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BOUNDARIES—INTERSTATE RIVER—EFFECT OF AVULSION.—The boundary between Arkansas and Tennessee was fixed by treaties and statutes as "the middle of the Mississippi River." Between 1823 and 1876 the channel had gradually shifted toward the Tennessee side. In 1876 by a sudden avulsion the river formed a new channel and the old river bed thereafter gradually filled in and became dry ground. The State of Arkansas brought an original suit in the United States Supreme Court against the State of Tennessee to determine the location of the boundary line between them. *Held,* that the boundary line was the center of the channel of navigation as it existed just prior to the avulsion. *Arkansas v. Tennessee* (1918, U. S.) 38 Sup. Ct. 301.

In declaring that a boundary designated as the "middle" of a river means, as applied to a navigable stream separating states, the center of the channel, the court follows the accepted rule of international law and its own earlier decisions. *Iowa v. Illinois* (1892) 147 U. S. 1, 13 Sup. Ct. 239. A similar rule prevails generally in boundary controversies between private riparian owners. *Miller v. Mann* (1882) 55 Vt. 475. A gradual shifting of the channel by erosion and accretion is held to change the boundary. *Nebraska v. Iowa* (1891) 143 U. S. 359, 12 Sup. Ct. 396; *Pack v. Stepp* (1908) 33 Ky. L. Rep. 677, 110 S. W. 887. But upon a sudden shifting by avulsion, the boundary remains fixed at its former line. *Philadelphia Co. v. Stimson* (1911) 223 U. S. 605, 32 Sup. Ct. 340. Tennessee contended that the above rules did not apply to the particular circumstances of this case, and that the reappearance of the land which constituted the bed of the river immediately before the avulsion reestablished the original boundary as it was, not merely before the avulsion, but before the previous gradual shifting by erosin and accretion had occurred. This contention had been sustained by its own courts. *State v. Muncie Pulp Co.* (1907) 119 Tenn. 47, 104 S. W. 437 [overruled in *Cissna v. Tennessee* (1918, U. S.) 38 Sup. Ct. 306, on the authority of the principal case]. In rejecting this contention and holding that an avulsion permanently fixes the boundary as it stood when the avulsion occurred, the case is clearly sound. See, in accord, *Winneman v. Reeves* (1917, C. C. A. 5th) 245 Fed. 254.

CONFLICT OF LAWS—CAPACITY—CONTRACTS OF MARRIED WOMEN.—A married woman domiciled, as the plaintiff apparently knew, in Texas signed, while she was temporarily in Chicago, a guaranty of her husband's note to the plaintiff. Suit was brought on the guaranty in a federal court in Texas. It was assumed that if the wife's domicil had been in Illinois, the guaranty there signed would have been valid under Illinois law. *Held,* that the law of Texas, denying a married woman capacity to make such a contract, rendered this contract unenforceable in a court administering Texas law, on the ground that it would be against the policy of the jurisdiction to enforce there a contract of the forbidden type entered into by a woman domiciled in the state, while she was temporarily in another state which allowed such contracts. *Union Trust Co. of Chicago v. Grosman* (1918) 38 Sup. Ct. 147. See COMMENTS, p. 816.

CONSTITUTIONAL LAW—TAXATION—MUNICIPAL FUEL YARD AS PUBLIC PURPOSE.—Under the authority of a legislative act and a city ordinance, the City of Portland, Maine, proceeded to establish a municipal yard for the purpose of supplying "wood, coal and fuel" to its inhabitants at cost. The plaintiffs, citizens and taxpayers of Portland, sought an injunction on the ground that

municipal dealing in fuel was not a public purpose and that taxation to equip and maintain such an enterprise was a taking of property without due process of law. The Supreme Court of Maine upheld the statute and the plaintiffs appealed to the Supreme Court of the United States. *Held,* that municipal sale of fuel under such an ordinance might properly be considered a public purpose, and taxpayers' rights under the due process clause of the Fourteenth Amendment were not violated by a levy for that purpose. *Jones v. City of Portland* (1918) 38 Sup. Ct. 112. See COMMENTS, p. 824.

COPYRIGHTS—PUBLISHER'S CONTRACT—IMPLIED CONDITION IN RESPECT TO COMPETING BOOKS.—The plaintiff was author of Foster's "Federal Practice." The defendant contracted, on a royalty basis, to publish, advertise, and promote the sale of this book for a term of years. During the term the defendant published and advertised Byrne's "Federal Criminal Procedure," the preface to which stated that a comprehensive treatment of the subject was needed and that theretofore the law could be ascertained only by searching the statutes and decisions. The plaintiff alleged that these statements were false and that his book fully covered the subject. He sought an injunction against the defendant's advertising and promoting the sale of this competing book. The defendant moved to dismiss the complaint. *Held,* that the plaintiff was entitled to equitable relief. *Foster v. Callaghan & Co.* (1918, U. S. D. C., S. D. N. Y.) 58 N. Y. L. J. 1479.

