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ASSIGNMENTS—ASSIGNMENT OF AN EXPECTANCY.—Joseph and James were two of six children. A contract witnessed "that Joseph Snyder has sold to James Snyder one undivided sixth of the real estate owned by the mother, Susan Snyder; to secure said interest to James after her death, the mother unites in the conveyance of said interest. The said Joseph warrants and defends the interest from all claims." The contract was signed by Joseph and by the mother. *Held,* Joseph had no estate which he could convey, and the contract, though made with the consent of the mother, was unenforceable either in law or in equity as against him. But the contract, though joined in by Joseph, who had no interest, was effective as a conveyance to James by the mother of a one-sixth interest of her estate in remainder. Joseph should be allowed to share equally with the others in the remaining five-sixths of the estate, after deducting the consideration money paid to him, which should be considered as an advancement." *Snyder* v. *Snyder* (Ky., 1921), 235 S. W. 743.

At common law, "if a son bargain and sell the inheritance of his father, this is void, because he hath no right in himself." Co. Litt. 265. The more general rule in equity is that the transaction will be enforced against the heir as a contract to convey as soon as the title of the heir becomes absolute, if the contract is supported by a fair consideration. *Whelen* v. *Phillips,* 151 Pa. 312; *Crum* v. *Sawyer,* 132 Ill. 443; *Pierce* v. *Robinson,* 13 Cal. 123. Several jurisdictions hold that equity will not enforce the transaction unless it be entered into with the assent of the parent. The reason given is that it is a fraud on the parent who, if he had known that his property was going to a stranger, might have disposed of it in some other way. *McClure* v. *Raben,* 133 Ind. 507; *Boynton* v. *Hubbard,* 7 Mass. 112; *Alves* v. *Schlesinger,* 81 Ky. 291. Equity may give effect to the transaction if based merely upon a quit-claim deed. *Clendening* v. *Wyatt,* 54 Kans. 523. If the deed is a warranty deed, a much stronger case is presented and the heir is estopped, as against his grantee, to claim the interest which he subsequently acquires. *Bank* v. *Mersereau,* 3 Barb. Ch. 528; *Steele* v. *Frierson,* 85 Tenn. 430. The principal case, where the contract was based on a fair consideration, assented to by the parent, and warranted by the expectant heir, is as strong a case as there could be for giving effect to the intended transfer by Joseph to James; yet the majority of the court held that, as between them, nothing passed. A well-reasoned dissenting opinion argues that the transaction should be considered as a conveyance by the mother of a one-sixth interest in her estate to Joseph and a conveyance of this by him to James, thus giving effect to the intention of the parties and doing justice to the other four children with whom Joseph is allowed to share under the majority opinion. Would it not be still better for Kentucky to go one step

farther than the principle contended for in the dissenting opinion, and adopt the more general equity rule, directly giving effect to the contract for the transfer of an expectancy, so long as it has been entered into fairly?

CARRIERS—BAGGAGE—UNNECESSARY FOR PASSENGER TO TRAVEL ON TICKET. —P purchased a ticket for passage on D's railroad from Addyston to Cincinnati. From the latter place she could take D's through train, which did not stop at Addyston, to her destination in Michigan. She checked her trunk in the evening, intending herself to follow the next morning. It being more convenient, however, to take an interurban to Cincinnati, she did this and destroyed the ticket for passage on D's road. At Cincinnati she bought a ticket over D's road to Michigan. On arrival at her destination it was discovered that her trunk had been stolen from D's station at Addyston on the preceding evening. In a suit by P it was *held,* that when she purchased the ticket over D's road and checked her trunk the relation was in effect that of passenger and carrier, and D was liable as an insurer for the subsequent loss, though P did not travel on her ticket. *Caine* v. *Cleveland, C., C. & St. L. Ry. Co.* (Mich., 1921), 185 N. W. 765.

The rule upheld by the earlier cases on this subject seems to have been that the passenger must accompany his baggage. *The Elvira Harbeck,* 2 Blatchf. 336; *Graffam* v. *Boston & Maine R. Co.,* 67 Me. 234; 3 HUTCHINSON, CARRIERS (Ed. 3), § 1275. "Baggage implies a passenger who intends to go upon the train with his baggage." *Marshall* v. *Pontiac, O. & N. R. Co.,* 126 Mich. 45, 55 L. R. A. 650. In that case one purchased a ticket for the sole purpose of checking his baggage, later selling the ticket, and it was held that the railroad was only liable as a gratuitous bailee. The holding was not free from criticism, and though approved and followed by some courts—*Perry* v. *Seaboard Air Line Ry. Co.,* 171 N. C. 158; *Carlisle* v. *Grand Trunk R. W. Co.,* 25 Ont. L. Rep. 372; *Wood* v. *M. C. R. R. Co.,* 98 Me. 98—it was disapproved and repudiated by others—*McKibbin* v. *Wisconsin C. R. Co.,* 100 Minn. 270; *Alabama Gt. Southern R. Co.* v. *Knox,* 184 Ala. 485, 12 MICH. L. REV. 409. See also *Larned* v. *Central R. Co.,* 81 N. J. L. 571, 9 MICH. L. REV. 707. In the principal case the question arose for the first time in Michigan since the decision of the *Marshall* case twenty years before. Four justices undertook to distinguish the cases on the ground that in the *Marshall* case the loss occurred at the destination, the plaintiff not being there to receive the baggage, while in the principal case the loss at the point where the trunk was accepted, the plaintiff being ready at the destination to receive it; and on the further ground that in the *Marshall* case the plaintiff intended to deceive the railroad as to his riding on its train, while here there was no evidence of deception. Four justices considered the *Marshall* case as squarely overruled. The cases might have been further distinguished on the ground that in the *Marshall* case the plaintiff had sold his ticket and was having his baggage carried without cost to himself, while here the plaintiff destroyed her ticket and was fully paying the railroad for its service in transporting her baggage. Under

the old methods of transportation there was some reason for saying that a passenger must accompany his baggage so that he might look after it in case of emergency or immediately claim it on his arrival at his destination. But in modern times the reasons for the old rule no longer apply. Baggage is in the exclusive control of the carrier and is often not even carried on passenger trains. The carrying of baggage is no longer a matter of grace, but is a distinct duty of the carrier, and a ticket entitles the purchaser not only to be carried but to have his baggage carried as well. Having paid both privileges, it is difficult to see why the buyer must avail himself of both to have the benefit of one. See *Alabama Gt. Southern R. Co.* v. *Knox, supra.*

CONTRACTS—AGENCY—IS AUTHORIZATION TO SELL LAND ON COMMISSION A MERE REVOCABLE OFFER.—Action for breach of contract: P (a broker) alleged as the basis of the contract that he had received from D a written instrument giving him "exclusive sale" of certain property, and that he had spent time and money in reasonable efforts to procure a purchaser. The instrument in question was entitled a "contract" in its head-note, but it was simply an exclusive authorization to sell on commission basis (no time limit set), and was signed solely by D. *Held,* facts sufficiently set out a contract. *Harrison* v. *McPherson* (Conn., 1922), 115 Atl. 723.

