RECENT CASES.

BILLS AND NOTES—ILLEGAL CONSIDERATION—Physician's services were paid for by note. Statute provides that a physician shall not be permitted to practice or entitled to receive compensation for services where his certificate has not been recorded, making a violation thereof a misdemeanor subject to fine or imprisonment. *Held:* Violation of the statute is a good defense to a note given for the services of a physician, though the plaintiff was an innocent purchaser of the note before maturity, Whitehead *et al.*, v. Coker, 76 Southern 484 (Ala. 1917).

Citizens' State Bank of Newman Grove v. Nore, 67 Neb. 69 (1903), is directly *contra* to the principal case. The prevailing law is that if the statute merely declares illegal and forbids the acts or transactions giving rise to a bill or note, the instrument will not be held void in the hands of a holder in due course. Farmers' National Bank of Valparaiso v. Sutton Manufacturing Company, 52 Fed. 591 (1892). It by no means follows because a contract made in violation of law, common or statutory, is void between the original parties, that, if given the form of negotiable paper, it is void in the hands of a bona-fide holder. When a contract takes that form it is not, in the hands of a bona-fide holder, subject to the defense which avoided it in the hands of the original parties. Union Trust Company v. Preston National Bank, 136 Mich. 460 (1904); Gray v. Boyle, 55 Wash. 578 (1909). Where a statute in direct terms declares that a note given in violation of its provisions shall be void, it is so, no matter into whose hands it may pass. Bohon's Assignee v. Brown, 101 Ky. 354 (1897).

The above cases were decided without reference to the Negotiable Instruments Law. Section 57 of the Negotiable Instruments Law would seem to cover all these cases: A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. Under this section a bona-fide holder may enforce a promissory note against the maker, even though the note was given for a gambling debt, and this statute has repealed the statutes of 16 Car. 2 Ch. 7 and 9 Anne, Ch. 14, which were in force in the District of Columbia. Wirt v. Stubblefield, 17 App. Cases D. C. 283 (1900), wager. *Accord:* Broadway Trust Company v. Manheim, 95 N. Y. Supp. 93 (1905), *semble,* usury; Arnd v. Sjoblom, 131 Wis. 642 (1907), statutory defense; Klar v. Kostiuk, 119 N. Y. Supp. 683 (1909), usury. *Contra:* George Alexander & Company v. Hazelrigg, 123 Ky. 677 (1906), wager; Lawson v. Bank, 102 S. W. 324 (Ky. 1907), *semble,* statutory defense; McAfee v. Bank, 104 S. W. 287 (Ky. 1907), statutory defense.

The subject is one, perhaps, upon which the courts will never agree; for they will construe the section with reference to the policy of their respective states. In some states the requirements of commerce will be the controlling consideration, it being recognized that the interests of commerce require that a promissory note, fair on its face, should be as negotiable as a government

bond, and that every restriction upon the circulation of negotiable paper is an injury to the state, for it tends to derange the trade and hinder the transaction of business. Chemical National Bank v. Kellogg, 183 N. Y. 92 (1905). George Alexander & Co. v. Hazelrigg, *supra,* was decided upon the policy of the state of Kentucky to suppress gaming, and the statutes making gaming contracts void are founded upon what the legislature has for many years deemed to be sound public policy.

CONSTITUTIONAL LAW—IMPAIRING CONTRACT OBLIGATIONS—POWER OF A PUBLIC SERVICE COMMISSION—A municipality and a street railway company agreed on rates for the company's services. The state constitution allowed a municipality to make a charter subject to the laws of the state, and also required the legislature to regulate the rates and charges of common carriers. After the agreement between the city and the company the state Public Service Commission changed the rates. *Held:* This is not an impairment of contract obligations. The contract was expressly made subject to the laws of the state, which means the laws as they from time to time exist, including a commission's order. Puget Sound Traction Co. v. Reynolds, 37 Sup. Ct. Rep. 705 (1917).

