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CEMETERIES—CIVIL LIABILITIES—TORTS.—Plaintiff sued defendant corporation for malicious prosecution by its sexton and secretary. Defendant was organized for cemetery purposes, not for profit, and without capital stock. The state general code provided that such an association might acquire and hold not exceeding one hundred acres of land, and also take any gift or devise, or the income thereof, in trust, "all of which shall be exempt from execution." *Held*, one justice dissenting, under the maxim *"expressio unius, exclusio alterius"* the statute expressly excluded other property from execution. Hence defendant, though a charitable organization, was liable in a tort action. *Canton Cemetery Association* v. *Slayman* (Ohio, 1918), 121 N. E. 819.

One line of cases holds that there is no tort liability whatsoever of a charitable organization, whether the person injured be a beneficiary, an employe, or a third person. *Gable* v. *Sisters of St. Francis*, 227 Pa. 254. The basis of this is that the corporation is merely trustee of a fund for the public benefit, that since it may not divert the fund by direct acts, it should not be allowed to do so by indirect. *Fordyce* v. *Library Ass'n.*, 79 Ark. 550. These courts allow only the action against the tortfeasor himself. *Perry* v. *House of Refuge*, 63 Md. 20. That the wrongdoer may often be penniless is the misfortune of the injured party, since "the law does not undertake to provide a solvent defendant for every wrong done." *Vermillion* v. *Woman's College*, 104 S. C. 197. In distinct conflict is the view taken in *Glavin* v. *Rhode Island Hospital*, 12 R. I. 411, where the plaintiff recovered against a charitable institution for unskilful treatment. Subsequent to this decision, the Rhode Island legislature created an exemption for hospitals sustained by charity. Gen. Laws of R. I., Cap. 213, Sec. 38. See *Parks* v. *Northwestern Univ.*, 218 Ill. 381. Partial exemption obtains in other courts, which hold that the corporation is liable for the torts of its servants only where it has failed to use due care in hiring them. The basis of this view may be that the foundation of the *respondeat superior* doctrine is that the servant works for the master's benefit, and that it cannot be applied where the servant works instead for the benefit of the public. *Hearns* v. *Waterbury Hospital*, 66 Conn. 98. There is still another line of cases: that the charitable organization is liable to employees and third persons, but not to beneficiaries, on the grounds that one who avails himself of the charity assumes the risks incident thereto. *Downes* v. *Harper Hospital*, 101 Mich. 555. However correct the decision of the principal case may be as a rule of abstract justice, it is hardly logical from the course of reasoning laid down by the court. That the legislature permitted some of defendant's property to be taken on execution may have been no more than a means of satisfying judgments in contract actions. The right to sue a charitable organization in contract is well settled. *Armstrong* v. *Wesley Hospital*, 170 Ill. App. 81. A situation similar to that in the principal case arose in *Abston* v. *Waldon Academy*, 118 Tenn. 24. There the charter of the defendant corporation provided that it might sue and be sued. The

court denied recovery in tort, on the grounds that there was abundant scope for the operation of the clause in the charter without interfering with the principle that a charitable organization could not be sued in tort.

COMMON CARRIERS—APPLICATION OF HOURS OF SERVICE ACT TO EMPLOYEES OF TERMINAL CO.—Does the Hours of Service Act apply to a Terminal Company, operating a union freight station under contracts with ten railroads and several steamship companies; owning freight sheds and yards and connecting tracks, also tugs and car floats, but no cars; leasing two switching engines and employing crews, but carrying no passengers, and receiving goods only as agent of the railroads and steamship lines? *Held,* that such a company was a common carrier within the meaning of the Act, thus reversing 239 Fed. 287. *United States* v. *Brooklyn Eastern District Terminal,* (U. S. Supreme Court, March 24, 1919).

