RECENT CASE NOTES

ADMIRALTY—SUITS AGAINST THE UNITED STATES—PLACE OF SUIT.—The plaintiff brought a libel *in personam* against the United States under the provisions of the Suits in Admiralty Act, Act of March 9, 1920 (41 Stat. at L. 525) to prosecute a claim previously enforceable only *in rem*. *Held*, that the action could be brought in any district where an action *in personam* could be brought. *Alsberg v. United States* (1922, S. D. N. Y.) 285 Fed. 573.

Historically the necessity of securing jurisdiction of the ship to assure satisfaction of the judgment led to the development of the libel *in rem*. 1 *Select Pleas in the Court of Admiralty* (1894, 6 Seld. Soc.) lxxii. In this country, suits *in rem* against government vessels were allowed by the Shipping Act, Act of September 7, 1916 (39 Stat. at L. 728); *The Lake Monroe* (1919) 250 U. S. 246, 39 Sup. Ct. 460. But the arrest of government vessels hampered their sale by the Shipping Board and led to the passage of the Suits in Admiralty Act, *supra*, prohibiting such arrest, and providing for suits against the United States with a means of satisfying judgments. See (1920) 59 CONG. REC. 1680, 1685, 3630; *The Caddo* (1922, S. D. N. Y.) 285 Fed. 643, 644. Under this act it has been held that the action *in rem* still exists, only the liability of the government is substituted for the so-called liability of the vessel. *The Isonomia* (1922, C. C. A. 2d) 285 Fed. 516; *Gray Harbor Co. v. United States* (1923, W. D. Wash.) 286 Fed. 444. But such language is open to the objection that the suit and judgment against the government unlike those *in rem* are wholly without effect on any proprietary interest in the vessel. See Hohfeld, *Fundamental Legal Conceptions* (1923) 108, 109. And the statute gives the judgment creditor no rights to the proceeds of the sale of the vessel, nor to any specific money of the government. Thus an analysis of this statutory libel shows that the judgment, the action, and the proceedings are essentially *in personam*. See Cook, *Powers of Courts of Equity: I "In Rem" and "In Personam."* (1915) 15 COL. L. REV. 37. There is some practical convenience in having the trial in the district where the ship is found, as the evidence is likely to be close at hand and the witnesses are available. But it is equally desirable that the plaintiff be able to sue at his residence. Furthermore, the doctrine of the immunity of the government from suit for its civil wrongs arising from the conduct of business, already the object of much sound criticism, should not be extended. *Bank of United States v. Planters' Bank* (1824, U. S.) 9 Wheat. 904; Laski, *The Responsibility of the State in England* (1919) 32 HARV. L. REV. 447; Weston, *Actions against the Property of Sovereigns* (1919) 32 *ibid.* 266, 269; NOTES (1922) 70 U. PA. L. REV. 322, 326. The decision of the instant case adopting all the incidents of the action *in personam*, including venue, is a desirable interpretation of the statute. Lord, *Admiralty Claims Against the Government* (1919) 19 COL. L. REV. 467; COMMENTS (1923) 31 YALE LAW JOURNAL, 879.

ADVERSE POSSESSION—CONSTRUCTIVE ADVERSE POSSESSION OF TRACTS SEPARATELY DESCRIBED IN A VOID DEED.—Claiming under a void deed, which purported to convey several separately described tracts of land, the plaintiff occupied one of such tracts for the statutory period. He sued to recover another tract which he did not occupy. *Held*, that he could not recover. *Georgia Minerals Co. v. Cox* (1923, Ga.) 115 S. E. 770.

Adverse occupation of part of a tract claimed under color of title generally is equivalent to possession of the whole tract. *Jones v. Pond & Decker M'fg. Co.* (1906) 79 Ark. 194, 96 S. W. 756. This rule has been made statutory in some

jurisdictions. *Herbst v. Merrifield* (1896) 133 Mo. 267, 34 S. W. 571; *Scaife v. Western North Carolina Land Co.* (1898, C. C. A. 4th) 90 Fed. 238; see *Barber v. Shaffer* (1886) 76 Ga. 285. But adverse possession of one of several non-contiguous tracts separately described in an invalid deed of conveyance will not be effective as to the others. *Stephenson v. Doe* (1847, Ind.) 8 Blackf. 508; *Dow v. Dow* (1923, Mass.) 137 N. E. 746. The same is true even though the tracts are contiguous, if separately described in a deed. *Loftin v. Cobb* (1854) 46 N. C. 406; *Hornblower v. Banton* (1907) 103 Me. 375, 69 Atl. 568; *contra: Parsons v. Dills* (1914) 159 Ky. 471, 167 S. W. 415; *Brougher v. Stone* (1895) 72 Miss. 647, 17 So. 509; *cf. Overton v. Perry* (1908) 129 Ky. 415, 111 S. W. 369. But where the invalid instrument purports to convey a single body of land, and describes it as composed of several lots or parcels, actual occupation of a single lot is effective as to all. *Johnson v. Simerly* (1892) 90 Ga. 612, 16 S. E. 951; *Webb v. Richardson* (1869) 42 Vt. 465. This fiction of constructive adverse possession is based on the idea that the paper title is evidence of the extent of the claim made by the actual occupancy. It seems reasonable, however, to limit the application of the rule to cases where the actual occupation is not only under color of title, but also notorious, as regards all of the land. See (1909) 23 HARV. L. REV. 56.

