RECENT CASE NOTES

ADMINISTRATIVE LAW—JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS.—The Commissioner of Internal Revenue, under the authority of U. S. Rev. Stat. (1919) § 3220, U. S. Comp. Stat. (1923 Supp.) § 5944, refunded certain excise tax payments made by the defendant corporation on its manufactures. Subsequently, the Commissioner ruled that the goods were properly subject to taxation. In an action by the government to recover the amount of the tax, judgment was rendered for the defendant. *United States v. Detroit Steel Products Co.*, 20 F. (2d) 675 (S. D. Mich. 1927).

It has generally been held that the determinations of the Commissioner of Internal Revenue, when made under his statutory authority, are conclusive. *United States v. Kaufman*, 96 U. S. 567 (1877) (allowance of commissioner not reviewable); *Cohen v. Edwards*, 256 Fed. 964 (S. D. N. Y. 1919) (no collateral attack on finding of fact); *Penrose v. Skinner*, 293 Fed. 335 (D. Colo. 1923) (determination of commissioner binding on both his successors and court); see Pillsbury, *Administrative Tribunals* (1923) 36 HARV. L. REV. 405, 413-415. But this does not prevent an attack on the decision based on an allegation of fraud or lack of jurisdiction. See *Dugan v. U. S.*, 34 Ct. Cls. 458, 466 (1899); Albertsworth, *Judicial Review of Administrative Action* (1921) 35 HARV. L. REV. 127, 151; Holmes, *Federal Taxation* (6th ed. 1925) § 915; *cf. School v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33 (1902) (Postmaster-General—determination of question of law reviewable on appeal). The same rule is applicable to the determinations of other administrative officers. *United States v. Babcock*, 250 U. S. 328, 39 Sup. Ct. 464 (1919) (claims before Treasury Dep't); *United States v. Hitchcock*, 190 U. S. 316, 23 Sup. Ct. 698 (1903) (Secretary of Interior, public lands); *Ekiu v. United States*, 142 U. S. 651, 12 Sup. Ct. 336 (1892) (immigration); *United States v. Black*, 128 U. S. 40, 9 Sup. Ct. 12 (1888) (pension); *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 595 (1904) (Postmaster-General, specific claim); *cf. Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 177 (1904) (immigration, jurisdictional matter reviewable); see (1923) 32 YALE LAW JOURNAL 735; Grimm, *Administrative Determinations* (1919) 3 ST. LOUIS L. REV. 140; Note (1927) 25 MICH. L. REV. 288. The justification for this rule lies in the better adaptability of administrative tribunals for such hearings and the consequent relief to already crowded trial dockets. See Note (1927) 27 COL. L. REV. 450, 452; Pillsbury, *op. cit. supra*, at 591-2. Another ground upon which the instant decision is based is the rule barring recovery of taxes voluntarily paid. *Chesebrough v. United States*, 192 U. S. 253, 24 Sup. Ct. 262 (1904); *Fox v. Edwards*, 287 Fed. 669 (C. C. A. 2d, 1923); *Proctor & Gamble Co. v. United States*, 281 Fed. 1014 (S. D. Ohio, 1922); See 3 Cooley, *Taxation* (4th ed. 1924) § 1282. It has been pointed out that there is a tendency to abrogate this rule. See Note (1926) 12 VA. L. REV. 433. And several dicta criticize, as having no foundation in policy, the requirement that taxes be paid under protest as a prerequisite to refund. See *People v. Haverstraw*, 126 App. Div. 414, 419, 110 N. Y. Supp. 769, 773 (2d Dept. 1908); *Hotel Richmond v. Commonwealth*, 118 Va. 607, 611, 88 S. E. 173, 174 (1916). Most of the inroads upon the rule have been in cases involving statutes which authorize the refund without mentioning the manner of payment. *Cf. Stewart Co. v. Alameda County*, 142 Cal. 660, 76 Pac. 481 (1904); see *Rand v. United States*, 249 U. S. 503, 508, 39 Sup. Ct. 359, 360 (1919). Moreover, the doctrine seems hitherto to have been restricted to suits

brought by a taxpayer for recovery of taxes. Any extension to make it applicable to refunds made by a tax commissioner would seem unwarranted.

ALIENS—CONSTITUTIONAL LAW—SECTION OF NATURALIZATION ACT HELD MANDATORY.—Section 4 of the Naturalization Act of 1906 [U. S. Comp. Stat. (1916) § 4352] requires that the applicant's certificate of arrival and petition for citizenship be filed concurrently. Appellee was permitted to file his certificate of arrival twenty days after filing his petition for citizenship, it being entered *nunc pro tunc*. The government petitioned to cancel appellee's certificate of citizenship on the ground that failure to comply with Section 4 was a jurisdictional defect. The district court dismissed the petition. *Held*, on appeal (one judge *dissenting*), that the decree be reversed, since strict compliance with Section 4 is necessary. *United States v. Maney*, 21 F. (2d) 28 (C. C. A. 7th, 1927).

