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Recent Cases

S. L.

RECENT CASES

HUSBAND AND WIFE—PARTNERSHIP—TORT OF PARTNER—LIABILITY OF EACH. The defendants, husband and wife, owned a car jointly. The plaintiff was injured because of the wife's negligence. He alleged in his complaint and defendants by their answer admitted "that at the time plaintiff alighted from said street car, an automobile owned by said defendants, George C. Grandy and wife, and operated for their use and benefit was being driven by defendant, Alma M. Grandy " No proof was introduced as to the purpose for which the automobile was being driven. *Held*. The husband was liable on the theory that the husband and wife were partners, and the wife was acting as the agent of the partnership. *Anderson v. Grandy*, 54 Wash. Dec. 394, 283 Pac. 186 (1929).

A partnership is a contract of two or more competent persons to place their money, efforts, labor and skill, or some or all of them, in lawful commerce or business and to divide the profit and bear the loss in certain proportions. *Kelly v. Bourne*, 15 Ore. 476, 16 Pac. 40 (1887). A mere agreement by two persons to buy an article together does not amount to an agreement to form a partnership, where there is no agreement for a joint sale of the property and a sharing of profits and losses. *Harris v. Umsted*, 75 Ark. 499, 96 S. W 146 (1906)

A reasonable interpretation of the allegations and admissions in the pleadings is that each joint owner of the car was benefited by his or her use thereof. This was the object of the joint ownership. Such a purpose should not be construed as the "business" of a partnership, since no dealing with third parties was intended. Burdick on Partnership, 2d Ed. p. 27. It seems this relation should not be viewed as a partnership for the further reason that the wife is not competent to form a partnership with her husband in this state. *Board of Trade v. Hayden*, 4 Wash. 263, 30 Pac. 87, 31 Am. St. Rep. 919, 16 L. R. A. 530.

In support of its decision in the principal case the court cites the case of *Cowart v. Lewis*, 151 Miss. 221, 117 So. 531 (1928). In that case the spouses, as here, owned a car jointly. While on a pleasure trip for the mutual enjoyment of both, the wife was driving and the husband was seated beside her. He saw that she was driving in a negligent manner, and heard the remonstrances of the other occupants. The court held the husband liable on the theory that the negligence of the wife was imputed to the husband, but stated in its decision, "Pretermitting a decision of the question of the agency relationship alleged to exist between the appellant and his wife, because such a decision is not necessary for the determination of this question, we are yet of the opinion the appellant (husband) is liable." The *Cowart* case appears to be decided on the doctrine of joint enterprise, in which the husband had the right, either express or implied, to exercise control over his wife in the management of the automobile.

As a general proposition of law, the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the injury resulting from the wrong at the time and in respect of the very transaction out of which the injury arose, the servant acting within the scope and course of his employment. *Doran v. Thomsen*, 76 N. J. Law. 754, 71 Atl. 296, 19 L. R. A. (n.s.) 296 (1908). The rule is founded on the superintendence and control which the master is supposed to exercise over his servant. *Maximilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468 (1875) The doctrine of joint enterprise has a similar foundation, the right of those engaged therein to control each other's acts. *Cotton v. Willmar & Sioux Falls Ry. Co.*, 99 Minn. 366, 109 N. W 835, 8 L. R. A. (n.s.) 643 (1906). It is therefore consistent with the general proposition above stated. Joint ownership, in itself, of a chattel does not contemplate the right of one joint owner to superintendence and control over the acts of the other in respect to the chattel. *Mills et al. v. Malott*, 43 Ind. 248

(1873) The decision in the instant case fails to distinguish between joint ownership and joint enterprise. S. L.

TAXATION—CONSTITUTIONAL LAW—DUE PROCESS—SITUS OF BONDS—INTANGIBLES. Taylor, domiciled in New York, owned and kept within that state negotiable bonds issued by Minnesota and municipalities of that state. None had any connection with business carried on by or for Taylor in Minnesota. He died testate in New York, where his will was probated and his estate administered. New York imposed a tax on the testamentary transfer and Minnesota sought to do likewise. The Supreme Court of the latter state upheld the tax, but it was appealed to the United States Supreme Court. *Held*, reversing the judgment in and expressly overruling *Blackstone v. Miller* 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277 (1902) Minnesota could not assess an inheritance tax on the transfer of public securities owned by a non-resident decedent and kept in his possession in the state of his domicile. *Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 47 L. ed. 439, 50 Sup. Ct. Rep. 98 (1930) Stone, J., concurring, Holmes and Brandeis, J. J., dissenting.

