RECENT CASE NOTES

ALIEN FRIEND—AMERICAN-BORN WIFE—RESIDENT CITIZEN OF ENEMY STATE—INHERITANCE.—The plaintiff and the defendant were sisters, the only daughters of a decedent American citizen. The defendant married an Austrian subject before the outbreak of war between the United States and Austria. With her husband, she had resided continuously in the United States since their marriage, and they had been peaceful and unobjectionable residents since the outbreak of the war. The New York Real Property Law limits the privilege of inheritance to "alien friends." The plaintiff filed a complaint to bar the defendant from any share of the decedent's estate on the ground that she was an "alien enemy." *Held*, that the complaint should be dismissed. *Hughes v. Techt* (1919, App. Div.) 177 N. Y. Supp. 420.

The case turned upon the meaning of "alien friend" under the New York statute. It was contended by the plaintiff that it had the popular meaning of a citizen of a state at peace with the United States. But the court decided, we believe correctly, that the term had the technical meaning assigned to it by the federal Trading with the Enemy Act and by international law, as set forth in numerous recent decisions—namely, the opposite of "alien enemy," and including, therefore, persons of enemy nationality who had been permitted under the governmental regulations to continue their peaceful residence in the United States. See (1917) 27 YALE LAW JOURNAL, 104. The American-born woman by marriage to an alien doubtless becomes an alien under the Act of Congress of March 2, 1907, 34 Stat. L. 1228. *Mackenzie v. Hare* (1915) 239 U. S. 299, 36 Sup. Ct. 106 (1918) *ibid.*, 97. At the outbreak of the war with Austria, she became, like her husband, the subject of an enemy state. But so long as her peaceful residence in the United States was not disturbed by expulsion, internment, or other measure which might have been taken against enemy citizens, she was by implication excluded from the technical character of an "alien enemy," and was empowered to continue in the enjoyment of all her civil rights. These have been held to cover the right to sue in domestic courts and the right to take real estate by purchase. *Porter v. Freudenberg* (C. A.) [1915] 1 K. B. 857; *Arndt-Ober v. Metropolitan Opera Co.* (1918) 182 App. Div. 513, 169 N. Y. Supp. 944; *Tortoriello v. Seghorn* (1918, N. J. Ch.) 103 Atl. 393. It is now construed to include the capacity to inherit.

ATTORNEY AND CLIENT—PRACTICE BY SUSPENDED ATTORNEY—DISBARMENT.—The defendant attorney was suspended from practice. During the period of his suspension he filed pleadings in the name of another attorney, and also in some instances in his own name. He maintained a law office, as before his suspension, with a sign which bore his name as attorney at law. He consulted clients in regard to their actions pending, and was present in court when their cases were tried. Disbarment proceedings were instituted. *Held*, that such acts constituted the practice of law in violation of the duty of a suspended attorney, and, together with other misconduct, were cause for disbarment. *State v. Fisher* (1919, Neb.) 174 N. W. 320.

That the acts of the defendant constituted the practice of law seems certain. The practice of law is not limited to the conduct of cases in courts. It embraces advice to clients regarding legal matters, pending or to be brought before a court of record, the preparation of pleadings and of legal instruments of all kinds, conveyancing, and, in general, all actions taken for clients in matters

connected with the law. *In re Duncan* (1909) 83 S. C. 186, 65 S. E. 210; *In re Bailey* (1915) 50 Mont. 365, 146 Pac. 1101; but *cf. Metcalfe v. Bradshaw* (1893) 145 Ill. 124, 33 N. E. 1116 (acting as administrator). An attorney at law is not merely a member of a profession practicing for personal gain, nor is he, on the other hand, a public officer. He is an officer of the court. *In re Splane* (1889) 123 Pa. 527, 16 Atl. 481. Courts of record have the privilege of saying who shall, as attorneys, be recognized as officers of the courts, and the power to expel such persons whenever they have been adjudged unworthy or unfit for this important trust. *Danforth v. Egan* (1909) 23 S. D. 43, 119 N. W. 1021. This "power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself." *Ex parte Secombe* (1856, U. S.) 19 How. 9; *State v. Stiles* (1900) 48 W. Va. 425, 37 S. E. 620. A proceeding for disbarment is simply the exercise of jurisdiction over an officer, an inquiry into his conduct, not for the purpose of granting redress to a client for wrong done, but only for the maintenance of the fairness and dignity of the court by the removal of an unfit officer. *Bar Association of City of Boston v. Casey* (1912) 211 Mass. 187, 97 N. E. 751.

BANKRUPTCY — VOLUNTARY BANKRUPT — PUBLIC UTILITY CORPORATION. — A public service corporation which supplied gas to a city was threatening to discontinue service, unless financial relief in the form of higher rates was granted. The city brought suit in the state court to restrain the corporation from either raising its rates or discontinuing its service. The suit was based upon an alleged contract contained in the corporation's franchise. After a temporary injunction had been issued, but before trial on the merits, the defendant filed a voluntary petition in bankruptcy and was later adjudged bankrupt. Through the trustee in bankruptcy the defendant continued to supply gas, but at an increased rate. The city then filed a petition in the federal court to have the bankruptcy proceedings set aside. *Held,* that the petition should be denied. *City of Holland v. Holland City Gas Co.* (1919, C. C. A. 6th) 257 Fed. 679.

