RECENT CASES

BREACH OF THE PEACE—ARREST FOR POSSESSION OF LIQUOR—Defendant was asleep in his automobile, parked without lights on the highway. At 2 A. M. Sunday morning, officers awakened him to look at his license cards. They smelled liquor and searched the car, finding liquor in cans in the rear seat. *Held:* a breach of the peace. *Commonwealth v. Dakich,* 73 Pitts. L. J. 768 (Pa. C. C., 1924).

A breach of the peace is a violation of public order or decorum, a disturbance of public tranquillity, by any act or conduct inciting to violence or tending to provoke others to break the peace. *Davis v. Burgess,* 54 Mich. 514, 20 N. W. 540 (1884); *Commonwealth v. Taylor,* 5 Binn. 277, 281 (Pa., 1812); *Lentz v. Raum,* 21 Pa. D. R. 1116 (1911).

In *Commonwealth v. Krubeck,* 23 Pa. C. C. 35 (1896), the court, referring to the nature of breaches of the peace, says at p. 38, "the element of *violence,* actual or threatened, which was essential, . . . was wanting."

In the instant case, the court says at p. 769, "it is a violation of peace or order because it tends to the disturbance of peace or order, *although it be not a violent demonstration.*"

The court goes rather far in finding that this automobile—parked on the highway with the owner asleep at the wheel—"tended to the disturbance of peace or order," and the court's next statement is hardly reconcilable with the statement in *Commonwealth v. Krubeck, supra.*

According to the Act of 1705, Pa. St. 1920, § 20250, no warrant, etc., may issue on Sunday except for treason, felony or breach of the peace: *a fortiori,* an arrest without warrant would be lawful only for such offenses. Since violation of the Liquor Law of 1923, P. L. 34, Pa. St. Supp. 1924, § 14098a, is only a misdemeanor (§ 10), the act of the officers would be unlawful unless this were a breach of the peace. And so, to convict an obviously guilty defendant, the court stretches the definition of breach of the peace almost beyond its very elastic limits.

CONSTITUTIONAL LAW—DUE PROCESS—PROHIBITION OF POSSESSION OF LIQUOR LAWFULLY ACQUIRED—It was provided by a Georgia statute, Acts Ga. 1917 (Laws Ex. Sess. 1917, § 18), that the possession of liquor in the home was unlawful though for private use. A quantity of liquor which the plaintiff had acquired before the passage of the act, and which had been used in his home for family purposes was seized by state agents. Petition for an injunction to prevent the destruction of the liquor, and to obtain a recovery, refused in the Georgia courts, and in the Supreme Court of the United States the appellant urged as the principal ground for reversal that he was being deprived of his property without due process of law. *Held:* The statute extended to the situation where the liquor had been lawfully acquired before the enactment of the statute. *Samuels v. McCurdy,* 267 U. S. 188 (1925).

The statute, the constitutionality of which is thus upheld, goes further, of course, than the National Prohibition Act. There, it is provided that the

possession of liquor lawfully acquired and for private use in the home is not unlawful, 41 Stat. 305, Tit. 2, § 33.

It is within the police power of the state to prohibit the manufacture and sale of intoxicating liquors. This principle is so well established as to require no citation of authority. That the state may through its police power prohibit the continued possession of lawfully acquired liquor is, however, a proposition which cannot be given such unqualified acceptance. In the past the Supreme Court has approached the problem with extreme diffidence. The question has been referred to as an open one in a number of cases: *Bartemeyer v. Iowa,* 18 Wall. 129 (U. S., 1873); *Eberle v. Michigan,* 232 U. S. 700 (1914); *Hamilton v. Kentucky Distilleries,* 251 U. S. 146 (1919).

In *Crane v. Campbell,* 245 U. S. 304 (1917), the constitutionality of an Idaho statute similar to the Georgia statute was upheld, but the point was not raised whether or not the liquor had been acquired before the passage of the act. The court in *Samuels v. McCurdy, supra,* leans heavily upon the decision in *Barbour v. State of Georgia,* 249 U. S. 454 (1919), but the possession of the liquor in the *Barbour* case was acquired after the passage of the act, although before it went into effect.

