Michigan Law Review

Volume 23 | Issue 5

1925

RECENT IMPORTANT DECISIONS

RECENT IMPORTANT DECISIONS

APPEAL AND ERROR—TECHNICAL ERROR AS A BASIS FOR REVERSING A CONVICTION.—Criminal proceedings were instituted against the plaintiff in error on a charge of carnal abuse of a minor girl. The record of a prior trial in which the age of the prosecutrix had been mentioned was admitted in evidence over the objection of the counsel for the defense. This evidence was incompetent because none of the parties to the suit were connected in any way with the other proceedings. The ground for alleging error was the admission of this incompetent evidence. *Held,* that this error would be presumed prejudicial in the absence of an affirmative showing to the contrary and the conviction should be reversed. *Doles v. State* (Ark. 1924) 265 S. W. 663.

It is generally accepted in the federal courts that the admission of incompetent evidence on the trial is not a basis for reversal in the absence of a showing of actual prejudice. *Hart v. United States,* 240 Fed. 911; *Simpson v. United States,* 289 Fed. 188. Many of the state courts have adopted a similar rule. *State v. Buralli,* 27 Nev. 41; *Smith v. Territory,* 14 Okla. 162; *Pate v. State,* 15 Okla. Cr. Rep. 90; *State v. Ray,* 32 Idaho 363; *People v. Malley,* 49 Cal. App. 597; *Mucker v. State,* 89 Tex. Cr. Rep. 122; *State v. Washburn,* 116 Wash. 97. Many other states, however, have not favored such a doctrine and have stated the rule to be that which is asserted in the instant case. *Haynes v. Commonwealth,* 104 Va. 854; *Powe v. State* (Ala. App. 1923) 96 So. 370; *Hawkins v. State,* 185 Ind. 147; *Underhill v. State,* 185 Ind. 587; *State v. White,* 81 W. Va. 516; *Gunn v. State,* 78 Fla. 599; *Moon v. State,* 161 Ark. 234. This serves to illustrate a state of confusion existing in the law which is not confined to cases involving the admission of incompetent evidence alone, but which extends to the whole general field of technical and formal error without prejudice to the party concerned. Upon the particular facts of some cases, the technical error may be sufficient of itself to show prejudice. In the instant case, the admission of the incompetent evidence may have been enough to prejudice the plaintiff in error but the court did not rest its decision on that ground; rather, it stated the general rule that such errors shall be presumed prejudicial in every case and a new trial must be granted as a matter of right. The better authorities at present are opposed to this doctrine and the courts and legal writers generally favor the adoption of rules which will do justice without regard to mere technicalities and harmless errors. 17 MICH. L. REV. 406; 21 MICH. L. REV. 584; 22 MICH. L. REV. 591; 23 MICH. L. REV. 402; 1 CAL. L. REV. 536. WIGMORE ON EVIDENCE, ed. 2, sec. 21, says, "we shall some day awake to be convinced that a system of necessary rules of evidence can exist and be obeyed, without affixing indiscriminately to every contravention of them the monstrous penalty of a new trial." The instant case is another example of the persistence with which courts cling to the older theory that error gives a basis for a new trial as a

matter of right in every case and it indicates the unwillingness with which some of the courts view any attempt to alter this practice, no matter how sound the reason may be for doing so.

APPEAL AND ERROR — TECHNICAL ERROR AS A BASIS FOR REVERSING A CRIMINAL CONVICTION.—The defendant participated in a street fight in which deceased was shot and killed. Several shots were fired and it was impossible to ascertain whether the defendant or the partner of the deceased had inflicted the fatal wound in as much as the deceased was between the two fires at the time. It was left to the jury to determine whether there was manslaughter, murder, an assault with intent to commit murder, an assault with intent to commit manslaughter, or no crime at all. The jury returned a conviction as assault with intent to commit manslaughter. The defense appealed. *Held,* that it was error on the part of the court not to have submitted to the jury a charge of assault with intent to do great bodily injury. *State v. Marish* (Iowa 1924) 200 N. W. 5.

One of the most deplorable shortcomings of our present criminal law system is the frequency with which convictions are reversed and the penalty avoided because of some formal or technical error in the record of the case. The instant case is a striking example of the willingness of courts in such cases to render decisions entirely apart from any consideration of the real merits of the prosecution. The result is not in harmony with a modern tendency toward requiring actual prejudice from an error before it can support a reversal. See 22 MICH. L. REV. 591. A provision to this effect is contained in the Iowa Code, sec. 13604, 14010. As a general rule, a finding of fact by the jury is conclusive unless clearly unsupported by the evidence before it. *People v. Jacobs,* 16 Cal. App. 478; *Williams v. State,* 15 Ga. App. 306; *State v. Colletti,* 97 Kan. 364; *State v. Egan,* 84 N. J. L. 701. In the principal case, the jury found as a fact that the defendant had committed an assault with intent to commit manslaughter. But the appellate court seemed to think that the jury might have found a lesser offense had it been included in the charge of the court. Such a conclusion must be predicated upon a doubt as to the honesty of the jury. It presupposes that the jury might have returned a verdict upon insufficient evidence only because it was unwilling to acquit the prisoner. Impliedly, this seems to be an insult to the integrity of the jurors. At least, the court was unwilling to give to the jury that credence which is usually accorded in the absence of evidence clearly indicative of a wrong result. In *Stewart v. United States,* 300 Fed. 769, several misrepresentations were alleged as a basis for an action of fraud. Although part of the allegations were not proved, the jury returned a conviction. On appeal, the court refused to disturb the verdict and held that the jury was competent to pass upon the probative effect of the evidence presented. Since it had found enough to establish fraud to its own satisfaction, that finding was held to be binding on the court. Also, in *Adams v. State,* 165 Ark. 308, the fact that counsel misapprehended on his argument the actual evidence in the case was not a reason for reversing the conviction, because the jury had heard the

evidence and was capable of judging its effect. These cases are in accord with most of the decisions, which concede a reasonable amount of intelligence in the jurors. *Derrick v. State,* 92 Ark. 237; *Poe v. State,* 95 Ark. 172; *People v. Craig,* 152 Cal. 42; *State v. Wren,* 77 N. H. 361; *Williams v. State,* 4 Okla. Cr. Rep. 523. However, a criticism of the instant case is not necessarily confined to a comment on the reflection it casts upon the jury, as the case is not in accord with most of the authorities on its facts. It might have been held that a failure to request the submission of the issues contended for was a waiver of the right to insist on their presentation. *State v. Ewing,* 103 Kan. 399. But whether requested and refused or merely omitted by the court, a failure to submit all lesser crimes is generally held to constitute no prejudicial error when a conviction is reached upon the issues actually submitted. *Clemmons v. State,* 2 Tex. Cr. Rep. 276; *Pool v. State,* 59 Tex. Rep. 482; *State v. Moss,* 216 Mo. 436; *Commonwealth v. Weiner,* 67 Pa. Sup. Ct. 558; *State v. Leete,* 187 Ia. 305; *State v. Davidson,* 108 Kan. 310. For a discussion of assault with intent to commit manslaughter, see WHARTON ON HOMICIDE, ed. 3, sec. 164.

ATTORNEYS—THEIR STATUS AS AFFECTED BY SUSPENSION.—Although suspended from the practice of the law for five years, *held* that the plaintiff was still a member of the legal profession and could claim the benefit of the statute exempting from attachment "tools, apparatus and books" belonging to his profession. *McBrayer v. Cravens, Dargan & Roberts* (Tex. 1924) 265 S. W. 694.

Exemption statutes are to be liberally construed in favor of the debtor. *Life Assurance Society v. Goode,* 101 Ia. 160; *Van Lue v. Wahrlich-Cornett Co.* 12 Cal. App. 749. For the statutes to operate in his favor it is not necessary that the debtor be actually engaged in the pursuit of his profession at the time of the levy. It is sufficient if he has not permanently abandoned his profession, but intends to resume it when the circumstances permit. *Cable v. Hoolihan,* 98 Minn. 143; *Caswell v. Keith,* 78 Mass. 351; *Harris v. Haynes,* 30 Mich. 140. These premises established, the decision in the principal case must depend upon the status of an attorney who has been suspended for a denite period. If suspension is equivalent to disbarment, and carries with it the same results and incidents, the plaintiff could not avail himself of the exemption statute, for disbarment revokes the license to practice law given by the state and takes away all privileges the license had previously granted. *Danforth v. Egan,* 23 S. D. 43; *In re Thatcher,* 83 Oh. St. 246. It is as though he had never been admitted to practice. *State v. Swan,* 60 Kan. 461. But, says the court in *Bradley v. Fisher,* 13 Wall. 335, "A *removal from the bar* should * * * never be decreed where any punishment *less severe*—such as reprimand, temporary *suspension,* or fine—would accomplish the end desired." (The italics are the writer's.) Suspension then would not produce the same result. Under such a judgment he retains his office of attorney but is deprived temporarily of the right to practice his profession. 6 C. J. 614; *State Board of Examiners v. Byrnes,* 97 Minn. 534; *In re Lizotte,* 32 R. I. 385.

