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Recent Important Decisions

RECENT IMPORTANT DECISIONS.

BANKRUPTCY—JURISDICTION OVER PARTNERSHIP.—Pursuant to §5(c) of the Bankruptcy Act of 1898, providing that the court of bankruptcy which has jurisdiction of one member of a partnership may have jurisdiction of them all and of the administration of the partnership and individual property, *held* that a court having jurisdiction over one partner can take jurisdiction over the firm, without reference to whether the partnership is six months old, and whether there is any specific allegation as to the firm's principal place of business. *In Re Mitchell,* 219 Fed. 690.

The instant case seems to leave little room to doubt that the existence of the partnership, as an entity, for any considerable period prior to bankruptcy, is not necessary to confer jurisdiction, provided, meanwhile, at least one partner has resided within the jurisdictional limits for at least three months. Nor is it of any consequence that the business of the firm was carried on in another state or district or that the other partners reside in distant states. *Ex Parte Hall,* Fed. Cas. 5919; *In Re Penn,* Fed. Cas. 10927; *Whitson* v. *Farber Bank,* 105 Mo. App. 605. But if the petition is distinctly based on the ground of residence or domicile, it cannot be supported, if the court be convinced that none of the members of the firm had been domiciled within the district for a sufficient period. *In Re Blair,* 99 Fed. 76. But if the principal place of business of a partnership has been within a given district for the requisite length of time, the bankruptcy court sitting in that district will have jurisdiction of a voluntary or involuntary petition against the partnership irrespective of the fact that some of the partners may be non-residents. *Cameron* v. *Canieo,* Fed. Cas. 2340. And where the partnership has had its only place of business within a given judicial district for a period of more than three months before the filing of a petition in bankruptcy against it in such district, the court therein will have jurisdiction of the petition although during a part of that time, the only business carried on was that in the way of winding up the affairs of the firm by two of the partners, the others having withdrawn and retired. *In Re Blair,* 99 Fed. 76.

BILLS AND NOTES—FRAUD IN ESSE CONTRACTUS.—Action on a promissory note against the maker, by an indorsee for value before maturity. Plaintiff alleged the note was given to the payee, an attorney, for legal services in divorce proceedings. Defendant alleged in defense that she had, while in poor health and affected by eye trouble, signed the note under the belief induced by the payee that she was signing the divorce petition. *Held,* it was error to direct a verdict for the plaintiff and not to submit to the jury an issue of fraud *in esse contractus;* for if defendant without fault signed a note, being induced to believe it was an instrument of another character, she was not liable. *First Nat. Bank of Shenandoah* v. *Hall,* (Iowa 1915), 151 N. W. 120.

A person cannot be made a party to a contract without his consent, in the absence of negligence. So fraud or misrepresentation in the making of

a contract, such as to secure liability on an obligation not knowingly assumed by the party, will constitute a defense. This is termed fraud *in esse contractus*. Thus signatures to promissory notes have been secured by misrepresentation of a duplicate agency contract, or by concealing a note in a contract and later clipping out the note and signature, or by misreading an instrument to a person entitled to rely upon the reading, or by a substitution of one instrument for another. Notes so secured cannot be recovered upon, even by a holder in due course. *Kagel* v. *Totten*, 59 Md. 447; *Green* v. *Wilkie*, 98 Iowa 74, 66 N. W. 1046; *Eldorado Jewelry Co.* v. *Darnell*, 135 Iowa 555, 113 N. W. 344; *Brown* v. *Reed*, 79 Pa. St. 370; *Porter* v. *Hardy*, 10 N. D. 551, 88 N. W. 458. On the other hand, fraud in the inducement—that is, inducing a person to make a note, upon fraudulent representations as to collateral matters or as to the legal effect of the note—is not a defense to an action by a holder in due course. *Taylor* v. *Gribb*, 100 Ga. 94; *David* v. *Merchants Bank*, 103 Ky. 586; *Beath* v. *Chapoton*, 115 Mich. 506. There the maker really intended to sign, and the concealed conditions would not affect an innocent purchaser of the note. Thus, in *Jackson* v. *Chemical Bank*, 46 S. W. 295, the signing was induced under a promise that the note would not be put in circulation. Where the fraud is *in esse contractus* the defense is not available if the maker was negligent in ascertaining the nature of the instrument or its terms. *Douglass* v. *Matting*, 29 Iowa 498; *Gibbs* v. *Linabury*, 22 Mich. 479; *Williams* v. *Stoll*, 79 Ind. 80. In the instant case defendant was in poor health and suffering from eye trouble. That alone should not excuse the signing. Mere failure to read the note is insufficient. *Yeomans* v. *Lane*, 101 Ill. App. 228; *Graham* v. *Insurance Co.*, 110 Mo. App. 95; *Ort* v. *Fowler*, 31 Kan. 478; *Chapman* v. *Ross*, 56 N. Y. 137. Where a person is unable to read he should request assistance from others present who can read, and failure to do so may defeat the defense. *Brown* v. *Feldwert*, 46 Ore. 363; *Shores Co.* v. *Lonning*, 159 Iowa 95, 140 N. W. 197. But if the relation of the parties is such that the maker is entitled to repose confidence in the person making the representation, then a failure to call other persons present may not prejudice the defense. So in the instant case the fact that the two sons of the defendant were present in the room when the instrument was signed, and that they were not called to read or see the instrument believed to be a divorce petition, would not in itself be negligence. The relation of attorney and client coupled with the temporary disability of the client is a more weighty consideration.

BILLS AND NOTES—RECOVERY OF MONEY PAID BY THE SECRETARY OF THE TREASURY ON FORGED DRAFT.—Action by the United States to recover the amount of a draft paid by the Secretary of the Treasury to Defendant Bank. The draft was dated in the Argentine Republic, and apparently signed by Crane, the American Consul, whose signature had been forged. Defendant was the holder in due course, and was paid the amount of the draft under a mistake of fact,—both parties being ignorant of the forgery. *Held*, the United States cannot recover the money paid. *United States* v. *Bank of New York*, (Cir. Ct. App., second circuit, 1914), 219 Fed. 648.