The court below held that the switching crews of defendant were clearly within the object of the Hours of Service Act, but as that act was limited to "common carriers" the point was too plain to need elaboration that it did not apply to defendant. The Supreme Court finds it too plain to call for much elaboration, that this unanimous conclusion of the Circuit Court of Appeals, First Circuit, is wrong. It does not depend on any nice distinctions of definite or corporate power, or of agency, but "whether Congress, in declaring the Hours of Service Act applicable to any common carrier or carriers, their officers, agents and employees, engaged in the transportation of passengers or property by railroad, made its prohibitions applicable to" defendant. The decision accords with the general principle that the public is not concerned with the agencies employed by a carrier to perform its duties, they are all impressed with the public nature of the carrier, and as to such public duties, the liability is joint and several. No duty or liability should be escaped by dividing the service with other agencies. In addition to the cases cited in the opinion, see such cases as, *Christenson* v. *American Express Company,* 15 Minn. 270 (Express Companies); *Robinson* v. *Southern Railroad Company,* 40 App. Cas. (D. C.) 549, Ann. Cases, 1914 C 959 (Sleeping Car Companies); *C. M. & St. P. Ry. Co.* v. *Minneapolis Civic Association,* 247 U. S. 490 (June, 1918, involving separate charges over terminal tracks).

COMMON CARRIERS—DISCRIMINATION BY GRANTING SPECIAL PRIVILEGES.—Plaintiff bought a railway ticket to a station at which his train did not stop. He brought an action for damages caused by requiring him to change cars so as to take a train stopping at his station. *Held,* that under such circumstances it was the duty of the passenger to stop off and wait for such train. Defendant company could not stop the other train at that station for plaintiff without violating the Federal Statute forbidding granting to any person any privileges in the transportation of persons or property, except such as are specified in the tariff. *May* v. *S. A. L. Ry.* (S. C. 1918), 96 S. E. 482.

The common law rule that charges must be reasonable did not require that they should be equal. *Fitchburg Ry. Co.* v. *Gage,* 12 Gray 393. If the

charge to me is reasonable I cannot complain that the charge to you was less, was the doctrine of the old cases. In *Schofield* v. *L. S. & M. S. Ry.*, 43 Ohio St. 571, the effect of this doctrine in building up the Standard Oil Company and in crushing its competitors, led the court severely to limit the doctrine. It was reviewed in *Cook* v. *C. R. I. & O. Ry.*, 81 Ia. 551, with the conclusion that carriers were not presumed to be in the business of "alms-giving". The only reasonable conclusion is that the less rate was reasonable, and the greater was too much. Judge Landis in *U. S.* v. *C. & A. Ry.*, 148 Fed. 646, took the ground that "no rate can possibly be reasonable that is higher than anybody else has to pay." Meantime statutes were taking the same direction and dealing with discriminating service as well as rates. They were not merely fixing a maximum rate, but were providing that there should be but one rate and one set of privileges for all in the same class. The main object of the acts of 1906 and 1910 was held to be to secure equality of treatment for all. *Adams Express Co.* v. *Crominger*, 226 U. S. 491. A newspaper editor must pay the same cash fare as other passengers, and cannot lawfully ride on a pass paid for by advertising. *McNeil* v. *D. & C. Ry. Co.*, 132 N. C. 510; *C. J. & L. Ry.* v. *U. S.*, 219 U. S. 486. Equally forbidden is the issue of a free pass in settlement of a claim for damages against a railroad. *L. & N. R. Co.* v. *Mattley*, 219 U. S. 467. Nor can a sheriff pay for his rides by his fees in suits in which the railroad was a party. In a recent case his removal from office was justified because he made such an arrangement. *Coco* v. *Oden* (La., 1918), 79 So. 287. An agreement to expedite a shipment is equally within the inhibition. *C. & A. Ry. Co.* v. *Kirby*, 225 U. S. 155; *Clegg* v. *St. Louis, etc. R. Co.*, 203 Fed. 971. See also previous notes, 13 MICH. L. REV. 514, 14 MICH. L. REV. 416. In a recent opinion, Mr. Justice Holmes thinks "the passion for equality sometimes leads to hollow formulas". In *Postal-Tel. Cable Co.* v. *Tonopah & Tide Water R. Co.* (U. S. Sup. Ct., Jan. 20, 1919), he finds contracts for exchange services between telegraph and railroad companies, whether on or off the line, are not within the Act of June 18, 1910, c. 309, Sec. 7, thus reversing the ruling of the Interstate Commerce Commission, and affirming, 241 Fed. 162, 249 Fed. 664.

CRIMINAL LAW—CONSTRUCTIVE INTENT—INVOLUNTARY MANSLAUGHTER.—Defendant sold to deceased "cream soda" containing 38% wood alcohol, which deceased imbibed with fatal effect. The trial court charged, in effect, that if defendant, without knowledge of its poisonous quality, put wood alcohol in the soda with intent to make an intoxicating liquor to sell in violation of the laws of the state, he was guilty of manslaughter, and of this crime the jury found him guilty. *Held*, no error, the sale of intoxicating liquor being "not only *malum in se*, but *malum prohibitum*." *State* v. *Keever*, (N. Car., 1919), 97 S. E. 727.

