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BOUNDARIES—PROPERTY CONVEYED—HALF OF "LOT"—STREET.—Plaintiff and defendants own, respectively, the easterly and westerly halves of "lot 17" of a certain tract of land. Defendants' deed described the land conveyed to them as the "westerly one-half of lot 17" of said tract, according to a recorded map, which indicated that the western boundary of lot 17 is the center line of an avenue 60 feet wide. Plaintiff sues to quiet title to a strip of land 15 feet wide adjacent to the center line of said lot. *Held*, that the 30-foot strip covered by the avenue was not part of the lot within the meaning of the deed, and that therfore the eastern boundary of defendants' land was a line halfway between the eastern boundary of the avenue and the eastern boundary of lot 17. *Earl* v. *Dutour et al.* (Cal., 1919), 183 Pac. 438.

A basic rule of the law of real property is that with regard to grants of land abutting on a highway the ownership is presumed to extend to the middle of the way if the grantor owns that far, unless a contrary intention appear from the conveyance. *Paul* v. *Carver*, 26 Pa. St. 223; *Low* v. *Tibbetts*, 72 Me. 92. And at least one court has gone so far as to hold that nothing short of an intention expressed in *ipsis verbis* to exclude the soil of the highway can exclude it. *Salter* v. *Jonas*, 39 N. J. Law 469; *Simmons* v. *City of Paterson*, 84 N. J. Equity 23 (land contiguous to a river). At least the declaration to rebut the legal presumption must be clear. *Oxton* v. *Groves*, 68 Me. 372. Likewise, if the description is by courses and distances and a line runs, in fact, upon, by, or along a street, altnough not so described, the language will be construed as carrying the grant to the middle of such street. *Champlin* v. *Pendleton*, 13 Conn. 23; *Sizer* v. *Devereux*, 16 Barb. (N. Y.) 160. But in order to have the middle of the highway included, it must actually be used as a public way, and not merely exist as a designation on a plan. *Bangor House Proprietary* v. *Brown*, 33 Me. 309. Contra, *Jarstadt* v. *Morgan*, 48 Wis. 245. Judged in the light of these general principles the instant case is sound, it simply presenting a different angle to the problem. The conclusion of the Court, that the term "lot" means "that portion of the platted territory measured and set apart for individual and private use and occupancy," is good sense as well as good law.

CONTRACTS—RIGHTS OF THIRD PARTY BENEFICIARY.—Husband and wife entered into a contract whereby the husband agreed to make a transfer of certain property for the benefit of an invalid daughter. *Held*, (two justices dissenting) that under 3 Mich. Comp. Laws 1915, § 12361, which provides among other things that "in all equitable actions all persons having an interest in the subject of the action and in obtaining the relief demanded, may join as plaintiffs" the daughter could maintain an equitable proceeding against the father to enforce the contract, although she was not a party thereto. *Preston* v. *Preston* (Mich., 1919), 205 Mich. 646.

The case is the more remarkable in view of the fact that the Michigan Supreme Court, contrary to the prevailing American doctrine, seems hereto-

fore to have adhered strictly to the orthodox English view that a beneficiary under a contract to which he is not a party has no enforcible interest either legal or equitable. *Knights of the Modern Maccabees* v. *Sharp* (1910), 163 Mich. 449; *Edwards* v. *Thoman* (1915), 187 Mich. 361; *In Re Bush's Estate* (1917), 199 Mich. 192. The statute relied upon by the majority opinion as the basis for changing the rule, while first enacted by the legislature as a part of the "Judicature Act of 1915," does not seem to announce a new principle either of substantive or adjective law. It is simply a statement of the generally prevailing equity rule in regard to joinder of parties, and was apparently borrowed from the Federal Equity Rules (No. 37) and from the state Codes of Civil Procedure, of which it is an integral part. POMEROY'S CODE REMEDIES (4th ed.) § 111. "It is," in the language of the dissenting opinion in the principal case, "a novel idea that a statute, plainly intended to affect procedure only, may be used to change a settled rule of the law of contracts, to confer upon a person a legal right and interest in subject matter where there was none before the statute was enacted". Especially is this so where the statute is merely declaratory. It is to be hoped that a more satisfactory basis can be found for a result which is undeniably desirable. For a collection of the cases and full discussion of the problem involved see 15 HARVARD L. REV. 767; 27 YALE L. JOUR. 1008.

DAMAGES: MOUSE IN COCA-COLA.—A bottling company sold a bottle containing a mouse as well as the well-known beverage to a retailer, who sold it (or them) to the innocent and unsuspecting female plaintiff. The lady became acutely sick after drinking the concoction and brought suit against the bottling company. *Held*, award of $500.00 damages was not excessive, there being no evidence "that passion or prejudice operated upon the members of the jury." *Bellingrath* v. *Anderson* (Ala., 1919), 82 So. 22.

For an exhaustive as well as an interesting discussion of the principles involved in numerous cases of this character, see 17 MICH. LAW REV. 261.

DEEDS—CONDITIONS—REPUGNANCY TO INTEREST CREATED—SALE TO NEGROES. —Plaintiff company, owner of many lots in certain locality, sold one lot to K, under whom defendant, a negro, claims title. The deed to K, duly recorded, provided that if grantee, her heirs or assigns, should lease or sell to any negro, Chinese, or Japanese, title should revert to grantor. This was put in the form of a covenant and expressly stated to run with the land,—to be terminable, if desired by owner, in 1925. *Held*: Such condition in deed of fee simple is within rule of common law, as re-declared in Civil Code of California, § 711, that "conditions restraining alienation, when repugnant to the interest created, are void." *Title Guarantee and Trust Co.* v. *Garrott*, Dist. Ct. App., 2nd Dist. Cal., 183 Pac. 470.

