# RECENT CASE NOTES

BANKRUPTCY—SURETY ON ATTACHMENT BOND CONDITIONED UPON FINAL JUDGMENT NOT RELEASED BY PRINCIPAL'S BANKRUPTCY.—The defendant became surety on a bond given to release an attachment of the principal's property and conditioned upon final judgment. The principal was declared bankrupt within four months of the attachment and the final judgment entered against him remained unsatisfied. The defendant pleaded the bankruptcy adjudication as a defense to a suit on the bond. *Held*, that the surety was not released. *Andrews v. Jones* (1924, R. I.) 125 Atl. 356; *Andrews v. Fain* (1924, R. I.) 125 Atl. 357.

Two types of suretyship bond may be given to release property attached as security pending suit: one, a forthcoming bond conditioned to restore the specific property levied on or to pay the value thereof; the other, a bond conditioned upon final judgment, entry of judgment making the surety's obligation absolute. See *Shumack v. Art Metal Co.* (1911) 84 Conn. 331, 336, 80 Atl. 290, 293; Spencer, *Suretyship* (1913) sec. 282, 283. U. S. Comp. Sts. 1916, sec. 9651 (f) dissolves all attachment liens obtained against an insolvent person within four months prior to the debtor's petition in bankruptcy but does not affect the judgment. *Metcalf v. Barker* (1902) 187 U. S. 165, 174, 23 Sup. Ct. 67, 71; *Guaranty Security Co. v. Oppenheimer* (1923) 243 Mass. 324, 137 N. E. 644. So a surety on a bond conditioned to restore the attached property is discharged by his principal's bankruptcy within four months of the attachment, since the bankruptcy destroys the surety's privilege of extinguishing his duty by having the released property returned to the creditor. *Wise Coal Co. v. Columbia Zinc & Lead Co.* (1911) 157 Mo. App. 315, 138 S. W. 67; *Casady v. Hartzell* (1915) 171 Iowa, 325, 151 N. W. 97. And as the bankruptcy of the principal does not take away any similar privilege from the surety on a bond conditioned upon final judgment, such a surety is not discharged. *Pope v. Title G. & S. Co.* (1913) 152 Wis. 611, 140 N. W. 348; *Marks v. Outlet Clothing Co.* (1923) 122 Me. 448, 120 Atl. 427; 1 Collier, *Bankruptcy* (13th ed. 1923) 587. Due to the similarity of purpose of the two types of bond, i. e. to release the attachment, some courts have confused the results flowing from each and have discharged the surety regardless of the condition in the bond. *Muhlhauser Brewing Co. v. Simms* (1911) 129 La. 134, 55 So. 739; *Crook-Horner Co. v. Gilpin* (1910) 112 Md. 1, 75 Atl. 1049; COMMENTS (1917) 5 CALIF. L. REV. 335. The instant case is apparently sound in giving a different legal effect to the differing intentions of the obligee as expressed in the terms of the bond. See Glenn, *Surety's Right to Indemnity* (1922) 31 YALE LAW JOURNAL, 582, at pp. 596, 597.

BANKS AND BANKING—COLLECTION—RESPONSIBILITY FOR NEGLIGENCE OF SUB-AGENT.—The plaintiff deposited in a local bank an out-of-town check which was duly sent to the defendant bank for collection. Through the defendant's negligence the collection was not made before the drawee bank failed. The plaintiff sued the defendant for negligence. *Held*, that the plaintiff could not recover. *City of Douglas v. Federal Reserve Bank of Dallas* (1924, W. D. Tex.) 300 Fed. 573.

When a bank has undertaken to collect a negotiable instrument for another bank and negligently fails to collect, under the Massachusetts rule it alone is responsible to the depositor. *Dorchester Bank v. New England Bank* (1848, Mass.) 1 Cush. 177; *Lord v. Hingham Nat. Bank* (1904) 186 Mass. 161, 71 N. E. 312; COMMENT (1924) 12 CALIF. L. REV. 209. Under the New York rule the bank of deposit is alone responsible to him. *Revere Bank v. Bank of Republic* (1902) 172 N. Y. 102, 64 N. E. 799. And each sub-agent is responsible only to its immediate principal. *Gilpin v. Columbia Nat. Bank* (1917) 220 N. Y. 406, 115 N. E. 982.

A few isolated decisions let the depositor hold either the agent or the sub-agent. *Bank of Lindsborg v. Ober* (1884) 31 Kan. 599, 3 Pac. 324. Either rule may be varied by special agreement or statute. *First Nat. Bank v. Butler* (1885) 41 Ohio St. 519; *Fed. Reserve Bank v. Malloy* (1924) 264 U. S. 160, 44 Sup. Ct. 296. The United States Supreme Court has adopted the New York rule. *Exchange Nat. Bank v. Third Nat. Bank* (1884) 112 U. S. 276, 5 Sup. Ct. 141. The lower federal courts, as in the instant case, follow this decision regardless of the rule applied by the state where the contract was made. *Taylor v. Nat. Bank* (1919, N. D. Ohio) 262 Fed. 168.

CARRIERS—WHO ARE PASSENGERS—WHEN RELATION EXISTS.—The plaintiff, a passenger on a street car, got off at the request of the conductor to inspect the damage to the car from a collision. While on the street, he was injured by an automobile. The lower court refused to charge that the plaintiff was a passenger. From a judgment for the defendant, the plaintiff appealed. *Held*, that the instruction should have been given. *Moffet v. Grand Rapids Ry. Co.* (1924, Mich.) 200 N. W. 274.

Because of the high degree of care owed by a carrier to its passengers, the moment of the creation and termination of the status is vital. See (1923) 32 YALE LAW JOURNAL, 841. As regards railways, the relation begins as soon as one intending in good faith to become a passenger enters upon the carrier's premises to engage passage, and that relation continues until arrival at the place of destination and a reasonable time to alight and leave the carrier's premises has elapsed. *Powell v. Philadelphia & Reading Ry. Co.* (1908) 220 Pa. 638, 70 Atl. 268. Similarly, with respect to steamboats. *Hrebrik v. Carr* (1886, E. D. N. Y.) 29 Fed. 298. But since one usually boards and alights from street cars in public streets, there is here less uniformity as to the origin and termination of the relation. It is generally held that one becomes a passenger of a street car when the motorman checks the car in response to a signal. *Karr v. Milwaukee Heat, L. & T. Co.* (1907) 132 Wis. 662, 113 N. W. 62; see (1906) 19 HARV. L. REV. 250. But some courts have held that the relationship does not begin until the person reaches the vehicle. *Donovan v. Hartford Street Ry. Co.* (1894) 65 Conn. 201, 32 Atl. 350. The carrier-passenger relation continues while transferring from one car to another. *Pins v. Conn. Co.* (1917) 92 Conn. 310, 102 Atl. 595; *Feldman v. Chicago Rys. Co.* (1919) 289 Ill. 25, 124 N. E. 334; see (1920) 18 MICH. L. REV. 231; *contra: Virginia Ry. & Power Co. v. Dressler* (1922) 132 Va. 342, 111 S. E. 243. But where the destination has been reached, the relation ceases as soon as one has alighted. *Creamer v. West End St. Ry. Co.* (1892) 156 Mass. 320, 31 N. E. 391. There is considerable authority, however, that the relation continues for a reasonable time after alighting until a place of safety is reached. *Melton v. Birmingham Ry., Light & Power Co.* (1907) 153 Ala. 95, 45 So. 151; see (1924) 37 HARV. L. REV. 497. Where, however, a person alights temporarily for a purpose other than that of transportation, the determinant factor has been said to be the propriety of the purpose. But the exact content of the term "proper purpose" is vague. The submission of a dispute over a fare to an inspector was held to be a proper purpose. *Seidman v. N. Y. Rys. Co.* (1914, Sup. Ct. App. T.) 88 Misc. 53, 150 N. Y. Supp. 578. But otherwise, where one alighted to pacify the conductor and a third person. *Zeccardi v. Yonkers R. Co.* (1907) 190 N. Y. 389, 83 N. E. 31. Where one was procuring change to pay a carrier, he was held to be a passenger. *Fornoff v. Columbia Taxicab Co.* (1913) 179 Mo. App. 620, 162 S. W. 699 (taxi). And so, where help was being offered to the carrier. *Stuchly v. Chicago City Ry. Co.* (1913) 182 Ill. App. 337 (removing wagon from tracks); *Street Ry. Co. v. Bolton* (1885) 43 Ohio St. 224, 1 N. E. 333 (pushing car). In these border-line cases, where the person is not actually being transported, the courts seem astute to find the relation.

