RECENT CASE NOTES

AGENCY—AGREEMENT WITH BROKER GIVING "EXCLUSIVE SALE."—The defendant signed a written agreement giving the plaintiff, a real estate broker, the "exclusive sale" of certain land for a specified period, promising to pay an agreed commission. The broker paid nothing for the promise nor did he in words agree to undertake the sale. But he did spend time and money trying to sell the property. Before he succeeded the defendant made the sale himself. Plaintiff sued for his commission. *Held,* that the plaintiff could not recover, since the promise was gratuitous. *Roberts v. Harrington* (1918, Wis.) 169 N. W. 603.

See COMMENTS, p. 575, *supra.*

BANKRUPTCY—INSURANCE POLICIES—RIGHTS OF TRUSTEE UNDER EXEMPTION STATUTES.—The bankrupt took out two policies of life insurance, one payable to his executors or assigns and the other to his brother and sister, with full power in the insured to change the beneficiaries. At the time of the bankruptcy his wife was the beneficiary of both policies, provided "she outlives" the insured, with power reserved in him to change the beneficiary or surrender the policies at any time, thus realizing their cash value. When the policies were demanded by his trustee in bankruptcy he contended that the beneficiary's interests could not be defeated, because of a Georgia statute which provides: "The assured may direct the money to be paid to his personal representatives or to his widow or to his children or to his assignee; and upon such direction given and assented to by the insurer no other person can defeat the same. But the assignment is good without such assent." *Held,* that the policies passed to the trustee. *Cohn v. Malone* (1919) 39 Sup. Ct. 141.

Where there is no local exemption statute, all the life and endowment policies of the bankrupt which have an actual cash value pass to the trustee. *Equitable Assurance Soc. v. Miller* (1911, C. C. A. 8th) 185 Fed. 98 (endowment); *Cohen v. Samuels* (1917) 245 U. S. 50, 38 Sup. Ct. 36 (life); see (1918) 27 YALE LAW JOURNAL, 403. And this is true although the insured has not reserved the power to change the beneficiary. *In re Boardman* (1900, D. Mass.) 103 Fed. 783 (endowment); *In re Coleman* (1905, C. C. A. 2d) 136 Fed. 818 (life). In a majority of jurisdictions statutes are in force which exempt from the claims of creditors insurance policies payable to the insured's wife or immediate relatives. Such policies do not pass to the trustee in bankruptcy, because of the exemption of sec. 6 of the Bankruptcy Act. And this section is not limited by sec. 70a. *Holden v. Stratton* (1905) 198 U. S. 202, 25 Sup. Ct. 656. Even when the insured has power to change the beneficiary, it is generally held that the policy is covered by such exemption. *In re Orear* (1911, C. C. A. 8th) 189 Fed. 888; *contra, In re Loveland* (1912, D. Mass.) 192 Fed. 1005, reversed on another point (1912, C. C. A. 1st) 200 Fed. 136. The minority view, as illustrated by the case last cited, reasons that the power to change the beneficiary gives the insured such dominion over the policy as to make it an asset of his estate. The principal case places a construction upon the Georgia statute which in effect adopts this view. If, as would seem to be true, the insured's "dominion over the policy" lies in his power to defeat the beneficiary's interest, the same result would logically be reached where the insured has power to so defeat it by surrendering the policy for cash. So it has been held. *In re White* (1909, C. C. A. 2d) 174 Fed. 333. It is made even clearer that this interest should pass as an asset, by the fact that the insured can assign it at will. See (1918) 27 YALE LAW JOURNAL, 1083. It is submitted, therefore, that if the minority doctrine be applied to such

statutes, they logically become of no effect whatever as regards the Bankruptcy Act. For no policy having any cash value, whether realizable through assignment, through change of beneficiary, or through surrender, even where there is no power to change the beneficiary, would be exempt. Such a result, it is submitted, defeats the purpose of the statute. It might, however, be avoided by making a distinction: exempting a policy which must be surrendered and cancelled to defeat the beneficiary, and not exempting one where he may be defeated and the policy still kept alive.

CONFLICT OF LAWS—FULL FAITH AND CREDIT—CONCLUSIVENESS OF RECITAL OF SERVICE IN STATE JUDGMENT.—An action was brought in Michigan on a Pennsylvania judgment. One of the defenses was that the defendant had neither been served with process in the Pennsylvania action nor been given any notice of the same. *Held,* that these facts, if true, constituted a defense. *Smithan v. Gray* (1918, Mich.) 168 N. W. 998.

