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CARRIERS OF PASSENGERS—DUTY TO STOP AT STATION TO PERMIT PASSENGER TO ALIGHT—CONTRIBUTORY NEGLIGENCE OF PASSENGER.—Plaintiff's intestate was riding in the front end of a crowded vestibule car in the coach next to the tender of the engine. When the train stopped at his station he tried to leave by the front end, but found the door from the vestibule closed. As he did not know how to open it, or was unwilling to be carried by his station, he stepped from his platform to the bumper of the tender and tried to follow it to the side and alight from it. Before he could do so the engine started with a lurch, he was thrown down and killed. The evidence strongly tended to prove that he would have escaped serious injury if the engineer had understood and heeded the cries and signals given by fellow passengers. *Held,* for the jury to say whether so leaving the train under unusual circumstances was contributory negligence on the part of the passenger. *Donnally* v. *Payne* (W. Va., 1921), 109 S. E. 760.

The court recognizes that for a passenger under ordinary circumstances to make a hazardous attempt to alight because the train does not stop at his station long enough to permit his leaving the train by the usual exits is in law contributory negligence, barring recovery. But peculiar circumstances may take the case out of the rule. The cases are very fully considered in *Filer* v. *N. Y. C. R. R. Co.,* 49 N. Y. 47, a leading case. Generally, courts regard alighting from a moving train as negligence *per se,* unless the carrier puts the passenger in the position of risking one danger in order to avoid another. *Pa. R. Co.* v. *Aspell,* 23 Pa. St. 147. The act of the passenger in such case is treated as the proximate, and the failure to stop the train as the remote, cause of the injury. *Jammison* v. *C. & O. Ry. Co.,* 92 Va. 327. Some courts say that by jumping from a moving train one ceases to be a passenger. *Com.* v. *B. & M. R. Co.,* 129 Mass. 500. This may be a question for the jury. *Ft. Worth & D. C. Ry. Co.* v. *Hawley* (Tex. Civ. App., 1921), 235 S. W. 659. In any view the instant case is at the very limit in holding that the carrier may be liable to one leaving the train in such a manner, and it is not strange that Miller, J., vigorously dissented from the decision. There was some evidence on which the jury might have had instructions as to the last clear chance, but the court does not pass upon that. Contributory negligence in such cases is not always a matter of law, but is to be tested by what the ordinarily prudent person would do under all the circumstances of the case. If reasonable men can differ, then it is for the jury. *Pa. R. Co.* v. *Kilgore,* 32 Pa. St. 292; *Louisville & N. R. Co.* v. *Crunk,* 119 Ind. 542. But cf. *Solomon* v. *Ry.,* 103 N. Y. 437.

CONSTITUTIONAL LAW—APPLICATION OF GUARANTY OF FREEDOM OF SPEECH TO ALIENS.—Information charging defendant, an alien, with violation of a statute of Connecticut penalizing seditious publications. Demurrer based

upon the Connecticut Bill of Rights, of which Section 5 reads: "Every *citizen* may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty," and Section 6: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press." *Held,* demurrer overruled for two reasons: first, that aliens "do not possess the right of attempting to alter our form of government, and for that reason are not qualified to plead the privilege of unlimited political discussion," on which the provisions of the Bill of Rights are founded; and second, that the language of Section 6, above quoted, "plainly refers to the liberty of speech conferred by Section 5 upon citizens" alone, and hence is not applicable to aliens. *State* v. *Sinchuk* (Conn., 1921), 115 Atl. 33.

It is impossible to determine from the decision which of the two above reasons was the controlling one in the mind of the court. If the latter, there is some justification for the result; but if the former, a new and startling construction of the freedom of speech clause has received the sanction of judicial decision. There is no historical justification for restricting the clause until it is a mere concomitant of the right to "alter our form of government." On the contrary, one of the earliest objects of guaranties of freedom of speech, both in England and in this country, was the protection of discussion of religious matters. "FREEDOM OF THE PRESS IN MASSACHUSETTS," by Duniway, Chapters I to VI. In an address by the Continental Congress to the inhabitants of Quebec in 1774, the right of freedom of speech was broadly characterized as consisting, "besides the advancement of truth, science, morality and the arts in general, in the diffusion of liberal sentiment in the administration of government, the ready communication of thoughts between subjects, and the consequential promotion of union among them." JOURNAL OF THE CONTINENTAL CONGRESS, Vol. 1 (Ed. 1800), p. 57. Cooley, in his "CONSTITUTIONAL LIMITATIONS," Ed. 7, p. 604, after sketching the history of the right of freedom of speech, refers to the constitutional guaranties, and says: "Their purpose has evidently been to protect *parties* in free publication of matters of public concern, to secure their rights to a free discussion of public events and public measures, and to enable any *citizen* at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct." These views indicate a far broader historical basis for freedom of speech than that conceded by the Connecticut court. Nor has the doctrine of the principal case ever been asserted in previous judicial utterances. If it were sound, it is not unreasonable to suppose that it would have been brought to light, especially in the host of recent cases involving the Espionage Acts of 1917. In several of these cases the defendants were aliens. *Abrams* v. *U. S.,* 250 U. S. 616. Furthermore, both the due process and the equal protection clauses of the Fourteenth Amendment to the Federal Constitution should protect the alien from discriminatory action because of his alienage by a state. That these clauses apply to aliens as well as to citizens is well settled. *State* v. *Montgomery,* 94 Me. 192; *Yick Wo* v. *Hopkins,* 118 U. S. 356. It is true that the state, in the exercise of its police power, may make reason-

able classifications of persons and impose restrictions upon them. For instance, aliens as a class may be prohibited from entering the liquor business. *Trageser* v. *Gray*, 73 Md. 250. But the classification must bear some reasonable relation to the evil which it is sought to prevent, and it is doubtful if alien anarchistic propaganda is more dangerous than that of citizens. At any rate, it is for the legislature and not for the court to adopt the classification. It is entirely possible that the defendant in the principal case deserved the punishment he received, but the reasoning by which the court disposed of the case is questionable, to say the least.

CONSTITUTIONAL LAW—INCOME TAX ON SALARIES OF FEDERAL JUDGES.—Plaintiff, a United States district judge, paid an income tax under the provision of Sec. 213 of the Income Tax Act, on his judicial salary, under protest, and sued the deputy collector for the return of the tax. The United States Constitution, Art. 3, Sec. 1, provides that compensation of judges of the supreme and inferior courts "shall not be diminished during their continuance in office." *Held*, such a tax violates this constitutional provision. (Holmes and Brandeis, JJ., dissenting.) *Evans* v. *Gore*, 253 U. S. 245.

In reversing the federal court, 262 Fed. 550, the majority opinion points out that the purpose of this provision is to prevent the legislative department from influencing in any way the judiciary, and says that the public interest demands that the judge be kept even above the suspicion of outside influence. The tax does give the legislature power indirectly over the judicial department, and hence is invalid. The Sixteenth Amendment does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income, whether derived from one source or another, and hence does not extend to federal judges nor permit Congress to impose an income tax on them. Justice Holmes in his dissenting opinion reasons that the case is not within the scope of the provision, as the tax is laid on all persons having such amounts of income, and that at all events the Sixteenth Amendment gave such power to tax. The decision of the district court was commented upon favorably in 18 MICH. L. REV. 697. See also *Note*, 11 A. L. R. 532, 19 MICH. L. REV. 117; 34 HARV. L. REV. 70. The court in declaring that the judiciary must be, like Caesar's wife, "above suspicion," go a long way in their interpretation of the purpose and intent behind the constitutional provision, and unduly anticipate the alarming dangers which they so eloquently picture. The purpose of the provision is to protect the independence of the judiciary. Does the law give the legislature power to injure the judge without likewise injuring every other person in the same classification regarding income? It would seem not. Have the judges or any one of them been put into a class whereby the legislature may tyrannize over them? Not as yet, and if the time should come when such was attempted the judiciary will undoubtedly have the opportunity to say that such a classification is unreasonable and an arbitrary discrimination. Certainly, it requires quite a stretch of the imagination to conjure up the spectre of legislative discrimination which was so real to the Supreme Court.

CONTRACTS—RESTRAINT OF TRADE—EMPLOYEE'S CONTRACT TO REFRAIN FROM COMPETITION.—In a contract of employment made with complainant defendant promised that he would not at any time, either during or subsequent to such employment, give out any information regarding the plant or processes of complainant, and would not do anything which might injure, by competition or otherwise, the complainant, its successors or assigns, in its business. In a bill for an injunction to restrain defendant from carrying on a similar business in another town, subsequent to the term of employment with complainant, *held,* denying an injunction, that the contract was void as in restraint of trade, in the absence of proof that the employer was possessed of a trade secret. *Victor Chemical Works* v. *Iliff* (Ill., 1921), 132 N. E. 806.

There is apparently a growing tendency to regard contracts of employment in partial restraint of trade with disfavor, and at least to refuse injunctions, unless the scope of the contract is clearly no greater than necessary for the protection of the promissee's rights. *Hepworth Mfg. Co.* v. *Ryott,* L. R. [1920], 1 Ch. 1, 18 MICH. L. REV. 795. The decision in the instant case is placed on the ground that the restraint was unlimited as to time and place, and that the proof does not show that complainant had any trade secret. The terms of the contract hardly seem to justify this broad statement. Defendant might set up a similar business in a location where he would not injure or compete with complainant. Reasonable territorial limits might have been implied from this fact, as well as a time limit co-extensive with the existence of the complainant's business. Such an interpretation would not be lacking in precedent in the case of the sale of good will with a business, *Wooten* v. *Harris,* 153 N. C. 43; *Morgan* v. *Perhamus,* 36 Ohio St. 517; *Prame* v. *Fcrrell,* 166 Fed. 702; although in this class of cases limitations as to both time and place are unnecessary, according to the modern view, if the agreement is reasonable in other respects and does not unduly conflict with the public interest. "The rule, broadly stated, is that no contract of this kind is void as being in restraint of trade where it operates simply to prevent a party from engaging or competing in the same business." *Southworth* v. *Davison,* 106 Minn. 119. The instant case, however, does not consider the implied limitations as to time and space nor the analogy between the two classes of cases.

