RECENT CASE NOTES

ADMINISTRATIVE LAW—IMMUNITY OF STATE—STATUTORY WAIVER.—A member of the state board of health inoculated plaintiff's two children with impure vaccine causing their deaths. The legislature by a private statute, 1918, 30 S. C. Stat. at L. 1097, authorized the plaintiff to bring an action for the recovery of such damages as may be proper under the provisions of the Wrongful Death Act. In a former action, it was held that the state had effectively waived immunity as a sovereign. After judgment for the plaintiff, the state appealed claiming immunity as an eleemosynary corporation. *Held,* (one judge *dissenting*) that the state had waived all immunities. *Sandel v. State* (1923, S. C.) 119 S. E. 776.

Such statutes as in the instant case have been strictly construed as conflicting with a supposedly fundamental theory of public policy—that "the king can do no wrong." By the general rule as to governmental functions the state is held not liable in damages where the statute simply permits suit. *Smith v. State* (1920) 227 N. Y. 405, 125 N. E. 841; 13 A. L. R. 1276, note. A second type of statute, empowering the plaintiff to sue the state for a particular tort, has been held to create no more than a common law liability, and gives the court jurisdiction without authority to award damages. *Apfelbacher v. State* (1915) 160 Wis. 565, 152 N. W. 144. The instant case presents a third type, where recovery of damages is expressly authorized. Wherever such a statute extending liability is not prohibited by a constitutional provision a liberal construction as by the court in the instant case seems wiser than a judicial adherence to the old conception of an unaccountable sovereign. *Cf.* COMMENTS (1922) 31 YALE LAW JOURNAL, 879; (1923) 32 *ibid.* 410. Similar results have been reached under statutes expressly admitting liability for negligence. *Sipple v. State* (1885) 99 N. Y. 284, 1 N. E. 892. A distinction has, however, sometimes been drawn between governmental and corporate functions, on the basis that in practise injuries are more likely to result from the latter. *Arnold v. State* (1914, 3d Dept.) 163 App. Div. 253, 148 N. Y. Supp. 479; Maguire, *State Liability for Tort* (1916) 30 HARV. L. REV. 20, 30. It is no longer possible to lay down rules as to when a function is governmental and when corporate, for each state adopts its own classification. In the instant case the function is clearly governmental rather than eleemosynary, the purpose of vaccination being not to benefit the individual but rather to safeguard the public health.

ATTORNEY AND CLIENT—NEGLIGENCE IN COLLECTING JUDGMENT—DEFENSE THAT ENDORSER OF NOTE IS LIABLE.—The plaintiff hired the defendants as attorneys to collect a promissory note which had been pledged with it as collateral security for an antecedent debt. The note was endorsed by the pledgor. The defendants secured a judgment against the maker but negligently allowed it to become worthless. The lower court directed a verdict for the plaintiff for the amount of the uncollected judgment. *Held,* (one judge *dissenting*) that the judgment on the verdict be affirmed. *Orr v. Waldorf-Astoria Hotel Co.* (1923, C. C. A. 8th) 291 Fed. 343.

An agent for collection is liable in contract to his principal for the actual loss sustained as a proximate result of his negligence. 1 Thornton, *Attorneys at Law* (1914) sec. 326. Where the debt is evidenced by a negotiable note, the loss is *prima facie* the face value of the paper, but the agent may prove any relevant facts in mitigation of damages. *First National Bank v. Henry* (1905) 159 Ala. 367, 49 So. 97; *Moorman v. Wood* (1889) 117 Ind. 144, 19 N. E. 739; 3 Shearman and Redfield, *Negligence* (6th ed. 1913) sec. 587a. Thus he may show that there is a responsible party still liable on the note. *Huntington v. Rumnill* (1809, Conn.)

3 Day, 390; *City National Bank v. Clinton County National Bank* (1892) 49 Ohio St. 351, 30 N. E. 958; 1 Thornton, *op. cit.* 593. In such a case, the measure of damages might be the cost of collection from the endorser. See *Jacobsen v. Peterson* (1918) 91 N. J. L. 404, 103 Atl. 983. In the instant case, however, the only endorser is also the pledgor, and the pledgee is under a duty to him to use due care in enforcing the pledged chose in action. *Hanna v. Holton* (1874) 78 Pa. 334; Dobie, *Bailments and Carriers* (1914) 220. Thus in an action by the negligent pledgee, the pledgor would have a counterclaim for the amount which proper enforcement of the security would have obtained. *National Exch. Bank v. Kilpatric* (1907) 204 Mo. 119, 102 S. W. 499; 68 L. R. A. 485, note; see L. R. A. 1917 E, 509, note. The wasting of the security had the same effect as a realization thereon, so far as concerns the agent's duty. As this waste was caused by the agent's negligence he is rightly held liable for the resulting loss.

BANKS AND BANKING—LIABILITY FOR PAYMENT TO AGENT OF DEPOSITOR.—The plaintiff, receiver of a corporation, carried accounts with two banks. The banks were notified that the plaintiff's auditor had no power to draw checks. The auditor presented checks at the A bank, drawn by the plaintiff on the B bank payable to the A bank, and after endorsing the checks received payment in cash, which he misappropriated. Monthly statements were sent to the plaintiff by both banks. Six months later, the plaintiff discovered the defalcation and sued the A bank for the amount of the checks as deposits due. *Held,* (one judge *dissenting*) that the bank was negligent and the plaintiff could recover. *Graham v. Southington Bank & Trust Co.* (1923) 99 Conn. 494, 121 Atl. 812.

Depositary banks are in general not liable for misappropriation by fiduciaries of trust accounts, except when payment is made in violation of the deposit contract or with knowledge or notice of the intended misappropriation, as where the bank itself receives part of the funds in payment of the fiduciary's debt. See (1917) 4 VA. L. REV. 153; McCollom, *Liability of Banks Receiving Checks to a Trustee's Order for Deposit in His Individual Account* (1911) 11 COL. L. REV. 428; Thulin, *Misappropriation of Funds by Fiduciaries: the Bank's Liability* (1918) 6 CALIF. L. REV. 171; COMMENTS (1923) 32 YALE LAW JOURNAL, 377. But, unlike a trustee, an agent with power to deposit generally has no power to withdraw funds. See *Honig v. Pacific Bank* (1887) 73 Calif. 464, 15 Pac. 58; see Zane, *Banks and Banking* (1900) sec. 135, 136. The demand of an agent that a draft drawn on his principal be paid by a certificate of deposit to the agent's personal order has been declared more indicative of fraudulent intent than a demand for cash. *Farmer's Loan & Trust Co. v. Fidelity Trust Co.* (1898, C. C. A. 9th) 86 Fed. 541 (not clear to whose order draft was drawn). Yet, under circumstances somewhat similar to those of the instant case, a bank was recently held not liable for having paid checks signed by the plaintiff drawn on and payable to the defendant bank, by cashier's checks to the order of the plaintiff's agent, on the grounds of local custom and lack of notice of the misappropriation. *Griffin v. National Bank of Commerce* (1922, Mo.) 246 S. W. 180. Even though in that jurisdiction it seems that a payee cannot become a holder in due course. *St. Charles Savings Bank v. Edwards* (1912) 243 Mo. 553, 147 S. W. 978. This illustrates again the sharp difference between purchase and payment in due course. See Llewellyn, *Conditions Precedent in Negotiable Paper* (1923) 23 COL. L. REV. 142, 148, note 25; 15 A. L. R. 437, note. It seems that in the *Griffin* case, as in the instant case, the court might well have found the bank negligent. See also *Sims v. U. S. Trust Co. of New York* (1886) 103 N. Y. 472, 9 N. E. 605; COMMENTS (1923) 33 YALE LAW JOURNAL, 177, 184, note 37. Any supposed practice negativing negligence will ordinarily be found to rest on the bank's acquaintance or assumption of acquaintance with the powers of the defaulting agent. But there is a sound contention in the dissenting opinion of the instant case that the failure of the depositor

