RECENT CASE NOTES

ARBITRATION AND AWARD—EVIDENCE—COURT MAY NOT ORDER DEPOSITION AND DISCOVERY BEFORE SUBMISSION OF ISSUES.—An arbitration had been ordered by the court. Before the submission, one of the parties applied to the court for an order directing the other to appear for an examination and to disclose its books. *Held*, that the petition be denied, since, under the New York Arbitration Law, a court cannot order a statutory deposition to be taken before trial of the issues by the arbitrators. *In re Schwartz*, 127 Misc. 452, 217 N. Y. Supp. 233 (Sup. Ct. 1925).

In New York, before trial of an action, any party thereto may cause a deposition to be taken or a bill of discovery to be issued for certain testimony. N. Y. Civ. Prac. Act (1924) § 288; *Klapp v. Merwin*, 122 Misc. 708, 203 N. Y. Supp. 694 (Sup. Ct. 1924). A statute provides that "arbitration of a controversy under a contract or submission . . . shall be deemed a special proceeding. . . ." N. Y. Cons. Laws (Cahill's 1923) c. 341, § 6-a. Another statute provides that testimony may be taken by deposition in a special proceeding or for use in such a proceeding about to be brought, as though the proceeding were an action. N. Y. Civ. Prac. Act (1924) § 303; *cf. People v. Fowler*, 107 Misc. 253, 176 N. Y. Supp. 806 (Sup. Ct. 1919). Hence as a matter of statutory interpretation, any party to an arbitration under the New York Act ought to be able to obtain a court order for deposition before or during trial of the issues. *Interocean Mercantile Corp. v. Buell*, 207 App. Div. 164, 201 N. Y. Supp. 753 (1st Dept. 1923). Moreover, it would seem that the court could adequately order a statement of the necessary issues from the demandant, there being no statutory bar thereto. But *cf. Smyth v. Board of Education*, 217 N. Y. Supp. 231 (Sup. Ct. 1925). The instant decision holds, in effect, that by agreeing to arbitrate, parties thereby forfeit the use of expedient methods of obtaining evidence. The danger that arbitration would be hindered by such "procedural technicalities" seems slight since the arbitrators have a wide discretion in using any evidence which may be obtained. *Cf. Everett v. Brown*, 120 Misc. 349, 198 N. Y. Supp. 462 (Sup. Ct. 1923).

ARBITRATION AND AWARD—WHAT CONSTITUTES A CONTROVERSY UNDER NEW YORK ARBITRATION LAW.—The plaintiff sold foxes to the defendant, who gave notes for part of the purchase price. The written contract of sale provided "that should any unreconcilable dispute arise in connection with this purchase and sale," it should be arbitrated. The defendant refused to pay or arbitrate, claiming a set-off arising out of a second contract for the care of the foxes, which contained a similar arbitration provision. The plaintiff petitioned the court under § 3 of the Arbitration Law to order arbitration. The order was refused in the lower court. *Held*, on appeal, (two judges *dissenting*) that the ruling be affirmed since there was no "controversy" within the Arbitration Law under the first contract, for the defendant admitted his responsibility thereunder and merely refused to pay. *Webster v. Van Allen*, 216 N. Y. Supp. 552 (App. Div. 4th Dept. 1926).

A refusal to pay the agreed purchase price for any reason whatever should present a "dispute . . . in connection with this purchase and sale." Assuming with the court that the counterclaim arises out of a separate contract, the counterclaim would be outside of the arbitrators'

jurisdiction. *Webb v. Parker*, 130 App. Div. 92, 114 N. Y. Supp. 489 (1st Dept. 1909); *Busse v. Agnew*, 10 Ill. App. 527 (1882); *cf.* (1926) 35 YALE LAW JOURNAL, 369. In the absence of statute, an award such as was requested in the instant case would not have been final. Assumpsit could have been brought on the award. *Whitcher v. Whitcher*, 49 N. H. 176 (1870). In such action the defendant could avail himself of counterclaims arising under the second contract. N. Y. Civ. Prac. Act (1924) § 266 (2); *cf. Job & Co. v. Sanders*, 121 Misc. 760, 202 N. Y. Supp. 752 (Sup. Ct. 1923). But, by statute in New York, a judgment and execution issues upon the award on motion to the court. N. Y. Civ. Prac. Act (1924) §§ 1456, 1461, 1463. This motion is open to attack only upon grounds of lack of jurisdiction, of evident miscalculation of figures, of imperfection in form, or of fraud upon the part of the arbitrators. N. Y. Civ. Prac. Act (1924), §§ 1456, 1457, 1458; *Everett v. Brown*, 120 Misc. 349, 198 N. Y. Supp. 462 (Sup. Ct. 1923); *Matter of Goff & Sons*, 199 App. Div. 617, 192 N. Y. Supp. 92 (1st Dept. 1922). Apparently, therefore, an arbitration and award would be conclusive as to whether the defendant should pay the notes. The court, in the instant case, said that the plaintiff should not be allowed to gain a tactical advantage by securing arbitration on the first contract without asking for it on the second. But since the defendant can obtain arbitration of the second contract, the plaintiff gains no such advantage.

BANKRUPTCY—PRIORITIES OF LIENS OVER TAXES.—Mechanic lienors petitioned the court for an order directing the trustee in bankruptcy to give their liens priority over United States income tax claims. Section 64-a of the Bankruptcy Act [U. S. Comp. Stat. (1916) § 9648-a] directs that taxes be paid "in advance of the payment of dividends to creditors." Section 67-d [U. S. Comp. Stat. (1916) § 9651-d] provides that liens given for a present consideration and not in fraud upon the bankruptcy law shall "not be affected by this act." *Held*, that the order be granted, since the priority given by section 64-a affects only unsecured claims and does not displace subsisting liens within section 67-d. *In re Caswell Const. Co.*, 13 Fed. (2d) 667 (N. D. N. Y. 1926).

Section 67-d of the Act is ambiguous in that its language is broad enough to cover the whole Act, but its position would make it appear to qualify only section 67-c which voids certain liens. The Supreme Court, however, has held that it applies to the whole Act. *Richmond v. Bird*, 249 U. S. 174, 39 Sup. Ct. 186 (1919). The instant decision in subordinating tax claims to mechanics' liens is in accord with the legislative policy of preferring private creditors. See a recent amendment to the Act giving wage claims priority over tax claims. U. S. Comp. Stat. (Supp. 1926) § 9648.

BANKS AND BANKING—JOINT DEPOSITS—RIGHT OF SURVIVOR.—Plaintiff's intestate opened a joint savings account in the name of his sister and himself, giving both the privilege of withdrawal, but reserving to himself the power of revocation. He died without having exercised this power. In letters to his sister he stated his desire that the balance be paid to her in case she survived him. In an action to prevent the bank from paying her, the lower court gave judgment for the plaintiff. *Held*, on appeal, that the judgment be reversed on the ground that a joint interest was created at the time the account was opened. *Cleveland Trust Co. v. Scobie*, 151 N. E. 373 (Ohio, 1926).

