

RECENT CASE NOTES

ALIENS—DECLARANT'S LIABILITY TO MILITARY SERVICE—CONFLICT OF STATUTE AND TREATY.—The petitioner, a native of Spain, who had declared his intention of becoming a citizen of the United States, was arrested off the coast of Mexico, while returning to Spain, charged with evading the Selective Draft Act. He sued out a writ of *habeas corpus* on the ground that the treaty of 1903 between the United States and Spain exempted him from "compulsory military service." The Selective Draft Act of May 18, 1917, subjected declarant non-enemy aliens to liability to military service. *Held*, that the statute prevailed over the treaty and that the writ must be denied. *Ex parte Larrucea* (1917, S. D. Cal.) 249 Fed. 981.

It is beyond doubt that under the Constitution a statute and a treaty are on a parity and in a judicial proceeding before the courts, if they should conflict, the latest in point of time will prevail. *Cherokee Tobacco Cases* (1870, U. S.) 11 Wall 616; *Head Money Cases* (1884) 112 U. S. 580, 598, 5 Sup. Ct. 247. But this does not necessarily determine the final disposition of the matter, for the alien whose treaty privileges have been impaired or violated by a subsequent municipal statute has available the extraordinary remedy of appeal for diplomatic protection to his national government. That government may then protest to our State Department to obtain recognition for the treaty rights of its subjects or citizens, which, if valid, will hardly be withheld. See COMMENTS (1918) 27 YALE LAW JOURNAL, 683. On a previous occasion (during the Civil War) when Congress subjected declarants who had exercised the voting privilege to liability to military service, the protests of foreign countries were heeded by Congress by extending to the declarant the option of serving or leaving the country within 65 days. 1 Halleck, *Int. Law* (3d ed.) 558. The present Congress has yielded to these protests to the extent of giving neutral declarants, whether citizens of treaty countries or not, the option of serving or of withdrawing their declarations of intention, which shall operate to cancel the declaration of intention and forever to debar them from the privilege of becoming American citizens. Act of August 31, 1918 (Public, No. 210, 65th Cong. sec. 1).

ALIENS—NATURALIZATION—APPLICANT'S VIOLATION OF SUNDAY SALOON LAW.—Prior to October 10, 1915, the municipal authorities of Chicago made no effort to enforce the state law which forbade the opening of saloons on Sunday. The applicant, a saloon-keeper, whose petition for naturalization was filed January 25, 1916, had violated the Sunday closing law until notified that after the date first mentioned the law would be enforced. Thereafter he obeyed it. The naturalization statute provides that it must appear to the court that the applicant, during the five years preceding his application, "has behaved as a man of good moral character" and "well disposed to the good order and happiness of" the United States. *Held*, that the applicant was not entitled to naturalization. *United States v. Gerstein* (1918, Ill.) 119 N. E. 922.

The court argues that a man who knowingly disobeys the law does not behave as a man of good moral character, even though the public sentiment of a large part of the community disapproves the law in question and though the public authorities have not attempted to enforce it. An opposite conclusion was reached in respect to a saloon-keeper in Milwaukee, where the Wisconsin Sun-

day law had been "honored in the breach" for forty years. *In re Hopp* (1910, D. C. Wis.) 179 Fed. 561. The argument advanced in the latter case that the standard of conduct contemplated by the statute does not require the applicant to rise above the level of the mass of the people, is persuasive; yet it is believed that the principal case presents the safer view. It is a dangerous doctrine to admit that good citizens may habitually disregard law. The remedy for an unpopular law is repeal, not violation. But *quaere* whether there might not be a difference according to the character of the law violated—a habitually disregarded traffic ordinance, for instance. In any case, as the court intimates, the applicant has not lost his privilege of citizenship forever. After good behavior for the requisite time he may apply again.

ALIENS—NATURALIZATION—CANCELLATION OF CERTIFICATE FOR FRAUD EVIDENCED BY LOYALTY TO ENEMY COUNTRY OF ORIGIN.—A naturalized American citizen of German origin, having made statements which indicated his attachment and loyalty to Germany rather than to the United States, a proceeding was instituted under section 15 of the Act of June 29, 1906 (34 Stat. L. 601) for the cancellation of his certificate of naturalization on the ground of fraud in its procurement, the applicant's oath at the time of naturalization to the effect that he "absolutely and entirely" renounced and abjured all allegiance to any foreign sovereignty and particularly to the Emperor of Germany having been false. *Held*, that the certificate of naturalization was obtained by fraud and must be cancelled. *United States v. Wursterbarth* (1918, N. J.) 249 Fed. 908.

