RECENT CASE NOTES

BANKS AND BANKING—POWER OF COLLECTING BANK TO CHARGE BACK CHECK WITH FORGED INDORSEMENT.—Over a year after the deposit of a check for collection by the plaintiff member bank with the defendant Federal Reserve Bank, the Treasurer of the United States, the drawee, notified the defendant that the check had been altered and the name of the payee forged. The defendant thereupon credited the amount of the check to the account of the drawee, and charged it back on the account of the plaintiff. The defendant had expressly reserved the power to charge back at any time and unconditionally checks on the Treasurer of the United States. The member bank sued to recover the amount of the check. *Held,* that the plaintiff could not recover. *Closter Nat. Bank v. Federal Reserve Bank* (1922, C. C. A. 2d) 285 Fed. 138.

The statement is broadly made that when a government departs from its position of sovereignty and enters the domain of commerce it submits itself to the same rules that govern individuals. *England Nat. Bank v. United States* (1922, C. C. A. 8th) 282 Fed. 121; 2 Morse, *Banks and Banking* (Carter's ed. 1917) 145. Thus, the familiar rule that money paid by maker or acceptor of negotiable paper cannot be recovered applies to drafts on the United States. *Price v. Neal* (1762, K. B.) 3 Burr. 1354; (1920) 18 MICH. L. REV. 790. And the United States ordinarily can recover money paid on a forged endorsement. (1915) 63 U. PA. L. REV. 682. But, as in the case of an individual, the United States must use due diligence both in discovering the forgery and in giving notice to the holder. *United States v. Central Bank* (1881, E. D. Pa.) 6 Fed. 134; see *Cooke v. United States* (1875) 91 U. S. 389. In the case of pension warrants, however, it has been held that the Government can recover although the forgery is not discovered for several years. *United States v. Nat. Exch. Bank* (1908) 214 U. S. 302, 29 Sup. Ct. 665; *Onondaga Bank v. United States* (1894, C. C. A. 2d) 64 Fed. 703. These cases seem unsound. But assuming the United States to have been negligent in the principal case, the result is justified by the express agreement. *Farmers' Bank v. Union Bank* (1919) 42 N. D. 449, 173 N. W. 789. The decision is noteworthy in view of the vast body of collections now passing through the Federal Reserve Banks, and their approximation in fact to the condition of a public utility. *Cf.* Kemmerer, *Some Public Aspects of the Aldrich Plan* (1911) 19 JOUR. POL. ECON. 819. *Quaere,* on these facts could the plaintiff bank sue the United States?

CARRIERS—FORWARDING AGENTS—WHETHER CARRIER OR AGENT.—The defendant company shipped goods to the plaintiffs to be forwarded f. o. b. New York to England and Ireland. As forwarding agents the plaintiffs returned to the defendant their "bill of lading." They then shipped the goods to England, and paid the freight, taking the steamship company's bill of lading to themselves for delivery in Liverpool. The goods were ultimately confiscated by the British Government because of a war embargo, and the plaintiff sued the defendant for the freight charges. *Held,* that they had no authority as agents to pay the freight and that they could not recover for a mere voluntary payment. *Royer Wheel Co. v. Lunham & Moore* (Jan. 16, 1923) Ohio Court of Appeals, No. 1943.

A true forwarding agent is one who, either with or without custody of the goods, contracts as agent of the shipper for their transportation. *Tilles v. American Express Co.* (1916, Wis.) 186 S. W. 1102; *Stannard v. Prince* (1876) 64 N. Y. 300. He must have no interest in their carriage after delivery to the carrier and must receive no part of the freight as compensation. 1 Hutchinson, *Carriers* (3d ed. 1906) sec. 71; 10 C. J. 50. Thus an agent who delivers goods to a carrier for transportation and delivery at the end to a connecting carrier is a forwarding agent

with respect to the second carrier. 1 Hutchinson, *op. cit.* sec. 472; *Fisher v. B. & M. Ry.* (1904) 99 Me. 338, 59 Atl. 532. But if he exercises control over the goods while in transit, he becomes a common carrier. This is true where he contracts with the shipper to transfer the goods through to their final destination, even though he does not own the means of transportation. *Bare v. American Forwarding Co.* (1909) 146 Ill. App. 388; *Blakiston v. Davies, Turner & Co.* (1910) 42 Pa. Super. Ct. 390; *contra: Blair v. American Forwarding Co.* (1911) 159 Ill. App. 511. So also where he combines small shipments into carload lots for a common destination. *Kettenhofen v. Globe Transfer & Storage Co.* (1912) 70 Wash. 645, 127 Pac. 295; *Heath v. Judson Freight Forwarding Co.* (1920) 47 Calif. App. 426, 190 Pac. 839; *contra: Calif. Com. Ass. v. Wells Fargo & Co.* (1908) 14 I. C. C. 422. The express company, which issues its own bill of lading, makes its own contracts, and sends direct to its agent who distributes the goods, is universally held to be a carrier. *Southern Express Co. v. Raney* (1909) 164 Ala. 206, 51 So. 314; *Buckland v. Adams Express Co.* (1867) 97 Mass. 124. The same is true of transportation companies within cities. *Benson v. Oregon Short Line Ry.* (1909) 35 Utah, 241, 99 Pac. 1072. The distinction seems to depend upon whether there is an agreement with the shipper actually to carry the goods, or merely to arrange for carriage. The question usually arises where goods are lost in transit, and should not be influenced by the name which the "forwarding agent" has chosen. *Schloss v. Wood* (1888) 11 Colo. 287, 17 Pac. 910; *Blakiston v. Davies Turner & Co., supra.* In the instant case the agent received the goods, issued its own bill of lading, took the steamship company's bill of lading in its own name, and paid the freight. This is a clear enough undertaking to carry to constitute the plaintiff a carrier, and the decision in the instant case might better have been based on that ground.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—CONCILIATION CERTIFICATE CONDITION PRECEDENT TO TRIAL.—The plaintiff sued on a $60 promissory note. A statute provided that no process should be issued in the commencement of a civil suit involving less than $200, unless the moving party had filed a conciliator's certificate showing that an attempt to effect a settlement had been made and had failed. N. D. Sess. Laws, 1921, ch. 38. The plaintiff had not filed a certificate. *Held,* that the plaintiff could not recover. *Klein v. Hutton* (1922, N. D.) 191 N. W. 485.

