RECENT CASES.

ADMIRALTY—STATE DEATH ACT—CONTRIBUTORY NEGLIGENCE.—Libel by the administrator of a deceased stevedore to recover damages for his wrongful death under the statute of Maine (R. S. 1916, c. 92, sec. 9) granting a right of action in such cases. The contributory negligence of the deceased is set up as a defense. *Held:* Contributory negligence is not a bar to recovery. *The Devona*, 1 Fed. (2d) 482 (D. C. 1924).

The court applied the usual admiralty rule that the libellant's contributory negligence should work only in mitigation of damages, and not as a complete bar to a recovery, as at common law. It based its decision primarily on the language in *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917), and *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372 (1918). In the *Jensen* case it was said: "And plainly, we think, no such (state) legislation is valid if it . . . works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Prior to the *Jensen* case there had been many decisions on the validity and effect in admiralty of the state death acts. In all of them it had been held that the acts were valid and that if the statute itself made contributory negligence a bar to a recovery it was effective. *The A. W. Thompson*, 39 Fed. 115 (D. C. 1889); *The City of Norwalk*, 55 Fed. 98 (D. C. 1893); *Gretschmann v. Fix*, 189 Fed. 716 (D. C. 1911). And it had been accepted also that since the body creating the right was accustomed to regard contributory negligence as a defense, it was intended to be a defense here also, although not specifically stated in the particular statute. *Robinson v. Detroit Nav. Co.*, 73 Fed. 883 (C. C. A. 1896); *Regina v. Dunlop*, 128 Fed. 784 (D. C. 1904); *Quinette v. Bisso*, 136 Fed. 825 (C. C. A. 1905). Similarly, the limitations as to the time in which the action must be brought have been applied instead of the admiralty doctrine of laches. *The Harrisburg*, 119 U. S. 199 (1886); *International Nav. Co. v. Lindstrom*, 123 Fed. 475 (C. C. A. 1903); *Williams v. Quebec S. S. Co.*, 126 Fed. 591 (D. C. 1903). One case has even applied the general statute of limitations. *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921). But see *The Wm. M. Hoag*, 69 Fed. 742 (D. C. 1895), where even a specific limitation was ignored. And, although such torts usually afford an action *in rem* in admiralty, the admiralty rule is not applied to actions brought under the state acts, and they are not construed to give anything but a right *in personam* unless they expressly give the right *in rem*. *The Corsair*, 145 U. S. 335 (1892); *The Hamilton*, 207 U. S. 398 (1908); *The Sammanger*, 298 Fed. 620 (D. C. 1924). In the cases on the state laws giving liens for supplies furnished in the home port the limitation expressed in the act granting the right has also been applied. *The Edith*, 94 U. S. 518 (1876); *H. N. Emilie*, 70 Fed. 511 (D. C. 1895); *James G. Swan*, 106 Fed. 94 (D. C. 1901). But there appears to be an impression that the general statute of limitations is inapplicable. *Boon v. Hornet*, Crabbe 426 (D. C. 1841), *semble*; 2 PARSONS ON SHIPPING, 325. *Quære*, as to the distinction.

It is submitted that the *Jensen* case has not affected the law on this matter. The language quoted *supra* was intended to apply to matters of

general admiralty cognizance, and not to certain other points as to which it was recognized the states could legislate, and which were discussed in reaching the rule enunciated. In *Western Fuel Co. v. Garcia, supra,* the Supreme Court subsequently stated that the death cases did not come within this rule and not only enforced the death statute but applied to it the general limitations of the code of civil procedure. Similarly, in *O'Brien v. Luckenbach S. S. Co.,* 293 Fed. 170 (C. C. A. 1923), the state's rule of contributory negligence, and in *The James McGee,* 300 Fed. 93 (D. C. 1924), the state's rule on the presumptions of negligence were applied. And in *Nolte v. Hudson Nav. Co.,* 297 Fed. 758 (C. C. A. 1924), the court followed the state limitation on liens when applying the Merchant Marine Act of 1920, 41 STAT. AT L. 250, sec. 30, which provides that the previous rules in regard to laches shall be unaffected by it. Thus it seems to be still recognized that the states can give rights of action in certain matters in admiralty and can prescribe their limits. If they have the power to limit them at all, they can do it equally well whether the restriction be in the specific act which gives the right or in some other rule of substantive law. It is submitted that the state's common law rule should have been applied here and that the contributory negligence should have been a complete defense to the action.

BANKRUPTCY—SURETYSHIP—EXTENT OF SUBROGATION.—A creditor held a note of the principal debtors, indorsed by five sureties. The creditor recovered a judgment against Thompson, one of the surety-indorsers. The creditor then compelled another surety, H, to pay the debt in full. One of the sureties was insolvent and Thompson was in bankruptcy. H filed a claim against the bankrupt's estate for the full amount he had paid and claimed dividends on that amount; the referee denied this claim and held that H was entitled to prove a claim on one-fourth of the amount he had paid. The court reversed the referee, holding that the paying surety may make proof against the estate of his co-surety exactly as the creditor could whose debt he paid, being limited in recovery, however, to the ratable part for which the surety is liable. *In re Thompson,* 300 Fed. 215 (D. C. 1924).

The cases recognize that a paying surety is entitled to be subrogated to all the rights and remedies of the creditor as against his co-sureties, in precisely the same manner as against the principal debtor. *Liddcrdale v. Robinson.* 2 Brock. 159 (U. S. C. C. 1824), affirmed in 12 Wheat. 594 (U. S. 1827); *Croft v. Moore,* 9 Watts 451 (Pa. 1840). But when we come to the extent of the subrogation permitted, we find an irreconcilable conflict of authority.