As a general rule the drawee of a draft, having paid it, cannot recover the money paid to a holder in due course, upon discovery that the drawer's name was forged. He is presumed to know the handwriting of the drawer, and is estopped to deny its genuineness. *Price* v. *Neale*, 3 Burr. 1354; *Nat'l. Park Bank* v. *Ninth Nat'l. Bank*, 46 N. Y. 77; *U. S. Bank* v. *Bank of Georgia*, 10 Wheat 333, 6 L. ed. 334. See 10 MICH. LAW REV. 226, and cases there cited. *Bank of Cottage Grove* v. *First Nat'l. Bank*, 117 Pac. 293. The basis for the rule is the same as that supporting the liability of a bank to know the signature of its customer, in that it is presumed to have greater means of becoming familiar with the handwriting of a depositor than has the holder of the instrument. However, the rule does not apply in case the holder by negligence has contributed to the success of the fraud. *Myers* v. *S. W. Nat'l. Bank*, 193 Pa. 1, 44 Atl. 280; *Woods* v. *Colony Bank*, 114 Ga. 683, 40 S. E. 720; *Brennan* v. *Merchants Bank*, 62 Mich. 343, 28 N. W. 881; *Weisberger Co.* v. *Barberton Bank*, 84 Oh. St. 21. No such charge was made against the defendant in the instant case. The argument of counsel for the United States was that the Secretary of the Treasury is not presumed to know the signature of such agents as are authorized to draw upon him; that the general rule is confined within limits, and the application of it here would be unreasonable; and that the United States is entitled to greater protection than an individual in such a case as the present. In *United States* v. *National Exchange Bank*, 214 U. S. 302, 29 Sup. Ct. 665, an action was brought to recover sums paid on one hundred and ninety-four pension checks, where the signatures of the payee were forged. Recovery was granted, and the court said that to apply the rule, (based on the presumption of a duty to know signatures), to the government in its duty of paying millions of pension claims, usually discharged by means of checks, would be clearly unreasonable and contrary to common sense. But that case involved the forgery of the name of the payee. And a case in accord, *United States* v. *County Bank*, 64 Fed. 703, 12 C. C. A. 407, involved the forgery of an indorser's name. Those cases are easily distinguished from one in which the drawer's name is forged. The common law rule never required the drawee to know the genuineness of the signature of the payee or indorser. And no good reason is suggested why the United States should not protect itself against imposition, as banks are required to do. Those who have the right to draw bills upon the government are relatively few in number. The United States, when it becomes a party to an instrument of commercial paper, should incur all the responsibility of a private person under the same circumstances. *Cooke* v. *United States*, 91 U. S. 389, 23 L. ed. 237.

CONDITIONAL SALE—ELECTION OF REMEDIES.—Plaintiff sold to defendants' grantor certain bottling machines on condition that title was to remain in the plaintiff until fully paid in cash. Breach was made by vendee. Plaintiff brought an action for the purchase price, but was compelled to take a nonsuit. He then brought an action for conversion. Defendant contended that the bringing of the first action was an election of remedies and barred the action for conversion. *Held*, that since the action for the purchase price

was not prosecuted to judgment, there was not such an election as barred the action in trover. *Machinery Co.* v *Mineral Water and B. Co.*, (Mo. 1915), 171 S. W. 944.

Where, on the sale and delivery of personal property on credit, the title is to remain in the vendor until payment, the vendor, upon non-compliance with the conditions of the sale by the vendee, may either retake the property or may treat the sale as absolute and bring an action for the price, but an assertion of either right is an abandonment of the other. *Davis* v. *Millings*, 141 Ala. 378. This seems to be the universal rule. But just what "an assertion of either right" is, is a question upon which there is much conflict. The weight of authority is probably with the rule which holds that there is an election when one remedy has been prosecuted to judgment even though the judgment remains unsatisfied. *Holt Mfg. Co.* v. *Ewing*, 109 Cal. 353; *Crompton* v. *Beach*, 62 Conn. 25; *Smith* v. *Barber*, 153 Ind. 322; *Bailey* v. *Hervey*, 135 Mass. 172; *Whitney* v. *Abbott*, 191 Mass. 59; *Alden* v. *Dyer*, 92 Minn. 134. Still there are many cases holding that the prosecuting of one action to judgment is not such an election as to bar an action on the other remedy, if the judgment in the first suit remains unsatisfied. *Thomason* v. *Lewis*, 103 Ala. 426; *Forbes Piano Co.* v. *Wilson*, 144 Ala. 586; *McPherson* v. *Acme Lbr. Co.*, 70 Miss. 649; *Printing Press and Mfg. Co.* v. *Publishing Co.*, 56 N. J. L. 676; *Root* v. *Lord*, 23 Vt. 568. There are a few cases which hold contra to the instant case. *Frisch* v. *Wells*, 200 Mass. 429; *Orcutt* v. *Rickenbrodt*, 59 N. Y. Supp. 1008; *Kirk* v. *Crystal*, 103 N. Y. Supp. 17. These establish the rule that the mere bringing of one action by the vendor, even though not prosecuted to judgment, is such an election that it bars action on any other remedy.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF WEBB-KENYON ACT.—A state statute required all transportation companies to keep a separate book in which was to be entered the name of the consignee of all liquors to be delivered in the state; *held* that this Act was valid and a constitutional exercise of the police power in order that the SEARCH AND SEIZURE ACT prohibiting the sale, bartering, or keeping in possession of certain quantities of liquor for purposes of sale, might be carried into effect. *State of North Carolina* v. *Seaboard Air Line Ry.*, (N. C. 1915), 84 S. E. 283.

The act would be invalid as a regulation of interstate commerce were it not for the WEBB-KENYON ACT, which prohibits shipments of intoxicating liquor from one state to another to be used in violation of law, and brings them within the police power of the state; so it would follow that if the WEBB-KENYON ACT were invalid the state act would fall with it. The constitutional principles involved in the WEBB-KENYON ACT have been discussed in a note in 12 MICH. LAW REV. 585. It could not be argued with force that even if the federal act were valid this act would be invalid and an unreasonable regulation. The obvious intent of the federal act was to enlarge state power so that the states could enforce their policies in regard to intoxicating liquors, and such a regulation is only a reasonable means of carrying into effect a power already granted, and lies within the legislative discretion. *Dewey* v.

