RECENT CASES

BANKS AND BANKING—NATIONAL BANKS—ASSESSMENT OF STOCKHOLDERS —The complainant, by reason of a debt owing to it, brought a bill in equity[1] to assess stockholders of a national bank which had gone into voluntary liquidation. Since some of the stockholders were outside the jurisdiction, and were not before the court for assessment, the question involved was to what extent the defendants before the court were liable. The *Federal Reserve Act* provides: "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof, in addition to the amount invested in such stock."[2] The defendants relied on an Act of 1864, which is similar to the *Federal Reserve Act,* except that it provides, in addition, that the stockholders shall be liable "equally and ratably, and not one for another."[3] The special master held that the earlier act of 1864 was not repealed[4] and that the stockholders' liability had to be apportioned "equally and ratably, and not one for another." The complainant excepted to this on the ground that such assessment would not raise the entire amount due. *Held:* The defendants to be assessed to the full extent of their liability under the *Federal Reserve Act* which repealed the Act of 1864[5] (as to liability of stockholders). *First Nat. Bank in Eureka v. First Nat. Bank of Eureka,* 14 Fed. (2d) 129 (D. C. Kan. 1926).

There do not appear to be any other adjudicated cases on the question presented by the principal case, but a comparison of the above quoted acts seems to leave no doubt that the decision is correct and that the *Federal Reserve Act* was intended by the legislature to replace the earlier Act as a yardstick by which liability of stockholders was to be measured. The result reached is inevitable inasmuch as Congress has failed to provide a method whereby all the stockholders could be brought before one court. The defendants, of course, are left with the right to enforce contribution from the non-resident stockholders not before the court.[6]

---

[1] The procedure which a complainant must follow will be found in the Act of 1876, 19 Stat. 63, U. S. Comp. Stat. (1918) § 9807.

[2] 38 Stat. 273 (1913), U. S. Comp. Stat. (1918) § 9689.

[3] The entire provision as to liability is as follows: "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." U. S. Rev. Stat. (1878) § 5151.

[4] The Federal Reserve Act provides for the repeal of inconsistent laws, as follows: "All provisions of law inconsistent with or superseded by any of the provisions of this Act are to that extent, and to that extent only hereby repealed." 38 Stat. 274 (1913), U. S. Comp. Stat. (1918) § 9803.

[5] It is interesting to note that in the margin of the Federal Reserve Act, *supra,* note 2, there is the following notation by the editor: "R. S. § 5151 *amended.*" This is the result reached by the court.

[6] So held in the principal case.

CONTRACTS—UNILATERAL CONTRACTS—WHEN CONTRACT COMES INTO EXISTENCE—The plaintiff sues on defendant's promise to pay him six thousand dollars for procuring a mortgage loan. This sum is in excess of the compensation provided by the *Usury Act*,[1] which is set up as a defense. After plaintiff started work on the loan but before it was secured the act was repealed. The lower court decided that the Act had been repealed before a contract existed and defendant appeals. *Held:* A contract came into existence when the plaintiff started work on the loan, and therefore he is subject to the Act. *Grossman v. Calonia Land and Improvement Co.*, 134 Atl. 740 (N. J. 1926).

It appears that the unilateral contract has presented a situation that many courts have failed to consider properly. It is practically axiomatic that, in order to create a contract, there must be an acceptance to meet the terms of the offer.[2] Yet the court here held that a contract existed in the principal case before the *Usury Act* was repealed despite the fact that at this time the plaintiff had not secured the loan. It would seem that the court thereby disregarded the rules of contract law since the plaintiff did not perform the act specified in defendant's offer. It is submitted that the rationale of the court in supporting this conclusion is also erroneous. They reason that as soon as the plaintiff started negotiations a bilateral contract was created, placing upon the plaintiff the obligation of "using reasonable diligence and skill in effecting the loan." [3] As a matter of fact plaintiff made no promise to use reasonable skill or diligence and to assume that he did is a fiction. Furthermore, it is well settled that until the plaintiff performs the act requested by defendant's offer he is under no obligation whatever and may stop performance if he so desires.[4] It is true that a number of courts in other jurisdictions have availed themselves of the fiction employed by the New Jersey Court.[5] In these cases, however, a different question was precipitated, namely, the right of an offeror to withdraw his offer after the offeree has partly performed. Such cases often result in such hardship and injustice to the offeree that the court indulges in the fiction in an effort to make the best of a situation in which the law is admittedly inadequate.[6] In the principal case, however, there is not even this stimulus for what appears to be so great a departure from good law and sound reason.

CONSTITUTIONAL LAW—KANSAS INDUSTRIAL COURT—REGULATIONS OF STRIKES—The defendant and another official of the United Mine Workers of America called a strike of member coal miners in the employment of a Kansas Fuel Company to compel the company to pay a disputed but unarbitrated claim of $180.00 to a former employee. The men struck and did not return to work until after the claim was paid. While the men were out on strike this criminal

[1] 4 N. J. Comp. St. 1910, p. 5706.

[2] Minneapolis and St. Louis R. R. v. Columbus Rolling Mill, 119 U. S. 149 (1886); Wittwer v. Hurwitz, 216 N. Y. 259, 110 N. E. 433 (1915).

[3] Grossman v. Calonia Land Improvement Co., 134 Atl. at 742.

[4] 1 WILLISTON, CONTRACTS, (1904) § 60.

[5] Bloomenthal v. Goodal, 89 Calif. 251, 26 Pac. 906 (1891); Miller v. Moffat, 153 Ill. App. 1 (1910); Loyd v. Long, 123 La. 777, 49 So. 521 (1909).

[6] Ashley, *Offers Calling for a Consideration Other Than a Counter Promise*, 23 HARV. L. REV. 157 (1910).

proceeding was begun under the provisions of the Kansas *Court of Industrial Relations Act.*[1] The defendant was convicted of inducing a strike in violation of sections 17 and 19 of the Act.[2] This decision was affirmed by the Supreme Court of Kansas.[3] Thereupon the defendant sued out a writ of error in the Supreme Court of the United States, contending that section 19 as applied was void because it prohibits strikes, which is a denial of the liberty guaranteed by the Fourteenth Amendment. *Held:* Judgment of the state court affirmed. *Dorchy v. Kansas,* U. S. Sup. Ct., Oct. T. 1926, No. 119.

