RECENT CASE NOTES

ADMINISTRATIVE LAW—REVIEW OF ADMINISTRATIVE DISCRETION—REVOCATION OF SECOND CLASS MAIL PRIVILEGE.—The relator, having had due notice, was represented at a hearing before an administrative officer, at which an order was entered revoking its second-class mail privilege granted in 1911. This order was based on certain articles, appearing in the relator's newspaper at frequent intervals during a period of five months. These articles were declared to be non-mailable because they violated the Espionage Act. On appeal to the Postmaster-General, the order was approved. The relator then brought this writ of error on the grounds that the order was unconstitutional, because it did not afford the relator a trial in a court of competent jurisdiction, that the order deprived the relator of the right of free speech, and was destructive of the rights of free press, and deprived it of its property without due process of law. *Held,* that the order was constitutional. Brandeis and Holmes, JJ., *dissenting. United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson* (1921) 41 Sup. Ct. 352.

Hearings, similar to that accorded to the relator in the instant case, when fairly conducted, satisfy all the requirements of due process of law. *Public Clearing House v. Coyne* (1904) 194 U. S. 497, 24 Sup. Ct. 789; see *Smith v. Hitchcock* (1912) 226 U. S. 53, 60, 33 Sup. Ct. 6, 8; 2 Willoughby, *Constitutional Law* (1910) 1283. Since the filing of the petition in the instant case the Espionage Act had been held constitutional. *Abrams v. United States* (1919) 250 U. S. 616, 40 Sup. Ct. 17; see COMMENTS (1920) 29 YALE LAW JOURNAL, 337; 33 HARV. L. REV. 442. The second-class privilege is granted upon an application of the publisher for entry in that class, after an investigation of the character of the newspaper by the Postmaster-General under the rules and regulations prescribed by him. U. S. Postal Laws & Regulations (1913) sec. 411-435; cf. *Smith v. Hitchcock, supra.* This permit contains the provision that "the authority herein given is revocable upon determination by the Department that the publication does not conform to law." The Espionage Act declares that any newspaper violating any provision of the act is "non-mailable matter" which shall "not be conveyed in the mails, or delivered from any post office or by any letter carrier." National Defense Act, 1917, sec. 1 (40 Stat. at L. 217, 230). The Postmaster-General has the power "to execute all laws relating to the postal service." Act of June 8, 1872 (17 Stat. at L. 283, 285). The holding of the court that there was a sufficient delegation of power to warrant the respondent's order seems sound. Courts are reluctant to disturb an exercise of discretion by a Postmaster-General under delegated powers. See *Bates & Guild Co. v. Payne* (1904) 194 U. S. 106, 110, 24 Sup. Ct. 595, 597; cf. *Public Clearing House v. Coyne, supra.* The objection of the dissenting judges, in the instant case, that the effect of the order, therein rendered, was to deprive the relator of the privilege of the second-class rate in the future for publishing non-mailable matter in the past, seems unsound, because, on a new application, by proving it is now publishing mailable matter, the relator would be entitled to a new permit. The dissenting opinions seem to doubt the value of this privilege. For a discussion of governmental regulations in similar matters, see Hart, *Power of Government over Speech and Press* (1920) 29 YALE LAW JOURNAL, 410.

ADMIRALTY—EXTENT OF LIABILITY TO INJURED SEAMAN.—The plaintiff was injured by an accident for which the shipowner was in no way at fault. He was

brought a long distance back to the home port and meanwhile was not furnished with proper medical attention. He brought actions to recover for the injuries, for failure to furnish him with proper medical attention, and for "maintenance and cure" after the termination of his employment. *Held*, that he could recover for the failure to furnish him with proper medical attention, and for his care for a reasonable time after the termination of his employment. *Falk v. Thurlow* (1921, Sup. Ct.) 114 Misc. 586, 187 N. Y. Supp. 57.