R. R., 142 N. C. 400; SUTHERLAND, STATUTORY CONSTRUCTION, 427. Much more stringent and confiscatory state laws have been upheld in late years. *Patstone* v. *Pa.*, 232 U. S. 138; *Siez* v. *Hesterburg*, 211 U. S. 31; *Lawton* v. *Steel*, 152 U. S. 133. In the late case of *Gherna* v. *State*, (Arizona) 146 Pac. 494, a constitutional amendment prohibiting the sale of intoxicating liquors was upheld as a valid exercise of the police power even though it caused a loss of investments already made in those commodities. There was also a clause in this amendment which prohibited the importation of intoxicating liquors into the state, but the court was correct in refusing to consider the validity of this section, and of the WEBB-KENYON ACT as the defendant was indicted for selling, not importing, and the court declared the sections separable. The question on the WEBB-KENYON ACT will no doubt arise soon in Arizona under the other clause of the constitutional provision.

CONTRACTS—CONSTRUCTION OF LIMITING LIABILITY CLAUSE.—Appellee shipped certain goods over appellant's road under a contract limiting the liability of the appellant in case of injury or loss to $100. Part of the goods were injured, the actual value of which was over the stipulated amount. The question was whether the whole value up to $100 or only a proportionate part could be recovered. *Held*, that the whole loss up to $100 could be recovered. *Central of Georgia Ry. Co.* v. *Broda*, (Ala. 1914) 67 So. 437.

The court in deciding the case admitted that the cases and text writers are in direct conflict on the subject, and decides that the contract should be construed strictly against the railroad company and in favor of the shipper. The reasoning of the courts which follow this side of the question is that the parties do not agree as to the value of the goods but only as to the amount the carrier shall pay in case of injury and hence if the injury reaches the limit, that amount should be paid and not a proportionate amount as would be the case if all the goods were valued at the stipulated price. In addition to the courts cited in the principal case the following also hold the same view. *Huguelet* v. *Warfield*, 65 S. E. 985; *Carleton* v. *N. Y. C. & H. R. R. Co.*, 117 N. Y. Supp. 1021; *Visanka* v. *Southern Exp. Co.*, 75 S. E. 962. Other courts take the view that the contract does fix the whole value of the goods and in case of injury only a proportionate amount should be allowed as damages. HUTCHINSON, CARRIERS, § 429; *Goodman* v. *M. K. & T. Ry. Co.*, 71 Mo. App. 460; *Shelton* v. *Canadian Northern Ry.*, 189 Fed. 153.

CORPORATIONS—IMPLIED POWERS—SALE OF LIQUOR BY CLUB.—The Country Club in Austin, Texas was duly and legally incorporated under the state law. The charter authorized the corporation "to support and maintain a golf club and other innocent sports in connection therewith." A suit was brought to enjoin the club from maintaining a buffet and dispensing intoxicating liquors to its members upon the ground that such acts were not within the implied powers of the corporation. *Held* that an injunction would issue. *State* v. *Country Club* (Tex. 1915), 173 S. W. 570.

It is a general rule that a corporation has only such powers as are granted to it by its charter either expressly or as incidental to its existence. *Cumber-*

land Telephone and Telegraph Co. v. *City of Evansville*, 127 Fed. 187; *Daniels* v. *Wilson*, 73 Ill. App. 287; *Railway Co.* v. *Worthington*, 88 Tex. 562. And in case of doubt arising from the language used in the charter, or the nature of the business claimed to be within the implied powers of the charter, or the general policy of the state in reference to the powers or privilege claimed, the doubt is resolved against the corporation. *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *People* v. *Palace Car Co.*, 175 Ill. 124; *People* v. *Gas Co.* 130 Ill. 268. In the principal case the court, after considering the charter of the corporation with reference to these principles and the general policy of the laws of Texas in regard to the liquor traffic, reached the conclusion that such acts were not within the implied powers of the golf club. In the light of present day views their decision was no doubt correct. A few years ago, however, the "nineteenth hole" was regarded, at least by golfers, as the most important one on the course, and a Scotch highball an essential to the Scotch game. The decision in the case clearly represents the changing spirit of the times.

CORPORATIONS—RIGHT OF MONOPOLY TO RECOVER ON CONTRACT OF SALE.—The Corn Products Company entered into a contract with the Wilder Manufacturing Company to sell glucose to the latter. Among the stipulations in the contract it was provided that the vendee was to receive a stipulated percentage upon the amount of the purchase made in one year, to be paid at the end of the following year, *provided* that during that time the company dealt with no one but the combination. Upon a suit by the refining company for the price of goods sold, the manufacturing company defended upon the grounds that the refining company had no legal existence as it was a combination in restraint of trade, and further that the contract itself being in restraint of trade, the plaintiff could not recover the price of goods sold thereunder. *Held*—that the refining company could recover. *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 35 Sup. Ct. 398.

The manufacturing company having dealt with the refining company as an existing concern possessing the capacity to sell, the assertion that it had no existence because it was a combination in restraint of trade was irrelevant to the question of liability for goods sold, and being a mere collateral attack, could not be sustained. *Mackall* v. *Chesapeake & O. Canal Co.*, 94 U. S. 308, *American Steel & Wire Co.* v. *Wire Drawers etc. Union*, 90 Fed. 608. The remaining question in the case was whether the contract was a monopolistic one so as to come under the principle that a court will not lend its aid in any way to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality. *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 28, 29 Sup. Ct. 280, 7 MICH. LAW REV. 608. The court held that a rebate contract such as this was distinguishable from one so illegal in character as that in *Continental Wall Paper Co.* v. *Voight and Sons Co.*, supra., and was merely collateral to the monopoly and not illegal. *U. S.* v. *Greenhut*, 51 Fed. 213; *Olmstead* v. *Distilling and Cattle Feeding Co.*, 77 Fed. 265; *Whitewell* v. *Continental Tobacco Co.*, 125 Fed. 454; *Bessire & Co.* v. *Corn Products Mfg. Co.*, (Ind. App.) 94 N. E. 353. The contract itself not

being illegal, a recovery may be had for goods sold thereunder and the question of corporate existence is merely collateral thereto and cannot be raised. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

