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ANIMALS—INJURIES BY ANIMALS AT LARGE.—In an action for damages for injuries sustained by the kick of a horse, the petition alleged that for many days the defendant carelessly and negligently permitted a horse owned by him to run loose on the streets unattended, and that the plaintiff while playing about was kicked by the horse. On demurrer, *held,* no cause of action stated because no allegation that the owner knew the horse was vicious. *Brady* v. *Straub,* (Ky. Ct. of App. 1917), 197 S. W. 938.

Injuries by domestic animals may be divided into two classes, usual and unusual, or those according to the nature of the animal and those not according to the nature of the animal. For instance it is the usual nature of a domesticated animal to stray if unconfined and the defendant is charged with notice of such propensity. *Tonawanda R. R. Co.* v. *Munger,* 5 Denio (N. Y.) 255. In the case of a trespass no negligence on the part of the owner need be proved. *Milligan* v. *Wehinger,* 68 Pa. 235; *Noyes* v. *Colby,* 30 N. H. 143. But if the animal is lawfully where it is, as on a highway, and is not trespassing, the owner is not liable without proof of negligence on his part for any injury it may do upon the highway. *Tillett* v. *Ward,* L. R. 10 Q. B. D. 17; *Griggs* v. *Fleckenstein,* 14 Minn. 81. Where, however the harm is not according to the nature of the animal the law holds that the owner or keeper is not liable unless it appears that he should reasonably have foreseen the likelihood of such damage through his knowledge of a vicious or mischievous propensity in the animal. *Crowley* v. *Groonell,* 73 Vt. 45; *Cox* v. *Burbridge,* 106 E. C. L. 430; *Eddy* v. *Union R. R. Co.,* 25 R. I. 451. But in *Dickson* v. *McCoy,* 39 N. Y. 400, where the facts were practically the same as in the principal case it was held that it was sufficient to allege merely that the horse was negligently turned into the street without restraint or control, as it is in one sense a mischievous habit for a horse to run and play in the streets. In *Fallon* v. *O'Brien,* 12 R. I. 518, the court said, in accordance with the New York cases, that a horse even though he is not vicious is a dangerous animal to be at large in the frequented streets of a city. These latter cases would seem to indicate that even where the injuries are not according to the nature of the animal it is not necessary to allege knowledge of the vicious propensity of the beast, and that the owner may be negligent regardless of such knowledge. See ROBSON, TRESPASSES AND INJURIES BY ANIMALS.

BLASPHEMY.—DEVISE TO COMPANY ORGANIZED FOR PURPOSE OF FURTHERING ATHEISM.—Property was devised subject to certain annuities "upon trust for the Secular Society Limited". The object of the Society was "to promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knewledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action". On an originating summons asking for payment

over to the Society of the residue of the testator's estate, *held,* that the Society was not incapable of taking under the devise. *Bowman* v. *Secular Society, Limited,* [1917] A. C. 406.

For discussion of this case, see article by Dean Lee in this issue.

BUILDING RESTRICTIONS—EMINENT DOMAIN—PUBLIC USE.—Petitioner proceeded under a statute providing that if the land court finds that the enforcement of a restriction would be inequitable it shall register title to the land free from the restrictions, provided, that in case of damage resulting therefrom, a reasonable compensation shall be paid to the owner. *Held,* that restrictions, requiring that no building costing less than $15,000 should be erected and that any building so erected should not be used as an apartment house or for mercantile purposes, give a property right and the statute is therefore unconstitutional as involving the taking of property for a private use. *Riverbank Improvement Co.* v. *Chadwick,* (Mass., 1917), 117 N. E. 244.

This case adopts the modern doctrine that such a restrictive covenant gives a property right and is not a mere personal covenant. 14 MICH. L. REV. 219. The principal question involved in this case is a determination of what is a public use. There are three different views. The old idea that property is practically absolute in the owner is seen in *Minnesota Canal and Power Co.* v. *Koochiching Co.,* 97 Minn. 429, in which it was held that a use is not public unless the public as a whole has the right to resort to the property for the use for which it was acquired. The opposing view that public use means public benefit or advantage is found in *Tanner* v. *Treasury Tunnel Mining and Reduction Co.,* 35 Col. 593. Another line of decisions, and probably the modern tendency, repudiates the doctrine that any enterprise which indirectly promotes the public prosperity is necessarily a public use and holds that the true definition lies between the two opposing doctrines. *Albright* v. *Sussex County Lake and Park Association,* 71 N. J. L. 303. An attempt to compel a railroad company to permit private persons to erect private grain elevators upon its right of way is a taking for a private use. *Missouri Pacific R. R. Co.* v. *Nebraska,* 164 U. S. 403. A statute permitting an indiivdual to enlarge the ditch of another and thereby obtain water for his own land is constitutional in view of the facts of the case and the peculiar conditions existing in the state of Utah. *Clark* v. *Nash,* 198 U. S. 361. The state may forbid the erection of buildings beyond a certain height in order to preserve architectural symmetry. *Attorney General* v. *Williams,* 174 Mass. 476. A statute which authorized the taking down of a dam upon payment of compensation for loss to the mill owner is valid. *Talbot* v. *Hudson,* 16 Gray (Mass.) 417. A statute authorizing the taking of land for park purposes is constitutional. *Shoemaker* v. *United States,* 147 U. S. 282. It is a public use to take land used for a quarry in order to preserve the scenic beauty of a river and a park. *Bunyan* v. *Palisades Park Commissioners,* 153 N. Y. Supp. 622. These and many other decisions seem to make this decision inconsistent with the modern trend. Here, the purpose for which the restrictions were created had failed. The court found that it would be clearly inequitable to enforce them.

It would seem that the public is interested in having such restrictions, that have outlived their usefulness, destroyed and sufficiently so to authorize their taking under eminent domain proceedings.

CONSTITUTIONAL LAW—"EQUAL PROTECTION OF THE LAWS"—COSTS.—Chapter 87, section 5, Oklahoma Session Laws 1915, provided that a docket fee of $25 should be taxed, collected and recoverable as other costs in each case filed in the Supreme Court. Petitioner claimed that the provision was unconstitutional because the amount of the fee was unreasonable considering the service rendered. *Held,* that the provision was constitutional. *In re Lee,* (Okla. 1917), 168 Pac. 53.