See COMMENTS, p. 579, *supra.*

CONSTITUTIONAL LAW—RATE FIXING STATUTE—SUPERVENING UNCONSTITUTIONALITY—SUPERVENING BECAUSE OF CHANGING CONDITIONS.—The plaintiff, a corporation furnishing gas to the city of Albany, brought action for an injunction against the further enforcement of a rate-fixing statute passed in 1907. The corporation alleged that with the rise in the cost of gas-producing the rates had become confiscatory. The defendants maintained that the statute in question, having admittedly been constitutional when passed, could not later be attacked. *Held,* that the complaint stated a cause of action. (1919, N. Y.) 121 N. E. 772.

See COMMENTS, p. 592, *supra.*

CORPORATIONS—REINSTATEMENT AFTER FORFEITURE—LIABILITY OF DIRECTORS.—A New Jersey statute provided that a corporation failing to pay a tax assessed against it for two successive years should on proclamation by the governor forfeit all powers conferred upon it by law, which powers should be deemed thereafter "inoperative and void." The defendant was a director in the Crosthwaite and Cannon Company, which neglected to pay such tax; wherefore the governor proclaimed their charter void. The company continued to carry on its business and entered into a contract with the plaintiff who, alleging breach on the part of the corporation, brought suit for damages, but against the directors individually. The defendants set up that the governor, after his proclamation of cancellation, has issued an order reinstating the corporation in all its franchises *nunc pro tunc. Held,* that the plaintiff was not entitled to recover; one ground being that one who contracts with a corporation whose franchise has been terminated by the state for failure to pay a tax must be deemed to have contracted "under the implied agreement" that the corporation might be reinstated, and any individual liability of the directors thereby barred. *Held v. Crosthwaite* (1918, S. D. N. Y.) 60 N. Y. L. J. 661 (Nov. 27, 1918).

There seems no reason to question the soundness of the decision. It is at least doubtful whether the directors were ever liable. Forfeiture of a corporation's charter for misuser or non-user of corporate franchises can ordinarily take effect only on judgment in a proper *judicial* proceeding brought by the state. 7 R. C. L. 731; Clark & Marshall, *Corps.* sec. 213. And the state may waive the forfeiture. Clark, *Corps.* (3d ed., 1916) 306. The charter itself may indeed reserve to the *legislature* power to revoke. *Greenwood v. Union Freight Ry.* (1881) 105 U. S. 13. But it does not follow that such reservation is self-executory. *New York, etc. Co. v. Smith* (1896) 148 N. Y. 540, 42 N. E. 1088; and see 2 Morawetz, *Corps.* sec. 1006; 8 Am. St. Rep. 803, note. Even less will a *general statute* be necessarily self-executory, when it provides that non-compliance

with given conditions will *ipso facto* work forfeiture. *Cluthe v. Evansville, etc. R. R.* (1911) 176 Ind. 162, 95 N. E. 543; Ann. Cas. 1914A 935, note. That question seems to depend on the legislature's intent. *Kaiser, etc. Co. v. Cary* (1909) 155 Cal. 638, 103 Pac. 341; Clark, *Corps.* (3d ed., 1916) 301. It has been held that executive proclamation could not take the place of a judicial decree. *Shand v. Gage* (1877) 9 S. C. 187. There seems, therefore, good ground to believe that unless the statute was itself of the kind deemed self-executory a governor's proclamation, as in the instant case, could not put the corporation entirely out of business. Even if it could, the question would arise whether the making of the proclamation without a hearing would not violate due process. *Cf.* (1919) 28 YALE LAW JOURNAL, 391. But assuming a valid non-judicial forfeiture, it does not follow that the directors incurred personal liability in carrying on the corporate business. After such forfeiture the body often has at least some of the marks of a *de facto* corporation. In the majority of jurisdictions it can still contract, and can sue and be sued as a corporation on contracts made both before and after forfeiture. *Gilmer Creamery Assn. v. Quentin* (1908) 142 Ill. App. 448; *Lively v. Picton* (1914, C. C. A. 6th) 218 Fed. 401; *Stark Electric Ry. v. McGinty* (1917, C. C. A. 6th) 238 Fed. 657; *Greenbrier Lumber Co. v. Ward* (1887) 30 W. Va. 43, S. E. 227. It can be proceeded against in bankruptcy. *In re Munger Tire Co.* (1908, C. C. A. 2d) 159 Fed. 901. Whether or not the body is like a *de facto* corporation in regard to personal liability of the directors, the instant case is clearly sound in holding that any rights against the latter are held subject to a liability of being divested and replaced by rights solely against the corporation, at once on the latter's reinstatement.

CRIMINAL LAW—EXTORTION—WHAT CONSTITUTES "INJURY TO PROPERTY."—The defendant, an elevator inspector, obtained $50 from J. S. by threatening to report falsely that his elevator was defective. An indictment thereupon charged the defendant with obtaining money by extortion, "by the wrongful use of force and fear, induced by the threat of the defendant to do an unlawful injury to his property." It appeared that J. S. had no license to run an elevator. *Held,* that the defendant was guilty of extortion and that preventing further use of the elevator would be an "injury to property." *People v. Sheridan* (1919, N. Y. App. Div.) 60 N. Y. L. J. 1783 (Mar. 3, 1919).

