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RECENT IMPORTANT DECISIONS

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ATTORNEY AT LAW—DISBARMENT—MORAL TURPITUDE.—The plaintiff in error, a member of the bar in good standing, was convicted of the misdemeanor of making beer in his own home for the use of his family and guests in violation of the National Prohibition Act (Comp. Stat. 1923, No. 10138 1/4 et seq.). On account of such proceeding he was disbarred for three years. *In re Bartos,* 13 F. (2d) 138. The district judge relied on the proposition that a violation of the National Prohibition Act was an offense involving moral turpitude. *Ex parte Wall,* 107 U. S. 265, 2 Sup. Ct. 569; *In re Kirby, held,* that such first offense did not involve moral turpitude and that the order of disbarment should be vacated. *Bartos v. U. S. District Court,* 19 F. (2d) 722.

An attorney may be disbarred for conviction of a misdemeanor involving moral turpitude. *Ex parte Wall,* 107 U. S. 265, 2 Sup. Ct. 569; *In re Kirby,* 84 F. 606. Exactly what offenses involve moral turpitude has been a subject of much doubt and difference of opinion. Some courts have held a mere breach of a criminal statute is sufficient; others, that only those crimes "that present such depravity as arouses the abhorrence of all mankind" are included. Others rely on scriptural prohibitions. *Earley v. Winn,* 129 Wis. 291, 309, 109 N.W. 633. Some courts make a distinction between acts *malum in se* and *malum prohibitum, Pippin v. State,* 197 Ala. 613, 73 So. 340; while others expressly repudiate any such distinction. *Rudolph v. United States,* 6 F. (2d) 487. "It has been defined as anything done contrary to justice, honesty, principle, or good morals, and as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and wrong between man and man." 27 Cyc. 912; 36 C. J. 1194. Where conviction of a crime involving moral turpitude is allowed to be shown to discredit a witness, the weight of authority holds that violations of liquor laws cannot be shown for this purpose. See note, 40 A. L. R. 1049 citing also cases contra. In *Fort v. The City of Brinkley,* 87 Ark. 400, 112 S.W. 1084; a violation of a liquor law was held not to involve moral turpitude in a proceeding to revoke the license of a physician. But in *Rudolph v. United States, supra,* such violation was held to involve moral turpitude and the violator's police pension was discontinued. In the principal case, the District Court had cited four cases: *McLean v. Johnson,* 174 N. C. 345, 93 S.E. 847; where it was the attorney's fourth conviction and the court stressed the habitual criminality; *Underwood v. Commonwealth,* (Ky.) 105 S.W. 151, where it was the third conviction of the county attorney and the court stressed professional misconduct; *In re Callicotte,* 187 Pac. 1019, where moral turpitude was not discussed; and *State ex rel. Young v. Edmunson,* 103 Ore. 243, 204 Pac. 619; where there were other charges and the attorney was a fugitive from justice. *State v. Bieber,* 247 Pac. 875, is the one case squarely contrary to the principal

case, and in that there were two judges who disagreed with the majority on the moral turpitude of the violation. The Circuit Court of Appeals said in the principal case in regard to moral turpitude, "It is subjective in meaning and restricted to those who have committed the gravest offenses, felonies, infamous crimes and those malum in se." Considering the serious legal consequences of labeling an act one of moral turpitude, and in view of the fact that there is still a substantial difference of opinion as to the morality of the use of intoxicants, and since it is difficult to see how the acts of the plaintiff in error made him in any way an unfit person to be entrusted with a client's business, it seems the court was correct in adopting a strict definition of the term and holding only those acts within it which are the subject of more unanimous public agreement as to their immorality.

BANKRUPTCY—PREFERENCE—KNOWLEDGE OF AGENT.—Action by the trustee in bankruptcy to recover an alleged preferential payment made to the defendant. A was an agent of both the bankrupt and the defendant. Acting within his authority as agent for the bankrupt, and knowing of his principal's insolvency, A signed and delivered a check of the bankrupt's in payment of a debt due the defendant. A's interest as agent for the bankrupt was of such a nature as would defeat a presumption that he would disclose his knowledge of the insolvency to the defendant. The Bankruptcy Act of 1898, Section 60 b, provides that "if a bankrupt shall have given a preference * * * and the person receiving it, or to be benefitted thereby, or his agent therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee." *Held,* because of A's knowledge of the bankrupt's insolvency, plaintiff may recover under the statute. *Holbrook v. U. S. Nat. Bank, et al.,* (1927), 20 Fed. (2d) 961.

It is a general rule that notice to, or knowledge of, an agent while acting within the scope of his authority is notice, to, or knowledge of, the principal. 2 MECHEM ON AGENCY (2d Ed.) 1384; *Hewitt v. Boston Straw Board Co.,* 214 Mass. 260, 101 N. E. 424; *Constam v. Haley,* 206 Fed. 260. An exception, as well recognized as the rule itself, is that where the agent is acting for his own or in another's interest, and adversely to that of the principal, his knowledge is not imputed to the principal. 2 MECHEM ON AGENCY (2d Ed.) 1399; *Benner v. Blumauer-Frank Drug Co.,* 198 Fed. 362; *High v. Opalite Tile Co.,* 184 Fed. 450; *Scott County Milling Co., et al., v. Powers,* 112 Miss. 798, 73 So. 792. The principal case cites as authority for its decision, *Campbell, et al., v. Balcomb,* 183 Fed. 766, in which it was stated that "the statute (Bankruptcy Act quoted above) purports to give the whole law on the subject. In it we find no exceptions to the effect that a preferred creditor may hold his advantage, provided his agent and the insolvent have confidential relations, or provided his agent has self-interests antagonistic to a disclosure to his principal. To interpolate such exceptions we deem beyond the proper sphere of statutory construction and violative of the spirit of the act." In *High v. Opalite Tile Co., supra,* the Court said, "In making the payment, Carter (the agent of both the bankrupt and the defendant in this case) was clearly acting for himself, and not for the defendant company, and his knowledge of the defendant company, and his intention to prefer the defendant company cannot be attributable

to that company." This is the view also taken by *Benner v. Blumauer-Frank Drug Co., supra,* and *Scott County Milling Co., et, al., v. Powers, supra,* these three cases having been decided with regard to the Bankruptcy Act, Section 60 b. See also, *American Nat. Bank v. Miller, Agent of the First Nat. Bank,* 229 U. S. 517, 33 Sup. Ct. 883. It is submitted that the Court in the principal case might better have taken this view in rendering their decision than that of *Campbell et, al., v. Balcomb, supra.* As the Bankruptcy Act does not expressly exclude the general rules of agency, it seems they should be considered in so far as they do not interfere with the operation of the Act. The agency rule of imputed knowledge is generally rested upon the principle that it is the duty of the agent to disclose to his principal all material facts coming to his knowledge, and upon the presumption that he has discharged that duty. 2 MECHEM ON AGENCY (2d Ed) 1390. The exception to the rule rests upon the principle that there can be no presumption of performance of duty when the agent is acting adversely to the interests of his principal. 2 MECHEM ON AGENCY (2d Ed.) 1399. Query, what is the justification for removing from the general rules of agency the case of an agent who effects a preference in favor of his principal while acting adversely to the interests of that principal? There evidently is little justification, for the case of *Campbell, et, al., v. Balcomb, supra,* is the only one found in support of the decision of the principal case.

BILLS AND NOTES—CORPORATE CHECK GIVEN TO PAYEE IN PAYMENT OF CORPORATE OFFICER'S PERSONAL DEBT—LIABILITY FOR PROCEEDS.—Action to recover proceeds of corporate checks signed by Charles Clukey as treasurer, payable to defendant's order, and credited by the latter on Clukey's personal notes. *Held,* Clukey's act constituted a plain misappropriation of the corporate funds, and the form and manner of payment sufficed to put the defendant on its inquiry and to notify it that it accepted the payments at its peril. *Boyle v. Lewiston Trust Co.,* (Me. 1927) 136 Atl. 292.

It is settled that one who accepts property from a trustee in payment of the latter's personal debt, knowing that it is trust property, is liable to the cestui que trust, unless upon reasonable inquiry it appears that the transferor was not violating his duty as trustee. With reference to negotiable instruments, occasion for the application of this principle may arise in at least two situations, (1) where an instrument is drawn by a corporate officer payable to his personal creditor and (2) where an instrument is drawn payable to the corporate officer and delivered by him in payment of his private debt. Scott, 34 HARV. L. REV. 461, and cases cited. The instant case is an example of the former situation. While Missouri, by legislation, Laws, 1917, p. 143, absolves the payee as well as the indorsee from liability unless he has actual knowledge of lack of authority, this seems to be the only instance where the payee escapes liability as a participant in a breach of trust, on facts similar to these. Until recently, the authorities, with the exception of Massachusetts, were quite uniform in treating both situations alike. The Uniform Fiduciaries Act, however, adopted by Colorado, Idaho, New Mexico, North Carolina, Pennsylvania, Utah and Wisconsin, exempts the creditor in the latter situation from liability, unless he acted improperly, or in bad faith, following the dis-

tinction brought out in *Johnson & Kettell Co. v. Longley Luncheon Co.*, 207 Mass. 52, 92 N.E. 1035. In support of the distinction it is argued that in the second case, "it may very well be that the fiduciary was entitled to receive payment out of his principal's funds, as where the principal is indebted to him for salary, commissions, reimbursements for expenses, dividends or the like." Uniform Laws Annotated, Vol. 9, p. 106. With reference to the situation of a bank, in accepting checks of the second type, two recent cases indicate a disposition to limit the liability. *Eastern Mut. Ins. Co. v. Atlantic Nat. Bank* 157 N.E. 520; *Corporation Agencies, Limited, v. Home Bank of Canada,* (1927) A. C. 318. See also *Empire Trust Co. v. Cahan,* 47 Sup. Ct. 661, 71 L. Ed. 826, reversing *Cahan v. Empire Trust Co.,* 9 Fed. (2d) 713. Having in mind the general circulation of negotiable instruments, it does not seem feasible to impose on the purchaser the onus of inquiring into the consideration for which the instrument was given, the authority of the holder to negotiate the instrument, or whether the transferor has exceeded his authority. If the officer were dishonest, the questions would probably prove futile. If honest, persistent inquiries might offend him. Further inquiry would necessitate a most unreasonable delay. These considerations make the conclusions in these recent cases seem quite acceptable.

