CURRENT DECISIONS

ADMINISTRATIVE LAW—COMMISSION FOR INDIAN LANDS—JUDICIAL NON-INTERFERENCE WITH FINDING OF FACT.—The United States sought to quiet title in the Creek Indian Tribe and to annul a land certificate and patent awarded by the Dawes Commission, alleging that the patentee had never existed. *Held,* that the finding by the Commission as to the existence of the patentee was final. *United States v. Minnie Atkins* (1922, U. S.) 43 Sup. Ct. 78.

A similar decision of the Dawes Commission was held not reviewable although evidence was offered to prove the death of the patentee before the date of allotment. *United States v. Wildcat* (1917) 244 U. S. 111, 37 Sup. Ct. 561. For a discussion of the present legal situation of the Indian, see Knoepfler, *Legal Status of American Indian* (1922) 7 IOWA L. BUL. 232. The instant case is in accord with the rule that the finding of an administrative commission as to a question of fact will not be disturbed unless it is arbitrary or fraudulent. See Needham, *Judicial Determinations by Administrative Commissions* (1916) 10 AM. POL. SCI. REV. 235; Albertsworth, *Judicial Review of Administrative Action* (1921) 35 HARV. L. REV. 127; Isaacs, *Judicial Review of Administrative Findings* (1921) 30 YALE LAW JOURNAL, 781.

BILLS AND NOTES—ALTERATION OF CHECKS FACILITATED BY FAILURE TO USE SAFETY DEVICES—HOLDER IN DUE COURSE.—The defendant bank issued four "New York Exchange checks," amounting in all to $13.00, to one Massey, who fraudulently raised them to over $40,000 and negotiated them with the plaintiff bank for that amount. The plaintiff alleged negligence on the part of the defendant in facilitating alteration by a failure to use "safety paper" and a protectograph device, which negligence was the proximate cause of the loss. The defendant demurred. *Held,* (one judge *dissenting*) that the demurrer should be sustained. *Broad Street Bank v. National Bank of Goldsboro* (1922, N. C.) 112 S. E. 11.

By the better view the drawee may charge the drawer for any loss due to an alteration facilitated by leaving unfilled spaces on the paper. *London Joint Stock Bank v. MacMillan* [1918, H. L.] A. C. 777; COMMENTS (1917) 27 YALE LAW JOURNAL, 242; NOTES (1918) 31 HARV. L. REV. 779. The probability of intervening criminal conduct is the only reason for imposing the duty, and consequently such conduct ought not to be considered as a break in the chain of causation. See (1918) 27 YALE LAW JOURNAL, 1087. In view of section 124 of the Negotiable Instruments Law the decision in the instant case is correct, although the policy of the rule which allows the drawee to recover is broad enough to cover holders in due course as well, particularly since the drawee is to some extent protected by the current practice of receiving advice upon the drawing of a banker's draft. Although the reason of the rule on unfilled spaces might without undue extension be held to apply to a banker's draft drawn without the customary safeguards, such a result is hardly to be expected at present.

CONSTITUTIONAL LAW—INSURANCE—STATUTE REQUIRING PROMPT REJECTION OF APPLICATION BY INSURER.—A North Dakota statute (N. D. Comp. Laws, 1913, sec. 4902) provided that every company insuring losses by hail should be bound from and after twenty-four hours from the time of the application, unless it had notified the applicant by telegram of the rejection of his application. The plaintiff made such an application to a local agent, who forwarded it to the defendant company. The next day the defendant sent a rejection by mail. In the meantime, the plaintiff had suffered a severe loss by hail, but the defendant,

being ignorant of this fact, had acted in good faith. The plaintiff brought an action on the policy. *Held,* that the defendant was liable. *National Union Fire Insurance Co. v. Wanberg* (1922, U. S.) 43 Sup. Ct. 32.