The conclusion arrived at by the court is founded on an implied condition in the contract that the publisher would not compete with the author by making false statements which depreciated the value of the book and tended to affect its sale adversely. The question is one of construction of a special kind of contract,—one granting to the publisher an exclusive privilege which the author has by reason of his copyright. The relationship between author and publisher is a personal one. *In re McBride & Co.* (1904 D. C. S. D. N. Y.) 132 Fed. 285. It has been held to be a joint adventure. *Stevens v. Benning* (1855) 6 De G. M. & G. 223; *Reade v. Bentley* (1858, V. C.) 4 Jur. N. S. 82, 27 L. J. Ch. 254. As such, the joint adventurers owe to each other the utmost good faith and scrupulous honesty. *Selwynn & Co. v. Waller* (1914) 212 N. Y. 507, 106 N. E. 321. The relation is, therefore, confidential and it is reasonable that the law should deem that a condition against unfair competition should have been within the contemplation of the parties. *Cf. Tuck & Sons v. Prieste* (1887, C. A.) 19 Q. B. Div. 629, 635. A somewhat similar construction has been put on a contract whereby the owner of a copyright granted a producer the privilege of dramatizing and producing. *Harper Bros. v. Klaw* (1916, S. D. N. Y.) 232 Fed. 609; *Pulte v. Derby* (1852, C. C. D. Oh.) Fed. Cas. 11465, 5 McLean 328. The principal case, however, seems to be limited to competition by false statements. This would seem a reasonable construction.

COURTS-MARTIAL—JURISDICTION—PREFERENCE OVER FEDERAL COURT TO TRY SOLDIER FOR MURDER.—Subsequent to the declaration of war against Germany, a United States soldier killed a policeman in Newport, Ky. He was committed to the county jail and was indicted for murder, his captain and major consenting to let the civil court take jurisdiction. *Habeas corpus* proceedings were instituted and the commanding officer of the brigade demanded that the prisoner be delivered to the military authorities for trial by court-martial. *Held,* that the jurisdiction of the military authorities was superior to that of the civil authorities. *Ex parte King* (1917, E. D. Ky.) 246 Fed. 868.

In time of peace no soldier can be tried by a court-martial for murder or rape committed within the United States. This is expressly provided by Article

92 of the present Articles of War, enacted August 29, 1916. See 39 St. at L. ch. 418, sec. 3. Under prior legislation courts-martial were not without jurisdiction to deal with capital crimes as acts prejudicial to good order and military discipline, but the military authorities, except in time of war, were obliged to surrender the accused, upon application being duly made, for trial by the civil courts. See *Ex parte Mason* (1882) 105 U. S. 696; *In re Stubbs* (1905, C. C. D. Wash.) 133 Fed. 1012; *Grafton v. United States* (1907) 206 U. S. 333, 27 Sup. Ct. 749. A similar preference (with certain exceptions) is given to civil tribunals under Article 74 of the present Articles of War. But such preference is limited to times of peace. In time of war courts-martial as well as civil courts have jurisdiction over crimes committed by soldiers. In such a case, should the tribunal which first takes jurisdiction be allowed to keep it on the basis of comity, or must the civil authorities yield to the military and surrender the accused for trial by court-martial? The principal case is the first decision which squarely answers that the civil authorities must surrender the soldier, if demanded, to his officers. It is believed that the decision is sound. The court intimates that there is a question under the existing Articles of War whether the jurisdiction of the military tribunals is not exclusive in time of war. If such is the true interpretation of the statute it would doubtless be constitutional. See *dictum* in *Coleman v. Tennessee* (1879) 97 U. S. 509, 514. But the court preferred to decide the case merely on the ground that in time of war courts-martial are entitled to priority if the offender is demanded for military trial.

DECEIT—STATEMENT OF VALUE AS FRAUDULENT REPRESENTATION.—The defendants induced the plaintiff to allow them to exchange her property for a farm which they said they knew to be worth $30,000. The defendants knew the value to be much less as they had been unsuccessful in trying to sell it for a smaller sum. It was contended that the statement as to value was a mere expression of opinion and so not actionable. *Held,* that the plaintiff could recover in an action of deceit. *Southern Trust Co. v. Lucas* (1917, C. C. A. 8th) 245 Fed. 286.

The courts usually construe statements of the value of property to be mere expressions of opinion and not statements of fact. *Hecht v. Metzler* (1897) 14 Utah 408, 48 Pac. 37; *Gustafson v. Rustemeyer* (1898) 70 Conn. 125, 39 Atl. 104. The actual value of the property is of course a fact. *Pratt v. Allegan Circuit Judge* (1913) 177 Mich. 558, 143 N. W. 890. But an expression of opinion also states a fact, namely, the belief of the speaker that the land is worth a certain amount. Where both parties have equal means of knowledge an action usually will not lie for an alleged misrepresentation of the actual value, the courts holding that the speaker is merely expressing his opinion and that the other party is not entitled to rely upon it. *Clark v. Rice* (1906) 127 Wis. 451, 106 N. W. 231; *Liliênthal v. Suffolk Brewing Co.* (1891) 154 Mass. 185, 28 N. E. 151. But if the statement of belief is knowingly false and the circumstances are such as to justify reliance upon it as an honest statement of the speaker's true opinion, it may be a misrepresentation of an essential fact and the basis of an action for deceit. *Olston v. Oregon Water Power Co.* (1908) 52 Oreg. 343, 96 Pac. 1095; *Crompton v. Beedle* (1910) 83 Vt. 287, 75 Atl. 331. In the principal case the court found as a fact that confidential relations had been established, from which the conclusion properly followed that the defendants were liable for misleading the plaintiff.

EVIDENCE—CHARACTER OF DEFENDANT—PRESUMPTION OF GOOD CHARACTER.—In a criminal trial in a federal District Court, no evidence as to the character of the defendant having been introduced, the judge refused to charge the jury that the accused was presumed to be a person of good character and that this pre-

sumption should be considered as evidence in his favor. *Held,* that the court rightly refused to give the requested charge. McKenna, J. *dissenting. Greer v. United States* (1918) 38 Sup. Ct. 209.