Strict compliance with the terms of a tax statute is required in situations where a variance therefrom endangers one's ownership in land. *Womack v. Central Lumber Co.*, 131 Miss. 201, 94 So. 2 (1922) (statute requiring land to be sold in prescribed manner to satisfy delinquent taxes); *Cook v. Vincent*, 111 Okla. 95, 238 Pac. 471 (1925) (failure to publish notice for the statutory period avoided a tax sale). Otherwise if the variation would not have such an effect. *Thomas v. Chapin*, 116 Mo. 396, 22 S. W. 785 (1893) (binding of assessment roll in two volumes contrary to statute did not avoid a levy on personalty). Deviations from the copyright law are immaterial when no general injury to the public is occasioned. *Wireback v. Campbell*, 261 Fed. 391 (W. D. Md. 1919) (requirement that applicant for copyright set forth his citizenship not mandatory). But courts strictly enforce requirements as to the publication of notice of the copyright, since such publication is a prerequisite to a suit for infringement. *Louis De Jonge & Co. v. Breuker*, 182 Fed. 150 (S. E. D. Pa. 1910) (one notice on a sheet containing several reproductions of a painting insufficient, statute requiring one on each). Election statutes are liberally construed unless a variance from the prescribed mode affects the merits of the election. *State v. Hackman*, 273 Mo. 670, 202 S. W. 7 (1918) (janitor delivering ballot boxes instead of city clerk immaterial); *State v. Superior Court*, 140 Wash. 636, 250 Pac. 66 (1926) (statute requiring 30 days notice of special election mandatory). And also statutes affecting only the procedural part of a task. *Cline v. Cline*, 198 Ky. 585, 249 S. W. 348 (1923) (failure to file transcript with court clerk by statutory date not fatal); *Emhardt v. Schroeder*, 155 U. S. 124 (1894) (likewise as to customs officer's failure to follow statutory mode of examining goods); *In Re Stein*, 105 Fed. 749 (C. C. A. 2d, 1901) (statutory mode of securing service of process in bankruptcy proceeding not mandatory). It seems then, that strict compliance with statutes requiring affirmative action is indispensible only in cases where its absence would jeopardize the interests of others or tend to defeat the purpose of the statute. See, Sedgwick, *Statutory and Constitutional Law* (1857) 229 *et seq.*, 291, 294. And this is true with respect to the naturalization law. *United States v. Stoller*, 180 Fed. 910 (E. D. Wash. 1910) (requirement that applicant's petition be filed in duplicate not mandatory); *In Re Denny*, 240 Fed. 845 (S. D. N. Y. 1917) (likewise as to requirement that name of applicant's former sovereign appear in his declaration of intention). Section 4 was designed to disclose sources of evidence regarding applicant's arrival, as it can hardly be assumed that it is a trap set for the unwary alien. A variation from its terms would not affect the value of the evidence disclosed. *Cf. In Re Pick*, 209 Fed. 999 (E. D. N. Y. 1913) (original certificate not required); *In Re Page*, 206 Fed. 1004 (E. D. Mich. 1913) (need not be based on information

received at port of arrival). Neither would an abbreviation in the period allotted the government for investigation result, since, as the dissenting opinion suggested, the court could extend it. Nor would the public appear to be adversely affected if the applicant were otherwise eligible. The instant court appears to have insisted too strongly on a mere formality.

BANKRUPTCY—LIENS UPON EXEMPT PROPERTY—JURISDICTION OF THE BANKRUPTCY COURT.—An attachment was levied on a debtor's land before it was appropriated as a homestead and within four months of bankruptcy. In the bankruptcy proceedings which followed, the land was set aside as exempt. The referee then permitted the trustee in bankruptcy to become a party to the suit for which the attachment issued, for the benefit of all the creditors. *Held*, that this was error since the lien, even if valid, was outside the jurisdiction of the bankruptcy court. *In re Rabb*, 21 F. (2d) 254 (N. D. Tex. 1927).

It was finally considered settled that under § 67f of the Bankruptcy Act a discharge in bankruptcy discharged liens acquired by legal proceedings within four months of bankruptcy on exempt property. *Chicago, Burlington & Quincy R. R. Co. v. Hall*, 229 U. S. 511, 33 Sup. Ct. 885 (1913); *Booth v. Bates*, 215 Ala. 613, 112 So. 209 (1927); Remington, *Bankruptcy* (3d ed. 1923) § 1359. But liens created by contract upon the exempt property are not discharged, unless preferential under § 60 (a) and (b). *Bank of Mendon v. Mell*, 185 Mo. App. 510, 172 S. W. 484 (1915) (mortgage given on exempt property within four months of bankruptcy); *Schwanz v. Farmers' Co-op. Co. of Lorimor*, 214 N. W. 491 (Iowa, 1927); *Pace v. Berry*, 176 Ky. 61, 195 S. W. 131 (1917). Likewise where a judgment is acquired on an instrument which expressly waived exemptions. See *Chicago, Burlington & Quincy R. R. v. Hall, supra* at 516. But a debt evidenced by exemption waiver notes not reduced to judgment does not survive the discharge in bankruptcy. *Joyner v. Bank of Menlo*, 156 Ga. 750, 120 S. E. 4 (1923). Nevertheless, the bankruptcy court may withhold the discharge for a reasonable time to permit the creditor to secure a judgment lien which will not be avoided by the discharge. *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751 (1903); *In re Maynard*, 183 Fed. 823 (N. D. Ga. 1910). And it has even been held proper for the trustee to withhold the exemptions to permit garnishment proceedings against him in a state court. *In re Solomon*, 294 Fed. 295 (E. D. Ala. 1923). In Texas the homestead exemption exists from the date of its designation. *Heady v. Behar Bldg. Ass'n*, 26 S. W. 468 (Tex. Civ. App. 1894). And liens acquired on the premises before such designation are superior to homestead rights later acquired. *Brooks v. Chatham*, 57 Tex. 31 (1882). Therefore, it is preserved against a discharge in bankruptcy. *In re Malone's Estate*, 228 Fed. 566 (E. D. Idaho, 1915) (and may be administered by the bankruptcy court). And it would seem that such lien should be preserved only for the lienor, and not for the estate. *Cf. American Trust & Savings Bank v. Duncan*, 254 Fed. 780 (C. C. A. 5th, 1918); *In re Moore*, 11 F. (2d) 62 (C. C. A. 5th, 1926); (1927) 36 YALE LAW JOURNAL 417. Assuming the validity of this lien, it is generally held that the jurisdiction of the bankruptcy court over exempt property is limited to segregating and setting it aside for the benefit of the bankrupt. It has no power to determine claims against the exempt property. *In re Hatch*, 102 Fed. 280 (S. D. Iowa 1900); *Woodruff v. Cheeves*, 105 Fed. 601 (C. C. A. 5th, 1901); *Peyton v. Farmers' Nat. Bank*, 261 Fed. 326 (C. C. A. 5th, 1919); *Birmingham Finance Co. v. Chisholm*, 284 Fed. 840 (C. C. A. 5th, 1922); *Eckhardt v. Hess*, 200 Iowa 1308, 206 N. W. 291 (1925). A very few states hold that the equitable jurisdiction of the bankruptcy court includes the privilege of administering the exempt

property in behalf of valid claims. *Brooks v. Britt-Carson Shoe Co.*, 133 Ga. 191, 65 S. E. 411 (1909); *In re Malone's Estate, supra.* The instant decision is clearly in line with the greatly prevailing view that a claim against exempt property, not extinguished by the discharge in bankruptcy, is outside the jurisdiction of the bankruptcy court.

