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Recent Important Decisions; Book Reviews

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RECENT IMPORTANT DECISIONS.

ADMIRALTY—WHEN SHIP IS IN MARITIME SERVICE.—Defendant steamer anchored in front of plaintiff's docks and remained there for 37 days while waiting for its turn to discharge its cargo in an elevator located a short distance away. Plaintiff sued in a state court for damages under the WATERCRAFT ACT (§ 13625 HOWELL'S MICH. STAT. 1913). *Held,* that the vessel was, while awaiting her turn to unload, engaged in maritime service, that the admiralty courts of the United States had exclusive jurisdiction over an action to enforce a lien then arising against her, and that the action was properly dismissed by the state court; though that court would have had jurisdiction to enforce a lien against a vessel engaged in non-maritime service. *McMorran* v. *Steamer Millinokett,* (Mich. 1916) 156 N. W. —, 23 Det. Leg. News 111.

This decision re-affirms a proposition upon which doubt was thrown as a result of the conflicting opinions of majority and minority of the United States Supreme Court in the case of *The Robert W. Parsons,* 191 U. S. 17, and which was categorically denied by the writer of the note to *Ward* v. *Willson,* in 3 Mich. 1, on the supposed authority of certain decisions of the United States court. The proposition is that a state legislature is not restrained by the Federal Constitution from providing for the enforcement, by a proceeding in rem against the vessel itself in the state court, of a lien based on a non-maritime contract. Upon an examination of the decisions upon which the writer of the note in 3d of Michigan seems to rely for his conclusion, it is found that they merely hold that a proceeding in rem against the vessel in the state court is unauthorized for the enforcement of a lien based on a *maritime* contract, such a proceeding being considered to be peculiar to admiralty and not within the clause of the act of Congress saving to suitors their common law remedy on such contracts in the state courts. See *The Belfast,* 7 Wall. 624; *The Hine* v. *Trevor,* 4 Wall. 555, 571; *The Moses Taylor,* 4 Wall. 411, 427; *The Robert W. Parsons, supra.* In the dissenting opinion in the latter case, Justice BREWER's extended argument to uphold the right of state courts to enforce non-maritime liens by a proceeding *in rem* analogous to that used in admiralty, if the legislature provided such a remedy, leaves the impression that the majority opinion denied the right. But the opinions do not conflict on this point. The only conflict between them is that one (per BROWN, J.), held the lien to be maritime while the other held it to be non-maritime. Under later authorities, there is clearly no warrant for saying that "state laws for the enforcement *in state courts* of maritime liens, and of *all liens in rem,* on boats and vessels, whatever their origin, are void." (See note in 3d Michigan, page 2.) See *Edwards* v. *Elliott,* 21 Wall. 532, 22 L. Ed. 487; *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638, 44 L.Ed. 921; *The Winnebago,* 141 Fed. 945; s. c., 205 U. S. 354. In the case first cited, it was said: "In respect to such contracts (non-maritime), it was competent for the states to enact such laws as their legislatures might deem

just and expedient, and to provide for their enforcement *in rem.*" See also *Baizley* v. *The Odorilla,* 121 Pa. 231, 1 L. R. A. 505; *City of Erie* v. *Canfield,* 27 Mich. 479, and note; 15 COL. LAW REV. 343. "If the contract is not of a maritime nature, it is of no concern to the federal jurisdiction what remedies the State may provide, whether *in rem* or otherwise." Per SEVERENS, J., in *The Winnebago,* 141 Fed. 945.

BANKRUPTCY—INVOLUNTARY BANKRUPTCY AS ANTICIPATORY BREACH OF CONTRACT.—Claimant, a hotel company, granted baggage and livery privileges to the bankrupt for a term of five years in consideration of the bankrupt's agreement to pay $350.00 per month. The adjudication in involuntary bankruptcy occurred while the contract had more than four years to run, but the trustee did not elect to assume its performance. *Held,* the bankruptcy proceedings amount to an anticipatory breach of the contract, and the claim founded upon this breach is provable under § 63a (4) of the Bankruptcy Act. *Central Trust Co., Trustee,* v. *Chicago Auditorium Association,* 36 Sup. Ct. 412.

The courts seem to agree that bankruptcy is not an anticipatory breach of a covenant in a lease to pay rent. *Ex parte Houghton,* Fed. Cas. No. 6,725; *In re May,* Fed. Cas. No. 9325; *Bailey* v. *Loeb,* Fed. Cas. No. 739; *In re Jefferson,* 93 Fed. 948; *Atkins* v. *Wilcox,* 105 Fed. 595; *In re Mahler,* 105 Fed. 428; *In re Arnstein,* 101 Fed. 706; *In re Hays, F. & W. Co.,* 117 Fed. 789; *In re Rubel,* 166 Fed. 131; *Bray* v. *Cobb,* 100 Fed. 270. (Reversed in *Cobb* v. *Overman,* 109 Fed. 65 on other grounds); *Watson* v. *Merrill,* 136 Fed. 359; *In re Hinckel Brewing Co.,* 123 Fed. 942; *In re Roth & Appel,* 181 Fed. 667; *In re Rennewell,* 119 Fed. 139; *Colman Co.* v. *Withoft,* 195 Fed. 250; *Cotting* v. *Hooper Lewis & Co.,* 220 Mass. 273. Some of these courts support the decisions upon the theory that the bankrupt lessee receives no discharge from paying future rents; while the others say that bankruptcy terminates the relation of landlord and tenant and destroys all future liability. *In re Inman & Co.,* 171 Fed. 185, in agreeing with this latter view considers that the relation of employer and employee is analogous to the relation of landlord and tenant and that involuntary bankruptcy therefore constitutes no breach of an executory contract to pay for personal services, since the contract has come to an end (at least when the bankrupt is a partnership and therefore dissolved by operation of law). The same court on the authority of this case and of *Malcolmson* v. *Wappo Mills, et al.,* 88 Fed. 680 and *People* v. *Globe Mutual Life Insurance Co.,* 91 N. Y. 174, held that involuntary bankruptcy constituted no breach of an executory contract to buy merchandise. *In re Inman & Co.,* 175 Fed. 312, *accord*: *In re Imperial Brewing Co.,* 143 Fed. 579. The latter court, however, was of the opinion that the contract continued in full force between the claimant and the bankrupt. The holding in the principal case is supported by the following: *Ex Parte Pollard,* Fed. Cas. No. 11, 252; *In re Pettingill & Co.,* 137 Fed. 143; *In re Stern,* 116 Fed. 604; *In re Neff,* 157 Fed. 57; *Pennsylvania Steel Co.* v. *New York City Ry. Co.,* 198 Fed. 721; *Board of Commerce of Ann Arbor, Mich.* v. *Security Trust Co.,* 225 Fed. 454. In the last-mentioned case, the contract was executory only on the part of the bankrupt. The holding in *In re Swift,*

112 Fed. 35, that an adjudication in bankruptcy which resulted in depriving the bankrupt broker of stock which he had agreed to transfer, amounts to a breach, is referred to without criticism in *In re Imperial Brewing Co., supra.* The Supreme Court would probably not hold bankruptcy to be an anticipatory breach where it appears that the bankruptcy proceedings have not impaired the ability of the bankrupt to perform his part of the contract. But it is to be regretted that the rule of the court, in the principal case, even as thus limited and however beneficial it may be in other respects, furnishes a rather simple method for an unscrupulous insolvent debtor to defraud his creditors by making "improvident" executory contracts with his confederates.

BANKRUPTCY—POWER OF DISTRICT COURT TO DETERMINE VALIDITY OF TAXES.—A corporation made a padded return of its assets to the state tax commissioner. Later the corporation was adjudicated bankrupt. *Held,* the claim of the state for the amount of the assessment based on the padded return should not be allowed. *In re E. C. Fischer Corp.* (1915) 229 Fed. 316.