Joint deposits without the power of revocation have been held to pass

to the survivor on various legalistic theories. *Booth v. Oakland Sav. Bank*, 122 Calif. 19, 54 Pac. 370 (1898) (trust); *Kelly v. Beers*, 194 N. Y. 49, 86 N. E. 980 (1909) (gift); *Erwin v. Felter*, 283 Ill. 36, 119 N. E. 926 (1918) (joint tenancy); *Brewer v. Bowersox*, 92 Md. 567, 48 Atl. 1060 (1901) (estate by the entireties); *Deal's Adm'r v. Merchants & Mech. Sav. Bank*, 120 Va. 297, 91 S. E. 135 (1917) (contract); *Chippendale v. North Adams Sav. Bank*, 222 Mass. 499, 111 N. E. 371 (1916) (novation). *Contra: Swan v. Walden*, 156 Calif. 195, 103 Pac. 931 (1909) (disapproving estate by the entireties); *Norway v. Merriam*, 88 Me. 146, 33 Atl. 840 (1895) (held to be a testamentary document void because of the Statute of Wills). The instant case does not fit any of the orthodox theories. The presence of the power of revocation would not be fatal to a trust. *Robb v. Washington and Jefferson College*, 185 N. Y. 485, 78 N. E. 359 (1906). In the instant case, however, the facts from which the court can deduce an "intention" to create a trust are lacking. There was no express declaration of trust nor any unequivocal act evidencing desire to create one accompanying the making of the deposit. *Cf. Nicklas v. Parker*, 71 N. J. Eq. 777, 61 Atl. 267 (1905); *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748 (1904) (doctrine of tentative trusts); (1920) 30 YALE LAW JOURNAL, 96. The power of revocation precludes a gift. *Denigan v. Hibernia Sav. Soc.*, 127 Calif. 139, 59 Pac. 389 (1899). Likewise, a joint tenancy. *Staples v. Berry*, 110 Me. 32, 85 Atl. 303 (1912). The entireties apply only to husband and wife. *Cf. Brewer v. Bowersox, supra.* The contract theory requires consideration. See *Denigan v. San Fran. Union, supra*, at 150, 59 Pac. at 392. There seems to be a tendency, however, to be liberal in the application of the legalistic theory used. *Hoboken Bank v. Schwoon*, 62 N. J. Eq. 503, 50 Atl. 490 (1901) (unequivocal declaration of trust held unnecessary); *Negaunee Nat. Bank v. Le Beau*, 195 Mich. 502, 161 N. W. 974 (1917) (delivery of pass book not essential for a gift). These theories are used to arrive at conclusions consonant with the intention of the parties. The instant decision on its facts seems to carry out the obvious contemplation of the parties. Many states have statutes protecting banks which have paid balances to the surviving joint depositor. *E.g.* Mass. Gen. Laws (1921) c. 167, § 14; (1923) 9. CORN. L. Q. 48. Similar legislation to fix the rights of survivors in accordance with the intention of the depositors seems desirable. *E.g.* N. Y. Cons. Laws (Cahill's, 1923) § 249.

BANKS AND BANKING—TIME FOR PRESENTMENT OF "ON ARRIVAL" DRAFT.—The defendant flour company shipped flour to a Bridgeport dealer and drew a draft "payable thirty days after arrival." The draft with a bill of lading attached was sent for collection to the defendant bank, with instructions to "surrender documents upon drawee's acceptance of draft." Before arrival of the flour the drawee accepted the draft, and the bank, in accordance with a local banking custom, treated acceptance as "arrival," dated the draft accordingly, and surrendered the bill of lading. Thereupon, the drawee pledged the bill on a loan from the bank. A few days later the drawee became insolvent. Before demand for the flour by the bank, the flour company notified the plaintiff railroad to stop delivery The latter brought a bill of interpleader to determine title to the flour. The trial court held that the custom of Bridgeport banks was inconsistent with instructions, and gave judgment for the flour company. *Held*, on appeal, that the judgment be reversed. *New York, N. H. & H. R. R. v. First Nat. Bank of Bridgeport, Conn.*, 134 Atl. 223 (Conn. 1926).

If a bank having an item for collection fails to follow the instructions of its principal, it becomes responsible for resulting loss. *Collin County*

Nat. Bank v. Turner, 167 S. W. 165 (Tex. Civ. App. 1914). In the absence of instructions, a bank has certain well-defined duties. It must present paper for acceptance where necessary to charge drawers or indorsers. *Citizen's Bank v. Third Nat. Bank*, 19 Ind. App. 69, 49 N. E. 171 (1898); N. I. L. § 143. Even where not thus required under the N. I. L., a bank must present promptly to protect its principal, and give notice if there is refusal of acceptance. *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141 (1884). Upon acceptance of a time or sight draft (of more than three days) in absence of instructions, a bank should surrender the attached bill of lading. *National Bank v. Merchants' Bank*, 1 Otto, 92 (U. S. 1875); Porter *Law of Bills of Lading* (1891) 400 *et seq.* But only upon payment, if the draft is on demand or under four days. N. B. L. Act. § 41. Where there is neither instruction nor established law a bank may sometimes rely on custom. *Sahlien v. Bank*, 90 Tenn. 221 (1891) (custom to hold dishonored paper 10 days without giving notice); *Bank of Washington v. Triplett & Neale*, 1 Pet. 25 (U. S. 1828). But it has been held that a particular custom will not excuse unless known to the principal. *Federal Reserve Bank v. Malloy*, 264 U. S. 160, 44 Sup. Ct. 296 (1924). And even if known, the agent may still assume the risk of being held responsible. See *Federal Reserve Bank v. Malloy, supra* at 170, 44 Sup. Ct. at 299. There seems to be no case of premature presentment for acceptance. Premature payment to a collecting bank, however, has been held to discharge a drawee. *Bliss v. Cutter*, 19 Barb. 9 (N. Y. 1854) (dictum that bank is not responsible). The instant case seems to be the first raising the question of when "on arrival" drafts should be presented. The court interpreted the action of the bank as consistent with the instructions. If the instruction had been "to surrender upon acceptance on arrival," the court might have treated it as authorizing surrender only on arrival. The case, therefore, leaves undecided whether an "on arrival" draft may be presented before the arrival of the goods. Hence, a bank that follows a custom of presenting "on arrival" drafts immediately for acceptance assumes the risk of having the custom declared contrary to instructions.

BILLS AND NOTES—CANCELLATION OF NOTATION OF PAYMENT ON BACK OF NOTE NOT ALTERATION OF "INSTRUMENT."—The plaintiff was the holder of two promissory notes made by the defendant. Note A was secured by a mortgage and contained an indorsement by the plaintiff of a partial payment of $500. Note B was not so well secured. The plaintiff drew a pencil line through the notation of payment on note A and credited the amount on note B. In an action to foreclose the mortgage securing note A, the lower court found for the plaintiff crediting the defendant with the partial payment. The defendant appealed on the ground that the instrument had been materially altered and was, therefore, avoided. *Held*, that the judgment be affirmed. *Harrington v. Leighton*, 208 N. W. 219 (S. D. 1926).

