

RECENT CASE NOTES

ASSIGNMENT—ASSIGNMENT OF HEIR'S EXPECTANCY—ANCESTOR UNITED IN CONVEYANCE.—A deed purported to convey, for ample consideration given to the grantor, an expectancy in an undivided sixth of real estate then owned by the grantor's mother, from whom the grantor expected to inherit the interest as one of her six children. The mother united in the conveyance in order to secure the interest to the grantee after her death. The deed contained a covenant of warranty by the grantor but not by his mother. *Held*, that the deed was unenforceable as against the son but was valid as a conveyance by the mother. Clay, J., *dissenting*. *Snyder v. Snyder* (1921, Ky.) 235 S. W. 743.

At common law any assignment or conveyance by an heir of his expected interest in property, made during the lifetime of the ancestor, was void. *Bayler v. Commonwealth* (1861) 40 Pa. 37; 33 L. R. A. 266, note. In some instances, however, such transfers were enforced through the doctrine of estoppel arising from covenants contained in the deed. *Johnson v. Johnson* (1902) 170 Mo. 34, 70 S. W. 241. Courts of equity have generally enforced such transfers as contracts to convey the legal estate or interest when it has ceased to be an expectancy and has become a vested estate. *Thornton v. Louch* (1921) 297 Ill. 204, 130 N. E. 467; *Richey v. Richey* (1920, Iowa) 179 N. W. 830; Ann. Cas. 1916 E, 1241, note. In Kentucky the law is well settled that such a transfer is invalid in both law and equity and that the doctrine of estoppel will not be applied. *Hunt v. Smith* (1921) 191 Ky. 443, 230 S. W. 936. Hence it was impossible in the instant case to give the intended effect to the instrument. This, however, is an insufficient basis for giving it the un contemplated effect of conveying a one-sixth interest from the mother to the grantee. It was the mother's desire that her six children share her entire estate equally at her decease. It unquestionably was not her intention to convey by the instrument an undivided sixth of her land, leaving only five-sixths to be divided equally at her death among her *six* children. The court allowed the son who had deeded away his interest to share further in the division of the estate at the death of the mother, and treated the consideration given him for his conveyance as an advancement from his mother's estate, a result not within the contemplation of the parties to the deed or to the suit. The son intended to part with his entire interest in his mother's estate and the fact that he received the consideration and bound himself by the covenant of warranty clearly indicates that it was he only who was acting as grantor. It is the rule in many jurisdictions that for a transfer of an expectancy to be valid, it must be made with the knowledge and consent of the ancestor. *Stevens v. Stevens* (1914) 181 Mich. 438, 148 N. W. 225. The mother took part in the transaction with probably some such idea in mind. The court, in attempting to uphold the deed as a valid conveyance of some sort, arrived at an anomalous result which only serves to illustrate the justice of the rule prevailing in most jurisdictions whereby the conveyance of the expectancy is held to be valid.

BANKRUPTCY—PREFERENCES—COMPLETION OF EQUITABLE LIEN WITHIN FOUR-MONTHS PERIOD.—A Maryland corporation, about to liquidate, agreed to transfer its vessels to the defendant. In return, he agreed to give it \$73,000, with which to pay its debts, and to organize a new corporation in Delaware to which he would redeliver the vessels upon the execution by it of a mortgage of \$100,000 upon the vessels. Upon redelivery to it, the Delaware corporation adopted a resolution authorizing the \$100,000 mortgage, but the mortgage was not actually given and recorded until within four months of the filing of a voluntary petition in

bankruptcy. *Held*, that the earlier equitable lien of the defendant on the vessels could not operate as a present consideration to keep the mortgage within the four-months period from being a preferential transfer. *In re New York & Baltimore Inland Transportation Co.* (1921, D. Del.) 276 Fed. 145.

It can no longer be doubted that there are two divergent tendencies in the interpretation of secs. 60 b and 47 a (2) of the Federal Bankruptcy Act as amended in 1910. Act of June 25 (36 Stat. at L. 840). The tendency of the Supreme Court has been toward validating a "transfer" of property made within four months, even in contemplation of insolvency, where there has been an equitable or legal lien, valid as against the bankrupt, acquired in good faith before the four-months period. *Martin v. Commercial Bank* (1918) 245 U. S. 513, 38 Sup. Ct. 176; (1919) 18 MICH. L. REV. 544. These prior rights may arise under an unrecorded conditional sale; *Baker Ice Machine Co. v. Bailey* (1915) 239 U. S. 268, 36 Sup. Ct. 50; an unrecorded mortgage; *Martin v. Bank, supra*; a promise to give as security for a debt a mortgage on a present or future specific *res*; *Lewin v. Teluride Iron Works Co.* (1921, C. C. A. 8th) 272 Fed. 590; or a promise to give a present or future specific *res* as a pledge. *Sexton v. Kessler* (1911) 225 U. S. 90, 32 Sup. Ct. 657; (1909) 9 COL. L. REV. 624. However these rights may arise, and whether they are enforceable in a court of law or of equity, their significant similarity, from the point of view of bankruptcy law, lies in two elements; they are all valid as against the debtor himself, and by the majority of state statutes, they are invalid only as against a creditor who has actually attached *before* recordation or reduction into possession by the lienor. Several cases, however, in the lower federal courts, have extended the interpretation of the term "preference" to include any completion within the four-months period of the position of a creditor as secured against the claims of other creditors. *Lathrop Bank v. Holland* (1913, C. C. A. 8th) 205 Fed. 143; *In re Pittsburgh-Big Muddy Coal Co.* (1914, C. C. A. 7th) 215 Fed. 703. Such a view of the policy of preserving the bankrupt's estate intact for all of his creditors equally, is a normal and perhaps a desirable extension. (1921) 34 HARV. L. REV. 309. But to support the decision, as in the instant case, on the ground that the trustee, when appointed, is put in the position of an attaching creditor by sec. 47 a (2), as amended in 1910, results, it must be submitted, in a *non sequitur*. If the only attaching creditor who has priority over the equitable or legal lien against the bankrupt is one who actually attaches the goods before the recordation or reduction into possession takes place, there is no general creditor in a position to invalidate the mortgage, and, therefore, the trustee should not be able to do so. *Zehner v. Southern Surety Co.* (1921, C. C. A. 3d) 272 Fed. 954. It is only if the trustee is considered in the position of a creditor who has actually attached at the outset of the four-months period, and not at its termination, that this result can be reached. Such an interpretation of sec. 47 a (2) seems particularly strained in view of the fact that the case which it was expected to correct was one where the first creditor completed his lien by reducing the goods into possession after the end of the four-months period, i. e., after the petition in bankruptcy had been filed, so that the trustee needed to be placed in the position of an attaching creditor at the moment of his appointment only, to have a claim prior to that of the secured creditor. *York Mfg. Co. v. Cassell* (1906) 201 U. S. 344, 26 Sup. Ct. 481; *Potter Mfg. Co. v. Arthur* (1915, C. C. A. 6th) 220 Fed. 843. The real issue, however, is whether such a completion of a prior equitable or legal lien should be considered a preference, which the trustee may avoid under sec. 60 b. And in determining whether the defendant has been preferred to other creditors of the same class, one may well ask whether there are any other creditors similarly situated. But whether it is finally decided that the policy of the Bankruptcy Act is to favor the creditor with the specific claim at the expense of the one with the general claim or vice versa, it is to be hoped that there soon will be a Supreme Court decision on the question.

