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RECENT IMPORTANT DECISIONS

AGENCY—RATIFICATION—KNOWLEDGE NECESSARY.—Defendant, a married woman, was proprietor of a drug store, and her husband was her general agent in charge of the same. Plaintff's agent, while endeavoring to sell a bill of goods to the agent of defendant, was expressly notified by defendant that she would not buy any goods from plaintiff's house, and told him not to sell any goods to her agent. Notwithstanding this express notification and prohibition, goods were sold and were received by defendant's agent, placed on the shelves of the store and disposed of in the regular course of trade. An action was brought for the price of these goods. The question was, whether under the circumstances, there was a ratification of the transaction. The lower court instructed the jury in effect, that if the goods were delivered into the pharmacy and were sold by the employes of the defendant and the proceeds were put into her possession, there was a ratification by her. *Held*, that this instruction was erroneous, on the ground that in order to constitute a ratification it must appear that defendant had knowledge of all the material facts, and, under the circumstances of this case, a receipt and sale of the goods by her agent would not bind defendant. *Schollay v. Moffitt-West Drug Co.* (Colo.) 67 Pac. Rep. 182.

There may be a ratification by receiving the profits of an unauthorized transaction; but knowledge of all the material facts is essential. *Craighead* v. *Peterson*, 72 N. Y. 279; *Herring* v. *Skaggs*, 73 Ala. 446. In this case the agent of the plaintiff had been expressly notified not to sell goods to the defendant's agent; therefore plaintiff was charged with notice not to sell. *Flower* v. *Elwood*, 66 Ill. 438. There was no reason to believe that this prohibition had been withdrawn, and by acting in disregard of it and selling the goods, a fraud was perpetrated upon the defendant. Where there is collusion between the agent and the party seeking to hold the principal, notice to the agent is not notice to the principal. *Innerarity* v. *The Bank*, 139 Mass. 332.

AGENCY—UNDISCLOSED PRINCIPAL—DEFENCE AGAINST AGENT.—D. F. Holden, acting really as the agent of one D. O. Coles, but without disclosing that fact, purchased in his own name from the defendant railroad company, a mileage book, good for use by those only whose names should be inserted on the cover by defendant's agent. Plaintiff signed the contract in the back part of the book in his own name, but the defendant's agent in inserting the name on the cover wrote it by mistake "A. F. Holden." Plaintiff used the book for one journey, and then delivered it to Coles, the true owner, paying him for the mileage used. Afterwards, in order to make another journey on the ticket, plaintiff hired it of Coles, and Coles, without authority, inserted the name of the plaintiff's daughter on the cover so that she might go with him. When plaintiff presented the book in payment of fare for himself and daughter, the conductor refused to receive it, and caused the plaintiff's arrest. In an action by the plaintiff to recover damages, *Held*, that he could not recover. *Holden* v. *Rutland Ry. Co.* (1901) Vt., 50 Atl. Rep. 1096.

The court adopted the well known rule that upon contracts, not under seal, made by an agent for an undisclosed principal, either the principal or the agent may sue; (MECHEM on AGENCY, § 755; DICEY on PARTIES, 136; *Sims* v. *Bond*, 5 B. & Ad. 393;) but applied the other rule equally well settled, that if the agent sues in his own name, the defendant may make any defense which he may have, either against the agent himself or against the principal. (MECHEM on AGENCY, § 762; DICEY, PARTIES, 142; 2 SMITH'S LEAD. CAS. 428.) The insertion of the name of the plaintiff's daughter was a material alteration, and was designed to promote a fraud upon the defendant for the plaintiff's advantage. This defence being available against the plaintiff in the action in his own name, he could not recover.

BAILMENTS—ACTION BY BAILEE AGAINST THIRD PERSON.—In an action against a third person by whose negligence property in the hands of a bailee was destroyed, *Held*, that the bailee can recover the value of the goods, on the ground that possession is title both as regards the right to bring the action and as to the quantum of damages; though previous to such recovery he would have a good answer to an action by the bailor, the liability over of the bailee to the bailor being not the ground of the bailee's right to recover but a consequence of the right. *The Winkfield*, [1902] Pr. Div. 42, 71 L. J. R., P. D. 21.

In HOLMES' COMMON LAW, ch. v. it is said the original rule was that a bailee was answerable to the owner because he was the only person who could sue; but in course of time, by a peculiar inversion of reasoning, it came to be said that the bailee could sue because he was answerable over to the bailor; while in POLLOCK AND MAITLAND'S HISTORY OF ENGLISH LAW, Vol. II. p. 70, it is said that, as between these two old rules, there was perhaps no logical priority. See also HOLLAND, JURISPRUDENCE, 5th ed., note to p. 171. The principal case, it seems then, is probably historically sustained. It distinctly overrules *Claridge* v. *S. Staffordshire Tramway Co.* [1892] 12 Q.B. 422, which was based on the "inverted" rule, and returns to what previously was regarded as the English doctrine. *Sutton* v. *Buck*, 2 Taunt. 302; *Burton* v. *Hughes*, 2 Bing. 173; *Swire* v. *Leach*, 18 C. B. (N. S.) 479. It is in accord also with the American decisions. SEDGWICK, DAMAGES. 8th ed. § 76-8; *White* v. *Webb*, 15 Conn. 302; *Ullman* v. *Barnard*, 7 Gray (Mass.) 554.

BANKRUPTCY—HOMESTEAD EXEMPTION—STATE LAW NOT ENFORCED.—A, gave promissory notes in which he waived his homestead exemption. Then he went into bankruptcy. *Held*, that the claims of the creditor were unenforceable against the homestead, though a waiver of a homestead exemption in a promissory note was admitted to be valid in Georgia under the constitution of that state. *In re* Swords, (District Ct., N. D., Ga.), 112 Fed. Rep., 661.

BANKRUPTCY—HOMESTEAD EXEMPTION.—A, who was insolvent, took money from his business and invested it in a homestead. Later, he became bankrupt. Then he claimed his homestead exemption, under the state law, as permitted by the Bankruptcy Act, Chap. III, § 6. *Held*, that the exemption could not be sustained, on the ground that the claimant should not have taken money from his business for the purpose of securing a homestead, knowing he was insolvent. *McGahan* v. *Anderson* (C. C. A. 4th circuit,) 113 Fed. Rep. 115.

