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Recent Important Decisions

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BANKRUPTCY—APPOINTMENT OF RECEIVER AS ACT OF BANKRUPTCY.—An insolvent corporation, against which a creditors' suit was brought in the state court, procured the appointment of a receiver therein by an answer and cross bill in the name of its president, who was a defendant, and who with one other stockholder owned the majority of the stock and controlled the corporation. *Held,* that the corporation applied for the appointment of a receiver within the meaning of §3a(4) of the BANKRUPTCY ACT, making such application, while insolvent, an act of bankruptcy; it being unnecessary that the application be by a bill or cross bill filed in the name of the corporation. *Graham Mfg. Co.* v. *Davy-Pocahontas Coal Co.,* 238 Fed. 488.

Though the debtor himself must make application, in case of corporations it is not always requisite that there be a formal declaration by the corporation, if the application for a receiver is substantially the act of the corporation; where those so applying control the corporation and especially where there is an attempt to evade the bankruptcy law, *Exploration Co.* v. *Pacific Co.,* 177 Fed. 825, 839, 101 C. C. A. 39; *James Supply and Hdwe. Co.* v. *Dayton Coal & Iron Co.,* 223 Fed. 991, 139 C. C. A. 367; *In re Maplecroft Mills,* 218 Fed. 659, 673; *Doyle-Kidd Dry Goods Co.* v. *Sadler Lusk Trading Co.,* 206 Fed. 813, even though the laws of the state court do not authorize such application, *Exploration Co.* v. *Pacific Co.,* supra. It is immaterial that receivership was not ordered because of insolvency if the corporation was actually insolvent. *James Hdw. Co.* v. *Dayton Coal & Iron Co.,* supra; *Hill* v. *Electric Co.,* 214 Fed. 243, 130 C. C. A. 613.

BANKRUPTCY—STATUTORY LIABILITY OF SHAREHOLDER AS PROVABLE DEBT.—A discharge in bankruptcy was pleaded as a defense to a suit against the shareholders of an insolvent corporation under a New York statute making them "individually responsible, equally and ratably, for all contracts, debts and engagements of such corporation to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Under §63 of the BANKRUPTCY ACT debts founded upon a contract, expressed or implied, are provable in bankruptcy. §14 provides for the discharge of provable debts. *Held,* that the liability was contractual, provable, and the discharge was a good defense. *Van Tuyl* v. *Schwab, et al.,* 164 N. Y. Supp —.

Under most statutes such liability is held to arise out of an implied contract and to accrue before the corporation becomes insolvent. *Platt* v. *Wilmot,* 193 U. S. 613, 24 Sup. Ct. 542, 48 L. ed. 809; *Whitman* v. *Oxford National Bank,* 176 U. S. 559; *Nimick* v. *Mingo Iron Wks. Co.,* 25 W. Va., 184; *Flash* v. *Conn,* 109 U. S. 371, 27 L. ed. 961. In many cases, however, the statutory liability is made a penalty for some misdeed, e. g., failure by the president or corporation to file a certificate showing amount of stock paid in. *Woods* v. *Wicks,* 7 Lea. 40; *Sayles* v. *Brown,* 40 Fed. 8. However, *Marshall* v. *Sherman,* 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654,

is to be distinguished from the principal case. In that case the court expressly declared the cause of action to be contractual, but refused to sustain it in New York against stockholders of a Kansas corporation.

BANKRUPTCY—STAYING AN ACTION PENDING IN STATE COURT.—§11(a) of the BANKRUPTCY ACT provides that a suit founded upon a claim from which a discharge in bankruptcy would be a release and pending against a person at the time of the filing of the petition *shall* be stayed until after an adjudication or dismissal of the petition, and that if such person is adjudged a bankrupt, such action *may* be further stayed until twelve months after the date of adjudication, etc. *Held,* that suit in the state court should have been stayed till after adjudication. *Anders Bros.* v. *Latimer,* (Ala. 1917), 73 So. 925.

Held, that whether the action is to be further stayed after an adjudication is to be determined by the trial judge in the exercise of his discretion. *Smith* v. *Miller,* (Mass. 1917), 115 N. E. 243.

Held, that the state court is not deprived of its jurisdiction by the stay, and may proceed after adjudication. *Brazil* v. *Azevedo,* (Cal. App. 1916), 162 Pac. 1049.

Because of the use of the word "shall" in the first part of §11(a) and of "may" in the second part, these three recent cases agree that till after adjudication a stay shall be granted as of right, but that thereafter the state court can exercise its discretion. Other cases to the same effect are *Rosenthal* v. *Nove,* 175 Mass. 559, 563, 56 N. E. 884, 886; *In re Gunacevi Tunnel Co.,* 201 Fed. 316, 119 C. C. A. 554. Only suits founded on claims provable and dischargeable are stayed under §11(a). *In re Macauley,* 101 Fed. 223; *Imbriani* v. *Anderson,* 76 N. H. 491, 84 Atl. 974. Those to which a discharge is not a release are not stayed, such as suits to require corporations to issue stock, suits based on fraud, or to recover fines imposed by state courts, etc. *In re Clipper Mfg. Co.,* 179 Fed. 843; *In re Wallack,* 120 Fed. 516; *In re Cole,* 106 Fed. 837; or suits in state courts to assert rights in rem, *Tennessee Marble Co.* v. *Grant,* 135 Fed. 322, 14 A. B. R. 288; *United Wireless Co.,* 192 Fed. 238. Even though the suit is commenced after the filing of the petition, it must be stayed as of right till after adjudication. *In re Basch,* 97 Fed. 761.

BANKRUPTCY—TRUSTEE'S RIGHTS UNDER UNRECORDED CONDITIONAL SALE.—Under §62 of the PERSONAL PROPERTY LAW of New York (CONSOL. LAWS, c. 41), providing that all conditions in a conditional sale contract, accompanied by delivery of the goods reserving title in the vendor, shall be void as against subsequent purchasers, pledgees or mortgagees in good faith, unless recorded, an unrecorded conditional sale contract is valid against the creditors of the buyer. §47a(2) of the BANKRUPTCY ACT gives to the trustee in bankruptcy the rights, remedies and powers of lien creditors. *Held,* that the trustee in bankruptcy acquired no rights to the goods. *Mergenthaler Linotype Co.* v. *Hull,* 239 Fed. 26.

§47a(2) as amended in 1910 confers upon the trustee the rights which the bankrupt or any creditor possessed at the time of filing the petition. *Potter Mfg. Co.* v. *Arthur,* 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A 1268;

In re Floyd-Scott Co., 224 Fed. 987. But as the reserved title of the conditional vendor was valid as to creditors of the vendee, the trustee had no right to retain the property. Other cases arising under the same New York statute and decided in the same manner are *In re I. S. Remsen Mfg. Co.*, 227 Fed. 207; *In re White's Express Co.*, 215 Fed. 894. Where the conditions in an unrecorded conditional sale are void *as to creditors*, the trustee is entitled to the goods. *In re Roellich*, 223 Fed. 687; *Augusta Grocery Co.* v. *Sou. Moline Plow Co.*, 213 Fed. 786, 130 C. C. A. 444; *In re Franklin Lumber Co.*, 187 Fed. 281. Where the conditions are void only as to creditors fastening liens or taking out execution on the property, the right to fasten them or levy execution passes to the trustee. *Potter Mfg. Co.* v. *Arthur*, 220 Fed. 843; *In re Gehris-Herbine Co.*, 188 Fed. 502. The trustee, even where he acquires no rights to the goods, may, with the approval of the court, pay the amount due and retain the property. *In re Wegman Piano Co.*, 221 Fed. 128.