The term "property" may be used to describe physical objects or as an inclusive term to describe those general or "multital" jural relations commonly known as *rights in rem.* In the present case there was no threat to do injury to physical objects. The threat to prevent use of the elevator would have been a threat to destroy a valuable property *privilege* but for the fact that J. S. had no permit and seems therefore not to have had such a privilege. Even without a legal privilege, however, J. S. could physically operate the elevator, and this gave him a valuable *factual* interest. It was by no means unreasonable in the instant case to extend the meaning of the word "property" to cover this factual interest, especially as the term is used in an extortion statute. In a prosecution under the same statute the court had said in a previous case: "The word, as here used, is intended to embrace every species of valuable right and interest, and whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property." *People v. Warden* (1911, N. Y.) 145 App. Div. 861, 863, 130 N. Y. Supp. 698. Here "right" is evidently used to include all the jural relations involved—the *jural* interest; and the term "interest" would naturally include mere physical relations—a *factual* interest. In applying this language, however, the instant decision goes beyond the earlier cases; for in the latter the injury threatened was directed to existing *jural* relations— a true *legal* interest; the complainant there had multital rights that there should be no inter-

ference with his labor supply or his employment. *People v. Warden, supra* (threat to cause complainant's discharge, a "right to labor" being described as property); *People v. Barondess* (1891, N. Y. Sup. Ct.) 61 Hun, 571 (threat to prevent striking workmen from returning); *People v. Weinseimer* (1907, N. Y.) 117 App. Div. 603, 102 N. Y. Supp. 579 (same).

EASEMENT AND LICENSE—PAROL LICENSE IRREVOCABLE BY EXECUTION—EASEMENT BY "ESTOPPEL BY DEED."—The defendant owned the rear half of a lot with a "right of way" over a strip of the front half of the lot. This strip was immediately adjacent to the plaintiff's land and to the road thereon which he used to reach the rear part of his lot. An oral agreement was made between the plaintiff and the defendant to unite the roads, exchanging mutual licenses, the defendant professing to have power to give the privilege of using his road to the plaintiff. Pursuant to the agreement the plaintiff incurred considerable expense in removing the dividing fences and otherwise improving the common road. The defendant sometime later acquired title to the servient front half of the lot and then undertook to keep the plaintiff off that part of the common road situated thereon. The plaintiff brought suit to quiet title to his easement and for an injunction. *Held,* that an injunction would issue. *Chamberlin v. Myers* (1918, Ind. App.) 120 N. E. 600.

(1) The authorities are not in agreement with respect to the power to revoke a license relating to real property, where the privilege conferred has been exercised with considerable outlay of money. Washburn, *Real Property* (6th ed., 1902) secs. 843-846; 10 R. C. L. 792; Ann. Cas. 1913A 74 note; see (1917) 26 YALE LAW JOURNAL, 395. It is settled in Indiana, however, that on equitable principles such a license is irrevocable where the licensee cannot be placed in *statu quo*. *Ferguson v. Spencer* (1890) 127 Ind. 66, 25 N. E. 1035; *Jann v. Standard Cement Co.* (1914) 54 Ind. App. 221, 102 N. E. 872; for analysis and comparison of easement and license see (1917) 27 YALE LAW JOURNAL, 66. (2) But admitting in the normal case this immunity from revocation, it was contended in the principal case that the giver of the license had merely a right of way in the strip and therefore had no power to give such license; that therefore the licensee could by virtue of his license have acquired no privilege of user to which the immunity claimed could attach. The doctrine of estoppel by deed is an answer to such a contention, where the question involves a professed grant of a fee in land later acquired by the grantor. 16 *Cyc.* 686. The same doctrine applies where a limited estate, an easement, purports to be granted by deed. Washburn, *Easements and Servitudes* (3d ed., 1873) 96; Goddard, *The Law of Easements* (Bennett's ed., 1880) 95; *Ewing v. DeSilver* (1822, Pa.) 8 Serg. L. R. 92; *Jarnigan v. Mairs* (1840, Tenn.) 1 Humph. 473; *Swedish-American Natl. Bank v. Connecticut Mutual, etc. Co.* (1901) 83 Minn. 377, 86 N. W. 420. The principal case appears wholly sound in coupling the two doctrines, and recognizing against the parol licensor whose license has thus become equivalent to an easement by deed, an estoppel—as if by deed—to deny his original power to confer either the license or the easement into which it has ripened.