Petitioner challenged the reasonableness of the fee, yet the court's argument and citations go to prove little more than that the constitutional provision against selling justice "was never intended to guarantee the right to litigate entirely without expense to the litigants * * *" *Malin* v. *Lamoure County,* 27 N. D. 140. The position is sound as far as it goes, but it is far from a complete answer to the problem propounded. A $25 fee may be so large as to constitute a denial of the equal protection of the laws. The broad reasoning of *Harrison Co.* v. *Willis,* 7 Heisk. (54 Tenn.) 35, eliminates any investigation into the reasonableness of the amount by calling the docket fee a tax on litigation and grouping it with general taxes. *Weston* v. *Charleston,* 2 Pet. 449. But that grouping cannot be relied on here because the act now in question originated in the Senate and it gains its validity only by being distinguished from taxes for revenue. *Henderson* v. *State ex. rel. Stout,* 137 Ind. 552; *Northern Counties Trust* v. *Sears,* 30 Ore. 388. If, then, the reasonableness of the docket fee must be considered, the largest amount actually approved by a court seems to be $6. *Swann* v. *Kidd,* 79 Ala. 431. Still this might not make $25 unreasonable. If the statute had provided for an exception upon filing an affidavit of poverty, it would probably be a clear case. One would like to know whether the state may make a profit on its litigation; whether any uniform fee is reasonable so long as the state makes no profit; whether reasonableness is to be tested only by the possibility of discrimination among the litigants; whether the fee may be more than a reasonable compensation for the actual labor performed by the clerk. The facts seem to answer the last question in the negative unless answers to all the questions be considered *dicta* on the ground that the docket fee was for the Supreme Court and might well be considered as intended to repress appeals. *Harrigan* v. *Gilchrist,* 121 Wis. 127. The question then would be whether the right to abolish gives the right to regulate without judicial control.

CONSTITUTIONAL LAW—POLICE POWER—UNIFORM STATE GRADING ACT.—N. Dak. Laws 1917, c. 56, proposed to create uniform state grades for all grain by having an expert state inspector appointed to define and publish the grades. He was, also, to appoint deputy inspectors and it was made unlawful for any person operating a public warehouse to purchase grain without being licensed as a deputy unless the grain had been previously graded, weighed, and inspected by a deputy. The towns in various quarters were to furnish means for weighing and inspecting; the state inspector was to prescribe the

rates to be charged. Petitioner was arrested for operating a public elevator and purchasing grain without such a license. In *habeas corpus* proceedings he questions the constitutionality of the act. *Held,* that so far as petitioner was concerned, the act was constitutional. *State ex. rel. Gaulke* v. *Turner,* (N. Dak. 1917), 164 N. W. 924.

What is due exercise of the police power is in every case a question of fact, hence a discussion of authorities is rather unsatisfactory. To judge the evils attacked by a statute or the importance of the question in state life, knowledge of local conditions, rather than law, is requisite. With such a fertile field for distinguishing cases it seems rather unnecessary for the court to go to the trouble of trying to overrule the recent case of *Adams* v. *Tanner, Atty. Gen. of Wash.,* 244 U. S. 590. While the majority of the court there held unconstitutional a statute doing away with private employment agencies, it was conceded, in view of *Murphy* v. *California,* 225 U. S. 623, that non-useful occupations may be prohibited even before the evil is flagrant, if the occupation is harmful to the public according to local conditions or the manner in which it is conducted. It was for the court here only to discuss the evil instead of taking it for granted. Running a public warehouse or dealing in grain would seem to be, like transportation, "clothed with a public interest" and consequently especially liable to legislative regulation. *Munn* v. *Illinois,* 94 U. S. 113; *Ruggles* v. *Illinois,* 108 U. S. 526. The limitation of the farmers' market would seem to present a greater argument against the constitutionality of the statute. But as no farmer was before the court, petitioner was not alowed to attack the statute as an undue limitation of the farmers' rights. The court cites no authority for this proposition.

CONSTITUTIONAL LAW—RIGHT OF WOMEN TO VOTE.—The constitution of Indiana provides that in all elections not otherwise provided for by the constitution, every male citizen of the age of 21 years and upward shall be entitled to vote. The legislature passed an act extending the privilege of voting to persons not named in the constitution. *Held,* since the right of suffrage is not inherent or natural and is held only by those upon whom it is bestowed by express constitutional grant, the legislative act is unconstitutional and void. *Board of Election Com'rs of City of Indianapolis* v. *Knight,* (Ind. 1917), 117 N. E. 565.

This decision was forecasted by two earlier Indiana decisions involving the same constitutional question, where it was held that that which is expressed negatives that which is not expressed. *Gougar* v. *Timberlake,* 148 Ind. 38. A constitutional declaration as to how a right may be exercised impliedly prohibits its exercise in some other way, under the rule that *expressio unius est exclusio alterius. State* v. *Patterson,* 181 Ind. 660. Cooley, (CONSTITUTIONAL LIMITATIONS, 7th ed., 99), was of the same opinion. The legislature has no general power to confer the elective franchise on classes other than those to whom it is given by the constitution, since its description of those who are entitled to vote is regarded as excluding all others. Kansas, New Jersey, New York, Utah, and Pennsylvania follow the Indiana rule. *Wheeler* v. *Brady,* 15 Kas. 26; *Kimball* v *Hendee,* 57 N. J. L. 307; *In Re Gage,* 141

N. Y. 112; *Anderson* v. *Tyree,* 12 Utah 129; *McCafferty* v. *Guyer,* 59 Pa. 109. The Supreme Court of the United States said, in construing Sec. 2, Art. 3, of the Federal Constitution which confers original jurisdiction on that court, that the affirmative words, declaring in what cases the Supreme Court should have original jurisdiction, must be construed negatively as to all other cases. Applying the same principle of construction to the instant case, it follows that those designated in the constitution shall be the only persons entitled to vote, excluding all others. The instant case does not mention *State* v. *French* (Ohio, 1917), 117 N. E. 173, which held a similar act valid. See 16 MICH. LAW REV. 125. In that case the court held that the constitutional section was merely inclusive but did not exclude others whom the legislature saw fit to include; i. e. the constitutional requirement was not exclusive of all others. In accord with Ohio are Illinois, Nebraska, and Washington. *Scown* v. *Czarnecki,* 264 Ill. 305; *State* v. *Cones,* 15 Neb. 444; *Holmes & Bull Furniture Co.* v. *Hedges,* 13 Wash. 696. Wisconsin and Michigan have decisions both ways. From the above cases it will be seen that as yet there is no weight of authority and that within the same year (1917) the Ohio and Indiana courts have handed down conflicting opinions.