CONSTITUTIONAL LAW—ALIENS—ANTI-ALIEN LEGISLATION WITHIN POLICE POWER.—The petitioner was convicted for the violation of a statute which provided that "no unnaturalized foreign-born person . . . . shall own or have in his possession . . . . any pistol, revolver or other firearm capable of being concealed on the person." Calif. Sts. 1923, ch. 339, sec. 2. The statute was attacked as violating the equal protection clause of the fourteenth amendment of the Federal Constitution and a writ of *habeas corpus* was issued. *Held,* that the writ be discharged. *Ex parte Rameriz* (1924, Calif.) 226 Pac. 914.

Various discriminations against aliens have been upheld as a valid exercise of the police power. *Heim v. McCall* (1915) 239 U. S. 175, 36 Sup. Ct. 78 (employment in public works); *Patstone v. Commonwealth of Pennsylvania* (1914) 232 U. S. 138, 34 Sup. Ct. 281 (hunting); *Trageser v. Gray* (1890) 73 Md. 250, 20 Atl. 905 (licenses to sell liquor); *State v. Rheaume* (1922) 80 N. H. 319, 116 Atl. 758 (use and possession of firearms); *Commonwealth v. Hana* (1907) 195 Mass. 262, 81 N. E. 149 (peddler's license). See COMMENTS (1922) 31 YALE LAW JOURNAL, 299; (1923) 23 COL. L. REV. 388. Since the war there seems to be a tendency to tolerate discriminatory restrictions upon aliens.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—POWER OF APPROPRIATION.—A statute authorized, in cases of emergency, annual appropriations from any unappropriated funds in the state treasury, to meet operating expenses of any state institution, upon the certification of the governor, secretary of state, and treasurer that such moneys were needed to carry on the regular work of the institution. Wis. Sts. 1921, ch. 3, sec. 20.74. The secretary of state refused his certification of a certain appropriation made by authority of this statute, on the ground that the statute itself was unconstitutional as amounting to a delegation of the legislative power to appropriate public money. The relator sought a writ of mandamus to compel the secretary of state to make the proper certification. *Held,* (one judge *dissenting*) that the statute was constitutional, and that since the approval of only a majority of the three executive officials was necessary to make an appropriation, the writ be denied. *State, ex rel. Board of Regents of Normal Schools, v. Zimmerman* (1924, Wis.) 197 N. W. 823.

It is generally stated that legislative power may not be delegated to a non-legislative body. *Field v. Clark* (1892) 143 U. S. 649, 694, 12 Sup. Ct. 495, 504; Cooley, *Constitutional Limitations* (7th ed. 1903) 163. But efficiency in modern government often requires that the formulation of rules and regulations for the enforcement of general laws of the legislature be left to administrative bodies. *Chicago & N. W. Ry. Co. v. Dey* (1888, C. C. S. D. Iowa) 35 Fed. 866; *United States v. Grimaud* (1910) 220 U. S. 506, 31 Sup. Ct. 480; Foster, *The Delegation of Legislative Power to Administrative Officers* (1913) 7 ILL. L. REV. 397-413. Naturally, the difficult question arises as to the line of distinction between legislative and administrative functions. *Wayman v. Southard* (1825, U. S.) 10 Wheat. 42; *Commonwealth v. Sissons* (1905) 189 Mass. 247, 75 N. E. 619; *United States v. Grimaud, supra.* The power to make appropriations from public funds has been considered as purely a legislative function. *State v. Burdick* (1893) 4 Wyo. 272, 33 Pac. 125; *State v. Moore* (1896) 50 Nebr. 88, 94, 69 N. W. 373, 375. And also as analogous to the power of taxation, the two being inseparably connected. *Agricultural & Mechanical College v. Hager* (1905) 121 Ky. 1, 14, 87 S. W. 1125; *Gem Irrigation Dist. v. Van Deusen* (1918) 31 Idaho, 779, 176 Pac. 887; 1 Cooley, *Taxation* (4th ed. 1924) sec. 177. The power of taxation is one of the most jealously guarded of legislative powers and rarely delegated. *Houghton v. Austin* (1874) 47 Calif. 646; *Inhabitants of Town of Bernard v. Allen* (1898) 61 N. J. L. 228, 39 Atl. 716; 1 Cooley, *Taxation,* sec. 74. By analogy it would seem that the wide discretion left to the executive officials in the instant case to decide not only the necessity for the appropriation but also the amount thereof, is more of a legis-

lative than an administrative function. Many state constitutions require that the legislative appropriation be specific as to amount and purpose. See Ill. Const. art. 5, sec. 16; N. D. Const. art. 2, sec. 62; Calif. Const. art. 4, sec. 22.

CONSTITUTIONAL LAW—POWER OF SENATE TO ORDER THE APPEARANCE OF A WITNESS.—The United States Senate by resolution authorized a committee to investigate the failure of the Attorney General to prosecute those implicated in the Teapot Dome oil leases, and to investigate any activities of the Attorney General and his assistants which might tend to impair their efficiency as representatives of the government. It was authorized to send for persons, books, and papers. The committee ordered the petitioner to testify before it and to bring bank ledgers and files with him. He refused to comply. The Senate by resolution then ordered the petitioner arrested and brought before them to testify so that the committee might "properly execute the functions imposed upon it, and obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." The petitioner applied for a writ of *habeas corpus*. *Held*, that the petitioner be discharged since the Senate was attempting to exercise a judicial power which the Constitution did not give it; that there was no legislation in view; and that though the Senate has judicial power to try an impeachment, its power was limited to the trial and did not extend to cover the investigation. *Ex parte Daugherty* (1924, D. Ohio) 299 Fed. 620.