DAMAGES—INSTRUCTIONS.—Appellee sued appellant in an action for personal injuries and recovered damages in the trial court. The trial court in instructing the jury told them they might find a verdict for such an amount as in their judgment the evidence of the case warranted and enumerated certain things they might take into consideration, but did not give any instructions concerning contributory negligence, and the defense failed to ask for such. *Held*, that the instructions were good and correctly stated the rule of law which obtained in Mississippi as to guiding the jury. *Lindsay Wagon Co.* v. *Nix*, (Miss. 1915) 67 So. 459.

In the leading case of *B. & O. Ry. Co.* v. *Carr*, 71 Md. 135, the rule was laid down that an instruction which told the jury they might give such damages as in their judgment, under the circumstances, would compensate the plaintiff, was bad. The case held that the court "must inform the jury what was the true measure of damages, whether the point was taken or not." A jury, in other words, cannot use their own discretion in awarding damages, but must follow settled rules which the court must give them. *Chicago, E. & L. S. Ry. Co.* v. *Adamick*, 33 Ill. App. 412; *Chicago, B. & O. Ry. Co.* v. *Kuck*, 112 Ill. App. 620. In cases of personal injury, however, in some jurisdictions the strict rule is relaxed and it is held that if the jury are told that they may use their judgment "in view of all the evidence" that is sufficient. *Pittsburg C. C. & St. L. Ry. Co.* v. *Carlson*, 24 Ind. App. 559; *Gulf & S. I. Ry Co.* v. *Nelson*, 82 Miss. 653; *Kelley* v. *Stewart*, 93 Mo. App. 47; *Boltz* v. *Town of Sullivan*, 101 Wisc. 608. Contra. *L. S. & M. S. Ry. Co.* v. *May*, 33 Ill. App. 366; *Louisville & N. Ry. Co.* v. *Mason*, 24 Ky. Law Rep. 1623. This case also holds, due however to a Mississippi statute, that the court cannot of its own accord instruct on points not asked for, whereas in *B. & O. Ry. Co.* v. *Carr* it was held to be the duty of the court to do so.

DAMAGES—MISTAKE IN TELEGRAM.—Plaintiff received the following message to be delivered, "Button pike eighty thousand francs." The agent of plaintiff delivered it to the agent of defendant to be transmitted under an agreement existing between the two companies. The words "Button pike," were code words indicating the sender and also containing an order to pay the sum later mentioned. In transmission a mistake was made, not in code parts of the message but in changing "eighty" to "eight." Due to this error the sender suffered large damages which he recovered from plaintiff who now sues for the mistake of the defendant. The action is brought in tort because of a statute in Nebraska making telegraph companies liable for all damages resulting from mistakes. *Held* defendant was liable for the whole damage. *American Express Co.* v. *Postal Telegraph-Cable Co. of Nebraska*, (Neb. 1915) 151 N. W. 240.

Due to the statute of Nebraska which made telegraph companies liable for all damages resulting from mistake or non-delivery of messages, and decisions

of the Nebraska courts holding that telegraph companies are common carriers, the familiar rule of *Hadley* v. *Baxendale* was avoided in this case by bringing the action in tort for a breach of duty. In jurisdictions which have such a statute such a rule has been followed. *Western Union Tel. Co.* v. *Eubank,* 100 Ky. 591; *Fisher* v. *Western Union Tel. Co.* 119 Wisc. 146. The unusual point in this case is the fact that the message was partly in cipher and that the mistake was in the part not in cipher. The question of liability for cipher messages does not seem to have been touched on in this case but it seems it might well have been urged as a defense. The general rule is that the transmitting company is not liable for more than nominal damages in case of cipher messages. *Western Union Tel. Co.* v. *Wilson,* 32 Fla. 527; *Western Union Tel. Co.* v. *Martin,* 9 Ill. App. 587. In some of the jurisdictions which have held telegraph companies as common carriers and unable to limit their liability, the rule is applied to cipher messages as well as others. *Postal Telegraph Co.* v. *Wells,* 82 Miss. 733; *Western Union Tel. Co.* v. *Eubank,* 100 Ky. 591. Such a decision would be the logical outcome of statutes like the one here cited if carried to a conclusion, but because of the attitude of the courts in regard to cipher messages, it should not be inferred from a decision like this.

DAMAGES—REMOTENESS.—Plaintiff had agreed to thresh all the grain of the defendant. He threshed the wheat and oats and then breached the contract and refused to thresh the flax. The flax was injured by the weather, not due to any fault or delay of the defendant. Plaintiff in this case is suing for the amount earned by threshing the wheat and oats and the defendant seeks to set off the damages resulting from plaintiff's failure to completely perform. *Held,* that the damages due to the failure to perform the contract were too remote and not in contemplation of the parties. *Lyon* v. *Seby,* (N. D. 1915). 151 N. W. 31.

This case is avowedly decided on the authority of *Hayes* v. *Cooley,* 13 N. D. 204 and there is no attempt to reason out or justify the decision. *Hayes* v. *Cooley* does endeavor to do this and distinguish a set of facts exactly like those in the instant case, from facts and law as laid down in *Smead* v. *Foord,* 1 El. & El. 602 and *Houser* v. *Pearce,* 13 Kans. 104. In all of these cases the facts were substantially the same, namely that because of a breach of contract, there was a failure to cut certain grain which was injured or destroyed. In *Smead* v. *Foord,* the failure was to deliver a threshing machine, in all the others it was simply a refusal to cut. The difference which the North Dakota court sees in these cases is that in the English and Kansas cases the circumstances were such that it was within the contemplation of the parties that damage might result to the grain from failure to perform the contract. It is very hard to see, especially in the Kansas case, how the parties there could have contemplated injury to the grain any more than the parties in the North Dakota cases did, as the facts seem to be identical. It would seem to be very much in the minds of the contracting parties that failure to cut the grain might very probably result in loss or injury. There is no doubt that the instant case follows the law of North Dakota, but the weight of authority and reasoning would appear to be otherwise.