The court regarded the instrument as an offer of employment, and the work and expense undergone in reliance thereon as an acceptance. The propriety of the holding must depend upon what sort of a contract and acceptance the offer contemplated. If it merely contemplated a unilateral contract to pay a certain commission in case P produced a purchaser, then there was no contract formed for lack of both acceptance and consideration. But the offer might in substance and effect, even though not expressly, be to pay a certain commission in case of sale if the broker put the property on his books or in his lists or advertisements, etc. Here also the offer would contemplate a unilateral contract, but the act of acceptance would be the preliminary work of listing the property, or doing whatever else the offer called for. If the instant case had been decided on the construction of the particular offer involved, we might question the validity of the court's construction, but not of the law laid down. In this event it would simply be in line with the strong desire courts in general seem to manifest in working out a valid contractual basis in these brokerage cases. *Goward* v. *Waters,* 98 Mass. 596; *Attix* v. *Phelan,* 5 Iowa 336; *Axe* v. *Tolbert,* 179 Mich. 556; *Rowan* v. *Hull,* 55 W. Va. 335. It does not appear, however, that the court put its decision upon the construction of the particular offer made by this defendant. Apparently the court lays down the broad rule that where an authority to sell on commission is given, and the offeree makes a reasonable effort to procure a purchaser and spends time and money in so doing, there is a contract formed that requires the offer of commission to be kept open for the time stipulated, or, if none is stipulated, for a reasonable time. The exact basis and nature of this contract is not clear. It certainly is somewhat difficult to square with the general theory governing

offers to unilateral contracts, and a recent New Jersey case emphatically repudiates it. *Ettinger* v. *Loux,* 115 Atl. 384. The court in the latter case insists that such an authority is merely an offer toward a unilateral contract, to be accepted by finding a purchaser, and subject to revocation like any other simple offer prior to acceptance by performance of the act contemplated. But so extensive is this solicitude for the broker that what we might term the "mere assumption" of the existence of a contract is not altogether uncommon in these cases. *Gregory* v. *Bonney,* 135 Cal. 589; *Harrison* v. *Augerson,* 115 Ill. App. 226 (a case almost identical with *Ettinger* v. *Loux, supra*); *Hartford* v. *McGillicudy,* 103 Me. 224; *Hartwick* v. *Marsh,* 96 Ark. 23; *Black* v. *Snook,* 204 Pa. 119. It is probably but another illustration of the growing inclination to restrict the offeror's right to revoke in these cases, by treating it as a bilateral contract and the offeree's commencement of performance as the counter promise, *Rowan* v. *Hull, supra; Lapron* v. *Flint,* 86 Minn. 376, *semble* (compare argument in *Offord* v. *Davies,* 12 C. B. N. S. 748); or by implying in effect a collateral offer to keep the principal offer open, whenever the act of acceptance required by the latter will necessarily involve time and expense for its performance. *Jaekel* v. *Caldwell,* 156 Pa. 266; *Dodge* v. *Childers,* 167 Mo. App. 448. Professor McGovney advances this latter theory with considerable plausibility in an article in 27 HARV. L. REV. 654, and Sir Frederick Pollock, in 28 LAW QUARTERLY REV. 101, maintains strenuously that the right of revocation in these cases ought not as a matter of principle, and does not as a matter of fact, exist. Sir Frederick answers the objection of logical difficulties by insisting that "law exists for the convenience of mankind, not for the training of logicians." Excellent discussions of the problem appear in 26 YALE L. J. 193-196; WILLISTON ON CONTRACTS, § 60, and MECHEM ON AGENCY (with reference to brokerage cases), § 2451 *et seq.*

CONTRACTS—INDEFINITE WAIVER OF STATUTE OF LIMITATIONS.—Plaintiff executed his promissory note with a provision waiving all his rights under the statute of limitations. After the lapse of the statutory period from the maturity of the note, the defendant brought suit and recovered judgment. In an action to set the judgment aside, *held,* the provision waiving the statute, since it was for an indefinite time, was void. *First National Bank* v. *Mock* (Colo., 1922), 203 Pac. 272.

Whether or not an agreement to waive the benefit of the statute of limitations is valid is in dispute. Those courts which hold that such an agreement is void do so on the ground that the statute of limitations, being a statute of repose, is essential to the security of all men, and that it would be contrary to public policy to allow parties to waive its benefits. *Wright* v. *Gardner,* 98 Ky. 454; *Crane* v. *French,* 38 Miss. 503; *Ann. Cas.* 1916 A 686. On the other hand, the courts which hold that such an agreement is valid say that no principle of public policy is violated because the statute of limitations was designed for the benefit of the debtor, and if he wishes to contract away this privilege he may do so. *Parschen* v. *Chessman,* 49 Mont.

326; *Quick* v. *Corlies,* 39 N. J. L. 11; *State Trust Co.* v. *Sheldon,* 68 Vt. 259. In those jurisdictions in which it is held that such an agreement does not contravene public policy the question has arisen as to the length of time for which a waiver, indefinite in terms, is operative. In *Mann* v. *Cooper,* 2 App. Cas. (D. C.) 226, and *State Trust Co.* v. *Sheldon, supra,* it is held that a waiver for an indefinite time operates to remove the bar of the statute permanently. Other cases hold that such a waiver is effective only for a reasonable time after the statute has run,—to at least for a period equal to that provided by the statute relating to the cause of action in question. *Parschen* v. *Chessman, supra.* The more common rule is to treat such an agreement as operative for the same term as it would be if it were a new promise to pay the debt. See 1 WILLISTON ON CONTRACTS, 376. Such a rule would not, however, extend the time at all if the waiver were a part of the original transaction.

CONTRACTS—SILENCE AS ACCEPTANCE OF AN OFFER.—Defendant company issued a life insurance policy to one B, naming the plaintiff as beneficiary. B allowed the policy to lapse by failing to pay the second premium. Agents of the defendant company solicited reinstatement and obtained the signature of B to an application and a note for the premium, giving him assurance at the time that upon receipt of his note and application the company would reinstate the policy. The note and application were then sent in to the actuary of the company, who later returned the note to the agent, stating that it could not be received in payment. B was not notified and the note was not returned to him. He died six weeks later and plaintiff brought action on the policy. *Held,* that the agent's failure to return the note and communicate the rejection amounted to an assent to the reinstatement application. *Lechler* v. *Montana Life Ins. Co.* (N. D., 1921), 186 N. W. 271.

It is generally held that an offeree has a right to make no reply to offers, and that his silence and inaction cannot be construed as an assent to the offer. This is true even though the offer states that silence will be taken as consent, for the offeror cannot prescribe conditions of rejections so as to turn silence on the part of the offeree into acceptance. *Beach* v. *U. S.,* 226 U. S. 243; *Royal Ins. Co.* v. *Beatty,* 119 Pa. 6; *Prescott* v. *Jones,* 69 N. H. 305; *Grice* v. *Noble,* 59 Mich. 515. Silence or inaction, however, may amount to assent to an offer for a unilateral contract, where the offer calls for inaction on the part of the offeree. See WILLISTON ON CONTRACTS, § 135. Where the offer contemplates a bilateral contract the courts look upon the situation somewhat differently. But even in this class of cases there may be situations in which the relations between the parties have been such as to justify the offeror in expecting a reply, so that the offeree's silence will be considered to be an acceptance. *Hobbs* v. *Massasoit Whip Co.,* 158 Mass. 194; *House* v. *Beak,* 141 Ill. 290; *Emery* v. *Cobbey,* 27 Neb. 621; *Orme* v. *Cooper,* 1 Ind. App. 449; *Cole-McIntyre-Norfleet Co.* v. *Holloway,* 214 S. W. 817. So, also, where the offeree has come under a duty to return money or property in his possession belonging to the offeror, or to accept

an offer for its purchase, silence and failure to return the property will amount to an assent to buy it. *Wheeler* v. *Klaholt,* 178 Mass. 141; *Turner* v. *Machine & F. Co.,* 97 Mich. 166; *Butler* v. *School Dist.,* 149 Pa. St. 351. Acceptance may also be inferred from silence where goods are sent to another without request and are used and dealt with as his own. A common illustration of this is where newspapers and periodicals are sent to one who has not subscribed to them or whose subscription has ceased. *Austin* v. *Burge,* 156 Mo. App. 286; *Fogg* v. *Portsmouth Atheneum,* 44 N. H. 115; *Goodland* v. *Leclair,* 78 Wis. 176. Under the circumstances of the principal case the court was justified in holding that there was a duty to notify the policyholder of the rejection and that a failure to do so amounted to an acceptance of the application.

CRIMES—EXTRADITION—EFFECT OF ILLEGAL DEPORTATION.—The petitioner was convicted of manslaughter in Oklahoma and fled to Mexico. He was illegally ejected by Mexican officials and was immediately arrested and placed in confinement in California. *Habeas corpus* proceedings being begun, the petitioner contended that he was not subject to arrest and extradition because United States and Mexican officials had conspired to bring him into California, and had done so without complying with the deportation laws of Mexico. *Held:* Had the United States officials conspired to bring the prisoner within the limits of the United States, he would not be subject to arrest, but as the evidence did not show this the petitioner was properly held, regardless of any irregularities committed by Mexican officials. *In re Jones* (Cal., 1921), 201 Pac. 944.