CARRIERS—EXTENT OF LIABILITY FOR BAGGAGE UNACCOMPANIED BY PASSENGER.—The plaintiff purchased a ticket to her destination on the defendant's railway and checked her baggage on the ticket. She later decided to take a different route and destroyed the passenger ticket. The baggage was stolen without fault of the defendant. In an action for its value, the defendant pleaded that its liability was only that of a gratuitous bailee. *Held*, that the defendant was liable as an insurer. *Caine v. Cleveland, etc. Ry.* (1921, Mich.) 185 N. W. 765.

It has now become well settled that a carrier is liable for the loss or destruction of baggage as an insurer, even though the owner does not travel on the same train. *St. Louis, etc. Ry. v. Dewitt* (1914) 115 Ark. 578, 171 S. W. 906; *Larned v. Central Ry.* (1911) 81 N. J. L. 571, 79 Atl. 289; *McKibben v. Wisconsin Cent. Ry.* (1907) 100 Minn. 270, 110 N. W. 964; (1912) 46 AM. L. REV. 264; (1911) 9 MICH. L. REV. 707. The ancient rule originated in stage-coach days when baggage was carried as a matter of grace and no checking system existed. It was obviously not an unjust requirement, in view of the methods of transportation, that the passenger accompany his own baggage. *Collins v. Boston & Me. Ry.* (1852, Mass.) 10 Cush. 506. And the rule is still necessary in England, where the passenger is required to identify his luggage at the end of the journey. A situation which has raised more difficulty exists where the owner checks his baggage on a ticket which he never intends to use. The few adjudicated cases on the point have held that the carrying of baggage is incidental only to the carrier and passenger relation and that in purchasing a ticket there is an implied promise to become a passenger. *Marshall v. Pontiac, etc. Ry.* (1901) 126 Mich. 45, 85 N. W. 242; *Wood v. Maine Cent. Ry.* (1903) 98 Me. 98, 56 Atl. 457; *Lusk v. Bloch* (1917, Okla.) 168 Pac. 430. It has also been suggested that such a practice may convert passenger trains into fast freight trains (1914) 50 CAN. L. JOUR. 140; (1914) 78 CENT. L. JOUR. 55. On the other hand it has been considered illogical to reduce the liability of a carrier to that of a gratuitous bailee merely because the owner did not intend to or did not impose the additional burden of carrying him as a passenger. See *Ala. Great So. Ry. v. Knox* (1913) 184 Ala. 485, 63 So. 538. The court, in the instant case, does not expressly overrule *Marshall v. Pontiac, supra*, but sees a distinction in that there was an element of deceit in that case, the plaintiff never having intended to ride as a passenger. Still it is doubtful whether, in view of modern usage and the demands of transportation, the earlier decisions will stand.

EVIDENCE—POWER OF COURT TO ORDER PHYSICAL EXAMINATION OF PLAINTIFF.—The court was empowered by statute to order the physical examination of the plaintiff in an action for personal injuries. N. Y. C. C. P. sec. 873 (C. P. A. sec. 306). A blood test was considered necessary to determine the nature of the injury. The plaintiff objected on the ground that an infection might be caused by the needle in making the puncture required to draw the blood. *Held*, that the court could properly order the plaintiff to submit to such a blood test. *Hayt v. Brewster, Gordon & Co.* (1921) 199 App. Div. 68, 191 N. Y. Supp. 176.

Ever increasing litigation over personal injuries renders important the power of the courts to order the plaintiff to submit to a physical examination for the purpose of determining the nature and extent of the injury. The end sought by allowing an examination is, of course, a nearer approach to the truth. It is clear that in the absence of such a power, there is more room for fraud and the ascertainment of truth becomes practically impossible. In the absence of statute, the authorities are in square conflict as to whether the power exists. The weight of authority, at least in the number of decisions, seems to recognize such a power. 3 Wigmore, *Evidence* (1904) sec. 2220; *Schroeder v. Chicago, etc. Ry.* (1877) 47 Iowa, 375; *Wanek v. Winona* (1899) 78 Minn. 98, 80 N. W. 851; *Cincinnati, etc. Ry. v. Nolan* (1914) 161 Ky. 205, 170 S. W. 650; *Williams v. Chattanooga Iron Works* (1915) 131 Tenn. 683, 176 S. W. 1031; *State v. Troup* (1915) 98 Neb.