The deed in full does not appear in the report of this case, nor was it set forth in the complaint, the court assuming from briefs of counsel that a title in fee simple absolute was conveyed thereby, and proceeding on that basis. The plaintiff's contention was this clause in the deed created a condition subsequent and that, by its violation, the fee was forfeited and the plaintiff is en-

titled to re-entry. The court agrees that this is to be considered as a condition subsequent, but declares it void. The theory, in part, is as follows: that the granting of a fee simple is a conveyance of the whole estate, and carries with it an absolutely unfettered right of alienation; and the court thinks, on principle, that there should be no such restriction allowed either as to persons or time,—(following a dictum in *Murray* v. *Green* 64 N. C. 367, in which case the restriction was not limited either as to persons or time), and that the same reasoning which declares void a restraint total as to persons, though limited as to time, (*Latimer* v. *Waddell*, 119 N. C. 370), should apply here with equal force; that any restraint on alienation is repugnant to the grant of a fee simple. The consideration of public policy, as involved in the uncertainty of titles which the court seemed to fear would follow if such restraints were allowed, seemed to have some weight in influencing the decision. Contra: In the following case it was held that a restriction in deed against selling to any negro is not an unlawful restraint on powers of alienation and not against public policy. *Koehler* v. *Rowland*, 275 Mo. 573; also substantially the same in *Queensborough Land Co.* v. *Cazeaux*, 136 La. 724, L. R. A. 1916 B, 1201. Professor GRAY, in his RESTRAINTS ON THE ALIENATION OF PROPERTY, discusses this subject after an exhaustive review of the cases—pp. 25-42. He states in part, § 41, as follows: "The authorities, it will be seen, are in hopeless conflict. The rule which naturally suggests itself is that a condition is good if it allows of alienation to all the world with the exception of selected individuals or classes; but is bad if it allows of alienation only to selected individuals or classes. (Williams on Settlements, 134, 135.) Perhaps this rule might be difficult of application, or easily evaded. At any rate the leading case of *Doe* v. *Pearson*, 6 East. 172, and the late case of *In re Macleay*, L. R. 20 Eq. 186, cannot be brought within it, for they both allow the power of alienation to be restrained within the narrowest limits; and Sir George Jessel says: 'The test is whether the condition takes away the whole power of alienation substantially.' L. R. 20 Eq. 189."

DIVORCE—ALIMONY—FUTURE EARNINGS AS PROPERTY UNDER STATUTE.—In a proceeding for divorce under the Ohio statute (General Code Sec. 11,990) providing that "the court shall * * * allow such alimony out of her husband's property as it deems reasonable, etc." it was contended that permanent alimony could not be allowed which was based upon the future personal earnings or wages of the husband. *Held*, that the words "out of her husband's property" were directory only and not mandatory and that permanent alimony could be based on future earning power under this particular statute. *Lape* v. *Lape* (Ohio, 1919), 124 N. E. 51.

The generally accepted doctrine in this country has been that future earnings could be considered as a basis for permanent alimony. *Campbell* v. *Campbell*, 37 Wis. 206; *Muir* v. *Muir*, 133 Ky. 125; *Griffin* v. *Griffin*, 173 Ky. 636; *Snyder* v. *Snyder*, 162 N. Y. Supp. 607. And this even though the statute provided for such alimony out of the husband's estate at the time of the divorce. In the Wisconsin case above cited, the court remarked: "We cannot regard it [the statute] as a hard provision, but as a remedial and bene-

ficial statute for the protection of natural claim, founded on natural relations." So, too, in the principal case, the court, although not citing in their opinion the decisions above mentioned, or *Cox* v. *Cox*, 20 Ohio St. 439, the latter a decision allowing alimony based upon property acquired subsequent to the divorce decree, gave a broad interpretation to the words of the statute upon the grounds of interpreting the intention of the General Assembly. The instant case in the lower court, Hamilton Insolvency Court, *Lape* v. *Lape*, 62 Ohio Law Bulletin 398, was developed on a different and contrary theory to the one given by the Supreme Court. *Davis* v. *Davis*, 21 Ohio Circuits 136; *DeWitt* v. *DeWitt*, 67 Ohio St. 340. There are early cases which lay down the proposition flatly that "alimony being an allowance out of the husband's estate for the support of the wife, when there is no estate, there can be no alimony." *Feigley* v. *Feigley*, 7 Md. Reports 537, 563. This is based on the theory that the duty to support stops with the decree of divorce. However the cases following the weight of authority, previously cited, refuse to follow this doctrine and go on the theory that the duty to support still continues. But in *Wilson* v. *Wilson*, 67 Minn. 444, where the statute provided for permanent alimony "from the estate of her husband", they interpreted the statute literally and held that future personal earnings could not be the basis for permanent alimony under that statute, and that the remedy lay with the legislature, the court admitting the equity of allowing permanent alimony based on future income, but also admitting their inability to correct it. *State of Minnesota ex rel. Wise* v. *Jamison*, 69 Minn. 427 sustained the above cited Minnesota case. To the same effect see also *Jackson* v. *Burns*, 116 La. 695.

EMINENT DOMAIN—PARTIES—INCHOATE DOWER—RIGHT TO DAMAGES.—Action by plaintiff against her husband for a share, as the fair and reasonable value of her inchoate right of dower, in damages awarded the husband in appropriation proceedings against land owned by him in fee. Plaintiff claims her right of action under statutes relating to the appropriation of land. *Held* —The wife's inchoate right of dower was not such an "interest, legal or equitable, in the property," as would require her to be a party to condemnation proceedings under the statute. Nor can she claim a present pecuniary interest in the damages awarded, for this fund is no different from any other personal estate of the husband. *Long* v. *Long* (Ohio, 1919), 124 N. E. 161.

