RECENT CASE NOTES

CONSTITUTIONAL LAW—CIVIL SERVICE APPOINTMENTS—VALIDITY OF STATUTE PREFERRING VETERANS.—The municipal Civil Service Commission of New York City certified three names to the Police Commissioner for promotion, giving preference to veterans of the Great War, in accordance with a New York Statute (Laws, 1920, ch. 282) which provided that such veterans should, in civil service appointments and promotions, be preferred above others of the same grade on the lists of those who had passed the civil service examinations. The petitioners contended that the statute was unconstitutional and that the three highest names on the examination list should be certified for promotion. *Held,* that the statute was unconstitutional. *Matter of Barthelmess v. Cukor* (1921) 231 N. Y. 435, 132 N. E. 140.

Under a state constitution providing that the legislature shall not grant to any class of citizens privileges or immunities which, upon the same terms, shall not apply to all citizens, a veteran preferment statute has been held constitutional on the ground that the phrase "privileges and immunities" means only such as belong to every citizen, and does not include the privilege of holding office. *Shaw v. City Council of Marshalltown* (1905) 131 Iowa, 128, 104 N. W. 1121, construing Iowa Acts, 1904, ch. 9, sec. 1. Where a state constitution provided that the legislature might make "wholesome and reasonable" laws to govern public employments, a statute preferring veterans was considered valid. *Opinion of the Justices* (1896) 166 Mass. 589, 44 N. E. 625, construing Mass. Sts. 1896, ch. 517, sec. 6. At least one court has circumvented a similar statute by holding that it is not to be invoked by any veteran unless he can show that he is the *only* veteran qualified for preferment under its terms. *Allison v. Board of Education* (1899) 125 Calif. 72, 57 Pac. 673, construing Calif. Sts. 1891, ch. 212. In the instant case, the unusual wording of the New York Constitution to the effect that promotions should be made as far as practicable on the basis of competitive examination is held to preclude any unreasonable statutory preferment of one class over all other classes of candidates irrespective of any consideration of their relative fitness for office or their comparative standing on the lists of those successfully passing the examinations.

CONSTITUTIONAL LAW—EMERGENCY CLAUSES IN LEGISLATION—LEGISLATIVE DECLARATION NOT CONCLUSIVE ON COURTS.—Mandamus proceedings were instituted to compel the Secretary of State of Missouri to file referendum petitions against four bills passed by the Legislature abolishing certain county offices. The Secretary of State refused to file these petitions because each bill contained the words "This enactment is hereby declared necessary for the immediate preservation of the public peace, health, or safety." Article 4, section 57 of the Constitution of Missouri provides that a referendum "May be ordered except as to laws necessary for the immediate preservation of the public peace, health, or safety." *Held,* (two judges *dissenting*) that a statutory statement of purpose does not foreclose a judicial determination of the real character of a law. *State v. Becker* (1921, Mo.) 233 S. W. 641.

As a general rule, the existence of a public necessity is a matter for the exclusive determination of the legislature and not within the province of the courts. 1 Willoughby, *Constitution* (1910) 19; *Scott v. Frazer* (1919, S. E. D. N. D.) 258 Fed. 669; *Miller v. Fitchburg* (1901) 180 Mass. 32, 61 N. E. 277. Citing a South Dakota decision as authority, several cases have held that the judgment of a legislature in determining whether a measure is necessary for the preservation of the public peace, health, or safety, is not subject to judicial review. *State v. Bacon* (1901) 14 S. D. 394, 85 N. W. 605; *Kadderly v. Portland* (1903) 44 Or. 118,

74 Pac. 710; *Van Kleeck v. Ramer* (1916) 62 Colo. 4, 156 Pac. 1108. But *State v. Bacon, supra,* seems to have been overruled. *State v. Whisman* (1915) 36 S. D. 260, 154 N. W. 707. And a later South Dakota decision holds that while the existence of an emergency making the preservation of the public peace, health, or safety necessary is a question for the legislature, yet whether an act, in substance and effect, meets the emergency is a question for the courts. *Hodges v. Snyder* (1920, S. D.) 178 N. W. 575. The latter may scrutinize a legislative declaration of an emergency and, if the statute purporting to be enacted to meet the emergency has no relation to its object, it is the duty of the court to so adjudge. *Mugler v. Kansas* (1887) 123 U. S. 623, 8 Sup. Ct. 273; *State v. Meath* (1915) 84 Wash. 302, 147 Pac. 11. A declaration that an act is of a certain class, excepted by the Constitution, has no more binding force than a declaration that an act is constitutional. *McClure v. Nye* (1913) 22 Calif. App. 248, 133 Pac. 1145. The instant case appears to follow the present trend of authority in holding that whether a measure is for the immediate preservation of the public peace, health, or safety, is controlled by the facts and not by a superfluous declaration of necessity. If the stated object is not in reality involved, its avowal should not deprive the people of their constitutional privilege of referendum. The power to determine whether the act falls within the legislative declaration of purpose rests with the courts. *State v. Sullivan* (1920, Mo.) 224 S. W. 327; *State v. Stewart* (1920, Mont.) 187 Pac. 641; (1915) 29 HARV. L. REV. 91.

JURISDICTION—SERVICE OF PROCESS ON OFFICERS OF FOREIGN CORPORATION NOT DOING BUSINESS IN STATE.—Suit having been filed against certain foreign corporations, service of process was attempted upon their officers who had come into the state to attend a convention on matters of business policy. *Held,* that the writ should be quashed for lack of jurisdiction, since the defendants were not "doing business" within the state. *Apgar v. Altonna Glass Co.* (1921, N. J. Eq.) 113 Atl. 593.

