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RECENT CASES

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BILLS AND NOTES—GOOD FAITH—NOTICE OF DEFECTS.—PAIKA v. PERRY (1917) 114 N. E. (MASS.) 830.—M. made a contract with the plaintiffs to remodel the latter's house. The plaintiffs, who were illiterate, were induced by the fraud of M. to sign a note and mortgage, believing these instruments comprised the building contract. M. negotiated the note and mortgage, and it passed into the hands of the defendant, who knew that the mortgage was not to be given until the work on the building had been performed, and, further, that the mortgage had been given before any work had been done by M. He also knew that no work had been done for over two months after the mortgage was given, and that the plaintiffs were illiterate. *Held,* that the defendant's action in taking the note and mortgage amounted to bad faith, so that he took with notice within Rev. Laws of Mass. (1902) chap. 73.

To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. Rev. Law of Mass. (1902) chap. 73; *Mass. Nat'l. Bank v. Snow* (1905) 187 Mass. 159; *Lancaster Bank v. Garber* (1896) 178 Pa. St. 91; *New York Mine v. Citizens' Bank* (1880) 44 Mich. 344. The court held that the defendant might take with notice within this rule without knowing the exact fraud practiced on the plaintiff, citing the following cases: *Hager v. Nat'l Bank* (1898) 105 Ga. 116; *Henry v. Sneed* (1899) 99 Mo. 407. Mere knowledge that a note was given in consideration of the executory contract of the payee which has not been performed will not deprive the indorsee of the character of a *bona fide* holder. *McKnight v. Parsons* (1907) 136 Ia. 390; *Rublee v. Davis* (1892) 33 Neb. 783; *Houston v. Keith* (1911) 100 Miss. 83. Although the notes were procured by fraud, and given before the contract was performed, the defendant would have been a *bona fide* holder in the principal case if he had not been guilty of bad faith. *New England Trust Co. v. New York Belting Co.* (1896) 166 Mass. 42; *Burnes v. Fertilizer Co.* (1914) 218 Mass. 300. This fact is brought out by the actual decision of the case. The facts would clearly seem to justify the court in holding that the defendant was guilty of bad faith.

J. I. S.

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACT—STATE COURT'S CONSTRUCTION OF CONTRACT NOT FOLLOWED.—DETROIT UNITED RAILWAY v. MICHIGAN (1916) 37 SUP. CT. REP. 87.—By an ordinance of Jan. 3, 1889, the city of Detroit required the A Ry. Co. to stipulate that it would sell eight tickets for twenty-five cents, to be good over the entire route within the city limits. The township of Greenfield, in 1897, granted

to the B Ry. Co. a franchise to run a railway, but made no such provision for the sale of tickets. In 1900 the defendant company was incorporated with power to purchase and acquire other railways, and to use and enjoy the rights of such companies upon the same terms as they themselves had. The defendant company purchased the franchises and property of the A and B companies. Thereafter, in 1907, the legislature of Michigan annexed part of the township of Greenfield to Detroit, and provided that all the state and city ordinances applicable to Detroit should apply to the annexed territory. The Supreme Court of Michigan, in issuing a mandamus to compel the defendant to observe the provisions of the ordinance of 1889, construed the contract of the defendant company with the city to mean that the company was to sell eight tickets for twenty-five cents within the city limits as the limits should be extended. *Held,* that the state court's construction of the contract would not be accepted by the Supreme Court, and that the act of 1907 impaired the obligation of the contract. Brandeis and Clark, JJ., *dissenting.*

The Supreme Court as a general rule will accept the construction placed by the highest court of the state upon the state constitution and statutes, and upon contracts alleged to be affected by them; but this rule will not be applied when the question before the court is whether there has been an impairment of the obligation of a contract. *Delmas v. Insurance Company* (1871) 14 Wall. (U. S.) 661; *Jefferson Bank v. Skelly* (1861) 1 Black (U. S.) 436. It will not interfere with a judicial decision on a construction of the terms of a contract, unless there is a statute involved. *Bacon v. Texas* (1895) 163 U. S. 207. The impairment clause of the constitution is concerned only with legislative acts. *New Orleans Gas Co. v. Louisiana Light Co.* (1885) 115 U. S. 650. Where a state court enforces a subsequent statute, its construction of the contract will not be accepted by the Supreme Court even though the act is not specifically mentioned in the decision of the state court. *Carondelet Canal and Navigation Company v. State of Louisiana* (1913) 233 U. S. 362. To accept the construction of the state court in the principal case is to allow any state court, by putting a strained construction upon a contract, to deprive the Supreme Court of its jurisdiction. The court in refusing to accept the construction of the state court seems to be altogether correct, and the decision is in accord with the settled policy of the Supreme Court to decide for itself what the terms of the contract are when the question of the impairment of the obligation of a contract is involved.

