

RECENT CASE NOTES

ARBITRATION AND AWARD—JURISDICTION OF ARBITRATORS—CONSTRUCTION OF SECTION THREE OF NEW YORK ARBITRATION LAW.—The question was submitted to three arbitrators “whether or not [the] 500 cases . . . of butter . . . are a good delivery *per* terms of said contracts”. The contracts provided that an inspector’s certificate as to quality should be final. The defendant attempted to raise the question of quality at the arbitration. Over the objection of the plaintiff that this was not within the terms of the submission, the chairman of the arbitration board ruled that the certificate of quality was not final; whereupon the plaintiff and one arbitrator withdrew. The two remaining arbitrators took testimony and made an award in favor of the defendant. The lower court vacated the award, and the defendant appealed. *Held*, that the judgment be affirmed under N. Y. C. P. A., 1924, sec. 1453, and under the New York Arbitration Law, sec. 3. *Bullard v. Grace* (1925) 240 N. Y. 388, 148 N. E. 559.

The New York Arbitration Law provides that a party aggrieved by the failure of another to perform a contract to arbitrate or to go through with a submission once made, may petition the Supreme Court, and the Court, upon being satisfied [1] “that the making of the contract or [2] submission or [3] the failure to comply therewith is not in issue”, shall order the arbitration to proceed “in accordance with the terms of the contract or submission”. Cahill’s N. Y. Cons. Laws, 1923, ch. 2, sec. 3. The court in the instant case construed this section as reserving to a party to a submission the right to a judicial hearing on any of these three excepted points before such party should be ordered to proceed with the arbitration. To determine whether there has been a failure to comply with the terms of the submission agreement, a court must obviously determine what questions have actually been submitted to the arbitrators. These questions, as determined by the court, are the only ones that the arbitrators are authorized to decide. *Boston Water Co. v. Gray* (1843) 47 Mass. 131; *In re Kelley* (1925) 240 N. Y. 74, 147 N. E. 363. But where the court has not previously interpreted the terms of the submission agreement, it becomes necessary for the arbitrators themselves to do so, in order to determine what questions have been submitted. *Willesford v. Watson* (1870) L. R. 8 Ch. App. 473; *cf. In re Kelley, supra*. Decisions of law or fact made by the arbitrators are not subject to judicial review unless an error appears on the face of the award, *i. e.*, unless the award is *clearly unreasonable*. *Hatch v. Cole* (1924) 128 Wash. 107, 222 Pac. 463; *In re Burke* (1908) 191 N. Y. 437, 84 N. E. 405; *Brodhead Co. v. Davis Co.* (1924) 97 W. Va. 165, 124 S. E. 600. From the standpoint of policy it would seem desirable that this rule should apply also to the decision made by the arbitrators as to the scope of the submission; but the decisions appear to be generally in accord with the instant case to the contrary. *Halstead v. Scaman* (1880) 82 N. Y. 27; *Adams v. Adams* (1835) 8 N. H. 82; *Piercy v. Young* (1879) 14 Ch. Div. 200. Yet the possibility of a judicial hearing before as well as after the arbitration clearly increases possible delays and expenses of litigation, whereas the recognized purpose of the Arbitration Law was to diminish them. It seems impossible to believe that the rights of the parties would be prejudiced if a judicial hearing as to the scope of a submission could be had only after arbitration.

BILLS AND NOTES—WANT OF CONSIDERATION—BURDEN OF PROOF.—In a suit by the plaintiff, as payee and holder of a promissory note made by the

defendant, the latter alleged that the note was without consideration. The jury was charged that under the Negotiable Instruments Law, secs. 24, 28, (Conn. Gen. Sts. 1918, ch. 225, secs. 4382, 4386) the burden of proving lack of consideration was on the defendant. To this the defendant excepted. Judgment was rendered for the plaintiff, and the defendant appealed. *Held*, that the judgment be affirmed. *Kessler v. Valerio* (1925, Conn.) 129 Atl. 788.

"Absence or failure of consideration is matter of defence as against any person not a holder in due course. . . ." Negotiable Instruments Law, sec. 28. To apply this section the court necessarily assumed that the payee was *not* a holder in due course. It thus construed the section as a provision regarding burden of proof. The jury having found for the plaintiff, however, it is evident that, for the purpose of this case, the payee *was* a holder in due course, the other requisites being present. It seems, therefore, that the court was in error in applying section 28 which is in point only as against a holder *not* in due course. Had the court taken the position, apparently not passed on in Connecticut, that a payee cannot be a holder in due course, the foregoing would not apply. The better view, however, would seem to be that a payee may become a holder in due course. *Liberty Trust Co. v. Tilton* (1914) 217 Mass. 462, 105 N. E. 605; L. R. A. 1915B, 144; *Drumm Construction Co. v. Forbes* (1922) 305 Ill. 303, 137 N. E. 225; (1918) 28 YALE LAW JOURNAL, 197, 710; *contra: Vander Ploeg v. Van Zuuk* (1907) 135 Iowa, 350, 112 N. W. 807; (1908) 13 L. R. A. (N. S.) 490. In view of the difficulty of applying section 28 without first assuming the point in issue, it seems probable that it should not be interpreted as asserting a rule as to burden of proof. The section might reasonably be construed as being merely a substantive declaration. See *contra: Brannon, The Negotiable Instruments Law* (3d ed. 1920) 97; 1 Williston, *Contracts* (1920) sec. 108. This construction is the more plausible since the probable purpose of the latter part of the section was to resolve doubt as to whether partial failure, whether liquidated or not, would constitute a partial defence. Crawford, *The Negotiable Instruments Law* (3d ed. 1908) 43. It seems doubtful that there is any controlling reason of policy for placing the burden of proof on the defendant, it being a sufficient recognition of the negotiable character of the instrument, in a suit between immediate parties, that it be deemed *prima facie* to have been issued for a valuable consideration. Sec. 24. The conflict existing on this point before the uniform act has been continued. The construction adopted in the instant case has considerable support. *Piner v. Brittain* (1914) 165 N. C. 401, 81 S. E. 462; *Shaffer v. Bond* (1917) 129 Md. 648, 99 Atl. 973. But see *contra* on the general question: *Lombard v. Bryne* (1907) 194 Mass. 236, 80 N. E. 489; *Ginn v. Dolan* (1909) 81 Ohio, 121, 90 N. E. 141; (1925) 35 A. L. R. 1370, note.

CARRIERS—EXTENT OF RECOVERY FOR PARTIAL LOSS OF INTERSTATE BAGGAGE.—The plaintiffs, interstate passengers, checked a trunk worth \$675 without declaring its value. There was a partial loss of \$111.30, and suit was brought to recover this amount. Under tariffs filed with the interstate Commerce Commission, payment for the tickets included transportation of baggage not exceeding in value \$200 for both passengers—this sum, in the absence of a declaration of a greater value and payment of an additional charge, to be binding upon the passengers as the value of the baggage transported. *Held*, reversing the lower court, that the amount of recovery for partial loss is limited to such a proportion of the carrier's maximum responsibility (\$200) as the actual loss (\$111.30) bears to the actual value (\$675); *i. e.*, \$32.98. *Robidoux v. Chicago & N. W. Ry.* (1925, Neb.) 204 N. W. 870.

The effect of the decision in the instant case is to make the plaintiff a co-insurer for the excess above the agreed valuation. This is the settled rule in marine insurance. 2 Arnould, *Marine Insurance* (11th ed. 1924) 1314. But it is believed that the rule there shows the influence of the law of general average. Under valued policy statutes, the valuation placed on property insured against fire, conclusive in case of a total loss, is set aside in assessing a partial loss, and serves merely as a limit of recovery. *Oppenheim v. Fireman's Fund Ins. Co.* (1912) 119 Minn. 417, 138 N. W. 777; *Sachs v. L. & L. Fire Ins. Co.* (1902) 113 Ky. 88, 67 S. W. 23. In the above cases the result was required by express statutory provisions, but the same result has been reached in a recent case in seeming contradiction to express words of the statute. *Columbia Real Estate and Trust Co. v. Royal Exchange Assurance* (1925, S. C.) 128 S. E. 865; see (1925) YALE LAW JOURNAL, 376. Where a part only of a shipment of goods is lost, and there has been an agreed valuation, some courts are in accord with the instant case in allowing only a proportional recovery. *Fielder v. Adams Express Co.* (1911) 69 W. Va. 138, 71 S. E. 99; *United States Express Co. v. Joyce* (1904, Ind.) 72 N. E. 865. Others treat the agreed valuation as fixing merely a limit of recovery, and allow full recovery for a partial loss up to such limit. *Visanska v. Southern Express Co.* (1912) 92 S. C. 573, 75 S. E. 962; *Central of Georgia Ry. v. Broda* (1914) 190 Ala. 266, 67 So. 437. Assuming, however, that the carrier's rates are based upon an expectation that actual values will be declared, undervaluation considered in reference to the totality of shipments handled by a carrier, will obviously operate unjustly as to the carrier, since, unless the rule of proportional recovery be applied, there will be a lessening of tariffs allocable to premiums, without a proportionate lessening in payments to be made on losses expected on such shipments. For the total expected losses are made up of both total and partial losses, whereas undervaluation under the non-proportional rule will result in a lessening of payments on the total losses only, although in every case undervaluation will lessen the tariffs to be paid. On the other hand, it is believed that the ordinary shipper understands such contracts as imposing responsibility on the carrier in any event up to the sum fixed, and under the rule that contracts limiting responsibility are to be construed strictly against the carrier, it would seem that these expectations should be realized. *Central of Georgia Ry. v. Broda*, *supra*. The court in the instant case felt bound by the decision of the United States Supreme Court in *Western Transit Co. v. Leslie* (1917) 242 U. S. 448, 37 Sup. Ct. 133. In that case the agreed valuation was on a unit basis ("value not to exceed \$100 per ton") and something less than a ton (actually worth \$271.38) had been lost. The court held that "the valuation clause fixes not an arbitrary limit of recovery, but a ratio"; but also that recovery should be "not more than \$100 a ton for each or any ton damaged or lost". (Italics ours). The language of the decision is clearly ambiguous, and another decision by the Federal Supreme Court will be needed to clarify the law on this point.

