RECENT CASE NOTES

BANKRUPTCY—JURISDICTION OF A REFEREE IN PLENARY ACTIONS.—The trustee in voluntary bankruptcy brought a bill in equity before the referee to set aside an alleged fraudulent chattel mortgage given by the bankrupt to his brother, under which the latter had obtained possession of the property. Objection to the jurisdiction was overruled by the referee, sustained by the District Court, and overruled again by the Circuit Court of Appeals. *Held,* that the referee had no jurisdiction over a plenary suit. *Weidhorn v. Levy* (1920, U. S.) 45 Am. B. R. 493, 40 Sup. Ct. 534.

A referee as well as any other bankruptcy court may determine in a summary proceeding all claims as to property in the custody of the trustee or any other officer of the bankruptcy court. *White v. Schloerb* (1900) 178 U. S. 542, 20 Sup. Ct. 1007, 4 Am. B. R. 178; see *Mueller v. Nugent* (1901) 184 U. S. 1, 13, 22 Sup. Ct. 269, 274; Collier, *Bankruptcy* (11th ed. 1917) 541. If the property is in the possession of an adverse claimant, the question as to title can be determined in a plenary action only. *Louisville Trust Co. v. Comingor* (1902) 184 U. S. 18, 22 Sup. Ct. 293, 7 Am. B. R. 421; see COMMENTS (1918) 5 VA. L. REV. 272. A few courts have held that the referee has jurisdiction in plenary actions on the ground that the fundamental purpose of the U. S. Bankruptcy Act was to place a bankruptcy court in every county of the United States, and that refusing jurisdiction to the referee in such cases would violate the spirit of the Act. *In re Andrew J. Murphy* (1900, D. Mass.) 3 Am. B. R. 499; *In re Shults* (1904, W. D. N. Y.) 11 Am. B. R. 690. This objection does not seem very forceful, since under sec. 70 (e) state courts have concurrent jurisdiction in such plenary suits and consequently the actions remain localized. The majority of lower federal courts refused to give the referee jurisdiction in plenary proceedings, because the referee has not the necessary machinery at hand for the conducting of a plenary suit with its requirements of formal service of process, rule days, etc. *In re Carlile* (1912, D. N. C.) 199 Fed. 612, 29 Am. B. R. 373; *In re Overholzer* (1909, D. N. D.) 23 Am. B. R. 10; 1 Remington, *Bankruptcy* (2d ed. 1915) sec. 545. The court in the instant case bases its decision on the ground that a plenary suit is not a "proceeding" within the meaning of sec. 12 (1) of the General Orders, but an entirely independent action. The decision in the instant case finally settles this much disputed question in accordance with the majority of the previous decisions in the lower federal courts.

CONTRACTS—AUCTIONS—KNOWLEDGE BY PURCHASER OF CONDITIONS ANNOUNCED AT COMMENCEMENT OF SALE NOT NECESSARY.—The plaintiffs, through an auctioneer, offered certain land for sale at public auction with certain restrictions. The property was knocked down to the defendant, who thereupon signed memoranda of sale and gave his check in payment of ten per cent of the purchase price. He later stopped payment on the check and refused to take the land, on the ground that he did not hear the terms read at the beginning of the sale, and that he bought the land under the impression that the property was unrestricted. There was some evidence that he was led on to bid by representations of the auctioneer. The plaintiff brought this action for specific performance of the contract. *Held,* that specific performance should not be granted. *Josephy v. Golden* (1920, N. Y. Sup. Ct.) 113 Misc. 284, 184 N. Y. Supp. 549.

It is generally considered that a contract is entered into at an auction sale when the auctioneer knocks down the thing to be sold to the highest bidder. 1 Williston, *Contracts* (1920) 39. The auctioneer is the agent of both vendor and purchaser with sufficient authority to bind the vendee to the terms of the

sale so as to satisfy the statute of frauds. *Love v. Harris* (1911) 156 N. C. 88, 72 S. E. 150, Ann. Cas. 1912 D, 1065, note; *Sims v. Landray* [1894] 2 Ch. 318. The vendor, through the auctioneer, may impose such conditions as he sees fit on the bidding, and control the sale in other ways. *Farr v. John* (1867) 23 Ia. 286. When the terms of the sale as announced by the auctioneer vary from the terms as advertised in written or printed form, the courts are in conflict as to whether parol evidence of the auctioneer's statements is admissible. NOTES (1915) 15 COL. L. REV. 695, 696; Ann. Cas. 1912 A, 1128, note. This is closely related to the question as to whether or not the purchaser is bound by the conditions as announced at the commencement of the sale, when he did not know of them. It has been held that a party may not be bound by conditions in a contract on the ground that the mode of calling his attention to such conditions did not amount to reasonable notice. *Parker v. Ry.* (1877, C. A.) 2 C. P. 416. But in auction cases the better view binds the purchaser regardless of his knowledge of the conditions announced. *Clarke v. Maisch* (1920, Wis.) 177 N. W. 11; *Kennell v. Boyer* (1909) 144 Ia. 303, 122 N. W. 941; *Vanleer v. Fain* (1845, Tenn.) 6 Humph. 104, 107; 2 R. C. L. 1123. Where, however, the purchaser has been misled by the wrongful statements or misrepresentations of the auctioneer, and has acted in reliance upon such misrepresentations, he may avoid the sale. *Roberts v. French* (1891) 153 Mass. 60, 26 N. E. 416; see Anson, *Contract* (Corbin's ed. 1919) 241. There are some cases also where the sale may be avoided on the ground of mistake. But all such cases, where there is evidence of misrepresentation or of mistake, are decided on their particular facts, according to general principles governing contract relations. 34 L. R. A. (N. S.) 927, note. In the principal case, unless the misrepresentation alleged was proven, it would seem more in accord with the weight of authority to hold the purchaser to his contract, even though it has to do with sale of land.