F. L. McC.

CRIMINAL LAW—ACCUSED AS WITNESS—COMMENT ON OMISSIONS IN TESTIMONY.—CAMINETTI V. UNITED STATES (1917) 37 SUP. CT. REP. 192.—In the *Diggs* case, the defendant voluntarily took the stand in his own behalf, but failed to explain incriminating circumstances and events already in evidence in which he had participated, and concerning which he was fully informed. *Held,* that such failure justified comment by the court, and could be considered by the jury with all the other circumstances in reaching a verdict.

The defendant in a criminal case is under no obligation to become a witness, and his failure to take the stand does not create any presumption against him. Act of March 16, 1878; 20 St. at L. 30, chap. 37; Comp. St. 1913, sec. 1465. Whether the defendant's failure to testify as to material matters, having taken the stand, is ground for comment by the court, and the subject of inference by the jury, is a disputed point, hitherto undecided by the Supreme Court. The cases in that court in which the question has been argued have involved the subsidiary question of the right of cross-examination under the federal rule, and have been disposed of either upon the ground that the limit to the right of cross-examination was not exceeded, *Fitzpatrick v. United States* (1900) 178 U. S. 304; or, if exceeded, the answers given were not prejudicial to the respondent, *Sawyer v. United States* (1906) 202 U. S. 150. The Circuit Court of Appeals, in the eighth and first circuit, has held contrary to the principal case, on the ground that too great latitude is thus given to the jury, and too great a burden is put upon the defendant. *Balliet v. United States* (1904) 129 Fed. 689; *Myrick v. United States* (1915) 219 Fed. 1. The principal case proceeds upon the theory that a defendant cannot partially waive his constitutional privilege, and if he steps outside of the circle which the Constitution draws around him, he then subjects himself to the same rule as that applying to any other witness, and his silence may be the subject of comment and inferences drawn from it. This reasoning is generally followed in state jurisdictions. *State v. Ober* (1873) 52 N. H. 459; *Stover v. People* (1874) 56 N. Y. 315; *Cotton v. State* (1888) 87 Ala. 103. See Dunmore, Comment on Failure of Accused to Testify (1917) 26 YALE LAW JOURNAL, p. 464.

E. J. M.

EVIDENCE—EXPERT OPINION—FOUNDATION.—MALONE-MCCONNELL REAL ESTATE CO. v. SIMPSON AUDIT CO. (1916) 73 So. (ALA.) 369.—An accountant, conceded to be an expert, made a personal examination of the books of the defendant and of the audit of the same by the plaintiff, and stated that plaintiff's work was worthless, giving only some of the facts upon which his conclusion was based. *Held,* that the opinion of the accountant was rightly admitted.

The authorities are not uniform as to whether the opinion of an expert who has had the opportunity of examination is admissible, if he does not first give in detail the facts from which he has drawn his conclusion. Probably the weight of authority is that such testimony is inadmissible. *Raub v. Carpenter* (1902) 187 U. S. 159; *Sauntman v. Maxwell* (1900) 154 Ind. 114; *Scott v. Hay* (1903) 90 Minn. 304; *State v. Simonis* (1901) 39 Or. 111; *Kinney v. Brotherhood of American Yeomen* (1905) 15 N. D. 21; *Flanagan v. State* (1898) 106 Ga. 109. These courts say that the expert must first state the facts, so that the jury may judge whether the facts as well as the opinion are correct, and other experts may express an opinion on these facts. They say that it is the conclusion from the facts in evidence, not the general opinion of the expert, which is of interest to the jury. Where the facts are voluminous, complicated and difficult, some courts have admitted an opinion without a detailed state-