The rule as laid down in the principal case that irregularities of a surrendering state alone are immaterial seems to be without conflict in the cases. *Ex parte Wilson,* 63 Tex. Crim. 281. But the *dictum* to the effect that if the state in which the crime was committed participated in those irregularities, and jurisdiction was obtained by force or fraud, the offender would not be deemed within the state, is not in accord with the majority of cases. The general rule is that a court trying a person for a crime committed within its jurisdiction will not investigate the manner of his capture in case he has fled to a foreign country and has been returned to the jurisdiction. *Ex parte Barker,* 87 Ala. 4; *Ker* v. *Illinois,* 119 U. S. 436; *Klingen* v. *Kelly,* 3 Wyo. 566. These cases proceed upon the theory that the only question before the court is that of the defendant's guilt. That if any wrong has been committed it is a wrong against the state from which he was illegally taken, and those guilty must answer to the party aggrieved, which is not the defendant. A few courts have held, however, that where the officers of a state in which a crime has been committed have invaded the sovereignty of another state, and have wrongfully brought the offender back, the state acquires no jurisdiction. *State* v. *Simmons,* 39 Kans. 262; *In re Robinson,* 29 Neb. 135. These courts justify their conclusion upon the grounds of public policy. The court in *State* v. *Simmons, supra,* said: "Not only would the special wrong be committed against the individual, but it would be a

general wrong to society itself—a violation of those fundamental principles of mutual trust and confidence which lie at the very foundation of all organized society, and which are necessary in the very nature of things to hold society together."

CRIMES—MANSLAUGHTER AS RESULT OF AN ACT MALUM PROHIBITUM ONLY.—Defendant, apparently through failure of service brake, lost control over the speed of his automobile on a steep down-grade. In passing a street car letting off passengers at the foot of the grade, defendant's automobile, then traveling at an estimated speed of 35 to 40 miles per hour, struck and killed deceased. Defendant was convicted of involuntary manslaughter and appealed. The judgment on the counts based on the commission of an unlawful act was reversed because of the unconstitutionality of certain statutes and a defect in the indictment, and it was *held* reversible error for the judge to omit to charge the jury, without request, the law relating to the crime of involuntary manslaughter in the commission of a lawful act without due caution. *McDonald* v. *State* (Ga., 1921), 109 S. E. 656.

The general rule is that the unlawful act must be *malum in se,* and not merely *malum prohibitum,* in order to sustain a conviction for involuntary manslaughter. 21 CYC. 765; *Com.* v. *Adams,* 114 Mass. 323; *State* v. *Horton,* 139 N. C. 588. Convictions for manslaughter based upon violations of laws regulating speed and establishing traffic rules are, however, becoming increasingly common, and this class of cases may be said to form a now well-recognized exception. *State* v. *Rountree,* 181 N. C. 535; *State* v. *McIvor* (Del., 1920), 111 Atl. 616; *Madding* v. *State,* 118 Ark. 506; *People* v. *Camberis,* 297 Ill. 455. "It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous and death ensues, that the person violating the statute is guilty of manslaughter at least, and under certain circumstances of murder." *State* v. *McIver,* 175 N. C. 761. Where the defendant is not exceeding the speed limit, or that fact is in doubt, it is generally held that, to be criminally liable, he must have been guilty of gross or wanton negligence. *People* v. *Adams,* 289 Ill. 339; *State* v. *Long,* 30 Del. 397, which was the proximate cause of the death. *Dunville* v. *State,* 188 Ind. 373. As suggested in *State* v. *McIver, supra,* the basis for the recognition of this exception is public policy, in view of the constant danger to travelers on the highways from the ever increasing automobile traffic. It is to be noted that the facts in the instant case are unusual, and if the jury should find the defendant not guilty under instructions as to the crime of involuntary manslaughter in the commission of a lawful act without due caution, it is doubtful if he could properly be convicted under the other counts.

EQUITY—CANCELLATION BECAUSE OF MISTAKE.—The defendant, who was the owner of the majority of the stock in the Banker's Trust Company, entered into a contract to sell his holdings to the plaintiff. Subsequently

a shortage of $17,000 was discovered in the assets of the company, due to the defalcation of a bookkeeper. This shortage, which had been concealed by false entries in the books, materially reduced the value of the stock. The plaintiff thereupon sued for cancellation of the contract on the ground of mutual mistake as to the assets. *Held,* since there was a clear case of *bona fide* mistake regarding material facts, without culpable negligence on the part of the person complaining, there is such mistake as to warrant a decree of cancellation. *Lindberg* v. *Murray* (Wash., 1921), 201 Pac. 759.

The parties were mistaken as to the facts creating the inducement to contract. An error, and possibly a material one, was made as to the facts which determined the value of the shares. Such an error is usually termed a mistake as to collateral matter to distinguish it from a mistake as to the identity or existence of the subject matter of the sale. To determine whether or not such a mistake should have the legal effect of justifying cancellation, the Washington court declared that "the true test in cases involving mutual mistake of fact is whether the contract would have been entered into had there been no mistake." This test is far more comprehensive than that generally accepted by courts of equity in such cases. In discussing the legal effect of various kinds of mistake, the New York court has said: "There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. * * * In such cases, if a court of equity could intervene and grant relief because a party was mistaken as to such a fact as would have prevented him from entering the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment." *Dambmann* v. *Schulting,* 75 N. Y. 55. Influenced by these considerations, the Minnesota court in the recent case of *Costello* v. *Sykes,* 143 Minn. 109, on facts almost identical to those of the principal case, refused to cancel the contract, saying: "A mistake relating merely to the attributes, quality or value of the subject of a sale does not warrant rescission." This view is quite the antithesis of that of the principal case, and, if strictly adhered to, would be nearly as objectionable. That a mistake as to quality or value will, in fact, warrant cancellation, at least in extraordinary cases, is well illustrated by *Sherwood* v. *Walker,* 66 Mich. 568. The most satisfactory solution of the problem involves taking a position somewhere between the two extremes above indicated. This middle ground is well expressed in the leading English case of *Kennedy* v. *Panama, etc., Mail Co.,* L. R. 2 Q. B. 580, where the court, in discussing the legal effect of mistake, said that the problem "in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." In other words, a mistake should go to the very essence of the contract to justify cancellation by a court of equity. This is obviously quite different from a mere mistake as to a fact, a knowledge of which would have prevented the contract. Furthermore, the determination of the

question cannot be accomplished by the application of a geometrical test such as that suggested in the principal case, but, again to quote the words of the English court, it "must depend upon the construction of the contract and the particular circumstances of the particular case." According to Holmes, C. J., in *Dedham Natl. Bank* v. *Everett Natl. Bank*, 177 Mass. 392, "the ground of recovery * * * under a mistake of fact is that the existence of the fact supposed was the conventional basis or tacit condition of the transaction." The Washington court will be compelled to recede from its position in the principal case unless it intends to extend relief to a vast number of cases of mistake which have not been generally recognized as warranting the interposition of equity.

EQUITY—INJUNCTION AGAINST USURPATION OF OFFICER'S DUTIES.—The charter of Oklahoma City vested the powers of city government in five commissioners. One provision of the charter placed the police department under the supervision of the mayor. Another provision authorized the commission by a vote of four to one to "transfer duties from one commissioner and from one department to another commissioner and another department." By such a vote the control of the police department was transferred from the mayor to the commissioner of accounting and finance. Upon a bill for an injunction, *held*, the charter could not be construed to empower the commissioners to make this transfer, and equity had jurisdiction to enjoin the assumption of authority over the police. *Walton* v. *Donnelly* (Okla., 1921), 201 Pac. 367.

