RECENT CASE NOTES

BANKS AND BANKING—CERTIFICATES OF DEPOSIT—PAYMENT TO ALTERNATE PAYEE AFTER DEATH OF DEPOSITOR.—A deposited money with the defendant bank and took a certificate of deposit to the effect that "A or B have deposited $3,550.00 payable to either order six months after date." A died four months later. At maturity the bank with knowledge of A's death paid B. A's administrator sued the bank to recover the amount so paid. *Held,* (one judge *dissenting*) that the plaintiff could recover. *Smith v. Planters' Savings Bank* (1923, S. C.) 117 S. E. 312.

As between the alternate payees or their representatives, the prevailing rule seems to be that a deposit by A to the account of A or B is not effective to convey title to B without consideration, because it fails as a testamentary disposition for want of compliance with the statute of wills and as a gift *inter vivos* because the depositor retains a power to withdraw it. *Sawyer v. Mabus* (1917) 107 S. C. 369, 92 S. E. 1029; (1922) 31 YALE LAW JOURNAL, 776. For the variety of interpretations given to similar types of deposit, see Brady, *Bank Deposits* (1911). The instant case is to be distinguished in two respects: it concerns a certificate of deposit and not a simple account; and the defendant is not the other payee but the bank. The majority of the court holds that in its nature the certificate of deposit is a power of attorney from A to B, and is revoked by the death of A. But it seems hard to regard a contract signed only by the obligor as a contract of agency between the obligees. By the great weight of authority, such a certificate of deposit as that in the instant case is a negotiable promissory note, and may be made payable to alternate payees. 1 Williston, *Contracts* (1920) 612; L. R. A. 1918 C, 691, note; N. I. L. sec. 8 (5). But even under the minority rule that a certificate is only evidence of a contract of deposit, the bank need not go behind the terms of the contract as dictated to it by the depositor. The only notice to the bank beyond the written terms of the contract is that A made the deposit in person, and this is clearly insufficient to prove A the owner. It is equally conceivable that B has furnished a valuable consideration or even that A deposited merely as his agent. If B in fact has no legal rights against the administrator, the latter's remedy should be against B. Public policy demands that banks be free to pay their debts promptly, provided they are not in so doing guilty of negligence or the breach of an actual contract. *Providence Assisting Association v. Citizens' Savings Bank* (1895) 19 R. I. 142, 32 Atl. 306; *cf.* COMMENTS (1917) 27 YALE LAW JOURNAL, 242. The cases requiring the bank to ascertain that payments are made to the proper person are cases in which the account is payable to an administrator or guardian, and the duty is simply to ascertain who is the true administrator or guardian. *Wolfe v. Bank of Anderson* (1922, S. C.) 116 S. E. 451; *McMahon v. German-American National Bank* (1910) 111 Minn. 313, 127 N. W. 7.

CARRIERS—BILLS OF LADING—TRANSFER OF ORDER BILLS AFTER DELIVERY OF GOODS.—The defendant delivered goods but neglected to take up the order bills of lading, which were later fraudulently altered in date from 1909 to 1910 and transferred for value to the plaintiff. The alteration was obvious. The bills included stipulations that their surrender should be required before delivery of the goods, and that any alteration unauthorized by the carrier should be without effect and the bills enforceable according to their original tenor. Delivery of the goods without surrender of the bill was a crime by the carrier under N. Y. Penal

Law, 1909, sec. 365. The plaintiff sued the defendant carrier for the loss. *Held,* (two judges *dissenting*) that the plaintiff could not recover. *Saugerties Bank v. Delaware & Hudson Co.* (1923) 204 App. Div. 211, 198 N. Y. Supp. 722.

The variety of forms of bills of lading and of the laws applying to them in different jurisdictions has been a source of great financial difficulty and loss. Moulton, *Financial Organization* (1921) 396. The result has been a uniform bill of lading, and uniform and federal statutes. The instant case interprets the uniform bill of lading at common law. At common law an assignee, even of an order bill, acquired no greater rights than his assignor, and the early statutes aiming at negotiability were construed merely to confirm the power of assignment. *Shaw v. R. R. Co.* (1879) 101 U. S. 557; but see *Hutchings v. Missouri, K. & T. Ry.* (1911) 84 Kan. 479, 114 Pac. 1077. Therefore, no rights could be acquired on a "spent" bill. *National Commercial Bank of Albany v. Lackawanna Transport Co.* (1901) 59 App. Div. 270, 69 N. Y. Supp. 396, *affirmed* 172 N. Y. 596, 64 N. E. 1123. If the plaintiff acquired the bill before the goods were delivered by the carrier, the result was the contrary. This has been explained on the ground that the penal statute gives a private right to one injured. *First National Bank v. N. Y. Central R. R. Co.* (1895, Sup. Ct.) 85 Hun, 160, 32 N. Y. Supp. 604. Or on the ground that the carrier is liable for conversion. *Sheldon v. N. Y. Central R. R. Co.* (1908, Sup. Ct.) 61 Misc. 274, 113 N. Y. Supp. 676. In the instant case the minority invokes estoppel, which would be equally applicable to spent bills. The doctrine has been applied to non-negotiable contracts. *American National Bank v. Somerville* (1923, Calif.) 216 Pac. 376. And to stock certificates. *McNeil v. Tenth National Bank* (1871) 46 N. Y. 325. This last case purports "to apply a general rule, applicable to property other than negotiable securities," and there are further *dicta* favoring its application to bills of lading. See *Shaw v. R. R. Co., supra,* at p. 561; *Friedlander v. Texas Ry.* (1888) 130 U. S. 416, 424, 9 Sup. Ct. 570, 572. This is in accord with the purpose of the uniform bill of lading and modern statutes to protect banks which advance against bills. *Matter of Bills of Lading* (1908) 14 I. C. C. Rep. 346, 348; Act of August 29, 1916 (39 Stat. at L. 538, sec. 11); Uniform Bills of Lading Act, sec. 14. It seems that the policy of the statutes should apply at common law, whenever estoppel may be invoked. It is difficult to perceive what other purpose the surrender clause may have. In the instant case, however, the plaintiff was put on notice of the alteration. The minority answers that this is immaterial under the stipulation that an altered bill is to be enforced according to its original tenor. This stipulation is incorporated in the new statutes. It seems to have been conceived with specific reference to alterations before delivery of the goods, in which case no hardship is imposed on the carrier by requiring him to fulfill his original obligation. Commissioners' Note to Uniform Act, sec. 16; 39 Stat. at L. 538, sec. 13. But neither estoppel nor negotiability protects one relying even without notice on the appearances created by an intervening alteration of a completed instrument. *Cf.* N. I. L. sec. 124. And there is ground for the contention that the plaintiff in the instant case took a bill so out of date under its original and only effective tenor, as to be out of the course of business practice and thus to make its reliance unreasonable. A like result might be obtained under the good faith clause in the recent statutes. Uniform Act, sec. 14; 39 Stat. at L. 538, sec. 11.