CRIMINAL LAW—COMMENTS BY COUNSEL—FAILURE TO PRODUCE WITNESSES.—In his closing argument to the jury, counsel for the state remarked that it was accused's duty to bring in as witnesses two persons who had been jointly indicted with accused, but who had not as yet been brought to trial. The court, after presentation of authorities, overruled an objection to the propriety of such remark. *Held,* statements of counsel together with the ruling of the court thereon constituted prejudicial and reversible error. *People* v. *Munday,* (Ill., 1917), 117 N. E. 286.

It may be stated as a general proposition that no inference can be drawn from the failure of a defendant to call witnesses which are equally accessible to the state. WIGMORE, EVIDENCE, § 288. Such is the rule in Illinois, *People* v. *Munday, supra,* accused's co-defendants being considered equally available to the state. In a few jurisdictions, however, mere reference to the failure of co-defendants to testify does not constitute error. *People* v. *Ye Foo,* 4 Cal. App. 730; *State* v. *Madden,* 170 Ia. 230. Some courts have allowed reference to the failure of co-defendants to testify, and, also, have permitted counsel to draw inferences therefrom as to the guilt or innocence of the accused. *McElwain* v. *Commonwealth,* 146 Ky. 104; *State* v. *Matthews,* 98 Mo. 125; *People* v. *Ruef,* 14 Cal. App. 576. Other courts in which the precise question has come up for decision have held to the contrary. *Harville* v. *State,* 54 Tex. Crim. 426; *Brock* v. *State,* 123 Ala. 24. In Missouri, where such comment was permissible, a statute has been passed forbidding comment on the failure of co-defendants to testify, but this statute has not been extended to a case in which the witness was charged in a separate information with an offense growing out of the same transaction as that in which the defendant was involved. *State* v. *Shepherd,* (Mo., 1917), 192 S. W. 427. However justifiable the position of those courts which allow comment on the absence of co-defendants may be, it seems clear that when

counsel go so far as to mis-state the law to the prejudice of the accused, and especially when such error is not corrected by the court, a new trial should be granted. *People* v. *Smith,* 121 Cal. 355. For a clear statement of the reasons for forbidding counsel to draw inferences from failure of co-defendant to testify, see *State* v. *Cousins,* 58 Ia. 250.

DAMAGES—MITIGATION OF—ERROR IN TRANSMISSION OF TELEGRAM.—Plaintiff shipped a carload of apples from Oregon to California and drew on the consignee at $2.00 per box. The consignee telegraphed a refusal to pay more than $1.25. In reply plaintiff delivered to the defendant company a telegram addressed to his California agents authorizing them to accept $1.80, —but the telegram as delivered read $1.08. The agent, a bank, collected at that price and completed the sale by delivery. When the mistake was discovered, the defendant succeeded in getting an offer of $1.50 from the consignee, which the plaintiff refused and elected to sue the company for its negligence. *Held,* that plaintiff's election to retain $1.08 was no new offer, but an effort to make the best of a bad bargain. The company was still liable to him for negligence, but he was bound to mitigate damages and so can recover only the difference between $1.80 and $1.50. *Bentley* v. *Western Union Telegraph Co.* (Wash., 1917), 167 Pac. 1127.

Two judges dissent on the theory that by accepting the $1.50 offer plaintiff would have lost the right to further recovery from the company because the acceptance and not the mistake would then have been the proximate cause of loss. They insisted that the damages should be the difference between the price in the telegram as sent and as delivered. This position, however, is untenable, for it is an elementary principle of the law of damages that one who suffers through the negligence of another is bound to reduce his loss by all reasonable means and can then recover the balance from the tort feasor. Defendant contended that when plaintiff refused the $1.50 offer, he made a new contract and so this new contract and not the error was the proximate cause of his loss; that he might well have rescinded the original contract with the consignee who must be deemed to have accepted fraudulently, since he himself had already offered more than the price at which the sale was consummated. Cases cited in the opinion, however, seem to justify the decision, that a contract entered into by mistake through the negligence of the agent may be ratified without losing the right of action against the agent. The offeror may elect to be bound by his contract and need not subject himself to the risk of doubtful litigation, particularly as here in a distant forum, and where the subject matter of the controversy is perishable and may deteriorate *pendente lite. Cf. Reed* v. *Western Union Telegraph Co.,* 135 Mo. 661; *Pepper* v. *Telegraph Co.,* 87 Tenn. 554. The case of *Western Union Telegraph Co.* v. *Shotter,* 71 Ga. 760, is a strong authority in point. But the closest analogy is presented by *Ayer* v. *Western Union Telegraph Co.,* 79 Me. 493, where an offer to sell lath at $2.10 per M. was incorrectly transmitted $2.00, and accepted at that price. Though the mistake was discovered before shipment the court held that the telegraph company was the agent of him who first employed it and a

loss occurring through its mistake must be recovered from the agent and not from the offeree. In the principal case there was the additional element, not present in the other cases, of knowledge of the mistake on the part of the offeree, and a second larger offer made by it in consequence of knowledge, and yet the holding is the same as if no such knowledge existed. A dictum of the Maine court in the case above cited seems to hint at a possible defense had the element of fraud been present. "Of course the rule above stated, presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error." Though mere *obiter* not necessary to the decision it raises the question at least, would not the decision of that court have been for the defendant in the principal case?

