RECENT CASE NOTES

ALIENS—EXEMPTION OF NON-DECLARANT ALIENS FROM DRAFT—STATUTORY CONSTRUCTION—ADMINISTRATIVE LAW.—The petitioner, a non-declarant alien, having failed to file his claim for exemption under the Selective Draft Act within the time allowed by the regulations, was certified for military service by a local draft board, and sued out a writ of habeas corpus, on the ground of alienage, to obtain his release from military custody. *Held,* (1) that the writ would issue, the petitioner being absolutely excluded from service under the Act and not merely conditionally subject to exemption; and (2) that as the draft board, an administrative board with quasi-judicial functions, had acted in excess of its jurisdiction, its decision was void. *Ex parte Beck* (1917, D. Mont.) 245 Fed. 967. *Contra,* on the first point, *United States v. Finley* (1917, S. D. N. Y.) 245 Fed. 871; *Ex parte Hutflis* (1917, W. D. N. Y.) 245 Fed. 798.

The complainant, alleging that he was a non-declarant alien, asked an injunction restraining the military authorities from certifying him for military service, the local and district boards having found on the facts adversely to his claim of alienage. *Held,* that in the absence of a denial of due process in the hearing of his claim for exemption, the finding of the district board was final. *Angelus v. Sullivan* (1917, C. C. A. 2d) 246 Fed. 54. See COMMENTS, p. 683.

BILLS AND NOTES—NOTE SIGNED IN REPRESENTATIVE CAPACITY—EFFECT OF DISCLOSING PRINCIPAL.—The trustees of a church gave a note to A, reading "we promise to pay," etc., and signed by the trustees in their own names, with the words "trustees A. M. E. Zion Church" after their signatures. The note was endorsed in blank by A. The plaintiff, a subsequent holder, sued both the church and the trustees as individuals. *Held,* that under section 20 of the Negotiable Instruments Law, since the principal was disclosed, the note was on its face the obligation of the church, and the individual defendants were not liable if in fact authorized to bind the church. *Wilson v. Clinton Chapel Afr. M. E. Zion Church* (1917, Tenn.) 198 S. W. 244. See COMMENTS, p. 686.

BILLS AND NOTES—NOTE SIGNED IN REPRESENTATIVE CAPACITY—EXTRINSIC EVIDENCE OF INTENTION.—The defendants, in fact trustees of a church and authorized to bind the church, gave a note to the plaintiff, reading "we promise to pay," etc., and signed by the defendants in their own names, with the word "trustee" after each name. There was nothing else on the face of the instrument to indicate that it was other than the personal note of the signers. The plaintiff sued the defendants personally on the note. *Held,* that under the Negotiable Instruments Law the defendants were entitled to show by extrinsic evidence, as a defense against personal liability, that the note was given and accepted as the note of the church, and not of the individual signers. *G. C. Riordan & Co. v. Thornsbury* (1917, Ky.) 198 S. W. 920. See COMMENTS, p. 686.

CARRIERS—REASONABLE REGULATIONS AS TO PASSENGERS—"LADIES FIRST."—A special car belonging to the defendant stopped in front of a crowd of factory hands. An inspector of the defendant, who was in charge of the car, stood at the steps and directed that women should be allowed to get on first. The plaintiff disobeyed this direction and mounted the steps, whereupon the inspector

kicked him off. *Held,* that the order of the inspector was a reasonable regulation, and that in the absence of unnecessary violence the plaintiff had no right to damages. *Garricott v. New York State Rys.* (Feb. 26, 1918, N. Y.) 9 Rochester-Syracuse Daily Record, No. 55.

The women in this case, having presented themselves for carriage, had become passengers and were entitled to protection by the carrier. *Davey v. Greenfield, etc. Ry. Co.* (1900) 177 Mass. 106, 58 N. E. 172. A carrier has power to make binding regulations in regard to the admission of passengers to its cars, provided such regulations are reasonable. *Baltimore & O. R. R. Co. v. Carr* (1889) 71 Md. 135, 17 Atl. 1052. The question of reasonableness is sometimes treated as one of fact for the jury. *Morris, etc. R. R. Co. v. Ayres* (1862) 29 N. J. L. 393. In New York, however, it is for the court to determine. *Vedder v. Fellows* (1859) 20 N. Y. 126; *Avery v. New York Central, etc. R. R. Co.* (1890) 121 N. Y. 31, 24 N. E. 20. The fact that in the principal case the regulation was made by a subordinate official does not invalidate it. *Commonwealth v. Power* (1844, Mass.) 7 Metc. 596 (superintendent of depot). Nor should the fact that it was made for a special occasion only. Regulations separating passengers according to sex and giving special privileges to women have often been sustained. *Peck v. New York Central, etc. R. R. Co.* (1877) 70 N. Y. 587; *Bass v. Chicago, etc. R. R. Co.* (1874) 36 Wis. 450. In the present case the court holds that the inspector's order "Ladies first" was reasonable, because "in the struggling and pushing crowd, women were at a disadvantage in gaining entrance to the car and in protecting themselves." No authorities are cited, and there is no reference to the recent extension in New York of the voting franchise to women.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—NEWSPAPERS CONTAINING CIGARETTE ADVERTISEMENTS.—A Kansas statute made it unlawful for any person to sell, give away, or advertise cigarettes in Kansas (Kan. Laws, 1917, ch. 166, secs. 1 and 2). The plaintiff, a Missouri corporation, published in Missouri a newspaper which was distributed throughout Kansas by mail and otherwise, containing advertisements of cigarettes made and kept for sale outside of Kansas. *Held,* that interference under authority of the state statute with this distribution was unconstitutional and would be enjoined. *Post Printing and Pub. Co. v. Brewster* (1917, D. Kan.) 246 Fed. 321.