The decision is at variance with the practically unanimous holdings of the state courts. Waples, Homestead and Exemptions, p. 508: "The doctrine that homestead may be selected, to defeat creditors, from property liable for debts due them, has been so pointedly laid down that it must be stated here, however antagonistic to just principles it may appear. The profession cannot disregard what rests on the principle of *stare decisis*, even though the courts, in the exposition of statutes, admit that principles of equity have no control." *Jacoby* v. *Distilling Co.*, 41 Minn. 227; citing numerous cases, among them *Tucker* v. *Drake*, 11 Allen, 145; *O'Donnell* v. *Segar*, 25 Mich. 367. WAPLES further says that "creditors are deemed to have notice that such setting apart may be done, and therefore to have trusted their debtor with such understanding. In the selection by the debtor or the officer, therefore, there is no fraud."

BILLS AND NOTES—CASHIER'S CHECK—INDORSED FOR ILLEGAL CONSIDERATION.—The defendant issued to the plaintiff a cashier's check, which plaintiff indorsed and delivered to a gambler in a gambling transaction. Defendant paid the check to the indorsee after notice of the defect in his title. Action for amount of the check. *Held*, that plaintiff was entitled to recover. *Drinkall* v. *State Bank*, (N. Dak.) 88 N. W. Rep. 724.

This holding is striking in view of the multitude of cases supporting the well established principle that the courts will leave the parties to a prohibited transaction where their unlawful acts have placed them. The applicatiou of this principle where securities are given is seen in the following cases: Where an assignment of a mortgage was made in payment of a gaming debt it was held that, by the assignment, the gaming contract was fully executed and would not defeat a foreclosure of the mortgage. *Reed* v. *Bond*, 96 Mich. 134, 55 N. W. Rep. 619. A bill in equity will not lie to compel the surrender or cancellation of a note and mortgage given for an illegal consideration. *Atwood* v. *Fisk*, 101 Mass. 363, 100 Am. Dec. 124. Where a bank check is given in payment of losses incurred in a gaming contract, equity will not grant relief, either by enjoining the bank from paying the check, or ordering it cancelled and surrendered. *Kahn* v. *Walker*, 46 O. St. 195, 20 N. E. Rep. 203.

CARRIERS—STREET RAILWAY—TRACK USED BY ANOTHER COMPANY.—Plaintiff's decedent was riding on defendant's tracks on a car owned and operated by another street railway, which by a traffic arrangement with the defendant ran its cars on the latter's tracks: and while standing on the platform was struck by a tree standing within 1 ft. 7 in. of the rail. *Held*, Non-suit proper, as decedent was not a passenger on defendant's road, and sustained no contractual relations to it by virtue of the traffic arrangement. *Sias* v. *Rochester Ry. Co.* (N. Y.) 62 N. E. Rep., 132.

If a company's track is so close to an obstruction as to endanger the safety of the travelling public, the company neglects its duty to its own passengers and employees if they be injured

thereby. *Benthin* v. *R. R. Co.* 24 N. Y. App. 303; *Tucker* v. *Ry. Co.* 53 N. Y. App. 571. So if it has running powers over the line of another company, it is responsible to its own passengers for negligence of the other company, no matter what the arrangement with said company, because of the contract to carry and the consequent implied contract of due care in all the agencies to be employed. HUTCHINSON ON CARRIERS, § 514. Where a company, without authority divests itself of its duties to the public, as by lease to another, it is liable to passengers for injuries arising from its own failure to keep the road in order or for such other's negligence. *Abbott* v. *R. R. Co*, 80 N. Y. 27; *Nelson* v. *R. R. Co.* 26 Vt. 717. By the weight of authority, if the lease be authorized, the lessor is not liable for injuries arising from the negligent operation of the road by the lessee, but is liable for breach of duty to the public in the construction of tracks, buildings, etc, *Nugent* v. *R. R.* 80 Me. 62; *R. R.* v. *Phinazee*, 93 Ga. 488; ELLIOTT ON RAILROADS, § 467. If one company merely permits another to make use of its track it is responsible to its own passengers for injury to them from negligence of the other company. *R. R.* v. *Barron*, 5 Wall. (U. S.) 90: *McElroy* v. *R. R.* 4 Cush. (Mass.) 400; though a contract to use a track is not necessarily a lease. *U. P. Ry.* v. *C. R. I. & P. Ry.* 51 Fed. 309. It will also be liable for animals negligently killed, or for damage by fire caused, by such other company. *R. R. Co.* v. *Hinebaugh*, 43 Ind. 354; *R. R. Co.* v. *Salmon*, 39 N. J. L. 299. As to whether a company, by giving permission to another to use its tracks, owes a duty to the passengers of the other road, some cases, with the principal case, hold it not responsible. *March* v. *R. R.* 9 Foster (N. H.) 9; WOOD ON RAILWAY LAW, § 325. Others hold it responsible. *R. R.* v. *Lane*, *Admr.* 83 Ill. 448; *R. R.* v. *Phenazee*, *supra.* In such a case, if the injured person founds his claim on contract, he will fail, as there is no privity between him and the company. ELLIOTT ON RAILROADS, § 475; *Nugent* v. *R. R. supra.*

CHATTEL MORTGAGE—SUFFICIENCY OF DESCRIPTION.—A description in a chattel mortgage of the property as "five hundred bushels of yellow corn" at a certain place, when there was a greater quantity of the same kind in the pile, *Held*, sufficient. *McCormick, etc., Co.* v. *Reynolds* (Neb. 1901), 88 N, W. Rep. 530.

On principle this decision is contrary to the great weight of authority, *Stonebraker* v. *Ford* (1884) 81 Mo. 532; *Moore* v. *Brady* (1899), 125 N. C. 35. There are no cases directly supporting the proposition. The basis for the opinion is the analogy to the doctrine that a valid sale may be made of an undesignated aliquot part of a large mass of uniform quality, Even as to this there is certainly a conflict of authority, though it is stated in respect to grain, that the American courts largely support the affirmative view. MECHEM, SALES §§ 713, 716. The rule has been opposed in sales on the ground that confusion and fraud might easily result. *Ferguson* v. *Northern Bank* (Ky. 1897), 14 Bush 555. The same objections may be urged in case of a mortgage.