CORPORATIONS—LEASE TO CORPORATION NOT TERMINATED BY DISSOLUTION. —D represented the stockholders of a dissolved corporation which had been the lessee for years. After accepting rentals from D subsequent to the dissolution the lessor made a new lease of the premises to P for an increased rental. In arbitration proceedings to try title, *held,* D was entitled to the difference in rentals as trustee for the stockholders. *Cummington Realty Associates* v. *Whitten* (Mass., 1921), 132 N. E. 53.

The often stated rule of the common law is that upon the dissolution of a corporation the real property reverts to the grantor and the personalty escheats to the lord. Co. LIT. 13b. Corporations in Coke's time, however, were ecclesiastic or municipal and conveyances to them were usually without

consideration. The development of the modern business corporation necessitated a different treatment of assets on dissolution to prevent great hardship. The modern rule is that in equity all the property of a dissolved business corporation will be treated as a trust fund, first for the payment of debts and then for the stockholders. 2 MORAWETZ ON PRIVATE CORPORATIONS, § 1032. In the instant case the unexpired term was valuable property, as proved by the lease to P at an increased rental. No good reason for forfeiture of this property is seen. In the English case of *Hastings Corporation* v. *Letton* (1908), 1 K. B. 378, in which it was held that the lease terminated upon the dissolution of the lessee corporation, the equitable rights of the stockholders were not considered, the question being whether the crown took by escheat or whether the lessor's interest accelerated. *In re Mullings Clothing Co.*, 238 Fed. 58, holds that the dissolution of a lessee corporation does not terminate the lease but amounts to an anticipatory breach which warrants the lessor in suing for damages. Other American cases to the same effect are cited therein. In the instant case the difficulty of a leasehold without a leaseholder is neatly disposed of by the court by treating the stockholders as tenants in common. But, *quaere,* if the leasehold should depreciate in value and the stockholders elect to abandon the premises, could the lessor hold them for the unaccrued rentals?

CRIMES—DISTINCTION BETWEEN "ATTEMPT," "PREPARATION" AND "SOLICITATION."—The defendant asked one C to see certain jurors then sitting on trial of a case to which the defendant was a party and endeavor to persuade them to return a verdict in his favor. He was indicted under a count charging attempted embracery. *Held,* defendant was properly convicted under the indictment. *State* v. *Lavine* (N. J., 1921), 115 Atl. 335.

The court in the principal case seems to have confused the two separate offenses, attempt and solicitation. An attempt to commit a crime is an act done in part execution of a criminal design, amounting to more than mere preparation, which, if not prevented, would have resulted in the full consummation of the intended crime. *U. S.* v. *Quincy,* 6 Pet. 445; *Graham* v. *People,* 181 Ill. 477; *State* v. *Taylor,* 47 Ore. 455; *Com.* v. *Peaslee,* 177 Mass. 267. Between preparation for the attempt and the attempt itself there is a difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made. *Groves* v. *State,* 116 Ga. 516; *Hicks* v. *Com.,* 86 Va. 223; *State* v. *Hurley,* 79 Vt. 28; *People* v. *Youngs,* 122 Mich. 292. Solicitation is the act of soliciting another to commit any crime amounting to felony, although the solicitation is of no effect and the crime is not in fact committed. *State* v. *Avery,* 7 Conn. 266; *Lamb* v. *State,* 67 Md. 524; *State* v. *Hayes,* 78 Mo. 307. Some courts have treated solicitation to commit a crime as though it were an "attempt." *People* v. *Bloom,* 133 N. Y. Sup. 708; *State* v. *George,* 79 Wash. 262; *State* v. *Bowers,* 35 S. C. 262. By the weight of authority, however, solicitation is not considered a sufficient causal act to be indicted as an attempt, but must be indicted as a distinct offense. *State* v. *Donovan,* 28

Del. 40; *Cox* v. *People,* 82 Ill. 191; *McDade* v. *People,* 29 Mich. 50. In the principal case there was clearly solicitation of C to commit the crime, rather than an attempt by the defendant to commit embracery himself.

EQUITY—RELIEF ON CONTRACT FOR BENEFIT OF THIRD PERSON.—D Union contracted with P's predecessor to sell to the latter the entire loganberry crop of some of its members. In order to secure performance of this agreement the union entered into contracts with the several growers by which it was constituted agent to sell the crops to P's predecessor and the growers agreed to deliver their crops to P's predecessor. Upon threatened breach of these contracts P brought a bill in equity for specific performance of the contracts and injunction against sale to others. On appeal from an order sustaining the demurrer of the growers it was *held,* that the injunction should have been granted. *Phez Co.* v. *Salem Fruit Union et al.* (Ore., 1921), 201 Pac. 222.

In the instant case there are several grounds for equitable relief—character of the chattels (see next note), avoidance of multiplicity of suits, and the nature of the contract involved. In regard to the last point the court says that there is respectable authority to the effect that the proper remedy for the breach of third-party beneficiary contracts is in equity rather than law. The only authority cited is Mr. Williston's very able argument in his work on CONTRACTS, § 358, 359, in which he points out the practical advantages of determining the entire controversy in equity. However, Mr. Williston cites little authority on the subject. In *Peel* v. *Peel,* 17 W. R. 586, the beneficiary was given specific performance of a contract to pay an annuity on the ground that the promisee would suffer no pecuniary damage from the breach. In a subsequent English case, *Re Rotherham Alum & Chemical Co.,* 25 Ch. D. 103, Lord Lindley said that the beneficiary has no peculiar equity. No American cases seem to have passed squarely upon the subject. In some jurisdictions where the beneficiary cannot sue at law in his own name he is allowed to bring a bill in equity on the theory of being subrogated to the rights of his debtor. *Smith* v. *Robins,* 149 C. C. A. 324; *Palmer* v. *Bray,* 136 Mich. 85; *Green* v. *McDonald,* 75 Vt. 93. Such cases obviously afford no authority for the principal case because Oregon permits an action at law. *Davidson* v. *Madden,* 89 Ore. 209. It will be interesting to note whether, in the absence of other equitable grounds, the courts will follow Mr. Williston and the principal case.

EQUITY—SPECIFIC PERFORMANCE OF CONTRACT TO SELL CHATTELS.—For statement of facts, see preceding note on *Phez* v. *Salem Fruit Union.*

The doctrine is well settled that ordinarily contracts for the delivery of chattels will not be specifically enforced. The reason is that money damages will usually compensate the disappointed promisee and permit him to purchase other chattels of like kind. However, if the legal remedy is inadequate the contract may be specifically enforced. POMEROY ON EQUITY JURISPRUDENCE, §§ 2170, 2171. Some of the reasons for the inadequacy of the legal remedy are that the chattel is unique, that the supply is limited, or

that the damages are conjectural. In the instant case it was alleged that the total crop of loganberries was quite limited and that the berries contracted for were essential to the carrying on of P's canning business. Thus the legal remedy appears to be entirely inadequate. Like chattels could not be obtained elsewhere and ascertaining the damage would involve an inquiry into lost profits and possibly the value of P's business. In *Curtice Bros. Co.* v. *Catts,* 72 N. J. Eq. 831, a contract to sell tomatoes was specifically enforced because of the uncertainty of the market. Other examples of the enforcement of delivery of rather prosaic chattels may be found in *Equitable Gas Light Co.* v. *Baltimore Coal Tar & Mfg. Co.,* 63 Md. 285, (coal tar); *Gloucester I. & G. Co.* v. *Russia Cement Co.,* 154 Mass. 92, (fish skins); *Omaha Lumber Co.* v. *Coöperative Inv. Co.,* 55 Colo. 171, (standing timber). The principal case would appear to be well within such a line of authorities.

EVIDENCE—PROBATIVE VALUE OF PRESUMPTIONS.—In an action to recover for baggage destroyed by fire, the defendant offered in evidence rates filed with the Interstate Commerce Commission to show that the goods accepted as baggage should be classed as merchandise. The court ruled that the rate schedules were not conclusive unless they were also on file in the railway office. When the defendant rested he had introduced no evidence to prove this, but *held,* that since there was a penalty for failure to file the schedule of rates, the presumption of innocence could be used as evidence to aid defendant in establishing the fact of the rates being filed, but would not justify a directed verdict since it was opposed by the conflicting presumption that the agent acted correctly in accepting the goods as baggage. *Simpson* v. *Central Vt. R. Co.* (Vt., 1921), 115 Atl. 299.

The decision is in accord with previous Vermont holdings. It was held reversible error for the trial court to refuse to charge that the presumption of undue influence was to be regarded as a piece of evidence to be weighed in favor of the contestants. *In re Cowdry's Will,* 77 Vt. 359. Reliance is placed on *Coffin* v. *United States,* 156 U. S. 432, which held that the presumption of innocence was to be considered as evidence in favor of the accused, and that an instruction as to the necessity of proving him guilty beyond a reasonable doubt was not sufficient. This rule was again approved in *Kirby* v. *United States,* 174 U. S. 47. It has been held that the fact that a woman endorsed certificates of stock created a presumption that she knew their contents, and the presumption stood in lieu of evidence of the fact, and should be weighed against facts offered in rebuttal. *Williams* v. *Vreeland,* 244 Fed. 346. But it seems that the Supreme Court earlier entertained a different opinion from that expressed in *Coffin* v. *United States, supra.* As, "the presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact." *United States* v. *Ross,* 92 U. S. 281. And also, "presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear." *Lincoln* v. *French,* 105 U. S. 614. These two decisions suggest what appears to be the more accurate and sound rule—*i. e.,*

that presumptions only affect the burden of going forward with the evidence, or operate to make a *prima facie* case, but have no probative value in themselves apart from the substantive facts which give rise to them. This view is approved by authorities. THAYER, PRELIM. TREAT. EVID., 314, 575; 4 WIGMORE, EVID., Sec. 2491. It is also the view more generally accepted by the courts. See 13 MICH. L. REV. 504; 8 COL. L. REV. 127. It is said that "presumptions are rules of convenience based upon experience or public policy, and established to facilitate the ascertainment of truth in the trial of causes." *Ward* v. *Teller Reservoir & Irrigation Co.*, 60 Colo. 47. See also *Helbig* v. *Citizens Insurance Co.*, 234 Ill. 251; *Nicholson* v. *Neary*, 77 Wash. 294. "A presumption of fact will not be permitted to contradict or overcome facts actually proved." *Western Advertising Co.* v. *Starr Publishing Co.*, 146 Mo. App. 90. It was held error to find for the plaintiff upon no other proof than the fact that his cow was found dead near the tracks, which in the lower court was deemed to prove that it was killed by a train; on appeal it was decided that this conclusion could only be reached by erroneously giving probative effect to a presumption. *Union Pacific R. Co.* v. *Bullis*, 6 Colo. App. 64. Many courts appear not to discriminate between the two views as to the probative effect of presumptions, but assume that the distinction is merely academic. That it is important, however, is explained in *Hall* v. *State*, 78 Fla. 420, where it was held that the lower court properly refused to instruct that the presumption of innocence should go to the jury as evidence, because it incorrectly assumed that there were stages in the process of conviction. 1. Overcoming the presumption of innocence. 2. Proving the defendant guilty. The fallacy of this is seen in regarding the proof as not sufficient when the presumption of innocence is overcome, because the defendant is then in effect still presumed to be innocent. The same reasoning is applicable to any presumption of fact which is claimed to have probative effect, and shows the error in the principal case which regards the two opposing presumptions as evidence.

