RECENT CASE NOTES

ADMINISTRATIVE LAW—POWER OF ALIEN PROPERTY CUSTODIAN—COURT WILL NOT ENJOIN HIS SEIZURE OF PROPERTY AS ENEMY OWNED.—The plaintiff, a friendly alien engaged in the insurance business, brought a bill in equity to enjoin the trustee of a fund established for the security of the plaintiff's American policy holders from paying over to the Alien Property Custodian pursuant to his demand certain funds found by the Custodian to be the property of an alien enemy, not licensed by the President. Motion was made for an injunction *pendente lite*. *Held*, that the motion be denied and the bill dismissed. *Salamandra Ins. Co. v. New York Life Ins. etc. Co.* (1918, U. S. D. C., S. D. N. Y.) 60 N. Y. L. J., Jan. 3, 1919.

The state of war justifies the seizure not only of enemy persons, but of enemy owned private property. *Brown v. United States* (1814, U. S.) 8 Cranch 110; *Miller v. United States* (1870, U. S.) 11 Wall. 268. But in modern times this has merely involved sequestration, not confiscation, of the property, the purpose being to prevent its use for the benefit of the enemy in arms. See COMMENTS, *supra*, p. 478. In the instant case, a Russian insurance company had relieved its former general agents, German subjects in Germany, from the power of doing business in America and had transferred the American agency to an American firm. This firm had set aside from premiums received a certain sum whose ownership was in issue. The Custodian deemed it to be the property of the German general agents and demanded its surrender. The Court seemed inclined to consider it the property of the Russian Company, but nevertheless refused to enjoin its surrender to the Custodian, on the ground that the Trading with the Enemy Act (sec. 9) made the Custodian's determination of ownership unreviewable judicially, except in proceedings following and not preceding the transfer of possession to him. This seems in accord with principle. To enjoin the Custodian might defeat the purposes of the Act, which were of the utmost public importance. See *In re Kastner & Co., Ltd.* (1917, Eng. Ch.) 33 Times L. R. 149. The position of the enemy arrested under Presidential warrant or of the tax payer whose property is distrained for non-payment of taxes is analogous. To enjoin the marshal or the tax collector would defeat the purposes of government. The arrested alien can try the legality of the governmental act in *habeas corpus* proceedings, the tax payer in an action at law against the collector. *Pittsburg, etc. Ry. v. Board of Public Works of West Virginia* (1898) 172 U. S. 92, 19 Sup. Ct. 90. Probably the sale of sequestered property might be enjoined, as incidental to proceedings under the Act to determine ownership. Inasmuch as the seizure and sale of enemy property is derived from the power to kill the enemy, it is somewhat doubtful, as a matter of international law, whether such power of sale survives the armistice; or whether it constitutes a belligerent necessity under the power "of disposition to the limits of the necessity" sanctioned in *Miller v. United States, supra*.

CONFLICT OF LAWS—STATUTE OF LIMITATIONS—ACTION BARRED UNDER STATUTE OF FORUM.—In an action brought in Italy on an English contract the defendant pleaded the Italian statute of limitations in bar to the action. The plaintiff replied that the English statute governed and that this statute had not yet run. *Held*, that the enforcement of the English statute of limitations would violate the public policy of the forum and conflict therefore with Art. 12 of the

Preliminary Provisions of the Italian Civil Code. *Sala v. Model* (1916, App. Milan) *2 Rivista di Diritto Commerciale,* 1916, 896.

See COMMENTS, p. 492.

CONSTITUTIONAL LAW—ADMIRALTY—STATE STATUTE OF FRAUDS NOT APPLICABLE TO MARITIME CONTRACT.—In a libel in admiralty in the United States District Court the claimant alleged an oral contract entered into in California with the owner of a vessel, to proceed to Alaska with the vessel and after arrival there to serve one year as master. One of the defenses was that the California Statute of Frauds rendered the alleged contract unenforcible since it was not to be performed within a year. *Held,* that the contract was of a maritime character and not subject to the California statute. *Union Fish Co. v. Erickson* (1919) 39 Sup. Ct. 112.

