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ADVERSE POSSESSION—COLOR OF TITLE—DEED COLOR OF TITLE ALTHOUGH KNOWN NOT TO CONVEY TITLE.—In a suit for trespass the land which the plaintiff claimed to own was in part occupied by plaintiff's church building and the adjoining lot was used by the members of the church for hitching their horses and for picnics, etc. Both tracts had been so used by the plaintiff for twenty-five years or more. The land was conveyed by A to plaintiff, by deed recorded, describing the land purported to be conveyed. The defendant claimed that the deed did not operate as "color of title" because the plaintiff knew that the title was not in A and because the deed was executed after the church had taken possession of the land. *Held*, one justice dissenting, defendant liable, as the deed to plaintiff was sufficient to constitute "color of title." *Shutt et al.* v. *Methodist Episcopal Church* (Ky. 1920), 218 S. W. 1020.

In the absence of any express statutory requirement, it is not essential to the acquisition of title to land actually occupied by adverse possession that the possession should be held under "color of title." *Probst* v. *Mission Board Presb. Ch.*, 129 U. S. 182; *Pearson* v. *Adams*, 129 Ala. 157; *Horner* v. *Reuter*, 152 Ill. 106; *Crary* v. *Goodman*, 22 N. Y. 170. However, the courts have often included this so-called requirement in the elements of adverse possession. *Ewing* v. *Burnet*, 11 Pet. 52. It seems, however, that this is due to a confusion of "claim of title" with "color of title," or to a reference to the sufficiency of evidence to show that the possession of the claimant was in fact adverse. 2 ENC. L. & P. 501. The mere term itself, adverse possession, implies that there must be a "claim of title" by the claimant, else the holding is not adverse. If this distinction be correct the statements of the courts requiring "color of title" seem to be nothing but dicta. However, it is undoubtedly the rule that one must claim under "color of title" in order to acquire property by constructive adverse possession. *Barr* v. *Gratz*, 4 Wheat. 224; *Tracy* v. *Norwich*, 39 Conn. 382; *Boynton* v. *Hodgdon*, 59 N. H. 247. But the court held, and rightly it seems, that in the principal case the adjoining lot was actually in the possession of the plaintiff as it was used during the statutory time for purposes of the church. Aside from this, however, the claim of defendant is not justifiable. A deed to confer "color of title" need not be valid. In fact, it cannot be valid, else a valid title will be passed. Color of title may be defined as that which in appearance is title, but which in reality is not title. *U. S.* v. *Casterlin*, 164 Fed. 437; *Miller* v. *Clark*, 56 Mich. 337; *Whitcomb* v. *Provost*, 102 Wis. 278. Whenever an instrument by apt words in form passes what purports to be a title it gives color of title. *Hall* v. *Law*, 102 U. S. 466; *Green* v. *Horn*, 112 N. Y. S. 993. However, an instrument creating an equitable interest does not confer color of title. *Faith* v. *Yocum*, 51 Ill. App. 620. There is a conflict of authority as to whether the claim must be based on a writing. Georgia, Indiana, Missouri, and North Carolina have held that a writing is not necessary, while Iowa, Mississippi,

and Pennsylvania hold that color of title may arise from an act *in pais* without a writing. As to the necessity of good faith on the part of the claimant in his "color of title," the better doctrine seems to be in accord with the view taken by the majority of the court in the principal case; this is, that good faith is not required. 2 ENC. L. & P. 527; *Latta* v. *Clifford*, 47 Fed. 614; *Lee* v. *O'Quin*, 103 Ga. 355; *McCann* v. *Welch*, 106 Wis. 142. Contra: *Burns* v. *Edwards*, 163 Ill. 494; *Green* v. *Kellum*, 23 Pa. St. 254, and the cases cited by the dissenting justice in the principal case on page 1022. Statutes in some states require the element of good faith in such claims. *May* v. *Sutherlin*, 41 Wash. 609. Furthermore, the court seems to be correct in their holding that since the plaintiff's possession continued for more than the statutory period, it is immaterial that the original entry was not made under the deed. 2 C. J., Sec. 401, p. 198; *Hawkins* v. *Richmond Cedar Works*, 122 N. C. 87; *Ege* v. *Medlar*, 82 Pa. St. 98. See also 7 MICH. L. REV. 253; 10 MICH. L. REV. 51; 14 MICH. L. REV. 338.

[1]BANKRUPTCY—ACTS OF BANKRUPTCY—ADMISSION OF INABILITY TO PAY DEBTS, ETC.—Under authority from the directors a clerk of a corporation wrote a letter stating "* * * The only course open to the non-attaching creditors is to bring involuntary proceedings in bankruptcy, and the company will admit its insolvency, and its willingness to be adjudged bankrupt on that ground." In involuntary bankruptcy proceedings this was counted upon as the necessary act of bankruptcy. *Held*, not sufficient under Bankruptcy Act, § 3a (5). *In re Standard Shipyard Co.* (D. C., Maine, 1920), 262 Fed. 522.

It would seem that since the amendment allowing corporations to become voluntary bankrupts there would not be much occasion to rely on this act of bankruptcy. See *In re C. Moench & Sons Co.*, 130 Fed. 685. The provision in § 3a (5) is such that, taking into account the marked disposition of the courts to require a quite literal compliance therewith, about the only occasion when a commission of that particular act of bankruptcy could be shown would be when the proceedings were essentially voluntary. Now that corporations also are allowed to initiate bankruptcy proceedings, the direct course would seem ordinarily preferable to the indirect. The principal case follows *In re Baker-Ricketson Co.*, 97 Fed. 489. When proceedings are based on § 3a (5) solvency or insolvency is not a material matter. *In re McNally Co.*, 29 Am. B. R. 772; *Matter of Cohn*, 227 Fed. 843; *In re Dressler Producing Corp.*, 262 Fed. 257 (1919). Compare *Maplecroft Mills* v. *Childs*, 226 Fed. 415, 14 MICH. L. REV. 338, where is considered the somewhat analogous question whether, under the last part of § 3a (4) making it an act of bankruptcy if "because of insolvency a receiver or trustee has been put in charge," etc., actual insolvency must be shown. To constitute the act of bankruptcy under cl. (5), however, there must be an admission in writing of "inability to pay his debts." As to whether "inability to pay his debts" is equivalent to "insolvency" as defined in the Bankruptcy Act is a question which may well be considered. If Congress meant *insolvency*, why did it not use that word, one that is used so frequently and has such a well-defined meaning in the Act?

BANKS AND BANKING—LIABILITY OF BANK COLLECTING COMMERCIAL PAPER FOR ACTS OF CORRESPONDENT.—The plaintiff deposited for collection, four drafts with bills of lading attached, in the Wisconsin National Bank, at Milwaukee. The same were forwarded to the defendant bank, correspondent in Ashtabula, Ohio, which bank held them without demanding payment from the drawee or making any report, until the corn deteriorated in value, and the consignee then refused to accept it. The plaintiff consignor sued the negligent correspondent bank. *Held,* that the receiving bank, alone, is liable to the plaintiff for all the negligence and default of correspondent banks, since it acts as an independent contractor in making collections and is liable for the negligence of its agents. Therefore, the defendant correspondent bank cannot be sued by the plaintiff. *Taylor & Bournique Co.* v. *National Bank of Ashtabula* (D. C., N. D. Ohio, E. D. 1919), 262 Fed. 168.

