RECENT CASE NOTES

BILLS AND NOTES — CONSIDERATION — NOTE GIVEN BANK TO DECEIVE BANK EXAMINER.—A note given by the defendant to a bank was discharged by the defendant's bankruptcy. Later the defendant gave a new note, solely in order that it might be shown to the bank examiner as one of the bank's assets. The receiver of the bank brought suit to recover on the note. *Held,* that the receiver could recover. *Niblack v. Farley* (1919, Ill.) 122 N. E. 160.

There can be no question as to the soundness of the decision. No recovery, indeed, can be had by the payee on a note given without consideration. So with a director of a bank giving his own note to replace among the assets the worthless note of another. *First Natl. Bk. v. Felt* (1896) 100 Ia. 680, 69 N. W. 1057. And in general a defence good against the bank is good against its receiver. *Steelman v. Atchley* (1911) 98 Ark. 294, 135 S. W. 902. But where the note was given to puff the bank's apparent assets and so defraud the examiner and the public, courts properly refuse to allow the lack of consideration to be set up against the receiver. *Lyons v. Benney* (1911) 230 Pa. 117, 79 Atl. 250. There has been some disposition to limit this rule to cases where payment of the obligation is necessary to satisfy creditors. *Lyons v. Westwater* (1909, W. D. Pa.) 173 Fed. 111 (but there the promise not to enforce was in writing). But where the maker of the obligation was interested in the bank, the New York courts have been very ready to find actual consideration to him, through the benefit to the bank. *Hurd v. Kelly* (1879) 78 N. Y. 588; *Union Bank v. Sullivan* (1915) 214 N. Y. 332, 108 N. E. 558. This would not apply to the maker in the instant case, who was in no way connected with the bank. But a prior debt discharged by bankruptcy is consideration for a new promise to pay. The new promise is, to be sure, binding only according to its own terms. *Gillingham v. Brown* (1901) 178 Mass. 417, 60 N. E. 122. And here one of the terms was, that it was not to be enforced. But the "promise" having been put into the form of a note, the parol evidence rule comes into play. It has been very generally held that such additional terms as would defeat any purpose in making the instrument, may not be shown. See 4 Wigmore, *Evidence,* sec. 2443; *cf.* 5 Chamberlain, *Evidence,* sec. 3553. So generally with a promise to renew at the maker's option. *Hall v. First Natl. Bk.* (1899) 173 Mass. 16, 53 N. E. 154; *New London Credit Syndicate v. Neale* (C. A.) [1898] 2 Q. B. 487. And so concededly with a promise never to sue on the note. *Davis v. Randall* (1874) 115 Mass. 547; *First Natl. Bk. v. Foote* (1895) 12 Utah, 157, 42 Pac. 205; *Western Carolina Bank v. Moore* (1905) 138 N. C. 529, 51 S. E. 79; *Bailey v. Lankford* (1916) 54 Okla. 692, 154 Pac. 674. It is believed therefore, that in the instant case the defendant would have been held on his note even as against the bank. And it is believed that the interests of the bank's innocent creditors and stockholders would suffice to bar the defense of *in pari delicto. Cf.* (1919) YALE LAW JOURNAL, 699; but see *First Natl. Bk. v. Felt, supra,* at p. 685. And the defense that the note was signed as a mere sham might very properly be excluded, on the ground that recognizing such a sham as this would be contrary to morals and sound policy. See *Grand Isle v. Kinney* (1898) 70 Vt. 381, 41 Atl. 130; 4 Wigmore, *Evidence,* sec. 2406 and nn. 6, 7; but *cf.* cases 5 *ibid.* 608.

CONFLICT OF LAWS—JURISDICTION FOR DIVORCE—DOMICIL IN COUNTRY GRANTING EXTRATERRITORIAL RIGHTS.—The appellant, a British subject, made his permanent home in Egypt with the intention of residing there for an unlimited time, and

enjoyed extraterritorial rights. The respondent, his wife, petitioned for a divorce in England. *Held,* that as a matter of law it was not impossible for a British subject in this position to acquire an Egyptian domicil, that in fact the appellant had acquired such a domicil and that there was no jurisdiction in the English court to dissolve the marriage of the appellant with the respondent. *Casdagli v. Casdagli* (1919, H. L.) 120 L. T. Rep. 52.

See COMMENTS, *supra,* p. 810.

CONSTITUTIONAL LAW—DUE PROCESS—FORFEITURE.—A Georgia statute provided that all vehicles used to transport liquor, the sale or possession of which is prohibited by law, should be "seized, condemned and sold." An action was instituted to condemn the plaintiff's automobile, and claim was made that the statute was in violation of the "due process" clause of the federal constitution. *Held,* that the statute was valid. *Mack v. Westbrook* (1919, Ga.) 98 S. E. 339.