The reasoning of the court appears sound. If the wife could share in the fund today, and the husband die tomorrow, she would again share in the remaining fund, as in all his other personal and real property. *Cf. accord, Weaver* v. *Gregg*, 6 Oh. St. 547; *Moore* v. *Mayor, etc. of City of New York*, 8 N. Y. 110; *Gwynne* v. *City of Cincinnati*, 3 Ohio 24; *Flynn* v. *Flynn*, 171 Mass. 312; *contra, Wheeler* v. *Kirtland*, 27 N. J. Eq. 534; *In re New York and Brooklyn Bridge*, 75 Hun 558. The *Weaver* case held that a partition sale divests the wife of a co-tenant in fee of her inchoate right of dower therein. The principal case is carefully distinguished from those in which creditors have subjected the husband's estate to the satisfaction of judgments rendered against him, in which the inchoate right of dower was ascertained and exempted from execution. In such cases the husband's interest has been wholly

extinguis. ' and he receives no compensation such as arises from cases of eminent domain or a sale in partition. The inchoate right of dower is treated as some sort of present interest, entitled to protection in equity, in *Brown* v. *Brown*, 82 N. J. Eq. 40 (against a possible bona fide purchaser without notice from trustee), and in *Brown* v. *Brown*, 94 S. Car. 492 (against waste).

FISH—MUSSELS—PROPERTY OF STATE.—In a suit by the owner of the bed of a non-navigable stream for the conversion of mussel shells taken from the bed of said stream by defendants, the plaintiff claimed the mussels were part of the realty. *Held*,—A mussel, having powers of locomotion, is a fish *ferae naturae* within the meaning of the Rev. Stat. Mo. 1909, Sec. 6508, and the owner of the bed of the stream cannot acquire title to them, title being always in the state. *Gratz* v. *McKee et al*, (C. C. A., 8th Circ.) 258 Fed. 335.

Thus mussels in fresh waters seem to be included by an extension of the law relative to salt water shell-fish, which rules that shell-fish, such as oysters and clams, in their natural state, are classified as *ferae naturae*, and their ownership is in the state in its sovereign capacity, *State* v. *Harub*, 95 Ala. 176, —though where planted in a place where they would not naturally grow, and their location well marked, they partake of the nature of *ferae domitae*, and are the subjects of private ownership, *State* v. *Taylor*, 27 N. J. L. 117, 72 Am. Dec. 347; *People* v. *Morrison*, 194 N. Y. 175. In England, mussels in a mussel bed granted by an order of the Board of Agriculture and Fisheries, sufficiently known and marked out as such, are the absolute property of the grantees of the order. Sea Fisheries Act, 1868, 31-32 Vict., c 45, ss 51, 52, 53. Likewise in this country some states may convey or lease beds for cultivating shell-fish to individuals, and the grantee or lessee gets an exclusive right to cultivate shell-fish on the bed, protected by equity, *Sequim Bay Canning Co.* v. *Bugge*, 49 Wash. 127. But while power of locomotion, which is mentioned in the principal case, may bring mussels within the class of swimming fish, which are *ferae naturae*, still it would seem more logical that viewed as an article of commerce, due to the similarity of its organism, habits, and mode of capture to those of other shell-fish subjects of commerce, the law relative to property rights in mussels should follow the trend of decisions declaring property rights in shell-fish, such as oysters and clams. Thus upon principle the law applicable to mussels in planted beds should be the same as that which is applied to oysters and clams in planted beds.

JOINT ADVENTURERS — BREACH OF CONFIDENCE — RESCISSION. — The three plaintiffs and the defendant MacDonald purchased an undivided four-fifths in defendant Oxnam's mine. Later, plaintiffs discovered that defendant MacDonald had agreed secretly with Oxnam that if the project was not profitable at the end of two years, MacDonald should have the right to reconvey his undivided one-fifth to Oxnam. *Held*, that MacDonald's conduct amounted to a constructive fraud to which Oxnam was a party and that the plaintiffs had a right to rescind.—*Menefee et al.* v. *Oxnam et al.* (Cal., 1919), 183 Pac. 379.

The rule is universal that no one having duties of a fiduciary character shall be allowed to enter into engagements in which he has, or can have, a

personal interest, conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. *Glover* v. *Ames,* (C. C.) 8 Fed. 351. Accordingly, it is held that the fiduciary relationship between cotenants of land is such that it is not consistent with good faith for either of them to purchase an outstanding adverse title. *Van Horne v. Fonda,* 5 Johns. Ch. (N. Y.) 388. (For criticism of this doctrine see 9 HARV. LAW REV. 427.) The same doctrine has also been extended to the case of a remainderman purchasing a tax title thereby attempting to exclude the other remainderman. Held that this was a breach of faith and not allowable. *Johns* v. *Johns,* 93 Ala. 239. The law will not permit an agent to place himself in a situation in which he might be even tempted by his own private interests to disregard the interests of his principal. *People ex rel. Pluger et al.* v. *Township Board,* 11 Mich. 222; MECHEM, AGENCY, Sec. 455. Nor will a partner be allowed to gain a secret advantage or enter into any transaction in any way adverse to the partnership interests. *Nelson* v. *Matsch,* 38 Utah 122, Ann. Cas. 1912 D, 1242. Therefore, it seems very natural for courts to apply a similar line of reasoning to cases of joint adventures, even though the essentials of a cotenancy, agency, or partnership are not present. The tendency of modern decisions is to regard the rights of joint adventurers, *inter se,* as controlled practically by the law of partnerships. 15 RULING CASE LAW 500. The court in the principal case said that it is immaterial whether the plaintiffs and MacDonald were partners in the strict sense. Persons engaged in a joint adventure, or about to assume such a relation, owe to each other the utmost good faith and will not be permitted to enjoy any unfair advantage. Where any abuse of that relation is discovered the complaining party is entitled to relief, whether any actual damage be proved or not. "The question is not whether the breach of confidence has resulted in profit to the unfaithful coadventurer, or whether it has resulted in injury to his joint adventurers, but whether there has been a breach of confidence on the part of the fiduciary." The mere making of a secret agreement by one of the joint adventurers is such a breach of faith as amounts to constructive fraud and will entitle the coadventurers either to rescind the contract (*Noble* v. *Fox,* 35 Okla. 70) or to maintain an action for damages for fraud and deceit (*Page* v. *Parker,* 43 N. H. 363) or to have the defendant account to his coadventurers (*Kennah* v. *Huston,* 15 Wash. 275).