CONSTITUTIONAL LAW—DUE PROCESS—STATUTE INVALID FOR ALLOWING SUBSTITUTION OF FOREIGN EXECUTOR FOR DECEASED DEFENDANT.—In an action *in personam*, the defendant died pending suit, leaving no property in New York. The plaintiff moved to substitute the decedent's foreign executor, as authorized by the Decedent Estate Law, sec. 160, amended by N. Y. Laws, 1925, ch. 253. From judgment for the defendant, the plaintiff appealed. *Held*, that the order be affirmed, because the statute as amended violated the constitutional requirement of due process. *McMaster v. Gould* (1925) 240 N. Y. 379, 148 N. E. 556.

In the final analysis "due process" appears to be no more than "reasonable-

ness". COMMENTS (1925) 34 YALE LAW JOURNAL, 886. The statute in question seems to fulfill this requirement, for one of the most important functions of the probate courts is to settle all just claims against a decedent. 3 Schouler, *Wills, Executors and Administrators* (6th ed. 1923) sec. 1391. And although the original conception of jurisdiction, as the authority of the sovereign over territory in which the defendant is found, is still the standard test, there is to-day a growing acknowledgment that fair notice, when in conjunction with the operative facts giving rise to a cause of action, is the better test. COMMENTS (1925) 34 YALE LAW JOURNAL, 415. So it would seem that a contrary and more desirable result could have been reached in the instant case, unless the court is justified in its assumption that the ancient rule that the decedent's representative has no legal existence in another state because merely the statutory creature of the state of his appointment, can have no exception. But the very fact that the law of wills, executors and administrators was created and is governed by statute, should be sufficient reason to validate any reasonable changes in it which the legislature might care to make. And the ancient rule actually has many exceptions today. Thus an action *in rem* to foreclose a lien may be maintained against a foreign executor. *Holmes v. Camp* (1916) 219 N. Y. 359, 114 N. E. 841. Where a legatee sued the executor and other legatees to obtain a distribution of the estate, the foreign executor of a deceased non-resident legatee, being a necessary party, was joined as defendant. *Stone v. Demarest* (1902, 1st Dept.) 67 App. Div. 549, 73 N. Y. Supp. 903. An administrator appointed in one state may be sued in another for a debt owed by the intestate. *Evans v. Tatem* (1823, Pa.) 9 Serg. & R. 252; *contra: Fay v. Haven* (1841, Mass.) 3 Metc. 109. [on ground that it was not equitable to permit foreign representative to be sued when he could not himself sue. But New York by statute permits him to sue. 3 Bliss, N. Y. *Annotated Code* (6th ed. 1913) sec. 1836 (a)]. Where jurisdiction was obtained by service of summons within the state on a foreign executor who died thereafter, the action was continued against the foreign administrator with the will annexed, without further service. *Thorburn v. Mitchell* (1920, 1st Dept.) 193 App. Div. 174, 183 N. Y. Supp. 424. Moreover, in the instant case, there would seem to be sufficient privity between the decedent and his executor to constitute the entire matter but a single code cause of action. *Latine v. Clements* (1847) 3 Ga. 426; see Clarke, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817. Under the instant decision, due to the courts' clinging to the narrow, territorial notion of jurisdiction which seems out of harmony with the ever increasing interstate activity of to-day, the plaintiff is forced to the delay and expense of reinstituting his action in another state.

DIVORCE—RECOGNITION OF FOREIGN DECREES IN NEW YORK.—The defendant left his wife, the plaintiff, in Canada, which was the matrimonial domicile of the two, and obtained a divorce in Pennsylvania by substituted service. He remarried and established his domicile in New York. The plaintiff thereupon moved to New York and brought this action for divorce, naming the second wife as co-respondent. From a judgment for the plaintiff, the defendant appeals. *Held*, (two judges *dissenting*) that since the law of Canada would not recognize the Pennsylvania decree, the judgment be affirmed. *Dean v. Dean* (1925, 4th Dept.) 213 App. Div. 360, 210 N. Y. Supp. 695.

Where a divorce decree is based on substituted service in a state other than that of the domicile of the husband and wife or a state other than that of the last matrimonial domicile, a court of another state is privileged to question the validity of the decree. *Haddock v. Haddock* (1906) 201 U. S. 562, 26 Sup. Ct. 525; *Ransom v. Ransom* (1907, Sup. Ct. Spec. T.) 54 Misc.

410, 104 N. Y. Supp. 198, *aff'd* (1908, 1st Dept.) 125 App. Div. 915, 103 N. Y. Supp. 1143. The stand taken in the more recent New York cases in regard to decrees so awarded appears to be as follows: (1) Where the matrimonial domicile of the parties to the foreign decree was New York, the decree will not be recognized. *Bell v. Little* (1922, 4th Dept.) 204 App. Div. 235, 197 N. Y. Supp. 674; *O'Dea v. O'Dea* (1885) 101 N. Y. 23, 4 N. E. 110. (2) Where the matrimonial domicile was not New York: (a) If the defendant to the decree was a New York citizen at the time of the suit for the decree, the decree will not be recognized. See *Powell v. Powell* (1925, 1st Dept.) 211 App. Div. 750, 756, 203 N. Y. Supp. 153, 158; *Kaiser v. Kaiser* (1920, 1st Dept.) 192 App. Div. 400, 402, 182 N. Y. Supp. 709, 711; *cf. Campbell v. Campbell* (1895, N. Y. Sup. Ct. Gen. T.) 90 Hun, 233; *cf. contra: Hatch v. Hatch* (1921, N. Y. Sup. Ct. Spec. T.) 187 N. Y. Supp. 568. (b) If the defendant to the decree was not a New York citizen at the time of the suit and had not subsequently remarried, formerly the decree would be recognized. *Powell v. Powell, supra*; *cf. Percival v. Percival* (1905, 2d Dept.) 106 App. Div. 111, 94 N. Y. Supp. 303, *aff'd* (1906) 186 N. Y. 587, 79 N. E. 1114; *Hubbard v. Hubbard* (1920) 223 N. Y. 81, 126 N. E. 508; *contra: Matter of Caltabellotta* (1918, 4th Dept.) 183 App. Div. 753, 171 N. Y. Supp. 82. But under such circumstances the instant case applies the doctrine of *renvoi*,—i. e., the validity of the decree is made to depend upon the effect which would be given it by the state in which the defendant in the original suit was domiciled at the time of the suit. See COMMENTS (1921) 31 YALE LAW JOURNAL, 191. (c) Where the defendant to the decree, not a New York citizen at the time of the suit for the decree, remarries: (i) If the second spouse was a New York citizen at the time of the remarriage, formerly the decree would not be recognized. *Moe v. Moe* (1874, N. Y. Sup. Ct. Gen. T.) 2 Thomps. & C. 647; *Borden v. Fitch* (1818, N. Y. Sup. Ct.) 15 Johns. 121. Today *renvoi* is applied. *Bull v. Cross* (1921) 231 N. Y. 329, 132 N. E. 106. (ii) If the second spouse was a New York citizen at the time of the suit for the decree, but not at the time of the remarriage, *quacres*. Following the instant case and *Bull v. Cross, supra*, presumably *renvoi* would be applied. (iii) If the second spouse was not a New York citizen at the time of the suit for the decree or at the time of the remarriage, formerly the decree would be recognized. See *Bull v. Cross, supra*, at 331, 132 N. E. at 107; *Powell v. Powell, supra*, at 756, 203 N. Y. Supp. at 158. But under the theory of the instant case *renvoi* would be applied. The instant case, therefore, appears to effect a simplification, substituting the following rules as to decrees the recognition of which is not compulsory under the Constitution: 1. If, at the time of the suit for the decree, (a) the defendant to the decree was a New York citizen, or (b) New York was the matrimonial domicile, recognition will be denied. 2. Otherwise *renvoi* will be applied. See, generally, NOTES (1923) 23 COL. L. REV. 469.