Tobacco and cigarettes are of course articles of interstate commerce and as such have been held to be protected from state statutes regulating their importation. *McGregor v. Cone* (1898) 104 Ia. 465, 73 N. W. 1041; *Austin v. Tennessee* (1900) 179 U. S. 343, 21 Sup. Ct. 132. And there is no federal legislation to remove or lessen this protection, as is done in the case of intoxicating liquors by the Wilson and the Webb-Kenyon Acts (26 U. S. St. at L. 313; 37 U. S. St. at L. 699). In holding that newspapers also are subjects of interstate commerce, within the constitutional provision relating to such commerce, the principal case follows *Preston v. Finley* (1896, C. C. W. D. Tex.) 72 Fed. 850. And on principle the delivery to subscribers within a state of newspapers published in another state would seem to be clearly interstate commerce, and as such not in itself a proper subject of state regulation. It would not follow, however, that such newspapers could be used with impunity for the promotion of objects made unlawful by a valid state law. If, therefore, the advertisements in the principal case had related to cigarettes manufactured or sold in Kansas in violation of state law, it would seem that Kansas under its police power could prohibit the circulation of such advertisements, whether printed in the state or brought in from outside, just as it could prohibit the circulation of libelous or obscene publications or lottery advertisements. If on

the other hand the newspaper had been published in Kansas, though advertising cigarettes to be sold in interstate commerce, or if the question had related to local sales of the newspapers not in original packages, it is possible that the state police power might have justified the prohibition. *Cf. Delameter v. South Dakota* (1907) 205 U. S. 93, 27 Sup. Ct. 447; *State v. J. P. Bass Pub. Co.* (1908) 104 Me. 288, 71 Atl. 894; *State v. Delaye* (1915) 193 Ala. 500, 68 So. 993; *State v. Davis* (1915, W. Va.) 87 S. E. 262. In the *Delameter* case, on the authority of which the other three cases were decided, the Wilson Act was expressly relied on, and the case is distinguished in the principal case as depending on the effect of that Act. No doubt the change in national policy evidenced by the Wilson Act materially influenced the decision in the *Delameter* case, but it is difficult to see how the reasoning in the last part of the opinion, on which the case finally turned, gained any direct assistance from the Act. In the principal case, however, since both the distribution of the newspapers to subscribers and the sales of cigarettes which the advertisements tended to promote were interstate commerce, there was nothing done or contemplated within the state on which its police power could be exercised without a direct interference with interstate commerce. This would seem to be the true ground for distinguishing the *Delameter* case.

CONTRACTS—INSTALLMENT CONTRACTS—NON-PAYMENT OF PRICE OF FIRST INSTALLMENT AS ENTIRE BREACH.—The plaintiff agreed to sell and deliver to the defendant certain picture films. One film was to be delivered each month and payment therefor was to be within thirty days. The defendant failed to make the first payment on the day, and two days later the plaintiff sued for damages, alleging the defendant's breach and his own election to terminate the contract. The trial court found that there was a refusal to pay, unaccompanied by any repudiation, but there was no finding as to any of the other surrounding circumstances from which the materiality of the breach could be determined. *Held,* that there was no showing of such a breach as justified the plaintiff in renouncing the contract, and that the plaintiff was entitled to judgment for the sum due and unpaid but not for damages as for an entire breach. *Helgar Corp. v. Warner's Features, Inc.* (1918, N. Y.) 58 N. Y. L. J. 1780.

The case was governed by section 45 of the Uniform Sales Act as adopted in New York, which provides that "it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract." This makes the question one of *fact* to be determined, as it should be, in each case separately on its merits. The courts have generally, however, attempted to lay down a rule apparently capable of mechanical application. Thus the English courts have said that mere non-payment of the price is not vital unless accompanied by repudiation. *Freeth v. Burr* (1874) L. R. 9 C. P. 208; *Mersey Steel and Iron Co. v. Naylor* (1884, H. of L.) 9 App. Cas. 434. The soundness of this rule was seriously doubted by Sir Frederick Pollock. Wald's Pollock, *Contracts* (Williston's ed.) 330. In the United States the courts have generally declared non-payment in such cases to be always vital, without reference to the circumstances accompanying it, contenting themselves with some such general proposition as "In the contracts of merchants, time is of essence." See Williston, *Sales,* sec. 467. In the present case the court very sensibly disregards such a "general statement," and refuses to lay down a mechanical rule making failure to pay on time always equivalent to an entire breach. Upon delivery of the films and the arrival of the day of payment the buyer became the plaintiff's *debtor* for the agreed price then payable. Upon non-payment, the plaintiff has a right to damages caused by the

non-payment. But in the absence of a showing as to the seriousness of the damage suffered by him, or as to the probability of further breaches by the defendant, the plaintiff is not privileged to refuse further deliveries, and has no right to damages based on the assumption of further non-performance by the defendant. The rule should be the same even where the Sales Act has not been adopted.

CRIMINAL LAW—INSANITY—EFFECT OF INSANITY AT TIME OF TRIAL.—The defendant, who was not represented by counsel, was convicted of an assault with intent to rape. Later a lawyer was secured, who moved for a new trial, alleging that the defendant was insane at the time of trial. The trial court offered to submit the question of present insanity to a jury, under a code section relating to insanity supervening after conviction, but declined to hear evidence to show that the defendant was insane when tried as a ground for granting a new trial on the original indictment. *Held,* that the trial court should have heard and considered the evidence, and if it appeared that the defendant was insane when tried, should have granted a new trial. *Gardner v. State* (1917, Tex.) 198 S. W. 312.

As suggested by the court, reversal of the first trial was warranted by an objection more fundamental than that of newly discovered evidence, namely, that the insanity of the appellant avoided the former proceedings. Nor, it would seem, does the objection really depend on the fact that he could not be held to know of his insanity so as to plead it as a defense. It is elementary that a man cannot legally be tried, or convicted, or sentenced, while in a state of insanity. 1 Bishop, *Criminal Law,* sec. 396; 1 Wharton, *Criminal Law,* sec. 58 *et seq.* Where the question of present insanity is raised before trial, the usual procedure is to present the question to the trial jury. *Frith's Case* (1790) 22 How. St. Tr. 307. But other procedure may be adopted in the discretion of the court. See *Freeman v. People* (1847, N. Y. Sup. Ct.) 4 Den. 9. It is for the court to determine whether there is sufficient evidence to warrant submission of the question to the jury. *Spann v. State* (1872) 47 Ga. 549. And the determination of this question is not reviewable on appeal. *Webber v. Commonwealth* (1888) 119 Pa. 223. The question of present insanity may be raised at any stage of the trial, and the court must receive any evidence offered but may dispose of the issue as it sees fit. *State v. Reed* (1889) 41 La. Ann. 581. The approved course seems to be to submit the special issue with the general issue to the jury. The instant case is novel in that it appears to be the first in which the question of insanity at the time of trial was not raised until later. But there are cases holding that where it appears after trial that the defendant was deaf and dumb, or intoxicated, and therefore incapable of understanding the proceedings, the trial will be set aside. *Regina v. Berry* (1876, Cr. Cas. Res.) 1 Q. B. D. 447; *Taffe v. State* (1861) 23 Ark. 34.

