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Recent Important Decisions

RECENT IMPORTANT DECISIONS.

BANKRUPTCY—CONCEALMENT OF ASSETS IN ANOTHER JURISDICTION.—The defendant was adjudicated bankrupt in New Jersey on his voluntary petition. His assets were all in New York and had never been in New Jersey; they were fraudulently concealed by him from the trustee. Defendant also fraudulently omitted to include these assets in his schedules. On an indictment for concealment of assets, laying the offense in the District of New Jersey, *held,* that the District Court for the District of New Jersey had no jurisdiction, as the crime charged was committed in New York. *Gretsch* v. *United States* (3rd C. C. A.) 36 Am. By. Rep. 571.

On behalf of the government, it was urged that property is fraudulently concealed within the meaning of § 29b (1) of the Bankruptcy Act when the bankrupt fraudulently fails to list it on his schedule. But such act of a bankrupt is within § 29b (2) which provides the offense of "Making a false oath or account in, or in relation to, any proceeding in bankruptcy." The majority of the court therefore took the view that it could not have been the intention of Congress that the two offenses separately stated should include the same substantive crime. The dissenting opinion makes no attempt to answer this objection to the government's contention.

BILLS AND NOTES.—ILLEGAL CONSIDERATION.—The plaintiff, a holder in due course of a promissory note, sued the maker. The note was executed in consideration of the transfer to the maker of a saloon license; a state statute declared that a saloon license should not be assignable; and the NEGOTIABLE INSTRUMENTS LAW provides that the title of a person who executes a negotiable instrument is defective when he obtained the instrument for an illegal consideration. *Held,* that the plaintiff should recover over the defendant's objection that the note was absolutely void and therefore a nullity even in the hands of a holder in due course. *Farmers' Savings Bank* v. *Reed* (Mo. App. 1915), 180 S. W. 1002.

The defendant's objection was good only as against the original payee. *As between the original parties* a note violative of a statute is a nullity, and with that qualification in mind the courts are uniform in referring to such an instrument as void. See 12 L. R. A. (N. S.) 575 with note and collected cases. It is, however, not void in itself and as against all parties. Holders in due course are protected. *Union Trust Co.* v. *Preston Nat. Bank,* 136 Mich. 460. But if the statute expressly declares that a note given in violation of a statute is void, then it is useless even in the hands of a bona fide purchaser, for circulation cannot give validity to a note void per se. DANIEL, NEG. INST., § § 197, 198, 807. Occasionally dicta are found to the effect that "a note executed in violation of a statute is void, even in the hands of one who would otherwise be a bona fide holder." *Prudential Life Ins. Co. of Texas* v. *Smyer* (Tex. 1916), 183 S. W. 825. But the case cited in support of the statement, *Jones* v.

Abernathly, 174 S. W. 682, was governed by a statute which expressly declared void an instrument so made, and the dictum is therefore misleading unless qualified as above suggested.

BILLS AND NOTES.—NOTICE OF DEFECT.—A bank as indorser of a promissory note brought action to recover from the maker. The bank had no knowledge of equities that in fact existed between the original parties, but it did have knowledge of circumstances that would have caused suspicion in the mind of an ordinarily prudent man. The jury was instructed that nothing short of bad faith would overthrow the plaintiff's position as holder in due course. This was *held* error and a judgment for the bank was reversed. *Boxell* v. *Bright Nat. Bank of Flora* (Ind. App. 1916), 112 N. E. 3.

The decision brings again to the fore the question as to what constitutes such notice of an infirmity or defect as to defeat the character of a holder in due course. The doctrine followed in the principal case—that a knowledge of circumstances causing a mere suspicion is sufficient to prevent the holder from being a holder in due course—would seem to place an impediment upon the negotiability of commercial paper, and has for that reason been repudiated in most jurisdictions. *McNamara* v. *Jose,* 28 Wash. 461; *Valley Savings Bank* v. *Mercer,* 97 Md. 478; *Mass. Nat. Bank* v. *Snow,* 187 Mass. 159, 72 N. E. 959. Numerous other states repudiating such a doctrine are noted in articles dealing with this subject in 5 MICH. L. REV. 466 and 11 MICH. L. REV. 67. As some of these states had formerly held with the court of the instant case, but later abandoned that view, it is sometimes remarked that such a rule has been universally repudiated. This is too broad a statement, as the present case illustrates. Though this case arose before the adoption of the Negotiable Instruments Law, the decision would have been the same though governed by that law. *Bright Nat. Bank of Flora* v. *Hartman,* (Ind. App. 1915), 109 N. E. 847.

BULK SALES ACT—TRANSFER IN PAYMENT OF A CREDITOR.—A grocer assigned his stock in trade to a creditor to whom he was indebted to an amount greater than the value of the goods, under an agreement that the creditor should sell them and apply the proceeds to the debt and turn any balance over to the debtor. The Bulk Sales Act, providing that a sale or delivery of a stock in trade without certain notice to creditors should be presumed to be fraudulent and void as to such creditors, was not complied with, but there was no bad faith. *Held,* the transfer was valid as to other creditors. *Des Moines Packing Co.* v. *Uncaphor* (Iowa 1916) 156 N. W. 171.

It is not clear upon what theory the decision rests. The court seems to decide that the transfer was one which the act contemplated and was by it rendered presumptively fraudulent, but that this presumptive evidence of fraud was rebutted by the evidence of actual good faith. The syllabus, however, indicates that the transaction was not within the Act and there is some slight indication in the opinion that this was the ground the court based its decision upon. The court pointed out that a chattel mortgage, under

which the mortgagee could at once take possession of the property and foreclose the mortgage, would not come within the Act, and decided it was not the intention of the legislature to prevent creditors from securing their claims. The court distinguished the principal case from *Gallus* v. *Elmer,* 193 Mass. 106, 78 N. E. 772, 8 Ann. Cases 1067, 12 L. R. A. (N. S.) 174 (holding such a transfer to a creditor to secure a claim came within the Bulk Sales Act and was void) on the ground that the Massachusetts Act was broader. The Massachusetts Act declares sales in violation thereof to be fraudulent and void as to creditors, while the Iowa statute only presumes such to be fraudulent and void. This would indicate that the court in the principal case considered the transaction to be within the Act. If the decision rests upon the theory that the presumption of fraud is rebutted by the evidence of good faith, the transaction coming within the Act, it would seem to be in accord with most of the cases on the subject. But if it rests upon the ground that the transaction does not come within the Act, it makes the authorities upon the point about evenly split. In *Sampson* v. *Brandon Grocery Co.,* 127 Ga. 454, 56 S. E. 488, 9 Ann. Cases 331, 12 L. R. A. (N. S.) 174 (in accord with the Massachusetts case) the Act in question conclusively presumed sales in violation thereof to be fraudulent and such a transaction was held to come within the Act. In *Hart* v. *Dean,* 93 Md. 432, 49 Atl. 661, under a Bulk Sales Act declaring a sale in violation thereof to be only presumptively fraudulent, the court held a transfer to a creditor of a stock in trade in satisfaction of his claim and for an additional consideration, came within the statute, but that the presumption of fraud was rebutted by the facts. In *Peterson* v. *Doak,* 43 Wash. 251, 86 Pac. 663, 12 L. R. A. (N. S.) 174, under a Bulk Sales Act declaring sales in violation thereof to be fraudulent and void, the court held a transfer such as that in the principal case did not come within the Act. The court stated that a debtor there had a right to secure a creditor's claim and since there was nothing left for other creditors there was no occasion for notifying them.

BULK SALES ACT—WHO ARE CREDITORS.—A tenant, who owed one month's rent on a lease which had four years to run, conveyed his stock of merchandise in bulk to defendant, without giving the landlord the notice required by the Bulk Sales Act to be given to creditors. There was an existing continuing liability on the part of the tenant to pay rent for the rest of the term. The landlord thereafter obtained a judgment for one month's rent which had accrued after the transfer and sought to reach the goods conveyed. *Held* the landlord was a creditor within the meaning of the act and could subject to his claim the goods in defendant's hands. *Apex Leasing Co.* v. *Litke* (1916), 158 N. Y. Supp. 21.

The principal case seems to be in accord with the weight of authority in holding a simple contract creditor to be protected by the Bulk Sales Acts. *Rabalsky* v. *Levinson,* 221 Mass. 289, 108 N. E. 1050; *Eklund* v. *Hopkins,* 36 Wash. 179, 78 Pac. 787; *Scheve* v. *Vanderkalk,* 79 Neb. 204, 149 N. W. 401. But New Jersey holds that the creditor must have reduced his claim to a judgment in order to avail himself of the Act. *Muller v. Hubech-*

man (N. J. 1916), 96 Atl. 189. In *Hanna* v. *Hurley*, 162 Mich. 601, 127 N. W. 710, a surety on an appeal bond was held to be a creditor within the Act before any liability had accrued. It would seem that to be a creditor whom the Act protects one need not have sold goods constituting a part of the stock transferred nor need he even be a mercantile creditor. *Galbraith* v. *Oklahoma St. Bank*, 36 Okla. 807, 130 Pac. 541; *Peoples Savings Bank* v. *Van Allsburg*, 165 Mich. 524, 131 N. W. 101; *Rabalsky* v. *Levenson*, supra; *Eklund* v. *Hopkins*, supra; *Hanna* v. *Hurley*, supra; *Joplin Supply Co.* v. *Smith*, 182 Mo. App. 212, 167 S. W. 649. Tennessee holds creditors of individual partners are within the Act. *Mahoney-Jones Co.* v. *Sams Bros.*, 128 Tenn. 207, 159 S. W. 1094. But such creditors cannot attack a sale as fraudulent, merely because they are not notified, if the buyer consumes the whole stock in paying the firm creditors, because they are entitled only to the surplus after the firm creditors have been paid. *Gilbert* v. *Ashby* (Tenn. 1916), 181 S. W. 321. Washington holds that the individual creditors of the partners are not entitled to notice when the firm's stock is transferred. *Whitehouse* v. *Nelson*, 43 Wash. 174, 86 Pac. 174. Where one partner sold out and the new firm mortgaged the stock to another, creditors of the old firm were held not to be such creditors as could attack the mortgage under the Bulk Sales Act, in *Markarian* v. *Whitmarsh* (N. H. 1915), 95 Atl. 788.

