Michigan Law Review

Volume 10 | Issue 4

1912

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ARMY AND NAVY—ENLISTMENT OF MINOR—DISCHARGE.—When X was about two years old his mother gave to petitioner "full control, care and custody and complete management" of the infant, petitioner agreeing to "raise, support and educate " him. At the age of eighteen years and seven months, X enlisted in the United States army. REV. STAT., § 1117 (U. S. COMP. STAT., 1909, p. 813) provides that no person under twenty-one years of age shall be mustered into the service of the United States without the consent of his parent or guardian provided he has such. Here a brother of X, claiming to be his guardian, had furnished the necessary consent, neither his mother, who was then living, nor this petitioner consenting to the enlistment. Petitioner applied for the discharge of X on a writ of habeas corpus, and, during the pendency of the action, regularly adopted X. *Held,* that petitioner is entitled to secure the discharge. *Deane* v. *Burkman* (1911), 190 Fed. 541.

The statute here in question has repeatedly been held to be solely for the benefit of the guardian, conferring no privileges even upon the minor. *Solomon* v. *Davenport,* 30 C. C. A. 664, 87 Fed. 318. The Federal courts have consequently held that one who has become guardian since the enlistment of the minor has not the right to secure his discharge: "The sole question is whether this petitioner who has become guardian since his (the minor's) enlistment is entitled to avoid it. In my opinion he is not. One who was a guardian at the time of enlistment is referred to." *In re Perrone,* 89 Fed. 150. To the same effect is *In re Morrissey,* 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644. The court has refused to apply to the facts in this case the rule of the two cases mentioned, distinguishing this case on the ground that the petitioner has, for years, stood *in loco parentis,* although a legal adoption was not had previous to the enlistment.

ARREST—AUTHORITY TO ARREST WITHOUT WARRANT—"IN HIS PRESENCE."—"WITHIN HIS IMMEDIATE KNOWLEDGE."—Plaintiff, suspected of having stolen money, was arrested, taken to the police station, and there imprisoned until the next afternoon, without the issuance of any warrant. Section 917 of the Penal Code is as follows: "An arrest may be made for a crime by an officer, either under a warrant or without a warrant if the offense is committed *in his presence,* or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant." The only ground of justification was that the crime was committed in the officer's presence. *Held,* to justify the arrest without a warrant the officer need not see the act, which constitutes the crime, take place, if by any of his senses he has personal knowledge of its commission as the words "in his presence" as used in Penal Code, § 917, and the words "within his immediate knowledge" as used in § 921 are synonymous. *Piedmont Hotel Co.* v. *Henderson* (Ga., 1911), 72 S. E. 51.

Although the necessity of an immediate arrest to prevent the escape of

the guilty person is undoubtedly the reason why the common law permits arrest in certain cases without a warrant, neither an actual, nor an apprehended, attempt to escape is, at common law, a condition of the right to arrest without a warrant in an otherwise proper case. *Rohan* v. *Sawin*, 5 Cush. 281. At common law peace officers had power to arrest without a warrant when the offense was committed in their view. *Prell* v. *McDonald*, 7 Kan. 426; *State* v. *Lafferty*, 5 Harr. (Del.) 491. But this has in some States been restricted by statutory condition that an immediate arrest must be necessary to prevent an attempted or apprehended escape. There is, however, very little authority upon the effect of this condition. If the power is conferred by charter, an ordinance may authorize the officer to arrest without a warrant, where the offense is committed in his view. *Chicago* v. *Kenney*, 35 Ill. App. 57, 63; *Bryan* v. *Bates*, 15 Ill. 87; *Scircle* v. *Neeves*, 47 Ind. 289. But unless the violation is committed in his view, process or warrant for arrest is required. *Clark* v. *New Brunswick*, 43 N. J. L. 175. An ordinance authorizing police officers to make arrests without a warrant for breaches of ordinances not committed in their presence was held void in *Pesterfield* v. *Vickers*, 3 Coldw. 205; and see *Judson* v. *Reardon*, 16 Minn. 431. An officer who hears a pistol shot and immediately discovers a man running from that direction may arrest on the ground that the person was endeavoring to escape. *Brooks* v. *State*, 114 Ga. 6. Under N. C. CODE, § 1126 it is only when an officer apprehends an escape unless he acts promptly that he is justified in making an arrest for a felony which he has reasonable grounds to believe has been committed by the person arrested. *Neal* v. *Joyner*, 89 N. C. 287 under the TEX. CODE CRIM. PROC., Art. 229, an officer has no right to make an arrest for a felony without a warrant unless the person arrested is "about to escape." *Karner* v. *Stump*, 12 Tex. Civ. App. 460. Nor is an officer acting without a warrant justified in killing a person while fleeing from arrest for a crime which is only a misdemeanor, although such officer acts on his suspicion that a felony has been committed. *Petrie* v. *Cartwright*, 114 Ky. 103, 59 L. R. A. 720, 102 Am. St. Rep. 274, see notes and cases cited. The right to arrest, without a warrant, a fugitive from justice from another State has been passed upon in a few cases. In *Harris* v. *Louisville N. O. & T. R. Co.*, 35 Fed. 116 it was held that a temporary arrest without previous warrant may be made in a case of urgent necessity, but that the detention can only last to bring the prisoner before a magistrate for a proper inquiry. Substantially the same position is taken in *Re Henry*, 29 How. Pr. 185; *State* v. *Anderson*, 1 Hill, L. 327; and *Simmons* v. *Vandyke*, 138 Ind. 380, 26 L. R. A. 33, 46 Am. St. Rep. 411. But in *Botts* v. *Williams*, 17 B. Mon. 687, it was said that there could be no arrest in such a case without a warrant; and that the one making such an arrest was guilty of assault and battery is held in *State* v. *Shelton*, 79 N. C. 605.

BANKRUPTCY—THE RIGHT OF A WIFE TO RECOVER AN EQUITABLE CLAIM AGAINST HER HUSBAND'S ESTATE IN BANKRUPTCY.—A wife had received and inherited property from her father, and had always treated it as her sole and separate estate; from this separate estate she paid a matured obligation of her

husband, taking his note for the amount, and on his bankruptcy she presented the note as a claim against his estate. Contractual relations between husband and wife were not recognized by the law of the State of their domicile but a wife's separate estate was provided for by statute, and under the decisions in that State she could have maintained a claim in equity against her husband. *Held*, the wife's claim can now be maintained in bankruptcy, as the bankruptcy court is a court of equity as well as of law. *In re Hill* (1911), 190 Fed. 390.

The seemingly conflicting decisions on this point divide themselves into but two distinct classes, and turn on but a single point; that is, whether a court of bankruptcy will be bound strictly by the law as laid down by the State courts, or will follow the general Federal rule, in its determination of the question. On the one side, in the early case of *In re Blandin*, 1 Low. 543, it was decided that since by State law a wife could maintain an equitable claim against her husband's estate, that claim was provable in bankruptcy; Cited with approval in *Fleitas* v. *Richardson*, 147 U. S. 550 at 555, 13 Sup. Ct. 495; overruled in *Re Talbot*, 110 Fed. 924, on the ground that the State law had been misconceived, but distinctly stating the rule of bankruptcy to be that bankruptcy courts would be governed by the State rule in regard to the validity and provability of an equitable claim of a wife against her husband or his estate. *In re Novak*, 101 Fed. 800; *In re Neiman*, 109 Fed. 113; *In re Domenig*, 128 Fed. 146; *In re Foss*, 147 Fed. 790; *In re Kyte*, 164 Fed. 302. On the other side, the rule is fully stated in *James* v. *Gray* 131 Fed. 401, 1 L. R. A. (N. S.) 321: "While the Federal courts are required by the statutes creating them to accept as rules of decision in trials at common law the laws of the several States, excepting where the Constitution, treaties, and Statutes of the United States otherwise provide, their proceedings in equity suits, involving equitable rights, cannot be impaired by the local rules of the different States in which they sit. The principles of equity as applied by them are the same everywhere in the United States." But this broad statement of the rule has been limited to apply only to debts based on a valuable consideration. *In re Tucker*, 148 Fed. 928. Reason and the texts sustain the former view; COLLIER, BANKRUPTCY, Ed. 8, p. 704, and 1 REMINGTON, BANKRUPTCY, § 798, p. 466; but the question will not be conclusively determined until passed upon by the Supreme Court.

BANKRUPTCY—TITLE OF TRUSTEE AS AGAINST UNRECORDED CONTRACT OF CONDITIONAL SALE—EFFECT OF AMENDMENT OF 1910.—Petitioners had sold a sprinkling system to the bankrupt, under a contract of conditional sale, but the contract had not been recorded as required by the State statute. After adjudication, petitioners sought to enforce a lien on the sprinkling system under their contract, but the referee decided that their claim was invalid. On application to review the referee's decision, it was *Held*, that, though prior to the amendment of July 25, 1910, c. 412, § 8, 36 STAT. 840, to the Bankruptcy Act of 1898, § 47, subd. a, cl. 2, 30 STAT. 557, an unrecorded conditional sale contract would be valid against the trustee in bankruptcy, by this amendment, where under State law a conditional sale contract was invalid as against lien

creditors unless recorded, an unrecorded conditional sale contract was invalid also as against the trustee in bankruptcy or purchasers claiming through him. *In re Williamsburg Knitting Mill* (1911), 190 Fed. 871.

For a discussion of the principles and authorities involved in this decision and of the approved construction of the amendment referred to, see 7 MICH. L. REV., 474; 10 MICH. L. REV., 131.