The conflict still remains in the law between the so-called "New York rule" and the "Massachusetts rule" as to the liability of the receiving collecting bank for the negligence and default of its correspondent in collecting out of town collections. Under the "New York rule," the bank with which the collections are deposited is liable for the negligence or default of any agents which it may select for the purpose of collecting such items. *Commercial Bank* v. *Union Bank,* 11 N. Y. 203; *National Revere Bank* v. *National Bank of Republic,* 172 N. Y. 102; *Martin* v. *Hibernia Bank,* 127 La. 301; *Simpson* v. *Waldby,* 63 Mich. 439; *Sagerton Hdw. Co.* v. *Gammer Co.* (Tex. Civ. App.), 166 S. W. 428; *Pickney* v. *Kanawha Valley Bank,* 68 W. Va. 254; *Hoover* v. *Wise,* 91 U. S. 308; *Exchange National Bank* v. *Third National Bank,* 112 U. S. 276. The "Massachusetts rule" holds that where a collecting bank uses due care in selecting competent and worthy agents, its duty is done, and such correspondent banks become the agents of the depositor. *Fabens* v. *Mercantile Bank,* 23 Pick. (Mass.) 330; *Lord* v. *Hingham National Bank,* 186 Mass. 161; *Brown* v. *People's Savings Bank,* 59 Fla. 163; *Stacy* v. *Dane County Savings Bank,* 12 Wis. 702. For a list of states and the rule which they follow, see 5 MICH. L. REV. 109; 52 L. R. A. (N. S.) 608; 7 C. J. 606-7. In the principal case a situation arose, such that the plaintiff contended that the Wisconsin law prevailed, since the draft was deposited for collection in Wisconsin, while the defendant claimed that the Ohio law prevailed, since the collection was to take place in Ohio. Inasmuch as Ohio follows the "New York rule," *Reeves* v. *State Bank,* 8 Oh. St. 466, and Wisconsin the "Massachusetts rule," *Stacy* v. *Dane County Bank, supra,* either of the parties was entitled to judgment if his contention was correct. However, the court held that being a question of general and not local or statute law, the case would be determined by reference to all the authorities, and not by the law of the place where the contract was made or where the contract was to be performed. *Swift* v. *Tyson,* 16 Pet. 1; *B. & O. Ry.* v. *Baugh,* 149 U. S. 368. Having determined that the general law would prevail, the case, since it was in the Federal courts, was determined by the rule laid down in the Supreme Court of the United States, which is the "New York rule." *Exchange National Bank* v. *Third National Bank, supra.* Inasmuch

as there is much to be said in favor of the "New York rule," on the ground of strict agency principles, and of the "Massachusetts rule," on the ground of banking policy and general business considerations, it is doubtful if the conflict can ever be settled except by the adoption of a uniform banking statute by the various states. See also 4 MICH. L. REV. 226; 5 MICH. L. REV. 109.

BILLS AND NOTES—CERTAINTY OF PROMISE.—In an action for judgment on a promissory note it was shown that the promise was to pay "when the present indebtedness of Highland Park Co. is paid," and that such indebtedness had not been paid. *Held,* the payee could recover. *Dille* v. *Longwell* (Ia., 1920), 176 N. W. 619.

The settled rule is that a promissory note must contain an "unconditional" promise to pay. *Josselyn* v. *Lacier,* 10 Mod. 294, 317; *Carlos* v. *Fancourt,* 5 Term. R. 482, "It would perplex the commercial transactions of mankind if paper securities of this kind were issued out into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to enquire when these uncertain events would probably be reduced to a certainty. * * * The justice of the case is certainly with the (payee): but we must not transgress the legal limits of the law in order to decide according to conscience and equity." *Worden* v. *Dodge,* 4 Denio (N. Y.) 159 (promise to pay out of proceeds of ore to be mined, held a conditional promise). This common law rule of sound policy is embodied in the UNIFORM NEGOTIABLE INSTRUMENTS ACT, § 1, 2,—"must contain an unconditional promise or order to pay." In *Devine* v. *Price,* 152 N. Y. S. 321, decided after the adoption of the act, a promise to pay "when Post Office Department accepts my building" was held to be conditional. The principal case does not refer to this rule requiring an absolute promise, but avoids the rule by deciding that the particular promise was unconditional; that a promise to pay "when the thing should be done" was in fact a promise to pay "when the thing *ought* to have been done." In so interpreting the apparent condition as in fact not a condition, the court has much justification in precedent. To pay "when convenient" has been held to mean "within a reasonable time." *Jones* v. *Eisler,* 3 Kan. 134; *Benton* v. *Benton,* 78 Kan. 366; *Page* v. *Cook,* 164 Mass. 116. In *Randall* v. *Johnson,* 59 Miss. 317, a promise to pay "when a certain vessel should return" was held to mean "when she should normally have returned." The opinion cites much authority for its decision. The court was obviously influenced by the fact that the accomplishment of the condition, that is, the payment of the debts, happened to be a duty of the defendant, regardless of the note. These decisions perhaps accomplish justice between the parties, but inasmuch as they leave it quite uncertain whether a literal condition will be treated as such, or will be judicially "interpreted" as meaning something different, they quite disregard the reason for the rule, as stated in *Carlos* v. *Fancourt, supra,* that the taker of a note should be able to know at the time whether it will ever be payable.

CHARITIES—BEQUESTS FOR MASSES CHARITABLE.—A will contained several bequests to priests for masses to be said by them in their churches for the repose of the soul of the testator and certain relatives. The residue of the estate was left to a Catholic archbishop in Dublin, Ireland, with a request that priests in designated churches in his jurisdiction be procured to say masses for the soul of the testator and designated relatives. *Held,* the gifts to the priests are not trusts but are valid as direct gifts to the donees. The residuary legacy is a charitable trust within the meaning of the California Civil Code limiting gifts of that character by will. *In re Hamilton's Estate* (Cal., 1920), 186 Pac. 587.