The previous rule was that ordinarily choses in action were subject to taxation both at the debtor's domicile and at the domicile of the creditor. *Blackstone v. Miller supra.* But under the facts of the principal case the state of the debtor's domicile was refused the privilege because it had been legally exercised by the state of the creditor. Such a holding suggests that the court is preparing to extend the doctrine of immunity from double taxation to intangibles, and in fact they said that "We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles." But for the court to lay down such a rule would seem to be discovering a new concept in the meaning of the due process clause of our Constitution.

The holding of the principal case is decidedly out of harmony with the previous decisions of the Court. New York was allowed to tax the testamentary transfer of notes merely left in that state for safe-keeping by a non-resident decedent, although the state of the latter's domicile also levied a tax. *Wheeler v. Sohmer* 233 U. S. 434. 58 L. ed. 1030, 34 Sup. Ct. Rep. 607 (1913) Where the evidence of the debt is in another state, which may assess a testamentary tax, the state of the owner's domicile may likewise tax the transfer. *Blodgett v. Sibberman*, 277 U. S. 1, 72 L. ed. 749, 48 Sup. Ct. Rep. 410 (1719) States which created corporations issuing stocks which form part of the estate of a deceased person may impose a tax upon the transfer irrespective of the owner's domicile or the actual situs of the stock certificates. *Frick v. Pennsylvania*, 268 U. S. 473, 69 L. ed. 1058, 45 Sup. Ct. Rep. 603, 42 A. L. R. 316 (1924)

What the effect of the holding of the principal case on these and similar decisions will be, it is impossible to say It may well be contended, however, that double taxation of the transfer of intangibles may often be justified. For example, the succession to shares of corporate stock might reasonably be taxed in the state of incorporation; *Frick v. Pennsylvania, supra*, the state where the certificates were permanently kept; *Wheeler v. Sohmer supra*, and the state of the decedent's domicile; *Blodgett v. Sibberman, supra.*

It is interesting to note that the Supreme Court of Washington strongly relied on *Blackstone v. Miller supra*, overruled by the principal case, in recently holding that the state has power "to levy an inheritance tax on movable personal property owned by a person who dies domiciled in this state, regardless of the situs of the property or whether it is tangible or intangible in nature." *In re Sherwood's Estate*, 122 Wash. 648, 211 Pac. 734 (1922). S. B.

NUISANCE—ACTS OR CONDUCT CAUSING NUISANCE—AMUSEMENT PARK ON LAKE. Lake Burien, about forty acres in extent, situated in a rather thickly

settled community a few miles from Seattle, is entirely surrounded by privately owned property. Defendant proposes to use his property, which has a two hundred foot frontage on the lake, for an amusement resort, having already installed parking space for two hundred automobiles, picnic tables and stoves, a boathouse, bathhouse and diving platform. He intends to install usual playground equipment, swings, slides, etc. He does not intend to install a dancing pavilion, merry-go-round or other noise making amusement, nor to allow intoxicating liquor on the premises. He intends to close at nine o'clock every evening. Lake Burien has no outlet, and is fed probably exclusively from surface water. The County Health Officer testified that in his opinion the lake is too small to be safely used as a public bathing resort. Plaintiffs, owners of property bordering on the lake, asked that defendant be enjoined from opening his amusement resort. *Held.* If reasonable grounds exist to believe the proposed use will result in a nuisance, the court will not require the plaintiff to wait until the injury is inflicted, but will decree immediately to restrain such acts. *Held.* The evidence establishes reasonable grounds to believe that the proposed use will result in a nuisance. *Turtle et al. v. Fitchett et al.* 56 Wash. Dec. 249 (1930).