The principal case is primarily interesting in that it is the first decision of the federal judiciary passing upon the power of a state to prohibit the right to strike. It is to be noted, however, that the Court did not consider the broad question of the power of a state to prohibit strikes but only of the power of the Kansas Legislature under the facts of this case to prohibit a strike. The affirmation of the power under these conditions was anticipated from the declarations of the Court in certain recent decisions,[4] especially in *Wilson v. New,*[5] which seemed to indicate that the right to freedom of contract and labor, secured by the Fourteenth Amendment,[6] was subject to limitation when employment was accepted in a business charged with public interest. However, the decision in the principal case is not based on the affectation of public interest in the mining of coal but rather on the necessity of strikers having a lawful purpose[7] for quitting their employment so as to justify the tort committed by interfering with the right of their employer to a free flow of labor,[8] which if not justified results in a violation of a property right.[9] It is submitted that the court in the principal case in requiring a lawful purpose to justify the strike and in holding that the facts of this case did not constitute such a pur-

---

[1] Kansas Laws, 1920, ch. 29.

[2] Sec. 17, while reserving to the individual employee the right to quit his employment at any time, makes it unlawful to conspire to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation of mining. Sec. 19 makes it a felony for an officer of a labor union wilfully to use the power or influence incident to his office to induce another person to violate any provision of the Act.

[3] Kansas v. Howat, 112 Kan. 235, 210 Pac. 352 (1922).

[4] Block v. Hirsh, 256 U. S. 135 (1921); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170 (1921).

[5] See 243 U. S. 332, 352 (1917).

[6] See Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 542 (1923).

[7] It is submitted that the purpose of strikes held justifiable is to settle some trade dispute personally affecting the rights of the strikers; while the purpose of strikes held not justifiable is to affect the rights of a third party who is not immediately concerned in the competition between the strikers and their employer. Under the first class fall strikes that have as their purpose the securing of better hours, wages, or working conditions. Willcut & Sons Co. v. Driscoll, 200 Mass. 110, 85 N. E. 897 (1907). Under the second class fall strikes to compel a stranger not to deal with the employer of the inducers of the strike, against whom they are striking. Duplex Printing Co. v. Deering, 41 U. S. 172 (1921); see 30 YALE L. J. 280, 404, 501 (1921).

[8] O'Brien v. People, 216 Ill. 354, 75 N. E. 108 (1905); Haverhill Strand Theatre v. Gillen, 229 Mass. 413, 118 N. E. 671 (1918).

[9] King v. Weiss, 266 Fed. 257 (C. C. A. 6th, 1920).

pose followed the reasoning of previous federal decisions[10] and various state holdings.[11] The Kansas Act, therefore, as applied to the facts of this case is but a restatement of the common law and judicial legislation of the courts of this country, regulating the right to strike, despite the alarm expressed by some of the commentators on the Act.[12]

EQUITY—VENDOR'S LIEN—CONDITIONAL SALE—DEFICIENCY DECREE—The plaintiff made a conditional sale of personal property to the defendant, reserving title in himself until payment of the purchase price, and granting immediate possession to the defendant. The contract provided that if the defendant defaulted in any condition, the plaintiff had the right to retake possession of the property, consider the contract as terminated, and treat all payments as forfeited in full satisfaction of damages. The defendant defaulted, and the plaintiff, proceeding in equity, claimed a lien on the property. *Held:* The vendor has an equitable lien. *Malone* v. *Meres,* 109 So. 677 (Fla. 1926).

This decision is founded on the theory that the vendee in a conditional sale is the beneficial owner, with the vendor holding the legal title as trustee, thereby giving the vendor a lien on the vendee's equitable estate to insure payment of the purchase price.[1] It is submitted that the courts upholding the doctrine of the principal case are assuming fallacious jurisdiction. A court of equity has no jurisdiction of a case if there is an adequate remedy at law. In the case at bar, the vendor has two adequate remedies at law, viz., a suit for the balance of the purchase price on the contract, or an action to recover the property with a forfeiture of the payments made as liquidated damages.[2] There is therefore no necessity for an extension of equity's jurisdiction. Moreover, the result of this decision is to grant the vendor a lien on his own property, thus

[10] Aikens v. Wisconsin, 195 U. S. 194 (1904); Hitchman Coal and Coke Co. v. Mitchell, 245 U. S. 229 (1917); Thomas v. Railway Co., 62 Fed. 803 (S. D. Ohio, 1894); United States v. Cassidy, 67 Fed. 698 (N. D. Pa. 1895); Wabash Ry. v. Hannahan, 121 Fed. 563 (E. D. Mo. 1903).

[11] State v. Stockford, 77 Conn. 227, 58 Atl. 769 (1904); Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753 (1906); Bausbach v. Reiff, 244 Pa. 559, 91 Atl. 224 (1924); Nat. Protective Ass'n v. Cummings, 170 N. Y. 315, 63 N. E. 398 (1902).

[12] See Dean, *The Fundamental Unsoundness of the Kansas Industrial Court Law,* 7 A. B. A. J. 333 (1921); *Report of the Executive Committee of the American Federation of Labor,* 27 AMERICAN FEDERATIONIST, 627 (1920); Wickersham, *Recent Extensions of State Police Power,* 54 AM. L. REV. 801 (1920).

[1] Aycock Lumber Co. v. Bank, 54 Fla. 604, 45 So. 501 (1907). Accord: Ballinger v. West Publishing Co., 44 App. D. C. 49 (1915); Wolf Co. v. Hermann Savings Bank, 168 Mo. App. 549, 153 S. W. 109 (1912); Singer Sewing Machine Co. v. Leipzig, 113 N. Y. Supp. 916 (1908). *Contra:* United States v. Montgomery, 289 Fed. 125 (D. C. Ariz. 1923); Ahrend v. Odiorne, 118 Mass. 261 (1875); Heist v. Baker, 49 Pa. 9 (1865).

