Michigan Law Review

Volume 9 | Issue 1

1910

Recent Important Decisions

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ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—COMPROMISE.—Without express authority plaintiff's attorney compromised a cause of action, after suit started, and stipulated for a dismissal upon the merits. Plaintiff by a different attorney brought another action on the same cause. The compromise was pleaded in bar to which the plaintiff replied that said compromise was unauthorized and fraudulent. *Held,* that a general retainer gives no implied power to compromise except in case of emergency, and furthermore as the compromise was not followed by judgment, that the doctrine of collateral attack did not apply. *Nelson* v. *Nelson,* (1910), — Minn. —, 126 N. W. 731.

The courts do not all agree upon the authority of an attorney to compromise his client's claim. *Holker* v. *Parke,* 11 U. S. (7 Cranch) 436 and *Nolan* v. *Jackson,* 16 Ill. 272, are typical cases enunciating the American rule that an attorney has no such implied power. *Bonney* v. *Morrill,* 57 Me. 368; and *Levy* v. *Brown,* 56 Miss. 83 are contra. Generally then in this country such an implied power is not recognized, but it must be noted that an attorney can do all things that pertain to the remedy and not the cause. A dismissal should be carefully distinguished from a compromise. Non-residence of the client does not increase the authority. *Housenick* v. *Miller,* 93 Pa. St. 514. However in England an attorney is a general agent and can compromise. *Butler* v. *Knight,* 2 Exch. 109. But later cases qualify this by requiring good faith and reasonableness, and that the adverse party must be ignorant of any violation of authority. *Swinfen* v *Swinfen,* 18 C. B. 485 and *Whipple* v. *Whitman,* 13 R. I. 512. Under the American rule the client has two alternatives: first, to ignore the old suit and start another (see *Jones* v. *Inness,* 32 Kan. 177); or second, he can have the compromise set aside and the case reinstated (see *Dalton* v. *West End R. R. Co.,* 159 Mass. 221).

ATTORNEY AND CLIENT—DISBARMENT—REASONABLE DOUBT.—Proceedings to disbar appellants for misconduct in conspiring to obtain perjured testimony. *Held,* that disbarment proceedings are civil and not criminal and that allegations need be proved by only a preponderence of the evidence. *In re Darrow* (1910), — Ind. —, 92 N. E. 369.

Many text writers say that when in a civil case a criminal act is one of the allegations to be proved, the ordinary rule in civil cases applies and that a preponderence of evidence suffices. WIGMORE, EVIDENCE, § 2498. WIGMORE particularly says that the above is the rule in disbarment proceedings. But the decisions on this point are not harmonious. In Michigan disbarment proceedings are of a criminal nature and allegations should be clearly supported. *Matter of Baluss,* 28 Mich. 507. In Colorado, clear and convincing proofs are necessary. *People* v. *Pendleton,* 17 Colo. 544. In Utah more than a preponderence of evidence is required. *Re Evans,* 22 Utah 366. In Illinois the case must be clear and free from doubt. *People* v. *Harvey,* 41 Ill. 277.

In Kentucky testimony of a doubtful character is not sufficient. *Tudor* v. *Commonwealth,* 27 Ky. Law Reporter, 87. In New Jersey the evidence must be clear and convincing. *Re Noonan & Simpson,* 65 N. J. L. 142. *In the Matter of Attorney* (1 Hun 321) the disbarment is held to be penal and should be free from serious doubt. *In Matter of Mashbir* (44 App. Div. 632) guilt must be established beyond a reasonable doubt. When the courts say that a case must be free from doubt, if anything less than a reasonable doubt is meant the persuasion required is even greater than that necessary in a criminal prosecution. In short we find from the cases that the rule is in several states opposed to that enunciated in the principal case. On principle an anomalous situation arises if the rule of the principal case is to be followed in disbarment for commission of a felony. Many courts, among them the United States Supreme Court (see 3 AM. & ENG. ENC. OF LAW, 304, Ed. 2) hold that for indictable misconduct in an official capacity previous conviction is not necessary to warrant disbarment. In disbarment proceedings the attorney may demand a jury trial, as he has the right to do in Indiana, (*Reilly* v. *Cavanaugh,* 32 Ind. 214), and the jury may find the preponderance of evidence in favor of guilt. But if the attorney is afterward indicted and tried for the same offense, the jury may find that the evidence does not show guilt beyond a reasonable doubt. The result is that an attorney is disbarred for something of which a jury says he is innocent. It is submitted that, upon this assumed state of facts, the same measure of persuasion should be required in each trial, or else that the cases holding that a previous conviction is not a prerequisite to disbarment should be overruled.

BANKRUPTCY — CORPORATIONS SUBJECT TO INVOLUNTARY BANKRUPTCY — AMENDMENT OF 1910.—The Willis Cab and Automobile Co. was a corporation whose principal business was the keeping of a boarding stable to feed and care for horses for hire. An involuntary petition in bankruptcy filed against the corporation, in the District Court for the Southern District of New York, was dismissed, on the ground that the corporation was not one engaged principally in mercantile or trading pursuits within the meaning of § 4 b of the Bankruptcy Act of 1898. *In re Willis Cab & Automobile Co.* (1910), — D. C., S. D., N. Y. —, 178 Fed. 113.

Three other cases coming under the same section of the Statute were decided by the United States Supreme Court shortly previous to the foregoing one. The Toxaway Hotel Co., a corporation, duly formed under the laws of Georgia, was chartered to conduct hotels, inns, restaurants, etc., with their usual and necessary adjuncts. The company acquired and operated six hotels. Creditors filed a petition to adjudicate the corporation a bankrupt as having been principally engaged in mercantile and trading pursuits. *Held,* that the company was not amenable to the act. *Toxaway Hotel Co.* v. *Smathers* (1910), 216 U. S. 439. The Monongahela Construction Company was a Pennsylvania corporation, the principal business of which was to make and construct arches, walls, bridges, etc., out of concrete. It was held to be a corporation engaged principally in manufacturing within the meaning of § 4 of the Bankruptcy Act. *Friday* v. *Hall & Kaul*

Co., 216 U. S. 449. Another case coming up before the U. S. Supreme Court for decision involved the question as to whether a corporation engaged principally in carrying on a general restaurant business, could be considered as engaged in a trading or mercantile pursuit within the meaning of § 4 of the statute. The court held that it could not. *Nollman* v. *Wentworth Lunch Co.* (1910), 217 U. S. 591. Other recent cases upon the points involved in the preceding cases are: *In re Humphrey*, 177 Fed. 187; *Robertson* v. *Union Potteries Co.*, 177 Fed. 279; *Bollinger* v. *Central Nat. Bank*, 177 Fed. 609; *In re Eagle Laundry Co.*, 178 Fed. 308; *U. S. Surety Co.* v. *Iowa Mfg. Co.*, 179 Fed. 55. These are the latest cases decided under § 4 of the Bankrupt Act as amended by § 3 of the Act of February 5, 1903, c. 487, 32 Stat. 797, relating to involuntary bankrupts. The section was amended in June, 1910, extending the application of the Act to all moneyed, business or commercial corporations, excepting municipal, railroad, insurance and banking corporations. This amendment eliminates a question, over which there has been much contrariety of opinion in the lower Federal courts, and which has but recently been settled by the Supreme Court of the United States in the three cases noted above. It is practically a return to § 37 of the Bankruptcy Act of 1867, except that municipal, railroad, insurance and banking corporations are expressly excluded. The Federal Courts held that the Act of 1867, applied to all corporations created for the purpose of carrying on or pursuing any lawful business defined by their charters, and clothed with power for this purpose, for the sake of gain. *Rankin* v. *Florida R. R. Co.*, 20 Fed. Cas. 274; *Alabama R. R. Co.* v. *Jones*, 1 Fed. Cas. 275. Apparently under such a holding all of the corporations in the principal cases above mentioned would have been adjudicated bankrupts. The Act of 1898 narrowed down considerably the class of corporations that might become involuntary bankrupts. The Federal Courts under this act have construed strictly and technically the terms applied to the classes of cases enumerated. *In re Cameron Town Ins. Co.*, 96 Fed. 756; *In re Tontine Surety Co.*, 116 Fed. 401; *In re Guarantee and Trust Co.*, 121 Fed. 73. The new amendment is a return to a more liberal application of involuntary bankruptcy to corporations generally.

BANKRUPTCY—FOLLOWING TRUST FUNDS INTO HANDS OF TRUSTEE IN BANKRUPTCY.—S, who did a private banking business, became insolvent prior to Aug. 15, 1908. Between that date, and Sept. 30, 1908, claimant made a number of deposits in S's bank. On the latter date S. filed a voluntary petition in bankruptcy, claimant having in the bank at the time a balance of $231.11, which was more than covered by the cash on hand. Claimant was ignorant, prior to proving his claim, that S. had accepted claimant's deposits, knowing himself to be insolvent at the time. Claimant bases his claim on the fraudulent receipt of his deposits, and seeks to recover the amount of his balance as a trust fund, in preference to the other creditors. *Held*, that claimant could follow the full amount of his claim into the hands of S's trustee in bankruptcy, as a trust fund, and in preference to other creditors. *In re Stewart* (1910), — D. C., N. D., N. Y. —, 178 Fed. 463.