CONSTITUTIONAL LAW—EXEMPTION FROM TAXATION—HOUSING EMERGENCY LAWS.—On the report of legislative committees that a housing emergency existed throughout the state, the New York legislature passed statutes commonly known as the September Housing Laws, to relieve the situation. One of these statutes empowered the legislative body of any city or county to exempt from taxation for local purposes for a period of ten years, new buildings planned for dwelling purposes. N. Y. Laws, 1922, ch. 281. An action was brought to determine the

constitutionality of this statute. *Held*, that it was constitutional. *Hermitage v. Goldfogle* (1923, N. Y.) 204 App. Div. 710.

The power to determine what property shall be taxed implies a power to prescribe what property shall not be taxed. *Baker v. West Hartford* (1915) 89 Conn. 394, 94 Atl. 283. Furthermore, the power to exempt falls within the legislative power to classify for taxation. See *American Sugar Refining Co. v. Louisiana* (1900) 179 U. S. 89, 21 Sup. Ct. 43; 1 Cooley, *Taxation* (3d ed. 1903) 343; see also Hall, *Cases on Constitutional Law* (1913) 617, note (cases cited). Hence, unless restrained by constitutional provisions, the legislature has power to exempt from taxation any person or class of property according to its views of public policy or expediency. *Laurence University v. Ontagamic County* (1912) 150 Wis. 244, 136 N. W. 619; *Gibbons v. District of Columbia* (1886) 116 U. S. 404, 6 Sup. Ct. 427. Thus, exemptions from property taxation of charitable and educational institutions are valid. *State v. Carleton College* (1922, Minn.) 191 N. W. 400; see NOTES (1923) 36 HARV. L. REV. 733. Similarly a limited exemption to ex-soldiers from property taxes. *Mechanic Falls v. Millet* (1922, Me.) 117 Atl. 93. Or exemptions as a means of encouraging industry. *Opinion of the Court* (1879) 58 N. H. 623; *cf. Florida Central Ry. v. Reynolds* (1902) 183 U. S. 471, 22 Sup. Ct. 176. The presumption is that any particular classification or exemption is a valid means of effectuating the purpose of the legislature. *A. T. & S. F. Ry. Co. v. Matthews* (1898) 174 U. S. 96, 19 Sup. Ct. 609; *Beach v. Bradstreet* (1912) 85 Conn. 344, 82 Atl. 1030. New Jersey recently held a statute similar to the one in the instant case unconstitutional. *Braunstein v. Jersey City* (1923, N. J.) 120 Atl. 19. The New York court distinguishes this case in that the New Jersey constitution, as opposed to its own, contains a provision that "property shall be assessed for taxes under general laws and by uniform rules according to its true value." But even under such a provision the legislature may exempt various classes of property. *Harrison County v. Military Academy* (1921) 126 Miss. 729, 89 So. 617; Cooley, *Constitutional Limitations* (7th ed. 1903) 738. In the instant case the court suggested that this statute is not nearly as drastic as the emergency rent regulation statute which had been upheld. *Marcus Brown Holding Co. v. Feldman* (1921) 256 U. S. 170, 41 Sup. Ct. 465; COMMENTS (1921) 9 CALIF. L. REV. 337; see also *Bloch v. Hirsh* (1921) 256 U. S. 135, 41 Sup. Ct. 458; (1922) 5 MINN. L. REV. 472. If the police power of a state in an emergency is broad enough to include rent regulation despite a constitutional provision against impairment of contracts, and the due process clause, a tax exemption for new buildings in a like emergency should also be upheld even where uniformity and equality are required. Cooley, *Constitutional Limitations, loc. cit.;* see Wickersham, *The Police Power and the New York Emergency Rent Laws* (1921) 69 U. PA. L. REV. 301. The instant case has been recently affirmed by the Court of Appeals. *Hermitage v. Goldfogle* (1923) 236 N. Y. 52.

CONSTITUTIONAL LAW—FULL FAITH AND CREDIT—INJUNCTION AGAINST FOREIGN SUIT.—An Iowa court issued an injunction permanently restraining the defendant from suing the plaintiff in the State of Minnesota for an injury received in Iowa throught the latter's negligence. The defendant commenced an action against the plaintiff in Minnesota. The plaintiff then sued for an injunction in Minnesota, relying on the Iowa decree. *Held*, (two judges *dissenting*) that the Minnesota action was not barred by the Iowa decree. *Union Pac. R. Co. v. Rule* (1923, Minn.) 193 N. W. 161.