In the majority of the state courts where this question has been raised the decisions are opposed to the rule in the principal case. *In re Seven Barrels of Wine,* 79 Fla. 1, 83 So. 627 (1920); *Commonwealth v. Smith,* 163 Ky. 227, 173 S. W. 340 (1915); *State v. Gilman,* 33 W. Va. 146, 10 S. E. 283 (1889). Also opposed are BLACK, INTOXICATING LIQUORS 50; DABNEY, LIQUOR PROHIBITION 63. But *Edmunds v. State,* 199 Ala. 555, 74 So. 965 (1917) is in accord with *Samuels v. McCurdy, supra.*

The decision in the principal case cannot be characterized as a radical departure, but may fairly be said to stretch the elastic principle of the police power of the states to a greater degree than has hitherto been attempted.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—TAXATION OF MUNICIPAL PUBLIC UTILITY LOCATED OUTSIDE MUNICIPALITY—A state law exempted from taxation all publicly owned property except "municipal electric light plants located outside the town where the municipality is situated." This classification affected only three municipalities in the state and the plaintiff sought to recover taxes paid to defendant town under protest on the grounds that the classification was arbitrary and so deprived it of the equal protection of the law guaranteed by the Constitution, 14th Amendment, and the Vermont Constitution, Art. 9, Ch. 1. *Held* (two dissenting): Plaintiff cannot recover. *Village of Hardwicke v. Town of Wolcott,* 129 Atl. 159 (Vt., 1925).

A municipality is not entitled to the protection of the Constitution as against the state, when it is functioning as a branch of a state government. *Hunter v. City of Pittsburgh,* 207 U. S. 161 (1907); 1 COOLEY, TAXATION (3d ed.), 82. However, the courts almost universally distinguish between property owned by the municipality in its governmental function and that owned in its proprietary function. *Dickinson v. Boston,* 188 Mass. 595, 75 N. E. 68 (1905); and see *Hunter v. Pittsburgh, supra,* p. 178; but see *Black v. Columbia,* 19 S. C. 412, 443 (1883). See also 23 MICH. L. REV. 325 (1924).

Vermont decisions have uniformly held that the property of a municipality owned in its proprietary function was protected by the due process clause. *Poultney v. Wells,* 1 Aik. 180 (Vt., 1826); *Montpelier v. East Montpelier,* 29 Vt. 12 (1856); *Sargent v. Clark,* 83 Vt. 523, 77 Atl. 337 (1910). Municipal electric light plants are usually considered as owned in the proprietary function. *Sykes v. Village of Portland,* 177 Mich. 290, 143 N. W. 326 (1913); *Swanton v. Village of Highgate,* 81 Vt. 152, 69 Atl. 667 (1908); *cf. Western Savings Fund v. Philadelphia,* 31 Pa. 175, 183 (1858).

In the principal case the court held that the classification complained of was not arbitrary, and therefore constitutional. *Bell's Gap R. R. v. Pa.,* 134 U. S. 232 (1890); *State v. Clement National Bank,* 84 Vt. 167, 78 Atl. 944 (1910). There would be no difficulty with this basis of decision, but the majority of the court, ignoring the Vermont decisions on the subject, continue with the dictum that a municipality is not entitled to the protection of the Constitution in any function. This in turn is based on a dictum in a recent case in the Supreme Court of the United States, *Trenton v. New Jersey,* 262 U. S. 182, 191 (1923). These dicta may indicate that distinguishing between the public and private functions of a municipality has reached its limit, and that a trend in the opposite direction has begun.

CONTRACTS—ENFORCEMENT IN EQUITY—MUTUALITY—Plaintiffs, the vendors, sought specific performance of a contract to sell land. Proper deeds to the land were executed and tendered by all having an interest therein. Defendants alleged lack of mutuality in that some of plaintiffs were not bound by contract when made. *Held:* Lack of mutuality was no defense. *Meier Grape Juice Co. v. Koehne,* Court of Appeals of Ohio, September 25, 1925.

The strict older view is that mutuality of remedy is to be ascertained as of the time when the contract was made. *Luse v. Deitz,* 46 Iowa 205 (1877); *Norris v. Fox,* 45 Fed. 406 (C. C., 1891). This view is still adhered to in some few jurisdictions. *Childs v. Reed,* 34 Idaho 450, 202 Pac. 685 (1921). The prevailing view today is that it is not essential that mutuality of remedy shall exist at the inception of the contract and that an original want of mutuality may be supplied by performance of the unenforceable condition. *Smurr v. Kamen,* 301 Ill. 179, 133 N. E. 715 (1921); *Epstein v. Gluckin,* 233 N. Y. 490, 135 N. E. 861 (1922); *Rittenhouse v. Swiecicki,* 94 N. J. Eq. 36, 118 Atl. 261 (1922). The principal case is in accord with this rule.

Since the purpose of the doctrine of mutuality is to work out the equities between the parties, it would seem that the prevailing view is the better one, for where a valid contract exists, even though unenforceable at its inception because of lack of mutuality, equity should specifically enforce the contract at the suit of one party if it can assure the other of that for which he contracted.