BILLS AND NOTES—EFFECT OF A SEAL—DEFENSE OF FAILURE OF CONSIDERATION.—Action by the payee of a sealed promissory note. The defendant, executor of the maker of the note, defended on the ground of lack of consideration. *Held,* that a defense of total or partial failure of consideration for a negotiable instrument under seal is available against a person not a holder in due course. *Citizens' Nat. Bank of Pocomoke City v. Custis,* (Md. 1927), 138 Atl. 261.

Section 6 of the Negotiable Instruments Law provides that "the validity and negotiable character of an instrument are not affected by the fact that it bears a seal." Before the N. I. L., a sealed instrument executed by a natural person was quite generally held not negotiable, but since the passage of the said act it is generally conceded that a promissory note may be both sealed and negotiable. *St. Paul's Episcopal Church, et al., v. Fields, Ex'r., et al,* 81 Conn. 670, 72 Atl. 145; *Clarke v. Pierce, Ex'r.,* 215 Mass. 552, 102 N.E. 1094. The court in the principal case based its decision on Section 24 of the N. I. L., which provides that "every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration." In holding that the defense of lack of consideration is available they say, "Thus the instrument becomes a statutory negotiable paper, and, by a statutory conversion, loses its position and quality as a specialty to the extent both of its negotiable characteristics and of its validity or legal sufficiency as a negotiable instrument. * * * By the express terms of this statute, the note now before the court is deemed *prima facie* to have been issued for a valuable consideration, and the maker to have become a party to the note for value, but absence or total or partial failure of consideration is a matter of defense as between the parties or to any person not a holder in due course." The decision of this court typifies the view taken by most of the few courts that have been confronted with this problem. *Arnd v. Heckert,* 108 Md. 300, 70 Atl. 416; *St. Paul's Episcopal Church, et al. v.*

Fields, Ex'r., et al., supra; Toller v. Hewitt, 12 Ga. App. 496, (N. I. L., not in effect); see also 29 YALE L. J. 345. The opposite result is not without support. Under the law merchant, the plaintiff was allowed to sue on a promissory note without alleging consideration. This rule has been incorporated into the N. I. L., by Section 24, *supra.* If a *prima facie* presumption of consideration is an aid to circulability, surely a conclusive presumption of consideration would be even more effective. Section 24 does not necessarily include sealed negotiable instruments, it being merely declaratory of the law merchant which did not recognize a sealed instrument as negotiable. Then, if there be applied the rule that consideration for a sealed instrument is conclusively presumed, the conclusion follows that failure of consideration is no defense to a negotiable instrument under seal. Actions on sealed negotiable instruments continue to be governed by the statute of limitations relating to actions on sealed instruments, *Clarke v. Pierce, Ex'r., supra,* hence it does not seem illogical to say that the N. I. L., has not removed the conclusive presumption of consideration in cases of sealed negotiable instruments. This conclusion of the problem has been reached, but without mention of the N. I. L., in *Burriss v. Starr,* 165 N. C. 657, 81 S.E. 929; and in *Kennedy v. Collins,* 30 Del. 426. In the interest of uniformity, however, the rule of the principal case may be preferable.

BILLS AND NOTES—GIVING OF CREDIT AS CONSTITUTING VALUE.—Plaintiff indorsed a check in blank, and deposited it in a bank, with a parol agreement that the bank should be an agent for collection. The bank indorsed it in blank and sent it to the defendant, its correspondent, who credited its account in good faith and before maturity. The depositing bank being insolvent, plaintiff seeks to hold defendant as a subagent. *Held,* that under the N. I. L., defendant was a holder in due course. *Blacher v. National Bank of Baltimore* (Md. 1926) 135 Atl. 383.

The decision in the principal case is in accord with the English rule on the subject, which has received but rare approval in this country. *Ex Parte Richdale,* L. R. 19 Ch 409; *Royal Bank of Scotland v. Tottenham,* (1894) 112 Q. B. 715; *Williamson Bank and Trust Co. v. Miles,* 113 Ark. 342, 169 S. W. 368; *Wheeler v. First Nat. Bank,* 3 Tex. Ct. App. Civ. Cas. 192, overruled in *Sperlin v. Peninsular Stove Co.* (Tex. Civ. App. 1907) 103 S. W. 232. See also *Farmers and Merchants Bank v. Nissen,* 46 S. D. 121, 190 N.W. 1014. The generally accepted view in the United States is that the giving of credit by a bank, without withdrawals, does not amount to the giving of value. 1 DANIELS NEGOTIABLE INSTRUMENTS 907; *Grocery Co. v. First Nat. Bank,* 158 Ala. 143, 48 So. 340; *Drovers Nat. Bank v. Blue,* 110 Mich. 31, 67 N.W. 1105; *Central Nat. Bank v. Valentine,* 18 Hun (N. Y.) 25 N. Y. S. C. 417; *Citizens Bank v. Cowels,* 180 N. Y. 346, 73 N. E. 33, BRITTONS CASES ON NEGOTIABLE INSTRUMENTS, 308; *Manufacturers Nat. Bank v. Newell,* 71 Wis. 309, 37 N.W. 420; many other cases may be found cited in BRANNAN, NEGOTIABLE INSTRUMENTS LAW, (4th. Ed.) 386 and 6 A. L. R. 252. It is submitted that the principal case represents the better view both in logic and in policy. The N. I. L., sec. 25, defines value as "any consideration sufficient to support a simple contract." The giving of credit fully satisfies that requirement, since it embodies at least an im-

plied promise to pay upon proper demand, and in the case of a bank, to pay upon the presentation of the depositor's checks. Should the bank refuse to pay such checks, it would subject itself to the possibility of the inconvenience of a lawsuit. Furthermore, no court would deny that value would have been given had the bank handed the customer cash, and he immediately, without leaving the bank, given it back in the form of a deposit. If it is possible to avoid the consequences of the general rule by such a simulated transaction, it is submitted that the rule itself is of doubtful value. In light of the general acceptance of the view that the taking of negotiable paper as collateral security for a preexisting debt, without the creditor's otherwise giving up anything, is value, it seems surprising that the giving of credit, as by a bank to a depositor, should not be considered sufficient. 33 YALE L. J. 628.

CARRIERS—POWER OF RAILROAD TO GRANT EXCLUSIVE RIGHTS TO CAB STAND ON DEPOT PROPERTY.—The plaintiff company which is engaged in the cab business secured a decree restraining the defendants, who are rival companies, from trespassing on or interfering with the plaintiff's enjoyment of a cab stand on depot grounds, to which the plaintiff claims the exclusive right under a lease from the railroad companies, the owners of the depot. *Held,* that the injunction was properly issued. *Red Top Cab Co. v. McGlashing,* (Iowa, 1927) 213 N.W. 791.

A railroad performs a public function. Nevertheless it holds legal title to its property which it employs in the discharge of that function. As an incident of ownership it may make a profit for itself from the use of its property. However, it must make no unreasonable discrimination among passengers and shippers, and it must always use its property in the interest of what is reasonably necessary to accommodate passengers and shippers. *Donovan v. Pennsylvania Company,* (1905) 199 U. S. 279, 26 S. Ct. 91, 50 L. Ed. 192. The defendants in the principal case claim that such exclusive rights as the plaintiff has will tend to create in the plaintiff a monopoly of the business from incoming passengers, and place other cabmen, including defendants, at an inconvenience in discharging outgoing passengers at the station. The court, while stating that the actual inconvenience to the defendants in the principal case is very slight, declares that the defendants have no legal right to use the companies' property for solicitation and transaction of business without the consent of the companies. The carrier fulfills its duty to its patrons when it affords reasonable and proper means of entrance and exit to and from the premises. It may contract with whomsoever it pleases for the private use of its premises when such use will not conflict with the performance of its public duties. *Black and White Taxicab & Transf. Co. v. Brown & Yellow Taxicab and Transf. Co.* (C. C. A. 6th, 1926) 15 F. (2d.) 509. This is the law in the majority of state courts and in the federal courts. See annotation in 15 A. L. R. 356 (1921). 10 C. J. 657. Note 16 L. R. A. (N. S.) 777. A few states hold to a contrary doctrine, the general theory being that to allow the granting of exclusive privileges of the kind under consideration would be to create a monopoly, stifle competition, and inconvenience the public. See *Montana Union R. Co. v. Langlois* (1890) 9 Mont. 419, 24 Pac. 209; *Indianapolis Union R. Co. v. Dohn,* (1899) 153 Ind. 10, 53 N. E. 937; *Palmer Transfer Co. v. Anderson* (1909) 131 Ky. 217,

115 S. W. 182. Michigan was formerly recognized as adopting the minority doctrine. *Kalamazoo, etc., Co. v. Sootsma* (1890) 84 Mich. 194, 47 N. W. 667. But the Supreme Court of Michigan in *Dingman v. Duluth, S. S. & A. R. Co.* (1911) 164 Mich. 328, 130 N. W. 24, distinguished the *Kalamazoo* case and on the question then before it put itself in harmony with the majority rule. The holding in the principal case is in line with the decision of the Supreme Court of the United States in *Donovan v. Pennsylvania Company, supra.* Most of the states following the minority rule were committed to it before the Supreme Court passed on the question in the *Donovan* case. It is submitted that the same reasoning which supports the right of railroads to make exclusive contracts with express companies, *Express Cases* (1886) 117 U. S. 1, 24, 6 S. Ct. 542, 628, 1190, 29 L. Ed. 791, and with sleeping car companies, *Chicago etc. Ry. Co. v. Pullman Car Co.* (1891) 139 U. S. 79, 89, 11 S. Ct. 490, 35 L. Ed. 97, will also support their right to contract exclusively with taxicab companies for service to and from depots, so long as the standard of adequate service to the public is maintained. See also 4 MICH. LAW REV. 304.

