RECENT CASE NOTES

ADMINISTRATIVE LAW—REMOVAL OF PUBLIC OFFICER—FAIRNESS OF HEARING.—The relator, a police captain, by sending a letter directly to the defendant, the acting mayor of the City of Buffalo, had disregarded a departmental rule requiring communications to be made through the Chief of Police. For this he had been demoted to the rank of patrolman by the defendant. Notice and a hearing had been given, according to the city charter, and certiorari proceedings were brought to review the trial. The evidence showed that, although ill will existed between the relator and the defendant, the latter had acted as judge in the proceedings which found the former guilty. *Held*, that the prejudice of the acting mayor was insufficient to disqualify him as judge, but that there had been on the merits no such violation of the departmental rules as to warrant demotion. *People v. Kreinheder* (1921) 197 App. Div. 887, 189 N. Y. Supp. 767.

In the absence of statute, the power of removal from public office is incidental to the power of appointment. *Burnap v. United States* (1920) 252 U. S. 512, 40 Sup. Ct. 374; *Kydd v. San Francisco* (1918) 37 Calif. App. 598, 174 Pac. 88. An incumbent for an indefinite term holds office at the discretion of the person holding the appointing power. *Barbor v. County Court* (1920) 85 W. Va. 359, 101 S. E. 721. Where however, the term is fixed by law, removal is possible only as the state constitution or statute may direct. *State v. Hough* (1915) 103 S. C. 87, 87 S. E. 436. Police departments ordinarily derive their organization from city charters, which designate a method of removal. Thus where notice and a hearing are provided, a failure to comply with the statute renders a dismissal of no effect. *State v. Wilkinson* (1921) 59 Mont. 327, 196 Pac. 878. The hearing must be fair. *Eisberg v. Mayor* (1919, Sup. Ct.) 92 N. J. L. 321, 105 Atl. 716. Where a board of police commissioners conduct the hearing, an interested commissioner may not sit as judge. *People v. Roosevelt* (1897) 23 App. Div. 533, 48 N. Y. Supp. 578. But the mere filing of charges by a commissioner does not thus disqualify him as a judge. *State v. Burney* (1917) 269 Mo. 602, 191 S. W. 981. The removal proceeding is reviewable by a court which will determine whether the finding of fact is supported by the evidence. *McCarthy v. Board* (1915) 38 R. I. 385, 95 Atl. 921. But where any evidence sustains the finding, the reviewing court will not pass on the facts. *Cole v. City of Portland* (1920) 96 Ore. 645, 190 Pac. 720. The sufficiency of the cause of removal has been held to be a question of law for the court. *Stanley v. Fiscal Court* (1921) 190 Ky. 495, 227 S. W. 813. Hence a removal will not be sustained where the accused has been guilty of a mere technical violation of the police regulation. *People v. McAdoo* (1907) 117 App. Div. 438, 102 N. Y. Supp. 656. The court in the instant case quite properly reinstated the relator, for a slight infraction of department rules should not call for such a severe punishment as demotion. The case might well have held that the Mayor was too prejudiced against the relator to act as judge at the hearing.

ADMIRALTY—SEAMEN'S RIGHT TO NEW CONTRACT BEFORE COMPLETION OF VOYAGE.—The libellants, seamen, signed for a six months' voyage to an African port and return to the United States. The vessel, delayed by trouble, was at Accra, on the African West coast, at the expiration of the six months. The crew demanded double wages for the return trip and the master acceded under protest. Upon landing in Philadelphia he refused to abide by the agreement. *Held*, that

the crew were entitled to double wages from Gibraltar, the nearest port where a consul could have considered the question, although the vessel had in fact never touched there. *Shanley v. United States* (1921, E. D. N. Y.) 274 Fed. 691.

A master is not privileged to discharge his crew nor has the crew a right to wages in full until the end of the voyage. *Schermacher v. Yates* (1893, E. D. N. Y.) 57 Fed. 668. The end of the voyage is not a port of distress, but one of destination. *Fairchild v. The Aurelius* (1914, D. Mass.) Fed. Cas. No. 4609. An extension of the voyage by intention or neglect of the master is such a breach of the contract as entitles the seamen to demand their release in any safe port. *The Hotspur* (1874, D. Or.) 3 Sawyer, 194. But an extension of the voyage as in the instant case, beyond the time stipulated, due to perils of the sea which could not reasonably be guarded against, is not a breach of the contract as to time and does not privilege the seamen to leave the vessel nor demand wages in full before reaching the port of destination. *Hamilton v. United States* (1920, C. C. A. 4th) 268 Fed. 15. The new contract obtained by the libellants was prematurely demanded and void at its inception. Some courts have held such contracts entirely void as contrary to public policy. *Bartlett v. Wyman* (1817, N. Y.) 14 Johns. 260. But the instant case, by validating the agreement in part, adopts the more general and equitable principles of courts of admiralty in construing contracts of seamen. *Brice v. The Nancy* (1783, Pa. St. Adm. Ct.) Fed. Cas. No. 1855; *The Helen Fairlamb* (1918, E. D. Pa.) 251 Fed. 412.

ATTORNEY AND CLIENT—ATTORNEY'S IMPLIED AUTHORITY—POWER TO BIND CLIENT IN JUDGMENT BY CONSENT.—In a summary proceeding in ejectment, the jury gave possession of the property to the plaintiff and fixed the rental at an amount considerably higher than was warranted by the evidence. Upon an intimation by the court that the verdict would be set aside unless the rental were reduced, the plaintiff's attorney, disregarding his client's express instructions but believing that he was acting for the latter's best interest, consented to the reduction. *Held,* that such a judgment should be set aside upon motion by the client. *Bizzell v. Auto Tire & Equipment Co.* (1921, N. C.) 108 S. E. 439.