It is settled that, where the city has no express power to fix the rates of a public service corporation, the state can change them. Indianapolis v. Navin, 151 Ind. 139 (1897); City of Dawson v. Dawson Telephone Co., 72 S. E. 508 (Ga. 1911); City of Benwood v. Public Service Commission, 83 S. E. 295 (W. Va. 1914); Woodburn v. Public Service Commission, 161 Pac. 391 (Ore. 1916). This regulation of rates has been held to be an exercise of the state's police power, Munn v. Illinois, 94 U. S. 113 (1876), and a municipality cannot by contract foreclose the exercise of that power, unless clearly authorized to do so by the legislature.

The right of a city to change rates to which it has agreed depends on the extent to which legislation has conferred on it the power to bargain with respect to rates. This "power is measured by the legislative grant, and they can exercise such powers only as are expressly granted, or necessarily implied from those expressly conferred." Freeport Water Co. v. City of Freeport, 180 U. S. 587 (1900). Thus the legislature may delegate its power to regulate rates to a municipality, although the alleged grant must be strictly construed against the municipality. Home Telephone & Telegraph Co. v. Los Angeles, 155 Fed. 554 (1907). A power to "contract at such rates as may be fixed by ordinance," gives the city the right to change rates when once fixed. Freeport Water Co. v. Freeport, *supra.* Of two possible constructions of the city charter, that is adopted which is most favorable to the public, not that which ties the hand of the city council and prevents the adjustment of the rates. But where the municipality is expressly authorized to enter into a binding contract and does so, it may not later change the rates so fixed. Detroit v. Detroit Citizens' Street Ry. Co., 184 U. S. 368 (1901).

LANDLORD AND TENANT—FURNISHED LODGINGS—IMPLIED WARRANTY AS TO FITNESS OF TENANT—A sufferer from an infectious disease, leased furnished rooms. In consequence some of the landlord's furniture had to be destroyed to get rid of the infection. The landlord sued for the damages thus

sustained, claiming that the law imposed on the tenant an implied warranty of his fitness to inhabit the rooms. *Held:* There is no such warranty. Humphreys v. Miller (1917), 2 K. B. D. 122.

The well-known implied covenant to use the premises in a tenant-like manner has never been held to apply to injuries due to the person of the tenant. On the other hand, it is well settled that, though there is no implied covenant that the premises are in good condition, a tenant is justified in quitting without notice furnished apartments which are uninhabitable due to vermin or unsanitary conditions. Smith v. Marrable, 11 M. & W. 5 (Exch. 1843); Wilson v. Finch-Hatton, L. R. 2 Ex. D. 336 (1877); Bird v. Greville, Cab. & E. 317 (N. P. 1883); Imgalls v. Hobbs, 156 Mass. 348 (1892). This rule applies, however, only where the lease is a short one.. Franklin v. Brown, 118 N. Y. 110 (1890). The reason for the distinction is that in a short lease the tenant intends to enter at once without cleaning or repairing, and it is difficult for him to discover the unsanitary condition of the premises.

Based on these precedents, some cases have gone much further and have held that where there is a lease of furnished apartments for a short time, the landlord is liable to the tenant for damages due to an infectious disease caught from the premises. The duty on the landlord to warn of the infection is held to be one of plain humanity. Minor v. Sharon, 122 Mass. 477 (1873); Caesar v. Karutz, 60 N. Y. 229 (1875). It has even been held that the landlord is answerable when he did not know the premises were infected. Charsley v. Jones, 53 J. P. 280 (1889).

As these cases establish an actual implied warranty by the landlord that the premises are sanitary, it would seem that the court in the principal case should have held that there was a correlative warranty of fitness imposed on the tenant, especially since the warranty imposed on the landlord is not supported by any reasoning not equally applicable to the tenant's position, but is held to be one of common sense and plain humanity.