A conciliator cannot compel the attendance of parties or witnesses, or determine any cause without consent of the parties. If no agreement is reached and the certificate is filed, either party may proceed with the action. See (1923) 6 AM. JUD. SOC. JOUR. 133. Statutes may change the remedy for a breach of legal obligation, if some adequate remedy remains. *National Surety Co. v. Architectural Decorating Co.* (1912) 226 U. S. 276, 33 Sup. Ct. 17. Although the proceeding before the conciliator may be considered a trial, it is generally held that the right to a jury trial is not violated where a jury is granted only on appeal. *Capital Traction Co. v. Hof* (1899) 174 U. S. 1, 19 Sup. Ct. 580; *Flour City Fuel & Transfer Co. v. Young* (1921) 150 Minn. 452, 185 N. W. 934. The statute might be sustained as an exercise of the police power, since unnecessary and harmful litigation may be prevented by it. See *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 31 Sup. Ct. 186. Various statutory measures decreasing the expense and formality of litigation have been declared constitutional in recent years. Arbitration agreements made irrevocable: *White Eagle Laundry Co. v. Slawek* (1921) 296 Ill. 240, 129 N. E. 753; Cohen, *Commercial Arbitration* (1921) 31 YALE LAW JOURNAL, 147; workmen's compensation acts: *Arizona Employers' Liability Cases* (1919) 250 U. S. 400, 39 Sup. Ct. 553; 1 Honnold, *Workmen's Compensation* (1917) ch. 1, art. 3; conciliation court: *Flour City Fuel & Transfer Co. v. Young, supra;* Vance, *Minneapolis Court of Conciliation* (1918)

2 MINN L. REV. 491; juvenile, domestic relations, and small claims courts: Flexner and Oppenheimer, *Legal Aspects of the Juvenile Courts* (1922); Smith, *Justice and the Poor* (1919); 23 LAW NOTES, 185. Conciliation requirements similar to those adopted by the instant statute have been in force in Norway and Denmark since 1795. Grevstad, *Courts of Conciliation* (1891) 68 ATLANTIC MONTHLY, 401, 405: Teisen, *The Danish Judicial Code* (1917) 65 U. PA. L. REV. 543, 560. Voluntary conciliation was provided for in North Dakota, but the statute proved impracticable. N. D. Comp. Laws, 1913, sec. 9187-9192; Grevstad, *Courts of Conciliation in America* (1893) 72 ATLANTIC MONTHLY, 671; (1919) 2 AM. JUD. SOC. JOUR. 151. Conciliation procedure, adopted from continental systems, has existed in Latin America. Obregón, *Latin-American Commercial Law* (1921) 765. Some forms of conciliation are in use on the Continent. 2 Garsonnet & Cezar-Bru, *Procédure civile* (1912) 258-300; Gaupp-Stein, *Die Zivilprozessordnung für das Deutsche Reich* (11th ed. 1913) secs. 510(c), 608, 611. Devices which tend to reduce litigation while preserving all the rights of the parties cannot but be welcomed. On the related question of contractual agreement on a sole forum as the exclusive place of litigation, see (1918) 28 YALE LAW JOURNAL, 190.

CONSTITUTIONAL LAW—INJUNCTION—COLLECTION OF PENALTY AS "TAX" ON LIQUOR.—The complainant asked that the defendant revenue officer be enjoined from collecting by the usual tax distraint an assessment under sec. 35 of the National Prohibition Act. Act of Oct. 28, 1919 (41 Stat. L. 305, 317). ". . . . upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor. . . ." The petitioner claimed that this section imposes a penalty, and that the collection as a tax was therefore unconstitutional. *Held,* (two justices *dissenting*) that the defendant should be enjoined. *Lipke v. Lederer* (1922, U. S.) 42 Sup. Ct. 549. (Followed in *Regal Drug Corp. v. Wardell* (1922, U. S.) 43 Sup. Ct. 152.)

