

RECENT CASE NOTES

ADMIRALTY—JURISDICTION—DEATH ON SHORE FROM INJURY RECEIVED ON HIGH SEAS.—The deceased, a cattle tender on a British ship, was injured on the high seas, and died on shore some hours later. A libel was brought by his widow seeking recovery either from the decedent's employers or the owners of the ship. *Held*, that the libel be dismissed, *inter alia*, on the ground that since the Federal Death Act of March 30, 1920 (41 Stat. at L. 537) gives a right of action only at the moment when death occurs, the cause of action arose on land and hence the admiralty court was without jurisdiction. *Pickles v. F. Leyland & Co.* (1925, D. Mass.) 10 Fed. (2d) 371.

When the negligence which causes an accident resulting in death or injury occurs in one state or country and the accident itself in another, the law of the latter place governs. *Chicago, St. L. & N. O. R. Co. v. Doyle* (1883) 60 Miss. 977; *Cameron v. Vandergriff* (1890) 53 Ark. 381, 13 S. W. 1092. If the injury occurs in one state, and death results therefrom in another, the cause of action is regarded as having arisen in the former state. *Rudiger v. Chicago, St. Paul Ry. Co.* (1896) 94 Wis. 191, 63 N. W. 661; *cf. Hoodmacher v. Lehigh Valley Ry. Co.* (1907) 218 Pa. 21, 66 Atl. 975; *Cook, The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE LAW JOURNAL, 457, 466. And so where death is the only operative fact occurring within a state the wrongful death statute of that state does not impose responsibility. *Needham v. Grand Trunk Ry. Co.* (1865) 38 Vt. 294; *Louisville & Nashville Ry. Co. v. Williams* (1896) 113 Ala. 402, 21 So. 938; *Van Doren v. Penn. Ry.* (1899, C. C. A. 3d) 93 Fed. 260. Similarly, admiralty has no jurisdiction if the fatal force is applied to the victim on land, though put in motion by negligence on navigable waters. *Cordrey v. The Ece* (1921) 102 Or. 636, 201 Pac. 202; *Billings v. Breinig* (1881) 45 Mich. 65, 7 N. W. 722; *Martin v. West* (1911) 222 U. S. 191, 32 Sup. Ct. 42; *Lermond's Case* (1923) 122 Me. 319, 119 Atl. 864. Conversely, admiralty has jurisdiction when the fatal force is applied on navigable waters, although the causation was a negligent act on shore. *Hermann v. Port Blakely Mill Co.* (1895, D. Calif.) 69 Fed. 646. And if the fatal force is applied to the body of the deceased on navigable waters, admiralty has jurisdiction even though the death occurs on shore. *The Chiswick* (1916, C. C. A. 5th) 231 Fed. 452; *Liverani v. John T. Clark & Son* (1919, Sup. Ct. Spec. T.) 176 N. Y. Supp. 725; *The Samnanger* (1924, S. D. Ga.) 298 Fed. 620; *The Anglo-Patagonian* (1916, C. C. A. 4th) 235 Fed. 92; *Campbell v. Luckenback S. S. Co.* (1925, D. Or.) 5 Fed. (2d) 874. However, a few cases, including the instant decision, have held that if the death occurs on land admiralty has no jurisdiction. *The Kaian Maru* (1924, D. Or.) 2 Fed. (2d) 121 (apparently overruled though not cited by the decision in *Campbell v. Luckenback S. S. Co.*, *supra*); *Ryley v. Philadelphia & R. Ry. Co.* (1909, S. D. N. Y.) 173 Fed. 839. This minority doctrine is based upon an interpretation of the Federal Death Act which makes the death the wrongful act for which the action is given on the theory that the statute is not a survival statute but a death statute. *Hughes, Death Actions in Admiralty* (1921) 31 YALE LAW JOURNAL, 115, 120; *Hughes, Admiralty* (2d ed. 1920) 236. But what seems to be the better view is that the application of fatal force to the body of the victim should be the gist of the action. Under this view the Federal Death Act would apply when death occurs on land from an injury at sea. *Magruder and Grant, Wrongful Death within the Admiralty Jurisdiction* (1926) 35 YALE LAW JOURNAL,

395; Benedict, *Admiralty* (5th ed. 1925) sec. 142. It is submitted that the purpose of the framers of the Federal Act has been frustrated by the denial of admiralty jurisdiction in the instant case. As it is probable, in view of the above cases, that no recovery can be had for the wrongful death under the Massachusetts Death Act, the result would seem to bar all recovery. Cf. *The Sagamore* (1917, C. C. A. 1st) 247 Fed. 743; *Needham v. Grand Trunk Ry. Co.*, *supra*; *Louisville & Nashville Ry. Co. v. Williams*, *supra*.

APPEAL AND ERROR—CONNECTICUT PRACTICE—GENERAL VERDICT—EFFECT OF ERROR AS TO ONE OF SEVERAL ISSUES.—In an action by the plaintiffs to recover a commission, the defendant offered evidence to show (1) that the defendant never employed the plaintiffs, (2) that the plaintiffs did not procure a customer. No special interrogatories were requested. Exception was taken by the plaintiff to a part of the charge to the jury dealing with the second defense. The jury returned a general verdict for the defendant. *Held*, on appeal, that the judgment on the general verdict be affirmed; and, by way of dictum, that appeal can be taken from error in the trial of one of several independent issues only when proper interrogatories have been offered for submission to the jury. *Spring v. Nagle* (1926) 104 Conn. 23, 131 Atl. 744.

Connecticut and a very few other states have always followed the rule that a general verdict will stand, although error has intervened in the trial of one of several independent issues. *Aaronson v. New Haven* (1920) 94 Conn. 690, 110 Atl. 872; (1920) 30 YALE LAW JOURNAL, 197. While this rule was definitely established after full argument in the early cases of *Louis v. Niles* (1792, Conn.) 1 Root 433, and *Wolcott v. Coleman* (1817) 2 Conn. 324, and while it has never been overruled, it probably has been applied only occasionally by the court for it seems to have been but little appreciated by the bar. Thus in some of the more recent leading cases where this rule has been applied, the point was not argued by counsel in their briefs, or, as far as any intimations in the opinions show, argued at all. *Foster v. Smith* (1885) 52 Conn. 449, Briefs and Records, 1st Jud. Dist. Jan. Term. 1885; *Aaronson v. New Haven*, *supra*, Briefs and Records 3rd Jud. Dist. Jan. Term 1920; *Spring v. Nagle*, *supra*, Briefs & Records 1st Jud. Dist. Jan. Term. 1926. Recently the court has suggested methods for avoiding the effect of this rule. Thus, in the instant case reference is made to *Callahan v. Jursek* (1924) 100 Conn. 490, 124 Atl. 31, where the court said that the proper procedure is to request separate verdicts on separate counts, or answers to special interrogatories on separate issues in one count. But it would seem that an attempt to have the jury make special findings of fact generally perplexes the jury more, results in more mistrials through inconsistencies, and does less substantial justice than a general verdict. Sunderland, *Verdicts General and Special* (1920) 29 YALE LAW JOURNAL, 253. Furthermore, this suggested procedure conflicts with the formerly accepted Connecticut rule that the submission of interrogatories is solely within the discretion of the trial court. The common law use of special verdicts adopted by statute (Conn. Gen. Sts. 1918, sec. 5789) had fallen into disuse by 1822. 1 *Swift's Digest* (1822) 774. But interrogatories had been frequently allowed in the ordinary jury cases at the trial court's discretion until finally the rules were laid down in *Freedman v. New York, N. H. & H. Ry. Co.* (1909) 81 Conn. 601, 71 Atl. 901. There it was stated that interrogatories could only be used at the discretion of the court. (1922) Conn. Prac. Bk. 298, sec. 236. But in those cases where there are several issues, the submission of interrogatories to the jury is said to be a matter of right and not of discretion. *Callahan v. Jursek*, *supra*. In that case the action of the trial judge in refusing requested interrogatories was sus-

tained on the ground that they were not so framed as correctly to separate the issues and conclude each issue by an answer. The future procedure in Connecticut may possibly be: (1) A continued application of the rule that a general verdict imports that all points were found in favor of the prevailing party. While this rule may, in certain cases, prevent reversals on technicalities, yet it forces requests for special interrogatories, thus necessitating decisions as to whether in a given case the interrogatories as offered properly separate and conclude the issues. (2) In reaction to such technical distinctions the general trend of practice may be for the trial courts to submit interrogatories as a matter of course when and in the form offered. This would burden and confuse the jury contrary to considerations of policy above stated. (3) Practical disregard of the rule as applied in the instant case and the development of a practice to grant a new trial whenever there is error as to a material issue.

BILLS AND NOTES—DRAWEE WHO WAS ALSO DRAWER, PAYING RAISED CHECK, CANNOT RECOVER OVERPAYMENT.—A United States disbursing officer drew a check upon the Treasurer of the United States. The check was raised from \$47.50 to \$4750. The defendant received payment of the raised amount through the Federal Reserve Bank, the *agent* of the Government. On learning of the alteration, the United States sued to recover the difference. On demurrer, judgment was rendered for the defendant. The plaintiff appealed. *Held*, that the judgment be affirmed for when the United States issues an order upon itself, it has notice of the amount, and by payment admits correctness of the amount paid. *The United States v. The National Exchange Bank of Baltimore* (1926) U. S. Sup. Ct., Oct. Term, 1925, No. 222.

