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Recent Important Decisions

RECENT IMPORTANT DECISIONS.

ATTACHMENT—PROPERTY IN CUSTODIA LEGIS.—The proceeds of certain property sold in claim and delivery proceedings, were paid to the attorney for the plaintiff, and while still in his possession were sought to be attached as the property of such plaintiff. The latter claimed them to be exempt, as being *in custodia legis*, but *held*, the attachment would lie. *First National Bank* v. *Johnston* (N. C. 1913), 77 S. E. 404.

The general rule is that property *in custodia legis* can not be attached, *Hagan* v. *Lucas*, 10 Pet. 400; *Brewer* v. *Hutton*, 45 W. Va. 106, 72 Am. St. Rep. 804. Money therefore collected under execution while in the hands of the officers collecting it is not subject to levy, *Turner* v. *Fendall*, 1 Cranch 117; *Reddick* v. *Smith*, 4 Ill. (3 Scammon), 451. Likewise money paid into the hands of a clerk on a judgment may not be levied upon, *Ross* v. *Clarke*, 1 Dall. 354; nor is the personal property of an insane person attachable in the hands of the guardian, *Hale* v. *Duncan*, Brayton (Vt.) 132. The reason for the rule lies in the fact that in order to make the levy the attaching officer must lawfully take possession of the goods, and this he can not do if another officer of the court has a special property in them, for the law will not permit one court to assume control over the representative of another court, or over the property confided to his charge, for his possession is the possession of the court, and to interfere with his possession is to invade the jurisdiction of the court itself, *Bailey* v. *Childs*, 46 Oh. St. 557; *Burlingame* v. *Bell*, 16 Mass. 318; *Beers* v. *Place*, 36 Conn. 578; ROOD, GARNISHMENT, § 27. In the principal case the attorney held the property as agent for the plaintiff rather than the court, and therefore it became subject to the attachment as the property of the principal. There is in this connection a distinction to be observed, and indeed some conflict of authority. When the purposes of the court have been fully accomplished in respect to the particular property, and after the person who is entitled to it is ascertained, together with the amount to which he is entitled, and the order has been made for payment, some courts allow the attachment to be had, proceeding on the ground that the custodian then ceases to remain the agent of the court, and becomes instead the agent of the party, *Dunsmoor* v. *Furstenfeldt*, 88 Cal. 522, 12 L. R. A. 508, 22 Am. St. Rep. 331; *Weaver* v. *Davis*, 47 Ill. 235; *Gaither* v. *Ballew*, 49 N. C. 488, 69 Am. Dec. 763; *Boylau* v. *Hines*, 62 W. Va. 486, 125 Am. St. Rep. 983, 13 L. R. A. (N. S.) 757, and note. See also, *In re Shelly*, 24 Del. 10. The preponderance of authority, however, would seem to point in another direction, for it is elementary that it does not rest in the authority of other tribunals to determine the status of a fund or property in the custody of a court, and therefore it is difficult in such case to see upon what principle the attachment would ever be allowed, *Hudson* v. *Saginaw Circuit Judge*, 114 Mich. 116, 68 Am. St. Rep. 465, 47 L. R. A. 345, and note; *In re Forsyth*, 78 Fed. 296; *Curtis* v. *Ford*, 78 Tex. 262, 10 L. R. A. 529; *Sturtevant* v. *Bohn*, 57 Neb. 671; *Field* v. *Jones*, 11 Ga. 413.

BANKRUPTCY—PROMISE AFTER ADJUDICATION TO PAY DISCHARGEABLE DEBT.—Appellant, having been adjudged a bankrupt, offered a composition to his creditors, of whom appellee was one, and borrowed $500 from appellee with which to carry into effect the terms of the composition, promising, in consideration of the loan, that after receiving his discharge he would pay appellee the residue of his claim after the distribution under the composition agreement, in addition to repaying the loan. On appellant's failure to do so, appellee brought an action on the promise, and appellant pleaded that the promise was barred by the subsequent compromise and discharge. *Held,* that the promise created a valid and binding obligation, and, being made after the filing of the petition, it was not a provable claim and not, therefore, discharged. *Zavello* v. *Reeves,* 33 Sup. Ct. 365.

It is elementary that a debt discharged by an adjudication in bankruptcy may be revived by a subsequent promise on the part of the debtor to pay; the discharge does not affect the indebtedness, but merely bars the remedy, and the original consideration supports the new promise. The issue presented in the principal case was whether this promise made after adjudication but before discharge, was renewal of a debt already barred by the proceedings in bankruptcy. A discharge releases the bankrupt from all "provable debts," with certain well known exceptions. The term "provable debts," as applied to those arising upon ordinary contracts, refers only to such as are in existence at the time of the filing of the petition. *In re Burka,* 104 Fed. 326; *In re Swift,* 112 Fed. 315; *In re Roth & Appel* (C. C. A.) 181 Fed. 667, 104 C. C. A. 649. As the date of filing the petition determines the claims that are to be affected by the discharge, it also marks the time to which the discharge reverts as a bar in case of a composition; and any promise such as the law will ordinarily recognize as reviving a pre-existing debt, will, at any time subsequent thereto, renew the obligation. A debt thus renewed is not a "provable claim" that is barred by that particular discharge. In numerous decisions by state courts the rule is declared that a promise made any time after the petition is filed will revive the debt. *Otis* v. *Gazlin,* 31 Me. 567; *Kirkpatrick* v. *Tattersall,* 1 Car. & K. 577, 14 L. J. Exch. N. S. 209, 9 Jur. 214; *Hill* v. *Trainer,* 49 Wis. 537; *Jersey City Ins Co.* v. *Archer,* 122 N. Y. 376.

BILLS AND NOTES—PROVISION FOR EXTENSION OF TIME OF PAYMENT.—A promissory note contained a provision that "the indorsers, guarantors, and assigns severally * * * consent that time of payment may be extended without notice." *Held,* that such provision does not render the note non-negotiable. *De Groat* v. *Focht* (Okl. 1913), 131 Pac. 172.

This case is another example of the failure of courts to look beyond the decisions in their own jurisdictions, and thus defeat legislators in their attempt to secure uniformity in the law. The Negotiable Instruments Law was enacted with the laudable design of securing uniformity in the law of commercial paper so that it might pass from hand to hand as ordinary currency, but that purpose has been thwarted by the courts time and time again on account of their reluctance to seek information beyond their own decisions.