Section 124 of the N. I. L. provides that where a negotiable instrument has been materially altered, it is avoided except as against a holder in due course. When an instrument is avoided depends upon what meaning is put into the variable term "instrument." Additions to and erasures from the principal wording on the face of a note have been held to be alterations of the "instrument." *Builders Lime & Cement Co. v. Weimer*, 170 Iowa, 444, 151 N. W. 100 (1915); ("order of" stricken out and "or bearer" inserted); *Draper v. Wood*, 112 Mass. 315 (1873) (adding interest provision). Also, conditions attached to the face of a note by glue or perforation. *Bothwell v. Schweitzer*, 84 Neb. 271, 120 N. W. 1129

(1909); *Heldman v. Gunell*, 201 Ill. App. 172 (1916). But courts have held marginal notations used as reference memoranda not to be part of the "instrument." *Eaton v. Daley*, 32 N. D. 328, 155 N. W. 644 (1915); *Clem v. Chapman*, 262 S. W. 168 (1924) (extending due date). There is less uniformity in the decisions as to whether indorsements are part of the "instrument." "Material" changes of the nature of an indorsement have been held to discharge the indorser. *Sawyer State Bank v. Sutherland*, 36 N. D. 493, 162 N. W. 696 (1917) (writing "protest waived" above blank indorsement); *Waltham State Bank v. Tuttle*, 160 Minn. 250, 199 N. W. 970 (1924) (erasure of "without recourse" and substitution of "demand and protest waived"). But not to be a defense to a maker. *Continental Bank v. Sacks*, 152 La. 98, 92 So. 747 (1922). It seems, then, that so far as the maker is concerned, the "instrument" is his original agreement. Thus, notations on the back of promissory notes have been held "independent collateral" agreements. *Cambridge Saving Bank v. Hyde*, 131 Mass. 77 (1881) (notation that interest was to be reduced); *Hakes v. Russ*, 175 Fed. 751 (C. C. A. 6th, 1910); *Bland v. Fidelity Trust Co.*, 71 Fla. 499, 71 So. 630 (1916) (addition of notation of payment—under N. I. L.). Likewise, prior to the N. I. L., the erasure of such indorsements was held not to be a material alteration of the "instrument." *Sims v. Paschal*, 27 N. C. 276 (1844); *Theopold v. Deike*, 76 Minn. 121, 78 N. W. 977 (1899). The instant decision would seem to be a commercially satisfactory limitation to the drastic penalty, in many cases, of complete avoidance imposed by section 124.

CARRIERS—AGREEMENT TO EXEMPT ONE JOINT TORT-FEASOR BEFORE CAUSE OF ACTION HAS ACCRUED HELD A RELEASE OF BOTH.—The defendant railway company issued to the plaintiff a gratuitous pass, the latter assuming all risks of personal harm. The plaintiff entered the terminal to board a train, and was injured by falling on a slippery floor. In an action for damages, the defendant terminal company successfully pleaded the agreement with the defendant railway company as a bar to the action. *Held*, on appeal, (one judge *dissenting*) that the judgment be affirmed, since the agreement operated as a release of both defendants. *Wilder v. Pennsylvania Ry. Co.*, 217 N. Y. Supp. 56 (App. Div. 1st Dept. 1926).

A carrier is responsible to a passenger for hire for negligent injury, regardless of an agreement to the contrary. *Buckley v. Bangor, etc. R. R.*, 113 Me. 164, 93 Atl. 65 (1915). It is otherwise where the passenger is given a gratuitous pass. *Quimby v. Boston & Maine R. R.*, 150 Mass. 365, 23 N. E. 205 (1890); *Charleston, etc. Ry. v. Thompson*, 234 U. S. 576, 34 Sup. Ct. 964 (1913). *Contra: Huckstep v. St. Louis & H. Ry.*, 166 Mo. App. 330, 148 S. W. 988 (1912); *cf. New York Cent. R. R. v. Mahoney*, 252 U. S. 152, 40 Sup. Ct. 287 (1920) (recovery was allowed where railway was guilty of "gross" negligence); 9 A. L. R. 496, note. A release of one tort-feasor after the cause of action has accrued operates to release all. *Snyder v. Telephone Co.*, 135 Iowa, 215, 112 N. W. 776 (1907). The reason given is that since there is but a single injury there can be but one satisfaction; that the release implies satisfaction, and hence another suit is repugnant thereto. *Abb v. Northern Pac. Ry.*, 28 Wash. 428, 68 Pac. 954 (1902). The extreme technicality of this rule has been criticised. (1921) 21 COL. L. REV. 491; (1923) 10 VA. L. REV. 70. The tendency of the courts is to be liberal to the releasor. Some courts are astute in finding the joint tort relationship not to exist. *Wiest v. Traction Co.*, 200 Pa. 148, 49 Atl. 891 (1901). *The Koursk*, 40 T. L. R. 399 (C. A. 1924); (1924) 24 COL. L. REV. 891; (1924) 34 YALE LAW JOURNAL, 335. The most common evasion of the rule, however, lies in construing the agreement

to exempt from responsibility as a covenant not to sue rather than a technical release. *Kropidlowski v. Pfister, etc. Co.*, 149 Wis. 421, 135 N. W. 839 (1912). Especially where there is a reservation in the release evidencing an intention to hold all other tort-feasors. *Dwy v. Conn. Co.*, 89 Conn. 74, 92 Atl. 883 (1915); *Adams Express Co. v. Beckwith*, 100 Ohio 348, 126 N. E. 300 (1919). But no such reservation should be necessary. *Cf. Warner v. Brill*, 195 App. Div. 64, 185 N. Y. Supp. 586 (3rd Dept. 1921). Particularly where, as in the instant case, the agreement is made before any right of action has arisen, since it is not likely that a party, in exempting a railway company from responsibility for possible future negligence, would contemplate an exemption of all others whose negligence might concur to produce injury.

CONSTITUTIONAL LAW—ORE EXTRACTED FROM INDIAN LAND NOT TAXABLE BY STATE.—Plaintiff sued to recover tax money paid under protest to the State of Oklahoma. The levy in question was an *ad valorem* tax on ores taken from a federal Indian reservation under a lease to the plaintiff which provided for payment of royalties directly to the Secretary of the Interior for the Indians. The Oklahoma Supreme Court gave judgment for the State. *Held*, on writ of error, (Justices Brandeis and McReynolds *dissenting*) that the judgment be reversed since this was a tax on an agency of the government. Two considerations were advanced in the *dissent* of Mr. Justice Brandeis: (1) the ore became private personal property on severance from the ground, (2) there is a distinction between a state tax restricting the power of a federal instrument to serve the government and a tax upon its property. *Jaybird Mining Co. v. Weir*, 46 Sup. Ct. 592 (1926).

The distinction between taxation of the operation of a federal "instrument" and taxation of its property although previously recognized was not followed in a recent decision. *Clallam County v. United States Spruce Corp.*, 263 U. S. 341, 44 Sup. Ct. 121 (1923). But this distinction seems justified where the property sought to be taxed is used primarily to earn profit for a private corporation and not for the governmental purposes of the United States. Cohen and Dayton, *Federal and State Taxation* (1925) 34 YALE LAW JOURNAL, 807. The exemption of a federal instrument from state taxation should be justified only when the functioning of the instrument is obstructed. Thus, by way of analogy, state taxes on foreign corporations and corporations engaged in interstate commerce have been upheld where the burden was slight, in spite of the prohibition in the federal constitution against the burdening of interstate commerce. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876 (1891); *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214 (1897). The decision in the instant case is unfortunate in that it may lead to the conclusion that *all* property of a federal instrument is exempt from state taxation.