Equity generally has jurisdiction to restrain the bringing of foreign suits. *Lord Portarlington v. Soulby* (1834, Ch.) 3 Myl. & K. 104; *Wabash Ry. Co. v. Peterson* (1919) 187 Iowa, 1331, 175 N. W. 523. The decree is directed against the person, not against the courts of a sister state. *Jones v. Hughes* (1912) 156

Iowa, 684, 137 N. W. 1023; (1920) 5 IOWA L. BULL. 271. Such a decree does not deny any privilege or immunity guaranteed by the Constitution. *Cole v. Cunningham* (1889) 133 U. S. 107, 10 Sup. Ct. 269. There is some confusion as to the kind of equitable decree entitled to full faith and credit. A decree ordering the payment of a specific sum of money must be given full faith and credit. *Barber v. Barber* (1858, U. S.) 21 How. 582; *Lynde v. Lynde* (1901) 181 U. S. 183, 21 Sup. Ct. 555. But not a decree for future payments, if the court rendering the decree has power to revoke or alter it. *Cf. Sistare v. Sistare* (1909) 218 U. S. 1, 30 Sup. Ct. 682. A decree adjudicating fraud in the procurement of a judgment must be held under the full faith and credit clause conclusive evidence of such fraud in another state. *Dobson v. Pearce* (1854) 12 N. Y. 156. A decree adjudicating an antecedent obligation which is conclusive in the jurisdiction where rendered is likewise conclusive on the merits elsewhere. So when a decree of specific performance for the conveyance of land is alleged as the foundation of an action at the *situs* it must be given full faith and credit. *Burnley v. Stevenson* (1873) 24 Ohio St. 474; COMMENTS (1917) 26 YALE LAW JOURNAL, 311; Barbour, *The Extra-Territorial Effect of the Equitable Decree* (1919) 17 MICH. L. REV. 527. And a decree for the conveyance of foreign land on the settlement of a partnership has been held conclusive by the *situs* without reference to the full faith and credit clause. *Dunlap v. Byers* (1896) 110 Mich. 109, 67 N. W. 1067. It has often been asserted that equitable decrees for the conveyance of land in other states are not enforceable. *Bullock v. Bullock* (1894) 52 N. J. Eq. 561, 30 Atl. 676; *Fall v. Eastin* (1909) 215 U. S. 1, 30 Sup. Ct. 3; *contra: Mallette v. Carpenter* (1916) 164 Wis. 415, 160 N. W. 182. But these cases are distinguishable inasmuch as the courts had not the obligor, but only his transferees before them. A decree of divorce seems to stand on special footing and need be given full faith and credit only when rendered by the state of the matrimonial domicile if the plaintiff is domiciled within the state. *Atherton v. Atherton* (1901) 181 U. S. 155, 21 Sup. Ct. 544; *Haddock v. Haddock* (1906) 201 U. S. 562, 26 Sup. Ct. 525; 1 Schofield, *Constitutional Law and Equity* (1921) 153. In the instant case the Iowa injunction may be said to represent the adjudication of plaintiff's "equitable right" not to be sued in a Minnesota court. While this would not create a duty of enforcement by process on the Minnesota court, it seems that under the full faith and credit clause it should be conclusive of the question at issue. The United States Supreme Court has not yet spoken on the subject.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—POWER TO ATTORNEY GENERAL TO ISSUE SUBPOENAS UNCONSTITUTIONAL.—A New York statute authorized the Attorney General, when directed by the Governor, to inquire into matters concerning the public peace, safety, and justice, and empowered him to subpoena witnesses, examine them under oath, and require the production of material documents. N. Y. Cons. Laws, 1909, ch. 23, sec. 62 (8). The Attorney General subpoenaed officers of a telegraph company to deliver to him cablegrams sent by one Ward, indicted for murder. The Ward Baking Co., an interested party, sought an injunction to restrain such delivery. *Held,* reversing an order denying plaintiff's motion for a temporary injunction, that if the purpose of the statute was to authorize a criminal investigation by the Attorney General, with power to subpoena, it was unconstitutional, as usurping the power of the judiciary. *Ward Baking Co. v. Western Union Telegraph Co.* (1923) 205 App. Div. 725, 200 N. Y. Supp. 865.

The doctrine of the separation of powers is not susceptible of rigorous application. It is essential, however, that the group exercising the whole power of any one department shall not control the whole power of either of the other departments. Story, *The Constitution* (5th ed. 1891) 393. The modern tendency

is toward increasing correlation of the departments of government. See Green, *Separation of Governmental Powers* (1920) 29 YALE LAW JOURNAL, 369, 391. The grand jury fulfills a governmental and not a judicial function in investigating crime and presenting offenders. *State, ex rel. Doerfler, v. Price* (1920) 101 Ohio St. 50, 128 N. E. 173. The Attorney General, supplanting the prosecuting officer in a proper case, may attend its proceedings and examine witnesses. See *Commonwealth v. Kozlowsky* (1921) 238 Mass. 379, 131 N. E. 207; *State, ex rel. Miller, v. District Court* (1910) 19 N. D. 819, 124 N. W. 417. And it is held that when making his own investigations, as directed by the Governor, he may subpoena witnesses. *State, ex rel. Stubbs, v. Dawson* (1911) 86 Kan. 180, 119 Pac. 360. He may administer oaths to those summoned and take their testimony. *State, ex rel. Stubbs, v. Dawson, supra;* Kan. Gen. Sts. 1915, sec. 5503. Investigation of crime is accelerated by the Attorney General's assumption of this branch of the grand jury's work, for his established department can operate more efficiently than a temporary body. The customary method of determining whether the executive is infringing on the judiciary is by ascertaining whether it is attempting to adjudicate the rights of individuals. Cooley, *Constitutional Limitations* (7th ed. 1903) 132; *The Queen v. Local Government Board* [1902, K. B.] 2 Ir. L. 349, 373. Judicial power is not usurped by authorizing non-judicial officers to investigate complaints concerning civil service officers, to subpoena witnesses and papers, administer oaths, and take testimony, where no judgment is authorized. *People v. Kipley* (1897) 171 Ill. 44, 49 N. E. 229. As no power to determine rights were granted to the Attorney General in the instant case it seems that the court might properly have held the statute constitutional.