In England, until recently, a trust for the saying of masses was considered as a superstitious use which was illegal and void. *Re Egan* [1918], 2 Ch. 350; *Re Blundell's Trusts,* 30 Beav. 365; *Atty. Gen.* v. *Fishmonger's Co.,* 2 Beav. 151. But see *Bourne* v. *Keane* [1919], A. C. 815, overruling these cases. See 18 MICH. L. REV. 558. In Ireland trusts for the saying of masses have been held valid as to immediate masses, but not charitable and invalid if creating a perpetuity. *Reichenbach* v. *Quin,* 21 L. R. Ir. 138; *Kehoe* v. *Wilson,* 7 L. R. Ir. 10; *Morrow* v. *M'Conville,* Ir. L. R. 11 Eq. 326. But see *O'Hanlon* v. *Logue* [1906], 1 L. R. 247 (masses to be said in public). In this country, by what is probably the weight of authority, bequests for masses are held valid, but on varying grounds. In one class of cases they are upheld as charitable. *Ackerman* v. *Fichter,* 179 Ind. 392 (all poor souls); *Hoeffler* v. *Clogan,* 171 Ill. 462; *Schouler, Petitioner,* 134 Mass. 426; *Rhymer's Appeal,* 93 Pa. 142 (called a religious use). In other cases they are upheld as private trusts or construed as gifts to the donees. *Harrison* v. *Brophy,* 59 Kan. 1; *Moran* v. *Moran,* 104 Ia. 216 (said not to be a trust but a valid gift); *Sherman* v. *Baker,* 20 R. I. 446; *Re Lennon's Estate,* 152 Cal. 327. Courts which deny the validity of such bequests generally regard them as private trusts which are void for lack of a beneficiary. *Festorazzi* v. *St. Joseph's Catholic Church,* 104 Ala. 327; *McHugh* v. *McCole,* 97 Wis. 166; *Holland* v. *Alcock,* 108 N. Y. 312 (abrogated by statute in 1893; see *Matter of Morris,* 227 N. Y. 141.) In other courts they are regarded as not charitable and invalid if creating a perpetuity. See Irish cases, *supra; Re Zeagman,* 37 Ont. L. Rep. 536. The instant case is interesting because in effect it overrules *Re Lennon's Estate, supra,* where it was distinctly held that a bequest for masses was not charitable. The case illustrates two types of bequests for masses which are given effect on different theories, viz., as a direct gift to the named beneficiary, and as a charitable trust. The opinion contains an interesting discussion of the nature and purposes of the mass according to the doctrine of the Roman Catholic Church, upon which the court bases its conclusion that a bequest for such purposes is charitable. See further, 14 Ann. Cases 1025; 65 Am. St. Rep. 119; 40 L. R. A. 717; SCOTT'S CASES ON TRUSTS, p. 283, note.

CONSTITUTIONAL LAW—INCOME TAX ON SALARIES OF FEDERAL JUDGES.—The provision of Income Tax Act, Sec. 213, in requiring salaries generally to be included in gross income returns, specifies salaries of federal judges

shall likewise be taxed. Plaintiff, United States District Judge, paid income tax on his judicial salary, under protest, and sued deputy collector for return of the tax. United States Constitution, Art. 3, Sec. 1, provides compensation of judges of Supreme and inferior courts "shall not be diminished during their continuance in office." *Held,* such tax does not violate this constitutional provision. *Evans* v. *Gore* (D. C., W. D. Ky., 1919), 262 Fed. 550.

This case presents a very novel question, which seems to be correctly decided, although there is apparently no decision directly in point. Clearly this is a general tax on incomes, including the judicial salary, and is not directed against salaries as such. It merely incidentally falls on salaries, and so is no diminution within the meaning of the constitutional provision. The constitutional provision does not exempt federal judges generally from taxation, and each must bear his share of that burden which the United States sees fit to impose upon its citizens for its maintenance. To support this decision we have only to realize that the purpose and practical effect of the constitutional provision is conserved,—the absolute independence of the judiciary from the legislative branch of the government is not impaired, inasmuch as the amount of compensation received by the judges, in the first instance, is not diminished by the legislature. This tax, being generally on all incomes, is not such a diminution of judges' salaries as to bring the judiciary within reach of the legislative department, nor would it cause any suspicion of influence that might tend to shape or warp their decisions. The amount of income received, in the form of judicial salary, remains the same throughout, even though part of this income must later be paid back to the government in the form of taxes. The judge's claim for salary remains unimpaired, and he receives a salary the same in amount as prior to this tax, inasmuch as the amount of the tax is not deducted from the salary before it is paid to the judge. The government's claim for taxes, against all citizens alike, cannot be resisted, in the absence of exemption, even by federal judges. This tax does not render the judiciary subservient to another branch of the government, but merely to the government itself, which, in its supreme exercise of sovereignty, has the right to subject all its citizens to like and equal burdens, duties, and taxes. See contrary view, 13 OPIN. ATTY. GEN. 161, and BLACK, TREATISE ON FEDERAL TAXES, Sec. 16, which seems to carry little weight since the adoption of the Sixteenth Amendment to the Constitution providing "Congress shall have power to lay and collect taxes on incomes, from whatever source derived."

CONSTITUTIONAL LAW—REFERENDUM AS TO AMENDMENTS OF FEDERAL CONSTITUTION.—In November, 1918, the people of Ohio adopted an amendment to the state constitution providing that "The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States." The legislature of Ohio having voted approval of the proposed Eighteenth (Prohibition) Amendment, a petition for referendum was filed with the secretary of state. Plaintiff thereupon filed a petition for injunction to restrain the defendant, the secretary of state, from spend-

ing any public money in the submission of such matter to the vote of the people *Held,* a demurrer to the petition was properly sustained. *Hawke* v. *Smith, Secretary of State* (Ohio, 1919), 126 N. E. 400.

In discussing this general question in 18 MICH. L. REV. 51, it was said that two questions were bound to arise in this connection. "Does the language of Article V of the National Constitution make the matter of ratification or rejection of proposed amendments a function of the *'legislature,'* in the usual sense of that word? This, of course, is a federal question, and until passed on by the United States Supreme Court must be considered as open. The second questions is: Does the state provision for referendum cover the reference of acts of the legislature such as are consummated in ratifying a proposed amendment? This obviously is a local question, and the Supreme Court will not examine into the soundness of the conclusion of the state court. *Davis* v. *Ohio,* 241 U. S. 565." In view of the amendment to the Ohio constitution above quoted, the second question was not involved in the principal case. In the Colorado and Michigan cases cited below, it was held that the state provisions for referendum did not extend to approvals or rejections of proposed amendments. The court concluded that "legislature" in Art. V of the federal Constitution does not mean the legislative *body,* thus agreeing with the Washington court in *State ex rel. Mullen* v. *Howell,* 181 Pac. 920, and disagreeing with the Maine court in *Re Opinion of the Justices,* 107 Atl. 673. The Maine case is approved in *Prior* v. *Noland,* (Colo., 1920) 188 Pac. 729. In the principal case the court felt very strongly the supposed weight of *Davis* v. *Ohio,* 241 U. S. 565 (Wanamaker, J., in concurring opinion considered the decision conclusive), entirely misconceiving what was really involved and decided in that case. See 18 MICH. L. REV. 52, *et seq.,* where the character of the question there before the Supreme Court is pointed out. In *Decher* v. *Secretary of State,* (Mich., Apr. 10, 1920) the court avoided this error. In *Ex parte Dillon,* 262 Fed. 563 (1920), Rudkin, D. J., concluded that the principal case was incorrectly decided, saying: "Had the resolution (of Congress) in this case provided that the amendment should be ratified by the people of the several states by direct vote, such provision would be clearly in derogation of the Constitution and void, and what Congress could not do it is needless to say the several states cannot do, because full power over the matter is conferred upon the former and denied to the latter."

