RECENT CASES

BILLS AND NOTES—PRESUMPTION OF CONSIDERATION—DIRECTION OF VERDICT.—MCCORMACK V. WILLIAMS, 95 ATL. (N. J.) 978.—In an action on a promissory note the defense was lack of consideration to the knowledge of plaintiff. Plaintiff put notes in and rested. Defendant and two others testified that there was no consideration. The trial court directed a verdict for defendant. *Held,* error. Bergen, Black, Heppenheimer, and Williams, JJ., *dissent.*

A negotiable note is deemed to have been issued for valuable consideration. N. I. L., Sec. 24. Hence plaintiff got the benefit of a presumption by putting the note in evidence. The lower court refused to give the same effect to this presumption as to evidence, saying, "There is no evidence to overcome the proof as made by the defendant." Since the presumption arose from evidence and since its effect was to make out a prima facie case for plaintiff, *Metropolitan R. Co. v. Powell,* 89 Ga. 605; *State v. Lee,* 69 Conn. 186, the reversal is correct in holding that it is, in effect, evidence, *Williams v. Hasshagen,* 166 Cal. 386; *In re Cowdry's Will,* 77 Vt. 359; contra, *Peters v. Lowe,* 24 S. Dak. 605; and that there was a question for the jury. *Volguards v. Myers,* 23 Cal. App. 500. The court went farther and said, speaking of the testimony offered by defendant, "no matter how strong that evidence, it raised, in effect, a conflict of testimony; and conflicting testimony is always for the jury." As a rule the question of whether or not a presumption has been rebutted is for the jury. *Volguards v. Myers, supra.* The question of whether or not evidence has been rebutted is for the jury, but evidence may be so strong that the court will be justified in directing a verdict. *Travelers Ins. Co. v. Randolph,* 78 Fed. 759. It would seem that in such a case the verdict might be directed regardless of whether the opposing side had attempted to make out a case by evidence or by getting the benefit of a presumption. *Williams v. Hasshagen,* 166 Cal. 386. But see *Citizen's Bank of Tifton v. Timmons,* 84 S. E. (Ga.) 232.

R. C. W.

CHARITIES—BEQUESTS TO PROMOTE SECULARISM—VALIDITY.—RE BOWMAN; SECULAR SOCIETY L'TED V. BOWMAN, 113 L. T. 1095.—*Held,* that a gift in trust to promote the principle "that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action," is a valid charity not contrary to public policy.

Early cases frequently assert that "Christianity is part of the common law." *Rex v. Taylor,* 1 Vent. 293; *Rex v. Woolston,* 2 Stra. 834; *Updegraph v. Com.,* 11 S. & R. (Pa.) 394 (blasphemy). Thus gifts for infidel or anti-Christian purposes have been held void. *Zeiswenn v. James,* 63 Pa. St. 465; *Briggs v. Hartley,* 19 L. J. R. N. S. (Eq.) 416. And a contract to let rooms for atheist lectures was unenforceable. *Cowan v. Milbourn,* (1867) L. R. Q. Exch. 230. It was doubted whether gifts for

anti-Trinitarian purposes could be upheld. See *Att'y. Gen. v. Pearson,* 3 Mer. 353. But it has been established that a bequest promotive of "any doctrine of Christianity" is good. *Att'y Gen. v. Meeting-House,* 3 Gray (Mass.) 58. The rule has been generally laid down that there must be "nothing hostile to morality, religion, or law." See *George v. Braddock,* 45 N. J. Eq. 757; *Jones v. Watford,* 62 N. J. Eq. 339, 344. But nothing short of a repudiation of Christianity will invalidate. *Thornton v. Howe,* 31 Beav. 14; *Vidal v. Philadelphia,* 2 How. (U. S.) 127; see *Miller v. Gable,* 2 Den. (N. Y.) 492, 525. The holding of the principal case, though unique, is undoubtedly correct.