to check up the statements rendered should preclude it from recovering, to the extent of any resultant damage to the bank. Such a rule is applied in analogous situations with respect to forged checks. *California Vegetable Union v. Crocker National Bank* (1918) 37 Calif. App. 743, 174 Pac. 920; see Arant, *Forged Checks —The Duty of the Depositor to His Bank* (1922) 31 YALE LAW JOURNAL, 598; (1920) 20 COL. L. REV. 613. It seems that, at least, a jury question as to the existence of damages to the bank resulting from the failure of the plaintiff to act was present in the instant case.

CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF RESALE PRICES OF THEATRE TICKET BROKERS.—A statute declared the price of admission to theatres to be a matter affected with a public interest and prohibited anyone to resell tickets without a license, or at an advance of more than fifty cents over the price charged by the theatre. N. Y. Laws, 1922, ch. 590, secs. 168 and 172. The defendant was convicted of reselling tickets without a license. He contended that the statute was unconstitutional on account of its price-fixing provision. *Held,* (two judges *dissenting*) that the entire statute was constitutional. *People v. Weller* (1923, 1st Dept.) 70 N. Y. L. JOUR. 869.

The licensing feature of the statute is readily sustainable as an exercise of the police power to protect the public against fraud. 1 Tiedemann, *State and Federal Control of Persons and Property* (1900) sec. 119. It has been held a valid exercise of the police power to refuse a license to a theatre owner for violating an ordinance forbidding collusion with ticket brokers to sell tickets above the price printed thereon, and divide the excess. *People v. Thompson* (1918) 283 Ill. 87, 119 N. E. 41. In upholding the statute in the instant case, the court rejected the reasoning of a previous New York case which failed to distinguish between regulatory and prohibitory legislation. *People v. Newman* (1919, Gen. Sess.) 109 Misc. 622, 180 N. Y. Supp. 892 (ordinance). Statutes which prevent any resale of theatre tickets at a profit have been held to deprive brokers of liberty and property without due process. *Ex Parte Quarg* (1906) 149 Calif. 79, 84 Pac. 766; *People v. Steele* (1907) 231 Ill. 340, 83 N. E. 236; *cf. Adams v. Tanner* (1917) 244 U. S. 590, 37 Sup. Ct. 662 (statute forbidding employment agents to charge fees to workers for whom they found employment); but see *Ex Parte Dickey* (1904) 144 Calif. 234, 77 Pac. 924 (mere regulation of such fees held unconstitutional). But price fixing by the state has generally been held within the police power. Thus it may fix a maximum price for storing grain in elevators. *Munn v. Illinois* (1876) 94 U. S. 113; *Budd v. New York* (1892) 143 U. S. 517, 12 Sup. Ct. 468. These cases turned on the great importance of the business and on the existence of a virtual monopoly. But the former element has been held sufficient of itself, given the added factor of an abuse calling for remedy. *Brass v. North Dakota* (1894) 153 U. S. 391, 14 Sup. Ct. 857 (grain-elevator). Fire insurance rates have also been held subject to state regulation. *German Alliance Ins. Co. v. Lewis* (1914) 233 U. S. 389, 34 Sup. Ct. 612. A price situation may also take on a temporary emergency character justifying price regulation. *Block v. Hirsh* (1921) 256 U. S. 135, 41 Sup. Ct. 458 (rents in emergencies). Wage regulation, however, has been held invalid. *Adkins v. Children's Hospital* (1923) 261 U. S. 525, 43 Sup. Ct. 394; *Wolff Packing Co. v. Court of Industrial Relations of Kansas* (1923) 262 U. S. 522, 43 Sup. Ct. 630; COMMENTS (1923) 32 YALE LAW JOURNAL, 829; 33 *ibid.* 196. The court in the instant case pointed out that the control of admission tickets to theatres is largely in the hands of a comparatively small number of brokers. In view of the *Brass* case, this is probably not an essential condition to state regulation. Prior price regulation cases have largely involved businesses affecting trade and commerce. But to extend their principle to cover speculation in tickets involves no straining of the police power. The theatre has become a vital and highly commercialized portion of our national life.

CONSTITUTIONAL LAW—POWER OF APPOINTMENT IN THE EXECUTIVE—LIMITATION BY LEGISLATURE.—A Florida statute created a State Board of Chiropractic Examiners, the members of this board to be appointed by the Governor from a list of at least ten persons recommended by the Florida Chiropractic Association. The petitioner was arrested for practicing chiropractic without a certificate from the board, and brought this action to obtain his release. He alleged that the statute was unconstitutional, as the state constitution expressly vested the power of appointment of all officers not otherwise provided for in the Governor. Fla. Laws, 1919, ch. 7821, sec. 2. *Held,* (two judges *dissenting*) that the statute was unconstitutional and that the petitioner be discharged. *Westlake v. Merritt* (1923, Fla.) 95 So. 662.

The power to appoint an officer is usually considered an executive function. *State v. Hyde* (1889) 121 Ind. 20, 22 N. E. 644; see Dodd, *State Government* (1922) 242; Fairlie, *The Separation of Powers* (1923) 21 MICH. L. REV. 393. Congress may not vest the appointment of officers elsewhere than in the President alone, the President and the Senate, or the heads of departments. U. S. Const. Art. II, sec. 2; *Ekiu v. United States* (1892) 142 U. S. 651, 12 Sup. Ct. 336; 2 Willoughby, *Constitutional Law* (1910) sec. 696. But there is nothing in the federal constitution which requires a separation of powers by state governments. *Satterlee v. Matthewson* (1829, U. S.) 2 Pet. 380, 413; Black, *Constitutional Law* (1895) 74. The chief executive of a state has no prerogative powers and is confined to those expressly conferred upon him by the constitution and statutes. *Richardson v. Young* (1910) 122 Tenn. 471, 125 S. W. 664; *State v. Bowden* (1912) 92 S. C. 393, 396, 75 S. E. 866. Therefore, in the absence of a constitutional limitation upon the legislature, it may delegate the power of appointment to any office it may create. *Sweeney v. Coulter* (1900) 109 Ky. 295, 58 S. W. 784; *Dunbar v. Cronin* (1917) 18 Ariz. 583, 164 Pac. 447. But where the constitution in express terms confers upon the Governor the power to appoint all officers not otherwise provided for by the constitution, the legislature cannot directly or indirectly encroach upon this power. *State v. Washburn* (1902) 167 Mo. 680, 67 S. W. 592; *People v. Capp* (1916) 61 Colo. 396, 158 Pac. 143. This is in accordance with the tendency to construe broadly implied constitutional limitations upon the powers of the legislature. Dodd, *Implied Powers and Implied Limitations in Constitutional Law* (1920) 29 YALE LAW JOURNAL, 137. It may, however, fix the qualifications for appointees to offices created by the legislature. *In re Campbell* (1901) 197 Pa. 581, 47 Atl. 860 (qualifications of incumbent for state board of medical examiners); see *State v. Wright* (1913) 251 Mo. 325, 158 S. W. 823. Or make reasonable regulations as to the performance of his duties by an appointed officer. *People v. Brady* (1916) 275 Ill. 25, 114 N. E. 261. But the statute in the instant case seems too great a limitation upon the executive's power of appointment and hence unconstitutional. See Green, *Separation of Governmental Powers* (1920) 29 YALE LAW JOURNAL, 369.