CONSTITUTIONAL LAW—STATUTORY STAY OF ACTION ON INSURANCE CONTRACTS PAYABLE IN RUSSIAN RUBLES.—The plaintiff, a Russian refugee residing in France, brought suit on two matured insurance policies issued in Russia in 1901 and 1906. The defendant, a New York corporation, moved for a stay of action under a statute [N. Y. Laws (1926) c. 232; Civ. Prac. Act, § 169-a] which provides that all actions on insurance contracts made before November 7th, 1917, by any American insurance company, and payable in Russian rubles, or to be performed in Russia, on application shall be stayed until thirty days following the recognition *de jure* of a government of Russia by the United States. As appeared in the defendant's affidavits, the act was passed to prevent the Soviet govern-

ment from collecting on policies issued by American insurance companies whose Russian assets had been confiscated by it. *Held*, that the motion be denied since the statute is unconstitutional, *inter alia*, as impairing the obligation of contracts. *Sliosberg v. New York Life Ins. Co.*, 217 App. Div. 67, 216 N. Y. Supp. 215 (1st Dept. 1926).

Some stay laws have been upheld on the ground that they merely change the existing remedy without substantially diminishing the value of the contract. *Breitenbach v. Bush*, 44 Pa. 313 (1863); see *Bronson v. Kinzie*, 1 How. 311, 315 (U. S. 1843); *Edwards v. Kearzey*, 96 U. S. 595, 598 (1877). But it is only in the exigency of war or panic that the courts have sanctioned statutory stays of considerable duration, and then only for a "reasonable," limited, time. *Johnson v. Duncan*, 3 Mart. 530 (La. 1815) (stay of all civil actions for four months during invasion); *Breitenbach v. Bush, supra; Pierrard v. Hoch*, 97 Or. 71, 191 Pac. 328 (1920) (stay of suits against volunteers during three-year enlistment); *Chadwick v. Moore*, 8 Watts & S. 49 (Pa. 1844) (stay of sales on execution for year during panic). Even in an emergency, an indefinite postponement has been held void, as in effect denying the remedy. *Hudspeth v. Davis*, 41 Ala. 389 (1867); *Luter v. Hunter*, 30 Tex. 688 (1868) (stay of execution or collection of debts until ratification of peace); *Clark v. Martin*, 49 Pa. 299 (1865); *Granger v. Luther*, 42 S. D. 636, 176 N. W. 1019 (1920) (stay of suits against volunteers for duration of war). Hence, because of the uncertain duration of the stay in the instant case, and also because the plaintiff had no connection with the Soviet government, the holding seems desirable.

COURTS—FEDERAL EQUITY JURISDICTION—REFUSAL OF APPELLATE COURT TO RETAIN SUIT WHEN THERE IS ADEQUATE REMEDY AT LAW.—The plaintiffs, out of possession, brought suit to quiet title to certain real estate of which defendants were in possession under claim of ownership. The plaintiffs also asked for the cancellation of a mortgage. The defendants failed to object that the remedy at law was adequate. A decree was given for the plaintiff. *Held*, on appeal, that the decree be reversed since it was the "duty" of the appellate court, *sua sponte*, to raise the objection of lack of equity jurisdiction so as to give effect to U. S. Comp. Stat. (1916) § 1244, which provides that "suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law." *Denison v. Keck*, 13 Fed. (2d) 384 (C. C. A. 8th, 1926).

A bill to quiet title cannot be maintained in a federal court by a complainant out of possession against a defendant in possession as there is an adequate remedy at law. *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276 (1891); *Hipp v. Babin*, 19 How. 271 (U. S. 1856). Most federal courts hold that by failing to plead the adequacy of remedy at law seasonably the defendant waives his power of doing so. *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604 (1890). Courts in accord with the instant case base their decision on the fact that the constitutional guarantee of the right to trial by jury must be preserved. *Hipp v. Babin, supra; Lewis v. Cocks*, 23 Wall. 466 (U. S. 1874). In these cases, failure to object should be tantamount to a waiver of the right to trial by jury. *Cobbam v. Conklin*, 208 Fed. 231 (C. C. A. 9th, 1913); see *Toledo Computing Scale Co. v. Computing Scale Co.*, 142 Fed. 919, 923 (C. C. A. 6th, 1906). Another ground relied on the instant case is "the duty of the court to recognize and preserve as far as it can the constitutional difference between law and equity actions." There is, however, nothing in the constitution that requires a distinct *procedure* for law and equity in the

federal courts. All that is necessary is that *substantive* rights, previously denominated legal or equitable, should be adjudicated. *Cf.* Pound (1911) 36 A. B. A. REP. 470; CLARK (1926) 5 AM. LAW SCH. REV. 716; *Phillips v. Gorham,* 17 N. Y. 270 (1858) (under a similar provision of the New York constitution). The greater number of decisions hold that the appellate court may, in its discretion, omit from its consideration the objection of adequacy of remedy at law when not raised below. *Reynes v. Dumont,* 130 U. S. 354, 9 Sup. Ct. 486 (1889); *Hapgood v. Berry,* 157 Fed. 807 (C. C. A. 8th, 1907). In the instant case, the court might well have exercised its discretion and thus saved itself and the parties time and expense.

DAMAGES—ATTORNEY'S FEES EXPENDED IN DEFENDING SUIT BROUGHT IN VIOLATION OF INJUNCTION NOT RECOVERABLE.—The plaintiff was granted an injunction restraining the defendant from interfering with certain drilling contracts. Later the defendant brought ejectment against the plaintiff, who was awarded judgment. The plaintiff then brought an action for damages, including attorney's fees paid by him in defense of the ejectment action. The lower court gave judgment for the plaintiff. *Held,* on appeal, that the judgment be reversed, even assuming that the defendant sued in violation of the injunction. *Hertzel v. Weber,* 246 Pac. 839 (Okla. 1926).

In the absence of statute, attorney's fees are not ordinarily recoverable as damages. *Oerlichs v. Spain,* 15 Wall. 211 (U. S. 1871); *Day v. Woodworth,* 13 How. 363 (U. S. 1851). In a few states recovery is permitted by statute. Ga. Civ. Code (1911) § 4392 (if the defendant acted in bad faith); Wis. Stat. (1921) § 3490 (if the plaintiff sustained actual loss by the defendant's misconduct). Even in the absence of statute, counsel fees have frequently been allowed in cases of malicious prosecution and false imprisonment. *Lytton v. Baird,* 95 Ind. 349 (1883); *Blythe v. Tompkins,* 2 Abb. Prac. 468 (N. Y. 1856). Likewise, a grantor is responsible on his covenant of warranty for attorney's fees expended by the grantee in defending the title. *Seitz v. People's Savings Bank,* 140 Mich. 106, 103 N. W. 545 (1905); *cf. New Haven & Northampton Co. v. Hayden,* 117 Mass. 433 (1875). In actions for damages for the violation of an injunction, and in proceedings for civil contempt, attorney's fees have frequently been awarded, particularly in the federal courts. *Toledo Scale Co. v. Computing Scale Co.,* 261 U. S. 399, 43 Sup. Ct. 458 (1923); *A. B. Dick Co. v. Fuller,* 6 Fed. (2d) 393 (S. D. N. Y. 1923); *Campbell v. Motion Picture Mach. Operators,* 151 Minn. 238, 186 N. W. 787 (1922). *Contra: Oerlichs v. Spain, supra; People v. Jacobs,* 5 Hun, 428 (N. Y. 1875). The main basis for denying recovery in such cases is the difficulty of ascertaining the fee. See *Oerlichs v. Spain, supra,* at 231. But the assessment of damages is certainly no easier in other situations as, for example, where compensation is allowed for mental suffering. *Merrill v. Los Angeles Gas Co.,* 158 Calif. 499, 111 Pac. 534 (1910); *Young v. Western Union Tel. Co.,* 107 N. C. 370, 11 S. E. 1044 (1890). It has also been urged that the granting of attorney's fees would prevent much vexatious litigation. MECCARTNEY, PROCEEDINGS, ILL. STATE BAR ASS'N 419 (1923).