LANDLORD AND TENANT—CONSTRUCTIVE EVICTION—VERMIN.—At the expiration of a period of two years of an apartment lease the premises became infested by cockroaches, which, after notice, the landlord unsuccessfully attempted to eradicate, whereupon defendants moved out. In an action for rent, *held,* defendants had not been exonerated from liability. *Hopkins* v. *Murphy* (Mass., 1919), 124 N. E. 252.

The case turns on whether or not the presence of the vermin constituted an act of constructive eviction. Crosby, J., in disposing of this contention says "There is nothing to indicate the plaintiff was responsible for the presence of the insects or that he failed in any duty which he owed to the defendant." In this he touched the real issue. The cases almost without dis-

sent take the view that the act complained of must be one of omission or commission by the lessor. TIFFANY on LANDLORD AND TENANT, p. 1258-62. Inability to link the cause with the lessor is fatal, though the actual condition of the premises renders its inhabitance impracticable. *Lack* v. *Wyckoff*, 11 N. Y. St. Rep. 678; *Griffin* v. *Frecborn*, 181 Mo. App. 203. An early case in point arose in New York in 1887 in which it was held that a constructive eviction could not be predicated on abandonment by reason of the presence of vermin. *Pomeroy* v. *Tyler*, 9 N. Y. St. Rep. 514. England, on similar facts is in accord. *Hart* v. *Windsor*, 12 Mees. & W. 68. Involving vermin and to the same general effect are, *Vanderbilt* v. *Persse*, 3 E. D. Smith (N. Y.) 428 (bedbugs); *Jacobs* v. *Morand*, 110 N. Y. Supp. 208 (waterbugs and bedbugs); *Fisher* v. *Lighthall*, 4 *Mackey* (D. C.) 82 (ants). But where there is a duty imposed on the landlord failure to fulfill it will justify abandonment under eviction. *Bradley* v. *Goicouria*, 67 How. Pr. 76. Where the defect is in existence at the time of letting the doctrine of *caveat emptor* applies. *Roth* v. *Adams*, 185 Mass. 341. As indicated in the decisions on this subject the defendant's proper remedy is preventive. A stipulation in the lease covering the relations of the parties in event of the appearance of objectionable features is a matter but of a moment, provides adequate relief and obviates the necessity of straining established legal doctrines in the apparent interest of immediate justice.

LANDLORD AND TENANT—HOLDING OVER—TENANCY FROM YEAR TO YEAR—DATE OF COMMENCEMENT—NOTICE TO QUIT.—By an agreement plaintiff let premises to defendant from Nov. 11, 1915 to Dec. 25, 1916 at yearly rent payable in quarterly installments. The defendant held over without any further agreement so that by plaintiff's acceptance of the quarter's rent on March 25, 1917, defendant was recognized as tenant from year to year. On June 8, 1917, defendant gave notice that he would quit the premises on Dec. 25, 1917. Plaintiff contended that since the original entry was on Nov. 11, the tenancy could be terminated only on Nov. 11 of some year, and hence the notice on June 8 was ineffective because not six months prior to Nov. 11. *Held*, that this year to year tenancy was a new tenancy commencing Dec. 25, 1916 and determinable on any subsequent Christmas Day by giving six months notice. *Croft* v. *William F. Blay, Ltd.* (1919), 1 Ch. 277.

When a tenant goes into possession and pays rent on a periodic basis under a void lease, no court has ever questioned the soundness of the plaintiff's contention. It is settled law that the tenancy from year to year has inception from the date of the original entry and can be terminated only upon the same date of some succeeding year. *Cf. Coudert* v. *Cohn*, 118 N. Y. 309. And it was also considered settled law in England (until the decision in the principal case) that when the tenancy from year to year was created by a holding over by the tenant after the expiration of a valid lease the implied tenancy could be terminated only upon the date of the original entry in some succeeding year. No distinction was made between the two situations. The rule in question was thus stated in 2 SMITH'S LEADING CASES, 12th edit., 123: "Where a tenant holds over and becomes a yearly tenant, then, if the time of the

year at which the term originally commenced and the time at which it ended be not the same, the notice must *prima facie* be made to expire at the former time." Cases cited in support of this proposition are *Doe* v. *Dobell*, 1 Q. B. 806; *Berry* v. *Lindley*, 3 Man. & Gr. 498; *Kelly* v. *Patterson*, 30 L. T. Rep. 842, L. R. 9 C. P. 681. The same rule is stated in substance in WOODFALL, LANDLORD AND TENANT, 12th edit., p. 207 and in 18 HALSBURY, LAWS OF ENGLAND 448. But the principal case expressly repudiates the soundness of such a rule of law when applied to tenancies from year to year created by a holding over after the expiration of a valid lease, and points out that the said rule was expounded in cases where the dates of the original entry and the end of any current year of the implied tenancy necessarily coincided because of the fact that the original term was for exactly one year or two years, etc., and not for a year and a fraction as in the principal case. Therefore, although the statements of the courts in those cases, if taken abstractly and divorced from the peculiar facts with reference to which they were uttered, do support the plaintiff's contention in the principal case, they are no authority for such a proposition when properly considered. The decision in the principal case appears proper. Certainly the implied tenancy from year to year does not commence until the original term terminates and the tenant holds over. Hence, the first day of the holding over must, by necessity, be the first day of the new tenancy. In the principal case the original term expired and the implied tenancy from year to year had inception on Dec. 25, 1916. Therefore, consistency required the court to hold that this new tenancy could be terminated only on some subsequent Christmas Day.—*Right ex dem. Flower* v. *Darby*, 1 Term Rep. 159; *Coudert* v. *Cohn*, *supra*. The principal case is severely criticized in 146 Law Times 308, wherein the writer assumes that certainty is more important in law than common sense. A diligent examination of the American authorities has failed to reveal any adjudication on the point involved in the principal case. The point is referred to in 2 TIFFANY, LANDLORD AND TENANT, 1451 without a reference to an American decision.