CONTRACTS—SALE OF LAND ON INSTALLMENTS—BREACH BY VENDEE—RECOVERY OF PAYMENTS IN EXCESS OF ACTUAL DAMAGES.—A vendee in an installment land contract defaulted on one payment. The vendor thereupon terminated the contract, retook possession of the land, and sued for damages for the breach. The vendee counterclaimed for payments in excess of the vendor's reasonable damages. The lower court gave judgment for the vendor, and the vendee appealed. *Held,* that the vendee should recover on his counterclaim. *Malmberg v. Baugh* (1923, Utah) 218 Pac. 975.

The vendor of land sold on an installment contract may upon default by the vendee retake the land and sue for damages. *Perrin v. Chidester* (1913) 159 Iowa, 31, 139 N. W. 930. If time is of the essence of the contract, the great majority of American courts will enforce an express condition forfeiting payments

already received, regardless of the extent of the vendor's actual damages. *Glock v. Howard* (1898) 123 Calif. 1, 55 Pac. 713; Ballantine, *Forfeiture for Breach of Contract* (1921) 5 MINN. L. REV. 329, 345. Otherwise the vendor's measure of damages is the difference between the contract price of the land and its market value at the time of breach, less the portion of the purchase price already paid. *Hayden v. Pinchot* (1916, 1st Dept.) 172 App. Div. 102, 158 N. Y. Supp. 215; *McGregor v. Echols* (1922) 153 Ark. 128, 239 S. W. 736; 3 Sedgwick, *Damages* (9th ed. 1912) sec. 1023. But when the vendee in default sues, the general American rule denies him recovery of any portion of the purchase money paid even in the absence of an express provision for forfeiture. *Hurley v. Anicker* (1915) 51 Okla. 97, 151 Pac. 593; 2 Sutherland, *Damages* (4th ed. 1916) sec. 585; L. R. A. 1918 B, 538, note. Some cases avoid this harsh rule by finding a "rescission" which would place the parties in *statu quo*. *Lytle v. Scottish-American Mortgage Co.* (1905) 122 Ga. 458, 50 S. E. 402; *Pierce v. Staub* (1906) 78 Conn. 459, 62 Atl. 760. These strained constructions are really disguised attempts to follow the English rule forbidding forfeitures on equitable principles. *Steedman v. Drinkle* [1916, H. L.] 1 A. C. 275; 2 Williston, *Contracts* (1920) sec. 806. A more recent minority in the United States allows the defaulting vendee to sue directly for the amount of payments in excess of the vendor's damages. *Norris v. Letchworth* (1912) 167 Mo. App. 553, 152 S. W. 421. Or to accomplish the same result by counterclaim. See *Waters v. Pearson* (1914) 163 Iowa, 391, 144 N. W. 1026. The principal case evidences a sound development toward more equitable treatment of the defaulting vendee.

CORPORATIONS—SALE OF ASSETS BY MAJORITY STOCKHOLDERS FOR INADEQUATE CONSIDERATION.—A statute gave majority stockholders power to sell the entire assets of the corporation. The plaintiffs, minority stockholders, applied for a temporary injunction to restrain a proposed sale, alleging that the consideration was grossly inadequate, there being a variance of twenty million dollars between the sale price and the balance sheet of the corporate assets. *Held*, that a temporary injunction should issue. *Allied Chemical & Dye Co. v. Steel & Tube Co. of America* (1923, Del.) 120 Atl. 486.

In the absence of statute the majority stockholders do not have the power to sell the entire assets of a corporation if the corporation may be profitably continued. *Kean v. Johnson* (1853) 9 N. J. Eq. 401; *contra: Treadwell v. Salisbury* (1856, Mass.) 7 Gray, 393; see E. D. Warren, *Voluntary Transfers of Corporate Undertakings* (1917) 30 HARV. L. REV. 335; NOTES (1921) 7 VA. L. REV. 640. Even if the power to sell is granted, the majority must act in good faith. *Kavanaugh v. Kavanaugh Knitting Co.* (1919) 226 N. Y. 185, 123 N. E. 148; *Lane & Co. v. Maple Cotton Mills* (1915, C. C. A. 4th) 226 Fed. 692; 6 Fletcher, *Cyclopedia Corporations* (1919) sec. 3997. Similarly the majority stockholders may not, as against a minority stockholder, fraudulently dispose of, or dissipate any corporate property. See *Russell v. Patterson Co.* (1911) 232 Pa. 113, 81 Atl. 136; Fletcher, *loc. cit.* The court in the present case follows the prevalent and sound view that while gross inadequacy of price will be considered a badge of fraud, mere inadequacy standing alone and capable of being construed as an honest exercise of sound judgment, will not be a sufficient basis to set aside the sale. *Koehler v. St. Mary's Brewing Co.* (1910) 228 Pa. 648, 77 Atl. 1016; *Smith v. Stone* (1912) 21 Wyo. 62, 128 Pac. 612. Inadequacy of price coupled with a sale to a majority stockholder will be deemed a fraudulent sale. *Wheeler v. Abilene National Bank Building Co.* (1908, C. C. A. 8th) 159 Fed. 391; see 16 L. R. A. (N. S.) 892, note; 14 Ann. Cas. 920, note. Or if the sale is made to a corporation in which some of the majority are stockholders. *Geddes v. Anaconda Mining Co.* (1921) 254 U. S. 590, 41 Sup. Ct. 209; *Jones v. Missouri Edison Electric Co.* (1906, C. C. A. 8th) 144 Fed. 765.

EQUITY—JURISDICTION TO GIVE DAMAGES—FAILURE TO PROVE EQUITABLE CAUSE OF ACTION.—The plaintiffs brought a bill in equity for rescission for fraud of an executed contract for the exchange of lands. They failed to establish a right to equitable relief, as there was no disaffirmance within a reasonable time, and on their motion the case was transferred to the law side of the court for the assessment of damages. The defendants sought a writ of mandamus against the trial judge to set aside the transfer so that damages might be assessed on the equity side. *Held,* (one judge *dissenting*) that the writ of mandamus should be refused. *Koontz v. Houghton* (1923, Mich.) 194 N. W. 1018.

