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CONSTITUTIONAL LAW—TAXATION—PUBLIC PURPOSE.—Rev. St. Me. 1903, c. 4, sec. 87, authorized any municipality to establish a permanent wood, coal, and fuel yard for the purpose of selling wood, coal, and fuel to its inhabitants at cost. *Held,* not to violate the Fourteenth Amendment. *Jones* v. *City of Portland* (U. S., 1917), 38 Sup. Ct. Rep. 112.

When the act was attacked as a violation of the state constitution, the Maine court declared such an establishment to be a public purpose. *Laughlin* v. *City of Portland,* 111 Me. 486, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916 C, 734. Yet in regard to eminent domain, generating and transmitting electricity had been held not a public use. *Brown* v. *Gerald,* 100 Me. 351. *Contra, Jones* v. *N. Ga. Electric Co.,* 125 Ga. 618. The reasoning used in the *Laughlin Case, supra,* is followed now both in considering heat to be "as indispensable to the health and comfort of the people as light or water" and in seeing no ground for objection in the means used to distribute heat. The contrary view would seem to assert that the means used is of vital importance. *Opinion of the Justices,* 155 Mass. 598; *Opinion of the Justices,* 182 Mass. 605; *Opinion of the Justices,* 211 Mass. 624; *Maker* v. *Grand Rapids,* 142 Mich. 687. Decisions as to what is a public use in questions about eminent domain are involved in the same conflict. *Minn. Canal & Power Co.* v. *Koochiching Co.,* 97 Minn. 429; *Rockingham Co. Light & Power Co.* v. *Hobbs, 72* N. H. 531. It also occurs in regard to occupations affected with a public interest, a matter which has been in dispute since *Munn* v. *Illinois,* 94 U. S. 113. Each bears witness to the influence of developing public needs and a developing public opinion. 17 YALE L. J. 162. The line of development is perhaps indicated by recent decisions allowing a municipality to furnish ice and to supply natural gas for heating. *Holton* v. *Camilla,* 134 Ga. 560; *State* v. *Toledo,* 48 Ohio St. 112. Municipal theaters and moving picture theaters have not yet been allowed. *State* v. *Lynch,* 88 Ohio St. 71; 12 MICH. L. R. 132; *Egan* v. *San Francisco,* 165 Cal. 576.

CONSTITUTIONAL LAW—TRADING STAMP STATUTES.—Defendant objected to the constitutionality of a statute under which he was indicted for issuing, without license, trading stamps to merchants, to use with the sale of goods, entitling the purchaser receiving the same with such sale to procure, free of charge, premiums from a special stock selected by the defendant's company. The license fee was assumed prohibitive by the court. *Held,* constitutional both as to Federal and State Constitutions. *State* v. *Wilson* (Kan., 1917), 168 Pac. 679.

Some form of repressive legislation against trading stamps has been undertaken in a majority of the states, and the Parliament of Canada has prohibited their use. *State* v. *Wilson, supra.* In a majority of jurisdictions these statutes have been held unconstitutional. *Ex parte Drexel,* 147 Cal. 763; 2 L. R. A. (N. S.) 588; *State* v. *Sperry and H. Co.,* 94 Nebr. 785;

49 L. R. A. (N. S.) 1123; *People* v. *Sperry and H. Co.* (Mich., 1917), 164 N. W. 503. The principal ground of these decisions is that such statutes are an unjust suppression of a legitimate method of advertising, and not of a scheme involving elements of lottery. Trading stamp statutes have been upheld in *Dist. of Columbia* v. *Kraft,* 35 App. D. C., 253; 30 L. R. A. (N. S.) 957; *State* v. *Pitney,* 80 Wash. 699; overruling *Leonard* v. *Bassindale,* 46 Wash. 301; *Rast* v. *Van Deman and Lewis Co.,* 240 U. S. 342, L. R. A. 1917A 421; Ann. Cases 1917B 455; *Tanner* v. *Little Id.* 369; *Pitney* v. *Washington, Id.* 387; and *State* v. *Wilson* (*supra*). Most of the more recent decisions have upheld these statutes primarily on the contention that it was not unreasonable to say that the trading stamp business involves elements of lottery, and that it is not merely advertising. "Advertising is identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold." *Tanner* v. *Little* (*supra*). It is to be noted that there is some diversity among the statutes which may justify some of the diversity in the decisions. In *Humes* v. *City of Little Rock,* 138 Fed. 929, the court said the case of *Lansburgh* v. *District of Columbia,* 11 App. Cases 512, holding the statute there constitutional, was clearly distinguishable. "The Act of Congress governing the District prescribes what is meant by gift enterprises and its definition precisely covers the trading stamp concern. That definition is not binding here * * * Then too the court in that case lays stress on the fact that the holder of the stamps could get nothing unless he accumulated stamps representing purchases to the extent of $99, and as few did that it was held the uncertainty of ever getting anything on the stamps introduced an element of chance. No such element exists in the case at bar." In *State* v. *Ramseyer,* 73 N. H. 31, the court said in distinguishing the case before it: "The case of *Humes* v. *Fort Smith,* 93 Fed. Rep. 857, relates to a regulation, not the prohibition, of the stamp business." See also *People* v. *Sperry and H. Co.,* (*supra*). Also ordinances relating to trading stamps will more readily be held unconstitutional under the more strict construction by the courts of the terms of the grants of powers to municipalities than of the terms of the grant of powers to the legislature in the state constitution. *State* v. *Wilson, supra.*

CORPORATIONS — FOREIGN CORPORATIONS — DOING BUSINESS WITHIN THE STATE—CORPORATE FRANCHISE TAX.—The Revised Statutes of Texas, 1911, imposed a franchise tax on any foreign corporation, as a condition to its right to do business in Texas, of a given percentage of all of the corporation's capital and surplus, representing all its property wherever situated, and all of its business both intrastate and interstate, thereby placing a tax on the corporation's property beyond the jurisdiction of the state for taxation purposes. *Held,* the statute was unconstitutional because it imposed a burden on interstate commerce and because of want of due process. *Looney* v. *Crane Co.,* (1917); 38 Sup. Ct. 85.

