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RECENT IMPORTANT DECISIONS

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ACTIONS—RIGHT OF WIFE TO SUE HUSBAND FOR BREACH OF MARRIAGE CONTRACT.—Plaintiff, having received such cruel treatment from her husband as to render further cohabitation unbearable, left and remained apart from him. Since then brought an action against him for breach of contract, alleging the loss of such comfort and support as she was entitled to receive and would have received but for the defendant's breach of his marriage contract with her. *Held,* that neither under statute nor common law, has a wife a cause of action against the husband for breach of his contract of marriage in failing to provide support for the wife. *Gowin v. Gowin* (Tex. 1924) 264 S. W. 529.

Under statutes similar to the Married Women's Property Act of Texas, it has been generally held that the wife cannot sue the husband in contract for failure to support. *Peters v. Peters,* 42 Iowa 182; *Main v. Main,* 46 Ill. App. 106; *Bandfield v. Bandfield,* 117 Mich. 80. The common law gave no such right of action for breach of the obligations of the marriage contract, and the statutes permitting the wife to sue the husband did not create a right of action in the wife. *Trevino v. Trevino,* 63 Tex. 650; *Abbe v. Abbe,* 48 N. Y. S., 25; *Hobbs v. Hobbs,* 70 Me. 381. In three analogous situations, however, the courts have been more inclined to grant relief to the wife. In *DeBrauwere v. DeBrauwere,* 203 N. Y. 460, where the wife had furnished herself with necessaries, she was permitted to recover their reasonable worth from the husband. In at least three other jurisdictions, she has been given recovery for torts committed upon her person by her spouse. *Brown v. Brown,* 88 Conn. 42; *Roberts v. Roberts,* 185 N. C. 566; *Prosser v. Prosser,* 114 S. C. 45. Further, in *Rawlings v. Rawlings,* 121 Miss. 140, the opinion of the dissenting judges would allow alimony without divorce as being in accord with the modern trend of public policy, and would permit the child to maintain an action against the father for support. But aside from these exceptional cases, the law seems well established, the general refusal of recovery in the parent-child cases supporting the decision in the principal case. *Sikes v. Sikes* (Ga. 1924) 123 S. E. 694; *McKelvey v. McKelvey,* 111 Tenn. 388; *Alling v. Alling,* 52 N. J. Eq. 92.

AGENCY—WHEN PRINCIPAL MAY RELY ON KNOWLEDGE OF AGENT.—Plaintiff Company and X Company had the same officers. Prior to the contract in question X Company had dealt with the defendant company through one Rosenblatt, the defendant's agent. This agency had been revoked, but no notice of the revocation had been given. Relying on the knowledge obtained in the prior transactions as to Rosenblatt's agency the officers of the plaintiff on behalf of the plaintiff sold to the defendant through Rosenblatt several car loads of junk. On receiving shipment defendant paid Rosenblatt supposing him to be the principal and plaintiff brought this action against the defendant to recover

the purchase price of the goods. *Held,* the defendant was liable, being estopped to deny the agency. *Montana Reservoir and Irrigation Co. v. Utah Junk Co. et al.* (Utah 1924) 228 Pac. 201.

"It is the general rule that notice to, or knowledge of an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of the principal." 2 MECHEM ON AGENCY, 2nd ed., §1803. In the principal case the officers or agents of the plaintiff corporation were acting on behalf of the X Company when they obtained the knowledge upon which the plaintiff now relies as the basis for an estoppel and the question is whether the plaintiff legally has knowledge of the facts so obtained by the agents and may rely upon it. It is to be noted that almost without exception the cases arising under this head are cases in which the principal is charged with the knowledge to his detriment, but the fact that the principal is relying upon the knowledge should not alter the rules applicable. *Haines v. Starkey,* 82 Minn. 230. There are two theories advanced in support of the general principle. The first and older theory is that based upon the identity of the principal and agent. Under this theory knowledge obtained by the agent prior to the agency or while not acting as agent could not logically be imputed to the principal. *Houseman v. Girard Mutual Building and Loan Association,* 81 Pa. St. 256. Thus the plaintiff under this theory would not have the knowledge relied on in the principal case. The second theory now generally followed is based upon the presumption that the agent has performed his duty to communicate to his principal the knowledge he has respecting the subject matter of negotiation. *The Distilled Spirits,* 11 Wall. (U. S.) 356; *Schwind v. Boyce,* 94 Md. 510; *Trentor v. Pothen,* 46 Minn. 298. It is obvious that the agents here acting for the principal concerning the matter of which they had knowledge had a duty to communicate and thus the case falls within the general rule. Is it taken out by any of the exceptions? A mere statement of them will negative such contention. The three generally recognized are cases where the agent owes a positive duty to someone else not to communicate, *Melms v. Pabst Brewing Co.* 93 Wis. 153; where the agent's interest in the subject matter is adverse to that of the principal, *Frenkel v. Hudson,* 82 Ala. 158; and where the person claiming the benefit of the notice colluded with the agent to cheat or defraud the principal. *National Life Insurance Co. v. Minch,* 53 N. Y. 144. Does the fact that the principal is a corporation alter the rules applicable? It is said in 2 MECHEM ON AGENCY, 2nd ed., §1843, that these rules apply with particular force to the case of corporations. Also see *First National Bank v. Chowning Electric Co.* 142 Ky. 624. It is therefore submitted that the principal case is correctly decided by the rules of agency above set forth.

CARRIERS—EVIDENCE—NEGLIGENCE OF CARRIER PRESUMED FROM FACT OF INJURY TO PASSENGER.—Plaintiff was a passenger on defendant's street car. While the car was standing at a cross street for the purpose of letting off passengers, it was run into from the rear by another of defendant's cars which was unable to stop because of defective brakes. The jar caused by the col-

lision severely injured plaintiff's head. No attempt was made to prove that the railway company had notice of the defective brakes. *Held,* that having alleged only general negligence, proof of relationship of carrier and passenger raises a presumption of defendant's negligence in running its cars which operates in plaintiff's favor throughout the trial, in the absence of countervailing evidence, and is not removed by unnecessary proof of specific acts of negligence. *Kinchlow v. Kans. City etc. Ry. Co.* (Mo. 1924) 264 S. W. 416.

It is well settled that proof by a passenger of an accident such as would not happen in the ordinary course of things under proper management, as a result of which he is injured, makes out a prima facie case, and raises a presumption of negligence on the part of the carrier, which places on him the burden of rebutting it. *Chlanda v. St. Louis Transit Co.* 213 Mo. 244; *Greinke v. Chicago City Ry. Co.* 234 Ill. 564; *Loudoun v. Eighth Ave. R. Co.* 162 N. Y. 380; *Gleeson v. Va. Midland R. Co.* 140 U. S. 435; 3 MOORE ON CARRIERS, ed. 2, p. 1496; 3 ELLIOTT ON RAILROADS, ed. 3, §1548. Various reasons are advanced by the courts for the rule, but they seem to simmer down to the two following: first, that the carrier being in the exclusive management and control of the thing which caused the injury, such injury is naturally to be attributed to its own act or omission; and second, that the carrier's means and sources of knowledge are superior to those of the passenger. *Edgerton v. N. Y. & H. R. Co.* 39 N. Y. 227; *D. L. & W. Ry. Co. v. Napheys,* 90 Pa. St. 135. But something more than a mere injury must be shown before the doctrine of *res ipsa loquitur* can be invoked. To throw the burden upon the carrier, it must be first shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars or something improper or unsafe in the conduct of the business or in the appliances of transportation. *Ault v. Cowan,* 20 Pa. Sup. Ct. 616. If it appears that the accident was due to a cause beyond the control of the carrier, as the presence of a *vis major,* or the tortious act of a stranger, no such prima facia case is made out. *The Chicago City Ry. Co. v. Rood,* 163 Ill. 477; *Cent. of Ga. Ry. Co. v. Brown,* 165 Ala. 493. With respect to the second question raised by the instant case, the rule also seems to be well settled that where the plaintiff alleges only general negligence on the part of the carrier, by proving specific acts of negligence, he is not thereby precluded from claiming the benefit of the presumption. *Cassady v. Old Colony St. Ry. Co.* 184 Mass. 156. Otherwise, however, where he alleges specific acts of negligence. In such a case he must prove those specific acts to make out his case. The reason for this rule seems to be that if the passenger shows that the cause of the accident is within his knowledge, he must prove it. *Sullivan v. Cap. Traction Co.* 34 App. Cases D. C. 358; *Roscoe v. Railroad,* 202 Mo. 576. The burden is still on the plaintiff to establish the required negligence. The presumption works in his favor simply because it is not presumed that he has a knowledge of the cause from which the negligence flowed. *Feital v. Middlesex Ry. Co.* 109 Mass. 398. It is submitted, therefore, that the instant case has followed the established rule on both questions.

CARRIERS—NEGLIGENCE—ALIGHTING FROM A MOVING TRAIN.—P, a passenger on one of D's trains, was injured when alighting from the train while it was still in motion and going past the platform of the station. P contended that the conductor, who alighted before P, directed him to alight and led him to believe it was safe to do so. *Held,* though the general rule in this state is that one injured by boarding or alighting from a moving train cannot recover because he is negligent as a matter of law, in this case it was a question for the jury whether there was a direction or invitation to P to alight and whether P was guilty of contributory negligence. *Fullerton v. Chicago Great Western R. Co. et al.* (Minn. 1924) 199 N. W. 93.

The jury's finding that there was a direction or invitation to P to alight and that this constituted negligence in D made the principal issue in the case the question of contributory negligence. The great weight of authority is that alighting from a moving train is not negligence *per se,* but raises ordinarily a question for the jury. 3 HUTCHINSON, CARRIERS, ed. 3, §1177-1180; *Filer v. The Railroad,* 49 N. Y. 47; *Carr v. The Railroad,* 98 Cal. 366, noted, with a citation of authorities, in 21 L. R. A. 354. However, in jurisdictions following the majority rule, where the facts are undisputed and no other inference is possible than that the plaintiff did not act under the circumstances as a reasonably prudent person under similar circumstances would have conducted himself, the question is taken from the jury and the plaintiff is held guilty of contributory negligence as a matter of law. *Morrison v. The Railway,* 56 N. Y. 302. In those jurisdictions following the view of the principal case, certain exceptions are recognized. The broad principle running through all these exceptional cases seems to be that where such special conditions have been created that the plaintiff's action under the circumstances might fairly be considered as the act of an ordinarily prudent person, then the question of contributory negligence in the plaintiff should be submitted to the jury. *Pa. R. Co. v. Kilgore,* 32 Pa. State 292 (two of plaintiff's children had already alighted and plaintiff was apprehensive of being carried away); *Merritt v. The Railroad,* 162 Mass. 326 (evidence tended to show that the plaintiff did not and could not have known that the train was in motion); *Holden v. The Railway,* 103 Minn. 98 (plaintiff was directed to get off in a manner calculated to create a confidence in defendant's servants); *Jones v. The Railway,* 42 Minn. 183 (plaintiff's judgment was disturbed by having been awakened suddenly and told he was at his destination though the train was actually leaving it). But even in the exceptional case where the plaintiff has been directed or invited to alight from the moving train by agents of the defendant, the act of alighting will still be negligence *per se* if it is obviously dangerous. *Flaherty v. The Railroad,* 186 Mass. 567. But a conclusive inference of negligence is not to be made merely because plaintiff has violated a statute making it a misdemeanor for anyone but a passenger or an employee of a railroad to board or alight from a moving train. *Street v. The Railway,* 124 Minn. 517 (plaintiff was a licensee). Though the rule more consistent with the prevailing rule as to contributory negligence in negligence cases other than carrier cases is the rule of the *Filer* case, *supra,* the position of courts on this vexatious question

is not free from uncertainty. A striking example of such uncertainty is seen in the fact that cases in New York lay down both rules as the prevailing one. *Filer v. The Railroad, supra; Solomon v. The Railway,* 103 N. Y. 437; *Burrows v. The Railway,* 63 N. Y. 556. In most instances the same result would probably be reached by both rules. But in the test case where the plaintiff alighted from a moving train and there were present none of the exceptional circumstances recognized in jurisdictions following the rule of the principal case as taking the case out of the general rule, it might make a substantial difference whether plaintiff's act was called negligence *per se* or whether it was a jury question.