BANKS AND BANKING—ENTRY OF DEPOSIT FOR COLLECTION—INSOLVENCY OF BANK'S AGENT.—Plaintiff deposited to his account in defendant bank a check drawn upon a bank in another State, indorsing it to the order of defendant bank; it was entered on a deposit slip on which was the printed statement, "All items credited subject to final payment," and was sent by the defendant bank to its correspondent bank for collection. That bank collected the check, but did not pay the money to defendant bank, and became insolvent. Defendant bank thereupon charged the amount back to the account of plaintiff, who brought this action to recover the amount of the check. There was no evidence as to any want of diligence or due care in the selection of the correspondent bank. *Held*, that plaintiff was not entitled to recover. *Falls City Woolen Mills* v. *Louisville Nat. Banking Co.* (Ky. 1911) 140 S. W. 66.

It is clear that if the defendant bank had been negligent in selecting the correspondent bank, it would have been liable, 1 DANIEL, NEG. INST., Ed. 5, 336. But the question whether the bank is liable under the facts of the principal case is one on which the decisions of the courts are utterly irreconcilable. The decisions that are in accord with the case under consideration are based upon the reason that in such case the customer, knowing that the check cannot be collected by the ordinary officers of the bank, but that this service must be performed by a sub-agent at the place where the check is payable, impliedly authorizes the selection of such sub-agent, and thereby assumes the risk of failure of duty on the part of the latter; and that the benefit which may accrue to the bank is not a sufficient consideration from which to imply an undertaking on the part of the bank to assume that risk itself. *Dorchester & Milton B.* v. *New England Bk.*, 1 Cush. 177; *Jackson* v. *Bk.*, 6 Har. & J. 146; *Fabens* v. *Mercantile Bk.*, 23 Pick. 330; *Lawrence* v. *Stonington Bank*, 6 Conn. 521; *Hyde et al.* v. *Planters, Bk.* 17 La. 560; *Baldwin* v. *Bank of La.*, 1 La. Ann. 13; *Bowling* v. *Arthur*, 34 Miss. 41; *Citizens' Bank* v. *Howell*, 8 Md. 530; *Stacy* v. *Bank*, 12 Wis. 702; *Aetna Ins. Co.* v. *Bank*, 25 Ill. 221; *East-Haddam Bank* v. *Scovil*, 12 Conn. 303; *Daly* v. *Bank*, 56 Mo. 94; *Guelich* v. *Bank*, 56 Iowa 434; *Third Nat. Bank* v. *Vicksburg Bank*, 61 Miss. 112; *Firts Nat. Bank* v. *Sprague*, 34 Neb. 318, 51 N. W. 846; *Bank of Big Cabin* v. *English* (Okl.), 11 Pac. 386; *Winchester Milling Co.* v. *Bank of Winchester*, 120 Tenn. 225, 111 S. W. 248. In *Winchester Milling Co.* v. *Bank*, *supra*, it is said that each successive bank handling an item for collection is agent of the owner and liable to him for the discharge of duties incumbent upon collecting agents, and the several banks in the chain of transmission are held responsible only for the selection of proper agents and for their own diligence and propriety of action in respect to the collection. The main reason of the doctrine holding the bank first receiving the paper liable

for the conduct of any and all of the subsequent agents is that in the law of agency the first agent is liable for the acts of all the sub-agents employed by him. MORSE, BANKS AND BANKING, Ed. 2, p. 402. This doctrine is upheld in the following cases. *Exchange Nat. Bank* v. *Third Nat. Bank*, 112 U. S. 276; *Mackersy* v. *Ramsays*, 9 Cl. & Fin. 818, 3 Eng. Rul. Cas. 762; *Baile* v. *Augusta Savings Bank*, 95 Ga. 277; *Allen* v. *Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Titus* v. *Bank*, 35 N. J. L. 588; *Tyson* v. *Bank*, 6 Blackf. 225; *American Exp. Co.* v. *Haire*, 21 Ind. 4, 83 Am. Dec. 334; *Reeves* v. *Bank*, 8 Ohio St. 466; *Simpson* v. *Waldby*, 63 Mich. 439; *Power* v. *Bank*, 6 Mont. 251; *Thompson* v. *Bank of South Carolina*, 3 Hill's S. C. L., 77; *Schumacher* v. *Trent*, 18 Tex. Civ. App. 17, 44 S. W. 460; *First Nat. Bank* v. *Quinby*, (Tex. Civ. App.) 131 S. W. 429. In *Hyde* v. *First Nat. Bank*, Fed. Cas. No. 6, 970, 7 Biss. 156, and *First Nat. Bank* v. *Quinby, supra*, it is said that the bank receiving a note for collection does not thereby become the agent of the holder, but is an independent contractor, and the subsequent agents are treated as its own and not the sub-agents of the owner of the paper. The supporters of this rule contend that by it alone can the depositor who intrusts his business to a bank be secure against carelessness or dishonesty on the part of collecting agencies employed by banks to carry out their contract.

BILLS AND NOTES—STIPULATIONS FOR ATTORNEY'S FEES—VALIDITY.—The note involved in this case contained the following provision, "If this note is placed in the hands of an attorney at law for collection, we agree to pay 10 per cent. attorney's fees." The lower court allowed the holder to recover 10 per cent. attorney's fees only upon the balance due on the note, and not 10 per cent. of the whole amount. *Held*, that the court is not bound by a provision that any particular amount shall be allowed for attorney's fees, but the stipulation will be enforced only to the extent of making a reasonable allowance, and that allowance of such fees being largely a matter of discretion of the trial court, the exercise of such discretion will not be interfered with on appeal unless the allowance is materially wrong. *Holston Nat. Bank* v. *Wood* (Tenn. 1911), 140 S. W. 31.

The decided cases on the question whether a stipulation in a note for attorney's fees is valid may be divided into four classes. First, the stipulation is valid and enforceable and does not affect the negotiability of the instrument. *Dorsey* v. *Wolff*, 142 Ill. 589. Second, the stipulation is valid and enforceable, but it destroys the negotiability of the instrument. *Jones* v. *Radatz*, 27 Minn. 240; *Johnston Harvester Co.* v. *Clark*, 30 Minn. 308; *First Nat. Bank* v. *Larson*, 60 Wis. 206. Third, the stipulation is void, and as it may therefore be disregarded, it does not affect the negotiability of the instrument. *Gilmore* v. *Hirst*, 56 Kan. 626; *Chandler* v. *Kennedy*, 8 S. D. 56. Fourth, the stipulation is void, but nevertheless it destroys the negotiability of the instrument. *Bullock* v. *Taylor*, 39 Mich. 137; *Tinsley* v. *Hoskins*, 111 N. C. 340. See BUNKER, NEG. INST., p. 37. The Negotiable Instruments Law, now adopted by many of the States in this country, makes such stipulation valid and enforceable. When the stipulation in a note provides for a reasonable fee, it is held to be the value of the services rendered in its collection, *Rinker* v.

Lauer, 13 Idaho 163, 88 Pac. 1057. When a definite amount for attorney's fees is specified in a note, the question whether the holder is entitled to recover the entire amount named is one on which the authorities do not agree. In *McIntire* v. *Cagley*, 37 Iowa. 676, it is held that a stipulation to pay an attorney's fee of 10 per cent. on the amount collected imports liquidated damages and not a penalty, and therefore the total stipulated percentage, and not merely the actual expenses, may be recovered. The principal case is in accord with the decisions of the following courts, in which it is held that a provision for the payment of attorney's fees if the note is placed in the hands of an attorney for collection is a contract of indemnity and not for liquidated damages, so that the maker is liable to the holder only for the amount of attorney's fees actually contracted for, or, in the absence of a special contract for fees, for the reasonable value of the services rendered. *Farmers' & Merchants' Nat. Bank* v. *Barton*, 21 Ill. App. 403; *Hassell* v. *Steinmann* (Tex. Civ. App.), 132 S.W.948; *Koppe* v. *Groginsky*, (Tex. Civ. App.) 132 S.W. 984; *Elmore* v *Rugely*, (Tex. Civ. App.), 107 S.W.151; *Starnes* v. *Schofield*, 5 Ind. App. 4, 31 N.E. 480. If the owner of the note in good faith agrees with an attorney to pay him the percentage stated in the stipulation for attorney's fees in a note, that amount is recoverable whether it is a reasonable fee or not. *Frantz* v. *Masterson* (Tex. Civ. App.), 133 S. W. 740. The amount of the attorney's fee stipulated for in a note should be allowed, unless it is unjust or unreasonable in view of the circumstances. *McCornick* v. *Swem*, 36 Utah 6, 102 Pac. 626; *Utah Nat. Bank of Salt Lake City* v. *Nelson*, 111 P. 907; *Smiley* v. *Meir*, 47 Ind. 559. A stipulation to pay 10 per cent. on the amount of the note as attorney's fees was enforced in the following cases. *Walker* v. *Tomlinson* (Tex. Civ. App.), 98 S. W. 906; *Stocking* v. *Moury*, 128 Ga. 414, 57 S. E. 704; *First Nat. Bank* v. *Campbell Co.* (Tex. Civ. App.), 114 S. W. 887; *Carver* v. *J. S. Mayfield Lumber Co.*, 29 Tex. Civ. App., 434, 68 S. W. 711.

CORPORATIONS—SALE BY CORPORATION TO SOLE STOCKHOLDER—NOTICE.—Plaintiff corporation, by a contract containing provisions as to payments, retention of title in vendor, etc., sold certain mill machinery to a milling company. Defendant, who was the sole acting officer of, and practically the sole stockholder in, the vendee corporation, conducted all negotiations of sale and signed the contract in its behalf. Shortly after the machinery was delivered he caused the real estate upon which the mill stood to be conveyed by the corporation to himself. Plaintiff company brought replevin for the machinery, and defendant alleged that it had become fixtures in the mill and part of his property. *Held*, that he was personally bound by the terms of the contract, in so far as they were effective between the parties, to preserve the character of the machinery as personal property. *Wolf Co.* v *Kutch* (Wis. 1911) 132 N. W. 981.

This holding is in line with that in cases cited and discussed on page 310, supra, and the same principles seem to be involved.