It is within the power of the state to levy an excise tax for the privilege of permitting a foreign corporation to exercise its franchise within the state. *Maine* v. *Grand Trunk Ry.,* 142 U. S. 228. Nor is there any limitation on

the method that the legislature may adopt as a means of measuring the tax. *Home Insurance Co.* v. *New York*, 134 U. S. 594. But the tax must be taken by due process of law and must not become a burden on interstate commerce. The court in the principal case admits that the state had authority and power to lay the franchise tax and the authority to control the business within the state of the foreign corporation and the right to tax the intrastate business of such corporation carried on as a result of permission to come in. But though the state has such power it must be exercised so as not to be inconsistent with the Constitution of the United States because the power of the state legislature is not paramount but subordinate to the U. S. Constitution. The court hastily disposes of the cases cited by counsel contending that the statutes are not repugnant to the Constitution of the United States; *Baltic Mining Co.* v. *Mass.*, 231 U. S. 68; *St. Louis Southwestern Ry.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Memphis Ry.* v. *Botkin*, 240 U. S. 227, by merely saying "the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases". The court bases its decision upon the substance of the tax, the particular provisions contained therein, the subject matter and the amount. The tax must be of such a character and of such an amount as not to be a burden upon the corporation's interstate commerce. *Williams* v. *Talladega*, 226 U. S. 404. The instant case shows clearly that the state can impose a tax—by whatever name it chooses to call it—on a foreign corporation for the privilege of doing intrastate business and that such a tax can be measured by the corporation's entire wealth, be it situated wherever it may, but the amount must not be such as to burden the corporation's interstate business.

CRIMINAL LAW—SELF-INCRIMINATION—CONSTITUTIONAL PROVISIONS—EVIDENCE.—On the morning after a barn had been burned the sheriff traced footprints from the barn to a point near defendants' residence, and then compelled the defendants to walk back with him beside the trail and to remove their shoes in order that he might compare them with the footprints found. Defendants were not under arrest, and the sheriff was not acting under judicial process of any kind. *Held*, that the sheriff's testimony as to measurement and comparison of tracks thus obtained was admissible and that its introduction did not violate the constitutional provision against self-incrimination. *State* v. *Barela* (N. Mex., 1917), 168 Pac. 545.

The general rule has long been settled that the admissibility of evidence is not affected by the manner in which the evidence was obtained. 4 WIGMORE ON EVIDENCE, sec. 2183; *Rex* v. *Granatelli*, 7 St. Tr., N. S. 979; *State* v. *Fuller*, 34 Mont. 12. The constitutional provisions against unlawful searches and seizures and against compulsory self-incrimination are limitations upon this general rule. As to just what is the scope of these limitations the authorities are in confusion. The great weight of authority, however, seems to support the decision in the instant case, which places the test of admissibility upon "whether the evidence is compulsorily given by the

defendant under process as a witness". For a discussion of cases involving the guaranty against unlawful searches and seizures, see 15 MICH. L. REV. 65. The cases involving only the limitation against self-incrimination are numerous. Several involve the situation in which the defendant was forced by one not acting under judicial process to remove his shoes for the purpose of comparison with tracks, and the evidence thereby gained was held admissible. *People* v. *Van Worner,* 175 N. Y. 188; *State* v. *Fuller, supra; State* v. *Arthur,* 129 Ia. 235 (But the court assumed that the accused, in jail, voluntarily gave up his shoes to the sheriff); *Krens* v. *State,* 75 Neb. 294; *Magee* v. *State,* 92 Miss. 865 (in which the accused was compelled to put his foot in a track for the purpose of identification). *Contra*: *Day* v. *State,* 63 Ga. 667; *Evans* v. *State,* 106 Ga. 519. And if the accused takes off his shoes for inspection or does some similar act or gives testimony against himself without compulsion or threats, the evidence is doubtless admissible, since he is then deemed to have waived the benefit of the limitation. *Moss* v. *State* (Ala.), 40 So. 340; *State* v. *Taylor, 202* Mo. 1; *State* v. *Fuller, supra.* There is also some authority for the view that if the defendant is compelled by legal process to remove his shoes for the purpose of comparison, the evidence is admissible. *State* v. *Graham,* 74 N. C. 646; *Walker* v. *State,* 7 Tex. App. 245. The reason governing the prevailing view that testimony secured by such means as in the instant case is not rendered inadmissible by the provision against self-incrimination is that such testimony is the testimony of the physical facts and not that of the accused himself. *State* v. *Thompson,* 161 N. C. 238; *Holt* v. *United States,* 218 U. S. 245.

