RECENT CASE NOTES

ADMINISTRATIVE LAW—IMMUNITY FROM SUIT—EMERGENCY FLEET CORPORATION.—The Emergency Fleet Corporation awarded a contract to the plaintiff, but before complete execution refused to make further payments and unlawfully took possession of its entire property. *Held,* that the defendant was not immune as a governmental agency from suit in tort. *Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation* (1922, U. S.) 42 Sup. Ct. 386.

Although the state may not be sued without its own consent, its officers may be impleaded personally for their torts. *United States v. Clarke* (1834, U. S.) 8 Pet. 436. *Mitchell v. Harmony* (1851, U. S.) 13 How. 115. The officer is not suable when a judgment or decree against him would operate upon state property or funds, as such relief is in reality relief against the state. *Cunningham v. Macon-Brunswick Ry.* (1883) 109 U. S. 446, 3 Sup. Ct. 292; *Belknap v. Schild* (1896) 161 U. S. 10, 16 Sup. Ct. 443; see *The Coldwater* (1922, S. D. Fla.) 283 Fed. 146. For the same reason, state administrative boards, although membership corporations, are not suable in tort. *Moody v. State's Prison* (1901) 128 N. C. 12, 38 S. E. 131; *Leavell v. Asylum* (1906) 122 Ky. 213, 91 S. W. 671; *Morrison v. McLaren* (1915) 160 Wis. 621, 152 N. W. 475. There is a small minority *contra.* But according to the instant case a governmental agency in the form of a stock corporation loses its immunity and is analogous to the individual officer in so far as liability to suit is concerned. The theory is that the corporate entity is distinct from the corporation's stockholders, and that the ownership of its stock by the state does not affect its status as a separate legal individual. *Bank of United States v. Planters' Bank* (1824, U. S.) 9 Wheat. 904; *Bank of Ky. v. Wister* (1829, U. S.) 2 Pet. 318; *United States v. Strang* (1921) 254 U. S. 491, 41 Sup. Ct. 165. But an individual officer will respond to a judgment with his private resources; the corporate state agency must respond with corporate funds. When the corporation is financed entirely by the government, and is sought to be charged for a tort committed which acting as an agent of the state, it seems that the tax-payer's money is reached quite as effectively as in an action against an administrative board, or against an officer to direct the disposal of public property in his possession. See *Ballaine v. Alaska Ry.* (1919, C. C. A. 9th) 259 Fed. 183. In protecting them from other forms of attack, the courts have recognized that the funds of corporate state agencies virtually belong to the public. Such bodies are not subject to state taxation. *McCullough v. Md.* (1819, U. S.) 4 Wheat. 316; *King County v. United States, etc.* (1922, C. C. A. 9th) 282 Fed. 950. Conspiracy to defraud them is a crime against the United States. *United States v. Union Timber Products Co.* (1919, W. D. Wash.) 259 Fed. 907; *United States v. Carlin* (1917, E. D. Pa.) 259 Fed. 904; *contra, Salas v. United States* (1916, C. C. A. 2d) 234 Fed. 842. The corporate entity theory is usually applied merely to evade the rule of sovereign immunity. In other situations, the courts recognize the public nature of the corporate agent and its funds. This inconsistency is probably justified in that the rule of the immunity of the sovereign is certainly unjust, and possibly, in the United States, theoretically unsound. See COMMENTS (1922) 31 YALE LAW JOURNAL, 879; (1920) 29 *ibid.* 911.

ADMIRALTY—EXTENSION OF ADMIRALTY JURISDICTION—APPLICATION OF WORKMEN'S COMPENSATION LAWS.—The deceased, a longshoreman, while unloading a vessel lying in navigable waters, fell on a dock, sustaining fatal injuries. The New York Court of Appeals refused to award compensation. The case was brought to the United States Supreme Court. *Held,* that the case was not within the jurisdiction of admiralty. *State Ind. Comm. v. Nordenholt Corporation* (1922, U. S.) 42 Sup. Ct. 473.

State workmen's compensation acts do not apply to cases within the jurisdiction of admiralty. *Southern Pacific Co. v. Jensen* (1917) 244 U. S. 205, 37 Sup. Ct. 524; see COMMENTS (1917) 27 YALE LAW JOURNAL, 255; (1919) 28 *ibid* 281. Where the injury occurs in the course of the construction of a vessel already launched but not completed, the workmen's compensation act is applicable on the ground that the contract was non-maritime. *Grant-Smith Porter Co. v. Rhode* (1922, U. S.) 42 Sup. Ct. 157; see (1922) 31 YALE LAW JOURNAL, 561; NOTES (1922) 35 HARV. L. REV. 743. The instant case represents another step in the Supreme Court's endeavor to define the extent of admiralty jurisdiction in relation to the application of workmen's compensation acts, this time by insisting on the established rule that the maritime nature of a tort depends on the damage occurring on navigable waters as opposed to a dock. Thus the rule of the *Jensen* case is being obscured by its exceptions. See *Newham v. Chile Exploration Co.* (1921) 232 N. Y. 37, 39, 133 N. E. 120. Where the contract and injury are both maritime in nature, admiralty has exclusive jurisdiction; where the contract is non-maritime and the injury is maritime, the state law may be applicable; where the contract is maritime and the injury is non-maritime, the state compensation law applies.

BANKS AND BANKING—DUTY OF BANK TO SET OFF DEPOSITS OF INDORSER.—The plaintiff bank acquired a note before maturity, for value, and without notice of any defenses. While it held deposits to the credit of the indorser, it learned of the failure of consideration from the payee-indorser to the maker, protested the note at maturity, and fixed the indorser's liability. The plaintiff then sued the maker. *Held,* (one judge *dissenting*) that the plaintiff could recover only the difference between the amount of the note and the amount of the deposits held by the plaintiff to the credit of the indorser. *Second Nat. Bank of Hoboken v. McGehee* (1922, Tex. Civ. App.) 241 S. W. 287.