The authority of an attorney extends to all the customary incidents of litigation, being especially broad during the actual progress of the trial, as prompt action is then essential. *Christy v. Atchison, T. & S. F. Ry.* (1916, C. C. A. 8th) 233 Fed. 255; *Dixon v. Floyd* (1906) 73 S. C. 202, 53 S. E. 167. A material right, such as that of trial by jury, may not be waived without the client's consent. *Lyman v. Kaul* (1916) 275 Ill. 11, 113 N. E. 944. But the attorney may agree to omit certain evidence. *Szunyog v. Kiss* (1920, Sup. Ct.) 182 N. Y. Supp. 898. He may permit the court to fix the allowance for counsel fees, although no evidence as to what they should be has been introduced. *Callahan v. Callahan* (1920, Idaho) 192 Pac. 660. He may consent to a judgment in debt, in consideration of the withdrawal of an allegation of tort. See *So. Chemical Co. v. Bass* (1918) 175 N. C. 426, 95 S. E. 766. And his client is concluded by an admission of fact during the trial, or by a judgment based upon an agreed statement of facts. *Oregon-Washington Ry. & Nav. Co. v. Reed* (1917) 87 Or. 398, 169 Pac. 342; *Scotti v. District Court* (1920) 42 R. I. 556, 109 Atl. 207. But the court has power to relieve a party from an improvident agreement that would otherwise be binding. *Humphries v. Shapiro* (1919) 187 App. Div. 96, 175 N. Y. Supp. 426. A distinction is drawn between the attorney's power to compromise a client's cause of action and his power to confess judgment. *Parr v. Chicago, B. & Q. Ry.* (1916) 194 Mo. App. 416, 184 S. W. 1169. The former is not permissible unless there is no time in which to communicate with the client without hazarding a loss. *Gibson v. Nelson* (1910) 111 Minn. 183, 126 N. W. 731. And

he can never compromise a judgment or release a judgment debtor. *McGill v. Coleman* (1921, Mich.) 182 N. W. 76. The authorities differ as to his power to consent to a judgment. Some cases hold that an employment to *defend* cannot include the power to *settle,* and that a decree based upon such a consent is not binding on the client. *Nothem v. Vonderharr* (1920, Iowa) 175 N. W. 967. Others hold the judgment binding and give a remedy against the attorney only. *Chicago Benev. Soc. v. Chicago Aid Soc.* (1918) 283 Ill. 99, 118 N. E. 1012. While still others feel bound to recognize the assumed authority of the attorney and to hold the decree binding, but when informed that the attorney acted against his client's express instructions, exercise their power to vacate the judgment entered upon the agreement, if the parties can be put *in statu quo. Dalton v. West End St. Ry.* (1893) 159 Mass. 221, 34 N. E. 261; *Beliveau v. Amoskeag Mfg. Co.* (1895) 68 N. H. 225, 40 Atl. 734. Although the agreement in the instant case seems to have been decidedly advantageous to an insistent client, the Court was clearly sound in following a rule so obviously necessary for the protection of a client's interest.

BANKRUPTCY—TRUSTEE'S INTEREST IN LIFE INSURANCE POLICY—EFFECT OF PAYMENT TO BENEFICIARY.—The bankrupt carried life insurance having cash surrender value, the policy being payable to his wife but reserving to him the power to change the beneficiary with the written approval of the company and surrender of the policy. After adjudication and appointment of the trustee, the bankrupt died and the company, without actual knowledge of the bankruptcy proceedings, paid the full amount of the policy to the widow. Thereafter the trustee sued the company for the cash surrender value. *Held,* that he was not entitled to recover. *Frederick v. Fidelity Mutual Life Ins. Co.* (1921, U. S.) 41 Sup. Ct. 503.

The power of the insured to change the beneficiary and obtain the cash surrender value of the policy was an asset which passed to the trustee in bankruptcy. *Cohen v. Samuels* (1917) 245 U. S. 50, 38 Sup. Ct. 36; see (1917) 27 YALE LAW JOURNAL, 403; *Cohen v. Malone* (1919) 248 U. S. 450, 39 Sup. Ct. 141; see (1919) 28 YALE LAW JOURNAL, 603. The trustee contended that the company, though without actual knowledge of the proceedings, could not deprive him of this asset by making payment to the beneficiary, on the principle that a petition in bankruptcy is a *caveat* to all the world. *Mueller v. Nugent* (1901) 184 U. S. 1, 22 Sup. Ct. 269. This principle is subject to some exceptions on grounds of policy. *Jones v. Springer* (1912) 226 U. S. 148, 33 Sup. Ct. 64. The decision in the instant case, however, was not on the ground of an exception to the *caveat* principle, but on the ground that this principle had no application whatever. The trustee's "title" was only such power to change the beneficiary as the policy created. Until this power was exercised by the trustee, by giving the company actual notice and making demand for a change, the right of the original beneficiary to receive payment in full upon proof of the death of the insured and the surrender of the policy, and the correlative duty of the company to make payment, remained unimpaired. *Sullivan v. Maroney* (1909) 76 N. J. Eq. 104, 73 Atl. 842. The company, in paying the widow, did nothing more than discharge its legal duty, and this, done in good faith, necessarily destroyed the power thereafter to change the beneficiary. The decision is undoubtedly sound in protecting the company from any further liability under the policy. In case of a policy payable to the estate of the insured, on the other hand, the trustee has an immediate right to the cash surrender value against the company, instead of a mere power, and, it is submitted, the company can discharge its duty as to this amount only by payment to the trustee. Cf. *Everett v. Judson* (1913) 228 U. S. 474, 33 Sup. Ct. 568; *Andrews v. Partridge* (1913) 228 U. S. 479, 33 Sup. Ct. 570. While the trustee, in the instant case, had no right against the company, the

decision is not inconsistent with a recovery from the widow, against whom the trustee would seem entitled to the advantages of an equitable assignee. Cf. *Schoenholz v. New York Life Ins. Co.* (1920) 192 App. Div. 562, 183 N. Y. Supp. 251.