Art. 3, sec. 2, of the Federal Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." The effect of this grant upon the powers of the states to determine the legal consequences which shall attach to maritime transactions within their borders is even today in doubt. In some cases the federal district courts, which by congressional enactment "have exclusive, original cognizance of all civil cases of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it," have applied common law principles unknown to the maritime law in giving relief, and this has been sanctioned by the Supreme Court. *Atlantic Transport Co. v. Imbrovek* (1913) 234 U. S. 52, 34 Sup. Ct. 733 (libel by stevedore *in personam* against the master for personal injuries suffered while loading a ship). So also the Supreme Court has recognized that a state statute may lay down the rule for the decision of a maritime case in the federal courts. *Peyroux v. Howard* (1833) 7 Pet. 324 (libel *in rem* against vessel allowed where state statute gave lien when none existed according to the general maritime law); *The Lottawanna* (1874) 21 Wall. 558 (lien for repairs on vessel in home port); *The Hamilton* (1907) 207 U. S. 398, 28 Sup. Ct. 133 (state statute giving damages for wrongful death). See also *La Bourgogne* (1908) 210 U. S. 95, 28 Sup. Ct. 664, and note in L. R. A. 1916A 1157. On the other hand we find cases refusing to apply the state law—common or statutory. *Workman v. Mayor of New York* (1900) 179 U. S. 552, 21 Sup. Ct. 212 (refusing to apply rule of the common law of the state where the injury happened, which exempted a municipal corporation from the operation of the principle of *respondeat superior* in the case of the city fire department); *The Roanoke* (1903) 189 U. S. 185, 23 Sup. Ct. 491 (state law cannot create lien for materials used in repairing a foreign ship). The attempt to reconcile these and other more or less similar cases led to the unfortunate "five to four" decision in *Southern Pacific Railway Co. v. Jensen* (1917) 244 U. S. 205, 37 Sup. Ct. 525, commented upon in (1917) 27 YALE LAW JOURNAL, 255. The immediate effect of that decision was to prevent the application to maritime injuries of state laws providing for workmen's compensation, even in the state courts. Congress has attempted to remedy this by a recent statute. See *Cimmino v. John T. Clark & Son* (1918, App. Div.) 172 N. Y. Supp. 478, discussed in (1918) 28 YALE LAW JOURNAL, 281. The general principle laid down in the opinion of the majority in the *Jensen* case—to the effect that state legislation is invalid "if it works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony or uniformity of that law in its international or interstate relations"—was cited in the present case in support of the conclusion reached. It is indeed difficult to reconcile all the decisions with this general principle, and it is still true, as Mr. Justice McReynolds remarked in the *Jensen*

case, that it is "difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation." Additional legislation by Congress upon the subject would seem to be desirable

CONSTITUTIONAL LAW—REGULATION OF INTERSTATE COMMERCE—VALIDITY OF THE "REED AMENDMENT."—The so-called "Reed Amendment" provides as follows: ". . . Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished as aforesaid: *Provided,* That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State . . ." The defendant carried for his own personal use a quart of intoxicating liquor from Kentucky into West Virginia, a state in which the manufacture and sale of intoxicating liquors for beverage purposes was then prohibited. *Held,* that the act of the defendant was a violation of the Amendment and that the latter was a valid regulation of interstate commerce. McReynolds and Clarke, JJ., *dissenting. The United States v. Hill* (1919) 39 Sup. Ct. 143.

The district court had sustained a demurrer to the indictment chiefly on the ground that the statute did not cover transportation for purely personal use. The Supreme Court rejected this contention and also held that the prohibition of the statute was within the power of Congress to regulate interstate commerce. In the light of previous decisions it is difficult to see how a different conclusion could have been reached by the court. In the absence of congressional regulation, states cannot constitutionally exclude articles coming from other states if they are generally recognized as legitimate subjects of commerce. This is put on the ground that such a matter requires national regulation and that the inaction of Congress means that interstate commerce in such articles is to remain open. *Leisy v. Hardin* (1890) 135 U. S. 100, 10 Sup. Ct. 681. Congress, however, has the power to determine that a given matter does not require national regulation and so may permit the state laws to operate. *In re Rahrer* (1891) 140 U. S. 545, 11 Sup. Ct. 865 (holding the "Wilson Act" valid). It can also entirely forbid interstate transportation of such articles as intoxicating liquors, lottery tickets, etc., even though state laws permit their manufacture and sale. *Lottery Case* (1903) 188 U. S. 321, 23 Sup. Ct. 321 (lottery tickets); *Hoke v. United States* (1913) 227 U. S. 308, 33 Sup. Ct. 281 (white slave law); *United States v. Popper* (1899) 98 Fed. 423 (articles intended for the prevention of conception). *Cf.* also *The Abby Dodge* (1912) 223 U. S. 166, 32 Sup. Ct. 310 (excluding from importation deep sea sponges taken by divers—a conservation measure). Moreover, the operation in a particular state of the federal prohibition of interstate commerce in a given article can be made conditional upon the existence of a state law making the bringing of the article into the state in question a criminal offense. *Clark Distilling Co. v. Western Maryland R. Co.* (1916) 242 U. S. 311, 37 Sup. Ct. 180 (sustaining the "Webb Kenyon" Law), commented on in (1917) 26 YALE LAW JOURNAL, 399. The principal case goes one step farther, holding that the operation in a particular state of the federal prohibition of interstate commerce in a given article can be made conditional upon the existence in that state of a state law which while it prohibits the manufacture or sale of the article, does not forbid its importation from other states. The dissenting justices argued that all that the earlier cases had held was that Congress could permit the state laws to operate, not that Congress could

itself conditionally prohibit. This was true of the decision under the Wilson Act—*Leisy v. Hardin*—but the opinion in the *Clark Distilling Co.* case made it very clear that the Webb Kenyon law was sustained on the ground stated above. The nearest analogy is probably that of local option laws, where the state law goes into operation or ceases to operate within a particular portion of the state according to the number of votes cast for or against the proposition involved. Such laws are generally held valid. The cases and arguments of both sides of that question are fully collected in the two cases which follow. *State ex rel. Witter v. Forkner* (1895) 94 Iowa, 1, 62 N. W. 772; *Fouts v. Hood River* (1905) 46 Ore. 492, 81 Pac. 370.