333, 152 N. W. 748; *contra*, *Union Pac. Ry. v. Botsford* (1891) 141 U. S. 250, 11 Sup. Ct. 1000; *Larson v. Salt Lake City* (1908) 34 Utah, 318, 97 Pac. 483. Several jurisdictions, in which this power was denied, have remedied the defect by statute. N. Y. C. P. A. 1921, sec. 306; N. J. Comp. Sts. 1910, sec. 19; Fla. Rev. Gen. Sts. 1919, sec. 4968. Once the power is recognized, either by statute or at common law, the extent to which it may be applied depends necessarily upon the wording of the statute, if a statute exists, or upon the particular facts of each case. Whether or not a physical examination in a particular case is necessary may properly be left to the discretion of the court; as may also the question of probable physical harm to the plaintiff. *Ottawa v. Gilliland* (1901) 63 Kan. 165, 65 Pac. 252; *Wanek v. Winona*, *supra*; *Atkinson v. United Rys. Co.* (1921, Mo.) 228 S. W. 483; *City of Valparaiso v. Kinney* (1921, Ind.) 131 N. E. 237; *Stearns Coal & Lumber Co. v. Williams* (1917) 177 Ky. 698, 198 S. W. 54. Analogous to this power is that conferred on health officers to examine any person whom they have reasonable cause to believe to be infected with a venereal disease. *Rock v. Carney* (1921, Mich.) 185 N. W. 798. With a proper exercise of discretion in cases of this kind, and a reasonable degree of care by the courts in ordering physical examinations, there is little if any danger of causing unnecessary embarrassment or physical harm to a plaintiff. The instant case is an excellent example of a usual and sound exercise of discretion by the court. Considering the conditions which prevail in present day medical practice, it can hardly be seriously contended that submitting to a simple blood test involves any real danger.

FUTURE INTERESTS—ESTATE IN FEE TAIL AS CONTINGENT REMAINDER—DESTRUCTIBILITY.—T devised certain lots to A for life, remainder to B and the heirs of his body, other land to B and the heirs of his body, and, in the event of B dying without any children surviving him, all property devised to B to be divided among certain nephews and nieces. B acquired A's life interest by quit-claim deed and also procured quit-claim deeds from the nephews and nieces. B then conveyed his entire interest to C who reconveyed to B. B had no children, was the sole heir of T, and held the reversion. By statute estates in fee-tail were changed into a life estate in the donee with a remainder in fee to the person to whom the estate tail would first pass at common law. Hurd's Ill. Rev. Sts. 1919, ch. 30, sec. 6. B brought a bill to quiet title. *Held*, that the estates limited to B's children and to the nieces and nephews were contingent remainders and were destroyed by the merger of the life estate and reversion through the conveyance to C. *Edmiston v. Donovan* (1921, Ill.) 133 N. E. 237.

At common law B's estate would have been a fee tail and the subsequent limitations indestructible executory devises. Changed by statute into a life estate with a remainder in fee to the person to whom the estate tail would first pass according to common law on the death of B, the remainder is contingent until such a person is born and consequently at common law destructible by failure of the particular estate. See Kales, *Later History of the Rule of Destructibility of Contingent Remainders* (1919) 28 YALE LAW JOURNAL, 656. For a discussion of such statutes and their operation, see Kales, *Future Interests* (2d ed. 1920) secs. 402-405. A life estate is destroyed by merger when the life estate and reversion come together in the hands of the same party, there being no vested intervening remainder, except where the two estates are created by the same instrument. A conveyance by the holder of the two estates to a third party will thus effect a merger, as in the instant case. See Kales, *Future Interests*, sec. 311; 1 Tiffany, *Real Property* (1920 ed.) sec. 34; see *McCullough v. Carpenter* (1921, Mo.) 225 S. W. 674. Contingent remainders are now preserved by statutes in many states. See Kales, *Future Interests*, sec. 106; 1 Tiffany, *op. cit.* secs. 177, 178. Such a statute has recently been enacted in Illinois. Laws, 1921, p. 470. But the court refused to hold it retroactive. After birth of issue of the donee in tail, the remainder is

considered vested in Illinois. See *Calvert v. Calvert* (1921) 297 Ill. 22, 130 N. E. 347; for other possible views see Kales, *Future Interests*, sec. 405. The operation of the statute as to estates in fee tail seems rather unexpected as it enabled a donee in fee-tail to bar subsequent contingent limitations which at common law would have been indestructible executory interests.

PARTNERSHIP—DISSOLUTION—RIGHTS OF PURCHASER OF EXPIRATION RECORDS OF AN INSURANCE AGENCY.—The plaintiff and the defendant were formerly partners engaged in business as general insurance agents. Upon dissolution of the firm the plaintiff purchased all the assets from the receiver including a valuable record of the expiration dates of various policies. Subsequently the defendant, in his efforts to secure the business of former customers of the firm, used copies of these expiration records made by him during the partnership's existence. The insurance companies, which the partnership had served as agent, also gave him valuable data derived from copies of these records which had been required of the firm by the companies. The plaintiff sought an injunction alleging the infringement of his exclusive property rights. *Held*, that the plaintiff was entitled to an injunction and an accounting of all business obtained by use of the copies made by the defendant; but that the defendant was privileged to use the information furnished him by the insurance companies. *Chamberlain v. Hemingway* (1921) 97 Conn. 156, 115 Atl. 632.