DOMICILE—DECREE OF UNFITNESS AS AFFECTING CHILD'S DOMICILE AND PARENT'S RIGHT TO CUSTODY.—A divorce decree on the ground of adultery gave custody of an infant to the father and proclaimed the mother unfit to have custody of it. The father died domiciled in Dutchess County. Without notice to the mother, who was domiciled in New York County, the surrogate of Dutchess County appointed a testamentary guardian for the infant. On petition by the mother, it was held that the domicile of the infant changed on the death of the father to that of the mother, and that the appointment was, therefore, void for want of jurisdiction. The guardian appealed. *Held*, (three judges dissenting) that the judgment be affirmed, since the decree of unfitness did not prevent the shift of the child's

domicile to that of the mother. *Matter of Thorne* (1925) 240 N. Y. 444, 148 N. E. 630.

Where no decree of unfitness accompanies the award of custody, the domicile of the infant shifts at the death of the guardian-parent to the domicile of the surviving parent. *Clarke v. Lyon* (1908) 82 Neb. 625, 118 N. W. 472; see (1925) 34 YALE LAW JOURNAL, 447. The domicile of an infant has, it seems, normally followed that of the person having the prima facie right to the custody of the infant. *Ex parte Means* (1918) 176 N. C. 307, 97 S. E. 39; *Ex parte McCoun* (1915) 96 Kan. 314, 150 Pac. 516. If, then, the decree of unfitness were operative to deprive the surviving parent of this prima facie right upon death of the other spouse, it might be expected that the child's domicile would not shift in that event to the domicile of the surviving parent. Cf. *Bangor v. Veazie* (1914) 111 Me. 371, 89 Atl. 193; *In re Vance* (1891) 92 Calif. 195, 28 Pac. 229 (loss of custody of child through abandonment or emancipation involves loss of control over the child's domicile). But awards of custody relate only to the circumstances of the time of the award. *MaGill v. MaGill* (1925) 133 Wash. 597, 234 Pac. 273; Schouler, *Domestic Relations* (6th ed. 1921) sec. 749. The effect of concurrent decrees of unfitness is generally limited in like manner. The few American courts, therefore, which have passed on the point recognize in the parent declared "unfit" a prima facie right to custody of the child upon death of the other parent. *In re Neff* (1899) 20 Wash. 652, 56 Pac. 383 (parent decreed unfit because of non-support); *Bryan v. Lyon* (1885) 104 Ind. 227, 3 N. E. 880 (parent decreed unfit because of abandonment). English authority (under a statute) is *contra*. *Webley v. Webley* (1891, Prob.) 64 L. T. R. 839; cf. *Handford v. Handford* (1890, Prob.) 63 L. T. R. 256 (parent decreed unfit because of murderous assault on wife and children). Thus, in America, the decree of unfitness seems to be no more than an expression of judicial opprobrium. It is obvious, however, that the American cases have not involved serious depravity in the "unfit" parent. Whether the surviving parent's prima facie right to custody in such a case would be recognized may still be regarded as an open question, as may the related question of the locus of the infant's domicile under those circumstances. Courts have not regarded adultery as necessarily a disqualification for custody. *Osterhoudt v. Osterhoudt* (1900, 1st Dept.) 48 App. Div. 74, 62 N. Y. Supp. 529, *aff'd* (1901) 168 N. Y. 358, 61 N. E. 285; *Brogna v. Brogna* (1912) 67 Wash. 687, 122 Pac. 1; see *contra*: *Peese v. Gellerman* (1908) 51 Tex. Civ. App. 39, 41, 110 S. W. 196, 197. The instant decision seems proper enough since there are, on the facts, no compelling reasons for a decision one way rather than the other. Cases may well arise, however, in which the determination of the infant's domicile will be important in determining the disposition to be made of a deceased infant's estate. As other considerations would be involved in such a case, it seems clear that the instant case need not be accepted as an authority predetermining the result therein.

EQUITY—MISTAKE—REFORMATION TO PREVENT FUTURE SUIT.—The plaintiff, alleging mistake, prayed for the reformation and specific enforcement of a contract to sell land. Specific performance was denied because of the Statute of Frauds. The plaintiff thereupon asked reformation as protection against a possible future action for breach of the contract as written. Held, that the bill be dismissed, on the ground that, though the mistake could be shown defensively in a future action, the plea was premature. *Gross v. Yeskel* (1925, N. J. Eq.) 130 Atl. 546.

Originally, the equitable defense had to be made use of by appealing to the chancellor to enjoin the action at law. *Hancock v. Blackwell* (1897) 139 Mo. 440, 41 S. W. 205; *contra*: *Non-Royalty Shoe Co. v. Phoenix Assur.*

Co. (1919) 277 Mo. 399, 210 S. W. 37 (because of a statute). But in suits for specific performance parol evidence was admitted to prevent the Statute of Frauds from being used inequitably. *Marquis Townshend v. Stangroom* (1801, Ch.) 6 Ves. 328; *Diffendaffer v. Knoche* (1912) 118 Md. 189, 84 Atl. 416. Under some codes the defendant at law is permitted to set up his equitable claim by a cross bill. *South Portland Land Co. v. Munger* (1898) 36 Or. 457, 54 Pac. 815, *aff'd* (1900) 36 Or. 457, 60 Pac. 5. And the federal equitable defense statute now allows the equitable defense to be set up in the action at law. Jud. Code, sec. 274b, Act of March 3, 1915, ch. 90 (38 Stat. at L. 956). In the instant case, since the defendant may ultimately have to submit to the plaintiff's parol evidence, it would seem convenient and economical to have admitted it while the parties were before the court. And in a closely analogous situation, equity does not withhold relief until action is brought on the written contract. Thus relief has been given against sealed instruments induced by fraud. *Glanvill v. Jennings* (1669) Nels. Ch. 129; *Lovell v. Hicks* (1836, Exch.) 2 Y. & C. 46. In the event the defendant in the instant case does not sue, the plaintiff is left with a cloud on his title in the sense that while there is apparently a valid contract to sell, although probably unenforceable as written, still this cannot be established. Frequently when clouds upon title are removed, there is no immediate threat of a suit. *Kesner v. Miesch* (1903) 204 Ill. 320, 68 N. E. 405 (purported contract to sell land which agent had no authority to sign); *Day Land and Cattle Co. v. State* (1887) 68 Tex. 526, 4 S. W. 865 (cancellation of invalid land certificates). It may be, however, that in the instant case no satisfactory evidence of mistake was produced.

EQUITY RECEIVERSHIP—RIGHT OF THE UNITED STATES TO PRIORITY OF PAYMENT OF TAXES IN ABSENCE OF STATUTE.—In an equity receivership suit the United States filed its claim for taxes, claiming priority. This claim was granted by the District Court. The other creditors appealed. *Held*, that the order be affirmed. *Liberty Mutual Ins. Co. v. Johnson Shipyards Corp.* (1925, C. C. A. 2d) 6 Fed. (2d) 752.

It has been held generally that the United States has no right to priority of payment of debts, except by force of statute. *United States v. Oklahoma* (1923) 261 U. S. 253, 43 Sup. Ct. 295; *United States v. Fisher* (1805, U. S.) 2 Cranch, 358. The court, in the instant case, although dealing with a case involving taxes, thought it necessary to declare that a "fundamental distinction" exists between taxes and debts, that "a debt is not a tax and a tax is not a debt". Such a distinction, however, has not always been recognized. *Cf. Morrow v. Hayes* (1924) 226 Mich. 301, 197 N. W. 554 (where the term "debt" was held to include "taxes" in a private contract to indemnify for all "debts"); *Dollar Savings Bank v. United States* (1873, U. S.) 19 Wall. 227 (where the United States recovered taxes in an action for a debt). At least, the distinction was not necessary to the instant decision, since priority was finally granted on the ground that the United States has "so much of the royal prerogative as belonged to the king in his capacity of *parens patriae*". The court relied solely on a dictum in *Dollar Savings Bank v. United States*, *supra*, at 239, for there is apparently no holding to this effect. Thus the government has been declared as holding all the prerogatives of the king as *parens patriae*, through the enunciation of a "principle" broader than was necessary to the decision. The concurring opinion seems sound in saying that "it is quite possible that the implied prerogatives of a republic against its citizens may not go so far", and sounder in saying that priority might better have been granted merely because "the nature of a tax" gives it, "independently of statute."

