RECENT CASE NOTES

BANKS AND BANKING—"LINE OF CREDIT" CONTRACTS—SPECIAL DAMAGES FOR BREACH BY BANK.—The plaintiff bank agreed with the defendants, prospective investors in a corporation, that it would make advances up to $25,000 to the corporation when organized. In reliance on this agreement, the defendants subscribed for stock, deposited $5,000 for the corporation in the bank, and launched the enterprise. The bank refused to give credit in the absence of a personal guaranty from the defendants. Having obtained it, they advanced $14,000, and then refused to continue. Upon the corporation's insolvency the bank realized all it could from the assets, and then sued the defendants on their guaranty. The defendants pleaded affirmatively the bank's breach of the contract to loan without the guaranty, and set up damages, greater than those asked by the plaintiff, based on the loss of prospective profits. *Held*, that the plaintiff's complaint should be dismissed. *Merchants' Bank of Canada v. Sims* (1922, Wash.) 209 Pac. 1113.

Agreements to lend money are generally not specifically enforceable on the ground that there is no mutuality of remedy. See (1918) 27 YALE LAW JOURNAL, 1083; (1918) 18 COL. L. REV. 491. And where the action is at law, unless special damages are proved, the recovery will be limited to the difference between the contract interest rate and the prevailing market rate. *Coles v. Lumber Co.* (1909) 150 N. C. 183, 63 S. E. 736, L. R. A. 1916 F, 506, note; 29 L. R. A. (N. S.) 194, note. Bank "line of credit" agreements are themselves a recent and rapidly developing special class of such contracts devised to attract or promote business. They may take the form of offers by a bank to extend a "line of credit" to the offeree provided that he keep average deposits of 20% of the amount of the promised advances; or they may consist of promises to loan which so induce the promisee to make commitments in reliance as to give the making of such commitments the character of both acceptance and consideration. Whether or not there is a binding contract depends upon the facts of a particular case. *Farabee-Treadwell Co. v. Union and Planter's Bank* (1916) 135 Tenn. 208, 186 S. W. 92; *Murphy v. Hanna* (1917) 37 N. D. 156, 164 N. W. 32 (advances by an individual); *contra: Swindell & Co. v. First Nat. Bank* (1905) 121 Ga. 714, 49 S. E. 673. In the instant case such a contract existed. The consequences of finding such a contract are important only when lost profits are recoverable as special damages for the breach. *Cf. Murphy v. Hanna, supra; Pugh v. Jackson* (1913) 154 Ky. 649, 157 S. W. 1082. Theoretically the loss of profits contemplated by the parties, if a proximate result of the breach, are recoverable, yet in practice such profits are generally held to be speculative and remote, difficult or incapable of proof. *Allied Silk Mfrs. v. Erstein* (1915) 168 App. Div. 283, 153 N. Y. Supp. 976; *aff'd.* (1921) 195 App. Div. 366, 186 N. Y. Supp. 295. But this objection is being undermined in other types of contracts. *Shelly v. Eccles* (1922, C. C. A. 8th) 283 Fed. 361 (damages allowed for contemplated advance in the price of sugar-cane land due to the erection of an adjoining refinery). And perhaps it is the same tendency which now permits the recovery of "gains prevented" or "losses incurred" in suits on contracts to loan money, since in such cases it is contemplated that the customer shall make commitments which he cannot fulfill without the capital promised by the bank. *Holt v. United Security Co.* (1909) 76 N. J. L. 585, 72 Atl. 301; *Norris Lumber Co. v. Harris* (1915, Tex. Civ. App.) 177 S. W. 515. Perhaps the line of division explaining conflicting cases which announce the preceding principle may be

between contracts where the business has been carried on long enough to make an adequate basis for calculation of future profits, and those where it has not. The application of this rule of special damages to the "line of credit" contract is logical, although unwelcome to bankers. *Cf.* (1918) 18 COL. L. REV. 170.

CARRIERS—LIMITATION OF LIABILITY—INTERPRETATION OF THE SECOND CUMMINS AMENDMENT.—The defendant express company published a schedule of rates based upon an agreed valuation of goods shipped, and filed it with the Interstate Commerce Commission. The plaintiff shipped goods at the lower rate but did not sign the receipt, which stipulated that the rate paid was based upon an agreed valuation. The plaintiff sued for the full value of the goods which were damaged in transit. *Held,* that recovery was limited to the agreed valuation. *American Ry. Express Co. v. Lindenburg* (1923, U. S.) 43 Sup. Ct. 206.