ALIENS—CITIZENSHIP—WOMAN'S MARRIAGE TO ALIEN.—An unmarried female alien, who was ordered deported as a feeble-minded person, was allowed, under bond, to land for six months to visit relatives. Within that period she was married in good faith to a citizen of the United States. Her mental condition remained unchanged, and her deportation was ordered. A petition was filed for a writ of *habeas corpus*. *Held,* that she had acquired American citizenship and thus was not subject to deportation under the immigration laws. *United States, ex rel. Sejnensky, v. Tod* (1922, C. C. A. 2d) 285 Fed. 523.

At common law, marriage had no effect on the nationality of a woman. 1 Piggott, *Nationality* (1907) 57; Borchard, *Diplomatic Protection of Citizens Abroad* (1915) 593. But a woman married to a citizen of the United States was deemed to be a citizen by statute. Act of Feb. 10, 1855 (10 Stat. at L. 604); U. S. Rev. Sts. 1878, sec. 1994; U. S. Comp. Sts. 1916, sec. 3948. As the statute was construed after 1910, she could no longer be excluded under the immigration laws. *Hopkins v. Fachant* (1904, C. C. A. 9th) 130 Fed. 839; *In re Nicola* (1911, C. C. A. 2d) 184 Fed. 322; *contra: Ex parte Kaprielian* (1910, D. Mass.) 188 Fed. 694. Before September 22, 1922, the status of the wife followed that of her husband, and any American woman who married a foreigner thereby took his nationality. Act of Mar. 2, 1907 (34 Stat. at L. 1228). *Mackenzie v. Hare* (1915) 239 U. S. 299, 36 Sup. Ct. 106; Borchard, *op. cit.* 598, 685. The instant case is then unquestionably sound. The national status of a married woman was, however, changed by the Act of September 22, 1922 (42 Stat. at L. 1021) providing that she shall not become a citizen of the United States by reason of marriage; nor cease to be a citizen thereby, unless she marries an alien ineligible to citizenship. As to expatriation, this seems to be a reversion to her status prior to the Act of 1907, when she lost her nationality only by marrying and removing with an alien to his country. *Shanks v. Dupont* (1830, U. S.) 3 Pet. 242; *Comitis v. Parkerson* (1893, E. D. La.) 56 Fed. 556; *Ruckgaber v. Moore* (1900, E. D. N. Y.) 104 Fed. 947. But while, under the Act of 1907, an American woman regained her citizenship through her husband's naturalization, under the present act it seems that she may be regarded as an alien, while her foreign born husband possesses the privileges of citizenship. The present Act leaves unremedied the possibility of statelessness of an American woman who follows her husband, where, as in Brazil, his country does not confer his nationality upon her; and creates the possibility of a similar result for the alien woman

who comes here to marry an American, where by the law of her country she is thus expatriated. For a criticism of the present Act before its passage, see Flournoy, *Naturalization and Expatriation* (1922) 31 YALE LAW JOURNAL, 848, 866.

CARRIERS—CONTRACT OF HIRE CONSTITUTING COMMON CARRIER.—By statute, motor vehicles used in the public transportation of passengers for hire over state roads were declared to be common carriers and the owners of such vehicles were required to secure a permit from the Public Service Commission. 4 Md. Ann. Code, 1918, sec. 189, art. 56; Md. Laws, 1920, ch. 677, sec. 1. A hired his truck to B, agreeing to transport twice daily between two designated points such persons as B desired, A to furnish a driver at his own expense. B agreed to pay A a stipulated sum for each trip and an additional amount for every passenger beyond a fixed number. No permit was obtained. The Public Service Commission sought to enjoin A and B from so operating the truck. *Held,* that the injunction should issue since A and B were common carriers. *Goldsworthy v. Maloy* (1922, Md.) 119 Atl. 693.

To enable the state more effectively to exercise control the legislature has denominated certain instrumentalities of commerce and travel common carriers. See Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135. The result involved in each individual case seems to have swayed the courts in classifying a carrier as "common" or "private." A special contract of hire is merely one circumstance to be considered in the classification. *Campbell v. A. B. C. Storage & Van Co.* (1915) 187 Mo. App. 565, 174 S. W. 140 (lien claimed on goods transported). So a ship chartered to transport a specific cargo has been exempted from a common carrier's liability for goods damaged. *The Dan* (1889, S. D. N. Y.) 40 Fed. 691. A railroad hauling over its lines a special train of circus cars may stipulate against liability for damages since it is not a common carrier. *Chicago, M. & St. P. Ry. v. Wallace* (1895, C. C. A. 7th) 66 Fed. 506. A garagekeeper who furnishes automobiles on orders is not a common carrier for purposes of regulation. *Terminal Taxicab Co. v. Dist. of Col.* (1916) 241 U. S. 252, 36 Sup. Ct. 583. Nor is he bound to a common carrier's standard of care for the safety of passengers. *Forbes v. Reinman & Wolfort* (1914) 112 Ark. 417, 166 S. W. 563. But one who engages in renting his automobile at a fixed stand has been deemed a common carrier and hence subject to regulation. *Cushing v. White* (1918) 101 Wash. 172, 172 Pac. 229. A common carrier is not divested of its character as such merely because it serves a particular or limited group of customers. *Terminal Taxicab Co. v. Dist. of Col., supra.* So a railroad transporting miners to and from their work under a contract of hire with their employer under an arrangement similar to that in the principal case was held responsible as a common carrier for injuries received by a miner while so riding. *Vandalia Ry. v. Stevens* (1917) 67 Ind. App. 238, 114 N. E. 1001. And a jitney-line which had contracted with a municipality to carry passengers between certain points was amenable to criminal prosecution for failure to obtain a permit required of common carriers. *State v. Ferry Line Auto Bus Co.* (1916) 93 Wash. 614, 161 Pac. 467. In the instant case the court strongly suggested that the contract contemplated the solicitation of business. But the result effectuates the apparent intent of the legislature to subject such businesses to regulation. There may, however, be some doubt whether the holding necessarily calls for the imposition on the defendants of all the duties and liabilities of a common carrier. But see *Terminal Taxicab Co. v. Dist. of Col., supra; cf.* Adler, *op. cit.* 144, 145.