§ 64 of the Bankruptcy Act, which gives priority to claims for taxes, provides that the bankruptcy court shall have the power to determine the amount and legality of such taxes. The Supreme Court of the United States held that this provision gave the bankruptcy court power to review a tax assessed by a state board upon a corporation which failed to make a tax return although the state statute provided that such tax should be final. *New Jersey* v. *Anderson,* 203 U. S. 483. In *In re Otto Freund Arnold Yeast Co.,* 178 Fed. 305, the tax was regularly assessed and levied and was neglected up to a time when under the state law no review or objection to the legality of the tax was possible, but the court held that the statutory legality of the tax from the standpoint of regularity is no bar to the bankruptcy court's power to determine whether the property supposed to be taxed actually existed. *Accord*: *In re Selwyn Importing Co.* (D. C.) 18 Am. B. R. 190; *In re Heffron Co.,* 216 Fed. 642. But in *In re Bushnell,* 215 Fed. 651, the court was of the opinion that the failure of the bankrupt to pursue the remedy allowed by the statute of the state deprived his trustee of the right to complain that the assessments are excessive. In this case, as in the principal case, the assessments were based upon the valuation as evidenced by the bankrupt's returns. In those cases cited *supra,* in which the state's claim was not allowed, the courts took the view that the jurisdiction of the bankruptcy court to determine the amount and legality of the tax is not barred by the fact that the tax was assessed, levied and declared to be proper by competent state authority. The effect of such a holding is to give the trustee a greater right than the bankrupt himself had, so far as jurisdictional questions are concerned. The principal case, however, goes much further in holding that the padded tax return does not estop the trustee, although it would have estopped the bankrupt before the institution of the bankruptcy proceedings.

BILLS AND NOTES—BONA FIDE PURCHASER.—The officers of the defendant corporation each morning signed in blank sufficient checks to meet the demands of the day. These checks were kept in the office under conditions that

made a theft easily possible. One such check was stolen; filled in as to date, name of payee and amount, and then negotiated to the plaintiff who took for value without notice. Payment was refused by the bank, and the plaintiff is seeking to recover from the company which signed the check. Judgment for the plaintiff. *Phillips* v. *A. W. Joy Co.,* (Me. 1916) 96 Atl. 727.

The decisions under the law merchant were in direct conflict concerning the situation that arose when a stolen instrument came into the hands of a bona fide purchaser. The leading case of *Baxendale* v. *Bennett,* L. R. 3 Q. B. D. 525 (1878) laid down the proposition that there could be no liability on the part of a maker or drawer without delivery; that without delivery there was no contract, and a stolen instrument, therefore, even in the hands of an innocent holder, was valueless. BRAMWELL, J., in delivering the opinion anticipated such a case as the instant one, by saying "suppose he had signed a blank check, with no payee, or date, or amount, and it was stolen, would he be liable or accountable not merely to his banker the drawee, but to a holder?" The question implies a negative answer, even upon the assumption that the maker was negligent in keeping the check where it might have been stolen. In such a case the crime of theft, and not the negligence, was the proximate cause of the fraud; and there could be no estoppel "because the maker has not said or done anything contrary to the truth so that he should be prevented from setting up the truth." See also *Bank of Ireland* v. *Evans' Trustees,* 5 H. L. C. 389. Numerous American cases followed this doctrine. *Burson* v. *Huntington,* 21 Mich. 416; *Branch* v. *Sinking Fund,* 80 Va. 427; *Dodd* v. *Dunne,* 71 Wis. 578; *Palmer* v. *Poor,* 121 Ind. 135. The contrary doctrine, however, is adopted in *Kinyon* v. *Wohlford,* 17 Minn. 239; *Gould* v. *Segee,* 5 Duer (N. Y.) 268; *Worcester County Bank* v. *Dorchester and Melton Bank,* 10 Cush. 488. The latter doctrine is more in harmony with the spirit of the Law Merchant, which permits the negotiability of instruments of this sort in the interest of commerce, and was accordingly adopted in the Uniform Negotiable Instruments Law in the following words: "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all the parties prior to him, so as to make them liable to him, is conclusively presumed." Maine, however, is one of the few states that have not yet adopted the Negotiable Instruments Law, and therefore the decision in the instant case must have been arrived at without any statutory assistance. An examination of the cases cited by the court shows that the one Maine case directly in point is authority for a decision contrary to the one herein handed down, *Salley* v. *Terrill,* 95 Me. 553; and the three others involved a different situation. Thus, in *Nutter* v. *Stover,* 48 Me. 163, there was a delivery for a specific purpose not apparent on the face; and in *Abbott* v. *Rose,* 62 Me. 194. and *Kellogg* v. *Curtis,* 65 Me. 59, there was a signing and delivery of an instrument under the belief that it was of a character different from that of a negotiable instrument. In *Sally* v. *Terrill,* supra, there was a theft even after the note had already been filled in and made payable to the person who actually stole it, yet it was held that an innocent purchaser could not recover. The court in the instant case sought to differentiate the two cases, but it is submitted that a fortiori the decision in the present case should have been

adverse to the bona fide purchaser. Though this decision does not seem to be supported by the prior Maine cases, it is nevertheless the one that would probably be rendered in the 46 states that have adopted the Negotiable Instruments Law.

BOUNDARIES—ESTABLISHMENT BY ACQUIESCENCE.—Defendant company took possession in 1913 of a twenty foot strip of land in the east side of its right of way which had theretofore been fenced as a part of the tract of land now owned by plaintiff; the fence had been erected in 1899 and had since been recognized by both parties as the boundary line. Plaintiff acquired title to her tract in 1908 by a deed which did not include the twenty foot strip in its description. Plaintiff brings an action to quiet her title to this strip. *Held*, in affirming decree for the plaintiff, that the fence was established as a boundary line by the acquiescence of the parties for ten years. *Helmick* v. *Davenport, R. I. & N. W. Ry. Co.* (Iowa 1916) 156 N. W. 736.

There is a conflict of authority as to what circumstances will make possession adverse when the entry was by mistake. One line of decisions following in the lead of *French* v. *Pearce*, 8 Conn. 439, holds that possession is the important element and that an occupation of land by the claimant as owner is necessarily adverse. *Searles* v. *DeLadson*, 81 Conn. 133; *Mielke* v. *Dodge*, 135 Wis. 388; *Ovig* v. *Morrison*, 142 Wis. 243; *Metcalfe* v. *McCutcheon*, 60 Miss. 145; *Yetzer* v. *Thoman*, 17 Ohio St. 130; *Bayhouse* v. *Urquides*, 17 Idaho 286; *Miles* v. *Penn. Coal Co.*, 245 Pa. St. 94. Another line of cases influenced by *Brown* v. *Gay*, 3 Greenl. (Me.) 126, considers the intent of the claimant as a decisive criterion in determining the character of his possession. If the claimant occupied with the intention of holding only to the true line his possession was not adverse, *Grube* v. *Wells*, 34 Iowa, 148, *Preble* v. *Me. Cent. R. R. Co.*, 85 Me. 260; *Wilson* v. *Hunter*, 59 Ark. 626; *Ayers* v. *Reidel*, 84 Wis. 276; *McCabe* v. *Bruere*, 153 Mo. 1; *Taylor* v. *Fomby*, 116 Ala 621; *Winn* v. *Abeles*, 35 Kan. 85; *King* v. *Brigham*, 23 Or. 262; *Aldrich Mining Co.* v. *Pearce* (Ala.) 68 So. 900. But if he occupied with the intention of holding to the line whether it were correct or not his possession would be adverse. *Somner* v. *Compton*, 52 Or. 173; *Gloyd* v. *Franck*, 248 Mo. 477; *Rosenmeier* v. *Marenholz*, 179 Ind. 467; *Bruce* v. *Washington*, 80 Tex. 368; *St. Louis S. W. Ry. Co.* v. *Mulkey*, 100 Ark. 71; *Edwards* v. *Fleming*, 83 Kan. 653; *Jacobs* v. *Disharon*, 113 Md. 92; *Moore* v. *Fowler*, 58 Ore. 292; *Johnson* v. *Ingram*, 63 Wash. 554. In determining the intent of the claimant the presumption recognized by the court is usually decisive. Some courts presume a holding under mistake to be in subordination to the paper title and not adverse, but by the weight of authority such a holding is presumed to be adverse. See 11 MICH. LAW REV. 57.