[2] Mizell Live Stock Co. v. McCaskill, 59 Fla. 322, 51 So. 547 (1910); Ratchford v. Cayuga Storage Co., 217 N. Y. 565, 112 N. E. 447 (1916); Winton Motor Co. v. Broadway Auto Co., 65 Wash. 650, 118 Pac. 817 (1911). See also 70 U. OF PA. L. REV. 338 (1922).

creating a legally impracticable situation, since the vendor, having title and the right to possession, procures no rights under the lien he would not otherwise have. It is also submitted that the statute[3] on which the court relied does not apply to the situation arising in conditional sales. A conditional sale does not create a mortgage, for the vendee has no legal title to convey defeasibly.[4] Since the parties in their contract stipulated two methods of satisfaction in case of default, it would seem that the court, in creating the lien, did so needlessly and in violation of the expressed intenion of the parties.

Not only did the court permit the plaintiff to foreclose on his lien and purchase the property at a low figure, but also granted a deficiency decree for the balance of the purchase price. Such a decree is granted in all jurisdictions upholding the equitable lien theory.[5] The results attending this decision are not only absurd but unjust, when viewed from the equitable standpoint. The vendor in the intant case found himself in absolute possession of the personal property, retained the two thousand dollars paid by the vendee, and in addition was granted a deficiency decree against the vendee for ten thousand dollars. Moreover, the court in granting this decree acted in complete contradiction of the terms of the contract and the intention of the parties, for the contract provided that in case of default, the retention by the vendor of the payments made would be considered as full liquidated damages.[6] This example of inequitable equity is another indication that the theory of equitable liens, as applied to conditional sales, would seem to be not only illogical but in absolute derogation of the fundamental principles of equity.

EVIDENCE—ADMISSIBILITY OF EVIDENCE OF NON-ACCESS—The plaintiff claims land as the illegitimate son and heir of the intestate, who generally and "notoriously" recognized him as a son. The plaintiff's mother, at the time of his birth, was the intestate's servant and married to another. The mother's testimony, which the trial court refused to admit, showed non-access of her husband at any time within which the conception of the child was possible. *Held:* The evidence of non-access is admissible. *Lynch v. Rosenberger,* 249 Pac. 682 (Kan. 1926).

It is now generally conceded that the conclusiveness of the presumption that a child born of a married woman during wedlock is the child of her then

[3] Any instrument in writing selling or conveying real or personal property for the purpose of securing payment of money, whether from debtor to creditor or debtor to third person in trust for creditor, shall be deemed and held a mortgage and that mortgage is a lien and not a conveyance of legal title or right of possession. Fla. Rev. Gen. Stat. (1920) §§ 3836, 3837.

[4] American Soda Fountain Co. v. Blue, 146 Ala. 682, 40 S. E. 218 (1906); Mizell Live Stock Co. v. McCaskill, *supra,* note 2; Nichols v. Ashton, 155 Mass. 205, 29 N. E. 519 (1892).

[5] Gigray v. Mumper, 141 Iowa, 396, 118 N. W. 393 (1909); McDaniel v. Chiaramonte, 61 Ore. 403, 122 Pac. 33 (1912); Campbell Printing Press v. Powell, 78 Tex. 53, 14 S. W. 245 (1890). See also cases in note 1, *supra.*

[6] 3 JONES, MORTGAGES (1915) § 1711.

husband is relaxed,[1] so that non-access during the period of gestation,[2] and other evidence showing the impossibility of the husband's being the father is admissible.[3] But it is accepted as settled law in the courts of England and most of the United States, that parents cannot "bastardize their issue" by testifying to non-access.[4] This rule was first enunciated *obiter* by Lord Mansfield.[5] Though the dictum was pure invention and had no authority in the law of England, it was accepted with unquestioned faith and by singular process became firmly established in the law of evidence.[6] Statutes abolishing the disqualification-by-interest of the testimony of husband and wife, have not changed the rule,[7] for this disqualification affords no ground on which the rule is to be supported. It is self-evident that if the ultimate purpose of rules of evidence is to establish the most sagacious and certain means of discriminating truth from error, there should be no artificial restriction on the admissibility of relevant evidence without sound reasons. Even a casual examination of the support of the rule given at its inception—"decency, morality, and policy"—[8] shows that it is artificial and false.[9] The rule has been so frequently criticized and denounced by analytical investigators,[10] that the only inquiry that the prin-

---

[1] 1 JONES, EVIDENCE, (2d ed. 1926) § 68; THAYER, CASES, EVIDENCE, (Maguire ed. 1925) 58, note. For concise summary of effect of the presumption see note, 33 HARV. L. REV. 306 (1919).

[2] Banbury Peerage Case, 1 Sim. & Stu. 153 (Eng. 1811); Rex v. Luff, 8 East, 193 (Eng. 1807); Wright v. Hicks, 15 Ga. 160 (1854); Gors v. Froman, 89 Ky. 318, 12 S. W. 387 (1889), note in 8 L. R. A. 102; Dennison v. Page, 29 Pa. 420, 425 (1857); State v. Shaw, 89 Vt. 121, 94 Atl. 434 (1915).

[3] Bullock v. Knox, 96 Ala. 195, 11 So. 339 (1892); Nolting v. Holt, 113 Kan. 495, 215 Pac. 282 (1923), annotated in 31 A. L. R. 1117 (husband and wife white, child mulatto).

[4] Kennedy v. State, 117 Ark. 113, 117 S. W. 842 (1915); Taylor v. Whittier, 240 Mass. 514, 138 N. E. 6 (1922); Cross v. Cross, 3 Paige Ch. 39 (N. Y. 1840); Tioga v. South Creek, 75 Pa. 433 (1874); State v. Flynn, 180 Wis. 586, 193 N. W. 651 (1923). The English cases are summarized in PHIPSON, EVIDENCE (6th ed. 1921) 198. A recent English case extended the rule to apply to divorce proceedings, Russell v. Russell, [1924] A. C. 687.

[5] Goodrich v. Moss, 2 Cowp. 591 (Eng. 1777).

[6] See the "singular" story of this rule in 4 WIGMORE, EVIDENCE, (2d ed. 1923) §§ 2063, 2064, and concise summary in 19 ILL. L. REV. 280 (1924).

[7] Egbert v. Greenwalt, 44 Mich. 245, 248, 6 N. W. 654, 656 (1880); Chamberlain v. People, 23 N. Y. 85, 88 (1861); Tioga v. South Creek, *supra*, note 4, at 437.