INSURANCE—CONSTRUCTION OF STATUTE—AMOUNT OF RECOVERY WHERE PARTIAL DAMAGE EXCEEDS AMOUNT CARRIED.—A building of the actual cost of \$25,335 was damaged by fire to the extent of \$12,047. The value stated in the policy was \$9000 and the amount of insurance was \$7500. A statute, after requiring the value of the property to be specified in the policy, provided that in case of total loss, the insured should recover the full amount of insurance and "a proportionate amount in case of partial loss". The defense contended that this meant that the proportion between the actual value (\$25,335) and the actual damage (\$12,047) should determine the proportion between the insurance carried (\$7,500) and the recovery, making the latter \$3,566. The lower court permitted recovery of the entire amount of insurance carried, since the plaintiff's actual partial loss exceeded it. *Held* (two judges dissenting) that the judgment be affirmed. *Columbia Real Estate & Trust Co. v. Royal Exchange Assurance* (1925, S. C.) 128 S. E. 865.

Where the common law is not modified by statute the insured is entitled to recover the actual loss sustained up to the full amount of the policy. *Getchell v. Mercantile & Manufacturer's Fire Ins. Co.* (1912) 109 Me. 274, 83 Atl. 801; *Eagle Ins. Co. v. Lafayette Ins. Co.* (1857) 9 Ind. 443. Some states have passed statutes expressly declaratory of this common law rule. 1 Ga. Code, 1911, sec. 2545; Ohio Gen. Code, 1921, sec. 9583. By express contract the insured may limit the ordinary measure of damages. *Malin v. Mercantile Town Mut. Ins. Co.* (1904) 105 Mo. App. 625, 80 S. W. 56; *Commonwealth Ins. Co. v. Sennett* (1860) 37 Pa. 205; 4 Cooley, *Briefs on Insurance* (1905) 3085. Obviously an express statute will curtail the insured's recovery in the same way, and such statute must be considered a part of the insurance contract. *Barnett Bros. v. Western Assurance Co.* (1920) 143 Ark. 358, 220 S. W. 465; *Alford v. New York Life Ins. Co.* (1919) 280 Mo. 11, 216 S. W. 754. But generally no statute is construed to change a rule of the common law unless it does so by clear and unambiguous language. *In re Johnson's Will* (1921) 175 Wis. 1, 183 N. W. 888; *Baudfield v. Baudfield* (1898) 117 Mich. 80, 75 N. W. 287; *State v. Sullivan* (1909) 81 Ohio, 79, 90 S. E. 146. Moreover, where there is an ambiguity, courts tend to interpret an insurance contract in favor of the insured, since all its terms are proposed by the insurer. *O'Brien v. North River Ins. Co.* (1914, C. C. A. 4th) 212 Fed. 102; *Rochester v. Maryland Casualty Co.* (1910) 143 Mo. App. 555, 128 S. W. 204. And where the policy and a statute are to be construed together the insured still should receive the benefit of any doubt. *Levinton v. Ohio Farmers' Ins. Co.* (1920) 267 Pa. 448, 110 Atl. 295; *Gazzam v. German Union Fire Ins. Co.* (1911) 155 N. C. 330, 71 S. E. 434; Vance, *Insurance* (1904) 430. But in the instant case, although the result was desirable, it is submitted that it was reached by doing considerable violence to the plain meaning of the words of the statute.

INSURANCE—INSURABLE INTEREST OF STOCKHOLDER IN SPECIFIC CORPORATE ASSETS.—The plaintiff, sole stockholder in a corporation, insured its timber holdings with the defendants in his own name. The timber having been destroyed by fire, the plaintiff sued on the policies. From a judgment for the defendants, the plaintiff appealed. *Held*, that the judgment be affirmed, on the ground that a stockholder has no insurable interest in the corporate property. *Macaura v. Northern Assurance Co.* (1925, H. L.) 41 T. L. R. 447.

"Insurable interest" is not necessarily equivalent to unqualified ownership, but may include "rights" in the *res* insured which are tenuous in the extreme or altogether lacking. Fegan, *Notes on the Development of the Doctrine of Insurable Interest* (1919) 8 GEORGETOWN L. JOUR. 1, 2. Thus,

a surety may insure the property of the principal debtor appropriated to the security of the creditor, although the surety's interest "in" the res is merely a future power of subrogation conditional upon non-payment by the debtor. *American Ins. Co. v. Dean* (1922, Mo. App.) 243 S. W. 415; see (1925) 34 YALE LAW JOURNAL, 444. And one who has contracted to move a house has been permitted to insure it to the amount of the expenditures made under the contract and the profit expected thereunder. *Planters' & Merchants' Ins. Co. v. Thurston* (1891) 93 Ala. 255, 9 So. 263. In England a stockholder in a corporation has been permitted to insure his "interest in the adventure." *Wilson v. James* (1867) L. R. 2 Ex. 132. This interest clearly consists of an interest in the corporate assets proportional to his stock, plus a hope of profits. Whether profits as such should be insurable may be considered doubtful. They are a mere expectancy whose insurance seems little less than a wager. There is obviously no res the preservation of whose value is assured. In the case of corporate assets, however, this latter objection does not hold, and the stockholder has many immediately enforceable rights of an equitable nature with respect to such assets whether capital, surplus, or undivided profits. See COMMENTS (1925) 34 YALE LAW JOURNAL, 637. In American courts the stockholder has generally been permitted to insure his interest in specific corporate property. *Warren v. Davenport Fire Ins. Co.* (1871) 31 Iowa, 464 (stock-in-trade of lumber company); *Riggs v. Commercial Mut. Ins. Co.* (1890) 125 N. Y. 7, 25 N. E. 1058 (steamers); *Actna Ins. Co. v. Kennedy* (1909) 161 Ala. 600, 50 So. 73 (printing outfit); *Vance, Insurance* (1904) 117. The difficulty in evaluating the individual stockholders' interest in specific corporate property, considered insurmountable by the House of Lords in the instant case, is not really serious, given a financial statement (free from "water") and the value of the destroyed property. Cf. Berle, *Non-Cumulative Preferred Stock* (1923) 23 COL. L. REV. 358. But obviously on the facts of the instant case, this difficulty is wholly imaginary.

LIENS—CONDITIONAL SALES—ORDER OF PREFERENCE BETWEEN ARTISAN'S COMMON LAW LIEN AND CLAIM OF CONDITIONAL VENDOR.—The plaintiff, assignee of a conditional sales contract, duly recorded, brought action for conversion based on the refusal of the defendant artisan to relinquish an automobile bailed to him for necessary repairs. The defendant pleaded a common law lien and the plaintiff demurred. The demurrer was sustained, and the defendant appealed. *Held*, that the judgment sustaining the demurrer be reversed, since authority to subject to liens for necessary repairs was to be inferred from delivery with privilege of user. *New Britain Real Estate and Title Co. v. Collington* (1925, Conn.) 129 Atl. 780.

When the recording statutes have been complied with, the claim of a conditional vendor is superior to all subsequently accruing claims unless the vendee was authorized to subject the chattel to such claims. *Small v. Robinson* (1879) 69 Me. 425; COMMENTS (1923) 22 MICH. L. REV. 46. So an express negation of such authority will always defeat the subsequent claim. *Arnold v. Chandler Motors* (1924) 45 R. I. 469, 123 Atl. 85. Authority may be implied from some express term of the contract, as where the vendee undertakes to keep the chattel in repair. *Green v. All Motors, Ltd.* [1917] 1 K. B. 625; *City National Bank v. Laughlin* (1919, Tex. Civ. App.) 210 S. W. 617. Or it may be implied, as in the instant case, as necessarily incidental to the exercise of the privilege of user. *Mcyers v. Neeley & Ensor Auto Co.* (1923) 143 Md. 107, 121 Atl. 916; *Stobbs v. Balfour* (1923) 157 Minn. 135, 195 N. W. 773. This result seems particularly appropriate where the purchase price is to be paid, in whole or in part, from earnings derived from the use of the chattel. *Williams v.*