Power in a legislative body to exercise a judicial function must be expressly granted or be given by fair implication in the Constitution. *McCulloch v. Maryland* (1819, U. S.) 4 Wheat. 316; see 2 Willoughby, *Constitutional Law* (1910) 1263. Thus where the proper exercise of constitutional functions demands, a power is implied to punish outsiders for contempt. *Anderson v. Dunn* (1821, U. S.) 6 Wheat. 204; *In re Chapman* (1897) 166 U. S. 661, 17 Sup. Ct. 677. The court in the instant case found that there was no legislation in view and that the clause to that effect in the second resolution was inserted merely in an attempt to obtain the necessary power. It has been held that the object of a legislative body must be presumed to be legitimate if it can possibly be so construed. *People, ex rel. McDonald, v. Keeler* (1885) 99 N. Y. 463, 2 N. E. 615; *cf. Ex parte Caldwell* (1905, C. C. N. D. W. Va.) 138 Fed. 487. And that a mere possibility of legislation is sufficient to support the action. *In re Falvey* (1858) 7 Wis. 630; see *In re Chapman, supra*. A minor state court has held that a mere assertion in the resolution is inconclusive. *People, ex rel. Sabold, v. Webb* (1889, Sup. Ct. Spec. T.) 5 N. Y. Supp. 855. But in examining state decisions on this subject, it should be remembered that state legislatures have broader powers in this regard than has Congress. See 2 Willoughby, *op. cit.* 1273. The Senate is expressly granted the power to try an impeachment. U. S. Const. Art. I, sec. 3, cl. 6. But that power is limited to trial and the power to conduct an investigation such as this resides in the House. U. S. Const. Art. I, sec. 2, cl. 5. The Supreme Court's decision on appeal would seem to depend upon its ideas as to how much power the Senate should be allowed—whether or not it is expedient to permit such investigations when there is a mere chance of subsequent legislation. It is obvious that the individual should not be subject to prying investigations, instituted upon any grounds whatsoever. See *Kilbourn v. Thompson* (1880) 103 U. S. 168; *In re Pacific Ry. Commission* (1887, C. C. N. D. Calif.) 32 Fed. 241. In general, see Loring, *Powers of Congressional Investigating Committees* (1924) 8 MINN. L. REV. 595; NOTE (1924) 19 ILL. L. REV. 44; NOTES (1924) 73 U. PA. L. REV. 60.

CONTRACTS—ACTION FOR RESTITUTION ON REPUDIATION OR BREACH OF CONTRACT—NOTICE OF RESCISSION.—The defendants contracted with the plaintiffs to transmit by cable a sum of money to Russia. They failed to perform, and the plaintiffs, after a delay of six years, demanded their money back. The defendants

refused to refund the money on the grounds that the plaintiffs, by failing to make demand within a reasonable time, had waived their right to restitution. *Held,* that the plaintiffs should recover. *Bank of United States v. National City Bank of New York* (1924, N. Y. Sup. Ct. Spec. T.) 123 Misc. 801.

On the repudiation or vital breach of a contract an action for restitution may be maintained as an alternative remedy to an action for damages. *St. Helens Quarry Co. v. Crowe & Co.* (1918) 90 Or. 284, 176 Pac. 427; Anson, *Contracts* (Corbin's ed. 1919) sec. 402; 3 Williston, *Contracts* (1920) sec. 1455 *et seq.* And it may be brought at any time until barred by the Statute of Limitations, without previous notice of "rescission" or abandonment by the plaintiff. *Ripley v. Hazelton* (1870, N. Y. C. P.) 3 Daly, 329; *Richter v. Union Land & Stock Co.* (1900) 129 Calif. 367, 62 Pac. 39; Woodward, *Quasi-Contracts* (1913) sec. 267; 3 Williston, *op. cit.* sec. 1469. For a criticism of the use of the word "rescission" in this connection see Woodward, *op. cit.* sec. 260; Anson, *op. cit.* 440, note 2, 465, note 1.

EQUITY—ALIENATION SUIT—JURISDICTION OF COURT WHERE NO "PROPERTY RIGHTS" INVOLVED.—The plaintiff asked for an injunction restraining the defendant from associating with the plaintiff's husband, claiming that the defendant's insolvency rendered the remedy at law inadequate. The Court of Appeals affirmed a decree granting the injunction. *Held,* (two judges *dissenting*) that the injunction be dissolved. *Snedaker v. King* (1924, Ohio) 145 N. E. 15.

The statement is often made that the jurisdiction of a court of equity is confined to the protection of "property rights" only and does not extend to the protection of purely personal rights. *Brandeth v. Lance* (1839, N. Y.) 8 Paige, 24; *Chappel v. Stewart* (1896) 82 Md. 323, 33 Atl. 542; see *Gee v. Pritchard* (1818, Ch.) 2 Swanst. *403. The modern tendency has been to construe the rule very liberally. The courts when they have exercised jurisdiction have seemingly based their decisions on the ground that in the specific case the plaintiff had a sufficient "property interest." *Gee v. Pritchard, supra; Vanderbilt v. Mitchell* (1907) 72 N. J. Eq. 927, 67 Atl. 103. But relief has actually been granted where clearly no "property right" was involved. *Ex parte Warfield* (1899) 40 Tex. Cr. 413, 50 S. W. 933; see *Hall v. Smith* (1913, Sup. Ct. Spec. T.) 80 Misc. 85, 140 N. Y. Supp. 796; Pound, *Equitable Relief against Defamation and Injuries to Personalty* (1916) 29 HARV. L. REV. 640; Long, *Equitable Jurisdiction to Protect Personal Rights* (1923) 33 YALE LAW JOURNAL, 115. The utility of attempting to control domestic affairs in the manner asked by the defendant in the instant case may well be questioned. In exercising jurisdiction in such cases, the ability of the court to carry its decree into effect should be one of the controlling factors.

EVIDENCE—DYING DECLARATION NOT ADMISSIBLE WHEN MADE BY VICTIM, OTHER THAN ONE FOR WHOSE DEATH DEFENDANT IS TRIED.—In a prosecution for murder the trial court admitted in evidence the dying declaration of a decedent, who was shot by the defendant at the same time as the person for whose homicide the defendant was on trial. *Held,* that the evidence should not have been admitted. *Commonwealth v. Stallone* (1924, Pa.) 126 Atl. 56.

The dying declaration is admitted in evidence from the two-fold considerations of necessity of not allowing the murder to go unpunished, and the assurance of trustworthiness from the solemnity of the occasion. *State v. Terrell* (1859, S. C.) 12 Rich. 321, 329; see Larremore, *Dying Declarations* (1907) 41 AM. L. REV. 660, 666; 3 Wigmore, *Evidence* (2d ed. 1923) sec. 1431. But many limitations have been imposed on the competency of such evidence. Wigmore, *op. cit.* secs. 1432-1445. Amongst the limitations is the requirement that the deceased declarant be the person for whose death the defendant is being tried. *Allsup v. State* (1916) 15

Ala. App. 121, 72 So. 599; *State v. Holland* (1916) 126 Ark. 332, 190 S. W. 104; Wigmore, *op. cit.* sec. 1433. A few courts have taken the opposite view, where the declarant was killed by the same act which caused the death under investigation. *State v. Terrell, supra* (drank of same poisoned whiskey); *King v. Baker* (1837) 2 Moo. & Rob. 53 (partook of same poisoned cake); *State v. Wilson* (1871) 23 La. Ann. 558 (declarant wounded at approximately same time or from same bullet). The limitations on dying declarations have been criticized as an unreasonable exclusion of evidence equally as safe for the jury to handle as other excepted hearsay statements. Wigmore, *op. cit.* 1436; 1 Greenleaf, *Evidence* (16th ed. 1899) 246, note 6. And the tendency of some courts is rightly towards greater liberality in their admission. *Thurston v. Fritz* (1914) 91 Kan. 468, 138 Pac. 625; see *People v. Borella* (1924, Ill.) 143 N. E. 471. But the court, in the instant case, expressed itself as "satisfied to hold to the doctrine of the weight of decisions as stated in *Railing v. Commonwealth* (1885) 110 Pa. 100, 1 Atl. 314, without entering into a discussion of the reasons for the rule."