ment. *Charlotte v. Atlantic Bitulithic Co.* (1915) 228 Fed. 456; *Schaefer & Co. v. Ely* (1911) 84 Conn. 501. Professor Wigmore maintains that the rule requiring the facts to be stated first is based on a misconception of the meaning of "opinion." Originally the term was applied only to guesswork and not intended to hinder or exclude a statement formed from personal examination. It is sufficient to ask the expert if he has made an actual examination, and then permit him to state his opinion. This rule would remove burdensome details, and would work no injustice to the opposing party, as every fact even to the smallest detail could be brought out on cross-examination. Wigmore, *Evidence,* secs. 675, 1922. This view has been adopted in several comparatively recent cases. *People v. Faber* (1910) 199 N. Y. 256; *State v. Ross* (1915) 178 S. W. (Mo.) 475; *Commonwealth v. Johnson* (1905) 188 Mass. 382. In the principal case some of the facts were already before the jury, but the language of the court is in entire accord with the latter doctrine. It is submitted that any change in the present cumbersome state of our law is exceedingly desirable.

J. E. H.

EVIDENCE—NON-EXPERT OPINION—ADMISSIBILITY.—STATE v. PRUETT (1916) 160 PAC. (N. M.) 362.—The defendant was indicted for murder. At the trial the state's witnesses testified over objection that they saw knee-prints adjacent to a cedar bush near the scene of the homicide. One witness stated farther, that the knee-print he identified was at a normal distance from a toe-print of the left foot and opposite a ball-print of the right foot. *Held,* that the testimony was admissible.

Opinions of non-expert witnesses are admitted where, by the nature of the matter, an attempted description, because insufficient or vague, would leave the jury unable to form a judgment of its own. *Com. v. Sturtivant* (1875) 117 Mass. 122; *Evans v. People* (1858) 12 Mich. 35; *Bates v. Sharon* (1873) 45 Vt. 481. Under this recognized rule witnesses have been permitted to express opinions on the physical cause of a great variety of marks and imprints. The testimony may be as to what kind of object produced the mark in question, as for example, that overshoes left certain tracks found in the snow. *State v. Ward* (1888) 61 Vt. 153. Or it may go farther and indicate what particular one of a class made the impressions observed. Accordingly, the opinion that certain foot-prints were left by a particular pair of shoes worn by the defendant has been admitted. *State v. Reitz* (1880) 83 N. C. 636. Similarly, the statement that the wagon-track and hoof-prints about the scene of a theft were the same as those seen by the witness elsewhere was admitted. *Williams v. State* (1916) 182 S. W. (Tex.) 335. A stricter application is found, however, in some states which permit only a description of the several tracks, barring opinion thereon. *Terry v. State* (1898) 23 So. (Ala.) 776; *State v. Green* (1893) 40 S. C. 328, 330. The broader rule, admitting opinion, has been applied to testimony involving other varieties of marks, seemingly less characteristic. In a homicide case, the witness, having seen a depression in a bed, stated that in his opinion it was made

by a person's head. *State v. Welch* (1892) 36 W. Va. 690. Testimony, "that the ends of a person's fingers were like a burn, shiny," also has been held unobjectionable. *Fortier v. Western F'd'y Co.* (1915) 182 Ill. App. 115. The decision also in a very recent case held admissible an opinion that cuts on plaintiff's thumb were teeth marks which were caused by a bite. *Patterson v. Blatti* (1916) 157 N. W. (Minn.) 717. The principal case presents an interesting variation of the applicability of the rule, but in no sense does it seem a departure in principle.

M. S. B.

EVIDENCE—NON-EXPERT'S OPINION AS TO MENTAL CAPACITY—THE MASSACHUSETTS DIVISION LINE.—RAYMOND v. FLINT (1917) 114 N. E. (MASS.) 811.—In a proceeding involving the mental condition of a deceased grantor, a witness was asked whether she noticed anything in the deceased's conversation, or otherwise, that indicated mental failing. This question was objected to on the ground that it called for an expression of an opinion by a non-expert witness. *Held,* that the question was competent, as it called for a statement of "fact."