That trust funds may be followed from the holder, into the hands of the

latter's trustee in Bankruptcy, when capable of identification, is well settled. *In re Taft,* 66 C. C. A. 385; *Erie R. R. Co.* v. *Dial,* 72 C. C. A. 183. There is what some courts call a modern tendency to allow recovery if it can be shown that the general fund in the hands of the creditor's trustee has been augmented by the commingling of trust funds with it, the entire fund then being considered a trust fund. *Massey* v. *Fisher,* 62 Fed. 958. *National Bank* v. *Insurance Co.,* 104 U. S. 54. What appears to be the better doctrine, as applied by the federal courts, is that at least some identification of the property must be shown. *American Can Co.* v. *Williams,* 178 Fed. 420. The court in the latter case however, seems to consider that by showing a conversion into, or commingling with, the general fund, a sufficient identification is established, provided that withdrawals have not reduced the general fund to below the amount of the trust fund.

BILLS AND NOTES—NOTICE BY MAIL—PROOF OF MAILING.—A banker testified that he deposited in the post-office, postage prepaid, and mailed the proper notices of dishonor of certain notes. Upon cross-examination, the witness said: "They were mailed by the clerk." Q. "Did you mail them?" A. "Put them with our mail." Q. "Do you know whether they were put into the office of your own knowledge?" A. "I don't." Q. "You don't know who put the mail or carried the mail to the office on either of those days?" A. "I do not." No evidence was offered to show why the clerk was not called as a witness. *Held,* there was sufficient evidence to justify a finding, in the absence of proof that the notices were not received, that they were duly mailed as required by the Negotiable Instruments Law, §§ 4259-4276, Gen. St. 1902. *Central Nat. Bank* v. *Stoddard* (1910), — Conn. —, 76 Atl. 472.

Proof of notice must be strict. A mere probability is not sufficient. *Martinis* v. *Johnston,* 21 N. J. L. 239. *Schoneman* v. *Fegley,* 14 Pa. St. 376. In the main case, the court said that the fact of mailing may be proved by either direct or circumstantial evidence. It is not necessary that a single witness should swear positively that he deposited the notice in the proper place. But all who had anything to do about the matter of depositing the notice should be called. *Commercial Bank* v. *Strong,* 28 Vt. 316. If the person whose duty it was to deposit letters in the post office is not called or his absence accounted for, compliance with the usual custom (*Bell* v. *Hagerstown Bank,* 7 Gill 216) is not fully proved. *Brailsford* v. *Williams,* 15 Md. 150, 74 Am. Dec. 559. This rule was first announced in *Hetherington* v. *Kemp* (1815), 4 Camp. 193. Where the person who deposited the letters testifies either from recollection or invariable custom, the evidence is sufficient. *People* v. *North River Bank,* 17 N. Y. Supp. 200, 62 Hun 484; *Martin* v. *Smith,* 108 Mich. 278, 66 N. W. 61; *Skilbeck* v. *Garbett,* 7 Q. B. (53 E. C. L.) 844; *Commercial Bank* v. *Strong,* supra. And insufficient, where such person does not testify. *Brailsford* v. *Williams,* supra, *Newport Nat. Bank* v. *Tweed,* 4 Houst. 197. See full discussion in *Goucher* v. *Carthage Novelty Co.,* 116 Mo. App. 99, 91 S. W. 447. In the main case, the testimony leaves the letter in the office. There seems to be an essential link missing in the proof of mailing.

BILLS AND NOTES—RIGHT OF DRAWEE OF FORGED CHECK OR DRAFT TO RECOVER MONEY PAID THEREON.—One Paul sold plaintiff a span of horses, receiving plaintiff's note. About the time that this note became due, plaintiff received word from the defendant that it held the note given by plaintiff to Paul. Plaintiff paid the note, which, it afterwards developed, was a forgery, almost a duplication of the Paul note. The forgery was not discovered until plaintiff was called upon to pay the genuine note. The defendant refused to return the money upon demand. *Held,* the drawer of a check or maker of a note, being required to know his own signature, can not recover payment made through mistake to a holder in due course of a forged instrument. *Jones* v. *Miners' and Merchants' Bank* (1910), — Mo. App. —, 128 S. W. 829.

Explaining the reason for its decision, the court said: "We can not give our sanction to such a rule, and should not hesitate to repudiate it, as many other courts have done, but for the fact that this rule has come to be the settled law of the State in a way that will control our actions until a different rule shall be adopted by a power that is superior to us." That money paid under mistake of fact may be recovered is the general rule of law. *Lyle* v. *Shinnebarger,* 17 Mo. App. 66. An exception was announced, in 1762, in the case of *Price* v. *Neal,* 3 Burr. 1354, in which case it was held that where a forged bill of exchange had been accepted and paid by the drawee, he could not recover from the indorsee to whom he paid it. That holding has been followed by the English courts and by a great majority of the American courts, being applied alike to forged bills of exchange, checks, and notes. *First Nat. Bank* v. *Northwestern Nat. Bank,* 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289. In Pennsylvania, however, the rule of *Price* v. *Neal* has been changed by statute. *Tradesmen's Nat. Bank* v. *Third Nat. Bank,* 66 Pa. 435. *Iron City Nat. Bank* v. *Fort Pitt Nat. Bank,* 159 Pa. 46, 28 Atl. 195. In other States, the courts have so restricted the rule, or repudiated it, as to warrant the inference that the unqualified rule of *Price* v. *Neal* was inadvertently announced. Many courts restrict the rule to cases of an innocent holder for value, some even requiring the holder receiving payment to be absolutely without fault, with reference thereto. See notes, 10 L. R. A. (N. S.) 1-74. *Northwestern Nat. Bank* v. *Bank of Commerce,* 107 Mo. 402, 15 L. R. A. 102. Other courts allow a recovery in all cases except where to allow it would place the person from whom payment was recovered in a worse position than he would have been in had payment been refused. *First Nat. Bank* v. *Bank of Wyndemere,* 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 1. *Ellis* v. *Ohio Life Ins. & T. Co.,* 4 Ohio St. 628, 64 Am. Dec. 610. *People's Bank* v. *Franklin Bank,* 88 Tenn. 299, 6 L. R. A. 724, 12 S. W. 716, 17 Am. St. Rep. 884. This view is supported by many of the text books, and seems to be growing in favor with the courts. See 71 CENT. L. J. 137. In MORSE, BANKS AND BANKING, Ed. 4, § 464, it is said of the harsh rule of *Price* v. *Neal*: "This doctrine is fast fading into the misty past, where it belongs."

BOUNDARIES—LINE BETWEEN RIPARIAN OWNERS.—Complainants and defendants were owners of adjoining lots bordering on Detroit river. Both

parties had docks extending out into the river along their shore line. The parcel in dispute is a triangle whose apex is the point where the lot line, on land, intersects the water line. The hypothenuse of this triangle is this lot line extended from the apex to the thread of the stream. The other side of the triangle is a line extending from the apex into the river, and at right angles with the thread of the stream. In an action to quiet title, it was *held* that the boundary line between two adjoining riparian owners as to the land covered by water is not in any way dependent upon the direction of the lines on land, but the line from the shore should run as near as may be perpendicular to the course of the stream. *A. M. Campau Realty Co.* v. *City of Detroit et al.* (1910),— Mich. —, 127 N. W. 365.

Nearly all the courts adopt this rule where the shore line is straight. *Menasha Wooden Ware Co.* v. *Lawson,* 70 Wis. 600; *City of Elgin* v. *Beckwith,* 119 Ill. 367; *Miller* v. *Hepburn,* 8 Bush 326; *Knight* v. *Wilder,* 2 Cush. 199, 48 Am. Dec. 660. The reason for the rule is that it gives to each riparian owner his equitable share of the bed of the stream. Where the stream is not straight each riparian owner is entitled to a share of the river bed out to a line following the thread of the stream proportionate to the size of his lot bordering on the shore. *Northern Pine Land Co.* v. *Bigelow,* 84 Wis. 157; *Deerfield* v. *Arms,* 17 Pick. 41. In New Jersey a statute has been construed to have embodied the above rules. *Delaware, L. & W. R. Co.* v. *Hannon,* 37 N. J. L. 276. In tidal waters the same reason applies and the line of navigation or harbor line is divided among the riparian owners, proportionate to their respective holdings on the shore. *Aborn* v. *Smith,* 12 R. I. 370; *Emerson* v. *Taylor,* 9 Greenl. 42; *Cornwall* v. *Woodruff,* 30 App. Div. 43; *Groner* v. *Foster,* 94 Va. 650. In England the boundary line is run at right angles with the shore from the corners of the property, *Crook* v. *Seaford,* L. R. 6 Ch. 551.