The conclusion of the Oklahoma court in the above case is opposed not only to the better reasoning but to the great weight of authority. *Rossville State Bank* v. *Heslet,* 84 Kan. 315; *Woodbury* v. *Roberts,* 59 Ia. 348; *Smith* v. *Van Blarcom,* 45 Mich. 371; *Coffin* v. *Spencer,* 39 Fed. 262; *Merchants & Mechanics' Sav. Bank* v. *Frazer,* 9 Ind. App. 161; *Mitchell* v. *St. Mary,* 148 Ind. 111. Any provision permitting an extension of time without notice clearly offends against the requirement of the Negotiable Instruments Law that an instrument, in order to be negotiable, "must be payable on demand or at a fixed or determinable future time." *Second Nat. Bank* v. *Wheeler,* 75 Mich. 546; *Glidden* v. *Henry,* 104 Ind. 278. In *Coffin* v. *Spencer, supra,* the court, speaking of such a clause in a promissory note, said: "Every successive taker of the paper is, of course, bound to take notice of this stipulation, and, instead of looking only to the face of the instrument for the time of its maturity, as in case of commercial paper he must, is put upon inquiry whether or not any agreement for a renewal or extension has been made by his proposed assignor or by any previous holder." And in *Hartley* v. *Wilkinson,* 4 Maule & S. 25, Lord ELLENBOROUGH says: "How can it be said that this note is a negotiable instrument for the payment of money absolutely, when it is apparent that the party taking it must inquire into an extrinsic fact in order to ascertain if it be payable."

BILLS AND NOTES—TRANSFER AS COLLATERAL FOR PRE-EXISTING DEBT.—Plaintiff bank sued on two promissory notes transferred to it as collateral security for a pre-existing note of which it was the payee. *Held,* the transfer was in due course of trade and for a valuable consideration. *Lane et al.* v. *First Nat. Bank of Canyon City* (Texas 1913) 155 S. W. 307.

The courts are not in accord on their construction of the provision in the Negotiable Instruments Law that "an antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." The point of conflict among the authorities is as to whether or not the statute includes instruments given merely as collateral security for a pre-existing debt. A minority of the courts hold that one who takes a note as additional security for a pre-existing debt, without releasing any security already held or agreeing to extend the time of payment is not a *bona fide* holder for value. *Boxheimer* v. *Gunn,* 24 Mich. 372; *Thompson* v. *Maddux,* 117 Ala. 468; *Goodman* v. *Simonds,* 19 Mo. 106; *Penn Bank* v. *Frankish,* 91 Pa. St. 339; *First Nat. Bank* v. *Strauss,* 66 Miss. 479; *Jenkins* v. *Schaub,* 14 Wis. 1. The United States courts and a majority of the state courts hold that such transferee is a *bona fide* holder and is unaffected by equities or defenses between prior parties of which he had no notice. *Swift* v. *Tyson,* 16 Pet. 1; *Maitland* v. *Citizens' Nat. Bank,* 40 Md. 540; *Nat. Revere Bank* v. *Morse,* 163 Mass. 383; *Spencer* v. *Sloan,* 108 Ind. 183; *Barker* v. *Licthenberger,* 41 Neb. 751. The law in New York on the point in question had undergone various changes as appears from three leading cases adjudicated in that state, namely, *Coddington* v. *Bay,* 20 Johns. 636; *Brewster* v. *Shrader,* 57 N. Y. Supp. 606; *Sutherland* v. *Mead,* 80 N. Y. Supp. 504; and it is now established in that state that an antecedent or pre-existing debt does

not constitute value unless the holder parted with something, if not with the debt, at least with the right to sue upon it for some determinate period. *Bank of America* v. *Waydell,* 92 N. Y. Supp. 666.

CARRIERS—TICKET NOT CONCLUSIVE EVIDENCE OF CONTRACT OF CARRIAGE.—The station agent of defendant company sold plaintiff a ticket which had printed upon its face the words, "Station stamped on back," but the agent failed to stamp it. The plaintiff boarded defendant's train, and later when the conductor came, offered him the unstamped ticket. The conductor, in accordance with an order of the superintendent, refused to accept it, and upon failure of the plaintiff to pay cash fare he was ejected. Plaintiff brings this action for the wrongful expulsion. *Held,* plaintiff should recover damages resulting from such expulsion. *Norman* v. *Carolina Ry. Co.,* (N. C. 1913) 77 S. E. 345.

The rule obtains in a number of jurisdictions that the face of a ticket presented by a passenger is, as to the conductor, conclusive of the terms of the contract of carriage between the passenger and the railroad company, and hence, if the ticket does not entitle the passenger to be on the train, he must establish his right to be there by payment of fare, or submit to ejection. *Shelton* v. *Erie Ry. Co.,* 73 N. J. L. 558, 9 Ann. Cas. 899; *McGhee* v. *Reynolds,* 117 Ala. 413, 23 So. 68; *Morse* v. *Southern Ry. Co.,* 102 Ga. 302, 29 S. E. 865; *Pittsburg C. C. & St. L. R. Co.* v. *Daniels,* 90 Ill. App. 154; *Brown* v. *Rapid R. Co.,* 124 Mich. 591, 96 N. W. 925; *Townsend* v. *N. Y. Central Rd. Co.,* 56 N. Y. 295; *Cory* v *Cincinnati, etc. R. Co.,* 3 Ohio Dec. (Reprint) 82; *N. Y., etc. Ry. Co.* v. *Bennett,* 50 Fed. 496; *McKay* v. *Ry. Co.,* 34 W. Va. 65; *Peabody* v. *Navigation Co.,* 21 Ore. 121. The reason for this rule, it has been stated, is found in the impossibility of operating railways on any other principle, taking into consideration the convenience and safety of other passengers, and the proper security of the company in collecting fares. But irrespective of the rule stated above, it is held that a passenger who has been ejected because the ticket presented by him is invalid, where such invalidity is due to the negligence of an agent of the carrier, may recover for injuries sustained by him by reason of such ejection. In some jurisdictions these damages are recoverable only in an action for breach of the contract to carry: *Lexington & E. R. Co.* v. *Lyons,* 104 Ky. 23, 46 S. W. 209; *Western Md. R. Co.* v. *Stocksdale,* 83 Md. 245, 34 Atl. 880; *McKay* v. *Ohio R. Co.,* 34 W. Va. 65. But in others, damages are recoverable in an action of tort for the ejection itself: *Ellsworth* v. *C. B. & Q. R. Co.,* 95 Ia. 98, 63 N. W. 584; *Yorkton* v. *V. M. S. S. & W. R. Co.,* 62 Wis. 370, 21 N. W. 516; *Head* v. *Ga. Pac. R. Co.,* 79 Ga. 358; *Louisville, etc. R. Co.* v. *Hine,* 121 Ala. 234, 25 So. 857; *Hot Springs R. Co.* v. *Deloney,* 65 Ark. 177, 45 S. W. 351; *Sloane* v. *Southern Cal. R. Co.,* 111 Cal. 668, 44 Pac. 320.