Reinstatement proceedings after disbarment are applications for admission to the bar and not applications to vacate the order of disbarment. *In re Cate,* 60 Cal. App. 279. When one has been suspended his license is not extinguished, as in the case of disbarment, but the benefit of it is taken away for the period of suspension and at the end of that time he will be entitled to practice without procuring a new license. *State ex rel. McAllister v. Sanderson,* 280 Mo. 258. It was suggested by the writer in 2 TEX. L. REV. 371 that even in the case of suspension the attorney must apply for reinstatement, but it is believed that the majority of the cases where the suspended attorney is said to apply for reinstatement are instances where he was suspended for a definite time and until the further order of the court, *In re Kone,* 90 Conn. 440; *In re Troy* (R. I. 1922) 118 Atl. 869; *In re Weed,* 30 Mont. 456; or where he seeks to practice before the period of suspension has expired. *In re Sparks,* 32 Oh. Cir. Ct. 674; *Bar Assn. of San Francisco v. Cantrell,* 53 Cal. App. 758. It is submitted that the principal case enunciates the true effect of suspension. Of course, during such period the attorney cannot hold himself out to the public as a practicing attorney, and any exercise of the function of an attorney would be in contempt of the suspension order. *State v. Richardson,* 125 La. 644; *In re Lizotte, supra; State v. Marron, 22* N. M. 632.

BANKS AND BANKING—CERTIFIED CHECKS—ORDER BY DRAWER TO STOP PAYMENT.—The drawer procured certification of his check by the defendant bank. After delivery to the payee he ordered the bank to stop payment. *Held,* that if the check is certified at the drawer's request before delivery, he may stop payment if payee is not a bona fide holder for value but has obtained the check by fraud, and he has the same right against the indorsee holder, if the latter is not a holder in due course, as he has against the payee, and the bank against whom such payee brings action for refusing to pay has the same defenses the drawer would have had against the payee. *Sutter v. Security Trust Co.* (N. J. 1924) 126 Atl. 435.

Upon certification, it is the recognized banking practice to charge the drawer's account with the amount of the check and enter that amount to the credit of the certified check. *Merchants' Bank v. State Bank,* 10 Wall. (U. S.) 604. Courts and text writers are agreed that if the bank certifies at the request of the payee or holder, it operates to discharge the drawer and makes the bank directly liable as debtor to the payee or holder. N. I. L. § 187, 8; MORSE, BANKS AND BANKING, 5th ed., § 414 *et seq.; Natl. Commercial Bank v. Miller & Co.* 77 Ala. 168; *Freund v. Importers' & Traders' Natl. Bank,* 76 N. Y. 352. And it seems as fully agreed that if the certification takes place before the delivery at the request of the drawer, the latter is not discharged, the bank merely adding its credit to that of the drawer. *Born v. First Nat. Bank of Indianapolis,* 123 Ind. 78; *Minot v. Russ,* 156 Mass. 458; *Blake v. Hamilton Dime Sav. Bank,* 79 Ohio St. 189. The reason for this distinction seems to be that the payee could have payment at the time of the certification and if he elects not to receive payment then but chooses instead to have it certified, he is in effect depositing the check and receiving a certificate of deposit

in exchange. 2 DANIELS, NEG. INST., ed. 6, § 1603; *Times Square Auto Co. v. Rutherford Nat. Bank,* 77 N. J. L. 649. Whether the distinction is objectionable, as the writer in 6 HARV. L. REV. 138 strongly insists, or not the fact remains that it almost universally followed. Has this element of discharge any effect on the drawer's right to stop payment? The cases leave no doubt but that if the check is certified at the procurement of the payee, the drawer has no right to stop payment. Note, 16 AM. & ENG. ANN. CAS. 213; *Meridian Nat. Bank v. Nat. Bank of Shelbyville,* 7 Ind. App. 322. The same rule has been applied where certification was at the request of the drawer. *Poess v. Twelfth Ward Bank,* 86 N. Y. S. 857; *Merchants & Planters Bank v. New First Nat. Bank,* 116 Ark. 1. But in both of these cases, the holder against whom payment was refused were holders in due course. As pointed out in 22 MICH. L. REV. 367, commenting on the decision in the principal case handed down in 95 N. J. Eq. 44, the principal case seems the first direct adjudication on the situation where the presenting holder is not one in due course. Like dicta were present in *Times Auto Square Co. v. Rutherford Nat. Bank, supra,* and inference of some such distinction might be gathered from the *Poess* case, *supra,* and from *Trust & Safe Deposit Co. v. White,* 206 Pa. St. 611. The principal case does not stand for the broad proposition that when the drawer procures certification, he may stop payment against all. It is limited to a payee who obtains the check through fraud, duress, etc., and to those who are not holders in due course. Since the drawer is not discharged from liability when the check is certified at his request, it is submitted that the doctrine of the principal case, restricted as it is, is not unreasonable or illogical.

BANKS AND BANKING — SPECIFIC DEPOSITS — PRIORITY IN GARNISHMENT PROCEEDINGS.—Defendant P deposited a draft and check with the defendant bank for the expressed specific purpose of meeting certain checks outstanding and directed the bank to charge the account at once with such checks, regardless of when presented. The bank's officer gave P a deposit slip for same but told P that no checks would be cashed until the proceeds were received from the draft and the check. The proceeds were received on the 24th and at that time credited to P's special account but notice of garnishment had been served on the bank on the 23d. *Held,* that P's intent was to make a special deposit; that he had done all in his power to create one for the specific purpose, and that it was actually made when P made his deposit so that the garnishing creditor had no greater right than P, who had none as against the check holder. *First Nat. Bank of Cherokee v. Propp,* (Ia. 1924) 200 N. W. 428.

Although the cases talk indiscriminately of special deposits and include therein both special and specific deposits, they are distinct and different. Both arise and derive their qualities from the contract entered into between the bank and the depositor. A special deposit leaves the title in the depositor with the resulting relation of bailor and bailee, and the identical subject matter of the bailment is to be returned at the end of the bailment period to the bailor. *Fogg v. Tyler,* 109 Me. 109; *Butcher v. Butler,* 134 Mo. App. 61; MORSE,

BANKS AND BANKING, ed. 5, sec. 183. As to the legal effect of the specific deposit, where the fund is deposited for a specific purpose, *e. g.*, the payment of checks or of notes, the answer is not so clear. Three possibilities occur according to a writer in 6 MINN. L. REV. 306. The deposit may result in an agency relation, a contract for the benefit of a third party, or a trust. Many courts have held it to be a trust fund. *People v. City of Rochester*, 96 N. Y. 32; *Morton v. Woolery*, 48 N. D. 1132; *Woodhouse v. Crandall*, 197 Ill. 104. If the fund were to be kept intact, there would be no objection to this view since there would be a definite trust *res*. But the practice is to mingle the funds and not to use he idenical fund deposied to carry out the designated purpose, and of this the depositor is aware. This practice takes away any definite trust *res* and would seem an effective stumbling block to the trust theory. 16 HARV. L. REV. 228; 6 MINN. L. REV. 306. Sometimes the courts seemed to have overlooked this, *Massey v. Fisher*, 62 Fed. 958; or to have held that a mingling does not destroy the trust, *Mitchell v. Bank of Indianola*, 98 Miss. 658; or that the fund was to have been kept intact, although no express understanding as to this, and that the trust could not be destroyed by mingling, the depositor being unaware thereof, *Woodhouse v. Crandall, supra*. Possible ways out have been suggested. One is to say that the depositor and the bank are tenants in common of the commingled funds, using as an analogy confusion in grain cases. 6 MINN. L. REV. 306. Or that it is a trust with authority to mingle. Other courts have held that if there is a mingling, there is not a trust fund but a general deposit with relation of debtor or creditor. *Butcher v. Butler, supra; Mutual Accident Assn. v. Jacobs*, 141 Ill. 261; *Kuehne v. Union Trust Co.* 133 Mich. 602. Many courts have spelled a trust fund from the fiduciary relationship of principal and agent. *Peak v. Ellicott*, 30 Kan. 156; *Star Cutter Co. v. Smith*, 37 Ill. App. 212. See *Marvin v. Brooks*, 94 N. Y. 71. But it is obvious that agency and trust are two different relationships. BOGERT, TRUSTS, p. 33. The same tendency to spell out a trust fund is sometimes attempted where a bailment relationship is held to exist. *McBride v. American Ry. & Lighting Co.* 60 Tex. Civ. App. 226. It has been held by several courts that a deposit for a specific purpose is not a trust but creates a contractual obligation to pay in a certain manner or for the benefit of third parties. *First Nat. Bank v. Higbee*, 109 Pa. St. 130; *Mayer v. Chattahoochee Bank*, 51 Ga. 325; *Dolph v. Cross*, 153 Ia. 289. MORSE, BANKS AND BANKING, sec. 185, 207 *et seq.* See also the note by AMES in SCOTT, CASES ON TRUST, 80. These last two cases cited were ones in which the question of priority between the garnishing creditor and the payee of the check arose. Diametrically opposed results were reached, the Iowa case favoring the payee and the Georgia case the garnishing creditor. The suggestion is offered in the note in 43 L. R. A. (N. S.) 100 that the payee is preferred in those states where the delivery of a check operates as an equitable assignment *pro tanto* in the hands of the drawee. But the principal case expressly disavows putting its decision on such a ground and rests it upon the nature of the deposit. The true ground for the Iowa decisions is that expressed in *Iowa Mut. Liability Ins. Co. v. De La Hunt*, (Ia. 1923) 196 N. W. 17, that the lien of the garnishing creditor

attaches only to the depositor's interest, which is subordinate to the agreement between himself and the bank. This would seem to say that the contract entered into by the depositor was irrevocable and vested at once a right in the beneficiary. That, however, is not in accord with authority for until the beneficiary assents to the contract, it may be modified or annulled and the beneficiary's right defeated. See Ames' note referred to above. It is therefore submitted that the decision in the *Mayer* case, giving preference to the garnishing creditor, is the sound view to take under this theory of the specific deposit. It would then seem that we must accept this conclusion or take the alternative one of calling the deposit a trust and not requiring a definite trust *res,* if we wish to protect the deposit from garnishment proceedings.