The general rule undoubtedly is that the opinion of a non-expert witness as to a disputed fact, whether it be operative or evidential in character, is inadmissible if it involves a fairly elaborate process of inference. *Masterson v. St. Louis Transit Co.* (1907) 204 Mo. 507; *Shuler v. State* (1906) 126 Ga. 630; *Lewis v. Brown* (1856) 41 Me. 448. As regards some questions, particularly those involving sanity or insanity, many jurisdictions allow the opinions or inferences of lay witnesses provided they have first placed before the jury the facts upon which the opinion is based. *State v. Smith* (1901) 106 La. 33; *The Berry Will Case* (1901) 93 Md. 560; *State v. Cross* (1900) 72 Conn. 722. A few courts indeed go farther and permit a non-expert witness to give his opinion after merely testifying to having had adequate opportunity for observing the person whose mental capacity is in issue. *Turner v. American Security & T. Co.* (1909) 213 U. S. 257; *Hardy v. Merrill* (1875) 50 N. H. 227; see *Grand Lodge v. Wieting* (1897) 168 Ill. 408; *Grimshaw v. Kent* (1903) 67 Kan. 463. The modern Massachusetts doctrine, however, is less liberal, for it permits a layman to testify to a person's general rationality only with reference to particular acts or specific conduct, and not independently of such particular acts or specific conduct. *Hogan v. Roche's Heirs* (1901) 179 Mass. 510; *Clark v. Clark* (1897) 168 Mass. 523; *May v. Bradlee* (1875) 127 Mass. 418; *Nash v. Hunt* (1874) 116 Mass. 251; see Wigmore, *Evidence,* Vol. III, sec. 1938. In the application of this anomalous rule, which is presumably adopted to assist the jury in arriving at more accurate and trustworthy deductions, the Massachusetts courts are often forced to many fine distinctions which amount to the apotheosis of artificiality. The following questions were held proper: "any fact which led you to infer that there was any derangement of intellect," *May v. Bradlee, supra;* "that he was not a bright boy," *Laplante v. Warren Cotton Mills* (1896) 165 Mass. 487; "whether your sister has failed or has not failed in her mental capacity during the past five years," *Clark v. Clark, supra;*

"whether the testatrix knew what she was talking about at that time," *Hogan v. Roche's Heirs, supra.* On the other hand, the court excluded: "whether from the general appearance of the testator he considered him capable of making a contract or of transacting important business," *Smith v. Smith* (1892) 157 Mass. 389; "was he subject to delusions or hallucinations," *Ratigan v. Judge* (1902) 181 Mass. 572. The court in the principal case has apparently followed the established precedent in that jurisdiction of arriving at a more or less arbitrary conclusion under the guise of distinguishing between "opinion" and "fact." Obviously such a differentiation can, at best, be only one of degree. Whether the doctrine be right or wrong, it should be placed upon its true basis.

S. F. D.

EXCHANGE OF PROPERTY—RESCISSION—VALUE OF THE LAND AS RELIEF.—ROHR V. SHAFFER ET AL. (1916) 160 N. W. (IA.) 279.—The defendant represented that certain land situated in Canada was of good quality, capable of immediate cultivation and free from stones, swamp, and brush. Relying on this representation, the plaintiff exchanged his interest in Iowa land for the Canadian land. In reality, this land was partially covered with water and was wholly unfit for cultivation. The plaintiff tendered a reconveyance of the Canadian land and asked that the defendant be required to reinvest him with the title to the Iowa land or to give damages in lieu thereof. *Held,* that upon rescission, the land having been sold, the plaintiff could recover the value of the interest which he formerly had in it.