CONFLICTS—ANNULMENT OF MARRIAGE—JURISDICTION.—A, an Englishwoman, married B, an Austrian, in Paris. They became domiciled in Germany, and A thereafter brought annulment proceedings in a German court. The court issued a decree declaring the marriage in France null and void. The question is whether this decree is binding on the courts of England in the present suit. *Held,* The court of the *lex domicilii* has jurisdiction to nullify a marriage, and this being a proceeding *in rem,* determining status, it is controlling in the courts of this country. *Salvesen v. Adm'r of Aust. Property* (1927). A. C. 641.

This case reopens, so far as England is concerned, the interesting controversy as to which law controls the nullification of marriage—*the lex domicilii,* or the *lex loci contractus.* See Goodrich, "Jurisdiction to Annul a Marriage" (1918) 32 HARV. L. REV. 806. As pointed out in this article, the logic of the situation favors the latter view—which seems to represent the weight of authority in the United States. *Levy v. Downing* (1913) 213 Mass. 334, 100 N.E. *Garcia v. Garcia* (1910) 25 S. D. 645, 127 N.W. 586; cf. *Roth v. Roth* (1882) 104 Ill. 35, 48; but see 38 C. J. 1349 par. 122. The courts of the country whose act created the status would seem to be the only ones authorized to declare it void *ab initio.* See also (1912) 26 HARV. L. REV. 253; Goodrich, "Foreign Marriages and the Conflict of Laws," 21 MICH. L. REV. 743. Such a rule, furthermore, tends toward a greater stability of the status, as demonstrated in the latter article.

The English courts have found themselves in a peculiar predicament concerning this question. On the one hand they have held that a resident or domiciled Englishman contracting a marriage abroad, valid by the laws of the foreign state in which it was celebrated, may have the act annulled and declared void by the courts of England, *Roberts v. Brennan* (1902) P. 143; *Johnson v. Cooke* (1898) 2 Ir. 130. On the other hand they have declared that a man domiciled in France, and by its law incapable of marriage, was validly married by going through the English ceremonies in England. They refused to recognize a French decree of nullity. *Ogden v. Ogden* (1908) P. 46; *Simonin v. Mallac* (1860) 2 S.W. and Tr. 67. In other words, they make the *lex*

domicilii controlling in the one instance and the *lex loci contractus* in the other—depending, it seems, on which happens to be the law of England. "Apparently an Englishman takes his personal law abroad in this matter and a foreigner deposits his in bond at the Dover Customs House."—BATY, POLARIZED LAW p. 41.

In the principal case the English court finds itself in the novel situation of being called upon to decide whether the law of the domicile shall control when neither the *lex domicilli* or the *lex loci contractus* is the law of England. The English court takes the step of approving the decree of the court of domicile. *Quaere*: Whether this is indicative of a tendency toward consistency in the British policy or whether its application will be limited to cases like the present.

CONFLICT OF LAWS—JURISDICTION OVER NON-RESIDENT MOTORISTS.—Mass. St., 1923, C. 432, Sec. 2, provides that the use by a non-resident motorist of the state's highways shall be deemed an appointment of the registrar of motor vehicles as agent for the service of process in all actions arising out of the motorist's use of the state's highways. It requires notice by registered mail and ample allowance of time to defend. Plaintiff sued for personal injuries caused by defendant's negligent operation of his car in Massachusetts. Defendant is a resident of Pennsylvania and was served in accordance with the statute. *Held,* that the court acquired jurisdiction by such service. *Hess v. Pawloski,* (May 1927) 47 S. Ct. 632.

A state may in the exercise of its police power exclude a non-resident motorist until he appoints an agent in his state for service of process as to actions growing out of his use of the state's highways. *Kane v. New Jersey,* 242 U. S. 160, 37 S. Ct. 30. Massachusetts took the next step by dispensing with the actual execution of the power. Affirming the decision of the Massachusetts Supreme Court, 253 Mass. 478, 149 N.E. 122, the court held in the principal case that the power to exclude gives the power to treat the doing of the act as the equivalent of an appointment, and that the difference is immaterial so far as due process is concerned. This does not set up any new basis of jurisdiction. The principle involved is the same one relied upon in upholding similar provisions as applied to foreign corporations doing business in the state. It is not based upon consent, *Pa. Ins. Co. v. Issue Mining Co.,* 243 U. S. 93, 37 S. Ct. 344, but upon the power of the state to regulate in the interest of public safety and convenience, within constitutional limits, the conduct of persons coming into the state. Hand, J. in *Smolick v. Phila. and R. Coal and Iron Co.,* 227 Fed. 148, and see 25 MICH. L. REV. 538. In view of the universal interstate use of motor cars, the constantly increasing number of auto accidents, and the well known difficulties of foreign litigation, the result of the case seems eminently desirable. Already at least four other states have enacted similar legislation: Conn. P. A. 1925, c. 122; N. H. P. A. 1925, c. 106; N. J. Laws 1924, c. 232; Wis. Laws 1925, c. 94. And it is probable others will follow. It is to be noted that the New Jersey act makes no provision for notice to the defendant. It might be questioned whether it satisfies the due process clause. But see *Martin v. Condon,* 129 Atl. 738 and *Piszutti v. Wuchter,* 134 Atl. 727, both under the act in question. In both there was however some personal service made. For a valuable article on the general

subject see A. W. Scott, "Jurisdiction over Non-Resident Motorists," 39 HARV. L. REV. 563.

CONFLICT OF LAWS—WORKMEN'S COMPENSATION ACT—LOCAL ACT APPLIED THOUGH CONTRACT IS A FOREIGN ONE.—The plaintiff made a contract in Iowa for employment in Minnesota. He suffered injuries in the course of employment and sought an award under the Minnesota Compensation Act. *Held*, that even though the contract of employment was a foreign one the Minnesota Act was applicable. *Ginsburg v. Byers* (Minn. 1927) 214 N. W. 55.

On one ground or another courts have applied the local compensation act, even where the injury was sustained in other states. *Kennerson v. Thames Tow Boat Co*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916 A 436; *Crane v. Leonard, Crossette & Riley*, 214 Mich. 218, 183 N. W. 204; *Holmes v. Communipaw Steel Co.*, 186 N. Y. App. 645, 174 N. Y. S. 772; *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351. The theory generally advanced in support of such application is that the cause of action is *ex contractu* and the *lex loci contractus* governs. *Smith v. Van Noy Interstate Co.*, 150 Tenn. 25, 262 S.W. 1048. A much sounder view divorces the right from contract and holds it to have been conceived by the statute which regulates the employer and employee relation, and annexes the right as an incident thereto. *Anderson v. Miller Scrap Iron Co.*, 169 Wis. 106, 170 N. W. 275; GOODRICH CONFLICT OF LAWS, p. 204. When the court is asked as in the instant case to apply the local act for a local injury on a foreign contract, we have a situation which puts the contract theory to the acid test, for if the court does apply the local act, whatever theory it thus indorses, it certainly is not the contract theory. But see *Douthwright v. Champlin*, 91 Conn. 524, 100 Atl. 97. The instant case does not throw any light on this interesting question, since the court disposes of the case in a brief opinion, citing no authority, and grounding its decision by an appeal to the underlying economic consideration that any localized industry should bear the burdens of its industrial mishaps, whether the injury is localized or out of the state, regardless of the origin of the contract. Thus the decision is consistent with the peculiar Minnesota doctrine that the "localization" of an industry creates the obligation to pay compensation for injuries sustained in its operations. *Krekelberg v. M. A. Floyd Co.*, 166 Minn. 149, 207 N.W. 193, noted in 25 MICH. L. REV. 738.

Other jurisdictions have reached the same result as the Minnesota court, although the theoretical basis for applying the local act is not clear. New Jersey adheres to the contract theory, but has no difficulty in applying its act where the contract is foreign. *American Radiator Co. v. Rogge*, 86 N. J. L. 436, 92 Atl. 85, 94 Atl. 85. The Indiana court so far regards its act as a legislative statement of public policy as to hold that a foreign contract of employment containing a stipulation for an appropriate forum for adjudication of right, tort or contract, must be disregarded as being contrary to the law of the forum. *Hagenback etc. Show Co. v. Randall*, 75 Ind. App. 417, 126 N.E. 501. Connecticut, the pioneer exponent of the contract theory held its act was applicable in a situation similar to the present case. *Banks v. Howlett*, 92 Conn. 368, 102 Atl. 822. However, it soon recognized that this holding was inconsistent with the contract theory and overruled the case by *Pettiti v. Construction Co.*, 103

Conn. 101, 130 Atl. 70, 35 YALE L. J. 118. The Connecticut court will apply the local act where the contract is a foreign one only if the foreign jurisdiction has no compensation act, or having one, does not make any award for foreign injuries. The Colorado court has refused to apply the local act where the contract was a foreign one. *Hall v. Industrial Commission,* 77 Colo. 338, 235 Pac. 1073. It would appear that a uniform application of the local act, regardless of the origin of contract can be logically grounded only on some such doctrine as that of statutory regulation of the employer and employee relation. This might give the employee the power of bringing suit in the state of injury and also in the state where the contract was made. This double-barrelled approach would result only in a single recovery for the injury, the smaller award being deducted from the larger. *Gilbert v. Des Lauriers Columnar Mould Co.,* 180 App. 59, 167 N. Y. S. 274.