BILLS AND NOTES—PRESENTMENT FOR PAYMENT BY TELEPHONE.—The plaintiff was the holder of a negotiable note payable at the maker's office. On the day of its maturity a notary, on behalf of the holder, telephoned the office of the maker corporation and asked for an officer by name, making demand for payment. The reply was that the officer was not there. In an action against the indorser, the trial court gave judgment for the plaintiff. *Held*, on appeal, that the judgment be reversed since this was an insufficient presentment to charge the indorser. *Robinson v. Lancaster Foundry Co.*, 136 Atl. 58 (Md. 1927).

The same result has been reached when the maker himself answered the telephone and refused payment. *Gilpin v. Savage*, 201 N. Y. 167, 94 N. E. 656 (1911). Section 74 of the N. I. L. requires the instrument to be exhibited to the person from whom payment is demanded. But when there is a refusal to pay on other grounds, the courts disregard this requirement. *Lockwood v. Crawford*, 18 Conn. 361 (1847); *Porter v. Thom*, 40 App. Div. 34, 57 N. Y. Supp. 479 (2d Dept. 1899) (note in the possession of the holder at the time). Some courts do not insist that the holder have the note in his possession under these circumstances. *Freudenberg v. Lucas*, 38 Cal. App. 95, 175 Pac. 482 (1918); *Porter v. East Jordan Realty Co.*, 210 Mich. 398, 177 N. W. 987 (1920). *Contra: Reichert v. McQuade*, 217 App. Div. 779, 216 N. Y. Supp. 729 (2d Dept. 1926). Thus it seems that a demand upon the proper party, on a proper day, with an unqualified refusal by him to pay, will constitute a presentment. *Cf. King v. Crowell*, 61 Me. 244 (1873) (presentment on street with demand but no exhibition held sufficient). It is possible that the fact of due demand is more easily proved if accompanied by the physical presence of the holder. And the indorser would be prejudiced if the maker is more likely to refuse payment over the telephone than when confronted by the holder. Thus, a sanction of presentment by telephone might tend to increase litigation. But unless these considerations outweigh the increased facility in collection attendant upon an adoption of the contrary rule, the result in the *Gilpin Case* seems undesirable. In the absence of the maker, a presentment to anyone at the place where an instrument is payable is good under sections 72 (4) and 73 (1) of the N. I. L. The instant case may be supported since, even if a personal demand had been made, it does not appear that all the proper officers of the maker corporation were absent or inaccessible. *Cf. Simmons v. Poole*, 227 Mass. 29, 116 N. E. 227 (1917).

CHARITIES—DEVISE TO UNINCORPORATED ASSOCIATION INVALID.—The testatrix devised part of her real estate to an unincorporated charitable association, which was related to a charitable corporation, of which the unincorporated association was an auxiliary, if not a branch. In a suit for partition of the estate, *held*, that the attempted devise was invalid, on the ground that an unincorporated association is incapable of taking property by devise. *Fisher v. Lister*, 223 N. Y. Supp. 321 (Sup. Ct. 1927).

The common law rule that an unincorporated association is not a capable grantee under a deed or devise still prevails. *Donthitt v. Stinson*, 63 Mo. 268 (1876); *East Haddam Church v. Baptist Soc.*, 44 Conn. 259 (1877); *Wilmoth v. Wilmoth*, 34 W. Va. 426 (1890); *Schein v. Erasmus Realty Co.*, 194 App. Div. 38, 184 N. Y. Supp. 840, (2d Dept. 1920); *Hawk v. Hawk*,

88 Pa. Super. Ct. 581 (1927). *Contra: N. J. Title Guarantee Co. v. Smith*, 90 N. J. Eq. 386, 108 Atl. 16 (1919) (as to personalty only). But there has been a complete abandonment of the doctrine that an unincorporated association cannot be the beneficiary of a trust. *Meeker v. Lawrence*, 212 N. W. 688 (Iowa, 1927); *Van de Boget v. Dutch Church*, 219 App. Div. 220, 220 N. Y. Supp. 58 (2d Dept. 1927); *Ruddick v. Albertson*, 154 Cal. 640, 98 Pac. 1045 (1908); *Re Drummond* [1914] 2 Ch. 90; *Penny v. Coke Co.*, 138 Fed. 769 (C. C. A. 8th, 1905); *Tarrett v. Taylor*, 9 Cranch. 43 (U. S. 1815); 3 Maitland, *Collected Papers* (1911) 366 *et seq.*; but *cf.* Gray, *Gifts for a Non-Charitable Purpose* (1902) 15 HARV. L. REV. 525. And where a will purports to create a trust, equity will appoint suitable trustees, if the will does not designate them, or if those designated do not act. *Olson v. Larson*, 320 Ill. 50, 150 N. E. 337 (1926); *Turner v. Henshaw*, 155 N. E. 222 (Ind. App. 1927); *Windsor v. Barnett*, 201 Iowa 1226, 207 N. W. 362 (1926); *Re Turk's Will*, 128 Misc. 803, 221 N. Y. Supp. 225 (Surr. Ct. 1927); *Doming v. Stanley*, 162 Ga. 211, 133 S. E. 245 (1926); *Case v. Hasse*, 83 N. J. Eq. 170, 93 Atl. 728 (1914); *Kemmerer v. Kemmerer*, 233 Ill. 327, 84 N. E. 256 (1908). Moreover, where a testator inadvisedly attempts to make a direct devise to an unincorporated charitable association, courts usually seem disinclined to allow a gift for such a purpose to fail for want of a capable devisee. Thus, where such an association is connected with a principal corporation, or is a branch or auxiliary thereof, some courts construe the will as a devise to the corporation to be used for the purposes of the unincorporated association. *Re Cameron's Estate*, 113 Misc. 416, 184 N. Y. Supp. 540 (Surr. Ct. 1920); *Reilly v. Union Infirmary*, 87 Md. 664, 40 Atl. 894 (1898); *Cosgrove v. Cosgrove*, 69 Conn. 416, 38 Atl. 219 (1897); *Guild v. Allen*, 28 R. I. 430, 67 Atl. 855 (1907). Most courts, however, will give the attempted devise the effect of a trust, naming trustees to hold the property for the beneficiary association. *Tillinghast v. Council at Narragansett Pier*, 133 Atl. 662 (R. I. 1926); *Schneider v. Kloepple*, 270 Mo. 389, 193 S. W. 834 (1917); *Eccles v. R. I. Hospital Trust Co.*, 90 Conn. 592, 98 Atl. 129 (1916); *Re Shand's Estate*, 275 Pa. 77, 118 Atl. 623 (1922); *Wood v. Paine*, 66 Fed. 807 (C. C. R. I. 1895); *Byers v. McCartney*, 62 Iowa 339, 17 N. W. 571 (1883); *Re Winchester's Estate*, 133 Cal. 271, 65 Pac. 475 (1901); *Washburn v. Sewall*, 50 Mass. 280 (1845); *Packer v. Cowell*, 16 N. H. 149 (1844). The court in the instant case thought the relation of the unincorporated association to a parent corporation too distant to warrant a construction of the will as a devise to the corporation. But in view of the prevailing disposition to surmount a technicality that would defeat the testator's intention, the failure of the instant court to carry out the will as a trust would seem regrettable.

