RECENT CASES

ATTORNEY AND CLIENT—CONTRACT FOR SERVICES—LIMITATION TO QUANTUM MERUIT.—MARTIN V. CAMP (1916) 56 N. Y. L. J. 241.—The plaintiffs' assignors were retained by the defendant to conduct a case. Their compensation was contingent on success and proportionate to the amount recovered. They were discharged without cause after rendering substantial services. The plaintiff brought an action for breach of contract. *Held,* that the plaintiff could recover on a *quantum meruit* for services rendered, but could not recover for breach of the contract.

Where the contract is broken without fault of the attorney, he may recover on a *quantum meruit* for services rendered or he may sue on the contract. *Schemsohn v. Limonek* (1911) 84 Oh. St. 425; *Johnston v. Cutchin* (1903) 133 N. C. 119; *Henry v. Vance* (1901) 111 Ky. 72; *Henry v. Ross* (1894) 5 Ind. 445; *Larned v. Dubuque* (1892) 86 Ia. 166; *Moyer v. Cantieny* (1889) 41 Minn. 242. New York makes an exception and allows suit only on a *quantum meruit* where the contract is for services in a single suit. *Andrewes v. Haas* (1915) 214 N. Y. 255; *Haire v. Hughes* (1908) 111 N. Y. S. 892; *Clark v. Nichols* (1908) 111 N. Y. S. 66; *Johnson v. Ravitch* (1906) 99 N. Y. S. 1059. *Contra, Carlisle v. Barnes* (1905) 92 N. Y. S. 917. But where an attorney is employed for a fixed period under a general retainer even in New York he may have an action for damages. *Gilman v. Lamson Co.* (1916) 234 Fed. 507; *Copp. v. Colonial Co.* (1901) 67 N. Y. S. 910. The reason for this exception is not apparent. The reason given in the principal case should apply to both, *i. e.,* the personal nature of the relationship. There is not sufficient difference between a contract for a fixed period and the contract in the principal case. Moreover the measure of damages may be difficult but not impossible to establish. *Henry v. Vance, supra.*

S. J. T.

CARRIERS—LIABILITY PRIOR TO RECEIPT OF GOODS—EFFECT OF BILL OF LADING.—KNAPP V. MINNEAPOLIS, ST. P. & S. S. M. RY. CO. (1916) 159 N. W. (N. D.) 81.—The plaintiff sued for the value of wheat lost while in the custody, not of the defendant, but of the preceding carrier. The defendant's station agent had issued a bill of lading purporting to have received the grain at a station on the preceding carrier's line before that at which the loss occurred. *Held,* that the defendant was not bound by the oral agreement to assume responsibility for the grain while still in the custody of the preceding carrier. Bruce, J., *dissenting.*

The duties and obligations of a common carrier with respect to goods for transportation begin with delivery to it, and such delivery must be complete. *Iron Mt. Ry. v. Knight* (1887) 122 U. S. 79; *Ry. v. Commercial Union Ins. Co.* (1891) 139 U. S. 223; *Garner v. St. Louis Ry. Co.* (1906) 79 Ark. 353; *American Lead Pencil Co. v. Ry.* (1910) 124 Tenn. 57. The issuance of a bill of lading or any written contract of shipment is not essential to complete a delivery and, conversely, the mere issuance

of such does not itself transfer possession of the freight to the carrier. The writing is only *prima facie* evidence of a receipt of the goods and may be rebutted by oral evidence. *Amory Mfg. Co. v. Gulf Ry. Co.* (1896) 89 Tex. 419; *Louisville etc. Ry. Co. v. Wilson* (1889) 119 Ind. 352. The local station agent of a railway company cannot, unless specially authorized, bind it by contract to become liable for any loss or damage to goods being transported over a preceding carrier's line. *Roy v. C. & O. Ry. Co.* (1907) 61 W. Va. 616; *Erie Ry. Co. v. Cappel* (1909) 80 Oh. St. 128. A bill of lading being both a receipt and a contract for transportation, its terms as a receipt might be rebutted by the oral evidence offered by the defendant to show that its line did not begin at the station named therein, but a subsequent one. But it was held to be the contract aspect of the bill of lading that the plaintiff attempted to vary by oral evidence that the defendant's station agent had bound it as carrier from the named station on the preceding line, and the evidence was accordingly rejected. *Whitmack v. Chicago etc. Ry. Co.* (1908) 82 Neb. 464. The differentiation by the court of the two characters of a bill of lading is exceedingly minute; particularly since it necessitates holding that the same words naming the station of issuance are as an *indicium* of receipt, variable, but when once so varied, become part of the written contract against which oral evidence, seeking to prove that they mean what they literally state, is inadmissible.

