taken as existing, or because human experience has found that the fact is usually a natural sequence from the facts upon which the presumption is based. As the learned author shows, a presumption then is a mere short cut taken to establish a fact, and the result of taking the short cut is that a fact is taken as proved without the labor of proving it.[12]

This being the nature of a presumption, it is urged that a court should never make one, and take a fact as proven through this method, unless the fact would have been admissable in evidence under the petition in the ordinary way. After all a presumption is only a substitute for proof; it is a method of taking a fact as proved. Accordingly, for this reason, it is submitted, no fact ought to be presumed unless it would be provable under the pleadings if there were no grounds for making the presumption. If a presumption is only a substitute for proof, is it not essential to have the same grounds for making the presumption that it would be essential to have to prove the fact, if no presumption could be made? This proposition, when the matter is considerêd, seems to be obvious enough and inevitable. While there is little authority on the general question, there is an analogous case in the Supreme Court of the United States which seems to support the writer's contention. In *Mountain View etc. Co. v. McFadden*[13] it was urged by plaintiffs that the court ought to take judicial notice of a fact which was essential to plaintiffs' cause of action, but plaintiffs had laid no foundation for the proof of this fact in their pleadings. They had not alleged that the fact existed. The court conceded that it knew the fact to exist, but refused to take notice of it because plaintiffs had not chosen to rely on the existence of that fact as a part of their cause. Said the Court: "But the circuit court

11. Opinion of Woodson, J., in *Madden v. Ry. Co. supra* note 10, 192 S. W. 1. c. 458.

12. Thayer, Preliminary Treatise on Evidence at the Common Law chap. VIII.

13. (1901) 180 U. S. 533, 21 Sup. Ct. Rep. 488.

could not make plaintiff's case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge." [13a] Now judicial notice is merely another case where the court will dispense with the proof of a fact, and take the fact known as proved; if the court knows a fact to exist, it will excuse the party from proving it; it is a short cut to establish a fact; it is a substitute for proof. But the court clearly holds that the short cut cannot be taken unless the fact could have been proven in the round-about-way; if the fact could not have been proved without judicial notice, then it will not be provable thru this method. It would seem that the decision is good law, and good sense, and that the principle adopted is altogether applicable to our problem. If this is the case, then it follows that the court will not make a presumption unless the pleading lays the foundation by properly alleging the fact, which is to be presumed to exist. For these reasons the decision in the principal case is believed to be sound. Conceding that presumptions can sometimes be made as to foreign law, still they ought never to be made unless the law desired to be presumed would be provable under the pleading.

While the writer has urged that the law of a foreign state ought always to be pleaded, and no presumption about it ought to be indulged in unless the pleading contains a basis for such a presumption, still the rule in some cases is *contra*. In Wharton on Conflict of Laws[14] it is said that if the case is one where the court can either assume that the common law prevails in the foreign state, or that there is statutory law in the foreign state similar to that of the forum, then the plaintiff need not plead the foreign law, but the court will apply the law, which is presumed to exist. Some four cases are cited to sustain this rule, but the editor points out that the rule "is generally assumed by the cases on the subject," which is undoubtedly true. Why, however, this should be the rule is a matter as to which the cases leave one in the dark. It should not be the rule and if it is applied, it involves the violation of another fundamental rule to the effect that a man can only prove those matters that are comprised within the allegations of his pleading.

Suppose that the rule is as stated in the last paragraph, does the decision in the case under review conflict with the same? It is believed that it does not, for the reason that the court could not make any presumption as to the law of Texas. The court knew that Texas is not a common law state, or to use its expression, that Texas is not a state

13a. (1901) 180 U. S. 1. c. 535, 21 Sup. Ct. Rep. 488.

14. Wharton on Conflict of Laws. Third Edition by Parmele, sec. 781f.

where the "equitable doctrines of the common law" prevail. This being so, the court could not presume that "common law," or English equity existed in Texas. Nor is there a statute in Missouri, which gives a party a right to specific performance in a case like plaintiff's. So the court could not assume that the statutory law of Texas was the same as that of the forum. There was no statute in the forum giving a right to a plaintiff similarly situated. It is believed, therefore, that to this point the case is right on principle, and within the authorities, as well.