DEFENCE OF THE REALM—HABEAS CORPUS.—Appellant, Arthur Zadig, was born in Germany, but had become a naturalized British subject. By an order of the Secretary of State under Regulation 14B of the Defence of the Realm Regulations, Zadig was interned in a detention camp without a trial except for a hearing before an advisory committee presided over by a person who held or had held high judicial office. The reason given in the order for internment was that it was expedient for securing the public safety and the defence of the realm, "in view of his hostile origin and associations". Regulation 14B purports to be authorized by the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), the relevant part of which is section 1, sub-section 1, providing that "during the continuance of the war" the Crown has power "to issue regulations for securing the public safety and the defence of the realm," and particularly to prevent assistance or information from being given to the enemy. A rule *nisi* was obtained calling upon the respondent, commandant of the place in which Zadig was interned, to show cause why a writ of *habeas corpus* should not issue on the ground that Regulation 14B was *ultra vires* and not authorized by the Defence of the Realm Consolidation Act. *Held,* that the rule should be discharged; that Regulation 14B was not *ultra vires,* but was authorized by the express language of the statute. Lord Shaw dissenting. *Rex* v. *Halliday,* [1917], A. C. 260.

The power of Parliament to authorize such a proceeding was conceded, and the sole question was one of construction of the Act. The chief arguments for the position that the regulation was *ultra vires* were that there was no provision for imprisonment of a British subject without trial; that a statute penal in nature must be strictly construed; and that some limitation must be put upon the general words of the statute, since an unrestricted interpretation would allow opportunity for abuse of the unlimited power thus given the government. The Lord Chancellor, in giving the prevailing opinion, gave as an answer to the latter argument "that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised". The House took the view that the order in question was not penal or punitive in character, but merely precautionary,

and that the limitation in time to the period of the war would be a protection against a permanent assumption of such power by the executive. The prevailing opinion further justified the refusal of a trial by the comment that "It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law," since no crime is charged and the only question is whether there is a ground for suspicion that a particular person may be disposed to help the enemy. Lord Shaw's able dissenting opinion goes largely upon the grounds argued by counsel for Zadig and upon the further ground that if Parliament had intended to interfere with the personal liberty and rights of a British subject it would have expressly said so, particularly by suspending the rights as to a writ of *habeas corpus,* as had been done on previous occasions when the nation was at war. The reply of the majority was that Parliament had here selected another way for effecting the same purposes by empowering the Crown "to issue regulations for securing the public safety and the defence of the realm," and that this authority covers "preventive methods, properly so called, for securing the desired end, as well as those methods which are truly punitive". On the other hand, Lord Shaw argued that the statute was meant to prescribe a course of conduct for the citizen, and that he could not be punished until he had offended; that the effect of the regulation would be to put a premium on offending by allowing a trial in case of an actual offender while imprisoning without trial and thus punishing those who had complied with the regulation. It is quite evident that the decision was governed to a considerable extent by the critical circumstances of the time, and that the dissenting opinion of Lord Shaw would in normal times be received favorably. Nevertheless, it is hard to see how the object of the statute could be effectively carried out unless the government were allowed to detain persons suspected of aiding the enemy, even though such detention would amount to punishment.

ESCROW—ORAL CONTRACT—STATUTE OF FRAUDS.—Pursuant to an oral agreement for the exchange of lands the parties thereto deposited their respective deeds with H. Before delivery was made B and C directed H not to deliver their deed to A and wife. H thereupon refused to deliver this deed. Action was brought to compel delivery. *Held,* that admitting that there was a valid escrow, the deposit of the same in escrow did not take the case out of the statute of frauds where there was no written enforcible contract. *McLain* v. *Healy* (Wash., 1917), 168 Pac. 1.

Prior to this case the law of the state of Washington on this point was uncertain, due to the apparent conflict between the cases of *Nichols* v. *Oppermann,* 6 Wash. 618, and *Manning* v. *Foster,* 49 Wash. 541. The principal case reaffirms the indefensible doctrine of the earlier case of *Nichols* v. *Oppermann, supra,* and impliedly overrules the more recent opinion in *Manning* v. *Foster, supra,* thus settling the law in that state. For a collection of other cases supporting this doctrine and comment thereon, see 15 MICH. L. REV. 579.

ESTOPPEL—INTERESTS AFTER ACQUIRED—QUIT CLAIM DEEDS.—By a deed containing a covenant warranting and defending the promises against the lawful claims and demands of all persons, plaintiff conveyed "all of my entire interest" of certain land to X, under whom the defendant claims. At the time this conveyance was executed the plaintiff had no interest in the land, but subsequently acquired an undivided interest under his mother's will. He thereupon brought suit to be let into possession of his estate as tenant in common with the defendant. *Held,* plaintiff was estopped by his covenant of warranty from claiming any interest in the land as devisee of his mother. *Baker* v. *Austin,* (N. C., 1917), 93 S. E. 949.

As a general rule, if a grantor having no title, a defective title, or an estate less than that which he assumes to grant, conveys with warranty, and subsequently acquires the title or estate which he purported to convey, or perfects his title, such after-acquired or perfected title will inure to the grantee by way of estoppel. RAWLE, COVS. FOR TITLE (5th ed.), Ch. 11. The application of this rule to conveyances of the grantor's "right, title, and interest," protected by covenants of warranty, has presented a perplexing problem to the courts. In some cases, the phrase "said premises" or similar expressions ordinarily used in covenants of warranty, have been construed to mean the lands previously described. BIGELOW, ESTOPPEL, (6th ed.) 438; *Jones* v. *King,* 25 Ill. 334; *Loomis* v. *Bedel,* 11 N. H. 74; *Bayley* v. *McCoy,* 8 Ore. 259; *Blackwell* v. *Harrelson,* 99 S. C. 264; *Mills* v. *Catlin, 22* Vt. 98. In such instances, as in the present case, any interest which the grantor may subsequently acquire will inure to the benefit of the grantee. On the other hand, many courts have held that such expressions as "said premises" in covenants of warranty are limited to the restricted estate conveyed, that is, to the interest which the grantor had at the time; and that no subsequently acquired title could inure to the benefit of the grantee. *Kimball* v. *Semple,* 25 Cal. 441; *Young* v. *Clippinger,* 14 Kan. 148; *Hill* v. *Coburn,* 105 Me. 437; *Sweet* v. *Brown,* 12 Metc. 175; *Hull's Adm'r.* v. *Hull's Heirs,* 35 W. Va. 155; *Hanrick* v. *Patrick,* 119 U. S. 156. Such was also the holding in the recently decided case of *Southern Pac. Co.* v. *Dore et al.,* (Dist. Ct. of App., 1st Dist. Cal., 1917), 168 Pac. 147. See DEVLIN, DEEDS, Ed. 3, § 27; BREWSTER, CONVEYANCING, § 207; BIGELOW, ESTOPPEL, (6th ed.) 435. Under the construction adopted in these last mentioned cases, if a grantor has no title at the time he executes the conveyance, the covenant of warranty is valueless at a time when it is most needed. Such a result should cast some doubt on the wisdom of adopting that construction.