DAMAGES—BREACH OF CONTRACT—DAMAGES RESULTING FROM DEATH OF WIFE.—In consideration of one dollar deducted monthly from the plaintiff's wages, the defendant company agreed to provide him and his family with medical attention. The plaintiff's wife having become ill, the plaintiff sent for the company's doctor. He refused to attend her. The plaintiff brought an action for breach of contract, and, alleging that he could not afford to engage another doctor, claimed damages for the death of his wife. *Held,* on demurrer, that the plaintiff had a cause of action. *Owens v. Atlantic Coast Lumber Corp.* (1917, S. C.) 94 S. E. 15.

A husband has by the common law a legal right to the society and services of his wife. Schouler, *Husband and Wife*, sec. 143. He may maintain an action for an injury to this right. *Kelly v. New York, N. H. & H. R. R. Co.* (1897) 168 Mass. 308, 46 N. E. 1063; *Birmingham Southern Ry. Co. v. Lintner* (1904) 141 Ala. 420, 38 So. 363. The husband's right to recover for loss of *consortium* has been denied, however, since the enactment of legislation enlarging the rights of married women. *Bolger v. Boston El. Ry. Co.* (1910) 205 Mass. 420, 91 N. E. 389. But the common law right of recovery was always limited to damages accruing before the wife's death. *Baker v. Bolton* (1808, N. P.) 1 Camp. 493. In the absence of statute, damages resulting solely from the death are not an element of recovery. *Hyatt v. Adams* (1867) 16 Mich. 180; *Covington Street Ry. Co. v. Packer* (1872, Ky.) 9 Bush, 455. The English courts have qualified this general rule and have held that where the conduct of the tort-feasor resulting in the death of the plaintiff's wife constitutes also a breach of a contract duty to the husband, and the death is not therefore an essential part of his cause of action, damages resulting from the death will be permitted as an element of recovery. *Jackson v. Watson* (C. A.) [1909] 2 K. B. 193. The American authorities, however, are opposed to such a distinction, and hold that the general rule is as well applicable to actions of contract as to actions of tort. *Sheerlag v. Kelley* (1908) 200 Mass. 232, 86 N. E. 293; *Duncan v. St. Luke's Hospital* (1906) 113 App. Div. 68, 98 N. Y. Supp. 867, affirmed 192 N. Y. 580, 85 N. E. 1109. The principal case was an action on the contract. It would seem, therefore, that although there did exist in favor of the husband a cause of action, his damages, according to the American authorities, were merely nominal, unless it should appear that actual damages were suffered prior to the wife's death.

DEEDS — DELIVERY IN ESCROW — REVOCATION — STATUTE OF FRAUDS. — The plaintiffs entered into an oral agreement to exchange land with the defendants, M. and P. Both deeds were to be deposited with the other defendant, an attorney, who was to deliver the deeds to the respective grantees after examining titles. M. and P. did so deposit their deed, but later instructed the attorney not to deliver it. The plaintiffs' deed was not deposited until after this instruction had been given. The plaintiffs sued to compel a delivery. *Held*, that as there was no written contract or memorandum to satisfy the statute of frauds, the depositary in escrow could not be compelled to deliver the deed. *McLain v. Healy* (1917, Wash.) 168 Pac. 1.

The rule announced in the principal case, which practically overrules the case of *Manning v. Foster* (1908) 49 Wash. 541, 96 Pac. 233, and follows a still earlier case, makes clear the position of the state of Washington on this point. This view has been supported by text-books and by a few recent cases. 1 Devlin, *Deeds* (3d ed.) sec. 313; *Campbell v. Thomas* (1877) 42 Wis. 437; *Clark v. Campbell* (1901) 23 Utah 569, 65 Pac. 496; *Holland v. McCarthy* (1916) 173 Cal. 597, 160 Pac. 1069. Though rules concerning delivery in escrow were developed at an early date in our law, there was no suggestion of this rule until the case of *Fitch v. Bunch* (1866) 30 Cal. 208. It is apparently based upon the idea that the rights and powers created by a deposit in escrow depend wholly upon contract. See *Campbell v. Thomas, supra.* Such a rule puts an unfortunate limitation upon the utility of the conditional delivery of conveyances. In many cases, at least, it is the intention in a delivery in escrow, and is essential to its purpose, that it be irrevocable. *Fine v. Lasater* (1913) 110 Ark. 425, 161 S. W. 1147. Indeed, it is the very nature of an escrow that, as to the grantor, the transaction is entirely executed. The delivery of a deed in escrow creates in the grantee of the deed a legal power to obtain title to

the realty by mere performance of the condition of the escrow. (1913) 23 YALE LAW JOURNAL, 33; and see *Farley v. Palmer* (1870) 20 Oh. St. 223, 225. If this is the correct analysis of the nature of an escrow it is apparent that the section of the Statute of Frauds relating to contracts has no application. If the Statute applies at all it must be by virtue of the section which relates to the conveyance of interests in land. The physical act of handing over a deed, either to the grantee or to a third person, may always be explained by oral testimony to show whether or not intended as a "delivery" at all. Why not, then, to show whether it was a conditional or an unconditional delivery? If it appears that the grantor by the delivery intended to create a legal power in the grantee to obtain title by performing a condition, that is, intended to create an escrow, why should not effect be given to that intent? If the delivery was absolute, the grantee is vested with all the rights, powers, etc., which make up title; if the delivery was in escrow, he is vested with the power to acquire title. There seems no more reason to apply the Statute of Frauds to one conveyance than to the other. The question remains whether a delivery in escrow had in fact taken place in the principal case. It may be doubted whether the grantor defendants intended the delivery of their deed to the attorney to operate as an escrow until the other parties had made a similar delivery. But if they did, it is submitted, effect should have been given to it. To require an enforcible executory contract in addition to a conditional delivery goes a long way toward abolishing the doctrine of escrows. See Tiffany, *Conditional Delivery of Deeds* (1914) 14 COLUMBIA L. REV. 380, 398 *et seq.*

EVIDENCE — DYING DECLARATIONS — "MURDERED" AS AN EXPRESSION OF OPINION.—In a homicide trial the state offered in evidence the testimony of a witness who swore that the deceased made a dying declaration to the witness to the effect that the defendant "murdered" him. The trial court admitted the evidence. *Held,* that this was error as it was a mere expression of opinion by the dying man involving a conclusion of law. *Pilcher v. The State* (1917, Ala.) 77 So. 75.