CRIMINAL LAW—ADJOURNMENT OF COURT TO HOUSE OF A SICK WITNESS:—Appellant, indicted for unlawful sale of intoxicants, applied for a continuance because of the absence of a material witness who was ill at his home in the

town where court was held. The court overruled the application and, against appellant's protest, adjourned the whole court to the home of the witness and tendered witness to counsel for appellant for examination. Said counsel declined to examine witness, claiming the courthouse was the place provided by law for the trial of cases. Conviction reversed. *Carter* v. *State* (Miss. 1911) 56 South. 454.

If the place of holding court is provided for by statute, court cannot lawfully be held elsewhere, unless the parties consent. *Bennett* v. *Cooper* 57 Barb. 642, held that there is wisdom in giving publicity to legal proceedings, and to allow court to be adjourned to the office of the judge would be to repeal the code. *Northrup* v. *People*, 37 N. Y. 203, held a conviction had at any other place than that provided by statute is void. In *Funk* v. *Carroll County*, 90 Ia. 158 the court held that, as a courthouse was provided by law as the place for holding court, there could be no adjournment to the house of a sick witness for the purpose of examination if done without the consent of the parties. Many cases hold that, even in the absence of statute, it can not be done; that because of the universal custom to hold court at the county seat at the courthouse, court must be held there. *Board of Commissioners of White County* v. *Gwin, Sheriff et al.* 136 Ind. 562. In *Williams* v. *Reutzel*, 60 Ark. 155 the reason given for confining the place to the county seat, is to attain "certainty and to prevent a failure of justice by reason of parties concerned or affected not knowing the place." In *Selleck* v. *Janesville*, 100 Wis. 157 it was held error to hold court at any place except the county seat, yet a removal, merely for the purpose of taking testimony, was held not a proceeding in open court but merely a proceeding in the action and, though an irregularity, would not work a reversal. Minnesota would probably hold that court could not be held anywhere except at the courthouse though still at the county seat. *Bell* v. *Jarvis*, 98 Minn. 109. In *Adams* v. *State* 19 Tex. App. 1, which arose on facts similar to those of the principal case and which the principal case cites and follows, it was held there could be no removal for the purpose of taking testimony against the objection of the defendant. The court said:—"if the defendant could be compelled to go one-half a mile * * * he could be required to go one, two, or five miles. We cannot sanction such a practice." There is a line of cases holding that court may be held at places other than the county seat or courthouse; *Hampton* v. *U. S.*, Morris (Ia.) 489 in which there was an adjournment to the house of a sick witness in the same town; *Mohon* v. *Harkreader*, 18 Kan. 383 holding that though the removal was irregular the trial was fair and no substantial rights of the complaining party affected; *Bates* v. *Sabin*, 64 Vt. 511 in which court was adjourned to the residence of a sick judge; *Litchfield Bank* v. *Church*, 29 Conn. 137, in which court was adjourned from the courthouse to a hotel in the same town, where one of the jurors was sick. Circumstances may be such as to justify a removal; *Boulden* v. *Ewart*, 63 Mo. 330, until a suitable building was erected at the county seat; *Herndon* v. *Hawkins*, 65 Mo. 265, if the houses at the county seat were destroyed by fire. Also *Williams* v. *Reutzel*, *supra*. If the removal is consented to or waived, no objection can be raised; *Adams* v. *State*, *supra*; *Bell* v. *Jarvis* *supra*; *Funk* v. *Carroll County*, *supra*;

Mahon v. *Harkreader, supra.* Some states hold that, though it is error to hold court at a place unauthorized by law, yet the proceedings had there are not void; *Lessee of Le Grange* v. *Ward et al.*, 11 Ohio 258; *State of Missouri* v. *Peyton*, 32 Mo. App. 522. What is the proper rule? It seems that in the absence of express provision by statute, if the court had jurisdiction of the subject matter and the person, and due notice was given to all parties concerned of the place of removal, and sufficient opportunity to be present without substantial inconvenience, the proceedings there had should be held valid. See *Reed* v. *State* 147 Ind. 41, 46 N. E. 135.

CRIMINAL LAW—ERROR IN ADMISSION OF EVIDENCE.—Plaintiff in error was tried for murder and found guilty on circumstantial evidence. The jury fixed his punishment at death. On his cross-examination it was proved that he had been convicted of a crime and had served in the penitentiary in Kentucky; also that he had once pleaded guilty to larceny in another county. *Held,* such evidence was inadmissible. *People* v. *Blevins* (Ill. 1911) 96 N. E. 214.

It is error to admit proof of other and distinct crimes when not offered to evidence motive, etc., and the court so held in this case. It was insisted, however, by counsel for the State that, though admission of the evidence was error, yet other evidence so clearly showed Blevins guilty that the conviction ought not to be reversed. In answer the court said: "True, error will not always reverse * * * where guilt is conclusively shown, *People* v. *Cleminson* 250 Ill. 135, 95 N. E. 157, but to this rule there are certain exceptions. In murder cases the jury fixes the punishment (either at death, imprisonment for life or term of years not less than fourteen). In this case (the principal case) the death penalty was fixed by the jury, and it may well be that * * * the admission in evidence * * of incompetent testimony calculated to prejudice and degrade plaintiff in error in the minds of the jury, influenced the jury in determining the punishment that should be inflicted. * * * (and) to say that we think he was not prejudiced, would be to establish a dangerous precedent." In support of its decision the court cites *Farris* v. *People,* 129 Ill., 521, 21 N. E. 821, in which defendant was indicted for murder and evidence that after the crime defendant committed rape on the wife of deceased was erroneously admitted. The proof of defendant's guilt was conclusive, yet the court in that case reversed the conviction because though the jury would have found defendant guilty they might not have imposed the death penalty. But it was thought the case of *Farris* v. *People, supra,* was overruled by the case of *People* v. *Cleminson* (Apr. 1911) 250 Ill. 135, 95 N. E. 157, 10 MICH. L. REV. 60, in which defendant was convicted of uxoricide and his punishment fixed at imprisonment for life. Evidence that defendant had committed abortions was erroneously admitted in that case, but the court refused to reverse because it seemed to them that under the evidence defendant was clearly guilty, apparently disregarding the argument in the *Farris* case, *supra,* to-wit: that the jury might have given him a less severe punishment. Had the court in the principal case followed the *Cleminson* case, *supra,* it could not have held as it did. Therefore it

seems the *Cleminson* case has been overruled and the law of *Farris* v. *People, supra,* reestablished.

DAMAGES—BREACH OF CONTRACT TO CARRY DEAD BODY. Plaintiff's son was killed in the State of Washington. She contracted with the defendant railway to ship the remains to her home in Texas within five days. There was delay in forwarding the body and plaintiff brought suit to recover damages for physical pain and mental suffering alleged to have been sustained by her. *Held,* mental suffering is a proper element of damages for breach of such contract. *Missouri K. & T. Ry. Co. of Texas* v. *Linton* (Texas 1911) 141 S. W. 129.

It is a rule of general application that damages for mental anguish are not recoverable in actions on contract. *Beaulieu* v. *Great Northern Railway Co.,* 103 Minn. 47. There are recognized exceptions to this rule as, actions for indignities by railway employees to passengers on railroad trains. *Brown* v. *C. M. & St. P. Ry. Co.,* 54 Wis, 342; actions for breach of promise to marry, *Thorn* v. *Knapp,* 42 N. Y. 474; and breach of contract to send and deliver a telegram, *Louisville & N. R. Co.* v. *Hull,* 113 Ky. 561. But there is conflict as to the doctrine in the last class of cases, the so-called "Texas doctrine" being repudiated by a majority of the State courts. 63 CENT. L. J. 340; *Francis* v. *Western Union Tel. Co.,* 58 Minn. 252; 1 AM. & ENG. ANN CAS. 355, and cases cited. The rule announced in the principal case seems to be drawn by analogy from the doctrine in these telegraph cases. Injury to the feelings is said to be the gist of the damages for breach of the contract on which the action is brought. It is to be noted that most of the States that have passed upon the question involved in the principal case allow a recovery for mental suffering or not according to their position in the telegraph cases. 19 L. R. A. (N. S.) 564, Note; *Western Union Telegraph Co.* v. *Crowley,* 158 Ala. 583, 48 South. 381. That recovery for mental suffering can be had for breach of contract to carry a corpse is expressly denied in *Beaulieu* v. *Great Northern Railway Co., supra.* It is there intimated, however, that if the action had been in tort the holding of the court would have been different, the court saying that recovery could be had only where the breach of contract amounted in substance to "an independent, wilful tort." A dissenting opinion in the Minnesota case is based on the theory that the complaint stated a cause of action in tort as well as in contract. That mental suffering is properly included as an element of damage in actions for a tort committed upon a corpse seems to be well settled. *Bessemer Land etc. Co.* v. *Jenkins,* 111 Ala. 135; *Meagher* v. *Driscoll,* 99 Mass. 281; 3 AM. ENG. ANN. CAS. 136, Note. Although the doctrine followed in the Texas case has made a considerable invasion on the common law rule of damages for breach of contract laid down in *Hadley* v. *Baxendale,* 9 Exch. 341, the courts repudiating it do so in no unmistakable terms. It is said in *Western Union Tel. Co.* v. *Ferguson,* 157 Ind. 64, "So in cases like that at bar the remedy should come from legislation, and not by judicial decision out of harmony with established principles of law."

DAMAGES—DENIAL OF RECOVERY FOR MENTAL SUFFERING UNDER STATUTE—Action by husband to recover damages, alleging, among other grounds, mental suffering by his wife resulting from a fire negligently set by defendant railroad company, which fire spread to and burned on plaintiff's premises. A statute of Oklahoma Territory, in which the case arose, provides that any railroad company operating a line within that jurisdiction shall be liable for *all damages* sustained from fire originating from operating the road. *Held*, that the term "all damages" did not include mental anguish, suffering, terror, and other states of mind when unaccompanied by physical injuries or sufferings. *Tiller* v. *St. Louis & Santa Fe R. Co.* (1911) 189 Fed. 994.