DIVORCE—EFFECT—TENANCY BY ENTIRETIES.—Complainant filed a bill for partition of real estate which had been held by himself and wife as tenants by the entireties. The defendant, the divorced wife of the complainant, contended that such a tenancy cannot be partitioned. *Held,* that a decree of divorce severs the interest of such tenants and they become tenants in common or joint tenants, according to the statutes of the state in which the land is located. *Sbarbaro* v. *Sbarbaro,* (N. J., 1917), 102 Atl. 256.

Only two authorities are cited against the rule thus promulgated namely, *In re Lewis,* 85 Mich. 340, and *Alles* v. *Lyon,* 216 Pa. St. 604, and of these the effect of the decision in Michigan has been nullified by Sec. II, 437 MICH. COMP. LAWS, 1915, providing that divorce changes a tenancy by entireties to one in common unless otherwise provided in the decree. The Pennsylvania decision still stands, unaffected by legislation, and expressly followed, as late as 1912, in *Hilt* v. *Hilt,* 50 Pa. Super. Ct. 455. The result in the principal case is attained on the theory that entirety holdings rest on the fiction of unity of person, and when this is destroyed, its incidents must of necessity fail. Additional support is adduced—*e converso*—from a statement in Coke, Litt. 187b: "If an estate be made to a man and woman and their heirs, before marriage, and after they marry, the husband and wife have moieties between them." With the exceptions noted, the instant decision is in harmony with that of courts in other jurisdictions where the same question has arisen. Though a wife pay out of her personal estate for land conveyed to

herself and spouse, a divorce merely renders them tenants in common and she has no equitable claim to the whole, *Reed* v. *Reed,* 109 Md. 690. Community property, including a homestead, was divided by divorce in *Speer* v. *Sykes,* 102 Tex. 451. If in the decree the legal interest is not provided for, the divorcees take as tenants in common, *cf. Joerger* v. *Joerger,* 193 Mo. 133. It is discretionary in the trial court to award all the property to the husband, subject to alimony, *Brogna* v. *Brogna,* 67 Wash. 687. The tendency would appear to be general to do away, in the given circumstances, not only with seisin *per tout* but also with the incident of survivorship; although, in those states where a joint tenancy has not yet fallen into disfavor, the severance may not destroy survivorship, *Ames* v. *Norman,* 36 Tenn. (4 Sneed) 683.

EVIDENCE—DYING DECLARATIONS—OPINION RULE.—In the trial on indictment for manslaughter, deceased's wife was permitted to testify for the state that deceased said, the day after the shooting, "I won't be with you much longer. I have got to leave you. Oh, Lord, what a pity for Frank McNeil to shoot a poor boy like I am for nothing! I never done anything to Frank." *Held,* error. *McNeal* v. *State,* (Miss., 1917), 76 So. 625.

An examination of the numerous decisions on dying declarations in criminal cases shows that the application of the Opinion Rule by the courts has resulted in great confusion and conflict. See note, 56 L. R. A. 365; note 21 L. R. A. (N. S.) 840. The Opinion Rule has been declared by Wigmore to have no application to dying declarations "because the Opinion Rule is based on the theory that wherever the witness can state specifically the detailed facts observed by him, the inferences to be drawn from them can equally well be drawn by the jury. But since declarant is here deceased, it is no longer possible to obtain from him by questions any more detailed data than his statement may contain, and hence his inferences are not in this instance superfluous but are indispensable. Nevertheless the courts seem to accept the Opinion Rule as applicable. 2 WIGMORE ON EVIDENCE, 1447, and note; and see note 56 L. R. A. 375. This illogical application of the Opinion Rule has been overcome in some jurisdictions by the application of the fiction that the statement sought to be admitted in evidence is not opinion, but a "collective fact". *State* v. *Fielding,* 135 Ia. 255; *Smith* v. *State,* 133 Ala. 73. On this theory, while not repudiating the Opinion Rule in name, the Supreme Court of Mississippi, previous to this case, showed a tendency to follow the doctrine stated in WIGMORE, (*supra*). The declarations in *Payne* v. *State,* 61 Miss. 161, that "he shot me without any cause whatever;" in *Powers* v. *State,* 74 Miss. 777, "you have killed me without cause;" in *Jackson* v. *State,* 94 Miss. 8', that the accused killed him for nothing; in *House* v. *State,* 94 Miss. 107, 21 L. R. A. (N. S.) 840, that H. had killed him, and killed him without cause, were all admitted. In the last case the court relied on the section of WIGMORE, and note cited, *supra.* Despite the statement of the court in the principal case that it is not overruling the above cases, it is difficult to see how a distinction can be based on anything but a barren quibble over terms. It is a return to the Opinion Rule *in toto.*

HOMESTEAD—SALE—VALIDITY OF CONTRACT—INTENT OF STATUTE.—Plaintiff contracted for the sale of the homestead of which she and her husband were joint owners, without the husband joining in the contract, but he thereafter confirmed it. The defendant refused to carry out the contract because of section 6961, GENERAL STATUTES, 1913, which provides in part as follows: —"But if the owner be married, no mortgage of the premises, nor any sale or other alienation thereof, shall be valid without the signature of both husband and wife." *Held,* the contract valid and enforcible by the plaintiff. *Lennartz* v. *Montgomery,* (Minn., 1917), 164 N. W. 899.