CONTRACTS—ILLEGALITY—COMBINATION TO OBTAIN CONTRACT FROM GOVERNMENT.—The plaintiffs and the defendant, contractors, agreed to join efforts to obtain for the defendant from the United States Government a contract for construction of a military camp. All were to share in performance and in distribution of profits. It was known that the contract would be let not on competitive bids, but on a cost plus percentage basis, with special reference to ability to construct rapidly. The defendant secured the contract; the plaintiffs sued to recover their agreed share of the profits. *Held,* that the plaintiffs were entitled to relief, as the contract was not against public policy. *Anderson v. Blair* (1918, Ala.) 80 So. 31.

The plaintiff, a member of the Imperial Air Fleet Committee, undertook to use his influence with Government officials to secure capital for the development of the defendant's business, for which service he was to be paid a commission. The Government subsequently made an advance to the defendant to assist him in the production of war materials. An action was brought for the unpaid balance of the commission, while the defendant counterclaimed for the part already paid. *Held,* that the contract was illegal and void as contrary to public policy, and would not be enforced in spite of the defendant's failure to plead the illegality, nor would recovery be allowed of the amount already paid under it. *Montefiore v. Menday Motor Company* (1918, K. B.) 119 L. T. Rep. 340.

Combination to obtain contracts from the government is not, today, illegal in itself; and contracts so to combine will be normally enforced by the courts. *Hegness v. Chilberg* (1915, C. C. A. 9th) 224 Fed. 28. It is otherwise when the use of improper means and influence is provided for, which tend to injuriously affect the public service. A contract secured by such means can not of course be enforced against the government. *Crocker v. United States* (1916) 240 U. S. 74, 36 Sup. Ct. 245. Nor can the parties, as being *in pari delicto,* enforce among themselves an agreement so to procure a government contract. *Gulick v. Ward* (1829, Sup. Ct.) 10 N. J. L. 87; but *cf. Whalen v. Brennan* (1892) 34 Neb. 129, 51 N. W. 759 (agreement not to press a bid already entered); on the general subject of *pari delicto,* see (1915) 24 YALE LAW JOURNAL, 255; (1918) *27 ibid.* 1090. This holds true although the contract is harmless on its face, where the means used to carry it out are illegal. *McMullen v. Hoffman* (1899) 174 U. S. 639, 19 Sup. Ct. 839. And where a tendency which contravenes public policy is apparent in the terms of the agreement, enforcement is refused at once, without inquiry into whether the actual proceedings of the parties under that agreement were unlawful. *Henry County v. Citizens' Bank of Windsor* (1907) 208 Mo. 209, 234; 106 S. W. 622, 628; *Brown v. Columbus First National Bank* (1894) 137 Ind. 655, 37 N. E. 158. And the position of the *Montefiore* case is sustained by authority, that where the illegality appears on the face of the declaration, or is disclosed by the plaintiff's evidence, the court will of its own motion refuse enforcement, whether or not the defendant pleads or seeks to waive illegality.

Holman v. Johnson (1775, K. B.) 1 Cowp. 341; *Northwestern Salt Co. v. Electrolytic Alkali Co.* (C. A.) [1913] 3 K. B. 422, 424; *Oscanyan v. Arms Co.* (1880) 103 U. S. 261, 266. Inasmuch as, where there is no question of bribery, the evil of combination appears to lie almost wholly in stifling competitive bids, the holding in *Anderson v. Blair* seems undoubtedly sound, there being no question of bidding, and the tendency of the combination being rather to serve the government's purpose of speedy construction. The closely related question of hiring a man to use his "influence" to procure contracts or advances from the government involves delicate problems of policy and of fact. Where "influence" means only able advocacy, or the weight of reputation for honest, sound judgment, it would seem unobjectionable. Where it meant the jockeying of a hanger-on, our Supreme Court has condemned it flatly. *Providence Tool Co. v. Norris* (1864) 2 Wall. 45. Much would seem to turn on the soundness of the proposition advanced, and of the person or firm to be benefited, as in the *Montefiore* case. And it is believed that both of the cases last cited were influenced by the fact that a person of official or semi-official position was involved in the agreement.

INJUNCTIONS—JURISDICTION OF STATE COURT TO ENJOIN SUIT IN ANOTHER STATE COURT—REASONS FOR EXERCISE.—A Georgia railway corporation was sued in Georgia for the death of plaintiff's husband resulting from an accident which occurred in Alabama. Plaintiff and her deceased husband were residents of Alabama. The Georgia corporation sought an injunction from the Alabama courts restraining the farther prosecution of the Georgia action. It alleged that the plaintiff in the damage suit had chosen the Georgia courts in order to evade the "stop, look, and listen" rule of Alabama, which rule, it alleged, did not obtain in Georgia. *Held,* that the Georgia corporation was not entitled to the injunction. Sayre and Somerville, JJ., *dissenting. Folkes v. Central of Georgia R. Co.* (1918, Ala.) 80 So. 458.

