RECENT CASES.

BILLS AND NOTES—HOLDER IN DUE COURSE—GAMBLING CONSIDERATION.—Plaintiff, a holder in due course of a check, sued the defendant as maker thereof. The defendant pleaded that the check, having been given in payment of a gambling debt, was void under a local statute. *Held:* The plaintiff could not recover. Larschen v. Lantzes, 189 N. Y. Supp. 137 (1921).

Before the N. I. L. local statutes were enacted in many states declaring void instruments given in payment of a gambling debt or upon usurious interest. Under these statutes even the holder in due course was denied recovery. Unger v. Boas, 13 Pa. 601 (1850). Then the N. I. L. was passed, section 57 of which provided that "the holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves." Whether this section served to supersede the prior local statutes insofar as the rights of the innocent holder are concerned, has been a source of considerable conflict.

Prompted by the desire to facilitate the free circulation of negotiable paper, and to protect the innocent purchaser as against the maker—a party to the illegality—some courts held that the N. I. L. changed the existing law so as to make a personal defense that which had previously been an absolute defense under the local statute. Wirt v. Stubblefield, 17 App. D. C. 283 (1900); Klar v. Kostiuk, 65 Misc. Rep. 199, 119 N. Y. Supp. 683 (1909). According to the weight of authority, however, where the local statute is unquivocal and expressly declares such an instrument *void,* it is void in its inception, and can gather no vitality, no matter what its subsequent history. Alexander and Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353 (1906); Twentieth St. Bank v. Jacobs, 74 W. Va. 525, 82 S. E. 320 (1914); Martin v. Hess, 23 Pa. Dist. R. 195 (1914). It is generally agreed that the holder in due course may recover upon an instrument which arose from such a transaction as to be merely *illegal,* not void. Samson v. Ward, 147 Wis. 48, 132 N. W. 629 (1911); Farmer's Savings Bank v. Reed, 192 Mo. App. 344, 180 S. W. 1002 (1916).

The main purpose of the N. I. L. was to obtain uniformity in commercial legislation. To accomplish this object fully the State legislatures should have repealed inconsistent local statutes. Where, however, they have failed to do so, it would seem necessary to apply the well-recognized rule of law that when a certain state of facts is within the terms of both a definite statute and a general rule of law embodied in another statute, the specific statute will prevail. In such a case the local statutes are merely regarded as an exception to the general rule contained in section 57 of the N. I. L.

The New York Courts, while not expressly overruling Klar v. Kostiuk, *supra,* tacitly repudiated that decision in a recent case. Sabine v. Paine, 223 N. Y. 401, 119 N. E. 849 (1919). Thus it would seem that the court in the instant case rendered a decision which is supported by the great weight of authority and reason.

BILLS AND NOTES—PAYEE NOT A HOLDER IN DUE COURSE.—The defendant gave a note for a subscription to stock in a corporation, but made it payable to the plaintiff company, which accepted it in part payment of the

purchase of its business by the corporation. The defense was that the note was induced by fraud on the part of the agent of the corporation. *Held:* The plaintiff cannot recover, since a payee cannot be a holder in due course. Britton Milling Company v. Williams, 184 N. W. 265 (S. D. 1921).

The general common-law rule was that a payee could be a holder in due course. Russel v. Langstaffe, 2 Doug. 514 (Eng. 1790); Johns v. Harrison, 20 Ind. 317 (1863). Under the Bills of Exchange Act in England, however, a contrary rule was laid down in the case of Herdman v. Wheeler L. R. (1902), 1 K. B. 361. But in a later case an English court allowed recovery by a payee on the theory that the maker was estopped from setting up that a third party had filled up the blanks in excess of his authority. Lloyd's Bank v. Cooke, L. R. (1907), 1 K. B. 794. It is believed that the latter case has overruled Herdman v. Wheeler, *supra,* and that the present English law is what it was before the adoption of the Bills of Exchange Act. 59 U. OF PA. L. REV. 477.