Allsup (1861) 10 C. B. (N. S.) 417; *Hammond v. Danielson* (1879) 126 Mass. 294. Where the vendor knows repairs are being made and does not object, he may be estopped to deny the authority. *Broom & Son v. Dale & Sons* (1915) 109 Miss. 52, 67 So. 659; *Etchen v. Dennis & Son Garage* (1919) 104 Kan. 241, 178 Pac. 408; *contra: Baughman Auto Co. v. Emanuel* (1912) 137 Ga. 354, 73 S. E. 511. Some courts have refused to imply the authority from mere delivery with privilege of user, lest the vendor's security be impaired. *Ehrlich v. Chapple* (1924) 311 Ill. 467, 143 N. E. 61; *Bath Motor Mart v. Miller* (1922) 122 Me. 29, 118 Atl. 715; (1923) 32 YALE LAW JOURNAL, 623, 624. This reasoning has cogency where a lienor has a power of sale. Such claims are generally postponed to the claim of the vendor. *Neitzel v. Lawrence* (1924, Idaho) 231 Pac. 423 (statutory lienor); *Liver v. Mills* (1909) 155 Calif. 459, 101 Pac. 299 (innocent purchaser); *contra: Guaranty Security Corp. v. Brophy* (1923) 243 Mass. 597, 137 N. E. 751. But common law liens give a privilege of retention only until receipt of reasonable compensation for the repairs. See *Meyers v. Neeley & Ensor Auto Co.*, *supra*, at 109, 121 Atl. at 917. The value of the repairs obviously accrues to the vendor and it seems equitable that payment should be a condition precedent to this privilege of retaking the chattel. The inconvenience of record-searching may justify an exception in favor of repairmen. In the instant case, the authority might have been inferred from express contract stipulations, but the court soundly elected the broader ground of authority based on privilege of user.

MARRIAGE AND DIVORCE—DEGREE OF PROOF REQUIRED TO SUSTAIN ADULTERY CHARGE AS GROUND FOR DIVORCE.—A petition for divorce was based upon a charge of adultery by the wife. The vice-chancellor below dismissed the suit on the ground that the petitioner had failed to support his case by a preponderance of the evidence. The petitioner appealed. *Held*, (four judges *dissenting*) that the judgment be affirmed, since the fact of adultery must be established not merely by a preponderance of the evidence, but by evidence such as to leave the court free from "conscientious and perplexing doubts". *Marchese v. Marchese* (1925, N. J. Eq.) 129 Atl. 131.

The rule requiring proof beyond a reasonable doubt where a criminal act is charged in a civil case has been generally repudiated. *Blackmore v. Ellis* (1904) 70 N. J. L. 264, 57 Atl. 1047 (assault and battery); *Farmers' Loan & Trust Co. v. Southern Surety Co.* (1920) 285 Mo. 621, 226 S. W. 926 (larceny); *Cooper v. Spring Valley Water Co.* (1911) 16 Calif. App. 17, 116 Pac. 298 (theft); *contra: McInturff v. Insurance Co. of North America* (1910) 248 Ill. 92, 93 N. E. 369 (arson). But in some civil cases, something more than a preponderance of the evidence is required. 5 Wigmore, *Evidence* (2d ed. 1923) sec. 2498 (collecting the cases). The explanation of these stricter requirements seems uncertain, but it has been suggested that they are a survival from the old chancery practice. *Ellott v. Ellett* (1911) 157 N. C. 161, 72 S. E. 861. In divorce cases, based upon a charge of adultery, some courts are in accord with the instant case in requiring a higher standard of proof than is ordinarily required in civil cases. *Sterling v. Sterling* (1924, Md.) 125 Atl. 809 ("clear and convincing"); *Vickers v. Vickers* (1921) 89 W. Va. 236, 109 S. E. 234 ("so strong and clear as to carry conviction of the truth of the charge"); *Berckmans v. Berckmans* (1864) 17 N. J. Eq. 453 ("beyond a reasonable doubt", defined as meaning "free from conscientious and perplexing doubts"). But the majority do not depart from the usual rule in civil cases. *Jenkins v. Jenkins* (1922, Or.) 204 Pac. 165; *Neff v. Neff* (1921) 96 Conn. 273, 114 Atl. 126; *Lindley v. Lindley* (1896) 68 Vt. 421, 35 Atl. 349. The desirability of the departure in the instant case from the usual rule seems questionable. The historical explanation of the rule requiring proof "beyond a

reasonable doubt" in criminal cases was the barbarity of the penal code. May, *Some Rules of Evidence* (1876) 10 AM. L. REV. 642. There are, of course, no such considerations in modern civil cases. Wigmore, *op. cit.* sec. 2498. It has been urged in justification of the rule of the instant case that the stigma of "adulteress" should not lightly be put upon a defendant. See *Berckmans v. Berckmans*, *supra*, at 460. But this is not necessarily conclusive, since in New Jersey it is settled that a preponderance of the evidence is sufficient to sustain, in a civil case, a charge of arson with intent to defraud insurers. *Kane v. Hibernia Ins. Co.* (1877) 39 N. J. L. 697. And the judgment of society as expressed in statutes is that as between adultery and arson, arson is the more heinous offense. *Cf.* Comp. Sts. N. J. 1910, 1760, 1786.

PERSONAL PROPERTY—GIFTS CAUSA MORTIS MADE IN CONTEMPLATION OF SUICIDE.—Before committing suicide, the donor delivered to her brother envelopes containing money, which were addressed to donees. The administrator of the donor issued this summons to test the validity of these gifts. *Held*, that these were not valid gifts *causa mortis*, since if the donor was insane at the time of death she had no capacity to complete the gifts; if she was sane, she could not give effect to the gifts by a crime. *Dudman v. Dudman* (1925, Ch.) 133 L. T. R. 465.

Formerly, the personalty of a suicide was forfeited to the crown. 4 Blackstone, *Commentaries*, *190. Wills of suicides were, therefore, inoperative to pass personalty. *Matter of Bailey* (1861, Prob. Ct.) 2 Sw. & Tr. 156. Forfeiture has, however, been abolished by statute. (1870) 33 & 34 Vict. ch. 23, sec. 1. And wills of suicides bequeathing personalty are now given effect. 1 Jarman, *Wills* (6th ed. 1910) 61. This has always been the American rule. *Koegel v. Egnor* (1896) 54 N. J. Eq. 623, 35 Atl. 394; *Roche v. Nason* (1906) 185 N. Y. 128, 77 N. E. 1007. In view of the abolition of this policy of forfeiture, however, the decision in the instant case must be justified, if at all, on other grounds. The theory, implied in the instant case, that the property in a gift *causa mortis* passes only upon the death of the donor, seems to be contrary to the prevailing view that where the donor has attempted to retain the property until death the transaction is invalid as an attempted testamentary disposition. *McCord v. McCord* (1882) 77 Mo. 166; *Basket v. Hassell* (1882) 107 U. S. 602, 2 Sup. Ct. 415; *Reddel v. Dobree* (1839, Ch.) 10 Sim. 244; *Farquharson v. Carr* (1846, Ch.) 2 Coll. 356; *Mitchell v. Smith* (1864, Ch.) 4 De G. J. & S. 421. The better view seems to be that the property passes at once with the condition that it shall revert to the donor upon revocation by him, or upon his surviving the contemplated peril. *Basket v. Hassell*, *supra*; *Emery v. Clough* (1835) 63 N. H. 552; *cf.* *Hewitt v. Kaye* (1868) L. R. 6 Eq. 198; *Moore v. Moore* (1873) L. R. 18 Eq. 474, 485; *contra: Hatcher v. Buford* (1895) 60 Ark. 169, 29 S. W. 641; see *Bunn v. Markham* (1816, C. P.) 7 Taunt. 224, 229. In one aspect a gift *causa mortis* is an extraordinary power, functionally similar to the power of bequeathal, granted, in exception to the policy of the Statute of Wills, to persons in imminent peril of death. It stands on somewhat the same footing as the power of making nuncupative wills. On the other hand, it is often merely a juridical device to do justice to the donor in view of the fact that the expectation of death is the prepotent inducement to the making of what is intended at the time to be an absolute gift *inter vivos*. *Cf.* *Grymes v. Hone* (1872) 49 N. Y. 17, 21; *Gardner v. Parker* (1818, Ch.) 3 Madd. 184, 185; *Moore v. Moore*, *supra*. Clearly one contemplating suicide is in no such imminent peril as to justify an exception to the general policy of the Statute of Wills. But it is believed that the facts of the instant case show no actual attempt to make a gift *causa mortis*. Rather they show an attempt to make a gift *inter vivos*. As such a gift is

impeachable as a constructive gift *causa mortis* only at the suit of the donor who has survived the contemplated peril, it would seem that after the donor's death the gift should be open to attack by the administrator only on the grounds of imperfect delivery or of mental incapacity at that time to make the gift. The making of a gift should require no greater mental capacity than the making of a will. This has been recognized by the decisions in this country. *Sass v. McCormack* (1895) 62 Minn. 234, 64 N. W. 385; *Matter of Hall* (1896, Surro. Ct.) 16 Misc. 174, 38 N. Y. Supp. 1135. Both in this country and in England it has been held that contemplation of suicide is not conclusive of testamentary incapacity. *McElwee v. Ferguson* (1875) 43 Md. 479; *Burrows v. Burrows* (1827) 1 Hagg. Eccl. 109; *Matter of Bailey, supra*. (This last case did not turn on testamentary capacity. The court intimated that the will would have been effective to pass realty). It would seem, therefore, that on the facts, the gifts should have been held valid as *inter vivos*.