DESCENT AND DISTRIBUTION—WHAT LAW GOVERNS—Under the Kentucky statute, providing that in the absence of a will the estate of a non-resident, situated in that state, should "be distributed and disposed of according to the laws of the state of which he was an inhabitant," a surviving husband takes the whole of the estate of his wife, under the common law in force in New Jersey where the parties were domiciled. *Lee* v. *Belknap* (Ky. 1915), 173 S. W. 1129.

This decision is in direct conflict with *Locke* v. *McPherson*, 163 Mo. 493, 63 S. W. 726, 52 L. R. A. 420, 85 Am. St. Rep. 546, where the court held that the property should be distributed under the Missouri statute, even though the parties were residents of New York, and Missouri had a statute virtually the same as that of Kentucky. The court takes the view that since the common law is in force in New York as to descent and distribution between husband and wife there was no law in New York within the meaning of the Missouri statute. They say that in using the word "law" the legislature referred to some statute of descent and distribution in another state and that since, by the common law, the husband took all the personal property of the wife upon marriage, although by the New York statute she was given control of it during her life, there was no law in force in New York on descent and distribution as between husband and wife. This decision of the Missouri court has not gone without criticism—see Note 29 L. R. A. N. S. 781—and it would seem that the principal case is the correct view. As is said in this opinion, on page 1138, "it (law as used in the statute) means the law in force in that state, whether it be common law, or statute law, or by whatever name it may be called." No valid reason is perceived why the effect of the statute should be limited to the declaration of the legislature of another state, if the policy of that state is to let the common law stand.

EQUITY—SPECIFIC PERFORMANCE OF SALE OF CORPORATE STOCK.—Plaintiff filed a bill praying specific performance of a contract for the sale of corporate stock to defendant, alleging that the stock was not procurable in the market and that its value was not readily ascertainable. The lower court dismissed the bill for want of equity jurisdiction. In reversing this decree, *held* that although as a general rule the parties are left to their legal remedy for a breach of a contract for the sale of chattels, yet there are many exceptions, and property not procurable in the market and having an uncertain value is within the exception, the legal remedy in such a case being inadequate. *Morgan* v. *Bartlett*, (W. Va. 1915). 83 S. E. 1001.

The rule laid down above is entirely in accord with the more recent decisions. Among the many cases in accord are, *Newton* v. *Wooley*, 105 Fed. 541; *Hills* v. *McCunn*, 232 Ill. 488; *Schmidt* v. *Pritchard*, 135 Iowa 240; *Baumhoff* v. *Railroad*, 205 Mo. 262; *N. Cent. Ry.* v. *Walworth*, 193 Pa. 214; and *Leach* v. *Fobes*, 77 Mass. 506. It must clearly appear, however, that the shares are not obtainable in the market, or that their value is not ascertainable, else the remedy will not be granted. *Northern Trust Co.* v. *Markell*, 61 Minn. 271; *Rigg* v. *Ry.* 191 Pa. 305; *Moulton* v. *Warren Mfg. Co.*, 81 Minn. 259. And specific performance will not be granted where plaintiff's only claim is that he

should be re-imbursed for money expended for stock. *Johnson* v. *Stratton*, 109 Ill. App. 481. Nor does the mere fact that the stock is not listed and sold, or offered for sale, so that its market value is difficult to ascertain warrant a decree of specific performance, where the value can be otherwise ascertained and the damage established. *Ehrich* v. *Grant*, 97 N. Y. Supp. 100. But in some states specific performance will be granted where it appears that the stock is of peculiar value to the plaintiff in order that he may obtain proper and legitimate control of a corporation. *O'Neill* v. *Webb*, 78 Mo. App. 1; *Sherman* v. *Herr*, 220 Pa. St. 420; *Schmidt* v. *Pritchard*, 135 Iowa 240; *Sherwood* v. *Wallis*, 1 Cal. App. 532. A few states deny the remedy on this ground *Ryan* v. *McLane*, 91 Md. 175; *Cowles* v. *Miller*, 74 Conn. 287; *McLaughlin* v. *Leonhardt*, 113 Md. 261. Where the defendant is financially irresponsible specific performance of a contract for sale of stock will be decreed. *Rau* v. *Seidenberg*, 105 N. Y. Supp. 798. But in this, as in all cases of this kind, the question of whether a court of equity will take jurisdiction and grant specific performance is a matter resting in the sound discretion of the court and cannot be demanded as a matter of right. *Butler* v. *Wright*, 93 N. Y. Supp. 113; *Cowles* v. *Miller*, 74 Conn. 287; *McLaughlin* v. *Leonhardt*, 113 Md. 261; *Newton* v. *Wooley*, 105 Fed. 541.

EQUITY—TRADE-MARKS—UNFAIR COMPETITION.—Crutcher and Starks, as a partnership, and later as a corporation, had been in the clothing business for 28 years under the active management and control of the Stark brothers, who subsequently retired from the corporation. Parties, none of whom were named Starks, organized the Starks Company, which engaged in the same business, on the same street, and only two blocks away. Persons had been deceived by the similarity of names. In the suit to enjoin the defendant corporation from using the name of Starks, *held*: That the use of such name was unfair competition, which is "the passing off or attempted passing off upon the public of the goods or business of one man as those of another, and which embraces any conduct tending to produce this effect, regardless of the means employed", and would be enjoined. *Crutcher & Starks* v. *Starks* (Ky. 1914) 171 S. W. 433.