MALICIOUS PROSECUTION—PERJURED TESTIMONY—PRIVILEGE.—In a suit for damages for malicious prosecution, where it appeared that defendant had willfully and maliciously given perjured, though relevant, testimony under oath before a grand jury relating to plaintiff, which originated an inquiry the result of which caused the investigation of the matter by said grand jury, as a result of which proceeding plaintiff was indicted for grand larceny and later acquitted, *held*, that plaintiff might recover. *Kintz* v. *Harriger* (Ohio, 1919), 124 N. E. 168.

Regarding the question whether statements made by a witness in the regular course of a judicial proceeding are privileged or not, and, if so, to what extent, the American rule is that they are privileged provided they are relevant and material to the case, (*White* v. *Carroll*, 42 N. Y. 161; *Smith* v. *Howard*, 28 Ia. 51) or, if irrelevant, have been called out by questions put by counsel to the witness. *Calkins* v. *Sumner*, 13 Wis. 193. The English rule, on the other hand, results in absolute privilege whether the remarks are rele-

vant or irrelevant. *Henderson* v. *Broomhead,* 4 Hurl. & N. 569. The main point, therefore, upon which these cases turn is whether the alleged words are pertinent or not. The instant case deals with this proposition, the Ohio supreme court holding that this is but a distinction without a difference. Mr. Justice Wanamaker, speaking for the Court, in a vigorous opinion referring to Solomon and Shakespeare, as well as Magna Charta and the Constitution, puts the problem upon public policy. He cites no cases to support the conclusion arrived at; yet the argument that these statements do damage, whether relevant to the matter concerning which they are given or not, is founded upon reason and common sense. Somewhat similar to the point here involved is that where the prosecution has been started before a magistrate upon a false and malicious affidavit, in which case, quoting the Court, "the rule is well settled in Ohio * * * that such perjured affidavit can be made the basis of action in malicious prosecution." In the principal case the Court of Appeals had said "There is no decision in Ohio directly on the question. * * * In the cases outside our state, involving the question before us, and by the text-writers, there is complete unanimity touching the doctrine that for the giving of evidence by a witness in a judicial proceeding, so long as such evidence is relevant to the matters concerning which it is given, an action will not lie against the witness, even though the evidence be false, its falsity known by the witness at the time, and that it be maliciously given."

PHYSICIANS AND SURGEONS—NEGLIGENT ADVICE—CAUSE OF ACTION.—Defendant, a physician, was employed by plaintiff to attend plaintiff's minor child. Plaintiff alleged that the defendant, knowing the child's disease was scarlet fever and contagious, negligently advised the plaintiff that it was safe to visit the child; that the plaintiff, not knowing of the contagious nature of the disease, relied upon the defendant's advice, visited the child and contracted scarlet fever to his damage. Defendant demurred. *Held,* that the complaint states a cause of action. *Skillings* v. *Allen,* (Minn., 1919), 173 N. W. 663.

The liability of a physician to respond in damages to a patient who has suffered injury from the physician's negligence is well settled. It is equally well settled that no contractual relation need have existed between plaintiff and defendant, for the liability attaches where the professional services were rendered gratuitously. *McNevins* v. *Lowe,* 40 Ill. 209. A physician is not compelled to respond to the call of a charity patient, but if he undertakes to attend said person, he assumes a duty to use reasonable care. *Becker* v. *Janinski,* 15 N. Y. Supp. 675. "The material fact (to be) alleged in the petition is that the relation of physician and patient existed between plaintiff and defendant at the time of the alleged negligence of the defendant." *Hales* v. *Raines,* 146 Mo. App. 232. But it has also been held that a physician is liable for injuries caused to one whom he was examining merely for the purpose of giving information to a third person and not for the purpose of giving treatment. *Harriott* v. *Plimpton,* 166 Mass. 585. In this case the relation of the plaintiff to the defendant was quite remote, but in *Edwards* v. *Lamb,* 69 N. H. 599, the defendant was held liable where the relation of physician

and patient did not exist between plaintiff and defendant in any sense of the word. There the defendant was held liable for negligently advising the plaintiff that there would be no danger in her dressing an infection for her husband. The principal case was apparently decided on analogy with *Edwards* v. *Lamb*, but the duty of the defendant to plaintiff seems more debatable in the principal case for the reason that in the New Hampshire case the plaintiff might be considered the assistant or nurse, thereby establishing some sort of professional relationship while in the principal case no such relation existed. The only duty which the defendant owed to the plaintiff, by reason of being employed to give medical treatment to the plaintiff's child, was the contractual duty to apply his skill for the benefit of the child. However, this point apparently did not trouble the Minnesota court which relied upon the broad general principle of tort liability stated in *Depue* v. *Flatau*, 100 Minn. 299, that "whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger, and a negligent failure to perform the duty renders him liable for the consequence of his neglect." See also *Heaven* v. *Pender*. L. R. 11 Q. B. Div. 503. It is clear that, although originally defendant owed the plaintiff no more than a contractual duty, he, by assuming to advise the plaintiff, imposed upon himself a duty to use reasonable care in so doing. See *Black* v. *N. Y., New Haven & Hartford R. Co.*, 193 Mass. 448. The principal case is an excellent example of increasing favor of courts toward the principle quoted from *Depue* v. *Flatau, supra*. *Cf. Tustesen* v. *Penn. R. Co.* (N. J. 1919), 106 Atl. 137.