EMINENT DOMAIN—ABANDONMENT OF ROAD—COMPENSATION TO ABUTTING OWNERS.—The plaintiff owned a farm abutting on a county highway, which was the only means of access to his land. The county "abandoned" the road. The plaintiff, claiming that he had lost a "special easement right" in the road, apart from that lost by the public at large, and that his land had suffered depreciation in value, sued the county for taking his private property without due compensation. *Held,* that the plaintiff was entitled to damages. *Morris v. Covington County* (1919, Miss.) 80 So. 337.

A city or county may have the *power* to abandon any road and extinguish all

persons' privileges to pass along it. *Davis v. County Comrs.* (1891) 153 Mass. 218, 26 N. E. 848. The county is under no *duty* to non-abutting owners not to exercise that power. *Enders v. Friday* (1907) 78 Neb. 510, 111 N. W. 140; but see *Falender v. Atkins* (1917, Ind.) 114 N. E. 965. And "non-abutting owners" seem to include those whose property touches only the end of the road. *Kingshighway Supply Co. v. Banner Iron Co.* (1915) 266 Mo. 138, 181 S. E. 30. But all courts recognize that an abutter has an interest in access to his land by the highway, and, recognizing a *de facto* condition, have laid a duty on the county, to the abutter, not to extinguish his interest by abandoning the road. Nor can a statute do away with this duty. *Coyne v. Memphis* (1907) 118 Tenn. 651, 102 S. W. 355. The stranded owner has no power to condemn an easement of way into his land; the purpose would be private. But resort is had in his favor to the law of eminent domain. Some courts hold the abutter's interest—his "special easement," "appurtenant to his land"—to be "property" which is "taken" by an abandonment. *Cincinnati, etc. R. v. Cumminsville* (1863) 14 Ohio St. 523; see also *Bigelow v. Ballerino* (1896) 111 Cal. 559, 44 Pac. 307. This is certainly sound so far as it holds the legal relation, the *privilege* of passage, to be property. *Cf.* (1918) 28 YALE LAW JOURNAL, 171. And it may be that "taking for the public use" fairly covers the destruction for private benefit of an individual's privilege or other property, even without the acquisition by the public of any corresponding interest. Some courts, however, unwilling to so construe "'taking," or unable to think of property save as a physical thing, have refused compensation. See *Hunt v. Atlanta* (1897) 100 Ga. 274, 28 S. E. 65. This has been largely remedied by statutes requiring compensation for *damaging* as well as for *taking* property in the public interest. 15 L. R. A. (N. S.) 49, note, at p. 56. Under such statutes, and even under the first-mentioned line of decisions, compensation would seem requisite where access was cut off from one direction only—the *cul-de-sac* cases—or made more difficult: longer or steeper. But as the damage becomes less appreciable, the cases fall into the tone of police power cases generally; compensation is given or not, at bottom, according as the court feels the individual loss thrown on the plaintiff to be only a little, or outrageously much, greater than that suffered by the public at large. *Cf.* (1918) 27 YALE LAW JOURNAL, 393. The actual decisions conflict generously. *Vanderburgh v. Minneapolis* (1906) 98 Minn. 329, 108 N. W. 480, 6 L. R. A. (N. S.) 269 (recovery; "consequential" damage to property); *McCann v. Clark County* (1910) 149 Iowa, 13, 127 N. W. 1011. *Contra, Stanwood v. Malden* (1892) 157 Mass. 17, 31 N. E. 702 (mere diversion of traffic; no recovery); *Burkley v. Omaha* (1918, Neb.) 167 N. W. 72. Another prolific source of conflict is the attempt—believed improper—which is made by some courts to found the right of recovery on an implied term in the contract of dedication of the highway; this has led to distinctions between city streets and county roads, and between land fronting on the side and on the end of a road which, it is submitted, run counter to common sense. *Cf. Levee District v. Farmer* (1894) 101 Cal. 178, 35 Pac. 569; *Bradbury v. Walton* (1893) 94 Ky. 163, 21 S. W. 869; *Kingshighway Supply Co. v. Banner Iron Co., supra.*

EMINENT DOMAIN—TAKING FOR A PRIVATE PURPOSE—LIABILITY FOR INSTITUTING PROCEEDINGS.—The defendant water company instituted proceedings to condemn the plaintiff's land, professedly for a public but in fact for a private purpose. The proceedings were abandoned before the determination of compensation and the plaintiff brought an action in tort for damages sustained in being hindered and delayed in the timbering operations on his land. There was no physical interference with the possession of the plaintiff. *Held,* that the plaintiff could recover the actual damages suffered. *Sidelinker v. York Shore Water Co.* (1918, Me.) 105 Atl. 122.

