RECENT CASE NOTES

ARBITRATION AND AWARD—FIRST CONSTRUCTION OF SECTION 3 OF NEW YORK ARBITRATION LAW.—The defendant and plaintiff, English and American corporations, made in New York a contract which provided for arbitration in that state of all disputes arising out of the contract. The arbitration clause provided that "in default of either party appointing any arbitrator within one month of the other party requesting it to do so, the latter shall name both arbitrators and they shall elect an umpire" and together make an award. The defendant refused to appoint an arbitrator to settle a dispute. The plaintiff thereupon, pursuant to the contract, appointed an arbitration board which made an award. The present action was brought in England on the award, which the defendant claimed was not binding. The plaintiff relied upon section 2 of the New York Arbitration Law of 1920. Construing section 3 of that Act, the court below held for the defendant that the "party aggrieved by the . . . refusal of another to perform under a contract . . . . providing for arbitration" must first obtain an order from the court directing that the arbitration proceed in the manner provided for in the contract, which the plaintiff had not done. *Held,* in reversing the judgment, that under section 2 of the New York statute the power of the plaintiff to appoint an arbitration board was irrevocable and that the award therefore was binding. *Bankers & Shippers Insurance Co. of New York v. Liverpool Marine & General Insurance Co., Ltd.* (1925, C. A.) N. Y. L. JOUR. March 4, 1925.

Whether the party willing to arbitrate must apply to the court for aid before he can proceed to an award pursuant to the contract, if the arbitration agreement provides also the remedy for refusal to arbitrate, has as yet not been decided by a New York court. In holding it unnecessary, the present decision gives agreements to arbitrate a legal sanction which makes them effective and carries out the spirit of the Arbitration Act. See Cohen, *The Law of Commercial Arbitration and the New York Statute* (1921) 31 YALE LAW JOURNAL, 147; Sturges, *Commercial Arbitration or Court Application of Common Law Rules of Marketing?* (1925) 34 *ibid.* 480; *cf. Berkovitz v. Arbib & Houlberg* (1921) 230 N. Y. 261, 130 N. E. 288. And in giving the same effect to an arbitration statute which is given to other provisions of contract law in cases involving the conflict of laws, it makes commercial treaties unnecessary for the operation of such statutes in international commerce. See Wolfe, *Arbitration that "Sticks"* (Oct. 13, 1924) 41 COMMERCE REPORTS, 67.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF ACT IMPOSING COMMON CARRIER DUTIES ON TRUCKING BUSINESS.—A Michigan statute made all persons engaged in the business of transporting persons or property by motor vehicle for hire upon the public highways of the state "common carriers" and subject to regulation as such. Mich. Pub. Acts, 1923, no. 209. One section of the act provided for compulsory insurance by common carriers for the protection of property carried by them. Plaintiff, the owner of trucks engaged solely in interstate transportation of automobile bodies under three contracts, obtained an interlocutory injunction restraining the defendant commission from enforcing the act against him on the ground that the imposition of such duties on him burdened interstate commerce and violated the fourteenth amendment to the federal constitution. Defendant appealed. *Held,* that the decree be affirmed. *Michigan Public Utilities Commission v. Duke Cartage Co.* (Jan. 12, 1925) U. S. Sup. Ct., Oct. Term, 1924, No. 283.

Persons engaged in a business involving the use of public highways, conducting it solely by discriminate rather than indiscriminate special contracts, are not common carriers. See *Terminal Taxicab Co. v. District of Columbia* (1916) 241 U. S. 252, 36 Sup. Ct. 583; see (1923) 32 YALE LAW JOURNAL, 841. It is submitted that the distinction is justified because of no public need for the imposition of public service duties in a business such as the plaintiffs, as contrasted with a jitney business. See (1921) 31 YALE LAW JOURNAL, 183. Or an ordinary trucking business. *Collier v. Langan and Taylor Storage and Moving Co.* (1910) 147 Mo. App. 700, 127 S. W. 435. But a duty to insure as provided in the statute in the instant case might well be imposed on private as on common carriers. See Marx, *Compulsory Compensation Insurance* (1925) 25 COL. L. REV. 164, 191.

CONSTITUTIONAL LAW—ELECTIONS—VALIDITY OF ABSENTEE-VOTING ACT.—A petition was presented to reject the absentee votes in the election of a councilman, on the ground that the act of the legislature permitting absent voting was unconstitutional. The lower court granted the petition. *Held,* that the judgment be affirmed. *In re Contested Election in Fifth Ward of Lancaster City* (1924, Pa.) 126 Atl. 199.