There can be no doubt that the rule of law as stated by the court is well supported by the authorities. *Everett v. Paschall*, 61 Wash. 47, 111 Pac. 879, Ann. Cas. 1912B 1128, 31 L. R. A. (N. S.) 608 (1910) *Densmore v. Evergreen Camp. No.* 147 *W O. W.*, 61 Wash. 230, 112 Pac. 255, Ann. Cas. 1912B 1206, 31 L. R. A. (N. S.) 608 (1910) *Edmunds v. Duff*, 280 Pa. St. 355, 124 Atl. 489, 33 A. L. R. 719 (1924) *Hamilton Corporation v. Julian*, 130 Md. 597, 101 Atl. 558 (1917). But, "An injunction, being the strong arm of the court, should never be granted except in a clear case of irreparable injury, and with full conviction on the part of the court of its urgent necessity." *Morse v. O'Connell*, 7 Wash. 117, 34 Pac. 426 (1893) *Bouchaert v. State Board of Land Com.*, 84 Wash. 356, 145 Pac. 848 (1915) *Hodgeman v. Olsen*, 86 Wash. 615, 150 Pac. 1122, L. R. A. 1916A 739 (1915) An amusement place is not necessarily a nuisance, but may be conducted as to become one. *Rockville, etc. Co. v. Koelsch*, (Conn.) 96 Atl 947 (1916) *City of Lynchburg v. Peters*, (Vir.) 133 S. E. 674 (1926).

As in most nuisance cases, the real problem is not one of law, but of fact; that is, whether the facts show that "reasonable grounds exist to believe the proposed use will result in a nuisance." In holding that the defendant's resort will constitute a nuisance, the court relies on the fact that adjoining property would depreciate in value, but it immediately concedes that this may be a case of *damnum absque injuria*, which automatically defeats the importance of that question. The decision also points out the testimony that the lake might become an unhealthy place in which to bathe, but it is shown that the county health officers have full power to control the situation, if in fact the lake does become insanitary. It is submitted that if the decision is based on the ground that the lake might become unhealthy, the court is assuming a purely administrative function, which is the proper duty of other officials, and is granting injunctive relief when no necessity exists, contrary to well established principles. The third basis of its finding is best stated in the words of the court, "Courts can scarcely refrain from taking judicial notice that some persons who are so aquatically inclined (i. e., swimmers and users of defendant's boats) would from time to time take undue liberties with or upon the property of persons living along the lake." If by this statement, the court means to say that it is physically impossible for the owner of a resort to run his place in such a way as to prevent swimmers and users of his boats from becoming nuisances, then it is submitted that the court is taking judicial notice of that which is not a fact. But, if the court means to say, which seems more logical, that the court will take judicial notice that the defendant's patrons would from time to time annoy persons living along the lake, and that they might go so far as to become nuisances, we are then reduced to the fundamental question whether the possibility that defendant's patrons might become nuisances, creates a

reasonable ground to believe that defendant's place will constitue a nuisance.

The following facts must be kept in mind: The defendant is found, in good faith, to intend to operate his place in an orderly manner. There is no showing, except for his lack of experience, that the defendant is unqualified to run such a place in such a manner. It is granted by the court that the ordinary noise resulting from the attendance of people at a recreation grounds, conducting themselves in an orderly manner, would not constitute a nuisance. The same must be true of persons using the lake, since it is navigable and is, therefore, a public highway It is submitted that since an amusement park, run in an orderly manner, is not a nuisance and since there is no evidence to show that defendant would be unable to run it in such a manner, it should be presumed that the defendant's patrons will not act in such a way as to constitute a nuisance.

