

RECENT CASE NOTES

ADMIRALTY—MARITIME LIENS—NO LIEN ATTACHES WHERE SUPPLIES ARE FURNISHED TO OWNER OF FLEET.—The libellant company sold coal to a corporation owning a fleet of vessels and delivered it at the corporation's bins, from which it was taken from time to time to supply the vessels and also the corporation's factories. The understanding was that the law would afford a lien on the vessels for the purchase price of the coal. Thereafter the coal company libelled twelve of the steamers, asserting maritime liens for the value of either all the coal or of such parts of it as had been used by the libelled vessels respectively. *Held*, that there was no maritime lien, as the coal was not furnished to the vessels by the libellant but by the fleet owner. *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.* (1920, U. S.) 41 Sup. Ct. 1.

The principal element in a maritime lien on another's property is the creditor's power to cause the thing to be sold in order to have the debt paid out of the price. See 2 Jones, *Liens* (3d ed. 1914) 922; NOTES (1915) 15 COL. L. REV. 343. There has been confusion in the law as to when a materialman could enforce such a lien for repairs, supplies, or necessaries furnished to a vessel. Fitz-Henry Smith, Jr., *The Confusion in the Law Relating to Materialmen's Liens on Vessels* (1908) 21 HARV. L. REV. 332. Congress cleared away much of this confusion and overcame the evil results of several early decisions by statute in 1910. 36 U. S. Stat. at L. 604, U. S. Comp. St. 1916, secs. 7783-7787. This act does not define what is meant by "furnishing repairs, etc. . . . to a vessel." See Fitz-Henry Smith Jr., *New Federal Statute Relating to Liens on Vessels* (1911) 24 HARV. L. REV. 182, 200. The better view appears to be that a lien does not attach "unless the goods are actually put on board the ship, or else are brought within the immediate presence or control" of the master. *The Vigilancia* (1893, S. D. N. Y.) 58 Fed. 698; *The Geisha* (1912, D. D. Mass.) 200 Fed. 865. The mere fact that the delivery is made under a contract with the owner for supplying a fleet of vessels does not in itself prevent the acquiring of a maritime lien if the preceding requirement is met. In such cases, however, the lien does not operate against the fleet as a whole, but only against the separate vessels to the extent to which each has been served. *Astor Trust Co. v. White* (1917, C. C. A. 4th) 241 Fed. 57, L. R. A. 1917 E, 526, note; *The Alligator* (1908, C. C. A. 3d) 161 Fed. 37; Hughes, *Admiralty* (2d ed. 1920) 106. This requirement may be met by forwarding the supplies to a place indicated for the vessel by the order of one in authority. *The Yankee* (1916, C. C. A. 3d) 233 Fed. 919. If the supplies are furnished to the owner, the fact that they are subsequently used on his vessels will not of itself create a lien. This arises, if at all, at the time the supplies were furnished by the libellant and not from what may have happened subsequently. *The Cora P. White* (1917, D. D. N. J.) 243 Fed. 246. The decision in the principal case expresses very clearly, with abundant citations, what appears to be the generally accepted view.

ARMY AND NAVY—JURISDICTION OF COURTS-MARTIAL—CONSTITUTIONALITY OF SECOND ARTICLE OF WAR—END OF WAR.—The petitioners had been sentenced to dishonorable discharge from the army and to confinement in the United States Disciplinary Barracks. After execution of the dishonorable discharge and while in confinement, they were, on November 4, 1918, placed on trial before a general court-martial, charged with murder. On November 25, 1918, they were found guilty, after which they were sentenced to imprisonment in the United States penitentiary. They sought release on habeas corpus, contending that the

court-martial had no jurisdiction to try them on a charge of murder, because they were not at the time of the offense or of the trial members of the land or naval forces and because the trial occurred in time of peace. *Held*, that the district court correctly dismissed the petition. *Kahn v. Anderson* (Jan. 31, 1921) U. S. Sup. Ct. Oct. Term, 1920, No. 421.

The enactment which authorized the establishment of the military prisons at Rock Island and Fort Leavenworth made all persons confined therein amenable to trial by courts-martial, under the rules and articles of war, for offenses committed during confinement. U. S. Rev. St. sec. 1361. The Act of June 18, 1898, provided that soldiers sentenced to dishonorable discharge and confinement should be subject to the laws relating to the administration of military justice until discharged from such confinement. 30 Stat. at L. 484. The second article of war, as contained in the Act of June 3, 1916, subjected to the articles of war "all persons under sentence adjudged by courts-martial." 39 Stat. at L. 208. Colonel Winthrop, the leading American authority upon military law, was of the opinion that such enactments could not be constitutionally construed to apply to offenses committed by soldiers whose sentences to dishonorable discharge had been executed. He argued that such soldiers had ceased to be part of the land or naval forces and were therefore within the protection of the Fifth Amendment. 1 Winthrop, *Military Law* (1st ed. 1886) 110, 121-129. His argument did not find support either with the Attorney General or with the federal District Courts. It was met by two answers: first, that the military prison is a part of the military establishment and subject to military jurisdiction, so that an offense committed therein is a case arising in the land forces; second, that the statute necessarily limits the power of a court-martial to sever the connection of a convicted soldier with the army. Notwithstanding the execution of the sentence, he still retains his military status. *Ex parte Wildman* (1876, D. C. D. Kans.) Fed. Cas. 17653a; *In re Craig* (1895, C. C. D. Kans.) 70 Fed. 969; 16 Op. Atty. Gen. 292. The Supreme Court, in a dictum, had assumed the constitutionality of the provision as applied to military prisoners. *Carter v. McClaughry* (1902) 183 U. S. 365, 383, 22 Sup. Ct. 181, 188. In the instant case it summarily dismisses the claim of unconstitutionality by referring to the above cases, saying that "the principles upon which they rest adequately demonstrate the unsubstantial character of the contention." As to the contention that the trial occurred "in time of peace," the court held that the phrase did not contemplate "a mere cessation of hostilities, but peace in the complete sense, officially proclaimed." See *Hamilton v. Kentucky Distilleries Co.* (1919) 251 U. S. 146, 40 Sup. Ct. 106; (1919) 29 YALE LAW JOURNAL, 113.