It is well settled that a shipowner, though himself not at fault, owes some duty to "maintain and cure" a seaman taken sick or injured in the service of his ship through no wilful misconduct of his own. *The Osceola* (1903) 189 U. S. 158, 175, 23 Sup. Ct. 483, 487; see Smith, *Liability in Admiralty for Injuries to Seaman* (1906) 19 HARV. L. REV. 418. But the courts are in conflict as to the limits of this liability. The term "cure" was probably originally used in the sense of "care," and not in the sense of healing. See *The Atlantic* (1849, S. D. N. Y.) Fed. Cas. No. 620. Some courts hold that the duty of the shipowner terminates with the completion of the voyage. *Anderson v. Rayner* [1903] 1 K. B. 589; *The J. F. Card* (1890, E. D. Mich.) 43 Fed. 92. Others consider the duty as continuing until a cure is effected as far as possible. *Reed v. Canfield* (1832, C. C. D. Mass.) 1 Sumner, 195; *The Lizzie Frank* (1887, S. D. Ala.) 31 Fed. 477. While some allow expenses for maintenance and medical treatment incurred within a reasonable time after the termination of the employment. *The Bouker No. 2* (1917, C. C. A. 2d) 241 Fed. 831; *The Ella S. Thayer* (1887, N. D. Calif.) 40 Fed. 902, 904. A seaman can recover for the injuries resulting from a failure to provide him with proper medical attention. *Scarff v. Metcalf* (1887) 107 N. Y. 211, 13 N. E. 796; *The Troop* (1902, D. D. Wash.) 118 Fed. 769. In no case, can he recover full indemnity for the injury itself, unless it was due to the failure of the owner to furnish and maintain a seaworthy vessel, or safe appliances. See *Chelentis v. Luckenbach Steamship Co.* (1918) 247 U. S. 372, 380, 38 Sup. Ct. 501, 502. The injured seaman cannot take advantage of any of the several workmen's compensation acts. *Southern Pac. Co. v. Jensen* (1917) 244 U. S. 205, 37 Sup. Ct. 524; *Knickerbocker Ice Co. v. Stewart* (1920) 253 U. S. 149, 40 Sup. Ct. 438. Thus, it appears that seamen, who have been called the "wards of the court," are now in a less favored position than land workmen under workmen's compensation acts. In view of this situation, and considering the improvidence of the average seaman, it would seem better policy to require the shipowner to maintain and care for a seaman injured in his service, not only for a reasonable time after the termination of the employment, but until cure. See federal statute of June 5, 1920, extending to seamen the benefit of the Federal Employers' Liability Act, not yet passed upon by the courts.

CONFLICT OF LAWS—FOREIGN JUDGMENTS—JURISDICTION—NATURE OF INTERPLEADER.—A, the holder of certificates in an unincorporated mutual benefit association, whose principal office was in New York, died domiciled in Maryland, his wife, B, having predeceased him. The Association levied assessments and deposited the money collected with its general beneficiary fund. The Association filed a bill of interpleader in New York against several claimants of the money, all of whom except A's son were non-residents of the state. Service was made upon the representative of B's estate by publication. Final judgment was rendered in favor of the son and the money was paid to him. After the commencement of the foregoing action, and before the attempted service upon B's representative was completed, the representative of B's estate sued the Association in Maryland. The Association set up the New York judgment, but the Maryland court decided that the New York court had acquired no jurisdiction,

and rendered judgment in favor of the plaintiff. The judgment was assigned to C, who sought to enforce it in New York against the Association. *Held,* that the interpleader action was a proceeding *in personam,* that the New York court had acquired no jurisdiction over the representative of B's estate by publication of the summons in the original action, and that the plaintiff was entitled to judgment. *Hanna v. Stedman* (1921) 230 N. Y. 326, 130 N. E. 566.

Of the two conflicting judgments in the case the earlier one would control by virtue of the full faith and credit clause of the federal Constitution if the court had jurisdiction. Jurisdiction within the meaning of the constitutional provision exists if the action is one *in rem* and the res is within the state. In such a case service by publication upon a non-resident defendant is sufficient. Personal service or consent is required, however, if the action is *in personam. Pennoyer v. Neff* (1877) 95 U. S. 714. Whether an exception should be recognized with respect to citizens of the state or residents domiciled therein so as to authorize a personal judgment upon constructive service is not finally determined. See *McDonald v. Mabie* (1917) 243 U. S. 90, 37 Sup. Ct. 343. Differing from garnishment proceedings, a bill of interpleader does not seek to apply property to the payment of debts, but determines merely personal rights to a money demand. *N. Y. Life Ins. Co. v. Dunlevy* (1916) 241 U. S. 518, 36 Sup. Ct. 613; Huston, *The Enforcement of Decrees in Equity* (1915) 63-65. Interpleader is a proceeding *in personam,* even though the fund in dispute is placed in possession of the court. *Cross v. Armstrong* (1887) 44 Ohio St. 613, 10 N. E. 160. As the New York court had obtained no jurisdiction over the representative of B's estate, the judgment was not binding upon him. The Maryland judgment, on the other hand, was entitled to full faith and credit in New York because the Association had been served in Maryland and had appeared in the action. The decision emphasized the need of legislation giving to bills of interpleader *in rem* effect, so that a party seeking interpleader, who has paid the money into court or has delivered the res to the court, may be protected against suits in other jurisdictions by non-residents who have been served merely by publication. Under the existing law such party can protect himself against the contingency which happened here only by demanding a bond in indemnity from the successful party in the interpleader proceedings. See *Stevenson v. Anderson* (1814, Ch.) 2 Ves. & B. 407.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND PRESS—CONVICTION FOR CRIMINAL ANARCHY.—The defendant was part owner and business manager of "The Revolutionary Age" and had knowledge of the publication therein of the "manifesto" of the "Left Wing" section of the Socialist party. The manifesto advocated as a "direct objective" the "conquest by the proletariat of the power of the state," and that this be accomplished by conquering and destroying "the bourgeois parliamentary state," the weapon to be the "political mass strike." The defendant was tried and convicted under authority of sections 160-161 of the New York Penal laws (Laws of 1902, ch. 371), making the advocacy of criminal anarchy a felony. *Held,* that the conviction should be affirmed. *People v. Gitlow* (1921, N. Y. App. Div.) 65 N. Y. L. J. 93.