CONFLICT OF LAWS — JURISDICTION — GARNISHMENT. — The plaintiff sued out a writ of garnishment in an Arizona court against the Southern Pacific Railroad Company of Mexico, a foreign corporation, in order to reach a debt that the railroad company owed to the defendant, a resident of Mexico, for wages earned in Mexico, in order to apply the proceeds on a judgment obtained by the plaintiff against the defendant in the courts of Arizona. The garnishee maintained offices and was doing business within the state of Arizona so as to be within the jurisdiction of Arizona courts and subject to process there. The garnishee admitted the debt was due to the defendant but claimed that payment by order of the Arizona court would not be recognized by the courts of Mexico as a defense to a suit brought by the defendant-creditor against the garnishee in Mexico and offered evidence by an expert to prove this fact. *Held,* that the garnishee ought not to be compelled to pay such a debt to an Arizona creditor when it was not only possible, but probable that it would have to pay the debt again. *Weitzel v. Weitzel* (*Southern Pac. R. Co. of Mexico, Garnishee*) (Ariz. 1924) 230 Pac. 1106.

Garnishment is usually regarded as a proceeding *in rem* or *quasi in rem* against the thing or property of the absentee debtor in the hands of the garnishee to apply the property to a debt owed by the defendant to the plaintiff. Being a proceeding *in rem* the court has jurisdiction only where it has control over the chattel or property of the debtor. Thus jurisdiction to garnish tangible property is only conferred by the physical presence of the property within the jurisdiction of the court. *Western R. R. Co. v. Thornton and Acee,* 60 Ga. 300; *Montrose Pickle Co. v. Dodson and Hills Manufacturing Co.,* 76 Ia. 172. The source of jurisdiction in cases involving the garnishment of intangible property such as a debt has presented a question resulting in great confusion. Intangibles obviously have no situs in the sense that they are physically present at any place. A debt is a relation between two parties and there being no tangible property upon which a court can base a proceeding *in rem* it would seem that in order to garnish a debt both the garnishee and the principal defendant should be within the jurisdiction of the court issuing the writ. In the case of tangible property it is only because of the court's power over the property of the absent principal defendant that its judgments are binding upon him. In the case of a debt the court in the nature of things can not

have control over the debt when it has jurisdiction over only one of the parties to the relation. It is argued that this control is present where a court has jurisdiction over the person of the debtor. Therefore even in case of intangible property in a proceeding where the court merely has jurisdiction over the person of the debtor the proceeding is *in rem*. See CARPENTER, "JURISDICTION OVER DEBTS," 31 HARV. L. REV. 905. This is erroneous, first, because in such a case the control of the debt is only partial, and secondly, because in a proceeding *in rem* it is through jurisdiction of the property that the court controls the person, while here it is through jurisdiction of the person that the court controls the property. However it is held that a court has jurisdiction at the domicile of the garnishee even though the principal defendant is beyond the jurisdiction of the court. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710. The court went further in *Harris v. Balk*, 198 U. S. 215, and held that a court has jurisdiction wherever it can reach the garnishee-debtor. Failure to recognize a judgment so rendered is a denial of full faith and credit under the federal Constitution. *Harris v. Balk, supra*. The force of this decision has caused this test as to jurisdiction to be adopted generally. *Bristol v. Brent*, 38 Utah 58; *Wright v. Railroad*, 141 N. C. 164; see note to *Starkey v. Cleveland, C. C. & St. L. Ry. Co.* 114 Minn. 27, L. R. A. 1915 F, 880. Among the objections that have been advanced to the doctrine of *Harris v. Balk, supra*, is that the garnishee would not be protected against a suit by the principal defendant against the garnishee in another jurisdiction. Obviously under the full faith and credit clause this objection has no weight as applied to suits brought within the United States. The principal case presents a situation wherein the objection has particular force for the Mexican courts are not bound by our federal Constitution. The defense allowed in the principal case may not be logical, owing no doubt to the fact that the doctrine of *Harris v. Balk* is not logical, but it undoubtedly reaches a just result and takes most of the force out of the objection referred to above. For a more complete discussion and citation of authority see Beale, "The Exercise of Jurisdiction in Rem to Compel Payment of a Debt," 27 HARV. L. REV. 107.

EQUITY—PARTIAL SPECIFIC PERFORMANCE WITH ABATEMENT—CONSTRUCTIVE NOTICE OF DEFECT IN TITLE.—The plaintiff contracted to purchase a tract of land from the defendant, making a down payment of $1,000. At the time of performance it appeared that there was an outstanding right of way across the land of which the purchaser had no actual notice at the time of entering the contract, although the defect appeared in the record of title. The vendee, upon learning of this, refused to pay the full contract price, and upon the vendor's refusal to convey, filed his bill for specific performance with abatement for the defect. *Held*, the plaintiff was charged with constructive notice of the defect which appeared on the record, and hence, was entitled only to specific performance without abatement of the purchase price; otherwise, he was left to his action at law to recover back his down payment. *Maturi v. Fay*, (N. J. Ch. 1924) 126 Atl. 170.

When, in a contract for the sale of land, there is a defect in the vendor's

title, the purchaser is, as a general rule, entitled to specific performance with a *pro rata* abatement in the purchase price to offset the defect. *Wellington Realty Co. v. Gilbert,* 24 Colo. App. 118; *Nelson v. Gibe,* 162 Mich. 410; *Lathrop v. Columbia Collieries,* 70 W. Va. 58; see cases collected in 10 L. R. A. (N. S.) 117; 1 AMES, CASES IN EQUITY JURISDICTION, p. 251. An exception arises, however, where the purchaser, at the time of entering the contract, had notice of the defect, it being well settled that in such cases he is not entitled to specific performance unless he is willing to pay the entire contract price. *Knox v. Spratt,* 23 Fla. 64; *Peeler v. Levy,* 26 N. J. Eq. 330; *Lucas v. Scott,* 41 Ohio St. 636. In only a few jurisdictions, however, has the vendee been charged with constructive notice of a defect in title so as to defeat his right to abatement of the purchase price. The English courts charged the vendee with notice of an outstanding leasehold from mere possession by the tenant, *James v. Lichfield,* L. R. 9 Eq. 51; *Carroll v. Keayes,* Ir. Rep. 8 Eq. 97, and although this rule was disapproved by dictum in *Caballero v. Henty,* 9 Ch. App. 447, it has been adopted in Illinois. *Franz v. Orton,* 75 Ill. 100. The principal case goes a step farther and bars the vendee's right to specific performance with abatement, by constructive notice from record. It seems that the rule refusing partial specific performance with abatement in case of actual notice is justified in that actual notice does reduce the equity of the vendee, not that it shows bad faith, but rather that it shows he was willing to take his chances. But as applied to constructive notice, there is nothing to show that the vendee, entering the contract in good faith, was willing to take a chance. There was nothing unconscionable in his acts. And since the reason for the rule fails in such a case, it seems the rule itself should be inapplicable. This position is further strengthened as regards constructive notice from record by the fact that most land contracts are entered into before the record of title has been examined. The result of the principal case would seem to require the vendor to furnish an abstract of title, and the vendee to hire counsel to examine such abstract before the contract of sale is entered into. It is submitted that such a rule is not only without reason or justification, but if generally adopted, would be a serious impediment to the sale and exchange of real estate. It may also be noted that the principal case, and those as well which deal with notice by possession, go beyond the purpose of the doctrine of constructive notice. That purpose is to regulate the rights *inter se* of prior owners (of various interests or estates) and subsequent purchasers (of various interests or estates). Therefore, the effect of the doctrine should be merely this,—that when the subsequent purchaser is charged with notice of the prior owner's rights, he cannot claim the position of bona fine purchaser as against the prior owner. Such notice should not affect his rights or remedies as against third persons. See 22 MICH. L. REV. 405.

EVIDENCE—DOCUMENTS—CARBON COPY ADMISSIBLE AS DUPLICATE ORIGINAL.—In a suit against the surety on an administrator's bond, the plaintiff offered in evidence a carbon copy of a letter written by an attorney in Georgia to the defendant in Maryland. The attorney testified that he wrote the letter,

that he properly stamped, addressed, and mailed the letter to the defendant, that he kept a carbon copy which was the one offered in evidence. There was no evidence to show where the original letter was, nor any notice to the defendant to produce it. *Held,* the carbon copy was admissible in evidence. *Maryland Casualty Co. v. Simmons,* 2 F. (2d.) 29.

