Michigan Law Review

Volume 18 | Issue 6

1920

Recent Important Decisions

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Courts Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol18/iss6/6

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Accretion—Title to New Land—Encroachment of Watercourse Upon Lands Beyond.—D's lands were bounded on the east by a river and on the west by the land of P. By erosion the river slowly shifted until all of D's tract was washed away as well as part of P's holding. The river then slowly receded and the land of P was built up as was also new land east of the former boundary of P and D. P brings an action to quiet title for the land newly formed. Held, title to the land in dispute rested in P. Yearsley v. Gipple, (Nebr., 1919) 175 N. W. 641. D, though accepting the general principal of accretion, contended that the doctrine did not apply to lands the boundary of which is fixed and definite as in the case of property not originally riparian. This contention is not without authority. Volcanic Oil and Gas Co. v. Chaplin, 27 Ont. L. Rep. 34; Allard v. Curran, 168 N. W. 761; Gilbert v. Eldridge, 47 Minn. 210; Ocean City Ass'n v. Shriver, 64 N. J. L. 550. This view however has been denied in the following cases: Welles v. Bailey, 55 Conn. 292; Peuker v. Caute, 62 Kan. 363; Widdecomb v. Chiles, 173 Mo. 195. The principal case follows the latter authorities and refuses to distinguish the case where the boundary is a fixed line and from its very nature is unshiftable. Under this view land entirely landlocked may acquire the privileges and liabilities of riparian land by means of the action of the forces of nature. See 17 Mich. L. Rev. 95; see also 26 Harv. L. Rev. 185.

Adoption—Descent and Distribution in Relation to an Adopted Child.—An intestate left surviving him two sons of his deceased sister and an adopted son of his deceased brother. The adopted son claimed, by right of representation, one-half of the estate as heir of the intestate under § 3964, Wyoming Compiled Statutes, which provides, that an adopted child "* * * shall be entitled to the same rights of person and property as children or heirs at law of the persons thus adopting them, unless the rights of property should be excepted in the agreement of adoption." Held, that the adopted son was entitled to one-half of the estate. In re Cadwell's Estate, (Wyo., 1920), 186 Pac. 499. Adoption was unknown to the common law, and hence, the legal status of an adopted child is determined entirely by statute. Albring v. Ward, 137 Mich. 352; Peck, Domestic Relations, § 106. The statutes generally provide that the adopted child may inherit from the adopting parents. Morrison v. Sessions, 70 Mich. 297; Stimson, Am. St. Law, § 6647a. Although his right to inherit from his natural kindred is not thereby destroyed. In re Darling's Estate, 173 Cal. 221; 15 Mich. L. Rev. 161. Since all the rights in favor of the adopted child exist solely by statute, it has generally been held, in the absence of special provision in the statute, that the adopted child cannot inherit from the kindred of the adopting parent. Wallace v. Noland, 246 Ill. 535, 545; In re Leask, 197 N. Y. 193. In accord with this view, and contrary
RECENT IMPORTANT DECISIONS

to the decision in the principal case, it has been held that the adopted child will not take by descent from a brother of his deceased adopting parent. Van Derlyn v. Mack, 137 Mich. 146; Hockaday v. Lynn, 200 Mo. 456. Nor from the father of such parent. Quigley v. Mitchell, 41 Ohio St. 375. Nor, the mother of such parent. Meader v. Archer, 65 N. H. 214; Merritt v. Morton, 143 Ky. 133. Nor from the grandson of the adopting parent. Helm's Adm'rt. v. Elliott, 89 Tenn. 446. The decision in the principal case, therefore, must depend solely upon some decisive distinction between the statute upon which it rests and the statutes of other states—especially in the absence of a special provision for inheritance from kindred. As to the devolution of the estate of an adopted child, it is universally held that the estate will descend to his issue. In default of issue, some states give the estate to the natural kindred of the adopted child. Reinders v. Koppelmann, 68 Mo. 482; Baker v. Clowser, 158 Ia. 156. But the better view seems to be that the estate should go to the adopting parents or their kindred. Paul v. Davis, 100 Ind. 422; Estate of Jobson, 164 Cal. 312. It has been held that the issue of an adopted child may inherit direct from the adopting parents by representation. Pace v. Klink, 51 Ga. 220. But see, contra, In re Sunderland's Estate, 60 Ia. 732. As to the effect of a subsequent adoption destroying all rights of inheritance under a prior adoption, see, In re Klapp's Estate, 197 Mich. 615, 16 Mich. L. Rev. 120.

ANIMALS—RIGHT TO KILL DOG—RELATIVE VALUE OF DOG AND PROPERTY ATTACKED.—In an action for killing of P's dog, D justified on the ground that he was protecting his own valuable guinea hens. Held, it was a question for the jury whether the act of D was a reasonable one under the circumstances. They might consider the relative values of the dog and the guinea hens, but they should not consider "valuable qualities in the trespassing dog, whether of pedigree or training, not apparent to the observation of a man of ordinary intelligence and not ordinarily inherent in dogs of a similar appearance." Ex parte Minor, (Ala., 1919) 83 So. 475.

A dog was not the subject of larceny at early common law, the reason assigned being its base nature. 3 Coke, Litt., p. 295. Although this view would seem to negative the existence of a legal property in canines, courts have uniformly allowed proof of a dog's value in civil cases. Bowers v. Horen, 93 Mich. 420, (shepherd dog); Uhlein v. Cromack, 109 Mass. 273, (watch dog); Brill v. Flagler, 23 Wend. (N. Y.) 354, (well-trained setter dog). But a dog's general "character" for value may be impeached by showing that he is a sheep killer. Dunlap v. Snyder, 17 Barb. (N. Y.) 561. Where a dog is negligently killed, his pedigree may be given in proof of value. Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317. The court said, at p. 326, "* * * this particular dog killed is said to have had what, in dog circles, is regarded as 'blue blood,' and among these he belongs to the inner circle of the four hundred, a member of the F. F. T., or first families of Tennessee." But courts do not always consider the fact that the dog may be much more valuable than the property to be protected. Leonard v. Wilkins, 9 Johns (N. Y.) 233; Simmonds v. Holmes, 61 Conn. 1. It is said that a dog may be destroyed under any circumstances when it is absolutely necessary for the
preservation of property. Ingham, The Law of Animals, p. 128. While a dog may not lawfully be killed for mere trespassing, (Marshall v. Blackshire, 44 Iowa 475) yet a man is justified in shooting into a congregation of dogs on his premises at night, if they are creating such a disturbance as to make the shooting a reasonable and necessary means of abating the nuisance. Hubbard v. Preston, 90 Mich. 221. Where the relative value of the dog and the property attacked is considered at all, it is a question for the jury to determine. Anderson v. Smith, 7 Ill. App. 354, (Irish setter pups killing blooded hen). It is submitted that the test established in the principal case is sound, —i.e., the proportionate value apparent or known to the person killing the dog rather than the actual value of the animals. See notes 40 L. R. A. 510; 19 L. R. A. (N. S.) 836; L. R. A., 1915 C 359; 8 Col. L. Rev. 147; 24 Yale L. J. 170.

Bankruptcy—Preference—Four Months Period.—A transaction by which a corporation, more than four months prior to its bankruptcy, made a verbal and later a confirmatory written assignment of stock in other corporations as security for a loan, held, not to constitute a voidable preference, though the certificates of stock were delivered within four months of the bankruptcy. Wiener v. Union Trust Co., (D. C. E. D. Mich., S. D., Dec., 1919), 261 Fed. 709.

This case exemplifies the principle of the bankruptcy law which emerges with gratifying consistency from much more complicated problems of fact and interrelated law. A setting aside of securities as collateral amounted to a lien on such securities preferable to the claim of the trustee in bankruptcy, notwithstanding lienor retained possession. Sexton v. Kessler & Co., 225 U. S. 90. Delivery of securities carried by a broker, to a customer, after the broker's insolvency is not necessarily a preference. Richardson v. Shaw, 209 U. S. 365. A legal lien on shares of stock bought by a broker and retained by him on behalf of a customer, will endure even after the trustee takes over the estate, Gorman v. Littlefield, 229 U. S. 19. But where there is no specific res to identify the fund and separate it from the estate, there may be no lien, and hence even under the agreement between the parties a voidable preference will follow, Hotchkiss v. Nat'l City Bank of N. Y., 231 U. S. 50; an equitable lien to validate a preference must relate to some specific property or thing capable of segregation or identification, In re Imperial Textile Co., 255 Fed. 199, In re Mandel, 127 Fed. 863, In re Sheridan, 98 Fed. 406. However, if the transaction merely renders specific a pre-existing general lien, it is a valid preference, Gage Lumber Co. v. McEldowney, 207 Fed. 255; and where the goods never would have come into the bankrupt's hands, had he not promised to give a lien thereon, accepted in good faith, the lien endures against all rights no greater. Greey v. Dockendorf, 231 U. S. 513, Cr. Re Imp. Textile Co., supra. This array of cases reveals the test of the character of a preference: Is or is not the estate of the bankrupt during the prescribed period depleted by it? If a legal or equitable lien attaches to property in his hands before the four months' period, it carries through. "No creditor can demand that the estate be augmented by the
wrongful conversion of property of another, or the application to the general estate of property which does not belong or never has belonged to the bankrupt." Gorman v. Littlefield, 229 U. S. 19, 25.

