RECENT CASES.

AGENCY—CONTRACT FOR SALE OF LAND SIGNED BY AGENT FOR UNDISCLOSED PRINCIPLE.—Plaintiff, the purchaser, brought an action for the specific performance of an alleged agreement for the conveyance of land owned by the defendant. The only evidence in writing was a memorandum made and signed by the defendant and another, as agents for the purchaser without disclosing the latter's name. The decree was refused. *Halperin v. Magida*, 201 N. Y. S. 180 (1923).

If the statute of frauds is satisfied the contract is enforceable. Jones v. Barnes, 105 App. Div. 287, 94 N. Y. S. 695 (1905).

A memorandum of a contract for the sale of land must show the parties on its face. 27 C. J. 276; Gafton v. Cummins, 99 U. S. 100 (1878); Walsh v. Amringe, 103 N. Y. Misc. 350 (1918). The statute is generally held to be satisfied in this respect when the agent signs his own name without disclosing either the principal or the fact of the agency, for the reason that the writing, on its face, does show two people who are bound, and the undisclosed principal may charge or be charged on it. Byrne v. McDonough, 114 N. Y. Misc. 529, 186 N. Y. S. 807 (1921); Usher v. Daniels, 73 N. H. 206, 60 Atl. 746 (1905); 27 C. J. 276, 298. However, if the agent discloses the agency, the statute is not satisfied, according to the weight of authority. Gafton v. Cummins, *supra;* Mertz v. Hubbard, 75 Kans. 1, 88 Pac. 529 (1907); 27 C. J. 276. The rule is otherwise in Massachusetts and Ohio. Tobin v. Larkin, 183 Mass. 389, 67 N. E. 240 (1903); Walsh v. Barton, 24 Ohio St. 28 (1873).

But by merely adding "agent" or similar words after his signature, the agent does not indicate thereby that he acts only in a representative capacity, in cases where the principal is undisclosed and where, by a grammatical and logical construction of the instrument, the agent binds himself. Such additional words are construed to be merely *descriptio personae.* See 72 U. OF PA. L. REV. 50.

The real test in cases like the one under consideration should be whether or not the agent signed in such manner as to bind himself as a party. The test is thus frequently stated. 27 C. J. 276; 25 R. C. L. 658. But in deciding the cases courts pay no attention to the rules determining whether or not the agent is himself bound and make the disclosure or non-disclosure of the agency the real basis of their decisions. Gafton v. Cummins, *supra;* Mentz v. Newwitter, 122 N. Y. 491 (1890). In the principal case whether or not the agent was bound does not clearly appear. No effort was made to answer this question; and the court rests its decision, it is submitted, without good reason on the fact alone that the agent disclosed the agency without disclosing the principal.

AGENCY—RATIFICATION—RECEIVING BENEFITS IN IGNORANCE OF UNAUTHORIZED PROVISIONS.—Defendant's agent, with powers limited to the sale of stock, sold and delivered stock to the plaintiff under an unauthorized agreement to repurchase same at the end of three years at a premium. Defendant received proceeds of the sale without knowledge of the agreement to repurchase, and, when told of the agreement three years later, promptly

repudiated it. Plaintiff claims the subsequent retention of the benefits of the sale, after knowledge of the agreement, amounts to ratification. *Held:* Judgment for the defendant. *Murray v. Standard Pecan Co.*, 140 N. E. 834 (Ill., 1923).

The general rule is that receipt of the benefits of an unauthorized contract will not amount to ratification if done in ignorance of material facts; Combs v. Scott *et al.*, 12 Allen 493 (Mass., 1866); although the principal will be charged with notice when he knows irregularities have occurred and receives the fruits of the contract without inquiry, Niemeyer Lumber Co. v. Moore, 55 Ark. 240 (1891); or, where the facts are so obvious that the principal, as a reasonable man, cannot say he was ignorant of them. Scott v. Middleton Railroad Co., 86 N. Y. 200 (1881); Swisher v. Palmer, 106 Ill. 432 (1902).

After knowledge of all material facts, the principal can either affirm or repudiate the unauthorized contract. If he would effectually do the latter, he must restore to the other party the benefits he has received, within a reasonable time after knowledge. Koch v. Oil City, 47 Pa. Super. 248 (1911): National Bank of Los Vegos v. Oberne, 121 Ill. 25 (1886). Otherwise, he will be taken to have ratified the contract. Mechem, Agency (2d ed.), Vol. I, sec. 436.

This generalization, however, is subject to several exceptions. One is where the principal, before knowledge, has put it beyond his power to restore the benefit received, as where it has been disposed of. Thacher v. Pray, 113 Mass. 291 (1873); Baldwin v. Burrows, 47 N. Y. 199 (1872); or cannot be identified, Thrall v. Wilson, 17 Pa. Super. 376 (1901); or where such return cannot be made without substantial injury, Forman & Co. v. The Liddesdale, [1900] App. Cas. 190 (Eng.); Cooley v. Perrine, 41 N. J. L. 322 (1879); Bryant v. Moore, 26 Me. 84 (1846).

Another exception, and the one illustrated by the principal case, is where the agent, in making a contract on behalf of his principal, adds thereto stipulations which he was not authorized to make, such stipulations not being essential or customary elements of the particular contract. John Gund Brewing Co. v. Tourtellotte, 108 Minn. 71, 121 N. W. 417 (1909); 21 R. C. L. 929, sec. 108. Also see note to the Minnesota case in 29 L. R. A. (N. S.) 210.