The cases in America under the N. I. L. have varied somewhat, but the tendency is to protect the payee and allow him the rights of a holder in due course. Liberty Trust Co. v. Tilton, 217 Mass. 462, 105 N. E. 605 (1914); Brown v. Rowan, 91 Misc. Rep. 220, 154 N. Y. Supp. 1098 (1915); *Ex parte* Goldberg & Lewis, 191 Ala. 356, 67 So. 839 (1914); Johnston v. Knipe, 260 Pa. 504, 105 Atl. 705 (1918). The leading case adopting a contrary interpretation of the N. I. L. is Van der Ploeg v. Van Zuuk, 135 Iowa 350, 112 N. W. 807 (1907). The court in that case, however, based its decision mainly on the English case of Herdman v. Wheeler, *supra.* For a criticism of these two cases, see Brannan, The N. I. L., Sec. 14, C., and 59 U. of Pa. L. Rev. 477.

In the principal case, the court has followed the cases of Van der Ploeg v. Van Zuuk and Herdman v. Wheeler, without considering the interpretation given to the English Bills of Exchange Act and the N. I. L. by the English and American courts since then. Its decision is based on Section 52 (4) of the N. I. L., which requires a "holder in due course" to receive an instrument by "negotiation," and interprets this clause to exclude a payee.

It is submitted that this construction is not warranted. Section 30, N. I. L., defines an instrument as being negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. Section 191, N. I. L., expressly defines a holder as "the *payee* or indorsee of a bill or note, who is in possession of it, or the holder thereof." Since Section 30 abstains from prescribing that the transferor must be a holder, it would seem that it was not intended that the N. I. L. was to alter the common-law. Liberty Trust Company v. Tilton, *supra*; Brannan, The N. I. L., Sec. 52, A.

CONSTITUTIONAL LAW—PHYSICIANS AND SURGEONS—UNCONSTITUTIONALITY OF STATUTE VESTING BOARD WITH ARBITRARY POWER TO GRANT OR REFUSE LICENSES TO PRACTISE DENTISTRY.—A Washington statute made it unlawful for any person to practise dentistry unless he should file an application with a board of examiners, for an examination, and present evi-

dence of good moral character and a diploma from some dental college in good standing. Plaintiff took the examination three times, but was informed on each occasion that he had failed, without any record or information as to the result of the examinations being given. *Held:* The statute is void, since it is not an exercise of the police power of the state, but an arbitrary and unwarranted interference with the constitutional right to carry on a lawful business. Noble v. Douglas, 274 Fed. 672 (D. C. 1921).

It is well settled that a state has the right, for the protection of the public, to prescribe such reasonable conditions upon the right to practise professions requiring special knowlege or skill, as will exclude those who are unfitted. Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623 (1888). A requirement that an applicant be a graduate of a dental college is not unreasonable. State *ex rel.* Smith v. Board of Dental Examiners, 31 Wash. 492, 72 Pac. 110 (1903). The practice of such professions, even by persons duly admitted, is subject to regulation in the interest of the public welfare. Bandel v. New York, 204 N. Y. 683 (1910).

But the complaint in the principal case is that this was not a legislative regulation of the practice of dentistry, but merely an attempt on the part of the legislature to delegate to a board of examiners the right to regulate. In sustaining this contention, the court emphasized the failure of the statute to lay down a rule of action for the board to follow, which would render capable of proof the question whether the board had, in a given case, obeyed such rule. It is also pointed out that there is no regulation concerning the subjects upon which the applicants are to be examined, nor are there any tests for the determination of their fitness.

An examination of cases dealing with similar subjects shows a uniform tendency, on the part of the various legislatures, to define more or less fully the manner, extent and subjects of state board examinations. Dent v. West Virginia, *supra*. The Pennsylvania dental examination act provides in detail what the subjects of examination shall be and the provisions for ascertaining the marks of the various applicants. Act of May 7, 1907, P. L. 161.