The defendant contended and the dissenting opinion adopted the same reasoning, that the contract was absolutely void under the statute, it being for the sale of the homestead, and the husband not having signed. The cases cited by the dissenting judges unfortunately, however, presented situations where the homestead owner was being sued so as to give validity to the contract and enable the purchaser to deprive the owner of his homestead. *Barton* v. *Drake,* 21 Minn. 299; *Law* v. *Butler,* 44 Minn. 482; *Weitzner* v. *Thingstad,* 55 Minn. 244. In those cases the courts held that under a statute the same as the one in question in the instant case, the contracts were not voidable but void. In the principal case the majority held that only the owners of the homestead were protected by the statute, and that the statute did not protect the purchaser so as to enable him to repudiate the contract.

HUSBAND AND WIFE—CONTRACTS OF MARRIED WOMAN—LAW OF PLACE OF CONTRACT.—Defendant, with her husband, entered into a contract with plaintiff. The contract was made in Oregon and was to be performed there. Later defendant separated from her husband and removed to Idaho, where plaintiff sued her on the contract made in Oregon. It was conceded that the contract was valid in Oregon, and that it would be void if made in Idaho, where a married woman's right to contract was limited to contracts for her own use or benefit or in reference to her separate estate. The controversy was over the question of whether the courts of Idaho should give effect to the law of Oregon determining the capacity of a married woman to contract. *Held,* that the contract was valid and would be enforced in Idaho. BUDGE, C. J., dissenting. *Meier & Frank Co.* v. *Bruce* (Idaho, 1917), 168 Pac. 5.

The dissenting opinion conceded the general rule that validity is determined by the application of the law of the place of the transaction, if it is a "voluntary" one, as is a contract. But it was contended that the settled public policy of Idaho should defeat the application of the rule in the case of a contract made by a married woman. In the prevailing opinion, which applies the general rule, only two cases are cited in support of the position taken by the court, and one of these, *Milliken* v. *Pratt,* 125 Mass. 374, is not in point, since there was no settled policy in Massachusetts against a married woman so contracting. The other case cited, *International Harvester Co.* v. *McAdam,* 142 Wis. 114, involved a situation similar to that of the instant case, with a similar result. Although the reasoning of the Wisconsin court (that if the court should refuse to enforce contracts such as are here involved merely because the policy of the state is otherwise, the result would

be to enforce them only when they would be valid if made in the state of the forum) would seem sound, yet most of the cases cited by the Wisconsin court fail to support the decision because no fixed policy was actually violated. *Milliken* v. *Pratt, supra; Bell* v. *Packard,* 69 Me. 105; *Bowles* v. *Field,* 78 Fed. 742; *Baum* v. *Birchall,* 150 Pa. St. 164; *Young* v. *Hart,* 101 Va. 480. Furthermore, the statement of the Wisconsin court and of the Idaho court in the instant case that the exception contended for by the dissenting opinion applies only where the enforcement of the contract would be pernicious or grossly immoral is stronger than actually necessary to the decision. On the other hand, the cases cited in the dissenting opinion are hardly in point, inasmuch as they involve the situation where the married woman is already domiciled in the state where enforcement is sought, and makes the contract while out of the state only temporarily. *Armstrong* v. *Best,* 112 N. C. 59; *First National Bank* v. *Shaw,* 109 Tenn. 237; *Brown* v. *Dalton,* 105 Ky. 669. See, too, *Union Trust Co.* v. *Grosman,* U. S. S. C. No. 106, decided Jan. 7, 1918. In the latter situation there would be good reason for refusing to enforce the contract, because of the tendency thus to avoid the law of the forum. The tendency of modern authority appears to be with the prevailing opinion. *International Harvester Co.* v. *McAdam* (1910), *supra; Barbee & Co.* v. *Bevins, Hopkins & Co.* (Court of Appeals of Ky., 1917), 195 S. W. 154 (A case in which the domicile was the state of the forum, the note in question being governed by the law of West Virginia because the decision was delivered there.); *Young* v. *Bullen* (Court of Appeals of Ky., 1897), 43 S. W. 687. But there is authority *contra*: *Hayden* v. *Stone,* 13 R. I. 106. Also, as is conceded in all of the cases cited above, the fact must never be overlooked that the enforcement of contracts made outside the forum depends wholly upon international comity.

INJUNCTION — RESTRAINING USE OF NAME AND PICTURE — CIVIL RIGHTS LAW.—Defendant film manufacturing company used plaintiff's name and picture without her consent, for display in a moving picture film (entitled "Universal Animated Weekly", and purporting to represent plaintiff as a woman lawyer who had solved a murder mystery), and on posters and placards advertising the film, which film defendant marketed and sold for profit. *Held,* plaintiff was entitled to an injunction *pendente lite,* under the Civil Rights Law (N. Y. CONSOL. LAWS, c. 6) secs. 50 & 51, prohibiting the use of the name, portrait, or picture of any living person, without his consent, for advertising or trade purposes, and giving the person, whose name, portrait, or picture is so used, an equitable action, to restrain such use, and for damages. *Humiston* v. *Universal Film Mfg. Co.* (N. Y. S. C.), 167 N. Y. Supp. 98.

