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Attorney and Client, Compromise, Mistake

In *Hickman* v. *Berens*, [1895] 2 Ch. 638, the Court of Appeal of England has enunciated a rule that seems to rest upon a sound basis of principle, holding that when counsel, acting under general instructions given by his client to compromise a litigation, consents to a compromise under a misapprehension, *e. g.*, when, intending to concede one thing, he inadvertently concedes another, or when the counsel on both sides do not put the same interpretation upon the terms of the compromise, neither the client nor the counsel are bound thereby, and the court will set it aside, on application.

Bailee for Hire, Barber, Liability for loss of property of Customer

The Supreme Court of Georgia has lately conferred upon the barber fraternity a new distinction, which they will hardly covet. In *Dilberto* v. *Harris*, 23 S. E. Rep. 112, it held that the proprietor of a barber shop kept for public patronage is liable to a customer for the value of his hat, which was deposited on a hat-rack in the shop, and which disappeared from the shop and was lost while the customer was being shaved, since the proprietor is, in such circumstances, a bailee for hire as to the hat.

The court does not deign to fortify its decision by any discussion of the questions involved; but Chief Justice BLEAKLEY, in a dissenting opinion, discourses on the aspects of the case in a way which, while professedly facetious, contains a good deal of common sense, and some keen satire. "It hath never happened," he says, "from the earliest times to the present, that barbers, who are an ancient order of small craftsmen, serving their customers for a small fee, and entertaining them the while with the small gossip of the town or village, have been held responsible for a mistake made by one customer whereby he taketh the hat of another from the common rack or hanging place appointed for all customers to hang their hats; this rack or place being in the same room in which customers sit to be shaved. The reason is that there is no complete bailment of the hat. The barber hath no exclusive custody thereof, and the fee for shaving is too small to compensate him for keeping a servant to watch it. He himself could not watch it, and at the same time shave the owner. Moreover, the value of an ordinary gentleman's hat is so much, in proportion to the fee for shaving, that to make the barber an insurer against such mistakes of his customers would be unreasonable. The loss of one hat would absorb his earnings for a whole day; perhaps many days. The barber is a craftsman laboring for wages, not a capitalist conducting a business of trade or trust."

As a general rule, any one who invites persons to come into his store or place of business, for the purpose of dealing with him, will be held liable for whatever articles it may become necessary that the person so invited should lay aside while engaged in dealing with the tradesman; and therefore a dealer in clothing is liable for the loss of valuables or clothing laid aside while trying on other clothing: *Bunnell* v. *Stern*, 122 N. Y. 539; S. C., 25 N. E. Rep. 910; *Woodruff* v. *Painter*, 150 Pa. 91, and the keeper of a bathing establishment is liable for the loss of clothing taken from the bath-house or dressing-room: *Bird* v. *Everard*, 23 N. Y. Suppl. 1008; S. C., 4 Misc. Rep. 104, or for the loss of valuables delivered by him to one who had stolen the check issued therefor,

when, by looking at the person who presents the check, he could perceive that he is not the one to whom the check was issued: *Tombler* v. *Koelling*, 60 Ark. 62; S. C., 28 S. W. Rep. 795.

The keeper of a restaurant is liable for the loss of a customer's overcoat or wraps left in his charge, or taken in charge by his employee: *Ultzer* v. *Nicols*, [1894] 1 Q. B. 92; *Buitmann* v. *Dennett*, 30 N. Y. Suppl. 247; S. C., 9 Misc. Rep. 462, but not for overcoats or wraps hung up by the customer himself on a rack provided for the purpose, if he keeps a vigilant watch over the room: *Simpson* v. *Rourke*, 34 N. Y. Suppl. 11.

Bids, Collusion

A secret contract between persons who propose to bid upon the construction of a public work, that their bids shall be put in apparently in competition, but really in concert, with the intention of securing as high a price as possible, and dividing the profits, is illegal, and contrary to public policy, and will not be enforced, though one of the parties to it has secured the contract for the work, and has executed the same and received the profits: *McMillan* v. *Hoffman* (Circuit Court, Dist. Oreg.,) 69 Fed. Rep. 509.

Constitutional Law, Liability for Negligence

In *Durkin* v. *Kingston Coal Co.*, 33 Atl. Rep. 237, the Supreme Court of Pennsylvania has dealt a severe blow to the unscrupulous labor legislation that is at present epidemic. The act of that state of 1891, June 2, P. L. 176, Art. VIII, § 6, provides that the owners of every anthracite coal mine shall employ a certified mine foreman, who shall examine the working places in the mine to see if they are safe, and permit no one to work in an unsafe place; and Art. XVII, § 8, declares that "For any injury to person or property occasioned by any violation of this act *or any failure to comply with its provisions by any mine foreman, a right of action shall accrue to the party injured against* said owner or operator for any direct damages he may have sustained thereby." This the court holds unconstitutional, in a strong opinion by Justice WIL-

LIAMS, of which the following extract contains the gist: "To see the true character of this legislation we must keep both lines of objection in mind. We must remember that the injury complained of is due to the negligence of a fellow workman, for which the master is responsible neither in law nor in morals. We must also remember that this fellow workman has been designated by the state, his duties defined and his powers conferred by statute, and his employment made compulsory, under heavy penalties, by the same statute. Finally, we must remember that it is the negligence of this fellow servant, whose competency the state has certified, and whose employment the state has compelled, for which the employer is made liable. The state says: 'He is competent. You must employ him. You shall surrender to his control the arrangements for the security of your employes.' It then says, in effect: 'If we impose upon you by certifying to the competency of an incompetent man, or if the man to whom we commit the conduct of your mines neglects his duty, you shall pay for our mistake and for his negligence.'"

