RECENT CASES.

CONSTITUTIONAL LAW—SALE OF TICKETS—REGULATION BY STATES.—The defendant, convicted of selling steamship tickets without a license in violation of the Act of 1919, P. L. 1003, Pa. Stat. 1920, Sec. 20197, amended by the Act of 1921, P. L. 997, Pa. Stat. Supp. 1924, Sec. 20197, appealed on the ground that the statute contravened the commerce clause of the Federal Constitution. *Held:* The statute is unconstitutional. *Com. v. Disanto*, 85 Pa. Super. 149 (1925).

It is fundamental that a State, through its police power, has a right to require of its citizens whatever qualifications it sees fit to impose as a prerequisite to doing business in the State. It is, however, well settled that a state law is unconstitutional and void which required a party to take out a license for carrying on interstate or foreign commerce. *McCall v. California*, 136 U. S. 104 (1889); *Crutcher v. Ky.*, 141 U. S. 47 (1890); *Adams Express Co. v. N. Y.*, 232 U. S. 14 (1914).

The present statute expressly excludes railroads and steamship companies from its provisions, and is aimed solely at the independent dealer in such tickets, who is usually financially unreliable and too often unscrupulous in his dealings. In the principal case, the majority of the Court looks on such a dealer as an agent of each of the companies which he represents and holds that, since the company is engaged in foreign commerce, he, as agent, is also engaged in such commerce so that the license requirement is a burden on foreign commerce and void under the Constitution, Article 1, Sec. 8, cl. 3. It would seem that his relation with the various companies is hardly that of an agent. He is in no sense an employee; his position more nearly resembles that of an independent broker who is selling a particular kind of wares, *i. e.*, tickets furnished by the various companies.

The Supreme Court of the United States has upheld many state statutes which, in so far as they affect transactions of interstate or foreign commerce, did so indirectly. Thus statutes requiring the examination and licensing of locomotive engineers have been upheld; *N. C. & St. L. Ry. v. Ala.*, 128 U. S. 96 (1888); forbidding the running of freight trains within the state on Sunday; *Hennington v. Georgia*, 163 U. S. 299 (1896); heating of steam passenger cars; *N. Y., N. H. & H. R. R. v. N. Y.*, 165 U. S. 628 (1897).

The Act of 1919, if it affects foreign commerce at all, does so only indirectly and might have been upheld.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—ZONING ORDINANCES—SEGREGATION OF RACES.—Ordinance and statutes provided for segregation of the residences of whites and negroes by precisely the same restrictions upon each. Ordinance 8037 of New Orleans, enacted under the authority of La. Acts 1912, No. 117; La. Acts 1924, No. 118, *Held:* Ordinance and Statutes constitutional. *Tyler v. Harmon*, 104 So. 200 (La. 1925).

A municipality exercising its police power under express authority of the legislature may restrict the use of private property in the public interest;

Slaughterhouse Cases, 16 Wall. 62 (U. S., 1873); *Taunton v. Taylor*, 116 Mass. 254 (1874); I DILLON MUN. CORP., Sec. 144 and note; but the restriction must be reasonable, in good faith, and for a public good. See *Plessy v. Ferguson*, 163 U. S. 537, 550 (1896); I DILLON MUN. CORP., Secs. 319, 322 and note. It must not discriminate against some and favor others. See *Yick Wo v. Hopkins*, 118 U. S. 356, 368 (1886). In determination of reasonableness, courts consider the necessity of the object sought. *Commonwealth v. Worchester*, 3 Pick. 462 (Mass., 1826); *Kneedler v. Norristown*, 100 Pa. 368 (1882); I DILLON MUN. CORP., Sec. 327. Gauged by these standards, segregation of the races, as provided in the ordinance under review, is permissible under the police power. *Plessy v. Ferguson, supra.* Segregation has been upheld as to schools; *People v. Gallagher*, 93 N. Y. 438 (1883); *Roberts v. City of Boston*, 5 Cush. 198 (Mass., 1849), and as to railroad trains. *McCabe v. Atchinson*, 235 U. S. 151 (1914); *Plessy v. Ferguson, supra.*