In Iowa under the doctrine of *Grube* v. *Wells*, supra, as modified by *Doolittle* v. *Bailey*, 85 Iowa 599, possession of land beyond the true boundary by mistake may or may not be adverse depending upon the presence or absence of an intention to claim title. *Gordon* v. *Ferree*, 101 Iowa 440, 444; *Fullmer* v. *Beck*, 105 Iowa 518. However this doctrine was heavily cut away by the recognition in *Miller* v. *Mills County*, 111 Iowa 654, of the principle

of establishment of boundaries by acquiescence which prevents any controversy as to the true location of a boundary line if there has been an occupancy for the statutory period up to a marked division line without questioning its correctness. *Axmear* v. *Richards*, 112 Iowa 657; *Kennedy* v. *Niles* (Iowa), 96 N. W. 772; *Griffith* v. *Murray*, 166 Iowa 380. The distinction between the results of the doctrine of adverse possession and those of acquiescence which were recognized in *Klinker* v. *Schmidt*, 114 Iowa 695, and *Bradley* v. *Burkhart*, 139 Iowa 323, is strikingly illustrated by the principal case. The defendant contended that private title could not be secured by adverse possession of a railroad right of way, *Northern Pacific Railway Co.* v. *Townsend*, 190 U. S. 267; *Union Pacific Railroad Co.* v. *Laramie Stockyard Co.*, 231 U. S. 190, 12 MICH. LAW REV. 144, 300; and further that plaintiff could not tack her possession to that of her grantor as her deed did not include the strip in controversy. *Gildea* v. *Warren*, 173 Mich. 28; 11 MICH. LAW REV. 245; *Lake Shore & M. S. Ry. Co.* v. *Sterling*, (Mich.) 155 N. W. 383, 15 MICH. LAW REV. 413. The court passes upon these contentions by saying that they are involved in the question of adverse possession but do not arise under the doctrine of acquiescence. The court holds that the same rules apply to a railroad corporation and a natural person and that the only element necessary to invoke the doctrine is acquiescence in an established boundary for the statutory period, privity of estate between the claimant and her grantor not being essential though it would be required to make the statutory period. See note in 21 L. R. A. 829, 834.

BULK SALES ACT—CHATTEL MORTGAGE AND RELEASE OF EQUITY OF REDEMPTION.—A grocer gave a chattel mortgage on his stock, together with a release of his equity of redemption. No notice to creditors was given as provided for in the Sales in Bulk Act, but there was no actual bad faith. *Held*, that the mortgagee had no rights as against a subsequently attaching creditor of the mortgagor. *Mills* v. *Sullivan*, (Mass. 1916) 111 N. E. 605.

The court found that the mortgage was not within the Act but that the effect of the mortgage and release together was to transfer the absolute legal title to the property and if allowed to be good would defeat the statute. In two other states where the question has arisen the courts have held that a chattel mortgage does not come within the Bulk Sales Acts. *Hannah and Hogg* v. *Ritcher Brewing Co.*, 149 Mich. 220, 112 N. W. 713, 12 L. R. A. (N. S.) 178, 119 Am. St. Rep. 674, 12 Ann. Cases 344; *Noble* v. *Ft. Smith Wholesale Grocery Co.*, 34 Okl. 662, 127 Pac. 14, 46 L. R. A. (N. S.) 455. In a note to the last case in 11 MICH. LAW REV. 248, it was pointed out that a chattel mortgage does not pass the legal title in Michigan or Oklahoma but that it does pass title in Massachusetts. It was there mentioned that the Oklahoma case suggesed that in states where title is passed by a chattel mortgage it may well come within a Bulk Sales Act. Massachusetts, in holding that a simple chattel mortgage does not come within the Act, but that the transaction involved in the principal case does, would seem to indicate that it is the passing of the equity of redemption and not the bare legal title which brings the transaction within the Act.

CONSTITUTIONAL LAW—COMPULSORY SERVICE ON HIGHWAYS.—Plaintiff in error had been convicted in Florida for violation of a statute requiring of each able-bodied citizen of certain ages, six days work on the highway, with the alternative of paying three dollars to the county treasurer. Plaintiff contended that this statute imposed involuntary servitude upon him contrary to the thirteenth amendment. The court, however, *held* that work upon the highway was part of the duty which one owes to the state. *Butler* v. *Perry,* 36 Sup. Ct. 258, affirming same in 67 Fla. 405, 66 So. 150.

The constitution secures to the individual liberty and freedom from involuntary servitude. But liberty is not absolute. It is enjoyed subject to government, which may limit its absolute character in order to secure to other members of the community the same liberty, or in order to perpetuate the government itself. Work upon public roads has from immemorial time been regarded as a necessary duty from the citizen to the state. It is no doubt a restriction upon liberty, but it is necessary to the existence of the government which protects the remainder of the liberties guaranteed. Services in the army and on juries is of a like character. The practice has been sustained by the cases. *In re Dassler,* 35 Kan. 678; *Dennis* v. *Simon,* 51 Oh. St. 233.

CONSTITUTIONAL LAW—EXTENSION OF TERM OF OFFICE BEYOND CONSTITUTIONAL LIMIT.—Quo warranto on the relation of Smallwood to try the title of Windom to the office of municipal judge of Duluth, relator claiming title by appointment and respondent by virtue of a hold-over provision of the municipal court act. Windom was elected to the office in February, 1912, for a term of three years. In 1913 the legislature extended the term of the office to four years, providing for an election in April, 1915, and further providing that the then incumbent should continue in office until the election and qualification of his successor. At this election Smallwood won over Windom but the preferential system of voting used was held unconstitutional in *Brown* v. *Smallwood,* 130 Minn. 492, 153 N. W. 953, 14 MICH. LAW REV. 74. Shortly afterward the Governor appointed Smallwood on the theory that the office was vacant. The Constitution limited the term of office of a municipal judge to seven years. If Windom were allowed to hold over as he claimed, his term would extend beyond that fixed by the Constitution, and he would serve seven years and two months. The question was whether the hold-over provision, providing for a term in excess of the constitutional period, was altogether void or void only as to the excess. *Held,* that the hold-over provision was unconstitutional so that the whole term created by it ceased to exist. *State ex rel. Smallwood* v. *Windom,* (Minn. 1916) 155 N. W. 629.

It seems quite clear that the legislature cannot extend an office beyond the constitutional term by a hold-over provision. *State* v. *Clark,* 87 Conn. 537; *Commonwealth* v. *Sheatz,* 228 Pa. 301, 77 Atl. 547. Yet where the legislature has created a longer term than the Constitution allows, the baffling question is whether the term is wholly void or void only as to the excess. In the instant case the majority of the court held that the provision for holding over was unconstitutional, and that the defeasible term which it created fell with it. HAL-

LAM, J., dissented from this ruling and held that the hold-over provision was void only as to the excess. If the act had provided for a term in excess of the constitutional limit, for example a term of eight years—one year beyond that fixed by the Constitution—then according to most cases the act would be void only as to the excess of the term. *Sinking Fund Com.* v. *George,* 104 Ky. 260, 47 S. W. 779; *State* v. *Long,* 21 Mont. 26; *State ex rel.* v. *Bates,* 108 Minn. 55; *People* v. *Perry,* 79 Cal. 105, 21 Pac. 423; *Lewis* v. *Lewelling,* 53 Kan. 201; 29 CYC. 1396. The writer is unable to distinguish between the majority opinion and the cases cited supra.

CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.—The town of Warwick had been authorized to issue bonds to be secured by a sinking fund annually to be increased by taxation. A statute of 1913 provided for the division of the town of Warwick into two towns and for a commission to make the division; it also provided that all duties and liabilities of the old town were to remain intact, but the commission was to decide which town would be primarily liable. The commission, following this power, attempted to divide the sinking fund, already accumulated, between the two towns, and apportioned the liability on the bonds in the same proportion. No express provision was made for future additions to the fund. It was *held* that this action of the commission impaired the obligation of the contract of the bond-holders. "The security of the bond-holders required the safe-guarding of that portion of the sinking fund already accumulated and also required that there should be adequate legislation providing for a suitable annual addition to such fund." *Town of Warwick* v. *Rhode Island Hospital Trust Co.,* (R. I. 1916) 96 Atl. 508.

