RECENT CASES

ALIENS—STATUS OF ALIEN WIVES OF CITIZENS—An unmarried woman, a native of the Azore Islands, a race eligible to citizenship, was found to have been at the time of her entry into the United States of constitutional psychopathic inferiority. While proceedings to deport her were pending, she married a citizen of the United States. *Held:* Her marriage did not affect the applicability of the pertinent provisions of the immigration statutes. *Gomez v. Nagle,* 6 Fed. (2d) 520 (C. C. A., 1925).

The nationality of women was unaffected by marriage at common law. *Shanks v. Dupont,* 3 Peters 242 (U. S., 1830). 1 PIGGOTT, NATIONALITY, 57. But a woman, who might herself be lawfully naturalized, by marriage to a citizen was deemed to be a citizen of the United States; Act of 1855, 10 Stat. 604, U. S. Comp. Stat. (1916) § 3948; and could not be excluded, nor deported, under the immigration laws. *Hopkins v. Fachant,* 130 Fed. 839 (C. C. A., 1904); *Ex parte Grayson,* 215 Fed. 449 (D. C., 1914); *United States v. Tod,* 285 Fed. 523 (C. C. A., 1922). See 32 YALE L. J. 840. However, the Act of 1922, 42 Stat. 1021, provides that an alien woman who marries a citizen of the United States shall not become a citizen by reason of such marriage; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all the requirements of the naturalization laws. In *Dorto v. Clark,* 300 Fed. 568 (D. C., 1924), it was held that under this act a new class of aliens—the alien wives of American citizens—has been created, the compensatory provision giving a right to become naturalized, and that since this class did not exist at the time of the passage of the Immigration Act of February 5, 1917, U. S. Comp. Stat. (Supp. 1919) § 4289¼, such a class was not contemplated and hence did not come under its provisions. See 5 BOSTON UNIV. L. REV. 133. The decision of the present case is based on the ground that to hold the immigration laws inapplicable to alien wives of American citizens would defeat the policy of Congress to prevent the introduction and retention in the United States of the undesirable aliens excluded by the Act of 1917, *supra.* The existence of a special right to become naturalized was denied, and it would seem that the right of an alien wife of an American citizen is no greater than that of any other alien. See C. A. Enslow, *The Alien Deportation Law,* 18 LAW. & BANK. 146.

BANKRUPTCY—JUDICIAL NOTICE OF PENDING APPLICATION FOR DISCHARGE—A petitioner had in 1915 filed a voluntary petition in bankruptcy, and within the statutory period he applied for discharge. A report of the referee recommending that a discharge be denied, was filed, but was not acted upon by the court. In November, 1922, a second voluntary petition was filed. An application for discharge was filed under this second petition and the referee recommended a discharge. *Held:* A bankruptcy court may on its own initiative take judicial notice of a pending application for discharge and thus deny a discharge requested in a second application in respect to the creditors included in the first petition. *Freshman v. Atkins,* Supreme Court of the United States, November 16, 1925.

While cases and text-writers say little as to the right of a trial court so to act, it would seem clear that such a right exists. Appellate courts have so acted. *Brown v. Piper*, 91 U. S. 37 (1875); *Cluggish v. Koon*, 15 Ind. App. 609, 43 N. E. 161 (1896). Since with regard to matters of evidence the trial court's authority is as extensive as that of the appellate court, it would follow that if a matter is subject to judicial notice, the lower court may also consider it on its own initiative.

The pending discharge was a part of the court's record, of which it might take judicial notice. In *In re Sussman*, 190 Fed. 111 (D. C., 1911), and *In re Loughram*, 218 Fed. 621 (C. C. A., 1914), where prior discharge had been denied, the courts asserted that they might take judicial notice of their own records and act upon the facts there disclosed. In *Bienville Water Co. v. Mobile*, 186 U. S. 212 (1902), the court took judicial notice of former proceedings in that court by one of the parties to the present suit, though the point in issue was not *res judicata*. In *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. 296 (C. C. A., 1896), the court took judicial notice of pendency of another suit in the same court.

From these cases it seems that the court followed the usual rule in approving the action of the lower court in taking the judicial notice of its own records and of the pending application therein revealed.

BOUNDARIES—STATE JURISDICTION OVER COASTAL FISHERIES—The state of Washington sought to exercise jurisdiction over coastal fisheries adjacent to its coast line, within one marine league. The relator petitioned for a writ of prohibition to restrain the exercise of such jurisdiction. *Held:* Writ denied. *Luketa v. Pollock*, 239 Pac. 8 (Wash., 1925).