C. R. W.

EQUITY—DILIGENCE—FRAUD.—SMITH V. ROGERS ET AL., 87 S. E. (GA.) 772.—The plaintiff, an invalid woman for years, was the victim of fraud practiced upon her by her brother-in-law and cousin, who took advantage of her confidence, illness, and ignorance of business. The brother-in-law obtained her signature to a deed to half her land, under pretense of seeing which could write the better hand. The cousin got her to sign a deed to the other half, under pretense of a lease of the whole tract to him, to terminate at her option. *Held,* that the plaintiff was so negligent in the execution of the instruments, that equity will not aid her by a cancellation of the deeds; and that the case was properly dismissed on demurrer. Evans, P. J., and Lumpkin, J., *dissenting.*

No grounds for the decision are given by the court. From the uncontroverted facts the defendants fraudulently deceived, tricked, and misled the plaintiff into signing the deeds. There is no class of cases where equity will allow a defrauder to set up negligence of his victim as a defense to his own fraud. Where there is fraud, equity will look upon any disability of plaintiff with unusual indulgence. *McIntire v. Pryor,* 173 U. S. 38; *Carter v. Tice,* 120 Ill. 277; *Harding v. Randall,* 15 Me. 332. And where one who occupies a confidential relation to another takes advantage of that relation by fraudulent misrepresentations to procure the execution of a deed, such deed may be cancelled. *White v. White,* 89 Ill. 460; *Lyons v. Van Riper,* 26 N. J. Eq. 337; *Bayne v. Whistler,* 4 Alaska 15. Laches cannot be set up as a bar to an action if delay is the result of fraud. *Kelley v. Boettcher,* 85 Fed. (Colo.) 55; *Wampler v. Wampler,* 30 Gratt. (Va.) 454; *Free v. Buckingham,* 57 N. H. 95. In no case will the statute of limitations run until plaintiff has knowledge of the fraud. *Brown v. Norman,* 55 Miss. 369; *Crowther v. Rowlandson,* 27 Cal. 376. The plaintiffs in cases similar to the principal cases have been held justified in relying on the representations of the supposed lessee, and failure to investigate, without grounds for suspicion, was held not to constitute laches. *McIntire v. Pryor,* and *Carter v. Tice, supra.* There are no rights of innocent third parties to consider in the principal case, and equity had only to deal with the immediate parties. One finds difficulty in sustaining the conclusion reached.

L. W. B.

JUDGMENT LIENS—PREFERENCE.—HULBERT V. HULBERT ET AL., 101 N. E. (N. Y.) 70.—Where a judgment debtor inherited realty from his

father, so that the liens of the judgment creditors, whose judgments had been docketed, attached thereto simultaneously on the death of the father, *held,* the issuing of an execution on one of the judgments was an unnecessary act, and did not give such judgment creditor preference or priority over the other judgment creditors. Williard Bartlett, C. J., and Cuddeback and Pound, JJ., *dissenting.*

At common law a mere judgment created no lien. *Shrew v. Jones,* 22 Fed. Cas. No. 12818; *Mitchell v. Wood,* 47 Miss. 231. Judgment liens are statutory. Previous to the N. Y. Revised Laws of 1913, and under the "Act concerning judgments and executions" passed the 31st of March, 1801, "a judgment *lien* attaches upon land from the *time of filing* the record of judgment." Under the Act of 1801, though not expressly stated, judgments were considered liens upon real estate, and the language of the act necessarily implied as much. Under this act, the judgment creditor first taking proceedings by way of execution gained a priority over the others, entitling him to prior satisfaction. *Adams v. Dyer,* 8 Johns. (N. Y.) 347; *Waterman v. Haskin,* 11 Johns. (N. Y.) 228. This rule has been followed in other jurisdictions. *Rockhill v. Hanna,* 15 How. (U. S.) 189; Freeman on Executions, Vol. I, 2d Ed. § 203; Rorer on Judicial Sales, § 826. The Revised Laws of 1813 expressly state that a "judgment shall be a lien on lands, etc." This is nothing more than was necessarily implied in the Act of 1801. This statute (1813) can furnish no grounds for a distinction between the two earlier cases and the principal case. Execution was necessary to gain priority under the Act of 1801, and gave priority. The principal case cannot be distinguished from the two leading cases (*supra*) decided under the Act of 1801. Apparently New York has overruled precedents and reversed itself on this point.