A similar holding was made in *United States v. Darmer* (1918, W. D. Wash.) 249 Fed. 989. A certificate of naturalization is not only an evidence of citizenship, but, emanating from the judicial department of the government, it is also the evidence of a judgment. Attorney-General Ackerman erroneously held that it was a judgment binding only on parties and their privies; hence that the United States was not concluded by a fraudulent certificate of naturalization (1871) 13 Op. Atty. Gen. 376. The true ground is rather that a judgment *in rem* may be attacked for fraud, or that, being an *ex parte* proceeding, the United States is not concluded by the certificate granted. *Johannessen v. United States* (1911) 225 U. S. 227, 237, 32 Sup. Ct. 613. Even before the Act of Congress of June 29, 1906, which for the first time gave statutory power to the Department of Justice to institute direct proceedings for the cancellation of fraudulently obtained certificates of naturalization, it had been held that only the United States and not a State or private parties could impeach the record of naturalization. *United States v. Norsch* (1890, C. C., E. D. Mo.) 42 Fed. 417; *Petersen v. State* (1905, Tex.) 89 S. W. 81 (State cannot); *Commonwealth v. Paper* (1868, Pa.) 1 Brewster 263, 267 (private individuals cannot). Section 15 of the Act of 1906 has been held by the Supreme Court to be retroactive. *Johannessen v. United States*, *supra*; *Luria v. United States* (1913) 231 U. S. 9, 34 Sup. Ct. 10. It therefore covers the case of individuals who, like the defendant in the principal case, were naturalized prior to its passage. The Department of Justice has limited its proceedings under the statute to cases in which it seemed that the result of the suit would benefit the citizenship of the country. The Department's Circular letter No. 107 of Sept. 20, 1909, reads in part: "The legislation referred to, being retroactive, is construed to be remedial rather than penal in its nature; for the protection of the body politic rather than for the punishment of the individual concerned." Most of the proceedings instituted under the Act have involved clear cases of fraud on the part of the applicant, usually false allegations under oath as to the length of his residence in the United States, or as to other essential facts. *United States v. Mansour* (1908, S. D. N. Y.)

170 Fed. 671; *United States v. Albertini* (1913, Mont.) 206 Fed. 133. But the statute itself provides that certain acts subsequent to naturalization shall be construed as *prima facie* evidence that the naturalization was obtained in bad faith, *e. g.*, proceeding abroad within five years after naturalization to take up a permanent residence there. So it seems reasonable that clear evidence afforded by subsequently spoken words of the falsity of the oath renouncing allegiance to a foreign sovereign, an essential condition of naturalization, proves fraud in obtaining citizenship. To determine a person's state of mind at a given time, it is proper to consider subsequently spoken words or evidence of a subsequent state of mind. *Waterman v. Whitney* (1854) 11 N. Y. 157. Wigmore, *Evidence*, sec. 233. Although 36 and 30 years respectively had elapsed since the naturalization of the defendants in the principal case and the other recent case which accords with it, it is not unreasonable to suppose, said the court, that the attachment to the native country, only now openly avowed, was stronger at the time of naturalization than now. Provided the evidence of alien loyalty is convincing, it is not unfair to conclude that the mental reservation thereof at the time of naturalization, though latent and not manifested for many years, falsified the oath by means of which the certificate of naturalization was secured, and constitutes that fraud which justifies cancellation proceedings.

ARMY AND NAVY—CRIMINAL OFFENSES—IMMUNITY OF NAVAL DISPATCH DRIVER VIOLATING STATE SPEED LAW BY ORDER OF SUPERIOR OFFICER.—A criminal complaint was brought against the defendant for violating the automobile speed law of Rhode Island, and the following question of law was certified to the State Supreme Court: "Is a man of the U. S. Naval Reserve Force, on duty as a dispatch driver, amenable to the provisions of [the state motor vehicle law] while acting under specific instructions of his superior officer to proceed in a motor vehicle with all possible dispatch along one of the highways of the state, which instruction said man was obliged to obey, which instruction was assumed by said officer to necessitate the violation by said man of the speed laws of the state, and which instruction was given by said officer in a matter deemed by him to be of urgency and appertaining to the conduct of the war between the United States and Germany?" *Held*, that the question should be answered in the negative. *State v. Burton* (1918, R. I.) 103 Atl. 962.

