RECENT CASE NOTES

BILLS AND NOTES—GARNISHMENT—NOTICE AS DETERMINING PRIORITY.—The plaintiff obtained a judgment against the defendant and caused execution and garnishment to be served on a bank holding as security a note payable to the defendant and not yet matured. After collection of the note and payment of the bank loan, a sum still remained to the defendant's credit. Subsequently an assignee of the defendant's interest in the note by a separate instrument made before garnishment, claimed the balance and was interpleaded. The city court ordered that the plaintiff be paid the balance, but on appeal the assignee obtained judgment. *Held,* that the judgment be affirmed. *Johnson v. Beikey* (1924, Utah) 228 Pac. 189.

In the instant case the pledgor held no negotiable evidence of his interest, and he was therefore not a holder. N. I. L., sec. 191. He could not transfer the note by delivery as provided by N. I. L., sec. 30. His assignee therefore had no greater rights than the transferee of a chattel or an assignee of a chose in action. The analogy of the chattel is strong in favor of the first party to give notice. Sales Act, sec. 43 (3); *Hodges v. Hurd* (1868) 47 Ill. 363; *Riddle v. Blair* (1906) 148 Ala. 461, 42 So. 560. The rule of first notice has been applied to choses in action. *Graham Paper Co. v. Pembroke* (1899) 124 Calif. 117, 56 Pac. 627; *contra: Thayer v. Daniels* (1873) 113 Mass. 129; *Salem Trust Co. v. Manufacturers Finance Co.* (1924) 44 Sup. Ct. 266. It has also been applied to equitable interests of long continuing character. *Dearle v. Hall* (1823, Ch.) 3 Russ. 1; *contra: Central Trust Co. v. West India Improvement Co.* (1901) 169 N. Y. 314, 62 N. E. 387; see COMMENTS (1924) 33 YALE LAW JOURNAL, 767, and a criticism of the rule in NOTES (1924) 24 COL. L. REV. 501. Yet it is doubtful whether in reference to short term commercial paper in a known pledgee's hands, the criticism is applicable. This latter situation is not complicated by a negligent trustee, an unknown or absent trustee, or several trustees; and the requirement of notice would insure promptness in the presentation of the assignee's claim. While the courts have never attempted to draw a distinction between the assignee of an equitable interest and the assignee of a short term chose in action, such a distinction might seem to be justifiable and might lead to opposite results in the two types of cases. In the latter instance notice would not seem to be an unreasonable requirement to protect an assignee of a chose in action from subsequent garnishment.

CARRIERS—ERRONEOUS STATEMENT BY CARRIER TO CONSIGNEE THAT CONSIGNOR PAID FREIGHT—NO CLAIM BY CARRIER AGAINST CONSIGNEE.—The Director-General of Railroads sued the defendant for freight charges on goods consigned to the latter f. o. b. defendant's city. The defendant pleaded that in reliance on the railroad's representation that such charges had been paid by the consignor, it had accepted the consignment and paid what was due under the bill of lading without making any deduction for the charges in question. The representation was due to an innocent mistake. No assets of the consignor could be reached. *Held,* that a judgment dismissing the petition be affirmed. *Davis v. Akron Feed & Milling Co.* (1924, C. C. A. 6th) 296 Fed. 675.

Though a carrier has erroneously quoted an interstate rate greater or less than that on file with the Interstate Commerce Commission, only the approved rate governs since any deviation therefrom would open the door to rebates and other unprivileged discriminations. *N. Y. Central & H. R. R. R. v. York & Whitney Co.* (1921) 256 U. S. 406, 41 Sup. Ct. 509; *Forster Bros. Co. v. Duluth, South Shore & Atlantic Ry.* (1908) 14 I. C. C. 232; (1923) 32 YALE LAW

JOURNAL, 734. A pecuniary penalty payable to the United States for any harm which such misstatement may cause the shipper has been deemed a sufficient deterrent. Act of June 18, 1910 (36 Stat. at L. 548); see Barnes, *Freight Rates and Charges* (1922) sec. 605-A. But some courts have strongly intimated, although not held, that the carrier might be liable to the shipper in a tort action where it has misquoted such rate to the injury of the former. See *Ga. R. R. v. Creety* (1909) 5 Ga. App. 424, 427, 63 S. E. 528, 529 (deceit suggested). Especially when its agent misquotes wilfully in order to obtain the shipper's patronage. See *Savannah Ry. v. Bundick* (1894) 94 Ga. 775, 778, 21 S. E. 995, 997 ("a cause of action of some kind"); *Melody v. Great Northern Ry.* (1910) 25 S. D. 606, 614, 127 N. W. 543, 546. But although such intimations do not appear to have been sanctioned by the United States Supreme Court, there are exceptional situations where a departure from the harsh rule has been deemed by some courts not to contravene the Interstate Commerce Act. Thus, where the carrier has published conflicting rates effective contemporaneously in the same tariff, the shipper is privileged to pay only the lower one. *Dreyfuss v. Pa. R. R.* (1915, Sup. Ct. App. T.) 90 Misc. 581, 153 N. Y. Supp. 966. And so when the application of one rate or another is to be inferred from ambiguous language. See *Lakewood Engineering Co. v. N. Y. Central R. R.* (1919, C. C. A. 6th) 259 Fed. 61, 64. Or where the carrier selects the more expensive of two routes. See *Poor Grain Co. v. Chicago, B. & Q. R. R.* (1907) 12 I. C. C. 469, 470; *Hennepin Paper Co. v. Northern Pacific Ry.* (1907) 12 I. C. C. 535, 537. The instant case rests on the narrow ground that the rule that both "shipper and consignee are conclusively presumed to know the published scheduled rate" had no application. But it seems unnecessary for the court to have reasoned from the fiction of presumptive knowledge. See NOTES (1914) 27 HARV. L. REV. 737, 738. The true basis for the result should lie in the absence under the facts of any loophole which would allow deliberate discrimination.

CONFLICT OF LAWS—COLLATERAL ATTACK OF FOREIGN DECREE OF DIVORCE.—The decedent's widow applied to have certain lands set apart for her as a year's support. The defendant's heir claimed that the plaintiff was not the widow, since the Tennessee divorce from her first husband was obtained by false statements of residence and defective service by publication. The lower court refused to allow the divorce decree to be collaterally attacked. *Held*, that the judgment be reversed. *Green v. Whatley* (1924, Ga.) 123 S. E. 871.

Non-compliance with statutory requirements such as residence and service of process, subjects a domestic judgment to direct attack. But on collateral attack, the court's "jurisdiction" is sustained by showing merely a general power to adjudicate such cases. *Welch v. Focht* (1918) 67 Okla. 275, 171 Pac. 730 (defective petition); *Louisville & N. R. R. v. Tally* (1919) 203 Ala. 370, 83 So. 114 (unauthorized appearance of attorney); COMMENTS (1919) 28 YALE LAW JOURNAL, 579; *contra: Empire Ranch & Cattle Co. v. Coldren* (1911) 51 Colo. 115, 117 Pac. 1005. But where the judgment of a sister state is involved, these statutory requirements are considered "jurisdictional facts" and their absence in general renders the judgment attackable collaterally. *Smithman v. Gray* (1918) 203 Mich. 317, 168 N. W. 998; *Chicago Title & Trust Co. v. Smith* (1904) 185 Mass. 363, 70 N. E. 426; NOTES (1917) 30 HARV. L. REV. 640; *contra: Kern v. Field* (1897) 68 Minn. 317, 71 N. W. 393. Compare *Citizens' Bank & Trust Co. v. Moore* (1924, Mo.) 263 S. W. 530 (findings of probate court of general jurisdiction conclusive); *Lewis v. Klingberg* (1923, Conn.) 123 Atl. 4 (findings of probate court of limited jurisdiction open to collateral attack). Where all the statutory requirements have been satisfied, the judgment, though procured by trick or fraud not relating to those statutory requirements, is generally con-