EVIDENCE—GENERAL REPUTATION OF DISORDERLY HOUSE INADMISSIBLE.—In a prosecution for keeping a disorderly house the state's evidence of the general reputation of the house was admitted over the defendant's objection. *Held,* on appeal, that the defendant's objection be sustained since there was no "necessity" for an exception to the hearsay rule. *State v. Still,* 133 Atl. 778 (Del. 1926).

Where the offense is keeping a house of "ill fame," some courts hold that the reputation is "part of the offense," and hence not hearsay. *Cadwell v. State*, 17 Conn. 467 (1846); see (1911) 25 HARV. L. REV. 88. *Contra: State v. Boardman*, 64 Me. 523 (1874). Otherwise, where, as in the instant case, the indictment is for keeping a "disorderly house." *Henson v. State*, 62 Md. 231 (1884). Such a technical distinction, however, seems unwarranted. See *State v. Boardman, supra*, at 529. Generally, to have an exception to the hearsay rule there must be (1) a guarantee of trustworthiness, and (2) some "necessity." 3 Wigmore, *Evidence* (1923) §§ 1421, 1422. The guarantee of trustworthiness, in cases of general reputation evidence, is the general discussion of the community as to the truth of the matter asserted. See *South-West School District v. Williams*, 48 Conn. 504, 507 (1881); *Regina v. The Inhabitants of Bedfordshire*, 4 E. & B. 535, 541 (Q. B. 1855). "Necessity," as interpreted in the instant case, does not exist unless there is an inability of witnesses, through lack of knowledge, to give direct evidence of the fact. This view has some support. *Wooster v. State*, 55 Ala. 217 (1876); *Henson v. State, supra;* see *Kenyon v. People*, 26 N. Y. 203, 209, (1863). This "necessity," however, was said to be present where general reputation of insolvency was offered. See *Downs v. Richards*, 4 Del. Ch. 416, 425 (1872). Likewise, where the general reputation of defendant's accomplice as a kidnapper was offered to show defendant's intent. *State v. Harter*, 4 Har. 532 (Del. 1847). It would seem that the "necessity," as defined in the instant case, would be as great as in the above. Most courts in similar situations admit the evidence because, otherwise, as a practical matter, the difficulty of proof would approach the impossible; the keeper and frequenters would not voluntarily testify and they could not be compelled to do so. *Gray v. United States*, 266 Fed. 355 (C. C. A. 3d, 1920); *Commonwealth v. Murr*, 7 Pa. Super. Ct. 391 (1898). It seems that "necessity" means simply the practical convenience of admitting the evidence and the value of it. *Cf. Anzine v. United States*, 260 Fed. 827 (C. C. A. 9th, 1919); *Hunter v. United States*, 272 Fed. 235 (C. C. A. 4th, 1921); 3 Wigmore, *Evidence* (1923) § 1620. Where the evidence is admitted there must be corroborating evidence to support a conviction. *Howard v. State*, 150 Tenn. 341, 265 S. W. 542 (1924); *Johnson v. State*, 102 Tex. Cr. App. 409, 278 S. W. 210 (1925); *Putman v. State*, 9 Okla. Cr. 535, 132 Pac. 916 (1913); 46 L. R. A. (N. S.) 593, note. But this does not do away with the "necessity." Many states have statutes admitting the evidence. Iowa Comp. Code (1919) § 1030; Mich. Comp. Laws (1915) § 7783; 3 Wigmore, *Evidence* (1923) § 1620, note 7.

INTERNATIONAL LAW—IMMUNITY FROM RESPONSIBILITY OF COMMERCIAL VESSEL OF FOREIGN GOVERNMENT.—A merchant vessel operated by the Italian government was libelled by a private suitor for failing to deliver goods accepted for carriage. The lower court dismissed the libel for want of jurisdiction on the ground that the vessel was a public ship of a foreign government. *Held*, that the decree be affirmed. *The Pesaro*, 46 Sup. Ct. 611 (1926).

The immunity from responsibility of a public vessel of a foreign government is generally recognized. *The Exchange*, 7 Cranch, 116 (U. S. 1812) (warship). No exception is made for public ships engaged in commerce. *The Parlement Belge*, 5 P. D. 197 (1880). In some countries (including Italy), however, the government may be held responsible for injuries inflicted by its vessels. U. S. Comp. Stat. (Supp. 1923) § 1251½-a. For Italian law, see 1 Giaquinto, *La Responsabilita degli enti Pubblici* (1912) 145. But immunity from responsibility accorded to foreign public vessels is founded on a rule of comity between nations. *The Parle-*

ment Belge, supra. Courts have recognized that the principle of the instant case is unsound. See *Bank of United States v. Planter's Bank of Georgia,* 9 Wheat. 904, 907 (U. S. 1824); *The Maipo,* 259 Fed. 367, 368 (S. D. N. Y. 1919); *The Pesaro,* 277 Fed. 473, 481, 482 (S. D. N. Y. 1921). The Italian courts would probably have assumed jurisdiction, on facts similar to those of the instant case, over an American public vessel engaged in commerce. *Cf.* Gabba (1888) 15 CLUNET, 180; (1889) 16 *ibid.* 538; (1890) 17 *ibid.* 27. *Contra: cf. Anzilloti* (1895) 5 ZTSCHR F. INT. PRIVAT. U. STRAFRECHT 24, 138. The broad extension of the doctrine of "sovereign immunity" has been attacked by writers generally. See Borchard, *Government Liability in Tort* (1924) 34 YALE LAW JOURNAL, 1; Weston, *Actions against the Property of Sovereigns* (1919) 32 HARV. L. REV. 266; Lord, *Claims in Admiralty Against the Government* (1919) 19 COL. L. REV. 467. It not only works hardship on private suitors, but it might also operate to the government's disadvantage by causing private vessels to refuse to salvage government merchant vessels. See *The Pesaro,* 277 Fed. 473, 481 (S. D. N. Y. 1921). The rule, however, has apparently become too firmly entrenched to be uprooted by judicial decision. The adoption of an international agreement imposing the same responsibility on government and privately operated merchant vessels seems desirable.