The efforts of carriers to avoid their strict common-law liability met with varying success in the various jurisdictions resulting in much confusion. *Southern Pacific Co. v. Crenshaw* (1909) 5 Ga. App. 675, 63 S. E. 865; see (1917) 26 YALE LAW JOURNAL, 611; (1922) 32 *ibid.* 85. The Carmack Amendment, Act of June 29, 1906 (34 Stat. at L. 584, 595) to the Interstate Commerce Act brought all contracts for interstate shipments under one federal law, permitting the carrier to limit the amount recoverable to an agreed valuation where the shipper had chosen a lower or "released" rate. *Adams Express Co. v. Crominger* (1913) 226 U. S. 491, 33 Sup. Ct. 148; *Pierce Co. v. Wells Fargo & Co.* (1915) 236 U. S. 278, 35 Sup. Ct. 351. The latter decision was severely criticized. NOTE AND COMMENT (1915) 13 MICH. L. REV. 590. Almost immediately thereafter Congress passed the first Cummins Amendment, Act of March 4, 1915 (38 Stat. at L. 1196), making the carrier liable irrespective of any device tending to limit liability. This in turn was followed by the second Cummins Amendment, Act of August 9, 1916 (39 Stat. at L. 441), interpreted by the Supreme Court for the first time in the instant case. According to its terms the provisions of the first Amendment do not apply to property concerning which the carrier is "expressly authorized" by the Interstate Commerce Commission to maintain rates "dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property." In the instant case the tariff of the defendant company filed with the commission was in conformity with released rate schedules, authorized by the Commission for certain other express companies. The Court presumed such filing to be evidence of due authority, although there was no authorization expressly given to the defendant. The Court also held that a shipper was bound by mere acceptance of a bill of lading, even though he had not signed it, basing its decision upon a recent report of the Commission. *In the Matter of Bills of Lading* (1919) 52 I. C. C. Rep. 671, 681. The decision apparently restores the Carmack Amendment, and in effect repeals the first Cummins Amendment in so far as it relates to released rates. The chief objection to the former law, namely, that the differential between rates limiting and those not limiting the carrier's liability far exceeds the additional insurance risk to the carrier, is removed by the approval of the Commission to the presently existing released rate schedules. The effect of this decision is to educate the shipper on the operation of released rates by sad experience. If the rates for the higher valuations are unfair, shippers may combine to petition the Commission to act in that regard.

CRIMINAL LAW—HOMICIDE COMMITTED IN THE COURSE OF A CONSPIRACY.—Five men conspired to rob a bank. After being discovered one of them, in order to make his escape, shot and killed a pursuer. The trial court charged that if the attempted escape was part of a common plan that involved shooting if necessary anyone who might attempt to prevent such plan, all would be equally

guilty with the one who did the killing. *Held,* that this instruction was correct. *Burns v. State* (1922, Ind.) 136 N. E. 857.

Even unintentional homicide committed in the perpetration of a felony is murder. *People v. Sullivan* (1903) 173 N. Y. 122, 65 N. E. 989; 63 L. R. A. 353, note; (1922) 36 HARV. L. REV. 222. Where the homicide is committed by one conspirator in the course of the conspiracy, all the co-conspirators are equally liable provided the killing is a natural and probable consequence of the conspiracy. *Powers v. Commonwealth* (1902) 114 Ky. 237, 70 S. W. 644 (intimidation of legislature); *State v. Doty* (1916) 94 Ohio St. 258, 113 N. E. 811 (violence to compel cessation of work); *Matthews v. State* (1918) 16 Ala. App. 514, 79 So. 507 (use of gun to compel submission); *People v. Andrae* (1920) 295 Ill. 445, 129 N. E. 178 (burglary); *State v. Roselli* (1921) 109 Kan. 33, 198 Pac. 195 (robbery). On the other hand, merely being a party to the agreement does not make the conspirator liable for the homicide of his confederate where the conspiracy entails no probability of danger to human life. *Lamb v. People* (1880) 96 Ill. 73 (disposition of stolen goods); *State v. Furney* (1889) 41 Kan. 115, 21 Pac. 213 (assault); *People v. Koharsky* (1913) 177 Mich. 194, 142 N. W. 1097 (whipping). If the killing was a natural and probable consequence, it is no defense for the co-conspirators to show that the homicide was not intended or contemplated, or even that it was expressly forbidden. *People v. Vasquez* (1875) 49 Calif. 560; *People v. Lawrence* (1904) 143 Calif. 148, 76 Pac. 893; *Henry v. State* (1922) 151 Ark. 620, 237 S. W. 454. But the homicide must have been committed in attempted furtherance of the common design. *People v. Garippo* (1920) 292 Ill. 293, 127 N. E. 75. Responsibility does, however, extend to collateral acts growing out of the common design, including acts done for the purpose of escaping detection or arrest. *McMahon v. People* (1901) 189 Ill. 222, 59 N. E. 584; *Romero v. State* (1917) 101 Neb. 650, 164 N. W. 554. But where the conspiracy did not include a plan for escape, liability for the acts of co-conspirators ceases with the completion or abandoment of the crime. *People v. Marwig* (1919) 227 N. Y. 382, 125 N. E. 535. The instant case states the law correctly.

DAMAGES—CONVERSION OF BANK BOOK.—The plaintiff deposited a bank book with the defendant as collateral security on a note which he had indorsed. At maturity he refused to indorse a renewal of the note, demanding a return of his bank book. The defendant refused, whereupon the plaintiff sued in trover and recovered fifteen cents damages. *Held,* that the plaintiff should recover the full value of the deposit plus interest from the time of conversion. *Stebbins v. North Adams Trust Co.* (1922, Mass.) 136 N. E. 880.