CARRIERS—PROPRIETOR OF AMUSEMENT DEVICE NOT A COMMON CARRIER—DEGREE OF CARE REQUIRED.—The plaintiff paid a fare to ride on the defendant's aeroplane swing. The swing broke and the plaintiff was injured. In a suit for damages,

the court charged that the defendant was required to exercise the highest degree of care and skill which may reasonably be expected of persons engaged in that business. *Held,* that since the defendant was not a common carrier, the charge was error. *Firszt v. Capitol Park Realty Co.* (1923, Conn.) 120 Atl. 300.

Although the cases are in conflict, the weight of authority seems to be that the proprietor of an amusement device is not a common carrier, and, therefore, he is not held to the standard of the highest degree of care generally required of such a carrier. So, the proprietor of an undulating floor known as an "ocean wave" has been held to the standard of only ordinary care. *Carlin v. Krout* (1923, Md.) 120 Atl. 232; *contra: Tenn. State Fair Ass'n. v. Hartman* (1916) 134 Tenn. 149, 183 S. W. 735. But the proprietor of a scenic railway has been considered a common carrier. *O'Callaghan v. Dellwood Park Co.* (1909) 242 Ill. 336, 89 N. E. 1005; *Best Park & Amusement Co. v. Rollins* (1915) 192 Ala. 534, 68 So. 417; but see *contra: Lumsden v. Thompson Scenic Ry. Co.* (1909) 130 App. Div. 209, 114 N. Y. Supp. 421; *Pointer v. Mountain Ry. Construction Co.* (1916) 269 Mo. 104, 189 S. W. 805; *Linthicum v. Truitt* (1911, Del.) 2 Boyce, 338, 80 Atl. 245 (merry-go-round); *Meisner v. Detroit Ferry Co.* (1908) 154 Mich. 545, 118 N. W. 14; 26 L. R. A. (N. S.) 1054, note; Ann. Cas. 1915B, 546, note. The distinction, according to the principal case, is not in the nature of the instrumentality but in the occasion for its use—transportation as distinguished from amusement. But such a distinction is difficult of application to such cases as the sight-seeing bus or the observation train at a boat race. See *Hinds v. Steere* (1911) 209 Mass. 442, 95 N. E. 844. Historically the distinction may be sound as the law of passenger carriers developed by analogy from the law of carriers of goods where a "holding out" to the public was the test of its "common" character. *Fish v. Chapman* (1847) 2 Ga. 349; *cf. Central Ry. v. Lippman* (1900) 110 Ga. 665, 36 S. E. 202. On policy it seems desirable, however, to require a high degree of care from the proprietor of a dangerous instrumentality. The attempt to differentiate between those cases would have been unnecessary had the courts not attempted to distinguish beween degrees of care. Such distinction has been often criticized. *Steamboat New World v. King* (1853, U. S.) 16 How. 469, 474; *Dickerson v. Conn. Co.* (1922) 98 Conn. 87, 118 Atl. 518; but see *Astin v. Chicago Ry.* (1910) 143 Wis. 477, 128 N. W. 265; see (1922) 31 YALE LAW JOURNAL, 555. A few courts have even held erroneous instructions which require of a common carrier the "highest degree of care." *Union Traction Co. v. Berry* (1919) 188 Ind. 514, 121 N. E. 655; *O'Brien v. New York Rys.* (1919) 185 App. Div. 867, 174 N. Y. Supp. 116; see *Kelleher v. Atkinson* (1922) 201 App. Div. 876, 193 N. Y. Supp. 939; (1919) 19 COL. L. REV. 166. It seems that the rule of due care, or care proportioned to the danger, should apply even to common carriers. The elusive nature of any distinctions between degrees of care is indicated in the instant case, for the court says that the jury should be instructed that as to the device in question ordinary care required more supervision of its use than in the case of a device with little or no danger.

CONFLICT OF LAWS—RECOGNITION OF DIVORCE GRANTED IN FOREIGN COUNTRY.—After marriage the plaintiff and the defendant became domiciled in New York. Subsequently they resided in France for several years, but retained their original domicile. The defendant procured a divorce in a French court on the ground of adultery, the plaintiff in the same action asking for affirmative relief. Later the plaintiff brought this suit for divorce. *Held,* that the French decree was a bar to the action. *Gould v. Gould* (1923, N. Y.) 138 N. E. 490.