CARRIERS—CARMACK AMENDMENT—LIABILITY AS WAREHOUSEMAN.—An action was brought to recover for the loss of nine boxes of shoes destroyed by fire while in the warehouse of defendant carrier. Before the fire occurred, the consignee had paid the freight, given his receipt for the goods, and removed four boxes from the warehouse; the rest, which were later destroyed, were permitted to remain to meet the consignee's convenience in removal. The schedule filed with the Interstate Commerce Commission provided that the reduced rates would "apply on property shipped subject to the carrier's bill of lading". One of the stipulations of the bill of lading was that "property not removed * * * within forty-eight hours after notice of its arrival" must be kept in the warehouse "subject to the carrier's responsibility as warehouseman only". Plaintiff contended that defendant's liability as warehouseman was governed by the state statute, and that therefore the burden was on the defendant to show that the loss occurred without its negligence. But the court *held* that the retention of the goods by the carrier in its warehouse was a terminal service forming a part of the "transportation" in the sense of the Federal Act and governed by the Act; that the parties could not alter the terms of this service as fixed by the filed regulations; that until actual delivery of the goods to the consignee the Federal Law should govern the rights and liabilities of the parties, and that therefore the burden was upon the plaintiff to show negligence as a basis for recovery. *Southern Railway Co.* v. *Prescott*, 36 Sup. Ct. 469.

By the ACT TO REGULATE COMMERCE (§ 1), the transportation it regulates is defined as including "All services in connection with the receipt,

delivery, elevation, * * * and handling of property transported". The carrier's services as warehouseman are therefore a part of the "transportation" by the words of the act itself, and its duties and liabilities as such warehouseman are determined by the Act. *C. C. C. & St. L. Ry.* v. *Dettlebach,* 239 U. S. 588, 14 MICH. L. REV. 497. In that case the carrier's liability for goods destroyed while in its possession as warehouseman was limited to the value agreed in the bill of lading. It is also clear that with respect to the services governed by the Federal Statute, the parties are not at liberty to alter the terms of service as fixed by the filed regulations. *Kansas So. Ry.* v. *Carl,* 227 U. S. 639; *Chi. Alton Ry.* v. *Kirby,* 225 U. S. 155; *Atchison etc. Ry.* v. *Robinson,* 233 U. S. 173. It would seem therefore that the terminal services incident to an interstate shipment are within the Act, and the conditions of liability while the goods are retained in the warehouse, are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling until *actual* delivery of the goods to the consignee, and the parties cannot substitute therefor a special contract. In arriving at this conclusion, the court extends the doctrine of the *Dettlebach* case, but the decision is undoubtedly in harmony with previous cases.

CARRIERS—CONNECTING CARRIER NOT LIABLE UNDER BILL OF LADING ISSUED BY IT.—Plaintiff delivered sheep for interstate shipment to the X railway, which issued a bill of lading to plaintiff. The X railway delivered the sheep to the defendant, a connecting carrier, to whom the first bills of lading were surrendered, and new bills of lading were issued by the defendant. The shipment was damaged while in the hands of the subsequent connecting carrier. The plaintiff sued defendant carrier for the loss, contending that by issuing new bills of lading the defendant had become an "initial" carrier within the meaning of the CARMACK AMENDMENT, and hence was liable for losses occurring anywhere en route. But the court *held,* that the "initial" carrier within the meaning of the act is the one first receiving the property for interstate shipment; and that the purpose of the act—to localize responsibility—would be defeated if every connecting carrier who saw fit to issue a new bill of lading could be held liable as an initial carrier merely by issuing such bill of lading. *Looney* v. *Oregon Short Line Co.,* (Ill. 1916) 111 N. E. 509.

The Appellate Court (192 Ill. App. 273) had held the defendant liable as an initial carrier within the meaning of the CARMACK AMENDMENT. The reversal of this decision by the Illinois Supreme Court, brings the case in accord with *Hudson* v. *Chi. St. Paul, etc., Ry.,* 226 Fed. 38. See 14 MICH. L. REV. 243.

CARRIERS—RECONSIGNING CONNECTING CARRIER AS INITIAL CARRIER.—X made an interstate shipment of potatoes. The consignee having failed to honor drafts drawn on him, X ordered the potatoes to be reconsigned to the plaintiff, while they were in the hands of the defendant, a connecting carrier. The defendant agreed to reconsign the potatoes to the

plaintiff, and the original bill of lading was indorsed by the defendant, consigning the shipment to the plaintiff. The shipment was lost somewhere en route, and the plaintiff sought to hold the defendant liable as an initial carrier. The court *held,* that the consignor had a right to stop the shipment *in transitu* and reconsign the shipment to the plaintiff, and that by such a reconsignment a new shipment originated on the lines of the defendant; further, the only contract of carriage in existence was made by the defendant, and this constituted it an initial carrier. *Myers & Co.* v. *Norfolk Southern Ry.* (N. C. 1916), 88 S. E. 149.

There is no question as to the right of a consignor after he has exercised the right of stoppage *in transitu,* to divert the shipment from the original destination, and order the goods to be rebilled to another point. *Atkinson etc. Ry* v. *Schrener,* 72 Kan. 550; *Ryan* v. *Great Northern Ry. Co.,* 90 Minn. 12; *Strahorn* v. *Ry.,* 43 Ill. 424. The CARMACK AMENDMENT defines the "initial" carrier to be "any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another." The original shipment having been put to an end by the exercise of the right of stoppage *in transitu,* and a new contract of shipment having been made by rebilling the goods to a new destination, the principal case seems logical in holding that since this new shipment originated on the lines of the defendant, the defendant is an "initial" carrier within the meaning of the Act. The principal case is not in conflict with *Looney* v. *Ore. Short Line Co.,* 111 N. E. 508, noted above, or with *Hudson* v. *Chi. St. P. R.,* 226 Fed. 38, where the connecting carrier, issuing new bills of lading on its own initiative on a through shipment, was held not to be an "initial" carrier.

CARRIERS—WAIVER OF NOTICE AS DISCRIMINATION.—The plaintiff made interstate shipments of watermelons under bills of lading containing a provision that notice of claims for loss or damage should be made in writing within ten days after delivery, and if no claim was made within the time specified no carrier should be liable in any event. The property deteriorated through unnecessary delay in transportation, and the plaintiff brought this action for damages. The defendant contended that it was not liable as no claim for damages had been presented within the time specified in the bill of lading. Plaintiff contended that although no notice was given within the ten days as per bill of lading, yet the defendant had waived the right to insist on this defense, because the defendant had actual notice at the time of the loss, and also because when a claim was presented *after* the ten-day period, the defendant had received the claim without protest and had refused to pay, not on the ground that the claim had not been filed within the stipulated time, but only on the ground that it was not responsible for the delay in delivery which was the cause of the loss. *Held,* that the provision of the CARMACK AMENDMENT against unjust discriminations relates not only to the inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier; and that

to permit the carrier to waive the defense in this case would open the door to preferences. BERGEN, J., dissented on the ground that by the "waiver of defenses" forbidden by the Act was intended only such defenses as are conferred by statute or by common law, and not a defense resting merely upon a contract, the terms of which depended upon an agreement with the shipper,—agreements which are neither uniform nor treat all alike; and that the facts of this case showed a waiver of the contractual defense. *Olivit Bros.* v. *Pa. Ry. Co.*, (N. J. 1916), 96 Atl. 582.