See COMMENTS, p. 588, *supra.*

LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS—STATEMENT AS TO CREDIT PUBLISHED TO MEMBERS OF MERCHANTS' PROTECTIVE ASSOCIATION.—The Perry Merchants' Protective Association was declared in its constitution and by-laws to be organized for the protection of its members against "those who live on the confidence of humanity, and against loss by reason of extension of credit to those unworthy of trust." The defendant caused to be published among the other members the name of the plaintiff as one who had failed to pay his account. The plaintiff sued for libel, claiming that the publication by innuendo charged him with belonging to the objectionable classes mentioned. *Held,* that the innuendo was not supported by the communication, since the latter related merely to the plaintiff's financial ability; and that the communication to other members of facts regarding such ability was privileged. *Putnal v. Inman* (1918, Fla.) 80 So. 316.

A publication as to the financial stability of possible customers made by an association of traders—or others interested in extending credit—in order to protect its members, may be privileged. *Woodhouse v. Powles* (1906) 43 Wash. 617, 86 Pac. 1063; *Barr v. Musselbrugh Merchants' Assn.* (1912, Ct. Sess.) 49 Sc. L. R. 102; *McDonald v. Lee* (1914) 246 Pa. 253, 92 Atl. 135. But where the purpose is to coerce payment of old debts—which may be in dispute—there is, very properly, no privilege. *Masters v. Lee* (1894) 39 Neb. 574, 58 N. W. 222. The association's agreement often helps to determine into which class a given publication falls. See *Weston v. Barnicoat* (1900) 175 Mass. 454, 56 N. E. 619 (no sales to be made to a reported delinquent until payment; publication libelous); *Reynolds v. Plumbers' Assn.* (1902) 169 N. Y. 614, 62 N. E. 1100 (delinquent to be made to pay cash before delivery; publication privileged). The principal case is clearly sound in finding privilege, where the agreement was simply that if a member gave credit to a delinquent he would assume the latter's debts to other members. In determining the extent of the innuendo, and so the character of the publication, the courts are also guided by the apparent purpose of such publication. See *Muetze v. Tuteur* (1890) 77 Wis. 236, 46 N. W. 123; *State v. Armstrong* (1891) 106 Mo. 395, 16 S. W. 604 (bad debt collection agency; held to impute dishonesty as well as failure to pay). Or by the manner of it. See *Thompson v. Adelberg & Berman* (1918, Ky.) 205 S. W. 558 (placarding debtor's dwelling; libel); *Muetze v. Tuteur, supra; State v. Armstrong, supra* (blatant envelopes: "Bad Debt Collection Agency"; libel). Or even by the presence or lack of mutuality of interest between publisher and publishee. So *McDonald v. Lee, supra.* But falsity would seem to suffice in itself to make the publication libelous. *Werner v. Vogeli* (1901) 10 Kan. App. 536, 63 Pac. 607. There has been some tendency to protect traders very rigorously, making any imputation of failure to pay their debts libel *per se.* See *Fry v. McCord* (1895) 95 Tenn. 678, 33 S. W. 568. But this tendency seems to be yielding to-day to the desirability of sounder credit extension; *cf.* in this connection also the modern American doctrine on mercantile agency reports: 12 Am. & Eng. Ann. Cas. 149, note.

LIBEL AND SLANDER—PRIVILEGE OF COUNSEL IN PARDON HEARING.—The plaintiff was instrumental in securing the conviction of the defendant's client on a charge of abortion. In a hearing before the Governor for a pardon, the defendant attacked the character of the plaintiff. The plaintiff brought an action for libel and the defendant claimed an absolute privilege as counsel. *Held,* that the defendant's privilege was qualified as the proceeding was not strictly judicial. *Andrews v. Gardiner* (1918, N. Y.) 121 N. E. 341.

The prevailing rule in the United States extends to attorneys conducting judicial proceedings an absolute immunity from liability in libel and slander for words, otherwise defamatory, published in the course of such proceedings, pro-

vided the statements are pertinent and relevant to the questions involved. *Youmans v. Smith* (1897) 153 N. Y. 214, 47 N. E. 265; *Maulsby v. Reifsnider* (1888) 69 Md. 143, 14 Atl. 505; *Lawson v. Hicks* (1862) 38 Ala. 279, 81 Am. Dec. 49. A few courts have afforded the same immunity when the statements were made in proceedings for the disbarment of an attorney, in proceedings before the Interstate Commerce Commission, and before the Governor in extradition proceedings. *Brown v. Globe P. Co.* (1908) 213 Mo. 611, 112 S. W. 462; *Duncan v. Atchison, etc., R. Co.* (1896) 72 Fed. 808, 19 C. C. A. 202; *Youmans v. Smith, supra.* And affidavits pertaining to the moral character of an applicant for admission to the bar, when filed in obedience to a mandate of the court, have been held absolutely privileged. *Baggett v. Grady* (1911) 154 N. C. 342, 70 S. E. 618. And the remarks of a college president before the board of trustees which was investigating charges against his character were held absolutely privileged on the ground that the board was properly functioning like a court of law. *Gattis v. Kilgo* (1901) 128 N. C. 402, 38 S. E. 931. However, the decision of the instant case would seem to be in harmony with the tendency of the courts not to extend the scope of absolute privilege in libel to include proceedings which are not strictly judicial, although they are official and public. *Bingham v. Gaynor* (1911) 203 N. Y. 27, 96 N. E. 84; *Blakeslee v. Carroll* (1894) 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106; *Wright v. Lothrop* (1889) 149 Mass. 385. But on a state of facts identical with that in the principal case, the Court of Civil Appeals of Texas held the counsel's statement absolutely privileged. *Connellee v. Blanton* (1914, Tex. Civ. App.) 163 S. W. 404.

