CURRENT DECISIONS

CONSTITUTIONAL LAW—DUE PROCESS—FORFEITURE—DRAFT ANIMAL AND HARNESS PART OF "CONVEYANCE."—A proceeding was begun for the seizure and condemnation of a buggy together with the draft animal and harness hitched thereto under a statute which provided for the condemnation of "all vehicles and conveyances of every kind and description which are used . . . in conveying any liquors." It was urged that the mule with the harness hitched to and being used to draw the buggy in which liquors were being conveyed in violation of the statute did not constitute a part of the "conveyance." *Held,* that the mule and harness constituted an essential part of the conveyance. Atkinson, J., dissenting. *Gates v. State* (1919, Ga.) 101 S. E. 769.

The decision sustaining the constitutionality of this Georgia statute was annotated in (1919) 28 YALE LAW JOURNAL, 824.

CONTRACTS—CONSIDERATION—ILLEGALITY.—The defendant induced the plaintiff to break his contract with a third party by giving a bond to indemnify the plaintiff in case he should be compelled to pay damages for the breach. The plaintiff, having been compelled to pay damages, sued the defendant on the bond. *Held,* that he should not recover. *Hocking Valley Ry. v. Barbour* (1920, App. Div.) 179 N. Y. Supp. 810.

The court held that since the consideration for the contract of indemnity, breaking the contract with the third party, was illegal, the contract of indemnity was unenforcible; that to enforce it would be assisting in the civil wrong done the third party. This seems sound and in accord with the authorities. Inducing one to break a contract operates to create a right to damages in the injured third party against the enticer. See COMMENT (1916) 25 YALE LAW JOURNAL, 407. And where the consideration is the commission of a civil wrong the contract is usually unenforcible. *Randall v. Howard* (1862, U. S.) 2 Black, 585; *Stewart v. Scott* (1891) 54 Ark. 187, 15 S. W. 463.

CONTRACTS—INTERPRETATION—DUTY AND LIABILITY OF PUBLIC SERVICE COMPANIES.—The appellant company entered into a contract with the respondent city by which *inter alia* the former secured a *privilege* to operate its cars over certain streets together with a *duty* "to keep in good repair the roadway between the rails . . . with the same material as the city shall have last used to pave or repave these spaces *and the street* previous to such repairs." At the time this contract was made, the entire street was paved with macadam. Fifteen years later the city repaved all the street except this railway zone with asphalt upon a concrete foundation and ordered, by ordinance, the company to repave its zone with like material. Upon refusal the city secured a peremptory writ of *mandamus.* The company claimed that its contractual duty was only to repave with the same material as the city *last used between the rails;* that the city was attempting to impose an inherently arbitrary and unreasonable non-contractual duty; and that performance of the duty contemplated by the city would reduce its income below a reasonable return on the investment and thus deprive it of its property in violation of the Fourteenth Amendment. *Held,* that the duty to repave created by the contract, as construed by the city, must be fulfilled. Pitney and McReynolds, JJ., *dissenting. Milwaukee Electric Railway and Light Co. v. State of Wisconsin ex rel. City of Milwaukee* (March 1, 1920) U. S. Sup. Ct. Oct. Term, 1919, No. 55.

The Court based its decision solely on the contract and termed the company's

construction "not reasonable." It professed not to consider whether the city possessed, as contended, a *power,* created by statute, to make "reasonable rules and regulations," the company being under the correlative statutory *liability* of being placed under a *duty* by the exercise of the *power.* It was further held that the contract duty was not extinguished by the financial condition of the company although this *fact* should be considered in determining the existence in a particular case of a common-law or statutory *power* to direct an unremunerative extension of facilities or to forbid their abandonment, i. e., whether the company was under a correlative *liability* to have such a *duty* imposed upon it. See (1913) 23 YALE LAW JOURNAL, 51-52. In reference to the power to change rates fixed by contract see Professor Burdick, *Regulating Franchise Rates* (1920) 29 *ibid.,* 589.