To appreciate how far the court has gone beyond any previous cases, in finding that the facts herein create a reasonable certainty that a nuisance will be created, one need merely examine the cases upon which the court relies as authority for its holding. In *Densmore v. Evergreen Camp, supra*, the court enjoined the creation of an underktaking establishment in a residential district, where the testimony, while disputed, was strong that noxious odors and gases would permeate the homes of the plaintiffs, that there would be danger of infection and contagion, and that the holding of funeral services would seriously spoil the enjoyment of the plaintiff's home. In *Everett v. Paschall, supra*, the court enjoined the erection of a tuberculosis sanitarium in a residential district, on the ground that a general, reasonable fear of contagion will justify an injunction, where it was shown by the evidence that such a general dread existed. In *Ferry v. Seattle*, 116 Wash. 437, 200 Pac. 336, 203 Pac. 40, the city was enjoined from erecting a reservoir with a 56-foot embankment in a residential district, where it was shown that there was some possibility of a break, and that if it did break, loss of life would be inevitable. In *Edmunds v. Duff, supra*, the court issued an injunction against an amusement company which intended to erect music pavilions, merry-go-rounds, scenic railways, shooting galleries, dance halls, theaters, electric fountains. The case of *Hamilton Corp. v. Julian, supra*, was tried on a demurrer, and the court held simply that the plaintiff court enjoin the erection of bowling alleys, if he showed with reasonable certainty that it would be a nuisance. Whether or not it would be a nuisance, the court did not attempt to say In *Eckels v. Weibly*. 232 Pa. St. 547, 81 Atl. 645, 7 A. L. R. 739, and in *Mason v. Deitering*, 132 Mo. App. 26, the court enjoined the erection of stables for large numbers of cattle and horses in a residential district. In *Goodrich v. Starrett*, 108 Wash. 437, 184 Pac. 220· *Andrews v. Perry*, 126 Misc. Rep. 320, 216 N. Y. Supp. 537 *Phelps v. Winch*, 140 N. E. 847, 28 A. L. R. 1169· *Deevers v. Lando*, 285 S. W (Mo.) 746, and *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. 27, 53 Atl. 289, which were the only other cases cited by the court in support of its conclusion, the principal question was not in issue, since the cases involved attempt to enjoin establishments which were already in operation.

The preceding group of cases undoubtedly supports the rule laid down, that the establishment of an enterprise will be enjoined if it is reasonably certain that the proposed use will result in a nuisance, but it is submitted that not one case cited in the opinion will support the holding that the facts here involved bring this case within the rule. In every case cited by the court it was found that the business or enterprise enjoined would constitute a nuisance because of uncontrollable factors in the nature of the proposed undertaking, even though run in an orderly, scientific and approved manner. But in the principal case the proposed use of the defendant's grounds and of the lake cannot constitute a nuisance if used in an orderly fashion. The case, therefore, does not involve the question of whether the proposed business would be a nuisance because of its nature, as in the cases cited, but is entirely a question of the defendant's ability as a manager of such a resort. It is submitted that if the court is going

to issue injunctions solely because in its opinion the defendant will not be able to run his business in an orderly manner, when it is a matter of common knowledge that some managers can operate such places without constituting a nuisance, it is not only opening the door to interminable litigation, but it is grossly abusing its power, since it is issuing an injunction on the basis of a finding as to the defendant's personal ability, which from its very nature must be questionable, and cannot be termed reasonable grounds to believe that the proposed use will constitute a nuisance. C. A. E.

EXCHANGE OF PROPERTY—RESCISSION FOR FRAUD—RELIANCE—KNOWLEDGE OF PARTIES. Plaintiff made an agreement with defendant, acting as agent of another, for a mutual transfer of lands; plaintiff being in California, where he then resided, and defendant in Seattle. Plaintiff came to Seattle shortly thereafter, saw defendant's property, and in fact lived in the house about three weeks before the transfer was completed. He now seeks to rescind the contract, claiming fraud on the part of the defendant in representing that the property was in "First class condition" and a "Desirable location." *Held*. There was no condition represented which plaintiff did not become aware of, by personal observation before the completion of the contract; therefore, no fraud on which to base recission. *Savinovich v. Winbigler* 55 Wash. Dec. 245, 284 Pac. 77 (1930).