A resident of Georgia obtained personal service in Tennessee upon another resident of Georgia while the latter was temporarily in Tennessee. The operative facts constituting the cause of action—one of so-called transitory character—occurred in Georgia. The defendant in the Tennessee action sought an injunction from the Georgia courts to restrain the farther prosecution of the action in Tennessee. The petition for the injunction alleged, but in general language only, that the law of Tennessee applicable to the case differed from that of Georgia and that the suit was brought there rather than in Georgia in order to "harrass and annoy" the petitioner into paying the amount demanded rather than to go to the expense of a suit in Tennessee. *Held,* that the petition stated no grounds for equitable relief. *McDaniel v. Alford* (1918, Ga.) 97 S. E. 673.

It is well settled that a court of equity has jurisdiction, i. e., power, to enjoin litigants personally subject to its jurisdiction from prosecuting suits in other jurisdictions. *Portarlington v. Soulby* (1834, Eng. Ch.) 3 My. & K. 104; Story, *Equity Jurisdiction* (14th ed.) sec. 1224. It was at one time supposed that the courts of one state had no power to enjoin a suit in the courts of another state. Story, *op. cit.,* sec. 1225. But the law has long been settled to the contrary. *Kempson v. Kempson* (1899, Ch.) 58 N. J. Eq. 94, 43 Atl. 97; 14 R. C. L. 412. However, there is much conflict as to when the jurisdiction will be exercised. The commonest case is where a resident of one state is seeking to evade the laws of his domicile by suing in another state—as, for example, where he sues in the foreign court to evade an exemption law of his own state. In such cases it is usual to grant an injunction. *Wilson v. Joseph* (1886) 109 Ind. 490; *Teeger v. Landsley* (1886) 69 Iowa, 725; (1888) 23 CENT. L. J. 268. So also where the

court is satisfied that the suit in the other state is "vexatious." *Claflin & Co. v. Hamlin* (1881, N. Y. Sup. Ct.) 62 How. Pr. 284. In a case in Alabama decided prior to the *Folkes* case the facts were substantially identical with that case except that both parties were citizens of Alabama. The injunction was granted. *Weaver v. Alabama, etc. R. Co.* (1917, Ala.) 76 So. 364. Where, as in the *Folkes* case, the one asking the injunction is being sued in his own state there seems less reason for interference. In favor of an injunction, however, is the fact that the operative facts all occurred in Alabama, the parties and presumably the witnesses resided there, and the law applicable to determine the substantive rights of the parties is that of Alabama. On the other hand there is the fact that in this and other similar situations the substantive rights of the parties would, according to well-recognized principles of the Conflict of Laws, be settled in other states by the rule laid down by the law of the place where the transaction took place. This is frequently overlooked. For example, in one case an injunction was granted to prevent a bailor from suing a carrier in another jurisdiction where it was alleged the measure of damages would be much larger than in the state granting the injunction. *Dinsmore v. Neresheimer* (1884, N. Y. Sup. Ct.) 32 Hun, 204. On the facts of that case the court in the state in which the action enjoined was brought would, if the case were properly presented, clearly have applied the law of the state granting the injunction. In justification of the *Weaver* case, however, was the fact that the Georgia courts had refused to apply to an "Alabama cause of action" the "stop, look, and listen rule" of that state. *Krogg v. Atlanta, etc. R. Co.* (1886) 77 Ga. 202. The result in the *McDaniel* case seems contrary to that reached by most courts and can hardly be supported as a desirable rule. There was every reason why on the state of facts presented the action should have been tried in Georgia. The operative facts all occurred in that jurisdiction. Both parties and probably the necessary witnesses resided there. The law applicable was that of Georgia. It is difficult to see why a Georgia court should on such a state of facts permit one of its residents to compel another resident to go to the trouble and expense of presenting to a foreign tribunal evidence of both the facts and the Georgia law, even if that tribunal would, if the case were properly presented, apply the Georgia law.

JUDGMENTS—EFFECT OF DISSOLVING INJUNCTION IMPOSED FOR A TRIAL PERIOD—RECOVERY BY CARRIER OF FAIR VALUE OF SERVICES.—A statute of North Dakota prescribed certain rates to be charged by common carriers. By injunction the railroad was compelled to put these into effect. A writ of error was taken up to the Supreme Court, which affirmed the decree without prejudice to the carrier to reopen the case if, after a trial period, the rates proved confiscatory. Subsequently, the case was reopened and the rates were declared to be confiscatory, whereupon a new decree was entered dissolving the injunction. The instant action was brought by the carrier to recover from a shipper the difference between a reasonable rate and the rate which the carrier had been compelled to charge during the period of probation. *Held,* that the carrier could not recover. *Minneapolis, etc. Ry. Co. v. Washburn Coal Co.* (1918, N. D.) 168 N. W. 684.