By the amendment of 1910 to section 4a of the Bankruptcy Act, the power to become a voluntary bankrupt is extended to corporations, other than municipal, railroad, insurance, and banking corporations. *Bell v. Blessing* (1915, C. C. A. 9th) 225 Fed. 750. Prior to that time, corporations within the Act could become bankrupts by admitting in writing their inability to pay their debts and their willingness to be adjudged bankrupt on that ground. The substance of such proceedings was voluntary, even though the form was involuntary. *In re New Amsterdam Motor Co.* (1910, D. N. Y.) 180 Fed. 943. The power, by the amendment of 1903 to section 4a, to be thus adjudged bankrupt was limited to corporations engaged principally in manufacturing, trading, printing, publishing, mining and mercantile pursuits. *Cf. In re Excelsior Café Co.* (1910, D. N. Y.) 175 Fed. 294. Public service corporations were held not to come within the meaning of any of these classes. *In re Bay City Irrigation Co.* (1905, D. Tex.) 135 Fed. 850. The reason given for this interpretation was that bankruptcy proceedings might impair the public obligations which were peculiar to such corporations. *In re Hudson River Electric Power Co.* (1909, D. N. Y.) 173 Fed. 934. The same reasoning would seem to apply to the interpretation of the Act as amended in 1910. That amendment, under the doctrine of *expressio unius,* by expressly excluding certain classes of corporations from the operation of the Act, implicitly includes all others. Hence all rules of policy for excluding public service corporations must give way to the express legislative enactment.

The court in the principal case is clearly correct in this interpretation. See *Words and Phrases* (2d ser. 1914) 412. The result, however, is to be regretted. Since the public service corporation has the power to become a voluntary bankrupt, the court has no discretion to inquire into the motives of the proceeding. *In re Carthage Lodge* (1916, D. N. Y.) 230 Fed. 694. Nor is it essential that the corporation be insolvent. *In re Foster Paint & Varnish Co.* (1914, D. Tenn.) 210 Fed. 652. Consequently, public service corporations have the power to avoid their public duties by becoming bankrupt. It is suggested that the situation should be remedied by proper legislative enactment.

CARRIERS—PROTECTION OF PASSENGER FROM POLICE.—Prohibition officers, under an illegal warrant, forced the plaintiff passenger to leave the defendant's train and expose his liquor to an examination to determine whether or not the containers were labelled according to law. None of the train crew attempted to prevent the plaintiff from being ejected, nor did they inquire into the authority of the officers, whom they knew to be such. The plaintiff brought an action on the case. *Held*, that he should not recover. *Clark v. Norfolk and Western Ry.* (1919, W. Va.) 100 S. E. 480.

The court based its decision on the ground that the defendant was under a duty to the state not to interfere with known officers of the law acting under color of authority, and also that the defendant was privileged, even against its passengers, not to inquire into the legality of the officers' acts. These grounds accord with the authorities. The negation of the carrier's duty to protect the passenger in such a situation is an exception to the law of carriers. The general rule is that the carrier is under a duty to protect the passenger from insult or injury caused by its own servants, by other passengers, or by intruders, where the danger is known, or is reasonably ascertainable, and can be prevented by the exercise of due care. *Stewart v. Brooklyn and Crosstown R. R.* (1882) 90 N. Y. 588; see *Gillingham v. Ohio River R. R.* (1891) 35 W. Va. 588, 592, 14 S. E. 243, 245. There has been some tendency to hold that this exception does not apply where the carrier knows the arrest is illegal, that in such case it is under a duty to protect the passenger from the officer. *Anania v. Norfolk and Western Ry.* (1915) 77 W. Va. 105, 87 S. E. 167; see *Burton v. New York Central etc. R. R.* (1911) 147 App. Div. 557, 564, 132 N. Y. Supp. 628, 634; see *Louisville and Nashville R. R. v. Byrley* (1913) 152 Ky. 35, 40, 153 S. W. 36, 39. And this is because an officer acting without authority comes within the class of tort feasors, against whom the carrier undertakes to protect the passenger by the contract of transportation. See *Weeks v. N. Y., N. H. & H. R. R.* (1878) 72 N. Y. 50, 59. But, in general, the carrier is held liable only when it has assisted in the arrest. *Brunswick and Western R. R. v. Ponder* (1903) 117 Ga. 63, 43 S. E. 430. In such cases its liability would seem to be based on the ground that it is a joint tort feasor, instead of upon breach of its contractual duty. There is a difference of opinion as to what constitutes assistance on the part of the carrier, whether it must instigate the arrest or merely point out the person sought. See *Texas Midland R. R. v. Dean* (1905) 98 Tex. 517, 522, 85 S. W. 1135, 1137; see *Owens v. Wilmington & Weldon R. R.* (1900) 126 N. C. 139, 141, 35 S. E. 259, 260. There being no active assistance in the instant case, there was no question of tort feasance; and the majority of the courts find no breach of contract in mere failure to protect a passenger against an officer of the law.