CONSTITUTIONAL LAW—TAXATION—EDUCATIONAL BONUS LAW FOR A PUBLIC PURPOSE.—The Legislature of Wisconsin provided (chapter 5, Laws of 1919, Special Session) for a bonus of thirty dollars per month to soldiers, sailors and nurses who served in the late war with Germany and Austria, while in regular attendance as a student of any of certain designated institutions. This provision is stated to be in lieu of the soldier's bonus provided for in chapter 667 of the Laws of 1919. The benefits of the act extend to those who were residents of Wisconsin at the time of their induction into the service and who, after being discharged, desire to continue their education in any of the public schools and colleges named. The expenses of

this provision are to be defrayed by a special tax on property and a surtax on incomes. The constitutionality of the act is assailed upon the ground that the taxation provided for is for a purpose not public. *Held,* the purpose of the tax is public, despite the abandonment of the volunteer system for raising troops and the resort to compulsory draft. *State ex rel. Atwood* v. *Johnson* (Wis., 1920), 176 N. W. 224.

For a discussion of the constitutionality of this question and the similar question involved in the Soldiers' Bonus Law, see 18 MICH. L. REV. 535, and the cases there noted. See also *State ex rel. State Reclamation Board* v. *Clausen,* (Wash., 1920) 188 Pac. 538.

CONSTITUTIONAL LAW—VALIDITY OF EIGHTEENTH AMENDMENT.—Petitioner was in custody charged with violation of a provision of the National Prohibition Act of October 28, 1919, c. 85, which by the terms thereof was not to be in force until the date when the Eighteenth Amendment should go into effect. The offense charged was alleged to have been committed January 17, 1920. In habeas corpus petitioner claimed release because (1) the Eighteenth Amendment was not in force on date of alleged offense, since the Secretary of State's proclamation was not issued until January 29, 1919, and (2) the amendment was and is no part of the Constitution. *Held,* (1) the amendment became operative when the thirty-sixth state ratified, not when the Secretary of State promulgated same; (2) the amendment is constitutional and effective. *Ex parte Dillon* (D. C., N. D. Cal., 1st Div., 1920), 262 Fed. 563.

In this case Judge Rudkin very shortly disposes of some of the contentions that have been so frequently advanced against the validity of the Prohibition Amendment. As to one phase, see *supra,* note to *Hawke* v. *Smith.* In the principal case it was argued that an "amendment" "implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed." Citing *Livermore* v. *Waite,* 102 Cal. 118. The court says the Thirteenth Amendment abolishing slavery would have been invalid on such test, yet it had never been seriously challenged. On the scope of the power of amendment, see the article by George D. Skinner in 18 MICH. L. REV. 213. See also 33 HARV. L. REV. 223; *Ibid,* 659; 90 CENT. L. J. 229. It was further contended in the principal case that the seven-year limitation upon the period during which the proposed amendment might be ratified made the whole submission nugatory. This, too, was rejected. If the thirty-sixth state had voted ratification *after* the seven years had gone by, a really nice question might have arisen. No one would now contend that an illegal condition subsequent or void attempt to cut off an estate granted (see such cases as *Brattle Square Church* v. *Grant,* 3 Gray, 142) would make ineffective the whole grant. Yet that is what the contention here amounts to. Of course, it is unsafe to argue questions of constitutional law and construction on the basis of decisions in such a field as the law of estates, but if the illegal, added provision in the grant of an estate has no effect upon the validity of

the main grant, it would seem, *a fortiori*, to be true that, even though such a limitation as the one in the submission of the Eighteenth Amendment is void, the whole submission does not fall therewith.

COURTS—PENDENCY OF ANOTHER ACTION—ABATEMENT AND REVIVAL.—Plaintiff brought an action in the county court for injuries to his automobile, sustained in a collision with the defendant's automobile. Defendant later sued plaintiff in the municipal court for damages sustained in the same collision, and judgment for defendant was rendered in the suit in the municipal court. Plaintiff filed a bill to restrain the further prosecution of the suit in the municipal court on the ground that the county court had acquired jurisdiction first. *Held*, the two suits not being for the same cause of action, the bill should be dismissed. *Gilley* v. *Jarvis* (Vt., 1920), 109 Atl. 41.

The view taken by the court in this case is undoubtedly correct. For a discussion of this question and contrary decisions, see *supra*, 18 MICH. L. REV. 421.

DAMAGES—BREACH OF COVENANT OF SEISIN.—The grantee of land entered into a contract for the sale of it; the purchaser from the grantee repudiated the contract and obtained judgment for an advance payment and costs on the ground that the title was not marketable. The grantors of the land were notified, but refeused to defend the suit. In an action against the grantor for breach of the covenant of seisin it was *held* that the grantors are liable to the grantee for the difference between the total purchase price and the value of the portion of the land to which they had title with interest. As the suit with the purchaser was not in defense of the title, no damages could be recovered in respect to it. *Hilliker* v. *Rueger* (New York, 1920), 126 N. E. Rep. 266.

The rule in England for failure to convey realty is to allow nominal damages merely. *Flureau* v. *Thornhill*, 2 W. B. 1078; *Bain* v. *Fothergill*, 7 H. L. Cas. 158. But in the United States the rule is generally the difference between the value of the realty at the time of conveyance and the contract price. *Hopkins* v. *Lee*, 6 Wheat. 109; *Doherty* v. *Dolin*, 65 Me. 87; *Plummer* v. *Regdon*, 78 Ill. 222. *Contra*, see *Hammond* v. *Hannen*, 21 Mich. 374; *Burk* v. *Serull*, 80 Pa. 413; *Pumpelly* v. *Phelps*; 40 N. Y. 59; *Margraf* v. *Muir*, 57 N. Y. 155. On general principles, the measure of damages would be fixed by the bargain—*i. e.*, in case of eviction the value of the property lost. Under a covenant of seisin the value would be taken at the time of the conveyance, for it is then the breach occurs. Under the covenant of quiet enjoyment and warranty the value would be taken at the time of actual eviction. But owing to the extreme hardship which would result to a remote grantor the rule has been adopted that in breach of covenants of seisin and warranty the damages are the consideration paid, with interest and reasonable costs of defending the title. *Staats* v. *Ten Eycks* (N. Y.), 3 Cain. 111; *Pitcher* v. *Lewingston* (N. Y.), 4 Johns. 1. See cases cited in TIFFANY ON REAL PROPERTY, Chap. XIX, note 301. Under the ancient *warrantia chartae* the value of the land at the time of conveyance, rather than the consideration paid, was recovered. In a few states the covenant of warranty is consid-

ered a covenant to indemnify and the value at the time of eviction may be recovered. *Horsford* v. *Wright* (Conn.), Kirby 3; *Gore* v. *Brazier*, 3 Mass. 523; *Cecconi* v. *Rodden*, 147 Mass. 164; *Park* v. *Bates*, 12 Vt. 381; *Williamson* v. *Williamson*, 71 Me. 442. When the seisin of part of the property fails the damages are the purchase price, and interest, of the part which fails. The damages will bear the same proportion to the whole purchase money that the value of the part to which the title failed bears to the value of the whole premises. *Phillips* v. *Reichart*, 17 Ind. 120; *Norton* v. *Norton*, 10 Conn. 422; *Bibb* v. *Freeman*, 59 Ala. 612; *Weber* v. *Anderson*, 73 Ill. 439; *Wright* v. *Nipple*, 92 Ind. 310; *Scantlin* v. *Allison*, 12 Kans. 85; *Cornell* v. *Jackson* (Mass.), 3 Cush. 506; *Adkins* v. *Tomlinson*, 121 Mo. 487; *Beaupland* v. *McKeen*, 28 Pa. St. 124; *Partridge* v. *Hatch*, 18 N. H. 494. It is submitted that the damages awarded in the principal case are on no logical basis; neither a proportionate part of the consideration nor a proportionate part of the value at the time of conveyance. The rule is properly stated in *Partridge* v. *Hatch, supra*, viz.: "If the title fail to part of the land conveyed the grantee may recover a sum bearing the ratio to the whole purchase money with interest, that the value of such part of the land bears to the whole conveyed."