CONSTITUTIONAL LAW—RACE DISCRIMINATION IN SELECTION OF JURY.—Defendant, a negro charged with embezzlement, challenged the regular panel of jurors on the ground of discrimination against the negro race in its selection, and it was quashed. Then he challenged the special panel on the same

ground. To rebut the challenge the deputy sheriff who selected and summoned the panel was put on the stand. He denied any discrimination in the selection of jurors. On cross-examination the defendant's counsel asked the witness, "You have stated that you have been deputy sheriff for eight years, now state whether or not you have selected any colored men as jurors in this court or any of the courts of the county during this time?" State's objection to this question was sustained. Defendant rested and was convicted. *Held,* that this ruling was reversible error, and new trial granted. *Bonaparte* v. *State* (Fla. 1913) 61 So. 633.

For the purpose of discrediting witnesses a wide range of cross-examination is allowed as matter of right. *Wallace* v. *State,* 41 Fla. 547; *Stewart* v. *State,* 58 Fla. 97. When the presumption that the officers have legally discharged their duty in selecting and summoning the jurors is overcome by uncontroverted testimony, and no evidence is offered to show there was no legal discrimination by the officers in selecting and summoning the juries, the challenge should be sustained. *Montgomery* v. *State,* 55 Fla. 97. The principal case goes a step farther than this in holding that an admission by the deputy sheriff, that in eight years' service he had never summoned a negro juror, would be material and would go far toward impeaching his testimony that he had not discriminated in selecting the jurymen in question. Recent decisions in several other states have not gone so far. *Lewis* v. *State,* 91 Miss. 505, 45 So. 360; *Eastling* v. *State,* 69 Ark. 189; *Hubbard* v. *State,* 43 Tex. Crim. Rep. 564. One feature which may help to differentiate the principal case from the others cited is that here there was undisputed testimony that there were in the county more than 1000 negroes qualified to act as jurors.

CORPORATIONS—RIGHTS OF PLEDGOR OF STOCK.—The plaintiff pledged certain stock as collateral security for a note. During the time the pledgee held the stock, a 40% dividend was declared payable in cash or in stock as each shareholder might elect. The plaintiff made no election and the pledgee elected to take the stock dividend. The plaintiff sought to redeem the stock and to have the stock dividend treated as a conversion and its value set off against the amount due on the note. *Held,* that in an action in equity to redeem, the plaintiff cannot treat the stock dividend as a conversion on the ground that a cash dividend should have been chosen, but he will be allowed to redeem his original stock with all increment. *Whitney* v. *Whitney Bros. Co. et al.* (Wis. 1913) 140 N. W. 35.

When a dividend is declared on pledged stock, payable in cash or stock as the shareholder may elect, is the right of election in the pledgor or in the pledgee? The principal case suggests the question, but a direct answer was not necessary to the decision. There seems to be no direct authority on the point. In the absence of restrictive statutes, the pledgee of certificates of stock, indorsed and transferred on the books of the company, has a right to vote at its meetings. The right to vote the stock is an incident of the pledge. COLEBROOKE, COLLATERAL SECURITIES, 493; JONES, COLLATERAL SECURITIES, § 441. In several states it is provided by statute that a pledgor of stock may

represent it and vote upon it at all meetings of the stockholders, unless the right to vote be expressly given to the pledgee. JONES, COLLATERAL SECURITIES, 523, note. Courts of equity may look behind the books to ascertain who is the real owner of the shares and may enjoin a pledgee from voting the shares pledged, to the prejudice of the rights of the pledgor. *Haskell* v. *Read*, 68 Neb. 107; JONES, COLLATERAL SECURITIES, § 442. The pledgee is not obliged to pay calls on the stock in order to prevent its forfeiture, but may pay them and charge the pledgor the amount so paid as an expense necessary to the collection of the debt. 4 THOMP., CORP., Ed. 2, § 4239. The pledgee has a right to receive the dividends as trustee and must account for them on payment of the debt. 5 THOMP., CORP., Ed. 2, § 5339; COLEBROOKE, COLLATERAL SECURITIES, 486. The tendency seems to be to give the pledgee the power of control of the stock only so far as is necessary to protect his security, and generally to leave the power of election or control in the hands of the pledgor.

COURTS—ENGLISH THE OFFICIAL LANGUAGE OF THE PHILIPPINES.—On a motion to strike from the record a brief because written in Spanish, the question was whether the provision of § 12 of the Code of Civil Procedure of the Philippine Islands, that English be the official language of the courts after Jan. 1, 1913, applied to cases commenced before that date. The court *held*, that it did not. *Mantilla* v. *La Corporacion de PP. Augustinos, etc.* (Phil. Isls. 1913) 11 Official Gazette 453.

The Code originally provided that English should be the official language of the courts after Jan. 1, 1906, but later it was deemed expedient, in fairness to the Spanish-speaking attorneys, to extend the time. In looking for precedents, we naturally turn to the leading colonizing nation and find that the British government proclaimed English to be the official language of the courts of Ceylon in 1801, the former language having been Dutch. 1 LEGIS. ACTS, CEYLON, 1796-1833; but this provision was repealed in 1835. In India at the present time each local government may determine what shall be deemed the official language of the districts administered by such government. STOKES, ANGLO-INDIAN CODE, ch. XLVI, No. 536. In England itself, English has been the sole official language only since 21 GEO. II, c. 3 (1748). From the time of William the Conqueror, Latin and French had always been the language of the courts and remained so until 36 EDW. III, c. 15, which provided that all pleas which had before been debated in French were to be in English from the 15th of Hilary next following, but that they should still be enrolled in Latin. Then the statute of 12 GEO. I, c. 29 provided that all process and notice written thereon be in English where the cause of action should not amount to £10 in the superior or 40*s.* in the inferior court. The statute was to remain in force for only five years, but the time was extended seven years by 5 GEO. II, c. 27, and it was made perpetual by 21 GEO. II, c. 3. In the meantime, however, 4 GEO. II, c. 26 had provided that after March 25, 1733 all writs, processes, judgments, records, statutes, etc., should be in English only; some doubt having arisen as to its application to Wales, it was expressly made so to apply by 6 GEO. II, c. 14.