See COMMENTS, p. 61.

BILLS AND NOTES—HOLDER IN DUE COURSE—USURY AS DEFENSE.—The defendant executed a promissory note for \$2,100, payable to the order of one F, and delivered it to the latter as his agent for the purpose of having it discounted. F sold it to the plaintiff for \$1,850, endorsing it and delivering it in the usual way. To a suit on the note the defendant pleaded usury. *Held*, that the plaintiff, although a holder in due course, was not entitled to recover. *Sabine v. Paine* (1918, N. Y.) 119 N. E. 849.

Whether usury is a mere personal defense not available against a holder in due course, or an absolute defense good against everyone, depends upon the usury statute of the particular jurisdiction concerned. The present case is of interest because it settles apparently for the first time the effect of the uniform Negotiable Instruments Law upon the usury law of New York in force at the time of its passage. That law expressly declared that all "bonds, bills, notes . . . tainted with usury" were void and that upon proof of the facts "the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and cancelled." General Business Law (N. Y.

Cons. Laws, ch. 20) secs. 370, 371, 373. The present case holds that the later enactment of section 96 (New York numbering) of the N. I. L. (section 57 of the original N. I. L.) did not effect the repeal of this usury law, in spite of the fact that section 96 provides that "the holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves." Earlier cases in the lower courts of New York were conflicting, but a large majority of the judges of the Court of Appeals had in *dicta* expressed themselves in accordance with the decision now reached. For the earlier cases see Norton, *Bills and Notes* (4th ed.) 304, note 64, and the opinion of the Appellate Division in the principal case (1915) 166 N. Y. App. Div. 9, 151 N. Y. Supp. 735.

CONFLICT OF LAWS—EXTRATERRITORIAL STATUTES—NEW YORK ACTION FOR DEATH CAUSED IN MASSACHUSETTS.—A resident of New York was negligently killed in Massachusetts by a New York corporation's servant who was acting within the scope of his employment. The administrators of the deceased sued the corporation in New York for the benefit of the widow and children, claiming to be entitled to recover according to the terms of the Massachusetts statute relating to wrongful killing. The statute in question provided that the damages should be "assessed with reference to the degree of culpability" of the defendant or (in this case) its servant, rather than according to the loss suffered by the widow and children, differing in this respect from the New York statute. *Held*, that the plaintiffs were entitled to recover in accordance with the terms of the Massachusetts statute. *Loucks v. Standard Oil Co. of New York* (1918, N. Y.) 120 N. E. 198.

See COMMENTS, p. 67.

CONTRACTS—ANTICIPATORY BREACH—WAIVER OF REPUDIATION.—The plaintiff had contracted with the defendant to deliver a quantity of merchandise in installments, each to be paid for within thirty days after its delivery. After the second delivery the plaintiff repudiated; the defendant repeatedly tried, in vain, to induce the plaintiff to continue performance. When payment on the second delivery came due, the defendant refused to pay unless the plaintiff would go on with his contract. Relying on the defendant's actions as first a waiver of the repudiation, and then a breach of the contract, the plaintiff sued to recover the price of the goods delivered. The defendant counterclaimed for damages arising from the repudiation. *Held*, that the conduct of the defendant was not such a "waiver" as a matter of law, and that the plaintiff's repudiation was a "continuing breach of which the defendant was at liberty to avail at any time during its continuance." *Hadfield v. Colter* (1918, App. T.) 170 N. Y. Supp. 643.

Repudiation is a communication by a promisor to a promisee of intention not to perform further. Its legal effect is to give the promisee (1) a privilege and power to create in himself a right to damages for breach of the entire contract, by accepting the repudiation as final, before it is withdrawn. *Kadish v. Young* (1883) 108 Ill. 170; *Rochm v. Horst* (1899) 178 U. S. 1, 20 Sup. Ct. 780. It gives the promisee also (2) a privilege and power to elect not to exercise this power to accept the repudiation; and thereby—subject to the rules on wilfully increasing damages—to nullify it, leaving the contract "open": i. e., restoring the duties of both parties to full effect, and making the promisee himself liable, as originally, for any future default. *Johnstone v. Milling* (1886, C. A.), 16 Q. B. D. 460; *Claes etc. Mfg. Co. v. McCord* (1896) 65 Mo. App. 507. This is a "waiver" of the repudiation. But (3) the promisee is also privileged by the

