RECENT CASES

ADVERSE POSSESSION—INSTRUCTIONS—PRESUMPTIONS.—LEWIS v. POPE, 68 S. E., 680 (S. C.).—*Held*, that in an action for the possession of land when defendants show adverse possession by themselves and their ancestors for over twenty years, a request to charge that the mere going on the land, while living on another tract, and cultivating a part of it for a few years, or occasionally cutting wood upon it, is not possession from which it can be presumed that there was a deed properly refused.

Possession in order to ripen into a title to land must be actual, continuous, visible, notorious, and hostile to that of the true owner. *Smeberg v. Cunningham*, 96 Mich., 378. Such actual possession of land consists in exercising acts of dominion over it, in making ordinary use of it, and in taking the profits of which it is susceptible. *Webber v. Clarke*, 74 Cal., 11; *Collett v. Vanderbaugh County*, 119 Ind., 27. This domination may consist in a great number of acts, and in the absence of statutes designating certain things as requisites, the law has prescribed no particular manner in which possession shall be maintained. *Adams v. Clapp*, 87 Me., 316; *Eastern R. R. v. Allen*, 135 Mass., 13. In thus determining whether a possession is actual or not, all the circumstances of the case must be considered such as the situation of the parties, the character of the land, and the purposes to which it has been adapted. *Houghton v. Wilhelmy*, 157 Mass., 521; *Bowen v. Guild*, 130 Mass., 121. Ordinarily, however, acts of ownership are sufficient to constitute possession, which are of such a nature as a party would exercise over his own property and not over another's. *Farley v. Smith*, 39 Ala., 38; *Hubbard v. Kiddo*, 87 Ill., 578. Hence, the actual residence of the claimant upon the land has been the most effectual mode of manifesting possession. *Bennett v. Kovarick*, 23 Misc. (N. Y.), 73, and in like manner the improvement of land, reducing it to cultivation, opening up mines, are also regarded as indicating an actual and adverse possession. *Deer Lake Co. v. Mich. Land Co.*, 89 Mich., 180; *Butler v. Drake*, 62 Minn., 229; *Stephenson v. Wilson*, 50 Wis., 95. But the occasional cutting of timber is not alone such evidence of ownership as would amount to possession adverse to the true owner, although there are some decisions to the contrary. *Burks v. Mitchell*, 78 Ala., 61; *Yokum v. Fickey*, 37 W. Va., 762; *Brett v. Farr*, 66 Iowa, 684. Nor do mere acts of trespass upon vacant and uninclosed lands not amounting to an exclusive appropriation thereof and not made under a *bona fide* ownership constitute an adverse possession. *Chicago & N. W. R. Co. v. Galt*, 133 Ill., 657; *Aiken v. Ela*, 62 N. H., 400.

BILLS AND NOTES—RIGHT OF TRANSFEREE—COLLATERAL SECURITY.—GAY v. HUDSON RIVER ELECTRIC POWER CO., 180 FED., 222.—*Held*, that where a company sold goods under a contract, retaining the title until the payment of purchase money notes, the transfer of the notes carried with it the contract in so far as it reserved the title to the goods, as collateral secur-

ity for the payment of the notes, though the transferee at the time of the transfer was ignorant of the existence of the contract.

In general a lien or mortgage securing a negotiable note passes as an incident to the note to a *bona fide* assignee of the note before maturity. *Tweto v. Horton,* 90 Minn., 451; *Brass v. Green,* 113 Ill. App., 58. And an assignment of one of several notes secured by a mortgage acts as a *pro tanto* assignment of the rights under the mortgage. *Harman v. Barhydt,* 20 Neb., 625. Furthermore, one who purchases a note secured by a general guaranty is entitled to the benefit of such guaranty, though he buys in ignorance thereof. *Tidionte Savings Bank v. Libbey,* 101 Wis., 193. Since the assignment of a note ordinarily operates as an assignment of a mortgage made to secure the note, where it so operates an irregular assignment of the mortgage is immaterial. *Robinson v. Campbell,* 60 Kan., 60. However, a mere vendor's lien for purchase money will not, without a contract and in the absence of a statute, be enforced in favor of an assignee of the notes given for the purchase money. *Wellborn v. Williams,* 9 Ga., 86.