CORPORATIONS—LIABILITY FOR CRIME.—The defendant corporation was indicted for manslaughter. The appellate court affirmed the decision sustaining the indictment. *Held*, that the corporation could be indicted. *State v. Lehigh Valley Ry.* (1920, N. J.) 111 Atl. 257, affirming (1917, Sup. Ct.) 90 N. J. L. 372, 103 Atl. 685.

The doctrine of the criminal liability of a corporation is one of comparatively recent development. *Commonwealth v. Turnpike Co.* (1823) 2 Va. Cas. 362 (indictment dismissed); *State v. Great Works Co.* (1841) 20 Me. 41 (liable for criminal acts of nonfeasance, but not for those of misfeasance); *Commonwealth v. Proprietors of New Bedford* (1854, Mass.) 2 Gray, 339 (liable for acts of nonfeasance and misfeasance); *State v. Morris & Essex Ry.* (1852) 23 N. J. L. 360. Recently indictments for manslaughter were quashed solely for lack of precedent. *Commonwealth v. Punxsatawney Ry.* (1899) 24 Pa. Co. Ct. 25; *Reg. v. Great West Laundry Co.* (1900, Manitoba Q. B.) 3 Can. Cr. Cas. 514. The difficulty of the courts is in finding a state of mind for a corporate entity, particularly when a statute requires a specific intent. Even this latter obstacle has been overcome in recent years. *United State v. MacAndrews Co.* (1906, C. C. S. D. N. Y.) 149 Fed. 823 (conspiracy); *Grant Bros. Construction Co. v. United States* (1911) 13 Ariz. 388, 114 Pac. 955 (consciously encouraging alien contract labor); but see *Androscoggin Water Power Co. v. Bethel Co.* (1874) 64 Me. 441; see Canfield, *Corporate Responsibility for Crime* (1914) 14 COL. L. REV. 469. The liability for crime may be enforced on either of two theories. (1) The doctrine of respondeat superior, it is true, is not applied where the principal is an individual. 1 Clark & Skyles, *Agency* (1905) sec. 520. But it is submitted that the reason is to be found in the disinclination of the law to impose the odium of a crime upon an innocent person, and that the same policy is less applicable to a corporation, which can only act through agents and which

is directly represented by certain of its principal executive officers. (2) Its liability for punitive damages for the torts of such officers might well be extended to hold it criminally liable for the offenses committed by them in its behalf. See *Memphis Telephone Co. v. Cumberland Co.* (1916, C. C. A. 6th) 231 Fed. 835 (punitive damages for officers' torts). If, however, a crime is by statute punishable only by imprisonment, it is strong evidence that the legislature did not intend to include corporations within the scope of the statute. Cf. *Attorney General v. Hamilton St. Ry.* (1897) 24 Ont. App. 170. But it is not by any means conclusive. *United States v. Young & H. Co.* (1909, C. C. D. R. I.) 170 Fed. 110; *United States v. Van Schaick* (1904, C. C. S. D. N. Y.) 134 Fed. 592. It is suggested that the obloquy of a conviction, although no punishment can be administered, is yet of some force as a deterrent. It is interesting to note that no modern cases have been found where a defendant was freed solely on the ground that the crime was completely without the scope of the corporate powers. It would seem that the doctrine of the principal case should be supported.

CORPORATIONS—SUBSCRIPTIONS FOR STOCK—FAILURE OF CORPORATION TO OBSERVE STATUTORY REQUIREMENTS.—The plaintiff, as trustee in bankruptcy, brought an action against the defendant to recover the balance claimed to be due on a subscription for stock in the bankrupt corporation. The defendant demurred on the ground that there was no allegation that the statute requiring the payment of ten per cent cash at the time of the subscription to the stock had been fulfilled. *Held,* (two judges *dissenting*) that the demurrer should be sustained. *Mills v. McNamee* (1920, App. Div.) 184 N. Y. Supp. 613, affirming (1920, Sup. Ct.) 111 Misc. 253, 181 N. Y. Supp. 285.

According to the later decisions, section 53 of the New York Stock Consolidation Act applies only to subscriptions made after organization. *Rogers v. Baird,* (1917) 181 App. Div. 927, 167 N. Y. Supp. 35. The object of the statute is said to be to enable the corporation to obtain sufficient working funds, and hence a check or note will not validate the subscription. *Van Schaick v. Mackin* (1908) 129 App. Div. 335, 113 N. Y. Supp. 408; *Hapgoods v. Lusch* (1907) 123 App. Div. 27, 107 N. Y. Supp. 331. The statute is mandatory and cannot be evaded by estoppel, waiver, or acquiescence. *New York and Oswego Midland Ry. v. Van Horn* (1874) 57 N. Y. 473. Although the subscription is not accompanied by the required cash, a later payment has been held sufficient. *Black River & Utica Ry. v. Clarke* (1862) 25 N. Y. 208. This seems to conflict with the object avowed for the statute in some of the cases. Though the courts may say the subscription is void without the payment of the required cash, and despite the strong language of the statute ("No subscription shall be taken, unless. . ."), where a stockholder has taken full benefits under the contract and injustice would result if he were permitted to avail himself of the defense established by the statute, he has been held bound, without having made the required payment. *Jeffrey v. Selwyn* (1917) 220 N. Y. 77, 115 N. E. 275 (defendant, a director, accepted dividends and sold his stock); see 6 A. L. R. 1111, note; see 1 Machen, *Modern Law of Corporations* (1908) sec. 200. Such a rule is analogous to the doctrine, prevailing in many of our state courts, which prevents a party having enjoyed the full benefits of an *ultra vires* contract from repudiating its burdens. *Carson City Sav. Bank v. Carson City Elevator Co.* (1892) 90 Mich. 550, 51 N. W. 641; see 2 Machen, op. cit., sec. 1055 ff. It should be noted, however, that the defense relied on in the instant case is not that the contract in *ultra vires,* but a stronger ground—that the subscription claimed is opposed to a specific statutory expression of public policy. A commissioner appointed to take subscriptions cannot invalidate his own subscription on the ground that the required amount has not been paid on it. *Highland Turnpike v. McKean* (1814, N. Y. Sup. Ct.) 11 Johns. 98; *Ryder v. Alton & Sangamon Ry.* (1851)

13 Ill. 516. The corporation, the "person" who was to receive the cash in the instant case, is an entity distinct from its directors, but the defendant, by failing to object to the violation of the statute, participated in a breach of duty toward it, and should not be permitted to take advantage of such breach. *Pittsburgh Ry. v. Applegate* (1882) 21 W. Va. 172; see (1915) 25 YALE LAW JOURNAL, 154. If the statute was designed to secure good faith, then a defendant by doing, or assisting in doing the very thing the statute aims to prevent, has the protection of the courts thrown about him. It would seem that the defendant in the principal case should be held liable on his subscription. For the power of a trustee in bankruptcy to bring suit on an unpaid subscription for stock, see (1918) 27 YALE LAW JOURNAL, 403.