In such event, retention of the benefits of the contract, after knowledge of the unauthorized, collateral stipulations, will not be an affirmation of the latter. Daly v. Iselin, 218 Pa. 515, 67 Atl. 837 (1907); Smith v. Tracy, 36 N. Y. 79 (1867); Bierman v. City Mills Co., 151 N. Y. 482 (1897). The principal, by retaining the proceeds, adopts and ratifies only what he had authorized, Wheeler v. Northwestern Sleigh Co., 39 Fed. 347 (1889); and the third party must suffer for having dealt with a special agent without ascertaining the extent of his authority. Davenport Savings Fund & Loan Asso. v. The North American Fire Insurance Co., 16 Iowa 74 (1864).

To hold otherwise, would be to ignore the doctrine that an agent can bind his principal only within the scope of his authority. Roberts v. Rumley, 58 Iowa 301 (1882).

ALIENS—IMMIGRATION—RIGHT OF WIFE TO ENTER.—An alien Turkish merchant, who had resided in the United States eight years and had declared his intention to become a citizen, returned to his native land on a temporary visit in order to get married and, several months later, returned with his wife. The Turkish quota had been filled and admission was refused the wife. *Held:* She was entitled to enter. *U. S. ex rel. Markarian v. Tod,* 290 Fed. 198 (C. C. A. 1923).

The Immigration Act of February 5, 1917, 39 Stat. at L. 874, excepts from exclusion (among other classes) merchants and "their legal wives and their children under 16 years who shall accompany them." The Quota Act of May 19, 1921, 42 Stat. at L. 5, which is expressly "in addition to and not in substitution for the provisions of the immigration laws," limits the admissible aliens to 3 per cent. of the number of foreign born persons of such nationality resident in the United States, but excepts from exclusion aliens returning from a temporary visit abroad.

These two statutes are clearly in *pari materia* and, as such, must be construed together as if parts of the same statute. Board of Commissioners v. Aetna Life Ins. Co., 90 Fed. 222 (1898); Peoples Dep. Co. v. Ehrhart, 34 Pa. Sup. 16 (1907); Hemmer v. U. S., 204 Fed. 898 (1912); especially since the expression in the later act clearly shows an intent that it adds to and not replaces the former. State v. Given, 48 Fla. 165, 37 So. 308 (1904). Absurd and unreasonable constructions (such as the admission of a husband and the exclusion of his wife) are to be avoided. Lau Ow Bew v. U. S., 144 U. S. 47 (1891); and no part of a previously existing statute is to be inoperative unless no other construction is reasonable. U. S. v. Munday, 222 U. S. 175 (1911).

With these well-settled principles firmly in mind, the court construed (and, it would seem, correctly construed) the two acts as not reasonably requiring the exclusion attempted—thereby affirming the very similar case of U. S. *ex rel.* Gottlieb v. Commissioner of Immigration of New York, 285 Fed. 295 (1922). The wife was clearly admissible under the earlier act and nothing in the later statute militated against her rights.

AUTOMOBILE—HIGHWAY REGULATION—CIVIL LIABILITY.—An English statute on highway regulations provides that "the motor car . . . shall be in such a condition as not to cause, or to be likely to cause, danger to any person . . . on any highway." Breach of this provision is punishable by fine. (Locomotives on Highway Act (1896), Sec. 6, sub-s. 1, and Sec. 7; Motor Cars (Uses and Construction) Order (1904), art. II, reg. 6). While defendant's motor lorry was being driven on the public highway, a wheel came off and damaged plaintiff's van. Defendant was not negligent, having received the car back from a reputable repair shop only two days before the accident. *Held:* No recovery. *Phillips v. Brittannia Hygienic Laundry Co., Ltd.,* L. R. [1923], 1 K. B. 539 (Eng.).

When a statute imposes a duty where none existed before, a puntiive remedy provided by the statute is generally held exclusive; Saunders v. Holborn District Board of Works, L. R. [1895], 1 Q. B. 604 (Eng.); Mack v.

Wright, 180 Pa. 472, 36 Atl. 85 (1897); but when the duty is plainly for the benefit of individuals, and the penalty is inadequate to compel performance of the duty, it is held that the legislature intends to create a private right of action as well. Groves v. Lord Wimborne, L. R. [1898], 2 Q. B. 402 (Eng.); Danner v. Wells, 248 Pa. 105, 93 Atl. 871 (1915). On this principle the decision of the instant case seems open to question in holding the statute to be simply a police measure. Here the statute is passed to save from danger "any person . . . on any highway," and creates an absolute duty, resting on the owner, that his car be in good condition. This duty, and consequent absolute liability, might be intended to stimulate the owner to the highest degree of care, in which case the purpose is public and no civil liability would arise, or it might be intended to shift the loss, arising from an accident where there is no negligence, from the casual passerby to the owner of the car, on the ground that he who enjoys the use of the car should bear any loss incident to its operation. It is submitted that ordinary tort principles afford ample protection from negligence; cf. E. R. Thayer, 29 HARV. L. REV. 805. Admitting this, the statute is of no benefit to the travelling public unless an absolute civil liability is created thereby. But considering the purview of the statute, the inclusion of this section in an act with traffic regulations of a police character tends to show that this section is of a like character. In any case, there should be no recovery in the instant case, since damage to property could not be breach of a duty not to endanger persons. Gorris v. Scott, L. R. 9 Exch. 125 (Eng., 1874).