The decision repudiates the test urged by many authorities, that only agitation creating a "clear and present danger" of criminal acts may be constitutionally subject to punishment. See *Shenck v. United States* (1919) 249 U. S. 47, 39 Sup. Ct. 247; dissenting opinion of Mr. Justice Holmes in *Abrams v. United States* (1919) 250 U. S. 616, 40 Sup. Ct. 17; see COMMENTS (1919) 29 YALE LAW JOURNAL, 337. The doctrine of "constructive intent" is applied by holding that since the mass strike cannot be employed without force, violence and bloodshed, the defendants must be presumed to intend the use of such means.

This doctrine has been the subject of harsh and able criticism. See Chafee, *Freedom of Speech* (1920) 54 ff; but see *contra,* Corwin, *Freedom of Speech and Press* (1920) 30 YALE LAW JOURNAL, 48. It is further held that the jury was warranted in finding that "unlawful means" were contemplated, and that, while the guilt of the accused could not be declared as a matter of law, the court could well instruct that the advocacy of these doctrines violated the statute. See *Horning v. District of Columbia* (1920) 41 Sup. Ct. 53; (1921) 30 YALE LAW JOURNAL, 421. The instant case illustrates forcibly how strong a hold the policy of strict repression has now obtained. For recent legislative action see NOTES (1920) 20 COL. L. REV. 700. The jury might very well have convicted even though the court had not been so vigorous in its application of the statute. One may share the court's aversion to the defendant's views and yet doubt the corrective effect and the social desirability of the means of repression adopted. If a similar policy is applied to that most difficult of present problems, industrial warfare, i. e. in connection with strikes which are not "mass strikes," the misunderstanding and hatreds likely to result seem distinctly undesirable. See COMMENTS (1920) 30 YALE LAW JOURNAL, 280.

CONTRACTS—ILLEGALITY—ARBITRATION AGREEMENTS.—The plaintiff charterers sued the defendant owners on a charter-party for damage to goods in shipment. The defendants pleaded that the charter-party provided that all disputes arising under it should be referred to arbitration and that a failure to present a claim and appoint an arbitrator within three months from the date of delivery would bar the claim. *Held,* that this clause was void as against public policy. *Dreyfus Co. v. Atlantic Shipping and Trading Co.* (1921, C. A.) 37 T. L. R. 417.

The early courts looked upon arbitration agreements in contracts with disfavor. *Thompson v. Charnock* (1799, K. B.) 8 T. R. 139. But where the contract made arbitration an express condition precedent to a right of action, the English courts have held that such an agreement does not oust the court of its jurisdiction, for no cause of action has arisen until the condition is fulfilled. *Scott v. Avery* (1856) 5 H. L. 811. Thus the distinction came to be drawn between agreements where arbitration was a condition precedent to an enforceable right, and those where it was merely agreed upon as a collateral term of the contract, operating to create a right but not a condition precedent. *Viney v. Bignold* (1887) L. R. 20 Q. B. Div. 172. Some courts construed the doctrine of *Scott v. Avery, supra,* to be applicable only to agreements providing for the arbitration of a dispute as to a particular fact, but after a period of confusion the law is now settled in England that agreements providing for the arbitration of all disputed facts are valid. *Trainor v. Phoenix Fire Ass. Co. Ltd.* (1892, Q. B.) 65 L. T. 825; *Woodall v. Pearl Ass. Co. Ltd.* [1919, C. A.] 1 K. B. 593. However, this confusion left its mark on the courts in this country, with the result that there are a few decisions which hold that a clause making arbitration of any possible dispute a condition precedent is void. *Whitney v. National Masonic Acc. Ass'n.* (1893) 52 Minn. 378, 54 N. W. 184. The weight of authority distinguishes, as in England, conditions precedent and collateral agreements to arbitrate, holding the former a valid bar to an action on the contract and the latter no bar at all. *Graham v. Ins. Co.* (1907) 75 Ohio St. 374, 79 N. E. 930; *Memphis Trust Co. v. Brown-Ketchum Iron Works* (1909, C. C. A. 6th) 166 Fed. 398. To constitute a valid bar the parties must make arbitration a condition precedent either expressly or by necessary implication in fact. *Mecartney v. Guardian Trust Co.* (1918) 274 Mo. 224, 202 S. W. 1131. In England a further recognition of the benefits of settling disputes by arbitration was made by statute giving courts the discretionary power of staying actions on contracts until the *collateral* arbitration agreement has been performed. (1889) 52 & 53 Vict.

c. 49, sec. 4. This statute accords with the decisions of England in whittling down the common-law doctrine. See *In re Berkovitz v. Arbib & Houlberg* (1921) 230 N. Y. 261, 276, 130 N. E. 288, 292. The instant case, in refusing to recognize the validity of an arbitration clause containing a condition subsequent, appears to have set a limit upon this process of qualification.