Contract in Restraint of Trade

The Supreme Court of Rhode Island has recently announced a very peculiar decision, in *Macaulay* v. *Tierney*, 33 Atl. Rep. 1, holding that an agreement by the members of a national association of master plumbers to withdraw their patronage from any dealer selling supplies to other than master plumbers is not unlawful, even though "master plumbers" be construed to mean the members of said association.

As a general rule, a person has the right to deal with whom he pleases,—to sell to one, and to refuse to sell to another, or to buy of one, and refuse to buy of another—without regard to the motive which actuates him, and he cannot be held accountable for such action, even if it results in injury to a third party. He has also a right to use any lawful means he pleases to increase his own trade, though the direct result of it is to injure the business of another. Further, what one man may thus do lawfully, any combination of men may do collectively, unless their collective action is of such a

nature that it falls within a prohibitive rule of law that does not apply to individuals. Accordingly, any agreement between individuals, which has for its object the advancement of their own trade at the expense of others, by underselling them, by refusing to deal with them, or by refusing to deal with others who deal with them, is not such a conspiracy or combination in restraint of trade as to render the agreement unlawful, or their acts a cause of action: *Mogul Steamship Co.* v. *McGregor*, [1892] App. Cas. 25, affirming 23 Q. B. D. 598; *Bowen* v. *Matheson*, 14 Allen, 499; *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223; S. C., 55 N. W. Rep. 1119; *Payne* v. *Western & Atl. R. R. Co.*, 81 Tenn. 507. But if the acts of the parties to the agreement are such that they do not serve a legitimate purpose, but appear to be wanton and malicious, an action will lie at the suit of the party injured. This is clearly the case when the parties defendant and complainant are not in direct competition, but dependent the one on the other, as when a combination of wholesalers refuse to sell to a retailer, or dealers in supplies refuse to supply a tradesman or manufacturer. Each individual may refuse to sell to the complainant; but if they agree not to sell to him, or induce others not to sell to him, they are clearly acting wantonly, and cannot claim that they are acting within their rights: *Delz* v. *Winfree*, 80 Tex. 400; S. C., 16 S. W. Rep. 111; *Olive* v. *Van Patten*, (Tex.) 25 S. W. Rep. 428. Such an agreement is a combination in restraint of trade, and therefore illegal; and the very act of inducing another to refuse to deal with the complainant is also illegal. In *Jackson* v. *Stanfield*, (Ind.) 36 N. E. Rep. 345, the defendant was an active member of "The Retail Lumber Dealers' Association of Indiana," an organization whose by-laws gave an active member a claim against a wholesaler for selling to a person not a "regular dealer" in that member's community, and required members to refuse to patronize a wholesaler who ignored the decision of the committee appointed to hear the claim. The plaintiff, who was not a "regular dealer," underbid the defendant on a contract, but wholesalers refused to sell to him, because the defendant had previously enforced a claim against a wholesaler who had sold

to the plaintiff, and expressed an intention of continuing to enforce such claims; and the plaintiff was consequently obliged to abandon the contract. It was held that the defendant was liable for the amount which the plaintiff lost by abandoning his contract, and would be perpetually enjoined from making a claim under the by-laws of the association against any one who sold to the plaintiff.

It is on this ground of wanton injury that the illegality of a boycott rests. As usually practiced, it has for its immediate object the destruction of the trade of the person boycotted, if he does not comply with some demand made upon him, with the ulterior design of some benefit to the boycotters therefrom; and is not intended primarily to benefit them, with the destruction of the other's trade as an unfortunate, if necessary, incident. This makes the distinction between a legal agreement and an illegal conspiracy. If the facts in any case prove the latter state of affairs to exist, the agreement and the acts done under it are legal, unless, as has been said, the combination is so extensive as to equal a restraint of trade; but if the former condition is proved to exist, the combination and all acts done in pursuance thereof are illegal. In the case in hand, the primary object of the agreement was not to benefit the business of those who entered into it, but to punish the dealer who acted in opposition to their desires, and, *pace* the court, was therefore illegal; and the complainant was entitled to damages.