The requirements of due process of law forbid the assumption of jurisdiction *in personam* over anyone, in the absence of consent, who is not found in the state. *Pennoyer v. Neff* (1877) 95 U. S. 714. Hence, to render a foreign corporation amenable to process, it must appear that it is "doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent." *Philadelphia & R. Ry. v. McKibbin* (1916) 243 U. S. 264, 37 Sup. Ct. 280. The question as to what constitutes the doing of business for the purpose of jurisdiction is one for which no general rule can be given. Each case depends upon its own facts. It has been held, for instance, that a railroad company was not amenable to process in a state where it maintained an active soliciting office, which not only sought business, but received money from prospective passengers to whom it gave prepaid orders for tickets to be obtained at another point, and issued exchange bills of lading for the convenience of shippers. *Green v. Chicago, Burlington, & Quincy Ry.* (1906) 205 U. S. 530, 27 Sup. Ct. 595. On the other hand, where a foreign manufacturing corporation maintained a soliciting office which had authority to take orders for machines and receive payment in money, checks, or drafts, payable and collectible within the state, it was held that the corporation was sufficiently present to validate a personal judgment. *International Harvester Co. v. Kentucky* (1913) 234 U. S. 579, 34 Sup. Ct. 944. It is to be noted that the jurisdictional question is distinct from the question as to the extent of business which must be done in order to bring foreign corporations within regulative statutes. Business may be sufficient to subject the foreign corporation to service of process, and yet insufficient to require it to take out a license. *International Text-Book Co. v. Tone* (1917) 220 N. Y. 313, 115 N. E. 914; *Tauza v. Susquehanna Coal Co.* (1917) 220 N. Y. 259, 115 N. E. 915.

As to what constitutes "doing business" for the latter purpose, see (1921) 30 YALE LAW JOURNAL, 529. In the instant case, the only basis for jurisdiction urged was that the officers were in the state on business of their corporations. But since the corporations themselves were not transacting business within the state, the service was properly held abortive.

KANSAS INDUSTRIAL COURT—REGULATIONS FOR CONDUCT OF PACKING BUSINESS.—An agreement between the defendant, a small meat packing concern, and its four hundred employees expired on January 1, 1921, and the defendant refused to renew it. Failing of agreement a complaint was filed by the plaintiff labor organization against the defendant industry. *Held,* that (1) the employees were to receive a minimum wage as scheduled by the court, (2) a basic working day of eight hours was to be established, (3) sufficient work was to be furnished to the "regular employees" so that their monthly earnings would constitute a fair wage, (4) women were to receive the same wages as men engaged in the same character of work, and (5) time and a half was to be paid for work on legal holidays. *Amalgamated Meat Cutters and Butchers Workmen of North America v. Wolff Packing Company* (1921, Kan. Ind. Ct.) Docket No. 3926.

The instant case shows the scope and extent of the court's supervision over one of the selected industries of food, clothing, fuel, and transportation. The order passes far beyond the bounds of regulation into the field of managerial supervision. Its only precedents are found in the decisions of the Australian and New Zealand Courts of Conciliation. See Henry B. Higgins, *A New Province for Law and Order* (1915) 29 HARV. L. REV. 13; (1918) 32 *ibid.* 189; (1920) 34 *ibid.* 105; W. Jethro Brown, *The Separation of Powers in British Jurisdictions* (1921) 31 YALE LAW JOURNAL, 24, 33. The underlying economic basis of the decision is found in the principle that wages to labor should be considered before dividends to the investor, and that if a business cannot be maintained without cutting down an employee's fair wage then the enterprise should be abandoned. *Electric Railway Employees v. Joplin and Pittsburgh Railway Company* (1920, Kan. Ind. Ct.) Docket No. 3283; *Broken Hill Mine* (1909, Austr. Ct. of Concil.) 3 Com. Arb. 1, 32. The Australian rule is in accord with the principal case in prescribing the hours of labor, pay for work on legal holidays, and in holding that women are to receive the same wages as men engaged in the same class of work. *Postal Electricians* (1913, Austr. Ct. of Concil.) 7 Com. Arb. 5, 15; *Fruit Growers* (1912, Austr. Ct. of Concil.) 6 Com. Arb. 61, 71. The courts are not in entire harmony as to what constitutes a fair wage. Cf. *State v. Topeka Edison Company* (1920, Kan. Ind. Ct.) Docket No. 3245-1-2; *Boot-factories* (1910, Austr. Ct. of Concil.) 4 Com. Arb. 1, 10. Whether such interference with a business, affected with a public interest, but nevertheless private, will be held by the Supreme Court of the United States to be within the police power of the State and so not in contravention of the Fourteenth Amnedment to the Federal Constitution, seems doubtful, to say the least. In the meantime there is being evolved a system of industrial jurisprudence. Other provisions of the Act creating the court have been held constitutional by the Supreme Court of Kansas. *State v. Howat* (1921, Kan.) 198 Pac. 686; see COMMENTS (1921) 31 YALE LAW JOURNAL, 75. For a discussion of the Kansas Court of Industrial Relations, with provisions of the Act, see Vance, *Kansas Court of Industrial Relations with its Background* (1921) 30 YALE LAW JOURNAL, 456.

LANDLORD AND TENANT—NOTICE TO QUIT—WAIVER BY STATUTORY ACCEPTANCE OF RENT.—The defendant became tenant from year to year of the plaintiff under an agreement which became effective on December 25, 1916. On May 25, 1920, the plaintiff notified the tenant to quit at the expiration of the then current year of tenancy, December 25, 1920. The defendant held over until June 24, 1921, during

which time the plaintiff accepted two quarters' rent. The landlord then brought an action for the recovery of the premises, which, being business premises, were excluded from the provisions of the Rent Restriction Act after that date. *Held,* that such acceptances of rent did not constitute a waiver of the notice to quit. *Town Properties Development Co. v. Winter* (1921, K. B.) 37 T. L. R. 979.