The court drew attention to the fact that it was not called upon to determine the complainant's title to his office, and placed its decision upon the ground that there was no legal remedy, because information in the nature of *quo warranto* was confined to the determination of title to office, and could not be used to determine who should perform particular official duties. The scope of a *quo warranto* proceeding is generally regarded as so limited. HIGH, EXTRAORDINARY LEGAL REMEDIES, § 618. *Quo warranto* was held not to be the proper remedy to prevent city officers from levying and collecting taxes beyond the city limits. *People* v. *Whitcomb*, 55 Ill. 172. Injunction and not *quo warranto* was held to be the proper remedy to prevent the county tax collector from paying into the county treasury taxes levied upon city property. *Sanderson* v. *Texarkana*, 103 Ark. 529. In a recent case, however, a writ of prohibition was granted to prevent the circuit court from assuming jurisdiction to grant an injunction to restrain the circuit judges from classifying the deputies in county offices, under a statute authorizing this, the injunction being asked upon the ground that the statute was unconstitutional. The reasons given were (1) that equity has no jurisdiction to restrain political acts; (2) the legal remedy by proceeding in *quo warranto* was available, because the statute giving the remedy of *quo warranto* made it available to protect "franchises," and in its broad sense a franchise may include the right of a public officer to perform official duties as well as the rights of corporations. *State* v. *Dawson* (Mo., 1920), 224

S. W. 824. An injunction was refused on the same ground in *Cochran* v. *McCleary*, 22 Iowa 75. Equity will enjoin the ouster of an officer without a proper hearing at law, and, without trying the title to an office as between rival claimants, will protect its enjoyment. *Kerr* v. *Trego*, 47 Pa. 292; see 20 MICH. L. REV. 238. But it is clear that in the principal case the court decided upon the disputed right of the complainant to exercise certain duties claimed as appurtenant to his office, and the assumption of jurisdiction as to this political question can be justified, in view of equity's traditional attitude toward political questions, only upon the ground given that the legal remedy of *quo warranto* is not available for the purpose.

EQUITY—UNCONSCIONABLE CONTRACT CANCELED.—The plaintiff had a deposit in a trust company of $22,500, of which he had lost all recollection because of an illness which had resulted in a loss of memory. A company official who knew of the plaintiff's mental condition, and also, by reason of his connection with the company, of the deposit, concealed from the plaintiff his official connection and induced him to contract to pay nearly one-half of the sum as consideration for revealing its whereabouts. Later the plaintiff sued for cancellation of the contract. There was no claim of mental incapacity to contract. *Held*, because of the abnormal condition of the plaintiff's mind, and also because of the semi-confidential position which the defendant occupied with respect to the plaintiff, equity would give the desired relief. *Gierth* v. *Fidelity Trust Company* (N. J., 1921), 115 Atl. 397.

The case was well decided on either of the two bases suggested by the court. As to the effect of the plaintiff's mental condition, although there was no claim that he was mentally incompetent to contract, yet his illness had materially weakened his mental powers and impaired his power of self-protection. In such cases, especially when coupled with inadequacy of consideration, equity will give relief, even though neither the mental impairment nor the inadequacy of consideration, standing alone, would suffice. Courts are particularly willing to refuse specific performance against a defendant so afflicted. *Blackwilder* v. *Loveless*, 21 Ala. 371. But it is also well settled that, in cases of sufficient hardship, affirmative relief by way of cancellation will be given. *Mann* v. *Butterly*, 21 Vt. 326; *Maddox* v. *Simmons*, 31 Ga. 512. The decision in the principal case is warranted on this ground. The other ground suggested by the court, namely, the defendant's semi-confidential position with respect to the plaintiff, presents more difficulty. The case is somewhat analogous to those cases in which the directors of corporations have purchased shares from non-official shareholders, either concealing their identity as directors or withholding information material to the value of the shares. The earlier cases refused to recognize the "duty to disclose" under such circumstances. In 1847 Chief Justice Shaw said, "The directors are not the bailees, agents, factors, or trustees of the individual stockholders." *Smith* v. *Hurd*, 12 Met. (Mass.) 371. But in 1904, in *Strong* v. *Repide*, 213 U. S. 419, the Supreme Court, recognizing that the earlier rule opened the door to most inequitable impositions, decided

that, "If it were conceded that the ordinary relations between directors and shareholders are not of such a fiduciary nature as to make it the duty of the director to disclose to the shareholder general knowledge which he possesses in regard to the shares before he purchases, yet there are cases where by reason of the special facts the duty does exist." A few cases of a still later date have gone even further and have held that there is a duty to disclose, though no "special facts" exist. *Dawson* v. *National Life Ins. Co.*, 176 Ia. 362. See 8 MICH. L. REV. 267, and 19 MICH. L. REV. 698. In the principal case the defendant's official connection with the trust company might well place him in the same semi-fiduciary position as that of the director. A state of facts somewhat similar to those of the principal case was presented in *Jones* v. *Stewart*, 62 Neb. 207. The plaintiff had forgotten the existence of a certain bank deposit, and the defendant, who knew about it, though he was not connected with the bank, induced the plaintiff, as consideration for the conveyance of some relatively worthless land, to assign the deposit to him by executing the necessary papers without reading them. When the plaintiff learned what he had done he sued the defendant in case for deceit. A decision for the defendant was predicated upon the fact that the parties had contracted on equal terms and that there was no fiduciary relationship between them. The plaintiff's position was somewhat weaker than that of the plaintiff in the principal case because there was no evidence of an abnormal mental condition, nor was the defendant connected in any way with the bank. So, in spite of the imposition on the plaintiff which would have made a decree granting relief seem equitable, the two cases may be distinguished.

EVIDENCE—CHARACTER WITNESSES IN SUPPORT OF VERACITY.—Testimony of the accused, who was his own witness in a trial for robbery, was directly contradictory to the testimony of a witness for the state. *Held,* accused was entitled to support his evidence by calling character witnesses to sustain his general reputation for truth and veracity. *Smith* v. *State* (Okla. Cr. App., 1922), 202 Pac. 1046.

The court takes the broad stand that when the veracity of the witness is *in any manner* called into question character witnesses in support of same may be introduced. The only authorities cited are three prior decisions by the same court, *Friel* v. *State,* 6 Okla. Cr. 532; *Gilbert* v. *State,* 8 Okla. Cr. 329; *Davidson* v. *State,* 15 Okla. Cr. 85; and in only one of the three (*Gilbert* v. *State*) is the question directly raised and discussed. None of these cases discuss the earlier *contra* holding by the supreme court of the state, which at that time was the court of last resort in criminal as well as in civil appeals. *First National Bank* v. *Blakeman,* 19 Okla. 106. This may result in having one rule enforced in criminal cases and another in civil cases. As a general rule, however, no such distinction is recognized. There certainly is no logical basis for it. The same objections so clearly pointed out in *Tedens* v. *Schumers,* 112 Ill. 263, 266, apply in both cases, viz., that the trial would become interminable, and the main issues befogged perhaps

by the large number of side issues with respect to the veracity of witnesses. The cogency of these objections has determined the issue in all but a very few jurisdictions. *Gertz* v. *Fitchburg R. Co.*, 137 Mass. 77, 78; *Farr* v. *Thompson*, Cheves (S. C.) 37; *Louisville & N. R. Co.* v. *M'Clish*, 115 Fed. 268; *Texas & P. R. Co.* v. *Raney*, 86 Tex. 363; *Jacobs* v. *State*, 42 Tex. Cr. 353. [A very recent Texas decision in a civil action is in accord with the principal case. *Davis* v. *Hudson*, 135 S. W. 1107. The earlier Texas view, however, is with the general rule; and since the later case was not in the court of last resort, nor the point discussed, its weight would appear to be negligible.] But in at least one jurisdiction following the general rule the courts have permitted exceptions under special circumstances. *State* v. *DeWolf*, 8 Conn. 92; *Merriam* v. *Hartford & N. H. R. Co.*, 20 Conn. 354. And perhaps with perfect consistency with the spirit and reasons for the rule, an exception might be made where the accused in a criminal trial is a witness in his own behalf. When the crime charged involves any moral turpitude the very fact that the accused is being tried for such a crime involves a direct and serious attack upon his credibility as a witness, and evidence of his reputation for veracity might properly be admissible. But see *Spurr* v. *U. S.*, 87 Fed. 701, 713, *contra*.