Where a cause is dismissed "without prejudice," the form of the decree merely bars the plea of *res judicata*. *Bucholz-Hill Trans. Co. v. Baxter* (1912) 206 N. Y. 173, 99 N. E. 180; Ann. Cas. 1914A 1105, and note. Where a court, having jurisdiction and acting under a statute that is apparently constitutional, enters a judgment, absolute in form, but without prejudice to the reopening of the proceedings, the decree is *res judicata* for the period that it is in force, even if it is subsequently replaced by another. See *Missouri Rate Cases* (1912) 230

U. S. 474, 508; 33 Sup. Ct. 976; *Missouri v. Chicago etc. R. R.* (1915) 241 U. S. 533, 36 Sup. Ct. 715. Consequently, when a subsequent decree is entered dismissing the first, the new decree has no retroactive force, but merely concerns the future. It is generally held that where a decree is merely erroneous and not void, a party acting in pursuance of same will be protected, even though it is superseded by a reversal that is retroactive. See Ann. Cas. 1914C 542, note; *Clark v. Rodes* (1876, Ky.) 12 Bush 13. The same rule should hold where a judgment is entered, absolute for a limited time, but subject to change or dismissal thereafter. So in the principal case: *cf. Missouri v. Chicago, etc. R. R., supra;* see also *Knoxville v. Water Co.* (1908) 212 U. S. 1, 29 Sup. Ct. 148. Because of this, the rights of parties who contracted while the first judgment was in force should be considered as finally determined by that judgment and should not be subject to change if that decree is superseded. *Henderson v. Folkstone Waterworks Co.* (1885, Q. B. D.) 1 Times L. R. 329 (suit to recover overcharge by the public service corporation); see also *Missouri v. Chicago, etc. R. R., supra; Palmer v. Foley* (1877) 71 N. Y. 106. Justice may dictate that the carrier be permitted a recovery, where he has been compelled to render service at a confiscatory rate. But justice also dictates that the shipper, who has based his charges to his vendees on the rates charged him at the time for carriage, should not be held to a liability of which he could have no notice, to reimburse the carrier. Any criticism must therefore be directed against the decree which, in putting the debatable rates into effect for a trial period, failed to provide by bond or action for indemnifying the carrier in case those rates should prove confiscatory.

MONOPOLIES—SHERMAN ACT AND CLAYTON ACT—REFUSING TO SELL TO CUSTOMERS WHO CUT PRICES.—Colgate & Company, a corporation, was indicted under the Sherman Anti-Trust Act for entering into a combination in restraint of trade because it agreed with its customers individually upon reasonable prices at which its products might be resold, and declined to deal with those who would not maintain such prices. A demurrer was interposed. *Held,* that the indictment charged no offense. *United States v. Colgate & Co.* (1918, E. D. Va.) 253 Fed. 522.

The manufacturer of Goodyear automobile tires, an Ohio corporation, and its exclusive selling agent, a New York corporation, refused to sell its tires to the plaintiff, a dealer in automobile accessories, because he had cut prices established by the defendants for the resale of their products, and they also declined to sell to other dealers because they sold to the plaintiff contrary to the defendants' rule that their dealers should sell only to consumers. Upon these facts the plaintiff sought to recover treble damages upon two causes of action (1) under the Sherman Act and (2) under the Clayton Act. The defendants demurred. *Held,* that the complaint stated no cause of action. *Baran v. The Goodyear Tire & Rubber Co.* (1919, U. S. D. C., S. D. N. Y.) 60 N. Y. L. J. 1513 (Feb. 7, 1919).

It has been established in recent years by the court of final authority that a manufacturer or dealer cannot by printed notice attached to the goods he sells impose restrictions on their resale price which will bind persons into whose hands they may later come; nor can he by contract with his immediate vendee impose a contractual duty upon the latter to maintain resale prices. And this is true not only of ordinary chattels but also of patented and copyrighted articles. *Dr. Miles Medical Co. v. Park & Sons Co.* (1911) 220 U. S. 373, 31 Sup. Ct. 376; *Motion Picture Patents Co. v. Universal Film Mfg. Co.* (1917) 243 U. S. 502, 37 Sup. Ct. 376; see also (1917) 26 YALE LAW JOURNAL, 270, 600, and (1918) 27 *ibid.* 397. Such notices and contracts are unenforcible because they are thought to be

in restraint of trade and hence illegal both at common law and under the prohibitions of the Sherman Act. *Boston Store v. American Graphophone Co.* (1918) 246 U. S. 8, *22*, 38 Sup. Ct. *257*, *259*; but see dissent of Holmes, J. in *Dr. Miles Medical Co.* case. These authorities, however, are not conclusive on the question presented by the two recent cases under discussion. Discrimination between the several classes of cases is necessary. The first class relates to the vendor's legal *powers* as to third parties: he has no power to impose price restrictions on any sub-vendee in respect to goods with the title to which he has parted. The second class relates to his *rights* against the immediate vendee: he can acquire no right that the latter shall resell at an agreed price. The third class, exemplified by the instant cases, relates to his *privileges*: he is privileged, both as against his customer and as against the State, to refuse to deal with customers who decline to maintain reasonable resale prices. Obviously a man is generally privileged to sell or to refrain from selling his products for any reason he pleases. When a business is affected with a public interest, like railroading, the owner may lose his privilege of refusing to deal with a customer for capricious reasons. When the exercise of a privilege is contrary to public policy as declared by some statute, it may be lost. But it is believed that the above cases are right in construing the Sherman Act as not destroying this privilege of a manufacturer who has no monopoly of the market, and especially when the resale prices he seeks to maintain are not unreasonable. Earlier cases are in accord. See *Great Atlantic & Pac. Tea Co. v. Cream of Wheat Co.* (1915, S. D. N. Y.) 224 Fed. 566; s. c. (1915, C. C. A. 2d) *227* Fed. 46; *Whitwell v. Continental Tobacco Co.* (1903, C. C. A. 8th) 125 Fed. 454. As pointed out by Judge Waddill in the *Colgate* case, price-cutting is frequently in the long run detrimental rather than beneficial to the public. See also *The Right to Refuse to Sell* (1916) 25 YALE LAW JOURNAL, 194. For the reasons stated by Judge Hand in the *Goodyear* case, it is also believed that the Clayton Act did not destroy the Rubber Company's privileges to do the acts complained of.