CORPORATIONS—RECEIVERS—CLAIMS FOR INTEREST.—BLAIR V. CLAYTON ENTERPRISE CO., 77 ATL., 740 (DEL.).—*Held,* that in distributing assets of an insolvent corporation, interest should be allowed only on claims of creditors who, in probating them, ask for interest, and those who do not will be assumed to have either waived it or not to be entitled to it.

As a general rule, after property of an insolvent passes into the hands of a receiver, interest is not allowed on the claims of creditors. *Thomas v. Western Car Co.,* 149 U. S., 95. But the creditor may obtain interest when he asks specially for it and shows that there were funds on hand to pay all of the demands and accrued interest. *New York Security & Trust Co. v. Lombard Inv. Co.,* 73 Fed., 537. And where the payment of a dividend is deferred by reason of an unsuccessful contest of a claim by a receiver, the creditor so delayed is allowed interest on the dividend in equity. *Citizens' Savings Bank v. Vaughan,* 115 Mich., 156; *Armstrong v. American Exch. Bank,* 133 U. S., 433. But where damages occurred after the appointment of a receiver, in a suit for such damages, the allowance of interest on the claims from the date when the decision was filed on which the decree was afterward entered, was held to be within the discretion of the court. *Central Trust Co. v. Denver & R. G. R. Co.,* 97 Fed., 239. Furthermore, interest on dividends should not be allowed one who voluntarily delays presenting his claim until long after the dividends have been declared. *Chemical Nat. Bank v. Armstrong,* 59 Fed., 372. Moreover, the security and priority of the lien attaches as well to interest as to principal. *Central Trust Co. v. Condon,* 67 Fed., 84.

CORPORATIONS—SALES OF STOCK—BREACH OF WARRANTY—INSTRUCTION. —ILER V. JENNINGS, 68 S. E., 104 (S. C.).—*Held,* that where it appeared that the seller of corporate stock referred the purchaser to the bookkeeper for information as to the status of the business, and that the statement given was affirmed by the seller to be correct according to the

books, and the purchaser relied thereon to his prejudice, the instruction that the jury should find for the seller if he merely stated that the books of the company showed this condition, was erroneous.

Representations made by the vendor on a sale for the purpose of inducing the vendee to purchase, and which did induce the vendee to purchase, amount to a warranty. *Marsh v. Webber,* 13 Minn., 109. No particular words are necessary to create a warranty. *Thorne v. McVeagh,* 75 Ill., 81. The decisive test as to whether there is a warranty or not has been said to be "whether the vendor assumes to assert a fact of which the buyer is ignorant; or merely states an opinion or judgment upon a matter of which the vendee has no special knowledge, and on which the vendor may be expected to have an opinion; in the former case there is a warranty, and in the later case there is not." *Mechem's Sales,* Vol. II., Sect. 1243. Whether the representation was made as one of fact, or merely of opinion, is, where a dispute arises, a question of fact for the jury to determine. *Hawkins v. Pemberton,* 51 N. Y., 198. Whenever the facts are conceded, and the expressions of both parties are admitted, then the question is one which the jury should not decide. *Holmes v. Tyson,* 147 Penn., 305. When the warranty has been broken, then the offended party is entitled to maintain an action for such breach. *Bryant v. Isburgh,* 13 Gray (Mass.), 607. Records on the corporation books are not generally evidence against a stranger; but they are against a corporator who assented to the entry made in them, or against anyone claiming under him. *Union Canal Company v. Loyd,* 4 Watts and Sar (Penn.), 393.

HUSBAND AND WIFE—LIABILITY OF HUSBAND—NECESSARIES.—THRALL HOSPITAL V. CAREN, 124 N. Y., SUPP., 1038.—*Held,* that a physician's service to a sick wife is a necessary that the husband must furnish, either through himself or through her implied authority to call a physician, and the husband is primarily liable therefor.