BANKS AND BANKING—SECURITIES SUBJECT TO BANKER'S LIEN.—A retail monument dealer deposited his customers' contracts with his manufacturer as security for the orders. The manufacturer deposited them with the defendant bank for collection. In a suit by the trustee in bankruptcy of the manufacturer to recover the proceeds of the contracts after collection, *held*, the contracts are paper securities within the rule that a banker has a lien for a general balance due him on all securities deposited with him for collection. *Goodwin* v. *Barre Sav. & Trust Co.*, (Vt. 1917), 100 Atl. 34.

It has long been settled that a banker who has advanced money to another has a general lien on funds of the latter in his hands for the amount of his general balance unless such were delivered to him under a particular agreement limiting their application. *Bank of Metropolis* v. *New England Bank*, 1 How. 234; *Sweeny* v. *Easter*, 1 Wall. 166; *Barnett* v. *Brandao*, 6 M. & G. 630. The theory is that the possession of the securities or the expectation of possession leads to the extension of credit by the bank. *Reynes* v. *Dumont*, 130 U. S. 354; *Gibbons* v. *Hecox*, 105 Mich. 509. Just what property in the possession of the banker is subject to this general lien does not appear to have been so definitely decided. It is clear that it attaches to deposits and ordinary commercial paper, *Joyce* v. *Auten*, 179 U. S. 591, 45 L. ed. 332; *Wood* v. *Bank*, 129 Mass. 358; and this extends to commercial paper left with the bank for collection, *Joyce* v. *Auten*, supra, *Garrison* v. *Trust Co.*, 139 Mich. 392, 102 N. W. 978; but a bank has no such lien on securities accidentally in its possession, *Bank* v. *Gatton*, 172 Ill. 625, nor on packages left for safe keeping, *Leese* v. *Martin*, L. R. 17 Eq. 224; *Ex Parte Eyre*, 1 Ph. 227. In *Bank of Metropolis* v. *New England Bank*, supra, the rule was stated to be that the lien attached to all "paper securities" and this has been approved by other cases although the courts in each case were dealing with commercial paper. *Lehman Bros.* v. *Mfg. Co.*, 64 Ala. 567; *Bank* v. *Hanson*, 34 Neb. 455, 51 N. W. 1035. In *Tufts* v. *Bank & Trust Co.*, 59 N. J. L. 380, 35 Atl. 792, it was held that the lien attached to the proceeds of a paper in the form of a promissory note, but invalid as such. The court in the instant case

reasons that since the theory of the law is that the bank extends credit on the expectation that such paper will come into its possession from time to time and be available as a security for balances due, and since contracts such as are involved in that case are often used as security, modern business methods demand that any business paper that may be the basis of this credit shall be included under the term "paper securities" in the rule above stated; and be subject to the lien. This reasoning would seem to be logically as well as economically correct.

BILLS AND NOTES—WAIVER OF NOTICE OF DISHONOR.—On the back of a promissory note there was a printed waiver of protest and notice of dishonor. Several persons at the same time, and before delivery of the note to the payee, indorsed their names in blank in regular order beneath the waiver. *Held*, §110 of the Uniform Statute does not change the common law rule, and the waiver extends to all the indorsers alike. *Central Nat. Bank of Portsmouth* v. *Sciotoville Milling Co.*, (W. Va. 1917), 91 S. E. 808.

At common law notice of dishonor might be waived by a provision in the instrument itself or in the indorsement. If made in the instrument itself it operated as a waiver as to all signers whether indorsers, makers, or payees. *Dunnigan* v. *Stevens*, 122 Ill. 396, 13 N. E. 651; *Hoover* v. *McCormick*, 84 Wis. 215, 54 N. W. 505; 8 C. J. 701, §984, and cases cited. If the waiver were written over the indorsement and the instrument subsequently negotiated and indorsed the decisions are in conflict as to the effect of the waiver on the subsequent indorsers. Those who indorse under the waiver must be assumed to have adopted the same, and are bound thereby. *Bank v. Gold Mining Co.*, 129 Cal. 263, 61 Pac. 1077; *Parshley* v. *Heath*, 69 Me. 90, 31 Am. Rep. 246; *Loveday* v. *Anderson*, 18 Wash. 322, 51 Pac. 463; *Bank* v. *Ewing*, 78 Ky. 266, 39 Am. Rep. 231. Where the waiver is written over an indorsement it is an individual waiver only, and not binding on those who do not expressly make themselves parties to it. *Central Bank* v. *Davis*, 19 Pick. 373; *Woodman* v. *Thurston*, 8 Cush. 157; *Duffy* v. *O'Connor*, 7 Baxt. 498. DANIEL, NEGOT. INSTR., §1092a. If the waiver is written or printed on the back of the instrument before execution or indorsement and delivery to the payee it must be considered as a part of the instrument as much as if it had been written on the face as to all who indorse it before delivery, and all such are bound thereby. *Bank* v. *Gold Mining Co.*, supra; *Bank* v. *Wilson*, 5 App. (D. C.) 8; *Johnson* v. *Parker*, 86 Mo. App. 860; *Bank* v. *Ewing*, supra. §110 of the Uniform Statute provides "where the waiver is embodied in the instrument itself, it is binding on all parties; but where it is written above the signature of an indorser it binds him only." In the instant case it was contended that this section abrogated the common law rule, and that even though all the indorsers wrote their names in blank below the waiver at the same time and before delivery to the payee, yet the waiver applied only to the first indorser. It would seem clear that in such a case the waiver should be considered as a part of the original contract of all the indorsers—they are all of a kind, all having indorsed under exactly the same conditions—who should be treated as one indorser within the second clause of §110.

CANCELLATION—OF DEED FOR MISTAKE ON PART OF GRANTOR.—The defendant company bought the land in question at a tax sale. It then discovered that the plaintiff railroad had a claim upon the land, and instituted proceedings to quiet title. The plaintiff company, relying on the advice of the state land commissioner to the effect that it had no title to the land in question, executed a quit claim deed to the defendant company. Then the plaintiff company discovered that it had title to the tract, and brought suit to cancel its deed on the ground of mistake. It was admitted that there was no fraud on the part of the defendant in procuring the quit claim deed, and the court found that the officers of the plaintiff company were not negligent in failing to discover, before the execution of the deed, that the plaintiff had an interest in the land. *Held*, that the deed should be cancelled. *Chicago, St. P., M. & O. Ry. Co.* v. *Washburn Land Co.*, (Wis. 1917), 161 N. W. 358.