Where reparation for a cause of action, either *ex delicto* or *ex contractu* is allowed in equity, it may include as part of the relief granted an accounting for profits gained by the defendant from his wrong. *Tilghman v. Proctor* (1888) 125 U. S. 136, 8 Sup. Ct. 894. See *Worrall v. Munn* (1868) 38 N. Y. 137; 1 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) 241 (a), note. And in actions *ex contractu,* compensatory damages based on the losses sustained by plaintiff are allowed. *Chicago, M. & St. P. Ry. v. United States* (1914, C. C. A. 9th) 218 Fed. 288. By the better view, such damages may also be allowed in actions *ex delicto. Whipple v. Village of Fair Haven* (1890) 63 Vt. 221, 21 Atl. 533; *contra: Martin v. Martin & Wilckes Co.* (1909) 75 N. J. Eq. 257, 72 Atl. 294; see 1 Cook, *Cases on Equity* (1923) 446, note. These results are commonly integrated into the statement that where equity has obtained jurisdiction, it will be exercised so as to grant complete relief consistent with the complaint. See 1 Pomeroy, *op. cit.* 181, 230. "Jurisdiction" in this rule means such jurisdiction as is acquired when the equitable cause of action is proved as well as pleaded. *Brauer v. Laughlin* (1908) 235 Ill. 265, 85 N. E. 283; *Dowell v. Mitchell* (1881) 105 U. S. 430; *Davis v. Union Meeting House Society* (1918) 93 Vt. 520, 108 Atl. 704; 1 Pomeroy, *op. cit.* 237 (b), note. In such a case the plaintiff may obtain a money decree alone when unknown to him rights of third parties have intervened before suit was brought. *Hetrick v. Gerlinger Motor Car Co.* (1917) 84 Or. 133, 164 Pac. 379; see 19 L. R. A. (N. S.) 1064, note. The principal case, arising under a modified system of common law pleading, does not come within this qualification and follows the well settled rule. The error of the dissenting judge seems based on too broad a definition of "jurisdiction." For the two distinct senses in which this term is used, see COMMENTS (1923) 33 YALE LAW JOURNAL, 193, note 2. In some code states a failure seasonably to ask for a jury trial, allows an action, even though improperly begun on the equity side, to continue as equitable in so far as a right of trial by jury is concerned. See *Barlow v. Scott* (1861) 24 N. Y. 40; COMMENTS (1923) 32 YALE LAW JOURNAL, 707. In England, where an action for damages based on fraud is considered concurrently legal and equitable, a result contrary to the principal case may be reached. *Cf. Hill v. Lane* (1870) 11 L. R. Eq. 215.

EXECUTORS AND ADMINISTRATORS—REIMBURSEMENT FOR EXPENSES OF LITIGATION.—The plaintiff as administrator defended an action brought by the defendant for specific performance of a contract alleged to have been made by the plaintiff's intestate to will to the defendant the residue of her estate. The suit was also actively defended by the only heir at law. The plaintiff, unsuccessful in the prior suit, sued the defendant for the expenses incurred in the litigation. *Held,* that the plaintiff could not recover. *Foltz v. Boone* (1923, Ohio) 140 N. E. 761.

A personal representative may charge the estate with the reasonable expenses of litigation incurred in good faith in behalf of the estate. *Shouldice v. McLeod's Estate* (1906) 145 Mich. 708, 108 N. W. 1083; Woerner, *The American Law of Administration* (3d ed. 1923) sec. 514. Nor need the litigation have resulted beneficially to the estate. *Moore v. Randolph's Adm'r* (1881) 70 Ala. 575; *Polhemus v. Middleton* (1883) 37 N. J. Eq. 240; Woerner, *op. cit.* sec. 517. By the weight of authority, the executor has at least a privilege, and from the

language of the courts, probably a duty to seek probate of the will, and from this there follows a right to reimbursement for expenses of litigation when probate is contested. *Davison v. Sibley* (1913) 140 Ga. 707, 79 S. E. 855; *Fillinger v. Conley* (1904) 163 Ind. 584, 72 N. E. 597; 26 L. R. A. (N. S.) 757, note; see NOTES (1920) 4 MINN. L. REV. 282. A strong minority denies this duty or privilege, and refuses reimbursement where probate has been refused, on the ground that where there is no will there can be no executor. *Dodd v. Anderson* (1910) 197 N. Y. 466, 90 N. E. 1137; *Kelly v. Kennedy* (1916) 133 Minn. 278, 158 N. W. 395. But where an unsuccessful contest is made after the will has been admitted to probate, even those courts generally hold that the executor is under a legal duty to sustain the will under which he acts. *McIntire v. McIntire* (1904) 192 U. S. 116, 24 Sup. Ct. 196; see *Dodd v. Anderson, supra;* see COMMENTS (1909) 7 MICH. L. REV. 334; *contra: Andrews' Ex'rs v. Andrews' Adm'rs* (1857) 7 Ohio St. 143; *Minnesota Loan & Trust Co. v. Pettit* (1919) 144 Minn. 244, 175 N. W. 540, criticized in COMMENTS (1920) 5 CORN. L. QUART. 464. In Ohio reimbursement has been refused even though the named executor, under the statute, is made a necessary party to the suit. *Thurston v. Ludwig* (1915) 4 Ohio App. 486. Since a suit for specific performance of a contract to make a will is a claim adverse to the will as made, or to the statutory rule of distribution if there is no will, it should, on the same principles, be the duty of the named executor to preserve the estate. *Turnipseed v. Sirrine* (1900) 60 S. C. 272, 38 S. E. 423. And it has been held that the fact that devisees or legatees also defended the suit would not negative the existence of the duty or privilege of the apparent executor to defend. *Reed v. Reed* (1903) 24 Ky. L. 2438, 74 S. W. 207; *Alexander v. Bates* (1899) 127 Ala. 328, 28 So. 415. The power of determining the devolution of one's estate is an important attribute of property granted by the State, and under our policy of safeguarding private property, should be made effective after the owner's death by being protected by the *prima facie* authorized representative of the deceased, rather than by the chance interest of legatees or distributees.

HUSBAND AND WIFE—ESTATES BY ENTIRETIES IN PERSONAL PROPERTY.—The defendant and her husband, the plaintiff's intestate, sold certain real estate, taking in payment bonds executed to both. The plaintiff sued to recover the whole amount for the husband's estate. The defendant contended that, as the survivor, she was entitled to the entire proceeds. The lower court ordered that each should have a half interest as a tenant in common with the other, and both parties appealed. *Held,* that the judgment be affirmed, as there are no estates by entireties in personal property. *Turlington v. Lucas* (1923, N. C.) 119 S. E. 366.