PROHIBITION—FUNCTIONS OF THE WRIT.—The city of Cleveland had sought in the Court of Common Pleas an injunction against the Cleveland Telephone Company to restrain it from charging rates higher than those fixed in the city ordinance. At the time a proceeding was being carried on before the State Public Utilities Commission to determine the reasonableness of a schedule of telephone rates filed with it by the Telephone Company, which contended that the Commission had sole power to fix such rates. The Company as relator now sought a writ of prohibition from the Supreme Court restraining the Common Pleas from going on with the injunction proceeding. *Held,* that the relator was not entitled to have the writ issued, as the Common Pleas had jurisdiction to determine which body had power to fix the rates. Wannamaker, J., *concurring* specially; Jones, J., *dissenting. State ex rel. Cleveland Telephone Company v. Court of Common Pleas* (1918, Ohio) 120 N. E. 335.

See COMMENTS, p. 482, *supra.*

PROPERTY—ADVERSE POSSESSION BY TRUSTEE UNDER TRUST VOID AS PERPETUITY.—The testatrix in 1886 executed a declaration of trust of certain real estate in Baltimore, containing a provision in favor of the American Colonization Society. Upon her death in 1890 the trustees filed their petition and took possession under order of the court. More than twenty years later the testatrix's heirs and residuary legatees had the trust declared void, as an active trust with no time limit in violation of the rule against perpetuities in Maryland. But the

heirs were held barred from recovering the realty by the adverse possession of the trustees for 27 years. The Colonization Society then filed their bill against the trustees demanding the corpus of the property; the State filed its bill claiming the property as escheat. *Held,* that neither plaintiff was entitled to relief. *American Colonization Society v. Latrobe* (1918, Md.) 104 Atl. 120; s. c. (1917) 131 Md. 296, 101 Atl. 780; s. c. (1917) 129 Md. 605, 99 Atl. 944, L. R. A. 1917C 937.

See COMMENTS, p. 488, *supra.*

TORTS—EXPECTATION OF BENEFIT—INTERFERENCE BY OUTSIDER.—The plaintiff sued for damages, alleging that the defendant had negligently driven piles through the intake pipes of a city's water system; that before the damage was repaired a house insured by the defendant took fire, and burned down because the defendant's negligence had prevented the municipality from furnishing water enough to quench the fire. *Held,* on demurrer, that the complaint stated a cause of action. *Concordia Fire Ins. Co. v. Simmons Co.* (1918, Wis.) 168 N. W. 199.

A tort action will lie for wilfully inducing a third party to break a contract with the plaintiff. *Lumley v. Gye* (1853, Q. B.) 2 E. & B. 216; *Knickerbocker Ice Co. v. Gardiner Dairy Co.* (1908) 107 Md. 574, 69 Atl. 405, 16 L. R. A. (N. S.) 746 and note; but see *Jackson v. Morgan* (1911) 49 Ind. App. 376, 94 N. E. 1021. *A fortiori* should it lie where the defendant, not indirectly by persuasion, but by his sole direct act, wilfully prevents performance of a duty to the plaintiff. Nor has recovery been limited to persons having a contract immediately with the party prevented. *Wakin v. Wakin* (1915) 119 Ark. 509, 180 S. W. 471, commented on (1916) 25 YALE LAW JOURNAL, 407 (where plaintiff was liable to indemnify the surety on a bond, forfeiture of which defendant induced). Nor has it always been insisted on that the defendant's action be wilful. *Twitchell v. Glenwood-Inglewood Co.* (1915) 131 Minn. 375, 155 N. W. 621 (notice of third party's duty to plaintiff was enough); *Wilkins v. Weaver* [1915] 2 Ch. 322; but see (1916) 25 YALE LAW JOURNAL, 509. The principal case stands on what at first seems less cogent ground. A taxpayer has no right against either the municipality, or a water company under contract with the municipality, that they shall furnish him water to protect his property from fire. *Wallace v. Mayor, etc. of Baltimore* (1914) 123 Md. 638, 91 Atl. 687; (1918) 27 YALE LAW JOURNAL, 1008, 1018. But he has a reasonable expectation that they will, to his benefit, exercise their legal privilege so to furnish. Some similar expectations the law protects, by imposing duties on third parties not to interfere in certain ways with the realization of the expectation. So with good will, i. e., the expectation that third parties will exercise their privilege of dealing with the plaintiff; so with the expectation of "free flow of labor"; so with an employer's expectation that his men, barring outside persuasion, will continue to exercise their privilege of working for him. See Cook, *Privileges of Labor Unions* (1918) 27 YALE LAW JOURNAL, 779, commenting on *Hitchman Coal & Coke Co. v. Mitchell* (1917) 38 Sup. Ct. 65; *Lewis v. Bloede* (1912, C. C. A. 4th) 202 Fed. 7; *Hutton v. Waters* (1915) 132 Tenn. 527, 179 S. W. 134, L. R. A. 1916B 1238. So also perhaps, with an expectation that a testator will allow his property to come to the plaintiff. See (1917) 27 YALE LAW JOURNAL, 263. Nor need the expectation be always that another person confer the benefit. *Keeble v. Hickeringill* (1809, K. B.) 11 East, 574 (frightening away birds ordinarily landing on plaintiff's property). But in all the above cases "malice" was involved: i. e., a will to damage the plaintiff, without such justification as made the damaging privileged. The principal case presents the question how far expectations otherwise protected by the law should also be protected against *negligence* of third parties, where no malice is involved.