Until this type of liquor case, section 3224 of the Revised Statutes forbidding the maintenance of suits in any court "for the purpose of restraining the assessment or collection of any tax" has been rigidly applied to prevent delay in the collection of taxes. U. S. Rev. Sts. 1873, sec. 3224; *Singer Sewing Machine Co. v. Benedict* (1913) 229 U. S. 481, 485, 33 Sup. Ct. 942, 943. This is in accord with the general rule in tax cases, even in the absence of statute. *Pullan v. Kinsinger* (1870, C. C. A. 6th) 2 Abb. 94, 105. Even before sec. 3224, it was established that the mere claim of unconstitutionality or illegality of the tax would not be sufficient ground to induce equity to interfere. *Dows v. Chicago* (1870, U S.) 11 Wall. 108. But after sec. 3224, the grounds which usually give equity jurisdiction—such as a resulting multiplicity of suits or a cloud on title, in addition to the claimed unconstitutionality—were specifically rejected. *Dodge v. Osborn* (1915) 240 U. S. 118, 36 Sup. Ct. 275. In the field outside of taxation courts seem, where constitutional guaranties have been concerned, to have been more ready to accept even a minimum technical "irreparable injury" or "inadequate remedy at law," and to grant the injuction with little discussion of these grounds. See 4 Pomeroy, *Equitable Jurisprudence* (4th ed. 1919) 4135. Several cases do not discuss "irreparable injury" or "inadequate legal remedy" at all, the only point made being the violation of the "due process" clause. *Reagan v. Farmers' Loan & Trust Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047; *Ex parte Young* (1907) 209 U. S. 123, 28 Sup. Ct. 441; *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 31 Sup. Ct. 186. Even in the field of taxation, the square conflict in the states over the granting of such injunctions, and the frequency of such petitions as caused the enactment of sec. 3224, indicate the belief in both petitioners and courts that injunctions against

the invasion of constitutional guaranties are *sui generis*, and do not come within the ordinary meaning of "irreparable injury" or "inadequate remedy at law." See 2 Ames, *Cases in Equity Jurisdiction* (1904) 73; 4 Pomeroy, *op. cit.* sec. 1779 *et seq.* The dissent, however, takes a stand sanctioned both by the usual requirements for equity jurisdiction and the special severity of tax cases. Ames, *op. cit.* 72. Can it be said that the majority held that an invasion of a constitutional guaranty—here the collection of a *penalty* by summary tax process without a hearing—is itself an "irreparable injury"? See *Interstate Commerce Commission v. Brimson* (1894) 154 U. S. 447, 485, 14 Sup. Ct. 1125, 1136. If so, they have been preceded and followed by similar decisions. *Fontenot v. Accardo* (1922, C. C. A. 5th) 278 Fed. 871; *Regal Drug Corp. v. Wardell, supra;* see *Du Pont v. Graham* (1922, D. Del.) 283 Fed. 300. In making such decisions, a court of equity more nearly approaches the ideal of a perfect remedial agency, preventing the injury rather than applying the imperfect cure of damages.

CONTRACTS—ALTERNATIVE PROMISES—DAMAGES FOR BREACH.—In consideration of the plaintiff's assignment of all of its rights in a certain patent the defendant agreed to pay $30,000 in cash and within ninety days to organize a corporation and deliver to the plaintiff stock to the value of $120,000 at the market price, or, in lieu of the stock, to pay the plaintiff $50,000. After the ninety days neither the stock nor the $50,000 had been delivered. The plaintiff sued for damages. *Held*, that the plaintiff could recover $50,000. *Pennsylvania Retreading Tire Co. v. Goldberg* (1922, Ill.) 137 N. E. 81.

The contract may be in form alternative where there is a provision for a penalty or liquidated damages. Penalty clauses have become unenforceable and inoperative. *Fellows v. National Can Co.* (1919, C. C. A. 6th) 257 Fed. 970. A reasonable attempt to liquidate damages is effective. *Rabinowitz v. Apter* (1915) 90 Conn. 1, 96 Atl. 157. The character of the provision is a question of law for the court. *Dowd v. Andrews* (1922, Ind. App.) 134 N. E. 294. The provision in the instant case for the payment of $50,000 is not a penalty since it is for a smaller sum than the alternative, and it is not liquidated damages since the value of the stock is already liquidated by the terms. This seems, rather, a real alternative contract where the performance of either alternative will fully discharge the promisor's duty. In the absence of a stipulation to the contrary the one who is to render the performance has the choice. Coke, *Littleton* *145a. There is a breach of contract only when neither alternative is performed. Damages for breach are measured by the value of the alternative less onerous to the defendant, because he has the power of choice. *Franklin Sugar Refining Co. v. Howell* (1922, Pa.) 118 Atl. 109. An inconsistent and perhaps erroneous view is to give the promisee the option when the promisor fails to make an election. *Phillips v. Cornelius* (1900, Miss.) 28 So. 871; 3 Williston, *Contracts* (1920) sec. 1407; 5 Page, *Contracts* (2d ed. 1921) sec. 2799. But where one alternative is to pay a sum of money most courts will enforce that alternative, as in the instant case. 1 Sedgwick, *Damages* (9th ed. 1912) sec. 423; Williston, *loc. cit.; Pa. Ry. v. Caspar Reichert* (1882) 58 Md. 261. Also the court correctly followed the rule as to the less onerous alternative. The lower court said that by failing to organize the corporation and deliver the stock the defendant must be held to have elected to pay the sum of $50,000. *Pa. Retreading Tire Co. v. Goldberg* (1922) 224 Ill. App. 241. More properly this was not an election, since there was a failure to perform either alternative on time. An election was more satisfactorily shown by the upper court which assumed that the corporation was to be for the purpose of manufacturing the invention, and since the defendant assigned the letters patent to another corporation before the ninety days were up, it was thus impossible for him to perform that alternative. So the duty to pay $50,000 would follow from the general rule that where one alternative becomes impossible it does not excuse the promisor from performing that which remains possible. *Board of Education v.*

Townsend (1900) 63 Ohio St. 514, 59 N. E. 223; 3 Williston, *op. cit.* sec. 1961. As to the effect of the Statute of Frauds on alternative performance, see (1921) 7 CORN. L. QUART. 51.