L. W. B.

CARRIERS—INDEMNITY—ISSUE OF CLEAN WARRANTS BY WAREHOUSEMAN.—GROVES AND SONS V. WEBB AND KENWARD (1916) 114 L. T. 1082.—The plaintiffs as warehousemen, at the defendant's request had issued clean warrant for wheat of which only a small part had been transferred into the plaintiff's warehouse from the defendant's ship. Owing to a leaky barge some of the remaining wheat was injured *in transitu* and the plaintiffs were compelled to pay £107 on the clean warrants to the ultimate purchasers. They then sued for indemnity. *Held,* that there was an implied contract by the defendants to indemnify the plaintiffs for such loss.

The lightermen were agents of the defendants, but in order to bring the defendants under an obligation to the plaintiffs for injury to goods still within their possession, the court proceeded on the above theory. There is a distinction between cases where one may act at his discretion and where one must act according to directions. At first, recovery in the former situation was denied. *Haycraft v. Creasy* (1801) 2 East, 92. Later, it was decided that an auctioneer who sold at the request of the defendant was entitled to indemnity for his liability to the true owner. *Adamson v. Jarvis* (1817) 4 Bing. 66. See also *Starkey v. Bank of England* (1903) 88 L. T. 244, and *Sim v. Anglo-American Tel. Co.* (1879) 42 L. T. 37. The obligation here put upon the defendants was quasi-contractual; an implication in law rather than in fact. There was enrichment to the defendants in being enabled to sell their wheat at full market price. Indemnity can be claimed by a surety on payment of the principal debtor's obligation, *Appleton v. Bascom* (1841) 3 Met. (Mass.) 169; *Stephen Sibley v. Hugh McAllister* (1836) 8 N. H. 389; also by an

agent for all acts performed in due execution of his authority. *D'Arcy v. Lyll* (1813) 5 Bin. (Pa.) 441; *Loveland v. Green* (1875) 36 Wis. 612. Similarly, a servant who suffers damage through the negligence of a superior officer may recover from the master. *Little v. Miami R. R.* (1851) 20 Oh. 415. The rule indicated above has been extended in the principal case to a novel situation.

G. S., Jr.

Constitutional Law—Class Legislation—Police Power—Bonus to Purchasing Agent.—People v. Davis (1916) 160 N. Y. S. 769.—The plaintiff was convicted of paying a bonus to a purchasing agent contrary to Sec. 439 of The Penal Law (Consol. Laws, c. 40) which forbids a third person to pay a commission or bonus to a purchasing agent even though done with the knowledge of the principal. *Held,* that this statute was not contrary to the Fourteenth Amendment of the Federal Constitution.

Possession and enjoyment of all rights are subject to such reasonable restrictions as may be deemed essential to the safety, health, and good order of the community. *Crowley v. Christensen* (1890) 137 U. S. 89; *Thorpe v. Railroad Co.* (1854) 27 Vt. 140. Such restrictions are within the police power of the state. *Commonwealth v. Alger* (1851) 7 Cush. (Mass.) 53; *Fertilizer Co. v. Hyde Park* (1878) 97 U. S. 57. The propriety of the application of the police power, within its scope, is purely a legislative and not a judicial question. *Bertholf v. O'Reilly* (1878) 74 N. Y. 509. Only where a statute is clearly an unjust discrimination in favor of, or against, a particular class will a court declare it to be class legislation. *Holden v. Hardy* (1898) 169 U. S. 366. Special legislation is not class legislation if the same rule is applied under similar circumstances to all engaged in the same business. *Barbier v. Connolly* (1885) 113 U. S. 703. A statute declaring it to be a felony for members of a particular bank to embezzle funds is class legislation and unconstitutional. *Budd v. State* (1842) 22 Tenn. 483. However, a statute making any person engaged in the banking business criminally liable for receiving money knowing the bank is insolvent, is not class legislation. *Baker v. State* (1882) 54 Wis. 368. In the principal case, whether or not it is a vicious tendency inviting fraud on the part of the agent, to allow an agent to accept pay from both his principal and a third party, appears to be a question for legislative decision and within a valid exercise of the police power.