[8] *Supra*, note 5.

[9] Why is it "indecent" to allow the parent to testify to non-access when in the same action a wife may testify to adultery with others? Kennedy v. State, *supra*, note 4. Why is it "immoral" when other's testimony may prove the same thing? Is it "policy" to have the same law make the stain of bastardy indelible, and censure parents for the abomination of testifying to that bastardy?

[10] See HOOPER, ILLEGITIMACY (1911) 217, and *Can Parents Give Evidence to Bastardize Their Issue*, 26 LAW QUART. REV. 53 (1910). Professor Wigmore is most caustic in his denunciation, WIGMORE, *op. cit. supra*, note 6. See criticism in 19 ILL. L. REV., *supra*, note 6; 73 U. OF PA. L. REV. 71 (1924); 25 HARV. L. REV. 746 (1912); 37 HARV. L. REV. 916 (1924); 24 COL. L. REV. 430 (1924).

cipal case gives rise to is as to whether the reinstating of the original law, changed by a misunderstood but adhered to dictum—itself nothing but judicial legislation—is an abuse of the judicial function. Although in fixing the status of property, the common welfare is best served by the court's strictly following the rule of *stare decisis*,[11] "considerations of policy that dictate adherence to existing rules where substantive rights are involved apply with diminished force when it is a question of the law of remedies." [12] It is therefore submitted that the reversal of the ill-considered rule is in accord with sound legal policy.[13] To ascertain the truth of paternity an action is instituted, pleadings framed, trial had and evidence heard. Can it be proper, because of a false and antiquated rule, to exclude that evidence which better than any other can demonstrate the truth of the issue?

INSURANCE—STATE LICENSING OF AGENTS—THE CHRYSLER FIRE AND THEFT POLICY—The plan of the Chrysler Sales Corporation[1] for a blanket insurance policy executed in Michigan and covering all the automobiles sold by Chrysler dealers on time payments has finally been brought before the Supreme Court for determination. The contract caused much litigation in the lower courts on the question whether it violated state laws requiring that insurance agents selling insurance in the state be licensed. The lower Federal courts,[2] with some dissent, decided that the Michigan contract was merely a contract for future insurance, and that dealers in Chrysler cars were in reality selling insurance without a license. The bases of these decisions seem to have been: (1) that a contract of insurance is "personal" and does not attach to property, and (2) that the insurance contemplated under the contract did not come into being until a sale to a retail purchaser, because before that time no existing risk was covered. The legal soundness of both of these premises is questioned and their tenability denied.[3]

On October 25, 1926, the Supreme Court by Holmes, *J.*, decided in *Palmetto Insurance Co. v. Conn*, and other connected cases, that the Superintendent of Insurance of Ohio was justified in revoking the license of the appellant insurance company because the latter was selling insurance in Ohio through

---

[11] Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 416 (1924).

[12] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, (1921) 156.

[13] " . . . the rules of evidence are not wholly fixed and arbitrary, but are still to be regarded as in a period of flux to the extent that changes, both judicial and legislative, may be expected from time to time as common sense dictates. The rules in the last analysis are but applications of common sense and judicial experience to the particular problem of determining issues in legal tribunals." JONES, *op. cit. supra*, note 1, § 5.

---

[1] For a statement of the facts see *The Chrysler Fire and Theft Policy*, 74 U. OF PA. L. REV. 491 (1926).

[2] An enumeration and criticism of these cases may be found in the article referred to in note 1.

[3] *The Chrysler Plan of Fire and Theft Insurance*, 35 YALE L. J. 989 (1926); *The Chrysler Fire and Theft Policy, supra*, note 1.

unlicensed agents. The decision rests on the ground that the obligation, although arising from a contract made in Michigan, became effective upon the performance of acts in Ohio, and since the co-operation of the law of that state was necessary to the obligation imposed, the state could insist upon its right to tax. The Court does not decide the nature of the contract made in Michigan, holding this immaterial. And it is interesting to note that the decision does not so much as mention the questions raised below whether a contract of insurance is personal only, and whether the covering of an existing risk is essential to the existence of such an agreement. Having decided the point, the Court refused to indulge in dicta, disappointing those who expected a decision of the interesting problems raised below.

QUASI-CONTRACTS—MISTAKE OF FACT—BALANCE OF FAULT—The plaintiff, induced by the fraudulent representations of one A, sent the defendant a check drawn to the latter's order, which defendant endorsed and cashed, taking it from A, the messenger, in the belief that it was intended as payment of A's debt to the defendant. On the faith of this check, the defendant delivered certain goods to A which cannot now be recovered without loss. The plaintiff now sues to recover the money on the theory that it was paid under a mistake of fact. *Held:* Recovery allowed. *R. E. Jones, Ltd. v. Waring & Gillow, Ltd.*, [1926] A. C. 670.

The obligation to repay money paid under a mistake of fact is quasi-contractual and based on the equitable theory that it would be unconscientious to retain it.[1] Recovery, therefore, is generally permitted where the defendant has not irrevocably altered his position in reliance on the payment;[2] accordingly, where there has been such a change, the action fails.[3] Where, however, the mistake is wholly or to the greater extent the fault of the defendant, it will be no excuse to show an irretrievable change of position.[4] A conflict in the decisions arises when, as in the principal case, there is a balance of blame or both parties are equally blameless. In England and New York recovery has been allowed.[5] These decisions have been roundly condemned by text-writers,[6] and the majority of jurisdictions in this country deny relief.[7] It is interesting to note that although the early English decisions confined the defense of irre-

[1] Costigan, *Change of Position as a Defense in Quasi-Contracts*, 20 HARV. L. REV. 205 (1906); KEENER, QUASI-CONTRACTS (1893) 66.

[2] Lawrence v. American National Bank, 54 N. Y. 432 (1873); Phetteplace v. Bucklin, 18 R. I. 297, 27 Atl. 211 (1893).

[3] Crocker-Woolworth Bank v. Nevada Bank, 139 Calif. 564, 73 Pac. 456 (1903); Behring v. Somerville, 63 N. J. L. 568, 44 Atl. 641 (1899); Boas v. Updegrove, 5 Pa. 516 (1847).