PRIZE LAW—RETALIATORY ORDER IN COUNCIL OF BELLIGERENT—NEUTRALS MUST BEAR REASONABLE LOSSES.—A Norwegian vessel bound from Norway to Rotterdam with iron-ore briquettes belonging to neutrals but destined to Germany was stopped on the high seas and ordered to discharge her cargo in England. This action was taken under an Order in Council, issued in retaliation against Germany's war-zone decree, by which Order, without the establishment of a legal blockade, all trade to and from neutral ports in cargo bound to or from Germany was prohibited. The cargo having been sold and freight allowed, the neutral owners of the vessel instituted a claim for damages arising out of her alleged unlawful detention. *Held,* that the claim must be dismissed. *The Stigstad* (1918, P. C.) 35 Times L. R. 176.

See COMMENTS, p. 583, *supra.*

RELEASE—PERSONAL INJURIES—RELEASE OF MASTER AS BARRING ACTION AGAINST SURGEON.—The plaintiff suffered a rupture in his right groin while in the employ of the New York Central R. R. He consulted the defendant, who, mistaking the plaintiff for another of his patients, performed an operation on the left side. The plaintiff executed a release of his claim against the railroad, and later brought this action against the defendant for the unauthorized surgical operation. *Held,* that the plaintiff could recover, as the operation on the left side was a wholly wrongful, independent and intervening cause of action. *Purchase v. Seelye* (1918, Mass.) 121 N. E. 413.

Where the plaintiff has exercised due care in engaging medical attendants, the liability of the party who caused the original injury extends, not only to that injury, but also to negligence or lack of skill on the part of the attending surgeon, such maltreatment being "constructively anticipated" as a "rational result" of the original injury. *Hunt v. Boston Terminal Co.* (1912) 212 Mass. 99, 98 N. E. 786; *Pullman's Palace Car Co. v. Bluhm* (1884) 109 Ill. 20, 50 Am. Rep. 601. Hence a full release to the employer, without reservation, under the law as to joint tort-feasors bars an action against the surgeon. *Martin v. Cunningham* (1916) 93 Wash. 517, 161 Pac. 355. The principal case limits this

doctrine, refusing to find causation by the railroad where the surgeon performed a wholly unnecessary operation solely because of his failure to inform himself of the patient's identity. Consequently, liability for the mistaken operation rests on the surgeon alone. See *Snow v. N. Y. N. H. & H. R. R.* (1904) 185 Mass. 321, 70 N. E. 205; *Scheffer v. Washington City V. M. & G. S. R.* (1882) 105 U. S. 249, 26 L. ed. 1070. Clearly, the case is not one of joint or concurrent negligence, where a release to one tort-feasor operates as a release to all. See *Mooney v. Chicago* (1909) 238 Ill. 414, 88 N. E. 194; see also (1918) 28 YALE LAW JOURNAL, 90, on the effect of reserving rights against one of the wrongdoers; and see (1915) 24 *ibid.* 505. To the release to the railroad, therefore, the defendant stands a stranger; as where two adjoining owners overflow the plaintiff's land with sewage, a release to one is utterly foreign to the other and does not bar an action. *Western Tube Co. v. Zang* (1899) 85 Ill. App. 63. Even special payments by the railroad in consideration of the wrong caused by the new, independent wrongdoer, have been held no defense for the latter, although the amount paid may be set off. *Scherger v. Lincoln Traction Co.* (1912) 91 Neb. 407, 136 N. W. 62; *El Paso & S. R. R. v. Darr* (1906, Tex.) 93 S. W. 166; *Randall v. Gerrick* (1916) 93 Wash. 522, 155 Pac. 357.