CONFLICT OF LAWS—STATUTE OF FRAUDS—STATUTE AFFECTING REMEDY—REPRESENTATIONS AS TO ANOTHER'S CREDIT.—A statute of Michigan prohibited the bringing of an action upon an unsigned representation as to another's credit, and the representation was made in New York, where it would have been actionable, but suit was brought in Michigan. *Held*, that the statute affected the remedy and not the right, and that suit could not be maintained. *Third Nat. Bank* v. *Steel*, (Mich. 1902) 88 N. W. Rep. 1051.

This is the view of the English authorities. *Leroux* v. *Brown* (1852), 12 C. B. 801; DICEY CONFLICT OF LAWS, 713. In this country there is a decided conflict. The doctrine is firmly upheld in some jurisdictions, *Kleeman* v. *Collins*, (Ky. 1872) 9 Bush 460; *Obear* v. *First Nat. Bank* (1895), 97 Ga. 587. But has received strong dissent in other states. *Cockran* v. *Ward*, 5 Ind. App. 89, 51 Am. St. R. 229; *Wolf* v. *Burk*, (1892) 18 Colo. 264. The distinction in the principal case appears to be based on technical differences of language and not on the intent of the statute. 19 L. R. A. 792, note.

CONSTITUTIONAL LAW—14TH AMENDMENT—CLASS LEGISLATION—LICENSE LAW.—An act imposed a greater license tax on those domestic corporations having their principal place of business or chief works outside of the state: *Held*, constitutional and not discriminative within the inhibition of the 14th amendment. *Blue Jacket Copper Co.* v. *Scherr*, (W. Va. 1901), 40 S. E. Rep. 514.

There is no doubt about the power of the legislature to classify. *Barbier* v. *Conolly*, (1885 113 U. S. 27. This classification may "proceed upon any difference which has a reasonable relation to the object sought to be accomplished." *Atchison etc., R. R., Co.* v. *Matthews* (1889), 174 U. S. 96. And the state may for that purpose adapt the laws to the conditions as found. *Clark* v. *Kansas City* (1900) 176 U. S. 520. A difference in the conditions of persons following

the same pursuit justifies a discrimination in license taxes. *Slaughter* v. *Com.* (Va. 1856), 53 Gratt. 776. The fact that corporations having property within the state are subject to ordinary taxes on property, while those having their property outside of the state cannot be so taxed, seems to be such a difference in condition as would allow the particular classification for taxation.

EVIDENCE—PHYSICAL EXAMINATION OF PLAINTIFF IN PERSONAL INJURY SUIT.—Plaintiff sued for personal injuries. Defendant demanded an order for a physical personal examination of the plaintiff. The order was granted, and physicians were appointed by the court for the purpose of making the examination. Before the examination had been made, the defense withdrew its request. The court, however, against the objection of both parties, proceeded on its own motion to cause the examination to be made and the physicians to testify. *Held*, the trial court exceeded its power. *South Covington St. Ry. Co.* v. *Stroh*, (Ky.), 66 S. W. Rep. 178.

In Kentucky the right of the defendant to compel the plaintiff in a personal injury suit to submit to an examination of his injuries, has been sustained; *Belt Electric Line Co.* v. *Allen*, 102 Ky. 551, 44 S. W. Rep. 89. And this is the rule in the Southern and Western states generally, wherever the question has arisen. To the contrary: N. Y. (before a statute providing differently), U. S., Ill., Ind., and possibly Del. and Tex. The right of the court itself, however, to compel such examination against the wishes of both parties seems not to have arisen before in Kentucky or in any other state.

INSURANCE—CONSTRUCTION OF TERMS OF INDEMNITY POLICY.—A policy of insurance provided "against loss from liability to every person who may . . . accidentally sustain bodily injuries while traveling on the road of the insured, under circumstances which shall impose upon the insured a common law or statutory liability." The question before the court was, whether the terms of this policy were "broad enough to cover the case where the person who is a traveler on plaintiff's road dies instantly and without conscious suffering in consequence of an accident for which the plaintiff is responsible." *Held*, that the terms of the policy were not broad enough to cover such a case, because, by the terms of the policy, "the liability is to a person who sustains bodily injuries, and such person must have a right of action therefor." *Worcester St. Ry. Co.* v. *Travelers' Ins. Co.*, (Mass. 1902) 62 N. E. Rep. 364.

There are two classes of statutes imposing liability for death caused by wrongful act. One of these classes continues the action which the person injured, had he lived, could have maintained, and does not create a new right of action. *McCubbin* v. *Hastings*, 8, 27 La. An. 713; *Read* v. *Great Eastern Ry. Co.*, L. R. 3 Q. B. 555. Under a statute of this kind it has been repeatedly held that if death was instantaneous, the deceased had no right of action and consequently none could survive. *Kearney* v. *Boston & Worcester Ry. Co.*, 9 Cush. 108; *Morgan* v. *Hollings*, 125 Mass. 93; *Mulchahey* v. *Washburn Car Wheel Co.*, 145 Mass. 281. The other class of statutes creates an entirely new right of action. *Hagan* v. *Kean*, 3 Dillon, 124; *James* v. *Christy*, 18 Mo. 162. Under a statute of the latter class recovery may be had, although there was instantaneous death without conscious suffering. *Mulhall* v. *Fallon*, 176 Mass. 266. The liability imposed in this case was not in continuation of any right of action the deceased had. The deceased had no right of action. By the terms of the policy indemnity was given against loss from liability to the person injured, There was no liability to the person injured in this case, death being instantaneous. Therefore, this case is correctly decided.

INSURANCE—AGREEMENT TO ISSUE NEW POLICY—EFFECT OF FAILURE TO SURENDER OLD POLICY AND MAKE DEMAND WITHIN TIME STIPULATED.—A policy of insurance provided that in case the policy should lapse by reason of non-payment of premium, the holder thereof should be entitled, upon surrendering the original policy and making demand within six months after such lapse, to a paid-up nonparticipating policy. There was a failure to surrender the old policy and make demand for a new one within the time stipulated. Held, that insured did not forfeit his right to a paid-up policy by a failure to surrender the original policy and make demand within the six months, because time was not of the essence of the contract. *Washington Life Ins. Co.* v. *Myles* (Ky. 1902) 66 S. W. Rep. 740.