Corporations, Auditors, Duties

The Court of Appeal of England has recently given a very clear and important definition of the duties of auditors in examining and reporting the financial condition of a corporation. It held, that though it is not incumbent on them to consider whether the business of the corporation is conducted prudently or imprudently, yet it is to consider and report to the stockholders whether the balance sheet exhibits a true and correct statement of the condition of the affairs of the corporation, and the true financial position of the company at the time of the audit. This must be ascertained by examining the books of the corporation; and

they must take reasonable care that what they certify as to the company's financial position is true. And it is also their duty, except in very special cases, to place before the stockholders the necessary information as to the true financial position of the corporation, not merely to indicate the means of acquiring it. Accordingly, in the case in hand, when an auditor presented a confidential report to the directors, calling their attention to the insufficiency of the securities in which the capital of the company was invested, and the difficulty of realizing them, but in his report to the stockholders merely stated that the value of the assets was dependent on realization, with the result that the stockholders were deceived as to the condition of the corporation, and a dividend was declared out of capital, and not out of income, it was held that the auditor had been guilty of misfeasance under § 10 of the Companies' (Winding-up) Act, 1890, and was liable to make good the amount of the dividend paid: *In re London & General Bank* (No. 2), [1895] 2 Ch. 673. It had been previously decided that the auditors of a corporation are "officers" within this act: *In re London & General Bank*, [1895] 2 Ch. 166.

Preference of Officers as Creditors

According to the Court of Chancery of New Jersey, a corporation organized under the laws of that state, which is in an insolvent condition, cannot prefer one of its officers as a creditor; and, therefore, when the president of a corporation then insolvent, who was also its creditor to a large amount for cash advanced, brought suit against it on one day, resigned as president and director the next day, and on the third day the directors accepted his resignation, and authorized an attorney to give a cognovit, on which judgment was at once entered, it was held that the president could not have preference by virtue of that judgment: *Mallory* v. *Kirkpatrick*, 33 Atl. Rep. 205.

Promoters, Individual Liability

Where individuals associate themselves for the purpose of promoting and organizing a corporation for the pecuniary gain of its members, and act as an association by electing directors and other officers through whom contracts are made for and in the name of the proposed corporation, and they afterwards abandon their pur-

pose to form a corporation; their relation, one to the other, as to persons dealing with the association, if not that of partners, is that of agent and principal, and each will be individually liable upon any contracts of the association which he directly or indirectly authorized or ratified. START, C. J., in *Roberts Mfg. Co.* v. *Schlick*, (Supreme Court of Minnesota,) 64 N. W. Rep. 826.

Courts, Federal, Appellate Jurisdiction

The Supreme Court of the United States, in *United States* v. *American Bell Telephone Co.*, 16 Sup. Ct. Rep. 69, has lately rendered a decision of great importance, as defining the jurisdiction of that court and the Circuit Court of Appeals. By § 6 of the Judiciary Act of 1891, March 3, 26 Stat. at Large, 828, the decision of the Circuit Court of Appeals is made final "in all cases arising under the patent laws." This the Supreme Court holds to refer only to suits at law and in equity for infringement, and to suits in equity for interference and to obtain patents, but not to suits brought by the United States to cancel patents, and therefore an appeal will lie in such cases from the Circuit Court of Appeals to the Supreme Court.

Elections, Constitutional Law

The Australian Ballot Law of Massachusetts (Stat. 1893, c. 417,) has just been declared constitutional: *Cole* v. *Tucker*, (Supreme Judicial Court of Massachusetts,) 41 N. E. Rep. 681.

In *Parker* v. *Orr*, 41 N. E. Rep. 1002, the Supreme Court of Illinois has decided a number of questions arising under the Ballot Law of that state, holding

Ballots, Validity

(1) That under that statute the provision that the voter shall prepare his ballot by marking in the appropriate margin or place a cross opposite the names of the candidates of his choice, is directory merely, and does not, as does the Indiana statute, render invalid ballots which show on their face that the voters attempted to make a cross in the proper place, but did not fully succeed in doing so; and that ballots marked with a cross made either by crossing the line diagonally (X) or vertically (+), were valid:

(2) That writing the word "Yes" or "Get" in the square at the margin of an affirmative vote for a constitutional amendment does not avoid the ballot:

(3) That signing the voter's name to the ballot invalidates it, as it tends to impair the secrecy of the ballot:

(4) That the making of any mark which bears no resemblance to a cross, such as a single stroke, or a circle, or a nondescript scribble, or writing out the party name, or placing a cross wholly outside the proper square, will invalidate the ballot for the same reason:

(5) That the erasure of a name with a lead pencil is not a distinguishing mark:

(6) That when a voter makes crosses opposite the names of two political parties, one of which has no candidate for a particular office, the vote is good only as to the candidate for that office on the other ticket, and a nullity as to the rest:

(7) That when a voter writes in the name of a candidate of his own, and marks a cross so that it is uncertain which candidate it refers to, his vote does not count for either.