BANKS AND BANKING—MONEY STANDING ON CURRENT ACCOUNT—DEMAND NECESSARY BEFORE CAUSE OF ACTION ACCRUES.—A partnership, which carried an account with the defendant bank, dissolved on August 1, 1914, with a balance of £2,321. No money was paid out of the acount after this date. In June, 1919, the plaintiff, one of the partners, sued in the firm name for the balance due, claiming that the cause of action had accured on August 1, 1914. The defendant denied that the cause of action had accrued on that date because no demand for payment had been made at that time. *Held,* that as a demand for payment was essential, the plaintiff could not recover. *N. Joachimson v. Swiss Bank Corporation* [1921, C. A.] 3 K. B. 110..

The rule in England has been that the Statute of Limitations runs against a bank deposit as against any other contract debt. *Pott v. Clegg* (1847, Exch.) 16 M. & W. 321; 1 Hals. Laws Eng. 586; Grant, *Bankers and Banking* (2d ed. 1865) 3. Based upon this rule, the supposition has arisen that a cause of action accrues to bank depositors without a demand and refusal. In America the rule is well established that a demand for repayment is a condition precedent to the maintenance of an action against a bank for an amount on deposit. *First National Bank of Mishawaka v. Stapf* (1905) 165 Ind. 162, 74 N. E. 987; *Clark's Adm'r v. Farmers' National Bank* (1907) 124 Ky. 563, 99 S. W. 674; Tiffany, *Banks and Banking* (1912) 90. Consequently the Statute of Limitations does not begin to run until there has been a demand and refusal. *Missouri Pacific Ry. v. Continental National Bank* (1908) 212 Mo. 505, 111 S. W. 574; Tiffany, *op. cit.* 93; *contra, Union Bank v. Knapp* (1825, Mass.) 3 Pick. 96; Carter, *Banks and Banking* (5th ed. 1917) 598. There are certain circumstances under which a demand is not necessary. When a depositor has demanded the full amount of his deposit, and has been paid a part thereof, he is not required to make a separate demand for the balance. *Lebrecht v. New State Bank* (1918) 199 Mo. App. 642, 205 S. W. 273. When a bank disputes its indebtedness to a depositor, no demand is necessary to support the depositor's action. *Marks v. First National Bank of Roseburg* (1917) 84 Or. 601, 165 Pac. 673; *Lifschutz v. Public Bank of New York City* (1916, Sup. Ct.) 159 N. Y. Supp. 879. The principal case has reached a conclusion, in accord with the American authorities, which seems best fitted to the commercial needs of the day.

CONSTITUTIONAL LAW—ELECTIONS—VALIDITY OF ABSENTEE-VOTING ACT.—The New Hampshire House of Representatives asked the opinion of the Justices of the Supreme Court as to the validity of certain proposed state legislation to provide for voting at the biennial elections by persons absent from the places in which they were qualified to vote. *Advised,* that the legislature may not authorize absentee voting for state officers; that it may authorize such voting for presidential electors; that it is doubtful whether its auhorization of such voting for Senators and Representatives in Congress would be held valid. *Opinion of the Justices* (1921, N. H.) 113 Atl. 293.

A state legislature has authority to direct the manner of appointment of presidential electors, except with respect to the time of appointment. U. S. Const. art. 2, sec. 1; *McPherson v. Blacker* (1892) 146 U. S. 1, 13 Sup. Ct. 3; (1913) 43 L. R. A. (N. S.) 282, 284, note. Congress has the paramount power to regulate the time and manner of holding elections for members of the Senate, and the time, manner, and place for members of the House of Representatives, and so far

as the power is exercised the federal regulations supersede state laws inconsistent therewith. U. S. Const. art. 1, secs. 2, 4, amendment 17; (1902) 53 L. R. A. 660, 663 note. A state statute providing for voting by soldiers on active service has been considered valid by the House of Representatives in the case of an election of a member thereto, while the same statute was held unconstitutional by the state court as to the election of a state officer. *People v. Blodgett* (1865) 13 Mich. 127; *Baldwin v. Trowbridge* (1866) 2 Bart. Cont. Elec. Cas. 46 (in the thirty-ninth Congress) with respect to election under Mich. Laws, 1864, no. 21. The validity of a state statute providing that absentees from their place of residence may vote for state officers is obviously ascertained in any given case by the provisions of the state constitution. *Jenkins v. Board of Elections* (1920) 180 N. C. 169, 104 S. E. 346; *Opinion to the Governor* (1918) 41 R. I. 118, 102 Atl. 913; *Stranghan v. Meyers* (1916) 268 Mo. 580, 187 S. W. 1159.

CONTRACTS—GAMBLING—RECOVERY OF MONEY PAID BY CHECK.—The plaintiff, having lost his wager on a horse race, gave his check to the defendant bookmaker, who endorsed the check in blank and handed it to his bankers for collection. It was presented to the plaintiff's bank and paid. The plaintiff then brought suit under the Gaming Act (1835) 5 & 6 Wm. IV, c. 41, sec. 2, which allowed the drawer of a bill given in payment of a gambling debt to recover from the payee the money paid to a holder of it. *Held,* that the plaintiff should recover. *Sutters v. Briggs* (1921, H. L.) 38 T. L. R. 30.