CARRIERS—WRITTEN NOTICE OF PERSONAL INJURY.—Plaintiff shipped cattle over the defendant railway and, in consideration of free transportation for himself, contracted to give written notice within thirty days of any personal injury. Plaintiff was injured and failed to give written notice but brought suit and alleged facts tending to show a waiver on the part of the defendant company. Defendant claimed that federal statutes and decisions applied and hence the stipulation for written notice could not be waived. *Held,* the duty of an injured passenger accompanying an interstate shipment to give notice of injury is governed by the common law and not federal statutes and under the common law a common carrier may waive a provision for written notice of injury. *Edmondson v. Mo. Pac. Ry. Co.* (Mo. 1924) 264 S. W. 470.

The United States courts under federal statutes refuse to recognize a waiver of a defense by a carrier as tending to discrimination and being thus repugnant to the Interstate Commerce Commission Acts. *Phillips Co. v. G. T. Ry.* 236 U. S. 662; 14 MICH. L. REV. 678. However, the state courts have very generally permitted a waiver of a stipulation for written notice of claim for loss of goods. *Produce Exchange v. N. Y. P. & N. RR.* 122 Md. 231; *Cheney Piano Co. v. N. Y. C. & H. Ry.* 148 N. Y. S. 108; *Hardin Grain Co. v. Mo. Pac. Ry.* 120 Mo. App. 203. A provision stipulating written notice of personal injury on the part of a passenger is of recent origin, the question being first passed upon in *Gooch v. O. S. L. Ry.* 258 U. S. 22. There the facts were very similar to the facts in the present case and the Supreme Court held that the federal statute (Cummins Amendment) had no application to cases of personal injury which were left to the Interstate Commerce Commission and the common law. To the same effect see *C. R. I. & P. Ry. v. Maucher,* 248 U. S. 359 (Carmack Amendment); *Van Zant v. K. C. & Ry.* 289 Mo. 163. Three justices dissented, reasoning that the restrictions placed upon notice of claims for loss of goods under the Cummins Amendment should on grounds of public policy be applied to a notice of personal injury by a passenger and that this was a novel and cunning device to defeat the normal liability of the carrier. Justice Clarke there says "Such a limitation (thirty days written notice) on passenger claims had never been heard of at that time but we may be sure it will be found in every railroad ticket promptly upon the publication of the court's opinion in this case unless prohibited by statute." The existence of the present case evidences partially at least, the correctness

of such prophecy. That rights of parties in personal injury cases are not affected by federal statutes but are determined under the common law, is not to be disputed since the decision handed down in the *Gooch* case and any change must necessarily be effected through legislation. The Missouri court has applied this rule in the instant case and decided the case under the common law which clearly allowed a carrier to waive a provision for written notice. See 14 MICH. L. REV. 244.

CONFLICT OF LAWS—INHERITANCE BY BASTARD WITHOUT LEGITIMATION.—A and B, inhabitants of Nova Scotia had two illegitimate children. Subsequently they intermarried and the children were adopted into the family. The mother died and the father again married and established a new home with all the family in Maine. To the second marriage several children were born among whom was C who while domiciled in Maine died intestate leaving an estate consisting of personal property only. One of the illegitimate children and the surviving children of the other marriage claimed distributive shares of C's estate under a Maine statute giving an illegitimate child adopted into the family of the father the right to inherit "the same as if legitimate." The fact of adoption had no legal significance in Nova Scotia, therefore the children remained illegitimate. *Held,* the statute being purely one of descent the claimants were entitled to participate in the distribution of C's estate. *In re Crowell's Estate* (Maine, 1924) 126 Atl. 178.

Legitimation is a matter affecting personal status and thus jurisdiction to legitimate will depend upon the domiciliary law of the place where such status or condition had its origin. *Smith v. Kelly,* 23 Miss. 167. Inheritance on the other hand is controlled by the law of the domicile of the deceased in case of personal property, *Holmes v. Adams,* 110 Me. 167; in case of realty by the law of the situs. *Moen v. Moen,* 16 S. D. 210. The prerequisites for legitimation and for inheritance are separate and distinct. *Van Horn v. Van Horn,* 107 Ia. 247. As it was said in the principal case, "Legitimation is not a prerequisite to inheriting, and inheritance does not legitimize." For a more complete discussion of the subject see 22 MICH. L. REV. 637.

CONSTITUTIONAL LAW—DISCRIMINATORY CLASSIFICATION.—A statute regulating primary elections provided that all qualified voters who are bona fide members of the Democratic party shall be eligible to participate in any Democratic party primary election, but in no event shall a negro be eligible to participate in any Democratic party primary. *Held,* that this statute is constitutional, as a proper exercise of the police powers of the state. *Chandler v. Neff* (D. C. Tex. 1924) 298 Fed. 515.

Because of the public importance of securing proper party nominations, laws regulating party primary elections and instituting official state-controlled primaries are universally held to be within the police powers. *State v. Felton,* 77 Ohio St. 554; *Ladd v. Holmes,* 40 Ore. 167. But laws must not be discriminatory, and are subject to the requirements of the Fourteenth Amendment that they shall not deprive persons of the equal protection of the laws,

and of state constitutions to the effect that all general laws shall be uniform in operation. *Britton v. Election Commissioners,* 129 Cal. 337; *State v. Moore,* 104 N. C. 714. While it is true that the principle of equal protection does not prevent the states from distinguishing, selecting and classifying objects of legislation within a wide range of discretion, still the classification must be based upon some reasonable ground, some difference which bears a just and proper relation to the classification and not a mere arbitrary selection. CONST. OF U. S., ANNOT., Senate ed., 1923; and cases there cited; *State v. Schlitz Brewing Co.* 104 Tenn. 715. Primary laws expressed to apply only to parties having polled ten percent, three percent, or other fraction of the votes polled at the last previous election have been upheld, the test of numerical strength of the party being a reasonable and proper basis for classification. *Katz v. Fitzgerald,* 152 Cal. 433; *State v. Michel,* 121 La. 374. The provision in the instant case, however, does not fall within the rule as it protects (?) only "the Democratic party" without regard to its size or strength and makes no provision for any change in case the Republicans should gain the ascendancy. The discrimination against negroes was justified by the court in the principal case on the basis of decisions holding that the legislature may require "any reasonable test of party affiliation" as a qualification upon the right to vote at primaries. 2 MINN. L. REV. 97, 108. These tests generally take the form of an expression of intention to support the party candidates in the ensuing election or of past support of, or affiliation with, the party, MERRIAM, PRIMARY ELECTIONS, their purpose being to prevent voters from raiding the primaries of a party to which they do not belong. It seems obvious, however, that the color of one's skin is no more a test of political affiliation or belief than, the color of one's hair. It is submitted, therefore, that the discrimination against negroes was arbitrary and capricious, and hence rendered the statute invalid. For other grounds of unconstitutionality, see NOTE AND COMMENT, *supra,* p. 279.

CONSTITUTIONAL LAW—NATIONAL BANKS—QUO WARRANTO BY STATE FOR VIOLATION OF STATE LAW.—The First National Bank in St. Louis established a branch bank some distance from its main banking house. The state of Missouri on the information of its Attorney-General brought quo warranto against the bank, contending it had violated the state law expressly forbidding all banks to establish branches and was not authorized by the national banking act to establish one. The state court gave judgment of ouster and on appeal *held,* the maintenance of branch banks was neither expressly nor impliedly authorized by the national banking act and quo warranto by the state was a proper means of testing its authority. *First National Bank in St. Louis v. State of Missouri* (U. S. 1924) 44 Sup. Ct. Rep. 213.

There seems to be little doubt that the court's construction of the national banking act was sound. National bank charters are strictly construed, so as to create only those powers granted expressly or by necessary implication. *Logan County Bank v. Townsend,* 139 U. S. 67; *First National Bank v. National Exchange Bank,* 92 U. S. 122; *California Bank v. Kennedy,* 167 U. S.

362. The court split on the second point, three dissenting justices relying on dicta that reach back to *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 429, to the effect that "the sovereignty of the state extends to everything which exists by its own authority or is introduced by its permission," not to "those means which are employed by Congress to carry into execution powers conferred on that body by the Constitution of the United States." The majority relied on decisions under the "due process" clause making the state's determination of its rules of procedure, evidence, and trial conclusive if they give notice and a hearing. *Iowa Central Railroad v. Iowa*, 160 U. S. 389; *Louisville and Nashville Railway Co. v. Schmidt*, 177 U. S. 230; *Rogers v. Peck*, 199 U. S. 425, 435; *Twining v. New Jersey*, 211 U. S. 78, 111. And *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, declared that the state's decision as to its jurisdiction in quo warranto against a foreign corporation was final. It is clear from the cases that national banks are instrumentalities of the federal government and that state laws conflicting with express provisions or frustrating the purpose of the national legislation are void. *Farmers' National Bank v. Dearing*, 91 U. S. 29; *Davis v. Elmira Savings Bank*, 161 U. S. 275; *Easton v. Iowa*, 188 U. S. 220; *First National Bank v. California*, 262 U. S. 366. It is almost equally clear that up to that point state law will control their activities. *National Bank v. Commonwealth*, 9 Wall. (U. S.) 353; *Waite v. Dowley*, 94 U. S. 527; *McClellan v. Chipman*, 164 U. S. 347. Federal officers in general are not subject to the jurisdiction of state courts in respect of their official conduct. *Ableman v. Booth*, 21 How. (U. S.) 506 (habeas corpus against United States marshal to secure release of prisoner); *Tarble's case*, 13 Wall. (U. S.) 397 (habeas corpus against army officer to secure release of soldier claimed to be under age); *McCluny v. Silliman*, 6 Wheat. (U. S.) 598 (mandamus against register of United States land office); *Nebraska Territory v. Lockwood*, 3 Wall. (U. S.) 236 (quo warranto to test authority of federal territorial judge); *Dobbins v. Erie County*, 16 Pet. (U. S.) 435 (taxation of federal officer's salary); *Tennessee v. Davis*, 100 U. S. 257 (prosecution for homicide committed in course of duty); *Easton v. Iowa*, 188 U. S. 220 (prosecution of national bank officer for receiving deposits after bank's insolvency); *State v. Curtis*, 35 Conn. 374 (quo warranto to try right to office of director in national bank). In *First National Bank v. Commonwealth*, 143 Ky. 816, both federal and state laws limited the holding of real estate by national banks to a period of five years, and a suit by the state to secure the escheat of land held for a longer period was sustained on the ground that "when the five years expires the protection extended by Congress ends and then these banks hold lands, not under the act of Congress, but subject to the laws of the state." The precise point discussed in the principal case appeared in *First National Bank v. Fellows*, 244 U. S. 416, where the Federal Reserve Board Act, authorizing permits to national banks to act as executors and trustees "where not in contravention of state or local law," was held unconstitutional in quo warranto proceedings brought by the state of Michigan. The majority relied on the reference in the act to "state of local law" as authority to the state to sue, but Justice Van Devanter, dissenting in the

principal case, dissented there also, contending that "the right to institute such proceedings is inherently in the government of the nation" and that the clause quoted could "do no more than permit such a proceeding to determine whether the privilege was in contravention of the state law." If quo warranto by information be viewed in its historical aspect, as a quasi-criminal proceeding brought to vindicate the state's authority against one purporting to act under its sanction, there would seem to be much in his contention. HIGH, EXTRAORDINARY LEGAL REMEDIES, 3d ed. 592, 600, 603. The principal case may be an echo from the battle fought a century ago in *McCulloch v. Maryland* but not to be concluded so long as sound policy supports the independence and authority of state governments.