In determining the validity of ballots cast under the Australian ballot laws, the fact that the stamp (when one is required,) was not placed on the ballot with such precision as to make a single, perfect impression, will not render the ballot invalid; but if, in the preparation of the ballot, there is such a departure from the strict letter of the law, that, if purposely done, the ballot could be known by the voter casting it, as when there are imprinted on it two separate and distinct impressions of the stamp, or when there is within one of the large squares a distinct mark, as of a pencil, in addition to the voter's stamp, the ballot will be rejected on the ground that it bears a distinguishing mark, though the mark was made innocently: *Zeis* v. *Passwater*, (Supreme Court of Indiana,) 41 N. E. Rep. 796.

Distinguishing Marks

Who dare say, "*De minimis non curat lex?*" The pencil mark in this case was one-fourth of an inch wide and five-sixteenths of an inch long. What man could say with certainty, "I made that mark?"

In *Williams* v. *Quebrada Railway, Land & Copper Co.*, [1895] 2 Ch. 751, Judge KEKEWICH, of the Chancery Division of England, has laid down the salutary rule, that when fraud is alleged against a defendant, communications between himself and his solicitor as to the subject-matter of the alleged fraud are not privileged from production, there being no distinction in this respect between a crime and a civil fraud; and that it is immaterial for this purpose, whether the solicitor is or is not a party to the alleged fraud.

Evidence, Privileged Communications, Discovery, Fraud

In *Morgan* v. *Kennedy*, 64 N. W. Rep. 912, the Supreme Court of Minnesota has lately held, that the common-law rule that holds a husband liable in damages for slanderous words uttered by his wife, though he is not present, and has not in any manner participated in the slander, has not been abrogated by the passage of the statutes relating to married women, and enlarging their property rights.

Husband and Wife, Husband's Liability for Slander by Wife

The Court of Appeal of England, in *Robins* v. *Gray*, [1895] 2 Q. B. 501, has affirmed the judgment of WILLS, J., in the court below, [1895] 2 Q. B. 78. In this case a commercial traveler employed by a firm that dealt in sewing-machines went to stay at an inn, and while there machines were sent to him by his employers in the ordinary course of business for the purpose of selling them to customers in the neighborhood. Before the goods were sent the innkeeper had express notice that they were the property of the employers, but he received them as the baggage of the traveler. The latter subsequently left the inn without paying for his board and lodging; and it was held that the innkeeper had a lien on the goods for the amount of his bill.

Innkeeper, Lien, Goods of Commercial Traveler

The Circuit Court of Appeals, Seventh Circuit, has recently decided a very interesting point of insurance law. An accident certificate issued by the Odd Fellows' Accident Association provided that written notice should be given to the insurer, within ten days of the date

Insurance, Accident, Notice

of the accident and injury for which a claim should be made, stating the circumstances of the accident and the nature of the injury, and that there should be no claim to death benefits unless death resulted within ninety days from the accident, of which accident the insurer should have had notice within ten days. While this certificate was in force, the plaintiff, assured stepped on a wire nail, inflicting a small but visible wound in his foot. He continued to pursue his usual occupation for fourteen days, and was then taken ill and died from lockjaw resulting from the wound. No notice of the accident was given within ten days after it occurred, but proofs of death were furnished in due time. Under these circumstances, it was held that the terms of the certificate did not require notice to be given within ten days of the happening of an accident which did not immediately disable the assured from pursuing his usual occupation, and which did not, within the ten days, give rise to a claim for death benefits; and that the beneficiary was therefore entitled to recover: *Odd Fellows' Fraternal Accident Association of America* v. *Earl*, 70 Fed. Rep. 16.

International Law, Jurisdiction of Consular Courts

According to a recent decision of the Judicial Committee of the Privy Council of England, under the treaties between Great Britain and Japan, by virtue of which the consular courts of the former and the territorial courts of the latter have exclusive jurisdiction over claims against British and Japanese subjects respectively, it would be in excess of the jurisdiction granted to the British consular court if it were to entertain by way of counter-claim or cross-action a claim by a British defendant against a Japanese plaintiff; the cognizance of such a claim belongs to the territorial courts. This rule was applied to a suit by the Emperor of Japan against a steam-boat company for damages resulting from a marine collision, in which the defendant company counterclaimed in respect of the same collision, on the ground that it was due to the negligence of the plaintiff's servants; and it was accordingly held that the counter-claim could not be sustained: *The Imperial Japanese*

Government v. *Peninsular & Oriental Steam Nav. Co.*, [1895] App. Cas. 644.

Interstate Commerce, Original Package

According to a recent decision of the Supreme Court of Pennsylvania, packages of oleomargarine, weighing ten pounds each, put up out of the state, and sent into it, by the manufacturer, to be there sold by his resident agent from his store, by the package, are not "original packages," within the interstate commerce clause of the United States Constitution, but, being intended for sale to the consumer, and being in fact so sold, are subject to the police regulations of the state: *Commonwealth* v. *Paul*, 33 Atl. Rep. 82.