DAMAGES—MITIGATION—BREACH OF CONTRACT.—"A contract for the sale of goods by the defendant to the plaintiff provided that delivery should be required during a period of nine months, and that payment should be made for each installment within one month of delivery, less 2½ per cent discount." "The plaintiffs failed to make punctual payment for the first installment, and the defendant * * * refused to deliver any more of the goods under the contract, but offered to deliver the goods at the contract price if the plaintiffs would agree to pay cash at the time of the orders." *Held*, "what is reasonable for a person to do in mitigation of his damages cannot be a question of law, but must be one of fact in the circumstances of each particular case." *Payzu, Ld.*, v. *Saunders* (C. A.) [1919], 2 K. B. 581.

This pronouncement from an authoritative source is refreshing. It means that we have no magic word by the utterance of which we can settle these cases, but that in every instance we must satisfy some fairly sensible men—a jury—that the plaintiff has done what reasonably might have been expected of him under all the circumstances to reduce the amount of damages. In the case of *Lawrence* v. *Porter* (1894), 63 Fed. 62, 11 C. C. A. 27, it was held that the offer to sell for cash and not for credit must be accepted because it was an offer in "mitigation." In the case of *Whitmarsh* v. *Littlefield* (1887), 46 Hun. 418, it was held that a cash offer of a less sum instead of the first cash offer of a greater sum need not be accepted because it was an offer in "substitution." This court also said that the second proposition was one to "abandon the old contract," and therefore it would result in a "waiver" or any rights under it. In a later federal case on a state of facts similar to those in *Lawrence* v. *Porter, supra*, the court decided that this case was not a precedent because the second offer was "conditional" rather than "unconditional." *Campfield* v. *Sauer* (1911), 189 Fed. 576. On the

basis of these decisions the writer of a note in 10 MICH. L. REV. 315 formulated the propositions that the new "offer must be one to mitigate and not to substitute; it must be unconditional and not conditional, and lastly, must be without abandonment of waiver." He hazarded further that "A fourth essential might well be inferred from the whole case, and that is that the offer must be beneficial in order to make its acceptance necessary." The trouble with all these refinements is that in every case the question is still one of fact as to which of these two sets of antinomic words applies. Finally, the writer of the note in 16 MICH. L. REV. 536 suggests that all these forced distinctions between words should be abandoned, and that "The sole question should be: Is it reasonable under all the circumstances that the new offer should be accepted?" This is apparently an anticipation of the conclusion in our instant case.

DOWER IN EQUITABLE ESTATES.—D's husband during coverture contracted to purchase land from P and paid $900 on the contract. The contract was assigned to X and D did not join in the assignment. In a suit to foreclose by P, D claims a dower interest as against X in the surplus. *Held,* D not entitled to dower in equitable estate not owned by her husband at the time of his death. *Corcorren* v. *Sharum* (Ark., 1920), 217 S. W. 803.

Prior decisions in Arkansas had established that the general statute providing that a widow should be endowed of all lands whereof her husband was seised of an estate of inheritance extended the right to dower to equitable as well as legal estates. *Kirby* v. *Vantrece,* 26 Ark. 368; *Spaulding* v. *Haley,* 101 Ark. 296. A similar statute has been held to be merely declaratory of the common law and that dower would only attach to legal estates. *Will of Prasser,* 140 Wis. 92. But the court in a later case decided that a full equitable title in realty with a right to be immediately clothed with the legal title is substantially a legal estate within the meaning of the dower statute. *Harley* v. *Harley,* 140 Wis. 282. So zealous indeed are the courts to extend the right of dower to equitable estates that one court at least has extended the common law rule without the aid of any statute. *Shoemaker* v. *Walker,* 2 Serg. and R. (Pa.), 554. In some states dower is limited by statute to the equitable estates of which the husband died seised. *Thompson* v. *Thompson,* 1 Jones, 430. But in other jurisdictions the same result has been reached by judicial decision. *Heed* v. *Ford,* 16. B. Mon. (Ky.) 114; *Bowie* v. *Berry,* 1 Md. Ch. Dec. 452; *Morse* v. *Thofsell,* 78 Ill. 600; *McRae* v. *McRae,* 78 Md. 270. But see *James* v. *Upton,* 96 Va. 296. While the former Arkansas cases may be supported by interpreting the words estates of inheritance as meaning either in law or in equity, the principal case has read into the statute a limitation of dower in equitable estates which they refuse to apply to dower in legal estates, a doctrine certainly not warranted by the words of the statute.

EQUITABLE PROTECTION OF EASEMENTS—BALANCE OF CONVENIENCE.—Plaintiff owns a city lot upon which formerly stood an old house in the cellar of which was an excellent well. Defendant owns an adjoining lot on which is his residence, which was formerly connected by an underground pipe with

the well, to the enjoyment of which connection defendant has a right of easement. Plaintiff, preparatory to building a new house on his lot, tore down the old house, cut off the pipe line at the boundary of his lot, and walled up the well to the level of the ground. It does not appear that it was impossible, or even expensive, to make the improvements without disconnecting the well. Defendant's house is adequately supplied with water by the city system, but the well furnished superior drinking water. Defendant began to dig across plaintiff's lot to restore the connection. Plaintiff sues to enjoin this operation. Defendant asserts his easement, claims damages for its disturbance, and prays for an order requiring plaintiff to restore the connection. *Held,* defendant entitled to damages for disturbance of his easement, but not entitled to equitable relief, and plaintiff entitled to an injunction against trespass. *Wilkins* v. *Diven* (Kans., 1920), 187 Pac. 665.

This decision is put upon the broad ground that "Easements * * * are given greater significance in England than in America. * * * It would ill accord with our ever advancing development and progress to tie us down too rigidly * * * to old ways and old notions." The authorities cited are cases holding that, on the facts, there was no easement. This application of the balance of convenience doctrine is startling. Upon a motion for preliminary injunction, where the court must act on probabilities as to the rights of the parties, it is quite appropriate that it should consider the hardship upon the respective parties, and the effect on the public, of giving or refusing relief. At final hearing, when the rights of the parties have been ascertained, the application of the doctrine is obviously more questionable. The stock argument for it is that injunction is not a remedy of right but of grace. The stock objection is that the denial of specific relief works an informal condemnation for private use, an objection the force of which depends upon the wisdom with which the doctrine is applied, for there clearly are cases where such condemnation is very much to be desired. Reference to the balance of convenience at final hearing is most familiar in cases of nuisance, and may be considered most appropriate there. Since the basic rights depend upon a balance of conflicting interests, the law being one of degree, of live and let live, we may well say that, between the annoyances which one must endure without remedy and those against which one should be specifically protected, lie intermediate cases where damages, but damages alone, are appropriate. Outside of this peculiar nuisance group, the cases are very rare in which protection of ascertained rights has been refused on the balance of convenience, and these cases have been very strong upon their facts. See *Lynch* v. *Union Inst.,* 159 Mass. 394; *Hall* v. *Rood,* 40 Mich. 46; *Welsh* v. *Taylor,* 50 Hun. 137. The principal case is extreme in its denial of equitable relief to defendant. But how much more extreme it is in granting to plaintiff an injunction the effect of which is to abet the tort by restraining defendant from the exercise of the privilege of self-help, which is incident to his easement. In this aspect, the case seems to be wholly without support in authority and wholly outside the doctrine of "grace." The nearest analogy to it is the doctrine of equitable waste, which has always been re-

garded as anomalous, though grounded in good sense and sound policy. The principal case cannot be commended for sense or policy unless we assume that the maintenance of the water connection would prevent, or render very difficult, the improvement of the plaintiff's land, facts which do not appear in the report.

