RECENT CASES

CONTRACTS—INTERPRETATION—WRITING AND PRINTING.—B. F. STURTEVANT CO. v. FIREPROOF FILM CO., N. Y. L. J., DECEMBER 1, 1915 (CT. OF APPEALS).—The plaintiff sent a contract to defendants, typewritten upon their office stationery, at the bottom of which were printed in small type certain conditions and exceptions to which no reference was made in the body of the contract. *Held,* such conditions and exceptions do not become part of the contract.

Where part of a contract is written and part is printed, and the written and printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing will control the construction of the contract. 6 Ruling Case Law, p. 847; *City of Chicago v. Weir,* 165 Ill. 582; *Mansfield Mach. Works v. Lowell Common Council,* 62 Mich. 546. The reason for the rule is, that the part which is specially put into a particular instrument is naturally more in harmony with what the parties intend, than the other. *Daly v. Busk Tunnel Ry. Co.,* 129 Fed. 513; *Joyce v. Realm Marine Ins. Co.,* L. R. 7 Q. B. 580. The courts are agreed that if reference be made in the contract to written or printed terms contained in another instrument, such instrument becomes part of the contract; a fortiori, then, reference to printed matter, contained on the same paper as the contract, will make the matter referred to a part of the contract. *Barton v. Traveler's Ins. Co.,* 84 S. C. 209. If the written and printed portions be not inconsistent and irreconcilable, they must be made to harmonize. *Soucy v. Obert Brewing Co.,* 180 Ill. App. 69; *Wheeling R. R. Co. v. Gourley,* 99 Pa. St. 171. In the instant case, the court seems reasonably to have been influenced by the fact that the typewritten words appeared above the printed form, and the page numbering intervened. But since there is a positive duty on the court to construe the contract on a consideration of the whole instrument and not on detached portions, and since, further, it was possible to harmonize the two, the court should have made an attempt to do so. The printed form adopted for general use should be disregarded only so far as it appears that it was the intention of the parties to change or reject such printed stipulation. See *Frost's Detroit Lumber, Wooden-Ware Works, etc. v. Miller's, etc., Ins. Co.,* 37 Minn. 300.

A. N. H.

DAMAGES—PERSONAL INJURIES—MENTAL ANGUISH—PROXIMATE OR REMOTE.—ST. MARTIN v. N. Y., N. H. & H. R. R. CO., 94 ATL. (CONN.) 279.—*Held,* that mental anguish due to plaintiff's inability to be with his dying wife and subsequent remorse at her grave because he was unable to see her before her death are too remote elements of damage to be considered in an action for personal injuries.

The general rule has come to us from England that mental anguish and suffering resulting from negligence unaccompanied by injury to the person cannot be the basis of an action for damages. *Lynch v. Knight,* 9 H. L.

Cases 577; *Hokks v. R. R.*, L. R. 10 Q. B. 122. Such is the rule to-day in all actions ex contractu and ex delicto, with modifications. *Mentzer v. W. U. Tel. Co.*, 93 Iowa 752. Considering that sufferings of mind and body usually act reciprocally on each other, damages are allowed for mental suffering consequent upon physical injury. *Seger v. Town of Barkhamstead*, 22 Conn. 290. Still it must result directly from the injury or be the natural and proximate consequence of it. *Sullivan v. Ry.*, 197 Mass. 152; *Chicago City Ry. v. Anderson*, 182 Ill. 298. The courts, however, are divided in deciding what mental suffering is to be considered proximate, the difficulty seeming to arise as to the causal connection between the injury and the resultant damages. It has been held that mortification due to one's appearance as a result of the injury is sufficiently allied to allow recovery. *Gray v. Wash. Water Power Co.*, 36 Wash. 665; but *contra, Linn v. Luquesne*, 204 Pa. St. 511; *So. P. Co. v. Hetzu*, 135 Fed. 274. However, the courts seem to be unanimous in disallowing recovery where the anguish arises from worry concerning matters apart from the injury, which, although they may affect him, are caused by some conception arising from a different cause. *Chicago v. McLean*, — Ill. —; *Keyes v. Ry.*, 30 Minn. 290; *Atchison Ry. Co. v. Chaner*, 57 Kansas 41. The principal case seems to follow the authorities, which draw an artificial line where facts similar to its facts exist. In drawing this line the courts consider the mental anguish as too remote, although primarily caused by the defendant's acts.