Occasionally it has been held that if the court cannot make a presumption as to the foreign law either because it knows that the common law cannot prevail in the foreign state, or because there is no statute in the forum, which gives a right similar to that claimed by the plaintiff to which the foreign law can be assumed to be similar, that the court will apply the law of the forum on the theory that it is the only law before it. Where the decision is to this effect, no presumption as to the nature of the foreign law is made at all, and the rule if it is to be justified at all, is based on the theory that "the parties by failing to prove the proper foreign law have impliedly agreed to abide by the law of the forum." [15] This rule has been adopted in several Missouri cases[16] and was urged by Blair, J., in his dissenting opinion in the principal case as one that might be acceptable.[17] The propriety of these decisions might well be questioned. Is the agreement by implication to this effect? But even so, the decisions are not inconsistent with, or contrary to the principal case. It must be remembered that the only point decided in this case was that where a plaintiff's case depends on the law of a foreign state, that plaintiff's petition is not demurrer proof unless the same pleads the law of the foreign state. In all the cases cited, which apply the law of the forum for want of any other law to be applied, the defendant did not demur to the petition, but on the contrary joined issue and went to trial. This being the situation, the court might well have felt that the matter of pleading the foreign law might be regarded as waived. In fact in *Biggie v. Chicago etc. R. R.* [18] the court intimated that this was the rea-

15. Wharton on Conflict of Laws, Third Edition by Parmele, sec. 781d; the quotation is from the editor at this point.

16. *Flato v. Mulhall* (1880) 72 Mo. 522; *Philpot v. Ry. Co.* (1884) 85 Mo. 167 (*dictum*). *Thompson v. Ry. Co.* (1912) 243 Mo. 336, 148 S. W. 484; *Lyons v. Ry. Co.* (1913) 253 Mo. 143, 161 S. W. 726. *Biggie v. Ry. Co.* (1911) 159 Mo. App. 350, 140 S. W. 602. *McManus v. Ry. Co.* (1906) 118 Mo. App. 152, 94 S. W. 743. *Sterling v. Ry. Co.* (1914) 185 Mo. App. 192, 170 S. W. 1156.

17. (1919) 217 S. W. 1. c. 290.

18. (1911) 159 Mo. App. 1. c. 351, 140 S. W. 602. There is *dicta* to be found in other cases to the same effect. so in *Lee v. Ry. Co.* (1905) 195 Mo. 415, the court said: "By the strict rules of pleading therefore the plaintiffs in their petition should have stated the laws of Kansas applicable to the facts to

son why the court did apply the law of the forum, saying: "Defendant did not attack the petition by demurrer, nor plead in its answer that no cause existed under the laws of Iowa * * *." The statement clearly shows that the court felt that had the petition come up on demurrer that it might have been regarded as defective, just as the Supreme Court regarded the petition in the instant case in this light. While there may be some decisions in Missouri on some phases of this question which are not all that could be desired, still they are distinguishable from the principal case which is certainly correct and is a decided step in the right direction.

J. L. PARKS[19]

CHARITABLE TRUST—RULE IN *Morice v. The Bishop of Durham. Jones v. Patterson.*[1] Fannie R. Lytle by her will gave all her property in California and the rent of a 160 acre farm in Platte County, Missouri, to her husband for life, and at his death to be "placed" in the hands of the defendant, "to be used for missionary purposes in whatever field he thinks best to use it, so it is done in the name of my dear Savior and for the salvation of souls."

The court held this provision of the will invalid as being too indefinite and uncertain, both as to purpose and as to object because no particular form of the Christian religion was intended to be propagated or advanced, and because the scope of the field in which the trustee was empowered to exercise the charity was as unlimited as human thought "when applied to the determination of what constitutes a belief in the Christian religion." It was thought that no court could supervise the application of the fund, for it fixes upon no definite object, but in effect made the defendant the owner of the property. Consequently, the property descended to the testatrix's heir at law.

show that the deceased if he had lived could under that law have maintained an action for damages, and if *timely* objection to the petition had been made by demurrer or otherwise it would doubtless have been sustained * * *." Again in *Madden v. Ry. Co.* 192 S. W. l. c. 456 the court said: "The courts of Missouri do not take judicial notice of the judicial decisions, or the statutory law of sister states * * *. Hence they can only be brought to the knowledge of the courts of Missouri where their consideration is essential to the sustention of a cause of action or a defense by being both pleaded and proven by the party relying upon them."

19. In the preparation of this note, the writer has been furnished with the Missouri authorities by Lynn Webb Esq., LL. B., University of Missouri, of the Kansas City, Mo. Bar. Mr. Webb has also generously made some other useful suggestions but he is in no way responsible for the conclusions that have been reached.

1. (1917) 271 Mo. 1, 195 S. W. 1004.