In the case of "interference" with contracts, the answer has sometimes been: not at all, although loss was caused to the plaintiff immediately by the defendant's act. *La Société Anonyme de Remorquage à Hélice v. Bennetts* [1911] 1 K. B. 243, 27 L. T. Rep. 77 (defendant sank a barge plaintiff was actually engaged in towing); see also *Homan v. Hall* (1917, Neb.) 165 N. W. 881, (1918) 27 YALE LAW JOURNAL, 704. Yet, where the loss suffered was similarly immediate a mere—though very actual—expectation has been protected. *Metallic Compression Casting Co. v. Fitchburg R. Co.* (1872) 109 Mass. 277 (hose actually serving to put out fire negligently cut by defendant). The principal case is weaker in two ways: the damage to the water system was done with no notice of active danger to the plaintiff; and it was done a week before the fire. Both notice and immediacy may well be of importance in determining the reaction of community sentiment and so of the law. It is to be noted that the chain of causation in such cases is unusually long. It must be shown that the thing desired would have benefited the plaintiff, had it occurred, e. g., put out the fire; that it would in reasonable expectation have occurred; and that it was the defendant's act which prevented its occurrence—the causation here being further weakened in all persuasion cases by the factor of the "persuadee's" own will. It is believed that extension of such protection of expectations, against negligence, will turn on two factors: on a strict requirement of immediacy of causation—which might have served to distinguish the instant case from that in Massachusetts—; and on the policy of limiting the number of actions arising out of one act, recovery being denied to a party damaged only in second instance, when the act gives a cause of action to the party more directly injured—which would serve to distinguish the contract cases denying recovery.

TORTS—ILLEGAL OPERATION OF JITNEY BUSSES—RIGHT OF STREET RAILWAY TO INJUNCTION.—The defendant was operating jitney busses without license or bond, in violation of the statute. The plaintiff, a street railway with which the defendant competed, sued to enjoin further illegal operation. *Held*, that the injunction be granted, as the defendant's acts were an actionable interference with the plaintiff's property in its franchise; and as the defendant's illegal use of the public streets constituted a public nuisance to the special damage of the plaintiff. *Puget Sound Traction, etc. Co. v. Grassmeyer* (1918, Wash.) 173 Pac. 504.

See COMMENTS, p. 485, *supra*.

TORTS—MENTAL SUFFERING—NEGLIGENT LOSS OF ASHES OF DECEASED CHILD.—The plaintiffs had paid the defendant $12 to cremate the body of their child, to supply an urn for the ashes, and to keep them until called for. Three years later, when the ashes were demanded, they could not be found; whereupon the plaintiffs brought suit on two counts, one sounding in contract, the other in tort for negligent loss of the ashes, entailing mental suffering. Upon verdict judgment was entered for $12 on the first count and for $300 on the second. *Held*, that the judgment on the count sounding in tort was erroneous, as no damages were recoverable for mental suffering where there was no accompanying "physical invasion" of the plaintiffs' rights. *Kneass v. Cremation Society* (1918, Wash.) 175 Pac. 172.

It is generally recognized that the next of kin has a right, for the purpose of burial, to the body of the deceased in the same condition in which it was at the time of death. Violation of this right by negligent or wilful mutilation of the body gives rise to a right to recover increased burial expenses as compensatory damages. See *Long v. Chicago, etc. R. Co.* (1905) 15 Okla. 512, 520; 86 Pac.