It is commonly held that, in order that intent to do one act may supply the criminal intent necessary for conviction of doing another and unintended act, it is essential that the act intended be wrongful in itself, not merely prohibited by law. In other words, although no question of moral culpability is involved where one intentionally does a prohibited act (*Reynolds* v. *U. S.*,

98 U. S. 145; *U. S.* v. *Harmon,* 45 Fed. 414), where such act is done unintentionally there must be moral culpability to constitute crime. *Reg.* v. *Franklin,* 15 Cox C. C. 163; *Com.* v. *Adams,* 114 Mass. 323; *State* v. *Horton,* 139 N. C. 588; *Estell* v. *State,* 51 N. J. L. 182. The distinction must rest, on the one hand, on policy opposed to the admission in normal cases of the ethical issue, and, on the other hand, to repugnance for "constructive crime." The doctrine injects into the law a very broad question of ethics, upon which reasonable men are bound to differ. The Supreme Court of Connecticut seems to have differed from that of North Carolina upon the moral aspects of the liquor traffic, for, although they held intent to sell liquor without a license supplied the necessary intent for conviction of selling adulterated liquor, they put it upon a repudiation of the *malum in se* doctrine, at least where the act intended is criminal and not merely tortious. *State* v. *Stanton,* 37 Conn. 421. Looking more closely at the principal case, it will be seen that it may be said to rest, not upon the ground that the sale of liquor is immoral, but upon the narrower ground that the sale of liquor with knowledge that such sale is prohibited—that is to say, deliberate flouting of the law—is immoral. It will also be apparent that conviction might have rested upon the principle of negligence, that one is bound to know what is a matter of common knowledge. As Justice Holmes said in a similar case, "Common experience is necessary to the man of ordinary prudence, and a man who assumes to act as the defendant did must have it at his peril." *Com.* v. *Pierce,* 138 Mass. 165. See also, *White* v. *State,* 84 Ala. 421; *State* v. *Hardie,* 47 Ia. 647.

DAMAGES—PREDISPOSITION TO DISEASE—PROXIMATE CAUSE.—Plaintiff fell as result of the defendant's negligence. The evidence tended to show that prior to the accident the plaintiff was in apparently good health but had a latent tendency to ulcer of the stomach due to excessive acidity. After the injury an ulcer developed. Defendant asked for an instruction negativing a recovery since the injury merely caused an acceleration of the ulcer and there was no evidence to show how much it was accelerated. *Held,* that the instruction was properly refused. "Where, as here, the latent disease or weakness did not cause pain, suffering, etc. to the plaintiff but such condition plus the fall caused such pain, the fall and not the latent condition is the proximate cause and the plaintiff is entitled to recover the entire damage shown to have resulted from such fall." *Hahn* v. *Delaware, L. & W. R. Co.* (N. J., 1918), 105 Atl. 459.

There is a remark in *Dulieu* v. *White* [1901], 2 K. B. 669, 679, which is very pertinent. In that case the defendant suffered a miscarriage as a result of the fright caused by the defendant's negligence. The court there said that it was immaterial that the defendant did not know her condition: "What does the fact matter? If a man is negligently run over or otherwise negligently injured in his body it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart." The situation in the principal case is precisely the same. In *Vosburg* v. *Putney,* 80 Wis.