CONDITIONAL SALES—TRANSFER OF NOTES AS AFFECTING TITLE.—The defendant gave his notes to the plaintiff on conditional sale contracts of machinery. The plaintiff transferred these notes to a bank as collateral. The defendant went into receivership and the plaintiff subsequently took up the notes with the bank. In reclamation proceedings to recover the machines, the defendant contended that the transfer of the notes to the bank was an election to treat the sale as absolute and that "title" to the machines vested in the defendant. The trial court held that such transfer indicated no such election. *Held*, on appeal, that the decree be affirmed. *McMullen Machinery Co. v. Grand Rapids Trust Co.*, 214 N. W. 110 (Mich. 1927).

An act of the conditional vendor which is deemed by the court to be "inconsistent" with his retaining "title" to the goods for the purpose of security, is said to indicate an election to treat the sale as absolute and to vest "title" in the buyer. *Endicott v. Digerness*, 103 Or. 555, 205 Pac.

975 (1922); 2 Williston, *Sales* (2d ed. 1924) §§ 579, 579 (a). Taking the buyer's notes is not such an "inconsistency." *McArthur Bros. Mercantile Co. v. Hagihara*, 22 Ariz. 100, 194 Pac. 336 (1921); *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 36 Sup. Ct. 50 (1915); 2 Williston, *op. cit. supra*, § 579 (b). *Contra: First Cong. Church v. Grand Rapids School-Furniture Co.*, 15 Colo. App. 46, 60 Pac. 948 (1900). Nor is the renewal of such notes. *McDonald Automobile Co. v. Bicknell*, 129 Tenn. 493, 167 S. W. 108 (1914). But accepting a mortgage from the buyer on the goods is. *Crewson v. Commercial Investment Trust, Inc.*, 250 Pac. 521 (Okla. 1926); *In re A. E. Richardson Co., Inc.*, 294 Fed. 451 (C. C. A. 2d, 1923). And likewise the mere commencement of suit for the entire price. *Utah Implement Vehicle Co. v. Kesler*, 36 Idaho 476, 211 Pac. 1079 (1922); *Young v. Phillips*, 203 Mich. 566, 169 N. W. 822 (1918); *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775 (1909); see 23 L. R. A. (N. S.) 144 (1910) annotation; (1919) 17 MICH. L. REV. 518. *Contra: Twentieth Century Machinery Co. v. Excelsior Springs Mineral Water Co.*, 180 Mo. App. 381, 171 S. W. 944 (1914) (discontinued suit held not an election). But the more desirable view would seem to be that commencing suit on the note is not inconsistent with the seller's rights as security holder, which remain till judgment is satisfied. *Murray v. McDonald*, 212 N. W. 711 (Iowa, 1927); 2 Williston, *op. cit. supra*, § 579 (a); Uniform Conditional Sales Act, § 24. When the buyer's note is assigned, the security "title" to the goods passes as an incident with the note. *Zederman v. Thomson*, 17 N. M. 56, 121 Pac. 609 (1912); 2 A Bogert, *Uniform Laws Annotated* (1924) § 41 (b). *Contra: Merchants & Planters Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565 (1887). And when the seller transfers the notes as security for his own debts, as in the instant case, it is not an election to treat the sale as absolute, and the seller's rights as security holder remain. *Schneider v. Daniel*, 191 Ind. 59, 131 N. E. 816 (1921); *Estes v. Lamb*, 149 Ark. 369, 233 S. W. 99 (1921); *In re Rector's*, 220 Fed. 645 (C. C. A. 2d, 1915); 2 Williston, *op. cit. supra*, § 579 (b). *Contra: Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817 (1911); see *MacLeod v. Aberdeen Brewing Co.*, 82 Wash. 74, 79, 143 Pac. 440, 442 (1914). But the doctrine of the Washington cases does not seem to be consistent with later holdings in the same jurisdiction. *Cf. Thayer v. Yakima Tire Service Co.*, 116 Wash. 299, 199 Pac. 234 (1921); 2 A Bogert, *op. cit. supra*, § 127, 41 (b). The instant decision recognizes a common business practice by sellers of raising funds by pledging such credit instruments as collateral. Also, in upholding such conditional sale agreements, the result is beneficial to all parties concerned in that it makes for more extensive and flexible uses of sellers' assets, and, in the resulting stimulation of sales, the buyer is favored by lower prices.

CORPORATIONS—LEASES—RESPONSIBILITY OF LESSOR RAILROAD FOR TORT OF LESSEE.—The defendant and the *X* railways were jointly using the former's road. The movement and operation of the trains of both were exclusively directed and controlled by defendant. Due to the negligence of the employees of *X*, a head-on collision occurred, injuring the plaintiff, the engineer of defendant's train. In an action under the Federal Employers Liability Law, verdict was directed for the plaintiff. *Held*, on appeal, that motion for new trial be denied on the ground that defendant, to protect his employees, was under a duty to keep the tracks clear for the operation of trains. *Nectaux v. Kansas City Southern Ry.*, 18 F. (2d) 681 (W. D. La. 1926).

Unless authorized by legislative authority to lease, a lessor railroad is uniformly held responsible for torts committed by the lessee in the operation of the road. *Briscoe v. Southern Kan. Ry.*, 40 Fed. 273 (W. D. Ark.