clusive against collateral attack. *Christmas v. Russell* (1866, U. S.) 5 Wall. 290; *Chicago Ry. v. Callicotte* (1920, C. C. A. 8th) 267 Fed. 799; NOTES (1921) 21 COL. L. REV. 268; *cf. Toledo Scale Co. v. Computing Scale Co.* (1922, C. C. A. 7th) 281 Fed. 488 (relief denied for suppressing evidence); *Levin v. Gladstein* (1906) 142 N. C. 482, 55 S. E. 371 (fraud a direct defense under the code). And this rule is adhered to though the fraud causes the court to find these statutory requirements present though in fact absent. *Hicks v. Hicks* (1912) 69 Wash. 627, 125 Pac. 945; *Thurston v. Thurston* (1894) 58 Minn. 279, 59 N. W. 1017. However, as in the instant case, an exception is sometimes made where recognition of a foreign decree of divorce is sought, and a collateral attack for "fraud" allowed. *Corbin v. Commonwealth* (1921) 131 Va. 649, 108 S. E. 651; *Davis v. Davis* (1921) 70 Colo. 37, 197 Pac. 241; (1922) 31 YALE LAW JOURNAL, 548. It seems needlessly confusing to single out fraud as the basis for the decision and overlook the solid ground of lack of jurisdiction. The result in the instant case might then have been reached without an unnecessary impairment of the value of "comity." See *Caswell v. Caswell* (1919) 84 W. Va. 575, 100 S. E. 482.

CONSTITUTIONAL LAW—DUE PROCESS—STATUTE RESTRICTING ASSIGNMENT OF EARNED WAGES WITHIN POLICE POWER.—A Maryland statute placed certain limitations upon the assignment of wages. Md. Laws, 1906, ch. 399. The plaintiff was the assignee of wages already earned, but the provisions of the statute had not been carried out in making the assignment. The plaintiff sought to collect the assigned wages. He contended that the statute dealing with wages already earned was unconstitutional, as it deprived him of property without due process of law. *Held,* that the legislature might provide restrictions upon the assignment of earned as well as unearned wages. *Wight v. Baltimore & O. Ry.* (1924, Md.) 125 Atl. 881.

Some states under the police power absolutely prohibit the assignment of unearned wages. Mo. Rev. Sts. 1919, ch. 18, sec. 2171; Burn's Ann. Ind. Sts. 1914, ch. 91, sec. 7987; *International Text-Book Co. v. Weissinger* (1902) 160 Ind. 349, 65 N. E. 521. Although other states have passed statutes similar to the one in the instant case, the distinction between earned and unearned wages seems never before to have been raised in the courts. Minn. Gen. Sts. 1913, ch. 23, sec. 3858; Burn's Ann. Ind. Sts. 1914, ch. 91, sec. 7999. See *Cleveland, C., C. & St. L. Ry. v. Marshall* (1914) 182 Ind. 280, 105 N. E. 570.

CONTRACTS—PAYMENT OF LESSER SUM AS ACCORD AND SATISFACTION.—The defendant paid for shipments of onions deducting a sum for those decayed and notified the plaintiff that payment was "in full" of the amount owed. The plaintiff accepted payment and sued for the balance alleged due. Upon judgment for the plaintiff, defendant appealed. *Held,* that the judgment be affirmed as the dispute between the parties was an honest one and the acceptance and retention of payment constituted an accord and satisfaction. *Schnell v. Perlman* (1924) 238 N. Y. 362, 144 N. E. 641.

In three comparatively recent New York cases a contrary holding is found. *Windmuller v. Goodyear Tire and Rubber Co.* (1908, 1st Dept.) 123 App. Div. 424, 107 N. Y. Supp. 1095; *Kleinfelter v. Granger* (1911, Sup. Ct. Tr. T.) 136 N. Y. Supp. 485; *Frank v. Vogt* (1917, 1st Dept.) 178 App. Div. 833, 166 N. Y. Supp. 175. These cases broke away from the established law of the state. *Hills v. Sommer* (1889, N. Y. Sup. Ct.) 53 Hun 392; *Jackson v. Volkening* (1903, 1st Dept.) 81 App. Div. 36, 80 N. Y. Supp. 1102, aff'd 178 N. Y. 562, 70 N. E. 1101. They were not followed in a later case. *Hettrick Mfg. Co. v. Barish* (1923, Sup. Ct. App. T.) 120 Misc. 673, 199 N. Y. Supp. 755. The instant case settles the New York law on the point and is in accord with the prevailing view.

CRIMINAL LAW—EFFECT OF DELAY IN EXECUTION OF SENTENCE.—The defendant was sentenced to fine and imprisonment. Through error the commitment read in the alternative. The prisoner paid the fine and was released. When the error was discovered, the defendant was rearrested and imprisoned to serve the term, although the time set for it had then expired. The lower court denied a writ of *habeas corpus. Held,* that the writ was properly denied. *In re Birbiglia* (1924, La.) 99 So. 462.

By the prevailing view the time for the execution of a sentence of corporal punishment is not an essential part of the sentence. *Hollon v. Hopkins* (1879) 21 Kan. 638; *State v. Vickers* (1922) 184 N. C. 676, 114 S. E. 168; 2 Bishop, *New Criminal Procedure* (1913, 2d ed.) sec. 1310; see 3 A. L. R. 1572, note. If included in the sentence, it is mere surplusage. *Bernstein v. United States* (1918, C. C. A. 4th) 254 Fed. 967. Thus it is held that suspension or delay in execution of the sentence does not deprive the court of subsequent power to inflict the punishment. *In re Collins* (1908) 8 Calif. App. 367, 97 Pac. 188; *Terrell v. Wiggins* (1908) 55 Fla. 596, 46 So. 727. Even though such suspension or delay was unauthorized. *In re Lujan* (1913) 18 N. M. 310, 137 Pac. 587; *Brewster v. Piper* (1918) 103 Kan. 794, 176 Pac. 626. Or if the execution of the sentence occurred after the date set for its expiration. *Miller v. Evans* (1901) 115 Iowa, 101, 88 N. W. 198; *Middleton v. State* (1923) 160 Ark. 108, 254 S. W. 342; *contra: People v. Shattuck* (1916) 274 Ill. 491, 113 N. E. 921; *Blackwell v. State* (1924, Ala.) 99 So. 49. Courts holding the contrary view deem it bad policy to allow a sentence to be kept hanging over a defendant's head, enforceable at the discretion of the court. *In re Webb* (1895) 89 Wis. 354, 62 N. W. 177. But even under this view a delay is immaterial if caused by the defendant. *In re McCauley* (1904) 123 Wis. 31, 100 N. W. 1031. It is suggested that a distinction might be made in such cases between a reasonable and an unreasonable delay. *People v. Shattuck, supra.* By statute in some states the inclusive dates for the imprisonment must be fixed in the sentence. Del. Rev. Code, 1915, ch. 155, sec. 8; *McCoy v. State* (1886) 14 Del. 433, 9 Atl. 416. By other statutes the execution of a sentence of imprisonment begins to run on the day of the pronouncement of sentence. Neb. Comp. Sts. 1922, ch. 35, sec. 10195; *In re Fuller* (1892) 34 Neb. 581, 52 N. W. 577; see *Corporate Authorities of Scottsboro v. Johnson* (1899) 121 Ala. 397, 25 So. 809 (without statute). But even under such a statute a defendant has been denied a writ of *habeas corpus* on facts similar to those of the instant case. *Sartain v. State* (1881) 10 Tex. App. 651; *cf. McCoy v. State, supra.* The instant case seems to represent the better view. The effectiveness of the criminal law rests largely on the certainty of its enforcement. To have allowed the defendant in the instant case to escape punishment through a technical loophole in the law, would have seriously prejudiced its effectiveness.

EVIDENCE—PRIVILEGE AGAINST SELF-INCRIMINATION IN BANKRUPTCY PROCEEDING.—An involuntary bankrupt appeared before a commissioner for examination as to his assets and answered some questions. On his refusal to answer others, claiming privilege against self-incrimination, he was committed for contempt. He was granted a writ of habeas corpus on the ground that despite certain oral answers given, he had not waived his privilege. The judgment was affirmed on appeal. On rehearing it was contended that the privilege against self-incrimination did not extend to an examination of a bankrupt for the purpose of obtaining possession of property belonging to his estate. *Held,* that the judgment be reaffirmed. *McCarthy v. Arnstein,* U. S. Sup. Ct., Oct. term, 1924, no. 404.