There is no part of our law in a more chaotic condition than that dealing with mistake as a ground for relief or defense in equity. It is not strange that this is so, for practically every case raises a different and complex question upon the facts, and hence it is impossible to apply any hard and fast set of principles to all cases. It is well settled that not every mistake which would be sufficient ground for refusal to decree specific performance would authorize a court to rescind and annul a contract. *Moffett, Hodgkins Co.* v. *Rochester*, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. ed. 1108. It is likewise settled law that a unilateral mistake is not ground for reforming a contract. *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488, 490; *Fritz* v. *Fritz*, 94 Minn. 264, 102 N. W. 705. However, in case the relief asked is not reformation but rescission, most of the courts hold that, even if the mistake of fact is on the part of one party only, such relief may be granted. *Wirsching* v. *Grand Lodge*, 67 N. J. Eq. 711, 63 Atl. 1119; *Moffett, Hodgkins & Co.* v. *Rochester*, supra; contra, *Thompson* v. *Dupont Co.*, 100 Minn. 367, 111 N. W. 302; *Chute* v. *Quincy*, 156 Mass. 189, 30 N. E. 550. In both of the latter cases the hardship upon the plaintiff was not as great as in the principal case, in which there was practically an instance of a person deeding away his property without consideration. It is true that a voluntary deed will not be cancelled because of mere hardship to the grantor, *Fretz* v. *Roth*, 70 N. J. Eq. 764, 64 Atl. 152; but in case the hardship is coupled with a bona fide mistake of one of the parties, a court of equity may rightly, as in the principal case, decree cancellation of the deed.

CONSTITUTIONAL LAW—POWER OF CONGRESS TO PUNISH FOR CONTEMPT.—The petitioner, a District Attorney of New York, whose conduct was being investigated by a sub-committee of the House of Representatives of the United States, wrote a letter to the chairman of the sub-committee, which letter was also given to the press, making charges against the sub-committee "in language which was certainly unparliamentary and manifestly ill-tempered and which was well calculated to arouse the indignation not only of the members of the sub-committee but of those of the House generally." Upon the report of a select committee appointed to consider the subject, the petitioner was found guilty of contempt, a formal warrant for arrest was issued

and its execution by the Sergeant-at-Arms was followed by an application for habeas corpus. *Held,* that the House of Representatives had no power to punish the petitioner for contempt. *Marshall* v. *Gordon,* (Apr., 1917), 37 Sup. Ct. —.

Though early decisions seem doubtful on the subject (see *Ex parte Nugent,* 18 Fed. Cas. No. 10,375), it has long since been decided that neither branch of Congress has any general power to punish non-members for contempt. Such limited power as exists arises only by implication and rests upon the right of self-preservation—that is, the right to prevent acts which in and of themselves obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed; and it is "the least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat, 204; *Kilbourn* v. *Thompson,* 103 U. S. 168. The principal case decides that such implied power does not embrace *punishment* for contempt, as punishment, and hence that the House of Representatives had no power to imprison the petitioner for a contempt which "was deemed to result from the writing of the letter not because of any obstruction to the performance of legislative duty * * * but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon members of the committee and of the House generally." The court is careful to point out that the *legislative* power to make criminal every form of act which can constitute a contempt to be punished according to the orderly process of law is not subject to the strict limitation applicable to the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law, citing *In re Chapman,* 166 U. S. 661.

COPYRIGHTS—PERFORMANCE FOR PROFIT OF A MUSICAL COMPOSITION.—The plaintiff was the owner of a copyrighted musical composition which was sung in defendant's restaurant without permission. The music was furnished merely as entertainment to the diners, and no admission fee was charged. The plaintiff sued defendant for infringement. The Circuit Court of Appeals had held that this was not a public performance for profit within the meaning of the COPYRIGHT ACT of March 4, 1909, (COMP. STAT. 1913, §9517). *Held,* that the decision of the Circuit Court of Appeals should be reversed. *Herbert* v. *Shanley,* (1917), 37 Sup. Ct. 232.

For the first time the supreme court of the United States has passed upon the meaning of the words "publicly for profit" in the COPYRIGHT ACT. The court of appeals in *Herbert* v. *Shanley Co.,* 229 Fed. 340, 143 C. C. A. 460, construed the act as pertaining only to performances where an admission fee or some direct pecuniary charge is made. Justice HOLMES, who delivered the opinion of the Supreme Court, has the support of the English case of *Sarpy* v. *Holland & Savage,* [1909], 99 L. T. 317, in his proposition that the music is part of what was paid for by the public. The learned justice says in the principal case: "It is true that the music is not the sole object but

neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal." In addition to the principal point involved, it is possible to conclude the courts' opinion as to two other matters. In the first place, it is not the wages of the musician that makes the performance one for profit, but rather the purpose for which his employer engages him. Thus if a band is hired by a public-spirited citizen to play in a park, the latter would not be guilty of an infringement of copyrighted music played. The court also intimates that it would distinguish between a performance for profit and an eleemosynary one. For instance, a performance by a church choir would probably be considered an eleemosynary one one rather than one for profit even if the music increased the attendance and in that manner swelled contributions. The principal case is a valuable one in the interpretation of this clause of the COPYRIGHT ACT, both as to the point actually decided and as to the other conclusions which may fairly be drawn from the opinion.

CORPORATIONS—EFFECT OF DECISION OF DIRECTORS AND SHAREHOLDERS IN DETERMINING WHETHER THEIR ACT IS WITHIN THE EXPRESS OR IMPLIED POWERS OF THE CORPORATION.—The board of directors of defendant bank had entered into a contract with defendant X, who had for many years been president of the institution, by which they paid him $50,000, in return for which he relinquished claims under the pension system of the bank and agreed, on his resignation, not to engage in the banking business with any other bank in the city for a certain period of time. Plaintiff, owning less than 1% of the shares of the bank, brings the present equitable action to have this contract set aside. *Held,* that while the action of the directors and shareholders (who had both affirmed the pension plan) had no legal weight in determining the construction of the express powers of a corporation, their judgment, while not conclusive, is entitled to consideration in determining whether a given action is within the implied powers of the corporation, and that shareholders of a national bank have incidental power to create a pension fund for the benefit of officers and employees. *Heinz* v. *National Bank of Commerce,* 237 Fed. 942, (C. C. A. 1916).

