# RECENT CASES.

AGENCY—ILLEGAL CONTRACT—IMPLIED AUTHORITY.—RICKARDS v. RICKARDS, 56 ATL. 397 (MD.).—An agent appointed to sell a horse sold it in violation of the Sunday laws. The principal sued in replevin on the ground that the agent had no authority to sell illegally. *Held,* that such sale was within the scope of the agent's authority and the principal is bound.

It is well settled that authority to commit a criminal act will never be inferred. *Pearce v. Foote,* 113 Ill. 228; *Clark v. Metropolitan Bank,* 3 Duer (N. Y.) 241. In civil cases the principal's liability depends on whether the act is within the scope of the agent's authority. A railroad company is liable where the conductor illegally puts a passenger off the train. *B. & Y. Turnpike Co. v. Boone,* 45 Md. 344. And in England where a party, authorized to get information, gets it illegitimately his partner is liable, *Hamlyn v. Houston & Co.,* L. R. (1903) I K. B. 81. But an agent, employed to make a loan, has no implied authority to make it usurious. *Condit v. Baldwin,* 21 N. Y. 219. And in *Arnot v. Pitson, etc., R. Co.,* 5 Th. & C. (N. Y.) 143, it was decided that, where an act may be done legally, authority in the agent to do it illegally will not ordinarily be presumed. Generally, however, such acts as that of the agent in the principal case would very likely be held to be impliedly authorized.

APPEAL AND ERROR—CONSTITUTIONAL RIGHT TO REVIEW—ISSUES FIRST RAISED IN APPELLATE COURT.—COOK v. AM. E. C. & SCHULTZ GUNPOWDER CO., 56 ATL. 114 (N. J.).—In an action for death of plaintiff's intestate charged to negligence of defendant while such intestate was in defendant's employ, verdict was rendered for plaintiff. On appeal, the defendant showed that the verdict was contrary to the evidence, but plaintiff sought to sustain the verdict on a contention that defendant had rendered the place of intestate's employment dangerous without intestate's knowledge. *Held,* that the verdict cannot be sustained on the theory that, in the absence of negligence of this character, the plaintiff was entitled to a verdict on some other ground not submitted to the jury's determination.

A plaintiff's verdict cannot be sustained on a theory of law antagonistic to that upon which the case was tried. To do so, upon a rule to show cause, would be to deprive defendant of his right to have the judgment of the court of last resort upon the soundness of that theory, as applied to the facts of the case. *DeRaismes v. DeRaismes,* 56 Atl. 170. When in a civil case no request is made, the mere omission to charge upon a particular point is not ground of error. *Fox v. Fox,* 96 Pa. St. 60; *Phila. & R. R. Co. v. Getz,* 113 Pa. St. 214. It is the constitutional right of every citizen to have his case reviewed, in one form or another, by a court of error. *Ringgold's Case,* 1 Bland 5 (Md.). This is impossible where a supreme court first settles an issue. But where both parties raise such issue on appeal, though neither raised it in lower court, such court may make it a basis of decision. *Summerson v. Hicks,* 142 Pa. St. 344.

BANKRUPTCY—COMPOSITION—OPERATION AND EFFECT—CLAIM NOT SCHEDULED.—IN RE LANE, 11 AM. B. R. 136 (D. C.).—A creditor inadvertently failed to prove his claim within a year of the adjudication. The bankrupt, in good faith and "under almost unavoidable circumstances," had omitted the debt from his schedule. Over a year after composition proceedings the creditor sought payment of his claim from the surplus left in the hands of the court. *Held,* that after composition proceedings any surplus remaining belongs to the bankrupt, and does not enure to unpaid creditors as in simple bankruptcy proceedings, unless such creditors prove their claims within the year allowed by statute.

Sec. 57n of the Act of 1898, that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication," applies to compositions as rigorously and explicitly as to other bankruptcy proceedings, and no exception can be made for innocently delayed creditors. *In re Brown,* 123 Fed. 336; 10 Am. B. R. 588. This feature of the Act of 1898 appears novel and questionable. Under the Act of June 22, 1874, creditors whose names, addresses and debts were not placed on the bankrupt's schedule were held not bound by the composition proceedings. *In re Becket,* Fed. Cas. 1,210; 2 Woods 173. *In re Blackmore,* 11 Fed. 412. A creditor whose address is stated to be unknown in bankrupt's proposal of composition, is not bound by the composition. *Harrison v. Gamble,* 69 Mich. 96. A bankrupt lessee of a trustee placed in his schedule the amount of rent due, with name and address of the cestui. On suit afterward brought by the trustee for rent due before bankruptcy, the composition was held no bar. *MacMahon v. Jacobs,* 129 Mass. 524.

