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# Recent Important Decisions

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# RECENT IMPORTANT DECISIONS

BUILDING RESTRICTIONS—SINGLE PRIVATE DWELLING ON ONE LOT—WHAT IS ONE LOT?—Land was platted into sixty foot lots and conveyed from time to time to various purchasers subject to restriction, *inter alia*, that "There shall be nothing but a single private dwelling with the necessary outbuildings erected on each lot." Defendant became the owner of the westerly ten feet of lot 50 and the easterly forty feet of lot 51; the remaining twenty feet of lot 51 and the whole of lot 52 adjoining lot 51 on the other side became the property of plaintiff. Defendant being about to build a dwelling on the fifty feet owned by him, plaintiff sought to enjoin such building as being in violation of the restriction. *Held*, (Brooke, Kuhn, and Bird, J. J. dissenting) that injunction should be denied. *Guan* v. *Fitzpatrick*, (Mich. 1918), 168 N. W. 1007.

The majority of the court seemingly content themselves with the observation that on the facts there would be only one dwelling on lot 51, that the terms of the restriction will thus be in fact observed, and that therefore equity should not give plaintiff the relief asked for. Suppose lot 51 or any lot in the restricted district had been subdivided in ownership into two thirty foot lots, and the owner of one of these had started to build thereon, would the prevailing judges refuse relief?. Suppose the two owners had started the erection of dwellings simultaneously, which one, if either, would the learned judges enjoin? If they adjoined neither the result would be two houses on the one sixty foot lot, clearly contrary to the intent and language of the restriction; if they enjoined both, then either the lot would have to remain vacant or one would have to buy out the other or so much of his thirty foot lot as to leave it physically impossible to get a house erected on it. The majority of the court, it is submitted, failed to attend sufficiently to the terms of the restriction. "Each lot" meant what? It would seem wholly clear that each sixty foot lot was meant. It seemed to have been felt that it would be a hardship upon defendant to have to buy up the remainder of the lot or to get the consent of plaintiff. But how can that be if, as must be assumed, the defendant bought his portion with notice of the restriction? *Cf. Walker* v. *Renner*, 60 N. J. Eq. 493.

CARRIERS—CUMMINS AMENDMENT AS TO LIMITATION OF LIABILITY.—Household goods were boxed so as to be hidden from view, under a bill of lading limiting liability to $10 per 100 lbs., at a freight charge based on such valuation. The goods weighed 480 lbs. and were destroyed by fire. A judgment for $565 was affirmed in *Thompson* v. *Great Northern Ry. Co.* (Ld.), 174 Pac. 607. The development of the carriers liability may be found in 8 MICH. L. REV. 531, 9 MICH. L. REV. 233, 11 MICH. L. REV. 460, 588, 13 MICH. L. REV. 590, 15 COL. L. REV. 399, 475. Hardly had the Supreme Court finally upheld limitations based on the tariff rates on file as required by law, no matter what the value of the goods, and regardless of whether the actual value

was known to the carrier, *Geo. N. Pierce Co.* v. *Wells, Fargo & Co.* 236 U. S. 278, 10 MICH. L. REV. 317, 13 *ib.* 570, when ten days later the Cummins Amendment, to the Carmack Amendment to the Hepburn Act was signed by the President. Its intent was to prevent the carrier from escaping liability for the actual value of goods injured or lost by its default. Less than a year and a half later the Amendment of August, 1916, modified the Cummins Amendment, but meantime a few cases had arisen and reached the courts of last resort. In New York it had been decided the Cummins Amendment had not affected shipments of goods hidden from view by their wrappings. *D'Utassy* v. *Barrett*, 157 N. Y. S. 916, affirmed, 219 N. Y. 420, in which the goods were alleged to have been stolen by employees of the carrier, *Granberry* v. *Taylor*, 159 N. Y. S. 932, in which the goods were lost. In both cases a $50 valuation was held good. In *McCormick* v. *Southern Express Co.* (W. Va.) 93 S. E. 1048 the shipper, nothwithstanding an express receipt limiting liability to $5 and a tariff based on that valuation, was allowed to recover $300 for a "dark Cornish gamecock of fine breed." The cock was in a box covered with slats. In the instant case the goods were hidden from view, but the shipper told the agent they were household goods. The court held that under these circumstances the agent was entitled to fix a value and charge a rate commensurate with the risk, and could not rely on a value stated by the shipper. Under the Cummins Amendment the carrier might have limited liability by having the shipper "state in writing the value of the goods."

That there are limits to the effect of liability limitations in a published tariff on file with, and therefore presumptively approved by, the Interstate Commerce Commission is well brought out in *Boston & Maine Ry.* v. *Piper*, 38 S. Ct. 354. The bill of lading, and tariff sheets, contained the stipulation that liability from unusual delay and detention, caused by the carrier's negligence, should be limited to the amount actually expended by the shipper for food and water while so detained. The court held this to be no limitation of the amount of recovery under an agreed valuation, but an attempt to escape "liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence." It is submitted that such was the precise effect of the limitation upheld in *Geo. N. Price Co.* v. *Wells, Fargo & Co., supra*, in which a recovery of $50 was allowed for an $1800 car-load of automobiles. The decision in the instant case seems to be correct, and hence the other should be wrong. See 13 MICH. L. REV. 590.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—Plaintiff, an Ohio corporation, sued on a contract made in Michigan with defendants, a Michigan corporation. It was contended that the contract was void because a Michigan statute provided that a foreign corporation, not authorized to do business in Michigan, could not make a valid contract, in Michigan, and the plaintiff had not been so authorized. *Held*, the making of the contract was itself interstate commerce, and therefore outside the power of the state. *American Distributing Co.*, v. *Hayes Wheel Co.*, (March, 1918), 250 Fed. 109.