Previous cases involving the interpretation of the above sections of the New York Civil Rights Law have held: that said statute is a valid and constitutional enactment, *Rhodes* v. *The Sperry & Hutchinson Co.,* 193 N. Y. 223; that "a picture is not used for 'advertising purposes' within its meaning unless the picture is part of an advertisement, while 'trade' refers to commerce or traffic, not to dissemination of information", *Jeffries* v. *N. Y. Eve. Journ. Pub. Co.,* 124 N. Y. Supp. 780; that "the right of privacy under the

statute cannot be invaded for purposes clearly informative or redemptive", *Almind* v. *Sea Beach Ry. Co.*, 141 N. Y. Supp. 842; that "it would not be within the evil sought to be remedied by that act to construe it so as to prohibit the use of the name, portrait, or picture of a living person in truthfully recounting or portraying an actual current event, as is commonly done in a single issue of a regular newspaper", *Binns* v. *Vitagraph Co.*, 210 N. Y. 51; that the statute would not be extended to prohibit the publication in the "NATIONAL POLICE GAZETTE" of the picture of a lady diver, in costume, and had never "been so far extended as to prohibit a publication, in a daily, weekly, or periodical paper or magazine, of the portrait of an individual", *Colyer* v. *Fox Pub. Co.*, 146 N. Y. Supp. 999. In the instant case, that the publication of the plaintiff's name and picture on the posters and placards of the defendant was a violation of the statute, as a use for "advertising purposes", seems clear; but, whether the use of her name and picture in the film was a violation of the statute, presents a more difficult question. The court held that such use was for "purposes of trade", that the film was used in defendant's regular business, for purposes of profit, and any dissemination of current news of the day was purely incidental; that the fact that defendant's film was a series of photographs of actual current events, produced and distributed weekly, and used as soon as possible after the occurrence of the events, did not make it a newspaper, or bring it within the protection extended to newspapers by the cases of *Colyer* v. *Fox Pub. Co., supra,* and *Jeffries* v. *N. Y. Eve. Journ. Pub. Co., supra;* that there was "a clear distinction between merely incidental and fortuitous use of an individual's picture as an incident to some important public event, and the exploitation of that individual as the important and central part of an event which is not of real public importance, however great may be the public interest therein".

INSURANCE—RISK—COLOR BLINDNESS—COMPLETE AND PERMANENT LOSS OF SIGHT OF BOTH EYES.—In an action on an insurance policy, *held,* that color blindness sustained by a railway trainman, which disqualified him from service is to be construed as the complete and permanent loss of sight of both eyes. *Routt* v. *Brotherhood of Railroad Trainmen* (Neb.), 165 N. W. 141.

The policy states that any member who shall suffer the complete and permanent loss of sight of both eyes shall be entitled to receive the full amount of his beneficiary certificate. The case involves the determination of what is a complete and permanent loss of sight. A dissenting opinion in this case by three justices stated, "To insure a person's ability to permanently continue in his particular vocation would, in a policy require words to that effect". A railway night switchman becoming color blind during his employment was held to be thereby disabled by sickness within the meaning of his employer's contract that they will pay him sick benefits for a limited time while he is disabled by sickness or accidental injury. *Kane* v. *Chicago, Burlington and Quincy Railroad Company,* 90 Neb. 112. In this case the court said, "The plaintiff for the purpose of his vocation is blind, and, being blind is sick within the meaning of the defendant regulations". Incurable blind-

ness is sickness within the meaning of the English Statute. *Regina* v. *Bucknell*, 77 E. C. L. 585. There are but few if any reported cases involving the question in this case. The holding goes pretty far and if it can be supported it must be on the grounds that the contract of insurance is construed most strongly against the insurer and that the defendant did business principally with railroad men.

INTOXICATING LIQUORS—STATUTE—CONSTRUCTION OF THE WORD "HOME."—Defendant stored two barrels of cider in an outhouse, situated at a distance of about eighty feet from the dwelling house in which there was no available space for storing the barrels. Molasses, apples, and other foods intended for the use of the family were also kept in this outhouse. Under the Mapp Prohibition Law, (ACTS, 1916, p. 216,) defendant was convicted for giving away cider taken from the barrels in the outhouse. Section 16 of the above law prohibited the giving away of ardent spirits in any place "except in a *bona fide* home"; section 61 provided that nothing in the law should prevent one "in his own home" from having and giving to another ardent spirits. The trial court refused to instruct the jury that the word "home" as used in the law was intended to include the curtilage, the whole cluster of buildings used by the family as a habitation. *Held*, the instruction should have been given. *Bare* v. *Commonwealth* (Va., 1917), 94 S. E. 168.

The construction of the statute adopted by the Supreme Court of Appeals seems in accord not only with the common understanding and acceptance of the term "home" as the place of residence rather than any particular building which may be at that spot, but also in accord with the construction of similar expressions as found in the common and statute law referring to arson, burglary and analogous crimes. For instance, in construing a statute prohibiting the carrying of weapons outside the "home", the court held that "home" included buildings necessarily appurtenant to the dwelling house. *Coker* v. *State*, 12 Ga. App. 425. An outhouse within the curtilage was considered a part of the "dwelling house" as regards the law of arson. *People* v. *Taylor*, 2 Mich. 250; *Page* v. *Commonwealth*, 26 Grat. (Va.) 943. An indictment for the burglary of a dwelling was sustained by proof of the breaking and entering of a barn eight rods in the rear of the house. *Pitcher* v. *People*, 16 Mich. 142. A game of cards played about ten feet from a tent used as private residence was played "at the residence" within the meaning of a statute prohibiting gaming at any place except at a private residence. *Hipp* v. *State*, 45 Tex. Cr. App. 200. The killing of a man in a building thirty-six feet from the accused's house was considered justified as in defense of his habitation. *Pond* v. *People*, 8 Mich. 150. See also 2 BISHOP, CRIMINAL LAW, Ed. 7, § 104.

LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS.—While the defendant was presenting a claim against the plaintiff in the regular course of business, he was shown the books of the company. He communicated the information thus obtained to a credit company of which he was correspondent along with his opinion that concerted action by the creditors was necessary. The infor-

mation, which was slightly incorrect, was sent to the plaintiff's creditors. They stopped credit, thereby causing the plaintiff inconvenience, but he was not insolvent and did not become so. *Held,* that the communication was privileged. *Simons* v. *Petersberger* (Ia., 1917), 165 N. W. 91.

The general rule was followed in considering the communication "qualifiedly privileged", thus making proof of the defendant's bad faith requisite to the plaintiff's success. *Bohlinger* v. *Germania Life Ins. Co.,* 100 Ark. 477, 36 L. R. A. (N. S.) 449. Defendant, though his communication was not an answer to an inquiry, had at least a duty of imperfect obligation in regard to the matter. *Caldwell* v. *Story,* 107 Ky. 10. The information seems, also, to have reached only interested subscribers thus avoiding cases where the information reached outsiders or was sent to all the subscribers irrespective of interest. *Pacific Packing Co.* v. *Bradstreet Co.,* 25 Idaho 596, Ann. Cas. 1916 D, 761. To reach its conclusion, the distinction between information furnished a credit company by its agent and information furnished by it to its members had to be ignored. *Sherwood* v. *Gilbert,* 2 Alb. L. J. 323. *Contra*: *State ex rel. Lanning* v. *Lonsdale,* 48 Wis. 348. Even then, the result is in conflict with several cases holding that such communications though given after a special request are not privileged. *Macintosh* v. *Dun* (1908), A. C. 390; *Johnson* v. *Bradstreet Co.,* 77 Ga. 172.

MASTER AND SERVANT — LIABILITY FOR NEGLIGENCE — HEAD OF FAMILY'S AUTOMOBILE OPERATED BY MEMBER OF FAMILY. — Defendant purchased and owned an automobile for family use, giving his wife general permission to use it whenever and wherever she desired. While the wife was driving the machine for her own pleasure, accompanied by a lady friend, it collided with a motorcycle on which the plaintiff was riding, injuring the latter. *Held,* that the defendant husband was liable for his wife's alleged negligence, on the ground that she was his agent. *Hutchins* v. *Haffner* (Colo., 1917), 167 Pac. 966. Defendant purchased and owned an automobile for family use, giving his daughter, a minor, permission to use it. While the daughter was driving the machine for her own pleasure, accompanied by a friend, it struck and injured the plaintiff. *Held,* that the defendant father was not liable for his daughter's alleged negligence, she not being his agent. *Blair* v. *Broadwater* (Va., 1917), 93 S. E. 632.

The decisions bearing upon the liability of an owner of an automobile, kept for family use, for the negligence of a member of his family, in driving the machine with his consent, are squarely in conflict, as illustrated by the principal cases. Cases following the doctrine of *Hutchins* v. *Haffner, supra,* are: *Birch* v. *Abercombie,* 74 Wash. 486; *McNeal* v. *McKain,* 33 Okla. 449; *Guignon* v. *Campbell,* 80 Wash. 543; *Griffin* v. *Russell,* 144 Ga. 275. Cases following the doctrine of *Blair* v. *Broadwater, supra,* are: *Doran* v. *Thomsen,* 76 N. J. L. 754; *Tanzer* v. *Read,* 145 N. Y. Supp. 708; *Parker* v. *Wilson,* 179 Ala. 361; *Van Blaricom* v. *Dodgson,* 220 N. Y. 111. Where one person is sought to be charged with the negligence or wrongdoing of another, the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought

to be charged, at the time of, and in respect to, the very transaction out of which the injury arose. *Forsyth* v. *Hooper,* 11 Allen (Mass.) 419; *Wood* v. *Cobb,* 13 Allen (Mass.) 58; *Wyllie* v. *Palmer,* 137 N. Y. 248 (257); WOOD, MASTER AND SERVANT, p. 10, sec. 7. No presumption of the relation of master and servant results from the mere fact of the domestic relationship. *Maddox* v. *Brown,* 71 Me. 432; *M'Calla* v. *Wood,* 2 N. J. L. 86; *Kumba* v. *Gilham,* 103 Wis. 312; SCHOULER, DOMESTIC RELATIONS, sec. 263; THOMPSON, NEGLIGENCE, sec. 537. The cases which hold the owner of an automobile liable as master argue that the machine was purchased and operated for family use; that, at the time of the accident, the driver was engaged in carrying out the general purpose for which the machine was bought and kept; that, as it was taken out at the time in pursuance of authority from the owner to take it for the pleasure of the family, and the driver, as a member of it, the driver was engaged in the exercise of the owner's business,—supplying of recreation to members of the family. Cases taking the opposite view attempt to meet this line of argument by saying that such reasoning bases the creation of the relation of master and servant upon the purpose which the owner had in mind in acquiring the ownership of the automobile, and its permitted use by the driver, ignoring an essential element in the creation of that status, as to third persons, viz.: that such use must have been in the furtherance of, and not apart from, the master's service and control; that it interdicts the owner's generosity, and his reasonable care for the pleasure, and even the well-being, of the members of his family, by imposing a universal responsibility for their acts; that it fails to distinguish between a mere permission to use, and a use subject to the control of the master and connected with his affairs. The doctrine supported by the case of *Hutchins* v. *Haffner, supra,* seems to be founded more on a desire to insure a remedy to parties injured by the negligence of drivers of automobiles, by fixing the liability on someone financially responsible, and to avoid setting a premium on the failure of the owner to employ a competent chauffeur, than upon any logical application of the privileges involved in the relationship of master and servant.