Where the contents of a written document are sought to be introduced in evidence, the original document must be produced or the failure to produce it satisfactorily explained before secondary evidence will be admissible to prove the contents of the instrument. The quetsion presented in the principal case is not concerned with what facts will constitute a valid excuse for the non-production of the original, but rather with the question as to what is the original document whose production will satisfy the rule. For a discussion of the former problem see 2 WIGMORE ON EVIDENCE, 2nd ed., sec. 1192 ff. Where an order was written, a carbon duplicate being made at the same time, by the same acts, the carbon copy was held to be admissible as a duplicate original. *International Harvester Co. v. Elfstrom,* 101 Minn. 263, 12 L. R. A. (N. S.) 343. In this latter case the two documents were identical, both being signed. It does not appear that the carbon copy in the principal case was signed; however this should not be material. *Goodman v. Saperstein,* 115 Md. 678. Where written notices were prepared at the same time and were all alike except that each was addressed to a different party it was held that they were duplicate originals. *Gardner v. Eberhart,* 82 Ill. 316; *Westbrook v. Fulton,* 79 Ala. 510. In *Federal Union Surety Co. v. Indiana Lumber and Manufacturing Co.* 176 Ind. 328, it was held that three memorandum slips made at the same time on an autographic register were duplicate originals. Bills of lading made in triplicate by means of carbon impression paper are duplicate originals. *Wilkes v. Coal Co.* 95 Kan. 493. If a carbon copy is made at the same time a letter is written and is retained by the writer it is admissible in evidence as a duplicate original. *Ches. & O. R. Co. v. Stock,* 104 Va. 97. Generally letter press copies and photographic copies are not regarded as duplicate originals. *Menasha Wooden Ware Co. v. Harmon,* 128 Wis. 177; *Eborn v. Zimpelman,* 47 Tex. 503. The distinction between the latter class of cases and the ones involving carbon copies is a practical one. Courts regard the latter two processes as ones mose apt to produce copies which are not true. For a further discussion and reference to other cases in point see 10 MICH. L. REV. 495.

EVIDENCE—PRIMA FACIE CASE—INJURY TO BAILED GOODS.—In an action for damages against a bailee for injury to bailed goods, the bailor merely alleged that the goods were deposited with the defendant in good condition, and were returned in a damaged condition. *Held,* such facts established a *prima facie* case of negligence. *Merchants' Southwest Transfer & Storage Co. v. Campbell,* (Okla. 1924) 229 Pac. 542.

The action against a bailee for damage done to bailed goods, while in his possession, is based on negligence. DOBIE, ON BAILMENTS AND CARRIERS, sec. 16. The old rule is that the bailor must allege and prove negligence before a cause of action is established. *James v. Orrell,* 68 Ark. 284; *Beller v.*

Schultz, 44 Mich. 529. In the experience of mankind, damage to goods in the exclusive control of the bailee generally occurs through lack of due care. Courts have recognized this "experience of mankind" and as a result infer negligence from proof of damage, in this situation. DOBIE ON BAILMENTS AND CARRIERS, sec. 17; *The Genessee,* 138 Fed. 549. The prevailing view is, that by alleging and proving damage to goods while in the bailee's possession, a presumption of negligence in the bailee arises, and the bailor has thereby established a *prima facie* case. *Jackson v. McDonald,* 70 N. J. L. 594; *Hunter v. Ricke Bros.* 127 Ia. 108; *Dixon v. McDonnell,* 92 Mo. App. 479; *Davis v. Tribune Job-Printing Co.* 70 Minn. 95.

EVIDENCE—PRIOR ACTS OF THE ACCUSED ADMISSIBLE TO SHOW MOTIVE.—The defendant, a night clerk at a hotel, was charged with murder of one of the guests, committed, according to the theory of the state, to prevent the victim from telling of a rape perpetrated on her earlier in the evening. The evidence was entirely circumstantial. The statement of the defendant, made subsequent to his arrest, to the effect that prior to the murder he had held sexual intercourse with other guests at the hotel, was admitted in evidence *Held,* such evidence was admissible as tending to show motive for the offence charged. *State v. Gummer,* (N. D. 1924) 200 N. W. 20.

As a general rule, evidence of other crimes by the accused in a criminal case is inadmissible, either to show guilt of the offense charged, or to establish an entirely independent crime, *Fish v. United States,* 132 C. C. A. 56; *State v. Meisner,* 311 Ill. 40; *People v. Grutz,* 212 N. Y. 72; *Ayres v. State.* 95 Tex. Crim. Rep. 334, the theory being, not that such evidence is immaterial, but rather that the prejudicial effect outweighs the probative value. (As to the effect of wrongfully admitting such evidence, see 10 MICH. L. REV. 60, 326.) An exception to this rule arises whenever the evidence offered tends to prove the identity, *Morse v. Commonwealth,* 129 Ky. 294, guilty intent, *State v. Hight,* 150 N. C. 817; 7 MICH. L. REV. 262, or motive of the accused, *Peoplè v. Argentos,* 156 Cal. 720; *Miller v. State,* 9 Okl. Crim. Rep. 255; *State v. Legg,* 59 W. Va. 315. In such cases, it seems well settled that the evidence is admissible. In fact, "evidence which tends in any way to show the motive of the accused, or will fairly tend to explain his actions, should be admitted. The test of admissibility of evidence in connection with the crime charged is whether the offered testimony tends to show directly whether the accused is guilty of the crime charged." *People v. Strause,* 290 Ill. 259, 22 A. L. R. 235. In spite of the fact that this point is well settled, few points have been made more often the basis of review. This is due, in all probability, to the difficulty in distinguishing between the different purposes for which the same evidence is admissible. The court in the principal case, attempted to make such a distinction, the theory being that the rape which had been committed on the deceased was the motive for the murder, that the relation of the defendant with other guests at the hotel prior to the murder tended to establish that he was the perpetrator of the rape, and in this manner show his motive for the crime of which he was accused. But was not

the court thus allowing evidence of one wrongful act by the accused to establish his guilt of another wrongful act, in direct contravention of the general rule? The fact that the offence attempted to be established (the rape) was a step removed from the crime charged (the murder) should not justify any deviation from the general rule. There is no doubt that evidence that the defendant committed the rape would be admissible to show motive for the crime charged. But it is respectfully submitted that evidence of prior sexual relations of the defendant to establish his guilt of rape on the deceased, falls within the general rule and should be excluded. For a full discussion of the problem, see WIGMORE ON EVIDENCE, 2d ed., sec. 216.

EVIDENCE—UNCORROBORATED TESTIMONY OF AN ACCOMPLICE—WHEN RULE IS APPLICABLE.—The defendant was indicted and convicted for incest with his thirteen year old daughter. The conviction rested upon the sole testimony of his daughter and there was no corroboration of any material fact given in evidence by any other witness. An Alabama statute provides that, "A conviction of a felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence if it merely shows the commission of the offense, or the circumstances thereof, is not sufficient." Ala. Code 1907, § 7897. Defendant appealed on the ground that the daughter was an accomplice. *Held,* that the uncorroborated evidence of the daughter was sufficient to sustain the conviction. *Duncan v. State* (Ala. 1924) 101 So. 472.

At common law a cautionary practice grew up of advising the jury as to the credibility of the uncorroborated testimony of an accomplice. The type of statute quoted above turns this practice into a rule of law which on principle is not suited to all cases, the credibility of a witness depending upon his particular character, demeanor, and behavior. For a discussion concerning the policy of the rule see 4 WIGMORE ON EVIDENCE, 2nd ed., § 2057. In order to escape the force of the rule courts have adopted rather technical arguments for the conclusion that a witness is not an accomplice. Thus the thief in selling stolen property is not an accomplice to the crime of receiving stolen property, *Bailey v. State,* 76 Fla. 103, the case being discussed in 17 MICH. L. REV. 273; the participants in an unlawful game of cards are not accomplices of one another, *Commonwealth v. Bossie,* 100 Ky. 151. The reasoning of the above type of case is that the crimes of the witness and the defendant are separate and distinct. A broader definition is given in *State v. Case,* 61 Ore. 265, where it is said that an accomplice is one "who is concerned in the commission of a felony." See also *People v. Coffey,* 161 Cal. 433. It is generally admitted that in incest or adultery cases the woman may be an accomplice in the crime. *Knowles v. State,* 113 Ark. 257; *People v. Stratton,* 141 Cal. 604. However where intercourse is had against the will of the woman by means of force, fraud, or undue influence she is not an accomplice. *Gaston v. State,* 95 Ark. 233; *State v. Kouhns,* 103 Ia. 720. Likewise where the woman is below the legal age of consent in sexual crimes she is not an accomplice.