It has long been established that the state may exercise jurisdiction over animals *ferœ naturæ* found within its territorial limits. This is a right inherent in sovereignty. *Corfield v. Coryell*, 4 Wash. C. C. 371 (U. S. C. C., 1825); *State v. Tower*, 84 Me. 444, 24 Atl. 898 (1892); *Dunham v. Lamphere*, 69 Mass. 268 (1855). The soundness of the instant case, therefore, seems to depend upon the question of whether the territorial limits of the state extend one marine league out to sea. The constitution of the state of Washington expressly provides in Article 24 that its boundaries shall extend one marine league out to sea. This provision would, of course, be void if in contravention to the federal Constitution. But the latter document makes no mention of state boundaries extending to sea. It would seem that, if it had been intended that this area was to be reserved to the national government, such provision would have been made in Art. 1, sec. 8, where are listed the places over which Congress shall have exclusive jurisdiction. Nor could it have been the intention of the framers of the Constitution to include this body of water under the category of "territory" within the meaning of Art. 4, sec. 3, since those living on islands a short distance off the coast would thereby be disfranchised so far as their rights as state citizens were concerned.

The courts seem to have assumed that the territory of coastal states extends one marine league to sea, and state jurisdiction over this area has been recognized. See *Manchester v. Massachusetts*, 139 U. S. 240, 264 (1890). It

was impliedly recognized in *United States v. Bevans*, 3 Wheat. 336 (U. S., 1818), where it was held that the cessation of maritime and admiralty jurisdiction over this area was not a cessation of residuary jurisdiction. The state having jurisdiction over this area, it would seem that its coastal counties extend one marine league out to sea also. *Mahler v. Transportation Co.*, 35 N. Y. 352 (1866).

It seems, therefore, that the state's assumption of jurisdiction over that area along its coast line extending one marine league out to sea is in harmony with the existent law, and that the decision of the instant case is a correct one.

CHARITIES—DISSOLUTION OF CORPORATION—ACTIVITIES OUTSIDE OF STATE OF INCORPORATION—The Meadville Theological School, founded for the education of candidates for the Unitarian ministry, specified in its charter that it was to be located at Meadville and was to be managed by a self-perpetuating board of trustees with the power to "acquire or dispose of any interest of the school if it seems beneficial for them to do so, and transact all and any business as fully and effectually as any person has the right to manage his own concerns . . . as may be necessary to carry the object of the school fully into effect." Due to the school's distance from any great university, and consequent lack of students, an experiment was undertaken by establishing an extension summer school at Chicago. This proving successful, the board decided to move the school to Chicago, incorporating it under Illinois laws and transferring all assets of the Pennsylvania corporation to the new one. The dissenting trustees and others filed a bill to enjoin this. *Held:* The trustees cannot dissolve the corporation and hand its assets over without leave of court. They have a right, however, to extend their activities to another jurisdiction, *i. e.*, to educate students in Illinois. *Hempstead v. Meadville Theological School*, 284 Pa. 147, 130 Atl. 421 (1925).

The great weight of authority supports the decision that a corporation cannot dissolve itself, through its trustees, without consent of the state, whose consent was required to form it. *In re Federal Contracting Co.*, 212 Fed. 688 (C. C. A., 1914); *Stinson v. Cedar Grove Cemetery Co.*, 40 Atl. 116 (N. J., 1898); *Boston Glass Manufactory v. Langdon*, 24 Pick. 49 (Mass., 1834). The exception sometimes made for strictly private corporations in which the public has absolutely no interest, obviously does not apply here. *Merchants' & Planters' Line v. Wagner*, 71 Ala. 581 (1882); *Chilhowee Woolen Mills v. State*, 115 Tenn. 266, 89 S. W. 741 (1905). As the principal case points out, the authority given to the trustees, wide as it is, was not given to destroy the very institution for whose interest they were appointed.

An early Pennsylvania case is opposed to the second proposition of the court—that the school may extend its activities to other jurisdictions; *Methodist Church v. Remington*, 1 Watts 218 (Pa., 1832); based on a fear of clerical monopoly that seems to have completely left modern courts, and definitely overruled in *Evangelical Association's Appeal*, 35 Pa. 316 (1860). More recent Pennsylvania cases uniformly hold that a corporation may act, through its agents, in other jurisdictions, on the ground of comity and commercial policy.