523 the plaintiff's leg had to be amputated because of complications following the defendant's touching the plaintiff's shin. The theory of the defence was predicated on the fact that the leg had previously been in a diseased condition. But the court held the defendant liable and approved of the rule that "the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him." See also *McNamara* v. *Village of Clintonville,* 62 Wis. 207—predisposition to rheumatism making the illness more severe and prolonged; *Baltimore City Passenger Ry. Co.* v. *Kemp,* 61 Md. 74—predisposition to cancer. In the last case the court admitted that the predisposition was an intervening cause but this did not render the defendant any less liable because the "defendant must be supposed to know that it was the right of all classes of people, whether diseased or otherwise. to be carried in their cars, and it must be supposed that they knew that a personal injury inflicted upon anyone with predisposition or tendency to cancer might, and probably would, develop the disease." To the same effect is *Chicago City Ry. Co.* v. *Saxby,* 213 Ill. 274, 68 L. R. A. 164; and cases cited in note 76 to Sec. 1244 of SUTHERLAND ON DAMAGES (4th ed.). It is a related question whether such latent conditions will affect recovery under the WORKMEN'S COMPENSATION ACTS. There is less harmony among these latter cases. However, it would seem that the controlling principles are the same, as was pointed out in the note in 3 MINN. L. REV. 125. True enough, the causes are different, but it is difficult to see why they should operate differently merely because the cause in the one case is a negligent act and in the other it is the accident arising "out of and in the course of employment." Once the accident is brought within the statute the question of cause is identical. Thus, recovery was allowed in *Indianapolis Abbatoir Co.* v. *Coleman,* 117 N. E. 502; and *Lloyd* v. *Sugg* [1900], 1 Q. B. 481. See also the recent case of *Wabash Ry. Co.* v. *Industrial Commission,* 121 N. E. 569 (Feb., 1919). But the contrary was held in *Stombaugh* v. *Peerless Wire Fence Co.,* 198 Mich. 445. And compare *Van Gorder* v. *Packard Motorcar Co.,* 195 Mich. 588.

EMINENT DOMAIN—COMPENSATION—TIME OF VALUATION.—Petition in eminent domain proceedings to take part of plaintiff's land was filed by defendant in July, 1915. The trial to determine the land's value took place in October, 1917. The property had greatly enhanced in value in the interim, and plaintiff claimed the increase. *Held,* one justice dissenting, the fixed rule in Illinois gave compensation as of the time of filing the petition, no matter what the value of the land became thereafter. *City of Chicago* v. *Farwell* (Ill., 1919), 121 N. E. 795.

Owing to constitutional provision, the universal rule in eminent domain proceedings is that the property appropriated is to be paid for at its value at the time of the taking. *Sweaney* v. *U. S.,* 62 Wis. 396; II LEWIS, EMINENT DOMAIN, (3rd Ed.), Sec. 705. Where clear, the language of the condemnation statute in the particular jurisdiction is decisive as to when the taking occurs. *San José, etc. R. R. Co.* v. *Mayne,* 83 Cal. 566; *Lamborn* v. *Bell,* 18 Colo. 346. The date of filing the petition is in several states accepted as the

time of the taking. *Muncie Natural Gas Co.* v. *Allison,* 31 Ind. App. 50. Others hold it to be the date of appraisement. *Matter of Forsyth Blvd.,* 127 Mo. 417. The dissenting opinion in the principal case contends for an exception to the general Illinois rule in those cases where years elapse between the time of filing the petition and the beginning of the trial, on the grounds that the nearer we get to paying the compensation with one hand, while applying the axe with the other, the nearer we come to justice to all the parties involved. See *Parks* v. *City of Boston,* 32 Mass. 198, 208. The reverse of the question showed itself in *South Park Commissioners* v. *Dunlevy,* 91 Ill. 49, where the property depreciated in value between the time of filing the petition and the time of the trial. The representatives of the public sought to change the rule of damages, but without success.

EVIDENCE—CRIMINAL LAW—IMPEACHMENT OF DEFENDANT—OTHER CRIMES. —On cross-examination in a trial for murder the defendant, who had taken the stand in his own behalf, was asked whether he had held up another man and woman in another place of business at the point of a pistol and robbed them. The defendant's previous testimony was to the effect that he had come into the store to rob but not to kill; that he only fired at the deceased after the latter had attempted to kill him. The question was asked to impeach the defendant's credibility on this point. *Held,* that the evidence was competent since it tended to show that, instead of being a person who was seeking to avoid taking life, he was one who cared not whether, in the accomplishment of his purpose, he did or did not kill a human being. *State* v. *Werner* (La., 1919), 80 So. 596.