[4] Union Bank v. United States, 3 Mass. 74 (1807); Phetteplace v. Bucklin, *supra*, note 2.

[5] Durant v. Ecclesiastical Commissioners, 6 Q. B. D. 234 (1880); Kingston Bank v. Eltinge, 40 N. Y. 391 (1869); Bank of Toronto v. Hamilton, 28 Ont. 51 (Can. 1898).

[6] Costigan *op. cit. supra*, note 1; KEENER *op. cit. supra*, note 1; WOODWARD, QUASI-CONTRACTS (1913) § 25.

[7] See cases cited *supra*, note 3.

vocable change of position to cases where there had been payment to a principal or *cestui que trust*,[8] recently the doctrine of estoppel has been invoked to mitigate the rigors of this position, where the plaintiff was the principal contributor to the mistake.[9] In the principal case, two of the five judges, in dissenting, were of the opinion that the plaintiff should be denied recovery on principles of estoppel. It is submitted that the doctrine of estoppel cannot properly be applied to the instant case because the blame was equal (the jury so found). The dissenting judges no doubt felt that the retention of the money was not inequitable. There being a balance of fault, it would appear that the equities were equal. Legal title to the money was clearly in the defendant. Applying the equitable maxim that where equities are equal the law must prevail, we arrive at the conclusion that the majority lost sight of equitable principles in permitting a recovery.

SEARCH AND SEIZURE—THE EFFECT OF AN UNCONSTITUTIONAL SEARCH AND SEIZURE UPON A SUBSEQUENT SEIZURE FOR A DIFFERENT PURPOSE—A raid was made on the petitioner's home by officers who had no search warrant. Over the petitioner's protest his home was searched and some intoxicating liquor found in it was seized. Shortly thereafter the court made an order that the liquor be returned to the petitioner, from which order the Government took no appeal. While the marshal was causing the liquor to be transported to the petitioner's home, it was seized by a Collector of Internal Revenue for nonpayment of taxes. *Held:* The second seizure was void. *In the Matter of the Petition of E. L. Morgan,* U. S. D. C., N. D. Calif., Div. 1, Nov. 1, 1926.

The first seizure here, after an illegal and unreasonable search, was void because it was made in plain violation of the petitioner's constitutional rights under the Fourth Amendment to the Federal Constitution.[1] Accordingly, the court ordered the seized liquor returned to the petitioner, thus following the present weight of authority.[2] Most of the cases which have adopted this principle have arisen as criminal actions in which the illegally seized property has been excluded as evidence against the person whose constitutional rights have been invaded, and have gone no further than to exclude the illegally obtained evidence and return it to the owner.[3] The instant case is somewhat unique in that, because of its facts, the court was obliged to take a further step.

---

[8] Baylis v. Bishop of London, [1913] 1 Ch. 127; 3 WILLISTON, CONTRACTS (1922) § 1595.

[9] Holt v. Markham, [1923] 1 K. B. 504; Deutsche Bank v. Beriro, 73 L. T. 669 (1895). See 72 U. OF PA. L. REV. 180 (1923).

---

[1] Agnello v. United States, 269 U. S. 20 (1925); United States v. Madden, 297 Fed. 679 (D. C. Mass. 1924).

[2] Weeks v. United States, 232 U. S. 383, (1914); Silverthorne Lumber Co. v. United States, 251 U. S. 385, (1919). For other cases, briefly annotated, see THORPE, PROHIBITION AND INDUSTRIAL ALCOHOL (1926) 1384.

[3] *Supra,* note 2, to which may be added the two recent cases of Lee v. United States, 14 Fed. (2d) 400 (C. C. A. 1st, 1926) and Hancock v. State, 248 Pac. 1115 (Okla. 1926). For an interesting, exhaustive discussion of this doctrine and cases under it see 4 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2183, 2184.

In order to give practical effect to its first decree this court held the second seizure void, despite the fact that it was made for tax purposes and not for the purposes of the first seizure. The decision was based on the reasoning that knowledge improperly obtained, in violation of constitutional guarantees, may not be used for any purpose. Though no authority is cited in the opinion, it is submitted that the court had in mind the words of Justice Holmes, in the *Silverthorne Lumber Co. case*:[4] "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." Certainly such language is authority for the decision in the instant case.

TAXATION—CAPITAL STOCK TAX—NON-DEDUCTIBLE ASSETS—The defendant, a domestic corporation, in its capital stock return, required of it by statute,[1] deducted from its total taxable assets the par value of the stock of a foreign corporation, all of the shares of stock of which were owned by the defendant. *Held:* Such deduction was not permissible. *Commonwealth v. Sunbury Converting Works,* 286 Pa. 545, 134 Atl. 438 (1926).

The rationale of the principal case is that the Pennylvania capital stock levy is, in effect, a tax upon the property in which the capital is invested, such as real estate, bonds, mortgage and shares of stock.[2] Through the tax on the capital stock, therefore, the state cannot reach property which it cannot tax directly,[3] such as capital invested in government bonds,[4] and property permanently located outside the jurisdiction.[5] But the state, through its taxing power may properly tax shares of stock of a foreign corporation in the hands of residents,[6] it being universally recognized that the property of the shareholders in their respective shares is distinct from the assets which the corporation itself owns.[7] And, since it is well established that a corporation is an

---

[4] *Supra,* note 2. The case held that neither a corporation's papers, illegally seized, nor copies thereof could be used as evidence against the corporation.

---

[1] Act of July 22, 1913, P. L. 903, 905, Pa. Stat. § 20366, amending Act of June 1, 1889, P. L. 420, § 21.

[2] Commonwealth v. Standard Oil Co., 101 Pa. 119 (1882); Commonwealth v. Shipbuilding Co., 271 Pa. 403, 114 Atl. 457 (1921).

[3] New York v. Tax, etc., Commissioners, 2 Black, 620 (U. S. 1862); Bank Tax Case, 2 Wall. 200 (U. S. 1864); Delaware, etc., R. R. v. Pennsylvania, 198 U. S. 341 (1905); Commonwealth v. Standard Oil Co., *supra,* note 2.

[4] Bank Tax Case, *supra,* note 3.

[5] Delaware, etc., R. R. v. Pennsylvania, *supra,* note 3; Commonwealth v. Standard Oil Co., *supra,* note 2; Commonwealth v. Shipbuilding Co., *supra,* note 2.