The judgment in the principal case can not be reconciled with all that is said in *Buchanan v. Warley*, 245 U. S. 60 (1917), yet the two cases may be distinguished. In the latter case the court found as a fact that the ordinance forbade a white person to sell his property, which was situated in a white neighborhood, to a colored person. Upon that finding of interference with the freedom of contract, the court declared the ordinance in violation of the Fourteenth Amendment, *Buchanan v. Warley, supra*, p. 73. In the principal case the Court found nothing in the statutes or ordinances that forbade a white person to sell his property to a colored person; and held that the ordinance merely denied the purchaser of the property the right to reside therein contrary to the provisions of the ordinance, *Tyler v. Harmon, supra*, p. 206.

It is not now an open question that a restriction on the enjoyment of one's property for the public good is not a violation of the Fourteenth Amendment, *Barbier v. Connolly*, 113 U. S. 27, 31 (1885); *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139 (1915). The decision in the principal case seems to be in accord with public policy.

CRIMINAL PROCEDURE—WITHDRAWAL OF PLEA OF GUILTY AFTER JUDGMENT.—Defendant was indicted for murder and arraigned without counsel. He pleaded guilty, and was sentenced to death. Counsel subsequently appearing for him filed a motion to vacate the judgment and for leave to withdraw the plea and enter not guilty. Motion was overruled. *Held:* Error. *Howington v. State*, 235 Pac. 931 (Okla. Crim. App., 1925).

It is discretionary with the trial court before judgment or sentence to permit a plea of guilty to be withdrawn for the purpose of interposing not guilty. *Rex v. Plummer*, [1902] 2 K. B. 339; *Billingsley v. United States*, 249 Fed. 331 (C. C. A., 1918). So, too, in general, of the withdrawal of not guilty and substitution of guilty. *State v. Shanley*, 38 W. Va. 516, 18 S. E. 734 (1893); *People v. Kaiser*, 150 App. Div. 541, 135 N. Y. Supp. 274, affirmed in 206 N. Y. 46, 99 N. E. 195 (1912); *State v. Ferranto*, 148 N. E. 362 (Ohio, 1925). The present case, in which the appellate court viewed the defendant's plea as not knowingly and voluntarily entered because he was not informed of his constitutional rights, would fall within the prevailing rule that a reversal is proper

where there has been a clear abuse of discretion. *Myers v. State*, 115 Ind. 554, 18 N. E. 42 (1888); *State v. Maresca*, 85 Conn. 509, 83 Atl. 635 (1912). After judgment a number of decisions have allowed the withdrawal of guilty, treating the discretion of the trial court as continuing. *Sanders v. State*, 85 Ind. 318 (1882); *State v. Maresca, supra; People v. Byzon*, 267 Ill. 498, 108 N. E. 685 (1915). *Contra: Regina v. Sell*, 9 Car. & P. 346 (Eng., 1840); *Beatty v. Roberts*, 125 Iowa 619, 101 N. W. 462 (1904). While the English rule would appear the more logical as indicating that the final determination of the court removes its discretionary power, it would seem that *Howington v. State, supra*, is in harmony with the desire of our law to throw the greatest protection around human life which is consistent with sound policy.

EASEMENTS—RIGHT OF WAY BY NECESSITY.—Plaintiff and defendant own adjoining properties, acquired from a common grantor. One outlet from plaintiff's property is a road over defendant's land; the only other is an adjacent thoroughfare twelve feet above level of plaintiff's property. Defendant offers to build plaintiff a driveway to this thoroughfare. Plaintiff, alleging road over defendant's land is way of necessity, seeks injunction to restrain defendant's blocking it. *Held:* Preliminary injunction granted. *Lederer v. Gun Hill Construction Co.*, N. Y. Supreme Ct., July 30, 1925.