A bank which is a holder of a note may set off the deposits of any party liable thereon, but there is a conflict as to whether the failure of the bank to set off the deposits of the maker releases the indorser. (1915) 25 YALE LAW JOURNAL, 150; 8 L. R. A. (N. S.) 944, note. Texas has consistently held that after notice of failure of consideration, the bank's omission to set off the deposits of an indorser whose liability has been fixed releases the maker *pro tanto. Union Nat. Bank v. Menefee* (1911) 63 Tex. Civ. App. 599, 134 S. W. 822; *contra, Mechanics Bank v. Seitz* (1892) 150 Pa. 632, 24 Atl. 356. A failure to set off the deposit of one indorser does not release a subsequent indorser. *Ticonic Bank v. Johnson* (1842) 21 Me. 426. There are balancing equities in this type of case. It is difficult for the maker to get a judgment against a non-resident fraudulent indorser. On the other hand, the rule of the principal case would make the holder in due course determine at his peril whether there has been a failure of consideration. The general custom of banks to collect rediscounted paper from their immediate indorser in case of dishonor may well account for the few cases on this point, but when there is a dispute the bank wishes to avoid tying up its customers' funds pending the litigation and forcing him to collect from the maker in the latter's jurisdiction. When the payee is an accommodated party, within the knowledge of the bank, failure by the bank to avail itself of his deposits discharges the maker. *Tatum v. Commercial Bank* (1915) 193 Ala. 120, 69 So. 508. But this does not release a subsequent indorser. *First Nat. Bank v. Peltz* (1896) 176 Pa. 513, 35 Atl. 218. This may be distinguished from cases of failure of consideration because in the case of the accommodated payee-indorser the true state of facts may ordinarily be ascertained by mere inquiry. Once his status is determined the bank should treat him as primarily liable. So also he can require the representative of an insolvent bank to set off the note against his deposit and thus relieve the accommodation maker. See *Building Co.*

v. Bank of N. Y. (1912) 206 N. Y. 400, 99 N. E. 1044; Negotiable Instruments Law, sec. 119.

CONSTITUTIONAL LAW—ADMISSION BY FEDERAL COURT OF EVIDENCE ILLEGALLY SEIZED BY STATE OFFICER.—A South Carolina constable illegally searched the defendant's automobile. Solely on the testimony of the constable, the defendant was convicted in a federal court of the unlawful transportation of liquor. *Held,* that the evidence was properly admitted. *Kanellos v. United States* (1922, C. C. A. 4th) 282 Fed. 461.

Evidence obtained by illegal search and seizure by federal agents or by state officers coöperating with them is not admissible against the defendant in a federal court, even though demand for the return of the evidence is not made until after the jury is sworn. *Amos v. United States* (1921) 255 U. S. 313, 41 Sup. Ct. 266; *United States v. Falloco* (1922, W. D. Mo.) 277 Fed. 75; COMMENTS (1922) 31 YALE LAW JOURNAL, 518. The majority of the state courts will not inquire into the legality of the method by which evidence has been obtained. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure* (1922) 8 A. B. A. JOUR. 479; Chafee, *The Progress of the Law, 1919-1922. Evidence* (1922) 35 HARV. L. REV. 673, 694; (1922) 32 YALE LAW JOURNAL, 178. It seems probable that the testimony would not have been admitted if the action had been brought in the state court. *Town of Blacksburg v. Beam* (1916) 104 S. C. 146, 88 S. E. 441; but see *State v. Harley* (1917) 107 S. C. 304, 92 S. E. 1034. An action by either a state or federal officer, in regard to the enforcement of prohibition laws, has as its ultimate authority the Eighteenth Amendment. See *National Prohibition Cases* (1920) 253 U. S. 350, 386, 40 Sup. Ct. 486, 488; Dowling, *Concurrent Power Under the Eighteenth Amendment* (1922) 6 MINN. L. REV. 447, 471. Where a federal prosecutor makes use of evidence obtained by state officers in the enforcement of the National Prohibition Act, it seems that federal courts should dispose of the case as if the state officers were federal agents, rather than as if they were private individuals. The reasoning of the present case, if carried to its logical conclusion, would provide a means for nullifying previous decisions. *Amos v. United States, supra.*

CONTRACTS—CONDITIONS SUBSEQUENT—IMPOSSIBILITY OF EXERCISING POWER TO TERMINATE CONTRACT.—The plaintiff, a "Home for Women," contracted to admit the defendant's testatrix in consideration of the promise of the latter to pay $5,000 immediately upon the execution of the contract. A by-law of the plaintiff provided for a two months probation period during which she could leave or be dismissed. She died before the expiration of the two months without having paid the $5,000. The plaintiff sued her estate for this amount. *Held,* that the plaintiff could not recover, since the continued existence of the decedent was the basis of the contract. *Kirkpatrick Home for Childless Women v. Kenyon* (1922, Sup. Ct.) 119 Misc. 349, 194 N. Y. Supp. 703.

Mutual promises are sufficient consideration, even though each party has the power of terminating his duty by notice or otherwise. *Ford v. Dyer* (1899) 148 Mo. 528, 49 S. W. 1091. Accordingly, in the instant case the plaintiff had a right to the payment of $5,000 and a duty, conditional upon payment, to support the defendant. Rule 1 of Sergt. Williams' Notes to *Pordage v. Cole* (1669, K. B.) 1 Wm's. Saund. 320; *Mass. Biog. Soc. v. Russell* (1918) 229 Mass. 524, 118 N. E. 662. Under the by-laws each party had a power to extinguish these jural relations, and the exercise of the power was a condition subsequent to the decedent's duty to pay. Upon the decedent's death the Home's contract was fully performed, and performance of the condition became impossible. Such an impossibility would not excuse performance of a condition precedent. Corbin, *Supervening Impossibility of Performing Conditions Precedent* (1922) 22 COL. L. REV. 421; *Primos Chemical Co. v. Fulton Steel Corp.* (1920, N. D. N. Y.)

266 Fed. 945; (1921) 30 YALE LAW JOURNAL, 298. When the performance of a condition subsequent, which would divest an estate, is or becomes impossible, the estate becomes absolute. *Merrill v. Emery* (1830, Mass.) 10 Pick 507. And a contract subject to revocation at the "option" of either party is in full force until actually revoked. *Ford v. Dyer, supra.* From these cases, and by analogy to the cases of impossibility of performing conditions precedent, it seems that impossibility should not excuse performance of a condition subsequent. Moreover, the Home's contracts were essentially aleatory; it undertook, in consideration of a sum certain, performance of uncertain extent, depending on the length of the life of each inmate. It is manifestly unjust to deprive the Home of its profits when the extent of performance required is small, when no provision is made to protect it from loss when the burden is great. See Corbin, *op. cit.* 427.