CONTRACTS—OFFER AND ACCEPTANCE—FAILURE OF OFFEREE'S AGENT TO TRANSMIT OFFER TO PRINCIPAL AS A TORT.—One Joplin, agent of defendant, in October, 1916, solicited and obtained from the plaintiff an order "taken subject to acceptance" of the defendant for 3 bales of duck to be shipped August 1, 1917. Joplin failed to transmit the order to the defendant who first learned of it when the plaintiff wrote in July, 1917, asking that shipment be made during the following month. Upon the defendant's refusal to ship, the plaintiff sued, setting up first a cause of action for breach of a contract and second that relying upon his belief that the contract had been accepted he had failed to buy duck until the market price had greatly advanced and that the defendant by reason of the negligence of its agent in failing to transmit the offer was estopped to deny the existence of a contract. The jury found for the plaintiff and judgment was entered on the verdict. *Held,* that such judgment was error and judgment should be entered for the defendant. *Four States Grocer Co. v. Wickendon* (1919, Tex.) 217 S. W. 1103.

See COMMENTS, *supra,* p. 673.

CONTRACTS—RESTRAINT OF TRADE—EMPLOYEE.—The defendant, in an employment contract with the plaintiff, agreed that he would not engage in any business which would compete with the plaintiff for five years after the termination of his employment. The defendant a month later set up a similar business of his own and advertised himself as formerly with the plaintiff's store. The plaintiff sued for an injunction. *Held,* that the injunction be denied. *Samuel Stores, Inc. v. Abrams* (1919, Conn.) 108 Atl. 541.

The decision seems sound and in accord with the weight of authority. See (1919) 29 YALE LAW JOURNAL, 232. As to implied conditions against unfair competition in a contract between a publisher and the owner of a copyright, see (1918) 27 *ibid.,* 837.

CONTRACTS—RESTRAINT OF TRADE—USE OF TRADE NAME.—The plaintiffs, manufacturers of motion picture films, engaged the defendant, an actor of almost no experience, to work for them on contracts from year to year. Each yearly contract provided that he should act under the name of Stewart Rome while employed by the plaintiffs, but that he should never use that name when not acting for them. After three years with the plaintiffs, during which time he became famous as the actor, Stewart Rome, the defendant, left for war service. On his return he was engaged by a rival concern and immediately proceeded to act under the name of Stewart Rome. The plaintiffs then brought this action to restrain him from using that name. *Held,* that an injunction should not be granted. *Hepworth Manufacturing Co., Ltd. v. Wernham Ryott* (1919, H. L.) 122 L. T. Rep. 135.

For a discussion approving the decision of this case in the court of Chancery, here affirmed, see (1919) 29 YALE LAW JOURNAL, 232.

CONTRACTS—THIRD-PARTY BENEFICIARY—STATUTORY RIGHT OF MATERIALMEN TO SUE ON CONTRACTOR'S BOND NOT EXTINGUISHED BY AGREEMENT BETWEEN CITY AND CONTRACTOR.—A state statute provided that a city which let a contract for a public building should require the contractor to execute a bond with sureties for the payment of all material furnished for the said work and gave those furnishing material therefor the "right to sue on said bond." The defendant builder contracted with the defendant city for the erection of a public building and furnished a bond with sureties to the city which contained a provision that "no right of action shall accrue by reason hereof, to or for the use or benefit of any one other than the obligee herein named." The plaintiff sued the city, contractor and sureties for material furnished, his real purpose being to "hold" the sureties on the bond. *Held,* that the plaintiff could recover from the sureties, as the right he secured under the statute could not be extinguished by the bond provision which limited the obligor's duty to the city only. *Ingold v. City of Hickory et al.* (1919, N. C.) 101 S. E. 525.

For a discussion of the right of a materialman against an obligor on a builders' bond in the absence of such a statute, see COMMENT (1919) 28 YALE LAW JOURNAL, 798.