J. McD.

DEATH—CONTRIBUTORY NEGLIGENCE OF PARENT.—DABRINSKY V. PENN. Co., 94 ATL. (PA.) 269.—*Held*, contributory negligence of one parent will bar recovery by the other parent for the death of their minor child, the negligence of the parent in charge of the child being imputed to the parent who seeks to recover.

The administrator of the estate of a deceased child may recover damages for its wrongful death though the parents or other persons having charge of the child were guilty of contributory negligence. *City of Birmingham v. Crane*, 56 So. (Ala.) 723. And this is so though the parent may be the sole distributee of the child's estate, *Nashville Co. v. Busbee*, 139 S. W. (Ark.) 301, and may be himself acting as administrator. *McKay v. Syracuse Ry. Co.*, 208 N. Y. 359; *Southern R. R. v. Shipp*, 53 So. (Ala.) 150. But on the other hand Illinois holds that in a suit by the administrator for the death of a child the right of the administrator to recover is barred by the contributory negligence of the child's parents. *Ohnesorge v. C. C. R. R.*, 259 Ill. 424; *Thomas v. Anthony*, 179 Ill. App. 463. In such a case if the parent is the real beneficiary, his contributory negligence will be imputed to the child, though the action is by the administrator. *Feldman v. Detroit Ry.*, 162 Mich. 486. As to the exact point of the principal case there is a square conflict of authority. For contrary holdings see: *Donk C. & C. Co. v. Leavitt*, 109 Ill. App. 385; *Phillips v. Denver Grain Co.*, 53 Colo. 458 (wife suing as co-plaintiff); *Potts v. Union Traction Co.*, 83 S. E. (W. Va.) 918; *Love v. D. J. & C. R. R.*, 135 N. W. (Mich.) 963. See also, *Vinnette v. N. P. R. R.*, 91 Pac. (Wash.) 975; *Kuchler v.*

Milwaukee R. & L. Co., 146 N. W. (Wis.) 1133. The principal case seems out of harmony with the weight of authority.

S. B.

EMINENT DOMAIN—VACATION OF ALLEY—COMPENSATION AS A CONDITION PRECEDENT—TAKING OF PRIVATE PROPERTY.—HUBBELL ET AL. V. CITY OF DES MOINES, 153 N. W. (IA.) 337.—*Held*, that where a coliseum, used for assembly purposes, abutted on an alley on which it had no exits, these being located on other streets, and the city vacated such alley, by an ordinance devoting the land to park purposes, payment by the city to the owner of the building of compensation for damages sustained by him by vacation of the alley was not a condition precedent to vacation, since such vacation of a street is not a "taking of private property" in contemplation of the constitution.

The general rule deducible from the authorities seems to be that any destruction, restriction, or interruption of the common necessary use and enjoyment of property constitutes a taking. *Hooker v. New Haven, etc., R. Co.*, 14 Conn. 146; *Brinton v. Comm.*, 178 Mass. 199. The benefits to be received by the person whose land is taken by the public for a road is a part of the consideration for release of the land, or its condemnation for a road. *Cochrane v. Comm.*, 175 Mass. 199. And when once vested in him, or he becomes entitled thereto, they become appurtenant to the land, and are as much his property as the land itself; and neither state nor person can deprive him of it except in the manner prescribed by the constitution. *Pearsall v. Eaton Co.*, 74 Mich. 558; *Gorgan, etc., v. Louisville & New Albany, etc., R. R.*, 89 Ky. 216; *Webster v. Lowell*, 142 Mass. 324; *contra, McGee's Appeal*, 11 Pa. St. 470; *Levee District No. 9 v. Farmer*, 101 Cal. 178; principal case.