The good will of the business having been expressly omitted from the assets sold, the privilege of either partner to re-enter business for himself and to solicit former customers of the partnership is unquestioned. *Cottrell v. Babcock Mfg. Co.* (1886) 54 Conn. 122, 6 Atl. 791; *Williams v. Farrand* (1891) 88 Mich. 473, 50 N. W. 446; cf. *Trego v. Hunt* [1896, H. L.] A. C. 7. The difficult problem presented by the principal case is to determine the legal relations created by the sale of the expiration records. Did the plaintiff obtain by his purchase only the bare physical chattels with the privilege of using the information contained therein, or did he get in addition thereto a right that the defendant refrain from using this information, unless derived from sources independent of the records? Was his privilege of user an exclusive privilege? It is fairly well established that a person expending both labor and money in accumulating information will be protected in equity from the piracy of others. *International News Service v. Associated Press* (1918) 248 U. S. 215, 39 Sup. Ct. 68; *Wintler Abstract and Loan Co. v. Sears* (1919) 108 Wash. 461, 184 Pac. 309; see COMMENTS (1919) 28 YALE LAW JOURNAL, 387; NOTES (1919) 67 U. PA. L. REV. 191. The principle has been stated to be that "one shall not reap where one has not sown." *International News Service v. Associated Press*, *supra*. Thus, it has been held that stock quotations are property and are entitled to the protection of the law. *Hunt v. New York Cotton Exchange* (1907) 205 U. S. 322, 27 Sup. Ct. 529. And an abstract company which permitted its abstract books to pass to another by foreclosure sale was held to have no privilege to use photographic copies which it made of the books before the sale took place. *Wintler Abstract & Loan Co. v. Sears*, *supra*; see COMMENTS (1920) 29 YALE LAW JOURNAL, 348. The courts have gone so far as to hold that a rival news syndicate could not use the news gathered by the agents of the Associated Press even after it had been published on bulletin boards by members of the latter organization. *International News Service v. Associated Press*, *supra*. Under the doctrine of these cases the partnership had the exclusive privilege of using the data contained in the expiration records. The plaintiff, by virtue of his purchase of the records, succeeded to this exclusive privilege. Especially is this true in his relation to the defendant who stands in the position of vendor to the plaintiff. Any use that the defendant might make of this information, if obtained directly or indirectly from the partnership records, would be in derogation of his grant, and would reduce the value of the subject-matter of the

sale. See *Wintler Abstract & Loan Co. v. Sears, supra*. Inasmuch as the memoranda furnished the defendant by the insurance companies came originally from the partnership books, it seems that the court should have enjoined the defendant from employing it in competition with the plaintiff.

PROXIMATE CAUSE—WRONGFUL DEATH—SUICIDAL MANIA RESULTING FROM MENTAL AND PHYSICAL TORTURE.—The defendant officers of the law, without a warrant, held the plaintiff's intestate *incommunicado* in a room of the Department of Justice Building for two months during which they subjected him to "physical and mental torture" for the purpose of securing information of anarchistic operations. In a fit of suicidal despondency, he threw himself out of a fourteenth story window and was killed. His administratrix brought an action for damages against the Attorney-General and others. Held, that as the suicide of the intestate operated to break the chain of causal connection between the act and the death, there could be no recovery. *Salsedo v. Pahner et al.* (Dec. 14, 1921) U. S. C. C. A. 2d, Oct. Term, 1921, No. 59.

The general effect of suicide upon causal connection seems to be that an action can be maintained only where the suicide results from an uncontrollable influence or is committed in a delirium or frenzy caused by the defendant's act. *Brown v. American Steel & Wire Co.* (1909) 43 Ind. App. 560, 88 N. E. 80; *Daniels v. New York, etc. Ry.* (1903) 183 Mass. 393, 67 N. E. 424. The instant case holds flatly that such a state of irresponsibility or "suicidal mania" was not a natural result of mental or physical torture and could not have been reasonably anticipated. This seems to be the federal rule. *Scheffer v. Railroad* (1881) 105 U. S. 249. There is a growing tendency to hold that the test of reasonable anticipation of harm should merely determine the existence of the negligence and once that is established the tort-feasor should be held responsible for all proximate and natural results. *Watts v. Evansville Ry.* (1921, Ind.) 129 N. E. 315; *In re Polemis and Furness, Withy & Co.* [1921, C. A.] 3 K. B. 560. Where, as in the instant case, there is a wilful tort, some courts strongly incline to hold the wrongdoer liable for all proximate consequences, whether probable or not. *Wyant v. Crouse* (1901) 127 Mich. 158, 86 N. W. 527; see Jeremiah Smith, *Legal Cause in Actions of Tort* (1912) 25 HARV. L. REV. 231, 242-247. Suicide in circumstances similar to the instant case is not a bar to recovery for the death in actions brought under the Workmen's Compensation Act. *Standard Ins. Co. v. Sponatski* (1915) 220 Mass. 526, 108 N. E. 466; *Marriott v. Maltby Main Colliery Co.* (1920, C. A.) 124 L. T. R. 489. It has been suggested that in compensation cases the test of probability is not applicable even in jurisdictions which apply that test in actions grounded upon negligence. *Milwaukee v. Industrial Commission* (1915) 160 Wis. 238, 151 N. W. 247; see also *Fiarenzo v. Richards Co.* (1919) 93 Conn. 581, 107 Atl. 563. Yet in both situations the problem is the same—namely, is there such a relation of cause and effect as the law will recognize? In its decision in the principal case the court relied solely upon the *Scheffer* case, *supra*, in which recovery was denied where the intestate, becoming despondent over his failure to recuperate from injuries received eight months before in a railroad accident, committed suicide. The instant case seems distinguishable not only in that it involved a wilful tort but that the suicide was contemporaneous with the wrongful act. The *Scheffer* case has been criticized as "hardly reconcilable with the current of authority" on this subject. See Beale, *The Proximate Causes of an Act* (1920) 33 HARV. L. REV. 633, 645. Upon its exceptionally strong facts the instant case might well have been decided otherwise. However, a justification for the decision may perhaps be found in the necessity for a "pragmatic" solution of these questions in causal connection. See Cardozo, J., in *Bird v. St. Paul Ins. Co.* (1918) 224 N. Y. 47, 52, 120 N. E. 86, 87. For a further discussion of causal connection as applicable to similar cases, see (1921) 31 YALE LAW JOURNAL, 102.

QUO WARRANTO—SCOPE OF ACTION—NOT AVAILABLE AS WRIT OF REVIEW.—The defendant drainage district, pursuant to a decree of the circuit court extending its boundaries, included the lands of the relators. An information in the nature of a *quo warranto* was instituted alleging that the defendant had unlawfully exceeded its franchise and praying judgment of ouster. *Held*, that the action would not lie. *State, ex rel. Manion, v. Albany Drainage District* (1921, Mo.) 234 S. W. 339.