BOUNDARIES — MONUMENTS GIVE WAY TO COURSES AND DISTANCES. — A state grant called for "fifty acres of land," described as follows: "On dividing ridge between John's river and Mulberry creek, adjoining his own land. Beginning on a black pine near the flat rock, and runs N. 35° W. 100 poles to a stake in Daniel Moore's line; then W. 80 poles to a stake in Jesse Gragg's line, then S. 35° E. 100 poles to a stake in his own line; then E. with said line to the beginning." The beginning corner of said grant was not in dispute. No lines were in fact run when the survey was made, and the land was platted merely from the courses and distances recited in the entry and grant. The evidence showed that the corner in Jesse Gragg's line was in dispute at the time that the grant was taken out. The lines of said grant, if run by course and distance, would embrace fifty acres. If run according to monuments or natural boundary, it would cover about seven hundred acres. *Held,* when the call for the boundary of another tract is uncertain and the boundaries are not established, such call must give way to courses and distances, and quantity becomes important to determine which governs. *Wilson Lumber Co.* v. *Hutton et al.* (1910), — N. C. —, 68 S. E. 2.

The general rule of construction in cases where there is a conflict in a

description between monuments and courses and distances, is that the monuments prevail; and where there is a conflict between either of these and the quantity of the land designated, the former prevails. BREWSTER, CONVEYANCING, §§ 87, 92. *City of Decatur* v. *Niedermeyer,* 168 Ill. 68; Notes and cases 30 Am. Dec. 737; *Peterson* v. *Beha,* 161 Mo. 513; *Matheny* v. *Allen,* 63 W. Va. 443, 60 S. E. 407, 129 Am. St. Rep. 984. The application of this rule has reference to the monuments and measurements made by the original survey. *Woodbury* v. *Venia,* 114 Mich. 251, 72 N. W. 189. It will not be applied where the natural object is shown to be variable in its position, *Smith* v. *Hutchinson,* 104 Tenn. 394, 58 S. W. 229. As where monuments called for as being near the intended line. *Harry* v. *Graham,* 18 N. C. 76, 27 Am. Dec. 226. So whenever the evidence is sufficient to induce the belief that the mistake in a survey is in the call for a natural or artificial object and not in the call for course and distance, the latter will prevail. *Johnson* v. *Archibold,* 78 Tex. 96, 22 Am. St. Rep. 27. And where the natural object is not clearly identified and where it would cause a departure from other natural objects called for, the monuments give way to courses and distances. *Bell County Land and Coal Co.* v. *Hendrickson,* 24 Ky. Law Rep. 371, 68 S. W. 842. Where it was shown that the greater portion of the boundary of a grant of 500,000 acres was not run on the ground but was platted in, and that the surveyor was mistaken or ignorant as to the true location of the monuments called for, so that, if they are taken as making the boundary the tract would contain but little over 100,000 acres, while as platted according to the courses and distances given, it contained the quantity called for in the grant, it was held that the general rule did not apply to mistaken or false calls and the courses and distances prevailed, *King* v. *Watkins,* 98 Fed. 913, nor does the general rule apply where the monument called for was not placed in position by the surveyor, but was merely an office call, and when in such a case, a call for courses and distances will maintain the integrity of an older survey, the courses and distances will prevail. *Holdsworth* v. *Gates,* Tex. Civ. App., 110 S. W. 537. Further as to when quantity controls, see 6 MICH. L. REV. 343.

CARRIERS—LIMITATION OF AMOUNT OF RECOVERY IN CASE OF LOSS OF BAGGAGE.—P purchased from D railroad company a fifty-trip commuter family ticket, issued in conformity to D's tariff, a list of which was on file as required by law with the Public Service Commission. The ticket provided that in consideration of the reduced rate, that "the company's liability for baggage belonging to each passenger shall not exceed fifty dollars." P's baggage, valued at over one thousand dollars, was lost and she seeks to recover its actual value. *Held,* (LAUGHLIN and SCOTT, JJ. dissenting), that the limitation of D's liability to a certain amount was clearly expressed in the ticket which P purchased and that P was bound by the limitation and could not recover in excess thereof, even though its loss was due to D's negligence. *Gardiner* v. *New York Cent. & H. R. Co.* (1910), 123 N. Y. Supp. 865.

It is well settled, despite some apparent conflict in the cases, that a com-

mon carrier and a passenger may make a binding contract with respect to the value of the baggage shipped, which will limit the amount of recovery in case of loss. However, the passenger must not be denied the right to demand a higher valuation, not exceeding the real value of the goods, upon the payment of reasonable compensation. *Hart* v. *Penn. R. R. Co.*, 112 U. S. 717; *Ullman* v. *Chicago etc. Ry. Co.*, 112 Wis. 150. According to the weight of authority, even when the loss of baggage is due to the railroad company's negligence, the recovery by P is limited to the stipulated amount, since the risk which the carrier assumed, was bas upon the amount fixed as the value, and the owner is estopped to deny a contract which was beneficial to him when made. *Hart* v. *Penn. R. R. Co.*, 112 U. S. 717; *Hill* v *Boston etc. R. R. Co.*, 144 Mass. 284; *Alair* v. *Northern Pacific R. R. Co.* 53 Minn. 160; *Ballou* v. *Earle*, 17 R. I. 441; *Johnstone* v. *Richmond etc. R R. Co.*, 39 S. C. 55; *R. R. Co.* v. *Sowell*, 90 Tenn. 17; *Donlin* v. *Southern Pacific Ry. Co.*, 151 Cal. 763; *Rose* v. *Northern Pac. Ry. Co.*, 35 Mont. 70; *Zouchs* v. *C. & O. Ry. Co.*, 36 W. Va., 524; *Chicago etc. R. R. Co.* v. *Chapman*, 133 Ill. 96. The minority view of holding the carrier liable for the full value of the goods is based mainly upon the ground that it is contrary to public policy to permit anyone to obtain a release from the result of his own negligence, partial and indirect though it may be by limiting the recovery in amount. *Everett* v. *R. R. Co.*, 138 N. C. 68; *U. S. Express Co.* v. *Backman*, 28 O. St. 144; *Broadwood* v. *Southern Express Co.*, 148 Ala. 17; *Southern Express Co.* v. *Rothenberg*, 87 Miss 656; *Fort Worth etc. Ry.* v. *Greathouse*, 82 Tex. 104; *McCune* v. *Burlington etc. R. R. Co.*, 52 Iowa 600. In the principal case, LAUGHLIN and SCOTT, JJ., in their dissenting opinion concede the legal right of the railroad company to limit, even in the case of negligence the amount of recovery by a mutual valuation agreement fairly and honestly made, but hold that the agreement printed on the ticket in controversy, to-wit, "the company's liability for baggage belonging to each passenger shall not exceed fifty dollars," is not a valuation agreement but an arbitrary attempt on the part of the railroad company to limit its liability which is contrary to public policy when the loss is caused by D's negligence.

CHARITIES—TESTAMENTARY TRUSTS—GIFT FOR MASSES.—The testator made the following bequest: "I give, devise and bequeath all the rest of my property for masses for the repose of my father's and mother's and sister's and brother's and my own soul. The masses will be said according to the direction of Thomas J. Fenlon and J. P. Watt, and I hereby appoint them to direct where and when to say said masses." Proceedings were brought for the construction of the will. *Held*, (TIMLIN, J., dissenting) that this testamentary gift is a valid public charity. *In re Cavanaugh's Estate* (1910), — Wis. —, 126 N. W. 672.

It is well settled that the advancement of religion is an object of charity. *In re Darling* [1896], 1 Ch. 50; *Alden* v. *St. Peter's Parish*, 158 Ill. 631, 30 L. R. A. 232, 42 N. E. 392. A bequest for masses, however, is held to be a superstitious use and void in England. *In re Bluntell's Trust*, 30 Beav. 360. In the United States the doctrine of superstitious uses does not obtain;

Harrison v. *Brophy*, 59 Kan. 1, 51 Pac. 883, 40 L. R. A. 721; *Hoeffer* v. *Clogan*, 171 Ill. 462, 40 L. R. A. 730, 63 Am. St. Rep. 241, yet our courts are in conflict on the question presented by the principal case. One line of authorities holds with the Wisconsin court that a gift for masses for the repose of the souls of certain specified persons is a public charity because the ceremony is public and all mankind receive a benefit. *Ex Parte Schouler*, 134 Mass. 426; *Hoeffer* v. *Clogan*, supra; *Webster* v *Sughrow*, 68 N. H. 380, 45 Atl. 139, 48 L. R. A. 100; *Coleman* v. *O'Leary's Exr.*, 114 Ky. 388, 70 S. W. 1068. Other courts hold that such a bequest is not a public charity and is invalid for want of definite beneficiaries. *Holland* v. *Alcock*, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; *Festorazzi* v. *St. Joseph's*, 104 Ala. 327, 18 South. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360. Iowa has decided that a bequest for the saying of masses for the repose of the soul of the donor is not a public charity but a private trust and valid as such, *Moran* v. *Moran*, 104 Ia. 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443. If the bequest is made direct to the priest some of the authorities say that it is neither a public charity nor a private trust but a simple gift. *Harrison* v. *Brophy*, supra; *Sherman* v. *Baker*, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717. The dissenting opinion in the principal case, holding the bequest invalid is based upon the ground of the inability of the state to enforce the trust, owing to the constitutional provision of that state forbidding the control or interference with any religious establishment or mode of worship.