At common law, a drawee who paid or who accepted and paid a draft admitted the drawer's signature. *Price v. Neal* (1762, K. B.) 3 Burr. 1354; *White v. Continental National Bank* (1876) 64 N. Y. 316. But he did not admit the genuineness of the indorsements or of the body of the instrument. *Espy v. Bank of Cincinnati* (1873, U. S.) 18 Wall. 604 (raised check); *Carpenter v. Northborough National Bank* (1877) 123 Mass. 66 (forged indorsement); see *Redington v. Woods* (1873) 45 Calif. 406, 419. Through legislation, the acceptor, by accepting an instrument makes certain admissions and binds himself to pay "according to the tenor of his acceptance." N.I.L. sec. 62. But this has been held not to change the above common law rules. *First Nat. Bank of Portland v. United States Nat. Bank* (1921) 100 Or. 264, 197 Pac. 547; *First State Bank & T. Co. v. First Nat. Bank of Canton* (1924) 314 Ill. 269, 145 N. E. 382; *cf. South Boston Trust Co. v. Levin* (1924) 249 Mass. 45, 143 N. E. 816 (denying that the N.I.L. Sec. 62 covers "payment" and basing the decision strictly on the common law rule of *Price v. Neal, supra.*) And thus, banks have recovered moneys over forged indorsements. *Interstate Trust Co. v. United States Nat. Bank* (1919) 67 Colo. 6, 185 Pac. 260; *cf. Jones Bros. v. Citizens Nat Bank* (1925) 106 Okla. 162, 233 Pac. 472; *First Nat. Bank of Wichita Falls v. Guaranteed State Bank* (1925) 106 Okla. 85, 233 Pac. 183 (recovery denied because of negligence on the part of the drawee bank). And also moneys paid out on raised checks. *McClendon v. Bank of Advance* (1915) 188 Mo. App. 417, 174 S. W. 203; *National Reserve Bank of N. Y. v. Corn Exchange Bank* (1916, 1st Dept.) 171 App. Div. 195, 157 N. Y. Supp. 316 (check had been certified for the raised amount); see *Central Nat. Bank v. Drostco Jewelry Co.* (1920) 203 Mo. App. 646, 658, 220 S. W. 511, 514 (forged indorsement and raised amount); *cf. Citizens' Bank of Winfield v. Commercial Sav. Bank of Guin* (1923) 209 Ala. 280, 96 So. 324 (raised sight draft); *National Union Fire Ins. Co. v. Mellon Bank* (1923) 276 Pa. 212, 119

Atl. 910. But in case of acceptance *after* the alteration of the payee's name it has been held that the common law rule is changed by N.I.L. Sec. 62 and the acceptance admits the payee's name appearing at the time of acceptance. *National City Bank v. National Repub. Bank* (1921) 300 Ill. 103, 132 N. E. 832; COMMENTS (1922) 31 YALE LAW JOURNAL, 522 (approving); NOTES (1922) 16 ILL. L. REV. 615 (disapproving). There is some disposition, although it is believed to be without basis, to hold that certification also binds the drawee to pay a raised amount if it appeared at the time of certification. See *Ozark Savings Bank v. Bank of Bradleyville* (1918, Mo. App.) 204 S. W. 570, 571. The instant case, without interpreting the N.I.L., reaches a similar result in a case involving payment rather than acceptance, but appears to rest the decision on the circumstance that the United States was both drawee and drawer. Although this is contrary to the rule obtaining where drawee and drawer are different persons, it has support in analogous cases denying recovery to the maker of a note where payment has been made by mistake. *Bank of United States v. Bank of Ga.* (1825, U. S.) 10 Wheat. 333 (raised bank notes); *Johnston v. Commercial Bank* (1885) 27 W. Va. 343 (forged maker's signature); see *Jones v. Miners' & Merchants' Bank* (1910) 144 Mo. App. 428, 435, 128 S. W. 829, 830 (forged maker's signature); cf. *Franklin Bank v. Raymond* (1829, N. Y.) 3 Wend. 69 (mistake as to whether holder is a holder in due course); *contra: Welch v. Goodwin* (1877) 123 Mass. 71 (forged maker's signature).

CONSTITUTIONAL LAW—COMMUTATION OF SENTENCE—CHANGE FROM DEATH SENTENCE TO LIFE IMPRISONMENT NOT PERMISSIBLE AS A MITIGATION OF PUNISHMENT.—The petitioner was convicted of murder in Alaska in 1905 and sentenced to death. In 1909 the President "commuted" the punishment from execution to life imprisonment. The petitioner brought suit for a writ of habeas corpus. *Held*, that the writ be granted on the ground that the "commutation" was beyond the President's power, since it was not a mitigation of, but an illegal change in the nature of punishment. *Ex parte Perovich* (1925; D. Kan.) 9 Fed. (2d) 124.

A commutation is the substitution by authority of law of a lesser for a greater punishment. See *State v. Wolfer* (1914) 127 Minn. 102, 103, 148 N. W. 896, 897. It differs from a pardon in that no acceptance is necessary for its validity, and it may be imposed upon the prisoner without his consent. *Lee v. Murphy* (1872, Va.) 22 Gratt. 789; cf. *Chapman v. Scott* (1926, C. C. A. 2d) 10 Fed. (2d) 690. The power to commute a sentence is a part of the pardoning power, and may be exercised under a general grant of that power. *Ex parte Wells* (1856, U. S.) 18 How. 307. Some courts have held statutes changing the punishment of certain crimes from death to life imprisonment to be *ex post facto* as to crimes committed before the passage of the statute on the ground that they did not mitigate, but imposed an entirely different punishment. *Shepherd v. People* (1862) 25 N. Y. 406. However, most courts have held such a statutory change valid as a mitigation of punishment. *Commonwealth v. Wymun* (1853, Mass.) 12 Cush. 237; *McGuire v. State* (1899) 76 Miss. 504, 25 So. 495; see *People v. Hayes* (1894) 140 N. Y. 484, 492, 35 N. E. 951, 953; Hall, *Constitutional Law* (1923) 94. Similarly, a "commutation" of a death sentence into one of life imprisonment by an executive, such as was attempted in the instant case, has been upheld under the pardoning power. *People v. Frost* (1909, 2d Dept.) 133 App. Div. 179, 117 N. Y. Supp. 524; see *State v. Olander* (1922) 193 Iowa, 1379, 1382, 186 N. W. 53, 54; *contra: Ex parte Janes* (1865) 1 Nev. 319. In *Ex parte Janes, supra*, the court, having granted the writ of habeas corpus, ordered the petitioner to be re-

tained in custody under the original death sentence. *Quere*, whether the absence of such an order would set the petitioner free. If so, the interpretation of "mitigation of punishment" given in the instant case seems undesirable.

CONSTITUTIONAL LAW—INHERITANCE TAX—GIFTS—CONCLUSIVE PRESUMPTION OF CONTEMPLATION OF DEATH.—A Wisconsin statute declared that every transfer of a material part of an estate, made within six years prior to the death of the transferor, without adequate compensation, should be construed to have been made in contemplation of death, and therefore within the provisions of the Inheritance Tax Law. The deceased, without an actual apprehension or contemplation of death, transferred five million dollars to the plaintiff within the prescribed period. The plaintiffs challenged the validity of the statute, but the Supreme Court of the State held it constitutional. *Held*, on appeal, (three judges *dissenting*) that since the statute arbitrarily made it a conclusive presumption that such gifts were made in contemplation of death, it was in conflict with the Fourteenth Amendment. *Schlesinger et al. v. State* (1926) U. S. Sup. Ct., Oct. Term, 1925, No. 146.

Inheritance taxation, in theory, is not a direct tax on property, but a tax on the privilege of transmitting property at death. *Corbin v. Baldwin* (1917) 92 Conn. 99, 101 Atl. 834; *In re Gihon's Estate* (1902) 169 N. Y. 443, 62 N. E. 561. As such, obviously, it cannot apply to gifts which have no relation to death either in point of time or intention, since such gifts are beyond its purpose and scope. *Cf. Conway's Estate v. State* (1918, Ind.) 120 N. E. 717. There would seem to be no constitutional objection to state legislation designed to tax gifts generally. In at least one country, gifts and legacies bear identical taxes. See Law of Germany, Sept. 10, 1919, Reichsgesetzblatt, 199, No. 173, pp. 1543, 1557. It is generally conceded that inheritance taxation can be extended to include gifts made "in contemplation of death." *Merrifield v. People* (1904) 212 Ill. 400, 72 N. E. 446; *Magoun v. Illinois Trust and Savings Bank* (1898) 170 U. S. 283, 18 Sup. Ct. 594. What will amount to a gift made in contemplation of death, involves questions of fact. *Estate of Benton* (1908) 234 Ill. 366, 84 N. E. 1026. And since the only persons who could testify on this point are usually those who would be directly benefited by proving it was not such a gift, great difficulty was found in enforcing this provision of the inheritance tax statutes. *Cf. Matter of Price* (1909) 6 Misc. 149, 116 N. Y. Supp. 283. Statutes, such as the one in the instant case, specifying a definite time within which gifts would be deemed to have been made in contemplation of death, were enacted in order to remedy this difficulty and thus prevent evasion of the Inheritance Tax. *Cf. Gleason and Otis, Inheritance Taxation* (3d ed. 1922) 123. The scope of these statutes clearly would include some cases where gifts within the prescribed period were made without actual apprehension or contemplation of death. But, as Mr. Justice Holmes points out in his dissent in the instant case, "the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured." *Cf. Purity Extract and Tonic Co. v. Lynch* (1912) 226 U. S. 192, 33 Sup. Ct. 44; *Jacob Ruppert v. Caffey* (1920) 251 U. S. 264, 40 Sup. Ct. 141 (unintoxicating malt liquors prohibited in order to make effective a prohibition of the sale of beer). Moreover, a legislature and state court, familiar with local conditions and aware of the abuses which the statute was designed to remedy, considered the six year period reasonable and necessary to give the statute practical force. The view of the dissent, therefore, in hesitating to pronounce it unreasonable and arbitrary seems justified.