At first sight this case would seem to be an extreme one, but an examination of the decisions would indicate that it is in accord with the weight of authority. Each case must necessarily depend to a large extent upon its own facts, for as was well said in *Ball* v. *Best*, 135 Fed. 435, "It is not a light thing to restrain a man from the full benefit of his name nor would a court of equity consider such a course in any case even now, in the absence of fraud or actual damage." A few cases in accord with the principal case go upon the principle that a man may acquire a property right in a trade-name which a court of equity will protect. *Wormser* v. *Shayne*, 111 Ill. App. 556; *Finney's Orchestra* v. *Finney's Famous Orchestra*, 126 N. W. 198 (Mich.); *Christy* v. *Murphy*, 12 How. Pr. (N. Y.) 77. But the better theory and the one most generally adopted is expressed in a leading English case as follows: "The principle upon which the cases on this subject proceed is, not that there is any property in the word, but that it is a fraud on a person who has

established a trade and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name and the same principle applies to the use of corporate names." *Lee* v. *Haley*, L. R. 5 Ch. 155. The above principle is shortly and aptly expressed in *Cady* v. *Schultz*, 19 R. I. 193, as follows: "No man has a right to sell his own goods as the goods of another." In accord with the above are *Christy* v. *Murphy*, 12 How. Pr. (N. Y.) 77; *Woodward* v. *Lazar*, 21 Cal. 449; *Busch* v. *Gross*, 71 N. J. Eq. 508; *Martell* v. *St. Francis Hotel Co.*, 51 Wash. 375; *Ball* v. *Best*, supra, and *Dewilt* v. *Mathey & Co.*, 18 Ky. L. Rep. 257. In the following cases an injunction was denied, but they are probably distinguishable from the principal case on the ground that there was no injury shown from the use of a similar name. *Black Rabbit Association* v. *Munday*, 21 Abb. N. C. 99; *Messer* v. *Fadettes*, 168 Mass. 140; *Supreme Lodge, K. of P.* v. *Improved Order, K. of P.*, 113 Mich. 133; *La Tosca Club* v *La Tosca Club*, 23 App. D. C. 96.

EVIDENCE—BOOKS OF ACCOUNT AS IMPEACHING EVIDENCE.—In an action for personal injuries a witness for the plaintiff accounted for his presence at the place of the accident by stating that he was hauling a load of lumber to another town which he delivered the next day at a store and received credit for it. In order to contradict and disprove this the defendant called the manager of the store who, by using the account books of the store, testified that its books showed no delivery of lumber by the witness at that time. *Held*, (MCCARTY, C. J., dissenting) that this was reversible error, that the account books of third parties as to transactions with another, both of whom are strangers to both litigants, is hearsay evidence and therefore inadmissible. *Shepherd* v. *Denver & R. G. R. Co.*, (Utah 1915) 145 Pac. 296.

While a witness may not as a rule be contradicted or impeached on collateral or immaterial matters brought out in cross-examination, yet it is competent for a party to produce evidence to contradict statements made by an adverse witness in regard to material matters which tended to corroborate and strengthen his testimony, even though the statements do not relate directly to the subject-matter of the litigation. *Chicago City Ry. Co.* v. *Allen*, 169 Ill. 287; *East Tenn. Va. & Ga. Ry. Co.* v. *Daniel*, 91 Ga. 768; *People* v. *DeFrance*, 104 Mich. 563; *James* v. *State*, 133 Ala. 208; *Chesebrough* v. *Conover*, 140 N. Y. 382. Conceding, as was done in the principal case, the materiality of the fact testified to, the difficult question is the competency of the evidence offered to contradict and impeach the witness in this regard. A witness may be contradicted on material matter by any written statement he may have made, as a letter or affidavit (*Foster* v. *Worthing*, 146 Mass. 607; *Western Mfg. Mut. Insurance Co.* v. *Boughton*, 136 Ill. 317; *Anthony* v. *Jones*, 39 Kan. 529; *Tucker* v. *U. S.*, 151 U. S. 164) or by books of account evidencing transactions between the parties to the suit (*Cross & Brigham* v. *Willard's Est.*, 46 Vt. 73; *Terry* v. *McNeil*, 58 Barb. (N. Y.) 241; *Bushnell* v. *Simpson*, 119 Cal. 658). But as a general rule the books of account of a

third person evidencing transactions between him and one of the parties to the suit are not admissible for purposes of contradiction, being hearsay as to the other party litigant. *Chandler* v. *Pomeroy,* 87 Fed. 262; *Watrous* v. *Cunningham,* 65 Cal. 410; *Mercier* v. *Copeland,* 73 Ga. 636; *Schwartz* v. *Southerland,* 51 Ill. App. 175. *A fortiori* are they not admissible where they evidence dealings with parties both of whom are strangers to both litigants. *Cornville* v. *Brighton,* 35 Me. 141; *Masters* v. *Marsh,* 19 Neb. 458; *Rielly* v. *English,* 77 Tenn. 16. Where, however, a witness testifies that he has made or seen an entry or otherwise refers to specific books of account to strengthen his testimony, or declares his knowledge of facts to which he testifies is derived from certain books, those books, if identified as the ones spoken of, are admissible to contradict his testimony, whether they are books of a stranger or not. *Davenport* v. *Cummings,* 15 Ind. 219; *City of Ripon* v. *Bittel,* 30 Wis. 614; *Baker & Sons* v. *Sherman,* 71 Vt. 439; *Gilmour* v. *Heinze,* 85 Tex. 76. In the principal case of Judge McCarty takes the view that the witness referred specifically to a credit in these account books which the witness saw and "assisted in making." The majority opinion takes the contrary view that the entry books of account were not in any way referred to by the witness. In view of these facts it would seem that the court divided not on the rule of evidence involved but rather on its application to the facts at hand.

Insurance—Recovery of Premiums Paid.—Defendant company, on July 23, 1909, issued a twenty-year life insurance policy to plaintiff, the annual premium of $2,860 to be payable quarterly with an allowance of thirty days' grace on each installment. The premiums due were regularly paid by the insured until January 23, 1912, but the payment due at that date was not tendered within the period of grace allowed. Six days after the expiration of the thirty days of grace, the insured tendered the premium due but was notified that the policy had been forfeited by his failure to comply with the conditions for payment of premiums. There were no stipulations in the policy as to forfeiture for default in the payment of premiums. Plaintiff brought action to recover $7,423, the amount of the premiums he had previously paid. *Held,* that since the company had attempted to terminate the policy, the insured could consent to the rescission and was entitled to a return of the premiums paid, no forfeiture having resulted. *Titlow* v. *Reliance Life Ins. Co.,* (Pa. 1914) 92 Atl. 747.