Under a like state of facts the court of appeals of Indiana holds that the surrender of the old policy and the making of demand within the six months is a condition precedent to the right to a paid-up policy. and a failure to comply with this condition amounts to a forfeiture of the right to a new policy. *Wells* v. *Vermont Life Ins. Co.* (Ind. 1902), 62 N. E. 501.

The rule enunciated by the Kentucky case has been the settled rule in Kentucky. *Montgomery* v. *Phoenix Life Ins. Co.*, 14 Bush, (Ky.) 51; *Mutual Life Ins. Co.* v. *Jarbor*, 102 Ky, 80. This is the rule in Maine. *Chase* v. *Phoenix Life Ins. Co.*, 67 Me. 85. The Indiana case, however, is in accordance with the weight of authority. and is the better doctrine. *Sheerer* v. *Manhattan Ins. Co.*, 20 Fed. 886; *Attorney-General* v. *Continental Ins. Co.*, 93 N. Y. 70; *Hudson* v. *Knickerbocker Life Ins. Co.*, 28 N. J, Eq. 167; *Universal Life Ins. Co.* v. *Whitehead*, 58 Miss. 226.

LANDLORD AND TENANT—COVENANT FOR RE-ENTRY—RE-ENTRY BY EJECTMENT ONLY—SUMMARY PROCEEDINGS.—Defendant leased premises to plaintiff's assignor with covenants, reserving to lessor the right to re-enter in case of default in payment of rent or breach of covenants in the lease. *Held*, to mean re-entry in the technical sense as known to the common law, by ejectment, and not by statutory summary proceedings. *Michaels* v. *Fishall*, (N. Y.) 62 N. E. Rep. 425.

The reservation in a lease of a right of re-entry by the lessor on default by the lessee in performance of any of the covenants made by him, is not a provision for summary proceedings, but for an action of ejectment. *Bixby* v. *Casino Co.*, 14 Misc. Rep. (N. Y.) 346. See also *Baldwin* v. *Thibadeau*, 28 Abb. N. C. 14, 17 N, Y. Supp. 532; *Kramer* v. *Amberg*, 53 Hun 427, 6 N. Y. Supp. 303. At first blush this construction seems highly technical, but when we consider that the term "re-enter" has always had a narrow and definite meaning in the law, that it is not found in the statutory provision for summary proceedings and that provisions for forfeiture are always strictly construed, the holding seems warranted in principle.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN—RUNS WITH THE LAND—RE-ASSIGNMENT TO ORIGINAL LESSEE.—A leased premises to B with covenant by B for himself and assigns not to assign during the term without A's written consent. Afterwards B assigned to C with A's consent. Subsequently C attempted to re-assign to B without A's consent. *Held*, that it was a covenant running with the land, and would prevent a re-assignment to the original lessee without the lessor's consent. *McEacharn* v. *Colton* (1902), Appeal Cases, 104.

There are very few reported cases on this proposition. The case of *McCormick* v. *Stowell* 138 Mass. 431, which is directly in point, and holds to the contrary, was the only American case cited, and it was rejected as authority by the Lords. The reasoning of the Massachusetts court is that the lessor having consented to take the lessee for the full term mentioned in the lease, that consent is available for any re-assignment to him during the term. But this theory does not seem to be well founded. The covenant runs with the land, is in plain terms, and under the well established doctrine of such covenants binds the person who for the time being stands in the shoes of the lessee, as fully as if it were his covenant originally. While the reasoning of the Massachusetts case is not without some force, the Lords seem to have the correct view.

MINING LAW—OIL LEASE—POWER OF COURT TO AUTHORIZE.—In a case where objection was made that the court, according to statute, had no power to authorize a guardian to lease, but only to sell, an infant's real estate, *Held*, that a lease of a tract of land for oil and gas purposes is a conditional sale of an interest in land—the oil and gas in place—contingent on the discovery and reduction to possession of the oil and gas, and therefore valid. *Lawson* v. *Kirchner*, (W. Va.,) 40 S. E. Rep. 344.

There are some holdings, especially in earlier cases, that a lease of lands for oil purposes gives merely a license—an incorporeal right, and not an estate in land. *Shepherd* v. *McCalmont Co.*, 38 Hun, 37; *Dark* v. *Johnston*, 55 Penn. St. 164; *Herrington* v. *Wood*, 6 Oh. C. C. 326; and that ejectment will not lie for the disturbance of the right. *Union Co.* v. *Bliven Co.* 72 Pa. St. 173. Ejectment, however, has been allowed, though lease held to be an incorporeal interest. *Karns* v. *Tanner*, 66 Pa. St. 297. In *Wagner* v. *Mallory*, 62 N. E. 584 [N. Y.], the right to oil was held to be personalty, not passing under deed of "all the lands" of grantors; there was statutory provision to this effect.

In other and later cases this view is modified. Such a lease is said to be "not a mere license." *Kitchen* v. *Smith*, 101 Pa. St. 452; *Duke* v. *Hague*, 107 Pa. St. 57; but an interest in land which is a chattel real. *Brown* v. *Beecher*, 120 Pa. St. 590. It is a grant of the corpus of an estate, and not of a mere incorporeal right—in effect a sale of a portion of the land. *Stoughton's App.* 88 Pa. St. 198; *Blakeley* v. *Marshall*, 174 Pa. St. 425. In the principal case, though the lease is held a sale of real estate, it is only of what the lessee may find and convert into personalty; but during life of the lease the lessee has such an interest in the oil and

gas in place that he can prevent even the owner of the land from committing waste by extraction of oil or gas. See also *Trees* v. *Eclipse Co.*, 47 W. Va. 107, 34 S. E. 933; *Williamson* v. *Jones*, 39 W. Va. 231, 25 L. R. A. 222.