repudiation to take, without prejudice to his rights or power, a reasonable time within which to make his election. This is the holding in the principal case. And the opinion properly stresses that the exercise of this privilege must not, until the expiration of that reasonable time, be confused with an election *not* to accept the repudiation. If there had been no repudiation by the plaintiff here, such a failure as the defendant's, to perform an installment or a part of the contract which went to the root of the contract, would have given the plaintiff (a) a right to damages for breach of the installment—see *Gerli v. Poidebard Co.* (1895, Ct. Er.) 57 N. J. L. 432, 31 Atl. 401—and (b) a privilege of refusing further performance himself, together with a right to damages for breach of the entire contract,—*National Machine & Tool Co. v. Standard, etc., Co.* (1902) 181 Mass. 275, 63 N. E. 900—and finally, (c) a privilege and power to waive (b) without affecting (a). *Garfield, etc., Coal Co. v. Fitchburg Ry. Co.* (1896) 166 Mass. 119, 44 N. E. 119; see Pollock, C. B., in *Hoare v. Rennie* (1859, Ex.) 5 H. & N. 19. What effect did the plaintiff's prior repudiation have on the above? The defendant and the court assumed—and it is believed, properly,—that repudiation did not affect (a): the defendant's duty to make up in damages for failure to pay the price of the *installment* of goods delivered and accepted. But the prior repudiation was rightly held to keep the consequence (b) from attaching to the defendant's refusal to perform his installment during the reasonable time described above under (3): that is, he did not, while deciding whether to accept the unwithdrawn repudiation or to reject it definitely, become liable for breach of the contract as a whole by his holding up temporarily a payment which he was ready to make, if the plaintiff should decide to go ahead with the contract. This is sound sense and sound law. See *Sperry & Hutchinson Co. v. O'Neill-Adams Co.* (1911, C. C. A. 2d) 185 Fed. 231; *contra Zuck v. McClure* (1881) 98 Pa. 541, *semble*. It is submitted, moreover, that the court properly decided that the efforts of the promisee to induce the promisor to revoke his repudiation constituted no "waiver," and in no way altered the above operative effects of that repudiation. Cf. *Sperry & Hutchinson Co. v. O'Neill-Adams Co.*, *supra*.

CONTRACTS—OPTIONS—"DOUBLE OPTIONS."—Mrs. S. for valid consideration made an agreement with one C. regarding certain of her real estate, "meaning thereby to give to the said A. R. Carrano the option upon the purchase of said property [at an agreed price] if the said parties of the first part [Mrs. S. and son] at any time desire to sell said property." Mrs. S. brought suit nine years later to have the agreement cancelled and her property freed from any incumbrance by reason thereof. *Held*, that the agreement, a "double option," under which the plaintiff might elect to sell or not to sell, be cancelled, as after nine years it was to be presumed that she had elected not to sell at the price. *Saraceno v. Carrano* (1918) 92 Conn. 563, 103 Atl. 631.

See COMMENTS, p. 65.

COURTS—ADVISORY OPINIONS OF JUDGES—NECESSITY OF ACTUAL LITIGATION.—The State Industrial Commission of New York, being in doubt whether it had power to adopt and put into execution a certain resolution, certified the question of power to the Appellate Division. The Appellate Division, acting under what it believed to be a duty imposed upon it by the state statutes, answered the question in the affirmative. Certain persons who had been permitted to intervene and file briefs as interested parties asked for leave to appeal to the Court of Appeals. This leave was granted. *Held*, that the Appellate Division was not

authorized to give the advisory opinion. *In re Workmen's Compensation Fund* (1918, N. Y.) 119 N. E. 1027.

The decision is based primarily upon the ground that, under the correct reading of the statute concerned, the Industrial Commission could certify questions of law to the Appellate Division only when they were incidental to a pending controversy with adverse parties litigant. The larger part of the admirably brief and concise opinion of Cardozo, J., is devoted to a review of the authorities and discussions relating to advisory opinions, and follows what may be called the orthodox view, viz., that the legislature cannot, in the absence of express constitutional authority, impose upon the courts the non-judicial function of answering questions of law apart from actual litigation. In justification of this view the opinion says: "The proposed resolution may be valid as to some . . . and invalid as to others. We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait until it arises." The point of view of the common law lawyer has perhaps never been better expressed. Whether this system has given results as excellent as past generations of lawyers would have us believe may be open to question, but that it is our system is beyond dispute. The arguments in favor of calling upon the American judiciary for advisory opinions on constitutional questions, as well as the history of the subject, are fully presented by Professor Albert R. Ellingwood of Colorado College in his recent book, *Departmental Co-operation in State Government*, a review of which will appear in the December issue of the YALE LAW JOURNAL.