The court interprets this statute so that its decision is in accord with a rule of damages adopted by a majority of the States, in the absence of any such statute as here exists. *Kyle* v. *Chicago R. I. & P. Ry Co.*, 182 Fed. 613; *Huston* v. *Freemansburg*, 212 Pa. 548; *Morse* v. *Chesapeake & Ohio Ry.*, 117 Ky. 11; *Rawlings* v. *Wabash Ry.*, 97 Mo. App. 511; *Gatzow* v. *Buening*, 106 Wis. 1. It is probable that the legislature desired to overcome this "rigid rule" of damages, as it is termed by SEDGWICK ELEMENTS OF DAMAGES, Ed. 2, p. 109, but, according to the court, the term "all damages" must be given its legal meaning, nothing to the contrary appearing in the context of the statute. Hence "all damages" must be construed as applicable only to such cases of invasion by one of the rights of another to his injury as will be compensated by law, and not to those acts dominated in the law "damnum absque injuria." Statutes of this nature have been adopted by only a few of the states, the only one exactly in point being in Wisconsin. And the supreme court of that State gave that Statute the same interpretation as in the principal case, stating that if any radical change in the law had been contemplated, the act would have so expressed in no uncertain terms. *Summerfield* v. *Western Union Tel. Co.*, 87 Wis. 1. Such statutes must be strictly interpreted. *Western Union Tel. Co.* v. *Burris*, 179 Fed. 92. However, if the plaintiff had sued for injury to his property because of the neglect of the railroad company in allowing fire to consume a portion of his buildings, there are cases which would authorize as part of the damages recoverable the mental suffering of his wife. *Meagher* v. *Driscoll*, 99 Mass. 281; *Moyer* v. *Gordon*, 113 Ind. 282; *Kimball* v *Holmes*, 60 N. H. 163; *City National Bank* v. *Jeffries*, 73 Ala. 183.

EQUITY—EQUITABLE SET-OFF OF CLAIM ACQUIRED AFTER INSTITUTION OF SUIT. Defendant, a foreign corporation doing business in Mississippi, sold plaintiff a piano to be paid for on the installment plan. Default was made in the payments and the defendant brought suit to replevin the piano. Plaintiff seeks to enjoin the replevin suit, to redeem the piano from the lien sought to be enforced by the defendant, and to establish a set-off against the defendant which was acquired after the institution of the suit. *Held* that the injunction would be granted and the set-off allowed. *McIntyre* v. *E. E. Forbes Piano Co.* (Miss. 1911) 56 South. 457.

The general rule is that a claim acquired after the institution of a suit cannot be valid as a set-off. *Reynolds* v. *Thomas and Smith*, 28 Kans. 810;

Cook & Woldson v. *Gallatin Ry. Co.*, 28 Mont. 509; *Gurske y. Kelpin*, 61 Neb. 517. But a line of cases hold that where the plaintiff is a non-resident or is insolvent, equity will allow a set-off which would not be available at law. *Fitzgerald* v. *Wiley*, 22 App. D. C. 329, citing *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.*, 152 U. S. 596, in which latter case the claim was unliquidated, and so could not be set-off, but equity intervened to ascertain the amount and ordered it set-off in order to prevent the injustice of compelling another suit in another court. In *Bibb Land-Lumber Co.* v. *Lima Machine Works*, 104 Ga. 116, the same principle is stated to have been laid down in Georgia in *Lee* v. *Lee*, 31 Ga. 26; *Harwood* v. *Andrews*, 71 Ga. 784; and *Barrow* v. *Mallory Bros. & Co.*, 89 Ga. 76. STORY, EQUITY (Ed. 2, p. 1437a) states the rule that equity usually follows the law in regard to set-offs arising after suit is begun, but equities "too various for enumeration" may arise to call for equitable relief. That insolvency is a ground seems undoubted. That nonresidence is also a ground is held in cases cited above and in *Carson* v. *Carson*, 59 Ky. (2 Metc.) 96. *Contra*: *Smith* v. *Wash. Gaslight Co.*, 31 Md. 12; *Isenburger* v. *Hotel Reynolds Co.*, 177 Mass. 455. The principal case seems to define one of the "various reasons" and to enlarge the scope of the equitable jurisdiction, for here the defendant had an office, an agent, and a large stock of goods within the jurisdiction, so that the usual ground for jurisdiction in cases where the party is a non-resident does not apply. This broader application of equity jurisdiction is to be favored as it tends to do away with multiplicity of suits, settles all claims in one action, and gives substantial justice in many instances where the second suit would avail the plaintiff nothing.

EQUITY—INJUNCTION—TRADE SECRETS. The plaintiff company is a manufacturer of oxygen for commercial uses, and hired defendant as its servant, by a contract of employment, which is about to expire, providing that the defendant shall not divulge trade secrets. Defendant has already signed a contract to work for another company and has agreed to manufacture commercial oxygen. Plaintiff seeks to enjoin defendant from communicating to his new employer the specific method of manufacturing such oxygen used by plaintiff. *Held* injunction not granted. *S. S. White Dental Manufacturing Co.* v. *Mitchell* (1911), 188 Fed. 1017.

The general rule is that employees of one having a trade secret, who are under express contract or a contract implied from their confidential relations to their employer, not to disclose the secret, will be enjoined from divulging or using the same to the injury of their employer, whether before or after they have left his employ, 22 CYC. 843; *Stone et al* v. *Goss et al.*, 65 N.J. Eq. 756, 55 Atl. 736. The mere fact that the defendant denies his intention to do the act is not sufficient ground for denying the injunction. On the other hand there must be actual or probable injury. In the principal case the court denies the injunction, relying on the statement of the defendant that he does not intend to divulge the secret, and upon the fact that the defendant's new employment, where the secret of the plaintiff would naturally be called into use, is in another jurisdiction, where an injunction would be ineffective. The

court says that an injunction will not be issued as a threat, because the defendant will still be under obligations not to divulge, even when the contract of employment with the plaintiff has been completed.

EVIDENCE—IMPEACHMENT OF DYING DECLARATION.—Plaintiff in error was convicted of murder in the first degree. Upon the trial the dying declaration of the deceased was introduced by the prosecution without objection. Certain statements made by the deceased prior to, and inconsistent with, his dying declaration were then offered on the part of the defendant. These statements were objected to by the district attorney upon the ground that they were hearsay, and that the proper foundation for their introduction had not been laid. The objection was sustained and the testimony was excluded. *Held,* it was competent for the defendant to introduce evidence tending to show that the deceased had made statements out of court, after he had received his mortal wound, inconsistent with his dying declaration, and the exclusion of such statements was reversible error. *Salas* v. *People,* (Colo. 1911), 118 Pac. 992.

The rule adopted by the court that a dying declaration may be impeached by showing that the person making it has made other statements inconsistent therewith, is held by many courts. *Carver* v. *U. S.,* 164 U. S. 694, *Gregory* v. *State,* 140 Ala. 16, *State* v. *Lodge,* 9 Houst. 542, *Allen* v. *Com.,* 134 Ky. 110, *State* v. *Charles,* 111 La. 933. But GARRIGUES, J., who dissented in the principal case, presents a very able argument in favor of the contrary doctrine. The law is thoroughly established that evidence cannot be introduced showing that a witness at some other time, when not under oath, made statements inconsistent with testimony, without first laying the foundation therefor by interrogating the witness himself as to whether he ever made such inconsistent statements or not. *Janes* v. *People,* 44 Colo. 535. The death of the witness does not dispense with the general rule in such cases requiring a foundation to be properly laid. *Mattox* v. *U. S.,* 156 U. S., 237, *Stacy* v. *Graham,* 14 N. Y. 492, *Runyan* v. *Price,* 15 Ohio St. 1. "It necessarily follows," concludes the judge, "if there is no such exception, that such statements, not made under oath, or *in extremis,* are purely hearsay, and not admissible to impeach a dying declaration. * * An exception to a general rule should never be created where it would simply shift the hardship from one party to another. If established, an impeaching witness could with impunity swear to any statement whatever, without fear of contradiction. Those with long practical experience in criminal trials know that to recognize such an exception will invite fraud, corruption, perjury, and subornation of perjury in our courts." The hearsay rule rejects assertions offered testimonially which have not been in some way subjected to the tests of cross examination and oath. *Fabrigas* v. *Mostyn,* 20 How. S. Tr. 135, *Marshall* v. *Chi. etc. R. Co.* 48 Ill 475. The dying declaration is an exception to this rule. *Wright* v. *Littler,* 3 Burr. 1244, *Campbell* v. *State,* 11 Ga. 353. If, therefore, the dying declaration is admitted but the inconsistent statements are rejected, since by hypothesis the statements in the dying declaration have not been subject to cross-examination, the law, if it insisted on requiring the preliminary question, would deprive the

impeacher of two of his most important weapons of defense—cross examination and prior self-contradiction. WIGMORE EVIDENCE, § 1033. Such prior inconsistent statements are therefore admitted on the ground of necessity and fairness. *State* v. *Lodge*, 9 Houst. 542. There are a number of cases, however, which hold with the dissenting judge that such oral hearsay statements, made out of court, not made under oath, and not *in extremis*, should not be admitted for the purpose of impeaching a dying declaration. *Maine* v. *People*, 9 Hun 113, *Wroe* v. *State*, 20 Ohio St. 460, *State* v. *Hendricks*, 172 Mo. 654, *State* v. *Mills*, 79 S. C. 187, and *Hamilton* v. *Smith*, 74 Conn. 374.