The court also denied recovery on common law principles. Two possible grounds for an opposite ruling suggest themselves, the rule in Rylands v. Fletcher, and liability for the work of an independent contractor (the repairer), because of the risk of injury to others. While the extent of Rylands v. Fletcher is difficult of definition; Charing Cross Electricity Supply Co. v. London Hydraulic Power Co., L. R. [1914], 3 K. B. 772 (Eng.); the case is not generally held to apply to other persons than those having some interest in land; Clark & Lindsell, Torts (7th ed., 1923) 427; or to other substances than those which have an inherent tendency to break forth and do damage; Clark & Lindsell, Torts, *supra*. Granting an extension to movable personal property, the condition of an automobile might well be such as to bring it within the latter restriction; Hutchins v. Maunder, 37 Law Times R. 72 (Eng., 1920); Lewis v. Amorous, 3 Ga. App. 50, 59 S. E. 338 (1907); 34 HARV. L. REV. 564; but the present case affords no such instance. Liability for the work of an independent contractor is confined to work which will be dangerous unless preventive measures are adopted; Holliday v. National Telephone Co., L. R. [1899], 2 Q. B. 392 (Eng.); Thompson v. Lowell Ry. Co., 170 Mass. 577, 49 N. E. 913 (1898); Bohlen, 59 U. OF P. L. REV. 448; so that defendant does not answer for the repairer's negligence in the principal case.

BANKS AND BANKING—INSOLVENCY—FRAUDULENT RECEIPT OF DEPOSITS.—On June 30, plaintiff made a deposit in the X bank which for some time had been experiencing a steady loss of profits and withdrawal of deposits. The bank had increasing difficulty in providing funds to meet the with-

drawals since most of their assets consisted of slow paper. About two weeks before, certain banks in the city evolved a plan whereby the X bank was to be consolidated with three others and continue business in that way. If the plan failed, the bank would have to close. There was every expectation of success until 11 o'clock P. M. of above date, when the plan failed and the bank was turned over to the defendant, supervisor of banking, for liquidation. Plaintiff seeks to recover the deposit on grounds of fraud. *Held* (two dissents): Judgment for the defendant *Washington Shoe Mfg. Co. v. Duke*, 218 Pac. 232 (Wash., 1923).

Generally, receipt of deposits by a bank which is hopelessly insolvent to the knowledge of its officers constitutes fraud and the depositor can recover back his money. St. Louis & San Francisco Ry. Co. v. Johnston, 133 U. S. 566 (1890); Corn Exchange Nat. Bk. v. Solicitors Loan and Trust Co., 188 Pa. 330, 41 Atl. 536 (1898); Pennington v. Third Nat. Bank, 114 Va. 674, 114 S. E. 771 (1913) (cases where the insolvency was beyond dispute). By continuing business, the bank is held impliedly to assert a condition of solvency and hence to defraud the depositor. Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537 (1885); N. Y. Breweries Co. v. Higgins, 79 Hun 250, 29 N. Y. S. 416 (1894); Wasson v. Hawkins, 59 Fed. 233 (1894). However, if there is no knowledge of the bank's condition by the officers, there is no fraud. Balbach v. Frehinghuysen, 15 Fed. 675 (1883); Williams v. Cox, 97 Tenn. 555, 37 S. W. 282 (1896).

In Illinois, receipt by the bank within thirty days of failure, suspension, or involuntary liquidation has by statute been declared *prima facie* evidence of fraud. Lanterman v. Travous, 174 Ill. 459, 51 N. E. 805 (1898); see also *In re* Silver, 208 Fed. 797 (1912). In Georgia, a peculiar (and, it would seem, unreasonable) duty of inquiry is put on the depositor. McGregor v. Battle, 128 Ga. 577, 58 S. E. 28 (1907).

As to just when a bank is hopelessly insolvent, there have been few decisions. It is generally held that a bank may be embarrassed and even actually insolvent, yet there is reasonable hope, expectation and intention on the part of the officers to carry on the business and recover sound financial footing, there is no fraud in accepting deposits. Williams v. Van Norden Trust Co., 104 App. Div. 251, 93 N. Y. S. 821 (1905); Brennan v. Tillinghast, 201 Fed. 609 (1913); Steele v. Allen, 240 Mass. 394, 134 N. E. 401 (1922). (In all these cases the banks had been running in uncertain and shaky condition for some years but were able to continue business and meet obligations with no anticipation of immediate failure.) Where it was reasonably believed that a number of friends of an insolvent debtor who owed the bank a large amount, would take over his obligations, no fraud was committed. Quin v. Earle, 95 Fed. 728 (1899). But see Rochester Printing Co. v. Loomis, 120 N. Y. 659, 24 N. E. 1103 (1887), where a similar expectation was of no avail, as not based on any legal duty to carry the debt.

The dissents are based on a distinction between carrying on business with the hope of recovering out of the assets, and hopeless insolvency with the hope of importing new capital and so continuing in a new and solvent business. Since the basis of the recovery is fraud, it seems that the principal case was correctly decided and that the reasoning of the dissent is faulty.

There was an honest and reasonable expectation of continuing the business (whether by realizing and recovering from the assets themselves or by new capital seems immaterial) and hence the necessary fraudulent intent is lacking.

BILLS AND NOTES—CERTAINTY—INCREASE OF INTEREST FOR NONPAYMENT AT MATURITY.—The defendant executed a promissory note stipulating that, if the note was not paid at maturity, the promissor should pay an increased rate of interest. *Held:* This provision did not make the note uncertain. *Gochard et al. v. Folsod et al.*, 195 N. W. 281 (Minn. 1923).