MASTER AND SERVANT—WORKMAN'S COMPENSATION—ACCIDENTS ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—The deceased, a carpenter, was employed by defendants to work on a barge which was lying at the foot of a private dock, not open to the public, but over which the defendants and their employees had leave to pass to work. The defendants had no control over the dock. The deceased after finishing his day's work started, on a dark night, along the quay to the dock gates, but fell off and was drowned. *Held:* Since deceased was on the dock solely by virtue of his contract of service the accident arose out of and in the course of his employment. John Stewart & Son, Limited, v. Longhurst, 1917 Appeal Cases 249 (Eng.).

It has been held by the English courts that to be an accident arising "in the course of employment" it must occur while the employee is doing what a man so employed might reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time. Moore v. Manchester Liners, Limited, 3 B. W. C. C. 527 (Eng. 1910); Chapman v. Owners of S. S. "John W. Pearse," 9 B. W. C. C. 224 (Eng. 1916).

The employment of a workman is not limited to the moment when he reaches the place where he is to begin his work and to the moment when he

ceases his work. It must include a reasonable interval of time and space. Gane v. Norton Hill Colliery Company, 2 B. W. C. C. 42 (Eng. 1909).

The English courts have held that an accident does not "arise out of the employment," unless the risk was one made special to the employee because of the nature of the employer's business. Slade v. Taylor, 1915 W. C. & Ins. R. 53 (Eng.); Harder v. A. E. Gains & Sons, 1916 W. C. & Ins. R. 99 (Eng.).

Where an employee was injured going out to lunch by way of stairs not controlled by her employer, but which were the only means of access to her place of work, it was held that the accident arose out of and in the course of employment, as it was a necessary incident of the employee's employment to use the stairs. Sundine's Case, 218 Mass. 1 (1914).

In most decisions in the United States construing the phrase "an accident arising out of and in the course of employment," the courts have adopted the same construction as the English courts. Bryant, *et al.*, v. Fissel, 86 Atl. 458 (N. J. 1913); Kunze v. Detroit Shade Tree Company, 158 N. W. 851 (Mich. 1916); Stacy's Case, 225 Mass. 174 (1916); Hillman v. Manning Sand Paper Co., 162 N. Y. S. 335 (1916).

In relation to accidents "arising out of the employment" the courts have held that an accident arises "out of the employment" when it is something, the risk of which might have been contemplated by a reasonable man when entering the employment, as incidental to it. Kimbol v. Industrial Accident Commission, 160 Pac. 150 (Cal. 1916); Stacy's Case, *supra.*

MASTER AND SERVANT—RAILWAY EMPLOYEE'S INJURY—FEDERAL EMPLOYERS' LIABILITY ACT—"EMPLOYEE"—The S. Railroad under an agreement with the defendant railroad, hired and maintained a signal operator at a crossing of the two roads. The operator was charged with the care of the signals of both roads. He was killed by the defendant's train while attending to lights used exclusively by the defendant. *Held:* The deceased was an employee of the defendant under the Federal Employers' Liability Act. Atl. Coast Line Ry. Co. v. Tredway's Adm'x, 93 S. E. 560 (Va. 1917).

Previous to the principal case only one case involving the definition of "employee" has arisen under this act. A "student fireman" receiving no compensation, but permitted to ride on an engine to learn the work, was held not an employee when otherwise engaged on the train; the *dicta* of the court intimate that he was an employee while so engaged. Chesapeake, *etc.*, Ry. Co. v. Harmon's Adms., 189 S. W. 1135 (Ky. 1916).

The principal case treats "employee" as synonymous with "servant," but the reasoning of the court in determining that the deceased was an employee of the defendant is rather confused. The decision is based principally upon the ground that the operator was performing a non-assignable duty of the railroad company, and therefore its servant. However, the cases cited by the court in support of this decision are cases determining a party's liability to third persons for the breach of an absolute duty to them. Clearly this doctrine does not apply here where the question of liability does not arise, but where the sole question is whether the relation of master and servant exists as between the person under the duty and the person per-