This case seems to settle the rule that a bankrupt upon examination may claim his privilege against self-incrimination at any time. However, where he is required to deliver books and papers, he is not thus privileged. *Ex parte Fuller* (1923)

262 U. S. 91, 43 Sup. Ct. 496. As to whether there must be reasonable ground to apprehend self-incrimination in bankruptcy proceedings, see (1923) 32 YALE LAW JOURNAL, 512.

INJUNCTION—EXERCISE OF EQUITY JURISDICTION TO RESTRAIN CRIMINAL PROCEEDINGS.—An ordinance imposed a license tax of $100 a year on each moving picture theatre within the city. The penalty for failure to pay was a fine, service in the chain gang, or confinement in the city jail. The plaintiffs filed a bill to enjoin a threatened criminal prosecution and to have the ordinance declared void. The lower court denied the injunction. *Held*, that the judgment be affirmed. *Burton v. City of Toccoa* (1924, Ga.) 122 S. E. 603.

Where equity has obtained jurisdiction to test a statute, a later criminal prosecution involving the same parties and statute will be restrained. *Ex Parte Young* (1907) 209 U. S. 123, 28 Sup. Ct. 441. It will also prevent harassment by a multiplicity of suits resulting from repeated attempts to enforce an invalid ordinance. *Kansas City Gas Co. v. Kansas City* (1912, W. D. Mo.) 198 Fed. 500; *Martin v. Baldy* (1915) 249 Pa. 253, 94 Atl. 1091. Or, where "property rights" are threatened by irreparable injury, proceedings under a void ordinance or the misapplication of a valid ordinance will be enjoined. *Clark v. Harford Assoc.* (1912) 118 Md. 608, 85 Atl. 503; *Zweigart v. Chesapeake R. R.* (1914) 161 Ky. 463, 170 S. W. 1194 (misapplication); *contra: Arbuckle v. Blackburn* (1902, C. C. A. 6th) 113 Fed. 616 (misapplication); *Buffalo Gravel Corp. v. Moore* (192) 201 App. DIV. 242, 194 N. Y. Supp. 225 (no injunction, if there has already been an arrest or indictment). The Federal courts seem to have taken this exception for granted in testing the constitutionality of statutes. *Hammer v. Dagenhart* (1918) 247 U. S. 251, 38 Sup. Ct. 529; *United States v. Cohen Grocery Co.* (1921) 255 U. S. 81, 41 Sup. Ct. 298. The definition of property rights has been strained to include the "right" to employment, to practice a profession, or to conduct a lawful business. *Truax v. Raich* (1915) 239 U. S. 33, 36 Sup. Ct. 7 (employment); compare *dissenting* opinion of Holmes, J. in *Truax v. Corrigan* (1921) 257 U. S. 312, 42 Sup. Ct. 124. A modern tendency refuses to make the distinction between personal and property rights a criterion of equitable relief. *Ex Parte Warfield* (1899) 40 Tex. Cr. App. 413, 50 S. W. 933; *Huntworth v. Tanner* (1915) 87 Wash. 670, 152 Pac. 523; Pound, *Equitable Relief against Defamation* (1916) 29 HARV. L. REV. 640; Long, *Equitable Jurisdiction to Protect Personal Rights* (1923) 33 YALE LAW JOURNAL, 115. Likewise, it has even been suggested that the shadowy discrimination between acts *malum in se* and acts *malum prohibitum* should be no bar to action by a court of equity. Fleischmann, *Injunctions Restraining Prosecutions* (1923) 9 A. B. A. JOUR. 169; but see *Huntworth v. Tanner, supra.* So where there is no complete and adequate remedy at law, equity has the power to grant relief regardless of whether "personal rights" or "property rights" are involved. But, in the exercise of that power, not only should the court be convinced that there is a reasonable doubt as to the validity of the ordinance or statute, and that irreparable damage will ensue, but also that the convenience of relief to the petitioner, as an individual, will over-balance the societal need of a swift and certain administration of the criminal law. The possible abuse by the courts of this check should be no deterrent to its exercise in a proper case.

INJUNCTION—POWER OF COURT OF EQUITY TO ENJOIN UNCONSTITUTIONAL STATUTE NOT YET OPERATIVE.—A state statute provided for compulsory attendance by all children at public schools. More than two years before the act was to become effective the plaintiff, a parochial school, brought a bill in equity to have the act declared unconstitutional and to enjoin state officers from insisting on its validity at any time, on the ground that plaintiff was already suffering damages

because of withdrawal of patronage. *Held,* that the act being unconstitutional, preliminary injunctions be issued. *Society of the Sisters of the Holy Names v. Pierce* (1924, D. Or.) 296 Fed. 928.

Ordinarily the enactment of an ordinance or statute will not be enjoined. *Lewis v. Denver City Water Co.* (1893) 19 Colo. 236, 34 Pac. 993; *Des Moines Gas Co. v. City of Des Moines* (876) 44 Iowa, 505. But equity has intervened where the mere enactment would immediately occasion irremediable injury or multiplicity of suits. *Roberts v. City of Louisville* (1891) 92 Ky. 95, 17 S. W. 216 (ordinance authorizing immediate conveyance of land to insolvent commission); *City of Norman v. Allen* (1915) 47 Okla. 74, 147 Pac. 1002. After the enactment of a statute alleged to be invalid, it has often been held that application for an injunction to restrain threatened enforcement is the proper procedure to determine the rights of the complainant. *Ex parte Young* (1907) 209 U. S. 123, 28 Sup. Ct. 441; *Truax v. Raich* (1915) 239 U. S. 33, 36 Sup. Ct. 7; *Halsey & Co. v. Merrick* (1915, E. D. Mich.) 228 Fed. 805. And even where there has been no threat of enforcement, equity will take jurisdiction if the severity of the penalty for violation prevents persons from attempting to violate. *Terrace v. Thompson* (1921, W. D. Wash.) 274 Fed. 841 (determining whether a contemplated contract violated the statute). It is difficult to see what would be enjoined in such a case since the officers are neither acting nor threatening to act to the plaintiff's damage. The injunction serves "only as a cloak to hide a mere declaration of rights." See (1922) 20 MICH. L. REV. 218. The declaratory judgment has been used in determining the constitutionality of statutes in countries where judicial control over legislation is similar to ours. *Colonial Sugar Refining Co. v. Attorney General* (1912, Austr.) 15 C. L. R. 182; see Borchard, *The Declaratory Judgment* (1918) 28 YALE LAW JOURNAL, 105, 136. The court in the instant case, in order to attain a just result, assumed a power to make a declaration of rights under the guise of granting an injunction. The benefits of the declaratory judgment procedure in such a case are obvious.

INSURANCE—EXTERNAL, VIOLENT AND ACCIDENTAL MEANS—DEATH BY TYPHOID FEVER WITHIN POLICY.—A railroad company provided drinking water for its employees. Through a defective connection with other pipes this water became accidentally polluted, and caused the death by typhoid fever of an employee who drank it. Suit was brought on a policy insuring this employee against death or injury caused solely by "external, violent, and accidental means." *Held,* that the insurance company was liable. *Christ v. Pacific Mutual Life Insurance Co.* (1924, Ill.) 144 N. E. 161.

Recovery under a like policy has been granted when death was caused by accidentally taking poison. *Healey v. Mutual Accident Association* (1890) 133 Ill. 556, 25 N. E. 52; *Paul v. Travelers' Insurance Co.* (1889) 112 N. Y. 472, 20 N. E. 347 (inhaling deadly gas); *Johnson v. Fidelity & Casualty Co.* (1915) 184 Mich. 406, 151 N. W. 593 (ptomaine poisoning caused by eating decomposed food). The tendency is apparently to extend the doctrine of *contra proferentem* to justify recovery in such cases. Its application in the instant case, however, seems to contravene the manifest intention of the parties not to insure against "death by disease" in its commonly accepted meaning.