An information in the nature of a *quo warranto* is employed to-day in three classes of cases: (1) Against public officers in determining disputed questions of right to hold public office; (2) against private corporations as the appropriate means of testing the right to exercise corporate franchises and as the proper corrective for misuser, nonuser, or abuse of such franchise; (3) against municipal corporations to determine the title by which such bodies exercise their franchise and to correct existing usurpations. High, *Extraordinary Legal Remedies* (3d ed. 1896) chs. 14, 15, 16. In any case, it will lie only for the redress of grievances in which the public has an interest, although incidental to the relator's own injury. *People, ex rel. Samuel, v. Cooper* (1891) 139 Ill. 461, 29 N. E. 872; Spelling, *Injunctions and Other Extraordinary Remedies* (2d ed. 1901) sec. 1773. An extraordinary remedy, it is exclusive and not available on behalf of a private relator where the grievance may be redressed by any other action, legal or equitable. *People v. Hillsdale Turnpike Co.* (1807, N. Y.) 2 John. 190; *Commonwealth, ex rel. Hunter, v. Smail* (1913) 238 Pa. 106, 85 Atl. 1088; see COMMENTS (1908) 18 YALE LAW JOURNAL, 58. Where another remedy for the redress of the grievance is provided by statute, unless it is clearly shown that the statutory method is to be exclusive, the tendency is to hold that *quo warranto* will also lie. High, *op. cit.* sec. 617 a. Its issuance rests in the discretion of the court. *Att'y-Gen'l, ex rel. Mann, v. City of Methuen* (1921, Mass.) 129 N. E. 662; *People v. City of Le Roy* (1920) 293 Ill. 278, 127 N. E. 695. For the Missouri rule see *State, ex rel. McAllister, v. Cupples Power Co.* (1920) 283 Mo. 115, 223 S. W. 75. Consequently, it may be refused when the petitioner has been guilty of laches or a waiver or estoppel can be shown. See *State, ex rel. Independent School Dist., v. Hall* (1921, Iowa) 181 N. W. 633. In the instant case, the information disclosed no grievance in which there was a substantial public interest and the relator had another full and complete legal remedy. The court considered a drainage district as in effect a municipal corporation and followed the usual rule in refusing to employ *quo warranto* to pass upon the irregular or improper exercise of recognized powers. *State v. City of Lyons* (1871) 31 Iowa, 432; *Price v. County School Trustees* (1917, Tex. Civ. App.) 192 S. W. 1140. Furthermore, where the lower court had proper jurisdiction, *quo warranto* cannot be invoked as a writ of review. *State, ex rel. Cole, v. Norborne Land Drainage District Co.* (1921, Mo.) 234 S. W. 344; *People, ex rel. Cash, v. Wells* (1920) 291 Ill. 584, 126 N. E. 575.

RESTRAINT OF TRADE—CLAYTON ACT—RESTRICTING USE OF CONTAINER IN SALE OF CONTENTS—TITLE REMAINING IN VENDOR.—The plaintiff sold acetylene gas in tanks to customers under a contract retaining title to the tanks in itself, requiring an initial deposit and return of the tanks when empty, in exchange for which it agreed to supply a filled tank for the price of the gas. The defendant, engaged in a similar business, was soliciting the plaintiff's customers and refilling the plaintiff's tanks with its own gas. The plaintiff sought an injunction and the defendant claimed that the tank contracts were in violation of sec. 3 of the Clayton Act. Act of Oct. 15, 1914 (38 Stat. at L. 730). *Held*, that the method of dealing with the tanks was not in violation of the Clayton Act. *Auto Acetylene Light Co. v. Prest-o-Lite Co.* (1921, C. C. A. 6th) 276 Fed. 537.

A reasonable restriction on the use of *real* property in a contract of lease or sale is enforceable. *Cowell v. Spring Co.* (1879) 100 U. S. 55; 10 Rose's Notes,

836; see 3 Williston, *Contracts* (1920) sec. 1642. The use of personalty after sale cannot be restricted even though the article is patented. *Motion Picture Patents Co. v. Universal Film Co.* (1917) 243 U. S. 502, 37 Sup. Ct. 416. But before the Clayton Act conditions might be imposed in a lease of personalty unless the lessor was illegally dominant in its particular field of trade. See *United States v. United Shoe Machinery Co.* (1918) 247 U. S. 32, 55, 38 Sup. Ct. 473, 482; see COMMENTS (1918) 27 YALE LAW JOURNAL, 1060; see also *Quincy Oil Co. v. Sylvester* (1921, Mass.) 130 N. E. 217. Under section 3 of the Act, if the lease restricts the use of competitors' wares, goods, or merchandise so as to substantially lessen competition, the restrictive condition is void. *United States v. United Shoe Machinery Co.* (1916, E. D. Mo.) 234 Fed. 127, (1920, E. D. Mo.) 264 Fed. 138. The inherent or potential viciousness of the contract or lease itself, not its present operative effect, is the test as to whether it may substantially lessen competition. The purpose of the Act is to prevent rather than cure. See *Standard Fashion Co. v. Magrane Houston Co.* (1918, D. Mass.) 254 Fed. 493, 499; see *United States v. Shoe Machinery Co.* (1916, E. D. Mo.) 234 Fed. 127, 150. This interpretation differs from that of restraint of trade under the Sherman Act in that no power to restrain need be shown, i. e., the size of the concern making the lease or contract has no effect. Cf. opinion of Brown, J., in *Standard Fashion Co. v. Magrane Houston Co.* (1919, C. C. A. 1st.) 259 Fed. 793, 801 (judgment must be based on evidence of effect and on a reasonable belief that there is a dangerous probability of lessening competition). It has been held that a trading stamp concern may by contract restrict subscribers to giving out stamps to customers only and enjoin third parties from using them for their own advertising; *Sperry & Hutchinson Co. v. Fenster* (1915, E. D. N. Y.) 219 Fed. 755; that a manufacturer of syrup may restrict its bottling to licensed bottlers; see *Coca-Cola Co. v. J. G. Butler & Sons* (1916, E. D. Ark.) 229 Fed. 224, 232; that a publishing company, having built up a staff of newsboys throughout the country, may restrain their handling other publications even after sale to district agents. *Pictorial Review Co. v. Curtis Publishing Co.* (1917, S. D. N. Y.) 255 Fed. 206 (the boys remained Curtis agents even though title to the magazine had passed to district agent). But a restriction not to handle other patterns in a two-year contract of sale was held void. *Standard Fashion Co. v. Magrane Houston Co.* *supra*. Yet leasing a gas pump on condition that only the lessor's gas be used in the pump was legal. *Canfield Oil Co. v. Fed. Trade Com'n.* (1921, C. C. A. 6th) 274 Fed. 571; *Sinclair Oil Co. v. Fed. Trade Com.* (1921, C. C. A. 7th) 276 Fed. 686. In the instant case there clearly was not a sale of the container. No restriction as to the use of a competitor's gas was imposed except that of not refilling the tank with another's gas. The dominant part of the transaction was the sale of the gas. Certainly a manufacturer need not supply a rival with containers by force of the Clayton Act unless he contracts to do so. Nor can such an arrangement substantially lessen competition. It will be of interest to see the future development of the term "substantially lessen competition." It is the teeth of section three of the Act. The tendency seems to be to give it a stricter interpretation than that applied to a reasonable restraint of trade under the Sherman Act. See NOTES (1917) 30 HARV. L. REV. 72.