The court was led to this conclusion by the argument that a policy of life insurance is not a contract for one year with the privilege of renewal from year to year, but is rather an entire and indivisible contract, any breach of which by the insured does not amount to a forfeiture (in the absence of a contract stipulation to that effect) but operates only as a breach of the contract,—a breach, which, as in ordinary contracts, the insurer could either waive or adopt as ground for a rescission of the contract by placing the insured in statu quo and returning the premiums already paid. The initial proposition in this reasoning,—that a life insurance policy evidences not a contract from year to year but rather a continuous and indivisible obligation,—has been accepted by the weight of authority as a rule of construction for

life insurance contracts. 2 MAY, INSURANCE, (3rd ed.) 717; *N. Y. Life Ins. Co.* v. *Statham*, 93 U. S. 24; *N. Y. Life Ins. Co.* v. *McMaster*, 90 Fed. 52; *Haas* v. *Mut. Life Ins. Co.*, 84 Neb. 682; *Manhattan Life Ins. Co.* v. *Warwick*, 20 Grat. (Va.) 614; *Ruse* v. *Mut. Ben. Life Ins. Co.*, 26 Barb. 556; *Murray* v. *State Life Ins. Co.*, 151 Fed. 539; *Ingersoll* v. *Mut. Life Ins. Co.*, 156 Ill. App. 568. One of the earliest cases to sanction this rule and the one most frequently referred to is that of *Woodfin* v. *Insurance Co.*, 6 Jones (N. C.) 558, decided in 1859. As stated in *N. Y. Life Ins. Co.* v. *Statham*, supra, "each installment is part consideration of the entire insurance for life. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid."

RAILROADS—EMINENT DOMAIN PROCEEDINGS.—Condemnation proceedings were brought by the complainant to acquire certain lands for the purpose of constructing a line of railroad to connect their coal fields with the lines of the I. C. R. R. Co. From a judgment in a certain amount the complainant appeals, largely upon the ground that certain evidence offered by the complainant had been excluded. The evidence excluded sought to establish the extent of the benefit that would accrue to the remaining lands of the defendant, by showing how land along the line of the railroad company, some seven miles distant from the parcel of land in the case, had increased in value as a result of the construction of that line. *Held*, that the evidence was properly excluded. *West. Ky. Coal Co.* v. *Dyer*, (Ky. 1914) 170 S. W. 967.

Although the question in this case arose as a point in the law of evidence, the correctness of the ruling depends upon the legal rules for determining the damages in eminent domain cases. When an entire tract of land is taken the measure of damages is the market value of the tract in money, *Gardner* v. *Brookline*, 127 Mass. 358. When, however, only a part is taken, just compensation includes damages to the remainder, being measured by the decrease in the actual fair cash market value of such part not taken, *Kiernan* v. *Chi. &c. Ry Co.*, 123 Ill. 188. In considering these damages, however, the remainder must be taken as a whole, and cannot be restricted to any small part thereof, *Page* v. *Ry. Co.*, 70 Ill. 324; *Schuylkill River R. R. Co.* v. *Stocker*, 128 Pa. St. 233. Under such a doctrine, benefits accruing to the remainder can be properly set off against damages to it. *Neilson* v. *Chi. &c. Ry Co.*, 58 Wis. 516. It was undoubtedly on such a theory that the complainant offered his evidence. However, the real question in this case extended further than the one touched in those cases, being rather as to a proper method for determining such depreciation in market value. Evidence of the sales of other lands similarly situated is admissible, *St. L. &c. R. R. Co. v. Haller*, 82 Ill. 208. But the lands must be similarly situated, and if the purpose is to measure the depreciation in the remainder, ought logically to have been affected by the same or a similar force. It was on this point that the evidence offered failed to meet the requirements of the legal rule, the court holding that the differences in the character of the

railroads in the two cases was such that the effects upon valuation in the one, would furnish no safe guide in determining the effects of the railroad in the instant case upon the value of the lands in question.

SALES—AGENCY OR SALE.—A contract between a fertilizer company and a dealer provided that it would furnish him with fertilizers at specified prices, to be sold at such advance prices as he might elect, such advance to constitute his entire commission and profit. By August 1st, and October 1st of each year the dealer was to make full settlement in cash or notes of purchasers, indorsed by him, and to guarantee the payment of all notes and accounts. He was to hold all fertilizers as the company's property, and to store and insure same at his expense for its account. When the fertilizers were sold, the entire proceeds of the sales, including cash, notes, open accounts and collections were to be turned over to the company until his obligation to it had been settled in full. *Held,* that, when the agreement was fully performed by a complete settlement for the fertilizers received by the dealer, the result would be precisely the same as if there had been a sale, but until that time the relation was that of bailor and bailee or principal and agent. *In Re Handy,* (1915) 218 Fed. 956.

It does not appear clearly from the report, whether or not the dealer was allowed to return all unsold fertilizers. The language of the court is as follows, "By such agreement the parties intend that when it is fully performed the result will be precisely the same as if the goods had been sold by the one to the other, but until that time the original owner of them shall have all the security he would have, had the other party been his sales agent and nothing more." If the agreement was that the dealer could return the unsold fertilizers, then this would be an agency contract, for such a contract signifies that if there is no sale there is no debt. *In Re Smith & Nixon Piano Co.,* 149 Fed. 111; *Ludvich* v. *Am. Woolen Co.,* 231 U. S. 522; *Conable* v. *Lynch,* 45 Iowa 84. If, as the language of the court would seem to indicate, the dealer was to account for all the fertilizers, whether sold or unsold, the holding in the principal case is inconsistent with a long line of authority in this country. Such contracts have been construed by a majority of courts, as conditional sales. *Snelling* v. *Arbuckle Bros.,* 104 Ga. 362; *Herry Ford* v. *Davis,* 102 U. S. 235; *Arbuckle* v. *Gates & Brown,* 95 Va. 802; *Arbuckle Bros.* v. *Kirkpatrick,* 98 Tenn. 221. Some English cases have gone further than this and have held that "if the consignee is at liberty to sell at any price he likes, but is to be bound, if he sells the goods, to pay the consignor at a fixed price and time, then the relation is not that of principal and agent. The alleged agent is, in such a case, making a contract of purchase with his alleged principal." *Ex Parte White,* 6 Ch. App. 397.