The contract was one by which the plaintiff undertook to act as agent of

the defendant in selling its product. It contemplated that plaintiff should sell goods for defendant, but was not itself a contract of sale. Federal regulation of commerce has been recognized as controlling the persons and property engaged in interstate transportation, the things transported, and the senders and recipients of things transported. Contracts of sale, whose direct effect is to require transportation of something, have been held to be within the control of Congress. *Robbins* v. *Shelby County, etc.*, 120 U. S. 489. But further than this courts have been loath to go, and could not logically go. Transportation is essential to commerce. *Railway Co.*, v. *Husen*, 95 U. S. 465; *County of Mobile*, v. *Kimball*, 102 U. S. 691; *Hammer* v. *Dagenhart*, U. S. Sup. Ct., June 1918. Mere manufacturing or producing, though it may result in interstate transportation, is not commerce. *United States* v. *Knight Co.*, 156 U. S. 1; *Del. L. & W. Ry.* v. *Yurkonis*, 238 U. S. 439. A contract by a person in one state to labor in another is not commerce, though it will result in commerce, *Williams* v. *Fears*, 179 U. S. 270; nor to do other acts in another state, *Pac. Adv. Co.*, v. *Conrad*, 168 Cal. 91; nor is making a contract of insurance interstate commerce, although the principals live in different states, *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *N. Y. Life Ins. Co.*, v *Craven*, 178 U. S. 389. The court in the principal case seems to have ignored the difference between a contract of agency to sell and a contract of sale.

CONTRACTS—"MUTUALITY"—COUNTER PROMISE IMPLIED.—Plaintiff wrote to defendant, "We will undertake the sale of your wheels . . . . upon the following terms and conditions: Commissions.—On all orders received, accepted and shipped by your company you will pay us 3% of the net sales price." This proposal was indorsed, "accepted," by the defendant. It was by its terms to continue for five years. Before the expiration of that time defendant repudiated the agreement and plaintiff sued for damages resulting from loss of future gains. *Held*, plaintiff could recover. *American Distributing Co.*, v. *Hayes Wheel Co.*, (March, 1918), 250 Fed. 109.

The issue made was whether the contract was "void for lack of mutuality." It was held that by the expression, "we will undertake the sale of your wheels," read in connection with the phrase, "orders taken by us shall be submitted for your acceptance, the plaintiff impliedly promised to use good faith and diligence in obtaining orders, and that there was therefore mutuality of obligation. See, in analogy, *Novakovich* v. *Union Trust Co.*, 89 Ark. 412; *Gilmore & Co.*, v. *Samuels & Co.*, 135 Ky. 706. No question was raised as to whether there was any promise on the defendant's part, as consideration for the plaintiff's implied promise. Yet this would seem the more doubtful point. Defendant promised nothing except to pay 3% commissions on "orders received, accepted and shipped" by it. There was no promise whatever that it would accept and ship orders received, unless it could be implied. In *Goodyear* v. *Koehler etc. Co.*, 143 N. Y. S. 1046, a very similar contract expressly provided that the defendant should not be liable for refusal or neglect to furnish the goods as ordered, and the court held that there was no mutuality of obligation. A dissenting opinion urged that there was an implied promise

to furnish the goods as ordered. An almost identical contract was upheld in *Gile* v. *Inter-State Motor Car Co.*, 27 N. D. 108, only on the ground that it had been adhered to by both parties during its stipulated term, and had therefore become enforcible as a unilateral contract, whether or not it had been enforcible in its inception. See 12 MICH. L. REV. 667. The necessary promise was implied in *Chi. R. I. & G. Ry.*, v. *Martin*, (Tex.), 163 S. W. 313, discussed in 12 MICH L. REV. 694.

CRIMINAL LAW—ESPIONAGE ACT—RED CROSS AND Y. M. C. A. AS PART OF "MILITARY OR NAVAL FORCES."—The Espionage Act (40 Stat. 219, C. 30) provides that "whoever, when the United States is at war, (1) shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of its enemies," etc., shall be guilty of an offense. Defendant was indicted for having said to numerous people while a "drive" was on to raise funds for the war work of the Red Cross and Y. M. C. A., "I am through contributing to your private grafts. There is too much graft in these subscriptions. No; I do not believe in the work of the Y. M. C. A. or the Red Cross, for I think they are nothing but a bunch of grafters. No, sir, I can prove it. I won't give you a cent. The Y. M. C. A., the Y. W. C. A., and the Red Cross is a bunch of grafters. Not over 10 or 15 per cent of the money collected goes to the soldiers or is used for the purpose for which it is collected. Who is the government? Who is running this war? A bunch of capitalists composed of the steel trust and munitions makers." On motion to squash, *held* that the indictment stated an offense under the Act. *United States* v. *Nagler*, (D. C. W. D. Wis., 1918), 252 Fed. 217.