The law takes a different view with reference to private trusts and charitable trusts. The well recognized public policy of disapproving the tieing up of property for long periods of time is rather strictly applied in the case of private trusts. Among the most noted examples is *Musset v. Bingle*,[2] where the interest on a sum of money was bequeathed for the perpetual upkeep of a monument to the testator's wife's first husband. This was held bad by the English court because it kept property out of commerce forever and also because it involved the perpetual upkeep of a non-charitable trust.

In the absence of a statute such gifts have been held invalid if the distribution of the trust fund extended beyond the period specified in the rule against perpetuities, viz: lives in being and twenty-one years thereafter.[3]

In dealing with bequests and devises for charitable trusts, however, a more liberal rule has been adopted, and trusts founded upon such bequests and devises are not invalid even tho they extend over long indefinite periods of time or even perpetually.[4]

The prevailing rule is that once the bequest is considered a charitable trust the elements of indefiniteness as to purpose and uncertainty as to object will not defeat the disposition, but the courts will uphold it and enforce it thru the Attorney-General.

In *In re Best*,[5] a provision "for such charitable and benevolent institutions as the trustees shall determine," was upheld. In *Rickarby v. Nicholson*[6] a provision for "such religious or charitable purposes as the trustee shall think fit," was held valid. Also, in *Everett v. Carr*[7] a provision was held valid "for charitable purposes for the greatest relief of human suffering, human wants, and for the good of the greatest number." This bequest includes a field whose scope also is as unlimited as human thought, and conceivably gives more latitude than does the will in the principal case, yet the Maine court found no difficulty in sustaining the bequest. A like result was reached in *Salstonstal v. Saunders*,[8] where the bequest was to trustees to hold and invest the same and appropriate so much of the whole of the principal and income as they might think proper, "to the furtherance of and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence and charity, public and private, or temperance, for the education of deserving youths." The bequest was upheld as to all its provisions

2. (1876) 1 W. N. 170.

3. *Dawson v. Small* (1874) L. R. 18 Eq. 114; *In re Rogerson* (1901) 1 Ch. 715; *Burke v. Burke* (1913) 259 Ill. 262, 102 N. E. 293.

4. *Pell v. Mercer* (1885) 14 R. I. 412.

5. (1904) 2 Ch. 354.

6. (1912) 1 I. R. 343.

7. (1871) 59 Me. 325.

8. (1865) 11 Allen (Mass.) 446.

and the court announced that it would find means of supervising the trust.[9] There are other decisions sustaining similar trusts.[10] In *Miller v. Teachout*[11] the bequest was in trust, "to the advancement of the Christian religion in the trustee's judgment." The Ohio court experienced no difficulty in giving effect to the charitable intention of the testator.[12]

Walker, P. J., in the principal case, apparently cited *Morice v. The Bishop of Durham*[13] for the proposition that the object of the trust must be sufficiently definite so that a court of equity can enforce the application of the trust fund in conformity to the expressed wishes of its creator. An analysis of that case, however, will show that it does not so hold. The trust created in the Bishop's case was a bequest to the defendant to dispose of the ultimate residue of the testatrix's estate to such objects of "benevolence and liberality" as the Bishop in his own discretion should approve. The court held the trust invalid because the words, "*benevolence and liberality*" were broader than the word charity. The objection was not that the bequest was indefinite and uncertain as a charity but that it was too broad to be a charity at all. The court in the principal case considers the gift as a charity and so considered, *Morice v. The Bishop of Durham, supra,* is no authority for holding this charitable trust invalid because of indefiniteness.

Another famous case relied upon by the court was *Tilden v. Green.*[14] There Samuel J. Tilden left a large sum of money to a corporation not then in existence for the purpose of maintaining a free library and reading room in the City of New York, and such other educational and scientific purposes as the trustees should designate. This provision was held invalid because the will of the trustees and not the will of the

9. "If at any time hereafter doubt should arise as to the mode of distribution, or the trustees should exercise their discretion illegally or unreasonably, this court, upon bill or information, may control and regulate the administration of the charity."

10. *Jackson v. Phillips* (1867) 14 Allen (Mass.) 539; *Welch v. Caldwell* (1907) 226 Ill. 488, 80 N. E. 1014; *Pell v. Mercer* (1885) 14 R. I. 412; *Swasey v. American Bible Society* (1869) 57 Me. 523; *Coffen v. Attorney General* (1919) 231 Mass. 575, 121 N. E. 397; *Miller v. Tatum* (1918) 181 Ky. 490, 205 S. W. 557; *Re Welch* (1918) 105 Misc. 27, 172 N. Y. Supp. 349. "The mere fact that the purpose of a charitable trust is left indefinite is not fatal according to the better view and weight of authority, provided it is limited to charitable purposes." Austin W. Scott, 33 Harvard Law Review 695.