TAXATION—STATE POWER TO TAX STOCKHOLDERS IN NATIONAL BANK—LIMITED WHEN BANK ALREADY TAXED AS A STOCKHOLDER IN ANOTHER NATIONAL BANK.—A national bank A, in California, owned stock in another national bank B, and in a state bank C, in that state. The Revised Statutes empower the states to tax stockholders in national banks, but at a rate no greater than is assessed upon other moneyed capital in the hands of individual citizens of the state. California taxed bank A as a stockholder in bank B and in bank C, and also taxed the stockholders of bank A on its entire assets, including in these taxable assets the value of the stock, already taxed, owned by bank A in banks B and C. *Held*, that the assessment of the stockholders of bank A on the amount already taxed on the bank as a stockholder in bank B, and the assessment of bank A as a stockholder in bank C were invalid. Pitney, Brandeis and Clarke, JJ., *dissenting*. *The Bank of California v. Richardson* (1919) 39 Sup. Ct. 165.

The power of the states to tax national banks and their stockholders is derived from and limited by federal statute. Rev. St. Sec. 5219; *Covington v. First Natl. Bank* (1904) 198 U. S. 100, 25 Sup. Ct. 562. The banks themselves as federal agencies are exempted from state burden by taxation, except as to their real estate; but the assets of stockholders in national banks are placed under the state taxing power, subject to a limitation prohibiting discrimination as against other moneyed capital. *Amoskeag Savings Bank v. Purdy* (1913) 231 U. S. 373, 393, 34 Sup. Ct. 114. The tax assessed on bank A as a stockholder in bank C, the state bank, being a tax on a federal agency, was unauthorized by the federal statute and was therefore void. *Owensboro Natl. Bank v. Owensboro* (1899) 173 U. S. 664, 19 Sup. Ct. 537. A tax on the stock held by one national bank in another national bank is valid under the grant of power to the states to tax stockholders in national banks. *National Bank of Redemption v. Boston* (1887) 125 U. S. 60, 8 Sup. Ct. 772. In disallowing the tax on the stockholders of bank A in so far as the assets thus taxed included the value of the stock already taxed on the bank as a stockholder in bank C, the court has adopted a new and enlightened policy of piercing the corporate veil to establish the ultimate beneficial interest of the stockholder. They therefore concluded that the double tax was a discrimination against a stockholder in a national bank, against which the federal statute was expressly designed to guard. The force of the common view that the corporation and the stockholders are entirely different entities, especially for purposes of taxation, is attested by Justice Pitney's vigorous dissent, supported by ample authority. See particularly *Owensboro Natl. Bank*

v. Owensboro, supra, and the cases there summarized, at pages 677-682. The fallacies involved in this common theory are exposed by the late Professor Hohfeld, *Nature of Stockholder's Individual Liability for Corporation Debts* in (1909) 9 COLUMBIA L. REV. 285, 288-291, note. The approval of the better view by the Supreme Court is encouraging. The present federal income tax follows this principle. But where there is no express limitation upon the taxing power, the states have not generally been denied this power to tax both the corporation and its stockholders.

TRADES UNIONS—CLOSED SHOP AGREEMENT—LIABILITY FOR PROCURING DISCHARGE OR PREVENTING EMPLOYMENT.—The defendant union and the shoe manufacturers of Lynn, Massachusetts, had come to an agreement which provided that none but union men should be employed. Because of the operation of this agreement, the plaintiff was unable to hold or secure employment. *Held,* that the plaintiff had no cause of complaint if the motives of the defendant in making the agreement were to secure all the work for the union and to enlarge and strengthen the union organization. *Shinsky v. O'Neil et al.* (1919, Mass.) 121 N. E. 790.

A workman has the right that others shall not combine to procure his discharge or prevent his employment unless special circumstances "justify" the interference. *Erdman v. Mitchell* (1903) 207 Pa. 79, 56 Atl. 327. That the workman is a non-union man does not in itself privilege a union to procure his discharge. *Smith v. Bowen* (1919, Mass.) 121 N. E. 814. But where the union is seeking to secure the work for its own members, its action does not render it liable to the man dismissed. *National Protective Assn. v. Cummings* (1902) 170 N. Y. 334, 63 N. E. 369. And so the instant case. But see *Lucke v. Clothing Cutters, etc.* (1893) 77 Md. 396, 26 Atl. 505. The existence of a closed shop agreement may or may not privilege the union's action as an attempt to enforce such agreement. It has been held, as in the principal case, that where the agreement itself is not against public policy, it is justification *per se. Jacobs v. Cohen* (1905) 183 N. Y. 207, 76 N. E. 5; *Hoban v. Dempsey* (1914) 217 Mass. 166, 104 N. E. 717, L. R. A. 1915A 1217, Ann. Cas. 1915C 810. But where the agreement affected the whole of an industry in any one locality, it has been held invalid and, therefore, no justification. *Curran v. Galen* (1897) 152 N. Y. 33, 46 N. E. 297; *Connors v. Connolly* (1913) 86 Conn. 641, 86 Atl. 600. There are cases in Massachusetts, however, which look behind the agreement, and decide that the union's conduct is actionable or not, according to the reason for which the agreement is invoked. *Berry v. Donovan* (1905) 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 3 Ann. Cas. 738 (invoked solely because plaintiff was non-union man); *Shinsky v. Tracey* (1917) 226 Mass. 21, 114 N. E. 957 (invoked to discipline plaintiff, a prior member of the union). Even the principal case intimates that if the agreement were being enforced for the sole end of forcing the defendant into the union, the action would not be privileged. But it is submitted that such a view in effect nullifies the closed shop contract, as between the union and the non-union men, and thereby deprives the union of one of its most effective means of gaining an end conceded to be lawful, the strengthening of its organization.

