RECENT CASES.

BANKRUPTCY—ATTORNEYS—ALLOWANCE.—PRATT V. BOTHE, 12 AM. B. R. 529.—*Held*, that the compensation allowed an involuntary bankrupt's attorney under the provisions of Sec. 60d of the American Bankruptcy Act relates to services to be rendered while the debtor is "in contemplation of bankruptcy," and not to services to be rendered after bankruptcy proceedings have commenced, compensation for which is provided for by Clause 3 of Sec. 64b.

Section 60d refers to such services as are to be rendered by an attorney, solicitor or practor for a person in contemplation of bankruptcy and they are a valid debt against the estate though not provable as a preferential claim. *In re Morris*, 11 Am. B. R. 145; *Re Laine*, 16 N. B. R. 168. Compensation for professional services rendered by an attorney after bankrupt proceedings have begun and by which the bankrupt is assisted in performing the duties imposed upon him, is provided for by Sec. 64b. *In re Carr*, 9 Am. B. R. 58; *In re Michel*, 1 Am. B. R. 665; *In re J. W. H. Mercantile Co.*, 2 Am. B. R. 420. There are no provisions made for compensation for services rendered by an attorney in general litigation or in the course of the debtor's business, but if rendered before bankrupt proceedings they are classed with the other claims against the estate; if after, and especially if rendered in resisting the creditors' petition for adjudication in bankruptcy, only those funds remaining after all debts are paid are subject to their liquidation. *In re Woodard*, 2 Am. B. R. 692; *In re Rosenthal*, 9 Am. B. R. 626. One of the objects of Congress in passing the Bankrupt Act was to give to creditors, rather than the agents and attorneys assisting the court and distributing the bankrupt estate, the favored place. *Re J. W. H. Mercantile Co.*, 2 Am. B. R. 420. As to an attorney's allowance in voluntary proceedings, see *In re Bock*, 1 Am. B. R. 535; and see *In re Hirschberg*, 2 Ben. 466, for construction of Sec. 64b. The doctrine announced in *In re Kross*, 3 Am. B. R., and disapproved by the court in the case under discussion is also distinctly denied in *In re Moyer*, 4 Am. B. R. 238; *In re Terrill*, 103 Fed. 781; *In re Anderson*, 103 Fed. 854.

BANKRUPTCY—CLAIM—CREDITOR PLEADING USURY AS DEFENSE.—IN RE WORTH, 12 AM. B. R. 566 (IOWA).—*Held* that in a jurisdiction where the rule is that usury is personal to the borrower, creditors of the bankrupt cannot interpose usury against the claims of another creditor upon a contract to which they are neither parties nor privies.

The rule as to the persons who may interpose the defense of usury, whether strangers, parties, privies or the borrower himself, differs in the different states. Thus privilege of pleading usury is held to be personal to the borrower, *Yardley v. N. Y. G. & Ind. Co.*, Fed. Cas. No. 18125; *Loomis v. Eaton*, 32 Ch. 550; *Ohio & M. R. Co. v. Kasson*, 37 N. Y. 218. Where a state statute does not declare a usurious contract utterly void, it is valid as to strangers to the usury. *Fleckner v. U. S. Bank*, 21 U. S. 338. A trustee in

bankruptcy can avail himself of the defense of usury as against an obligation of the bankrupt. *In re Kellogg*, 10 Am. B. R. 7. A trustee, under operation of the Bankruptcy Law, is a privy in estate with the borrower, and stands in the same relation with a mortgagee as the bankrupt stands, so far as the defense of usury is concerned. *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 150. The trustee stands in the shoes of the bankrupt. *Bankruptcy Act*, 70 a; *Wheelock v. Lee*, 64 N. Y. 243. He is his legal representative. *Wright v. First Nat. Bank*, Fed. Cas. No. 18078; *Collier on Bankruptcy*, 2nd. Ed., 415-417.