By the weight of authority there is no way of necessity if there be another exit, however steep, narrow or expensive. *United States v. Rindge*, 208 Fed. 611 (D. C., 1913); *Outerbridge v. Phelps*, 58 How. Pr. 77, 45 N. Y. Super. Ct. 555 (1879); *McDonald v. Lindall*, 3 Rawle 492 (Pa., 1827). By the minority rule one is entitled to a way by necessity though another exit is possible of which the expense or difficulty of construction is out of proportion to the value of the dominant tenement. *Smith v. Griffin*, 14 Colo. 429, 23 Pac. 905 (1890); *Pettingill v. Porter*, 90 Mass. 1 (1864). The previous cases stress the element of necessity and do not permit mere convenience to be substituted. *United States v. Rindge, supra; Nichols v. Luce*, 24 Pick. 102 (Mass., 1834); and *Littlefield v. Hubbard*, 128 Atl. 285 (Me., 1925), in which no way was granted although the only other exit was over the ocean.

The instant case therefore seems to go too far. A road built at defendant's expense would appear to be practicable and useful for all purposes, although too steep to be convenient. But to allow a way by necessity, for mere convenience, would too much curtail the right of a freeholder to the uninterrupted enjoyment of his land, a right of which our law is a very jealous guardian.

EVIDENCE—PAROL EVIDENCE RULE IN PENNSYLVANIA.—An important change in the application of the parol evidence rule in this state is indicated by the decisions in certain recent cases, notably *Gianni v. Russell & Co.*, 281 Pa. 320, 126 Atl. 791 (1924). An article by Earl G. Harrison, Esq., dealing with this question, will appear in the next issue of the LAW REVIEW.

GARNISHMENT—EFFECT OF PRIOR ASSIGNMENT.—A assigned a debt to C without notice to the debtor B. Subsequently D, a creditor of A, obtained a judgment against B, as garnishee. After this judgment had been entered C notified B of the assignment and C and B petitioned the court to strike out

the judgment and to let C intervene as claimant. *Held:* The judgment ordered stricken out. *McDowell v. Hopfield*, 128 Atl. 742 (Md., 1925).

By the great weight of authority the garnished debtor must be notified of the assignment of the debt in time for him to state it as garnishee; otherwise the attaching creditor has priority and the debtor may plead the judgment as a defense to an action by the assignee. *Coates v. Emporia Bank*, 91 N. Y. 20 (1883); DRAKE, ATTACHMENTS, 608 (7th ed.). *In re Phillips*, 205 Pa. 525, 55 Atl. 216 (1903). There has been some relaxation of this rule, however. Where the garnishee has left judgment go by default and by statute still has an opportunity to show cause why execution should not issue, notice any time before execution has been held to be sufficient to protect the assignee. *McPhail & Co. v. Hyatt*, 29 Iowa 137 (1870). And if the chose in action is represented by a written instrument, *e. g.*, a bond or note, many courts require no notice at all and compel the debtor garnishee to demand the surrender of such instrument or an indemnity bond, at his peril, before submitting to judgment. *Yocum v. White*, 36 Iowa 288 (1873); *Sheeler v. Oregon*, 65 N. C. 201 (1871). Of course, where the garnishee is considered a mere witness and no personal judgment can be rendered against him, but only a court order to pay the attaching creditor, notice any time before actual payment is sufficient. *Millegan v. Plymouth State Bank*, 26 Ohio C. C. 136 (1904). But where, as in most states, the judgment against a garnishee is final and binding and subject to execution very little authority supports striking it out upon notice of the assignment, after final entry. Such a judgment has been stricken out, as in the principal case, on the ground that notice of the assignment was required only to protect the debtor garnishee and that as between the assignee and the attaching creditor the superior equities were with the former. *McDonald v. Kneeland*, 5 Minn. 352 (1861). But it seems that when such a judgment has the same status as any other judgment it should stand or fall by the same legal principles and, though the result may entail some hardship, that the proper remedy, if any, is with the legislature.