CONTRACTS—CONSTRUCTION—AGREEMENTS TO AGREE.—The defendant contracted to sell 16,000 tons of paper to the plaintiff, to be shipped at the rate of 1,000 tons a month. The prices for the first four months were fixed by the contract, which also provided that "for the balance of the period of this agreement, the price of the paper and length of terms for which such price shall apply shall be agreed upon . . . . said price in no event to be higher than the contract price charged by the Canadian Export Company to large consumers." At the end of four months, the defendant refused to negotiate a price and refused the plaintiff's monthly demands for shipment in accordance with the price fixed by the Canadian Export Company. The defendant demurred to a complaint setting forth these facts. *Held,* (two judges *dissenting*) that the demurrer should be sustained. *Sun Printing & Publishing Assoc. v. Remington Paper Power Co.* (1923) 235 N. Y. 338.

An agreement to enter into a contract in the future the terms of which are definite and certain is binding. *Pratt v. Hudson River Ry.* (1860) 21 N. Y. 305; *Young v. Lanyon* (1922, Mo. App.) 242 S. W. 685. The same is true if the agreement to agree relates to some incidental or subsidiary term of the contract. *Howison v. Bartlett* (1906) 147 Ala. 408, 40 So. 757. When the intent to make a presently binding agreement is clear, the courts will construe the contract as calling for a reasonable time or price where there is a failure to agree. *Ramot v. Schotenfels* (1863) 15 Iowa, 457; *Page v. Cook* (1895) 164 Mass. 116, 41 N. E. 115; *Spiritusfabrieck Astra v. Sugar Products Co.* (1917) 176 App. Div. 829, 163 N. Y. Supp. 516; see *Noble v. Burnett Co.* (1911) 208 Mass. 75, 94 N. E. 289. The same rule has been applied especially to contracts between municipalities and public utility corporations. *Joy v. St. Louis* (1890) 138 U. S. 1, 11 Sup. Ct. 243; *Slade v. Lexington* (1910) 141 Ky. 214, 132 S. W. 404 (agreements for renewal with terms to be agreed upon); *contra: Livingston Waterworks v. Livingston* (1916) 53 Mont. 1, 162 Pac. 381. But agreements to negotiate merely are inoperative, as there is no duty to agree. *Shepard v. Carpenter* (1893) 54 Minn. 153, 55 N. W. 906; *Mayer v. McCreery* (1890)

119 N. Y. 434, 23 N. E. 1045; *cf. Dayton v. Stone* (1896) 111 Mich. 196, 69 N. W. 515; but see *Watts v. Weston* (1894, C. C. A. 2d) 62 Fed. 136 (nominal damages allowed). And performance under the contract subsequent to disagreement creates a quasi-contractual duty to pay a reasonable price. *Domhoff & Joyce v. Hamilton Furnace Co.* (1923, Ohio) 140 N. E. 485. Often, in the case of a binding option, one of the parties is for a good consideration given an irrevocable power to fix certain terms in the future. *Vickery v. Maier* (1912) 164 Calif. 384, 129 Pac. 273. Such a power must be exercised strictly within the limits set. *Winders v. Kenan* (1913) 161 N. C. 628, 77 S. E. 687. And a promise to perform a fixed and unconditional part of the agreement is a good consideration for the option as to the remaining part. *Koehler Mercantile Co. v. Ill. Glass Co.* (1919) 143 Minn. 344, 173 N. W. 703. Where a lessee is given an option to purchase at a price not to exceed a given fixed amount, the lessee has a power to purchase at the maximum price named. *Heyward v. Willmarth* (1903) 87 App. Div. 125, 84 N. Y. Supp. 75. In the instant case it is difficult to find an intent to give the buyer an option. But the intent to make a binding agreement for the sale of 16,000 tons of paper seems clear. Since shipments and payments were to be monthly, it seems that the adoption of the maximum price charged by the Canadian Export Company during the month of shipment offered a reasonable basis for giving operative effect to that intent. Nor does any substantial reason appear for the court to refuse to apply to the determination of the period over which a price is to operate the rule of reasonableness which is regularly applied to fix prices or times for delivery.

CRIMINAL LAW—ORATOR URGING ACTS OF VIOLENCE GUILTY OF SOLICITATION.—The defendant addressed an assemblage of striking workmen and urged them to commit acts of violence constituting felonies and misdemeanors. He was charged with the common law crime of solicitation. The trial court quashed the information. The state appealed. *Held,* that the information should be sustained. *State v. Schleifer* (1923, Conn.) 121 Atl. 805.

The contention that solicitation is not a crime distinct from a criminal attempt is squarely met and disapproved by the court. The weight of reason as of authority is in accord. *State v. Harney* (1890) 101 Mo. 470, 14 S. W. 657; *Ex parte Floyd* (1908) 7 Calif. App. 588, 95 Pac. 175; (1914) 14 COL. L. REV. 681; *contra: State v. George* (1914) 79 Wash. 262, 140 Pac. 337; 1 Bishop, *New Criminal Law* (8th ed. 1892) sec. 767. The court also rejected the contention that a solicitation must be addressed to a particular individual. What little authority there is supports this view. *Regina v. Most* (1881, Ct. Crim. App.) 14 Cox C. C. 583; *United States v. Galleanni* (1917, D. Mass.) 245 Fed. 977. The opinion makes a novel delimitation of the crime of solicitation, making the test whether an attempt to commit the crime advised would be a crime. This conclusion is based on the current formula that solicitation is a crime if the crime advised seriously affects the public peace and economy. *Rex v. Higgins* (1801, K. B.) 2 East, 5 (embezzlement); *Commonwealth v. Flagg* (1883) 135 Mass. 545 (arson); *State v. Sullivan* (1904) 110 Mo. App. 75, 84 S. W. 105 (bribery); Brill, *Cyclopedia of Criminal Law* (1922) sec. 158. There is another view that only solicitations to crimes which lead to breaches of the public peace or interferences with public justice are crimes. Wharton, *Criminal Law* (9th ed. 1885) sec. 179; *State v. Baller* (1885) 26 W. Va. 90 (procuring a witness to absent himself); *Cox v. People* (1876) 82 Ill. 191 (solicitation to incest). Some courts have limited the offense to solicitations to felonies. *Smith v. Commonwealth* (1868) 54 Pa. 209 (adultery); *Lamb v. State* (1889) 67 Md. 524, 10 Atl. 208 (abortion). A further delimitation, not mentioned in the case, is that the language complained of shall not be constitutionally privileged. Words have been said not to be indictable unless they create a clear and present danger of commission of crime. *United States v. Schenk* (1919)