CRIMINAL LAW—LARCENY BY TRICK DISTINGUISHED FROM OBTAINING PROPERTY BY FALSE PRETENSES.—The defendant acquired possession of a deed professedly as escrowee but with the secret purpose of depriving the grantor of his property therein. He was indicted for larceny by trick. *Held,* that the defendant was guilty. *State v. Ritchie* (1922, Iowa) 190 N. W. 943.

One N took possession of the plaintiff's motor-car under pretense of exhibiting it to H, a possible purchaser, but actually with the intention of feloniously converting it. An action was brought in the nature of trover against the defendants, *bona fide* purchasers from N. *Held,* that the defendants acquired no title, since N's possession was based on larceny by trick. *Heap v. Motorists' Agency, Ltd.* (1922, K. B.) 39 T. L. R. 150.

An essential element of the offense of larceny at early common law was a trespassory taking from the owner. Beale, *The Borderland of Larceny* (1892) 6 HARV. L. REV. 244. Rigorous technical construction of this requirement to limit the incidence of capital punishment also seriously restricted the scope of the criminal law. The later effort of courts and legislatures to provide a penalty for the fraudulent misappropriation of entrusted property has produced three separate crimes: larceny by trick, embezzlement, and obtaining property by false pretenses. If the accused obtains a chattel by fraud or artifice, intending at the time to convert it, while the owner intends to part with "possession" only, the crime is larceny by trick. *Rex v. Pear* (1779, all the judges of England, and Barons of the Exchequer) 1 Leach, 253, 2 East P. C. 685. But if the owner intends to part with his "property," that is, title, it is obtaining property by false pretenses. (1757) 30 Geo. II, c. 24, sec. 1; see *Williams v. State* (1905) 165 Ind. 472, 75 N. E. 875; 2 L. R. A. (N. S.) 249, note. If the acquisition of possession is lawful, and the intent fraudulently to convert is formed subsequently, the crime is embezzlement. (1799) 39 Geo. III, c. 85; see 2 Bishop, *Criminal Law* (8th ed. 1892) secs. 318(a)-329. In the instant Iowa case a conviction for larceny was sustained although the owner of the goods, induced by trick, intended, not to pass the property in them, but to confer on the person to whom he gave possession a power to pass the property. But the English decision considered the offense larceny expressly on the ground that the owner did not confer a power to pass the property. If he had, according to this opinion, the crime would have been obtaining property under false pretenses and the title of a *bona fide* purchaser for value indefeasible—a result which might have been reached under the law of agency. For both of these opposing views precedent may be found. *Zink v. People* (1879) 77 N. Y. 114; *contra: People v. Delbos* (1905) 146 Calif. 734, 81 Pac. 131. The continued existence of the subtle distinctions between these crimes is confusing and unnecessary. NOTES (1914) 2 CALIF L. REV. 334; NOTES (1920) 20 COL. L. REV. 318; COMMENTS (1921) 30 YALE LAW JOURNAL, 613. Remedial legislation, generally in the form of a consolidation of the offenses into one crime of larceny, has already been enacted in several jurisdictions. N. Y. Cons. Laws, 1909, ch. 40, sec. 1290; Mass. Rev. Laws, 1902, ch. 208, sec. 26; ch. 218, sec. 40.

CRIMINAL LAW—POWER OF APPELLATE COURT TO REDUCE PUNISHMENT.—In an indictment for rape, the jury found the defendant guilty, and fixed his punishment at death. *Held,* (two judges *dissenting*) that since there were mitigating circumstances, the sentence would be reduced to life imprisonment. *Davis v. State* (1922, Ark.) 244 S. W. 750.

The trial court always has the power to reduce to the legal penalty a penalty which is illegally excessive. *Shields v. People* (1907) 132 Ill. App. 109, 139;