EXTRADITION—"FUGITIVE FROM JUSTICE."—In proceedings under a petition for a writ of *habeas corpus,* it appeared that the petitioner had been arrested in the State of Texas for an offense there committed, had, with permission of the Texas authorities, been taken on process under extradition to the State of California, there to answer to a charge of having committed a crime, had been freed of the latter charge, and had again been taken into custody, under a warrant of rendition issued by the Governor of California upon a requisition made by the Governor of Texas. *Held,* that

petitioner was not a fugitive from justice, so as to be subject to extradition, under Sec. 2, Art. 4, U. S. Constitution. *In re Whittington* (Dist. Ct. of App., 2nd Dist., Cal., 1917), 167 Pac. 404.

The principal case is undoubtedly right in the conclusion it reaches and the broad general proposition it lays down, that one cannot be said to be a fugitive from justice who does not voluntarily leave the state, but is taken out against his will and under compulsory process, the state having voluntarily relinquished the jurisdiction of its courts over his person. But, when one, who does voluntarily leave the state, is a fugitive from justice therefrom, may present a more difficult question. The recent case of *Biddinger* v. *The Commissioner of Police of the City of New York*, 38 Sup. Ct. 41, is interesting as an indication of how far the courts will go in declaring one to be a fugitive from justice, under the constitutional provision and the laws in accordance therewith. Biddinger was indicted in Illinois, in 1916, charged with crimes committed there between Oct. 15, 1908, and Sept. 2, 1910. Illinois statutes provide that all indictments for crimes such as those charged against Biddinger must be found within three years next after the commission of the crime, no period during which the party charged was not usually and publicly resident within the state to be included in the time of limitation (Ill. Crim. Code, Div. IV, Secs. 3 and 5). Biddinger was taken into custody, under a warrant of rendition issued by the Governor of New York upon requisition made by the Governor of Illinois, and sued out a writ of *habeas corpus*. Upon the hearing, the writ was discharged. Biddinger appealed, upon the ground that the lower court erred in excluding evidence offered by him to prove that he had been usually and publicly resident within the State of Illinois continuously for more than three years after the dates on which he was charged with having committed the crimes, the claimed purpose of the tender of the evidence being to prove that Biddinger was not a fugitive from justice, and therefore not subject to extradition. The court held that there had been no error; that Biddinger was a fugitive from justice; that extradition provisions must be liberally construed, to effect their purpose of eliminating the boundaries of states, "so that each may reach out and bring to speedy trial offenders against its laws from any part of the land", and thus prevent the general requirement of the state constitutions, that persons accused of crime shall be tried in the county or district in which the crime was committed, "from becoming a shield for the guilty rather than the defense for the innocent, which it was intended to be". A person, charged by indictment or affidavit before a magistrate within a state with the commission of a crime covered by its laws, who leaves the state, no matter for what purpose nor under what belief; or who, having committed a crime in one state, returns to his home in another, has been held to become a fugitive from justice, from the time of such leaving, within the meaning of the constitution and laws of the United States. *Roberts* v. *Reilly*, 116 U. S. 80; *Appleyard* v. *Massachusetts*, 203 U. S. 222; *Kingsbury's Case*, 106 Mass. 223; *In re Hess and Orr*, 5 Kan. App. 763; *State* v. *Richter*, 37 Minn. 436. In view of these authorities, the court seems to have acted properly in the Biddinger case. Biddinger was in Illinois at the time the

crimes were committed there; he was charged by indictment with their commission; he voluntarily left the state subsequent to their commission and was found without the state. Thus, all the elements essential to constitute one a fugitive from justice were present. Whether Biddinger can be tried under the indictment is a question of a different nature, to be raised in a different manner. The court was concerned with the one question whether he was a fugitive from justice so as to be subject to extradition.

FRAUDS, STATUTE OF—CHECK AS PART PAYMENT.—Defendant received a check from plaintiff for $5,000 in payment for live stock. *Held,* a check is not such part payment as will take a contract out of the Statute of Frauds. *Bates* v. *Dwinell* (Neb., 1917), 164 N. W. 722.

The plaintiff in this case had only $1,500 in the bank at the time he issued the check but the cashier of the bank testified that the check would have been paid if presented. There is a direct conflict of authority upon the question here presented. In *McLure* v. *Sherman,* 70 Fed. 190, it was held that a check drawn upon a deposit in the bank named as drawee has a money value and is a sufficient part payment to satisfy the statute. In this case, it is said, "A check given to a person in the ordinary course of business is of such value that the person who receives it cannot look to the drawer of the check for the amount named therein until he has presented the check to the drawee or payee for payment, and payment refused". To the same effect is *Logan* v. *Carroll, 72* Mo. App. 613, in which it is held that if the check is accepted as payment the statute is satisfied. The contrary view is reached in *Groomer* v. *McMillan,* 143 Mo. App. 612, in which it is said, "The law is that the payment, to be effective in avoidance of the Statute of Frauds, must be an absolute payment * * * 'Nothing is better settled than that a check is not payment, but is only so when the cash is received on it'." It is said in a number of cases that the part payment may be in anything of value. *Kuhns* v. *Gates,* 92 Ind. 66; *Howe & Co.* v. *Jones,* 57 Iowa 130; *Dow* v. *Worthen,* 37 Vt. 108. It might be interesting to note in this connection that the giving of a buyer's promissory note is not a sufficient part payment because it is said that a note merely postpones the time of payment. *Krohn* v. *Bantz,* 68 Ind. *277; Combs* v. *Bateman,* 10 Barb (N. Y.) 573. In *Burton* v. *Gage,* 85 Minn. 355, it was held that the transfer of a logging contract as payment of the purchase money is within the Statute. The holding of this case, however, seems to be consistent with the view that a check is not a payment of an antecedent debt in the absence of an express agreement to consider it as such. *People's Savings Bank* v. *Gifford,* 108 Ia. *277.*