BANKRUPTCY—PREFERENCES—BANK DEPOSITS.—NEW YORK BANK V. MASSEY, 24 SUP. CT. 199.—Insolvents, indebted to a bank, made deposits therein subject to check, shortly afterwards filing a petition in bankruptcy. *Held,* that, as the deposits did not amount to a transfer of property equivalent to a preference, the transaction was not within 57g of the Bankruptcy Act, providing that the claims of creditors who have received preferences shall not be allowed unless such preferences be surrendered. McKenna, J., *dissenting.*

This decision, which reverses the ruling of the circuit court and is directly contrary to the only other adjudication in point, *In re Kellar,* 110 Fed. 348, is based upon the relationship of debtor and creditor created by a bank deposit, sec. 68a of the Bankruptcy Act stipulating that mutual debts or credits shall be accounted and the balance allowed. In *Pirie v. Trust Co.,* 182 U. S. 438, the word "transfer," as used in the Act, was construed in its most comprehensive sense, the court deciding that it included every means by which property can pass from one's ownership or possession; and, under sec. 60a a transfer will amount to a preference if it be prejudicial to other creditors of the same class. The ruling in the main case allows a creditor bank to prove its claims on the same footing with other creditors, notwithstanding it previously may have appropriated the deposited assets of the insolvent. The distinction which the court draws between transfers for the sole benefit of the creditor and those creating an obligation in favor of the bankrupt is incontrovertible. It is also true that the obtaining by the creditor of a greater percentage of his debt is an indirect result of the transfer, and not included within the strict letter of the Act; but can it be denied that it

is within its spirit? It would appear that the position taken, while sustainable in theory, is in derogation of justice and inconsistent with legislative intent.

CARRIERS—DELIVERY OF MACHINE—NEGLIGENT DELAY—MEASURE OF DAMAGES.—PACKET CO. v. BOTTROFF, 77 S. W. 920 (KY.).—In an action against a carrier for damages for negligent delay in the delivery of a machine, *held*, that the measure of damages should include loss of profits.

In a number of cases it has been held that anticipated profits, being inherently speculative and uncertain, may not be included in the measure of damages for a breach of contract. *The Amiable Nancy*, 3 Wheat. 546; *Freeman v. Clute*, 3 Barb. 424; *Wright v. Mulvaney*, 78 Wis. 89; *McKnight v. Ratcliff*, 44 Pa. St. 156. But the question as to what would be the rule if the anticipated profits were free from the element of uncertainty, is not discussed in these cases. In the leading English case it was held that anticipated profits are not recoverable as damages, except where such profits are not open to the objection of uncertainty or remoteness, or where it may be reasonably presumed that they were within the intent and understanding of both parties at the time the contract was entered into; *Hadley v. Baxendale*, 9 Exch. 341. This case has been generally approved and followed in this country, and enunciates the accepted doctrine on this subject; *Howard v. Manufacturing Co.*, 139 U. S. 199; *Crawford v. Parsons*, 63 N. H. 438; *Stewart v. Patton*, 65 Mo. App. 21; *Boom Co. v. Prince*, 34 Minn. 71; *Howe Machine Co. v. Bryson*, 44 Ia. 159. There have been comparatively few cases where the courts have found anticipated profits sufficiently free from remoteness and uncertainty to be included in the measure of damages for a breach of contract. *Crawford v. Parsons, supra; Schile v. Brokholms*, 80 N. Y. 614.

CITIZENSHIP—STATUS OF PORTO RICANS—IMMIGRATION.—GONZALES v. WILLIAMS, 24 SUP. CT. 177.—*Held*, that a Porto Rican, a native of the island at the time of its cession to the United States, was not an alien within the meaning of the Immigration Act of 1891, providing for the detention and deportation of alien immigrants likely to become public charges.