CORPORATIONS—STOCKHOLDER'S LIABILITY FOR CORPORATE DEBTS—JUDGMENT AT LAW AS A CONDITION PRECEDENT.—The plaintiff was the sole creditor of a corporation of which the defendant was the sole stockholder. The defendant took the corporate assets and left the corporation insolvent. This action was brought in equity, on the debt, without first securing a judgment at law or joining the corporation as a party defendant. *Held,* that the plaintiff should recover. *Louisville & N. R. R. v. Nield* (1919, Ky.) 216 S. W. 62.

See COMMENTS, *supra,* p. 659.

EASEMENTS—WAYS OF NECESSITY—REBUTTED BY ORAL CONVERSATION.—A deed of land was executed and delivered under such circumstances that a way of necessity would ordinarily have been created over land retained by the grantor. In litigation involving the existence of this right of way, evidence of an oral agreement between the parties that no easement should be granted was introduced without objection. Thereafter the alleged dominant owner requested a ruling that this evidence could not be considered. *Held,* that the evidence, having been introduced without objection, was relevant to show the actual intention of the parties in rebuttal of the presumption of a way of necessity. *Orpin v. Morrison* (1918) 230 Mass. 529, 120 N. E. 183.

See COMMENTS, *supra,* p. 665.

EQUITY—JURISDICTION—INJUNCTION AGAINST ELECTION.—The Secretary of the State of Illinois, under an act providing for the expression of opinion by electors on questions of public policy, intended to submit at an election questions presented by petition of ten *per cent.* of the voters. The plaintiff, a citizen and taxpayer of the state, filed a bill for an injunction to restrain the submission of these questions, alleging that if they should be favored by a majority of electors, they would constitute instructions to the delegates to the proposed constitutional convention, and that under the constitution of the state there was no power to instruct such delegates. *Held,* that the injunction should not issue. *Payne v. Emerson* (1919, Ill.) 125 N. E. 329.

See COMMENTS, *supra,* p. 655.

EVIDENCE—PRESUMPTIONS—SANITY OF TESTATOR.—An action was brought to set aside the probate of a will on the ground that the testator had been of unsound mind. *Held,* that the probate should stand, with a *dictum* that there was a presumption of sanity of the testator, consequently the burden of proving

incapacity was on the contestants. *Kerkhoff v. Monkemeier* (1920, Iowa) 175 N. W. 762.

A large minority of courts hold with Iowa as to the burden of proving testamentary incapacity but to treat such a rule as a consequence of the presumption of sanity seems clearly erroneous. See COMMENT (1917) 26 YALE LAW JOURNAL, 777; *cf. Thomson v. State* (1919, Fla.) 83 So. 291. But the rule itself has strong reason behind it. The presumption is not, on sound theory, itself evidence of the fact presumed. *Wheeler's Appeal* (1917) 91 Conn. 388, 100 Atl. 13, overruling *Sturdevant's Appeal* (1899) 71 Conn. 392, 42 Atl. 70. The fact on which it is based, that most men who duly execute a will are of sound mind, has strong probative value. See COMMENT, *supra*. And the Iowa rule seems in practice to be the simplest way of giving expression to this fact.

EVIDENCE—WITNESSES—CHILD.—The plaintiff when five years old was bitten by the defendant's dog. A suit for damages was begun and the case came to trial three years later. The plaintiff, who was a bright child and had due appreciation of the significance of an oath, was permitted to testify. *Held*, that such testimony was properly admitted. *Maynard v. Keough* (1920, Minn.) 175 N. W. 891.

The court said that even though the child was perhaps too immature to testify at the time of the occurrence, she was competent at the time of the trial, which is the time competency is to be determined; that her intelligence showed she could remember the incident; and that the distinctness of the witness's memory goes to the weight of the evidence. This seems sound.