DAMAGES—INTEREST—UNLIQUIDATED DAMAGES PRECLUDE RECOVERY.—A contract for the construction of an apartment house provided that if unpaid subcontractors should file mechanics' liens on the premises, the owners might hold back enough money, otherwise due the general contractor, to secure the liens. Because of the filing of such liens and because of claims for damages for failure to complete the work on time and for defective work, the owners did not pay the contractor. He recovered judgment nearly four years after the apartment house was completed and delivered to the owners, but was ordered to pay interest to the subcontractors and an allowance to the owners for defective work and delay. *Held,* that the general contractor was not entitled, as against the owners, to interest on either the amounts due the subcontractors or on the general balance due, since it had been unliquidated. Wheeler and Gager, JJ., *dissenting. Capitol City Lumber Co. v. Sudarsky* (1920, Conn.) 111 Atl. 349.

The law shows a steady development toward more frequent allowance of interest. The early English rule permitted interest as a matter of law only in suits on commercial paper and on contracts expressly, or by usage, providing for it. Later this was extended by the St. 3 & 4 Wm. IV (1833) c. 42 sec. 28, 29. Sedgwick, *Damages* (9th ed. 1912) 559. American courts have always been more liberal, and look on interest as a necessary incident to the use of money. There is great conflict among the authorities as to what types of unliquidated claims interest should accrue on, if on any. In personal injury and similar cases, where the extent of damages is peculiarly within the province of the jury, no interest is allowed. *Fell v. Union Pacific Ry.* (1907) 32 Utah, 101, 88 Pac. 1003. In actions for work and labor where the amount is unliquidated, some courts have held that interest should be granted from the date of completion of the work, others from the time of demand, while still others allow no interest at all. *Sullivan v. Nicoulin* (1901) 113 Iowa, 76, 84 N. W. 978 (date of completion); *Mulligan v. Smith* (1904) 32 Colo. 404, 76 Pac. 1063 (time of demand); *Swinnerton v. Argonaut Land Co.* (1896) 112 Calif. 375, 44 Pac. 719 (interest not allowed). In building contract cases the weight of authority seems to be in accord with the instant case. *Macomber v. Bigelow* (1899) 126 Calif. 9, 58 Pac. 312; *Delafield v. Village of Westfield* (1901) 169 N. Y. 582, 62 N. E. 1095. The rule stated by the majority opinion seems to have as its basis that the defendant may be excused from paying interest because of the indefiniteness of the amount, whereas if the defendant could easily have computed this amount upon which interest is to be figured, it should be allowed. *Gilpatric v. National Surety Co.* (1920) 95 Conn. 10, 110 Atl. 545. To make the rule turn upon the ease of computation of the damages to be awarded is to make it turn upon the defendant's conduct, i. e., the validity of his excuse, rather than upon the proper theory of damages, namely, compensation to the plaintiff. The rule stated by the minority, which grants interest whenever "the demands of justice" require it, is hopelessly indefinite. In any exact system of justice the breach of a right would be followed by a right to immediate redress. It

is only the unavoidable delay of slow moving courts which prevents such redress. Hence it is submitted that allowance should be made for such delay by way of interest. But where the damages are both indefinite and to a large extent for losses to be suffered in the future, as in personal injury actions, separate allowance for interest should not be made, but the jury in making the general award of damages should be allowed to consider the delay in payment. See (1920) 29 YALE LAW JOURNAL, 472. The present case, denying interest to the contractor, who must pay interest to his subcontractors, while at the same time the defendants were receiving rents and profits from their apartment house, seems unjustified.

EQUITY—DEEDS—REFORMATION OF A VOLUNTARY CONVEYANCE.—The plaintiffs, heirs-at-law of one Gowan, brought a suit for the partition of a lot occupied by the defendants, devisees of the grantee of the land from Gowan. The words of inheritance necessary to pass a fee in that jurisdiction had been omitted from the deed by mistake of the scrivener. The consideration recited in the deed was love and affection and five dollars. The defendants prayed for the reformation of the instrument to include the necessary words of inheritance. The lower court held that equity would not reform a voluntary conveyance. *Held,* that there was sufficient consideration to take the deed from the voluntary class, with a *dictum* that equity as between the parties or their privies will reform a scrivener's mistake even in a voluntary deed. *Lawrence v. Clark* (1920, S. C.) 104 S. E. 330.