[6] Hawley v. Madden, 232 U. S. 1 (1913); Bellows Falls Power Co. v. Commonwealth, 222 Mass. 51, 109 N. E. 894 (1915); Dupuy v. Johns, 261 Pa. 40, 104 Atl. 565 (1918); Callerly's Appeal, 272 Pa. 255, 116 Atl. 222 (1922).

[7] Van Allen v. Assessors, 3 Wall. 573 (U. S. 1865); Farrington v. Tennessee, 95 U. S. 679, 686 (1877); Greenleaf v. Morgan County, 184 Ill. 226, 56 N. E. 295 (1900); State v. Branin, 23 N. J. Law 484 (1852); McKeen v. Northampton County, 49 Pa. 519 (1865).

entity distinct from its individual members and stockholders,[8] the fact that one person owns all of the stock does not make him and the corporation one and the same person.[9] Therefore, although the capital stock levy taxes the defendant's ownership of the stock, it does not reach the assets of that corporation; and so, by the disallowance of the deduction claimed, nothing is being taxed through the guise of the capital stock tax which Pennsylvania could not lawfully tax directly.

Commonwealth v. Westinghouse Air Brake Co., which the principal case expressly overrules, was the basis of the defendant's contention in the instant case, that, since it owned all of the shares of stock of the corporation, it thereby became the owner of the corporate property and assets. By such a view, then, the capital stock tax being a levy upon the property in which the capital was invested, to tax the capital invested in the shares was to tax the corporate assets which such shares represented. It would then follow that such a result was taxing property permanently beyond the jurisdiction, which was violative of the Fourteenth Amendment to the Federal Constitution.[10]

The holding of the principal case harmonizes the decisions in Pennsylvania on this general question, and, it is submitted, soundly so, for the result is the inescapable logic of taxing any of the shares of stock of a foreign corporation in the hands of a resident. In recognition of that, the principle of the overruled case was discarded before the case itself was actually rejected.[11]

TAXATION—INCOME TAX—GAINS FROM UNLAWFUL BUSINESS—The defendant, in filing his income tax return, stated his sole income to be a salary of $10,000 yearly as officer of a certain corporation. In fact, his income was $500,000, and was obtained from the sale of liquor in violation of the *National Prohibition Act. Held:* The income was taxable. *Steinberg v. United States,* 14 Fed. (2d) 564 (C. C. A. 2d, 1926).

The decision in this case raises a nice question. If the government can tax

---

[8] Van Allen v. Assessors, *supra,* note 7; Bank v. Winchester, 119 Ala. 168, 24 So. 351 (1898); Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490 (1895); Commonwealth v. Bridge Co., 216 Pa. 108, 64 Atl. 909 (1906); Callerly's Appeal, *supra,* note 6.

[9] Bank v. Macon Construction Co., 97 Ga. 1, 25 S. E. 326 (1895); Winona R. R. v. St. Paul R. R., 23 Minn. 359 (1877); Bidwell v. Pittsburgh, etc., Ry., 114 Pa. 535, 6 Atl. 729 (1886); Bridge Co. v. Traction Co., 196 Pa. 25, 46 Atl. 99 (1900); Commonwealth v. Bridge Co., *supra,* note 8; Macan v. Belting Co., 264 Pa. 384, 107 Atl. 750 (1919).

[10] Delaware, etc., R. R. v. Pennsylvania, *supra,* note 3.

[11] Commonwealth v. Shenango Furnace Co., 268 Pa. 283, 110 Atl. 721 (1920), where a domestic corporation, owning all the shares of stock of another domestic corporation, not subject to the capital stock tax because its assets were permanently located beyond the jurisdiction, was not permitted a deduction for that stock. See Callerly's Appeal, *supra,* note 6, where a resident natural person was taxed for his ownership of stock in a foreign corporation which was sole owner of the stock of a domestic corporation not subject to the capital stock tax. In Washburn Co. v. Bliss, 42 R. I. 32, 105 Atl. 179 (1918), the doctrine of Commonwealth v. Westinghouse Air Brake Co. was expressly rejected. In accord with the principal case see Commonwealth v. Brill, 287 Pa. 59, 134 Atl. 441 (1926).

the profits gained from "bootlegging," can it also tax the profits of the highwayman, the paid gunman, the prostitute and the host of others who engage in criminal commerce? Before that can be answered, the meaning of the term "income" must first be ascertained. Income has been defined by statute,[1] by the United States Supreme Court,[2] by economists [3] and by text-writers,[4] but none of the definitions specifically covers profits gained through illegal transactions. A comparison of the income tax laws shows that in the law of 1913 [5] the statute provided for "a tax on gains from any lawful business carried on for gain or profit." In the law of 1916,[6] the word "lawful" was omitted, and the omission continued in the 1918,[7] 1921,[8] and 1924 [9] laws. This would seem to indicate that Congress intended to make "stealings" and "winnings" taxable as well as "earnings." [10] It has been held in the United States [11] and in England [12] that the earnings of a professional bookmaker are taxable. Where the gambling was for sport, England has held the income not to be taxable.[13] Canada, in a case on all fours with the principal case, decided the income was not taxable.[14] The income from embezzlement has been considered not to be taxable, because it would be taxing profits gained from a "larceny." [15] None of the courts have differentiated between the various kinds of crime, and this seems to be the cause for their confusion. An example of this is the opinion of

---

[1] "Gross income includes gains, profits and income derived from . . . professions, vocations, trades, businesses, commerce or sales . . . or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." 42 Stat. 238 (1921).

[2] "Income may be defined as a gain derived from capital, from labor or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets." Eisner v. Macomber, 252 U. S. 189, 207 (1920).

[3] "Income is receipts by the taxpayer of money, or money's worth, growing out of the productive process, and actually realized after deducting all necessary cost of acquisition." Hewett, *The Concept of Income in Federal Taxation*, 33 J. POL. ECON. 177 (1925). "Thieves and swindlers are parasites . . . Their activity is purely predatory. . . . The keeper of a dram-shop and the gambler are productive laborers." 1 TAUSSIG, PRINCIPLES OF ECONOMICS (3d ed. 1921) c. 2, § 3. See Merchants' Loan and Trust Co. v. Smietanka, 255 U. S. 509 (1921).