Decisions as to whether the rule, that a negotiable note must be certain in amount, is violated by such a provision for increased interest, are various and conflicting. By the great weight of authority such stipulations are held to be valid and the instrument negotiable. Towne v. Rice, 122 Mass. 67 (1877); De Haas v. Roberts, 70 Fed. 227, 17 C. C. A. 79 (1895); Merville v. Harley, 6 S. D. 592, 62 N. W. 958 (1895). Another class of cases maintain the negotiability of the instrument but regard the stipulation as a penalty and void. Smith v. Crane, 33 Minn. 144, 22 N. W. 633 (1885); Kendall v. Selby, 66 Neb. 60, 92 N. W. 178 (1900). Still others hold that the stipulation destroys the negotiability by making the note uncertain. Lamb v. Story, 45 Mich. 488, 8 N. W. 18 (1881); Davis v. Brody, 17 S. D. 511, 97 N. W. 719 (1903).

It would seem that it should make no difference whether the higher rate is to be paid from the date of execution or from maturity, except in determining the amount due at any time after maturity. It has been held that a stipulation to pay an increased rate from date does not destroy the negotiability. Clark v. Skeen, 61 Kans. 526, 60 Pac. 327 (1900); Hope v. Barker, 112 Mo. 338, 20 S. W. 567; Crump v. Berdan, 97 Mich. 293, 56 N. W. 559 (1894). The opposite view prevails in a few jurisdictions. Lamb v. Story, (*supra*); Davis v. Brady (*supra*).

Section 2, paragraph 1 of the N. I. L. provides that "the sum payable is a sum certain within the meaning of this act although it is to be paid with interest." This provision was held in Union Bank v. Mayfield, 174 Pac. 1034 (Okla. 1918), not to destroy the negotiability or validity of a note similar to that in the instant case; and that decision has been followed in Fox v. Crane, 43 Cal. 859, 185 Pac. 415 (1919); Sharpe v. Schoenberger, 44 S. D. 402, 184 N. W. 209 (1921). It is submitted that such instruments should be upheld as negotiable. At any time before maturity the amount is readily determinable from the face of the instrument. At maturity, negotiable paper ceases to be currency and a stipulation to pay more after an instrument ceases to be current should not affect its negotiability during currency. Daniel, Negotiable Instruments (5th ed.) 80. And if the stipulation is to be regarded as a penalty and therefore void, it is surplusage and should not affect the negotiability.

COPYRIGHT—RADIO BROADCASTING OF COPYRIGHTED SONG—PERFORMANCE FOR PROFIT.—The defendant company, a department store selling radio equipment, maintained a licensed station from which it broadcasted concerts and

other entertainment. At the beginning and end of every program, it was accustomed to announce its slogan, which appeared in all its printed advertisements: "L. Bamberger, One of America's Great Stores, Newark, N. J." In the course of one program it broadcasted a song of which the plaintiff owned the copyright. The plaintiff claimed this constituted a performance publicly for profit, and prayed for a preliminary injunction restraining further broadcasting. The injunction was granted. *M. Witmark & Sons v. L. Bamberger & Co.*, 291 Fed. 776 (D. C., 1923).

The Copyright Act of 1909 provides that the owner of the copyright of a musical composition shall have the exclusive right to perform the work publicly for profit. Act of March 4, 1909, c. 320, sec. 1 (e), 35 Stat. 1075. It seems unquestioned that the broadcasting of the plaintiff's song was a performance, and was public. The sole problem to which the court directed its attention was whether or not it was done for profit. On this point there are but few decisions, inasmuch as between 1897 and 1909 the owner of the copyright of a musical composition could recover damages for any performance of the work to which he did not consent, Act of Jan. 6, 1897, c. 4, 29 Stat. 481, while prior to 1897 he did not have the exclusive right of performance and hence could bring no action. See Act of July 8, 1876, c. 230, sec. 101, 16 Stat. 214.

The first case a court was called upon to decide was where the plaintiff's copyrighted musical composition was played by an orchestra in the dining-room of the defendants' hotel. The Circuit Court of Appeals held that this was not an infringement of the copyright, since Congress meant by the words "for profit" a direct pecuniary charge, such as an admission fee. John Church Co. v. Hilliard Hotel Co. *et al.*, 221 Fed. 229, 136 C. C. A. 639 (1915). This interpretation of the Act was followed where the plaintiffs sought an injunction to prevent their copyrighted song from being sung by a paid performer in the defendant's cabaret. Herbert *et al.* v. Shanley Co., 222 Fed. 344 (D. C., 1915); affirmed 229 Fed. 340, 143 C. C. A. 460 (1916). But when these cases were carried to the Supreme Court, the decisions below were reversed, the court holding that the Act included indirct, as well as direct, profit. In the words of Justice Holmes: "If the music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough." Herbert v. The Shanley Co.; John Church Co. v. Hilliard Hotel Co. *et al.*, 242 U. S. 591, 595 (1917). It has been held in England that the performance of a musical composition by a hotel orchestra was not a gratuitous public entertainment, because it was a means of attracting customers, and thus of gaining a profit. Sarpy v. Holland and Savage, L. R. [1908], 2 Ch. Div. 198, 99 Law Times R. 317 (Eng.). A recent decision holds that it is an infringement to play a copyrighted musical composition in a moving picture theatre. Harms *et al.* v. Cohen, 279 Fed. 276 (D. C., 1922).

It is submitted that the decision in the principal case is correct. Broadcasting furthers the sale of radio equipment, and thus stimulates the defendant's business. Moreover, the defendant derives great advantage from the advertising it receives through its name and slogan being constantly brought to the attention of a large number of people. Indirectly it secures a

profit from the broadcasting of the plaintiff's song. That is sufficient to constitute an infringement of the copyright.

COURTS—RESTRAINT OF PROCEEDINGS IN STATE COURTS BY FEDERAL COURTS.—The United States had a lien on crops for payment of rent. Certain persons acquired labor liens on the crops, and in foreclosure proceedings by them in a state court, a receiver was appointed to sell the crops. To protect the Government's lien, a Federal court enjoined the receiver from paying out the proceeds of the sale until further orders from it, the Federal court. A motion to dissolve the injunction as violating section 265 of the judicial code was denied. *U. S. v. Inaba et al.*, 271 Fed. 416 (D. C., 1923).