This statute, sustained as a reasonable police regulation, practically requires the insurance company to make constant use of the telephone and telegraph, or to delegate increased authority to its agents and sub-agents. For discussions of the case, see (1921) 19 MICH. L. REV. 340; (1921) 5 MINN. L. REV. 224.

CRIMINAL LAW—PUNISHMENT FOR CONSPIRACY GREATER THAN FOR CRIME.—The defendants were convicted of a conspiracy to commit an offense against the United States, in having possession of and transporting intoxicating liquor. The punishment given was greater than that prescribed for the offense which they had conspired to commit. The defendants contended that they should have been given the lesser penalty. *Held,* that the sentence imposed was correct. *Murry v. United States* (1922, C. C. A. 8th) 282 Fed. 617.

The legislature has the absolute power to define what penalty shall be inflicted for various offenses, so long as the punishment imposed is not cruel or disproportionate to the offense. *Clune v. United States* (1895) 159 U. S. 590, 16 Sup. Ct. 125; *State v. Woodward* (1910) 68 W. Va. 66, 69 S. E. 385. The principal case is in accord with the usual rule that the legislature may within its discretion impose a greater penalty for a conspiracy to commit an offense than for the consummation of the act itself. *United States v. Rabinowich* (1915) 238 U. S. 78, 35 Sup. Ct. 682; *Mitchell v. United States* (1916, C. C. A. 2d) 229 Fed. 357; *contra, Hartmann v. Commonwealth* (1846) 5 Pa. 60; *Williams v. Commonwealth* (1859) 34 Pa. 178.

DEEDS—DELIVERY IN ESCROW TO AN AGENT OF THE GRANTOR.—The plaintiff consulted a bank cashier with reference to a method whereby he could convey certain property to his son and retain possession himself during his lifetime. He then executed a deed and delivered it to the cashier to be held in escrow until his death. Later the plaintiff brought this bill to have the deed cancelled. *Held,* that the deed should be cancelled. *Grenowold v. Grenowold* (1922, Ill.) 136 N. E. 489.

A delivery in escrow cannot be made to an agent or attorney of the grantor, since possession by the agent is equivalent to possession by the principal, and therefore revocable at will. *Miller v. Smith* (1922, Wash.) 205 Pac. 386; *Shelinsky v. Foster* (1913) 87 Conn. 90, 87 Atl. 35. But the instant case might well have followed a growing limitation of this doctrine which holds valid a delivery to an agent in his personal capacity where the agent's interests are not antagonistic to those of his principal. *Kelly v. Chinich* (1919) 90 N. J. Eq. 602, 108 Atl. 372; *Henry v. Hutchins* (1920) 146 Minn. 381, 178 N. W. 807.

LIBEL AND SLANDER—PRIVILEGE OF JUDGE WHILE ACTING IN HIS JUDICIAL CAPACITY.—During the trial of a case against the plaintiff's husband the plaintiff offered to testify; the judge remarked, "a wife cannot testify either for or against her husband, but the place you are operating down there is such a dirty, low-down, and disorderly place, that I will take the lid off and let you say what you please." The plaintiff sued the judge for slander. *Held,* that the petition set out no cause of action. *Young v. Moore* (1922, Ga.) 113 S. E. 701.

In England the words of a judge, while acting in his judicial capacity, are absolutely privileged even though they are irrelevant or spoken maliciously. *Scott v. Stansfield* (1868) L. R. 3 Exch. 220; *Tughan v. Craig* [1918] 1 Ir. Rep. 245. There is little authority on the question in America, but the tendency is to follow the English rule. *Mundy v. McDonald* (1921) 216 Mich. 444, 185 N. W. 877; Newell, *Slander and Libel* (3d ed. 1914) 517; but see *Aylesworth v. St. John* (1881, N. Y.) 25 Hun. 156. The instant decision strengthens this

tendency. Concerning privilege in general, see COMMENTS (1922) 31 YALE LAW JOURNAL, 765.