EVIDENCE—ADMISSION BY SILENCE TO ACCUSATIVE DECLARATION AFTER ACCIDENT ADMISSIBLE.—In action for injuries sustained when struck by defendant's jitney bus it appeared that a bystander, after the accident, had told defendant he "ought to be strung up by the heels for running into a woman in that fashion." Defendant made no reply. This was offered in evidence and objected to. *Held,* properly admitted as an admission by silence when circumstances called for a reply, though the declaration of the bystander in itself, apart from the fact that it was unanswered, tended to influence the jury, and though not competent as proof of any fact implied in the declaration. *Baldarachi et al.* v. *Leach* (Cal., 1919), 186 Pac. 1060.

This court laid down as the better rule and the weight of authority on this question that when any declaration or question is directed to a party which challenges or suggests a response from one who could truthfully dispute or negative it, such is admissible in evidence, and it is for the jury to determine, in the light of all the circumstances, whether any significance attaches to a failure to reply; further, that the weight to be given this evidence depends upon how provocative the situation is to speech and how significant is the silence. The California Civil Code provides that evidence may be given of "an act or declaration of another in the presence and within the observation of a party and his conduct in relation thereto." The court in the present case, however, considers this to be merely the legislative statement of a recognized common law rule of evidence. Such a rule is undoubtedly often recognized and followed. See WIGMORE ON EVIDENCE, Vol, 2, §1071; *State* v. *Ellison,* 266 Mo. 604; *Int. Harvester Co.* v. *Voboril,* 187 Fed. 973; *Proctor* v. *Ry.,* 154 Mass. 251. It clearly could not be held as a matter of law that failure to make a response in such case would indicate a sense of guilt; if admitted at all, the jury must be the sole judges of the significance and weight of such evidence. Further, in the case of *State* v. *Ellison,* cited *supra,* the following qualification of such doctrine is laid down: that such failure to reply cannot be admitted in evidence "if voluntarily made by a stranger, that is, a person not a party to the action, and therefore an impertinence." The court in the case at hand notices this feature, but nevertheless allows the admission of this evidence. It is difficult to perceive why the present case would not come squarely within the above prohibition, and if such be the law, this would appear to be an unwarranted extension of the doctrine. In fact, the court did show some hesitation, and expressed as its own opinion that the significance of the defendant's silence was here practically negligible as evidence of an admission. This evidence, it seems, may well have prejudiced the defendant's rights in the present case. But the qualification above mentioned appears to be denied in *Boyles* v. *McCowen,* 3 N. J. L. 677, and perhaps in other cases, on the ground that it is the non-

denial which is the essential element, and therefore it is immaterial by whom the statement is made. Undoubtedly, much may be said for this view. But from one point of view, at least, it appears rather extreme to require one to deny or answer every such statement, however impertinent, made by anyone in his presence, or run the risk of having an admission implied against him therefrom. It is believed that, under the common law rules of evidence, it is within the power of the court to determine, before allowing the question to go to the jury at all, whether the occasion and attendant circumstances are such as reasonably call for an answer from the party. This principle seems to be recognized, at least, in numerous cases. See *Vail* v. *Strong,* 10 Vt. 457; *Moore* v. *Smith,* 14 S. & R. 388; *Com.* v. *Kenney,* 12 Metc. 235. But perhaps this rule is altered by the provision cited above from the California Code.

INTOXICATING LIQUORS—TERMINATION OF WAR—WAR-TIME PROHIBITION ACT.—In an action in equity to enjoin defendant, Collector of Internal Revenue, from enforcing the pains, penalties, etc., of the War-time Prohibition Act, it was *held* that the act, passed under the war power of Congress, ceased to be constitutionally effective when the war terminated and demobilization was completed as a matter of fact, in consequence whereof the war power of Congress, under which alone legislation in derogation of the constitutional rights of the states can be enacted or enforced, likewise ceased. *Simon* v. *Moore* (Mo. D. C., E. D., 1919), 261 Fed. 638.

The Supreme Court passed upon this same question ten days later, in *Hamilton* v. *Ky. Distilleries and Warehouse Co.,* S. C. Cas. No. 589, Oct. Term, 1919, and in *Dryfoos et al.* v. *Edwards,* S. C. Cas. No. 602, Oct. Term, 1919. The Missouri District Court based its decision upon the finding that the war has been terminated and demobilization completed, and determine *a priori* that the Act has become invalid. The Supreme Court says: "The implied power to enact such a prohibition must depend upon some actual emergency or necessity arising out of the war or incident to it; still, the power is not limited to victories in the field and the dispersion of the (insurgent) forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress." This court points out that the treaty of peace has not yet been concluded, that the railways and other industries are still under national control by virtue of the war powers, that demobilization is not complete, and that the act in question was not passed until one month after the Armistice had been signed. Concluding, it states that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued. Beyond a doubt, the Missouri District Court was influenced by the tremendous value of property which faced practical outlawry. But the Supreme Court, through its exhaustive interpretation of indicative facts, and upon sound principles of statutory construction, sustained the validity of the act, and demonstrated fully, although leaving the point to implication, that the remedy must lie with Congress and not with the courts.

LANDLORD AND TENANT—EVICTION BY MILITARY AUTHORITY.—The defendant entered into the possession of certain premises under a three-year lease dating from June 24, 1915. In May, 1917, the premises were occupied by military authorities acting under the DEFENSE OF THE REALM ACT. They remained in possession during the remainder of the term. The tenant refused to pay any rent after May, 1917. In an action by the landlord, the court *held* that the defendant was liable for the rent and resigned him to his claim for compensation from the War Losses Commission. *Whitehall Court Ltd.* v. *Ellinger* (Nov., 1919), 89 L. J. (K. B.) 126.