MARRIAGE AND DIVORCE—JURISDICTION OF STATE COURTS OVER RESIDENTS ON FEDERAL RESERVATIONS.—Maryland sold a tract of land to the federal government for military purposes, granting to the United States exclusive jurisdiction over the land, but reserving authority to serve process of Maryland courts. The plaintiff and defendant, residents on this land, applied for a divorce in the state court. The bills were dismissed, and the defendant appealed. *Held,* (two judges concurring in the result) that the decree be affirmed, for, since the federal government had exclusive jurisdiction over the reservation, the parties were not residents of the state for the purpose of securing a divorce in a state court. *Lowe v. Lowe,* 133 Atl. 729 (Md. 1926).

The Constitution gives the federal government exclusive legislative power over land and necessary buildings bought with the consent of the state for military purposes. Art. 1, § 8. Therefore, residents on such land may not vote. *Opinion of the Justices,* 42 Mass. 580 (1841); *Sinks v. Reese,* 19 Ohio St. 306 (1869); *In re Town of Highlands,* 48 N. Y. St. Rep. 795, 22 N. Y. Supp. 137 (Sup. Ct. 1892). Likewise, they are exempt from state taxation and may not enjoy the privileges of state institutions. *Opinion of the Justices, supra;* see *Fort Leavenworth R. R. v. Lowe,* 114 U. S. 525, 537 (1885). When the exclusive jurisdiction over such land is ceded to the United States, the courts follow the rule of international law that the former sovereign's municipal law, not inconsistent with the purpose of cession, is continued in force until the new sovereign repeals it. *Chicago, R. I. & P. Ry. v. McGlinn,* 114 U. S. 542 (1885); *Fant v. Arlington Hotel Co.,* 170 Ark. 440, 280 S. W. 20 (1926); *Anderson v. Chicago, etc. Ry.,* 102 Neb. 578, 168 N. W. 196 (1918). Congressional legislation in this connection seems to have covered only criminal matters, and not civil personal relations of residents on such public property. This permits the inference that state courts are to continue to enforce the old state law. See *Divine v. Unaka Nat. Bank,* 125 Tenn. 98, 108, 140 S. W. 747, 749 (1911). Such is the rule in international law. Magoon, *The Law of Civil Government under Military Occupation* (2d ed. 1902) 30. This seems to be the practice in regard to the probation of wills and the administration of estates of residents on federal property. *Divine v. Unaka Nat. Bank, supra; cf. In re Grant's estate,* 83 Misc. 257, 144 N. Y. Supp. 567

(Surr. 1913). Outside of territories and the District of Columbia, Congress has never given federal courts power to probate wills or to grant divorce; hence, it is doubtful whether they could do so without further congressional legislation. Rose, *Federal Jurisdiction and Procedure* (2d ed. 1922) §§ 162, 166. Therefore, it would seem more desirable, until Congress provides to the contrary, for the state court to assume jurisdiction in divorce actions following the custom as regards the probate of wills.

MASTER AND SERVANT—FELLOW-SERVANT RULE NOT APPLICABLE TO PROPERTY.—A co-employee negligently permitted his team to collide with plaintiff's automobile which the latter was using in the defendant's service. In an action for damages, the lower court gave judgment for the plaintiff. *Held*, on appeal, that the judgment be affirmed since the fellow-servant rule does not apply to property. *Setzkorn v. City of Buffalo*, 126 Misc. 858, 215 N. Y. Supp. 584 (Sup. Ct. 1926).

The fellow-servant doctrine is generally disfavored by commentators. (1920) 30 YALE LAW JOURNAL, 85; Boyd, *The Economic and Legal Basis of Compulsory Industrial Insurance for Workmen* (1912) 10 MICH. L. REV. 345; Labatt, *Master and Servant* (1913) § 1398; 1 Shearman & Redfield, *Negligence* (6th ed. 1913) 426, 427. Likewise, courts have restricted its application. *Koerner v. St. Louis Car Co.*, 209 Mo. 141, 107 S. W. 481 (1907) (where fellow servant worked in different department); *Fox v. Packing Co.*, 96 Mo. App. 173, 70 S. W. 164 (1902) (servant considered a "vice-principal"); *Beers v. Prouty Co.*, 200 Mass. 19, 85 N. E. 864 (1908) (incompetent co-employee); *Knoxville News v. Spitzer*, 279 S. W. 1043 (Tenn. 1926) (employing minor unlawfully). Workmen's compensation statutes abrogate the doctrine in most states, *e.g.*, Ill. Rev. Stat. (Smith, 1921) c. 48, §§ 138, 148; Mass. Gen. Laws (1921) c. 152, § 66. The refusal to apply the fellow-servant rule in case of property damage again illustrates the present hostility to the doctrine.

MUNICIPAL CORPORATIONS—POWER TO PERMIT PRIVATE BRIDGE OVER STREET.—Plaintiff sued to obtain a declaratory judgment as to whether the board of aldermen or other officers of the defendant city had power to give a landowner the privilege to build and maintain a bridge connecting its buildings on both sides of a public street owned in fee by plaintiff, and as to whether a permit was necessary to erect such a bridge. *Held*, that the board of aldermen (and no other officers) have such power, so long as the permit granted is revokable and the bridge does not interfere with the use of the street, and that the owner does not have the privilege of maintaining such a bridge without a permit. *Yale University v. City of New Haven*, 134 Atl. 268 (Conn. 1926).

The legislature has all authority for the regulation of public highways, but it usually delegates this power to local or state boards. See *New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397, 399, 65 N. E. 835, 836 (1903); *World Realty Co. v. City of Omaha*, 113 Neb. 396, 401, 203 N. W. 574, 576 (1925). The legislature, however, may at any time again exercise this power itself. *United R. R. & Canal Co. v. Jersey City*, 71 N. J. L. 80, 58 Atl. 71 (1904); see *New Eng. Tel. & Tel. Co. v. Boston Terminal Co. supra*, at 400, 65 N. E. at 836. Since delegated powers are usually limited by construction, there is sometimes doubt as to whether the powers granted to the city to regulate streets include the power to permit bridges over the streets. Where the city owns the fee to the street "in trust for the public" no permit for a private bridge can be given by the city. *Bybee v. State*, 94 Ind. 443 (1884). *Cf. Field v. Barling*, 149 Ill. 556, 37 N. E. 850 (1894). The city may grant a permit, however,

if the street is owned by the abutting owners and the bridge does not materially interfere with the public's easement of travel, light and air. *Hendryx Co. v. City of New Haven*, 134 Atl. 77 (Conn. 1926). *Cf. Kellogg v. Cincinnati Traction Co.*, 80 Ohio St. 331, 88 N. E. 882 (1909). Otherwise where view, light and air are obstructed, since this easement of the abutter cannot be taken except for public purposes. *World Realty Co. v. City of Omaha, supra; Field v. Barling, supra; Townsend v. Epstein*, 93 Md. 537, 49 Atl. 629 (1901). The instant case illustrates the benefits of a Declaratory Judgment Act. The legal relations here adjudicated include the power of a board of aldermen and the privilege of an abutting owner. As a result no unlawful act has been done, and the judgment will almost certainly prevent any such act.