MUNICIPAL CORPORATIONS—WAIVER OF PRIVILEGE TO SHUT OFF WATER.—The defendant city increased its charges for the use of water by the plaintiff, who unavailingly protested against the new rate as excessive and discriminatory. After three years, the city water board entered into a new contract with the plaintiff restoring the former charges; the board accepted payments for past use of the water under the new rate. Subsequently it attempted to collect the increased charges for the previous three years, threatening to shut off the water in the event of refusal. The plaintiff sought an injunction against this threatened action. *Held,* that the city's right to use its summary remedy was waived when it accepted payments under the new contract. *Mayor of Baltimore v. Tickner* (1922, Md.) 118 Atl. 136.

This case illustrates a method by which the privilege to shut off a water supply is lost. *Benson v. Paris Mountain Water Co.* (1911) 88 S. C. 351, 70 S. E. 897. For discussions of the privilege of a public service corporation to discontinue service, see (1917) 26 YALE LAW JOURNAL, 251.

SPECIFIC PERFORMANCE—CONTRACT CONTAINING PROVISION TO ARBITRATE.—The contract between the plaintiff and the defendant gave the plaintiff an option to purchase a water plant at the fixed price of $400,000. It was further agreed that the defendant was to be compensated for all extensions and enlargements it might make between the date of the contract and the time of the exercise of the option, the amount to be fixed by arbitrators in a specified manner. The arbitrators failed to fix the price. *Held,* that the plaintiff was entitled to specific performance. *City of Anniston v. Alabama Water Co.* (1922, Ala.) 93 So. 409.

Equity will not usually grant specific performance of agreements to submit a matter to arbitration, nor will it make a new contract for the parties by determining the price itself. 5 Pomeroy, *Equity Jurisprudence* (4th ed. 1919) sec. 2180; *cf.* (1919) 29 YALE LAW JOURNAL, 120. The instant case is in accord with a now recognized exception to disregard the express condition where the provision for arbitration relates to some subsidiary or incidental term of the contract. See Hayes, *Specific Performance of Contracts for Arbitration or Valuation* (1916) 1 CORN. L. QUART. 225; (1922) 31 YALE LAW JOURNAL, 670.

SPECIFIC PERFORMANCE—CONTRACT TO DEVISE IN CONSIDERATION OF FILIAL SERVICES.—In consideration of the plaintiff's promise to give filial services to the defendant's ancestors, they agreed to continue to regard him as their son, and, upon their deaths, to treat him as their lawful heir. The plaintiff brought an action against the true heir, for specific performance of this contract. *Held,* that the decree should be granted. *Barrett v. Miner* (1922, Sup. Ct.) 196 N. Y. Supp. 175.

"Virtual adoption" agreements are now generally recognized and enforced in equity. (1920) 19 MICH. L. REV. 114; (1919) 32 HARV. L. REV. 854; Collier, *Enforcement in Equity of Adoption Contracts and Those in the Nature of Adoption Contracts* (1917) 84 CENT. L. JOUR. 157; (1912) 40 WASH. L. REP. 453; 5 Pomeroy, *Equity Jurisprudence* (2d ed. 1919) sec. 2248.

TAXATION—TRUSTS—STATUTE OF FRAUDS.—One Allen purchased land, having the deeds made out in the name of his wife. She promised verbally to will the land, at her death, to his children by a former wife. She executed this verbal promise by a will. The Inheritance Tax Act (Hurd's Ill. Rev. Sts. 1919, ch. 120, sec. 1) provided that all blood-relations should be entitled to an exemption of $20,000; all others, $100. The plaintiff claimed that the step-children were entitled to an exemption of $100 only, and sued for an inheritance tax, no child having

received $20,000. *Held,* that the plaintiff could not recover. *People v. Tombaugh* (1922) 303 Ill. 591, 136 N. E. 453.