BANKRUPTCY—INVENTOR'S RIGHTS BEFORE PATENT—TRANSFER.—IN RE DANN, 129 FED. 495.—The Bankruptcy Act expressly provides for a transfer, to the trustee in bankruptcy, of the bankrupt's interest in patents, patent rights, copyrights and trade marks, and Rev. Stat. Sec. 4895, clause 5, provides for a surrender of all property, which, prior to filing of petition, the bankrupt could by any means have transferred. *Held*, that a bankrupt's incorporeal interest in an alleged invention pending application for patent, was not such property as would pass to his trustee.

This question seems not to have arisen before in this country, and in the only English case found on the point the holding of the court was contrary to the decision in the present case. *Hesse v. Stevenson*, 3 Bos. & P. 565. In the absence of statutes, an inventor has rights to the fruits of his ingenuity, but he cannot prevent others from enjoying them to the same extent. *Patterson v. Kentucky*, 97 U. S. 501, 507. Substantial property right of exclusive use in an invention is created alone by patent. *Gayler v. Wilder*, 10 How. 477. An assignment of patent rights is good, though the invention be not then patented. *Hendrie v. Sayles*, 98 U. S. 546; *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315. Materials of a newly invented machine pass to the trustee, though the patent for the invention has not then been granted. *Sawin v. Guild*, 1 Gallis. 485. It is difficult to see the reason for holding that the inventor has property right enough in his invention before patent to make a valid assignment, but that in case of an assignment by operation of law he has not such property rights, if his invention be not then patented. There are *dicta*, however, in the well-considered case of *Gillett et al. v. Bate et al.*, 86 N. Y. 87, which support the decision in the present case.

BRIBERY—VALIDITY OF ACT.—STATE V. LEHMAN, 81 S. W. 1118 (Mo.).—*Held*, that in order to constitute bribery it is not necessary that the vote of the official bribed should be on a valid measure.

The present case is in harmony with the rule laid down in *Glover v. State*, 109 Ind. 391, where a local official was held to be guilty of bribery, although the contract which he was bribed to make was not binding upon the township. It is also held in some jurisdictions to be immaterial whether or not the official bribed possessed the authority requisite to perform the act. *In re Bozeman*, 42 Kan. 451. But the rule in the Federal courts is otherwise. *U. S. v. Gibson*, 47 Fed. 833; *U. S. v. Boyer*, 85 Fed. 425. An offer to bribe a judge as to the decision of a case to be instituted before him in the future, where, however, it was never actually commenced, is indictable at common law. *People v Markham*, 64 Cal. 157. But the offering of money to a legislator to vote for a certain person to fill an office which does not in fact exist is not bribery. *Com. v. Reese*, 16 Ky. L. 493. Since the gist of the offense

is the attempt to improperly influence official action, the courts are not inclined to regard the legality of the particular act as essential.

CONSTITUTIONAL LAW—DUE PROCESS—FORFEITURE OF LAND FOR FAILURE TO PAY TAXES.—ROPER LBR. CO. v. ELIZABETH CITY LBR. CO., 47 S. E. 757 (N. C.).—*Held*, that a statute, declaring that on failure of grantee of state swamp lands to pay taxes due on same the interest of such grantee shall be forfeited and vested in the state, without any proceeding or judicial determination, is invalid because it deprives the grantee of his property "without due process of law," in violation of the state constitution.