CONSTITUTIONAL LAW—RELIGIOUS LIBERTY—RELIGIOUS EXERCISES IN SCHOOLS—BIBLE.—Relators, residents of and taxpayers in the school district, filed a petition for a writ of mandamus to require the school authorities to cause to be discontinued as exercises in the public schools the reading of the Bible, the singing of hymns, and the repeating of the Lord's Prayer. *Held*, (HAND and CARTWRIGHT dissenting), such exercises are violative of Const. Art. 2, § 3, guaranteeing the free exercise and enjoyment of religious profession and worship without discrimination; and are violative of Const. Art. 8, § 3, prohibiting the appropriation of any public fund in aid of any sectarian purpose. *People ex rel. Ring et al.* v. *Board of Education of Dist. 24* (1910), — Ill. —, 92 N. E. 251.

The principle announced in this case is perhaps more sweeping than in any case yet reported. It holds squarely that the Bible is a sectarian book, that singing of hymns and repeating the Lord's Prayer are religious worship, and that the only way to prevent sectarian instruction in the public schools is altogether to exclude religious instruction by means of reading the Bible or otherwise. Wisconsin and Nebraska hold with the principal case, except that each excludes only portions of the Bible as sectarian. *State* v *School District*, 76 Wis. 177; *State* v. *Scheve*, 65 Neb. 853. And in line with these is *O'Connor* v. *Hendrick*, 184 N. Y. 421. There are many cases opposed to the principal case, though varying greatly according to the facts of the cases and the particular wording of the respective state constitutions. In Ohio whether or not the Bible is excluded depends upon the ruling of the local school board. *Board of Education of Cincinnati* v. *Minor*, 23 Ohio St. 211.

Using the school building on Sunday does not violate the constitution. *Nichols* v. *School Directors,* 93 Ill. 61. Nor requiring students to attend chapel exercises. *North* v. *Trustees of University of Ill.,* 137 Ill. 296. The Bible is not a sectarian book and may be used if read without comment. *Hackett* v. *Brooksville,* 120 Ky. 608. Repeating the Lord's Prayer and Twenty-third Psalm is not religious worship, nor is it teaching sectarian or religious doctrine. *Billard* v. *Board of Education,* 69 Kan. 53. Opposed to *O'Connor* v. *Hendrick,* supra, on practically the same point, *Hysong* v. *School District,* 164 Pa. 629, allows persons to wear a certain garb of a religious order when teaching. Reading the Bible is allowed positively in Maine. *Donahue* v. *Richards,* 38 Me. 379. And is allowed positively in Massachusetts and Iowa unless the parents object. *Spiller* v. *Woburn,* 94 Mass. 127; *Moore* v. *Monroe,* 64 Iowa 367. And reading certain portions without comment, when children who object are not *required* to join in the exercise, is allowed in Texas and Michigan. *Church* v. *Bullock,* (Tex.) 109 S. W. 115; *Pfeiffer* v. *Board of Education of Detroit,* 118 Mich. 560. The central question is, Is the Bible a sectarian book? These cases show conflict of opinion with Maine, Massachusetts, Michigan, Iowa, Kansas, Kentucky, and Texas holding it non-sectarian, nevertheless weakening their stand by such provisos as, "without comment" and "unless parents object"; while on the other side are Nebraska and Wisconsin, weakening their stand by declaring only portions of the Bible sectarian. Illinois has taken an unconditional position.

CONTRACTS—IN RESTRAINT OF TRADE—WHEN VALID.—Plaintiff, a lumber company, had entered into a contract with defendant's assignor, which was operating a private railroad, whereby the latter agreed to transport freight for plaintiff at a certain rate and also agreed to charge a higher rate for all freight carried by it for plaintiff's competitors. When sued for breach of this contract defendant set up that the contract was illegal as in restraint of trade. *Held,* that since defendant was a private carrier it might discriminate in rates, and that since the contract was founded upon a valuable consideration, and was reasonable and not injurious to the public, it was valid. *Edgar Lumber Company* v. *Corine Stave Co.* (1910), — Ark. —, 130 S. W. 452.

It was the rule of the ancient common law that all contracts in restraint of trade were void. This rule has been gradually modified and qualified until at present, contracts in restraint of trade are valid where the restrictions as to the time and place are reasonable. *Harrison* v. *Glucose Sugar Refining Co.* (C. C. A.) 116 Fed. 304; *Diamond Match Co.* v. *Roeber,* 106 N. Y. 473; *Hodge* v. *Sloan,* 107 N. Y. 244; *Leslie* v. *Lorillard,* 110 N. Y. 519. A contract not to carry on a publishing business within the state of Michigan was upheld as not being an unlawful restraint of trade. *Beal* v. *Chase,* 31 Mich. 490. But while the law to a certain extent tolerates contracts in restraint of trade or business when made between vendor and purchaser, and will uphold them, they are not treated with special indulgence. They are upheld only for the purpose of securing to the purchaser of the good will of a

trade or business a guaranty against the competition of the former proprietor, and when this end has been attained it will not be presumed that more was intended. *Greenfield* v. *Gilman,* 140 N. Y. 168, 173. If the business be of such a character that it cannot be restrained to any extent without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because it is against public policy. *West Virginia Transp. Co.* v. *Ohio R. P. L. Co.,* 22 W. Va. 600; *Chicago Gas etc. Co.* v. *People's Gas Co.,* 121 Ill. 530; *Western U. T. Co.* v. *American U. T. Co.,* 65 Ga. 160; *Gibbs* v. *Consolidated Gas Co.,* 130 U. S. 396, 408, 409.

COURTS—DOCTRINE OF STARE DECISIS.—A Circuit Court of Appeals certified to the Supreme Court a question of taxation on which it had already passed in two previous cases, one of which had been affirmed by the Supreme Court without opinion, by an evenly divided court. *Held,* the affirmance necessitated by the even division of opinion in the Supreme Court was not such an authoritative determination of the question as to be conclusively binding on inferior Federal Courts. *Hertz* v. *Woodman et al.* (1910), 218 U. S. 205.

The holding in the principal case seems to be justified by reason as well as by authority. *Westhus* v. *Union Trust Co.,* 94 C. C. A. 95, 168 Fed. 617. *Durant* v. *Essex Co.,* 7 Wall 107, 19 L. Ed. 154. The circuit court is not inflexibly bound in all cases by its own prior decisions, *Leavitt* v. *Blatchford,* 17 N. Y. 521; *Butler* v. *Van Wyck,* 1 Hill 438, 462; and it is difficult to understand how an affirmance of its decision by an evenly divided court establishes a stronger precedent, *Hanifen* v. *Armitage* (C. C.), 117 Fed. 845. But the rule would seem to be otherwise in England. *Beamish* v. *Beamish,* 9 H. L. Cas. 274.

EVIDENCE—ADMISSIBILITY OF CONFESSIONS.—In a trial for murder committed while robbing the deceased, confessions made by the defendant to various parties and at various times were admitted in evidence against him, even though one of these confessions was made to an officer ten days before defendant's arrest and upon the advice of the officer, that it would be better for him, the defendant, to tell the truth. *Held,* that under the circumstances the statement made by the officer could not be regarded as such a threat by a person in authority as would deprive the confession of its voluntary character and render it inadmissible. *State* v. *Jacques* (1910), — R. I. —, 76 Atl. 652.

Where several confessions are made upon different occasions, each may be proved in evidence. *Lowe* v. *State,* 125 Ga. 55, 53 S. E. 1038. In order, however, for any confession to be admissible in evidence it must appear that it was made voluntarily. (*State* v. *Edwards,* 106 La. 674; *Burlingim* v. *State,* 61 Neb. 276, 85 N. W. 76; *State* v. *Mclain,* 137 Mo. 307, 38 S. W. 906); not prompted by the flattery of hope or by reason of fear (*State* v. *Hunter,* 181 Mo. 316; *State* v. *Grover,* 96 Me. 363); nor induced by threat or promise by a person in authority. *Brum* v. *U. S.,* 168 U. S. 532; *U. S.* v. *Nott,* 1 McLean 499; *People* v. *Stewart,* 75 Mich. 21; *People* v. *McCullough,* 81 Mich.