HUSBAND AND WIFE—SEPARATION AGREEMENTS—EFFECT OF SUBSEQUENT MISCONDUCT BY WIFE.—A husband and wife agreed to live apart, the husband promising to pay the wife for her support a definite sum weekly. Subsequently the wife committed adultery and the husband refused to make payments falling due thereafter. The wife sued to recover such payments. *Held*, that the misconduct of the wife was a defense to the suit. *Devine v. Devine* (1918, N. J. Ch.) 104 Atl. 370.

On the same facts the English courts permit a recovery. *Jee v. Thurlow* (1824, K. B.) 2 B. & C. 547; *Sweet v. Sweet* [1895] 1 Q. B. 12. The New Jersey court gives two reasons for holding the New Jersey law to be different from the English law. One is that in England agreements of this kind are prepared by skilled solicitors who embody *dum casta* clauses in the agreements, so that omission of a clause of that kind may well be held to signify that the husband agrees to pay even though the wife misconduct herself. The other reason is that a separation agreement has under New Jersey law legal effects which differ in important respects from its effects under English law. According to the latter the separation agreement is a contract with all the usual legal consequences. *Besant v. Wood* (1878) 12 Ch. D. 605, and cases there cited. According to the New Jersey law, however, while such an agreement confers upon each of the parties a legal privilege to live apart from the other, thus putting an end to the previously existing legal duty to live with the other, it is, nevertheless, "revocable," i. e., the legal privilege of each is subject to a legal power in the other to terminate the privilege by suitable notice and so to bring into existence again a duty to live with the other spouse. This rule apparently has been adopted in New Jersey on the ground that it is contrary to public policy to give to the separation agreement the consequences attached by English law. It follows that the agreement of the husband to make the stipulated weekly payments has legal effects comparable to those resulting from a continuing offer, revocable

at will; *i. e.*, it confers upon the wife a legal power to acquire, by continuing to live apart and to perform the other parts of the agreement as well as her duties growing out of her status as a married woman, a legal right to the payment for that week. There is, of course, a correlative liability on the part of the husband, so long as he does not revoke, to have the correlative duty to pay imposed upon him by the wife's so acting. However, as in the case of the offer, the power of the wife is subject to a power of revocation in the husband, *i. e.*, the husband may at any time by proper notice terminate it. There exists, therefore a correlative liability on the part of the wife to have her power destroyed by the husband; her power is not accompanied by an immunity from destruction, as it would be under the English law. Apparently most American courts assume that these separation agreements result in contractual obligations, if one may judge from the tenor of the opinions, but the point actually decided usually is merely that the wife may recover installments past due—a result also reached on the New Jersey theory. It should be noted that the decision reached in the principal case can quite as easily be arrived at by regarding the separation agreement as an irrevocable contract, on the ground that the resulting contractual obligation of the husband to make the payments is conditional upon the continued good conduct of the wife. Upon this ground the court in *Roth v. Roth* (1912, Co. Ct.) 138 N. Y. Supp. 573, on similar facts reached the same result as that in the principal case.

INSURANCE—RIGHTS OF BENEFICIARY—LIMITATIONS ON POWER TO CHANGE BENEFICIARY.—The defendant company issued an insurance policy upon the life of John Neary, whose wife, the present plaintiff, was named as beneficiary. The policy provided that the insured might change the beneficiary by written notice accompanied by the policy, the change to be effective upon indorsement thereof on the policy by the company. John Neary later sent written notice of a change to the company and the company assented and noted the change in its books. No indorsement was made on the policy because it was in the plaintiff's possession. The plaintiff paid all the premiums, including one after the attempted change, and at no time was informed of the change. *Held*, that no change had been effected and that the plaintiff was entitled to the insurance money. Wheeler, J., *dissenting*. *Neary v. Metropolitan Life Ins. Co.* (1918) 92 Conn. 488, 103 Atl. 661.