By "law" in this provision is not meant merely an act of the legislature. *Calhoun v. Fletcher*, 63 Ala. 574; *Clark v. Mitchell*, 64 Mo. 564. Nor can one be deprived of his property without due process through the medium of a constitutional convention. *Clark v. Mitchell*, 69 Mo. 627. Notice is required. *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389; *Louisville & Nashville R. Co. v. Schmidt*, 177 U. S. 230. There must be an opportunity for a hearing. *Davidson v. New Orleans*, 96 U. S. 97; *Simon v. Croft*, 182 U. S. 427. Judicial procedure is not always required. *Davidson v. New Orleans, supra.* A proper exercise of the taxing power of a state does not deprive a citizen of his property without due process of law, but the taxpayer must have some kind of notice and an opportunity to be heard before the charge becomes finally fixed upon his property. *Santa Clara v. So. Pac. R. Co.*, 18 Fed. 385; *Hayland v. Brazil Block Coal Co.*, 128 Ind. 335. Summary remedies may be used in the collection of taxes, that could not be applied in cases of judicial character. *Murray's Lessee v. Hoboken Land & Imp. Co.*, 18 How. 272. Statutes have been held valid which declared that upon failure to pay taxes the land should be forfeited to the state by operation of law, without any judicial proceeding or finding of any kind, the statutes providing further, that lands so forfeited should, at a certain time, be offered for sale, the former owner having a right to redeem at such sale. *W. Va. v. Sponangle et al.*, 45 W. Va. 415; *King v. Mullins*, 171 U. S. 404. In the present case, as the taxpayer is deprived of his property without any process at all, and as no opportunity is afforded him to repossess it, the correctness of the decision cannot be doubted. *Griffin v. Mixon*, 38 Miss. 424.

CONSTITUTIONAL LAW—STATUTE FORBIDDING DISCHARGE OF EMPLOYEE—MEMBERSHIP IN LABOR UNION.—COFFEYVILLE VITRIFIED BRICK & TILE CO. v. PERRY, 76 PAC. 848 (KAN.).—*Held*, that a statute which makes it unlawful to discharge an employee because he belongs to a lawful labor organization, and which provides for the recovery of damages for such discharge, is unconstitutional.

The right of employees to quit work singly or in a body is recognized. *U. S. v. Kane*, 23 Fed. 748; *King v. Ohio & M. R. Co.*, 7 Biss. 533; *U. S. v. Workingmen's Council*, 54 Fed. 794. The authorities put labor and capital on the same plane. *State v. Glidden*, 55 Conn. 74; *Rogers v. Evarts*, 17 N. Y. Supp. 264; *State v. Stewart*, 59 Vt. 285. It is a part of a man's civil rights that he be left at liberty to refuse business relations with another for any reason. *Dely v. Winfree*, 80 Tex. 400; *Orr v. Home Mut. Ins. Co*, 12 La. Ann. 255. Labor is property and the right to contract and terminate contracts is a property right preserved by the constitution. *Frorer v. People*, 141 Ill. 172; *Millet v. People*, 117 Ill. 295. A statute which attempts to

regulate such matters deprives a person of a constitutional right without due process of law. *State v. Loomis*, 115 Mo. 307; *Com. v. Perry*, 155 Mass. 117. It is unconstitutional where it subjects to criminal prosecution. *Stone v. Miss.*, 101 U. S. 814; *Re Jacobs*, 98 N. Y. 98. Nor is the statute a police regulation, for it does not expressly or impliedly promote the public health, welfare, comfort, or safety. *Re Jacobs, supra.* Whether the statute in question was unconstitutional, as being class legislation, is not considered in this case. It was so considered in two parallel cases. *State v. Tolle*, 71 Mo. 645; *Lippeman v. People*, 175 Ill. 106.

CONSTITUTIONAL LAW—STATUTES OF LIMITATIONS—JUDGMENTS.—LAMB V. POWDER RIVER LIVE STOCK CO., 132 FED. 434.—A statute which prescribes a general limitation of six years for all actions on foreign judgments, and, by proviso, declares three months to be the limitation, if the judgment upon which the said action is commenced is based on a cause of action which accrued more than six years prior to the commencement of said action upon the judgment, *held*, unconstitutional, as imposing in the proviso, an unreasonable limitation upon a contract.