GIFTS—ASSIGNMENT OF SAVINGS BANK DEPOSIT.—Deceased, in the presence of his wife, delivered a written order to the bank, transferring his savings account standing in his name to a joint account between himself and wife, subject to withdrawal by check, in the event of death of either the balance to belong to the survivor. The pass book was in the bank's possession. *Held*, not a valid gift, since the depositor did not in his lifetime release control and dominion over the account. *Pearre* v. *Grossnickle* (Md., 1921), 115 Atl. 49.

To constitute a valid gift of a chose in action, since there can be no actual delivery of the subject matter, the donor must surrender to the donee his voucher of right or title—that which is essential to his dominion over the subject of the gift. *Cook* v. *Lum*, 55 N. J. L. 373. Often in the case of savings bank accounts presentation of the bank book is essential in order for one to draw on the account. Where that is the case, a delivery of the savings bank book with intent to give the donee the deposits represented by the book constitutes a completed gift. *Hill* v. *Stevenson*, 63 Me. 364.

But if, after delivering to the donee a written assignment of the fund making the donor and donee joint owners, the donor retains the pass book, there is no valid gift. *Whalen* v. *Milholland,* 89 Md. 199. The real basis for this decision is not that advanced in one part of the opinion—being a joint owner, the donor could defeat the gift himself by withdrawing the entire fund—for the donee, as joint owner, would have the same power. The true reason is that given later in the opinion—that, since the donor retained the pass book which was necessary for the withdrawal of the money, he did not surrender dominion over the fund. The principal case relies upon this decision, but there is an important difference between the facts in the two cases. In the principal case, the bank in which the money was deposited held the pass book. Could it be said then that possession of the bank book was necessary to dominion over the fund? Where the debtor bank holds the book and the book therefore has nothing to do with dominion over the account, the case is analogous to one where a book has never been issued or where it is lost. In such a case, a valid gift may be made by delivery of a written assignment. *Candee* v. *Conn. Sav. Bank,* 71 Atl. 551. The fact that the donor was still a joint owner and could defeat the gift by withdrawing by check the whole amount should not invalidate the gift, since he had made as complete a surrender of dominion as was possible and still keep it a joint account. When as complete a delivery is made as the nature of the subject matter will permit, it has been held that the gift is valid. *Dinslage* v. *Stratman,* 180 N. W. 81; 19 MICH. L. REV. 656.

HIGHWAYS—LIABILITY OF ABUTTING LAND OWNER FOR DEFECTS IN TREES STANDING WITHIN LIMITS OF PUBLIC HIGHWAY.—A tree standing on defendant's land, but within the limits of a public highway, fell across the traveled part of the highway, severely injuring the plaintiff, who was driving past in an automobile. The tree was alive when it fell, but there was a serious defect in it which had existed for several years. *Held,* there was no legal duty on the defendant, the servient fee owner, to safeguard the traveler against dangers from defects in trees standing within the limits of the county road. *Zacharias* v. *Nesbitt* (Minn., 1921), 185 N. W. 295.

In the absence of any legislative enactment upon the subject, an abutting land owner is not liable to travelers for injuries received by them because of a defect in the street in front of his premises, unless such defect was caused by his own act or fault. ELLIOTT, ROADS AND STREETS, 539. The principal case held that decayed limbs of trees, or trees likely to fall, are defects of highways within the above principle. However, in *Weller* v. *McCormick,* 52 N. J. L. 470, it was held that where an abutting land owner planted a tree on the sidewalk in front of his premises, he was bound to use reasonable care to prevent the tree from becoming dangerous to travelers, and one injured by his failure to do so would be entitled to recover compensation. The court in the principal case declined to say whether a different rule should be applied to trees found growing on a rural highway when it was laid out and trees planted by the abutting owner in a village or city street. In *Hewison* v. *City of New Haven,* 37 Conn. 475, it was asserted that at

common law the owners of trees standing on the highway were liable for injuries occurring in consequence of their neglect to trim them, but the statement was not necessary to a decision of the case, which concerned the liability of a city for an alleged public nuisance, and in *Jones* v. *City of New Haven,* 34 Conn. 1, apparently the authority relied on, the liability of the city for injuries to a traveler caused by a tree falling in a public park was based on the charter and by-laws of the city rather than on the fact that the city was owner and in possession of the tree. On the other hand, municipal corporations have often been held liable for injuries caused by falling trees because of their duty to maintain the highways, a reasonable degree of care being the test for liability. *Lundy* v. *Sedalia,* 162 Mo. App. 218; *Chase* v. *City of Lowell,* 151 Mass. 422; *McGarey* v. *City of New York,* 85 N. Y. Supp. 861; *Jones* v. *Greensboro,* 124 N. C. 310. See *Miller* v. *City of Detroit,* 156 Mich. 630, *contra.* In the principal case, the court, following the decision in *Noonan* v. *City of Stillwater,* 33 Minn. 198, held that the fact that counties and statutory towns were not liable for damages occasioned by defects in the public highways, even though charged with the duty of keeping them in repair, was no valid reason for placing the liability for injuries caused by such defects on the abutting land owner, and the decision would seem to be satisfactory, even though in that state the risk of falling trees on the rural highways is thereby assumed by the traveler.

HUSBAND AND WIFE—HUSBAND LIABLE FOR WIFE'S CRIME IN HOME.—W owned the house in which she lived with her husband. She manufactured and sold whisky in the home in violation of Act No. 53 of the Public Acts of 1919. W and her husband were jointly charged with the offense. Evidence tended to show that the husband had disapproved of W's activities. *Held,* both were guilty of violating the statute. *People* v. *Sybisloo* (Oct., 1921), 216 Mich. 1.

When a wife commits a crime in the presence of her husband coercion is generally presumed, but this is rebuttable. *Commonwealth* v. *Hopkins,* 133 Mass. 381; *U. S.* v. *Terry,* 42 Fed. 317. Although otherwise in the case of criminal acts *malum in se,* if a statutory crime is merely *malum prohibitum* criminal intent may not be necessary. *Commonwealth* v. *Boynton,* 2 Allen 160 (defendant honestly believed the liquor sold was not intoxicating); *King* v. *The State,* 66 Miss. 502 (same, "He was bound at his peril to ascertain and know the nature of the article [liquor] which he sold"); 20 MICH. L. REV. 109. *Contra: Farrell* v. *The State,* 32 Ohio St. 456 ("The accused's intention at the time of the sale [of liquor] was involved in the issue.") The decisions based upon facts substantially like those of the principal case apply one of three rules regarding a husband's liability for his wife's criminal acts in the absence of coercion. 1. If the acts of the wife are without the consent and against the will of the husband, mere knowledge of the acts will not impose liability upon him. *Commonwealth* v. *Hill,* 145 Mass. 305 (W owned the house in which she and H lived, and she sold liquor and conducted the business of gambling and prostitution therein); *Commonwealth* v. *Pratt,* 126 Mass. 462 (W conducted a hotel and sold liquor in a portion

of the house rented by her and used as a home for W, and H); *Commissioners of Excise* v. *Keller,* 20 How. Pr. 280 (*semble*). 2. The husband has power to regulate his household, and his liability is absolute if he fails to prevent his wife from making an illegal use of the home. *Commonwealth* v. *Barry,* 115 Mass. 146 (H owned the house, but W was carrying on the business in her own name and violated the liquor statute); *Commonwealth* v. *Wood,* 97 Mass. 225 (W owned the house used as a home, and conducted therein the business of prostitution); *Commonwealth* v. *Kennedy,* 119 Mass. 211 (H and W owned the house, and W conducted a hotel and sold liquor in a part of it); *State* v. *Rozum,* 8 N. D. 548. 3. If the husband has knowledge of the fact that his wife is making an illegal use of the family dwelling-house he is bound to use *reasonable means* to prevent her acts. *Commonwealth* v. *Walsh,* 165 Mass. 62 (W used a part of the house as a store and made illegal sales of liquor). Where a wife acts as agent for her husband in a business not connected with the home, and violates the liquor law, the husband is not liable unless the illegal acts were done with his knowledge and consent. *Seibert* v. *State,* 40 Ala. 60. Also, *State* v. *Pisaniello,* 88 N. J. Law 262 (sale of liquor to a minor). The principal case adopts the *third* rule, and, consistent with the cases holding the husband liable even in the absence of coercion, reasons that the common-law right of the husband to regulate and control his own household imposes upon him a duty to use all "reasonable means" to prevent the commission of this class of illegal acts by his wife. The cases have not decided or suggested how far he must go before he has discharged the duty of using "reasonable means." Danger of exposing the wife to a criminal prosecution inheres in any active measures which the husband might take to prevent her criminal activities. With this consideration, it is submitted that domestic tranquility and social welfare are best secured by applying the *first* rule whenever the facts are similar to those in the principal case.