A defendant who takes the stand in his own behalf submits himself to impeachment just as any other witness. Though he can refuse to answer concerning other crimes by a claim of self-incrimination—*Saylor* v. *Commonwealth,* 97 Ky. 184—yet he is subject to the ordinary rules of evidence if he does not invoke that privilege. It is established that other crimes are not admissible in the trial of a particular issue although the exceptions to the rule have modified it to a considerable degree. But, whether the crimes are admissible to prove motive, identity, system or plan, it must still appear that they are connected with the present crime. *State* v. *Hale,* 156 Mo. 102; *Bain* v. *State,* 38 Tex. Cr. 635; *Rosensweig* v. *People,* 63 Barb. (N. Y.), 634. If the exception laid down by the principal case were accepted it would mean that the exception would swallow the rule so that it would vanish altogether. The theory upon which the evidence is admitted in the principal case is that the statement of the defendant is inconsistent with actual existing fact—it is an inconsistent statement and hence admissible. But is not all impeaching testimony used to disclose a state of facts contradicting the declaration of the witness? This would result in the admission of other crimes whether connected with the issue or not—so long as it could be used to impeach the credibility of the witness. To allow an exception, then, that other crimes can be used to impeach credibility amounts to making the exception the rule. But it seems that a few cases have erroneously recognized this broad exception. *People* v. *Pete,* 123 Cal. 373. See also *Jackson* v. *State,* 33 Tex. Cr. 281.

EVIDENCE—TRANSACTIONS WITH DECEASED PERSONS.—The plaintiff, claiming as assignee of a life insurance policy taken out by her late husband, was allowed to testify as to personal transactions between herself and the insured, for the purpose of proving the assignment. *Held,* that such evidence was proper. *Ward* v. *New York Life Ins. Co.* (N. Y., 1919), 122 N. E. 207.

There is some conflict of authority on the question whether such evidence comes within the terms of statutes prohibiting such testimony in actions against decedent's estates. In *Franken* v. *Order of Foresters,* 152 Mich. 502, evidence of this nature was held incompetent, although the contest was between different beneficiaries and the estate of the insured would not in any event receive the money. This case was adversely criticised in *Savage* v. *Modern Woodmen,* 84 Kan. 63, where the decision was explained as the result of "excluding witnesses who are within the reason of the statutory rule, although not within its terms, while the general practice and the practice in this state is to the contrary." In a number of cases the rule has been laid down that beneficiaries named in insurance policies are not disqualified under the statute from testifying as to transactions with the deceased. *Grand Lodge* v. *Dillard* (Tex. Cr.) 162 S. W. 1173; *Erickson* v. *Modern Woodmen,* 43 Wash. 242; *Sherret* v. *Royal Clan,* 37 Ill. App. 446; *Shuman* v. *Knights of Honor,* 110 Ia. 480; *Hamill* v. *Royal Arcanum,* 152 Pa. 537; *Macaulay* v. *National Bank,* 27 S. C. 215. But the principal case, while relying on a number of the cases here cited, goes farther than any of them, since it deals with a case of assignment by the deceased to the plaintiff. The court is evidently in sympathy with Mr. Wigmore's severe criticism of the policy of the statute. 1 WIGMORE ON EVIDENCE, Sec. 578.

HUSBAND AND WIFE—SUIT BY WIFE FOR CONSORTIUM.—Plaintiff's husband was severely and permanently injured through the negligence of Defendant. Plaintiff sues to recover for the loss of her husband's companionship and support, occasioned by the injury. *Held,* (one justice dissenting) plaintiff could not recover, even though her common law disabilities had been removed by statute. *Bernhardt* v. *Perry* (Mo., 1918), 208 S. W. 462.

For a discussion of this question as to whether the wife, emancipated by statute, is entitled to sue for the loss of consortium, see the notes in 14 MICH. L. REV. 689 and 12 MICH. L. REV. 72.

JURY—HOW FAR THE COURT MAY GO IN URGING AGREEMENT.—The jury went to the jury room to consider their verdict at 1:30 p. m. The next day at noon they reported a disagreement and asked to be discharged. The judge told them that the court could transact no business unless it could get verdicts; that they were as good a jury as could be obtained; that he appreciated their desire to get home, but the county which had stood the expense of the trial ought not to lose the benefit of it if an agreement was reasonably possible; that he would not force an agreement even if he could, but he thought a further consideration might bring them together; and he asked them to try again. This was substantially repeated at the close of the afternoon session. The next afternoon they brought in a verdict. *Held,* the language of

the court was improper, inasmuch as it suggested an agreement as a means to save expense, thus "depriving them of that freedom which the law contemplates they should exercise in reaching a verdict." The verdict was set aside. *Missouri, K. & T. Ry. Co.* v. *Barber* (Commission of Appeals of Texas, 1919), 209 S. W. 394.