In this case the validity of the contract is not affected, but the certainty of recovering on the bonds, their security, is said to be lessened. The court argues that each bond-holder has the right to look to an undivided and entire fund for the payment of his bond, and that when the fund is divided his security is less than before. The argument which might be opposed to this is that the bonds were also apportioned between the towns, and bond for bond the security was as great as before the division. In case of default the bond-holder would not draw upon the entire fund, but he would receive his proportionate share of it. If now it is held by two parties instead of by one, his probable proportionate share is not diminished. But the court placed special emphasis on the feature of having an undivided fund and this under a single management. The court also pointed out that the division was defective in not providing for future accumulations, and this point is perhaps more important. The bond-holder should be secured not only by the existing fund, but also by additions to be made annually. Yet it might have been maintained that the delegation of the liability on the bond, carried, by implication, the obligation to add annually to the sinking fund. If we could assume that in reality the security of the bond-holders was lessened the case is supported by *Van Hoffman* v. *Quincy,* 4 Wall. 535, 18 L. Ed. 403; *Green* v. *Biddle,* 8 Wheat. 84, 5 L. Ed. 547; *Louisiana* v. *Pilsbury,* 105 U. S. 278, 26 L. Ed. 1090; *Mount Pleasant* v. *Beckwith,* 100 U. S. 514, 25 L. Ed. 699.

CONTRACTS—AGREEMENT TO GIVE EMPLOYEE "FAIR SHARE OF PROFITS" VOID FOR INDEFINITENESS.—Defendant, an architect, employed plaintiff as a draftsman. After working for some time plaintiff was offered a position elsewhere and defendant, in order to induce plaintiff to remain with him, gave him an increase in salary and agreed to give him a "fair share of the profits" of the business as determined when he should close his books on the first of the following January. Plaintiff was discharged before that date and now sues to recover his share of the profits. *Held*, Plaintiff cannot recover. The agreement to give a "fair share of the profits" is too vague, uncertain and indefinite to be enforced. In addition to being uncertain the determination of what is a "fair" share of the profits under the circumstances of the business of defendant is dependent upon so many other circumstances that the intention of the parties is pure conjecture. *Varney* v. *Ditmars*, (N. Y. 1916) 111 N. E. 822.

Three judges dissented from the view taken by the majority of the court. The position taken by CARDOZO, J., who wrote the dissenting opinion, is that a promise to pay an employee a fair share of the profits is not of necessity too vague to be enforced. This view is sustained by the Massachusetts Court in cases where the promise was very similar to that under consideration in the principal case. *Noble* v. *Joseph Burnett Co.*, 208 Mass. 75, 94 N. E. 289; *Brennan* v. *Employers' Liability Assurance Corp., Ltd.*, 213 Mass. 365, 100 N. E. 633. On the other hand a great many courts have refused to allow recovery on agreements no less definite than the one in question. *Fairplay School Township* v. *O'Neill*, 27 Ind. 95, 26 N. E. 686; *Van Slyke* v. *Broadway Ins. Co.*, 115 Cal. 644, 47 Pac. 689, 928; *Taylor* v. *Brewer*, 1 M. & S. 290, 21 R. R. 831. The principal question in the cases of this character would seem to be one of fact as to whether or not the minds of the parties met, and at the time of the agreement intended that the terms used should designate some amount or share as the one upon which they could agree. If this agreement refers to something by which the amount the parties intended to agree upon can be ascertained the courts will undoubtedly give effect to it. But if something is left for future adjustment, the minds of the parties have not yet met, the agreement is not complete, and cannot be enforced. *Watts* v. *Weston*, 62 Fed. 136, 10 C. C. A. 302, 26 U. S. App. 121; *Wittowsky* v. *Wasson*, 71 N. C. 451; *Dayton* v. *Stone*, 111 Mich. 196, 69 N. W. 515. It seems probable therefore that if the court could have said from the agreement reached by the parties that their minds had actually met upon some method of ascertaining a fair share of the profits, or if proof had been offered that there was a customary method of making such finding, the decision of the courts would have been for the plaintiff.

CORPORATIONS—LIABILITY FOR SLANDER.—An action was brought to recover damages for slander against the plaintiff by an agent of the defendant, a New York corporation. The lower court held that although the words were actionable per se, the plaintiff could not recover because no action could be maintained against a corporation for slander. The decision was based on the decision in *Eichner* v. *Bowery Bank*, 24 App. Div. 63, 48 N. Y. Supp. 978, which held that "a corporation can act only by or through its officers or

agents, and as there can be no agency for slander, it follows that a corporation cannot be guilty of slander." The Court of Appeals in reversing the decision of the lower court *held* that the true rule is that a corporation is liable for torts committed by its officers or agents, when acting within the actual or implied scope of their employment. It expressly overruled the *Eichner* v. *Bowery Bank* case, supra, saying the archaic doctrine on which that case was based has long since been exploded. *Klaras* v. *Barron C. Collier,* (N. Y. 1916) 111 N. E. —.

For a discussion of the liability of corporations for their torts generally, see 14 MICH. LAW REV. 506-7.

COVENANTS—WARRANTY BY STRANGER TO TITLE.—Defendants, husband and wife, conveyed certain lands by warranty deed, the wife joining but having no title or estate in the land conveyed except her statutory dower. Their grantee conveyed to plaintiff who now sues for breach of covenants because of an encumbrance on the land. *Held,* that the wife is not liable on the covenant of warranty, as, being a stranger to the title, her covenant would not run with the land. *H. T. & C. Co.* v. *Whitehouse,* (Utah 1916) 154 Pac. 950.

It is usually stated as a general rule that for a covenant to run with the land it must not only touch and concern the land or estate granted but there must be a privity of estate between the covenanting parties, *Keppell* v. *Bailey,* 2 Myl. & K. 517; *Rogers* v. *Hosegood,* [1900] 2 Chan. 388; *Cole* v. *Hughes,* 54 N. Y. 444; *Hurd* v. *Curtis,* 19 Pick. (Mass.) 459; *Lyon* v. *Parker,* 45 Me. 474; *Town of Middletown* v. *Newport Hospital,* 16 R. I. 319; *Easter* v. *Little Miami Ry. Co.,* 14 Ohio St. 48. But as to the necessity for privity of estate between covenanting parties see HOLMES, J., in *Norcross* v. *James,* 140 Mass. 188. To meet the requirement of privity of estate it is not necessary that there be a relation of tenure in the feudal sense. *Van Renssalaer* v. *Read,* 26 N. Y. 558, 574. The acquisition or conveyance of subordinate and incorporeal interests such as easements has been held sufficient. *Nye* v. *Hoyle,* 120 N. Y. 195; *Morse* v. *Aldrich,* 19 Pick, (Mass.) 449; *Bronson* v. *Coffin,* 108 Mass. 175; *Hazlitt* v. *Sinclair,* 76 Ind. 488; *Fitch* v. *Johnson,* 124 Ill. 111; *Puden* v. *Chicago R. I. & R. Ry. Co.,* 73 Iowa, 329; *St. Louis I. M. & S. Ry. Co.* v. *O'Baugh,* 49 Ark. 418. Even the passing of the lowest estate possible, mere seisin in fact or possession, has been held to constitute privity of estate within this rule. *Slater* v. *Rawson,* 6 Met. (Mass.) 439; *Dickinson* v. *Hoomes,* 8 Gratt (Va.) 353, 395; *Morton* v. *Thompson,* 69 Vt. 432, 438; *Beddoe* v. *Wadsworth,* 2 Wend. (N. Y.) 120. To the effect that the benefit of a covenant will run with the land in the absence of privity, see *Shaber* v. *St. Paul Water Co.,* 30 Minn. 179; *Gaines' Adm'x* v. *Poor,* 3 Metc. (Ky.) 503; HOLMES, THE COMMON LAW, 404, WILLISTON'S WALD'S POLLOCK, CONTRACTS, (3 Am. Ed.) 300. Covenants for title run with the land till breach. RAWLE, Cov., (4th Ed.) 318, and in view of the generally prevailing doctrine it is difficult to see why privity of estate between the covenanting parties should not be necessary to make such covenants available to a remote grantee. In fact the rule as declared by the weight of authority seems to be that a cove-

nant for title by one having neither possession of, nor title to, the land conveyed is a personal covenant and will not run with the land. *Martin* v. *Gordon,* 24 Ga. 533; *Randolph* v. *Kinney,* 3 Rand. (Va.) 394; *Mygatt* v. *Coe,* 124 N. Y. 212, 142 N. Y. 78, 147 N. Y. 456, 152 N. Y. 457; *Pyle* v. *Gross,* 92 Md. 132; *Bull* v. *Beiseker,* 16 N. D. 290; *Wallace* v. *Pereles,* 109 Wis. 316. Contra are *Solberg* v. *Robinson,* 34 So. Dak. 55; *Wead* v. *Larkin,* 54 Ill. 489; and *Tellotson* v. *Prichard,* 60 Vt. 94. In the later two cases the grantees went into possession, and they might be distinguished on this point. Other courts achieve the same result on the theory that the broken covenant ripens into a chose in action in favor of the covenantee which would pass by assignment with the land to remote grantees. *Kimball* v. *Bryant,* 25 Minn. 496; *Iowa Loan & Trust Co.* v. *Fullen,* 114 Mo. App. 633.