It is well settled that a state has the power to prohibit or restrict the manufacture, sale or possession of liquor. *Mugler v. Kansas* (1887, 123 U. S. 623, 8 Sup. Ct. 273. The state may, within the discretion of the legislature, adopt such measures as are reasonably necessary to make the power effective. *Crane v. Campbell* (1917) 245 U. S. 304, 38 Sup. Ct. 98 (prohibiting the possession of intoxicating liquors for personal use); *Kidd v. Pearson* (1888) 125 U. S. 1, 9 Sup. Ct. 6. Forfeiture of property on account of the misconduct of those in possession, treating the thing as the instrument of the offense—is within the principles of our legislation. *Smith v. Maryland* (1855, U. S.) 18 How. 71. It has proven a very satisfactory means of combating evils. See Calif. Red Light Abatement Laws, St. 1913, 20, 21 (house of assignation); Minn. St. 1913, ch. 562 (disorderly houses); Neb. Rev. St. 1913, secs. 8775-8792; Conn. Gen. St. 1918, sec. 3138 (boats used to catch fish in violation of the law); N. Y. Laws 1908, 1041, ch. 350, sec. 31c (containers of liquor) Consequently such statutes have been repeatedly upheld. *People v. Barbiere* (1917, Calif.) 166 Pac. 812; *Wilcox v. Ryder* (1914) 126 Minn. 95, 147 N. W. 953. But it seems that strict compliance with such a statute is requisite to its valid enforcement. *Philipps v. Stapleton* (1919, Ga.) 97 S. E. 885. As applied to the liquor traffic their value is obvious. Where the property was in the possession of a third person, however, there are some difficulties of application. The cases are not in complete accord as to whether knowledge is to be "imputed" to the innocent owner: i. e., as to whether his actual knowledge is immaterial. *People v. Casa Co.* (1918, Calif.) 169 Pac. 454 (knowledge of lessee "imputed"); *Clement v. Robach* (1909, Sup. Ct.) 115 N. Y. Supp. 162 (knowledge of bailee "imputed"); *Robertson v. Lane* (1914) 126 Minn. 78, 147 N. W. 951 (knowledge of conditional vendee "imputed"). Inasmuch as no personal criminal penalty is imposed, the tendency not to permit the innocent owner to set up lack of knowledge may be justified as necessary to the efficacy of the statute; and is the more defensible where, as in the instant case, the proceeds of the sale of the property are turned over to him. *Cf.* also *Chase v. Proprietors of Revere House* (1919, Mass.) 122 N. E. 162. Such a provision as this last is not, however, necessary to the validity of the statute. See *United States v. Brig Malek Adhei* (1844, U. S.) 2 How. 210, 233. A somewhat analogous situation is presented where the master is made criminally responsible for the acts of his servant. See (1919) 28 YALE LAW JOURNAL, 700.

CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES CLAUSE—CLASSIFICATION FOR TAXATION.—A Tennessee statute provided that any foreign construction company with its chief office outside of the state, operating in the state, should

pay as a privilege tax $100 *per annum* and that any foreign and domestic construction company having its chief office in the state should pay $25. The defendant, whose principal office was in Alabama, failed to pay the tax and was denied the right to sue in the state courts. *Held,* that this classification based on the location of chief offices was arbitrary and unreasonable. *Chalker v. Birmingham & N. W. Ry.* (1919) 39 Sup. Ct. 366.

States may make "reasonable and natural" classifications of persons or property for purposes of taxation. *Bell's Gap Ry. v. Pennsylvania* (1889) 134 U. S. 232, 10 Sup. Ct. 533; *Michigan C. Ry. v. Powers* (1906) 210 U. S. 245, 26 Sup. Ct. 459. So a tax on hand laundries operated by men or over two women has been recognized as valid. *Qwong Wing v. Kirkendall* (1912) 223 U. S. 59, 32 Sup. Ct. 192. Or a graduated inheritance or income tax. See (1915) 25 YALE LAW JOURNAL, 427. But an exaction of a license fee from persons selling convict-made goods was held void as arbitrary. *People v. Raynes* (1910, N. Y.) 136 App. Div. 417, 120 N. Y. Supp. 1053. And so a tax upon the property of each race, white or colored, for the support of its own separate school. *Claybrook v. City of Owensboro* (1883, D. Ky.) 16 Fed. 297; *Davenport v. Cloverport* (1896, D. Ky.) 72 Fed. 689. Where the classification makes separate groups of residents and non-residents, the additional question of the "privileges and immunities" clause comes up. Not every discrimination against non-residents is bad under that clause. So the right of suffrage or eligibility to office may be conditioned on a period of residence. See *People ex rel. Akin v. Loeffler* (1898) 175 Ill. 585, 51 N. E. 785. State-owned property may be reserved for exclusive use of citizens. *People v. Setunsky* (1910) 161 Mich. 624, 126 N. W. 844. As a police regulation, residents and non-residents may also be separately classified. *DeGrazier v. Stephens* (1907) 101 Tex. 194, 105 S. W. 992 (liquor dealers must be resident); *State v. Richcreek* (1906) 167 Ind. 217, 77 N. E. 1085 (licensed bankers). But in matters of taxation states may enforce no classification which in its practical operation discriminates against non-residents or foreign products. *Ward v. Maryland* (1870) 12 Wall. 418; *Blake v. McClung* (1898) 172 U. S. 239, 19 Sup. Ct. 165. Thus non-residents selling or offering for sale any goods, may not be subjected to a tax higher than that levied on permanent residents. *Darnell & Son v. Memphis* (1908) 208 U. S. 113, 28 Sup. Ct. 247. And a state statute which imposes a tax on persons not having their principal place of business in the state, and engaged in selling foreign goods, is void, unless a similar tax is levied on persons selling goods manufactured in the state. *Walling v. Michigan* (1885) 167 U. S. 446, 6 Sup. Ct. 454. And similarly in the instant case, where the discrimination is wholly according to the chief place of business.