CORPORATIONS—POWERS—SUBSCRIPTION BY BANK TO STOCK OF LIGHTING COMPANY.—The defendant, cashier of the plaintiff bank, subscribed to five shares of stock of an electric company. The bank desired the formation of the company in order to obtain lights for its banking house. The plaintiff alleged that the money was wrongfully paid out in violation of a statute prohibiting banks from investing their assets in the stock of other corporations. N. D. Comp. Laws, 1915, ch. 54, sec. 1. *Held,* that the expenditure was not within the statutory prohibition. *Farmers' State Bank v. Richter* (1922, N. D.) 189 N. W. 242.

There is no power in one corporation to purchase stock in another, unless conferred expressly by charter or statute, or by implication as a necessary and reasonable means of accomplishing the purpose for which the corporation was created. *Golden v. Cervenka* (1917) 278 Ill. 409, 116 N. E. 273; *Central Life Securities Co. v. Smith* (1916) 149 C. C. A. 360, 236 Fed. 170; 2 Fletcher, *Cyclopedia of Corporations* (1917) secs. 1117, 1118. The mere fact that it might be profitable or beneficial does not authorize the purchase. *People v. Pullman Car Co.* (1898) 175 Ill. 125, 51 N. E. 664; *Riley v. Callahan Mining Co.* (1916) 28 Idaho, 525, 155 Pac. 665. But the corporation may purchase stock if such purchase is necessary to facilitate the operation of the business for which the corporation was organized. *State v. Mo. Pac. Ry.* (1912) 241 Mo. 1, 144 S. W. 863 *Fourth Nat. Bank of Nashville v. Stahlman* (1915) 132 Tenn. 367, 178 S. W. 942; *Edwards v. Internat. Pavement Co.* (1917) 227 Mass. 206, 116 N. E. 266. The instant case accords a greater power to a corporation than any previous decision, for hitherto a distinction has been drawn between the power to purchase and the power to subscribe, on the ground that a corporation should not be permitted to instigate an entirely different business. *Nebraska Shirt Co. v. Horton* (1903) 3 Neb. (Unof.) 888, 93 N. W. 225; *American Ball Bearing Co. v. Adams* (1915, D. C.) 222 Fed. 967.

CRIMINAL LAW—LARCENY—PURCHASE ON MARGIN BY STOCKBROKER.—The defendant, a broker on the New York Cotton Exchange, bought and sold cotton futures for one Oliver. Oliver received profits from time to time. When the transactions were closed the defendant, having converted the money and gone into bankruptcy, was unable to pay Oliver the original margin and the remaining profits. The defendant was arrested for larceny under the New York statute which provides that any bailee, trustee, or agent who appropriates the property entrusted to him shall be guilty of larceny. N. Y. Cons. Laws, 1909, ch. 40, sec. 1290. A writ of *habeas corpus* was sued out. *Held,* that the writ should issue, since the relation between the parties was, in the absence of proof to the contrary, that of debtor and creditor. *People, ex rel. Rosenberg, v. Hanley.* (1922, Sup. Ct.) 196 N. Y. Supp. 194.

A stock-broker who is given money to buy particular stock becomes a trustee as to both the money and the stock. 1 Dos Passos, *Stock-brokers* (2d ed. 1905) 199. An appropriation to his own use makes the broker guilty of larceny under

the New York statute. *People v. Meadows* (1910) 199 N. Y. 1, 92 N. E. 128. The broker holds stock purchased on margin as pledgee, and when the question is raised in a civil action his relation to his client is considered a fiduciary one. *Haight v. Haight* (1905) 46 Misc. 501, 92 N. Y. Supp. 934; *Batterson v. Raymond* (1914) 87 Misc. 229, 149 N. Y. Supp. 706. The misappropriation by a broker of funds held in a margin transaction has been held to be statutory larceny; the New York courts refuse to hold him criminally liable in such cases now, however, on the ground that the relationship between the broker and client is one of debtor and creditor. *Cf. Clark v. Pinckney* (1867, N. Y.) 50 Barb. 226, with *People, ex rel. Mansfield, v. Flynn* (1909) 64 Misc. 276, 118 N. Y. Supp. 533. As was pointed out in the principal case, there is no valid distinction between the purchase of cotton futures on margin and the purchase of stock on margin. See *Smith v. Craig* (1914) 211 N. Y. 456, 105 N. E. 798. This decision is in accord with authority, but in their language the courts seem to be making a distinction between civil and criminal standards.

EQUITY—RESTRICTIVE COVENANTS—EFFECT OF CHANGED CONDITIONS.—The defendant owned one plot of a large tract of land on which were imposed restrictive building covenants allowing only single dwelling houses to cost not less than a stated amount. Subsequently the character of the neighborhood was changed as a result of the erection of factories and stores. The plaintiffs, owners of lots in the same tract, sought to enjoin the defendants from erecting stores in the restricted area. *Held,* that the injunction should be granted. *Bohm v. Silberstein* (1922, Mich.) 189 N. W. 899.