HABEAS CORPUS—RELEASE OF CONVICT—CONVICTION BY FALSE TESTIMONY. —The plaintiff, a prisoner in the state penitentiary for three years, submitted an affidavit of the prosecutrix that her testimony leading to his conviction was procured by intimidation. *Held,* that *habeas corpus* would not lie to secure his release. *Springstein* v. *Saunders* (Iowa, 1917), 164 N. W. 622,

To warrant the discharge of a prisoner the sentence under which he is held, must be not only erroneous and voidable, but absolutely void. *Ex parte Reed,* 100 U. S. 13. An illegality which renders such judgment void

is such an illegality as is contrary to the principles of law as distinguished from the rules of procedure. *Habeas corpus* proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court on a criminal proceeding and it should therefore be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction or by reason of the court having exceeded its jurisdiction in the premises. *In re Frederick,* 149 U. S. 70, 76. *People* v. *Liscomb,* 60 N. Y. 559. In the instant case the court had complete jurisdiction. The judgment was based on false testimony but this did not make it void. This is the only case reported where *habeas corpus* was resorted to. The plaintiff's remedy, though unsatisfactory, was to appeal to the pardon board. In other words, the Court had jurisdiction to make wrong as well as right decisions in all stages of prosecution, and whether those made were right or wrong cannot be raised on *habeas corpus* proceedings. *People* v. *Liscomb, supra; State* v. *Sloan,* 65 Wis. 647.

INCOME TAX ACT—ALIMONY NOT INCOME.—Under a divorce decree, entered in 1909, whereby the plaintiff in error was ordered to pay the defendant in error, during her life, the sum of $3,000.00 every month, for her support and maintenance, the question arose whether the monthly payments during the years 1913 and 1914 constituted parts of defendant in error's income, within the intendment of the Income Tax Act, of Oct. 3, 1913 (38 Stat. 114, 166), so as to be subject to the tax prescribed therein. *Held,* that they did not. *Gould* v. *Gould,* (1917), 38 Sup. Ct. 53.

The particular portions of the Act involved in the question in the instant case were Section II, A, Subdivision 1, declaring that a tax of 1% per annum "shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, * * * and to every person residing in the United States, though not a citizen thereof"; and Section II, B, declaring that "the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid * * * or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent * * *". In interpreting the Act, the court applies what it lays down as the established rule to be applied in the interpretation of statutes levying taxes, viz.: The provisions of such statutes will not be extended, by implication, beyond the clear import of the language used; their operations will not be enlarged so as to embrace matters not specifically pointed out; and, in case of doubt, they will be construed most strongly against the Government, and in favor of the citizen; citing *U. S.* v. *Wigglesworth,* 2 Story, 369; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468; *Benziger* v. *U. S.,* 192 U. S. 38. Applying this rule, the Court in a very brief opinion, said that it could not assert that alimony paid to a divorced wife under a decree of court fell within the term "net income", as defined in the Act. This decision further increases the anomolous character of alimony, previous cases having held that it is not a debt so as to be prov-

able in bankruptcy and barred by the discharge, *Audubon* v. *Shufeldt*, 181 U. S. 575; *Wetmore* v. *Markoe*, 196 U. S. 68; *Thompson* v. *Thompson*, 226 U. S. 551; *Barclay* v. *Barclay*, 184 Ill. 375; that the property awarded to the wife as alimony does not become part of her estate in bankruptcy, *In re Le Claire*, (Dist. Ct. N. D. Ia., W. D. 1903) 124 Fed. 654, 658; that alimony awarded to a wife cannot be subjected to the payment of her debts existing prior to the decree of divorce, *Kingman & Co.* v. *M. A. Carter, et al.*, 8 Kan. App. 46; *Romaine* v. *Chauncey et al.*, 129 N. Y. 566; *Fickel* v. *Granger*, 83 Oh. St. 101; that alimony awarded a wife cannot be attached in an action against her, except in an action for such necessaries as the husband would have been obliged to furnish, had the marital relation continued, *West* v. *Washburn*, 138 N. Y. S. 230.

INCOME TAXES—CORPORATIONS—INTERNAL REVENUE.—A corporation owned all the stock of several subsidiary companies. A dividend was received by the main corporation from the subsidiaries. Plaintiff, Internal Revenue Collector, attempted to tax such dividend under the Income Tax Act Oct. 3, 1913, c. 16, 38 Stat. 114. *Held*, taxable as income. *Lewellyn* v. *Gulf Oil Corp.* (C. C. A. 3rd Cir. 1917) 245 Fed. 1.

Since the Sixteenth Amendment to the Constitution, which gave Congress the power to collect taxes on income from whatever source derived, was held constitutional, *Brushaber* v. *Union Pacific*, 240 U. S. 1, the question has often arisen what constitutes taxable income of corporations. In *Southern Pacific Co.* v. *Lowe*, 238 Fed. 847 it was held, where all the stock of a corporation was owned by another corporation which handled the money of the former and kept its accounts, the surplus earned by the former was nevertheless its property, so that a dividend declared was income of the holding corporation. It has been held that where property lying idle, earning no money but having increased to double its original value and sold for such increased value, that a distribution of the proceeds did not constitute a division of "income" within the meaning of the act. *Lynch* v. *Turrish*, 236 Fed. 653. Money earned as interest and distributed as dividends is without contradiction taxable income. So why not where the property lying idle increases in value and the sale price divided amongst the shareholders? If the original owners of the idle property had continued in possession and had issued stock dividends equal to the increased value of the property, no one would question that it would be taxable income. The decision in *Lynch* v. *Turrish* is to be reviewed by the Supreme Court. Income is defined to be receipts which constitute an accretion to capital and this would include increased value of idle property. The instant case holds that an ordinary dividend from accumulated earnings is income. The government cannot tax undistributed surplus as income but must wait until it is declared as dividends and paid. This is true whether the dividends be paid to a stockholder or to a holding corporation. *Union Pacific* v. *Frank*, 226 Fed. 906.