It is well settled that for the conversion of a negotiable instrument, the measure of damages is *prima facie* its face value. *Revert v. Hesse* (1920) 184 Calif. 295, 193 Pac. 943; *Peerless Fire Ins. Co. v. Barcus* (1921, Tex. Civ. App.) 227 S. W. 368. But in the case of a non-negotiable evidence of debt, such as a bank book, the courts have had some difficulty. On the one hand it has been held that the measure of damages is the actual damage suffered, and not the face value of the deposit. *Newman v. Munk* (1901, City Ct.) 36 Misc. 639, 74 N. Y. Supp. 467. This is on the ground that since the owner does not by the conversion of the book lose the right to his deposit, he should not recover its value. On the other hand is what seems to be the sounder view, namely that the full value of the deposit may be recovered. *Wegner v. Second Ward Savings Bank* (1890) 76 Wis. 242, 44 N. W. 1096. According to this, although the depositor still retains the right evidenced by the book, by the conversion he also gets a power, as in other cases of conversion, to transfer it to the converter even against the latter's will, and to create in himself a right against the converter for its value. This, the view of the instant case, is supported by cases of other

non-negotiable instruments. *Hetrick v. Smith* (1912) 67 Wash. 664, 122 Pac. 363 (account-book); *Stafford v. Lang* (1903) 25 R. I. 488, 56 Atl. 684; *Mut. Ins. Co. v. Allen* (1904) 212 Ill. 134, 72 N. E. 200 (insurance policies); *Canadian Bank v. McCrea* (1882) 106 Ill. 281 (warehouse receipt); *Ryan v. Young* (1906) 147 Ala. 660, 41 So. 954 (mortgage). Nor does the result seem unfair. The plaintiff in the instant case might, it is true, by filing an indemnity bond have compelled the bank to pay him the deposit. 3 Michie, *Banks & Banking* (1913) 2221. But by holding the converter personally liable for the full amount, the burden of collecting from the bank is placed on the wrongdoer, and a certainty of penalty is assured which is not only just, but which should more effectually serve to deter similar wrongdoers in the future. *Cf.* (1920) 29 YALE LAW JOURNAL, 689.

EQUITY—RESCISSION OF INSTRUMENTS—MISTAKE OF LAW.—A died intestate. B and C, his two children, believing that D, the widow, was entitled as dower to a third of the real estate in fee and not merely a life interest as the statute provided (Ill. Rev. Sts. 1921, ch. 41, sec. 1), agreed with D to divide the land in three equal portions, each taking title to one portion in fee. Quit claim deeds to this effect were executed and delivered. Subsequently B and C learned of their error, and sought rescission of the deeds so that the law of inheritance might control. *Held,* that the mistake being one of law, the relief should be denied. *Holbrook v. Tomlinson* (1922) 304 Ill. 579, 136 N. E. 745.

The distinction between mistake of fact and mistake of law is not readily appreciable, and originally none was made whether relief was sought at law, upon principles of quasi-contract, or in equity. *Simpson v. Vaughan* (1739, Ch.) 2 Atk. 31; *Hewer v. Bartholomew* (1598, Q. B.) Cro. Eliz. 614; Woodward, *Quasi-Contracts* (1913) secs. 35, 36. In the nineteenth century, owing to a misapprehension of the doctrine *"Ignorantia juris non excusat"* relief was denied for mistake of law both at law and in equity. *Bilbie v. Lumley* (1802, K. B.) 2 East, 469; *Currie v. Goold* (1817, Ch.) 2 Madd. 163. And the doctrine still persists. *Scott v. Ford* (1904) 45 Or. 531, 78 Pac. 742; *Halloway v. Ward* (1922) 84 Okla. 247, 203 Pac. 217; *contra: Scott v. Board of Trustees* (1909) 132 Ky. 616, 116 S. W. 788; *Park Bros. v. Blodgett & Clapp* (1894) 64 Conn. 28, 29 Atl. 133. In a few jurisdictions the distinction between mistake of law and mistake of fact has been abolished by statute. Woodward, *op. cit.* sec. 39. Where it still remains, numerous exceptions have, however, grown up around mistake of law. NOTES (1922) 22 COL. L. REV. 166; NOTES (1918) 32 HARV. L. REV. 283. Among the more noteworthy situations in which redress may be had are the following: (1) a mutual mistake as to the legal effect of a document. *Canedy v. Marcy* (1859, Mass.) 13 Gray, 373; *contra: Fowler v. Black* (1891) 136 Ill. 363, 26 N. E. 596. (2) A mistake as to private right, where in equity and often in quasi-contract courts grant relief. *Cooper v. Phibbs* (1867) L. R. 2 H. L. 149; *Love v. Phillips* (1922, Utah) 208 Pac. 882; *Varnum v. Town of Highgate* (1892) 65 Vt. 416, 26 Atl. 628. (3) A unilateral mistake of law with knowledge thereof or fraudulent concealment on the part of the other party. *Hudson v. Ins. Co.* (1916) 218 N. Y. 133, 112 N. E. 728. Even an innocent misrepresentation of law has been held sufficient to afford relief. *Ryon v. Wanamaker* (1921, Sup. Ct.) 116 Misc. 91, 190 N. Y. Supp. 250. (4) Mistake as to the law of a foreign state is considered a mistake of fact. *Haven v. Foster* (1829, Mass.) 9 Pick. 112. In England to-day there is little left of the rule, at least so far as concerns relief of an equitable nature. *Daniell v. Sinclair* (1881) L. R. 6 A. C. 181; *Beauchamp v. Winn* (1873) L. R. 6 H. L. 223. Of course in order to have reformation there must have been a definite oral bargain to which the written agreement or conveyance may now be made to conform. *Hunt v. Rousmaniere* (1828, U. S.) 1 Pet. 1. And as for rescission, it must be possible

to put the parties in *statu quo*. *Empire Gas Co. v. Higgins Oil Co.* (1922, C. C. A. 5th) 279 Fed. 977. And in either case intervening rights of *bona fide* purchasers will prevent relief. *Cole v. Fickett* (1901) 95 Me. 265, 49 Atl. 1066; 2 Ames, *Cases on Equity Jurisdiction* (1904) 181, note 1. For the degree of proof required to establish the mistake, see Ames, *op. cit.* 312, note 2. In the instant case there was nothing on which to base reformation; but, as the parties could be put in *statu quo*, if it had not been for the fact that the evidence of the mistake fell below the required standard, the decision might well have been brought within the exception of a mistake as to private right. *Cooper v. Phibbs, supra; Love v. Phillips, supra.*