The prevailing opinion relies entirely upon *Phillips Co.* v. *Grand Trunk Ry.*, 236 U. S. 662, where the Supreme Court held that the Act forbade the "Waiver of defenses open to the carrier" as being a preference. In that case, however, the plaintiff sought to show a waiver of a Statute of Limitations relative to the filing of claims with the Interstate Commerce Commission. If the "waiver of defenses" prohibition laid down in the *Phillips* case refers not only to statutory and common law defenses,—as was held in the principal case,—but also to contractual defenses, then a long line of cases in the state courts have been erroneously decided. The state courts have generally held that although no claim has been presented within the specified time, yet the carrier may by subsequent conduct waive this contractual defense. In *Cheney Piano Co.* v. *N. Y. C. Ry.*, 148 N. Y. Supp. 108, the sending of a tracer and an invitation to present a claim after the expiration of the stipulated time, was held to be a waiver of the defense of want of due notice. Where the carrier knew of the damaged condition of the goods at the time of delivery, and after the expiration of the stipulated time, considered a claim for damages which it rejected on the merits, it was held to constitute a waiver. *Sauls-Baker Co.* v. *Atl. Coast Line Co.*, 98 S. C. 300; *Conrad-Schopp Fruit Co.* v. *Pittsburg Ry.*, 43 Pa. Super. Ct. 481. Where the carrier, after the time limit had expired, corresponded with the shipper as to the merits of the claim, and then rejected the claim, not on the ground of want of due notice, but on the ground of non-liability, it was held to constitute a waiver. *Post & Woodruff* v. *Atl. Coast Line*, 138 Ga. 763; *Peninsula Produce Exchange* v. *N. Y. &c. Ry.*, 122 Md. 231; *Banks* v. *Pa. Ry.*, 111 Minn. 48, 126 N. W. 410; *Isham* v. *Erie Ry.*, 98 N. Y. Supp. 609; see also 14 MICH L. REV. 244. In none of these cases is there any intimation that a waiver of a want of due notice defense would be a preference forbidden by the CARMACK AMENDMENT. The dissenting view seems to be the more logical opinion, because if the carrier is not permitted to waive a defense arising out of a contract, and may stipulate for a five-day notice period with one shipper and a six-months period with another, the grossest kind of discrimination and preference would thereby result. To prevent such discrimination, carriers must be required to make identical contracts with all shippers. The tendency of judicial interpretation is, however, towards the narrow and strict interpretation applied in the principal case, as is shown by a recent case in the United States Supreme Court. In *United States* v. *Union Mfg. Co.*, 36 Sup. Ct. 420, the consignee was indicted under a Federal Statute, for falsely understating the weight of a shipment of lumber, and convicted,

although the representations were made after the property had been delivered and during the adjustment of freight charges. The indictment was justified on the ground that underbilling is a form of securing preferences.

COVENANTS.—RESTRICTIONS ON LAND ACQUIRED BY ACCRETION.—Defendant company platted and sold lots, covenanting to keep free from all buildings a certain area bordering on the Atlantic Ocean. This area was enlarged by accretion and the defendant company was about to erect buildings on the added land. Plaintiffs, who were lot owners, sought an injunction to restrain the erection of these buildings. *Held*, that the restriction upon use of land fronting on navigable waters extended over lands afterwards acquired by accretion. *Bridgewater* v. *Ocean City Ass'n.* (N. J. Eq. 1915), 96 Atl. 905.

This particular question appears to be raised here for the first time. However, other questions fundamentally the same have been ruled upon. It has been held that land formed by accretion is subject to an outstanding lease upon the land to which the accretion adheres. See *Cobb* v. *Lavalle*, 89 Ill. 331; *Williams* v. *Baker*, 41 Md. 523. It has also been held that a widow is entitled to her dower in accretions. *Lombard* v. *Kinzie*, 73 Ill. 446. Accretions are held to be subject to an easement upon the land to which the accretion is made. *People* v. *Lambier*, 5 Denio (N. Y.) 9. There is also dictum to the effect that in such cases accretions are subject to liens and mortgages. *Cobb* v. *Lavalle*, 89 Ill. 331. If the statute of limitations has run partially against an owner's right to recover land originally existing, it is held that his right to recover the newly formed land is liable to be barred within the same time. See *Bellefontaine Co.* v. *Niedringhaus*, 181 Ill. 426; and *Benne* v. *Miller*, 149 Mo. 228. See also *Schmidt* v. *Supply Co.* (N. J.), 184 Atl. 807.

CONSTITUTIONAL LAW.—INCOME TAX.—A stockholder of the Union Pacific Railroad Company brought a bill in equity to restrain the directors of that company from paying the income tax levied under the authority of an Act of Congress, October 3rd, 1913, alleging in general that the law was unconstitutional. The statute in question was passed by Congress pursuant to the Sixteenth Amendment, which is as follows: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." It was contended that all income taxes must be precisely of the kind authorized by the technical terms of the Amendment, or else be subject to the rule of apportionment; that in effect the Amendment took a certain type of direct taxes and prevented the requirement for apportionment from operating upon them; that when the Amendment authorized a tax upon incomes "from whatever source derived," a classification of incomes is not permitted and an income law which excludes some persons or property does not fall within its terms and therefore such a law remains in the class of direct taxes. It was *held* that the con-

tentions were without foundation. *Brushaber* v. *Union Pacific Railroad Company,* 36 Sup. Ct. 237.

The principal case is the first one decided under the provisions of the Sixteenth Amendment, and is therefore peculiarly important. It cannot intelligently be read without a consideration of the case of *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 129, 39 L. Ed. 759, 15 Sup. Ct. 673; 158 U. S. 601, 39 L. Ed. 1108, 15 Sup. Ct. 912, where it was held that an income tax should be tested by its results, and as the tax finally falls upon the property from which the income was derived, the tax must, in effect, be a tax upon the property itself; insofar as the tax fell upon either real or personal property it was deemed to be direct within the meaning of the Constitution. It thus appears that an income tax was looked upon as direct because the court looked not to the immediate point at which the tax was levied, but to the source upon which it ultimately fell, and falling in the end on real and personal property, it was direct. In the present case the court suggested that, although from the time of the decision in *Hylton* v. *United States,* 3 Dall. 171, 1 L. Ed. 556, direct taxes were deemed to be only those upon real estate and capitation taxes, yet the result reached in the *Pollock* case that a tax on personal estate was also a direct tax, is not attempted to be disturbed by the Amendment. The Amendment goes rather to the rule laid down in that case which requires the court, in determining whether or not a tax is direct, to look to the source from which the income arises rather than merely stopping with the income itself. The Amendment orders the court to look no further than the income itself and to disregard the source from which the income is derived. Income taxes are not by the Amendment taken from the class of direct taxes, but the Amendment prevents the operation of a rule which had removed that type of taxation from the class of excise taxes to that of direct taxes, viz., the rule of looking to the ultimate source.

CONSTITUTIONAL LAW.—POWER OF COMMISSIONER TO PUNISH A WITNESS.—X was appointed commissioner by a New York court to take the testimony of A and B in Ohio for a cause pending in New York. A and B refused to be sworn as witnesses, and X, finding their testimony necessary, ordered them imprisoned for contempt. A and B applied for a writ of habeas corpus, claiming that the Ohio statute authorizing such commitment by a commissioner of a sister state was unconstitutional because it allowed the exercise of judicial power by one not a member of the judicial department of the State of Ohio. *Held,* that the statute was constitutional, since the power conferred on the commissioner to commit to jail for refusing to testify is not judicial in the sense of the Constitution conferring all judicial power upon the courts of the state. *Benckenstein* v. *Schott* (Ohio 1916), 110 N. E. 633.

It is interesting to note that the instant decision is in conflict with the law in New York, so a commissioner appointed in Ohio to take testimony in New York cannot punish for contempt, while if appointed in New York to act in Ohio he may do so. *People ex rel. Macdonald* v. *Leubischer,* 54

N. Y. Supp. 869. The New York court entertains the view that the power of an officer in taking depositions to commit for contempt is judicial in its nature. That the power to punish for contempt can be exercised by non-judicial tribunals and is not judicial in its nature as that word is used in the Constitution is undoubtedly the weight of authority; and the present case is in accordance with the better view. *DeCamp* v. *Archibald,* 50 Oh. St. 618; *Ex parte Jennings,* 60 Oh. St. 319, 54 N. E. 262; *Burtt* v. *Pyle,* 89 Ind. 398; *In re Huron,* 58 Kan. 152; *Ex parte McKee,* 18 Mo. 599; *Coleman* v. *Roberts,* 133 Ala. 323; contra, *Burns* v. *San Francisco Super. Ct.,* 140 Cal. 1.

CONTRACTS—EXCUSE FOR DELAY IN PERFORMANCE.—The Carnegie Steel Company contracted with the United States Government to manufacture armor-plate for the Ordnance Department in accordance with specifications contained in the contract. The contract provided for deductions from contract price for delay, but that some delays might be excused, viz., those which the Chief of Ordnance might determine to have been due to "unavoidable causes, such as fires, storms, labor strikes, actions of the United States, etc." It was found by the Carnegie Company, after it had commenced to manufacture the armor plate, that the process which it had supposed adequate for its production was in fact inadequate, and considerable delay was occasioned in experimenting before the proper process was discovered. The Government deducted for the delay and the Carnegie Company sued to recover the amount deducted, claiming that the cause of delay was "unavoidable" within the meaning of the clause above mentioned. The Goverment demurred to the petition. *Held*: Demurrer should be sustained. The cause of the delay was not one provided for, and was inexcusable. *Carnegie Steel Co.* v. *United States,* 240 U. S. 156, 36 Sup. Ct. 342.