MORTGAGES—"CLOG" ON REDEMPTION—COLLATERAL ADVANTAGES.—A covenant was inserted in a mortgage, not to use or sell in a certain house any malt liquors except such as should be purchased of the mortgagees whether any money should or should not be owing on the security of the mortgage. *Held*, upon payment of all due on the security, to be void as being a "clog" on the redemption and a reservation of a collateral advantage outside of the mortgage contract. *Noakes & Co.* v. *Rice* [1902], A. C. 24.

In England, since the repeal of the usury laws in 1854, there has been a variance in the application of the principles announced. 25 Ir. Law Times, 332; *Santley* v. *Wilde* [1899], 2 Ch. 474. In this country, the rules have been unreservedly approved. JONES, MORTGAGES, § 1044. Yet it has recently been held that besides principal and interest, a mortgagor must also pay a bonus agreed upon where usury is not specially pleaded. *Yankton B. & L. Asso'n* v. *Dowling* (1898), 10 S. D. 540. While the principal case expresses the equitable and logical views, it seems difficult for the courts in applying them to determine where the ordinary contract to secure ends and the "clog" or collateral advantage begins.

MUNICIPAL CORPORATIONS—TRAVELERS—STATUTE LIABILITY—PROXIMATE CAUSE.—Plaintiff, who entered a sewer for the purpose of rescuing her child, who had fallen through an open man-hole in the traveled portion of the street, contracted rheumatic fever as a consequence of the exposure and sued the city for damages caused by its negligence in leaving the cover off the man-hole. *Held:* That the city was not liable. *Kelley* v. *City of Boston*, (Mass.) 62 N. E. Rep. 259 [1902].

The city's liability arises only under the statute requiring it to keep streets reasonably safe for travelers. The plaintiff abandoned her position as a traveler when she voluntarily entered the basin and left the traveled portion of highway. *Harwood* v. *Oakham*, 152 Mass. 421, 25 N. E. 625. Her voluntary act in entering the catch-basin, and not the negligence of the city in leaving the cover off, was the proximate cause of the injury. Either view sustains the decision and is in accordance with the weight of authority.

MUNICIPAL CORPORATIONS—INJUNCTION TO RESTRAIN THE CARRYING OUT OF CONTRACT—COMPETITIVE BIDDING.—The charter of the City of Baltimore provided that in letting contracts for work and purchasing material of the value of five hundred dollars, the same should be done by advertising for bids and letting to the lowest responsible bidder. The city advertised for bids to collect, remove and dispose of garbage and dead animals, each bidder to submit his own plan of disposal of the garbage and dead animals with his bid. Contract let to defendant, and plaintiff, a tax-payer, files a bill to enjoin the carrying out of the contract. *Held:* That the city should be enjoined from carrying out the contract, on the ground that there was no actual competition as required by the charter. *Packard* v. *Hayes*, (Md.) 51 Atl. Rep. 32,.

The holding of the principal case is the general rule, See *Mazet* v. *Pittsburg*, 137 Pa. 548, where it was held that in advertising for street paving bids, the city must give specifications as to kind of pavement, Also *Hardware Co.* v. *Erb*, 54 Ark. 645, where it was held that the Board could not advertise for both plan and bid, and accept a plan and its accompanying bid. The case is interesting as showing the construction by the court of the phrase "lowest bidder," it being held to require actual competition for the purpose of preventing favoritism and fraud, and that this can be done only by the city adopting plans and specifications and having all bidders compete on the same footing.

MUNICIPAL CORPORATIONS—NEGLIGENCE—LIABILITY FOR ACTS OF OFFICERS,—One Cope was employed by the Health Board of the city of Detroit to tear down an old pest house located on grounds owned by the city. He contracted small pox and died. His wife, as administratrix, sued the city for negligently causing the death of her husband, and alleged that Cope was not notified of danger and that the city did not properly disinfect. *Held:* That even if this were so, the city was not liable for negligent acts of the officers of the Board of Health. *Nicholson* v. *City of Detroit*, (Mich.) 88 N. W. Rep. 695 [1902].

The city is liable for negligent plumbing and draining of a school building, whereby adjacent property is flooded. *Briegel* v. *Philadelphia*, 135 Pa. 451. Ownership of the land seems to be the deciding point in this case, which cannot be said to be well supported by authorities. Municipal corporations are liable for the improper management and use of their property to the same extent and in the same manner as private corporations and natural persons. 2

DILL. MUN. COR., [3rd Ed.] § 985. This language is very broad, but the cases cited seem as a rule to recognize the principle that the use to which the property is put is important. The true test seems to be as stated in the principal case, whether the act is one in which the city has a private interest instead of a public duty.

Local health officers, acting under general statute, are representatives of the state. 2 DILL. MUN. COR, [4th Ed.] § 974. In the principal case the Board of Health is created by statute and though its members are chosen by the city it still represents and acts for the state and the city is not liable for its acts. This is the general rule and governs the principal case, and plaintiff's only remedy, if she has one, is against the officers personally.

PLEADING—SPLITTING CAUSE OF ACTION—INJURY TO PERSON AND PROPERTY.—A plaintiff who had recovered for injury to his person caused by the negligent act of defendant, sued for injury to his property caused by the same act. *Held*, that the former judgment was a bar, both injuries being items of damages of the same cause of action. *King* v. *Chicago, etc., Ry. Co*, [1900], 80 Minn. 83, 81 Am. St. Rep. 238.

This doctrine is not accepted in England or in some of the states. *Brunsden* v. *Humphrey* [1884], 14 Q. B. Div, 141; *Watson* v. *Texas, etc., Ry. Co.* [1894], 8 Tex. Civ. App. 144, But it appears as established in the United States in decisions prior to the English case, *supra*. *B. & O. R. R. Co.* v. *Ritchie* [1869], 31 Md. 191; *Cincinnati, etc. R. R. Co.* v. *Chester* [1877], 57 Ind. 297. And is sustained by the weight of authority. *Bliss* v. *N. Y. Central R. R. Co.*, [1894] 160 Mass. 447; *Reilly* v. *Sicilian Paving Co.* [N. Y. 1897] 14 App. Div. Rep. 242. While perhaps strictly not the more logical rule, *Darley, etc., Co.* v. *Mitchell* [1886], 11 App. Cas. 127; it is the more practical and expeditious, *Howe* v. *Peckham* [N. Y. 1851] 10 Barb, 656.