JURIES—SETTING ASIDE VERDICT BECAUSE OF AFFIDAVITS SHOWING MISTAKE.—The plaintiff sued on a note for some $445. The defendant admitted the execution of the note, but set up a counterclaim. The jury returned a verdict of $250 for the defendant. The plaintiff moved for a new trial and filed affidavits of jurors which stated that it was the intention of the jury merely to reduce the plaintiff's claim against the defendant in the amount of $250. *Held,* (one judge *dissenting*) that the jurors could not impeach their verdict. *Long v. Cassiero* (1922) 105 Ohio St. 123, 136 N. E. 888.

The affidavits of jurors which are offered to set aside a verdict may be divided into three classes. First, those which concern the jurors' subjective state of mind, as where the affidavits disclosed that the jurors misunderstood the charge of the court, or made some mistake concerning the evidence. These affidavits are not accepted. *Beaubien v. Detroit United Ry.* (1921) 216 Mich. 391, 185 N. W. 855; *Valentine v. Pollak* (1920) 95 Conn. 556, 111 Atl. 869. It has been suggested that acceptance of them would be a violation of the parol evidence rule. The verdict of a jury is a written act, like a will or a contract or a judgment reduced to writing, and the negotiations and motives preceding and leading up to the final act of uttering the verdict are immaterial. 4 Wigmore, *Evidence* (1905) sec. 2345; but see Hinton, *Cases on Evidence* (1919) 208, note. Furthermore, to admit them would be contrary to public policy, since it would tempt unsuccessful parties to tamper with juries. Second, those affidavits which concern objective conduct of the jurors, such as offer to show misconduct while in the jury room. These also, are not received for the same reasons. *Beaubien v. Detroit United Ry., supra; Valentine v. Pollak, supra.* But if the alleged misconduct took place outside the jury room they are received by many courts. *United States v. Ogden* (1900, D. Pa.) 105 Fed. 371; *contra: Wyckoff v. Chicago City Ry.* (1908) 234 Ill. 613, 85 N. E. 237. Third, affidavits of jurors which state that the writing handed to the court, or the verdict reported, is not their true verdict. Such a case arose where through a clerical error the verdict returned did not represent the conclusion actually reached. *Paul v. Pye* (1916) 135 Minn. 13, 159 N. W. 1070. This class of affidavits is admitted. *Carlson v. Adix* (1909) 144 Iowa, 653, 123 N. W. 321, 1912A, Ann. Cas. 1204, note. Their admission does not violate the parol evidence rule. Like the case where a deed by mutual mistake does not conform to the original agreement, the verdict may be corrected. 4 Wigmore, *op. cit.* sec. 2355. A clerical error or a mistake of the foreman should not result in a misadministration of justice. The majority, in the instant case, regarded the affidavits as belonging to class one. The dissenting judge properly placed them in class three, since they stated in substance that the verdict handed in did not express the true conclusion of the jury.

MANDAMUS—WRIT TO COMPEL RECOGNITION AS OFFICER OF PRIVATE CORPORATION.—The plaintiff, upon being duly elected to a trusteeship in the defendant corporation, was refused recognition by the acting board of trustees. To a

writ of *mandamus* brought to compel the trustees to accept his election, the corporation answered that the plaintiff having once been guilty of embezzlement was ineligible as the holder of an office expressly required to be filled by a person of good moral character. The plaintiff demurred. *Held*, that the demurrer should be overruled. *Hempstead v. Atchison & Sante Fé Hospital* (1922, Kan.) 210 Pac. 492.

Originally *mandamus* issued only against public officers but it is now settled that it will issue to execute a private right in regard to even the internal affairs of a corporation. See Bailey, *Habeas Corpus and Special Remedies* (1913) sec. 299; 26 Cyc. 353. As for example, to enable one to secure a private corporate office to which he has title. *State v. Goodwin* (1919) 83 W. Va. 255, 98 S. E. 577; *Spahn v. Bielefeld* (1917) 256 Pa. 543, 100 Atl. 987. Or to effect the restoration of a member of a private corporation irregularly removed. *Venezia v. Italian Society* (1907) 74 N. J. L. 433, 65 Atl. 898; *Miller v. Imperial Water Co.* (1909) 156 Calif. 27, 103 Pac. 227. But the writ will not issue against an unincorporated society or association. *State v. Cook* (1912) 119 Minn. 407, 138 N. W. 432, Ann. Cas. 1914B 88, note; *Doyle v. Burke* (1908) 29 R. I. 123, 69 Atl. 362. By the general rule *mandamus* will immediately issue to the holder of a clear *prima facie* title to office, regardless of evidence pointing to his ultimate defeat, and the actual validity of his claim will not be determined in this proceeding. *Stevens v. Carter* (1895) 27 Or. 553, 40 Pac. 1074; *In re Williams* (1908, Sup. Ct.) 57 Misc. 327, 107 N. Y. Supp. 1105; see L. R. A. 1915A 833, note; *contra*: *Longyear v. Hardman* (1914) 219 Mass. 405, 106 N. E. 1012. The reason for this rule lies in the necessity for preserving the special value of *mandamus* as a speedy and effectual remedy. See *Eldodt v. Territory* (1900) 10 N. M. 141, 61 Pac. 105. But, even so, the writ will be granted with discretion, and will not issue in support of claims clearly unjust, although technically regular. *Gross v. Baltimore* (1909) 111 Md. 543, 75 Atl. 346; *State v. Hare* (1916) 78 Or. 540, 153 Pac. 790. In view of the by-laws of the corporation in the instant case, the plaintiff by demurrer confessed his ineligibility. Had he contested the accusation the court might have refused to try the merits on the *mandamus* proceeding, and have granted the writ. For further discussion of mandamus, see (1922) 31 YALE LAW JOURNAL, 554; (1918) 3 CORN. L. QUART. 308; (1915) 3 VA. L. REV. 75; (1915) 63 U. PA. L. REV. 575; Harker, *The Use of Mandamus to Compel Educational Institutions to Confer Degrees* (1911) 20 YALE LAW JOURNAL, 341.