CONSTITUTIONAL LAW—TAXATION—THE "UNIT RULE" NOT APPLICABLE TO CAR COMPANIES.—An equipment company, incorporated in New Jersey, owned about 12,000 cars, which it rented to shippers and railroads. Georgia imposed a tax on the entire property of such companies based on the ratio of track miles in the state to the total track mileage over which the cars operated. This resulted in fifty-seven cars, the average number constantly used in that state *per annum,* which were valued at $47,000, being taxed as on $291,000. The company refused to pay the tax, alleging the invalidity of the assessment. *Held,* that the mode of appraisement was arbitrary and in violation of the "due process" clause of the Federal Constitution. Day, J., *concurred* in the result. Pitney, Brandeis, Clarke, JJ., *dissenting. Union Tank Line v. Wright* (1919) 39 Sup. Ct. 276.

See COMMENTS, *supra,* p. 802.

CONTEMPTS—CONSTRUCTIVE—PUBLIC ASSAULT ON ALLEGED INFORMER.—During the progress of litigation involving the continuance of the respondent's liquor business, the respondent went on a search for the man who had given the complainant the information upon which the latter had acted. Thinking the individual was his business neighbor, he taxed the neighbor with having given the information, threatened to oust him from the premises (of which he, the respondent, had the rental) and concluded by striking him. *Held,* that the respondent was guilty of a contempt of court. *In re Hand* (1918, N. J. Ch.) 105 Atl. 594.

Having become convinced after extended examination that a witness was deliberately giving false testimony, the court placed him in custody for contempt. He sued out a writ of *habeas corpus. Held,* that the commitment was void for excess of power, as the punishment might not be imposed for supposed perjury alone, without reference to circumstances giving it an obstructive effect upon the administration of the court. *Ex parte Hudgings* (1919) 39 Sup. Ct. 337.

The theory of the *Hand* decision was that the respondent's act had a tendency to interfere with the due administration of justice, and so came within the classification of constructive contempts. A constructive contempt has been defined as an act done not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice. See 9 *Cyc.* 5. Some courts refuse to find such "obstruction" or "embarrassment" in a prevention of the presence of a person in court, unless at the time of the interference a proceeding was actually pending, and the person interfered with was, at that time, in some way legally connected therewith. Thus removing a prospective witness from the county, or inducing him to absent himself, has been held no contempt unless a proper subpoena had issued, for that witness. *Scott v. State* (1902) 109 Tenn. 390, 71 S. W. 824 (under statute); *McConnell v. State* (1874) 46 Ind. 299; *Dobbs v. State* (1875) 55 Ga. 272. But if a proper subpoena has been issued, although not served, such persuasion is a contempt. *Haskett v. State* (1875) 51 Ind. 176; *State v. Perry Moore* (1908) 146 N. C. 653, 61 S. E. 463; *cf. People v. Jackson* (1913) 178 Ill. App. 121. And so *a fortiori,* it would seem, the intimidation of, or assault on, a party concerned with the suit. *Turk v. State* (1916) 123 Ark. 341, 185 S. W. 472 (plaintiff intimidated); *Brannon v. Commonwealth* (1915) 162 Ky. 350, 172 S. W. 703 (witness assaulted); *cf. United States v. Barrett* (1911, S. D. Ga.) 187 Fed. 378 (attorney assaulted). The *Hand* case is novel, however, in that the person assaulted was in no manner, as yet, legally connected with the suit; and there has been some disposition to confine constructive contempts closely within the rules already established. See *Haskett v. State, supra.* One might distinguish the instant case on the ground that the *McConnell* and *Dobbs* cases, *supra,* involved mere persuasion, not intimidation. And this would harmonize the one English decision found on the point. *Shaw v. Shaw* (1862, P. D.) 6 L. T. Rep. (N. S.) 477 (intimidation of prospective witness a contempt). But the true distinction is believed to lie in the court's interpretation in each individual case of the facts therein. The gravamen of the offence lies in obstructing the administration of justice. What certain actions do so obstruct it, and what do not, depends on circumstances. And this point is admirably illustrated by the *Hudgings* case; the norms in this matter being applicable to all contempts, whether direct or constructive.

CONTRACTS—IMPOSSIBILITY—IMPLIED CONDITIONS—EFFECT OF RECOMMENDATION OF WAR LABOR BOARD.—By municipal ordinances, passed in 1901, the city of Columbus granted the plaintiff street-railway company the privilege of using its

streets for twenty-five years, stipulating that free transfers be issued and eight tickets be sold for twenty-five cents. The plaintiff duly accepted and established a trolley system. In 1918, a strike occurred and the National War Labor Board increased the wages of the plaintiff's employees fifty per cent, and recommended that the city allow an increased fare. The city refused. The company then gave notice to the city that it regarded the franchise as cancelled and increased the fares to five cents a single trip. A bill was filed to enjoin the city from enforcing the terms of the ordinances. *Held,* that the bill must be dismissed. *Columbus Ry. Power & Light Co. v. City of Columbus* (1919) 39 Sup. Ct. 349.