E. J. M.

LANDLORD AND TENANT—LEASES—CONSTRUCTION.—PHELPS V. JOHNSON, 181 S. W. (Texas Civ. Ap.) 862. A lease contract, after providing in detail for rents, etc., declared that, should the lessors sell the land, the lease should immediately become void. The lease was for a term of five years and the premises were sold during the last year of the term.—*Held,* that when the tenant entered upon the last year, his right to a continuation of possession for that year became vested. Levy, J., *dissenting.*

The court bases its decision to a great extent on the rule of construction stated in Cyc and quoted by the court in its opinion. "The court will endeavor to give a construction most equitable to the parties and which will not give one of them an unfair or unreasonable advantage over the other. Thus where the meaning is doubtful, the construction will be avoided which will entail a forfeiture." 9 Cyc 587. Yet on the same page Cyc continues: "It is not the province of a court, however, to change the terms of a contract which has been entered into even though it may be a harsh and unreasonable one." And later, "Words are to be interpreted in the ordinary and popular sense." 24 Cyc 915. Argumentatively, the majority contend that a strict interpretation of the provision would work a hardship as the landlord might sell in mid-summer and the tenant would lose the labor expended upon crops if the lease became void immediately

and he must give up possession forthwith. But this objection is unfounded. A tenant is entitled to crops where his estate is terminated by act of God or of another without his fault. 1 Tiffany 524. And where the term is uncertain, the tenant who sows is entitled to reap the crop. *Heavilon v. Farmer's Bank,* 81 Ind. 249; *Pfanner v. Sturmer,* 40 How. Prac. 401. The courts have frequently held that if so stipulated in the lease, a tenancy might terminate with the sale of the land. *Hickox v. Sugner,* 123 Wis. 128; *Jones v. Shibley,* 166 S. W. (Ark.) 937; *Shaw v. Appleton,* 161 Mass. 313. The tenancy will end at once and before the end of the year. *Taylor v. Froback,* 85 Ill. 584; *Szpakowski v. Buwoy,* 166 App. Div. (N. Y.) 578. The principal case apparently overrules *Thompson v. Oates,* 46 Texas Civ. App. 383. A contrary conclusion could well have been reached.

A. S. B.

LIS PENDENS—APPLICATION TO PERSONALTY.—MABEE V. MABEE, 96 ATL. (N. J. EQ.) 495.—A wife, in a suit against her husband, who was her debtor, for a legacy left him by his father, was interfered with, in her claims, by an attaching creditor of the husband's interest in the estate. *Held,* a *lis pendens* was created by her filing of the bill: The English rule, that the doctrine of *lis pendens* is inapplicable to personal property other than chattel interests in land, probably not being the rule in the United States.

The general doctrine of *lis pendens* has been stated as follows: During the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute, so as to affect the rights of the opponent. Pomeroy—Equity, Sec. 633; *Norris v. Ile,* 152 Ill. 190. The doctrine has always been applied to real property without question. *Warren County v. Marcy,* 97 U. S. 96. But whether it is to apply to personalty is a matter of great conflict. Pomeroy (*op. cit.,* Sec. 636), without citing any authority, dogmatically asserts that the doctrine has no application to personal property, except when there is a trust extending over the personalty. For arguments against its application to personalty, see 21 Am. and Eng. Encyc. 627. Stocks, bonds and other negotiable instruments transferred before maturity are held not subject to *lis pendens* for their circulation must not be impeded. *Secor v. Witter,* 39 Ohio St. 218; *Mayberry v. Morris,* 62 Ala. 113. This is substantially the English doctrine, except that English courts hold chattel interests in land subject to *lis pendens,* as stated by Lindley, L. J., in *Wigram v. Buckley* (1894) 3 Ch. 493. But Pomeroy's position is strongly opposed by many, 1 Freeman—Judgments (4 ed.), Sec. 194, cited in *Osborn v. Glasscock,* 39 W. Va. 749, on the ground that the danger of defeating judgments or decrees by a transfer of the subject-matter is much greater in the case of movable than immovable property. See also *Burnham v. Smith,* 82 Mo. App. 35. The authorities are hopelessly in conflict. *Reid v. Sheffy,* 75 Ill. App. 136; *Miles v. Left,* 60 Iowa, 168. Where the statutes have spoken on the subject, they have in nearly every case concerned themselves with real property only. The statement in the principal case represents as well as any the American holdings, having regard both to the numerical weight of authority and the probable trend of the decisions.