The court refused to recognize the contention that the cession of Porto Rico accomplished the naturalization of its people; that, under the act of 1900, Porto Ricans necessarily became citizens of the United States; but based its opinion upon the test of alienage alone. Chief Justice Fuller, delivering the opinion of the court, said: "We think it clear that the Act (Immigration Act of 1891) relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the place of the dominion of the United States; the organic law of whose domicile was enacted by the United States, and is enforced through officials sworn to support the United States constitution,—are not 'aliens,' and upon their arrival by water at the ports of our mainland are not 'alien immigrants' within the intent and meaning of the Act of 1891." By the ratification of the treaty of peace between the United States and Spain, Porto Rico ceased to be a foreign country within the meaning of the tariff laws. *De Lima v. Bidwell*, 182 U. S. 1; and Porto Rican vessels were nationalized as vessels of the United States by virtue of the Act of 1900. *Huns v. S. S. Co.*, 182 U. S. 392.

CONSTITUTIONAL LAW—LIBERTY OF CONTRACT—SALES OF MERCHANDISE IN BULK—NOTICE TO CREDITORS.—SQUIERS v. TELLIER, 69 N. E. 312 (MASS.).—A statute providing that a sale of merchandise in bulk, other than in the ordinary course of business, is void unless seller and purchaser make an inventory and the latter notify creditors of the former of the sale and its condition. *Held*, not unconstitutional as infringing on liberty of contract.

Similar statutes have recently been held constitutional in many of the States. *Wills v. Yates*, 12 S. W. 233; *Neas v. Borches*, 71 S. W. 50; *McDaniels v. Shoe Co.*, 60 L. R. A. 947. While the principle of the police power cannot render good legislation which without reason or justice deprives one of liberty of contract; *Chicago v. Netcher*, 55 N. E. 707; *Young v. Comm.*, 45 S. E. 327, it has nevertheless been extended broadly, *The Slaughterhouse Cases*, 16 Wall. 36, and its limits are hard to define. It is evident that statutes such as the one in question are aimed at a particularly common kind of fraud, and are not arbitrary legislation, certainly not class legislation, *Comm. v. Danyiger*, 176 Mass. 290; and come clearly under the police power as it is now construed. See IX *Virginia Law Register*, 682.

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—STATE v. NELSON, 97 N. W. 652 (MINN.).—*Held*, that new trials should be granted in criminal cases on the ground of newly discovered evidence only where it is reasonably clear that the new evidence would be likely to change the result. Lewis, J., *dissenting*.

Some courts distinguish between civil and criminal cases in regard to granting new trials; though as a general rule the practice is the same in both. *Eldridge v. Minn. & St. Louis R. R. Co.*, 32 Minn. 252; *Grayson v. Commonwealth*, 6 Grat. 712. Though there is much conflict in the cases the principal case seems to be supported by the weight of authority. *Parker v. Hardy*, 24 Pick. 246; *Moore v. State*, 96 Tenn. 209; *Eberhart v. State*, 47 Ga. 598. The rulings in many cases recklessly granting new trials on technicalities, etc., have done much to increase the delay of litigation and to encourage defiant criminality. See the dissenting opinions of *Whitfield, J.*, in *Lipscomb v. State*, 75 Minn. 559, and of *Haight, J., in People v. Koerner*, 154 N. Y. 355. The dissenting judge in the principal case contends that in criminal cases motion for a new trial should not be denied where there is a possibility that the new evidence might affect the verdict. This view is supported by *Green v. State*, 17 Fla. 669; *People v. Williams*, 18 Cal. 187; *Dennis v. State*, 103 Lud. 142.

DEATH—PRESUMPTION—TITLE—SPECIFIC PERFORMANCE.—MCNULTY v. MITCHELL, 84 N. Y. SUPP. 89.—The purchaser of property at a partition sale refused to take title on the ground that there was no evidence of the death of one to whom or to whose issue if living, the entire property would belong. This person forty-three years ago was unmarried and has been unheard of since that time. *Held*, that the purchaser should be compelled to take the title.