PLEADING—JOINDER OF CAUSES OF ACTION—COUNTERCLAIM FOR ASSAULT AND SLANDER.—In an action for assault, defendant counterclaimed for assault and slander. The plaintiff moved for an order directing the dismissal of defendant's counterclaim. *Held*, that the motion be granted on the ground that assault and slander are separate causes of action and may not be joined. *Raspaulo v. Ragona*, 215 N. Y. Supp. 407 (Sup. Ct. Spec. T. 1926).

The instant case involves the interpretation of the meaning of the phrases "cause of action" and "same transaction" which occur in sections 258 (Joinder of Causes of Action) and 266 (Counterclaim) of the N. Y. Civ. Prac. Act. Occasionally, the New York courts have been quite liberal in allowing joinder under these sections. *Brewer v. Temple*, 15 How. Prac. 286 (N. Y. 1857); *Beardsley v. Soper*, 184 App. Div. 399, 171 N. Y. Supp. 1043 (3d Dept. 1918); *Ter Kuile v. Marsland*, 81 Hun. 420 (N. Y. 1894). Generally, however, they have followed a policy of narrow construction. *Anderson v. Hill*, 53 Barb. 238 (N. Y. 1869); *DeWolfe v. Abraham*, 151 N. Y. 186, 45 N. E. 455 (1896); *Adams v. Schwartz*, 137 App. Div. 230, 122 N. Y. Supp. 41 (1st Dept. 1910). In many states which still retain the usual code classification of joinable causes of action, the restrictions on joinder have been largely removed by a liberal interpretation of the "same transaction" and counterclaim provisions. *Craft Refrigerating Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76 (1893); *Dinges v. Riggs*, 43 Neb. 710, 62 N. W. 74 (1895); *Harris v. Avery*, 5 Kan. 146 (1869); *Scott v. Waggoner*, 48 Mont. 536, 139 Pac. 454 (1914); L. R. A. 1916 C., 491, note. Commentators who otherwise differ considerably in their views on the subject, agree on this point. See Clark, *Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817; McCaskill, *Actions and Causes of Action* (1925) 34 *ibid.* 614; *cf.* (1925) 34 *ibid.* 879; (1925) 35 *ibid.* 85. Section 258, subdivision 2 (which permits joinder of actions "for personal injuries, except libel, slander, criminal conversation or seduction") should not be considered inconsistent with subdivision 9 (the "same transaction" provision), for although the former does not *allow* a joinder of assault and slander, it does not *prohibit* such joinder under the latter or under the corresponding provision of the counterclaim section. A few code states have largely removed the restrictions on joinder by omitting the usual classifications of joinable causes and allowing comparative freedom of joinder. Iowa Code (1924) § 10960; Kan. Rev. Stat. (1923) § 60-601; Mich. Comp. Laws (1915) § 12309; N. J. Prac. Act (1912) § 100; Wis. Stat. (1921) § 2647. The decision in the instant case is opposed to the desirable tendency of eliminating restrictions on joinder of actions in both complaints and counterclaims.

REAL PROPERTY—HUSBAND MAY NOT "FRAUDULENTLY" DEFEAT WIFE'S DOWER RIGHTS.—The plaintiff joined with her husband in a mortgage on his land to secure his debts. Later, though able to do so, he refused to pay the debt. At the foreclosure sale his agent bid in the premises, with money supplied by him. The agent subsequently conveyed, without consideration, to the husband's sister. The wife brought an action to establish her dower rights on the ground that the transaction was a fraudulent attempt to defeat her dower. The lower court dismissed the complaint. *Held*, on appeal, (two judges *dissenting*) that the judgment be reserved. *Byrnes v. Owen*, 243 N. Y. 211, 153 N. E. 51 (1926).

A husband may not, by the use of a "subterfuge," dispose of his property so as to bar his wife's dower rights. *McClean v. Denwood Realty Co.*, 124 Misc. 283, 207 N. Y. Supp. 226 (Sup. Ct. 1924) (husband procured third person to buy and foreclose mortgage); *Turner v. Kuehnle*, 70 N. J. Eq. 61 (1905) (secret agreement between husband mortgagor, and foreclosure purchaser); *Douglas v. Douglas*, 11 Hun, 406 (N. Y. 1877) (wife joined husband in exchange of land; exchanged land was conveyed to husband's sister instead of to himself); *Stokes v. Stokes*, 119 Misc. 193, 196 N. Y. Supp. 184 (Sup. Ct. 1922) (wife joined husband in conveyance to corporation of which husband was the only shareholder). A disposal of property in contemplation of marriage in order to bar the future wife's dower has been held to be in "fraud" of the wife. *Deke v. Huenkemeier*, 260 Ill. 131, 102 N. E. 1059 (1913); 48 L. R. A. (N. S.) 512, note. But where the husband later purchased land in the name of a third person, the "fraud" theory was not followed. *Nichols v. Park*, 78 App. Div. 95, 79 N. Y. Supp. 547 (1st Dept. 1903). Other courts have protected the wife on the ground of a resulting trust. *Douglas v. Douglas*, *supra*. And in a few states where the wife joins in her husband's mortgage, she is accorded the rights of a surety. *Mowry v. Mowry*, 24 R. I. 565, 54 Atl. 383 (1902). If the court in the instant case had applied the suretyship analogy, the same result would have been reached. The wife's (surety's) dower rights would not be affected by the act of her husband (the principal) in purchasing the land at the foreclosure sale. *Cf. Van Horne v. Everson*, 13 Barb. 526 (N. Y. 1852); *Madgett v. Fleenor*, 90 Ind. 517 (1883). The question is one of policy, and these various theories reflect the courts' desire to protect the wife. *Cf.* (1923) 8 CORN. L. Q. 390.

TORTS—AUTOMOBILE REGISTERED IN MARRIED WOMAN'S MAIDEN NAME—"NUISANCE" ON THE HIGHWAY.—A Massachusetts statute requires that a motor vehicle shall be registered in the "name" of its owner. Mass. Gen. Laws (1921) c. 90, § 2. The plaintiff, a married woman, registered her automobile in her maiden name, although she usually used her husband's name. In a collision resulting from the negligence of the defendant's motorman, the plaintiff was injured and her automobile damaged. In an action for damages the lower court directed a verdict for the defendant. *Held*, on appeal, that the judgment be affirmed, since the plaintiff's automobile, not being legally registered, was a "nuisance" on the highway. *Bacon v. Boston Elevated Ry.*, 152 N. E. 35 (Mass. 1926).

