CURRENT DECISIONS

ATTORNEY AND CLIENT—LIEN OF ATTORNEY—SET OFF.—The defendant recovered a judgment against the plaintiff on October 27, 1916. A bank recovered a judgment against the defendant on October 28, 1916, and later assigned it to the plaintiffs. This action was against the defendant and its attorneys to set off the judgment which they had acquired against the one they owed. *Held,* that the set off should be decreed but subject to the attorney's lien. *Beecher v. Vogt Manufacturing Company* (Jan. 6, 1920, N. Y. App.) 62 N. Y. L. J. (Feb. 10, 1920).

The opinion contains a very able and interesting discussion of the "ancient judicial controversy" as to whether the right to set off judgment against judgment is superior to the attorney's lien upon a judgment. The result is equitable but only New York decisions were discussed and it should be noticed that there are some well reasoned cases *contra.* See *Wildung v. Security Mortgage Co.* (1919, Minn.) 173 N. W. 429, (1919) 29 YALE LAW JOURNAL, 111, and cases there cited.

ATTORNEY AND CLIENT—WHAT CONSTITUTES PRACTICING LAW—PRACTICE WITHOUT A LICENSE.—The defendant was indicted under section 270 of the New York Penal Law which makes it a misdemeanor to practice law in any manner without first being licensed and admitted to practice. The defendant carried on a real estate and insurance business, and drew legal papers, contracts for the sale of real estate, deeds, mortgages, bills of sale and wills. A large sign over the window bore the words, "Notary Public—Redaction of all legal papers." He testified that "redaction" meant the drawing of legal papers. On occasion, he had advised as to the form and kind of instrument to be used and had received pay therefor. *Held,* that the defendant was guilty. McLaughlin and Hogan, JJ., *dissenting. People v. Alfoni* (1919, N. Y.) 62 N. Y. L. J. (Jan. 15, 1920).

The Appellate Division had reversed the conviction by the Court of Special Sessions on the ground that the statute related only to practice connected with court or legal proceedings. In a forceful and convincing opinion in the Court of Appeals, Crane, J., points out that the statute is intended to protect the public, not the bar, and that there is more danger to the public from office practice by an incompetent than from like practice in a court where the proceedings are public and under the control of an experienced presiding official. For a contrary view, see (1918) 31 HARV. L. REV. 886. See authorities collected in Cohen, *The Law—Business or Profession* (1919) Appendix C, 381-393; (1920) 29 YALE LAW JOURNAL, 350.

CONSTITUTIONAL LAW—DUE PROCESS—NECESSITY AND EXPEDIENCY OF CONDEMNATION.—A state statute authorized certain officers engaged in repairing public roads to take earth for that purpose from adjacent lands. Provision was also made for the assessment and payment of damages. The plaintiff sought to enjoin the taking of earth from his land because no hearing was afforded him by the statute respecting the necessity or expediency of the taking. *Held,* that the injunction be denied, because a hearing thereon was not essential to due process. *Bragg v. Weaver* (1919, U. S.) 40 Sup. Ct. 62.

The decision is clearly sound on authority. The legislature is the sole judge of the public necessity which requires or renders expedient the exercise of the power of condemnation. *City of Grafton v. St. Paul, etc., Ry.* (1907) 16

N. D. 313, 113 N. W. 598; see 22 L. R. A. (N. S.) 1, note. And the determination of these legislative questions may be delegated, as in the instant case, to public officers or municipalities who may decide them without a hearing of the owners of the property affected. See *City of Boston v. Talbot* (1910) 206 Mass. 82, 90, 91 N. E. 1014, 1016; *cf. People v. Smith* (1860) 21 N. Y. 595.

CONSTITUTIONAL LAW—POLICE POWER—MUNICIPAL ORDINANCE.—A city ordinance required street railways to sprinkle their tracks when necessary to settle the dust. The defendant was fined for refusal to comply with the statute and applied for a writ of *certiorari*. *Held*, that the writ be denied. *Pacific Gas & Electric Co. v. City of Sacramento* (1919) 40 Sup. Ct. 79.

The court based its decision on the ground that the ordinance was a valid exercise of the police power of the state which was delegated to the city. See *supra*, RECENT CASE NOTES, *sub. tit.*, CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT; Ann. Cas. 1912B, 1139 note. It seems that the only limitations on such legislation are that the result desired be practical and that the penalties for non-compliance be reasonable.