The general principles with respect to fraud and the power of the contracting party to rescind are equally applicable to the exchanges of land for land as to any other form of transaction. Thus a party to an exchange may, on account of a fraud as to the quality and practical use of the land, ask a court of equity to rescind the transaction and force the other to his duty of reconveyance. *Burgen v. Boardman* (1914) 254 Mo. 238; *Benham v. Tipton* (1915) 181 S. W. (Tex.) 510; *Spence v. Hull* (1915) 146 Pac. (Or.) 95. As rescission means the undoing of the former transaction, in general there must be a restoration to the former status. But rescission for fraud will not be denied to the injured party because restitution cannot be made by the wrongdoer, he having parted in the meantime with the property, the subject matter of the contract. *Wolfinger v. Thomas* (1908) 22 N. D. 57; *Parks v. Brooks* (1915) 155 N. W. (Mich.) 450; *Daiker v. Strelinger* (1898) 50 N. Y. S. 1074. In such a situation, equity will grant relief to the defrauded party by giving him, in lieu of the land which should otherwise have been returned, the value of the same. *Valentine v. Richardt* (1891) 13 N. Y. S. 417; *Fulton v. Fisher* (1911) 151 Ia. 429; *Wright v. Chandler* (1915) 173 S. W. (Tex.) 1173; *Forrest v. Wardman* (1913) 40 App. D. C. 520. The court regards the defendant as a constructive trustee for the plaintiff. Considered in this light, the plaintiff is entitled to the value of the land, to the funds realized from its sale, or to any property purchased through the proceeds derived from the sale

of the original land by this trustee. *Dorsey v. Wolcott* (1898) 173 Ill. 539; *Taylor v. Kelly* (1857) 3 Jones (N. C. Eq.) 240; cf. *Huxley v. Rice* (1879) 40 Mich. 73; *Kinney v. Keplinger* (1899) 89 Ill. App. 570.

A. S. B.

INTERNATIONAL LAW—JURISDICTION OF THE UNITED STATES COURTS IN THE APPAM CASE.—THE APPAM (MARCH 6, 1917) U. S. SUP. CT., OCT. TERM, 1916, Nos. 650 AND 722.—The Appam, an English vessel, captured by a German raider, came into the port of Hampton Roads, an unconvoyed prize, for purposes of permanent internment rather than seeking to secure a temporary asylum. *Held,* that restitution of the vessel would be made to the English owners.

For a discussion of the principles involved in this case in accord with the decision of the U. S. Supreme Court, see comment (1916) 26 YALE LAW JOURNAL, 148.

G. S., JR.

MARRIAGE—FRAUD—ANNULMENT ON GROUND OF REFUSAL TO COHABIT.—SAMUELS V. SAMUELS (1917) 56 N. Y. L. J. 2052.—The husband brought an action for the annulment of a marriage on the ground of fraud by the wife in entering into the marriage contract. The plaintiff alleged and proved that the respondent had a preconceived intention not to permit marital intercourse; that she had carried out her intention, and that the marriage, in consequence, had not been consummated. *Held,* that the marriage would be annulled for fraud.

The decision in the principal case is the first of its kind in the state of New York, although there are dicta to the same effect in several cases in that state. For a discussion of earlier American cases in which the same conclusion was reached on a similar statement of facts, see *Anders v. Anders* (1916) 113 N. E. (Mass.) 203 in (1916) 26 YALE LAW JOURNAL, 159.

B. L.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXCLUSIVE CHARACTER.—SHANAHAN V. MONARCH ENGINEERING CO. (1916) 114 N. E. (N. Y.) 795.—The constitution of New York, Art. I, sec. 18, declares that the right to recover damages for injuries resulting in death shall never be abrogated. Sec. 19, added in 1913, says that nothing in the constitution shall limit the power of the legislature to enact laws for the protection of employees and for compensation for injuries and death, and that the legislature may make these rights and remedies exclusive. The Code of Civil Procedure, sec. 1902, provides an action for wrongful death for the benefit, among others, of brothers and sisters. The Workmen's Compensation Act (Consol. Laws, chap. 67) provides that every subscribing employer shall pay compensation according to the schedules stated, and that as to such employers this liability shall be exclusive. Provision is then made for dependent parents, wives, husbands, and

children under eighteen. *Held,* that the Workmen's Compensation Law was exclusive, and adult brothers and sisters could not recover under the Code of Civil Procedure. Bartlett, C. J., and Chase, J., *dissenting.*