INTERNATIONAL LAW—FOREIGN ENVOY TO THIRD STATE IMMUNE FROM SERVICE OF PROCESS.—The defendant was a diplomatic attaché of Panama to its legation in Italy. While passing through New York he was arrested and served with a summons in an action for divorce. He moved to vacate the order of arrest and the service of summons. *Held,* that the motion to vacate the order of arrest be granted, but that the motion to vacate the service of summons be denied. *Carbone v. Carbone* (1924, Sup. Ct. Spec. T.) 123 Misc. 656, 206 N. Y. Supp. 40.

While it is generally agreed that a foreign representative travelling in a third state is free from arrest, there is some difference of opinion as to his freedom from service of process. *Holbrook v. Henderson* (1851, N. Y. Super.) 4 Sandf. 619; *Wilson v. Blanco* (1889) 56 N. Y. Super. Ct. 582; 4 Moore, *Internat. Law Digest* (1906) sec. 643; 1 Oppenheim, *Internat. Law* (3d ed. 1920) 574; Lawrence, *Principles of Internat. Law* (7th ed. 1923) 289. If an unnecessary impediment is thrown in the way of free passage, the right of embassy of the sovereign is impaired. *Holbrook v. Henderson, supra,* at p. 633. Service of process on the defendant in the instant case was not such an impediment as to interfere with his diplomatic functions. He could appear by attorney and personally be free to go about his sovereign's business. See generally 1 Sartow, *Diplomatic Practice* (2d ed. 1922) 329 *et seq.*

INTERNATIONAL LAW—UNRECOGNIZED DE FACTO GOVERNMENTS—EXTRA-TERRITORIAL EFFECT OF ITS DECREES ON INTERNAL MATTERS.—The plaintiff was the assignee of a claim against the defendant, a Russian corporation dissolved by decree of the Soviet Government. *Held,* that the complaint will not be dismissed on the ground that the defendant no longer exists, since the court would thus be indirectly recognizing the existence of the Russian Socialist Soviet Republic. *James & Co. v. Second Russian Ins. Co.* (1924, 1st Dept.) 210 App. Div. 82, 205 N. Y. Supp. 472.

Recognition is necessary to assure a political organism an independent status in international political intercourse. 1 Moore, *Digest of International Law* (1906) 72. When this status is involved in litigation, the court must be guided by the political department of the forum. *Foster v. Neilson* (1829, U. S.) 2 Pet. 253, 307. But a faction may actually exist and exercise internal sovereignty though nations refuse to enter into diplomatic relations with it; it is then called a *de facto* government, local or general. *Thorington v. Smith* (1868, U. S.) 8 Wall. 1; COMMENTS (1922) 31 YALE LAW JOURNAL, 534; Dickinson, *The Unrecognized Government or State in English and American Law* (1923) 22 MICH. L. REV. 29. Its existence as a *de facto* government acting as such is the operative fact by reason of which foreign courts will not examine or pass upon the legality of its

actions. This is a political question. Its existence gives it the power and the privilege to collect duties and taxes. *United States v. Rice* (1819, U. S.) 4 Wheat. 246; *MacLeod v. United States* (1913) 229 U. S. 416, 33 Sup. Ct. 955; *Bluefields Case* (1899) 1 Moore, *supra* 49. Or to give a title to property which will be "recognized" elsewhere. *The Helena* (1801, Adm.) 4 C. Rob. 3; *Oetjen v. Central Leather Co.* (1918) 246 U. S. 297, 38 Sup. Ct. 309; *Underhill v. Hernandez* (1895, C. C. A. 2d) 65 Fed. 577, aff'd (1897) 168 U. S. 250, 18 Sup. Ct. 83 (subsequent recognition of the *de facto* government was really immaterial). And foreign courts will not exercise jurisdiction over it for acts of confiscation within its own territory. *Wulfsohn v. Russian Socialist Soviet Republic* (1923) 234 N. Y. 372, 138 N. E. 24. But the *laws* of a foreign government, recognized or unrecognized, will not be "enforced" in the courts of the forum if contrary to public policy. There is no public policy, however, in our country disabling a state from dissolving its domestic corporations; and such dissolutions have resulted in their being treated as defunct in every other state. 8 Fletcher, *Corporations* (1919) 9702. But it cannot dissolve foreign corporations. *Sokoloff v. National City Bank,* N. Y. Ct. of Appeals (Nov. 25, 1924). The issue before our courts in such matters would seem to be the existence of the *de facto* government and the effect of its laws where it exists. See *Sokoloff v. National City Bank* (1922, Sup. Ct. Spec. T.) 120 Misc. 252, 190 N. Y. Supp. 355; NOTES (1923) 71 U. PA. L. REV. 270. Recognition of a government has no "retroactive" or other effect except as evidence of its existence. In the instant case, the existence of the Soviet Government is conceded. *Wulfsohn v. Russian Soviet supra.* It would seem, therefore, that the question before the court is whether the Russian law did dissolve the defendant corporation. See *Sea Ins. Co. v. Rossia Ins. Co.* (1923, K. B.) 17 Lloyd's List 316; (August 2, 1924) 5 *Russian Information & Review* no. 5. A recent *dictum* that political recognition is material seems erroneous. *Joint Stock Co. v. National City Bank,* (Dec. 10, 1924) N. Y. App. Div. 1st Dept. Oct. Term 1924, no. 130.

MUNICIPAL CORPORATIONS—TAXATION—POWER TO EXEMPT A RAILROAD.—In 1855, the defendant municipality granted to the plaintiff's predecessor the exclusive use of certain lands for railroad purposes, free from all taxes and assessments, in consideration for a conveyance to it of riparian lands owned by the predecessor. In 1865, a town ordinance affirmed the contract as to the plaintiff. In 1894, the plaintiff obtained a temporary injunction against the collection of taxes for that year by the defendant, which was renewed in 1895. In 1923, these injunctions were made permanent. *Held,* (one judge *dissenting*) that the decree be reversed. *City of Parkersburg v. Baltimore & O. Ry.* (1923, C. C. A. 4th) 296 Fed. 74.

A grant to a municipality of power to tax does not authorize exemption from taxation. Unless authorized in its charter to do so, an exemption grant is *ultra vires* and void. 5 McQuillan, *Municipal Corporations* (1913) 5011; 2 Cooley, *Taxation* (4th ed. 1924) 1398. This rule strikes at effecting a restraint upon so important a power as that of taxation; at permitting the grantee to escape a common burden; at the possibilities of corruption incident to leaving the taxing power within the bargaining power of municipal officials. To throw the risk of the existence of this power upon the claimant of the privilege does not seem unfair in the light of the public nature of charter powers and the foregoing matters of policy. Nor should the fact that consideration was paid by the claimant be material. *Tarver v. Dalton* (1910) 134 Ga. 462, 67 S. E. 929; *Richmond v. Va. Ry. & Power Co.* (1919) 124 Va. 529, 98 S. E. 691. And the city has the power to tax without being liable for a breach of contract. *Turner Investment Co. v. Seattle* (1912) 70 Wash. 201, 126 Pac. 426. Where practicable, the consideration received by the city may be required to be returned. *Walker v. Richmond* (1916)