[4] "Income is the amount of actual wealth which comes to a person during a given period of time other than as a mere return of capital." HOLMES, FEDERAL TAXES (6th ed. 1925) 487. See KIX MILLER AND BAAR, U. S. TAX GUIDE (1926) § 129; MONTGOMERY, INCOME TAX PROCEDURE (9th ed. 1925) 490.

[5] 38 Stat. 167 (1913).

[6] 39 Stat. 757, U. S. Comp Stat. (1918) § 6336b.

[7] 40 Stat. 1065 (1919).

[8] *Supra*, note 1.

[9] 43 Stat. 267, U. S. Comp. Stat. (1925) § 6336 1/6 ff.

[10] KIX MILLER AND BAAR, *op. cit. supra*, note 4, at § 299; MONTGOMERY, *op. cit. supra*, note 4, at § 537.

[11] James P. McKenna, 1 B. T. A. 326.

[12] Partridge v. Mallandaine, 18 Q. B. D. 276 (1886).

[13] Graham v. Green, [1925] 2 K. B. 37, 39 HARV. L. REV. 274 (1925).

[14] Smith v. Minister of Finance, 2 D. L. R. 1137 (Canada, 1925), commented upon in Commerce Clearing House Rewrite Service, Fed. Tax. Bull., 13, § 5269 (1925).

[15] Rau v. United States, 260 Fed. 131, 136 (C. C. A. 2nd, 1919).

Judge Manton in the principal case, which, while concurring with the majority, dissented in several particulars. He drew an analogy between a highwayman and a bootlegger, and contended that the income from neither could be taxed. But there would seem to be a distinction. Highway robbery is a crime *malum in se*,[16] whereas "bootlegging" is merely a *malum prohibitum*,[17] and it is submitted that the decided cases in the United States can only be reconciled by use of such a classification. While the courts have hesitated to make this distinction,[18] it nevertheless seems to be the basis of their decisions and was suggested in one of them.[19]

TORTS—LIABILITY OF MAKER TO THIRD PARTY FOR DEFECTIVE PRODUCT—The plaintiff's intestate was killed in the collapse of the Knickerbocker Theatre in Washington. The declaration, to which the defendant demurred, alleged that the defendant had contracted to design, fabricate, furnish, and install the structural steel to be used in the roof and balcony of the theatre; that it was the duty of the defendant to use reasonable care and diligence in the carrying out of the contract; and that, because of the defendant's carelessness and negligence, the roof and balcony of the theatre fell and caused the death of the plaintiff's intestate. The theatre had been accepted and maintained by the owner. *Held:* Demurrer sustained. *Ford v. Sturgis*, 14 Fed. (2d) 253 (Ct. of App., D. C. 1926).

While the court might have rested its decision on the failure of the plaintiff's declaration to allege specific negligence, yet it preferred to base its holding on the broader ground of non-liability for negligence of manufacturers to third parties not in privity of contract. The court recognizes four exceptions to this rule:[1] (1) when an article of a manufacturer or vendor is imminently dangerous to human life and health, and negligence is committed in the preparation or sale of the article the primary use of which is to serve, destroy, or affect life and health; (2) when an owner has invited third parties to use defective machines furnished by him; (3) when a manufacturer knows of, or has concealed, a defect which will render the machine imminently dangerous to the one using it for its intended purpose; and (4) when the article or structure is a nuisance *per se*. Cases on the liability of manufacturers and contractors to third parties not in privity of contract with them have fallen into three classes. The first, the old rule, is that of *Winterbottom v. Wright*[2] which holds no liability except

[16] Commonwealth v. Adams, 114 Mass. 323 (1873). See 16 C. J. 58.

[17] Fort v. Brinkley, 87 Ark. 400, 112 S. W. 1084 (1908).

[18] For distinction between *malum prohibitum* and *malum in se* see Commonwealth v. Adams, *supra*, note 16.

[19] James P. McKenna, *supra*, note 11.

[1] Accord: Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865 (C. C. A. 8th, 1903); Hruska v. Parke, Davis Co., 6 Fed. (2d) 536 (C. C. A. 8th, 1925); Heizer v. Kingsland Mfg. Co., 110 Mo. 605, 19 S. W. 630 (1892). For complete annotation of liability of manufacturers to third parties not in privity of contract with them, see 17 A. L. R. 672 (1922).

[2] 10 M. & W. 109 (Ex. 1842).

to those in contractual relations. The next and most prevalent class of cases is that of the principal case. The third and more modern class has grown out of the confusion in respect to the first exception. Some courts in accord with the principal case restrict the first exception to articles of themselves dangerous. Other courts include in this exception articles which may become eminently dangerous if defective, although the duty under both views is to take reasonable care to guard against defects, and knowledge of the specific defect is not required. New York has taken the lead in the latter view,[3] and definitely bases the liability on a tort duty, which is of great antiquity.[4] Much of the conflict in decisions has been due to a misunderstanding of *Winterbottom v. Wright,* which decided merely that a third party could not sue on a contract to which he was not a party, not that a tort obligation did not also exist.[5] Other reasons given by the principal case and its class of cases, for restricting liability to articles of themselves dangerous, is the danger of endless suits, lack of foreseeability of the injury, and the danger of leaving the question of reasonable care to the prejudice of juries.[6] But it is submitted that the New York view is not only logical, but has been found to be practical and just. The principal case illustrates the inconsistency of not holding the present defendant liable for his negligence especially when cases hold liability under the first exception of the principal case where the article is considered inherently dangerous,—automobile wheels,[7] foods,[8] beverages,[9] iron stoves,[10] saw frames,[11] and soaps.[12] However inconsistent with these cases the principal case may seem, the decisions are practically unanimous in not holding the constructor of a building after it has been accepted by the owner.[13] The principal case is another decision strengthening the authority of the second classes of cases, and shows the unwillingness of the federal courts to adopt the growing New York view, although it seemed at one time as if they might.[14]

---

[3] MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916); Henry v. Crook, 202 App. Div. 19, 195 N. Y. Supp. 642 (1922), 71 U. OF PA. L. REV. 184 (1923).