INJUNCTIONS—LABOR UNIONS—"CHECK-OFF" SYSTEM.—A conspiracy was formed between the coal mine operators of the Central Competitive Field (Western Pennsylvania, Ohio, Indiana, and Illinois) and their miners (members of the United Mine Workers of America) to coerce mine operators of the Williamson District (West Virginia and Kentucky) into unionizing their mines. The result of such action would have been to raise the price of the Williamson District product so that it could not compete with the Central Competitive Field through interstate commerce. To accomplish their design the United Mine Workers sent into West Virginia over two and a half million dollars, and a veritable state of war existed until the President was forced to send troops into the state to quell the disturbances. Union funds were raised by means of the "check-off" system. Under this system assessments are taken from the wages of the miners by the operators and paid by them to the Union. Plaintiff, a non-union operator in the Williamson District, obtained a temporary injunction, enjoining, *inter alia,* the raising of money by means of the "check-off." 275 Fed. 871. On appeal it was *held,* that this phase of the injunction should be modified, that the operation

of the "check-off" system should not have been enjoined. It was held proper, however, to enjoin the sending of money into West Virginia to be used in aiding or promoting the unlawful acts. *Gasaway* v. *Borderland Coal Corporation,* U. S. C. C. A., 7th Ct., Oct. Term, 1921.

The reasoning of the court seems to be that, conceding the "check-off" to be one of the elements in the chain of causation which resulted in the injury, it would have been innocuous had it not been for the immediate interfering acts. Since these unlawful acts have been enjoined it is not necessary to enjoin the "check-off" system itself. Having enjoined the proximate causes of the injury, the court refuses to extend the remedy to a more remote cause. An injunction should be no broader than the necessities of the case require. *Norfolk Southern R. Co.* v. *Stricklin,* 264 Fed. 546; *Rider* v. *York Haven W. and P. Co.,* 242 Pa. 141. But the court should grant all the relief which the facts demand. In the principal case it would seem that that part of the injunction which prohibits the sending of money to aid unlawful acts would be difficult to enforce. Violations of it would be very difficult to detect and hard to stop. It would be more feasible to enjoin the source of these wrongful occurrences, the "check-off" system. A lawful issue of bonds has been enjoined when the proceeds were to have been used for an unlawful purpose. *Town of Afton* v. *Gill,* 57 Okl. 36; *Bates* v. *City of Hastings,* 145 Mich. 574. However, these cases may be distinguished from the principal one in that in them all of the money so raised was to be used unlawfully, while in the principal case only a part of it was probably so used. But in *Seastream* v. *New Jersey Exhibition Co.,* 67 N. J. Eq. 178, Sunday baseball games were enjoined because the crowd drawn by them was a nuisance to neighboring property owners, and stopping the cause was the only effectual way of abating the nuisance. See also *Walker* v. *Brewster,* L. R. 5 Eq. 25; *Bellamy* v. *Wells,* 39 W. R. 158. The doctrine of these cases is applicable in the principal case. It is true that, upon the motion for preliminary injunction, the balance of convenience might justify refusal of the relief. Yet, the district court having granted the relief, it would seem that there was not such an abuse of discretion as to warrant reversal.

INSURANCE—ACCIDENT—PROVISION FOR FORFEITURE IN CASE OF CREMATION WITHOUT NOTICE.—In an action on an accident insurance policy which contained a provision that in the event of death by accidental means the policy would be forfeited if the insured was cremated without first giving the company seven days' notice, it was *held,* by a divided court, three to three, that the provision was unreasonable and would not be enforced. *Kroner* v. *Order of United Commercial Travelers of America* (Wis., 1921), 184 N. W. 1037.

An insurance policy is a contract between the parties thereto, and in general the rules established for the construction of written instruments apply to contracts of insurance. *Liverpool, etc., Ins. Co.* v. *Kearney,* 180 U. S. 132; *Continental Ins. Co.* v. *Kyle,* 124 Ind. 132. While forfeitures in such policies are never favored, and ambiguous provisions are construed

most strongly against the insurer, yet "if, upon a reasonable construction, it appears that the parties contracted for a forfeiture upon certain conditions, it only remains for the courts to enforce the contract as the parties have made it. It is neither unlawful nor against public policy for a contract of life insurance to stipulate that upon certain conditions the policy shall be void." *Northwestern Mutual Life Ins. Co.* v. *Hazelett,* 105 Ind. 212; *Northwestern Masonic Aid Assn.* v. *Bodurtha,* 23 Ind. App. 121; *Dumas* v. *Northwestern Nat. Ins. Co.,* 12 App. Cas. (D. C.) 245. Nor should a court refine away the terms of a policy which are expressed with sufficient clearness to convey the plain meaning of the parties. *Guarantee Co.* v. *Mechanics',* etc., 183 U. S. 402; *Insurance Co.* v. *Boon,* 95 U. S. 117; *Schroeder* v. *Imperial Ins. Co.,* 132 Cal. 18; *Schuermann* v. *The Dwelling House Ins. Co.,* 161 Ill. 437. In the principal case, the provision was clear, there was no dispute as to its true meaning, and inasmuch as it was intended to give the insurer the opportunity of making an examination of the cause of the death of the insured at a time when the evidences were available, the provision would seem to be a reasonable one, and should have been enforced. Provisions for examination of the insured by a medical examiner of the insurer, or for an autopsy, are reasonable and well calculated for the proper protection of the insurer, and will be enforced provided they are claimed under reasonable circumstances. VANCE ON INSURANCE, 588. In the principal case there was a dispute as to the actual cause of the death of the insured, and if the decision is followed, in such cases the rights of the insuring company may be very seriously prejudiced through a lack of opportunity for adequate inquiry.

INSURANCE—DEATH WHILE IN MILITARY SERVICE.—Decedent's life insurance policy, dated October 20, 1913, contained an exception that "Military or naval service in time of war * * * is a risk not assumed * * * but the legal reserve * * * will be * * * payable in case of death while in such service." He was inducted into the military service in September, 1918, and sent to a California camp. On December 2, 1918, he was granted a leave of absence (or furlough) until midnight. While en route to the Pacific coast on such leave decedent's autocycle collided with an automobile, and he was killed. *Held,* plaintiff could recover face of policy, because the accident "was not a risk of military service." *Atkinson* v. *Indiana Nat. Life Ins. Co.* (Ind. App., 1921), 132 N. E. 263.

Where the language of an insurance policy is ambiguous it will be construed most favorably to the insured. *Manufacturers' Accident Indemnity Co.* v. *Dorgan,* 58 Fed. 956; *Glens Falls Ins. Co.* v. *Michael,* 167 Ind. 659. An exemption clause like that in the principal case is not void as against public policy. *Miller* v. *Illinois Bankers' Life Assn.,* 212 S. W. 310; 3 JOYCE ON INSURANCE, § 2237. In the principal case the court evidently considered *causation,* not *status,* to be the test for the application of the exemption clause. The conflicting cases in point are collected and considered in 18 MICH. L. REV. 686, with the conclusion that most of the cases present no real occasion for construction and that *status* should be the test for liability. Later cases are cited in 19 MICH. L. REV. 443. The most recent cases refus-

ing full payment and accepting *status* as the test are: *Field* v. *Western Life Indemnity Co.* (Texas Civ. App.), *227* S. W. 530 (death by suicide while in A. E. F.); *Railey* v. *United Life & Accident Ins. Co.* (Ga. App.), 106 S. E. 203 (soldier being transported to France, drowned by accidental collision at sea). Recent cases allowing full payment and adopting the *causation* test are: *Boatwright* v. *American Life Ins. Co.* (Iowa), 180 N. W. 321 (sailor died of influenza at naval training station); *Gorder* v. *Lincoln Nat. Life Ins. Co.* (N. D.), 180 N. W. 514 (pneumonia, evidence of increased risk by reason of camp conditions admissible but insufficient in instant case); *Rex Health & Accident Ins Co.* v. *Pettiford* (Ind. App.), 129 N. E. 248 (death from influenza, at Camp Custer); *Farmers Nat. Life Ins. Co. of America* v. *Carman* (Ind. App.), 132 N. E. 697 (death from pneumonia, while in S. A. T. C.). If the war ended on November 11, 1918, it is clear that the principal case is correctly decided. But that fact is not considered. The question was raised in *Slaughter* v. *Protective League Life Ins. Co.* (Mo. App.), *223* S. W. 819, but left undecided.

LANDLORD AND TENANT—LIABILITY OF LESSOR FOR LEASING PREMISES INFECTED WITH HOG CHOLERA.—Defendant leased his farm to plaintiff. Within one month after plaintiff moved on the farm hog cholera broke out among his hogs and many of them died. Plaintiff sued defendant for damages, alleging, but failing to prove, knowledge by defendant that premises were infected, and that he fraudulently concealed that fact when the lease was made. *Held,* in absence of fraud, or any agreement to the effect that the premises may be safely used for the purposes for which they are intended, defendant is not liable for condition of premises. *Kutchera* v. *Graft* (Iowa, 1921), 184 N. W. *297.*

This case is unique on the facts. It is, however, analogous to those cases where the letting of infected premises results in the sickness or death of a tenant or some member of his family. The general rule in such cases is that the lessor is liable, on the basis of negligence, if he had actual knowledge that the premises were infected with a contagious disease when let. There is a duty on him to warn the tenant of such a dangerous condition. *Cesar* v. *Karutz,* 60 N. Y. *229*; *Minor* v. *Sharon,* 112 Mass. 477; *Cutter* v. *Hamlen,* 147 Mass. 471; SHEARMAN & REDFIELD, NEGLIGENCE, § 709. Recovery on this basis is difficult inasmuch as the plaintiff must prove that the premises were infected, that the defendant knew of the infection, and that the disease was communicated through the premises. Even if the lessor knew that the premises had been infected, if they were thereafter disinfected by one apparently qualified, the lessor is not liable for the sickness of a subsequent lessee's child. *Finney* v. *Steele,* 148 Ala. 197. While the decision in the instant case may very well rest on lack of proof of defendant's knowledge that the premises were infected, the court expressly adopts and applies the general rule that the lessee has no cause of action unless there has been a fraudulent concealment by the lessor, or a warranty that the premises are fit for the purpose intended. This ruling apparently disregards the well-established distinction between patent and latent defects. As to the former,

the rule of *caveat emptor* applies, and there is no implied warranty that the premises are fit for the purposes for which they are leased. *The Shinkle, Wilson & Kreis Co.* v. *Birney & Seymour,* 68 Ohio St. 328; UNDERHILL, LANDLORD AND TENANT, § 477. However, it is generally admitted that the lessor is liable for loss or injury caused by latent defects in the leased premises, of which he had actual knowledge at the time of making the lease, but which he did not disclose to the lessee. *Mansell* v. *Hands,* 235 Mass. 253; *Johnston* v. *Nichols,* 83 Wash. 394; *Kurtz* v. *Pauly,* 158 Wis. 534. See also note to *Walsh* v. *Schmidt,* 34 L. R. A. (n. s.) 798.