INSURANCE—INCONTESTABILITY OF LIFE POLICY—DEATH OF INSURED BEFORE END OF INCONTESTABILITY PERIOD.—The defendant issued a life insurance policy which was to be "incontestable after 2 years from the date of its issue." The insured died within the 2 years and the beneficiary sued on the policy after the period had expired. The trial court held that the incontestability period continued to run after the insured's death and refused to admit evidence of fraud offered by the defendant.

Held, that the insured's death fixed the rights of the parties and that the evidence should have been admitted. *Markowitz v. Metropolitan Life Ins. Co.* (1924, Sup. Ct. App. T.) 122 Misc. 675, 203 N. Y. Supp. 534.

On similar facts the Supreme Court of Michigan reached a contrary conclusion. *Becker v. Illinois Life Ins. Co.* (1924, Mich.) 198 N. W. 884. Opposing theories of the interpretation of life insurance incontestability clauses are thus exemplified. The New York court overlooked an early decision of its own Court of Appeals which assumed without argument that the incontestability period continued to run after the insured's death. *Wright v. Mutual Benefit Life Assoc. of America* (1890) 118 N. Y. 237, 23 N. E. 186. This view has been adopted by a number of jurisdictions. *Monahan v. Metropolitan Life Ins. Co.* (1918) 283 Ill. 136, 119 N. E. 68; *Mutual Life Ins. Co. of N. Y. v. Hurni Packing Co.* (1923) 263 U. S. 167, 44 Sup. Ct. 90; see Head, *Life Insurance: The Incontestable Clause* (1924) 97 CENT. L. JOUR. 40, 44. On this theory the insurer may seek cancellation of the policy after the death of the insured before the expiration of the period cuts off his defense. *Ebner v. Ohio State Life Ins. Co.* (1918) 69 Ind. App. 32, 121 N. E. 315; *Harwi v. Metropolitan Life Ins. Co.* (1924, D. Kan.) 297 Fed. 479. And if the insured's estate is beneficiary the period is suspended pending appointment of an administrator whom the insurer may sue. *Ramsay v. Old Colony Life Ins. Co.* (1921) 297 Ill. 592, 131 N. E. 108. A few jurisdictions support the instant case. *Jefferson Standard Life Ins. Co. v. McIntyre* (1922, S. D. Fla.) 285 Fed. 570; *Indianapolis Life Ins. Co. v. Aaron* (1924, Minn.) 197 N. W. 757. Under this doctrine the policy will not be cancelled at the suit of the insurer, as there is a good defense to an action by the beneficiary. *Mutual Life Ins. Co. of N. Y. v. Stevens* (1923, Minn.) 195 N. W. 913. It is significant that New York and Illinois have amended their statutes requiring 2 year incontestability clauses and now permit "a provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of 2 years." N. Y. Laws, 1921, ch. 407 (2), amending Cons. Laws (1909) ch. 35, sec. 101; Ill. Laws, 1921, p. 482, amending Ann. Sts. (J. & A. 1913) sec. 6513. These amendments in effect adopt the minority rule as to the interpretation of the usual incontestability clause. The instant case, without mention of the statute, interpreted the clause, which appears in the usual form, as if it contained the expression now provided by the amended statute.

LABOR LAW—INJUNCTIONS—STRIKE AGAINST MANUFACTURERS NOT CONSPIRACY TO RESTRAIN INTERSTATE COMMERCE IN VIOLATION OF FEDERAL STATUTES.—The complainants were manufacturers more than ninety per cent. of whose products went into interstate commerce. The defendants declared a strike against the complainants and engaged in picketing and intimidation, with the effect that the latter were unable to fill regular orders, the defendants being aware of such result. There was no interference with the transportation in interstate commerce of material consigned to the complainants nor of goods already manufactured nor with the sale in other states of such goods. The complainants filed a bill for an injunction, alleging that the defendants' conduct amounted to a conspiracy to restrain interstate commerce in violation of the Act of July 2, 1890 (26 Stat. at L. 209) and Act of Oct. 15, 1914 (38 Stat. at L.) 730. *Held,* (three judges *dissenting*) that the injunction should be denied. *United Leather Workers' I. U. v. Herkert & Meisel Trunk Co.* (1924, U. S.) 44 Sup. Ct. 623.

Although the line between interstate and intrastate commerce is blurred and uncertain and often determined by the social end to be reached by the court's decision, the federal courts have unequivocally declared that an incidental and remote interference with interstate commerce does not come within the purview of these statutes. *United Mine Workers of America v. Coronado Coal Co.* (1922) 259

U. S. 344, 42 Sup. Ct. 570; *Gable v. Vonnegut Machinery Co.* (1921, C. C. A. 6th) 274 Fed. 66. But if a specific intent to produce such interference is compellably inferred from the facts, the proximity or remoteness of the act to the consequence is immaterial. *Cf. Duplex Printing Press Co. v. Deering* (1921) 254 U. S. 443, 41 Sup. Ct. 172; see *United Mine Workers of America v. Coronado Coal Co., supra,* at p. 408, 42 Sup. Ct. at p. 582; NOTES (1922) 71 U. PA. L. REV. 48, 51.

LICENSES—DISTINGUISHED FROM EASEMENTS.—A granted B, by deed, the privilege to maintain an encroachment of his building on the adjoining lot. In that deed, and in consideration therefor, B agreed to permit A to enter on the premises in suit to repair the side of the adjacent house. B transferred his property to the plaintiff. The defendant contracted to purchase the premises, free of all incumbrances, from the plaintiff. In a suit for specific performance of the contract the defendant claimed this "permission to enter" was an encumbrance on the title. *Held,* that specific performance be granted, as the privilege was a mere revocable license. *Klein v. Stamler* (1924, N. J.) 124 Atl. 366.

A licensee has a mere privilege of user, whereas a holder of an easement has this privilege plus an immunity from revocation. 2 Tiffany, *Real Property* (2d ed. 1920) 1202. Whether the parties intended to create one or the other, is a question of fact to be determined from the circumstances of the case. (1924) 33 YALE LAW JOURNAL, 560; see Hohfeld, *Fundamental Legal Conceptions* (1923) 160. Since the duty created by the document of not interfering with the encroachment of the building was continuing, it seems only reasonable to infer that the parties intended the corresponding privilege of entrance to continue.

MARRIAGE AND DIVORCE—ANNULMENT FOR FRAUD.—The plaintiff, a Catholic, married the defendant after she had represented to him that her former divorced husband was dead. Nine years later the plaintiff learned that his wife's former husband was living. The plaintiff, whose faith forbade such a marriage, sued for annulment on the ground of fraud. The lower court sustained defendant's demurrer. *Held,* that the demurrer was properly sustained. *Oswald v. Oswald* (1924, Md.) 126 Atl. 81.

A marriage procured by fraud will be annulled only when the fraud touches what is regarded as the "essentialia" of the marriage contract. *Reynolds v. Reynolds* (1862, Mass.) 3 Allen, 605; *Chipman v. Johnston* (1921) 237 Mass. 502, 130 N. E. 65; Schouler, *Domestic Relations* (6th ed. 1921) sec. 23. The court in the instant case regarded a "mere disturbance of religious convictions" as not touching the "essentialia." *Wells v. Talham* (1923) 180 Wis. 654, 194 N. W. 36. According to the New York decisions any misrepresentation of a material fact is ground for annulment. And "material" is interpreted as in other contracts. *Kujek v. Goldman* (1896) 150 N. Y. 176, 44 N. E. 773; *Di Lorenzo v. Di Lorenzo* (1903) 174 N. Y. 467, 67 N. E. 63. It is submitted that a judicious application of the liberal rule would tend to more wholesome results without seriously endangering the permanency of the marriage institution. *Robertson v. Cole* (1854) 12 Tex. 356; 33 YALE LAW JOURNAL, 209.