PARTNERSHIP—ORAL AGREEMENTS TO DEAL IN LAND.—The defendant was the owner of timber land. He entered into a verbal agreement with the plaintiff for the formation of a partnership for the development and sale of the timber, the plaintiff to contribute his labor and skill, and the profits to be divided according to an agreed ratio. Subsequently the defendant refused to carry out the agreement. The plaintiff sued to recover damages for the loss of expected profits. The defendant demurred, on the ground that the oral agreement involved the transfer of an interest in land, and was therefore within the Statute of Frauds. *Held*, that the demurrer should be sustained. *Edgcomb v. Clough* (1922, Pa.) 118 Atl. 610.

Oral agreements of this type may be either an agreement for a joint ownership or a true partnership contract. In the former it is usually held that if B orally agrees to purchase land for the joint benefit of himself and A, the transaction involves the creation of an interest in land and is within the statute of frauds, in the absence of proof of confidential relationship, fraud, or misrepresentation. *Fischli v. Dumaresly* (1820, Ky.) 3 A. K. Marsh, 23; *Mancusso v. Rosso* (1908) 81 Neb. 786, 116 N. W. 679. But if A advances a definite proportion of the purchase money, a resulting trust may be declared in his favor to the extent of his interest. *Seiler v. Mohn* (1892) 37 W. Va. 507, 16 S. E. 496; *Skehill v.*

Abbott (1903) 184 Mass. 145, 68 N. E. 37; (1923) 32 YALE LAW JOURNAL, 509 Where, however, a true partnership agreement has been formed to deal in land not yet acquired the contract is by the weight of authority enforceable, even though oral. *Robinson v. Horner* (1911) 176 Ind. 226, 95 N. E. 561; *Hardin v. Hardin* (1910) 26 S. D. 601, 129 N. W. 108; *Buckley v. Doig* (1907) 188 N. Y. 238, 80 N. E. 913; *contra: Seymour v. Cushway* (1898) 100 Wis. 580, 76 N. W. 769; *Raub v. Smith* (1886) 61 Mich. 543, 28 N. W. 676. And even in the courts adopting the minority view, if the transaction is so far completed that all that remains to be done is a division of profits, an action will be entertained to recover a proportionate share. *Huntington v. Burdeau* (1912) 149 Wis. 263, 135 N. W. 845; *Bates v. Babcock* (1892) 95 Calif. 479, 30 Pac. 605. But where, as in the principal case, the agreement itself involves a transfer of land from one partner to the firm, the transaction would clearly seem to be within the statute of frauds. *Burgwyn v. Jones* (1912) 113 Va. 511, 75 S. E. 188; *Pound v. Egbert* (1907) 117 App. Div. 756, 102 N. Y. Supp. 1079. The majority view is sound. A partnership may be created by parol. 1 Rowley, *Modern Law of Partnership* (1916) sec. 212. And once the relation is established, there seems to be no objection to the acquisition and sale of land for profit. See Uniform Partnership Act (1914) secs. 6 (1), 8 (1, 2). Such land is merely a partnership asset, impressed with a trust in favor of the partners. *Miller v. Ferguson* (1907) 107 Va. 219, 57 S. E. 649; *Stitt v. Rat Portage Lumber Co.* (1906) 98 Minn. 52, 107 N. W. 824. And clearly the partnership agreement does not of itself involve the creation or transfer of any interest in land. Difficulty in interpreting the transaction usually arises because the agreement of partnership and the stipulation of dealing in real estate are part of the same transaction. Where evidence of the former is clear its validity should not be affected by the nature of the purpose of organization.

PATENTS—INTEREST OF EMPLOYER IN INVENTION OF EMPLOYEE.—Under a contract with the defendant's predecessor, the plaintiff developed a process for the production of automobile springs, installed six such machines, and obtained a patent thereon. The defendant proceeded to build and install four more of the machines. In a suit for infringement, the defendant filed a cross-bill claiming the equitable title to the patent and sought to compel the plaintiff to convey the legal title. *Held,* that the cross-bill should be dismissed, since the defendant had no equitable title. *Peck v. Standard Parts Co.* (1922, C. C. A. 6th) 282 Fed. 443.