CONTRACTS—BROKERS' COMMISSIONS—WHEN EARNED.—The defendant, a Canadian corporation, through the agency of the plaintiff, entered into a written contract with parties in New Foundland for the sale of a British steamship for $475,000. The purchasers paid $5,000 at the execution of the contract, and the defendants paid the plaintiff his agreed percentage of the payment. He then sued for his commission on the remainder of the sale price which had not been paid. *Held*, that the plaintiff should recover, because he earned his commission when the contract was signed. *Warner v. Gaston, Williams and Wigmore, Ltd.* (Nov. 13, 1919) C. C. A. 2d, Oct. Term, 1919, No. 8.

The defendants offered in evidence section 39cc of the British Defense of the Realm Regulations which forbade the sale of any ship without the permission of the Shipping Comptroller. The purchasers had no such permission. But as there was no evidence that this would prevent performance of the contract, the court refused to consider the purchaser's failure to obtain permission as an excuse and justification for the defendants' refusal to perform their part of the contract. This case applies under unusual circumstances, the rule that a broker earns his commissions at least when he procures a purchaser ready and willing to buy, with whom the seller enters into a contract. *Cf. Lang v. Hand* (1894) 57 Ill. App. 134; *cf. Alt v. Doscher* (1905) 102 App. Div. 344, 92 N. Y. Supp. 1112; *cf. Knisely v. Leathe* (1915) 266 Mo. 355, 178 S. W. 453.

DECLARATORY JUDGMENTS—DECLARATION OF FUTURE RIGHTS AND DUTIES ARISING FROM CONTRACT—CONSTRUCTION OF WRITTEN INSTRUMENT.—The defendant water company supplied water to company A under various contracts. A in turn supplied this water to the city of Bayonne, New Jersey. In 1917 A assigned its contracts with the defendant company to the municipality, whereupon the defendant refused further delivery of water, on the ground that by the assignment it had been relieved of further performance of its duties arising from the contract. The city thereupon sued for an injunction and for a declaration as to the future rights of the plaintiff and the defendant arising from several of the assigned contracts. *Held*, that the injunction and declaration issue. *Mayor and Council of City of Bayonne v. East Jersey Water Co.* (1919, N. J. Eq.) 108 Atl. 121.

See COMMENTS, *supra*, p. 545.

DECLARATORY JUDGMENTS—DECLARATION OF PRIVILEGE OR ABSENCE OF DUTY.—The plaintiffs were the owners of a vessel which they chartered to the defendants in 1914 for a period of eight years, with a proviso that hire was to cease

from the day the vessel should become lost. In 1917 the vessel was requisitioned by the British Admiralty under terms that if she were lost by war risks, compensation would be made on her ascertained value. Shortly thereafter she was sunk by the enemy. The plaintiffs instituted proceedings against the defendant and sought a declaration that the admiralty compensation belonged exclusively to the plaintiffs. *Held,* that the declaration be made as requested. *London-American Maritime Trading Co. v. Rio Janeiro T. L. & P. Co.* [1917] 2 K. B. 611.

See COMMENTS, *supra,* p. 545.

GIFTS—DELIVERY—INTENT—ACCEPTANCE.—The grantor executed deeds which he delivered to a third party with written instructions to hold until the grantor's death and then deliver to the grantees named therein. The deeds in a sealed envelope were placed in a safe deposit box, to which the grantor acquired a key. He continued to exercise full control over the property described in the deeds, paid taxes, renewed a mortgage, insured the premises and listed them for sale with a real estate agent. After his death the unopened envelope was found in the box with his private papers. An heir sued for an interest in this property. *Held,* that he should not recover, because there had been a valid gift of the land. *Moore v. Downing* (1919, Ill.) 124 N. E. 557.

For a discussion of this and other similar recent cases, see COMMENTS, *supra,* p. 549.

INTERSTATE COMMERCE—TELEGRAPHS—INTRA-STATE MESSAGE—TRANSMISSION THROUGH ANOTHER STATE.—A telegraph company, having direct lines between two places within North Carolina, transmitted a death message through an adjoining state for the purpose of evading the state law relating to the recovery of damages for mental anguish. The plaintiff sued to recover for mental anguish. *Held,* that he should recover, since the message did not become interstate by such transmission. *Watson v. Western Union* (1919, N. C.) 101 S. E. 81.