A statute impairing the remedy upon a contract impairs the obligation of a contract and is unconstitutional. 2 *Story on Const.* §1385. An action upon a judgment may indirectly be a remedy upon a contract. But a statute limiting the time in which to bring an action does not impair the obligation of contract, if it is reasonable. *Antoni v. Greenhow*, 107 U. S. 769. It is primarily the province of the legislature to determine what a reasonable time is. *Smith v. Morrison*, 22 Pick. 433; *Jackson v. Lamphire*, 3 Peter 280. But courts are not hesitant in deciding for themselves, taking all the circumstances into account. *Koshkonong v. Burton*, 104 U. S. 675; *Wynn v. Stone*, 69 Miss. 80.

CRIMINAL LAW—HOMICIDE—REMARKS BY COUNSEL TO THE JURY.—POWERS V. COMMONWEALTH, 83 S. W. 146, (KY.).—Defendant and H. were jointly indicted for conspiracy to murder. It was the theory of the state that H. fired the fatal shot. On the separate trial of defendant the prosecuting attorney stated that "H. was not hung but eleven of the twelve jurors who tried him were in favor of hanging him, and one was for life imprisonment and the eleven had to come to one." The motion to exclude this was overruled by the court. *Held*, that the error of the court in not sustaining the motion was prejudicial. Paynter, Hobson, and Nunn, JJ., *dissenting*.

By this decision the court reverses its decision in *Parrott v. Commonwealth*, 20 Ky. Law Rep. 764, where it was said: "The bill of exceptions does not contain the connection in which these words were spoken. It may have been in reply to some argument of the counsel for the appellant and, if so, it might have been proper." Error to be available must fully appear by the record since the record is the only authentic evidence of the trial court proceedings. *Railroad v. Goyette*, 133 Ill. 21; *Farrand v. Aldrich*, 85 Mich. 393; *Cecconi v. Rodden*, 147 Mass. 164.

CRIMINAL LAW—MISCONDUCT OF JURY—NEW TRIAL.—MANN V. STATE, 83 S. W. 195, (TEX.)—The conduct of a juror in telling the jury, in the jury room, that defendant had hit prosecutor on the head with an ax-handle on a former occasion, *held*, ground for a new trial.

It is misconduct on the part of a juror to give testimony to his associates in the jury room. *Richards v. State*, 36 Neb. 17; *Ellis v. State*, 33 Tex. Cr.

R. 508; but by the weight of authority, when a new trial is asked for on the ground of misconduct of a juror it must be shown that the party was probably injured by such misconduct. *Medlar v. State*, 26 Ind. 171; *State v. Cross*, 95 Iowa 629. Bearing directly on the principal case, it was said in *State v. Woodson*, 41 Iowa 425, "It is not sufficient to vitiate a verdict of conviction, that a juror made statements to his associates concerning defendant's character from his own knowledge unless prejudice is shown to have resulted." In a few cases it has been held that a presumption of prejudice arises from proof of misconduct. *Commonwealth v. Roby*, 12 Pick. 496; *Creek v. State*, 24 Ind. 151. The better rule is that the matter of denying a motion for new trial for alleged misconduct on the part of the jury lies largely within the discretion of the trial court. *Wiest v. Luyendyk*, 73 Mich. 661; *People v. Johnson*, 110 N. Y. 134; *Com. v. White*, 147 Mass. 76.

DAMAGES—PERSONAL INJURIES—FUTURE SUFFERING.—SCHWEND v. ST. LOUIS TRANSIT CO., 80 S. W. 40, (Mo.).—*Held*, that an instruction, in an action for personal injuries, authorizing recovery for pain and anguish which plaintiff "may" suffer in the future, is erroneous.

While damages for future suffering may unquestionably be awarded, it is generally required that the suffering must be such as will necessarily follow. *Washington & G. R. Co. v. Harmon's Admr.*, 147 U. S. 571; *Filer v. N. Y. C. R. Co.*, 49 N. Y. 42; *Atlanta & W. P. R. Co. v. Johnson*, 66 Ga. 259. Or at least must be reasonably certain. *Ohio & M. R. Co. v. Cosby*, 107 Ind. 32; *Stutz v. Chicago & N. W. R. Co.*, 73 Wis. 147. Such prospective suffering must not be merely speculative. *Strohm v. N. Y. L. E. & W. R. Co.*, 96 N. Y. 305; *Dawson v. City of Troy*, 49 Hun 322. When the court had correctly charged the jury that such future suffering must be reasonably certain, a request by the defendant to charge further that "damages must not be assessed for merely possible or even probable future effects not now apparent," was properly refused because it would merely tend to confuse the jury. *Kansas City, F. S. & M. R. Co. v. Stoner*, 49 Fed. 209. In *Raymond v. Kesenburg*, 91 Wis. 191, an instruction practically the same as that in the present case was held to be erroneous and both decisions follow the weight of authority.