CONTRACTS—CONSIDERATION—PROMISE TO SELL “SURPLUS.”—The defendant agreed to sell all of its surplus stock of steel sheets and bars to the plaintiff, the quantity to be stated by the defendant. Plaintiff brought an action on the contract and the court directed a verdict for the defendant. *Held*, on appeal, that the judgment be affirmed as the contract was “unforceable for want of mutuality,” the seller having retained the power to declare the amount of the surplus. *Midland Steel Sales Co. v. Waterloo Gasoline Engine Co.* (1925, C. C. A. 8th) 9 Fed. (2d) 250.

If either party to a bilateral agreement retains an option which renders his promise illusory, there is no contract because of lack of consideration. *Wickham & Burton Coal Co. v. Farmers' Lumber Co.* (1920) 189 Iowa, 1183, 179 N. W. 417 (option to buy any quantity desired); *A. Santuella & Co. v. Otto F. Lange Co.* (1907 C. C. A. 8th) 155 Fed. 719 (similar option). The ambiguous phrase “want of mutuality” as used in the instant case means lack of consideration. 1 Williston, *Contracts* (1920) sec. 140; (1921) 30 YALE LAW JOURNAL, 297. Where the option is limited, the promisor may be said to be under a new detrimental legal relation, and the contract is therefore held to be supported by a valid consideration. *Lima Locomotive etc. Co. v. National Steel Castings Co.* (1907, C. C. A. 6th) 155 Fed. 77 (contract to buy of defendant all of the “requirements” of plaintiff's business); *Scott v. Moragues Lumber Co.* (1918) 202 Ala. 312, 80 So. 394 (contract to charter boat to the plaintiff if the defendant purchased it); *Gurfein v. Werbelovsky* (1922) 97 Conn. 703, 118 Atl. 32 (contract of sale with option to cancel before shipment); *Burgess Sulphite Fibre Co. v. Broomfield* (1902) 180 Mass. 283, 62 N. E. 367 (contract to sell to defendant all the scrap iron plaintiff wished to sell); Corbin, *Effect of Option on Consideration* (1925) 34 YALE LAW JOURNAL, 571; Patterson, “Illusory” Promises and Promisor's Options (1921) 6 IOWA L. BULL. 129, 209; *contra: Velie Motor Car Co. v. Kopmeier Motor Car Co.* (1912, C. C. A. 7th) 194 Fed. 324 (contract of sale with option to cancel). Some courts have held that there was no contract where the quantity was not ascertainable with reasonable certainty otherwise than by optionee's statement. *Bailey v. Austrian* (1873) 19 Minn. 535; *cf. Wells v. Alexandre* (1891) 130 N. Y. 642, 29 N. E. 142 (buyer bound to take quantity otherwise ascertainable at the time the contract was made). Other courts have held that the duty not to buy of, or sell to, any other party is in itself a valid consideration. *Burgess etc. v. Broomfield, supra; Bartlett Springs Co. v. Standard Box Co.* (1911) 16 Calif. App. 671, 117 Pac. 934. In the instant case, the seller had a limited option between selling surplus to the plaintiff and managing his business so as to have no surplus. “Surplus” is as objectively determinable as the “requirements” of a business, and the fact that the optionee is to submit statements of this quantity should not affect its objective determination. *Lima Locomotive etc. Co. v. National etc. Co., supra*, (buyer to tell seller amount of his “needs”). The defendant's promise was, therefore, not illusory and should have been sufficient consideration to make the contract binding.

CRIMINAL PROCEDURE—COURT'S POWER TO MITIGATE SENTENCE ENDS WHEN PUNISHMENT BEGINS.—The defendant pleaded guilty to the crime of unlawfully making mash, and was sentenced to serve a year in the penitentiary. After the execution of the sentence had begun, the court during the same term at which sentence was pronounced, set it aside and ordered the prisoner discharged. The plaintiffs, members of the State Board of Correction, refused to obey the order, and petitioned to quash a judgment on habeas corpus commanding the defendant's release. *Held* (two judges *dissenting*) that the judgment be quashed, since to vacate the

original sentence after its partial execution would put the defendant in jeopardy twice for the same offense. *Emerson v. Boyles* (1926, Ark.) 280 S. W. 1005.

A court is usually said to have inherent power to modify its own judgments during the same term at which they are rendered. 2 Bishop, *New Criminal Procedure* (2d ed. 1913) sec. 1298; see *King v. Price* (1805, K. B.) 6 East, 323, 328; *Holden v. State* (1923) 156 Ark. 521, 527, 247 S. W. 763, 770. But in cases where the court has sought to revise its judgment and increase the penalty, it is held that after the sentence has been partially or fully executed, the court is without power to change or amend it. *Ex parte Lange* (1874, U. S.) 18 Wall. 163; *People v. Meservey* (1889) 76 Mich. 223, 42 N. W. 1133; *State v. Meyer* (1912) 86 Kan. 793, 122 Pac. 101. The reason assigned is that to permit a second sentence under these circumstances would be to punish the prisoner twice for the same offence, in violation of his constitutional rights. See *Ex parte Lange*, *supra*, at 168; *Smith v. District Court* (1906) 132 Iowa, 603, 607; 109 N. W. 1085, 1087; *People v. Sullivan* (1907) 54 Misc. 489, 490, 106 N. Y. Supp. 143, 144. However, the constitutional prohibition against double jeopardy would seem properly to apply only to trying a man twice for the same offence. Cf. *Commonwealth v. Fitzpatrick* (1888) 121 Pa. 109, 116, 15 Atl. 466, 469; 1 Bishop, *Criminal Law* (9th ed. 1923) sec. 979; Comley, *Former Jeopardy* (1926) 35 YALE LAW JOURNAL, 674, 675. Hence that does not appear to be a sound argument against empowering a court to modify sentences already in execution, by vacation or substitution of sentence in diminution of punishment. Thus it has been held that a court has power to mitigate its sentence though it has been partially executed. *In re Brittain* (1885) 93 N. C. 537; see *Plain v. State* (1873) 60 Ga. 284, 288; *Ammon v. Johnson* (1888) 3 Ohio Cir. Ct. 263. This doctrine, the basis of the dissent in the instant case, is established in the federal courts. See *In re Graves* (1902, E. D. Wis.) 117 Fed. 798, 799.

CRIMINAL LAW—VERDICT ON SINGLE COUNT APPARENTLY INCONSISTENT WITH VERDICT ON OTHER COUNTS NOT REVERSIBLE ERROR.—The defendant was indicted on four counts. The first charged unlawful possession of intoxicating liquor; the second, unlawful possession of apparatus for its manufacture; the third, unlawful manufacture, and the fourth, maintaining a common nuisance as defined by the Volstead Act (maintaining a place for the illegal manufacture or sale of intoxicating liquors). The same evidence was relied upon by the prosecution on all four counts. The jury found the defendant not guilty on each of the first three counts and guilty on the fourth count. The defendant appealed on the ground that the verdicts on the several counts were inconsistent. *Held* (one judge *dissenting*) that the conviction be sustained. *Gozner v. United States* (1925, C. C. A. 6th) 9 F. (2d) 603.

It is well settled that in a civil action at common law a jury may at its discretion return either a general or a special verdict. *Railway v. Lassiter* (1909) 58 Fla. 234, 50 So. 428. The same rule applies in criminal actions. *Commonwealth v. Chatham* (1865) 50 Pa. St. 181; Clementson, *Special Verdicts* (1905) 179. Statutory provisions making special verdicts mandatory on the jury at the court's instruction do not apply to criminal cases. *People v. Marion* (1874) 29 Mich. 32. At common law, and by statute generally, the court may, in its discretion, either upon its own initiative or upon proper request from counsel, submit special interrogatories to the jury. Special findings, in response to these interrogatories, when inconsistent with the general verdict are controlling in civil suits. *Richardson v. Weare* (1882) 62 N. H. 80. But this is not so in criminal cases, as it

seems to be against the policy of the law to apply any limitations on the jury's privilege to render a general verdict in such cases. *People v. Tessmer* (1912) 171 Mich. 522, 137 N. W. 214. Each count in an indictment is a distinct indictment, and, therefore, the finding of the jury as to a particular count may with some plausibility be treated as independent of, and unaffected by, the finding upon another count. *Selvester v. United States* (1898) 170 U. S. 262, 18 Sup. Ct. 580. Hence while the verdicts on the several counts may appear to be logically inconsistent, they are not legally so. *Griffin v. State* (1868) 18 Ohio St. 438. It would seem that the power of the court to set aside a conviction not sustained by the evidence is considered a sufficient safeguard against abuse of the wider discretion given the jury in criminal cases. The instant decision is in accord with the weight of authority. *Marshallo v. United States* (1924, C. C. A. 2d) 298 Fed. 74; *Huffman v. United States* (1919, C. C. A. 8th) 259 Fed. 35; *contra: Rosenthal v. United States* (1921, C. C. A. 9th) 276 Fed. 714.