A divorce granted by one state having jurisdiction is binding upon a sister state by virtue of the full faith and credit clause. *Haddock v. Haddock* (1906) 201 U. S. 562, 26 Sup. Ct. 525; *Thompson v. Thompson* (1913) 226 U. S. 551, 33 Sup. Ct. 129; see COMMENTS (1917) 26 YALE LAW JOURNAL, 319. But the

validity of such a decree by the court of a foreign nation is to be decided by each state for itself upon principles of comity. Minor, *Conflict of Laws* (1901) sec. 4. However, divorces granted in the country in which both parties were domiciled are universally recognized. *Kapigan v. Der Minassin* (1912) 212 Mass. 412, 99 N. E. 264 (Mohammedan); *Miller v. Miller* (1911, Sup. Ct.) 70 Misc. 368, 128 N. Y. Supp. 787 (rabbinical); *Wall v. Williamson* (1845) 8 Ala. 48 (Indian tribal). In Anglo-American law, jurisdiction over the *res*, the marital status, depends upon domicile. Minor, *op. cit.* sec. 88. And, as a rule, the domicile of either spouse has sufficient jurisdiction for a decree of its courts to be recognized in other countries. *Cheever v. Wilson* (1869, U. S.) 9 Wall. 108; *Lie v. Lie* (1916, Sup. Ct.) 96 Misc. 3, 159 N. Y. Supp. 748. But a dissolution of marriage in a nation where neither spouse is domiciled is not accorded extra-territorial validity. *Sure v. Lindefelt* (1892) 82 Wis. 346, 52 N. W. 308. And the consent of the parties in submitting to a foreign court is held not to give jurisdiction over their status. *Andrews v. Andrews* (1903) 188 U. S. 14, 23 Sup. Ct. 237. The party invoking a foreign jurisdiction, however, may be personally estopped to deny its competency. *Starbuck v. Starbuck* (1903) 173 N. Y. 503, 66 N. E. 193. But the decree may usually be attacked by third parties. *Andrews v. Andrews, supra* (second wife); *German Savings and Loan Society v. Dormitzer* (1904) 192 U. S. 125, 24 Sup. Ct. 221 (heirs); see COMMENTS (1919) 28 YALE LAW JOURNAL, 821. In view of the absence of domicile the liberal recognition of the foreign divorce decree by the court in the instant case may be supported on the ground of estoppel. Furthermore it seems desirable for the forum to concede its sovereignty when its own laws are not eluded or its local policy offended.

CONTEMPT—CONSTRUCTIVE CONTEMPT—CLAYTON ACT PROVISION FOR JURY TRIAL.—The defendants, members of an organization enjoined from committing certain acts, were ordered to show cause in contempt proceedings for violation of the injunction. The defendants denied the alleged acts and demanded a jury trial, under sections 21 and 22 of the Clayton Act. Act of Oct. 15, 1914 (38 Stat. at L. 730, 738). *Held*, that even if the Act applied to the facts in this case, the jury trial provision was unconstitutional. *In re Atchison* (1922, S. D. Fla.) 284 Fed. 604.

Acts in derogation of the authority of a court, resulting in punitive proceedings, constitute criminal contempts; those resulting in proceedings to right civil wrongs constitute civil contempt. *Gompers v. Buck Stove & R. Co.* (1911) 221 U. S. 418, 441, 31 Sup. Ct. 492, 498. Procedural differences and a lack of power in executive departments to pardon for civil contempt make this classification important. Beale, *Contempt of Court, Criminal and Civil* (1908) 21 HARV. L. REV. 161; NOTES (1912) 25 *ibid.* 375; NOTES (1921) 5 MINN. L. REV. 459; (1923) 36 HARV. L. REV. 617 (pardoning power). Direct contempts necessitate the use of summary proceedings; statutory provisions for jury trial where they exist at all in this relation deal only with constructive contempts. 1 Ga. Code, 1911, 1095, 1096; 1 Bunn's Okla. Comp. Sts. 1921, 121 (constitutional provision); see Cheney, *Jury Trials in Contempt Cases* (1914) 78 CENT. L. JOUR. 183; see Beale, *op. cit.* 172, 173. The power to punish for contempt is less subject to interference by legislatures in the case of courts created by a constitution than in courts of legislative creation. *Cf. Ex Parte Robinson* (1873, U. S.) 19 Wall. 505, 510; Rapalje, *Contempts* (1884) 12; 16 Ann. Cas. 759, note. Legislative attempts to provide for jury trials of persons accused of contempt in constitutionally created courts have been held invalid. *Carter's Case* (1899) 96 Va. 791, 32 S. E. 780; *Walton Lunch Co. v. Kearney* (1920) 236 Mass. 310, 128 N. E. 429; see NOTES and COMMENT (1921) 6 CORN. L. QUART. 329. A jury trial of a contempt charge