In a few states the common law doctrine of estates by entireties has never been recognized. *Whittlesey v. Fuller* (1836) 11 Conn. 337; *Farmers & Merchants National Bank v. Wallace* (1887) 45 Ohio St. 152, 12 N. E. 439. By the minority view, such estates are considered to be abolished by the Married Women's Property Acts. *Thornley v. Thornley* [1893] 2 Ch. 229; *Kellar v. Kellar* (1920) 142 Tenn. 524, 221 S. W. 189; *O'Malley v. O'Malley* (1922) 272 Pa. 528, 116 Atl. 500; 1 Tiffany, *Real Property* (2d ed. 1920) 650. In at least one state they are regarded as abolished by omission from the recognized forms of ownership in the Community Property Act. *Swan v. Walden* (1909) 156 Calif. 195, 103 Pac. 931. And they have been expressly abolished by statute. Va. Code, 1887, sec. 2430. Where tenancy by entireties has been retained, the courts seem evenly divided as to whether it may exist with respect to personalty. *Re McKelway* (1917) 221 N. Y. 15, 116 N. E. 348; *Re Parry* (1898) 188 Pa. 33, 41 Atl. 448; 8 A. L. R. 1017, note. It has been stated that such estates existed in personal property at common law. *George v. Dutton* (1920) 94 Vt. 76, 77, 108 Atl. 515. But this seems doubtful, since ownership of the wife's personal property vested in the husband at marriage. Coke, *Littleton,* *351 b; 1 Bishop, *The Law of Married*

Women (1873) sec. 211. Though this reason no longer obtains under modern statutes allowing married women to hold personal property in their own right, it seems undesirable to extend the scope of the antiquated doctrine of estates by entireties, resting as it does on the fiction that husband and wife are one. The better view, therefore, as adopted by the court in the instant case, seems to be that there can be no such form of ownership in personalty. See (1920) 33 HARV. L. REV. 983; (1921) 19 MICH. L. REV. 879.

INJUNCTION—TRADE SECRETS—KNOWLEDGE GAINED BY FAIR MEANS.—The plaintiff and the defendant's father had been partners in a manufacturing enterprise in which an unpatented machine invented by the latter was used. One of these had been stored in the barn of the defendant's father. Some months after the plaintiff purchased the partner's interest, the defendant made drawings from this machine, which had not been removed. The plaintiff sought to enjoin the defendant from disclosing its construction. The chancellor dismissed the bill, after finding that the defendant bore no relation of trust or confidence and had obtained his knowledge by fair means. *Held,* that the decree should be affirmed. *McClary v. Hubbard* (1923, Vt.) 122 Atl. 469.

Equity will enjoin the disclosure of business secrets learned in the course of confidential employment, and will restrain their use in competition with the employer. *Tabor v. Hoffman* (1889) 118 N. Y. 30, 23 N. E. 12 (pump); *Empire Steam Laundry Co. v. Lozier* (1913) 165 Calif. 95, 130 Pac. 1180 (list of customers); 1 High, *Injunctions* (4th ed. 1905) sec. 19. An injunction will also issue against an inventor who has sold the right to the exclusive use of the secret to the complainant. *Pomeroy Ink Co. v. Pomeroy* (1910) 77 N. J. Eq. 293, 78 Atl. 698. Or against any one who has obtained knowledge of the secret while in a position of trust or confidence. *Vulcan Detinning Co. v. American Can Co.* (1907) 72 N. J. Eq. 387, 67 Atl. 339 (director of corporation). Nor is an express contract not to disclose or use the secret necessary. *Elaterite Paint Co. v. Frost Co.* (1908) 105 Minn. 239, 117 N. W. 388; *Stevens Co. v. Stiles* (1909) 29 R. I. 399, 71 Atl. 802. Equity will also restrain the use or disclosure by a third person, who knowingly learns the secret from one whose communication of it is a breach of confidence, even though such third party might in time have learned the secret process by independent effort. *Vulcan Detinning Co. v. American Can Co., supra; Elaterite Paint Co. v. Frost Co., supra.* It is often said that trade secrets are property. *Peabody v. Norfolk* (1868) 98 Mass. 952; *Herold v. Herold* (1919, C. C. A. 6th) 257 Fed. 911. And they are assignable. *Grand Rapids Wood Finishing Co. v. Hatt* (1908) 152 Mich. 132, 115 N. W. 714. It has been held that an undisclosed formula is an asset which passes to the trustee of a bankrupt estate. *In re Keene* [1922] 2 Ch. 475; see (1923) 8 CORN. L. QUART. 174. But, at most, it seems to be only a qualified property, since, as held in the principal case, where the owner makes no attempt to protect the secret and it comes to the knowledge of one who violates no trust by disclosure, no property in it will be recognized. *Bristol v. Equitable Life Assurance Society* (1892) 132 N. Y. 264, 30 N. E. 506; see *Westervelt v. National Paper & Supply Co.* (1900) 154 Ind. 673, 57 N. E. 552. Thus the assumption of jurisdiction in cases involving rights in trade secrets is indicative of the trend away from the doctrine that equity protects only property rights. See COMMENTS (1920) 29 YALE LAW JOURNAL, 348.

INTERNATIONAL LAW—STATUS OF ARMED MERCHANT VESSELS.—Certain small Turkish sailing vessels of commercial type, engaged in transporting munitions of war in the Sea of Marmora, were attacked and sunk by a British submarine. The crews deserted their vessels, took up positions on shore and immediately opened an intense rifle fire on the submarine, forcing her to operate from a distance of about 2,000 yards. The officers and crew of the submarine claimed prize

bounty under the Naval Prize Act of 1864, 27 & 28 Vict. c. 25. *Held,* that the claimants were entitled to bounty, as the vessels with their crews constituted an effective belligerent force capable of successfully engaging the submarine and were therefore armed vessels of the enemy within the meaning of the Act. *H. M. Submarine E 12* (1923, Adm.) 40 T. L. R. 18.

A merchant vessel belonging to a belligerent can be captured but not sunk except under exceptional circumstances. *The Rita* (1898, D. S. C.) 87 Fed. 925; 7 Moore, *Digest of International Law* (1906) sec. 1212. A warship or other combatant vessel can be attacked and sunk on sight. 2 Hyde, *International Law* (1922) sec. 741. The question arises whether a defensive armament alters a ship's merchant status. It was formerly common practice for merchant vessels to arm as a protection against pirates and privateers. See *The Nereide* (1815, U. S.) 9 Cranch, 388, 426; Frothingham, *The Armed Merchantman* (1917) 13 CURRENT HISTORY, 464. And it has been said that the mere fact of armament is devoid of marked significance. See *Hooper v. United States* (1887) 22 Ct. of Claims, 408, 434; *Cushing v. United States* (1886) 22 Ct. of Claims, 1, 40. But if the armament was susceptible of use for hostile purposes her status was changed. *The Panama* (1900) 176 U. S. 535, 20 Sup. Ct. 480. Such an armament came in to common use during the world war for defense against submarines. *Rep. of Secy. of Navy* (1918) 53; Castex, *Synthèse de la Guerre Sous-Marine* (1920) 57. It was the argument of the United States that since pirates had been swept from the seas and privateers abolished, merchant vessels under modern conditions while privileged to arm forfeited their immunity by so doing. *Letter from Secy. Lansing to the British Ambassador,* Jan. 18, 1916, 2 Diplomatic Correspondence between the United States and Belligerent Governments (1916) 310. It is difficult to escape the logic of a British writer that "a fighting ship is a combatant; otherwise language has no meaning." Sir Graham Bower, (1920) 30 REP. INT. LAW ASSOC. 262. Every neutral country except Holland and Mexico, however, admitted these ships into their ports as merchantmen. 12 SUPP. AM. J. INT. LAW (1918) 197, 216. Although the authorities are widely divided, the better view is in accord with the decision in the instant case, making the potential hostile power of the vessel the test. 2 Hyde, *International Law* (1922) secs. 741, 743; *Letter from Secy. Lansing to British Ambassador, loc. cit.* For other suggested tests, see 42 Sen. Doc. 64th Cong. 1st Sess. No. 332, at p. 24. *Cf. Several Dutch Schuyts* (1805, Adm.) 6 C. Rob. 48. The Reparations Commission has in effect held in defining the term "naval material" under Par. 9, Annex I, of the Treaty of Versailles, that the following classes of ships are no longer simple merchantmen: (a) all vessels employed for offensive operations, whatever the ownership of the vessels; (b) vessels which are the property of the naval administration . . . and were used in connection with operations of war, whether offensive or defensive. 5 *Report on the Work of the Reparations Comm.* (1923) 49. Since the German-American Mixed Claims Commission now sitting in Washington must pass upon this same question, it becomes a matter of great importance.