The case is clearly distinguishable from eviction by act of the landlord. It bears some resemblance, however, to an eviction by title paramount, the legal effect of which is to suspend the rent during the time that the tenant is deprived of the possession. *Marsh* v. *Butterworth*, 4 Mich. 574; *George* v. *Putney*, 4 Cush. 351. But it seems that it has been expressly excluded from that title. TIFFANY, LANDLORD AND TENANT, §186c. Total failure of consideration has been given as the reason for the suspension of rent in the case of eviction by title paramount. *Russell* v. *Fabyan*, 28 N. Hamp. 543. It would seem that the same reason ought to apply to the principal case, although an opposite result is reached. And the same difficulty is to be found in cases where the tenant has been deprived of possession as a result of condemnation under the power of eminent domain. In these cases, the tenant is generally held liable for the payment of rent. *Folts* v. *Huntley*, 7 Wend. 210; but, *contra*, *Barclay* v. *Picker*, 38 Mo. 143. The tenant has also been held liable for rent where there has been a total destruction of the premises. *Ross* v. *Overton*, 3 Call 552. Perhaps an explanation of the principal case would be that, since the premises were occupied for temporary purposes only, the lessor still held the reversion, together with the rent which was incident to it. This would not be true of cases involving eviction by title paramount. Perhaps the earliest case involving occupation by military authorities is *Paradine* v. *Jane*, Aleyn 26, where the tenant was ousted from possession by alien enemies. It was there held that the tenant was not relieved from his obligation to pay rent. The same result was reached in *Pollard* v. *Shaaffer*, 1 Dallas 210. *Contra*, *Bayly* v. *Lawrence*, 1 Bay 499. And see *Coogan* v. *Parker*, 2 S. Car. 255, where the landlord was allowed to recover rent on the sole ground that the tenant had resumed possession. Perhaps the cases resulting from the Civil War are more closely analogous to the principal case. The tenants were here compelled to pay rent to the Federal military authorities on penalty of forfeiture, and the landlords were not allowed to recover the rent from the tenants after the termination of the war. *Harrison* v. *Myer*, 92 U. S. 111; *Gates* v. *Goodloe*, 101 U. S. 612; *Zacharie* v. *Sproule & Co.*, 22 La. 325. Here it is doubtful whether the Federal authorities can properly be treated as alien enemies.

MARRIAGE—FRAUD JUSTIFYING ANNULMENT.—In an action to annul her marriage on the ground of fraud, plaintiff relied on the contention that she had consented to marry the defendant relying on his false and fraudulent representations that after the civil ceremony there would be a Jewish cere-

mony, and that the defendant had first postponed and then refused to go through with the religious ceremony. *Held,* plaintiff was induced to enter into a marriage with the defendant "solely by reason of his false and fraudulent misrepresentations," and that she was entitled to a decree adjudging the marriage null and void. *Rubinson* v. *Rubinson* (Sup. Ct., 1920), 181 N. Y. S. 28.

Schacter v. *Schacter* (1919), 178 N. Y. S. 212, is a decision apparently squarely the other way. The *Schacter case* is discussed *supra,* p. 243.

MUNICIPAL CORPORATIONS—CORPORATE FUNCTIONS—LIABILITY FOR TORTS OF FIREMEN.—Plaintiff's testate died as the proximate result of injuries sustained by being struck by defendant's city fire hose truck, operated negligently by defendant's servants. Upon demurrer it was *held* that plaintiff could recover. *Fowler* v. *City of Cleveland* (Ohio, 1919), 126 N. E. 72.

It is well-settled law that when a municipal corporation exercises a purely governmental function no liability attaches to it for its torts. *Hill* v. *Boston,* 122 Mass. 344. This principle is admitted everywhere except in the admiralty tribunals of the United States. *Workman* v. *New York City,* 179 U. S. 552; see 5 MICH. L. REV. 275. The courts are, nevertheless, not in accord as to what functions come within the scope of this term. Among the acts which are almost universally admitted to be public or governmental are those of its police officers (*Lafayette* v. *Timberlake,* 88 Ind. 330); of its officers and agents in the maintenance, repairing, or management of a city hall used for city business (*Snider* v. *St. Paul,* 51 Minn. 466; cf. *Little* v. *Holyoke,* 177 Mass. 114, and *Wilcox* v. *Rochester,* 190 N. Y. 137); of those engaged in the duty of erecting and maintaining public schools (*Hill* v. *Boston, supra; Kinnare* v. *Chicago,* 171 Ill. 332; *contra, Higbie* v. *N. Y. Board of Education,* 122 N. Y. App. Div. 483); and of health officers (*Webb* v. *Detroit Bd. of Health,* 116 Mich. 516). Likewise, the prevailing rule is that municipal corporations are not liable for injuries occasioned by negligence in using or keeping in repair the fire apparatus owned by them. *Wilcox* v. *Chicago,* 107 Ill. 334. With this case compare *Kies* v. *Erie,* 169 Pa. St. 598. See also the text and cases cited in DILLON, MUN. CORP. [5th Ed.], Sec. 1660. In the instant case the Ohio court expressly overruled its previous holding in *Frederick* v. *Columbus,* 58 Oh. St. 538, and, by implication, the one in *Wheeler* v. *Cincinnati,* 19 Oh. St. 19, on the ground that the act complained of was purely ministerial. It is believed that Justice Wanamaker, who concurred in the result only, is correct when he contends that the act was done in the exercise of a governmental function; and it is submitted that, while the result reached may be a salutary one from the plaintiff's viewpoint, the decision is a glaring example of judicial legislation and in conflict with the well-known principle of *stare decisis.* See also the note in 17 MICH L. REV. 503.

PARTIES—JOINDER OF DEFENDANTS IN TORT ACTIONS.—Six mining companies severally caused refuse to be discharged into a stream, thereby injuring the lands of a lower riparian owner, who joined them as defendants in

an action of trespass on the case. There was no allegation of concert, collusion, or the pursuit of a common design. *Held,* on demurrer to the declaration, that no joint liability was shown, and therefore there was a misjoinder of defendants, and the demurrer was sustained. *Farley* v. *Crystal Coal & Coke Co.* (W. Va., 1920), 102 S. E. 265.

This case fully examines the authorities on the question of joint liability, and concludes that there is no such liability on these facts, going so far as to expressly overrule a recent prior case which laid down the opposite rule. Conceding that the court was right on this point, did it follow that the demurrer must be sustained and the parties compelled to maintain and defend as many separate actions as there were defendants? The common law required such separate actions. But inasmuch as a single action is much superior in point of justice and convenience, some modern statutes have expressly authorized the joinder of defendants severally liable, and the rendition of separate judgments for or against each. England, Order 16, rule 4; Michigan, C. L. 1915, Sec. 12366. There is no reason, however, why the courts should not themselves allow such a joinder, without any statute, under their inherent power to regulate procedure. If separate actions had been brought against each tort feasor on the facts shown in the principal case, it would have been within the discretionary power of the court to order them consolidated for trial. *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285. Why, then, should not the court have treated the case as a consolidation of separate actions against the several defendants, and retained it for the verdict of the jury upon the merits of the case and the apportionment of damages among those defendants proved to be liable, instead of sustaining the demurrer and forcing the case out of court? In *Snow* v. *Rudolph* (Tex. Civ. App.), 131 S. W. 249, where a single cause of action was improperly split into several actions, the court treated a consolidation of these cases as the full substantial equivalent of a single action, and this was held on appeal to have cured the error. It would require no greater exercise of judicial ingenuity to treat a single action against several tort feasors as the full substantial equivalent of a consolidation of several actions against each, and in this way judicially permit the same procedural liberalty which the jurisdictions above mentioned have secured through legislation. A still keener appreciation of its obligation to make rules of procedure strictly subservient to the broader ends of justice would doubtless justify the court in wholly abandoning the common law restriction and adopting the statutory rule above referred to as a general rule of practice.