249 U. S. 47, 39 Sup. Ct. 247; *United States v. Abrams* (1919) 250 U. S. 616, 40 Sup. Ct. 17; COMMENTS (1920) 29 YALE LAW JOURNAL, 337. But this test seems applicable only to public addresses or writings. *Cf. State v. Sullivan, supra* (bribery); *State v. Avery* (1860) 7 Conn. 266 (adultery). Also it seems that the persons who are to be the objects of the crime must be capable of identification from the language and circumstances. 1 Wharton, *Criminal Law* (11th ed. 1912) sec. 218. Following the decision of the lower court a drastic statute was passed making criminal any advocation, encouragement or justification of public or private injury to persons or property. Conn. Pub. Laws, 1923, ch. 178. For similar statutes see N. J. Pub. Laws, 1908, 577; Calif. Sts. 1919, ch. 188.

MANDAMUS—ILLEGAL DISMISSAL FROM PUBLIC OFFICE—EXERCISE OF DISCRETION.—The relator, a city councilman, procured a police sergeant to buy liquor for him and later recommended to the council that this same sergeant be appointed chief of police. The council dismissed the relator and declared his office vacant. The city charter provided that no councilman be dismissed except upon conviction of malfeasance in office or some infamous crime. The relator sought a writ of mandamus to be re-instated. The lower court issued the mandamus and the state appealed. *Held,* (two judges *dissenting*) that the relator was not entitled to a mandamus. *State, ex rel. White, v. Mills* (1923, Conn.) 121 Atl. 561.

Although the writ of mandamus was originally a prerogative writ issued at the discretion of the king, with the enactment of the Common Law Procedure Act the jurisdiction was extended to the superior courts of England. *Bagg's Case* (1616, K. B.) 11 Co. Rep. 93 b; Jenks, *Prerogative Writs in English Law* (1923) 32 YALE LAW JOURNAL, 523, 529; 58 L. R. A. 833, note. In this country the writ has entirely lost its prerogative characteristics and is strictly an action at law. *Gilman v. Bassett* (1866) 33 Conn. 298; *Moody v. Fleming* (1848) 4 Ga. 115, 119. It lies to re-instate in office one who has been illegally ousted. *Rex v. Barker* (1762, K. B.) 3 Burr. 1265; *Thompson v. Troup* (1901) 74 Conn. 121, 49 Atl. 907. Where, however, there is a successor holding office under color of title, *quo warranto* is the appropriate remedy. *Duane v. McDonald* (1874) 41 Conn. 517. The writ will not lie if the relator is guilty of laches. *State v. Paterson, Newark & N. Y. Ry.* (1881) 43 N. J. L. 505. Or if the mandamus in a proper case would be of no avail. *Commonwealth v. Anthony* (1842, Pa.) 4 Watts & S. 511. It is said the writ is unavailable if there is another adequate or easily obtainable remedy. *State, ex rel. Reed, v. Board of Education* (1898) 100 Wis. 455, 76 N. W. 351; *Bonner v. State, ex. rel. Pitts* (1849) 7 Ga. 473. But this qualification does not apply where the other remedy is equitable. *Baltimore University v. Colton* (1904) 98 Md. 623, 57 Atl. 14. It is frequently stated that in all cases the writ of mandamus is discretionary and this is the basis of the decision in the principal case. But the cases generally cited for this proposition are those where the relator's legal right is in doubt or where the writ would be of no avail. See *Woodbury v. County Commissioners* (1855) 40 Me. 304 (term of office already expired); *Rex v. Mayor of Bristol* (1822, K. B.) 1 Dowl. & Ryl. 389 (relator's right not proven). As is pointed out in the dissenting opinion of the principal case, no case has been found where the writ was refused when the relator had a clear legal right. In the principal case the relator's legal right not to be removed from office except in the prescribed manner was invaded. A writ of mandamus being denied, and no other remedy being available, we have the peculiar case of a right without a remedy. The dissenting judges seem, therefore, correct in arguing that the court should have no discretion to refuse to issue the writ.

MUNICIPAL CORPORATIONS—CONTRACTS—STATUTORY LIMITATION ON EXPENDITURES—EMPLOYMENT OF EMERGENCY POLICE.—The Mayor of a city engaged extra

policemen during a strike, pursuant to an Act authorizing him to do so in time of emergency. At the request of the Mayor, who promised that the city would repay the money if it could legally do so, the bank met the payroll of the additional policemen. Ohio Gen. Code, 1921, sec. 3806 provided that no contract involving the expenditure of money should be made by a municipal officer unless a certificate had been obtained from a city auditor that the money was in the treasury to the credit of the fund from which it was to be withdrawn. No certificate had been obtained. The bank brought an action against the city for the sums advanced. *Held,* that the provision of the General Code was inapplicable and the plaintiff could recover. *City of Youngstown v. First National Bank of Youngstown* (1922, Ohio) 140 N. E. 176.