The statement, "He killed me" satisfies the requirements for a dying declaration and is admissible everywhere as a statement of a fact. *Parker v. State* (1914) 10 Ala. App. 53, 65 So. 90. The fact is the belief of the deceased that he met his death at the hands of the defendant. But when anything beyond this is involved in the statement some courts exclude it as an expression of an opinion. *Jones v. Commonwealth* (1898, Ky.) 46 S. W. 217 ("shot me for nothing"); *State v. Sale* (1902) 119 Ia. 1, 92 N. W. 680 (the deceased "was to blame"); *Berry v. State* (1897) 63 Ark. 382, 38 S. W. 1038 (the whiskey was "poisoned"). A larger number of courts, though with considerable hesitation, have admitted such statements. *State v. Lee* (1900) 58 S. C. 335, 36 S. E. 706 ("killed me for nothing"); *Gerald v. State* (1901) 128 Ala. 6, 29 So. 614 ("killed me for nothing"); *Powers v. State* (1897) 74 Miss. 777, 21 So. 657 ("killed me without cause"); *Shenkenberger v. State* (1900) 154 Ind. 630, 57 N. E. 519 ("poisoned by my mother-in-law"); *State v. Gile* (1894) 8 Wash. 12, 35 Pac. 417 ("butchered" by the doctors). It is believed that these difficulties follow from too close an application of the opinion rule, the object of which is to require witnesses to place the facts in detail before the jury, leaving the latter to draw the necessary inferences. Where the declarant is dead it is impossible to obtain from him any more detailed facts to guide the jury in drawing such inferences. As Professor Wigmore declares, "Some of the rulings, in their pedantic technicality, would be a scandal to any system of evidence supposed to be based on reason and common sense." Wigmore, *Evidence,* sec. 1447. From a technical viewpoint the word "murdered" is a conclusion of mixed law

and fact rather than purely an expression of opinion. *Cf.* (1917) 27 YALE LAW JOURNAL, 277. But in popular usage it is at least predominantly a statement of a fact. The deceased simply meant that he was killed by what appeared to be the deliberate act of the defendant, and his statement should not be interpreted as an attempt to give a legal opinion with respect to degrees of homicide. Once the fact is established that the homicide was the act of the defendant, other evidence is nearly always available bearing on the issues which determine its legal classification. Since the statement bears directly on the most fundamental issue of fact in the case, and the one most difficult to prove by any other evidence, it seems pure technicality to allow so slight an admixture of anything but fact to exclude it. In accordance with this view, such a statement was admitted in *State v. Mace* (1896) 118 N. C. 1244, 24 S. E. 798. *Cf. State v. Baldwin* (1890) 79 Ia. 714, 45 N. W. 297. The principal case seems an unfortunate example of a tendency from which the criminal law is now happily freeing itself.

FRAUD—MISREPRESENTATION BY SILENCE—RESCISSION.—In an action for the purchase price of a span of mules, the buyer's defense was that he had rescinded the contract because of the fraud and deceit of the seller. The trial court found that the plaintiff when he sold the mules refused specifically either to warrant their soundness or to make any statement as to their condition, but told the defendant to examine them for herself. The defendant's examination failed to reveal that one of the mules was suffering from a disease which the trial court deemed a latent and material defect. At the time of the sale the seller knew of the existence of this disease. Immediately on discovery of the disease the buyer offered to return the mules to the seller. *Held,* that the seller was not entitled to recover the purchase price. *Salmonson v. Horswill* (1917, S. D.) 164 N. W. 973. See COMMENTS, p. 691.

LIBEL AND SLANDER—MALICE IN FACT AND LAW—COMPENSATORY AND PUNITIVE DAMAGES.—In an action for libel and slander the trial court made certain detached statements from which the jury might well have inferred that the amount of the damage was within the discretion of the jury and was dependent upon the malice involved. Then the court correctly stated the Connecticut rule which gives as compensatory damages the equivalent of injuries received, and as punitive damages the expenses of the suit less taxable costs. *Held,* that there was error in the first part of the instructions, as the effect of malice in fact on compensatory damages should have been expressly limited to the actual effect of such malice in increasing the plaintiff's suffering. *Craney v. Donovan* (1917, Conn.) 102 Atl. 640.

In actions of libel and slander two kinds of malice are recognized, malice in law and malice in fact. *Coleman v. MacLennan* (1908) 78 Kan. 711, 98 Pac. 281; *Sullivan v. McCafferty* (1917, Me.) 102 Atl. 324. Malice in law is a so-called presumption of law which finds malice in the utterance of the words without legal justification. *Tim v. Hawes* (1916, N. Y. App. T.) 97 Misc. 30, 160 N. Y. Supp. 1096. This is a confusing fiction which really means that no malice is required to sustain the action. Jeremiah Smith, *Surviving Fictions* (1917) 27 YALE LAW JOURNAL, 147, 156. If the plaintiff rests his case here, he is entitled to compensatory damages. *Haines v. Schultz* (1888, Sup. Ct.) 50 N. J. L. 481, 14 Atl. 488. A majority of the states award punitive damages in case malice in fact, or actual ill-will, is shown. *Cohalan v. New York Press Co.* (1914) 212 N. Y. 344, 106 N. E. 115. In these states the absence of actual malice has been held inadmissible to affect the amount of compensatory damages. *Garrison v. Robin-*

son (1911, Ct. Err.) 81 N. J. L. 497, 79 Atl. 278. But in some states no punitive damages are allowed, and there actual malice has been admitted, not as a ground for an arbitrary increase of compensatory damages, but in order to find the exact amount of the damage inflicted, since the plaintiff may in a particular case suffer greater distress by knowing that the words were spoken maliciously. *Burt v. Advertiser N. Co.* (1891) 154 Mass. 238, 28 N. E. 1; see also Odgers, *Libel and Slander* (5th ed.) 398. This doctrine, if properly safeguarded, appears sound on principle, but it is open to some practical objections. It is believed that in many cases the plaintiff would actually suffer less from knowing that the words were spoken from prejudice and ill-will rather than from sober conviction, and it is likely that in every such case the jury would award really punitive damages under the guise of compensation. This objection, however, is less forcible in a state which allows punitive damages, whether or not such damages are limited as they are in Connecticut, and granting that there is a real relation between malice and the amount of the damage suffered, the principal case seems logical in holding, in effect, that this element should not be excluded in measuring the compensation, merely because a further allowance may be made by way of punitive damages.