MARRIAGE AND DIVORCE—CONFLICT OF LAWS—RIGHT OF AFTER-BORN CHILD TO DECREE OF SUPPORT IN A FOREIGN STATE.—A decree divorcing the parties in Missouri was silent as to children. The plaintiff had since resided in New York with a child born after the divorce. On personal service of the defendant this action was brought to recover expenses for the support of the after-born child. The lower court refused recovery on the ground that Missouri had sole and continuing jurisdiction. *Held,* that the judgment be reversed. *Laumeier v. Laumeier* (1924) 237 N. Y. 357, 143 N. E. 219.

By the majority view the father is under a duty to support his children after divorce. *Gilley v. Gilley* (1887) 79 Me. 292, 9 Atl. 623; 2 Bishop, *Marriage, Divorce and Separation* (1891) sec. 1223; *contra: Hampton v. Allee* (1896) 56 Kan. 461, 43 Pac. 779 (decree, previously rendered, was silent as to father's liability). Nor is he relieved of this duty because the divorce decree granted custody to the mother and was silent as to support. *Bennett v. Robinson* (1914) 180 Mo. App. 56, 165 S. W. 856; *Viertel v. Viertel* (1908) 212 Mo. 562, 111 S. W. 579. The court which granted the divorce may decree increased support to meet changed conditions. *Harlan v. Harlan* (1908) 154 Calif. 341, 98 Pac. 32; *Mack v. Mack* (1919) 91 Or. 514, 179 Pac. 557. It can also modify its original custody order when changed conditions require. *Hill v. Hill* (1907) 196 Mass. 509, 82 N. E. 690; *Chappell v. Chappell* (1907) 45 Wash. 652, 89 Pac. 166. So also in the case of alimony. *Meyers v. Meyers* (1901) 91 Mo. App. 151. And if alimony is not asked when the divorce is granted, the same court will often order it later. *Crugom v. Crugom* (1885) 64 Wis. 253, 25 N. W. 5. When the wife and child have removed to another state after the divorce, the latter state has modified the custody order in view of changed conditions. *Griffin v. Griffin* (1920) 95 Or. 78, 187 Pac. 598; 2 Bishop, *op. cit.*, sec. 1189; see 20 COL. L. REV. (1920) 491. When the original decree is silent as to alimony, it has been obtained in another state on personal service of the defendant. *Toncray v. Toncray* (1910) 123 Tenn. 476, 131 S. W. 977 (matrimonial domicile); *contra: McCoy v. McCoy* (1921) 191 Iowa, 973, 183 N. W. 377. This is not a violation of the "full faith and credit" clause, since the original decree is *res judicata* only as to issues before the court at that time, and has no binding effect when conditions have subsequently changed. See *Griffin v. Griffin, supra;* 54 L. R. A. (N. S.) 154, note; 20 A. L. R. (1922) 815, 824, note. The "issue" in such cases cannot be the question of alimony or no alimony, but must be the ability of the defendant to pay determined by the then existing conditions. The court which granted the divorce can order support of an after-born child not mentioned at the hearing. *Shannon v. Shannon* (1902) 97 Mo. App. 119, 71 S. W. 104. Since the state of the new domicile will pass on questions of alimony and custody when changed conditions warrant, it seems that the court in the instant case correctly ordered support of a child domiciled within the state, a problem the Missouri court may fairly be said not to have decided. As the child if not supported would be a public charge, New York has an interest in its support. Goodrich, *Custody of Children in Divorce Suits* (1921) 7 CORN. L. QUART. 1. Furthermore, to force the mother to bring her action in a court a thousand miles from her domicile would seem scarcely justified by the mere fact that she was divorced in that court. The territorial theory of "sole jurisdiction" is thus again denied.

PLEADING—UNION OF LAW AND EQUITY—FAILURE TO ALLEGE LACK OF ADEQUATE REMEDY AT LAW.—The complaint set forth an oral agreement to lease for two years and requested specific performance by the lessee. The lessee pleaded a general denial and the Statute of Frauds and moved for judgment on the pleadings. *Held,* that the motion be granted with leave to amend since the plaintiff failed to allege he had no adequate remedy at law. *Daly v. Sobieski* (1924, Sup. Ct. Spec. T.) 123 Misc. 176, 204 N. Y. Supp. 546.

The codifiers intended to effect a blended system of law and equity "so that the same form of allegation may be adapted to cases which have heretofore been distinguished as legal and equitable." *First Report of Commissioners* (1848) 75, 76. Hence, the code provided that distinctions between actions at law and suits in equity be abolished and that there be but one form of civil action. N. Y. C. P. A. 1924, sec. 8. In this action a simple story of the

facts of the controversy stated the cause of action. *First Report of Commissioners, supra,* sec. 120; *Theiling v. Marshall* (1910, 2d Dept.) 140 App. Div. 134, 124 N. Y. Supp. 1066. It was the narrative of historical events between the parties. Clark, *The Code Cause of Action* (1924) 33 YALE LAW JOURNAL, 817. Viewed in this light, the allegation that the plaintiff had no adequate remedy at law does not seem a necessary part of the cause of action. See generally, Costigan, *The Spirit of Code Pleading* (1917) 11 ILL. L. REV. 517. Even as regards the remedy, the plaintiff was entitled to equitable relief if it appeared from the facts that he had no adequate remedy at law. *Pine Cliffs Farms v. Collier* (1915, Sup. Ct. Spec. T.) 92 Misc. 269, 156 N. Y. Supp. 293; *Finance Corp. v. Scard* (1924) 100 Conn. 712, 124 Atl. 715. The cases relied on in the instant opinion support no more rigid rule. See the language in *Bateman v. Straus* (1903, 2d Dept.) 86 App. Div. 540, 83 N. Y. Supp. 785. The prayer for relief is no part of the cause of action. *McVey v. Security Ins. Co.* (1907, 3d Dept.) 118 App. Div. 466, 103 N. Y. Supp. 1056; Pomeroy, *Code Remedies* (4th ed. 1904) 665. Compare Conn. Gen. Sts. 1918, ch. 294, sec. 5672, 5673. Even where law and equity have not been blended, if the cause of action did not warrant the equitable relief prayed for, the complaint was not dismissed but transferred to the law side of the court. *Birmingham Sawmill Co. v. So. Ry.* (1923) 210 Ala. 126, 97 So. 78. Similarly in New York the case was transferred to the jury calendar. *Doctor v. Reiss* (1917, 1st Dept.) 180 App. Div. 62, 167 N. Y. Supp. 193. The Appellate Division has gone so far as to order a dismissal in a similar case. *Poth v. Washington Sq. Church* (1923, 1st Dept.) 207 App. Div. 219, 201 N. Y. Supp. 776. But that case seems to be based on a misconstruction of *Jackson v. Strong* (1917) 222 N. Y. 149, 118 N. E. 512. The latter ordered a new trial, not a dismissal. Similarly *Saperstein v. Mechanics' & Farmers' Bank* (1920) 228 N. Y. 257, 126 N. E. 708. In the instant case a dismissal was not ordered, but even judgment on the pleading with leave to amend seems too drastic. At best the cause should have been transferred to the jury calendar. *Doctor v. Reiss, supra.* And since the code provides that, an answer having been made, the court may permit the complainant to take any relief consistent with the issue raised, the result reached seems the more remarkable. N. Y. C. P. A. 1924, sec. 479; *Marquat* v. *Marquat* (1855) 12 N. Y. 336; NOTES (1924) 24 COL. L. REV. 286, 289. The code was more liberally construed seventy-five years ago. See *Phillips v. Gorham* (1858) 17 N. Y. 270.

PUBLIC SERVICE LAW—WHOLESALER AS PUBLIC SERVICE CORPORATION.—The defendant was engaged in generating electricity which it sold exclusively to two public service companies who in turn sold to the public. The defendant formerly held most of the stock in these companies, and upon application of a purchaser from the distributing companies to force filing of rates and charges was declared a public service corporation. The Public Utilities Commission ordered the defendant to file its rates and the latter appealed, setting up as a defense that since the previous decree it had sold to its stockholders the stock it held in the subsidiary companies. *Held,* (two judges *dissenting*) that the sale of stock restored the status of private corporation. *Southern Ohio Power Co. v. Public Utilities Commission of Ohio* (1924, Ohio) 143 N. E. 700.