173 Ky. 26, 189 S. W. 1122. Where services have been rendered to the city in exchange for the exemption agreement, the courts, struck by the apparent injustice, uphold the exemption. *Maine Water Co. v. Waterville* (1900) 93 Me. 586, 45 Atl. 830; *Portland Water Co. v. Portland* (1922, Conn.) 118 Atl. 84; 3 Dillon, *Municipal Corporations* (5th ed. 1911) 2173; (compare part performance under the Statute of Frauds). However unfortunate it may appear to the claimant of the exemption in a particular case, it is inconsistent to forbid exemptions and yet uphold a contract to exempt. See *Edwards v. Jackson* (1910) 96 Miss. 547, 51 So. 802. Or to allow the running of the Statute of Limitations to give the exemption validity. But see (1924) 38 HARV. L. REV. 120. Nor does it seem sound to distinguish and enforce an agreement to pay back the taxes assessed as a "compensation" or "commutation." *Washington Power Co. v. Spokane* (1916) 89 Wash. 149, 154 Pac. 329; *Hampton Co. v. Hampton* (1914) 77 N. H. 373, 92 Atl. 549. Besides, most courts agree that the power to "commute" exists only where there is a power to exempt. *Dayton v. Bellevue Water & Fuel Co.* (1902) 119 Ky. 714, 68 S. W. 142; *New Orleans v. New Orleans Sugar Co.* (1883) 35 La. Ann. 548. It is probably less socially desirable for railroads and other enterprises to locate because of tax exemptions, than because of other rules of engineering and business economy. See Goodnow, *The Nature of Tax Exemptions* (1913) 13 COL. L. REV. 104; Harriman, *State Suicide and Tax Exemptions* (1922) 16 ILL. L. REV. 575.

NEGLIGENCE—DUTY OF LANDOWNER TO RESCUER OF BUSINESS VISITOR.—A janitress of premises owned by the defendant fell through a secret trap door in the floor. The plaintiffs, husband and wife, sue for injuries to the wife resulting from falling through the same trap door in rushing to answer the janitress' cries for help. From judgments dismissing the complaints, the plaintiffs appeal. *Held,* (two judges *dissenting*) that the judgments be reversed. *Laufer v. Shapiro* (1924, 1st Dept.) 206 N. Y. Supp. 189.

A landowner is responsible in damages to a servant for injuries resulting from a failure to keep his premises safe or to warn of concealed dangers. *Falardeau v. Hoar* (1906) 192 Mass. 263, 78 N. E. 456; *Day v. Emery, Bird, Thayer Dry Goods Co.* (1905) 114 Mo. App. 479, 89 S. W. 903; 3 Labatt, *Master and Servant* (1913) sec. 979, note 3. See *Fleckenstein v. Great A. & P. Tea Co.* (1917) 91 N. J. L. 145, 102 Atl. 700; (1918) 16 MICH. L. REV. 458; (1924) 33 YALE LAW JOURNAL, 662. And also to one rushing to rescue a party endangered by a breach of such duty. *Gibney v. State* (1893) 137 N. Y. 1, 33 N. E. 142. But only where the act of rescue "whether impulsive or deliberate is the child of the occasion." *Wagner v. International Ry. Co.* (1921) 232 N. Y. 176, 133 N. E. 437. This is a question of fact in each case. But see Bohlen, *The Duty of a Landowner toward Those Entering His Premises of Their Own Right* (1921) 69 U. PA. L. REV. 142, 237, 340.

PLEADING—COUNTERCLAIM FOR BREACH OF WARRANTY IN ACTION OF REPLEVIN.—Upon default of payment for an automobile purchased on a conditional sale, the vendor brought an action of replevin to recover possession. The defendant counterclaimed for breach of warranty and fraud. A motion to strike the counterclaim as improper in the action of replevin was overruled by the lower court. *Held,* (two judges *dissenting*) that the judgment be reversed. *McCargar v. Wiley* (1924, Or.) 229 Pac. 665.

Some states still refuse to allow a counterclaim in an action to recover specific chattels. *Sylvester v. Ammons* (1904) 126 Iowa, 141, 101 N. W. 782 (expressly prohibited by statute); *General Motors Co. v. Phila. Paving Co.* (1915) 248 Pa. 499, 94 Atl. 235; Pomeroy, *Code Remedies* (1904, 4th ed.) sec. *767. Other states, under the counterclaim provisions of their codes, limit it to matters of defense

which deny the plaintiff's right to possession. *Baldwin v. Burrows* (1883) 95 Ind. 81; *Dearing Water Co. v. Thompson* (1909) 156 Mich. 365, 120 N. W. 801; see (1916) 16 COL. L. REV. 358. The basis of this limitation is the theory that a counterclaim must "defeat or diminish the plaintiff's recovery." Pomeroy, *supra*, sec. *744, *745, *767; *Spaus v. Stolwein* (1911, Sup. Ct.) 75 Misc. 1, 134 N .Y. Supp. 603; see N. Y. C. P. A. 1921, sec. 266. It is contrary to the time-saving practice of settling all controversies between the parties which may be conveniently tried at the same time. *McCormick Harvesting Co. v. Hill* (1904) 104 Mo. App. 544, 79 S. W. 745; *Titan Truck Co. v. Richardson* (1922) 122 Wash. 452, 210 Pac. 790; see COMMENTS (1923) 33 YALE LAW JOURNAL, 862. If the damages in the instant case equalled or exceeded the debt due, the allowance of the counterclaim might be justified to the extent of defeating the plaintiff's claim under even the stricter view. *Ames v. Rea* (1892) 56 Ark. 450, 19 S. W. 1063; *Zimmerman v. Sunset Lumber Co.* (1910) 57 Or. 309, 111 Pac. 690.

RES JUDICATA—EFFECT OF PRIOR JUDGMENT IN DEATH ACTION BY PERSONAL REPRESENTATIVE UPON RIGHTS OF UNBORN CHILD.—For wrongful death a statute granted to the heirs or personal representative of the deceased, for the benefit of the heirs, a right of action against the person causing the death. Utah Comp. Laws, 1917, secs. 6504, 6505. The plaintiff brought an action under the statute against the defendant company to recover damages for the death of his father. Prior to this suit and before the birth of the plaintiff, damages had been recovered from the defendant by the widow, as personal representative, for her benefit and that of the three children then living. The lower court denied recovery on the ground that the plaintiff was an heir within the meaning of the statute. *Held*, that the judgment be affirmed. *Parmley v. Pleasant Valley Co.* (1924, Utah) 228 Pac. 557.

The statement is often made that whenever it is for a child's benefit he will be given the rights he would have had if alive at the time the operative facts occurred. *Doe dem. Clarke* (1795, C. P.) 2 H. Bl. 399; *Deal v. Sexton* (1907) 144 N. C. 157, 56 S. E. 691; *contra: Gorman v. Budlong* (1901) 23 R. I. 169, 49 Atl. 704; *Drobner v. Peters* (1921) 232 N. Y. 220, 133 N. E. 567, reversing (1921, 1st Dept.) 194 App. Div. 696, 186 N. Y. Supp. 278 (recovery denied in action for prenatal injury); but see (1921) 21 COL. L. REV. 199. He has been recognized as a person for the purpose of recovering under death statutes. *The George and Richard* (1871, Adm.) L. R. 3 A. & E. 466; *Texas and Pac. Ry. v. Robertson* (1891) 82 Tex. 657, 17 S. W. 1041. According to the general rule judgments and decrees are binding only upon those who are parties to the controversy in which they were rendered. *Hanberry v. Doolittle* (1865) 38 Ill. 202; *Monarque v. Monarque* (1880) 80 N. Y. 320. But out of necessity the doctrine of representation grew up as a limitation upon this rule. By that doctrine a party not before the court in person, if so represented by others that his interests receive efficient protection, is bound by the decree. *Hale v. Hale* (1893) 146 Ill. 227, 33 N. E. 858. In order to have effective representation there must be absence of conflicting interests between the unborn child and the living representative as against the defendant. *Kent v. Church of St. Michael* (1892) 136 N. Y. 10, 32 N. E. 704 (unborn child bound by judgment of partition because interests virtually represented); *Ladd v. Weiskopf* (1895) 62 Minn. 28, 64 N. W. 99 (decree of probate court for distribution of estate); see *Gavin v. Curtin* (1898) 171 Ill. 640, 49 N. E. 523 (possible future remainderman bound by sale of realty under court order); *Tonnelle v. Wetmore* (1909) 195 N. Y. 436, 88 N. E. 1068 (construction of will). But where the interests of the child are not adequately represented, the decree will not be binding on him. *Downey v. Seib* (1906) 185 N. Y. 427, 78 N. E. 66; *Deal v. Sexton, supra.* In the instant case it seems that the interests of the unborn