The decision of the court, it is submitted, is well justified, since there is no method of determining whether or not a wrong had been done. A statute of this nature, which does not require examinations to be uniform as to all applicants would seem to be clearly contrary to the provisions of the Fourteenth Amendment. It is not a case of an abuse of powers lawfully conferred, but the abuse and wrong consist in undertaking to confer unlimited and undefined powers. Dobbins v. Los Angeles, 195 U. S. 223, 25 U. S. Sup. Ct. 18, 49 L. Ed. 169 (1904).

CONSTITUTIONAL LAW—PROVISIONS OF FOURTH AMENDMENT INAPPLICABLE TO UNLAWFUL SEIZURES BY PRIVATE PERSONS.—Private papers, stolen from the petitioner, subsequently came into the possession of federal prosecuting authorities who intended to use them as evidence against the petitioner in a federal prosecution. Petitioner sought the return of the stolen papers on the ground that his rights under the Fourth Amendment had been violated. *Held:* Petition denied on the ground that the Fourth Amendment applies solely to governmental action and not to unlawful acts of private persons in

which the government has no part. Burdeau v. McDowell, 41 U. S. Sup. Ct. 574 (1921).

It has been uniformly held that the inhibitions established by the original amendments to the Constitution operate on the National Government alone and impose no limitation upon the powers of the states. Barron v. Baltimore, 7 Pet. 243 (U. S. 1833); Spies v. Illinois, 123 U. S. 131 (1887). Furthermore, the Fourth Amendment to the Federal Constitution, affording security from unreasonable searches and seizures, has been adopted by many states as a part of their own constitutions; and in construing it as such, state courts have held that it effects a limitation upon the power of the state alone and has no reference to unauthorized acts of private persons. Commonwealth v. Dana, 2 Metc. 329 (Mass. 1841); Gindrat v. The People, 138 Ill. 103, 27 N. E. 1085 (1891).

This view supports the purpose for which the Fourth Amendment to the United States Constitution was adopted. The amendment was designed to prevent the issuance of general warrants and writs of assistance, and to make impossible a recurrence of the persecutions that resulted therefrom under the cloak of judicial authority; but it was not intended to afford protection against the unlawful acts of private persons.

Although there is a recognition of the Federal Courts' jurisdiction over articles improperly seized by agents of the government, and such articles will be returned to their owner upon petition made before trial, U. S. v. Mills, 185 Fed. 318 (C. C. 1911); U. S. v. McHie, 194 Fed. 894 (D. C. 1912); such jurisdiction is exercised because the articles have been unlawfully seized by government officers. U. S. v. McHie, *supra;* U. S. v. Abrams, 230 Fed. 313 (D. C. 1916).

Although once decided by the Circuit Court of Appeals, in Bacon v. U. S., 97 Fed. 35 (1899), the question presented in the principal case has not before been adjudicated by the Supreme Court; but the decision represents merely a specific application of well settled principles and is fully consistent with the earlier decisions.

CONSTITUTIONAL LAW—SEIZURE UNDER SEARCH WARRANT OF PAPERS OF EVIDENTIAL VALUE ONLY HELD A VIOLATION OF THE FOURTH AMENDMENT.—Two contract forms, one executed by defendant and the other unexecuted, and a bill to defendant by an attorney for professional services, were seized by government officials under a properly issued search warrant. Defendant sought the return of the papers on the ground that his rights under the Fourth Amendment had been violated. *Held:* Seizure of papers "of evidential value only" is a violation of the Fourth Amendment, and such papers must be returned on petition since their admission in evidence would violate the Fifth Amendment. Gouled v. U. S., 41 U. S. Sup. Ct. 261 (1921).