The validity of legislation, permitting absentee voting for a state officer, depends on the controlling provisions of the state constitution. See *Bourland v. Hildreth* (1864) 26 Calif. 161, 180; *Twitchell v. Blodgett* (1865) 13 Mich. 127, 149; (1922) 31 YALE LAW JOURNAL, 326. But courts interpret differently like provisions of their constitutions. See *Jenkins v. Board of Elections* (1920) 180 N. C. 169, 104 S. E. 346. The court in the instant case reasoned that the phrase "offer to vote" required personal presence of voter; that constitutional provisions giving one class, i. e. soldiers, the privilege of voting impliedly excluded all others; and that the provision for secrecy would not be preserved if absentee voting was allowed. As forty-three states have already adopted absentee voting laws in some form, and as a fuller expression of public opinion at the ballot box seems desirable, such legislation, unless palpably unreasonable or arbitrary, should be sustained. See 14 A. L. R. 1256, note.

CONSTITUTIONAL LAW—STATUTE TO DEAL WITH SINGLE SUBJECT EXPRESSED IN TITLE—CHOSES IN ACTION BEYOND SCOPE OF SALES ACT.—The plaintiff sued on the defendant's oral agreement to purchase certain shares of stock. The defendant pleaded the Statute of Frauds (Uniform Sales Act, sec. 4). The State Constitution provided that no bill, except general appropriation bills, should be passed containing more than one subject to be clearly expressed in the title. Pa. Const. Art. III, sec. 3. The lower court gave judgment for the defendant. The plaintiff appealed on the ground that since shares of corporate stock were choses in action and since "choses in action" did not appear in the title of the Sales Act, sec. 4 was unconstitutional in so far as it applied to choses in action. *Held,* that the judgment be reversed. *Guppy v. Moltrup* (1924, Pa.) 126 Atl. 766.

Sec. 76 of the Sales Act states that the context of the Act might require "goods" to include "choses in action." And sec. 4 (3) has been in effect so construed. *Davis Laundry & Cleaning Co. v. Whitmore* (1915) 92 Ohio St. 44, 110 N. E. 518; but *cf. Smith v. Lingelbach* (1922) 177 Wis. 170, 187 N. W. 1007 (shares of corporate stock not "goods" within meaning of sec. 76). The stringent mode of construction adopted by the court might with equal justice be made to effect the nullification of all provisions of the Sales Act relating merely to contracts to sell rather than "sales." As no evils are likely to be incurred, it seems desirable to avoid a narrow construction of these terms with respect to the problem herein involved. *Cf.* generally 1 Sutherland, *Statutory Construction* (2d ed. 1904) secs. 111, 115, 127; Rose, *Titles of Statutes* (1883) 17 AM. L. REV. 495; (1922) 22 COL. L. REV. 484.

CONTRACTS—EFFECT OF POWER TO CANCEL.—The plaintiff promised to manufacture collision mats for the Navy Department of the United States which agreed to pay a certain price and to supply the required canvas. Before the time for supplying the canvas had expired, the armistice was signed and soon after the Navy Department suggested that the plaintiff stop operations. The plaintiff had made some preliminary preparations. After a partial settlement, the plaintiff sued claiming further amounts. The contract was made pursuant to the Act of June 15, 1917 (40 Stat. at L. 182) which gave the United States an unconditional power of cancellation, although apparently unknown to either party. The Court of Claims refused to award prospective profits to the plaintiff. *Held,* that in view of the Government's power to cancel, the judgment be affirmed. *College Point Boat Corp. v. United States* (Jan. 19, 1925) U. S. Sup. Ct., Oct. Term, 1924, no. 121.