forming it for him. It is true that in some cases where an employee of one party also performed services for a second, and by his negligence caused a breach of a non-assignable duty owed by the second party to third persons, the courts, in dealing with the question of liability, have loosely stated that the employee must be taken to be the servant of him for whom he performed the duty. Wabash, *etc.*, Ry. Co. v. Peyton, 106 Ill. 534 (1883); Murray v. L. V. R. Co., 66 Conn. 512 (1895); Floody v. G. N. Ry. Co., 102 Minn. 81 (1907). But this conclusion does not follow, because such a relation is not a necessary incident to the liability of the party owing the duty; a person under such an obligation is none the less liable when the breach is caused by an independent contractor. Murray v. Currie, L. R. 6 C. P. 24 (1870); Bonaparte v. Wiseman, 89 Md. 12 (1879); Standard Oil Co. v. Anderson, 212 U. S. 215 (1909). Furthermore such statements are *dicta*, and inapplicable to the principal case.

Upon a state of facts very similar to those of the principal case, am employee serving two parties has been held not a fellow-servant of the employees of the party whom he served specially, in the absence of the element of control. Swainson v. N., *etc.*, R. Co., 3 Ex. Div. 341 (1878); Erickson v. Kansas City, *etc.*, R. Co., 71 S. W. 1022 (Mo. 1903).

PROPERTY—EASEMENTS—SCOPE OF GRANT—The grantee of a right of way crossed a stream in the line of his easement by means of a ford for twenty years. *Held:* He was not thereafter precluded from erecting a bridge over the stream. Hammond v. Hammond, 101 Atl. 855 (Pa. 1917).

It is a well-established principle that the conveyance of an easement gives the grantee all such rights as are incidental or necessary to the reasonable and proper enjoyment of the easement. Nichols v. Peck, 70 Conn. 439 (1898); Weed v. McKey, 37 Misc. Rep. 105 (N. Y. 1902). What is considered a proper and reasonable use must of necessity be left to the jury as a question of fact. Chapman v. Newmarket Mfg. Co., 74 N. H. 424 (1908).

It has been held that the grantee may fill in a depression so as to make the way passable, White v. Eagle & Phoenix Hotel Co., 34 Atl. 672 (N. H. 1894), or he may remove a part of the way to make it correspond with the new grade of the highway, Nichols v. Peck, *supra*, or under a grant of a convenient way for carrying coal, he may lay a framed wagon way, Senhouse v. Christian, 1 T. R. 560 (Eng. 1787). However, in each of these cases the alteration was required to enable the grantee to use the easement. In the principal case the use of the ford for twenty years seems to indicate that the erection of a bridge was not necessary to enable the grantee to enjoy the easement. This case may be supported, however, by the ruling in Dand v. Kingscote, 6 M. & W. 174 (Exch. 1840), where the court held that the grantee might build a railroad over his right of way, sixty years after the easement was granted, since he could thus more fully carry out the purpose for which the easement was created. However this is *contra* to the weight of authority and the test seems to be whether or not the alteration is so substantial as to result in a different servitude. Allen v. San José Land & Water Co., 92 Cal. 138 (1891); Oliver v. Agasse, 132 Cal. 297 (1901). So an easement to carry water in an open ditch may not be

altered by placing a pipe line in the ground in lieu thereof. Allen v. San José Land & Water Co., *supra*. On the ground that it is just as illegal to force another to receive a benefit as it is to make him submit to an injury, it is well settled that no material change may be made in an easement by either party without the other's consent, although the result will be beneficial to both parties. Johnston v. Hyde, 32 N. J. Eq. 446 (1880); Harvey v. Crane, 85 Mich. 316 (1891).

TORTS—INTOXICATING LIQUORS—ACTION BY WIFE FOR SALE OF LIQUOR TO HUSBAND—MEASURE OF DAMAGES—In an action by a wife against a saloon keeper for sale of intoxicating liquor to husband. *Held:* The husband's earning capacity as a sober man at the time of the first sale by the defendant complained of and not his salary or earning capacity as a sober man prior thereto, is the basis for measuring the husband's impaired earning capacity. Strong v. Schaffer, 163 N. W. 1035 (S. D. 1917).