One view is, that the liability of a co-surety is only for that which the other has paid for him, and therefore he can prove for that amount only (one-fourth, in the principal case); that the paying surety may use the security or rights which the creditor has obtained only to that extent; and unless the paying surety is prejudiced by being deprived of subrogation, payment will satisfy and extinguish the judgment, and the paying surety will be remitted to his individual rights against his co-sureties for the amount paid to their use. Because the creditor might prove the whole claim is no reason why the paying surety should. A paying surety takes the risk of the in-

solvency of his co-sureties, and it is inequitable to other creditors of the insolvent to permit a claim for more than the insolvent estate really owes the paying surety. *New Bedford Institution for Savings v. Hathaway*, 134 Mass. 69 (1882); *Apperson, et al. v. Wilbourn, et al.*, 58 Miss. 439 (1880), *semble.*

The other view takes the position that the paying surety is subrogated to *all* the rights of the creditor, and as the creditor could have proved for the whole debt, so likewise may the paying surety. At the time of the declared insolvency, the rights of the creditors become fixed, a constant quantity; each creditor becomes part owner of the assets to such an extent as his debt bears to the total debts. When the surety pays the debt, he succeeds to that quasi-ownership of the creditor whose debt he pays; this is not inequitable as to the other creditors, as their rights, fixed at the date of insolvency, are unimpaired. This position is similar to the "equity rule," regarding proof made by a creditor with collateral; such a creditor can prove for and receive dividends on the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided he shall not receive more than the full amount due him. *Miller's Appeal*, 35 Pa. 481 (1860); *Chemical National Bank v. Armstrong*, 59 Fed. 372 (C. C. A. 1893); *contra, Amory v. Francis*, 16 Mass. 309 (1820). This position, it is claimed, works out the equities among the sureties as if creditor's right had been enforced against them in a way conformable to their rights against each other, and makes the rights of the paying surety fixed and certain, instead of depending on the election of the creditor to proceed first against the insolvent or the solvent surety. *Ex parte Stokes*, De Gex Bankruptcy Cases, 618 (Eng. 1848); *Hess's Estate*, 69 Pa. 272 (1871); *Pace v. Pace's Adm'r., et al.*, 95 Va. 792, 30 S. E. 361 (1898).

As a practical matter, the view of the principal case is better, as it fixes the rights of the paying surety. It is to the interest of the solvent surey that the creditor prove his full claim against the insolvent estate; it is to the interest of the other creditors of the insolvent to have the creditor collect in full from the solvent surety, and then have the latter come against the estate with his smaller claim (if that is all that will be permitted) for contribution. So the criticism has been made that the Massachusetts view gives opportunity to the creditor by collusion or otherwise to further the interest of one surety at the expense of the just and equal rights of the co-surety. *Pace v. Pace, et al., supra.* By permitting the paying surety to prove for the full claim and limiting his dividends to the amount for which the co-surety is liable. the rights of the parties are adjusted with substantial equity.

CONSTITUTIONAL LAW—DUE PROCESS—LIMITATION OF NUMBER OF AGENTS OF INSURANCE COMPANIES.—A statute prohibited insurance companies from having more than two agents. It permitted, however, an agent to have as many solicitors as he desired in any city. The plaintiff, desiring to represent a company in a city where it already had two agents, claimed the statute violated the Fourteenth Amendment of the Constitution of the United States. *Held:* The statute is unconstitutional. *Northwestern National Insurance Co. v. Fishback*, 228 Pac. 516 (Wash. 1924).

The court emphasized that the legislature had failed to show that the statute was of benefit to the public and held that it was a discriminatory measure tending to monopoly. However, in determining the constitutionality of a law, the burden is not upon the state to show that the law is reasonable. *Booth v. Illinois*, 184 U. S. 425 (1901). The legislature should be given the benefit of every doubt; *McLean v. Arkansas*, 211 U. S. 539 (1908); and every presumption should be made in favor of the statute. *Otis v. Parker*, 187 U. S. 606 (1902). The dissenting judges suggested a reasonable purpose for the regulation, namely, to curtail the number of record insurance agencies, and so to simplify the work of the insurance commission of the state. *Cf. La Tourette v. McMasters*, 248 U. S. 465 (1918). Whether a given regulation is reasonable and valid under the Fourteenth Amendment is usually a very doubtful question, upon which even the United States Supreme Court is apt to be divided. *Cf. Holden v. Hardy*, 169 U. S. 366 (1897); *Lochner v. New York*, 198 U. S. 45 (1904); *Adams v. Tanner*, 244 U. S. 590 (1917). A phase of this problem is whether the right to engage in a lawful employment may be abridged. See *Matter of Lowe*, 54 Kan. 757, 39 Pac. 710 (1895); *Schnair v. Navarre, etc., Co.*, 182 N. Y. 83, 74 N. E. 561 (1905). It has been held that an exclusion of persons from a given business is within the state's police power, if the exclusion is not designed to confer special privilege even though such privilege may result as an incidental effect. *Decie v. Brown*, 167 Mass. 290, 45 N. E. 765 (1897). This seems to be the sound view. See FREUND, POLICE POWER, 694.

Inasmuch as in the instant case a valid purpose may be found for the enacting of the statute, and since the plaintiff is not excluded from engaging in the business of an insurance agent if some company should desire to appoint him as one of its two representatives, it is submitted that the court could have found sufficient grounds to hold the statute reasonable and valid.

CONSTITUTIONAL LAW—WAR POWER—DIVERSION OF COAL.—The defendant's predecessor as Director General of Railroads, under authority conferred by the Fuel Administrator, after the signing of the Armistice and on account of the serious coal strike of November, 1919, diverted coal consigned to the plaintiff, for use on certain railroads under his control. *Held:* The act of diversion was wrongful and the defendant was liable in tort for the conversion. *Newton Coal Co. v. Davis, Director General of Railroads*, 281 Pa. 74 (1924).

The main question raised in the opinion is whether the defendant had authority to divert the coal, the court reaching the conclusion that he had not, on the ground that the power of Congress and of the President to make such regulations had expired, although the Lever Act, 40 STAT. AT L. 284, c. 53, sec. 25, under which the Director General purported to act, specifically provided that it should remain in force until the war should have terminated and the fact and date of such termination should be ascertained and proclaimed by the President.