Derry Council v. State Council, 197 Pa. 413, 47 Atl. 208 (1900); *Re Kimberly's Estate*, 249 Pa. 469, 95 Atl. 86 (1915). Other jurisdictions support this view on the same grounds. *Whickey v. Hume*, 7 H. L. Cas. 124 (Eng., 1858); *Oregonian Ry. v. Oregon Ry. & Nav. Co.*, 27 Fed. 277 (C. C., 1886); *Santa Clara Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183 (1886). The natural exception to such rule would be where the charter shows an opposite intention. The location given in the charter is not the expression of such intention for it indicates where the corporate functions are to be performed—not where the work will be done. *Mount Sharon Cemetery Charter*, 277 Pa. 79, 120 Atl. 700 (1923). And it is generally accepted that unless the extension is expressly forbidden, the wide authority granted to the trustees permits them to do this in the exercise of their sound discretion. *Hervey v. Illinois Midland Ry.*, 28 Fed. 169 (C. C., 1884); *N. Y. Floating Derrick Co. v. N. J. Oil Co.*, 3 Duer 648 (N. Y. Super., 1854).

CONSTITUTIONAL LAW—RETROACTIVE TAX STATUTES—The North Dakota Act taxing the capital stock of banks was repealed in 1919. Taxes were assessed in 1920, 1921 and 1922, although no taxing statute was in force during those years, and the majority of banks agreed to pay an amount equal to fifty per centum of the assessment under the repealed act. In 1923, the legislature passed a law purporting to validate the unauthorized assessments, the second section of which authorized a compromise of the original assessments on the terms of the agreement already entered into by the banks. This section was repealed by referendum to a general election. The plaintiff, as receiver of a bank which had not entered into the original compromise, sought to enjoin the collection of taxes under the new Act. *Held:* Injunction granted. *Baird v. Burke County*, 205 N. W. 17 (N. D., 1925).

In the absence of constitutional provision to that effect, retroactive laws are not per se unconstitutional. The majority of retroactive laws which are not *ex post facto* either impair the obligation of contracts or come within the scope of the "due process" clause. A law such as that in the instant case cannot be brought within either of those provisions, and the question arises as to whether any restraint may be imposed on such enactments.

The tax statutes of the United States, especially the *Income Tax Law* of 1913, have frequently assessed taxes for periods immediately prior to the passage of the Act, and no serious question as to their constitutionality has been raised. *Stockdale v. Insurance Co.*, 20 Wall. 323 (U. S., 1873). See *Billings v. U. S.*, 232 U. S. 261, 282 (1914); *Brushaber v. Union Pacific*, 240 U. S. 1, 20 (1915).

The court in the instant case, while holding the statute void on other grounds, strongly intimated that it would, if necessary, hold such a law unconstitutional. While the fact that the tax was assessed for a three year period shows the extent to which it is possible to go in wielding the tax power, it is difficult to see upon what basis its constitutionality could be attacked aside from those abstract principles of "natural justice" which are sometimes invoked in such cases. For a similar dictum, see *Bank v. Covington*, 103 Fed. 523, 527

(C. C., 1900). For a discussion between Mr. McMurtrie and Mr. Lewis on the power to declare statutes unconstitutional when they conflict with no express constitutional provision, see 41 AM. L. REG. 1, 594, 782, 971, 1064, 1093.

CONTRIBUTION—STATUTORY LIABILITY OF OFFICERS FOR CORPORATE DEBTS—A personal judgment for a corporate debt was given against the president of a corporation, under a statute making corporation officers personally and individually liable for corporation debts upon failure to file certain corporation reports. The statute also provided a maximum fine of $500. The president then sued for contribution other officers equally at fault. *Held:* Judgment for defendants. *Nettles v. Alexander,* 275 S. W. 708 (Ark., 1925).

The weight of authority seems to hold that there can be no contribution in this situation, where the statute is construed as a penal statute. *The Hudson,* 15 Fed. 162 (D. C., 1883); *Wiles v. Suydam,* 64 N. Y. 173 (1876); *Hill v. Frazier,* 22 Pa. 320 (1853); 2 THOMPSON, CORPORATIONS, (2d ed.) § 1367. In *Wiles v. Suydam, supra,* the penalty is said to be one "imposed for neglect of duty in not filing a report showing the condition of the company." In that case the statute did not impose a fine. In the principal case the court said there could be no contribution because the statute provided for a fine, which made it a criminal statute, so that the plaintiff, in proving his case, proved a violation of the criminal law of the state.