PLEADING—ANSWER INSUFFICIENT AS A CONCLUSION OF LAW.—The plaintiff sued on a promissory note. The defendant answered, "not indebted to the plaintiff upon the note sued on." The court sustained the plaintiff's motion for a judgment on the pleadings, on the ground that the defendant's answer was neither a general nor a special denial. *Held*, on appeal, that the judgment be affirmed. *Franklin Bank v. International Hospital Equipment Co.* (1925, Mo.) 273 S. W. 197.

Most cases agree with the instant case that an allegation or denial of indebtedness is insufficient, such statements usually being considered mere "conclusions of law". *Fox v. Monahan* (1908) 8 Calif. App. 707, 97 Pac. 765; *Clements v. Cooper* (1912, Sup. Ct. Spec. T.) 136 N. Y. Supp. 93; *contra: Gillespie Bros. v. Page* (1910) 87 S. C. 82, 68 S. E. 1044. But the distinction between a "statement of fact" and a "conclusion of law" seems to be one of degree only, for when a statement of certain happenings is sufficiently abbreviated into a general classification it is called a "conclusion of law", while, if less general, it is called a "statement of fact". *Payno v. Treadwell* (1860) 16 Calif. 220; see Cook, *Statements of Fact in Pleading under the Codes* (1921) 21 COL. L. REV. 416, 423; Clark, *The Complaint in Code Pleading* (1925) 35 YALE LAW JOURNAL, 259; see *State v. Green* (1913) 87 Vt. 94, 97, 88 Atl. 515, 517. But, although words state certain happenings in abbreviated form, and a certain knowledge of law is necessary thus to classify and combine them, they are none the less statements of facts. Cook, *op. cit.* 420; see *Eaglefield v. Marquis of Londonderry* (1876) 4 L. R. Ch. Div. 693, 702; *Clark v. Chicago, M. & St. P. Ry.* (1881) 81 Minn. 69, 71. Failure to recognize this has resulted in endless confusion. Thus, in the following cases, words have been held "conclusions of law": *Fulton v. Varney* (1907, 1st Dept.) 117 App. Div. 572, 102 N. Y. Supp. 608 ("valuable consideration"); *Tallasse Falls M'fg Co. v. Moore* (1908) 158 Ala. 356, 48 So. 593 ("that the plaintiff assumed the risk"); *Florence Land Co. v. City of Florence* (1915) 193 Ala. 179, 69 So. 109 ("that ground is a public park"); *Fox v. Monahan, supra*, ("indebted"); *Pacetti v. Central of Georgia Ry.* (1909) 6 Ga. App. 97, 64 S. E. 302 ("that plaintiff knew or ought to have known"). But in the following cases, similar phrases have been considered "statements of fact": *California Packing Co. v. Kolley Storage Co.* (1920) 228 N. Y. 49, 126 N. E. 269 ("a valuable consideration"); *Gillespie Bros. v. Page, supra* ("indebtedness"); *De Runtz v. St. Louis Police Relief Assoc.* (1913) 180 Mo. App. 1, 168 S. W. 1053 ("that he had complied with laws, rules and regulations"); *Atlantic Tel. & Tel. Co. v. Cheshire* (1913) 12 Ga. App. 652, 78 S. E. 53 ("that defendant knew or should have known"). Under what seems the better theory of pleading this attempted distinction between "statements of fact" and "conclusions of

law" is avoided by substituting the test of whether the words give reasonable notice of the pleader's case. Clark, *History, Systems and Functions of Pleading* (1925) 11 VA. L. REV. 517; Cook, *op. cit.*; Whittier, *Notice Pleading* (1918) 31 HARV. L. REV. 501; see *American Express Co. v. State* (1918) 132 Md. 72, 74, 103 Atl. 96. In the instant case, even though sufficient notice may not have been given, the plaintiff, if in honest doubt as to his opponent's defense, should have been granted a bill of particulars rather than a judgment on the pleadings. Whittier, *op. cit.* 521; *American Plate Glass Co. v. Struthers-Wells Co.* (1912, C. C. A. 3d) 201 Fed. 6; see *Wall v. Buffalo Water Co.* (1885) 18 N. Y. 119, 122. Thus pleading, instead of being an end in itself, which is not desirable, would be an aid in the application of substantive law. See COMMENTS (1925) 35 YALE LAW JOURNAL, 85, 89; see *Dunnett v. Thornton* (1900) 73 Conn. 1, 5, 46 Atl. 158, 160; Pound, *Procedural Reform* (1910) 4 ILL. L. REV. 388, 402.

PUBLIC LANDS—VALIDITY OF MORTGAGE ON HOMESTEAD ENTRY.—The plaintiff executed to the defendant two mortgages on his federal homestead entry before having made final proof or received the official patent. Later, when he became owner in fee by award of the patent, he sued to quiet title and cancel the mortgages. Judgment was rendered for the plaintiff. *Held*, on appeal, that the judgment be reversed, on the ground that the federal statute, exempting the homestead entry from liability for debts contracted prior to patent date, did not apply to voluntary mortgages. *Bashore v. Adolf* (1925, Idaho) 238 Pac. 534.

It is provided by statute that until issue of the patent, the legal title to the entry remains in the government. U. S. Rev. Sts. 1874, sec. 2291. The entryman may not alienate his interest before he acquires title. U. S. Rev. Sts., *loc. cit.* Either by deed. *Hale v. McGraw* (1917) 201 Ala. 353, 78 So. 214. Or by contract to convey when patent is issued. *Anderson v. Carkins* (1890) 135 U. S. 483, 10 Sup. Ct. 905. Nor may the land become liable to satisfaction of any debt contracted prior to the patent date. U. S. Rev. Sts. 1874, sec. 2296; *Ruddy v. Rossi* (1918) 248 U. S. 104, 39 Sup. Ct. 46; NOTES (1919) 32 HARV. L. REV. 721. These limitations are to prevent fraud on the government and to encourage the development of the public domain. See *Anderson v. Carkins*, *supra*, at 489, 10 Sup. Ct. at 907; *Ruddy v. Rossi*, *supra*, at 107, 39 Sup. Ct. at 47. Where no conflict with the purposes of the statutes arises, courts, even before award of the patent, grant the entryman many incidents of ownership. Thus from date of original entry, the entryman may be taxed as owner of the land. *Witherspoon v. Duncan* (1866, U. S.) 4 Wall. 210. He may assert his interest to defeat the claim of a holder of a subsequent government grant of the entire district. *Hastings & D. Ry. v. Whitney* (1889) 132 U. S. 357, 10 Sup. Ct. 112. He may also maintain an action of ejectment. *Thompson v. Basler* (1906) 148 Calif. 646, 84 Pac. 161. Finally, when he fulfills the conditions precedent to his right to the patent, the government is said to hold the title in trust for him. See *United States v. Detroit Company* (1906) 200 U. S. 321, 337, 26 Sup. Ct. 282, 287. Where, as in the instant case, a mortgage is given on the land before the patent is issued, it is generally allowed. *Adam v. McClintock* (1911) 21 N. D. 483, 131 N. W. 394; see also *Hafeman v. Gross* (1905) 199 U. S. 342, 347, 26 Sup. Ct. 80, 83. They are held to be neither "alienations". *Lohman State Bank v. Grim* (1924) 69 Mont. 444, 222 Pac. 1052. Nor violations of Sec. 2296. *Klempp v. Northrop* (1902) 137 Calif. 414, 70 Pac. 284. But they are called equitable mortgages. *Adam v. McClintock*, *supra*. Hence, the subsequently acquired title is held to inure to the mortgagee's benefit. *Wildman v. Means* (1922) 208 Ala. 487, 94 So. 823. The courts base the validity of these mortgages on the fact that they are voluntary. *First State Bank*:

v. Durand (1923) 69 Mont. 184, 222 Pac. 434. But the underlying reason seems to be that they do not militate against the purpose of the statutory restraints, especially since it seems that the mortgagee acquires no enforceable rights until the mortgagor personally acquires the patent. *Martyn v. Olson* (1914) 28 N. D. 317, 148 N. W. 834; *Hebert v. Brown* (1895, C. C. A. 5th) 65 Fed. 2. But if mortgages are thus upheld, courts seem inconsistent in following *Anderson v. Carkins*, *supra*, to the effect that contracts to convey after the patent is issued are void.