It is well settled that during a war the authority of Congress is practically unlimited, unless the subject of legislation is obviously and flagrantly unconnected with the prosecution of the war. *Hamilton v. Kentucky Co.*, 251

U. S. 146 (1919). The court in the principal case is creating a third status, between a state of war and that of peace, in which the nature and purpose of such governmental activities may be examined. It is clear that the Armistice did not end the war as such, but merely indicated, from a military standpoint, a general cessation of hostilities: 2 OPPENHEIM, INTERNATIONAL LAW, (2d. ed.) 290; *Hijo v. United States*, 194 U. S. 315, 323 (1904); and such has been the view adopted by the majority of those courts which have had occasion to pass upon this question; *Commercial Cable Co. v. Burleson*, 255 Fed. 99 (D. C. 1919); *United States v. Oglesby Grocery Co.*, 264 Fed. 691 (D. C. 1920); *State v. Dixon*, 66 Mont. 76, 99, 213 Pac. 227, 235 (1923). Some courts have held otherwise, under the Lever Act, on the strong ground that the President, in his message to Congress of November 11, 1918, declared several times that the war was over; *United States v. Hicks*, 256 Fed. 707 (D. C. 1919); but it seems better to take this as referring only to hostilities, in view of the universally known facts, and especially since the President clearly so indicated by subsequent acts, and it was so held in *Hamilton v. Kentucky Co., supra*, which rejected the argument used in the case just cited.

In the principal case the court attempts to determine when the act lapsed without regard to section 24, but it would seem to be the better view to accept the statements of the other departments of government as to states of war and peace. *Kneeland-Bigelow Co. v. Michigan Central R. R. Co.*, 207 Mich. 546, 174 N. W. 605 (1919).

But the facts of this case show no authority in the defendant to make such a diversion of coal, that power having been entrusted to the Fuel Administrator by the President's executive order of October 30, 1919, which authorized him to make such regulations of distribution as "may in his judgment be necessary." The Fuel Administrator then gave the defendant's predecessor full authority to make such diversions, as his agent, but it is clear that this attempted delegation of authority must have been ineffectual; MECHEM, AGENCY (2d ed.), sec. 307. Nor does the Overman Act, 40 STAT. AT L. 556, c. 78, provide for such a transfer of authority, giving power only to the President and only in "matters relating to the conduct of the present war" which, as the sole limit, is too specific to cover this case. It is submitted, therefore, that the decision of the principal case is correct, because of the lack of authority in the Director General and not because of the want of constitutional power in Congress or in the President.

CONTRACTS—RESTRAINT OF TRADE—RESTRICTIVE AGREEMENT WITH PUBLIC UTILITY.—A city, in purchasing the water works of a water company, covenanted not to supply water outside a specified area. *Held:* This contract was void as an illegal restraint of trade. *East Jersey Water Co. v. City of Newark*, 125 Atl. 578 (N. J. Eq. 1924).

In general, agreements in unreasonable restraint of trade are illegal and void; *American Laundry Co. v. E. & W. Dry Cleaning Co.*, 199 Ala. 154, 74 So. 58 (1917); but agreements in partial restraint of trade are reasonable and valid. *Carter v. Alling*, 43 Fed. 208 (C. C. A. 1890); *Rose v. Gordon*, 158 Wis. 414, 149 N. W. 158 (1914). The theory on which these partial

restraints are allowed is that there must be a public policy requiring the restraint which outweighs the public policy forbidding it. Therefore, where a contract in restraint of trade is injurious to public interest, the reason for allowing it is gone, and it will not be sustained, however partial and reasonable, as between the parties, the restraint may be. *Nester v. Continental Brewing Co.*, 161 Pa. 473, 29 Atl. 102 (1894). This is particularly true of contracts affecting business of a quasi-public character, such as that of railroads, *Chicago, Etc., R. R. Co. v. Southern Indiana R. R. Co.*, 38 Ind. App. 234, 70 N. E. 843 (1904); telegraph, *Central New York Telephone & Telegraph Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206 (1910); telephone, *Gwynn v. Citizens Telephone Co.*, 69 S. C. 434, 48 S. E. 460 (1904); gas, *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396 (1889); electric, *Keene Syndicate v. Wichita Gas, Electric, etc., Co.*, 69 Kan. 284, 76 Pac. 834 (1904); and other public service corporations. *Union Bank v. Kinloch Telephone Co.*, 258 Ill. 202, 101 N. E. 535 (1913). But the New York rule, based upon the right of freedom of contract, is that quasi-public corporations may make contracts in reasonable restraint of trade so long as the public rights are not unduly affected. *Whitaker v. Kilby*, 55 Misc. 337, 106 N. Y. Supp. 511 (1907).

It is to be noted that the enumerated cases concern public utilities, any restraint of which would be injurious to the public, which has an interest paramount, or even superior, to any private rights of the parties to the contract. Partial restraints in such cases have long been held invalid, but heretofore the doctrine has not been applied to water. The instant case, therefore, involves no new or controverted principle, but is merely an extension of an old rule, applying it to water.

CRIMINAL PROCEDURE—RIGHT TO TRY CONVICT DURING IMPRISONMENT FOR ANOTHER CRIME.—The relator was convicted of embezzlement and sent to the penitentiary. He appealed, and during the pendency of the appeal he remained in prison. In the meanwhile, the same court which sentenced him took steps to place him on trial for another crime. He sought a writ of prohibition. *Held:* Writ discharged. *State ex rel. Meininger v. Breuer*, 264 S. W. 1 (Mo. 1924).

Under the great weight of authority, a court having jurisdiction over the person of a prisoner by virtue of his presence within the jurisdiction has the right to place him on trial, during his imprisonment, for another crime which he had previously committed. *Rigor v. State*, 101 Md. 465, 61 Atl. 631 (1905); *Commonwealth v. Ramunno*, 219 Pa. 204, 68 Atl. 184 (1907); *Ponzi v. Fessenden*, 258 U. S. 254 (1921). *Contra: Ex parte Meyers*, 44 Mo. 279 (1869); *State v. Buck*, 120 Mo. 479, 25 S. W. 573 (1893). The reasoning of the latter cases is that a prisoner undergoing sentence is in the custody of the law, different from that of a criminal court, and hence the latter court cannot acquire jurisdiction until the discharge of the prisoner. This minority rule would seem to be unsound, since it may be carried to the absurdity that one having committed a crime and being still under suspicion, may commit and be convicted of a lessor offense and thereby hinder all attempts to place him on trial for the graver one, until after the expiration of his sentence,

when an acquittal might be more easily obtained. Then, too, the Sixth Amendment of the United States Constitution guaranteeing a speedy trial, might then be successfully pleaded. But even those courts which follow such a rule make an exception where the prisoner has committed a crime while undergoing sentence in prison, in which case the prisoner may be immediately tried for the offense. *Kennedy v. Howard*, 74 Ind. 87 (1881); *Ex parte Allen*, 196 Mo. 226, 95 S. W. 415 (1906) (by virtue of statute).