Negotiable paper given in payment of a gambling debt is invalid as between the original parties because the consideration is illegal. Anson, *Contract* (Corbin's ed. 1919) 311. A holder in due course may collect on such security, however, in the absence of statutes making it absolutely void. *Fitch v. Jones* (1855, Q. B.) 5 El. & Bl. 238; *Wilson v. National Fowler Bank* (1911) 47 Ind. App. 689, 95 N. E. 269. And the maker thus compelled to pay the holder cannot recover from the payee. *Haynes v. Rudd* (1880) 83 N. Y. 251. If the loser in a gambling transaction voluntarily pays the winner, he cannot recover the payment at common law because he is in *pari delicto*. *Thistlewood v. Cracroft* (1813, K. B.) 1 Ma. & Sel. 500; *Davies & Co. v. Porter* (1918, C. C. A. 8th) 248 Fed. 397. Statutes in many states allow a recovery, however. Stimson, *American Statute Law* (1886) sec. 4132; see Gaming Act (1710) 9 Anne, c. 14 repealed by Gaming Act (1845) 8 & 9 Vict. c. 109, sec. 15. Under the Gaming Act (1835) 5 & 6 Wm. IV, c. 41, which allowed a holder for value without notice to collect a security given in gambling transactions, the maker could recover the money paid to the holder from the person to whom he originally gave such paper. It would seem that the maker could only recover payments made to such holders as could compel him to pay. *Nicholls v. Evans* [1914] 1 K. B. 118; see *Lynn v. Bell* (1876) 10 Ir. R. C. L. 487; see *Hyams v. Stuart King* [1908, C. A.] 2 K. B. 696, 714. "Holder," as ordinarily used, means, however, any bearer and includes the payee or his agent for collection. Chalmers, *Bills of Exchange* (8th ed. 1919) 5. The absence of any limitations in the statute on the sort of holder intended, and the inability of the drawer or his bank to know whether the person presenting the check is a holder in due course or not, led the court in the instant case to adopt this construction of the term "holder" in the statute and to allow the maker of a check to recover money paid to any "holder." The court affirmed the decisions in other recent cases which have tended toward the same conclusion. *Golding v. Bradlaw* [1919] 2 K. B. 238; *Dey v. Mayo* [1920, C. A.] 2 K. B. 346. Thus the courts have created the peculiar anomaly in England that a loser may recover his gambling wagers paid by check but not those paid in cash. To remedy the situation a bill has already been passed by the House of Lords repealing this section of the statute. See (1921) 66 SOL. JOUR. 56.

CONTRACTS—SALE OF STANDING TIMBER—WHEN AGREEMENT DOES NOT PASS TITLE AND VENDEE REPUDIATES.—The vendor and vendee entered into a written contract, not under seal, for the sale of all standing timber on a certain tract of land for $100,000, payable in four annual instalments. A statute required a seal on every deed or other conveyance of real estate. N. H. Pub. Sts. 1901, ch. 137, sec. 3. The vendee, after having cut some of the wood and having made two payments, notified the vendor that it abandoned the contract. The vendor, denying the power of the vendee to terminate the contract, brought an action for the third instalment. *Held,* that the contract created merely a license in the vendee to enter upon the land and cut the timber, and the vendee, having received what he bargained for, became indebted for the specified sum of money payable under the contract. *George W. Blanchard & Sons Co. v. American Realty Co.* (1921, N. H.) 115 Atl. 4.

A sale of growing timber is the sale of an interest in land, and consequently within the Statute of Frauds. 1 Tiffany, *Real Property* (1920 ed.) 886. The statute in the instant case gave a written contract without a seal the same effect as if it were oral. See *Kingsley v. Holbrook* (1864) 45 N. H. 313. The contract, therefore, created a mere license. 1 Tiffany, *op. cit.* 887; *Fish v. Capwell* (1894) 18 R. I. 667, 29 Atl. 840. Such a license is personal, and not assignable. *Ward v. Rapp* (1890) 79 Mich. 469, 44 N. W. 934. This gave the vendee the privilege to enter upon the land of the vendor, and the power to vest in himself title to as much timber as he might cut. *Starks v. Garver Lumber Mfg. Co.* (1914) 182 Mo. App. 241, 167 S. W. 1198. But the license might at any time have been revoked, and the revocation would have been effective as to all the timber left standing. *Hodsdon v. Kennett* (1905) 73 N. H. 225, 60 Atl. 686. The statement in the court's opinion that the revocation of the license might have been enjoined is probably to be referred to a state of facts in which the purchase money had been fully paid. Had the vendee, in the instant case, specifically contracted for a privilege to cut timber, the court would have been correct in holding that the vendee must pay the contract price since he received what he bargained for, and it was no fault of the vendor that the vendee did not use his privilege. The parties, however, intended to buy and sell timber and so stated in their agreement, but their intention was not effectuated in a binding contract because the agreement was not in proper statutory form. At the instant the writing was signed by the parties no rights or correlative duties were created in either the vendor or vendee. It was merely equivalent to an offer for the sale of trees with the privilege in the vendee to enter and cut the trees, and the power to accept by such cutting. See *Erskine v. Savage* (1901) 96 Me. 57, 51 Atl. 242. The statute changed a contract to sell standing timber into merely a revocable, unassignable privilege; and to say that the vendee agreed to pay $100,000 for this privilege was to make a new contract for the parties. It is submitted that the vendor was entitled, in quasi-contract, only to the value of the timber cut by the vendee.

EQUITY—BENEFIT SOCIETIES—MEMBER MUST EXHAUST REMEDIES WITHIN THE ORDER BEFORE BRINGING SUIT—The plaintiff was suspended from the defendant lodge until he should pay a sum said to have become due through his alleged misconduct. By the laws of the Order a lodge was empowered to inflict the following penalties upon its members: reprimand or censure in open lodge, suspension for a definite time, expulsion, and a fine not exceeding five dollars. The rules of the Order gave a "right" of appeal within the lodge to either party to a controversy. Without taking such an appeal, the plaintiff sought damages and an injunction to compel restoration to him of the rights and privileges of membership. *Held,* that the plaintiff was entitled to relief, because the decision of the lodge was void, being outside the lodge's jurisdiction, and therefore no appeal was necessary. *Gardner v. East Rock Lodge* (1921, Conn.) 113 Atl. 308.