The majority opinion holds that the existing facts created a "legal interest" in the first beneficiary and not a "mere expectancy," even though the interest was "qualified" by the reserved power to change, and that there was no power to change except by proceeding as prescribed in the policy. If facts create nothing more than an "expectancy," they create nothing at all other than a state of mind. An "expectancy" involves no legal relations whatever. The term "legal interest," however, indicates that legal relations exist. In the absence of any reserved power in the insured, those legal relations seem to be as follows. The beneficiary has what is usually called a "conditional right" against the insurer, and the insured has no power (*i. e.* he has a disability) to terminate this right by any purely voluntary act of his own. The beneficiary has no active and instantly enforceable right against the insurer (except perhaps a right that the insurer shall not repudiate); but nevertheless the conditional right when accompanied by the disability is an interest that is much more than a mere "expectancy." In the principal case, however, there was no such disability. The insured having reserved the power to change, the beneficiary had a liability that her conditional right might be extinguished. Where the power to change is reserved the intention seems to be to make the beneficiary's future

right dependent upon the will of the insured, and no particular importance should ordinarily be given to the method of expressing his will and of exercising his power to change the beneficiary, at least so far as a mere donee is concerned. In the present case the beneficiary is more than a mere donee, having paid the premiums. A substantial change of position like this is often held to be an operative fact terminating legal powers previously existing, and it was here properly held to limit the power of the insured so that it could thereafter be exercised only in the exact method prescribed in the policy. A mere quasi-contractual right to the return of the premiums paid would not satisfy the average man's sense of justice. The question is one of policy to be solved by an appeal to the prevailing *mores*, and not merely by logic and the use of such terms as "vested interest." See the discussion of a similar case in (1918) 27 YALE LAW JOURNAL, 957.

JOINT TORTFEASORS—RELEASE OF ONE RESERVING RIGHTS AGAINST THE OTHER.—The plaintiff, who was injured through the joint negligence of the defendant and a railroad company, covenanted for a consideration not to sue the railroad. The instrument expressly reserved the right to proceed against the defendant, and stated that it was executed not in full settlement of the entire cause but only as "a mere quitclaim" in so far as the cause related to the railroad. *Held*, that this agreement did not bar suit against the defendant. *Berry v. Pullman Co.* (1918, C. C. A. 5th) 249 Fed. 816.

At common law a technical release of one joint tortfeasor operated to release the others as well. *Cocke v. Jennor* (1614, K. B.) Hob. 66; *Gunther v. Lee* (1876) 45 Md. 60. The rule is logically indefensible. When two defendants together violate the plaintiff's primary rights, the law gives him a secondary right to damages against *either*. He can have only one satisfaction; but release of the one tortfeasor is an election to seek that satisfaction from the other. There is no logic to make such election release both. See 2 Wigmore, *Select Cases on Torts*, 866. The rule is also inconvenient and unjust; and it shackles compromise. Nevertheless, it became firmly fixed in the law. *Seither v. Philadelphia Traction Co.* (1889) 125 Pa. 397, 17 Atl. 338; *Carpenter v. McElwain* (1916, N. H.) 97 Atl. 560 (*semble*). The cure was found in the covenant not to sue, which was a personal agreement without effect upon the cause of action, although to prevent circuitry of action it was recognized to bar suit against the covenantor. *Hutton v. Eyre* (1815, C. P.) 6 Taunt. 289; *Duck v. Mayeu* [1892] 2 Q. B. 511. Some confusion exists when, as frequently happens, the instrument purports to "release" one tortfeasor, but "reserves all rights" against the other. If the word "release," or the fact of discharging the one, is held technically operative to release the other, the reservation must be void for repugnancy; and so some courts hold. *Abb v. Northern Pac. Ry. Co.* (1902) 28 Wash. 428, 68 Pac. 954. The saner view is to construe the instrument as a whole, inquiring especially whether the consideration given for its execution was or was not accepted by the plaintiff as a complete satisfaction of his damages. If his expressed intent was to reserve his right of action against the other wrongdoer, that intent should rule, and the instrument be given the effect of a covenant not to sue. Many courts have so held. *Dwy v. Connecticut Co.* (1915) 89 Conn. 74, 92 Atl. 883; *Smith v. Dixie* (1913) 128 Tenn. 112, 157 S. W. 900; *Edens v. Fletcher* (1908) 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618 and note. This is the doctrine applied in the principal case, despite the use of the technical word "quitclaim" in the plaintiff's settlement with the railroad. Against this more liberal view the argument has been advanced that permitting individual settlements may open the way to obtaining satisfaction beyond the amount of