EVIDENCE—RES GESTAE.—In a trial for murder the statement by the deceased that "a stranger shot (him)," made in reply to a question by a police official, was admitted in evidence. It appeared that the statement was made immediately after the deceased recovered his speech, although about thirty minutes had elapsed since the shooting. Upon appeal, it was *held* admissible as part of the *res gestae*. *Commonwealth* v. *Puntario* (Penn., 1922), 115 Atl. 831.

The instant case is supposed to be representative of an exception to the hearsay rule which Mr. Wigmore confesses to approach "with a feeling akin to despair." 3 WIGMORE ON EV., § 1745. That courts style such statements *res gestae* is not especially illuminating. The use of this phrase is apt to lead to confusion with the Verbal Act doctrine under which extra-judicial statements are admissible to explain or give color to otherwise equivocal acts which they accompany, and so-called spontaneous statements which get their probative value from the fact that the declarant is under some nervous shock and has very slight opportunity for fabrication. As to how nearly contemporaneous with the transaction to which it refers the statement must be no rule can be given. *Kennedy* v. *R. Co.*, 130 N. Y. 654. Very much must be left to the discretion of the trial court. *State* v. *Ah Loi*, 5 Nev. 101. That the declarant has been without the power of articulation in the meantime, as in the principal case, has often been deemed important. *Lewis* v. *State*, 29 Tex. A. 201 (one and a half hours); *Eby* v. *Ins. Co.*, 258 Pa. 525 (fifteen minutes or more). The reason for this is not altogether obvious, for inability to speak is apt to encourage premeditated rather than spontaneous statements after speech is regained. What the law distrusts is not after-speech but after-thought. *Ins. Co.* v. *Sheppard*, 85 Ga. 751; *Green* v.

State, 154 Ind. 655. It is submitted that the statement in the instant case cannot be brought within the Verbal Act doctrine because the transaction to which it referred was completed and unequivocal; nor can it properly be treated as a spontaneous statement, because it appears to have been a deliberate answer to a question after the lapse of considerable time. However, some of the authorities already cited support the decision. For an extensive note on the subject see 42 L. R. A. (n. s.) 198.

FALSE IMPRISONMENT—CONSENT AS A DEFENSE.—Defendants with others went to the house where the plaintiff was staying and forcibly entered. The plaintiff resisted at first, but was induced to go with the defendants, by whom he was taken to the state line. He was there assaulted. In an action for assault and battery and false imprisonment the court instructed the jury that the plaintiff could not recover for anything done prior to the assault, on the theory that the plaintiff had consented to everything done before that time. *Held,* the instruction was erroneous. *Meints* v. *Huntington,* 276 Fed. 245.

The instruction was held to be erroneous not only because based on a conclusion of fact, the determination of which should have been left to the jury, but also because it was an inaccurate statement of the law. It was held to be inaccurate on the theory that consent is no defense to an action for false imprisonment. The only cases cited to sustain this position were cases of assault and battery. As a general rule, in an action for assault and battery, if what is done amounts to a breach of the peace or is forbidden on public grounds, consent is no defense. *Stout* v. *Wren,* 8 N. C. 420; *Shay* v. *Thompson,* 59 Wis. 540; *Morris* v. *Miller,* 20 L. R. A. (n. s.), 907, note. It may, however, be shown in mitigation of damages. *Barholt* v. *Wright,* 45 Ohio St. 177. The theory is that the state is involved and there can be no defense based on a breach of the law. COOLEY ON TORTS (Ed. 2) 188. For a criticism of this rule and the reasons underlying it with respect to cases of mutual combat, see *Galbraith* v. *Fleming,* 60 Mich. 403; *Smith* v. *Simon,* 69 Mich. 481; *Lykins* v. *Hamrick,* 144 Ky. 80. Conceding the soundness of the rule, it is of doubtful application in a case of false imprisonment, since the gist of the action is the detention of the plaintiff without his consent, and there is no legal wrong unless the detention was involuntary in the sense of being contrary to the will of the plaintiff. Consent given before the alleged detention took place was held to be a defense in the following cases: *Moses* v. *Dubois* (S. C.), Dudley 209; *Houston & T. C. R. Co.* v. *Roberson,* 138 S. W. 822; *Ellis* v. *Cleveland,* 54 Vt. 437. The result reached in the principal case is the correct one, but may be more properly based upon a proposition to which all authorities will agree, namely, that a detention sufficient to support an action for false imprisonment may arise despite submission if the circumstances are such as to induce an apprehension that force will be used. There is no obligation to incur the risk of personal violence by resisting until actual violence is used. *Comer* v. *Knowles,* 17 Kan. 436; *Pike* v. *Hanson,* 9 N. H. 491. That the court in the

principal case had in mind a submission to a show of force appears from its consideration of the evidence. To call a submission to a show of force consent is a misuse of terms, and the further statement that consent is no defense to an action of false imprisonment was unnecessary to the decision of the case and is not sustained by the authorities.

INJUNCTION—RIGHT OF ATTORNEY TO CONSULT WITH CLIENT CONFINED IN JAIL.—A client of P, an attorney, was confined in a county jail. Notwithstanding P's repeated efforts to see her, D, the sheriff in charge of the jail, arbitrarily refused to permit P to see or consult with her client. On a petition for an injunction against D, the court *held* that an attorney has the right to be allowed, without undue or arbitrary restraint, to consult with clients confined in a jail, and that an injunction may be granted to enforce the right. *Wilmans* v. *Harston* (Tex., 1921), 234 S. W. 233.

A person confined in jail clearly has the right to consult with his attorney at reasonable times. *State* v. *Davis,* 9 Okla. Cr. Rep. 94; *People* v. *Risely,* 1 N. Y. Cr. Rep. 492; *Hamilton* v. *State,* 68 Tex. Cr. Rep. 419 (involving a statute). But see *Kinloch* v. *Harvey,* 11 S. C. 326. It would seem that an attorney had a reciprocal right to see his client, and it has been so held. *In the Matter of the Sheriff, etc.,* 1 Wheeler Cr. Cas. (N. Y.) 303. The principal case clearly states this right, but the report does not show on what basis the court took jurisdiction to enforce the right by injunction. Assuming the general rule to be that injunctions are only granted when a right of property is involved (but see 29 HARV. L. REV. 640), it would seem, nevertheless, that such a right was clearly present here. "The right of a citizen to pursue any calling, business, or profession he may choose is a property right to be guarded by equity as zealously as any other form of property." *New Method Laundry Co.* v. *MacCann,* 174 Cal. 26. An attorney's right to his clientele and to carry on his profession is one of substance, and a direct violation of that right, like that in the principal case, would obviously result in a certain pecuniary loss to him. Equity may refuse to enjoin an injury to reputation only. *Mead* v. *Stirling,* 62 Conn. 586; *Judson* v. *Zurhorst,* 30 Ohio C. C. 9. But courts of equity have often gone much farther than the principal case in finding a property right on which to base their jurisdiction, as when the publication of private letters is restrained, *Gee* v. *Pritchard,* 2 Swanston's Rep. 402; *Woolsey* v. *Judd,* 4 Duer (N. Y.) 379; or a birth certificate cancelled. *Vanderbilt* v. *Mitchell,* 72 N. J. Eq. 910. See also cases collected in note to *Ex parte Badger,* 14 A. L. R. 286. While the principal case seems to be without direct precedent, it is submitted that the holding is a correct one and is no departure from the established fields of equity jurisdiction.

INJUNCTION—WASTE—BALANCE OF INJURY.—There was a devise of a portion of an estate to the defendant for life, with remainder to the heirs of his body, and if there should be no heirs of his body, remainder to the plaintiff. The defendant joined with his nine children in mortgaging the

premises to secure a loan, and proposed with them to dispose of a portion of their property to a subdividing company in order to raise sufficient money to discharge the mortgage and prevent the sale of the land on foreclosure. The plaintiff, who was a contingent remainderman, sought to enjoin the sale and subdivision of the property into building lots on the ground that it was waste, but it was *held* that equity would not enjoin. *Brown* v. *Brown* (W. Va., 1921), 109 S. E. 815.

