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# Recent Important Decisions

# RECENT IMPORTANT DECISIONS.

BANKRUPTCY—CONCLUSIVENESS OF REFEREE'S FINDING.—A creditor filed a claim with a referee in bankruptcy against the estate of a bankrupt. The trustee thereupon filed an objection setting up the contention that the creditor had received a voidable preference. Upon a hearing, the referee sustained the objection and disallowed the claim. The trustee now brings suit to recover the property which the referee had declared to have been transferred by way of preference. *Held,* the decision of the referee on the question of preference constituted such an adjudication as to render further proof of the facts unnecessary. *McCullock* v. *Davenport Savings Bank,* 226 Fed. 309.

Judgment by a court having jurisdiction of the questions decided operates as an estoppel in a subsequent suit between the same parties as to every question which was actually litigated in the former suit, even though the subsequent suit be based on a different cause of action—*Southern Pacific Railroad Co.* v. *United States,* 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; *Hickman v. Town of Fletcher,* 195 Fed. 907, 115 C.C.A. 595; *Union Central Life Co.* v. *Drake,* 214 Fed. 536, 131 C.C.A. 82. The referee is a judicial officer and the allowance of rejection of a claim is within his jurisdiction as referee. BANKRUPTCY ACT, §55b; COLLIER, BANKRUPTCY (10th ed.) 590. Incidental to this jurisdiction, he has jurisdiction to determine whether the creditor presenting a claim for allowance holds a voidable preference. BANKRUPTCY ACT, §57g. It follows that a referee's decision as to a creditor's preference, in considering a claim presented by the creditor, is conclusive in a subsequent suit brought by the trustee to recover the preference. The principal case is supported by *Moore* v. *Brent,* 220 Fed. 97, 135 C.C.A. 573, affirming 211 Fed. 687; and *Clendening* v. *Red River Bank,* 12 N. D. 51. The latter opinion, in fact, seems to go so far as to say that if a claim is allowed by the referee, the trustee's failure to contest the claim on the ground that the creditor has received a voidable preference, is a bar in a subsequent suit by the trustee to recover the preference. REMINGTON, BANKRUPTCY, 792, adopts this proposition on the authority of this case. But *Buder* v. *Columbia Distilling Co.,* 96 Mo. App. 558 and *Utah Association of Credit Men* v. *Boyle Furniture Co.,* 39 Utah 518, expressly hold otherwise, upon the theory that a different cause of action is presented in the second suit, and the matter controverted in the second suit was not actually litigated in the first. BRANDENBURG, BANKRUPTCY, (3d ed.) 605, and LOVELAND, BANKRUPTCY, (3d ed.) 620 make statements in accord with the holding of these two cases.

BILLS AND NOTES—MARRIED WOMAN'S NOTE.—In an action on a promissory note executed by a married woman, the plaintiff produced the note, gave evidence that the signature was the defendant's, showed the amount

due, and rested, claiming that he had made a prima facie case entitling him to recover. The defendant requested a directed verdict on the ground that the plaintiff must show that the consideration for the note was connected with her separate property. By agreement the case was tried by the court. At the conclusion of testimony, plaintiff requested the trial court to direct a verdict in his favor on the alleged prima facie showing originally made; this was refused and judgment went for defendant. The supreme court affirmed the judgment, holding that the introduction of the note in evidence without proof of a consideration connected with her separate estate, did not establish a prima facie case. *Judd* v. *Judd,* (Mich., 1915), 154 N. W. 31.

The case illustrates one of two different rules. Some courts in considering the question suggest that the proper rule to be applied depends upon the construction as to the scope of the enabling statute. At common law the contract of a married woman was void; her disability was the rule, and the presumption was absolute against her liability. Modern statutes have raised this disability in varying degrees. If a given statute be construed as sufficiently broad to remove the disability generally, with certain exceptions, thus making disability the exception rather than the rule, then a married woman's contract is in the same category as that of a person under no disability, and subject to no different rules. Under such a statute and with a similar set of facts as in the instant case, the plaintiff would have made her prima facie case because a note imports consideration. *Miller* v. *Shields,* 124 Ind. 166; *Grand Banking Co.* v. *Wright,* 53 Neb. 574. One Michigan case, that of *Bank v. Miller,* 131 Mich. 564, rested its decision as to this point on a broad interpretation of the Michigan statute, and is contrary to that of the case at bar. It was rendered, however, without argument, and without reference to the decisions that had established the other rule for Michigan; it has never been followed, and the court in the instant case expressly overruled it. The decision in the instant case construes the Michigan statute as removing the disability, not generally, but only in respect to certain specified matters; thus the plaintiff before making out a prima facie case must show affirmatively that the note was given in respect to a contract which by the enabling statute a married woman had power to make. In Michigan, where a married woman can make no obligation except with reference to her separate property, the statute would seem to be one which recognizes the common law concept of general disability except in the instances provided, and the decision of the instant case, therefore, is in line with the foregoing theory.

BILLS AND NOTES—WAIVER OF NOTICE BY CONSENT TO EXTENSION OF TIME.—The payee sued the indorser on a promissory note which contained an agreement binding the indorser "notwithstanding any extension of time granted to the principal" and "waiving all notice of such extension of time". The payee had extended the note, but when the extension had ended and payment been refused, had failed to give notice of dishonor to the defendant. The defense was based upon this fact, the plaintiff contending there had

been a waiver of notice. *Held*: a consent by the indorser to an extension of the time of payment is an implied waiver of notice. *First Nat. Bank of Henderson* v. *Johnson* (N. C. 1915) 86 S.E. 360.

The Negotiable Instrument Law provides: "Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied." An implied waiver is considered to exist when the indorser has given the holder to understand that such a waiver was intended and that he was not expected to give notice. DANIEL, NEG. INST., (5th ed.) §1103. The dissenting judge in the instant case argued that, applying such a test, the conclusion should be that the indorser agreed only to an extension of the time of payment and to a waiver of "notice of such extension of time" as expressly stipulated in the contract; that as the holder and not the indorser could know the date when the extended period has ended, the reason was all the stronger for requiring notice to be given him that he might take steps for his own security. The argument would seem to be reasonable but the decisions do not sustain it. A few old cases only might be cited in its support. *Michand* v. *Lagrade,* 4 Minn. 21; *Norton* v. *Lewis,* 2 Conn. 478; *Cayuga Bank* v. *Dill,* 5 Hill 403. An extended list of authorities, on the other hand, confirms the majority opinion, which is based upon the theory that when an indorser agrees to an extension of the time of payment of a promissory note, that agreement converts his contingent liability of indorser into the absolute liability of the guarantor, and that no notice is therefore necessary. *Hudson* v. *Wolcott,* 39 Oh. St. 618; and the cases in the note on p. 641 of 33 L. R. A. (N. S.)

CARRIERS—LIABILITY OF INTERMEDIATE CARRIER FOR DELAY IN TRANSPORTATION.—Cattle were shipped under a through bill of lading from Montana to Chicago via St. Paul, where they were unloaded by the initial carrier and reloaded by defendant into its cars, bills of lading from St. Paul to Chicago being then issued by the defendant company from the original bill. Damage resulted from delay on the lines of a succeeding carrier, to whom the cattle were delivered by the defendant, and plaintiff contended that defendant was liable for such damage, on the ground that by issuing a new bill of lading, the defendant had become an "initial" carrier within the meaning of the CARMACK AMENDMENT, and was therefore liable for the default of any subsequent connecting carrier in the chain of transportation, an intermediate carrier cannot be sued for a delay in transportation of an interstate shipment, where the delay was not caused on its lines, regardless of whether or not it had issued a bill of lading. *Hudson* v. *Chi. St. P., M. & O. Ry. Co.,* 226 Fed. 38.

Before the CARMACK AMENDMENT, the obligation of an intermediate carrier, arising out of the implied contract springing from the receipt of the goods, extended no further than to safe carriage over its own lines and seasonable delivery to the succeeding carrier. *Illinois C. R. Co.* v. *Curry,* 127 Ky. 643; *G. R. & I. R. Co.* v. *Diether,* 10 Ind. App. 206; *Deming* v. *Norfolk & W. R. Co.,* 21 Fed. 25; *Breston* v. *Pa. R. Co.,* 116 Fed. 235. An

intermediate carrier was, however, liable for any loss or damage occurring on its own lines and also for loss or damage occurring upon any subsequent line, if its own negligence or breach of contract was the proximate cause of the loss or damage. *Ill. C. R.* v. *Foulks,* 191 Ill. 57, *St. L. I. M. & S. R. Co.* v. *White,* (Tex. Civ App 1907), 103 S. W. 673. But the intermediate carrier was not liable for damages occurring before the goods were delivered to it. *Gulf C. & S. F. Ry.* v. *Cunningham,* 51 Tex. Civ. App. 368, 113 S. W. 767, nor for damages caused by acts of subsequent carriers. *Ill. C. R. R.* v. *Curry,* supra. An intermediate carrier could, however, by special contract assume liability for loss occurring on subsequent lines. *Tex. & Pa. Ry. v. McCartley,* 29 Tex. Civ. App. 616. *Burnside etc. Ry.* v. *Tupman,* 24 Ky. Law Rep. 2052. The CARMACK AMENDMENT has changed these former rules somewhat. Under this amendment a carrier receiving property for interstate shipment is made liable for loss anywhere en route, and may not contract against such liability. *Atlantic Coast Line Co.* v. *Riverside Mills,* 168 Fed. 990; *Louisville & N. R. Co.* v. *Scott,* 219 U. S. 209. And failure to issue a bill of lading as required by the amendment, does not release it from liability. *International Watch Co.* v. *Delaware L. & W. R. Co.,* 80 N. J. L. 553, 78 Atl. 49. Although the initial carrier is liable and may be sued, the shipper may nevertheless bring his action against the connecting carrier responsible for the loss. *Louisville S. E. Ry. Co.* v. *Ray,* (Tex. Civ. App. 1910) 127 S. W. 281. But whether an intermediate carrier is liable under the CARMACK AMENDMENT for losses not occurring upon its own lines, nor through its fault, was not definitely settled until the present case. It has been assumed that the shipper can sue the initial carrier alone, or any of the connecting carriers, or all jointly. *A. T. & S. F. Ry.* v. *Boyce,* 171 S. W. 1094. The court in *Eastern Ry. Co.* v. *Montgomery,* (Tex. Civ. App. 1911) 139 S. W. 885, held that the intermediate carrier was not liable, basing their decision on the want of a partnership agreement between the several connecting carriers. In *Looney* v. *Ore. Ry.,* 192 Ill. App. 273, an intermediate carrier was held liable for losses occurring upon the lines of a subsequent connecting carrier, where the intermediate carrier had issued new bills of lading, the court holding that the intermediate carrier by issuing these bills of lading became an "initial" carrier within the meaning of the CARMACK AMENDMENT. This principal case supports the rule in the *Montgomery* case, although not upon the same reasoning, and declines to follow the *Looney* case. The case is interesting and extreme because the defendant carrier sued, is as a matter of fact—though it is not so stated in the opinion—a part of the Northwestern Railway System, of which the succeeding carrier is also a part.