A. N. H.

MARRIAGE—BREACH OF PROMISE—SURVIVAL OF ACTION AGAINST EXECUTOR OF PROMISOR—SPECIAL DAMAGE.—QUIRK V. THOMAS, CT. OF APP., 140 L. T. (ENG.) 131.—Where the plaintiff, relying on the promise of marriage by the executor's testator, gave up a profitable business, thereby suffering financial loss through the breach of promise, *held,* that there could be no recovery, the court expressing its doubts as to whether or not the action would lie, even if special damage had been proven.

As a general proposition, an action for breach of promise of marriage does not survive at common law as it is purely personal. *Hayden v. Vreeland,* 37 N. J. L. 372. Some courts, however, intimate that the action survives if special damage is proven. *Larocque v. Conheim,* 87 N. Y. S. 625; *Grubb v. Sult,* 32 Gratt. (Va.) 203; *Smith v. Sherman,* 4 Cush. (Mass.) 408. The allegation of special damage must relate to property and be such as would be sufficient of itself to maintain a suit. *Hovey v. Page,* 55 Me. 142; *Jenkins v. French,* 58 N. H. 532. So where the primary cause of the injury is personal, although with resultant damage to the party's estate, which latter would not of itself be a ground for action, the action does not survive. *Drake v. Beckman,* 11 Me. & Wel. 316; *Vittum v. Gilman,* 48 N. H. 419; *Payne's Appeal,* 65 Conn. 379. In classifying the action for breach of promise, it resembles an action on the case for personal injuries, being sui generis, as it cannot be classed as a pure action ex contractu, as distinguished from one purely ex delicto, or vice versa. *Wade v. Klabfleisch,* 58 N. Y. 282. Regarding the action as being one of deceit, as there is a resemblance (*Stebbins v. Palmer,* 1 Pick. (Mass.) 71), it would not survive unless the estate of the testator was enriched thereby, *Jones v. Van Zandt,* 4 McLean 599, Fed. Cas. No. 7, 503. Thus there was created no quasi contract. *Phillips v. Homfray,* L. R. 24, Ch. D. 439. However, the states of New Hampshire and North Carolina have made statutory provision for the survival of the same. *Stewart v. Lee,* 70 N. H. 181; *Shuler v. Millsap,* 71 N. C. 297. In view of the unsettled state of the authorities regarding the survival of a breach of promise action, in the absence of statutory enactment, no definite rule can be laid down. However, it may be stated as a settled doctrine that where the injury to property is incidental to the personal injury, it does not survive. In the principal case the loss grew out of the broken promise, as appears, and therefore it should die with the transgressor, as his estate was not enriched and the primary cause of the action was the personal injury.

J. McD.

SALE OF STANDING TIMBER—CONSTRUCTION OF CONTRACT. CHAPMAN V. DEARMAN ET AL., 181 S. W. (TEX.) 808.—*Held,* that a warranty deed to all timber standing and growing upon a described tract of land, no mention being made in deed as to time of removal, conveyed a fee simple to the timber, and the grantee was under no obligation to remove the same within a reasonable time. Middlebrook, J., *dissenting.*

It has been held that such a grant does not convey the title in fee simple, but gives the grantee the beneficial interest only, until the timber shall be cut and removed,—a terminable estate, which ends when a reason-

able time, after the execution of the deed, for the removal of such timber has expired. *Fletcher v. Lyon,* 93 Ark. 5; *McNair & Wade Land Co. v. Parker,* 59 So. (Fla.) 959; *Carson v. Three States Lumber So.,* 108 Tenn. 681. Mississippi agrees with the principal case. *Butterfield Lumber Co. v. Guy,* 46 So. (Miss.) 78. Where the parties use words from which it is inferable that a reasonable time was meant, such construction will control. *Houston Oil Co. of Texas v. Boykin,* 153 S. W. (Tex.) 1176, where the phrase "to remove as shall be convenient" was construed to mean within a reasonable time. It would seem that parol evidence should have been admitted in the principal case, not to vary, but to explain the terms of the deed, to show the intention of the parties. *McNair & Wade Land Co. v. Adams,* 54 Fla., 550; *McRae v. Stillwell,* 111 Ga. 65. The principal case is clearly contrary to the great weight of authority.