It is not by any means every utterance, however disloyal the speaker may thereby be indicated to be, that is covered by the Espionage Act, the Act covers only utterances affecting the military or naval forces. *United States* v. *Schutte*, 252 Fed. 212. A strict application of the general rule that criminal statutes are to be strictly construed might conceivably lead to a conclusion opposite to the one reached in the principal case. The court felt warranted in upholding the indictment because of the relationship of the Red Cross and Y. M. C. A. organizations with the forces in the field, created and recognized by the President and the constituted authorities. The fact that the Red Cross is recognized by international treaties and its members are by the Treaty of Geneva of August 12, 1864, to be treated as neutrals when captured were deemed not to interfere with treating the organization as part of the military and naval forces of the United States. No doubt it will be a source of great satisfaction to most people that the circulation of such vicious lies as were repeated by the defendant in the principal case can be reached by criminal proceedings.

CRIMINAL LAW—POWER OF PROSECUTING ATTORNEY TO ENTER A NOLLE PROSEQUI.—Respondent was judge of the Municipal Court of Chicago, and had about 400 cases for violation of the Sunday liquor law pending in his court, when the relator, the State's attorney of Cook County, proposed to enter a *nolle prosequi* in every one of the cases. The judge refused to allow this to be done, and the instant case was selected as a test case, the State's attorney

filing a *nolle prosequi* and the judge refusing to enter it. Petition for mandamus commanding Judge Newcomer to enter of record this *nolle prosequi* was denied, on the ground that the power of the State's attorney to enter *nolle prosequi* was not absolute, but was subject to the consent of the court. *People ex rel Hoyne* v. *Newcomer,* (Ill. 1918), 120 N. E. 244.

At common law, in England, the power to enter a *nolle prosequi* was lodged exclusively in the attorney general, *Regina* v. *Dunn,* 1 Car. & Kir. 730, and it was absolute, *Queen* v. *Allen,* 1 B. & S. 850. In the United States the prevailing rule is that the prosecuting officer has the same power in this regard at the attorney general in England. *Lizotte* v. *Dloska,* 200 Mass. 327; *People* v. *District Court,* 23 Colo. 466; 16 Cor. Jur. 434. But there are a few cases which support the rule of the principal case. *Denham* v. *Robinson,* 72 W. Va. 243, Ann. Cos. 1915 D, 997; *State* v. *Moody,* 69 N. C. 529. In others it is held that the court is necessary for a *nolle prosequi* after the trial commences to the jury, *State* v. *Roe,* 12 Vt. 93; *State* v. *Hickling,* 45 N. J. L. 152. In some states the consent of the court is expressly required by statute, *Statham* v. *State,* 41 Ga. 507; *People* v. *McLeod,* 1 Hill (N. Y.), 377, 405.

EMINENT DOMAIN—CONDEMATION FOR CANTONMENT.—In proceedings by the Government to acquire for temporary use land for construction of a military camp it was held that the owner was entitled to rental value based on the value of the land without improvements, and to compensation for improvements which will necessarily be destroyed, and in addition the Government should obligate itself to return the land in as good condition as when taken, or to make compensation for future injuries due to the military use. *In re Condemnation of Lands for Military Camps,* 250 Fed. 314.

Many delicate questions have arisen from the construction of our cantonments. Under the Act of July 2, 1917, C. 35, 40 Stat. 241, the Secretary of War was authorized to institute proceedings in court to condemn temporary use of land, or other interest therein, in the meantime taking immediate possession thereof. Under this power farmers, in some cases at least, were paid a flat rental of $5 per acre for their farms, with no assurance of any allowance for permanent injuries from the cutting of trees or impairment of the land by reason of the packing of the soil. Claims against the Government are very uncertain and expensive luxuries in many cases. Some Civil War claims are still before the Court of Claims and some despairing of the judicial route, or not being willing to submit to judicial investigation, are constantly before Congress. The rule of damages laid down in this case is fair, but the fairest provision is that the court will keep jurisdiction of the case till future damages can be assessed. This is an especially equitable disposal of the case, and saves the land owner from the doubtful remedy of a suit against the Government.

LIBEL—PUBLICATION—DICTATION TO TYPIST.—W, a solicitor, in dictating to his typist a bill of costs, to be sent to his client, as a matter of office routine, inserted in the bill, without malice, information which was defamatory to plaintiff, though relevant and reasonably necessary to enable the client

to understand what the bill was for. *Held*: There was not such a publication by the dictation to the typist as creates a liability for libel. *Morgan* v. *Wallis*, (1917, K. B. Div.), 33 T. L. R. 495.