CONTRACTS—STATUTE OF FRAUDS—ORAL MODIFICATION OF CONTRACT FOR SALE OF LAND—ESTOPPEL—A written contract provided that defendants should convey property to plaintiff subject to mortgages to be held by banks. In compliance with an oral request of plaintiff's made shortly after the signing

of the contract, defendants tendered the deed with the mortgages made out to individuals. Plaintiff then refused to accept it, and sued for his deposit. *Held:* Plaintiff estopped to set up the written agreement. *Gold v. Schneider,* 130 Atl. 133 (N. J., 1924).

By the great weight of authority a contract required by the Statute of Frauds to be in writing cannot be modified by subsequent oral agreement. *Reid v. Diamond Plate-Glass Co.,* 85 Fed. 193 (C. C. A., 1898); *Abrams v. Eckenrode,* 136 Md. 244, 110 Atl. 468 (1920); *Schaap v. Wolf,* 173 Wis. 351, 181 N. W. 214 (1921). Where, however, the agreement as modified has been acted upon, a number of courts hold that the rights of the parties are to be determined by the modified agreement. *Smiley v. Barker,* 83 Fed. 684 (C. C. A., 1897); *Denison v. Sawyer,* 95 Minn. 417, 104 N. W. 305 (1905); *Producers' Coke Co. v. Hoover,* 268 Pa. 104, 110 Atl. 733 (1920). In one class of decisions estoppel has been invoked in order to bar a party who has given his assent to a subsequent oral agreement from taking advantage of the failure of the other party to comply with the original contract. *Swain v. Seamens,* 9 Wall. 254 (U. S., 1869); *Hecht v. Marsh,* 105 Neb. 502, 181 N. W. 135 (1920); *Imperator Realty Co. v. Tull,* 228 N. Y. 447, 127 N. E. 263 (1920). It would seem that in *Gold v. Schneider, supra,* such an estoppel was properly raised in favor of the defendants, they having been able to perform according to the written contract and having varied their performance only on the faith of the plaintiff's conduct.

CONTRACTS—STATUTE OF LIMITATIONS—AGREEMENT NOT TO PLEAD—The defendant's intestate, in a contract not under seal, promised to pay his divorced wife a certain sum per month for the support of a child, and further promised not to plead the Statute of Limitations to any payment, due under the contract, for a period of ninety-nine years. In this suit, thirty-seven years later, to recover all payments but the first, his administrator set up the Statute of Limitations as a defense. *Held:* The agreement not to plead the Statute was binding upon the defendant. *Brownrigg v. DeFrees,* 238 Pac. 714 (Cal., 1925).

There is a great diversity of opinion, and scarcity of reasons, in the cases on the question as to whether or not an agreement to waive the Statute of Limitations is void as against public policy. Fearing a virtual overthrow of the Statute through private agreements, a respectable number hold that it is void. *Bank of La Junta v. Mock,* 70 Colo. 517, 203 Pac. 272 (1922); *Wright v. Gardner,* 98 Ky. 454, 33 S. W. 622 (1895); *Shapley v. Abbott,* 42 N. Y. 443 (1870). The majority hold that it is valid, some on the sole ground that it is not against public policy; *State Loan Co. v. Cochran,* 130 Cal. 245, 62 Pac. 466 (1900); others, dodging the question of public policy, base the decision on the ground of an estoppel *in pais; State Trust Co. v. Sheldon,* 68 Vt. 259, 35 Atl. 177 (1895); *Quick v. Corlies,* 39 N. J. L. 11 (1876), while one case holds that the Statute runs on the promise not to plead and then on the obligation, thus doubling the statutory period. *Hoffman v. Fisher,* 2 W. N. C. 17 (Pa., 1875).

The public policy of a State in such a situation may be best found in the intention of the Legislature as revealed in the Statute of Limitations, itself.

The intention there is to provide, solely for the benefit of a party, a defense which he may invoke if he chooses, and, having given the option it would seem to be of no consequence to anyone, legislature, courts, or public, how that option is exercised. Since the decision is entirely within the individual's control, it should not be against public policy that he have the right to bind himself by contract not to plead the Statute. *Parchen v. Chessman,* 49 Mont. 326, 143 Pac. 631 (1914).

CONTRACTS—STATUTORY PENALTIES—EFFECT ON CIVIL RIGHTS—Plaintiff left his truck with defendant for repairs, orally agreeing to pay the cost thereof, approximately three hundred dollars. A statute, Conn. Acts 1921, Ch. 400, § 63, required that all repairs to motor vehicles in excess of fifty dollars be authorized in writing by the owner, and attached a penalty of fifty dollars for violation. The defendant failed to obtain such written authority. Upon completion of the repairs, the plaintiff refused to pay the entire amount, and when the defendant refused to deliver the truck, brought an action of replevin. *Held:* Plaintiff entitled to possession of the truck upon tender of fifty dollars. *Di Biase v. Garnsey,* Supreme Court of Errors of Connecticut, October 2, 1925.