CORPORATIONS — BY-LAWS — RESTRICTION ON TRANSFER OF STOCK. — Three brothers, co-partners, formed a corporation to carry on their business, and caused all the stock to be issued to themselves and their wives. The certificate

of incorporation provided that stock could not be transferred unless it had first been offered for sale to the other stockholders upon terms to be fixed by a subsequent agreement, but upon the refusal of the stockholders to purchase, the stock should no longer be subject to the restriction. All the stockholders entered into such an agreement, which was embodied in a by-law. Notice of the agreement and by-law was stamped upon the certificates of stock. The complaint alleged that the defendant brother had transferred stock to his wife without consideration, without having offered the same to the other stockholders, and asked that the wife be deemed to have no title to the stock. The wife demurred to the complaint. *Held,* that the demurrer be overruled. *Bloomingdale v. Bloomingdale* (1919, Sup. Ct.) 177 N. Y. Supp. 873.

The great weight of authority holds a by-law prohibiting any transfer of stock without the consent or approval of the officers or members of a corporation to be in restraint of trade and void. *Finch v. Macoupin Tel. & Tel. Co.* (1908) 146 Ill. App. 158; *Miller v. Farmers Milling & Elev. Co.* (1907) 78 Neb. 441, 110 N. W. 995. Such a by-law puts the stockholder under a disability to transfer his stock without the consent of the corporation, which is inconsistent with the incidents of the ownership of personalty. *In re Klaus* (1886) 67 Wis. 401, 29 N. W. 582. The effect of such a by-law as that in the instant case could not be to destroy the power to transfer stock, but only to limit the parties to whom the transfer could be made in the first instance, i. e., to confer upon specified parties a right of preëmption. *Cf.* (1918) 28 YALE LAW JOURNAL, 65. The weight of modern authority is in accord with the principal case. *Ganet v. Philadelphia Lawn Motor Co.* (1909) 39 Pa. Super. Ct. 78; *Chaffee v. Farmers' Co-op. Elev. Co.* (1918, N. D.) 168 N. W. 616. Such by-laws have been specifically enforced as contracts against stockholders who were parties to their enactment. *New England Trust Co. v. Abbott* (1894) 162 Mass. 148, 38 N. E. 432; *Weiland v. Hogan* (1913) 177 Mich. 626, 143 N. W. 599. According to this view, the stockholder would have the power, although not the privilege, of effecting a transfer to a purchaser for value without notice of the contract. Under the provision of the Uniform Stock Transfer Act which provides that there shall be no restriction upon the transfer of shares, unless the restriction is stated in the certificate—it is submitted that, in the absence of notice stated in the certificate, the owner would have the power of making a valid transfer although the purchaser had knowledge of the by-law. See (1910) Uniform Stock Transfer Act, sec. 15. The Act thus gives the stockholder a greater power of transfer than where the by-law is enforced as a contract.

CRIMINAL LAW — HOMICIDE — SELF-DEFENCE — PURSUIT OF ADVERSARY. — The accused engaged in a struggle which resulted in the death of his adversary. There was evidence tending to show that the deceased had struck the first blow and that he had seriously cut the hand of the accused with a piece of plank large enough to crush a man's skull. The accused defended himself with a knife and, in the course of the struggle, followed his retreating assailant for forty or fifty steps. The trial court charged the jury that the accused, if attacked, was under no duty to retreat; but did not instruct that the accused was privileged to pursue his assailant until the danger was over. *Held,* that the failure to so instruct was error. *Taylor v. State* (1919, Tex. Cr. App.) 213 S. W. 985.

The ancient common-law doctrine as to the duty of one, when attacked, to "retreat to the wall" has been abandoned, except in a few jurisdictions. See (1909) 18 YALE LAW JOURNAL, 648. The "stand ground when in the right" rule is now generally adopted. *Hammond v. People* (1902) 199 Ill. 173, 64 N. E. 980; *Runyan v. State* (1877) 57 Ind. 80. This rule is adopted universally when the encounter took place on the premises of the accused. See (1910) 20