WORKMEN'S COMPENSATION—DISOBEDIENCE OF ORDERS—SCOPE OF THE EMPLOYMENT—SUNDAY EMPLOYMENT—ILLEGALITY OF CONTRACT.—The appellant had entered cars in an automobile race held on Sunday. The decedent, a mechanic regularly employed in the warehouse, was given charge of the pit on the track, with instructions not to leave the pit. He left the pit to go to one of appellant's cars which had stopped on the track, and was killed. *Held,* (1) that the injury arose "in the course of" the employment; and (2) that the illegality of the

contract does not affect the operation of the Act. *Frint Motorcar Co. v. Industrial Commission* (1919, Wis.) 170 N. W. 285.

(1) Whether an employee undertaking a given act is injured "in the course of" his employment under the Act, depends first upon his contract of employment,—was he doing what he was hired to do? *Spooner v. Detroit Saturday Night Co.* (1915) 187 Mich. 125, 153 N. W. 651; *Re McNicols* (1913) 215 Mass. 497, 102 N. E. 697. Or was he doing something reasonably incidental thereto? *Terlecki v. Strauss* (1914, Sup. Ct.) 85 N. J. L. 454, 89 Atl. 1023; *State v. District Court* (1915) 129 Minn. 176, 151 N. W. 912. Or doing additional acts at the direction or with the consent of his employer? *Griebe v. Hammerle* (1918) 222 N. Y. 382, 118 N. E. 805; *Miner v. Franklin Telegraph Co.* (1910) 83 Vt. 311, 75 Atl. 653. This last rule would clearly serve in the principal case to cover the extra work done in the pit, although not the voluntary service contrary to instructions, out of which the fatal injury arose. But zealous employees have been compensated as if " in the course of" their employment when doing something totally different from their regular duties, providing they were honest in attempting to serve their employer's interest. *Rees v. Thomas* (C. A.) [1899] 1 Q. B. 1015 (miner undertook to stop runaway tramway truck horse in pit); *Hartz v. Hartford Faience Co.* (1916) 90 Conn. 539, 97 Atl. 1020 (shipping clerk undertook to lift barrel). The service here undertaken answers the only test applied to such work: it was one which he might be expected to undertake. *Williamson v. Industrial Acc. Com.* (1918, Cal.) 171 Pac. 797 (chambermaid not expected to take over absent janitor's work of cleaning a light well).

(2) In the matter of illegality the Wisconsin Court seems to draw a distinction between the *contract* of employment and the relation of employer and employee, the liability under the Act being said to arise wholly out of the latter. *Anderson v. Miller Scrap Iron Co.* (1919, Wis.) 170 N. W. 275, 277; but see *contra, Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, 94 Atl. 372; and see discussion (1917) 27 YALE LAW JOURNAL, 113. For instance, in regard to illegal employment of minors, Wisconsin seems to hold that the relation in question arises on work being actually done, even under a prohibited contract, if the parties have by law capacity to contract for any employment at all. *Foth v. Macomber & Whyte Rope Co.* (1915) 161 Wis. 549, 154 N. W. 369 (minor permitted by law to work at some things, but injured while doing others; recovery); *Stetz v. Mayer Boot & Shoe Co.* (1916) 163 Wis. 151, 156 N. W. 971 (minor absolutely forbidden to work; no recovery); see also in this connection the cases discussed (1919) 28 YALE LAW JOURNAL, 509. The Wisconsin distinction is by no means universal. See *Lostutter v. Brown Shoe Co.* (1916) 203 Ill. App. 517. But under it the relation of master and servant would exist between persons *sui juris*, whether or not the contract was a Sunday one. Yet, the plaintiff being regularly employed by the defendant, it would seem sufficient to explain the instant case, without reference to illegality of contract, that this particular Sunday work was merely extra work undertaken at the employer's direction. See *Hugh v. Atlanta Steel Co.* (1911) 136 Ga. 511, 71 S. E. 728; Ann. Cas. 1912C 394, note.