Apart from the question of whether the fiction of corporate entity should be observed in determining questions of public policy is the problem as to the status of any wholesaler of the type here involved. It is well recognized that if an owner devotes his property to a use in which the public has an interest he must submit to public control. *Munn v. Illinois* (1876) 94 U. S. 113. Wholesalers of this type have been held to be public service corporations on

such grounds. *Salisbury & S. Ry. v. Southern Power Co.* (1920) 179 N. C. 330, 102 S. E. 625 (power); *Acquackanonk Water Co. v. Board of Public Utility Com'rs.* (1922) 97 N. J. L. 366, 118 Atl. 535 (water); but *cf. Colorado Power Co. v. Haldermann* (1924, D. Colo.) 295 Fed. 178, 194. Some statutes constitute such wholesalers public service corporations. Okla. Comp. Sts. 1921, sec. 3462. ("every corporation . . . . . that may supply any commodity to be furnished to the public"). *Southern Oklahoma Power Co. v. Corporation Commission* (1923) 96 Okla. 53, 220 Pac. 370. The constitutionality of such a statute may still be attacked as an unwarranted exercise of the police power, depriving one of property without due process of law. See *Clarksburg Light & Heat Co. v. Public Service Commission* (1919) 84 W. Va. 638, 100 S. E. 551. Acceptance of a charter conferring the right of eminent domain is held to subject a wholesaler to public regulation. *North Carolina Public Service Co. v. Southern Power Co.* (1922, C. C. A. 4th) 282 Fed. 837. But it is held the wholesaler must have been a public service corporation anyhow or the grant of eminent domain would have been void. *Bridal Veil Lumbering Co. v. Johnson* (1896) 30 Or. 205, 46 Pac. 790; *contra:* Burdick, *Origin of Public Service Duties* (1911) 11 COL. L. REV. 514, 617. See NOTES (1920) 26 W. VA. L. QUART. 140. The public has just as much interest in the regulation of wholesalers of this sort as it has in retailers. It appears difficult to reconcile the instant case with the same court's earlier views. *Ohio Mining Co. v. Public Utilities Commission* (1922) 106 Ohio St. 138, 140 N. E. 143.

REAL PROPERTY—EASEMENT BY IMPLIED RESERVATION—REQUIREMENT OF PERMANENCY.—The plaintiff conveyed to the defendant that part of his lot across which a switch ran to the plaintiff's coal-yard, located on the retained part of the same lot. No mention of the switch was made in the deed. The plaintiff claimed an easement to use it by implied reservation, and secured an injunction prohibiting the defendant from interfering with such use. *Held,* that the decree be reversed since the way claimed was not "permanent." *Nauman v. Treen Box Co.* (1924, Pa.) 124 Atl. 349.

In holding that an easement may be reserved, as well as granted, by implication, the Pennsylvania courts are opposed to the English and the prevailing American views. See COMMENTS (1911) 9 MICH. L. REV. 709-712; 26 L. R. A. (N. S.) 315-377, note. In determining whether an easement is created by implication, the intention of the parties is generally regarded as determinative. 2 Tiffany, *Real Property* (2d ed. 1920) 1270-1272. But the courts, not recognizing that the intention of the parties is primarily a matter of construction, have enumerated essential characteristics which the easement must have in order to be granted or reserved by implication. 2 Tiffany, *op. cit.,* 1273. Thus it is generally required that the user of the servient lot be "obvious, continuous, permanent and necessary." 2 Tiffany, *op. cit.,* sec. 363. This has been the rule in Pennsylvania. *Liquid Carbonic Co. v. Wallace* (1908) 219 Pa. 457, 68 Atl. 1021. It seems that the only justifiable use of these test characteristics is collectively as a mere index of the intention of the parties. The instant case, however, goes much further and isolates one of these characteristics, "permanency," and applies it as an independent test, holding that since the way for the switch might have been terminated by the act of the city in closing the street, or by that of the railroad in removing the track with which the switch connected it was not of a "permanent" nature. Such a test for arriving at the intention in fact of the parties seems arbitrary. Other courts have used "permanent" as a test, but seemingly as supplementary to "obvious and continuous," all taken collectively as being a mere index to the intention of the parties. See *German Savings & Loan Soc. v. Gordon* (1908) 54 Or. 147, 102 Pac. 736; *Hoepker v. Hoepker* (1923) 309 Ill. 407, 141 N. E. 159; Jones,

Easements (1898) sec. 145; (1912) 56 SOL. JOUR. 717-718. Some courts have failed to mention "permanency" as a requisite, probably considering it superfluous. *McCleary v. Lourie* (1922, N. H.) 117 Atl. 730; *DeConley v. Winter Creek Coal Co.* (1923, Neb.) 193 N. W. 157. The holding in the instant case is hard to reconcile with a later case in the same court, in which it was said that a telephone or telegraph line was a "permanent" easement. See *Tide-Water Pipe Co. v. Bell* (1924, Pa.) 124 Atl. 351. While the conclusion arrived at by the court accords with the general feeling that a grantor should not be allowed to derogate from his grant, the reasoning seems unfortunate. If the intention of the parties in fact is the governing factor, it ought to be determined by the facts and circumstance of the transaction, and not by mere test words or labels.

REAL PROPERTY—EASEMENTS IN STRUCTURES—EXTINGUISHMENT BY DESTRUCTION OF SERVIENT ESTATE.—The complainant, lessee of rooms in the second floor of a building, had an easement of passage through a doorway to an adjoining building. The latter building was accidentally destroyed by fire, but was later rebuilt with the doorway as before, the door now being kept locked. On the ground that the easement was not revived in the new building, the lower court denied the complainant's prayer to have the door opened, and the complainant appealed. *Held,* that the judgment be affirmed. *Rudderham v. Emery Bros.* (1924, R. I.) 125 Atl. 291.

Easements confined to structures are extinguished when the servient estate is destroyed without fault of the servient tenant. *Shirley v. Crabb* (1894) 138 Ind. 200, 37 N. E. 130; see (1918) 6 CALIF. L. REV. 299. But an easement is not affected by the destruction of the servient structure, if it is also appurtenant to the soil. *Citizens' Electric Co. v. Davis* (1910) 44 Pa. Super. 138 (plank road washed away, easement held undisturbed). Also easements in structures remain in existence if enough of the structure is left on which the easement can operate. *Commercial Bank of Ogden v. Eccles* (1913) 43 Utah, 91, 134 Pac. 614; (1913) 13 COL. L. REV. 754. Where the easement is confined to a structure which is accidentally destroyed, the servient owner is under no duty to rebuild for the benefit of the dominant estate. *Heartt v. Kruger* (1890) 121 N. Y. 386, 24 N. E. 841. Even if the servient tenant does rebuild as before the legal relations constituting the easement are not revived. *Brechet v. Johnson Hardware Co.* (1918) 139 Minn. 436, 166 N. W. 1070; *contra: Douglas v. Coonley* (1898) 156 N. Y. 521, 51 N. E. 283; Washburn *Easements & Servitudes* (4th ed. 1885) 733; *cf. Campbell v. Mesier* (1820, N. Y.) 4 John. Ch. *334. To hold otherwise would unduly restrict the development of land in a complex and continually changing civilization. *Bowhay v. Richards* (1908) 81 Neb. 764, 768, 116 N. W. 677, 678. The facts in *Douglas v. Coonley* suggest that it may not be contrary to the general view, for after the destruction of their adjoining buildings by fire, the parties rebuilt the structures simultaneously, the dominant tenant relying on the servient tenant's apparent intention to resume the former relations and making no allowances otherwise in rebuilding. *Cf. Day v. Caton* (1876) 119 Mass. 513. The possibility of imposing an obstruction on the development of land has even led some courts to hold that the easement rights are terminated by the servient owner's voluntary destruction of his estate and that they are not revived in the new building. *Union Bank of Lowell v. Nesmith* (1921) 238 Mass. 247, 130 N. E. 251; see (1921) 19 MICH. L. REV. 876. The instant case is in accord with the general tendency of the common law to discourage incumbrances on property interests.