CORPORATIONS—WAIVER OF LIABILITY OF STOCKHOLDERS.—The constitution of Ohio of 1851 provided for double liability of stockholders for corporate debts. The Southern Ohio Traction Co., an Ohio corporation, issued mortgage bonds which provided for a waiver of such liability as a condition to the contract. After insolvency of the corporation, the bondholders sued to enforce the liability imposed upon the stockholders by the constitution. *Held*, a corporation may at the time of creating corporate obligations stipulate for a waiver of such liability as a condition to the contract and if fairly made and supported by a valid consideration, the stipulation is enforceable and not contrary to sound public policy. *Marfield v. Cincinnati D. & T. Traction Co.* (Ohio 1924) 144 N. E. 689.

It is a well settled principle that a corporate creditor may by express contract, when the debt is incurred, waive his right to collect from the stockholders debts which the corporation fails to pay. 1 COOK ON CORPORATIONS, 8th ed. sec. 216. 4 THOMPSON ON CORPORATIONS, ed. 2, sec. 4764. While the United States Supreme Court has not passed directly upon this question, this proposition was upheld by the circuit court of appeals for the second circuit in *Babbitt v. Read*, 236 Fed. 42, and an application for a writ of certiorari was denied by the Supreme Court. See 243 U. S. 648. State courts of last resort have held to the same effect. *Grady v. Graham*, 64 Wash. 436; *Basshor v. Forbes* 36 Md. 154; *Kohn v. Sacramento Electric etc. Co.* 168 Cal. 1; *Bush v. Robinson*, 95 Ky. 402. Clearly any legislation or attempt by corporate resolution to abrogate the double liability would contravene the state constitution, but a provision for a waiver in a contract based upon a supporting consideration may well present a different situation. A right arising out of legislation or even out of a constitutional provision when the public morals, health, safety, or welfare is not directly concerned may be voluntarily waived. It is difficult to see wherein the public is affected by the allowance or disallowance of such a waiver where the creditor voluntarily agrees thereto at the time the indebtedness is incurred and receives valuable consideration therefor. On the other hand there is considerable merit in holding a constitutional provision to be mandatory as a rule of policy and not subject to waiver. It is noteworthy that this double liability provision was abolished by an amendment to the constitution of Ohio in 1903 and such action may have influenced the court

to hold that this stipulation was not against public policy. However no direct authority by a court of last resort has been found to the effect that ordinary statutes fixing stockholders' liability may not be waived by express contract. As to a similar problem in connection with liability of partnerships and unincorporated associations see LINDLEY'S LAW OF PARTNERSHIP, ed. 8, p. 244, WRIGHTINGTON ON UNINCORPORATED ASSOCIATIONS, sec. 31.

COVENANTS OF TITLE—INCUMBRANCES—PUBLIC HIGHWAYS.—P had paid twenty thousand dollars for an option to purchase a strip of land from D, who agreed to deliver a deed, with full covenants of title to the property. P had the land surveyed and discovered that a public highway 80 feet in width had been laid out over it. P then demanded a return of the money paid for the option. On refusal, he brought this bill in equity to recover the money, alleging that the land was valuable only for residential lots and that the highway was an incumbrance within the covenants. *Held,* for P; a public highway is an incumbrance on land valuable only for city lots, though the contrary rule exists as to rural land. *Meacham v. Burgiss,* (1924) 1 Fed. (2nd) 47.

There is a sharp conflict of authority on the broad question whether a public road over land, deeded with full covenants, is a breach of the covenant against incumbrances. It is clear that the existence of a private road is a breach. *Young v. Gower,* 88 Ill. App. 70. The earlier decisions are fairly uniform, holding, that a public road is an easement which precludes exclusive enjoyment by the vendee, and decreases the market value of the land, and, as such, is within the covenant. *Kellogg v. Ingersoll,* 2 Mass. 97; *Burk v. Hill,* 48 Ind. 52; *Herrick v. Moore,* 19 Me. 313. Knowledge of the right of way in the vendee is immaterial. *Hubbard v. Norton,* 10 Conn. 422. Many of these cases involve town lots, but the courts use the same broad language in these situations, as in the cases where rural land is involved. These decisions are based upon technical rules of law, "dry law", as expressed in *Butler v. Gale,* 27 Vt. 739, which does not always arrive at an equitable result. A strong line of contrary authorities has been developed, probably in the spirit of the suggestion of the Vermont court, to the effect that a public highway over rural land is not an incumbrance. *Desvergers v. Willis,* 56 Ga. 515; *Harrison v. The Des Moines & Ft. Dodge Ry. Co.* 91 Ia. 114; *Sandum v. Johnson,* 122 Minn. 368. The reasons given are many and various: (a) A public highway should not be within the covenant because such a rule would cause endless litigation, *Desvergers v. Willis, supra;* (b) The vendee is presumed to have knowledge of the existence of the highway and it is not within the contemplation of the parties that it shall be considered an incumbrance, *Harrison v. The Des Moines & Ft. Dodge Ry. Co. supra;* (c) The easement may arise from the right of eminent domain and is without the control of the vendor, *Ake v. Mason,* 101 Pa. 17; (d) An easement fundamentally is depreciative of value, while a public road is actually appreciative, and should not come under the same rule, *Killen v. Funk,* 83 Neb. 622; *et cetera.* Thompson states that these cases assert the prevailing view, 4 THOMPSON ON REAL PROPERTY, 1924 ed. sec. 3512. These decisions are couched in general terms

and do not indicate that there is a different rule applicable to the situation involving city lots, as is pointed out in the principal case. But, that the effect of a public highway over the land in the two situations is different, is apparent. In the one, the road consumes only a negligible percentage of the total acreage; in the other, a substantial part. In the one, the use of the land may not be interfered with by the existence of the road; in the other, it probably will make the land valueless for other uses. Certainly it is clear that in the latter situation the practical result of a right of way over the land probably will be to depreciate greatly the value of the land, and possibly utterly to destroy it. Because the general rule applicable to rural land is based on practical considerations, it seems only reasonable that if the practical considerations point to an opposite rule in regard to city lots, such rule should be established. Tiffany in his work on REAL PROPERTY, sec. 452, suggests such a distinction, but the cases he cites give little, if any, support to his statement. However, a lucid statement is made in the dicta in *Sandum v. Johnson, supra.* The court in ruling that a public road through rural land is an incumbrance, explicitly states that the decision is not in conflict with *Smith v. Mellen,* 116 Minn. 198, which holds that a public street over a city lot is within the covenant. The court states that the situations are distinct, and (in accord with the principal case) that different rules are properly applicable to them.

CRIMES—CONVICTION FOR SIMPLE ASSAULT UNDER AN INDICTMENT FOR ASSAULT WITH INTENT TO RAPE.—Under an indictment for assault with intent to rape, defendant was convicted of assault and battery and fined $100.00. The indictment contained no allegation that a battery was actually committed. On appeal *held,* that there could be no conviction for a battery unless the indictment contained allegations to that effect; but that if defendant was guilty of assault and battery he was necessarily guilty of simple assault, as the lesser offense was embraced in the greater, and that since the fine imposed was possible for simple assault, defendant was not prejudiced. *Crank v. State,* (Ark. 1924) 264 S. W. 936.

At common law all assaults of whatever kind were misdemeanors only, although circumstances of aggravation could be taken into account by the court in affixing punishment. *Cornelison v. Commonwealth,* 84 Ky. 583; 1 MCCLAIN ON CRIMINAL LAW, p. 227. By statute, generally, assaults with intent to commit a felony are made punishable to a greater degree than a simple assault. *Commonwealth v. Barlow,* 4 Mass. 439; 2 WHARTON ON CRIMINAL LAW, ed. 11, p. 1051. To sustain such a conviction it is of course necessary to prove a particular intent, since that is the essence of the offense. *Ogletree v. State,* 28 Ala. 693. Many of the statutes contain provisions by which, on charges of assault with intent to commit the various felonies, there may be a conviction of the included offenses. *State v. Gummell,* 22 Minn. 51; Minn. Rev. Laws, sec. 5371; *State v. Melton,* 102 Mo. 683; Rev. Laws of Mo., sec. 3693. But even where there is no such statutory provision, it is well settled that an indictment for a higher offense will sustain a conviction of a lower one included in the higher, "provided the allegations thereof name every material

fact necessary to constitute the offense of which the defendant has been found guilty". *Jones v. State,* 100 Ark. 195. It is not important whether the greater offense charged is a statutory or common law offense. *Chacon v. Territory,* 7 N. M. 241. Thus, an indictment for assault with intent to murder will warrant a conviction of simple assault, *Knight v. State,* 70 Ind. 375; of assault with intent to commit murder in the second degree, *State v. Williams,* 23 Foster (N. H.) 321; of assault with intent to commit manslaughter, *Jerrell v. State,* 58 Ind. 293; or an assault with intent to kill, *State v. Nichols,* 8 Conn. 496. So an indictment for assault with intent to rape includes an aggravated assault or a simple assault depending on the circumstances, *Curry v. State,* 4 Texas Ap. 574, although it would not necessarily include a battery unless violence were alleged. *State v. Fontenette,* 38 La. Ann. 61. But in view of the general principle that the accused can only be convicted of an offense charged, there can be no conviction, as for an included offense, of an offense some element of which is not covered by the higher crime. *State v. Ackles,* 8 Wash. 462. Thus under an indictment for assault with intent to murder there cannot be a conviction for assault and battery (unless, of course, the indictment alleges a battery). *Sweeden v. State,* 19 Ark. 205. *Contra,* however, is *Johnson v. State,* 17 Tex. 516. The instant case has therefore followed the established rule in this particular. Of course, under an indictment for assault with intent to commit a crime, defendant cannot be found guilty of the crime itself. *Manigault v. State,* 53 Ga. 113.

CRIMES—PROCEDURE—URGING JURY TO AGREE.—After having deliberated many hours, the jury returned and reported that they had not been able to agree. In a supplemental instruction the court told them it was highly desirable to agree if possible. *Held,* reversible error because too coercive on the minority. *Stewart v. U. S.* 300 Fed. 769.