HUSBAND AND WIFE—ANNULMENT OF MARRIAGE FOR CONCEALMENT OF PRIOR INSANITY.—The defendant had been incarcerated in an insane asylum prior to marriage, but was subsequently discharged as cured, and married three years later. Insanity returned following birth of a child. Defendant had not disclosed fact she had previously been adjudged insane, nor did plaintiff make any inquiry about insanity. *Held:* Not sufficient grounds for annulment of the marriage. *Robertson v. Roth*, 204 N. W. 329 (Minn., 1925).

The court said it was against the policy of the state to permit a ready annulment of this "extraordinary contractual relation" and that "concealment in order to annul a marriage must go to the very essence of the contract." The fraud contemplated by the statute providing for annulment must be something which destroys the contract or creates an unforeseen condition at the time of marriage which is "intolerable to society and detrimental to the marriage relation."

This case follows the weight of authority. *Cummington v. Belchertown*, 149 Mass. 223, 21 N. E. 435 (1889), on similar facts is in accord. Insanity

occurring after marriage is not grounds for annulment. *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323 (1890); 26 Cyc. 902.

New York in its lower courts, at least, appears to hold the contrary. *Weill v. Weill*, 104 Misc. 561, 172 N. Y. Supp. 589 (1918), adopts the rule that if the facts on which the alleged fraud is based had been known there would have been no marriage, such facts are material and furnish grounds for annulment. This rule is iterated in *Truiano v. Truiano*, 121 Misc. 635, 201 N. Y. Supp. 573 (1923). In accord with these cases is *Gatto v. Gatto*, 79 N. H. 177, 106 Atl. 493 (1919), where annulment was decreed because the wife had represented herself as chaste and later revealed incest.

Under the Act of 1913, P. L. 1013, Pa. St. 1920, Sec. 14566, Pennsylvania provides that no license to marry shall be issued where either of the contracting parties is a person of unsound mind. The Act of 1905, P. L. 211, Pa. St. 1920, Sec. 9148, which amended the Act of 1843, P. L. 233, Pa. St. 1920, Sec. 9147, allows a divorce, not an annulment, from an insane spouse. Consequently the question would not arise in that state.

HUSBAND AND WIFE—INJUNCTION—SCOPE OF REMEDY.—The plaintiff obtained an injunction restraining the defendant from associating or communicating with the plaintiff's husband and from annoying the plaintiff by her attentions to plaintiff's husband. Defendant appealed. *Held:* Injunction properly granted. *Smith v. Womack*, 271 S. W. 209 (Texas, 1925).

It is now settled law that a wife may maintain a damage action for the alienation of her husband's affections. *Westlake v. Westlake*, 34 Ohio 621 (1878); *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17 (1889); *Gernerd v. Gernerd*, 185 Pa. 233, 39 Atl. 884 (1898); 21 Cyc. 1617. But courts are not so unanimous in permitting her to enjoin another from interfering with her right to those affections. The courts of Texas and New York have recognized the power of equity to so restrain one interfering with the marital relation. *Ex parte Warfield*, 40 Tex. Cr. 413, 50 S. W. 933 (1899); *Hall v. Smith*, 80 Misc. 85, 140 N. Y. Supp. 796 (1913); *Witte v. Bauderer*, 255 S. W. 1016 (Tex., 1923). See 72 U. OF P. L. REV. 451; 37 HARV. L. REV. 770. But a recent Ohio case holds the granting of such an injunction an unwarranted extension of equity jurisdiction. *Snedaker v. King*, 111 Ohio 225, 145 N. E. 15 (1924). The value of the Texas cases as authority is lessened by the fact that by statute the courts of that state have wider powers of granting injunctions than courts have under the general equity doctrine. Pound, *Equitable Relief against Defamation and Injury to Personality*, 29 HARV. L. REV. 640, 675.