EQUITY—CANCELLATION OF INSTRUMENTS—EFFECT OF THE MAXIM OF "CLEAN HANDS" ON INFANT'S RIGHT TO RELIEF.—The plaintiff, a moving picture actress domiciled in California, entered into contracts in New York with the defendants, New York corporations, for services to be performed in New York and California. Under the law of New York she was an infant but under the law of California she was of age. Before the expiration of these contracts she represented to the Keeney Corporation that she was free to accept employment and contracted with it for her exclusive services. The defendants refused to release her and notified the Keeney Corporation of their claim. The plaintiff filed a bill to have the original contract cancelled and to enjoin the defendants from interfering with her employment by others. *Held*, that equity would not give affirmative relief to one coming into court with unclean hands to "repudiate her pledged word of honor," even though she were only morally bound. *Carmen v. Fox Film Corporation and William Fox Vaudeville Company.* (Nov. 10, 1920) U. S. C. C. A. 2d, Oct. Term. 1920, No. 29.

It is well settled that equity will not aid one who has acted in bad faith or

unfairly even if he has kept "within the law." *Weeghman v. Killifer* (1914, C. A. 6th) 215 Fed. 289; *Horton v. Little* (1914) 188 Ala. 640, 65 So. 951; see 1 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 398. Here this principle comes into sharp conflict with the absolute power of an infant to disaffirm his contract. Whether this power will have to be modified to meet existing business conditions, especially in the "movie" industry, where youth plays so large a part, is an important question of policy for the courts. An entering wedge has already been driven. In New York an injunction has been granted to restrain an infant from violating his contract not to use his employer's list of customers for a period after he left his employ. *Mutual Milk and Cream Co. v. Prigge* (1906) 112 App. Div. 652, 98 N. Y. Supp. 458; see NOTES (1906) 20 HARV. L. REV. 64. A recovery of premiums on an insurance policy made during infancy and later disaffirmed has also been denied. *Link v. N. Y. Life Insurance Co.* (1909) 107 Minn. 33, 119 N. W. 488; *contra*, *Simpson v. Prudential Ins. Co.* (1903) 184 Mass. 348, 68 N. E. 673. To prevent the use of equity to aid in "contract jumping" would seem to be the next logical step.

EQUITY—SPECIFIC PERFORMANCE—INDEMNITY FOR DOWER INTEREST.—The defendants were partners in real estate operations. They contracted to sell land to the plaintiff, but finding that the property was increasing in value, they refused to perform, giving as an excuse that the wife of one of them refused to release her dower interest. The plaintiff brought this bill for specific performance. *Held*, that the plaintiff was entitled to a decree for performance with indemnity for the dower interest, since the wife collusively refused to join in the conveyance. *Scheffrin v. Wilensky* (1920, N. J. Ch.) 111 Atl. 660.