DAMAGES—FOR MENTAL SUFFERING ALONE.—Plaintiff delivered to defendant company for transportation from Asheville, N. C., to Hickory Grove, S. C., a casket and grave-clothes intended for the burial of the wife of plaintiff. Through the negligence of defendant's agent, the casket was misrouted, and arrived too late to be used for the burial. Plaintiff accepted full payment for the value of the articles shipped, and brought this action claiming damages solely on account of the mental anguish occasioned him by the delay. *Held,* that no recovery should be allowed; mere mental pain and anxiety being too vague for legal redress where no injury is done to person, property, health or reputation. *Southern Express Co.* v. *Byers,* 36 Sup. Ct. 410.

This decision of the Supreme Court follows the view taken by the lower Federal courts in a long list of cases cited in the opinion. Thus the doctrine announced by the Supreme Court of Texas in 1881 in the case of *So Relle* v. *Western Union Tel. Co.,* 55 Tex. 308, is definitely rejected by the United States Courts. The question of whether recovery may be had for mental suffering alone has usually arisen in cases against telegraph companies on account of delayed or lost death-messages. The same reasoning which allows recovery in those cases would seem equally applicable, however, to a common carrier of goods who accepts the goods with notice of their character, so that the knowledge that mental suffering may follow from their delay may be imputed to it. For a time the doctrine of the Texas case gained adherents rapidly, and seven states are now lined up on that side of the question. As against this number, however, fifteen states, and now the Supreme Court of the United States, have taken the opposite view. A recent case which reviews many of the cases on the question is that of *Western U. Tel. Co.* v. *Choteau,* 28 Okla. 664, 115 Pac. 879, 49 L. R. A. (N. S.) 206, cited in the opinion in the principal case. For further discussion and authority as to damages for mental suffering see MICH. LAW REV., Vol. 2, pp. 150, 421, 641, 642; Vol. 3, pp. 74, 399; Vol. 4, p. 244; Vol. 5, pp. 208, 382; Vol. 6, pp. 341, 503, 592; Vol. 7, p. 673; Vol. 10, p. 328; Vol. 12, p. 149.

DEEDS—REMEDY FOR VIOLATION OF RESTRAINT ON ALIENATION.—A conveyed property to B with the condition that B should not alienate the property during A's lifetime. B disposed of the property before A's death. After B's death, the heirs at law of B sought to obtain a cancellation of the deed exe-

cuted by B since it violated the condition in A's deed to B. *Held* that the heirs of B were not the proper persons to complain of such violation. *Kentland Coal & Coke Co.* v. *Keene,* (Ky. 1916) 183 S. W. 247.

It is assumed here that the condition in restraint of alienation for the life of the testator is good. Such a restraint, however, is generally held to be void. See 14 MICH. L. REV. 353. The court in the principal case based its decision upon the well-established rule that when a breach or non-performance of a condition annexed to the grant of a freehold estate occurs, the title conveyed is not void but is only voidable by the act of the grantor or his heirs. Such a question may arise in three ways. First, when the grantor by his deed imposes a condition subsequent and attempts to pass the right of entry to someone else by the same deed, it is the established rule that, though this is void as a condition, the court will give it effect as a conditional limitation and the gift over will take effect as an executory devise or a springing use. See *Newis* v. *Lark and Hunt,* 2 Plowd. Com. 403. But in view of the recent statutes allowing assignments of choses in action and providing that suits shall be brought in the name of the real party in interest, such assignments of the right of entry have been sustained in several states. See *Bouvier* v. *Ry. Co.,* 67 N. J. L. 281, 60 L. R. A. 750. Second, when the grantor by a subsequent instrument attempts to devise or grant this right of entry, it is held void at the common law, whether made before or after breach. See *Upington* v. *Corrigan,* 79 Hun. (N. Y.) 488, 37 L. R. A. 794; and *Trustees, etc.* v. *Venable,* 159 Ill. 215, 50 Am. St. Rep. 159. Third, when the grantor makes no attempt to transfer his right of entry, the universal rule is that the grantor and his heirs are the only ones entitled to a right of entry. See *Lewis* v. *Lewis,* 74 Conn. 632; *Board of Education, etc.* v. *Trustees, etc.,* 63 Ill. 204; *Osgood* v. *Abbott,* 58 Me. 73; *Mo. Hist. Society* v. *Academy of Science,* 94 Mo. 459; and *Phelps* v. *Chesson,* 34 N. C. 194. Dictum to this effect is found in *Adams* v. *Ore Knob Cooper Co.,* 4 Hughes 589. Only two cases have been found which question this doctrine: *Frazier* v. *Combs,* 140 Ky. 77; and *Pond Creek Coal Co.* v. *Runyan,* 161 Ky. 64. These two cases are expressly overruled by the principal case, so that the doctrine announced therein stands unquestioned.

FALSE IMPRISONMENT—DETENTION IN MINE.—Plaintiff contracted to work in defendant's coal mine for seven hours at a time. Defendant lowered the plaintiff, by means of an elevator, to the level where he was to work. Plaintiff, after working for about two hours, decided to work no longer and requested defendant's servant to raise him, by means of the elevator, to the surface. This, defendant's servant refused to do until seven hours after plaintiff had started work. Plaintiff sued defendant for false imprisonment. *Held* that defendant was under no legal obligation to convey plaintiff to the surface until the end of this seven hour period, and hence plaintiff had failed to make out a cause of action. *Herd* v. *Weardale Steel Coal & Coke Co. and others,* 84 L. J. K. B. 121.

The court in this case was of the opinion that since plaintiff had contracted to remain in defendant's mine for seven hours, the defendant was under no

liability to convey him to the surface any sooner. The court pointed out that defendant's elevator was no doubt busy hauling coal, other men, etc., and hence defendant could not be required to perform a service outside of its contract. The conclusion reached by the court here appears to be sound. In *Robertson* v. *Ferry Co.*, 79 L. J. P. C. 84, it was held that the plaintiff who had entered a gate to a ferry dock intending to be transported on a ferry had no right to demand that he be let back through the same gate, and hence it was not false imprisonment for the ferry company to refuse to let him through the gate. Plaintiff had contracted to be carried on defendant's ferry and not to be let back through the entering-gate of defendant's dock. A somewhat similar situation occurred in *Talcott* v. *Nat'l Exhibition Company*, 144 App. Div. (N. Y.) 337. Here the plaintiff had gone into the enclosure of a ball-park to purchase a ticket. Crowds of people were coming into the park through entrances and plaintiff was not allowed to go out by these entrances. An hour later he was conducted out of the field through an entrance leading into the club-house. Keeping the plaintiff in the ball-park for an hour was held to be false imprisonment. This case, however, is clearly distinguishable from the principal case, since in the principal case the only possible means of exit was one which was being used, while in the *Talcott* case it is not shown that the entrance through the club-house was being used at all. The principal case is supported by *Spoor* v. *Spooner*, 12 Met. (Mass.) 281.