1889); *Abbott v. Johnstown Ry.*, 80 N. Y. 27 (1880); 7 Elliott, *Railroads* (2d ed. 1921) § 537. Even when the lessee's acts are those of a warehouseman. *Railroad v. Moody*, 71 Tex. 614, 9 S. W. 465 (1888) (goods burned while awaiting consignee). But not for the lessee's violation of the Interstate Commerce Act. *Western N. Y. Ry. v. Penn Refining Co.*, 137 Fed. 343 (C. C. A. 3d, 1905) (charging of rates in excess of regulation). Even under authorized leases, some courts require express statutory exemption for the lessor to escape responsibility. *Logan v. North Carolina Ry.*, 116 N. C. 940, 21 S. E 959 (1895); *Singleton v. Southwestern Ry.*, 70 Ga. 464 (1883). This, on the notion that the grant of the privilege to lease should be strictly construed to preclude a concomitant immunity from tort responsibility. *Balsley v. St. Louis Ry.*, 119 Ill. 68, 8 N. E. 859 (1886). Most cases, however, seem to consider the amount of control delegated as a criterion of responsibility, and so, where entire control passed, the lessor was held not responsible. *Caruthers v. Kansas City Ry.*, 59 Kan. 629, 54 Pac. 673 (1898) (exclusive control of all rolling stock, and disbursement of earnings conferred on lessee); *Moorshead v. United Ry.*, 119 Mo. App. 541, 96 S. W. 261 (1906) (all rolling stock, and personal and real property with the exclusive privilege of running trains over the road conferred on the lessee). But the exemption to the lessor is limited to injuries due to the operation of the road. *Lee v. Southern Pac. Ry.*, 116 Cal. 97, 47 Pac. 932 (1897) (lessor held responsible for injury due to defective roadbed); *St. Louis Railway v. Curl*, 28 Kan. 622 (1882) (lessor responsible for failure to erect cattleguards); *Nugent v. Boston Ry.*, 80 Me. 62, 12 Atl. 797 (1888) (negligently constructed awning on a station house). Where some control is retained the lessor may be held. *Driscoll v. Norwich Ry.*, 65 Conn. 230, 32 Atl. 354 (1894) (lessor's treasurer having control over disbursement of the earnings); *Manning v. Ry.*, 107 Tex. 546, 181 S. W. 687 (1916) (authority to employ and discharge train crews of the lessee); *Gulf C. & S. F. Ry. v. Miller*, 98 Tex. 270, 83 S. W. 182 (1905) (control of lessee's train orders); *Cincinnati Ry. v. Sleeper*, 5 Ohio Dec. (Reprint) 196 (1874) (control of road by joint committee). Likewise in case of injuries by a temporary joint user of the road. *Hammond v. Kansas Ry.*, 109 Okla. 72, 234 Pac. 731 (1925). The instant case seems to be amply supported by authority.

EVIDENCE—PRELIMINARY QUESTIONS OF FACT AS TO ADMISSIBILITY—LOST INSTRUMENTS.—In an action of trespass to try title to land, the defendant claimed under *X*, whose deed of title was alleged to have been lost. There was conflicting testimony as to whether the destruction of the deed was accidental or intentional. The trial court held that the destruction was wilful, thereby making secondary evidence as to its execution and contents inadmissible in the absence of sufficient proof to overcome the presumption of fraud. A verdict was directed for the plaintiff. *Held*, on appeal (one judge *dissenting*), that it was error for the trial court to decide that the alleged deed was intentionally destroyed, since this was an issue of fact for the jury. *Massie v. Hutcheson*, 296 S. W. 939 (Tex. Civ. App. 1927).

Generally it is within the province of the trial judge to determine any preliminary question of fact affecting the admissibility of secondary evidence to prove the contents of a lost deed. *Mays v. Moore*, 13 Tex. 85 (1854); *St. Croix Co. v. Sea Coast Canning Co.*, 114 Me. 521, 96 Atl. 1059 (1916); *Martinez v. Bruni*, 216 S. W. 655 (Tex. Civ. App. 1919); *Wright v. Rever*, 136 Atl. 61 (Md. 1927); 2 Wigmore, *Evidence* (2d ed. 1923) § 1194. And the manner of loss of an original document is such an incidental question of fact. *Massie v. Hutcheson*, 270 S. W. 544 (Tex. Comm. App. 1925); *Mason v. Libbey*, 90 N. Y. 683 (1882). In some states, the trial

court's finding seems to be conclusive, unless the court chooses to report the evidence for appellate consideration. See *Dunklee v. Prior*, 80 N. H. 270, 273, 116 Atl. 138, 139 (1922); *Sarle v. Arnold*, 7 R. I. 582, 586 (1863). But many states revise the trial court's determination under the guise of ascertaining whether its descretion has been abused. *Collins v. Boyd*, 59 S. W. 831 (Tex. Civ. App. 1900); *Foster v. MacKay*, 7 Metc. 531 (Mass. 1844); *Freeman v. Rice Institute*, 60 Tex. Civ. App. 191, 128 S. W. 629 (1910). Or error of law has been committed. *Avery v. Stewart*, 134 N. C. 287, 46 S. E. 519 (1904); *Ames v. N. Y., N. H., & H. R. R.*, 221 Mass. 304, 108 N. E. 920 (1915); *Robertson v. Talmadge*, 174 S. W. 627 (Tex. Civ. App. 1915). A few states permit the judge to submit such disputed questions of fact to the jury. *Niles v. Houston Oil Co.*, 191 S. W. 748 (Tex. Civ. App. 1916); *Dunklee v. Prior, supra; King v. Hanson*, 13 N. D. 85, 99 N. W. 1085 (1904); *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502 (1877). Still others require such submission. *Gordon v. Bowers*, 16 Pa. 226 (1851); Gaskins v. Guthrie, 162 Ga. 103, 132 S. E. 764 (1926). The usually stated formula is that the evidence to establish the loss of a deed must be clear and convincing. *Lucas v. Hensley*, 81 W. Va. 239, 94 S. E. 138 (1917); *Massie v. Hutcheson*, 258 S. W. 244 (Tex. Civ. App. 1924). This is so because in decreeing a reproduction of a lost deed, the court is virtually establishing title to land by parol. *In re Nicholls*, 190 Pa. 308, 313, 42 Atl. 692, 694 (1899). The temptation to fraud and perjury necessitates receiving such evidence with great caution. *Mays v. Moore, supra* at 88. 2 Moore, *Facts* (1908) § 891. In view of the strictness of the rule, it would seem preferable that conflicting testimony on the material point should be decided by the trained legal mind of the court. It is difficult for an ordinary jury to disregard incompetent evidence which it has considered. See *State v. Armstrong*, 118 La. 480, 482, 43 So. 57, 58 (1907). The evaluation of the credibility of the respective witnesses in the instant case, which had been litigated in Texas courts for more than fifteen years, was peculiarly appropriate for the court. Any abdication of the judicial function in favor of the jury would seem ill advised. 5 Wigmore, *op. cit. supra*, § 2550. See Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence* (1927) 40 HARV. L. REV. 392 (suggesting a number of possible solutions to the problem of choice of judge or jury).