INNKEEPER—IMPLIED WARRANTY—LIABILITY FOR PERSONAL INJURY.—Plaintiff became a guest for reward at defendant's hotel. During the night fire broke out and in endeavoring to escape from the hotel, plaintiff was severely

injured. The jury found that the premises were not as safe as reasonable care and skill could make them and that the fire resulted from negligence of an independent contractor who carried out the kitchen fire scheme. *Held,* that defendant impliedly warranted that his premises were as safe as reasonable care and skill could make them, and that, as they were not, defendant was liable. *Maclenan* v. *Segar,* [1917], 2 K. B. 325.

The defense in this case relied upon the rule that the duty of an occupier towards a person who is lawfully upon the premises, is a duty to use reasonable care for the safety of that person. *Indermaur* v. *Dames,* 36 L. J. C. P. 181. The failure of defendant to inspect was not found to be negligence. The court refused to be found by *Indermaur* v. *Dames, supra,* and held defendant liable upon an implied warranty. This higher degree of liability arises whenever the occupier of premises agrees for a reward that a person shall have the right to enter and use them for a mutually contemplated purpose. In *Francis* v. *Cockrell,* 39 L. J. Q. B. 113 the proprietor of a race stand was held to have impliedly warranted that his premises were reasonably fit for the purpose for which they were to be used. This same warranty was extended to theaters. *Cox* v. *Coulson,* 85 L. J. K. B. 1081. But in the case of *Sandys* v. *Florence,* 47 L. J. Q. B. 598 the court impliedly held that a guest must prove negligence on the part of an innkeeper or his servants to recover for personal injuries. In *Walker* v. *Midland Ry. Co.,* 55 L. T. 489, the House of Lords also discussed the inn-keepers liability on the same principle though the case turned on a different point. The conflict of authority in America on the innkeeper's liability may be traced to the same error. The courts have confused the innkeeper's duty with that owed to an invitee. An innkeeper is liable for injury to a guest upon the same principle as is applicable in other cases where persons come on the premises at invitation of owner or occupant. *Patrick* v. *Springs,* 154 N. C. 270. The obligation resting upon an innkeeper to keep a guest safe is one imposed by law and does not grow out of the contract; and for a violation, the action is case, *Stanley* v. *Bircher,* 78 Mo. 245. On the other hand the innkeeper has been held to impliedly contract that a guest shall be treated with due consideration for his safety and comfort. *Clancy* v. *Barker,* 71 Neb. 83; *Lehmen* v. *E. J. Hines & Co.,* 88 Kan. 58. The The significance of this decision is well illustrated by *Stanley* v. *Bircher, supra,* where plaintiff failed in tort but could have recovered had the liability been contractual.

LIBEL AND SLANDER — QUALIFIED PRIVILEGE—INTEREST. — Plaintiffs opened an upstairs clothing store and advertised that they sold $25 clothing for $15 because they had no expensive floor rent, nor expensive show cases or windows, and that they were thus able to undersell ground floor merchants who were imposing on the public by charging in the cost of their goods their extravagant rents. The defendants who were downstairs clothiers were also advertisers in the same newspaper and in interviewing the advertising manager of such paper stated that the plaintiffs could not do business on that basis and that they would go broke and asked him to look into the matter. Plaintiffs brought suit against the defendants alleging that they wrongfully

and maliciously and by certain false statements persuaded The Times Printing Co. to break an advertising contract with the plaintiffs. *Held,* the communications having been made in good faith and without malice were privileged. *Fahey et al.* v. *Shafer et al.,* (Wash., 1917), 167 Pac. 1118.

The principal case lays down the rule that where a communication is prompted by a duty to the public or to a third person or is made touching a matter in which the party making it has an *interest* to a party having a *corresponding interest,* it is privileged if made in good faith and without malice. NEWELL, LIBEL AND SLANDER, (2 Ed.), p. 391. The defendants' interest is shown in that the appellants' advertisements were a direct attack upon their business methods. The interest of the advertising manager lay in the necessity of treating all patrons of their advertising columns fairly. In both cases the corresponding interest was a pecuniary interest, the questionable advertising having the tendency to affect directly both parties to their financial detriment. In England the doctrine of interest has been expanded to such an extent that a friend may confidentially advise a lady not to marry a suitor provided he really believes in the truth of the statements he makes. *Todd* v. *Hawkins,* 2 M. & Rob. 20. The rule then in England is that the actual interest need only be on one side. *Adams* v. *Coleridge,* 1 Times L. R. 84. In *Herver* v. *Dowson,* Buller N. P. 8 the defendant warned his friend confidentially against trading with the plaintiff saying that he would soon be bankrupt. No malice having been found the court held that the communication was privileged. This case goes much farther than the principal case in that there is no *corresponding interest* to be found, the interest being really all on one side. But in *"The Count Joannes"* v. *Bennett,* 5 Allen (Mass.) 169, it was held that a letter written by a pastor as a friend, containing libellous matter against her future husband, cannot be justified on the ground of privilege, the actual interest being all on one side. Written information by a mercantile agency to its subscribers given voluntarily or in answer to their inquiries is privileged. *Locke* v. *Bradstreet Co.,* 22 Fed. 771. The conduct of a member of a Board of Trade is a matter of public interest and may form the subject of privileged communications. *Atkinson* v. *Detroit Free Press Co.,* 46 Mich. 341. Where one person seeks information from another as to the credit of a third, the communication is privileged. *Fahr* v. *Hayes,* 50 N. J. L. 275. The distinction between this case and the Dowson case (*supra*) is that in the latter case the communication was made voluntarily. These cases illustrate the various applications of the doctrine of interest both in America and in England. It seems that the principal case would clearly fall within the rules laid down in either country.