It is elementary that in a criminal case the prosecution cannot attack the character of the accused unless he himself introduces evidence in support of his good character. 4 Chamberlayne, *Evidence,* secs. 3275, 3277; 1 Wigmore, *Evidence,* secs. 56-58. No inference of bad character may be drawn from the prisoner's failure to introduce evidence of good character. *State v. Dockstader* (1876) 42 Ia. 436; *State v. O'Neal* (1847) 29 N. C. 251. Some courts have held that the defence is entitled to a statement that there is a presumption of good character. *Goggans v. Monroe* (1860) 31 Ga. 331; *Stephens v. State* (1886) 20 Tex. App. 255. But in these cases the prosecution had attacked the character of the accused in addressing the jury. A larger number of state courts have held that there is no presumption of good character. *Danner v. State* (1875) 54 Ala. 127; *Addison v. People* (1901) 193 Ill. 405, 62 N. E. 235. The lower federal courts were in conflict on the subject. See *Price v. United States* (1914, C. C. A. 8th) 218 Fed. 149, L. R. A. 1915 D, 1070; *Mullen v. United States* (1901, C. C. A. 6th) 106 Fed. 892. The principal case is the first decision of the United States Supreme Court upon the question, and in refusing to recognize the presumption it reaches a sound conclusion. Such a presumption, if recognized, should clearly be rebuttable; a conclusive presumption of good character in criminal cases would be absurd. But under the established rule above stated, in regard to the admissibility of character evidence, the accused could as a practical matter make the presumption irrebuttable, by refusing to present any character evidence and simply relying on the presumption. The rule which puts it wholly in the hands of the defendant whether or not to open the question, and denies any adverse inference from his silence, gives him quite sufficient advantage on this issue, without raising any affirmative presumption in his favor. The courts which have supported such a presumption have apparently confused it with the "presumption of innocence" doctrine. See 2 Chamberlayne, *Evidence,* sec. 1168.

HUSBAND AND WIFE—ESTATE BY ENTIRETIES—LIMITATION OVER TO HEIRS OF ONE.—A deed named a husband and wife as grantees "of the second part." The grant and habendum were "to the party of the second part, *her* heirs and assigns." *Held,* that under the deed the husband took an estate by entirety with the wife for his life with right of survivorship, and that "to the estate of the wife there was added a limitation over to her heirs, so that the plaintiff as her heir took in fee the entire estate, with right of possession after the death of" the husband. *Kimble v. Mayor, etc., of Newark* (1917, N. J. Ct. Err.) 102 Atl. 637.

At common law a deed to A and B jointly and to the heirs of B was regarded as creating a good jointure, with a life estate in A and a fee simple in B. *Co. Litt.* sec. 285; *Sprinkle v. Spainhour* (1098) 149 N. C. 223, 62 S. E. 910. Though the language is not entirely clear, this was apparently the view adopted in the principal case, substituting, of course, an estate by entireties for a joint tenancy. But the courts in deciding these cases have given A, upon B's death, the entire estate for life, B's heirs getting no enjoyment of the estate until A's death. *Den v. Hardenbergh* (1828, Sup. Ct.) 10 N. J. L. 42; *Breed v. Osborne* (1873) 113 Mass. 318; *Sprinkle v. Spainhour, supra.* In effect, therefore, the courts have treated such deeds as creating a joint life estate in A and B, with a remainder in fee to B and his heirs, rather than as creating a present fee in B. Apparently, in calling B's estate a present fee, the courts have been influenced by the rule that a life estate followed by a remainder in fee in the same person merges to form a present fee simple. But the case of joint estates forms a logical exception to this rule, and particularly in the case of estates by entireties; for

there, under the common law idea of the unity of husband and wife, they might be regarded as constituting, in a limited sense, a distinct legal person, so that a life estate in the husband and wife would not merge with a remainder in either one alone. *Cf. Den v. Hardenbergh, supra; Town of Corinth v. Emery* (1891) 63 Vt. 505, 22 Atl. 618; *Bomar v. Mullins* (1851, S. C.) 4 Rich. Eq. 80.

INTERNATIONAL LAW—ACT OF STATE—ACTS OF MEXICAN REVOLUTIONARY AUTHORITIES BEFORE RECOGNITION.—General Villa, as a military commander of the Constitutionalist Army of Carranza, who later was recognized by the United States as head of the *de facto* and subsequently of the *de jure* government of Mexico, levied a military contribution on the inhabitants of Torreon, Mexico, a city under the military occupation of his forces. M., one of the citizens, an adherent of Huerta, fled the city, and failed to pay the assessment imposed upon him at a meeting of the inhabitants to carry out Villa's levy. To satisfy this assessment, Villa ordered the seizure of a quantity of hides belonging to M., and sold them in Mexico to an American corporation, by whom they were brought to the United States and sold to the defendant. The plaintiff, an American citizen, was the assignee of M., the original owner, and brought suit in replevin to recover the hides. *Held,* that the action could not be maintained. *Oetjen v. Central Leather Co.* (1918) 38 Sup. Ct. 309.

General Pereyra, as a commanding officer of the Constitutionalist Army of Carranza, requisitioned certain lead bullion from the Penoles Mining Co., a Mexican corporation, giving a receipt therefor with promise to pay "on the triumph of the revolution." General Pereyra sold the bullion to the defendant, R., who sold it to the defendant B., the proceeds being used by the General for the supply of his troops. It appears that some months prior to the requisitioning of the bullion, the Mexican corporation had sold it to the plaintiff, an American corporation, which, on the bullion being brought into the United States, enjoined the Collector of Customs from delivering the bullion to any of the defendants, claiming title to be in the plaintiff. *Held,* that a United States Court could not question the defendants' title acquired in Mexico. *Ricaud et al. v. The American Metal Co. Ltd.* (1918) 38 Sup. Ct. 312.