The same reasoning applies to cumulative sentences as to the right to try a prisoner during his confinement. The great weight of authority is that such cumulative sentences may be imposed, and when imposed, the second sentence usually becomes effective upon the termination of the first. *Rex v. Wilkes*, 4 Burr. 2527 (Eng. 1770); *Kite v. Commonwealth*, 11 Metc. 581 (Mass. 1846); *Ponzi v. Fessenden, supra. Contra: Miller v. Allen*, 11 Ind. 389 (1858); *James v. Ward*, 2 Metc. 271 (Ky. 1859).

The instant case, overthrowing the doctrine of *Ex parte Meyers, supra*, and *State v. Buck, supra*, places the courts of its jurisdiction in line with the great weight of authority, and establishes a rule conducive to greater justice, and productive of a more salutary effect on the community.

FRAUD AND DECEIT—MEASURE OF DAMAGES.—The plaintiff, in selling the defendant a pop-corn machine, fraudulently represented no other machine would be sold in the defendant's town. The same day the plaintiff sold another machine. The defendant, sued for the balance of the purchase money, filed a cross-petition asking for damages. *Held:* The measure of damages is the difference between the actual value of the machine in competition with another and its value if the plaintiff's representation were true. *Holcomb & Hoke Mfg. Co. v. Jones*, 228 Pac. 968 (Okla. 1924).

The rule laid down in the principal case, that the measure of damages to a purchaser for the fraud of his seller in inducing him to enter into a contract is the difference between the actual value of the property sold and the value it would have had if the representations were true, is the weight of authority in this country; *Mueller v. Michels*, 199 N. W. 380 (Wis. 1924); *Sullivan v. Helbing*, 226 Pac. 803 (Cal. 1924); and the measure of recovery is not affected by the question whether the purchaser paid more or less than the actual value of the property he received. *Murray v. Jennings*, 42 Conn. 9 (1875). The theory upon which this doctrine is based is that a purchaser who acts honestly on his own part is entitled to the full fruit of his bargain and cannot, without his consent, be deprived thereof by the fraud of the seller. Cases upholding the doctrine that the measure of damages is the difference between the value of the property received and the price paid are fewer in number, but constitute a vigorous minority. *Texas Employers' Ins. Ass'n. v. Pierce*, 254 S. W. 1019 (Tex. 1923); *Hooning v. Henry*, 106 Ore. 605, 213 Pac. 139 (1923). This rule is well settled in England, *Simons v. Patchett*, 7 El. & Bl. 569 (Eng. 1857); *Twycross v. Grant*, 36 Law Times R. 812 (Eng. 1877), and in the Federal Courts of this country. *Smith v. Bolles*, 132 U. S. 125 (1889); *Rockefeller v. Merritt*, 76 Fed. 909 (C. C. A. 1896). The principle upon which these cases proceed is that to consider as an element of recovery the value the property would have had if the repre-

sentations had been true would enable the plaintiff to recover anticipated profits and not merely the actual loss, which is the true measure of damages in a tort action. In *Bokoshe Smokeless Coal Co. v. Bray*, 55 Okla. 446, 155 Pac. 226 (1916), decided in a jurisdiction where damages are assessed under the majority rule, the court held that "anticipated profits of a commercial or other like business are too remote, speculative and dependent upon uncertainties to warrant a judgment for their loss." However, if the form of action is *ex contractu*, the majority rule can hardly be questioned, since in such action the plaintiff is entitled to receive compensation for the loss of his bargain. *Page v. Johnston*, 205 Mass. 274, 91 N. E. 214 (1910).

In Pennsylvania, compensation for the actual loss sustained by reason of the deceit is the measure of the plaintiff's damages. *Weaver v. Cone*, 12 Pa. Super. 143 (1900). This would seem to bring the state within the minority view assessing damages as the difference between the value and the price paid for the property, and some cases so hold. *High v. Berret*, 148 Pa. 261, 23 Atl. 1004 (1892). But there are other cases in which the courts lay down the majority rule that the measure of damages is the difference between the actual and represented values. *Stetson v. Croskey*, 52 Pa. 230 (1866); *Lukens v. Aiken*, 174 Pa. 152, 34 Atl. 575 (1892). However, in these latter cases, the represented value of the goods was also the price paid, so that the same decisions would have been reached under both rules.

It is submitted that the instant case was correctly decided, since the fraudulent representation was a part of the contract itself and in a suit on the contract, the plaintiff's damage is the loss of the benefit of his contract.

INJUNCTIONS—RESTRAINT OF NUISANCE—BALANCE OF INJURY.—The plaintiff maintained a nursery in the vicinity of the defendant's light and power plant, and had done so for more than twenty years prior to the defendant's establishment. In the production of power and light, upon which the city of Pittsburgh and its environs were dependent, the defendant's plant discharged large quantities of soot and sulphur dioxide, which materially destroyed the plaintiff's nurseries. The plaintiff sought an injunction. *Held:* Injunction denied. *Elliott Nursery Co. v. Du Quesne Light Co.*, 281 Pa. 166, 126 Atl. 345 (1924).