The general rule is that if the instruction on a fair and reasonable interpretation had or was calculated to have the effect of coercing the jury into rendering a compromise verdict, the judgment must be reversed, but the trial judge is vested with a wide latitude of discretion. *Shaffman v. U. S.* 289 Fed. 370; *People v. Engle,* 118 Mich. 287. Just how much discretion the trial judge is allowed is not entirely clear, but it seems that the great majority of decisions both in federal and state courts are opposed to the ruling in the principal case and allow the trial judge to go a good deal further in urging agreement than was allowed in the principal case. *Suslak v. U. S.* 213 Fed. 913; *Bernal v. U. S.* 241 Fed. 339; *Ammerman v. U. S.* 262 Fed. 124; *People v. Becker,* 215 N. Y. 126; *Bandy v. Ohio,* 13 Ohio App. 461, affirmed in 102 Ohio St. 384; see also an annotation to *People v. Strzempkowski,* 211 Mich. 266, in 10 A. L. R. 420. The point so decided in the principal case was not at all necessary to the decision, there being other grounds upon which to grant a new trial, and the court might well have held the instruction proper. While it is always true that a slight thing may turn the balance against the accused, *Burton v. U. S.* 196 U. S. 307, it should appear plainly to the court that the charge given had a tendency to make the jurors feel they must yield their convictions and agree

with the majority. *Allen v. U. S.* 17 Sup. Ct. 154. See also note in 16 L. R. A. 643.

EQUITY—INJUNCTION AGAINST TRESPASS—TRIAL OF TITLE.—D, at a tax sale, bought land through which P had been granted a right of way to convey oil in a pipe line, which was laid under the surface of the ground. D took possession and demanded $150,000 for continuation of the right to use the easement. On P's refusal to pay, D dug down to the pipe line and threatened to cut it, and threatened to shoot anyone offering interference. P brought a bill in equity for an injunction. *Held,* P was entitled to a temporary injunction against interference with its right of way, and at final hearing, upon a trial of the title by the Chancellor, to a perpetual injunction. *Tide-Water Pipe Co. Lt. v. Bell,* (Pa. 1924) 124 Atl. 351.

It is now generally recognized that equity has jurisdiction to grant a temporary injunction against trespass where the legal title is in dispute. CLARK ON EQUITY, §193. Threat of irreparable injury, where damages at law will be an inadequate remedy, gives jurisdiction. 4 POMEROY'S EQUITY JURISPRUDENCE, ed. 3, §1357. And particularly where there is gross misconduct on the part of D, as in the principal case. Where D takes the law in his own hands and threatens the public peace, equity in a suit against trespass will grant a preliminary injunction regardless of the property rights. *Cooke v. Boynton,* 135 Pa. 102. Having, then, given temporary relief will equity go further and give complete relief? There is a strong tendency toward equities establishing legal titles to real property in certain classes of cases. *Douglas Co. v. Tenn. Lumber Mnfg. Co.* 118 Fed. 438; *Steinman v. Vicars,* 99 Va. 595; *City of Peoria v. Johnston,* 56 Ill. 45; *Miller v. Lynch,* 149 Pa. 460. It will not sustain a bill which is merely a substitute for an action in ejectment, *Kavanaugh v. Rabior,* 215 Mich. 231, but where it has gained jurisdiction on equitable grounds the Chancellor will round out complete justice by establishing the legal title. 21 C. J. 146; *Cullman Prop. Co. v. Hitt Lumber Co.* 201 Ala. 150; *Cumbee v. Ritter,* 123 Va. 448. The principal case indicates that the wrongdoing of D is sufficient to give it jurisdiction to determine the property rights. But it also finds that P is in possession. He is, then, precluded from bringing his action in ejectment; and the situation offers the strongest grounds for the Chancellor's trying the legal title. *O'Brien v. Murphy,* 189 Mass. 353; *The Va. Coal and Iron Co. v. Kelly,* 93 Va. 332; *Carberry v. W. Va. & P. R. Co.* 44 W. Va. 260. Although the court relied in part upon the failure of D to challenge the jurisdiction of the court, by demurrer or answer, and upon the circumstance that the title depended upon a pure question of law, on undisputed facts, the opinion indicates a departure from the earlier rulings.

EVIDENCE—INSANITY—BURDEN OF PROOF.—In a prosecution for murder an instruction to the jury to acquit if they were not convinced that the accused was mentally responsible at the time of the alleged crime was *held,* erroneous in that it placed the burden of proving sanity on the state. *White v. State* (Ala. 1924) 101 So. 312.

The case is in accord with *Rice v. State,* 204 Ala. 104. Both of the cases

are decided under an Alabama code provision to the effect that the defense has the burden of proving insanity to the reasonable satisfaction of the jury. *Ala. Code,* 1907, sec. 7175. This code provision states the more generally accepted doctrine that the defense must prove insanity by a preponderance of evidence. *State v. Quigley,* 26 R. I. 263; *State v. Lawrence,* 57 Me. 574. This view also finds support in the House of Lords' decision in *McNaghten's Case,* 10 Cl. & Fin. 200. The theory is that although the prosecution must prove all ingredients of the crime, as to sanity this burden never attaches; the plea of insanity being at least in the nature of an affirmative defense must be proved by him who asserts it. *State v. Lawrence, supra.* The contrary doctrine however is the orthodox view and is to the effect that although there is a presumption of sanity, as soon as this issue is raised by evidence to the contrary, the prosecution then has the burden of proving sanity and criminal intent the same as with any other element of the crime. This view is held by the United States Supreme Court. *Davis v. United States,* 160 U. S. 469. The theory of this doctrine is that from beginning to end the defendant is entitled to invoke the presumption of innocence throughout the trial until it is proven beyond a reasonable doubt, not only that he committed the act alleged, but that he did so with the criminal intent. *People v. Garbutt,* 17 Mich. 9. There are slight modifications of both of these doctrines and there is some authority for the extreme view that the accused must prove insanity *beyond a reasonable doubt. State v. Paulk,* 18 S. C. 514; *State v. Spencer,* 21 N. J. L. 196; *State v. Pratt,* 1 Houst. Cr. Cas. (Del.) 249. But there are few if any modern decisions supporting this view. On the other hand there are a few scattered rulings to the effect that although the state has the burden of proving sanity, it need do so only by a preponderance of evidence, rather than beyond a reasonable doubt. *People v. Koerner,* 154 N. Y. 355; *People v. Nino,* 149 N. Y. 317. But this view finds no support in the more recent decisions. For an exhaustive collection of authorities see 36 L. R. A. 721 (note). See also 11 HARV. L. REV. 62; 13 *id.* 59; 18 *id.* 312; 25 *id.* 387; and 20 MICH. L. REV. 672. It would seem that the orthodox view that sanity must be proved beyond a reasonable doubt is the sounder view from the standpoint of logic, but that the majority view is shown to be more suitable by judicial experience. Professor Jones was of the opinion that the tendency of the courts was to adopt the orthodox view. 2 JONES ON EVIDENCE, sec. 188. But on the other hand Professor Wigmore suggests that the view that the accused runs the risk of non-persuasion as to his insanity is being adopted by an increasing number of courts. 5 WIGMORE ON EVIDENCE, 2d. ed., sec. 2501. Both doctrines find numerous supporting decisions among the more recent cases. The following decisions of the last few years support the view that the prosecution must prove the sanity of the accused when the issue is raised; *People v. Ahrling,* 279 Ill. 70; *Thomson v. State,* 78 Fla. 400; *Shannon v. State* (Neb. 1924) 196 N. W. 635; *Walters v. State,* 183 Ind. 178; *Territory v. McNabb,* 16 N. M. 625; *State v. Speyer,* 207 Mo. 540; *Flanders v. State,* 24 Wyo. 81; *State v. Warner,* 91 Vt. 391. The following recent cases hold that the accused has the burden of proving by a preponderance of evidence that he was mentally irre-

sponsible at the time of committing the alleged act; *State v. Terry,* 173 N. C. 761; *Commonwealth v. Dale,* 264 Pa. 362; *Craven v. State,* 93 Tex. Cr. Rep. 328; *Rehfeld v. State,* 102 Ohio. St. 431; *State v. Cooper,* 195 Iowa 259; *Commonwealth v. Myma,* 278 Pa. 505; *State v. Ehlers* (N. J. L. 1922) 119 Atl. 15; *State v. Fenik* (R. I. 1923) 121 Atl. 218; *State v. Craig,* 52 Wash. 66; *State v. Nelson,* 36 Nev. 403.

EVIDENCE—PERMITTING JURY TO TASTE OR SMELL LIQUOR.—In a prosecution for conspiracy to violate the prohibition law, the trial court ordered the attendant to pour some of the liquor into a glass and let the jury smell of it. *Held,* that permitting liquor to be passed around for the jury to smell was error, being improper and an abuse of discretion. *Jianole v. United States* (1924) 299 Fed. 496.

This case is in accord with the decision and reasoning of *Gallaghan v. U. S.,* 299 Fed. 172, decided by the same court two days previous. In that case it was held that the order of the trial judge permitting the jurors to smell and taste the liquor offered in evidence was improper because it would prove prejudicial rather than helpful and because, "it is not in keeping with an orderly and dignified administration of justice." In the instant case the basis for the decision was, that, "it was not comportable with the dignity of the court and the orderly conduct of a trial, or necessary, to have whisky poured out and passed around for the jury to taste". On first blush *Miller v. U. S.,* 300 Fed. 529, decided two months later, might seem inconsistent with this holding. But in that case no objection was made by the defense at the time, and as the evidence to its identity as alcohol and whisky was considered by the court as undisputed, the submission to the jurors did no harm and so was not a reversible error. The court passed the point without discussion as to the propriety of submitting the liquor to the jury, but the language of the opinion indicates that the court considers it improper. Aside from being supported by the federal courts, the doctrine of this case is applied in Kansas. *State v. Lindgrove,* 1 Kan. App. 51; *State v. Coggins,* 10 Kan. App. 455. In *Commonwealth v. Brelsford,* 161 Mass. 61, it was held that it was improper for the jurors to *taste* the liquor, the court saying, "There are grave reasons against giving the jury liquor to drink for the purpose of determining whether or not it is intoxicating". It has also been held improper for the jury to take the liquor into the jury room. *Wadsworth v. Dunnam,* 117 Ala. 661. The instant case however is contrary to most of the cases in point. The recent case of *State v. Dascenzo* (N. M. 1924) 226 Pac. 1099, is directly opposed; the basis of the decision being that it is entirely proper for the jurors to bring the sense of smell into play along with the sense of hearing and seeing in order to arrive at the proper conclusion as to the facts. The court said, "To deny the juror the right to look upon it, to smell it, * * * results in closing their eyes against the acquisition of truth". In *Reed v. Territory,* 1 Okl. Cr. R. 481, the court points out that jurors have but three methods of receiving the evidence; inspection, documents, and oral testimony, and that it is a common practice for the jurors to exercise the power of inspection through the sense of sight and

sense of hearing, as well as the sense of touch, and that there is no valid reason why they should not exercise it through the sense of smell. See also *Thompson v. State,* 72 Tex. Cr. R. 6; *Enyart v. People,* 70 Colo. 362. In the following cases it was held proper, not only for the jury to smell the liquor, but also to taste it. *State v. Simmons,* 183 N. C. 684; *Troutner v. Commonwealth,* 135 Va. 750; *People v. Kinney,* 124 Mich. 486; *Schulenberg v. State,* 79 Neb. 65; *State v. Baker,* 67 Wash. 595. In *State v. Foell,* 37 Idaho 722, it was held that the jury could take the liquor offered in evidence to the jury room and make such examinations and tests as were proper. But this was under a statute, the court doubting the wisdom of taking intoxicating liquors to the jury room. It would seem that the weight of logic as well as numbers is with the view opposed to the instant case. Such evidence is referred to by Wigmore as "Autoptic" evidence, and is said to be always proper unless specific reasons of policy prevent. 2 WIGMORE ON EVIDENCE, 2nd. ed., sec. 1150-1160. There seems to be no serious reason or policy for denying such examination by the jurors. Indeed, as Denison, J., remarked in the case *Enyart v. People, supra*: "In general it (autoptic evidence) is allowed and is usually the most reliable evidence."