The bare relationship of employer and employee does not ordinarily give the employer an equitable title to a patent taken out by the employee. *Johnson Furnace Co. v. Western Furnace Co.* (1910) 102 C. C. A. 267, 178 Fed. 819. But the employer might have a license to use the invention on the ground of an express or implied contract, or of estoppel. *Gill v. United States* (1896) 160 U. S. 426, 16 Sup. Ct. 322; *Solomons v. United States* (1890) 137 U. S. 342, 11 Sup. Ct. 88. It has been held, however, that the employer has an equitable title to the patent, even without an express contract, where one is employed to devise or perfect a process or machine, because in making the invention the employee is merely doing what he was hired to do. *Wireless Specialty Apparatus Co. v. Mica Condenser Co.* (1921, Mass.) 131 N. E. 307; (1922) 2 BOST. U. L. REV. 44; (1921) 93 CENT. L. JOUR. 276. This view originated by mere *dicta* in the *Gill* and *Solomons* cases, *supra.* The instant case properly points out that the character of employment is of weight in suits based on license, whereas it has no application to those involving equitable title. Macomber, *The Fixed Law of Patents* (2d ed. 1913) 160; Cheever, *The Rights of Employer and Employee to Inventions Made by Either during the Relationship* (1903) 1 MICH. L. REV. 384, 387.

PLEADING—AMENDMENT—NEW CAUSE OF ACTION.—The plaintiff brought a bill in equity to have a conveyance to the defendant set aside on the ground that it was obtained by fraudulent misrepresentations. On appeal after judgment for the plaintiff, the Court of Appeals allowed her to amend her petition to the effect that the deed was executed while she was under the influence and control of the defendant. On further appeal to the Supreme Court the defendant contended that the amendment stated a new cause of action, and hence should not have been allowed. *Held*, that there was no error. *Tinker v. Sauer* (1922) 105 Ohio St. 135, 136 N. E. 854.

The term "cause of action," used in the codes in several distinct connections, has been a constant source of difficulty to the courts. NOTES (1922) 22 COL. L. REV. 61. Notwithstanding some variation in meaning in the different code references to it, the idea involved in the phrase seems basically the same wherever used and should be capable of scientific definition. It has often been used interchangeably with right of action. Thus it is said to include the right to prosecute an action successfully. *Schempp v. Davis* (1919) 201 Mo. App. 430, 211 S. W. 728; *Travelers' Ins. Co. v. Padula* (1918) 224 N. Y. 397, 121 N. E. 348. It would seem, however, properly to refer only to the operative facts which give rise to the right. Phillips, *Code Pleading* (1896) 27, 28, criticising Pomeroy, *Code Pleading*, 453, 519; *cf.* Sibley, *The Right to and The Cause for Action* (1902). Hence the remedy is a consequence of, and no part of the cause of action. *Felt City Townsite Co. v. Investment Co.* (1917) 50 Utah, 364, 167 Pac. 835; *Vaughn v. St. Louis & S. F. Ry.* (1914) 177 Mo. App. 155, 164 S. W. 144. It has been said to consist of every fact which the plaintiff must prove to get judgment. *Furnace Co. v. Scranton Coal Co.* (1920, C. C. A. 3d.) 266 Fed. 798. And of only the defendant's wrongful act. Sibley, *op. cit.* 24-30. It has been defined as the violation of a primary right—apparently meaning principal right. (1920) 29 YALE LAW JOURNAL, 685; Burgett, *When Does an Amendment Introduce a New Cause of Action* (1908) 40 CHIC. LEG. NEWS, 219; *cf. Rowland Co. v. Kell Co.* (1922, Ga.) 107 S. E. 602. This definition seems open to criticism for ambiguity in the term *primary*, which also offers no clue as to its content in specific cases. The modern tendency to permit amendments changing the legal theory of recovery—amendments "from law to law"—indicates that the cause is not the same as the remedial right. See (1922) 32 YALE LAW JOURNAL, 198; (1920) 29 *ibid.* 685; COMMENTS (1919) 28 *ibid.* 693; (1918) 27 *ibid.* 1053; Albertsworth, *The Theory of the Pleadings in Code States* (1922) 10 CALIF. L. REV. 202. Injuries to both person and property inflicted at the same time are by the majority view held to constitute but one cause of action, although clearly more than a single primary right is involved. *Jenkins v. Skelton* (1920) 21 Ariz. 663, 192 Pac. 249; *Anderson v. Jacobson* (1919) 42 N. D. 87, 172 N. W. 64; (1922) 32 YALE LAW JOURNAL, 190. The cause of action seems therefore to refer to the entire series of facts out of which a right to remedial relief through the courts arises. To determine whether a new cause of action is stated will therefore involve a comparison of the operative facts originally stated with those now stated, to determine whether they are in any large measure dissimilar. The conclusion of the instant case is proper. For a similar result permitting at the trial an amendment of a claim for money obtained by undue influence to a claim for the money as a loan, although the defendant had died in the meantime and no claim had been presented against her estate, see *Raymond v. Bailey* (1922, Conn.) 118 Atl. 915. It may even be questioned whether the power of amendment should be restricted to the stating of the same cause of action except in cases where the statute of limitations has intervened, and in cases similar to the instant case where the amendment is offered to an appellate tribunal.

PUBLIC UTILITIES—RATE-MAKING—GOING CONCERN VALUE.—The plaintiff street railway company secured a temporary injunction against the enforcement of an ordinance restricting it to a five-cent fare on its lines, and the court appointed a master to make advisory findings as to whether the rate was confiscatory. In fixing the base value the master made allowance for value as a going concern and computed it by capitalizing past deficits. He found that the rates were not confiscatory, and the injunction was dissolved. The plaintiff appealed. *Held,* that good will and going concern value are important in determining whether a rate is reasonable, but are to be excluded in determining whether it is confiscatory; in any event they are not to be computed by capitalizing past deficits. *Galveston Elec. Ry. v. Galveston* (1922, U. S.) 42 Sup. Ct. 351.