POSSESSION AND RIGHT OF POSSESSION OF A GROWING CROP.—The plaintiff owned apple trees growing eight feet from his boundary line. The branches of these trees overhung the defendant's land. The defendant picked apples off the overhanging branches and sold them. Plaintiff sued for damages for conversion. *Held*, the defendant is guilty of conversion and liable to the owner for the value of the apples. *Mills* v. *Brooker* (1919), 1 K. B. 555.

The decision is in perfect accord with a number of American decisions. *Cf. Lyman* v. *Hale* (1836), 11 Conn. 177; also TIFFANY, REAL PROPERTY, page 532, note 80, and the case would therefore be scarcely worthy of note, except for the court's complete refutation of the ingenious misuse by counsel of the statement in POLLOCK AND WRIGHT, ON POSSESSION, p. 230. It is there said that trespass to a chattel cannot be committed by severing and carrying away a growing crop, for possession of the chattel cannot come into existence until the thing becomes a chattel and as the carrying away and the converting are one continuous act there is no trespass to chattels as such. Neither is there a trespass to realty as the defendant had the right to lop the overhanging branches. The court answered these arguments by showing that the right to lop rests upon the right of the defendant to abate the nuisance caused by the growth of the branches over the defendant's land, but that this right cannot be used as a basis for a right of appropriation of the prop-

erty of the plaintiff, whether it be realty, personalty or the intermediate type, a growing crop. Furthermore, an action for conversion may rest either upon possession or upon the right to possession, and the latter right was plainly violated by the defendant when he took into his possession the property of the plaintiff. There is an interesting short note on this case in 25 LAW QUARTERLY REVIEW, 210.

PRIZE JURISDICTION—CAPTURE ON INLAND WATERS.—During the recent war the British Government requisitioned, armed, and commissioned small trading vessels on Lake Victoria Nyanza in East Africa. The Victoria Nyanza is an inland lake having no navigable connection with the ocean. All but the smallest craft plying upon it were transported overland, either whole or in sections, and then assembled if necessary and launched. After being commissioned certain of these vessels made captures of enemy craft and property. *Held*, that captures by commissioned ships of His Majesty's Navy on the waters of Lake Victoria Nyanza are the subjects of jurisdiction in prize. *In the matter of Certain Craft Captured on the Victoria Nyanza*, L. R. [1919], 1 P. D. 83.

Whether jurisdiction in prize extends to inland waters seems to have been an unsettled question in the English law until the decision in the principal case. During the recent war, Sir Samuel Evans is reported to have awarded prize bounty to armed motor launches brought from England and launched on Lake Tanganyika, also an inland lake (Lloyd's List, March 19, 1917), but it appears that the question of prize jurisdiction was not discussed. See L. R. (1919) 1 P. D. 83, 85. The question was discussed at length in the principal case. The decision was founded upon the proposition (1) that all enemy property is *prima facie* liable to capture, except as the right of capture has been limited by the Law of Nations, and (2) that captures by commissioned naval forces on inland waters fall within none of the established limitations. The decision is a logical inference from the nature and scope of prize jurisdiction. See *Lindo* v. *Rodney* (1782), 2 Doug. 613 (Lord Mansfield): *Brown* v. *United States* (1814), 8 Cr. 110, 129, 137 (dissenting opinion of Justice Story); *The Roumanian*, L. R. (1915), P. D. 26, 37 (Sir Samuel Evans). "The prize jurisdiction does not depend upon locality, but upon the subject matter." Per Story, J., in *Brown* v. *United States*, 8 Cr. 110, 139. In the United States, admiralty jurisdiction in general extends to the Great Lakes and navigable waters connecting them. *The Propeller Genesee Chief et al.* v. *Fitzhugh et al.* (1851), 12 How. 443, 451; *The Cotton Plant* (1870), 10 Wall. 577, 581 (*semble*); *United States* v. *Rogers* (1893), 150 U. S. 249, 252 (*semble*). The admiralty courts exercised jurisdiction in prize over captures made on inland waters during the Civil War. *Six Hundred and Eighty Pieces of Merchandise* (1863), 22 Fed. Cas. 252; *United States* v. *Two Hundred and Sixty-Nine and One-Half Bales of Cotton* (1868), 28 Fed. Cas. 302 (*semble*). This seems also to have been the Italian and the German practice during the recent war. See L. R. (1019). 1 P. D. 83, 87. Capture would hardly fall within prize jurisdiction unless naval forces at least participated. See *The Rebeckah* (1799), 1 C. Rob. 227; *The Island of Trinidad* (1804), 5 C. Rob. 92;

Capture of Chinsurah (1809), Acton 179; *Thorshaven* (1809), Edw. Adm. 102; *The Buenos Ayres* (1811), 1 Dod. 28. It is also clear that the capture should result from operations on the sea or on navigable inland water, or at least from operations that are primarily naval in character. Compare cases just cited and the case of *Mrs. Alexander's Cotton* (1864), 2 Wall. 404. Compare also the case of *Six Hundred and Eighty Pieces of Merchandise, supra,* and *United States* v. *Two Hundred and Sixty-Nine and One-Half Bales of Cotton, supra.*

STOCK DIVIDENDS—AS INCOME OR CAPITAL—AS BETWEEN LIFE TENANT AND REMAINDERMAN.—Mrs. D. by will created trusts in favor of her son and grandson, her property consisting largely of corporate stock; after her death several dividends were declared, payable in stock, part of which was declared by the corporation to be paid out of a surplus accumulated before testatrix's death, the remainder after. All these stock dividends were received by the executor during administration. *Held*: That stock dividends paid out of earnings accumulated after the death of a stockholder are income, and go to the life beneficiary of such trust; if paid out of earnings which accrued before the life estate arose, they are principal, belonging to the corpus of the estate. Declaration of directors of corporation as to the source of its dividends has no binding or even persuasive effect on the court in deciding this question. *In re Duffil's Estate* (Cal., 1919). 183 Pac. 337.