A void promise is insufficient consideration to support a counter promise. *Shaver v. Bear River Co.* (1858) 10 Calif. 396 (the promise of a married woman under disability to contract); see 1 Williston, *Contracts* (1920) 207, note 48. In these cases there is no inquiry whether the party receiving the void promise knew of the facts making it void. *Meyer v. Haworth* (1838) 8 A. & E. 467; see 1 Williston, *Contracts* (1920) 207. An illusory promise is likewise insufficient consideration; as where one party reserves an unqualified power to cancel. *Miami Coca-Cola Bottling Co. v. Orange Crush Co.* (1924, C. C. A. 5th) 296 Fed. 693; see 1 Williston, *Contracts* (1920) 73, note 7, 219-220. The same rule has, peculiarly enough, been applied to a power in either party to cancel "for just cause." *Oakland Motor Car Co. v. Indiana Automobile Co.* (1912, C. C. A. 7th) 201 Fed. 499. But legal consequences may arise from such promises. The supposed contract may amount to an offer to one party acceptable before revocation. *Great Northern Ry. v. Witham* (1873) L. R. 9 C. P. 16. So, in the instant case the preliminary negotiations may be regarded as an offer which the Government could have accepted by sending canvas. Contractual rights have been regarded as created by mere lapse of a stipulated time. *Gile v. Inter-State Motor Car Co.* (1914) 27 N. D. 108, 145 N. W. 732; see (1914) 12 MICH. L. REV. 677, and (1914) 62 PA. L. REV. 633. Preliminary negotiations have been considered as neither a contract nor an offer but an agreement silently incorporated into all subsequent dealings. See *Willard, Sutherland & Co. v. United States* (1923) 262 U. S. 489. Of this type are most contracts of employment between an employer and a union, acquiring legal force only when individual contracts of employment are made with reference to them. *Hudson v. Cincinnati, N. I. & T. P. Ry.* (1913) 152 Ky. 711, 154 S. W. 47. Similar fixed terms for possible future contracts are finding growing favor in business, *e.g.,* the bankers' regulations regarding documents of title. See 1 Williston, *Sales* (2d ed. 1924) 624; *cf. Wenger & Co. v. Proffer Silk Hosiery Mills* (1925) 239 N. Y. 199, 146 N. E. 203. "Agreement" and "contract" thus seem to be turning into widely different conceptions. Such growth of business practices supplementing and ultimately becoming law is a continuous process. See Commons, *Law and Economics* (1925) 34 YALE LAW JOURNAL, 371. In general, the same rules of contract law are applied where the United States is a party as in contracts between private persons. See *United States v. Bentley & Sons Co.* (1923, S. D. Ohio) 293 Fed. 229; see Grismore, *Contracts With the United States* (1924) 22 MICH. L. REV. 749. There is no reason to quarrel with the instant decision, since the lapse of time had not resulted in uncompensated outlays by the plaintiff and no fixed orders had been stipulated for periods already elapsed.

CONTRACTS—SUIT FOR PART OF RENT DUE BARS SUBSEQUENT ACTION FOR BALANCE.—Upon a breach of contract to pay rent monthly in advance, the plaintiff on June 22 sued for rent due. On August 7, when the July and August rent was due, the plaintiff sued for and recovered only the July rent. Upon

leave, the plaintiff then amended his first complaint to include the August rent. The trial court allowed judgment for the June rent and refused to allow for the August rent and the plaintiff appealed. *Held*, that the judgment be affirmed. *Hare v. Winfree* (1924, Wash.) 229 Pac. 16.

To avoid harassing courts and defendants by a multiplicity of suits, a single cause of action cannot be split to furnish the bases for several suits. *Roy v. Scales* (1921) 76 Ind. App. 373, 132 N. E. 268; *Klinkert v. Streissguth* (1923) 155 Minn. 388, 193 N. W. 687; see (1922) 32 YALE LAW JOURNAL, 190; Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817. But see *McLaughlin v. Levenbaum* (1924, Mass.) 142 N. E. 906. So, where rent is payable at stated times, separate actions may be brought for each installment as it falls due. *Marshall v. Grosse Clothing Co.* (1900) 184 Ill. 421, 56 N. E. 807. But all installments due and unpaid when one action is brought must be included in that action. *Burritt v. Belfy* (1879) 47 Conn. 323; *See v. See* (1922) 294 Mo. 495, 242 S. W. 949; 24 A. L. R. 885, note. See *Matheny v. Preston Hotel Co.* (1918) 140 Tenn. 41, 203 S. W. 327; *Kennedy v. New York* (1909) 196 N. Y. 19, 89 N. E. 360. Lower New York courts have drawn exceptions to this general rule where special circumstances appeared to take the case outside the policy upon which the rule was founded. *Kieley v. Kahn* (1906, Sup. Ct. App. T.) 50 Misc. 309, 98 N. Y. Supp. 774 (second suit for subsequent rent started during pendency of first; recovery in second no bar to first); *Petersen v. Claire* (1922, Sup. Ct. Spec. T.) 118 Misc. 85, 193 N. Y. Supp. 543 (first suit did not include all necessary parties); *Van Damm v. Penrose* (1923, Sup. Ct. App. T.) 120 Misc. 111, 197 N. Y. Supp. 513 (defendant avoided summons on first action until another month's rent was due). In the instant case, the coincidence that the plaintiff had a suit pending and thus was enabled to include his action for the August rent by an amended complaint seems an insufficient reason for excepting this plaintiff from the penalty usually imposed for the benefit of the defendant for similar failures to sue for all due installments. See *Claflin & Kimball v. Mather Electric Co.* (1899, C. C. A. 2d) 98 Fed. 699. The hardship involved in the value of the general rule is only another reason for making few exceptions thereto. *Petersen v. Claire, supra; Burritt v. Belfy, supra.*

CRIMINAL LAW—CONSPIRACY—AFFECT OF OVERT ACTS ON VENUE.—The defendants were indicted in Oneida County for a conspiracy to defraud by means of false reports mailed in New York County and received in Oneida County. A statute required an illegal agreement and an overt act in pursuance thereof to convict for the crime of conspiracy. N. Y. Penal Laws, 1909, sec. 583. The defendants demurred on the ground that the crime was not within the jurisdiction of the County Court of Oneida County. *Held*, that the demurrer be overruled. *People v. Levy* (1924, Oneida County Ct.) 123 Misc. 228, 206 N. Y. Supp. 857.