Mr. Justice DARLING says: "For my own part I think that this doctrine of publication of libel by putting the thing before a typist verges on the absurd.*** Publication of a libel may be a criminal offence for which a man may receive a very heavy sentence, and to say that submitting a draft to a typist who will simple rattle it over a typewriter, hardly comprehending what the thing says is a publication which may involve a man in a criminal charge, is to my mind, verging on the absurd I do not say that it is absurd, because other judges have said it is a publication.*** Therefore as far as publication goes I shall not leave it to a jury." In *Pullman* v. *Hill & Co.* (1891), 1 Q. B. D. 524, (C. A.) Lord ESHER, M. R., in ruling that the dictation of a libelous letter to a shorthand clerk by the manager of a commercial company was a publication, said: "What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written here is no publicaion of it.*** If the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication. If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is showing it to a third person.*** I cannot, therefore, feel any doubt that if the writer of a letter shows it to any person other than to whom it is written, he publishes it." LOPES and KAY, LL. J., expressed themselves in a similar way. In the case of *Boxsius* v. *Goblet Frères* (1894), 1 Q. B. Div. 842 (C. A.), Lord ESHER, M. R. and LOPES and DAVEY, LL. J., held that the dictation of a libelous letter to a client, by a solicitor to his stenographer in the ordinary course of his business, and in the proper and prompt discharge of his duty to his client, was a publication, but if without malice was a privileged publication,—the solicitor having the privilege of his client to send a letter directly to the plaintiff, and to use such incidental means of doing this as would enable him to perform his duty to his client promptly. In *Edmondson* v. *Birch & Co. Ltd.* (1907), 1 K. B. Div. (C.A.) 371, this privilege was extended to one business company in communicating to another, on a privileged occasion, through a typewritten letter dictated to a stenographer. In the United States it was early held, and has not been questioned, that getting a libelous letter copied in writing for one by another is a publication to the latter. *Kiene* v. *Ruff* (1855), 1 Ia 482; *Adams* v. *Lawson* (1867), 17 Gratt. 250, 94 Am. Dec. 455. So in *Gambrill* v. *Schooley* (1901), 93 Md. 48, 48 Atl. 730, 52 L. R. A. 87, 86 Am. St. R. 414, it was ruled that dictation of a letter to a stenographer was a publication, relying on the *Pullman* case above. The same view is taken in *Sun Life Assurance Co.* v. *Bailey* (1902), 101 Va. 443, 44 S. E. 692; *Puterbaugh* v. *Gold Med. Mfg. Co.* (1904), 7 Ont. L. R. 582, 1 Am. Cas. 100; *Ferdon* v. *Dickens* (1909), 161 Ala. 181, 49 So. 888. On the other hand the following recent cases take a different view. *Owen* v. *Ogilvie Pub. Co.*

(1898), 32 App. D. 465, 53 N. Y. 1033; *Central R. R. Co.* v. *Jones* (1916), 18 Ga. App. 414, 89 S. E. 429; *Cartwright-Caps Co.* v. *Fischel & Kaufman* (1917), 113 Miss. 359, 74 So. 278.

MORTGAGES—FORECLOSURE BY JUNIOR MORTGAGEE NOT PARTY TO PRIOR FORECLOSURE OF SENIOR MORTGAGE.—A first mortgage was foreclosed by action and sale without the owner of a second mortgage being made party. The latter now sues to foreclose, making defendants the purchaser under the prior sale and his subsequent mortgagee, and asking that the land be sold and the proceeds applied in payment of the liens in order of priority. On the prior sale the land brought more than enough to satisfy the senior mortgage. The particular relief seems to have been opposed. *Held,* that complainant was entitled to the relief prayed. *Union Bank* v. *Cook,* Supreme Court of South Carolina, June 25, 1918, 96 S. E. 484.

Insofar as it holds that the former suit had, on the one hand, no efficacy to displace complainant's lien, but had, on the other hand, the effect of transferring to the purchaser thereunder all the rights of the parties thereto, and that the senior mortgage so acquired by the purchaser would not merge in the equity of redemption by the purchaser but would be kept on foot, on the principle of subrogation, and that the purchaser's equitable right to the benefit of the first mortgage passed to his subsequent mortgagee—to this extent, the case involves the application of unquestioned principles, though unusual in its circumstances. As to the propriety of the specific relief here granted, however, the authorities are not so clear. It would seem to be axiomatic that the former suit to which the junior mortgagee was not a party should not affect his remedies any more than his substantive rights, except in so far as it might operate as a transfer of the adverse interests and so require him to prosecute his remedies against different parties—a result which might have been brought about by voluntary conveyance. What, then, was the junior mortgagee's right of foreclosure before the prior suit? Although it is often stated that the only purpose of a foreclosure suit is to subject to the payment of the debt the estate which the mortgagor had at the execution of the mortgage, and hence that the only proper parties are the mortgagor and subsequent transferees and encumbrancers, it is generally conceded that a junior mortgagee may join a senior lienor, whose lien is matured, and have the premises sold free from both liens and the proceeds applied in satisfaction of both, in the order of their priority. *Hagen* v. *Walker,* 14 How. 37; *Cullum* v. *Erwin,* 4 Ala. 452; *Masters* v. *Templeton,* 92 Ind. 447; *Heimstreet* v. *Winnie,* 10 Ia. 430; *Emigrant Bank* v. *Goldman,* 75 N. Y. 127; *Person* v. *Merrick,* 5 Wis. 231. There is some doubt about the right of the junior mortgagee to force foreclosure of the senior mortgage over objection. *Foster* v. *Johnson,* 44 Minn. 290; *Missouri Trust Co.* v. *Richardson,* 57 Neb. 617; *Hudnit* v. *Nash,* 16 N. J. Eq. 550; *Bexar Building Assn.* v. *Newman,* 86 Tex. 380. It was said in the principal case that this could be done only upon a showing that the property would probably produce more than the amount of the senior encumbrance. But it is almost universally held that whatever right of foreclosure the junior mortgagee had in the first instance he still has