SET-OFF AND COUNTERCLAIM—CHOSE IN ACTION ASSIGNED BEFORE MATURITY SUBJECT TO SET-OFF FOR CLAIM AGAINST ASSIGNOR ACQUIRED BEFORE NOTICE OF ASSIGNMENT.—The defendant made a contract to pay one Nolan, after one year, a minimum license fee for certain manufacturing privileges. Before the expiration of the year, Nolan assigned the contract to the plaintiff, who brought suit to recover the amount due. The defendant pleaded, as a set-off, a claim he held against Nolan on another contract acquired before notice of the assignment. *Held*, that the set-off should be allowed. *Nordsell v. Neilsen* (1921, Minn.) 184 N. W. 1023.

Not existing at common law, the right of set-off is purely statutory. Loyd, *The Development of Set-off* (1916) 64 U. PA. L. REV. 541. The courts are in considerable confusion, however, as to the extent to which various statutes allow the defendant to set off claims against the assignor of a chose in action in a suit by the assignee. The decisions may be conveniently grouped into three classes. (1) The New York rule is strict in requiring that both claim and set-off must be due and payable at the time of the assignment. The New York statute provides that a claim may be set-off if it existed at the time of the assignment and might have been allowed against the assignor while the contract belonged to him. C. P. A. sec. 267; *Martin v. Kunzmüller* (1867) 37 N. Y. 396; *Michigan Savings Bank v. Miller* (1906, Sup. Ct.) 96 N. Y. Supp. 568; *Harrisburg Trust Co. v. Shufeldt* (1898, C. C. A. 9th) 87 Fed. 669. Thus, under the Michigan statute, which is similarly worded, a creditor cannot set off a mature claim against the assignee of a chose in action which was not due at the time of the assignment. *Bradley v. Thompson Smith's Sons* (1894) 98 Mich. 449, 57 N. W. 576; see *Cosmopolitan Trust Co. v. Rosenbush* (1921, Mass.) 131 N. E. 858. (2) California represents the other extreme. Section 1459 of the Civil Code of California provides that the assignee of a contract takes it "subject to all the defenses existing in favor of the maker at the time of the endorsement," but section 368 of the Code provides that "the action of the assignee is without prejudice to any defense existing at the time of or before notice of the assignment." The latter section is controlling and the Supreme Court has gone so far as to hold that the claim may be set off even if not mature at the date of the notice, so long as it is due at the commencement of the action. *St. Louis Nat. Bank v. Gay* (1894) 101 Calif. 286, 35 Pac. 876; *contra, Stadler v. First Nat. Bank of Helena* (1899) 22 Mont. 190, 56 Pac. 111 (holding the first section controls and applying the New York rule). (3) Many statutes (e. g., Nev. Civil Pract. Act, sec. 46, Rev. Laws, 1912, sec. 4988) contain only the latter section of the California statute and this is interpreted, quite logically, to mean that the defendant may set off any claim which had matured before notice of the assignment. *Hibernian Banking Assoc. v. City of Chicago* (1913) 178 Ill. App. 138; *First Nat. Bank v. Nye County* (1914) 38 Nev. 123, 145 Pac. 932. The instant case is another illustration of this. As a matter of abstract justice, it seems fair to extend the doctrine even as far as the California view. The mere notice of the assignment ought not to destroy any right which the defendant has acquired against the assignor prior to the notice, even though that right is not immediately enforceable at that time. This has been recognized by courts of equity when a debtor is allowed to set off unmatured claims against the assignee of an insolvent creditor. See Clark, *Set-off in Cases of Immature Claims in Insolvency and Receivership* (1920) 34 HARV. L. REV. 178.

SPECIFIC PERFORMANCE OF CONTRACTS CONTAINING A PROVISION TO ARBITRATE.—A contract between A and B gave A the right to dig a tunnel. The plans for the tunnel were to be submitted to B for his approval. In case of disagreement an umpire was to be called, and if the parties could not agree upon an umpire, one X was to act as umpire. A submitted plans to B who refused to co-operate and threatened to obstruct construction. A thereupon submitted the plans to X, who approved of them, and then A filed a bill asking that B be enjoined from obstructing the construction. *Held*, that the agreement to arbitrate was subsidiary and incidental and that the injunction be granted, since the remedy at law was inadequate. *Hydraulic Power Co. v. Pettebone-Cataract Paper Co.* (1921, App. Div.) 191 N. Y. Supp. 12.