The court chose to follow what appears to be the better reasoned of two recent conflicting decisions on the question of waiver under the English War and Rent Restriction Acts. See *Hartell v. Blackler* [1920] 2 K. B. 161; *Davies v. Bristow* [1920] 3 K. B. 428; (1915) 5 & 6 Geo. V, c. 97, sec. 1 (3); (1920) 10 & 11 Geo. V, c. 17, sec. 5. Although strictly speaking notice to quit as such cannot be waived, the parties may by mutual agreement, express or implied, create a new tenancy upon the expiration of the notice, and the rights that had accrued to the parties by reason of the notice will be deemed to have been relinquished. Woodfall, *Landlord and Tenant* (19th ed. 1912) ch. 8, sec. 7. See *Blyth v. Dennet* (1853) 13 C. B. (o. s.) 178. But the implied agreement which creates a new tenancy must be evidenced by such voluntary acts of the parties as indicate an intention to enter into the new relationship. *Herter v. Mullen* (1899) 159 N. Y. 28, 53 N. E. 700. So a landlord does not waive his right to possession by permitting the tenant, at the latter's request, to enjoy the benefit of the premises until sold. *Whiteacre v. Symonds* (1808, K. B.) 10 East, 13. Nor does he waive it even by thereafter accepting rent from a tenant whom a statute prevents him from expelling. *Palmer v. City Livery Co.* (1897) 98 Wis. 33, 73 N. W. 559. Under the recent English rent legislation a landlord cannot rid himself of a tenant holding over except in cases prescribed by statute. *Remon v. City of London* [1921, C. A.] 1 K. B. 49. A waiver necessarily implies the existence of a right or privilege. When, therefore, a statute takes away the landlord's right to possession after notice, an acceptance of rent should not operate as a waiver of any benefit resulting from the notice to quit. No American case under recent rent legislation has been found which involved the exact question of the instant case, although a provision similar to that of the English statute appears in the recent New York Act. See N. Y. Laws, 1920, ch. 942, 947. One decision, however, seems to predict a similar holding when the point shall be adjudicated. See *Ginsburg v. Leit* (1921, Sup. Ct.) 187 N. Y. Supp. 450.

LIBEL AND SLANDER—ABSOLUTE PRIVILEGE—DEFAMATORY STATEMENTS IN PLEADINGS.—The plaintiff had brought suit for the specific performance of an agreement to return certain shares of stock which the defendant held as security for a loan. In his answer to the complaint the defendant in effect charged the plaintiff with the crime of grand larceny. The plaintiff then brought the present action for libel. The defendant made a motion for judgment on the pleadings. *Held,* that the motion should be granted. *Chapman v. Dick* (1921) 197 App. Div. 551.

Beyond doubt, the prevailing rule in this country is that defamatory allegations in pleadings are absolutely privileged, provided they are pertinent and relevant to the issue. If the statements are not pertinent, the privilege is conditioned on good faith and probable cause. *McLaughlin v. Cowley* (1879) 127 Mass. 316; *Moore v. Manufacturers' Nat. Bank* (1890) 123 N. Y. 420, 25 N. E. 1048; *Simon v. London Guarantee & Accident Co.* (1920) 104 Neb. 524, 177 N. W. 824; 25 Cyc. 378. It is also well settled that the question of relevancy and pertinency is one of law for the court. *Dada v. Piper* (1886, N. Y.) 41 Hun, 254; *Crockett v. McLanahan* (1903) 109 Tenn. 517, 72 S. W. 950. The test is indeed liberal. The statements in the pleadings need not be obviously material; it is sufficient if they might conceivably become so during the trial. *Dayton v. Drumheller* (1919) 32 Idaho, 283, 182 Pac. 102. Some courts have gone so far as to assert that the

plaintiff must prove beyond any doubt that the privilege has been exceeded. *Hammer v. Forde* (1914) 125 Minn. 146, 145 N. W. 810. The defendant is allowed greater latitude in the pleadings than as a witness. See (1919) 28 YALE LAW JOURNAL, 608; (1920) 29 *ibid.* 579. In England the rule is broadly stated that no action can be sustained for any defamatory statements arising out of pleadings. *Munster v. Lamb* (1883) L. R. 11 Q. B. Div. 588; *Bottomly v. Brougham* [1908] 1 K. B. 584. The American courts, if not consciously adopting the English view, are nevertheless arriving at the same practical result, since cases are few where the defamatory matter has not been held to be within the privilege. The matter to which the privilege does not extend must be apparently so palpably wanting in relation to the subject matter that no reasonable man could doubt its irrelevancy. As expressed by the courts, it must clearly appear that the defamatory matter was wholly uncalled for, irrelevant, and immaterial, that it was known by the defendant to be false and untrue, and that it was published without cause or justification and with express malice. *Kemper v. Fort* (1907) 219 Pa. 85, 67 Atl. 991; *Sherwood v. Powell* (1895) 61 Minn. 479, 63 N. W. 1103; *Hammer v. Forde, supra.* Though unavailable in the ordinary case, it is well that this qualification exists, since the result is to prevent wanton attacks on another's reputation in pleadings. See Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings* (1909) 9 COL. L. REV. 579.

MASTER AND SERVANT—COURSE OF EMPLOYMENT—USE OF INCIDENTAL INSTRUMENTALITY.—A servant of the defendant was employed to collect packages in a building in which the plaintiff was the regular operator of the freight elevator. Before the latter went on duty, the defendant's servant asked her to take him up in the elevator. While the plaintiff was obtaining permission from the superintendent, the defendant's servant entered the elevator and proceeded to the tenth floor. Upon returning, the plaintiff stepped into the vacant shaft, receiving the injury for which suit was brought. There was no contention of contributory negligence. A verdict for the plaintiff was set aside on the ground that it was contrary to law. *Held,* that the plaintiff could not recover. Guy, J., *dissenting. Besnar v. American Express Co.* (1921, Sup. Ct.) 115 Misc. 515, 188 N. Y. Supp. 786.