A number of states have enacted statutes similar to that in the instant case, requiring for the crime of conspiracy the agreement and an overt act. 3 Bishop, *New Criminal Procedure* (2d ed. 1913) sec. 202; U. S. Rev. Sts. 1878, sec. 5440. Under such statutes a conviction in either jurisdiction has been sustained. *Benson v. Henkel* (1905) 198 U. S. 1, 25 Sup. Ct. 569; *Hyde v. Shine* (1904) 199 U. S. 62, 25 Sup. Ct. 760. In the absence of statute the crime of conspiracy is complete when the agreement is made. *Commonwealth v. McHale* (1881) 97 Pa. 397; *Commonwealth v. Fuller* (1882) 132 Mass. 563. Yet even then the venue may be laid in any jurisdiction where either the agreement is made or where any act is committed in furtherance of the common design. *King v. Brisac* (1803, K. B.) 4 East, *164; *Territory of Hawaii v. Goto* (1923) 27 Haw. 65; *People v. Blumenberg* (1915) 271 Ill. 180, 110 N. E. 788; *Noyes v. State* (1879) 41 N. J. L. 418; 1 Wharton, *Criminal Law* (11th ed. 1912) sec. 333; 3 Bishop, *op. cit.* sec. 236.

INSURANCE—EXPLOSION CAUSED BY FIRE IN NEIGHBORING BUILDING NOT WITHIN FIRE INSURANCE POLICY.—The plaintiff's building was insured against fire, the policy providing that the company would not be liable for explosion of any kind "unless fire ensues, and in that event for the damage by fire only." Fire in a neighboring building caused an explosion therein which materially damaged the plaintiff's building in addition to the slight damage caused by sparks from the fire. In a suit on the policy the lower court denied recovery for the material damage. *Held,* that the judgment be affirmed. *Exchange Bank of Novinger v. Iowa State Insurance Co.* (1924, Iowa) 265 S. W. 855.

Even where the policy carries an express exemption, as in the instant case, recovery is allowed when the explosion occurs on the insured premises as a direct result of a "hostile fire." *Wheeler v. Phenix Insurance Co.* (1911) 203 N. Y. 283, 96 N. E. 452; *Western Insurance Co. v. Skass* (1918) 64 Colo. 342, 171 Pac. 358; 4 Cooley, *Briefs on the Law of Insurance* (1905) 3027. If the wording is ambiguous the court construes the policy most favorably to the insured. *Boon v. Aetna Insurance Co.* (1874) 40 Conn. 575; 3 Joyce, *Insurance* (1897) sec. 2592; Beal, *Cardinal Rules of Legal Interpretation* (3d ed. 1924) 144, 240. The proximity of the cause in such case is held to bring the loss within the contemplation of the parties. On the facts of the instant case the law of torts would doubtless consider the cause sufficiently proximate to impose responsibility on the negligent or wilful instigator of the fire. *Cf. Milwaukee and St. Paul Ry. v. Kellogg* (1876) 94 U. S. 469; *Chicago R. I. & P. Ry. v. McBride* (1894) 54 Kan. 172, 37 Pac. 978; 3 Shearman & Redfield, *Law of Negligence* (6th ed. 1913) sec. 666; *contra: Ryan v. N. Y. Central R. R.* (1866) 35 N. Y. 210. But in construing insurance contracts the question is whether the loss suffered was within the contemplation of the contracting parties.

PROCESS—PERSONAL SERVICE—ORAL ACCEPTANCE BY DEFENDANT ON DELIVERY TO HUSBAND INOPERATIVE.—A process server went to the home of the defendant for the purpose of making "personal service" of a summons on her. The defendant, from a room adjoining that in which her husband and the process server were, accepted the service orally, and directed that a copy of the summons be left with her husband. The lower court refused to set aside a default judgment entered on her failure to appear, and the defendant appealed on the grounds that there had been no "personal service." *Held,* that the motion to set judgment aside be granted. *Ives v. Darling* (1924, 3d Dept.) 206 N. Y. Supp. 493.