In general, where a vendor has contracted to convey a larger estate than he has, the vendee is entitled to specific performance of the contract with an abatement in the purchase price for that part of or interest in the property which the vendor is unable to convey. See *Mortlock v. Buller* (1804, Ch.) 10 Ves. 292, 316; see NOTES (1912) 25 HARV. L. REV. 731; 2 Pomeroy, *Equitable Remedies* (1st ed. 1905) sec. 831. An exception in some jurisdictions is where the outstanding interest is dower. 2 Pomeroy, *op. cit.*, sec. 834; see 36 Cyc. 745. Two main reasons are given for this exception. In the first place a decree for specific performance in such a case tends indirectly to exert pressure on the wife and upset domestic relations. *Haden v. Falls* (1914) 115 Va. 779, 80 S. E. 576. But this reason does not apply where there is collusion between husband and wife, as in the instant case, or misrepresentation on the part of the wife, since the wife no longer is an innocent party in the matter. *Stein v. Francis* (1919, N. J. Ch.) 109 Atl. 737. Secondly, the difficulty of computing the value of the inchoate dower because of the contingencies thereof, has been held to be so great that a fair abatement or indemnity cannot be determined. *Long v. Chandler* (1914) 10 Del. Ch. 339, 92 Atl. 256. Where the dower is consummate the difficulty is less, and a court has granted an abatement in such a case where it might not have done so had the dower been inchoate. *Bostwick v. Beach* (1886) 103 N. Y. 414, 9 N. E. 41; *Roos v. Lockwood* (1891, Sup. Ct.) 59 Hun. 181, 13 N. Y. Supp. 128; but see *Compione v. Eckert* (1920, Sup. Ct.) 110 Misc. 703, 182 N. Y. Supp. 137. The difficulty of calculation depends to a great extent on the dower statutes of the jurisdiction. Therefore no general rule based on this argument is possible. An abatement may be unfair, as the dower may never vest. But an indemnity which returns to the vendor if the dower does not vest has been held to work no great hardship on the vendor. *Minge v. Green* (1912) 176 Ala. 343, 58 So. 381. Although it may be to the disadvantage of the purchaser and against public policy by rendering the land unmarketable. *Minge v. Green* (1912) 176 Ala. 343, 365, 58 So. 381, 388. Many courts have held that neither reason is sufficient to take such a case out of the general rule. *Bethell v. McKin-*

ney (1913) 164 N. C. 71, 80-S. E. 162; *Tebeau v. Ridge* (1914) 261 Mo. 547, 170 S. W. 871. As the court in the instant case found that there was collusion, the decision seems sound both on authority and reason. See L. R. A. 1917 F, 579, note.

EVIDENCE—COMPARISON OF HANDWRITING—ADMISSION OF SPECIMENS CONCEDED TO BE GENUINE FOR PURPOSES OF COMPARISON.—The plaintiff, a depositor with the defendant bank, recovered in an action for a sum of money which he alleged that the bank had paid out and charged to his account upon forged checks. The bank brought this appeal, alleging as error the admission in evidence of checks conceded to bear the genuine signature of the plaintiff. *Held*, that a paper not already in evidence, and having no connection with the issue to be tried, could not be admitted either for the purpose of comparison by the jury or to test the general accuracy of witnesses on cross-examination. *Texas State Bank v. Scott* (1920, Tex.) 225 S. W. 571.

In nearly all jurisdictions comparison by the jury of the disputed handwriting with specimens properly before them is allowed. There is, however, some conflict and confusion as to the method of getting specimens before the jury. Many jurisdictions admit for the purpose of comparison by the jury, writings irrelevant to the issue and in no way in the case upon proof to the satisfaction of the court of their genuineness. *Homer v. Wallis* (1814) 11 Mass. 308; 62 L. R. A. 866, note. Other jurisdictions admit specimens conceded to be genuine. *Cochrane v. National Elevator Co.* (1910) 20 N. D. 169, 127 N. W. 725; *Seaman v. Husband* (1917) 256 Pa. 571, 100 Atl. 941. Some courts admit no writings solely for comparison, but allow comparison by the jury of writings already in evidence. *Mississippi Lumber & Coal Co. v. Kelly* (1905) 19 S. D. 577, 104 N. W. 265, 9 Ann. Cas. 449, note. Other jurisdictions limit comparison to specimens already in evidence and admitted to be genuine. *Barnes v. United States* (1909, C. C. A. 5th) 166 Fed. 113. The objections advanced against the admission of signatures for comparison are that there may be an unfair selection of specimens, and also that there may arise a confusion of issues. The first objection is completely met by the rule limiting comparison to specimens admittedly genuine, and also by the rule requiring the specimens to be already in evidence and admitted to be genuine. This objection is of slight weight at best, for in every action the party producing the evidence selects such evidence as will be favorable to himself. See 3 Wigmore, *Evidence* (1904) sec. 1999. The second objection is obviously taken care of under any of the rules except the one allowing comparison only with those writings already in evidence, but even here it is of comparatively little weight. See Wigmore, *op. cit.*, sec. 2000. It seems, therefore, that since a writing admittedly genuine obviates the above mentioned objections, it should be admitted for comparison. A writing conceded or proved to be genuine, though otherwise irrelevant to the cause, may be admitted to test the accuracy of a handwriting witness. *McArthur v. Citizens' Bank of Norfolk* (1915, C. C. A. 4th) 223 Fed. 1004; Ann. Cas. 1917 B, 1067, note. But when the testing signature is one whose genuineness is not admitted or must be specially proved, because it is not otherwise in the case, the objections of multiplicity of issues and of unfairness of selection again arise. Owing to the dangerous nature of expert handwriting testimony and the necessity of testing it thoroughly to prevent injustice, the deprivation of this weapon for the cross-examiner is a loss so serious as to outweigh the inconveniences of its sanction. See Wigmore, *op. cit.*, sec. 2015.

EVIDENCE—REASONABLE DOUBT—CHAIN AND CABLE THEORIES.—The defendant was convicted of statutory rape and brought this appeal, assigning as error the charge of the lower court that the corroborative evidence produced by the

state must be established by a fair preponderance of the evidence, but that the jury must be satisfied of the sufficiency of the whole evidence beyond a reasonable doubt. *Held*, that this instruction was erroneous, since corroborative evidence, being a vital supplement to the body of the case, must be established separately beyond a reasonable doubt. *State v. Smith* (1920, Iowa) 180 N. W. 4.