DEATH BY WRONGFUL ACT—ELEMENTS OF COMPENSATION.—INTERNATIONAL & G. N. R. CO. v. MCVEY, 81 S. W. 991 (TEX.).—In an action to recover damages for death by wrongful act brought under a statute similar to Lord Campbell's Act, *held*, that the children of the deceased may recover not only for the loss of the earning capacity of the father but also for the loss of his care and counsel.

The liberal rule of compensation laid down in the present case is in harmony with many decisions holding that the care and counsel of a parent have a pecuniary value and that damages may be awarded for their loss. *Anthony Ittner Brick Co. v. Ashly*, 198 Ill. 562; *Sternfels v. Metropolitan St. Ry. Co.*, 174 N. Y. 512; *N. P. R. Co. v. Freeman*, 83 Fed. 82. In many cases however it is held that recovery cannot be had in the absence of evidence that the deceased was fitted to give valuable advice and counsel. *Walker v. Lake Shore R. Co.*, 111 Mich. 518; *St. Louis & S. F. R. Co. v. Townsend*, 69 Ark. 380. In *May v. W. Jersey R. Co.*, 62 N. J. L. 63, it is held that the counsel must relate to pecuniary matters in order to form an element of compensation; while in *Ill. R. Co. v. Bentz*, 108 Tenn. 670, it is stated that a wife cannot recover for the loss of the advice and counsel of her husband. In

most jurisdictions no recovery can be had for mental suffering of the beneficiary. *State v. B. & O. R. R. Co.*, 24 Md. 84; *Mansfield Coal, etc., Co. v. McEnery*, 91 Pa. St. 185; *contra, Cleary v. City R. Co.*, 76 Cal. 240; nor for loss of society of deceased. *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 377; *Caldwell v. Brown*, 53 Pa. St. 453; *contra, Dyas v. So. Pac. R. Co.*, 140 Cal. 268. The tendency of the latest decisions is to allow damages only for pecuniary loss and to award nothing by way of *solatium*.

EQUITY—FRAUDULENT CONVEYANCES—TRUSTS.—MONAHAN V. MONAHAN, 59 ATL. 169, (VT.).—Where one makes a conveyance of securities to avoid taxation and subsequently seeks to impress such securities with a trust, *held*, that the complainant will not be denied relief when the issue raised by the pleadings is without reference to the fraudulent conveyance. Tyler, Start, and Stafford, JJ., *dissenting*.

There is a manifest distinction between cases such as the above and those in which equitable relief would result in the enforcement of an illegal agreement, as in *Ritchie v. Smith*, 6 C. B. 462. But the line of demarcation has not been clearly drawn. Equity will not necessarily refuse its aid when a party to an illegal transaction seeks relief in respect to property which has been acquired thereby. *Sharp v. Taylor*, 2 Phil. Ch. 801; *Tyler v. Tyler*, 25 Ill. App. 333. But it is held in many jurisdictions that any unconscientious conduct connected with the controversy will preclude redress. *Mitchell v. Commissioners*, 91 U. S. 206; *Ransom v. Burlington*, 111 Iowa 77. It is said in some cases that relief will be given when the party does not have to appeal to and rely upon the terms of the illegal agreement in establishing his claim. *Simpson v. Bloss*, 7 Taunt. 246; *Spring v. Knowlton*, 103 U. S. 49. This rests upon the ground that the violation of law has already been accomplished and no further detriment can result in compelling one who has property in his possession belonging to another to make restitution. *Gilliam v. Brown*, 43 Miss. 641.