CONTRACTS—OPTIONS—NOTICE OF ELECTION EXERCISED BY MAILING LETTER.—The plaintiff company had an option to renew a contract for the defendants' services provided it gave the defendants notice of its election. A letter containing the notice was posted in due time, but was never received by the defendants. *Held,* that the option was sufficiently exercised by the mailing of the letter. *Shubert Theatrical Co. v. Rath* (Feb. 16, 1921) U. S. C. C. A. 2d, Oct. Term, 1920, No. 170.

Options have been interpreted both as conditional contracts and continuing offers, though it has been pointed out that there is a distinction between an option and an offer. Langdell, *Equitable Conversion* (1904) 18 HARV. L. REV. 11, 12. Whichever view one adopts, the legal relations created are the same. The optionee has the power to bind the optionor upon the terms and conditions of the contract. Giving of notice may be a condition precedent to the optionee's rights under the contract or it may be a prescribed manner of acceptance. In leasing contracts, with option to renew, notice has generally been held to be a condition precedent to the right to renew, and this condition is fulfilled only upon the receipt of the notice by the lessor. *Bluthenthal v. Atkinson* (1910) 93 Ark. 252, 124 S. W. 510; *Doepfner v. Bowers* (1907, Sup. Ct.) 55 Misc. 561, 106 N. Y. Supp. 932. This rule has been generally followed in other option contracts where notice is expressly required. Mere mailing of the notice is not sufficient, except when the party to be notified conceals himself or in some other way tries to avoid the service of the notice. *Haldane v. United States* (1895, C. C. A. 8th) 69 Fed. 819; *Wheeler v. McStay* (1913) 160 Iowa, 745, 141 N. W. 404, L. R. A. 1915 B, 181, note. So, in insurance contracts requiring notice of cancellation or of assessments, notice means actual notice, and the mere posting of the letter is not sufficient. *Farnum v. Phoenix Ins. Co.* (1890) 83 Calif. 246, 23 Pac. 869; *German Union Fire Ins. Co. v. F. J. Clarke Co.* (1911) 116 Md. 622, 82 Atl. 974, 39 L. R. A. (N. S.) 829, note. This result seems to be the most logical and just, since the parties by agreement have conditioned the acquirement or loss of contract rights upon the giving of the notice. *Hoban v. Hudson* (1915) 129 Minn. 335, 152 N. W. 723, L. R. A. 1916 B, 1114, note. The instant case reaches a conclusion inconsistent with the weight of authority in reasoning that the notice is the acceptance of a continuing offer in the contract. The court overlooks the fact that "notice" is expressly required, and even though the offer was made by post, an inference is not warranted that the defendants consented to be served with the notice by the mere posting of the letter. *Hoban v. Hudson, supra.*

CONTRACTS—LANDLORD AND TENANT—EFFECT OF THE NATIONAL PROHIBITION LAW ON LEASES.—The plaintiff sued for rent under a lease which provided that the demised premises be used for a "café" only. The defendant contended that the Eighteenth Amendment absolved him from liability under the lease. *Held,* that the plaintiff could recover. *Proprietor's Realty Co. v. Wohltmann* (1921, N. J. L.) 112 Atl. 410.

In a similar case, suit was brought to recover rent under a lease stipulating that the demised premises were to be used for the sole purpose of carrying on a "saloon" business. The defendant lessee pleaded the Eighteenth Amendment as a defence. *Held,* that the plaintiff could not recover. *Doherty v. Monroe Eckstein Brewing Co.* (1921, N. Y. Sup. Ct.) N. Y. L. J. April 18, 1921.