EVIDENCE—PRESUMPTION AS TO A FOREIGN LAW.—The Pennsylvania probate court distributed one-third of the proceeds of the sale of certain real estate of the testator, situated in New York, to the testator's widow absolutely, she having elected to take against the will. The heirs claimed that by the law of New York the widow should have been given the one-third for life only. *Held,* if that was the law of New York, it should have been proved as a fact; since it was not so proved, the court would assume that the law of New York is the same as that of Pennsylvania, and in Pennsylvania the widow gets an absolute estate. *In re Baughman's Estate* (Pa. 1924) 126 Atl. 58.

It is the general rule that the law of a foreign state must be proved as a fact, since, in the absence of statute, the courts do not judicially know it. 5 WIGMORE ON EVIDENCE, ed. 2, sec. 2536. In the absence of such proof, however, the court will, within certain limits, presume that the foreign rule is the same as that of the forum. *Id.* Upon the question as to when a court will make such a presumption, the authorities are in hopeless conflict. See 5 WIGMORE ON EVIDENCE, ed. 2, sec. 2536 *et seq;* 10 R. C. L. p. 890-6. See also 19 HARV. L. REV. 401, in which Mr. Kales undertakes to classify the different authorities under three general rules, basing his statements upon the practical effect of the cases, rather than the principles set forth by them. In the principal case, the Pennsylvania court evidently assumed that the statute of New York relating to dower was the same as that of Pennsylvania, an assumption which, as Mr. Kales says (19 HARV. L. REV. 412), cannot rest upon "any particularly rational inference from the facts of which the court takes judicial notice". It would seem more logical for the Pennsylvania court to rest its decision upon the rule that the law of forum will be applied in the absence of evidence as to the foreign law, as Mr. Kales suggests. *Id.* p. 410. For other

recent cases upon this subject, see 6 MICH. L. REV. 175; 8 *id* 50 (note); 21 *id.* 223; 22 *id.* 267, 375, 734, 841.

EVIDENCE—PRESUMPTION FROM DELIVERY OF MONEY BY WIFE TO HUSBAND.—P delivered to D, her husband, money which he placed in a bank in his own name. Marital difficulties having occurred, P sued to recover the money on the theory that it was a loan. Evidence was offered to establish a loan while D offered evidence tending to show a gift. *Held,* since the money received was not a part of the wife's income but constituted the corpus of the wife's whole estate, the transaction would be presumed a loan and that the husband had the burden of proving a gift. *Colangelo v. Colangelo* (R. I. 1924) 125 Atl. 285.

The pecuniary transactions between members of a family are sometimes made the subject of presumptions based upon probable intent and motive, but it can hardly be said that these rules are uniform or are universally recognized. Where a wife delivers a part of her separate estate to her husband and no evidence exists indicative of her intent, or the evidence is conflicting, many courts will presume the transaction a loan and place the burden of proving a gift on the party so asserting. *McKay v. McKay,* 184 Cal. 742; *Harter v. Holman,* 152 Wis. 463. Other courts under the same circumstances will presume a gift. *Clarke v. Patterson,* 158 Mass. 388. A presumption is founded on probable intent and motive. The reason for the rule of the instant case is ably stated by Gavin, J., in *Parrett v. Palmer,* 8 Ind. App. 356, where he says: "The trust and confidence ordinarily reposed by the wife in her husband—her natural reliance and dependence on him for the management of her business—the fact that as a rule he is possessed of general business experience while the experience of the wife is limited—all these considerations sustain us in the conclusion that when the wife voluntarily delivers her money to the husband the law presumes that he takes it as trustee for her and not as a gift, even though there be no express promise to repay". At common law obviously a wife could not make such a gift, as her personality vested in her husband on marriage. While such gifts are permissible now in equity or by modern statute, they will be carefully scrutinized to make certain that there was no fraud present either in procuration or in purpose. This attitude has resulted in a general rule that "he who alleges a gift has the burden of proving the same", in these pecuniary transactions between husband and wife. See 28 C. J. 670. Some statutes provide that a gift from wife to husband will not be presumed. *Frank v. McEachin,* 148 Ga. 858. Speaking generally, this case announces a presumption which represents probable intent and motive in the average case where a wife delivers her separate property to her husband.

EVIDENCE—RES GESTAE—SPONTANEOUS STATEMENTS.—Action on an insurance policy. Deceased started home, about one block away, and about 30 minutes later arrived home suffering severe pain from a broken leg. He made a statement to his sister immediately after getting home as to the cause of the injury. *Held,* admissible as *res gestae* to prove death was from violent ex-

ternal means. *International Travelers' Ass'n v. Griffing* (Texas 1924) 264 S. W. 263.

The modern tendency is to allow "spontaneous statements" as proof of the truth of the fact contained in them, on the theory that, although clearly hearsay, they are made while the declarant is so excited as to exclude the presumption of premeditation or design. 3 WIGMORE ON EVIDENCE, 2d. ed., §1745, 1747; *Mitchum v. Georgia,* 11 Ga. 615; *Christopherson v. Chicago, M. & St. P. R. Co.* 135 Iowa 409. Much confusion in the cases is due to a failure to distinguish between "spontaneous statements" and the so-called "verbal act", the courts speaking broadly of both as *res gestae.* For example see *Vicksburg & Meridian R. v. O'Brien,* 119 U. S. 99, and *Williams v. Southern Pacific Company,* 133 Cal. 550. The one is hearsay, the other not, and of course different limitations on their admissibility result. The "verbal act" must be contemporaneous with the occurrence of which it is a part, but since the "spontaneous declaration" receives its credibility from the fact that the declarant's reflective processes are arrested, it should escape the ban of the Hearsay Rule whether actually contemporaneous or not. In one case the declarant had lain unconscious for eight days and his declaration made immediately upon regaining consciousness was admitted, the court saying that there had been no opportunity for reflection or deliberation. *Britton v. Washington W. P. Co.* 59 Wash. 440. The question as to whether the statement is "spontaneous" is of necessity largely within the discretion of the trial judge. *Nevada v. Ah Loi,* 5 Nev. 99. For an excellent analysis see 31 YALE L. JR. 229. See also 5 MICH. L. REV. 211; 19 MICH. L. REV. 442; and 20 MICH. L. REV. 797. For an extended annotation see 42 L. R. A. (N. S.) 917.

GIFTS CAUSA MORTIS—EFFECT OF REDELIVERY TO DONOR FOR SAFE CUSTODY.—During his last sickness a donor handed a sealed envelope containing money to his niece and her husband with whom the donor lived. The niece secured permission to put this in the donor's strong box for safety against fire. This box was kept under the donor's bed and the key hung on the wall in his room. *Held,* that this was an effective gift causa mortis. *In re Hawkins,* [1924] 2 Ch. 47.

The difficulty of arriving at a decision in this case is not in determining the rules for a gift causa mortis but in applying these rules to the specific facts. It is well settled that a gift causa mortis is a voluntary executed transfer, intended as a gift of a present interest in personal property, to any amount, accompanied by delivery and acceptance, made by an owner having testamentary capacity, in peril of death, and because of such peril. ROOD ON WILLS, sec. 15. There must be an actual unequivocal and complete delivery of the property in the lifetime of the donor, wholly divesting him of the possession and control of the property. *Daniel v. Smith,* 75 Cal. 548; 14 AM. & ENG. ENCY. ed. 2, 1058, and cases there cited. The delivery must be such that, in conjunction with the donative intent, it completely strips the owner of his dominion of the thing given. *Cook v. Lum,* 55 N. J. L. 373. Neither a previous and continued possession nor an after acquired possession is sufficient to take the

place of delivery. *Cutting v. Gilman,* 41 N. H. 147. Strict delivery is required to distinguish a gift causa mortis from a legacy. *Drew v. Hagerty,* 81 Me. 231. There must also be a continuous possession by the donee until the death of the donor, and the donor must have parted with all dominion and control over the corpus of the gift. *Dunbar v. Dunbar,* 80 Me. 152; 14 AM. & ENG. ENCY. ed. 2, 1061; 99 A. S. R. 895. The difficulty in the present case is in the determination of the continuity of the donee's possession. The result must depend on the interpretation of the word possession. In the principal case the court says that the possession to the donee may continue though he returns the gift to the donor as bailee, for the donor takes no control over the gift by his possession as bailee. This holding enlarges the scope of gifts causa mortis and is therefore open to criticism, for sound policy requires that the law regulating gifts causa mortis should not be extended and that the range of such gifts should not be enlarged, *Ridden v. Thrall,* 125 N. Y. 572, because in gifts causa mortis there are strong temptations for fraud, and the courts might better cause a few of them to fail than to encourage fraud by lax interpretation and enforcement of their rules. *Parker v. Copland,* 70 N. J. E. 685. The principal case seems to be the furthest step which should be taken to enforce gifts causa mortis, and it should only be followed upon strict proof that the apparent restoration of the donor's dominion was not an integral part of the donative transaction, concurred in as such by the deceased party to it. *Parker v. Copland, supra.*

INSURANCE—AUTOMOBILES—MEANING OF "COLLISION" IN INSURANCE CONTRACTS.—An accident policy insured against "accidental collisions with objects, moving or stationary." *Held,* plaintiff was entitled to recover for damages sustained when his car overturned on the pavement while rounding a corner. *Great American Mutual Indemnity Co. v. Jones* (Ohio 1924) 144 N. E. 596.