R. W. D.

Damages—Liquidated Damages or Penalty.—Northwestern Terra Cotta Co. v. Caldwell et al. (1916) 234 Fed. 491.—In a contract to furnish the plaintiff, who was building a court house, $13,000 worth of terra cotta which was to be manufactured especially for the purpose, it was stipulated that, should the defendant fail to deliver at a certain date, he should pay $50 "liquidated damages" for each day's delay. There was a delay of twenty-nine days. *Held,* that the plaintiff could not recover on the contract stipulation since it was a penalty and not liquidate damages. Hook, J., *dissenting.*

If the amount is disproportionate to the probable damage sustained, the court will treat it as a penalty. *Connelly v. Priest* (1898) 72 Mo. App. 673; *Zimmerman v. Conrad* (1903) 74 S. W. (Mo.) 139. A contract for the construction of a building costing $13,675, which called for a payment of $50 by the contractor for every day after the seventieth that the building was uncompleted was held not an unreasonable amount as liquidated damages. *United Surety Co. v. Summers* (1909) 72 Atl. (Md.) 775. But *Cochran v. People's Ry. Co.* (1892) 113 Mo. 359, held that where the contract price was $17,785, a forfeiture of $50 per day for sixty-five days was a penalty.

J. I. S.

EVIDENCE—RELEVANCY OF LETTER-PRESS COPY OF A LETTER NOT PROVED TO HAVE BEEN SENT.—FITCH V. SHUBERT THEATRICAL COMPANY (1916) 56 N. Y. L. J. 20.—In an action upon a contract for royalties, the plaintiff alleged that the modification set up by the defendant, reducing the amount to be paid, was obtained by fraud. The alleged fraud was the defendant's misrepresentation that he was still paying 30 per cent of the gross proceeds to the German authors. The defendant claimed to have written the plaintiff that he had purchased the rights of the German authors, and offered in evidence a letter-press copy of the letter of notification. This evidence was excluded by the trial court. *Held,* that it was not reversible error for the lower court to exclude the copy, inasmuch as there was no proof of the mailing of the original.

The court relied altogether upon the case of *Gardam v. Batterson* (1910) 198 N. Y. 175. In that case the evidence offered was the dictation and writing of the letter; the placing of it in a receptacle for that purpose; and a copy of the letter but no proof that anyone mailed it. In the principal case there were not only facts similar to those of *Gardam v. Batterson, supra,* but also correspondence between the plaintiff and the defendant, suggesting, by the failure of the plaintiff to renew a certain demand, the possible receipt of the letter in question; and finally the plaintiffs' refusal to deny that the letter was received. Had there been any evidence offered by the person accustomed to mail the letters in the receptacle, that he always mailed all the letters in it, the testimony should have been admitted to prove an actual mailing. *Hetherington v. Kemp* (1815) 4 Camp. N. P. 192; *Thallhimer v. Brinckerhoff* (1826) 6 Cow. (N. Y.) 90. But regardless of whether the evidence offered in the principal case should have been admitted for the purpose of proving a mailing, it should have been admitted in order to show good faith on the part of the defendant, since the want of good faith is essential to the existence of fraud, which was the question before the jury. In order that the evidence be admissible, it need only be logically and legally relevant. Intrinsic sufficiency is not required. *De Arman v. Taggart* (1896) 65 Mo. App. 82. It is sufficient if it may be expected to become relevant in connection with other facts. *Aycock v. Johnson* (1898) 119 Ala. 405. It is sufficient that it is to be used merely to substantiate the party's own theory. *Comstock v. Butterfield* (1886) 60 Mich. 203.