has been granted under sections 21 and 22 of the Clayton Act, *supra*. *Tosh v. West Kentucky Coal Co.* (1918, C. C. A. 6th) 252 Fed. 44, 45. Some equity courts have referred the determination of facts in indirect contempt proceedings to masters. *Merchants' S. & G. Co. v. Board of Trade of Chicago* (1912, C. C. A. 8th) 201 Fed. 20, 29; *Huttig Sash & Door Co. v. Fuelle* (1906, E. D. Mo.) 143 Fed. 363, 375; *Seastream v. N. J. Exhibition Co.* (1907) 72 N. J. Eq. 377, 65 Atl. 982. For discussions of related matters, see 38 Ann. Cas. 1048, note (contempt procedure in federal courts); 8 A. L. R. 1543, note (location of contempt power). Power to punish for contempt is an inherent judicial function. It seems better policy to construe constitutions liberally, and allow legislation providing jury trials in proceedings for criminal constructive contempt of court. See also NOTES (1923) 23 COL. L. REV. 375.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE DUE TO FOREIGN LAW—QUASI-CONTRACTUAL RECOVERY.—The plaintiff deposited dollars with the defendant bank which agreed to open an account in roubles in the plaintiff's name in the defendant's branch bank in Russia. A small part of this account was so paid to the plaintiff. Later all Russian bank funds were confiscated by the Soviet Government. The plaintiff sued to recover the balance of his deposit. *Held*, that the plaintiff could not recover. *Sokoloff v. National City Bank of New York* (1923, Sup. Ct.) 120 Misc. 252.

The rule that subsequent impossibility of performance does not excuse the promisor from the duty to perform, has gradually given way before judicial implications of conditions to excuse performance where impossibility intervenes. *Paradine v. Jane* (1647, K. B.) Aleyn, 26; see *Baily v. De Crespigny* (1869) L. R. 4 Q. B. 180; *Taylor v. Caldwell* (1863, Q. B.) 3 Best & Smith, 826; (1918) 27 YALE LAW JOURNAL, 953; Anson, *Contracts* (Corbin's ed. 1919) sec. 376. The modern tendency is to excuse the defendant even in situations where performance by him is not, in fact, impossible, but where the condition or state of things which formed the basis of the contract has ceased to exist. *Horlock v. Beal* [1916, H. L.] 1 A. C. 486; *The Kronprinzessin Cecilie* (1917) 244 U. S. 12, 37 Sup. Ct. 490; *Columbus Trust Co. v. Moshier* (1906, Sup. Ct.) 51 Misc. 270; *aff'd.* 193 N. Y. 660, 87 N. E. 1117; (1922) 10 CALIF. L. REV. 337; (1918) 31 HARV. L. REV. 640; 3 A. L. R. 21, note; L. R. A. 1916F, 10, note. The same rule has often, and correctly, been applied, although by a minority of the courts, where the impossibility is due to foreign law. See *Ford v. Cotesworth* (1870, Exch. Ch.) L. R. 5 Q. B. 544; *Cunningham v. Dunn* (1878, C. A.) L. R. 3 C. P. Div. 443; Anson, *op. cit.* sec. 378; *contra: Tweedie v. McDonald Co.* (1902, S. D. N. Y.) 114 Fed. 985. It seems in the instant case that the defendant's failure to perform would not be an actionable breach; but this is no reason for allowing him to enrich himself at the expense of the plaintiff. Keener, *Quasi-Contracts* (1893) 292. According to the weight of American authority, the defendant must compensate the plaintiff for benefits received. *Callahan v. Shotwell* (1876) 60 Mo. 398; *Hudson v. Hudson* (1891) 87 Ga. 678, 13 S. E. 583; *Butterfield v. Byron* (1891) 153 Mass. 517, 27 N. E. 667; *Dolan v. Rodgers* (1896) 149 N. Y. 489, 44 N. E. 167; *Jones v. Judd* (1863) 4 N. Y. 411. The English courts adopt a contrary view. *Appleby v. Myers* (1867) L. R. 2 C. P. 651. While the plaintiff would normally sue to recover the sum he has paid under the contract, yet where the defendant, according to the intention of the parties, converted that payment into foreign currency of speculative value, with the understanding that the loss or profit arising from the change of value should go to the plaintiff, it seems proper to allow him to recover the value of his right at the time of impossibility. See Woodward, *Quasi-Contracts* (1913) sec. 125; *cf.* (1922) 31 YALE LAW JOURNAL, 418; 32 *ibid.* 179.

PARTNERSHIP—INTEREST OF PARTNER IN SPECIFIC FIRM REAL ESTATE—A partnership purchased real estate for resale, taking the conveyance in the individual names of the two partners. On the decease of one of the partners the survivor, having contracted to sell the property in administering the firm business, brought a bill in equity to test whether the heirs of the deceased had an interest in the specific property that had been purchased. *Held,* that under the Uniform Partnership Act, sec. 26, the heirs had no interest in the specific property, but only the deceased's interest in the partnership, which was personalty. *Wharf v. Wharf* (1922, Ill.) 137 N. E. 446.