The Federal judicial code provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except where such injunction may be authorized by any law relating to proceedings in bankruptcy." 36 Stat. at L. 1162, c. 231, sec. 265. This, and provisions like it, except as relating to bankruptcy, have been in force since 1793. 1 Stat. at L. 333, c. 22, sec. 5; U. S. Rev. Stat., sec. 720.

The courts have held, however, that certain types of cases are not within the scope of this provision, and in such cases injunctions may issue. Madisonville Traction Co. v. Mining Co., 196 U. S. 239 (1905); Simon v. Southern Ry. Co., 236 U. S. 115 (1915). On the whole subject, see 36 HARV. L. REV. 461. The present case was not within any of the recognized exceptions, and the injunction was sustained solely because the United States was a party. The reasoning of the opinion is that the United States could not have intervened in the state court, as that would have been compelling the sovereign to subject itself to the jurisdiction of a state, and that consequently the injunction was necessary to protect the lien. If this reasoning is correct, the case would seem properly to have been held outside the statute. But a consideration of the opinion raises two questions. Would such intervention constitute the subjection of sovereignty which the law interdicts? And would such intervention be a result of compulsion?

The court fails to distinguish between making the United States a defendant and making it a plaintiff in a state court. The former cannot be done without Congressional consent, which has never been given; Stanley v. Schwalby, 162 U. S. 155 (1896); but the latter has been done frequently, U. S. v. Dodge, 14 Johns. 94 (N. Y., 1817); U. S. v. White, 2 Hill 59 (N. Y., 1841); U. S. v. Burrill, 107 Me. 382, 78 Atl. 568 (1910); and was approved by a Federal court, Stearns v. U. S., 2 Paine 300 (C. C., 1835). In the principal case the United States would have intervened as a plaintiff. As to compulsion, the necessity which makes a claimant enter a tribunal to assert his claim seems scarcely such compulsion as would generally be considered subversive of sovereignty.

There is, in addition to all this, one precedent against the decision in the principal case. On almost parallel facts a Federal district court decreed the discharge of an attachment obtained by the United States unless the United States should interplead in the state court, which it accordingly did. See Johnston v. Stimmel, 26 Hun 435 (N. Y., 1882).

COVENANTS—BUILDING RESTRICTIONS—INTERPRETATION.—The plaintiff and defendant purchased adjoining lots. The deeds contained clauses forbidding the erection of "any slaughter-house, piggery, smithshop, forge, furnace, foundry, or any other factory of any kind whatsoever, or any brewery, distillery or any other noxious or dangerous trade or business, . . . any stores or garages." The plaintiff sought to enjoin the defendant from erecting a garage for his private use. The injunction was denied. *Gibson et al. v. Main*, 122 Atl. 188 (Del., 1923).

It is a general rule that any reasonable or substantial doubt regarding the meaning of building restrictions will be resolved against the grantor and in favor of the free and unrestricted use of the property. Johnson v. Jones, 244 Pa. 386, 90 Atl. 649 (1914); Conrad v. Boogher, 201 Mo. App. 644, 214 S. W. 211 (1919). The rules for interpreting such covenants follow in brief. The court must determine the intention of the parties by reading, not a single clause of the deed, but the entire context and, where the meaning is doubtful, by considering the attending circumstances. Hutchinson v. Ulrich, 145 Ill. 336, 34 N. E. 556 (1893); Kitching v. Brown, 180 N. Y. 414, 73 N. E. 241 (1905); the deed must be considered with reference to the situation of the property affected and its present and prospective use. Kenwood Land Co. v. Hancock Invest. Co., 169 Mo. App. 715, 155 S. W. 861 (1913); regard must be had to the object which the covenant was designed to accomplish, and the language used must be read in an ordinary or popular, and not in a legal or technical, sense; Elterich v. Leech R. E. Co., 130 Va. 224, 107 S. E. 785 (1921); the purpose to be achieved by the covenant must be kept in mind; Godfrey v. Hampton, 148 Mo. App. 157, 127 S. W. 626 (1910); though restrictions are in general disfavor, the courts must give effect to the intention of the parties in good faith, and not seek by ingenious subtleties to evade the restrictions; Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577 (1905); particular words are to be given their common meaning at the time the covenant was extended. White v. Collins Co., 82 N. Y. App. Div. 1, 81 N. Y. S. 434 (1903). If, after the application of the above tests, the court is still in doubt, the general rule invariably applies.

In the principal case the court found that the restrictions applied only to such structures as are identified with trade or business or some quasi-public use. The instant case is simply another illustration of the tendency of courts to favor the free and unrestricted use of real property. St. Andrew's Church's Appeal, 67 Pa. 512 (1871).

EQUITY PRACTICE—MONEY DAMAGES ALONE.—A bill was brought for rescission of a contract to exchange land, on the ground of fraud. Rescission was refused because of laches of plaintiff and the case transferred to the law side of the court to determine plaintiff's damages. Defendant desired a final settlement of the case in the equity proceeding and now applies for a writ of mandamus to compel the judge to set aside the order of transfer. The writ was refused. *Hoontz v. Houghton*, 194 N. W. 1018 (Mich., 1923).