Weaver v. State (1911) 1 Ala. App. 48, 55 So. 956; *Taylor v. State* (1915, Tex. Cr. App.) 180 S. W. 242; 51 L. R. A. (N. S.) 373, note. Statutes in some states give the appellate court power to reduce a sentence although it is not illegally excessive, whether it has been imposed by the jury or by the trial court. *Reed v. State* (1920, Okla. Cr.) 191 Pac. 1041 (jury); *Childs v. State* (1918, Okla, Cr.) 175 Pac. 59 (court); *State v. Ringdahl* (1921) 191 Iowa, 748, 183 N. W. 332 (court). In the case of an appeal from a sentence imposed by the trial court it has been held that the judgment will not be modified unless there has been an abuse of discretion. *State v. Olander* (1922) 193 Iowa, 1379, 186 N. W. 53. Where statutes exist, reduction of the sentence is considered a matter of justice and not of clemency. *Anderson v. State* (1889) 26 Neb. 387, 41 N. W. 951; *Fritz v. State* (1912) 8 Okla. Cr. 342, 128 Pac. 170. In the absence of a statute the cases are perhaps too few to establish a majority rule, but apparently the tendency is to deny the appellate court power to reduce a penalty. *People v. Huff* (1887) 72 Calif. 117, 13 Pac. 168; *Raymond v. United States* (1905) 26 App. D. C. 250; *Hall v. State* (1914) 113 Ark. 454, 168 S. W. 1122; *contra: Marshall v. State* (1884) 74 Ga. 26. Regardless of whether the appellate court should be able to reduce a penalty imposed by a trial judge or not, it seems that it should not have power to mitigate a sentence which, as in the instant case, is part of the jury's verdict, except under the rules with reference to disregarding verdicts generally. *Burns v. State* (1922, Ark.) 243 S. W. 963. In giving exclusively to the jury the power to impose the penalty, the statute must have been intended to take it from the judge, unless (as seems dubious) it was intended to take it only from the trial judge and not from the appellate court.

DIVORCE—SEPARATION—EFFECT OF RECONCILIATION.—Several years after a decree of separation from bed and board, the plaintiff asked that judgment be entered for arrears of unpaid alimony. The defendant claimed that because of a reconciliation the judgment of separation had become a nullity. *Held,* that the decree was not annulled by the reconciliation. *Bailey v. Bailey* (1922, Sup. Ct.) 196 N. Y. Supp. 340.

Where cause for divorce is condoned, and not subsequently repeated, it is no ground for an action. *Griffith v. Griffith* (1906) 77 Neb. 180, 108 N. W. 981; *Phinizy v. Phinizy* (1922, Ga.) 114 S. E. 185. An action of separation also is abated by a reconciliation. *Schaub v. Schaub* (1906) 117 La. 727, 42 So. 249. Unless expressly excepted by the deed, a reconciliation will avoid a separation agreement. *Roberts v. Hardy* (1901) 89 Mo. App. 86; *Daniels v. Benedict* (1899, C. C. A. 8th) 97 Fed. 367; *cf. Brody v. Brody* (1920) 190 App. Div. 806, 180 N. Y. Supp. 364. And voluntary cohabitation pending divorce proceedings operates to extinguish the cause. *Jenkins v. Jenkins* (1922, Or.) 204 Pac. 165. Although reconciliation has no effect on a final decree of divorce, yet by cohabitation after an interlocutory decree the offense is forgiven, and the final decree will be refused. *Hyman v. Hyman* [1904] P. 403; *Cary v. Cary* (1911) 144 App. Div. 846, 129 N. Y. Supp. 444. But in accord with the instant case a decree of separation is not affected by a subsequent reconciliation in the absence of an order by the court rendering it. *Hobby v. Hobby* (1896) 5 App. Div. 496, 39 N. Y. Supp. 36; *contra: Tiffin v. Tiffin* (1809, Pa.) 2 Binn. 202. Otherwise the fear of losing alimony might well deter a wife from seeking reconciliation. Or, to frustrate the decree, an artful husband might seduce his wife into a momentary reunion followed by renewed illtreatment which might be difficult of proof. See *Lockridge v. Lockridge* (1835, Ky.) 3 Dana, 28. Although condonation is itself made nugatory by a repetition of the offense, the safer rule seems to be to put the burden on the husband to procure alteration of the alimony decree where the reconciliation was in good faith, rather than on the wife to re-establish a decree made *prima facie* null by a pretended reconciliation.

FEDERAL PRACTICE—INJUNCTION BASED UPON CONSTITUTIONALITY OF STATUTE—NUMBER OF JUDGES REQUIRED.—The plaintiff company asked for an injunction against a State Board to prevent it from reducing the telephone rates, on the ground that such reduction would be unconstitutional. The District Judge granted a temporary restraining order. A court consisting of three judges, as required by section 266 of the Judicial Code, denied the application for an interlocutory injunction. Later, the District Judge, sitting alone, allowed an appeal and continued the restraining order issued by him. A motion was made to set aside the restraining order. *Held,* that the motion would be granted. *Cumberland Tel. and Tel. Co. v. La. Commission.* (1922, U. S.) 43 Sup. Ct. 75.

The Michigan Public Utilities Commission issued an order establishing new telephone rates. The plaintiff applied for an interlocutory injunction restraining its enforcement on the ground of unconstitutionality. *Held,* that since the unconstitutionality of a statute was not involved, section 266 of the Judicial Code did not apply, and that the court could hear the application without calling two additional judges. *Michigan Telephone Co. v. Odell* (1922, E. D. Mich.) 283 Fed. 139.