Usually in the absence of statutory provision, an agent may not accept service. *Davidson v. Clark* (1887) 7 Mont. 100, 14 Pac. 663; *Odessa Loan Ass'n. v. Dyer* (1911, Del.) 2 Boyce, 457, 81 Atl. 469; but *cf. Williams & Pearson v. Dittenhoefer* (1904) 188 Mo. 134, 86 S. W. 242 (corporation). But where the person accepting service acts not as an agent but in the nature of an "automaton" the service is valid. *Woodley v. Jordan* (1900) 112 Ga. 151, 37 S. E. 178; *Krotter & Co. v. Norton* (1909) 84 Neb. 137, 120 N. W. 923; 1 Mechem, *Agency* (1914) sec. 1462; but see *Ambrose v. Barber* (1913) 13 Ga. App. 788, 79 S. E. 1135. A defect in the service of process will not deprive the court of jurisdiction if there is a general appearance or a plea to the merits. *Grahm v. Wallace* (1910) 206 Mass. 39, 91 N. E. 1002. Or an acceptance or acknowledgment. *Carter v. Penn* (1888) 79 Ga. 747, 4 S. E. 896 (written); *Chapman v. Allen* (1839, Iowa) Morris, 32 (oral); *Johnson v. Johnson* (1874) 52 Ga. 449 (conduct); 1 Kerr, *Pleading & Practice in the Western States* (1919) sec. 250 *et seq.; contra: Montgomery v. Tutt* (1858) 11 Calif. 307 (oral). The instant case appears to be unduly strict since it seems as if valid service could be found either on the grounds of acceptance or of actual delivery to the defendant through her husband as an "automaton." The decision seems unfortunate in that it fails to recognize that the chief purpose of "personal service" is actual notice. See *Hiller v. B. & M. Ry.* (1877) 70 N. Y. 223, 227.

REAL PROPERTY—RIGHT OF WARRANTOR OF TITLE TO QUIET TITLE.—The plaintiff, owner of land in fee, brought a bill to quiet title against the defendant, holder of a trust deed to the land, under a statute permitting such action by "any person against another who claims an estate or interest in real property adverse to him." Before the case came to trial, plaintiff conveyed the land to X, warranting the title. The defendant moved for judgment dismissing the action, or for a nonsuit on the ground that having conveyed the land *pendente lite*, the plaintiff had no interest therein to which defendant's claim was adverse. The motion was denied, and judgment entered for the plaintiff. The defendant excepted. *Held*, that the judgment be affirmed. *Plotkin v. Merchant's Bank and Trust Co.* (1924, N. C.) 125 S. E. 541.

Under statutes similar to that in the instant case, and to some extent in equity courts in the absence of statute, any interest which has to do with the present or contingent enjoyment of land is sufficient to support a bill to remove cloud on title. *German-American Savings Bank v. Gollmer* (1909) 155 Calif. 683, 102 Pac. 932 (estate for years); *Dudley v. Browning* (1916) 79 W. Va. 331, 90 S. E. 878 (vendor's lien). But equity generally considers a "pecuniary" as well as a "proprietary" interest a ground for relief. See *International News Service v. Associated Press* (1918) 248 U. S. 215, 39 Sup. Ct. 68; Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640. So, courts have held a "pecuniary interest" sufficient to enable a plaintiff to bring a bill to remove cloud on title. *In re Phillips* (1875) 60 N. Y. 16; *Pier v. Fond du Lac County* (1881) 53 Wis. 421, 10 N. W. 686. Thus a vendor retaining the legal title as security for the purchase price is a proper plaintiff. *Heppenstall v. Leng* (1907) 217 Pa. 491, 66 Atl. 991. As is one who retains legal title and gives a bond for title. *Coel v. Glos* (1907) 232 Ill. 142, 83 N. E. 529; see *Langlois v. Stewart* (1895) 156 Ill. 609, 41 N. E. 177. And a sufficient "pecuniary" interest is shown by a vendor whose vendee refuses to complete payment of the purchase price because of the cloud. *City of Hartford v. Chipman* (1852) 21 Conn. 488; *Styer v. Sprague* (1896) 63 Minn. 414, 65 N. W. 659. Or refuses to sue. *Sutliff v. Smith* (1897) 58 Kan. 559, 50 Pac. 455. Or whose inertia will result in loss of evidence or the perfecting of an adverse title. *Jackson v. Kittle* (1890) 34 W. Va. 207, 12 S. E. 484. A mere warrantor of title has no interest in the present or contingent enjoyment of the land, and the cases denying him the right to maintain a bill to remove a cloud from the title do so on the ground that he has not a "property right." *Chapman v. Jones* (1897) 149 Ind. 434, 47 N. E. 1065; *Glos v. Goodrich* (1898) 175 Ill. 20, 51 N. E. 643. But the contingent risk of loss from the possible defect in the title, even without present damage, would seem a sufficient "pecuniary" interest to support such a bill. *Remer v. Mackay* (1888, C. C. N. D. Ill.) 35 Fed. 86; *Jones v. Nixon* (1899) 102 Tenn. 95, 50 S. W. 740; *Jackson Milling Co. v. Scott* (1907) 130 Wis. 267, 110 N. W. 184; *contra: Bissell v. Kellogg* (1871, N. Y. Sup. Ct.) 60 Barb. 617. The court took a laudable point of view in refusing to dismiss the action because the plaintiff's interest had changed from a "proprietary" to a "pecuniary" one *pendente lite*, since the gravamen of the action, defendant's claim, and the relief proper to be given, remained unchanged. *Begole v. Hershey* (1891) 86 Mich. 130, 48 N. W. 790; see Clark and Hutchins, *The Real Party in Interest* (1925) 34 YALE LAW JOURNAL, 256, at p. 269.