The law does not recognize the impossibility of one living in 1034 to be still living in 1827. *Best, Evidence*, Sec. 408; *Duke of Cumberland v. Graves*, 9 Barb. 608. The presumption of death is prima facie merely and should absentee return, the purchaser's title would be defeated. *Young v. Heffner*, 36 Ohio St. 237. In some States a century must elapse before death will be

presumed. *Burney v. Ball*, 24 Ga. 505; *Owens v. Mitchell*, 5 Mart. (La.) 668. Although it is a settled rule of law that a purchaser will not be compelled to take a doubtful title there is some conflict as to what degree of doubt will relieve the purchaser. *Best, Ev.*, p. 502. If the uncertainty of the title affects its marketable value, specific performance will not be decreed. *Vreeland v. Blauvelt*, 23 N. J. Eq. 485; 3 *Pars., Cont.* (6th ed.), 380. In some cases the test is whether the doubt is a reasonable one. *Fleming v. Burnham*, 100 N. Y. 1; *Dingley v. Bon*, 130 N. Y. 614. The principal case is supported by *Ferry v. Sampson*, 112 N. Y. 418, but this case is considerably limited by *Vought v. Williams*, 120 N. Y. 260.

EQUITY—ADEQUATE LEGAL REMEDY—JURISDICTION OF FEDERAL COURTS.—CABLE V. INSURANCE CO., 24 SUP. CT. 74.—An action was instituted in a State court to recover on a policy of life insurance. The company filed a bill in equity, in federal jurisdiction, asking cancellation of the policy on the ground of fraud, alleging an inadequate legal remedy because of the administration in the State courts of laws unduly adverse to insurance companies and because a removal to the federal courts of the action brought against them would, under a State statute, subject them to a revocation of their license. *Held*, that the inadequacy of legal remedy alleged was not sufficient to warrant the federal courts of equity in assuming jurisdiction. Harlan and White, JJ., *dissenting*.

Although the company, in removing the original suit to the federal courts, might suffer a forfeiture of their license, the court reasoned that, as the contingency was one of the complainant's own creation, they could not avail themselves of it as a foundation for equitable relief. There is a well defined tendency, however, to relax the strictness of the doctrine followed. *Assur. Co. v. Ry. Co.*, 20 Law F. 422; *Smyth v. Ames*, 169 U. S. 466; *Sullivan v. Railroad Co.*, 94 U. S. 806; *Bank v. Stone*, 88 Fed. 383, holding that equity can be refused only when the relief at law is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. That the company would suffer irreparable injury by a forfeiture of its license is incontrovertible. It is true that it might adopt the alternative of defending the original suit, but at the expense of renouncing an equitable basis of relief. Perhaps the doctrine most consistent with the principles of equity is that supported in the minority opinion.

EXCHANGES—PROPERTY RIGHT IN QUOTATIONS—PROTECTION IN EQUITY.—CHRISTIE GRAIN & STOCK CO. V. CHICAGO BOARD OF TRADE, 125 FED. 161 (C. C. A.).—An Illinois statute makes it a crime for any person to keep a "bucket shop" or any place wherein is permitted the buying or selling of stocks or produce without the intention of actual delivery, and provides that any person or corporation who shall communicate quotations with a view to such transactions shall be considered an accomplice. *Held*, that, although the rules of the board of trade forbid dealing in futures, where the evidence shows that 85 per cent. of its transactions were in actual violation of these rules and of the statute, equity will not protect the property right of the board of trade in its quotations.

It is well established that a stock exchange has a qualified property right in its quotations. *Marine, etc., Ex. v. W. U. Tel. Co.*, 22 Fed. 23; *Com. Tel. Co. v. Smith*, 47 Hun. 494; *Live Stock Com. Co. v. Live Stock Ex.*, 143 Ill.

210. But equity will not permit gambling in stock quotations. *Bryant v. W. U. Tel. Co.*, 17 Fed. 825. What effect rules of a board of trade forbidding dealing in futures may have toward relieving its quotations from taint of immorality, has given rise to a conflict of decisions. The earlier decisions seldom withheld the protection of equity; *Metropolitan, etc., Ex. v. Chicago Board of Trade*, 15 Fed. 847; and the Circuit Court, in the case under consideration, held that such rules presumptively free a board of trade from the charge of being a party to any illegal transactions upon its floors. A stipulation in the contract for delivery has the same effect. *Beadles v. McElrath*, 85 Ky. 230. But in *Board of Trade v. O'Dell*, 115 Fed. 574, and in *Board of Trade v. Donovan*, 121 Fed. 1012, it was held that where the evidence shows that the greater part of the transactions of a board of trade involve no delivery, the intention to permit dealing in futures must be presumed, and prohibitory rules which are not enforced will not be permitted in equity to screen the real nature of the transactions. The present decision concludes a long line of conflict and places stock exchanges, where the majority of the trade is in futures, on the same basis as bucket shops.