FRAUD—LEASE—RESCISSION.—The plaintiff in writing leased certain premises to the defendant, rent to be paid quarterly. The defendant took possession in 1916 and paid rent until 1918 and then defaulted. The plaintiff sued for the rent due. The defendant again defaulted on the next payment, and the plaintiff brought an action for the rent for that term. The two actions were consolidated, and the defence was that the plaintiff had induced the defendant to accept the lease by fraud. He had not rescinded upon discovery of the fraud, but retained possession. *Held*, that the plaintiff should recover. *Defiel v. Rosenberg* (1919, Minn.) 174 N. W. 838.

The court correctly stated that the proper remedy of the defendant was prompt rescission, upon discovery of the fraud, of the unexpired term of the lease, and an action for damages or proper relief which would restore him as nearly as possible to his position before accepting the lease. As to re-tender of consideration in rescission, see *supra*, CASE NOTES, *sub. tit.*, FRAUD.

INSURANCE—LIFE INSURANCE—ASSIGNMENT OF POLICY TO ONE WITHOUT INSURABLE INTEREST VALID.—The holder of a policy of life insurance "taken out" in good faith and payable to "his executors, administrators, or assigns" assigned it for value to one who had no insurable interest in his life. The assignee notified the company of the assignment and paid the premiums thereafter until the insured's death. The executor then filed a bill to set aside the assignment. *Held*, that the bill be dismissed. *Hawley v. Aetna Life Ins. Co.* (1919, Ill.) 125 N. E. 707.

The court stated: "To sustain the doctrine of counsel for appellant on this point would be, in effect, to hold that a valid policy cannot be sold in the best market but must be either surrendered to the company or sold to a person having an insurable interest, and this would in most cases result in compelling the policy holder to surrender his policy to the insuring company at its own figure." It is now generally admitted that one who has insured his own life in good faith has a *power* to "assign the policy" to another who has no insurable interest in the

insured's life and thus create a conditional right in the assignee to the payment of the insurance money. It must appear that the insurance contract was made in good faith and not merely to circumvent the requirement of insurable interest. For a discussion of the relevant decisions, some of which retarded the crystallization of the now well recognized rule, see (1915) 24 YALE LAW JOURNAL, 433; (1911) 21 *ibid.*, 168, 422; see also (1918) 27 *ibid.*, 1083; and a leading *contra* case, *Russell v. Grigsby* (1909, C. C. A. 6th) 168 Fed. 577, approved (1909) 23 HARV. L. REV. 65, and repudiated by the Supreme Court in *Grigsby v. Russell* (1911) 222 U. S. 149, 32 Sup. Ct. 58, which adopted the view of the principal case.

MONOPOLIES—SHERMAN ACT—IMPOSING RESALE PRICES BY CONTRACT WITH CUSTOMERS UNLAWFUL.—An indictment under the Sherman Act alleged that the defendant corporation manufactured under letters patent valves and other accessories which it sold to manufacturers and jobbers in automobile tires under uniform contracts that they should resell at fixed prices, thereby suppressing competition. The lower court sustained a demurrer. *Held,* that this ruling was erroneous. *United States v. Schrader's Son, Inc.* (March 1, 1920) U. S. Sup. Ct. Oct. Term 1919, No. 567.

In sustaining the demurrer the lower court relied upon a recent Supreme Court decision. *United States v. Colgate & Co.* (1919) 250 U. S. 300, 39 Sup. Ct. 465. It thought this case modified the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.* (1911) 220 U. S. 373, 31 Sup. Ct. 376. The opinion of Mr. Justice Brandeis repudiates the suggestion that there is no inconsistency between the two cases, and reaffirms the distinction, taken in the Colgate case, between exercising one's *privilege* of refusing to sell to customers who are unwilling to maintain resale prices and attempting by contract to obtain a *right* that one's customers shall maintain such prices. The former is lawful; the latter forbidden by the Sherman Act. See (1919) 28 YALE LAW JOURNAL, 505; (1920) 29 *ibid.*, 365. And see Brown, *The Right to Refuse to Sell* (1916) 25 *ibid.*, 194.