BUILDING RESTRICTION—A DUPLEX, OR TWO-FAMILY RESIDENCE AS A "FIRST-CLASS PRIVATE RESIDENCE."—The grantee covenanted that for a certain period "no building or structure other than a first-class private residence shall be erected, placed, or permitted on said premises." The grantee erected a "duplex" building to house two families but it was occupied by one only up to time of trial. Held: The building "as now used and occupied" constitutes a strictly first-class private residence as to outward appearances and the departure from the terms of the covenant as to the interior may be remedied by enjoining its use to one family. Walker v. Haslet et al., (Cal., 1920), 186 Pac. 622.

Covenants of restriction of use though not favored will be enforced. The intent of the parties as determined from the language of the covenant construed strictly will govern. In Levy v. Schreyer, 177 N. Y. 293, the covenant against any house except private dwellings was held not violated by an erection of a three-story flat building but is use by more than one family was enjoined as in the principal case. However, generally, when the plural is used the covenant is not held violated by a structure housing more than one family. See cases cited in 45 L. R. A. (N.S.) 729. In the principal case the court took the words of the covenant to describe the use rather than the structure. Where the words are private residence or private dwelling there appears to be little conflict of opinion. But where the covenant calls for no building other than a dwelling house or a residence building the authorities are not in accord. In Schadt v. Brill, 173 Mich. 647, and in Misch v. Lehman, 178 Mich. 225, the restriction that "no building other than a dwelling house shall be erected on a lot" was held to warrant an injunction against a flat building and a double house with one entrance, the court construing the intention to be a single dwelling for one family on each lot and not merely one dwelling house for more than one family. Accord, see Harris v. Roraback, 137 Mich. 292; Kingston v. Busch, 176 Mich. 566; Bagnall v. Young, 151 Mich. 69; Powers v. Radding, 225 Mass. 110; 11 Mich. L. Rev. 521. In these cases the connoted meaning of the words is included rather than the bare meaning denoted and to this extent they do not follow the rule of strict construction against the covenant which itself is based on the disfavor of covenants of restriction. The more recent cases incline to the rule of strict construction. See Mannett v. Born, 247 Pa. 418; Johnson v. Jones, 244 Pa. 386, 52 L. R. A. (N.S.) 325; Hutchinson v. Ulrich, 145 Ill. 336; Anoff v. Williams, 94 Ohio St. 145; Reformed Church v. Building Co., 214 N. Y. 268; L. R. A. 1915-F 651. In a late case in the Supreme Court of Missouri, Bolin v. Tyrol Inv. Co., 273 Mo. 257 (1917), in which all the above cases were cited, the rule of strict construction was adopted, contrary to the former holdings in that state in Thompson v. Langan, 172 Mo. App. 64, and in Sanders v. Dixon, 114 Mo. App. 229, and it was held a covenant excluding the erection of more than "one dwelling house" of not less than two stories in
height, being in derogation of the fee, could not be extended by implication and an apartment building being a dwelling house was not excluded by the covenant.

**Constitutional Law—Equal Protection of the Laws—Refilling of Bottles Protected by Trade-Mark.**—The defendant was prosecuted under a Florida statute forbidding the refilling of milk bottles, etc., having a registered trade mark 'blown in.' The purchaser from the owner of the trade-mark was excepted from the operation of the law. *Held,* the statute was invalid as contrary to the Florida and Federal constitutions: This inhibited refilling was an unjust and unreasonable discrimination in favor of a class of people who own a very common and ordinary kind of personal property. *Yeager v. State,* (Fla., 1920) 83 So. 525.

There seems to be a decided split in authority on the question of the validity of statutes similar to the one in the principal case. Following the decision of *People v. Cannon,* 139 N. Y. 32, the courts of Cal., Ky., Mass., and R. I., have held such statutes constitutional; while, upon the reasoning of the leading case of *Lippman v. People,* 175 Ill. 101, the courts of Ind., Mo., and Ohio have come to the opposite conclusion. Although the authorities are perhaps irreconcilable, yet there are certain variations in the wording of the different statutes on which the courts lay great emphasis. In two of the statutes declared invalid, bottlers of milk, cream, etc., were not included in the operation of the law. *Lippman v. People,* supra; *State v. Baskowitz,* 250 Mo. 82. In the latter case this exclusion was regarded as sufficient to negative the claim that the act was a proper exercise of the police power, and to distinguish the statute from that in the *Cannon case,* supra. Statutes not referring to food products, but merely to containers generally, have been held invalid as not intended primarily for the protection of the public. *Horwich v. Walker-Gordon Lab. Co.,* 205 Ill. 497; *State v. Wiggam,* (Ind., 1918) 118 N. E. 684. Statutes which have been upheld have uniformly contained an express reference to food products. *Bartolotti v. Police Court,* 35 Cal. App. 372; *Comm. v. Goldberg,* 167 Ky. 96; *Comm. v. Anselvitch,* 186 Mass. 376; *People v. Cannon,* supra; *People v. Luhrs,* 195 N. Y. 377; *State v. Hand Brewing Co.,* 32 R. I. 56. It was said by the court in the *Anselvitch case,* supra, at p. 378, that the statute "*** makes provisions in reference to a kind of property used in a peculiar way, which is of such a nature as to call for peculiar provisions for the protection of the public and its owners against the fraud of evildoers." Another variation in wording is emphasized in the case of *State v. Schmuck,* 77 Ohio St. 438. The court, in holding invalid a 'milk bottle' statute, pointed out that in the New York statute the purchaser from the owner of the trade-mark was excepted from the penalty of the law, while the Ohio act made no such exception and so deprived the purchaser of the right of acquiring property. The statute in the principal case (*Fla. Gen. Stat.* 1906, par. 3345), being identical with the New York statute in the two particulars above emphasized, the decision would hardly seem to be supported by the line of authorities cited by the court. The contention that such a statute is bad as class legislation was effectively disposed of by the court in
COMM. V. GOLDBERG, supra, the court saying, at p. 109: "* * * every act having for its purpose the prevention of fraud and the punishment of persons who commit fraud necessarily affords protection to the persons who might be defrauded except for the statute." See also note to State v. Bashowitz, supra, Ann. Cas. 1915-A, 487.

CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—NEW YORK INCOME TAX.—The New York income tax law (Chap. 627, Laws 1919) provided for deduction at the source of salaries of non-residents in every case where the salary was more than $1,000 per annum. An exemption of $1,000 or more was allowed to every resident. A non-resident was allowed only an exemption based on the amount of income tax he paid in his own state, and then only in case such state allowed similar exemptions for residents of New York. Held, the act was invalid under the ‘privileges and immunities’ clause of the Federal Constitution. Under the known circumstances that citizens of Connecticut and New Jersey (states having no income tax laws), would be allowed no exemptions, this was an unwarranted discrimination against the citizens of those states. Travis v. Yale & Towne Mfg. Co., (March 1, 1920) — Sup. Ct. Rep. —.

A state is given great latitude in the manner of collecting taxes from non-residents, (see Shaffer v. Carter, infra), but there must not be an unreasonable difference in the manner of assessment as between resident and non-resident. Maxwell v. Bugbee, 250 U. S. (inheritance tax). An act giving resident creditors priority over non-resident creditors violates the ‘privileges and immunities’ clause. Blake v. McClung, 172 U. S. 239. So also does a statute placing a higher license tax on non-residents than on residents. Ward v. Maryland, 12 Wall. 418, 430, the court stating that one of the privileges and immunities protected is the right "* * * to be exempt from any higher taxes or excises than are imposed by the state on its own citizens." Although this question has been side-stepped by one court, (State v. Frear, 148 Wis. 456), yet the decision in the principal case would seem unassailable, once it be admitted that the inequality between residents is neither accidental nor merely occasional. Maxwell v. Bugbee, supra; Amoskeag Savings Bank v. Purdy, 231 U. S. 373.