INJUNCTION—RAILROAD TICKETS—SALE BY BROKERS.—RAILWAY CO. V. REEVES, 85 N. Y. SUPP. 28.—*Held*, that where defendants purchased the return portions of non-transferable round trip tickets from the original holders and resold them, thereby defrauding the railroad company, injunction would not be to restrain this traffic.

A statute forbidding the sale of railway tickets by others than the duly authorized agents of the company is unconstitutional. *Tyroler v. Warden*, 157 N. Y. 116. This, however, is not the prevailing view and the contrary has been held in several States. *State v. Corbett*, 57 Minn. 345; *Burdick v. People*, 149 Ill. 600; *Fry v. State*, 63 Ind. 552. The contract of the railway company and the original purchaser in this case was that the ticket should be non-transferable, and a third party who wilfully induces one to break a contract is liable therefor to the party injured. *Angel v. Railway Co.*, 151 U. S. 1; *Benton v. Pratt*, 2 Wend. 385. A railway company is entitled to an injunction to prevent ticket brokers buying the return portions of non-transferable, round trip tickets from the original purchasers and re-selling them. *Railway Co. v. McConnell*, 82 Fed. 65.

INTERNAL REVENUE—OLEOMARGARINE.—BRAUN & FITTS V. COYNE, 126 FED. 331.—*Held*, that a food product made of leaf lard and beef fat, bathed in salt water to take away fat odor, but not being artificially colored or flavored, though sold in pound packages, is not taxable as oleomargarine.

Oleomargarine is usually defined as a product or compound made wholly or partly out of any fat, oil or oleaginous substance. *Cook v. State*, 110 Ala. 40. But there is doubt whether a statute to regulate or prohibit the manufacture of oleomargarine on any other ground than to prevent a fraud on the public through the imitation of butter, would be constitutional. *State v. Marx*, 99 N. Y. 377; *Ex parte Virginia*, 100 U. S. 339. Although *Powell v. Penn.*, 127 U. S. 678, would seem to hold otherwise. But possibly because of the doubtful validity of statutes based upon any other ground, the courts have usually interpreted them as merely intended to prevent fraud. *People v. Arensberg*, 105 N. Y. 123; *Mugler v. Kansas*, 123 U. S. 623. This case sustains this view, and, since the compound under consideration could hardly lead to fraud, it is relieved from taxation.

LIBEL—NEWSPAPERS—PUNITIVE DAMAGES—LIABILITY OF OWNER FOR ACTS OF MANAGER.—CRANE V. BENNETT, 69 N. E. 274 (N. Y.).—Where a newspaper publishes a libel with aggravating circumstances, *held*, that the owner is liable in punitive damages for acts committed by his manager in his absence.

In general, it is recognized that acts done by an employe cannot ordinarily render the employer liable in punitive damages, *Hagan v. R. R.*, 3 R. I. 38; *Cleghorn v. R. R.*, 56 N. Y. 44, the necessary malice being absent. This is not, however, the uniform rule; *Canfield v. R. R.*, 59 Mo. App. 354; *Fell v. Northern Pac. R. R.*, 48 Fed. 248. The principal case follows the dissenting opinion in *Samuels v. Evening Mail Ass'n.*, 9 Hun. 288, 294, afterward affirmed by the New York Court of Appeals, 75 N. Y. 604. It being thoroughly settled that the proprietor of a newspaper is liable in compensatory damages for any tort committed by it in his absence; *Curtis v. Muzzy*, 6 Gray 251. It would seem that where the proprietor has so thoroughly alienated the business from his control, and has put himself away from all oversight, he should be responsible for the conduct of the business so delegated to his manager, in the same extent as if he himself published the libel.

LIMITATION OF ACTIONS—NEW PROMISE—ACKNOWLEDGMENT BY AGENT—PROMISSORY NOTE.—DERAISMES V. DERAISMES, 56 ATL. 170 (N. J.).—*Held*, that under a statute requiring that an acknowledgment, to defeat the operation of limitations, must be in writing, signed by the party chargeable thereby, a written promise to pay a note by an agent of the person to be bound thereby is insufficient.