EVIDENCE—HUSBAND AND WIFE—DEED OF SEPARATION ADMISSIBLE AS EVIDENCE OF NON-ACCESS.—A married couple entered into a deed of separation and lived apart for three years. At the end of this period the wife gave birth to a child. The husband petitioned for a divorce on the ground of adultery, and offered in evidence of non-access the deed of separation. *Held*, that the deed was properly admitted in evidence, and that, since there was no evidence to rebut the presumption which it created of non-access, judgment be given for the plaintiff. *Mart v. Mart* (1925, Prob.) 42 T. L. R. 253.

The well established rule that a spouse is incompetent to testify as to non-access when such testimony may bastardize a child of the marriage had its inception in Lord Mansfield's emotional reaction (1) against allowing indecent evidence as to private life and (2) against the "immorality" of a wife's seeking to injure her child or of a husband's seeking to disclaim a child presumably his. *Goodright v. Moss* (1777, K. B.) Cowp. 591. Both reasons, while conceivably proper in isolated cases, have failed to justify its existence as a generally applicable rule. See 4 Wigmore, *Evidence* (2d ed. 1923) sec. 2064. Adopting reason (1) it would seem that while the spouse's testimony as to non-intercourse must be barred, either spouse's testimony as to the husband's absence at the time of conception should be admitted. Such, however, has apparently not been the result. *Rex v. Sourton* (1836, K. B.) 5 A. & El. 180; see *Russell v. Russell* [1924, H. L.] A. C. 687, 698, 706; *cf. Flint v. Pierce* (1912, Sup. Ct. Spec. T.) 136 N. Y. Supp. 1056. But see *Kennedy v. State* (1915) 117 Ark. 113, 117, 173 S. W. 842, 843. And the most intimate details of family life are not kept unexposed in divorce suits in which children are not so concerned. Generally, therefore, emphasis has been laid solely on reason (2). See *Goodright v. Moss, supra*, at 592; *Melvin v. Melvin* (1879) 58 N. H. 569, 570. The rule does not prevent a spouse from giving evidence that a bastard child was born before the marriage. *Janes' Estate, McDonald's Appeal* (1892) 147 Pa. 527, 23 Atl. 892 (testimony of mother). And it has been held, by strict construction, that a judicial separation sufficiently terminates the marriage to allow a parent's testimony to bastardize a child conceived and born after the separation. *Andrews v. Andrews and Chalmers* [1924] Prob. 255. The decision in the instant case may be justified on the ground that a deed of separation in similar manner sufficiently ends the marriage. The distinction made in the application of the rule in cases of coverture is obviously technical for to bastardize issue after separation is certainly not more moral than to do the same time during coverture. What is probably the most sane (though not entirely

satisfactory) explanation of the rule is of recent origin: to allow a spouse to introduce before a jury evidence as to intercourse—something within the sole knowledge of the married couple—is to put too strong a weapon (blackmail) in the spouse's hands. If the evidence has to do with absence, however, third parties can almost always be found to testify as to it. See Lord Dunedin in *Russell v. Russell*, *supra*, 720 ff. Adopting this explanation, the conception of the immorality of bastardizing issue is dropped out, and hence the court in the instant case properly gave free rein to the presumption of non-access. See, generally, Thayer, *Cases on Evidence* (MaGuire's ed. 1925) 237 note; (1925) 2 *CAMB. L. JOUR.* 233.

HUSBAND AND WIFE—POSSIBILITY OF MARRIED WOMAN ACQUIRING SEPARATE DOMICILE FROM THAT OF HER HUSBAND.—The plaintiff had sued in Alberta for a judicial separation. Both spouses were resident in Alberta at the time the decree was granted. The subsequent whereabouts of the husband became unknown. Later the plaintiff instituted this suit for divorce in Alberta and obtained leave for substituted service on her husband at his last known address within the jurisdiction. The husband's domicile of origin was Ontario which was never changed. The trial court dismissed the petition on the grounds that, since the domicile of the wife was the same as that of the husband, the Alberta court had no jurisdiction to dissolve the marriage. This decision was reversed on appeal and a decree for dissolution of the marriage entered. *Held*, on appeal, that the judgment of the intermediate court be reversed and the judgment of the trial court restored. *Attorney-General for Alberta v. Cook* (1926, P. C.) 161 L. T. 314.

The old common law rule was that a married woman could not under any circumstances or for any purpose, establish an independent domicile from that of her husband. *Yelverton v. Yelverton* (1859) 1 Sw. & Tr. 574; Dicey, *Conflict of Laws* (3rd ed. 1922) 127. The basis for the rule was that, in law, man and wife were one. 1 Blackstone, *Commentaries*, *442. But dicta in some later English cases pointed to some relaxation of the rule. So it was intimated that where there had been a judicial separation obtained by the wife, she could have an independent domicile. See *Dolphin v. Robins* (1859) 7 H. L. C. 390, 418. Also, where the husband afforded the wife grounds for a divorce or judicial separation. See *Le Sueur v. Le Sueur* (1876) 1 P. D. 139, 142; overruled by *Lord Advocate v. Jaffrey* [1921] 1 A. C. 146. Some English colonial courts have held that the wife's domicile did not follow the husband's in a case where the wife had obtained a judicial separation. *Hastings v. Hastings* [1922] N. Z. L. R. 273; *Protopsaltis v. Protopsaltis* [1918] Queensland St. R. 270. The instant case appears to complete the return to the common law rule. However, American courts, perhaps influenced by the rising popular demand for equal rights for both sexes appear to have reached a stage of development where they allow the wife an independent domicile. It is necessary that the wife have the intent to acquire a domicile in the fixed abode which she selects. *Barrow v. Barrow* (1926, La.) 106 So. 705; *De Bouchel v. Candler* (1924, N. D. Ga.) 296 Fed. 482. Also that she is without fault amounting to desertion. *Loker v. Gerald* (1892) 157 Mass. 42, 31 N. E. 709. Thus a wife can establish an independent domicile under the following circumstances. (a) Where husband and wife have agreed to live apart permanently. *Licht v. Licht* (1914, Sup. Ct.) 88 Misc. 107, 150 N. Y. Supp. 643; *Buchholz v. Buchholz* (1911) 63 Wash. 213, 115 Pac. 88. (b) Where a judicial separation has been granted. *Miller v. Miller* (1925, Iowa) 206 N. W. 262; *Humphreys v. Humphreys* (1924, Va.) 123 S. E. 554. (c) Where the husband, by misconduct, has

given grounds for divorce or separation. *Jenness v. Jenness* (1865) 24 Ind. 355; *Ditson v. Ditson* (1856) 4 R. I. 87. In any such cases the wife is at liberty to establish her independent domicile elsewhere than at the domicile of the husband at the time of his misconduct. *Dean v. Dean* (1925) 241 N. Y. 240, 149 N. E. 844 (husband deserted wife in Ontario and subsequently domiciled in Pa.; wife became domiciled in N. Y. where she obtained divorce). Formerly, the independent domicile was thought to be available only in litigation involving the marital status. See *Barber v. Barber* (1858, U. S.) 21 How. 582, 594. But later cases have indicated that the independent domicile exists for all purposes. *White v. Glover* (1909, Sup. Ct., Tr. T.) 116 N. Y. Supp. 1059 (jurisdiction by substituted service on wife as defendant in civil action); *Watertown v. Greaves* (1901, C. C. A. 1st) 112 Fed. 183 (jurisdiction of federal court in tort action on ground of diversity of citizenship); *In re Crosby's Estate* (1914, Surro.) 85 Misc. 679, 148 N. Y. Supp. 1045 (tax on wife's property); *In re Florance's Will* (1889, N. Y. Sup. Ct.) 54 Hun, 328, 7 N. Y. Supp. 578 (probate of will). Concededly it is socially desirable to preserve the factual unity of the family. The court in the instant case, in saying that there still remain all the disabilities attendant upon coverture except those expressly removed by statute, doubtless felt bound by the merely logical implications of the old view that husband and wife "are one." Insofar as the application of the rule in this case may be expected to coerce such unity, it probably fails of its purpose. The tendency of the American courts, therefore, in recognizing the logical possibility of a wife having a domicile separate from that of her husband in certain circumstances, seems much sounder social policy.

JUDGMENTS—RES ADJUDICATA—RECOVERY UNDER WORKMEN'S COMPENSATION ACT BARS SUIT UNDER FEDERAL ACT.—The plaintiff's intestate was killed while in the employ of the defendant. Plaintiff sued in the federal court under the Employers' Liability Act for the sole benefit of the surviving widow. The defendant pleaded a judgment recovered in the state court under the Workmen's Compensation Act by the widow in her own right, as sole beneficiary. The lower court gave judgment for the plaintiff on the ground that there was no identity of parties. *Held*, on appeal, that the judgment be reversed. *Chicago, Rock Island & Pac. Ry. v. Schendel* (1926) U. S. Sup. Ct. Oct. Term, 1925, No. 683.