In reaching this remarkable conclusion, the court rests wholly on its own decisions to the same effect, in *Commonwealth* v. *Zelt*, 138 Pa. 615; S. C., 21 Atl. Rep. 7, and *Commonwealth* v. *Schollenberger*, 156 Pa. 201; S. C., 27 Atl. Rep. 30, which in their turn rest on the newly discovered principle that "a manufacturer who puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another state, and sends them to his own agent in that state, for sale to consumers, is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title." There is also a good deal said in regard to the dire and awful consequences which would result from the opposite doctrine, and the learned judge who delivered the opinion declares that "we cannot adopt a construction that seems to us so unnatural and unreasonable, and that would work such absurd and monstrous results," meaning thereby the construction which would hold the separate packages, shipped in an open box or barrel, an original package. But the very strength of his language betrays the weakness of his argument. It is not necessary to vituperate when one is sure of his position.

It is the general opinion that when the bottles or other vessels in which the goods are put up, though each enclosed in a separate wrapper, are put into one common receptacle for

the purpose of transportation, that receptacle is the original package, and, when that receptacle is opened, and the contents are separated, the original package is broken, and none of the separately wrapped packages can be called original. The importer may put up and ship his packages separately in any form he pleases; but, if he puts them up together in the same box or barrel, he cannot claim that they are original packages. The presumption in such a case is that the separate wrapping is a mere device to evade the law: *In re Harmon*, 43 Fed. Rep 372; *Harrison* v. *State*, 91 Ala. 62; S. C., 10 So. Rep. 30; *Smith* v. *State*, 54 Ark. 248; S. C., 15 S. W. Rep. 882; *State* v. *Parsons*, 124 Mo. 436; S. C., 27 S. W. Rep. 1102; *Haley* v. *State*, (Neb.) 60 N. W. Rep. 962; *Commonwealth* v. *Zelt*, 138 Pa. 615; S. C., 21 Atl. Rep. 7; *Commonwealth* v. *Schollenberger*, 156 Pa. 201; S. C., 27 Atl. Rep. 30; *State* v. *Chapman*, 1 S. Dak. 414; S. C., 47 N. W. Rep. 411. If, however, the carrier puts the separate bottles or packages into a receptacle furnished by itself, for its own convenience in transporting them, without the knowledge of the consignor, the receptacle is not the original package. *Keith* v. *State*, (Ala.) 8 So. Rep. 353; *Tinker* v. *State*, 96 Ala. 115; S. C., 11 So. Rep. 383.

The Iowa courts alone have seen the absurdities to which this doctrine will lead, and have held that in such a case the separately wrapped bottle or package is the original: *State* v. *Coonan*, 82 Iowa, 400; S. C., 48 N. W. Rep. 921; *State* v. *Miller*, 86 Iowa, 638; S. C., 53 N. W. Rep. 330. But this, if applied indiscriminately, is as far wrong as the other doctrine. The only safe rule is, to leave to the jury, as a question of fact, to find whether the separate packages or the receptacle is the original package in any given case, under instructions that if they find that the intent of the importer was to evade the law, not to assert *bona fide* his rights under the interstate commerce rule, that they should find the receptacle to be the original package; otherwise, the separate bottles or packages. To assert that a pint bottle of whisky, wrapped separately, and then boxed with others, is an original package, is absurd; but it is equally absurd to claim that a ten-pound

package of anything is an intentional evasion of the law. And this absurdity cannot be rendered serious argument by an assertion that it is an evasion of the law, because the packages are plainly put up to sell at retail. The law makes no distinction between wholesale and retail sales; and the rules of interstate commerce extend their protection equally over each. If, in the case in hand, the packages of oleomargarine had weighed but an ounce, and yet had been separately wrapped, and carried by the dealer into the state in separate pockets of his overcoat, they would have been original packages, in spite of the evident purpose of selling them at retail; and yet, if two hundred pound packages should be shipped in one box, for convenience sake, they would not be such, under this ruling, although just as clearly intended for wholesale dealing. "A Daniel come to judgment, yea, a Daniel!"

Judgment, Satisfaction, Vacating

When an attorney of record receives from the defendant a sum less than the amount due on a judgment against the latter, and satisfies the judgment without the consent of his client, the satisfaction will be vacated only on the terms that the plaintiff release and discharge the defendant from the judgment to the extent of the payment made to the attorney: *Faughnan* v. *City of Elizabeth*, (Supreme Court of New Jersey,) 33 Atl. Rep. 212, 1895.

Parliamentary Law, Committees, Authority

Since the existence of all committees, in the absence of legislation, necessarily determines upon the adjournment of the body to which they belong, there must be an explicit enactment that the sessions of the committee can be held after such adjournment, or, at least, a clear implication to that effect from the words used in the act or resolution creating the committee, to prevent this determination. Therefore, when a committee is created by the legislature from its own members, to investigate certain facts, and report to the legislature, if it should be possible to do so before its adjournment, and if not, then to the Supreme Court, the committee can do nothing after the adjournment of the legislature, except make

its report: *Commercial & Farmers' Bank* v. *Worth*, (Supreme Court of North Carolina,) 23 S. E. Rep. 160.