The requirements of fraud are: material representation, made with knowledge of its falsity, or recklessly, with intent that the representation shall be acted on; and reliance by the plaintiff with resulting injury. *Pain v. Kiel*, 228 Fed. 527 (1923) *Ochs v. Woods*, 221 N. Y. 335, 117 N. E. 305 (1917). The requirements of intent to defraud has been done away with in this jurisdiction. *Starwich v. Ernst*, 100 Wash. 198, 170 Pac. 584 (1918) The representation as to location is material, rescission being given for misrepresentation of the avenue on which a lot is located, *Day v. Taylor*, 123 Wash. 286, 212 Pac. 170 (1923), or as to desirable location, *Wiley v. Simons*, 259 Mass. 159, 156 N. E. 23 (1927), if such statements induced purchase. One can also have rescission for fraudulent representations concerning the existence of a condition, *McCracken v. Bangs*, 148 Ark. 655, 229 S. W 730 (1921), or of the character of the land, *Leipold v. Epler* 198 Ill. App. 618 (1916), when they would wholly or in part induce vendor to act. In this case, the lack of the element of reliance caused the plaintiff's defeat. The reliance necessary must not only be actually present, but must be a reasonable reliance on the facts. *In re Hunter-Rand Co.*, 241 Fed. 175 (1917). Where there is no opportunity to discover the misrepresentation, the purchaser may rescind for fraud. *Houder v. Reynolds*, 195 Mich. 256, 161 N. W 856 (1917). Conversely, if there have been misrepresentations, but no actual reliance thereon, the vendee cannot rescind merely on the strength of the fact such statements were made. *Berrendo Irrigated Farms Co. v. Jacobs*, 23 N. M. 290, 168 Pac. 483 (1917). The courts do disagree, however, in the cases where there is no investigation, but there could have been one revealing the fraud, had the vendee wished to make it. Some hold that one who buys property has a right to rely on representations, even though he could have investigated, and can sue if defrauded. *Eufemia v. Moan*, 206 N. Y. S. 185 (1923) *Dickey v. Dunn*, 80 Cal. App. 724, 252 Pac. 770 (1927). Others do not allow the vendee to rescind for fraud when he has the means of investigating, but does not use them. *Dean v. Merchants & Farmers Bank*, 24 Ga. App. 475, 101 S. E. 196 (1919) *Hones v. Herring*, 16 S. W (2d) 325 (1929).

The vendee in the instant case was on the property, not only for a superficial examination, but for actual residence for a time; so that a knowledge, or investigation, of the facts must have come to him. The contention of the defendant is that this knowledge of conditions negatives any claim of reliance he might advance, even though the defendant did make misrepresentations which, if they had been relied on in good faith, might have been grounds for rescission. The merit of such a

plea in every case lies in the facts of the case itself. A strong case, for this jurisdiction, of justification in relying on vendor's statements is *Bickford v. Uthe*, 134 Wash. 636, 239 Pac. 898 (1925) where a woman who had lived for some years in the vicinity of the land sold was allowed to rely on representations of the seller that the orchard was not in a frost pocket, and would not be killed by frost. There was, however, no evidence of actual inspection of the particular premises. Generally one examining land before purchase, so that he can see its condition, cannot claim he relied on the vendor's representations. *Sims v. Robinson*, 142 Wash. 555, 253 Pac. 788 (1927). But special circumstances will change the rule. Investigation does not cut off reliance where the person investigating really knows nothing of the use of the land, and must rely on the representations about facts not readily ascertainable even by investigation. *Bliss v. Clebanck*, 136 Wash. 32, 238 Pac. 979 (1925) Nor is relief denied where statement of general characteristics is made as one of fact, to induce purchase, if there is actual reliance thereon, the plaintiff in the case of *Rockham v. Koch*, 125 Wash. 451, 216 Pac. 835 (1923) being held entitled to rely, where there was an honest misrepresentation of the acreage in an enclosure, even though he looked at the land, the statement being made as of fact. But one of experience had been held not to rely justifiably on a statement as to the number of acres of a tract cleared, when he saw the land. *Mackay v. Peterson*, 122 Wash. 550, 211 Pac. 716 (1922). Reliance is the criterion, the vendee being allowed no action of fraud where he has not actually relied on the representations of the vendor, as a reasonable person. *Johnson v. Chesser* 129 Wash. 580, 225 Pac. 442 (1924). Had the vendee never seen the premises, he might readily have recovered, but with his ample chance to investigate, as a dweller on the property, he cannot reasonably complain that the very facts which were misrepresented were not those most forcibly brought to his attention, barring relief. W J. P