HUSBAND AND WIFE—STATUTORY RIGHT AND INTEREST OF WIFE BY DESCENT WHILE HUSBAND IS ALIVE.—Defendant husband by fraudulent representations persuaded plaintiff, his wife, to sign a deed whereby her rights by descent in certain of his lands were released. The statutes of Maine (Laws of 1895, c. 157, § 2, R. S. c. 77 § 8) provide that in lieu of dower the husband's real estate shall descend to his wife upon his death, the quantity she takes being contingent upon the existence of issue or kin. *Held* that a bill in equity by the wife against her husband seeking to impress a trust *ex maleficio* upon a portion of the money in his hands derived from the sale of the land was properly sustained on demurrer. *Whiting* v. *Whiting*, (Me. 1916) 96 Atl. 500.

There are few cases wherein the rights of the wife under such statutes are determined, but inasmuch as the rights given the wife are in lieu of and analogous to dower, it is clear that the principles governing dower are applicable. There is great contrariety of judicial opinion as to the exact status of inchoate dower. Some of the courts have taken the view that inchoate dower is a mere possibility of acquiring an estate; that it can be taken away by the legislature while inchoate. *Moore* v. *City of New York*, 8 N. Y. 110. The court held in the case of *In Re Mary Ann Alexander*, 52 N. J. Eq. 96, that the legislature could not deprive an insane woman of inchoate dower. And it has been held in many cases that a husband can defeat his wife's dower by dedication or appropriation to public use. *Gwynne* v. *City of Cincinnati*, 3 Oh. St. 24, 17 Am. Dec. 576; *Duncan* v. *City of Terre Haute*, 85 Ind. 104; *Orrick* v. *City of Fort Worth*, (Tex. Civ. App.) 32 S. W. 443; *Venable* v. *Wabash Western R. Co.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; *Baker* v. *Atchison, etc., R. Co.*, 122 Mo. 396, 30 S. W. 301; *Randall* v. *Texas Cent. R.*

Co., 63 Tex. 586. "According to the better view, when proceedings are instituted to condemn real estate for public use, and an award of damages is made, the inchoate right of dower of the owner's wife will be protected, and her interest in the award will be preserved to her." 14 CYC. 927; *Matter of New York, etc., Bridge*, 75 Hun. (N. Y.) 558, 27 N. Y. Supp. 597; *Wheeler* v. *Kirtland*, 27 N. J. Eq. 534. Following the general rule that anyone who has an interest in mortgaged land that may be cut off by foreclosure may redeem "A widow or a married woman who has joined in release of dower may redeem, as she is entitled to dower as against every person except the mortgagee and those claiming under him." JONES, MORTGAGES, (7th Ed.), § 1067. In the case of *Brown* v. *Brown*, 94 S. C. 492, the commission of waste by a vendee of the husband the wife not joining in the conveyance, was enjoined at the suit of the wife to protect her inchoate dower. In *Rumsey S. Sullivan*, 150 N. Y. Supp. 287, the court refused to enjoin a vendee of the husband from drilling for oil on land in which the wife had not released her dower interest. But in the main, recognizing the old principle that dower is a favorite of the law, Co. LITT. 1246, the tendency of the modern cases is in support of the principal case.

INSURANCE—DUTY OF INSURED TO DISCLOSE AFTER APPLICATION FILED.—Insured applied to defendant company for a life insurance policy and agreed that answers to its medical examiner, by whom he was examined, should be the basis of and consideration for the contract. Three days later he was examined by the examiner of another company and found to be suffering from Bright's disease. He made arrangements for treatment, but did not disclose his condition to defendant company, whose local agent, about a month later, delivered his policy to him, just before receiving a telegram ordering that the policy be not delivered, as the insurer had learned of the results of the second examination through the second physician. Insured died five months after receiving the policy. The company appeals from verdict in favor of beneficiary. *Held*, that although being told after applying for insurance that he was suffering from Bright's disease he was not bound to inform the insurer unless he believed the information to be true. But the facts show a later microscopic examination and treatment and this amounts to intentional concealment of a material fact, and avoids the policy. *United States Annuity & Life Ins. Co.* v. *Peak*, (Ark. 1916) 182 S. W. 565.

The authorities, almost without exception, hold to the doctrine that an applicant for insurance must use due and reasonable diligence to disclose all facts affecting the risk which arise after the application has been made and before the contract is consummated by delivery. *M'Lanahan* v. *Universal Ins. Co.*, 1 Pet. 170; *Piedmont & A. L. Ins. Co.* v. *Ewing*, 92 U. S. 377; *Equitable Life Assur. Soc.* v. *McElroy*, 83 Fed. 631; *Whitley* v. *Piedmont A. & L. Ins. Co.*, 71 N. C. 480; *Thompson* v. *Travellers' Ins. Co.*, 13 N. D. 444; *Blumer* v. *Phoenix Ins. Co.*, 45 Wis. 622; *Harris* v. *Security Mut. Life Ins. Co.*, 130 Tenn. 325. The basis for the rule is stated in the *M'Lanahan* case in that a life insurance contract is a contract uberrimae fidei, and the duty to disclose arises immediately after the learning of the change in the status of the risk,

and would seem to require disclosure to the insurer even if the insured doubted the truth of the change, as even the possibility of the change affects the desirability of the risk to the insurer. The doctrine has been modified to some extent where the applicant has qualified his statements or warranties by the words "to the best of my knowledge and belief." When such is the fact the applicant is not required to notify the insurer unless he is sure of the truth of the change in the nature of the risk, or of a misrepresentation made in his statements. See note 42 L. R. A. N. S. 431. However, in the principal case, there are no qualifications, and it seems as if the court has applied the reasoning of the modified rule without the necessary facts to base that doctrine upon.

INSURANCE—WAIVER OF DEFENSE.—Insured died in 1897, and in 1914, plaintiff, wife of insured, opened negotiations with insurer, informing of the death and asking the status of the policy. Insurer replied stating that its record showed the policy to be forfeited for non-payment of a premium due in 1894. Plaintiff answered claiming death within three years so that a certain portion of the policy was payable. Insurer then forwarded blank proofs of death, but stated that the company waived no defenses. Plaintiff expended some money in preparing the proofs of death, and brought suit after insurer refused to honor the policy. *Held,* that the insurer waived not only the right to insist on the proofs of death within ninety days from the death, but also the defense of the statute of limitations, and judgment for the plaintiff. *Shearlock* v. *Mut. Life Ins. Co.,* (Mo. 1916) 182 S. W. 89.

The waiver of the two defenses is based on the request for submission of the proofs of death, and is merely the application of a doctrine universally followed as to the failure to submit the proofs within the prescribed time, but new as to the second defense. 4 COOLEY, INS., 3993; *De Farconnet* v. *West Assur. Co.,* 122 Fed. 448; *Covenant Mut. Life Ass'n* v. *Baughman,* 73 Ill. App. 544; *Bowen* v. *Preferred Acc. Ins. Co.,* 81 N. Y. Supp. 840. But since the waiver is made after the time limit has expired, the facts constituting the waiver must contain the element of estoppel. *Chandler* v. *Ins. Co.,* 180 Mo. App. 394; *Walker* v. *Knights of Maccabees,* 177 Mo. App. 50; *Hollis* v. *State Ins. Co.,* 65 Iowa 454. The *Hollis* case says that the facts need not be such that present a case of technical estoppel, and the court holds in the principal case that the expense gone to by the plaintiff in filing the proofs of death supplies this necessary element. The general statement that no defenses would be waived is held to be insufficient—there must be a specified statement not only of the refusal to waive, but also of the defenses. *Marthinson* v. *Ins. Co.,* 64 Mich. 372; *Corson* v. *Ins. Co.,* 113 Iowa 641; *Home Ins. Co.* v. *Kennedy,* 47 Neb. 138.