F. L. McC.

EVIDENCE—ADMISSIBILITY OF PROOF OF ANOTHER CRIME.—PEOPLE v. THAU (1916) 219 N. Y. 39.—The defendant was indicted for assaulting the complainant by striking him with a bottle. The prosecution was permitted to introduce evidence of a previous act of vandalism by defendant, in entering complainant's shop two weeks before the assault, and destroying $50 worth of garments by pouring ink upon them. *Held,* that such evidence was admissible, the identity and motive of the assaulting party being in issue.

The general rule may be thus stated: "It is improper in the trial of a defendant for a crime to prove that he has committed other crimes having no connection with the one under investigation." Jones, *Evidence,* Vol. I, p. 721. But facts and circumstances which tend to prove any of the essential elements or ingredients of the crime for which the defendant is on trial, are not to be rejected as evidence simply because they may prove, or tend to prove, the accused to have committed another and distinct crime. *Regina v. Briggs* (1839) 2 Mood. & R. 199. Evidence of another offense, if it tends to show the existence of a motive to commit the crime charged, is competent where there is an apparent connection between the imputed motive and such crime. *Commonwealth v. Robinson* (1888) 146 Mass. 571. The same rule applies in proving intent. *State v. Burns* (1886) 35 Kan. 387; in establishing identity, *Johnson v. Commonwealth* (1886) 115 Pa. 369; or in proving malice, *Walter v. People* (1865) 32 N. Y. 147. Where the crime charged is so connected with the other offense sought to be proved as to form part of an entire transaction, or where proving the former would tend to prove the latter, such evidence is admissible. *Wilson v. State* (1900) 55 S. W. Tex., 68; *State v. Vines* (1882) 34 La. Ann. 1979. The real test of admissibility is best stated by Parker, C. J., *dissenting,* in *People v. Molineux* (1901) 168 N. Y. 343, a case in which proof of another crime similar to that sought to be proved against the defendant in the instant case, was rejected: "Does the evidence of the other crime fairly aid in establishing the commission by defendant of the crime for which he is being tried?" Accordingly in the principal case the court modifies its position from that of the majority in the *Molineux case.* For a discussion of the entire question, see *State v. Adams* (1878) 20 Kan. 319.

A. N. H.

EVIDENCE—CONFESSIONS IN CRIMINAL TRIAL—ADMISSIBILITY AGAINST A CONFIDANT.—PEOPLE v. BUCKMINSTER (1916) 113 N. E. (ILL.) 713.—Two defendants, accused of arson, were tried jointly and, for the purpose of impeaching one, his involuntary confession was offered. *Held,* that it was error to admit that part of the confession which affected the codefendant, even though the jury were instructed to disregard the confession as affecting such codefendant.

In regard to the party who confessed, the trial court agreed with the general rule that the involuntary confession of one accused of crime is inadmissible in evidence. *Ammons v. State* (1902) 80 Miss. 592. But it accepted the confession to impeach the testimony of the person who made it. This is a disputed point, and although before the upper court for

the first time, is not passed upon. In some jurisdictions it is inadmissible. *People v. Yeaton* (1888) 75 Cal. 415; *Shephard v. State* (1894) 88 Wis. 185. The main ground of this holding is that such a confession is unreliable as circumstantial evidence of the untrustworthiness of the witness. *Harrold v. Oklahoma* (1909) 169 Fed. 47. In federal cases the admission of such a confession is considered a violation of the constitutional guaranty for the accused to be compelled to testify against himself. Fifth Amendment, U. S. Const.; *Sorenson v. U. S.* (1906) 143 Fed. 820. In other jurisdictions it is admissible. *Hicks v. State* (1892) 99 Ala. 169; *State v. Broadbent* (1903) 27 Mont. 342. The theory is that a defendant in a criminal case, by exercising the privilege given him by statute of testifying, thereby becomes a general witness in the case, subject to cross-examination and impeachment. *Commonwealth v. Tolliver* (1875) 119 Mass. 312; *Smith v. State* (1902) 137 Ala. 22.