CARRIERS—GRATUITOUS PASS—LIMITATION OF LIABILITY. The plaintiff was issued a series of free railroad passes; one entitling him to ride from Seattle, Washington, to the city of Omaha, Nebraska, another from Omaha to Minneapolis, Minnesota, and the last pass entitled him to travel from Minneapolis to his destination at Wood Lake, within the state of Minnesota. The plaintiff was injured while riding on this last pass, the back of which provided that the holder "assumes all risk of accident and injury to person." On appeal, the United States Circuit Court of Appeals *held* that the stipulation contained in the pass exempting the carrier from liability for negligence was valid. The court were of the opinion that this was an interstate pass and subject to the federal law, but said that even if it were an intrastate pass they would not recognize the repeated decisions by the Minnesota Supreme Court holding such exemptions void as against public policy and unless there was a controlling state statute, they would follow the federal rule. *Bush v. Bremer* 36 Fed (2d) 191 (1929).

The decision is undoubtedly correct if the pass is construed as an interstate pass. The Supreme Court of the United States, in its interpretation of that provision of the Hepburn Act, limiting the issuance of free interstate passes to certain classes of persons, has held that by this legislative enactment, Congress took over the whole subject of free interstate passes to the exclusion of state laws, not only superceding the state laws as to what passes might be issued, but also as to their limitations and effect upon the rights of the passenger and carrier respectively. *Kansas City So. Ry. v. Van Zant*, 260 U. S. 459, 43 Sup. Ct. Rep. 176, 67 L. ed. 348 (1923). The federal cases lay down the rule that a stipulation in a gratuitous pass for interstate transportation, exempting the carrier from liability for negligence, is valid. *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408 (1904) *Charleston & Western Carolina Ry. v. Thompson*, 234 U. S. 576, 34 Sup. Ct. 694, 58 L. ed. 1476 (1914).

But a more difficult question is presented if the free pass in the principal case is construed as merely an intrastate pass. No attempt was

made by Congress in passing the Hepburn Act to regulate the issuance of intrastate passes, and it would seem that the issuance and validity of stipulations or conditions annexed to such passes would be a matter of state determination and control. As in the principal case, the United States Supreme Court has recognized the validity of an express state statute, prohibiting a carrier from limiting its liability for negligence in a free intrastate pass. *New York Central Railroad Co. v. Mohney*, 40 Sup. Ct. 287, 252 U. S. 152, 64 L. ed. 502, 9 A. L. R. 496 (1920). The intimation by the court in the *Bremer* case that they would not follow the decisions of the state supreme court rendering such stipulations in a free intrastate pass invalid, would seem to give rise to an inconsistency, inasmuch as it is clearly recognized that a legislative enactment would be controlling, yet the federal court would not be bound by decisions of the state court. A review of the decisions reveal that the United States Supreme Court has consistently followed the doctrine that in matters of general law, the federal courts will exercise their own judgment, uncontrolled by state decisions. *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865 (1842) *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914 (1892) *Black and White T. & T. Co. v. Brown and Yellow T. & T. Co.*, 276 U. S. 518, 48 Sup. Ct. 404, 72 L. ed. 681 (1927). It follows, therefore, as a necessary conclusion, that the states may legislate as to the validity of conditions and stipulations annexed to free intrastate passes exempting the carrier from liability and such statutes will be enforced by the federal courts. But in the absence of such legislation, where cases involving this question are tried and instituted in a state court, decisions rendering such stipulations invalid will not be controlling when appealed to or reviewed by the Supreme Court of the United States. In view of the fact that the principal case has adopted this line of reasoning, it would seem to be correctly decided. O. .H