It has been said that in the matter of nuisances a chancellor dispenses injunctions as a matter of grace and not of right, and that in determining whether he shall grant an injunction, he is to discern whether or not he will cause greater hardship by issuing or by denying it, and in so doing, he is to balance the respective injuries. *Richard's Appeal*, 57 Pa. 105 (1868); *Huckenstine's Appeal*, 70 Pa. 102 (1871); *Bliss v. Anaconda Copper Mining Co.*, 167 Fed. 342, 365 (1909). This view, originating in a time when kings bestowed their royal favors through their chancellors, is still to be found in the modern decisions. *Daniels v. Keokuk Water Works*, 61 Ia. 549, 16 N. W. 705 (1883). The weight of authority today, however, would seem to be *contra*, and where a complainant can show the existence of a valuable right, which has been substantially and materially interfered with by an artificial nuisance, and the injury is a continuing one, requiring a multiplicity of suits, an injunction will issue as a matter of right, and relief is not dependent upon

any balance of injuries. *Attorney General v. Council of Birmingham*, 4 Kay & J. 528 (Eng. 1858); *Sullivan v. Jones & Laughlin Steel Co.*, 208 Pa. 540, 57 Atl. 1065 (1904); *Judson v. Los Angeles Sub. Gas Co.*, 157 Cal. 168, 106 Pac. 581 (1910). The fact that the defendant is a public or quasi-public service corporation will not be grounds for withholding relief, even though such defendant serves thousands of people. *Broadbent v. Imperial Gas Co.*, 7 De Gex, M. & G. 436 (Eng. 1857); *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218 (1894); *Stock v. Township of Jefferson*, 114 Mich. 357, 72 N. W. 132 (1897). In *Attorney General v. Gaslight and Coke Co.*, L. R. 7 Ch. Div. 217 (Eng. 1876) a gashouse was restrained even though it was operating by municipal permission, where its operation had been adjudged a nuisance.

The instant case is interesting in that it would seem to mark a reversion to the "matter of grace" doctrine laid down in *Richard's Appeal, supra*, which was followed until practically overruled by *Sullivan v. Jones & Laughlin Steel Co., supra*, and although the court in the instant case seeks to distinguish the latter case, yet it substantially ignores the doctrine promulgated therein. Of the two views, it is submitted that the one announced in *Sullivan v. Jones & Laughlin Steel Co., supra*, which is also the weight of authority, is the better. Where a valuable right is materially interfered with, for which there is no adequate remedy at law, it should be protected regardless whether the interest against which protection is sought is great or small. If such interest greatly affects the public, then proceedings in the nature of public condemnation should be instituted. Otherwise, to refuse relief would be practically to take property without due process of law.

INSURANCE—WAIVER—FAILURE TO TAKE ACTION AFTER NOTICE OF PROTEST OF PREMIUM CHECK.—The insured sent his check to the insurance company at the time when his premium was due and received an unconditional receipt. When the check was presented to his bank it was protested and returned to the company, which held the check for nine days, until it received word of the death of the insured. The insured had acted in good faith and did not know of the protest. The company refused to pay the full value of the policy and the beneficiary sued. *Held:* She could recover. Since the retention of the protested check gave the company a right of action which it had not formerly had, these facts were sufficient to justify the finding of the trial court that there had been a waiver of the forfeiture in fact, although not in law. *State Life Insurance Co. v. Little*, 264 S. W. 319 (Texas 1924).

The usual life insurance policy contains a clause providing for forfeiture of the policy upon failure to pay any premium at the time specified. The courts, however, do not favor forfeitures. Slight acts will be construed as a waiver on the part of the insurer where the condition in the policy is in favor of the company. *Hartford Life Insurance Company v. Unsell*, 144 U. S. 439 (1892); *Federal Life Insurance Company v. Sayre*, 142 N. E. 223 (Ind. 1924). When some good ground in the conduct of the insurer, on which the insured may base his default, cannot be shown, the forfeiture will be enforced. *Thompson v. The Insurance Co.*, 104 U. S. 252 (1881); *Philadelphia Life Insurance Co. v. Hayworth*, 296 Fed. 339 (1924). Waiver has

been found where the policy contained a receipt for the first premium, although in fact notes had been given for part payment and one of them was overdue and unpaid; *McAllister v. New England Insurance Company*, 101 Mass. 558 (1869); and where the animal insured had died before the payment of a premium seven months overdue. *Western Insurance Company v. Scheidle*, 18 Neb. 495, 25 N. W. 620 (1895). In two cases the policy was held to be in force until cancelled by some positive act on the part of the insurer. *Brady v. Prudential Insurance Co. of America*, 9 Misc. 6, 29 N. Y. Supp. 44 (1894); *O'Brien v. Same*, 12 Misc. 127, 33 N. Y. Supp. 67 (1895). The holding of a check during correspondence with the insured was held to be evidence that the policy had not lapsed in a case similar to the instant one. *Veal v. Security Mutual Life Insurance Co.*, 6 Ga. App. 72, 65 S. E. 714 (1909). It is submitted that the finding of the trial court in the principal case is based on a logical extension of the law of the decided cases and that the higher court was right in supporting it.

INTERSTATE COMMERCE—TELEGRAM PASSING BETWEEN TWO POINTS IN A STATE BY WAY OF ANOTHER STATE.—In an action under a state law, it became necessary to determine if a message from one town to another in the same state, transmitted by way of another state, was intrastate commerce. The usual way was to send the message more directly within the state. The message was relayed outside the state to suit the convenience of the telegraph company. *Held:* This was intrastate commerce. *Western Union Telegraph Co. v. Wood*, 264 S. W. 118 (Tex. 1924).

The instant case holds that it was within the contemplation of the parties to use the usual line within the state, and that, therefore, as a matter of contract the message was intrastate; that the telegraph company could not evade a liability by using an interstate line. In a recent case which has caused much discussion it was held that a message sent by the usual way outside of the state, was a matter of intrastate commerce. *Western Union Tel. Co. v. Sharp*, 121 Ark. 135, 180 S. W. 504 (1915). This decision would appear to be authority for the principal case, but on reasoning the two are opposed. It was based on three cases recently overruled and now may be taken to have been repudiated in its own state. *Shannon v. Western Union Tel. Co.*, 152 Ark. 358, 238 S. W. 59 (1922). There is no doubt that it is now the law that a telegram, sent by the only or usual way out of the state, is in interstate commerce, even though between two points in the same state. *Western Union Tel. Co. v. Bolling*, 120 Va. 413, 91 S. E. 154 (1917); *Western Union Tel. Co. v. Bushnell*, 73 Ind. App. 511, 128 N. E. 49 (1920). And it has been held that where a telegram could have been sent with equal dispatch either entirely within the state or by way of another state the use of the interstate line was interstate commerce. *Taylor v. Western Union Tel. Co.*, 199 Mo. App. 624, 204 S. W. 818 (1918).