The legislature may make the recovery under the Workmen's Compensation Law exclusive and deny a recovery on all other actions. Alien dependents were unable to recover under an act limiting compensation to residents of the United States, although they would have had a good cause of action at common law. *Gregutis v. Waclark Wire Works* (1914) 86 N. J. L. 610. An act, reciting the weaknesses of the common law in actions by employees against employers and withdrawing all phases of the premises from private controversy and making the employer liable without negligence, removed the rights of the employee against third parties. *Peet v. Mills* (1913) 76 Wash. 437. But this doctrine has been repudiated by the federal courts. *Meese v. Northern Pac. Ry. Co.* (1914) 211 Fed. 254, reversing 206 Fed. 222. The cases may possibly be reconciled on the ground that the action was against an officer of the employing corporation, and consequently not against a third party. A statute declaring that if the employee accepts compensation under this act, such action shall constitute a release to the employer of all claims or demands at law, does not prevent the mother from suing the employer at common law for the loss of the son's services. *King v. Viscoloid Co.* (1914) 219 Mass. 420. In New York the courts have already begun to restrict the force of the word "exclusive." They have held that this clause applies only to employers and does not prevent an action against third parties. *Lester v. Otis Elevator Co.* (1915) 153 N. Y. S. 1058. They have also held that the term "exclusive" does not apply to schedules not covered by the act and that the right to recover for an injury to an ear, an injury not covered by the schedules, remained as it was at common law. *Shenneck v. Clover Farms Co.* (1915) 154 N. Y. S. 423. The lower courts of New York, whose reasoning the dissenting judges adopt in the principal case, would extend this doctrine one step farther. They maintain that the legislature intended the remedies in the Workmen's Compensation Act to be exclusive only as regards those who were there provided for and that there was no intention to remove any common-law remedy without substituting another, so that the plaintiff might maintain an action under the Code of Civil Procedure. The majority adopt a stricter construction, declaring the language of the act to be clear, and that if any injustice is caused thereby, the remedy is by an amendment by the legislature and not by a strained construction of the act.

J. E. H.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF EMPLOYMENT.—FOLEY V. HOME RUBBER CO. (1917) 99 ATL. (N. J.) 624.—The plaintiff's husband, a traveling salesman, with the knowledge of defendant, his employer, engaged passage on the Lusitania on a visit to the London office of defendant company. On the voyage the steamer was destroyed by a submarine. *Held,* that this was an accident "arising out of the employment," for which the plaintiff was entitled to

recover compensation on the ground that the defendant was chargeable with knowledge that England and Germany were at war.

The words "arising out of the employment" as found in the Workmen's Compensation Act are descriptive of the character and quality of the accident and refer to origin or cause. *Hills v. Blair* (1914) 182 Mich. 20; *Fitzgerald v. Clark & Son* [1908] 2 K. B. 796. The criterion is not that other persons are exposed to the same dangers but rather that the employment renders the servant peculiarly subject to the danger. *Symmonds v. King* (1915) 8 B. W. C. C. 189. The principal case follows those courts which hold that the words "arising out of" make it a condition precedent to the right to recover compensation that the accident shall have resulted from a risk which might have been contemplated by a reasonable person as incidental to the employment. *Bryant v. Fissell* (1913) 84 N. J. L. 72; *Collins v. Collins* [1907] 2 I. R. 104; *Blake v. Head* (1912) 106 L. T. R. 822; *Coronado Beach Co. v. Pillsbury* (1916) 158 Pac. (Cal.) 212. The danger of the destruction of the ship by a submarine was one to be reasonably apprehended by the defendant. When it is considered that the purpose of the act is to relieve a social condition, it is difficult to see why so much stress is laid upon the subjective test. Whether the business caused the injury depends on the sequence of events and, from that point of view, the test should be an objective one.

R. L. S.

SPECIFIC PERFORMANCE—OBLIGATION TO CONVEY REAL ESTATE—DECEDENT'S ESTATE.—THOMAS V. HEDDON (1916) 114 N. E. (IND.) 218.—One McNaughton leased premises to Thomas with the option to purchase for $17,000 at the expiration of the lease. McNaughton died testate but without providing for conveyance. Subsequently the option was exercised and tender made both to the executor and the heirs. Then this action was brought for specific performance. The Indiana statute (Burns' Ann. St., secs. 2897-2900) provides that where a decedent has contracted for conveyance, his executor may file a petition to have a commissioner appointed to convey and thereafter maintain an action for the purchase money. *Held,* that under this statute it was the duty of the executor to petition for conveyance by a commissioner when there is doubt as to who should receive the payment and that the lessee might secure the appointment of a commissioner by filing a bill for specific performance.