the damage suffered. *McBride v. Scott* (1903) 132 Mich. 176, 93 N. W. 243. This seems scarcely tenable; for anything received by the plaintiff in satisfaction will reduce *pro tanto* his recovery against the other defendants. 34 Cyc. 1089. Hence a satisfaction complete in fact will bar suit against any. *Johnson v. Von Scholly* (1914) 218 Mass. 454, 106 N. E. 17; *Wagner v. Chicago, etc. Ry. Co.* (1914) 265 Ill. 245, 106 N. E. 809. All the above discussion is to be taken with due regard to means of proving intention expressed in writing; for instance, to the conclusiveness of recitals under seal. See *Johnson v. Von Scholly*, *supra*. For discussion of the effect of releasing one joint tortfeasor against whom the other has a claim for indemnity, see COMMENTS (1915) 24 YALE LAW JOURNAL, 505.

NEGLIGENCE—VIOLATION OF TRAFFIC LAW NOT NEGLIGENCE PER SE.—The Traffic Act of New Jersey, Pub. L. 1915, ch. 156, sec. 2 (6), provides that "a vehicle turning into another road to the left, shall, before turning, pass, when possible, to the right of and beyond the center of the intersection of the two roads." The defendant in his automobile turned a corner without complying with the above directions, and collided with and injured the plaintiff on his motorcycle. The lower court directed a verdict for the plaintiff on the ground that such non-compliance constituted *per se* a tortfeasance, and the defendant appealed. *Held*, that the direction of a verdict was error, since the violation of the traffic law by the defendant was only one element to be left with the others to the jury. *Winch v. Johnson* (1918, N. J. Ct. Er.) 104 Atl. 81.

The Traffic Act further provides, sec. 4 (1), for right of way at an intersection to the vehicle approaching from the right. The plaintiff, who desired to turn off, gave the proper statutory signals; the defendant, who had the right of way, failed to slow down from some 25 miles an hour, and a collision of the automobiles resulted. The plaintiff recovered judgment. *Held*, that the judgment was correct, since the right of way conferred by the statute was not absolute, with a *dictum* that compliance with the Traffic Act did not *per se* relieve a man of the common law duty to observe existing conditions and guide his machine accordingly. *Paulsen v. Klinge* (1918, N. J. Sup. Ct.) 104 Atl. 95.

The express "when possible" provision of the statute in the *Winch Case* merely gives legislative sanction to results very generally reached even without such provision. See *Temple v. Walker* (1917, Ark.) 192 S. W. 200; *Heryford v. Spitcaufsky* (1917, Mo. App.) 200 S. W. 123. But the effect in law of rules of the road is neither uniform, nor, it would seem, wholly settled. It seems clear that they free the driver of a vehicle from having to look out for violation of them under pain, in case of collision, of being held negligent: so as to render him liable as a defendant, or to bar his action as a plaintiff. *Ballard v. Collins* (1911) 63 Wash. 493, 115 Pac. 1050 (plaintiff); see *Cook Brewing Co. v. Ball* (1899) 22 Ind. App. 656, 665; 52 N. E. 1002, 1004 (defendant). It is clear on the other hand that observance of those rules does not in itself relieve a defendant of liability for collision, nor, it would seem, prove a plaintiff free from contributory negligence. *Erwin v. Traud* (1917, N. J. Ct. Er.) 100 Atl. 184, L. R. A. 1917 D, 690 and note. Despite the language of some courts in special circumstances, as in *Freeman v. Green* (1916, Mo. App.) 186 S. W. 1166, it seems also clear both that non-compliance with road regulations is not negligence *per se*, but may be excused by circumstances, and that the last clear chance doctrine applies to both plaintiff and defendant. See cases cited (1913) 41 L. R. A. (N. S.) 322, 337, 346. In Colorado, indeed, the plaintiff's failure to keep a lookout for a vehicle which had the right of way seems to have been held *per se* contributory negligence. *Livingston v. Barney* (1917, Colo.) 163