The Amendment of June 18, 1910, 36 STAT. AT L. 539, to the Commerce Act of 1887 indicates that only messengers "wholly within one state" are matters of intrastate commerce. Before this amendment the principal case would have been followed in many jurisdictions which, like the principal case, refused to follow *Hanley v. Kansas, Etc., Ry. Co.*, 187 U. S. 617 (1903),

as applicable to telegraph cases. For a development of telegraph law from railroad cases see 4 VA. L. REV. 35 and L. R. A. 1918A (805). The United States Supreme Court has clearly applied the latter case to telegraph cases, and has held that a message passing out of a state becomes interstate commerce as a matter of fact, irrespective of the motive of the telegraph company. *Western Union Telegraph Co. v. Speight*, 254 U. S. 17 (1920). This interpretation was refused in the instant case but has been generally accepted. *Western Union Tel. Co. v. Beasly*, 205 Ala. 115, 87 So. 858 (1920); *Son v. Western Union Tel. Co.*, 115 S. C. 520, 106 S. E. 507 (1921); *Shannon v. Western Union Tel. Co., supra.* It has been suggested that the rule would not be applied where there was an attempt to avoid a state law; *Bateman v. Western Union Tel. Co.*, 174 N. C. 97, 93 S. E. 467 (1917); but this is repudiated in *Western Union Tel. Co. v. Speight, supra.* See also *Kirmeyer v. Kansas*, 236 U. S. 568 (1914).

It is submitted that the instant case draws distinctions from the Federal authorities which are not well founded; and that it is clearly established by Federal and state courts that interstate commerce is a matter of fact, and that if a telegram is sent outside of a state, in transmitting it from one town to another within the state, it is a matter of interstate commerce whether so sent necessarily or not.

LABOR LAW—STRIKES—DURESS—MONOPOLY.—The defendants called a strike of the workers in the plaintiffs' employ, members of a union embracing ninety-five per cent. of the workers in the clothing trade in the city of New York, and in order to secure labor and avoid the very heavy loss of an idle plant, the plaintiffs agreed to a contract with the union by which the number of persons employed by the former, the amount and distribution of work sent out to be done by submanufacturers, and the identity of those submanufacturers was closely regulated. After working under this agreement one season and having violated some of its clauses, the plaintiffs sought to have it set aside. *Held:* The contract was not obtained by duress and was valid. *Maisel v. Sigman*, 205 N. Y. Supp. 807 (1924).

The validity of this contract obviously depends upon whether or not the means used to obtain it were lawful; *Carew v. Rutherford*, 106 Mass. 1 (1870); a subject on which there is wide diversity of opinion. *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389 (1912). The right to strike is now well recognized, but the majority of courts hold that it can be employed only for certain purposes, as for better working conditions, shorter hours, or increased wages; *Kemp v. Division No. 241, supra; Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327 (1903); *DeMinico v. Craig*, 207 Mass. 593, 94 N. E. 317 (1911); while others, as in the principal case, hold that it is an absolute right and that if the means employed are not in themselves illegal the object sought cannot make them so. *Parkinson Co. v. Building Trades Council* 154 Cal. 581, 98 Pac. 1027 (1908); and see able discussion in *Allen v. Flood*, (1898) A. C. 1 (Eng.). It seems that this is the better view, so long as no contract is violated and no statute or rule of public policy of general application is contravened. The old idea of the common law of what constitutes a conspiracy or acts in restraint of trade has long since lost all reason for

existence, and has been swept away completely in many jurisdictions. On this basis the present case would be correct.

But it appears from the facts of this case that the defendant organizations amounted to a monopoly in this field. A monopoly is forbidden both by Federal law, 26 STAT AT L. 209, ch. 647, sec. 1, which was before the Clayton Act amendment, 38 STAT. AT L. 731, ch. 323, sec. 6, held applicable to such cases as the present; *United States v. Elliott*, 64 Fed. 27 (C. C. 1894), *United States v. Debs*, 64 Fed. 724 (C. C. 1894); and New York statute, PENAL LAW, secs. 580-582, amended LAWS OF 1918, c. 491, which does not specifically exempt such cases as the present from its operation, though interpreted to do so in the principal case. New York has recognized and forbidden an effective monopoly in this field when created by an association of employers; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297 (1897); *McCord v. Thompson-Starrett Co.*, 129 App. Div. 130, 113 N. Y. Supp. 385 (1908); as distinguished from an agreement by a single employer; *Jacobs v. Cohen*, 183 N. Y. 207, 76 N. E. 5 (1905); but in the principal case the court refuses to extend the rule logically to an association of employes equally powerful.

In other states, statutes such as those referred to above have been specifically held applicable to monopolies of labor, although Pennsylvania, by ACT OF 1891, P. L. 300, sec. 1, has removed all criminal liability as a conspiracy in such cases. It is submitted that whenever a labor organization becomes so powerful as to enforce its demands by shutting off entirely the labor supply of an industry, it should be regarded in the same light as a monopoly in any other field; *Bishop v. American Preservers' Co.*, 157 Ill. 284, 310, 41 N. E. 765 (1895); *Commonwealth v. Dyer*, 243 Mass. 472, 486, 138 N. E. 296, 303 (1923); and its contracts held, even at common law, invalid and voidable by action of the other party.

MUNICIPAL CORPORATIONS—ORDINANCES PROHIBITING DISTRIBUTION OF CIRCULARS.—Defendants were arrested for distributing pamphlets criticising the local municipal government and indicted under an ordinance prohibiting "the distribution of circulars, pamphlets, etc., in the public streets." The court held the ordinance unreasonable because it prohibited the distribution of circulars of all kinds. It took judicial notice of the fact that the distribution of advertising matter has a natural tendency to litter the streets, but refused to extend this principle to include such circulars as were in fact distributed. *Coughlin v. Sullivan*, 126 Atl. 177 (N. J. Sup. Ct. 1924).