See COMMENTS, p. 812.

INTERNATIONAL LAW—NATIONALITY—STATELESSNESS.—K., an Austrian subject born in 1860, settled in France in 1885, where he married and had children, who were conceded to be French. He had not obtained from the Austrian authorities any permission to expatriate himself, which according to Austrian law was required in the case of Austrians liable to military service. K. offered no evidence of any release from this Austrian military obligation. In 1890 he returned temporarily to Austria, to be baptized. In 1909 he had, as an Austrian subject, applied for French naturalization, which was refused. In the early part of the present war, he rendered some technical service to the French armies. K.'s property having been sequestrated in France on the ground that he was an enemy (Austrian) alien, he applied for its release from sequestration on the ground that he had lost his Austrian nationality by reason of his long residence in France without intent to return to Austria. *Held,* that the application should be denied on the ground that it had not been proved that by Austrian law the applicant had lost Austrian nationality, or that he had no intent to return to Austria. *Kornfeld v. The Attorney General,* Tribunal Civil de la Seine (1st Chamber), June 20, 1916, reported in (1917) 44 CLUNET, 638.

The applicant in this case, not having acquired French nationality, sought to show that he was in a position of "statelessness" or *Heimatlos.* This condition arises when one loses his original or acquired nationality without obtaining any other. Two such cases have recently come before the British courts, and like

the French court in the instant case, they demanded the most convincing evidence, not only that the petitioner had technically lost his original nationality, but that he was not in a privileged position to reclaim it. In the case of *Ex parte Weber* (C. A.) [1916] 1 K. B. 280; (H. of L.) [1916] 1 A. C. 421, 425, the applicant was born in Germany in 1883, left Germany in 1898 for South America, and since 1901 had lived continuously in England. By the German law of 1870, sec. 21, ten years' uninterrupted residence abroad, and by the law of July 22, 1913, sec. 26, failure to obtain a decision on his liability to military service up to his thirty-first year, effected expatriation. The applicant came within these provisions. He was interned in England, at the age of 32, as an alien enemy, and applied for a writ of habeas corpus, alleging that he had lost German nationality, and as he had not acquired any other, that he was a person without nationality. It was objected by the Court of Appeal and by the House of Lords that while the letter of the law would seem to have expatriated him, he had not shown that he could not be claimed for military service on his return to Germany; and furthermore, by the law of 1913 it appeared that he could reacquire German nationality on privileged terms; hence they concluded that the German tie was not so completely severed that he could be considered as released from German nationality. See also *The King v. Superintendent of Vine Street Police Station* [1916] 1 K. B. 268, 277. In *Simon v. Phillips* (K. B. Div. 1916) 114 L. T. Rep. N. S. 460, Simon was born in Coburg, Germany, in 1869, emigrated to the United States in 1887, obtained a discharge from German nationality in 1891, became naturalized in the United States in 1894, and on the outbreak of the war had been employed for many years in London. There was no evidence that he had ever returned to Germany. In 1915, he was refused registration in the American Consulate on the ground that the presumption of expatriation from the United States under the Act of March 2, 1907, had arisen against him by reason of his long residence in England. He claimed, therefore, to be a person without nationality. It was held that he had not proved that his nationality of origin had not reverted or that he had entirely lost his right to be readmitted thereto. In France, it was recently held that a person claiming to have become expatriated from Germany by ten years' uninterrupted absence, according to the law of 1870, had to meet the burden of proving that he had during the ten year period never set foot in Germany. *Aronsohn v. Attorney General,* Tribunal de la Seine, Nov. 13, 1916, reported in (1917) 44 CLUNET, 645. These decisions would tend to show a decided indisposition to admit a status of "statelessness," at least with respect to the circumstances of these cases, and to show that the rule with respect to nationality of origin is applied analogously to that of domicile of origin. See Field, *Outlines of an International Code* (2d ed.) 130. This principle, however, can hardly be considered a recognized rule of international law. By the United States Act of March 2, 1907, "statelessness" has been made possible by the fact that the presumption of expatriation which arises as a consequence of the residence of a naturalized citizen in his native country for two years or in any other country for five years does not *necessarily* confer his old nationality upon him, as is the case in the municipal law of some countries; and by the provision in section 3 that "any American woman who marries a foreigner shall take the nationality of her husband," apparently disregarding the fact that the law of his country may not confer his nationality upon her, as is the case in Brazil and some other countries.

INTERNATIONAL LAW—PRIZE—NEUTRAL VESSEL CARRYING CONTRABAND.—A neutral (Norwegian) vessel was chartered to German dealers in fish, under circumstances from which the owner may be presumed to have known that his ship was to carry fish from Norway to Germany. The vessel was captured by

a British cruiser while on the way to Germany with a cargo of fish, which was conditional contraband. The German Government had taken over by requisition all food supplies, which fact was generally known. *Held*, that the neutral ship was liable to condemnation as prize. *The Hakan* (1917, P. C.) 117 L. T. Rep. N. S. 619.