It has long been a settled rule that impossibility of performance arising from a change in the law exonerates a promisor. Anson, *Contract* (Corbin's ed. 1919) 433; where, however, the courts have tried to determine the degree of hardship of performance necessary to discharge a lessee, there is conflict. Some courts hold that where premises are leased for saloon purposes only, the lessee is not absolved from liability under a subsequently enacted prohibition statute. *O'Byrne v. Henley* (1909) 161 Ala. 620, 50 So. 83; *Hecht v. Acme Coal Co.* (1911) 19 Wyo. 18, 113 Pac. 788. Others hold that even where the premises are leased for saloon and hotel purposes the lessee is absolved. *Kahn v. Wilhelm* (1915) 118 Ark. 239, 177 S. W. 403; *Kaiser v. Zeigler* (N. Y. Sup. Ct.) N. Y. L. J. May 2, 1921. The most logical rule, however, seems to be that the court should first inquire whether the use is permissive or restrictive. *Brunswick-Balke-Collender Co. v. Seattle Brewing etc. Co.* (1917) 98 Wash. 12, 167 Pac. 58. If permissive the lessee will not be discharged. *Security Bank v. Claussen.* (1919, Calif. App.) 187 Pac. 140. But if restrictive, the court should then further determine whether the business is merely made less valuable, in which case the lessee must still perform, or whether it is totally destroyed, in which case the lessee should be discharged. *Conklin v. Silver* (1919, Iowa) 174 N. W. 573; *The Stratford Inc. v. Seattle Brewing Co.* (1916) 94 Wash. 125, 162 Pac. 31. The instant New Jersey case decides that a "café" means a restaurant and saloon, and hence the rule that the business has merely become less valuable is applied; while the New York case decides that the "saloon" business is totally destroyed by the National Prohibition Act and hence the rule of total impossibility is applied. It is to be noted, however, that it is not the lessee's duty under the lease (i. e. to pay rent) which has become impossible to perform, but the condition precedent, which the courts imply, that the premises were to be used for a certain purpose.

CRIMINAL LAW—PROCEDURE—DOUBLE JEOPARDY—NEW TRIAL AFTER CONVICTION OF DEFENDANT.—The defendant was indicted for receiving stolen goods. At the same time, but in a separate indictment, another prisoner was charged with stealing and receiving the same goods. The two men were tried jointly and convicted. The defendant appealed on the grounds of "mis-direction and mis-reception of evidence." After notice of appeal it was discovered that the indictments were several. *Held,* that the trial was a nullity and a *venire de novo* should be awarded. *Rex v. Crane* (1920, Cr. App.) 124 L. T. R. 256.

The instant case suggests the interesting and much controverted question as to the extent of the power of a court to order a new trial in a criminal case after conviction. Unquestionably the early English law was to the effect that a court had no such power. It was argued that the defendant would be placed in double jeopardy. See *King v. Mawbey* (1796, K. B.) 6 T. R. 620, 638; 1 Chitty, *Criminal Law* (1819) secs. 653, 654. But, as in the instant case, a distinction was made where the court had no jurisdiction and the trial was a nullity. *Rex v. Fowler* (1821, K. B.) 4 Barn. & Ald. 273. This rule was adopted also in this country in a few early decisions, holding that a new trial could not be granted even on motion of the accused. *United States v. Gibert* (1834, C. C. 1st) 2 Sumner, 19. These cases, however, have been overruled in all jurisdictions in the United States either by decision or by statute, and a new trial may now be granted everywhere on motion of the defendant. *United States v. Keen* (1839, C. C. 7th) 1 McLean, 429; *People v. Grill* (1907) 151 Calif. 592, 91 Pac. 515. In England since 1907 "motions for a new trial and the granting thereof" are abolished. See Criminal Appeal Act, 1907, sec. 20. The only possibility now is that the court might grant a new trial *ex proprio motu.* The English courts have refused to do this, even where the defendant has appealed. *Rex v. Dyson* (1908) 1 Cr. App. 13; *Rex v. Dibble* (1908) 1 Cr. App. 155. They still recognize the

common-law exception where the first trial is a nullity. *Rex v. Baker* (1912) 7 Cr. App. 217; *Rex v. Golathan* (1915) 11 Cr. App. 79. In the few cases which have arisen in this country, the decisions are in conflict as to the power of the court to grant a new trial *ex proprio motu*, although all courts will set aside the judgment where the defendant has done no affirmative act. A few courts argue that the defendant has everything to gain and nothing to lose by a new trial. *Commonwealth v. Gabor* (1904) 209 Pa. 201, 58 Atl. 278. A very striking refutation of this theory is found in a case where the new trial resulted in an increase of the sentence from six months to five years. *State v. Snyder* (1889) 98 Mo. 555, 12 S. W. 369. Other courts hold it beyond their power to grant a new trial *ex proprio motu*. *State v. Williams* (1886) 38 La. Ann. 969; *People v. McGrath* (1911) 202 N. Y. 445, 96 N. E. 92. In the latter case the new trial was granted after the defendant asked to withdraw his motion. American courts, however, unanimously hold that a new trial may be granted by the court of its own motion on the theory that the accused has waived his defense of double jeopardy, where the defendant has appealed from the conviction and the judgment has been reversed. *Stroud v. United States* (1919) 251 U. S. 15, 380 (motion for rehearing), 40 Sup. Ct. 50; *Harvey v. State* (1901, Tex. Cr. App.) 64 S. W. 1039. The adoption of this rule by the English courts would seem an effective means of remedying a mode of procedure which the English judges recognize as inadequate.