INSURANCE—WAIVER OF DEFENSE.—Plaintiff insured a stock of merchandise with the defendant company, the policy containing an "iron safe" clause which the plaintiff violated. The property was destroyed by fire and plaintiff demanded payment, which was refused on the ground of the non-payment of the last premium. Action was commenced and at the trial the defendant was

refused the privilege of amending its answer to include the violation of the iron safe clause. Plaintiff received a verdict, and defendant thereupon moved for a judgment non obstante veredicto and for an order that the amendment be included in the answer. The trial court granted these motions and entered judgment for defendant. On appeal the Supreme Court *held* that by not relying on the defense during the negotiations the defendant did not waive the right to the defense, but since at the trial the request for a directed verdict was properly denied, there was no foundation for judgment non obstante veredicto; and judgment was therefore ordered in accordance with the verdict. *Ennis* v. *Retail Merchants Assoc. Fire Ins. Co.,* (N. D. 1916) 156 N. W. 234.

The courts of this country have differed greatly as to what constitutes a waiver of defense by an insurance company, but since the case of *Brink* v. *Hanover Fire Ins. Co.,* 82 N. Y. 108, the following doctrine has been generally followed: "Such companies may refuse to pay a loss without specifying any ground, and when sued may insist on any available ground; but if they plant themselves upon any specified defense and so notify the assured, they should not be permitted to retract after he has acted on their position as announced, and incurred expense in consequence of it." The basis of this rule is the estoppel, and the difficult question before the courts has been to decide whether all the elements of a technical estoppel need be present. In general, the courts declare that some element of estoppel must be present. *Early* v. *Ins. Co.,* 178 Pa. 631; *Moore* v. *National Acc. Ass'n,* 38 Wash. 31; *Kerr* v. *Milwaukee Mech. Ins. Co.,* 117 Fed. 442; *Cassimus Bros.* v. *Scottish Union & Nat. Ins. Co.,* 135 Ala. 256; *Fraser* v. *Aetna Life Ins. Co.,* 114 Wis. 510. The reason for this being that the law does not favor forfeitures. See 2 BACON, INS. § 435 et seq. The knowledge of all the facts was held to be necessary to establish the waiver in *Security Ins. Co.* v. *Laird,* 182 Ala. 121, and the doctrine of the principal case supports the *Laird* case, since the defendant never learned of the breach of the iron safe clause until at the trial.

MARRIAGE—WHO MAY SUE TO ANNUL?—The plaintiffs individually and as the committee of the person and estate of X, a lunatic, brought an action to annul his marriage on the ground of his incompetency at the time the marriage was contracted. The Domestic Relations Law of New York, § 7, provides that "an action to annul a void or voidable marriage may be brought only as provided in the Code of Civil Procedure." §§ 1747-1748 of the New York Code of Civil Procedure do not provide for a lunatic's committee annulling his marriage. *Held,* that the action was not maintainable in the name of the committee. *Walter* v. *Walter,* (N. Y. 1916) 111 N. E. 1081.

In 26 CYC. 911 the rule is laid down that "in case the injured party is insane and under guardianship, the suit should generally be brought in the name of the guardian." In *Crump* v. *Morgan,* 3 Ired. Eq. 91, 40 Am. Dec. 447 a committee was permitted to maintain an annulment suit in the name of the lunatic. By way of dictum the court stated that the committee might sue in his own name. The suit in the case of *Countess of Portsmouth* v. *Earl of Portsmouth,* 1 Hag. Ecc. 355, was brought by "John Charles, Earl of Ports-

mouth, acting by Mr. Fellows, his committee." The court in *Crump* v. *Morgan*, supra, states that it does not "doubt that a suit for nullity may in England be brought by the committee alone; for in the ecclesiastical courts any party in interest, though a third person, as a committee of a lunatic, or one claiming an estate in remainder after failure of issue, may institute such a suit or intervene in it, as Mr. CHITTY states: 2 Gen. Prac. 460." Under § 1025, R. S. 1881 (Ind.) in the case of *Price* v. *Aughe's Guardian*, 101 Ind. 317, it was held that suit for annulment could be maintained only in the name of the incapable party and not in the name of the guardian. While the holding in the principal case is novel yet it is clear that it is a correct adjudication in view of the New York Statutes.

MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS.—Plaintiff, a taxpayer, brought an action to enjoin the issue and sale of bonds for the purpose of refunding an indebtedness incurred in paving the streets and in improving the waterworks system. When these improvements were contracted for, the city was indebted beyond the limit set in the CONSTITUTION OF 1895, Art. 8, § 7. Subsequent to this, an amendment to the constitution was passed which made § 7 ineffective, as far as it applied to the indebtedness of the defendant city "already incurred." The refunding was begun pursuant to the authority conferred in this amendment. It was *held*, that the amendment validated the debt which was created when the city had no power to contract for such improvements under the constitution, especially when no vested rights were impaired. *Lucas* v. *City of Florence*, (S. C. 1916) 87 S. E. 996.

The decision giving effect to the amendment is not open to debate. Either as an enabling act or as a measure to make good a moral obligation, the conclusion is well supported, *United States* v. *Realty Co.*, 163 U. S. 427. However the conclusion of the court as to the legality of refunding a debt of this kind without the aid of an enabling act, is a doubtful one. The rule announced from the case of *Luther* v. *Wheeler*, 73 S. C. 83, in terms stated in the principal case, that a recovery could be had for these improvements, when the debt was contracted in the face of a constitutional provision, is not supported by good authority. The following cases deny a recovery, under such circumstances, on either an express or an implied contract. *Litchfield* v. *Ballou*, 114 U. S. 190; *Jutte & Folly Co.* v. *City of Altoona*, 94 Fed. 61; *Gamewell Fire Alarm Tel. Co.* v. *City of Laporte*, 96 Fed. 664, affirmed in 102 Fed. 417; *Wykes* v. *City Water Co. of Santa Cruz*, 184 Fed. 752, affirmed in 202 Fed. 357; *Pilling* v. *City of Everett*, 67 Wash. 109; *Ft. Dodge Elec. Light & Power Co.* v. *City of Ft. Dodge*, 115 Ia. 568; *State* v. *City of Helena*, 24 Mont. 521; *Herman* v. *City of Oconto*, 110 Wis. 660; *Balch* v. *Beach*, 119 Wis. 77; 14 COL. L. REV. 70; DILLON, MUNICIPAL CORPORATIONS. (5 Ed.) § 190 et seq. If the rule announced in the principal case is in fact the true rule of *Luther* v. *Wheeler*, supra, the purpose of a constitutional limit of municipal indebtedness is nugatory in South Carolina. A careful examination will make it evident that the decision in *Luther* v. *Wheeler* does not support the broad rule, as stated in the principal case. That decision had reference to contracts made payable out of current revenue, hence the debt was not one to which the con-

stitutional limitation is applicable. The principal case illustrates another effective means of evading a constitutional limitation—by amendment to the constitution validating a void debt.

PROCESS—JURISDICTION OVER A FOREIGN CORPORATION IN ACTIONS ARISING OUTSIDE THE STATE.—The plaintiff, a resident of New York, sued the defendant corporation in the New York court upon a contract made in Pennsylvania, and served process upon an agent designated by the defendant as "a person upon whom process against the corporation may be served within the state." The defendant was engaged in business within the state of New York and conceded the agency of the person upon whom process was served, but contended that the agency to receive service must be confined to actions which arose out of business transactions in New York. This position was sustained by the Supreme Court and the Appellate Division, but on appeal to the Court of Appeals the order was reversed, and it was *held* that the appointment of the agent to receive service of process was for any action which under the laws of the state might be brought against a foreign corporation. *Bagdon* v. *Philadelphia and Reading Coal and Iron Company,* (N. Y. 1916), 111 N. E. 1075.

The District Court of the United States for the Northern District of California reached a contrary conclusion in a case, decided in October, 1915, which was not cited in the opinion of the New York court. *Fry* v. *Denver & R. G. R. Co.,* 226 Fed. 893, commented upon supra, page 333. The court in this latter case relied upon two decisions of the Supreme Court of the United States, which held that in a suit against a foreign corporation that has not appointed a resident agent to receive service of process, service upon a person designated by the statute providing for such service is not sufficient to give the court jurisdiction over a cause of action arising in another state. *Old Wayne Life Assn.* v. *McDonough,* 204 U. S. 8; *Simon* v. *Southern Railway Co.,* 236 U. S. 115, noted in 13 MICH. L. REV. 520. These two cases were urged upon the New York court as conclusive authority for the position it advanced, but the court distinguished them from the case before it, where the corporation itself appointed the agent to receive service, and declined to follow them. The reasoning of the court is similar to that outlined in the criticism of the *Fry* case, supra, page 333.