Partners may own real estate in their partnership right, even though the deed to the property is in their individual names. *McKleroy v. Musgrove* (1919) 203 Ala. 603, 84 So. 280; Burdick, *Partnership* (1917) 101. There is a conflict, however, as to whether a partner's interest in firm real estate is specific and subject to the law of real property. In the case of personal property, the partner's interest is undivided and relates to the partnership assets as a whole. *Jensen v. Wiersma* (1919) 185 Iowa, 551, 170 N. W. 780; see 4 A. L. R. 300, note. The English courts have long held to the same rule in regard to partnership real estate, treating such property as equitably converted into personalty and so entirely merged into the partnership fund. *Darby v. Darby* (1856, Ch.) 3 Drewry, 495. This result is now statutory. (1890) 53 & 54 Vict. c. 39, sec. 22. By the majority American rule, in the absence of governing stipulations between the parties, partnership real estate is treated as personalty only to the extent that it is needed to pay partnership debts. *Priestley v. Treas. and Receiver General* (1918) 230 Mass. 452, 120 N. E. 100; 37 L. R. A. (N. S.) 900, note. So the widow of a deceased partner is entitled to dower in that part of the real estate not needed to pay such debts. *Woodward-Holmes Co. v. Nudd* (1894) 58 Minn. 236, 59 N. W. 1010; 27 L. R. A. 340, note. And where the personal property is sufficient to pay firm debts, the interest of the deceased partner in the specific realty passes directly to his heirs according to the laws of real estate succession. *Weitz v. Weitz* (1921) 15 Ohio App. 134. But even by the American rule, real estate purchased by a partnership for resale is treated as personalty between the partners. *Parish v. Bainum* (1920) 291 Ill. 374, 126 N. E. 129 (dissolution of partnership and distribution of assets); (1920) 15 ILL. L. REV. 122. The Uniform Partnership Act, adopted in 14 states, was intended to embody the English rule under section 26. Lewis, *The Uniform Partnership Act* (1915) 24 YALE LAW JOURNAL, 617, 637. The instant case, decided under this act, changes the previous Illinois rule. *Galbraith v. Tracy* (1894) 153 Ill. 54, 38 N. E. 937. The result reached is desirable, inasmuch as it effects a simpler administration of partnership assets by overcoming the practical difficulty of assigning specific property to the individual partners or their heirs.

SALES—BREACH OF IMPLIED WARRANTY—EFFECT OF PROVISION FOR RETURN.—The plaintiff contracted to sell the defendant a quantity of silk thread. The contract provided that all shipments should be tested by the buyer and returned within fifteen days if unsatisfactory. The thread was on spools and the defects were not discovered until it was unwound and made into fabric. In a suit for the price, the buyer counterclaimed for damages. *Held,* (one judge *dissenting*) that it was a question for the jury whether the parties intended by the contract to negative the implied warranty under Personal Property Law (N. Y. Cons. Laws, 1909, ch. 41 as amended by Laws, 1911, ch. 571, sec. 96; Uniform Sales Act, sec. 15). *Wilbur-Dolson Silk Co., Inc. v. William Wallach Co., Inc.* (1923, Sup. Ct.) 120 Misc. 340, 198 N. Y. Supp. 243.

The seller's liability for the breach of an implied warranty of quality generally survives acceptance, where the defects are latent and undiscoverable by inspection. Uniform Sales Act, sec. 49; *Preist v. Last* [1903, C. A.] 2 K. B. 148;

see *Carleton v. Lombard, Ayres & Co.* (1896) 149 N. Y. 137, 43 N. E. 422; Williston, *Sales* (1909) secs. 232, 234. By the better view, these implied warranties remain effective unless inconsistent with the warranties expressed in the contract of sale. *Hansmann v. Pollard* (1911) 113 Minn. 429, 129 N. W. 848; Uniform Sales Act, sec. 15 (6). But at common law it is generally held that an express warranty excludes an implied warranty of quality where both cover the same or closely related subjects. *Somerville v. Gullett Gin Co.* (1917) 137 Tenn. 509, 194 S. W. 576; *Monroe v. Hickox Co.* (1906) 144 Mich. 30, 107 N. W. 710; but see Mich. Comp. Laws, 1915, ch. 228 (Sales Act), sec. 15 (6). Many courts extend this rule, and hold that an express warranty of quality excludes any implied warranty of merchantability or fitness. *DeWitt v. Berry* (1890) 134 U. S. 306, 10 Sup. Ct. 536; but see *Guhy v. Nichols & Shepherd Co.* (1908) 33 Ky. L. Rep. 237, 109 S. W. 1190 (express warranty held to exclude all implied warranties). The parties may clearly nullify any or all implied warranties by express provisions in the contract. *Burntisland Shipbuilding Co. v. Barde Steel Products Corporation* (1922, D. Del.) 278 Fed. 552; Uniform Sales Act, sec. 71; Sale of Goods Act (1894) 56 & 57 Vict. c. 71, sec. 55. But even in such a case it has been held that the buyer may recover for non-compliance with description where the defects are not discoverable by inspection. *Wallis v. Pratt* [1911, H. L.] A. C. 394; *contra: Leonard Seed Co. v. Crary Canning Co.* (1911) 147 Wis. 166, 132 N. W. 902; 37 L. R. A. (N. S.) 79, note; *Kibbe v. Woodruff* (1920) 94 Conn. 443, 109 Atl. 169. The same rule is applicable where the contract by its terms limits the remedies of the buyer to a return of the goods. *Elgin Jewelry Co. v. Estes and Dozier* (1905) 122 Ga. 807, 50 S. E. 939; *Main v. Dearing and Wallace* (1905) 73 Ark. 470, 84 S. W. 640. The reasoning is that the effectiveness of the limitation is itself conditional on compliance with the description. *Cf.* (1923) 32 YALE LAW JOURNAL, 739. It often seems desirable, however, to consider the intention of the parties as a question of fact rather than to construe the contract by applying fixed rules of law. Pennsylvania has enacted the rule of the instant case in interpreting all contracts of sale purporting to vary or negative implied obligations. Uniform Sales Act, sec. 71, as modified by Pa. Laws, 1915, No. 241, sec. 71.