The construction of the word "collision" has resulted in great uncertainty as to the scope of insurance contracts covering automobile accidents. The courts seem to be in hopeless conflict on the question and any attempt to distinguish the cases seems futile. The leading case supporting the doctrine that a mere "upset" or "overturning" is not within the reasonable construction of the contract is *Bell v. American Ins. Co.,* 173 Wis. 533. See 22 MICH. L. REV. 487. In that case, the car overturned when the ground gave way beneath it and striking against the surface was not construed as a collision. This might be reconciled upon its facts with many of the decisions allowing a recovery were it not for the fact that it is cited with approval and followed in other contrary cases involving situations very similar to those in the principal case. *Moblad v. Western Indemnity Co.* 53 Cal. App. 683; *Stuht v. United States Fidelity and Guaranty Co.* 89 Wash. 93. In *London Guarantee & Accident Co. v. Sowards,* [1923] 2 D. L. R. 495; the supreme court of Canada sustained the trial court and reversed the appellate court by a divided opinion holding that the mere change in the point of contact with the pavement from the wheels of the car to its side was not sufficient to show a col-

lision within the reasonable and intended meaning of the contract. But in *Interstate Casualty Co. v. Stewart,* 208 Ala. 377, running against an embankment was held to be a collision. And in *Rouse v. St. Paul Fire & Marine Ins. Co.* 203 Mo. App. 603, a recovery was allowed when the car rolled off the road and against an embankment on the other side of the ditch. It is difficult to see any real distinction between striking the pavement in one case and an embankment in the other. From this discussion of the cases, it appears that no definite standard of interpretation and construction has been adopted. Because of the uncertainty involved, many of the insurance companies have drawn their policies expressly excluding "upsets" and "contacts with roadbeds or pavements" as a basis for recovery. *Harris v. American Casualty Co.* 83 N. J. L. 641; *Stuht v. United States Fidelity and Guaranty Co. supra; Hardenbergh v. Employers' Liability Assurance Corp.* 141 N. Y. S. 502; *Lepman v. Employers' Liability Assurance Corp* 170 Ill. App. 379. In the principal case, some minor exemptions were expressed but no reference was made to "upsets" etc. and in adopting a liberal view of insurance contracts in general, the court held that the company had expressly included all the cases in which it intended to assert non-liability. This construction seems reasonable and is in accord with general contract rules which provide that a contract should be construed against the party drawing it when there is any room for doubt and uncertainty. VANCE, INSURANCE, p. 565; 2 WILLISTON ON CONTRACTS, sec. 621.

INSURANCE—EFFECT OF REPRESENTATIONS KNOWN BY APPLICANT AND AGENT TO BE FALSE.—Applicant for life insurance made material false statements as to his health. The agent to whom he made them knew them to be false, but it was *held,* that the knowledge of the agent did not preclude the defense of false representations. *Priest v. Kansas City Life Ins. Co.* (Kan. 1924) 227 Pac. 538.

The decision of the principal case is founded on the idea that it would be unjust for the insurer to be thus made the victim of collusion between its representatives and the applicant. Insurance companies are not exempt from the general rule, that knowledge acquired by agents in the performance of their duties is the knowledge of the principal. *Globe Mutual Life Ins. Assn. v. Ahern,* 191 Ill. 167; 107 Am. St. Rep. 106; Ann Cas. 1913 A 849, note *Qui facit per alium, facit per se,* applies in all its ancient vigor to insurers. *Rissler v. American Central Ins. Co.* 150 Mo. 366. A medical examiner employed by insurer merely to write down answers to questions, with no authority to pass upon the risk, is not such an agent, whose knowledge will be imputed to the company. *Caruthers v. Kansas Mutual Life Ins. Co.* 108 Fed. 487; *Hancock Mutual Life Ins. Co. v. Houpt,* 113 Fed. 572; *Foot v. Aetna Life Ins. Co.* 61 N. Y. 571. See *Franklin Life Ins. Co. v. Galligan,* 71 Ark. 295, *contra.* Where the insured has acted in entire good faith in answering interrogatories, and the agent, either carelessly or wrongfully, reports another state of facts, upon which the company issues a policy, the negligent or wrongful act of the agent is binding upon the principal. *Kansas Protective Union v. Gardner,* 41 Kans. 397; *Marston v. Kennebec Ins. Co.* 89 Me. 266; *Meadowcraft v. Standard Fire*

Ins. Co., 61 Pa. St. 91; 1 BACON ON LIFE AND ACCIDENT INSURANCE, ed. 4, sec. 179. The instant case is in accord with the almost unanimous weight of authority, in holding that the insurer is not estopped to set up the falsity of statements made in the application, if the insured were a party to the deception. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; see 14 L. R. A. (N. S.) 279. *Guardian Mutual Life Ins. v. Hogan*, 80 Ill. 35, *contra*. Where applicant wilfully makes false statements, and the agent knows of their falsity, there is apparent, although there may not be actual, collusion. 1 JOYCE, INSURANCE, sec. 492. Direct evidence of collusion between the applicant and agent is not necessary to avoid the policy. *Triple Link Assn. v. Williams*, 121 Ala. 138. One *particeps criminis* should not be permitted to profit by his own wrongful act. *Eilenberger v. Protective Mutual Fire Ins. Co.*, 89 Pa. St. 464. See 14 MICH. L. REV. 347. The principal case is sound both in principle and in policy. The rule which imputes the agent's knowledge to the principal is invoked to protect those who exercise good faith, not as a shield for fraud. *Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519.

INSURANCE—LIMITATIONS ON AGENT'S POWER TO WAIVE CONDITIONS.—The policy of insurance contained a clause that it should become void, if the interest of the insured became other than unconditional and sole ownership; and that the agent should not have the power to waive any of the conditions of the policy, save by so recording on the policy in writing. The insured, after giving a mortgage on the property covered by the insurance, informed the agent of it, and requested that he record the mortgage on the policy which had remained in the possession of the agent. In an action by the insured, on the policy, it appeared that the agent had failed to record the change in plaintiff's title; which, as the insurer claimed, was a defense to the action. *Held*, that the clause against waiver by an agent was binding on the insured; but that the insurer was estopped from relying on that provision of the policy. *Corporation of Royal Exch. Assur. of London v. Franklin* (Ga. 1924) 124 S. E. 172.

The decision of the principal case recognizes that there is a diversity of opinion in the effect to be given such a provision of the policy. The view there taken, that it was of full force and binding on the insured, is supported largely by the argument that it guards against the uncertainties of parol evidence which would be present, were we to allow proof that the very terms of the policy were without effect. *Kyte v. Commercial Union Assur. Co.* 144 Mass. 43; *Northern Assur. Co. v. Grand View Building Association*, 183 U. S. 308; *New York Lumber Underwriters v. Rife*, 237 U. S. 605. But the view more commonly taken favors the insured, that a clause refusing the agent the power to waive a policy provision save in the manner provided, is itself but a mere condition and as such may be waived and dispensed with by the company, the same as any other term of the policy. *Security Mutual Life Ins. Co. v. Riley*, 157 Ala. 553; *Allen v. Phoenix Ins. Co.* 14 Ida. 728; *Phenix Ins. Co. v. Grove*, 215 Ill. 299; *Wilson v. Commercial Union Assur. Co.* 51 S. C. 540; *Mattingly v. Springfield Fire and Marine Ins. Co.* 120 Ky. 768. How-

ever, both lines of cases reach the same final result when the facts are as in the principal case. Regardless of whether or not the agent can waive a limitation on his authority, he is the agent and representative of the company; and as such, the company will be estopped, if the insured is misled by the agent's failure to perform such acts as would constitute a waiver under the contract, from asserting such clause of the policy. *Rockford Ins. Co. v. Travelstead,* 29 Ill. App. 654; *Eagle Fire Ins. Co. v. Lewallen,* 56 Fla. 246; *Parsons v. Knoxville Fire Ins. Co.* 132 Mo. 583; *Morrison v. Ins. Co. of North America,* 69 Tex. 353; *Virginia Fire and Marine Ins. Co. v. Richmond Mica Co.* 102 Va. 429; *Peoples Fire Ins. Co. v. Goyne,* 79 Ark. 315; *Welch v. Philadelphia Fire Association,* 120 Wis. 456.

INTERNATIONAL LAW—COUNTER-CLAIM AGAINST A SOVEREIGN—HOW CLAIM TO IMMUNITY MUST BE MADE.—A foreign corporation brought suit and the defendant counterclaimed. In the replication the plaintiff alleged that it was an agency of the King of Sweden and objected to the counterclaim as an invasion of the immunity of a sovereign. *Held,* that when the party before the court is neither the sovereign nor his ambassador, the claim of immunity will not be recognized unless made by diplomatic intervention. *Kungley Jarnvagsstyrelsen v. Dexter and Carpenter,* 300 Fed. 891.

The immunity of a sovereign from suit except by consent is an accepted principle of international law. The methods of claiming the immunity will naturally vary in the different countries as there could hardly be any universal rule of procedure. In the United States the sovereign may claim immunity; first, by direct intervention as a suitor; second, by the intervention of his ambassador or minister; third, by action through diplomatic channels eventuating in the Attorney General filing a suggestion with the court. *Ex Parte Muir,* 254 U. S. 522. A consul without special authority from his government is incompetent to intervene. *The Anne,* 3 Wheaton 435. Story, J. in the case cited, even questioned the power of an ambassador to intervene. A consul general is also incompetent to intervene. *The Sao Vicente,* 260 U. S. 151. A master of a ship owned by a foreign government engaged in ordinary commerce cannot claim immunity. *The Gul Djemal,* 264 U. S. 90. In *The Pesaro,* 255 U. S. 216, it was held that the filing of a suggestion by an ambassador was insufficient. The court said, "The terms and form of the suggestion show that the ambassador did not intend thereby to put himself or the Italian government in the attitude of a suitor * * *. He called it a 'suggestion' and we think it was nothing more". The courts say that it is contrary to our established policy to allow such procedure though it might be argued that there is no substantial difference between an appearance as a suitor and a filing of a suggestion that immunity be given. In both cases an objection is made to the court taking jurisdiction. The courts take cognizance of suggestions filed by the Attorney General objecting to the exercise of jurisdiction over property belonging to foreign states because such decisions might involve war. *United States v. Lee,* 106 U. S. 196, 209. The same reason would apply to suggestions filed by the ambassador. In the present case it would seem that the court

was undoubtedly correct in not allowing the corporation to make the claim of immunity, as the sovereign might subsequently repudiate the agency. In such a case, the giving of immunity would be obviously unfair to the defendant. Requiring that the claim of immunity be made through diplomatic channels, when the suitor is neither a sovereign nor an ambassador, recognizes fully the right of immunity, and at the same time creates a reasonable safeguard for private suitors.

INTOXICATING LIQUOR—KNOWLEDGE AS ELEMENT OF POSSESSION.—In a prosecution for violation of a statute forbidding the possession of more than a stated amount of liquor, the defendant contended that he had no knowledge of the presence of the liquor in his home. In the appeal from the conviction the court *held,* that it was proper to submit the question of whether the defendant had possession to the jury and that the evidence justified the finding that he did have possession. *State v. Shockley* (Del. 1924) 126 Atl. 181.