The weight of authority appears to be contrary to the dictum in the principal case. *Smith v. Smith* (1906) 80 Ark. 458, 97 S. W. 439; see note, 10 Ann. Cas. 523; *Browne v. Gorman* (1919, Tex. Civ. App.) 208 S. W. 385. The "peppercorn" theory of consideration seemed to prevail in these cases, but love and affection alone seems not to justify reformation. *Triesback v. Tyler* (1911) 62 Fla. 580, 56 So. 947; *Peters v. Priest* (1918) 134 Ark. 161, 203 S. W. 1042. Yet love and affection and one dollar recited as consideration in a deed has supported such a bill. *Mason v. Moulden* (1877) 58 Ind. 1. Also where special services have been rendered by a grantee to a grantor, members of the same family, whether with a prior understanding to convey or not, reformation of the deed has been granted. *Finch v. Green* (1907) 225 Ill. 304, 80 N. E. 318. In certain cases meritorious consideration, such as the moral duty of the grantor to support the grantee, has enlisted the aid of equity in behalf of the grantee for reforming the instrument. *Partridge v. Partridge* (1909) 220 Mo. 321, 119 S. W. 415; *Huss v. Morris* (1869) 63 Pa. 367; see 23 R. C. L. 346. But equity will not interfere where the claims of the parties are equally meritorious. *Hout v. Hout* (1870) 20 Ohio, 119; *Willey v. Hodge* (1899) 104 Wis. 81, 80 N. W. 75. The cases show a tendency to carry out after his death the intention of the grantor. Some courts have searched diligently for a consideration as in the cases *supra.* Others as in the principal case have held flatly that a volunteer can have reformation of a deed as against the heirs-at-law of the grantor. *Spencer v. Spencer* (1917) 115 Miss. 71, 75 S. 770; *McCabe v. O'Connor* (1920, S. D.) 176 N. W. 43. The person intended by the grantor should have the gift rather than he who takes by a windfall. See Pound, *Consideration in Equity* (1918) 13 ILL. L. REV. 667, 676. But logically there seems to be no reason for equity disturbing the legal title where neither party has given anything for it and the equities are balanced.

EVIDENCE—CONFESSIONS—ADMISSIBILITY WHEN ELICITED BY ADVICE TO TELL THE TRUTH.—While under arrest, the defendant was told by an officer that "he better make sure of it and tell the truth." The defendant then confessed. The lower court admitted this confession, but it was subsequently stricken out and the jury was instructed to disregard it. The defendant moved for a new

trial after a conviction of murder, partly on the ground that the admission of the confession was prejudicial error which the subsequent ruling and instruction could not cure. *Held,* that the judgment should be affirmed, the confession being admissible and erroneously stricken out. *People v. Foster* (1920, Mich.) 179 N. W. 295.

It has been said that the privilege against self-crimination is the basis for excluding confessions under certain circumstances. See *Bram v. United States* (1897) 168 U. S. 532, 543, 18 Sup. Ct. 183, 187; 18 L. R. A. (N. S.) 772; 50 L. R. A. (N. S.) 1077. But the true reason for exclusion, supported by the weight of modern authority, is that the confession is testimonially untrustworthy. 1 Wigmore, *Evidence* (1904) secs. 822, 823; 1 R. C. L. 552. The confusion of authority seems due to the variety of the tests employed. The customary expression that only voluntary confessions are admissible would seem only to lead to the further inquiry of what is meant by "voluntary" in this sense. 2 Chamberlayne, *Evidence* (1911) sec. 1479. Courts usually exclude confessions induced by a threat or a promise, by fear or hope, and the like. *Robertson v. State* (1917) 81 Tex. Cr. App. 378, 195 S. W. 602; *People v. Brockett* (1917) 195 Mich. 169, 161 N. W. 991. It would seem that such tests are serviceable, but that the courts, in applying them, should not lose sight of the true reason for exclusion. And, on principle, the correct test seems to be: "was the inducement sufficient, by possibility, to elicit an untrue acknowledgment of guilt?" Wigmore, *op. cit.,* secs. 824, 825, 826; see *Wilson v. State* (1917) 19 Ga. App. 759, 766, 92 S. E. 309, 312. Since testimonial untrustworthiness is the real basis for exclusion, it would seem that *a fortiori* a confession elicited by advice to tell the truth should be admissible. *State v. Williams* (1911) 129 La. 215, 55 So. 769, Ann. Cas. 1913 B, 302, note. And it should be admissible even though the advice is given by an officer after arrest. *Roszczyniala v. State* (1905) 125 Wis. 414, 104 N. W. 113; *Huffman v. State* (1901) 130 Ala. 89, 30 So. 394; *contra, Regina v. Doherty* (1874) 13 Cox C. C. 23. It should only be excluded if the circumstances show that the defendant was induced, not to tell the truth, but to tell such a story as the authorities would accept, and thereby to make a false confession. Chamberlayne, *op. cit.* sec. 1519; Wigmore, *op. cit.* sec. 832. Each case obviously must be decided on its own facts, but the decision in the instant case seems clearly sound.

MORTGAGES—STATUTE OF FRAUDS—PAROL AGREEMENT TO EXTEND THE TIME OF REDEMPTION.—The purchaser of mortgaged premises at a foreclosure sale agreed orally with the mortgagor prior to the expiration of the statutory period to extend the time of redemption. The latter remained in possession and made several payments. Shortly before the end of the statutory period he executed a second mortgage for almost the amount due on the first, but did not redeem. The purchaser procured a sheriff's deed, but did not attempt to enter until three years later. During this time the mortgagor continued in possession and made payments in addition to the rent. *Held,* that the payments and the execution of the second mortgage were sufficient part performance to take the agreement out of the operation of the statute of frauds. *Coates v. Dortch* (1920, Ark.) 224 S. W. 721.

Where part performance is relied on to take an oral contract for the sale of land out of the statute of frauds, an unequivocal act is required. Payment of even the entire consideration is generally held not sufficient. See 5 Pomeroy, *Equitable Remedies* (2d ed. 1919) sec. 2246. Nor is continuance in possession sufficient unless accompanied by an act explicable only on the basis of a new contract. *Wills v. Stradling* (1797, Ch.) 3 Ves. Jr. 378. Even in those jurisdictions where relief is given on the theory of equitable estoppel, an unequivocal act is required in addition. *Lechenger v. Merchants' National Bank* (1906, Tex. Civ. App.) 96 S. W. 638. Measured by this test, the instant agreement is