While most states have a contrary rule, in Massachusetts an unregistered motor vehicle is a "nuisance" on the highway. *Dudley v. Northampton St. Ry.*, 202 Mass. 443, 89 N. E. 25 (1909). *Contra: Muller v. West Jersey & Seashore R. R.*, 99 N. J. L. 186, 122 Atl. 693 (1923). Similarly, if the automobile is registered in a "name" other than that of the owner. *Love v. Worcester St. Ry.*, 213 Mass. 137, 99 N. E. 960 (1912) (registration in the name of the owner's wife); *Gould v. Elder*, 219 Mass. 396, 107 N. E. 59 (1914) (registration in the name of a dealer who was

the agent and employee of the owner); *Fairbanks v. Kemp*, 226 Mass. 75, 115 N. E. 240 (1917) (registration in the name of the owner's dead husband); *Rolli v. Converse*, 227 Mass. 162, 116 N. E. 507 (1917) (registration in the names of two partners, one of whom had retired and transferred his interest); *Hanley v. American Ry. Exp.*, 244 Mass. 248, 138 N. E. 323 (1923) (registration in the name of an unincorporated association—trade union—of which the owners constituted the local branch). The statute has been strictly construed because its purpose is to make the ownership of motor vehicles readily ascertainable. See *Bourne v. Whitman*, 209 Mass. 155, 172, 95 N. E. 404, 408 (1911); Huddy, *Automobiles* (7th ed. 1924) 83. Accordingly, the same court has held that registration is not invalidated by an irregularity which does not conceal the identity of the owner. *Crompton v. Williams*, 216 Mass. 184, 103 N. E. 298 (1913) (registration in a trade name under which the owner did business). Because of the apparent ease with which the plaintiff in the instant case was identified, the court might well have held that the requirements of the statute for registration were satisfied, and thus could have avoided an unreasonable extension of the much criticized Massachusetts rule. (1923) 32 YALE LAW JOURNAL, 394. Moreover, a statute which merely provides for the resumption of maiden names by divorcées [Mass. Gen. Laws (1921) c. 208 § 23] is scant justification for the conclusion that a married woman must take her husband's name. While she usually does so, she is impelled by custom rather than by law. (1925) 34 YALE LAW JOURNAL, 447.

WILLS—PROBATE—JUDGMENT CREDITOR OF DISINHERITED HEIR NOT PRIVILEGED TO CAVEAT WILL.—The complainant secured a judgment against the heir of the decedent prior to the latter's death. The judgment debtor had been excluded from his ancestor's estate by a will which devised the estate to the debtor's wife. The complainant alleged that the will was invalid, and filed a caveat to contest its probate. The lower court dismissed the caveat. *Held*, on appeal, that the order be affirmed, since the judgment creditor had no sufficient interest in the estate of the decedent to file a caveat. *Lee v. Keech*, 133 Atl. 835 (Md. 1926).

Universally, either by statute or by court decision, only an "interested party" may contest a will. *Johnston v. Willis*, 147 Md. 237, 127 Atl. 862 (1925); Ill. Rev. Stat. (Smith, 1921) c. 148, § 7; L. R. A. 1918 A, 447, note. The courts differ as to the content of the term "interested party." A general creditor has not a sufficient "interest" to contest the probate of a will. *Shepard's Estate*, 170 Pa. 323, 32 Atl. 1040 (1895). *Contra: Brooks v. Paine*, 28 Ky. L. Rep. 857, 90 S. W. 600 (1906). Similarly, a trustee in bankruptcy of an heir at law. *In re Beinhauer's Estate*, 118 Misc. 527, 193 N. Y. Supp. 758 (Surr. 1922). But the purchaser of the heir's interest prior to the probate of the will is permitted to do so. *Komorowski v. Jackowski*, 164 Wis. 254, 159 N. W. 912 (1916); *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668 (1905); see *Elmore v. Stevens*, 174 Ala. 228, 230, 57 So. 457 (1912). *Contra: In re Vanden Bosch's Estate*, 207 Mich. 89, 173 N. W. 332 (1919). Moreover, most courts hold that a lienor or judgment creditor, such as in the instant case, may caveat the will. *Smith v. Bradstreet*, 16 Pick. 264 (Mass. 1834); *Watson v. Alderson*, 146 Mo. 333, 48 S. W. 478 (1898) (where judgment creditor had levied execution on and purchased all the interests of the debtor in the real estate of his father); *In re Langevin's Will*, 45 Minn. 429, 47 N. W. 1133 (1891). *Contra: Lockhard v. Stephenson*, 120 Ala. 641, 24 So. 996 (1899). The argument generally advanced by courts in accord with the instant decision is that the heir has a "mere expectancy which is without substance and

utterly beyond the grasp of creditors," hence the latter have no "interest" in the estate. See *Shepard's Estate, supra,* at 327, 32 Atl. at 1041 (1895). The heir has, however, a property interest conditioned upon the will being invalid. The instant decision fails to indicate on what grounds the will is sought to be attacked. But as a general holding it may encourage the exercise of undue influence by the heir upon his ancestor for the purpose of defrauding the heir's creditors.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—COMMON LAW DEFENSES.—The compensation allowance previously granted to the plaintiff was rescinded by the Industrial Compensation Board on the ground that the plaintiff, being a minor between 14 and 16, and employed without a certificate in violation of the Child Labor Law at the time of the injury, was illegally employed and so not an "employee" within the Workmen's Compensation Act. The plaintiff then brought an action at law against his employer and contended that although he was not entitled to an award under the Workmen's Compensation Act, the defendant should not be permitted to set up the common law defenses. The lower court gave judgment for the plaintiff. *Held,* on appeal, that the judgment be reversed. *William B. Tilghman Co. v. Conway,* 133 Atl. 593 (Md. 1926).

Workmen's Compensation Acts generally include in their definition of employees "minors who are legally permitted to work under the laws of the state." Ill. Rev. Stat. (Hurd, 1919) ch. 48, § 130. Where, however, relief has been sought under the act, a few courts, under certain circumstances, have so strained it as to include minors "illegally" employed. *Wargo v. State's Workmen Insurance Fund,* Mackey 184, Workmen's Comp. Rep. (C. P. Luzerne Co. Pa. 1920) (because being illegally employed by a charitable institution, minor could not recover at common law); see *Foth v. Macomber & Whyte Rope Co.,* 161 Wis. 549, 551, 154 N. W. 369, 370 (1915) (dictum that minor between 14 and 16 although working without required certificate could recover under the Act); (1917) 15 Neg. Comp. Cas. Ann. 720, 723, note. But most courts interpret the Acts to exclude minors employed in violation of the Child Labor Law. See *Lostutter v. Brown Shoe Co.,* 203 Ill. App. 517, 522 (1917). And have granted relief in actions brought at law. *Hetzel v. Wasson Piston Ring Co.,* 89 N. J. L. 201, 98 Atl. 306 (1916); *Kruczouski v. Polonia Pub. Co.,* 203 Mich. 211, 168 N. W. 932 (1918). Even though recovery is allowed at common law, the minor is not fully protected, for the employer may still, as in the instant case, avail himself of the common law defenses. Where an employer has failed to insure according to the provisions of the Act, common law defenses have been abrogated by statute in all but a few states. 1 Schneider, *Workmens' Compensation Laws* (1922) 68. This power of the legislature is now recognized. *Hawkins v. Bleakley,* 243 U. S. 210, 37 Sup. Ct. 255 (1916); Schneider, *op. cit. supra,* at 70. However, no such power seems to have been recognized as residing in the courts. If, therefore, the repetition of so harsh a decision as the instant case is to be avoided, legislation specially providing for a minor illegally employed seems necessary. *Cf. Rasi v. Howard,* 109 Wash. 524, 187 Pac. 327 (1920); *Lutz v. Wilmanns Bros. Co.,* 166 Wis. 210, 164 N. W. 1002 (1917).