25; 3 ENCYC. EVID., pp. 301-302 and cases cited. Mr. WIGMORE in his Treatise on Evidence partially repudiates the tests of admissibility embodied in the rule just stated and contends that the test should be whether the inducement was such as that there would be any fair risk that the confession would be false. 1 WIG. EVID., § 824, and cases there cited. While in theory it is difficult to see how the employment of the words used in the principal case should render the confession inadmissible, when judged by the standard contended for by Mr. WIGMORE, who repudiates the exclusion of a confession made subsequent to such advice, yet the English courts quite generally exclude a confession made under such circumstances. *R.* v. *Garner,* 1 Den. Cr. C. 329; *R.* v. *Baldry,* 2 Den. Cr. C. 441; *R.* v. *Fennell,* 7 Q. B. D. 147; *R.* v. *Bate,* 11 Cox Cr. C. 686. These cases represent the weight of authority in England on the point involved in the principal case. See also 1 WIG. EVID. 832 and note. In the United States the weight of authority is that a confession made subsequent to such advice is admissible. *Aaron* v. *State,* 37 Ala. 106; *State* v. *Potter,* 18 Conn. 166; *Hardy* v. *U. S.,* 3 D. C. App. 35; *Valentine* v. *State,* 77 Ga. 471; *Nicholson* v. *State,* 38 Md. 140; *Com.* v. *Mitchell,* 117 Mass. 431; *People* v. *Kennedy,* 159 N. Y. 346, 54 N. E. 51; *Benson* v. *State,* 119 Ind. 488; *State* v. *Kornstell,* 62 Kas. 221; *Sharkey* v. *State,* 4 O. Cir. Ct. Rep. 101. Contra: *Kelley* v. *State,* 72 Ala. 244; *Briscoe* v. *State,* 67 Md. 6; *State* v. *Walker,* 34 Vt. 296; *Stephen* v. *State,* 11 Ga. 225; *People* v. *Gonzales,* 136 Cal. 666; *State* v. *Jackson,* 3 Pinnewell (Md.) 270, 50 Atl. 270.

EVIDENCE—ADMISSIBILITY OF MARKET QUOTATIONS.—In an action to recover damages for breach of contract to deliver eggs in stipulated installments the defendant was allowed to introduce in evidence the quotation of the Kansas City Produce Exchange of the price of eggs upon the day of breach, in order to show that the market price on that day was 14½c, the contract price, and hence, plaintiff had not suffered by the breach. It appeared that the quotation offered was the official quotation of that market and was made up by a committee of the exchange, who, using the receipts and sales of the day as a basis, took into consideration the state of the market in other places, and various other items, and fixed the quotation for that day at what they thought it ought to be in view of all the facts. *Held,* that the admission of a quotation made up in such a manner was error. *F. W. Brockman Commission Co.* v. *Aaron* (1910),—Mo. app.—, 130 S. W. 116.

The general rule upon the point involved in the principal case, as stated by Judge Cooley in *Sisson* v. *R. Co.,* 14 Mich. 496, is that a market quotation or report is admissible if it is such a report as people generally place reliance on in their actual business dealings, provided it is based on a survey of the whole market and is derived from persons having an opportunity to know the course of the market. This rule is supported by the following cases, *Western Wool Commission Co.* v. *Hart* (Tex.) 20 S. W. 131; *Kebler* v. *Caplis,* 140 Mich. 28; *Tri-State Milling Co.* v. *Breisch,* 145 Mich. 232; *Mosley* v. *Johnson,* 144 N. C. 257; *St. Louis & S. F. R. Co.* v. *Pearce,* 101 S. W. 760, 82 Ark. 339; *Chicago B. & Q. R. Co.* v. *Todd,* 74 Neb. 712; *Farley* v. *Smith,*

87 N. C. 367; *Cliquots Champagne*, 70 U. S. (3 Wall.) 114; *Peter* v. *Thickstun*, 51 Mich. 589. In theory the principal case is not in harmony with the cases just cited, for it appears that the quotation offered and rejected was the official quotation of that market, made up as all quotations on eggs were made in that market, and by persons familiar with the course of trade in that market. Some courts refuse to receive market quotations unless it be shown how they are made up. *Bunte* v. *Schuman*, 92 N. Y. Supp. 806; *Whelan* v. *Lynch*, 60 N. Y. 469; *Merewether* v. *O. & K. C. R. Co.*, 128 Mo. App. 647, 107 S. W. 434. Contra: *Mt. Vernon Brewing Co.* v. *Teschner*, 108 Md. 158, 69 Atl. 702. Some courts go so far as to allow a witness to testify to the market price of commodities, whose knowledge is based on quotations found in newspapers or received from dealers. *Tex. Cent. R. Co.* v. *Fischer*, 18 Tex. Civ. App. 78; *Tex. & Pac. R. Co.* v. *W. Scott & Co.* (Tex.) 86 S.W. 1065; *Chicago R. I. & T. R. Co.* v. *Hassel*, 36 Tex. Civ. App. 522, 81 S. W. 1241; *Suttle* v. *Falls*, 98 N. C. 393; *Smith* v. *N. C. R. Co.*, 68 N. C. 107. Contra: *Tountain* v. *Wabash R. Co.*, 114 Mo. App. 683, 90 S. W. 393, 114 Mo. App. 683; *Norfolk & W. R. Co.* v. *Reeves*, 97 Va. 284; *Ferris* v. *Sutcliffe*, 1 Alb. Law J. 238; *Bunte* v. *Schuman*, 92 N. Y. Supp. 806.

EXECUTORS AND ADMINISTRATORS—DENIAL OF APPLICATION FOR APPOINTMENT OF ADMINISTRATOR—REMEDY—MANDAMUS APPEAL.—Sylvanus Flick died intestate in Missouri and his only son applied for letters of administration, which the Probate Court refused to grant. A statute in force in Missouri provides that "Letters of administration shall be granted: First, to the husband or wife; secondly, to those who are entitled to distribution of the estate, or one or more of them, as the court or judge or clerk in vacation shall believe will best manage and preserve the estate." *Held*—, the rule laid down in the statute is not so strict as to preclude a Probate Court from passing over one entitled to letters under it, where the one so entitled is unfit to administer and to appoint him would subject the assets of the estate to unusual hazard. *State ex. Rel. Flick* v. *Reddish et al.* (1910), — Mo. App. —, 129 S. W. 53.

This case is also interesting in respect to procedure. The relator appealed from the ruling of the Probate Court and failing in the Circuit Court, appealed to the Court of Appeals where his right to appeal at all from the ruling of the Probate Court was denied and the case dismissed. That court, however, certified the case to the Supreme Court which affirmed the holding of the Court of Appeals—*Flick* v. *Schenk* (1908), 212 Mo. 275—and pointed out that the proper remedy was by a proceeding in mandamus. Accordingly, relator instituted the present proceeding. The Circuit Court granted the writ, but an appeal was again taken and the same court which had previously denied relator an appeal held mandamus improper in this case, since the Probate Court had acted judicially and not ministerially and appeal was the proper remedy.

FRAUD—FALSE REPRESENTATION—KNOWLEDGE OF FALSITY.—Plaintiff sued defendant for the amount of a promissory note given by plaintiff to defendant for an option which defendant claimed he held on certain land. The

note was assigned to an innocent purchaser and plaintiff was compelled to pay it. Plaintiff alleged that he was induced to sign the note by the fraudulent representation of defendant that he had an option on the land when in truth and fact he had none. It was proved that defendant had no option whatever on the land, but it appeared that he believed he had been given an option. *Held*, that defendant was liable for the money that he obtained from plaintiff by false representations as to the option on the land, whether he knew they were false or not. *Magill et al.* v. *Coffman et al.* (1910), — Tex. — 129 S. W. 1146.

This decision, while in accord with the principle stated in *Loper* v. *Robinson*, 54 Tex. 510, and *Culbertson* v. *Blanchard*, 79 Tex. 486, is opposed to the well established rule that to support an action of deceit based on a false representation a *scienter* must be proved. *Glasier* v. *Rolls*, 42 Ch. Div. 436; *Derry* v. *Peek*, 14 App. Cas. 337; *Hindman* v. *Louisville First Nat. Bank*, 112 Fed. 931; *Belding* v. *King*, 159 Fed. 411. The courts of twenty-six states have followed this rule, the strictness with which it is applied varying from the requirement of actual knowledge of the falsity, *Jolliffe* v. *Collins*, 21 Mo. 338, to merely a representation made without knowledge of its truth or falsity, or under circumstances in which the person making it ought to have known of its falsity. *Wheeler* v. *Baars*, 33 Fla. 696. However, the rule of the Texas court, while contrary to that of most of the states, is not without support. *Totten* v. *Burhans*, 91 Mich. 495; *Davis* v. *Nuzum*, 72 Wis. 439; *Foley* v. *Holtry*, 43 Neb. 133.