In Hackett v. Smelsey, 77 Ill. 109 (1875), it was held that the making of a drunkard of the plaintiff's husband was but a single injury and that the defendants contributed to the result that produced the injury—that made her husband a drunkard. O'Halloran v. Kingston, 16 Ill. App. 659 (1885); Weiner v. Edmiston, 24 Kan. 147 (1880), *accord*. Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it. Clinger v. C. & O. R. R., 128 Ky. 736 (1908); Day v. Louisville Coal Co., 60 W. Va. 27 (1906). In Strauhal v. Asiatic Steamship Co., 48 Oregon 100 (1906), it was held that it is not necessary that the tortfeasors be acting together or in concert, it is sufficient if their concurring negligence occasions the injury. Each of several persons who sell, barter or give intoxicating liquors to one in the habit of becoming intoxicated, thereby contributing in part to his intoxication, is liable to his wife or other persons depending upon him for support to the full extent of the injury. Fountain v. Draper, 49 Ind. 441 (1875).

The only reliable means of actually ascertaining the injury to the means of support is to consider what the husband worked at and what wages he received therefor prior to becoming addicted to the excessive use of intoxicants, as compared with what he earned after becoming a drunkard. Flynn v. Fogarty, 106 Ill. 263 (1883). In accord with this view, it has been held that the plaintiff may show what work had been done by the drunkard previous to the time when he became such, in order to determine what injury had resulted. The injury is the loss of earning power actually due to the drunkenness; and this is ascertained by comparing the wages earned before the person became a drunkard, with the wages he now earns. That a long period of time has intervened is immaterial. Thomas v. Dansby, 74 Mich. 398 (1889); Weiser v. Welch, 112 Mich. 134 (1897).

TORTS—LIABILITY FOR ACCIDENTAL FIRE—ACT OF GOD—The plaintiff entrusted books to a bookbinder to be bound, under a contract to deliver them when bound, as and when required by the plaintiff. The plaintiff having required the defendant to deliver the whole of the books then bound, the defendant failed to deliver them within a reasonable time and they were sub-

sequently burnt in an accidental fire on his premises. *Held:* The bookbinder was liable in damages for the loss of the books, and was not absolved by the Fires Prevention (Metropolis) Act of 1774, which exempted property owners from any liability for such fires. Shaw & Co. v. Symmons & Sons, 1 K. B. 799 (Eng. 1917).

This case denies the defendant's right to claim exemption from an act of God provided for by statute, contract or the common law.

In "deviation" cases in England the courts have deprived the defendant of exemption from loss caused by an act of God when the deviation was a breach of contract, holding that the breach was the proximate cause of the loss. Davis v. Garrett, 6 Bing. 716 (Eng. 1830). The defendant to obtain exemption must show that he was free from fault or that the loss must have occurred even had he performed the contract. Lilley v. Doubleday, 7 Q. B. D. 510 (Eng. 1881); Royal Exchange Shipping Co. v. Dixon & Co., 12 App. Cases 11 (Eng. 1887).

It has been held where defendant's ship was torpedoed and sunk by a submarine, while on a deviation from the route prescribed by the bill of lading, that the defendant was liable for the loss of the plaintiff's goods since the deviation was a contractual breach, and since he was unable to show that the loss must have occurred even had the ship not deviated. Morrison & Co., Ltd., v. Shaw, Savill, and Albion Co., 2 K. B. 783 (Eng. 1916).

It is possible, however, to explain the "deviation" cases on the theory that as the plaintiff's insurance policy is avoided because of the deviation, Elliott v. Wilson, 4 Brown, P. C. 470 (Eng. 1776), the defendant should be substituted in place of the insurer.

As applied to railroads the question of exemption by an act of God where there was a contractual breach, it seems, has never come before the English courts. From the close analogy existing between the English cases, involving the question, and the cases of railroads in the United States, it would seem that the English courts would hold the breach of the contract to be the proximate cause of the loss and deny exemption to the railroad.