11. (1874) 24 Ohio St. 525.

12. *Re Dulle's Estate* (1907) 218 Pa. 162, 67 Atl. 49; *Selleck v. Thompson* (1907) 28 R. I. 350, 67 Atl. 425; *Re Stewart's Estate* (1901) 26 Wash. 32, 66 Pac. 148.

13. (1805) 10 Ves. 521. See also *Smith v. Pond* (1919) 107 Atl. (N. J. Eq.) 800, 29 Yale Law Journal 242.

14. (1891) 130 N. Y. 29, 28 N. E. 880; Ames, Lect. Leg. Hist. 285, 5 Harv. L. Rev. 389.

testator was made controlling. But the decision in that case has not stood the test of time. Two years later the legislature of New York passed an act which nullified the doctrine of the Tilden case.[15] Later cases in New York dealing with trusts of this nature have regularly sustained them.[16] Like statutory changes have taken place in Virginia,[17] and Tennessee,[18] and the prior decisions in those states,[19] some of which are cited by the court in the principal case, must be considered as recalled.

In *Schmucker's Estate v. Reel*[20] it was held by the Missouri court that a trust, to be applied according to the best discretion of the trustee, must fail for uncertainty. But the decision is no weight in the solution of the present problem, for the reason that the gift was not for a charitable purpose. In such a case the rule in *Morice v. The Bishop of Durham* would properly apply.

In *Board of Trustees v. May*[21] a portion of the testatrix's estate was given to a person "to use as he may desire in the master's work." In *Hadley v. Forsee*[22] a bequest was made to the testator's wife "to advance the cause of religion and promote the cause of charity as the wife should think the most conducive to carrying out the testator's wishes." In both cases the gifts were held invalid because of uncertainty of the beneficiaries. But such is not the prevailing rule in the United States. Only Michigan, Minnesota, and Maryland[23] adhere to this view of charitable trusts. Furthermore, an attempt was made in Michigan in 1903 to change the rule by legislation, but the act was declared unconstitutional because of insufficiency of the title of the act. In West Virginia[24] it has been held that sec. 3 and sec. 10 of ch. 57, Code 1906 had changed the previous rule in that state (in accord with the old law of Virginia) as to charitable trusts.

It is submitted that the rule in Missouri, followed in the principal case,—is undesirable and unfortunate and that the Supreme Court of

15. Acts 1893, ch. 701.
16. *Matter of Cunningham* (1912) 206 N. Y. 601, 100 N. E. 437; *Roth- v. Schiff* (1907) 188 N. Y. 327, 80 N. E. 1030.
17. Va. Acts, 1914, p. 414, Code, sec. 1420.
18. Shannon's New Code, sec. 3530, a. I.
19. *Carpenter v. Miller* (1869) 3 W. Va. 174; *Fifield v. Van Wyck* (1897) 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; *Reeves v. Reeves* (1880) 5 Lea (Tenn.) 644.
20. (1876) 61 Mo. 592.
21. (1906) 201 Mo. 360, 99 S. W. 1093.
22. (1907) 203 Mo. 418, 101 S. W. 59.
23. Ames, Lect. Leg. Hist. 285; 5 Harv. L. Rev. 389.
24. *Hays v. Harris* (1914) 73 W. Va. 17, 80 S. E. 827.

Missouri has not followed modern authority. A change of viewpoint might disturb certain titles but the balance of convenience is in favor of the change.[25]

Moberly, Missouri. DAVID P. JANES[26]

PLEADING—RIGHT OF PLAINTIFF TO AMEND AFTER JUDGMENT. *Swift et al v. Union Fire Insurance Company.*[1] The Supreme Court in the above case held that if a petition entirely omitted to allege a fact necessary to the statement of a cause of action, the defect is fatal and cannot be cured by amendment of the petition after rendition of a verdict, but a motion in arrest of judgment will lie .

The facts in the case are: A sued B upon a parol contract to insure A's house, alleging that the contract was upon the same terms as a previous policy which was set out in the petition. The petition omitted to allege consideration for the parol promise to insure. This defect was not objected to until after a trial upon the merits, which resulted in a verdict in favor of plaintiff. Then a motion in arrest was made. The trial court allowed the plaintiff to amend his petition and entered judgment upon the verdict for plaintiff.

Numerous authorities support the view that the allegation of consideration in a suit on a contract not importing a consideration is a necessary part of the cause of action.[2] It is one of those "radical constitutional defects" which is not cured by verdict,[3] and can be taken advantage of by motion in arrest.[4] Section 2774 R. S. Mo. 1909, makes it unnecessary to allege a consideration in certain classes of written contracts,[5] but does not affect parol contracts.