It is well established that a city, acting under statutory authority, may make contracts by which privileges in the streets are granted in consideration of a promise to render services at a fixed charge. *Vicksburg v. Vicksburg Waterworks Co.* (1906) 206 U. S. 496, 27 Sup. Ct. 762; *Cleveland v. Cleveland City Ry.* (1903) 194 U. S. 512, 24 Sup. Ct. 756. The city has no power to terminate such an agreement. *Vicksburg Waterworks Co. v. Vicksburg* (1904) 202 U. S. 453, 26 Sup. Ct. 661. In the principal case, the railway held itself excused from performance of its contract through supervening impossibility due to war conditions. Had that been so, it could have continued operation on the basis of an implied grant for an indefinite period, setting the old rates aside as confiscatory. *Denver Union Water Co. v. Denver* (1917) 246 U. S. 178, 38 Sup. Ct. 278; *Detroit United Railway v. Detroit* (1919) 248 U. S. 429, 39 Sup. Ct. 151. But the War Labor Board merely stated conditions, under which the plaintiff had contracted to operate; and made a recommendation. It made no executive order making performance impossible. See *Metropolitan Water Board v. Dick, Kerr & Co.* [1917] 2 K. B. 1, [1918] A. C. 119; *Moore & Tierney v. Roxford Knitting Co.* (1918, N. D. N. Y.) 250 Fed. 278; see (1918) 27 YALE LAW JOURNAL, 953; (1919) 28 *ibid.* 399. Nor is the present case one of temporary suspension of the duty to perform, as in *Tamplin S. S. Co. v. Anglo-Mexican etc.,* [1916] 2 A. C. 397. To be sure, the old rule holding contractors to the letter of their agreements has been somewhat relaxed, and in exceptional cases courts have given relief from dangers and hardships through the medium of constructive conditions. *Chicago, etc. Ry. v. Hoyt* (1893) 149 U. S. 1, 13 Sup. Ct. 779; *Kronprinzessin Cecilie* (1917) 244 U. S. 12, 37 Sup. Ct. 490, (1917) 27 YALE LAW JOURNAL, 247, 791. But the court in the instant case weighed the fact that no loss had been shown *over the full period of operation,* and decided that this was not a case in which such a condition should be implied. The case thus falls under the general rule that unforeseen difficulties do not excuse performance.

CONTRACTS—THIRD-PARTY BENEFICIARY—MATERIALMEN AND BUILDER'S BOND.—The defendant surety company bound itself to the owner of a building, as obligee, to see that the building contractor should perform all of his duties to the owner, one of these duties being that he should pay all claims for labor and material. It was expressly provided in the bond that the surety was to be notified of any act on the part of the principal that might involve loss to the surety, immediately upon knowledge of such an act coming to the owner or his supervising architect. No notice of this sort was ever given. The materialman, being unpaid, brought suit against the surety company on the bond. *Held,* that the materialman might maintain suit. *Forburger Stone Co. v. Lion Bonding & Surety Co.* (1919, Neb.) 170 N. W. 897.

See COMMENTS, *supra,* p. 798.

DAMAGES—"DUTY" TO MITIGATE—RECOVERY OF EXPENSES OF DENIAL IN ACTION FOR LIBEL.—The defendant published a libel concerning the plaintiff, which the

plaintiff denied by advertisement in newspapers. The plaintiff sought to recover the costs of such advertisements as an item of damage. The defendant moved to strike the item from the complaint. *Held,* that the plaintiff could recover the expense of his denials. *Den Norske Americkalinje Actiesselskabet v. Sun Printing and Publishing Association* (1919, N. Y.) 122 N. E. 463.

Opinions and text books abound with the assertion that an injured plaintiff is under a "duty" to mitigate his damages. 13 *Cyc.* 71, 73; Sutherland, *Damages,* 311. This "duty" is proclaimed in the case of injury to the person. *Flint v. Connecticut Hassam Paving Co.* (1918) 92 Conn. 576, 103 Atl. 840 (hiring physician). Likewise in breach of contract. *Feeney & Bremer Co. v. Stone* (1918) 89 Or. 360, 171 Pac. 569. He whose property has been negligently injured is said to be under this "duty," although where the injury is intentional, the devotion of the common law to the protection of property releases the plaintiff from his so-called obligation. *Borden et al. v. Carolina Power, etc. Co.* (1917) 174 N. C. 72, 93 S. E. 442; *City of Jackson v. Wilson* (1916) 146 Ga. 250, 91 S. E. 63. If this relation of the plaintiff to the defendant were a *duty* in the strict, legal sense, it would follow that if he failed to make a reasonable attempt to mitigate, he would himself be *subject to an action for damages.* But such is not the consequence. If he fails to mitigate his damages, he is only under a legal *disability* to collect from the defendant for the items which might reasonably have been prevented. Furthermore, but entirely separate and distinct, the plaintiff has a legal *power,* by attempting to mitigate, to create in the defendant a duty to *pay the costs* of his reasonable attempts. The confounding of legal duty with legal disability, and a failure to discern this legal power, led the court in the principal case over a very circuitous route, to reach a near goal. They did not want to hold that the plaintiff was under a "duty" to publish denials, in the sense that if he had failed to publish them, he could not have recovered full damages for his injury. But they did want the plaintiff, having published the denials, to recover the expense of such publication. They cut the knot with the alarming statement that this is one of the few instances where "duty" and "right" are not correlative. The correct solution of the problem seems to be that a libeled plaintiff is like one whose realty has been intentionally injured, in that he does not labor under a disability to collect damages if he fails to publish denials, but that he nevertheless does possess the entirely separate and distinct power, by publishing such denials, to impose a duty upon the defendant to pay the expenses so incurred. Perhaps the rule as to libel, however, should not be treated as exceptional. In no case does the law disable a plaintiff on account of a failure to mitigate, where the means are very expensive and the results speculative. *American Smelting and Refining Co. v. Riverside Dairy and Stock Farm* (1916, C. C. A. 8th) 236 Fed. 510; *Youmans v. City of Hendersonville* (1918) 175 N. C. 574, 96 S. E. 45; *Louisville and Nashville R. R. v. Kerrick* (1917) 178 Ky. 486, 199 S. W. 44. And certainly the effect of an expensive published assertion of innocence is not easy to calculate. On the other hand, if a libeled plaintiff wishes to use reasonable means to deny his guilt, it would seem just to compel the defendant to foot the bill even though the effectiveness of the effort is in doubt. *Peck v. Chicago Railways* (1915) 270 Ill. 34, 110 N. E. 414.