PUBLIC LANDS—WHEN VACANT—OCCUPANCY BY EXPLORER FOR MINERALS.—Public land, selected in lieu of relinquished forest reserve lands, under act of June 4, 1897, was at the time of application for approval of the selection in actual occupancy by others engaged in exploring for oil under a previous unperfected location, no oil having yet been discovered; but before the approval by the land department, the explorers found oil. *Held*, that while such land is occupied by persons making such exploration it is not "vacant and open to settlement," and so subject to selection under said act, though the location of the explorers does not appear by the records of the land office, and no oil is discovered; and a selection under said act, until approval, gives no legal or equitable title to the land selected, and leaves it subject to exploration for minerals. *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 112 Fed-4 (C. C. A.)

No valid location of a mining claim can be made until discovery of mineral. R. S. of U. S. § 2320; and the right of possession comes only from a valid location. *Belk* v. *Meager*, 104 U. S. 279. Mere occupancy of lands of any class and improvements thereon give no vested rights as against the U. S., or one connecting himself with the government by compliance with the law, *Sparks* v. *Pierce*, 115 U. S. 408; LINDLEY ON MINES, § 216, But possession is good as against a mere intruder, being *prima facie* evidence of title. *People* v. *Shear*, 73 Cal. 541; LINDLEY ON MINES. § 218. The principal case holds the applicant under the reserve act to be a mere intruder. as the land in question was excepted by occupancy from locations and rights on the public domain cannot be initiated by forcible entry even against mere possession: *Atherton* v. *Fowler*, 96 U. S. 513. 25 Pac. Rep. 793, seems to decide that the occupant in search for minerals may not only protect himself in his *pedis possessio*, but may hold the entire claim by location without discovery, excluding other prospectors. But MORRISON, MINING RIGHTS (1900), 289, says such holding is against the weight of authority. The principal case apparently holds that occupancy excludes not only other prospectors, but any settler or appropriator of public lands. Such holdings, as said in the dissenting opinion, may lead to undesirable results.

PUBLIC OFFICERS—JUDICIAL—LIABILITY OF JUDGE.—A judge of a court of common pleas took into his possession the record and files of a cause in order to prevent a party to such cause from securing a copy of a Master's report and of the evidence. *Held*, that this was a judicial act for which the officer was not liable civilly, irrespective of motive. *English* v. *Ralston* (Cir. Ct. E. D. Pa.) 112 Fed. Rep. 272.

Cases with similar facts seem very rare, and the report of this case is not as full as would have been desirable. The prothonotary of such court is the proper custodian of the records, and it is his power and duty to issue exemplifications of all records and process therein, B, P. Digest, Vol. II., p. 1379, §§ 71 & 72; p. 1272, § 41. Such copies may be absolutely essential to one's case, (*Detra* v. *Hoffman*, 5 Del. (Pa.) 321), and the allowance of inspection and copies may be enforced by mandamus: As to evidence, *Daly* v. *Dimock*, 55 Conn. 579; books of court

of conscience, *Wilson* v. *Rogers*, 2 Strange, 1242; any public records, *Boylan* v. *Warren*, 39 Kan. 301, 7 Am. St. 551; *Ferry* v. *Williams*, 41 N. J. L. 332; court rolls, *Rex* v. *Lucas*. 10 East 235; judicial records, *In re Caswell*, 27 L. R. A. (R. I.) 82; records of federal courts, *In re McLean*, Fed. Cases, No. 8877, 9 Cent. Law Journal 425; records and indexes in clerk's office, *Lum* v. *McCarty*, 39 N. J. L. 287; judgment docket, *In re Chambers*, 44 Fed. 786; opinions of court, *Nash* v. *Lathrop*, 142 Mass. 29; municipal court records, *State* v. *Meagher*, 57 Vt, 398. The inspection and exemplification of the records of the King's courts is the common right of the subject, and any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions. 1 GREENLEAF, EVIDENCE, 471. A judge is liable for refusal to issue a writ of *habeas corpus* whenever a *prima facie* case of confinement is made out (COOLEY TORTS, 378,) and when he acts without being clothed with jurisdiction. he is but an individual falsely assuming an authority he does not possess and liable as such, Id. p. *417.

PUBLIC OFFICERS—MINISTERIAL—CONSTABLE -LIABILITY OF SURETIES.—Under threat to levy an execution, the judgment debtor paid the amount to the constable with the understanding that the money should be retained pending an appeal and returned if the case were reversed. The case was reversed, the constable embezzled the money, and the judgment debtor sued on the officer's bond. *Held*, that the sureties were not liable. *Heller* v. *Gates* (Ore.) 67 Pac. Rep. 416.

The reason of the decision is that the act of the constable was not an official one. There seemed to be no peculiar terms in the bond, and the case differs from those where the officer has no writ at all or only a void writ, and from cases of oppression or fraud of the officer, of payment in lieu of a bail or replevin bond, and of payment after the return day. It would seem that the execution defendant could not plead or prove the void agreement in order to show his right. Acts colore officii are those of such nature that neither his office nor his writ gives the officer authority to do them. For all others the officer and his sureties are liable, *State* v. *Conover*, 4 Dutch. (N. J.) 224, 78 Am. Dec. 54; *State* v. *Fowler*, 88 Md, 601, 71 Am. St. 452. The writ commanded the constable to make the sum due, so that its receipt was justified by the writ. His agreement to hold the money was void, *Hodson* v. *Wilkins*, 7 Me. 113, 20 Am. Dec. 347, and might have been disregarded without any liability to the defendant. *Goodale* v. *Holdridge*, 2 Johns. (N. Y.) 193. It became his duty to pay it to plaintiff at once, and he and his sureties were liable, for failure to do so, to the plaintiff (*Borden* v. *State*, 9 Ark, 252; *Sloan* v. *Case*, 10 Wend. 370), and to defendant for any balance (*State* v. *Clymer*, 3 Houst.(Del.) 20; *Seaver* v. *Pierce*, 42 Vt. 325), or for any over-payment exacted by threat to levy an execution (*Snell* v. *State*, 43 Ind. 359), and if he still held the money after the judgment was reversed they would be liable for the full amount collected, after demand and refusal to pay it to the execution defendant, *State* v. *Vananda*, 7 Blackf. (Ind.) 214; *State* v. *Olden*, 12 O. 59; *People* v. *Lucas*, 93 N. Y. 585. So, too, a constable and his sureties are liable for negligent loss of or damage to, defendant's property seized on a valid writ. *Witkoski* v. *Hern*, 82 Cal. 604; *Snydacker* v. *Brosse*, 51 Ill. 357, 99 Am. Dec. 551; *Burns* v. *Lane*, 138 Mass. 350; and the sureties are not discharged by a consent without a consideration on the part of plaintiff to a temporary delay by the constable in paying over the money received. *Boice* v. *Main*, 4 Denio (N. Y.) 55; *Dickens* v. *State*, 7 Blackf. (Ind.) 358; *State* v. *Olden*, 12 O. 59.