The Indiana statute does not expressly cover the case of an option. It provides for cases of title-bonds or contracts. Furthermore, if the statute did include options, rights under it would not extend to the lessee, they being conferred expressly on the executor. Peculiarly enough, the statutes of most states provide only for exactly the reverse situation, being thereby a sort of legal complement to the Indiana statute. (1902) Mass. Rev. Laws, chap. 148, sec. 1; (1911) Wis. Sts., secs. 3907-3912; (1905) Minn. Rev. Laws, secs. 3777-3780; (1910) Okl. Rev. Laws, secs. 6410-6414; (1911) Tex. Rev. Civ. Sts., arts. 3518-3520. In the principal case the whole transaction may be regarded as a single contract, tender of purchase money being

a condition precedent. See Arthur L. Corbin, Option Contracts (1914) 23 YALE LAW JOURNAL, 650. Even assuming this reasoning, the Indiana court would seem in effect to have legislated on behalf of the lessee, but it has thereby doubtless accomplished the general purpose of the legislature. One question was raised in the case but not decided by the court, namely, as between the executor and the heirs of the lessor, who should receive the purchase money? The English and American rule regards land subject to option as converted into personalty, although there is some difference of opinion as to when the conversion takes place, whether at the time of the agreement or when the option is exercised. Under this rule of fictitious conversion, therefore, the decisions favor the executor. *Townley v. Bedwell* (1808) 14 Ves. 591; *Kerr v. Day* (1850) 14 Pa. St. 112; *Newport W. Wks. v. Sisson* (1893) 18 R. I. 411; *Clapp v. Tower* (1903) 11 N. D. 556. Ohio adopts the opposite view, however, to the profit of the heir, and in the case of an option much can be said for this position. *Smith v. Lowenstein* (1893) 50 Oh. St. 346. In a very recent case the court, after reviewing the authorities and considering numerous arguments, decided in accordance with the Ohio rule. *Ingraham v. Chandler* (1917) 161 N. W. (Ia.) 434.

M. S. B.

STATUTES—WHITE SLAVE TRAFFIC ACT—CONSTRUCTION.—CAMINETTI V. UNITED STATES (1917) 37 SUP. CT. REP. 192.—The White Slave Traffic Act of June 25, 1910 (36 St. at L. 825, chap. 395; Comp. St. 1913, sec. 8813) made criminal the transportation, or the causing to be transported, or the obtaining, aiding, or assisting in the transportation in interstate commerce of women or girls for the purpose of prostitution, debauchery, or "for any other immoral purpose." *Held,* that the transportation of a woman in interstate commerce in order that she might be debauched, or become a mistress or concubine, although unaccompanied by the expectation of pecuniary gain, was a violation of the act. White, C. J., McKenna and Clark, JJ., *dissenting.*

The question in the case involved the meaning of the clause, "any other immoral purpose." In determining the meaning of a statute, the words, when clear, are decisive. *Lake County v. Rollins* (1888) 130 U. S. 662. The words in question, though clear in meaning, are general and uncertain in their application, and should be limited to those objects to which the legislature intended to apply them. *United States v. Palmer* (1818) 3 Wheat. (U. S.) 610. While it is the duty of the court to yield to the words of the statute, nevertheless, in determining what meaning it was intended to have, it is proper to consider its spirit, the object it was intended to subserve, and the evils it was intended to remedy. *United States v. Wiltberger* (1820) 5 Wheat. (U. S.) 76; *Mosle v. Bidwell* (1904) 130 Fed. 334. In the construction of a remedial statute, cases not within the reason, although within the letter of the statute, should not be taken to be within it. *Church of the Holy Trinity v. United States* (1891) 143 U. S. 457; *Mayor, etc., of Baltimore v. Root* (1855) 8 Md. 95. The holding of the majority judges in the principal case

recognizes as valid the regulation by the federal government—by virtue of the commerce clause—of matters hitherto dealt with by the states under their police power.