The case is interesting because of the novelty of the contention of the plaintiff that because the ignorance under which it labored as to the inadequacy of the process was an ignorance shared by the whole world, the delay was unavoidable. The argument seems to have been that since this was the first attempt ever made to manufacture this kind of armor plate, and since it was reasonable to assume that the process they expected to use was a sufficient one, they contracted under a mistaken belief which fell within the class provided for as "unavoidable causes." The answer made by the court to this contention is that, though the ignorance was world-wide, it was an ignorance which might have been dispelled by proper experimenting before the contract was entered into, and the cause of delay was therefore avoidable. The rule followed is the well established one laid down in the case of *The Harriman,* 9 Wall. 161, 172, 19 L. Ed. 629, 633, that, "if what is agreed to be done is possible and lawful it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant." The principle is the same as that applied in excuses for non-performance. If the parties have not stipulated that the cause which has operated to prevent performance or to cause delay shall

excuse the delay or non-performance, the court will not interpolate such provision, because to do so would be to make a contract different from that the parties themselves have made. *Ptacek* v. *Pisa*, 231 Ill. 522, 83 N. E. 221, 14 L. R. A. (N. S.) 537; *Anderson* v. *May*, 50 Minn. 280, 36 Am. St. Rep. 642; 6 R. C. L. 997. It was held in *Nordyke & Marmon Co.* v. *Kehlor*, 155 Mo. 643, 56 S. W. 287, that where parties had contracted for the erection of a flour mill of a standard of efficiency which did not exist and could not be obtained, this would excuse performance, notwithstanding the person pleading such facts had the means of discovering the mistake and by diligence might have avoided it. While at first glance it would seem that this case is similar to the principal case, the distinguishing feature is that in the principal case it was possible to produce the product contracted for and the delay was avoidable, while in the *Nordyke* case the impossibility of producing the article contracted for amounted to a mutual mistake of fact which excused performance. Unavoidable cause as used in a contract in much the same connection as in the instant case has been defined to be such a cause as is inevitable and such that no human power can prevent. *City of Mankato* v. *Barber Asphalt Paving Co.*, 142 Fed. 329, 345, 73 C. C. A. 439. It is quite evident that the Carnegie Company fails in the case under consideration for the reason that it cannot show that the cause of delay was such an inevitable one, even though it was not caused through culpable negligence.

CORPORATIONS.—RIGHT OF A COURT TO PASS, OF ITS OWN MOTION, ON THE LEGAL STATUS OF A CORPORATION.—X company instituted a suit against the defendant because of the alleged infringement of certain patent rights. Before trial plaintiff company was allowed to intervene and prosecute the suit in lieu of X company, plaintiff company having just been organized for the purpose of possessing itself of and granting licenses that were owned by X company and two other companies. The object of this combination was to put an end to the numerous infringement suits which were constantly arising between the three companies, each of which disputed the patent rights of the other two. The plaintiff company was organized by five attorneys, who had absolutely no financial interest therein, and who immediately turned over their offices as directors to the representatives of the three companies more directly and vitally interested. *Held*, that the district court, in which the suit was instituted, committed error in deciding, of its own motion, that the plaintiff was not a corporation, and hence had no standing in court. *The Kardo Co.*, substituted for *The American Ball Bearing Co.* v. *Henry J. Adams*, dealing as *Reo Motor Sales Co.*, (C. C. A. 6th, 1916), — Fed. —.

This case is noteworthy, first, because of the exhaustive and comprehensive discussion of the modern doctrine of *de facto* corporations contained therein, and, secondly, because of the jurisdictional question involved. As to this latter point, it might appear that the decision is in direct conflict with the decision in the case of *The Great Southern Fire-Proof Hotel Co.* v. *Jones, et al.*, 177 U. S. 449. A careful examination, however, reveals the

fact that a question of an entirely different character was presented to the court in that case. In the principal case the district court took it upon itself to investigate all the details of the organization of the plaintiff company, in spite of the fact that the declaration alleged that the said company was a corporation duly organized and existing under the laws of Ohio. Such an allegation submitted the question of incorporation and organization as an issuable fact. Furthermore, as the suit pertained to a controversy concerning a patent right, it was one which was cognizable only in the United States courts; and no question of diversity of citizenship was involved. Hence, the declaration set forth a case over which the district court had jurisdiction, and it seems that it should have allowed a trial on the merits. On the other hand, the declaration in *The Fire-Proof Hotel Co.* case disclosed on its face that the plaintiff was a partnership and not a corporation; and, as the jurisdiction of the court depended entirely upon diversity of citizenship, it dismissed the case of its own motion. The plaintiff's own admissions were the sole cause of the action taken by the court. For similar cases see, *Louisville, Cincinnati & Charleston R. Co.* v. *Leston,* 2 How. 497; *Ohio & Miss. R. R. Co.* v. *Wheeler,* 1 Black 286; *Steamship Co.* v. *Tergman,* 106 U. S. 118; *Chapman* v. *Barney,* 129 U. S. 677. In the principal case the district court did not have the benefit of such admissions, and it seems that the circuit court of appeals was correct in its conclusion that the powers of the United States courts have not been extended or enlarged as regards the question raised in *The Fire-Proof Hotel Co.* case by virtue of § 37 of the JUDICIAL CODE (1875), on which the district court based its decision.

CORPORATIONS.—RIGHT OF STATE TO TAX FOREIGN CORPORATIONS FOR PRIVILEGE OF DOING INTRASTATE BUSINESS.—Defendant company, an Ohio corporation, filled orders for its machines, which orders were solicited by its agent in the state of Virginia. As an incident to his duties of soliciting such orders, this agent kept in stock ribbons, repairs, paper, etc., which he sold to customers. Furthermore, he kept machines on exhibit; exchanged new machines for old ones; rented new or used machines whenever the opportunity presented itself; and entered into "repair contracts" with the customers, the company employing a mechanic whose duty it was to make all necessary repairs. All contracts closed and all sales made by the agent were required to be reported to and approved by the home office. *Held,* that the company was engaged in intrastate business and liable to the payment of a statutory fine imposed for failure to pay a license fee. *Dalton Adding Machine Co.* v. *Comm.* (Va. 1916), 88 S. E. 167.

Manufacturing corporations and all other corporations whose business is of a local and domestic nature cannot carry on their business in another state without submitting to whatever conditions precedent the state may see fit to impose. *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Paul* v. *Virginia,* 8 Wall. 168; *Liverpool Ins. Co.* v. *Mass.,* 10 Wall 566; *Cooper Mfg. Co.* v. *Ferguson,* 113 U. S. 727; *Phil. Fire Ass'n.* v. *New York,* 119 U. S. 110. The paramount question in each case, however, calls for an investigation

of the character of the business being transacted by the corporation within the state; if it is interstate in nature, the state must not interfere; but if it is purely intrastate it may prescribe rules and regulations pertaining to it. The court in the principal case took into consideration the sum total of the business which the company was transacting within that state, and it seems that it was clearly justified in adopting this method of investigation. *Kehrer* v. *Stewart,* 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; *Brown* v. *Houston,* 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. 1091; *Armour Packing Co.* v. *Lacy,* 200 U. S. 226, 26 Sup. Ct. 232, 56 L. Ed. 451. Exchanging old machines for new ones and disposing of the former in the state where the contract was made; supplying customers with necessary repairs, ribbons, paper, etc.; and renting or selling within the state, machines rejected by the vendee, are all acts which under certain and particular circumstances might constitute the doing of a domestic business merely incidental to interstate business. *Crutcher* v. *Kentucky,* 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. 851; *Kehrer* v. *Stewart,* 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663. In the principal case, however, it was discovered that the corporation was doing all of these things, and, furthermore, it was actually shipping the supplies into the state where they came to rest and were co-mingled with other commodities of like character being offered for sale by the retail merchants of the state. The action of the court seems to be substantiated by authority. *Brown* v. *Houston,* 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Woodruff* v. *Parham,* 8 Wall. 123, 19 L. Ed. 382; *Austin* v. *Tenn.,* 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; *Leisy* v. *Hardin,* 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128.

COVENANTS.—WHO HAS RIGHT TO ENFORCE.—The owner of four adjacent lots, who also owned other property across the street, conveyed the west end lot to plaintiff Wright, and the east end lot to another party, by deeds containing restrictive covenants. The two middle lots were conveyed to one Garlock subject to restrictive covenants. Garlock conveyed one lot to defendant and the other to plaintiff Beeman and his deeds contained the same covenants as were in the deeds to him from his grantor. The covenants in the different deeds were not identical but were substantially alike in fixing a building line and in requiring that only private residences above a stated cost should be erected on the lots. Plaintiffs seek to enjoin defendant from using her lot for rooming and boarding purposes. *Held*: (three justices dissenting) that plaintiffs had no cause of action, as the covenants were not for the benefit of their lots. *Wright* v. *Pfrimmer* (Neb. 1916), 156 N. W. 1060.