Where husband and wife live together, the husband is liable for medical attention and services appropriate to his wife's illness, if they are supplied on his credit, but not if supplied on her credit, and charged to her alone. *Black v. Clements,* 2 Pennewill, 499. A husband living apart from his wife is liable for necessary medical services furnished the wife, where he made no adequate provision for such necessaries. *Button v. Weaver,* 84 N. Y. Supp., 388. Medical services are necessaries, within the rule making the husband liable for necessaries furnished the wife. *Cothran v. Lee,* 24 Ala., 380; *Glaubensklee v. Low,* 29 Ill. App., 408; *Mayhew v. Thayer,* 8 Gray (Mass.), 172; *Potter v. Virgil,* 67 Barb. (N. Y.), 578. A husband's liability for medical services rendered his wife while she is living apart from him depends on whether the separation is due to his fault. *Wolf v. Schulman,* 90 N. Y. Supp., 363.

HUSBAND AND WIFE—WIFE'S INDORSEMENT ON HIS NOTE—LIABILITY.—BASILEA V. SPAGNUOLO, 77 ATL., 532 (N. J.).—*Held,* that a wife, indorsing for accommodation a note of her husband in New Jersey, and made

payable there, to his creditor, to whom it is delivered, is not liable thereon to the creditor.

The validity of a contract of indorsement is ordinarily determined by the law of the place where the indorsement is made. *Union National Bank v. Chapman,* 169 New York, 538, 543. Every indorsement is presumed, unless the contrary appears, to have been made at the place where the instrument is dated or payable. *Daniels on Negotiable Instruments* (5th ed.), Sect. 728; *Chemical National Bank v. Kellogg,* 183 New York, 92. The Negotiable Instruments Law, enacted in nearly all the states, supports this doctrine. *Crawford on the Negotiable Instruments Law,* 58. Where a married woman indorses an accommodation note in a state where her common law disabilities have not been removed as to indorsement, dated and payable in that state, her contract is therefore of no effect. But if the note is dated or payable in another state, where her indorsement would be valid, and where the note is negotiated, she is liable on the note to a *bona fide* purchaser for value without notice, being estopped to show the true facts. *Chemical National Bank v. Kellogg,* 183 New York 92. Even in New Jersey, where a married woman is not liable as an accommodation indorser, her indorsement will be enforced as a New York contract in such a case. *Thompson v. Taylor,* 66 N. J. Law, 253. Another view is that even if the contract is to be regarded as of the place where she wrote the indorsement, she will be estopped to deny that her contract was made in another state. *Union National Bank v. Chapman, supra; Quaker City National Bank v. Showacre,* 26 W. Va., 52. Still another theory, upheld by many text writers, and supported by a number of decisions, is that an accommodation party's contract is made in the state where the instrument is first negotiated. *Daniels on Negotiable Instruments,* Sect. 868.

INFANTS—DEEDS—RATIFICATION.—SYCK v. HELLIER, 131 S. W., 30 (KY.).—*Held,* that the mere retention of the purchase money paid to an infant in consideration of his conveyance of real estate is not a confirmation of the deed after his attaining full age.

There is much conflict of opinion on the point as to whether mere acquiescence by an infant on attaining his majority will serve to ratify his prior contract. Some authorities hold that omission to disaffirm a contract within a reasonable time after attaining his majority will amount to ratification. *Hastings v. Dollarhide,* 24 Cal., 195; *Dolph v. Hand et al.,* 156 Pa. St., 91. But on the other hand there are many cases holding that mere acquiescence will not bar an infant from disaffirming his contract. *Tyler v. Gallop,* 68 Mich., 185; *Vaughan v. Parr,* 20 Ark., 600. Likewise, there is also much conflict among the authorities as to the effect of retention of the consideration of a contract by an infant after reaching majority. The weight of authority seems to hold that the retention of the consideration without disaffirmance for an unreasonable time will amount to ratification. *Robbins v. Eaton,* 10 N. H., 561; *Hubbard v. Cummings,* 1 Greenl. (Me.), 11. However, other cases hold that mere retention of the consideration does not ratify the purchase. *Benham v. Bishop,* 9 Conn.,

330. Furthermore, when the infant on reaching his majority still has the consideration, his subsequent disposal of the same to a third person will amount to ratification. *Henry v. Root,* 33 N. Y., 526. But the retention of proceeds of land purchased and sold during infancy is not a ratification. *Walsh v. Powers,* 43 N. Y., 23. If an infant elects to repudiate his contract on reaching majority, he must turn over whatever he has received by virtue of the contract, provided he still has the proceeds, as a condition precedent to disaffirmance. *Amer. Freehold Land Mortgage Co. v. Dykes,* 111 Ala., 178.