Prior to the Napoleonic Wars it was the general practice, adopted in England, to condemn neutral vessels carrying contraband. *The Mercurius* (1799, Eng. Adm.) 1 C. Rob. 288, note; *The Bermuda* (1865, U. S.) 3 Wall. 514, 555. This rule was relaxed in *The Neutralitet* (1801, Eng. Adm.) 3 C. Rob. 295, by Lord Stowell, who held the neutral ship non-confiscable unless the owner of the ship was also the owner of some of the contraband cargo, or the ship had sailed with false papers, or it appeared that the owners had in fact knowledge of the noxious character of the cargo. For cases illustrating respectively these three exceptions to the more liberal rule, see *The Jonge Tobias* (1799, Eng. Adm.) 1 C. Rob. 329; *The Ringende Jacob* (1798, Eng. Adm.) 1 C. Rob. 89; *The Neutralitet, supra.* They are all in reality based on the inference of the knowledge of the shipowner of the trade of his ship, and therefore on his "taking hostile part against the country of the captors" and "mixing in the war." *The Bermuda, supra.* The prize regulations of various countries by which a certain proportion of contraband on a vessel infects the vessel itself (summarized by Sir Samuel Evans, President of The Admiralty Division, in the decision in the principal case below, reported in [1916] P. 266, 278-280), and article 40 of the Declaration of London, adopted by British Orders in Council of August 20 and October 29, 1914, according to which "a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo," merely afford a practical test in aid of the inference of knowledge on the part of the shipowner, an irrebuttable inference in England and the United States, but rebuttable, it seems, in Holland and Italy by proof of actual ignorance of the nature of the cargo. In the instant case the Judicial Committee of the Privy Council found that the circumstances clearly created a presumption of knowledge on the part of the shipowners, whereas the court below considered it unnecessary to go behind the test afforded by the fact that more than half (indeed the whole) of the cargo was contraband.

INTERSTATE COMMERCE—TRANSPORTATION OF PROPERTY BY OWNER FOR PERSONAL USE.—The defendant purchased a quart of intoxicating liquor in Kentucky and carried it into West Virginia, intending it for his own personal use. An Act of Congress declares it unlawful for anyone "to cause intoxicating liquors to be transported in interstate commerce" into any state, the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes. *Held*, that defendant was not guilty for a violation of the Act, his transportation of liquor for personal use not amounting to "interstate commerce." *United States v. Mitchell* (1917, S. D. W. Va.) 245 Fed. 601.

See COMMENTS, p. 808.

MAINTENANCE—DEFENSES—SUCCESSFUL PROSECUTION OF MAINTAINED ACTION.—The plaintiff promoted a prize competition which required an entrance fee of three guineas. The defendants, newspaper publishers, through their columns invited competitors to bring actions to recover their entrance fees on the ground that the money had been obtained by fraudulent misrepresentation, the defendants offering to pay the legal expenses of such actions. A number of the competitors thereupon joined together and two actions, maintained by the defendants, were successfully brought against the plaintiff. The plaintiff brought suit, charging

maintenance. *Held,* that the defendants were liable unless they had an interest in the maintained actions or acted from motives of charity. *Neville v. London Express Newspaper Ltd.* (1918, C. A.) 117 L. T. Rep. N. S. 598.

The rigid doctrine of maintenance of the early common law has been greatly modified and relaxed in England by modern decisions. *British Cash & Parcel Conveyors v. Lawson Store Service Co.* (C. A.) [1908] 1 K. B. 1006; *Fitzroy v. Cave.* (C. A.) [1905] 2 K. B. 364. The general rule is that an action for damages will lie at the suit of the party aggrieved. *Harris v. Brisco* (1886, C. A.) 17 Q. B. D. 504. And it is well settled in England that it is immaterial that the maintained action was successful, the objectionable ingredient of maintenance being the stirring up of actions which would not otherwise be brought. *Oram v. Hutt* (C. A.) [1914] 1 Ch. 98. But there are various well recognized exceptions, as when the maintainer acts from motives of charity, neighborly spirit, or personal financial interest. *Alabaster v. Harness* (C. A.) [1895] 1 Q. B. 339. In fact maintenance now seems to be confined to the officious intermeddling of a stranger for the purpose of stirring up strife and continuing litigation. *British, etc. Conveyors v. Lawson, etc., Co., supra; cf. Thompson v. Marshall* (1860) 36 Ala. 504. In the United States, in some jurisdictions, the doctrine of maintenance is deemed to be wholly unsuited to the social and political system and so has not been adopted as part of the common law. *Mathewson v. Fitch* (1863) 22 Cal. 86; *Richardson v. Rowland* (1873) 40 Conn. 565; *Duke v. Harper* (1876) 2 Mo. App. 1. Where the offense exists at all there has been a great modification of the harsher features of the law. See *Gilman v. Jones* (1888) 87 Ala. 691; *Newkirk v. Cone* (1857) 18 Ill. 449. Yet, though the cases in modern times are rare, the doctrine of maintenance is a living doctrine and the action is one which in a fit case the courts of this day in most states will support. The principal case appears to have all the necessary elements of the action and to be correctly decided. If the newspaper had in any way encouraged the public to participate in the competition it would have been justified in advising its readers of the truth and of their privilege of bringing suit, but it went entirely too far in offering to pay the expenses of such suits regardless of the financial ability of the aggrieved competitors to vindicate their rights at their own expense.