unenforceable. The execution of the second mortgage suggests a final effort to redeem according to law rather than an agreement for an extension. But equity with its usual tenderness for the mortgagor has adopted without qualification the doctrine of equitable estoppel in dealing with agreements to extend the time of redemption where the mortgagor has been "lulled into false security" and relaxed his efforts to redeem. *Schroeder v. Young* (1896) 161 U. S. 334, 16 Sup. Ct. 512; *Taggart v. Blair* (1905) 215 Ill. 339, 74 N. E. 372. The extension may be for a definite or an indefinite period, which the courts construe as a reasonable time. *Diggins v. Axtell* (1915) 196 Ill. App. 480; *Dow v. Bradley* (1913) 110 Me. 249, 85 Atl. 896. But since the agreement is merely a qualified waiver of the mortgagee's power of forfeiture, the mortgagor is held strictly to its terms. *Turpie v. Lowe* (1902) 158 Ind. 314, 62 N. E. 484. Courts of law have also given effect to it where the mortgagee has conveyed to a bona fide purchaser by allowing a recovery of the value of the equity in a quasi-contractual action. *Dow v. Bradley, supra.* The decision in the instant case is sound, but the reason would seem to lie rather in equitable estoppel than in part performance of contracts relating to land. Still another reason might have been found in the acceptance of payments after foreclosure and receipt of the deed. This has been held to reopen the foreclosure and re-invest in the mortgagor the power of redemption. *Lounsbury v. Norton* (1890) 59 Conn. 170, 22 Atl. 153; see 2 Jones, *Mortgages* (7th ed. 1915) sec. 949a.

MUNICIPAL CORPORATIONS—ESTOPPEL TO DENY GRANT OF FRANCHISE TO TELEPHONE COMPANY.—The plaintiff, a municipal corporation, sought to have the defendant telephone company enjoined from maintaining its wires, etc., along the streets of the city. Ten years before this suit was brought, the defendant had presented a petition to the board of trustees of the then town, asking for the privilege of erecting its system. The petition had been approved by the individual members of the board, but no formal action was ever taken. A statute provided that consent of the municipal authorities must be obtained before such a company could operate in any city. *Held,* that the injunction should not issue, since the city was estopped to deny that consent had been given. Bradley, P. J. *dissenting. City of Mountain View v. Farmer's Telephone Co.* (1920, Mo. App.) 224 S. W. 155.

It is well settled that where a municipal corporation has no power to grant a franchise to a public service corporation, the city will not be estopped to question the validity of a grant so made. *State v. Monroe* (1905) 40 Wash. 545, 82 Pac. 888; *Smith v. Westerly* (1896) 19 R. I. 437, 35 Atl. 526. Where the municipality has the power and it is claimed that it has been invalidly exercised, the cases may be divided into two groups. If no particular method of making the grant is prescribed by statute, a municipal corporation may estop itself just as an individual. *Missouri River Telephone Co. v. Mitchell* (1908) 22 S. D. 191, 116 N. W. 67. Where the method is prescribed, however, there is a variety of decisions. Some courts lay down the strict rule that the statute must be complied with and that therefore there can be no estoppel. *Holland Realty and Power Co. v. St. Louis* (1920, Mo.) 221 S. W. 51; *Toronto Electric Light Co. v. Toronto* [1917, P. C.] A. C. 84; *Detroit v. Railway Co.* (1894, C. C. E. D. Mich.) 60 Fed. 161. On the other hand, it is held, that where from the facts of the case justice requires that the doctrine be applied, the courts will do so even against a municipal corporation. *Hagerstown v. Hagerstown R. Co.* (1914) 123 Md. 183, 91 Atl. 170; *London Mills v. White* (1904) 208 Ill. 289, 70 N. E. 313; 3 Dillon, *Municipal Corporations* (5th ed. 1911) secs. 1194, 1242. Mere acquiescence does not constitute sufficient basis for application of the doctrine. *Bangor v. Bay City Traction Co.* (1907) 147 Mich. 165, 110 N. W. 490; *Morris and Essex Ry. v. Newark* (1855) 10 N. J. Eq. 352. But where there has been reliance

on a positive act of the municipal authorities, as in the instant case, courts will hold that the city is estopped. *People v. Union Gas Co.* (1913) 260 Ill. 392, 103 N. E. 245; *Hagerstown v. Hagerstown Ry., supra.* Although this decision is supported by much authority, it would seem that the better rule is laid down in *Holland Realty and Power Co. v. St. Louis, supra,* since the granting of such a privilege should be closely supervised.

PRACTICE—DIRECTED VERDICTS IN CRIMINAL CASES—JUDGE AND JURY—INSTRUCTIONS AS TO LAW IN EFFECT DIRECTING A VERDICT.—The defendant and his assistant admitted moving his loan office into Virginia, maintaining a reception office in the District of Columbia, and conducting as many as 200 patrons a day across the line by automobile, in order to evade the statute regulating the business in the District. The judge instructed the jury that this admitted course of dealing constituted a violation of the law; that to find for the defendant would be contrary to the law and the evidence and a violation of their oath; that by law he had no power to direct a verdict in a criminal case, but that what he said amounted to that. *Held,* (four justices *dissenting*) that whatever wrong the defendant may have suffered was purely formal, as from the admitted facts there was no doubt of his guilt, and the judge always has the privilege of telling the jury what the law is upon a certain state of facts, even where the facts are agreed. *Horning v. District of Columbia* (1920, U. S.) 41 Sup. Ct. 53.