SPECIFIC PERFORMANCE—PAROL CONTRACT WITHIN STATUTE OF FRAUDS—POSSESSION AS SUFFICIENT PART PERFORMANCE.—In the ejectment action the defendant counterclaimed for specific performance of the oral contract of purchase under which she had taken possession of the premises and occupied without payment of rent for two years. *Held,* that the defendant could have specific performance. *Bradley v. Loveday* (1922) 98 Conn. 315, 119 Atl. 147.

The English doctrine that possession alone is sufficient part performance to take an oral contract out of the Statute of Frauds has some standing in America by reason of numerous *dicta* accepted by commentators. *Butcher v. Stapely* (1685, Ch.) 1 Vern. 363; *Wharton v. Stoutenburgh* (1882) 35 N. J. Eq. 266; *Eaton v. Whitaker* (1846) 18 Conn. 222; 1 Ames, *Cases in Equity Jurisdiction* (1904) 279, note 1; Pomeroy, *Specific Performance* (2d ed. 1897) sec. 96; (1920) 29 YALE LAW JOURNAL, 462. In some states, it has been expressly repudiated. *Baldridge v. Centgraf* (1910) 82 Kan. 240, 108 Pac. 83; *Glass v. Hulbert* (1869) 102 Mass. 24. Whether possession alone is a sufficient part performance seems to depend on the theory upon which the court bases its willingness to act. Some courts enforce the parol agreement where it would be a "virtual fraud" on the vendee to permit the vendor to set up the Statute of Frauds after he had allowed acts to be done in reliance on the contract. Pomeroy, *op. cit.* sec. 104; *Miller v. Ball* (1876) 64 N. Y. 286; COMMENTS (1915) 24 YALE LAW JOURNAL, 426. Under this theory it seems that possession alone would not put the vendee in a position of material hardship. See *Glad-*

ville v. McDole (1910) 247 Ill. 34, 41, 93 N. E. 86, 88. Other courts grant specific performance to protect the vendee from an action for trespass. *Clinan v. Cooke* (1802, Ch.) 1 Sch. & Lef. 22; *Ham v. Goodrich* (1856) 33 N. H. 32. But one in possession without doing other acts may be fully protected in this respect by showing the parol agreement as a license. *Ann Berta Lodge v. Leverton* (1875) 42 Tex. 18; (1920) 29 YALE LAW JOURNAL, 462. A third theory is that equity acts only to prevent "irreparable injury." *Burns v. Daggett* (1886) 141 Mass. 368, 6 N. E. 727; *Clinchfield Coal Co. v. Steinman* (1914, C. C. A. 4th) 217 Fed. 875; NOTES (1904) 18 HARV. L. REV. 137. The courts under this theory seem to require in addition to possession permanent improvements of such a nature that specific performance alone would be adequate redress. *Cobb v. Johnson* (1908) 101 Tex. 440, 108 S. W. 811. The instant case seems to follow the theory that acts unequivocally referring to some contract are a substituted evidence for the required writing. *Morphett v. Jones* (1818, Ch.) 1 Swanst. 172; *Eaton v. Whitaker, supra; cf. Dickinson v. Barrow* [1904] 2 Ch. 339. Here the suggestive act is said to be possession, but the fact that the possession was undisturbed for a considerable time weakens the force of the assertion that possession alone is enough. The theory of the case may be criticised as a contravention of the Statute of Frauds. It seems that equity should disregard the statute only when the decree of specific performance will be the only means of preventing irreparable injury. *Cf. Clinchfield Coal Co. v. Steinman, supra.*

TAXATION—CONTINGENT REMAINDERS.—The testator devised property to trustees in trust for his son and daughter for life, with general powers of appointment of the remainder. The trustees appealed from an order of the surrogate that, subject to any refund eventually necessary, the remainder was presently taxable upon the death of the testator, at the rate applicable to devisees unrelated to the testator. *Held,* that the assessment was proper. *Matter of Cole* (1923) 235 N. Y. 48, 138 N. E. 733.