The Supreme Court, in the instant case, in effect overruled the holding of the Circuit Court of Appeals in the case of *Dennison v. Payno* (1923, C. C. A. 2d) 293 Fed. 333, where the same question was raised. For adverse criticism of *Dennison* case, see (1924) 33 YALE LAW JOURNAL, 326; *contra*: (1924) 37 HARV. L. REV. 778; *cf. Troxell v. Delaware, L. & W. R.R. Co.* (1913) 227 U. S. 434, 33 Sup. Ct. 274. The court correctly lays the emphasis upon the identity of the *cause* of action as contrasted with the *right* of action. See Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817; Phillips, *Code Pleading* (1896) sec. 30 *et seq.* And properly refuses to let the mere technical difference in identity of parties prevent merger of the rights of action, since the only person benefited is the same in each case. *Missouri, K. & T. Ry. Co. v. Wulf* (1913) 226 U. S. 570, 33 Sup. Ct. 135; *Wilson v. Denver & R. G. R.R. Co.* (1920) 68 Colo. 105, 187 Pac. 1027; *cf. Chand, Res Judicata* (1894) 180, 182; 2 Black, *Judgments* (1891) sec. 610.

LIMITATION OF ACTIONS—CAUSE OF ACTION UNDER EMPLOYERS' LIABILITY ACT HELD TO ACCRUE AT DATE OF DEATH.—The plaintiff's intestate died from injuries on April 23, 1921. Nearly seven years after the death, but

less than two years after his appointment as administrator, the plaintiff sued under the Employers' Liability Act, Act of April 22, 1903 (35 Stat. at L. 65, 66) as amended by Act of April 5, 1910 (36 Stat. at L. 291). Section 6 of the Act provided that no action could be maintained under this Act "unless commenced within two years from the day the cause of action accrued." The Supreme Court of Pennsylvania decided that the cause of action accrued within the meaning of the Act at the time of the administrator's appointment and not at the date of the death, and so gave judgment for the plaintiff. *Held*, on appeal, that the judgment be reversed, on the ground that the cause of action accrued when the events occurred which determined the defendant's responsibility. *Reading Co., etc., v. Koons* (1926) Supreme Court of the United States, Oct. Term, 1925, No. 213.

In the instant case the Supreme Court for the first time directly decided a question on which there has been much conflict of authority. A number of state and federal courts have interpreted the limitation provision in the Federal Act to mean that the cause of action accrued upon the appointment of the administrator, and not at the time of death, since only the legal representative may sue. *Davis v. Gray* (1925, C. C. A. 1st) 8 Fed. (2d) 843; *Bird v. Fort Worth & R. G. Ry. Co.* (1918) 109 Tex. 323, 207 S. W. 518; *Tiffany, Death by Wrongful Act* (2d ed. 1913) sec. 122; (1925) 9 MINN. L. REV. 282; (1914) 47 L. R. A. (N. S.) 67, note. But where cause of action is defined as the operative facts which give rise to the right of action, the courts reach the opposite result. *Louisville & N. Ry. Co. v. Simral's Admr.* (1907) 127 Ky. 55, 104 S. W. 1011; *Clark, The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817, 828; *COMMENTS* (1925) 34 YALE LAW JOURNAL, 432. The court in the instant case expressly adopts this interpretation. See (1925) 34 YALE LAW JOURNAL, 450, advocating this construction.

MONOPOLIES—AGREEMENTS IN RESTRAINT OF TRADE.—The defendant sold goods to various retailers with a warning that if a certain price were not maintained, sales would not be made to them in the future. Suit was brought on the ground that this violated the Sherman Act (U. S. Comp. Sts. 1916, sec. 8820). *Held*, that the bill be dismissed, there being no agreements in restraint of trade. *United States v. Hudnut* (1925, S. D. N. Y.) 8 Fed. (2d) 1010.

Most cases seem to hold, in accord with the instant case, that a mere warning that there will be a refusal to sell, unless a fixed resale price is complied with, is not against public policy at common law, nor within the Sherman Act. *Dunn, Resale Price Maintenance* (1922) 32 YALE LAW JOURNAL, 676; *United States v. Colgate* (1919) 250 U. S. 300, 39 Sup. Ct. 465. But agreements which restrict the resale price are considered invalid under the Sherman Act and also at common law, on the theory that they "qualify the vendee's title." *Dr. Miles Medical Co. v. John Park Co.* (1911) 220 U. S. 373, 31 Sup. Ct. 376; *Coke, Littleton* *360. However, other courts refuse to make this distinction, and enforce such agreements unless the producers are thereby given control of the whole, or too great a part of any one commodity, or attempt such control by agreement with other producers. *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 137 Pac. 144; *Ghirardelli Co. v. Hunsicker* (1912) 164 Calif. 355, 123 Pac. 1041. *Elliman v. Carrington* (1901) 2 Ch. 275. Thus it seems that the legality turns upon the method used (restriction contracts or refusal to sell) rather than upon the result attained, for one method seems to be about as effective as the other in maintaining a uniform price. *Dunn, op. cit.* 693. It would seem, however, that regardless of the method employed, the test should be whether the restraint is conducive to monopoly.

Applying this test, restraint with regard to a particular brand only, as in the instant case, might very well not be considered contrary to public policy. See *Fisher Flouring Mills Co. v. Swanson*, *supra*, at 656, 137 Pac. at 148.

PATENTS—JURISDICTION—JOINDER BY LICENSEE OF NON-RESIDENT PATENTEE AS CO-PLAINTIFF WITHOUT HIS CONSENT.—The owner of a patent gave the plaintiff an exclusive license to make, use and sell the patented devices, reserving to itself “non-exclusive, non-transferable and personal rights” to make, use and sell them for specified purposes. The defendant infringed plaintiff’s rights under the license, and plaintiff brought suit for an injunction and damages. The owner of the patent, a non-resident, was made a party plaintiff without his consent. The bill was dismissed by the District Court on the ground that the owner must be made a party to the suit by process. This ruling was reversed by the Circuit Court. *Hold*, on certiorari, that the decree of the Circuit Court be affirmed. *Independent Wireless Telegraph Co. v. Radio Corporation of America* (1926) 46 Sup. Ct. 166.

Where the owner transfers the entire patent, or an undivided interest therein, the transfer, if it covers the entire country, is technically an “assignment,” and if limited to a particular territory, a “grant.” Walker, *Patents* (5th ed. 1917) secs. 274, 287. By statute, the “assignee” or “grantee” may sue infringers in his own name. U. S. Rev. Sts. 1873, sec. 4919. Any other transfer is a mere “license.” *Gayler v. Wilder* (1850, U. S.) 10 How. 477. At law, the licensee can sue infringers, but he must do so in the name of the owner. *Goodyear v. McBurney* (1853, C. C. S. D. N. Y.) 3 Blatchf. 32. The owner appears to be a nominal plaintiff and need not be a party by process. *Goodyear v. Bishop* (1860, C. C. S. D. N. Y.) 4 Blatchf. 438. But, in suits in equity, it seems that the licensee must join the owner as co-plaintiff. *Waterman v. MacKenzie* (1890) 138 U. S. 252, 11 Sup. Ct. 334. If the owner refuses to join, he may be made a party upon personal service. *Hurd v. Goold* (1913, C. C. A. 2d) 203 Fed. 998. Moreover, the instant case allows him to be joined, upon his refusal, even where he is a non-resident and cannot be personally served. This is in accord with earlier federal decisions. *Brush-Swan Electric Light Co. v. Thomson-Houston Electric Co.* (1891 C. C. Conn.) 48 Fed. 224; *Brush Electric Co. v. California Electric Co.* (1892, C. C. A. 9th) 52 Fed. 945. The reason assigned for requiring joinder is that the infringer might be subjected to two suits, if all the parties having an interest in the patent were not joined. See *Gayler v. Wilder*, *supra*, at 495. Joining him in the instant case, would, therefore, seem to be a mere formality—like the use at common law of the name of the assignor of a chose in action in a suit by the assignee—for the owner here retains merely a personal and non-exclusive privilege which interest was not infringed. However, an owner of a patent may retain some exclusive privileges, transferring only part to the licensee. Cf. *Blanchard v. Eldridge* (1849, C. C. E. D. Pa.) 1 Wall. Jr. 337 (owner retained exclusive privilege to use device generally, licensee to use it only in making shoes.) In such a case, if the licensee were to sue alone, the alleged infringement might be found not to have violated any of the licensee’s special rights. Subsequent suit might then be brought by the owner on his general rights. By requiring the owner to be joined with the licensee, such possible multiplicity is avoided. This result seems desirable where the owner has been personally served. But the doctrine of the instant case, if extended to allow all patent owners to be made party plaintiffs in suits brought by their licensees, would allow the owners’ possible claims for infringements to be determined even though

they are non-residents and have not been personally served. Unless the courts are willing to regard such determination as a proceeding *in rem*, which is doubtful, it would seem violative of the requirements of due process. *Cf. Pennoyer v. Neff* (1877) 95 U. S. 714.