C. Y. B.

EQUITABLE CONVERSION—DISPUTED LEGACY—SPECULATIVE PURCHASE BY EXECUTOR.—COYNE V. DAVIS, 154 N. W. (NEB.) 547.—*Held*, that land devised in trust, to be sold to satisfy certain legacies, is personalty in equity, to the exclusion of the heir-at-law, even after the executrix has purchased for a nominal sum the valid, but then doubtful, claim of a legatee thereto. Morrissy, C. J., and Sedgwick and Fawcett, JJ., *dissenting*.

The doctrine of equitable conversion applies only to effectuate the testamentary intention. *In re Rudy*, 185 Pa. St. 359. If the trustee to sell acquires but the bequest fails, the trust results to the heir-at-law. *Matter of Wagner*, 74 Hun. (N. Y.) 352. Similar in effect is the discharge or release of a legatee's claim, as this enures to the benefit of the estate. See *Hale v. Aaron*, 77 N. C. 371. When an executor buys in the claim of a creditor, this is presumed to be a payment and not a purchase. *Gillett v. Gillett*, 9 Wis. 194. In case of a legacy purchased by the executor in his individual capacity, it is held that only the vendor can attack the executor's interest. *Peyton v. Enor*, 16 La. Ab. 135; *Hale v. Aaron, supra*; *Barton v. Hassard*, 3 Drury & Warren's C. L. Cases 461. This doctrine, if sound, extends

only to a clear case of a purchase by the executor individually. In so equivocal a transaction as that of the principal case, the heirs should at least have been allowed the usual presumption in favor of a discharge and not a purchase.

C. R. W.

INJUNCTION—SUNDAY PICTURE SHOW—ENFORCEMENT OF INVALID ORDINANCE—ADEQUACY OF LEGAL REMEDY.—KLINGER V. RYAN, 153 N. Y. S. 937.—*Held,* injunction will not issue enjoining the chief of police of a city from arresting the proprietor of a picture show under an invalid ordinance forbidding Sunday exhibitions, inasmuch as the proprietor has a remedy at law.

The issuance of an injunction depends primarily on the adequacy of a remedy at law, for when the latter exists equity will not interfere. *Klinesmith v. Harrison,* 18 Ill. App. 467; *Willis v. Staples,* 30 Hun. (N. Y.) 644. Equity, however, will act where irreparable damage will be done to plaintiff's business. *Hale v. Burns,* 91 N. Y. S. 929; *Dobbens v. Los Angeles,* 195 U. S. 223. Accordingly a municipality and its officials will be enjoined from acting under a void ordinance where property rights will be injured and damages will not compensate. *Morris Canal Co. v. Jersey City,* 12 N. J. Eq. 252. It is well settled that police officers will not be enjoined from performing their duties in excess of general police power, even though done in an oppressive manner. *Sterman v. Kennedy,* 15 Abb. Pr. (N. Y.) 201; *Olympia Ath. Club v. Speer,* 29 Colo. 158. Nor even to the injury of the plaintiff's business by warning the public of its character, if done in good faith. *Gilbert v. Mickli,* 4 Sanford Chan. (N. Y.) 357. It is for the public good that the police officers be allowed to act without restraint in the performance of their duties, as what might be a trespass on one occasion would be lawful on another. *Pon v. Wiltman,* 147 Cal. 280; *Delaney v. Flood,* 183 N. Y. 323. If the principal case involved only the prevention of an arrest there is no doubt that the court acted correctly in refusing to issue an injunction. *Burns v. McAdoo,* 99 N. Y. S. 51. On the other hand, if damages for injury to his business were caused by the closing of the Sunday picture shows under the invalid ordinance, the proprietor had an adequate remedy at law against the officer acting under the ordinance, as he would be liable personally. *Campbell v. Sherman,* 35 Wis. 103. It is evident that the damages might have been ascertained and recovered. *Allison v. Chandler,* 11 Mich. 542. On whatever ground the injunction might have been prayed for, the court acted correctly in refusing to issue the same.