The instant case illustrates the difficulties of the courts on the question whether the jury must be satisfied beyond a reasonable doubt as to every essential fact to be established by the state or as to the evidence as a whole only. 16 C. J. 765. Two theories have been advanced, the "chain" theory and the "cable" theory. See 2 Thompson, *Trials* (2d ed. 1912) secs. 2512-2515. The adherents of the chain theory have found great difficulty in reaching a uniform conclusion. Some courts hold that each link in the chain of evidence connecting the accused with the crime, must be proved individually beyond a reasonable doubt. *Commonwealth v. Webster* (1850, Mass.) 5 Cush. 295; *People v. Carson* (1909) 155 Calif. 164, 99 Pac. 970. Others hold that the theory applies only where each link depends on the strength of the preceding one. *State v. Young* (1900) 9 N. D. 165, 82 N. W. 420; *State v. Shimes* (1899) 125 N. C. 730, 34 S. E. 552. Still others hold that though each individual link must be proved beyond a reasonable doubt, yet the facts which make up each link require only a fair preponderance of the evidence. *State v. Pack* (1920) 106 Kan. 188, 186 Pac. 742; *State v. Gullivan* (1902) 75 Conn. 326, 53 Atl. 731. The followers of the cable theory hold that the jury should be convinced beyond a reasonable doubt from the evidence as a whole, for the incriminating facts are likened to the strands of a cable, and though some of the strands break, if the cable is still strong enough, the accused should be convicted. *Pitts v. State* (1904) 140 Ala. 70, 37 So. 101; *Carr v. State* (1907) 81 Ark. 589, 99 S. W. 831. In the state in which the instant case was decided, there has been an unusual amount of litigation on this particular point, but the court seems finally to have adopted an intermediate rule, viz: when the proof of the particular crime depends on circumstantial evidence, then the chain theory is applied; otherwise the cable theory governs. *State v. Cohen* (1899) 108 Iowa, 208, 78 N. W. 857; *State v. Hossack* (1902) 116 Iowa, 194, 89 N. W. 1077. It is submitted that though the chain theory has many adherents, it is not the logical rule, for it makes each circumstance stand by itself, unable to gain strength from the other circumstances of the case. See 41 L. R. A. (N. S.) 749, note. Also the greater the number of circumstances essential to the crime, the harder it is to convict, for a long chain is weaker than a short one. It is not without reason that Wigmore says, "and herein is given opportunity for much vain argument. . . ." See 4 Wigmore, *Evidence* (1905) sec. 2497.

FUTURE INTERESTS—DEVISE TO SOLE HEIR-AT-LAW OF LIFE ESTATE WITH CONTINGENT REMAINDER BUT NO LIMITATIONS OVER.—POWER OF TESTAMENTARY DISPOSITION.—The plaintiff, administrator of the estate of Anna Haley, brought this suit against the latter's executors to recover for collateral heirs, the only remaining next of kin, the share of the estate left to her by her father, in trust for her benefit during life, and upon her death to her issue. The father's will did not provide for disposition of the property in case Anna left no issue. Anna died without issue, leaving a will, purporting to dispose absolutely of a portion of the trust estate left her by her father's will. The plaintiff claimed that the will was not effective to pass the property but that it became intestate property upon Anna's death, and as such went to the testator's next of kin determined as of the time of Anna's death. *Held*, that the corpus of the trust estate vested in Anna as of the time of her father's death, subject to the contingent limitation to her issue, and her will disposing thereof was effective. *Velders v. Gaines* (1920, Sup. Ct.) 112 Misc. 226, 184 N. Y. Supp. 100.

The court in the instant case seems to be of opinion that the above holding is in opposition to a decision on the same point in the *Simonson* Case. *Simonson v. Waller* (1896) 9 App. Div. 503, 41 N. Y. Supp. 662. It is not difficult to reconcile these two cases, however, as the court in the latter case, after deciding that the reversionary fee simple went back as intestate property to the heirs of the testator, as of the date of his death, left the question of the validity of the testamentary disposition by the life tenant, who was the only heir-at-law, to be determined by the English courts. Where the testator devises an estate for life with a contingent remainder and no limitation over, in case the remainder fails, the property reverts to the heirs as intestate property. *Heck v. Burgen* (1920, Pa.) 111 Atl. 160; see *Schmidt v. Schmidt* (1920, Ill.) 126 N. E. 736, 739; 40 Cyc. 195 b. Where the original devise is ineffective on account of illegality or other reasons, it has been held that the property goes back as intestate property to the next of kin of the testator or to the residuary legatee, if any. *In re Billing's Estate* (1920, Pa.) 110 Atl. 768; *In re Kelsey's Estate* (1920, Surro.) 184 N. Y. Supp. 67. Both the American and English courts have decided that the fact that a life tenant is also one of the next of kin does not prevent him from sharing in the intestate property or in a residuary devise. *Doane v. Mercantile Trust Co.* (1899) 160 N. Y. 494, 55 N. E. 296; *Wharton v. Barker* (1858, Ch.) 4 Kay & J. 483; *Bullock v. Dumes* (1860) 9 H. L. Cas. 1. It may be noted that if there be an absolute gift of specific property, and later in the same instrument a limitation of that property to the devisee for life, followed by a contingent remainder for the devisee's children, the original gift remains absolute where the limitation fails by reason of the fact that no children survive. See *Simonson v. Waller* (1896) 9 App. Div. 503, 510, 41 N. Y. Supp. 662, 667; *Lassence v. Tierney* (1849, Ch.) 1 McN. & G. 551; see *In re Mercer's Trusts* (1876) L. R. 4 Ch. Div. 182, 188. It is practically settled that where a contingent remainder is created by a will, and the fee is not otherwise disposed of until the happening of the contingency, such fee descends in the meantime to the testator's heirs, and when the contingency happens it opens to let in the remainder. *Collins v. Whitman* (1920, Mo.) 222 S. W. 840; see *Matthews v. Andrews* (1919, Ill.) 124 N. E. 871, 872; 1 Fearn, *Contingent Remainders* (10th ed. 1844) 343. The conclusion reached by the court in the instant case is in accord with sound principle and upheld by both American and English authorities.