MARRIAGE AND DIVORCE—CEREMONY INVALID BECAUSE OF EXISTING IMPEDIMENT—COMMON LAW MARRIAGE ON REMOVAL OF IMPEDIMENT.—Believing her prior marriage in Russia to have been invalid, the defendant contracted a second with the petitioner; early in the course of their fourteen years' cohabitation as husband and wife, the defendant's first husband died. The second husband later sought annulment on the ground that the first marriage had been valid and subsisting at the time the second was celebrated. *Held,* among other reasons for sustaining the second marriage (1) that if the parties entered on the marriage in ignorance of an existing impediment, and cohabitated matrimonially both before and after the impediment was removed, they in law became husband and wife at once on its removal; and (2) that even if the second marriage was meretricious at the start, a new consent to a common law marriage would be found from continued cohabitation and declarations of the parties that they were husband and wife, after the removal of the impediment. *Schaffer v. Krestovnikow* (1917, N. J. Ch.) 102 Atl. 246.

The holding on the first point amounts to a declaration that a common law marriage exists under the circumstances stated. The essence of common law marriage is an agreement between the parties,—mutual consent in some manner to the relation of husband and wife. Bishop, *Marriage, Div. and Sep.* (6th ed.) sec. 218. Habit and repute are only evidence from which such agreement is inferred or presumed. *Ibid.,* sec. 434. In a case like the present the mutual consent to *enter upon* the marriage relation was clearly without effect when given: an impediment existed. After the impediment's removal no such consent was ever expressed, nor is there reason to presume it; persons who believe themselves married do not consent to *enter on* marriage. The "continuing consent" sometimes spoken of, so far as it means consent to enter on the relation, is wholly a fiction. To common law marriage, then, if the principal case is sound, the only agreement necessary is to *be*—not to *become*—husband and wife. This is also the necessary result of a previous New Jersey case, in which the marriage was held to become valid on the removal of the impediment, whether or not the parties knew of the removal. *Robinson v. Robinson* (1914, Ch.) 83 N. J. Eq. 150, 90 Atl. 311. This view has not always been taken. In *Collins v. Voorhees* (1890, Ct. Err.) 47 N. J. Eq. 555, 22 Atl. 1054, the court met the problem with cold logic: consent to cohabitation which followed a ceremony could, until something further appeared, be referred only to that ceremony; if

the ceremony was without effect, there was no marriage. *Accord, Cartwright v. McGown* (1887) 121 Ill. 388, 12 N. E. 737. In both the cases last cited, however, one of the parties was lacking in good faith at the outset, and *Collins v. Voorhees* has since been distinguished on that ground. *Robinson v. Robinson, supra.* But the real ground of the *Robinson* case, as of the principal case, seems to be that the ruling consideration is not logic, but a public policy which favors sustaining marriage whenever possible. This principle has been applied elsewhere to cases in which one or even both of the parties knew of the impediment at the beginning of the cohabitation. *Yates v. Houston* (1848) 3 Tex. 433, 450; *De Thoren v. Attorney General* (1876, H. of L.) 1 App. Cas. 686; *The Breadalbane Case* (1867) L. R. 1 H. L. Sc. 182. See also dissenting opinion in *Collins v. Voorhees, supra,* 47 N. J. Eq. 315, 20 Atl. 676. The holding on the second point in the principal case indicates a readiness, not perhaps to overrule *Collins v. Voorhees* in terms, but practically to abandon the distinction based on good faith at the outset, by finding a new consent on evidence hardly differing from that held insufficient in the earlier case. Since society is interested primarily in the marriage *status*—in the contract only as a definite entry upon that *status*—there seems to be no sound reason why, in states which recognize common law marriages, consent to *be,* rather than to *become,* husband and wife should not in all cases be sufficient to constitute the relation.

SALES—STATEMENT THAT GOODS HAD BEEN SHIPPED—WHETHER OR NOT A "WARRANTY."—The plaintiff sold a carload of apples to the defendant, and stated in a letter which was held to be a part of the contract that the apples had been shipped "yesterday." The plaintiff believed this statement to be true, but in fact the plaintiff's vendors, who were to make the shipment, did not forward the apples to the defendant until the next day. The defendant refused to accept the apples resting his refusal on the unfounded claim that they did not come up to the agreed weight. In an action for the price the defendant relied on the fact the apples were not shipped at the time stated. *Held,* that the defense must fail, both because the statement in question was made merely to identify the particular shipment, and the delay was an immaterial variation which gave no privilege of rejecting the goods, and because, if available at all, this objection was waived by failure to assert it immediately on learning the facts. *DeHoff v. Aspegren* (1917, App. T.) 166 N. Y. Supp. 1019.

In the case of a charter party a statement in the contract that the ship had sailed "three weeks ago" has been held to be a warranty and not a mere representation. *Ollive v. Booker* (1847) 1 Exch. 416; *accord, Oppenheim v. Fraser* (1876, Q. B. Div.) 34 L. T. Rep. N. S. 524 ("now at Rangoon"). A warranty has been defined, in effect, as a statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, equivalent to an express condition precedent, so that if found to be untrue in fact, it justifies the other party in repudiating the entire contract. See *Norrington v. Wright* (1885) 115 U. S. 188, 203; 6 Sup. Ct. 12, 14, and cases above cited. Whether such a statement is to be regarded as a warranty or a mere representation is treated as a question of construction, depending on the court's judgment of the materiality of the statement. In cases involving so-called "implied conditions" it is generally declared that time is presumptively of the essence in all mercantile contracts. See for example *Norrington v. Wright, supra; Salmon v. Boykin* (1887) 66 Md. 541, 7 Atl. 701. It is obvious that this rule, followed blindly, would often produce unjust results. In most of the cases decided under it, however, the delay was in fact substantial and serious; and it is to be hoped that the law will eventually reject the artificial theory of implied "conditions" where no condition is expressed, and treat the defense as depending simply on

the seriousness of the breach. See Williston, *Sales,* sec. 453, and compare the discussion of *Helgar Corp. v. Warner's Features, Inc.* (1918, N. Y.) 58 N. Y. L. J. 1780, on page 697 of this number. But such an equitable doctrine is hardly applicable to the case of express conditions. The intent should therefore be very clear before an ambiguous phrase is construed as equivalent to such a condition. Indeed since the notion of a "warranty" as virtually amounting to an express condition has been chiefly confined to insurance and maritime contracts, the courts might well decline to extend it any further. The result in the principal case is therefore to be commended, though the decision would be more satisfactory had it been rested squarely on the first ground.