EVIDENCE—RIGHT OF ACCUSED TO CONFRONT WITNESSES AGAINST HIM—ADMISSIBILITY OF TESTIMONY OF WITNESS NOW OUT OF STATE GIVEN ON FORMER TRIAL. Defendant was convicted of murder and upon appeal a new trial was granted. By the time of this second trial one of the witnesses for the prosecution on the former trial had removed from the State and could not be effectively served with a subpoena. Thereupon the official reporter was allowed to read the testimony of the witness as given at the former trial, from his shorthand notes then taken and properly preserved. Defendant contends that the right of the accused in all criminal prosecutions and cases involving life or liberty to be confronted with the witnesses against him was thereby violated. *Held*, (WEAVER, J. dissenting) the admission of such testimony violated no rights of the accused. *State* v. *Brown*, (Iowa 1911) 132 N. W. 862.

It has been held that Article 6 of the Amendments to the Constitution of the United States does not apply in prosecutions in State courts. *West* v. *Louisiana*, 194 U. S. 258, 24 Sup. Ct. 650. But the constitutions in most of the States contain a similar provision. Where a witness dies before the second trial, it has generally been conceded that the former testimony of the witness is admissible, and no right of the accused is violated by its admission. *U. S.* v. *Greene*, 146 Fed. 796, *Kendrick* v. *State*, 10 Humph. 479, *Com.* v. *Richards*, 18 Pick. 434, *State* v. *Kimes*, (Iowa), 132 N. W. 180. Some courts base this upon a construction given to the constitution as a matter of compelling necessity to avoid a failure of justice. *Marler* v *State*, 67 Ala. 55; or upon the ground that the constitutional provision in this regard is but declaratory of the common law, under which this practice is allowed, *State* v. *McO'Blenis*, 24 Mo. 402. Others hold that by being confronted with the witness who undertakes to state the testimony of the deceased, the constitutional requirement is met, leaving only the competency of the evidence to be determined. *Summons* v. *State*, 5 Ohio St. 325. But the real basis for the admission of such testimony is to prevent a miscarriage of justice, and its admission is in reality an exception to, rather than a compliance with, the rule that the accused is entitled to be confronted with the witnesses against him. *Mattox* v. *U. S.*, 146 U. S. 140. In a few jurisdictions such former testimony is not admitted, even in the case of the death of a witness. *State* v. *Potter*, 6 Idaho 584, overruling *Territory* v. *Evans*, 2 Idaho 627, *Kaelin* v. *Com.*, 84 Ky. 354. In Texas it was first held in the case of *Greenwood* v. *State*, 35 Tex. 587 that such testimony was admissible, then in the exhaustively considered opinion of *Cline* v.

State, 36 Tex. Crim. Rep. 320, the contrary rule was adopted,, only to be overthrown by the subsequent decision in *Porch* v. *State*, 51 Tex. Crim. Rep. 7. But where the witness is absent from the jurisdiction, various conditions have been imposed by the different courts as essential in order that his former testimony may be given. It has been said that the absence must be by way of residence, and not merely a temporary sojourn, because otherwise the trial could be postponed until his return. *Jacobi* v. *State*, 133 Ala. 1; or that an effort should be made to persuade the witness' voluntary attendance, *Slusser etc.* v. *Burlington*, 47 Iowa 300. It has also been suggested that an effort should have been made to obtain the witness' deposition by commission. *Berney* v. *Mitchell*, 34 N. J. L. 337. But this is futile, for a deposition is no better than the former testimony. WIGMORE EVIDENCE, § 1404. Many states recognize the absence of the witness as a ground for the admission of his former testimony generally. *State* v. *Nelson*, 68 Kan. 566, *Hurley* v. *State*, 29 Ark. 17, *Adair* v. *Adair*, 39 Ga. 75, *Wheeler* v. *Jenison*, 120 Mich. 422, *Wheeler* v. *McFerron*, 38 Or. 105. A few refuse to recognize it at all. *Wilbur* v. *Selden*, 6 Cow. 162, *Crary* v. *Sprague*, 12 Wend. 41, *Berney* v. *Mitchell*, 31 N. J. L. 337, *Collins* v. *Com.*, 12 Bush. 273, *State* v. *Lee*, 13 Mont. 248. Others refuse to recognize the rule in criminal cases. *Owens* v. *State*, 63 Miss. 450, *State* v. *Houser*, 26 Mo. 431, *Finn* v. *Com.*, 5 Rand. 701, *Brogy* v. *Com.*, 10 Gratt. 722. In *State* v *Conklin*, 133 N. W. 119 the Iowa court, divided as in the principal case, held that even where the testimony of the absent witness had not been taken down in shorthand it was permissible for one who had heard it to give the substance thereof against the accused.

EXECUTION SALE—RIGHT OF PURCHASER ON FAILURE OF TITLE. Plaintiff was a bona fide purchaser of chattels at an execution sale; the chattels were later replevined as the property of a third party and plaintiff sued the execution creditor for money had and received. *Held*, that the purchaser could recover the sum paid by him. *Dresser* v. *Kronberg* (Me. 1911) 81 Atl. 487.

The general rule is that there is no warranty of title at an execution sale, the purchaser takes just what title the defendant in execution had and buys at his peril, the rule of *caveat emptor* applying. *Green* v. *Wintersmith*, 85 Ky. 516. *Barnett* v. *Vincent*, 69 Tex. 685, 5 Am. St. Rep. 98; *Lewark* v. *Carter*, 117 Ind. 206, 10 Am. St. Rep. 40, 3 L. R. A. 440. In the principal case the court allowed a recovery of the full amount paid, which is equivalent to making the sale on execution a sale with warranty of title, the usual amount recoverable for a failure of title in such cases being the amount paid. SUTHERLAND DAMAGES Ed. 3, § 666. *Jeffers* v. *Easton*, 113 Cal. 345, 45 Pac. 680; *Noel* v. *Wheatley* 30 Miss. 181; *Anding* v. *Perkins*, 29 Tex. 348. The question of what remedies if any are to be allowed the purchaser of goods at an execution sale, upon failure of title in the execution defendant, is one upon which there is much conflict of opinion. It has been held by the supreme court of Indiana that if payment has not been made it may be resisted for a failure of title, *Julian* v. *Beal*, 26 Ind. 220, 89 Am. Dec. 460. This rule has been denied in the courts of other States. *McGhee* v. *Ellis*, 4 Litt. 244; *Cameron* v. *Logan*, 8 Iowa 434;

Humphrey v. *Wade*, 84 Ky. 391. Where the money has been paid into the hands of the clerk the purchaser cannot recover it. *Dunn* v. *Frazier*, 8 Blackf. 432; *Whitmore* v. *Parks* 22 Tenn. 95. If the money is merely paid to the officer, it has been held it can be recovered. *Bartholomew* v. *Warner*, 32 Conn.98; *Bragg* v. *Thompson*, 19 S. C. 572. Where a stranger to the proceedings has paid money at an execution sale for property not belonging to the defendant in the execution, he may recover this amount in an action against the judgment debtor, as money paid to his use. *Preston* v. *Harrison*, 9 Ind. 1; *McLean* v. *Martin*, 45 Mo. 393. And it is generally held that where an execution sale is set aside, the satisfaction may be set aside and a new execution awarded on *scire facias*. *Magwire* v. *Marks*, 28 Mo. 193; *Adams* v. *Smith* 5 Cow. 280; *Cross* v. *Zane*, 47 Cal. 602. No case like the present is cited by the court in its opinion, and none has been found, though the case of *Sanders* v *Hamilton*, 3 Dana (Ky.) 550 resembles it in some respects. Perhaps if the doctrine of warranty of title in execution sales of chattels had been established in the beginning it would have been a better rule. The effect of such a rule would undoubtedly be to increase the price paid for goods sold on executions, by placing the duty of ascertaining and warranting the title on the real seller, the execution creditor. And it would seem that since the creditor would be in no worse position if the title proved defective than if no sale were made, such a rule would not impair the usefulness of such sales to the execution creditor. At present the rule that there is no warranty of title in execution sales of chattels is clearly established. *England* v. *Clark*, 5 Ill. 486; *Salmon* v. *Price*, 13 Ohio 368, 42 Am. Dec. 204: *The Monte Allegre*, 9 Wheat 616; *Lewark* v. *Carter*, 117 Ind 206. On the other side of the question there are reasons other than precedent for refusing to allow a recovery in a suit against the execution creditor, for as Mr. Freeman aptly says, "Such an action is necessarily founded upon a mistake of law. The purchaser is sure to base his claim upon the fact that he mistook the legal effect of the proceedings in the case, or of the defendant's muniments of title. And it is a well known fact that a mistake of law is ordinarily not a sufficient foundation for relief at law nor in equity. FREEMAN EXECUTIONS, Ed. 3, § 352.

HUSBAND AND WIFE—TENANCY BY THE ENTIRETY—EXECUTION.—Plaintiffs, husband and wife, were owners as tenants by the entirety of a parcel of land when a joint judgment was taken against them. Execution issued and levy was made upon the estate. After the usual formalities a deed to the land was made to defendants. Plaintiffs in this action asked that their title to the estate as tenants by the entirety be quieted and that defendants be ejected from the land. *Held*, that the estate by the entirety was liable on a joint execution against the plaintiffs. *Sharp et al* v. *Baker* (Ind. App. 1911) 96 N. E. 627.