The authorities cited for this doctrine are MORSE, BANKS AND BANKING, §54; 1 MACHEN, MODERN LAW OF CORPORATIONS, §§67, 87-90; THOMPSON, CORPORATIONS, (2nd ed.), §§2100-2129. The sections cited in MORSE and THOMPSON, neither in the text nor in the cases cited, give any *direct* support to the doctrine advanced in the instant case. Nor, we submit, does the *text* in MACHEN. The last named author does, however, give an effective discussion of the power of a corporation to dispense gratuities to its servants, and in the English cases cited by the author we find ample authority for the doctrine of the instant case. Thus in *Atty.-Gen.* v. *Great Eastern Ry.,* 11 Ch. D. 480, JAMES, L. J., says: "The majority of managing partners may be trusted, and ought to be trusted, in determining for themselves what they may do and to what extent they may go in matters directly connected with, or arising out

of, their business relations with others." In *Hampson* v. *Price's Patent Candle Co.*, 45 L. J. Ch. 437, where it was decided that a bonus profit-sharing scheme approved by directors' and shareholders' meeting of manufacturing corporation was intra vires, JESSEL, M. R., says: "He [the judge] ought to consider that the manager and directors of the corporation whose business it is, and who ought to know how to conduct the business to the most advantage, ought to be allowed to judge whether what is about to be done is advantageous and reasonable or not." So in *Henderson* v. *Bank of Australasia*, 40 Ch. D. 170, which is almost on all fours with the instant case, in that gratuity to family of bank manager who had been killed in accident was sustained by the court as sound business policy and within the province of the board of directors, the preceding cases were cited and approved by NORTH, J., who also distinguished *Hutton* v. *West Cork Ry. Co.*, 23 Ch. D. 654, because the gratuities in that case were on the *dissolution* of the company. *In re Irish Provident Assurance Co.*, [1913], 1 Ir. R. 352, is a modern case along the same line. There seem to be no other American cases which *expressly* recognize the doctrine of the instant case, though it seems in accord with the general trend of decisions in this country and may be said to be tacitly recognized in the consideration *actually* given to the superior knowledge naturally possessed by directors concerning the conduct of the business of the corporation.

CORPORATIONS—REFUSAL TO ACCEPT ARTICLES OF INCORPORATION BECAUSE OF UNCERTAINTY IN EVALUATION OF PATENTS AS CONSIDERATION FOR STOCK.—$64,050 worth of the shares of the M. Calculator Co. were issued for patents controlling the special machine the corporation was incorporated to manufacture and sell. Under § 6, Art. 12, of the Constitution of Texas no shares of a corporation shall be issued except for "money paid, labor done, or property actually received," and under Arts. 1126-1128 of Vernon's Sayles' Civil Statutes it is provided that 50% of the stock of the corporation shall be paid in, that the property given for the stock shall be described and evaluated and the description and evaluation sworn to by the incorporators, and that if the affidavits accompanying the articles fail to satisfy the Secretary of State he may refuse to "receive, file and record" such articles until satisfactory evidence be forthcoming. In the instant case the Secretary of State had refused to receive the articles on the ground that the evidence of the value of the patent rights was unsatisfactory as part of the requisite 50% paid up stock; plaintiffs, applicants for the corporate charter, bring mandamus to compel the acceptance of the articles. *Held*, that it was within the discretion of the Secretary of State to refuse to receive the articles. *Beach et al.* v. *McKay*, (Tex. 1917), 191 S. W. 557.

It was contended by the Secretary of State in this case that patent rights are never property which can be "actually received" within the terms of the Constitution. The court did not consider it necessary to pass on that point, finding sufficient legal ground to hold against the relators in the uncertain character of the value of any patent right and lack of power in the court to compel a discretional act by a state officer. The case is interesting, however, in that many states, including Michigan, have similar requirements to those

of the Texas statute as to making affidavits of the value of property paid in for stock, and similar discretion reposed in the Secretary of State. Under such provisions it has been a matter of doubt for some time to thoughtful lawyers who have been confronted with the problem of incorporating firms whose stock was to be largely issued for patents, as to the precise effect of the statutory provisions concerning valuation under oath of the property turned in for stock. The instant case does not tend to encourage those who would incorporate with patent rights of more or less nebulous value as the principal asset of the corporation. The effect would be to give greater protection to creditors, but considering how many important companies, a source of profit to their shareholders and of benefit to the community, have been launched almost entirely on the value of the patents assigned to them, it is doubtful whether there may not be a distinct loss from a larger view. A Michigan case along this line is discussed in 15 MICH. L. REV. 443.

CORPORATIONS—WHEN IS A CORPORATION A "MANUFACTURING CORPORATION"?—Art. 10, §3 of the Minnesota Constitution provides for the statutory double liability of shareholders of a corporation "excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business." A corporation was organized for the general purposes of manufacturing and furnishing electric current for light, heat and power, and, aside from the usual accessory power to acquire land and water rights, was to furnish or supply electrical appliances, and also to conduct the business of "electrical contractors and electrical and mechanical engineers." In a suit to recover from the shareholders of this company under the statute, *held*, that the corporation was not a manufacturing company so as to come within the exemption. *Goddard* v. *Jost*, (Minn. 1917), 161 N. W. 223.

The court states that a corporation for the manufacture and distribution of electrical power is a manufacturing corporation, citing two Minnesota cases. One of these, *Vencedor Inv. Co.* v. *Highland Canal & Power Co.*, 125 Minn. 20, gives an excellent review of this point, and in connection with the note to *Williams* v. *Warren*, 72 N. H. 305, in 64 L. R. A. 38, clearly shows that the weight of authority is with the statement of the law made above. The power to manufacture and furnish electrical appliances is a common accessory power of electric light companies. The other two powers are clearly accessory to the main power already stated. That of holding lands for the charter purposes of the corporation has often been defined as an inseparable incident to every corporation. See 1 BLACKSTONE, COMM. 475; *Thomas* v. *Dakin*, 22 Wend. 1; *Snell* v. *Chicago*, 133 Ill. 413. The conferring of that power could hardly remove the company from the class of manufacturing corporations. There remains only the power of doing business as contractors and engineers. This is clearly not manufacturing in its nature, and while it is as clearly a power entirely incidental to the main purposes of the corporation, it seems sufficient ground, possibly in conjunction with the power to manufacture and furnish electrical appliances, for the court to refuse to include A. Co. within the exemption. Reference to the five cases cited by the court as "interesting" in this connection shows how strong

is the policy of the Minnesota courts to prevent, if possible, the operation of the exemption clause of the statute. Thus corporations manufacturing, packing and selling dairy products; in general laundry business; allowed to manufacture, sell, use and lease machinery; allowed to manufacture and deal in azotine, etc.; and manufacturing, purchasing and repairing plows and agricultural machinery were all held not to be manufacturing corporations so as to entitle their shareholders to the exemption of the Constitution. We assume, with some little hesitation, that a corporation empowered to *manufacture,* but in no way authorized to *dispose of* its product would be within the terms of the exemption as defined by the Minnesota courts.

DIVORCE—DOMICILE AND ESTOPPEL.—Defendant had been deserted by her husband in New York; plaintiff persuaded her to go to Nevada, establish a domicile there, and get a divorce; which she did, receiving financial aid from plaintiff. Plaintiff and defendant were then married. Plaintiff now seeks to have the marriage annulled on the ground that the divorce in Nevada was void because defendant's first husband was not a resident of Nevada, had not been personally served, and did not appear. *Held* that the Nevada decree might be recognized in New York under interstate comity and that the plaintiff could not question a decree which he himself was instrumental in obtaining. *Kaufman* v. *Kaufman,* (1917), 163 N. Y. Supp. 566.