CARRIERS—WAIVER OF STIPULATION FOR WRITTEN NOTICE OF CLAIM.—A bill of lading covering a shipment of cattle stipulated that, as a condition precedent to any recovery of damages, written notice of any loss or injury should be given to the carrier's agent before the cattle were removed from the car or intermingled with other cattle; and further that no agent of the company had the authority to vary the terms of the con-

tract. After an alleged injury, the cattle were removed without such written notice, but after the plaintiff had called the attention of the defendant's agent to their injured condition. The court *held* that the stipulation requiring written notice was valid; but that such a stipulation is waived by actual knowledge on the part of the carrier of the injury before the cattle were removed from the cars. *Baldwin* v. *Atlantic Coast Line Co.*, (N. C. 1915) 86 S. E. 776.

Under a similar stipulation requiring that the shipper should give notice of injuries in writing within one day after delivery, *held* that such a stipulation could not be enforced in a case where the injured condition of the animal could not be discovered until more than one day had elapsed. *Eoff & Snapp* v. *Scullin*, (Ark. 1915) 179 S. W. 663.

All state statutes and policies with respect to the validity of contracts stipulating for notice of loss or injury are superseded, so far as interstate shipments are concerned, by the CARMACK AMENDMENT. *Galveston Ry.* v. *Sparks*, (Tex. Civ. App.) 162 S. W. 943; *Joseph* v. *Chi. B. & Q. R.*, 175 Mo. App. 157; *St. Louis & S. F. R. v. Bilby*, 35 Okla. 589, 130 Pac. 1089. But the CARMACK AMENDMENT has not limited a carrier's right to make a reasonable shipment contract requiring notice of loss or damage. *Ray* v. *Mo. K. & T. Ry.*, 90 Kan. 244. Such stipulations for written notice of loss are generally upheld, in so far as they are reasonable, upon the ground that they are proper requirements in behalf of the carrier to enable him to take the necessary steps to investigate the loss and to prevent fraudulent claims being made after an opportunity for examination has passed. *Atchison T. & S. F. Ry.* v. *Morris*, 65 Kan. 532. In many cases, however, it has been held that the stipulations must be construed to effect their legitimate purpose, and a strict compliance with them will not be required where, in the light of all the attending circumstances after the event, the stipulations are shown to be unreasonable, or where all the beneficial purposes of the stipulation have been accomplished and the carrier has been given as full an opportunity to investigate as he would have had, had the stipulations been strictly complied with. *Mo. K. & T. Ry.* v. *Davis*, 24 Okla. 677, 104 Pac. 34; *Mo. N. A. Ry* v. *Pullen*, 90 Ark. 182; *Atchison T. & S. F. Ry.* v. *Collins*, 47 Kan. 11. Where the damage was not discovered until after the time for notice had expired, the failure to give notice was excused. *Wabash R. Co.* v. *Thomas*, 222 Ill. 337; *Louisville N. A. & C. Ry.* v. *Steele*, 6 Ind. App. 183. But the carrier may waive this stipulation of notice. It is difficult to determine what facts will constitute a waiver. There is a waiver where the carrier invites presentation of the claim after the expiration of the notice period, *Cheney Piano Co.* v. *N. Y. Cent. & H. R. R.*, 148 N. Y. Supp. 108; *Sauls-Baker Co.* v. *Atlantic Coast Line*, 98 S. C. 300. Or where the carrier does not raise the objection of time of presentment, but rejects the claim on the ground of proper delivery of the goods, *Produce Exchange* v. *N. Y. P. & R. R.*, 122 Md. 231. Or where the carrier had knowledge of the injuries at time

of delivery to consignee and acknowledged liability if they had been injured through its negligence, *Shoemaker* v. *Adams Express Co.*, 51 Pa. Sup. Ct. 284; *Kelly* v. *So. Ry. Co.*, 84 S. C. 264. Or where the goods have been totally destroyed by fire while in the possession of the carrier, *Drake* v. *Nashville etc. R.* 125 Tenn. 627, 148 S. W. 214. But it has been held in several cases that if *after* the property has been delivered, knowledge of the injury is brought to the attention of the carrier and it negotiates for a settlement of the claim, this does not operate as a waiver of the stipulation for written notice, *Clegg* v. *St. Louis & S. F. R. Co.*, 203 Fed. 970; *Kidwell* v. *Oregon*, 208 Fed. 1. The court in the *Baldwin* case attempts to distinguish the two federal cases above on the grounds that here the carrier had knowledge of the injury before the cattle were removed from the cars. But it is difficult to see how knowledge, whether before or after removal, can effect a waiver of a contractual requirement of written notice of what the plaintiff's claim will be.

CONSTITUTIONAL LAW—DISCRIMINATION AGAINST ALIEN LABOR ON PUBLIC WORKS.—A statute of the state of New York provides that in the construction of public works by the state or a municipality only citizens of the United States shall be employed. The Public Service Commission of New York City awarded contracts for the construction of street-car lines, and inserted the provisions of this statute into the contracts, stipulating that a violation of the statute be followed by a forfeiture of the contracts. Complainants are contractors, working under such contracts, and bring a bill in equity to restrain the Commission from forfeiting their contracts, alleging the necessity of employing alien labor, and seeking to avoid the statute on the ground that it denies to employers (on public works) and employees the equal protection of the laws. It was *held* that "it belongs to the state, as guardian of its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done in its behalf", and that the statute did not fall within the condemnation of the fourteenth amendment. *Heim et al.* v. *McCall, et al.*, 36 Sup. Ct. 78.

This case stands on a different ground from those cases where the alien is denied equal opportunity for employment generally, represented by *Truax v. Raich*, 36 Sup. Ct. 7, commented on in 14 MICH. L. REV. 152; *In Re Tiburcio Parrott*, 1 Fed. 481; *Ex Parte Case*, 20 Idaho 128, 116 Pac. 1037. In the *Truax* case a law prohibiting the employment of aliens, except as to 20% of the force employed, was held to deny aliens the equal protection of the laws. That case fell clearly within the prohibition of the constitution. The instant case also discriminates against aliens; no alien can be employed in any public work. But the cases are distinguishable. The former is a law affecting all employments, and practically depriving non-citizens of the chance for employment in the entire state. The latter case prevents employment only on public works, and thus leaves the whole field of private industry where employment may be sought. A more vital distinction perhaps is this, that in the

former case the state acts in a sovereign capacity and prohibits the employment of aliens in any industry operated by individuals within its jurisdiction; in the latter the state takes the part of an employer saying whom he will or will not employ. The state is said to have the same right as any other employer in determining with whom it will contract. A dual capacity is exercised by the state: with reference to its citizens and their business it is a sovereign, exercising legislative power, which must be exercised within the constitutional bounds; as to its own business and activities, it is like any other corporation which employs labor, exercising directory power. It would seem that the only question in the latter case would be whether the state may engage in the activity in question. If that power is conceded, it ought to be able to execute the work in whatever manner and under whatever conditions it sees fit. To prescribe conditions under which public work is to be done, would seem to be exclusively within the discretion of the legislature and beyond the power of the courts to review, if it be conceded that the legislature may undertake the public work with reference to which it prescribes the conditions. The power of the state to make such regulations has been upheld in *Atkin* v. *Kansas,* 191 U. S. 207; of the federal government in *Ellis* v. *United States,* 206 U. S. 246. These cases would seem to be somewhat different from the cases of *Patsone* v. *Pennsylvania,* 232 U. S. 138, 58 L. Ed. 39; *McCready* v. *Virginia,* 94 U. S. 391, 24 L. Ed. 248; see also *Geer* v. *Connecticut,* 161 U. S. 519, 40 L. Ed. 793. In the latter cases courts passed upon state statutes which prohibited non-citizens of the state from participating in the natural resources of the state, e. g. fish and game. These laws were upheld on the ground that the property in these resources was vested in the state, and the state could distribute them to whom it pleased. The giving of employment doubtless differs from the distribution of property, but the result in the principal case is consistent with sound constitutional principle.

CORPORATIONS—NOTICE OF STOCKHOLDERS' MEETINGS.—The M. company was organized under a statute which required the holding of an annual election "at such time and place as the board of directors might designate," and also the giving of personal notice to each stockholder at least fifteen days prior to the meeting. A by-law was enacted which provided for the holding of said meeting, in the office of the company, on the eighteenth of each December. For forty-two years the stockholders, without demanding or receiving any personal notice, assembled on the day so specified for the purpose of electing directors and transacting routine business. At one of these meetings, plaintiff being present, objecting to the meeting and refusing to participate, defendant was elected director. *Held,* that the defendant was usurping the office of which he claimed to be the incumbent. *People ex rel Carus* v. *Matthiessen,* (Ill. 1915) 109 N. E. 1056.