Municipal ordinances prohibiting the distribution of advertising circulars on the streets have been uniformly held a reasonable exercise of the police power, although the distribution alone made the offense complete. The opinions have been based upon one of two grounds. Some courts have recognized in whole or in part the doctrine laid down in the principal case that the natural result of the distribution of advertising matter is the littering of the streets. *Wettengel v. Denver*, 20 Colo. 552, 39 Pac. 343 (1895); *Philadelphia v. Brabender*, 201 Pa. 574, 51 Atl. 374 (1902). Others have gone upon the principle that such a prohibition is a valid exercise of the police power so long as it does not conflict with any fundamental right of citizenship and that the right to advertise by this particular method is not such a right. *In re*

Anderson, 69 Neb. 686, 96 N. W. 149 (1903); *People v. Horwitz*, 27 N. Y. Crim. Rep. 237, 140 N. Y. Supp. 437 (1912). Similarly it has been held that such an ordinance does not interfere with interstate commerce. *International Text Book Co. v. Auburn*, 155 Fed. 986 (C. C. 1907). Where the ordinance itself limited its application to advertising matter, a New York court refused to extend the term "advertising" to include a circular against the Ku Klux Klan, and further held that such an interpretation would make the statute unconstitutional as an unreasonable regulation in conflict with the right of free speech. *People v. Johnson*, 117 Misc. 133, 191 N. Y. Supp. 750 (1921). In an early and oft-quoted case on this subject in Michigan an ordinance similar to that in the principal case was held unreasonable as applied to the distribution of circulars advertising a Y. M. C. A. gathering. The court in this case seemed to base its decision partly on each of the two general theories already discussed. *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275 (1889).

As a practical matter the results under these varying doctrines have been uniform. Where the distribution was in fact of a commercial nature the offender has been held, whereas in all other cases the distributors have been released. It is difficult to understand upon what ground the courts can hold that it is common knowledge that a large portion of *all* advertising distributed on the streets is thrown away, whereas a similar situation is not presumed as to the unregulated distributions of the so-called reformers. It is submitted that the sounder doctrine is that which holds such ordinances reasonable until they conflict with some fundamental right of citizenship.

PUBLIC UTILITY—MUNICIPAL GOLF COURSE—POWER OF CITY TO PURCHASE. —The City of Portland purchased land for a municipal golf links and financed the transaction by issuing "public service certificates" which the city had charter power to issue to acquire facilities for doing "municipal work," or to purchase "any part of any public utility." A taxpayer questioned the validity of the issue. *Held:* The issue is valid. *Copen v. City of Portland*, 228 Pac. 105 (Oregon, 1924).

If this decision means merely that purchasing land for a public golf course is "municipal work," it is in accord with the general rule. By the weight of authority, it is legitimate municipal endeavor for a city to supply its citizens with libraries, museums and places for public recreation. *Commonwealth v. Harrigan*, 84 Mass. 159 (1861); *Laird v. Pittsburgh*, 205 Pa. 1, 54 Atl. 324 (1903); *Lambert v. Owensboro Public Library*, 151 Ky. 725, 152 S. W. 802 (1913). The cases recognize that some sort of a "public use" or "public interest" is necessary in order to bring the endeavor within their scope, but usually consider that any project merely convenient to the public or "in some manner concerning public welfare" is within this rule. *Feldman & Co. v. City Council of Charleston*, 23 S. C. 57 (1885). It seems reasonable to include a municipal golf course in such a category.

However, if the principal case means to decide that a public golf course is a "public utility" within the meaning of that phrase when used in connection with eminent domain, the case is not so well supported by authority. In this connection the term is generally limited to include only such projects as are termed "public necessities" or "public needs." *Memphis Freight Co. v.*

City of Memphis, 44 Tenn. 419 (1867); *Edgewood Railroad Company's Appeal*, 79 Pa. 269 (1875); *Appeal of Rees*, 8 Sad. 582, 12 Atl. 427 (Pa. 1888). True, there are authorities for the proposition that even in this connection, a "public use" or "public utility" includes anything of "convenience" to the public. *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147 (1880); COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed., 1903), 532. However, these authorities cite railways and turnpikes as examples of public "conveniences." It is at least doubtful, then, that even these authorities would include a public golf course as a public "convenience."

It seems, therefore, that the court in the principal case, in using the phrase "public utility" meant to use it in its broad sense, as including anything benefiting the public by furnishing means for public pleasure, education or recreation; and not in the narrower sense, as including only those things in which the public has such a vital interest as to justify the taking of private property. It is submitted that the decision is sound, and that the only possibly objectionable feature in the case is the court's unqualified classification of a public golf course as a public utility, without explanation of the scope in which this flexible term was intended to be used.

TORTS—INJURY TO TRESPASSER—LIABILITY OF LANDOWNER.—Several small boys came upon the defendant's land without permission. They were playing there when the defendant appeared with a stick in his hand. The defendant "chased" the boys from the lumber pile. One of the boys in his attempt to escape ran into the street and was killed by a trolley car. *Held:* There was no liability in absence of proof that the defendant's conduct was wilful or malicious. *Miller v. Oscar Schmidt, Inc.*, 126 Atl. 309 (N. J. L. 1924). (The facts of the case are very unsatisfactorily reported. It is impossible to tell from the report how close the defendant was to the deceased or how great was the probability under the surrounding circumstances that injury would result from the defendant's act. Knowledge on these two points is really necessary for a proper understanding of the case.)

It is well settled that an owner of property may eject a trespasser, using whatever force is reasonably necessary. *Lewis v. Arnold*, 4 Car. & P. 854 (1830); *Comm. v. Clark*, 2 Met. 23 (Mass. 1840); *Lichtenwallner v. Lauterbach*, 105 Pa. 366 (1884). The privilege to use force, however slight, does not exist in the first instance, but only after the trespasser has been notified to depart and refuses to do so. *Cox v. Cooke*, 1 Marsh., J. J., 360 (Ky. 1829); *Emmons v. McQuade*, 176 Mo. 22, 75 S. W. 103 (1903). When the privilege to use force exists but the force used is excessive it is uniformly held that the privilege has been exceeded and that the owner has committed an assault. *Tallmadge v. Smith*, 101 Mich. 370, 59 N. W. 370 (1894); *Deragon v. Sero*, 137 Wis. 276, 118 N. W. 839 (1908); *Newcome v. Russell*, 133 Ky. 29, 117 S. W. 305 (1909). Whether a person may threaten to use force which he would not be privileged to use is a question not settled by authority. If the threat is made with a deadly weapon and the owner would not have been justified in using it he is held to be guilty of an assault. *James v. Hayes*, 63 Kan. 133, 65 Pac. 241 (1901); *Lewis v. Fleer*, 30 Pa. Sup. 237 (1906), *semble; State v. Paxon*, 6 Boyce 249, 99 Atl. 46 (Del. 1916); but *cf.*

State v. Yancey, 74 N. C. 244 (1876). In the instant case it is clear that a grown man would not have been privileged to use a stick to drive away the deceased. However, the facts do not reveal that the defendant was close enough to the deceased to warrant the finding of a technical assault. If such were the case the test of liability would be different; *Kline v. Kline*, 158 Ind. 602, 64 N. E. 9 (1902); *Lonergan v. Small*, 81 Kan. 48, 105 Pac. 28 (1909); and a recovery might well have been permitted.