HUSBAND AND WIFE—ABANDONMENT—WIFE'S IMMUNITY FROM ALIENATION BY HUSBAND.—A poor debtor abandoned his wife without fault on her part; he later attempted to sell to his father certain chattels in the possession of the wife. Statutes exempted the property left by an absconding debtor in the hands of his wife from execution by his creditors, and allowed the wife as head of the family to "manage, sell and incumber his property." The father sued on the

bill of sale. *Held,* that the husband had no power to alienate this property. *Holdorf v. Holdorf* (1919, Iowa) 171 N. W. 42.

When a husband has failed to perform his duty to support his wife, she has the power to pledge his credit for necessaries. See L. R. A. 1917A 958 note. In such a case the wife would seem of course to have the privilege, as against her husband, of using this property: so crops grown on the homestead, or the proceeds thereof. For she has the power and privilege of turning such property into money by sale. *Hoskins v. Fayetteville Grocery Co.* (1906) 179 Ark. 399, 96 S. W. 195; *Rawson and Rice v. Spangler* (1883) 62 Ia. 59, 17 N. W. 173. And, often, of conducting the business of her husband, and of making contracts reasonably necessary for its management, as under the statute in the principal case. Furthermore, it seems that the deserted wife has an immunity in the homestead, against creditors of the husband. 16 L. R. A. (N. S.) 114. And, as a general rule, in the crops grown and growing thereon. See 32 *ibid.* 577, note. And under statutes granting exemption to the property of a poor debtor, the immunity both as to realty and personalty is extended to the debtor's wife, if wrongfully deserted. *Bank of Liberal v. Redlinger* (1902) 95 Mo. App. 279, 68 S. W. 1073; *Mitchell v. Joyce* (1886) 69 Ia. 121, 28 N. W. 473. (As to what is necessary to constitute desertion and abandonment, see (1914) 24 YALE LAW JOURNAL, 578.) So the wife, as "head of the family" of an absconding debtor, has the right to recover chattels wrongfully attached. *Baum v. Turner* (1903) 25 Ky. L. Rep. 600, 76 S. W. 129. And it seems to be likewise settled that she has an immunity from alienation of a homestead by the husband's sole act. See *Murphy v. Renner* (1906) 99 Minn. 348, 109 N. W. 593, 8 L. R. A. (N. S.) 564, and note. The principal case makes a logical development in extending this last immunity to chattels of her husband left in her hands, and denying him, after desertion, the power of alienating them. The two dissenting judges admit the justice of the majority decision, but contend that the court has no power to construe the statutes so liberally as to practically produce legislation by the court.

INJUNCTIONS—INJUNCTION PENDENTE LITE—RESTRAINING ENFORCEMENT OF INCREASED RATES.—The Attorney General and the railway commission on behalf of South Dakota petitioned to permanently restrain the defendant express company from making effective a schedule of increased intra-state rates, and to secure an injunction *pendente lite.* It was claimed, that the President and the administrative officers acting for him had exceeded their authority under the Federal Control Acts of August 26, 1916, and March 21, 1918, in putting into effect the increased rates. *Held,* that an injunction *pendente lite* should be issued; since the suit might drag for years, and the smallness of the sums and the number and variety of the persons involved would make later restitution practically impossible should the increase in rates be found unwarranted. *State ex rel. Caldwell v. American Ry. Express Co.* (1919, S. D.) 170 N. W. 570.

Pending determination of such an action there are four possible solutions of the question of injunction *pendente lite.* (1) To issue, or (2) to deny an injunction, without more. Either course lays the court open to the danger of keeping rates in force over a considerable period which subsequently prove to have been unjust. And no recovery can be had by either party of what he has suffered by being forced to contract in accordance with the temporary order. See (1919) 28 YALE LAW JOURNAL, 504. This situation can be remedied by (3) issuing or (4) denying the injunction, but requiring shippers or carrier respectively to furnish bond for payment or refund respectively of the amount of increase, according to the later decision as to the propriety of the increase. The company may be required to pay into court monthly all charges in excess

of those fixed by the commission. *Louisville & N. R. R. v. Kentucky R. R. Com.* (1914, E. D. Ky.) 214 Fed. 465. Or be compelled to issue to each person purchasing a ticket at the higher rate a coupon for eventual redemption. *Bellamy v. Missouri & N. A. R. R.* (1914, C. C. A. 8th) 215 Fed. 18; see also *Taylor-Williams Coal Co. v. Public Utilities Com.* (1918, Ohio) 119 N. E. 459. In the instant case, the injunction might be denied; the new rates are *prima facie* necessary for the successful operation of a public utility for the prosecution of the war. And increased rates, where necessary to operation, have been allowed to remain in force pending decision. *Public Utilities Com. v. Rhode Island Co.* (1918, R. I.) 104 Atl. 690. It is submitted that the instant decision takes to an unwise, somewhat arbitrary, and, it may prove, very unjust means to prevent an evil against which ample protection could be had in the way suggested. A novel jurisdictional complication of these cases is introduced by a recent Massachusetts decision, *Public Service Com. v. New England Tel. Co.* (1919, Mass.) 122 N. E. 566. There a petition by the commission, to enforce an order suspending the taking effect of increased intra-state rates, was dismissed on the ground that the United States "was vitally interested and alone concerned in the toll rates," was a necessary party, could not be impleaded without its consent, and had not consented. *Cf.* (1919) 28 YALE LAW JOURNAL, 714; *ibid.* 199; and see further, on the effect of reversal of an injunction decision, *ibid.* 600.