The New York courts have been little disposed to recognize divorce decrees granted in other states against residents of New York who were not personally served and who did not appear. In *O'Dea* v. *O'Dea,* 101 N. Y. 23, the wife deserted the husband, who moved to Ohio and secured a divorce from her. She married again and her second husband successfully sued for annullment on the ground that the Ohio divorce was not entitled to recognition in New York. The United States Supreme Court reached a different conclusion in *Atherton* v. *Atherton,* 181 U. S. 155, where the divorce was granted by a court in the matrimonial domicile. Since the *Atherton* case two New York cases, *North* v. *North,* 93 N. Y. Supp. 512, and *Post* v. *Post,* 133 N. Y. Supp. 1057, (affirmed 210 N. Y. 607), have followed the *Atherton* case. In *Post* v. *Post* the court said that where the wife deserted the husband and moved to another state the decision of the court of the state where the husband remained was conclusive as to the justification of her leaving and would be entitled to full faith and credit, but where the husband moved to another state leaving the wife, the decision of the court where the husband goes is not conclusive, thus distinguishing *Atherton* v. *Atherton,* supra, and *Haddock* v. *Haddock,* 201 U. S. 562. See *Perkins* v. *Perkins,* (Mass), 113 N. E. 841, 15 MICH. L. REV. 269, following *Haddock* v. *Haddock.* But a different situation is raised when the wife has gone to another state and secured a divorce, her husband having deserted her. It is universally held that under such circumstances she may secure a separate domicile. *Harding* v. *Alden,* 9 Greenl. (Me.) 140; *Buckley* v. *Buckley,* 50 Wash. 213; *Wacker* v. *Wacker,* 139 N. Y. Supp. 78. But a decree so obtained by her in another state has not been recognized in New York, provided the husband is a resident of New York. *People* v. *Baker,* 76 N. Y. 78. The court in the principal case held it did not

appear clearly that the husband was a resident of New York, and so the policy of New York did not forbid the recognition of the Nevada decree; and even if it did so appear, still the plaintiff was estopped to deny the validity of defendant's divorce. The holdings of the New York court in regard to recognizing a foreign divorce decree have placed it in a puzzling situation sometimes. In *Re Swale's Estate,* 70 N. Y. Supp. 220, the wife went to Illinois, got a divorce from her husband, came back to New York, married again and upon her first husband's death sued to get administration of his estate. Her second marriage was invalid by the laws of New York; yet it would be inconsistent to allow her, being the wife of another, to secure administration of her first husband's estate. The New York court solved the difficulty by holding that the wife, having secured the decree in Illinois, was afterwards estopped to deny its validity. For other cases arising under like circumstances see *In Re Feyh's Estate,* 5 N. Y. Supp. 90, *Berry* v. *Berry,* 114 N. Y. Supp. 497, *Starbuck* v. *Starbuck,* 173 N. Y. 503. The instant case goes a step further in holding that the plaintiff, who aided the wife in securing the decree, will also be estopped to deny its validity. See also *Kinnier* v. *Kinnier,* 45 N. Y. 535.

DIVORCE—INDIANS.—Plaintiff's mother was a Sioux Indian who had been abandoned by her husband Alexis, a half-breed, about four years before plaintiff's birth. Plaintiff claimed certain land as heir of Alexis upon the ground that there had been no valid divorce between Alexis and his mother. Alexis could read and write, and looked and dressed like a white man, but was recognized as a member of the Sioux tribe and followed tribal customs when he "bought" and married plaintiff's mother; under the same customs, his later abandonment of her amounted to a valid divorce. *Held,* that a divorce by abandonment according to Indian customs, when the tribe is still treated by the Federal government as a distinct community, will be recognized by state courts. *La Framboise* v. *Day,* (Minn. 1917) 161 N. W. 529.

The Indian custom in regard to marriage consisted simply in living together as husband and wife; divorce was an agreement to part, or abandonment by one party of the other. *Earl* v. *Godley,* 42 Minn. 361. One case says there must be express words uttered in the present tense disclosing a meeting of minds in order to constitute an Indian marriage. *Henry* v. *Taylor,* 16 S. D. 424. But most authorities do not require that the elements of a common law marriage be present. The question is simple when the marriage or divorce takes place in Indian territory and both parties are Indians; it is held uniformly in such cases that the marriage or divorce is valid. *Buck* v. *Branson,* 34 Okl. 807; *Wall* v. *Williamson,* 8 Ala. 48; *Earl* v. *Godley,* supra. The principal case holds that a marriage and divorce between a half-breed and Indian woman will be recognized although the half-breed acted and appeared like a white man and did not live on a reservation; the important fact was that he was recognized as a member of the tribe. In *Cyr* v. *Walker,* 29 Okl. 281, a white man who had been adopted by the Pottowatomie Indians married a white wife in Illinois, and after moving with her to an Indian reservation, abandoned her. It was held to constitute a divorce.

The court in the principal case disapproves of this case as going too far, and the trend of *Wells* v. *Thompson,* 13 Ala. 793, is also contrary. Where a white man lives upon an Indian reservation and takes an Indian woman and later abandons her, the proceeding has been upheld as marriage and divorce in several cases. *Johnson* v. *Johnson,* 30 Mo. 72; *Boyer* v. *Dively,* 58 Mo. 510; *La Riviere* v. *La Riviere,* 77 Mo. 512. Such a marriage without a later divorce was recognized in *Bank* v. *Sharpe,* 12 Tex. Civ. App. 223, and *Morgan* v. *McGhee,* 5 Humph. (Tenn.) 13. *In Re Wilbur's Estate,* 8 Wash. 35, was attempted to be distinguished from these cases on the ground that a prohibitory state statute applied within the reservation. If both parties are Indians and move out of the reservation into a state proper and then attempt to dissolve the marriage relation by abandonment, the divorce will not be upheld. *Connolly* v. *Woolrich,* 11 Lower Can. Jur. 197. If they remain after land has been allotted and state statutes have been applied a divorce according to Indian custom will not be recognized. *Moore* v. *Nah-con-be,* 72 Kan. 169. Contra *Kalyton* v. *Kalyton,* 45 Ore. 116.

HUSBAND AND WIFE—CONTRACT FOR SERVICES RENDERED HUSBAND.—The husband had hired the plaintiff, his wife, to assist him in his work as a detective agreeing to pay her what her services were reasonably worth. The statute provided that a married woman might contract with reference to her property in the same manner and to the same extent as a married man and that she should be entitled to her earnings. She sued to recover from her husband's estate the value of her services to him. *Held,* that a married woman under an express contract with her husband may recover for extra or unusual services rendered him. *In Re Cormick's Estate,* (Neb. 1916) 160 N. W. 989.