MONOPOLIES—SHERMAN ACT—SUIT BY STOCKHOLDER TO SET ASIDE DEED OF CORPORATE PROPERTY FOR ALLEGED MONOPOLISTIC DESIGN OF PURCHASER.—Suit was brought by minority stockholders of a mining corporation, which had sold and conveyed all its property to the defendant corporation, to have the deed set aside on the ground that the defendant was acquiring the property with the intention of securing a monopoly of the copper mining industry in violation of the Sherman Anti-Trust Act. *Held,* that the sale could not be attacked by the complainants on this ground. *Geddes v. Anaconda Copper Mining Co.* (1917, C. C. A. 9th) 245 Fed. 225.

It has become well settled that the mere fact that a plaintiff corporation is a monopoly will not preclude it from recovering the purchase price of goods sold on contracts otherwise legal, even though some benefit incidentally results in favor of a wrongdoer. *Connolly v. Union Sewer Pipe Co.* (1902) 184 U. S. 540, 22 Sup. Ct. 431; *Wilder Mfg. Co. v. Corn Products Ref. Co.* (1915) 236 U. S. 165, 35 Sup. Ct. 398. Nor will it prevent suit for wrongful destruction of property. *Louisville & N. R. R. Co. v. Burley Tobacco Society* (1912) 147 Ky. 22, 143 S. W. 1040. But no recovery will be allowed on contracts inherently illegal, as being in direct furtherance of a purpose forbidden by the Anti-Trust Act. *Continental Wall Paper Co. v. Louis Voight & Sons Co.* (1909) 212 U. S. 227, 29 Sup. Ct. 280. The court relies for its decision on the case of *Wilder*

Mfg. Co. v. Corn Products Ref. Co., supra. It is submitted that the instant case is distinguishable in that, under the allegations of the bill, the transaction asked to be set aside was itself one of the very steps by which the defendant was attempting to create its monopoly, and was therefore inherently illegal, and in direct violation of the Act. It seems clear, therefore, that had this been a suit by the present defendant to enforce the contract of sale, no recovery would have been permitted, under the doctrine of the *Continental Wall Paper* case, *supra. Cf. Brent v. Gay* (1912) 149 Ky. 615, 149 S. W. 915. There is an obvious distinction, however, between a case in which the guilty party asks the aid of the court in carrying out his illegal purpose, and one in which the other party, however innocent of any participation in the illegal purpose, seeks to take advantage of the alleged violation of the Act as a ground for setting aside in a court of equity, for his own private benefit, an executed transaction. Even where it is shown that special damage to the complainant will result from a violation of the Act, it has recently been held that under the Sherman Act, as distinguished from the Clayton Act, a private person cannot maintain a suit for an injunction, the remedies under the Act being limited to those expressly provided by the statute. *Paine Lumber Co. v. Neal* (1917) 244 U. S. 459, 37 Sup. Ct. 718. The Clayton Act (Act Oct. 15, 1914, ch. 323, sec. 16; 38 U. S. St. at L. 737) has since given to any person threatened with special injury by a violation of the anti-trust laws a right to relief by injunction. The principal case, like the *Paine Lumber Co.* case, arose before the passage of the Clayton Act, though decided after it. But the Clayton Act would hardly have aided the complainants, since under the doctrine of the *Paine Lumber Co.* case, equitable relief at the suit of private persons would be strictly limited to that specifically provided, or in other words, to relief by injunction.

PURCHASE FOR VALUE—POWER OF THIEF TO PASS TITLE—MONEYS OF FOREIGN COUNTRIES.—The plaintiffs sued the defendant for the alleged conversion of foreign moneys purchased by the defendant banker from the plaintiffs' employee who had embezzled them from the plaintiffs. *Held,* that the defendant acquired a valid title to the moneys. *Brown et al. v. Perera* (1918, N. Y. Sup. Ct., referee's decision) 58 N. Y. L. J. 1751.

On grounds of policy the possessor of money of the realm, even though he has stolen it and so has no title to it himself, has a legal power to give title to any one who takes it *bona fide* in a business transaction. This is not because money has no earmark, but, in the words of Lord Mansfield, "the true reason is upon account of the *currency* of it: it cannot be recovered after it has passed *in currency.*" *Miller v. Race* (1758, K. B.) 1 Burr. 452, 457. So a five-pound gold piece purchased from a thief by a dealer in coins may be recovered by the owner because it was not passed as currency. *Moss v. Hancock* (Q. B. Div.) [1899] 2 Q. B. 111. Is the desirability of having foreign money pass freely so great as to justify applying the same rule to it? Considering the actual use of foreign coins in border states, the volume of foreign exchange business transacted in New York, and the desirability of facilitating and safeguarding commercial transactions, the court held that foreign money should be considered the same as domestic money in respect to the possessor's power to pass title. No precise authorities were cited, but the court relied upon the analogy of the negotiability of bills and notes payable in foreign money. It is submitted, however, that such instruments are negotiable in spite of, rather than because of, being expressed as payable in foreign money. They are really payable in domestic money of an amount determined by the current rate of exchange. See Norton, *Bills and Notes* (3d ed.) 46. Nevertheless, on grounds of policy the decision is believed to be commendable, though it is perhaps doubtful whether previous authorities fully sustain it.

See *Thompson v. Sloan* (1840, N. Y. Sup. Ct.) 23 Wend. 71, 74 (*dictum:* "It is not pretended that coins current in Canada are, therefore, so in this state"); see also *Picker v. London etc. Banking Co.* (1887, C. A.) 18 Q. B. D. 515 (Prussian bonds). It would seem that the actual decision in the principal case might have been rested upon the ground that the plaintiffs' agent had apparent authority to deal with the defendant as he did. See Mechem, *Agency,* sec. 1723; *Columbia Mill Co. v. Nat'l Bank* (1893) 52 Minn. 224, 53 N. W. 1061; *Fifth Ave. Bank v. Forty Second St. etc. R. R. Co.* (1893) 137 N. Y. 231, 33 N. E. 378.