The court did not commit itself on the question as to whether knowledge is necessary to possession. It evaded the issue by allowing the jury to determine whether there was possession by the defendant and apparently gave the jury no instructions as to what was necessary to make out possession. The question here presented is not what constitutes possession in the abstract but rather whether the legislature, in enacting the statute involved, could have eliminated the element of knowledge. Mr. Justice Harlan has said, "The power of the legislature to declare an offense and to exclude the elements of knowledge and due diligence from an inquiry as to its commission cannot, we think, be questioned." *C. B. & Q. Ry. Co. v. U. S.* 220 U. S. 559. In such repressive measures as the pure food laws, the many liquor laws and others of the same nature, the element of knowledge has been dispensed with on the grounds of expediency. *Com. v. Farren,* 9 Allen (Mass.) 489; *People v. Kibler,* 106 N. Y. 321. The courts say that the state would find it difficult to refute such a defense if it were allowed, or they say that by its rejection more effectual enforcement of such police regulations would follow. *Com. v. Farren, supra; People v. Kibler, supra.* "A crime however is not a mere event. It consists in the opposition of the individual will to the will of the state, having perceptible causal connection with a given event." Alonzo H. Tuttle, "Due Process and Punishment," 20 MICH. L. REV. 643. A good many courts are unwilling to go as far as Justice Harlan. The Ohio supreme court has held a statute unconstitutional because it eliminated knowledge from the crime of having stolen goods in one's possession. *Kilbourne v. State,* 84 O. S. 247. The Mississippi court in a liquor case held an instruction that the defendant should be acquitted unless it was shown beyond a reasonable doubt that the liquor was in his conscious possession, to be correct. *City of Jackson v. Gordon,* 119 Miss. 325. The Iowa courts have held that while laws dispensing with knowledge and intent might be validly enacted, this was true only in a limited way. *State v. O'Neil,* 147 Ia. 513. The supreme court of Washington in *State v. Arrigoni,* 119 Wash. 358, says that the presence of liquor in the defendant's house raises a presumption of possession by the de-

fendant but that he may rebut it by showing that he had no knowledge of its presence. In a Georgia case, delivery of liquor to the defendant's place of business in his absence and against his orders was held to not be a violation of a law forbidding the keeping of liquor at one's place of business. *Johnson v. State,* 13 Ga. App. 654. The general statement that the legislature may do away with the element of intent and attach punishment to what remains, the act; MAY, CRIMINAL LAW, ed. 3, sec. 53; *People v. Werner,* 174 N. Y. 132; *Shevlin-Carpenter Co. v. Minn.* 218 U. S. 57; may be accepted, but it is submitted that no definition of a crime can cover the case where punishment is attached to an act of which the defendant had no knowledge and with which he was in no way connected save that it took place on his property. It would seem that due process would entitle him to object to the visitation of punishment upon him for an occurrence toward which any will of his own had no causal connection.

LANDLORD AND TENANT—FAILURE OF SUB-LESSOR TO DISCLOSE THE HEAD-LEASE.—Seeing a "To Rent" sign on a well-situated premises, the sub-lessee entered into negotiations and finally rented them for the express purpose of operating a bakery. By a clause in the lease the sub-lessee was restricted from using the premises for manufacturing purposes, or for any business likely to be objectionable or annoying to the neighboring owners and occupants. This clause was similar to the clause in the head-lease. The sub-lessee was not informed that the lessee was not the owner of the premises until after he had entered into possession and started his bakery business. Having been enjoined from operating the bakery at suit of the owner, the sub-lessee sued the sub-lessor in deceit for failure to disclose the ownership of the property before the lease was executed. *Held,* that the lessee was not bound to disclose the ownership of the property to the sub-lessee and there was no cause of action for deceit for failure to make such disclosure. *Maguet v. Frantz* (W. Va. 1924) 124 S. E. 117.

It is quite generally held that a lessee is liable to a sub-lessee for any fraud perpetrated on the sub-lessee with respect to the lease. *Calvert v. Hobbs,* 107 Mo. App. 7. Such fraud does not have to be an actual misrepresentation, but may be an act designed to make the other party act without knowledge, such as suppression of facts or failure to disclose such facts. *Traber v. Hicks,* 131 Mo. 180; *Rothmiller v. Stein,* 143 N. Y. 581. Acts of the latter sort will support an action of deceit only if the failure to state the facts is equivalent to a fraudulent concealment and amounts to a fraud equally with an affirmative falsehood. *Farrar v. Churchill,* 135 U. S. 609; 12 R. C. L. 306. An exception to this general statement is made where there is a duty of disclosure arising from the close fiduciary relationship of the parties, CLARK, TORTS, p. 87, but where the parties deal at arm's length, the courts permit one party consciously to take advantage of the ignorance of the other provided no words or acts of the former contributed to the mistake, 3 WILLISTON, CONTRACTS, §1497; *Doyle v. Union Pacific Ry. Co.* 147 U. S. 413. It has been suggested with reference to these silence cases that the damaged

party must use ordinary diligence in trying to discover all the relevant facts. *Kohl v. Lindley,* 39 Ill. 195. Even though diligent, a sub-lessee is bound nevertheless by restrictions in the chain of title above him and stands in the position of one having notice. *Hartford Deposit Co. v. Rosenthal,* 192 Ill. App. 211. This holds whether the head-lease is recorded or not. *Stees v. Kranz,* 32 Minn. 313. The silence of the lessee in the instant case in connection with his permission to carry on a manufacturing business in spite of the restrictive covenant, a power possessed usually by the owner alone, comes close to an affirmative representation of ownership. On the other hand, the mere neglect to state an apparently obvious fact, with no fraudulent intent, would hardly justify an action in deceit, especially when the sub-lessee was not diligent in searching the title, or in making inquiries of the lessee.

REMEDIES—MANDAMUS TO COMPEL PLACING MATTER ON BALLOT.—Mandamus proceedings were brought to compel the secretary of state to place a proposed amendment to the state constitution on the ballot. *Held,* that the court had no alternative other than to issue the writ and that the question of whether the proposed amendment was unconstitutional could not be considered before its adoption. *Hamilton v. DeLand,* 227 Mich. 111.

The proposed amendment was designed to compel attendance at public schools, of all children below a certain age. The secretary of state and the dissenting judges contended that since it would destroy the parochial schools by preventing children from attending them, it would be a violation of the due process clause of the fourteenth amendment to the federal Constitution and should not be placed on the ballot for that reason. The dissenting opinion then concludes that the court may refuse the writ of mandamus because it would not accomplish anything in the end. Such an amendment could only be sustained as an exercise of the police power of the state. It has been held repeatedly that in order that a statute may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil, or tend toward the preservation of the public health, safety, morals or general welfare. *Lawton v. Steele,* 152 U. S. 133; *Holden v. Hardy,* 169 U. S. 366. Only such activities or such use of property as may produce injurious consequences or infringe lawful rights of others can be prohibited without violation of the constitutional provisions against depriving one of property without due process of law. *State ex rel Lachtman v. Houghton,* 134 Minn. 226. In *Society of Sisters of the Holy Names etc. v. Pierce,* 296 Fed. 937, a case involving a statute similar in nature to the amendment in the principal case, the court said, "Compulsory education being the paramount policy of the state, can it be said with reason and justice that the right and privilege of parochial and private schools to teach in the common school grades is inimical or detrimental to, or destructive of, that policy? . . . No one has advanced the argument that teaching by these schools is harmful or that their existence with the privilege of teaching in the grammar grades is a menace, or of vicious potency, to the state or com-

munity at large, and there appears no plausible or sound reason why they should be eliminated from taking part in the primary education of the youth." It is difficult to see how this amendment could be sustained as a proper exercise of the police power. While counsel did not advance the proposition that such a law would also violate the liberty of the parent to send his child to whatever school he wished, it would seem that a strong case might be built on that alone. But granting that it would be unconstitutional, could the court properly refuse to mandamus the secretary of state, in the principal case? It is said that this extraordinary writ is discretionary, but with the qualification that where a person holds a clear legal right under the laws of the state with no remedy to enforce it, the court cannot refuse the writ, for the law and the right are imperative upon it. *Moody v. Fleming,* 4 Ga. 115; *Ill. Cent. R. Co. v. People,* 143 Ill. 434. The duty of the secretary of state was simply to determine whether the requirements for submission had been complied with. Such an officer cannot determine the constitutionality of proposed amendments. *Scott v. Secretary of State,* 202 Mich. 629. A mandamus in a case where the duty of a public officer is absolute and specific is no more a matter of discretion than any other remedy. *Auditor General v. County Treasurer,* 73 Mich. 28, 32. If the requirements for submission had been complied with the secretary of state was in duty bound to place it on the ballot. The plaintiff having a clear legal right that could only be protected by mandamus, the court was bound to issue the writ. In *Scott v. Secretary of State, supra,* the court held that neither the court nor the secretary of state had the power to prevent an amendment being presented to the people. In *Hamilton v. Secretary of State,* 212 Mich. 38, the court said, "To exercise the power of judicial veto against the constitutionality of an amendment before its adoption or a law before its enactment finds no justification in necessity and is an unwarranted assumption by the courts of the power reserved to the people in the constitution or conferred by it on the legislature." It would seem then, that the decision is sound. The question of the constitutionality of the amendment can have nothing to do with the issuance of the writ of mandamus, nor can the court pass upon the question of constitutionality prior to its adoption.

STATUTE OF FRAUDS—LEASE CONTINGENTLY PERFORMABLE WITHIN ONE YEAR.—D orally to lease land from P at a certain sum per month until such time as the land should be sold. D paid rent monthly for six months when he was given notice to vacate. He refused to do so whereupon an action was brought to evict him. P claimed that the lease was invalid on the ground that it was for a term exceeding one year, and was therefore unenforcible because of Comp. Laws 1915, sec. 11975, which provides that no estate or interest in lands, other than leases for a term not exceeding one year, shall hereafter be created except by operation of law or by a proper written instrument. *Held,* that the lease was good for the period of one year as it might be performed within the time allowed by the statute. *Caplis v. Monroe,* 228 Mich. 586.

This case was decided on the theory that the Michigan statute applies only to those leases which are for a longer period than one year either by their

express terms or by their very nature. This is analogous to the interpretation of that section of the statute which applies to contracts not to be performed within one year. Statutes similar to the latter section have been interpreted almost unanimously as not affecting contracts capable even contingently of being performed within a year. *Doyle v. Dixon,* 97 Mass. 208. However, there is a material difference in the language used in the two sections, and this might logically support divergent views. Very few American courts have been called upon to decide the question involved in the present case, and little harmony exists between the decided cases. The Wisconsin court, under a statute exactly similar to the one under consideration, held that a lease at a stipulated price monthly until the land should be sold was void under sec. 2302, Wis. Stats., on the ground that it must affirmatively appear that the term of the lease does not exceed one year. *Sutherland v. Drolet,* 154 Wis. 619. The court refused to draw any analogy between that section of the statute applying to realty and the section applying to contracts not to be performed within one year, for the latter section included only contracts which by their very terms could not be performed within the stipulated time. In *Hintze v. Krabbenschmidt,* (Tex. Ct. of Civ. App. 1897) 44 S. W. 38, it was held that a lease of land "until the return of the lessor" was not within the statute of frauds, as it could have been fully executed within one year. This case was decided under Tex. Stats. 3965 which says that no action shall be brought upon any transfer of an interest in land, except leases for a period not to exceed one year, unless such transfer is evidenced by an instrument in writing. The decision in the principal case is one step beyond the decision in *Drew v. Billings-Drew Co.* 132 Mich. 65, where it was decided that a parol lease for an indefinite period which had been performed within a year was valid, and it is submitted that this step is well taken. The statute of frauds is in derogation of a common law right and should be strictly construed. Furthermore where the acts of parties show that a legal effect was intended it must be presumed that they expected to accomplish something, and where their purpose is shown the courts should endeavor to carry it out. Attention is directed to that portion of the opinion which holds the lease valid only for the period of one year. It is noteworthy that *Hintze v. Krappenschmidt, supra,* takes a contrary view on this point.