LANDLORD AND TENANT—PROVISION IN LEASE NOT TO ASSIGN WITHOUT CONSENT OF LESSOR—EFFECT OF BREACH.—Petitioners leased to two persons with a provision against assigning or subletting without the written consent of the lessors. A corporation was to be formed by the lessees and it was agreed that they might assign to it on a form which was provided and which bore a place for the lessors' consent. The lessees assigned to this corporation, but not by means of the form provided and without the lessors' consent. After occupation for some time, the corporation became bankrupt, and notwithstanding a notice by the lessors that the lease was forfeited, it was decreed that the trustee in bankruptcy was entitled to the leasehold. Upon review, the court *held,* there had been no effective transfer of the lease to the corporation, and reversed the decree. *In re Lindy-Friedman Clothing Co., Inc.* (U. S. D. C., Ala., 1921), 275 Fed. 453.

It is undisputed that a lease may be assigned or sublet unless the lessee is restrained by statutory provision or by the lease itself. Under the latter category the effect of a breach differs, depending on whether the restraint is by a covenant or by a condition with a power of re-entry. 1 TIFFANY LANDLORD AND TENANT, § 152j; 2 UNDERHILL, LANDLORD AND TENANT, § 624. If it is by a covenant, the general rule is that an assignment in breach of it passes the title of the leasehold to the assignee. *Williams* v. *Earle,* L. R. 3 Q. B. 739; *Meyer* v. *Alliance Investment Co.,* 84 N. J. L. 450. "A covenant not to do a thing really implies the power to do it. An assertion of the breach affirms that the covenantor has effectively done what he covenanted not to do." *Shirk* v. *Adams,* 130 Fed. 441. The only remedy of the lessor is an action for damages against the covenantee. *People* v. *Gilbert,* 64 Ill. App. 203. It is said in *Wray-Austin Machinery Co.* v. *Flower,* 140 Mich. 452, that the assignment works a forfeiture, but the cases cited do not support this *dictum.* See also *Rees* v. *Andrews,* 169 Mo. 177; *Emery* v. *Hill,* 67 N. H. 330. However, if the restraint on assignment is imposed as a condition the lessor may re-enter for the breach and cut off the assignee's estate. *Kew* v. *Trainor,* 150 Ill. 150; *Shattuck* v. *Lovejoy,* 74 Mass. 204. But the breach does not *ipso facto* terminate the estate. It passes to the assignee and is valid until re-entry by the lessor. *Keegan* v. *Heileman Brewing Co.,* 129 Minn. 496; *Taylor* v. *Marshall,* 255 Ill. 545. In the principal case there was a right of re-entry reserved to the lessors for a violation of any provision of the lease. But the opinion of the court is rather obscure as to whether it considered the provision restricting assignment as a covenant or as a

condition. If the former, the title of the lease should be in the bankrupt corporation. *In re Pennewell,* 119 Fed. 139; *Hague* v. *Ahrens,* 53 Fed. 58. If the latter, the notice of forfeiture given by the lessors divested the estate in the corporation, and the result reached in the case is correct.

LAW OF NATIONS—SEIZURE AND SALE OF ENEMY MERCHANT SHIP EXTINGUISHES PRIOR LIEN.—The Nyanza (Esslingen), a German merchant ship, arrived at Manilla on the 9th of August, 1914, carrying a cargo belonging to libelant, a French national. Upon demand of libelant's Manilla agent the master refused to deliver the cargo, and subsequently allowed the ship to be interned by the United States government. Libelant recovered a judgment against the owners, for loss of cargo, and attached the ship. After the United States entered the war the ship was seized and, by authority of Congress and the President, turned over to the United States Shipping Board. Under authority of the Act of Congress of June 5, 1921, it was sold to the claimant "clear of all claims or liens." Libelant sought to enforce the admiralty lien and the lien obtained by attachment. *Held,* that seizure and sale operated to cut off claims against the ship. *The Nyanza* (D. C., E. D., N. Y., 1921), 276 Fed. 415.

The right of a belligerent to seize and condemn as prize an enemy merchant ship found in the belligerent's port at the outbreak of war is almost undisputed. *The Marie Leonhardt* [1921], P. 1; *The Thalia,* 2 Russ. and Jap. P. C. 116; HALLECK'S INT. LAW, 4th ed., II, 96; 20 MICH. L. REV. 114. The condemnation proceedings may take place even after peace is concluded. *The Blonde and Other Ships* [1921], P. 155; 20 MICH. L. REV. 113. In determining the national character of a ship, courts of prize generally look only to the legal title. A *bona fide* sale of a ship by an enemy, *imminente bello* or *flagrante bello,* is valid. *The Ariel,* 11 Moo. P. C. C. 119; *The Edna* [1919], P. 157. If the ship comes into the possession of the purchaser before seizure the sale is valid, although made *in transitu. The Baltica,* 11 Moo. P. C. C. 141. But mortgages and liens are generally disregarded in prize courts, even when created in good faith. *The Hampton,* 5 Wall. 372; *The Mirianna* (1805), 6 C. Rob. 24. In *The Tobago* (1804), 5 C. Rob. 218, a bottomry bond had been acquired by a national subject, in good faith, before the outbreak of war. In condemning the captured ship, and refusing the national's claim, the court said that "he [the national] acquires the *jus in* [*ad?*] *rem,* but not the *jus in re,* until it has been converted and appropriated by the final process of a court of justice. * * * If there is no change of property there can be no change of national character." Likewise, where the lien is on a neutral ship, in favor of an enemy, the ship cannot be condemned as prize, even *pro tanto. The Ariel, supra.* A limited class of liens may give a *jus in re. The Frances,* 8 Cr. 418; HALLECK'S INT. LAW, 4th ed., II, 115. Although reaching a harsh result, upon principle of international law the instant case is correctly decided. The libelant might look to the generosity of the captor for compensation.

LEASE—COVENANT AGAINST ASSIGNMENT WITHOUT CONSENT—POWER OF LIQUIDATOR TO ASSIGN.—Appellant had leased premises in question to Farrow's Bank in 1910 for a term of twenty-one years. The lease contained a covenant by "the lessees, their successors and assigns," not to assign the demised premises without previous consent in writing of the lessor. The company was ordered to be wound up compulsorily in January, 1921. A dispute having arisen as to the powers and duties of the liquidator with respect to the lease, the court of equity was called upon to declare, *inter alia,* whether or not the liquidator was bound by the covenant restricting assignment. *Held,* that the liquidator was bound by the covenant. *In re Farrow's Bank, Ld.* [1921], 2 Ch. 164.

The decision in this case is interesting not so much because of its holding as to the powers of the liquidator under the Companies Act of 1908, but because of the reasoning upon which the court proceeded. Under the Companies Act, the liquidator, who is appointed by the court, and resembles the American receiver, takes over full control of the company, and does all necessary acts on its behalf. None of the property is vested in the liquidator, however, in which respect he differs from a trustee in bankruptcy. A trustee in bankruptcy has generally been held *not* to be bound by such a covenant restricting assignment, *Gazlay* v. *Williams,* 210 U. S. 41; *Doe* v. *Bevan,* 3 Maule & S. 353; even though the proceedings were begun upon the lessee's own petition. *Bemis* v. *Wilder,* 100 Mass. 446; *In re Riggs* [1901], 2 K. B. 16. The reason seems to be that the property has vested in the trustee by operation of law, and that then, either because he is under a duty imposed by law to dispose of it for the benefit of creditors, or because he is not a voluntary "assignee," he is not bound by the covenants. But the court in the principal case appeared not entirely in sympathy with rule or reason. Younger, L. J., referred to these bankruptcy cases as "somewhat anomalous," and said they were based on "no very intelligible principle." The court therefore refused to apply the rule of the bankruptcy cases, basing its decision upon the narrow technical distinction that the property did not vest in the liquidator. Or perhaps it would be fairer to say that the court was not inclined to extend a rule which, even as regards bankruptcy, was considered as resting upon a very slender foundation. It is worthy of note that of two American decisions with reference to transfers by receivers one court held that the receiver was bound, *Spencer* v. *Darlington,* 74 Pa. 286; and the other that he was not bound, *Fleming* v. *Fleming Hotel Co.,* 69 N. J. Eq. 715.

MORTGAGES—FORECLOSURE SALE—DESTRUCTION BY FIRE BEFORE CONFIRMATION.—On the foreclosure of a mortgage by advertisement and sale P purchased certain premises. A state statute, C. S., § 2591, provided that ten days should be allowed after a foreclosure sale for receiving additional bids, and if within that time a higher bid was offered there should be a resale. Before the expiration of the ten days a dwelling house on the premises, constituting a third of the value, was accidentally destroyed by fire. P petitioned to be released from his bid. On appeal it was *held* that P's status was only that of a preferred bidder, that the loss sustained by reason of the

fire did not fall on him, and that he should be released from his bid. *In re Sermons' Land* (N. C., 1921), 108 S. E. 497.