EVIDENCE—ANCIENT DEEDS—NO WITNESSES OR ACKNOWLEDGMENT.—O'NEAL ET AL. V. TENNESSEE COAL, IRON & R. CO., 37 So. 275 (ALA.).—A deed signed by the grantor by his mark only, not witnessed or acknowledged, therefore insufficient on its face, *held*, inadmissible as an ancient deed without proof of execution.

Proof of the execution of an ancient deed, apparently genuine, is not necessary in order that it may be admitted in evidence. *Fulkerson v. Holmes*, 117 U. S. 389; *Whitman v. Heneberry*, 73 Ill. 109. The genuineness must be established, *McCloskey v. Leadbetter*, 1 Ga. 551. The mere production is not sufficient for its admission, *Fogal v. Pirro*, 23 N. Y. 100. Where an instrument is admitted as an ancient deed it is admitted as being formally executed by signing, sealing and delivery. *Brown v. Wood*, 6 Rich. Eq. 155. What is necessary for a deed to show in order to be admitted as an ancient deed without proof seems to differ in the several states. Antiquity alone is not sufficient if the deed is apparently defective. *Williams v. Boss*, 22 Vt. 352; *Reaume v. Chambers*, 22 Mo. 36; thus where no consideration is expressed and the words "this indenture" are omitted. *Gittings v. Hall*, 1 Har. & J. 14. But they are upheld though defective in form and execution in *Hill v. Lord*, 48 Me. 83; *Hoge v. Hobb*, 94 Mo. 489; *White v. Hutchings*, 40 Ala. 253. Failure to record power of attorney to convey is held not to be fatal in *Taylor v. Cox*, 41 Ky. 429.

EVIDENCE—INSANITY—NON-EXPERT TESTIMONY.—FREEMAN V. STATE, 81 S. W. 953, (Texas.).—*Held*, that in a prosecution for homicide the opinion of a non-expert witness was properly excluded.

In most jurisdictions the opinion of an ordinary witness as to a person's insanity is competent to go to the jury when, as in the present case, the witness has fully stated the facts and circumstances upon which such belief is based. *Charter Oak Life Ins. Co. v. Rodel*, 95 U. S. 232; *Kimberly's Appeal*, 68 Conn. 428; *Title Ins. Co. v. Gray*, 150 Pa. St. 255. But in Maine and Massachusetts such evidence is inadmissible whatever may have been the witness' opportunities for observation, except in the case of a subscribing witness to a will. *Wyman v. Gould*, 47 Me. 159; *McCoy v. Jordan*, 184 Mass. 575. In New York it is held that a non-expert may testify as to the facts and incidents of which he has personal knowledge and may state whether, from these indications, the patient impressed him as being rational or irrational but the witness is not allowed to express an opinion as to the patient's mental capacity. *Paine v. Aldrich*, 133 N. Y. 544; *People v. Strait*, 148 N. Y. 566. In *People v. Borgetto*, 99 Mich. 336, it is held that a witness who is shown to have had reasonable opportunities for judging may testify that he saw nothing to indicate insanity. But a witness cannot be allowed to express an opinion that an individual is insane until he has stated the actions and conduct upon which he founds his belief. *Lamb v. Lippincott*, 115 Mich. 611. The rule laid down in the present case is less liberal than that established by the great weight of authority.

FIXTURES—BUILDING MATERIAL—CONVEYANCE OF LAND AND PARTIALLY CONSTRUCTED BUILDING.—BYRNE V. WERNER, 101 N. W. 555, (MICH.).—*Held*, that cut stone and structural iron belonging to the owner of a lot on which there is a partially completed building, secured by the owner for use in the erection of the building, and lying on the same and adjoining lots at the time of sale, passed by the owner's warranty deed of the lot on which the building stood. Moore, C. J., and Hooker, J., *dissenting*.