As a general rule, in order to entitle the owner of a lot to enforce the restrictions in a deed under which the defendant claims, but to which he is not a party, he must show that the restriction was inserted to create an easement in favor of his lot, and that the defendant purchased the lot with notice. *Renals* v. *Cowlishaw,* 9 Ch. Div. 125, 11 id. 866; *Sharp* v. *Ropes,* 110 Mass. 381; *Lowell Sav. Inst.* v. *City of Lowell,* 153 Mass. 530; *Equitable Life Assur. Soc.* v. *Brennan,* 148 N. Y. 661. In the principal

case the restriction appeared in the defendant's deed and the question of notice was not raised, but the point was confined to whether the restriction was inserted for the benefit of the plaintiff's lots. Such an intention may appear from the nature of the restriction or from the situation of the property and the surrounding circumstances. *Peck* v. *Conway*, 119 Mass. 546; *Peabody Heights Co.* v. *Wilson*, 82 Md. 186; *Coughlin* v. *Barker*, 46 Mo. App. 54; *Muzzarelli* v. *Hulzhizer*, 163 Pa. St. 643. Such an intention will be presumed if it appears that the lots were laid out to be sold under a general building scheme with the grantor retaining none of the land. *Nottingham Pat. Brick & Tile Co.* v. *Butler*, 16 Q. B. Div. 778; *Parker* v. *Nightingale*, 6 Allen (Mass.) 341; *Spicer* v. *Martin*, 14 App. Cas. 12; *Sharp* v. *Ropes*, supra. In the instant case the court found that there was no general plan or building scheme. The principal case is not the ordinary situation where the owner of a tract of land sells part of it subject to restrictions and the purchaser of the part retained seeks to enforce the restriction, but the land sold subject to the covenants has been divided and sold to different purchasers, some of whom now seek to enforce the restrictions against another. *Winfield* v. *Henning*, 21 N. J. Eq. 188, seems to be the only case allowing the plaintiff to enforce restrictions on such a state of facts. It has been declared to be bad law (*Dana* v. *Wentworth*, 111 Mass. 291), and is probably wrong. According to the weight of authority, there is no cause of action in such a situation. *Dana* v. *Wentworth*, supra; *Jewell* v. *Lee*, 14 Allen (Mass.) 145; *Korn* v. *Campbell*, 192 N. Y. 490; *Graham* v. *Hite*, 93 Ky. 474; *Wille* v. *St. John*, L. R. [1910] 1 Chan. 84.

DIVORCE.—ATTACHMENT OF PERSON FOR COSTS AND ATTORNEY'S FEES.—Suit for divorce by husband against wife was dismissed with counsel fee and costs, and defendant moves to attach petitioner for non-payment. *Held*, counsel fee and costs allowed in a final decree may be enforced by a process of attachment for contempt. *Letts* v. *Letts*, (N. J. Eq. 1916), 96 Atl. 887.

The practice of requiring the husband to provide his wife with means to defend a divorce suit and to support her while it is pending, had its origin in the principle that, at common law, the husband having, by the marriage contract, the control of the wife's property, she was destitute of means for her own protection. The general rule has been modified by state statutes giving to married women property rights, but the quality of the duty upon which it arose is undiminished. *Marker* v. *Marker*, 11 N. J. Eq. 256. This allowance may be enforced by attachment for contempt, or execution, or, when the husband is plaintiff, the court can make the payment a condition to the further prosecution of the suit. *Waters* v. *Waters*, 49 Mo. 385; *Ormsby* v. *Ormsby*, 1 Phila (Pa.) 578. This allowance is in the nature of alimony, and the means open to enforce alimony are available to enforce the order for costs and expenses. "The grounds for these allowances are, indeed, indistinguishable, whether made for support solely or to carry on or defend the suit. Both are equally within the discretion of the chancellor, and subject to his sole power of enforce-

ment." BIDDLE, DIVORCE, 170. In Kentucky the court held that the attorney's fees and other costs ordered to be paid, in divorce proceedings, made abortive by the wife's death, could be enforced in a summary way by attachment and imprisonment. *Ballard* v. *Caperton,* 59 Ky. 412. In New York it is held that the costs of an action for divorce cannot be collected by proceedings to punish for contempt. *Jacquin* v. *Jacquin,* 36 Hun. (N. Y.) 378; *Weil* v. *Weil,* 10 N. Y. Supp. 627; *Branth* v. *Branth,* 13 N. Y. Supp. 360. These cases are all based upon the Civil Code of Procedure of that state, and they appear to be in conflict with the case of *Park* v. *Park,* 80 N. Y. 156, affirming *Park* v. *Park,* 18 Hun. (N. Y.) 466, wherein it is said that the claim that the attachment should be vacated, because it was based upon the refusal of the defendant to pay the costs of the suit, is sufficiently answered by the fact that it was issued for disobedience of the order of the court. In many of the states statutes have been passed permitting the court to enforce the payment of its decrees for alimony, counsel's fees, and costs, by orders and executions, and proceedings as in case of contempt. See *Staples* v. *Staples,* 87 Wis. 592, and note thereto in 24 L. R. A. 433, 439, collecting the statutes and decisions thereunder.

EXECUTORS AND ADMINISTRATORS.—RIGHT OF SET-OFF.—In an action by the administrators of the insolvent estate of the deceased against a bank for the amount of money which the deceased had on deposit to his credit, *Held*: That the bank could set off against this claim the amount of a note of the deceased held by it, although the note had not yet matured. *Conquest* v. *Broadway National Bank* (Tenn. 1916), 183 S. W. 160.

SHANNON'S CODE, § 4137, provides that in cases similar to the principal case, the defendant might plead a set-off of whatever amount is due him from the deceased, in an action by the administrator. But at the time this action was brought there was no amount due from the deceased to the bank. A strict construction of the statute would, therefore, lead to a different result from that reached in the principal case. It is true that the deceased was admittedly insolvent. Now a bank may set off against a deposit the unmatured debts of an insolvent depositor, through an application of the doctrine of equitable set-off. *Nashville Trust Co.* v. *Fourth National Bank,* 91 Tenn. 350, 18 S. W. 822, 15 L. R. A. 710; *Ex parte Howard National Bank,* 16 Nat. Bankr. Reg. 420. This right of the bank has been allowed where it was sued by an assignee for the benefit of creditors when it appeared that the assignor was insolvent. *Fidelity Trust & Safety Vault Co.* v. *The Merchants National Bank,* 90 Ky. 225, 13 S. W. 910, 9 L. R. A. 108; *Demmon* v. *Boylston Bank,* 5 Cush. 194; *New York County National Bank* v. *Massey,* 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380: *Contra, Chipman* v. *Ninth National Bank,* 120 Pa. 86, 13 Atl. 707. The right of the bank has been allowed where the bank has been summoned as a garnishee. *Schuler* v. *Israel,* 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707: *Contra, The Manufacturers' National Bank* v. *Jones* (Pa.), 2 Penny. 377. Should this right of equitable set-off be extended and allowed in a suit by the administrator of the insolvent depositor, in respect to unmatured

debts which the bank holds against the deceased? While the authorities are somewhat in conflict over this extension, and while the precise question involved has seldom been presented, the true rule seems to be that the death of the depositor and the appointment of an administrator makes no difference in the solution of the problem. This conclusion is supported by the following cases, allowing the set off, *Ford* v. *Thornton,* 3 Leigh (Va.) 695; *Knecht* v. *The United States Savings Institute,* 2 Mo. App. 566; *Mathewson* v. *The Strafford Bank,* 45 N. H. 108; *Camden National Bank* v. *Green,* 45 N. J. Eq. 346, 17 Atl. 689; as well as by *Appeal of The Farmers & Mechanics Bank,* 48 Pa. St. 57, which denied the set-off in a similar action. See also *Howze* v. *Davis,* 76 Ala. 381, where it was held that a legatee could not set off a legacy against a suit by an executor for a debt which the legatee owed the testator. In order to bring Tennessee in line with the more numerous decisions and make it accord with the statute involved in the principal case, the court decided that the statute, being declaratory only of the existing law, could not be narrowly construed; and while the statute only deals with matured obligations, it does not deny the right to an equitable set-off of an unmatured obligation against an insolvent estate, a right created by the Court of Chancery before the statutes.

EVIDENCE.—JUDICIAL NOTICE OF MULE'S KICKING PROPENSITY.—In an action for personal injury sustained by being kicked by a mule which he was driving for the defendant, plaintiff recovered a verdict and judgment. When kicked, the plaintiff was in the act of unhooking a "tail-chain" which was near the mule's heels. He struck the mule to make it go forward, as he had been instructed to do. The mule kicked. *Held,* on appeal, in reversing the judgment of the lower court, "The kicking propensity of the mule is a matter of common knowledge and has been the subject of comment from the earliest time. * * * An employee cannot court danger by inviting and provoking a mule to kick him, and then recover of the master for a consequent injury, on the ground that he is a bona fide cripple without notice. * * * It follows that the trial court should have directed a verdict in favor of the defendant." *Consolidation Coal Co.* v. *Pratt* (Ky. App. 1916), 184 S. W. 369.

Twice at least now, the Kentucky Court has held that it will take judicial notice of the traditional kicking propensity of the unfortunate mule. *Tolin* v. *Terrell,* 133 Ky. 210, 117 S. W. 290. The Missouri Court has also held that "the mule is a domestic animal, whose treacherous and vicious nature is so generally known that even courts may take notice of it." *Borden* v. *The Falk Co.,* 97 Mo. App. 566, 71 S. W. 478. Such a tradition there most certainly is, a tradition originally founded upon an actual propensity, but there may well be some doubt as to whether this propensity still exists as a matter of fact so as to be worthy of judicial notice.

EVIDENCE.—REHABILITATION AFTER IMPEACHMENT OF MORAL CHARACTER ON CROSS-EXAMINATION.—Plaintiff, called as a witness in his own behalf, on his cross-examination testified that he had been convicted of forgery and

sentenced to prison. He thereafter offered evidence of his general good reputation in the community in which he lived. This was excluded as incompetent on the ground that his reputation had not been impeached except by cross-examination. *Held,* that the exclusion was erroneous. *Derrick* v. *Wallace* (N. Y. 1916), 112 N. E. 440.