This is a very extreme case. In *Fleck* v. *Missouri, K. & T. Ry. Co.* (Tex. Civ. App.), 191 S. W. 386, an almost identical reference to the expense of the trial was held proper. In *Kelly* v. *Emery*, 75 Mich. 147, the court said to the jury: "This case has already been tried once, and the amount involved is not large, and the parties cannot afford to litigate it forever, and the county cannot afford to have them do it. You see it takes some time to try the case, and I hope you will be able to arrive at a conclusion and settle the facts in the case, at least." This was held to be entirely proper. In *Watson* v. *Minneapolis Street Ry. Co.*, 53 Minn. 551, it was held proper to urge the jury to make every honest effort to agree because another trial would make expense to the county and to the parties. In *Knickerbocker Ice Co.* v. *Pennsylvania R. R. Co.*, 253 Pa. 54, it was held proper to urge the jury to agree in view of the length of time consumed in the trial and the amount of testimony heard.

MASTER AND SERVANT—RELATION.—Plaintiff, an employee of defendant, after several days discontinuance of his work because of an injured foot, returned to his place of employment, arriving there about 15 or 20 minutes before his work ordinarily commenced. He did not at this time apply for his work card, nor did he go for his tools, but went into a small shack to warm, this shack being used for such purpose by the workmen with defendant's knowledge and acquiescence. While here the stove fell, injuring plaintiff, and this suit is brought to recover for such injury. *Held*, defendant at the time of the injury owed no duty to plaintiff with reference to the stove, the relation of master and servant not then existing. *Flanigan* v. *K. C. S. Ry.* (Mo., 1919), 208 S. W. 441.

No doubt can arise as to the propriety of this decision, for though in some cases the question whether the relation of master and servant existed is left to the jury, such is not the rule when the evidence is as conclusive as it is here. In the case of a workman who begins his labors at a certain hour in the morning there is necessarily a time when he is on the premises of the master going to his work, and preparing for his work as by washing his hands, procuring his tools, or changing his clothes. "All these requirements are incident to the employment, and it is therefore held that the relation of master and servant continues from a reasonable time before the actual beginning of work until a reasonable time subsequent thereto." *Lyons* v. *People's Savings Bank*, 251 Pa. 569. In the English case of *Sharp* v. *Johnson & Co.*, [1905] 2 K. B. 139, cited with approval in the principal case the court held that the relation existed when an employee, arriving on his employer's premises 20 minutes before he was to begin work, was injured, it being shown that it was customary for the workmen to arrive as early as this, and upon arriving to deposit their tickets at the office and go to the mess cabin for

refreshment. Where the plaintiff reached his employer's building 5 or 10 minutes before his period of employment was to begin, and having taken the elevator to get his working clothes was injured by the negligence of the elevator operator whom he was to relieve, the court held that at the time of the injury the plaintiff was a servant of the defendant. *Lyons* v. *People's Bank, supra.* In an earlier case in the same court where a workman was injured by the explosion of a boiler at his place of employment, which occurred ten to thirty minutes before the hour for commencing work, it being the habit to use the time between his arrival and starting work in oiling and getting ready his machine, it was held that the question whether he had arrived at the works within a reasonable time was a question for the jury; and the jury having found that the relation of master and servant did exist at the time, their finding was sustained. *Walbert* v. *Trexler,* 156 Pa. St. 112. For an annotation of cases involving the question whether the relation was existing, see 13 NEGLIGENCE AND COMPENSATION CASES, ANNOTATED, 630.

TAXATION—RIGHT OF STATE TO SELL PROPERTY OF MUNICIPALITY FOR TAXES.—The land in question had been assessed for taxes and the assessment roll had been confirmed by the city council twenty days before the city bought the land on which it erected an engine house for its fire department. The state and county taxes were returned delinquent to the auditor general. In the usual manner at the tax sale the state bid in the property and later the plaintiff got tax deeds to the land from the state. All notices required by the statute were given by the plaintiff, but the city neither repaid the plaintiff nor demanded a reconveyance after tender. In a petition for a writ of assistance to obtain possession of the land, it was *held* that the land was not exempted from taxes because subsequently put to a municipal purpose, and that the city was in the position of any other negligent owner. (Brooke and Kuhn, JJ., dissenting.) *Petition of Auditor General* (Mich., 1918), 170 N. W. 549.