J. McD.

LIBEL—PUBLICATION—WHEN MAILED COMMUNICATION IS PUBLISHED.—HUTH V. HUTH, 3 K. B. 32, 84 L. J. K. B. 1307.—*Held,* the fact that a written communication is sent through the mail in an unclosed envelope is not of itself evidence of publication, although in fact the contents were taken out and read by a servant in breach of duty.

The recognized general rule as laid down in *Roberts v. English Mfg. Co.,* 46 So. (Ala.) 752, is that sending through the mail is not evidence of publication unless the sender knew that a third party would read the

communication, or that knowledge of its contents would in the ordinary course of business be acquired by a third party. Accordingly the mere writing of a letter by the defendant and sending of it to the plaintiff only, does not constitute publication, *Penry v. Dozier,* 49 So. (Ala.) 909. But where it may reasonably be expected that an open communication, as a post card, will be seen and read by third parties, there the sending is of itself evidence of a publishing. This is agreed upon by English and American courts. G. Swinfen Eady, L. J., in the principal case, quoting *Sadgrove v. Hole,* 2 K. B. 1, 70 L. J. K. B. 455. *Logan v. Hodges,* 146 N. C. 38; 59 S. E. 349. The principal case, however, goes on to draw a distinction in regard to the unclosed envelope, considering it more nearly analogous to the sealed letter than to the postal card. This reasoning would seem open to question, especially in view of the modern postal distinction between sealed and unsealed matter. If there were not the implication that unsealed letters were likely to be read, as in the case of post cards, there would be no reason for paying first-class mail matter rates to obtain the privacy resulting from sealing.

C. B.

LICENSES—ORDINANCES—CONSTRUCTION.—MCDONALD V. CITY OF PARAGOULD, 179 S. W. (ARK.) 335.—*Held,* an ordinance requiring the payment of a license fee by operators of vehicles "for transportation of passengers within the city limits" does not apply to the transportation of passengers from points within to points outside the city, and vice versa. Kirby, J., *dissenting.*

In construing similar acts, courts have held they do not apply to vehicles *passing through* the city, or affect those who haul goods from another city wherein they are licensed. *Bennett v. Borough of Birmingham,* 31 Pa. St. 15; *City of East St. Louis v. Bux,* 43 Ill. App. 276. But that part of the business carried on within the municipality is taxable. *Morristown-Madison Auto Bus Co. v. Borough of Madison,* 85 N. J. L. 59 (dictum). Such a tax was held valid against those who came to the city in wagons every day and sold goods therein. *Wonner v. City of Cartersville,* 125 S. W. (Mo.) 861. On facts precisely similar to those of the principal case, other courts have reached a contrary conclusion. *City of Cartersville v. Blytone,* 141 S. W. (Mo.) 701; *City of Sacramento v. The California Stage Co.,* 12 Cal. 134. There seems to be a direct conflict in the cases on the point involved, the decisions depending on those extrinsic facts upon which the court lays stress. The courts which emphasize the inadvisability of double taxation construe these statutes strictly; the others, looking to the reason for the imposition of the tax (use of city streets, etc.), construe them more liberally.

L. S.

LIFE ESTATES—INJURY BY STRANGER—EXTENT AND GROUND OF RECOVERY.—ROGERS V. ATLANTIC G. & P. CO., 107 N. E. (N. Y.) 661.—*Held,* life tenant may recover for injury by negligence of a stranger not only to the life estate but also to the remainder, on the theory of trusteeship.

A number of states allow the life tenant to bring trespass, and the reversioner to bring case. *Burnett v. Thompson,* 51 N. C. 210; *Bentonville*

R. R. v. Baker, 45 Ark. 252; *Lane v. Thompson,* 43 N. H. 320. Some allow them to join in an action for damages to their separate estates. *McIntire v. Westmoreland Coal Co.,* 118 Pa. St. 108; *R. R. v. Boyer,* 13 Pa. St. 497. But the life tenant may only recover for damages to life estate. *Brown v. Woodliff,* 89 Ga. 413. And neither can recover damages covering the entire injury to both estates. *Jordan v. City of Benwood,* 42 W. Va. 312; *Zimmerman v. Shreeve,* 59 Md. 357. The principal case seems to have gone further than any case, and is in conflict with the last two cases cited. However, the analogy which the case draws with the rights of a bailee against third parties, where the bailee is not liable to the bailor, seems to be sound, and that rule is well applicable to the state of facts under consideration.