It is generally held that an injunction will issue to restrain third persons from inducing the breach of a lawful contract by one of the parties thereto, where it will result in irreparable injury. *Truax v. Raich*, 239 U. S. 33 (1915); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229 (1917); *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1920); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921). While these cases concern the right of an employer to enjoy the fruits of his contract with his employees, the right of a wife to her husband's affections by virtue of the marriage contract can scarcely be considered less worthy of protection.

MORTGAGES — CHATTEL MORTGAGES — ATTACHMENT — PRIORITY — REMOVAL FROM STATE.—Mortgagor removed a mortgaged automobile from Kentucky, where the mortgage was duly recorded, to West Virginia, where plaintiff secured an attachment lien against the automobile. *Held:* The chattel mortgage takes precedence over the subsequently acquired attachment lien. *Ashland Finance Co. v. Dudley*, 127 S. E. 33 (W. Va., 1925).

In directly overruling *Ballard v. Great Western Co.*, 39 W. Va. 394, 19 S. E. 510 (1894), the Court brings itself in accord with the majority view, that, by virtue of the doctrine of comity, when a chattel mortgage is valid and effective according to the *lex loci contractus* such mortgage will be regarded as valid in the state into which the chattel is removed, as against an innocent purchaser for value provided that the *lex situs* of the chattel is not contravened thereby. *National Live Stock Bank v. Geneseo First National Bank*, 203 U. S. 296 (1906); *Creelman Lumber Co. v. Lesh*, 73 Ark. 16, 83 S. W. 320 (1904); *Nichols v. Mase*, 94 N. Y. 160 (1883).

Some jurisdictions qualify this rule to the extent of holding that where the mortgagee has consented to the removal he is not entitled to the amenities of comity, but must protect his rights by complying with the laws of the state to which the chattel has been removed, which are designed to preserve those rights. *Farmers and Merchants State Bank v. Sutherlin*, 93 Neb. 707, 141 N. W. 827 (1913); *Newsum v. Hoffman*, 124 Tenn. 369, 137 S. W. 490 (1911); *Jones v. North Pacific Fish Co.*, 42 Wash. 332, 84 Pac. 1122 (1906). Other jurisdictions regard the consent of the mortgagee to the removal, or knowledge thereof, as immaterial. *Shapard v. Hynes*, 104 Fed. 449 (1900); *Handley v. Harris*, 48 Kan. 606, 29 Pac. 1145 (1892); *Cobb v. Bushwell*, 37 Vt. 337 (1864).

Texas and Michigan refuse to give effect to the principle of comity in enforcing foreign chattel mortgages when to do so would cause injury to citizens of those States. *Corbett v. Littlefield*, 84 Mich. 30, 47 N. W. 581 (1890); *Best v. Farmers, etc., Bank*, 141 S. W. 334 (Tex. Civ. App., 1911).

The policy of Pennsylvania makes impossible the recognition of secret liens. Into this category fall chattel mortgages recorded in a foreign state, though not in Pennsylvania, and hence the exercise of comity in these cases is prohibited. *Sherman State Bank v. Carr*, 15 Pa. Super. 346 (1900); *Armitage v. Spahn*, 4 Pa. D. R. 270 (1895).

The rule of the minority, although founded in good logic and strict law, would seem to be the less satisfactory of the two, since it is eminently desirable that rights acquired under the laws of one state should be upheld in other states so far as is practicable under their laws.

PUBLIC FUNDS—ILLEGAL DISBURSEMENT—RIGHT OF TAXPAYER TO SUE FOR RECOVERY.—Six taxpayers brought suit against the printer of ballots to recover for the benefit of the county an amount paid him in excess of the legal charge, the county commissioners having refused to institute such action. *Held:* An individual taxpayer has no right to sue in behalf of the county for funds illegally paid out. *Clark v. George*, 236 Pac. 643 (Kan., 1925).

The weight of authority is opposed to this decision. An analogy is found in the case of private corporations: *Burns v. Essling*, 154 Minn. 304, 191 N. W.