after a suit to foreclose the senior mortgage, to which he was not a party. *Catterlin* v. *Armstrong,* 101 Ind. 258; *Foster* v. *Johnson,* 44 Minn. 290; *Peabody* v. *Roberts,* 47 Barb. 91; *Besser* v. *Hawthorne,* 3 Ore. 129; *Turner* v. *Phelps,* 46 Tex. 251. See also *Alexander* v. *Greenwood,* 24 Cal. 506. *Contra, Rose* v. *Walk,* 149 Ill. 60, approved in *Rodman* v. *Quick,* 211 Ill. 546. 555.

PARTNERS AS TENANTS IN COMMON.—The Sewell's (plaintiffs below) claim title to certain mineral rights based on a conveyance "by John Sebastian to J. W. Sewell & Co., which was a partnership composed of John W. Sewell and Harriet Sewell—father and mother, respectively, of plaintiffs, whose rights descended in equal shares to plaintiffs, their children and heirs at law. The Kentucky Coal Co. claims through a devise by Sebastian subsequent to this conveyance." *Held,* "the deed to J. W. Sewell and Co. vested the legal title in the partners as tenants in common." *Kentucky Block Cannel Coal Co. et al.* v. *Sewell et al.* (C. C. A. 6th circ.) 249 Fed. 840.

The inadequacy of the terminology of common law tenure to describe accurately the nature of the conjoint holding by partners has frequently been mentioned (Cf. 9 COL. L. REV. 213, ff.; 29 HARV. L. REV. 163; 15 MICH. L. REV. 618, ff.) Lord HOLT, in *Heydon* v. *Heydon,* apparently considered partners as joint tenants and a vendee of either partner's interest a tenant in common with the other partners, but the rigid application of that doctrine in instances where parties were claiming through the rights of partners as such and not through their rights as tenants has caused the confusion that has been so often deplored. The use of the inaccurate terminology in the instant case will do no harm if it is plainly recognized that the court is describing the nature of the conjoint *holding* without reference to any partnership *activities* in dealing with the property. The Sewells—father and mother—received the property as tenants by entireties (being husband and wife) and dealt with it during their lives as partners. At their death their children and heirs at law received the interests of the parents and held, apparently, by the old common law title of coparceners, but as the Coal Company were claiming through a later conveyance of Sebastian and there was no question as to the partnership rights of the elder Sewells or any creditors of them as partners, the description of the elder Sewells as tenants in common may be considered as meaning nothing more than that they held conjointly under a conveyance which was prior to the one to the Coal Company and therefore they and their heirs took precedence in the chain of title. Any dispute as to the meaning of the decision would be avoided by the adoption of the terminology of our new UNIFORM PARTNERSHIP ACT. In Section 25 (1) of this Act a holding such as that of the elder Sewells is correctly termed a tenancy in partnership and for this terminology we have a good old common law precedent as early as the time of Edward III. (Cf. STATHAMS ABRIDGMENT OF THE LAW. Translated by Klingelsmith, p. 7; 15 MICH. LAW REV. 618, note 32.)

PERSONS SUBJECT TO MILITARY LAW.—Subdivision (d) of Art. 2, of the Articles of War, (Sec. 1342, R. S., as amended by Act of Congress, Aug. 29, 1916), relating to "persons subject to military law," reads: "(d). All re-

tainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, thought not otherwise subject to these articles." The words *"acompanying or,"* were not in the old article, number 63. Two recent cases applying this subdivision are of interest. G, a civilian employee of the U. S. Shipping Board, went to Europe as a mate on a military transport; he was there discharged, and sent back to the United States on another transport. He volunteered to stand watch on the vessel, and did so for several days, but finally refused to continue. For this disobedience to the order of the army officer in command of the vessel, he was tried by court-martial and sentenced to five years' imprisonment. On *habeas corpus* (after reaching the United States), it was held he was "accompanying" the army, "voluntarily serving with it," "in the field," and was punishable as a person "subject to military law" under this article. *Ex parte Gerlach* (1917), 247 Fed. R. 616.