In general if the municipality bought and applied the land to a use which exempted the lot from taxation before the lien for taxes against the land was perfected, then the liability of the land to taxation was arrested and the lot could not be sold for taxes; the theory being that none had legally accrued, *Laurel* v. *Weems* (1911), 100 Miss. 335, Ann. Cas. 1914 A, 159; *Territory of Arizona* v. *Perrin* (1905), 9 Ariz. 316; *Gachet* v. *New Orleans* (1900), 52 La. Ann. 813, L. R. A. 1915 C 129. If a lien for taxes had attached before the municipality bought the land, the state then giving a tax deed for the delinquent taxes, the power of the state so to sell the land is questioned. Some cases, however, do not consider the question of the power of the state to sell, but say that if the lien once attaches, then purchase by the municipality does not exempt the land from taxes, *Public Schools &c.* v. *O'Connor* (1906), 143 Mich. 35; *Puyallup* v. *Lakin* (1907), 45 Wash. 368. But in other cases the power of the state to give a valid tax title is questioned on the ground that the municipality having the title of the grantor, holds such title as agent of the state, and that there is a merger of the tax title of the state with this title which the municipality obtained, *Graham* v. *Detroit* (1913), 174 Mich.

538, 44 L. R. A. (N. S.) 836; *Foster* v. *Duluth* (1913), 120 Minn. 484, 48 L. R. A. (N. S.) 707. The instant case recognised this doctrine, but distinguished *Graham* v. *Detroit, supra,* saying that the merger occurred only when the municipality acted as agent of the state, and that in the instant case there was no merger, for the city was acting in regard to the fire department, a purely local matter, *Davidson* v. *Hine* (1908), 151 Mich. 294, 15 L. R. A. (N. S.) 575. It would seem that the courts should hold that there is a merger of the two titles when it can be conceded that the municipality is acting as agent of the state. On the other hand when the municipility acts in a matter of local rather than general interest, it would seem that the courts would divide, even as they differ on the question of legislative control over municipalities in matter of local concern to the latter. Michigan has upheld the doctrine of home rule and the right of local self government for cities, *People ex rel Le Roy* v. *Hurlbut* (1871), 24 Mich. 44; *Davidson* v. *Hine, supra.* On the related question of municipal liability for the tort of its fire department, other courts have held that there was no liability on the ground that the fire department is a matter of general concern rather than of local interest; *Burrell* v. *City of Augusta* (1886), 78 Me. 118; *Smith* v. *City of Rochester* (1879), 76 N. Y. 506; *Frederick* v. *City of Columbus* (1898), 58 Oh. St. 538. From a practical and judicial point of view, however, it is often difficult to determine whether a given case is of local or general concern. Distinctions on this basis are bound to give trouble, for municipal acts usually have two aspects: when primarily governmental and public in their nature and purpose, still they are incidentally a benefit to the municipality, and the reverse is also true.

WILLS—PATENT AMBIGUITY—DESIGNATION OF DEVISEE. Paragraphs 2 to 7 of testator's will were devoted to devises of lands; paragraphs 8 to 15, to bequests of personalty. Paragraph 16, devising certain real property to "my son John S. Bruce," ended in the middle of a line, and paragraph 17, beginning with a capital letter, gave the residue "to have and to hold to him his heirs, executors, administrators and assigns." *Held,* that the scheme of the will and the apparent independence of each preceding paragraph would not permit of construing paragraphs 16 and 17 together; that paragraph 17 therefore name no legatee and a patent ambiguity existed to remedy which parol evidence was inadmissible. *Bruce* v. *Bruce,* (N. J. Ch., 1918) 105 Atl. 492.

The conclusions of the court are by no means free from difficulty. Conceding that the two paragraphs in question were not related structurally, that fact would not necessarily preclude construing them as connected in meaning. In *Kuehle* v. *Zimmer,* 249 Ill. 544, paragraphs wholly independent both as to arrangement in the will and as to express subject matter, were read together because of an inference deduced from particular words used in one of them. The distinction invoked by the decision of the principal case between patent and latent ambiguities as a ground for the admission of extrinsic evidence in aid of the interpretation of wills is universally recognized. But the application of the rule has more than once taxed the ingenuity as well as the wisdom of the legal profession. In *Hunt* v. *Hort,* 3 Bro. C. C. 311, it was held that a

bequest to "Lady ————" was not to be supplemented by parol and *Baylis* v. *Attorney General,* 2 Atk. 239, is to the same effect. Such an expression in a will would seem the equivalent of a *complete* blank as denoting that the testator had not yet decided upon the legatee. Yet the court allowed affidavits to help expain which of three granddaughters the testator intended should take under devise to "my granddaughter ————." *Goods of Hubbuck,* 92 L. T. N. S. 665.