The rule is often broadly stated that where associations, voluntary or incorporated, have provided tribunals for the redress of grievances a member must exhaust those remedies before seeking relief in court. *Hickey v. Baine* (1907) 195 Mass. 446, 81 N. E. 201; *Pixley v. Cleaver* (1920, Neb.) 181 N. W. 138; *Loeffler v. Modern Woodmen* (1898) 100 Wis. 79, 75 N. W. 1012. This is without doubt the rule as to voluntary associations where no property rights are involved, and when the procedure is in good faith, according to the rules of the order and not in violation of municipal law, and it is only to determine those requirements that the courts will interfere at all. *Zeliff v. Knights of Pythias* (1891) 53 N. J. L. 536, 22 Atl. 63; *Willis v. Davis* (1921, Tex. Civ. App.) 233 S. W. 1035. But the courts have been reluctant to recognize any abridgment of a right of access to them for the enforcement of property or contractual rights. See *Bauer v. Samson* (1885) 102 Ind. 262, 1 N. E. 571; *Keefe v. Women's Order* (1896) 162 Ill. 78, 44 N. E. 401. A few jurisdictions entirely deny such a power of abridgment by the lodge contract. *Kelly v. Trimont Lodge* (1910) 154 N. C. 97, 69 S. E. 764. And the majority of the states will not uphold a stipulation in the lodge contract if it tends to oust the courts of entire jurisdiction by making the decisions of the tribunals of the order conclusive. *Zaremba v. Int'l Harvester Corp.* (1916) 162 Wis. 231, 155 N. W. 114; *Bauer v. Samson, supra; contra, Fillmore v. Great Camp* (1895) 109 Mich. 13, 61 N. W. 785. Where the provision for appeal is merely permissive the better rule seems to be that the aggrieved party is not bound to exhaust his remedies within the order before appealing to the court. 2 Bacon, *Life & Accident Ins.* (4th ed. 1917) sec. 624; *Grand Lodge v. Grogan* (1829) 44 Ill. App. 111. Since under the rules of contractual construction, the contract of a mutual benefit society must be construed against it and in favor of the member, to impose upon a member the duty of exhausting the remedies within the order before appealing to the courts, where he has not expressly agreed to do so, seems to violate this rule of construction and vary the terms of the contract. The basis of the decision in the principal case carries with it the weight of authority. *Rueb v. Rehder* (1918) 24 N. M. 534, 174 Pac. 995; *Keefe v. Women's Order, supra.* But it is submitted that the court might well have held that the plaintiff was under no duty first to exhaust the remedies within the order, irrespective of the void judgment.

EQUITY—CHURCH PROPERTY—POWER OF MAJORITY TO CHANGE DOCTRINE AND RETAIN CONTROL.—In 1905 a group established and obtained a charter for "St. Michael's Greek Catholic Church." In 1919 the church trustees, with the approval of a majority of the members, appointed a pastor who changed the form of worship to the Russian Orthodox faith and refused admission to the priest appointed by the bishop of the Greek Catholic Church. The minority brought suit to restrain the action of the trustees, and to determine who should have the use and control of the church property. *Held,* that the trustees must admit the Greek Catholic priest, but that the property should remain in their custody. *Chrapko v. Kobasa* (1921, Pa.) 114 Atl. 254.

It is well settled that unless civil or property rights are involved, courts will not pass upon differences between contending factions of a church. *Stallings v. Finney* (1919) 287 Ill. 145, 122 N. E. 369. And the ecclesiastical and doctrinal questions will only be inquired into so far as may be necessary to determine the property rights of the parties. *Mendelsohn v. Gordon* (1913, Tex. Civ. App.) 156 S. W. 1149; *Gibson v. Singleton* (1919) 149 Ga. 502, 101 S. E. 178. If a religious organization has a tribunal with jurisdiction to decide differences between its members as to creed or doctrine, the majority of courts will accept the judgment of the church tribunal as conclusive upon them. *Manning v. Yeager* (1919) 203 Ala. 185, 82 So. 435; *Presbyterian Church v. Lincoln First*

Cumberland Presbyterian Church (1910) 245 Ill. 74, 91 N. E. 761; *Krecker v. Shirey* (1894) 163 Pa. 534, 30 Atl. 440. A few courts regard the decision of a church tribunal as establishing a mere presumption which is not conclusive upon them in the settlement of property rights. *Monk v. Little* (1916) 122 Ark. 11, 182 S. W. 511. The instant case is in accord with the almost universal rule that the majority faction of a church cannot divert the property to another denomination or to the support of doctrines radically and fundamentally opposed to the characteristic doctrines of the original faith, to which a minority still clings. *Baptist City Mission Soc. v. People's Tabernacle Congregational Church* (1918, Colo.) 174 Pac. 1118; *Lindstrom v. Tell* (1915) 131 Minn. 203, 154 N. W. 969; *Kicinko v. Petruska* (1917) 259 Pa. 1, 102 Atl. 286. Where no particular doctrine is designated in a deed or grant to trustees, the nature of the trust is ascertained by reference to the circumstances, such as, the denominational name, the doctrine actually taught at the time, and the length of time such a doctrine has continued to be taught without interruption. *Hale v. Everett* (1868) 53 N. H. 9; *Lindstrom v. Tell, supra.*

EVIDENCE—NEGLIGENCE—ADMISSIBILITY OF SIMILAR ACCIDENTS.—The plaintiff sued the municipality for damages to an automobile driven against an unlighted concrete wall at the end of a bridge. The testimony of the police officer on the beat as to the number of accidents that had occurred at this place was rejected. *Held,* that it was not error to exclude testimony of other accidents at the same place in the absence of evidence that the same weather conditions prevailed. *Charles v. Mayor, etc., of Baltimore* (1921, Md.) 114 Atl. 565.