The authorities are in considerable conflict upon the point raised in the instant case. Under most Married Women's Statutes the wife is entitled to her earnings in her separate business or when she is in the employ of a third person. *Carse* v. *Reticker,* 95 Ia. 25; *Peterson* v. *Mulford,* 36 N. J. L. 481. All the authorities agree to the invalidity of a contract by a married woman to render services about the household, which she is duty bound to do. *Michigan Trust Co.* v. *Chapin,* 106 Mich. 384, 58 Am. St. Rep. 490 and note. But if the wife has good cause for divorce and, in consideration of money to be paid her for continuing her household duties, drops a divorce suit, the contract will be enforced. *Phillips* v. *Meyers,* 82 Ill. 67. The New York decisions are contrary to the principal case. In *Blaechinska* v. *Mission and Home,* 130 N. Y. 497, the plaintiff, a married woman, was employed as a seamstress by her husband. She was injured through the negligence of the defendant and sued for the value of her services, which she could no longer perform. The New York Statute then provided that a married woman should be entitled to her earnings, but the court held she could not recover. In *Coleman* v. *Burr,* 93 N. Y. 17, the wife agreed with her husband to care for his mother for $5 a week, and did so for eight years. The husband conveyed to her a tract of land in payment, and the deed was set aside as a fraud upon creditors. See also *Matter of Callister,* 153 N. Y. 294. Even

under the latest New York Statute, which provides that a married woman may make all contracts in regard to her property which an unmarried woman may make, and with any person, including her husband, the court held that she could not contract with him for her services even in an extraordinary or unusual employment. *In Re Kaufmann,* 104 Fed. 768. In New Jersey the statute provided that a married woman might bind herself by contract with any person in the same manner as if she were unmarried; it was held not to apply to a contract to act as saleswoman of a partnership of which her husband was a member. *Turner* v. *Davenport,* 61 N. J. Eq. 18. Contra *Powers* v. *Fletcher,* 84 Ind. 154. The Indian statute provides that all the legal disabilities of a married woman are abolished except as otherwise provided; the court said that as it was not expressly provided that she might not contract with her husband to serve him, she might do so. *Roche* v. *Union Trust Co.,* 52 N. E. 612 (Ind.) holds that a woman who clerked in a store for her husband under an express agreement might recover from the trustee for the benefit of creditors. The case of *Nuding & Schlouch* v. *Ulrich,* 169 Pa. St. 289, holds that the wife might recover compensation under an express agreement to cook in her husband's restaurant. The statute in that case is similar to those in New York and New Jersey.

INJUNCTION—RIGHT OF A MEMBER OF TRADE UNION TO ENJOIN A WRONGFUL EXPULSION.—Plaintiff, a member of the defendant union, was fined for an offense against the union; the fine was not, however, imposed in the manner required by the constitution of the union. Plaintiff was suspended for non-payment of the fine, whereupon he appealed to the judicial board of the union, which informed him that according to the constitution he must pay his fine before the appeal would be heard; he brings an action for an injunction to prevent defendant union and its officers from refusing to treat him as a member and from refusing to accord to him the benefits incident to membership. *Held,* the injunction should be granted. *Holmes, et al.* v. *Brown* (Ga. 1917) 91 S. E. 408.

In this case equity grants an injunction to protect a property right, i. e., the plaintiff's interest in the beneficiary and mortuary funds of the association. While equity will not usually prevent the expulsion of a person from a purely social association, (*Wellenvoss* v. *Grand Lodge,* 103 Ky. 415, 45 S. W. 360; *O'Brien* v. *Musical M. P. & B. Union,* 64 N. J. Eq. 525, 54 Atl. 150), it will prevent an expulsion when the complainant would be deprived of a property right thereby. *Mesisco* v. *Giuliano,* 190 Mass. 352, 76 N. E. 907, *Evans* v. *Philadelphia Club,* 50 Pa. St. 107. But it is well settled that the plaintiff must first exhaust his remedy within the association. *Engel* v. *Walsh,* 258 Ill. 98, 101 N. E. 222; *Oliver* v. *Hopkins,* 144 Mass. 175, 10 N. E. 776; *Harris* v. *Detroit Typographical Union,* 144 Mich. 422, 108 N. W. 362. Some cases hold that a person is bound by the constitution regardless of the justice of the same, on the theory that the constitution and rules of an association constitute a contract between the members, and while the provision might be invalid as a by-law passed without his assent, he is bound because he has agreed to it. *Levy* v. *Magnolia Lodge,* 110 Cal. 297, 42 Pac.

887; *Lawson* v. *Hewel,* 118 Cal. 613, 50 Pac. 763. According to this "contract" theory a person could be expelled by a proceeding which failed to give any notice or even be bound by an agreement not to question the decision of the board by resorting to the courts. A better view seems to be the one evidently taken by the court in the principal case, that equity will grant relief against rules contrary to natural justice. *People* v. *Uptown Assoc.,* 9 App. Div. 191, *Williamson* v. *Rundolph,* 48 Misc. 96. Whether this particular rule is contrary to natural justice or not, is a debatable question—the court assumes that it is, without discussion. Surely, however, there may be instances when a party should not be bound by unjust provisions in the constitution, which he has probably never read and which was never intended as a contract.

MARRIAGE—ANNULMENT.—Suit to annul a marriage on the ground that it was induced by the concealment of defendant that she was an incurable epileptic. No children were born of the marriage. *Held,* that the marriage should be annulled. *McGill* v. *McGill,* (1917) 164 N. Y. Supp. —.

The English courts which have jurisdiction over this subject have followed closely the decrees of the ecclesiastical courts which they succeeded, and will annul a marriage only when there is fraud in the factum, or that sort of fraud which produces an appearance without a reality of consent. *Moss* v. *Moss,* L. R. (1897) Prob. & Div. 263. The American courts, led by those of New York, have departed in varying degrees from this restricted view. *Reynolds* v. *Reynolds,* 3 Allen 605; *Ryder* v. *Ryder,* 66 Vt. 158. The statute of New York, (§1730 CODE CIV. PROC.) which authorizes the annulment of marriage for fraud, is in terms merely declaratory of the common law, and does not affect the question. The decisions in that jurisdiction have resulted from a greater liberality of view on the part of the courts, and not from legislation. Facts practically identical with those here given have been held to furnish insufficient grounds of annulment. *Lewis* v. *Lewis,* 44 Minn. 124, 46 N. W. 323; *Lyon* v. *Lyon,* 230 Ill. 366, and to the same effect is the recent case of *Allen* v. *Allen,* 85 N. J. Eq. 55, 95 Atl. 363, in which there was concealment of hereditary insanity. But in the latter jurisdiction, as in all others where the question has arisen, a venereal disease has resulted in annulment. *Crane* v. *Crane,* 62 N. J. Eq. 21, 49 Atl. 734; *Smith* v. *Smith,* 171 Mass. 404, 50 N. E. 933. Why many of these courts give relief in some cases, and deny it in others where the fraud of the defendant is equally plain and the danger to succeeding generations probably greater, is not apparent. *Sobol* v. *Sobol,* 150 N. Y. Supp. 248, in which annulment was granted because the husband was shown to have tuberculosis, furnishes a proper stepping-stone to the instant decision. Both promote the best interests of society and work no injustice to the defendant. See 13 MICH. L. REV. 426, and 13 HARV. L. REV. 110.