Equity will usually not grant specific performance of contracts for valuation or arbitration, even though the legal remedy is inadequate. Fry, *Specific Performance* (4th ed. 1903) sec. 356; 5 Pomeroy, *Equity Jurisprudence* (4th ed.

1919) sec. 2180. It will not compel the discretionary act of choosing an arbitrator or valuer, since the appointee may refuse to act. Hayes, *Specific Performance of Contracts for Arbitration or Valuation* (1916) 1 CORN. L. QUART. 225. In addition, the defendant acting because of compulsion would not be likely to appoint a fair arbitrator or appraiser. Neither will the court appoint one and enforce his decision, nor itself appraise, as either would be enforcing a contract not made by the parties. *Southern Lumber Corporation v. Doyle* (1912, E. D. S. C.) 204 Fed. 829. But exceptions to this rule are recognized. See 8 Ann. Cas. 664, note; L. R. A. 1917 C, 813, note. Where the clause as to arbitration or valuation relates to some subsidiary or incidental term, specific performance will be granted. Thus equity decreed specific performance of a contract to sell an estate for £24,000, although containing a stipulation that furniture (valued at about £2,000) should be appraised by valuers mutually agreed upon. *Richardson v. Smith* (1870) L. R. 5 Ch. App. 648. The court itself has likewise appraised the value of property under an agreement to buy or sell, on the ground that the valuation was a subsidiary part of the contract. *Castle Creek Water Co. v. City of Aspen* (1906, C. C. A. 8th) 146 Fed. 8; *Town of Bristol v. Bristol & Warren Water Works* (1896) 19 R. I. 413, 34 Atl. 359. For the same reason it has appraised the rent to be paid under a renewal lease. *Grosvenor v. Flint* (1897) 20 R. I. 21, 37 Atl. 304; see *Williams v. Cow Gulch Oil Co.* (1921, C. C. A. 8th) 270 Fed. 9. It is submitted, however, that in the last two instances valuation was a most important element in the contract, and that the purchase price or sum to be paid was not a mere subsidiary part. The court, by appraisal, made a new contract for the parties. But such practice may be preferable to abandoning the plaintiff to whatever damages a jury might assess. In cases where the lessor, contrary to his agreement, refused to appoint a valuer of improvements made by the lessee, it has been held grossly inequitable to allow the lessor to appropriate the improvements without payment. *Hug v. Van Burkleo* (1874) 58 Mo. 202; see *Castle Creek Water Co. v. City of Aspen*, *supra*. The alternate provision in the instant case, that X act as umpire, if no other could be agreed upon, and X's willingness to act, appear at first glance to make this a simple case for equity jurisdiction. But as B refused to participate, X could not "umpire," and the actual contract of the parties could not be enforced, due, however, to B's wrongful act. The decree of the court in granting relief to A is sound, and in accord with an increasing number of cases. The application of the New York arbitration law does not enter into the decision of this case. Laws, 1920, ch. 275. As to its effect, see Cohen, *Commercial Arbitration and the New York Statute* (1921) 31 YALE LAW JOURNAL, 147.

TAXATION—INHERITANCE TAX—TRANSFER INTENDED TO TAKE EFFECT AT DONOR'S DEATH.—The decedent during his life-time created certain trust estates of which the income was to be paid, beginning at the date of creation of the trusts, to certain named beneficiaries for their lives, the corpus to be variously distributed thereafter. The decedent retained a power of revocation of the trusts. The tax commissioners sought to tax the trust deeds under the transfer tax law on the ground that there had been a transfer of property intended to take effect in possession or enjoyment at the death of the donor. N. Y. Cons. Laws, 1909, ch. 60, sec. 220 (4). *Held*, that the trust deeds were not liable to such taxation. *In re Cochran's Estate* (1921, Surro.) 190 N. Y. Supp. 895.

When a donor alienates the corpus of an estate and reserves the income thereof to himself during his life, giving a life estate in the income to some other person thereafter, the transfer is held to take effect in possession or enjoyment at the death of the donor. *People v. Shaffer* (1920) 291 Ill. 142, 125 N. E. 887; cf. *Nickel v. State* (1919) 43 Nev. 12, 185 Pac. 565; *In re Bottomley's Estate* (1920) 92 N. J. Eq. 202, 111 Atl. 605. But such a transfer, though not taking effect in

enjoyment until the donor's death, nevertheless effects a transfer at the time of the alienation of the corpus, and its status is determined by the laws existing at that time. *In re Brix's Estate* (1919) 181 Calif. 667, 186 Pac. 135. If the donor also retains a power of revocation of the corpus, or its income, no transfer takes place until the death of the donor. *In re Allis' Will* (1921, Wis.) 184 N. W. 381; *contra*, *In re Murphy's Estate* (1920) 182 Calif. 740, 190 Pac. 46. In such a case the law existing at the time of the donor's death controls the status of the transfer. *Matter of Dana Co.* (1915) 215 N. Y. 461, 109 N. E. 557; *Gleason & Otis, Inheritance Taxation* (1919) 131. When the corpus of an estate is alienated, and the alienor retains only a power of revocation, but does not reserve the income, permitting it instead to flow at once to the life beneficiary, then immediate enjoyment vests in the beneficiary, and if in fact the estate is not revoked, the transfer takes effect in possession or enjoyment at the time of the alienation of the corpus. It is therefore not taxable as a transfer intended to take effect at the death of the donor. *People v. Northern Trust Company* (1919) 289 Ill. 475, 124 N. E. 662; (1920) 29 YALE LAW JOURNAL, 464. But if the alienor of the corpus retains a substantial control over the corpus and its income, and not merely a power of revocation, the transfer takes effect in possession or enjoyment at the transferor's death, even though he permits benefits at once to flow to the transferee. *Matter of Bostwick* (1899) 160 N. Y. 489, 55 N. E. 208. In any given instance of this class of cases a clear analysis of the actual facts constituting the transfer of benefits or the retention of control by a donor should be more important in determining the issue than the unanalytical application of principles necessarily tending to involve the metaphysical definition of transfer. But perhaps the following generalizations may be drawn from the reasoning of the cases: In determining when a transfer is intended to take effect in possession or enjoyment, the courts look to two things,—the flow of benefits to the transferee, and the control retained by the transferor. If no control is retained, or only a power of revocation, the transfer is intended to take effect when the flow of benefits to the transferee begins. If a larger degree of control is retained, the transfer is said to take effect at the donor's death, whether the flow of benefits begins then or earlier.