LANDLORD AND TENANT—LEASES—RELEASE OF SURETY.—TAYLOR V. DINSMORE, 124 N. Y. Supp., 936.—*Held,* that where a landlord fails to perform a covenant in a lease to adapt the premises to the tenant's business, in the absence of a rescission by the tenant, the sureties may not recover back bonds deposited to secure performance of the lease by the tenant.

The authorities seem to be in conflict with the principal case. The contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms. *Miller v. Stewart,* 9 Wheat., 680; *Woodi Landlord and Tenant* (Second Ed.), Vol. 2, Sect. 470. And it is a general rule that any agreement between the creditor and principal which varies essentially the terms of the contract by which the surety is bound, without the consent of the surety, will release the surety. *United States v. Tillotson,* 1 Paine (C. C.), 305; *Blakey v. Johnson,* 13 Bush. (Ky.), 197; *Thompson v. Massie,* 41 Ohio St., 307. So a material alteration in the terms of the lease by the mutual agreement of the landlord and tenant, and without the consent of the surety, discharges the surety. *Taylor's Landlord and Tenant* (Eighth Ed.), Vol. 1, Sect. 424 b; *Penn v. Collins,* 5 Rob. (La.), 213. Consequently, where a lessor failed to repair and furnish a hotel as agreed, the sureties were released, although the lessees waived the right to demand the repairs and furnishing. *Stemo v. Sawyer,* 78 Vt., 5. And, on this principle, property which is pledged by a third person as security for the obligation of another will be released under the same circumstances as a surety personally bound. *Brandt on Suretyship,* Second Ed., Vol. 1, Sect. 34; *Price v. Dime Savings Bank,* 124 Ill., 317; *Davies County Bank v. Trust Co.,* 33 Ky. L. Rep., 457.

LANDLORD AND TENANT—SAFETY OF PREMISES—DUTY OF LANDLORD.—WASH V. SCHMIDT, 92 N. E., 496 (MASS).—*Held,* that since the rule of *caveat emptor* applies to leases of land, and the landlord is not impliedly bound to keep the premises in safe condition, the landlord did not impliedly warrant that a house rented, or the piazza thereof, was safe and fit for occupancy.

A lessee of land is a quasi-purchaser, and as such is bound to inspect the property before leasing it. He is subject to the principle of *caveat emptor.* The law implies no warranty on the part of the lessor as to the condition of the premises, and the lessee cannot complain that they were not at the commencement of the tenancy, in a habitable condition, or were not adapted to the tenant's purposes. *Minor and Wurts Real Property,*

Sect. 355; *Doyle v. Union Pacific R. R. Co.*, 147 U. S., 413; *Bowe v. Hunking*, 135 Mass., 380; *Franklin v. Brown*, 118 N. Y., 110. In support of the above it was said in *Bennett v. Sullivan*, 100 Me., 118, that "when a landlord leases a house to a tenant there is no implied warranty that such dwelling house is reasonably fit for habitation, and no obligation on the part of the landlord to make repairs on the leased premises unless he has made an express valid agreement to do so." On the other hand, in the case of *Ingalls v. Hobbs*, 156 Mass., 348, it was held that in a lease of a completely furnished dwelling house for a single season, at a summer watering place, there is an implied agreement that the house is fit for habitation without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed. But this case is generally repudiated, and a New Jersey case, *Land v. Fitzgerald*, 68 N. J. Law, 28, goes so far as to say that there is no implied duty on the owner of a house which is in an unsafe condition, to inform a proposed tenant that it is in a dangerous condition, and no action will lie against him for an omission to do so in the absence of express warranty or deceit.

MECHANICS' LIENS—ERECTION OF BUILDING.—MUNROE V. CLARK, 77 ATL., 696 (ME.).—*Held*, that when one contracts to furnish completed articles, like cut and fitted stones, for a building to be erected, and is to have no part in the erection of a building, his employees have no lien on the building for their labor in preparing and completing the articles.