It would seem that the court would have been justified in holding that the acts sought to be enjoined were of such an ameliorating nature as not to amount to waste. It was held not waste to raze a dwelling house when changes in the surroundings had made the premises more valuable as business property. *Melms* v. *Pabst Brewing Co.,* 104 Wis. 7; see 19 MICH. L. REV. 105. The court, however, assumed that these acts would be waste, and placed its decision upon two grounds: first, that the complainant's interest was not likely to vest, since it depended upon the double contingency of his surviving the defendant and the defendant surviving all of his nine children and their issue; secondly, that the hardship upon the defendant by granting the injunction would greatly exceed the hardship upon the complainant if it was refused, which, partly because of the remoteness of his property right, the court regarded as inconsequential. It appears settled that a contingent remainderman cannot maintain an action at law for waste. *Hunt* v. *Hall,* 37 Me. 363; *Taylor* v. *Adams,* 93 Mo. App. 277; *Latham* v. *Lumber Co.,* 139 N. C. 9. In equity it is held that one having a possibility of reverter, as upon the owners of the fee ceasing to use the land for church purposes, cannot obtain an injunction against waste. *Dees* v. *Cheuvronts,* 240 Ill. 486. See also *Curles et al.* v. *Wade,* 151 Ga. 142; *Mathews* v. *Hudson,* 81 Ga. 120. But although a contingent remainderman cannot succeed at law, he may obtain an injunction against waste. Where the life tenant committed waste by drilling for oil, it was said that while the contingent remainderman could not sue for damages nor bring a bill for accounting for past waste, he could enjoin future waste "for the protection of the inheritance which is certain, though the person on whom it may fall is uncertain." *Ohio Oil Co.* v. *Daughetee,* 240 Ill. 361; see also *Watson* v. *Wolff-Goldman Realty Co.,* 95 Ark. 18. It would seem, therefore, that the fact that the complainant is a contingent remainderman should have no bearing on the decision in the principal case, except as it leads the court to refuse to enjoin waste of a negligible nature in favor of one whose property interest is uncertain, and thereby impose a serious present loss on the defendants. The equities favor the defendant from the standpoint of hardship. But the doctrine of balance of injury has been generally confined to those cases where the injury to the defendant from an injunction would be very great, as where it involved the closing down of a large manufacturing plant, or where, under similar circumstances, the suppressing of an important commodity vitally affected the interests of the public. And on principle the weight of authority is against the doctrine, because, justifying under the discretion of equity to grant or refuse an injunction, it determines the legality of claimed rights

in accordance with their value. See POMEROY, EQUITY JURISPRUDENCE (Ed. 2), §§ 1943-1945; *Hansen* v. *Crouch*, 98 Ore, 141. In *Continental Fuel Co.* v. *Haden*, 182 Ky. 8, the court was asked to cancel a mining lease upon the ground that the lessees had committed waste by failing to operate the mines in a workmanlike manner. This was refused because the injury to complainants was inconsequential as compared to the loss of $100,000 in mining machinery and equipment installed in the mine by the defendant. It is seen that this decision is in harmony with the distinction which has been drawn between the case where the complainant's injury is actually small and the case where his injury is clearly substantial but proportionately less than the injury to the defendant. The courts will more readily refuse an injunction upon balancing injuries in the former case than in the latter. *Campbell* v. *Seaman*, 63 N. Y. 568. The technical or imponderable nature of the plaintiff's injury seems also to have been considered in *Bliss* v. *Washoe Copper Co.*, 109 C. C. A 133. This factor was present in the principal case, since the beneficial character of the changed use of the property made the plaintiff's injury, if any, purely technical, and, together with the uncertainty of his ultimate property right, causes the result reached to appear preëminently just. It should be noted, however, that in the cases above referred to, and in those cited in POMEROY, *supra*, the plaintiff would have alternative recourse to a suit for damages at law, while in the principal case, as pointed out above, refusing an injunction leaves the plaintiff without a remedy. It is well, however, to confine the relief which equity grants to a contingent remainderman to those cases in which equitable considerations are more clearly in his favor.

NEGLIGENCE—PARTY GUILTY OF CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW BECAUSE STRUCK BY AUTOMOBILE HAVING RIGHT OF WAY.—While crossing a street at a speed of 15 miles an hour the plaintiff was struck by the defendant, who was coming along a cross street at 35 miles an hour and had the right of way by statute. *Held*, the plaintiff was guilty of contributory negligence as a matter of law. *Anderson* v. *Jenny Motor Co.* (Minn., 1921), 185 N. W. 378.

The rule laid down in the principal case is taken from the Minnesota decision of *Lendahl* v. *Morse*, 181 N. W. 323, in which negligence in law is confused with negligence in fact. It is submitted that in the principal case Holt, J., takes the sounder view in his dissenting opinion when he says: "There are so many varied circumstances in every accident at a street crossing that the question of whose fault it was should be determined by the triers of fact." He further points out that "under the rule of the *Lindahl* case an ox team could never cross a downtown street of Minneapolis, except possibly between 2 a. m. and 6 a. m., for some reckless speeders to the right of the team would surely be in time to hit the rear of the wagon, even if two blocks away when the team first entered the intersection." Obviously, the whole matter of who was to blame for the accident should be left to the jury with proper instructions as to the law applicable to the circumstances.

Authority in other jurisdictions is uniformly against the holding in the principal case. A driver having the right of way at a street crossing is not justified in plunging ahead regardless of consequences nor failing to exercise ordinary care to avoid injury to others. *Glatz* v. *Kroeger Bros. Co.,* 168 Wis. 635. "If we assume the defendant had the right of way the conditions must be such as to justify him in the absolute exercise of the right. In any event, his right on the highway is not exclusive, but at all times relative and still subject to the fundamental common law doctrine: *Sic utere tuo ut alienum non laedas.*" *Paulsen* v. *Klinge,* 92 N. J. L. 99. The right of precedence at a crossing has no application where one not having that right approaches the crossing and has no reasonable grounds for apprehending a collision because of the distance from the crossing of one having such right. *Barnes* v. *Barnett,* 184 Iowa 936. Furthermore, "the rule regarding the right of way does not impose upon the person crossing the street the duty of assuming that the other will continue to cross an intersecting street without slowing down, as required by law." *Whitelaw* v. *McGilliard,* 179 Cal. 349. Perhaps in the principal case the fact was that the plaintiff was guilty of contributory negligence because of a failure to yield the defendant the right of way, but whether or not this was so should have been found as a matter of fact rather than as a matter of law.

PERJURY—ACQUITTAL OF CRIME CHARGED NO BAR TO SUBSEQUENT PROSECUTION FOR PERJURY.—Defendant was convicted of perjury for giving false testimony at a previous trial in which he was acquitted of a charge of receiving stolen property. The conviction of perjury was inconsistent with the prior acquittal. *Held,* acquittal was no bar. *People* v. *Niles* (Ill., 1921), 133 N. E. 252.

The general rule is that acquittal on a criminal charge is no bar to a subsequent prosecution of the defendant for perjury. The cases of *United States* v. *Butler,* 38 Fed. 498, and *Cooper* v. *Commonwealth,* 106 Ky. 909, to the contrary, have been seriously questioned and expressly overruled respectively by *Allen* v. *United States,* 194 Fed. 664, and *Teague* v. *Commonwealth,* 172 Ky. 665. In some cases it has been said that if the conviction of perjury necessarily contradicts the previous acquittal, the latter is a bar. *Chitwood* v. *United States,* 178 Fed. 442; *State* v. *Smith,* 119 Minn. 107. The logic of treating the matter as *res judicata* is somewhat impaired by recalling that the prior acquittal was essentially a failure to find the defendant guilty beyond a reasonable doubt rather than a finding that he was not guilty. Thus, if an acquittal were held conclusive of the fact *a fortiori,* a conviction should have the same effect. Sound policy seems to require that a defendant taking the stand in his own behalf should not be able to perjure himself with utter impunity, nor should his immunity depend upon the convincingness with which he lies. For notes and citations of authorities see 39 L. R. A. (n. s.) 385; L. R. A. 1917 B 743.