A slightly later case on the same facts held that going value, being dependent on the financial history of the utility, should not be allowed. *Houston v. S. W. Bell Tel. Co.* (1922, U. S.) 42 Sup. Ct. 486. Going concern value is the value which attaches to a utility because its business is established, as distinguished from one in a static state. *Des Moines Gas Co. v. Des Moines* (1915) 238 U. S. 153, 35 Sup. Ct. 811. Because of the element of monopoly, in public utilities it includes only the actual cost of putting the utility on a paying basis, and not good will. *Willcox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 29 Sup. Ct. 192; 2 Wyman, *Public Service Corporations* (2d ed. 1911) sec. 1102; COMMENTS (1917) 27 YALE LAW JOURNAL, 386. The usual rule is that going value is a property interest and should be considered in fixing base value, on proof of the investment necessary to organize and establish the business. *Lincoln Gas & Elec. Co. v. Lincoln* (1918) 250 U. S. 256, 39 Sup. Ct. 454; *Re Interstate Water Co.* [1922 E] Pub. Util. Rep. (Ill.) 246; *Re Huntington Water Corp.* [1922 C] Pub. Util. Rep. (W. Va.) 636. The item of going concern value does not arise under the prudent investment theory. The test applied by the instant case is not clear. See COMMENTS (1922) 32 YALE LAW JOURNAL, 390; NOTES AND COMMENTS (1922) 1 TEX. L. REV. 89. Several methods have been employed in computing the amount to be allowed. Hardman, *Going Value as Value for Purposes of Rate Regulation* (1917) 25 W. VA. L. QUART. 89. The principal case repudiates the Wisconsin rule of capitalizing past deficits, which has found little support. *Hill v. Antigo Water Co.* (1909) 3 Wis. Ry. Cas. 623; *Re Clayton-Glassboro Water Co.* [1922 E] Pub. Util. Rep. (N. J.) 223; *Trustees v. Western N. Y. Util. Co.* [1922 E] Pub. Util. Rep. (N. Y.) 119; *Ga. Ry. & P. Co. v. Comm.* (1922, N. D. Ga.) 278 Fed. 242. The injustice of this rule appears when courts refuse to allow going value because the utility's excessive earnings have been sufficient to offset past deficits, thus permitting capital value to be wiped out by subsequent earnings. *In re Clarksburg Co.* [1917 A] Pub. Util. Rep. (W. Va.) 577; *San Joaquin L. & P. Corp. v. Comm.* (1917) 175 Calif. 74, 165 Pac. 16; Hardman, *loc cit.* The ordinary method of computing this interest is to add an indefinite "something" to the value of many of the items constituting the plant, and not to make a separate allowance. *Des Moines Gas Co. v. Des Moines, supra; In re W. Va. Tract. & Elec. Co.* (1917) W. Va. Pub. Serv. Cas. No. 568. It seems that a more workable method would be through a comparison of the estimated net earnings of a hypothetical plant and of the actual plant during the period necessary to bring the earnings of the hypothetical plant up to those of the actual plant; the present worth of the difference representing the going value.

QUASI-CONTRACT—MISTAKE—SERVICES RENDERED BY WOMAN BELIEVING HERSELF TO BE MARRIED.—The plaintiff was induced into marital relationship by means of false representations. It was not until the decease of her paramour that she first learned that the marriage was void. She brought this action against

the administratrix of the estate of the deceased for the value of her personal services and for the rental value of her house in which both she and the deceased had lived. *Held,* (two judges *dissenting*) that the plaintiff could recover. *In re Fox's Estate* (1922, Wis.) 190 N. W. 90.

The authorities appear to be unanimous in holding that a woman deceived into a void marriage with a man already married may maintain an action against him for deceit. *Morrill v. Palmer* (1895) 68 Vt. 1, 33 Atl. 829; 33 L. R. A. 411, note. But in the absence of statute the action for deceit does not survive against the personal representative. *Grim v. Carr's Administrators* (1858) 31 Pa. 533; *Price v. Price* (1878) 75 N. Y. 244. The courts, however, are in conflict as to whether an action in quasi-contract can be maintained for services rendered *credente sese uxorem.* No case has been found where such an action was brought during the lifetime of the wrongdoer. In Massachusetts the rule is well settled that the plaintiff's only remedy is an action of tort for deceit, a cause of action which does not survive. *Cooper v. Cooper* (1888) 147 Mass. 370, 17 N. E. 892. In Connecticut it seems that an action in quasi-contract is allowed only if the deceased acquired specific property which increased the assets in the hands of his personal representative. *Payne's Appeal* (1895) 65 Conn. 397, 32 Atl. 948; Keener, *Quasi Contracts* (1893) 323. Several jurisdictions have allowed a quasi-contractual recovery for the rendition of services. *Fox v. Dawson's Curator* (1820, La.) 8 Mart. (o. s.) 94; *Higgins v. Breen* (1845) 9 Mo. 293; *Sanders v. Ragan* (1916) 172 N. C. 612, 90 S. E. 777. In such a case the proper measure of recovery should be the reasonable value of the benefits given in excess of the benefits received. *Sanders v. Ragan, supra;* Woodward, *Quasi Contracts* (1913) 296. No distinction should be made between receipt of money and receipt of services or other benefits. The decision in the instant case is in accord with the better reasoned opinions and arrives at the more equitable result. See (1923) 9 VA. L. REV. 313; (1923) 23 COL. L. REV. 190.