It is the prevailing American doctrine that the character of a chattel alleged to be a part of this realty is to be determined by the intention with which annexation is made; *Hackett v Amsden*, 57 Vt. 432; *Gunderson v. Kennedy*, 104 Ill. App. 117; yet when articles have not been actually annexed, but have been brought on or near land with such intention, many authorities still adhere to the English rule which accentuates the mode of annexation as the test. *Turner v. Cameron*, 5 Q. B. 306. Rails lying on the land and intended for a fence were held to be personalty in *Thweat v. Stamps*, 67 Ala. 96; so of lumber intended for a building; *Carkin v. Babbitt*, 58 N. H. 579; and in *Peck v. Batchelder*, 40 Vt. 233, it was held that windows and blinds made to be used in a house, but not actually put in place, were not part of the realty. The opposite view is exemplified in *Hackett v. Amsden*, *supra*, and *McFadden v. Crawford*, 36 W. Va. 671.

JURISDICTION—DECISION BY TRIBUNAL OF BENEFICIAL ASSOCIATION—REVIEW BY COURTS.—DICK V. SUPREME BODY OF INTERNATIONAL CONGRESS, 101 N. W. 564 (MICH.).—A by-law of a beneficial association provided for a hearing, before its supreme tribunal, on all contested death claims, and declared that the decision of such tribunal should be final. *Held*, that an adverse decision of the tribunal, as to liability of a certificate of membership, was not conclusive where, upon a hearing of the claim, evidence was admitted which was

within the terms of a statute forbidding a physician to disclose information acquired in visiting a patient. Hooker and Grant, JJ., *dissenting*.

If laws of a beneficial order require it, and are not contrary to the law of the land or to public policy, members must exhaust their remedy in the order before resorting to the courts. *Weigand v. Fraternities Accidental Order*, 97 Md. 443; *Schon v. Sotoyome Tribe*, 140 Cal. 254. *Contra, Whitney v. National Masonic Ass'n.*, 52 Minn. 378. Rules of an order declaring that decisions of its tribunal shall be final do not preclude a suit at law. *Ry., Passenger and Freight Conductors' Ass'n. v. Tucker*, 157 Ill. 194; *Daniher v. Grand Lodge, A. O. U. W.*, 10 Utah, 110. *Contra, Road v. Ry., Passenger and Freight Conductors' Ass'n.*, 31 Fed. 62. Action of a tribunal of an order, in determining status of a member, in absence of bad faith and if rules of the order are reasonable, is not subject to review by the courts. *Crook v. High Court*, 162 Ill. 298; *Wolsey v. Odd Fellows Lodge*, 61 Iowa 492. Findings of a tribunal are not vitiated because technical rules of evidence are violated. *Barker v. Great Hive Ladies of Modern Maccabees*, 98 N. W. 24 (Mich.). Held, in *Sperry's Appeal*, 116 Pa. St. 391, that rejection of testimony that should have been admitted at hearing before tribunal, was not ground for interference by the courts. Thus it would seem that courts review findings of fraternal tribunals because of rights which courts have to try such causes, regardless of the rules of the order, rather than because of some error in the proceedings of the tribunal, as was the ground of review in this case.

LATERAL SUPPORT—APPROPRIATION OF LAND—DAMAGES TO ABUTTING PROPERTY.—KANSAS CITY NORTHWESTERN R. CO. V. SCHWAKE, 78 PAC. 431, (KAN.).—*Held*, that, since the actionable wrong for impairment to lateral support is not the excavation, a land owner does not sustain damages for the deprivation of lateral support until there is an actual subsidence of the soil. Mason and Burch, JJ., *dissenting*.