PUBLIC OFFICERS—STATE OR MUNICIPAL—APPOINTMENT—CONFIRMATION.—The Governor appointed for a term of twelve years unless sooner removed by the General Assembly, and at a salary $1500, a Judge for the Statutory City Court of Wilmington, having civil and criminal jurisdiction and being a court of record. A Constitutional Amendment required the consent of the Senate to such appointment of "officers" as the Governor was by law authorized to make. *Held*, that such judge was a municipal rather than a State officer, and that consent of the Senate was not necessrry to his holding beyond the rising of the Senate. *State* ex rel. v. *Churchman* Del, 51 Atl. Rep. 49.

Neither the power of the Governor nor the right of local self-government is in question, and the case turns npon the meaning of "officers." In construing a constitutional provision of this kind, it should be expounded in the light of conditions existing at the time of its adoption, in connection with forffier provisions and historical facts, so as to give effect to the intent of the people. *Fox* v. *McDonald* 101 Ala. 51. 21 L. R. A, 529. The administration of justice although confided to local agencies is essentially a matter of public concern (DILLON. MUN CORP. § 58, and a judge of a municipal court is not a city officer but a judicial officer embraced within the judicial system of the State. THROOP, PUB. OFF., § 29; *Whitmore* v.

Mayor, 67 N. Y. 21; *Commonwealth* v. *Hawkes*, 128 Mass. 528. A state officer is one who receives his authority under the laws of the state and performs some of the governmental functions of the state. *State ex rel.* v. *Valle*, 41 Mo. 29. *State ex rel.* v. *Bus*, 135 Mo. 325. A justice of the peace in a city constitutes a part of the judicial department of the state government and is a public officer. *People* v. *Ransom*, 88 Cal. 568. The nature of the duties of the officer determines his character as state or municipal. *People* v. *Hurlbut*, 24 Mich. 44; DILLON. MUN. CORP., § 58. We think with Spruance, J., who dissents, that the respondent was intended to be included by the terms of the amendment.

REAL PROPERTY—VENDOR'S LIEN NOTE—EFFECT OF TRANSFER.—A vendee's note was given in payment for land, *Held*, that a transfer of the note carried with it the vendor's lien. *Brandenburg* v. *Norwood* (Tex.), 66 S. W. 587. This follows the English precedent. *Rayne* v. *Baker*, 1 Giff. 241; though contrary to the decided weight of American authority. *Shall* v. *Briscoe*, 18 Ark. 142.

REAL PROPERTY—HOMESTEAD—WIDOW'S RIGHT TO.—A wife voluntarily lives apart from her husband in a different state, *Held*, she is not entitled to the homestead of her deceased husband. *Ullman* v. *Abbott* (Wyo.), 67 Pac. 467.

The authorities, however, are not harmonious. *Brown* v. *Brown*, 68 Mo. 388. But if driven away by the wrong of her husband, her homestead right continues. *Barker* v. *Dayton*, 28 Wis. 367. These same principles have been applied to dower cases. *Stanton* v. *Hitchcock*. 64 Mich. 316; *Sherrid* v. *Southwick*, 43 Mich. 515.

REAL PROPERTY—RIGHT TO IMPROVEMENTS—COLOR OF TITLE.—A deed was given in payment for liquors to be sold in violation of law, *Held*, not to constitute color of title which will entitle the grantee to the value of the improvements placed on the property by him during possession. *Lindt* v. *Uihlein* (Iowa), 89 N. W. Rep. 214.

The illegality of the transaction was the basis of the decision, for a void deed may constitute color of title. *Railway Co.* v. *Alfree*. 64 Ia. 504.

RES JUDICATA—SPECIFIC PERFORMANCE AFTER NOMINAL DAMAGES.—A and B entered into a contract with each other for a lease of telegraph lines. B broke the contract. A prosecuted to judgment for nominal damages at law, and now comes into equity for specific performance. Granted. The court states that a judgment for substantial damages might have acted as a bar. *Slaughter et al.* v. *Compagnie Francaise des Cables Telegraphiques* (Cir. Ct., S. D. N. Y.), 113 Fed. Rep. 1.

It would seem that no case involving the precise question has heretofore arisen. Nearly the converse has been decided. *Putnam* v. *Clark*, 34 N. J. E. 535, where an injunction issued to restrain a party from proceeding at law for the same matter after he had secured a decree in equity. And a question very similar to the one under discussion has been decided, but contrariwise (*Allis* v. *Davidson*), where a judgment at law was successfully set up as a bar to a suit for cancellation of a note and mortgage. And reformation has been refused after judgment at law. *Washburn* v. *Great Western Insurance Co.* 114 Mass. 175; *Metcalf* v. *Gilmore*, 63 N. H. 174; *Steinbach* v. *Insurance Co.* 77 N. Y. 498.