State v. Pelser, 182 Ia. 1; *State v. Goodsell,* 138 Ia. 504; *Whittaker v. Commonwealth,* 95 Ky. 632; *Craig v. Comonwealth,* 190 Ky. 198. The principal case is thus in accord with the prevailing view as to when the woman is an accomplice in incest cases. An interesting aspect of the problem of the application of the rule is presented by cases where the question of whether the witness is an accomplice is left to the jury. As a practical matter this practice makes the rule merely advisory. In *People v. Patterson,* 102 Cal. 239, the court referring to an objection that the witness was an accomplice said, "The jurors saw the witness, and heard her tell her story, and were in a better position than we are to determine whether she was worthy of belief or not." See also *State v. Stalker,* 169 Ia. 396, where the question of whether a witness had sufficient mental capacity to harbor the criminal intent necessary to be an accomplice was left to the jury.

EVIDENCE — USE OF EVIDENCE ILLEGALLY OBTAINED — PRIVILEGE AGAINST SELF INCRIMINATION. — Defendant was accused of attempting to administer poison to an unfriendly neighbor by sprinkling paris green on the turnip leaves in the latter's garden. The sheriff compelled the accused to go with him to the garden and when she refused to place her shoe in tracks found about the garden, she was made to sit down and take off her shoe which the sheriff then fitted into the tracks. This and the result of the experiment were admitted in evidence and the defendant appealed. *Held,* testimony of the sheriff as to the comparing of the shoe with the tracks was not unlawfully obtained, and even though it had been unlawfully secured would have been properly admitted, but testimony as to the defendant's conduct in refusing to put her foot in the track was improper as compelling the defendant to testify against herself and should have been excluded. *State v. Griffin* (S. C. 1924) 124 S. E. 81.

The opinion of Cothran, J., presents a very excellent analysis of the problem and leaves little to be added. The difficulty of the problem lies in the fact that it involves two distinct questions: the matter of self incrimination, and the matter of the admissibility of evidence illegally secured. The general rule is that evidence which would have been otherwise admissible is not rendered inadmissible because of the method in which it was secured. 4 WIGMORE ON EVIDENCE, 2d. ed. sec. 2183; *People v. Swaile,* 12 Cal. App. 192. The federal courts however have been loathe to admit evidence which was secured through unlawful search and seizure. *Weeks v. United States,* 232 U. S. 383. Wigmore refers to this doctrine of the federal courts as a logical absurdity based on error and sentimentality. This phase of the subject is ably dealt with in 15 MICH. L. REV. 65; 17 id. 273, 19 id. 355. Assuming then that evidence otherwise admissible will be allowed regardless of how reprehensible the manner of its procurement, the question becomes whether it would have been otherwise admissible, and in order so to be, it must not violate the established rule against compelling a witness to incriminate himself. This privilege against self crimination extends to acts and exhibitions or inspections as well as to words, and to all sorts of investigations as well as to hearing before the court. *Counselman v. Hitchcock,* 142 U. S. 547. In the instant case the

sheriff attempted to compel the defendant to put her foot in incriminating tracks, which she refused to do. This evidence was held inadmissible as compelling the witness to give incriminating testimony against herself. The sheriff then forced her to take off her shoe and he fitted it into the tracks. This evidence was held admissible on the ground that it was lawfully secured and that even though unlawfully secured it would still be admissible, for it did not amount to compelling the defendant to testify against herself. As the court points out the test, or line of cleavage, is whether the proposed evidence is the testimony of the defendant or is evidence in itself unaided by any statement or act of the defendant. This case is a very good illustration of the fine distinction which is drawn. Where the accused is compelled to put her foot in the incriminating tracks, the evidence is inadmissible. But where she is forced to take off her shoe and the officer then puts it in the track and makes the comparison, he is free to testify to the experiment and its results. This distinction is drawn by Wigmore, *supra,* sec. 2664. The criterion is: Who furnished or produced the evidence? If the person suspected is made to produce the incriminating evidence then it is inadmissible. *Evans v. State,* 106 Ga. 519. But if his persons or belongings are searched by another, the evidence thus discovered may be used against him. Thus a person may be required to roll up his sleeve or take off his shoe, for he is not called upon as a witness in such cases and it is not the idea of compulsion alone, but rather of testimonial compulsion that the courts protect against. It is not surprising that the cases are in great confusion and represent every shade and variety of opinion on the subject. The instant case seems to be in accord with the majority of courts which have ruled on the question. Thus, compelling the defendant to make foot tracks for comparison was held improper in *Cooper v. State,* 86 Ala. 610; *Day v. State,* 63 Ga. 667. And the comparison of shoes of accused, forcibly taken, with incriminating tracks has been held admissible. *Younger v. State,* 80 Neb. 201; *State v. Fuller,* 34 Mont. 12. But in *State v. Graham,* 74 N. C. 646, it was held no error to admit evidence where accused had been compelled to put his foot in tracks at the scene of the crime. The modern tendency seems to be altogether toward the limitation of privilege within strict confines. Indeed the detection of crime and administration of justice seem to make it necessary that such evidence should not be considered as coming within the privilege, and thus being otherwise admissible should not be excluded because it is forcibly or unlawfully secured.

GUARDIAN AND WARD—AGREEMENT TO CONVEY WARD'S REAL ESTATE.—In consideration of the plaintiff conveying 132 acres to the four children of B., the defendant, claiming to represent himself, his incompetent sister, and two minor brothers, contracted to convey to the plaintiff 520 acres of pasture land without having obtained any authority from the court for that purpose. It was *held,* that such agreement was void as against public policy. *Boyd v. Boyd,* (Ore. 1924) 230 Pac. 541.

Many courts hold that the guardian has the power to sell the ward's *personal* property without a court order, PECK, DOMESTIC RELATIONS, 311,

but practically all agree that such a sale of the *real estate* is not binding on either the person or the estate of the ward. *Forster v. Fuller,* 6 Mass. 58; *Tenney v. Evans,* 14 N. H. 343. A few courts consider the sale as only voidable. WOERNER, THE AM. LAW OF GUARDIANSHIP, 175; *McDuffie v. McIntyre,* 11 S. C. 551. The better view is that it is absolutely void. *Wells v. Chaffin,* 60 Ga. 677; *Dellinger v. Foltz,* 93 Va. 729. The title to both real and personal property remains in the ward, WOERNER, *supra,* and any sale is judicial; it being the theory that the court makes the sale, and that the guardian acts only as the agent or arm of the law. PECK, *supra.* Statutory provisions must be strictly pursued. *Ellwood v. Northrup,* 106 N. Y. 172. There is considerable conflict of authority as to whether a contract to sell without a court order is void as against public policy, or simply void as being without authority. The court in *Hyatt v. Anderson,* 69 Neb. 702, held that it was not contrary to public policy, or fraudulent, for a guardian, before applying to sell the real estate of his ward, to procure an intending purchaser for an adequate price at the sale. *Stuart v. Allen,* 16 Cal. 474, held that to make such a contract void as against public policy the necessary effect must be to contravene some declared right or positive duty. The reasoning of the courts taking the other view is that it is contrary to public policy because the law was violated, *Downing v. Peabody,* 56 Ga. 40, or, as it was well expressed in *Doughty v. Cottraux,* 8 Tex. Civ. App. 125, "The law contemplates that sales of a minor's property should not be made except when necessary for special purposes, through proceedings carefully devised for their protection, and so as to bring the largest price; and we incline to view as illegal and contrary to public policy the contract of the [guardian] with reference to his [ward's] estate."

INCOME TAX — DEDUCTION FOR LOSSES. — P acquired property prior to March 1, 1913 at a price less than the fair market value on March 1, 1913. He sold it in 1919 at considerably less than he had actually paid for it. Section 202 (a) of the Revenue Act of 1918 says that for the purpose of ascertaining the "gain derived or loss sustained" from the sale of such property the basis shall be the fair market price or value of such property as of March 1, 1913 if the property was acquired before March 1, 1913. P paid his income tax under protest having had his loss based on the price he had paid for the property rather than the market value as of March 1, 1913. *Held,* the tax was improperly levied, and the basis for deducting P's loss should have been the fair market value as of March 1, 1913. *Ludington v. McCaughn,* (U. S. C. C. App. 1924) 1 F. (2d) 689.

Prior to this decision the only authority on this precise point was an opinion of the Attorney General and the decision of the lower court appealed from in the principal case, both of which stated the rule to be that the basis for deductions should be the cost price in case that were lower than the market value on March 1, 1913. *Op. Atty. Gen.* 24 T. D. 3393; *Ludington v. McCaughn,* 290 Fed. 604. The theory of these two decisions, briefly stated, is as follows: the same construction should be applied in case of deductions for

losses as in computing the *gain*. In the case of computing the gain it was settled by the Supreme Court that in case the market value on March 1, 1923 was lower than the cost price the basis on which to determine the gain should be the cost price, since a different holding would mean that the tax would be based on a fictional income in fact greater than the actual gain to the taxpayer. *Goodrich v. Edwards*, 255 U. S. 527; *Walsh v. Brewster*, 255 U. S. 536. This construction rather strains the words of the Act, but the decisions are justified as an attempt to save the act from being held unconstitutional. The court in the principal case justifies its refusal to follow the same construction for losses as for gains by asserting that the 16th Amendment does not require Congress to make any deductions for losses at all and so it is not pressed with the necessity of the strained interpretation in order to hold the act constitutional as was the situation in the above-cited cases. What the Supreme Court will hold on this question is still a matter for speculation. It is interesting to note that the new Act of 1924 has gotten away from this particular difficulty by providing specifically that in determining both gain and loss the basis is the cost of the property or its fair market value as of March 1, 1913, *"whichever is greater."* Section 204 (b), thus substantially adopting the rule of the principal case in that particular situation. See 24 COL. L. REV. 852. It would seem that if the general purpose of the Act was that a taxpayer should be taxed on actual income. *In re Harrington*, 1 F. (2d) 749, a point apparently completely ignored in the principal case, the result reached in *Op. Atty. Gen. supra*, comes nearer that goal than the result of the decision in the principal case which deducts a fictitious loss rather than the actual loss. See 1 C. C. H. (1925) 94-96.