Frequently a statute imposes a penalty upon an act without prohibiting it or expressly declaring it illegal or void. In cases of this kind, the decisions of the courts are not in harmony. Some courts hold that an agreement founded on or for the doing of such penalized act is void, reasoning that a penalty implies a prohibition even though there are no prohibitory words in the statute. *Sagal v. Fylar,* 89 Conn. 293, 93 Atl. 1027 (1915); *Doe v. Burnham,* 31 N. H. 426 (1855); *Columbia Bridge Co. v. Haldeman,* 7 W. & S. 233 (Pa., 1844); *Holt v. Green,* 73 Pa. 198 (1873). Others have regarded the question as one of legislative intent, and have declared the proper rule to be that the courts will look to the language of the statute and the purpose sought to be accomplished in its enactment; and if, from these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will construe the statute accordingly. *National Bank v. Matthews,* 98 U. S. 621 (1878); *Coombs v. Emery,* 14 Me. 404 (1837); *Buckman v. Bergholz,* 37 N. J. L. 437 (1874).

It is believed that the instant case would be correctly decided under either theory, since the court says that the purpose of the statute was to put the parties to such contracts in a position of honesty and fair dealing.

DAMAGES—PROXIMATE CAUSATION—LOWERED VITALITY RESULTING IN SUBSEQUENT DISEASE—Fifteen months before he died of tuberculosis, deceased had, due to defendant's negligence, received certain injuries which had lessened his power of resistance to disease. But during the interval he had worked as an embalmer and had also at times unwisely exposed himself in inclement weather. *Held:* Defendant not liable in damages for the deceased's death. *Miqliaccio v. Public Service Ry. Co.,* 130 Atl. 9 (N. J., 1925).

The broad general rule is that a lowered vitality and a lessened power of resistance, alone, are insufficient to form a causal connection between an injury and a subsequent disease. *Gray v. Chicago, etc., Ry.,* 153 Wis. 637, 142 N. W.

505 (1913). Perhaps a more satisfactory statement, of the converse rule, is that defendant's negligence may be regarded as the direct cause of a disease which, from causes not attributable to treatment, improper habits, or peculiar constitutional tendencies, frequently develops from personal injuries. See *Dickson v. Hollister,* 123 Pa. 421, 431, 16 Atl. 484, 487 (1889). Thus where a flesh wound developed erysipelas, not attributable to improper treatment, recovery was permitted. *Dickson v. Hollister, supra.* Similarly, a verdict in favor of a workman, previously robust and healthy, who developed consumption four months after being struck on the chest by a heavy timber, was upheld. *Seckinger v. Philibert Mfg. Co.,* 129 Mo. 590, 31 S. W. 957 (1895). And the same decision was reached where a previously healthy boy, partially paralyzed by defendant's negligence, died five months later of pneumonia, contracted under the ordinary conditions of the sick room. *Beauchamp v. Mining Co.,* 50 Mich. 163, 15 N. W. 65 (1883). And it makes no difference that a disease so contracted is epidemic in the community at the time. *Terre Haute Ry. v. Buck,* 96 Ind. 346 (1884). But in the principal case, inasmuch as the deceased's occupation abnormally exposed him to the disease germs and his indiscretion increased his susceptibility, the result seems to be consistent with the general law on the subject. In applying the same principle to a case where expert medical testimony was relied upon, it has been recently held that such testimony must be to the effect that the disease "most probably" resulted from the injury to entitle it to consideration. *McCrosson v. P. R. T. Co.,* 283 Pa. 492, 129 Atl. 568 (1925). Apparently only the presence of some unusual intervening cause in that case could explain the physician's unwillingness to testify more positively.

EVIDENCE—MEMORANDA USED BY WITNESS—RIGHT OF OPPOSING COUNSEL TO INSPECT—Defendant was on trial on a criminal charge. A witness for the state used a private memorandum to refresh his memory. The court refused to allow the counsel for the defendant to see the book or to cross-examine the witness about the paper. *Held:* No error. *Adams v. State,* 128 S. E. 924 (Ga., 1925).

The great weight of authority is opposed to this decision, holding that a memorandum once put into the hands of a witness to refresh his memory should be open to the inspection of counsel and jury and to the cross-examination of the former. Some courts merely state it as a recognized and universal rule of evidence. *Gregory v. Tavernor,* 6 C. & P. 280 (Eng., 1833); *Morris v. United States,* 149 Fed. 123 (C. C. A., 1907). Others support the rule on the ground of protection for the opposing party in avoiding imposition and false aids; *Capital Traction Company v. Hoover,* 45 D. C. App. 247 (1916); *Duncan v. Seely,* 34 Mich. 369 (1876); *Tibbets v. Sternberg,* 66 Barb. 201 (N. Y., 1870); and on the fact that an inspection of the memorandum may reveal its insufficiency to refresh the memory, or circumstances that would detract from its credibility. *Acklen's Executor v. Hickman,* 63 Ala. 494 (1879); *Harman v. Illinois & Eastern Coal Co.,* 237 Ill. 36, 86 N. E. 625 (1908); *Commonwealth v. Jeffs,* 132 Mass. 5 (1882).