EQUITY—JURISDICTION WHERE RES IS IN FOREIGN STATE.—The defendant, a resident of California, bought from the plaintiff, a resident of New York, a half interest in a thoroughbred stallion. The defendant was to have possession and use of the stallion in California during the seasons of 1919 and 1920, and the plaintiff was to have him for use in Kentucky during the seasons of 1921 and 1922. Upon the opening of the season of 1921 the defendant refused to abide by the agreement. The plaintiff brought this suit in New York, personal service of the summons having been made upon the defendant in that state. *Held*, that a mandatory injunction should be granted requiring the defendant to ship the stallion to Kentucky; and that a receiver should be appointed with power to proceed to California, and take appropriate steps, including the invoking of the aid of the courts, to gain possession of the animal and ship him to the plaintiff's stock farm. *Madden v. Rosseter* (1921, N. Y. Sup. Ct.) 114 Misc. 416, 187 N. Y. Supp. 462.

The orthodox doctrine, that equity can enforce its decrees only by personal coercion of the defendant, expressed in the formula *aequitas agit in personam*, needed qualification at an early date by reason of the development of the writs of assistance and sequestration. See Cook, *Powers of Courts of Equity* (1915) 15 COL. L. REV. 106; Huston, *Enforcement of Decrees in Equity* (1915) 78-83. By modern legislation power is generally given to courts of equity to grant decrees *in rem;* but such statutes, of course, have no extra-territorial effect. Where a subject-matter, or res, in another jurisdiction is concerned, a court of equity may entertain the suit only in cases where it has personal jurisdiction of the defendant and where effective relief may be given by a decree *in personam*. See 69 L. R. A. 673-697, note. In such cases the decree is made effectual by ordering the defendant to do or to refrain from certain acts toward the res, and the res itself is thus ultimately but *indirectly* affected. 4 Pomeroy, *Equity Jurisprudence* (4th ed. 1919) secs. 1318, 1437. Where the defendant would be required to go into a foreign jurisdiction and there do affirmative acts, relief may be denied. *Port Royal Ry. v. Hammond* (1877) 58 Ga. 523; see Beale, *The Jurisdiction of Courts over Foreigners* (1913) 26 HARV. L. REV. 293. This is on the ground of expediency in such cases, since interference in a foreign sovereignty is undesirable, and since theoretically the decree would become

unenforceable upon the departure of the defendant, though the latter difficulty may be eliminated by requiring him to act by agent or by requiring bond. The more recent tendency seems to be to attach less weight to these difficulties. See *Salton Sea Cases* (1909, C. C. A. 9th) 172 Fed. 792; *Vineyard Land and Stock Co. v. Twin Falls Co.* (1917, C. C. A. 9th) 245 Fed. 9; see NOTES (1917) 31 HARV. L. REV. 646; COMMENTS (1917) 27 YALE LAW JOURNAL, 946. Consistently with the doctrine that equity acts *in personam*, a court having personal jurisdiction of a defendant may appoint a receiver of his property in another jurisdiction. *Stewart v. Laberee* (1911, C. C. A. 9th) 185 Fed. 471. The decree operates *in personam*, and only upon the parties to the suit, who are rendered liable for contempt in case they interfere in any way with the receiver's possession of the property or his attempts to gain possession through the assistance of the courts of the *locus rei sitae*. *Langford v. Langford* (1835) L. J. (N. S.) 5 Ch. 60; *Schindelholz v. Cullum* (1893, C. C. A. 8th) 55 Fed. 885; *Maudslay v. Maudslay* [1900] 1 Ch. 611. The instant case is interesting as illustrative of the lengths to which a court of equity will go in order to give really effective relief.

EVIDENCE—ADMISSIBILITY OF CONDUCT AS PART OF THE RES GESTAE.—The defendant's chauffeur ran over and injured the plaintiff, a boy of five. The plaintiff brought this action and on the issue of negligence offered in evidence the fact that immediately after the accident the chauffeur jumped from the truck and ran away. The trial court admitted the evidence and the defendant excepted. *Held*, that the admission of this evidence was error, because the chauffeur's conduct was not part of the res gestae. *Molino v. City of New York* (1921, App. Div.) 186 N. Y. Supp. 742.