There is considerable conflict as to the admissibility of evidence of previous accidents at the same place to prove negligence on a particular occasion. *Phillips v. Willow* (1887) 70 Wis. 6, 34 N. W. 731; *Kress & Co. v. Markline* (1918) 117 Miss. 37, 77 So. 858. Some courts, considering such evidence as raising too many collateral issues, have held it entirely incompetent. *Williams v. Inhabitants of Winthrop* (1913) 213 Mass. 581, 100 N. E. 1101. A comparison of the decisions with a careful distinguishing of the facts will reconcile a great number of the cases. The admissibility of such evidence is best determined by its probative bearing on the case before the court. (1911) 32 L. R. A. (N. S.) 1104, note. The majority apply the test of relevancy. 1 Jones, *Evidence* (Horwitz ed. 1913) sec. 163, 164. So where the court has thought the testimony of previous accidents to be irrelevant and more collateral than probative, it has been rightly excluded. *Langworthy v. Green* (1891) 88 Mich. 207, 50 N. W. 130; *Barrett v. Hammond* (1894) 87 Wis. 654, 58 N. W. 1053. But such evidence is admitted by the majority of courts also to show notice of the dangerous character of the place of the accident. *District of Columbia v. Armes* (1883) 107 U. S. 519, 2 Sup. Ct. 840; *Kress & Co. v. Markline, supra.* However, testimony as to the absence of previous accidents at the same place and from the same cause is usually excluded as too remote and as raising too many collateral issues. *Cochran v. Kankakee Co.* (1913) 179 Ill. App. 437. Previous accidents, if relevant, are not objectionable on the mere ground of surprise. *Smith v. Seattle* (1903) 33 Wash. 481, 74 Pac. 674. Certainly, to be relevant, the previous accidents must have occurred under conditions similar to those in the case before the court. *Samuels v. Ry.* (1912, Tex. Civ. App.) 150 S. W. 291; *Chesapeake Ry. v. Kellys Adm'x* (1914) 160 Ky. 296, 169 S. W. 736. The trial court correctly used its discretion in excluding the evidence.

INJUNCTIONS—CONTINUED TRESPASS TO PERSONAL PROPERTY—BALANCE OF CONVENIENCE.—The defendant railroad seized coal shipments in transit whenever its own supply was interfered with by labor troubles. The defendant always offered

to pay the invoice price of the coal, plus ten per cent, but the plaintiff, whose shipments had been taken in this manner, sought to enjoin any such further seizures by the railroad. *Held,* that an injunction should be granted. *Mobile v. Zimmern* (1921, Ala.) 89 So. 475.

The defence to this admitted tort was that the seizures were affected with a public interest, and that the plaintiff had an adequate remedy at law. The question, therefore, was whether the court should take into consideration the balance of convenience, when it would otherwise restrain the threatened tort. As between the plaintiff and the defendant, there is some authority for the view that the balance of convenience should be the deciding factor. *Beidenkopf v. Des Moines Life Ins. Co.* (1913) 160 Iowa, 629, 142 N. W. 434; *Smith v. Rowland* (1914) 243 Pa. 306, 90 Atl. 183; *McCarthy v. Bunker Hill* (1906, C. C. Idaho) 147 Fed. 981, aff. in (1909) 212 U. S. 583, 29 Sup. Ct. 692. Where the general public interest is involved, the courts seem to be more willing to apply this doctrine. *Frost v. City of Los Angeles* (1919) 181 Calif. 22, 183 Pac. 342; *Andrews v. Cohen* (1917) 221 N. Y. 148, 116 N. E. 862; *Booth-Kelly Co. v. Eugene* (1913) 67 Or. 381, 136 Pac. 29. In the absence of this public interest, however, many courts refuse to apply the rule of comparative damage. *Felsenthal v. Warring* (1919, Calif. App.) 180 Pac. 67; *Longton v. Stedman* (1914) 182 Mich. 405, 148 N. W. 738. The instant case, involving a continued trespass, is to be distinguished from the cases involving a nuisance, as a different rule is applied. (1919) 29 YALE LAW JOURNAL, 240. It seems to accept the more general view that the balance of convenience should not control where a continuous trespass is involved. 5 Pomeroy, *Equity* (4th ed. 1919) sec. 1922; (1920) 18 MICH. L. REV. 703; *Hansen v. Crouch* (1920, Or.) 193 Pac. 454.

JURISDICTION—INDIAN COURTS—POWERS OF STATE COURTS IN CONTROVERSIES OVER INDIAN RESERVATION LANDS.—A peacemaker's court had been recognized on the Cattaraugus Indian Reservation. N. Y. Cons. Laws, 1909, ch. 26, sec. 46. This court had "exclusive jurisdiction . . . to hear and determine all questions and actions between individual Indians," residing on the reservation, involving the title to real estate thereon. Sections 5 of the Act gave the state courts power over such actions as were not under the jurisdiction of the peacemakers' court. A controversy arose among certain Seneca Indians. The plaintiff brought suit in a state court to determine her right to certain reservation lands in her possession, alleging that she resided "outside the territorial jurisdiction of the peacemakers' court." On a motion for judgment on the pleadings the complaint was dismissed. *Held,* that the judgment should be affirmed since the complaint did not show that the peacemakers' court was without jurisdiction. *Mulkins v. Snow* (Oct. 25, 1921) N. Y. Ct. of App. Not yet reported; for the opinion below see (1919, Sup. Ct.) 106 Misc. 556, 175 N. Y. Supp. 41.

Tribal Indians have a peculiar status: they are not citizens, and are, as a rule, subject only to federal authority. *United States v. Kagama* (1886) 118 U. S. 375, 6 Sup. Ct. 1109; *Naganab v. Hitchcock* (1906) 202 U. S. 473, 26 Sup. Ct. 667. The federal government derives its power to control them from historic reasons and from its sovereignty over the lands which they occupy. *United States v. Kagama, supra.* When the tribal organization is recognized by the federal government the Indians may regulate and govern their own internal affairs. *In re New York Indians* (1866) 72 U. S. 761. They are, as a general rule, not within the jurisdiction of a state, though residing within its geographic boundaries. *United States v. Hamilton* (1915, W. D. N. Y.) 233 Fed. 685. The state cannot tax their lands. *In re New York Indians, supra.* The Indians cannot, in the absence of an enabling statute, sue in a state court. *Johnson v. L. I. Ry.* (1899) 42 App. Div. 626, 61 N. Y. Supp. 1139. The statute giving the Seneca