CONSTITUTIONAL LAW—STATE INCOME TAX—POWER TO TAX INCOME OF NON-RESIDENT.—A statute of Oklahoma laid a tax on the total income of residents from whatever source derived, and taxed that part of the income of non-residents which was derived from property situated within the state. Unpaid taxes were to become a lien on the property of the taxpayer. The exemptions for married persons, etc., were the same for non-residents as for residents. The plaintiff, a non-resident whose income from oil lands within the state was $1,500,000 yearly, claimed that the imposition of the tax was in violation of the ‘due process’ and ‘equal protection’ clauses of the Federal Constitution. Held, the act was a valid exercise of the state’s taxing powers. The fact that a citizen of one state has a right to hold property or carry on an occupation or business in another state is a very reasonable ground for
subjecting such non-resident, to the extent of his business carried on there-
in, to a duty to pay taxes not more onerous in effect than those imposed upon
Rep. —

This decision settles a much discussed question. **Black on Income
Taxes**, sec. 15. Where the question of residence is not involved, income is
taxable irrespective of its connection with interstate commerce. *U. S. Glue
Co. v. Oak Creek*, 247 U. S. 321. The fact that the creditor is a non-resident
does not prevent the taxation of credits in the hands of a resident agent,
(New Orleans v. Stempel, 175 U. S. 309), nor the taxation of bonds and
mortgages within the taxing state. *Bristol v. Washington County*, 177 U. S.
133. But the operation of a state tax law must be limited to persons, prop-
erty, and business within its jurisdiction. *State-tax on Foreign-Held Bonds*,
15 Wall. 300. The fact that such a tax as the one in the principal case
amounts to double taxation of property within the state does not make it
as are not arbitrary and unreasonable may be made by a state for taxing
purposes. *M. C. R. Co. v. Powers*, 201 U. S. 245. The fact that different
methods are provided for collection from one class than from another does
Yale & Towne Mfg. Co.*, (U. S., 1920) supra. But, outside of mere methods
of collection, a state income tax, to be valid, must bear equally on residents
and non-residents. *Travis case, supra*. See also note L. R. A. 1915-B 569.

**Deeds—Condition in Restraint of Alienation—Invalid, as Repugnant
to Interest Created.**—Plaintiff conveyed the lot in question by a deed which
contained provisions that (1) it should not be sold, leased or rented to any
person other than of the Caucasian race, nor (2) should any person other
than of the Caucasian race be permitted to occupy such property; upon
breach the grantor or his assigns to have the right of re-entry. Such restric-
tions to terminate on January 1, 1930. By mesne conveyances the lot has
come to the defendant, a negro. The plaintiff seeks to declare a forfei-
ture of title for breach of the conditions subsequent. Held: These provisions
must be construed as conditions subsequent; the first is void as in restraint
of alienation; the second, being merely a restriction on the use, is valid.
*Los Angeles Inv. Co. v. Gary*, (Cal., 1919) 186 Pac. 596.

The court held that the condition against alienation came directly within
Sec. 711, Civ. Code Cal., which is as follows: “conditions restraining alien-
ation, when repugnant to the interest created, are void;” that an incident of
an estate in fee, which was here purported to be conveyed, is the right of
free disposal and transfer; that this condition is, therefore, void, the Code
leaving no room for a distinction between partial and total restraints. This
court, in substance, affirms the decision in *Title Guarantee Co. v. Garrott*,
(Cal., 1919), 183 Pac. 470, noted and discussed briefly in 18 Mich. L. Rev.
59. The court in the latter case held, in substance, that any restraint on
alienation is repugnant to the grant of a fee simple, (the condition there
only prohibiting sale to negroes, Chinese or Japanese, and being limited in
time), and, in the case at hand, the same principle seems to be adopted. It
may be noted, however, that there is a slight variation in the facts of the two cases, inasmuch as in the present case alienation is only allowed to be made to a specified class while in the previous case it was allowed to all save certain specified classes. This is sometimes made a basis of distinction. See Gray, Restraints on the Alienation of Property, § 41; Williams on Settlements, 134, 135. While, as a general principle, restraints on the alienation of an estate in fee are looked upon with disfavor, and certainly any attempt at a total restraint is void, cases may be found which uphold certain partial and limited restraints; as, for instance, a restriction against the sale to negroes—Koehler v. Rowland, 275 Mo. 573; Queensborough Land Co. v. Ca- seaux, 136 La. 724. Some proceed upon the distinction above mentioned, that is, whether the restraint affects alienation only to a certain class, or to all but the specified class or classes; others suggest that the period of time during which the restraint is to be effective should be considered. The cases are in great conflict, and it seems impossible to deduce therefrom any rule which may be said to govern all cases. For a discussion of the subject of segregation ordinances and their validity see 16 Mich. L. Rev. 109, though this is on a different phase of the subject.

Easements—Profits a Prendre—Licenses—Revocability.—Plaintiff corporation was granted (by deed) the right to bottle and sell the surplus waters from the Saratoga springs on specified terms with the right to enter and use the reservation for that purpose. In an action to enjoin the defendant from preventing the plaintiff from entering and enjoying his rights, held, that the instrument granted an easement, an incorporeal hereditament, an interest in the land and not a mere revocable license. Saratoga State Waters Corporation v. Pratt, (N. Y., 1920) 125 N. E. 834.

If the right granted was an easement it was obviously an easement in gross since it was unattached to any tenement. In England and in some of the states of this country the existence of an easement in gross is denied, and such a right is regarded as no more than a mere license. Ackroyd v. Smith, 10 C. B. 164; Boatman v. Lasley, 23 Ohio St. 614. Other courts recognize such an easement and hold it to be assignable and inheritable. Goodrich v. Burbank, 97 Mass. 27; Poull v. Mockley, 33 Wis. 482; New York v. Law, 125 N. Y. 380. A profit a prendre is a right to take the soil or the products of the soil; it is assignable and may be held in gross or as appurtenant to another estate. Grubb v. Grubb, 74 Pa. St. 25; Welcome v. Upton, 6 M. & W. 536. The right to take the waters of a spring is regarded not as a profit but as an easement. Race v. Ward, 4 El. & Bl. 702. A very recent case in Vermont holds such right to be a profit. Clement v. Rutland Country Club, (1920) 108 Atl. 843. A mere license to do something on the land of another is revocable at the will of the licensor, but in some states it becomes irrevocable when executed or when the licensee has incurred expense. Oster v. Broe, 161 Ind. 113; Rerick v. Kern, 14 S. & R. (Pa.) 267. There is another class of privileges, not strictly embraced within the term easements, profits or licenses, which are regarded as assignable and irrevocable. These are variously called "a great deal more than a license," Standard Oil Co. v.
Buchli, 72 N. J. Eq. 492 (right to lay oil pipes); cf. Davis v. Tway, 16 Ariz. 566; or "a license coupled with a grant," Penman v. Jones, 100 Atl. 1043 (right to dig and remove coal); cf. Caldwell v. Fulton, 31 Pa. 475; or "coupled with an interest," Ingalls v. St. Paul etc. Ry., 39 Minn. 479 (to enter and remove chattels). For an exhaustive discussion of the confusion in terms and faulty analysis in easement and license cases see 27 Yale L. Joue. 66. See also 7 Col. L. Rev. 536; 14 Mich. L. Rev. 259; 7 Mich. L. Rev. 605; 13 Mich. L. Rev. 401.

Evidence--Intoxicating Liquors--Admissibility of Unproved Note.--In a prosecution under the Alabama prohibition law, the state was allowed to show that officers found the following note on top of some cases of beer in the possession of the defendant: "Frank, please put this in the lounge and make Elvira burn the boxes and go to sleep and don't talk. B." The name of the defendant was Ben. Held, the note was improperly admitted in evidence, since there was no proof that it was written or authorized by the defendant. Ex parte Edmunds, (Ala., 1919) 89 So. 93.

The rule followed in the principal case has the approval of text writers and courts. 3 Wigmore, Ev., § 2130; 1 Greenleaf, Ev. [16th ed.], 680; Stamper v. Griffin, 20 Ga. 312; Langford v. State, 9 Tex. App. 283; State v. Grant, 74 Mo. 33. If there had been proof of the handwriting of the note it would presumably have been admissible. Burton v. State, 107 Ala. 108. Such evidence would, if proved, be admissible irrespective of the method by which it was obtained. People v. Trine, 164 Mich. 1. A distinction is made in the principal case and elsewhere between papers and other property seized, (State v. Krinski, 78 Vt. 162), the theory being that the writing without proof of identity is legally non-existent. Stamper v. Griffin, supra. Courts do not always observe this distinction. In a recent Alabama case the state was allowed to prove by parol evidence the contents of an unproved writing similar to the one in the principal case. Johnson v. State, 78 So. 716. It was said in Sigfried v. Levan, 6 Serg. & R. (Pa.) 308, 312, "** if there be any fact or circumstance tending to prove the execution, or from which the execution might be presumed, then like other presumptive evidence, it is open for the decision of the jury." It is submitted that a fair construction of the circumstances would make the note a part of the whole transaction and presumptively part of the instructions given by the defendant to his confederate.