LABOR LAW—EMPLOYMENT CONTRACTS—INTEREST PROTECTED.—The plaintiff, a laundry company, employed certain members of the Laundry Drivers' Union under written contracts of service. The Union desired to have these contracts modified and ordered its members to breach them. The plaintiff sought an injunction against the officers of the union. *Held,* that an injunction *pendente lite* be granted to restrain such orders and to prevent the Union from disciplining those members who refused to obey, and from granting pecuniary relief to the others. *Best Service Wet Wash Laundry Co. v. Dickson* (1923, Spec. T.) 121 Misc. 416, 201 N. Y. Supp. 173.

An employer has in general a right against third persons that they shall not induce an employee under an express contract to breach the contract of employment.

Lumley v. Gye (1853, Q. B.) 2 El. & Bl. 216; COMMENTS (1921) 30 YALE LAW JOURNAL, 280, 618. The rule seems equally applicable whether the contract be individual, or a "trade agreement" between an employer or an association of employers and an association of employees. *Iron Moulders' Union v. Allis Chalmers Co.* (1908, C. C. A. 7th) 166 Fed. 45; see *Barnes v. Berry* (1907, C. C. S. D. Ohio) 156 Fed. 72. And the correlative rights of a union under contract with an employer against third persons who attempt to induce a breach by the employer are being recognized. *Tracey v. Osborne* (1917) 226 Mass. 25, 114 N. E. 959; see *Schlessinger v. Quinto* (1922, 1st Dept.) 201 App. Div. 487, 194 N. Y. Supp. 401. But there are limitations on the rule where the breach is held merely incidental. Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 686. To induce cessation of work where the employees are under contract for a fixed time, is clearly actionable, and it has been held that an employment at will terminable at seven days' notice stands on the same footing. *Patterson Glass Co. v. Thomas* (1919) 41 Calif. App. 559, 183 Pac. 190. An employment terminable at will, on the other hand, is commonly not protected against the peaceful persuasion of striking employees. *Iron Moulders' Union v. Allis Chalmers Co., supra;* see *National Protective Assn. v. Cumming* (1902) 170 N. Y. 315, 63 N. E. 369; *contra: Jonas Glass Co. v. Glass Bottle Blowers' Assn.* (1908) 77 N. J. Eq. 219, 79 Atl. 262; 41 L. R. A. (N. S.) 445, note. But in some cases of employment wholly at will but automatically terminated by affiliation with a union, both inducement to quit and inducement to practically or substantially join the union while continuing work have been enjoined. *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U. S. 229, 38 Sup. Ct. 65; but see Cook, *Privileges of Labor Unions in the Struggle for Life* (1918) 27 YALE LAW JOURNAL, 779. When applied to the employer's expectation in the labor market—the "right to a free flow of labor"—the injunction seems to be limited to "foreign" organizers or other non-employees of the plaintiff. *McMichael v. Atlanta Envelope Co.* (1921) 151 Ga. 776, 108 S. E. 226; *Hitchman Coal and Coke Co. v. Mitchell, supra. Cf.* (1919) 28 YALE LAW JOURNAL, 507. Or to cases where the disputing employees use means recognized as tortious to plaintiff. *Jersey City Printing Co. v. Cassidy* (1902) 63 N. J. Eq. 759, 53 Atl. 230; COMMENTS (1921) 30 YALE LAW JOURNAL, 280, 404, 501. Although it has been held that the promise of financial aid by striking employees to induce the breach of an employment at will is tortious, aid given to the contract breaker after his breach obviously cannot be put on the same basis. *Tunstall v. Stearns Coal Co.* (1911, C. C. A. 6th) 192 Fed. 808; *Gasaway v. Borderland Coal Co.* (1921, C. C. A. 7th) 278 Fed. 56. But this distinction may often raise nice issues of fact, which in the injunction cases go to the court.

PATENTS—FORFEITURE OF PATENT RIGHT BY DELAY.—In 1852 one Woodbridge invented an improved method of firing projectiles from rifled cannon. He directed that his specifications be filed in the secret archives of the patent office, intending to wait for an opportunity to market his invention to best advantage. In 1861, Woodbridge applied for the issuance of his patent. The application was rejected on the ground of abandonment. This claim is brought by the executors of Woodbridge under a special statute, Act of March 2, 1901 (31 Stat. at L. 1788) allowing them to claim compensation for an improper rejection of the application. *Held,* that the rejection was proper. *Woodbridge v. United States* (1923, U. S.) 44 Sup. Ct. 45.

An inventor has no common law right to exclusive use of an invention and therefore must rely on his ability to keep the nature of his discovery secret. *American Stay Co. v. Delaney* (1912) 211 Mass. 229, 97 N. E. 911; *Gaylor v. Wilder* (1850, U. S.) 10 How. 477. The object of the patent statutes in granting to an inventor a monopoly for a limited period of time is to induce disclosure of the invention. *Rubber Tire Wheel Co. v. Milwaukee Rubber Works* (1907,

C. C. A. 7th) 154 Fed. 358; *Goodyear v. N. J. Central R. R.* (1853, C. C. D. N. J.) 1 Fisher, 626. Thus, if the invention has been in public use for two years prior to the application, or has been abandoned, there is no right to a patent. Act of March 3, 1897 (29 Stat. at L. 692). To constitute an abandonment, there must be conduct clearly indicating an intent to relinquish the right to patent the invention. *Burdon Wire & Supply Co. v. Williams* (1904, C. C. D. Mass.) 128 Fed. 927; *Johnson v. Fassman* (1871, C. C. D. La.) 1 Wands, 138; see (1922) 21 MICH. L. REV. 205. Hence a delay in application for purpose of perfecting the invention is no abandonment. *Agawam v. Jordan* (1868, U. S.) 7 Wall. 583. The same is true where the delay is due to financial inability or other causes beyond the control of the inventor. *Hoenig v. Parker* (1920) 50 App. D. C. 21, 267 Fed. 323; *Johnson v. Fassman, supra* (civil war). The courts have considered concealment of an invention for a long period of time as an abandonment. See *Macbeth Evans Glass Co. v. General Electric* (1917, C. C. A. 6th) 246 Fed. 695; *Appeal of Mower* (1899) 15 App. D. C. 144. But it seems that conduct looking to a prolongation of the monopoly is inconsistent in fact with an intent to abandon. See (1918) 31 HARV. L. REV. 1033. In the instant case the court soundly bases its decision on a forfeiture of the right by frustrating the object of the statute to induce a disclosure of the invention.