The Indiana court is here confronted with an argument by plaintiffs' counsel that the estate by the entirety is one created for the use and benefit of the husband and wife during coverture and intended to be preserved as a sort of a homestead. There is discoverable no report of a previous decision of the point. Consequently this court reaches its decision by means of an ex-

haustive review of the principles governing estates by the entirety. Referring to the common law status of such an estate as a species of joint tenancy, hence having the four unities; viz, of interest, title, time and possession, BLACKSTONE'S COM. *180 *183, the court points out that joint tenants held equal shares for the purpose of immediate alienation but, for the purposes of possession and survivorship, each owned the whole. 1 PRESTON ESTATES *136; *Wilkins* v. *Young*, 144 Ind. 1, 41 N. E. 68, 55 Am. St. Rep. 162. At common law husband and wife were regarded as one. BLACKSTONE'S COM. *182. This notion gave rise to the construction of an entirety of estate in their tenancy. 1 PRESTON, ON ESTATES *32. Each was seized of the whole and neither of a divisible part. 1 BLACKSTONE'S COM. *182. As a result, a tenant by entirety could not defeat the right of the survivor to hold the entire estate. At common law the husband had, during the coverture, a right to possess and control the wife's portion of such estate. *Beach* v. *Hollister*, 3 Hun 519; *Hall* v. *Stephens*, 65 Mo. 670, 27 Am. Rep. 302; *Davis* v. *Clark*, 26 Ind. 424, 89 Am. Dec. 471. This right to rents could be sold on execution for his debts. *Ames* v *Norman*, 4 Sneed 683, 70 Am. Dec. 269; *Bennett* v. *Child*, 19 Wis. 362 88 Am. Dec. 692; *Snyder* v. *Sponable*, 1 Hill (N. Y.) 567. After the passage of modern statutes, however, the profits of the State became her separate property as fully as if she were unmarried. BURNS ANN ST., 1908 § 7852. Consequently the husband does not own the rents of the property held in entirety with his wife and they cannot be sold for his debts. *Chandler* v. *Cheney*, 37 Ind. 391; *Jones* v. *Chandler*, 40 Ind. 588; *Patton* v. *Rankin*, 68 Ind. 245, 34 Am. St. Rep. 254. From the further facts which the court points out, that the estate by entirety with its incidents is preserved under the statutes as at common law (BURN'S ANN. ST., § 3954), and that a husband and wife are undisputably entitled jointly to sell such an estate, it concludes that plaintiffs' argument is not sound and that defendants have good title through the joint judgment.

INJUNCTION—DAMAGES—ATTORNEY'S FEES. Five temporary injunctions were adjudged to have been wrongfully sued out and were ordered dissolved in *C. H. Albers Commission Co. et al.* v. *Spencer et. al*, 205 Mo. 105, 103 S. W. 523. When this mandate went down to the lower court defendants there moved for assessment of damages on the injunction bonds, including in their motion a request for allowance of attorney's fees incurred both (1) in seeking to dissolve the injunctions in the lower court, and (2) in defending appeals from the lower court's order of dissolution. *Held*, as to (1) attorney's fees were properly assessed as part of the damage flowing naturally and proximately from the wrongful injunctions, but that as to (2) attorney's fees for defending appeals were too remote and would not be allowed. *C. H. Albers Commission Co, et. al.* v. *Spencer et. al.* (Mo. 1911) 139 S. W. 321.

The rule that attorney's fees incurred in getting rid of a wrongful injunction are properly included as part of the damage sustained by the injured party is in accord with that followed generally. *Porter* v. *Hopkins*, 63 Cal. 53; *Keith* v. *Henkleman*, 173 Ill. 137; *Swan* v. *Timmons*, 81 Ind. 243; *Nielson* v. *Albert Lea*, 87 Minn. 285. But some courts hold that the defendant is

entitled to be indemnified only for damages caused to him by the restraint imposed, and not for the cost of ridding himself of the restraint. *Oliphant* v. *Mansfield,* 36 Ark. 191; *Wood* v. *State,* 66 Md. 61; *Sensenig* v. *Parry,* 113 Pa. St. 115; *Jones* v. *Rosedale Street Ry. Co.,* 75 Tex. 382; and the Federal courts take the latter view. *Lindeberg* v. *Howard,* 146 Fed. 467; *Sullivan* v. *Cartier,* 147 Fed. 222, 77 C. C. A. 448; *Oelrichs* v. *Spain,* '15 Wall, 211. Hence in an action in a State court on an injunction bond given in a Federal court the State court is bound to follow the rule of the Federal courts that counsel fees are not recoverable. *Tullock* v. *Mulvane,* 184 U. S. 497, 22 Sup. Ct. 372. Where the injunction is auxiliary to some other cause of action, all courts agree that recovery is limited to the expense rendered necessary in procuring dissolution of the injunction, and does not include expense caused by defenses to the main suit. *Chicago Veneered Door Co.* v. *Parks,* 79 Ill. App. 188; *Randall* v. *Carpenter,* 88 N. Y. 293; *Lamb* v. *Shaw,* 43 Minn. 507. It is held that there can be no recovery for fees expended in an unsuccessful attempt to dissolve an injunction, though it be finally determined that the injunction was wrongfully issued. *Pollock* v. *Whipple,* 57 Neb. 82. As to recovery of fees incident to appeal in suits for dissolution of injunction, there is good authority that such may be had, contrary to the holding on the second proposition in the principal case. *Jesse French Piano etc. Co.* v. *Porter,* 134 Ala. 302, 32 South. 678; *Lambert* v *Haskell,* 80 Cal. 611, 22 Pac. 327; *Ryan* v. *Anderson,* 25 Ill. 330. The St. Louis Court of Appeals held in *Neiser* v. *Thomas,* 46 Mo. App. 47 that a supersedeas bond being given and the injunction not continuing in force pending appeal, there could be no recovery for fees expended on the appeal. The Supreme Court of Missouri takes this view in the principal case, saying that the reason for allowance of fees in getting rid of a temporary injunction in the lower court is the existence and operative force of the restraining orders wrongfully obtained, and when those orders are lifted below, the reason no longer operates in favor of subsequent services of counsel. *Elwood Mfg. Co.* v. *Rankin,* 70 Ia. 403, 30 N. W. 677; *Barre Water Co.* v. *Carnes,* 68 Vt. 23; HIGH, INJUNCTIONS, Ed. 4 § 1687.

LIBEL—RIGHT OF PRIVACY—PUBLICATION OF PHOTOGRAPH.—The defendant newspaper published a photograph of the plaintiff to add interest to an article which stated that her father was charged with a crime and would be arrested. *Held* publication of the photograph was not actionable as statutory libel or as a violation of any legal right of privacy. *Hillman* v. *Star Pub. Co.* (Wash. 1911) 117 Pac. 594.

Under the Washington code, it is a libel "to expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse." To print a picture of a prominent millionaire's daughter as part of a story that her father was indicted and would be arrested for a penitentiary offense, would not, holds the Washington court, "tend to deprive her of social intercourse among right-thinking people, but would rather tend to excite pity for her." It is submitted that the psychological ratiocination of the court will not bear close scrutiny. Newspaper stories with a "heart throb" do not always invoke pity and must be

construed with care. See *Moffatt* v. *Cauldwell*, 3 Hun 26; *Ball* v. *The Tribune Co.*, 123 Ill. App. 235. The principal case also denies the existence of a right of privacy. "not so much because a primary right may not exist, but because, in the absence of statute, no fixed line between public and private character can be drawn." This decision evenly divides the courts that have considered this principle of an "inviolate personality." *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828; *Henry* v. *Cherry*, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991; *Atkinson* v. *Doherty*, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507, and the principal case deny such a right; *Contra*: *Pavesich* v. *New Eng. Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104; *Edison* v *Edison Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl. 392; *Foster-Milburn Co.* v. *Chinn*, 134 Ky. 424, 120 S. W. 364; *Munden* v. *Harris*, (Mo. App.) 134 S. W. 1076; see 9 MICH. LAW REV. 627. The subject is modern, see 4 HARV. L. REV. 205; and still in the process of formative growth. See 3 MICH. L. REV. 559, 8 MICH. L. REV. 221. Most of the cases involve the use of an individual's picture for purposes of commercial advertisement, and the few statutes passed have been so restricted. See Note 24 L. R. A (N. S.) 991. The facts of the principal case broaden the scope of the question. In an age of sensational journalism, many cases not concerned with advertising are sure to arise. The issue is particularly fine when the publication borders on the libellous. *Morrison* v. *Smith*, 177 N. Y. 366, 69 N. E. 725. But the basis of the decision of the Washington court seems unsound. Naturally, there is no violation of personal privacy when the individual is a public character. *Corliss* v. *Walker*, 64 Fed. 280, 31 L. R. A. 283. But though the line between a public and a private character is not a fixed and absolute one, its determination in the case before the court presents itself as a proper subject for judicial decision. It would seem that in the principal case the distinction would not have been difficult to make. The demands of yellow journalism hardly should be the final test of legitimate legal publicity.

LIBEL AND SLANDER—WORDS ACTIONABLE PER SE—SPECIAL DAMAGES.—Defendant said of plaintiff, a white man, "W is a damn negro and his mother was a mulatto." Plaintiff claimed the words were actionable *per se*, but alleged as special damages the loss of the company of a young lady with whom he had been going, and of association with the best people of the neighborhood. *Held*, the charge was not actionable *per se*, and as the special damages alleged showed no pecuniary loss or loss of marriage, plaintiff cannot recover. *Williams* v. *Riddle* (Ky., 1911), 140 S. W. 661.

Unless words of oral defamation fall under the artificial and rigid classification generally accepted, see *Pollard* v. *Lyon*, 91 U. S. 225, 23 L. Ed. 308, they are not actionable *per se*, although vituperative and insulting,—cases cited in ADDISON, TORTS, Ed. 7, p. 38. To publish that a white man is a negro has been held libel *per se* in recent cases. *Upton* v. *Times-Democrat Pub. Co.*, 104 La. 141, 28 South. 970; *Flood* v. *News & Courier Co.*, 71 S. C. 112, 50 S. E. 637; 4 AM. & ENG. ANN. CAS., 685 (1905), but the charge orally made is not so construed. *Johnston* v. *Brown*, 4 Cranch, C. C. 235, Fed Cas.