TAXATION—INHERITANCE AND TRANSFER TAXES—SHAREHOLDERS' INTEREST IN MASSACHUSETTS BUSINESS TRUST.—The testator died domiciled in Massachusetts; part of the estate consisted of shares in a business trust whose trustees were also domiciled there; the trust property was a factory and materials situated in New Hampshire. Objection was made to the assessment of the Massachusetts succession tax on so much of the shares "as constituted an equitable interest in foreign real estate." *Held,* that where the trust fund was ultimately to be converted into personalty for distribution, and where it from the beginning consisted of mixed realty and personalty, it must be treated as converted into personalty from the beginning, so that a succession tax at the domicile of the decedent shareholder was valid. *Dana v. Treasurer & Recvr. Genl.* (1917, Mass.) 116 N. E. 941. See COMMENTS, p. 677.

TORTS—INDUCING BREACH OF CONTRACT—ENGAGEMENT TO MARRY.—The defendants maliciously, and for the purpose of advancing their own pecuniary interests, induced the plaintiff's fiancé to break his engagement with her. *Held,* that these facts gave the plaintiff no right of action. *Homan v. Hall* (1917, Neb.) 165 N. W. 881.

Authorities in point are scarce and unsatisfactory. The court relies chiefly on a passage in Cooley, which in turn cites no authority. Cooley, *Torts* (2d ed.) 277. The leading case for the doctrine that inducing a breach of contract may constitute a tort is *Lumley v. Gye* (1853, Q. B.) 2 E. & B. 216. There are *dicta* in English cases, containing elaborate discussions of this doctrine, which ridicule the idea of recovery in a case like the principal case. *Allen v. Flood* (1897, H. of L.) [1898] A. C. 1, 35; *Glamorgan Coal Co. v. South Wales Miners' Federation* (C. A.) [1903] 2 K. B. 545, 577; *National Phonograph Co. v. Edison Bell Cons. Phonograph Co.* (1906, Ch. D.) [1908] 1 Ch. 335, 350. Finally, there is an American case denying recovery, which also based its decision on the passage in Cooley. *Leonard v. Whetstone* (1903) 34 Ind. App. 383, 68 N. E. 197. The doctrine of *Lumley v. Gye* has been accepted by the United States Supreme Court and by most of our states, with some statutory modifications. *Angle v. Chicago, St. Paul, etc., Ry. Co.* (1893) 151 U. S. 1, 14 Sup. Ct. 240, and cases collected in note, Ann. Cas. 1916 E. 608. At first the doctrine was applied only to labor contracts, but the present tendency is to extend its scope. *Moody v. Perley* (1915, N. H.) 95 Atl. 1047. With reference to actions for interfering with engagements of marriage, it is submitted that there is room for analysis and differentiation with regard to the motives of the defendant and the relationship between the persons concerned. The allowance of the action must ultimately rest on considerations of policy. While it is conceivable that recovery against parents or near relatives acting in good faith from disinterested motives ought to be denied on the ground of privilege, it is difficult to see why recovery should not be allowed against persons standing in no such relation and

actuated by malice or self-interest. Compare the discussion of privilege and motive in tort actions in (1917) 27 YALE LAW JOURNAL, 263.

TRUSTS—RESULTING TRUSTS—INDIRECT PARTIAL PAYMENT BY WIFE FOR LAND CONVEYED TO HUSBAND.—The defendant wife inherited from her father a specific portion of an estate. She did not actually receive the land, but the value thereof was credited to her husband on a purchase of land from the estate by him and in his name. *Held,* that there was a resulting trust in the land in favor of the wife for a proportionate undivided interest. *Hinshaw v. Russell* (1917) 280 Ill. 235, 117 N. E. 406.

The general rule is that where two or more pay the consideration and the conveyance is taken in the name of only one, a resulting trust is created in favor of the others *pro tanto*. *Barrows v. Bohan* (1874) 41 Conn. 278; *Moultrie v. Wright* (1908) 154 Cal. 520, 98 Pac. 257; 1 Perry, *Trusts* (6th ed.) sec. 126. Though the wife paid no money actually in the principal case, the analogy seems close enough to warrant the extension of the general rule to such cases. As regards the relationship, there is a presumption of a gift where one pays for a conveyance to another whom he is under a duty to support. *Dyer v. Dyer* (1788, Exch.) 2 Cox Ch. 92; *Bailey v. Dobbins* (1903) 67 Neb. 548, 93 N. W. 687. But where the conveyance is to the husband and payment is made by the wife, this presumption does not apply. *Silling v. Todd* (1911) 112 Va. 802, 72 S. E. 682; *In re Mahin's Estate* (1913) 161 Ia. 459, 143 N. W. 420. While the conclusion in the principal case seems sound, the language of the opinion leaves much to be desired. For example, the court quotes with apparent approval: "This trust arises, not from a contract or agreement of the parties, but from their acts," and "Its very name implies that it is independent of any contract, and is raised by the law itself upon a particular state of facts." Strictly speaking a resulting trust of the kind under consideration is based upon a presumption that the one furnishing the consideration for the conveyance *intended* that the property should be held for him. This presumption may be rebutted by evidence showing that this was not the intention. H. F. Stone, *Resulting Trusts and the Statute of Frauds* (1906) 6 COLUMBIA L. REV. 326, 330. Much confusion has proceeded from a failure to distinguish clearly between such trusts, based on assumed intention, and constructive trusts, created by the law regardless of intention. The principal case helps little to clear up this confusion.