899 (1923); *Quaw v. Paff*, 98 Wis. 586, 74 N. W. 369 (1898); and it is held good public policy to encourage efforts of citizens to compel strict observance on the part of public officers of their duties. *Mills v. Lantrip*, 170 Ky. 81, 185 S. W. 514 (1916). It would seem that when the proper authorities wrongfully refuse to act, the taxpayer has no remedy, and would be at the mercy of dishonest officials. *Zuelly v. Casper*, 160 Ind. 455, 67 N. E. 103 (1903); *Land Co. v. McIntyre*, 100 Wis. 245, 75 N. W. 964 (1898). See also DILLON, MUNICIPAL CORPORATIONS, Secs. 1580, 1588.

The Kansas courts rely on the county commissioners to protect the interests of the county, and if they fail the remedy is to be found in the next election, or they may be prosecuted on criminal charges, or removed in civil proceedings, and the moneys recovered by their successors. *Craft v. Jackson*, 5 Kan. 518 (1870); *Kerby v. Clay County*, 71 Kan. 683, 81 Pac. 503 (1905). The doctrine is supported by a very few cases in other jurisdictions. Those courts seem to fear a multiplicity of suits which might be brought by persons similarly situated: *Sears v. James*, 47 Ore. 50, 82 Pac. 14 (1905); and hold that the county alone has a right to complain. *Stevens v. Campbell*, 26 Tex. Civ. App. 213, 63 S. W. 161 (1901). The injury has been done, and the necessity for an immediate remedy, the usual ground for an injunction, does not exist. *Eaton v. Thayer*, 128 Atl. 475 (Me., 1925); *Brownfield v. Houser*, 30 Ore. 534, 49 Pac. 843 (1897).

In several states, including Pennsylvania, actions by taxpayers are provided for by statute. *Knight v. Village of Thompsonville*, 74 Ill. App. 550; *Hick v. Eggleston*, 105 App. Div. 73, 93 N. Y. Supp. 909 (1905); Act of 1878, P. L. 208, Pa. St. 1920, Sec. 6477.

SCHOOLS—RIGHT TO PUNISH PUPIL—ASSAULT AND BATTERY.—School principal mildly chastised plaintiff, a pupil, who, while on his own home property, annoyed girl pupils trespassing over it on their way home. *Held:* No assault and battery. *O'Rourke v. Walker*, 128 Atl. 25 (Conn., 1925).

Public schools have the right to make reasonable rules for the conduct of pupils. *Wilson v. Board of Education*, 233 Ill. 464, 83 N. E. 697 (1908); *Jones v. Cody*, 132 Mich. 13, 92 N. W. 495 (1902). For violation of such rules, the teacher, "*in loco parentis*," may chastise reasonably, whether the act is committed in school; *Mansell v. Griffin* [1908] 1 K. B. 160; *Vanvactor v. State*, 113 Ind. 276, 15 N. E. 341 (1887); *State v. Randall*, 79 Mo. App. 226 (1898); out of school; *Kinzer v. Directors, etc.*, 129 Iowa 441, 105 N. W. 686 (1906); *Deskins v. Gose*, 85 Mo. 485 (1885); or at home. *Burdick v. Babcock*, 31 Iowa 562 (1870); *Commonwealth v. Seed*, 5 Clark 78 (Pa., 1851); *Bolding v. State*, 23 Tex. App. 172, 4 S. W. 579 (1887).

But here there was no violation of rules, but independent misconduct. Few cases of this type have arisen. In *State v. Pendergrass*, 19 N. C. 365 (1837), the misconduct took place in school; in *Cleary v. Booth*, [1893] 1 Q. B. 465 on the way to school. Considering the cases where the misconduct took place after the pupil had returned home after school, none are direct authority for the present decision. *Morrison v. Lawrence*, 186 Mass. 456, 72 N. E. 91 (1904), and *People v. School Board*, 135 Wis. 619, 116 N. W. 232 (1908), are cases

where the pupil published in town newspapers burlesques on the school; and in *Lander v. Seaver*, 32 Vt. 114 (1859), the pupil insulted the teacher in public. These are acts directly injurious to the school.