PROPERTY—OBSTRUCTION OF VIEW FROM STREET TO SHOW WINDOW.—The defendant, licensed by city officials, erected an awning in front of its building which adjoined that of the plaintiff. This awning obstructed the view from Fifth Avenue to the plaintiff's window display on Forty-ninth Street. The plaintiff sought to enjoin the maintenance of the awning and to recover damages. *Held*, that an injunction be granted and that damages be awarded on the ground that the plaintiff had a right that the view from the street to the show window be not obstructed. *Brown-Brand Realty Company v. Sals & Company* (1926, N. Y. Sup. Ct.) 126 Misc. 336.

The right of an owner of land on a public street to access, light, and air from the street is well recognized. *Rigney v. City of Chicago* (1881) 102 Ill. 64; *O'Brien v. Central Iron & Steel Co.* (1902) 158 Ind. 218, 63 N. E. 302 (access); *Lahr v. Metropolitan Elevated Railroad Co.* (1887) 104 N. Y. 268, 10 N. E. 528; *Field v. Barling* (1894) 149 Ill. 556, 37 N. E. 850 (light and air). These are property rights and the city cannot lawfully authorize a permanent obstruction which impairs them without compensation. *Story v. New York Elevated Railroad Co.* (1882) 90 N. Y. 122. An unobstructed view from the street to the show window has become as necessary to the beneficial enjoyment of business property as access and light from the street. The instant case, therefore, seems sound in extending the old doctrine to meet new conditions and is supported by decisions. *Montgomery First National Bank v. Tyson* (1902) 133 Ala. 459, 32 So. 144; *Williams v. Los Angeles Railway Co.* (1907) 150 Calif. 592, 89 Pac. 330; *Hallock v. Scheyer* (1884, N. Y.) 33 Hun, 111; *contra: Smith v. Owen* (1866) 35 L. J. Ch. (O. S.) 317; *Hay v. Weber*, (1891) 79 Wis. 587, 48 N. W. 859; *cf. Wormser v. Brown* (1896) 149 N. Y. 163, 43 N. E. 521 (obstruction of view from window of residence to street held not actionable as damage was inconsiderable).

REAL PROPERTY—RESTRAINTS ON ALIENATION—COVENANT IN LEASE NOT TO PART WITH POSSESSION.—The defendant lessee covenanted with his lessor not to "assign, underlet, part with possession, or otherwise dispose of the premises or any part thereof" without the written consent of the latter. Subsequently, the defendant, without such consent, assigned his business to a company of which he was the managing director. By stipulation, the defendant retained possession although the company conducted the business on the demised premises. The plaintiff brought an action for breach of covenant and recovered. *Held*, that the judgment be reversed as the defendant had not parted with possession. *Chaplin v. Smith* (1925, C. A.) 134 L. T. R. 393.

In order for a party to be in possession of real property he must have the intent to control plus the ability to exclude others. Holmes, *The Common Law* (1881) 216, 220; Pollock and Wright, *Possession in the Common Law* (1888) 20. While the defendant's conduct in the instant case falls within the definition of possession, what occurred seems to have been exactly that contingency against which the lessor took precaution to provide in the lease. Where restrictive covenants are incorporated into a lease, the general rule of interpretation is that they should be so construed as to carry into effect the intent of the parties. *Croft v. Lumley* (1853, Q. E.) 6 H. L. Cas. 672; *Kerley v. Mays* (1895, C. P.) 10 Misc. 718, 31 N. Y. Supp. 818. But restrictions in leases against assignments, subletting, and

giving up of possession, like other restraints on alienation, are regarded with disfavor. Gray, *Restraints on the Alienation of Property* (2d ed. 1895) secs. 4, 5, 27, 278. Cf. *Church v. Brown* (1808, Ch.) 15 Ves. 258; *Gazlay v. Williams* (1906, C. C. A. 6th) 147 Fed. 678; *Wainwright v. Bankers' Loan, etc., Co.* (1911) 112 Va. 630, 72 S. E. 129. And such restraints are not extended by implication. *Jackson v. Silvernail* (1818, N. Y.) 15 John. 278; *Leduke v. Barnett* (1881) 47 Mich. 158, 10 N. W. 182; *Jackson v. Simons* [1923] 1 Ch. 373. This does not, however, prevent the lessor from enforcing clearly expressed intentions included in restrictive covenants against alienation. *Greenslade v. Tapscott* (1834, Exch.) 1 Crompt. Mees. & Ros. 55; *Varley v. Coppard* (1872) L. R. 7 C. P. 505; *Emery v. Hill* (1892) 67 N. H. 330, 39 Atl. 266. The instant case is interesting not only in pointing out the court's preference to construe the lease to prevent a restraint on alienation, but also in indicating a method to evade covenants against parting with possession by mere compliance with the technical rules of possession. It is submitted that the holding of the lower court would have more nearly carried out the intent of the parties.

TORTS—BREACH OF CONTRACT—ILLEGAL INTERFERENCE.—The plaintiffs, manufacturers of tires, made an agreement with a motor car company that whenever the latter sold or exhibited cars they would be fitted with tires purchased from the plaintiffs. Cars thus equipped were sent for exhibition purposes. Prior to the exhibit, the defendants, without authority from the motor car company, removed the tires and substituted tires of their own make which they desired to advertise. The plaintiff sued defendant for causing a breach of contract. The lower court gave judgment for the plaintiff, and defendant appealed. *Held*, that the judgment be affirmed. *G. W. K. Ltd. et al. v. Dunlop Rubber Co. Ltd.* (1926, K. B.) 42 T. L. R. 376.

It is generally accepted that a tort action will lie for wilfully inducing a third party to break a contract with the plaintiff. *Lumley v. Gye* (1853, Q. B.) 2 El. & Bl. 216; *Knickerbocker Ice Co. v. Gardiner Dairy Co.* (1908) 107 Md. 556, 69 Atl. 405. But courts, apparently, have not extended this doctrine to situations where the defendant has interfered with the performance of a contract by acts not done for the purpose of inducing its breach. *Dale v. Grant* (1870) 34 N. J. L. 142 (act of defendant causing A to be unable to supply B with manufactured products according to contract held not actionable by B); *Kokomo Rubber Co. v. Anderson* (1924) 33 Ga. App. 241, 125 S. E. 783 (holding over by tenant causing lessor's breach of contract with reversioner held not actionable). However, the interference with the consummation of an expected contract by means of fraud or intimidation has been held actionable. *Lewis v. Bloede* (1912, C. C. A. 4th) 202 Fed. 7; *Krigbaum v. Sbarbaro* (1913) 23 Cal. App. 427, 138 Pac. 364. From this it would seem to follow that an action should lie for an unauthorized interference with the performance of already existing contracts. Moreover, an expectancy of profit is protected against wilful and unjustifiable interference. *Keeble v. Hickeringill* (1809, K. B.) 11 East, 574; *Kiernan v. Metropolitan Const. Co.* (1898) 170 Mass. 378, 49 N. E. 648; *Tuttle v. Buck* (1909) 107 Minn. 145, 119 N. W. 946; *Hutton v. Watters* (1915) 132 Tenn. 527, 179 S. W. 134. In the instant case, it is possible that the defendant, by interfering with the plaintiff's advertising, injured plaintiff's expectancy of business. And competition would not be a justification for such interference for the defendant resorted to force and fraud. *Doremus v. Hennessy* (1898) 176 Ill. 608, 52 N. E. 924; *Dunshoo v. Standard Oil Co.* (1911) 152 Iowa, 618, 132 N. W. 371; see *Mogul S. S. Co. v. McGregor* (1889) L. R. 23 Q. B. D. 598, 614.

TORTS—CONVERSION—RESPONSIBILITY OF AGENT.—The defendant express company, being engaged by the N. K. K. Company to forward to Japan certain steel which was expected to arrive at Seattle by railroad, delivered lists to the steamship company showing the number of the cars in which the steel was expected. The railroad company erroneously entered on its books the numbers of the cars containing the plaintiff's steel as being consigned to the N. K. K. Company. The steamship company, noticing a discrepancy in the car numbers, refused to accept shipment without the defendant's assurance that the steel belonged to the N. K. K. Company. The defendant and a representative of the N. K. K. Company inspected the steel, and, relying on the opinion of the latter, the defendant ordered it to be transferred to the ship. The steel was shipped to Japan and the plaintiff sued for conversion. Judgment was given for the plaintiff. *Held*, on appeal, that the judgment be affirmed. *Suzuki v. Small, as President of the American Express Co.* (1925, 1st Dept.) 214 App. Div. 541.