SEARCHES AND SEIZURES—INTOXICATING LIQUOR—QUASHING OF WARRANT BASED ON INFORMATION OBTAINED BY TRESPASS.—A federal prohibition agent, without permission, entered the yard and buildings of the defendant and there discovered alcohol illegally possessed. This was afterwards seized under a search warrant based on the information thus obtained. The defendant moved that the warrant be quashed and the property returned. *Held*, that the motion be denied. *United States v. Bloom* (1925, D. C. Mass.) 6 Fed. (2d) 584.

The federal courts and some state courts refuse to admit evidence obtained without a warrant, or with an invalid warrant. *United States v. Madden* (1924, D. C. Mass.) 297 Fed. 679; *State v. Harris* (1923, Mo.) 250 S. W. 925; *contra: People v. Bowen* (1923, Sup. Ct. N. Y. Co.) 120 Misc. 342, 198 N. Y. Supp. 306; (1922) 32 YALE LAW JOURNAL, 285, 745; COMMENTS (1921) 31 YALE LAW JOURNAL, 518. Likewise, warrants have been quashed and seized property returned where the warrants were based on information obtained in an illegal manner. Thus where prohibition agents under warrant for search of another building forcibly searched the defendant's residence and found liquor it was held that this information could not be the basis for another warrant. *United States v. Boasberg* (1922, E. D. La.) 283 Fed. 305; *cf. Kirvin v. United States* (1924, C. C. A. 2d) 5 Fed. (2d) 282. And in at least one instance the court ordered the return of documents obtained by a search warrant, issued on information obtained by a previous forcible search. *United States v. Kraus* (1921, S. D. N. Y.) 270 Fed. 579; *cf. Silverthorne Lumber Co. v. United States* (1919) 251 U. S. 385, 40 Sup. Ct. 182. Similarly, where a search warrant was issued on knowledge obtained by a prior breaking and entering, it was held that the evidence obtained under this warrant should be returned. *People v. Alverson* (1924) 226 Mich. 342, 197 N. W. 538; *Blakemore, Prohibition* (2d ed. 1925) 408; *cf. State v. Gibbons* (1922) 118 Wash. 171, 203 Pac. 390. But where the search warrant was based on observations by prohibition agents while on the premises by implied license, it was held that its issuance was valid. *Nicholson v. United States* (1925, C. C. A. 7th) 6 Fed. (2d) 569; *People v. Flaczinski* (1923) 223 Mich. 650, 194 N. W. 566. The entry in the principal case was, without doubt, a technical trespass. 2 Jaggard, *Torts* (1895) 660. But in all of the cases to which the federal rule has thus far been extended, as exemplified above, so as to result in a quashing of the warrant, there has been in addition some element of force or fraud, which has been made the basis of the extension. The presence of force or fraud may well be the proper criterion for deciding these cases.

SURETYSHIP AND GUARANTY—ALTERATION BY FILLING IN BLANKS.—A contract guaranteed payment of past indebtedness in one clause, and in another left blank a space provided for stipulating the amount. The jury found that the blank had been filled in by the plaintiff after the signing by the defendants as compensated sureties. The plaintiff company sued for the amount as to the correctness of which there was no dispute and the defendants claimed a discharge on the ground of material alteration. *Held*, (three

judges dissenting) that the plaintiff have the judgment, since the alteration was immaterial. *Watkins Co. v. Denbeigh* (1925, Wash.) 238 Pac. 13.

Any change in a suretyship contract is said to be "material" that causes the instrument to speak language that is different in legal effect; but as a practical matter it is often difficult to determine what is a "material" change. Greenleaf, *Evidence* (16th ed. 1899) sec. 565. This is exemplified by a group of cases, of which the instant case is one, where the Watkins Company, the plaintiff in the principal case, sued on what appeared to be identical form contracts, altered as in the instant case, in which the courts differed sharply as to the "materiality" of the alteration. In some of these cases the reduction of the obligation to a liquidated sum, such as the alteration in the instant case effects, was held to be "material". *Watkins Co. v. Fornea* (1924) 135 Miss. 690, 100 So. 185; *Watkins Co. v. Keeney* (1925, N. D.) 201 N. W. 833; *Watkins Co. v. Miller* (1918) 40 S. D. 505, 168 N. W. 373; *contra: Watkins Co. v. Powell* (1923) 93 Okla. 219, 220 Pac. 585; *Dr. Ward's Medical Co. v. Wollcat* (1924) 160 Minn. 21, 199 N. W. 738 (contract same as in Watkins Company cases); see *Heard v. Tappan* (1903) 116 Ga. 930, 935, 43 S. E. 375, 378. In all but the Miller case, *supra*, the "materiality" was found in the enhanced evidential value of the instrument. *Cf. Low v. Argrove* (1800) 30 Ga. 129. The court in the instant case, while recognizing the change in evidentiary effect, held that there was no change in "legal effect" and therefore no "material" alteration—probably because the substantive relations of the parties would be unchanged, even if the instrument were given effect as altered. But it seems unreasonable to say that a change in evidential effect is "immaterial", in the accepted sense, although, in the instant case, the change was certainly not injurious to the defendant, and the result reached is undoubtedly sound. Some courts have reached the same result as the court in the instant case by implying an authority to fill in correct amounts. *McConnon & Co. v. Howland* (1923) 156 Minn. 222, 194 N. W. 394. But that method of handling these cases seems objectionable, since the authority is clearly a fiction. It would seem, as has before been recognized, that the proper test is not change in legal effect but harm to the surety, even where he is an uncompensated surety as in the instant case. *Cf. Cambridge Savings Bank v. Hyde* (1881) 131 Mass. 77.

SURETYSHIP AND GUARANTY—EFFECT OF SURETY'S SIGNATURE AFTER EXECUTION OF A RENEWAL NOTE BY THE PRINCIPAL DEBTOR.—The plaintiff accepted promissory notes signed by the defendant's stepson as maker, and by the defendant as surety. At maturity the stepson signed a renewal note which he left with the plaintiff. The plaintiff thereupon sent it to the defendant for her signature. The defendant signed and returned the instrument to the plaintiff. In a suit on this renewal note judgment was rendered for the defendant, and the plaintiff appealed. *Held*, that judgment be affirmed on the ground that no consideration was given for the defendant's signature. *State Bank of Peck v. Pickens* (1925, Kan.) 237 Pac. 651.

Adherence to the legalistic requirement of a present detriment to the promisee or a present benefit to the promisor makes for the general rule that new consideration is necessary to support the signature of the surety, made after execution of the note by the principal. 1 Brandt, *Law of Suretyship and Guaranty* (3d ed. 1905) sec. 26. Such subsequent promise by the surety is enforceable, however, if it was contemplated by principal and maker when the note was executed. *Kugle v. Tradcrs Bank* (1923, Tex. Civ. App.) 252 S. W. 208; *Deposit Bank v. Peak* (1901) 110 Ky. 579, 62 S. W. 268; but *cf. Sawyer v. Fernald* (1871) 59 Me. 500. The result is then rationalized by saying that the transaction is not really closed until

the surety signs. *Deposit Bank v. Peak*, *supra*; *Kissire v. Plunkett-Jarrell Co.* (1912) 103 Ark. 473, 145 S. W. 567. Or, by saying that the surety's act is, "in the eyes of the law", contemporaneous with the principal's. *Ailes v. Miller* (1913) 52 Ind. App. 280, 100 N. E. 475. A sound reason for holding the surety in these cases, apart from any attempt at legalistic rationalization, seems to be that the creditor is induced to accept the note by the expectation that the surety will sign. *Steers v. Holmes* (1890) 79 Mich. 430, 44 N. W. 922. And the surety signs with the intention of continuing the existing relationship. The present decision undoubtedly defeated the reasonable expectations of all parties to the transaction. It reemphasizes the need of a broader and less technical concept of consideration—one more in accord with the common sense of the business community. *Holmes, Collected Legal Papers* (1920) 191-192.

TAXATION—INCOME TAX—BUSINESS TRUST TAXABLE AS CORPORATION, NOT AS PARTNERSHIP.—The Burk-Waggoner Oil Association is a "business trust" formed in Texas under a trust instrument which provided for transferable shares. It was assessed as a corporation under the Revenue Act of 1918, for income and excess profits taxes. It paid the taxes under protest and brought suit for their recovery, contending that since, by the common law of Texas, the Association was a partnership, taxation of it as a corporation was unwarranted. *Held*, that the tax is valid. *Burk-Waggoner Oil Association v. Hopkins, Collector* (Nov. 1925, U. S.) Adv. sheets, No. 67.