The means by which the court avoids deciding the above question and the ground on which it grants reversal is that in a joint trial only that part of an involuntary confession is admissible which in no way implicates the codefendant, even though the jury were instructed to disregard the confession as affecting such codefendant. It is the general rule, in a joint trial, that the voluntary confession of one defendant is admissible against him, although it implicates the other defendants and tends to prejudice them before the jury. *Ackerson v. People* (1888) 124 Ill. 563; *Fife v. Commonwealth* (1857) 29 Pa. St. 429. The remedy in such case is a motion for a direction by the court to the jury that the confession be evidence only against him who made it. *Commonwealth v. Ingraham* (1856) 7 Gray (Mass.) 46; *State v. Berry* (1887) 24 Mo. App. 466. But an involuntary confession, implicating codefendants, was held inadmissible against codefendants in separate trials. *Jackson v. State* (1906) 97 S. W. (Tex.) 312. The admissibility of an involuntary confession, implicating codefendants, in a joint trial, is a new question, before the court for the first time.

E. J. M.

FEDERAL EMPLOYERS' LIABILITY ACT—RIGHT TO SUE UNDER STATE STATUTE.—NEW ORLEANS, M. & C. R. Co. v. JONES ET AL. (1916) 72 So. (MISS.) 681.—A railroad porter, killed in interstate service, left surviving him neither widow, children, parent, or dependent relative, who alone have a right of action under Federal Employers' Liability Act, Apr. 22, 1908. Decedent's half-brother brought suit under state statute. *Held*, that the Federal Employers' Liability Act superseded all legislation over the same subject by the states, and that no suit could be brought under state law for injury or death of an employee of a common carrier, injured or killed in interstate commerce.

For a discussion approving the above rule, see *Taber v. Missouri Pac. Ry. Co.*, 26 YALE LAW JOURNAL, 72; *Staley v. Ill. Cent. R. R. Co.*, 25 *ibid.* 497.

E. J. M.

HUSBAND AND WIFE—COMMUNITY PROPERTY—VOIDABLE GIFT BY HUSBAND—RATIFICATION.—SPRECKELS V. SPRECKELS (1916) 158 PAC. (CAL.)

537.—A husband gave away a large portion of the community property to two of his children, with his wife's knowledge, but without her consent as required by Civil Code, § 172, amended by Statute of 1891, p. 425. The wife's will made after the death of her husband recited that she intentionally omitted making provision for these two children because her deceased husband had already given them a large portion of the estate. *Held,* that the gift of community property by the husband was voidable, not void, and was ratified and confirmed by the wife's will.

The law of community property is peculiar to those states which were formerly part of the Spanish and French domain in America. All that is acquired during coverture, otherwise than by gift, descent, or devise, becomes the joint property of the two. *Waterman Lumber & Supply Co.* (1913) 159 S. W. (Tex.) 360. In California prior to the Statute of 1891, *supra,* the husband could sell or otherwise dispose of the property; the interest of the wife being considered a mere expectancy, *Robinson v. Magee* (1858) 9 Cal. 81. However, a gift of the property was regarded as beyond the power of the husband, and was voidable at the option of the wife. *Smith v. Smith* (1859) 12 Cal. 216; *Peck v. Brummagin* (1866) 31 Cal. 440. The principal case turns upon the question whether the Statute of 1891, requiring the written consent of the wife to gifts of community property by the husband, made such gifts absolutely void. Under the Spanish and Mexican law, a donation of community property by the husband to the wife or by the wife to the husband was valid if not revoked; but was always revocable during the life of the donor. *Labbe's Heirs v. Abat* (1831) 2 La. 553; *Fuller v. Ferguson* (1864) 26 Cal. 546. The principal case seems to have decided correctly that the gifts by the husband to the two children were only voidable, and were ratified by the subsequent will of the wife. It is, moreover, arguable, that the limitation upon the power of the husband to give away the community property is no greater in the prohibitive effect of the above statute than the limitation upon his testamentary power. The husband cannot by devise or will defeat the wife's right of one-half the community property, although the wife may elect to take under her husband's will instead of taking her statutory portion. The testamentary disposition of the husband is consequently not void but voidable. *Cunna v. Hughes* (1898) 68 Am. St. Rep. (Cal.) 27.