It is an elementary proposition of law that the court cannot direct a verdict of guilty in a criminal action. *Breese v. United States* (1901, C. C. A. 4th) 108 Fed. 804. But it is the prevailing doctrine that the jury are bound, even in criminal trials, to follow and apply the law as laid down by the court. *Duffy v. The People* (1863) 26 N. Y. 588; *Sparf and Hansen v. United States* (1895) 156 U. S. 51, 64, 15 Sup. Ct. 273; 2 Thompson, *Trials* (2d ed. 1912) sec. 2133. On the other hand, the jury can, if they see fit, contrary to their moral duty and the obligations of their oath, disregard the evidence before them, and the law as expounded to them by the court, and return a verdict of not guilty. See 84 J. P. 506; Thompson, *op. cit.* See also COMMENT (1921) 19 MICH. L. REV. 325. In the principal case, where the facts showing the defendant's guilt were undisputed, these two principles of law came into direct conflict. The modern tendency is toward holding that an instruction correctly stating the law and warning the jury against a finding contrary to it, is not a direction of a verdict of guilty, though it in effect does direct the jury to find the defendant guilty. *Nicholson v. Commonwealth* (1879) 91 Pa. 390; *State v. Lackawanna Ry.* (1912) 82 N. J. L. 747, 82 Atl. 851. It is submitted that it is proper for the court to warn the jury against exercising their power of disregarding the law and the evidence in violation of their moral duty, and that no substantive rights of the defendant are violated, as it is not to be presumed that a jury will find in opposition to the law from mere whim, caprice, or prejudice, for all their power to do so. *People v. Neumann* (1891) 85 Mich. 98, 48 N. W. 290.

PRACTICE—INDICTMENT—JURY—PRESENCE OF UNAUTHORIZED PERSONS IN GRAND JURY ROOM AS GROUND FOR QUASHING INDICTMENT.—The defendants, having been indicted for unlawfully appropriating funds of a company of which they were members, moved to quash the indictment on two grounds: (1) it was found on hearsay evidence given by a committee of a previous grand jury; (2) the present grand jury was influenced by this committee, which came as a delegation to urge action on the part of the jury. *Held,* that the indictment should be quashed, on the second ground only. *State v. Ernster* (1920, Minn.) 179 N. W. 640.

The investigations of the grand jury are clothed in the utmost secrecy and indeed some courts have held that, in order that this secrecy may be complete,

they will not inquire into the amount or kind of evidence which produced the indictment. *State v. Fasset* (1844) 16 Conn. 457, 471; *State v. Comer* (1902) 157 Ind. 611, 62 N. E. 452. But since the innovation of rules limiting the grand jury in their reception of evidence, it has logically followed that the proceedings may be inquired into with reference to the sufficiency or legality of the evidence. *United States v. Farrington* (1881, N. D. N. Y.) 5 Fed. 343; see 4 Wigmore, *Evidence* (1905) sec. 2364. If the court should find that there was some competent evidence, the mere fact that incompetent evidence was admitted will not be sufficient ground to quash, as a valid indictment may have been found on the competent evidence. *People v. Rice* (1919) 206 Mich. 644, 173 N. W. 495; see 12 R. C. L. 1040. Where, however, the evidence is utterly insufficient, the indictment will be quashed. *United States v. Silverthorne* (1920, W. D. N. Y.) 265 Fed. 853; see 2 Wharton, *Criminal Procedure* (10th ed. 1918) sec. 1291. In the instant case it does not appear that the indictment was founded solely on the hearsay evidence, and so the court correctly decided that the indictment should not be quashed on the first ground. See 47 L. R. A. (N. S.) 1207, note. The argument dealing with the incompetency of witnesses before a grand jury as ground for quashal has resulted in a diversity of authority. See (1916) 16 COL. L. REV. 158; (1915) 28 HARV. L. REV. 326. It has been held that where a witness was not sworn, the indictment should be quashed even if the jurors were not actually influenced. *State v. Wetzel* (1914) 75 W. Va. 7, 83 S. E. 68. And again the court held it to be sufficient ground to quash that a private attorney was present, even if at the request of the county attorney. *Hartgraves v. State* (1911) 5 Okla. Cr. App. 266, 114 Pac. 343. But the logical rule would seem to be the one that is generally followed where there is incompetent evidence, viz., if there were some competent witnesses present, that is sufficient to sustain the indictment, even though incompetent witnesses were also present. *State v. Shreve* (1897) 137 Mo. 1, 38 S. W. 548. In the instant case, not only were incompetent witnesses present, but also an attempt was made by them as a delegation to influence the finding of the grand jury. Here also there is a diversity of opinion, as it has been held that where a witness did not have any actual knowledge of the case but merely came to urge the finding of an indictment, his conduct fell far short of being ground for quashal. *State v. Bacon* (1900) 77 Miss. 366, 27 So. 563. The line must be drawn somewhere, however, and it surely seems unjust to the accused to have witnesses come as a body to urge the finding of an indictment when the facts themselves may warrant such action. Considering also that the chief function of the grand jury is the impartial investigation of all the facts in a particular case, outside influence, especially where it is intended to affect the finding, should be entirely excluded. The instant case, therefore, is apparently sound. See 14 R. C. L. 205. An additional reason for this conclusion is found in the provisions of Minn. Gen. St. 1913, sec. 9180.

PROPERTY—TENANCY IN COMMON—DEED OF ENTIRE ESTATE IN SEVERALTY BY ONE CO-TENANT TO A STRANGER—ADVERSE POSSESSION UNDER SUCH A DEED.—The plaintiffs' and the defendant's grantors respectively owned land as tenants in common. The plaintiffs' grantor executed to them a deed purporting to convey the entire interest in severalty in a specific parcel thereof. The defendant claims under a deed of the other co-tenant's interest. For a longer time than the statutory period the plaintiffs grazed their cattle on the land during the grazing season; but did not prevent the defendant or his grantor from grazing their cattle. Little use was made of the land during the remainder of the year. The plaintiffs brought an action to quiet their title to the parcel in question, claiming title thereto in severalty by adverse possession. *Held*, that the plaintiffs were entitled to the relief sought, since entry under their deed is presumed to have been adverse

and possession thereafter for the statutory period gave them complete title. *O'Banion et al. v. Simpson* (1920, Nev.) 191 Pac. 1083.