MORTGAGES—FORECLOSURE—EFFECT.—The first and second mortgages on A's land were foreclosed by advertisement and sale, presumably in inverse order. The third mortgagee redeemed from one of these sales and took an assignment of the certificate of purchase under the other. He secured sheriff's deeds for both. He now seeks to recover in a personal action for the debt originally secured by his third mortgage. The trial court found the land of sufficient value to pay all three mortgages. *Held,* that the mortgagee's

debt was satisfied by merger of his lien in the estate redeemed. *Miller* v. *Little* (N. D. 1917), 164 N. W. 19.

Sprague v. *Martin*, 29 Minn. 226; *Work* v. *Braun*, 19 S. D. 437, *accord; Emmet's Adm'rs.* v. *Bradstreet*, 20 Wend. 50; *Van Horne* v. *McLaren*, 8 Paige 285 *contra.* It is elementary that the effect of foreclosure is to cut off all subsequent liens. This the North Dakota Code in effect provides. See CODE 1905, Sec. 7467. Consequently there could be no merger of the lien extinguished by foreclosure, with the title which arose from the foreclosure. The two interests were not coincident but consecutive. The better theory for the result contended for in this case is laid down in *Sprague* v. *Martin, supra.* The object of the redemption statute is to make the land bring its utmost value as far as creditors will voluntarily apply it in satisfaction of their debts. To accomplish this the foreclosure sale is held in suspense for a period during which a junior leinor may take over the rights of the purchaser and hold them, first for reimbursement of the redemption money, second, for satisfaction of his debt, to the extent of the value of the land. In other words, the junior lienor is a privileged bidder on the foreclosure sale, entitled to come in after the hammer has fallen and bid "the last bid plus the value of the excess value of the land, if any, up to the amount of my debt". If such redemptioner is not redeemed by another, he takes the title which would have gone to the original purchaser. But, as the amount of his bid is indefinite, the effect of the transactions upon his debt depends upon the value of the land, a matter which is the proper subject of proof whenever the question may arise, as it does when he sues upon his debt. To this extent the proceeding takes on the aspect of a strict foreclosure. The opposite conclusion has been reached by the New York Courts in the cases *supra,* they adhering both at law and in equity to a literal interpretation of the statute which gives the redemptioner the same title as the purchaser thus cutting off his lien and leaving his debt unsatisfied. While the Minnesota doctrine is in effect an enlargement of the statute it is a very satisfactory interpretation of the legislative intent.

NEGLIGENCE—FALLING OF A CORNICE—LIABILITY OF OCCUPIER.—Plaintiff, a news vender went to the home of defendant to collect for papers delivered during the preceding week. While standing on the steps, he was injured by the falling of a projecting cement cornice. At the trial, plaintiff admitted that defendant did not know of the defect and that the premises were apparently in good repair. *Held,* defendant was not liable. Plaintiff should have given some evidence to show what precautions are usual and proper for occupiers of houses with projecting cornices and that defendant failed to take them. *Pritchard* v. *Peto,* [1917], 2 K. B. 173.

In this case the court refused to apply the doctrine of *res ipsa loquitur* and based its decision upon the rule that an invitee is entitled to expect an occupier to use reasonable care to prevent damages from unusual dangers of which he knows or ought to know. *Indermaur* v. *Dames,* 36 L. J. C. P. 181. There can be little doubt that the plaintiff is correctly classified as an invitee. An invited person is one who has either an express invitation from the occu-

pant, or who comes under an implied invitation arising from the fact that the object of his visit is one in which he and the occupant have mutuality of interest. *Bennett* v. *Railroad Co.*, 102 U. S. 577; *Norris* v. *Nawn Contracting Co.*, 206 Mass. 58. But there may be some question as to whether the court was justified in requiring the plaintiff to put in evidence "to show what precautions are usual and proper" under the circumstances. The burden of proving negligence was upon the plaintiff who placed his reliance upon the doctrine of *res ipsa loquitur*, which means that the facts of the occurrence warrant an inference of negligence. It does not shift the burden of proof. *Sweeney* v. *Erving*, 228 U. S. 233. But the attendant circumstances which justify the inference must be proved and not left to mere speculation, and the inference to be drawn must be the only one reasonably and fairly to be drawn therefrom. *Ruppert* v. *Brooklyn Heights R. R. Co.*, 154 N. Y. 90. The mere falling of a cornice does not raise such an inference of negligence unless it be supported by evidence showing that the exercise of reasonable diligence would have disclosed the defective condition of the cornice. The decision in the principal case is in accord with *Hollander* v. *Hudson*, 152 (N. Y.) App. Div. 131, which presents an analogous situation. The principal case must also be distinguished from those in which the falling object injures a person on the highway, where the action is more properly one of nuisance.

SPECIFIC PERFORMANCE OF CONTRACT—CONTRACT UNENFORCIBLE.—Between the date of execution of a contract to purchase land, which was to be used for business purposes by defendant, the prospective purchaser, and the date of consummation of the contract, the use of land in that vicinity for other than residential purposes was prohibited by a resolution of the city board of estimates. *Held*, specific performance of the contract would not be decreed against the purchaser because, in view of the resolution, the decree would be inequitable. *Anderson* v. *Steinway & Sons*, (N. Y., 1917), 117 N. E. 575.

Instances of a subsequent event not reasonably to be anticipated at the time the contract was executed are seen in *Willard* v. *Tayloe*, 8 Wall. 557, where, by an act of Congress, bank notes were substituted for gold and silver as legal tender, the latter being legal tender at the time the contract was made; in *Gotthelf* v. *Stranahan*, 138 N. Y. 345, where assessments for grading and paving streets were levied on property after the execution of a contract in regard to said property; in *Gamble* v. *Garlock*, 116 Minn. 59, where fire destroyed the house on the premises previously contracted to be sold; in *Richardson Shoe Mach. Co.* v. *Essex Mach. Co.*, 207 Mass. 219, and in *Triumph Electric Co.* v. *Thullen*, 228 Fed. 762, where the situation of the parties to the contract was radically changed after the date of the execution of the contract. The instant case follows *Willard* v. *Tayloe*, *supra* and *Gotthelf* v. *Stranahan*, *supra*, saying it is not distinguishable on principle.