SALES—EFFECT OF FRAUDULENT MISREPRESENTATIONS.—In an action by a vendee of stock to recover the purchase price on the ground that, by false and fraudulent representations, he had been induced by a company to buy stock therein, in the belief that it was another and different company, *held,* that he might have rescinded without showing damage had he elected to do so with reasonable promptness, but this right is lost by unreasonable delay. *Everson* v. *J. L. Owens Mfg. Co.* (Minn., 1920), 176 N. W. 505.

Ordinarily, the element of fraud does not make the transaction void, but merely voidable as between the original parties. This voidable title may be transformed into a valid one either by subsequent express or implied acquiescence with knowledge of the facts on the part of the one defrauded, or by a resale to a bona fide purchaser before the transaction is disaffirmed by the original seller. In order to transfer even a voidable title to the buyer, there must be a contract of some sort between the original parties. It seems to be settled that where the misrepresentation is as to some fact other than the identity of the buyer, a contract comes into existence sufficient for this purpose. Where the buyer misrepresents his identity, however, a more difficult question is presented. Where such a sale is by correspondence, no title passes, since there is no meeting of minds, hence no contract, and a resale to a bona fide purchaser will not give good title as against the original seller. *Cunday* v. *Lindsay*, 3 App. Cas. 459, 464. In such a case, the seller is said to have two inconsistent intents which he supposes to be identical: one, to transfer title to the writer of the letter; the other, to transfer it to the bearer of the name signed thereto. Obviously, there is a meeting of the minds as to the first intent, but not as to the second, which is held to be the primary intent and governs the nature of the transaction. Where the buyer appears in person, but represents that he is buying as an agent, the rule is the same and the application is even clearer, since the seller, in that case, could have but one intent: to contract with the supposed principal. *Rodliff* v. *Dallinger*, 141 Mass. 1. Where the buyer appears before the seller in person, and purports to contract as a principal, but falsely represents himself to be another person, the rule seems just as clearly settled that the primary intent is to contract with the person actually present, thereby conferring a voidable title so that a subsequent bona fide purchaser will be protected against the original vendor. But few cases have been decided on the point, however, and no less an authority than Sir Frederick Pollock believes that at least it is a nice question, despite the present weight of authority. *Phillips* v. *Brooks, Ltd.* [1919], 2 K. B. 243, the most recent case of this type, follows the rule of *Edmunds* v. *The Merchants' Dispatch Transportation Co.*, 135 Mass. 283, the original case on this question. The sole basis for the decision in that case was the weight of reason as it appeared to the court, aided and abetted by a bit of harmless dictum from *Cunday* v. *Lindsay, supra,* to the effect that "where the chattel has come into the hands of the first buyer by a *de facto* contract * * * the purchaser will obtain a good title." The court decided that under the circumstances there was a *de facto* contract, since the primary intent was to sell to the person present and identified by sight and hearing, despite the fact that there may have been a secondary and inconsistent intent to transfer title to the bearer of the name. Both of these cases have been questioned on the ground that apparently they are in conflict with an old and accepted rule of contracts laid down by Pothier, to the effect that whenever consideration of the person enters into a contract, any error with regard to the person destroys the assent of the party misled and consequently annuls the contract. POTHIER, OBL., §19; POLLOCK OF CONTRACTS

[8th ed.], p. 497n; 35 L. QUART. REV. 288. So far, at least, courts have taken the view that there is in reality no error in regard to the person in these cases, and that the misrepresentation as to name is not materially different from that as to solvency. If it can be said that there is any intent to pass title to the owner of the name, however, there is certainly error with respect to the person, and the rule of Pothier would seem to be applicable. See further, 13 L. R. A. (N. S.) 413, and 24 R. C. L. 317.

SALES—IMPLIED WARRANTY—NEGLIGENCE.—Plaintiff alleged that he had been poisoned through eating beans from a can purchased by his agent from a retail grocer, who had brought it from a wholesaler, who had bought it from defendant, in whose factory it had been canned. The proof showed that defendant's system of operation in the canning process had been conducted with the highest degree of foresight and care. *Held,* the case was properly submitted to the jury. *Davis* v. *Van Camp Packing Co.,* (Ia., 1920) 176 N. W. 382.

The liability of defendant involves three properly distinct questions of law: 1. Does the law impose upon a manufacturer of food a liability as warrantor of its absolute wholesomeness even though no warranty is implied in fact. 2. Is a manufacturer liable, as for negligence, in putting out deleterious food, although he has not in fact been negligent. 3. Can either of the foregoing obligations be taken advantage of by one who did not himself purchase from the manufacturer. The principal case answers number one and three in the affirmative, but seems to evade the second by leaving to the jury the question of whether there was in fact negligence. Many authorities on all three questions are cited. The first and second questions are discussed in 18 MICH. L. REV. 316. The liability on imposed "warranty" was held not to run in favor of the remote owner in several cases; *Nelson* v. *Armour Packing Co.,* 76 Ark. 352; *Tomlinson* v. *Armour Packing Co.,* 75 N. J. L. 748; *Roberts* v. *Anheuser Busch Assn.,* 211 Mass. 449; *Prater* v. *Campbell,* 110 Ky. 23; *Crigger* v. *Coca Cola Bottling Works,* 132 Tenn. 545. But to the extent that the "warranty" by manufacturer of food is a liability imposed by law rather than one consciously, or by reasonable implication, assumed by contract, any "privity of contract" is quite unnecessary, and some recent decisions so hold. *Mazetti* v. *Armour & Co.,* 75 Wash. 622; *Ward* v. *Morehead City Seafood Co.,* 171 N. C. 33; *Catani* v. *Swift & Co.,* 251 Pa. 52; dissenting opinion in *Drury* v. *Armour & Co.,* (Ark.) 216 S. W. 40. The liability for *negligence,* whether actual or by fiction of law, can be taken advantage of by a remote buyer. 18 MICH. L. REV. 436; 15 MICH. L. REV. 672.

WATERS AND WATERCOURSES—WASTING PERCOLATING WATERS.—The defendant in a suit for injunction against diversion of percolating waters, used the water as a running supply for his stock, the overflow forming a wallow for his hogs. This user was of such an extent as to cause a spring on the plaintiff's land, which furnished water for human consumption, to cease running. *Held,* such user amounted to waste and was enjoinable. *De Bok* v. *Doak,* (Ia., 1920) 176 N. W. 631.

The decision adds one more court holding squarely to what may now fairly be called the American rule which repudiates the established doctrine that percolating water is the absolute property of the owner of the fee, to be dealt with as he sees fit, and extends the application of the maxim *"Sic utere tuo ut alienum non laedas"* to cases of of this sort. For an interesting series of notes showing the modern tendency toward the view adopted in the instant case see 2 MICH. L. REV. 403, 3 MICH. L. REV. 491, 7 MICH. L. REV. 85, and 16 MICH. L. REV. 36.