Before Lord Tenterden's Act requiring signature of the person chargeable, an acknowledgment by a wife was sufficient, when the wife had been accustomed to act as agent of her husband in his business generally. *Anderson v. Sanderson*, 9 Stark 204; Holt 591. So, in an action against a husband for goods supplied to his wife, a letter written by the wife acknowledging the debt was admissible to take the case out of the statute. *Gregory v. Parker*, 1 Camp. 394. But after Lord Tenterden's Act, an acknowledgment contained in a letter written by the wife of a debtor, in his name and at his request, was insufficient, because the statute gave no authority to an agent to make acknowledgment. *Hyde v. Johnson*, 3 Scott 289; 2 Bing. N. C. 776. Yet where an agent had been employed to pay money for work done, and the workmen were referred to him for payment, and he assented to it, an acknowledgment or a promise by him to pay was sufficient. *Burt v. Palmer*, 5 Esp. 145. The principal case seems to indicate the need for an amendment in New Jersey permitting acknowledgment of debts by duly authorized agents, as allowed by the act of 19 and 20 Vict., c. 97.

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.—MUSSER LAND, LOGGING & MFG. CO. V. BROWN, 126 FED. 141 (C. C. A.).—Plaintiff was employed in unloading logs from a sled on which they were bound with a chain, which plaintiff loosened by knocking out a hook with an ax. He requested an ax with a longer handle, and the foreman promised one, telling him to continue his work until the other ax could be provided. *Held*, that, in full knowledge of the danger, he assumed the risk, which precluded his recovery.

The gist of the question involved is whether, despite a promise of the master to supply a tool not defective and a request that the employe continue

in the service until that could be done, the danger was so obvious and imminent as to render the servant liable for contributory negligence. It is well settled that a servant who knowingly undertakes a hazardous work, assumes the risk. *Coal Co. v. Jones,* 127 Ill. 379; *Welton v. Railroad Co., 72* Mass. 555. But there is great conflict of decisions as to how far a promise on the part of the master to repair and a request that the servant continue in the employment, will relieve the servant, in case of injury caused by the defect, from a charge of contributory negligence. In *Erdman v. Steel Co.,* 95 Wis. 6, and *Indianapolis & St. L. R. Co., v. Watson,* 114 Ind. 20, it is held that a servant is relieved from all liability, except when he continues in an employment so fraught with perils that a man of ordinary prudence would not undertake it. Other cases hold that a promise to repair shifts all liability upon the master, except when it should be obvious to the employe that to continue the work meant imminent, if not inevitable, injury. *Green v. Railroad Co.,* 31 Minn. 248; *Rothenberg v. N. W. Consol. Mfg. Co.,* 57 Minn. 461; *Dells Lumber Co. v. Erickson,* 25 C. C. A. 397; *Hough v. Railway Co.,* 100 U. S. 213. The justifiability of the servant in remaining in the employment, after a promise to repair, is generally held to be a question for the jury. *Lynch v. Allyn,* 160 Mass. 249; *Smith v. Backus Lumber Co.,* 64 Minn. 447; *Hough v. Railway Co., supra; Woods on Master and Servant,* Secs. 378-381. The same rule is followed in England. *Clark v .Holmes,* 7 H. & N. 937. Thus the decision under consideration, in holding that the case should have been taken from the jury, would seem to rest on doubtful ground.

MASTER AND SERVANT—INJURIES—FELLOW SERVANT.—DONNELLY V. MINING CO., 77 S. W. 130 (Mo.).—*Held,* that a foreman in charge of a crew of miners is not a fellow servant with the men while taking part in their work, so as to relieve the master from the liability of his negligence in doing the work.