WILLS—INCORPORATION BY REFERENCE—PREVENTING LAPSE OF POWER OF APPOINTMENT BY INCORPORATING DONEE'S WILL.—The testator's will gave his wife a power of appointment and provided that in case they should die in a common disaster his will should be construed on the assumption that she survived him. The wife executed a will at the same time, attempting to exercise the power. Husband and wife were lost at sea with the Lusitania. *Held,* that the property passed under the husband's will to the person in whose favor the wife had attempted to exercise the power, her will being incorporated by reference into his. Crane, McLaughlin and Cuddeback, JJ., *dissenting*. *In re Fowles' Will* (1918, N. Y.) 118 N. E. 611. See COMMENTS, p. 673.

WILLS—LEGACIES CONDITIONED ON NOT CONTESTING WILL—WAIVER OF FORFEITURE.—A will created a trust for the testator's children and directed that if any child should contest the probate or operation of the will, the provision for such child should be void and his share should pass to the other children. All the children appealed from the order of probate on the ground that the testator

was of unsound mind. Later they abandoned this contention and stipulated that the only question to be decided was one concerning the construction of a certain part of the will. In a later suit by the trustee to obtain a declaration of the validity of the trust and a construction of the will, the children requested that the trust be carried out. *Held,* that in the absence of evidence of probable cause for the contest the beneficial provisions for the children were forfeited, that such forfeiture could not be waived, and that the property in the hands of the trustee must be distributed as intestate estate. *South Norwalk Trust Co. v. St. John* (1917) 92 Conn. 168, 101 Atl. 961.

Testators frequently try to prevent litigation by directing a forfeiture of the interest of any beneficiary who shall contest the will. The validity of such a provision appears not to have been previously determined in Connecticut. Nor are the authorities elsewhere very numerous or entirely consistent. Rood, *Wills,* secs. 616–622. Generally American courts have enforced such conditions without regard to whether there is a gift over of the forfeited legacy or devise. *Estate of Hite* (1909) 155 Cal. 436, 101 Pac. 443; but see *Matter of Wall* (1912, N. Y. Surr.) 76 Misc. 106, 136 N. Y. Supp. 452. Of course a suit to obtain a construction of the will does not violate the ordinary forfeiture clause. *Black v. Herring* (1894) 79 Md. 146, 28 Atl. 1063. But a contest as to testamentary capacity, undue influence, or the formal execution of the will clearly falls within the literal terms of the condition. Nevertheless a substantial conflict of authority exists whether a forfeiture should be enforced when such contest is carried on in good faith and on reasonable grounds. The principal case adopts the argument that to give effect to the condition under such circumstances would tend to intrench fraud and undue influence, and would be contrary to a sound public policy. *Friend's Estate* (1904) 209 Pa. St. 442, 58 Atl. 853, 68 L. R. A. 447, *accord; Estate of Miller* (1909) 156 Cal. 119, 103 Pac. 842, *contra.* But as the record contained no evidence whether the contest was begun in good faith and with probable cause, the actual decision was in favor of forfeiture. In holding further that such forfeiture could not be waived, the court expressly refused to follow a Tennessee decision directly in point. *Williams v. Williams* (1885, Tenn.) 15 Lea, 438. No other case has been found raising precisely this question.

It may be suggested, however, that not only on the question of waiver, but with regard to the effect of the forfeiture clause itself, the case called for further analysis. The question of waiver would seem to depend on whether the provision for forfeiture is to be construed as a common law condition subsequent, like a condition for re-entry, which would require some action on the part of the testator's heirs to enforce the forfeiture, and hence, it would seem, could be waived, or as a limitation on the estate created which, if it took effect at all, would be self-executing. In the principal case the language of the forfeiture provision seems most consistent with a limitation attached to each child's share by way of executory devise to the other children. But the evident general intent of the testator would require that if more than one child contested the will, each one so contesting should not only forfeit his original interest, but should be excluded from any share in the executory devise. What is to happen, then, when all the children join in the contest? Failure of an executory devise does not necessarily mean that the prior estate continues. *Doe v. Eyre* (1848, Exch. Ch.) 5 C. B. 713; *Robinson v. Wood* (1858) 27 L. J. Ch. 726; *O'Mahoney v. Burdett* (1874) L. R. 7 H. L. 388. Where the property is realty and the prior estate is in fee, the doctrine supported by the authorities just cited is perhaps open to criticism, but in other cases there seems no reason to doubt that the testator *could* make a limitation by which the interests first given would be *ipso facto* terminated by the happening of the condition, whether or not the gift over

could take effect. See Gray, *Perpetuities* (3d ed.) secs. 250, 78. This was in substance, if not in terms, the construction adopted by the Connecticut court. The result, however, was to give to the children as heirs, in fee simple and free of any trust or future limitation, the same property which they had forfeited as equitable legatees subject to gifts over on failure of issue. It may be conceded that the testator apparently did not consider the possibility of all the children contesting; but it seems more in accord with his probable general intent to conclude that the forfeiture was not to take effect unless there was some child qualified, by refraining from contest, to receive the gift over. It is suggested that this result could be accomplished, independently of any waiver, and in strict accord with legal principles, by holding that the estates first given were to be cut short only by the operation of the executory devises, and that since an express or implied condition of all the executory devises had failed, the prior estates continued. *Cf. Harrison v. Foreman* (1800, Ch.) 5 Ves. 207; *Jackson v. Noble* (1838, Ch.) 5 Keen 590; *Hodgson v. Halford* (1878, Eng. V. C.) 11 Ch. D. 959; *Drummond's Ex'r. v. Drummond* (1875, Ch.) 26 N. J. Eq. 234.

WORKMEN'S COMPENSATION ACT—CONFLICT OF LAWS—FOREIGN CONTRACT OF EMPLOYMENT.—A workman employed in New York for labor within that state was subsequently sent to work in Connecticut pursuant to a special arrangement as to wages entered into with his employer at the latter's New York office. Nothing was said about compensation in case of injury. The workman was injured at his work in Connecticut. *Held*, that the Connecticut Workmen's Compensation Act was applicable. *Banks v. Albert D. Howlett Co.* (1918, Conn.) 102 Atl. 822.