EVIDENCE—DECLARATIONS AS TO PEDIGREE.—In a suit for the partition of real estate, it was contended that G, who died seized of the property, was related to plaintiff, and in support of this contention witnesses were introduced who testified to declarations of G affirming such relationship. Evidence of these declarations was resisted on the ground that there was no independent proof that G was related by blood or marriage to the family to which the declarations referred. *Held,* that evidence of the declarations was, under the circumstances of this case, admissible. *Jarchow et al.* v. *Grosse* (Ill. 1912) 100 N. E. 290.

The court, while acknowledging the general rule that proof of the relationship of the declarant must be made dehors the declaration before evidence of the latter will be admissible, still asserts that "where it is sought to reach the estate of the declarant himself, and not to establish a right, through him, to the property of others, his declarations with reference to his family and kindred have been held admissible, though the relationship is not shown by other evidence." In relation to this topic the case of *Monkton* v. *Att'y-Gen'l,* 2 Russ. & M. 147, is applicable. Lord Chancellor BROUGHAM there states, "this documentary account was objected to, as not falling within the rule which admits hearsay or declarations of deceased persons in a question of pedigree, because (it was insisted) you must first give evidence dehors the declarations, to connect them with the parties respecting whom the declarations are to be tendered. I entirely agree, that in order to admit hearsay evidence in pedigree, you must, by evidence dehors the declarations, connect the person making them with the family. But I cannot go to the length of holding, that you must prove him to be connected with both the branches of the family, touching which his declaration is tendered. That he is connected with the family is sufficient; and that connection once proved, his declarations are then let in upon questions touching that family. * * * It is not more true that things which are equal to the same thing are equal to one another than that persons related by blood to the same individual are more or less related to each other." The declaration must have been uttered freely and naturally with no thought of future profit. Inscriptions upon tombstones, engravings upon rings, and similar evidence are admissible "upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth," *Whitelock* v. *Baker,* 13 Ves. 514; *Vowles* v. *Young,* 13 Ves. 140.

EVIDENCE—EXPERT TESTIMONY.—The admissibility of the opinion of an expert medical witness in respect to the extent of plaintiff's injury, the ailments claimed to have arisen therefrom, and their permanency, was involved. It appeared that the witness had never treated the plaintiff professionally, that he had, however, made two examinations for the purpose of qualifying as an expert witness, that at the time of such examinations there were no visible evidences of the injury, and that the opinion was founded upon the conditions then observed as well as upon the answers of the plaintiff to

certain inquiries made by the witness. The supreme court, deeming the opinion to have been based principally on plaintiff's statement of past conditions, *held,* the admission was reversible error. *Hintz* v. *Wagner* (N. D. 1913) 140 N. W. 729.

In delivering the opinion of the court Chief Justice SPALDING said that the testimony of expert witnesses should, in general, be confined to the result of their actual investigations, and not based upon hearsay evidence, self-serving declarations, or statements of other parties made under circumstances admitting of coloration or exaggeration for its effect upon the verdict." In this connection see *Vosburg* v. *Putney,* 78 Wis. 84; *Chicago & E. I. R. Co.* v. *Donworth,* 203 Ill. 192; *West Chicago St. R. R. Co.* v. *Carr,* 170 Ill. 478. In *Federal Betterment Co.* v. *Reeves,* 73 Kan. 107, 4 L. R. A. N. S. 460, the principle is thus stated, "The witness was an expert who under the rules of evidence might give his opinion based either on facts testified to by others, or upon hypothetical questions put to him, or upon an examination of the patient; but he could not testify to conclusions arrived at from the history of the case given him by the patient or others. * * * Nor can a physician give his opinion based partially upon what he has been told of the case, and partially upon what information he obtained by an examination of the patient."

HUSBAND AND WIFE—POWER OF HUSBAND TO DISPOSE OF HIS PERSONALTY BY GIFT CAUSA MORTIS.—Decedent had made provision in his will for leaving a large part of his estate to charitable uses. During his last illness, upon being advised that his wife would still be entitled to her share of the property in spite of the will, he executed and delivered assignments of certain stocks and bonds to trustees upon the same trusts as stated in the will, with the provision that the income from said stocks and bonds should be paid to him during his life. The widow, having elected not to take under the will, brought suit to have said assignments set aside. *Held,* the assignments constituted gifts *causa mortis,* but were invalid, because the husband cannot deprive his wife of her dower rights in his personalty by such a transfer. *Crawfordsville Trust Co.* v. *Ramsey,* (Ind. App. 1913) 100 N. E. 1049.

Vosberg v. *Mallory et al.* (Ia. 1912), 135 N. W. 577, is opposed to the principal case. For a discussion of the conflict on this question, see a note on the *Vosberg* case in 10 MICH. L. REV. 652.

INSURANCE—LIABILITY IN TORT FOR NEGLIGENT DELAY IN FORWARDING APPLICATION. Through the negligence of the general agent who solicited the application, the same was not forwarded to the head office after a satisfactory medical examination had been passed, until after the applicant died. *Held,* the personal representatives of the deceased may recover the value of the policy as damages in an action in tort. *Duffie* v. *Banker's Life Association of Des Moines* (Iowa, 1913) 139 N. W. 1087.