child were adequately represented at the prior suit especially as the amount of recovery is the same regardless of the number of children. But see *contra: Nelson v. Galveston H. & S. A. Ry.* (1890) 78 Tex. 621, 14 S. W. 1021. The child's remedy would seem to be a suit against his co-heirs for distribution.

SALES—INSPECTION OF GOODS—CONDITIONS PRECEDENT TO RECOVERY OF PRICE—RISK OF DETERIORATION UNDER ORDER BILLS OF LADING.—The seller contracted to sell rice to the buyer f.o.b. seller's city, and shipped it under a bill of lading to his own order with directions to allow inspection. Due to delay in transit the rice did not arrive till a month after shipment. The buyer, finding the rice had become mouldy in transit, refused to accept or pay for it. In a suit by the seller, apparently for the price, the lower court gave judgment for the defendant on the ground that title did not pass until arrival of the goods at destination and, apparently, that the risk of deterioration in transit was on the seller. *Held,* that the judgment be affirmed. *Farmers' Rice Milling Co. v. Standard Rice Co.* (1924, Tex. Civ. App.) 264 S. W. 276.

Unless a contrary intent appears, in a contract for the sale of goods f.o.b. seller's city, the seller has performed all conditions precedent to recovering the price when he has delivered to the carrier goods up to the specifications of the contract and fit to stand the ordinary exigencies of travel. *Hoffman v. Gosline* (1909, C. C. A. 6th) 172 Fed. 113, 96 C. C. A. 318; Sales Act, sec. 19, rule 4 (1), (2); 1 Williston, *Sales* (2d ed. 1924) 584, 602. There is no implied warranty that the goods will not deteriorate in case of unusual delay in transit, and such deterioration does not affect the legal relations of the parties. *English v. Spokane Commission Co.* (1893, C. C. A. 9th) 57 Fed. 451; Sales Act, sec. 22; 1 Williston, *op. cit.,* 493, 693, 700. Inspection is addressed primarily to the normal case where the goods on arrival conform to contract; it has real value in protecting the buyer from having to pay blindfolded. *Skinner v. Griffiths* (1914) 80 Wash. 291, 141 Pac. 693; 1, 2 Williston, *op. cit.,* 587, 1234. So, on the seller's side, a bill of lading to seller's order has real value as security, even where the draft is met promptly on presentation. Such a form of bill of lading is not commonly intended, nor is it by the better authorities construed, to prevent the passing of the beneficial interest and resultant risks of shipment. *Alderman v. Westinghouse Co.* (1918) 92 Conn. 419, 103 Atl. 267; *Rosenberg v. Buffum Co.* (1922) 234 N. Y. 338, 137 N. E. 609; Sales Act, secs. 20 (2), 22 (a); 1 Williston, *op. cit.,* 602, 642, 697, 700; *contra: Willman Merc. Co. v. Fussy* (1895) 15 Mont. 511, 39 Pac. 738. And a power in the seller to defeat the buyer's rights is not *per se* inconsistent with such risk-bearing by the buyer. Sales Act, sec. 25. The inspection provision, inserted to perform for the buyer the same security function as does the seller's order provision for the seller, should likewise be held not to shift risks. *Standard Casing Co. v. Cal. Casing Co.* (1922) 233 N. Y. 413, 135 N. E. 834; 2 Williston, *op. cit.,* 1234. But some courts have treated it as an indication that the seller's conditions and duty are not performed unless the goods on such inspection measure up to the contract. *Agri Mfg. Co. v. Atlantic Fertilizer Co.* (1916) 129 Md. 42, 98 Atl. 365. This is to give the condition of inspection the seemingly unwarranted effect of shifting the risk of loss or depreciation in transit. The court in the instant case apparently directed its attention largely to the form of the bill of lading and the inspection provision, adopting the less desirable interpretation of each. Such reasoning has been common in similar suits, resulting in clearly unfortunate decisions. *Cragun v. Todd* (1906) 131 Iowa, 250, 108 N. W. 450; *Sanders v. Landreth* (1915) 100 S. C. 389, 84 S. E. 880. That the instant decision is not under the Sales Act should not affect the result. *Mirabita v. Imperial Ottoman Bank* (1878, C. A.) L. R. 3 Exch. Div. 164; *Hoffman v. Wisconsin Lumber Co.* (1921) 207 Mo. App. 440, 229 S. W. 289; see also *Farmers' & Mechanics' Bank v. Logan* (1878) 74 N. Y. 568, 581.

SALES—LATENT DEFECT—LIABILITY OF VENDOR TO A THIRD PERSON IN WARRANTY.—The defendant, a retailer, sold to the plaintiffs a gas-heater, representing that "it could be used with perfect safety." Unknown to the defendant the heater was defectively constructed and generated a poisonous gas, causing the death of the plaintiff's infant child. An action was brought under a death damage statute for breach of an express or implied warranty of fitness for the particular use. The statute allowed a recovery if the decedent would have recovered had death not ensued. A demurrer to the declaration was sustained. *Held*, that the judgment be affirmed. *State, to use of Bond, v. Consolidated Gas, Electric and Power Co.* (1924, Md.) 126 Atl. 105.