Suspension of By-law by Vote on Motion

In *Kendall* v. *Board of Education of City of Grand Rapids*, 64 N. W. Rep. 745, the Supreme Court of Michigan recently decided an interesting point of parliamentary law. A by-law of the board provided that no text-book should be adopted unless proposed at a regular meeting at least one month before its adoption; but by-laws could be suspended by a two-thirds vote of the members present. A report recommending the adoption of a text-book was made, and a motion to lay the report on the table was lost by a two-thirds vote, after which the book was adopted by a majority vote. It was held that the by-law requiring the book to be proposed one month before its adoption was suspended by the defeat, by a two-thirds vote, of the motion to lay the report on the table, and that the adoption of the text-book was therefore valid.

Railroads, Notice of Lateness of Trains, Constitutional Law

The act of Indiana of 1889, March 9; Rev. Stat. Ind. 1894, §§ 5186, 5187, requires railroad companies to place in each passenger depot where there is a telegraph office a blackboard, and note thereon whether trains are late, and if so, how late; and provides that half the fine recovered for violation thereof shall go to the prosecuting attorney. This statute has lately undergone a thorough overhauling by the Supreme Court of that State, in *Pennsylvania Co.* v. *State*, 41 N. E. Rep. 937, and was held constitutional in spite of the many objections that were made against it. In the opinion, it is decided

(1.) That it is not void for ambiguity:

(2.) That it is not a regulation of interstate commerce, within the prohibition of the federal constitution:

(3.) That it is not unconstitutional, as being a local or special act, regulating practice, in courts of justice, on the ground that it provides for special judgments in favor of particular persons and against particular persons; or that it provides a special statutory action, and authorizes a particular judg-

ment in favor of a particular officer against particular persons; or because it gives a particular officer a part of a penalty, and thereby requires judgment in favor of such officer:

(4.) That it is not local or special, within the prohibition of the constitution of that state against passing local or special laws "in relation to fees or salaries," merely because the prosecuting attorney participates in the recovery, or on the theory that the defendant, aside from its interest in common with that of the people of the state, has an interest in the distribution of the fund recovered as a penalty for its violation of the act:

(5.) That it is not unconstitutional, as granting to any citizen, or class of citizens, privileges or immunities which do not belong equally to all citizens on the same terms:

(6.) That it does not violate the provisions of the federal constitution, that no state shall deny to any person the equal protection of its laws:

(7.) That the fact that there is a railway in the State which has no station or telegraph facilities, but is operated by a system of telephone, to which railway the act does not apply for that reason, does not expose it to the objection that it lacks uniformity.

The appellate court of the same state has lately held that this same act does not require the registering of night trains at passenger stations where its telegraph office is kept open only during the day-time: *Terre Haute & Ind. R. R. Co.* v. *State*, 41 N. E. Rep. 952, and by a parity of reasoning, it would in any case require the registering only while any telegraph office is open.

This statute is a proper police regulation, which does not interfere with interstate commerce, and is within the power of the legislature: *State* v. *Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69; S. C., 32 N. E. Rep. 817.

It is operative only when the company or person operating the railroad possesses the means of conveying such information to the point where it is to be noted: *State* v. *Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69; S. C., 32 N. E. Rep. 817, and therefore does not apply to stations where there are

no telegraph offices: *State* v. *Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69; S. C., 32 N. E. Rep. 817; *State* v. *Cleveland, Cincinnati, Chicago & St. L. Ry. Co.*, 8 Ohio Cir. Ct. 604. Nor to railroads whose trains cover their entire route in a time less than that within which the notice is to be posted: *State* v. *Kentucky & Ohio Bridge Co.*, 136 Ind. 195; S. C., 35 N. E. Rep. 991. The fact that some other company may operate its line of road by telephone, or by some other means of communication, does not invalidate the law, which is confined to those operated by telegraph, on the ground that it is class legislation, for the law applies to all alike who operate roads by means of telegraphic information: *State* v. *Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69; S. C., 32 N. E. Rep. 817; *State* v. *Pennsylvania Co.*, 133 Ind. 700; S. C., 32 N. E. Rep. 822. The fact that the law gives to the prosecuting attorney an interest in the amount recovered does not affect the validity of the law, as that is a matter in the discretion of the legislature in fixing the compensation of that officer: *State* v. *Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69; S. C., 32 N. E. Rep. 817.

Statutes, Amendment, Effect

When an act, which purports to amend a previous act "so as to read as follows," contains a provision different from that of the original act, but on the same subject, it is not a repeal of the previous act, and therefore other statutory provisions relating to the old act, and not inconsistent with the amendment, will apply to the latter: *Fitzgerald* v. *Lewis*, (Supreme Judicial Court of Massachusetts,) 41 N. E. Rep. 687.

Validity, Legislative Journals

The Supreme Court of Florida, in *State* v. *Green*, 18 So. Rep. 334, has recently reasserted some principles of statutory construction, which, though frequently expressed, are yet by no means universally adhered to, and are therefore well worth repeating.