The stipulation in the application that the policy should not take effect until the same was delivered to the applicant while in good health, was held

to be no bar to an action in tort against the insurer. A prerequisite to recovery is said to be proof that except for the negligence of the agent the policy in all reasonable probability would have been issued. The difficulty of proof is avoided by the presumption arising from a successful medical examination that the risk would in due course be accepted. But the novel feature of this case is the holding that an action *ex delicto* lies against the insurer. It would be a strange doctrine if ordinary private parties were held liable for negligence in failing to accept or reject a proposed offer. While such a liability has been enforced against public service companies, it cannot be said that insurance companies have been recognized as owing any such duty to the public. True, the business of insurance affects so vitally the public as to make the state regulation and control of insurance companies at this day unquestionable. However, no claim can be made that these corporations have been classified with those companies possessing the power of eminent domain with all their resulting obligations to the public. But the principal case holds that this public control creates a duty on the part of insurance companies in favor of the applicant to furnish indemnity or to decline to do so within such reasonable time as will enable the applicant to seek insurance elsewhere. The only other case involving this question seems to be *Boyer* v. *State Farmer's Mutual Hail Ins. Co.*, 86 Kan. 442, 121 Pac. 329, 40 L. R. A. N. S. 164, which is in accord with the principal case and is approved by the annotator in the L. R. A. series. Conceding the liability, the injury done was to the applicant himself, hence the proper parties plaintiff were the deceased's personal representatives and not the proposed beneficiary. The doctrine that the insurer is liable in tort will undoubtedly be readily seized upon in other jurisdictions for the reason that by the overwhelming weight of authority the insurer is not liable *ex contractu* for such delays. *N. W. Mutual Life Ins. Co.* v. *Neafus*, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. N. S. 1211; *More* v. *N. Y. Bowery Ins. Co.*, 130 N. Y. 537, 29 N. E. 757, *reversing* 55 Hun. 540, 10 N. Y. Supp. 44; *Brink* v. *M. & F. N. M. Ins. Ass'n*, 17 S. D. 235, 95 N. W. 929. But see *Robinson* v. *U. S. Benev. Soc.*, 132 Mich. 695, 94 N. W. 211, 102 Am. St. Rep. 436.

JUDGMENT—SUFFICIENCY OF AFFIDAVIT IN SERVICE BY PUBLICATION.—The statute required an affidavit for publication of summons to state that the postoffice address of the adverse party was unknown. The affidavit in a suit stated that the "residence" of the defendant was unknown. *Held*, the judgment rendered thereon was void. *Norris* v. *Kelsey*, (Colo. 1913) 130 Pac. 1088.

The general principle is that statutes providing for service by publication must be strictly complied with, for the reason that such proceedings are in derogation of the common law, *Pennoyer* v. *Neff*, 95 U. S. 714; *Schoenfeld* v. *Bourne*, 159 Mich. 139; *Schuck* v. *Moore*, 232 Mo. 649; *People* v. *Mulcahy*, 159 Calif. 34; *Tunis* v. *Withrow*, 10 Ia. 305, 77 Am. Dec. 117. Every fact should be shown in the affidavit which is necessary under the statute to give the right to an order for service by publication, *Lumber Co.* v. *Johnson*, 196 Fed. 56; *Harvey* v. *Harvey*, 85 Kan. 689; *Fontaine* v. *Houston*, 58 Ind. 316;

Hannas v. *Hannas,* 110 Ill. 53. Those facts which are enumerated in the conjunctive in the statute, must all be shown in the affidavit, *Cook* v. *Farmer,* 11 Abb. Pr. (N. Y.) 40, affirmed in 34 Barb. 95. If the statute requires the "residence" of the defendant to be stated if known, it is sufficient to give the name of the city where he resides, the street and number therein need not be added, *Burke* v. *Donnovan,* 60 Ill. App. 241.

MASTER AND SERVANT—LIABILITY FOR INJURIES TO INFANT UNLAWFULLY EMPLOYED.—The plaintiff, an infant under sixteen years of age, was employed by the defendant company, and sues for injuries received while cleaning machinery. The defendant set up contributory negligence as a defense. *Held,* § 1723 of MO. REV. STAT. 1909, forbidding the employment of persons under sixteen years of age in cleaning machinery, makes such employment negligence *per se,* and prevents a holding as a matter of law that the child was negligent; but does not prevent the employer from proving as a defense that the child was guilty of contributory negligence as a matter of fact. *Riegel* v. *Loose-Wiles Biscuit Co.* (Mo. App. 1913) 155 S. W. 59.

The holdings in cases where the defendant has employed a child under the age forbidden by statute and then has attempted to set up contributory negligence of the child to prevent recovery for injury received in that employment are by no means harmonious. The cases on the one side hold that the law does not change the rule of contributory negligence and that an infant employed contrary to the statutes may be guilty of contributory negligence as a matter of law. *Beghold* v. *Auto Body Co.,* 149 Mich. 14, 112 N. W. 691; *Borck* v. *Michigan Bolt & Nut Works,* 111 Mich. 129, 69 N. W. 254; *Belles* v. *Jackson,* 4 Pa. Dist. R. 194; *Woods* v. *Kalamazoo Paper Box Co.,* 167 Mich. 514, 133 N. W. 482. The majority of the cases hold with the principal case that the child is not guilty of contributory negligence as a matter of law but may be guilty as a matter of fact. *Darsam* v. *Kohlmann,* 123 La. 164, 48 So. 781; *Norman* v. *Virginia Pocahontas Coal Co.,* 68 W. Va. 405, 69 S. E. 857; *Blakenship* v. *Ethel Coal Co.,* 69 W. Va. 74, 70 S. E. 863; *Starling* v. *Union Carbide Co.,* 142 Mich. 284, 105 N. W. 755; *Woolf* v. *Nauman Co.,* 128 Ia. 261, 103 N. W. 785; *Smith* v. *National Coal & I. Co.,* 135 Ky. 671, 117 S. W. 280; *Marino* v. *Lehmaier,* 173 N. Y. 530, 66 N. E. 572; *Perry* v. *Tozer,* 90 Minn. 431, 97 N. W. 137; *Rolin* v. *Tobacco Co.,* 141 N. C. 300, 53 S. E. 891; *Queen* v. *Dayton Coal & Iron Co.,* 95 Tenn. 458, 32 S. W. 460. A considerable number of recent decisions, however, hold that contributory negligence is no defense where the child has been illegally employed. *Fortier* v. *The Fair,* 153 Ill. App. 200; *Maddin* v. *Wilcox,* 174 Ind. 657, 91 N. E. 933; *Stehle* v. *Jaeger Automatic Mach. Co.* 225 Pa. St. 348, 74 Atl. 215; *Glucina* v. *F. H. Goss Brick Co.,* 63 Wash. 401, 115 Pac. 843. The decisions in this latter class of cases are based upon the ground that the statutes forbidding the employment of infants are enacted to protect the infant and to prevent child labor, and as these objects can best be obtained by taking away the defenses of the employer and by making him employ infants at his own risk, the decisions seem to be more nearly in accord with the reason and spirit of modern legislation on this subject.