Warranties generally "run" only in favor of the immediate purchaser. Williston, *Sales* (2d ed. 1924) sec. 244. Any liability in tort is distinct. Thus, in the sale or preparation of an article which negligence may make imminently dangerous, the vendor owes a duty of care commensurate with the nature of the article. *Thomas v. Winchester* (1852) 6 N. Y. 397; *MacPherson v. Buick Co.* (1916) 217 N. Y. 382, 111 N. E. 1050; see (1916) 25 YALE LAW JOURNAL, 679. A vendor who merely acts as a middleman is under no obligation to discover the dangerous character of the goods he sells, and, except for "active misconduct," is not liable in tort. *Peaslee-Gaulbert Co. v. McMath's Adm'r* (1912) 148 Ky. 265, 146 S. W. 770; *Kusick v. Thorndike & Hix* (1916) 224 Mass. 413, 112 N. E. 1025; *Cox v. Mason* (1903, 2d Dept.) 89 App. Div. 219, 85 N. Y. Supp. 973 (liable for negligent repair). By means of an implied warranty which "runs" with the goods, there has been a tendency, in the food cases, to impose liability as an insurer on manufacturer and vendor indiscriminately. *Davis v. Van Camp Packing Co.* (1920) 189 Iowa, 775, 176 N. W. 382; *Sloan v. Woolworth Co.* (1915) 193 Ill. App. 620 (canned goods sold by retailer); see Perkins, *Unwholesome Food* (1919) 5 IOWA L. BULL. 6, 95; *contra: Chysky v. Drake* (1923) 235 N. Y. 468, 139 N. E. 576. But an "unwholesome can of beans" would seem no more imminently dangerous than a "defective auto wheel." A harmonization of the two lines of cases is to be desired, extending the obligation of the manufacturer or person whose label the goods bear, and limiting that of the mere retailer, with no opportunity of inspection, as in the case of package food. The use by the courts, as against a manufacturer, of *res ipsa loquitur*, raising an inference of negligence from the mere fact of the defect, tends in this direction. *Payne v. Rome Coca-Cola Bottling Co.* (1912) 10 Ga. App. 762, 73 S. E. 1087; *Pillars v. Reynolds Tobacco Co.* (1918) 117 Miss. 490, 78 So. 365. Where such responsibility is imposed the plaintiff's theory, whether in "tort" or "warranty," should not alter the result and his lack of privity should be no bar to an action on the "warranty." See COMMENTS (1920) 29 YALE LAW JOURNAL, 782; *cf. Gearing v. Berkson* (1916) 223 Mass. 257, 111 N. E. 785. But an "implied warranty" against a defect dangerous to life and limb is to be sharply distinguished from an "implied warranty" of merchantability or a defect in quality resulting merely in lessened exchange or use value, which concerns only the buyer and seller. For a valuable suggestion that an action be allowed a sub-purchaser on an "express warranty" made generally to the public by labels and advertisements, see Williston, *Sales* (2d ed. 1924) sec. 244a.

SPECIFIC PERFORMANCE—ABATEMENT FOR DEFICIENCY DENIED WHERE VENDEE KNEW OF DEFECT.—The plaintiff contracted with the defendant for the purchase of two tracts of land knowing them to be part of a trust estate of which the defendant was the trustee. By the terms of the trust, which were unknown to the plaintiff, the defendant could not convey one of these tracts. The plaintiff petitioned for specific performance with abatement for the deficiency. *Held*, that this relief should be denied. *Hughes v. Hadley* (1924, N. J. Eq.) 126 Atl. 33.

Where there is a substantial defect in the title which the vendor has contracted

to convey, the vendee, if unaware of the defect at the time of contracting, may compel the vendor to convey whatever he can with a proportionate abatement for the deficiency, when such deficiency can be apportioned. *Mellin v. Woolley* (1908) 103 Minn. 498, 115 N. W. 654; *Barthel v. Engle* (1914) 261 Mo. 307, 168 S. W. 1154; NOTES (1912) 25 HARV. L. REV. 731; and see 5 Pomeroy, *Equity Jurisprudence* (2d ed. 1919) sec. 2256. But abatement will be denied if the vendee at the time he entered into the contract had knowledge of the defect. *Peeler v. Levy* (1875) 26 N. J. Eq. 330; *Moore v. Lutjeharms* (1912) 91 Neb. 548, 136 N. W. 343; NOTES (1908) 8 COL. L. REV. 309. Or if a reasonable man would have known of the defect. Thus when the vendee knew the vendor was married, it is held he should have known of the wife's right to inchoate dower and no abatement is allowed. *Castle v. Wilkinson* (1870) L. R. 5 Ch. App. 535; *Kuratli v. Jackson* (1911) 60 Or. 202, 118 Pac. 192; see NOTES AND COMMENT (1924) 9 CORN. L. QUART. 470; L. R. A. 1917 F, 597, note. Similarly where there are "open and notorious" physical structures and easements on the premises. *Ashburner v. Sewell* [1891] 3 Ch. 405; *Wetherby v. Griswold* (1915) 75 Or. 468, 147 Pac. 388. And where a third party is in actual possession of the property to be conveyed. *James v. Lichfield* (1869) L. R. 9 Eq. 51; *Eppstein v. Kuhn* (1906) 219 Ill. 154, 76 N. E. 145. Also one who contracts with a known trustee is held to contract with reference to the extent and limitation of that trust, regardless of his actual knowledge. *Synder v. Collier* (1909) 85 Neb. 552, 123 N. W. 1023; *Alexander v. Harris* (1923, Tex. Civ. App.) 254 S. W. 146; 2 Devlin, *Deeds* (3d ed. 1911) sec. 738a. So the court, in the instant case, seems logical in denying specific performance with abatement where the vendee knew that the property contracted for was subject to a trust.

TAXATION—DECREASE IN LIABILITY DUE TO FALL IN THE RATE OF EXCHANGE NOT TAXABLE AS INCOME.—Before the war, the plaintiff, a domestic corporation, borrowed money from a German bank repayable in marks. After the United States entered the war, payment was made to the Alien Property Custodian at the current rate of exchange. This payment was approximately $684,000 less than the value of the marks at the time of the loan. The Collector of Internal Revenue attempted to tax the difference as income. *Held,* that this sum was a gain accruing to capital and not taxable income. *Kerbaugh-Empire Co. v. Bowers* (1924, S. D. N. Y.) 300 Fed. 938.

Prior to actual severance by a "sale or conversion," a gain accruing to capital is not "income" taxable within the Sixteenth Amendment. *Eisner v. Macomber* (1920) 252 U. S. 189, 40 Sup. Ct. 189; *Merchants L. & T. Co. v. Smietanka* (1921) 255 U. S. 509, 41 Sup. Ct. 386. Some economists regard appreciation of capital, susceptible of evaluation in terms of money, as "income" even before a "sale or conversion." Haig, *The Federal Income Tax* (1921) 1-28. The legal concept expresses merely the most convenient moment for taxation from an administrative point of view. Haig, *op. cit.* 18, 19. In the instant case there was no sale or conversion of capital assets, but there was an accrual of benefit whether it is called "accrued capital" or "income." The liquidation of the loan is as operative as a sale or conversion to fix the convenient point for evaluation of the increment. The only distinction is one of form; in the former, the actual money is received at the time of the loan and the form of the increment is a decrease in obligations, while in the latter the money is not received until the sale and the increment is an increase of assets. Thus, where a corporation issues bonds at par, and subsequently because of a fall in the market value, is enabled to re-purchase them at less than par, the difference is taxable income. *Income and Profits Tax Regulations* (1922) Reg. 62, art. 545, c. Unpaid debts, written off the books because of the Statute of Limitations, constitute income in the year written off. *Great Northern Ry. v. Lynch* (1921, D. Minn.) Treas. Dec. 3147. Cancellation

of indebtedness, used by the court in the principal case to illustrate its argument, is a gift, and not taxable unless given for a valuable consideration. Revenue Act of 1924, sec. 213 (3); *Income and Profits Tax Regulations, supra,* art. 50; Holmes, *Federal Taxes* (1923 ed.) 545, 668; see dissent of Ward, J. in *U. S. v. Oregon-Washington Co.* (1918, C. C. A. 2d) 251 Fed. 211. The decrease in obligations due to the fall in the rate of exchange was certainly not a gift within the meaning of the statute but constituted an accrual to capital which at the moment of liquidation became "income" in the legal sense. As such it should be taxable.