The usual effect of a restrictive covenant is to create an equitable easement. *Werner v. Graham* (1919) 181 Calif. 174, 183 Pac. 945; *Riverbank Improvement Co. v. Chadwick* (1917) 228 Mass. 242, 117 N. E. 244; Pound, *The Progress of the Law, 1918-1919* (1920) 33 HARV L. REV. 813. Such a covenant is sometimes held to vest in the promisee the right to specific performance against one holding the restricted land with notice of the covenant. *Cotton v. Cresse* (1912) 80 N. J. Eq. 540, 85 Atl. 600; Ames, *Specific Performance for and against Strangers to the Contract* (1904) 17 HARV. L. REV. 174; 2 Tiffany, *Real Property* (2d ed. 1920) 1434. But no relief is granted if enforcement becomes inequitable. *Norcross v. James* (1885) 140 Mass. 188, 2 N. E. 946; *Burdell v. Grandi* (1907) 152 Calif. 376, 92 Pac. 1022. Thus, a restrictive covenant will not be enforced if it will cause great damage to the defendant and if its original purpose cannot be carried out and it is of little value to the plaintiff. *Windemere v. American State Bank* (1919) 205 Mich. 539, 172 N. W. 29; *Jackson v. Stevenson* (1892) 156 Mass. 496, 31 N. E. 691; *Batchelor v. Hinkle* (1914) 210 N. Y. 243, 104 N. E. 629; COMMENTS (1914) 23 YALE LAW JOURNAL, 610; NOTES (1914) 14 COL L. REV. 438. The construction of an elevated railroad adjacent to property restricted by covenants to residences has been held to be conclusive evidence that the neighborhood has so changed as to render the covenant unenforceable. *Kneip v. Schroeder* (1912) 255 Ill. 621, 99 N. E. 617; *Columbia College v. Thatcher* (1882) 87 N. Y. 311. Nevertheless, the result in the instant case seems correct. Although the adjoining land had become devoted to industry and commerce, the observance of the restriction was still of substantial value to the entire area. See *Swan v. Mitshkun* (1919) 207 Mich. 70, 173 N. W. 529; *Brown v. Huber* (1909) 80 Ohio St. 183, 88 N. E. 322; *Wallack v. Smalwich Corp.* (1922) Sup. Ct.) 118 Misc. Rep. 106, 192 N. Y. Supp. 462; 2 Devlin, *Deeds* (3d ed. 1911) 1875.

EXTRADITION—FUGITIVE FROM JUSTICE—CONSTRUCTIVE PRESENCE.—The partners of the defendant obtained goods by false pretenses in Switzerland and shipped them to the defendant in England. The defendant was later indicted for the crime in Switzerland, and, on a demand by that country, an order for his extradition was

issued in England. He sued out a writ of *habeas corpus. Held,* that he was subject to extradition. *Rex v. Godfrey* (1922, K. B.) 39 T. L. R. 5.

Treaties usually define a fugitive from justice as one charged with a crime in country A who has sought asylum or is found within country B. 4 Moore, *International Law Digest* (1906) sec. 593. The instant case held that one who commits a crime "in" country A while physically in country B, can be deemed a fugitive from justice from the former. See also *Regina v. Nillins* (1884, Q. B.) 53 L. J. M. C. 157; *Regina v. Jacobi* (1881, Q. B.) 46 L. T. R. 595. An American Secretary of State appears to have taken a different view. Mr. Hay, Sec'y. of State, to Baron Fava, Italian Ambassador, March 8, 1901, 4 Moore, *op. cit.* 287. The view of the court, however, seems sound. Nevertheless, with respect to interstate rendition, it is not adopted in this country, and as a result persons guilty of crime may escape trial. Under the United States Constitution it is essential that the accused be within state A, commit a crime there, and then flee to state B. *Hyatt v. Corkran* (1903) 188 U. S. 691, 23 Sup. Ct. 456; *Taft v. Lord* (1918) 92 Conn. 539, 103 Atl. 644. U. S. Const. (1789) Art. 4, sec. 2. The motive of flight is immaterial. *Taylor v. Wise* (1915) 172 Iowa, 1, 126 N. W. 1126; *Ex parte Henke* (1920) 172 Wis. 36, 177 N. W. 880; *Appleyard v. Mass.* (1906) 203 U. S. 222, 27 Sup. Ct. 122. Even if the criminal commits in state A only one overt act in furtherance of the crime and then leaves before the crime is consummated, he is a fugitive from justice. *State v. Gerber* (1910) 111 Minn. 132, 126 N. W. 482; *Ex parte Finch* (1921) 106 Neb. 45, 182 N. W. 565. But he cannot be extradited if he commits a crime when only constructively present in state A. *Hyatt v. Corkran, supra; Ex parte Hoffstot* (1910, C. C. N. Y.) 180 Fed. 240; *Jones v. Leonard* (1878) 50 Iowa, 106; *State v. Wellman* (1918) 102 Kan. 503, 170 Pac. 1052. This conflict may be explained by the difference between the underlying statutory or treaty provisions in the international and domestic proceedings. The international result produces more efficient administration of justice. For possible remedies in the interstate situation, see McCarthy, *A Constitutional Question Suggested by the Trial of William D. Haywood* (1907) 19 Green Bag, 636; (1908) 21 HARV. L. REV. 224; Spear, *The Law of Extradition* (3d ed. 1885) 400.

FUTURE INTERESTS—WILLS—VESTED AND CONTINGENT REMAINDERS.—The testator devised a life estate in certain realty to his wife, and provided further that "upon the death of my said wife, I direct that all the residue of my estate . . . . be divided equally between my six children [naming them] share and share alike. If any of them shall have died leaving issue, his share shall go to such issue; but if any one shall have died without issue, his share shall be divided equally among those who survive." The testator's wife and five of the children were alive, the sixth having died without issue. The widow of the deceased son applied to have the will construed. *Held,* that the widow received no interest, the surviving children taking contingent remainders conditioned upon their surviving the testator's widow. *In re Wolber's Will* (1922, Iowa) 189 N. W. 782.

A contingent remainder is merely the possibility or prospect of an estate which exists when a future estate is subject to a condition precedent, or is created in favor of an uncertain person or persons. Tiffany, *Real Property* (2d ed. 1920) sec. 136. However, the remainder is vested when it does not depend on a condition precedent, and is always ready to come into the possession of an (existing and) ascertained person on the determination of the particular estate in any manner whatsoever. C. A. Graves, *Real Property* (1894) 190; *Howbert v. Cawthorn* (1902) 100 Va. 649, 42 S. E. 683; see 1 Tiffany, *op. cit.* sec. 135; Gray, *Rule Against Perpetuities* (3d ed. 1915) sec. 101. But a future estate is none the less vested because subject to be defeated by a condition subsequent. "If the conditional element is incorporated into the description of, or the gift to the remainder-man, then the remainder is contingent; but if, after words giving a

vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A, his share to go to those who survive, the share of each child is vested, subject to be divested by its death." Gray, *op. cit.* sec. 108 (3); see *Calvert v. Calvert* (1921) 297 Ill. 22, 130 N. E. 347; *Walker v. Alverson* (1910) 87 S. C. 55, 68 S. E. 966. The devise in the instant case creates an immediate right to possession in specified persons upon the determination of the precedent life estate, subject to possible divestiture. It thus fulfills every requirement of a vested remainder. It is true that the gift is in the form of a direction to divide at a future time, but where, as here, the direction is to divide at the conclusion of the preceding particular estate, the remainders created are not thereby prevented from vesting. *Carter v. Carter* (1908) 234 Ill. 507, 85 N. E. 292; *Atchison v. Francis* (1917) 182 Iowa, 37, 165 N. W. 587; L. R. A. 1918 E, 1097, note. It is also true that the instant case ultimately leads to the same result, whether the remainder be considered contingent or vested subject to be divested. See *Fulton v. Fulton* (1917) 179 Iowa, 948, 162 N. W. 253. But the distinction may be of great importance, particularly as to the effect of the rule against perpetuities, the alienation of the remainder, or its sale under execution. Rood, *Wills* (1904) sec. 601; see *Walker v. Alverson, supra; Caples v. Ward* (1915, Tex.) 179 S. W. 856. The tendency of the courts to regard all future estates subject to condition as contingent has perhaps contributed much to the existing confusion in the cases relating to future interests.

INSURANCE—LIMITATION OF ACTION BINDING AGAINST MINOR BENEFICIARY.—A certificate of insurance issued by the defendant on the life of the plaintiff's father for the benefit of the plaintiff contained a provision that no suit should be brought unless commenced within one year from the date of death. In 1908 the insured disappeared, the plaintiff then being eight years old. On reaching his majority the plaintiff brought an action on the policy. *Held,* that the plaintiff could not recover. *Beard v. Sovereign Lodge* (1922, N. C.) 113 S. E. 661.

Reasonable conditions expressly limiting the time for the bringing of suits to a period shorter than that fixed by the statute of limitations are generally held valid as tending to promote diligence. *Riddlesbarger v. Hartford Ins. Co.* (1868, U. S.) 7 Wall. 386; Vance, *Insurance* (1904) sec. 191; but see *Attleboro Mfg. Co. v. Frankfort Marine Ins. Co.* (1917, C. C. A. 1st) 240 Fed. 573; *Haines v. Modern Woodmen of America* (1920) 189 Iowa, 651, 178 N. W. 1010. Many states have passed statutes expressly regulating such limitations in contracts. *Sternheimer v. Order of United Travelers* (1917) 107 S. C. 291, 93 S. E. 8; *Karnes v. American Fire Ins. Co.* (1898) 144 Mo. 413, 46 S. W. 166; Mills' Colo. Ann. Sts. 1912, sec. 3570 (2); 5 Joyce, *Insurance* (2d ed. 1918) sec. 3224. Some courts have refused to enforce such conditions even in the absence of statute. *Miller v. State Ins. Co.* (1898) 54 Neb. 121, 74 N. W. 416; *Union Central Life Ins. Co. v. Spinks* (1904) 119 Ky. 261, 83 S. W. 615. The following are examples of conditions which have been held unreasonable in their application: *Semmes v. Hartford Ins. Co.* (1871, U. S.) 13 Wall. 158 (war making suit within the limited period practically impossible); *Magner v. Mutual Life Ass'n.* (1897) 17 App. Div. 13, 44 N. Y. Supp. 862 (insurer delayed final determination till three days before the end of the period); *Martin v. State Ins. Co.* (1882) 44 N. J. L. 485 (compliance with other conditions inconsistent with the observance of the limitation clause). The infancy of the beneficiary, however, does not defeat the operation of the condition. *Mead v. Phoenix Ins. Co.* (1904) 68 Kan. 432, 75 Pac. 475. It is not perceptible why the protection with which the infant is customarily clothed should be relaxed in this type of case. This is especially true since in North Carolina, as well as in other states, the operation of the statute of limitations is expressly suspended by statute during the infancy of the person entitled to sue. N. C. Cons. Sts. 1920, art. 407; Wood, *Limitations* (4th ed. 1916) sec. 238(a). Although the rights of

the parties are considered fixed by the insurance contract, yet courts do not hesitate to disregard express conditions not forming a substantial part of the agreed equivalent, where they prove unreasonable. *Muse v. Ass. Corp.* (1891) 108 N. C. 240, 13 S. E. 94; *Sternaman v. Metropolitan Life Ins. Co.* (1902) 170 N. Y. 13, 62 N. E. 763 (condition making the insurer the agent of the insured); Corbin, *Supervening Impossibility of Performing Conditions Precedent* (1922) 22 COL. L. REV. 421, 428. Conditions in policies, being "prepared by the wary and accepted by the unwary," are, when possible, construed so as to avoid forfeiture. *Hampton v. Hartford Fire Ins. Co.* (1900) 65 N. J. L. 265, 47 Atl. 433; (1921) 31 YALE LAW JOURNAL, 217; *Thompson v. St. Charles County* (1910) 227 Mo. 220, 231; 126 S. W. 1044, 1047. Although the instant case follows the orthodox rule, it seems to press a doctrine, doubtful in the case of adults, to an unreasonable result in the case of infants.

MASTER AND SERVANT—LIABILITY OF INDEPENDENT CONTRACTOR.—A trucking company having an agreement to furnish a certain number of trucks daily to a building contractor and to keep a representative on hand to oversee the drivers, sublet some trucks with drivers from a truck renting company. The plaintiff was injured through the negligence of a driver of one of the truck renting company's trucks and brought suit against the contractor, the trucking company, and the truck renting company. *Held,* (two judges *dissenting*) that he could recover only from the trucking company. *Wagner v. Motor Truck Renting Corp.* (1922) 234 N. Y. 31, 136 N. E. 229.