Gifts--Order in Bank Book Not Evidence of Gift of Bank Deposit--No Delivery Shown.--R sold land to H, agreeing to take in part payment thereof a deposit in a bank, and requested the purchaser to make the account payable to himself or M or the survivor of either of them. H executed the order and delivered the book and order to R or to R and M, by placing it on a table in their presence. M was later seen with the book but shortly afterwards it was returned to R in whose possession it remained until his death. In an action by R's executors against the bank and the alleged donee, held, no valid gift inter vivos to M was created since there was neither a sufficient showing of R's donative intent nor a valid delivery. Rice et al v. The Bennington County Savings Bank et al, (Vt., 1920) 108 Atl. 708.
To effect a valid gift *inter vivos* of money on deposit the same elements are required which are necessary for an effective donation of any other personal property, namely, a donative intent coupled with a valid delivery of some sort. *Dougherty v. Moore*, 71 Md. 248; *Bailey v. New Bedford Institute*, 192 Mass. 56. Delivery of a bank book coupled with the necessary intent is sufficient. *Camp's Appeal*, 36 Conn. 88; *Hill v. Stevenson*, 63 Me. 364. Where the book has been mislaid, a signed order to pay the amount of the deposit to the donee, delivered to him, has also been held to constitute a valid delivery. *Camp v. Connecticut Savings Bank*, 81 Conn. 372. When, however, an attempt is made to establish a gift whether neither of these modes of delivery has been made use of, a conflict arises. The situation in the principal case was of this sort and the majority holding followed the rule advocated chiefly by Maryland that the delivery of the pass-book itself or its equivalent is necessary. *Whalen v. Milholland*, 89 Md. 199; *Colmary v. Panning*, 124 Md. 548; *Dougherty v. Moore*, supra. Other cases from which the court purported to derive support are: *McCullough v. Forrest*, 84 N. J. Eq. 101; *Taylor v. Corriell*, 66 N. J. Eq. 262; *Schippers v. Kempkes*, 67 Atl. 74; *Denigan v. San Francisco Savings Bank*, 127 Cal. 142. All of these are distinguishable from the principal case and the Maryland cases on the ground that additional facts were present which tended to negative the donative intent. The dissenting opinion in the principal case adopted what appears to be a less technical minority rule that the contractual arrangement with the bank, whereby the account was made payable to either or the survivor, created a joint ownership and was of itself a sufficient delivery without a subsequent manual handing-over of either the book or the order. *Dunn v. Houghton*, 51 Atl. 71; *Dennin v. Hilton*, 50 Atl. 609; *Marston v. The Industrial Trust Co.* 107 Atl. 88; *Buckingham's Appeal*, 60 Conn. 143; *Erwin v. Felter*, 283 Ill. 36; *Whitehead v. Smith*, 19 R. I. 135; *Blick v. Cockins*, 252 Pa. 56; *Negau-nee Nat'l. Bank v. LeBeau*, 195 Mich. 502; *Kennedy v. MacMurray*, 169 Cal. 287. In most of these cases the donor and donee went to the bank together and made the arrangement whereby the deposit was put in their joint names. The intent in the principal case is by no means so clear, but the court foregoes the possibility of making a distinction on this ground and considers that such an arrangement can at best be nothing but evidence of an intent and that mere intent is not delivery. The argument which seems to make the strongest appeal to those adopting the majority view, is that the donor who retains the bank book may draw out all the funds and thus make the alleged gifts a nullity. *Whalen v. Milholland*, supra. The minority view counters with the argument that the fact that the donor may indirectly defeat the gift by withdrawing the account does not of itself show that there was no valid delivery since the donee also has the power to withdraw the deposit as joint owner. *Raftery v. Reilly*, 107 Atl. 711; *Industrial Trust Co. v. Scan- lton*, 26 R. I. 228. Clearly, it is not inconsistent with the creation of a joint ownership that the donor as one of the joint owners should retain the bank book. *Marston v. The Industrial Trust Co.*, supra. In spite of the logic and attempted logic advanced by both sides it seems evident that the real conflict it between an unwillingness to abandon the ancient technical theory of a
delivery upon the one side, as opposed to the more liberal view that the clear intention of the parties should not be defeated by technical considerations. For additional discussion see 12 Ruling Case Law 946, 22 Harv. L. Rev. 453, and 15 Harv. L. Rev. 751.

Highways—Coasting Traveler.—In an action for damages for personal injuries resulting from a collision on a public road between defendant's carriage and a sled upon which plaintiff was coasting for pleasure, it was held that each party had equal rights as travelers, and that coasting was not such an act as to amount to a public nuisance, and consequently no bar to recovery, Roennau v. Whitson, (Ia., 1920), 175 N. W. 849.

In some jurisdictions coasting on city streets is deemed a public nuisance per se (Wilmington v. Vandegrift, 1 Marv. 5; Reusch v. Licking Rolling Mill Co., 118 Ky. 369); while a statement to the contrary is found in Jackson v. Castle, 80 Me. 119. But even by such courts as the latter it is asserted, obiter, that under some circumstances coasting coupled with boisterous conduct may constitute a nuisance. Even the principal case does not go so far as to deny that proposition. Many of the cases on this subject are suits against municipalities by persons injured by coasters, where the municipality had, by ordinance, forbidden coasting (Faulkner v. City of Aurora, 85 Ind. 130), or where it had expressly given permission for such use (Burford v. Grand Rapids, 53 Mich. 98), in both cases a recovery being denied. Consciously or unconsciously, the courts are influenced by two considerations, viz., the means of locomotion and the purpose of the use, in this problem of determining who is a traveler. For instance, in McCarthy v. Portland, 67 Me. 167, the court says by way of dictum that a boy might be a traveler if he coasts his way to school, but not if he does so for pastime, but it is submitted that the fact was there lost sight of that highways are properly intended and used for purposes of pleasure as well as of business. Where the injured party's play involved travel over the highway, a recovery was allowed in Reed v. Madison, 83 Wis. 371, and in Beaudin v. Bay City, 136 Mich. 333; and in Gulline v. Lowell, 144 Mass. 491, we find the same result even though the injured party was, at the moment of injury, engaged in a sport not connected with travel. Compare with this last case Blodgett v. Boston, 8 Allen (Mass.) 237, and Tighe v. Lowell, 119 Mass. 472. On all fours with the case at hand is Lynch v. Public Service Ry. Co., 82 N. J. L. 712, 42 L. R. A. (N.S.) 865, note. See also the note in 4 Ann. Cas. 248.

Master and Servant—Liability of Owner for Injuries to an Invitee of His Chauffeur.—Defendant sent his chauffeur on an errand with his car. Contrary to instructions the chauffeur invited plaintiff's intestate to ride with him. The car was overturned and both were killed. In an action to recover for death of intestate, held, defendant was not liable, as chauffeur acted outside his authority in inviting deceased to ride. Rolfe v. Hewitt (N. Y., 1920), 125 N. E. 804.

Some difficulty was experienced in reaching the decision in this case. The plaintiff recovered in the trial court, and a divided court affirmed the
RECENT IMPORTANT DECISIONS

decision in the Appellate Division, apparently approving the theory of the trial court that the deceased was a licensee of the defendant, being in the car with the chauffeur's permission, and defendant, through his servant, owed him a duty of ordinary care. Had the view of the trial judge prevailed a very stringent liability indeed would be fixed on automobile owners who employ chauffeurs. On the general subject of a master's liability for the torts of his servant, Justice Holmes has said, "It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment." Dempsey v. Chambers, 154 Mass. 330. In some cases this liability is extremely severe, as in the case of the carrier, who is liable for assault and battery by a servant on a passenger even though committed under circumstances wholly unconnected with the discharge of servant's duty. Hutchinson, Carriers, [3d Ed.] § 1093, and cases there cited. This liability extends not only to conductors but also to brakemen and porters of sleeping and drawing-room cars. Hutchinson, supra, §§ 1094, 1095. The basis of the liability in these cases can be put on broad considerations of public policy, but in the present case no such considerations seem to enter. In automobile cases, in order to render the owner liable for the negligence of the driver, the latter must be his servant or agent and acting within the scope of his employment at the time the act was committed. This rule has been invoked mainly where a pedestrian has been injured by negligent driving. That case is to be distinguished from the principal case in that there the person is rightfully in the street when injured, while an invitee of the chauffeur is not rightfully in the owner's car. In the former case, where the driver is acting for the master at the time of the accident, the employer is liable for the driver's negligence; as to one rightfully in the road, driver is servant of the owner. Ann. Cases, 1914-C 1087, and numerous cases there cited. Where the chauffeur is on some errand of his own or is acting contrary to orders at time of accident, the owner is not liable; driver is not servant of owner,—he is acting for himself. Colwell v. Aetna Battle and Stopper Co., 33 R. I. 531. The situation in the principal case is distinguishable from this. The driver was on an errand for his employer. As to a pedestrian, the driven was, therefore, the owner's servant and owner would be liable for injuries to such pedestrian. But as to an invitee of the driver, the master-servant relation did not exist. In driving the car, the chauffeur was acting within the scope of his employment. In inviting another to ride with him he was acting outside it. As to the invitee the driver was not the servant of the owner, though he would be as to pedestrians or others lawfully in the highway. See an interesting case, Powers v. Williamson, 189 Ala. 600, where defendant permitted his son to use his car to take three of son's friends for a ride on condition that he secure one Skeggs to drive the car. The arrangement was made, and Skeggs invited the plaintiff to join the party. Plaintiff was injured through negligent driving of Skeggs and sued the owner of the car. The court denied his liability and stated that if "* * * Skeggs was, as to third parties, and as to the son and the three young ladies who were his guests—a matter which is not before us—the servant of the father, he was not the
servant of the father insofar as Miss Powers (the plaintiff) was concerned."