PROPERTY—PROFITS A PRENDRE—PRIVILEGE OF TAKING AND SELLING SPRING WATER.—In 1909 the New York legislature created a board of commissioners of the state reservation at Saratoga Springs empowering it to grant concessions and leases of any portion of the same upon terms to be fixed by it. Thereafter this board executed an instrument in writing with four individuals, granting them for a period, which with renewals would total twenty-five years, the privilege of bottling and selling the water from the Saratoga Springs under certain conditions and preserving to the public free access to the reservation and free use of the waters there for drinking or bathing. The plaintiff corporation was organized to take the place of the four individuals named. Thereafter the legislature transferred the powers of the board to the conservation commission which prevented plaintiff from exercising the privileges granted. He sued for an injunction and damages. *Held,* the plaintiff should have the relief sought. Crane, J., *dissenting.* *Saratoga State Waters Corporation v. Pratt* (1920, N. Y.) 125 N. E. 834.

The decision, which involves a holding that the privilege granted of taking and selling spring water was a profit *a prendre,* seems unquestionable. See COMMENT (1919) 29 YALE LAW JOURNAL, 218. So also does the holding that the defendant is not protected by a later act of the legislature and is to be treated as a private wrongdoer. The court below had held that injunction would not lie against a state officer acting pursuant to a statute. (1918) 184 App. Div. 561, 172 N. Y. Supp. 40. The writer of the opinion, however, attempts definitions of various terms, such as easements and profits, which are so lacking in careful analysis that they may well involve trouble for the court here-

after. The court also suggests that easements in gross are in many places held unassignable, indicating a lack of acquaintance with the New York authorities similar to that of the Appellate Division in *Matthews Slate Co. v. Advance Industrial Supply Co.* (1918) 185 App. Div. 74, 172 N. Y. Supp. 830; (1919) 29 YALE LAW JOURNAL, 218, 219.

SALES—WARRANTY—RUNNING WITH PERSONALTY.—The defendant traded a stallion to the plaintiff, representing that it was sound. The plaintiff traded it to W, making a similar representation. The stallion was in fact wind broken and W sued the plaintiff who notified the defendant to appear, which he failed to do. The plaintiff sued the defendant for the amount of the judgment which he paid W. The jury found that the stallion was sound when delivered by the defendant to the plaintiff. *Held,* that the plaintiff should not recover. *Booth v. Scheer* (1919, Kan.) 185 Pac. 898.

The finding of the jury rendered unnecessary the long discussion whether a warranty "runs with personalty." The accepted rule is that it does not. *Smith v. Williams* (1903) 117 Ga. 782, 45 S. E. 394. Except where there is an assignment of the right against the warrantor. *Cf. Bordwell v. Collie* (1871) 45 N. Y. 494; see Williston, *Sales* (1909) sec. 244. Or by trade custom, as in the case of a tobacco sampler's warranty. *Conestoga Cigar Co. v. Finke* (1891) 144 Pa. 159, 22 Atl. 868. Other seeming exceptions really "sound in tort." See COMMENT (1918) 27 YALE LAW JOURNAL, 1068.

TELEGRAPHS AND TELEPHONES—REGULATION MAKING COMPANY'S MESSENGER AGENT OF SENDER REASONABLE.—The plaintiff sued to recover damages caused by the defendant's failure to transmit and deliver a telegram addressed to him by A. The message was given by the sender to a messenger but was never delivered at the defendant's transmitting office. The company pleaded in defence the stipulation on the telegraph blank, a part of the contract, that "no responsibility attaches to this company concerning telegrams until same are accepted at one of its transmitting offices, and if the telegram is sent to such office by one of the company's messengers, he acts for that purpose as agent of the sender." *Held,* that recovery must be denied, the provision being reasonable and hence binding. *Collotta v. Western Union* (1920, Miss.) 83 So. 401.

The court followed the few cases which have decided this precise question. *Ayres v. Western Union* (1901) 65 App. Div. 149, 72 N. Y. Supp. 634; *Stamey v. Western Union* (1894) 92 Ga. 613, 18 S. E. 1008. For the effect of the company's limitation as to the amount of damages it will be under a duty to pay in case of nondelivery or error in an unrepeated message, see (1920) 29 YALE LAW JOURNAL, 573.