INTERNATIONAL LAW—REQUISITIONED SHIPS IMMUNE FROM PROCESS—AMICI CURIAE.—A suit *in rem* was brought against the *Gleneden*, a British ship privately owned. After process was issued and the vessel arrested, private counsel for the British embassy appeared as *amici curiae* and presented to the court a suggestion that jurisdiction be declined and the process quashed, as the *Gleneden* was an Admiralty transport, requisitioned by the British government. This suggestion was overruled. The master of the ship petitioned for a writ of prohibition preventing the District Court from proceeding with the suit, and for a writ of mandamus ordering the release of the ship without security. *Held*, that the petition should be dismissed, the suggestion by *amici curiae* not being the proper procedure to bring the facts of requisition before the court. *In re Muir* (1921, U. S.) 41 Sup. Ct. 185.

The court ruled that such facts could be laid before it in either of two ways. The British government could appear as a party to the suit. *The Santissima Trinidad* (1822, U. S.) 7 Wheat. 283, 353; *Colombia v. Cauca Co.* (1902) 190 U. S. 524, 23 Sup. Ct. 704. If unwilling to become a party, it was open to that government to apply to the State Department to ask the Department of Justice to cause the desired representations to be made. *The Exchange* (1812, U. S.) 7 Cranch, 116; *The Parlement Belge* (1880, C. A.) L. R. 5 P. D. 197. In the past the Supreme Court has permitted *amici curiae* to present suggestions, the

reception of them being purely within the discretion of the court. *Northern Securities Co. v. United States* (1903) 191 U. S. 555, 24 Sup. Ct. 119; *Dillon v. Streathearn Steamship Co.* (1919) 250 U. S. 638, 39 Sup. Ct. 495. The lower federal courts have consistently followed this practice in cases involving ships requisitioned by a foreign government. *The Roseric* (1918, D. N. J.) 254 Fed. 154; *Earn Line Steamship Co. v. Sutherland Co.* (1920, C. C. A. 2d) 264 Fed. 276; but see *The Florence H.* (1918, S. D. N. Y.) 248 Fed. 1012. The method would seem to be the most expeditious one, and there is little likelihood of its abuse. In the instant case the court refrained from deciding whether the *Gleneden* was subject to a civil suit *in rem* in the federal courts. The lower federal courts, as well as the English courts, have generally held that such a suit could not be brought against a ship requisitioned by a foreign government. *The Adriatic* (1919, C. C. A. 3d) 258 Fed. 902; *The Broadmayne* [1916, C. A.] P. 64; *contra*, *The Attualita* (1916, C. C. A. 4th) 238 Fed. 909. The ship may be immune from arrest and yet the owners may be liable for negligence in a suit *in personam*. The real foundation for the immunity of foreign public ships rests on courtesy and a recognition of the complete sovereignty of the foreign state, and it may well be as discourteous and embarrassing to a foreign nation to arrest a ship which it does not own but merely controls, as to hold a ship to which it has full title. With the growth of government ownership and operation throughout the world this problem is constantly becoming more pressing.

PERSONS—ALIENATION OF AFFECTIONS—ACTION AGAINST PARENTS OF HUSBAND UNDER AGE OF LEGAL CONSENT.—The defendants brought an action to annul the marriage of their son, because he had not attained the age of legal consent. Pending the annulment action, they made false representations concerning the plaintiff, their son's wife, which caused him to leave her. The plaintiff sued for alienation of his affections. The marriage was subsequently annulled. *Held*, that the action for alienation of affections would not lie. Putnam, J., *dissenting*. *Wolf v. Wolf* (1920) 194 App. Div. 33, 185 N. Y. Supp. 37.