There have been only a few cases involving a suit by an invitee of the chauffeur, injured through his negligence, though in the realm of horse-drawn vehicles the law is well-settled that the owner is not liable. Driscoll v. Scanlon, 165 Mass. 348; Scott v. Peabody Coal Co., 153 Ill. App. 103; Schulwitz v. Delta Lumber Co., 126 Mich. 559. See also, decided on the same day as principal case, Goldberg v. Borden's Condensed Milk Co., (N. Y., 1920) 125 N. E. 807. A similar rule has been employed where employees of a common carrier invite a person to ride without paying fare. Such a person is not entitled to the rights of a passenger. See extended note 37 L. R. A. (N.S.) 419 and cases there cited. These rules denying master's liability have been applied in automobile cases with few exceptions, one of which is noted below. The texts on automobile law lay down the broad rule that a guest of a driver cannot recover against the owner. The Law Applied to Motor Vehicles, Babett, [2d Ed.] § 818; Huddy on Automobiles, [4th Ed.] § 276. Similar statement in Ann. Cases 1917-D 1001. The decision in the principal case is in accord with this view and is supported by the following decisions in other cases: Walker v. Fuller, 223 Mass. 566; Gruber v. Cater Transfer Co., 96 Wash. 544; McQueen v. People's Store Co., 97 Wash. 387; Waller v. Southern Ice and Coal Co., 144 Ga. 695, holding uniformly that an invitation by a chauffeur to ride with him is an act outside the scope of his authority. A similar view is expressed in Eberle Brewing Co. v. Briscoe Motor Co., (Mich.) 160 N. W. 440, though the suit was not by an invitee who had been injured. A contrary rule was laid down in the jurisdiction of the principal case in Royal Indemnity Co. v. Platt and Washburn Ref. Co., 163 N. Y. Supp. 197, where an employee whose business was soliciting orders, using his employer's car for this purpose, invited another to ride with him. The passenger was injured and was held to be a licensee of the employer. There was evidence that the employee was soliciting an order from the invited during the trip, but that was not the basis of the decision. The court cited Grimshaw v. L. S. and M. S. R. Co., 205 N. Y. 366 and Adams v. Tozer, 140 N. Y. Supp. 163, as sustaining its position. The Grimshaw case does not involve the point in question and is distinguished by the court in the principal case. Plaintiff's intestate, in that case, was in the habit of riding to and from work on a Wabash engine which was struck by an engine of defendant's road. Defendant was held liable. The status of the injured person with reference to the Wabash road was immaterial to the question tried although the court discussed whether he was licensee or trespasser as to them. In Adams v. Tozer, supra, which is not discussed in the principal case, and which can be distinguished on its facts, defendant was hired to move household goods from a car to plaintiff's house. Plaintiff assisted driver, as was evidently contemplated by the parties, and the driver invited him to ride in the moving van, which overturned injuring plaintiff. Plaintiff was held to be a licensee of the owner and was allowed to recover on the ground that the driver had implied authority to do what was reasonable and necessary to move the goods, and inviting the plaintiff to ride was not outside that authority. From this it is apparent that the cases cited in it do not support
the conclusion in the *Royal Indemnity* case, and it is believed that that decision was overruled by the principal case, settling the law in New York in accord with the authorities elsewhere.

**Municipal Corporations—City Manager an Officer and Not an Employee.**—The city of Hot Springs, Arkansas, adopted the provisions of Act No. 114 of the Acts of 1917, which brought them under the commission form of city government, and the plaintiff was appointed city manager in accordance with the act. This act in Sec. 33 provides, among other things, that the city manager need not be a resident of the city at the time of his appointment. In this action,—which is to determine which one of two appointed boards of health is the legal one,—it is contended that whole of Act No. 114 is unconstitutional since the state constitution in Art. 19, Sec. 3 provides that no person shall be elected or appointed to fill an *office* who does not possess the qualifications of an elector. One of the qualifications of an elector is that he shall be a resident. *Held,* that a city manager is an officer and comes under the constitutional provision as to qualifications of an officer, but that the non-residence feature of the act can be stricken out since the legislature would have passed the act without it. *McClendon v. Board of Health,* (Ark., 1919) 216 S. W. 289.

This case involves the much mooted question as to whether a certain position is a public office or merely an employment. Employment is the broader term and includes a public office, but all employments are not public offices. *Rickers Petition,* 66 N. H. 207, 232; *U. S. v. Maurice,* 2 Brock. (U. S.) 96. It has sometimes been laid down as a general rule, that a position is a public office when it is created by law, which duties cast on the incumbent which involve an exercise of some portion of the sovereign power, and in the performance of which, the public is concerned and which also are continuing in their nature and not occasional or intermittent. *Groves v. Barden,* 169 N. C. 8; *U. S. v. Heinze,* 177 Fed. 770; (cannot be occasional service); *Scully v. U. S.,* 193 Fed. 185 (must be created by law); *Ill. Industrial Home for the Blind v. Dreyer,* 150 Ill. App. 574; (position created by law); *Blynn v. The City of Pontiac,* 185 Mich. 35 (performance of duties a matter of public concern); *State Tax Commission v. Harrington,* 126 Md. 157 (an office involves a delegation to the individual of some of the sovereign functions of government to be exercised by him for the benefit of the public). However the courts have ordinarily, in the different cases considered by them, passed upon the facts of each case and then reached a conclusion that the necessary elements were or were not present. *State Tax Commission v. Harrington,* supra; *Fredericks v. Board of Health,* 82 N. J. L. 200. In the principal case the court relied upon *Throop v. Langdon,* 40 Mich. 673, 682, where Judge Cooley said, "the office is distinguished from the employment in the greater importance, dignity, and independence of the position; in being required to take an official oath, and perhaps to give an official bond, etc." This view is to a great extent like the earlier authorities, *United States v. Hartwell,* 6 Wall. 383; *Hall v. Wisconsin,* 103 U. S. 5, although some of the recent cases have considered the absence or presence of a bond along with
other circumstances in determining whether a position was an employment or an office. State Tax Commission v. Harrington, supra; Reising v. Portland, 57 Ore. 295; Bankers Surety Co. v. Newport, 162 Ky. 473. In the same way the duty to take an oath has been considered in some late cases, Blynn v. Pontiac, supra; but the fact that an employee does take an oath will not make him an officer. Scully v. U. S., supra; Jones v. Battle Creek, 193 Mich. 1. It might perhaps be urged that the city manager in the principal case was not an officer, from the foregoing case, since he could be removed at any time by the commission. However duration of term was held not essential in Blynn v. Pontiac, supra, although it has been considered with other circumstances in holding a position an employment and not an office. Cross v. Fisher, 132 Tenn. 31; Bilger v. State, 63 Wash. 457; Jones v. Botkin, 92 Kan. 242; People v. Ry. Co., 267 Ill. 142. However the main difficulty is in failing to distinguish between a duration of an office, as such, and the duration of the term of the incumbent. The former seems to be necessary and the latter not.

Restraint of Trade—Sherman Act—Contracts Affecting the Resale Price.—Defendant was a manufacturer of pneumatic tire valves, gauges, etc. It required all dealers purchasing from it to contract in writing not to resell below stated prices. On this account it was indicted for engaging in a combination rendered criminal by the Sherman Act. The District Court sustained a demurrer. Held, demurrer should have been overruled. United States v. A. Schrader's Sons, Inc. — Sup. Ct. Rep. —.

The court distinguishes this case from United States v. Colgate & Co., 250 U. S. 300, on the ground that the Colgate Company was not charged with making contracts restricting the resale price, but only with refusing to sell to dealers who would not adhere to the resale prices fixed by the company. A dictum in Eastern States, etc. Ass'n v. United States, 234 U. S. 660, accords with the decision of the Colgate case. The decision of the principal case is consistent with the Supreme Court's holding in civil suits, that systematic attempts to control resale or use of a chattel by its owner are invalid, even though the chattel is made according to a secret process. Dr. Miles Medical Co. v. John D. Park & Son, 230 U. S. 303, or embodies an invention protected by patent, Boston Store v. American Gramophone Co., 246 U. S. 8; Straus v. Victor Talking Machine Co., 243 U. S. 490. For a discussion of these subjects and other cases see 15 Mich. L. Rev. 581; 16 Mich. L. Rev. 127-129. That it is not an infraction of the Sherman Act for a patentee systematically and by written contracts to restrict the acts of a lessee of chattels, although such restrictions affect interstate commerce, see, United States v. United Shoe Machinery Co., 247 U. S. 32; United States v. Winslow, 227 U. S. 202.

Sales—Trading With the Enemy—Effect of War Upon Contract for Sale of German War Bonds.—Prior to our entrance into the war with Germany, plaintiff and defendant, both "citizens, or, at least, residents of the United States," entered into a contract for the purchase and sale of 10,000
marks of German War Bonds to be delivered to the plaintiff upon arrival from Germany,—defendant already having contracted for the purchase of sufficient bonds from a German bank, to cover the plaintiff's purchase. Although the bonds were not yet issued by the German government, plaintiff paid the full purchase price for the same. War intervened, and the bonds never arrived up to the time of this action; some two years later, the plaintiff sues to recover the purchase price, claiming to have rescinded the sale. Held, a valid executed contract of sale, and title having passed, the plaintiff cannot recover,—end even though the contract be executory, the plaintiff must fail. Erdreich v. Zimmerman et al., (1920) 179 N. Y. S. 289.