The United States Supreme Court assumes an interpretation of section 266 of the Judicial Code opposed to that in the *Michigan* case. The difficulty arises from the ambiguous wording of the section, which says: "No . . . . injunction . . . . restraining the enforcement . . . . of any statute of a State by restraining . . . . any officer . . . . in the enforcement or execution of such statute, *or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State* shall be issued . . . . upon the ground of the unconstitutionality of such statute. . . ." Act of March 3, 1911 (36 Stat. at L. 1087, 1162) as amended by Act of March 4, 1913 (37 Stat. at L. 1013). If the words, "or of such order," had been added at the end of the quotation doubtless the intention of the amendment would have been definitely expressed. Before the amendment in 1913, which added the italicized words, it was held that three judges were not necessary where the constitutionality of the *statute* was not involved. *Chicago B. and Q. Ry. v. Oglesby* (1912, W. D. Mo.) 198 Fed. 153. The rule which best effects the apparent intention of the legislature in making the amendment is that three judges are also necessary where the constitutionality of such an *order* is involved. *Louisville Ry. v. Ala. Ry. Comm.* (1913, M. D. Ala.) 208 Fed. 35; *contra: Lykins v. Chesapeake R. Co.* (1913, C. C. A. 6th) 209 Fed. 573. Since the Supreme Court did not discuss this point, it can hardly be considered as settled. The decision in the *Cumberland* case is only an application of section 266 of the Judicial Code that "such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction." Act of March 3, 1911, *supra; Louisville Ry. v. Ala. Ry. Comm., supra.* See Rose, *Jurisdiction and Procedure of the Federal Courts* (2d ed. 1922) 470.

INSURANCE—WHEN DUTY TO GIVE NOTICE OF ACCIDENT ARISES.—The plaintiff sued on an accident insurance policy providing for forfeiture if notice was not given within thirty days of the accident. The insured, while repairing a fence, slipped and thought he swallowed a fence staple, which he had in his mouth, but physicians assured him that this was not so. Two years later, an X-ray examination disclosed that the staple was imbedded in his bronchial tube, and notice to the defendant company was given immediately. *Held,* that the duty to notify did not arise until the plaintiff discovered that the disability was due to accident and therefore that the notice given was sufficient. *Hawthorne v. Travelers' Protective Ass'n. of America* (1922, Kan.) 210 Pac. 1086.

In an action on a policy containing a similar provision, the insured disappeared on April 28, 1913. Three years later his automobile was dredged out of a river and notice was given to the company within the prescribed time after the discovery.

The jury found that the insured lost his life accidentally on April 28, 1913. *Held,* (two judges *dissenting*) that the time for notice runs from the date of accident and not from the date of discovery of the facts and therefore that the notice was insufficient. *Hanna v. Commercial Travelers' Mut. Accident Ass'n. of America* (1922, Sup. Ct.) 197 N. Y. Supp. 395.

These two cases offer a striking illustration of conflicting tendencies in the construction of conditions in insurance contracts. See (1922) 20 MICH. L. REV. 549. It is well settled that a provision in a policy requiring notice of loss within a prescribed time is valid and, in the absence of compliance or a waiver, the assured cannot recover. Joyce, *Insurance* (2d ed. 1918) sec. 3280. The application of this rule is simple where the failure to comply with the condition is due to the fault of the insured or assured, but there is difficulty where the delay is without fault. In the latter class, as indicated by the two instant cases, the courts are in conflict. In the absence of an express provision that ignorance of the accident, death, or other fact will not affect the duty to give notice within the prescribed time, it seems more reasonable to assume that the parties "intend" the period of notice to begin to run from the discovery of the facts and not from the date of their actual occurrence. *Concordia Fire Ins. Co. v. Waterford* (1920) 145 Ark. 420, 224 S. W. 953; *Commercial Travelers v. Barnes* (1907) 75 Kan. 720, 724, 90 Pac. 293, 295; *Kentzler v. Amer. Mut. Acc. Ass'n.* (1894) 88 Wis. 589, 60 N. W. 1002; Patterson, *Supervening Impossibility of Performing Conditions in Insurance Policies* (1922) 22 COL. L. REV. 625; Corbin, *Supervening Impossibility of Performing Conditions Precedent* (1922) 22 *ibid.* 425; see *Melcher v. Ocean Accident & Guarantee Co.* (1919) 226 N. Y. 51, 123 N. E. 81; (1919) 19 COL. L. REV. 414; *Sheafor v. Standard Accident Ins. Co.* (1919) 170 Wis. 307, 174 N. W. 916; *Employers' Liability Co. v. Jones Lumber Co.* (1916) 111 Miss. 759, 72 So. 152; *contra: Tuttle v. Pac. Mut. Life Ins. Co.* (1920) 58 Mont. 121, 190 Pac. 993; *Hatch v. Casualty Co.* (1908) 197 Mass. 101, 83 N. E. 398. The modern tendency is unquestionably in the direction of holding insurers to a stricter accountability. Accordingly most courts are unwilling to construe these conditions of forfeiture so as to defeat the rights of the assured unless the intention of the parties to create a forfeiture is beyond question, or the facts show fraud or clear injustice on the insurer. Vance, *Insurance* (1904) 497; see *Bingell v. Royal Ins. Co.* (1913) 240 Pa. 412, 87 Atl. 955; COMMENTS (1923) 32 YALE LAW JOURNAL, 274. According to the better view, when causes exist reasonably excusing the giving of notice within the time required, notice will be sufficient if given within the time stipulated after the cause of preventing prior compliance ceases to exist. Joyce, *op. cit.* sec. 3280a; *Woodmen Accident Ass'n. v. Pratt* (1901) 62 Neb. 673, 87 N. W. 546; *Bingell v. Royal Ins. Co., supra.* The *Hawthorne* case is of this type.