SALES—SALE OF FOOD BY RESTAURANT—IMPLIED WARRANTY OF FITNESS.—The plaintiff contracted ptomaine poisoning from eating unwholesome fish in the defendant's restaurant. She recovered damages in the lower court on the theory

that the transaction constituted a sale and a breach of an implied warranty of wholesomeness. *Held,* that the judgment be affirmed. *Temple v. Keeler* (1924) 238 N. Y. 344, 144 N. E. 635.

Service of food at a restaurant or eating house has been held not to be a sale, but a mere grant of a privilege of consumption. *Sheffer v. Willoughby* (1896) 163 Ill. 518, 45 N. E. 253; Beale, *Innkeepers and Hotels* (1906) sec. 169; see COMMENT (1918) 17 MICH. L. REV. 261. Courts following this view deny the existence of a warranty of wholesomeness of food served. *Merrill v. Hodson* (1914) 88 Conn. 314, 91 Atl. 533; (1914) 24 YALE LAW JOURNAL, 73. And make negligence the only ground for recovery. *Bigelow v. Maine Central R. R.* (1912) 110 Me. 105, 85 Atl. 396; *Travis v. Louisville R. R.* (1913) 183 Ala. 415, 62 So. 851; 32 HARV. L. REV. 71. The basis for this reasoning grows weaker as the price per article becomes more specific. See *Valeri v. Pullman* (1914, S. D. N. Y.) 218 Fed. 519, 520. Other courts hold service of food a sale, and by attaching a warranty thereto, impose absolute liability. *Smith v. Carlos* (1923, Mo.) 247 S. W. 468; *Friend v. Childs* (1918) 231 Mass. 65, 120 N. E. 407. In interpreting statutes, the courts have prohibited any transaction which the legislature intended to prohibit. Thus, the offense of "selling" articles the sale of which is prohibited by statute has been committed by service of such articles at an eating house. *Commonwealth v. Warren* (1894) 160 Mass. 533, 36 N. E. 308 (impure milk with meals); *People v. Clair* (1917) 221 N. Y. 108, 116 N. E. 868 (partridges served out of season); (1917) 27 YALE LAW JOURNAL, 140. Or by the conclusion of a contract for a future sale. *Ciocca-Lombardi Wine Co. v. Fucini* (1923, 1st Dept.) 204 App. Div. 392, 198 N. Y. Supp. 114 (contract for sale of liquor). Or by a transaction resembling a sale but lacking legal effect because of prohibitory legislation denying the privilege to acquire such goods. *Grande v. Eagle Brewing Co.* (1922) 44 R. I. 424, 117 Atl. 640 (liquor). In *Canavan v. City of Mechanicville* (1920) 229 N. Y. 473, 128 N. E. 882, the New York court held there was a "sale" of water furnished by a city but refused to find a warranty of its fitness for use. In protecting the customer the instant case seems sound. See Perkins, *Unwholesome Food as a Source of Liability* (1919) 5 IOWA L. BULL. 6, 86. But it is unfortunate that the court felt called upon to term the transaction a "sale." The courts should squarely consider whether or not they desire liability. By introducing the question of "sale" or "no sale," they are likely to strengthen a tendency to reason about labels rather than about issues. See *City of San Francisco v. Larsen* (1913) 165 Calif. 179, 131 Pac. 366; *Loucks v. Morley* (1919) 39 Calif. App. 570, 179 Pac. 529; COMMENT (1919) 7 CALIF. L. REV. 360.

SPECIFIC PERFORMANCE—PERSONAL SERVICES COMPENSABLE IN MONEY INSUFFICIENT TO TAKE ORAL CONTRACT TO CONVEY LAND OUT OF THE STATUTE OF FRAUDS.—In consideration of an oral promise to will her all his real and personal property on his death, the plaintiff lived with and cared for Joseph Wooley for six years, until his death. She brings this action for an injunction restraining partition of the estate of the deceased by his heirs, and prays specific performance of the contract. The lower court granted this relief. *Held,* that the decree be reversed. *Newbold v. Michael* (1924, Ohio) 144 N. E. 715.

Where personal services are of such character as to be incapable of estimation by a pecuniary standard, specific performance of oral contracts to convey land will be decreed in many states. *Svanburg v. Fosseen* (1899) 75 Minn. 350, 78 N. W. 4 (niece living with and caring for uncle and aunt); *Bryson v. McShane* (1900) 48 W. Va. 126, 35 S. E. 848 (living with and caring for an old person). Otherwise where such services can be compensated in money. *Grant v. Grant* (1893) 63 Conn. 530, 29 Atl. 15; *Walker v. Dill's Adm'r* (1920) 186 Ky. 638,

218 S. W. 247. In such case the remedy is on a quantum meruit for the value of the services, regardless of the value of the property. *Ellis v. Cary* (1889) 74 Wis. 176, 42 N. W. 252; 2 Reed, *Statute of Frauds* (1884) sec. 623. The instant case seems to follow the Ohio doctrine that services of this nature can be compensated for in money damages and will not entitle the plaintiff to specific performance. See *Shahan v. Swan* (1891) 48 Ohio St. 25, 40, 26 N. E. 222, 226.

TORTS—PROCURING BREACH OF CONTRACT—JUSTIFIABLE INTERFERENCE BY TRADE UNION.—The plaintiff was the manager of a touring theatrical company. The defendant committee of allied unions of theatrical artists and employees procured one of the defendants, proprietor of a provincial theatre, to break his contract with the plaintiff, on the ground that the plaintiff was not paying his touring company wages compatible with a decent livelihood. *Held*, that the action be dismissed. *Brimelow v. Casson* (1923, Ch. Div.) 130 L. T. R. 725.

To knowingly procure a breach of an existing contract is *prima facie* a tort. The plaintiff is said to have a "property right," *i. e.* a right *in rem*, against any third person that he shall not without "just cause" induce breach of existing contracts. *Hitchman Coal and Coke Co. v. Mitchell* (1917) 245 U. S. 229, 38 Sup. Ct. 65; *Northwestern Wisconsin Co-op Tobacco Pool v. Bekkedal et al* (1924, Wis.) 197 N. W. 936. The determination of what constitutes "just cause" involves a balancing of social and economic interests, and so must be worked out by the process of judicial inclusion and exclusion. COMMENTS (1922) 32 YALE LAW JOURNAL, 171; Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663. The desire to win in a competitive business struggle is not "just cause." *Lumley v. Gye* (1853, Q. B.) 2 El. & Bl. 216; *Cumberland Glass Manufacturing Co. v. Dewitt* (1913) 120 Md. 381, 87 Atl. 927. Nor where the defendant causes the breach by merely making a contract with a third party, the necessary result of which he knows will be the breach of the original contract. *Martens v. Reilly* (1901) 109 Wis. 464, 84 N. W. 840; *contra: Biggers v. Mathews* (1908) 147 N. C. 299, 61 S. E. 55. The language of some of the courts would almost exclude any justification for wilful interference with others' contractual rights. But there is a close analogy between this problem and that involved in privileged defamation. It has been held that procuring a breach of contract to marry is privileged. *Homan v. Hall* (1917) 102 Neb. 70, 165 N. W. 881; *Guida v. Pontrelli* (1921, Sup. Ct. Spec. T.) 114 Misc. 181, 186 N. Y. Supp. 147. Similarly, a mother who had children in a private school was held privileged to bring about the dismissal of other children who were exerting immoral influences. *Legres v. Marcotte* (1906) 129 Ill. App. 67. By statute in England a defense has been established to the procurement of breaches of contracts of employment in connection with trades disputes. Trades Dispute Act, (1906) 6 Edw. VII, ch. 47, sec. 3. The instant case, which does not come under that act, is apparently the first case to hold in the absence of statute that there may be a justification for procuring a breach of contract in the case of an industrial dispute. The court emphasized the fact that the plaintiff was not paying a living wage. Whether the defendants would have been justified in procuring the breach for the purpose of raising wages beyond a minimum living wage is perhaps an open question.