As against third parties, beneficiaries of an oral trust which has been executed receive an equitable interest directly from the settlor. *Sheffield Milling Co. v. Heitzman* (1921) 192 Iowa, 1288, 184 N. W. 631; *Arnston v. First Nat. Bank of Sheldon* (1918) 39 N. D. 408, 167 N. W. 760; *Bailey v. Wood* (1912) 211 Mass. 37, 97 N. E. 902; *Blaha v. Borgman* (1910) 142 Wis. 43, 124 N. W. 1047; (1918) 18 COL. L. REV. 375; (1910) 10 *ibid.* 151, 152. This is true even though the statute of frauds affects the substantive legal relations of the parties. In spite of the statute, the trust is not wholly void, because it creates, in the trustee, a power to validate the trust by executing the trust itself or a memorandum thereof and, in the beneficiary, a liability that the trustee's duties may thus become enforceable. See Corbin, *Cases on Contracts* (1921) 1475, note 55; *Sheffield Milling Co. v. Heitzman, supra; Blaha v. Borgman, supra;* (1910) 10 COL. L. REV. 151, 152.

TELEGRAPHS—NOTICE OF LIMITATION OF LIABILITY FOR UNREPEATED MESSAGES.—The plaintiff gave to the defendant telegraph company a message written on a blank piece of paper. Due to the negligence of the defendant it was incorrectly transmitted. The plaintiff sued for $1,000 damages. The defendant relied upon a condition printed on the back of their telegraph blanks, and filed with the Interstate Commerce Commission, to the effect that the company would not be liable for an amount in excess of the tariff rate for unrepeated messages. *Held,* that the plaintiff could recover only the amount of the tariff rate. *Western Union Tel. Co. v. Padgett* (1922, Ala.) 93 So. 238.

The decision follows a comparatively recent case which seems to be decisive upon the questions involved. *Western Union Tel. Co. v. Esteve Bros.* (1921) 256 U. S. 566, 41 Sup. Ct. 584. See Isaacs, *The Standardizing of Contracts* (1917) 27 YALE LAW JOURNAL, 34; (1920) 29 *ibid.* 573, 934; (1919) 28 *ibid.* 831.

TORTS—CONTRIBUTORY NEGLIGENCE—FAILURE TO EXTINGUISH A FIRE.—The defendant negligently started a fire on land adjoining that of the plaintiff. Although the latter expressed apprehension at the time, he did not attempt to avert the danger. Several days later it got beyond control due to a high wind, and destroyed the plaintiff's property. *Held,* that the plaintiff was guilty of contributory negligence as a matter of law, and hence could not recover. *Pribonic v. Fulton* (1922, Wis.) 190 N. W. 190.

A land-owner in the face of a "seen" danger must, as a condition precedent to recovering damages, use all proper and reasonable means to safeguard his property. 2 Thompson *Negligence* (2d ed. 1901) sec. 2329; *Brown v. Brooks* (1893) 85 Wis. 290, 55 N. W. 395. Although the question is normally one of fact, there may be a failure which so clearly contributes to the destruction of the property as to bar a recovery as a matter of law. *Hunter v. Pa. Ry.* (1911) 45 Pa. Super. Ct. 476; *Brunner v. Minn. St. P. & S. S. M. Ry.* (1913) 155 Wis. 253, 143 N. W. 305.

WORKMEN'S COMPENSATION—SCOPE OF EMPLOYMENT—"OUT OF" THE EMPLOYMENT.—The deceased, as manager of the defendants' business, was called to the company's home office in another town. On his return he was killed while trying to board a flat car instead of the caboose, which was intended for passengers. An action was brought under the Workmen's Compensation Act. *Held,* that the death did not arise "out of" the employment. *Christensen v. Hauff Bros.* (1922, Iowa) 188 N. W. 851.

The instant decision seems sound. See Berry, *Injuries Arising Out of and In The Course of the Employment* (1921) 92 CENT. L. JOUR. 156-162, 176-181, 195-199, 210-217; NOTES (1922) 22 COL. L. REV. 569; (1921) 31 YALE LAW JOURNAL, 215.