A master is ordinarily liable to third persons for injuries caused by the negligence of a servant acting in the course of his employment. This sometimes occurs in the performance of the act authorized. *Houston v. Keats* (1917) 85 Or. 125, 166 Pac. 531. Liability may result from the choice of the means of doing an authorized act. *Phelon v. Stiles* (1876) 43 Conn. 426; *Poucher v. Blanchard* (1881) 86 N. Y. 256; Mechem, *Agency* (2d ed. 1914) sec. 1878. Or, as in the principal case, from the servant's negligent use of an ordinary means of performance. *Evans v. Davidson* (1880) 53 Md. 245; *Seymour v. Greenwood* (1861, Exch.) 6 Hurl. & Norm. 359. Liability is imposed even if the method of performance is contrary to the explicit instructions of the master. *Klitch v. Betts* (1916) 89 N. J. L. 348, 98 Atl. 427; *Defoe v. Stratton* (1921, N. H.) 114 Atl. 29; Labatt, *Master and Servant* (1913) sec. 2285. That the instrumentality which occasioned the injury did not belong to the master will not in itself preclude recovery, if the tort was within the scope of the servant's employment. *Goldsmith v. Cheesebrough* (1921, Md.) 113 Atl. 285; Labatt, *op. cit.* sec. 2282. Even if the use of the elevator could be called a deviation from the master's service, a slight deviation does not relieve the master of liability. *Thomas v. Lockwood Oil Co.* (1921, Wis.) 182 N. W. 841. A servant is acting in the course of his employment when he is doing something incidental or natural to the promotion of his master's business. *Flores v. Garcia* (1920, Tex. Civ. App.) 226 S. W. 743; Mechem, *op. cit.* sec. 1874; Laski, *Vicarious Liability* (1916) 26 YALE LAW JOURNAL, 105. Whether or not a servant is acting in the course of his employment is a mixed

question of law and fact. *Richard v. Amoskeag Mfg. Co.* (1920) 79 N. H. 380, 109 Atl. 88. The question might well have been left to the jury in the instant case, as the dogmatic view of the court rather clearly overlooks the general trend of recent decisions in point.

PLEADING—BURDEN OF PROOF—WHERE WARRANTY IS DENIED BY VENDOR.—The vendor brought an action for breach of a contract for the sale of seed, alleging that the vendee agreed to buy the seed, and refused to accept it. The vendee pleaded a general denial; that the contract into which he entered with the vendor contained a warranty of quality, and that the seed was not of the quality warranted. The vendor denied the existence of the warranty. The trial court held that the burden of proof was on the defendant. *Held,* (four Judges *dissenting*) that the ruling of the trial court was correct. *Wilson v. Moran* (1921, Okla.) 197 Pac. 1051.

A warranty of quality in a contract of sale has a legal effect dependant upon the stage of performance. Anson, *Contract* (Corbin's ed. 1919) sec. 399. A breach of warranty in an executory contract goes to the essence; the existence of the fact warranted is a condition precedent to the vendee's duty to accept the goods and the vendor's right to payment. Williston, *Sales* (1909) sec. 184. If the vendee accepts the goods the warranty is considered collateral to the main purpose of the contract, a breach of it giving the vendee only a right of action for damages, or a recoupment in a suit by the vendor. *Pound v. Williams* (1904) 119 Ga. 904, 47 S. E. 218. A vendee bringing an action for breach of warranty must prove its existence and breach. When, however, the existence of a warranty is not denied in an *executed* contract, and the vendee alleges its breach as a defence to the vendor's suit, there is an apparent conflict as to which of the parties must prove the *fulfillment* or *breach* of the warranty. *Roper v. Wells* (1917) 182 Iowa, 237, 165 N. W. 385; *Terry v. Adams-Hicks Zinc & Lead Corp.* (1920, Mo. App.) 222 S. W. 488. But in similar circumstances where the vendor denies the very *existence* of the warranty, the burden is upon the vendee to prove its existence. *Rosenberg-Nougass Co. v. Bischoff* (1918, Sup. Ct.) 170 N. Y. Supp. 359. The instant case manifestly confuses proof of breach of a warranty with proof of its existence, and also the effect of a warranty when the contract is executed and when it is not. The contract was *executory,* the vendee having refused the shipment. The existence of the facts as warranted was then a condition precedent. Williston, *loc. cit.* The vendor alleged an unconditional contract containing no warranty, and the vendee's defence was the existence and breach of a warranty. There is no apparent reason for relieving the plaintiff from the burden of establishing the unconditional contract upon which he is suing. The ruling of the trial court placed upon the defendant the burden of disproving the contract pleaded by the plaintiff, that is, the risk of non-persuasion of the jury was placed upon the defendant, and if the evidence had been in equilibrium he would have lost. The defendant seems to have been done a rather gross injustice.

PROPERTY—MORTGAGE OF GOOD WILL AND TRADE-MARKS IN GROSS.—The petitioner held a mortgage on the property of a publishing corporation. The mortgage turned out to be invalid as to the chattels and other property therein described, whereupon the plaintiff sought to have it construed as a valid transfer of the good will and the trade-marks of the company. *Held,* that the good will and trade-marks could not be mortgaged apart from the business to which they were attached. *In re Leslie-Judge Co.* (1921, C. C. A. 2d) 272 Fed. 886.

There is nothing in the nature of good will and trade-marks that makes their mortgage in gross inherently impossible. Good will is either (1) non-transferable, (2) transferable in gross, or (3) transferable only when "appurtenant" to other property. The first group of cases is confined to good will derived solely from the personal qualities of individuals in certain professions, e. g. musicians;