The court in the principal case based its decision on *Schall v. Eisner,* 58 Ga. 190 (1877), and *Smith v. State,* 17 Ga. App. 298, 86 S. E. 660 (1915).

These cases, however, did not discuss the question involved here, but merely held that memoranda used to refresh the memory were not in themselves evidence. That does not necessarily mean that counsel may not inspect them or cross-examine on them.

There is some authority for the decision. *Wabash & Erie Canal v. Bledsoe,* 5 Ind. 133 (1854); *Bank of Du Bois v. Bank of Williamsport,* 114 Pa. 8 (1886); *State v. Collins,* 15 S. C. 373 (1881). But it seems to be based on no sound principle, relying mainly on the inference that the memoranda, not being evidence, cannot be inspected.

FORFEITURE—SEIZURE BY STATE OFFICERS FOR UNITED STATES—State officers seized without warrant an automobile transporting intoxicating liquors, and turned it over to Federal prohibition enforcement agents. A proceeding brought, under Volstead Act, § 26, to forfeit the car, was opposed on the ground that an illegal seizure cannot be the basis of a forfeiture. *Held:* Forfeiture allowed. *U. S. v. One Reo Motor Truck,* 6 Fed. (2d) 412 (D. C., 1925).

The Federal courts are not agreed whether a forfeiture can be based on a seizure made by an unauthorized person. It is held in *U. S. v. Story,* 294 Fed. 517 (C. C. A., 1923), and in *U. S. v. Two Automobiles,* 2 Fed. (2d) 264 (D. C., 1924), that a forfeiture may follow, while in *U. S. v. Loomis,* 297 Fed. 359 (C. C. A., 1924), the contrary is held. The former view is authorized by a doctrine laid down by Story, *J.,* in *The Caledonian,* 17 U. S. 100 (1819), and again in *Taylor v. U. S.,* 44 U. S. 197 (1845), to the effect that any person may at his risk seize for the purpose of enforcing a forfeiture, notwithstanding that he act without authority or that the seizure is otherwise irregular. This doctrine was rejected in *U. S. v. Loomis, supra,* as not authoritative, because in those decisions of Story, *J.,* the seizures were made by agents of the Federal government. While this is true, an examination of the cases shows that Story, *J.,* far from indulging in mere dictum, purposely based his decisions on a general principle of common law. Until *U. S. v. Loomis, supra,* his doctrine seems not to have been challenged; and therefore, in view of this state of the law, the instant case seems sound.

An attempt was also made to put the decision upon an actual seizure by the Federal officers. Since the car was turned over to them almost immediately after the seizure, the court thought the transportation in general had not ceased. But such a view tends to raise perplexing questions as to how much time may intervene before it will be said that the act of transporting ceases. It is submitted, therefore, that the decision is best supported on Justice Story's doctrine.

HUSBAND AND WIFE—ANNULMENT OF MARRIAGE FOR CONCEALMENT OF PRIOR INSANITY—Under this title in the November issue of the LAW REVIEW, at page 97, the statement is made that the Pennsylvania Act of 1905, P. L. 211, Pa. St. 1920, § 9148, allows a divorce from an insane spouse. This was erroneous, the Act having been construed, in *Baughman v. Baughman,* 34 Pa. Super. 271 (1907), to relate only to jurisdiction. Insanity of a spouse is not ground for divorce in Pennsylvania. *Mintz v. Mintz,* 83 Pa. Super. 85 (1924).

LARCENY—LOST PROPERTY—CONSTRUCTIVE POSSESSION—Defendant was inadvertently given a sack of money pinned to a dress along with other clothes to be washed. She subsequently discovered the sack of money floating in the wash tub and converted it to her own use, there being evidence of intention to convert at the time of the discovery. *Held:* Larceny, *Sessions v. State,* 274 S. W. 580 (Tex., 1925).

The ground on which the court based its decision was that this money was "lost property" which remained in the constructive possession of the real owner.

The correct definition of what constitutes lost property is: "To lose is not to place or put anything carefully and voluntarily in the place you intend and then forget it, it is casually and involuntarily to part from the possession." *Lawrence v. State,* 1 Humph. 228 (Tenn., 1839). In accord are *Foulke v. R. R.,* 228 N. Y. 269, 127 N. E. 237 (1920); *Hamaker v. Blanchard,* 90 Pa. 377 (1879); *Moxie v. State,* 54 Tex. Cr. R. 529, 114 S. W. 375 (1908); 25 C. J. 1134. England follows the same general view. *Cartwright v. Green,* 8 Ves. Jr. 405 (Eng., 1803).