TELEGRAPH COMPANIES—DAMAGES—LIABILITY FOR MENTAL SUFFERING.—A Florida statute made telegraph companies liable for damage resulting from mental anguish and suffering caused by the negligence of the company in delivering telegrams. An action was brought under this statute for such damages alleged to have been sustained when the defendant failed to deliver the following telegram: "Will be in Jacksonville and meet you all Saturday. You leave there Friday night. Have Fred secure sleeper for you all. Get ten dollars from your mother for sleeper. I will mail it back to her. Fred." *Held,* recovery must be limited to include only that mental suffering which should have been contemplated as a natural and probable result of the non-delivery as indicated by the language of the message or the actual facts known

to the company. *Western Union Telegraph Co. v. Taylor et. al.* (Fla. 1924) 100 So. 163.

At common law, no recovery for mental suffering was allowed in the absence of physical suffering or other pecuniary loss. 3 SUTHERLAND ON DAMAGES, ed. 4, § 975; 4 MICH. L. REV. 244. The first case announcing a contrary doctrine was *So Relle v. Western Union Telegraph Co.* 55 Tex. 308. See 1 MICH. L. REV. 525. Following that decision, several other cases adopted a similar view and it was thought that the Texas court had asserted a new doctrine destined to become the modern and accepted rule. 2 MICH. L. REV. 150, 642; 3 MICH. L. REV. 399; 5 HAR. L. REV. 41. However, the modern authorities have failed to bear out the prediction and the great weight of authority is still with the old common law view opposed to a recovery when only mental suffering is involved. 1 COOLEY ON TORTS, ed. 3, p. 92; *Western Union Telegraph Co. v. Chouteau,* 28 Okla. 664; ANN. CAS. 1912 D 838; 14 MICH. L. REV. 602. Nevertheless, the doctrine is firmly established in a few states and they have steadfastly followed the lead of the Texas case without the enactment of a statute. 3 MICH. L. REV. 399. Prior to the passage of the statute, Florida had adopted the prevailing view and had refused to allow any recovery for mere mental suffering. *International Ocean Telegraph Co. v. Saunders,* 32 Fla. 434. But § 4388, REV. GEN. STAT. OF FLA., 1920, changed this in language which was broad enough to cover all mental suffering resulting from the negligent act as a proximate consequence. In the instant case, however, the court limited the recovery to include only that mental suffering caused by the fact that plaintiff rode all night in a day coach. This was found to be the only result which defendant should have anticipated from the failure to deliver the telegram. Thus interpreted, the statute is held to have adopted the minority common law view which limits the recovery in such a case to those damages which should have been contemplated as a natural and probable consequence of the negligent act as indicated by the contents of the telegram or the actual notice given to the agent of the company. JONES, TELEGRAPH AND TELEPHONE COMPANIES, ed. 2, § 544; *Hildreth v. Western Union Telegraph Co.* 56 Fla. 387; *Western Union Telegraph Co. v. Howle,* 156 Ala. 331; *Postal Telegraph Cable Co. v. Terrell,* 124 Ky. 822; *Suttle v. Western Union Telegraph Co.* 148 N. C. 480; *Mentzer v. Western Union Telegraph Co.* 93 Ia. 752; *Marriott v. Western Union Telegraph Co.* 84 Neb. 443; *Western Union Telegraph Co. v. Pearce,* 82 Miss. 487. The same construction has been applied to similar statutes in Arkansas and South Carolina. *Western Union Telegraph Co. v. Hogue,* 79 Ark. 33; *Capers v. Western Union Telegraph Co.* 71 S. C. 29.

TRUSTS—WHETHER A CONVEYANCE IS PRESUMED A TRUST OR ADVANCEMENT.—The defendant's mother, Mrs. Flinn, being owner of a store and stock of goods, exchanged this property for a city lot. The lot was conveyed, not to Mrs. Flinn, but to her son, the defendant, who paid no consideration therefor. Mrs. Flinn having died, the defendant's father filed this bill to establish a trust, claiming that when the purchase price is paid by one, and the conveyance taken in the name of another, a trust is presumed in favor of the party furn-

ishing the consideration. *Held,* where land is granted to one and the consideration furnished by another, and the party furnishing the consideration stands toward the grantee in relation of parent, or *loco parentis,* a gift or advancement and not a resulting trust is presumed. This presumption is not conclusive, but the subsequent statements of the party paying the consideration are not admissible to rebut it. *McCafferty v. Flinn* (Del. 1924) 125 Atl. 675.

As a general rule, when one furnishes the purchase price of land, but takes the conveyance in the name of another, a trust results in favor of the party paying the purchase price. This rule is now well settled both in England, *Anonymous,* 2 Vent. 361; *Dyer v. Dyer,* 2 Cox. Ch. 92; *Rochefoucauld v. Boustead* [1897] 1 Ch. 196, and the United States, *Jones v. Jones,* 118 Ark. 146; *Doll v. Doll,* 96 Neb. 185; *Asam v. Asam,* 239 Pa. 295; *Straley v. Esser,* 117 Va. 135; *Amidon v. Snouffer,* 139 Iowa 159; *McKey v. Cochran,* 262 Ill. 376; see cases collected in 3 POMEROY'S EQUITY JURISPRUDENCE, ed. 4, sec. 1037, except in those states which have altered or abolished such rule by statute. See N. Y. Real Prop. Law, sec. 94; Carroll's Ky. Stats. 1922, ed. 6, sec. 2353-4; 2 Wis. Stats. 1919, sec. 2077. "This rule has its foundation in the natural presumption * * * that he who supplies the purchase money intends the purchase to be for his own benefit." *Smithsonian Institution v. Meech,* 169 U. S. 398. An exception to this general rule arises, however, where the party advancing the consideration stands in the relation of parent, or *loco parentis,* to the grantee. It is well settled that in such cases there is a presumption of gift or advancement and not of trust. *Cotton v. Citizens' Bank,* 97 Ark. 568; *Graves v. Garard,* 44 Ind. App. 712; *Adley v. Pletcher,* 55 Wash. 82. For a collection of the cases see 26 A. L. R. 1126. This presumption seems to have been based originally on the duty of the parent to support the child, *Soar v. Foster,* 4 Kay & J. 152, and hence was not applicable when the purchase money was paid by the mother during coverture, in that she was not liable for such support. *In re De Visme,* 2 De G. J. & S. 17. Such distinctions were made impossible by the Married Women's Property Acts, and with such distinctions have gone the artificial reasoning incident thereto, until today most courts recognize that, "the question (is) purely one of intention of the parent." *Graves v. Garard, supra.* The principal case is in accord with this rule, which, after all, is a rule of expediency. The question usually arises in such a manner as to be dependent on detailed circumstances with which only the parties litigant are familiar, and in respect to which the child is often at a disadvantage. This presumption is not conclusive. It only throws the burden of proof onto the parent and in this manner, it seems safe to presume, subserves the ends of justice more often than it results in harm.

WILLS—ADOPTED CHILD'S RIGHT TO TAKE UNDER DEVISE TO "CHILD OR CHILDREN."—Under a will directing the executors to hold certain property in trust for the testator's sister for life and upon her death to transfer the corpus to "such child or children as my said sister may leave her surviving," where the sister had adopted a child long before the date of the will and the child lived with its adopting mother, and was known to the testator and was spoken

of by him as the daughter of his sister and was so treated by him and the rest of the family and there was testimony to the effect that the sister to the knowledge of the testator was too old to have children it was *held*, that the adopted child took nothing at the death of her foster parent. *In re Yates' Estate* (Pa. 1924) 126 Atl. 254.

Whether or not an adopted child takes under a devise or bequest to "child or children" is a question of the intent of the testator. The question is so regarded both in cases which have held that under the particular circumstances the adopted child did not take, *Lichter v. Thiers*, 139 Wis. 481; *Middletown Trust Co. v. Gaffey*, 96 Conn. 61; and in cases which have held that the adopted child did take. *Munie v. Gruenewald*, 289 Ill. 468. Thus the words are used in a descriptive sense, their meaning being open to construction with regard to evidence of all the material circumstances surrounding the testator at the time of executing the will. The question being one of construction and intent, it is natural to suppose that the cases should present a showing of apparent conflict. This however is more apparent than real for generally the cases are distinguishable chiefly on two grounds. First, the statutes concerning adoption differ as to the status created. It is submitted, however, that the question here not being one of legal status, these differences should not in the absence of express provisions, be controlling; but should be regarded merely as of evidenciary value as helping to show the intent of the testator. The second ground for distinction is in regard to the relation of the time of adoption to the date the will was executed and on this point most of the cases are distinguishable. Where the child is adopted subsequently to the execution of the will, according to the overwhelming weight of authority the child does not take. *Schafer v. Eneu*, 54 Pa. St. 304; *Lichter v. Thiers*, 139 Wis. 481; *Will of Mitchell*. 157 Wis. 327; *Middletown Trust Co. v. Gaffey*, 96 Conn. 61; *Stout v. Cook*, 77 N. J. Eq. 153; *In re Leask*, 197 N. Y. 193; *In re Hopkins*, 89 N. Y. S. 467; *Russel v. Russel*, 84 Ala. 48; *Jenkins v. Jenkins*, 64 N. H. 407; *Puterbaugh's Estate*, 261 Pa. St. 235, 5 A. L. R. 1277; *Parker v. Carpenter*, 77 N. H. 453, the latter case being discussed in 13 MICH. L. REV. 528; *contra, Bray v. Miles*, 23 Ind. App. 432, where the child was adopted subsequently to the execution of the will, but prior to the death of the testator; *Hartwell v. Tefft*, 19 R. I. 644, where the child was adopted after the death of the testator, but the description in the devise was "lawful issue." In cases where the child was adopted prior to the execution of the will, although the cases are not so numerous, the strong tendency is to hold that the adopted child takes. *In re Truman*, 27 R. I. 209; *In re Olney*, 27 R. I. 495; *Munie v. Gruenewald*, 289 Ill. 468; *Sewall v. Roberts*, 115 Mass. 262; *contra, Woodcock's Appeal*, 103 Me. 214; *Adrian v. Koch*, 83 N. J. Eq. 484, where the testator adopted a granddaughter by blood and it appeared that he always treated her as a granddaughter. A somewhat analogous question is presented by cases involving the construction of insurance policies where there is a provision that in case the beneficiary dies before the insured, the policy shall be payable to the surviving "child or children" of the deceased beneficiary. Here the courts seem more ready to hold that the adopted child takes. *Martin v.*

Aetna Life Insurance Co. 73 Me. 25. It is submitted that a result more in harmony with the intent of the testator would have been reached had the court not considered itself bound by the case of *Shafer v. Eneu, supra,* where unlike the principal case the child was adopted subsequently to the execution of the will. The Pennsylvania legislature has expressed its disapproval by statute of the view taken in the principal case. Pa. St. 1920 § 8327. The statute was not controlling for the testator died before its provisions went into effect. It should be noted that the question of the adopted child's right to take under a will is distinct from the question arising in cases of intestacy. In the former as pointed out above the question is one of intent. In the latter case the question is, what rights does the statute give to the adopted child, for adoption being unknown to the common law all rights which an adopted child has must come from the statute applicable to the particular case. Thus the statute is controlling in cases of intestacy. *Morrison v. Sessions,* 70 Mich. 297; *Wagner v. Varner,* 50 Iowa 532; *Appeal of Woodward,* 81 Conn. 152.