In the English case of *Hollins v. Fowler* (1875, H. L.) 33 L. T. R. (N.S.) 73, it was held that an agent who purchases goods from a convertor, takes possession of the goods and transfers them to his principal, is a convertor. This view has been followed by American courts. *Williams v. Merle* (1833, N. Y.) 11 Wend. 80; *Flannery v. Harlcy* (1903) 117 Ga. 483, 43 S. E. 765; *contra: Leuthold v. Fairchild* (1886) 35 Minn. 99, 27 N. W. 503, 28 N. W. 218. Likewise, in England, it has been held that an agent who at his principal's direction, takes possession of goods without the true owner's consent, and transfers them to his principal pursuant to a sale by the purported owner, is guilty of a conversion. *Stephens v. Elwell* (1815) 4 M. & S. 259; *contra: cf. National Mercantile Bank Ltd. v. Ry-mill* (1881, C. A.) 44 L. T. R. (N.S.) 767. However, American courts refuse to hold that a mere dealing with possession is a conversion and hence decline to follow this view. *Burdett v. Hunt* (1845) 25 Me. 419; *Strickland v. Barrett* (1838, Mass.) 20 Pick. 415; see *Thorp v. Burling* (1814, N. Y.) 11 Johns 285, 286, 287; *Smith v. Colby* (1873) 67 Me. 169, 171; *Mead v. Jack* (1833, N. Y.) 12 Daly 65, 69. In the instant case, (considering the defendant as a link in the chain of transportation) had the plaintiff's steel been shipped in cars originally consigned to the N. K. K. Company, the defendant would not have been a convertor under the American view, because this too would have been a mere dealing with possession. *Cf. Gurley v. Armstead* (1889) 148 Mass. 267, 19 N. E. 389. But since the defendant's attention was called to the possibility of the railroad having delivered the plaintiff's steel, if the defendant, in ordering shipment passed upon the title of the steel and took possession, this determination would render him a convertor. *Thorp v. Burling, supra; Mead v. Jack, supra; La Touche v. Simpson* (1913) 85 N. J. L. 149, 88 Atl. 945. However, in the instant case, the defendant's determination rested upon the statement of a representative of the principal. Hence it becomes a question of fact whether the defendant or the principal exercised the "dominion." If it was the latter, the instant case would seem to be an application of the doctrine of *Stephens v. Elwell, supra*, which American courts purport not to follow.

TORTS—LIBEL—EXTRINSIC FACTS MAKE NEWSPAPER ARTICLE ACTIONABLE PER SE.—The defendant published a newspaper article stating that the plaintiff as the latest "ladylove" of "Fatty" Arbuckle and that there was a reported "match" between them. The lower courts held that the article was not libelous per se. *Held*, on appeal (two judges *dissenting*) that the

matter was libelous per se, since it appeared by extrinsic evidence that the plaintiff was a married woman. *Sydney v. MacFadden Newspaper Pub. Corp.* (1926) 242 N. Y. 208, 151 N. E. 209.

It is well settled that written defamation may be actionable without proof of special damage. *Thorley v. Lord Kerry* (1812 Exch. Ch.) 4 Taunt. 355; *Odgers, Libel and Slander* (5th ed. 1911) 377. Thus, any printed article which is false and tends to expose the plaintiff to public contempt, ridicule or disgrace is libelous per se. *Triggs v. Sun Printing & Pub. Asso.* (1904) 179 N. Y. 144, 71 N. E. 739. But the language used is sometimes ambiguous, or its defamatory character latent. *Odgers, op. cit.* 119. Under these circumstances, the plaintiff must allege in his complaint the extrinsic facts which establish the libelous nature of the article. *Van Heusen v. Argenteau* (1909) 194 N. Y. 309, 87 N. E. 437; *Kee v. Armstrong* (1919) 75 Okla. 84, 182 Pac. 494. The dissent in the instant case is based upon earlier New York decisions to the effect that if the publication is not libelous without the aid of extrinsic facts, special damages must also be alleged. *O'Connell v. Press Pub. Co.* (1915) 214 N. Y. 352, 108 N. E. 556. Accord in other jurisdictions. See *Tonini v. Cevasco* (1896) 114 Calif. 266, 271, 46 Pac. 103, 104; *Wiley v. Oklahoma Press Pub. Co.* (1925) 106 Okla. 52, 54, 233 Pac. 224, 225. The effect of such holding is that "language cannot be held to be libelous per se when it is necessary to examine extrinsic facts alleged to give the language a libelous meaning." See *Brodok v. Jones* (1925, 1st Dept.) 212 App. Div. 247, 252, 208 N. Y. Supp. 699, 704. But the court in still earlier New York decisions, as well as courts of other jurisdictions, have found articles libelous per se in consideration of the surrounding circumstances. *Morey v. Morning Journal* (1890) 123 N. Y. 207, 25 N. E. 161 (news item that plaintiff is threatened with suit for breach of promise to marry, when plaintiff is a married man); *Gates v. New York Recorder Co.* (1898) 155 N. Y. 228, 49 N. E. 769; (news item that plaintiff was once a concert-hall singer and dancer at Coney Island, when the neighborhood considered that concert-hall singers and dancers at Coney Island were a disreputable class); *Upton v. Times-Democrat* (1900) 104 La. 141, 28 So. 970 (news item that plaintiff is a negro, when plaintiff is white); *Morrison v. Ritchie* (1902, Ct. of Sess.) 39 Scot. Law Rep. 432 (announcement of the birth of twins to plaintiffs, when they have only been married a month); see *Stannard v. Wilcox Sewing Machine Co.* (1912) 118 Md. 151, 158, 84 Atl. 335, 338 (imputation of a want of credit, when plaintiff requires credit in his business). The article is to be construed as it would ordinarily be understood by the reading public. *Turton v. New York Recorder Co.* (1894) 144 N. Y. 144, 38 N. E. 1009; cf. *Klumph v. Dunn* (1870) 66 Pa. 141. It would, therefore, seem that the court should consider the surrounding circumstances, of which the readers may be aware, *e. g.*, as members of the same community as the plaintiff. Such is the rule in England. *Odgers, op. cit.* 133; *Williams v. Smith* (1889) L. R. 22 Q. B. 134; *Monson v. Tussands, Ltd.* (1894) L. R. 1 Q. B. 671. It is suggested by the dissent that the notorious reputation of "Fatty" Arbuckle should be a circumstance for judicial notice, as well as the fact that plaintiff is a married woman. The gravamen of libel is injury to the plaintiff's reputation. See *McLoughlin v. American Circular Loom Co.* (1903, C. C. A. 1st) 125 Fed. 203, 205. The injury follows, whether the libel is unequivocal, or whether the defamatory character of the language is revealed by extrinsic circumstances known to the public. Hence the requirement of an allegation of special damages in order to recover on a publication which is libelous, though by virtue of extrinsic facts, seems anomalous. It is essentially defamatory, and consequently distinguishable from a malicious falsehood, for which recovery depends upon proof of malice and actual damage. *Rat-*

cliffe v. Evans (1892) L. R. 2 Q. B. 524; see *Morasse v. Brochu* (1890) 151 Mass. 567, 574, 25 N. E. 74, 77.

TORTS—NEGLIGENCE—CHIROPRACTORS—VIOLATION OF STATUTE REQUIRING LICENSE TO PRACTICE MEDICINE.—The plaintiff sued the defendant for injuries resulting from improper chiropractic treatment. The defendant had not taken an examination for procuring a license as required of all medical practitioners by statute. The lower court charged the jury that the violation of the statute was some evidence of negligence. Judgment was given for the plaintiff. *Held*, on appeal (two judges *dissenting*) that the judgment be reversed on the ground that the violation of the statute warranted no inference of negligence. *Brown v. Shyne* (1926) 242 N. Y. 176, 151 N. E. 197.

Osteopaths, like Christian Science healers, are generally not treated as practitioners of medicine. *People v. Gordon* (1902) 194 Ill. 560, 62 N. E. 858; *People v. Cole* (1916) 219 N. Y. 98, 113 N. E. 790. Thus in New York there is a special provision for licensing osteopaths. Cahill's N. Y. Cons. Laws 1923, ch. 46, sec. 173. But there is in New York no statutory provision for licensing chiropractors as such. They seem to be regarded in New York and by most courts as ordinary physicians within the meaning of the licensing statutes, and are liable to prosecution if not licensed. *People v. Ellis* (1914) 162 App. Div. 288, 147 N. Y. S. 681; *Commonwealth v. Zimmerman* (1915) 221 Mass. 184, 108 N. E. 893; *Swartz v. Sweeney* (1912) 35 R. I. 1, 85 Atl. 33; *contra*: *State v. Gallagher* (1912) 101 Ark. 593, 143 S. W. 98; L. R. A. 1917, C. 823, note; *Green v. Hodges* (1914) 91 Kan. 653, (special board of examiners in Kansas). In tort cases the violation of a statute is material in determining the defendant's responsibility where the injury is of the character the legislature desired to prevent. *Gorris v. Scott* (1874) L. R. 9 Exch. 125; *Platz v. City of Cohoes* (1882) 89 N. Y. 220. The individual injured must be within the class for whose benefit the statute was passed. *Parker v. Barnard* (1883) 135 Mass. 116; *Taylor v. R. R.* (1881) 45 Mich. 74. The violation must also be the proximate cause of the injury. *Corbett v. Spanos* (1918) 37 Calif. App. 200, 173 Pac. 769. Some courts hold that the violation of a statute is merely some evidence of negligence. *Bourne v. Whitman* (1911) 209 Mass. 155, 95 N. E. 404 (driving automobile without a license); but *cf. Atl. C. L. P. R. v. Weir* (1912) 63 Fla. 69, 58 So. 641 (licensing statute construed as revenue measure); *Couch v. Steel* (1854) 3 E. & B. 402 (statute requiring medicine to be kept on vessel); *People v. Meyer* (1924, 2d Dept.) 209 App. Div. 908, 205 N. Y. Supp. 943, *aff'd* 239 N. Y. 608, 147 N. E. 216 (memorandum decision, criminal prosecution for manslaughter—cited by the dissent in the instant case to the effect that violation of the statute was some evidence of criminal negligence). Other courts hold that it is *prima facie* evidence of negligence. *U. S. Brewing Co. v. Stoltenberg* (1904) 211 Ill. 531, 71 N. E. 1031. It has been suggested that under these views the jury is allowed to substitute its judgment as to what is negligence for that of the legislature. See Thayer, *Public Wrong and Private Action* (1913) 27 HARV. L. REV. 317, 322. Accordingly most courts hold that such violations are negligence "per se" *i.e.*, statutory fault. *Martin v. Herzog* (1920) 228 N. Y. 164, 126 N. E. 814; *Osborne v. McMasters* (1889) 40 Minn. 103, 41 N. W. 543 (sale of unlabeled poisons); *Goodwin v. Rowe* (1913) 67 Or. 1, 135 Pac. 171 (unregistered druggist); *Meshbeshier v. Channellene* (1909) 107 Minn. 104, 119 N. W. 428 (sale in violation of pure food statute). While the instant decision may be sound in holding the violation no evidence of negligence, nevertheless, it would seem that the defendant should have been held responsible on the ground of statutory fault, since, as the dissent suggested,