Such evidence, however interpreted, is not admissible against the defendant as an admission, as the chauffeur had no authority so to prejudice his master. *Douglas v. Holyoke Mach. Co.* (1919) 233 Mass. 573, 124 N. E. 478; *Cross v. Coal Co.* (1916, Mo. App.) 186 S. W. 528. After the servant had testified to the contrary, this evidence would be admissible, but only to contradict the servant. *Louisville Ry. v. Davis* (1908) 32 Ky. L. R. 580, 106 S. W. 304; see *Loose v. Deerfield* (1915) 187 Mich, 206, 209, 153 N. W. 913, 914. If the servant's conduct could reasonably be interpreted as equivalent to a contemporaneous statement by him that he was not looking ahead or that he thought the child would get out of the way, by the weight of authority it would be admissible as a part of the res gestae. *Barrett v. Chicago Ry.* (1920, Iowa) 175 N. W. 950; *Chellis Realty Co. v. Boston Ry.* (1919, N. H.) 106 Atl. 742; *Louisville Ry. v. Broaddus' Adm'r.* (1918) 180 Ky. 298, 202 S. W. 654. In criminal prosecutions evidence of flight by the accused is admissible as directly relevant to show guilt. *State v. Rodrigues* (1917) 23 N. M. 156, 167 Pac. 426; *Windom v. State* (1917) 19 Ga. App. 452, 91 S. E. 911; 1 Wigmore, *Evidence* (1904) sec. 276. (It is difficult to see how it would be less relevant to show negligence under proper circumstances.) In the aspect least favorable to the plaintiff the running away is equivalent to a statement by the chauffeur that he believed he was at fault; the mere fact that the statement was in the form of an opinion should not make it inadmissible if all the elements necessary to make it a part of the res gestae were present. *Cromeenes v. San Pedro Ry.* (1910) 37 Utah, 475, 503, 109 Pac. 10, 20; *Cross Lake Co. v. Joyce* (1897, C. C. A. 8th) 83 Fed. 989. Where the spontaneous exclamation theory is not accepted, the necessary elements in this class of cases are usually stated to be: (1) an act independently admissible; (2) statement made contemporaneously with the act; (3) such statement relating to and tending to explain or elucidate the act. *Lund v. Tyngsborough* (1851) 63 Mass. 36; *Comstock's Adm'r. v. Jacobs* (1915) 89 Vt. 133, 143, 94 Atl. 497, 501. No definite rule has been laid down by the courts as to the meaning of "contemporaneous." It has been held improper in New York to admit statements made a few seconds

after the occurrence. *Brauer v. New York Ry.* (1909) 131 App. Div. 682, 116 N. Y. Supp. 59. On the other hand a comparatively recent Washington case held that it was proper to admit statements made by an employee about two hours after the accident. *Walters v. Spokane Ry.* (1910) 58 Wash. 293, 108 Pac. 593. Under the spontaneous exclamation theory the running away in the instant case might have been considered as equivalent to a statement made under the influence of nervous excitement induced by a startling occurrence. In this class of cases it is not necessary that the statement be made contemporaneously with the act. *St. Laurent v. Manchester Ry.* (1915) 77 N. H. 460, 92 Atl. 959; *Lambrecht v. Schreyer* (1915) 129 Minn. 271, 152 N. W. 645. Whether a given statement under the particular circumstances was made contemporaneously with the act or under the stress of nervous excitement, should be left largely to the discretion of the trial court. See *Washington-Virginia Ry. v. Deahl* (1919) 126 Va. 141, 147, 100 S. E. 840, 842; *Lambrecht v. Schreyer, supra.* It is submitted, therefore, that the ruling of the trial court in the instant case should have been permitted to stand.

TRUSTS—RESULTING TRUSTS IN MORTGAGES.—The plaintiff mortgaged land to a stranger. The land was sold on a foreclosure sale to an investment company. The plaintiff not having the means to redeem the land, the defendant advanced a portion of the money. There was no evidence as to the intention of the parties at the time of the redemption respecting the interest, if any, which the defendant was to take. The plaintiff brought a bill for a decree quieting title in himself. The lower court, on the theory of a resulting trust, decreed that the defendant had title to an undivided share of the land, proportional to the sum which he had advanced. *Held,* reversing the lower court, that a decree should be entered quieting title to all of the land in the plaintiff. *Cochran v. Cochran* (1921, Wash.) 195 Pac. 224.

Under the facts of this case there may well have been an intention by the parties to regard the advancement made by the defendant as a mere loan. The decision was not based on this ground, however. In Washington a mortgage is a mere lien upon the realty and the mortgagor retains the legal title even after the foreclosure sale and until his period of redemption expires. The decision rests upon the theory that, where property is taken in the name of one person and the consideration is paid by another, a resulting trust comes into existence only where a legal title passes as a result of the purchase. Under the common-law theory of a mortgage, whereby the legal title passes to the mortgagee, a resulting trust arises under such circumstances. *Kelly v. Jenness* (1862) 50 Me. 455; *Tillman v. Murrell* (1898) 120 Ala. 239, 24 So. 712. Where a mere equitable claim is bought by one and the title taken in the name of another, a resulting trust does not arise, there "being no legal title to which the equitable title can attach itself." *Livingston v. Murphy* (1905) 187 Mass. 315, 72 N. E. 1012; *Boyer v. Floury* (1888) 80 Ga. 312, 5 S. E. 63; *contra, Munch v. Shabel* (1877) 37 Mich. 166. Since there can be a trust of an equitable interest, it is difficult to see the necessity for the transfer of a legal interest to create a resulting trust. Under the lien theory of mortgages, where a resulting trust operates to make the mortgagor the beneficiary and so to extinguish the mortgage, the courts allow such a trust to be set up. *Smith v. Balcom* (1897) 24 App. Div. 437, 48 N. Y. Supp. 487. And where to set up a resulting trust of a lien created by mortgage will make a stranger the trustee and the person furnishing the consideration the mortgagee, the trust is upheld. *Hanrion v. Hanrion* (1906) 73 Kan. 25, 84 Pac. 381; *In re Tobin's Estate* (1909) 139 Wis. 494, 121 N. W. 144. In the instant case the fact that if a resulting trust is set up the trustee will be the mortgagor, should be immaterial. He holds the legal title in his own interest and the lien created by the mortgage only in his capacity as a passive trustee. He is a mere conduit through which the legal powers represented by the lien pass to the one paying the consideration. The purposes of a resulting trust—to