EVIDENCE—PRIOR CONVICTIONS INADMISSIBLE TO SHOW REPUTATION.—The defendants were convicted for keeping a disorderly house. The trial court allowed the state to prove that frequenters of the house had been convicted of prostitution and other criminal offenses. *Held*, on appeal, that the judgment be reversed because such evidence was inadmissible to show reputation of frequenters. *State v. Nickelsporn*, 138 Atl. 310 (N. J. 1927).

In general, courts admit evidence showing the general reputation of inmates and frequenters of alleged disorderly houses on the ground that such reputation is a fact in issue. *People v. Pasquale*, 206 N. Y. 598, 100 N. E. 413 (1912); *Marshall v. Newport*, 200 Ky. 663, 255 S. W. 259 (1923). But such evidence must be corroborated, being insufficient alone to convict. *Ward v. State*, 14 Ga. App. 110, 80 S. E. 295 (1913). Similarly, evidence of the bad character or lack of chastity of the defendant has been held competent as proof of the character of the house even though the defendant had not put his character in issue. *Claiburne v. State*, 100 Tex. Cr. App. 322, 273 S. W. 260 (1925); *Howard v. People*, 27 Colo. 396, 61 Pac. 595 (1900) (previous conviction admissible). *Contra: State v. Barnard*, 64 Mo. 260 (1876). Many kinds of evidence have been admitted to establish the character of frequenters. *Nakano v. United States*, 262 Fed. 761 (C.

C. A. 9th, 1920) (testimony of doctor as to diseased condition of inmates); *State v. Alston*, 28 N. M. 379, 212 Pac. 1031 (1923) (indecent and vulgar language and conversation); *State v. Toombs*, 79 Iowa 741, 45 N. W. 300 (1890) (conversations occuring in house during accused's absence); *Key v. State*, 71 Tex. Cr. App. 485, 160 S. W. 354 (1913) (conduct of frequenters). Likewise, specific acts of unchastity have been held proper evidence. *Beard v. State*, 71 Md. 275, 17 Atl. 1044 (1889). *Contra: State v. Baans*, 77 N. J. L. 123, 71 Atl. 111 (1908). It has been urged that such instances of conduct should be admitted in cases like the present on the ground that the usual objections to such evidence in proving character, *viz.*, undue prejudice and confusion of issues, are not present and a greater practical necessity exists when character is a fact in issue. 1 Wigmore, *Evidence* (2d ed. 1923) § 202. Evidence of conviction has been generally held relevant to show the character of frequenters. *Hardeman v. State*, 94 Tex. Cr. App. 642, 252 S. W. 503 (1923); *Harwood v. People*, 26 N. Y. 190 (1863) (conviction for prostitution held prima facie evidence of character of frequenters). *Contra: People v. Newbold*, 260 Ill. 196, 103 N. E. 69 (1913). The classification of "conviction of prostitution" as a "specific act of immorality" and hence inadmissible as being irrevelent would seem to be unwarranted, since the public notoriety of a conviction would seem to be such as to charge the accused with notice thereof.

EXECUTORS AND ADMINISTRATORS—DESCRIPTION OF REPRESENTATIVE CAPACITY.—An adminstrator brought replevin to recover furniture which had been the property of his intestate. Since he had never had possession of the property, the cause of action accrued to him only in his representative capacity. In the caption of the complaint, the action was described as one to recover furniture "belonging to F. D. A., adminstrator of the estate of C. E. A., deceased." There was no other allusion in the complaint to the decedant, or to the plaintiff's office as administrator, though his appointment and qualification were admitted. Plaintiff was nonsuited at the trial court. *Held*, on appeal, that the judgment be affirmed, as the words quoted were mere *descriptio personae*, and insufficient to show that plaintiff brought the action in his representative capacity. *Ames v. Weston*, 138 Atl. 560 (Me. 1927).

An executor or administrator bringing an action only in his representative capacity must show this capacity in his complaint. *Hamilton v. McIndoo*, 81 Minn. 324, 84 N. W. 118 (1900); Bancroft, *Code Pleading* (1926) § 1400; Sutherland, *Code Pleading and Practice* (1910) § 3319. From the authority cited it may be inferred that the instant court nonsuited the plaintiff because the caption of his complaint read "administrator" instead of "as administrator." *Bragdon v. Harmon*, 69 Me. 29 (1878). Other courts have similarly held that "administrator" alone was merely *descriptio personae* while "as administrator" was necessary to show a representative capacity. *Lucas v. Pittman*, 94 Ala. 616, 10 So. 603 (1891); *Burling v. Thompkins*, 77 Cal. 257, 19 Pac. 429 (1888). But the leading view today disregards the caption alone, if capacity is shown in the pleadings as a whole. *Beers v. Shannon*, 73 N. Y. 292 (1878) (allegation of issuance of letters testamentary to plaintiff, and of administration of goods by him); *Alabama City, G. & A. R. Co. v. Heald*, 178 Ala. 636, 59 So. 461 (1912) (damages alleged for death of plaintiff's "intestate"); *Carr v. Carr*, 15 Cal. App. 480, 115 Pac. 261 (1911) (allegation of appointment of plaintiff as administrator, and averment of demands made by him "as such administrator"); *Trask v. Karrick*, 87 Vt. 451, 89 Atl. 472 (1914) (notes alleged to have been endorsed by plaintiff's testator). Likewise, where the caption describes the plaintiff "as administrator," the suit has been held to have

been brought in an individual capacity, on an examination of the entire pleadings. *Rich v. Sowles*, 64 Vt. 408, 23 Atl. 723 (1892); *Smiley v. Finucane*, 134 N. Y. Supp. 59 (Sup. Ct. S. T. 1911). It has been pointed out that the requirement of a specific allegation of representative capacity in such actions merely gives the defendant an opportunity to make a dilatory objection which is rarely decisive as to the cause of action. Clark, *Complaint-Allegations in Particular Actions* (1927) 5 N. C. L. REV. 214. This same criticism would likewise apply to the instant decision.