No. 7,375 (1832), *McDowell* v. *Bowles*, 8 Jones (N. C.) Law 184 (1860). South Carolina before the Civil War held otherwise, because there the negro lacked all civil rights. *Atkinson* v. *Hartley* (1821), 1 McCord 203. The law is strict, and often harsh, in dealing with special damages caused by defamatory words and in themselves actionable. Such damages must be explicitly claimed in the pleadings and strictly proved at the trial. NEWELL, SLANDER & LIBEL, Ed. 2, p. 866. The rule generally stated, but not always followed, is that the plaintiff must have been deprived of some material temporal advantage. NEWELL (*supra*), p. 856. *Bassil* v. *Elmore*, 65 Barb. 627, 48 N. Y. 561. Some cases of such deprivation have been considered to be,—the loss of marriage by women, *Hardin* v. *Harshfield*, 11 Ky. Law Rep. 638, 12 S. W. 779; *Sheperd* v. *Wakeman*, Sid. 79; and by men, *Matthew* v. *Crass*, Cro. Jac. 323; the refusal of civil entertainment at a public house, *Olmsted* v. *Miller*, 1 *Wend.* 506; the loss of hospitality from relatives, *Williams* v. *Hill*, 19 Wend. 305; or from friends, *Davies* v. *Solomon*, L. R. 7 Q. B. 112, 41 L. J. Q. B. 10, 20 W. R. 167; but ill health, *Terwilliger* v. *Wands*, 17 N. Y. 54; exclusion from a private religious society, *Roberts* v. *Roberts*, 33 L. J. Q. B. 249, 12 W. R. 909; social ostracism and the loss of association with good friends, are not deemed sufficient special damage, *Allsop* v. *Allsop*, 5 H. & N. 539, 8 W. R. 449; *Beach* v. *Ranney*, 2 Hill 309. The distinction drawn between the loss of the "hospitality" and the "society" of friends, though perhaps logical, is hardly reasonable. Most civilized men would rather suffer the loss of a meal than be shunned and ignored. Many of the decisions seem arbitrary and hard. A liberal view was expressed in *Mudd* v. *Rogers*, 102 Ky. 280, 43 S. W. 255 (1897), which the same court, in the principal case, failed to comment upon. The court in that case, after holding certain slanderous words not actionable *per se*, concludes: "The special damages resulting to the plaintiff from the publication of the slander can scarcely be computed in dollars and cents. The treatment that he received from his heretofore friends and associates, and especially the ladies, to a sensitive, high-toned gentleman, would be immeasurable; and if the charges were false, and their utterance and publication brought upon the appellant the disgrace and ostracism which he alleges, he is certainly entitled to maintain this action, and to recover damages to some extent commensurate with the injuries inflicted."

MUNICIPAL CORPORATIONS—ASSESSMENT BEYOND CORPORATE BOUNDARIES—SIGNER OF PETITION NOT ESTOPPED TO DENY JURISDICTION TO ASSESS FOR SAME—Appellant company, defendant below, owned a tract of land outside the corporate limits of the city of Edmonds, and joined in signing a petition to said city for the construction of a sea gate as a municipal improvement. This improvement was made and the cost assessed against the property owners benefited, including defendants. This assessment was resisted on the ground that the municipality had no jurisdiction to make assessments against property outside its corporate boundaries. *Held*, the city had no jurisdiction and could exercise no municipal powers beyond its corporate boundaries, and defendant company was not estopped to deny this jurisdiction on the ground that it

had signed the petition for the improvement. *Edmonds Land Co.* v. *City of Edmonds* (Wash., 1911) 119 Pac. 192.

A municipality has no power to make assessments against property not within its corporate limits. *Farwell* v. *Seattle*, 43 Wash. 141, 86 Pac. 217; *City of Brooklyn* v. *Lott*, 2 Hun 628; *In re Flatbush*, 60 N. Y. 398; *Farlin* v. *Hill*, 27 Mont. 27, 69 Pac. 237; *In re Prospect Park*, 5 THOMP. & C. 188, 28 CYC. 1128. Nor is there any lien for improvements against land outside the corporate boundaries under a statute giving a lien on adjacent lots for an improvement "in an incorporated city." *Durrell* v. *Dooner*, 119 Cal. 411, 51 Pac. 628. And when part of a piece of property lies within and part without the boundary, only the part within can be assessed for its share of the improvement. *Lawrenceville* v. *Hennessey*, 244 Ill. 464, 91 N. E. 670. However, if the property benefited is made a part of the municipality while improvements are under way but before they are completed, it may be assessed its proportionate share of the entire improvement. *Hollister* v. *City of Rochester*, 85 N. Y. Supp. 147, 41 Misc. 559. In the principal case, it was not argued that the city had the power to assess property outside its limits, but that appellant by signing the petition was estopped to question its power so to do. It has been repeatedly held that one signing such a petition is estopped to deny the validity of an assessment made to pay for the improvement asked in the petition. *Shepard* v. *Barron*, 194 U. S. 553, 24 Sup. Ct. 737, 48 L. Ed. 1115. *Tacoma Land Co.* v. *Tacoma*, 15 Wash. 133, 45 Pac. 733. *Sexsmith* v. *Smith*, 32 Wis. 299; *Matthews* v. *Kimball*, 70 Ark. 451, 66 S. W. 651; 4 DILL., MUN. CORP., Ed. 5, § 1456, and cases cited. See also *De Noma* v. *Murphy* (S. D. 1911), 133 N. W. 703, noted on p. 341 *post*. But such estoppel does not extend to matters of jurisdiction, so as to give jurisdiction where none would otherwise exist. *Coggeshall* v. *Des Moines*, 78 Ia. 235, 41 N. W. 617, 42 N. W. 650; *Fox* v. *Middlesborough Town Co.*, 96 Ky. 262, 28 S. W. 776; *Strout* v. *Portland*, 26 Ore. 294, 38 Pac. 126; *McGowan* v. *Paul*, 141 Wis. 388, 123 N. W. 243; 4 DILL., MUN. CORP., Ed. 5, § 1455. The decision in the principal case would seem to settle a question upon which the decisions of the State of Washington seem to have been hitherto in conflict. *Howell* v. *Tacoma*, 3 Wash. 74, 29 Pac. 447, 28 Am. St. Rep. 83, holds that there is no estoppel raised by signing a petition in a case where the city council was without jurisdiction. But in *Barlow* v. *Tacoma*, 12 Wash. 32, 40 Pac. 382, the principle of estoppel was applied in a matter involving a jurisdictional question. And in *Wingate* v. *Tacoma*, 13 Wash. 603, 43 Pac. 874, the court expressly declared that the fact that a property owner signed a petition for an improvement, knew it was being made, and made no objections, will estop him and his successors in interest from asserting that the city never acquired jurisdiction to make the improvement and levy an assessment therefor. This opinion was followed in *Tacoma Land Co.* v. *Tacoma, supra*. In *Aberdeen* v. *Lucas*, 37 Wash. 190, 79 Pac. 632, the doctrine of *Howell* v. *Tacoma, supra*, was once more set forth, by way of *dictum* however, since the court held the defects set forth to be mere irregularities of procedure and not jurisdictional. The principal case, by holding that there is no estoppel to deny matters of

jurisdiction, once more brings this court into line with the rule as it is generally laid down regarding this question.

PARENT AND CHILD—MARRIAGE NOT AN EMANCIPATION.—Plaintiff and defendant, both being minors above the age of consent, were married, and plaintiff (the wife) afterward secured a decree of divorce and temporary alimony. The defendant had no property, and his father claimed and received his wages and services. Consequently he failed to pay the alimony. *Held*, that he was not in contempt for the failure. *Austin* v. *Austin* (Mich. 1911) 132 N. W. 495.

This case has been criticised as opposed to the great weight of authority, which holds that "the lawful marriage of an infant, whether with or without the parent's consent, entitles the infant to his earnings for the support of his family." 25 HARV. L. REV. 295. This statement of the rule seems rather too broad. Of the two cases cited as illustrative of the weight of authority, the first, *Commonwealth* v. *Graham*, 157 Mass. 73,31 N.E. 706,while opposed to the principal case, does not hold that the infant is fully emancipated by marriage, but only that "an infant husband is entitled to his own wages so far as they are necessary for his own support and that of his wife and children." The second, *Aldrich* v. *Bennett*, 63 N. H. 415, is not in point on this question, the emancipation there being that of a female infant. Courts have been willing to hold that marriage emancipates a female infant, *Aldrich* v. *Bennett*, *supra*, and that a male infant is emancipated where his father has consented to the marriage, *Inhabitants of Taunton* v. *Inhabitants of Plymouth*, 15 Mass. 203. Further they have allowed him necessaries for the support of himself and his family. *Commonwealth* v. *Graham*, *supra*; *Inhabitants of Taunton* v. *Inhabitants of Plymouth*, *supra*. But no court, apparently, has held that a male infant is fully emancipated by marriage without his parent's consent. The textbooks state with substantial uniformity, that marriage does emancipate. TIFFANY, DOM. REL., Ed. 2, 282, but the cases cited do not support the text statement. A line of cases in Vermont is often cited to support the emancipation doctrine: *Town of Bradford* v. *Town of Lunenburgh*, 5 Vt. 481; *Town of Sherburne* v. *Town of Hartland*, 37 Id. 528; *Town of Northfield* v. *Town of Brookfield*, 50 Id. 62. These cases all arose under the pauper laws, and the question was only as to what constituted emancipation under those laws, *Town of Sherburne* v. *Town of Hartland*, *supra*. Furthermore the two latter of these cases base their decisions on a statement in the earliest case which is but *dictum*. The only cases exactly in point seem, then, to be *Com.* v. *Graham*, *supra*, *White* v. *Henry*, 24 Me. 531 and *People* v. *Todd*, 61 Mich. 234, 28 N.W. 79. It is the rule in the two latter of these cases which the Michigan court has adopted in the principal case.