STATUTE OF LIMITATIONS—AMENDMENT OF DECLARATION—NEW CAUSE OF ACTION.—An action was begun on a contract to recover damages for breach thereof in failing to leave to plaintiff by will a child's portion, promised in consideration of plaintiff's rendering personal services. This action was defeated because the contract was oral and came within the Statute of Frauds. An amendment was made so as to declare on a quantum meruit, and the plea of limitations was interposed. *Held*, that the amendment added a new cause of action and that, as the period of limitations had elapsed before the amendment was made, the action could not be maintained and the plea of limitations was properly interposed. *Hamilton* v. *Thirston* (Md. 1902), 51 Atl. Rep. 42. A similar conclusion was reached in the case of *Lambert* v. *McKenzie* (Cal. 1901), 67 Pac. Rep. 6, where the complaint was so amended as to declare upon the negligence of the defendant.

This is the rule well established by the decisions generally. Where the amendment adds a new or different cause of action, the amendment is tantamount to the commencement of a new action and does not relate back to the time of filing the original declaration or complaint. Under such circumstances the statute of limitations may be pleaded. *State* v. *Green*, 4 Gill & J. (Md.) 381; *Harriott* v. *Wells*, 9 Bosw. (N. Y.) 631.

SALES—ENTIRE CONTRACT—RESCISSION.—Sale of 300 tons of iron, "cash payable on receipt of each 100 tons." Refusal by vendee to pay for first 100 tons until enough more should be

delivered to satisfy vendee that contract would be performed. *Held:* vendee's default, accompanied with announcement of intention not to perform upon agreed terms, gave vendor right to rescind. *Johnson Forge Co.* v. *Leonard*, (Del.) 51 Atl. Rep., 305.

The test prescribed by this case for determining whether the right of rescission exists appears to be somewhat unusual. It is stated that if a default by one party is accompanied with an announcement of intention not to perform upon the agreed terms, or is accompanied with a deliberate demand "insisting upon new terms different from the original agreement," the other party may rescind. A majority of the cases seem to warrant rescission upon a default in payment, even where no such intention is expressed or to be gathered from the conduct of the party in default, and upon other and quite different grounds. *Kokomo Strawboard Co.* v. *Inman*, 134 N. Y. 92, 31 N. E. Rep. 248; *Hess Co.* v. *Dawson*, 149 Ill. 188, 36 N. E. Rep. 557. *McGrath* v. *Gegner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415. A few courts, however, in accord with the English rule as stated in *Iron Co.* v. *Naylor*, 9 App. Cases, 434, hold that such a default does not justify rescission unless the acts or conduct of the defaulting party evince an intention no longer to be bound by the contract; (see *Withers* v. *Reynolds* 2 B. & Ad. 882) and the principal case is rather in harmony with those decisions. *Blackburn* v. *OReilly*, 47 N. J. L. 290, 34 Am. Rep. 159; *Myer* v. *Wheeler*, 65 Iowa 390, 21 N. W. 692; *West* v. *Bechtel*, 105 Mich. 204, 84 N. W. 69; *Cycle Co.* v. *Wheel Co*, 105 Fed. 325; *Cherry Valley Iron Works* v. *Iron River Co.*, 12 C. C. A. 306, 64 Fed. 659. (See MECHEM ON SALES, §§ 1140-1148.) The rule seems just and reasonable, and well calculated to protect the interests of both parties to the contract.

TRUSTS—USE OF TRUST FUNDS BY PARENT—REPAYMENT TO FUND—FRAUD ON CREDITORS.—A debtor, acting as trustee under his father's will for his own minor children, supported them out of the trust funds. *Held*, that whether the will be construed as clothing trustee with discretionary power as to the support of the children, or as creating an express trust for that purpose, the debtor is not permitted to restore to the trust estate the sums so expended on the plea that he is able and it is his personal duty to support his children, when by so doing he will evade the payment of his honest debts. *Nat'l Valley Bank* v. *Hancock* (Va.) 40 S. E. Rep. 611.

A father, if of ability, is bound to maintain his infant children, even though they may have property of their own. *Evans* v. *Pearce*, 15 Grat. (Va.) 513; 7 Richardson's Eq. (S. C.) 105; and this, ordinarily, though there is a provision in the trust instrument for their maintenance, *Mundy* v. *Howe*, 4 Br. Ch. 224; PERRY ON TRUSTS, § 612; unless the property is conveyed upon an express trust, one of the conditions of which is such maintenance, when it must be so applied irrespective of the father's ability to support. *Ransome* v. *Burgess*, L. R. 3 Eq. 773. When, however, trustees have discretion as to the application of the trust fund to the support of infant children, the father cannot compel its exercise in his favor, nor will the court interfere if they have exercised their discretion. *Brophy* v. *Bellamy*, 8 Ch. App. 798. It seems that the tendency now is to look to the circumstances of each case, and authorize the income from estates of infants to be applied to their support whenever it appears to be proper. *Andrews* v. *Partington*, 3 Br. Ch. 60, note; *Evans* v. *Pearce*, *supra*. The principal case held that the fund had been rightfully appropriated, and so could not be restored to evade payment of his honest debts by the debtor.

WILLS—REVOCATION BY MUTILATION BY VERMIN.—The statute of North Carolina provides that "no will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent." The testator executed a will and placed it in a wooden safe where it was mutilated by vermin. The evidence showed that he knew of this mutilation, and declared to various persons that he had revoked the will. *Held*, there is a revocation of a will where it is defaced and mutilated by vermin, and the testator adopts this with intent to revoke the will. *Cutler* v. *Cutler* (N. Car.), 40 S E. Rep. 689.

Similar provisions in the statutes of other states have always been strictly construed and no revocation has been held to have taken place unless the strict requirements as to burning, tearing, cancelling or obliterating have been met. The intent alone does not effect a revocation, unless there has been some act of destruction as prescribed by the statute. AM. & ENG. ENC. OF LAW, WILLS; JARMAN ON WILLS, p. 147. n. This case goes further in a liberal interpretation of the statute than any which has been decided. The evidence showed conclusively that the mutilation was due to vermin. In no sense, conse-

quently, could this result be said to have been brought about in the presence of the testator, or by his direction. The cases of *Steele* v. *Price*, 44 Ky. 58, and *Bethell* v. *Moore*, 19 N. C. 311, cited in the opinion, are authority only for the proposition that destruction in itself is without effect unless done with the intent to revoke. On the contrary, the court in *Steele* v. *Price* declare that to come within the statute the results to which effect is sought to be given must have been brought about by the testator, or have been caused by him to be accomplished in his presence.