HOMESTEAD—PROPERTY CONSTITUTING—EXEMPTIONS.—A Texas statute establishes a business homestead consisting of a lot or lots, provided same be used as place to exercise the calling of the head of the family. A school teacher maintained a normal college, rooming and boarding students on the premises. *Held*, land on which the college buildings were located is exempt, as business homestead. But other lots on which students were roomed and boarded are not so exempt. Likewise other parcels used as baseball ground and vegetable garden to supply students' table, are not exempt. *Harrington et al.* v. *Mayo* (1910), — Tex. Civ. App. —, 130 S. W. 650.

Under same provision it has been held that there may be several lots within the business homestead exemption, but they must constitute a single place at which business is transacted. *Rock Island Plow Co.* v. *Alten et ux*, 102 Tex. 366, 116 S. W. 1144. The courts seem to construe statutes more strictly in regard to business homestead, refusing as here the exemption in case of separation of lots, whereas the exemption is more liberally allowed, under the same constitutional provision, in case of homestead proper. *Anderson* v. *Sessions*, 93 Tex. 279, 51 S. W. 874, 77 Am. St. Rep. 873.

INFANCY—ESTOPPEL TO PLEAD.—Appellant, an infant, signed a note as accommodation maker. The note was accepted by respondent on the faith of appellant's representations by conduct or words that he had arrived at the age of twenty-one years. Whether he expressly so represented was disputed, the preponderance of the evidence being in the negative. From appellant's

appearance and other circumstances respondent had reasonable grounds to believe that the former had reached his majority. Judgment by default was taken against appellant, who now makes a motion to vacate said judgment and at the same time tenders an answer setting up his infancy. *Held*, appellant is not estopped to plead his infancy. *Grauman Marx & Come Co.* v. *Krienitz* (1910), — Wis. —, 126 N. W. 50.

The general rule is that an infant or other person under disability cannot bind himself by estoppel. *Sims* v. *Everhardt*, 102 U. S. 300. The fact that an infant, at the time of entering into a contract, makes false representations to the person with whom he deals that he has attained the age of majority does not give any validity to the contract or estop the infant from disaffirming the same or setting up the defense of infancy against its enforcement. *Wieland* v. *Kobick*, 110 Ill. 16; *Burley* v. *Russell*, 10 N. H. 184; *Conrad* v. *Lane*, 26 Minn. 389; *Ridgeway* v. *Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; *Carolina etc. Loan Assoc.* v. *Black*, 119 N. C. 323, 25 S. E. 975; *Corey* v. *Burton*, 32 Mich. 30; *Brown* v. *McCune*, 5 Sandf. 224; *Keen* v. *Coleman*, 39 Pa. St. 299; *Wilkinson* v. *Buster*, 124 Ala. 574, 26 South. 940. There is however some authority for the view that such false representations will create an estoppel. *Hayes* v. *Parker*, 41 N. J. Eq. 630, 7 Atl. 511; *Commander* v. *Brazile*, 88 Miss. 668, 41 South. 497, 9 L. R. A. (N. S.) 1117; *Ingram* v. *Ison*, 26 Ky. Law Rep. 48, 80 S. W. 787. In order to create such an estoppel there must be in the first place actual fraud. *Steed* v. *Petty*, 65 Tex. 490. In the second place it is confined to those cases in which the infant possesses the power of discretion. *Barham* v. *Turbeville*, 31 Tenn. 437, 57 Am. Dec. 782; *Williamson* v. *Jones*, 43 W. Va. 562. Also, the transactoin must be beneficial to the minor. *Ostrander* v. *Quin*, 84 Miss. 230, 36 South. 257, 105 Am. St. Rep. 426. The court in the principal case recognizes the rule that an infant may be estopped under these circumstances to plead his infancy but holds that the rule does not apply because the appellant received no benefit from the signing of the note. In cases of this kind one is confronted with two well established principles: first, that a person shall not be permitted to take advantage of his own fraud to injure other people; and second, that an infant is not liable on his contracts. Forbidding him to set up his infancy, indirectly makes him liable on his contract. On the other hand permitting him to plead his infancy, enables him to defraud innocent people, especially, if he has the appearance of one who has reached his majority. The weight of authority and the more logical view is that an infant is not estopped to plead his infancy. As the court said in *Sims* v. *Everhardt*, supra, "A fraudulent representation of capacity cannot be equivalent to actual capacity." Logical as this view is, however, it is apparent that it will not always work out justice, and in some jurisdictions an action in tort will lie against the infant where recovery can be had without giving effect to the contract. *Rice* v. *Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *New York Loan Co.* v. *Fisher*, 23 N. Y. App. Div. 363, 48 N. Y. Supp. 152. In other states such a liability has been denied. *Slayton* v. *Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560; *Nash* v. *Jewett*, 61 Vt. 501, 18 Atl. 47, 15 Am. St. Rep. 931, 4 L. R. A. 561.

INSURANCE — INDEMNITY — MEANING OF "ACCIDENT." — Defendant insured plaintiff against loss imposed by law upon employers for damages on account of bodily injuries or death accidentally suffered by an employee while on duty. Plaintiff was held liable to a hostler who contracted glanders from a diseased horse. In an action on the policy, *held*, that this was such an injury as came within the same. *H. P. Hood & Sons* v. *Maryland Casualty Co.* (1910), — Mass. —, 92 N. E. 329.

The decision is in accord with the great weight of authority. The case of *Hensey* v. *White* [1900], 1 Q. B. 481, laid down a contrary rule, holding that an internal rupture was not an accidental injury, there being an "entire absence of the fortuitous element." This doctrine of fortuitious element however was expressly repudiated in *Fenton* v. *Thorley & Co.* [1903], A. C. 443, which interprets accident in the popular ordinary sense, as any unexpected, personal injury resulting to a workman from any unlooked for mishap or occurrence, the court holding that an internal rupture was an accidental injury. In *Brinton's Ltd.* v. *Turvey* [1905], A. C. 230, the court citing *Fenton* v. *Thorley*, held that anthrax contracted by an employee while sorting wool, was accidental. Again in *Glover, Clayton & Co.* v. *Hughes* [1910], A. C. 242, the court again citing *Fenton* v. *Thorley*, came to a similar decision. Others to the same effect are *Ismay, Irmie & Co.* v. *Williamson* [1908], A. C. 437; *Wicks* v. *Dowell & Co* [1905], 2 K. B. 225. In the *Columbia Paper Stock Co.* v. *Fid. & Cas. Co. of N. Y.*, 104 Mo. App. 157, the court, holding that a disease contracted through the handling of rags was an accident, pertinently asked if there would be any doubt if the rags were to emit a poisonous gas causing instant death. In *Bacon* v. *U. S. Mut. Co.*, 123 N. Y. 304, the court held that anthrax contracted while handling hides was not accidental. The policy however called for an external, violent and accidental means of injury. Still the judges did not put their decision on the ground of lack of violence, but rather on the ground of lack of accidental features. On the other hand, *U. S. Mut. Acc. Assn.* v. *Barry*, 131 U. S. 100, under a still more restricted policy, announced a doctrine contrary to the above New York case and in line with the principal case. The principal case is further strengthened by the fact that policies are interpreted strongly against the insurer. *American Surety Co.* v. *Pauly*, 170 U. S. 133. MAY, INSURANCE, Ed. 4, §§ 174, 175. VANCE, INSURANCE, p. 430. Other decisions supporting the main one are *Freeman* v. *Mercantile Mutual Acc. Ass'n.*, 156 Mass. 351; *Aetna Life Ins. Co.* v. *Fitzgerald*, 165 Ind. 317; *Cary* v. *Preferred Acc. Ins. Co.*, 127 Wis. 67; *Omberg* v. *U. S. Mutual Acc. Ass'n*, 101 Ky. 303; *Delaney* v. *Modern Acc. Club*, 121 Ia. 528; and even New York leans somewhat in that direction in *Martin* v. *Mfg. Acc. Indem. Co.*, 151 N. Y. 94. Cases which have some contrary weight are *Dozier* v. *Fidelity Co.* (C. C.), 46 Fed. 446; *Southard* v. *Railway Co.*, 34 Conn. 574; *Feder* v. *Iowa State Traveling Men's Ass'n*, 107 Iowa 538.

LANDLORD AND TENANT—DEPRIVATION OF HEAT—EVICTION.—Three radiators in a leased apartment were removed at the request of tenant. During the following winter tenant complained of lack of heat, but refused to allow

landlord to restore the radiators or to install larger ones of a different variety. Tenant's family became ill and were compelled to move to a hotel, leaving their goods in the apartment. Rent was paid for the following month but thereafter was not paid, and the landlord sued. *Held,* the landlord's failure to provide sufficient heat was not a constructive eviction. *Merida Realty Co.* v. *Coffin* (1910), 123 N. Y. Supp. 120.