The United States Supreme Court, and the great majority of the state courts, formerly recognized the principle that evidence would not be excluded because it had been obtained by seizure, even though such seizure had been itself unlawful. Adams v. N. Y., 192 U. S. 585 (1904); Commonwealth v. Dana, 2 Metc. 329 (Mass. 1841); Gindrat v. The People, 138 Ill. 103, 27 N. E. 1085 (1891); Ann. Cas., Vol. 15, p. 1205, Note; *Id.*, Vol. 37, p. 1182,

Note; Greenleaf's Evidence, Vol. 1, Sec. 254a; Wigmore's Evidence, Vol. 4, Sec. 2264. The reason for this rule was that the court would consider only the matter immediately before it, and, if the evidence were competent, would not enter into the trial of a collateral issue to ascertain how it had been obtained. Legatt v. Tollervey, 14 East 302 (Eng. 1811); Williams v. The State, 100 Ga. 511, 28 S. E. 624 (1897). In the light of such decisions it is not difficult to understand the recognition by a Canadian court of the propriety of "setting a thief to catch a thief." Rex v. Honan, 26 Ont. L. R. 484 (1912).

A variation from this strict rule was first indicated by the United States Supreme Court when, speaking *obiter,* it suggested that the right protected by the Fourth Amendment would be infringed by a seizure, whether legal or illegal, of which the subject matter, irrespective of testimonial process, was intended to be used in evidence, on the ground that the admission in evidence of such matter, if incriminatory, would violate the right protected by the Fifth Amendment. Boyd v. U. S., 116 U. S. 616 (1885). This view, although adopted by a few state courts, State v. Glamon, 73 Vt. 212, 50 Atl. 1097 (1901), has been refused recognition by the majority of them, People v. Le Doux, 155 Cal. 535, 102 Pac. 517 (1909); Gindrat v. The People, *supra,* and the United States Supreme Court in one instance declined to recognize its validity. Adams v. N. Y., *supra.*

In 1914, however, the United States Supreme Court adopted the view expressed by the Court in the Boyd case and reversed a decision of the District Court for the Western District of Missouri on the ground that letters taken from the defendant without a valid search warrant were inadmissible in evidence against him and should have been returned to him in accordance with his petition filed before trial. Weeks v. U. S., 232 U. S. 383 (1914). This decision has since been followed by all federal courts, U. S. v. Abrams, 230 Fed. 313 (D. C. 1916); U. S. v. Friedberg, 233 Fed. 313 (D. C. 1916); Silverthorne Lumber Co. v. U. S., 251 U. S. 385 (1920), and furthermore in the principal case matter improperly seized was ordered returned, although the petition was made during the trial, since the defendant did not know before trial that it was to be used against him.

The doctrine of the principal case represents an extension of the principles of previous decisions. The papers in question were held to be inadmissible on the ground that the public could be interested in them "only to the extent that they might be used as evidence." It is submitted that such is as valid a ground for admitting them as is that on which any other incriminating matter, such as stolen goods, Langdon v. The People, 133 Ill. 382, 24 N. E. 874 (1890), or lottery tickets, Commonwealth v. Dana, *supra,* is admitted; and it is difficult to see how the Fourth Amendment, or the Fifth, which has been construed as supplementing it, would be violated by so doing.

CRIMINAL LAW—ACQUITTAL OF MURDER NOT A BAR TO INDICTMENT FOR INVOLUNTARY MANSLAUGHTER.—The defendant was acquitted on an indictment for murder. He was subsequently indicted for involuntary manslaughter to which he interposed a special plea of former acquittal. The

Commonwealth demurred to this plea, and the demurrer was sustained. *Held:* The judgment sustaining the demurrer was correct. Commonwealth v. Greevy, 114 Atl. 511 (Pa. 1921).

On appeal to the Superior Court from the decision of the lower court sustaining the demurrer, the defendant was discharged without day because, *inter alia,* judgment should have been entered in his favor on the demurrer to his special plea. Commonwealth v. Greevy, 75 Pa. Super. 116 (1920). The decision in the Superior Court was based on the theory that a general verdict of not guilty upon the trial of an indictment for murder, negatives the fact of the unlawful killing, and, therefore, the acquittal on that indictment is a bar to an indictment for involuntary manslaughter. But as was pointed out in the March, 1921, issue of this REVIEW (69 U. of Pa. L. Rev. 278), this reasoning was erroneous. In Pennsylvania there can be no conviction of involuntary manslaughter upon an indictment for murder. Walters v. Commonwealth, 44 Pa. 135 (1862); Commonwealth v. Gable, 7 S. & R. 423 (Pa. 1821). Thus, since the defendant could not have been convicted of involuntary manslaughter, the question of whether or not he was guilty of that offense was not in issue, and the verdict therefore, could not be a determination of that fact.