The responsibility for the torts of a servant who is borrowed or hired from his general master for a particular piece of work is imposed upon the person whose work is being done and who has control or the right to control when the tort occurs. *McNamara v. Leipzig* (1919) 227 N. Y. 291, 125 N. E. 244; *Pruitt v. Industrial Acc. Comm.* (1922, Calif.) 209 Pac. 31. The following tests are applied as evidential of these facts: Who selected the servant? Who pays his wages? Who has the power to discharge? *Quarman v. Burnett* (1840, Exch.) 6 M. & W. 497; *Laugher v. Pointer* (1826, K. B.) 5 Barn. & Cr. 547; *Diamond v. Sternberg Motor Truck Co.* (1914, Sup. Ct.) 87 Misc. 305, 149 N. Y. Supp. 1000; *Standard Oil Co. v. Anderson* (1909) 212 U. S. 215, 29 Sup. Ct. 252. The transfer of an instrumentality with the servant is commonly considered a criterion of transfer of control to the special master. Labatt, *Master and Servant* 2d ed. 1913) 175. Although these tests may furnish a rough guide, no standardized analysis of the facts is of any real use. (1920) 29 YALE LAW JOURNAL. 682. In a close case the question of control is for the jury. *Cattini v. American Ry. Express Co.* (1922, Sup. Ct.) 196 N. Y. Supp. 10. The instant case is typically borderline. The majority and minority opinions expressed the law by identical quotations, and then proceeded to apply it to the facts of the case with directly opposite conclusions.

MUNICIPAL CORPORATIONS—LIABILITY OF AN OFFICER FOR THE LOSS OF PUBLIC FUNDS.—The plaintiff, serving without compensation as bond commissioner of the defendant city, made a general deposit of its sinking funds, in a local bank. He was under a duty to invest the money in certain bonds within six months, and to keep the funds safely. Several years later, it was found that the bank had misappropriated the bonds. The bank became insolvent. *Held,* that the plaintiff must account for the full amount of the funds. *Wiley v. City of Sparta* (1922, Ga.) 114 S. E. 45.

The general rule is that a public officer is absolutely liable for the loss of public funds with which he is entrusted. (1917) 26 YALE LAW JOURNAL, 329; Dowling, *Liability of Public Officers for Loss of Public Funds* (1902) 55 CENT. L. JOUR. 483. But it has been suggested that he should be liable only when the loss is due to his negligence. Stein, *The Liability of the Custodian of Public Funds Lost*

Without His Fault (1903) 1 MICH. L. REV. 557, 585. The orthodox rule, originating in the conception of the officer as an ordinary debtor, is continued on grounds of policy when the liability is not governed by statute or by the express terms of an official bond. *Leachman v. Board of Supervisors* (1919) 124 Va. 616, 98 S. E. 656. The protection of public funds against fraud seems to require such a rule. *Tillinghast v. Merrill* (1896) 151 N. Y. 135, 45 N. E. 375. In spite of the fact that the liability does not extend to losses due to an act of God or the public enemy, the public officer has been called a debtor. 1 Dillon, *Municipal Corporations* (1911) 763. His duties have generally been worked out as if he were a bailee, however, even though no specific *res* is to be returned. *United States v. Thomas* (1872, U. S.) 15 Wall. 337; see (1921) 5 MINN. L. REV. 308. If so considered, the case is somewhat analogous to the absolute liability of a common carrier. (1922) 31 YALE LAW JOURNAL, 664. The liability of a carrier ceases to be absolute, however, when the serviecs are gratuitous, because then they are no longer of a public character. 2 Wyman, *Public Service Corporations* (1911) 851. It is obvious that no such argument would apply in the principal case. Perhaps it would be more proper to call a public officer a trustee. *Crane Township v. Secoy* (1921, Ohio) 132 N. E. 851. But the same result would have been reached, because the unauthorized deposit was allowed to remain for too long a time. Bogert, *Trusts* (1921) 353. It has been suggested that statutes should be passed to relieve an officer of this hardship, or that a compulsory place of deposit should be indicated. Dowling, *op. cit.* 491. In the absence of such protection, the position of a public officer seems undesirable, unless the dangers of loss are covered by insurance.

PLEADING—AIDER OF CROSS-COMPLAINT BY OTHER PLEADINGS.—The plaintiff brought an action for separate maintenance and the defendant filed a cross-action for divorce. *Held*, that the failure of the cross-complaint to allege the plaintiff's residence was fatal and could not be cured or aided by the allegations or admissions contained in the other pleadings. *Bullard v. Bullard* (1922, Calif.) 209 Pac. 361.

The authorities are meagre but appear to be with the principal case. *Conger v. Miller* (1885) 104 Ind. 592, 4 N. E. 300; *Dunham v. McDonald* (1917) 34 Calif. App. 744, 168 Pac. 1063. The reason for the rule is that a cross-complaint, like a complaint, must stand on its own allegations. *Ewing v. Patterson* (1871) 35 Ind. 326; *Kreichbaum v. Melton* (1874) 49 Calif. 50. But a complaint may be aided by the adverse pleadings. *Lux & Talbott Stone Co. v. Donaldson* (1903) 162 Ind. 481, 68 N. E. 1014; *Probate Court v. Van Duzer* (1841) 13 Vt. 135; *United States v. Morris* (1825, U. S.) 10 Wheat. 246; 4 Enc. Pl. & Prac. 608. This is true by the better view even when the adverse pleading is a denial. *Feibelman v. Manchester, etc. Co.* (1895) 108 Ala. 180, 19 So. 540; *Catlin v. Jones* (1906) 48 Or. 158, 85 Pac. 515; *Merryman v. Kirby* (1910) 13 Calif. App. 344, 109 Pac. 635; *contra, Scofield v. Whitelegge* (1872) 49 N. Y. 259. Another analogy for refusing to allow defects in the cross-complaint to be cured by allegations in the main pleading may be found in the rule that a defect in one count of a complaint setting up more than one course of action cannot be supplied from statements in other counts unless expressly referred to in the former. *Haskell v. Haskell* (1880) 54 Calif. 262. The rule of the instant case seems to be a survival of the almost obsolete excessive strictness in pleading requirements. The pleadings have fulfilled their functions when all the material facts are in issue at the trial.

STATUTES—CONSTITUTIONALITY—DEFINITENESS.—The Ohio Workmen's Compensation Act provides that where an injury to an employee arose through the failure of the employer to comply with any "lawful requirement" for the protection of his employees, the civil liability of such employer should not be affected, but that the injured party might at his option either claim compensation under the Act or sue for damages. Ohio Gen. Code, 1921, sec. 1465-1476. Section 12,593

provides that 'whoever . . . . employing another . . . . causes to be erected 'unsuitable or improper scaffolding' . . . . shall be fined not more than $500 or imprisoned not more than 3 months or both." The plaintiff was injured by a defect found by the jury to exist in the defendant's scaffolding, and he sued for damages, claiming that the defendant had violated a "lawful requirement" under this section. *Held,* (three judges *dissenting*) that the statute was too indefinite and vague to constitute a "lawful requirement." *Patten v. Aluminum Castings Co.* (1922, Ohio) 136 N. E. 426.