It was found as a matter of fact in this case that the issuing of these stock dividends did not reduce the value of the corpus of the estate, and that such were actually paid out of earnings of the corporation. In this case the California court had to decide, apparently for the first time, between the two rules existing on this subject, the one generally known as the "Massachusetts" rule,—followed by Mass., Conn., Me., R. I., Ill., D. C., some English cases, and one U. S Supreme Court case,—and the "Pennsylvania" or "American" rule, followed by Ky., Tenn., Pa., N. Y., N. J., Minn., and probably other states. It adopted, without apparent hesitation, the latter rule. By the former rule, the "Massachusetts" rule, stock dividends, though declared after the death of the testator, out of earnings accumulating after such death, nevertheless become part of the corpus of the estate, and are not to be considered as income. This seems to be based on the principle that such profit is treated as an increase in the property of the corporation, and becomes part of the capital thereof, and that the interest therein represented by each share of stock is capital and not income. By the "Pennsylvania" rule, the one adopted in the case at hand—stock dividends, declared after the life estate arose, and paid out of earnings accrued thereafter, are income, going to the life beneficiary of a trust created by testator, as against the remainderman. A few cases may be found to hold to this ruling even where the stock dividend was paid out of earnings accruing before the life estate arose, if paid afterwards, —but this class of cases is rather to be doubted on principle. The reason of the rule adopted in the present case is that such a dividend is, in reality, based on earnings, whether called by one name or another, and is, in fact, the income of the capital invested; that it is rightfully and equitably the prop-

erty of the life tenant, and the court here so decides. Accord: *Earp's Appeal*, 28 Pa. St. 368; *Hite's Devisee* v. *Hite's Executor*, 93 Ky. 257; *Pritchett* v. *Nashville Trust Co.*, 96 Tenn. 472; also see 12 L. R. A. N. S. 768. Upholding "Massachusetts" rule: *Minot* v. *Paine*, 99 Mass. 101; *Jackson* v. *Maddox et al*, Ann. Cas. 1912 B 1216; *Gibbons* v. *Mahon*, 136 U. S. 549. For an extended discussion of the question see 13 MICH. L. REV. 242.

TRESPASS—ANIMALS FERAE NATURAE—ATTRACTED TO PREMISES—DAMAGES TO ADJOINING PROPERTY—CAUSE OF ACTION.—Defendants, bone manure manufacturers, had a heap of bones on their premises, near the plaintiff's farm, for the purpose of their business. This caused a multitude of rats to assemble, and these very easily found their way onto the plaintiff's farm, resulting in the destruction of the plaintiff's crops. He now seeks compensation for losses thus sustained. It was not proved that the defendants' supply of bones was more excessive than in the past thirty years, or excessively large. *Held*, no cause of action had been established against the defendants. *Stearn* v. *Prentice Bros., Limited* [1919], 1 K. B. 394.

The court seems to have based its decision on the ground that the increase in the number of the rats in this year was not due to any acts or interference of the defendants, but merely to the fact that this was an exceptionally good breeding year. The plaintiff, though, tried to bring his case under the broad doctrine of *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330—namely, that a landowner, who brings any agency onto his land which would not naturally come there, is liable in damages to his neighbors who are injured by the subsequent escapes of said agency. The case failed on this theory because it was not shown that the defendants brought the rats onto their premises, nor that they did any act which artificially increased the number of them naturally present. See *Brady* v. *Warren*, [1900], 2 I. R. 632, 659. If the damage was caused by some natural forces, and not by the acts of the defendants, then the defendants can not be held liable. *Giles* v. *Walker* (1890), 24 Q. B. 656; *Roberts et al* v. *Harrison*, 101 Ga. 773. To bring this case under the principle of *Rylands* v. *Fletcher* it is not enough to show merely that the rats came from the defendants' land; and the mere fact that the defendants neglected to kill them would probably not impose any liability. CLERK AND LINDSELL, LAW OF TORTS, 2nd ed., p. 387. Assuming that the plaintiff could show that the presence of the rats was a nuisance, and that it resulted naturally and proximately from the acts of the defendants in storing these bones, it seems that the plaintiff might have been more successful had he gone into equity for an injunction, as well as for damages for past injuries. It is true that the defendants probably acquired a prescriptive right to carry on their business as they had for the past thirty years; but is not true that they could maintain such a nuisance as resulted in this year from the presence of the rats. It is entirely consistent with the facts, so far as revealed, that the defendants had no prescriptive right to continue this nuisance, (*i. e.*, the presence of the rats), even though they had been in the same business for some thirty odd years. In order to establish such right the "use must be adverse, under a claim of right, and with the

knowledge and acquiescence of the person whose right is invaded, and the nuisance must be continued in substantially the same way and with equally injurious results for the entire prescriptive period." 29 Cyc. 1206 and cases cited. In the case in hand it appears that this was the first year that the plaintiff had suffered such damage, and it seems therefore that the defendant could have acquired no prescriptive right, because it was only at this time that the rats became a nuisance to the plaintiff. The burden of proof was on the defendants to prove their prescriptive right, and they had not done so. *Stamm et al.* v *City of Albuquerque*, 62 Pac. 973; *Ball* v. *Ray*, L. R. 8 Ch. 467. In the absence of such prescriptive right in the defendants equity would most likely give the plaintiff equitable relief, as in *Bellamy* v. *Wells* (1890), 63 L. T. R. 635; *Rex* v. *Moore* (1832), 3 B. and Ad. 184; *Walker* v. *Brewster* (1887), L. R. 5 Eq. 25; *Bland* v. *Yates* (1914), 58 Sol. J. 612; *Richards* v. *Daugherty*, 133 Ala. 569.