SALES—REFUSAL TO PAY DRAFT ON ONE GROUND AS A WAIVER OF ALL OTHERS.—The defendant drawee refused payment of a draft on the ground that the goods for which the draft had been drawn were not shipped within the time specified. By agreement, the goods were sold and the proceeds applied to the purchase price and suit was brought for the difference. The trial court admitted evi-

dence that the plaintiff was not a bona fide holder of the draft. The plaintiff brought a writ of error. *Held,* that the evidence should have been excluded, since having based its refusal on one ground, the defendant could not defend on another ground. *Bank of Taiwan v. Union Nat. Bank* (1924, C. C. A. 3d) 1 Fed. (2d) 65.

The instant case represents a strict application of a rigid rule. It is not without support. *Harvard v. Himmelein* (1924, Mich.) 198 N. W. 207; *Honesdale Ice Co. v. Lake Lodore Co.* (1911) 232 Pa. 293, 81 Atl. 306. But there seems to be a general tendency against requiring a litigant to elect at his peril. *Leavenworth L. & H. Co. v. Waller* (1902) 65 Kan. 514, 70 Pac. 365 (not required to elect between two inconsistent defenses, but may set up both); *Kaufman v. Cooper* (1909) 39 Mont. 146, 101 Pac. 969 (mistake in election of remedies did not waive the right to proper relief). Thus it has been held that the setting up of one defense does not necessarily imply the absence of any others. *Woldert Grocery Co. v. Pillman* (1915) 191 Mo. App. 15, 176 S. W. 457; see *List v. Chase* (1909) 80 Ohio St. 42, 88 N. E. 120. And where the plaintiff will not be unfairly prejudiced, it seems that the defendant should be allowed to set up a defense not previously asserted. *Young v. Rocher* (1923, Calif. App.) 222 Pac. 861 (objection could not have been obviated); *Union Brokerage Co. v. Beall Bros.* (1923) 30 Ga. App. 748, 119 S. E. 533 (no hardship caused plaintiff); *Bates v. Cashman* (1918) 230 Mass. 167, 119 N. E. 663; *Parkins v. Mo. Pac. Ry.* (1906) 76 Neb. 242, 107 N. W. 260. As in code pleading, notice of the adversary's position might be considered an element of fairness. Whittier, *Notice Pleading* (1918) 31 HARV. L. REV. 501. Thus it would seem unfair if the allowance of an objection not previously disclosed should prevent a plaintiff from putting in rebutting evidence which he had permitted to escape. Although some courts have said that the defendant never waives an objection of which he had no knowledge at the time of refusal. *Fowler v. Cobb* (1921, Mo. App.) 232 S. W. 1084; *Cooperage Co. v. Scofield* (1902, C. C. A. 8th) 115 Fed. 119. The rule under discussion has become practically limited to commercial, and particularly sales, cases. *Cf.* 2 Williston, *Contracts* (1920) secs. 743, 744; 2 Williston, *Sales* (2d ed. 1924) sec. 495. New York, long a stronghold for the rigid rule, has recently adopted more liberal views. *Cawley v. Weiner* (1923) 236 N. Y. 357, 140 N. E. 724; see *Strasbourger v. Leerburger* (1922) 233 N. Y. 55, 134 N. E. 834. The decision in the instant case seems inconsistent with the language used by the same court in *Second Nat. Bank v. Lash Corp.* (1924, C. C. A. 3d) 299 Fed. 371. The rigid rule adopted in the instant case seems unfortunate in that it tends to curtail settlements out of court, since it puts a premium on not explaining a refusal to perform a contract.