When the injury results to the trespasser not directly from the defendant's act but as the proximate result of that act the courts seem to lose sight of the fact that the defendant is still exercising a privilege. Many courts treat the situation from the standpoint that the plaintiff was a wrongdoer. Therefore under the "Massachusetts view," under which the principal case is decided, the defendant is liable only for wilful and wanton acts resulting in injury to the plaintiff. *Bjornquist v. Boston & Albany R. R.*, 185 Mass. 130, 70 N. E. 53 (1904); *Hoberg v. Collins*, 80 N. J. L. 425, 78 Atl. 166 (1910). The "Michigan view" requires that after the trespasser's presence is known the owner is bound to exercise ordinary care with regard to him. *Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117 (1899); *Brennan v. Merchant & Co.*, 205 Pa. 258, 54 Atl. 891 (1903); *Bucci v. Waterman*, 25 R. I. 125, 54 Atl. 1059 (1903). It is submitted that the latter is better in that it recognizes that the defendant is exercising a privilege and that he should act in such a way as not to exceed his privilege. Robert J. Peaslee, Duty to Seen Trespassers, 27 HARV. L. REV. 403.

TORTS—LIABILITY FOR DEATH BY NEGLIGENT ACT—PANAMA CODE.—Plaintiff brought a civil action to recover damges for the death of his wife who was killed in Panama through the alleged negligence of the defendant railway company. Section 2341 of the Civil Code of Panama, adopted in 1860, was as follows: "He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed." This law is still in force. The defendant contended that Section 2341 of the Code was too general to be construed as a "death act" statute. *Held* (Taft, *C. J.*, Holmes, *J.*, McKenna, *J.*, Brandeis, J., dissenting): For the defendant *Panama Railroad Company v. James Rock*, United States Supreme Court, No. 4, October Term, 1924, decided November 17, 1924.

Despite the maxim "There is no wrong without a remedy," the principle became firmly entrenched at common law that the death of a human being by a negligent or wrongful act could not form the basis of a civil action for damages. 72 U. OF PA. L. REV. 333. For reasons for this anomalous rule see note in 41 L. R. A. 807. What the rule of the civil law was on this subject does not seem to be altogether clear. TIFFANY, DEATH BY WRONGFUL ACT (2d ed.), 2. The law of Panama being based upon the law of Spain, which, in turn, has its source in the civil law, the question of whether the civil law permitted an action for death by wrongful act became very pertinent in the instant case. In the works of Grotius there are statements indicating that the civil law did permit such an action. Book 2, c. 17, sec. 13. Rutherford in his INSTITUTES OF NATURAL LAW, Book 1, c. 17, sec. 9, reaches

a similar conclusion. In a case in the federal courts it was said that under these circumstances the civil law permitted a recovery, but unfortunately no authority was cited for the assertion. *Holmes v. O. & C. Railroad Company*, 5 Fed. 75 (D. C. 1880). In this connection it is significant that such a right of action has always been recognized in Scotland, where, it would appear, the civil law is followed. *Weems v. Mathieson*, 4 Macqueen H. L. C. 215 (1861); *Clark v. Carbine Coal Company*, (1891) A. C. 412. In the French regions of Lower Canada the same situation obtained. *Ravary v. Grand Trunk Railway Co.*, 6 Lower Can. Jur. 49 (1860); *Canadian Pacific Railway Co. v. Robinson*, 14 Can. S. C. 105 (1887). This question, however, was squarely present in two Louisiana cases, where it was decided that the civil law, like the common law, denied such a right of action. The statements in Grotius' writings, *supra*, were explained on the ground that he was not treating of jurisprudence but of the moral obligation to make indemnity. *Hubgh v. New Orleans & Carrollton Railway Co.*, 6 La. Ann. 495 (1851); *Virginie v. New Orleans & Carrollton Railway Co.*, 11 La. Ann. 5 (1856). HUGHES ON ADMIRALTY, at page 196, is inclined to agree with the Louisiana court in the matter. The majority of the court in the instant case adopted the Louisiana interpretation.

It is significant that a provision identical to Section 2341 of the Civil Code of Panama had for some time been a part of the law of France. CODE NAPOLEON, 1382 L. C. 2294. This provision had repeatedly been construed as authorizing a civil action for the wrongful or negligent taking of life. *Rolland v. Gosse*, 19 Sirey (Cour de Cassation) 269; see cases in 3 FUZIER-HERMAN ANNOT. ED. CODE NAPOLEON 766; see also *La Bourgogne*, 210 U. S. 95 (1908). The law of Spain also contained this provision, and it had been similarly interpreted. See *Borrero v. Compania Anonyma de la Luz Electrica de Ponce*, 1 Porto Rico Fed. 114 (1903); 22 HARV. L. REV. 409. In the instant case, the court having determined that the civil law did not permit the action, refused to follow the interpretation of the French and Spanish courts as to the scope of Section 2341, but decided to apply common law principles to the determination of this section. *Stutsman Co. v. Wallace*, 142 U. S. 293 (1892). It, therefore, held the language of the section in question too general to change the common law.

The dissenting opinion was written by Holmes, *J.*, who decried the tenacity with which courts adhere to rules of the common law which are "no longer true sentimentally, and which are economically false." His position was that the policy of this country, as evidenced by the present law in nearly all the states, was antagonistic to the common law holding, and that the United States in adopting this section of the Panama Code as the law of Panama had effectuated that policy. *Johnson v. United States*, 163 Fed. 30 (C. C. A. 1908). It is submitted that the court in the instant case should have permitted the plaintiff to recover, by giving to the words of the Panama Code their natural effect, without reference to the unfortunate state of the common law on the subject.