YALE LAW JOURNAL, 77. The cases cited above show, however, that this rule is by no means limited to that extent. Some courts hold that the old common law is no longer applicable to modern American conditions; possibly this view was a result of the more general use of fire-arms. Others put it on the basis that the privilege to stand ground to prevent a felony includes the privilege to prevent felonious attacks on one's own person, as well as to prevent some other felony, such as robbery, etc. *State v. Dixon* (1876) 75 N. C. 275; *Ragland v. State* (1900) 111 Ga. 211, 36 S. E. 682. However that may be, it has long been recognized that the privilege to pursue an assailant who is attempting to commit murder or inflict serious physical injury was essential to make complete the privilege of self-defence. See 1 East, *Pleas of the Crown* (1806) 271, 272. Comparatively few cases have been decided on this point. There seems to have been some extenuating circumstance in almost every instance. *Luby v. Commonwealth* (1876, Ky.) 12 Bush, 1 (attack made when the assailant was on the premises of the accused); *Stoneham v. Commonwealth* (1890) 86 Va. 523, 10 S. E. 238 (attempt to rob the accused); *Conner v. State* (1893, Miss.) 13 So. 934 (assailant retired to procure a deadly weapon with which to renew the contest); *State v. Thompson* (1893) 45 La. Ann. 969, 13 So. 392 (several persons made the attack); *Stanley v. State* (1898 Tex. Cr. App.) 44 S. W. 519 (assailant was retreating to a more favorable position). The last of the cases cited comes very close to the situation in the principal case. The decision is in accord with what has been the general tendency of development in this line of cases.

DAMAGES—CONSEQUENTIAL DAMAGES—NOTICE.—In response to a telegram from the plaintiff, the department of agriculture of the State of Virginia delivered to the defendants a package of hog cholera serum consigned to the plaintiff. At the time of the shipment the consignor notified the defendant of the nature of the article shipped and the necessity for a quick delivery. As a result of the defendant's negligence, the article was not delivered until one week later. The plaintiff brought this action on the contract between the consignor and the defendant, a provision of which made it enure to the benefit of the consignee, alleging that, as a result of their inexcusable delay, he was deprived of the use of the serum as a preventive treatment, and thereby lost certain hogs by death from cholera. There was evidence that the serum was successful as a preventive treatment in about ninety *per cent.* of the cases. This serum was prepared only by the department of agriculture to be distributed directly to owners of hogs solely for the purpose of preventing disease which was not epidemic at the time. *Held,* that the plaintiff should recover damages for the loss of the hogs. *Allen v. Adams Express Co.* (1919, Va.) 100 S. E. 473.

It is generally stated by the courts in actions for breach of contract, that recovery can be had for such damages only as are the natural and probable consequence of the breach; that unusual or special damages are not recoverable unless they ought reasonably to have been contemplated by the parties when the contract was made. *Cf. Hadley v. Baxendale* (1854) 9 Exch. 541; *cf. Cohen v. Norton* (1889) 57 Conn. 480, 18 Atl. 595. But the same test was evidently applied in determining ordinary damages as in the case of special damages, for a decision that damages are "ordinary" is in itself a holding that they should reasonably have been contemplated. See Smith (1900) 16 L. QUART. REV. 277. In neither case is it necessary that the parties actually foresee the consequences. The test is purely an objective one. See *Hydraulic Engineering Co. v. McHaffie* (1878) 4 Q. B. D. 670, 677. What circumstances are sufficient to constitute notice to the average man situated as is the defendant, is usually a question of fact for the jury. *Southern R. R. v. Longley* (1913) 184 Ala. 524, 63 So. 545. It has been held that the nature of the article shipped is sufficient evidence from which the jury may find notice. *Weston v. Boston and Maine R. R.* (1906) 190

Mass. 298, 76 N. E. 1040 (contract for the carriage of theatrical goods—ordinary damages sought); *Story Lumber Co. v. Southern R. R.* (1909) 151 N. C. 23, 65 S. E. 460 (contract for the carriage of a saw-mill edger—special damage sought). As applied to the facts in the principal case, in the absence of any showing that the manner of distribution of the serum directly to the user was a matter of general information, it may be doubted that there was sufficient evidence of notice to go to the jury. The argument has been made that the burden of special damages as a consequence of notice should not be imposed on carriers, because the carrier has not the privilege of refusing to enter into such contracts. See *Horne v. Midland R. R.* (1873) 8 C. P. 131, 137; see *Lonergan v. Waldo* (1901) 179 Mass. 135, 140, 60 N. E. 479, 481. But it is suggested that this additional burden may properly be considered merely another incident of the defendant's valuable franchise. See (1917) 26 YALE LAW JOURNAL, 252.

EVIDENCE — PRESUMPTIONS — ALTERATION OF INSTRUMENTS. — The plaintiff brought this action on a written contract by which the defendant's intestate agreed, in consideration of certain services to be rendered to him by the plaintiff, that the plaintiff should receive all the property of which the intestate might be possessed at the time of his death. The defendant, who was the administrator of the intestate, offered a check for $200. given by the intestate to the plaintiff, on the face of which appeared the words "$300. due on demand in full of all demands to date," as evidence of an accord and satisfaction. The plaintiff denied that the alleged indorsement was on the check when she cashed it, and the defendant offered no evidence to rebut her denial. The trial court gave judgment for the plaintiff for $300. only. *Held,* that there was no evidence to sustain the finding of the trial court. Evans, J. *dissenting. Kauffman v. Logan* (1919, Iowa) 174 N. W. 366.