The instant case goes farther than any of these, since the plaintiff here was annoying trespassers on his own property, and the effect on the school was indirect and remote. The Court justifies its decision by quoting *Lander v. Seaver, supra*, but this case is a considerable enlargement of that rule. It is perhaps not justified by it, but can be explained by the tendency in modern education to increase the authority of the teacher and protect him in the proper exercise of that authority.

SET-OFF—DEFENSE IN ACTION BY STATE.—The State of New York sued for a breach of contract. The defendants set up a counterclaim, to which the State objected. *Held:* The counterclaim was, in effect, a suit against the State without its consent and therefore was not allowed as a defense. *People v. Greylock Co.*, 209 N. Y. Supp. 735 (1925).

This case, though in accord with the general weight of authority; *People v. Miles*, 56 Cal. 401 (1880); *People v. Dennison*, 84 N. Y. 272 (1881); *Commonwealth v. Matlack*, 4 Dall. 303 (Pa., 1804); only partly adjudicates the rights of the parties before the court. While requiring the defendant to pay the State in full, it leaves his claim against the State to be settled separately. In support of the view it can be said only that it is the one which follows logically from the position that a State, being sovereign, cannot be sued without its consent.

A more practical and satisfactory solution of the problem is found in the view, held by a few States and the Federal courts, which allows the counterclaim to be used as a defense, on the ground that the State, by bringing suit, has subjected itself to the rules of court, one of which is that the defendant may use the counterclaim as a defense. *Powers v. Central Bank*, 18 Ga. 658 (1855); *Brundage v. Knox*, 279 Ill. 450, 477, 117 N. E. 123 (1917); *Commonwealth v. Barker*, 126 Ky. 200, 103 S. W. 303 (1907). The policy of the Federal courts rests upon the interpretation of an Act of Congress. 1 Stat. 514, U. S. Comp. Stat., Sec. 957; *United States v. Wilkins*, 6 Wheat. 135 (U. S., 1821); *United States v. Eckford*, 6 Wall. 484 (U. S., 1867); *The Gloria*, 286 Fed. 188 (D. C., 1923). In this way all the claims which each party has against the other may be settled in one suit, the defendant not being required to pay more than a settlement of accounts shows that he should. However, even in these jurisdictions, the defendant may only reduce the amount of damages claimed by the Government. An affirmative judgment against the Sovereign cannot be given. *Reedside v. Walker*, 11 How. 272 (U. S., 1850).

TORTS—JOINDER OF TORT-FEASORS.—Four independent mine owners combined in building dams to impound debris from their mines and in securing releases from liability from riparian land owners. Plaintiff sued them jointly and recovered damages. On appeal, defendants raised objection of misjoinder of defendants. *Held:* The defendants were properly joined. *Bunker Hill Mining Co. v. Polak*, Circuit Court of Appeals, Ninth Circuit, Aug. 24, 1925.

The courts are at variance on the right to join tort-feasors in nuisance or in pollution cases where there is no concurrence in doing the acts, but only in the injurious results of those acts. Some hold that there is joint and several liability. *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706 (1894); *Pickerill v. City of Louisville*, 125 Ky. 213, 100 S. W. 873 (1907). Some hold there is no joint liability. *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550 (1891); *Little Schuylkill Navigation Co. v. Richards*, 57 Pa. 142 (1868). Others agree with this where the injury is a remote consequence, but say there is joint liability where the injury results immediately or directly from the coincident and contemporaneous wrongful acts. *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744 (1897); *Farley v. Crystal Coal Co.*, 85 W. Va. 595, 102 S. E. 265 (1920). Other courts allow such joint liability only when the results of the acts concur in creating a public nuisance. *City of Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909 (1894); *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911 (1891).

The instant case turns on the conclusion that the combining of the defendants in an attempt to minimize possible injury and avoid liability showed sufficient concert of action and common design for their separate acts to be considered joint torts. It seems that this is a convenient rather than a logical solution.