The Revenue Act, Section 1, defines the term "corporation" as including "associations" and "joint stock companies". It subjects corporations to taxes different from those imposed upon individuals carrying on business in partnership. The sections referring to partnerships denote, the court holds, ordinary partnerships, not business trusts which resemble in form and effectiveness corporate organizations. Such a construction of the Act was clearly foreshadowed in a previous case involving excess profits taxes, *Hecht v. Malley* (1924) 265 U. S. 144, 44 Sup. Ct. 462. The contention that the Act, thus construed, is unconstitutional, is disposed of summarily by the declaration that "nothing in the Constitution precludes Congress from taxing as a corporation an association which, although unincorporated, transacts its business as if it were incorporated". Whether individuals do business as a corporation, as an unincorporated association, or as an ordinary partnership, it is in reality the individual members of the group who are engaged in the business, and it is upon them that legal relations are imposed, by common law or statute, as a consequence of their business activities. Their legal relations may vary with the form of their business organization: there may be only a liability to have the "corporate" fund taken to pay debts incurred in the business, or there may be a duty to pay out of any property they own. See Hohfeld, *Fundamental Legal Conceptions and Other Legal Essays* (1923) 194 *et seq.* When they conduct their business in the form called a "business trust", the duty to pay debts incurred in connection with the enterprise may rest upon the individual "shareholders" to the same extent as if they were doing business as ordinary partners. It is customary then to call them a partnership. *McCamey v. Hollister Oil Co.* (1922, Tex. Civ. App.) 241 S. W. 689; see (1922) 32 YALE LAW JOURNAL, 83. But the label "partnership" should not be thought a universal formula for determining their legal relations in other situations. In respect of many of these relations the business trust is like the corporation rather than the partnership. No reason is apparent why the statutory liability of the associates to have part of their income taken as income taxes should not be made similar to the liability imposed on persons doing business in the corporate form rather than similar to the duty to pay income taxes imposed on ordinary partners. *Cf. Morgan v. Deputy Federal*

Commissioner (1912, Australia) 15 Commonw. L. R. 661 (statute taxing shareholders of corporation as though they were joint owners of corporate land not unconstitutional); *R. I. Hospital Trust Co. v. Doughton* (1924) 187 N. C. 263, 121 S. E. 741 (valid inheritance tax on non-resident shareholders of foreign corporation owning property in taxing state); *contra: Shepard v. State* (1924) 184 Wis. 88, 197 N. W. 344.

TORTS—PERSONAL INJURY—DAMAGES FOR DISFIGUREMENT.—The plaintiff was injured by the defendant, permanent facial disfigurement resulting. From a judgment including damages for the disfigurement, the defendant appealed. *Held*, that the judgment be reversed. *Colonial Coal & Coke Co. v. Hobson* (1925, Ky.) 271 S. W. 680.

Most courts that deny recovery for disfigurement put their refusal on the ground that the disfigurement is "inseparable" from the resulting mental anguish for which there can be no recovery. *Camenzind v. Freeland Furniture Co.* (1918) 89 Or. 158, 174 Pac. 139; *Bonelli v. Branciere* (1922) 127 Miss. 556, 90 So. 245; *cf. Hendricks v. Jones* (1922) 23 Ga. App. 335, 111 S. E. 81. The rule denying recovery for mental anguish is, however, ordinarily limited to those cases wherein the mental anguish has arisen independently of a proved physical injury; and the rule is explained on the ground that mental anguish, being only a state of mind, is difficult to prove, and, if proved, is difficult to translate into money damages. *Camenzind v. Freeland Furniture Co.*, *supra*; *Southern Pacific Co. v. Hetcher* (1905, C. C. A. 8th) 135 Fed. 272. These considerations are not operative, however, to preclude recovery in other fields of the law, as, for example, in defamation. There the impossibility of any exact monetary equivalent for the harm to the plaintiff does not bar recovery. *Conard v. Dillingham* (1922) 23 Ariz. 596, 206 Pac. 166. And exemplary damages are made to depend on proof of actual malice although that, also, is only a state of mind. *Mattice v. Wilcox* (1895) 147 N. Y. 624, 42 N. E. 270. The real objection to recovery for mental anguish seems, however, to be fear of fraud based on difficulty of proof, for most courts permit recovery therefor when the fact of mental anguish is reasonably inferable from other facts more easily proved—for example, physical injuries. *Salina v. Trosper* (1882) 27 Kan. 544. It would seem that a disfigurement, being patent to observation, is such a fact; and mental anguish is almost inevitably to be inferred from a disfigurement. Indeed, a disfigurement would seem itself to be a physical injury. *Coombs v. King* (1910) 107 Me. 376, 78 Atl. 463; *Shortridge v. Scarritt Estate Co.* (1910) 145 Mo. App. 295, 130 S. W. 126. The court in the instant case affirmed the general rule allowing recovery for "mental suffering caused by the injury"; yet it denied recovery. The court may have rationalized this apparent inconsistency by a narrow view of what constitutes an "injury". Some courts seem to regard the "injury" as ceasing with actual physical pain. *Cf. Chicago, B. & Q. Ry. v. Hines* (1892) 45 Ill. App. 299. But even if the concept "injury" be still more narrowly limited—to the actual physical impact—it is difficult to regard the disfigurement and the mental anguish therefrom resulting as other than the direct and probable consequence of the "injury".

WATERS AND WATERCOURSES—PURCHASER OF LAND ON ARTIFICIAL POND ACQUIRES NO RIPARIAN RIGHTS AGAINST OWNER OF DAM MAINTAINED FOR PRESCRIPTIVE PERIOD.—Fifty years before the plaintiff's action, the defendant's predecessors in title had owned land on a stream across which they built a dam, creating an artificial pond. The plaintiff acquired land bordering on the pond and floated logs thereon to his sawmill. The defendant changed the user of the water from the pond, which resulted in lowering its water level so rapidly that the plaintiff could not float logs to his mill.

He sought to enjoin the defendant. *Held*, that the plaintiff acquired no riparian rights on an artificial watercourse against the owner of a dam which had been maintained for the prescriptive period. *Castisch v. Clymer Power Corporation* (1925, Sup. Ct. Chautauqua Co.) 125 Misc. 243, 211 N. Y. Supp. 338.

The growing tendency in this country is to grant to the owner of land on an artificial waterway riparian rights arising "by prescription", where the plaintiff's equities are strong. Various theories have been invented on which to allow him to recover, although the court in the instant case does not appear to have considered them. Thus by the doctrine of "reciprocal easements" the owner of the servient tenement is said to acquire his rights at the same time that the dominant owner gains his. *Delaney v. Boston* (1839, Del.) 2 Harr. 489; *Mathewson v. Hoffman* (1889) 77 Mich. 420, 43 N. W. 879; *Kray v. Muggli* (1901) 84 Minn. 90, 86 N. W. 882. This theory can hardly be sustained, for at no point during the prescriptive period does a right of action arise in favor of the dominant tenant. *Mason v. Shrewsbury* (1871) L. R. 6 Q. B. 578; 3 Farnham, *Waters and Water Rights* (1904) 2398. Again, a fiction has been resorted to by holding that artificial waterways become natural by continuing for the prescriptive period. *Minehan v. Murphy* (1912) 149 Wis. 14, 134 N. W. 1130; *Smith v. Youmans* (1897) 96 Wis. 103, 70 N. W. 1115. Likewise, where they are continued over so long a period of time that nature itself becomes adapted to the artificial conditions. *Kray v. Muggli*, *supra* (where a natural forest had sprung up around artificial lakes). In many cases the courts tend to combine these two theories with the so-called doctrine of equitable estoppel, based on the idea of unfairness to the servient tenant. *Shepardson v. Perkins* (1878) 58 N. H. 354; *Ford v. Whitlock* (1855) 27 Vt. 265. Normally it is said that, to constitute an equitable estoppel, there must be a false representation or concealment of material fact by the person estopped [*Pittsburg v. Danforth* (1875) 56 N. H. 272 (tax list and warrant)] made wilfully [*Pickard v. Sears* (1837, K. B.) 6 Ad. & El. 469 (sale of machinery)] or innocently [*Tomkinson v. Balkis Consolidated Co.* (1891) 2 Q. B. 614 (involving a share certificate)] and with the intent that the other party shall act upon it. *Mayenborg v. Haynes* (1872) 50 N. Y. 675 (involving promissory note). The time element does not seem important. In the artificial riparian cases, however, the running of at least the prescriptive period against the dominant owner appears essential to give rise to the rights of the servient owner. If a generalization may be drawn from these cases, it would seem that the servient tenant has been protected upon showing (1) that the prescriptive period has run, producing a reasonable belief in the permanency of the artificial conditions and (2) that serious injury would result from interference. It seems advisable to abandon the fictions and to allow recovery in cases which, like the instant one, are within the test suggested.