Many states, among them Maine, hold that statutes creating mechanics' liens should be liberally construed. *De Witt v. Smith*, 63 Mo., 263; *Shaw v. Young*, 87 Me., 271; *Steger v. Arctic Refrigerating Co.*, 89 Tenn., 453. On the other hand, it is frequently laid down that such statutes are to be strictly construed. *Willard v. Magoon*, 30 Mich., 273; *Jersey County v. Davison*, 29 N. J. L., 415; *McCay's Appeal*, 37 Pa. St., 125. It is the use of the materials furnished and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material man or laborer his lien under the statute. *Van Stone v. Stillwell Co.*, 142 U. S., 128; *Goodman v. Baerlocher*, 88 Wis., 287. Therefore, one who does work in his shop or elsewhere on materials to be used in the construction of the building, and so used, is entitled to a lien for such work. *Evans Marble Co. v. Trust Co.*, 101 Md., 210; *Howes v. Reliance Wire-works Co.*, 46 Minn., 44; *Parrish's Appeal*, 83 Pa. St., 111. Moreover, a workman may have a lien for his labor on material specially prepared at his shop, even though, owing to a dispute between the owner and the contractor, the material is not used. *Berger v. Turnbald*, 98 Minn., 163. But laborers making brick in a brick-yard of the contractor in his regular business have no lien on the house in which the bricks are laid. *Haynes v. Holland*, 48 S. W., 400 (Tenn.). It is not necessary that the parties furnishing materials should be also contractors or subcontractors for the erection or repair of the building. *Chapin v. Paper Works*, 30 Conn., 461. A lien is usually allowed for transportation of the material to be used in the construction of the building. *Fowler v. Pompelly*, 25

Ky. L. Rep., 615; *McKeen v. Haseltine,* 46 Minn., 426; *Hill v. Newman,* 38 Pa. St., 151; *Contra, Webster v. Real Estate Improvement Co.,* 140 Mass., 526.

MUNICIPAL CORPORATIONS—FRANCHISES—POWER OF REVOCATION.—CITY OF NEW YORK V. MONTAGUE, 124 N. Y. SUPP., 959—*Held,* that the franchise to operate a street railroad springs from the state, and not from the city where its lines lie, though it is essential that the consent of the municipal authorities should be secured, and hence the right to revoke the franchise rests in the state, and the municipality cannot move to compel a removal of such a company's tracks on the ground that they constitute a nuisance, not from operation in a manner not authorized by the grant, but for mere nonuser.

It is the general rule that the power to grant franchises is fixed in the sovereign state. *People's Railroad v. Memphis Railroad,* 10 Wall. (U. S.), 38; *The Denver & Swansea Railway Co. v. The Denver City Railway Co.,* 2 Colo., 673. But where the charter of the municipality derived from the state sanctions such an act, a city may grant a charter in the capacity of agent for the state. *Port of Mobile v. Louisville & Nashville R. R. Co.,* 84 Ala., 115. And it is well settled that a franchise having been granted by a state, the permission of the city granted to the corporation to exercise its charter rights is not a franchise, but a mere license. *Chicago City Railway Co. v. The People,* 73 Ill., 541. Moreover, in several states constitutional amendments have been passed prohibiting a grant of a franchise to a street railway without the consent of the municipal authorities. *Chicago City Railway Co. v. Story,* 73 Ill., 541. But a franchise once granted and accepted is in the nature of a contract, irrevocable by the state. *Dartmouth College v. Woodward,* 4 Wheat. (U. S.), 518. The same thing is true in case of a municipality, and consent once given to a franchise cannot, in absence of statute to the contrary, be withdrawn. *Africa v. City of Knoxville,* 70 Fed., 729. But where the public health or public morals are involved, the franchise is revocable by the state. *Butchers' Union Co. v. Crescent City Co.,* 111 U. S., 746.

MUNICIPAL CORPORATIONS—POLICE POWER—ORDINANCES.—CITY OF BUFFALO V. GEO. P. RAY MFG. CO., 124 N. Y. SUPP., 913.—*Held,* that the right to adopt ordinances in the exercise of a city's police power is limited only by the Constitution and statutes, and the reasonableness of the ordinance, without reference to whether it deals with a condition constituting a common law nuisance or not.