Indians such power has not been questioned. N. Y. Cons. Laws, 1909, ch. 26, sec. 54; *George v. Pierce* (1914, Sup. Ct.) 85 Misc. 105, 148 N. Y. Supp. 230. The law recognizing the jurisdiction of the peacemakers' court seems to be declaratory of an existing rule. See *Peters v. Tallchief* (1907) 121 App. Div. 309, 106 N. Y. Supp. 64. This court has been recognized recently by a federal court. *United States v. Seneca Indians* (1921, W. D. N. Y.) 274 Fed. 946, 949. It follows that the state court has only such jurisdiction over Indian affairs as is given by the statute. Since the jurisdiction of the state court is supplementary to that of the peacemakers' court, the allegation by the plaintiff that she resided "outside the territorial jurisdiction of the peacemakers' court" amounted to no more than an opinion that the state court had jurisdiction. In claiming a cause of action under an exception incorporated in the body of a statute, the plaintiff should have negatived the jurisdiction of the peacemakers' court. *Rowell v. Janvrin* (1896) 151 N. Y. 60, 66, 45 N. E. 398, 400.

MARTIAL LAW—EXTENT OF POWER OF GOVERNOR TO DECLARE ITS EXISTENCE.—The Governor of West Virginia proclaimed martial law in Mingo County. The petitioner was arrested for carrying a pistol contrary to orders in the Governor's proclamation, although he was duly licensed to do so by the civil authorities. At the time of the arrest there was no regular military force in Mingo County, but the Adjutant-General, holding a military commission, directed the civil authorities and the *posse comitatus*. The petitioner obtained a writ of habeas corpus. *Held,* that the writ should be sustained, as there was no regular military force in the territory covered by the proclamation. Miller, J., *dissenting*. *Ex parte Lavinder* (1921, W. Va.) 108 S. E. 428.

The governor of a state is the sole judge of conditions requiring a declaration of martial law. *Franks v. Smith* (1911) 142 Ky. 232, 134 S. W. 484; *In re McDonald* (1914) 49 Mont. 454, 143 Pac. 947. But the extent of this power is not settled. See Ballantine, *Unconstitutional Claims of Military Authority* (1915) 24 YALE LAW JOURNAL, 189; Lobb, *Civil Authority Verus Military* (1919) 4 VA. L. REG. 897. He may suspend the civil laws until the exigency is over. *In re Boyle* (1899) 6 Idaho, 609, 57 Pac. 706; *In re Moyer* (1905) 35 Colo. 159, 85 Pac. 190; *United States v. Wolters* (1920, S. D. Tex.) 268 Fed. 69. This is not a denial of due process under the Fourteenth Amendment. *Moyer v. Peabody* (1909) 212 U. S. 78, 29 Sup. Ct. 235. It is also held that the governor and those who act under his authority are not responsible civilly or criminally for acts done while martial law is in effect. *Hatfield v. Graham* (1914) 73 W. Va. 759, 81 S. E. 533; *In re Moyer, supra; Commonwealth v. Shortall* (1903) 206 Pa. 165, 55 Atl. 952. Some West Virginia cases have even held that persons may be arrested outside the zone of martial law and that they may be tried by a military commission, although the civil courts are still open. *Ex parte Jones* (1913) 71 W. Va. 567, 77 S. E. 1029; *State v. Brown* (1912) 71 W. Va. 519, 77 S. E. 243. But there are well-reasoned cases holding that the governor in declaring martial law acts merely as a civil officer of the state and that he must direct the military forces in accordance with the civil laws. *Franks v. Smith, supra; In re McDonald, supra;* cf. 2 Willoughby, *The Constitution* (1910) sec. 727. The decision in the instant case seems to indicate a tendency to depart from former West Virginia decisions. The restriction of the power to a time when a regular military force is in the field is desirable and it is hoped that it may aid in the ultimate adoption as general law of the able dissenting opinions in the extreme West Virginia cases. For proposed legislative reform see Ballantine, *Qualified Martial Law, A Legislative Proposal* (1915-1916) 14 MICH. L. REV. 102, 197.

PERSONS—RIGHT OF MOTHER TO RECOVER FOR DEATH OF ILLEGITIMATE CHILD.—An action was brought by the state on behalf of the mother of an illegitimate

child for the latter's death. A statute gave a right of action in cases of wrongful death for the benefit of husband, wife, parent, or child. *Held,* that the plaintiff could not recover. *State v. Hagerstown & Frederick Ry.* (1921, Md.) 114 Atl. 729.

The mother of an illegitimate child cannot recover for its death under wrongful death statutes. *Robinson v. Georgia Ry. & Banking Co.* (1903) 117 Ga. 168, 43 S. E. 452; *Lynch v. Knoop* (1907) 118 La. 611, 43 So. 252. The Court in the instant case, following the general rule, placed its decision on the ground that the statute was intended to cover only legitimate children. Md. Ann. Code Laws, 1911, art. 67. The jaded argument that the mother would be permitted to profit by her own wrong is also frequently urged to support such decisions. But Maryland has clothed illegitimate children with the attributes of legitimacy to the extent of allowing them to inherit and transmit inheritances. Md. Ann. Code Laws, 1911, art. 46, sec. 30. It is generally held that a mother is under duty to support her illegitimate child. *Galveston H. & S. Ry. v. Walker* (1907) 48 Tex. Civ. App. 52, 106 S. W. 705. The statute in the instant case was general and ought to have been construed in the light of the legislative purpose in enacting it. The conclusion of the court, that "child" *prima facie* means "legitimate child," was unjustified because the object of the statute was to provide compensation for the wrongful death of a dependent and in no way related to inheritance and kindred subjects where such a construction would be reasonable, if not compelling. The trend of the law, as well as the probable intent of the legislatures, is well illustrated by decisions and legislative enactments in South Carolina. In 1904, the Supreme Court refused to permit a mother to recover for the death of her illegitimate child. *McDonald v. Southern Ry.* (1904) 71 S. C. 352, 51 S. E. 138. In 1906, an act was passed stating that in the event of the death of an illegitimate child by wrongful act, the mother should have the same rights and remedies as though such child had been born in lawful wedlock. See S. C. Code, 1912, sec. 3562; *Croft v. Southern Cotton Oil Co.* (1909) 83 S. C. 232, 65 S. E. 216. The basis for the decision in the instant case seems rather narrow and specious, and entirely out of sympathy with the better view. See COMMENTS (1920) 30 YALE LAW JOURNAL, 167; *Andrzejewski v. Northwestern Fuel Co.* (1914) 158 Wis. 170, 148 N. W. 37; *Hadley v. City of Tallahassee* (1914) 67 Fla. 436, 65 So. 545; *Dickason Coal Co. v. Liddil* (1911) 49 Ind. App. 40, 94 N. E. 411.