New York, in accord with the weight of modern authority, allows the wife to recover for alienation of her husband's affections. *Bennett v. Bennett* (1889) 116 N. Y. 584, 23 N. E. 17; Code Civ. Proc. sec. 450. And the action lies against the parents of either spouse, if they acted from improper motives. 13 R. C. L. 1471. A parent is privileged to advise his son to leave his wife, provided he acts in good faith and reasonably believes that it is for the son's good. *Wilson v. Wilson* (1916) 115 Me. 341, 98 Atl. 938; *Bourne v. Bourne* (1919, Calif. App.) 185 Pac. 489. But a parent is not privileged to do so if he acts because of ill will toward the wife. *Lanigan v. Lanigan* (1915) 222 Mass. 198, 110 N. E. 285; *Melcher v. Melcher* (1918) 102 Neb. 790, 169 N. W. 720. The marriage, in the instant case, was void, not *ab initio*, but only from the time its nullity was decreed by the court. Domestic Relations Law (Consol. Laws, ch. 14) sec. 7; *Houle v. Houle* (1917) 100 Misc. 28, 166 N. Y. Supp. 67. And it would therefore seem to be a valid marriage for all civil purposes until the decree of nullity. *State v. Lowell* (1899) 78 Minn. 166, 80 N. W. 877. The majority opinion, however, holds the *quo animo* of the parent immaterial, where the child was under the age of legal consent. The view of the dissenting opinion is that false representations concerning the wife are never privileged and that parental interference is privileged only when it comes within the above rule. The dissenting opinion seems to advance the sounder view.

QUASI-CONTRACTS—CONTRIBUTION BETWEEN JOINT TORT-FEASORS.—The plaintiff was driving his car along a highway at a lawful rate of speed and using due care. The defendant, approaching from a side street, negligently drove his motor truck across the highway directly in front of the plaintiff's car. To

avoid a collision the plaintiff turned his car to one side, and in so doing ran up on the side walk and struck a pedestrian. The pedestrian sued the plaintiff and recovered. The plaintiff brought this action to recover indemnity from the defendant. *Held*, that the plaintiff could recover only if at the time of the accident he was not actively negligent, and the defendant alone could have prevented it by using ordinary care. *Knippenberg v. Lord & Taylor* (1920) 193 App. Div. 753, 184 N. Y. Supp. 785.

In Missouri contribution between joint tort-feasors is allowed by statute. See Rev. St. Mo. 1909, sec. 5431; *Eaton v. Miss. Valley Trust Co.* (1906) 123 Mo. App. 117, 100 S. W. 551. It is usually stated, however, as axiomatic that contribution will not be allowed. *Merryweather v. Nixan* (1799, K. B.) 8 T. R. 186; *Union Stockyards Co. v. Chicago B. & O. Ry.* (1904) 196 U. S. 217, 25 Sup. Ct. 226. However, since the time this so-called general rule was first announced, the courts have engrafted several exceptions: (1) Where the liability of the plaintiff who seeks contribution was merely a result of his relation to the defendant, as of master to servant. *Wooley v. Baitte* (1826, N. P.) 2 Car. & P. 417; *Bailey v. Bussing* (1859) 28 Conn. 455. (2) Where the defendant against whom contribution is sought was under a so-called primary duty to prevent the injury, as where a lessor has covenanted to repair. *Prescott v. Le Conte* (1903) 83 App. Div. 482, 82 N. Y. Supp. 411; *Pullman Co. v. Hoyle* (1908) 52 Tex. Civ. App. 534, 115 S. W. 315. (3) Where, as said in the instant case, the defendant alone was actively negligent or could have prevented the injury by using ordinary care. *Township v. Noret* (1916) 191 Mich. 427, 158 N. W. 17; *Nashua Iron Co. v. Worcester Ry.* (1882) 62 N. H. 159. (4) Where the joint wrong was not conscious or wilful, but merely negligent. There seems to be a strong tendency toward the adoption of this rule, although the cases so holding are still in the minority. *Mayberry v. Northern Pac. Ry.* (1907) 100 Minn. 79, 110 N. W. 356; *Hobbs v. Hurley* (1918) 117 Me. 449, 104 Atl. 815. It has been even argued that this always was the law. See T. R. Reath, *Contribution Between Persons Jointly Charged for Negligence* (1898) 12 HARV. L. REV. 176 ff. It is submitted that the court in the instant case should have reached the same decision by adopting this view instead of seeking justice for the plaintiff under the doctrine of last clear chance. See Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233, 242.

SALES—WARRANTY OF TITLE—WHERE SALE BY VENDEE WOULD BE INFRINGEMENT OF TRADE MARK.—The plaintiffs purchased for cash from the defendants one thousand cans of "Nissly" brand milk. The Nestlé company subsequently having established their right to the trade mark against other parties, the plaintiffs sold the milk without the labels and consequently at a lower price. They now sued the defendants for the purchase price, or alternatively, for damages. *Held*, that there was no right of recovery. *Niblett v. The Confectioners' Materials Co.* (1920, K. B.) 37 T. L. R. 103.