MASTER AND SERVANT—WAIVER OF RIGHT OF DISCHARGE.—Plaintiff was employed by the defendants to act, play and sing at the defendant's theater. The plaintiff refused to play a part assigned to her, and defendant told her that she would have to play the part or her contract was broken. Later the defendant said to the plaintiff, "Listen to me. You think the matter over and consider and do me a favor and play the part." The evening of the same day the plaintiff informed the defendant by telephone that she would play the part. The next day when plaintiff came to defendant's office, defendant said, "You have broken your contract and you are discharged." Plaintiff sued for wrongful discharge. *Held,* that an employer, by continuing an employee in his employ after cause for discharge exists, does not as a matter of law waive thereby the right to discharge the employee. *Rafalo et al.* v. *Edelstein et al.* (1913) 140 N. Y. Supp. 1076.

By the weight of authority in this country, when a master with knowledge of a material breach of contract by the servant, continues that servant in his employment, he is thereby presumed to have waived the breach and will not be allowed to set it up afterwards. *Ginning Co.* v. *McLaney,* 153 Ala. 586, 44 So. 1023; *Reynolds* v. *Hart,* 42 Colo. 150, 94 Pac. 14; *Collins Ice Cream Co.* v. *Stephens,* 189 Ill. 200, 59 N. E. 524; *Sharp* v. *McBride,* 120 La. 143, 45 So. 41; *Daniell* v. *Boston R. R. Co.,* 184 Mass. 337, 68 N. E. 337; *Batchelder* v. *El. Co., 227* Pa. 201, 75 Atl. 1090; *Dillard* v. *Wallace,* 1 McMullen (S. C.) 480; *Plow Co.* v. *London* (Tex.) 125 S. W. 974; *Hauerbach* v. *Calder,* 15 Utah 371, 49 Pac. 649; *Tickler* v. *Andrae Mfg. Co.,* 95 Wis. 352, 70 N. W. 292; *Jones* v. *Trinity Parish,* 19 Fed. 59. A limitation on the above rule recognized in many cases is that retention after breach of contract is a *prima facie* waiver and condonation is presumed, but if there are circumstances shown that tend to establish a reasonable or proper excuse for delay, it is for the jury to say whether in fact the breach was condoned. WOOD, MASTER & SERVANT, § 121; *James* v. *Trinity Parish, supra,* 59; *Tickler* v. *Andrae Mfg. Co., supra; Batchelder* v. *El. Co., supra; Atlantic Express Co.* v. *Young,* 118 Ga. 868, 45 S. E. 677. Another qualification of the above rule found in some cases is that the fact that a servant is retained after a commission of a breach of duty, will not preclude the master from using it as a ground for discharge, if the offense is repeated. *Gray* v. *Shepard,* 147 N. Y. 177; *McIntyre* v. *Hochin,* 16 Ont. App. 498; *Hauerbach* v. *Calder,* 15 Utah 371, 49 Pac. 649; *Daniell* v. *Boston R. R. Co.,* 184 Mass. 337, 68 N. E. 337; *Troy Fertilizer Co.* v. *Logan,* 90 Ala. 325, 8 So. 46. The cases in New York do not seem to be harmonious in their holdings. *Jerome* v. *Queen City Cycle Co.,* 163 N. Y. 351, 57 N. E. 485, cited in the principal case, holds that the offense has not been waived so as to preclude its use if the offense is repeated. *Gray* v. *Shepard,* 147 N. Y. 177, 41 N. E. 500, holds that if the servant continues his course of unfaithfulness, the master may determine from the whole course of conduct whether or not to terminate the employment, which practically amounts to the same rule. In *Rosback* v. *Sackett & Williams,* 134 App. Div. 130, 118 N. Y. Supp. 846, the court says that continuing the employment of a servant after a breach is not such a waiver as will preclude him from explaining the delay. All of these cases seem to hold inferentially that one breach

unexplained would be waived by continuing the employment. *Sabin* v. *Kendrick*, 58 App. Div. 108, 68 N. Y. Supp. 546, holds that continuation of employment after breach is a waiver. *Dunkell* v. *Simons*, 7 N. Y. Supp. 655, supports the principal case, but the holding is the minority rule in this country.

MINES AND MINERALS—RESERVATION OF PETROLEUM AND NATURAL GAS.—In a deed to defendant's predecessor "all mineral and mining rights" were reserved to the grantor. Plaintiff here succeeded to those reserved rights. *Held*, that such reservation did not include petroleum and natural gas. *Preston et al.* v. *South Penn. Oil Co.* (Pa. 1913) 86 Atl. 203.

The decision in the case is based on only two Pennsylvania cases in accord with it, and only two other states are cited as reaching the same conclusions. The decision seems to be contrary not only to the weight of authority generally, but even to the law in Pennsylvania. As a general proposition "minerals" include all substances which are obtained from below the surface for profit. *Williams* v. *S. Penn. Oil Company*, 52 W. Va. 188; *Murray* v. *Allred*, 100 Tenn. 100. Salt lakes and salt springs are classed as "minerals." *State* v. *Parker*, 61 Tex. 265. Water is a "mineral." *Ridgeway Light & Heat Co.* v. *Elk County*, 191 Pa. 468; *West Moreland & Cambria Natural Gas Co.* v. *DeWitt*, 130 Pa. 249. Within this definition and these cases oil and petroleum must logically be included. So it seems to be by far the weight of authority in spite of the decision in the principal case. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Manufacturers Gas & Oil Co.* v. *Indiana Natural Gas & Oil Co.*, 155 Ind. 468; *Gill* v. *Weston*, 110 Pa. 312; *Marshall* v. *Mellon*, 179 Pa. 371; *Williamson* v. *Jones*, 39 W. Va. 231; *Southern Oil Co.* v. *Colquit*, 28 Tex. Civ. App. 292; *Weaver* v. *Richards*, 156 Mich. 320; *Wagner* v. *Mallory*, 169 N. Y. 505; *Kelley* v. *Ohio Oil Co.*, 57 Oh. 317; SNYDER, MINES, §§ 143, 146.

MUNICIPAL CORPORATIONS—BUILDING REGULATIONS.—The city of Denver by ordinance prohibited the erection of store buildings within a specified residence section unless a majority of the land-owners on both sides of the street should consent, and unless the building should be erected a specified distance back from the front line of the lots. *Held*, that both these requirements were illegal, and that the building inspector could not refuse a permit because of non-compliance therewith. *Willison* v. *Cooke*, (Colo. 1913) 130 Pac. 828.