PLEADING—EXHIBITS AS PART OF COMPLAINT DEMURRED TO.—An action was brought against certain copartners and their bondsman, a corporation. The complaint failed to allege that the defendant bondsman was a corporation, but a copy of the bond sued on was attached to the complaint and

showed the incorporation of defendant. A demurrer to the complaint, based on the failure to allege incorporation, was overruled. *Held*, that the attached bond was such a part of the complaint that it was sufficient on demurrer. *Sogn* v. *Koetzle, et al.*, (S. D. 1916) 160 N. W. 520.

Pleading by way of exhibits, although known to the old equity practice, was not known at common law. The authorities are not uniform in their holdings as to whether an instrument of writing annexed to the complaint, and alleged to be a part thereof, can be considered in determining the sufficiency of the allegations of the complaint when a demurrer is interposed. 6 ENC. PL. & PR. 299. The weight of authority probably supports the rule that in the absence of a statute the annexing and filing of papers as exhibits to a pleading does not make them a part thereof. *Stratton* v. *Henderson*, 26 Ill. 69; *Hadwen* v. *Home Mut. Ins. Co.*, 13 Mo. 473; *Larimore* v. *Wells*, 29 Oh. St. 13; *Aultman* v. *Siglinger*, 2 S. D. 442. It naturally follows that they cannot be referred to for the purpose of remedying the omission of a material allegation or curing a fatal defect. *Hickey Co.* v. *Fugate*, 143 Mo. 71; *Burkett* v. *Griffith*, 90 Cal. 532; *Wynne* v. *State Nat. Bank*, 82 Tex. 378; *Cave* v. *Gill*, 59 S. C. 256. However, the court deciding the principal case repudiated the doctrine set forth above, and, referring to *Aultman* v. *Siglinger*, cited supra, stated that its decision had long been disaffirmed in South Dakota and other states. The decision of the case under consideration is supported by authorities. *Stephens* v. *American Fire Ins. Co.*, 14 Utah 265; *Hudson* v. *Scottish Union & Nat. Ins. Co.*, 110 Ky. 722; *Pefley* v. *Johnson*, 30 Neb. 529. It should be noted that in spite of the conflict as to the value of an exhibit attached to a pleading demurred to, the courts quite generally agree that exhibits may be looked to for definiteness and certainty of material allegations. 8 ENC. PL. & PR. 741.

PROCESS—EXEMPTION OF WITNESS IN REPRESENTATIVE CAPACITY. — The managing agent of the defendant corporation was served in X County with summons, directed against the corporation, while passing through said county to attend court as a witness in Y County. The defendant was a domestic corporation located and doing business in Y County and its only representative in X County when the summons in question was served was the above mentioned agent. The plea attacking the jurisdiction was overruled, an exception to the ruling was reserved, and, after a trial on the merits, judgment was given for the plaintiff. *Held*, that the plea to the jurisdiction should have been sustained. *Commonwealth Cotton Oil Co.* v. *Hudson*, (Okla. 1916) 161 Pac. 535.

The legislature of Oklahoma has provided that "a witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county, while going, returning, or attending in obedience to a subpoena." REVISED LAWS 1910, §5064. In applying that statute to the facts of the case under consideration two important questions are presented, (1) does the exemption apply to the witness in his representative capacity? and (2) does the exemption exist outside of the jurisdiction of the court whose subpoena the witness is obeying? On a similar state of

facts it has been held that the witness is exempt only in his personal capacity. *Currie Fertilizer Co.* v. *Krish,* (Ky.) 74 S. W. 268; *Linn* v. *Hagan,* 121 Ky. 627, 87 S. W. 1101; *Breon* v. *Miller Lumber Co.,* (S. C.) 65 S. E. 214, 24 L. R. A. N. S. 276. However, the weight of authority apparently supports the holding in the principal case that the exemption applies to a witness in both his personal and representative capacities. *Sewannee Coal, Coke & Land Co.* v. *Williams,* 120 Tenn. 339, 107 S. W. 968; *Mulhearn* v. *Press Pub. Co.,* 53 N. J. Law 153, 21 Atl. 186, 11 L. R. A. 101. See also 32 Cyc. 493 and 24 L. R. A. N. S., note. On the second point, there appear to be only two reported cases which have held that a suitor or witness is not exempt from service while in an intermediate state en route to or from a trial. *Holyoke Coal, Coke & Land Co.* v. *Ambden,* 55 Fed. 593, 21 L. R. A. 319; *Cronk* v. *Wheaton,* 15 Pa. Dist. Rep. 721. On the other hand, the doctrine that such persons are exempt from service when in an intermediate state is supported by the decision of one case and the dictum of another. *Lofge* v. *Lowes,* 131 Tenn. 626, 176 S. W. 106, L. R. A. 1916A 734; *Barber* v. *Knowles,* 77 Oh. St. 81, 82 N. E. 1065, 14 L. R. A. N. S. 663, 11 Ann. Cas. 1144. Further, the rule of the principal case as applied to intermediate counties is supported by authority. *Tyrone Bank* v. *Doty,* 2 Pa. Dist. Rep. 558, 12 Pa. Co. Ct. 287; *Hoffman* v. *Judge of Circuit Ct.,* 113 Mich. 109, 71 N. W. 480, 38 L. R. A. 663, 67 Am. St. Rep. 458. Thus it seems that the interpretation of the Oklahoma statute, while very liberal and extensive in its application, is in accord with the better reason and authority. For a discussion of the question as to whether this defect in service was waived by pleading to the merits after the plea to the jurisdiction was overruled, see the following note.

PROCESS—WAIVER OF DEFECT IN SERVICE BY PLEADING TO MERITS.—The defendant corporation, after excepting to the order of the court overruling its plea to the jurisdiction, went to trial on the merits. Judgment was rendered for the plaintiff and an appeal taken. *Held,* that the defendant did not waive the jurisdictional objection by contesting the case on the merits. *Commonwealth Cotton Oil Co.* v. *Hudson,* (Okla. 1916) 161 Pac. 535.

The decisions of the various courts of the United States are in hopeless conflict on the question of waiver raised in the principal case. 16 L. R. A. N. S. 177, note; L. R. A. 1916E 1082, note. For a full discussion of the question, see "PRESERVING A SPECIAL APPEARANCE," 9 MICH. L. REV. 396. While it may seem incongruous to maintain that one can contest a cause on its merits and still not waive objections to the jurisdiction, yet it may be answered that it is hardly fair for a defendant to be deprived of the benefit of jurisdictional defects when he, in court under protest, defends himself under compulsion rather than suffer judgment by default. This is the reasoning on which the decision in the principal case was based. For a discussion of the precise jurisdictional question involved in this case, see the preceding note.