The court concedes the prevailing rule to be that when there is a binding contract to convey the purchaser, as equitable owner, assumes the risk of loss from accidental fires. *Paine* v. *Meller,* 6 Ves. 349. See 19 MICH. L. REV. 576, 8 MICH. L. REV. 515. But if either the vendor or purchaser has any option in regard to the performance of the contract the loss falls on the vendor. 2 WILLISTON, CONTRACTS, § 932. For this reason it is generally held that a bidder at a judicial sale does not stand the risk of a loss occurring before the court has confirmed his bid. *Ex parte Minor,* 11 Ves. 559; *In re Finks,* 224 Fed. 92; *Harrigan* v. *Golden,* 58 N. Y. S. 726; *Taylor* v. *Cooper,* 10 Leigh (Va.) 317. But see *contra, Cropper* v. *Brown,* 76 N. J. Eq. 406; *Vance's Adm'r* v. *Foster,* 72 Ky. 389. Until the offer has been reported to the court and it has accepted it by confirmation there is no binding contract and the prospective purchaser is not the equitable owner. *Bowdoin* v. *Hammond,* 79 Md. 173. Until such confirmation the purchaser is nothing more than a preferred bidder. 3 JONES, MORTGAGES (Ed. 7), § 1637. The decision in the principal case is reached by construing the position of the prospective purchaser, during the ten days in which the sale is to remain open, as analogous to the position of the purchaser at a judicial sale before confirmation. Such a construction would seem warranted, and the result reached in the case is clearly a just one.

MUNICIPAL CORPORATIONS—FUTURE INSTALLMENTS AS CONSTITUTING PRESENT "INDEBTEDNESS."—Land was deeded to the city of Sacramento for park purposes, the conveyance being subject to the condition subsequent that if the grantee should not expend a minimum of $5,000 per year for ten years on improvements the land should revert to the grantor. Suit by taxpayer to have the deed declared void on the ground that it operated to create "indebtedness" of the city in violation of constitutional provisions was demurred to on the ground that the annual expenditure was to be met from current revenues and hence was not "indebtedness." *Held,* since the grantors had fully performed by delivering the property, the stipulated expenditure was really a consideration, and is "indebtedness," within the constitutional prohibition, of an amount equal to the sum of the installments. *Chester* v. *Carmichael* (Cal., 1921), 201 Pac. 925.

There is an utter lack of harmony in the various interpretations placed by the different courts on the word "indebtedness." Particularly is this so when, as in the principal case, the transaction concerns a present agreement to pay future installments. There are two types of such agreements, one in which the entire consideration is furnished by the creditor at once, as by erecting a public improvement or conveying property to the city, and the other in which the consideration is furnished continuously through a period of years—for example, by supplying water, gas, or electricity. A majority of courts draw a very sensible distinction between these types, regarding the former as creating indebtedness even though each installment is to be paid from current revenues, and the latter otherwise, at least until the service is

actually rendered. *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *South Bend* v. *Reynolds*, 155 Ind. 70. A few courts, however, adopt the rigid rule that the sum total of all the installments is "indebtedness," regardless of the object of the expenditure. *Chicago* v. *McDonald*, 176 Ill. 404. Such a rule places a municipality which has already exceeded the debt limit in an extremely embarrassing position by forcing it to do a cash business. On the other hand, a few courts have gone to the opposite extreme and decline to call any future installments "indebtedness" so long as they can be met by current revenues. *Giles* v. *Dennison*, 15 Okla. 55. This construction throws a heavy burden upon present taxpayers. The California court, in rendering the present decision, declared itself in favor of the first of the above views, and decided that the expenditures of the principal case were unconstitutional since they were intended to pay for permanent improvements rather than for current services. But the opportunity of acquiring a park would seem to warrant a contrary result if one could possibly be reached on logical principles. The case has an unusual aspect by reason of the fact that the city would have been under no direct personal obligation to spend the $5,000 annually. The only effect of default would have been reversion of the property. The condition subsequent would have had an effect similar to that of a mortgage on land without personal assumption of the mortgage debt, and this analogy might well have been applied to save the case. It is true that if a city mortgages its land, or if it buys property already subject to a mortgage, the mortgage is "indebtedness," even though there has been no personal assumption of liability. *Mayor of Baltimore* v. *Gill*, 31 Md. 375; *Waterworks* v. *Trebilcock, Mayor of Ironwood*, 99 Mich. 454. But a few courts have held that if a city purchases property, giving back a purchase money mortgage and stipulating that there shall be no corporate liability, there has been no indebtedness created within the constitutional prohibition. *Burnham* v. *Milwaukee*, 98 Wis. 128; *Swanson* v. *Ottumwa*, 118 Iowa 161. These cases rely upon the non-assumption of corporate liability combined with the fact that there is no chance of the city being forced to pay the debt to save property which it had previously held free from incumbrance. The situation which they present is similar to that in the principal case, and if their doctrine could have been applied to it the result would have been a salutary one.

NEGLIGENCE—IMPUTABLE—JOINT ENTERPRISE—HUSBAND AND WIFE.—Plaintiff was riding in an automobile driven by her husband when she was thrown from the car owing to a defect in the highway. Plaintiff and her husband were moving to another city, where they intended to reside, and at the time of the accident the plaintiff was in the rear seat of the car. *Held*, that the husband's contributory negligence was not imputable to the wife, because they were not engaged in a joint enterprise. *Brubaker* v. *Iowa County* (Wis., 1921), 183 N. W. 690.

In speaking of joint enterprise, the court says, "doubtless there may be such special facts showing agency or such joint financial interest in the undertaking as to make the negligence of the husband imputable to the wife,

and to defeat a recovery on her part. But no such facts are found in this case, and there is certainly no presumption that any such relation existed. It was merely the ordinary social and domestic relationship involved when husband and wife are travelling together. * * * from the mere marital relationship the contributory negligence of the husband is not to be imputed to the wife." This case seems to be in line with the majority of recent cases involving the question, and it is believed presents the best view on reason and principle. *Gaffney* v. *City of Dixon,* 157 Ill. App. 589; *Southern Ry. Co.* v. *King,* 128 Ga. 383; *Louisville Ry. Co.* v. *McCarthy,* 129 Ky. 814 (followed in *City of Louisville* v. *Zoeller,* 155 Ky. 192); *Knoxville Ry. & Light Co.* v. *Vangilder,* 132 Tenn. 487; *Senft* v. *West. Md. Ry. Co.,* 246 Pa. 446. In none of these cases, however, does the question of joint enterprise seem to have been raised. But in the case of *Fisher* v. *Ellston,* 174 Ia. 364, the court discusses that proposition at some length, in holding that the marital relation is not sufficient to make the travelling a joint enterprise, and that the husband's contributory negligence could not be imputed to the wife. The problem raised in the principal case is discussed in a note in 33 HARV. L. R. 313. On question of joint enterprise in general, see notes in 5 IA. L. B. 121 and 27 YALE L. J. 565. It cannot be denied that there is some authority holding a contrary doctrine to the principal case. See an excellent review of the cases in note in 8 L. R. A. (n. s.) 656. But this case would seem to present a sounder view and one more in accord with reason and justice.

PUBLIC UTILITIES—CONSTITUTIONALITY OF ACT REGULATING RATES OF PRIVATE COMPANIES BUT NOT OF COMPETING MUNICIPALLY OWNED PLANTS.—Bill in equity by a private gas and electric company to restrain the city from producing and selling electricity to private users without first filing a schedule of rates as required by law of private companies. *Held,* affirming 292 Ill. 236, that plaintiff was not denied equal protection of the law by a statute making the rates of privately owned, but not of municipally owned, utilities subject to the approval of the commission. *Springfield Gas and Electric Co.* v. *Springfield* (U. S., 1921), Adv. O. 38.

In a very concise opinion, without the citation of a case, Mr. Justice Holmes upholds as reasonable the classification in the Illinois Municipal Ownership Act and Public Utilities Act of the public utilities as privately owned and municipally owned. One is organized for private ends, for profit; the other for public ends, for the public welfare. It has never been doubted that the constitutional guarantee of equal protection of the law permitted a classification of persons subject to act of legislature; the only serious disputes have been over whether a given classification was reasonable, and therefore lawful. If reasonable, a classification is not unlawful because the act does not apply to all in the same class or line of business. *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; *Ex parte Girard* (Calif., 1921), 200 Pac. 593. The fear of ruinous competition was the animus of the attack in the instant case. In a proper case a competitor may invoke the aid of a court to entirely restrain the rival business. *Brooklyn City R. Co.* v. *Whalen,* 182 N. Y. S. 283, affirmed 229 N. Y. 570; *Memphis St. Ry. Co.* v. *Rapid Transit Co.,* 133

Tenn. 99 (jitney-bus case); *F. & M. Coöp. Tel. Co.* v. *Boswell Tel. Co.*, 187 Ind. 371, but it does not follow that relief will be given if the rival utility has been properly authorized to do business and is acting within such authority. *New Hartford Water Co.* v. *Village Water Co.*, 87 Conn. 183; nor if the complaining company has not itself been lawfully authorized to furnish service. *Rural Home Tel. Co.* v. *Ky. and Ind. Tel. Co.*, 128 Ky. 209. This protection from injury to its business by competition not lawfully authorized is like the analogous cases in which the legality of a differentiation in unit rates for different kinds of uses of the same utility—*e. g.*, the rates for gas used for fuel, or power, or light—is made to depend upon whether the different classes of users are in competition so that the discrimination in rates might injure the business of those charged the higher rate. *Boerth* v. *Detroit City Gas Co.*, 152 Mich. 654. It is certain that many statutes have been passed applying to private and not to municipal corporations, but which the legislature might have applied alike to both. It is usually a matter that addresses itself to legislative discretion, and the courts will interfere only in a clear case of abuse of that discretion. *Feemster* v. *Tupelo*, 121 Miss. 733. In any case, there can be no doubt that the supreme legislative body of the state has the power, if it chooses to exercise it, of regulating charges for the service of municipally owned utilities. *Bartlesville* v. *Corporation Com.* (Okl., 1921), 199 Pac. 396, and it would seem to follow that it can if it prefers leave the fixing of rates to the municipality itself. The principal case so holds. It would be strange indeed if the legislature may fix rates of a private corporation for a public service, and may allow a municipality to fix its own rates for service furnished by it, and yet it should turn out that a statute so providing should be found unconstitutional as a denial of equal protection of the laws. Neither the Illinois nor the federal supreme court found it necessary to cite authorities on this point.