E. J. M.

WILLS—CONFLICT OF LAWS—STATUTE GOVERNING DOWER.—JACKMAN v. HERRICK (1917) 161 N. W. (IA.) 97.—The testator died domiciled in New Hampshire, having land in Iowa. He devised to his widow a life estate in all his lands. By the statutes of Iowa the widow was entitled to a one-third interest in the Iowa land. *Held,* that the Iowa law governed and consequently the widow took both her statutory one-third interest and the life estate devised to her, although she would not have been entitled to any statutory interest under the laws of New Hampshire.

The defendant in this case contended that the widow's rights in her husband's estate of both realty and personalty were governed by the law of the domicile of the testator at his death. The court said that as to personalty, the construction, i. e., the interpretation of a will for the purpose of ascertaining the testator's meaning and intention, is generally governed by the law of the domicile of the testator. *Rockwell v. Bradshaw* (1895) 67 Conn. 8; *Lincoln v. Perry* (1889) 149 Mass. 368. The same rule is held to apply in the case of realty. 40 *Cyc.* 1382; Beale, *Cases on the Conflict of Laws,* Vol. II, p. 286; *Guerard v. Guerard* (1884) 74 Ga. 506; *Proctor v. Clark* (1891) 154 Mass. 45; *contra, Yates v. Thompson* (1835) 3 Cl. & F. 544. It is generally said (though perhaps inaccurately) that the operative effect of a will and the rights of the parties thereunder as to personalty are determined by the law of the domicile. 40 *Cyc.* 1384; *Jones v. Habersham* (1882) 107 U. S. 174; *Fellows v. Miner* (1876) 119 Mass. 541. But it is well settled that the law of the *situs* governs the disposition or creation of any interest in realty. *Keith v. Keith* (1888) 97 Mo. 223; *Hobson v. Hale* (1884) 95 N. Y. 588. The latter doctrine applies to the case of dower or statutory right of the widow in the lands of her husband. Minor, *Conflict of Laws,* p. 174; *Lamar v. Scott* (1849) 3 Strob. (S. C.) 562; *Newcomer v. Orem* (1852) 2 Md. 297; *Staigg v. Atkinson* (1887) 144 Mass. 564. It was by virtue of a provision in the Iowa code that the widow was entitled to her statutory interest as well as to a life estate. Code of Iowa (1873) secs. 2440, 2452.

J. I. S.

WILLS—CONSTRUCTION—DEVISE TO WIDOW.—STAACK v. DETTERDING (1917) 161 N. W. (IA.) 44.—The testator devised to his widow all his realty in fee simple so long as she should remain unmarried. In a suit to quiet title, the plaintiffs, who are grantees of the devisee, contended that the widow took a fee simple, and the defendants, as heirs of the deceased, contended that the words "fee simple" should be given no effect, and that the widow took only a life estate. *Held,* that the widow took a defeasible fee subject to being divested only by her marriage.

Of course the determining factor as to what estate passes to a devisee is the intention of the testator. *Bradshaw v. Williams* (1910) 140 Ky. 160. The intention is to be gathered from the instrument itself. *In re Blake* (1910) 157 Cal. 448. Effect should, as far as possible, be given to every word in finding the intention of the testator. *In re Sandford* [1901] 1 Ch. 939. A devise during widowhood creates only a life estate. *Shaw v. Shaw* (1901) 115 Ia. 193. But if we give effect to the words "fee simple" used in the principal case, it seems that we cannot but conclude that the testator intended that his widow should take a defeasible fee. That the testator did not devise the remainder over in case his widow should remarry indicates that he intended her to take more than a life estate, for otherwise he would die intestate as regards the remainder. That he made a will in the first place tends to show that he wished to die testate. In constructing a will to find the intention of the devisor, regard should not be had to the legal effect of a provision, but if there is any ambiguity the provision should be construed so as not to lead to an intestacy. *Kirby-Smith v. Parnell* [1903] 1 Ch. 483. Moreover, in ambiguous cases, construction should favor the first rather than the second taker. *Fidelity Trust Company v. Bobloski* (1910) 228 Pa. St. 52. The court seems to be correct in holding that the intention of the testator was to devise a fee instead of a life estate.

F. L. McC.