(1) The constitutional requirements as to the mode of enacting laws are mandatory, and if the journals kept by the two houses are silent as to matters which are required to be entered in them, or if they show affirmatively and explicitly that other

constitutional requirements have not been complied with in the enactment of a law, the evidence of the journals will control, and the act be held void; but, since every reasonable presumption must be made in favor of the action of the legislature in the apparent performance of its legal functions, it will not be presumed, in any case, from the mere silence of the journal, that either house has disregarded a constitutional requirement in the enactment of a law, unless the constitution has expressly required the journal to show the action taken. In such case, however, their silence will be fatal to the act:

(2) Since the governor acts as a part of the law-making power of the state in approving bills passed by the legislature, and unless substantially the same bill that passed the two houses of the legislature is submitted to him for approval, it cannot become a law by his approval, or by his silence, or against his approval:

(3) If the title of an act as it passed the legislature, and when approved by the governor, is so essentially different as to affect the whole act, it cannot be said that the same act received the sanction of the entire legislative department of the government; but if the difference is immaterial and unsubstantial, it will not avoid the law:

Title

(5) The rule of construction, that, though part of an act be void, it will not render the whole inoperative, if the good and the bad can be separated, and the legislative purpose expressed in the valid portions be given effect to, independently of the void part, applies also to the titles of acts; and if the unconstitutional part can be separated from the other, the latter will stand, and the act be construed with reference to the subject therein expressed.

It will be seen from this, that the Florida court has little sympathy with the absurd idolatry that sees in an enrolled bill a thing too holy to touch, before which, no matter how tainted with fraud, all principles of law and justice must lie inert, if the subject-matter is within the constitutional limits. Attention has been called to the results of that doctrine in commenting on the case of *Carr* v. *Coke*, (N. C.,) 22 S. E. Rep. 16; (See 2 AM. LAW REG. & REV., N. S. 441, 503,) and

this decision is now submitted as a very useful antidote to the injurious effects of that.

Taxation, Constitutional Law

The Supreme Court of Ohio has recently decided that an act which, professing to impose a tax on inheritances, exempts from taxation the right to receive or succeed to estates not exceeding $20,000, though taxing the whole right of receiving or succeeding to estates which exceed that sum in value, and taxes the right to receive or succeed to estates of a large value at a higher rate per cent. than the right of succession to estates of smaller value, is in conflict with § 2 of the bill of rights of the constitution of that state, which declares that "all political power is inherent in the people. Government is instituted for their equal protection and benefit;" and is, therefore, wholly unconstitutional and void: *State* v. *Ferris*, 41 N. E. Rep. 579.

Trade Names

In *Weinstock, Lubin & Co.* v. *Marks*, 42 Pac. Rep. 142, the Supreme Court of California has held that a tradesman, by adopting the name "Mechanics' Store" for his place of business, may acquire a property right therein as a trade-name, so that equity will enjoin another from using the name "Mechanical Store" in such a way as to induce persons to purchase goods from him under the belief that they are dealing with the former.

Mandatory Injunction

In this case a merchant had erected a building of peculiar architecture adjoining a similar building occupied by an old firm engaged in a like business, and with the purpose of deceiving the customers of the firm, adopted a similar name, and refrained from using any sign about the building to designate the proprietor. The court below decreed that he should maintain and place in a conspicuous part of his store, and also in a conspicuous place on the outside or front thereof, a sign showing the proprietorship of the store, in letters sufficiently large to be plainly observable by passers-by and customers entering therein; but it was held by the Supreme Court that this was holding the defendant to too strict a rule, and that all that should be required was

that the defendant, in the conduct of his business, should distinguish his place of business from that in which the plaintiff carried on its business, in some mode or form that should be a sufficient indication to the public that it was a different place of business from that of the plaintiff.

Waters, Percolation, Interference

The House of Lords has lately held, affirming the decision of the Court of Appeals, [1895] 1 Ch. 145, that the owner of land containing underground water, which percolates by undefined channels and flows to the land of a neighbor, has the right to divert or appropriate the percolating water within his own lands, by wells or drainage shafts, so as to deprive his neighbor of it; and his right is the same whether his motive be to *bona fide* improve his own land, or to maliciously injure his neighbor, or to induce his neighbor to buy him out: *Mayor, &c., of Bradford* v. *Pickles*, [1895] App. Cas. 587.

No one can be held liable for damages caused by sinking a well in his own ground, by which the percolating waters are diverted from his neighbor's wells or springs; but if he sinks a well to a plainly-defined underground water-course and diverts it, he is liable for all damages occasioned thereby: *Willis* v. *City of Perry*, (Iowa,) 60 N. W. Rep. 727; *Castalia Trout Club* v. *Castalia Sporting Club*, 8 Ohio Cir. Ct. 194; *Williams* v. *Ladew*, 161 Pa. 283; S. C., 29 Atl. Rep. 54; *Sullivan* v. *Northern Spy Min. Co.*, (Utah,) 40 Pac. Rep. 709.