SALES—FRAUDULENT CONVEYANCES—BULK SALES ACT—TORT CLAIMS.—The plaintiff was injured by the defendant's automobile. One week later a corporation was formed by the defendant and others, to which he transferred all his business assets and property. In return he received stock which he transferred to his wife in payment of a pre-existing debt. The plaintiff later sued and obtained judgment which he was unable to satisfy, and brought this action to declare the transfer to the corporation void as a fraud on creditors. *Held,* that the Bulk Sales Act did not apply to unliquidated claims *ex delicto. Harrison v. Riddell* (1922, Mont.) 210 Pac. 460.

Bulk sales acts have been passed in forty-five states and have been declared constitutional in all but five. NOTES AND COMMENT (1916) 2 CORN. L. QUART. 28; *Price Co. v. Musselman Co.* (1910) 217 U. S. 461, 30 Sup. Ct. 606; *Tackaberry Co. v. German State Bank* (1917) 39 S. D. 185, 163 N. W. 709. But difficulty arises in their application. The act is intended only to protect creditors and will not make the sale void as between the parties. *Krolik v. Kaczmarek* (1919) 208 Mich. 378, 175 N. W. 239. Its main purpose is to protect wholesalers, delivery on credit

being the normal practice. *Escalle v. Mark* (1919) 43 Nev. 172, 183 Pac. 387; COMMENTS (1923) 32 YALE LAW JOURNAL, 602. But it applies to other creditors also. *Eklund v. Hopkins* (1904) 36 Wash. 179, 78 Pac. 787 (attorney). It applies only to sales in bulk by a merchant, trader, or dealer. *Grove Mfg. Co. v. Salter* (1921) 26 Ga. App. 369, 106 S. E. 208. And the sale must be of the major part of the stock. *Fisk Rubber Co. v. Hayes Motor Car Co.* (1917) 131 Ark. 248, 199 S. W. 96. There must be an absolute sale by the owner other than in the regular course of business. *Wright v. Cline* (1921) 27 Ga. App. 129, 107 S. E. 593; (1916) 82 CENT. L. JOUR. 190. Since a chattel mortgage gives only a lien, and does not pass title, neither it nor a foreclosure thereunder is within the statute; but otherwise when a mortgage is followed by release of the equity of redemption. *Swartz v. King Realty Co.* (1920, N. J. App.) 109 Atl. 567; *Symons Bros. v. Brink* (1916) 194 Mich. 389, 160 N. W. 638; (1921) 5 MINN. L. REV. 557; (1916) 14 MICH. L. REV. 597; 9 A. L. R. 473, note. This rule offers obvious possibility of defeating the purpose of the acts. But the rule seems to be otherwise in states where title is passed by a mortgage. (1912) 11 MICH. L. REV. 248; (1916) 14 *ibid.* 674. A deed of trust, a sale by one partner to his co-partner, or a transfer of business and assets made in the process of forming a corporation have also been held to come within the act. *Hall v. Conine* (1921, Tex. Civ. App.) 230 S. W. 823; *Howell v. Howell* (1919) 142 Tenn. 31, 215 S. W. 278; (1920) 90 CENT. L. JOUR. 28; *Marlow v. Ringer* (1917) 79 W. Va. 568, 91 S. E. 386; *Sakelos & Co. v. Hutchinson Bros.* (1916) 129 Md. 300, 99 Atl. 357; *Smith-Calhoun Rubber Co. v. McGhee Rubber Co.* (1921, Tex. Civ. App.) 235 S. W. 321. The transfer must be of a stock of goods, and not merely of fixtures. *Ettelson v. Sankopp* (1918) 210 Ill. App. 348; *Heilmann v. Powelson* (1917, Sup. Ct.) 101 Misc. 230, 167 N. Y. Supp. 662; (1920) 20 COL. L. REV. 354. The courts have construed the Bulk Sales Act strictly and have held that one holding an unliquidated claim arising out of a breach of contract is not a creditor within the meaning of the Act. *Superior Plating Works v. Art Crafts Co.* (1920) 218 Ill. App. 148. Although probably of first impression, the instant decision is logically sound and is supported by the dictum in the *Art Crafts* case, *supra.*

SALES—PRIORITY OF CONDITIONAL VENDOR'S LIEN OVER NON-STATUTORY LIEN.—A conditional vendor brought replevin for an automobile in the possession of the defendant who claimed a lien on it for repairs ordered by the conditional vendee. The defendant had no notice of the plaintiff's title. *Held,* that the plaintiff could recover. *Bath Motor Mart v. Miller* (1922, Me.) 118 Atl. 715.