At common law the proceedings of a corporate meeting were entirely nugatory, unless notice of the meeting was actually given to every stock-

holder, or unless all the stockholders were present and participated in the transaction of business. *Tuttle* v. *Michigan Air Line R. Co.*, 35 Mich. 247; *Savings Bank* v. *Davis*, 8 Conn. 191; *Germer* v. *Triple State Mutual Gas & Oil Co.*, 60 W. Va. 143, 54 S. E. 509; ANGELL & AMES, CORPORATIONS, (2d Ed.), §391. In the absence of statutory provision, the charter or by-laws may fix the time and place at which the regular meeting shall be held, and this in itself is sufficient notice to the stockholders. *Morrill* v. *Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 173; 1 MORAWETZ, PRIVATE CORPORATIONS, §479. Where, however, charters and by-laws conflict with statutes the courts encounter difficulty. If a statute is plainly intended for the benefit and protection of the public and corporate creditors, or for the prevention of injury to stockholders, because of the holding of special meetings without their knowledge and consent, it is mandatory. *Cleveland City Forge-Iron Co.* v. *Taylor Bros. Iron Works Co.*, 54 Fed. 82; *United States v. McKelven*, 4 MacArthur, 162. But most of the statutes are enacted with special reference to the regular annual meeting. If such a statute requires that personal notice be given each stockholder, the presumption is that it was the legislature's aim to protect the stockholders; for it is manifest that the whole body of stockholders, duly assembled as a deliberative body, will best promote the corporate interests. Hence, the almost universal weight of authority at the present time is to the effect that the stockholders cannot, even though they all assent, alter the form of notice prescribed by the statute, under which the corporation is organized. *Westcott* v. *Minnesota Mining Co.*, 23 Mich. 145; *Stow* v. *Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Shelby R. Co.* v. *Louisville, C. & L. R. Co.*, 75 Ky. (12 Bush.) 62; *Wiggins* v. *First Freewill Baptist Church*, 49 Mass. (8 Metc.) 301; *Stevens* v. *Eden Meeting-House Society*, 12 Vt. 688; *In re St. Helen Mill Co.*, Fed. Cas., 12,222; *Hodgson* v. *Duluth, H. & D. R. Co.*, 46 Minn. 454, 49 N. W. 197; *Miller* v. *English*, 21 N. J. L. (1 Zab.) 317; *San Buenaventura Commercial & Mfg. Co.* v. *Vassault*, 50 Cal. 534; *Southern Plank Road Co.* v. *Hixon*, 5 Ind. 165; *Davies* v. *Monroe Waterworks & Light Co.*, 107 La. 145, 31 So. 694; *Charter Gas Engine Co.* v. *Charter*, 47 Ill. 36; *Rex* v. *Theodoric*, 8 East. 543; ANGELL & AMES, CORPORATIONS, §495; POTTER, CORPORATIONS, §343. For a discussion of the general nature of corporation meetings, see 10 MICH. LAW REV. 230. The court in the principal case has clearly indicated its intention of adhering to the above decisions, although it seems that the case might easily have been disposed of on the ground that the by-law in question, as it did not specify the exact hour for holding of meetings, was not sufficient notice.

COURTS—JURISDICTIONAL AMOUNT DETERMINED BY VALUE OF OBJECT TO BE GAINED.—Complainant electric company sues in the United States court to restrain the defendant, a like corporation, from maintaining its wires and poles in such proximity as to injure or endanger the property of complainant, and for general relief. It appeared that defendant had erected its poles on the same line and strung its wires for the most part immediately below those of the complainant, so as to make the maintenance and

operation of complainant's wires difficult and dangerous. Defendant denied that the damage caused to complainant or its property was in excess of $3000; and alleged that the cost of removal of all posts and wires in dangerous proximity to complainant's lines would not exceed $500. The District Court dismissed the bill for want of jurisdiction on the ground that the jurisdictional amount was fixed by the cost of removal of the poles and wires, and complainant appealed. *Held*, the jurisdictional amount is to be tested by the value of the object to be gained, which included not only the abatement of the nuisance but also the prevention of the occurrence of a like nuisance in the future. *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 36 Sup. Ct. 31.

In holding that the District Court erred by testing the jurisdiction as it did, and not by the relief sought to be gained, the principal case followed the general rule adopted by the Supreme Court under varying circumstances. *Scott* v. *Donald*, 165 U. S. 107; *McDaniel* v. *Traylor*, 196 U. S. 415; *Berryman* v. *Whitman College*, 222 U. S. 334; *Hunt* v. *N. Y. Cotton Exchange*, 205 U. S. 322; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543. The decisions of the inferior courts are to the same effect. *Rainey* v. *Herbert*, 55 Fed. 443, 5 C. C. A. 183; *Board of Trade* v. *Cella Commission Co.*, 145 Fed. 28; *American Smelting & Refining Co.* v. *Godfrey*, 158 Fed. 225; *Symonds* v. *Greene*, 28 Fed. 834. While the rule must necessarily depend upon the facts of each particular case, it must be applied largely where the relief prayed is an injunction. Where the facts warrant, the value of the right or thing which the complainant seeks to have enjoined, and not the damage suffered by him, is the amount in controversy, as is so well illustrated in the leading case of *Mississippi & Mo. R. R. Co.* v. *Ward*, 2 Black 492.

CRIMINAL LAW—VENUE IN CASES OF INTERSTATE SHIPMENTS OF INTOXICATING LIQUOR.—§240 of the FEDERAL CRIMINAL CODE makes it a punishable offense knowingly to "ship or cause to be shipped from one state,—or from any foreign country into any state,—" any package containing any intoxicating liquor of any sort, "unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of the contents, and the quantity contained therein." The defendant was indicted in the District of Kansas for violating this statute by knowingly shipping or causing to be shipped such an unlabeled package from Joplin, Missouri, into Cherokee County, Kansas. The District Court sustained a motion to quash and a demurrer, and ordered the discharge of the defendant, on the ground that the offense was complete when the package was delivered to the carrier for shipment, and was cognizable only in the Western District of Missouri. On appeal under the CRIMINAL APPEALS ACT, c. 2564, 34 Stat. 1246, *held*, to ship a package from one state into another is essentially a continuing act, the performance of which is begun by delivering to the carrier and completed when the package reaches its destination, and is therefore cognizable in the District into which the package was transported, as provided in JUD. CODE, §42, formerly REV. STAT. §731, which declares that where an offense is begun in one judicial circuit and completed

in another it shall be deemed to have been committed and to be cognizable in either district. *United States* v. *Freeman*, 36 Sup. Ct. 32.

In *Armour Packing Co.* v. *U. S.*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, it was held that the offense of receiving rebates, whereby interstate shipments were made at rates less than the published schedules, was committed in every District through which the transportation was conducted, and that therefore the provision in the statute allowing prosecution in every such District was within the Sixth Amendment to the Constitution of the United States. The court there said, "Transportation is an essential element of the offense, and equally takes place over any and all the traveled route, and during transportation the crime is being constantly committed." The court did not cite this case, nor any other, on this point, for it found sufficient justification for its construction of the statute from the fact that the statute likewise made it an offense to ship from a foreign country into a State, an act which Congress could not well have intended should be a crime complete in the place of shipment, but which it must have intended to be cognizable in the District into which the package was transported. It might be added that enforcement would be much more practicable in the "dry" state into which the goods would, in most of the cases arising, be sent, than in the "wet" state from which they would be shipped.

DAMAGES—DELAY IN DELIVERING TELEGRAPH MESSAGE.—Plaintiff was agent for a furniture company, and had put in a bid for equipping a building of the University of California. Before the day set for the opening of bids, plaintiff's principal had wired him information which would have enabled him to lower his bid to such an extent that it would have been the lowest bid made. The Board of Regents of the University, who awarded the contract, were given power by statute to let the contract to the lowest responsible bidder, or to reject all bids and advertise anew. Because of the negligent delay of defendant, the telegram did not reach the plaintiff until after the bids were opened and the contract was let to another company which made the lowest bid. Plaintiff seeks to recover from defendant as damages the amount of commission he would have received had he obtained the contract, alleging that he would have received the contract, had it not been for defendant's delay. *Held.*—Plaintiff's complaint was demurrable, the damages claimed being too remote; as the Regents had power to reject all bids, it was not certain that plaintiff's principal would have obtained the contract even though his bid had been the lowest. *McQuilkin* v. *Postal Telegraph Cable Co.* (Cal. 1915) 151 Pac. 21.

The probabilities under these facts would seem to be much stronger that plaintiff would have received the contract than that he would not have received it. The court, however, looks upon his chance for the contract as a "mere probability", and refuses to allow damages for its loss. In the case of *Chaplin v. Hicks*, C. A. (1911) 2 K. B. 786, the English Court of Appeal hald that the right of a young lady to compete for a valuable prize was such a valuable chance that damages should be allowed her for depriva-

tion of the right. The court in the instant case evidently rejects the doctrine announced in the cited case, that "the loss of a chance of winning in a competition is assessable." See note in 10 MICH. L. REV. 392. There are several cases holding that one may recover from a carrier for profits lost and contracts prevented by reason of delay in a shipment; the facts of many of these cases show that there were more causes which might have entered in to prevent the loss than there were in the principal case. *Illinois Cent. R. Co.* v. *Byrne,* 205 Ill. 9, 68 N. E. 720; 14 MICH LAW REV. 70. It is of course essential that the carrier or telegraph company have notice, either actually or from the nature of the goods or message, of the loss that would probably follow from delay. The message in the instant case, by reason of its contents, would have given this notice. There is a division of authority as to the liability of a telegraph company to one to whom an offer to make a mercantile contract is made, for failure to deliver a message containing such offer, but the weight of authority seems to be slightly in favor of allowance of such recovery. *W. U. Tel. Co.* v. *Bigger-staff,* 177 Ind. 168, 97 N. E. 531. In the principal case it would seem that the court went contrary to its own previous holding in deciding this case on demurrer, and denying the plaintiff the recovery of even nominal damages. *Parks* v. *Telegraph Co.,* 13 Cal. 423, 73 Am. Dec. 589; *Daughtry* v. *Tel. Co.,* 75 Ala. 168; see also Ann. Cas. 1914 C. 208. And it has also been held that the testimony of the persons having authority to accept the bid in a case of this kind is competent to establish the certainty of the loss, and that the plaintiff is entitled to have an opportunity to make such proof. *Texas & W. Telegraph & Telephone Co., et al* v. *Mackenzie,* 36 Tex. Civ. App. 178, 81 S. W. 581.

DEAD BODIES—EXHUMING FOR EVIDENCE.—In proceedings in escheat by the state, an order of the trial court that the body of the deceased be exhumed on motion of persons claiming as heirs, to enable identification by marks that had been sworn to, was affirmed on appeal. The court declared that the dead should be disturbed only in extreme cases; but one of these is this case in which one claiming to be the mother of the deceased asks for the order to enable her to establish her claim as heir, especially as the testimony of the claimant stands unimpeached. *Percival's Estate* (S. C. 1915) 85 S. E. 247.

The case declares the usual doctrine, though it is somewhat new in its facts. The dead have been ordered exhumed to obtain evidence to convict one on charge of murder: *People* v. *Fitzgerald,* 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483; to refute the state's case in such a prosecution: *Gray* v. *State,* 55 Tex. Crim. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513; and to prove that deceased was a suicide to avoid liability for life insurance: *Mutual Life Ins. Co.* v. *Griesa,* 156 Fed. 398, and denied in quite similar cases because of delay in asking for it, or because necessity was not extreme: *Moss* v. *State,* 152 Ala. 33, 44 So. 598; *State* v. *Highland,* 71 W. Va. 87, 76 S. E. 140; *Granger Life* v. *Brown,* 57 Miss. 308, 34 Am. Rep. 446.