TRADE-NAME—APPLICATION TO GOODS OF DIFFERENT CLASSES.—The defendants used the word "Vogue" as a label on his hats with the letter "V" so large as to dominate its surroundings. The plaintiff was a publisher of a magazine, known as an arbiter of style, using this name and letter in the same manner. In a suit to enjoin such use the lower court found for the plaintiff. *Held*, that the decree be affirmed. *Vogue Co. v. Thompson* (1924, C. C. A. 6th) 300 Fed. 509.

Relief in all cases of unfair competition should depend on the question: Is the

defendant trying to appropriate the good-will of the plaintiff through this use of the trade-name? *Anheuser-Busch v. Budweiser Malt Corp.* (1921, S. D. N. Y.) 287 Fed. 243; *Hanover Star Milling Co. v. Metcalf* (1915) 240 U. S. 403, 412, 36 Sup. Ct. 357, 360; Rogers, *Predatory Price Cutting as Unfair Trade* (1914) 27 HARV. L. REV. 139, 150; NOTES AND COMMENTS (1913) 11 MICH. L. REV. 391. The plaintiff had trade value in his trade-name, an earned increment of value, which the defendant appropriated by the technique of deceiving the public. He thus received an unearned increment of value from the trade-name. *American Tobacco Co. v. Polacsek* (1909, S. D. N. Y.) 170 Fed. 117, 121; *Walter v. Ashton* [1902] 2 Ch. 282; Nims, *Unfair Competition* (2d ed. 1917) 35; Hopkins, *Trademarks, Tradenames, and Unfair Competition* (3d ed. 1917) 221; Garrard, *Preemption in Connection with Unfair Trade* (1919) 19 COL. L. REV. 29, 45.

WILLS—ANNUITIES—CONSTRUCTION OF PROVISIONS OF WILL—LEGACIES IN FOREIGN CURRENCY.—In an action by executors for a judicial settlement of their accounts and a construction of provisions of decedent's will, the sole question was whether an annuity was payable at par or at the commercial rate of exchange for francs. *Held,* that the testator meant gold francs, not mere paper promises to pay francs. *Chemical National Bank v. Butt* (1924, Surro. Ct.) 123 Misc. 575.

As an annuity connotes stability and recurrence, and the gold franc is standard and stable, it is held that coin or its equivalent, and not paper currency, rising or falling in value according to circumstances, must be paid. *Graveley v. Graveley* (1885) 25 S. C. 1; *In re Hess' Will* (1923, Surro. Ct.) 120 Misc. 372, 198 N. Y. Supp. 573. Where gold and silver coins participated in the divergence of exchange, either, or its equivalent value, could be paid. *Volpe v. Benavides* (1919, Tex. Civ. App.) 214 S. W. 593. For discussion of the rate of exchange in the law of damages, see COMMENTS (1921) 31 YALE LAW JOURNAL, 198; Gluck, *The Rate of Exchange in the Law of Damages* (1922) 22 COL. L. REV. 217.

WILLS—CONSTRUCTION—DECLARATIONS TO SCRIVENER ADMITTED TO SHOW TESTATOR'S INTENT.—The testator in the first clause of his will made bequests to his "children" and "grandchildren" including a stepdaughter and her children. The residue of the estate was divided equally among the "children and grandchildren mentioned above." In a bill to construe the will, the lower court admitted in evidence the declarations of the testator to the scrivener that the stepdaughter and her children were to share in the residue. *Held,* that the evidence was admissible. *Von Fell v. Spirling* (1924, N. J.) 124 Atl. 518.

The rule of evidence excluding the testator's expression of intention as to the construction of his will, except in the one case of equivocation or latent ambiguity, has rarely been questioned. *Day v. Webler* (1919) 93 Conn. 308, 105 Atl. 618; Wigram, *Extrinsic Evidence in Aid of the Interpretation of Wills* (5th ed. 1914) sec. 18; 5 Wigmore, *Evidence* (2d ed. 1923) secs. 2471, 2472. It rests on the principle that no extrinsic utterances will be admitted to vary the written document. 5 Wigmore, *loc. cit. supra;* Kales, *Interpreting of Writings* (1918) 28 YALE LAW JOURNAL, 33, 42. As the court points out, the evidence was not necessary to the decision; and it was perhaps confused by cases admitting parol evidence on the issues of undue influence, forgery, or the contents of a lost will.

WITNESS—PARTY'S IMPEACHMENT OF OWN WITNESS—ADMISSION IN EVIDENCE OF SWORN STATEMENT PREVIOUSLY MADE.—In a criminal prosecution, a government witness testified contrary to his sworn statements previously made and gave testimony tending to strengthen the defense. Claiming a surprise, the prosecution was permitted to show the witness the sworn statement signed by him, and on his denial of having made it, was allowed to prove the execution of it, and also to

introduce it into evidence for purposes of impeachment. From a judgment of conviction, the defendant appealed, assigning as error that the admission of this evidence was a violation of the rule against impeachment of a party's own witness. *Held*, that the judgment be affirmed. *Sneed v. United States* (1924, C. C. A. 5th) 298 Fed. 911.

Even after the crystallization, in the late eighteenth century, of the rule that a party will not be allowed to impeach his own witnesses, testimony contradictory to that of an earlier witness was admitted to establish the facts at issue in the case but not to discredit the witness. *Friedlander v. London Ins. Co.* (1832, K. B.) 4 B. & Ad. 193; Buller, *Nisi Prius* (1806) 297; 2 Wigmore, *Evidence* (2d ed. 1923) sec. 896 *et seq.* And where the witness testified contrary to a statement he had previously made, it was held that witnesses might be called to establish the making of the earlier statement but that the effect of the evidence should be confined to the question of credibility. *Wright v. Beckett* (1834, C. P.) 1 M. & R. 414; *contra: Holdsworth v. Mayor of Dartmouth* (1838, N. P.) 2 M. & R. 153. Later, examination of the witness as to a previous statement was permitted but other witnesses were not allowed to contradict his testimony in regard to such a statement. *Melhuish v. Collier* (1850, Q. B.) 15 Ad. & El. (N. S.) 878. A statute was then passed permitting the party to prove, for purposes of contradiction, a prior inconsistent statement, if, in the opinion of the judge, the witness was adverse. (1854) 17 & 18 Vict. c. 125, secs. 22 & 23. In the United States, some courts allow the questioning of the witness as to his previous statement for the purpose of probing his recollection but do not permit proof of such statements by extrinsic evidence even to impeach him. *Bullard v. Pearsall* (1873) 53 N. Y. 230; *Hildreth v. Aldrich* (1885) 15 R. I. 163, 1 Atl. 249; *Hurley v. State* (1889) 46 Ohio St. 320, 21 N. E. 645. Others not only admit the statement into evidence for the purpose of impeaching the witness but also allow this impeachment by extrinsic evidence when the party calling the witness claims a surprise and the testimony is prejudicial. *Hurlburt v. Bellows* (1870) 50 N. H. 105; *Selover v. Bryant, Adm'r.* (1893) Minn. 434, 56 N. W. 58. In some states, the matter is regulated by statute. In the federal courts, the question of admissibility is left to the discretion of the trial judge whose decision is made with reference to the hostility of the witness, the surprise of the party calling him, and the prejudicial nature of the testimony. *Tacoma Power Co. v. Hays* (1901, C. C. A. 9th) 110 Fed. 496; *Griffin Wheel Co. v. Smith* (1909, C. C. A. 9th) 173 Fed. 245. The instant case exemplifies the liberal tendency to give the trial court greater freedom in ascertaining the facts in issue. *Cf.* May, *Some Rules of Evidence* (1877) 11 AM. L. REV. 261; NOTES (1908) 42 AM. L. REV. 757; Holtzoff, *The New York Rule as to Impeachment by a Party of His Own Witnesses* (1924) 24 COL. L. REV. 715, 716.