Statutes generally deny municipalities the power to incur a contractual obligation before an appropriation has been made to meet it. Occasionally such statutes, as in the principal case, require that a certificate that the money has been appropriated be obtained. These restrictions are often included in the corporation charter. The statutes are mandatory when applicable; and contracts made without compliance are void. 2 Dillon, *Municipal Corporations* (5th ed. 1911) sec. 790; *Smith Canal Co. v. Denver* (1894) 20 Colo. 84, 36 Pac. 844 (unenforceable against city); *Hinkle v. Philadelphia* (1906) 214 Pa. 126, 63 Atl. 590 (unenforceable against contractor). Nor are they subject to ratification by a later appropriation. *Indianapolis v. Wann* (1896) 144 Ind. 175, 42 N. E. 901. But in some cases where the city has received a benefit from the performance a recovery is allowed in quasi-contract. See (1922) 31 YALE LAW JOURNAL, 779; (1921) 34 HARV. L. REV. 439. The applicability of these statutes varies with circumstances. They seem designed to set limits to the possible waste, extravagance or corruption of any single administration by cutting down the available assets. Action involving foreseeable expenditure can therefore properly be held within the statute. Thus the provision has been applied with some reason to the compromise of a claim against the city for property damage due to street improvements. *Green v. Everett* (1901) 179 Mass. 147, 60 N. E. 490. Contracts for supplies or services over a period of years are subject to the statute. *Smith Canal Co. v. Denver, supra* (water supply); *Toomey v. Bridgeport* (1906) 79 Conn. 229, 64 Atl. 215 (garbage removal). In such a case the appropriation need be only for the amount to become due within the year, and failure to make an appropriation in any future year seems to end the contract, leaving no right of action against the city. See *Toomey v. Bridgeport, supra.* The statute does not apply where the funds for payment are to be derived from sources other than taxes. *Kerr v. Bellefontaine* (1898) 59 Ohio St. 446, 52 N. E. 1024 (maintaining city gas-works from profits). Nor where a later statute authorizes an expenditure, without mentioning the restrictive provision. *Cincinnati v. Holmes* (1897) 56 Ohio St. 104, 46 N. E. 514; *cf. United States v. New Orleans* (1878) 98 U. S. 381. In such cases, from their nature, there are other equally effective checks on the city administration. On principle it seems that unforeseeable liability, occasioned by an emergency which threatens the course of government, is not within the purpose of the statute. Since the preservation of the peace was here deemed endangered, the court's decision holding the contracts with the emergency police valid and that the bank was subrogated to these contract rights, is in accord with the tendency to construe these statutes with latitude to effect their purpose.

PROPERTY—FIXTURES—RIGHT OF DISSEISOR IN IMPROVEMENTS.—The defendant, pending condemnation proceedings in its behalf, entered upon the plaintiff's land and made improvements. The condemnation statute was subsequently declared unconstitutional. After bringing an action of ejectment the plaintiff sued to recover mesne profits, and also the value of the improvements which the

defendant had removed. *Held,* that the plaintiff could recover. *Titus v. Poland Coal Co.* (1923, Pa.) 119 Atl. 540.

When the question of the right to improvements on land arises between grantor and grantee or landlord and tenant, the right to the improvements depends upon the contract. *O'Neal v. Quilter* (1921) 111 Tex. 345, 234 S. W. 528; *Reeder v. Smith* (1922) 118 Wash. 505, 203 Pac. 951; see Ewell, *Fixtures* (1876) 76. But when made by a trespasser they usually pass to the owner of the realty by the mere fact of annexation. *Perley v. City of Cambridge* (1915) 220 Mass. 507, 108 N. E. 494; Tiffany, *Real Property* (2d ed. 1920) sec. 270. The same rule applies where the trespasser acted under an innocent mistake. *Honzik v. Delaglise* (1886) 65 Wis. 494, 27 N. W. 171; see *Dutton v. Ensley* (1898) 21 Ind. App. 46, 51 N. E. 380; *contra: Ousley v. Lambeth* (1917, Mo. App.) 199 S. W. 594; see (1918) 18 COL. L. REV. 367. And it is immaterial that the trespasser is also a disseisor. *Doscher v. Blackiston* (1879) 7 Or. 143; *Huebschmann v. McHenry* (1872) 29 Wis. 655; see (1907) 7 COL. L. REV. 22. But where the owner of land seeks to recover mesne profits in equity he must make allowance for improvements made by a disseisor under a bona fide claim of title. *Wakefield v. Van Tassell* (1905) 218 Ill. 572, 75 N. E. 1058. The same principle has frequently been applied by courts of law. *Ege v. Kille* (1877) 84 Pa. 333; *Sires v. Clark* (1908) 132 Mo. App. 537, 112 S. W. 526. In most states "Occupying Claimants' Acts" give the bona fide disseisor compensation for improvements. *Thompson v. Illinois Cent. Ry.* (1920, Ind. App.) 129 N. E. 55; *Wakefield v. Van Tassell, supra;* Tiffany, *op. cit.* sec. 274. The decision may be justified since the defendant was not in the position of an innocent disseisor, because he knew the validity of the statute was disputed. See *Welles v. Newsom* (1888) 76 Iowa, 81, 40 N. W. 105.

QUASI-CONTRACTS—BREACH OF CONTRACT BY PLAINTIFF—RECOVERY ALLOWED WHERE DEFENDANT UNABLE TO PERFORM.—The defendant contracted to manufacture and deliver fifty million bullets in weekly installments to the plaintiff. The contract provided that in case of default by the defendant, the plaintiff might carry out the contract by manufacturing the bullets itself. After accepting with protest a number of deliveries amounting to only six per cent of the deliveries due, the plaintiff repudiated the contract and sued to recover for money and materials advanced. The defendant counterclaimed for damages. The court found that defendant was and for a reasonable time thereafter would be unable to perform the contract according to its terms. *Held,* that since the defendant could not take advantage of the plaintiff's breach without showing ability to perform, a judgment for the plaintiff should be affirmed. *Remington Arms Co., Inc. v. Gaynor Mfg. Co.* (1923) 98 Conn. 721, 120 Atl. 572.