Judicial view expressed almost entirely in dicta is that attempts by municipalities to establish building lines by ordinances are abortive. See 11 MICH. L. REV. 401. The rule has been laid down and often approved that a city cannot, even under express legislative authority, impose restrictions upon the use of private property which are induced solely by æsthetic considerations. 2 DILLON, MUNIC. CORP. (5th Ed.) § 695; *Passaic* v. *Paterson Bill Posting Co.*, 72 N. J. L. 285; *Curran Co.* v. *City of Denver*, 47 Col. 226; 107 Pac. 261, 27 L. R. A. N. S. 544. It is, however, a valid exercise of the police power to establish reasonable restrictions on the character and size of buildings, to provide for security against fire, and to promote the public health or safety. FREUND, POLICE POWER, §§ 118, 128; *Welch* v. *Swasey*, 193 Mass. 364, 214

U. S. 91. But ordinances excluding from boulevards, etc., business occupations which are not noxious in their nature and restricting building thereon to residence uses only are void. 2 DILLON, MUNIC. CORP. (5th ed.) 1060; *St. Louis* v. *Dorr*, 145 Mo. 466; *Commonwealth* v. *Boston Advertising Co.*, 188 Mass. 348, 69 L. R. A. 817. The law on this subject is in process of development, and it is believed by many writers that the "increased æsthetic sentiment" will eventually cause such regulations to be recognized as valid. 20 HARV. L. REV. 35; 13 BENCH & BAR 10; *Eubank* v. *City of Richmond*, 110 Va. 749, 67 S. E. 376.

NEGLIGENCE—RULE OF RYLANDS V. FLETCHER.—The plaintiff occupied the second floor of a building leased from the defendant. On the third floor was a lavatory under defendant's control, and used by all of the tenants of the building. During the night, a third person stopped up the drain so that the lavatory overflowed and plaintiff's goods were damaged. No negligence on the part of the landlord was shown. *Held*, that defendant was not liable. *Richards* v. *Lothian* (1913) 82 L. J. P. C. 42.

It was held that this case did not come within the rule as laid down in *Rylands* v. *Fletcher*, 37 L. J. Ex. 161, that the person who, for his own purposes, brings on his lands and keeps there anything likely to do mischief if it escapes, must keep it at his peril. The court followed the *dictum* in *Nichols* v. *Marsland*, 46 L. J. Ex. 174, and the case of *Box* v. *Jubb*, 48 L. J. Ex. 417, which latter case cited the *dictum* of the former as law. This *dictum* was to the effect that the malicious act of a third person was to be taken, together with an act of God or *vis major*, as an exception to the doctrine *Sic utere tuo ut alienum non laedas*. It was pointed out that only when other than ordinary use was made of property did *Rylands* v. *Fletcher* control, that bringing water into a building for lavatory purposes is not such a use, and that in case of such ordinary use as this, negligence on the part of the landlord must be shown. The law in the United States has followed the English cases. *Becker* v. *Bullowa*, 73 N. Y. Supp. 944; *Marshall* v. *Cohen*, 44 Ga. 489. In *Rosenfield* v. *Newman*, 59 Minn. 156, a case similar to the principal case, it was held that the landlord is not liable when the damage is the result of a stranger's negligence. The case is decided on principle and without reliance on authority. *Kenney* v. *Barnes*, 67 Mich. 336, holds that the landlord is not liable for the act of a third person. In that case, the landlord had no control over the lavatory, and the case is decided on that ground and without supporting authority. While the cases in the United States on the point reach the same conclusion as the English cases, they do not place their finding on the ground, as does the principal case, that the act of a third person is an exception to the maxim above stated. This is doubtless due to the fact that the English courts are bound by *Rylands* v. *Fletcher supra*, while the courts of the United States have never followed that case to its full length.

PARTY-WALLS—RIGHT TO COMPENSATION FOR USE.—The charter of the City of W, provided that "the first builder shall be reimbursed one moiety of the charge of such party-wall, or for so much thereof as the next builder

shall have occasion to make use of." *Held,* that the right of compensation for the use of a wall was an easement appurtenant to the land of the first builder which passed to his grantee on a conveyance of the land. *Pfrommer* v. *Taylor,* (Del. 1913) 86 Atl. 212.

The decision as to whether the right to compensation for the use of a party-wall by an adjoining owner is a personal right in the builder of the party-wall or is a right running with the land, may be put in two classes: first, those depending on the express terms of the party-wall agreement, and second, those depending on the obligation imposed by a municipal ordinance or building regulation as in the principal case. As to the former there is a a complete conflict in the authorities; 10 MICH. L. REV. 187, and note to *Cook* v. *Paul,* (Neb. 1903) in 66 L. R. A. 673. A building regulation in language almost identical with that in the principal case was passed by the Provincial Assembly in Pennsylvania in 1721. Under this regulation it was held that compensation for the use of a party-wall was personal to the builder. *Todd* v. *Stokes,* 10 Pa. St. 155: *Gilbert* v. *Drew,* 10 Pa. St. 219. In 1849 the Pennsylvania legislature passed an act providing that the right of compensation for the use of a party-wall passed to the builder's grantee unless otherwise expressed. *Knight* v. *Beenken,* 30 Pa. St. 372; *Voight* v. *Wallace,* 179 Pa. St. 520. Cases directly in accord with the rule in the principal case are *Halpine* v. *Barr,* 21 D. C. 331; *Irwin* v. *Peterson,* 25 La. Ann. 300; *Thomson* v. *Curtis,* 28 Ia. 229; *Hunt* v. *Armbruster,* 17 N. J. Eq. 208.

SALES—INDEFINITENESS OF SUBJECT MATTER OF CONTRACT.—The defendant automobile manufacturing company made plaintiff its selling agent in certain territory, and agreed to supply cars at a certain discount, the plaintiff in return agreeing to order at least fifty cars. There were different priced models, and the plaintiff had the privilege of choosing from them in any proportion. The defendant, after filling a few orders, declined to deliver any more automobiles. *Held,* in an action for damages, that the agreement did not constitute a contract for the sale of any particular kind of automobiles, as there was no meeting of minds upon the models or prices of the particular cars to be sold. *Oakland Motor Car Company* v. *Indiana Automobile Company,* 201 Fed. 499.