Ordinarily, failure of landlord to supply heat would be a constructive eviction, if tenant promptly abandons the premises. *Jackson* v. *Paterno,* 58 Misc. 201, 108 N. Y. Supp. 1073; *Lawrence* v. *Burrell,* 17 Abb. N. C. 312. But if tenant obstructs prompt action on the part of the landlord, a different rule governs. The landlord has a right to a reasonable opportunity to rectify the defect, and in case of compliance with notice, no eviction can be predicated upon the temporary inconvenience of the tenant. *O'Gorman* v. *Harby,* 18 Misc. 228, 41 N. Y. Supp. 521. In the principal case failure of tenant to remove goods at once, and payment of rent for the subsequent month, combined with his action in refusing landlord permission to repair to overcome defense of constructive eviction.

MUNICIPAL CORPORATIONS—NUISANCES—BILLIARD HALLS AND POOLROOMS. —The town of Eldorado, Oklahoma, acting under the authority of § 847 of Snyder's Comp. Laws 1909 which provides that the boards of trustees of incorporated towns and villages shall have the following powers, namely: "(4) to declare what shall constitute a nuisance and to prevent, abate and remove the same," passed an ordinance which in substance declared that all billiard and poolrooms shall be deemed a nuisance and making it punishable by a fine of twenty-five dollars, etc., etc., for any person, either as owner, servant, or employee to open, establish or carry on the same within the corporate limits of the town. This ordinance became effective on Jan. 1, 1910. On Jan. 25, 1910, the petitioner, W. C. Jones, was convicted before the town justice of Eldorado of violating said ordinance by running a poolroom for hire in said town and sentenced to pay a fine of $25 and costs, failing to pay which he was committed to the town jail of Eldorado. He contended his imprisonment was illegal on two grounds, the first of which was that the ordinance in question was void for want of power in the trustees to enact the same. *Held,* the ordinance is valid and within the power of the town of Eldorado as conferred by the aforesaid section and moreover the enforcement of such ordinance infringes no constitutional right of plaintiff. *Ex parte Jones* (1910), — Okl. —, 109 Pac. 570.

In doubtful cases where a thing may or may not be a nuisance, depending on a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one in the principal case, the action of the town officials under such circumstances would be conclusive on the courts. This doctrine is set forth and followed in these cases: *North Chi. City R. R. Co.* v. *Town of Lake View,* 105 Ill. 207, 44 Am. Rep. 788; *Harmison et al.* v. *City of Lewiston,* 153 Ill. 313, 38 N. E. 628, 46 Am. St. Rep. 893; *Kansas City* v. *McAleer,* 31 Mo. App. 433; *Glucose Refining Co.* v. *City of*

Chicago, (C. C.) 138 Fed. 209; *Slaughter-House Cases,* 16 Wall. 36. Courts however have decided that a municipal ordinance is unreasonable in view of the conditions in the municipality and declared the ordinance void. *Crawford* v. *City of Topeka,* 51 Kan. 756, 33 Pac. 476, 37 Am. St. Rep. 323, 20 L. R. A. 692. That a court has the power to decide as to the question of the reasonableness of a municipal ordinance regulating a condition that is not a nuisance per se or was not so at common law, see *State* v. *Dubarry,* 46 La. Ann. 33, 14 South. 298; *State* v. *Stone,* 46 La. Ann. 147, 15 South. 11. There are numerous cases holding that billiard halls and poolrooms are not nuisances *per se.* The principal case must not be understood as being in conflict with these cases since it merely upholds that billiard halls and poolrooms may, because of certain conditions, because of the peculiarity of their surroundings, become nuisances and as such are subject to absolute control by the municipality in the exercise of its police power.

MUNICIPAL CORPORATIONS—POLICE POWER—EMINENT DOMAIN.—The city of Aberdeen, Wash., acting under the authorization of Laws 1909, c. 147, entitled "an act empowering cities *** to fill low lands within their borders and for that purpose to exercise the right of eminent domain for the taking and damaging of property, and providing a method for making compensation therefor, and providing for levying and collecting of special assessments on the property thereby benefited * * *," commenced filling in property of plaintiff, this property being situated in a low, swampy, district and shown to be a menace to public health. This suit is brought by the plaintiff to enjoin the prosecution of the work by the city on the ground that the city is encroaching on plaintiff's constitutional rights in that it has given him no opportunity of being heard by means of eminent domain proceedings and also that the prosecution of this work under the police power privilege is an unwarranted invasion of plaintiff's constitutional rights. *Held,* (FULLERTON, J. dissenting), the city may under the police power as enabled by the foregoing statute fill in low lands where these lands are unimproved without the exercise of eminent domain proceedings and assess the cost thereof against the landowner. *Bowes et ux* v. *City of Aberdeen et al.* (1910), — Wash. —, 109 Pac. 369.

The legislature may assert its police power to make an improvement common to all concerned, at the common expense of all, and the improvement need not be carried out under the law of eminent domain. This view is sanctioned by a very respectable line of decisions: *Charleston* v. *Werner,* 38 S. C. 488, 17 S. E. 33, 37 Am. St. Rep. 776; *Rochester* v. *Simpson,* 134 N. Y. 414, 31 N. E. 871 (both decided in 1892); *Nickerson* v. *Boston,* 131 Mass. 306; *Chicago & N. W. Ry. Co.* v *City of Chicago,* 140 Ill. 309, 29 N. E. 1109; *State* v. *Schlemmer,* 42 La. Ann. 1166, 8 South. 307, 10 L. R. A. 135; *Baker* v. *City of Boston,* 29 Mass. (12 Pick.) 184, 22 Am. Dec. 421 (1831); *Slaughter-House Cases,* 16 Wall 36; *City of Rochester* v. *West,* 164 N. Y. 510. There is authority to the contrary however, a number of cases holding that a municipality in the exercise of its delegated police power can only go to the extent of abating or removing a nuisance and cannot under the guise

of abating a nuisance compel a land owner on whose land the nuisance exists to make his property conform to some previously conceived system of public improvement; *Eckhardt* v. *City of Buffalo*, 19 App. Div. I, 46 N. Y. Supp. 204; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. The principal case is complicated by the fact that the evidence seemed to show that the nuisance was aggravated by the granting of a railroad franchise by the city itself, the railroad embankments causing an increased impediment to the escape of tidal waters. The following cases are authority for the proposition that a city aiding or creating a nuisance may not cause it to be abated at the expense of the owner: *Hannibal* v. *Richards*, 82 Mo. 330; *Lasbury* v. *McCague*, 56 Neb. 220, 76 N. W. 862. This would seem to be a reasonable and equitable view of the matter but see *Davidson* v. *Boston & Maine R. R. Co.*, 3 Cush. 91. Questions of this nature must of necessity vary greatly and each is generally decided according to the individual circumstances of the case. The weight of authority in this country is with the majority opinion in the principal case.

NEGLIGENCE—CARE REQUIRED—LICENSEES.—Plaintiff brought an action of tort to recover for the death of his son by the fall of a derrick in defendant's quarry where he had been delivering and selling newspapers. It appeared that the boy entered the quarry by permission to sell his papers, that he had one or two regular customers in the quarry, to deliver to whom it was not necessary for him to travel the path whereon the accident occurred, and that he sold to other workmen on the quarry. *Held*, that the boy was only a licensee and that a company operating a stone quarry owes no duty to a mere licensee passing through the quarry to keep its derrick safe so that the licensee may not be injured by its accidental fall. *Norris* v. *Hugh Nawn Contracting Co.* (1910), — Mass. —, 91 N. E. 886.

The rule is well settled that where one uses private property by bare permission, he must use it as he finds it and the owner is held to no greater degree of care than to abstain from willful or affirmative negligence. *Louisville etc. R. Co.* v. *Sides*, 129 Ala. 399; *Seward* v. *Draper*, 112 Ga. 673; *Dixon* v. *Swift*, 98 Me. 207; *Smith* v. *Day*, 100 Fed. 244; *Birch* v. *City of New York*, 190 N. Y. 397. Plaintiff contended, however, that his intestate was not a mere licensee but was there by invitation. A licensee has been defined to be "a person who is neither a passenger, servant nor trespasser, and not standing in any contractual relation with the owner of the premises, and is permitted to come upon the premises for his own interest, convenience or gratification." *Northwestern El. R. Co.* v. *O'Mally*, 107 Ill. App. 599. The Massachusetts court in *Plummer* v. *Dill*, 156 Mass. 426, laid down the following rule: "To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there." The same test was applied in the cases of *Dixon* v. *Swift*, supra; *Muench* v. *Heineman*, 119 Wis. 441; and *Ill. Cent. R. R. Co.* v. *Hopkins*, 200 Ill. 122; and in *Hobbs, Admr.* v. *Blanchard & Sons Co.*, 74 N. H. 116, 65 Atl. 382, the court held that an invitation by servants of a lumber company to

visit a camp is not, in a legal sense, the invitation of the company. The decision in the principal case seems to be supported by the authorities as well as by reason.