The holding in the instant case establishes the New York rule to be that an admission of conviction on cross-examination impeaches witness's moral character, and permits the calling of other witnesses to give evidence of the general reputation of the impeached witness for the purpose of rehabilitation. The decision is important in view of the fact that there seems to have been some doubt as to what the New York rule really was. The rule as announced in *People* v. *Rector,* 19 Wend. 569, would render admissible the evidence in the instant case. This rule was affirmed in *Carter* v. *People,* 2 Hill 317, and recognized in *People* v. *Hulse,* 3 Hill 309, but held not to be applicable to that case. In *People* v. *Gay,* 7 N. Y. 378, an admission by a witness on cross-examination that he had been admitted to bail on a charge of forgery was held not to render admissible evidence of his general good character. It was there said that *People* v. *Hulse* had in effect overruled the previous decisions of *People* v. *Rector* and *Carter* v. *People,* but this is clearly not the case, as is pointed out in the dissenting opinion of WILLIS, J., in *People* v. *Gay,* at p. 382. The decision in *People* v. *Gay* is in perfect accord with the rule as laid down in the early case of *People* v. *Rector,* nor is it in any way inconsistent with the decision in the instant case. A mere accusation of crime does not impeach one's moral character as does a conviction. There is a clear conflict in the cases as to the rule which should be applied in cases of impeachment of moral character by cross-examination. The authorities on both sides are collected, WIGMORE, § 1106, note. For a later case reviewing the authorities see *First National Bank of Bartlesville* v. *Blakeman,* 19 Okla, 106, 91 Pac. 868, 12 L. R. A. (N. S.) 364.

HUSBAND AND WIFE—LOSS OF CONSORTIUM.—Plaintiff's husband was severel ly injured and crippled for life through the negligence of the defendant. Plaintiff sues for the loss of her husband's society, companionship, affection and assistance caused by the injury. *Held,* (one justice dissenting), that the facts did not constitute a cause of action. *Smith* v. *Nicholas Bldg. Co.* (Ohio 1915), 112 N. E. 204.

At common law the husband had two causes of action for injury to his marital rights in which the loss of consortium formed the gist of the action: (1) Where the defendant alienated the affections of the wife, (*Heermance* v. *James,* 47 Barb. (N. Y.) 120; *Prettyman* v. *Williamson,* 1 Penn. (Del.) 224; *Hartpence* v. *Rodgers,* 143 Mo. 623, 635; *Rudd* v. *Rounds,* 64 Vt. 432; *Ireland* v. *Ward,* 51 Ore. 102); and (2) where the defendant injured the wife by negligent act, (*Guy* v. *Livesay,* Cro. Jac. 501; *Hyatt* v. *Adams,* 16 Mich. 180; *Sanford* v. *Augusta,* 32 Me. 536; *Hopkins* v. *Atlanta & St. Lawrence Ry.,* 36 N. H. 9; *Whitcomb* v. *Barre,* 37 Vt. 148; *Birmingham So. Ry. Co.,* v. *Lintner,* 141 Ala. 420; 3 BLACKSTONE, COM. *139, *140).

The wife had no remedy for the corresponding injuries to her marital rights because of her inferior position and her inability to sue in her own name or to retain her choses in action, PECK, DOM. REL., § 15. Consortium has been defined as the right of the husband and wife, respectively, to the conjugal fellowship, company, co-operation and aid of the other, 1 BOUVIER (3rd ed.) 621. The common law conception of consortium, however, included not only the sentimental element of the husband's right to the companionship, society and affection of his wife, but as well the practical element of his property right to her services in the household. The loss of services formed the gist of the action and constituted an injury capable of estimation in money to which the loss of society, companionship and affection could be added by way of aggravation. *Marri* v. *Stamford Street Ry. Co.*, 84 Conn. 9; *Gregory* v. *Oakland Motor Car Co.*, 181 Mich. 101. It was urged in the instant case that as the wife's common law disabilities had been removed by statute, the right to sue for loss of consortium arising from the negligent injury of her husband should be extended to her. However, the wife's right to her husband's consortium lacks the essential element of a property right to his services. The cases are uniform in denying the wife's right of action upon such facts. *Goldman* v. *Cohen*, 30 Misc. Rep. (N. Y.) 336; *Feneff* v. *N. Y. C. & H. R. Ry. Co.*, 203 Mass. 278; *Stout* v. *Kan. City Term. Ry. Co.*, 172 Mo. App. 113; *Gambino* v. *Mftr.'s Coal & Coke Co.*, 175 Mo. App. 653; *Brown* v. *Kistleman*, 177 Ind. 692; *Patelski* v. *Snyder*, 179 Ill. App. 24; 12 MICH. L. REV. 72. It is true that the modern cases recognize the right of the wife to sue for loss of consortium arising from intentional wrong-doing on the part of the defendant, such as persistently selling a habit-forming drug to the husband (*Flandermeyer* v. *Cooper*, 85 Ohio St. 327) or alienating his affections (*Foot* v. *Card.* 58 Conn. 1; *Rice* v. *Rice*, 104 Mich. 371; *Betser* v. *Betser*, 186 Ill. 537; *Haynes* v. *Nowlin*, 129 Ind. 581; *Bennett* v. *Bennett*, 116 N. Y. 584). However, this class of wrongs strikes directly at the marital relation and the rule has a strong foundation in public policy. Loss of consortium arising from negligent injury seems to be on the defensive as a cause of action, for not only do the courts refuse the wife relief for such a loss, but some jurisdictions are now denying the husband's right to sue for such an injury. *Bulger* v. *Boston Elevated Ry.*, 205 Mass. 420; *Whitcomb* v. *N. Y., N. H. & H. Ry.*, 215 Mass. 440; *Marri* v. *Stamford Street Ry.*, supra; *Blair* v. *Seitner Dry Goods Co.*, 184 Mich. 304; 13 MICH. LAW REV., 704.

INJUNCTION.—RESTRAINING THE LAWFUL ISSUANCE OF MUNICIPAL BONDS.—A town council lawfully voted the issuance of bonds for the construction of a certain public utility, but really intended to devote the funds thus derived to another and unauthorized utility. Complainant, a taxpayer of the town, successfully enjoined the issuance of these bonds upon the theory that a taxpayer may restrain the unlawful disposition of public funds. *Town of Afton et al* v. *Gill.* (Okla. 1916), 156 Pac. 658.

The question presented to the court was whether or not the issuance of

bonds in such case may be enjoined, or whether the remedy is confined to restraining the unlawful disposition of funds after the bonds are issued. It is clear that the issuance of illegal or unauthorized bonds will be restrained (*Hodgman* v. *Chicago & St. P. Ry. Co.,* 20 Minn. 48), and the unlawful disposition of the funds of a municipality will also be enjoined. (*City of El Reno* v. *Cleveland-Trinidad Paving Co.,* 25 Okla. 648, 107 Pac. 163). In the principal case, the court went further and enjoined the lawful issuance of bonds, the funds from which could not be applied to the designated purpose, upon the theory that it was merely a timely interposition of equity to avoid misappropriation of funds. In this connection, see *Bates* v. *City of Hastings,* 145 Mich. 574, 108 N. W. 1005. But where it appears that funds derived from a lawful issue of bonds might be used for the voted purpose, the issuance will not be enjoined, although the officers intend to misappropriate the funds. *City of Tampa* v. *Satomonson,* 35 Fla. 446, 17 So. 581; *State of Kansas ex rel* v. *Clay Center,* 76 Kan. 366, 91 Pac. 91. In the case under discussion, the court did not restrain merely an act within the legal discretion of the town council, but did restrain the issuance of bonds which must necessarily result in an another act outside of the council's legal discretion.

INSURANCE—EFFECT OF CHANGE IN TITLE.—A fire insurance policy on a building under construction in favor of plaintiff lumber company contained the provision that it should be void if any change took place in the interest, title or possession of the subject of insurance. The policy stood in the name of the owner of the building, and to cover plaintiff's interest a rider was attached to the effect that a loss, if any, was payable to plaintiff as its interest might appear. In the policy there was a printed stipulation that, if an interest under the policy should exist in favor of any person having an interest other than the insured, the conditions of insurance relating to such interest, as should be written upon, attached or appended thereto should apply. *Held,* that the conveyance of the building by the owner to his sister shortly before a loss by fire did not relieve insurer of liability to plaintiff, since the stipulation relating to change in title did not apply to the plaintiff where not set out in the rider. *Royal Ins. Co.* v. *Walker Lumber Co.,* (1916 Wyo.) 155 Pac. 1101.

The case is placed on the same ground as if the plaintiff had been a mortgagee and the interest payable to him as such. The earlier cases which have arisen under similar circumstances do not contain the rider, and the interest is made payable in the "loss payable" clause. In these cases the overwhelming weight of authority is that the mortgagee is merely the appointee of the insured and the terms of the policy apply to him equally, so that a breach by the mortgagor avoids payment to the mortgagee. See note in 18 L. R. A. N. S. 197. But when the interest is attached to the policy by means of a rider, a different question arises, that of determining whether the provisions of the policy attach to the interest appearing in the rider, unless specifically attached in the rider itself. The great weight of authority on this point is in accord with the principal case. *Oakland Home Ins. Co.* v.