PUBLIC UTILITY CORPORATIONS—RIGHT TO DISCONTINUE SERVICE.—The O Company entered into a contract with a village to supply it with gas for ten

years. Its supply of gas failing, the O Company made a contract with the E Company for a supply of gas, the contract being subject to termination upon six months' notice by either party. By means of the gas thus obtained the O Company was enabled for a time to perform its contract with the village, but before the term of the contract had expired the E Company gave notice as required and discontinued its supply of gas to the O Company, when then applied to the Public Utilities Commission for permission to withdraw its gas service and facilities from the village. The E Company was made a party to the proceedings, but was dismissed on the ground that the commission could not compel it to supply gas to the village because there was no contractual obligation between the E Company and the village, though the charter of the E Company expressly authorized it to supply gas to the village in question. The O Company was given permission to withdraw its service and facilities because of its inability to obtain gas. On appeal, the order of the commission was affirmed. *Village of St. Clairsville* v. *Public Utilities Commission* (Ohio, 1921), 132 N. E. 151.

The right of a public utility corporation to discontinue its service seems uncontested, so far as the general public is concerned, when the corporation acts with the consent of the state. *Jeffries* v. *Commonwealth,* 121 Va. 425. The United States Supreme Court has held that, in the absence of statute or express contract a public service corporation has the right to discontinue its entire service when operations are being carried on at a loss and without reasonable prospect of future profit. *Brooks-Scanlon Company* v. *Railroad Commission of Louisiana,* 251 U. S. 396; *Bullock* v. *R. R. Comm. of Florida,* 254 U. S. 513. In the latter case the court said: "No implied contract that they will do so (operate at a loss) can be elicited from the mere fact that they have accepted a charter from the state and have been allowed to exercise the power of eminent domain." Accord, *Lyon & Hoag* v. *Railroad Commission,* 183 Cal. 145; *New York Trust Co.* v. *Buffalo & L. E. Trac. Co.,* 183 N. Y. Supp. 278. To compel operation in such cases would result in the taking of property without due process of law, in violation of the Fourteenth Amendment. *Brooks-Scanlon Company* v. *Railroad Commission of Louisiana, supra.* Naturally, the courts have not frequently passed upon the right of a solvent public utility corporation to discontinue its service entirely. In support of such a right, see 1 WYMAN ON PUBLIC SERVICE CORPORATIONS, §§ 290-313; *Munn* v. *Illinois,* 94 U. S. 113; *San Antonio Street Railway Co.* v. *State of Texas,* 90 Tex. 520; *Gas Co.* v. *City,* 81 Ohio St. 33; *Fellows* v. *Los Angeles,* 151 Cal. 52. For opinions *contra,* see note, L. R. A. 1915 A 549; *Southern Ry. Co.* v. *Hatchett,* 174 Ky. 463. But where a public utility corporation discontinues its service as to part or all of its plant it renders its franchises liable to forfeiture. *State* v. *Pawtuxet Turnpike Corp.,* 8 R. I. 182; *The People* v. *The Albany & Vermont Railroad Co.,* 24 N. Y. 261; *San Antonio Street Railway Co.* v. *State of Texas, supra.* And where the corporation desires to retain its charter the state can compel it to render service even on those parts of its system where the operation results in a financial loss, provided the corporate property as a whole is

earning a profit. *Southern Ry. Co.* v. *Hatchett, supra; State* v. *Postal Telegraph Co.*, 96 Kan. 298; *Brownell* v. *Old Colony Railroad*, 164 Mass. 29; *Colorado, etc., Co.* v. *Railroad Commission*, 54 Colo. 64. But in Ohio, apparently, a corporation under a permissive charter has the right to discontinue any part of its service which it is not under contractual obligation to furnish. *Gas Co.* v. *City, supra.* See also *Selectmen of Amesbury* v. *Citizens' Elec. St. Ry.*, 199 Mass. 394; *Laighton* v. *City of Carthage, Mo.*, 175 Fed. 145. Ordinarily, where the discontinuance of part of the service results in a benefit to the public or is necessary to insure the financial success of the part operated, the state will take no action against the corporation. *Iowa* v. *Old Colony Trust Co.*, 215 Fed. 307. At common law, property devoted to a public use could be withdrawn in any case only after reasonable notice to the public. 1 WYMAN ON PUBLIC SERVICE CORPORATIONS, § 316. Many states now hold that a public utility corporation has no right to discontinue service without first obtaining the consent of the state, acting through its Public Utilities Commission. *People ex rel. Hubbard* v. *Colorado Title & Trust Co.*, 65 Colo. 472; *State* v. *Postal Telegraph Co.*, 96 Kan. 298; *Southern Ry. Co.* v. *Hatchett, supra.* The decisions of the commissions are subject to review by the courts. See cases last cited. It is also important to note that the right to discontinue service does not necessarily include the right to dismantle the plant. See *R. R. Commission of Ark.* v. *Saline River Ry. Co.*, 119 Ark. 239. Regarding the right to discontinue service, see L. R. A. 1915 A 549; 11 A. L. R. 252; 32 HARV. L. REV. 716. In *Northern Illinois Light & T. Co.* v. *Illinois Commerce Comm.* (Ill., Feb. 1922), 134 N. E. 142, a public service corporation was engaged in operating a street railway and also in furnishing light and power to a city. It was held that where an entire street railroad system was earning a reasonable return the company could not discontinue service on certain of its lines, even though those particular lines were not yielding a profit. But the court also held that the profit earned on one branch of the corporate business—*e. g.*, its light and power service—could not be considered in determining the right to discontinue service in regard to another branch of its business—*e. g.*, its street railway service—when the latter was being operated at a loss.

TRUSTS—INSURANCE TO A BENEFICIARY WITHIN PERMITTED CLASS IN TRUST FOR PERSON OUTSIDE CLASS.—Insured took out $5,000 of insurance with the Bureau of War Risk Insurance in favor of his mother. He desired to take out another $5,000 policy in favor of his fiancée, but was informed he could not name her as beneficiary. He thereupon took out the additional insurance in favor of his mother, but wrote a letter to his fiancée stating that his mother would pay over the money from the second policy to her. *Held,* evidence not sufficient to establish the existence of an executed trust. *Semble,* an attempt upon the part of the insured to accomplish by indirection what the statute forbids is illegal and unenforceable. *Caessna* v. *Adams* (N. J., 1921), 115 Atl. 802.

The decisions are conflicting in cases like the above where the insured

names a beneficiary within the permitted class, but charges this beneficiary with a trust to hold the proceeds of the policy for one outside the class. In Massachusetts the rule is that the next of kin, who would have been entitled in case no beneficiary were named, is entitled to the proceeds of the policy. *O'Brien* v. *Mass. Cath. Order of Foresters,* 220 Mass. 79. *Kerr* v. *Crane,* 212 Mass. 224, seems to decide that the intended beneficiary outside the class is entitled, but this is explained in the *O'Brien* case, *supra,* by the fact that the next of kin intervened in favor of the intended beneficiary. In some jurisdictions it has been held that the defense is one purely personal with the insurer. If the insurer does not object, the intended beneficiary is entitled to the proceeds of the policy. *Meyers* v. *Schumann,* 54 N. J. Eq. 414. In a suit by the intended beneficiary against the named beneficiary, who agreed to hold in trust, the general rule is that the intended beneficiary will prevail. 40 L. R. A. (n. s.) 692, note and cases cited. But equity should do complete justice, and although the suit is only one between the intended beneficiary and the named beneficiary, the outcome should not be different than if all parties were joined. The prohibition against naming certain classes of persons as beneficiaries was adopted by the insurance company for a purpose, and the insured assented to this when he took out the policy. Should not a court of equity declare that an attempt to evade this prohibition is void and give the proceeds of the policy to the next of kin or to such persons as would have been entitled if no beneficiary were named?