SPECIFIC PERFORMANCE—CONTRACT TO SELL STOCK—UNCERTAINTY OF VALUE.—The defendant contracted to transfer to the plaintiff ten shares of certain stock in consideration for legal services. In a suit for specific performance of the contract the evidence placed the value of the stock over a wide range. From the evidence a jury would have been warranted in finding the value, although such a finding might have been to the prejudice of either party. *Held,* that the plaintiff was entitled to specific performance. *Hubbard v. George* (1918, W. Va.) 94 S. E. 974.

The court decided this case under the principle that specific performance of stock transfer contracts will be decreed where the value of the stock is not easily ascertainable. *Hogg v. McGuffin* (1910) 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491, and note; *Baker Co. v. United States Fire Apparatus Co.* (1916, Del.) 97 Atl. 613. But it is believed that the principal case presents too broad an application of this rule, and that the better view is expressed in *Baker Co. v. United States, etc. Co., supra* in which the rule is strictly construed to apply only where the value cannot be ascertained by computation, or by any sufficiently certain estimate. See also *Baumhoff v. St. Louis & K. R. Co.* (1907) 205 Mo. 248, 104 S. W. 5; *Hills v. McMunn* (1908) 232 Ill. 488, 83 N. E. 963. Specific performance should not be decreed where there merely is a wide variation or uncertainty of opinion on market value, for in such a case the jury can arrive at a reasonably fair estimate. *Clements v. Sherwood-Dunn* (1905, N. Y.) 108 App. Div. 327, 95 N. Y. Supp. 766; *Moulton v. Warren Mfg. Co.* (1900) 81 Minn. 259; 83 N. W. 1082. The objection that a finding of value might be prejudicial to one party or the other is untenable, since that element is here involved to no greater extent than in other cases where juries assess damages. The recognition of a general principle that mere uncertainty and difficulty in ascertaining damage may alone give a basis for specific performance would be plainly inexpedient, and there seems to be no special reason for applying such a principle in the case of stock transfer contracts while denying its application to other contracts.

TAXATION—INHERITANCE AND TRANSFER TAXES—ALLEGED CONFLICT OF STATE STATUTE WITH TREATY.—A naturalized citizen of the United States, of Danish origin, left certain legacies to subjects and residents of Denmark. An Iowa statute imposed a higher inheritance tax on legacies to non-resident aliens than on legacies to residents of Iowa. A treaty of the United States with Denmark provided that "no higher or other duties, charges, or taxes of any kind, shall be levied in the territories . . . of either party, upon any personal property, money [etc.] of their respective citizens or subjects, on the removal of the same from their territories . . . either upon the inheritance of such property, money [etc.] . . . or otherwise, than are or shall be payable in each state upon the same, when removed by a citizen or subject of such state respectively." The executor of the estate having paid the tax and charged it in his accounts, a non-resident legatee opposed the charges on the ground that the statute of Iowa

was in conflict with the treaty between the United States and Denmark. *Held,* that the statute was not in conflict with the treaty. *Peterson et al. v. State of Iowa* (1917) 38 Sup. Ct. 109; *accord,* with respect to a similar treaty with Sweden, *Duus v. Brown* (1917) 38 Sup. Ct. 111.

The only question involved was whether the discrimination as to legatees imposed by the statute was a violation of the provisions of the treaty guarding against certain discriminations. It is beyond doubt that the treaty would be controlling over a conflicting state statute. *Ware v. Hylton* (1796, U. S.) 3 Dall. 199; *Chirac v. Chirac* (1817, U. S.) 2 Wheat 259. The treaties under examination, however, looked to the testator or living owner of the property, and sought to guard against any tax discrimination against him or his property, by reason of his alienage. Such discrimination against the alien owner of property (known as the *droit d'aubaine* and *droit de détraction*) was customary in the eighteenth and first half of the nineteenth centuries, and was only gradually removed, partly by statute and partly by treaty. Bernheim, *History of the Law of Aliens* (New York, 1885) 7 *et seq.;* Borchard, *Diplomatic Protection of Citizens Abroad,* 34 *et seq.* The Iowa statute imposed no higher tax on aliens or on their property in Iowa, but merely provided that non-resident alien *legatees* of property in Iowa, without regard to the residence or citizenship of the testator, should pay a higher death duty than resident legatees, and this discrimination the treaty did not cover. *Frederickson v. Louisiana* (1859, U. S.) 23 How. 445. The testators in the principal cases were citizens of Iowa, and nothing in the treaties contemplated an interference with the privilege of Iowa to legislate with respect to the disposition of property by her own citizens. No right of property arises in the alien non-resident legatee until the inheritance tax (especially when it involves the property of a deceased citizen) is paid. *United States v. Perkins* (1896) 163 U. S. 625, 16 Sup. Ct. 1073.

TRADING WITH THE ENEMY—EFFECT OF WAR ON CONTRACT OF AGENCY.—Article 4 of the French law of April 4, 1915, prohibits under penalty any commercial transaction or agreement with an enemy. On January 14, 1915, the defendant, a neutral resident in Paris, entered into an agreement with his old employers, a German firm in Germany, to represent their interests in France, for which he was to receive one-half the salary he had received before the war. It was not shown that there had been any intercourse with the enemy firm after April 4, 1915, but the defendant had carried out the duties of his agency before the Alien Property Custodian (who had taken over the property of the employers) until June 1915, and apparently had paid himself from his principal's resources the agreed salary. *Held,* that by continuing to execute the agreement after April 4, 1915, he had violated the prohibitions of the statute. *State v. Assal,* Trib. Correctional de la Seine, March 28, 1916, reported in (1917) 44 CLUNET, 593.