INSURANCE—FIRE INSURANCE—DAMAGE FROM SMOKE AND SOOT OF "FRIENDLY FIRE."—The plaintiff's house and its contents were damaged by smoke and soot caused by defective action of an oil burner system. An action was brought under an insurance policy covering "loss or damage by fire." The evidence showed that the fire was at no time outside of the furnace, and judgment was given for the defendant. *Held*, on appeal, that the judgment be affirmed on the ground that damage by smoke and soot from a fire confined within the furnace was not covered by the policy. *Lavitt v. Hartford County Mut. Fire Ins. Co.*, 105 Conn. 729, 136 Atl. 572 (1927).

The first court called upon to construe the meaning of fire in an insurance policy denied recovery for damage done by smoke on the ground that the fire was of ordinary size and confined to a furnace. *Austin v. Drewe*, 4 Camp. 360 (N. P. 1815) (a register in the chimney negligently left closed caused smoke from the ordinary fire in the furnace to escape and destroy sugar). American courts, though purporting to follow the English case, seem to deny recovery solely on the ground that the fire remained confined, without consideration of the test as to the size of the fire. *Cf. Gibbons v. German Ins. and Savings Institution*, 30 Ill. App. 263 (1888) (steam escaping from broken steam pipe damaged plaintiff's furniture); *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 35 S. E. 775 (1900) (disconnected stove pipe allowed smoke and soot from fire in stove to escape and do damage); *American Towing Co. v. German Fire Ins. Co.*, 74 Md. 25, 21 Atl. 553 (1891) (steam boiler from which the water had been drawn off damaged by heat from fire in the pit). Likewise, the test of a "hostile" fire is that it be accidental and burn in a place not intended. *Cf. Way v. Abington Mut. Fire Ins. Co.*, 166 Mass. 67, 43 N. E. 1032 (1896) (fire in chimney held hostile); *Pappadakis v. Netherlands Fire & Life Ins. Co.*, 137 Wash. 430, 242 Pac. 641 (1926) (fire escaping through crack in oven held hostile); *Cabell v. Milwaukee Mechanics Ins. Co.*, 218 Mo. App. 31, 260 S. W. 490 (1924) (live coals thrown out of heater on to dirt floor held "hostile" fire). Text writers also take the view that recovery is to be denied wherever the fire remained confined. 1 Wood, *Fire Insurance* (2d ed. 1886) § 103, citing *Austin v. Drew*, *supra*. The reasoning of the cases and of the text writers indicates that recovery would be denied even though the confined fire were excessive or otherwise operating in a manner not expected. See Abbott, *The Meaning of Fire in an Insurance Policy* (1910) 24 HARV. L. REV. 119, 135. This appears to be the result reached in at least two cases. *Samuels v. Continental Ins. Co.*, 2 Pa. Dist. Rep. 397 (1892) (flame flared up two or three feet above lamp chimney); *Hansen v. Lemars Mut. Ins. Ass'n.*, 186 Iowa 1, 196 N. W. 468 (1922) (burners of oil stove turned up too high, causing stove to give off smoke and soot). But the rule is the other way in a Wisconsin case which sought to limit the doctrine of "friendly fires" to the tests of the English case. *O'Connor v. Queen Ins. Co.*, 140 Wis. 388, 122 N. W. 1038 (1909) (recovery allowed where the fire, though confined to the furnace burned with unexpected violence and excessive heat). In support of the Wisconsin case it might

be argued that doubtful terms are to be construed in favor of the insured. 1 Joyce, *Insurance* (2d ed. 1917) § 221, n. 6. Although the court in the instant case, by applying simply the test as to the locus of the fire, is extending the doctrine of *Austin v. Drew, supra,* its decision may be justified on the ground that the contemplated risk upon which the premiums were computed did not include the risk in question in view of the respectable line of authorities which had already so held. But *cf.* Vance, *Friendly Fires* (1927) 1 CONN. B. J. 284.

INSURANCE—ILLEGALITY OF RISK—PUBLIC POLICY.—The plaintiff was convicted of manslaughter for having killed a person while driving his automobile under the influence of liquor. He was also subjected to a judgment in a civil action. The defendant, his insurer, refused to satisfy the judgment, contending that to do so would violate public policy since the obligation arose through criminal conduct. *Held,* that judgment be entered for plaintiff. *James v. British General Ins. Co.,* 137 L. T. R. 156 (K. B. Div. 1927).

It is generally said that one cannot insure himself against the consequences of his own intended illegal acts. *Ritter v. Mut. Life Ins. Co.,* 169 U. S. 139, 18 Sup. Ct. 300 (1898) (suicide); *Wells v. New Eng. Mut. Life Ins. Co.,* 191 Pa. 207, 43 Atl. 126 (1899) (death by abortion). But a life insurance policy has been held not to be avoided because of the legal execution of the insured. *Weeks v. N. Y. Life Ins. Co.,* 128 S. C. 223, 122 S. E. 586 (1924). *Contra: Northwestern Mut. Life Ins. Co. v. McCue,* 223 U. S. 234, 32 Sup. Ct. 220 (1912). And an employer may insure himself against losses occasioned by the criminal conduct of his employees. *Taxicab Motor Co. v. Pac. Coast Casualty Co.,* 73 Wash. 631, 132 Pac. 393 (1913). Likewise an insurance company may lawfully insure a conditional vendor against losses sustained because of the confiscation of an automobile while used by the conditional vendee in violation of the prohibition laws. *Fidelity & Deposit Co. v. Moore,* 3 F. (2d) 652 (D. Or. 1925). Insurance contracts indemnifying against loss of life and property damage caused by the insured's negligence are enforceable. *Hanover Fire Ins. Co. v. Merchants Transp. Co.,* 15 F. (2d) 946 (C. C. A. 9th, 1926). And the same result is reached though the insured was guilty of minor violations of motor vehicle laws. *Messersmith v. American Fidelity Co.,* 232 N. Y. 161, 133 N. E. 432 (1921) (driver under statutory age); *Brock v. Travelers Ins. Co.,* 88 Conn. 308, 91 Atl. 279 (1914) (same); *McMahon v. Pearlman,* 242 Mass. 367, 136 N. E. 154 (1922) (unlicensed driver); *Fireman's Fund Ins. Co. v. Haley,* 129 Miss. 525, 92 So. 635 (1922) (violation of speed law). Since, in many instances, the insured's civil liability is predicated on the infraction of some traffic regulation, to restrict an insurer's responsibility to those cases where no such criminal conduct existed would render indemnity insurance of negligible value. There is a conflict as to whether more reprehensible criminal conduct on the part of the insured renders the insurance contract unenforceable. *Cf. Tinline v. White Cross Ins. Ass'n, Ltd.,* 125 L. T. R. 632; [1921] 3 K. B. 327 (gross negligence resulting in manslaughter—recovery allowed); *O'Hearn v. Yorkshire Ins. Co.,* 67 D. L. R. 735 (Ont. 1921) (manslaughter by intoxicated driver—recovery denied). The instant case is commendable in that it lends support to the policy of protecting the public from risk of injury by financially irresponsible drivers. *Cf.* MASS. COMPULSORY MOTOR VEHICLE INS. LAW, Acts & Resolves of Mass. 1926, c. 368, §§ 1-6).