The principal case is opposed to the majority view that under the 1910 amendment to the Interstate Commerce Act of 1887, any crossing of a state line makes the message interstate. See L. R. A. 1918A, 805; 28 YALE LAW JOURNAL, 831.

LIBEL AND SLANDER—PRIVILEGE OF WITNESS.—In an action for an accounting, the defendant testified at the trial that the plaintiff had embezzled a thousand dollars in the transaction in question. The plaintiff sued the defendant for slander. *Held,* that recovery be denied, because the statement was pertinent to the issue then on trial and therefore privileged. *Weil v. Lynds* (1919, Kan.) 185 Pac. 51.

The decision is in accord with the great weight of authority: A statement made by a witness, counsel, or party in judicial proceedings, relevant to the pending inquiry, is absolutely privileged, even if made voluntarily. But if the statement is irrelevant, it is conditionally privileged, depending upon whether it was made in good faith and believed to be pertinent as well as true. *Cf. Keeley v. Great Northern Ry.* (1914) 156 Wis. 181, 145 N. W. 664. See (1919) 28 YALE LAW JOURNAL, 608; but see (1919) 29 *ibid.,* 106.

PROPERTY—CUT TIMBER—NO ACTION BY OWNER NOT IN POSSESSION.—The plaintiff sued for the value of timber which, as he alleged, the defendant cut and converted while in the possession of the plaintiff's land claiming title thereto. *Held,* that the petition disclosed no cause of action. O'Niell and Provosty, JJ., *dissenting. Ducros v. St. Bernard Cypress Co. Ltd.* (1918, La.) 82 So. 841.

See COMMENTS, *supra,* p. 539.

PROPERTY—EQUITABLE SERVITUDES—STATUTE OF FRAUDS.—At the time the respondent granted the complainant's lot, he orally agreed with the plaintiff to impose on all subsequent grantees restrictions not to construct certain kinds of buildings, not to build within ten feet of the street, etc. No covenant to that effect appeared in the deed to the complainant. The complainant brought a bill in equity to prevent the respondent from conveying some of his lots in violation of the agreement. *Held,* that the relief be denied, because such restrictions were hereditaments, and an oral agreement to impose them was unenforceable under the statute of frauds. *Ham v. Massasoit Real Estate Co.* (1919, R. I.) 107 Atl. 205.

There has been some question as to whether such equitable servitudes constitute "property interests"; but they have ordinarily been so treated. It has been held that they could not be imposed, save by deed or prescription. *Tibbets v. Tibbets* (1890) 66 N. H. 360, 20 Atl. 979. And they have been held to create "a property right," damage to which is direct and compensable, rather than uncompensable as merely consequential. *Flynn v. New York, W. & B. R. R.* (1916) 218 N. Y. 140, 112 N. E. 913. So an agreement not to build a front wall flush with the street is within the statute of frauds, as an attempt to create a property interest. *Rice v. Roberts* (1869) 24 Wis. 461. The instant case, classifying such servitudes as hereditaments, necessarily reaches the same conclusion. *Contra, Hall v. Solomon* (1892) 61 Conn. 476, 23 Atl. 876.

TORTS—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.—The defendants, ship repairers, undertook to rivet cleats to the weather deck of the plaintiff's steamer. A cargo of highly inflammable jute was exposed through the hatches to anything falling from the weather deck. A boy in the employ of the defendants, carrying a red-hot rivet in a pair of tongs, slipped on the deck and the rivet fell through the hatches and set the jute on fire. The plaintiff sued to recover for the loss caused by the fire. *Held,* that the plaintiff could recover because the loss was caused by the defendant's negligence, and that even though the plaintiff was guilty of contributory negligence, such negligence was not the proximate cause of the damage. *Ellerman Lines, Ltd. v. H. & G. Grayson, Ltd.* (1919, Ct. of App.) 121 L. T. R. 508.

See COMMENTS, *supra,* p. 542.

TORTS—TRESPASSERS ON TRACK—DUTIES OF RAILROAD.—The plaintiff sought to recover damages for the loss of his leg, which had been cut off by a train of the defendant railroad. The accident happened at night while the plaintiff was walking along the track in an intoxicated condition. The train was proceeding, according to instructions, at three or four miles an hour but neither the engineer nor the fireman saw the plaintiff in time to avoid the accident. The train was then stopped at once and all possible medical treatment furnished at the expense of the railroad. *Held,* that the plaintiff should not recover. *Hubbard v. Southern Ry.* (1919, Miss.) 83 So. 248.