The cases cited by the Texas court in support of its stand were decided on quite different facts, being principally cases of pocketbooks dropped in public streets and other more or less public places. However, the case of *Robinson v. State,* 11 Tex. App. 403 (1882), also cited by the court, is in accord with the interpretation given to the facts. There a merchant put clothes in a trunk, and his clerk later sold the trunk to the defendant, neither of them knowing it contained anything. In its opinion the court said: "The goods so far as these parties were concerned were lost," "they were in every sense lost goods which he [defendant] found." But the court also said the goods could be considered as mislaid. And in *Moxie v. State, supra,* the court held that a purse which had been forgotten and left in a buggy was not lost property.

The case is interesting because of the court's interpretation of the facts. The conviction would be proper on the grounds that the possession of the money had never been given to the defendant; *Merry v. Green,* 7 M. & W. 623 (Eng., 1841); or on the theory of larceny of mislaid property. A conviction would also be proper under an indictment for larceny by bailee. But the money certainly was not "lost property."

PROHIBITION LAW—POSSESSION OF LIQUOR—REQUIREMENTS—Defendant, suspected of committing robbery, was arrested by military police while driving his automobile through a military reservation. He was surrendered to county officials, but released on the charge. Before he left the building his automobile was searched by county officials and hidden liquor was discovered. He was arrested for the unlawful possession of liquor. *Held:* Liquor inadmissible as evidence. *State, et al., v. Ethridge,* 238 Pac. 19 (Wash., 1925).

Possession of liquor has been defined as the owning or having of it in one's power. *Thomas v. State,* 232 S. W. 826 (Tex., 1921); *State v. Spillman,* 110 Wash. 662, 188 Pac. 915 (1920). In the instant case the court reasoned that the control of the defendant's person and effects becoming absolute as the concomitants of arrest, the possession of the liquor was in the

military police and not the defendant, and lack of knowledge, by the military police, of the hidden liquor was immaterial.

Although power to control is important, the court seems to overlook the fact that possession of a chattel (the liquor) is not necessarily identical with possession of its receptacle (the automobile). For to possess the contents of the receptacle, one must know of its existence, or at least consent to assume control of whatever it may contain. *Merry v. Green,* 7 M. & W. 623 (Eng., 1841); *Durfee v. Jones,* 11 R. I. 588 (1877). And here there is no evidence of an intention to assume control of whatever the automobile may contain.

But even granting that the military police had gotten possession of the liquor, the decision is still difficult to sustain in the face of the fact that the liquor was seized after the defendant had been released. For, having been released on the charge on which he was taken into custody, how can it be said that the military police were still in possession of him and his effects, and if so, upon what grounds? In the light of its reasoning in the instant case, an interesting problem would have been presented to the court, if liquor had been found on the defendant's person under the same circumstances.

SALES—PAYMENT—BANK DEPOSIT AS TENDER—In consideration of five dollars, the plaintiff received an option from the defendant to purchase certain timber for fifteen hundred dollars. Upon payment of the purchase price, title was to be transferred to the plaintiff. Prior to the expiration of the option, plaintiff wired the defendant that he would take the property, and that the deed was to be forwarded to the Old National Bank, Spokane, where the proper sum was on deposit to take up the deed. The defendant refused to convey the timber. *Held:* The deposit of money to the credit of the seller and notifying him of it does not constitute a tender. *Chambers v. Slethei,* 238 Pac. 924 (Wash., 1925).

Ordinarily a tender in satisfaction of an obligation payable in money, to be unobjectionable, must be in such form of money as is, at the time, legal tender for the payment of debt. *Martin v. Bott,* 17 Ind. App. 444, 46 N. E. 151 (1897); 38 Cyc. 146. Thus a check is not ordinarily a good tender. *Harding v. Commercial Loan Co.,* 84 Ill. 251 (1876); *In re Collyer,* 124 App. Div. 16, 108 N. Y. Supp. 600 (1908). The rule is applied to certified checks in *Holland v. Mutual Fertilizer Co.,* 8 Ga. App. 714, 70 S. E. 151 (1911); *Hobbs v. Ray,* 29 Ky. L. Rep. 999, 96 S. W. 589 (1906). In exact accord with the principal case, that a mere deposit in bank in the name of the party to whom a tender is desired to be made, and notice to him is not a tender at all, is *Cassville R. M. Co. v. Aetna Ins. Co.,* 105 Mo. App. 146, 79 S. W. 720 (1904). But the rule has been modified in a number of jurisdictions which hold that tender of a bank check; *Kollitz v. Equitable Mutual Fire Ins. Co.,* 92 Minn. 234, 99 N. W. 892 (1904); *Pershing v. Feinberg,* 203 Pa. 144, 52 Atl. 22 (1902); or certificate of deposit; *Gradle v. Warner,* 140 Ill. 123, 29 N. E. 1118 (1892); in payment of a debt is a good tender unless it is specifically refused on the ground that it is not lawful money.