The result reached is correct, provided the court is justified in its fundamental assumption that title had passed, and the contract was executed. But it is apparent that the court was not warranted in making this assumption, because title could not possibly have passed, there being no bonds in existence at the time of the contract, to which such title could attach,—and title could not attach to bonds, to be issued thereafter. Deutsch v. Dunham, 72 Ark. 141; Bates v. Smith, 83 Mich. 347; Andrews v. Newcomb, 32 N. Y. 417; Maskelinski v. Wazsinenski, 20 N. Y. S. 533. Assuming this to be an executory contract of sale, it seems that the plaintiff should be allowed to recover his purchase money, on the ground that the declaration of war by the United States rendered it void and illegal. It has frequently been held that any exportation to, or importation from, an enemy port is a prima facie trading with the enemy, and therefore executory contracts involving the same are dissolved by a declaration of war. M'Grath v. Isaacs, 1 Nott & M'C. (S. C.) 563; 2 M'C. L. (S.C.) 26; Brown v. Delano, 12 Mass. 37. The English cases support this doctrine also, but draw a distinction between these cases and cases where some embargo, or mere temporary restraint is imposed by the government. In the latter cases, they hold that a mere suspension, and not a dissolution, of the contracts results,—on the theory that such restraints are only temporary, whereas no person can foresee the termination of a state of hostilities, for its duration depends, not upon the will of any one government, "but on a number of considerations all of which are as uncertain as any such considerations can be." Andrew Millar and Company v. Taylor and Company, [1916] 1 K. B. 402; Reid v. Hoskins, (1855) 4 E. & B. 979; Avery v. Bowden, (1855) 5 E. & B. 714; Esposito v. Bowden, (1855) 4 E. & B. 964. These cases hold that carrying of goods to or from an enemy port, even in a neutral vessel, involves prima facie a trading with the enemy. Thus it appears that the contract in the instant case should be considered as dissolved because these goods, the bonds which were the subject of the executory contract, were to be imported from an enemy port, and therefore a trading with the enemy was involved. As to intervening impossibility of performance of contracts, as a defense, see L. R. A. 1916-F. 71.

Statute of Limitations—Counterclaim Good for Defensive Purposes Though Barred by Statute of Limitations.—Plaintiff sued on a promissory note for three hundred dollars. Defendant filed a counter-claim, ex-delicto,
for eight hundred dollars on which the statute of limitations had run after the plaintiff had commenced his action, but before the defendant had filed his counterclaim. Held: That defendant could not get an affirmative judgment for the difference, but he could use the barred counterclaim as a defense. Huggins v. Smith, (Ark., 1919) 216 S. W. 1.

It is well settled that statutes of limitation do not apply to pure defenses, Louisville Banking Co. v. Buchanan, 117 Ky. 975; Buty v. Goldtisch, 74 Wash. 532; and some courts have held set-offs and counterclaims not to be barred by the statute, although they would be barred if made the basis of an affirmative action, Stewart v. Simon, 111 Ark. 358; Autman and Co. v. Meade, 121 Ky. 241; but other courts have held that the statute applies as well to a demand attempted to be set-off as to one upon which an action is brought, Nohin v. Blackwell, 31 N. J. L. 170; Moore v. Gould, 151 Cal. 723; Woodland Oil Co. v. Byers, 223 Pa. St. 241. If however, the statute has not run against the set-off or counterclaim at the time the plaintiff commenced his action, the defendant's cross action will not be barred by the running of the statute while suit is pending, Brumble v. Brown, 71 N. C. 513; McElwuig v. James, 36 Ohio St. 152. But in Pennsylvania, the time when the running of the statute is stopped is when defendant files his counterclaim, not when plaintiff commenced his action, Gilmore v. Reed, 76 Pa. St. 452; McClure v. McClure, 1 Grant Cas. 222. Nor can plaintiff evade the set-off or counterclaim by dismissing his action and later commencing anew, after the statute has barred the defendant's cross action, Bertschy v. McLeod, 32 Wis. 205. The principal case follows neither of the above rules, but holds that for the purpose of getting an affirmative judgment, the defendant's cause of action is barred even though the statutory period elapsed while the suit was pending, but that for the purpose of recoupment, "it existed as long as appellant's (plaintiff's) cause of action existed." The court apparently reasoned that since the statute of limitations is inapplicable to defenses (recoupment), and since by statute, set-off and counterclaim are broader than, but nevertheless, include, recoupment, hence a counterclaim must be usable either as a counterclaim or as recoupment as occasion demands. In Utah a statute (Comp. Laws 1907, sec. 2971) enacts the law as laid down in the principal case, but the Arkansas statute would seem not to justify such an interpretation. The principal case, therefore, appears to be an instance of judicial legislation.

SUPERSTITIOUS USES—BEQUEST FOR MASSES—CHARITIES.—A bequest for the saying of masses held valid; not illegal as a superstitious use.—Bourne v. Keane, [1919] A. C. 815.

A superstitious use has been defined as "one which has for its object the propagation of the rites of a religion not tolerated by the law." 4 Halsbury's Laws of England 120. It is quite evident that in this country there can be, in law or equity, no such thing within the above definition. See Methodist Church v. Remington, 1 Watts (Pa.) 218; Gass v. Wilhite, 2 Dana (Ky.) 170; Holland v. Alcock, 108 N. Y. 312; although such bequests may be void for other reasons; viz., because involving a perpetuity, In re Zeag-
man), 37 Ont. L. Rep. 536; because of lack of definite beneficiaries, Festorazzi v. St. Joseph's Catholic Church, 104 Ala. 327; Holland v. Alcock, supra (prior to Tilden Act). But in England, the law has been settled by a long line of decisions that a bequest or devise for the saying of masses is void as a gift to superstitious uses. Adams v. Lambert (1602) 4 Co. Rep. 104b; West v. Shuttleworth, (1835) 2 My. & K. 684; Heath v. Chapman, (1856) 2 Drew 417; In re Blundell's Trust, (1861) 30 Beav. 350; In re Fleetwood, (1880) 15 Ch. D. 594; In re Elliott, (1891) 39 W. R. 297; In re Egan, [1918] 2 Ch. 350. In the principal case, the question came before the House of Lords for the first time, and in several elaborate opinions the English cases are reviewed, the court being of the opinion that the whole doctrine was wrong ab initio, but that it had been perpetuated because it was considered poor policy to disturb it after such a long standing. Lord Wrenbury dissented in the principal case on that ground. The court emphasized the fact that the doctrine of the prior English decisions was not one of the common law and was not followed in any of the countries which had adopted the common law of England, citing (Ireland) O'Hanlon v. Logue, [1906] 1 I. R. 247, 269, 270; (Canada) Blyns v. Madden, 18 Grant 386; (New Zealand) Carrigan v. Redwood, 30 N. Z. L. R. 244; (Australia) Nelan v. Downes, 23 C. L. R. 546; (United States) In re Schouler, 134 Mass. 426. The old English doctrine was originally enunciated on the basis of the preamble to statute i Edw. VI c. 14, vesting in the crown property appointed to superstitious uses. The instant case, and the recent decision of the House of Lords, In re Bowman [1917] A. C. 406, 16 Mich. L. Rev. 149 (sustaining a trust to promote atheism), are a gratifying indication of a more tolerant attitude on the part of the English judiciary.

TELEGRAPHS—INTERSTATE COMMERCE—LIMITATION OF LIABILITY FOR NEGLIGENCE.—In an action for damages for delayed delivery of an unrepeated telegram between two points in Kansas, it appearing that the message was routed to a point in Missouri, which was the regular, usual, and customary route, and it appearing further that the message passed through its ultimate destination on its way to the relay point, it was held that this was an interstate transaction, and that a rule of defendant limiting its liability for negligence in delivery was valid. Klippel v. W. U. Telegraph Co., (Kan., 1920) 186 Pac. 993.

In a much cited case it was ruled that a railroad corporation of a state is liable to taxation by such state upon its receipts for the proportion of the mileage within the state, for transportation by continuous intrastate carriage, but over a line which passed for a short distance into another state. Lehigh Valley R. Co. v. Penna., 145 U. S. 192. Wholly misconceiving what that case really stood for, some state courts held, in reliance thereon, that, in the termini of a telegraph line were within one state, a message between them was intrastate, even though the line passed in part over the territory of another state. Telegraph Co. v. Reynolds, 106 Va. 459; Railroad Commis-
tion). But in the leading case of Hanley v. Kansas City So. R. Co., 187 U. S. 617, the supposed doctrine of the Lehigh Valley decision was whittled down and held to be inapplicable to the fixing of railroad rates. The Virginia court, however, reaffirmed its previous holding (two judges dissenting) in Telegraph Co. v. Hughes, 104 Va. 240, decided after the Hanley Case. Thereafter, in 1910, Congress amended the Interstate Commerce Act of 1887 so as to place telegraph companies, with respect to interstate business, on the same footing with other common carriers. This resulted in some of the state tribunals righting themselves. Telegraph Co. v. Bolling, 120 Va. 413. Others, however, stood their ground. Telegraph Co. v. Sharp, 121 Ark. 135. In accord with the principal case is Telegraph Co. v. Bowles, (Va., 1919), 98 S. E. 645. See also Telegraph Co. v. Lee, 174 Ky. 210, Ann. Cas. 1918-C, 1026 and 1036, notes. In Watson v. Telegraph Co., (N. C., 1919) 101 S. E. 81, it was held that a message like that in the case at bar was not interstate, where the mode of transmission was not the usual and customary one, but was adopted in order to evade state, laws. While this may be a desirable result from the public's point of view as well as a curb on fraud, as a matter of logic it is difficult to see how an intangible mental state can change the nature of a cold fact. See the reasoning on this point in Telegraph Co. v. Mahone, 120 Va. 423. On the whole topic, see the notes in 28 L. R. A. (N.S.) 985 and in L. R. A. 1918-A 805.