resulting imposition on the public precludes its transfer. *Blakely v. Sousa* (1900) 197 Pa. 305, 47 Atl. 286; *Messer v. Fadettes* (1897) 168 Mass. 140, 46 N. E. 407; Nims, *Unfair Competition* (2d ed. 1917) sec. 17. The second is where the good will is not attached to any tangible property, but consists of a clientage or a regulated system of business connections, possessing all the advantages which an established business has over a new enterprise. This is often the subject of sale. *Brett v. Ebel* (1898) 29 App. Div. 256, 51 N. Y. Supp. 573 (an unequivocal statement that such good will may be sold independently); *In re Vivanti's Estate* (1910) 138 App. Div. 281, 122 N. Y. Supp. 954 (transfer by deceased partner's widow of his good will to surviving partner); *Webster v. Williams* (1896) 62 Ark. 101, 34 S. W. 537 (goodwill and practice); *Dwight v. Hamilton* (1873) 113 Mass. 175; *Thompson v. Winnebago* (1878) 48 Iowa, 155 (land agent's book of addresses). An anomalous situation exists if it may not be mortgaged. The third group is where the good will is incident to, and can be transferred only with, tangible property or ownership of the business. *Johnson v. Bruzek* (1919) 142 Minn. 454, 172 N. W. 700; Hopkins, *Trademarks* (3d ed. 1917) sec. 96. The principles governing the transfer of this class of good will apply to trade-marks. See *Bulte v. Igleheart Bros.* (1905, C. C. A. 7th) 137 Fed. 492. They can be mortgaged, of course, only in the same manner as they are sold. *Metropolitan Nat. Bank v. St. Louis Dispatch Co.* (1888, C. C. E. D. Mo.) 36 Fed. 722, affirmed 149 U. S. 436. If the concept of good will in gross is recognized in the cases of the second group, what prevents the separation of good will from other property in those of the third group? It has a separate existence for every purpose except transfer. Its technical union with other property, resulting from the fact that it never has been recognized as a separate entity, has the argument of convenience rather than necessary logic to support its continuance. But the separation is avoided perhaps for the cogent reason of preventing fraud on the public, and upon this ground the instant case seems to be correctly decided. See *Bulte v. Igleheart Bros., supra; cf. Materne v. Horwitz* (1886) 101 N. Y. 469, 5 N. E. 331; *Morgan v. Rogers* (1884, C. C. D. R. I.) 19 Fed. 596.

PROPERTY—NATURE OF DOWER—TRANSFERABILITY WHEN CONSUMMATE.—The plaintiff claimed title to certain land through a deed of the defendant widow, delivered before assignment of dower, by which she purported to transfer all her interest. The widow had recovered possession in an action of ejectment against her grantee under the Homestead Act of 1895 (Mo. Rev. Sts. 1899, sec. 3620), but had forfeited this right of homestead by her subsequent marriage. The plaintiff now claimed that the widow's dower interest revived on her remarriage and that, having obtained her interest by deed, he was entitled to possession. *Held,* that the dower comsummate was assignable under statute (Mo. Rev. Sts. 1919, sec. 316), and that it revived on the widow's remarriage, but that the action was barred by the statute of limitations running from the time of revival. *C. M. Smith Bros. Land & Investment Co. v. Phillips* (1921, Mo.) 233 S. W. 413.

Dower is an incident of the marriage contract. 1 Tiffany, *Real Property* (1920 ed.) sec 208. In feudal times land could not be devised, and, without dower, a widow would have had no means of support, being unable to acquire land in her own right during coverture. 1 Scribner, *Dower* (1st ed. 1867) 21 (for historical origin, see *ibid.* ch. 1). Many jurisdictions continue in the feudal contract view as illustrated by the fact that dower is not subject to an inheritance tax, the widow taking by purchase and not by descent. *In re Bullen's Estate* (1915) 47 Utah, 96, 151 Pac. 533; *Randolph v. Craig* (1920, M. D. Tenn.) 267 Fed. 993; cf. (1920) 30 YALE LAW JOURNAL, 534; *contra, Corporation Commission v. Dunn* (1917) 174 N. C. 679, 94 S. E. 481; cf. (1917) 16 MICH. L. REV. 276. In at least one jurisdiction the widow is a cotenant with the heirs. *Humphry v. Gerard* (1912) 85 Conn. 434, 83 Atl. 210. Before the death of the husband the interest

is inchoate, in the nature of an incumbrance on the land, indestructible by any act of the husband, and protected by courts of equity. It could be released to the holder of the fee but not assigned. See COMMENTS (1916) 1 CORN. L. QUART. 202. It is consummated by the death of the husband, and is then in the nature of a power, but it does not become vested at common law until after assignment. Tiffany, *op. cit.* sec. 231; *Daily v. Benn* (1921, Okla.) 198 Pac. 323. Like other choses in action dower consummate was not transferable. *Daily v. Benn, supra; Consolidation Coal Co. v. Grayson* (1919) 186 Ky. 314, 216 S. W. 848; *Heimburger v. Holtapp* (1917) 206 Ill. App. 602. Statutes have quite generally been enacted, as in the instant case, either creating a vested estate immediately on death of the husband or permitting an equitable assignment. *Beal Burrow Dry Goods Co. v. Kessinger* (1918) 132 Ark. 132, 200 S. W. 1002; *Raulerson v. Peeples* (1920, Fla.) 84 So. 370. Every reason existing in feudal times for so closely protecting a widow has vanished with the modern emancipation of women. There seems to be no reason now why consummate dower should not be transferable, as any other chose in action by the modern view, even without the aid of statute.

PUBLIC SERVICE CORPORATIONS—DUTIES TO CITIZENS AS THIRD PARTY BENEFICIARIES UNDER IMPLIED CONTRACT.—The plaintiff florist, a customer of the defendant gas company, sued the latter for neglecting to furnish him with sufficient gas to keep his hot-house at a required temperature, by reason of which his plants were frozen. The defendant held a franchise from the city but had entered into no express contract to furnish any specified quantity of gas. *Held,* that by accepting the franchise the defendant entered into an implied contract to furnish citizens with such services as were reasonably required, and that the plaintiff was entitled to damages. *Humphreys v. Central Kentucky Natural Gas Co.* (1921, Ky. App.) 229 S. W. 117.