F applied to the Bureau of the U. S. Army Transport Service, which is under the Quartermaster's Department, for employment, was accepted, entered into an agreement to serve, and was assigned to duty as chief cook on a steamship then lying at Brooklyn, engaged in transporting supplies for the U. S. Army. Just before the ship sailed for a foreign port, F attempted to leave the ship with his baggage to desert the service, and refused to return thereto. He was arrested by the military police, sent to Camp Merritt, N. J., and tried by a court-martial. He sued out a writ of *habeas corpus*: *Held*: Although a civilian employee, he was "serving with the armies in the field," and a court-martial had jurisdiction to try him for his attempt to desert; also he can not question the jurisdiction of the court-martial to impose the death or other penalty (A. W. 58), on the ground that he was not charged "on a presentment or indictment of a grand jury," under the Fifth Amendment to the United States Constitution, since that expressly excepted "cases arising in the land or naval forces." The court says the words *"in the field,"* do not refer to land only, but to any place, whether on land or water, apart from the permanent cantonments or fortifications where military operations are being conducted."

RATES OF PUBLIC UTILITIES—RIGHT OF CARRIER TO REPARATION WHEN COMPELLED TO CARRY AT CONFISCATORY RATE.—The case of *M. St. P. & S. S. M. Ry.* v. *Washburn Lignite Coal Co.*, (N. D.), 168 N. W. 684, is an echo of the *Lignite Coal Case*, 236 U. S. 585. The latter case decided that the rates fixed by the legislature of North Dakota for the carriage of lignite coal were confiscatory, and dissolved an injunction restraining the carrier from charging more than the statutory rates. The present case is an action to recover from the coal company $2,6000, the alleged difference between the statutory rate and a reasonable rate for carrying coal for defendant company while the injunction was in force. It has often been held that a shipper paying under protest more than a reasonable freight rate may recover the excess. The question here is

can a carrier recover a deficiency when it has been compelled by action of the court to carry at a confiscatory rate. The positions seem reciprocal, but some very nice questions are raised. The court held, *Robinson J.* dissenting, that there could be no recovery by the carrier.

Beginning with the *Knoxville Water Case,* 212 U. S. 1 and the *Consolidated Gas Case,* 212 U. S. 19, the Supreme Court of the United States has often decreed an experiment to determine what would be the returns from certain rates, without prejudice to the right of the public utility to reopen the case if adequate trial proves them non-remunerative. The most important of these cases are referred to in the instant case. Of these the *Lignite Coal Case, supra,* was one in which the United States Supreme Court, after the experiment, found the trial rates confiscatory. Plaintiff by decree of court was coerced to carry at those rates, it was thereby deprived of its property, can it now recover the loss? The court finds there is no tort liability of defendant. Liability, if any, must be contract. There was no express contract to pay a higher rate, and it seems unreasonable to hold there was an implied one. There is complete absence of any implied consent of defendant to pay further freight bills if the litigation should finally prove the company had a right to a higher rate. His contracts with his customers were probably based on the tariffs he paid, and not on any implied promise to the carrier to pay a higher charge, if after years of litigation it should be decided the tariff was too low. Perhaps the most interesting suggestion of the case is that here is a contract by operation of law, a case of unjust enrichment. The court finds that to allow this would give plaintiffs a remedy against one who has done no wrong, and who would be unable to recoup his loss from those who had really benefited, the consumers of the commodity. What protection, then, shall public utilities have against such deprivation of property. They have sometimes been allowed to charge the higher rate ,giving the public rebate slips, 16 MICH. L. R. 379. The court might of course protect them by the form of the decree. Where one of these means is not permitted it seems to be a case of *dammum absque injuria.*

SALES—IMPLIED WARRANTY OF WHOLESOMENESS—CANNED GOODS.—The plaintiff bought a can of baked beans from the defendant who was a retail dealer. The brand was of a widely known variety. While eating the same the plaintiff broke his tooth on a pebble which was proven to have been among the beans in the can. An action was brought on the implied warranty that the beans were wholesome and fit for consumption. The Code provided that "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer, or not, there is an implied warranty that the goods shall be reasonably fit for such purpose." *Held,* for plaintiff. *Ward* v. *Great Atlantic & Pacific Tea Co.,* (Mass. 1918), 120 N. E. 225.

The code is but declaratory of the common law. *Cook* v. *Darling,* 160 Mich. 475, 481. Where the particular purpose is the consumption as food, the food must be wholesome. *Barrington* v. *Hotel Astor,* 171 N. Y. Supp.