There is a clear rule of practice that, if a court of equity has juris-

diction of a case for the purpose of granting an equitable remedy, it may retain the case to settle all disputes relating to the subject matter, and in so doing give such relief as is ordinarily given only by a court of law. McKevitt v. City of Sacramento, 55 Cal. App. 117, 203 Pac. 132 (1921); Blankenhorn v. Edgar, 193 Iowa 184, 186 N. W. 893 (1922); Bosworth v. Johnson, 119 Atl. 753 (R. I., 1923).

But it seems also to be well settled law that, if the right to an equitable remedy is not established, the court will not retain the case to grant a purely legal remedy. Kramer v. Cohen, 119 U. S. 355 (1886); Caldwell v. East Broad Top R. R., 169 Pa. 99, 32 Atl. 85 (1895); Merry Realty Co. v. Shamokin Realty Co., 230 N. Y. 316, 130 N. E. 306 (1921). See also 21 C. J. 142, 10 R. C. L., sec. 120, and note in 19 L. R. A. (N. S.) 1065 *et seq.*

Yet there are cases where the equitable remedy sought has been refused and damages awarded, some of which are, it is submitted, sound. In these cases the plaintiff has established his equity, but his recovery is prevented by the superior rights of an innocent third party, Case v. Minot, 158 Mass. 577, 33 N. E. 700 (1893), or of the general public, Lane v. Michigan Transit Co., 135 Mich. 70, 97 N. W. 354 (1903); Sadlier v. City of New York, 185 N. Y. 408, 78 N. E. 272 (1906), or by developments subsequent to the commencement of the action making the relief sought impossible or unjust. Lefevre v. Chamberlain, 228 Mass. 294, 117 N. E. 327 (1917); Lafean v. American Caramel Co., 271 Pa. 276, 114 Atl. 622 (1921).

There is, however, much loose language on the subject, and the decisions allowing damages seldom indicate that there are situations in which damages will not be granted. In addition to the cases which are flatly *contra* to the principal case, Downs v. Bristol, 41 Conn. 274 (1874); Evans v. Kelley, 49 W. Va. 181, 38 S. E. 497 (1901); Andrus v. Berkshire Power Co., 147 Fed. 76, 77 C. C. A. 248 (1906), there are others which seek some distinction to uphold them, usually that of the good faith of the complainant in bringing his action in equity rather than in law, Johnston v. Bunn, 108 Va. 490, 62 S. E. 341 (1908); McLennan v. Church, 163 Wis. 411, 158 N. W. 73 (1916). How such a fact can give a court jurisdiction where none existed before is not quite clear. See note in 19 L. R. A. (N. S.) 1065 *et seq.*; but these cases are comparatively few. The weight of authority is in support of the principal case and is decisive that, except in special cases where the plaintiff has established his rights in equity, no legal remedy may be granted in equity unless supplementary to the equitable remedy.

HUSBAND AND WIFE—TENANTS BY ENTIRETY—JUDGMENTS AS LIENS UPON LAND.—Title to certain premises in Pennsylvania was vested in A and B, husband and wife, as tenants by entirety. The defendants obtained two judgments, one against A and one against B. Thereafter A and B conveyed to the plaintiff. The defendants attempted to issue execution, and to sell the premises as the property of A and B. The plaintiff asked an injunction, on the ground that this was an unjustified use of the processes of the court to cast a cloud upon her title. *Held:* Under the law of Pennsylvania, injunction granted. *Getty v. A. Hupfel's Sons,* 292 Fed. 178 (D. C., 1923).

The form of estate known as tenancy by entirety, whereby husband and wife hold land as a single person, with the right of survivorship, has continued down to the present day in a number of jurisdictions. See list of states in 30 L. R. A. 314; 30 C. J. 557. At common law, since the husband had the use and disposition of his wife's property, an estate by entirety was subject to the payment of his debts, provided the wife's right of survivorship was protected. Barber v. Harris, 15 Wend. 615 (N. Y., 1836); Den v. Gardner, 20 N. J. L. 556 (1846); Bennett v. Child, 19 Wis. 362 (1865). Since the passage of the Married Women's Property Acts, decisions on this point have been conflicting. It has been held that judgment creditors of one spouse have a lien on a half interest of the estate, and may become tenants in common of the other spouse. Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695 (1887); Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337 (1895); Zubler v. Porter, 120 Atl. 194 (N. J. Eq., 1923). But what seems the logical view, and that which is supported by the weight of authority, is that a judgment against either the husband or the wife is not a lien on the estate which the two hold together, Otto F. Stofel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67 (1917), annotated in L. R. A. 1918C 1009; Hurd v. Hughes, 109 Atl. 418 (Del., 1920); Gorelick v. Shapiro, 192 N. W. 540 (Mich., 1923), and that they may join and convey a clear title to a purchaser. Jordan v. Reynolds, 105 Md. 288, 66 Atl. 27 (1907), annotated in 9 L. R. A. (N. S.) 1026 and 12 Ann. Cas. 53. Pennsylvania holds that a judgment against the husband is a lien against his expectancy of survivorship, which will become enforceable if his wife dies before him. Fleck v. Zillhaver, 117 Pa. 519, 12 Atl. 420 (1887). The lien may be divested by the predecease of the husband, or by a joint alienation of the estate by sale, Beihl v. Martin, 236 Pa. 519, 84 Atl. 953 (1912), annotated in 42 L. R. A. (N. S.) 555, although not by mortgage. Fleck v. Zillhaver, *supra*. The logic of the position of the Pennsylvania courts has been criticised. Shapiro, "Estates by Entirety—Beihl v. Martin," 61 U. OF PA. L. REV. 476. It seems undisputed that a joint judgment against husband and wife will be a lien on the estate. Union National Bank of Muncie v. Finley, 180 Ind. 470, 103 N. E. 410 (1913); Ades v. Caplan, 132 Md. 66, 103 Atl. 94 (1918).