On the other hand, in the absence of a fine, some courts have construed such statutes as remedial, instead of penal, and have allowed contribution. *Nickerson v. Wheeler,* 118 Mass. 295 (1875) (where the intent of the statute was held to be to secure the making of the proper certificates and also to benefit creditors).

Another class of cases, also recognizing a distinction, in allowing contribution among tort-feasors differentiates between acts *mala prohibita* and acts *mala in se,* and allows contribution in the former situation. *Gas Co. v. Dist. of Col.,* 161 U. S. 327 (1895). See *Lowell v. Boston & Lowell R. R.,* 40 Mass. 24, 32 (1839).

Unless the statute is of a criminal nature it would seem that the better view is to consider such statutes as remedial in their nature, and to allow contribution where the officer has been guilty only of negligence in failing to file the reports.

DAMAGES—RATE OF EXCHANGE AS BASIS OF COMPUTATION—The defendant agreed to establish a credit of 2,000,000 lei in Bucharest for the plaintiff by a certain date. He failed to do so until later, when lei had depreciated in value. Plaintiff accepted the credit and sought the amount of depreciation as damages for the delay. *Held:* No recovery. *Richard v. American Union Bank,* 241 N. Y. 163, 149 N. E. 338 (1925).

The court held this contract one to be performed in Bucharest, so that the breach occurred there and damages were to be measured by Roumanian currency. The plaintiff received 2,000,000 lei and was not damaged because lei measured by lei cannot depreciate in value.

It seems quite clear, however, that the plaintiff suffered actual loss and that damages should compensate for the loss suffered. By accepting belated performance he was in possession of less purchasing power than he contracted for. The value of the stipulated and of the belated performance is determined by the value of the lei. The difference between the two values represents the loss suffered.

Foreign money must be regarded not only as a standard of value but, in fixing its value in relation to our currency, as a commodity. *SS. Celia v. SS. Volturno*, [1921] A. C. 544; *British-American Bank re Legois Claim*, [1922] 2 Ch. 589. SEDGWICK, DAMAGES (9th Ed.) §§ 273, 274. And it is settled that in an action for failure to deliver lei in Roumania the value of the lei would be determined by converting lei into dollars at the rate of exchange prevailing on the date of breach. *De Ferdinando v. Simon, Smith & Co.*, [1920] 3 K. B. 409; *SS. Celia v. SS. Volturno, supra; Hoppe v. Russo-Asiatic Bank*, 235 N. Y. 37, 138 N. E. 497 (1923).

Since the rate of exchange is used to determine the value of lei in case of non-performance, it would seem logical to determine likewise the value of belated performance. Then the difference between the value of stipulated and of belated performance so fixed would be the damage suffered. In accord with this view is *Hicks v. Guinnes*, Supreme Court of the United States, November 16, 1925.

DIVORCE—JURISDICTION—RESIDENCE AND DOMICILE—A statute conferring jurisdiction to grant divorces required the plaintiff to have "continuously resided" within the state for three years. The plaintiff contended that the word "resided" was synonymous with "been domiciled" and that the court had jurisdiction if he was domiciled in the state, though he spent only a few days there each year. Bill dismissed for want of jurisdiction and plaintiff appealed. *Held:* Bill properly dismissed. *Morgan v. Morgan*, 130 Atl. 254 (Conn., 1925).

Domicile is a more extensive term than residence. Residence means personal presence in a fixed and permanent abode, while to constitute domicile an intention to remain in that place is essential in addition to residence. BOUV. L. D., 2920; CYCLOPEDIC L. D., 325; 19 C. J. 395.

In divorce statutes, "residence" is generally regarded as equivalent to "domicile." *Harrison v. Harrison*, 117 Md. 607, 84 Atl. 57 (1912); *Barber v. Barber*, 89 Misc. 519, 151 N. Y. Supp. 1064 (1915); *Connolly v. Connolly*, 33 S. D. 346, 146 N. W. 581 (1914). The additional element of intent to remain is required in order to prevent an abuse of the state's divorce laws by transients. The court in the instant case, however, requires an actual residence as distinguished from a domicile, adopting the view of several states which rather seem to fear the abuse of their divorce laws by domiciled inhabitants, who do not reside continuously in the place of their domicile. *Tipton v. Tipton*, 87 Ky. 243, 8 S. W. 440 (1888); *Michael v. Michael*, 34 Tex. Civ. App. 630, 79 S. W. 74 (1904). See Beale, *Residence and Domicil*, 4 IOWA L. BULL. 3, 8. These courts rather seem to require continuous physical presence and do not give domicile and residence their usual interpretation, according to which domicile includes residence.