SALES—INSPECTION—DIVERSION OF GOODS TO SUB-VENDEE.—The defendant bought three cars of lumber from the plaintiff and before receiving them resold two to a firm in another city. With the consent of the plaintiff, two cars were diverted to the sub-vendee who rejected one of them because of the inferior quality of the lumber. The plaintiff sued for the price claiming that inspection was waived by reconsignment to the sub-vendee. *Held,* that the plaintiff cou d not recover. *Industrial Lumber Co. v. N. E. Lumber Co.* (1923, Tex. Civ. App.) 254 S. W. 512.

The place of inspection is *prima facie* the place of delivery, but if inspection cannot reasonably be made there, it is at the destination of the goods. *Pierson v. Crooks* (1889) 115 N. Y. 539, 22 N. E. 349; *Eaton v. Blackburn* (1908) 52 Or. 300, 96 Pac. 870; Williston, *Sales* (1909) sec. 480; see 16 Ann. Cas. 1201, note. Normally an opportunity to inspect is a condition precedent to the vendor's right that the buyer accept. *Bridgeport Mfg. Co. v. Bouniol* (1915) 89 Conn. 254, 93 Atl. 674. But where there are unusual terms in the contract, provisional payment may be due before inspection, subject to later readjustment after inspection, but in either case an opportunity of inspection must be afforded unless waived. *Bragg v. Villanova* [1923, K. B.] 40 T. L. R. 154 (payment against documents); *Brown v. Raritan Chemical Works* (1919, 1st Dept.) 188 App. Div. 578, 177 N. Y. Supp. 309 (net cash against delivery order); *Wiltse v. Barnes* (1877) 46 Iowa, 210 (C. O. D.); *cf. Lawder v. Mackie Grocery Co.* (1903) 97 Md. 1, 54 Atl. 634 (f.o.b. seller's city); Sales Act, sec. 47; see (1909) 22 HARV. L. REV. 387; NOTES (1915) 63 U. PA. L. REV. 329. And any act amounting to an acceptance constitutes a waiver. *Hakes v. Aaron* (1913) 182 Ill. App. 100; *Wurlitzer v. United Realty Co.* (1915) 87 N. J. L. 656, 94 Atl. 630; Sales Act, sec. 48. Similarly, a resale of the goods. *Central Mercantile Co. v. Graves* (1906) 74 Kans. 718, 88 Pac. 78; *Rock Island Plow Co. v. Meredith* (1889) 107 Iowa, 498, 78 N. W. 233. But not if the vendor at the time of contracting knew that the goods were to be reshipped and not to be unpacked or inspected before reaching the sub-vendee. *Molling v. Dean* [1901, K. B.] 18 T. L. R. 217; *Heilbutt v. Hickson* (1872) L. R. 7 C. P. 438. Otherwise if there is no consent to a resale before unpacking and inspection could easily have been made by the vendee. *Perkins v. Bell* [1893] 1 Q. B. 193; *Watkins v. Guthrie* (1905, Miss.) 38 So. 370. A recent English case finds acceptance and waiver merely from a resale and delivery of a small quantity of the shipment, though the buyer later but within a

reasonable time did inspect and immediately regained possession of the goods resold. *Hardy v. Hillers* [1923, A. C.] 129 T. L. R. 674. The test of whether there has been an acceptance by resale should be the intent of the parties, either as expressed, or as implied from the nature of the transaction or commercial usage. In the instant case the seller's consent to a diversion clearly indicates an intent not to treat such diversion as an acceptance.

SALES—NON-ACCEPTANCE—MEASURE OF DAMAGES UNDER SALES ACT.—The plaintiff, a dealer in automobiles, contracted to sell a car to the defendant. The defendant refused to accept the car when it was tendered. The plaintiff returned the car to the manufacturer and received his purchase money. He then sued the defendant for the profits he would have made, had the defendant performed the contract. *Held,* that under the Uniform Sales Act, sec. 64 (3), the plaintiff could recover. *Stewart v. Hansen* (1923, Utah) 218 Pac. 959.

The object of damages for breach of contract is to put the plaintiff where he would be in the absence of the breach. In sale contracts broken by the buyer this can always be done by allowing suit for the contract price. *Ackerman v. Rubens* (1901) 167 N. Y. 405, 60 N. E. 750. But this rule is not normally applied under the Sales Act, secs. 63 and 64, when the property in specific goods is held not to have passed. *Harbison v. Propper* (1920, Spec. T.) 112 Misc. 588, 183 N. Y. Supp. 508; *Illustrated Post Card Co. v. Holt* (1912) 85 Conn. 140, 81 Atl. 1061; but see *Rylance v. James Walker Co.* (1916) 129 Md. 475, 99 Atl. 597; *Schuenemann v. Wollaeger* (1920) 170 Wis. 616, 176 N. W. 59. Unless perhaps where the property is retained by the seller for security only, as by taking a bill of lading to the seller's order. *Kinney v. Horwitz* (1919) 93 Conn. 211, 105 Atl. 438; *Glanzer v. Armsby Co.* (1917, 1st Dept.) 100 Misc. 476, 165 N. Y. Supp. 1006; *contra: Penniman v. Winder* (1920) 180 N. C. 73, 103 S. E. 908; Williston, *Progress of the Law* (1920) 34 HARV. L. REV. 741, 752. This is the case especially in respect to C. I. F. contracts. *Smith v. Marano* (1920) 267 Pa. 107, 110 Atl. 94; COMMENTS (1923) 32 YALE LAW JOURNAL, 711. Recovery of the full price works evident hardship on the buyer in cases of anticipatory breach, and the seller can at most recover the difference between the contract price and the market price. *Roth v. Taysen* (1896, Q. B.) 73 L. T. R. 628 (market price at time of action brought); *Samuels v. Drew* (1923, C. C. A. 2d) 69 N. Y. L. JOUR. 198 (market price at time of breach); Sales Act, sec. 64 (4); Williston, *Sales* (1909) secs. 562-566. A like rule applies to ordinary cases of non-acceptance. *Harbison v. Propper, supra.* But here this may be inadequate where the seller lacks immediate notice of non-acceptance or where no immediate market is available without expense, as it takes no account of difficulty, delay, or expense in obtaining a market, or of a fall in the market price during unsuccessful negotiations looking to eventual acceptance. Where the hardship is sufficiently unusual and apparent, the price can sometimes be obtained, regardless of whether property is held to have passed before breach, as in case the goods are not readily re-marketable. Sales Act, sec. 63 (3). There is some tendency to apply this rule broadly. *Belisle v. Berkshire Ice Co.* (1923) 98 Conn. 689, 120 Atl. 599 (ice); *Poppenberg v. Owen & Co.* (1914, Spec. T.) 84 Misc. 126, 146 N. Y. Supp. 478 (automobile). The instant case presents this situation in substance, the only resale seemingly available having been to the original manufacturer. There is also a tendency to extend the application of the Sales Act, sec. 64 (2) (3), under similar circumstances and allow the seller the profits, if definite and ascertainable, which he would have received had the contract been completed. *Torkomian v. Russel* (1916) 90 Conn. 481, 97 Atl. 760 (automobile); but see *Sabas v. Gregory* (1916) 91 Conn. 26, 98 Atl. 293; *Miami Cycle Co. v. National Carbon Co.* (1920, C. C. A. 6th) 268 Fed. 46 (speedometers); *Raymond v. Phipps* (1913) 215 Mass. 559, 102 N. E. 905 (milk, no mention of Sales Act). A similar tendency is observable at common law. *Tedford Auto Co.*

v. Horn (1914) 113 Ark. 310, 168 S. W. 133 (automobile). How far the language of the act should and can be stretched along these lines by judicial "definition" of "readily resalable" is yet to be determined. The commercial value of some such stretching as in the present case seems obvious.