It is submitted that the decision in the principal case is correct. There were two several judgments, not a joint one. Therefore, under the case of Beihl v. Martin, *supra*, the court was bound to decide that the plaintiff had received a clear title. The defendants had no lien on the land, and the court was justified in restraining them from attempting to assert one. It is further submitted, however, that the hardship worked on the creditor in those cases which adhere to the majority view is a strong argument for the abolition by the legislature of this archaic form of estate.

INFANTS—CONTRACTS—RIGHT OF RESTITUTION AFTER DISAFFIRMANCE.—The plaintiff, an infant, purchased stock in the defendant company and paid part of the purchase price. The shares were registered in her name. The plaintiff never applied for the certificates, but rescinded the contract and

sued to recover the cash paid. *Held:* Judgment for the defendant. *Steinberg v. Scala (Leeds), Ltd.*, 129 Law Times R. 624 (Eng., 1923).

It is a general rule that an infant may disaffirm a contract made by him for the purchase of property other than necessaries, and may recover the consideration from which he parted. Ruchizkey v. De Haven, 97 Pa. 202 (1881); Hamilton v. Vaughan-Sherrin E. E. Co., 3 Ch. 589 (Eng., 1894); Wuller v. Chuse Geo. Co., 241 Ill. 398, 89 N. E. 796 (1909). There is much conflict as to whether the infant must return or tender the consideration received by him as a condition precedent to his right of restitution. Probably the majority of American cases lay down the rule that an infant can in all cases disaffirm and recover the consideration given by him without first returning what he received, Ruchizkey v. De Haven, *supra*, but *contra*, Lemmon v. Beeman, 45 Ohio 505, 15 N. E. 476 (1888), although the vendor is at once entitled to retake it in an appropriate action. Carpenter v. Carpenter, 45 Ind. 142 (1873). If the infant has parted with the property or consideration the law is settled that his right to recover is not thereby lost, Ruchizkey v. De Haven, *sura;* Morse v. Ely, 154 Mass. 458, 28 N. E. 577 (1891); MacGeal v. Taylor, 167 U. S. 688 (1897). When under a fair contract he has received benefits which cannot be returned, a few courts deny him a recovery of the consideration given. Johnson v. Northwestern, etc., Ins. Co., 56 Minn. 365, 57 N. W. 934 (1894); Rice v. Butler, 160 N. Y. 578, 55 N. E. 275 (1899). No doubt most of the English cases holding that an infant is bound by his contracts if they are beneficial to him fall within the foregoing principle. Holmes v. Blogg, 8 Taunt 508 (1818). See Anson, Contracts (14th ed., 1919) 184.

In the principal case the court further extends the "beneficial" view by holding that it is unnecessary to find a benefit to the infant if a detriment on the part of his vendor is shown, making it necessary to prove a total failure of consideration before the infant may recover. In so holding the court practically overruled a similar English case, Hamilton v. Vaughan-Sherrin E. E. Co. *supra*. The Minnesota rule seems to be a flexible one which will prevent imposition upon the infant and also tend to prevent the infant from imposing to any serious degree upon others. It is submitted that the instant case goes too far. If sustained it will virtually destroy any possibility of restitution by an infant after rescission of contract, since some "forbearance" or "giving up of a legal right" can usually be shown by the other party. See 28 L. R. A. (N. S.) 128 (note); Williston, Contracts (1920) 459.

MUNICIPAL CORPORATION—RECITALS IN BONDS—ESTOPPEL TO DENY.—Action on a county's note for $5000 which recited that it was to recover a casual indebtedness and that it was for an amount within the constitutional debt limit. Actually, the note alone was within the limit but it was one of three the total of which was greater than was allowed. Attached to it, when received by the plaintiff, was a statement that it was part of the loan for the larger amount. It was claimed that the county was estopped to show the note void by reason of the constitutional limit. *Held* (3 dissents): Judgment

for defendant. *Bank of Moultrie v. Rockdale County*, 119 S. E. 322 (Ga., 1923).

In determining whether a bond issue is in excess of the constitutional limitations on indebtedness three facts must be known: (1) the percentage of the taxable property up to which the constitution permits the corporation to borrow, (2) the value of this taxable property, and (3) the amount of the outstanding indebtedness. The first and second are matters of record to which the creditor must look for his information and as to which he may not rely on the recitals. Dixon County v. Field, 111 U. S. 83 (1884). See note in L. R. A. 1915 A, 916 *et seq.* If the face of the bond shows the issue is greater than is allowed, the creditor has all the facts necessary and may not rely on the recital at all; Corbet v. Rocksbury, 94 Minn. 397, 103 N. W. 11 (1905); St. Lawrence Tp. v. Furman, 171 Fed. 400, 96 C. C. A. 356 (1909); Farmers' Loan and Trust Co. v. Wilcox County, 287 Fed. 809 (1923); likewise, if the bond itself is within the limit but public records show that the previous indebtedness taken with it is in excess of the limit. Sutliff v. Lake County Commissioner, 147 U. S. 230 (1892); National Life Ins. Co. v. Mead, 13 S. D. 37, 82 N. W. 78 (1900).

But where the indebtedness is not a matter of record and the note itself is not beyond the allowance, the purchaser has no way of learning of the invalidity of the bond. In such a case the recital on the bond is treated as a statement by the officers most concerned that the previous indebtedness and the present loan do not exceed the limit, and the corporation is thereafter estopped to deny it. Gunnison County v. Rollins, 173 U. S. 255 (1898); Waite v. Santa Cruz, 184 U. S. 302 (1902); City of Laredo v. Frishmuth, 196 S. W. 199 (Tex., 1917).