WATERS AND WATER COURSES—EFFECT OF DESERT LAND ACT.—The Act of March 3, 1877, generally known as the Desert Land Act, provides for the sale of desert lands to persons who agree to irrigate and cultivate such lands. The act defines desert lands as lands which will not, without some irrigation, produce crops, and provides that the Commissioner of the General Land Office shall determine what may be considered as such lands; it provides also that the right to the use of water on such lands shall depend upon appropriation, and continues as follows: "and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands * * * shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights." Defendants were appropriators of water from Spearfish Creek, and plaintiffs (apparently since March 3, 1877) had acquired title to lands bordering on that stream; defendants diverted all the water in the stream during a dry summer, in order to satisfy their appropriations, and plaintiffs brought an action to determine their riparian rights. It did not appear that either the riparian lands of plaintiffs or the lands on which the defendants used the appropriated water had been obtained under the Desert Land Act. *Held,* that no riparian rights exist in connection with any public lands granted by the government after the passage of the Desert Land Act. *Cook et al.* v. *Evans et al.* (S. D., 1921), 185 N. W. 262.

In a similar case in California appropriators sued to prevent the use

of water by upper riparian owners who had obtained title from the government after 1877. *Held,* that as defendants' title was not obtained under the Desert Land Act, that act did not apply, and defendants could use the water as riparian owners. *San Joaquin & Kings River Canal & Irrigation Co., Inc.,* v. *Worswick et al.* (Cal., 1922), 203 Pac. 999.

The opposed views of the two cases reflect the condition of the previous decisions on this point. In *Hough* v. *Porter,* 51 Ore. 318, which is cited in both cases and followed by the South Dakota court, the supreme court of Oregon held that all lands settled upon after March 3, 1877, "were accepted with the implied understanding that the first to appropriate and use the water for the purposes specified in the act should have the superior right thereto." On the other hand, the supreme court of Washington, in *Stitl* v. *Palouse Irrigation & Power Co.,* 64 Wash. 606, held that the provisions of the statute applied only to desert lands as defined therein, and did not apply to lands (or to streams thereon) title to which was obtained from the government under other statutes. Both decisions have been followed and affirmed by later cases in the same jurisdictions. There is no actual authority in the United States courts. *Winters* v. *U. S.,* 143 Fed. 740, though sometimes cited as opposed to *Hough* v. *Porter, supra,* is decided on another ground. In *Boguvillas Land & Cattle Co.* v. *Curtis,* 213 U. S. 339, the court finds it unnecessary to decide the question raised in the two principal cases, but refers to the decision in *Hough* v. *Porter, supra,* as being based on "plausible grounds." As to the text writers, Mr. Kinney (Sec. 817) criticises *Hough* v. *Porter,* while Mr. Wiel (Secs. 128-130) merely refers to the doctrine of that case as "a new phase of the law," and Mr. Long (Sec. 306) rather hazily inclines to Mr. Kinney's views. It seems clear that the question is still an open one.

WORKMEN'S COMPENSATION ACTS—INJURIES RECEIVED WHILE ACTING IN AN EMERGENCY AS "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."—The plaintiff's intestate, employed as a gardener by the defendant company, was severely injured while attempting to stop a team of horses which had run away from the defendant's receiving platform near which he had been working. The team belonged to a drayman who had been delivering goods to the defendant company at the receiving platform, which was located within the latter's grounds. *Held,* an injury "arising out of and in the course of employment." *Sebo* v. *Libby, McNeil & Libby* (Mich., 1921), 185 N. W. 702.

The plaintiff, a chambermaid, after retiring to her room in the hotel for the night, lighted an alcohol lamp with which to heat a curling iron. After she had finished curling her hair she left the room momentarily, and on returning discovered that the lamp had started a fire. In extinguishing the fire she was severely burned. The chambermaids had been expressly forbidden to use lamps like the one in question. *Held,* an injury "arising out of and in the course of employment." *Kraft* v. *West Hotel Co.* (Ia., 1921), 185 N. W. 895.

As to what circumstances may constitute an "emergency," see 25 HARV. L. REV. 416-418. The cases quite uniformly hold that a workman is still within the scope of his employment when, confronted with an emergency, he performs acts to protect his employer's property, even though such acts are entirely different from those included in his regularly appointed duties. *Rees* v. *Thomas* [1899], 1 Q. B. 1015 (mine worker injured while stopping employer's runaway horse); *Baum* v. *Industrial Com.*, 288 Ill. 516 (factory employee injured in defending employer's factory against strikers); *Southern Surety Co.* v. *Stubbs* (Tex. Civ. App.), 199 S. W. 343 (engineer injured while trying to save his employer's vessel from shipwreck). For a collection of cases, see note, 6 A. L. R. 1247. Recovery has been allowed where the employee was mistaken in his belief that danger to his employer's property was imminent. *Harrison* v. *Whitaker Bros.*, 16 T. L. R. 108 (employee injured while attempting to adjust a switch which he believed was not properly set for an approaching train, but which, in fact, was in good order, being worked automatically). The same general rule applies where an employee performs acts to save himself or other employees from injury for which the employer would be liable. *Rist* v. *Larkin & Sangster*, 156 N. Y. Supp. 875; *United States Fidelity & G. Co.* v. *Industrial Acc. Commission*, 174 Cal. 616; *London & E. Shipping Co.* v. *Brown* [1905], Scot. Sess. Cas. 488. Most of the courts limit the rule to cases like the above, where the employee acts in furtherance of the employer's "material interests." Recovery has been denied when an employee was injured while protecting his employer from physical injury. *Clark* v. *Clark*, 189 Mich. 652; *Collins* v. *Collins* [1907], 2 I. R. 104. And where an employee was injured while rescuing a fellow employee from the danger of an injury for which the employer would not have been liable. *Mullen* v. *Stewart & Co.* [1908], Scot. Sess. Cas. 991. But see *In re Waters* v. *Taylor Co.*, 218 N. Y. 248, where recovery was allowed to the employee of one contractor who was injured while rescuing the employee of another contractor, both being engaged in work on the same building. The court based its decision on the economic and humanitarian principles underlying the Workmen's Compensation Act and the fact that the act was "within the reasonable anticipation" of the employer. See also *Priglise* v. *Fonda, J. & G. R. Co.*, 183 N. Y. Supp. 414, commented upon in 20 COLUM. L. REV. 919. There is no settled rule regarding cases where the employee's wrongful conduct is the cause of the emergency. In *Hapelman* v. *Poole*, 25 T. L. R. 155, an employee had been left in charge of some caged lions and in trying to drive back into its cage one that had escaped the employee was killed. The court in allowing recovery declared that whether or not the escape of the lion was due to the employee's misconduct was unimportant, since wilful misconduct did not excuse the employer from liability where the injury resulted in death or serious and permanent disablement. Workmen's Compensation Act, 1906, 6 Edw. VII, c. 58, sec. 1 (2) (c). In *Powell* v. *Lanarkshire Steel Co.* [1904], Scot. Sess. Cas. 1039, an employee for his own pleasure, and contrary to orders, climbed into a car standing on a track at the top of a steep incline. He thus set the car

in motion, and while attempting to prevent its descent down the incline he suffered injuries from which he later died. The court denied relief on the ground that the wilful misconduct of the employee was the ultimate cause of the accident. The statute in that case denied recovery for all injuries due to the serious and wilful misconduct of the employee. Workmen's Compensation Act, 1897, 60-61 Vict., c. 37, sec. 1. The decision in the first of the principal cases, *supra,* is in accord with the general rule; that in the second seems sound in view of the fact that the Iowa statute denies relief for injuries due to misconduct only when the injury is due to the employee's intoxication or his wilful intention to injure himself or another. Compiled Code of Iowa, 1919, Sec. 808. Moreover, allowing relief even in cases where the misconduct of the employee has imperiled the employer's property will carry out the public policy underlying the Workmen's Compensation Acts and serve as an incentive to the employee to protect his employer's property.