If, in the principal case, the word "him" may be construed as a blank space (see cases *supra*) or as if description had been omitted by mistake or inadvertence (*Engelthaler* v. *Engelthaler,* 196 Ill. 230; *Karsten* v. *Karsten,* 254 Ill. 480; *Hawman* v. *Thomas,* 44 Md. 30; *Davis* v. *Davis,* 8 Mo. 56; *Crooks* v. *Whitford,* 47 Mich. 283; 1 JARMAN, WILLS, [3rd Am. Ed.] c. 14, p. 350) the holding is undoubtedly supported by the weight of authority. But the right so to disregard a personal pronoun is seriously challenged by the opinion in *Eichorn* v. *Morat,* 175 Ky. 80, 193 S. W. 1013. In that case the testatrix made a will of one paragraph which contained no other designation of the beneficiary than was supplied by the term "he." The court advanced, in part, the following interpretation to justify the admission of extrinsic evidence: "In the instant case it would be wholly incompetent to show by extrinsic proof that the testatrix meant by the use of the personal pronoun "he" a female to whom the word used did not apply*** It (to ascertain by extrinsic proof the person here referred to) does no violence to the rule against the substitution of a devisee when none is mentioned.*** It is true that in the case we now have the pronoun "he" which the testatrix employed might be applied to a great many persons, but when it is remembered that**** the same might be said with reference to the name "John"*** we are unable to distinguish and logical reason why the rule should not be applied in the one case as well at the other*** The two cases exhibit a difference in degree only, and not in kind."

WORK AND LABOR—CONTRACT TO PAY BY LEGACY—RIGHTS OF LEGATEE. P worked as a servant for D's testator under an express agreement that her services would be compensated by a legacy. P declined to accept the legacy provided by the testator and sued for the reasonable value of her services. *Held,* P could recover. *Shemetzer* v. *Broegler,* (N. J. 1918) 105 Atl. 450.

Recovery was allowed under similar circumstances in *Reynolds* v. *Robinson,* 64 N. Y. 589, the court holding that plaintiff could accept the legacy and also maintain suit for the difference between the legacy and the reasonable value of the services. But in *Lee's Appeal,* 53 Conn. 363, it was held that any legacy, however small, complied with the terms of the contract and precluded recovery on the basis of a *quantum meruit.* The New York case and the instant case in effect enunciate the same rule, which may be called the rule of reasonable construction. The Connecticut case enunciates the rule of strict construction; it enforces the contract exactly as made by the parties and refuses to read into the contract any terms not incorporated therein by the parties. The courts would have avoided much difficulty in application if the doctrine of strict construction had been consistently maintained. The New York court

has in other types of cases shown marked liberality in reading into an otherwise absolute contractual provision the word 'reasonable' or its equivalent; for example, in the builders' contract cases where an architect's certificate is stipulated for it has been held that the production of such certificate is excused when it is disclosed that the architect has refused unreasonably or capriciously. *Bowery National Bank* v. *The Mayor, etc. of New York,* 63 N. Y. 336; *Nolan* v. *Whitney,* 88 N. Y. 648. This doctrine has been generally followed. *Batchelor* v. *Kirkbride* 26 Fed 899; *Michaelis* v. *Wolf,* 136 Ill. 68; *Chism* v. *Schipper,* 51 N. J. L. 1. New York has also shown liberality where an action is brought on an insurance policy which provided for a certificate of a specific person as a condition precedent to the recovery of a loss under the policy, *Lang* v. *Eagle Fire Co.,* 12 App. Div. 39, where the certificate of the notary living nearest the place of fire was required, and it was held that on his refusal to act it was sufficient if the insured furnished to the insurer a certificate of the nearest notary who consents to act. This decision, however, is out of accord with the great weight of authority. *Worsley* v. *Wood,* 6 T. R. 710; *Johnson* v. *Phoenix Insur. Co.,* 112 Mass. 49; *Columbia Insur. Co.* v. *Lawrence,* 35 U. S. 10; *Protection Insur. Co.* v. *Pherson,* 5 Ind. 417; *Leadbetter* v. *Etna Insur. Co.,* 13 Me. 265. In view of the fact that it is the duty of courts to enforce the contracts as made by the parties and not to make or change their contracts, the strict rule of *Lee's Appeal, supra,* seems preferable to that of the instant case.