In the present case the note does not mention the total issue and its own amount is not in excess of the limit. Therefore, it seems that, unless the county showed that the plaintiff had notice of the total amount of the new indebtedness, he could rely on the recital and the county could not deny the facts represented therein.

PARTNERSHIP—LIABILITY FOR WILFUL AND MALICIOUS ACTS.—Two partners were engaged in a business on rented premises, and one of them, while attempting to remove some lumber from the premises in the absence of the other, committed a wilful and malicious assault on the landlord. The latter sued both partners jointly for injuries sustained. *Held:* Nonsuit imposed, because the absent partner was not liable. *Polis v. Heizman*, 276 Pa. 315, 120 Atl. 269 (1923).

Section 13 of the Uniform Partnership Act provides: "Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his co-partner, loss or injury is caused to any person, not being a partner in the partnership, the partnership is liable therefor to the same extent as the partner so acting or omitting to act." In all the cases dealing with the liability of the partnership for a partner's wrongful acts, the courts begin with the statement of the fundamental rule of law that such liability is based on the theory of agency. As a result, they merely apply to the relation of partnership the general law of agency. McIntyre v. Kavanaugh, 242 U. S. 138 (1916).

In the modern cases, the test which governs the liability of the principal for the wilful and malicious acts of his agent, is whether the agent was acting within the course of his employment in the doing of these acts. Mechem, Agency (2d ed.), vol. 2, 1520; Aiken v. Holyoke Ry. Co., 184 Mass. 269, 68 N. E. 238 (1903). But, based on this statement of the law, courts in the various jurisdictions arrive at widely different conclusions in their application of it. Rounds v. Delaware R. R. Co., 64 N. Y. 129 (1876); Magar v. Hammond, 183 N. Y. 387, 76 N. E. 474 (1906).

The expressions, "in the ordinary course of the business of the partnership" as used in the Act, and "in the course of employment," are similarly construed. For example, those courts which tend toward making the principal liable for the acts of his agent if they can reasonably do so, would take the same attitude in determining the liability of a partnership. If, as in the principal case, the acting partner disregards his service to the partnership and commits wilful and malicious acts to accomplish some purpose of his own, it is settled that the partnership would not be liable. Gilbert v. Emmons, 42 Ill. 143 (1866); Woodling v. Knickerbocker, 31 Minn. 268, 178 N. W. 387 (1883). Whereas, if the partner is acting for the interest of all, or with authority, as in bringing suits in the partnership name, such circumstances generally establish the liability of the partnership. See Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. 93 (1885); Page v. Citizens' Banking Co. *et al.*, 111 Ga. 73, 36 S. E. 418 (1900); McIntyre v. Kavanaugh, *supra*.

Although the principal case is apparently the first case decided on this point in Pennsylvania since the adoption of the Uniform Partnership Act, the court did not note any change in the law due to its provisions. There is no reason to believe that other courts will hold otherwise, since Section 13 of the Act is a mere restatement of the common law.

PROPERTY—CONTINGENT REMAINDERS—ALIENATION.—The testator in his will provided that A shall hold certain property during the term of her life and at her death it shall descend equally to the heirs of her body in fee simple. The plaintiff claimed an interest in the land through a conveyance from A's son, which was made prior to A's death; A had three children, two of whom, including the plaintiff's grantor, died in A's lifetime. The plaintiff instituted a suit to quiet title against the heirs of the child who survived A. *Held:* Judgment for defendants. *Kendrick v. Scott*, 254 S. W. 422 (Ill. 1923).

In the principal case the court decided that the remainder after the life estate to the "heirs of the body" created only a contingent remainder, whereas a devise over to the "children" would have given them a vested remainder. Because the law favors the vesting of estates, the inference is generally drawn that vested rather than contingent remainders were intended, especially where the limitations in the will are to the direct descendants of the testator. Woodard v. Woodard, 184 Iowa 1178, 169 N. W. 464 (1918); Mallaney v. Monahan, 232 Mass. 279, 122 N. E. 387 (1918). This tendency often leads courts to give the word "heirs" the meaning and legal

significance of the word "children." In such a case, the "children" of the life tenant who are living at the testator's death take a vested remainder in fee, subject to the letting in of after-born children, their enjoyment of the fee simple being postponed until the death of the life tenant. Levin v. Bell, 285 Ill. 227, 120 N. E. 633 (1918); Albright v. Voorhiis, 104 Atl. 27 (N. J., 1918); Burkley v. Burkley, 266 Pa. 338, 109 Atl. 687 (1920).

Although in some instances the courts disregard the real intention of the testator in determining the quantity of the estate devised, nevertheless, when it is ascertained that a remainder exists, the courts are guided by the apparent intention of the testator in deciding whether the remainder is vested or contingent. So, when the evident purpose of the testator is to give to the word "heirs" its strict legal meaning, the courts hold that the remaindermen have only a contingent interest. This is true, since there are no heirs until the death of the life tenant. Putnam v. Gleason, 99 Mass. 454 (1868); Rutherford v. Rutherford, 116 Tenn. 383, 92 S. W. 1112 (1906); Merserean v. Katz 197 App. Div. 895, 189 N. Y. S. 847 (1921). Hence, a deed executed by such a contingent remainderman before the death of the life tenant conveys nothing. Robeson v. Cochran, 255 Ill. 355, 99 N. E. 649 (1912).

The superadded words create a fresh limitation and the heirs of the body take by way of purchase and not limitation. Since the heirs of the body are made a "new and independent stream of descents," the conclusion of the court is apparently in agreement with the few decisions on these issues. See McCrea v. McCrea, 5 Ohio App. 351 (1915).