Where one party fails to perform his contract, the other may rescind and recover in quasi-contract for money and materials advanced. See Keener, *Quasi-Contracts* (1893) 292. The parties may, however, provide for a sole remedy in case of breach. But unless the intention be clear to make a given special remedy exclusive, it will be construed as cumulative and permissive. *Mayfield v. Richardson Co.* (1921) 208 Mo. App. 206, 231 S. W. 288; *Feeney & Bremer Co. v. Stone* (1918) 89 Or. 360, 171 Pac. 569. The court in the instant case properly held the remedy permissive. But acquiescence by the plaintiff in the continued defective performance generally deprives him of the privilege to rescind without first giving reasonable notice that strict performance will be insisted on. *Henderson Tire & Rubber Co. v. P. K. Wilson & Son* (1923) 235 N. Y. 489; *Vosburg v. Southern Lumber & Mfg. Co.* (1923, Tenn.) 251 S. W. 41; 2 Black, *Rescission and Cancellation* (1916) sec. 604. It seems that the plaintiff had himself broken the contract by repudiating without notice, and could not have recovered for advances if the defendant had been ready and able to perform. See *Ketchum v. Evertson*

(1816, N. Y. Sup. Ct.) 13 Johns. 359; *Foss-Hughes Co. v. Norman* (1923, Del.) 119 Atl. 854; *contra: Britton v. Turner* (1834) 6 N. H. 481; see also 4 Am. Dec. 657, notes. *Contra,* if the defendant's performance has become impossible. *McCormick v. Tappendorf* (1909) 51 Wash. 312, 99 Pac. 2. Or where there is a high degree of inability even though it amounts to less than total impossibility. *Strasbourger v. Leerburger* (1922) 233 N. Y. 55, 134 N. E. 834; see (1922) 32 YALE LAW JOURNAL, 91; 1 Black, *op. cit. supra,* sec. 207; 2 Williston, *Contracts* (1920) sec. 880. The instant case is to be supported on the ground that the defendant's inability to continue performance relieves the plaintiff of his duty to perform, giving him on the other hand a power to repudiate and a right to recover any advances in quasi-contract. Even to hold the plaintiff in default should not prevent a recovery where the default of the defendant is equally as great. The court also bases the plaintiff's right on a mutual rescission. But this reasoning seems doubtful on the facts, particularly since the defendant by its counterclaim claims under the contract. See *Merrill v. Merrill* (1894) 103 Calif. 287, 35 Pac. 768; *Wainwright v. Weske* (1889) 82 Calif. 193, 23 Pac. 12.

SURETYSHIP—RELEASE OF SURETY—FAILURE OF CREDITOR TO RECORD DEED OF TRUST.—The defendant was surety on a note held by the plaintiff, secured by a deed of trust which remained unrecorded. A second deed of trust was given by the principal debtor to another creditor, who upon default, foreclosed. The note was not paid. The defendant claimed to have been released by the negligence of the plaintiff in failing to record the deed. *Held,* that the refusal of the lower court to give a peremptory instruction was error, and that mere inaction of the plaintiff did not release the surety. *Bank of Hickory Flat v. Crawford* (1923, Miss.) 96 So. 100.

Delay by the creditor in proceeding against the principal debtor after default does not release the surety. *Clopton v. Spratt* (1876) 52 Miss. 251; *Arnett v. Simpson* (1922, Tex. Civ. App.) 235 S. W. 982. But in some states notice to the creditor to sue will effect such release unless prompt suit follows. *Pain v. Packard* (1816, N. Y. Sup. Ct.) 13 Johns. 174; Tex. Sts. 1920, arts. 6332, 6337; Spencer, *Suretyship* (1913) 240. The release of any or all of the security will operate as a discharge of the surety *pro tanto,* even though the surety was ignorant of its existence. *Richards v. Commonwealth* (1861) 40 Pa. 146; *Day v. McPhee* (1907) 41 Colo. 467, 93 Pac. 670; *Hubbard v. Hubbard* (1911) 161 Ill. App. 623. But the creditor need not obtain security nor actually enforce it if procured. *Campbell v. Sherman* (1892) 151 Pa. 70, 25 Atl. 35 (failure to revive judgment); *Philbrooks v. McEwen* (1868) 29 Ind. 347 (failure to foreclose mortgage); 31 Am. St. Rep. 737, note. But by the better view, impairment of the security will discharge the surety to the extent of his actual damage. *City Bank v. Young* (1862) 43 N. H. 457 (careless sale of mortgaged property); *contra: Philbrooks v. McEwen, supra.* Failure to perfect the security has a like result. *Southern Trust Co. v. Vaughn* (1921, C. C. A. 8th) 277 Fed. 145 (failure to record mortgage); *Redlon v. Heath* (1898) 59 Kan. 255, 52 Pac. 862 (same); *Nunn v. Smith* (1917, Tex. Civ. App.) 194 S. W. 406 (same); *contra: Westchester Mortgage Co. v. McIntire* (1916) 174 App. Div. 525, 161 N. Y. Supp. 390 (failure to file assignment in compliance with statute). To allow the security to lapse discharges in the same way. *Fennell v. McGowan* (1880) 58 Miss. 261 (security barred by the Statute of Limitations before maturity of the debt secured); *First National Bank v. Parsons* (1896) 42 W. Va. 137, 24 S. E. 554 (failure to file judgment lien); 37 L. R. A. (N. S.) 710, note. In a few states failure to perfect the security will entirely release the surety. *Bledsoe v. Ivey* (1921) 27 Ga. App. 235, 107 S. E. 615 (failure to record instrument of title). The creditor's duty ceases, however, where the surety can, by paying the debt, himself make the security

available. *Clopton v. Spratt, supra; Arnett v. Simpson, supra.* For upon payment of the debt the surety acquires the right to the full benefit of all the collateral security. *Schroeppel v. Shaw* (1850) 3 N. Y. 446; *Wills v. Fuller* (1915) 47 Okla. 720, 150 Pac. 693. Or upon tender. *Bankers' Surety Co. v. Linder* (1912) 156 Iowa, 486, 137 N. W. 496. The instant case is unsound in failing to distinguish between delay in the enforcement of the debt when due, and inaction which resulting in loss of the security should release the surety *pro tanto.*

TAXATION—CONSTITUTIONAL LAW—GRADUATED INHERITANCE TAX A TAX ON PROPERTY.—The House of Representatives requested the Justices to determine the validity of proposed legislation imposing a graduated tax upon property to which collateral descendants succeeded. The State Constitution provided that "the charges of government may be raised by taxation upon estates . . . . and property when passing by will or inheritance." N. H. Const. Amend. 1902, Part II, art. 6. *Held,* that the proposed tax was a property tax and unconstitutional for lack of uniformity. *In re Opinions of the Justices* (1923, N. H.) 120 Atl. 629.