SERVICE OF SUMMONS—FALSE RETURN—REMEDY.—In an action to enjoin a levy and sale under an execution issued on a judgment rendered by a justice of the peace, and to have the judgment declared null and void, because based upon a false return of service of summons. *Held*, that the return of the officer showing a service of summons in the manner pre-

scribed by the statute is conclusive upon the parties to the suit, and a judgment by default rendered in pursuance of such return cannot be attacked even in equity except where the plaintiff aided or abetted in the false return. *Ellis* v. *Nuckols* (Mo., 1911), 140 S. W. 867.

The conclusiveness of an officer's return of service of summons, and what remedy one injured by a false return of service may have either at law or in equity are questions which have been carefully considered by the courts with the result of an irreconcilable conflict of opinion. *Reiger* v. *Mullins,* 210 Mo. 563. In a note to this case in 124 Am. St. Rep. 755, the authorities are extensively reviewed. The rule stated in the principal case, that a judgment cannot be impeached in equity when it appears that the officer's return of service is false and no return of service has been made finds support in some of the American cases. *Walker* v. *Robbins,* 14 How. 584; *Taylor* v. *Lewis,* 2 J. J. Marsh. 400, 19 Am. Dec. 135; *Knox* v. *Harshman,* 133 U. S. 152; *Johnson* v. *Jones,* 2 Neb. 126. These cases proceed upon the theory that where the plaintiff in law is not in fault, redress can only be had in the court of law where the record was made, and if relief cannot be had there the party injured can seek his remedy against the officer in an action for damages for the false return; there thus being an adequate remedy at law. *Preston* v. *Kindrick,* 94 Va. 760; *Krug* v. *Davis,* 85 Ind. 309. The injustice of this rule is well illustrated by the principal case, in which the defendant by his demurrer admitted that the damages to the plaintiff were such as not to be capable of computation, that the officer was insolvent, and that the signatures of the sureties on the officer's bond were forgeries. These facts being true, it is evident that if the plaintiff has a remedy at law it is anything but adequate. *Owens* v. *Ranstead,* 22 Ill. 161. One of the strongest criticisms of the refusal of courts to grant relief in such a case is found in the note to the case of *Taylor* v. *Lewis, supra,* in 19 Am. Dec. 135, where it is said by Mr. FREEMAN, "It would seem to be * * * self evident * * * that no greater fraud can be perpetrated than to deprive a person of his property without giving him an opportunity to be heard in his defense. To do so is repugnant to our sense of natural justice and opposed to the underlying principles of free governments deriving their authority from written constitutions, and is seldom if ever sanctioned except where might and not right prevails." Where relief is allowed against such judgments there is some diversity of opinion as to what must be shown to impeach the judgment. Generally it is held that it must be shown that a different result will be obtained than was decreed by the void judgment, as by showing that there was a valid defense, either partial or entire to the former action. *Gifford* v. *Morrison,* 37 Ohio St. 502, 41 Am. Rep. 537; *Young* v. *Deenen,* 220 Ill. 350, 70 N. E. 193; FREEMAN, JUDGMENTS, Ed. 4, § 498, and cases cited. In some cases relief has been granted without showing a meritorious defense, *Bell* v. *Williams,* 1 Head. 229; *Ridgeway* v. *Bank of Tennessee,* 11 Humph. 523. Evidence to impeach a false return must be clear and cogent. *Osman* v. *Wisted,* 78 Minn. 295; *Huntington* v. *Crouter,* 33 Ore. 408, 54 Pac. 208, 72 Am. St. Rep. 726. There is conflict as to whether the testimony of the plaintiff is sufficient to overcome the return of service. *Tatum* v. *Curtis,* 68 Tenn. 360; *Davant* v. *Carlton,* 53 Ga. 491.

It was held in *Trager* v. *Webster*, 174 Mass. 580, 55 N. E. 318, that a return of service might be overthrown by the uncorroborated testimony of the plaintiff. The trend of the modern cases seems to be towards the doctrine that the return of an officer to a writ is only *prima facie* evidence of the facts stated therein, and that when a judgment had been obtained by means of a false return and without notice to the defendant, equity will grant relief. *Kochman* v. *O'Neil*, 202 Ill. 110; *Wilcke* v. *Duross*, 144 Mich. 243, 107 N. W. 907, 115 Am. St. Rep. 394; *Goble* v. *Brennenman*, 75 Neb. 309; *Emerson* v. *Gray* (Del. Ch.), 63 Atl. 768; *DuBois* v. *Clark*, 12 Colo. App. 220, 55 Pac. 750.

TAXATION—ESTOPPEL TO RAISE CONSTITUTIONAL QUESTION.—A landowner signed a petition asking for the construction of a ditch, knew of the procedure in its establishment, saw the ditch being constructed, acquiesced in its location, and made no protest until called upon to pay his assessment. He then instituted an action to restrain defendant from enforcing and collecting the assessment against his land on the ground that the law under which the ditch was constructed was unconstitutional. *Held*, that the plaintiff, by his actions, is estopped from questioning the constitutionality of the law under which the ditch was constructed. *De Noma* v. *Murphy et al.* (S. D., 1911), 133 N. W. 703.

Often a law will be held valid which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition. *Pierce* v. *Somerset Ry.*, 171 U. S. 641, 43 L. Ed. 316. 8 CYC. 791. This rule is almost universally applied to property rights, and is even applied to a limited extent to criminal law. COOLEY, CONSTITUTIONAL LIMITATIONS, Ed. 7, p. 250. It has been accepted by practically all of the States. COOLEY, TAXATION, Ed. 2, p. 819; *Ferguson* v. *Landram*, 5 Bush 230, 96 Am. Dec. 350; *Andrus* v. *Board of Police*, 41 La. Ann. 697, 6 South. 603, 5 L. R. A. 681; *Dupre* v. *Board of Police*, 42 La. Ann. 802, 8 South. 593; *People* v. *Murray*, 5 Hill 468; *Minneapolis, St. P. & S. St. M. Co.* v. *Nester*, 3 N. D. 480, 57 N. W. 510; *State* v. *Mitchell*, 31 Ohio St. 592. The plaintiff in the principal case, or any one in an analogous position, is, theoretically at least, not affected by the unconstitutionality. Provisions of constitutions which would apply in such cases are intended to protect the citizen from forced contributions levied *in invitum* beyond any power possessed by the authorities. The plaintiff cannot be considered as subject to an act *in invitum* because of his previous actions. The facts necessary to constitute a waiver of the right to raise the question of unconstitutionality, varies in the different jurisdictions. The general view is well illustrated by the Ohio decisions. Mere silence, even with knowledge of conditions, is not sufficient in itself. *Counterman* v. *Dublin Tp.*, 38 Ohio St. 515. Even signing the petition, if nothing more appears, may not be sufficient, *Tone* v. *Columbus*, 39 Ohio St. 281. (But see *City of Columbus* v. *Sohl*, 44 Ohio St. 479, 8 N. E. 299), though such persons might be estopped from enjoining the collection of assessments of costs proceeding from the petition proceedings themselves. A few courts give the rule a wide range; for example, even carrying it on to persons purchasing land with its burdens, where such land has been bene-

fited as in the principal case. *Hoertz* v. *Jefferson Southern Pond Drainage Co.*, 119 Ky. 824, 84 S. W. 1141. That the estoppel does not preclude the raising of the question of jurisdiction, see *Edmonds Land Co.* v. *City of Edmonds* (Wash. 1911), 119 Pac. 192, noted on p. 338 *ante*.

WILLS—REMAINDER—DISCLAIMER OF LIFE ESTATE—ACCELERATION.—Testator devised freehold estates to the use of his son J. for life, with remainder to his sons successively in tail male, with remainder to his grandson, Walter, for life, with remainders over. J. was married but there was no prospect of any issue and he disclaimed the life estate. *Held*, that Walter's estate for life in remainder was not accelerated, but that the rents and profits of the disclaimed estate during the life of J., so long as he had no son, formed part of the residuary estate of the testator. *In re Sir Walter Scott. Scott* v. *Scott* (1911), 2 Ch. D. 374.

The effect of J.'s renunciation of his life estate would at the common law have accelerated the remainders over. Late cases consider this rule to be supported by testator's intention, for it is presumed that he would wish the estate over to take effect upon any event removing the prior estate. ROOD, WILLS, § 576. *Blatchford* v. *Newberry*, 99 Ill. 11, and so a gift to X while single, with gift over on his death, was held to pass the estate to the remainderman immediately on X's marriage. *Bruch's Estate*, 185 Pa. St. 194, 39 Atl. 813. A contingent remainder such as that to the sons of J. successively, J. having none, required a particular estate to support it, 1 FEARNE, CONTINGENT REMAINDERS, Ed. 10, p. 281, for the fee could not by the common law be held in abeyance. Thus prior to the Contingent Remainders Act, 1877, the disclaimer by J. would have destroyed the contingent remainder. *Chudleigh's Case*, 1 Coke 120. *Faber* v. *Police*, 10 S. C. 376. This act, being passed to preserve contingent remainders, otherwise valid, from destruction by failure of the particular prior estate, had the same effect in the court's opinion as the appointment of trustees to preserve contingent remainders. Trustees, if they had been appointed, would have held the estate during J.'s life for the benefit of a possible future son, although there was no probability of one being born. (See *Carrick* v. *Errington*, 2 P. Wms. 361. *Hopkins* v. *Hopkins*, 1 Atk. 597.) The effect of the statute to preserve the contingent remainders was in like manner to prevent the coming into enjoyment and possession of Walter's vested remainder, for as the decision states it is "impossible that there could be an estate in remainder which might afterwards come to an end so as to let in an estate previously limited." The law of real property does not recognize the defeasance or interruption in enjoyment of a vested remainder to allow of the vesting in possession of a previously destroyed contingent remainder. 2 WASHBURN, REAL PROPERTY, Ed. 4, 543.