TAXATION—STATE FRANCHISE TAX OF FOREIGN CORPORATIONS BASED ON ALLOCATED INCOME.—The New York Tax Law, Cons. Laws, 1909, ch. 60, art. 9a as amended by N. Y. Laws, 1917, ch. 726 and N. Y. Laws, 1918, chs. 271, 276, 417, imposes an annual franchise tax on foreign corporations, based on the previous year's income in that state. This is found by allocating to the state that proportion of the corporation's total income that its property assets within the state bear to its entire property assets. It excludes all but ten *per cent.* of the corporation's holdings of stock in other corporations from its total assets, but permits the state to include the income from all of these stocks in the corporation's total income. The relator, having made no profit in the state during the previous year, paid the tax under protest and sued for its return in the New York courts where the tax was declared valid. On appeal to this court he assigned as one ground of error the unconstitutionality of the provision excluding the stock, which had not been raised below. *Held,* that the judgment be affirmed. *Bass. Ratcliff & Gretton, Ltd. v. State Tax Commission* (Nov. 17, 1924) U. S. Sup. Ct., Oct. Term, 1924, no. 10.

Allocation of a certain proportion of the corporation's entire income to a state according to its property in the state is a constitutional method of determining a subject of taxation, since the tax is held to be for the privilege of doing business within the state and not to be an income tax. *Underwood Typewriter Co. v. Chamberlain* (1919) 94 Conn. 47, 108 Atl. 154, aff'd (1920) 254 U. S. 113, 41 Sup. Ct. 45; *People, ex rel. Alpha P. C. Co. v. Knapp* (1920) 230 N. Y. 48, 129 N. E. 202; see NOTES (1920) 20 COL. L. REV. 324; and COMMENTS (1921) 30 YALE LAW JOURNAL, 512. The provision excluding stock from the corporation's total assets in computing the allocated income was declared unconstitutional by the New York Court of Appeals. *People, ex rel. Alpha P. C. Co. v. Knapp, supra.* But this question has never been properly presented for review before the United States Supreme Court. See *Gorham Mfg. Co. v. State Tax Commission* (Nov. 17, 1924) U. S. Sup. Ct., Oct. Term, 1924, no. 5.

TORTS—TESTS OF THE JOINT TORT RELATIONSHIP.—The plaintiff's ship A, the defendant ship B, and a third ship C were in convoy. As a result of independent acts of negligent navigation, a collision occurred between B and C, as a direct consequence of which A was sunk. A judgment for full damages was recovered against C, but later limited under an admiralty statute. Plaintiff then libeled B, and was met by a plea of judgment against its joint tort-feasor C as a bar. The lower court denied the existence of a joint tort and found for the plaintiff. *Held,* that the judgment be affirmed. *The Koursk* (1924, C. A.) 40 T. L. R. 399.

In applying the diverse rules premised upon the existence of the joint tort-feasor status, a practical difficulty has arisen in determining what constitutes that legal relationship. (1924) 36 JURID. REV. 178. In considering the definitions, cases of mere joinder of parties under the Codes, for procedural expediency, should be excluded. Such cases are not concerned with the substantive relations of the parties. *Sherlock v. Manwaren* (1924, 4th Dept.) 208 App. Div. 538, 203 N. Y. Supp. 709; (1924) 33 YALE LAW JOURNAL, 328. Four affirmative tests then appear. The first requires that the causes of action against each defendant be the same. Pollock, *Torts* (11th ed. 1920) 193; *King v. Hoare* (1844, Exch.) 13

M. & W. 493, 504. The solution would then depend upon a definition of "cause of action" which is itself a term of indefinite content. Clark, *The Code Causes of Action* (1924) 33 YALE LAW JOURNAL, 817. The second demands a single *injuria*, or wrongful act, and a single harm, or *damnum*—likewise terms of indefinite content. *Sadler v. G. W. Ry.* [1896, H. L.] A. C. 450. The third, approved in the instant case, limits the test to "concerted action toward a common end." Clerk and Lindsell, *Torts* (7th ed. 1921) 59, *et seq.; Dickson v. Yates* (1922) 194 Iowa, 910, 188 N. W. 948. But the last test finds a joint tort relation among all those whose acts directly cause a given injury. *Farley v. Crystal Coke Co.* (1920) 85 W. Va. 595, 102 S. E. 265; *Tobin v. Seattle* (1923) 127 Wash. 664, 221 Pac. 583. Applying the first three tests, the English cases have held, as in the instant case, that separate negligent acts, although concurring to create one injury, do not constitute a joint tort. *Sadler v. G. W. Ry., supra; Thompson v. London County Council* [1899, C. A.] 1 Q. B. 840. But the American decisions seem to find such a relation under the theory of the fourth test. *Farley v. Crystal Coke Co., supra; Pac. Tel. & Tel. Co. v. Parmenter* (1909, C. C. A. 9th) 170 Fed. 140; *contra: Little Schuylkill Co. v. Richards' Adm'r* (1868) 57 Pa. 142; 9 A. L. R. 933, 940, note. It may well be that the English courts are influenced by the rule that a judgment secured against one joint tort-feasor bars suit against all others. *Brinsmead v. Harrison* (1871) L. R. 6 C. P. 584. And since the majority American rule on this point raises no bar until satisfaction, the American cases are more liberal in finding the joint tort relation. *Litchfield v. Goodnow's Adm'r.* (1887) 123 U. S. 549, 8 Sup. Ct. 210. Thus the practical result of the cases is approximately the same in each country.

WILLS—NON DISPOSITIVE CLAUSE AFTER SIGNATURE DOES NOT INVALIDATE WILL.—The plaintiff was residuary legatee in two wills executed by the testatrix. In the second will, a clause relating to the compensation of executors followed the signature. As his share would be greater under the earlier will, he sought to overthrow the second as invalid under the Decedent Estate Law (N. Y. Laws, 1909, ch. 18, sec. 21) which requires the signature to be at the end of the will. *Held*, that the will be admitted to probate since the contested clause was mere surplusage. *In re McConihe's Estate* (1924, Surro. Ct.) 123 Misc. 318, 205 N. Y. Supp. 780.

Though it is fatal to a will to have a dispositive clause after the signature, under such statutes the general rule regarding surplusage agrees with the principal case. *Ward v. Putnam* (1905) 119 Ky. 889, 85 S. W. 179; 2 Ann. Cas. 730, note. In the absence of statutes the signature need not be at the end. *Armstrong v. Walton* (1913) 105 Miss. 337, 62 So. 173; Ann. Cas. 1916 E, 140, note. For a general discussion of the subject see 1 Schouler, *Wills* (6th ed. 1923) sec. 487.

WILLS—UNDUE INFLUENCE NOT PRESUMED FROM EXISTENCE OF MERETRICIOUS RELATIONS.—The deceased attempted to leave all of his property to the proponent, with whom he was having illicit relations at the time of executing the alleged will. Contestant urged this relation alone raised a presumption of undue influence. From the lower court's decree refusing probate, proponent appealed. *Held*, that the decree be reversed. *In re Gaddes' Will* (1924, N. J.) 126 Atl. 287.

The instant case merely adds another decision to the apparently well settled doctrine that the existence of illicit relations is not ground for a presumption of undue influence. *Middleton's Case* (1905) 68 N. J. Eq. 798, 64 Atl. 1134; 1 Underhill, *Law of Wills* (1900) sec. 150; 1 Woerner, *American Law of Administration* (3d ed. 1923) 63; see *Griffith v. Benzinger* (1924) 144 Md. 575, 587, 125 Atl. 512, 517. Other evidence must be introduced to show the actual exercise of improper influence in the procuring of a favorable will. *In re Black's Estate* (1901) 132 Calif. 392, 64 Pac. 695; Borland, *Wills and Administration of Estates* (1907) sec. 49; 1 Woerner, *op. cit.* 60; *cf. Gibony v. Foster* (1910) 230 Mo. 106, 130 S. W. 314.