TRESPASS—ASSAULT AND BATTERY—VIOLATION OF SUNDAY LAW—ABSOLUTE LIABILITY.—Plaintiff and defendant were hunting on Sunday in violation of the law. Defendant accidentally shot the plaintiff. Held: Defendant is liable in trespass, even in the absence of negligence. White v. Levarn, (Vt., 1920) 108 Atl. 564.

The fact that plaintiff was violating the Sunday law should not preclude recovery in an action on the case for negligence because the violation of the law was not the proximate cause of the injury. Bagan v. Maguire, 21 R. I. 189; Taylor v. Star Coal Co., 110 La. 40; Sutton v. Wauwatosa, 29 Wis. 21. The breach of the law was a mere condition under which the accident happened, not the cause, Deroven v. Premier, 91 Vt. 398. It was a mere violation of the plaintiff's collateral duty to the state. City of Kansas City v. Orr, 62 Kans. 61. See also Cobb v. Cumberland County Power Co., 117 Me. 455. But some courts have held that where plaintiff was violating the law, he could not recover for injuries due to defendant's negligence. Cratty v. City of Bangor, 57 Me. 453; Lyons v. Desotelle, 124 Mass. 387; 6 Central Law Journal 402; 21 Id. 525; Bechean v. Portsmouth Bridge, 68 N. H. 382. This has been changed by statute in Maine and Massachusetts. Where both plaintiff and defendant were violating the Sunday law, it was held that their relative rights were not affected, and that plaintiff could recover in an action on the case, if defendant were negligent. Gross v. Miller, 93 Ia. 722; Atlantic Steel Co. v. Hughes, 136 Ga. 511. See Cooley on Torts, [3rd. edit.] p. 273. All of the above cases were actions on the case where negligence is the gist of the action, but where plaintiff sues in trespass, as in the principal case, differ-
ent considerations may arise. The weight of authority holds that one who, while engaged in a lawful act, accidentally injures the person of another is not liable in trespass unless he was negligent. *Morris v. Platt, 32 Conn. 75; Vincent v. Stinehour, 7 Vt. 69; Brown v. Kendall, 6 Cush. (Mass.) 202. Contra: Sullivan v. Dunham, 161 N. Y. 290; 3 N. Y. Ann. Cas. 324, 328; Rafferty v. Davis, (1918) 260 Pa. 553.* After considerable controversy, the law of England was settled in accord with the weight of authority in this country. *Stanley v. Powell, (1891) 1 Q. B. 86; 5 Harv. L. Rev. 36.* Where the defendant's act was unlawful, it is held that he is liable in trespass for injuries inflicted directly by forces set in motion by him, although he had no intent to do the specific act which caused the injury, and even in the absence of negligence, *Williams v. Townsend, 15 Kans. 563; Murphy v. Wilson, 44 Mo. 313; even though plaintiff acquiesced in defendant's violation of the law, Evans v. Waite, 83 Wis. 286; and even where it seemed probable that the plaintiff's own act was the proximate cause of his injury, Horton v. Wylie, 115 Wis. 505. It has been noted above that where both plaintiff and defendant were engaged in an unlawful act, the plaintiff's right to recover in an action on the case is usually held to be the same as if neither had been unlawfully engaged. The right to recover in trespass in such a case has been denied in *Glimore v. Fuller, 198 Ill. 130; Vernon v. Bankston, 28 La. Ann. 710; Aldrich v. Harvey, 50 Vt. 162.* But a recovery has been allowed, as in the principal case, even where the plaintiff invited the defendant to enter into the unlawful engagement, on the theory that consent to an assault and battery is of no effect. *Stout v. Wren, 8 N. C. 420; Shay v. Thompson, 59 Wis. 540; Morris v. Miller, 83 Nebr. 218. Contra: Galbraith v. Fleming, 60 Mich. 403.* But this theory is not adhered to in cases holding that a woman can not recover damages for her own seduction if she consented, regardless of the unlawfulness of fornication. *Paul v. Frazier, 3 Mass. 71; Welsund v. Schueller, 98 Minn. 475.* While it would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover where he and the defendant were in equal fault (and thus was the law stated by Lord Mansfield in *Holman v. Johnson, (1775) Cowp. 341*) today the majority of courts allow a recovery. The apparent anomaly rests on the importance which the law attaches to the safety of life and person.

**VENDOR AND PURCHASER—MORTGAGES—No Constructive Notice of Recitals of Unrecorded Deed.—**D held a real property mortgage which was not recorded. Later, P took a mortgage on same land from the grantee of D's mortgagor. In said grantee's deed (which was not recorded) was a recital of the mortgage to D. P sued to foreclose. D claims a priority. **Held:** The recitals in the deed gave P no constructive notice, because it was not recorded. *Ebling Brewing Co. v. Gennaro et al, (1919) 179 N. Y. Supp. 384.*

In *Baker v. Mather, 25 Mich. 51,* it was held that a mortgage took subject to a prior unrecorded mortgage which was expressly referred to in the deed to the mortgagor of the subsequent mortgage. The principal case held
contra. Statements by numerous text writers that “a purchaser is affected with notice of recitals in conveyances forming his chain of title and material thereto, whether recorded or not” are not well supported by the authorities cited therefor. 1 Jones, Mortgages (7th ed.) sec. 574; 39 Cyc. 1715. The cases cited are cases where the instrument containing the recital was recorded. See Hancock v. McAvoy, 151 Pa. 439; White v. Foster, 102 Mass. 375. But Baker v. Mather, supra, sustains such a broad statement and possibly Stidham v. Matthews, 29 Ark. 650. It is clear that the recital of a mortgage in a recorded deed charges that grantee and subsequent mortgagee under him with notice of such mortgage, although it (the prior mortgage) is unrecorded. Taylor v. Mitchell, 58 Kans. 194; Sweet v. Henry, 175 N. Y. 268. The ultimate question in the principal case is, therefore, whether or not a mortgagee or grantee is charged with notice of recitals in unrecorded instruments in the chain of title. Cases answering in the affirmative thereby impose upon every purchaser or mortgagee of land the duty of employing a lawyer or title company to examine the title and if a deed in the chain of title be missing, require its production. It seems that the principal case is more in harmony with the true spirit of the recording laws in holding that the grantee or mortgagee is to be charged with constructive notice of only those instruments in his chain of title which were on record at the time he took his deed or mortgage. As suggested by the court in the principal case, the contrary view is reasonable in England where the title deeds are passed on to each successive grantee and where it is held, as a result, that the grantee has constructive notice of the contents of all the title deeds in the chain. Berwick v. Price, [1905] 1 Ch. 632. But under our system of conveyancing, says the court, the reason for such a rule does not exist.

Waters and Watercourses—Pollution of—Suit by Nonriparian User—An incorporated city was authorized by law to take water from a stream for distribution among its inhabitants. One of the customers sued an upstream riparian owner for damages resulting from alleged pollution of the water. Held, assuming the defendant owed a duty to the city as a lower riparian owner, the plaintiff failed to state a cause of action, as he was not such an owner nor was there privity of contract between him and defendant, nor does it appear that the defendant as a riparian owner owed a general duty to the public. Egyptian Lacquer Mfg. Co. v. Chemical Co. of America, (N. J., 1919) 108 Atl. 249.

In Baum v. Somerville Water Co., 84 N. J. Law 611, 46 L. R. A. (N.S.) 966, it was held the agreement of a water company to furnish water to a municipality which the latter delivered to the plaintiff did not impose on the company a duty to the public to furnish water at all times under a sufficient pressure to extinguish fires. This case is in accord with the weight of authority; however there are a few cases holding that water companies owe a direct duty to property owners and are liable either in tort or as third party beneficiaries. See Mugge v. Tampa Waterworks Co., 6 L. R. A. (N. S.) 1171, 42 So. 81. Fisher v. Greensboro Water Supply Co., 128 N. C. 375; Guardian
RECENT IMPORTANT DECISIONS

Trust and Deposit Co. v. Fisher, 200 U. S. 57; 3 Mich. L. Rev. 442; 4 Mich. L. Rev. 540; 5 Mich. L. Rev. 362. Although these cases give the consumer a right of action for failure of the supply against the water company, as a beneficiary of the contract with the municipality, or under a general duty to the public undertaken by the water company it is settled that a purchaser of the water can not bring an action based on the negligent interference with the water company's water rights. This follows from the rule that there is no right of action where the duty of another person to exercise care intervened between the neglect of the defendant and the injury to the plaintiff. There is ample authority to the effect that a city or water company authorized by statute to take water from a stream for municipal uses may maintain an action or bill for interference with the supply by upstream owners who have not previously acquired the right of interference by prescription. City of Baltimore v. Warren Mfg. Co., 59 Md. 96; City of Springfield v. Fullner, 7 Utah 450, 27 Pac. 577; Sprague v. Door, 185 Mass. 10; Martin v. Gleason, 139 Mass. 183; Indianapolis Water Co. v. American Strawboard Co., 53 Fed. 970. In reference to the right to divert waters to non-riparian lands unaided by statute see 12 Mich. L. Rev. 304.