840; see cases collected in 16 MICH. L. REV. 555. The difficulty in the principal case is to determine whether the vendee relied on the judgment and skill of the vendor. On this point the courts are in conflict. *Julian* v. *Laubenberger,* 16 Misc. (N. Y.), 646, created an exception in the case of canned goods; the court said: " . . . . the defendant sells a can of food . . . . It is well known and must be well known to both parties, that he has not inspected it, that he is entirely ignorant of the contents of the can, except so far as he had purchased from respectable dealers on the market . . . . if the purchaser desires to protect himself he may ask for an investigation at the time of purchasing, or he may get an express warranty as to the quality of the goods." The dissenting opinion in the principal case takes this view. In *Bigelow* v. *Maine Central Railroad Co.,* 110 Me. 105, the court denied an implied warranty of wholesomeness but admitted that the vendee got a warranty that the food was of "a reputable brand, packed and inspected in accordance with approved methods." These courts no doubt have the correct view on strict interpretation of the principles of the law of sales. The better holding, however, is that of the prevailing opinion, for reasons well stated in *Chapman* v. *Roggenkamp,* 182 Ill. App. 117: " . . . . public safety demands that there should be an implied warranty . . . . as a general rule, in the sale of provisions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale than are possessed by the purchaser to assume the risk." See also, *Sloan* v. *Woolworth,* 193 Ill. App. 620; *Cook* v. *Darling, supra.* It is a strong argument of the prevailing opinion, also, that the implied warranty must be regarded as a necessary inference from "the relation of the parties." It could hardly be expected that the customer should follow the suggestion of the N. Y. court in *Julian* v. *Laubenberger.* It would be impractical to open the can at the store; and it would be equally impractical to ask for an express warranty in all retail purchases when the small purchases are so numerous. It would seem that an implied warranty ought to be imposed from the nature of the retailer's business and the peculiar relation of dealer and customer. Dealers in food should be insurers of wholesomeness whether retailers or otherwise. The public interest so demands. The English courts are in accord with the principal case, *Jackson* v. *Watson,* (1909), 2 K. B. 193.

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PART PERFORMANCE—MUTUALITY OF REMEDY.—Defendants entered into an oral contract with the plaintiff for the purchase of a house and lot for $1,800. Defendants paid plaintiff $100, entered into possession of the house, which plaintiff vacated for that purpose, and made extensive changes in the premises which lessened their value Defendants subsequently refused to complete the contract. Bill by the plaintiff for specific performance. *Held,* that, inasmuch as part performance by the purchaser (defendants) took the case out of the statute of frauds so that he might have maintained suit against the vendor (plaintiff), the plaintiff may have relief. *Pearson* v. *Gardner et al.* (Mich. 1918), 168 N. W. 485.

The decision is placed squarely upon the ground of mutuality of remedy.

This is unfortunate for a number of reasons. In the first place, it seems to imply that there was not part performance by the vendor. Where possession is given under an oral contract of sale, it operates both for and against the purchaser. The owner has allowed the purchaser to do an act on the strength of the contract,—to-wit: enter on the land; the purchaser has induced the owner to do an act on the faith of the contract: withdraw from the land. Both are therefore bound in jurisdictions where taking possession is a sufficient act of part performance. *Wilson* v. *Hartlepool Ry. Co.*, 2 De G. J. & S. 475, 485; FRY: SPECIFIC PERFORMANCE, (ed. 5) § 604. In Michigan mere possession is not enough; but if expenditure by way of improvements and the exercise of acts of ownership will, in addition to possession, amount to part performance for the purchaser, it seems clear that giving up possession to the purchaser and permitting him to do acts which materially lessen the value of the premises should operate in favor of the vendor. The principle in either case is the same. In the second place the doctrine of mutuality of remedy does not furnish the easy solution which the court assumes. It is now an exploded doctrine, so many exceptions having accumulated that the principle is to all intents and purposes gone. Even if it be accepted, one of the recognized exceptions relates to the statute of frauds. If the defendant had signed a memorandum of the contract, the plaintiff might have had specific performance, even though the defendant could not hold him to the contract. AMES, MUTUALITY IN SPECIFIC PERFORMANCE, 3 COL. L. REV. 1, 5, LECTURES LEGAL HISTORY, 370, 373. For cases, see AMES, CASES EQUITY, 421, n. 1. It is difficult to reconcile this decision with such a firmly established exception. Again, it has more than once been declared that the acts of part performance must be done by the party seeking to enforce the contract; indeed it is believed that it would be difficult to gnd a case where that was not the situation. Cf. POMEROY, CONTRACTS (ed. 2) § 105. Finally it is by no means clear that the defendant would be entitled to specific performance. Where something in addition to possession is required the better view is that the acts done must be beneficial to the estate. *Hollis* v. *Edwards*, 1 Vern. 159; *Wolfe* v. *Frost*, 4 Sand. Ch. 79; *Chamberlain* v. *Manning*, 41 N. J. Eq. 651. The court seems deliberately to have selected the weakest basis upon which to support its decision.

TRESPASS—DAMAGES—NOTICE TO AGENT—WILLFUL TRESPASSER.—Where suit was brought against a defendant in trespass for cutting timber from the plaintiff's land, the defendant having relied upon the advice of his attorney that his title to such land was good; *held*, though the defendant was charged with his attorneys knowledge as to the claims of third persons, where he had no actual knowledge thereof and acted in good faith upon the advice of this attorney, he was not guilty of moral bad faith and should be allowed the expenses incurred by him in cutting and removing the timber. *Allen* v. *Frank Janes Co., Limited* (La., 1918), 78 South 115.