See further on this subject 6 MICH. LAW REV. 322-5; also *Right of Privacy,* 8 MICH. LAW REV. 221-2; *Duty to Submit to Physical Examination,* 1 MICH. LAW REV. 71, 193-211, 277, 669.

EQUITY—RECONVERSION.—A testator in his last will directed his land to be sold and the proceeds to be distributed to his children and the heirs of their bodies as legatees. He provided that should any legatee die without issue his legacy should return to the other children. Plaintiffs, grandchildren of the testator, claim a right to their father's share of this land under the will by asserting a reconversion. Defendants, children of another legatee, claim it through purchase by their father, who had used his legacy in payment of the purchase-price of the portion of the land held by defendants. *Held,* for defendant on ground that his title depends on purchase from the testator's title and not on reconversion. *Hibbler et al* v. *Oliver et al,* (Ala. 1915) 69 So. 477.

The court here had to interpret the effect of the legatee's method of acquiring title to this land. The chancery court had allowed two of the five legatees to exchange their legacies in this converted property for a corresponding interest in the land. It is well settled that a mandatory provision in a deed to sell land and distribute the proceeds constitutes a conversion. *Fletcher* v. *Ashburner,* 1 Bro. Ch. 499, *Burbach* v. *Burbach,* 217 Ill. 547, 75 N. E. 519. It is also a well recognized principle of equity jurisprudence that there can be a reconversion by election of all the beneficiaries. *Willing* v. *Peters,* 7 Pa. 287; *Duckworth* v. *Jordan,* 138 N. C. 520, 51 S. E. 109. The election must be made by all, because the direction of the will or deed gives each beneficiary a right to have the whole sold and necessarily denies to each the right to reconvert his single share. In the principal case the court avoided going against such well settled principle by treating the exchange by part of the beneficiaries of their legacies for shares in the property as a sale. But still this in reality forces only a sale of a part of the property and has the effect of a reconversion by election of a part of the beneficiaries. It might be noticed that each beneficiary's interest under the will was to become absolute only upon his death leaving issue of his body. This condition necessarily attached to the personalty since the conversion occurs upon death of the testator. *Robert* v. *Corning,* 89 N. Y. 225; *Starr* v. *Willoughby,* 218 Ill. 485; 2 L. R. A. (N. S.) 623.

EVIDENCE—WAIVER BY CONTRACT OF PRIVILEGE OF PHYSICIAN AND PATIENT. —In an action by the beneficiary on an insurance certificate, the application for which contained an express waiver for the insured and his beneficiary of all privileges or benefit disqualifying any physician from testifying concerning information obtained about him in a professional or other capacity, and also of the provisions of all laws which would conflict with such agreement, *Held*: the waiver contained in the application was against public policy and void, and the testimony of the attending physicians as to all knowledge obtained by them in such capacity was properly excluded. *Gilchrist* v. *Mystic Workers of the World,* (Mich. 1915) 154 N. W. 575.

Under statutes similar to that in force in Michigan previous to the amendment by Act No. 234, Pub. Acts 1909 (see Comp. Laws 1897, §10181, How. St. §12826) the courts have quite uniformly held that the statute confers a privilege which may be waived by the patient by contract, and is not declaratory of any public policy. *Trull* v. *Modern Woodmen of America,* 12 Idaho 318, 85 Pac. 1081; *Metropolitan Life Ins. Co.* v. *Willis,* 37 Ind. App. 48; *Geare* v. *U. S. Life Ins. Co.* 66 Minn. 91, 68 N. W. 731; *Keller* v. *Home Life Ins. Co.,* 95 Mo. App. 627, 69 S. W. 612; *Modern Woodman of America* v. *Angle,* 127 Mo. App. 94, 104 S. W. 297; *Andreveno* v. *Mutual R. F. L. Ass'n,* 34 Fed. 870; *Fuller* v. *K. of P.,* 129 N. C. 318, 40 S. E. 65; *Western Travelers' Acc. Ass'n.* v. *Munson,* 73 Neb. 858; *Foley* v. *The Royal Arcanum,* 151 N. Y. 196, 45 N. E. 456; WIGMORE, Ev. §2388. Subsequent to the decision of the New York Court in *Foley* v. *The Royal Arcanum, supra,* the section of the Code (Code of Civ. Proc. §834) was amended by amending §836, which made it necessary that the privilege be waived upon a trial or examination. Under this amendment, the New York court held that a previous waiver by contract by the patient was void. *Holden* v. *The Metropolitan Life Ins. Co.,* 165 N. Y. 13, 58 N. E. 771. The decision in the principal case is based upon the amendment to the Michigan statute by Act No. 234, Pub Acts 1909. This provides one and only one instance in which a waiver may be made after the decease of the patient, and applying the familiar rule of statutory construction, *"expressio unius, exclusio alterius,"* the court arrived at the conclusion that a previous express waiver by the patient was void. Since the privilege is entirely statutory, whether or not the right to waive it by express contract exists must depend upon the construction of the particular statute involved.

EXECUTORS AND ADMINISTRATORS—RIGHT TO PURCHASE CLAIMS AGAINST THE ESTATE.—A testator, by his will, made his wife executrix, and directed her to sell the property at the end of five years; after keeping one-third of the proceeds for herself and her heirs she was directed, after payment of certain minor bequests and legacies, to pay over the remainder to the "Swedish Mission Society of Chicago, Ill." as residuary legatee. The residuary legatee was misnamed as it was the intention of the testator that the proceeds should go to "The Swedish Evangelical Mission Covenant in America." At the expiration of the time, the executrix conveyed the property to W., who immediately reconveyed to the executrix. The executrix then paid the minor bequests and legacies, bought the interest of the residuary legatee for $31 and now claims title to the land, although the interest of the residuary legatee was, if valid, worth $4000. *Held,* in an action to quiet title in the plaintiff, who was purchaser of the interests of the heir of the testator, that by an application of the doctrine of equitable conversion, the realty was converted into personalty at the death of the testator; that the residuary legatee was competent to take, and therefore the heirs took nothing by inheritance which could pass to the plaintiff. The executrix having settled the claim of the residuary legatee, concerning which settlement no complaint is made by such legatee, she therefore has the

legal title and the right to possession of the land in controversy. (Three judges dissenting.) *Coyne* v. *Davis,* (Neb. 1915) 154 N. W. 547.

The principal race presents an exceedingly interesting problem and seems to be one of first impression. It must be taken as elementary that an executor cannot profit by speculation in the property of the estate which he represents, because he stands in a fiduciary relation to those taking through the estate and cannot use this position of trust and confidence to make a profit for himself. *Caldwell* v. *Caldwell,* 45 Ohio St. 512, 15 N. E. 297. See on this subject *Tyler et al.* v. *Sanborn,* 128 Ill. 136, 4 L. R. A. 218; *Munson* v. *Syracuse G. & C. Ry. Co.,* 103 N. Y. 75. An exception has been engrafted to this rule: a trustee, or one standing in a fiduciary character such as an executor or an administrator, may, with all parties represented, have leave to purchase, provided there is no fraud or combination of any kind. *Anderson* v. *Butler,* 31 S. C. 183, 5 L. R. A. 166. The purpose of the general rule is not only to prevent the practice of fraud, but also to deprive the one standing in the fiduciary relation of any temptation to commit fraud. *Sypher* v. *McHenry,* 18 Ia. 232; *Mapps* v. *Sharpe,* 32 Ill. 13 (making the rule applicable to mortgagors): *Moore* v. *Moore,* 5 N. Y. 256 (making the rule applicable to agents); *Parmenter* v. *Walker,* 9 R. I. 225. Where this general rule has been violated it is equally well settled that the executor or other fiduciary officer, who has taken advantage of his position can be held to a strict accounting for all profits made by such violation, by those whose interests have been affected. *Davoue* v. *Fanning,* 2 Johns, Ch. 252; see also *Michaud v. Girod,* 45 U. S. (4 How.) 557, 11 L. Ed. 1076, holding to the above principle and severely criticizing those courts which allow a purchase by the executor under any circumstances, whether they be fraudulent or not. But if it be conceded in the principal case that there was an equitable conversion of the testator's realty to personalty from the date of his death under the principles announced in *Boland* v. *Tiernay* 118 Ia. 59, 91 N. W. 836; *Burbach v. Burbach,* 217 Ill. 547, 75 N. E. 519, then the present plaintiffs could not complain, because they have no interest whatever in any dealings between the executrix and the residuary legatee. The purpose of the will and the intention of the testator had been carried out as far as they were concerned. The only person who could complain here was the residuary legatee, and in this suit, since it has allowed judgment to go against it by default, it is forever barred to assert its claim. The result therefore is, that the court is helpless to do otherwise than decree this property to belong to the executrix although it was gained by the grossest kind of fraud. The ground of the dissent, for which no cases are cited as precedents, is simply that the principles of equitable conversion did not apply and should not be allowed to apply to effect such a result as above stated.

GARNISHMENT—DUTY TO GIVE NOTICE AND MAKE DEFENSES.—Plaintiff sued defendant for a debt of $406.20 and defendant seeks a credit of $295.50 paid on a judgment rendered against it, as garnishee, by a justice of the peace in Kansas. In the suit in garnishment, defendant, as garnishee, neither

interposed defenses of which he was cognizant in behalf of his creditor, nor gave his creditor (present plaintiff) notice of the garnishment proceedings. *Held,* the paid judgment in the garnishment proceeding is not a satisfaction, *pro rata,* as against present plaintiff. *St. Louis & S. F. R. Co.,* v. *Crews,* (Okl. 1915), 151 Pac. 879.