The French statute governing trading with the enemy appears to be more severe than that of England or the United States. Prior to the Act of April 4, 1915, penalizing commercial intercourse with the enemy, such transactions had merely been prohibited and declared void (decree of September 27, 1914). The French court in the instant case, however, did not so characterize the agreement of January 14, 1915. By the common law, such intercourse is prohibited by the outbreak of war. But the *execution* of contracts of agency entered into when such contracts were lawful, i. e., before the war, is not prohibited, even after the outbreak of war, provided it involves no payments to or intercourse with persons in the enemy country. Both the English and the United States Trading with the Enemy Acts contemplate the continuation of the business of alien enemies through agents appointed before the outbreak of the war, although all profits realized must be paid to the Alien Property Custodian, who may take

control of the business. See *Tingley v. Müller* (C. A.) [1917] 2 Ch. 144. By the weight of authority, the agent appointed before the war (i. e. before such an appointment became illegal) may continue to perform his duties under the agency, (unless abrogated by act of the parties) provided no intercourse with any one in the enemy country is thereby required. See the leading cases of *New York Life Insurance Co. v. Davis* (1877) 95 U. S. 425, and *Williams v. Paine* (1898) 169 U. S. 55, 18 Sup. Ct. 279. The decisions of several state courts have held that an agency was terminated by the outbreak of war. *Blackwell v. Willard* (1871) 65 N. C. 555; *Howell v. Gordon* (1869) 40 Ga. 302. And this will generally be the case where the nature of the agency is such that constant communication between principal and agent is essential to its operation, or that its continuation may be deemed inequitable to either party. *Cocks v. Izard* (1871, C. C. D. La.) Fed. Cas. 2934.

WILLS—ATTESTATION—NECESSITY THAT WITNESSES SEE SIGNATURE.—A typewritten will offered for probate bore the signature of the testator and of three persons under whose names was appended the word "witnesses." They testified that they signed their names at the testator's request without knowing the character of the paper or the purpose of their signatures; and that they saw no writing upon the paper except their own signatures after they had successively signed. The statute (Gen. St. 1902, sec. 293) requires a will to be "in writing, subscribed by the testator, and attested by three witnesses, each of them subscribing in his presence." *Held*, that the will was not validly attested. *Pope v. Rogers* (1917, Conn.) 102 Atl. 583.

This case raises the question whether attesting witnesses must see the testator's signature. Under a statute which requires that the testator make or acknowledge his *signature* in the presence of witnesses, the witnesses must actually see the signature. *In re Mackay's Will* (1888) 110 N. Y. 611, 18 N. E. 433; *Ilot v. Genge* (1844, Eng. P. C.) 8 Jur. 323. But the Statute of Frauds and many American statutes, like that of Connecticut, merely require the writing to be signed by the testator and "attested" by subscribing witnesses. Under such statutes the testator need not expressly acknowledge his signature; it is enough if he acknowledges the instrument as his. *White v. Trustees of British Museum* (1829, C. P.) 6 Bing. 310; *Gould v. Theological Seminary* (1901) 189 Ill. 282, 59 N. E. 536; *In re Dougherty's Estate* (1912) 168 Mich. 281, 134 N. W. 24. The three cases last cited held also that the witnesses need not even see the testator's signature. But there is weighty authority *contra*. *Nunn v. Ehlert* (1914) 218 Mass. 471, 106 N. E. 163. And it is submitted that the latter view is supported by the stronger argument, for the very purpose of attestation is to require witnesses to the fact that the formalities required by the statute have been complied with. Of course under either view the testator's signature must have been made before the witnesses subscribe. *Limbach v. Bolin* (1916) 169 Ky. 204, 183 S. W. 495; but see *In re Silva's Estate* (1915) 169 Cal. 116, 145 Pac. 1015 (where the order of signing was held immaterial since all the signatures were affixed as part of a single transaction). The difficulty is in the proof of this fact when the signature is not visible to the witnesses. Where there is a perfect attestation clause, a proper execution is presumptively established. *Gould v. Theological Seminary, supra; McCurdy v. Weall* (1886) 42 N. J. Eq. 333, 7 Atl. 566. Perhaps also a statement to witnesses that the paper presented to them is a will justifies an inference of fact that it has been already signed by the testator. But under the facts of the principal case, it is submitted that no such inference would arise, so that the decision is clearly right under either view as to necessity that the witness see the signature.

WILLS—TESTAMENTARY CAPACITY—WILL OF SOLDIER UNDER AGE.—The testator, while an infant but an officer in the British army on active service, made his will. He was killed in action, while still an infant, and his will was admitted to probate as a soldier's will under section 11 of the Wills Act of 1837. Section 7 of the Act declares that no will made by any person under 21 years of age shall be valid; sections 9 and 10 deal with the formalities of executing wills; and section 11 reads: "Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." Questions arose as to the validity of a power of appointment attempted to be exercised by the testator's will. *Held,* that so long as the probate stood the testamentary power of appointment was validly exercised, with a *dictum* that the Wills Act makes an infant, even though a soldier, incapable of making a will. *Re Wernher* (1918, Ch. D.) 117 L. T. Rep. N. S. 801.

See COMMENTS, p. 806.