Although there are jurisdictions which hold to the contrary, the view that a true presumption, in itself, carries no weight as evidence is now upheld by the best authorities. See Thayer, *Preliminary Treatise on Evidence* (1898) 549, and Appendix B; *Agnew v. United States* (1897) 165 U. S. 36, 17 Sup. Ct. 235; *Peters v. Lohr* (1910) 24 S. D. 605, 124 N. W. 853. Where it is alleged that an alteration has been made which is apparent upon the face of an instrument, there is a hopeless conflict of authority as to whether or not there is any presumption as to whether the alteration was made before or after delivery. But where the alteration is not apparent, there is a presumption that the instrument was delivered as it appears. *Anderson v. Chicago & N. W. Ry.* (1911) 88 Neb. 430, 129 N. W. 1008; *Laurence v. Meenach* (1907) 45 Wash. 632, 88 Pac. 1120. The majority of the court, in the principal case, appear to have accepted the view that the alteration was apparent on the face of the instrument and that the defendant had, at most, the presumption in his favor that the check was in its present state when cashed by the plaintiff. The dissenting opinion, however, seems to adopt the view that the alteration was not apparent on the face of the instrument and that this fact raised more than a mere presumption that the instrument was originally as it appeared at the trial. Assuming that the alteration was not apparent it is submitted that the dissenting opinion is sound. It is admitted that where a mere presumption, unsupported by evidence, is rebutted by direct testimony, there is no case to go to the jury. But here the check itself was evidence. *Cf.* N. I. L. sec. 123. It has been clearly held that where there is a dispute as to the true tenor of a written instrument the appearance of the instrument itself may furnish satisfactory explanation without "extrinsic" evidence. *Hutchison v. Kelly* (1916) 276 Ill. 438, 114 N. E. 1012. If this doctrine, which is believed to be correct, had been applied in the instant case, there would have been evidence from which the trial court could have found as it did.

EVIDENCE—WITNESSES—PRIVILEGED COMMUNICATION—JUVENILE COURT JUDGE.—A twelve year old boy, being assured that his statements could not be used against him or his mother, who was charged with the murder of his father, confessed his part in the murder to Judge Ben Lindsey, the juvenile court judge of the district. Thereupon delinquency proceedings were instituted against the boy, and he was taken in charge as a delinquent child. At the trial of the mother, the boy testified in her favor. The prosecution called Judge Lindsey to impeach this testimony, the boy having consented to the judge testifying. The judge refused to testify and claimed the communication was privileged, whereupon the court imposed a fine for contempt. *Held,* (three judges *dissenting*) that the fine was correctly imposed, because the communication was not privileged. *Lindsey v. People* (1919, Colo.) 181 Pac. 531.

The privilege between attorney and client and that between husband and wife are well established. 4 Wigmore, *Evidence* (1905) secs. 2291, 2336; 5 Chamberlayne, *Evidence* (1911) secs. 3677, 3697. The privilege of an informer and a public official has also been recognized. *Worthington v. Scribner* (1872) 109 Mass. 487 (solicitor of United States treasury). That between physician and patient has been created in some states by statute. 5 Chamberlayne, *op. cit.*, sec. 3701. Wigmore divides the test for privilege into four elements, all of which were admittedly present in the instant case, except that "(4) the injury that would inure to the relation by the disclosure must be greater than the benefit thereby gained for the correct disposal of the litigation." 4 Wigmore, *op. cit.*, sec. 2285. The majority of the court held this element to be lacking and did not feel that it could recognize the privilege in the absence of statutory authority. The dissenting opinion by Bailey, J. presents forceful arguments to the contrary. And it is difficult to see how the work of a juvenile court judge can be of enough value to justify his existence, unless he is protected in keeping the children's confidence. In the instant case, to be sure, the boy had waived the privilege. The general rule is that the privilege can be thus waived by the person for whose benefit it was created and by him only. *McCooe v. Dighton, S. & S. Ry.* (1899) 173 Mass. 117, 53 N. E. 133; *Dowie's Estate* (1890) 135 Pa. 210, 19 Atl. 936. But it is submitted that, if the privilege were recognized in the principal case, the power of waiver might properly have been held to be in the judge of the juvenile court, since the child was a ward of the court.

EXECUTORS AND ADMINISTRATORS—ANCILLARY ADMINISTRATION NOT CHARGEABLE WITH EXPENSES OF DOMICILIARY EXECUTOR.—A testator died leaving property of small value in Oklahoma, the state of his domicile, and a bank deposit of much greater value in Texas. After litigation, in which the plaintiff, an attorney, was employed by the executor, the will was admitted to probate in Oklahoma. Meantime the defendant had been appointed administrator, without the will, in Texas. The plaintiff sought to recover the value of his services from the administrator, the Oklahoma estate being insufficient in amount and the executor insolvent. *Held,* that judgment for the plaintiff was erroneous, since the ancillary estate in Texas was not chargeable with any part of the expense of administrating the domiciliary estate in Oklahoma. *Hare v. Pendleton* (1919, Tex. Civ. App.) 214 S. W. 948.