L. S.

TORTS—CONSPIRACY AS IMPARTING TORTIOUS CHARACTER TO OTHERWISE INNOCENT ACTS.—CORNELLIER V. HAVERHILL SHOE MFRS. ASS'N. ET AL., 109 N. E. (MASS.) 643.—In determining the tortious character of picketing incident to a strike, *held,* that an act lawful when done by one, may be rendered unlawful by the fact of being done by many in coöperation.

The fact of conspiracy in the sense of preconcerted agreement cannot of itself impart a tortious character to harmful acts otherwise legal. *Bilafsky v. Ins. Co.,* 192 Mass. 504. Nor does the mere magnitude of the harm done, resulting from the increased number of perpetrators, create a tort out of what would otherwise be *damnum absque injuria. Gregory v. Brunswick,* 13 L. J. R., C. Pl. 34 (hooting at theatre). Cases of boycott should be distinguished from the principal case, their tortious character depending upon the successful infliction of the intended harm, and not upon the numbers engaged except as a means of accomplishing such infliction. *Quinn v. Leathem,* L. R. (1901) A. C. 495, 538. Numbers may, however, alter the legal character of the means employed to attain an end which might by one or a few be accomplished by the same means with impunity. *Vegelahn v. Gunter,* 167 Mass. 92 ("moral intimidation" imparted by the force of numbers engaged in picketing). Thus numerous injunctions have issued against acts not threatening physical injury or temporal loss, but involving merely "social pressure" and "organized persuasion." *Plant v. Woods,* 176 Mass. 492; *Murdock v. Walker,* 152 Penn. St. 595; *Ry. Co. v. Ruef,* 120 Fed. (Neb.) 102, 121. *Contra, People v. Radt,* 15 N. Y. Cr. Rep. 429. For an elaboration of the doctrine of the principal case see *Martell v. White,* 185 Mass. 255, 260.

C. R. W.

TRIAL—VERDICT—JOINT DEFENDANTS—APPORTIONMENT OF DAMAGES—SURPLUSAGE.—RATHBONE V. DETROIT UNITED RY. ET AL., 154 N. W. (MICH.) 143.—*Held,* that in an action against joint defendants, a verdict which assessed a sum total against both jointly, and then attempted to apportion the same, was defective, and such apportionment could not be regarded as surplusage. Bird, J., *dissenting.*

Damages cannot be assessed severally against joint defendants. *Marriott v. Williams,* 152 Cal. 705; *St. Louis Ry. v. Thompson,* 102 Tex. 89;

Jones v. Grimmet, 4 W. Va. 104. When a jury not only finds issues submitted to it, but also other matters, the added portions may be rejected as surplusage, and the verdict as to the rest sustained. *Odlin v. Gove,* 41 N. H. 465; *Goss v. Sloan,* 54 Ill. App. 202. So, costs which have been erroneously included in a verdict are regarded as surplusage. *State v. Beall,* 48 Neb. 817; *Tucker v. Cochran,* 47 N. H. 54. But no part can be struck out which is essential in making the finding accord with the issue. *Richardson v. Noble,* 143 Mich. 546. The courts are divided on the question of apportionment on facts similar to those of the principal case. One line of decisions holds that such an act on the part of the jury renders the verdict defective. *Whitaker v. Tatem,* 48 Conn. 520. The other line, which appears to include the majority of decisions, regards the apportionment as mere surplusage, and holds valid a verdict stating the sum total against them jointly. *Wash. Market Co. v. Claggett,* 19 App. (D. C.) 12; *Post v. Stockwell,* 34 Hun (N. Y.) 373. The weight of authority appears rightly to be against the holding of the principal case. The jury signified the total amount of damages to be assessed against the defendants, and when it went beyond what it was empowered to do, as in the case of an erroneous assessment of costs, this apportionment should have been regarded as surplusage, and the judgment rendered against the defendants jointly allowed to stand.

J. McD.