E. J. M.

TAXATION—DELEGATION OF POWER—CORPORATE AUTHORITIES.—LALLARD V. MELTON ET AL., 87 S. E. (S. C.) 421.—*Held,* that a statute enacted by the legislature creating a commission to carry out the work of improving highways in a county, and authorizing the issuance of bonds by such commission for that purpose within a limit, and to levy certain taxes to meet these bonds, is not unconstitutional in that it vests taxing power in persons other than corporate authorities. *Seven dissents.*

The court in the principal case is unanimous in holding that there was a delegation of the taxing power, but they are divided seven to eight upon the question as to who constitute "corporate authorities" within that provision of the constitution which provides that "Corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes." The majority followed the rule laid down in a long line of Illinois cases that corporate authorities must mean those municipal officers who are directly elected by the people, or appointed in some mode to which the people have given their consent. *Cornell v. People,* 107 Ill. 372. And the consent of the people to the election of these officers may be given by a vote upon the statute providing for their appointment. The officers so appointed become corporate authorities, and may exercise the taxing power when delegated to them. 4 Dillon Municipal Corps. sec. 1372; *People v. Knopf,* 171 Ill. 191. 2 Words and Phrases, 1602. However, there are courts which maintain that, inasmuch as taxation is a legislative act, "corporate authorities" in this connection refers to those officers to whom is given the ordinance-making power. *State v. Andrews,* 11 Neb. 524; *Howe v. Des Moines,* 103 Iowa 76. The still more strict view is held by the Kansas court that the officers must be directly elected by the people. *Parks v. Board of Com'rs,* 61 Fed. (Kan.) 437.

C. Y. B.

THEATERS—DRAMATIC CRITICS—CIVIL RIGHTS BILL.—WOOLLCOTT V. SHUBERT, NEW YORK LAW JOURNAL (CT. APLS.), FEB. 29, 1916.—The dramatic critic of a newspaper was refused admittance to a theater by the proprietors because of a displeasing comment upon one of their productions.

Held, the proprietors were within their common law rights, the state civil rights bill having reference only to discrimination on account of race, creed or color.

It is well settled that theatres are private enterprises, under the control of private parties and that they may license whomsoever they will to enter, and refuse admission to whomsoever they will. *Meisner v. Detroit Ferry Co.,* 154 Mich. 548; *Purcell v. Daly,* 19 Abb. N. Cas. (N. Y.) 301; *Luxenberg v. Keith Co.,* 117 N. Y. S. 979. Since theaters exist wholly under the authority and protection of state laws, it is competent for the state to impose the condition that the proprietors shall admit and accommodate all persons impartially. Cooley—Torts, Vol. II, p. 613. This is a legitimate exercise of its police power. *Mayor v. Eden Musée Co.,* 102 N. Y. 593; *People v. Steele,* 231 Ill. 340. An instance of state regulation which has been held to be within a state's police power is presented in *Greenberg v. Western Turf Ass'n.,* 140 Cal. 357, where a statute held unlawful the refusal of admission of any adult presenting a ticket to any place of public amusement. In the absence of like statutes under the police power, the only qualification in the law as to the absolute right of exclusion is that established by the state Civil Rights Bill; and the principal case is clearly correct in holding that this act refers only to discriminations because of race, creed or color. In the absence, then, of any statute, which is admittedly within the police power of the state, the holding of the instant case is correct on legal principle, however open to criticism it may be on ethical or aesthetic grounds.

A. N. H.

TORTS—INTERFERENCE WITH CONTRACT RELATIONS—KNOWLEDGE AS ELEMENT OF MALICE.—TWITCHELL V. NELSON ET AL., 155 N. W. (MINN.) 621.—In an action for inducing a breach of contract, by a third person, *held,* that the essential element of malice may be supplied by facts which should have put the defendant upon inquiry, amounting to legal "notice" of the contract, irrespective of whether he was actually aware of the contract or not.