CONSTITUTIONAL LAW—DUE PROCESS—INDEFINITENESS OF CRIMINAL STATUTES.—The Colorado Anti-Trust Act (Session Laws 1913, chap. 161) denounces conspiracies and combinations of persons and corporations for certain purposes which are enumerated in the act. The act further provides: "And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at reasonable profit those products which cannot otherwise be so marketed . . . " The district court permanently enjoined a state officer from enforcing this act on the ground that it deprives the plaintiff of due process of law, in that it is indefinite and uncertain and fails to fix any informing standard of criminality. *Held,* that the injunction was properly granted. *Cline v. Frink Dairy Company* (May 31, 1927) 47 S. Ct. 681, 71 L. Ed. 844.

The law requires a certain degree of definiteness and precision in denouncing acts as criminal. LEWIS' SUTHERLAND'S STATUTORY CONSTRUCTION, Vol. I, p. 86. Common fairness demands that criminal statutes contain some ascertainable standard of guilt. In the principal case, however, guilt or innocence is made to depend on whether the purposes of the combinations are to obtain only a reasonable profit in such products as cannot yield a reasonable return except by marketing them under the combination methods otherwise condemned. In other words, the line between lawfulness and criminality depends on, first, what commodities need to be handled by trust methods in order to assure to those dealing in them a reasonable profit; second, what generally would be a reasonable profit from such a business; and third, what would be a reasonable profit for the defendant under the circumstances of his particular business. The exceptions in the statute deprive it of certainty. Enforcement of it involves punishment of those who combine, when in the judgment of the court and jury combination is not necessary to enable the participants in the business to make a reasonable profit. But absolute and fixed standards are often difficult if not impossible to make. *Burlington. etc., Ry. Co. v. Dey* (1891) 82 Ia. 312, 48 N.W. 98; *Shultz v. State* (1911) 89 Nebr. 34, 130 N.W. 972; *Miller v. Oregon* (January 17, 1927) 273 U. S. —, 47 S. Ct. 344, 71 L. Ed. 400. "The law is full of instances where a man's fate depends upon his esti-

mating rightly, that is, as the jury subsequently estimates it, some matter of degree," declared Mr. Justice Holmes in *Nash v. United States* (1913) 229 U. S. 373, 33 S. Ct. 780, 57 L. Ed. 1232. But in the *Nash* case, in which the court upheld the criminal sections of the Sherman Anti-Trust Act as against the charge that they were so lacking in definiteness as to violate the Sixth Amendment, the court held that the common-law precedents as to what constituted an undue restraint of trade were sufficiently specific and well-known so that one engaged in interstate business could easily determine what course of conduct was legal. But whereas in the *Nash* case, which was greatly relied on by appellants in the principal case, there was a well understood body of precedent to aid in the interpretation of the Sherman Act, in the principal case there is none. There is only a guess as to what is a reasonable profit, and as to what commodities can not earn a reasonable profit unless sold by combination methods. In *United States v. L. Cohen Grocery Co.* (1921) 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, the court set aside for lack of certainty the fourth section of the Lever Act (Act of October 22, 1919, chap. 80, sec. 2, 41 Stat. at L. 297) which made it unlawful to charge an unreasonable price for handling or dealing with necessaries, or to combine with other persons to exact excessive prices for necessaries. The Lever Act was considered a war-time measure. The court objected that the act forbade no definite or specific charge but left to the court's discretion what was an unreasonable price. It would seem, however, that the Lever Act might have been construed to forbid, in time of war, any departure from the usual and established scale of charges in time of peace, which is not justified by some special circumstance of the commodity or dealer. Thus interpreted, it would seem that the Lever Act could have been sustained. The standard becomes ascertainable. See 19 MICH. L. REV. 648. The word employed to denote the criminal act may be definite enough if they have a well-known technical meaning, a common-law significance, or other recognized connotation which will give them a fairly definite meaning. *Hygrade Provision Co. v. Sherman* (1925) 266 U. S. 502, 45 S. Ct. 141, 69 L. Ed. 402; *International Harvester Co. v. Kentucky* (1914) 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1288. The court has never adopted a construction, however, making the difference between legal and illegal conduct in the field of business relations depend on so uncertain a test as whether prices are reasonable. *United States v. Trenton Potteries Co.* (February 21, 1927) 47 S. Ct. 377, 71 L. Ed. 404; *United States v. Addyston Pipe and Steel Co.* (1899) 175 U. S. 211, 20 S. Ct. 96, 44 L. Ed. 136. It is difficult at best to frame an anti-trust act that will accomplish the purpose aimed at by the legislature and also be sufficiently definite to meet the requirements of due process. Perhaps the desired result may be accomplished in the future through administrative action. It is suggested that if the statute laid down the legislative policy, a tribunal could adequately apply it to the situations as they arose. Such a handling of the problem, it is submitted, would satisfy the constitutional requirements.

DOWER—RELEASE OF INCHOATE RIGHT—EFFECT AS TO THIRD PARTY.—H owned an undivided half interest in Blackacre. He executed a mortgage to P in which his wife, W, did not join. Thereafter, H and W conveyed to D, subject to the mortgage, W releasing dower in the deed. H died. In a suit to

foreclose the mortgage, W was made a party and defaulted. It was *held* that P's lien under the mortgage covered the entire interest of H, and that D could not assert W's dower interest. *Louisa County v. Grimm, et al,* (1927 Ia.), 212 N.W. 324.

Where the wife does not relinquish dower to the husband's mortgagee, the mortgagee's security is the husband's whole estate subject to the wife's inchoate right of dower. *Turner v. Washington Realty Co.,* 130 S. C. 507, 126 S. E. 137; *Land v. Shipp,* 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560; *Miller v. Farmers' Bank,* 49 S.C. 427, 27 S.E. 514; *Harris v. Langford,* 26 Ky. L. Rep. 1096, 83 S.W. 566; *contra, Scott v. Croasdale,* 1 Yeates (Pa.) 75. She can, usually by statutory authority, relinquish her right to anyone having a freehold interest in the land. Iowa Code 1924, § 11990; TIFFANY ON REAL PROPERTY, Sec. 230, p. 803. But the one to whom the right is relinquished cannot assert the dower interest as dower is not assignable while inchoate. *Western States Finance Co. v. Ruff,* 108 Ore. 442, 215 P. 501. As to the effect of relinquishment on the rights of third parties, the cases are in conflict. One line of authority holds that relinquishment of dower to one is a relinquishment once and for all of the dower claim. *Elmendorf v. Lockwood,* 57 N. Y. 322; *Boorum v. Tucker,* 51 N. J. Eq. 135, 26 Atl. 456; *Morten v. Noble,* 57 Ill. 176; *Little v. Mundell,* 59 Ind. App. 227, 109 N.E. 227. The view *contra* is that the relinquishment is the release of a mere right, and therefore is effective by way of estoppel only. The benefit of the estoppel should be confined to the one to whom the relinquishment was made, or his privies. *Littlefield v. Crocker,* 30 Me. 192; *McMahon v. Russell,* 17 Fla. 698; *Bank v. Dudley,* 76 W. Va. 332, 86 S.E. 307; *French v. Lord,* 69 Me. 537. It is submitted that the latter view is preferable. A party not in privity with the relinquishment, and therefore not having furnished a consideration for it, should not be benefited.

EASEMENTS—USER COMMENCING UNDER LICENSE ADVERSE AFTER REVOCATION THEREOF.—A and B, owners of adjoining three-story buildings, used, in common, a stairway situated on B's land, B having given A oral permission to use the stairway. B conveyed the land, but A and his successors in title continued to use the stairway for more than 15 years, no action being taken on the part of B's grantees. At the time of this suit, they had forbidden the use of the stairway by plaintiff, mesne grantee of A, who filed a bill to enjoin such interference. *Held,* the conveyance of the land *ipso facto* revoked the license; the continued user after such revocation was adverse. *Burkhart v. Zimmerman,* 239 Mich. 491.

The chief difficulty and the problem in the case centers around the nature of the original licensee's user after the revocation of the license; whether adverse or permissive. (See 11 MICH. L. REV. 384.) The court in the case followed the settled rule in Michigan as laid down in the case of *Toney v. Knapp,* 142 Mich. 652, 106 N.W. 552, 4 MICH. L. REV. 545, in which it was held that continued user of itself, after the license had been revoked by the death of licensor, was sufficient to constitute an adverse user. The result of these Michigan cases is that the hostile character of the user follows from the mere notoriety. On the other hand, in *Bond v. O'Gara,* 177 Mass. 139, 58 N. E. 275, the origin of the possession was also in a license which was subsequently revoked by a con-

veyance, but the demandant mistakenly claimed under the license instead of under a fee. The Massachusetts court held that such possession was not adverse. It is submitted that the difference between the cases in that *Bond v. O'Gara* is a case of adverse possession, in which the courts concern themselves with the exclusiveness of the demandant's claim, while in the Michigan cases, the chief consideration presented, as in most cases involving the subject of prescription, is to determine whether there has been a sufficient acquiescence, the tendency then being to look to the servient owner's relation to the user. On considerations of policy also the rule of the instant case may be justified. While it has been argued that the effect of such a doctrine is to place a "premium on piracy," the real pervading and motivating purpose of such a rule in prescription is not "reward to the diligent trespasser," but rather a penalty for the dormant, negligent and indifferent owner who sleeps on his rights. *McCann v. Welch,* 106 Wis. 142, 148, 81 N. W. 996. As to whether this owner should be presumed to know his technical legal rights, see *Eyer v. Beck,* 70 Mich. 179, 38 N.W. 20; *Toney v. Knapp, (supra)*; *Jones v. Randall,* 1 Cowp. 38.

EQUITY ENFORCEMENT OF NEGATIVE COVENANT.—Complainant, who had built up a business of selling sand to manufacturers of castings in the steel and iron trade, entered into a contract with defendant who agreed, for a stipulated consideration, to supply complainant with sand and not to sell sand for said purposes to any other dealer; the contract to run for five years. After two years, defendant notified complainant that it cancelled the clause not to sell to others, but would continue to supply complainant. *Held,* that complainant is entitled to an injunction to enforce the negative stipulation. *Cramer v. Lewes Sand Co.,* (Del. 1927) 138 Atl. 78.