In the principal case, the Supreme Court clearly points out the fallacy of the Superior Court's reasoning by showing that a verdict of acquittal on an indictment for murder is merely an acquittal of a killing "feloniously, wilfully and with malice aforethought," and not an acquittal of an "unlawful killing."

LANDLORD AND TENANT—COVENANTS AGAINST ASSIGNMENT—BREACH BY OPERATION OF LAW.—A corporate lessee went into liquidation. The lease contained a covenant against assignment without the consent of the lessor, and provided for forfeiture in case the lessee went into liquidation either voluntarily or compulsorily. *Held:* The liquidator may assign the lease without the consent of the lessor. *In re* Farrows Bank, Limited, 37 Times L. R. 672 (Eng. 1921).

The courts of both England and America have for many years looked with disfavor upon covenants restraining the assignment of a lease. This attitude gave rise to the well-settled rule that such restrictions, if *general,* contemplate only a voluntary assignment by the lessee, and not an assignment by operation of law. Doe *ex dem.* Goodbehere v. Bevan, 3 M. & S. 353 (Eng. 1815); Gazley v. Williams, 210 U. S. 41, 28 Sup. Ct. 687 (1908). Thus an assignment under compulsion of law by the sheriff to an execution-creditor is not within the terms of a general covenant by the lessee. Doe v. Carter, 8 T. R. 57 (Eng. 1798); Farnum v. Hefner, 79 Cal. 575, 21 Pac. 959 (1889). Neither will an assignment by a trustee of an involuntary bankrupt work a forfeiture of the lease. Doe *ex dem.* Cheese v. Smith, 1 Marsh. 359 (Eng. 1814); *In re* Gutman, 197 Fed. 472 (D. C. 1912).

The decisions are conflicting as to whether a chancery receiver may similarly assign without breach of the covenant. A Pennsylvania case held that he could not do so. Spencer v. Darlington, 74 Pa. 286 (1873). The present tendency is to regard such an act by the receiver as a transfer by

operation of law, and hence not in violation of the covenant. Fleming v. Fleming Hotel Co., 69 N. J. Eq. 715, 61 Atl. 157 (1905). The view of the latter case seems correct, since the receiver, though assigning in the name of the lessee, does so as an officer of the court and agent of the law. Thus both authority and reason would have dictated the conclusion of the instant case had the lease contained only a general provision against assignment.

But a further clause expressly stipulated against an assignment by operation of law. A few decisions and many *dicta* declare such a provision enforceable. Roe v. Galliers, 2 T. R. 133 (Eng. 1787); *In re* Georgalas Bros., 245 Fed. 129 (D. C. 1917). In some cases, however, the courts resort to a very literal and often ingenious construction of such a prohibition to avoid enforcing it. Gazley v. Williams, *supra*. So the court in the instant case, by ignoring the stipulation in question, and treating the whole covenant as a general one, was able to sustain the right of the liquidator to assign. The reason for not enforcing a stipulation against assignments by operation of law is clear. It is a rule of law that, upon the bankruptcy of a lessee, the lease is subject to the claims of creditors and must be disposed of for their benefit. A clause contained in it which would make the very operation of the law itself cause a forfeiture of the lease and defeat the claims of the creditors, is against public policy and ought not to be enforced. It is submitted, therefore, that the conclusion of the English court was justified.

SPECIFIC PERFORMANCE—UNDISCLOSED PRINCIPAL—CONTRACT UNDER SEAL. —The plaintiff, as undisclosed principal, sued to obtain specific performance of a contract under seal in which the defendant had agreed to lease certain premises to the plaintiff's agent. The defendant demurred. *Held:* The demurrer was overruled. Lagumis v. Gerard, 190 N. Y. Supp. 207 (1921).