B. L.

MARRIAGE—FRAUD—ANNULMENT ON GROUND OF REFUSAL TO COHABIT.—ANDERS V. ANDERS (1916) 113 N. E. (MASS.) 203.—The respondent married solely in order to secure the right to bear the name of a married woman, with the preconceived intention never to allow marital intercourse. She left her husband, the libellant, at the church-door, and never saw him again. *Held,* that the marriage would be annulled for fraud.

To secure annulment on the ground of fraud it must be shown that an essential of the marital relation has been affected. *Crane v. Crane* (1901) 49 Atl. (N. J. Eq.) 734; *Boehs v. Hanger* (1905) 59 Atl. (N. J. Eq.) 904; *Smith v. Smith* (1898) 68 Am. St. Rep. (Mass.) 440. Formerly unless there had been deception as to the person, no less degree of fraud would

avail to set aside the contract of marriage. *Swift v. Kelly* (1835) 3 Kn. 257. This was extended to cases where there was physical incapacity, and the impotence existed before the marriage. Annulment was decreed after a required cohabitation of three years; or upon medical examination, *G—— v. G——* (1871) L. R. 2 P. 287. Also upon the legal fiction of inferred incapacity from the refusal of the respondent to cohabit. *S—— v. A——* (1878) 3 P. D. 72; *B—— v. B——* [1901] P. 39. The wilful and persistent refusal to consummate the marriage contract was *per se* and irrespective of any inferred incapacity, a sufficient ground for a decree of annulment, even though the husband knew before marriage of his wife's intention not to have intercourse. *Dickinson v. Dickinson* [1913] P. 198. In this country impotence has been held to be a ground for annulment. *Payne v. Payne* (1891) 49 N. W. (Minn.) 230. Likewise misrepresentation as to physical condition. *Reynolds v. Reynolds* (1862) 3 Allen (Mass.) 605. Also fraudulent concealment of the existence of disease. *Smith v. Smith* (1898) 171 Mass. 404. The principal case following the authority of *Dickinson v. Dickinson, supra,* has decreed annulment where no physical incapacity existed.

B. L.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REFUSAL TO SUBMIT TO OPERATION AS CONTRIBUTORY NEGLIGENCE.—KRICINOVICH V. AMERICAN CAR AND FOUNDRY CO. (1916) 159 N. W. (MICH.) 362.—The plaintiff suffered a compound fracture of the leg while in the employ of the defendant, and was twice operated on by physicians who pronounced this particular injury cured. As he continued to complain of pain, another operation to remove the entanglement of a nerve filament was recommended, but he refused. *Held,* that where the operation was not dangerous and offered a reasonable prospect of success, the plaintiff must submit or relieve the company of its liability to compensate him for his continued incapacity after such refusal.

No court will require submission to an operation where the possibility of death is involved, even though all except forty-eight operations out of twenty-three thousand may have been successful. *McNally v. Hudson & M. R. Co.* (1915) 87 N. J. L. 455, affirmed (1916) 88 N. J. L. 729; *Mattes v. Phila. Traction Co.* (1897) 19 Pa. Co. Ct. 106. The law is not so lenient with a complainant when there is no chance of death. In regard to such cases there is decided conflict. Some courts have held that the burden is on the employer, not only to prove the absolute safety of the operation, but also that it would be successful. On these grounds a plaintiff was justified in refusing to take ether, so as to permit the manipulation of her arm to break down the adhesions around the shoulder joint. *O'Donnell v. R. I. Co.* (1907) 28 R. I. 245. A seaman who refused to permit a slight operation on his injured finger, later being compelled to have it amputated, was permitted to recover because the defandants did not prove that the proposed operation would have saved the finger, although it was found as a question of fact that the plaintiff had been unreasonable in refusing to submit to the operation. *Marshall v. Orient*