Possession by one co-tenant is in law considered to be for the benefit of the other co-tenants. *Miller v. Powers* (1919) 184 Ky. 417, 212 S. W. 453; see *Schleuter v. Reinking* (1919, Iowa) 173 N. W. 18. To rebut this so-called presumption, notice of any adverse claim must be brought home to the other co-tenants, either actually or by notorious and unequivocal acts. *Berger v. Horsfield* (1919) 188 App. Div. 649, 176 N. Y. Supp. 854; *Stiles v. Hawkins* (1918, Tex. Sup. Ct.) 207 S. W. 89. A co-tenant can convey no greater interest than his own, and any deed purporting to convey more is inoperative as against those co-tenants who do not join therein. *Pastine v. Altman* (1919) 93 Conn. 707, 107 Atl. 803; see (1919) 29 YALE LAW JOURNAL, 248; *Le Vee v. Le Vee* (1919) 93 Oregon 370, 382, 183 Pac. 773, 774. Such a deed of itself raises no presumption of an adverse claim, even though it is recorded and the grantee pays all the taxes for the statutory period. *White v. Beckwith* (1892) 62 Conn. 79, 25 Atl. 400; see *Pickens v. Stout* (1910) 67 W. Va. 422, 432, 68 S. E. 354, 359. In North Carolina, despite a seven years statute of limitations, neither a co-tenant nor his grantee can defeat the interests of other co-tenants except by adverse possession for twenty years. *Hicks v. Bullock* (1887) 96 N. C. 164, 1 S. E. 629; *Mott v. Land Co.* (1908) 146 N. C. 525, 60 S. E. 423. This rule seems arbitrary. By the instant case and the great weight of authority, a stranger to whom a co-tenant purports to convey the entire interest in severalty has the power to invest complete title in himself by adverse possession through acts less notorious and unequivocal than would be required by his grantor. *Foulke v. Bond* (1879) 41 N. J. L .527; *Clarke v. Dirks* (1916) 178 Iowa, 335, 160 N. W. 31; see 32 L. R. A. (N. S.) 702, note. It appears more logical, however, as well as just that such a stranger should be compelled to give as unequivocal evidence as a co-tenant of an adverse claim to a greater interest than the co-tenant had. See *Hamershlag v. Duryea* (1899) 38 App. Div. 130, 133, 56 N. Y. Supp. 615, 618.

PROPERTY—WATERS AND WATERCOURSES—EXCLUSIVE RIGHT OF A RIPARIAN OWNER TO HUNT ANIMALS IN NAVIGABLE STREAM.—The plaintiff was the owner of land bordering a navigable stream and claimed ownership of its bed to the middle. The defendant had placed traps at the bottom of the stream for the purpose of catching muskrats and had succeeded in trapping some of considerable value. The plaintiff sought to enjoin this practice. *Held*, that the plaintiff was entitled to the relief sought, and to the exclusive privilege of trapping the aquatic animals in and upon the waters covering the soil submerged to the thread of the stream. *Johnson v. Burghorn* (1920, Mich.) 179 N. W. 225.

The instant case involves two questions. The first relates to the ownership of the soil underlying public or navigable fresh waters; the second to the rights of the owner to hunt aquatic animals in waters covering that soil. The authorities on the first question are in great conflict. Some states, following the common-law rule, hold that the ownership of the beds of non-tidal waters, though navigable in fact, is in the riparian owners. *Fulton v. State* (1911) 200 N. Y. 400, 94 N. E. 199; *Donovan etc. Co. v. Hope Lumber Co.* (1912, C. C. A. 9th) 194 Fed. 643. Others hold that title in the case of all public waters is in the state. *Hammond v. Shepard* (1900) 186 Ill. 235, 57 N. E. 867. The constitutions of some states so provide. *City of New Whatcom v. Fairhaven Land Co.* (1901) 24 Wash. 493, 64 Pac. 735. Where the title to the bed of a navigable stream is in the state, the public is privileged to fish and hunt fowl and animals inhabiting the waters. *Ex parte Bailey* (1909) 155 Calif. 472, 101 Pac. 441; *Ainsworth v. Munoskong Hunting Club* (1908) 153 Mich. 185, 116 N. W. 992. But no one, whether riparian owner or not, has a right to the materials in the

soil unless obtained by grant from the state. *Goodwin v. Thompson* (1885, Tenn.) 15 Lea. 209. *State v. Akers* (1914) 92 Kan. 169, 140 Pac. 637. And some courts have held that the state has no power of alienation of any interest in the soil of such streams, inasmuch as the title to such soil is held in trust for the people. *State v. Korrer* (1914) 127 Minn. 60, 148 N. W. 617; *Rossmiller v. State* (1902) 114 Wis. 169, 89 N. W. 839. Where the title to the soil of non-tidal waters is in the riparian owner, it is generally held that the public is not privileged to fish and hunt aquatic animals. *Decker v. Baylor* (1890) 133 Pa. 168, 19 Atl. 351; *Griffith v. Holman* (1900) 23 Wash. 347, 63 Pac. 239; *Adams v. Pease* (1818) 2 Conn. 481. But on the other hand it has been held that the right of fishing is incident to that of navigation and therefore public. *Diana Shooting Club v. Hasting* (1914) 156 Wis. 261, 145 N. W. 816; *Forestier v. Johnson* (1912) 164 Calif. 24, 127 Pac. 156. The principal case, while following the apparent trend of authority relative to the rights of riparian owners whose ownership of the beds of streams is recognized, would seem to have carried this doctrine to a point where the sanction of public policy is very doubtful.

PROPERTY—WATERS AND WATERCOURSES—FLOODS—RIPARIAN OWNER'S RIGHT TO PROTECT HIS PROPERTY BY EMBANKMENT.—The parties owned land in New Zealand upon opposite banks of a river, whose waters periodically in times of flood overflowed the bank at a point on the defendant's property, spread over it without any defined channel, and ultimately found their way back to the river. To exclude these waters he built an embankment, and this resulted in an increased flooding of the plaintiff's farm. The latter thereupon brought this action for damages and for the removal of the obstruction. *Held,* that the plaintiff was without remedy, since he had failed to establish the existence of any flood channel or ancient and rightful course for the flood waters over the defendant's land. *Gerrard v. Crowe* (1920, P. C.) 37 T. L. R. 110.