In *Pa. Del. etc. Nav. Co. v. Dandridge*[6] practically the same question arose as in the principal case. That was a suit upon a contract and no consideration was alleged. The court in sustaining a motion in arrest said: "The object of all pleadings is that the parties litigant may be mutually apprised of the matters in controversy between them. The declaration should substantially present the facts necessary to constitute the plaintiff's right of action, that the defendant being forewarned of

25. See *Klocke v. Klocke* (1919) 276 Mo. 572 1. c. 581, 208 S. W. 825.

26. Graduated from School of Law, April 1920, with degree of LL.B.—Ed.

1. (1919) 216 S. W. 935, 217 S. W. 1003.

2. 13 C. J. 722; *Polland v. Hollander* (1909) 115 N. Y. Supp. 1042, 62 Misc. 523.

3. *Robinson v. Barbour* (1840) 5 Blackford (Ind.) 468.

4. *Pa. Del. & Md. Steam Nav. Co. v. Dandridge* (1836) 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

5. *Eyermann v. Piron* (1899) 151 Mo. 107 1. c. 115, 52 S. W. 229.

6. See note 4 *supra.*

the nature of proof to be preferred against him, may, if necessary be prepared to contradict, explain or avoid it."

There is another class of cases, presenting a situation somewhat analagous to the principal case, which frequently has been before the courts. The Missouri Supreme Court often has held that the plaintiff must decide what action he will bring, and once having elected, must clearly state and prove it.[7] The plaintiff cannot allege a number of facts with no particular cause of action in view and then adopt his relief to his evidence.[8] As was said by a learned Wisconsin judge, speaking of the petition provided for by the code, "It cannot be 'fish, flesh or fowl' according to the appetite of the attorney preparing the dish set before the court."[9] The principle sustained by the decisions is that the function of a complaint is to place both parties on an equal footing. The idea should not be overlooked that the plaintiff is the actor calling the defendant into court and that it is his duty to state a cause of action "in plain and concise" language. This duty said Sherwood, J., in *Huston v. Tyler*[10] "is the primary duty of the party drawing the pleading and the latter cannot cast that onus on his opponent by failing to perform his own duty in the first instance and that duty consists in expressing his meaning clearly and unmistakably."[11] The purpose of the decisions is to guard the right of the defendant to be informed of the issues, the nature and kind of proof required to rebut the plaintiff's case.

It is suggested that the rule announced in the principle case is justifiable on the same grounds. The defendant could not be informed of something which is omitted from the petition. He could not know the kind and nature of proof required of him. Tho the spirit of the code is to prevent failure of justice because of formal defects which do not injure or prejudice the rights of either party, yet the code did not relieve the plaintiff from clearly defining the issues by stating all the essential elements of his cause of action. The code did not change the substance of the different causes of action, but operated only on the form of pleading.[12]

7. *Huston v. Tyler* (1897) 140 Mo. 252, 36 S. W. 654.

8. *Carson v. Cummings* (1879) 69 Mo. 325. *Huston v. Tyler* (1897) 140 Mo. 252, 36 S. W. 654. *Henry Co. v. Citizens Bank* (1907) 208 Mo. 1. c. 226, 106 S. W. 622.

9. *Supervisors etc. v. Decker* (1872) 30 Wis. 624.

10. See note 7 *supra.*

11. *Young v. Schofield* (1896) 132 Mo. 650, 34 S. W. 1. c. 499. *Huston v. Tyler, supra. Clark v. Dillon* (1884) 97 N. Y. 370--cited with approval in *Young v. Schofield.*

12. *Sumner v. Rogers* (1886) 90 Mo. 324, 2 S. W. 476.

In Kliefoth v. The Northwestern Iron Co.[13] the following rule for interpreting pleadings was announced: "In determining whether a complaint states a cause of action the question is not whether the plaintiff used the most appropriate language, but whether the language used will permit a construction which will sustain the pleading, and to that end such effect should be given to its allegations as will support rather than defeat it, if that can be done without adding, by way of construction, material words not necessarily implied, or giving to the language used a meaning that cannot be reasonably attributed to it." The above case involved the question of whether the allegations of a petition sufficiently connected the employment of a negligent servant with the act causing the injury. The Wisconsin Court while giving full scope to the doctrine of inference refused to infer an essential element. The effect of the decision is to limit the doctrine of inferring facts to formal necessary inferences and to hold the plaintiff to the duty of alleging all the essential facts.