This case presents a complication of two vexed questions, both of which would be avoided under the tort rule of construction of workmen's compensation acts, adopted in *Gould's Case* (1913) 215 Mass. 480, 102 N. E. 693. The first relates to the rule applicable to a contract where a place of performance distinct from the place of making is contemplated. In applying the rule of the place of performance, the principal case follows the established Connecticut doctrine. *Chillingworth v. Eastern etc. Co.* (1895) 66 Conn. 306, 33 Atl. 1009. The second question involves the choice between two possibly applicable compensation statutes, where an employment transcends state lines. In those jurisdictions where the contract theory of these statutes is adopted, the authorities are uniform in applying the statute of the forum to extra-territorial injuries arising under domestic contracts. *Post v. Burger* (1916) 216 N. Y. 544, 111 N. E. 351; *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, 94 Atl. 372; *Rounsaville v. Central Ry. Co.* (1915, Sup. Ct.) 87 N. J. L. 371, 94 Atl. 392; *Grinnell v. Wilkinson* (1916, R. I.) 98 Atl. 106. The inverse case of local injuries arising under foreign contracts has given rise to three divergent lines of decisions. Sometimes the *lex loci contractus* has been consistently held to govern, and the foreign statute applied. *Schweitzer v. Hamburg-American Line* (1912, N. Y. Trial T.) 78 Misc. 448, 138 N. Y. Supp. 944. See *Kennerson v. Thames Towboat Co., supra.* In one state it is held that the sending of the employee across state lines without dissent expressed pursuant to the terms of the compensation act of the new place of employment, creates a new contractual or quasi-contractual relationship, governed by the law of the latter place. *American Radiator Co. v. Rogge* (1914, Sup. Ct.) 86 N. J. L. 436, 92 Atl. 85, 94 Atl. 85. Other courts, while admitting that the foreign statute would be controlling if applicable, have resorted to the theory last mentioned, when the *lex loci contractus* happened not to possess an applicable statute. *Douthwright v. Champlin* (1917) 91 Conn. 524, 100 Atl. 97. By basing its decision on the finding of a real novation at the beginning of the work in Connecticut, the

principal case consistently adheres to the contract theory of its Compensation Act. Its intimation that the conclusion reached must be limited to such a situation of fact appears to involve a repudiation of *American Radiator Co. v. Rogge, supra,* which nevertheless is cited in the opinion with apparent approval. It also leaves *Douthwright v. Champlin, supra,* little ground for support. Manifestly the absence of a statute applicable to the contract in its inception has no tendency to show an intention to assume a new contractual relationship from the mere transit across state lines. To ascribe such a result is of course merely a verbal subterfuge for a plain switch to the tort theory of the local act. If the failure to express dissent from the latter is an expression of assent to its provisions, this can follow only from the already established premise that the act is applicable to all employment, irrespective of origin, within the limits of the state. Such applicability, however, can be established only on the theory that the statute enunciates a rule of policy applicable territorially after the manner of the law of torts. For a discussion of *Douthwright v. Champlin, supra,* see (1917) 27 YALE LAW JOURNAL, 113.

WORKMEN'S COMPENSATION ACT—INJURY DUE TO THIRD PERSON'S FAULT—SUBROGATION OF EMPLOYER TO RIGHTS OF EMPLOYEE.—An employee sustained an injury in the course of his employment due to the negligence of one not his employer. He filed a claim under the Workmen's Compensation Act, accompanied, as required by the Act, by an assignment of any claims against third persons. After allowance of his claim but before payment of the award, he brought this action against the third person responsible for the injury. While the action was pending, the defendant, through the Workmen's Compensation Commission, settled with the employer under the assignment. Thereafter the plaintiff applied to the Commission to withdraw his claim against the employer, and was allowed to do so. *Held,* that the assignment became effective when executed, and even if it could be avoided by withdrawal of the claim without the employer's consent, the defendant, having paid the assignee while the assignment was in effect, was protected by such payment against further liability. *Sabatino v. Crimmins Const. Co.* (1918, N. Y. Trial T.) 168 N. Y. Supp. 495.

Except in a few states, the statutory right to compensation given to an injured employee by the workmen's compensation acts does not in itself either impair or add to his common law rights against third persons. *Lester v. Otis Elevator Co.* (1915, N. Y.) 169 App. Div. 613, 155 N. Y. Supp. 524. He has an election of remedies, but having chosen one, cannot assert the other. *Turnquist v. Hannon* (1914) 219 Mass. 560, 563; 107 N. E. 443, 444; *Miller v. New York Ry. Co.* (1916, N. Y.) 171 App. Div. 316, 157 N. Y. Supp. 200; but see *Houlihan v. Sulzberger & Sons Co.* (1917, Ill.) 118 N. E. 429. And where he has elected to proceed against the employer, the latter has not, in the absence of express statutory provision, any recourse against the real tort-feasor. *Inter-State Tel. Co. v. Public Service Elec. Co.* (1914, Sup. Ct.) 86 N. J. L. 26, 90 Atl. 1062. In New York and a few other states there are express provisions by which an employer who is compelled to pay is allowed recourse against the person actually at fault. See *Sandek v. Milwaukee Elec. Ry. & Lt. Co.* (1916) 163 Wis. 109, 157 N. W. 579; *Grand Rapids Lumber Co. v. Blair* (1916) 190 Mich. 518, 157 N. W. 29; *Otis Elevator Co. v. Miller* (1917, C. C. A. 8th) 240 Fed. 376. The time when this statutory right becomes fixed in the employer depends, of course, on the differing phraseology of the statutes. The decision in the principal case seems a sound construction of the statute governing the case. A subsequent amendment has dispensed with the requirement of an assignment executed by the claimant, providing that "the awarding of compensation shall operate as an assignment of the cause of action." The statutes of a few other

states go still further. The Illinois act, for example, in cases where all parties have accepted the act, limits the employee to his claim for compensation against the employer, transferring to the latter, without any election by the employee, the common law rights of the employee against third persons, to the extent necessary to reimburse the employer. For a recent case construing and upholding these provisions, see *Friebel v. Chicago City Ry. Co.* (1917, Ill.) 117 N. E. 467. See also *Matheson v. Minneapolis St. Ry. Co.* (1914) 126 Minn. 286, 148 N. W. 71, *accord,* and *cf. Peet v. Mills* (1913) 76 Wash. 437, 136 Pac. 685.