It is a general rule that judgments and decrees are conclusive only between parties and privies thereto. ROOD, JUDGMENTS, §81. *Ruff* v. *Ruff,* 85 Pa. St. 333. A garnishee is not required, in garnishment proceedings, to interpose a defense for the principal debtor, in fact it would not do him any good if he would, for the principal debtor, not being a party to the suit in garnishment, would not be bound by the judgment. *Ruff* v. *Ruff, supra.* The garnishee may admit away his own rights, but he has no power to admit away the rights of others. *Hebel* v. *Amazon Ins. Co.,* 33 Mich. 400. The amount for which the garnishee has been made liable is never conclusive as against the principal debtor as determining that it is the full amount due from him; otherwise a garnishee, by confessing part of the debt, could avoid payment of the residue. FREEMAN, JUDGMENTS, §167. But "it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the party suing out the attachment." *Harris* v. *Balk,* 198 U. S. 215; *Pierce* v. *Chicago Ry.,* 36 Wis. 283; *Morgan* v. *Neville,* 74 Pa. 52; and mere notice without offer of opportunity to defend is not sufficient. *Crisp* v. *Ft. Wayne & E. Ry. Co.,* 98 Mich. 648; *Adams* v. *Filer,* 7 Wis. 265, 73 Am. Dec. 410. Good faith requires that he should bring to the attention of the court the claims of all persons to the property, but he is under no obligation to hunt up evidence as to the real owner, *Karp* v. *Citizens' National Bk.,* 76 Mich. 679; or to decide the questions at his peril, *Conshohocken Tube Co.* v. *Iron Car Equipment Co.,* 167 Pa. St. 592, 31 Atl. 949. The garnishee has the right, and it is his duty, in most of the states, to claim and defend the exemption for the principal debtor. *Crisp* v. *Ft. Wayne & E. Ry. Co., supra; Missouri Pac. Ry. Co.* v. *Whipsker,* 77 Tex. 14. 13 S. W. 639. In such a case the garnishee is not really interposing a defense of the principal debtor, but he is defending the portion allowed by law to the debtor and his family. It would seem that the principal case goes further than was justified when it said that the garnishee should interpose defenses, of which he was cognizant, in behalf of his creditor. *Moore* v. *The C. R. I. & P. R. Co.,* 43 Iowa, 385, 387. Speaking of the garnishee in that case the court said: "As to the merits of the case he is, and should be held to be, indifferent. 1 Iowa 411. To require him to interpose a defense would be to subject him to the expense of a trial and the risk of a judgment against him and costs."

INFANTS—ADVERSE INTEREST OF GUARDIAN AD LITEM.—A suit for partition had been brought by a tenant-in-common against the co-tenants, a widow and her infant children. The widow was appointed guardian ad litem for one of the infant defendants, and the suit proceeded to judgment.

The present bill, brought by the children, after attaining majority, against the widow and the complainant in the former suit, is to set aside the decree entered therein. One of the grounds upon which relief is asked is the fact that the guardian ad litem in the former suit had an interest in that suit adverse to the infant. *Held,* that the appointment was valid though "the appointment of some other person as guardian ad litem might have been better * * * * and the results ought not to be less binding unless there was fraud or collusion." *Howell* v. *Howell* (Ore. 1915) 152 Pac. 217.

In *Elrod* v. *Lancaster,* 39 Tenn. 571, one legatee under a will brought a bill against the executor and the other legatees for the settlement of the estate. The executor was appointed guardian ad litem for the infant defendants. In annulling the decree the Supreme Court said "We cannot permit a decree, made under such circumstances, to compromit the rights of the infants." See also *O'Connor* v. *Carver,* 59 Tenn. 436; *Patterson* v. *Pullman,* 104 Ill. 80; *George* v. *High,* 85 N. C. 113; *Walker* v. *Crowder,* 37 N. C. 478. In these cases the appointments were held invalid because there was a conflict of interest between the guardian ad litem and the infant. It was not suggested, as in the principal case, that fraud or collusion on the part of the guardian ad litem was necessary to invalidate the proceedings. The rule announced in I DANIELL, CHANCERY PRACTICE, (5th Ed.) 176, is in accord with the cases last cited.

INSURANCE—AGENT'S ADVERSE INTEREST IMMATERIAL.—An insurance agent was an officer and stockholder in a bank which held a mortgage on the property insured and inserted in the policy a clause which provided for the payment to the mortgagee as his interest might appear. *Held,* that the agent may make such a reservation in the policy, and that the insurer's ignorance of the other capacity of the agent will not, in the absence of fraud, render the policy void. *Milwaukee Mechanics Insurance Co. et al.* v. *Fuquay* (Ark. 1915) 179 S. W. 497.

The authorities are plain that the insurance agent may not insure property of a corporation of which he is a stockholder or officer, and that such a condition is a serving of two masters by the agent and renders the policy void. *Greenwood Ice & Coal Co.* v. *Georgia Home Ins. Co.,* 72 Miss. 46; *Rockford Ins. Co.* v. *Winfield,* 57 Kan. 576; *Riverside Devel. Co.* v. *Hartford Fire Ins. Co.,* 105 Miss. 184, 62 So, 169; *Shamokin Mfg. Co.* v. *Ohio German Fire Ins. Co.,* 39 Pa. Super. Ct. 553; see dictum in *Dull* v. *Royal Ins. Co.,* 159 Mich. 671. Or that the policy becomes voidable when the insurer learns of the double capacity of the agent. *Arispe Mercantile Co.* v. *Queen Ins. Co.,* 141 Io. 607. This doctrine of agency, however, is not applied in insurance law to cases where the agent also acts as agent of the insured for the purpose of keeping the property insured. *Wilson* v. *German Am. Ins. Co.,* 90 Kan. 355; *Phoenix Ins. Co.* v. *State,* 76 Ark. 180; *Dibble* v. *Northern Assur. Co.,* 70 Mich. 1; *Todd* v. *German Am. Ins. Co.,* 2 Ga. App. 789. Although the contrary has been asserted by the Illinois court. *People's Ins. Co.* v. *Paddin,* 8 Ill. App. 447, affirmed in 107 Ill. 196. An agent who at the time of issuing the policy was a member of the board of school directors for the district

whose property was insured has no such interest that disqualifies him from issuing the policy, as the interest is merely a nominal one. *German Ins. Co.* v. *Independent School Dist.*, 80 Fed. 366, 25 C. C. A. 492. The principal case relies on the authority of *Citizens State Bank of Chautauqua* v. *Shawnee Fire Ins. Co.*, 91 Kan. 18, where under the same statement of facts the Kansas court held that the policy was valid and that the maxim did not apply, the court saying that "The maxim that no man shall serve two masters does not prevent the same person's acting as agent for certain purposes of two or more parties when their interests do not conflict and when loyalty to one is not a breach of duty to the other. Here the fact that the agent was cashier of the bank which held the mortgage did not prevent his acting with fidelity to his principal, and there is no reason to suppose that the risk would have been refused had all the facts been fully disclosed." See also *Fisk* v. *Royal Exchange Assur. Co.*, 100 Mo. App. 545.

INSURANCE—FORFEITURE FOR BREACH OF CONDITION OR WARRANTY.—Plaintiff insured his farm and personal property in the defendant company, a farmers' mutual fire insurance company. The charter and by-laws of the insurer contained clauses which stated that the policy would become void if additional insurance was procured without notice or consent of the insurer. Plaintiff procured such other insurance without notice or consent; and when the plaintiff presented notice of loss and demanded payment, the defendant refused. *Held,* that the statute declaring "No policy of fire insurance shall hereafter be declared void by the insurer for the breach of any condition of the policy if the insurer has not been injured by such breach, or where a loss has not occurred during such breach and by reason of such breach of condition," applies and allows a recovery on the policy. *Lagden* v. *Concordia Mutual Fire Ins. Co.* (Mich. 1915) 154 N. W. 87.

The application of the plaintiff contained a promise to agree to and abide by the charter and by-laws, and that a breach of this should render the policy void. The dissenting opinion declares this to be a warranty and hence not affected by the statute, which applies only to conditions. *Sheldon* v. *Mich. Millers' Mutual Fire Ins. Co.*, 124 Mich. 303; *McGannon* v. *Mich. Millers' Mutual Fire Ins. Co.*, 127 Mich. 636; *Benham* v. *Farmers' Mutual Fire Ins. Co.*, 165 Mich. 406. The question whether a promise made in the application constitutes a warranty depends on whether the application is made part of the contract. *Phoenix Life Ins. Co.* v. *Raddin*, 120 U. S. 183. When the application is made part of the policy, the statements and answers made therein are warranties, if made in such form, and the insured's intent to bind himself to the exact truth in his answers, even as to immaterial facts, is adequately manifested, and the parties thereby agree upon the materiality of the things warranted. *Armour* v. *Insurance Co.*, 90 N. Y. 450; *Am. Credit Indemnity Co.* v. *Mfg. Co.*, 95 Fed. Ill., 36 C. C. A. 671; *Hoose* v. *The Prescott Ins. Co.*, 84 Mich. 309. Several states have regulated this rule by statute, declaring that to be effective, the warranty must be contained either in the policy, or in the signed application, which must be referred to in express terms in the policy or incorporated in full therein POMEROY'S

CALIF. CIVIL CODE, § 2605; MASS. REV. LAWS, 1902, chap. 18, § 21; MINN. LAWS 1895, chap. 175, § 52; MONT. CIVIL CODE 1895, § 3472; N. CAR. PUBLIC LAWS 1899, chap. 54, § 42; N. D. REV. CODE 1899, § 4505; S. D. REV. CODE 1903, § 1853; VA. CODE 1904, § 3252. The dissent also points out that the statute should only be held to apply to that class of conditions which relate, usually, to casual risks, and not to apply to those which relate to matters which are of the very essence of the contract—those which must always be considered as controlling in the accepting or continuing of the risk. "So construed it may sensibly be read and applied along with the statute which prescribes a standard form of policy, in which breaches of various conditions do, in terms and at once, make the policy void." See *Excelsior Foundry Co.* v. *Assurance Co.*, 135 Mich. 474; OSTRANDER, FIRE INSURANCE (2nd Ed.) 77.

JUDGMENT—EQUITABLE RELIEF ON GROUND OF PERJURY.—In a former action defendants (Freebury) suing as husband and wife, in an action for the woman plaintiff's personal injury, recovered $12,000, but the damages alleged were only such as she would have been entitled to if suing as unmarried. After the satisfaction of the judgment it was learned that plaintiffs in that suit were not husband and wife. Plaintiff, in this suit, seeks equitable relief against that judgment because of the perjury. *Held*, relief refused. *Robertson et al.* v. *Freebury et al.; (Chicago, M. & P. S. Ry. Co., Intervener.)* (Wash. 1915) 152 Pac. 5.