INSURANCE—STATEMENTS IN THE APPLICATION WAIVED BY THE INSURANCE COMPANY.—In the application for the policy of insurance, it was stated that the applicant had never had cancer. Upon the decease of the insured, the policy having been granted on the application, the insurer claimed to be relieved from payment of the policy, as it was shown that the insured died of cancer and previously to the application had had cancer. Upon proof that the examining physician for the insurer, who had written the statements of the decedent in the application, had failed either to call her attention to the policy provision regarding cancer or to ask her whether she had ever had the disease, and had been aware of such confinement in hospitals as to put the insurer on inquiry as to the nature of her illness, the court *held*, that the company could not complain of the applicant's failure to answer questions which the examiner did not ask her. Construing the application most strictly against the insurer, as it was written by the examiner, the acceptance of the application was declared to be a waiver of the right to require further answers to such questions as might have been but were not put. *Williams v. Metropolitan Life Ins. Co.* (Va. 1924) 123 S. E. 509.

It has generally been held that "where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want

or imperfection in the answer, and render the omission to answer more fully immaterial." VANCE ON INSURANCE, 258; *Carson v. Jersey City Ins. Co.* 43 N. J. L. 300; *Royal Neighbors of America v. Sims* (Tex. 1919) 216 S. W. 240; *Smith v. North America Acc. Ins. Co.* (Nev. 1922) 205 Pac. 801. Even though, as in the principal case, the application absolutely states that the applicant has never had a specified disease, if it be proved that the statement is that of the examiner and that he has neglected to call to the attention of the applicant such material provision of the application, it is permissible to show that the decedent did not make or warrant the statement to be true. The effect of such general statements may be modified by other parts of the application including the questions and the answers. *Alabama Gold Life Ins. Co. v. Johnston,* 80 Ala. 467; *Providence Savings Life Assur. Society v. Pruett,* 141 Ala. 467; *Lorillard Fire Ins. Co. v. McCulloch,* 21 Ohio St. 179. In many such cases, the courts apply the rule of construction that when the language of a policy of insurance is susceptible of two constructions, it is to be interpreted in the sense which is most favorable to the insured. *Thompson v. Ins. Co.* 136 U. S. 287; *Va. Fire and Marine Ins. Co. v. Vaughan,* 88 Va. 832, 836. Hence, if it be shown that the examiner wrote the application, that the applicant was not asked as to a material fact, and made no false statement or fraudulent concealment of the same. the insurer waives its right to insist that information as to such material fact be furnished, and such failure to furnish the information is no bar to recovery on the policy. *Liberty Hall Asso. v. Fire Ins. Co.* 7 Gray (Mass) 261; *Carson v. Jersey City Ins. Co.,* 43 N. J. L. 300; *Smith v. North America Acc. Ins. Co.* (Nev. 1922) 205 P. 801; *Lorillard Fire Ins. Co. v. McCulloch,* 21 Ohio St. 176, 179.

LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS—CANDIDATE FOR PUBLIC OFFICE.—D published a false statement charging a candidate for public office with crime. To an indictment because of it, D plead privilege. *Held,* the private character of a candidate for public office may not be falsely assailed with a charge of crime, though it be made in good faith, for beneficial purpose, and with a belief that it is true. *State v. Colby,* (Vt. 1924) 126 Atl. 510.

Though there is little express language in the cases, it is generally recognized that defamatory libels actionable *per se* in a civil suit are also indictable. 3 WHARTON'S CRIMINAL LAW, 11 ed. §1919; 12 AM. DIG. DEC. "Libel and Slander," §141; *Raker v. State,* 50 Neb. 202; *Commonwealth v. Child,* 30 Mass. 198. The rules as to privilege in these actions are the same in both courts. ODGERS ON LIBEL AND SLANDER, ed. 5, p. 472. Because of public interest in the qualifications of a candidate for public office, some jurisdictions qualifiedly privilege statements made concerning them. NEWELL ON LIBEL AND SLANDER, ed. 3, pp. 477, 494. However, there is little uniformity in the decisions as to whether this privilege exists at all, and if so, how far it extends. Michigan and New York recognize no privilege at all. *Wheaton v. Beecher,* 66 Mich. 307; *Lewis v. Few,* 5 Johns. 1. Many jurisdictions recognize a privilege in statements made concerning qualifications and fitness for office, but

not those affecting the moral character of the candidate. *Jones, Varnum & Co. v. Townsend's Adm.*, 21 Fla. 431; *Smith v. Burrus*, 106 Mo. 94; *Upton v. Hume*, 24 Ore. 420. A qualified privilege is extended to all statements regarding such candidate in *Mott v. Dawson*, 46 Ia. 533; *Coleman v. MacLennan*, 78 Kan. 711. The prevailing view seems to be that of the second catagory. See 18 MICH. L. REV. 104, for a thorough discussion of this subject of privilege.

NATURALIZATION — EFFECT OF DRAFT EXEMPTION CLAIM. — In naturalization proceedings the government set up that the petitioner had secured exemption from military service by answering certain questions in the selective draft questionnaire in the affirmative and had thereby disqualified himself for citizenship. *Held*, that the mere fact that petitioner had claimed exemption from military service did not bar him from becoming a citizen. *In re Naturalization of Aliens*, (Wis. 1924) 1 F. (2d) 594.

The question has been raised a number of times. See 22 MICH. L. REV. 152, 603. The decision in the present case gives a very clear and able review of the whole situation and should clear up much of the confusion that has prevailed. Some of the prior cases have laid down the rule that a friendly declarant alien must reassert his desire to be a citizen if he has once claimed exemption from the draft. *In re Pitto*, (D. Ore. 1923) 293 Fed. 200; *In re Kirby*, (D. Ore. 1923) 293 Fed. 200. Other cases have held that a claim of exemption makes it impossible for the alien to become a citizen at any time. Evidently the courts have felt that a claim of exemption from the selective draft is indicative of moral shortcomings or that such an alien does not entertain the proper attitude toward our Constitution and is therefore not a proper person to be naturalized. The court in the principal case calls attention to the fact that there was no escaping exemption in some cases and that where it was granted in others it was not always because the alien was entitled to it under the statute. The act arbitrarily exempted all enemy aliens from military service and a claim to exemption was nothing more than a statement of nationality that automatically excluded them from duty. Non-declarant friendly aliens had no choice but to register their nationality and under the general understanding of international law they were not subject to military service. The fact that a question was submitted to them as to whether they claimed exemption or not could not change their situation. Even declarant friendly aliens were eventually exempted as a matter of policy although the draft act did not give authority to do so. To say that they should be prevented from becoming citizens now, because they answered a question which indicated that they claimed only such rights as law and practice gave them, would seem rather harsh treatment. It does not seem to be an inevitable conclusion that such answers prove the applicant to be unfit for citizenship. See 1 HYDE, INTERNATIONAL LAW, pp. 610, 691; MOORE, DIGEST, III, pp. 297-810.

PROCEDURE—MOTIONS BY BOTH PARTIES FOR DIRECTED VERDICTS—WAIVER OF JURY TRIAL.—At the conclusion of the trial of an ejectment suit, both parties moved for a directed verdict. The motion of the appellant was de-

nied; while that of the appellee was granted and an instructed verdict upon which judgment was rendered was returned in his favor. In the appeal, the appellant contended that it was error for the court below to direct a verdict for the appellee, thereby denying the appellant the right to have the jury determine the issues of fact. *Held,* that when both parties moved for directed verdicts they were presumed to have waived their right to have the jury pass on the questions of fact, and to have constituted the court the trier of fact as well as of law; hence the action of the trial court in thus directing a verdict for the appellee would not be disturbed on the appeal. *Romero v. Herrera,* (N. M. 1924) 228 Pac. 604.