In *Elwaine-Richards Co. v. Wall,*[14] in sustaining the rule that plaintiff must allege all the essential facts the Indiana Court said: "For the rule recognized at common law and by our code affirms that material facts necessary to constitute a cause of action must be directly averred and cannot be left to depend upon or shown by mere recitals or inferences."

The Wisconsin and Indiana cases, *supra,* were decided upon demurrers. They do not decide the exact question involved in the principal case, yet they illustrate that the liberality of the code towards the plaintiff is not without limit.

The question of inferring facts has been before the Missouri Supreme Court several times and an examination of the cases reveals that it has drawn a distinction between a cause of action defectively set out and a defective cause of action.[15] There would seem to be no objection to holding in the former case that a trial upon the merits will cure the defect. Perhaps no better statement of the rule can be found than that made by Gantt, P. J., in *People's Bank etc. v. Scalzo*:[16] "If a material matter be not expressly averred in the petition, but the same is *necessarily* implied from what is stated in the context, the defect is cured after verdict, the doctrine resting on the presumption that the plaintiff

13. (1898) 98 Wis. 495, 74 N. W. 356.

14. (1902) 159 Ind. 557, 65 N. E. 753.

15. *McDermont v. Claas* (1891) 104 Mo. 1. c. 21, 15 S. W. 995. *Lynch v. The St. Joseph & I. Ry. Co.* (1892) 111 Mo. 1. c. 605, 19 S. W. 1114. *The Salmon Falls Bank v. Leyser* (1893) 116 Mo. 51, 22 S. W. 504. Bliss on Code Pleading (3rd Ed.) Sec. 438.

16. (1895) 127 Mo. 164, 29 S. W. 1032.

proved on the trial the facts imperfectly alleged, the existence of which was essential to his recovery." The principal case comes within the latter class. It is a defective cause of action, an entire omission to state sufficient facts and the question is not whether given a cause of action imperfectly stated, a trial upon the merits will cure the imperfections, but having none to start with, will the trial court manufacture one for the plaintiff. It is submitted, that the latter course would be unfair to the defendant.

A quick dispensing of justice would seem to demand that the issues be clearly and fairly stated. The Missouri Statute relating to amendments contains language capable of being construed more liberally,[17] and standing alone it could have been interpreted to allow greater freedom to amend, but this could not have been done consistent with good pleading and the requirements of a principal section of the code requiring the plaintiff to make "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition." [18]

Tho at first glance the decision of the principal case may seem to sacrifice justice for form, it is suggested that to hold otherwise would sanction loose pleading and compel defendant to surmise or infer the issues. In the very nature of things a party who is in possession of the facts should not be allowed to put upon his adversary the burden of badly drawn pleadings.

It is submitted that upon reason and authority, and in the interest of speedy and exact justice, the Supreme Court correctly refused to allow the plaintiff to amend his petition after judgment.

I. C. N.

BILLS AND NOTES—RENUNCIATION BY HOLDER. *Engle v. Brown et al.*[1] Defendants purchased a store building of plaintiff and gave in part payment a negotiable promissory note secured by a deed of trust on the building. Before the note became due defendant sold the building to one Lobdell, who assumed the note and mortgage and agreed to pay plaintiff. Plaintiff at the same time orally agreed with defendants to release them from liability on the note and accept Lobdell in their stead. Defendants resisted payment on the ground that the above transaction constituted a novation and discharged them from further liability on the note. The Kansas City Court of Appeals, while conceding the soundness of the defendant's contention prior to the enactment of the Negotiable Instruments Law, held that under Section 122 of that

17. Sections 2119 and 2120 R. S. Mo. 1909.

18. Section 1794 R. S. Mo. 1909.

1. (1919) 216 S. W. 541.

Act (R S. Mo. 1909, Sec. 10092) the oral renunciation of the plaintiff, unaccompanied by a surrender of the instrument, was ineffective to release defendant.

It is the well settled common law rule in this country that a unilateral contract right can be discharged before breach only by a sealed instrument or by an agreement supported by a consideration. A mere verbal release without consideration is ineffectual.[2] The English courts reached a different conclusion with respect to the obligation of parties liable on negotiable instruments, holding that such an obligation may be discharged by parol, without consideration, before or after breach.[3] This doctrine was not, however, adopted by the great majority of American courts. In the absence of statute, negotiable instruments have, in this respect, stood in this country on the same footing with simple contracts, except in cases in which the bill or note was destroyed or surrendered for the purpose of discharging the debt.[4] Such was the state of the law prior to the enactment of the Bills of Exchange Act and the Negotiable Instruments Law.