It is elementary that "A judgment, either of a legal or of a equitable tribunal, may be, in effect, vacated by a court of equity, if it was obtained by fraud." FREEMAN, JUDGMENTS (4th Ed.) § 489; *Young* v. *Tucker*, 39 Iowa, 600. It is generally held that procuring a judgment by perjured testimony is not such fraud as will merit equitable relief. Equity will relieve against a judgment only when the fraud relied upon is entirely extrinsic and collateral to the question examined. *U. S.* v. *Throckmorton*, 98 U. S. 61; *Kretschmer* v. *Ruprecht*, 230 Ill. 492; *Richards* v. *Moran*, 137 Iowa, 220; *Moore* v. *Gulley*, 144 N. Car. 81. "The reason of this rule is that there must be an end of litigation, and when the parties have once submitted a matter, or have the opportunity of submitting it for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive unless it can be shown that the jurisdiction of the court has been imposed upon." *Pico* v. *Cohn*, 91 Cal. 129. "If the courts of equity were to assume jurisdiction to vacate judgments at law because of false swearing at the trial, they would, in effect, become courts of review of large per cent of the litigation in trial courts." *Hendrickson* v. *Bradley*, 85 Fed. 508, 517. The rule applies though the false testimony was introduced through the procurement or connivance of the party to be benefited by it, and with knowledge on his part that it was false. *Pico* v. *Corn, supra; Maryland Steel Co.* v. *Marney*, 91 Md. 360. If a witness, on whose testimony the verdict was given, has been convicted of false swearing in the case, in a few instances, courts of equity have taken jurisdiction. *Morrell* v. *Kimball*, 1 Me. 322; *Moore* v. *Gulley*, 144 N. Car 81; *Great Falls Mfg. Co.* v. *Mather*, 5 N. H. 574. See *Keyes* v. *Brackett et al.*,

187 Mass. 306, 3 A. & E. Ann. Cas. 81 and note. Some courts will, however, enjoin the collection of judgments procured by perjury of the plaintiff, when the defendant was not guilty of negligence in not procuring other testimony. *Stowell et al.* v. *Eldred,* 26 Wis. 504. In the principal case the facts, on the basis of which relief is asked, might have been discovered at the trial by a rigid cross-examination, so petitioner has not shown himself entitled to equitable relief under any rule.

LICENSE—REVOCABILITY WHEN LICENSEE HAS GONE TO EXPENSE IN RELIANCE THEREON.—Water flowed to plaintiff's house from a spring on defendant's land through a pipe installed by plaintiff's predecessor in title at his own expense and with the knowledge of the then owner of defendant's land. Plaintiff sought to enjoin defendant from interfering with the flow of the water. *Held,* that a license to take the water could be inferred from the circumstances, and that the license would be irrevocable during the ordinary life of the pipe. *Phillips* v. *Cutler,* (Vt. 1915) 95 Atl. 487.

There is considerable confusion in the law as to the revocability of a license to maintain a burden on the land after the licensee has incurred expense in creating the burden. By what is probably the weight of authority such a license is revocable at the will of the licensor, and the licensee has no remedy at law or in equity. *Collins Co. v. Marcy,* 25 Conn. 239; *Pitzman* v. *Boyce,* 111 Mo. 387; *Lawrence* v. *Springer,* 49 N. J. Eq. 289; *Crosdale* v. *Lannigan,* 129 N. Y. 604; *Nowlin Lumber Co. v. Wilson,* 119 Mich. 406; *Great Falls Water Works Co.* v. *Great Northern Ry. Co.,* 21 Mont. 487; *Thoemke* v. *Fielder,* 91 Wis. 386; *Minneapolis Mill Co. v. Minneapolis, etc. Ry. Co.,* 51 Minn. 304; *Houston* v. *Lafee,* 46 N. H. 505; *Hodgkins* v. *Farrington,* 150 Mass. 19; *Beck* v. *Louisville, etc. Ry.,* 65 Miss. 172; *Carter* v. *Harlan,* 6 Md. 20; *Jackson & Sharp Co.* v. *Philadelphia, etc. Ry.,* 4 Del. Ch. 180. Many courts, however, following the lead of *Rerick* v. *Kern,* 14 Serg. & R. (Pa.) 267, afford the licensee relief on equitable grounds. Some of these cases proceed on the theory that the licensor is estopped to revoke the license, *Clark* v. *Glidden,* 60 Vt. 702; others find a parol contract for the right to maintain the burden and, considering the incurring of expense as part performance, decree specific performance, *Gilmore* v. *Armstrong,* 48 Neb. 92; and a few consider the licensor a trustee *ex maleficio, Flickinger* v. *Shaw,* 87 Cal. 126. The conception underlying this line of authorities is that it would be a fraud upon the licensee to allow the licensor to revoke. *Ferguson* v. *Spencer,* 127 Ind. 66; *Wynn* v. *Garland,* 19 Ark. 23; *Metcalf* v. *Hart,* 3 Wyo. 513; *Curtis* v. *Hydraulic Co.,* 20 Or. 34; *Cook* v. *Pridgen,* 45 Ga. 331. Some cases go so far as to give this relief when the action is at law. *Rhodes* v. *Otis,* 33 Ala. 578; *Wilson* v. *Chalfant,* 15 Ohio 248. The result of this rule is to transfer an interest in land without an instrument in writing in contravention of the Statute of Frauds. *Crosdale* v. *Lannigan, supra,* at 609; *Desloge* v. *Pearce,* 38 Mo. 588 at 599; *St. Louis Nat. Stock Yards* v. *Wiggins Ferry Co.,* 112 Ill. 384. It would seem that none of the equitable doctrines is applicable to the facts of the principal case. That element of fraud necessary to found an estoppel or raise a trust

is not present. There is no evidence of any contract that could be specifically enforced. On the general topic of the revocability of licenses, see 7 MICH. LAW REV. 660, 13 MICH. LAW REV. 401.

NAVIGABLE WATERS—DOCK AT END OF STREET.—Defendant owned a tract of land on the water-front of Long Island Sound, through which ran a street of the plaintiff city. Plaintiff city had erected a dock at the end of the street. In condemnation proceedings brought by the city to secure defendant's land, the city claimed that as it, having an easement extending from the terminus of the street to the navigable waters of the sound, had of right erected its dock, thereby depriving defendant of the use of this strip of land, she should only be awarded nominal damages for this particular piece of property. *Held*, that, although the city's street easement extended to the navigable water, it had no right to erect such a wharf, and consequently defendant should be given substantial damages for it. *In Re Main Street in City of New York* (N. Y. 1915) 110 N. E. 176.

The question of whether or not a city having a right of way running down to a river may build a dock at the end of that right of way is one which has arisen in but few cases. It has been held that, since such an easement extends out to the middle of the stream, the easement carries with it the right to build a dock. *Williams* v. *Intendant and Town Council of Gainesville*, 150 Ala. 177, 43 So. 209; *Backus* v. *City of Detroit*, 49 Mich. 110. There is a dictum to this effect in *City of Galveston* v. *Menard*, 23 Tex. 349. That such a right does not exist, is held in *In Re Cramps Appeal*, 13 Phila. 16. It would seem that the former rule were the better one. It has been held that a public right of way down to a stream gives the public an easement over the adjoining water and submerged land to the middle of the river, and hence the public has the right to use the terminus of the right of way as a ferry landing. *Mills* v. *Learn*, 2 Ore. 215; *Patrick* v. *Ruffners*, 2 Rob. (Va.) 209; *Peter* v. *Kendal*, 6 Barn. & Cress. 703. It would seem but a proper further step to hold that the public has a right under the circumstances to erect a dock as a means, not of crossing the stream, but of access to the stream, which also is a public highway.

MARRIAGE—NECESSITY FOR COHABITATION AFTER COMMON-LAW MARRIAGE.—Where a marriage was invalid as a statutory marriage because performed under a void license, and such attempted marriage, though made *per verba de praesenti*, was not consummated by cohabitation. *Held*, not a valid common law marriage, though common law marriages are good in the state. *Herd* v. *Herd* (Ala. 1915) 69 So. 885.

The rule as to the necessary elements of a common-law marriage is generally stated somewhat as follows: "A valid common-law marriage may be constituted by a mutual agreement between the parties * * * whereby they presently undertake and contract to be husband and wife * * * and thereupon assume their marital duties and cohabit together." 26 Cyc. 838; *Williams* v. *Kilburn*, 88 Mich. 279; *Shorten* v. *Judd*, 60 Kan. 73; *Tartt* v. *Negus*, 127 Ala. 301; *Hutchison* v. *Hutchison*, 196 Ill. 432; *Van Tuyl* v. *Van Tuyl*, 57 Barb. 235; *Univ. of Mich.* v. *McGuckin*, 64 Neb. 300; *Adger* v. *Acker-*

*man,* 115 Fed. 124; *Rose* v. *Clark,* 8 Paige 573; *Richard* v. *Brehm,* 73 Pa. St. 140, 13 Am. Rep. 733. But in practically all of the cases which are cited in support of this rule there had been cohabitation, and the statements of the courts as to the necessity for cohabitation are open to the objection that they do not relate to a litigated point. *Lorimer* v. *Lorimer,* 124 Mich. 631 and *Taylor* v. *State,* 52 Miss. 84 are open to this objection, though in both cases the courts stated that instructions given by the trial courts, failing to state that cohabitation was necessary, were erroneous. The exact point was raised in *Ashley* v. *State,* 109 Ala. 48, which was a prosecution for bigamy. The second marriage was solemnized under a void license but there was no cohabitation. On appeal it was held that there was no common law marriage. Precisely the opposite conclusion was reached in *Davis* v. *Davis,* 7 Daly (N. Y.) 308. The court said, "All that is necessary to constitute a valid marriage between parties competent to contract it, is their mutual consent to enter into the marital relation. * * * No particular ceremony or form of words is necessary, nor is cohabitation essential to its validity." There is dictum to the same effect in *Dickerson* v. *Brown,* 49 Miss. 357, 370. The weight of authority is apparently with the principal case, though it is difficult to see why there should be any difference in this respect between a ceremonial marriage and a common-law marriage.

OFFICERS—DE JURE OFFICER'S RIGHT TO COMPENSATION.—In a suit against a county for salary due as clerk of the board of road commissioners, plaintiff Hogan proved that he had rightfully continued in office and performed the duties thereof, because one McCutcheon, claimed to have been elected as his successor, was only a *de facto* officer under a void election. *Held,* the plaintiff could compel the county to pay the salary accrued. The court said further: "Even if McCutcheon had undertaken to perform the duties of the office, and had collected the salary, this would not have relieved the county from the duty to pay Hogan, the rightful officer." *Hogan* v. *Hamilton County* (Tenn. 1915) 179 S. W. 128.