WILLS—AWKWARDLY WORDED CODICIL CONSTRUED.—Under the original will the absolute title to the property would go to the testator's wife. Testator, by codicil, provided that all his property standing in his name should go to his son, except certain property which came to him through his wife, which was to go to his wife's estate. Another provision added "this codicil shall only be deemed valid in event that my wife * * * should die before my said wife makes a will after my death, otherwise it is to be treated as nugatory and as non-existent." Said wife died before testator. Held, valid, and son takes such property. In re Werlich's Will, (1920) 179 N. Y. S. 692.

Upon first reading this codicil it seems that it should become valid only upon one contingency,—namely, if the testator's wife dies, without making a will, after his death. So, at first glance, it appears the court is going directly contrary to the express words of the codicil, in holding it is valid if the wife dies before the testator. It must be admitted that the codicil was very awkwardly constructed, and that the testator's meaning was beclouded. The case is interesting in showing how far the courts will go to carry out the real intention of the testator, even to the extent of ignoring certain phrases and provisions. In effect, this court totally ignored the phrase, "after my death," as much as if it had been omitted by the testator. Upon consideration of the whole will and the codicil combined, the testator's intention clearly appears to have been that the property should pass to his son, as he provided by his codicil, unless his wife made some other testamentary disposition of it after his death. His wife having preceded him in death, the codicil became effective according to the testator's intention, and the property passes to his son. The court is not bound to a literal and strict interpretation of the words used. McMurtrie v. McMurtrie, 15 N. J. L. 276. Where the intention of the testator is manifest from the whole will and surrounding circumstances, but
the words and modes of expression are ambiguous, the intention controls the language used. *Phillips v. Davies*, 92 N. Y. 109; *Blair v. Blair*, 82 Kan. 464.

**WILLS—DEED IN FORM RESERVING OPERATION UNTIL DEATH OF GRANTOR.**—The appellant executed an instrument in the form of a warranty deed, to his son, in consideration of his verbal promise that he would care for and support the appellants. The instrument was headed “Warranty Deed” and was referred to in the body of the instrument as a “deed,” and in the acknowledgement as a “deed” conveying land to the grantee. But in the habendum clause it was provided “that the deed is inoperative prior to the death of” the appellants. This suit is in equity to cancel the instrument, the contention of the appellants being that it is a will and not a deed, and therefore revocable. Held, that this instrument was not a will, but a deed, the title to the land passing through the operation of the granting clause, but the possession was reserved to the grantors (the appellants) during their lives. Bill dismissed. *Sutton et al. v. Sutton*, (Ark., 1919) 216 S. W. 1052.

Between a deed and a will the following fundamental distinctions are to be noted: under the former, normally, a present interest passes, under the latter no interest passes until the death of the testator. The former is a completed legal act, beyond the power of the grantor to undo, the latter is ambulatory. 17 Mich. L. Rev. 413. In determining whether an instrument is a deed or a will the manifest intention of the party making it, as gathered from all the language used in the writing, is controlling. *Jones v. Caird*, 153 Wis. 384; *Sharp v. Hall*, 86 Ala. 110; *Phillips v. Thomas Lumber Co.*, 94 Ky. 445; *Bassett v. Budlong*, 77 Mich. 338; *Wall et al. v. Wall*, 30 Miss. 91. Moreover the courts will, where they can reasonably do so, construe an instrument so as to give it effect, and reject a construction which would deprive it of any effect. *Hunt v. Hunt*, 119 Ky. 39; *Jones v. Caird*, supra; *Love v. Blauw*, 61 Kan. 496; *Wilson v. Carrico*, 140 Ind. 533. As would be expected from the indefinite nature of the above methods of construction, the authorities are in conflict as to the effect of clauses reserving the operation of such an instrument,—as in the principal case,—until the death of the maker. Some cases have held such instruments to be testamentary in character and to be revocable even though delivered and in some recorded. *Turner v. Scott*, 51 Pt. St. 126; *Bigley v. Souvey*, 45 Mich. 370; *Hazelton v. Reed*, 46 Kan. 73; *Murphy v. Gabbert*, 166 Mo. 596; *Carlton v. Cameron*, 54 Tex. 72. On the other hand many cases have held, as did the court in the principal case, that a present interest in the land passed immediately through the operation of the granting clause, but the possession and enjoyment were reserved to the grantors by the reservation clause. *Wilson v. Carrico*, supra; *Prentico v. Hays*, 75 Kan. 76; *Hunt v. Hunt*, supra. In still another case while they held such an instrument a deed, and not a will, the court said that it operated to create an estate *in futuro*. *Abbott v. Holway*, 72 Me. 298. And this conflict is still to be found among the later cases, some holding that such instruments are wills, *Thomas v. Byrd*, 112 Miss. 692; *Cox v. Reed*, 113 Miss.
RECENT IMPORTANT DECISIONS

488; and others holding them to be deeds, which pass a present interest and reserve the possession to the grantor for life, Shaull v. Shaull, 182 Ia. 770; Lovenskold v. Casas, 196 S. W. 629; and the principal case. The reason for the conflict seems to lie in the desire of some courts to adhere to common law rules and strict interpretation, Turner v. Scott, supra, and the cases following it, while other courts lean to a liberal interpretation wherever necessary to uphold the apparent intention of the parties, Wilson v. Carrico, supra, and the cases following it. Also see 16 Mich. L. Rev. 386; 17 Mich. L. Rev. 413, and the article by Dean Ballantine, supra.

WILLS—NEXT OF KIN—TIME FOR ASCERTAINING CLASS.—The will of the testator settled the residue of his personal estate on his three daughters, with cross remainders, and provided that on failure of all these trusts such residue should be in trust "** for such person or persons as on the failure of such trusts should be his next of kin and entitled to his personal estate under the statutes for the distribution of the personal estates of intestates." The trusts failed and it was held that those entitled to take were the next of kin ascertained at the death of the testator. The literal and ordinary meaning of the words "next of kin" is to be preferred to an artificial meaning derived by supposing that the testator meant those who would have been his next of kin if he had died at the time of the failure of the trusts. Carter v. Hutchinson, [1919] 2 Ch. 17.

Where the class designated to take under the will is described as those "then entitled," the time for the ascertainment of the class is at the death of the testator and not at the time when the gift is to go over. Mortimore v. Mortimore, L. R. 4 App. Cas. 448; Dove v. Torr, 128 Mass. 38. Essentially the same problem is presented and the same result reached when different words of relationship than "next of kin" are used. Holloway v. Holloway, 5 Ves. 399, (heirs-at-law); Re Nash, 71 L. T. 5, (nearest relatives); Bullock v. Doumes, 9 H. L. Cas. 1, (relations). The fact that the heirs or next of kin are named in the plural and that there is but one person answering that description at the testator's death, does not show that the testator did not intend the class to be ascertained at that time. Ware v. Rowland, 2 Phil. Ch. 635; In re Trusts of Barber's Will, 1 Sm. & G. 118. The fact that the distribution is to take place on the death of A. does not prevent A's taking as one of the next of kin. Lee v. Lee, 1 Dr. & Sm. 85. "** It is not sufficient, in order to exclude him, to show the absence of a special intention to include him; you must show a clear and unambiguous indication of an intention to exclude him." Id., p. 89. Even where words of survivorship are part of the description of the class, such as "living at the time of the trusts failing," or "then living" are held not to refer to the ascertainment of the class but merely to show which of the class are to take. Brook v. Whilton, [1919] 1 Ch. 278; Re Nash, supra. But see, contra, Tiffin v. Longman, 15 Beav. 275; Eagles v. Le Breton, L. R. 15 Eq. 148. The decision in the latter case, however, was perhaps incorrectly reported. Note, 71 L. T. 7. If the clear intent of the testator is to fix the time of ascertainment of the class at
some time other than his own death, such intent will be given effect. *Welch v. Brimmer,* 169 Mass. 294; *Pinkham v. Blair,* 57 N. H. 226. But it was suggested by Lord Langdale in *Seifferth v. Badham,* 9 Beav. 370, 374, that a real intent very rarely exists in such cases. He said: "* * * it is perhaps probable that the testator, in such cases, means only to provide for those whom he does mean to benefit in the way he thinks best, and then to add, that if events defeat that particular intention the law may take its course."

The same idea was admirably expressed by Holmes, J., in *Whall v. Converse,* 146 Mass. 345, 348. "* * * such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes by the previous limitations, and is content thereafter to let the law take its course."