REMAINDERS TO A CLASS—WHEN CLASS DETERMINED.—There was a legacy "to my sister for life and at her death the amount to be equally divided between her children." At the time of the testator's death the sister had four children living, but one died during the mother's life, leaving two children of her own who are plaintiffs in this action. *Held*, the remainder vested at the death of the testator and the plaintiffs are entitled to one-fourth of the property. *Powell* v. *McKinney* (Ga., 1921), 108 S. E. 231.

The intention of the testator or grantor should control as to when the class is to be determined and the remainders vested, providing his intention does not conflict with the rule against remoteness or other absolute rules of law. The courts generally say his intention does control. *Crossley* v. *Leslie*, 130 Ga. 782. But the courts' interpretation of the words used is likely to be nearly as rigid as an absolute rule of law. In accordance with the rule that the law favors vested interests, it is said the instrument will, if possible, be construed to show an intent to determine the class as of the time when the instrument takes effect—*i. e.*, when the deed is delivered or the testator dies. 1 TIFFANY ON REAL PROPERTY (Ed. 2) 497. In grants or devises of the type "to A for life" and "then," or "upon," or "after," or

"at" his death "to my children" or "to his children," etc., the authorities very generally support the instant case. The class is determined as of the time when the instrument takes effect and the remaindermen have a vested interest from that time. *Ritzman's Estate* (Cal., 1921), 199 Pac. 783; *Sherley* v. *Sherley* (Ky., 1921), 232 S. W. 53; *Holmes* v. *Holmes* (Mich., 1921), 183 N. W. 784. Such interests, however, are not vested for all purposes. For instance, they are within the rule against remoteness. GRAY, RULE AGAINST PERPETUITIES, § 83. As is said in *Birdsall* v. *Birdsall,* 157 Ia. 363, when the remainder is to all the members of the specified class, and the language is not such as to prevent construction by the court, the remainder will be held to vest when the instrument takes effect. However, if no member of the class is then in existence, the remainder will be contingent until there is such member in existence, when it will vest in that member, subject to being opened to let in others until the time for distribution. *Carver* v. *Jackson,* 4 Peters 1, 90. "To A for life, then to my heirs" or "next of kin," generally gives a vested interest from the time the instrument takes effect, *Avinger* v. *Avinger* (S. C., 1921), 107 S. E. 26; but when such remainder is subject to the condition "if A die without issue," there is a sharp conflict of authority. ANN. CAS. 1917A 863-4. In *Meyer* v. *Matthews* (S. C., 1921), 108 S. E. 174, upon such a devise the remainder was held to vest at the testator's death, but subject to divestment. For the "New York rule" as to divesting remainders once vested, see 4 KENT COMMENTARIES (Ed. 14) 202-5. For an excellent analysis of that rule, see *In re Moran's Will,* 118 Wis. 177. If the remainder is to part of a class, as, for instance, to the survivors, there is great difficulty and sharp conflict. Some of our courts follow the early English decisions and hold that words of survivorship relate to the death of the testator unless there is a plain intent to apply them to a later period; that is to say, the class is determined as of that time. *Ball* v. *Holland,* 189 Mass. 369; *Jameson* v. *Jameson,* 86 Va. 51; *Ross* v. *Drake,* 37 Pa. St. 373; *In re Twaddell,* 110 Fed. 145. But more generally in recent decisions if the words are open to construction they are held to relate to the termination of the particular estate, and the remainder vests at that time. *In re Moran's Will, supra; Sullivan* v. *Garesche,* 229 Mo. 496; *Sinton* v. *Boyd,* 19 Ohio St. 30; *In re Winter's Estate,* 114 Cal. 186; *Bell* v. *Brinson* (Ga., 1921), 108 S. E. 47; 2 JARMAN ON WILLS (Am. Ed. 5) 674. The latter rule would seem the better in that it is more likely to give effect to the actual intent of the testator, and is not opposed to sound public policy. When the limitation is to such members of the class as reach a certain age, sustain a given character, do a particular act, etc., there being no distinct gift to the whole class, it is generally stated that the interest is contingent until some member of the class qualifies, when it becomes vested in him, subject to being opened to let in others. *Coggins' Appeal,* 124 Pa. St. 10; *McArthur* v. *Scott,* 113 U. S. 340. The general rule as to remainders, that if the postponement of possession and enjoyment is merely for the convenience and benefit of the estate, or to let in other interests, and not for reasons personal to the remainderman, the remainder vests at the death of the testator, while if postpone-

ment is annexed to the substance of the remainder and is personal to the remainderman, the remainder is contingent until the time set for distribution, applies to remainders to a class. *Thomas* v. *Thomas,* 247 Ill. 543.

SALES—RESCISSION OF CONTRACT BECAUSE OF FAILURE OF SELLER TO FULFILL WARRANTY.—The parties entered into a contract under which the defendant was to furnish and install two gas engines of 150 brake horsepower each. Relying on the defendant's promise that the engines would be of this power, the plaintiff made a deposit. The engines the defendant had built according to the plaintiff's plans in fact tested only 140 horse-power. Because of this discrepancy in their capacity the plaintiff refused to receive the engines at the freight house. He sued to recover his desposit. In a cross-complaint the defendant alleged that before he shipped the engines he told the plaintiff of the shortage of their capacity, but that the plaintiff said for him to ship them anyway. What finding of fact was made as to this allegation does not appear in the report. Judgment was given for the plaintiff on the ground of failure of consideration. *Mahony* v. *Standard Gas Engine Co.* (Cal., 1921), 202 Pac. 146.

The general rule is that when title has passed, if the chattel fails to come up to warranties the buyer's only remedy is an action for damages. *Street* v. *Blay,* 2 B. & Ad. 456; *Lyon* v. *Bertram,* 20 How. (U. S.) 149; *Crabtree* v. *Kile,* 21 Ill. 180; *Hoover* v. *Sidener,* 98 Ind. 290. But where a warranty is made with intent to defraud, and damage occurs, it is ground for rescission. *Montgomery* v. *Bucyrus Mach. Works,* 92 U. S. 257. Led by Massachusetts, some jurisdictions hold that in case of a "serious failure of consideration" through breach of warranty the buyer can return the property and be freed from liability for the purchase price. *Bryant* v. *Isburgh,* 13 Gray 607; *Kuntzman* v. *Weaver,* 20 Pa. St. 422; *Scranton* v. *Tilley,* 16 Texas 183; *Ruby Carriage Co.* v. *Kremer,* 26 Ky. Law Rep. 274. Although in the principal case the language used by the court might indicate a tendency to follow the Massachusetts rule allowing rescission of sale for breach of warranty, the holding on the facts does not give sound support to this doctrine. If the court in fact made an unreported finding that the plaintiff asked that the machines be shipped after he knew of their defect, even the courts following the Massachusetts rule would have held that he thereby waived his right to return the chattel for that breach of warranty. *Aultman-Taylor Co.* v. *Ridenour,* 96 Iowa 638. If no such finding was made, the plaintiff merely recovered under the doctrine recognized alike by the courts that allow rescission and those that do not, that in the case of a tender of something different than called for by the executory contract of sale the buyer can reject what is tendered and recover any money he has paid in advance. *Pope* v. *Allis,* 115 U. S. 363.

TAXATION—STOCK DIVIDENDS TAXABLE AS INCOME.—In 1917, the complainant stockholders in the Bronx Company received a "stock dividend" declared against appreciation of capital assets. *Held,* such "stock dividends"

are taxable as a "receipt of income" under St. 1916, c. 269. *Tilton* v. *Trefry* (Mass., 1921), 131 N. E. 219.

We may assume, in the principal case, that a part of this appreciation occurred before the Income Tax Law was passed. Some cases take the view that earnings of a corporation do not become "income" to the stockholders until paid to them, so the fact that any portion of the dividend was earned before the Tax Law went into effect would be immaterial. *Van Dyke* v. *Milwaukee,* 159 Wis. 460. There the court said, "As a stockholder he acquired no right to it until it was distributed in the form of dividend. The profits of a corporation become income to stockholders when distributed as dividends, but not before." Accord, *State* v. *Widule,* 166 Wis. 48 (dividends based on increased value of capital assets). The reasoning in the cases taking the contrary view seems more convincing. In *Lynch* v. *Turrish,* 236 Fed. 653, the court said, "They [stockholders] are the equitable and beneficial owners of all of its [corporation's] property, and it is the mere holder and manager of it for them. * * * As against its stockholders, a corporation has no and they have all the beneficial interest in its property. * * * The enhanced value of the property which accrues from the gradual increase of its value during a series of years prior to the effective date of an income tax law, although divided or distributed by dividend or otherwise subsequent to that date, does not become income, gain, or profits taxable under such an act." Accord, *Gray* v. *Darlington,* 15 Wall. 63; *Loomis* v. *Wattles,* 266 Fed. 876 (stock dividends); *Stevens* v. *The Hudson Bay Co.,* 25 T. L. R. 709. The leading case tending to support the principal case is *Tax Commissioner* v. *Putnam, 227* Mass. 522, but there the "stock dividend" was declared against profits other than increased capital assets. *State* v. *Widule, supra,* is more direct authority supporting the principal case. In an opinion by Justice Holmes, *Towne* v. *Eisner,* 245 U. S. 418, it was held that "stock dividends" were not "income." That case was followed in *Eisner* v. *Macomber,* 252 U. S. 189, where Justice Holmes dissented, basing his opinion on the belief that the sixteenth amendment to the Federal Constitution was broad enough to include stock dividends as income. In *Eisner* v. *Macomber* the act of Congress was broad enough to include stock dividends. Holmes cited *Tax Commissioner* v. *Putnam, supra,* with approval. The cases distinguishing "stock dividends" from "cash dividends" seem to have lacked convincing arguments to support the thesis that the former should be treated as a mere "distribution of capital" while the latter are to be regarded as "income." Compare *Wall* v. *London & Provincial Trust, Ltd.* [1920] 1 Ch. 45; 2 Ch. 582.