SALES—ELECTION OF REMEDIES BY THE SELLER AFTER ANTICIPATORY BREACH.—After partial performance of a contract for the sale of automobile tires to be manufactured, the buyer refused to accept and pay for the remainder. The seller sued for damages. *Held,* (two judges *dissenting*) that the plaintiff could not recover, since sec. 146 of the Personal Property Law, N. Y. Laws, 1911, ch. 571 (Uniform Sales Act, sec. 65) makes it mandatory to give notice of the seller's "election to rescind" as a prerequisite to a suit for damages for the breach. *Henderson Tire & Rubber Co. v. Wilson* (1922, App. Div.) 196 N. Y. Supp. 879.

In cases of anticipatory breach the plaintiff may elect one of three remedies: first, he may rescind and recover on *quantum meruit* for the part already performed; second, he need not avail himself of the anticipatory breach but may sue on the contract at the time set for performance; third, he may treat the repudiation as putting an end to the contract and sue for damages for the breach. *United Press v. Newspaper Ass'n.* (1916, C. C. A. 8th) 237 Fed. 547; *Stoneking v. Long* (1908) 142 Ill. App. 203; *Indiana Life Endowment Co. v. Carnithan* (1916) 62 Ind. App. 567, 109 N. E. 851; *Tipple v. Tipple* (1919) 189 App. Div. 28, 177 N Y. Supp. 813. The common-law rules of anticipatory breach apply with equal force to sales contracts. Uniform Sales Act, secs. 64, 65; *Texas Seed & Floral Co. v. Chicago Set & Seed Co.* (1916, Tex. Civ. App.) 187 S. W. 747; *Churchill Grain Co. v. Newton* (1914) 88 Conn. 130, 89 Atl. 1121 (applying sec. 64). By "rescission" both parties are completely released and restored as nearly as possible to the *status quo,* and all rights under the contract are extinguished. *Jones v. McGinn* (1914) 70 Or. 236, 240, 140 Pac. 994, 996; *Reiger v. Turley* (1911) 151 Iowa, 491, 501, 131 N. W. 866, 869. A suit for damages precludes the existence of rescission. *Anvil Mining Co. v. Humble*

(1894) 153 U. S. 540, 541, 14 Sup. Ct. 876, 880. The Court in the instant case misconstrued the meaning and effect of "rescission," both under and before the Act. See *Modern Hat Works v. Liberal Trading Co.* (1917, Sup. Ct.) 164 N. Y. Supp. 622, 623; *Wester v. Casein Co.* (1912) 206 N. Y. 506, 515, 100 N. E. 488, 491. As a result it applied the wrong section of the Sales Act, thereby denying the plaintiff damages to which he was entitled. The dissenting opinion is correct in insisting that sec. 146 has no application to the facts of this case.

TRUSTS—STATUTE OF FRAUDS—PAROL TRUST OF LAND.—A promised B, his nephew and business manager, $10,000 if B refrained from using intoxicating liquor for five years. After B had abstained for two years, A offered to buy any house B might select, instead of paying B $10,000 at the end of five years. A purchased such a house, taking title in his own name, and stating that he was buying for B. Possession was immediately delivered to B at A's direction. A always referred to B as owner, but never delivered a deed. After A's death his heirs claimed the house. *Held,* (one judge *dissenting*) that there was a valid trust. *Greensboro Bk. & Trust Co. v. Scott* (1922, N. C.) 114 S. E. 475.

The seventh section of the English Statute of Frauds has never been adopted in North Carolina, and it is well settled in that state that though one already owning land may not declare himself trustee orally, nevertheless one who intends to become holder of the legal title may validly agree by parol to hold it in trust. *Lefkowitz v. Silver* (1921) 182 N. C. 339, 109 S. E. 56; *Wilson v. Jones* (1918) 176 N. C. 205, 97 S. E. 18. In most jurisdictions, however, the statute of frauds would be an obstacle to the creation of an express oral trust in land. Bogert, *Trusts* (1921) 54. There are partial analogies to sustain the instant case even in those jurisdictions. Where A buys land, taking title in B's name, it is well settled that a resulting trust is created in favor of A to which the statute of frauds does not apply. Bogert, *op. cit.* 95. The majority of the court in the instant case suggest that the transaction really amounted to a purchase by A with B's money, since B released A from his promise to pay $10,000 after five years. This clearly would be true if the purchase were made after the five year period had passed and B had duly performed; or if A had loaned the purchase money to B and had taken title in himself as security. *Scott v. Beach* (1898) 172 Ill. 273, 50 N. E. 196. But such a result may be questioned here since at the time of the purchase B's performance still had three years to run. By the weight of authority in this country, delivery of possession to a vendee under a parol contract for the sale of land is sufficient part performance to take the contract out of the statute of frauds; the possession must be with the vendor's consent and in pursuance of the contract. Pomeroy, *Equity Jurisprudence* (4th ed. 1919) sec. 2241. By analogy the same rule should be applicable to express oral trusts of land where there has been sufficient part execution of a similar character. Particularly should this be so, where the trust is sought to be created only to enforce what in effect amounts to an oral sale of the land. Browne, *Statute of Frauds* (5th ed. 1895) sec. 113; see *Harman v. Fisher* (1912) 90 Neb. 688, 134 N. W. 246; Scott, *Cases on Trusts* (1919) 193, note 1. The result, however, would not be reached on this ground in North Carolina, since that state rejects the whole doctrine of part performance in transfers of realty. Ames, *Cases in Equity Jurisdiction* (1904) 289, note 2; Pomeroy, *op. cit.* sec. 2245; 1 N. C. L. REV. 48.