INSURANCE—LIFE POLICY—EXECUTION OF INSURED—The plaintiff held an insurance policy issued by the defendant on the life of one Weil. The policy contained a clause that "if this policy matures after the expiration of two years, the payment of the same shall not be disputed." Subsequent to the expiration of two years, Weil was executed for murder. *Held,* that the plaintiff could recover the amount of the policy. *Weil v. Travelers' Insurance Co.* (1918, Ala.) 80 So. 348.

Recovery was denied in the first case on this point, which was decided at a time when execution for crime worked a forfeiture of estate and corruption of blood. *Amicable Society v. Bolland* (1830, Eng. Ch.) 4 Bligh's N. R. 194. This holding has been followed by the Supreme Court, on the ground of public policy. *Burt v. Union Central Life Insurance Co.* (1902) 187 U. S. 362, 23 Sup. Ct. 139; *Northwestern Mutual Life Insurance Co. v. McCue* (1911) 223 U. S. 234, 32 Sup. Ct. 220. The objections to this rule are set forth in (1912) 22 YALE LAW JOURNAL, 158, 292. It is also weakened by the analogous cases of suicide which allow recovery. See *Campbell v. Supreme Conclave Order Heptasophs* (1901, Ct. Err.) 66 N. J. L. 274, 278-281, 49 Atl. 550, 551-552. Furthermore, it does not necessarily follow that there should be no recovery in such cases, where the policy contains no stipulation as to these events, merely because an express insurance of suicide or execution would be void. See (1909) 7 MICH. L. REV. 673-675. Indeed, the Supreme Court of Illinois refused to follow the above authorities because forfeiture was no longer affected by execution. *Collins v. Mutual Life Insurance Co.* (1907) 232 Ill. 37, 83 N. E. 542. Nevertheless, the majority doctrine has recently been followed and recovery denied, in the teeth of an incontestability clause in the policy. *Scarborough v. American Insurance Co.* (1916) 171 N. C. 353, 88 S. E. 482; *American National Insurance Co. v. Munson* (1918, Tex.) 202 S. W. 987. The Alabama court in the principal case, taking the opposite view, followed one of their recent decisions which held that the incontestability clause of a policy should bar all defenses not expressly reserved. *Life Insurance Co. v. Lovejoy* (1918, Ala.) 78 So. 299. This view seems preferable, both because of the above objections to the majority doctrine and because policies are to be construed in favor of the

insured. See 14 R. C. L. 926 and cases cited in note 9. It is doubtful, however, whether Alabama would adopt the minority holding should a policy have no clause of incontestability.

INTERSTATE COMMERCE—TELEGRAMS BETWEEN POINTS WITHIN A STATE PASSING THROUGH ANOTHER STATE.—The plaintiff delivered to the defendant at Bassett, Va., a message to be transmitted to Martinsville, Va. The message was sent by a wire which passed Martinsville, but is not designed for direct use there, to a point in North Carolina, whence it was relayed back to Martinsville. An error was made in the transmission, and this action was brought to recover the statutory penalty given by a Virginia statute. *Held,* that the message constituted interstate commerce and was beyond the control of the state. *Western Union Tel. v. Bowles* (1919, Va.) 98 S. E. 645.

Since the amendment of June 18, 1910 (36 Stat. L. 539) to the Commerce Act of 1887, it has generally been held, as in the principal case, that state statutes are inapplicable to telegrams between points within a state which pass through another state. *Bateman v. Western Union* (1917) 174 N. C. 97, 97 S. E. 467, L. R. A. 1918A 803, and see note, *ibid.* 805. The grounds given are that such messages constitute interstate commerce and the federal statute covers the whole subject. *Contra, Western Union Tel. Co. v. Sharp* (1915) 121 Ark. 135, 180 S. W. 504 (not interstate commerce); *Western Union Tel. Co. v. Boegli* (1917, Ind.) 115 N. E. 773 (act of Congress does not cover the whole field). The majority view seems the sounder, and the more likely to be upheld when the question comes before the Supreme Court. The essence of interstate commerce is the crossing of the state border; once it is crossed, whether to be recrossed again or not, the transaction cannot be said to be wholly within the state. There has been some indication of a disposition to limit the rule to cases where the message was not given its interstate routing solely in order to avoid the state statute. *Cf. Bateman v. Western Union, supra;* and the principal case. But it is not believed that such a limitation would be upheld. *Cf. Western Union v. Mahone* (1917) 120 Va. 422, 91 S. E. 157.