A municipality has such powers as the legislature thinks it wise to grant for the public good, either by special charter or general laws. *People v. Hill,* 7 Cal., 97. But it can exercise no power which is repugnant to the common or statute law of the state. *Haywood v. Savannah,* 12 Ga., 404. And in the exercise of police power, it must be fairly included in the grant. *Judy v. Lashley,* 50 W. Va., 628. A chartered municipal corporation may, by ordinance, duly enacted, not manifestly unreasonable or oppressive, nor unwarrantably discriminatory, prohibit things

which were not public nuisances at common law. *Pittsburg v. Keech*, 21 Pa. Super Ct., 548; *Com. v. Parks*, 155 Mass., 531. But in *Everett v. Council Bluffs*, 46 Ia., 66, the court declared that the municipality has no such authority unless it has been given by common or statute law. Yet, when it is a nuisance, *per se*, it unquestionably has the power. *Railroad v. Lakeview*, 105 Ill., 207. But it cannot make that a nuisance which, in its nature, is not one. *Ward v. Little Rock*, 41 Ark., 526. And it was held in *Opehouses v. Norman*, 51 La. An., 736, that where a thing is complained of as a nuisance, a municipal corporation in exercise of its police power, may make regulations for its suppression and prohibition. And the ordinance is valid unless shown to be unreasonable. *Railroad v. Casey*, 26 Pa., 287.

STATUTES—CLASSIFICATION OF CITIES—"PRIVATE, LOCAL, OR SPECIAL LAW."—WILSON V. MCKELNEY, 77 ATL. REP., 94 (N. J.).—*Held*, that the act creating a board of public works in cities having a population of not less than 100,000 nor more than 200,000 inhabitants is not a "private, local, or special law," affecting the internal affairs of towns or counties, within the constitutional prohibition. Pitney, Bergen and Garrison, JJ., *dissenting*.

The distinction necessary to mark a class, under the constitutional prohibition of special and local legislation, must be something in the situation or circumstances of the places embraced by the enactment, which would render like powers, if granted, inappropriate to and unavailable for other places. *Van Geisen v. Bloomfield*, 47 N. J. L., 442. And it seems to be generally held that a legislature may pass acts classifying cities according to their population, as a necessary means of providing for the local governments, best adapted to their needs, and in so doing it is not violating the constitutional provision against local and special legislation. *In re Ruan St.*, 132 Pa., 257; *State v. Baker*, 55 Ohio, 1. And it is the only proper classification; geographical distinctions cannot be resorted to without entering the domain of special legislation. *Commonwealth v. Patton*, 88 Pa., 258. Such an act is constitutional when applied to cities of a certain population or class, providing for public boards. *Warner v. Hoagland*, 51 N. J. L., 62. Although only one city was affected by the act at the time of passage. *Van Reipen v. Jersey City*, 58 N. J. L., 262. And the courts cannot inquire as to whether the legislature, in fixing the standard of classification purposed bringing only a single city under the act. *State v. Kalsem*, 130 Ind., 434. And in *Lloyd v. Smith*, 176 Pa., 213, the court holds that after actual classification has been made, the court is the final interpreter of the Constitution to see that it is not special legislation under that guise.

TRUSTS—MINGLING TRUST FUND.—TREACY V. POWERS, 127 N. W., 936 (MINN.).—*Held*, that a trustee cannot mingle the trust estate with his own and deny to the *cestui que trust* the option of following the joint affairs and availing himself of the proceeds the trustee may have realized from his improper conduct.

The doctrine is well established that, so long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and, if one mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. *Hutchinson et al. v. National Bank of Commerce,* 145 Ala., 196; *National Bank v. Insurance Co.,* 104 U. S., 54. In *Richelieu Hotel Co. v. Miller,* 50 Ill. App., 390, it is said, "The proceeds of a trust fund, wrongfully disposed of by a trustee, can be followed by the *cestui que trust* only so long as such proceeds can be identified and separated from others in the hands of the trustee." But when property is turned into money, and mixed in a general mass of property of a like description, the trust ceases. *Phillips v. Overfield,* 100 Mo., 466. However, in *Farmers, etc., Bank v. King,* 98 Am. Dec., 215, it is said equity will follow the fund through any number of transmutations and preserve it for the owner, so long as it can be identified, no matter in whose name the legal right stands.