The Pennsylvania decisions hold that the statute requires a permanent residence with domiciliary intent, but also that a domiciliary intent not accompanied by an actual, *bona fide* residence does not give jurisdiction to the courts. *Dulin v. Dulin*, 33 Pa. Super. 4 (1907); *Lake v. Lake*, 70 Pa. Super. 220 (1918); *Gearing v. Gearing*, 83 Pa. Super. 423 (1924). This attitude indicates accord with the instant case.

INTERSTATE COMMERCE—ANTI-TRUST ACT—LOCAL VIOLENCE—Members of a local union during a strike destroyed certain non-union mines. Testimony indicated that the purpose of the leaders was to enhance prices in interstate markets for the benefit of union mines. *Held:* Evidence upon which a jury might properly find a conspiracy to restrain interstate commerce. *Coronado Coal Co. v. United Mine Workers of America*, 268 U. S. 295 (1925).

Coal mining is not interstate commerce; *D. L. & W. R. v. Yurkonis*, 238 U. S. 439 (1915); see *Kidd v. Pearson*, 128 U. S. 1, 21 (1888); and ordinary disturbances are local state matters. See *United States v. Dewitt*, 9 Wall. 41, 45 (U. S., 1869); *Hammer v. Dagenhart*, 247 U. S. 251, 274 (1918). *Cf. United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922). But when such local matters are conducted with intent to restrain interstate commerce and to enhance prices in interstate markets, they come within the purview of the *Sherman Anti-Trust Act*, 26 STAT. 210, U. S. Comp. Stat. § 8820. *Montague & Co. v. Lowry*, 193 U. S. 38 (1903); *Swift & Co. v. United States*, 196 U. S. 375 (1905).

A conspiracy to restrict interstate traffic in cotton, and thereby artificially enhance the price in interstate markets, is within the terms of the *Anti-Trust Act; United States v. Patton*, 226 U. S. 525 (1913); although dealing in, or the production of, the commodity is not interstate commerce. *Ware v. Mobile County*, 209 U. S. 405 (1908); *Heisler v. Thomas Colliery Co.*, 260 U. S. 245 (1922). In the principal case, the violence was local, but the purpose was to enhance the price of coal in interstate markets. The prevention of such conspiracies is the aim of the *Anti-Trust Act. Standard Oil Co. v. United States*, 221 U. S. 1 (1911). The holding of the court is therefore in accord with well settled precedents, and substantiated by sound public policy.

JURISDICTION—ACTION AGAINST GOVERNMENT—SUIT TO RECOVER FINE ILLEGALLY IMPOSED—Action was brought in a United States District Court under Judicial Code of March 3, 1911, c. 231, § 24, par. 20, to recover from the United States a sum of money paid as a fine imposed under a statute that was subsequently declared unconstitutional. Upon a motion to dismiss the complaint because it sounded in tort and was consequently outside the jurisdiction of the Court. *Held:* The court has jurisdiction. *Sultzbach Clothing Co. v. United States*, United States District Court of New York, Western District, October 23, 1925.

If the action had sounded in tort, the court would have had no jurisdiction; *Langford v. United States*, 101 U. S. 341 (1879); *United States v. Nederlandsch*, 254 U. S. 148 (1920); for the United States can be sued only with its permission, which is not given in cases sounding in tort. Judicial Code of

1911, c. 231, § 24, par. 20; 36 Stat. 1093; U. S. Compiled Statutes, § 991 (20). In the principal case, however, the court said that if there was a tort element, the plaintiff had the right to waive it and sue on the implied contract to repay the fine if it were unlawfully exacted. There is authority for this view. *United States v. Great Falls Manufacturing Co.*, 112 U. S. 645 (1884); *Great Falls Manufacturing Co. v. Attorney General*, 124 U. S. 581 (1888). In many cases recovery has been permitted on implied contracts. *U. S. v. Lynah*, 188 U. S. 445 (1903); *United States v. Buffalo Pitts Co.*, 234 U. S. 228 (1914). It has even been said by a court that a fine illegally imposed is held by the government as a *deposit* and may be sued for on the implied promise to repay. *Devlin's Case*, 12 Ct. Cl. 266 (1876).