SLANDER OF TITLE—MALICE AN ESSENTIAL ELEMENT.—Plaintiff brought an action for damages resulting from a libelous communication sent by defendant company to plaintiff's customers, charging plaintiff with infringing defendant's patent in connection with a certain article sold. *Held,* plaintiff must show, not merely that the article in question was not an infringement, but

that defendant knew that it was not, and that the statement made was false, since, if defendant acted under an honest though mistaken belief, the communication would be privileged. *Wittemann Bros.* v. *Wittemann Co.*, (1915) 151 N. Y. Supp. 813.

The decision is based almost entirely upon the proposition that the occasion in question was qualifiedly privileged, thus necessitating a showing of malice before a recovery on the part of the plaintiff could be permitted. While the cases on this point are not numerous, the principal case seems to be in accord with the weight of authority. The theory is that such communications are privileged because "if defendant, in good faith, believing itself to have an exclusive patent, issued such a notice in good faith, as a warning to dealers against an invasion of its rights, in so doing it would only have discharged a moral obligation, and satisfied the demands of fair dealing." *Wren* v. *Wield*, L. R. 4 Q. B. 213; *Everett Piano Co.* v. *Bent*, 60 Ill. App. 372. *Hovey* v. *Rubber Tip Pencil Co.*, 57 N. Y. 120. The case, however, might have been decided in the same way, in accordance with the well-settled doctrine that in an action for slander of title, plaintiff may recover only when he affirmatively shows that the alleged slanderous statements were uttered maliciously, or with knowledge of their falsity. *John W. Lovell Co. v. Houghton*, 116 N. Y., 520; *Andrew* v. *Deshler*, 45 N. J. Law, 167; *Kendall* v. *Stone*, 5 N. Y. 14.

TORTS—ATTRACTIVE NUISANCES.—Plaintiff brought suit against defendant to recover damages for the value of a Jersey cow. Defendant was engaged in operating an oil mill. It had three tunnels about five feet high, used in conveying cotton seed. There was no fence around the mill. The mouth of the tunnel in question, situated about thirty feet from the highway, was A shaped, and cotton seed and hulls were scattered about the tunnel and in it. Cows were accustomed to come around the oil mill and eat the seed, etc. Plaintiff's cow fell into one of the tunnels and was killed. *Held*, plaintiff could recover, the negligence consisting not in the fact that defendant left its premises unenclosed, but that the same, being covered with cotton seed and hulls, were in such a condition as to prove attractive to cattle, and calculated to lure them into danger. *Buckeye Cotton Oil Co.* v. *Horton*, (Ark., 1915) 173 S. W. 423.

In arriving at a decision in a case of this description, there are two questions to be answered. First, was there any duty on the part of the landowner to enclose against trespassing cattle? Second, if such duty exists, then was defendant negligent? The court in this case attempts to arrive at its decision by answering the latter proposition, without considering the former at all. This is done on the theory that the doctrine of attractive nuisances applies in cases of this description, and therefore the entire proposition rests on the alleged negligence of defendant, without regard to any duty to fence the premises. But this theory is very difficult to sustain. Aside from the state of Arkansas, there is no jurisdiction which has made a similar holding, while several have held to the contrary. *Herold* v. *Meyers*, 20 Iowa 378; *Bush* v. *Brainerd*, 1 Cowing, 78; *Knight* v. *Abert*, 6 Barr (Penn.) 472.

The weight of authority sustaining this proposition, then obviously the primary question is whether or not there was any duty of the landowner to fence against trespassing cattle. If so, and there is a breach of this duty, the court may inquire whether or not the landowner has been negligent with respect to the condition in which he has left the premises. At common law there was no duty to fence against cattle. WATERMAN, TRESPASS, § 872. But this doctrine has been changed in some states by statute.

WILLS—EXECUTION—"SIGNING AT THE END."—The testator wrote a holographic will ending the last line thereof on the bottom line of a sheet of legal cap paper. He then turned the paper and signed his name on the left hand marginal line, beginning at the bottom and proceeding towards the top, the signature extending about half the length of the paper. Between the tops of the letters of the signature and the left hand margin of the paper there was a space of about one-half inch. The court *held* that in view of the small space left there was but very little opportunity for interlineation and that it was a valid execution. *Graham* v. *Edwards,* (Ky. 1915) 173 S. W. 127.

There is no other decision involving a will executed in the identical manner that this was. However the will involved in *Goods of Collins,* 3 Ir. L. R. 241, comes very close. There the signature was in the left hand margin beginning at the top of the page and continuing towards the bottom, leaving a small space between the tops of the letters of the signature and the left hand marginal line; this was held to be a good execution. The court in the principal case erroneously say that the will there involved is identical with the one involved in *Goods of Collins,* supra, overlooking the fact that the signatures in the former is diametrically opposite to that in the latter. There are two other cases in England which may be cited in support of the principal case. In *Goods of Coombs,* 1 L. R. Pro. & D. 301; in *Goods of Wright,* 4 Sw. & Tr. 35. In the former of these the will was written on the first and third pages of a sheet of foolscap, the signatures of the witnesses and testator being written crosswise of the second page. In the latter the will completely filled two pages and the testator's signature was written crosswise of the third page. In both the court held that the statute had been complied with and that the execution was good. The purpose of a statute requiring a signing at the end is to prevent fraud or unauthorized additions or alterations, 3 MICH. L. REV. 650, 9 MICH. L. REV. 342. This end is accomplished in the principal case, since the space between the tops of the letters of the signature and the left hand margin of the page is too small to allow the insertion of a clause which will have any effect on the will.