Subject to possible exceptions in favor of innkeepers and carriers, no common-law lien can be acquired on chattels delivered without the express or implied authority of the owner. *White v. Smith* (1882) 44 N. J. L. 105; Jones, *Liens* (3d ed. 1914) sec. 733. A mortgagor or conditional vendee in possession cannot without such authority create a lien for services rendered with respect to a chattel superior to the claims of the vendor or mortgagee. *Dennison v. Shuler* (1882) 47 Mich. 598, 11 N. W. 402; *Storms v. Smith* (1884) 137 Mass. 201. There is, however, some difference of opinion as to what constitutes an implied authorization. Where a continued use of the chattel contemplates repairs, many courts correctly hold that the conditional vendor or mortgagee by entrusting it to the possession of the vendee or mortgagor for use impliedly authorizes necessary repairs. *Williams v. Allsup* (1861) 10 C. B. (N. S.) 417 (steam vessel); *Watts v. Sweeney* (1890) 127 Ind. 116, 26 N. E. 680 (engine); *Broom v. Dale* (1915) 109 Miss. 52, 67 So. 659 (automobile); *Keene v. Thomas* [1905] 1 K. B. 136 (dog-cart). Other courts expressly refuse to imply such authority. *Baughman Auto Co. v. Emanuel* (1912) 137 Ga. 354, 73 S. E. 511; *Shaw v. Webb* (1915) 131 Tenn. 173, 174 S. W. 273; *Bankers' Com. Security Co. v. Brennan & Levy* (1920) 75 Pa. Super. Ct. 199. This view is sustained on two grounds: that otherwise it puts it into the power of the mortgagor to impair the security of the mort-

gagee without his consent; and that recordation, where required, is constructive notice of the existence of a prior lien. See (1922) 70 U. PA. L. REV. 328; (1920) 33 HARV. L. REV. 868. Statutes often give the repairman priority by providing that a lien will attach for repairs ordered by the person in lawful possession. *Smith Auto Co. v. Kaestner* (1916) 164 Wis. 205, 159 N. W. 738; *Mortgage Securities Co. v. Pfaffman* (1917) 177 Calif. 109, 169 Pac. 1033; *Cattell v. Rehrer* (1923, N. J. Eq.) 119 Atl. 374. The instant case is undoubtedly supported by authority, but it seems that the conditional vendor who grants an express authority to use a chattel impliedly authorizes the making of repairs necessary to such use under the familiar principle that a grant of authority carries with it everything reasonably necessary to exercise the main authority conferred. See Mechem, *Agency* (2d ed. 1914) sec. 715. Furthermore, such increase in value as the repairs afford inures to the benefit of the vendor or mortgagee by preserving his security intact. This has particular force where the debt is expected to be paid out of the earnings derived from the continued use of the chattel. There are analogous situations in the cases of maritime liens and farm laborers' liens. Act of June 23, 1910 (36 Stat. at L. 604); *Chapman v. Averill Co.* (1915) 28 Idaho, 121, 152 Pac. 573.

STATUTE OF FRAUDS—REFORMATION OF DEEDS—SPECIFIC PERFORMANCE—PAROL VARIATION.—Plots I and II were sold at auction to the plaintiff with the knowledge of the defendant, who later bought a house located on plot I. By mistake of the scrivener the contract of sale and the deed to the plaintiff included only plot II, and those to the defendant included plot I as well as the house. The plaintiff sought a conveyance from the defendant of plot I exclusive of that part on which the house was located. *Held,* that parol evidence of the mistake was admissible, and that the plaintiff was entitled to the equivalent of specific performance. *Craddock Bros. v. Hunt* (1922, Ch.) 128 L. T. R. 13.

Originally English courts made a distinction between executed and executory contracts, admitting parol evidence of mistake in the former for both reformation and specific performance. *Woolam v. Hearn* (1802, Ch.) 7 Ves. 211; *May v. Platt* [1900] 1 Ch. 616. Whether the theory was that such evidence violated the statute of frauds or the parol evidence rule is not clear. Clark, *Equity* (1919) sec. 347. A recent English case held that specific performance of the oral contract would be decreed where the written contract was incorrect but the defendant admitted the true agreement and did not plead the statute of frauds. *Forgione v. Lewis* [1920] 2 Ch. 326. By the majority rule in America fraud, accident, or mistake takes the case out of the statute of frauds and constitutes an exception to the parol evidence rule. *Chilton v. Head* (1922) 193 Ky. 768, 237 S. W. 422; *Atwood v. Mikeska* (1911) 29 Okla. 69, 115 Pac. 1011; 2 Pomeroy, *Equity Jurisprudence* (3d ed. 1905) secs. 862-866. This doctrine is applicable to the instant case, since the plaintiff must claim through the common grantor. By the minority view, however, the court will not, at the suit of the grantee, reform a conveyance which gives him less than his rights under the oral contract. *Glass v. Hulbert* (1869) 102 Mass. 24; *Westbrook v. Harbeson* (1827, S. C.) 2 McC. Eq. 112; 2 Pomeroy, *op. cit.* sec. 867. But at the suit of the grantor it will reform a conveyance which gives the grantee more than the oral bargain gives him. *Goode v. Riley* (1891) 153 Mass. 585, 28 N. E. 228. Part performance or a prior written agreement to which the deed does not conform will, however, take the case out of the statute. *Martin v. LaBoon* (1921) 116 S. C. 97, 107 S. E. 320; *Cooper v. McLaughlin* (1920) 114 S. C. 332, 103 S. E. 523. The evidence of mistake must be clear and convincing; a mere preponderance is insufficient. *Waddell v. Bowdre* (1922) 151 Ark. 474, 236 S. W. 599; *Costello v. Stokely Grain Co.* (1922) 193 Iowa, 203, 186 N. W. 842; 2 Ames, *Cases in Equity Jurisdiction* (1904) 312, note 2. The original English view seems unsound. The strict enforcement of it would permit the perpetration of fraud.