LIBEL AND SLANDER—DEFAMATORY TELEGRAM—PUNITIVE DAMAGES FOR MALICE OF AGENT IN TRANSMITTING.—The defendant's agent maliciously accepted and forwarded a message libelous on its face, concerning the plaintiff. In an action by the plaintiff, claiming punitive damages, the defendant contended that the agent acted beyond the scope of his authority. *Held,* that the corporation was liable in punitive damages. *Paton v. Great Northwestern Telegraph Co.* (1919, Minn.) 107 N. W. 511.

Telegraph companies are privileged to refuse messages presented when the acceptance and transmission of the message would subject the companies to civil liability. *Western Union v. Lillard* (1908) 86 Ark. 208, 110 S. W. 1035; *Gray v. Western Union* (1891) 87 Ga. 350, 13 S. E. 562. Such a privilege exists therefore where the message is clearly libelous on its face. *Peterson v. Western Union* (1899) 75 Minn. 368, 77 N. W. 985; *Stockman v. Western Union* (1900) 10 Kan. App. 580, 63 Pac. 658; *Western Union v. Cashman* (1906, C. C. A. 5th) 149 Fed. 367. These cases also hold that in the absence of gross negligence or malice, only compensatory damages may be recovered. Where, however, malice in *fact* is shown on the part of an agent of the company, the damages may be exemplary. A corporation is not usually liable for acts of its officers in their own private transactions. See (1911) 21 YALE LAW JOURNAL, 517. Yet it may be, if the frauds or other wrongs committed by the agent fall within the class of acts in which he usually represents the corporation, although done in the particular instance for his personal benefit. See (1907) 17 *ibid.* 56. So in

this country with the issuance of false stock certificates. *New York, N. H. & H. R. R. v. Schuyler* (1865) 34 N. Y. 30; *Fifth Ave. Bk. v. 42nd Street and Grand Street Ferry Co.* (1893) 137 N. Y. 231, 33 N. E. 378. Or of false bills of lading. Uniform Bills of Lading Act, sec. 23; Williston, *Sales,* sec. 419; *Bank of Batavia v. New York, L. E. & W. R. R.* (1887) 106 N. Y. 196; (1907) 17 YALE LAW JOURNAL, 400; *contra, Grant v. Norway* (1851) 10 C. B. 665; *National Bank of Commerce v. Chicago, B. & N. R.* (1890) 44 Minn. 224, 46 N. W. 342, 560. And to this rule defamation makes no exception; a corporation may be liable even for slander by its agents. See (1919) 28 YALE LAW JOURNAL, 702. On the measure of punitive damages therefor, see (1918) 27 *ibid.* 701. Nor is the imposition of punitive damages, for an agent's act, without support in the books. They are in the nature of a private penalty; but an agent's unauthorized act may even subject the corporation to a criminal penalty, of fine or forfeiture. See (1919) 28 *ibid.* 700; *cf.* also *supra, sub. tit.* CONSTITUTIONAL LAW—DUE PROCESS. And it may be that a stricter rule should be applied to public service than to private corporations. *Cf. Cohen v. Dry Dock & C. R. R.* (1877) 69 N. Y. 170.

QUASI-CONTRACTS—VOLUNTARY PERFORMANCE OF ANOTHER'S STATUTORY DUTY.—Statutes provided that schoolboards should arrange transportation to and from schools for children who lived beyond a certain distance. The plaintiff resided beyond this distance, but no transportation had been provided. He sued for the value of his services in daily conveying his children to school. *Held,* that he could recover. *Eastgate v. Osayo School District* (1919, N. D.) 171 N. W. 96.

It has seemed well settled that a plaintiff who has done that which is another's statutory duty cannot recover from the latter the value of the services rendered, if he has not first, without avail, demanded performance of the duty by the defendant. *Hamilton County v. Meyers* (1888) 23 Neb. 718, 37 N. W. 623 (medical aid to pauper); *Patrick v. Town of Baldwin* (1901) 109 Wis. 342, 85 N. W. 274 (same). And it has been held that even though notice was given no recovery could be had. *Macclesfield Corporation v. Great Central Ry.* (C. A.) [1911] 2 K. B. 528 (repairs on bridge). But the better authority allows recovery in that case. *Trustees of Cincinnati v. Ogden* (1831) 5 Ohio, 23 (support of pauper); *Randolph v. Town of Greenwood* (1905) 122 Ill. App. 231 (same). And an emergency which makes the giving of notice impracticable, dispenses therewith. *County of Madison v. Haskill* (1895) 63 Ill. App. 657 (medical services to pauper); *Robbins v. Town of Homer* (1905) 95 Minn. 201, 103 N. W. 1023 (same). In the principal case there was no emergency and no notice seems to have been given the school board. The decision, it is submitted, is a result of the combination of a number of circumstances tending toward recovery, no one of which alone would seem to justify it. A statute made education compulsory; statutes made it the mandatory duty of the board to apprise itself of what children were entitled to transportation, and to provide the same; there appears to have been in fact no transportation which the plaintiff's children might have used, even at some inconvenience; the statutes authorized compensation, where agreed, in lieu of transportation, and even set out a schedule of rates; and the acts—as promoting public education—were of benefit to the community, and were such as the plaintiff was under a moral duty to perform. The absence of other facilities distinguishes the case from those denying recovery for aid to paupers; for in those cases poor-houses were available. See *Hamilton County v. Meyers* and *Patrick v. Town of Baldwin, supra.* And it is suggested that where the combination exists, of benefit to the community and strong moral duty in the plaintiff, it should and will incline the

courts to allow recovery more readily. Hence the principal case seems sound in result. It may be doubted, however, whether the English courts would not on the same facts deny recovery, on the ground that a volunteer, even though not an officious intermeddler, cannot recover. See *Macclesfield Corporation v. Great Central Ry., supra.*