Steam Navigation Co. [1910] 1 K. B. 79. Where an operation is sure to remove the incapacity, the workman must submit or release the company. *Varncken v. Moreland and Son* [1909] I K. B. 185. Where in all probability an operation would have restored capacity, a refusal was unreasonable and prevented recovery. *Walsh v. Lock & Co.* [1914] 110 L. T. 452. The principal case goes one step farther and holds that where there is a reasonable chance of success, the plaintiff's refusal to undergo an operation bars any recovery after his refusal. But this advance of the rule of reasonableness brings it into direct conflict with *Marshall v. Orient Steam Navigation Co., supra.*

J. E. H.

MUNICIPAL CORPORATIONS—CEMETARIES—EXEMPTION FROM TAXATION.—WOODMERE CEMETRY ASSN. V. CITY OF DETROIT (1916) 159 N. W. (MICH.) 383.—Comp. Laws, 8406, declare. "All the lands of said corporation enclosed and set apart for cemetery purposes, and all rights of burial therein, shall be wholly exempt from taxation of any kind whatsoever." Proceedings were instituted to condemn and sell the plaintiff's land because of its refusal to pay the assessment for paving adjoining streets. *Held,* that the plaintiff was not liable for the assessment. Brooke, Steere, Bird, Kuhn, JJ., *dissenting* on the ground that the plaintiff was liable to pay the tax out of other assets, though concurring that the plaintiff's land could not be condemned.

Laws exempting cemeteries from taxation are very strictly construed. Exemption from taxation does not exempt from special assessments for local improvements unless specifically shown to be intended. *Bloomington Cemetery v. People* (1891) 139 Ill. 16. If the additional word "assessment" is used, this is generally construed to provide complete exemption. *Barry v. Wesleyan Cemetery Assn.* (1881) 10 Mo. App. 587; *Oakland Cemetery v. Yonkers* (1901) 71 N. Y. S. 783. Some states have held that "public taxes and assessments" included only general, indirect charges and not specific direct benefits for one locality. *Buffalo City Cemetery v. Buffalo* (1871) 46 N. Y. 506. A statute exempting from all taxation has been held not to include relief from assessments. *Mullins v. Mt. St. Mary's Cemetery Assn.* (1912) 239 Mo. 681. Likewise, one exempting "from any tax or imposition whatsoever." *Baltimore v. Green Mt. Cemetery* (1855) 7 Md. 517. A contrary interpretation was given to a statute exempting from "execution, taxation or any other claim, lien or process." *Union Dale Cemetery Company's Appeal* (1910) 227 Pa. St. 1. The intention of the legislatures is to prevent destruction of the burial places of the dead, not to assist the enterprises of corporations. Hence, when there were any assets aside from the grounds, they have generally been held liable for assessments. The majority base their opinion on the ground that exemption from the lien means exemption from the tax. The dissenting opinion, disagreeing on this point, and holding all the assets of the corporation, except the burial grounds themselves, liable for local improvements, seems to be more in accord with public policy and the intention of the legislature, and to represent the weight of authority.

J. E. H.

TAXATION—REFUND OF INVALID STAMP TAX.—VAN ANTWERP V. STATE (1916) 113 N. E. (N. Y.) 497.—Under a statute empowering the comptroller to pay claims to persons who suffered loss by erroneously affixing stamps to stock certificates, etc., in compliance with an unconstitutional transfer tax, the plaintiffs, brokers, who in remitting to their customers the proceeds of stock sales deducted the full amount of the transfer stamps used therein, sued the state for the amount of the stamps. *Held,* that the plaintiffs could recover since, being liable to suits by their customers for the sums withheld, they had suffered loss. Seabury and Hogan, JJ., *dissenting.*