With the court we assume the validity of the contract. The plaintiff's remedy at law is inadequate because the damages resulting to its business from defendant's sale of sand to competitors is highly conjectural. In the somewhat similar cases of contracts calling for personal services the injunction to enforce negative stipulations has been granted with hesitation unless the services were unique or extraordinary. *Lumley v. Wagner,* 1 De Gex M. & G. 604; *Phila. Ball Club v. Lajoie,* 202 Pa. 210, 51 Atl. 973. On the same facts courts have differed as to the applicability of the words "unique" and "extraordinary." See *Kennerley v. Simonds,* 247 Fed. 822, noted in 16 MICH. L. REV. 647, and compare *Tribune Ass'n v. Simonds* (N.J.) 104 Atl. 386, noted in 32 HARV. L. REV. 176. Although our contract did not involve the sale of a unique chattel, the case can be upheld upon recognized equitable principles. There was no question here of partial enforcement of a contract, because the facts show that defendant was willing to continue to supply plaintiff. In this regard the case more nearly resembles those employment cases where the obligation to serve the plaintiff has been fully performed and the promise not thereafter to compete is enforced without regard to the ordinary or extraordinary character of the service. *Freudenthal v. Espey,* 45 Colo. 488, 102 Pac. 280; *Marvel v. Jonah,* 83 N. J. Eq. 295, 90 Atl. 1004; *Eureka Laundry Co. v. Long,* 146 Wis. 205, 131 N. W. 412. Though the balance of hardship doctrine may require the services to be unique or extraordinary in the *Lumley v. Wagner* type of case, CLARK'S EQUITY, sec. 81, 17 COL. L. REV. 687 at 700, this is not essential in

the *Eureka Laundry Co. v Long* type, in which case the court said: "It does not lie in the defendant's mouth to say to anyone, whether skilled or unskilled, could cause similar damage to the plaintiff's business after leaving its employ. He agreed not to cause such damage." In our case the relative hardship on the parties, depending upon issuance of the injunction, favors the plaintiff, due to the possible destruction of the plaintiff's business caused by the defendant selling to plaintiff's customers precisely the same kind of sand. Preponderance of hardship strengthens the argument for the injunction. CLARK'S EQUITY, sec. 81. For other cases in accord similar to ours see: *Donnell v. Bennett,* L. R. 22 Ch. D. 835; *Lanyon v. Garden City Sand Co.,* 223 Ill. 616, 79 N. E. 313; *Western U. Teleg. Co. v. Rogers,* 42 N. J. Eq. 311, 11 Atl. 13; *Manhattan Mfg. Co. v. N. J. Stock Yard Co.,* 23 N. J. Eq. 161; *Am. Sand & Gravel Co. v Chi. Gravel Co.,* 184 Ill. App. 509.

FRIGHT—THREAT OF ARREST—APOPLEXY.—Upon the plaintiff's refusal to purchase a vacuum cleaner from the defendant's salesman, the latter left the cleaner with the plaintiff, saying he would call for it in a few weeks. Instead he returned after several months and demanded payment, and upon the plaintiff's refusal to pay, the salesman threatened to arrest her, whereupon the plaintiff became so frightened that she suffered an attack of apoplexy, for which she seeks damages. *Held,* by the Supreme Court of New Jersey, that the physical injury was not the proximate result of the wrongful act, and judgment for the defendant was affirmed. This decision was later affirmed by the Court of Errors and Appeals, by an equally divided court. *Oehler et al v. Bamberger & Co.,* (N. J.) 135 Atl. 71, and affirmed in 137 Atl. 425.

The law relative to damages for injuries resulting from fright caused by the defendant's negligence but unaccompanied by any bodily impact, is very uncertain and unsettled. There are three reasons one or more of which are usually employed by those courts which refuse to allow damages in such a case. 1. Assuming that no cause of action arises for fright alone, there can be no recovery for injuries resulting from the fright. *Mitchell v. Rochester Railway Co.,* 151 N. Y. 107, 45 N. E. 354; *Spade v. Lynn and Boston Railroad Co.,* 168 Mass. 285. 2. It is urged that to allow damages in such a case is inexpedient and against public policy because it would make defendants responsible for things they could not reasonably anticipate, would "open the floodgates of litigation" and give rise to numerous false and petty claims. *Mitchell v. Rochester Railway Co., supra; Morse v. Chesapeake and Ohio Ry. Co.,* 117 Ky. 11, 77 S. W. 361. 3. As the court in the principal case, courts often question whether the physical injury is the proximate consequence of the wrongful act. *Mitchell v. Rochester Ry. Co., supra; Braun v. Craven,* 175 Ill. 401, 51 N. E. 657. See also the following recent cases which deny a recovery for one or more of the above reasons. *O'Brien v. Moss,* 221 N. Y. S. 621; *Howarth v. Adams Express Co.,* 269 Pa. 280, 112 Atl. 536; *Alexander v. Pacholek,* 222 Mich. 157, 192 N. W. 652; *Louisville & N. R. Co. v. Roberts,* 207 Ky. 310, 269 S. W. 333; *Kisiel v. Holyoke Street Ry Co.,* 240 Mass. 29, 132 N. W. 622. On the other hand there is a strong line of cases which reject the above reasons and allow a

recovery. Even assuming there is no right of action for fright alone, this does not preclude a recovery for physical injury resulting from the fright, for the latter action is based upon the injury and not upon the fright. *Hanford v. Omaha & Council Bluffs Street Ry. Co.*, 113 Neb. 423, 203 N.W. 643. The mere fact that there may be fictitious and numerous claims should not close the door to just and legal claims. *Green v. Shoemaker & Co.*, 111 Md. 69, 73 Atl. 688. The injury itself need not be foreseeable, but if the fright is foreseeable as a result of the negligent act, and the physical injury follows as a result of the fright, the injury is the proximate result of the negligence. *Hanford v. Omaha and Council Bluffs Street Ry. Co., supra; Lambert v. Brewster*, 97 W. Va. 124, 125 S. E. 244; *Green v. Shoemaker, supra.* See also notes in 11 A. L. R. 1119 and 40 A. L. R. 983. It is submitted that these courts have successfully answered all objections and that the plaintiffs should be compensated for injuries resulting from fright when the defendant has wrongfully caused the fright. When the courts find that the injury was wilfully or intentionally caused by the defendant, they almost universally allow a recovery. See notes in A. L. R. cited above.

INTERNATIONAL LAW—CITIZENSHIP—JURISDICTION OVER NATIONAL SHIPS.—Petitioner, the son of Chinese residents of the United States, was born on an American ship on the high seas while his parents were returning from a visit to China. He was then permitted to enter this country, but was subsequently denied admission on his return from a visit abroad. He then appealed to the courts. *Held*, that even though the ship was of American registry, he was not born a citizen of the United States. *In re Lam Mow* (1927) 19 Fed. (2nd) 951.

The Fourteenth Amendment declares "all persons born or naturalized in the United States and subject to the jurisdiction thereof" to be citizens. This language is construed to apply to persons born within the territory of the United States. 3 MOORE, INTERNATIONAL LAW DIGEST, 280; HYDE, INTERNATIONAL LAW, 613; *U. S. v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456; *Gee Fook Sing v. U. S.*, 49 Fed. 146 (dictum). It is frequently stated, as a rule of law, that a ship is a part of the territory of the state of its registry. 1 OPPENHEIM, INTERNATIONAL LAW, (3rd Ed.) 424; 1 MOORE, *supra*, 930; *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133. Vattel, in stating the doctrine, refers to this specific situation and considers the child a citizen. VATTEL, THE LAW OF NATIONS, Liv. 1 Ch. xix, § 216, (translated in the Carnegie Classics of International Law, 3 VATTEL, (Book 1, 88). England has construed the rule as giving territorial jurisdiction, in certain situations. *Marshall v. Murgatroyd*, L. R. 6 Q. B. 30 (case involving the Bastardy Act). Moreover, by statute, she has expressly made such children citizens, 4 and 5 Geo. v., c. 17, Art. 1, (1), (c). While the courts in this country have but rarely had occasion to consider the problem, the tendency is to regard the theory of territoriality of ships as giving personal rather than territorial jurisdiction. *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 43 Sup. Ct. 504; *Scharrenburg v. Dollar S. S. Co.*, 245 U. S. 122, 38 Sup. Ct. 28. But see *U. S. v. Gordon*, 5 Blatch. 18, which also involves a child born at sea. It is submitted that the principal case is correct. The doctrine that a ship is a "floating bit of territory" is clearly a fiction founded on the exigencies of the situation, and as such, it should be strictly

applied. Conceding the hardship resulting from the rule of the principal case, the remedy should be legislative and not judicial; the court should not, by permitting a fiction to obscure the facts, attempt to remove the hardship caused by the failure of Congress to provide for such a case in the citizenship or immigration laws.

JOINT TENANCY IN PERSONALTY—CREATION BY SETTING ASIDE FOR "EITHER OR SURVIVOR."—Deceased rented a deposit box in a bank in the name of himself and his wife, "either or survivor," and placed therein $9,500 worth of bonds. They key was kept where it was known and accessible to either. The evidence showed that deceased made this arrangement to provide for his wife in case he was sick, or died. The widow, as administrator, appealed from a judgment of the circuit court requiring her to account for the bonds. *Held,* that the right of survivorship in personalty may be created by the express act of the parties, and that there were sufficient facts here to make out a valid gift. *In re Peterson's Estate,* 239 Mich. 452, 214 N.W. 418.