PROPERTY—ESCHEAT TO STATE OF UNCLAIMED DEPOSITS IN NATIONAL BANK.—The amount of certain deposits in the defendant national banks was for more than twenty years unclaimed by the depositors or anyone succeeding to their rights. A California statute (Sts. 1915, chs. 84, 555) provided that if deposits in banks were unclaimed for twenty years their amount should escheat to the state. The defendants contended that the law was inapplicable to national banks as the state could not to this extent control their conduct, such control being solely within the jurisdiction of the Federal Government. *Held,* that the right of a depositor escheated to the state. *State v. Anglo & London Paris Nat. Bank* (1921, Calif.) 200 Pac. 612.

Statutes providing that deposits which had remained inactive and unclaimed in a savings bank for a certain number of years should be paid to the state authorities, subject to being repaid by the state to a person afterwards establishing a lawful right thereto, have been held constitutional as to the bank. But these statutes were not styled statutes of escheats, nor were the banks national banks. *Provident Inst. for Savings v. Malone* (1911) 221 U. S. 660, 31 Sup. Ct. 661, *in re* Mass. Laws, 1907, ch. 340, sec. 1; *Commonwealth v. Dollar Savings Bank* (1917) 259 Pa. 138, 102 Atl. 569, *in re* Pa. Laws, 1872,

no. 49, secs. 2, 3. Such legislation would probably also be constitutional as to the absent depositor. A statute providing for administration of assets of an absentee as if he were dead, but making proper safeguard for the protection of his interests in case of return has been upheld. *Cunnuis v. School District* (1905) 198 U. S. 458, 25 Sup. Ct. 721, *in re* Pa. Laws, 1885, no. 122. The instant California Statute of Escheats provided for recovery by the former owner if discovered, and its validity has been upheld in an earlier case as to deposits in a *state* bank. *State v. Security Savings Bank* (1921, Calif.) 199 Pac. 791. Since it does not conflict with any federal legislation controlling national bank deposits, the instant case upholds its validity as to deposits in national banks. At least one other case holds similarly under a similar statute. *State v. First Nat. Bank* (1912) 61 Or. 551, 123 Pac. 712, *in re* Or. Laws, 1909, ch. 36. In an analogous case, where a state statute provided under certain conditions for the escheat to the state of real estate in the hands of a corporation, the statute was held to apply to realty held by a *national* bank for a purpose other than those specified in the National Bank Act. *Commonwealth v. Clark County Nat. Bank* (1919) 187 Ky. 151, 219 S. W. 175, *in re* Act of Apr. 5, 1893 (Carroll's Ky. Sts. 1915, sec. 567) and U. S. Act of June 3, 1864 (13 Stat. at L. 107) ch. 106, sec. 28. It has been said that the National Government is not in any case the sovereign to which ownerless property of any sort in any state escheats. See *Amer. Loan & Trust Co. v. Grand Rivers Co.* (1908, C. C. W. D. Ky.) 159 Fed. 775.

WILLS—VALIDITY—NECESSITY OF TESTAMENTARY INTENT.—The testator was a candidate for a degree in a secret order, and as a part of the initiation, he executed a paper which purported to be his last will and testament. Upon its being offered for probate, certain heirs, believing that the instrument was executed without any testamentary intent, contested its validity. *Held,* that the writing was a valid will. *In re Watkin's Estate* (1921, Wash.) 198 Pac. 721.

It is well settled that an instrument, although satisfying all the formal requirements of a will, does not operate as such unless executed with *animus testandi. In re Meade's Estate* (1897) 118 Calif. 428, 50 Pac. 541; *Clark v. Hugo* (1921, Va.) 107 S. E. 730. A will executed in ignorance of its true character is a nullity. *In re Gluckman's Will* (1917) 87 N. J. Eq. 638, 101 Atl. 295. Even though the true character of the instrument be known, if it was executed to effect some purpose other than a testamentary disposition of property, it is invalid. *Fleming v. Morrison* (1904) 187 Mass. 120, 72 N. E. 499. Under this rule a will written as a specimen of brevity was denied probate. *Nichols v. Nichols* (1814) 2 Phil. Eccl. 180. And likewise, a will executed in jest was invalid. See *Lester v. Smith* (1863, Eccl.) 3 Sw. & Tr. 282. Schouler, *Wills* (3d ed. 1900) sec. 278. As a general rule, however, the courts are reluctant to declare a will invalid which satisfies all the statutory requirements as to form and execution, and probate will be denied only when the proof is clear and convincing that the will was executed to effect a purpose wholly inconsistent with the intent expressed in the instrument. *Brown v. Avery* (1912) 63 Fla. 355, 58 So. 34. *Clark v. Hugo, supra.* And a few courts have held that the existence of the *animus testandi* is conclusively presumed from a writing containing every element of a valid will, and incapable of operating in any other way. *In re Kennedy* (1910) 159 Mich. 548, 124 N. W. 516. In the instant case the testimony of members of the secret order was somewhat conflicting as to the purpose of the alleged will, and in the absence of convincing evidence of a non-testamentary intent, the Court seems to have correctly sustained its validity.