The doctrine followed in this case is of modern origin. It was first declared in *Backhouse v. Bonomi*, 9 H. L. Cas. 503, which practically overruled *Micklin v. Williams*, 10 Exch. 259, and was finally established in *Mitchell v. Colliery Co.*, 11 App. Cas. 127, where the question is exhaustively discussed. These cases have been generally followed in the United States. *Schultz v. Bower*, 57 Minn. 493; *R. Co. v. Harlin*, 50 Neb. 698; *Smith v. Seattle*, 18 Wash. 484. The theory upon which they rest is that the excavation will not necessarily result in injury, since until there is a subsidence of the soil the excavation may be repaired.

LIFE INSURANCE—ASSIGNMENT OF POLICY—INSURABLE INTEREST.—GORDON V. WARE NAT. BANK, 132 FED. 444.—*Held*, that an assignment of a life insurance policy to one who has no insurable interest in the life of the assured is valid, if not made as a cover to a wager.

A life insurance policy is not strictly a contract of indemnity, and at common law the insured was not required to have an insurable interest in the life. The statute of 14 Geo. III. necessitated an interest at the inception of the contract, but this necessity, it was held, did not attach to an assignee; *Ashley v. Ashley*, 3 Sim. 149; unless the assignment were a mere cover for a wager. *Wainwright v. Bland*, 1 M. & Rob. 481. A *dictum* in *Stevens v. Warren*, 101 Mass. 564, led to the Indiana doctrine that the assignee must have an interest. This has been denied in Massachusetts and in most of the states,

lately in Indiana itself. The position which the Supreme Court has taken is uncertain. Justice Field in *Warnock v. Davis*, 104 U. S. 775, endorses the Indiana doctrine, and in *N. Y. Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 597, he apparently holds the same view.

TRADE—UNFAIR COMPETITION—USE OF SIMILAR SURNAME.—VAN HOUTEN V. HOOTON COCOA & CHOCOLATE CO., 130 FED. 600.—Defendant, a corporation named after its founder Hooton, in good faith manufactured and sold "Hooton's Cocoa" by use of which name confusion in trade resulted to the damage of complainants, makers of the well known "Van Houten's Cocoa." *Held*, that such liability to confusion and deception was ground for granting an injunction against the defendants' use of said name unless accompanied by a clear statement distinguishing its cocoa from complainants'.

The basis for relief in unfair competition is fraud. *Gorham Mfg. Co. v. Dry Goods Co.*, 104 Fed. 243; *Day v. Webster*, 49 N. Y. Supp. 314. The use in good faith of one's name in connection with an article offered for sale is generally held justifiable and damage resulting to another from similarity of surnames is *damnum absque injuria*. *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Nat'l Starch Mfg. Co. v. Duryea*, 101 Fed. 117; *Harson v. Hallyard*, 22 R. I. 102; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494.

USURY—PROMISSORY NOTE—LEX LOCI CONTRACTUS.—WHITLOCK V. COHN ET AL., 80 S. W. 141, (ARK.).—*Held*, that the place of payment of a promissory note will not be regarded as determining the place of the making of the contract so as to render the contract usurious, since the parties will not be presumed to have contracted with reference to a law which will make the contract illegal.

It is now well settled that where the place of the making of the contract and the place of performance are the same, its validity as regards usury is determined by the law of that jurisdiction and not by the law of the place where the suit is brought. *Merchants' Bank v. Griswold*, 72 N.Y. 472; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249. But when the contract is made in one state and payment is to be made in another, there is much conflict among the authorities. In some jurisdictions it is held without reserve that the law of the place of performance must govern. *Bennett v. Eastern Building & Loan Association*, 177 Pa. St. 233; *People's Building & Loan Association v. Tinsley*, 96 Va. 322. In Massachusetts the rule is that the law of the place of execution and payment of the consideration will control. *Akens v. Demond*, 103 Mass. 318; *Glidden v. Chamberlin*, 167 Mass. 486. In the Federal courts and in many of the state courts, it is held, as in the present case, that the intention of the parties is the controlling factor. *Miller v. Tiffany*, 1 Wall. 298; *Wayne Co. Savings Bank v. Lowe*, 81 N. Y. 566; *Pancoast v. Travellers Ins. Co.*, 79 Ind. 172.