TRUSTS—APPORTIONMENT OF "ROYALTY" ON PUBLICATION BETWEEN LIFE BENEFICIARY AND REMAINDERMAN.—By devise the testator created a trust estate, directing that the income therefrom be paid to certain life beneficiaries, with the remainder elsewhere. Among the assets of the trust estate was the right to "royalties" from a certain publication. The trustee seeks direction from the court as to who is entitled to the "royalties." The lower court directed that they be credited to the principal and held for the remaindermen. An appeal was taken. *Held,* that the "royalties" be apportioned between the life beneficiary and the remaindermen. *In re Elsner's Will* (1924, 4th Dept.) 206 N. Y. Supp. 765.

This case presents another aspect of the troublesome question as to the line of distinction between principal and income. See Clark, *Eisner v. Macomber and Some Income Tax Problems* (1920) 29 YALE LAW JOURNAL, 735; COMMENTS (1924) 34 *ibid.* 195. "Royalty" in a mining lease is usually regarded in the nature of "rent" and disposed of as "income," although obviously the right to the "royalty" becomes of less value as the mine decreases in value with the con-

tinual output. *Campbell v. Wardlaw* (1883, H. L.) L. R. 8 A. C. 641; *Saulsberry v. Saulsberry* (1915) 162 Ky. 486, 172 S. W. 932; 36 L. R. A. (N. S.) 1105, note. But the instant case holds that this decrease in the value of the right to "royalty" in the case of a publication is so great that the "royalty" partakes both of the nature of principal and income, although manifestly circumstances other than the yielding of the "income" produce the decrease. For an opposite conclusion, see *Davidson v. Ogilvie* (1910) 47 Sc. L. Rep. 248; Copinger, *Copyright* (5th ed. 1915) 552.

TRUSTS—CONSTRUCTIVE TRUST OF LAND ACQUIRED UPON ORAL AGREEMENT TO RECONVEY.—In reliance upon the defendant's oral agreement to execute a new mortgage, the plaintiff discharged a previous mortgage which he held on the defendant's farm, leaving the defendant the sole record owner. The defendant repudiated his once honest agreement, selling the farm to X. In a suit to establish a constructive trust in the land, and to recover from the defendant the sum received for the plaintiff's interest therein, the lower court found for the plaintiff, although the defendant pleaded the statute of frauds. *Held,* that the judgment be affirmed. *Miller v. Belville* (1924, Vt.) 126 Atl. 590.

A reconveyance by a grantee of land acquired on an oral agreement to hold in trust for the grantor, or to reconvey on demand, is generally not compelled because of the statute of frauds. *Patton v. Beecher* (1878) 62 Ala. 579; *contra: Davies v. Otty* (1865, Ch.) 35 Beav. 208; *Haigh v. Kaye* (1872) L. R. 7 Ch. App. 469 (England using the statute of frauds "to prevent fraud, not to foster it"). The court compels a reconveyance, however, by calling the grantee's holding of the land a constructive trust, an express exception from the operation of the statute of frauds, where the grantee's promise was fraudulent when made. *Brown v. Doane* (1890) 86 Ga. 32, 12 S. E. 179. Or where "confidential relations" exist between the grantor and grantee. *Cooney v. Glynn* (1910) 157 Calif. 583, 108 Pac. 506. And where one devises land to another upon the latter's prior oral agreement to convey to a third party. *Caldwell v. Caldwell* (1871, Ky.) 7 Bush, 515. A few American cases hold that the grantee's "refusal to perform his promise amounts to a constructive fraud" on which the court will create a constructive trust in favor of the grantor. *O'Day v. Annex Realty Co.* (1917, Mo.) 191 S. W. 41; *Hatcher v. Hatcher* (1919) 264 Pa. 105, 107 Atl. 660; *Faville v. Robinson* (1921) 111 Tex. 48, 227 S. W. 938. Land acquired in consideration of an oral agreement, thereafter broken, to exchange parcels of land, must be reconveyed to prevent the unjust enrichment of the grantee, although the oral agreement cannot be enforced. *Deming v. Lee* (1911) 174 Ala. 410, 56 So. 921. And where the vendor of land, after receiving money under an oral agreement to convey, refuses to perform, the vendee, although unable to enforce the contract, can recover the money in quasi-contract. *Payne v. Hackney* (1901) 84 Minn. 195, 87 N. W. 608. And the plaintiff can compel the reconveyance of land conveyed with an oral understanding that it was merely security for a loan, in the nature of a mortgage. *Campbell v. Dearborn* (1872) 109 Mass. 130. In view of these analogies it would seem that a constructive trust could be predicated on the unjust enrichment of the grantee, obviating the need of fraud other than the breach of the oral agreement, or the need of resorting to the "exceptions" developed by the American courts in order to avoid the statute of frauds and "get at" the grantee. Scott, *Conveyances on Trusts not Properly Declared* (1924) 37 HARV. L. REV. 653, 656, *et seq.* And this does not violate the statute of frauds, for in spite of the similarity in result, the enforcement of a constructive trust predicated upon the unjust enrichment of the grantee is *not* an enforcement of the express oral trust or agreement. It is a "purely accidental coincidence" that the relief happens to be the same. Ames,

Oral Trusts of Land (1907) 20 HARV. L. REV. 549, 551, et seq.; COMMENTS (1918) 27 YALE LAW JOURNAL, 389. See *Westphal v. Heckman* (1916) 185 Ind. 88, 97, 113 N. E. 299.