Wheaton v. *Cadillac Automobile Company,* 143 Mich. 21 is to the same effect. But such a contract is not too indefinite if past dealings between the same parties make is reasonably certain what the buyer would order. *Hardwick* v. *American Can Co.,* 113 Tenn. 657. And in the case of *George Delker Co.* v. *Hess Spring & Axle Company,* 138 Fed. 647, the buyer having contracted to buy 2,500 sets of axles (of different sizes and prices) expressly agreed to specify monthly for a minimum quantity. His failure to specify for the goods was held a breach. The express agreement to specify does not seem sufficient to distinguish the cases, since if the buyer agrees to take a certain number of articles made in different sizes or styles, it should be his duty to give a definite order anyway. Such contracts have been sustained in the absence of an express agreement to specify for the goods. An agree-

ment to buy a certain number of scales, which were made in various styles at different prices, was held valid in *Kimball Bros.* v. *Deere, Wells & Co.*, 108 Ia. 676. A contract to sell 750 tons of salt bound the seller, although the buyer had the privilege of choosing from various goods at different prices per ton in *Mebius & Drescher Co.* v. *Mills*, 150 Cal. 229. A contract to saw out and sell from 500,000 to 1,000,000 feet of lumber was binding, although the price per thousand depended on the kind of timber, and the probable amount or proportion of each kind was uncertain, in *American Hardwood Lumber Company* v. *Dent*, 164 Mo. App. 442. The point of indefiniteness does not seem to have been raised in *Alden* v. *Kaiser*, (Minn. 1913) 140 N. W. 343, where the agreement was to buy five automobiles, to be ordered from different priced models and styles. The problem of ascertaining the damage is met by assuming that the party with the privilege of selection would have chosen the goods on which the other party would have made the least profit. *George Delker Co.* v. *Hess, supra; Kimball Bros.* v. *Deere, supra; American Hardwood Co.* v. *Dent, supra.* There is, however, a *dictum* that the latter party may exercise the option for the purpose of estimating the damages, and make the contract for the goods on which he would have made the greatest profit. *Mebius & Drescher Co.* v. *Mills, supra.*

TRIAL—THE EFFECT OF INCONSISTENT SPECIAL FINDINGS.—Plaintiff sued for injuries sustained while he was engaged in unloading slabs of marble for the defendants. He alleged that the defendants were negligent in failing to provide a sufficient force of men to handle the marble. The jury returned a general verdict for the plaintiff, and made a number of special findings. One of the special findings as to the defendant's negligence was inconsistent with other special findings, and with the general verdict. The court *held* that a new trial should have been granted. *Willis* v. *Skinner et al.* (Kan. 1913) 130 Pac. 673.

When special findings are inconsistent with each other, of course no judgment can be rendered on them, and the trial judge must either render judgment on the general verdict, or grant a new trial. The cases are in conflict as to which he should do. In Colorado it has been held that "contradictory and inconsistent special findings destroy each other, and the general verdict stands." *Drake* v. *Justice Gold Mining Co.*, 32 Colo. 259, 75 Pac. 912. Indiana takes the same view. *Shuck* v. *State*, 136 Ind. 63, 35 N. E. 993; *Hereth* v. *Hereth*, 100 Ind. 35; *Dickel* v. *Shirk*, 128 Ind. 178, 27 N. E. 733; *C. & E. I. Rr. Co.* v. *Ostrander*, 116 Ind. 259, 15 N. E. 227; *Byram* v. *Galbraith*, 75 Ind. 134. There is *dictum* in Michigan and in Iowa to the same effect. *Burke* v. *Bay City Traction & Electric Co.*, 147 Mich. 172, 110 N. W. 524; *Foster* v. *Gaffield*, 34 Mich. 356; *Fishbaugh* v. *Spunaugle*, 118 Iowa, 337, 92 N. W. 58. A contrary rule is well established in Kansas, and it is there held that where special findings are inconsistent a new trial should be granted. *St. L. & S. F. Ry. Co.* v. *Bricker*, 61 Kan. 224, 59 Pac. 268; *Latshaw* v. *Moore*, 53 Kan. 234, 36 Pac. 342. It would seem that the Kansas rule is the more logical. The court in the principal case, in applying that rule, said of inconsistent special findings, that they "leave the matter in such uncertainty

that in effect it is still undetermined whether or not the plaintiff ought to recover." Moreover, the existence of inconsistent special findings tends strongly to show that the jury did not understand the case. 2 THOMPSON, TRIALS, § 2692.

WILLS—BARRING OF ESTATES TAIL BY DEED.—A testator devised certain described real estate to his daughter "absolutely" and if she died without "living issue" then over to the testator's brother. A few years after the testator's death the daughter conveyed the land to complainant, who later contracted to sell the property to defendant, and to convey "a good fee simple title;" defendant refused to accept the deed of conveyance when tendered on the ground that a fee simple could not be conveyed by complainant. *Held,* that the fee tail was barred by the daughter's deed of conveyance and became a fee simple absolute in the grantee. *Schneer* v. *Greenbaum,* (Del. 1913) 86 Atl. 107.

The Delaware Statutes provide that a fee tail could be converted into a fee simple by a deed of conveyance. For discussion of the principles applicable to the barring of estates tail see 11 MICH. L. REV. 534.

WITNESSES—PRIVILEGE—SELF-CRIMINATION.—Defendants, officers of an insolvent banking corporation, were ordered to deliver to the Bank Commissioner certain papers, books and property pertaining to the business of the bank. Defendants refused on the ground that the books might contain information which would tend to incriminate said defendants and to render them liable to criminal proceedings. *Held,* that this answer was insufficient. *Burnett et al.* v. *State,* (Okla. 1913) 129 Pac. 1110.

In view of the fact that the Oklahoma court deemed the records and papers of the bank to be public records the following principle enunciated by Justice HUGHES in the case of *Wilson* v. *United States,* 221 U. S. 361, which is strongly relied upon in the instant case, is pertinent, "Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself, and would supply the evidence of his criminal dereliction. If he has embezzled the public moneys and falsified the public accounts, he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-crimination. The principle applies, not only to public documents in public offices, but also to records required by law to be kept, in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained." See also *Manning* v. *Mercantile Securities Co.,* 242 Ill. 584, 30 L. R. A. N. S. 725 and note. *Boyd* v. *United States,* 116 U. S. 616; WIGMORE, EVIDENCE, § 2259.