This case was decided on the basis of the analogy to a case where the goods constituted an infringement of a patent. In the patent cases in this country, one case has denied the existence of a warranty of title. *Lowman v. Excelsior Stove Co.* (1894) 104 Ala. 367, 16 So. 17. Some have assumed the existence of such a warranty, whereas others have expressly affirmed it. *The Electron* (1896, C. C. A. 2d) 74 Fed. 689; Uniform Sales Act, sec. 13 (3). Assuming a warranty of title, the next question is whether a breach has occurred. Where the owner of a patent has threatened suit, there is no breach unless the owner has been shown clearly to have the right. *Geist v. Stier* (1890) 134 Pa. 216, 19 Atl. 505. Nor is mere notice of infringement a breach. *Consolidated Phosphate v. Sturtevant* (1917) 20 Ga. App. 474, 93 S. E. 155. Nor the filing of a claim for damages where the patent has been upheld by a court in a

proceeding against other parties. *Consumer's Gas Co. v. Am. Electric Co.* (1892, C. C. A. 3d) 50 Fed. 778. But there is a breach where an injunction against the use of the purchased article has been secured. *The Electron, supra.* The nature of the goods in the instant case was such that they were intended to be sold rather than kept for use. The privilege of selling these goods with the labels was as truly a part of the title intended to be conferred upon the plaintiff as was the right of possession. Where the right of possession has been questioned, the purchaser may voluntarily surrender on demand of the true owner and claim damages for breach of warranty. *Jordan v. Van Dusee* (1917) 139 Minn. 103, 165 N. W. 877. Similarly, it is submitted, the purchaser should be allowed voluntarily to sell without the labels and bring an action for breach of warranty.

SURETYSHIP—CRIMINAL BAIL BOND—CONTINUANCE PENDING TRIAL DOES NOT RELEASE SURETY.—The defendant was surety on a criminal bail bond for one Cooper, who had been indicted by a grand jury. Cooper appeared at the next term of court and the case was continued by agreement of the attorneys. When subsequently the case was called, Cooper did not appear and this action was brought against the surety to recover on the bond. *Held*, that the continuance of a criminal cause, pending trial, does not release a surety on the bail bond. *State v. Cooper* (1920, Minn.) 180 N. W. 99.

It is a general rule that a binding agreement made by the creditor to extend the time of the principal discharges the surety. *Kissire v. Plunkett-Jarrell Co.* (1912) 103 Ark. 473, 145 S. W. 567. The reason underlying this is that such an extension of time is prejudicial to the surety, since it increases his risk. This rule, however, does not apply here because of the difference between the ordinary surety and a criminal bail. The ordinary surety is under no duty prior to the default by the principal, and payment by him discharges the obligation of the principal to the creditor. The surety on a criminal bail bond is under a duty to secure the appearance of his principal before the court for the purposes of justice, and payment by the surety does not discharge the obligation of the accused to appear in court. The latter surety is an officer of the court who guards the accused in lieu of the jailor. *Suggs v. State* (1914) 129 Tenn. 498, 167 S. W. 122. There is a conflict as to whether a continuance of the cause discharges the surety. The courts which, in accord with the instant case, regard the ordinary criminal bail bond as one continuing until the case is finally disposed of, hold that a continuance does not discharge the surety upon the theory that the duty as policeman does not cease until the accused is either finally convicted or acquitted. *St. Louis v. Young* (1911) 235 Mo. 44, 138 S. W. 5; *State v. Williams* (1909) 84 S. C. 21, 65 S. E. 982. Following this theory it was held that a bail bond remained effective after a mistrial was ordered. *State v. Eure* (1916) 172 N. C. 874, 89 S. E. 788. Other courts construe the bond as meaning that the obligation of the surety is only to have the accused appear on the first day of a certain term and be in attendance until the end of said term, unless sooner discharged, and at the end of this term the surety is released. The theory here is that the accused should be remanded to jail at the end of the term or a new bond executed. *Lane v. State* (1897) 6 Kan. App. 106, 50 Pac. 905; *State v. Murdock* (1900) 59 Neb. 521, 81 N. W. 447. It seems that on the grounds of convenience and expediency the former view is to be preferred.

TAXATION—FOREIGN CORPORATIONS—WHAT CONSTITUTES "DOING BUSINESS."—The New York Tax Commission, the defendants, imposed upon the plaintiff, a foreign corporation, a license fee and a franchise tax under the Tax Law, secs. 181, 182, (N. Y. Consol. Laws 1909, c. 60) based on business done during 1916.

The plaintiff had no property in the state other than bonds and notes deposited with a trust company, and confined its operations to the collection and distribution to its stockholders of income from stock and the obligations of other foreign corporations. *Held*, that the tax was not collectable, since the corporation's activities did not constitute either "doing business" or "employing capital" in the state. *People ex rel. Manila Electric Ry. & Lighting Corporation v. Knapp* (1920) 229 N. Y. 502, 128 N. E. 892.