[4] The obligation of one engaging in a business or trade to exercise it competently. Y. B. 3 Hen. VI. 36 pl. 33 (1425) (millwright); Y. B. 20 Hen. VI. 34 pl. 4 (1442) (carpenter).

[5] See criticism in BOHLEN, STUDIES IN THE LAW OF TORTS (1926), 76-80.

[6] For discussion of, and answers to these reasons, see *supra,* note 5, at 127 *et seq.*

[7] Cadillac Motor Car Co. v. Johnson, 221 Fed. 801 (C. C. A. 2d, 1915); Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S. W. 1047 (1911).

[8] Ketterer v. Armour, 247 Fed. 921 (C. C. A. 2d, 1917).

[9] Coca-Cola Co. v. Barksdale, 17 Ala. App. 606, 88 So. 36 (1920).

[10] Coakley v. Prentiss, 182 Wis. 94, 195 N. W. 388 (1923), 9 CORN. L. Q. 494 (1924).

[11] Davidson v. Montgomery Ward, 171 Ill. App. 355 (1912).

[12] Armstrong Packing Co. v. Clem, 151 S. W. 576 (Tex. C. C. A. 1912).

[13] Salliote v. King Bridge Co., 122 Fed. 378 (C. C. A. 6th, 1903); Canal Const. Co. v. Clem, 163 Ark. 416, 260 S. W. 442 (1924); Curtin v. Somerset, 140 Pa. 70 (1891).

[14] See Cadillac Motor Car Co. v. Johnson, *supra,* note 7.

VENDOR AND PURCHASER—WRITTEN CONTRACTS—EFFECT OF CLAUSE EXCLUDING ALL REPRESENTATIONS—The defendant vendor orally represented that the rooms in the house in question were in a certain condition, and that the income from rents was a certain amount. These statements were false. The plaintiff vendee, relying upon these statements, decided to purchase the property and entered into a written agreement which made no reference to the above representations, but which contained the following clause: "No representation, agreement or promise has been made except as herein stated." Upon subsequent discovery of the false representations, the vendee brings a bill in equity to rescind the contract. *Held:* Vendee bound by the written agreement. *Sullivan v. Roche,* Supreme Jud. Ct. of Mass., Oct. 13, 1926.

It is a general rule that provisions in a contract for the sale of real estate or personal property the purpose of which is to secure from the vendee in advance a waiver of or an estoppel against any claim of fraud by the vendor or his agent in securing the contract, will not be given effect to preclude the former from setting up or relying upon such fraud order to rescind the contract or avoid liability thereunder.[1] It is held that the clause excluding representations has reference to the subject matter of the contract, and not to representations fraudulently made to induce and bring about its execution. If, therefore, the representations are fraudulent there is nothing to prevent the introduction of evidence of the fraud and the rescission of the contract.[2] The principal case is contrary to the general rule, but the law which it applied has been previously recognized in Massachusetts,[3] Georgia[4] and New Jersey.[5] These jurisdictions advance the theory that the vendor, a competent party, has a right to so contract that the excluding clause relates to the whole transaction, and the vendee cannot later explain if he has failed to protect himself by not inserting the representations in the contract. While much may be said for this view, it is felt that the majority rule is the better law. Since fraud has tainted the whole transaction, since misrepresentation has been resorted to to persuade the entry into the contract, the law should not aid in carrying out the fraud by declaring that the insertion of a clause excluding representations should be an absolute bar to the vendee who has been defrauded by a reliance upon prior misrepresentations.

WILLS—CONSTRUCTION—MEANING OF "FIRST RIGHT"—The testatrix devised to her oldest daughter the "first right" to her home. The devisee entered and took possession of the property described, and now claims the fee. *Held:* The language used was insufficient to pass a fee. *Estate of Louisa Gerheim,* 88 Pa. Super. 530 (1926).

---

[1] Jordan v. Nelson, 178 N. W. 544 (Iowa, 1920); Bridger v. Goldsmith, 143 N. Y. 424, 38 N. E. 458 (1894); Case Threshing Machine Co. v. McKay, 161 N. C. 584, 77 S. E. 848 (1913).

[2] Whiting v. Squeglia, 70 Calif. App. 108, 232 Pac. 986 (1924); Thompson Co. v. Schroeder, 131 Minn. 125, 154 N. W. 792 (1915); Dieterich v. Rice, 115 Wash. 365, 197 Pac. 1 (1921).

[3] O'Meara v. Smyth, 243 Mass. 188, 137 N. E. 294 (1922); Boss v. Boston Mortgage Co., 251 Mass. 455, 146 N. E. 686 (1925).

[4] Equitable Mfg. Co. v. Biggers, 121 Ga. 381, 49 S. E. 271 (1904); Morgan v. Denton, 28 Ga. App. 88, 110 S. E. 328 (1921).

[5] Edison Fixture Co. v. Copoulos, 127 Atl. 551 (N. J. 1925).

In determining what the testatrix intended, the court was greatly influenced by the use of the word "first" in the phrase "first right." In an early New York case[1] it was decided that a testator who devised his "right" in land passed all of his interest therein, including a fee if he had one. But the word "first," appearing in the principal case as a qualification of the right devised, seems to indicate that there were other rights, secondary to this one to the home. The court here being the first to be faced with the question of what passes by a devise of the "first right" to realty, arrived at the conclusion that the devisee was entitled to a prior right to purchase the real estate described at its fair value, *i. e.*, the value to be ascertained by an appraisement, with the obligation to account to the estate for the value thereof.[2] This conclusion has the effect of saying that as to this particular real estate the testatrix died intestate, and, although it is contrary to the general presumption that one leaving a will purports to dispose of his entire estate,[3] it is nevertheless submitted that the court correctly carried out the intent of the testatrix.

---

[1] Newkerk v. Newkerk, 2 Caines, 345 (N. Y. 1805).

[2] This procedure is provided for in the Fiduciaries Act of 1917, P. L. 447, § 33, Pa. Stat. § 8543.

[3] Jones v. Gane, 205 Mass. 37, 91 N. E. 129 (1910); Brown v. Quintard, 79 App. Div. 635, 81 N. Y. Supp. 918 (2d Dept. 1903); Long v. Hill, 29 Pa. Super. 606 (1905).