The decision is in accord with the general rule, that a railroad owes no duty to trespassers upon its tracks, save that of not injuring them wilfully or wantonly. See (1912) 21 YALE LAW JOURNAL, 248. This rule has been limited, however, to the extent that where the railroad tracks have long been used as a pathway with the knowledge and acquiescence of the company, it is bound to keep a reasonable lookout for persons upon the track. See (1911) 20 *ibid.,* 669.

TRIALS—MISCONDUCT OF JURY—STATEMENT BY JUROR OF FACTS NOT IN EVIDENCE.—The defendant was prosecuted for frequenting a house of ill fame. He pleaded that he was a constable and had gone there only to collect rent, apparently his duty. His position as constable was not questioned on the trial. He was convicted, but it later appeared from the affidavits of two jurors that

the jury's decision had been influenced by a statement of a juror during the deliberations. This juror said of his own knowledge that the defendant got drunk before the alleged visits and at the time of the visits had been discharged as constable. *Held,* that such conduct by the juror was prejudicial error. *State v. Gilliland* (1919, Iowa) 174 N. W. 496.

Iowa is one of the states which receives affidavits of jurors as to misconduct of the jury in the jury-room. This is contrary to the majority view, which follows Lord Mansfield's doctrine. *Cf. Vaise v. DeLaval* (1785, K. B.) 1 T. R. 11; *cf. State v. Sharp* (1919, La.) 83 So. 181; see (1918) 27 YALE LAW JOURNAL, 417; (1919) 29 *ibid.,* 248.

TRUSTS—CHARITIES—BEQUESTS FOR MASSES.—A provision of the will of the testatrix gave the residue of her estate to her executors "to pay funeral expenses, say masses and put a modest tombstone over my remains." In a petition of settlement by the executors, the next of kin contended that this bequest should be limited to the amount necessary to fulfill the objects according to the situation in life of the testatrix. *Held,* that the contention was not correct, the testatrix, in view of other legacies, having clearly intended that all the residue should be devoted to the named purposes, and that this bequest was a public charity and not void for indefiniteness. *Morris v. Edwards* (1919, N. Y. App.) 124 N. E. 724.

This decision is in accord with a growing number of recent cases. *Bourne v. Keane* (H. L.) [1919] A. C. 815; *cf. Wilmes v. Tiernay* (1919, Iowa) 174 N. W. 271. See Scott, *Cases on Trusts* (1919) 283, note.

WORKMEN'S COMPENSATION—LOSS OF EARNING CAPACITY—FACIAL DISFIGUREMENT.—In an action for personal injuries brought under the New York Workmen's Compensation Law, an award was made for serious facial disfigurement, irrespective of the allowance of compensation according to the schedule based upon the average wage of the injured employee and the character and duration of the disability. *Held,* that such award was proper. *New York Central R. R. v. Bianc* (1919) 40 Sup. Ct. 44.

In the present case the court said that the provision in the New York act making a special allowance for serious disfigurement of the face or head was not contrary to any fundamental right guaranteed by the Constitution; that such disfigurement lessened the employee's ability to obtain or keep employment, thus diminishing his earning capacity. See Corwin, *Social Insurance and Constitutional Limitations* (1917) 26 YALE LAW JOURNAL, 431. Under such statutes the New York and Illinois courts have allowed dual compensation for disfigurement and loss of earning capacity. See (1918) 27 *ibid.,* 1097; (1919) 28 *ibid.,* 715.

WORKMEN'S COMPENSATION—SCOPE OF EMPLOYMENT—VOLUNTARY ACT FOR BENEFIT OF EMPLOYER.—As the decedent, the foreman of the pattern department of the appellant company, was leaving the building after working hours, he noticed a fire in the basement. He returned to the building and lost his life in an attempt to extinguish the fire. The company appealed from the award of compensation to the widow. *Held,* that the award be affirmed. *Belle City Malleable Iron Co. v. Industrial Commission* (1919, Wis.) 174 N. W. 899.

It is fairly well established that an employee is "within the course of" his employment in performing acts other than his specific and regular duties provided such acts are prompted by reasonable zeal to advance the employer's interest; and clearly so if the acts are such as he might be expected to perform. *Williamson v. Industrial Acc. Com.* (1918) 177 Calif. 715, 171 Pac. 797. For other authorities, see 28 YALE LAW JOURNAL, 611.