The general authority of the broker to do everything necessary to effect the sales did not cover the affixing of the stamps, for an unconstitutional act is no authority or excuse for any action taken in conformance with it. *Norton v. Shelby County* (1886) 118 U. S. 425, 442. The brokers' act in buying was therefore their own act, the stamps their own property, and they alone suffered loss by the cancellation and destruction. Any loss to the customers came solely through the brokers' wrongful act in charging the amount of the stamps against their accounts. The state is in this case an indemnifier. Though it is bound by the statute to pay only those who have suffered a loss, the court seems to be applying a principle of insurance law: a mortgagee's right to recover on a policy based on his interest in the mortgaged property, is not affected by the repair of the premises by the owner of the equity of redemption; he recovers, though already indemnified. *Foster v. Equitable Mut. Ins. Co.* (1854) 68 Mass. 216. The insurer is not permitted to inquire into the state of accounts between the plaintiff and the owner. *Cone v. Niagara Fire Ins. Co.* (1875) 60 N. Y. 619. So here, whether or not the brokers have received moneys from their customers does not concern the state. And not only by destroying their own property did the brokers suffer loss, but by rendering themselves liable to their customers for the sums wrongfully withheld. Yet it is not quite clear how this liability can be considered a "loss" until the customers are in possession of the complete facts; for it will never come into existence, should they elect to ratify the brokers' act and sue the state instead. The act of affixing the stamps was clearly done in the course of transacting the customers' business, and it is competent for a principal to ratify any act done by another as his agent. *Hayward v. Langmaid* (1902) 181 Mass 426. By such ratification the court concedes that the customers would be subrogated to the brokers' rights. Knowledge of a transaction is ordinarily necessary to ratification. *Jones v. Atkinson* (1880) 68 Ala. 167. However, as the deduction of the stamp-price, being unitemized, was only to be ascertained by computation, it was possible to ratify in ignorance, taking the risks of the agent's action. *Fitzmaurice v. Baylay* (1856) 6 El. and Bl. 868. Also ratification of a main transaction and all its incidents may take place when the principal is only in possession of the facts of the main transaction. *Dempsey v. Chambers* (1891) 154 Mass. 330. Why should not accepting a lump remittance and thereafter treating the account of the transaction as closed be such a ratification? The dissent argues that the retention of the price of the stamps at the accounting constitutes a reimbursement of the brokers. If they were thus indemnified, it seems that the customers

might well, without ratification, by the very fact of payment, be subrogated to the brokers' rights. *Conn. Fire Ins. Co. v. Erie Ry. Co.* (1870) 73 N. Y. 399. To be thus subrogated it is not necessary that the indemnifier be under a legal obligation to make the payment. *St. Louis A. and T. Ry. Co. v. Fire Assn. of Phila.* (1895) 60 Ark. 325. All such considerations the court meets by a disconcerting alternate ground for the decision: even if the acts of the brokers be considered the acts of their customers, the former may yet be treated so far as necessary as trustees of the customers, and recover as such.

K. N. L.

USURY—LOAN OR SALE—DISTINCTION ON GROUND OF GOOD FAITH.—PEOPLE V. SILVERBERG (1916) 160 N. Y. S. *727*.—The complainant applied to the defendant for a loan of $100. The defendant agreed to sell the complainant a diamond ring which he could pawn and for which the complainant agreed to pay $295, in monthly installments. The complainant then pawned the ring for $125, the retail value of the same being $180. *Held*, that the real nature of this transaction was a loan and not a sale and it was within Banking Law (Consol. Laws, c. 2) § 314 forbidding usury. Moss, J., *dissenting*.

The intent of the parties is the essential element. 39 *Cyc.* 929. If an illegal interest was intended, whatever the color or disguise of the transaction, it was a loan. *Miller v. Bates* (1860) 35 Ala. 580. But a purchase of personal property of another with an agreement to resell it to such other in the future has been held a valid sale. *Rogers v. Blouenstein* (1915) 124 Ga. 501. Credit sales at exorbitant prices for immediate resale by the vendee where the vendee is in great need of money are generally regarded in the nature of loans and not *bona fide* sales. *Collier v. Barr* (1879) 64 Ala. 543; *Swanson v. White* (1844) 5 Humph. (Tenn.) 373; *Quackenbos v. Sayer* (1875) 62 N. Y. 344. The form of the transaction in the principal case is similar to that in *Rogers v. Blouenstein, supra*, and differs only in the finding of bad faith.

S. J. T.