MUNICIPAL CORPORATIONS—TRAFFIC ORDINANCE.—An ordinance of the city of Cleveland provided that "in case of accident to or collision with a person * * *, the person so driving or operating such vehicle shall stop and give such reasonable assistance as can be given * * *". Appellant was arrested and charged with violation of above ordinance in that she failed to render such reasonable assistance as could be given after her automobile knocked down A. *Held,* the ordinance was invalid for indefiniteness in that it failed to use the words "knowingly" or words of similar import. Second, that it took the time and money of a citizen without substantial compensation whether he is to blame or blameless for the injury. Third, that the ordinance fixed no standard of what constitutes reasonable assistance. *Henry* v. *Cleveland* (Ohio Ct. App., 1917), 39 Oh. C. C. 165.

The protection of life and limb is a matter of public concern and there is both power and obligation to pass and enforce reasonable police provisions.

Every ordinance must be definite and certain in its terms. MACQUILLAN, MUNICIPAL ORDINANCES, Sec. 651. In the instant case the court pointed out three particular reasons why the ordinance was indefinite. In the case of the food laws and Sunday closing laws, the failure to require knowledge on the part of the offender is not a mark of uncertainty. The court, however, distinguishes those cases by pointing out that the offender has control over the subject matter and can protect himself, while in this case the court was able to conceive of a situation, which, though highly improbable, was not within his control. The second reason seems to ignore the right of the state to take a limited amount of the property of blameless individuals by an exercise of the police power. *Noble State Bank* v. *Haskell,* 219 U. S. 104. The third reason is also very doubtful when considered in the light of those cases following "the rule of reason" laid down by the court in *The Standard Oil Co.* v. *United States,* 221 U. S. 1. In a very recent case in Ohio, not referred to, the Supreme Court held that a statute is valid if it is as definite and certain on the subject matter and the numerous situations arising thereunder, as the nature of the case and safety of the public will reasonably admit. *State* v. *Schaeffer* (Ohio), 117 N. E. 220.

PUBLIC OFFICERS—STATE TREASURER—LIABILITY FOR INTEREST ON FUNDS. —Defendant, a state treasurer, deposited in banks from time to time the funds received by him as treasurer and collected the interest for himself. *Held,* such treasurer is not entitled to interest. *State* v. *Schamber* (S. Dak., 1917), 165 N. W. 241.

There is a direct conflict of authorities on this question. In almost all of the adjudicated cases, courts recognize the fundamental proposition that interest is but an increment and goes with the principal. In a number of jurisdictions the question has been made to depend upon whether the relation of the treasurer to the state was that of debtor and creditor or whether it was that of trustee and *cestui que trust.* Perhaps the leading case supporting the view that the relation is that of debtor and creditor is *State* v. *Walsen,* 17 Colo. 170, which holds that a state treasurer who has received public money by virtue of his office is not liable for interest received on that money in the absence of a statutory provision to that effect. A county treasurer receives money as his own and cannot be required to account for and pay over amounts collected or received as interest on such money. *Shelton* v. *The State,* 53 Ind. 331. A public official is not chargeable with interest on the public funds in his hands although he may have received interest, unless he is required by law to place it in some safe depository as the money of the state. *Commonwealth* v. *Goldshaw,* 92 Ky. 435. A county treasurer is a special bailee and there can be no recovery of interest received by him after he has gone out of office. *Maloy* v. *Bd. of County Commissioners, Bernalillo,* 10 N. M. 638. The weight of authority, however, supports what seems to be the better view, that the interest which attaches to the principal belongs to the state and on failure to account for this the officer or his sureties may be held liable. This rule is applied notwithstanding the fact that the officer's liability was held or assumed to be absolute. *Adams* v. *Williams,* 97 Miss.

113. The leading case on this side of the question is *State* v. *McFetridge,* 84 Wis. 473, where all the authorities are reviewed. The supporting cases hold that it is a complete *non sequitur* to say that because a public officer who has charge of public funds is an absolute insurer, he therefore is entitled to the accruing interest thereon. A county treasurer is liable to the county for interest received on deposits of county funds. His liability arises not only from his fiduciary relations but from the fact that the interest belongs to the county and comes into his hands by virtue of his office. *Richmond County Supervisors* v. *Wandel,* 6 Lans. (N. Y.) 33. Instead of being the debtor of the district, he is its treasurer; the custodian of its funds; and he acquires custody of the funds without acquiring title to them. *Eshelby* v. *Cincinnati Bd. of Education,* 66 Ohio St. 71. A public officer is not entitled to interest on funds received by virtue of his office. The true test is not whether he is absolutely liable to account but whether he is the owner of the funds in his hands. *Rhea* v. *Brewster,* 130 Ia. 729.