Gas companies are public service corporations. *Charleston Natural Gas Co. v. Low* (1901) 52 W. Va. 662, 44 S. E. 410; Cook, *Corporations* (4th ed. 1898) sec. 927; but see *contra, Commonwealth v. Lowell Gas Light Co.* (1866, Mass.) 12 Allen, 75. A duty exists under an express contract with a municipality to render reasonable service impartially to all entitled to receive it. *Shepard v. Milwaukee Gas Light Co.* (1859) 6 Wis. 539; *City of Saginaw v. Consumers Power Co.* (1921, Mich.) 182 N. W. 146. The corporation may be compelled by mandamus, in an action by an individual, to perform its contract. *Portland Natural Gas & Oil Co. v. State* (1893) 135 Ind. 54, 34 N. E. 818. Where a beneficiary is allowed to sue, he may recover damages for the breach of an *express* contract made for his benefit. Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 YALE LAW JOURNAL, 1008, 1017. The present action justly implies a contract with the city to furnish gas to citizens in such quantities as were reasonably required. *Williams v. Mutual Gas Co.* (1884) 52 Mich. 499; *contra, McCune v. Norwich City Gas Co.* (1862) 30 Conn. 521. The instant case is in harmony with the Kentucky rule as to water companies, which are liable to citizens for neglecting to furnish sufficient water to extinguish fires. *Paducah Lumber Co. v. Paducah Water Supply Co.* (1889) 89 Ky. 340, 12 S. W. 554; *Gorrell v. Greensboro Water Supply Co.* (1889) 124 N. C. 328, 32 S. E. 720; *Mugge v. Tampa Waterworks Co.* (1906) 52 Fla. 371, 42 So. 81; Corbin, *Liability of Water Companies for Losses by Fire* (1910) 19 YALE LAW JOURNAL, 425. But curiously enough, this is a distinctly minority rule while the instant case is in accord with the majority rule which holds that public service gas corporations are liable to citizens for damages caused by breach of an express contract with the municipality to furnish service to the citizens. *Williams v. Mutual Gas Co.* (1884) 52 Mich. 499, 18 N. W. 236; *Baker v. New York Interurban Water Co.* (1920, Sup. Ct.) 113 Misc. 459, 184 N. Y. Supp. 833; *Pond v. New Rochelle Water Co.* (1906) 183 N. Y. 330, 76 N. E. 211.

The distinction may lie in the fact that most of the water company cases were suits on *express* contracts which contemplated the supply of water to the municipality itself, while the gas company cases and those water company cases, in which recoveries are generally allowed, are on contracts providing for individual service to citizens. The principal case materially extends the doctrine by allowing suit upon an *implied* contract.

TORTS—INDUCING BREACH OF LESSOR'S RESTRICTIVE AGREEMENT.—The defendant, with knowledge of the existence of a contract between the plaintiff and a third party in which the latter agreed to restrict the sale of a certain device leased to the plaintiff, induced the third party to sell him the restricted device. *Held,* that these facts constituted a cause of action. Putnam, J., *dissenting. Gonzales v. Kentucky Derby Co.* (1921) 197 App. Div. 277, 189 N. Y. Supp. 783.

Inducing a breach of contract is a tort. *Lumley v. Gye* (1853, Q. B.) 2 El. & Bl. 216. By the weight of authority this doctrine applies to all kinds of contracts. *Knickerbocker Ice Co. v. Gardiner Dairy Co.* (1908) 107 Md. 556, 69 Atl. 405; 16 L. R. A. (N. S.) 746, note. The modern tendency is to allow an action where one "maliciously" induces a party to a contract to break it, without regard to the means employed, "maliciously" meaning the intentional doing of a wrongful act without legal justification. *Beekman v. Marsters* (1907) 195 Mass. 205, 80 N. E. 817; *Cumberland Glass Mfg. Co. v. De Witt* (1913) 120 Md. 381, 87 Atl. 927; *Lamb v. Cheney* (1920) 227 N. Y. 418, 125 N. E. 817. But what constitutes legal justification has not been definitely decided. Competition does not justify interference. *Beekman v. Marsters, supra.* Nor is it sufficient that the defendant was seeking his own economic advancement. *Read v. Friendly Society* [1902] 2 K. B. 88. Nor does the unenforceability of the contract under the statute of frauds justify interference. *Cumberland Glass Mfg. Co. v. DeWitt, supra.* The justification is seemingly governed by individual circumstances. See *Glamorgan Coal Co. v. Miners' Federation* [1905, H. L.] A. C. 239, 249. The instant case is an interesting development of the New York rule. In an early decision, the New York Court of Appeals held that no action would lie for inducing a breach of a contract of sale unless it was procured by fraud or other tortious means. *Ashley v. Dixon* (1872) 48 N. Y. 430. In a recent case in which the Court of Appeals allowed a recovery for a "malicious" interference with a contract of employment, the language used was broad enough to cover contracts in general, and in fact the Court cited cases as authorities which had allowed a recovery on contracts other than those of service. See *Lamb v. Cheney, supra.* The majority of the Court in the instant case interpreted this decision as standing for the broad proposition that a "malicious" interference with a contract of any sort was actionable, and felt safe in so doing since the lower courts of New York have repeatedly held that there is no distinction between contracts of service and other contracts in actions for procuring their breach. *DeJong v. Behrman Co.* (1911) 148 App. Div. 37, 131 N. Y. Supp. 1083; *Laskey Feature Play Co. v. Fox* (1916, Sup. Ct.) 93 Misc. 364, 157 N. Y. Supp. 106; *Turner v. Fulcher* (1917, Sup. Ct.) 165 N. Y. Supp. 282. The present decision is in accord with the modern tendency to allow a cause of action for an unjustified intentional interference with a contract of any kind. It is perhaps safe to say that the decision in *Ashley v. Dixon, supra,* would not be followed to-day by the Court of Appeals.