the obvious purpose of the statute was to protect patients from incompetent practitioners.

TORTS—TRESPASSER ON THE HIGHWAY—ILLEGAL OPERATION OF BUSES AS A BAR TO RECOVERY FOR NEGLIGENCE.—Plaintiff sued for recovery for damages to his bus caused by a collision due to the defendant's negligence. The bus was operated on a certain route without a franchise under an invalid permit from the Department of Plant and Structures of the City of New York. A judgment for the plaintiff was affirmed in the Appellate Term and appealed from by the defendant. *Held*, that the judgment be reversed since the plaintiff was a trespasser on the highway. *Klinkenstein v. Third Avenue Railroad Co.* (1926, N. Y. App. Div. 1st Dept.) April 9, 1926, 75 N. Y. L. Jour. No. 8.

The problem involved is whether lawful users of the highway are under any duty to use care toward those whose presence is forbidden—trespassers on the highway. In the analogous situation of unregistered motor vehicles (which are prohibited from using the roads) being damaged by the negligent use of other vehicles, courts have held generally that the violation of the statute did not prevent recovery because the plaintiff's violation of the law was no part of the proximate cause of the injury. *Birmingham Ry. Light & Power Co. v. Aetna Accident and Liability Co.* (1913) 184 Ala. 601, 64 So. 44; *Moore v. Hart* (1916) 171 Ky. 725, 188 S. W. 861. Massachusetts, however, has applied a rule similar to the one in the instant case, that the owner or driver has no rights except that he shall not be recklessly or wantonly injured. *Dudley v. Northampton Street Ry. Co.* (1909) 202 Mass. 443, 89 N. E. 25; *Dean v. Boston Elevated Ry. Co.* (1914) 217 Mass. 495, 105 N. E. 616. This rule, however, is not applied in the case of unlicensed chauffeurs. *Bourne v. Whitman* (1911) 209 Mass. 155, 95 N. E. 404; *Clark v. Doolittle* (1923, 4th Dept.) 205 App. Div. 697, 199 N. Y. Supp. 814. The Sunday Laws prohibiting travel except "from necessity or charity" raise the same problem. The majority of courts have held that violation of these statutes is not a bar to the plaintiff's recovery, even for damage due to failure to repair the roads, since such violation was not a proximate cause of the injury. *Platz v. City of Cohoes* (1882) 89 N. Y. 219; *Sutton v. Town of Wauwatosa* (1871) 29 Wis. 21; *Jordon v. N. Y., N. H., & H. Ry. Co.* (1896) 165 Mass. 346, 43 N. E. 111 (express statutory provision, although formerly Massachusetts held *contra*, *Smith v. Boston and Maine Ry.* (1876) 120 Mass. 490). In a few states those violating the Sunday Laws and the law against the use of unregistered motor vehicles have been considered trespassers; but, in those jurisdictions, a distinction has been drawn between the duty owed by the state or its agent to keep the highway safe, and the duty owed by other travellers to use care toward those on the highway, recovery being allowed in the latter class of cases. *McCarthy v. Inhabitants of the Town of Leeds* (1916) 115 Me. 134, 98 Atl. 72; *Cobb v. Cumberland County Power & Light Co.* (1918) 117 Me. 455, 104 Atl. 844; *Johnson v. Irasburgh* (1874) 47 Vt. 28; *Gilman v. Central Vermont Ry. Co.* (1919) 93 Vt. 340, 107 Atl. 122. This distinction is analogous to that drawn between (1) the absence of duty to keep private premises safe for trespassers, and (2) the duty of one engaged in active conduct to use care toward a known trespasser. (1) *Union Stock Yards and Transit Co. v. Rourke* (1881) 10 Ill. App. 474; (2) *Herrick v. Wixom* (1899) 121 Mich. 384, 80 N. W. 117; *Rome Furnace Co. v. Patterson* (1904) 120 Ga. 521, 48 S. E. 166; *contra: Magar v. Hammond* (1906) 183 N. Y. 387 (holding no duty to refrain from inflicting wilful or wanton harm); *Hoberg v. Collins, Lavery & Co.* (1910) 80 N. J. L. 425, 78 Atl. 166.

TRUSTS—SPENDTHRIFT TRUST HELD NOT SUBJECT TO PAYMENT OF ALIMONY TO THE DIVORCED WIFE OF THE BENEFICIARY.—The plaintiff, the divorced wife of the beneficiary of a spendthrift trust, petitioned for payment of alimony out of the funds of the trust. The lower court granted the petition. The trustee excepted. *Held*, on appeal, that the decree be set aside on the ground that an award of alimony, being a judgment debt, could not be satisfied out of the funds of a spendthrift trust. *Eaton v. Eaton* (1926, N. H.) 132 Atl. 10.

Payment of alimony out of the funds of a spendthrift trust is generally denied as contrary to the intention of the settlor. *Thackara v. Mintzer* (1882) 100 Pa. 151; (1925) 35 A. L. R. 1035, note. Similarly, it has been held that a spendthrift trust may not be attached for the maintenance of the undivorced wife, deserted by the beneficiary. *Board of Charities v. Lockwood* (1901) 198 Pa. 572, 48 Atl. 496. In an earlier litigation, the particular trust involved in the instant case (created for the benefit of the testator's son "as his needs may require") was construed to permit the use of the funds for the support of the beneficiary's wife and child. *Eaton v. Lovering* (1924) 81 N. H. 275, 125 Atl. 433. But the court in the instant case refused to construe this trust as including a divorced wife. Obviously, in jurisdictions where spendthrift trusts are not recognized, a trust for the husband's benefit will be subject to attachment for alimony. *Montgomery v. Offutt* (1909) 136 Ky. 157, 123 S. W. 676. A similar result is reached where the trust is invalidly created. *De Rousse v. Williams* (1917) 181 Iowa, 379, 164 N. W. 896 (beneficiary gave consideration for establishment of trust). Moreover, it has been held that in the absence of objection to the decree by the beneficiary, the trustee of a spendthrift trust could be compelled to pay the wife alimony where the decree for alimony so provided. *Hoagland v. Leash* (1912, 1st Dept.) 154 App. Div. 101, 138 N. Y. Supp. 790 (affirmed without opinion (1915) 214 N. Y. 645, 108 N. E. 1096). Where, by statute, creditors may attach any surplus of the trust income not applied to the uses prescribed by the settlor, that surplus is also subject to payment of alimony. *Wetmore v. Wetmore* (1896) 149 N. Y. 520, 44 N. E. 169. But the ordinary remedies for enforcing an award of alimony must first have been exhausted. *Halsted v. Halsted* (1897, 1st Dept.) 21 App. Div. 466, 47 N. Y. Supp. 649. In such cases, however, the duty to pay alimony is considered more than a mere debt. See *Wetmore v. Wetmore*, *supra*, at 528, 44 N. E. at 170. And, consequently, it seems that the divorced wife will be given preference over other creditors. See *Wetmore v. Wetmore*, *supra*, at 529, 44 N. E. at 170. The husband's obligation to pay alimony is not usually defined as a debt. See 2 Bishop, *Marriage, Divorce and Separation* (1891) sec. 837. This obligation has been construed as not being within constitutional provisions against imprisonment for debt. *Tolman v. Leonard* (1895) 6 App. D. C. 224; *Wightman v. Wightman* (1867) 45 Ill. 167. So also, it has been held that the husband may not assert against his obligation to pay alimony, a statutory exemption of homestead lands from execution for debt. *Menzie v. Anderson* (1879) 65 Ind. 239. Likewise, the assignment of half the interest of a trust income for the support of a legally separated wife is not such an "alienation" of the trust fund as is prohibited by statutes. *In re Yard's Estate* (1921, Surro.) 116 Misc. 19, 189 N. Y. Supp. 190. Therefore, while the instant case is undoubtedly in accord with precedent on the particular issue, a contrary view might seem to be justified by the policy which in other situations has taken alimony out of the category of mere debts.