Will, Charitable Gift, Bequest for Encouragement of Sport

According to a recent decision of the Court of Appeal of England, a gift for the encouragement of a mere sport, though it may be beneficial to the public, cannot be upheld as charitable; and therefore a bequest of a fund in trust to provide annually forever a cup to be given to the most successful yacht of the season, though it states that the object of the gift is to encourage the sport of yacht racing, is in violation of the rule against perpetuities, and void: *In re Nottage*, [1895] 2 Ch. 649.

The one essential feature of a charitable gift is, that it should be for the benefit of the public, not for that of any number of

private individuals. It is not necessary that its benefits should be bestowed upon the public uniformly; it is sufficient if they are open to all who under the circumstances can avail themselves of them: *e. g.*, a hospital is a charitable institution, because it exists for the benefit of the sick of the community, so far as its resources extend, and also tends to lighten the burden which the support of those sick persons whom it cares for would throw upon the community; but a beneficial society is not a charity, unless its aims are such as bring it within the last-mentioned criterion, for it exists for the benefit of its own members only. Applying this broad rule, a bequest to a society founded for the dissemination of knowledge generally: *Beaumont* v. *Oliveira*, 4 L. R. Ch. 309; for the maintenance of missions: *Commissioners* v. *Pemsel*, [1891] App. Cas. 531; for the erection of a chapel and the maintenance of a public park: *In re Bartlett*, (Mass.) 40 N. E. Rep. 899; for the relief of the poor and the support of a sabbath-school: *Conklin* v. *Davis*, 63 Conn. 377; S. C., 28 Atl. Rep. 537; for founding and maintaining an institution for the purpose of studying and curing the diseases of animals and birds useful to man, and providing for free lectures to be given to the public: *University of London* v. *Yarrow*, 1 DeG. & J. 72, affirming 23 Beav. 159; for the increase and encouragement of good servants: *Lascombe* v. *Wintringham*, 13 Beav 87; for the establishment of a fund to be expended in prizes to marksmen: *In re Stephens*, W. N. [1892] 140; and to enable a corporation, organized for the purpose, to purchase land and erect residences thereon for the laboring classes, to be controlled "so as to improve the moral, physical and intellectual condition of the youth of this city," which residences were to be let to laborers for rent, and not gratuitously: *Webster* v. *Wiggin*, (R. I.) 31 Atl. Rep. 824, are charitable gifts. Such is also a gift to a library, organized as a private corporation, if not organized for pecuniary profit, and not conducted for that purpose, when all the moneys obtained by it are used to maintain the library and purchase books, and all are entitled to the use of the books in the library room, though books may be taken therefrom only by those who become subscribers for a

fixed time and pay a certain fee, or who pay a certain amount for each book without becoming subscribers: *Phillips* v. *Harrow*, (Iowa,) 61 N. W. Rep. 434; but a library maintained only for the benefit of the subscribers is not a charity, even though all who wish may become subscribers: *Carne* v. *Long*, 2 DeG., F. & J. 75; *In re Dutton*, 4 Exch. D. 54.

A charity need not necessarily be for an indefinite number of persons; and though a beneficial society whose benefits are confined to its own members is not a charity, yet a gift to the permanent fund of such an organization of public employes is a charitable gift, because it is not only in ease of all of those employes who may choose to become members, but tends to benefit the community by preventing their families from becoming a public charge: *In re Jeanes's Estate*, 3 D. R. (Pa.) 314; S. C., 34 W. N. C. 190.

On the other hand, a gift for the purpose of establishing a museum for the purpose of preserving relics of famous men is not a charity: *Thomson* v. *Shakespear*, 1 DeG., F. & J. 399. Nor is one for the maintenance of certain animals, though, not being a perpetuity, it is a valid trust: *In re Dean*, 41 Ch. D. 552. And if a valid charitable gift is itself conditional on the happening of a future and uncertain event, it violates the rule against perpetuities, and is void: *Alt* v. *Lord Stratheden*, [1894] 3 Ch. 265.

In a recent case in the Chancery Division of England, before Judge KEKEWICH, part of a testator's estate consisted of policies on the life of another, subject to a mortgage to the life assurance office. By his will he bequeathed his personal estate to one person for life, with remainders over. After the testator's death his executor paid the premiums on the policies and the interest on the mortgage out of the income of the personal estate until the death of the assured, when the office paid to the executor the surplus of the policy moneys remaining after deducting the mortgage debt. On these facts, it was held that, as between the tenant for life and the remaindermen, the amount of income expended in paying the premiums and interest ought to be recouped to the tenant for life, with interest, out of the prop-

Life Estate, Insurance Policies

erty preserved by the expenditures, viz.: the surplus policy moneys; and that the balance of that surplus must be apportioned between capital and income: *In re Morley*, [1895] 2 Ch. 738.

In calculating the proportions in which outstanding personal estate which falls in during the existence of a life estate, should be divided between capital and income, the proper method is to ascertain the sum which, put out at the legal rate of interest on the day of the testator's death, and accumulating at compound interest calculated at that date with yearly rests and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the rest as income: *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643.