TORTS—LIABILITY OF BAILOR OF AUTOMOBILE WITH DEFECTIVE STEERING GEAR TO INJURED THIRD PARTY.—D, the owner of an automobile, hired it to a bailee, who, while driving down a city street, ran into and injured P when the automobile became ungovernable due to a defective steering gear. By demurrer, D admitted that he negligently allowed bolts in the steering gear to become loose. *Held,* one who lets automobiles for hire "owes a duty to the public to the extent that he is bound to use ordinary care to see that

the automobile he lets to be operated upon the public highways has its steering gear in a reasonably safe condition, as injuries to other persons lawfully using the highways are reasonably to be foreseen as the probable result of a defective steering gear." *Collette* v. *Page* (R. I., 1921), 114 Atl. 136.

A manufacturer who is negligent in the manufacture of the articles he handles is not liable for his negligence to injured third parties who have no contractual relations with him. *Winterbottom* v. *Wright,* 10 M. & W. 107; *McCaffrey* v. *Mossberg Mfg. Co.,* 23 R. I. 381. *Contra: Schubert* v. *Clark,* 49 Minn. 331. An exception to this general rule is that a manufacturer of an *inherently dangerous* article owes a duty of care to all to whom it may come even in the absence of a contractual relation. *Thomas* v. *Winchester,* 6 N. Y. 397. The liability in such cases is not confined to manufacturers, but is placed also upon one who, without proper inspection, puts upon the market an inherently dangerous article. *Johnson* v. *Cadillac Motor Car Co.,* 261 Fed. 878. The principal case extends the analogy to the case of a bailor who bails an inherently dangerous article which injures a third party with whom the bailor had no contractual relations. The Rhode Island court had previously held that an automobile is not an instrumentality dangerous *per se, Colwell* v. *Ætna Bottle & Stopper Co.,* 33 R. I. 531; but now qualifies that by holding that an automobile with a defective part so vital as the steering gear becomes inherently dangerous to other parties traveling on the highway. See Note 18, MICH. L. REV. 676.

TRIAL PRACTICE—OFFICER'S RETURN ON SUMMONS NOT CONCLUSIVE.—Plaintiff alleged that judgment by default was taken against him in a case in which he had no notice of the pendency of the action in any manner or form and that he had a good defense. The sheriff's return stated that plaintiff had been served with summons. *Held,* a sheriff's return is not conclusively true against a direct attack on a judgment where the defendant had no knowledge whatever of the pendency of the suit and where no rights of third parties are jeopardized. *Nuttalburg Smokeless Fuel Co.* v. *First National Bank* (W. Va., 1921), 109 S. E. 766.

The common-law rule was that a sheriff's return was conclusive. A party injured by a false return had his only remedy in a suit against the sheriff making the false return. The basis for the rule has been explained in various ways. It is sometimes said that the sheriff is a sworn officer to whom the law gives credit. *Tillman* v. *Davis,* 28 Ga. 494. If that is sound, then the law should give as much credit to his statement when suit is brought against him as it does when the return is attacked. Again, it is said that his sworn statement is a matter of record; but this reason is unsound because matters of record are often subject to be disproved. BIGELOW, ESTOPPEL (Ed. 6), p. 38. The principal case explains it as follows: "When the verity rule was anciently formulated the sheriff was a high and important officer, the king's own representative, armed with the king's writ, and partaking of the king's fiction that he could do no wrong." The rule "was followed by many states, including Virginia, without consideration of its reasonableness or its adaptability to changed conditions." The most log-

ical explanation, however, is that advanced in 16 COL. L. REV. 287, where it is said that the action against the sheriff was given first and the common-law, being stingy of remedies, refused to give another by allowing the return to be attacked. In an excellent review of the cases in the various states the principal case points out that this common-law rule has been abandoned in twenty-one states, abolished by legislation in six others, and modified materially by the courts in seven others. Eight states, including West Virginia, still retain the rule. The common-law rule is clearly inequitable. If applied in the principal case, it would allow a plaintiff to retain $5,000 to which he was not entitled and make the sheriff liable to the defendant in like amount for serving process on a former president and shareholder of a corporation instead of the present president, to whom the former had sold out. The former West Virginia decisions, in upholding the rule, recognized it as a harsh rule, but said its harshness is "offset by the great inconvenience that would arise from uncertainty of judicial judgments and decrees" if any other rule were followed. *Milling Co.* v. *Read*, 76 W. Va. 557, 569. But Justice Lively, in the principal case, replies: "Experience, the great practical test, has demonstrated that no harm to the stability and certainty of judgments and decrees has resulted in the jurisdictions where the common-law rule of verity in the return has been abolished." It is gratifying to see a court take so progressive an attitude, and overruling its former decisions without waiting for legislation, abandon an inequitable rule founded upon no reasonable basis. For a complete discussion of this subject, see a leading article, entitled "THE SHERIFF'S RETURN," by Edson R. Sunderland, 16 COL. L. REV. 281, from which most of the material in the opinion in the principal case was obtained.

TRIALS—RIGHT OF COUNSEL TO QUESTION JURORS AS TO THEIR INTEREST IN LIABILITY INSURANCE COMPANY.—In an action for damages for personal injuries the plaintiff's counsel examined the jurors on their *voir dire*, and asked them as to their business relations with surety or casualty companies. On appeal the defendant contended that this line of questioning was improper, since whether the defendant was insured was immaterial and prejudicial, and the examination was calculated to present this improper matter to the jury. *Held*, the questions were proper, since they were pertinent in determining whether the jurors were biased, and the case would not be reversed in the absence of a showing that counsel abused their privilege by making it a mere excuse to communicate improper matter. *Wilson* v. *St. Joe Boom Co.* (Idaho, 1921), 200 Pac. 884.

When the question whether an insurance company is interested in the action is presented directly by the examination of witnesses, it is clearly immaterial and prejudicial. This has been held prejudicial and reversible, although the trial judge sustained objections to the questions and instructed the jury to disregard the implications from such questions. *Cosselmon* v. *Dunfee*, 172 N. Y. 507; *Stratton* v. *Nichols Lumber Co.*, 39 Wash. 323. Some courts hold it reversible error to introduce even a suggestion that an insurance company is interested in the suit by questioning jurors as to their

possible interest in such a company. *Lipschutz* v. *Ross,* 84 N. Y. Supp. 632; *Hoyt* v. *J. E. Davis Mfg. Co.,* 98 N. Y. Supp. 1031; *Swift* v. *Platte,* 68 Kan. 1; *Schmidt* v. *Schalm,* 2 Ohio App. 268; *Purcell* v. *Degenhardt,* 202 Ill. App. 611. On the other hand, a juror who is pecuniarily interested in the outcome of the suit is disqualified. *McLaughlin* v. *Louisville Electric Light Co.,* 100 Ky. 173. See 14 MICH. L. REV. 161. So from this point of view it seems justifiable to permit questioning of jurors as to their interest in indemnity or liability companies as tending to show implied bias or as supplying information for peremptory challenges. Thus, where the attorney for the casualty company was present in court openly defending the action, it was held in Illinois that the jurors could be examined as to their relations with this company. *Iroquois Furnace Co.* v. *McCrea,* 191 Ill. 340. Under similar circumstances the same result was reached in Indiana. *Goff* v. *Kokomo Brass Works,* 43 Ind. App. 642. One case takes the extreme view that there is no object in concealing from the jury the fact that an insurance company is interested in the suit, and if juries are influenced by such information to award larger recoveries such companies should provide for this increased liability in their contracts with the insured. *M. O'Connor & Co.* v. *Gillaspy,* 170 Ind. 428. The principal case takes a middle ground and admits that the line of demarcation between proper and improper questioning is not clear, but depends upon the circumstances of each case. The examination is permissible when confined to the good faith purpose of determining the qualifications of jurors, and is objectionable only when, by the assertion and repetition of facts unnecessary for this object, it is designed to introduce immaterial and prejudicial matter. This view seems sound, and is followed by other cases. *Faber* v. *Reiss Coal Co.,* 124 Wis. 554; *Heydman* v. *Red Wing Brick Co.,* 112 Minn. 158; *Williamson* v. *Hardy* (Cal., 1920), 190 Pac. 646; *Williams-Echols Dry Goods Co.* v. *Wallace,* 142 Ark. 363.

TRUSTS—RESULTING FROM PURCHASE WITH FUNDS OF GRANTEE AND WIFE. —P and D were the sole heirs of the latter's deceased wife. D had taken a conveyance to the land in question in his own name, $9,400 of the purchase price of $10,400 being secured by the sale of the wife's lands. D afterward admitted that the land in question belonged to his wife. On a bill for declaration of trust and partition, *held,* there was a resulting trust in favor of the wife to the extent of the part of the purchase price furnished by her. *Crawford* v. *Hurst* (Ill., 1921), 132 N. E. 521.

This case represents another example of a trust resulting from contributions from several persons to the purchase price. A good many cases have tended to throw confusion into the subject by stating a requirement that the part paid must be an aliquot part of the entire purchase price. *Furber* v. *Page,* 143 Ill. 622. Just what is meant by aliquot part is by no means certain. The dictionaries indicate that it means a sum by which the entire purchase price may be divided without leaving a remainder. Such a meaning has been distinctly repudiated. In *Fleming* v. *McHale,* 47 Ill. 282, where the complainant had paid the first instalment, $300, on a total price of $1,080, it was held that the aliquot part requirement was satisfied. In

Hinshaw v. *Russell,* 280 Ill. 235, it was held that "aliquot" meant a particular fraction of the purchase price as distinguished from a general contribution to the purchase money. *Onasch* v. *Zinkel,* 213 Ill. 119, was a case of general contributions of uncertain amounts, but the distinction was not made clear. It is submitted that the real requirement is that it must be certain how much of the purchase price was furnished by the person seeking to set up the resulting trust. *Currence* v. *Ward,* 43 W. Va. 367. In the instant case the aliquot part question was not considered at all, the court laying down the broad doctrine that where two or more persons advance the purchase price and the title is taken in the name of one, a trust results and each takes an undivided share in the equitable title proportionate to the amount advanced. For a similar development in Massachusetts, see *McGowan* v. *McGowan,* 14 Gray 119, and *Skehill* v. *Abbott,* 184 Mass. 145. See 1 TIFFANY ON REAL PROPERTY, § 107; BOGERT ON TRUSTS, p. 105.