Pac. 863. But it is believed that the plaintiff's position should be governed as to negligence *per se* by the same principles which in the *Winch Case* and the mass of authorities are applied to the defendant. In the case of speed laws, too, either the statutes or the courts generally make allowance for varying conditions of traffic in determining the violation of their letter to be negligence. *Irwin v. Judge* (1909) 81 Conn. 492, 71 Atl. 572. But where exceeding the speed limit is itself shown to have been the proximate cause of the damage, Minnesota has held such violation to be negligence *per se*. *Riser v. Smith* (1917, Minn.) 162 N. W. 520. It is believed that the better rule considers the fact of the violation of such a law or ordinance to raise a presumption of negligence, sufficient to cause a directed verdict in the absence of any other showing, but rebuttable. *Hartje v. Moxley* (1908) 235 Ill. 164, 85 N. E. 216 (by statute as to motor vehicles). And it is believed that the language of other courts which seem to hold such violation to be negligence *per se* would and should be read in proper circumstances to accord with the rule here suggested. Cf. *National Casket Co. v. Powar* (1910) 137 Ky. 156, 125 S. W. 279. That rule makes due allowance for variation of circumstances, while enforcing a presumption which fits the thinking of the people at large. A similar presumption has been occasionally enforced in rule of the road cases. *Buxton v. Ainsworth* (1904) 138 Mich. 532, 101 N. W. 817. It is submitted that sound growth of the law calls for violation of such road laws, instead of being merely one fact sufficient to go to the jury and to sustain a verdict, to be held broadly to raise a rebuttable presumption of negligence or contributory negligence in the violator. Tested by this the rule in *Paulsen v. Klinge* is wholly satisfactory; also that in *Winch v. Johnson*, so far as that case refuses to hold the defendant's conduct negligence *per se*; but that decision may, it is believed, be properly criticized for failure to raise the presumption here suggested.

TAXATION—INHERITANCE AND TRANSFER TAXES—TAX ON POWER OF APPOINTMENT EXERCISED BY DEED.—A testator who died in 1876, before any statute imposed an inheritance or transfer tax, devised real estate in New York City, giving to his son a life estate, with power to appoint in fee by deed or will to his issue or to his sisters or their issue, and limiting the remainder in case of a failure to appoint, to the son's issue or, in default of issue, to his sisters. In 1911 the son exercised the power of appointment and conveyed the property, including his own life estate, to his sisters in different proportions and interests. They immediately took possession. Three years later the son died, and proceedings were instituted to levy a tax upon his estate in respect to these lands, pursuant to section 220 of the New York Transfer Tax Law. The Surrogate confirmed a tax based upon the value of the lands at the date of the conveyance less the value of the son's life estate therein. The Appellate Division reversed this decision. *Held*, that the exercise of the power of appointment was taxable under the statute and that such a tax was constitutional. *In re Wendel's Estate* (1918, N. Y.) 119 N. E. 879.

Under the legislation of some of the states the creation of a power of appointment by the donor rather than its exercise by the donee is regarded as the act which effects a taxable transfer. *Kansas v. U. S. Trust Co.* (1917) 99 Kan. 841, 163 Pac. 156; see Ross, *Inheritance Taxation*, 106. But New York and certain other states have legislated upon the opposite theory. The principal case presents for the first time to the New York Court of Appeals the important question whether an appointment by deed not made in contemplation of death is a taxable transfer. The initial inquiry is, of course, one of construction of the statutory language. The sixth subdivision of section 220 of the Transfer Tax

provides that "whenever any person or corporation shall exercise a power of appointment . . . such appointment when made shall be deemed a transfer taxable . . . in the same manner as though the property [appointed] belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." This language, the court holds, since not limited to a particular form of transfer, must be given its ordinary meaning which includes an appointment by deed as well as one by will—particularly since a corporation, which is obviously contemplated as a possible donee of a power of appointment, cannot act by will. The argument for a more limited construction had prevailed below. *In re Wendel's Estate* (1917, App. Div.) 168 N. Y. Supp. 297. The second inquiry involves the constitutionality of such a tax. The validity of a tax upon the execution of a power of appointment by will had long been established. *Chanler v. Kelsey* (1907) 205 U. S. 466, 27 Sup. Ct. 550. Clearly it is as much the exercise of a power to appoint by deed as it is to appoint by will, and no valid constitutional objection exists to taxing such a power. It should be noted, however, that where the execution of the power of appointment does not pass to the persons in whose favor it is exercised more than they would take under the will of the donor of the power in default of an appointment, the property, for purposes of the transfer tax, is deemed to pass under the will of the donor. *Matter of Lansing* (1905) 182 N. Y. 238, 74 N. E. 882; *In re Chauncey's Estate* (1918, Surr. Ct.) 168 N. Y. Supp. 1019. But cf. *Minot v. Stevens* (1911) 207 Mass. 588, 93 N. E. 973. In the principal case the sisters acquired by the exercise of the power of appointment a different title than they had under the will of the donor.