In an Indiana case where the circumstances were very similar to those in the principal case, the court held that the negligence was that of a fellow servant. *Stone Co. v. Chastain,* 9 Ind. App. 453. And this is in harmony with the accepted doctrine that the employer is not liable to the employe for the negligence of a superintendent in doing the work of a co-employe, the liability arising only where such negligence occurs in the exercise of superintendence. *Quinn v. Lighterage Co.,* 23 Fed. 363; *Crispin v. Babbitt,* 81 N. Y. 516; *Hontford v. Railroad Co.,* 91 Wis. 374; *Legrone v. Railroad Co.,* 67 Miss. 592. In England it is provided under the Employers' Liability Act of 1880 that where a workman is injured through the negligent act of a superintendent, damages may be recovered from the employer in those cases only where it is shown that the negligence occurred in the exercise of superintendence. Similar statutes have been enacted in several of the States in this country. But decisions consonant with that in the principal case and against the weight of authority have been rendered in *Shumway v. Manufacturing Co.,* 98 Mich. 411; *Sweeney v. Railroad Co.,* 84 Tex. 433.

MUNCIPAL CORPORATIONS—DEFECTIVE SIDEWALK—NOTICE.—MCMANUS V. CITY OF WATERTOWN, 84 N. Y. SUPP. 638.—A municipal charter required actual notice of defects in the sidewalk as a pre-requisite to an action for

injuries caused thereby. *Held,* that evidence showing that an officer to whom notice would be sufficient had passed the place several days before the accident occurred was not sufficient to warrant a finding by the jury of actual notice. Williams, J., *dissenting.*

This case follows the decision in *Smith v. Rochester,* 79 Hun. 174. But it is difficult to harmonize these cases with the decisions on what constitutes actual notice. The term "actual notice" is sometimes used in the broad sense of constructive notice. *Am. & Eng. Enc. Law,* Vol. 21, p. 582. By the weight of authority the requirement of actual notice is satisfied whenever the authorities by reasonable diligence might have had knowledge. *McVee v. Watertown,* 92 Hun. 310; *Lyman v. Green Bay,* 91 Wis. 488. Some courts lay down broadly the principle that constructive notice, where the facts are uncontroverted, is for the court. *Birdsall v. Russell,* 29 N. Y. 249; *Claflin v. Lenheim,* 66 N. Y. 306. But the application of this principle to municipal corporations is opposed to the weight of authority. *Todd v. Troy,* 61 N. Y. 510; *Decatur v. Bestin,* 169 Ill. 340.

MUNICIPAL CORPORATION—INJUNCTION—PRIVATE PARTY AS PLAINTIFF.—AMUSEMENT CO. v. CITY, 74 PAC. 606 (KAS.).—The owner of a theatre sought to restrain city officers from allowing the use of public buildings for lectures and entertainments for private profit. *Held,* that his damages differing only in degree from those sustained by the general public, the action could not be maintained.

Before a person can maintain an action of this kind, he must show some interest peculiar to himself. *Mikesell v. Durkee,* 34 Kas. 509; *Davis v. New York,* 9 N. Y. Supp. Ct. 663. But in the application of this well settled principle there is considerable conflict. It has repeatedly been held that where a schoolhouse is used for religious meetings and entertainments an injunction will be granted against such use on the application of a taxpayer where his property, books and pencils were injured by such use. *School Dist. v. Wood,* 13 Mass. 193; *School Dist. v. Arnold,* 21 Wis. 657; *Spencer v. School Dist.,* 15 Kas. 259. In a few cases it has been held that such use of a schoolhouse might be enjoined at the instance of a taxpayer whose only damage consisted in the illegal use of the building. *Scofield v. School Dist., 27* Conn. 499, and cases therein cited. The facts in the principal case show a loss of profit upon the part of the theatre owner which, on its face, is a damage, different in kind as well as in degree from that suffered by the general public, and the decision thus seems contrary to the settled weight of authority.

MUNICIPAL CORPORATIONS—PURCHASE—INCUMBRANCES.—STATE v. TOPEKA, 74 PAC. 647 (KAS.).—*Held,* that the city may purchase a system of waterworks subject to an incumbrance.

The precise question in the principal case is presented for the first time. Though a municipal corporation may acquire property; *Windham v. Portland,* 4 Mass. 384; and has the right to secure the purchase price by giving a mortgage; *Eddy v. City,* 26 La. Ann. 636; it is well settled that a city cannot dispose of property of a public nature in violation of the trusts upon which it is held. *Dillon, Mun. Corps.,* sec. 575; *Meriwether v. Garret,* 102 U. S. 472. Waterworks owned by a city are deemed to be held in trust; *New Orleans*

*v. Morris,* 105 U. S. 600; but for the welfare of the city, the mayor and council were considered to have the power to mortgage the city waterworks to secure the payment of bonds lawfully issued for the construction of the same. *Adams v. Rome,* 59 Ga. 765; *Society v. City,* 31 Penn. 183; *Dillon, Mun. Corps.,* Sec. 579. It is upon these grounds that the decision in the principal case is based.