Unfair Competition — Federal Trade Commission — Constitutional Law.—A restraining order was issued by the Federal Trade Commission restraining the petitioner, a mail-order house doing an interstate business, from certain unfair practices in connection with the sale of sugar and other staple commodities and restraining the sale of such articles below cost. In a petition to review the order, petitioner contends that the order was improvidently issued because the petitioner had discontinued such methods, and that the act creating the Commission was unconstitutional. *Held*, the order was warranted, but that it should be modified so as not to prohibit sales below cost. *Sears, Roebuck and Co.* v. *Federal Trade Commission* (C. C. A., 7th Circ., 1919), 258 Fed. 307.

No inflexible rule can be laid down as to what conduct will amount to unfair competition. *Ludlow Valve Mfg Co.* v. *Pittsburg Mfg. Co.*, 166 Fed. 26, 92 C. C. A. 60. Unfair competition is always a question of fact. *Higgins C.* v. *Higgins Soap Co.*, 144 N. Y. 462; *Howe Scale Co.* v. *Wychoff, Seamans and Benedict*, 198 U. S. 118. The court in the principal case said that petitioner's conduct in representing that it had obtained special price concessions and could sell much cheaper than their competitors and that it purchased selected brands from abroad, when in fact it had not so done, were means of wrongfully imputing improper conduct to its competitors and consequently was unfair competition. In view of the advertisements published by petitioner such construction seems justifiable. The fact that petitioner had discontinued such practice will have no influence unless the circumstances are clear that the petitioner will not resume such practices. *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U. S. 202, 37 Sup. Ct. 105, 61 L. Ed. 248. The Commission, it is true, has administrative and quasi-judicial functions. Orders of the Commission are mandatory and have the force of judgments until reversed. The combinations of power so dissimilar, and each so far-reaching creates a department which is unique in federal legislation. However grants of similar authority to administrative officers and bodies have not, as the court points out, been found repugnant to the constitution. *Buttfield* v. *Stranahan*, 192 U. S. 470, 24 Sup. C. 349, 48 L. Ed. 525; *Union Bridge Co.* v. *United*

States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *National Pole Co.* v. *Chicago and N. W. Ry. Co.*, 211 Fed. 65, 127 C. C. A. 561. See also *Field* v. *Clark*, 143 U. S. 649. The court in modifying the order of the Commission gave little discussion to the matter. However an important question is presented. The right of a person to engage in a lawful business can not be placed under the arbitrary and uncontrolled will of an individual or board. *Cicero Lumber Co.* v. *Town of Cicero*, 176 Ill. 9, 42 L. R. A. 693. There is no obligation upon a person to sell his commodities to the public equally and no common law precedent for such can be found. *Great Atlantic and Pacific Tea Co.* v. *Cream of Wheat Co.* (1915), 227 Fed. 46; *Greater New York Film Co.* v. *Biograph Co.*, 203 Fed. 39, 121 C. C. A. 375. See also 14 MICH. L. REV. 228. In 29 HARVARD L. REV. 77, it is suggested that the common law principle that intentional damage without justification is actionable might sustain such an obligation. This however seems untenable and might lead to a return of the unsatisfactory system of government price fixing. 25 Yale L. JOUR. 194. The reason for a denial of the right of the courts to enforce such obligations seems to rest upon the constitutional guarantee in Article XIV which protects all citizens of the United States against deprivation of property, "without due process of law."

WORKMEN'S COMPENSATION—ACCIDENT: WHAT IS ACCIDENTAL INJURY?—A traveling salesman on a business trip missed the bus which was to carry him to the train, his delay being due to his stopping to talk to a customer. He started to walk to the station, carrying two sample cases and a suitcase. He became excited through fear of losing the train, ran to the station and as a result of the exertion ruptured a blood vessel in his brain, causing paralysis. *Held*, he had suffered an accident within the Workmen's Compensation Act. *Crosby* v. *Thorp-Hawley Co., et al.* (Mich., 1919), 172 N. W. 535.

This decision is clearly within the rule established by decisions of the British courts, notably in the opinion of Lord Macnaughton in *Fenton* v. *Thorley* (1903), A. C. 443, 19 Times L. R. 684, holding such cases "accidental" on the broad ground of public policy. In fact the English cases have, in general, gone far beyond the previously accepted idea that accident and disease are mutually exclusive terms. In a recent case, *Coyle* v. *Watson* (1915), A. C. 1, the House of Lords held that a miner imprisoned in a shaft where he caught cold, took a chill, and developed pneumonia, had suffered an "accident" within the "usual and ordinary meaning of the term." Although Michigan decisions have not expressly adopted this doctrine and have not expressly overruled the case of *Feder* v. *Iowa State Traveling Men's Assoc.*, 107 Iowa 538, in which the court held that a man bursting a blood-vessel on reaching to close a window, did not suffer an "accident" within the terms of a general policy; yet some doubt is cast on the authority of this case. In a strong opinion in *Sullivan* v. *Modern Brotherhood*, 167 Mich. 524, 42 L. R. A. (N. S.) 140, Justice Stone held that infection of an eye by gonococci due to splashing of water while washing clothes is an accidental injury to the eye within the terms of the policy. The apparent tendency of recent decisions is to broaden the meaning of the term "accident." See L. R. A. 1916 A 29, 267, 1917 D 103, 1918 F 867.