Bank of Commerce, 47 Neb. 717; *Queen Ins. Co.* v. *Dearborn Sav. L. & B. Ass'n.*, 175 Ill. 115; *Christenson* v. *Fidelity Ins. Co.*, 117 Iowa 77; *Welch* v. *British Am. Assur. Co.*, 148 Cal. 223; *Senor & Munz* v. *Fire Ins. Co.*, 181 Mo. 104; *East* v. *New Orleans Ins. Ass'n.*, 76 Miss. 697; *Edge* v. *St. Paul F. & M. Ins. Co.*, 20 S. D. 190; *Boyd* v. *Thuringia Ins. Co.*, 25 Wash. 447; *Stamey* v. *Royal Exchange Assur. Co.*, 93 Kan. 707. The minority rule follows the earlier cases and holds that the rider has no effect in removing the person named therein from the conditions of the policy, so that the person named there is merely the appointee of the insured. *Brecht* v. *Law Union & Crown Ins. Co.*, 160 Fed. 399; *Del. Ins. Co.* v. *Greer*, 120 Fed, 916; *Franklin Ins. Co.* v. *Wolff*, 23 Ind. App. 556; *Ritchie City Bank* v. *Fireman's Ins. Co.*, 55 W. Va. 261.

LANDLORD AND TENANT—LIABILITY OF ALIEN ENEMY FOR RENT.—Plaintiff leased property in England to defendant, a subject of Austria, for a term of years. Subsequently war broke out between England and Austria, and Austrian subjects were prohibited from residing in a certain district, wherein the leased property was located. In an action for rent brought by the plaintiff, defendant contended that the order prohibiting him from residing in the specified district terminated the tenancy between him and the plaintiff. *Held*, that the relation of landlord and tenant still existed and that defendant was liable for rent. *London and Northern Estates Company* v. *Schlesinger*, [1916] 1 K. B. 20.

The obligation to pay rent may be suspended not only by eviction of the tenant by the landlord but also by eviction by a holder of paramount title. *Home Insurance Co.* v. *Sherman*, 46 N. Y. 370; *Leopold* v. *Judson*, 75 Ill. 536; *George* v. *Putney*, 58 Mass. 351; *Friend* v. *Oil Well Supply Co.*, 165 Pa. 652; *Maxwell* v. *Urban*, 22 Tex. Civ. App. 565. It would seem that the rule holding that tenancy is terminated when the sovereign seizes land under the power of eminent domain might be based upon the theory that the state is a sort of a holder of paramount title. The rule, however, appears to be based on other reasoning. See *O'Brien* v. *Ball*, 119 Mass. 28; *McCardell* v. *Miller*, 22 R. I. 96; *Lodge* v. *Martin*, 31 App. Div. 13; *Corrigan* v. *City of Chicago*, 144 Ill. 537, and *Barclay* v. *Pickles*, 38 Mo. 143. In the principal case there is no eviction by the landlord. However, it might well be contended that the order of the government which prohibited the defendant from occupying the premises amounted to an eviction by a holder of paramount title or that this order amounted in effect to an exercise by the sovereign of the power of eminent domain. In either event it might well be held that the obligation to pay rent was suspended.

MARITIME LIENS—LIQUOR NOT A NECESSITY FOR THE CREW OF A FISHING BOAT.—Claiming under a Federal statute giving a lien for supplies or other necessities furnished to a vessel, libellant sought to establish a maritime lien against a fishing vessel for liquor supplied. Libellant alleged that the crew were Austrians, used to liquor, and would not be shipped without it. *Held*,

the liquors were not supplies or other necessaries within the meaning of the Act. *The Sterling,* 230 Fed. 543.

The court said, "Sufficient food, suitable clothing, proper shelter and such luxuries as contribute to the comfort and convenience of the seamen, are necessaries." Under this statute tobacco has been held to be a necessary on such a vessel. *The Fortuna,* 213 Fed. 285. In holding that tobacco contributes to the comfort of seamen but that liquor does not, the court evidently took judicial notice of the respective effects (and after-effects) of these stimulants upon the user. This would seem to be but a logical extension of the well-settled doctrine that the courts will take judical notice of the intoxicating character of our various beverages. 1 MICH. L. REV. 228; 10 MICH. L. REV. 496. This holding that $75.00 worth of liquor is not necessary for the crew of a fishing vessel is in striking contrast with the holding of the supreme court of Pennsylvania that a legislative committee was authorized to spend $3,000.00 of the state's money for liquor to be consumed by the legislators on a six hour excursion. *Russ* v. *Commonwealth,* 210 Pa. 544, 60 Atl. 169, 3 MICH. L. REV. 554. The court in the principal case further said, "The habits or desires of a particular class of seamen do not fix a criterion by which to measure necessaries. It is the need for the voyage, and not the habits or desires of the seamen, that is contemplated by the Act of Congress." By this the court must have meant the needs for such voyages generally and not the need for this particular voyage, because liquor certainly was needed for this voyage, the crew refusing to ship without it.

MUNICIPAL CORPORATIONS—CHANGE IN ASSESSMENT DISTRICT.—A contract for paving contained a stipulation for completion of the work by November 1, 1913, but a portion of the work was not completed on time and an extension of time was given; while the work was thus unfinished a statute was passed, in terms applicable to all special assessments made after January 1, 1914, which provided that assessment districts should include adjacent property within three hundred feet of the pavement, instead of only abutting property, as under the former statute. The question raised was whether the assessment levied in July, 1914, should be according to this statute or according to the law in force when the contract was let. It was *held,* that the assessment should be levied under the law in force when the contract was made, inasmuch as the legislative intent was not clearly expressed to make the change in the assessment district applicable to existing contracts. *Benshoof* v. *City of Iowa Falls.* (Ia. 1916) 156 N. W. 898.

Upon analysis the reasoning of the majority of the court tends to establish: (1) that it was not the intention of the legislature to have the new statute operate as an enabling statute; and (2) that the legislature could not so change the assessment district, as this would destroy the obligation of contract. Two dissenting judges deny both these propositions. If the intention of the legislature was not to have the new statute operate upon existing contracts, then the majority opinion can be sustained. But the second proposition as stated by the majority opinion is open to serious question. In this case the contractor is not complaining, hence the law affecting the rights

of municipal creditors is not involved. There was due notice given under the new statute by publication as was therein provided, hence the taking of property without due process of law is not involved in this case. The question narrows down to the right which a municipal corporation has in a particular assessment district, under existing law when it contracts for public improvements. In the absence of any statute which defines the municipal right or a statute which bars the effects of repealing laws on existing contracts (*Reed* v. *Bates,* 115 Ky. 437), a municipal corporation has no vested right in any particular revenue or any defined assessment district; but these may be changed, increased or diminished at the discretion of the legislature so long as vested rights of other contracting parties are not impaired: *Blanding* v. *Burr,* 13 Col. 343; *Weeks* v. *Gilmanton,* 60 N. H. 500; *City of Richmond* v. *Richmond & Danville R. R. Co.,* 21 Grat. (Va.) 604; *Hines* v. *City of Leavenworth,* 3 Kan. 186; *Stone* v. *Street Com'rs of Boston,* 192 Mass. 297; *Boston* v. *Water Power Co.,* 194 Mass. 571; *Nelson* v. *Dunn,* 56 Ind. App. 645, 104 N. E. 45; DILLON, MUNICIPAL CORPORATIONS, (5 Ed.) § § 233, 1352, 1377; 8 CYC. 944. Unless the finding of the majority is correct, in regard to the intention of the legislature, the new statute in force when the assessment was levied should be controlling under the circumstances of the principal case.

MUNICIPAL CORPORATIONS—REMOVAL OF OFFICER FOR OFFICIAL MISCONDUCT DURING A PRIOR TERM.—In a proceeding under the OUSTER LAW, misconduct in public office during a prior term was charged against the Mayor of Nashville. These charges included among other things, wanton waste of public money and encroachment on trust funds. The OUSTER LAW (PUB. ACTS 1915, Ch. 11) makes provision for the removal of officers who, "shall knowingly or wilfully misconduct [themselves] in office or who shall knowingly or wilfully neglect to perform any duty enjoined upon such officer by any of the laws of the State of Tennessee." It was *held,* that misconduct in office during a previous term could be proved under the OUSTER LAW. *State ex rel. Timothy* v. *Howse,* (Tenn. 1916) 183 S. W. 510.