NEGLIGENCE—BOILER EXPLOSION—INJURY TO ADJOINING PREMISES.—ANDERSON V. HAYS MFG. CO., 56 ATL. 345 (PENN.).—A person employed to inspect a boiler in a factory negligently overlooked a defect. The boiler exploded and plaintiff's house was injured. *Held,* that the owner of the factory, not being negligent in selecting the inspector, is not liable.

This decision is contrary to the established rule of law that a master cannot exempt himself from liability for the negligence of his servants by care in their selection. Even where a man has employed an independent contractor he is liable for injury from a defect in the work after its completion and acceptance. *Gorham v. Gross,* 125 Mass. 232; *Vogel v. N. Y.,* 92 N. Y. 10. The authorities cited in the present case are those involving either the fellow-servant doctrine or that of contributory negligence and thus are not in point. The work had been completed and accepted and the owner would in most courts have been held liable whatever the relation that existed between him and the inspector. *Cotter v. Lindgren,* 106 Cal. 602; *Khron v. Brock,* 144 Mass. 516.

NOTARY—ACKNOWLEDGMENT — INTEREST — DISQUALIFICATION. — BANKING HOUSE V. STEWART, 98 N. W. 34 (NEB.).—*Held,* that a cashier of a bank, employed on a fixed salary, is not disqualified to take an acknowledgment to a mortgage given to the bank,—even though he is related by marriage to the owner of the bank.

On this question the law is in conflict, and no rule can be laid down which will afford a safe test in all cases. The majority of decisions hold that a person cannot take an acknowledgment of an instrument in which he has an interest. *Wasson v. Connor,* 54 Miss. 351; 1 *Cyc.* 553. However, unless the acknowledgment is clearly fraudulent, a person related to the parties may take it. *Lynch v. Livingston,* 6 N. Y. 422; 1 *Bouvier,* 66-67. A stockholder in a bank cannot acknowledge a mortgage where the bank is beneficiary. *Smith v. Clark,* 100 Iowa 605. But, by the latest decision a stockholder may acknowledge a deed when the corporation is grantor. *Read v. Loan Co.,* 68 Ohio St. 280. *Contra, Bank v. Spencer,* 26 Conn. 195 (1856). Among those disqualified by interest are: partners for co-partners, *Bank v. Radtke,* 87 Iowa 363; grantors, *Davis v. Beazley,* 75 Va. 491. All the leading cases on this subject as to disqualification of grantees, mortgagees, trustees, beneficiaries, and *cestuis qui trustent,* are reviewed in *Horbach v. Tyrrel,* 48 Neb. 514; *Read v.*

PLEADING—LIBEL—COMPLAINT—IDENTIFICATION OF PLAINTIFF.—CORR V. SUN PRINTING CO., 69 N. E. 288 (N. Y.).—Where a person is libelled under the name of Kitty Carr, 35 years of age, and Kate Corr, 26 years of age, brings suit, *held,* that section 535 of the Code, providing that it is unnecessary to state extrinsic facts to show the application of the libelous matter to the

plaintiff, in the complaint, is not broad enough to render such complaint sufficient. Vann and Martin, JJ., *dissenting.*

The weight of authority in other States seem to be that it is always sufficient to state generally, in the complaint, that the libel or slander was published of the plaintiff, *Harris v. Zanone,* 93 Cal. 59; *Wozelka v. Hettrick,* 93 N. C. 10. The principal case resembles *Doan v. Kelly,* 121 Ind. 413, where, under a similar provision, a complaint by Louey Kelly was allowed, although the publication libelled Louise Kelley. The cases in New York are uniformly more strict, though none is wholly in point. *Miller v. Maxwell,* 16 Wend. 9, is a leading case holding that extrinsic facts showing the identity of the plaintiff must be pleaded. But see, *contra, Cook v. Rief,* 8 Civ. Proc. R. 133, where the Code is interpreted so as not to require them.