TRIAL PRACTICE—BREACH OF PROMISE—COMPULSORY PHYSICAL EXAMINATION.—In an action for breach of promise of marriage the defense was that the plaintiff was incapable of entering into the marriage state. The defendant moved for an order requiring the plaintiff to submit to a physical examination. N. Y. C. P. A. sec. 306 provides that in personal injury actions the court shall direct the plaintiff to submit to a physical examination if the defendant presents satisfactory evidence that he is innocent of the nature of the injury. *Held,* that the court had no power to grant the motion. *Welch v. Verduin* (1923, Sup. Ct.) 201 N. Y. Supp. 324.

Courts have frequently ordered physical examinations of parties to a civil action. Thus, the writ *de ventre inspiciendo* was issued to prevent a fraudulent claim of heirship. Coke, *Littleton,* *8 b; *In re Blakemore* (1845, Ch.) 14 L. J. (N. S.) Eq. 336. In an appeal of mayhem, on the defendant's demand, a physical examination of the plaintiff was ordered. *Case of the Abbott of Strata Mercella* (1591) 9 Co. Rep. 31 a. Similarly in an annulment of marriage suit to determine the truth of the plaintiff's charge of impotency. *Devenbagh v. Devenbagh* (1836, N. Y. Ch.) 5 Paige, 553; *Le Barron v. Le Barron* (1862) 35 Vt. 365. In personal injury actions the great majority of courts agree that the trial court has the discretionary power to order the plaintiff to submit to a physical examination. *Schroeder v. Chicago, R. I. & P. R. R.* (1877) 47 Iowa, 375; (1922) 56 AM. L. REV. 612; 4 Wigmore, *Evidence* (2d ed. 1923) 2220. The cases to the contrary are based on the ground that at common law the courts did not have this power; yet they recognize the practice in divorce suits because of the interest which the public has in upholding or dissolving the marriage state. *Union Pac. Ry. v. Botsford* (1891) 141 U. S. 250, 11 Sup. Ct. 1000; *McQuigan v. Delaware, L. & W. Ry.* (1891) 129 N. Y. 50, 29 N. E. 235. In 1893, a statute was passed in New York allowing such examinations in personal injury actions. N. Y. Laws, 1893, ch. 721, now C. P. A. sec. 306. The court in the instant case reasoned that it therefore excludes a right to physical examination in all other actions. But since the statute was passed immediately after the *McQuigan* case, it seems that the intention of the legislature was to apply to personal injury actions the same rule that was applied to other actions. In fact after the statute was passed, physical examinations were allowed in suits for the annulment of marriage. *Cahn v. Cahn* (1897, Spec. T.) 21 Misc. 506, 48 N. Y. Supp. 173; *Gore v. Gore* (1905, 3d Dept.) 103 App. Div. 168, 93 N. Y. Supp. 396. But even if the intention of the legislature is uncertain, physical examinations are not expressly disallowed, and the possible indignity to the plaintiff should not be allowed to prevent the ascertainment of truth. *A fortiori* does this hold where the very fact in question would, had the defendant performed the contract sued on, both have furnished ground for annulment and have been ascertainable in the manner requested in the instant case.

WILLS—STATUTORY PROHIBITION OF BEQUEST TO CHARITIES—WAIVER BY ACCEPTANCE UNDER THE WILL.—A testator left the residue of his estate to the trustees of a church to use for the advancement of home missions conducted by the church. Under Iowa Code, 1897, sec. 3270, any devise or bequest to a non-pecuniary corporation in excess of one-fourth of the testator's estate was void if a spouse, child, or parent survived. The testator's widow survived, and took under the will, without contesting the validity of the gift to the trustees. On her death, the heirs of the testator sought to have the gift declared void on the ground that the statutory provision could not be waived by the widow. The plaintiffs appealed from an

order of the lower court dismissing the petition. *Held,* that the judgment be affirmed, as the devise to the trustees was not a devise to a non-pecuniary corporation, and the protection of the statute was waived by the only survivor entitled. *Randleman v. Williams* (1923, Iowa) 194 N. W. 964.

The ancient statutes of mortmain restrained all alienation to religious institutions in order to maintain the feudal system and prevent the growth of ecclesiastical power. (1225) 9 Hen. III, c. 36 modified by (1601) 43 Eliz. c. 4, and extended by (1736) 9 Geo. II, c. 36; Jenks, *Short History of English Law* (1912) 105. The ancient statutes were evaded by long term leases, collusive suits, and uses. *Wimbish v. Tailbois* (1547, K. B.) Plowd. 38a, 43; Minor, *Real Property* (1908) secs. 1090-1095. The policy of these statutes was adopted in this country only in Pennsylvania. *Leazure v. Hilligas* (1821, Pa.) 7 Serg. & R. 313; Alger, *Ultra Vires Acquisition of Real Estate by a Corporation* (1894) 8 HARV. L. REV. 15, 17. But there are limitations on devises to charitable and religious institutions, sometimes called mortmain statutes, in a number of states. *Heiligenstein v. Schlotterbeck* (1921) 300 Ill. 206, 133 N. E. 188; *Unger v. Loewy* (1921, Sup. Ct.) 116 Misc. Rep. 628, 191 N. Y. Supp. 38. These modern statutes have been evaded by gifts to churches for non-religious purposes. *St. Stephen's Episcopal Church v. Norris's Adm'r* (1913) 115 Va. 225, 78 S. E. 622. And when the statute prohibits the church from taking land, grants in trust, or of the proceeds of land have been sustained, but not long term leases. *Chamber v. Higgins' Ex'r* (1899) 20 Ky. L. 1425, 49 S. W. 436; *Street v. Cave Hill Investment Co.* (1921) 191 Ky. 422, 230 S. W. 536. While the ancient statutes of mortmain did not apply to wills because they antedated the Statute of Wills, the modern statutes usually restrict gifts by will. They are intended not to prevent ecclesiastical domination, but to protect the testator's heirs against improvident benevolences induced by the fear of impending death. Chamberlain, *Mortmain* (1906) 63 CENT. L. JOUR. 240 This change in statutory purpose seems to break down the tenuous reasoning supporting the first ground of the decision, but lends support to the other ground that the protection of the statute was waived by the only survivor entitled to claim it.