Some American courts have held that the carrier is liable for a loss caused by an act of God after a breach of a contract of shipment, unless he could show that the loss must have occurred at all events. Michaels v. N. Y. C. R. R. Co., 30 N. Y. 564 (1864); Wald v. P. C. C. & St. L. R. R. Co., 162 Ill. 545 (1896); Bibb Broom Co. v. A. T. & S. F. Ry. Co., 94 Minn. 269 (1905). Under this minority view the breach of the contract is sufficient to destroy exemption by an act of God by prolonging the risk to which the goods are exposed.

The majority view of the United States holds that the act of God is the proximate cause of the loss and breach of the contract of the carrier the remote cause. The defendant is not liable for the loss unless he was negligent in caring for the goods after the danger arose. Morrison v. Davis & Co., 20 Pa. 171 (1852); Denny v. N. Y. C. R. R. Co., 13 Gray 481 (Mass. 1859). This rule governs common carriers as it does other occupations and pursuits. International & G. N. R. Co. v. Bergman, 64 S. W. 999 (Texas 1901); Moffat Commission Co. v. Union Pacific Co., 113 Mo. App. 544 (1905). The doctrine of Morrison v. Davis & Co., and Denny v. N. Y. C. R. R. Co., *supra*, has been expressly affirmed and followed by the Supreme

Court of the United States. Railroad Company v. Reeves, 10 Wallace 176 (U. S. 1869); St. Louis, *etc.*, Ry. Co. v. Commercial Union Insurance Co., 139 U. S. 223 (1890).

WILLS—EXECUTION—ATTESTATION—The testatrix could speak only the Greek language, which two of the three attesting witnesses to her will could not understand. The testatrix' declaration that the instrument was her will, was made in the Creek language and interpreted by one witness for the other two. *Held:* The declaration was made to only one attesting witness and the attestation was not sufficient. Hill v. Davis, 167 Pac. 465 (Okl. 1917).

Unless required by statute, a declaration by the testator to the attesting witnesses that the instrument is his will, is not necessary at all. Canada's Appeal, 47 Conn. 450 (1879); Gable v. Rauch, 50 S. C. 95 (1897); *In re* Claflin's Will, 75 Vt. 19 (1902); Historical Society v. Kelker, 226 Pa. St. 16 (1909). But in some jurisdictions, statutes require such a publication. Baskin v. Baskin, 36 N. Y. 416 (1867); Keyl v. Feuchter, 56 O. St. 424 (1897); Clark v. Clark, 64 N. J. Eq. 361 (1902). The rule has been laid down in broader terms that all that is necessary for publication is that the testator shall make known clearly to the witness "in any way by which one mind can communicate with another" that the writing is his will. Robbins v. Robbins, 50 N. J. Eq. 742 (1893); Remsen v. Brinkerhof, 26 Wend. 325 (N. Y. 1841), *semble.* In accordance with this view mere acquiescence by the testator in the statements or requests of another acting in his behalf has been held sufficient. Gilbert v. Knox, 52 N. Y. 125 (1873); Lacey v. Dobbs, 61 N. J. Eq. 575 (1901).

The law as regards publication through an interpreter is unsettled, because of the rarity of decisions on the point. It has been held that a communication through a third person must be made "so that the attesting witnesses may know of their own knowledge that what was said or done on behalf of the testator was assented to *by him.*" Burke v. Nolan, 1 Dem. Sur. 436 (N. Y. 1883). There have also been *dicta* to the effect that attestation through an interpreter would be insufficient. Stein v. Wilzinski, 4 Redf. Sur. 441 (N. Y. 1880). But *contra* to this, in a recent case, almost identical on its facts with the principal case, the court, looking to the general effect in law of the employment of an interpreter, held such attestation sufficient. Bell v. Davis, 155 Pac. 1132 (Okl. 1916). The principal case, decided by the same court, expressly overrules the decision of Bell v. Davis, *supra,* relying very largely on the case of Stein v. Wilzinski, *supra,* and refusing to consider as at all analogous cases of wills made in a language not understood by the testator. The principal case fixes the law on this point for the present.