In measuring the damages for cutting and removing timber by trespassers the court made a distinction between legal and moral bad faith. One who had knowledge that he had no title to lands, because of the imputation to him of his agent's knowledge of the facts, was held to be guilty of legal

bad faith only. The coort applied the same role of damages usually applied to cases of innocent as distinguished from cases of willful trespass and probably intended the terms to be used synonymously. The principal is liable to third persons for all acts committed by his agent within the actual or apparent scope of his agency, *Mather* v. *Barnes* et al., 146 Fed. 1000. On the question as to whether the malicious acts of the agent imposed any liability on the principal when not done with his assent, there is a decided conflict of authority. 2 *C. J.* 854 (Sec. 537). But in the instant case it is not an act of the agent but his knowledge which is imputed to the principal. It is a well settled general rule that a principal is affected with constructive knowledge, regardless of his actual knowledge, of all the material facts of which his agent receives notice or acquires knowledge, while acting in the course of his employment, although the agent does not in fact inform his principal thereof. *Armstrong* v. *Ashley,* 204 U. S. 272; *Daw* v. *Lally,* 213 Mass. 578. Thus notice to an agent for the purchase of land of the rights of another therein is notice to his principal of such defects in title. *Blair* v. *Whittaker,* 31 Ind. App. 664. If then the defendant in this case had the knowledge of the attorney that there was a defect in his title, in entering upon the premises he was a willful trespasser and logically should not have been allowed his expenses. But as the rule is in some cases a harsh one its operation should be rightly confined to those cases to which it is strictly applicable and it cannot be invoked for the purpose of imputing actual malice in the conduct of the principal because of the facts known to the agent. *Trentor* v. *Pothen,* 46 Minn. 298; *Reisan* v. *Mott* 42 Minn. 49. The principal case affords an illustration of the attempts on the part of the courts to restrict the doctrine of knowledge by imputation so as not to cause injustice or hardship.

WORKMEN'S COMPENSATION — ACCIDENT IN COURSE OF EMPLOYMENT. — Claimant sought compensation under the statute for the death of her husband who suffered a heat stroke while carrying on work pursuant to his employment by defendant. There was no evidence that deceased was exposed by his employment to any greater degree of heat than was any other member of the community generally. *Held,* in view of the fact that the Pennsylvania statute provides for compensation for personal injuries resulting from accident received "in the course of employment", claimant should recover. *Lane* v. *Horn & Hardart Baking Co.* (Penna. 1918), 104 Atl. 615.

In almost every other state these facts would not present a case for compensation, the statutes very generally requiring that the injuries shall have been received not only "in the course of employment" but "out of the employment" as well. HONNOLD, WORKMEN'S COMPENSATION, Sec. 101. Injuries from lightning, unless the victim was specially exposed by his employment to such dangers, are thus not within the provisions of the acts generally. In Pennsylvania, though, a person struck by lightning is entitled to compensation if at the time of injury he is working at his job as an employee, but not if he is at home or is not engaged in the business of his employment. The act in Pennsylvania, then, is really an insurance for all employees against accidental injuries received while on the job. The statutes generally may

be said to be insurances for employees against such injuries only where there is some causal connection between the employment and the injury. On the question as to the existence of such causal connection see 16 MICH. L. REV. 179. See also *Cennell* v. *Daniels Co.* (Mich.), 168 N. W. 1009.

WORKMEN'S COMPENSATION—WORKMEN WHO ARE TO BE COUNTED IN MAKING UP REQUIRED NUMBER.—Part A, Sec. 2 of Connecticut P. A. 1913, C. 138, the Workmen's Compensation Act of that state provides that the Act shall not apply to employees of any employer "having regularly less than five employees," etc. Defendants, conducting an amusement park, had three employees who quite clearly were "regularly" employed; claimant's deceased was one of these. On two nights of each week, when the weather was good, dances were given, the music being furnished by two orchestras of three or more pieces each, sometimes one orchestra being on duty, at other times the other. *Held,* the musicians were properly counted in making up the required number of five employees. *Boyle* v. *Mahoney & Tierney* (Conn. 1918), 103 Atl. 127.

So far as the musicians were concerned the attention of the court seems to have been directed to the question of their being employees of independent contractors; having concluded that they were not such, the court apparently takes it for granted that they were "regularly" employed. Quite a number of states have similar limitations in their workmen compensation acts, but there is a complete dearth of authority as to what sort of employees are to be counted in making up the specified number. Suppose an employer has four regular employees and a scrubwoman who comes in to clean up the office once each month. Is she to be counted as making up the required five? Or suppose a small corporation has clearly four such employees and has arrangements with the cashier of a local bank to keep the books and act as secretary, not, however, as an officer. Should he be counted as the fifth? In the absence of a controlling definition in the Act itself, it is proper to look to the object sought to be attained. Why was the Act limited to employees whose employer has regularly five or more employees? A comprehensive scheme for compensation to injured workmen grew out of a feeling, first of a certain inequality between employee and employer, and, second, that the industry should bear the burden resulting from injuries received in the course and out of employment. A number limitation as in Connecticut, it is believed, was put into the statute because it was felt that there was need of such sweeping changes in liability only where an employee by reason of being one of many was more exposed to industrial accident. The Kansas Act (Laws 1911, C. 218, §8) provides expressly: "It is hereby determined that the necessity for this law and the reason for its enactment, exist only with regard to employers who employ a considerable number of persons. This Act, therefore, shall only apply to employers by whom five or more workmen have been employed continuously," etc. In view of these considerations it is believed that it is questionable whether the court in the principal case should have counted the musicians. See in general, *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571.