The principal case follows *Lober v. Dorgan,* 215 Mich. 62, 183 N.W. 942, in permitting in effect, though not nominally, a joint tenancy to exist in personalty, with its incident right of survivorship. These cases seem to be a repudiation of the doctrine announced in *Ludwig v. Bruner,* 203 Mich. 556, 169 N.W. 890, capping a series of Michigan decisions which do not recognize joint tenancy in personalty. See 20 MICH. L. REV. 219. The question remains as to how the property is conveyed to the donee. Obviously, under the facts of the principal case, it is not a testamentary disposition. Nor is it a *donatio causa mortis.* The theories most generally relied on, when the court considers the question at all, are those of gift, or trust. It has been said that if the elements of trust are lacking, the transaction fails. *Denigan v. San Francisco Savings Union,* 127 Cal. 142, 59 Pac. 390; *Staples v. Berry,* 110 Me. 32, 85 Atl. 303. On the other hand, some courts give effect to the intention of the donor though the technical requirements are lacking. *Kennedy v. McMurray,* 169 Cal. 287, 146 Pac. 647; *Kelly v. Beers,* 194 N. Y. 49, 86 N.E. 980. See also 25 MICH. L. REV. 791. The court in the instant case seems to adopt the theory of gift, stressing the fact of delivery. A gift of what? A strict joint tenancy could not have been created, for either party could have withdrawn all the bonds while both were living, thus destroying the "unity of interest" required in joint tenancy. *Staples v. Berry, supra.* The voluntary trust theory, while doing away with the difficulties of delivery, as advanced in *Carr v. Carr,* 15 Cal. App. 480, 115 Pac. 261, suffers from a like defect, in that either the trustor or cestui may draw out during the lives of both without accounting. This defect has been explained away in *Booth v. Oakland Bank of Savings,* 122 Cal. 19, 64 Pac. 370, by asserting a claimed power of revocation of the trust which does not affect the remainder, which goes to the survivor, according to the intention of the donor. It is submitted that in all these cases an attempt is made to dispose of property after the death of the donor, which does not comply with provisions for testamentary dispositions, nor could the cases sustain strict tests of trust or gift. See L. R. A. 1917 C. 550.

LIBEL AND SLANDER—PRIVILEGE TO PUBLISH REPORTS OF JUDICIAL PROCEEDINGS—ARE PAPERS FILED, BUT NOT ACTED UPON, JUDICIAL PROCEEDINGS?—Plaintiff's action for libel was brought for publication in the defendant's newspaper of a report of a declaration for fraud and deceit filed against the plaintiff, the latter action being subsequently dropped. *Held,* that a pleading filed although not acted upon was a judicial proceeding, publication of a report of which was privileged. *Campbell v. N. Y. Evening Post,* 245 N. Y. 320, 157 N.E. 153.

It is interesting to note that the New York court, in disregarding the weight of authority to start with a rule of its own "consistent with practical experience" refers to a recent number of the MICHIGAN LAW REVIEW in which the vagaries of the law on this matter are soundly criticized. 24 MICH. L. REV. 489. The New York court belabors the distinctions commonly drawn between privileged and non-privileged judicial proceedings as "frivolous legal fictions" wholly indefensible. *Campbell v. N. Y. Evening Post, supra.* The court goes on to show that journalistic practice has for a long time disregarded the distinction by publishing reports of declarations as soon as they are filed. By this practice, the court points out that the public has been educated to appreciate that scurrilous charges are often made in declarations merely to villify the defendant, and that accusation is not proof. While this may be anticipating the future, rather than a sound expression of the present, upon all considerations of public policy, the decision is a good one. After all, we are already committed to a policy of publicity on judicial proceedings, and the decision in the principal case makes the law symmetrical where it was warped, and in so doing conforms the law to actual practice. These results justify creating the new rule.

MOTOR CARRIERS—INTERSTATE COMMERCE—LOCAL REGULATIONS.—P sues to restrain the Public Utilities Commission from interfering with his bus line between Providence and Woonsocket, both in Rhode Island, the route being diverted through a part of Attleboro, Mass. P claims he does not need a certificate of convenience and necessity as required by Rhode Island law because he is engaged in interstate commerce. The Public Utilities Commission was of opinion that he was diverting his route through Massachusetts merely to escape regulation, and hence refused to grant a certificate. Since the bus line only went through a sparsely populated part of Attleboro and the number of interstate passengers would be few, *held,* the interstate business would not excuse the utility from state control. *Inter-City Coach Co. v. Atwood,* (Dist. Ct. R. I., 1927) 21 Fed. (2nd.) 83.

It is now settled that a state cannot deny a certificate of convenience and necessity to motor vehicles engaged exclusively in interstate commerce. *Buck v. Kuykendall,* 267 U. S. 307, 45 Sup. Ct. 324; *Bush Co. v. Maloy,* 267 U. S. 317, 45 Sup. Ct. 326, 327; *Red Ball Transit Co. v. Marshall,* 8 Fed. (2nd.) 635. The principal case suggests the question whether a motor-bus company, engaged primarily in domestic business, can escape local regulation by extending its line into another state, and thus come within the protection of interstate commerce. In *Crigler v. Comm.,* 120 Ky. 512, 87 S.W. 276; a mere subterfuge of interstate commerce was not allowed to permit one to escape local

liquor regulations. This principle has been applied to motor-bus companies. In *Interstate Busses Corp. v. Holyoke St. Ry. Co.*, 273 U. S. 45, the court says, "Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees." See also *Barrows v. Farnum's Stage Lines*, 254 Mass. 240, 150 N.E. 206. Nor should extension of the bus line into another state afford protection. *B. & M. R. Co. v. Cate*, 254 Mass. 248, 150 N.E. 210; *B. & M. R. Co. v. Hart*, 254 Mass. 253, 150 N.E. 212. The principal case speaks of such attempts at evasion as "discreditable subterfuges" and "mere fictions of interstate commerce." Hence, the motor-bus cases show that in this field, at any rate, the definition of interstate commerce must include something more than running busses across state lines. With characteristic reticence in passing on points not directly before the court, the decisions leave us in doubt as to what this "something more" should include. It is safe to say, however, that when the interstate part of the business is added merely to avoid local regulation it will be of no avail.

MUNICIPAL CORPORATIONS—TORT LIABILITY—GOVERNMENTAL AND MINISTERIAL FUNCTIONS.—The liability of a municipal corporation for the tortious acts of its agents and employees is an extremely baffling concept arising under the peculiar rules governing general municipal liability. The following recent decisions will illustrate the two recognized types of municipal functions, and contrast the result reached by the courts generally in respect to the distinct functions. (1.) The plaintiff tripped over a hose placed across the side walk by the fire-department while fighting a fire. She suffered injuries, and contended that although there might not be liability for the negligence of the members of its fire department, the municipality had failed to keep the streets reasonably safe for travel, under Mich. C. L., 1915, Sec. 4584, and was liable. *Held*, fire fiighting is a governmental function, giving the municipal corporation immunity, and the statute raises no liability. *Powell v. Village of Fenton*, (Mich. 1927) 214 N.W. 968. (2.) The city of Galveston maintained a distinct unit of poles and wires for lighting a sea-wall road way, but did not operate the plant supplying electricty, nor did it furnish current through the system for profit. *Held*, a ministerial function was being performed by the city, and there is no exemption from liability for the death of a lineman. *City of Galveston v. Rowan*, 20 F. (2d) 501.

In the characteristic formula peculiar to municipal liability for tort the doctrine of *respondeat superior* attaches liability to the municipal corporation for negligence of its officials engaged in ministerial, or sometimes called proprietary or corporate, functions, while complete immunity exists if the function is governmental. DILLON ON MUNICIPAL CORPORATIONS. Sec. 974: *Murtaugh v. The City of St. Louis*, 44 Mo. 479. And there is perhaps no more firmly established principle of the law than that fire fighting is a governmental undertaking of a city with attendant immunity from torts of its fire department. DILLON MUNICIPAL CORPORATIONS, Sec. 976: *Hill v. City of Boston*, 122 Mass. 344; *Greenwood v. Louisville*, 76 Ky. 226. The immunity has been recognized when the negligent injury occurred while the fire department was not actually engaged in fighting fire; when the injury was caused by

the fire department during a practice drill. *Frederick v. City of Columbus,* 58 Ohio St. 538, 51 N.E. 35; and again while testing an as yet, not purchased apparatus, *Thompson v. Mayor, etc., of New York,* 52 N. Y. Super. Ct. 427. Only one state has had the temerity to break from the overwhelming majority; *Fowler v. City of Cleveland,* 100 Ohio St. 158, 126 N.E. 72, 9 A. L. R. 131. Ignoring a long list of authority *contra,* the court refused municipal immunity from tort of its fire-department, but avoided flaunting the doctrine of *stare decisis* by holding that the return run from a fire was a "ministerial" function. Three years later, in 1922, *Aldrich v. Youngstown,* 106 Ohio St. 341, overruled the *Fowler* case, *supra,* and brought Ohio back into line. The universal rule in this country, then, as summarized in *Fisher v. Boston,* 104 Mass. 87, is that in the absence of an express statute a municipality is not liable for the torts of its fire-department. There must now be considered the effect of Mich. C. L., 1915, Sec. 4584 on the recognized immunity. Liability must rise from a strict and true interpretation of the statute. *Dundas v. City of Lansing,* 75 Mich. 499, 42 N.W. 1011. So the court in the instant case did not go afield in denying liability under the statute. They had previously held a municipal corporation liable for injuries resulting from a fire truck over-turning on a defective pavement. *Cone v. City of Detroit,* 191 Mich. 198, 157 N.W. 417. But the factual difference distinguishes *Powell v. Village of Fenton, supra,* and does not bring it within the obvious intent of the statute. In passing to a brief consideration of the second recent case, *City of Galveston v. Rowan, supra,* we face the abstruse and utterly unworkable distinction between the so called governmental and ministerial function of municipalities. A glib terminology does not form the basis for a workable principle, and the Supreme Court of South Carolina, possibly influenced by the difficulty that baffles other jurisdictions, has abandoned all distinctions between governmental and ministerial functions, holding that there is no liability in either case unless under express statute. *Irvine v. Town of Greenwood,* 89 S. C. 511, 72 S.E. 228. Usually the element of emolument is used as a peg to hang the term "ministerial" on. Functions from which incidental and ever so slight remuneration reaches the municipal coffers have no attendant municipal immunity. *Foss v. City of Lansing,* 237 Mich. 633. But where emolument cannot be found, term juggling seems to be the *modus operandi,* and all that can be done with safety is to determine each case as it arises. *Lloyd v. Mayor, etc., of the City of New York,* 5 N. Y. 369. Thus the *Galveston* case, *supra,* may be well decided, and *Saulman v. Mayor of Nashville.* 131 Tenn. 427, 175 S.W. 532, is in direct accord: street lighting, no emolument from the system, and liability. The Michigan Court, on the other hand, indicates that it might reach another result, distinguishing street lighting with direct current from furnishing alternating current to inhabitants for remuneration, and holding a city liable for an injury from the latter system. *Hodgins v. Bay City,* 156 Mich. 687, 121 N.W. 274. Municipal immunity in the case of governmental functions is an archaic, though vital, doctrine deduced from the divine right of kings theory. Certainly in modern times there is no reason why municipal corporations should not have the same tort liability, regardless of functions being performed, as private corporations. Borchard, "Governmental Liability for Tort," 34 YALE L. J. 129, 229.