Some states under their statutes do not levy taxes on contingent estates until the remainderman comes into possession. *McLemore v. Raine's Estate* (1915) 131 Tenn. 637, 176 S. W. 109; *Moors v. Treasurer* (1921) 237 Mass. 254, 129 N. E. 364; *State v. Probate Court* (1907) 100 Minn. 192, 110 N. W. 865. This is the construction given the federal act taxing beneficial interests in land. Act of June 13, 1898 (30 Stat. at L. ch. 448, sec. 29); *Kahn v. United States* (1921) 257 U. S. 244, 42 Sup. Ct. 85. In New Jersey, this construction is, by statuute, applied to powers of appointment. *Security Trust Co. v. Edwards* (1917) 90 N. J. L. 579, 101 Atl. 383. In some states the demand for the tax is postponed until the remainderman comes into possession but it may be paid at any prior time, and at a rate applicable when payment is made. *Estate of De Borbon* (1905) 211 Pa. 623, 61 Atl. 244; see *McLemore v. Raine's Estate, supra.* In Wisconsin the tax becomes a lien at the time of the owner's death but payment is postponed until the estate becomes vested, at which time the property is valued. See *State v. Pabst* (1909) 139 Wis. 561, 121 N. W. 351. But in Minnesota, the tax is always computed upon the value at the time of the owner's death. *State v. Probate Court* (1910) 112 Minn. 279, 128 N. W. 18. The statute in Illinois, like that in New York, makes the estate presently taxable at the highest rate at which, on the happening of any of the contingencies, it might be taxed. *People v. Starring* (1916) 274 Ill. 289, 113 N. E. 627. Under this rule as applied in the instant case full protection is given the state, at the expense of tying up the ultimate settlement of the estate until the happening of the contingency. Warren, *The Progress of the Law* (1920) 33 HARV. L. REV. 556, 572; but see *In re Pratt's Estate* (1921) 60 Mont. 526, 199 Pac. 711. See also Gleason and Otis, *Inheritance Taxation* (3d ed. 1922) 261; Ross, *Inheritance Taxation* (1912) 126.

WORKMEN'S COMPENSATION—DEPENDENCY OF CHILDREN AFTER DIVORCE DECREE.—In a decree of divorce awarding custody to the mother, the father was ordered to pay three dollars a week for the support of the child. Subsequently the father was accidentally killed and the child brought action under the Workmen's Compensation Act, which provided that children under the age of sixteen years "shall be conclusively presumed to be wholly dependent . . . upon a parent who was at the time of his death legally bound to support although living apart from such child or children." Mass. Gen. Laws, 1921, ch. 152, sec. 32. *Held*, that this conclusive presumption of dependency did not apply to a child whose custody had been taken away from the deceased by a divorce decree. *Miller's Case* (1923, Mass.) 138 N. E. 254.

Actual dependency of a child upon a parent will support a claim under workmen's compensation acts. *Johnson Coffee Co. v. McDonald* (1920) 143 Tenn. 505, 226 S. W. 215; Harper, *The Law of Workmen's Compensation* (2d ed. 1920) sec. 138. The acts often provide for "conclusive presumptions" of dependency. *Ninneman v. Industrial Commission of Wisconsin* (1920) 171 Wis. 190, 176 N. W. 909; *Pacific Gold Dredging Co. v. Industrial Accident Commission* (1920) 184 Calif. 462, 194 Pac. 1; Conn. Pub. Acts, 1921, ch. 305, sec. 5. So under some statutes where the child is under a certain age. *Johnson Coffee Co. v. McDonald, supra;* Tenn. Pub. Acts, 1919, ch. 123, sec. 30. In others where a child under a certain age is living with its parent. Me. Laws, 1919, ch. 238, sec. 1; Mich. Comp. Laws, 1922, sec. 5436; R. I. Acts, 1912, ch. 831, art. II, sec. 7. Several statutes, as in the instant case, also provide for such a "conclusive presumption" if the parent was legally bound to support the child. *Stephens v. Stephens* (1921, Ind. App.) 132 N. E. 747 ("upon whom the laws of the state impose the obligation to support"); *Sherer & Co. v. Industrial Accident Commission* (1920) 182 Calif. 488, 188 Pac. 798 ("legally liable" for maintenance); Calif. Gen. Laws, 1915, act 2144 a, sec. 19; Harper, *op. cit.* sec. 129. The expression "duty to support" is used in connection with children in a variety of different senses. COMMENTS (1923) 32 YALE LAW JOURNAL, 825. "Duty to support" in the sense of duty to pay for necessaries furnished the child by third parties has been held in Massachusetts to depend upon the right to custody. *Brow v. Brightman* (1883) 136 Mass. 187. From this the court reasons that there is no duty of support and therefore no "conclusive presumption" of dependency in the instant case. But in this same sense there is no "duty of support" where the father is actually supporting the child, although dependency in such a case is obvious. 4 Ann. Cas. 1188, 1189, note; see *Lufkin v. Harvey* (1915) 131 Minn. 238, 239, 154 N. W. 1097. It seems that the divorce decree in the instant case created a clear "duty to support." The decision may be justified, however, on the ground that the child does not come within the "conclusive presumption" of total dependency, since the award itself was admittedly insufficient for complete support. See *Sherer & Co. v. Industrial Accident Commission, supra,* at p. 490, 188 Pac. at p. 799. Viewed in any other light the decision is at variance with the clear policy of the Act. See Schouler, *Domestic Relations* (6th ed. 1921) sec. 796; *Winner v. Shucart* (1919) 202 Mo. App. 176, 215 S. W. 905 (recovery by mother for child's support though father had no custody); *Panther Creek Mines v. Industrial Commission* (1921) 296 Ill. 565, 130 N. E. 321 (same under Workmen's Compensation Act); *Industrial Commission v. Drake* (1921, Ohio) 134 N. E. 465 (same); *Sherer & Co. v. Industrial Accident Commission, supra* (same); *Western & A. Ry. v. Williams* (1918) 22 Ga. App. 192, 95 S. E. 738 (father under duty to support after a divorce decree); *Continental Casualty Co. v. Pillsbury* (1919) 181 Calif. 389, 184 Pac. 658 (a legal duty of support after a decree of maintenance).