The cases in accord with this view are reviewed in the principal case. The weight of authority is against this decision. The following cases hold that misconduct in a prior term of office cannot be shown in ouster proceedings: *People ex rel. Bancroft* v. *Weygant,* 14 Hun. 546; (misconduct in a present as well as in a prior term), *People ex rel. Burby* v. *Common Council,* 85 Hun. 601; *Carlisle* v. *Burke,* 144 N. Y. Supp. 163; (dictum) *State* v. *Jersey City,* 25 N. J. L. 536; *Campbell* v. *Police Comr's,* 71 N. J. L. 98; *Speed* v. *Common Council of the City of Detroit,* 98 Mich. 360; *Commonwealth* v. *Shaver,* 3 Watts & S. 338; *State ex rel. Att. Gen.* v. *Hasty,* 184 Ala. 121; *In re Advisory Opinion to Governor,* 31 Fla. 1; *In re Advisory Opinion to Governor,* 64 Fla. 168; *Thurston* v. *Clark,* 107 Cal. 285; *State ex rel. Schulz* v. *Patton,* 131 Mo. App. 628; DILLON, MUNICIPAL CORPORATIONS, (5 Ed.) § § 471, 475, 477. In several impeachment trials misconduct during a prior term of office was proved: trial of Judge BARNARD, trial of Judge HUBBEL of Wisconsin, and trial of Governor BUTLER of Nebraska. This

subject is reviewed in *State* v. *Hill,* 37 Neb. 80; see also, 2 AMER. POL. SCI. REV. 378. This doctrine has been questioned and it is expressly declared to be against the weight of authority in *State ex rel. Schulz* v. *Patton,* cited above. It is submitted that the rule established in impeachment trials should not be applied to so summary a proceeding as is provided for under the ouster laws. For prior acts impeachment may be had, but no such purpose is expressed by the legislature in modern ouster laws, i. e. to substitute ouster in place of impeachment. Removal of an officer for cause is an incidental power in a municipal corporation, *Rex* v. *Richardson,* 1 Burr. 517. Modern ouster laws provide the necessary machinery for a speedy and summary removal. With this power well defined and so readily adapted to speedy operation, the doctrine that re-election operates to condone past offenses seems to be the better one in that it leaves the choice of officers with the people and the chosen in public service until a just and immediate cause for removal is shown in a present term. The opposite view makes the court the guardian over political qualifications of officers, a matter which the voter is generally competent to decide for himself. Furthermore, removal under the ouster law does not disqualify the offender from re-election or re-appointment, (*State ex rel. Thompson* v. *Crump,* (Tenn. 1916), 183 S. W. 505; *In re Advisory Opinion to Governor,* 31 Fla. 1; *State v. Jersey City,* cited above); hence an ouster for a prior act of misconduct seems more to rob the people of their choice than to secure proper administration of a public office, especially when no misconduct can be charged in a present term.

QUIETING TITLE—CANCELLATION OF VOID INSTRUMENT.—A court in a former suit decreed that the land in question in the present suit belonged to a former grantor of this complainant. Six months later, by a void decree, this same court purported to vest title to this same land in a former grantor of defendant. Each party, with his grantors, has claimed title through recorded deeds for more than sixteen years, but the land, being waste land, has not been occupied by either within the statutory period of limitations relating to adverse possession. A bill was filed in the present suit to remove this void decree as a cloud on complainant's title. It was *held,* upon the facts given in the bill, that the void decree should be cancelled as a cloud on the title. *Stearns Coal and Lumber Co.* v. *Patton* (Tenn. 1916), 184 S. W. 855.

The answer presented the issue whether an instrument which is void on its face or which must necessarily appear void when offered by one claiming under it should be cancelled as a cloud on a title. The general rule (by the great weight of authority) is that a court of equity will not exercise its jurisdiction to remove a cloud in case of such an instrument, for the assumed reason that there is no cloud. *Taylor* v. *Fisk,* 94 Fed. 242; *Parker* v. *Bantwell & Son,* 119 Ala. 297; *Hannibal & St. J. Ry. Co.* v. *Nartoni,* 154 Mo. 142; POMEROY, EQ. JUR. § 1399. The rule adopted by the court in the principal case is that equity has the power to cancel a void instrument whether its character appears from its face or otherwise. For other cases, see *Almony* v. *Hicks,* 3 Head. 40; *Day Company* v. *State,* 68 Tex. 526; *Stevenson* v. *Ryerson,* 6 N. J. Eq. 477. This latter rule is the more reasonable rule, if

not the more logical, because from a business point of view an instrument void on its face is an injury to one's title and depreciates its market value. The question of the running of the statute of limitations was also raised and it was adjudged that it has no application to an action to remove a cloud from title where the owner is not "out of possession" by means of defendant's possession. *Penrose* v. *Doherty,* 70 Ark. 256; *Cameron* v. *Lewis,* 59 Miss. 134; *American Emigrant Co.* v. *Fuller,* 83 Iowa 599; *Combs* v. *Combs,* 30 Ky. Law Rep. 873, 99 S. W. 919. The reason for this inoperation of the statute of limitations is that the cause of action is not the creation of the cloud but its existence. *Shoener* v. *Lissaner,* 107 N. Y. 111. Hence laches will not be imputed to one from a failure to guard against the recording of an invalid deed or instrument purporting a conveyance of his real estate. *Hodges* v. *Wheeler,* 126 Ga. 848.

WATERS—LIABILITY OF WATER COMPANY FOR NEGLIGENCE IN SUPPLYING WATER FOR FIRE PROTECTION.—A water company agreed to furnish water to the inhabitants of the city of Raleigh under a contract made solely with the city. There was a clause in the contract whereby the water company, "Shall hold said city harmless from any and all damages arising from negligence or mismanagement of the said Water Company or its employees in constructing, extending or in operating said works." Damage was caused to private property by fire due to insufficient water pressure in the mains. The plaintiff insurance company paid the loss and in this action seeks subrogation to the property owner's right to sue the water company for its negligence. It was *held,* that a recovery could be had against the water company for its negligence in not keeping sufficient pressure in the water mains to protect private property from loss by fire. *Powell & Powell* v. *Wake Water Co.,* (N. C. 1916), 88 S. E. 426.

The court in the principal case, one judge dissenting, held that the ruling in *Gorrell* v. *Water Co.,* 124 N. C. 328, 46 L. R. A. 513, 70 Am. St. Rep. 598, was applicable. In affirming the individual's right to sue for the negligence of the water company the principal case is in accord with previous cases: *Fisher* v. *Greensboro Water Co.,* 128 N. C. 375, 4 MICH. L. REV. 540; *Jones* v. *Water Co.,* 135 N. C. 553, 47 S. E. 615; *Morton* v. *Water Co.,* 168 N. C. 582, 84 S. E. 1019. See also, 13 HARV. L. REV. 226; 15 *id.* 784; 20 *id.* 242. This subject has been fully discussed pro and contra in this Review: 3 MICH. L. REV. 442, 501; 4 *id.* 540; 5 *id.* 362; 8 *id.* 485.

WILLS—GENERAL AND SPECIFIC LEGACIES.—Testatrix was the owner and in possession of 510 shares of the capital stock of the National Bank of Commerce at the time of her death. By her will she bequeathed to legatees named therein this stock as follows: "Four, I give and bequeath 136 shares of stock of the National Bank of Commerce to Martha," and other gifts in similar language. In an action by appellant as legatee of three hundred and eighteen shares of this stock for dividends paid to the respondents as executors by the Bank of Commerce, *held,* that the legatee took specific legacies of such shares and so was entitled to dividends. *In re Largue's Estate,* (Mo. 1916) 183 S. W. 608.

The respondents contended that the legacies to the appellant called for no particular shares or particular certificates of stock; that each legacy could have been satisfied by the delivery of any share or certificates of the requisite number; that they were in no wise identified or distinguished from the other shares of the same stock and were therefore general, and not specific, legacies. The question as to what are general and what are specific legacies has often been before the courts, both in this country and in England, and the judicial determination thereof has resulted in a well defined split of authority. In ROOD, WILLS, § § 705-6, a specific legacy is defined as a gift of an individual thing, or group of things as distinguished from everything else of the same kind; a general legacy is defined as something given so as not to amount to a bequest of a particular thing as distinguished from all others of the same kind. The question has frequently arisen over gifts of shares of stock. All of the authorities agree that if the will uses such expressions in designating the stock as, "my stock," or similar expressions the legacies will be deemed specific. But it is the omission of such words of designation which gives rise to the conflict of authority. The English courts, followed by a respectable number of American courts, agree that such omission changes the legacy from one which would otherwise be specific to a general legacy. *In re Gray,* 36 Ch. D. 205, 57 L. T. 132; *Tifft* v. *Porter,* 8 N. Y. 516; *In re Snyder,* 217 Pa. St. 71, 66 Atl. 157, 11 L. R. A. (N. S.) 49, 118 Am. St. Rep. 900, 10 Ann. Cas. 488; *Johnson* v. *Goss,* 128 Mass. 433; *Evans* v. *Hunter,* 86 Ia. 413, 53 N. W. 277, 17 L. R. A. 308, 41 Am. St. Rep. 503; *Gilmer's Legatees* v. *Gilmer's Executors,* 42 Ala. 9; *Palmer* v. *Estate of Palmer,* 106 Me. 25, 75 Atl. 130, 19 Ann. Cas. 1184. But on the other hand we find many courts which have in recent years broken away from the arbitrary and hard and fast English rule, and those courts hold that where the will on its face fairly discloses an intention to make a specific bequest, that intention will govern. In this connection see *Jewell* v. *Appolonio,* 75 N. H. 317, 74 Atl. 250; *Ferreck's Estate,* 241 Pa. 340, 88 Atl. 505; *Lewis* v. *Sedgwick,* 223 Ill. 213, 79 N. E. 14; *Gordon* v. *James,* 86 Miss. 746, 39 So. 18, 1 L. R. A. (N. S.) 461; *Thayer* v. *Paulding,* 200 Mass. 98, 85 N. E. 868; *Walters* v. *Hatch,* 181 Mo. 262, 79 S. W. 916, and others. Applying the principle of this latter group of cases, the court in the case under consideration, reached the conclusion that the testator intended to make the legacy specific, thus following what seems to be the trend of modern interpretation.