It is elementary law that a riparian owner is entitled to have a natural watercourse flow *ut currere solebat.* Surface water, on the other hand, may be obstructed in most jurisdictions. See (1920) 29 YALE LAW JOURNAL, 686. In the United States, flood water is generally considered to be a part of the watercourse, unless it becomes severed from the stream, spreading out over the land never to return; and its flow may not be obstructed to the injury of other riparian owners except at times of unprecedented flood. *Uhl v. Ry.* (1904) 56 W. Va. 494, 49 S. E. 378; *Town v. Hicks* (1909) 23 Okla. 684, 102 Pac. 79. A few states hold that it becomes surface water when it spreads out over the land without any fixed channel or definite current. *Gobin v. Picty* (1920, Ind.) 125 N. E. 655. The reason for these decisions seems to be that a contrary doctrine in those states would render useless large portions of their richest soil. See *Taylor v. Fickas* (1878) 64 Ind. 167, 175. In localities such as the Mississippi Valley, where the floods are so extraordinary and would cover the land where whole cities now stand, it is held that, for the protection of life and property, this land cannot be considered as a part of the flood channel, and any owner may protect his lands by dikes or levees without liability to others. *Cubbins v. Commissioners* (1916) 241 U. S. 351, 36 Sup. Ct. 671; *Smeltzer v. City* (1914) 246 Pa. 560, 92 Atl. 702. A riparian owner may protect his land from any change in the course of the stream, or from encroachment by the sea. *Barnes v. Marshal* (1886) 68 Calif. 569, 10 Pac. 115; *Rex v. Pagham* (1828, K. B.) 8 B. & C. 355. And if it appear that a structure previously erected by the plaintiff so changed the flow that the defendant's embankment merely served to protect his land from this added peril and was not obstructing the ancient and rightful course of the flood waters, the plaintiff may not complain if his lands are thereby inundated. *Trafford v. Rex* (1832, Exch.) 8 Bing. 204; *Wilhelm v. Burleyson* (1890) 106 N. C. 381, 11 S. E. 590. The waters of artificial canals are governed by principles

that differ from those which are applied to natural watercourses. *Neild v. Ry.* (1874) L. R. 10 Exch. 4. The leading English case holds that nature provides a flood channel for every stream, and that this may not be obstructed to the injury of others; it is clearly not stated that the channel must be well defined. *Menzies v. Breadalbane* (1828, H. L.) 3 Bligh (N. R.) 414. With one exception, which is cited in the principal case, there seems to be no English case since 1828 that cannot be distinguished under the principles stated in this note. *Drainage Board v. Ry.* (1912, K. B.) 106 L. T. 429. That case relies for its authority upon *Rex v. Pagham, supra,* which is a case of encroachment by the sea, and is governed by different principles. It is believed that the principal case cannot be supported on existing English authority, nor does it seem reasonable to hold that flood water overflowing the bank and later returning to the stream is not a part of the stream. The way which nature has provided for the flow is the watercourse, and water flowing in that course is not to be obstructed as mere surface water. See *Cairo Ry. v. Brevoort* (1894, C. C. D. Ind.) 62 Fed. 129, 133.

SALES—PUBLIC WATER WORKS—IMPLIED WARRANTY OF PURITY OF WATER SOLD.—The defendant city sold water to its inhabitants. The plaintiff, a purchaser, contracted typhoid from the water, and brought this action, alleging an implied warranty of purity. The defendant demurred. *Held,* (two judges *dissenting*) that there was no implied warranty of purity in a sale of water. *Canavan v. City of Mechanicville* (1920) 229 N. Y. 473, 128 N. E. 882.

This case is supported by almost all the little authority there is. See *Green v. Ashland Water Co.* (1898) 101 Wis. 258, 77 N. W. 722; *Hayes v. Torrington Water Co.* (1914) 88 Conn. 609, 92 Atl. 406; *Hamilton v. Madison Water Co.* (1917) 116 Me. 157, 100 Atl. 659. One case tending the other way, allowed an injunction to prevent the water company from collecting water rent where impure water had been supplied, irrespective of negligence, *Brymer v. Butler Co.* (1895) 172 Pa. 490, 33 Atl. 707. A municipal corporation which supplies water is held to the same liability as is a private water company. *Flutmus v. City of Newport* (1917) 175 Ky. 817, 194 S. W. 1039; *Oklahoma City v. Hoke* (1919) 75 Okla. 211, 182 Pac. 692. Liability in these cases was formerly denied on the ground that there was no sale. *Green v. Ashland Co., supra.* But this metaphysical distinction has not survived in the practical twentieth century. *Jersey City v. Harrison* (1904) 71 N. J. L. 69, 58 Atl. 100; see *Oakes Co. v. New York* (1912) 206 N. Y. 221, 228, 99 N. E. 540, 541. There seems to be the same relation between the parties as in the sale of foodstuffs. *Jones v. Mt. Holly Water Co.* (1915) 87 N. J. L. 106, 93 Atl. 860. In this regard it is a very nice question as to the effect of the sales act on the American theory of an absolute liability on an implied warranty because of a high regard for human life. The words of the statute require actual or implied notice of the particular use for which the article is bought, and actual or implied reliance upon the seller's skill; it is still an open question whether or not this is merely a codification of the common law. See Perkins, *Unwholesome Food as a Source of Liability* (1920) 5 IOWA L. BULL. 103; COMMENTS (1920) 29 YALE LAW JOURNAL, 782. It has been held necessary that the goods be such that the seller have an opportunity to examine. Cf. *Ward v. Atlantic & Pacific Tea Co.* (1918) 231 Mass. 90, 120 N. E. 225; *Bigelow v. Me. Central Ry.* (1912) 110 Me. 105, 85 Atl. 396. When a householder contracts for water, he commonly does so for purposes of securing a drinking supply. But is water nearer to nature and less under the seller's control than pork? Has modern science developed microscopic inspection so that it is practical for a city continuously to inspect its water supply for typhoid? Answering that there is no control, the instant case decides that without control on the seller's part there is no implied reliance on his skill, and that the words of the sales act make reliance necessary.