PUBLIC OFFICERS—CONTRACTUAL RIGHT TO SALARY.—Action was brought by several policemen against the City of Cleveland to recover for their salaries as police officers for the time during which they had been wrongfully ousted from office. Other policemen had been appointed in their stead during the interval and had drawn substantially the same salary. *Held,* where a policeman has been wrongfully dismissed from office, he may recover his salary from the city for the period of the wrongful ouster, less the amount otherwise earned by him, though another has been employed in his place and has been paid the salary thereof. *City of Cleveland* v. *Luttner,* (Ohio 1916) 111 N. E. 280.

In arriving at this conclusion the majority of the court took the view that a contract existed between the officer and the public, for the breach of which the former should have the same remedy as a private servant for any

wrong done him in his employment; in other words, that there subsisted between the officer and the public a contractual relation which was protected under the constitutional guaranty as an invasion of private contract. However, according to the overwhelming weight of authority, public policy does not support the theory that an official status, by election or appointment, together with the emoluments of office, constitutes a contract with the public. An officer de jure can recover his salary from the city, so long as it has not been paid to a *de facto* occupant, because he has a title to it, but the very basis of the *de facto* doctrine and policy is to protect the state in making just such a payment as this. That a *de jure* officer cannot recover against the city when it has employed and paid a *de facto* officer is clearly shown by JONES, J., who dissented in the instant case. See also *Bullis* v. *Chicago,* 235 Ill. 472, 85 N. E. 612; *Brown* v. *Tama County,* 122 Iowa 745; *Dolan* v. *Mayor,* 68 N. Y. 274, 23 Am. Rep. 168; *Westberg* v. *Kansas City,* 64 Mo. 493; *Scott* v. *Crump,* 106 Mich. 288, 64 N. W. I.; *Selby* v. *Portland,* 14 Or. 243. The decision is certainly in conflict with the previous cases in Ohio (*Steubenville* v. *Culp,* 38 Ohio St. 18; *State ex rel.* v. *Hawkins,* 44 Ohio St. 98; *Mason* v. *State ex rel.,* 58 Ohio St. 30) and contrary to the better doctrine.

WORKMEN'S COMPENSATION—TENDENCY TO DISEASE.—Because of what the doctors termed a "pre-existing constitutional disease known as syphilis," an injury suffered by A brought on paresis and A became insane and totally unfit for work of any kind. The disease had not interfered with his doing heavy work. Suit was brought for full compensation for his disability. *Held,* that A was entitled to full recovery, notwithstanding that his diseased condition had increased the extent of the injury. *Crowley* v. *City of Lowell,* (Mass. 1916) 111 N. E. 786.

Though the statutes are usually silent on the point decided, the courts have been practically unanimous in applying the rule of torts in regard to injuries which aggravate latent disease. If the latent condition did not itself cause pain, suffering, etc., to the patient, but such condition plus the accident caused the pain, the accident and not the condition is held to be the proximate cause of the injury. *Jones* v. *City of Caldwell,* 20 Idaho 5, 116 Pac. 110. The fact that the person injured had a predisposition to disease, or a latent weakness, cannot avail the defendant to relieve him from liability from the damages which ensue when his negligence brings the dormant disease into activity, or aggravates the latent weakness. *McNamara* v. *Clintonville,* 62 Wis. 207, 22 N. W. 472; *Miller* v. *St. Paul City R'y Co.,* 66 Minn. 192, 68 N. W. 862; *Sloane* v. *South Cal. R'y Co.,* 111 Cal. 668, 44 Pac. 320. Compensation awarded is to be measured by the disability directly traceable to the accident, and when such disability terminates, compensation ceases, although the injured person may be still disabled by the illness, or some other cause wholly unconnected with the accident. *Mack* v. *Pac. Telephone & Telegraph Co.,* Cal. Industrial Acc. B'd. The burden of proof is upon the plaintiff to prove that the harmful development of the disease is due to the injury and not to the natural progress of the disease. *Newman* v. *Ala. G. S. R'y Co.,* 38 Fed. 819.

BOOK REVIEWS

CASES ON THE LAW OF PUBLIC SERVICE. By Charles K. Burdick, Professor of the Law of Public Service in Cornell University, College of Law. Boston: Little, Brown & Co., 1916, pp. xiii, 544.

It would not be easy to include within so few pages more valuable case material on this subject than the author has brought together in this book. As the author does not believe that the extraordinary liability of the innkeeper and the common carrier is the result of the fact that their callings are public, the subject of liability naturally does not appear in the index. This book, accordingly, readily adapts itself to use in schools having separate courses in carriers and public service law. There would be very little overlapping in those courses if this book were used. Admitting that economic monopoly has latterly been recognized in some jurisdictions as justifying courts in declaring monopolistic businesses public in their nature, and therefore subject to public control, the author has given prominence to cases combating this idea. and by his selection of illustrative cases lends color to his known view that historically the common calling was simply the calling in which there was a public holding out to serve all, and not necessarily one having any monopolistic feature. This is an idea for which the author has previously contended in Volume II of the COLUMBIA LAW REVIEW, and much the same view is maintained by another recent writer in Volume 28 of the HARVARD LAW REVIEW in an article entitled BUSINESS JURISPRUDENCE. Beginning with the well known anonymous case in Year Book 19 Henry VI, 49, p. 5 (1441) the author brings the cases down as late as the case of *German Alliance Ins. Co.* v. *Kansas*, decided in April, 1914, and *Northern Pacific Ry. Co.* v. *North Dakota* in which the opinion was delivered March 8, 1915. He does not include the interesting and important case of *Des Moines Gas Co.* v. *Des Moines*, decided June 14, 1915, which touches, but does not yet definitely dispose of, that will-o'-the-wisp "going concern value," which means so many different things, and is found by such wild guessing.

The same restraint shown in selecting the cases, is seen also in the notes. They contain valuable additions to the selected portions of the cases reported, and perhaps a sufficient number of cases in accord, though they leave something to be desired in citation of cases contra. Only 479 pages are devoted to the reported cases. The balance of the book consists of an appendix, containing the INTERSTATE COMMERCE ACT, including the ELKINS ACT and the CUMMINS AMENDMENT of March 4, 1915, and a brief index. The book is a brief, and yet doubtless adequate selection of cases in its subjects for the ordinary two hour course, and is all in all a very valuable and workable tool for the law teacher, as well as a suggestive development of principles for the general student of this recent but growingly important branch of the law.

E. C. G.

GERMANY'S VIOLATIONS OF THE LAWS OF WAR—1914-15. COMPILED UNDER THE AUSPICES OF THE FRENCH MINISTRY OF FOREIGN AFFAIRS, translated and with an introduction by J. O. P. Bland. New York: G. P. Putnam's Sons, 1915. Pp. xxvi, 346.

This volume may be described as a book of source materials with reference to the conduct of the present war by the Germans in the form of a series of admissions by the defendant. There is a short section having to do with violations of the neutrality of Luxemburg and Belgium; another upon the violation of the French frontier before the actual declaration of war. The greater part of the book, however, is concerned with the violations of the specific rules with reference to the conduct of war on land. Many extracts from the notebooks of German officers and soldiers are translated and reproductions are given of the original pages of these notebooks and diaries. The purpose of course is polemic, and yet the volume has an abiding value as source material in international law. J. S. R.

AMERICAN GOVERNMENT AND MAJORITY RULE—A STUDY IN AMERICAN POLITICAL DEVELOPMENT, by Edward Elliott, Ph.D., Princeton, New Jersey, Princeton University Press, 1916. Pp. iv, 175.

This book is a well written semi-popular presentation of the various mechanical contrivances made use of in the United States from the beginning for securing the expression of popular opinion. Dr. ELLIOTT notes the tendency constantly to complicate the machinery of government for the purpose of expressing majority rule, and concludes that each successful complication renders majority rule, in its true sense, more difficult of realization. The remedy he sees in the simplification of government all along the line in accordance with the ideas of the short ballot. Indeed, the book may be said to be an excellent brief for the short ballot movement. J. S. R.