The rule as thus developed by the English courts was given statutory force in the Bills of Exchange Act, subject, however, to the qualification that the renunciation "must be in writing, unless the bill is delivered up to the acceptor."[5]

The author of the Negotiable Instruments Law adopted, in substance, the provision of the Bills of Exchange Act dealing with this subject. Section 122 of the Law (R. S. Mo. 1909, Sec. 10092) reads as follows:

> "The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing unless the instrument is delivered up to the person primarily liable thereon."

2. Anson on Contract, Corbin's Edition, p. 479; *Collyer v. Moulton* (1868) 9 R. I. 90; *Garnsey v. Garnsey* (1917) 116 Me. 295, 101 Atl. 447. But see *Robinson v. McFaul,* (1854) 19 Mo. 549.

3. *Foster v. Dawber* (1851) 6 Exch. 839.

4. *Upper San Joachin Irrigating Canal Co. v. Roach* (1889) 78 Cal. 552, 21 Pac. 304; *Rogers v. Kimball* (1898) 121 Cal. 247, 53 Pac. 648; *Smith v. Bartholemew* (1840) 1 Met. 276; *Bragg v. Danielson* (1886) 141 Mass. 195, 4 N. E. 622; *Henderson v. Henderson* (1855) 21 Mo. 379; *Crawford v. Millspaugh* (1816) 13 Johns (N. Y.) 87. See also *Lowrey v. Danforth* (1902) 95 Mo. App. 441, 69 S. W. 39.

5. See Law Reports, Statutes, 45 and 46 Victoria, 1882, (Vol. XVIII), p. 383. Sec. 62 of the B. E. A. reads as follows: "(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against

In the case under review the parties effected what was substantially a novation. As a part of an oral transaction between plaintiff, defendant, and Lobdell, plaintiff promised to discharge defendant from his obligation as maker of the note, the consideration for this promise being Lobdell's promise to assume defendant's obligation. Had the N. I. L. not been in force, the court intimates there would have been a valid discharge. Does the above quoted section of this Act, which requires a "renunciation" to be in writing, render ineffective the discharge, before breach, of the maker of a promissory note upon an *oral* agreement supported by a consideration?

The few courts which have had occasion to pass upon this point since the adoption of the N. I. L. have answered the question in the affirmative. In *Whitcomb v. Nat'l. Exchange Bank of Baltimore,*[5a] the defendant, accomodation indorser of a note, claimed that the payee of the note had orally released him in consideration of certain services performed by him in placing in the hands of the payee bonds as collateral security for the payment of the note, and resisted plaintiff's claim on the ground that this provision of the N. I. L. requiring renunciations to be in writing applied only to renunciations without consideration, and that therefore he was entitled to submit proof as to an oral agreement based upon a consideration. The court denied his contention, holding that the word "renunciation" comprehends the "surrender of a legal right" and that it not only "appropriately describes the act of surrendering a right or claim without recompense, but it can be applied with equal propriety to the relinquishment of a demand upon an agreement supported by a consideration." A similar view was taken by the Supreme Court of Washington in *Baldwin v. Daly*[5b] the court holding that the word "renunciation" was used in the sense of a release, and that an accommodation endorser could not be released by an oral agreement, even tho such agreement was supported by a sufficient consideration.[5c] In *Pitt v. Little*[6] the same court held that in the absence of a written release of the sur-

the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor. (2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

See also Benjamin's Chalmers Bills, Notes and Checks, 2nd Am. Ed., pp. 245-6.

5a. (1914) 123 Md. 612, 91 Atl. 689.

5b. *Baldwin v. Daly* (1906) 41 Wash. 416, 83 Pac. 724.

5c. The term "renunciation," which is probably of civil law origin, is used both by civil law and common law writers to express the general idea of the surrender of a legal right, without regard to whether the surrender is gratuitous or paid for. Planiol, in his Traite Elementaire de Droit Civil, Vol. I, p. 889, in discussing the renunciation by a usufructuary of his right to usufruct, speaks of renunciations which are paid for and renunciations which are made

render of the note, the maker was not released. But in that case the presence of a consideration was not so clear.

Is there any basis for drawing the distinction suggested between gratuitous renunciations and renunciations supported by a consideration, so far as the requirement of writing is concerned? Can it be fairly contended that the N. I. L. contemplates a writing only in the case of a renunciation without consideration? It is submitted it cannot.