WILLS—EXTRAORDINARY STOCK DIVIDEND AS RESIDUE.—At the time of making her will, testatrix was the owner of 30 shares of stock in the Stand-

ard Oil Company. Before her death this company, by virtue of a decree by the United States Supreme Court ordering its dissolution, distributed its holdings in subsidiary companies among its stockholders, and testatrix thereby became the owner of shares in 39 corporations, retaining at the same time the original 30 shares. The legatee of these shares claimed that this was a specific legacy which would be construed as of the time of the execution of the will, and that the shares in the subsidiary companies, which when the will was drawn were held by the parent corporation and gave the primary shares their value, were part of her legacy. *Held*, that the shares were in effect an extraordinary dividend, which, having been declared during the life of the testatrix, passed to the residuary legatee. *In re Brann* (N. Y 1917), 114 N. E. 404.

The question whether a legacy is adeemed upon the reorganization of a corporation and the reissue of stock by it, has not often been before the courts. See COOK, CORP., §306. In *Pope* v. *Hinkley*, 209 Mass. 323, 95 N. E. 768, the question was discussed, but it appears from the facts that the actual exchange of shares was not made until after the death of testator, though the agreement to reorganize and the dissolution of the old corporation were effected during the testator's life. *In re Pierce*, 25 R. I. 34, 54 Atl. 588, where there was a consolidation of several corporations, and in addition to the new stock issued a small cash payment was made to "equalize values," comes to the same conclusion, that the legacy was not adeemed. In *Turner* v. *Leeming*, [1912] 1 Ch. 828, during the life of testator a corporation was dissolved and reorganized, and a bequest of 10 shares was held not to have been adeemed, for the "subject matter remained, though changed in form and number," and the legatee was entitled to the 40 shares of stock (equal in par value) issued by the reconstructed company. See also *Mallam* v. *McFie*, [1912] 1 Ch. 29. But compare *In re Slater*, [1907] 1 Ch. 665, where it was held that a legacy of stock to the value of £1075 was adeemed upon the merger of one corporation into a second, when testator received shares in the second corporation valued at £3700, upon the grounds that this was not a substitution but an "extinction or annihilation of the original property." *Brundage* v. *Brundage*, 60 N. Y. 544, is cited by the court as authority for the decision in the principal case. In that case the stock issued between the time of making the will and the death of the testator might more truly be said to have been a dividend, for it represented earnings spent for improvements; while in the principal case the distribution was of the assets of the parent corporation and part of the "essence of the original shares," which is evidenced by the fact that at the time of the death of the testator the value of the thirty shares had been diminished to the extent of one-third of their former value. The question whether a stock dividend is income to which the life-tenant is entitled, or is a part of the corpus which must be preserved for the remainderman, has frequently been the subject of litigation, which has resulted in a sharp conflict of authority. *Matter of Osborne*, 209 N. Y. 450, 103 N. E. 723; see note in 12 L. R. A. (N. S.) 768, to *Holbrook* v. *Holbrook*, 74 N. H. 201, 66 Atl. 124; COOK, CORP., §§552-560.

WILLS—RETAINING SURPLUS INCOME FOR POSSIBLE FUTURE DEFICIENCY.—A one-sixth share of the residuary estate was left upon trusts to pay out of the income an annuity of £1000, to the wife of the testator, and "subject thereto to permit the same share to devolve under the provision for accruer" therein contained. The estate consisted largely of stocks and bonds, the income from which was ordinarily sufficient to provide for the annuity. But it was claimed by the widow that there was a possibility, on account of the war, of a dividend being passed, which would result in no funds to meet the annuity payment. The question presented was whether the trustees had the power to retain the present surplus income to meet possible future deficiencies. *Held,* that the income should be used to satisfy the claims of the annuitant to date, but beyond this it should be held according to the accruer declared by the will. *In Re Platt; Sykes* v. *Dawson,* [1917] 1 Ch. —; 86 L. J. Ch. 114.

The court in the instant case admits, and it is so held in this country, that where there has been a deficiency during certain years the annuitant is entitled to have the arrearages made up from the income during the subsequent years. *Rudolph's Appeal,* 10 Pa. 34; *Re Chauncey,* 119 N. Y. 77, 23 N. E. 448, 7 L. R. A. 361. In *Walters* v. *Steele,* 210 Pa. 219, 59 Atl. 821, the annuitant claimed that the surplus of the fund from a judicial sale of lands to satisfy arrearage should remain in court to secure future payments, but the court held that it was sufficient that the land was sold subject to this charge, while the surplus was awarded to the defendant in the execution. The reason given was "the impossibility of computing the amount of future arrears." In a suit asking for the distribution of surplus rent, it was urged on behalf of the annuitant that the surplus should be retained as a fund out of which any deficiency in the rents to pay the annuity in any year should be made good. It was declared by the court that such did not appear to be the intention of the testator, and a distribution was ordered. *In re Pierce,* 56 Wis. 560, 14 N. W. 588. The reason underlying the rule in this and the principal case seems to be the desire of the court to settle the estate as early as possible; to insure the payment of the annuity, but at the same time to postpone as little as possible the enjoyment of the corpus by the ultimate donee. *Harbin* v. *Masterman,* [1896] 1 Ch. 357; *Henderson's Estate,* 228 Pa. 405, 77 Atl. 634.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF EMPLOYMENT.—Deceased was an agent of respondent, and found it necessary to visit respondent's London office; with respondent's knowledge and tacit consent he sailed for London on the Lusitania, which ship was sunk by a German submarine within the war zone, and deceased was killed. *Held,* this is an accident arising out of the employment, and respondent is liable. *Foley* v. *Home Rubber Co.,* (N. J. 1917) 99 Atl. 624.

The main contention of the respondent was that, as the attack was in violation of the law of nations, therefore the act was not within the contemplation of the respondent when deceased undertook the risk. But the court held it immaterial whether the ship was destroyed by lawful or un-

lawful means; that respondent was charged with knowledge of the danger to belligerent ships, whether aware of the publication by Germany of the war zone or not. As to what constitutes an "arising out of" the employment, there exists a flat conflict of authority. The English courts, and a few of our courts, hold that the injury must result from a *special* danger or risk, and not such as the public in general assume. Under this view no recovery could be had, as deceased was assuming no greater risk because of his employment than the hundreds of others on the ship. But the New Jersey court here, as previously, chose the broader doctrine, holding it sufficient if the injury arises out of work or business being done for the master, either by direct or implied authority. For discussion of this point see 15 MICH. L. REV. 92. A sharp conflict also exists as to the extra-territorial effect of the Compensation Acts, where, as here, no provision on that point is contained. The English, Massachusetts, Michigan and Wisconsin courts deny them any extra-territorial effect, apparently fearing the result of a conflict of laws. *Gould's case,* 215 Mass. 480, 102 N. E. 693; *Keyes-Davis Co.* v. *Allerdice,* Mich. Ind. Acc. Board, (1913); *Schwartz* v. *Telegraph Co.,* (1912) 2 K. B. 299. But Ohio and New Jersey hold the contrary view, basing it on legislative intent, and also on the theory that the law of the place where the contract was made should govern the relations between the employer and employe wherever they may be. *Deeny* v. *Wright, etc. Co.,* 36 N. J. Law J. 121. *Re Edward Schmidt,* Claim No. 6, Ohio St. Lia. B'd Aw'd, (1912). For discussion of this point see 14 MICH. L. REV. 524.