Thus is created a situation which at first glance seems illogical. If a man is fined illegally by the government he may recover his money; but if he is imprisoned illegally, he is not permitted to bring suit against the government for damages. *Devlin's Case, supra; United States v. Rothstein*, 187 Fed. 268 (C. C. A., 1911); *Basso v. United States*, 239 U. S. 602 (1916). But the reason for the distinction is plain. The government cannot be sued without its consent, and in the section of the Judicial Code cited above, it has permitted suits to be brought on implied contracts, whereas it has expressly withheld its consent in cases sounding in tort.

JURISDICTION—INJUNCTION—RIGHT TO RESTRAIN FROM DOING ACTS OUTSIDE TERRITORIAL JURISDICTION—The international bridge over the Niagara River is owned by an American and a Canadian corporation, each owning from the shore to the international boundary line in the middle of the stream. The corporations leased the railway floor of the bridge to the Grand Trunk Railway, and when the lessee violated the terms of the lease the bridge companies sought an injunction in a New York court to restrain further violation of the terms of the contract. *Held:* Injunction granted. *Niagara Falls International Bridge Co. v. Grand Trunk Railway Co.*, 241 N. Y. 85, 148 N. E. 797 (1925).

In its effect the decision seems to present startling possibilities—a New York court forbids a Canadian corporation from doing certain acts in Canada (since half the bridge was on Canadian soil). The symptoms of heresy, however, are more apparent than real.

If the international coloring is extracted from the problem its solution presents little difficulty. It is generally accepted that courts of equity will enforce contracts even though they may deal with land outside the jurisdiction of the courts; *Groom v. Mortimer Land Co.*, 192 Fed. 849 (C. C. A., 1912); *Monnett v. Turpin*, 132 Ind. 482, 32 N. E. 328 (1892); or even though the title to land not within its territorial limits is affected. *Manley v. Carter*, 7 Kan. App. 86, 52 Pac. 915 (1898). In all these cases, including the principal case, the court had, of course, personal jurisdiction.

In the instant case the court of equity not only goes beyond its territorial limits with its injunction, but enters into the territory of an independent sovereign state. But every consideration of comity requires that it should. The use to which any portion of the bridge is put affects the whole; the lease was made for the entire bridge. The restraining on one-half of the bridge of

acts permitted on the other half would be as ineffective as it is ludicrous. No question of a conflict with the laws of Canada is raised because the purpose of the injunction is to prevent a violation of the terms of a lease which the Canadian Government authorized.

This is not the first decision in which the jurisdiction of equity has extended outside of the country. In the *Salton Sea Cases*, 172 Fed. 792 (C. C. A., 1909), the defendant was restrained from diverting the waters of the Colorado River in Mexico because it caused injury to the plaintiff in Arizona. In order to obey this injunction the defendant was required to perform positive acts, the order therefore going further than that in the present case. In commenting on that case, Mr. Beale considers it rightly decided. "The relief asked is an injunction and, as has been seen, an injunction may always be granted against doing an act abroad." Beale, *Jurisdiction of Courts over Foreigners*, 26 HARV. L. REV. 292, 295.

It has already been observed that the holding in the instant case recommends itself for practical reasons. It is also to be noted that it is not without the support of authority.

LIENS—EQUITABLE RIGHT TO FOLLOW MISAPPROPRIATED FUNDS—Defendant, president of a corporation, drew a sum of money over and above his salary and used this sum to improve his house. Both the defendant and the company shortly thereafter were declared insolvent. The trustee in bankruptcy of the company sought a decree declaring a lien on the defendant's house for the sum withdrawn. *Held:* An equitable lien exists. *Jones v. Carpenter*, Supreme Court of Florida, October 24, 1925.

A court of equity will declare that a lien exists where the general principles of justice require it, in accordance with the familiar doctrines that equity will not suffer a wrong to be without a remedy, or that equity will regard that as done which ought to be done. *Westall v. Wood*, 212 Mass. 540, 99 N. E. 325 (1912); *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937 (1908). See *Vidal v. South American Securities Co.*, 276 Fed. 855, 870 (C. C. A., 1922). Fraud on the part of the defendant is an additional reason for decreeing a lien. *Green v. MacDonald*, 75 Vt. 93, 53 Atl. 332 (1902). Where there is a sufficient remedy at law, or no grounds for equitable relief, a lien will not be created. *Gray v. Hudson River Electric Power Co.*, 190 Fed. 773 (C. C., 1911); *Richards v. Arms Shingle Co.*, 74 Mich. 57, 41 N. W. 860 (1889).