The obvious purpose of the statutory requirement that a renunciation be in writing is to secure a desirable mode of proof as to one of the methods of discharging a negotiable instrument. Section 122 of the N. I. L. deals with discharge by the method of renunciation, and the section provides that discharge by this method must be in writing unless "the instrument is delivered up to the person primarily liable thereon." Now if the purpose of the rule is primarily to secure a satisfactory mode of proof, is there, as a practical matter, substantially any less reason to require a renunciation for a consideration to be evidenced by a writing, than to require that a gratuitous renunciation should be so evidenced? It would seem not.

In this connection one possible source of difficulty should be pointed out. It will be noted that Sec. 119 of the N. I. L. (R. S. Mo. 1909, Sec. 10089) enumerates the various acts which will discharge a negotiable instrument. It stipulates that "a negotiable instrument is discharged.....(4) by any other act which will discharge a simple contract for the payment of money." So far as Section 119 is concerned, it does not require that any of the "acts" therein mentioned as sufficient to discharge a negotiable instrument be evidenced by a writing. Now it is, of course, obvious that the *oral* agreement in the case under review, supported, as it was, by a consideration, is sufficient to discharge a simple contract for the payment of money. Why, therefore, cannot the case be disposed of by Sec. 119, par. 4, of the N. I. L., and judgment given for the defendant? This very point was taken by counsel in *Whitcomb v. Nat'l. Exchange Bank, supra,* and ably disposed of by the court.[7] The answer is that Section 119 of the Act confines itself to

gratuitously. Sherman, in Vol. II of "Roman Law in the Modern World" (pp. 161, 170, 177, 188), in discussing the various methods by which the different forms of servitudes may be extinguished, describes "renunciation" as "the voluntary surrender of the right of servitude to the owner." The term is used in a generic sense, and not in the special sense of the surrender of the right without compensation.

The term is used in this same generic sense by common law writers to express the same idea. In Wood's Byles on Bills and Notes the author, on pp. 199-200, clearly indicates that the term is applicable to the surrender of a right on an instrument, whether there be consideration or not. To the same effect, see Story on Bills, s. 266. See also Gray v. McCune (1854) 23 Pa. St. 447, at 450.

6. (1910) 58 Wash. 355, 108 Pac. 941.

7. See *Whitcomb v. National Ex-*

enumerating certain acts which will operate as a method of discharge; among these acts is included, by implication, a novation, which, in turn, involves a renunciation supported by a consideration. Section 122, on the other hand, deals with renunciation as a method of discharge and prescribes a mode of proof for such method of discharge. Conceding that a renunciation for a consideration is one of the acts embraced in Sec. 119, par. 4, of the Act, must we not then look at Sec. 122, which deals specifically with renunciation as a method of discharge, for information as to what constitutes an effective renunciation?

For the reasons set forth, it is believed that the oral character of the renunciation in the case under review is fatal to the claim of the defendant, and that the court properly so held.

The discussion suggests a question not involved in the case under review, viz., the status of a written gratuitous renunciation. It is the generally accepted view that under the Bills of Exchange Act such a renunciation is good, altho there is little authority directly in point.[8] Such a result would, however, seem beyond question. To make renunciation effective, consideration was, as we have seen, unnecessary under the English common law. The Bills of Exchange Act merely adopted the common law rule, adding the requirement that the renunciation be in writing. It has likewise been generally assumed that the same result follows in this country under the N. I. L.[9] This assumption is also doubtless well founded. The English common law rule, which permitted an oral renunciation without consideration, was the rule of the law merchant,[10] which knew nothing of consideration and which permitted an oral renunciation. The American courts added to this rule of the law merchant the common law requirement of a consideration. The English courts did not. The Bills of Exchange Act has merely added to the rule of the law merchant a requirement of a satisfactory method of proof. This affords a desirable working rule, permitting the holder to renounce his rights on an instrument without encountering the doctrine of consideration, and at the same time safeguarding the transaction by a satisfactory method of proof. It is believed that the N. I. L. should be so construed as to reach this result.

STANLEY H. UDY.[11]

change Bank (1914) 123 Md. 612, 91 Atl. 689.

8. Benjamin's Chalmers Bills, Notes and Checks, 2nd Am. Ed., p. 245-6. See also *In re George* (1890) L. R. 44 Ch. Div. 627 and *Edwards v. Walters* (1896) 2 Ch. 157.

9. Williston, Cases on Contracts, Vol. II. p. 575 (5th paragraph of footnote beginning p. 574). See also *Leask et al v. Dew,* (1905) 102 App. Div. 529, 92 N. Y. Supp. 891.

10. Story, Promissory Notes, p. 562 (footnote 3, paragraph 2); Woods' Byles on Bills & Notes, p. 199; Corbin's Anson on Contracts, p. 481.

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