STATUTORY CONSTRUCTION—VACCINATION—EXCLUSION FROM SCHOOL.—The compiled laws of North Dakota provide that: it shall be the duty of principals, teachers, parents, etc., to refuse to permit any child having any contagious or infectious disease, including smallpox, to attend a public or private school; each parent or guardian *shall* cause any minor in his care to be vaccinated; any person not complying with this provision *shall* be guilty of a misdemeanor and punishable by a fine; it shall be the duty of the state board of health to make and enforce all *needful* rules and regulations for the *prevention* and cure, and to prevent the spread of any contagious, infectious or malarial diseases among persons and domestic animals; that all school boards shall coöperate with the state board of health. The state board of health promulgated an order requiring every child to present satisfactory evidence of vaccination before being admitted to school. The defendant, a local school board, adopted the order of the state board of health and excluded the plaintiff, a minor, from school for non-compliance therewith. There was no epidemic of smallpox in the neighborhood and no apprehension of such. A further statute made the attendance of children of the age of the plaintiff compulsory, and penalized the parents for failure to comply with same. The plaintiff applied for a writ of *mandamus* to compel the board to admit him to school. *Held,* (Cole, J., *dissenting*) that the writ should be granted. *Rhea v. Board of Education, etc.* (1919, N. D.) 171 N. W. 103.

The court reasoned that the failure to include non-vaccination in the statute which made it the duty of teachers, etc., to refuse admission to those children having any contagious or infectious disease, etc., indicated that the claimed power was not intended to be granted either to the state board of health or the local board of education, on the ground that *expressio unius est exclusio alterius;* that a board of health which possesses merely *general* powers for the *prevention* and spread of contagious diseases, cannot, in the absence of reasonable apprehension of danger, promulgate and enforce rules which seriously cut into the individual's liberty and whose preventive efficacy is doubtful to the court. The power of the legislature by *express* provision to authorize administrative boards to *require* vaccination and penalize non-compliance has been acknowledged in nearly every state. *Herbert v. School Board* (1916) 197 Ala. 617, 73 So. 321; *Blue v. Beach* (1900) 155 Ind. 121, 56 N. E. 89; *State v. Hay* (1900) 126 N. C. 999, 35 S. E. 459; *Morris v. City of Columbus* (1897) 102 Ga. 792, 30 S. E. 850. Nor is it necessary for such boards, possessing an express power, to wait until a threatened epidemic before prohibiting school attendance of children not complying with their order. *State ex rel. Milhoof v. Board of Education* (1907) 76 Oh. St. 297, 81 N. E. 568; *Re Rebenack* (1895) 62 Mo. App. 8; *cf. Bissel v. Davison* (1894) 65 Conn. 183, 32 Atl. 348. It has been denied, however, that a board possessing express power only to enforce regulations "necessary to safeguard the public health," and to "prevent the spread of disease," has the power to exclude children when there is no epidemic apprehended. *Jenkins v. Board of Health* (1908) 234 Ill. 422, 84 N. E. 1046, 17 L. R. A. (N. S.) 709; *Potts v Breen* (1897) 167 Ill. 67, 47 N. E. 81; *Adams v. Burdge* (1897) 95 Wis. 390, 70 N. W. 347; *cf. State ex rel. Cox v. Board of Education* (1900) 21 Utah, 401, 60 Pac. 1013. Whether such *general* power of the board includes the specific power to require vaccination, etc., in the absence of an epidemic, is obviously in any given case a question of legislative intent. In

the instant case the statutes requiring all children to be vaccinated, and to attend school, are in *pari materia* with the imposition of duty on teachers, etc., to refuse admission to schools of children suffering from disease or living in homes, etc., and with the statute giving the board of health general power to make all regulations needful for the public health. The intent of the legislature would seem to be strongly evidenced by the statute which required *all* children to be vaccinated and penalized the parents for the non-compliance. This interpretation does not seem to be materially weakened by the application to the statute making it the duty of teachers to exclude in certain cases of the maxim *expressio unius,* etc. It has been objected to such an interpretation, however, that when a parent was subject to a statute which required the vaccination of children and penalized him for non-compliance, and when he was also subject to a penalty for neglect to send his child to school, the result would by *implication* give the board a power to which an *express* grant of the legislature is necessary; namely, to enforce vaccination. *Cf. Matthews v. Board of Education* (1901) 127 Mich. 530, 86 N. W. 1036. The majority of the court in the principal case seem to have been influenced by this reasoning. "It is not particularly the function of the board of health to compel compliance with this statute. The board is not the public prosecutor." But the objection seems hardly sound, for it has been held under facts similar to those of this case that a parent acquires a privilege of not complying with the compulsory education act. *State ex rel. O'Bannon v. Cole* (1909) 220 Mo. 697, 119 S. W. 424; *Commonwealth v. Smith* (1900) 9 Pa. Dist. 625. It should be observed that the Supreme Court of North Dakota seems to judge for itself both whether the conditions demanded preventative measures and whether a requirement of vaccination was such a measure, which is contrary to the general rule of leaving the board a wide discretion in such matters and of taking judicial notice of the teachings and belief of the majority of medical experts on the value of vaccination. For similar distinction between general and express powers of boards, as to compulsory physical examination, see (1919) 28 YALE LAW JOURNAL, 703.