TRIAL PRACTICE—DISAGREEMENT OF JURY—COERCION AS GROUND FOR NEW TRIAL.—After an absence of two hours the jury in an action for personal injuries had reported agreement on liability but not on the amount of damages. They were dismissed until the next day. The presiding judge, being called away, appointed another judge to receive the verdict on the amount of damages. On being advised that the jury did not think they could agree, he told them that he had not been

asked to discharge them but to receive their verdict, that he would not feel warranted in discharging them, but would follow his rule of keeping juries together until they reached a verdict, and that the previous judge would be greatly disappointed and the whole effort of the trial would be wasted if they did not reach a verdict. He suggested a half hour's walk for relaxation and then an earnest endeavor to consider the case fully and reach a verdict. After a verdict for the plaintiff the defendant appealed on the ground that the judge's statements were coercive. *Held,* that the remarks were unwarranted and prejudicial, and that a new trial should be granted. *Texas Midland Ry. v. Brown* (1921, Tex. Com. App.) 228 S. W. 915.

Although agreed that coercion of the jury is error, the courts do not agree as to what amounts to coercion sufficient to warrant a new trial. It has been held not to be reversible error to urge a jury to agree. *Doty v. Smith* (1907) 80 Conn. 245, 67 Atl. 885; *Vinton v. Plainfield Township* (1919) 208 Mich. 179, 175 N. W. 403. Nor to remind the jury of the amount of effort spent on the trial. *Knickerbocker Ice Co. v. Pennsylvania Ry.* (1916) 253 Pa. 54, 97 Atl. 1051. Nor to keep the jury together for a long time. *Louisville & N. Ry. v. Johnson* (1920) 204 Ala. 150, 85 So. 372; *Baker v. Mohl* (1916) 191 Mich. 516, 158 N. W. 187. But it is reversible error to urge agreement in order to save expense. *Missouri, K. & T. Ry. v. Barber* (1919, Tex. Com. App.) 209 S. W. 394; *Covey v. Rogers* (1912) 85 Vt. 308, 81 Atl. 1130. Or to tell the minority to agree with the majority. *Picken v. Miller* (1915) 59 Ind. App. 115, 108 N. E. 968. Or to threaten to keep the jury a long time. *Mar v. Shew Fan Qui* (1909) 108 Minn. 441, 122 N. W. 321; *contra, Southern Ry. v. Fleming* (1907) 128 Ga. 241, 57 S. E. 481. Or to advise a compromise. *Peary v. Clemons* (1912) 10 Ga. App. 507, 73 S. E. 756; *Highland Foundry Co. v. N. Y., N. H. & H. Ry.* (1908) 199 Mass. 403, 85 N. E. 437; *contra, Smith v. Stanley* (1912) 114 Va. 117, 75 S. E. 742. Where the only question was the amount of damages, it was held not to be reversible error to refuse to discharge the jury. *St. Louis, I. M. & S. Ry. v. Devaney* (1911) 98 Ark. 83, 135 S. W. 802. This seems squarely opposed to the present decision. The test ought to be: has the judge given the jury an erroneous rule of conduct for its determination of the case? If he has there should be a new trial. *Sunshine Oil Corp. v. Randals* (1921, Tex. Civ. App.) 226 S. W. 1090. If not, the judgment should stand. *Northern Texas Traction Co. v. Brigance* (1910, Tex. Civ. App.) 128 S. W. 919. Here, it is submitted, nothing was said to the jury which it was improper for them to consider, and the judge was not attempting to force his opinion upon them.

TRUSTS—APPOINTMENT OF TRUSTEE—JUDICIAL DISCRETION.—Upon the death of the original trustees of an estate of $213,000, a member of the family was appointed as trustee, under bond of $250,000. Upon the death of the latter, all the parties in interest petitioned to have a specified trust company, which had always managed their affairs, appointed. The court, however, appointed a stranger to the parties, fixing his bond at $20,000. The petitioners thereupon again petitioned the court, stating that they had no personal objections to the appointee, that they did not even know him, but that they desired to have the trust company appointed for various reasons mentioned. This petition being denied, the plaintiffs appealed. *Held,* that the appointment of the lower court should be revoked, and the trust company appointed. *Matter of Gunther* (1921) 197 App. Div. 28, 188 N. Y. Supp. 615.

The appointment of trustees is a matter for the discretion of the court. *In re Tempest* (1866) L. R. 1 Ch. 485 (leading case). This discretion "in the best is often, at times, capricious; in the worst it is every vice, folly and madness, to which human nature is liable." See *Ex parte Chase* (1869) 43 Ala. 303, 310; *State v. Cummings* (1865) 36 Mo. 263, 278. It is generally governed by definite

rules; not arbitrary, vague, or fanciful ones. See *Matter of Watson* (1884, N. Y.) 2 Dem. Surro. 642, 645. The court, in making the appointment, usually considers suggestions of the parties in interest, but will not be controlled by such wishes against considerations of fitness. *Douglas v. Bolam* [1900] 2 Ch. 749; *Stevenson's Appeal* (1871) 68 Pa. 101. Where it was difficult to appoint responsible persons, satisfactory to all, a trust company has been named, the parties in interest assenting. *In re Battin* (1918) 89 N. J. Eq. 144, 104 Atl. 434. A court may appoint a banker trustee for the benefit of an infant, instead of the infant's guardian, *Kent v. McDaniel* (1915, Tex. Civ. App.) 178 S. W. 1006. Refusal to accept a life beneficiary's suggestion as to a new trustee and the appointment of a trust company instead has been held proper. *In re Pitney* (1906) 113 App. Div. 845, 99 N. Y. Supp. 588, modified in 186 N. Y. 540, 78 N. E. 1110. When the creator of a trust gives unlimited authority to a trustee to name his successor, the trustee must exercise discretion, and a court of Chancery may supervise his appointment. *Yates v. Yates* (1912) 255 Ill. 66, 99 N. E. 360. The better rule, however, seems to be that a court should not, in the exercise of its discretion, appoint a trustee who, for apparently valid reasons, is objectionable to a number of the *cestuis que trustent*. *In re Lafferty* (1901) 198 Pa. 433, 48 Atl. 301. The instant case should be a salutary check on rather unreasoned discretion, particularly where the court may feel inclined to name a personal friend.