Hence an equitable lien arises when one innocently and in good faith improves the property of another and no remedy at law exists; *Haggarty v. McCanna*, 25 N. J. Eq. 48 (1874); cases cited in 31 C. J. 342; or when one pays off claims existing against the property of another at the latter's request, express or implied. *Winks v. Hassall*, 9 B. & C. 372, (Eng., 1829); *Fowler v. Parsons*, 143 Mass. 401, 9 N. E. 799 (1886). *A fortiori*, if money has been improperly obtained and appropriated to any other shape, equity will give a lien thereon. *Red Bird Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340 (1910); *Hubbard v. Stapp*, 32 Ill. App. 541 (1889); *Storm v. McGrover*, 189 N. Y. 568, 82 N. E. 160 (1907).

It is therefore submitted that the instant case is in accord with both the spirit and the letter of the rules governing equitable liens.

NEGLIGENCE—ATTRACTIVE NUISANCE—TRESPASSING ANIMALS—The statement alleged that defendant placed poison on its right of way to kill weeds, knowing the odor and taste to be attractive to cattle. Plaintiff's cows broke down fence in adjoining field, ate poison, and died. *Held:* Statement showed cause of action, on theory of attractive nuisance. *Hagey v. R. R.*, 6 Pa. D. & C. 621 (1924).

For the general theory of attractive nuisance, see Jeremiah Smith, *Liability of Landowners to Children*, 11 HARV. L. REV. 349.

In Pennsylvania, the Act of 1889, P. L. 27, repealed the Act of 1700, § 1, 1 Sm. L. 13, and restored rights of landowners and owners of cattle as they existed at common law; *Barber v. Mensch*, 157 Pa. 390 (1893); which imposed the duty upon every man to keep his cattle within the limits of his own possessions. *Ellis v. Loftus Iron Co.*, L. R., 10 C. P. 10 (Eng., 1874). A railroad in this state has exclusive possession of its right of way, except at crossings; *Buckley v. B. & O. R. R. Co.*, 275 Pa. 360, 119 Atl. 413 (1922); and is not required to fence its right of way. *R. R. v. Skinner*, 19 Pa. 298 (1852); *R. R. v. Rehman*, 49 Pa. 101 (1866).

Where the common law is not applicable, the owner has been permitted to recover. *Ry. v. Newman*, 94 Ark. 459, 127 S. W. 735 (1910), holding the common law rule as to trespass of cattle not law in that state; *Brown v. R. R.*, 27 Mo. App. 394 (1887), where it was changed by statute. But even where cattle were allowed to run at large, it was held there could be no recovery for the death of cattle attracted by salt placed on switches. *Kirk v. R. R.*, 41 W. Va. 722, 24 S. E. 639 (1896).

Liability for causing the death of trespassing animals arises where a person intentionally set a trap for the purpose. *Townsend v. Wathen*, 9 East 277 (Eng., 1808); *Johnson v. Patterson*, 14 Conn. 1 (1839). Even in the absence of such intention, there may be liability by negligently maintaining a dangerous substance upon one's land with knowledge that trespassing animals are attracted thereby, depending upon the circumstances. *Hess v. Lupton*, 7 Ohio 216 (1835).

The rule of attractive nuisance in cases of infant trespassers is based upon an implied invitation, which seems ill-placed in the case of animals. It is doubtful whether it is necessary to extend the rule, or to classify under the doctrine of "attractive nuisance" an entirely separate rule of negligence.

NEGLIGENCE—CARRIERS'S LIABILITY TO PASSENGER—IMPLIED INVITATION TO ALIGHT—The plaintiff was injured in alighting from a car of the defendants' train which had stopped short of the station platform. *Held:* Plaintiff precluded from recovery. *Sharpe v. Southern R. R.*, [1925] 2 K. B. 311.