In many states attorney's fees for services beneficial to the estate are the personal obligation of the executor or administrator who employs the attorney. *Estate of Kruger* (1904) 143 Calif. 141, 76 Pac. 891; *cf.* (1919) 29 YALE LAW JOURNAL, 242. But in Texas, by reason of statute, such fees have been held to be a direct claim against the estate. *Gammage v. Rather* (1876) 46 Tex. 105. The court assumed the Oklahoma law to be the same and that the plaintiff had a direct claim against the Oklahoma estate. But was such a claim a charge upon the estate being administered in Texas? The plaintiff contended that the

executor would have a right to reimbursement out of the Texas assets for proper expenses of the Oklahoma administration and that he, the plaintiff, should be subrogated to such right. The court, however, denied that the executor, if he had paid the plaintiff, would have the right asserted. His claim for reimbursement out of assets of the estate was limited, the court said, to the property within his trusteeship, and until he obtained actual possession of the property in Texas, it was not within his trusteeship, nor was he bound to account for it. *Sherman v. Page* (1881) 85 N. Y. 123. The two administrations were separate and distinct; while usually the ancillary representative remits the surplus assets to the domiciliary representative for distribution, this is only by reason of comity; distribution directly to legatees or next of kin may be ordered by the court of the ancillary jurisdiction. *Harvey v. Richards* (1818, C. C. D. Mass.) 1 Mason, 381, 415; *Matter of Hughes* (1884) 95 N. Y. 55. The executor's right to reimbursement for proper expenses grows out of the trust relation which he holds in respect to property in his hands as trustee. He holds no such relation in respect to the Texas property. Neither would the Oklahoma executor occupy the position of a creditor of the estate being administered in Texas. The well-reasoned opinion seems clearly correct. There is a *dictum* that possibly the legatee who has been benefited by the establishment of the will might be held personally in a quasi-contractual action. *Cf. Williams v. Gibbes* (1857, U. S.) 20 How. 535. But even if the plaintiff were a creditor of the *sole* legatee, this fact would not give him a standing to demand payment from the defendant administrator. *Cf. Vinson v. Cook* (1919, Okla.) 184 Pac. 97.

LANDLORD AND TENANT—IMPROVEMENTS BY TENANT—COMPENSATION.—The plaintiff and his wife were in possession of land of his father-in-law, paying $100. yearly. There was an understanding that they were eventually to have it, but there was no contract to convey. The plaintiff, with the reluctant consent of the father-in-law on account of their expensive character, made improvements that increased the rental value $100. The wife, after a quarrel, went back to her father, who tried to regain the land. The husband, having been denied specific performance of an alleged contract to convey, sought compensation from the father-in-law for the improvements. *Held,* that the plaintiff should recover. Fraser, J. *dissenting. Coggins v. McKinney* (1919, S. C.) 99 S. E. 844.

The court based the recovery of the plaintiff, as tenant, on the ground that the improvements were made in good faith and with the knowledge and consent of the landlord, who would thereafter enjoy, in the increased rental value, the fruits of the tenant's expenditure. The well settled common-law rule, in the case of such erections by mistake by a stranger or intentionally by a tenant, was that they became, piece by piece, part of the land, and that the landlord or the owner was not liable for their cost in the absence of a contract, although the value of the land was increased. *Kutter v. Smith* (1864) 69 U. S. 491; see 2 Kent, *Commentaries* (13th ed. 1884) 335. But some courts of equity, looking more to the justice of the situation, gave a stranger, who supposed he had a good title, a right to the fair value of improvements made by him. *Bright v. Boyd* (1843, C. C. D. Me.) 2 Story, 605. But see Thurston, *Cases on Quasi Contracts* (1916) 444, note. This view has been adopted in many states by statute, as in South Carolina, the state of the instant case. S. C. Civ. Code, 1912, sec. 3526; see Woodward, *Law of Quasi Contracts* (1913) 301, 302, note. That statute provides only for the person who supposes that the title purchased is good, or that the lease conveys the title and interest therein expressed. In the instant case the plaintiff was unable to prove a contract to convey, and chose to deny even a verbal lease by calling his yearly payments "interest." So the

court quite properly considered the case as not within the statute. A tenant, to recover for improvements, need not prove a contract enforceable in equity, however, when such an understanding as there is in the instant case is acted upon. *King's Heirs v. Thompson* (1835) 34 U. S. 204; *Bourne v. Odam* (1895) 17 Ky. L. Rep. 696, 32 S. W. 398. The case comes down, then, to a question of fact as to the reasonableness of the plaintiff's supposition that he was to have the future enjoyment of the land, and there is to be found the basis of the dissenting opinion.

MANDAMUS—ISSUANCE OF DIPLOMA—SCHOOLS AND SCHOOL DISTRICTS—CONTRACTS.—The plaintiff attended the defendant high school for four years, passed in all her courses and in her final examinations, and delivered her graduation oration. The defendant secured caps and gowns, had them fumigated, and ordered all the girls to wear them at the graduation exercises. All refused to wear the caps, and all but three refused to wear the gowns, on account of the unbearable smell from the fumigation. But the verbal order to wear them was not rescinded, and only those three were given diplomas. The plaintiff sued for a writ of *mandamus* to compel the defendant to issue a diploma to her. *Held*, that she was entitled to the relief sought. *Valentine v. Independent School District* (1919, Iowa) 174 N. W. 334.