The cases involving the right of an officer *de jure* to his salary when the city or county has paid it to the incumbent officer *de facto,* before any judgment of ouster has been rendered against the latter, are hopelessly in conflict; but the rule generally prevailing is, that payment made in good faith to a *de facto* officer constitutes a bar to an action against the public corporation by an officer *de jure. Wayne County* v. *Benoit,* 20 Mich. 176, 4 Am. Rep. 382; *Nall* v. *Coulter,* 117 Ky. 747, 78 S. W. 1110; *Parker* v. *Dakota County,* 4 Minn. 30; *Dolan* v. *New York,* 68 N. Y. 274, 23 Am. Rep. 168; *Brown* v. *Tama County,* 122 Iowa 746, 98 N. W. 562. The correct reason, among the many offered, seems to be that the interest of the community requires that public offices be filled and the duties of the officers be discharged, and since, in order to secure such service, the officer performing must ordinarily be paid, payment in good faith to the officer discharging the duties of the office is justified. As stated by the court in *Michel* v. *New Orleans,* 32 La. Ann. 1094; "Sound public policy dictates the wisdom and the necessity of paying the salary of the officer in possession of the office and performing functions required for

the protection of society and the maintenance of peace and order; and after this duty is performed, both law and equity forbid that the city or state be compelled to account for the same salary to any other party who may subsequently be decreed as the proper officer." Nevertheless, a very respectable line of cases lay down the contrary doctrine that the right of a *de jure* officer to recover his salary from the public corporation is not impaired by payment to the officer *de facto*. *Mayor & Aldermen of Memphis* v. *Woodward*, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; *Andrews* v. *Portland*, 79 Me. 484, 10 Am. St. Rep. 280; *State* v. *Carr*, 129 Ind. 44, 28 N. E. 88; *Tanner* v. *Edwards*, 31 Utah 80, 86 Pac. 765. A good discussion of the authorities may be found in the notes in 19 L. R. A. 689; 16 L. R. A. (N. S.) 794; and 10 Am. St. Rep. 284. The reason for this view is found in the *wrongful* payment to one not entitled to receive it; but keeping in mind that the reason for the *de facto* doctrine is to further the public interests, it is difficult to understand why such payment, when public necessity really demands it, should be regarded as wrongful. Several of the cases may be distinguished on their facts, where the city or state failed to act in good faith, or where the person to whom payment was made was a usurper or intruder. Yet in no case does the principal argument for the majority rule seem to be successfully controverted; and the statement made by the court in the instant case is in conflict with the better view.

PLEADING—NECESSITY FOR ALLEGING TRESPASS IN ASSUMPSIT FOR USE AND OCCUPATION AGAINST A TRESPASSER.—§ 11207 of the COMPILED LAWS OF MICHIGAN allows a party having a cause of action for the taking of timber or other trespass on lands to waive the tort and bring assumpsit therefor. In assumpsit for use and occupation brought by the owner of premises against one occupying under claim of right, *held*, that an action for use and occupation, being founded on contract, express or implied, will not lie where the occupancy of the one sought to be charged has been tortious; and that an action for assumpsit under the above statute, based on a waiver of tort, cannot be maintained where there has not been any reference in the declaration to the statute, nor any allegation of the fact of the trespass. *Smith* v. *Haight* (Mich. 1915), 154 N. W. 563.

The common count for use and occupation has not been allowed against a tortious occupant of land. *Ward* v. *Warner*, 8 Mich. 508; *M., H. & O. R. Co.* v. *Harlow*, 37 Mich. 554. With all the technical elements present of a quasi-contractual obligation to pay for the use and occupation, the remedy has been denied for historical reasons. WOODWARD, QUASI-CONTRACTS, § 284, and cases cited. But see the opinion of MANNING, J., in *Welch* v. *Bagg*, 12 Mich. 41, where assumpsit for pasturing cattle was allowed against a trespasser. Before the above statute was passed, in Michigan there could be no recovery in assumpsit for the value of property converted but not sold. *Watson* v. *Stever*, 25 Mich. 386. In this case assumpsit was held to be an improper remedy against a trespasser who cut and carried away the plaintiff's timber. The statute above, passed in 1875, was designed to remedy this situation. The suggestion that the plaintiff might waive the tort of occupying his

premises and bring assumpsit for use and occupation puts a much broader construction upon this statute than any previous decision has done. But the suggestion, that in order to take advantage of this statute it is necessary either to refer to the statute or to allege the trespass in the declaration, is more difficult to understand. It was held in *Lockwood* v. *Thunder Bay River Boom Co.*, 42 Mich. 536, 4 N. W. 292, that the statute operated only to provide that a duty to pay damages for a trespass might be treated as an implied agreement, but that the damages must be shown in the declaration to have accrued out of a trespass. There is a similar holding with regard to the statutory action of assumpsit where a fraud is waived. *Anderson Carriage Co.* v. *Pungs*, 134 Mich. 79, 95 N. W. 985. A declaration in assumpsit for the value of goods converted and sold by the defendant need not allege the conversion or sale. *Newman* v. *Olney*, 118 Mich 545, 77 N. W. 9; *Brown* v. *Foster*, 137 Mich. 35, 100 N. W. 167. But see the dicta in *Farwell* v. *Myers*, 59 Mich. 179, 26 N. W. 328, and in *Tregent* v. *Maybee*, 54 Mich. 226, 19 N. W. 962. There would appear to be no more necessity for alleging the tort where the right to bring assumpsit exists by virtue of a statute than if it exists independent of one. Nor does the technical construction given to the statute in *Lockwood* v. *Thunder Bay River Boom Co.*, supra, seem in accord with the words of the statute. The statute does not create the cause of action, but merely extends the use of certain pre-existing forms of action. Inasmuch as the MICHIGAN JUDICIATE ACT of 1915 provides "that in case of trespass on lands, and in cases where an action on the case for fraud or deceit may by law be brought, and in cases of conversion of personal property into money, the plaintiff may bring and maintain either an action of assumpsit, or an action of trespass on the case," it would seem important that the courts should explain more specifically the reasons for the necessity of alleging the tort where assumpsit is brought.

REWARDS—PREVIOUS KNOWLEDGE OF OFFER NOT NECESSARY.—A statute authorized the Governor to offer rewards, not to exceed a specified amount, for the arrest and conviction of the persons guilty of a certain murder. The Governor offered the reward, and the plaintiffs, who killed the murderers, now seek to recover the reward, although they had no knowledge of the reward beforehand. *Held,* prior knowledge of the reward was not necessary; the right to the reward followed by operation of law upon the killing of the murderers. *Smith, et al.* v. *State* (Nev. 1915) 151 Pac. 512.

The court adopts as the reason for its decision the dictum of the case of *Broadnax* v. *Ledbetter*, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057, to the effect that right to a reward offered by the government in accordance with law may follow by operation of law, and without the aid of contract, upon the performance of that for which the reward is given. Apparently this is the first case in which the conclusion, that one who had no prior knowledge of the reward is entitled to it upon performance of the condition, has been reached by this line of reasoning. The court does not make it clear just what reasons go to substantiate this theory, but suggests that since this is a special statute passed for this particular case, and since everyone is pre-

sumed to know the law, the right to the reward follows upon compliance with the conditions of the statute. This argument might seem more reasonable if the statute itself gave the reward; but the statute only gives the Governor authority to offer the reward, and fixes the maximum amount which he may offer. Why there should be any more freedom from the contractual relation in the case of a special statute than in the case of a general statute authorizing rewards does not appear. The opposite conclusion to the decision in the instant case was reached in *Couch* v. *State,* 14 N. D. 361, under a statute which gave the governor authority in general to offer rewards. The weight of authority in this country upon the general question of whether recovery may be had where the party seeking the reward had no knowledge of the same before performing the service, is against such recovery. See note in 9 L. R. A. (N. S.) 1057; 34 Cyc., pp. 1751-2. The reasoning of the cases taking the opposite view is that the State receives the benefit from the service performed whether the person knew of the offer or not. *Auditor* v. *Ballard,* 9 Bush (Ky.) 572, 15 Am. Rep. 728. Or, as held in *Drummond* v. *United States,* 35 Ct. Cl. 356, "the motives of the person claiming the reward cannot be inquired into." Since it is a question of statutory construction, where a statute is involved as it is in the instant case, either of the reasons just noted would seem quite as sound as the one followed in the case under consideration. The reasoning of the courts holding with the weight of authority is that the relation between the parties is a contractual one, and should be governed by the rules relating to contracts. The decision on the other point in the case is also of interest, in that the court determines that a reward offered for "the arrest and conviction" of a criminal may be recovered by one who has killed the criminal in attempting to make the arrest. Although it is the general rule that the language of the offer should not be strictly construed, (See note to *Elkins* v. *Board of Commissioners,* 86 Kan. 305, 120 Pac. 542, in 46 L. R. A. (N. S.) 668) this would nevertheless seem to be carrying the doctrine of liberal construction to its limit.

SALES—WARRANTY TO PERSON OTHER THAN THE BUYER.—Plaintiff sold X a threshing machine, and took as security several notes given X by farmers as advances for threshing to be done with the machine. To induce defendant to make one of the notes, plaintiff's agent guaranteed him that the machine would do good work and was in good condition; relying upon this warranty defendant gave the note. When sued thereon, he answered that the machine was defective and could not be used, by reason of which he had suffered damage. *Held,* Defendant, although not a buyer, was not a stranger to the transaction, and can not only resist payment on the note, but can recover damages for the loss incurred by the breach of warranty. *Richardson Machinery Co.* v. *Brown* (Kan. 1915), 149 Pac. 434.

Usually only the buyer can recover for a breach of warranty, and third persons, strangers to the contract, cannot avail themselves of the warranty, *Talley* v. *Beaver,* 33 Tex. Civ. App. 675; *Carter* v. *Harden,* 78 Me. 528. Where the assignee of the vendee, or a subvendee, assumes the payment of the original purchase price in whole or in part, he may have advantage of the

warranty, *York Mfg. Co.* v. *Bonnell,* 24 Ind. App. 667; *Boyd* v. *Whitefield,* 19 Ark. 447; and in *Conestoga Cigar Co.* v. *Finke,* 144 Pa. St. 159, recovery was allowed a subvendee on a warranty of quality made by an inspector of tobacco to the vendee, because such was the general usage of the trade. But in these cases the warranty was made to the vendee, and recovery was allowed the subvendee because he was successor to the vendee's rights (except in the Pennsylvania case, where a custom was pleaded). In the instant case the warranty was not made to the vendee, but to a third person, who had an interest only because he secured the payment of part of the purchase price, and who was not a successor to the rights of the vendee in any way. Had the contract of warranty not been separable from the contract of sale, defendant's counter-claim could not have been allowed.

WATERS—EASEMENT OF UPPER PROPRIETOR—RIGHT OF LOWER OWNER TO REPEL SURFACE WATERS.—Plaintiff, the owner of land adjoining a highway, erected a dyke to prevent water from flowing from the highway on to his land. Defendant, a town controlling the highway, had the dyke cut down. In an action for damages brought against the defendant, *held,* that defendant, owner of the upper land, had no easement or servitude entitling it to discharge surface water on to the lower land. *Harvie* v. *Town of Caledonia* (Wis. 1915), 154 N. W. 383.