In the case of a purchase for value of a legal interest to which there are outstanding equities, it is settled that "notice" in law may consist, not in knowledge of the equities themselves, but in knowledge of facts which should have put the purchaser upon inquiry such as would have led to a discovery of the equities. *Kyle v. Ward,* 81 Ala. 120. An exception is generally recognized in the case of negotiable paper, where actual "bad faith" must be shown. *Murray v. Lardner,* 2 Wall. (U. S.) 110. In the principal case even the term "bad faith" is extended fictitiously to apply to all cases of legal "notice." Compare cases of deceit in which legal "notice" in the above sense is held sufficient, without an actual deceptive state of mind. *Gordon v. Irwine,* 105 Ga. 144; *Davidson v. Jordan,* 47 Cal. 353. *Contra, Nash v. Ins. & Trust Co.,* 163 Mass. 574; *Kountze v. Kennedy,* 147 N. Y. 124; *Warfield v. Clark,* 118 Iowa 69; and the cases generally. For an extreme case see *Donald v. Am. Smelting Co.,* 62 N. J. Eq. 729 ("actual fraud" extended to exercise of honest judgment without due examination of facts). In extending the sane

fictitious use of language to cases of express malice, the principal case departs from a uniform course of the authorities, all of whom require, in torts involving malice, the *intentional* infliction of injury upon another. *Beekman v. Marsten,* 195 Mass. 205, 212; *Mfg. Co. v. DeWitt,* 120 Md. 381; *Joyce v. Ry. Co.,* 100 Minn. 225; *Schonwald v. Ragains,* 32 Okl. 223.

C. R. W.

WAR-TRADING WITH THE ENEMY—CIVILIAN PRISONER OF WAR—INTERNMENT OF ALIEN ENEMY WITHIN REALM—DEPRIVATION OF CIVIL RIGHTS.—SCHAFFENIUS V. GOLDBERG, 113 L. T. (ENG.) 949.—*Held,* that the restraint imposed on the movements of an alien enemy by his internment does not make him an alien *ex lege,* thus depriving him of the civil rights he possessed theretofore.

On the breaking out of war, neutrals and the citizens of the opposing belligerent country are generally allowed a reasonable time to withdraw. *The Sarah Starr,* Blatch. Pr. Ca. 650. This provision has also been inserted in many treaties between countries. At once there is an entire cessation of all commercial intercourse with the opposing hostile country, except in case of *commercia belli,* unless by permission of the sovereign power. *Esposito v. Bowden,* (1857) 7 E. & B. 762; *The Hoop,* 1 Rob. Rep. Adm. 196. However, permission may be given to the subjects of the enemy to remain, and if given, they may enjoy their property. West. Int. Law. Vol. II, p. 42. In the enforcement of his civil rights such an alien enemy is treated as if a subject of the country in which he is, notwithstanding that at the same time he is the subject of an enemy, but he cannot enforce his rights for the benefit of the enemy. *Janson v. Dreifonstein Cons. Mines,* (1902) Appeal Cases, H. L. 484. The test is not a person's nationality, but his place of business. *McConnell v. Hector,* 3 B. & P. 113. If the alien enemy is residing in his own country his right to sue in the courts of the opposing country is suspended, by the latter, during the war. *Howes, Hyatt & Co. v. Chester & Co.,* 33 Ga. 89; *Bell v. Chapman,* 10 Johns. 183; *Wilcox v. Henry,* 1 U. S. (Dallas) 69. But if he is sued he may avail himself of all means and appliances of defense. *McVeigh v. U. S.,* 11 Wall. 259; *Albrecht v. Sussman,* 2 V. & B. 322. An alien enemy residing in the United States by permission is competent to maintain a personal action. *Otteridge v. Thompson,* Fed. Cas. No. 10, 618; *Clarke v. Morey,* 10 Johns. 69; and the same is held in England regarding alien enemies residing there. *Sparenburgh v. Bannatyne,* 1 B. & P. 163. So it was held that an alien who had complied with the Aliens Restriction Act, 1914, 4 & 5 Geo. 5 c. 12, might have access to the courts. *Princess Thurn & Taxis v. Moffitt,* (1915) 1 Ch. 58. Accordingly the principal case rightly holds that as long as he is permitted to remain in England with the permission of the Crown he is under its protection and should be permitted to exercise his civil rights. His internment cannot of itself be considered to have abridged them by implication, inasmuch as there was no express enactment to that effect.

J. McD.