It would seem that the latter is the better view, and more in accord with business practice. To say, as does the instant case, that a deposit in the name of the seller is not a good tender, is to deny to commerce the use of the bank, its main channel of payment.

TAXATION—ESTATE TAX—INCLUSION IN NET ESTATE OF LIFE INSURANCE PAYABLE DIRECTLY TO BENEFICIARIES—Suit was brought by executors of an estate to recover taxes paid upon the proceeds of insurance policies payable directly to the beneficiaries, and included in the value of the net estate under § 402 (f) of the Act of 1919, 40 STAT. 1057, c. 18. All the policies involved had been taken out prior to the passage of the act. *Held:* Judgment for plaintiffs. *Lewellyn v. Frick,* 268 U. S. 238 (1925).

The decision of the Supreme Court went upon the ground that the provision of the act was not retroactive, and did not apply to the policies in question. This was in pursuance of the rule that acts of Congress should be construed, if possible, so as to avoid questions of constitutionality. See *Panama R. R. Co. v. Johnson,* 264 U. S. 375, 390 (1924). The constitutionality of the tax was accordingly left undecided.

The estate tax imposed by the Act is an excise upon the right to transmit property. *Y. M. C. A. v. Davis,* 264 U. S. 47 (1924). It taxes "not the interest to which some person succeeds on a death, but the interest which ceased by reason of death." See *Knowlton v. Moore,* 178 U. S. 41, 49 (1902). The Act levies a tax equal to a percentage of the net estate transmitted. *Edwards v. Slocum,* 264 U. S. 61 (1924). An insurance policy, and the right to the money to become due under it, become vested in the beneficiary the moment it is issued. *Tyler v. Treasurer and Receiver General,* 226 Mass. 306, 115 N. E. 300 (1917); *Parsons' Estate,* 117 App. Div. 321, 102 N. Y. Supp. 168 (1907); *Entwhistle v. Travelers' Ins. Co.,* 202 Pa. 141, 51 Atl. 759 (1902). It would seem to follow that the proceeds of insurance policies payable directly to beneficiaries do not form a part of the estate of the decedent. It was contended for the government that the inclusion of the proceeds of the policies was not a tax upon the property, but a reasonable measure of the excise. But there is no transmission of property upon the value of which the percentage of taxation is based. Calling the value of the prospects of the policies a mere measure of the transfer tax is not consistent with the liability imposed upon the beneficiaries by §§ 408 and 409 of the act. The decision of the District Court was based squarely upon the unconstitutionality of the tax. *Frick v. Lewellyn,* 298 Fed. 803 (D. C., 1924).

The Supreme Court said in its opinion that a serious question must be answered before the tax could be upheld. A case requiring a decision on the point will undoubtedly be presented in the near future.

TORTS—NEGLIGENCE—ATTRACTIVE NUISANCE—Plaintiffs were mothers of deceased children, killed by a cave-in of an embankment in defendant's sand quarry in which they were trespassing. The quarry was fenced and the children had been repeatedly warned out by the defendant and others. The bank was mixed with clay to prevent falling, and the cave-in would not have occurred but for holes dug under the bank by the children. *Held:* Judgment for plaintiffs. *Baxter v. Park,* Supreme Court of South Dakota, September 18, 1925.

Some courts do not recognize the attractive nuisance doctrine with respect to trespassing children. *Skaling v. Sheedy,* 101 Conn. 545, 126 Atl. 721

(1924); *State v. Bealmear*, 130 Atl. 66 (Md., 1925); *Daniels v. N. Y. & N. E. R. R.*, 154 Mass. 349, 28 N. E. 283 (1891). Other courts allow recovery, permitting the jury to find anything with which a child can play an attractive nuisance and no amount of precaution by the land owner sufficient, thereby making him practically the insurer of all children. *Traction Co. v. Stark*, 74 Ind. App. 669, 127 N. E. 460 (1920); *Mattson v. R. R.*, 95 Minn. 477, 104 N. W. 443 (1920). The majority have at some time followed the latter rule, but seeing danger in the extent to which it may be carried, have placed arbitrary limitations upon it without clearly overruling their previous decisions, nevertheless making the rule practically ineffective. Some of these limitations are that the attraction must be visible from the street, or inherently dangerous, or dangerous machinery, or an unnatural use of the land, or the precautions need only be in proportion to the value of the property. *United Zinc Co. v. Britt*, 258 U. S. 268 (1922); *Polk v. Cemetery*, 37 Cal. App. 624, 174 Pac. 414 (1918); *Parkes v. Telephone Co.*, 120 Misc. 459, 198 N. Y. Supp. 698 (1923); *Ansell v. Philadelphia*, 276 Pa. 370, 120 Atl. 277 (1923).