EQUITY—REFORMATION OF INSTRUMENTS—MISTAKE OF LAW. Thirteen railroads became associated in the organization of the Union Railway Company, each paying one-thirteenth of the maintenance cost. Two of these led out from Indianapolis, each of which was encumbered by a mortgage. They consolidated and a consolidated mortgage was put on them. The plaintiff of this action became the owner of the railroads by purchase at the foreclosure sale. The foreclosure decree provided that the purchaser might elect whether to accept or reject any existing contract affecting the property. The plaintiff elected to retain the contract of one of the railroads with the Union Company but to reject the other. Later it was held that the Union Company was entitled to collect two shares of the maintenance cost from the plaintiff. The plaintiff seeks to be relieved from his election and to reject both contracts because his first election was made under a mistake of law. *Held*. That equity will often permit obligations to be reformed or rescinded because based on a mistake of law. *Cincinnati, I. & W R. Co. v. Indianapolis Union Ry. Co. et al.*, 36 Fed. (2d) 323 (1929)

Courts of equity early laid down the rule that equity would not relieve in case of a mistake of law. *Bilbie v. Lumley*, 2 East. 469, 6 R. R. 479 (1802) The reason for this doctrine was the maxim "ignorance of the law is no excuse." The federal courts have generally followed this rule. *Utermehle v. Norment*, 197 U. S. 40, 49 L. Ed. 655, 25 Sup. Ct. 291 (1904). However the courts will seize upon any possible excuse in order to give relief. Perhaps the only well supported holding now is that one cannot recover money which has been paid under a mistake of law. *Doll v. Earle*, 65 Barb. 298 (1874). There is one exception even to this rule, however, and that is that money paid under mistake of law by public officials must be refunded. *Wisconsin Central R'd. v. United States*, 164 U. S. 190, 41 L. Ed. 399, 17 Sup. Ct. 45 (1896).

The courts have granted relief under guise of many exceptions. Some courts have relieved where there is a mistake of law by one party known to the other and taken advantage of by him. *Rowe v. James*, 71 Wash. 267,

128 Pac. 529 (1912) Others have made a distinction between a mistake of private legal right and a mistake of a general law. *Lansdowne v. Lansdowne*, 1 Madd. 116, 1 Jac. & Walk 522, 15 R. R. 225 (1730). This is usually applied where by mistake of law one who has bought what is really his. *Bingham v. Bingham*, 1 Ves. 126 (1784). Another grounds for exception is in the case of the written agreement not carrying out the intention of the parties as was previously expressed in a parol agreement because of some mistake in reducing it to writing. *Hazard v. Warner* 112 Wash. 687, 211 Pac. 732, 31 A. L. R. 381 (1923) Courts will even take into consideration the hardship which may be caused by a mistake of law. *Ryon v. John Wanamaker New York, Inc.*, 116 Misc. Rep. 91, 190 N. Y. S. 250 (1921) Courts have also said that a mistake of foreign law is a mistake of fact and have relieved against such a mistake. *Osincup v. Henthorn*, 89 Kan. 58, 130 Pac. 652, 46 L. R. A. (n.s.) 175, Ann. Cas. 1914C 1262 (1921). Some states, for example, California, have passed statutes granting relief for mistake of law. Deering, Civ. Code of Cal., sec. 1578.

One means the courts have seized upon to avoid applying this doctrine is to find some mistake of fact, no matter how slight, involved in the mistake of law and for this reason give relief. *Usher v. Waddingham*, 62 Conn. 412, 26 Atl. 538 (1892). There was some element of a mistake of fact in the principal case. The plaintiff was mistaken as to the fact that the consolidated road had so acted as to merge the two contracts into one. However, this case openly states that equity will relieve for a mistake of law. Most courts are loath to go against the weight of authority and accept the statement that equity will relieve for mistake of law, especially as there are so many exceptions that justice and equity usually can be reached by means of these exceptions. Even in those cases where courts have said they would relieve for a mistake of law there were elements in the case which would bring it within one of the many exceptions. When the mistake is one purely of law and there are no elements to bring it within an exception, they have refused relief. As this rule is the outgrowth of *dicta*, the instant case by stating that mistake of law is a ground for equitable relief is adopting a position which leads away from the confusion and lack of frankness on the part of the courts and is therefore justifiable. There really is no logical reason for a different result in case of mistake of fact and of law Probably a better way than leaving it to courts to reach the desired result is to accomplish it by legislation. J. F