The general view is that succession is enjoyed only by virtue of a "privilege" granted by the state. *Eyre v. Jacob* (1858, Va.) 14 Gratt. 422; *Magoun v. Illinois Trust & Savings Bank* (1898) 170 U. S. 283, 18 Sup. Ct. 594; *In re Martin's Estate* (1923, Vt.) 120 Atl. 862; see *Stone v. Elliott* (1914) 182 Ind. 454, 106 N. E. 710; but see *Nunnemacher v. State* (1906) 129 Wis. 190, 108 N. W. 627 (state cannot appropriate entire estate of the deceased). Succession taxes, being thus upon the exercise of a privilege, are not subject to the restrictions placed upon so-called property taxes and may therefore be graduated. *State v. Handlin* (1911) 100 Ark. 175, 139 S. W. 1112. The practical effect of progressive rates is to prevent the overtaxing of the needy and the undertaxing of the prosperous. The court in the instant case reaches the unusual result by viewing the proposed tax as a tax upon "property when passing," and therefore as a property tax. Courts have construed the term "property" to refer to the physical thing and have intended that meaning in the term "property tax." *Cf. Hart v. Smith* (1902) 159 Ind. 182, 64 N. E. 661. More accurately the term refers only to the legal relations which a person has with respect to the physical thing. Hohfeld, *Fundamental Legal Conceptions* (1913) 23 YALE LAW JOURNAL, 16, 21. Any tax on "property," whether it be called an excise or property tax, is in essence a tax on what is equally a "privilege": the privilege granted by the state of enjoying such legal relations. Such an analysis in no way renders impossible or less practically sound the established historical distinction in taxation between the normal and ordinary property relations incident to mere holding and such an abnormal or unusual relation as the privilege of acquisition by inheritance. The effect of this decision is to render invalid N. H. Laws, 1919, ch. 37, creating a progressive tax on lineals, which as the court says, has apparently not been questioned. The opinion does not overrule but seems contrary to *Thompson v. Kidder* (1906) 74 N. H. 89, 65 Atl. 392, upholding an inheritance tax lacking uniformity because of its exemption features. By its failure properly to analyze the meaning of terms, the New Hampshire court has altogether needlessly deprived the state of power to resort to a popular and generally used form of tax, and departed from a well nigh universal current of authority.

WILLS—CONFLICT OF LAWS—RECOGNITION OF FOREIGN PROBATE DECREES.—The testatrix, domiciled in New Jersey, executed a will in New York disposing of realty and personalty situated in both states. Only five per cent of the property was situated in New Jersey. The New York court, assuming jurisdiction under authority of statute, denied probate on the ground of testamentary incapacity. Subsequently the executor, the proponent in the New York suit, joined two legatees and petitioned for probate in New Jersey. *Held,* that the New York decree was conclusive. *In Re Barney's Will* (1923, N. J. Prerog.) 120 Atl. 513.

A proceeding to probate a will is said to be in the nature of an action *in rem*. *Woodruff v. Taylor* (1847) 20 Vt. 65; Waples, *Proceedings in Rem* (1882) sec. 563. But the full faith and credit clause requires recognition of a judgment of probate only in respect to the property in the foreign state concerned. See *Brown v. Fletcher* (1908) 210 U. S. 82, 28 Sup. Ct. 702; *Robertson v. Pickrell* (1883) 109 U. S. 608, 3 Sup. Ct. 407; *contra: Ines v. Salisbury* (1884) 56 Vt. 565. However, as a matter of comity, other states do give effect to a foreign probate decree, but only if the court granting it had "jurisdiction over the *res*." *Brock v. Frank* (1874) 51 Ala. 85. Hence the decision of a foreign court on the *factum* of a will of realty is not, in the absence of statute, accepted at the *situs*. *Clarke v. Clarke* (1900) 178 U. S. 186, 20 Sup. Ct. 873; *Robertson v. Pickrell, supra; Rice v. Jones* (1786, Va.) 4 Call. 89. But as to wills of personalty, other sovereigns, for the sake of convenience, recognize the probate judgments of the decedent's last domicile. *Higgins v. Eaton* (1913, C. C. A. 2d) 202 Fed. 75. The *"res"* over which the domicile is said to have "jurisdiction" is the fictitious *"status"* of the estate. *Martin v. Stovall* (1899) 103 Tenn. 1, 9, 52 S. W. 296, 298. The courts of the domicile usually hold that the proving of a will at the *situs* of a part of the property does not affect assets located at the domicile. *Walton v. Hall's Estate* (1894) 66 Vt. 455, 29 Atl. 803; *Stark v. Parker* (1876) 56 N. H. 481; see *In Re Gaines' Will* (1895, Sup. Ct.) 84 Hun, 520, 32 N. Y. Supp. 398, *affirmed* 154 N. Y. 747, 49 N. E. 1097; *contra: In Re Estate of Spang* (1922, Pa. Orphans' Ct.) 68 N. Y. L. JOUR. 705 (unusual theory that the *res* is the will itself). However one who was a party to a foreign proceeding may be concluded by it, even in a subsequent suit involving different property interests. See *Torrey v. Bruner* (1910) 60 Fla. 365, 53 So. 337. But, contrary to the principal case, it has been held that the legatees are not in such privity with the executor as to be concluded by a judgment against him in a proceeding of probate to which they were not parties. *Foley v. O'Donaghue* (1906) 167 Ind. 134, 77 N. E. 352. See *De Mora v. Concha* (1884) L. R. 29 Ch. Div. 268, affirmed (1886, H. L.) L. R. 11 A. C. 541. *Cf. Brigham v. Fayerweather* (1886) 140 Mass. 411, 5 N. E. 265. The policy of the instant case would be highly questionable on any other facts, as it would compel the legatee to see that the will is not rejected in any state where property is located, and so would be against the settled rule of convenience allowing the domicile primary jurisdiction over wills of personalty.