It is universally held that if a passenger has been invited to alight either impliedly or expressly he may assume that a safe means of alighting has been provided for him. *Younglove v. Pullman Co.*, 207 Fed. 797 (D. C., 1913); *Smithers v. Wilmington City R. R.*, 22 Del. 422, 67 Atl. 167 (1907). And if the passenger has been misled by the carrier with reference to the safety of alighting, the carrier will be liable for injuries sustained; *B. & O. S. W. R. R. v. Mullen*, 120 Ill. App. 88 (1905); *Lent v. New York C. R. R.*, 120 N. Y. 467,

24 N. E. 653 (1890); provided that the passenger has used reasonable care in availing himself of that invitation. *Thompson v. Chicago M. & St. P. R. R.*, 189 Fed. 723 (C. C. A., 1911); *Smith v. Georgia Pacific R. R.*, 88 Ala. 538, 7 So. 119 (1889); *Lee v. Boston Elevated R. R.*, 182 Mass. 454, 65 N. E. 822 (1903). The court in the principal case held that he had not done so, but was negligent in not looking where he stepped.

It is also universally held that contributory negligence is a question of fact for the jury; *Texas & Pacific R. R. v. Bigger*, 239 U. S. 330, (1915); *Lee v. Boston Elevated R. R., supra; Warren v. Pittsburgh, etc., R. R.*, 243 Pa. 15, 89 Atl. 828 (1914); except where only one conclusion may reasonably be drawn from the facts, when it is a question of law. *Nagle v. California Southern R. R.*, 88 Cal. 86, 25 Pac. 1106 (1891); *Morrison v. Erie R. R.*, 56 N. Y. 302 (1874); *Kurfess v. Harris*, 195 Pa. 385, 46 Atl. 2 (1900).

In *Glasscock v. London, etc. R. R.*, 18 Times L. R. 295 (Eng., 1902), it was held, upon facts similar to those of the principal case, that the jury was justified in finding that the plaintiff was not negligent in failing to look where she stepped. It might appear that this is opposed to the holding in the instant case, but upon analysis it will be found that there is no conflict. The plaintiff in *Glasscock v. London, etc. R. R., supra,* had frequently traveled to, and was thoroughly familiar with, the station at which she was injured. Hence she had a right to assume that proper accommodations for alighting had been provided for her, as had always been the case before. The plaintiff in the instant case, however, had never before alighted at the station at which he was injured, had no such right, and was, therefore, clearly negligent in failing to examine his means of exit.

WILLS—MEANING OF "ISSUE" IN STATUTE—ADOPTED CHILDREN—A testator's wife, to whom a legacy was given, died before him, leaving an adopted son, but no issue. The Wills Act, 1917, § 15 (b), P. L. 403, Pa. St. 1920, § 8324, provides that a legacy shall not lapse if the legatee predeceases testator, leaving issue. *Held:* An adopted child is not issue within the meaning of the statute. *Russell's Estate*, 284 Pa. 164, 130 Atl. 319, (1925).

Opposed to the view expressed in the principal case, there is much authority to the effect that the word issue, as used in similar statutes, includes an adopted child. The courts reason that the adoption act is founded upon a wise and beneficent purpose, which should be sustained and promoted by giving the law a liberal construction. *Newman's Estate*, 75 Cal. 213, 16 Pac. 887 (1888); *Riley v. Day*, 88 Kan. 503, 129 Pac. 524 (1913); *In re Book's Will*, 90 N. J. Eq. 549, 107 Atl. 435 (1919). Other courts agree with the instant case, that an adopted child is not the issue of the adopting parents within the meaning of such a statute, and that to allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of adopted children unknown to the testator, contrary to his wishes and expectations. *Davis v. Fogle*, 124 Ind. 41, 23 N. E. 860 (1889); *Morse v. Osborne*, 75 N. H. 487, 77 Atl. 403 (1910); *Phillips v. McConica*, 59 Ohio 1, 51 N. E. 445 (1898).

It should be noted that Pennsylvania, under its Intestate Act of 1917, § 16 (b), P. L. 429, 439, Pa. St. 1920, § 8383, gives to adopted persons the rights of a member of the family of the adopting parents for all purposes of inheritance and of taking by devolution. The Pennsylvania Wills Act, however, has no such provision as to adopted children. Nevertheless, a lower court, in *Moore's Estate*, 30 Pa. Dist. 152 (1921), held directly contrary to the principal case. It would seem that the construction placed upon the word issue by the court in the instant case is the correct one. In view of the absence of a general act giving to adopted children all the rights of those who are natural born, and under the rule of construction, that where statutes are in derogation of the common law they should be strictly construed, the word issue should be given its strict legal meaning, which does not include adopted children.