VERDICTS—ACCEPTANCE BY CLERK—REJECTION OF IMPROPER VERDICT.—In a civil suit the judge by authority of statute left the clerk to take the verdict. The jury reported: "We find the defendant guilty and fine him $1,000." After twice remanding the jury with instructions as to a proper verdict the clerk accepted this: "We find for the plaintiff $2,500." A new trial was granted on the grounds that the first verdict was a nullity and that the clerk had authority only to accept it as rendered. *Folkner v. Hopkins* (1924, N. J. L.) 126 Atl. 633.

In the absence of statutory authority a judicial function performed by a clerk is usually void. *Scale Co. v. Friedman* (1909) 79 N. J. L. 214, 74 Atl. 270. But his receipt of a civil verdict in the absence of the judge is a defect which may be waived. *Dubuc v. Lazell Co.* (1905) 182 N. Y. 482, 75 N. E. 401 (by stipulation); *Nelson v. Wood* (1914, C. C. A. 3d) 210 Fed. 18 (by laches); (1910) 16 Ann. Cas. 90, note; but see *Kelly v. Western Ry.* (1911) 46 Ind. App. 697, 699, 93 N. E. 616, 617. In New Jersey the practice is authorized by statute. 3 N. J. Comp. Sts. 1911, p. 4103. A court may remand a jury with instructions to reform an improper verdict. *Morley v. Wilson* (1921) 109 Kan. 603, 201 Pac. 81. Or reform it in open court with the approval of the jury. *Mackay Co. v. Armstrong* (1922, Tex. Civ. App.) 241 S. W. 795. Or after the jury is discharged reform it so as to change form but not substance. *Minot v. Boston* (1909) 201 Mass. 10, 86 N. E. 783. What is form and what is substance is a question of fact in each case. A verdict is to be upheld if possible by liberal construction. *Hubbard S. S. Co. v. Crescio* (1913) 179 Ill. App. 56 (verdict in tort language held to sustain judgment in contract action). This doctrine might well have been extended to obviate the expense and delay of a new trial in the instant case. The result reached is surely diametrically opposed to the time-saving intent of the framers of the statute.

WILLS—ATTESTATION—NECESSITY THAT WITNESSES SEE TESTATOR'S SIGNATURE.—A will was so folded when the witnesses signed that they could not see the testatrix's signature. A judgment denying probate was affirmed and proponents appealed. *Held,* that it was error to deny probate on this ground. *Thornton v. Herndon* (1924, Ill.) 145 N. E. 603; *contra: In re Crill's Estate* (1924, Surro. Ct.) 124 Misc. 134, 207 N. Y. Supp. 775.

The English Wills Act, followed by the statutes of New York and other states, requires the testator's signature to be made or acknowledged in the presence of the attesting witnesses, necessarily implying that the signature must be in sight when the witnesses sign. *In re Sage's Will* (1919, Prerog. Ct.) 90 N. J. Eq. 209, 107 Atl. 151; *Matter of Pierce* (1920, Surro. Ct.) 113 Misc. 311, 184 N. Y. Supp. 536; (1918) 27 YALE LAW JOURNAL, 847. But in those states whose acts follow the Statute of Frauds the statutory provision is that the will shall be attested and subscribed by the witnesses. 1 Schouler, *Wills, Executors, and Administrators* (6th ed. 1923) sec. 527. Some of these states construe this provision also to require that the testator's signature be at least acknowledged to the witnesses and that it be visible. *Hawkes v. Hawkes* (1918) 230 Mass. 11, 119 N. E. 122; *Albert v. Stafford* (1918) 123 Va. 338, 96 S. E. 761; (1914) 2 VA. L. REV. 228. Others, holding an acknowledgment of the will rather than of the signature necessary, do not require the signature to be visible. *Gould v. Seminary* (1901) 189 Ill. 282, 59 N. E. 536; *In re Dougherty's Estate* (1912) 168 Mich. 281, 134 N. W. 24; (1921) 4 ILL. L. QUART. 62. In any case the failure of a witness to notice an apparently visible signature will not invalidate the will. *Coleman v. Lindley* (1924) 115 Kan. 802, 224 Pac. 912.