An obvious corollary to the old common law rule that none but the parties to a sealed instrument could have any rights or be subject to any liabilities thereunder is that a principal who is not named in a sealed instrument as a party cannot sue or be sued thereon. Appleton v. Binks, 5 East 148 (Eng. 1804); Quigley v. DeHass, 82 Pa. 267 (1876); New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381, 21 N. E. 947 (1889); Elliott v. Brady, 192 N. Y. 221, 85 N. E. 69 (1908). This rule, still generally accepted where the common law significance of a seal has not been destroyed by statute, is recognized and frankly departed from in the principal case. To quote the court: "There is and can be no doubt that heretofore in this state the rule has been as defendant contends. But there is no reason for continuing to follow that rule." The court further calls attention to the fact that the recent decisions in New York indicate a tendency to disregard the effect of a seal. McCreery v. Day, 119 N. Y. 1, 23 N. E. 198 (1890); Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13 (1895); Harris v. Shorall, 230 N. Y. 343, 130 N. E. 572 (1921).

Without questioning the practical justice of the decision or attempting to uphold the value of the sanctity of the seal, one cannot but be reminded of the quotation from Lord Coke to the effect that, "The knowne certaintie of the law is the saftie of all."

TRUST FOR CHARITY—INDEFINITENESS OF OBJECT.—The testatrix left real estate in trust, the income to be used for religious and philanthropic work in Mansfield, Ohio, especially among children and young people. *Held:* The bequest was void for uncertainty. Dirlam v. Morrow, 131 N. E. 365 (Ohio, 1921).

Indefiniteness and uncertainty as to purpose do not *per se* render charitable bequests invalid. On the contrary, those very qualities, to a greater or less extent, are the chief characteristics of charitable trusts. It is only required that the general purpose be clearly stated and that there be sufficient definiteness to enable the trust to be carried out. Bispham's Equity, Sec. 116; John v. Smith, 91 Fed. 827 (C. C. 1899); Harrington v. Pier, 105 Wis. 485, 82 N. W. 345 (1900). Consequently a gift for religious or philanthropic purposes is usually held to be a valid charitable gift. The following examples may be mentioned: "For foreign missions," Bartlet v. King, 12 Mass. 537 (1815); "to the cause of Christ for the benefit and promotion of true evangelical piety and religion," Going v. Remedy, 16 Pick. 107 (Mass. 1834); "to the advancement of the Christian religion," Miller v. Teachout, 24 Ohio 525 (1874); "in the purchase and distribution of such religious books as the trustees shall deem best," Simpson v. Welcome, 72 Me. 496 (1881); "to aid in propagating the holy religion of Jesus Christ," Hinckley v. Thatcher, 139 Mass. 477, 1 N. E. 840 (1885); "for the relief of the resident poor," Webster v. Morris, 66 Wis. 366 (1886); "for the promotion of art," Almy v. Jones, 17 R. I. 265, 21 Atl. 616 (1891); "for the boys and girls of California," Ellert v. Cogswell, 113 Cal. 129, 45 Pac. 270 (1896); "for distributing the Bible or Word of God to the destitute of the earth," Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 S. W. 739 (1909); "for the education of poor children," Hitchcock v. Board of Home Missions, 259 Ill. 288, 102 N. E. 741 (1913).

On the other hand, the following bequests were held invalid for uncertainty of object: "To foreign missions and the poor saints," Bridges v. Pleasants, 4 Ire. Eq. 26 (N. C. 1845); "for the support of indigent pious young men preparing for the ministry in New Haven," White v. Fisk, 22 Conn. 31 (1852).

The principal case is clearly *contra* to the general rule and, it seems, *contra* to the decisions of the same court, not only in the case of Miller v. Teachout, *supra,* but in the case of Palmer v. Oiler, 131 N. E. 363 (1921), decided practically simultaneously with the principal case, in which a bequest "to be devoted to the needy and poor women" was upheld.