The "New York rule", in accord with above holding and adopted by a majority of the courts, is to the effect that where "each of the parties to an action requests the court to direct a verdict in his favor, and makes no request that the jury determine any question of fact, the parties will be presumed to have waived the right to a trial by jury and to have constituted the court a trier of questions both of fact and law." *A. E. McBee Co. v. Shoemaker,* 160 N. Y. S. 251; *Simpson v. Murphy,* (Mich.) 201 N. W. 464; *Michigan Copper and Brass Co. v. Chicago Screw Co.* 269 Fed. 502; *Williams v. Vreeland,* 250 U. S. 295; *First Nat'l Bank v. Hayes,* 64 Oh. St. 100. Parties have the right to waive a jury trial, and motions by both parties for a directed verdict are sufficient evidence of an intention to waive that right. *Share v. Coats,* 29 S. D. 603, 611. But the request by any party any time before judgment entered for a jury's determination of a special fact issue negatives that implied assent. *International Battery Co. v. Westreich,* 170 N. Y. S. 149. Or if the request for a directed verdict is coupled with a motion for other instructions, or a petition for the jury on a question of fact, there can be no presumption of any intent to take the case out of the hands of the jury. *Stanford v. McGill,* 6 N. D. 536; *Kane v. Detroit Life Ins. Co.* 204 Mich. 357; *Empire State Cattle Co. v. A. T. & S. F. Ry.* 210 U. S. 1. But a few courts deny that a motion by each of the parties for the direction of a verdict waives the submission of the facts to the jury. *Wolf v. Chicago Sign Printing Co.* 233 Ill. 501; *German Savings Bank v. Bates Improv. Co.* 111 Iowa 432; *Hayes v. Kluge,* 86 N. J. L. 657. "Such motions do not indicate any mutual concession of the parties. Neither is willing, against the motion of the other, to waive a jury." *Manska v. San Benito Land Co.* 191 Iowa 1284. Surely, reason is with the minority. The first motion presents a question of law. *Stauff v. Bingenheimer,* 94 Minn. 309, 311. Why, then, should a similar motion by the second party be construed as a waiver by both parties of their right to a jury's determination of facts? The court in *Virginia-Tennessee Hardware Co. v. Hodges,* 126 Tenn. 370, states that the motion of each party should be treated for what it is, as distinct from and adverse to that of his adversary, and the only question then submitted to the court is the question of law. Neither party should be able by a subsequent motion to change the legal effect of a prior motion by the other party. The problem is one of practice and involves the determination as to when the law will presume an intent to waive the jury trial.

PROPERTY—BOUNDARIES DISPUTE—EFFICACY OF PAROL AGREEMENT.—The respective grantors of the plaintiff and the defendant owned adjoining farms The dividing line was not on the true line. In an action of ejectment, the court *held,* that whenever the boundary line is unascertained or in dispute, adjoining owners may establish it by parol agreement and if possession in pursuance of that agreement is taken the line so established is binding on them and their grantees. *Jones v. Scott* (Ill. 1924) 145 N. E. 378.

This case represents the general rule. *Sonnemann v. Mertz,* 221 Ill. 362; 1 TIFFANY, REAL PROPERTY, 2d. ed., 996. It applies only to agreements made between owners of adjoining lands. 9 C. J. 232. They are favored by the courts as they tend to prevent litigation, *Hollingsworth v. Barrett,* 28 Ky. L. Rep. 280, and are enforceable in equity. *Frazier v. Mineral Development Co.* 27 Ky. L. Rep. 815; 9 C. J. 233. The settlement of the disputed boundary is sufficient consideration for the agreement. *Wade v. McDougle,* 59 W. Va. 113; *Thaxter v. Inglis,* 121 Cal. 593. The true line must be doubtful or uncertain, yet in most jurisdictions it is not necessary that the agreement be by way of compromise of conflicting claims. TIFFANY, *supra; Howatt v. Humboldt Milling Co.* 61 Cal. App. 333. Such agreements do not come within the Statute of Frauds, *Jones v. Pashby,* 67 Mich. 459, the effect being, it is said, not to pass title by parol, but to fix the unascertained or disputed boundary. *Jones v. Scott, supra.* It is difficult to see, however, why it does not actually involve a transfer of an interest in land, except in those rare instances where the agreed line happens to follow exactly the true line. The agreement is binding on the parties and their privies. *Sonnemann v. Mertz, supra.* Tiffany seems to think that a purchaser for value cannot be affected by his predecessor's agreement unless he took with actual or constructive notice thereof. No cases are cited for the proposition, and it is of doubtful soundness. Many cases hold that the agreement binds the vendee, and make no mention of notice. *Watrous v. Morrison,* 33 Fla. 261. In *Bartlett v. Young,* 63 N. H. 265, the vendee had no notice, actual or constructive, yet the court held him bound, holding notice was not necessary. Another uncertain point is the length of time during which the possession must continue. That it must be for a considerable time, though less than the period of limitation, see MINN. L. REV. 569; *Steinhilber v. Holmes,* 68 Kan. 607. While the point seems never to have been actually decided, it is submitted that no particular length of time is necessary. The case of *Cooper v. Austin,* 58 Tex. 494, held that a long period was not essential. The court in *Turner v. Bowens,* 180 Ky. 755, held the line was fixed when followed by *some* possession. In *Hoxey v. Clay,* 20 Tex. 582, the agreement was made in the summer, and suit was brought the same fall, yet the court held the agreement binding.

RULE IN SHELLY CASE — EFFECT OF LIMITATION OVER ON TECHNICAL MEANING OF "HEIRS OF BODY."—Suit was brought on a will which included a devise of realty in the following terms: the same "may be equally divided between my four children * * * which I lend unto them during their natural lives and give to their heirs lawfully begotten of their bodies, but should any

one of my said children die leaving no child, it is my will that the portion of the child so dying may be equally divided between those that may survive or their heirs". *Held,* that the modifying words showed that the testator was not giving to the heirs of his children an estate in indefinite succession; and that therefore, the rule in Shelly's case did not apply, and the testator's children took only a life estate with right of survivorship. *Jenkins v. Hogg,* (Va. 1924) 124 S. E. 392.

The court in the instant case has correctly recognized the rule that the meaning of the words used to describe the devisees of the estate in remainder is a matter of construction, while the Rule itself is in no way a rule of construction, but rather takes effect regardless of the testator's intention. 1 TIFFANY ON REAL PROPERTY, ed. 2, p. 537. Thus the Rule does not apply to a limitation in favor of the heirs or heirs of the body of the devisee of the prior life estate, unless the word "heirs" can be regarded as meaning an indefinite number of persons to take in succession. 1 FEARNE ON REMAINDERS 188. Standing alone they have a technical meaning. Are they affected by qualifying words? It seems settled that where the words of limitation inserted in the gift to the heirs or heirs of the body are such as to indicate a totally different line of succession, the words will be regarded as words of purchase. *Archer's Case,* 1 Co. 66b. For example, a gift to A for life, remainder to his heirs, and the heirs female of their bodies. 1 PRESTON ON ESTATES 349. But as stated by Lord Alvanley in *Poole v. Poole,* 3 B. & P. at p. 627, "the courts have never deviated from the general rule, which gives an estate tail to the first taker when the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it". And as stated by Lord Eldon in *Jesson v. Wright,* 2 Bligh. 1, "The words 'heirs of the body' will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator, but that must be clearly intelligible and unequivocal". See also 2 JARMAN ON WILLS, 1902. In the instant case the court thought the fact that the gift was to the testator's four children jointly with a right of survivorship among them, was sufficient to deprive the words "heirs of their bodies" of their technical meaning. On the question whether a limitation over to the "survivor" or "survivors" after a failure of issue, will have the effect of raising a presumption that a definite failure of issue was intended, the authorities are divided. That it has, *Abbott v. Essex Co.* 18 How. (U. S.) 202; *Anderson v. Jackson,* 16 Johns (N. Y.) 382. That it has not, *Caulk's Lessee v. Caulk,* 3 Pennew. (Del.) 528. Virginia, like a number of the other states, has a statute abolishing the rule in Shelly's case, but since the will under consideration was drawn before that statute became effective, it was necessary to decide the case upon common law principles, it is conceivable that the court was not insensible of the existence of the statute as evidencing a change of policy in the state.

TAXATION — EXCISE TAX — FOREIGN CORPORATION.—A New York statute imposed a tax on foreign corporations for the privilege of doing business in the state, providing for an annual franchise tax of three percent on a portion of the net income for the preceding year, determined by finding the ratio between assets of the corporation within the state and the total assets owned by the corporation, and then taking that proportion of the net income for the preceding year as the basis for the tax. The assets entering into this ratio are real and tangible personal property, bills and accounts receivable, and shares of stock in other corporations. *Held*, in the absence of proof that the complainant, a British corporation, had received no net income from its New York business, the tax was valid and did not deprive complainant of property without due process under the Fourteenth Amendment, nor did it violate the commerce clause of the Constitution. *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, (U. S. Sup. Ct., Oct. Term, 1024) 69 L. Ed. 45.