PUBLIC OFFICERS—DE FACTO OFFICER—WHAT CONSTITUTES.—Plaintiff filed a bill in equity to enjoin county officials from paying L., for services rendered as special state's attorney appointed by the court for the purpose of prosecuting primary election frauds. *Held,* L was entitled to his salary, *Lavin* v. *Board of Commissioners of Cook County et al.* (1910), — Ill. —, 92 N. E. 291.

Though the judges were unanimous in holding that L was entitled to his salary, they did not agree as to the character of his position, a majority of the court holding L to be at least a de facto officer (*State* v. *Messervy,* — S. C. —, 68 S. E. 766; *State* v. *Carroll,* 38 Conn. 449; while the three dissenting judges were of opinion that he was a mere employee or agent. The minority opinion seemed to be based on the constitutional definition of an officer and employee. Const. Art. 5, § 24: *Bunn* v. *People,* 45 Ill. 397. In the opinion of the writer L would seem to be a de jure officer: *State* v. *Staton,* 73 N. C. 546, 21 Am. Rep. 479; because all the circumstances provided for in the statute under which he was appointed were present. Therefore the sounder view would seem to be that of the majority of the court.

TELEGRAPH COMPANIES — STATUS OF A TELEGRAPH COMPANY BETWEEN SENDER AND SENDEE OF A TELEGRAM.—S & S sent a telegram to C. L. S. & C. Co., offering a lot of steers at $3.95 per cwt. The telegraph company erred in the transmission of the message and made the quotation read $3.25 per cwt. C. L. S. & Co. wired their acceptance and the steers were shipped, but they refused to pay more than at the rate of $3.25 per hundred pounds. S. & S. sued the telegraph company for the loss caused by D's mistake. *Held,* the telegraph company is not the agent of the sender of the telegram, and the sender is not liable to the receiver of the message by the terms, as negligently altered by the transmitting company. *Strong et al.* v. *W. U. Telegraph Co.* (1910), — Idaho —, 109 Pac. 910.

The law concerning telegraph companies is still in course of formation, and the rule set forth in the principal case follows that laid down in the early English and Scotch cases. The fact that the telegraph lines in these countries are owned and operated by the government and that the government is not liable for the negligence of one of its servants, led the English and Scotch courts to refuse the agency doctrine. *Henkel* v. *Pape,* L. R. 6 Exch. 7; *Verdin* v. *Robertson,* 10 Sess. Cas. (3rd. Series) 35. However, the American cases holding to the view of non-agency, declare that no control exists over the telegraph company by the sender, and that it acts as an independent party in serving the public, having authority only to transmit the message as given to it, of which fact the sendee is supposed to have notice, and that no liability can be imposed by an altered message. *Pepper* v. *W. U. Telegraph Co.,* 87 Tenn. 554; *Postal Teleg. Co.* v. *Schaefer,* 110 Ky. 907; *Pegram* v. *W. U. Teleg. Co.,* 100 N. C. 28; *Shingleur* v. *W. U. Teleg. Co.,* 72 Miss.

1030; *Postal Teleg. Co.* v. *Akron Cereal Co.*, 23 Ohio C. C. 516. The cases of the contrary view find in the business necessity of the sender of a telegram, honoring the terms of the message as received by the sendee, together with the fact that he has selected it as the medium to transmit his offer, sufficient reasons for making the law of agency apply to this comparatively new phase of business life, telegraphing. *W. U. Teleg. Co.* v. *Shotter*, 71 Ga. 760; *Ayer* v. *W. U. Teleg. Co.*, 79 Me. 493; *A. B. Brewing Assoc.* v. *Hutmacker*, 127 Ill. 652; *Magie* v. *Herman*, 50 Minn. 424; *Dunning* v. *Roberts*, 35 Barb. (N. Y.) 463; *N. Y. etc. Printing and Teleg. Co.* v. *Dryburg*, 35 Pa. St. 298; *Saveland* v. *Green*, 40 Wis. 431. The principal case states that conceding the presence of an agency relation, its character would be limited or specific in its scope and exten only to transmitting the message, identically as given by the sender, and the sendee as well as every one else would have notice of its limitation and of the inability of the telegraph company to impose any additional liability on the sender by negligent alteration.

TELEGRAPHS AND TELEPHONES—USE OF STREETS BY TELEGRAPH COMPANY—CONTROL AND REGULATION BY CITY.—The W. T. U. Co., authorized by its charter and by acts of Congress, was using the streets and alleys of Richmond, Va., for its poles and wires. It brought this bill to determine its rights with reference to an ordinance passed by the city. That ordinance regulates the size, number, and location of poles; requires the company to allow other persons or companies to use its poles under certain conditions; gives the city the right to use the poles for its fire alarm wires; and creates an "underground district" within which wires must be placed under ground. *Held*, the ordinance is not a restriction upon any right to use the streets given the company by the federal statutes, but on its face is a reasonable exercise of the police power and is valid. *Western Union Telegraph Co.* v. *City of Richmond* (1909), — C. C., E. D., Va. —, 178 Fed. 310.

There is no dispute at this day that telegraph companies doing business under congressional acts (U. S. Comp. St. 1901, p. 3579 et seq., and p. 2708) are subject to the police power of the state and municipality. *Richmond* v. *Southern Bell Telephone and Telegraph Co.*, 174 U. S. 761; *Village of Jonesville* v. *Southern Mich. Telephone Co.*, 155 Mich. 86. The question is, what is a reasonable exercise of police power? Laws requiring electric wires to be placed under ground are a legitimate exercise of police power. *People* v. *Squire*, 107 N. Y. 593; *American Rapid Tel. Co.* v. *Hess*, 12 N. Y. Supp. 536; *Northwestern Tel. Exch. Co.* v. *City of Minneapolis*, 81 Minn. 140. Removing electrical wires and poles not removed by the owner after notice is valid police regulation. *American Rapid Tel. Co.* v. *Hess*, 12 N. Y. Supp. 536. That a company shall have permission from board of commissioners or special officer before doing certain contruction work or be prosecuted is not impairing the rights of contracts, and is valid exercise of police power. *People* v. *Squire*, 145 U. S. 175; *People* v. *Squire*, 107 N. Y. 593; *City of Carthage* v. *Garner*, 209 Mo. 688. A company which has already obtained permission from a city council to occupy the streets on certain conditions is subject to subsequent regulations. *People* v. *Squire*, 145 U. S. 175. The

principal case is of interest because the court makes the positive statement that the above regulations are not unreasonable, and holds that it is the duty of local authorities to see that the safety and interests of the communities where such companies are located are protected.

WILLS—CONSTRUCTION—ESTATES CREATED.—A will contained the following clause: "I give and bequeath unto my beloved wife *** all the remainder of my estate, *** to be hers and at her disposal during her natural life or so long as she remains my widow, at the expiration of which term all of my estate then remaining to be equally divided among my remaining children." The wife executed a deed conveying the fee simple and warranting the title. *Held*, the title thus conveyed is good against the claim of title by the remaindermen under the will. *Mayo et al.* v. *Harrison et al.* (1910), — Ga. —, 68 S. E. 497.

In *Brant* v. *Virginia Coal and Iron Co. et al.* (1876), 93 U. S. 326, the Supreme Court of the United States construed a similar clause: "I give and bequeath to my beloved wife *** all my estate, both real and personal *** to have and to hold during her life, and to do with as she sees proper before her death." The court held that the wife took a life estate only and the power conferred was to deal with the property as she might choose, consistently with that estate; that the power of disposition was limited to the estate granted. This conclusion may seem not in accord with the holding in the principal case, but it is believed that the decisions may be reconciled upon the ground that in the principal case there was a power of disposition given which might be exercised at any time during the life of the donee of the power, while in the Supreme Court case there was a devise of a life estate followed by a power of disposition, and this power of disposition was very properly held to refer to the estate created by the words just preceding. The decision of the same court in *Roberts* v. *Lewis* (1893), 153 U. S. 367, illustrates that these cases are of a very doubtful nature. There the words of the will were: "To be and remain hers, with full power, right and authority to dispose of same as to her shall seem most meet and proper, so long as she shall remain my widow, etc." The Supreme Court of Nebraska held that the will gave power to convey the fee. On appeal, the Supreme Court held that the power covered only the estate granted. *Giles* v. *Little* (1881), 104 U. S. 291. The same will came before the Nebraska court again in the *Roberts* case, supra, and that court abided by its former decision and an appeal was again taken. The Supreme Court then reversed its former decision, basing the reversal on an omission of the word "clearly" from a statute of Nebraska set out in the former record. That statute enacted that a testator is deemed to devise all the estate which he can lawfully devise unless a contrary intent appear clearly from the will. The holdings of the state courts differ widely on the question, but as Mr. Justice GRAY said in *Roberts* v. *Lewis*, supra, "The general current of authority in other courts is with our present conclusion," that a deed in fee under such a devise is valid.