TRUSTS—CONSTRUCTIVE TRUSTS—ORAL PROMISE OF GRANTEE TO RECONVEY.—The plaintiff and defendant were interested in a mortgage on certain real estate. They entered into a parol agreement whereby the defendant should bid for the property at the foreclosure sale and later convey to the plaintiff. The defendant purchased the property at the sale, but refused to carry out the agreement. The plaintiff brought suit to establish a trust. *Held*, that the defendant could not interpose the invalidity of the parol agreement as a defence and that a trust would be created. *Fletcher v. Manhattan Life Insurance Co.* (1921) 197 App. Div. 484, 189 N. Y. Supp. 453.

In American jurisdictions where the statute of frauds requires express trusts to be either created or evidenced in writing, the general rule is that equity will not enforce a verbal agreement, made by a grantee, to hold land in trust for a grantor. *Gray v. Walker* (1910) 157 Calif. 381, 108 Pac. 278. In England, however, there are several decisions allowing the grantor to recover his land on the theory of a constructive trust, because it would be inequitable for the grantee to avail himself of the invalidity of the parol agreement and also appropriate what he has acquired under it. *Davies v. Otty.* (1865, Ch.) 35 Beav. 208; *Rochefoucauld v. Boustead* [1897] 1 Ch. 196. The American rule is subject to several exceptions. In Massachusetts, on principles of quasi-contract, the grantor is allowed to recover the value of the land, but not the land itself. *Twomley v. Crawley* (1884) 137 Mass. 184. It is also a well-settled rule that equity will raise a constructive trust where the grantee is guilty of some positive fraud in procuring the legal title. *Davis v. Stambaugh* (1896) 163 Ill. 557, 43 N. E. 170. Or if a fiduciary relationship exists between the promisor and the promisee, a constructive trust will arise even without evidence of any actual fraudulent intent on the part of the promisor. *Henderson v. Murray* (1909) 108 Minn. 76, 121 N. W. 214. In circumstances similar to those of the principal case, the majority of courts will recognize a constructive trust in favor of a plaintiff who has given up some interest in property in reliance on a verbal agreement. *Waller v. Jones* (1895) 107 Ala. 331, 18 So. 277; *Carr v. Craig* (1908) 138 Iowa, 526, 116 N. W. 720. A respectable minority, however, refuse to recognize a constructive trust unless the mortgagee is guilty of some actual fraud or has deterred, by means of the parol agreement, the mortgagor or others from bidding at the sale. *Wheeler v. Reynolds* (1876) 66 N. Y. 227; *Coleman v. McKee* (1903) 24 R. I. 596, 54 Atl. 374; 1 Perry, *Trusts* (6th

ed. 1911) sec. 206, note (a). The principal case falls within the existing New York rule, the minority view, by implying an agreement on the part of the plaintiff not to bid or to procure others to bid at the sale. The majority rule, which approaches that of the English courts, seems to be the better as it prevents an unjust enrichment of the defendant and restores the property to the plaintiff.

WORKMEN'S COMPENSATION—SCOPE OF EMPLOYMENT—SERIOUS OR WILFUL MISCONDUCT OF EMPLOYEE.—The plaintiff sued under the Minnesota Workmen's Compensation Act [Gen. Sts. 1913. ch. 84a.] to recover for the death of her husband, a teamster employed by the defendant. It was the duty of the deceased to curry his horses every day before taking them out. While angry one morning, on account of his wife's failure to prepare his breakfast, and without any provocation, he commenced to beat a gentle mare with a whip. The mare became frightened and kicked him in the abdomen. He died the next day. *Held,* that the plaintiff could not recover. *Harris v. Kaul* (1921, Minn.) 183 N. W. 828.

The basis of the decision is that death did not arise "out of and in the course of" the employment. The exact scope of this provision, which occurs both in English and American compensation statutes, has been the subject of much litigation. There must be a direct causal connection between the employment and the resulting injury. *Dougherty's Case* (1921, Mass.) 131 N. E. 167; *Industrial Commission of Ohio v. Weigandt* (1921, Ohio) 130 N. E. 38. The prevailing rule is that the statute should be liberally construed in favor of the employee. *Radtke Bros. v. Industrial Commission of Wisconsin* (1921, Wis.) 183 N. W. 168; *Stasmas v. State Industrial Commission* (1921, Okla.) 195 Pac. 762; *Eastern Texas Electric Co. v. Woods* (1921, Tex. Civ. App.) 230 S. W. 499; *Fennessey's Case* (1921, Me.) 113 Atl. 302. However, it should not be interpreted so broadly as to make the employer an insurer of his workmen against all misfortunes which may happen to them while in his service. *White v. Eastern Mfg. Co.* (1921, Me.) 112 Atl. 841. The general rule in this country is that an injury or death resulting from "serious or wilful misconduct" on the part of the employee is not compensatory. *In re Nickerson* (1914) 218 Mass. 158, 105 N. E. 604; L. R. A. 1916A, 243, note. In England, compensation is allowed under such circumstances only when the injury results in "death or serious and permanent disablement." Workmen's Compensation Act (1906) 6 Edw. VII, c. 58. Whether the misconduct is serious or not is to be determined from its nature and not from its consequences. *Johnson v. Marshall* [1906, H. L.] A. C. 409; L. R. A. 1916A, 355, note. The burden of proving that the accident was due to the serious or wilful misconduct of the workman is upon the employer. *Wick v. Gunn* (1917, Okla.) 169 Pac. 1087; *Haskell, etc. v. Kay* (1918) 69 Ind. App. 545, 119 N. E. 811. The court seems to have reached the correct conclusion in the instant case, since it is clear that the accident did not arise "out of and in the course of" the employment. Had that not been so apparent, however, it is likely that the misconduct of the deceased would have precluded a recovery. For a general discussion, see (1918) 15 Neg. and Comp. Cas. Ann. 148, note; (1919) 17 *ibid.* 377, note.