TORTS—CONSPIRACY NOT TO INSURE—MALICIOUS MOTIVE.—The plaintiff, a retail grocer, had a dispute with an insurance adjustment company, which was settled in a legal action. In order to punish the plaintiff for not settling the matter outside of court, the defendant adjustment company and the agents of other insurance companies refused to write insurance upon the plaintiff's stock. The plaintiff sued for resulting damage. The intermediate court held that malice alone would not support the action. *Held*, that a conspiracy or combination, when actuated by malice, is actionable and that damages should be awarded. *Griffin v. Palatine Ins. Co.* (1921, Tex. Com. of App.) 235 S. W. 202.

The troublesome word "malice" has been used in the instant case to mean malevolence, and not mere absence of excuse. The court seems to be on dangerous ground in stating that an act, legal when done by an individual, becomes unlawful when done by several persons acting together. *Allen v. Flood* [1898, H. L.] A. C. 1; but see (1911) 33 L. R. A. (N. S.) 1034, 1038 note. A conspiracy is merely a combination of two or more persons, in concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Pettibone v. United States* (1893) 148 U. S. 197, 13 Sup. Ct. 542; but see *Cornellier v. Haverhill Shoe Mfg's Assoc.* (1915) 221 Mass. 554, 109 N. E. 643. Thus if the act itself is legal, a conspiracy to do this act becomes unlawful only if the defendants use more than persuasion on each other. The conspiracy to do an illegal act, or a legal act by unlawful means, should merely operate to increase damages and not affect the question of the tort itself. If maliciousness is to be the crux of the decision, the court should

be willing to decide that the act of the defendant, if done maliciously, is actionable whether done by an individual or by a combination of individuals. Had one of the defendants in the instant case been the sole agent for all the companies, the court would have been forced to change its position. There is some authority for holding that a malicious act, injuring a person in his business, is actionable. *Tuttle v. Buck* (1909) 107 Minn. 145, 119 N. W. 946; Ames, *Tort because of Wrongful Motive* (1905) 18 HARV. L. REV. 411; but see Jeremiah Smith, *Crucial Issues in Labor Litigation* (1907) 20 HARV. L. REV. 251, 451. Malice as the deciding factor will bring law and ethics into closer relation. Ames, *Law and Morals* (1908) 22 HARV. L. REV. 97. It is but an extension of the rule applied in malicious prosecution and similar cases, and should undoubtedly be encouraged.

WILLS—REVOCATION BY SUBSEQUENT MARRIAGE.—A testator provided in his will that, in the event of his being married at the time of his death, his widow should have a certain bequest. He later married and died. His widow contested the probate under a statute providing that marriage should be deemed a revocation of a prior will. Hurd's Ill. Rev. Sts. 1919, ch. 39, sec. 10. *Held*, (two judges dissenting) that the will had been revoked. *Gillmann v. Dressler* (1921, Ill.) 133 N. E. 186.

The ecclesiastical courts incorporated in the common law the civil-law principle that marriage and birth of issue revoked a husband's prior will. But whether the revocation resulted as a "presumption of fact" or "an inference of law" was in confusion. Under the former view, based on the presumption that the change of circumstance had caused the testator to alter his intent, a provision in the will for the wife and child prevented revocation. *Lugg v. Lugg* (1697, Eccl.) 2 Salk. 592; *Kenebel v. Scrafton* (1802, K. B.) 2 East, 529. Other courts treated the revocation as arising from an implied condition annexed to the will. *Lancashire v. Lancashire* (1792, K. B.) 5 T. R. 49. In such an event the testator's purpose to have the will remain valid was immaterial. *Marston v. Fox* (1838, Exch.) 8 Adol. & El. 14. Then, by statute, marriage alone was made an absolute revocation of a prior will. (1837) 7 Wil. IV & 1 Vict. c. 26, sec. 18. This provision was generally incorporated in many American statutes, and Illinois and some other states reached the same result without legislation after the wife became an heir. *Tyler v. Tyler* (1857) 19 Ill. 151; *contra*, *Vanek v. Vanek* (1919) 104 Kan. 624, 180 Pac. 240. The early difference of opinion in England as to the conclusiveness of the implication was also reflected in decisions in this country. The majority have considered the effect of marriage to be an absolute revocation. *Francis v. Marsh* (1904) 54 W. Va. 545, 46 S. E. 573. On the other hand Illinois adopted the minority view, allowing the testator's intent to rebut the presumption. *Tyler v. Tyler*, *supra*; see also *Wheeler v. Wheeler* (1850) 1 R. I. 364. This was deemed to have been so incorporated into the state statutory law that a will, providing for a bequest upon marriage to a designated fiancée, was not considered annulled by the subsequent marriage. *Ford v. Greenawalt* (1920) 292 Ill. 121, 126 N. E. 555; (1920) 34 HARV. L. REV. 95. The court, however, refused to uphold the presumption theory to the extent of going outside of the will to find the intention of the testator. *Wood v. Corbin* (1921) 296 Ill. 129, 129 N. E. 553; (1921) 35 HARV. L. REV. 95. The instant case held that a will making provision for the contingency of some indefinite person surviving the testator as widow does not reveal an intent which will rebut the statutory presumption of revocation. Thus the majority of the court declined to follow the presumption theory to its logical conclusion and seemed to realize that the definiteness which results from a strict construction of such a statute is more desirable than carrying out the testator's intent. Both a certainty of result and respect for testamentary intent can easily be attained by a statute expressly excepting an instrument making provision for a future wife from otherwise absolute revocation. See *In re Adler's Estate* (1909) 52 Wash. 539, 100 Pac. 1019.