Since the defendant in the instant case seems to have taken all reasonable precautions commensurate with the value of his business, the court might have found little difficulty in bringing this case within one of the exceptions favored by the modern tendency.

TRUSTS—CONDITIONS—RESTRAINT ON FREEDOM OF WORSHIP—A deed of trust was executed by a grandfather to provide for the education and support of his three-year-old grandson—but only so long as the latter should be brought up and reared in the Roman Catholic faith. It was argued that this condition if allowed would deprive the infant of his right to freedom of worship. *Held:* Condition void; the beneficiary entitled to the income free of the restriction. *Devlin's Trust Estate*, 284 Pa. 11, 130 Atl. 238 (1925).

This very question has arisen in a number of jurisdictions and has invariably been settled the other way. *Hodgson v. Halford*, L. R. 11 Ch. D. 959 (Eng., 1879); *Magee v. O'Neill*, 19 S. C. 170 (1882); *Re Paulson*, 127 Wis. 612, 107 N. W. 484 (1906). Sometimes the condition has concerned marriage into or out of a certain church; *Haughton v. Haughton*, 1 Mol. 611 (Ir., 1824); *Re Knox*, 23 L. R. Ir. 542 (1889); *Renaud v. Lamothe*, 32 Can. S. C. Rep. 357 (1902); and sometimes the taking of religious orders. *Re Trust Funds*, 1 Sim. N. S. 37 (Eng., 1850); *Barnum v. Baltimore*, 62 Md. 275 (1884); *Kenyon v. See*, 94 N. Y. 563 (1884). A different but analogous point is raised when loyalty to a religion is made a condition subsequent to membership in a benefit society. *Mazurkiewicz v. St. Adelbertus Aid Society*, 127 Mich. 145, 86 N. W. 543 (1901); *Franta v. Bohemian*, 164 Mo. 304, 63 S. W. 1100 (1901). In all these cases the condition was held valid.

The Pennsylvania rule governing the principal case was laid down in *Drace v. Klinedinst*, 275 Pa. 266, 118 Atl. 907 (1922). There the condition was in a will; and the court held that public policy prohibited such religious control by a testator through the disposition of his property.

It is submitted that the constitutional provisions concern only interference by the state with religious liberty; and that this public policy, if consistently applied, would forbid most gifts to religious organizations.

WILLS—RIGHT OF CODICILLARY LEGATEE TO TAKE UNDER RESIDUARY CLAUSE OF WILL—Testatrix by will devised the remainder of her estate to the "persons herein named as legatees." Later by a codicil some of the legatees named in the will having died, she revoked their legacies and in lieu thereof gave them to A, B and C. *Held:* The latter cannot take under the residuary clause of the will. *Lodge v. Grubb,* 130 Atl. 28 (Del., 1925).

If a legacy given in a codicil is expressly stated to be on the same conditions as the legacy given to that person in the will, the court will, of course, enforce the evident intention of the testator. *Cooper v. Day,* 36 Ch. 59 (Eng., 1817). So also if the second legacy is declared to be given in "addition to" or in "substitution for" the legacy given by the will. *Cooper v. Day, supra; Day v. Croft,* 49 Rolls 456 (Eng., 1841); *Earl of Shaftsbury v. Duke of Marlborough,* 58 Ch. 827 (Eng., 1884). But there is no inference that a legacy bequeathed by a codicil stands on the same footing with a legacy bequeathed in the will for which it has been substituted. It cannot, for instance, enjoy any exemption from duty given to the legacy created by the will unless an intention to exempt is clearly indicated. *Burrows v. Cottrell,* 57 Ch. 1038 (Eng., 1830). Moreover, the general rule that a substituted bequest is subject to the same provisions as the original bequest does not apply where the bequests are not to the same person. *Chatteris v. Young,* 38 Ch. 304 (Eng., 1827); *Re Gibson,* 70 Ch. 1222 (Eng., 1861).

Pennsylvania seems contrary—that in such a case there is a subrogation entitling the legatee substituted in the codicil to stand on the same footing with the one named in the will. *Alsop's Appeal,* 9 Barr 374 (Pa., 1848). The instant case is in accord with the English view, and opposed to that of Pennsylvania. There appears to be no other American case on the point.