avoid unjust enrichment and to carry out the presumed intention of the parties—are as necessary and are as fully accomplished in such a case as if the legal title to the land had passed. Therefore it would seem that a resulting trust in a mortgage in a lien theory state might well be sustained.

WILLS—CONSTRUCTION—ESTATE IN FEE CREATED BY DEVISE WITH UNLIMITED POWER OF DISPOSAL DURING LIFE.—A testator devised his real and personal property to a woman to be used by her during her life with full powers of alienation, and upon her decease without issue whatever remained unused was to revert to the testator's estate. *Held,* that the devisee takes an estate in fee. Sharpe and Clark, JJ., *dissenting. Gibson v. Gibson* (1921, Mich.) 181 N. W. 41.

In the construction of a will the intention of the testator, as expressed by the words of the entire instrument, prevails, provided it be within the rules of law, one of which is that no limitation over after a fee simple estate is valid. *Smith v. Bell* (1832, U. S.) 6 Pet. 68. Due to the vague phraseology of wills, the cases often are confusing as to the estate devised, and the intention of the testator is exceedingly difficult to determine. For the purpose of analysis, the decisions may be classified as follows: (1) "To A for life with unrestricted power of disposal." Here a life estate is expressly devised, and by the great weight of authority, the addition of an unrestricted power of disposal does not enlarge the estate to a fee. Any remainders over are therefore valid. *Steiff v. Seibert* (1905) 128 Iowa, 746, 105 N. W. 328, 6 L. R. A. (N. S.) 1186, note; but see *contra, Barnett v. Blain* (1919) 126 Va. 179, 101 S. E. 239. (2) "To A with restricted power of disposal." This is a general devise, but the limited power of alienation shows an intention to pass less than a fee and the devisee therefore takes only a life estate. *Gadd v. Stoner* (1897) 113 Mich. 689, 71 N. W. 1111. (3) "To A with unrestricted power of disposal." Here any implication of a life estate is destroyed by the unlimited power of disposal, and the devisee takes a fee simple estate. *Henderson v. McCowan* (1920, N. J. Eq.) 110 Atl. 517. But a few cases hold that where the testator has provided a remainder over after such a general devise, his intention is to give the first devisee only a life estate. *Smith v. Bell, supra; Robinson v. Finch* (1898) 116 Mich. 180, 74 N. W. 472. Statutes in most states specifically provide that a general devise without words of inheritance will pass a fee unless it clearly appears that the intention of the testator was to create a lesser estate. Mich. Comp. Laws, 1915, sec. 11818; see *Bilger v. Nunan* (1911, C. C. D. Ore.) 186 Fed. 665. (4) "To A with unrestricted power of disposal for her natural life." Where there is no remainder over, the devisee takes a fee, since the courts are opposed to partial intestacy. *In re Weien's Will* (1908) 139 Iowa, 657, 116 N. W. 791, 18 L. R. A. (N. S.) 463, note; *In re Hardaker's Estate* (1902) 204 Pa. 181, 53 Atl. 761. Where there is a remainder, there seem to be two distinct lines of cases. Under one theory the devisee gets only a life estate and the remainder over is valid. Thus in effect there is an express life estate with an unrestricted power of disposal and a remainder over. *Walker v. Pritchard* (1887) 121 Ill. 221, 12 N. E. 336; *Perkinson v. Clarke* (1908) 135 Wis. 584, 116 N. W. 229; see Kales, *Future Interests* (2d ed. 1920) sec. 168. The other view has evidently developed as a result of the statutes which raise a presumption of an estate in fee. The courts hold that in the above limitation it does not *clearly* appear that the testator intended to restrict the devisee to a life estate, since even were the devise expressly in fee, the devisee would have no greater powers. *Roberts v. Lewis* (1894) 153 U. S. 367, 14 Sup. Ct. 945; *Bilger v. Nunan, supra; Luckey v. McCray* (1904) 125 Iowa, 691, 101 N. W. 516. The instant case follows this latter view which, it seems, fails to take into account the intention of the testator as it appears from the entire will. The reasoning would apply as well to an express life estate with unrestricted power of disposal and remainder over.