TRUSTS—CHARITABLE TRUSTS—PROMOTION OF SPORTS.—A testator bequeathed two sums to form the nucleus of a fund for his regiment "for the promotion of sport (including in that term only shooting, fishing, cricket, football and polo)." A summons was taken to determine the validity of the legacies. *Held:* The legacies were charitable gifts. *In re Gray*, [1925] Ch. 362.

The promotion of physical efficiency, as well as mental efficiency, is an educational purpose. *In re Mariette* [1915], 2 Ch. 284. And any gift which improves the efficiency of the army is charitable within the meaning of the Charitable Trusts Act, 43 Eliz. c. 4. (1601). *In re Good* [1905], 2 Ch. 60.

The precise question whether the promotion of sport, *per se*, is a charitable purpose has seldom arisen in England and has never been decided in this country. A bequest to create interest in a single sport (yachting), though beneficial to the public, is not charitable. *In re Nottage* [1895], 2 Ch. 649. But a fund to establish a prize for shooting was upheld. *In re Stephens* [1892], W. N. 140 (Eng.). A gift devoted to "proper forms of entertainment" for members of a lodge is not charitable. *Mason v. Perry*, 22 R. I. 475 (1901); and it seems that a trust to erect a building for dancing and other amusements, open to the public, is invalid. *Gibson v. Frye Institute*, 137 Tenn. 452, 460, 193 S. W. 1059, 1062 (1916). But although the primary intention of the donor in making the gift is to amuse or entertain, if it will advance charitable purposes the gift is none the less valid. *Gibson v. Frye Institute, supra.* That is to say, if the practical effect of the gift is to make the sport the means, and not the end, the purpose is charitable. This appears to be the basic principle in the foregoing cases and the instant case is substantially in accord.

TRUSTS—TESTAMENTARY DISTRIBUTION—EFFECT OF ELECTION.—An estate was left in trust during life of widow, annuities to be paid to her and other designated beneficiaries. If the wife refused to accept provisions of will, two

provisions in favor of her relatives were to be annulled. At expiration of trust, estate was to be distributed to designated parties, or if any deceased, then to issue. Widow refused to take under the will. *Held:* Widow's election did not consummate trust as to others and did not accelerate the distribution of the estate. *Reighard's Estate,* 283 Pa. 140, 128 Atl. 847 (1925).

The court relied on three contentions in support of its decision.

The general rule is that the election of the widow to take against the will of the husband is equivalent to her death, and bequests to those in remainder become due and payable as if she were actually dead. *Ferguson's Estate,* 138 Pa. 208, 20 Atl. 945 (1890); *Vance's Estate,* 141 Pa. 201, 21 Atl. 643 (1891); *Woodburn's Estate,* 151 Pa. 586, 25 Atl. 145 (1892). There are, however, exceptions, depending upon the expressed or clearly implied contrary intent of the testator, such as the provision for other trusts in the will besides those for the widow, as here. *Ferguson's Estate, supra; Disston's Estate,* 257 Pa. 537, 101 Atl. 804 (1917); *Wyllner's Estate,* 65 Pa. Super. 396 (1917).

If all the parties who are or possibly might be interested in the property, being *sui juris,* ask for the determination of the trust, it will be decreed. *Smith v. Harrington,* 4 Allen 566 (Mass., 1862); *Culbertson's Appeal,* 76 Pa. 145 (1874). But here the shares of the designated beneficiaries, if they die prior to the period of distribution, will vest in the issue. Hence all persons who might possibly be interested cannot be said to have petitioned for the determination of the trust.

Finally, since the testator had provided for certain results to ensue from the wife's failure to take under his will, it is fair to assume that had he intended other results to follow in that contingency he would have said so.

These three outstanding characteristics of the will clearly show that this decision is in accord with the law as formulated in *Harrar's Estate,* 244 Pa. 542, 91 Atl. 503 (1914); *Disston's Estate, supra; Bruntrager's Estate,* 2 Pa. D. & C. 747 (1922).