The court proceeded on the ground that the order of the defendant was arbitrary, unreasonable, and exceeded its authority. In view of the fact that the plaintiff had complied with all rules and conditions to entitle her to graduate, except the one in question, there was no fair occasion for the further exercise of discretion by the board. So the ministerial duty remaining—to issue the diploma—was enforceable by *mandamus*. There is little conflict in the authorities as to this use of the writ, and nearly all of them are fully discussed in the opinion. However, this case raises the interesting question of the exact legal relations between a student and his school. As a rule, the sum of these relations is a unilateral contract. See Corbin, *Offer and Acceptance* (1916) 26 YALE LAW JOURNAL, 169. The first step in the formation of the contract—the offer—seems to be made in the ordinary case when the student, after satisfying all entrance requirements, presents himself with his credentials and his cash deposit (if required). A public school is then, by statute, under a duty to receive him, while a private school is not; but this duty, like that of an innkeeper or common carrier on the custom of the realm, lies entirely outside the contract, and does not make the formation of the latter different in the two cases. The school, by allowing the student-offeror at this time to matriculate, accepts his offer, and undertakes certain duties defined by its advertisements, its catalogues and its rules and regulations. It seems that this acceptance covers the whole period necessary to complete the course, since the school cannot raise that student's tuition during that time. *Cf. Niedermeyer v. University of Missouri* (1895) 61 Mo. App. 654. The school's duties are, *inter alia*, to furnish instruction for the advertised period, to provide board and lodging in a proper case, to provide an opportunity to take the final examinations, and to issue a diploma. These duties are conditional, much like the duties of the company on a life insurance contract; unless the student shall obey the rules of the institution, obtain the necessary passing mark, and make the necessary tuition payments, the school has the privilege of dropping him. *State v. Orange Training School* (1899, Sup. Ct.) 63 N. J. L. 528, 42 Atl. 846. And he has no right to recover his deposit or tuition paid in advance. *Fessman v. Seeley* (1895, Tex. Civ. App.) 30 S. W. 268. The student has his corresponding rights, and may secure reinstatement by *mandamus* if he has fulfilled all conditions. *Baltimore University v. Colton* (1904) 98 Md. 623, 57 Atl. 14. In one instance, however, cited in the principal case, a writ of *mandamus* was denied in these

circumstances on the ground that there was an adequate remedy in damages for breach of the contract or in a bill for specific performance of it. *State v. Milwaukee Medical College* (1906) 128 Wis. 7, 106 N. W. 116. But no case has been found giving either kind of relief. Even after completing the whole course satisfactorily and passing his final examinations, a student may relieve the school of its duty to give him a diploma by a flagrant violation of school discipline. *People v. New York Law School* (1893, Sup. Ct.) 68 Hun, 118, 22 N. Y. Supp. 663. But he retains even then a right to a certificate showing what he has accomplished. After a student has passed the final examinations and it is in the discretion of the faculty to grant him a diploma, they are under a duty to exercise that discretion; and if all questions of discretion are settled in his favor, then the school must issue the diploma. *State v. Lincoln Medical College* (1908) 81 Neb. 533, 116 N. W. 294.

MANDAMUS—STATUTES—FINANCIAL INABILITY TO PERFORM.—By the decisions of the courts of Florida, railroads are under an absolute duty to provide and maintain an adequate and safe roadbed and track. The defendant having been ordered by the State Railroad Commissioners to make proper repairs, refused to do so. The Commissioners instituted *mandamus* proceedings to enforce the order, and the defendant pleaded its complete financial inability. *Held,* that neither an alternative nor a peremptory writ should be granted. *State ex rel. Burr v. Tavares and Gulf R. R.* (1919, Fla.) 82 So. 833.