289, 292. And mental suffering caused by wilful violation of the right may be compensated in damages. *Finley v. Atlantic Transportation Transport Co.* (1917) 220 N. Y. 249, 115 N. E. 715, commented on (1917) 26 YALE LAW JOURNAL, 790; *Larson v. Chase* (1891) 47 Minn. 307, 50 N. W. 238. Many states admit such recovery, although the violation of the right is merely negligent. *Wright v. Beardsley* (1907) 46 Wash. 16, 89 Pac. 172 (negligent burial); *Renihan v. Wright* (1890) 125 Ind. 536, 25 N. E. 822; *Kyles v. Southern R. Co.* (1908) 147 N. C. 394; 61 S. E. 278; *contra, Long v. Chicago, etc. R. Co., supra; Awtrey v. Norfolk, etc. R. Co.* (1917) 121 Va. 284, 93 S. E. 570, commented on (1918) 27 YALE LAW JOURNAL, 416 (omission to notify before burial; distinguishable because of the bailment in the principal case). The principal case presents, apparently for the first time, the question of whether the rule should be extended to cover the case of ashes after cremation. It has been argued that in the case of the body recovery is wholly anomalous, since the plaintiff would have no recovery for his mental anguish if the injury had been inflicted on the body of another which was alive, not dead. But this contention applies with equal force to, and is refuted by the cases involving wantonness, and can hardly be invoked to deny extension of the rule to ashes. It is believed that the same rules should apply throughout to the ashes as to the body. The interest to be protected is the next of kin's satisfaction in fitting disposal of the remains, which is equally strong in the two cases. It has, however, been argued, as in the principal case, that mental suffering produced by negligence will never be compensated unless it accompanies actionable physical damage to the plaintiff. *Awtrey v. Norfolk, etc. R. Co., supra.* This argument in such cases as the present seems to rest on a confusion. In the case of the living, the interest in peace of mind and that in peace of body are intimately connected in fact; normally the one is not violated save in conjunction with the other. But the interest in a dead body has none of the elements of physical enjoyment. A "physical invasion" of that interest is unthinkable. *Cf.* (1918) 28 YALE LAW JOURNAL, 171. Mutilation, desecration, improper burial, and loss, all have from this angle one and the same effect: to lacerate the feelings of the living. It may be that that protection should not be accorded against mere negligent violation; but that question should be settled on its own merits: to require accompanying "physical injury" is to require the factually and logically impossible. The same would seem to hold true of ashes. That the change in physical and chemical form has produced a thing capable of true ownership ought not, it is believed, to alter the nature of the protection accorded the only serious interest involved, any more than does the possibility that a corpse might by lawful appropriation to scientific purposes become property. *Cf. Long v. Chicago, etc. R., supra.* The principal case, though attempting to distinguish *Wright v. Beardsley, supra,* has in effect overruled that case, and, it is believed, on insufficient grounds.

WORKMEN'S COMPENSATION—ILLEGAL EMPLOYMENT OF MINOR—COMPENSATION ACT NOT APPLICABLE.—In violation of a state law defendants employed in their store a girl under fourteen. They in good faith believed her to be over that age, as she so represented and also produced a "permit" from a government official. She was killed because of defendant's negligence. In an action brought to recover damages to her estate the defendants claimed that as both they and the deceased had accepted the Workmen's Compensation Act, recovery could be had only under its provisions. *Held,* that her estate was entitled to recover on the statutory liability for negligently causing death. *Sechlich v. Harris-Emery Co.* (1918, Iowa) 169 N. W. 325. In a similar action in New York the same result was reached. *Wolff v. Fulton Bag & Cotton Mills* (1918, App Div.) 173 N. Y. Supp. 75.

The court held that the employment of the deceased was unlawful, even though defendants in good faith believed her to be over fourteen. The agreement on her part to accept the terms of the Compensation Act was therefore not legally effective. Many of the earlier cases in other jurisdictions, cited in the opinion, did not involve the element of misrepresentation by the employee and consequent good faith on the part of the employer. If we accept the court's interpretation of the law forbidding child labor—an interpretation which is in accord with the great weight of authority—the conclusion reached in the principal case logically follows. But where the minor is lawfully employed to do certain kinds of work and is given a prohibited kind to do, it has been held that since the original contract of employment was lawful, recovery can be had only under the Compensation Act. *Foth v. Macomber & Whyte Rope Co.* (1915) 161 Wis. 549, 154 N. W. 369. *Contra: Lostutter v. Brown Shoe Co.* (1916) 203 Ill. App. 517. The question may be raised whether, even if the minor is entitled to damages because his agreement is not binding on him, he may not, if he prefers, hold the employer to the latter's agreement to accept the terms of the Compensation Act. In the law of contracts it is held that an adult cannot set up the infancy of the plaintiff as a defense to an action at law for damages, so long as the infant has not disaffirmed. *Harris v. Musgrove* (1883) 59 Tex. 401. Because of the lack of mutuality, however, the infant while still under age cannot have specific performance. *Flight v. Bolland* (1828, Eng. Ch.) 4 Russ. 298. Nevertheless, in the only case which has been found deciding the point it was held, simply on the authority of the cases permitting the infant to treat his agreement as a nullity, that he could not elect to take compensation instead of damages. Apparently the court took the view that he was not an "employee" within the meaning of the Compensation Act. *Messmer v. Industrial Board* (1918, Ill.) 118 N. E. 993.