TAXATION—INCOME TAX—ROYALTIES OF MINES AS INCOME—DEPRECIATION. —Plaintiff corporation leased two iron mines, the lessees agreeing to pay certain specified royalties annually on the ore taken out. The Wisconsin Income Tax Law, LAWS 1911, c. 658, 1, provided that "income" as used in the act should include "all rent of real estate", and permitted a reasonable deduction for depreciation of property from which the income was derived. Under this act taxes were collected on the royalties received by the plaintiff, but no deduction was allowed for the depletion of the ore deposits. This action was brought to recover the taxes paid under protest. *Held,* that no recovery should be allowed. *Pfister Land Company* v. *Milwaukee* (Wis., 1917), 165 N. W. 23.

In holding that the value of the ore as it leaves the mine was income and not converted capital, and therefore that the royalties paid by the lessees to the owners were to be regarded as rents within the meaning of the Income Tax Law, the Wisconsin court has relied expressly upon the authority of *Von Baumbach* v. *Sargent Land Company,* 242 U. S. 503, and *State* v. *Royal Mineral Association,* 132 Minn. 232. The fundamental principle upon which these holdings are based seems to be as follows: that the land itself is the chief thing, that mining is one of the productive uses of which the land is capable, and that the product of that use should be called income. In a case recently decided in the Circuit Court of Appeals, *Biwabick Mining Company* v. *U. S.,* 243 Fed. 9, it was held that, from the lessee's standpoint, receipts from the sale of ore represented conversion of capital assets and did not constitute taxable income. This case has now been carried up for review by the Supreme Court. The position for which the appellant contended in the principal case, that the contract between the parties is not accurately speaking a lease but a sale of a part of the corpus of the property, has been approved by the English courts and has found some support in this country. *Coltness Iron Company* v. *Black,* 6 A. C. 315; *Stoughton's Appeal,* 88 Pa. 98; *Blakley* v. *Marshall,* 174 Pa. 425; *Wilson* v. *Youst,* 43 W. Va. 826. Its further contention that the extraction of the ore is an exhaustion of the

capital, and hence depreciation, is not without logical foundation in economic theory. In *Earl of Derby* v. *Aylmer* [1915], 3 K. B. 374, a somewhat analogous question was raised concerning a tax which was imposed on the income which the Earl received from the services of two stallions for breeding purposes. He claimed a deduction as depreciation for the annual loss in value of the horses, computed on the probable length of time during which they could be used for the above purposes. In rejecting the Earl's claim, the court emphasized a consideration which is of prime importance in dealing with cases arising under income tax laws—while such contentions may be sound from an accountant's point of view, courts must be governed by the intention of the legislature.

TAXATION—INHERITANCE TAX—DOWER.—The State attempted to collect inheritance tax on a dower interest allotted to a widow, upon her dissent from testator's will. A statute provided that all real and personal property which passes by will or intestate laws of the state from any person who may die seized of the same should be subject to an inheritance tax, allowing, however, exemptions in favor of a widow and children for certain amounts. *Held,* dower is property which passes by the intestate laws of the State. *Corporation Commission et al* v. *Dunn et al* (N. C., 1917), 94 S. E. 481.

The weight of authority is represented by the recent case of *In re Bullen's Estate* (Utah, 1915), 151 Pac. 533, which holds that dower passes to the widow as of her own right by purchase and not by "intestate laws". *In re Weiler's Estate,* 122 N. Y. S. 608; *In re Shield's Estate* (N. Y.) 68 Misc. 264; *Crenshaw* v. *Moore,* 124 Tenn. 528; *Commonwealths Appeal,* 34 Pa. 204. Only one case can be found which supports the theory of the principal case that dower is inherited and is subject to an inheritance tax. *Billings* v. *People,* 189 Ill. 472. In the concurring opinion it was urged that the intention of the legislature, as shown by the history of legislation on the subject and the changes made by the act in question whereby the widow was allowed an exemption, was that dower should come within the meaning of the phrase "intestate laws of the State". But the dissenting opinion maintained the view that the fact, that the widow is allowed an exemption where none was allowed before, does not show that her dower is taxable as she may derive personal property from her husband under the intestacy law as one of the distributees, and to this the exemption would apply, and not to property already made not taxable by the language of the statute.

WILLS—CONTRACT TO OPERATE ON DEATH.—An action in assumpsit was brought alleging that defendant promised plaintiff's decedent in writing to pay plaintiff $275 for the interest of decedent in the business in which decedent and defendant were engaged, in case defendant should survive, that the consideration for the promise was the agreement of decedent that defendant should have the business in that event, and that defendant took possession on the death of his partner. *Held,* no cause of action was stated; because the transaction alleged was testamentary, not contractual, and retaining possession proved nothing, because a surviving partner is entitled to do so. *Ferrara* v. *Russo* (R. I., 1917), 102 Atl. 86.

In reaching this conclusion the court relied on the cases which hold that the test to determine whether a transaction is testamentary, is whether rights are to arise on the death of the maker of the instrument or on the execution of it. Admitting that this test is sound, as no doubt it is, it is submitted that it is wholly misapplied in the instant case. True, the defendant's right and his liability to pay were to become absolute upon survivorship, an event that would happen, if at all, on the death of the plaintiff's decedent; but on the execution of the instrument he acquired a vested right to take on a future contingency, which the decedent could not defeat by revocation, a feature wholly inconsistent with a testamentary disposition, and one of the primary objects of the contract was to give the defendant this indefeasible right. A will is a disposition to take effect on the death of the disposer, not an acquisition to take effect on the death of the acquirer. Even a liability to pay to arise on the death of the obligor is not testamentary. *Eisenlohr's Est.* (Pa. Sup. Ct. 1917), 102 Atl. 115, a promise by a partner to pay on his death.