NEGOTIABLE INSTRUMENTS—INTERIM CERTIFICATES.—Defendant issued to S., interim certificates, providing in substance that upon surrender thereof, properly indorsed, the defendant would deliver to S, or order, $2,000 par value, first mortgage collateral trust bonds of the defendant. By fraud S was induced to transfer these certificates by endorsement to M, who in turn, sold them to plaintiff, an innocent purchaser for value. Both S and the plaintiff claim to be entitled to the bonds from defendant. *Held,* plaintiff had the better right thereto. *Hopple v. Cleveland Discount Company* (Ohio App., 1927) 157 N.E. 414.

The conclusion of the court is based on two grounds: (1) That the plaintiff, as an innocent purchaser of a chose in action, took it free of collateral equities, I WILLISTON ON CONTRACTS § 447; 2 POMEROY, EQ. JUR. (4th ed.) § 712; and *Saba v. Cleveland Trust Company,* 23 Ohio App. ———, 154 N.E. 799, being relied upon as authorities. (2) That the interim certificates were negotiable instruments and therefore that the plaintiff, as an innocent purchaser, even from one who took through fraud, acquired a perfect ownership. In concluding that the certificates were negotiable, the court overlooks a decision to the contrary in *Manhattan Company v. Morgan,* 242 N. Y. 38, 150 N.E. 594, and adopts the theory suggested in 24 COL. L. REV. 563, to the effect that the Uniform Negotiable Instruments Law, in its requirements for negotiable paper, should not be taken as applicable to documents by their terms calling for the payment or delivery of property and which may therefore acquire recognition as negotiable instruments by force of usage, though failing to comply with the requirement of the N. I. L. that an instrument to be negotiable must call for the payment of a sum certain *in money.* The New York court held that this requirement of the statute was all inclusive; that under it, no instrument could be recognized as negotiable if it does not comply with all the requisites laid down in that act. Immediately after the New York decision, the legislature in that state provided for such documents being recognized as negotiable. See Laws of 1926, c, 704; 26 COL. L. REV. 884. As bearing on the question whether the provisions of Section I of the N. I. L. shall be deemed to apply to what might be designated as money documents, and not as applicable to those calling for the delivery of property, it is worth noticing that in Illinois, the first part of Section I of the N. I. L., the words, "payable in money" were added so that the statute there reads, "An instrument *payable in money,* to be negotiated, (sic) must conform to the following requirements:" etc. Laws of 1907, p. 403. These words apparently were inserted for the purpose of leaving outside of the operative effect of that statute, instruments payable in property. It is a possible, though somewhat strained construction, that the statute bears the same meaning without the words added by the Illinois legislature. The principal case lends support to this view.

TAXATION—PIPE LINES AS REAL ESTATE.—The legislature of Arkansas created a district to construct sixty miles of highway, and empowered a commission to assess the improvement to the real estate within the district, including railroads and pipe lines. P is owner of a pipe line for the transportation of oil, running through this district, and instituted suit to enjoin collection of the

tax on the ground, *inter alia,* that the pipe line was personal property not subject to the improvement tax. *Held,* that the pipe line was realty for tax purposes. *Miller Co. Highway Dist. v. Standard Pipe Line Co.,* (C. C. A., 8th. Cir., 1927) 19 Fed. (2nd.) 3.

Whether or not a pipe line is real estate for tax purposes has been seriously controverted, resulting in a conflict of authority and a variety of judicial opinion. The question usually arises regarding mains and pipe systems of water and gas companies. The difficulty results from the fact that the pipes belong to one person and are situated on the land of another. A few courts have held them personalty, either because of express statutory enactment, *Shelbyville Water Co. v. People,* 140 Ill. 545, 30 N.E. 678, or by the common law, *Memphis Gas-Light Co. v. State,* 46 Tenn. 310; *Ark. Nat. Gas Co. v. Comm'rs.,* 142 Ark. 351, 218 S.W. 664, though the latter view has been criticized. 20 COL. L. REV. 703. The majority view is that they are realty, *Paris Mt. Water Co. v. Woodside,* 133 S. C. 383, 131 S.E. 37, though three different theories are given to support this view. Iowa holds the anomalous doctrine that they are appurtenant to the main plant and taxable at its situs *as realty. Appeal of Des Moines Water Co.,* 48 Ia. 324; *Capital City Gas Light Co. v. Charter Oak Ins. Co.,* 51 Ia. 31, 50 N.W. 579. This view is without support elsewhere. *Paris v. Norway Water Co.,* 85 Me. 330; Beale, "Taxation of Pipes in Public Streets," 4 HARV. L. REV. 83. Rhode Island considers the right to lay pipes across the land of another an easement and regards the pipes as being affixed to this interest in land. *Providence Gas Co. v. Thurber,* 2 R. I. 15. The difficulty with this view is that it is hard to conceive of so concrete a thing as a pipe line *affixed* to an incorporeal hereditament. The other theory is that they are realty where situated. Under the last view it is hard to tell whether the court regards the pipes as an interest in land, *i.e.,* an easement themselves, *Consol. Gas Co. v. Baltimore,* 101 Md. 541, 61 Atl. 532; *Tide Water Pipe Line Co. v. Berry,* 53 N. J. L. 212, 21 Atl. 490, or merely part of the realty which belongs to another than the owner of the supporting land. *Standard Pipe Line Co. v. Index-Sulphur Dist.,* 293 S.W. 1031; *The King v. Brighton Gas Co.,* 5 B. & C. 466. Upon principle it would seem clear that, whatever the theory, the pipes are realty, for they are affixed to the soil with the idea of permanency, and removal is not within the intention of the parties. Why not merely say, then, that they are realty and taxable to the owner of the pipes where they are situated? It is submitted that this is the result reached by the better considered cases, and the theory here suggested seems more in accord with the facts than an easement theory stretched to cover a novel situation. The pipes become realty by being permanently located in the soil, they have a definite immovable situs, and hence should be taxed to the owner of the pipes *there* as *realty.*

TORT—BLASTING—ABSOLUTE LIABILITY.—P railway company sues to recover for damages to its right of way occasioned by blasting operations of D, carried on in the construction of a public highway. The injury resulted from blasted rock falling on P's tracks. *Held,* D company is liable for the injury done, on the principle that it is guilty of trespass, and quite irrespective of

whether or not it was in the exercise of due care. *Asheville Const. Co. v. So. Ry. Co.,* 19 Fed. (2d) 32.

Old authorities were unanimous in affirming the proposition that intent or negligence are not necessary elements of the action of trespass. *Guille v. Swan v. Johnson* (N.Y.) 381; *Newsome v. Anderson,* 2 Ired. (N. C. Law) 42; *Hay v. Cohoes,* 2 N. Y. 159. On the basis of the theory of these cases no objection can be taken to the ruling of the court in the principal case. Why, then, should we find such wide divergence of authority in cases involving injuries arising out of explosions and blasting?

In the case of *Bessemer v. Doak,* 152 Ala. 166, 44 So. 627, the shock of an explosion caused a premature birth, physical injuries, and disfiguration. The court held that there was no liability without a showing of negligence. This case is readily distinguishable on common law principles, on the grounds that the injury was to the person rather than to real property. The courts were not so solicitous of the former as of the latter, and required a showing of negligence or intent, *Weaver v. Ward, Hobart,* 134 (K. B. 1616); *Adrean v. Mathews,* 104 Okla. 198, 230 Pac. 889. Nevertheless, we have *Sullivan v. Dunham,* 161 N. Y. 290, 55 N.E. 923, directly opposed to this basis of reconciliation. It may also be justified, however, on the basis of the *Booth* case, cited later.

Another line of decisions is represented by the cases of *Heeg v. Licht,* 80 N. Y. 519; and *Kinney v. Koopman,* 116 Ala. 310, 22 So. 593, wherein it is asserted that a showing of negligence or intent is necessary. In both of these cases, however, the powder was stored on the land and exploded accidentally. This calls to mind the case of *Fletcher v. Rylands,* 3 H. L. 330, which laid down the rule that one who collects on his land a substance which, should it escape, would be likely to do great harm to the property of his neighbor, does so at his peril. The rule of this case would seem to point to a different conclusion in the two cases under observation, but since the courts of this country have been very reluctant about accepting *Fletcher v. Rylands,* or having accepted it have qualified it with exceptions, this result is not surprising, *Suthiff v Sweetwater Water Co.,* 182 Cal. 34. Logically, trespass won't lie as in the principal case, the injury being consequential and not the direct result of D's act of storing. Some text writers and courts think that the distinction is trifling and immaterial and that there should be practically an insurers liability in both instances. JOYCE, LAW OF NUISANCES, sec. 385, note 36 and collected cases. Some of these latter courts justify their stand by declaring that the storage constitutes a nuisance *per se. McAndrews v. Collerd,* 42 N. J. L. 189; *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.,* 60 Ohio St. 560.