TORTS—NEGLIGENCE—LAST CLEAR CHANCE.—The decedent, a "licensee," while walking on the tracks of the defendant railroad, was struck and killed by a train. The engineer gave no signal of danger, and the inference was that he saw the decedent but expected her to get off the tracks. Her administrator sued for wrongful death. *Held,* that recovery should be allowed because the defendant had the last clear chance to avoid the injury. *Gunter's Adm'r v. Southern Ry.* (1920, Va.) 101 S. E. 885.

The opinion would seem to be somewhat confused in its application of the doctrine of last clear chance. See COMMENT (1915) 24 YALE LAW JOURNAL, 330; (1920) 29 *ibid.,* 542. However the decision can be explained by the fact that the defendant was under a duty to give some warning to those privileged to walk on its tracks, and that, therefore, the decedent was not negligent in relying upon performance of this duty.

TORTS—VEXATION—TELEGRAPH AND TELEPHONE.—The defendant telephone company disconnected the plaintiff's telephone, believing, as a result of a mistake in their accounting department, that the plaintiff had not paid his bill. The plaintiff brought suit for vexation, annoyance, and inconvenience. *Held,* that he should recover. *Southwestern Telegraph & Telephone Co. v. Riggs* (1919, Tex. Civ. App.) 216 S. W. 403.

This case is directly opposed to the general rule that damages will not be given for mere inconvenience and annoyance where there is no actual physical or mental injury. Mental injury for which recovery can be had must be more than mere vexation or loss of temper. See Sedgwick, *Damages* (9th ed. 1912) sec. 42, 46a; see also (1919) 28 YALE LAW JOURNAL, 508, 707, 713.

UNFAIR COMPETITION—SIMILARITY OF APPEARANCE—PAINTING TAXI.—The plaintiff had built up a prosperous taxicab business and was known by the color of his cabs. The defendant's cabs differed in minor points, but the bodies were of the same general shape, and had recently been painted the same color for the purpose of securing patronage. The plaintiff sued to enjoin the operation of such cabs by the defendant while so painted. *Held,* that an injunction should issue. *Taxi & Yellow Taxi Operating Co. v. Martin* (1919, N. J. Ch.) 108 Atl. 763.

This case seems sound and in accord with the tendency of the modern decisions. See (1919) 28 YALE LAW JOURNAL, 288.

WILLS—CONDITIONS—REMOVAL.—The testatrix provided that if her son "shall marry" a certain widow, his income by the will in question should be cut in half. The son married the widow subsequent to the execution of the will, but prior to the death of the testatrix, who had had immediate knowledge of the marriage. The decree of distribution allowed the son the full income. *Held,* that such decree was correct, because the marriage before the death of the testatrix removed the very contingency upon which the inhibition was to become effective. *In re Duffill's Estate* (1919, Calif.) 183 Pac. 337.

The court reasoned that since a will "speaks as at the death of the testator," and since there was nothing in the will by which the son's income was to be diminished in event of the marriage before the death of the testatrix, the will contemplated the possibility of marriage after the death. Such strict construction, while in accord with some respected authority, seems to defeat the intent of the testatrix. Although she knew of the marriage and did not revoke the will, she well might have thought the situation amply provided for.

WORKMEN'S COMPENSATION ACT—INJURY ARISING "OUT OF THE" EMPLOYMENT—VOLUNTARY ACT OF A COËMPLOYEE.—The decedent had been employed as a watchman and was in the performance of his duties. The fifteen year old office boy, finding a pistol on the desk in the next room, began to examine it to satisfy his curiosity. While he was so doing, the pistol was discharged and struck and killed the decedent. His dependants sought compensation. *Held,* that the injury arose "out of the" employment. *Marchiatello v. The Lynch Realty Co.* (1919, Conn.) 108 Atl. 799.

For discussion, see COMMENTS, *supra,* p. 669.