The question of the right to discharge surface water over the lower land is one concerning which there is much conflict of authority. There are first those decisions which follow the civil law rule. allowing the upper proprietor such a right. *Village of Trenton* v. *Rucker,* 162 Mich. 19, 127 N. W. 39; *Baltimore and S. P. Ry. Co.* v. *Hackett,* 87 Md. 224, 39 Atl. 510; *Sanguinetti* v. *Pock,* 136 Cal. 466, 69 Pac. 98; *Pinkstaff* v. *Steffy,* 216 Ill. 406, 75 N. E. 163; *Baker* v. *Town of Akron,* 145 Ia. 485, 122 N. W. 926; *Livingston v. McDonald,* 21 Ia. 160, 89 Am. Dec. 563; and *Foley* v. *Godchaux,* 48 La. Ann. 466, 19 So. 247. Secondly there are those decisions which follow the so-called common law rule that a land-owner, for the purpose of improving or cultivating his land, may raise it, or fill it in, even though the natural flow of surface water is thereby interrupted. *Barkley* v. *Wilcox,* 86 N. Y. 140, 40 Am. Rep. 519; *City of Paola* v. *Gorman,* 80 Kan. 702, 103 Pac. 83; *Chadeayne* v. *Robinson,* 55 Conn. 345. Thirdly, there are those decisions which hold that the water flowing from higher land is a common enemy and that the lower proprietor may, to prevent the flow of the water on to his land, erect any such barriers or obstructions as he may desire. This is really an extension of the so-called common law rule. *Bates* v. *Smith,* 100 Mass. 181; *Edwards* v. *Ry. Co.,* 39 S. C. 472, 18 S. E. 58; *Gross* v. *Lampasas,* 74 Tex. 195, 11 S. W. 1086; *Lessard* v. *Stram,* 62 Wis. 112; and *Bryant* v. *Merritt,* 71 Kan. 272, 80 Pac. 600 (dictum). It is this "common enemy" doctrine upon which the principal case is decided. Finally there are those decisions which say that the owner of the lower land may, by artificial means, prevent water from flowing on to his land when, considering all the circumstances, such an act would be reasonable. *Cox* v. *H. & St. J. Ry. Co.,* 174 Mo. 588, 74 S. W. 854; *Peterson* v. *Lindquist,* 106 Minn. 339, 119 N. W. 50; *Little Rock & Fort*

*Smith Ry. Co.* v. *Chapman,* 39 Ark. 463, 43 Am. Rep. 280; *Swett* v. *Cutts,* 50 N. H. 439, 9 Am. Rep. 276. It has been suggested that any rule on this question should make a distinction between city and rural property. See article on SURFACE WATERS in 6 MICH. L. REV. 448.

WATERS—RIGHT TO REMOVE ICE.—In an action to enjoin defendant from taking ice formed on a mill-pond, it was *held* that the title to the ice is in the owner of the soil, and not in the owner of the right to flow the land for creating water power. *Valentino* v. *Schantz et al.* (N. Y. 1915), 109 N. E. 866.

It seems to be the well-established rule that the ice formed in waters where the bed is in private ownership is the property of the owner of the soil over which it is formed. *Washington Ice Co.* v. *Shortall,* 101 Ill. 46; *State* v. *Pottmeyer,* 33 Ind. 402; *Marsh* v. *McNider,* 88 Iowa 390. This rule has been based on the theory that the ice, by being attached to the soil, became part of the realty on the theory of accretion, *Washington Ice Co.* v. *Shortall,* supra, at p. 55, and also on the principle that the owner has the same rights in the ice as in the water, that is, "the right to take the ice from the water resting upon his land." *Stevens* v. *Kelley,* 78 Me. 445, 451. It would seem that different results would flow from these theories; the first giving title in the ice, the second giving the right to a reasonable use of the ice. Where riparian owners or their predecessors in title have granted the right to flow their land by means of a dam to raise a head of water for propelling machinery, the owner of the right of flowage does not, by the prevailing rule, acquire any right to the ice which may form on the pond over the land of the riparian owners. *Julien* v. *Woodsmall,* 82 Ind. 568; *Bigelow* v. *Shaw,* 65 Mich. 341. The owner of the land flowed may use the ice adjoining his land to any extent which does not decrease the flow of water below that necessary to successfully fulfill the needs of the owner of the dam. *Eidemiller Ice Co.* v. *Guthrie,* 42 Neb. 238; *Reyson* v. *Roate,* 92 Wis. 543; *Stevens* v. *Kelley,* supra; *Searle* v. *Gardner,* 10 Sadler (Pa.) 163; *Beachwood Ice Co.* v. *American Ice Co.,* 176 Fed. 435; *Paine* v. *Woods,* 108 Mass. 160, 173; *Abbott* v. *Cremer,* 118 Wis. 377; *Cummings* v. *Barrett,* 10 Cush. 186, (semble). This rule rests on the theory that the owner of the servient estate can make any use of it not inconsistent with the easement of flowage. *Brookville & Metamora Hydraulic Co.* v. *Butler,* 91 Ind. 134, 138. The courts of New York and Connecticut formerly took the view that the owner of the mill privileges had a right to all the ice formed on the pond. *Myer* v. *Whitaker,* 5 Abb. N. C. (N. Y.) 172; *Mill River Woolen Mfg. Co.* v. *Smith,* 34 Conn. 462. These cases, however, have been questioned; *Dodge* v. *Berry,* 26 Hun (N. Y.) 246; *Howe* v. *Andrews,* 62 Conn. 398. It would seem that the principal case, being from the Court of Appeals, clearly sets forth the New York doctrine on this question, and adopts the rule which is at present universally accepted in this country.

WILLS—EFFECT OF PARTIAL CANCELLATION ON THE RESIDUE OF ESTATE.—Where the sixth paragraph and part of the tenth paragraph (the latter being the residuary clause) had been cut and removed from the will of the testa-

trix with intent of revoking such parts, it was found by the surrogate that the sixth paragraph contained two legacies of $2,500 each to X and Y, and that the missing part of the tenth clause gave each of the above one-fourth of the residue of the estate. He admitted the will to probate, including the missing clauses as he found their contents to be. His findings of fact were reversed on account of admission of hearsay evidence and as to the question of law the Supreme Court of New York *held* that in case the contents of the missing clauses could not be proved, the two legacies in the sixth paragraph should sink into the residue of the estate and the two one-fourth shares of the residue should become intestate property. *In re Ursula Kent* 155 N. Y. Supp. 894.

In England by the Statute of Frauds and the Statute of Wills, a clause of a will may be revoked by cancellation. The same is true in some of our states, *In re Brown's Will,* 40 Ky. 56; *In re Tomlinson's Estate,* 133 Pa. St. 245. But in New York and in other jurisdictions, according to the interpretation of their statutes, an obliteration is ineffectual to revoke such clauses. *Lovell* v. *Quetman,* 88 N. Y. 377; *Griffin* v. *Brooks,* 48 Oh. St. 211; *Law* v. *Law,* 83 Ala. 432. In the states which follow the New York rule, the question in the principal case can only arise, therefore, in those cases where it is impossible to prove the contents of the obliterated clauses. At common law lapsed devises did not fall into the residue but lapsed legacies did. *Crerar* v. *Williams,* 145 Ill. 625, 34 N. E. 467. Under our Statutes allowing after-acquired real estate to be devised, lapsed devises fall into the residue. *Upham's Estate,* 127 Cal. 90, 59 Pac. 315; *Holbrook* v. *McCreary,* 79 Ind. 167; *Cruickshank* v. *Home for Friendless,* 113 N. Y. 337, 21 N. E. 64, 4 L. R. A. 140. But at common law failure of part of the residue, as to that part became intestate property. *In re Hoffman,* 201 N. Y. 247; *Ward* v. *Dodd,* 41 N. J. Eq. 414; *Wahn's Estate,* 156 Pa. St. 194; *Worcester Trust Co.* v. *Turner,* 210 Mass. 215. It would seem that this rule would also apply to cases where the clause was revoked by cancellation. This was the reasoning followed in the principal case. However, the court was confronted with a recent case in its own jurisdiction, *Osburn* v. *Rochester Trust and Safe Deposit Co.,* 209 N. Y. 54, where the court held that the cancellation of a codicil (inconsistent with the will) did not restore the will to its original form but that the testatrix in that case died intestate as to the property referred to in the codicil. In other words, the lapsed legacy did not fall into the residuary clause but became intestate property. The court attempts to distinguish these two cases and at least decides that the holdin in the *Osburn* case does not control the decision in this case, for if the legacies failed for lack of proof of their contents here, they were held as a matter of law to fall into the natural "catch-all," the residuary clause.

WORKMEN'S COMPENSATION ACT—DELEGATION OF JUDICIAL POWERS TO ADMINISTRATIVE BOARD.—In an action to recover damages from defendant under the common law for personal injuries sustained while in its employ, plaintiff contended, among other reasons, that the Workmen's Compensation Act of 1912 was unconstitutional because the powers conferred and duties imposed

upon the Industrial Accident Board combined executive, administrative, and judicial functions contrary to the Constitution. *Held,* that the Board was an administrative body created by the act to carry its provisions into effect, although vested with various and important duties and powers, some of them quasi-judicial in their nature; that it did not exercise a judicial function since the act failed to give it that final authority to decide and render an enforceable judgment. *Mackin* v. *Detroit Timkin Axle Co.* (Mich. 1915), 153 N. W. 49.

In upholding the Workmen's Compensation Act on this point the principal case has followed the rule generally laid down by the other states. *State* v. *Creamer,* 85 Ohio St. 349, 97 N. E. 602; *Cunningham* v. *N. W. Imp. Co.,* 44 Mont. 180, 119 Pac. 554; *Borgnis* v. *Falk Co.,* 147 Wis. 327, 133 N. W. 209; *Hawkins* v. *Bleakley,* 220 Fed. 378. The legislature cannot place its own acts beyond the constitutional jurisdiction of the courts, *Reck* v. *Whittlesberger,* 181 Mich. 463, 148 N. W. 247; yet some of the decisions have upheld workmen's acts through a desire rather to foster the compensation principle than to lay down the correct rule of law. A review of the experiments may be had in 10 MICH. L. REV. 278. See also 13 MICH. L. REV. 683. Of the many administrative bodies not invested with judicial power in the constitutional sense, which seem likely to increase, is the so-called Industrial Accident Board. And in the present case a very moderate act has been sustained without yielding constitutional principles to needed reform.