Still a different angle is presented by the cases of *Booth v. Rome Etc. R. R.,* 140 N. Y. 267, 35 N.E. 592; and *Whitlae v. Ippolita,* 131 Atl. 873. Here the injury was caused by intended blasting, but was due to tremor and concussion rather than to thrown fragments of debris. Proof of negligence was required. This may be reconciled with the principal case since there was no invasion of P's close. Such distinction cannot be made, however, with reference to the case of *Watson v. Miss. River Power Co.,* 174 Iowa 23, 156 N.W. 188, and *Longtin v. Persell,* 30 Mont. 306, 76 Pac. 699, which are directly opposed to such reasoning.

The cases seem to show that in striving for a uniform result the courts have entangled themselves in a maze of logical difficulties and have left the law in a state of utter confusion. It is submitted that the real solution seems to lie in the ability of the courts to bring themselves around to the point where they are willing to accept negligence as the test of liability in all such tort cases, aided perhaps by an extension of the rule of *res ipsa loquitur*. 30 HARV. L. REV. 409.

TORTS—NEGLIGENCE OF PARENT IMPUTED TO CHILD AS BARRING CHILD'S RECOVERY.—A tree fell and lodged over the roadway. Plaintiff's father saw and drove around the tree on Saturday afternoon. On Sunday night, returning, the father drove his car into the unlighted tree. Plaintiff, an infant of six months, was injured. There was evidence tending to show that the defendant commissioners had notice of the fallen tree on Friday afternoon preceding. Defendants asked for an instruction, which was refused, that the parent's negligence, if found, be imputed to the child. *Held*, the refusal of the requested instruction was error. *County Com'rs. of Carolina Co. v. Beulah.* (Md. App. 1927). 138 A. 25.

The rule followed in a majority of the jurisdictions is that in an action by or in behalf of an infant of tender years for a personal injury, the contributory negligence of its parent or custodian cannot be imputed to the child. This doctrine is followed by over thirty jurisdictions in the United States (cases collected in 15 A. L. R. 414) and is the one favored by text writers. 1 SHEARMAN AND REDFIELD ON NEGLIGENCE, 6th ed., sec. 78; BISHOP ON NON-CONTRACT LAW, sec. 582; BEACH ON CONTRIBUTORY NEGLIGENCE, 2nd ed., sec. 130; 2 MICH. L. REV. 735; 19 *Ibid.* 110. This is frequently referred to as the "Vermont rule," inasmuch as it originated in Vermont in 1850 in the leading case of *Robinson v. Cone*, 22 Vt. 213. The law of the instant case is by far in the minority. Delaware, Maine, Mass., Maryland, and New York are the present day adherents to the minority rule. 15 A. L. R. 423, note and cases collected. Ever since the date of its first enactment the doctrine has been, severely criticized on the grounds that the child is *non sui juris*, that the parent is not the child's agent, that the child is not identified with the parent, and that the child can get no redress against the parent. 1 SHEARMAN AND REDFIELD, *op. cit.*, sec. 76 *et seq.*; BEACH, *op. cit.*, secs. 127-129 and cases cited. The parent's negligence is a bar to a recovery where the parent is legal plaintiff under the familiar rules of contributory negligence. 1 SHEARMAN AND REDFIELD, *op. cit.*, sec. 71; BEACH, *op. cit.*, sec. 13. This is true even under the majority rule. *Bellefontaine etc. R. Co. v. Snyder, Jr.*, 18 Ohio St. 399 (recovery allowed to child); *Bellefontaine etc. R. Co. v. Snyder, Sr.*, 24 Ohio St. 670 (recovery denied the negligent parent); see note 18 L. R. A. (N. S.) 328; 3 MICH. L. REV. 166; 9 *ibid.* 266. It seems safe to venture that the states of the minority persuasion will eventually do as the California court did in overruling its prior decisions in *Shierhold v. North Beach etc. R. Co.*, 4 Cal. 447, and *Meeks v. Southern P. R. Co.*, 52 Cal. 604, by "well and wisely, though somewhat tardily" declaring the rule of imputed negligence no longer the prevailing one. *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 Pac. 203, 15 L. R. A. 401.

TORTS—RECOVERY BY AN UNLICENSED AUTOMOBILE DRIVER.—The plaintiff, while carrying passengers for hire without being licensed under Mass. G. L. C. 159 S. 45, 46, suffered damages to his automobile from collision with the negligently operated automobile of the defendant. *Held,* recovery was not barred by the violation of the statute, *Farr v. Whitney,* (Mass. 1927) 156 N.E. 863.

The prevailing rule is that illegal conduct of the plaintiff must be a proximate cause of his injury to bar recovery. 27 HARV. L. REV. 93. And as a general proposition of tort law the Massachusetts courts follow the prevailing rule. *Newcome v. Boston Protective Department,* 146 Mass. 596, 16 N.E. 555; *Hall v. Ripley,* 119 Mass. 135. The court, however, departed from the rule when, in 1909, it decided that violation of a statute requiring registration of an automobile precluded recovery for damages suffered while operating without the required license. *Dudley v. Northampton Street R. Co.,* 202 Mass. 443, 89 N.E. 25, 23 L. R. A. (N.S.) 561. The court in quoting from *Commonwealth v. Kingsbury,* 119 Mass. 542, concerned itself with the "frightful appearance" and great dangers involved from "applying the forces of nature in previously unknown ways," and based its decision, without considering whether violation of the statute contributed to the cause of the injury, on the theory that a violator is a "trespasser on the highways," toward whom there is only a duty to abstain from wanton injury. Since the establishment of the rule in *Dudley v. Northampton Street R. Co., supra,* it has been followed in numerous representative Massachusetts decisions, collected in *Holden v. McGillicuddy,* 215 Mass. 563, 565, and has also been followed in two other Atlantic states: Connecticut, where the result has been reached by statute, *Stroud v. Water Commissioners,* 90 Conn. 412, 97 Atl. 336, and in Maine, where the court expressly relied on the leading Massachusetts case, *Dudley v. Northampton Street R. Co., supra,* and reiterated the "trespasser" theory, *McCarthy v. Town of Leeds,* 115 Me. 134, 98 Atl. 72. The Massachusetts doctrine clearly runs counter to the great weight of authority in this country. The following cases may be considered typical, holding that violation of the licensing statute is not a proximate cause of the injury, and is no bar to recovery: *Central of Georgia Ry. Co. v. Moore,* 149 Ga. 581, 101 S.E. 668; *Wolford v. City of Grinnell,* 179 Iowa 689, 161 N.W. 686; *Armstead v. Lounsberry,* 129 Minn. 34, 151 N.W. 542. And two eastern states in the section where the *Dudley* case, *supra,* has a following, hold to the general rule in the matter: *Marquis v. Messier,* 39 R. I. 563; and *Gilman v. Central of Vermont Ry. Co.,* (Vt. 1919) 107 Atl. 122. See HUDDY ON AUTOMOBILES, 6th Ed., Sec. 125. If would appear that since there is neither legal nor logical differentiation between the case of violation of an automobile licensing statute and the case of violation of a licensing for hire statute that the instant case is well decided and in accord with the general rule, though taken out of the rule of the *Dudley* case, *supra. Dicta* in that case that violation of safety appliance statutes would not bar recovery indicates that the Massachusetts court, itself, is prone to regard the *Dudley* case, *supra,* as more or less of an anomaly in the law, a doctrine to be curtailed rather than extended, and to be followed only when the identical fact situation arises.

TRIAL—APPORTIONMENT OF DAMAGES BETWEEN JOINT TORTFEASORS.—In a suit to recover damages for an accident resulting from the joint negligence of the railroad company and its engineer, the jury assessed the damages against each of the defendants separately at $16,000. *Held,* this was an attempt to apportion damages between joint wrongdoers, hence the verdict must be set aside. *Ross v. Pennsylvania R. Co.* (N. J. 1927) 138 Atl. 383.

There can be no apportionment of damages between joint wrongdoers. SEDGWICK ON DAMAGES, vol. 1, p. 39. Where the total damage to be assessed is clearly to be inferred from the verdict, the court will disregard the attempted apportionment as surplusage, and render a joint judgment on the verdict for the total amount. *Lake Erie & W. R. Co. v. Halleck,* 78 Ind. App. 495, 136 N. E. 39. The difficulty arises where, as in the principal case, the same amount is assessed against each of the defendants with nothing in the verdict to indicate whether the jury attempted to apportion the damages, or whether the jury meant to render a joint verdict for the single amount. The trial court has discretion to inquire into the meaning of such an ambiguous verdict, before dismissing the jury, and to require the latter to return a verdict in the correct form. *Olson v. Nebr. Tel. Co.,* 87 Neb. 593, 127 N.W. 916; *Rhame v. City of Sumter,* 113 S. C. 151, 101 S.E. 832; *Bartlett v. Hammond,* 76 Colo. 171, 230 Pac. 109. If the court dismisses the jury without having the verdict reformed, as in the principal case, is there no alternative other than a new trial? In *Bartlett v. Hammond, supra,* where the trial court after dismissing the jury rendered a joint judgment and inserted therein the single amount, the supreme court criticised this action as amounting to a joint judgment rendered on two separate verdicts. Was this a proper construction of the verdict? In construing a verdict as joint or several, the court should presume that the jury heeded its instruction to return a joint verdict. In the principal case, the plaintiff below was willing to have the verdict construed most strongly against himself, as an award of $16,000 against both defendants, instead of against each. It is difficult to perceive what just end could be served by setting aside the verdict on the technical ground that its wording indicates "an intention to apportion the damages as between the two defendants." See *Olson v. Nebr. Tel. Co., supra.* It would seem that the court might have regarded the verdict as defective in form only, and disregarded the words of severalty as mere surplusage, thus construing the verdict as joint in substance, and rendering judgment thereon against both defendants for the single amount.