Mandamus is the ordinary procedure to compel public service corporations to perform the express and implied duties imposed on them by their charters or by statutes. See *In re Wheeler* (1909, Sup. Ct.) 62 Misc. Rep. 37, 50, 115 N. Y. Supp. 605, 613. The duty must be clear and specific. See *Public Service Comsion v. Interborough Rapid Transit Co.* (1916) 172 App. Div. 324, 329, 158 N. Y. Supp. 480, .484. Where the acts to be done under the order would be of a continuing nature, what seems the best opinion holds that the writ will not issue, since it would partake too much of the character of an injunction. *Ibid.* This procedure has been used to compel street railway companies to pave the street between their rails, to compel the operation of adequate and convenient trains, to compel the construction of safe crossings and to compel adoption of rates fixed by state commissions. See 24 L. R. A. 564, note. It seems to be well settled that the existence of other remedies does not prevent the issuing of the writ, if it appears they are not equally adequate, convenient, and complete. *State v. Lake Erie & Western R. R.* (1897, C. C. D. Ind.) 83 Fed. 284; *State v. Chicago, Madison & Northern R. R.* (1891) 79 Wis. 259, 48 N. W. 243. It is generally an adequate defence in *mandamus* proceedings that the writ would be futile and inoperative; and financial inability, when it is as complete as in the instant case, clearly is within the rule. *Ohio & Mississippi Ry. v. People* (1887) 120 Ill. 200, 11 N. E. 347; *State v. Dodge City, Montezuma & Trinidad Ry.* (1894) 53 Kan. 329, 36 Pac. 755; see also 2 Bailey, *Habeas Corpus* (1913) 1139. It has been suggested that *mandamus* might issue at least when the defendant wilfully and, perhaps, fraudulently placed itself in difficulties. That view has some support particularly when the situation developed after the original issuing of the writ. *Silverthorne v. Warren R. R.* (1868) 33 N. J. L., 173; *Public Service Commission v. International Ry.* (1919, Sup. Ct.) 106 Misc. Rep. 364, 174 N. Y. Supp. 708. It is hard to see, however, how the defendant's fraud makes the writ any more enforceable. Perhaps, as suggested in a Georgia case (sometimes erroneously cited as contrary to the doctrine of the principal case), the financial inability will be received as a valid defence to contempt proceedings for failure to comply with the writ. *Savannah & Ogeechee Canal Co. v. Shuman* (1893) 91 Ga. 400, 17 S. E. 937.

PROPERTY—RESTRAINTS ON ALIENATION—CONDITION BARRING ALIENATION TO NEGRO.—The plaintiff conveyed by deed one of many lots to K, under whom the defendant claims title. There was a condition in the deed that if the purchaser, his heir, or assigns leased or sold any portion of the premises to any person of African, Chinese, or Japanese descent, the title should revert to the vendor, his successors, or assigns. The plaintiff brought this action for a reconveyance on the ground that defendant was of African descent. *Held*, that it should not be allowed, because the condition was void as a restraint on alienation. *Title Guarantee & Trust Co. v. Garrott* (1919, Calif.) 183 Pac. 470.

Where a party creates a legal estate in lands and then adds a provision, the effect of which is to deprive the grantee of one of the essential incidents to the estate granted, such limitation is repugnant and void. So a clause in a deed restraining all alienation of an estate in fee. *McDowell v. Brown* (1855) 21 Mo. 57; *De Peyster v. Michael* (1852) 6 N. Y. 467; *Munroe v. Hall* (1887) 97 N. C. 206, 1 S. E. 65. The question now arises as to what degree of restraint on alienation makes the deed void. On this point the authorities are in hopeless conflict. Gray, *Restraints on the Alienation of Property* (2d ed. 1895) sec. 41. It is generally conceded that a condition annexed to a deed in fee simple, prohibiting, even for a limited time, all alienation by the grantee, is void. *Mandelbaum v. McDonnell* (1874) 29 Mich. 78; *Latimer v. Waddell* (1896) 119 N. C. 370, 26 S. E. 122. But it is also held that a condition that the grantee shall not alienate for a particular time or to a particular person or persons is good. *Langdon v. Ingram's Guardian* (1867) 28 Ind. 360; *cf. Cowell v. Springs Co.* (1879) 100 U. S. 55; *contra, Harkness v. Lisle* (1909) 132 Ky. 767, 117 S. W. 264. Finally, a few cases hold, in accord with the principal case, that any restraint whatever on the power of alienation of a fee simple is repugnant to the interest conveyed, and is invalid. *Williams v. Jones* (1853, Tenn.) 2 Swan, 620; see *Murray v. Green* (1883) 64 Calif. 363, 367, 28 Pac. 118, 120. But the following cases are directly opposed to the holding of the principal case. *Queensborough Land Co. v. Cazeaux* (1915) 136 La. 724, 67 So. 641; *Koehler v. Rowland* (1918) 275 Mo. 573, 205 S. W. 217. The court's attempt to explain these cases seems unsuccessful. Moreover, they are more in accord with public policy than the instant holding. Restrictions on use of land—"equitable easements"—are generally upheld. *Cf. Peck v. Conway* (1876) 119 Mass. 546. Restraints on alienation, such as that in the principal case, serve the same purpose as restriction on use—namely, protection of the value of the surrounding property. It is true that it is difficult to define the extent of the grantor's power to restrict alienation by his grantee; Gray's rule seems to be as exact as it is possible to state the law: that a condition is valid, if it allows alienation to all the world with the exception of selected individuals or classes; but is invalid, if it allows alienation only to selected individuals or classes. Gray, *op. cit.*, sec. 41. A restraint similar to that in the principal case has been evaded by the formation of a corporation whose members were within the prohibited class. *Cf. Peoples Pleasure Park Co. v. Rohleder* (1909) 109 Va. 439, 61 S. E. 794, 63 S. E. 981. In regard to the effect of segregation ordinances limiting alienation, see COMMENT (1918) 27 YALE LAW JOURNAL, 393.