The earlier doctrine of the Supreme Court that a state having the power to exclude a foreign corporation could sell the privilege of admission for any price (*Horn Silver Mining Co. v. New York*, 143 U. S. 305) has been cut down considerably by later decisions of that same court. A state may not base an excise tax on the entire capital stock of a foreign corporation if that capital stock represents in part property owned outside the taxing state, *W. U. Tel. Co. v. Kansas*, 216 U. S. 1, unless a limit is set for the amount of the tax. *Gen. Ry. Signal Co. v. Virginia*, 246 U. S. 500. The limit must be unreasonably high and the court itself called *Signal Co. v. Virginia* a "border line" case. Two reasons are given for the invalidity of the tax in the *Western Union* case; first, that it was an unlawful interference with interstate commerce, and second, that it was in effect an attempt to tax property outside the state and so beyond the jurisdiction of the taxing power of the state. But if the tax is based on a method which reasonably restricts it to local property or local business it is valid, and the court will not upset a state's exaction unless it finds it "wholly arbitrary and unreasonable". *Gen. Ry. Signal Co. v. Virginia, supra; Schwab v. Richardson*, 263 U. S. 88; *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113. In order to complain of the unreasonableness of a particular taxing method the complainant must prove that the method is unreasonable as to him. *Union Tank Line v. Wright*, 249 U. S. 275. Just where the line is drawn between methods which are "unreasonable and arbitrary" and those which are valid is not definitely settled as yet. See article by Thomas Reed Powell on "State Excises on Foreign Corporations" in PROCEEDINGS OF THE 12TH ANNUAL CONFERENCE ON TAXATION, p. 230. It is submitted that if the Virginia statute is valid which bases a tax on the entire capital stock of the corporation, although most of its property may be out of the state, the statute merely providing for a maximum charge beyond which the tax is not to go, then the court in the principal case is undoubtedly correct in holding the New York statute valid and not "unreasonable and arbitrary".

TRIAL PRACTICE—SERVICE OF PROCESS.—In reliance on his father-in-law's agreement to a proposed discussion of family troubles, the defendant, a non-resident of New Jersey, came into the state and while there was served with process in a divorce suit brought by the wife. *Held,* that such service was void as contrary to the dictates of justice and that one should not be inveigled into a jurisdiction for the purpose of serving process on him. *Ultcht v. Ultcht,* (N. J. E. 1924) 126 Atl. 440.

It is undisputed that service of process secured through trickery, deceit, or fraud of a party or of those acting for him will not be upheld. *Union Sugar Refinery v. Mathiesson,* 2 Cliff. (U. S.) 304, 309; 15 C. J. 800. This rule is not based on a lack of jurisdiction but upon the principle that "you cannot do a wrong and upon that build a right"—that it is improper for a court to exercise a jurisdiction so obtained. *Siro v. American Express Co.* 99 Conn. 95. This general principle is perhaps universally accepted by the various courts but, like many rules of law, its application is varied. Certainly it must appear that the aggrieved party has been brought into the jurisdiction through fraud or some deceptive contrivance to which the plaintiff in the suit was privy. What will constitute a sufficient fraud presents the same difficulty as in other fields of the law. It is subject to no rule of thumb and depends on all the facts presented in each case. The United States Supreme Court has held that service of a writ otherwise lawful does not become unlawful because hope for a chance to make it was the sole motive for other acts tending to create the chance, which other acts would themselves have been lawful but for that hope. *Jaster v. Currie,* 198 U. S. 144 (notice to attend taking of a deposition). It has even been termed a legitimate act of diligence to procure a defendant to come into a state for the purpose of having summons served on him. *Carney v. Taylor,* 4 Kansas 178; *Iams v. Tedlock,* 110 Kan. 510, (notice to attend a trustee's meeting). But if service of process is the sole reason of inveigling the defendant into the jurisdiction and the method of inducement is a pure artifice, the service is void. *Cavanagh v. Manhattan Transit Co.* 133 Fed. 818; *Garabettian v. Garabettian,* 201 N. Y. S. 548. In the present case the court found upon all the facts that the service was procured by deceptive methods of such a nature as to render the service invalid and it must be assumed that such finding is correct. See further, *Taylor, Petitioner,* 29 R. I. 129; *Crandall v. Trowbridge,* 170 Ia. 155; *Van Horn v. Mfg. Co.* 37 Kan. 523; *Holker v. Hennessey,* 141 Mo. 527.

TRIAL PRACTICE—WHEN MAY A JUROR IMPEACH HIS OWN VERDICT.—Defendant was indicted for murder and convicted. Upon motion for a new trial the judge examined the jurors under oath as to their accessibility to a law book while arriving at a verdict. *Held,* that while the general rule is that affidavits of jurors are admissible to explain and uphold but not impeach their verdict, testimony may be received to show any matter which does not inhere in the verdict itself and the testimony here was within this qualification and properly received. *Linsley v. State,* (Fla. 1924) 101 So. 273.

From an early date a verdict once formed has been immune from any attack by its creators. It is the well settled rule that affidavits of jurors are admissible to explain and uphold a verdict but not to impeach or overthrow it. THOMPSON AND MERRIAM ON JURIES, sec. 440; *Owen v. Warburton,* 1 Bos. & Pull. N. R. 326; *Sanitary District v. Cullerton,* 147 Ill. 385. Tennessee has however refused to sanction such a rule and allows affidavits of jurors for the purpose of attacking and setting aside their own verdict. *Norris v. State,* 3 Humph. (Tenn.) 333. Strict application of this rule led to harsh results in many cases and Cole, J. of Iowa supreme court laid down the doctrine that affidavits or testimony will be received of matters to impeach the verdict which do not "inhere" in the verdict. *Wright v. Tel. Co.* 20 Ia. 195. This view was approved and concisely stated by Brewer, J. in *Perry v. Bailey,* 12 Kan. 539, where he says "Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusion of twelve; its tendency is to induce bad faith on the part of a minority; to induce apparent acquiesence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct the remaining eleven can deny it. One cannot disturb the action of the twelve; it is useless to tamper with one for the eleven may be heard." The United States Supreme Court has also placed its stamp of approval upon this doctrine. *Mattox v. U. S.* 146 U. S. 140. Also see *Woodward v. Leavitt,* 107 Mass. 453. Other courts disapprove strongly of this inroad upon the general rule. *Phillips v. R. I. Co.* 32 R. I. 16. And probably the weight of authority still adheres to the stricter rule. See cases cited in THOMPSON & MERRIAM ON JURIES, sec. 440; *Herring v. Wabash R. R.* 80 Mo. App. 562; *Siemson v. Oakland etc. R. R. Co.* 134 Cal. 494. There is no doubt difficulty in saying what matters "inhere" in the verdict and what matters do not—what acts are overt and what acts are not. However the instant case is fairly representative of the modern trend to break away from the strict rule which has grown up as a part of the jury system and apply a rule which seems more in accord with the modern conception of the jury. See also 12 MICH. L. REV. 405.

VENUE—ACTION FOR TRESPASS TO REAL PROPERTY.—An action was brought in New Jersey to recover for an injury to plaintiff's building in New York city. Water seeping through the building wall caused the injury. *Held,* that since the action was for injury to real estate it should have been brought in the jurisdiction where the land was located. *Van Ommen v. Hogeman,* (1924 N. J.) 126 Atl. 468.

The decision is undoubtedly in line with the great weight of authority and follows the old conventional common law theory of classing all causes that concern real property as local. The general rule that where a cause of action can arise in one place only, it is local, *Mattix v. Swepston,* 127 Tenn.

693, while if it is one which might arise anywhere it is transitory, *Woolf v. McGaugh*, 175 Ala. 299, has quite generally been interpreted to mean that all actions that concern real property are local. *Ellenwood v. Marietta Chair Co.* 158 U. S. 105; *Livingston v. Jefferson*, 15 Fed. Cas. No. 8411, 1 Brock 203. Thus where there has been an injury to property outside the state the courts have held that although all the parties were before it, the court did not have jurisdiction over the cause. *Kroll v. Chicago etc. R. R. Co.* 98 Nebr. 322; *Watts' Administrators v. Kinney*, 23 Wend. (N. Y.) 484. The theory seems to be founded on the maxim that every state possesses exclusive sovereignty and jurisdiction within its own boundaries. A court would be powerless to execute its orders beyond the limits of its jurisdiction and from this they conclude that any action that concerns realty must be brought in the jurisdiction where it lies. But while it would seem that the application of this rule would be logical in all cases where the title was involved or where some act that is so closely bound up with the land itself as to be inseparable, must be ordered done, it does not seem sound to say that merely because damage to real property is the basis of the action, the cause is local and cannot be tried in any other jurisdiction than that in which the property is located. Actions on a contract are transitory, *Ill. L. Ins. Co. v. Prentiss*, 277 Ill. 383; *Peabody v. Hamilton*, 106 Mass. 217. Tort actions are also so classed. *Barrow S. S. Co. v. Kane*, 170 U. S. 100; *Stewart v. Baltimore etc. R. R. Co.* 168 U. S. 445. In an action to recover for trespass to real property the bringing of an action in the state where the property is located may greatly facilitate collection of the judgment but so also, in the case of some contracts, it may be advantageous to bring suit in the jurisdiction where the contract was made. This has never been regarded as sufficient reason for confining the right of an action on the contract to the state wherein the contract was made. The Minnesota courts have felt that the old theory was illogical and in *Little v. Chicago etc. Ry. Co.* 65 Minn. 48, the court says: "Every argument founded on practical considerations against entertaining jurisdiction of actions for injuries to lands lying in another state could be urged as to actions on contracts executed or for personal torts committed out of the state, at least where the subject matter of the transaction is not within the state. Take, for example, personal actions on contracts respecting lands which are conceded to be transitory. An investigation of title or boundaries etc. may be desirable and often would be essential to the determination of the case yet such considerations have never been held to render the actions local." In *Brisbane v. Penn. R. R. Co.* 205 N. Y. 431, the New York court severely criticised the prevailing rule but followed it nevertheless. The rule in the instant case is in line with precedent but seems without support in principle and reason.