A statute imposing criminal liability must clearly and explicitly define the crime because the accused is entitled to know the nature and cause of the accusations against him. *United States v. Cohen Grocery Co.* (1921, U. S.) 41 Sup. Ct. 298; *Northern Pac. Ry. v. United States* (1914, C. C. A. 8th) 213 Fed. 162. But a statute imposing civil liability is valid unless it violates some constitutional provision, or is too indefinite and uncertain to be reasonably interpreted. *Coggins v. Ely* (1921, Ariz.) 202 Pac. 391; *Mitchell v. Coast Line Co.* (1922) 183 N. C. 162, 110 S. E. 859. A statute dealing with rules or standards of conduct must necessarily be expressed in general terms, and the application of those rules will depend upon varying circumstances. *Miller v. Strahl* (1915) 239 U. S. 426, 36 Sup. Ct. 147; *Waters-Pierce Oil Co. v. Texas* (1909) 212 U. S. 86, 29 Sup. Ct. 220; *State v. Schaeffer* (1917) 96 Ohio, 215, 117 N. E. 220; Pound, *An Introduction to the Philosophy of Law* (1922) 116 *et seq.;* Freund, *The Use of Indefinite Terms in Statutes* (1921) 30 YALE LAW JOURNAL, 437. The instant decision seems to be based upon the erroneous assumption that the statute is distinctly and solely penal in its nature. But even a penal statute may impose some civil liability. *Narramore v. Cleveland Ry.* (1899, C. C. A. 6th) 96 Fed. 298; *Hepner v. United States* (1909) 213 U. S. 103, 29 Sup. Ct. 474. Assuming that the statute is too indefinite to impose a criminal liability, there seems to be no reason why it may not reasonably establish a civil standard of conduct, since in effect the statute merely expresses in statutory form the recognized standard of the "reasonably prudent man." Statutes similarly worded have been upheld as satisfying due process of law. *Levy Leasing Co. v. Siegal* (1922, U. S.) 42 Sup. Ct. 289; *Aiton v. Board of Medical Examiners* (1911) 13 Ariz. 354, 114 Pac. 962. The trend of modern legislation indicates a tendency to delegate quasi-legislative powers. There seems to be no reason why a legislature may not leave to a jury the duty of determining whether the scaffolding is unsuitable. Furthermore, in the instant case it appears that Section 12,594 sufficiently defines the nature of "improper" scaffolding to permit Section 12,593 to apprise an employer of his legal obligations. The court, by holding the provision void in effect disregarded the requirement of Article IV, Section 2, of the Ohio Constitution, which provides that "no law shall be held to be unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges." See *The Toledo Cooker Co. v. Sniegowski* (1922, Ohio) 136 N. E. 904.

TROVER—DEMAND AND REFUSAL.—The plaintiff agreed to sell personal property to the Timberland Company, title to pass upon payment of the purchase price. Before title passed the Timberland Company sold the property to the defendant who consumed a part. The plaintiff brought trover without a demand and refusal. *Held,* that the plaintiff could recover. *Wyman v. Carrabassett Lumber Co.* (1922, Me.) 116 Atl. 729.

The situations are few where a defendant cannot be sued as a converter without a demand and refusal. *Carelton v. Lovejoy* (1867) 54 Me. 445 (borrower); *Nicholson v. Chapman* (1793, C. P.) 2 H. Bl. 254 (finder); *Smith v. Durham* (1900) 127 N. C. 417, 37 S. E. 473 (bailee). In such cases the defendant acquires possession lawfully and until after a demand and refusal does no act inconsistent with the plaintiff's ownership. When the defendant does such an act, the general rule permits trover without demand. *Dowd v. Wadsworth* (1829, N. C.) 2 Dev.

130 (bailee lent chattel bailed and acted as owner). And so the obtaining by the defendant of a chattel from the plaintiff through fraud or trespass is of itself a conversion. *Thurston v. Blanchard* (1839) 39 Mass. 18; *Quitman Co. v. Conway* (1912) 63 Fla. 253, 58 So. 840. The question is more complex where the defendant innocently buys the plaintiff's chattel from a third person. Most courts hold that trover or replevin will lie in such a case without a previous demand. *Hyde v. Noble* (1843) 13 N. H. 494; *Eldred v. Oconto* (1873) 33 Wis. 139. In a few jurisdictions, however, a demand and refusal are necessary if the defendant is morally innocent. *Gillet v. Roberts* (1874) 57 N. Y. 28; *Plano Mfg. Co. v. N. Pac. Elevator Co.* (1892) 51 Minn. 167, 53 N. W. 202; *Parker v. Middlebrook* (1855) 24 Conn. 207. New York has applied this rule even where he is not a purchaser for value. *Goodwin v. Wertheimer* (1885) 99 N. Y. 149, 1 N. E. 404 (assignee for the benefit of creditors). These cases are indicative of an indisposition to apply the orthodox rules of conversion where it is possible for the plaintiff to regain his goods, at least where the goods are undamaged. But trover will lie at once, even under the New York rule, against an innocent agent in possession who sells or otherwise deprives the plaintiff of his property. *Everett v. Coffin* (1831, N. Y.) 6 Wend. 603; *contra, Fargason v. Ball* (1913) 128 Tenn. 137, 159 S. W. 221. The contrary result is reached where negotiable instruments are the subject of the sale. *Pratt v. Higginson* (1918) 230 Mass. 256, 119 N. E. 661; COMMENTS (1918) 28 YALE LAW JOURNAL, 175. The rules of conversion are relaxed in favor of common carriers. *Gurley v. Armstead* (1889) 148 Mass. 267, 19 N. E. 389 (carriage for the delivery to thief no conversion); *Dixon v. So. Pacific Co.* (1918) 42 Nev. 73, 172 Pac. 368 (common carrier must surrender goods if demand made while in its possession). In the principal case the defendant "entirely used up" some of the property. As to such property, there would be no reason to modify the rule even if the defendant were an innocent purchaser for value, since the reason of the New York rule would not apply. The court very properly allowed in mitigation of damages the value of the property retaken by the plaintiff.