What constitutes "doing business" for tax purposes seems not susceptible of any general definition that is not so general as to be of no practical use. The present decision holds that "doing business" implies that the foreign corporation's activities are of a kind which the state might prevent, the doing of which, therefore, is a privilege requiring governmental control and protection for which taxation is compensation. The federal test is whether the corporation is active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain, and such activities as are essential to those purposes. *Von Baumbach v. Sargent Land Co.* (1916) 242 U. S. 503, 37 Sup. Ct. 201. The changing circumstances incident to an almost endless amount of litigation on the subject have created a vast number of subsidiary rules, varying according to the character of the applicable statutes and their interpretation by the courts. See Haring, *Corporate Interstate Commerce Business* (1917) 671, appendix; (1916) 14 MICH. L. REV. 588. But the underlying question in each case is whether the business implies corporate continuity of conduct, as might be evidenced by any of the acts which some of the courts have seized upon as criteria. *Pa. Collieries Co. v. McKeever* (1905) 183 N. Y. 98, 75 N. E. 935. See Beale, *Foreign Corporations* (1904) secs. 201-210 (classification of operative acts and collection of cases). Continuity, however, would be immaterial if the acts done were not "business" in themselves. *Natural Carbon Paint Co. v. Fred. Bredel Co.* (1911, C. C. A. 7th) 193 Fed. 897 (mere holding of property). The test applied in the instant case does not seem as satisfactory or useful as that of continuity, which in the last analysis becomes a question of fact for the jury.

TORTS—INJURY AGGRAVATED BY PHYSICIAN—SUBROGATION OF FIRST TORT-FEASOR TO INJURED PERSON'S RIGHTS—PARTIES.—A fracture of the plaintiff's wrist, caused by the alleged negligence of the defendant electric light company, was treated so unskillfully by one Rumph, a physician, that the plaintiff's arm became paralyzed. A statute provided that where a defendant would have a cause of action over against a third person for the amount of the recovery against him, on a contention closely related to the subject of the original action, the court, in its discretion, might make such third person a party defendant. The company in a cross complaint asked that Rumph be made a party defendant, and that it recover of him such damages as were in excess of those which have followed had the plaintiff's injury been treated with ordinary skill. Rumph demurred to the cross complaint. *Held*, that the demurrer should be overruled, and that the action of the court in bringing Rumph in as a party, could not be reviewed on demurrer. *Fisher v. Milwaukee Elec. Ry. & Light Co.* (1920, Wis.) 180 N. W. 269.

It is generally held that unskillful treatment of an injury does not break the chain of legal causation so as to bar a recovery against the original tort-feasor unless the injured party was negligent in selecting a physician. *Fields v. Mankato Elec. Traction Co.* (1911) 116 Minn. 218, 133 N. W. 577; *Hunt v. Boston Terminal Co.* (1912) 212 Mass. 99, 98 N. E. 786; see 48 L. R. A. (N. S.) 116, note. Ordinarily, any person liable for, and who has paid for a loss or injury caused by another, is subrogated to the rights of the injured party against that other person. *Texas & P. Ry. v. Eastin* (1907) 100 Tex. 556, 102 S. W. 105; *Holmes v. Balcom* (1892) 84 Me. 226, 24 Atl. 821. However, it has been said that a wrongdoer cannot invoke the doctrine, and that the right is never granted

as a reward for negligence. See *Padgett v. Young County* (1918, Tex. Civ. App.) 204 S. W. 1046, 1054; *Rowley v. Towsley* (1884) 53 Mich. 329, 339, 19 N. W. 20, 25; *Ft. Dodge Bldg. & Loan Ass'n. v. Scott* (1892) 86 Iowa, 431, 434, 53 N. W. 283, 284. But there would seem to be no public policy against permitting a merely negligent defendant to invoke the doctrine as to a particular part of a loss, for which he is very little at fault, against one in whose favor there are no equities, and who is greatly at fault. Cf. *Texas & P. Ry. v. Eastin*, *supra*; see tit. QUASI-CONTRACTS, *supra*. In the absence of statute, subrogation is not allowed to an employer who pays an employee workmen's compensation for an injury due to a third person's fault, but this is on the theory that money so paid is not compensation or indemnity for the injury. See (1918) 27 YALE LAW JOURNAL, 708; (1918) 18 COL. L. REV. 598. Without such a statute as in the instant case, actual payment to the injured party is necessary for subrogation. *Aetna Life Ins. Co. v. Middleport* (1888) 124 U. S. 534, 8 Sup. Ct. 625; *Musgrave v. Dickinson* (1896) 172 Pa. 629, 33 Atl. 705. Generally, a defendant can only bind a party against whom he will have a remedy over, when he is compelled to defend no misfeasance of his own, and has called on such other person to defend the action against him. *Lord & Taylor v. Yale & Towne Mfg. Co.* (1920) 230 N. Y. 132, 129 N. E. 346; *Consolidated Machine Co. v. Bradley* (1898) 171 Mass. 127, 133, 50 N. E. 464, 467. Even though the statute in the instant case, by its own language, calls for a liberal construction "in order that as far as possible, closely related questions may be settled in one action," an interpretation rendering the words, "for the amount of the recovery against him," of no force, may be questioned. Even if we assume that the statute did confer the power, it would seem that the exercise of the court's discretion in bringing in such a party as the physician here, was unwise, because the plaintiff might lose the physician's co-operation in his professional capacity, since under the circumstances he would try to keep down the amount of her recovery.