TRUSTS—DIVERSION BY EXECUTOR OF FUNDS OF ONE ESTATE TO COVER DEFALCATION IN ANOTHER ESTATE.—A defaulting executor of the S estate, in order to conceal his defalcations, diverted money into that estate from trust funds of the D estate, of which he was also executor. The D estate sued the S estate to recover the funds so diverted. *Held,* that the D estate could recover. *Whiting v. Hudson Trust Co.* (1922) 202 App. Div. 375, 195 N. Y. Supp. 829.

When wrongfully acquired money is mingled with other money its identity is not considered destroyed. Scott, *The Right to Follow Money Wrongfully Mingled with Other Money* (1913) 27 HARV. L. REV. 125. But a *bona fide* transferee for value of money or bills of exchange may keep them. *Miller v. Race* (1758, K. B.) 1 Burr. 452, 457; Woodward, *Quasi-Contracts* (1913) 450. In a situation like that in the instant case the courts ask, first, whether the S estate is a *bona fide* transferee of the money, and secondly, whether it has given value therefor. Lack of *bona fides* is held not proved by the knowledge of the fraudulent trustee or agent, because the "presumption of disclosure" is held to be negatived when the transaction is one which the trustee or agent would normally conceal from his *cestui* or his principal. *Innerarity v. Merchants' Nat. Bank* (1885) 139 Mass. 332, 1 N. E. 282; Baker, *Application of Money Wrongfully Procured, etc.* (1911) 59 U. PA. L. REV. 225; 2 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) 1355. Payment of a pre-existing debt constitutes value. *Stephens v. Board of Education* (1879) 79 N. Y. 183; *Negotiable Instruments Law,* sec. 25; *Uniform Sales Act,* sec. 76; *Uniform Stock Transfer Act,* sec. 22. Therefore a trust estate is treated as a *bona fide* purchaser for value of fraudulently procured money when such money is paid into it by the trustee in satisfaction of a debt owed by him. See *London Banking Co. v. River Plate Bank* (1888) L. R.

20 Q. B. Div. 232; *Stephens v. Board of Education, supra; Craft v. South Boston Railroad* (1889) 150 Mass. 207, 22 N. E. 920. Since such payment is beneficial, it takes effect, in the absence of disaffirmance, as if accepted at the time by the beneficiary; assent is said to be presumed. *London Banking Co. v. River Plate Bank, supra; cf.* Thornton, *Gifts and Advancements* (1893) 71. But the principal case relies largely upon a Massachusetts case holding that the knowledge of the trustee should be imputed to his trust estate, so that the trust estate was unjustly enriched by the payment. *Newell v. Hadley* (1910) 206 Mass. 335, 92 N. E. 507. In that case the court attempted to distinguish the *Craft* case, *supra,* on the ground that in the latter case there was evidence from which a change of position by the defendant might have been inferred. The dissenting opinion, however, points out that there is no sound distinction between the two cases. The better rule and the one more in accordance with the current of authority, is that a trust estate or a principal receiving such funds from its defaulting trustee or agent should be protected. *London Banking Co. v. River Plate Bank, supra;* Weston, *Money Stolen by a Trustee from one Trust and Used for Another* (1912) 25 HARV. L. REV. 602; Baker, *op. cit.* Under either solution, the result seems harsh; but both parties have in the same manner trusted the same defaulter; to shift the loss from where it has fallen at the time of discovery is at best arbitrary, and the widespread application of the *bona fide* purchase for value doctrine to the situation shows that most courts wisely feel such action to be unwarranted. The application of the rule with respect to property other than money or negotiable securities might raise other questions.

WILLS—UNDUE INFLUENCE—ONLY CLAUSES AFFECTED INVALIDATED.—The testatrix, presumably through the undue influence of one S, bequeathed to him $5,000, and gave the rest of her estate to the value of about $10,000 to some of her heirs and to charitable institutions. Other heirs contested the will. *Held,* that the whole will was void, since undue influence was exercised by one of the beneficiaries. *Snyder v. Steele* (1922) 304 Ill. 387, 136 N. E. 649.

It has been universally held that in a will only those gifts obtained by undue influence are invalid. *Old Colony Trust Co. v. Baily* (1909) 202 Mass. 283, 88 N. E. 898; *In re McCaffrey's Will* (1918, Surrs.) 105 Misc. 433, 173 N. Y. Supp. 392; *Walker v. Irby* (1921, Tex. Civ. App.) 229 S. W. 331; 41 L. R. A. (N. S.) 1126, note; Gardner, *Wills* (1903) 179. The same rule is applied if the gift is induced by fraud. Gardner, *loc. cit.* Although there is but little authority in point it seems that a will may be only partly invalidated even by lack of testamentary capacity. Thus, if the testator bequeathes part of his property under an insane delusion, and makes a normal disposition of the rest, it seems that only the gift caused by the delusion should be declared void. See *Holmes v. Campbell College* (1912) 87 Kan. 597, 125 Pac. 25; *contra, Randolph v. Lampkin* (1890) 90 Ky. 551, 14 S. W. 538. But if the entire instrument is tainted with undue influence, or if it is impossible to determine to what extent specific legacies are affected, the whole will is set aside. *Coghill v. Kennedy* (1898) 119 Ala. 641, 24 So. 459; *In re Cooper's Will* (1908, Prerog.) 75 N. J. Eq. 177, 71 Atl. 676. In the instant case the court states that its decision is in accord with "the greater weight of authority" and has "always been the law in Illinois." No case has been found in any other jurisdiction to warrant such an assertion. Previous Illinois cases have not squarely raised the question of "part valid and part invalid," the broad rule having been laid down that where the execution of a will is induced by undue influence, the whole will is void. *Gum v. Reep* (1916) 275 Ill. 503, 510, 114 N. E. 271, 274; *Weston v. Teufel* (1904) 213 Ill. 291, 299, 72 N. E. 908, 910. The court in the instant case, by giving too much weight to previous Illinois cases, lost an opportunity to place Illinois in line with other jurisdictions.