INNKEEPERS—DEFINITION FOR PURPOSE OF STATUTORY PROVISION.—The defendant operated a thirty-five room establishment for the accomodation

of transient guests. There was no dining room. The plaintiff, a guest on a weekly rate basis, sought to recover for injuries sustained during a fire, because of the failure of the defendant to comply with certain statutory requirements imposed on "hotels." At the trial, the jury found that the establishment was a "hotel" and returned a verdict for the plaintiff. *Held*, on appeal, that the judgment be reversed since the common law elements of an "inn" were not present. *Dixon v. Robbins*, 246 N. Y. 169, 158 N. E. 63 (1927).

At common law, in order to establish an innkeeper's responsibility to a guest, it was required that food, lodging and stabling be available to the guest. *Cf. Cromwell v. Stephens*, 2 Daly 15 (N. Y. 1867); 5 *Bacon's Abridgment, Inns and Innskeepers* (1844) § B; Story, *Bailments* (8th ed. 1870) § 475. But courts no longer insist upon all of these requirements in determining the existence of responsibility in particular cases. Accordingly, it has been held that to establish responsibility for the loss of a guest's goods, it need not appear that stabling was available. *Thompson v. Lacy*, 3 B. & Ald. 283 (1820). Nor that provision was made for food. *Nelson v. Johnson*, 104 Minn. 440, 116 N. W. 828 (1908); *Kanelles v. Locke*, 12 Ohio App. 210 (1919); *Metzler v. Terminal Hotel Co.*, 135 Mo. App. 410, 115 S. W. 1037 (1907) (adjoining restaurant operated by a third party). And it seems that the responsibility was not affected by the guest's entering under an agreement to remain a definite period of time. *Hancock v. Rand*, 94 N. Y. 1 (1883) (seven months). Nor by a mutual agreement as to the terms of payment. *Holstein v. Phillips*, 146 N. C. 366, 59 S. E. 1037 (1909) (ten dollars per week). But *cf. Waitt Const. Co. v. Chase*, 197 App. Div. 327, 188 N. Y. Supp. 589 (1st Dept. 1921) (concerning a statutory exemption clause); *Roberts v. Case Hotel*, 106 Misc. 481, 175 N. Y. Supp. 123 (1st. Dept. 1919) (apartment hotel). Failure to operate the establishment during all hours of the day was no defense in a prosecution for "presuming" to be an innkeeper without a license. *Commonwealth v. Weatherbee*, 101 Mass. 214 (1869). And the maintenance of a building open to transients has been held to be a violation of a restrictive user covenant against hotels even though no food was served. *Huntley v. Stanchfield*, 168 Wis. 119, 169 N. W. 276 (1918). A statutory hotelman's lien has been enforced although the rooms of the establishment were unfurnished. *Kieffer v. Keogh*, 188 S. W. 44 (Tex. Civ. App. 1916). A room adjoining a hotel, in no way used by guests, but rented for yearly periods was held to fall within a statute prohibiting card games at hotels. *Foster v. State*, 84 Ala. 451, 4 So. 833 (1888). The inclination to construe the word "hotel" according to the purpose to be served should be a strong reason for broadening its scope under a statute, so long as the purpose of the measure is thereby served. *Cf. Foster v. State, supra.* And it seems improbable that the framers of a measure which was designed to protect the inmates of buildings open to transients should have intended, as a test of responsibility for its breach, the presence of characteristics of purely historical significance.

LIBEL—CORPORATIONS—DEFAMATION OF ANTI-VICE SOCIETY ACTIONABLE PER SE.—The plaintiff was a corporation organized to suppress obscene literature. The defendant, a newspaper company, charged the plaintiff with "engineering" crimes to obtain half of the fines. *Held*, that this was libelous *per se* since it impaired the plaintiff's credit in the management of its business and caused pecuniary loss. *New York Society for the Suppression of Vice v. MacFadden Publications Inc.*, 129 Misc. 408, 221 N. Y. Supp. 563 (Sup. Ct. 1927).

In most cases of libel on a corporation an analogy has been drawn to a

natural person. See *First National Bank v. Winters*, 225 N. Y. 47, 52, 121 N. E. 459, 460 (1918); *South Hetton Coal Co. v. North Eastern News Ass'n*, 1 Q. B. 133, 138 (1894); Newell, *Slander and Libel* (1924) 344. An article which injures a person in his trade is libelous *per se* and actionable without proof of special damage. *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701 (1890). The same is true of a corporation. *Reporters' Ass'n of America v. Sun Printing and Pub. Co.*, 186 N. Y. 437, 79 N. E. 710 (1906); *International Text Book Co. v. Leader Printing Co.*, 189 Fed. 86 (N. D. Ohio, 1910). In addition, an article is libelous *per se* if it injures a person's reputation by bringing him into hatred, ridicule or contempt. *Sydney v. MacFadden Publishing Corp.*, 242 N. Y. 208, 151 N. E. 209 (1926); *Orband v. Kalamazoo Telegraph Co.*, 170 Mich. 387, 136 N. W. 380 (1912). But most courts hold that a corporation cannot have a reputation for this purpose. *Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories*, 17 F. (2d) 255 (C. C. A. 8th, 1926); *Reporters' Ass'n of America v. Sun Print. & Pub. Co., supra. Contra: Finnish Temperance Society Sovitlaja v. Publishing Co.*, 238 Mass. 345, 130 N. E. 845 (1921). Thus a corporation has an action for libel *per se* only when injured in its business or credit. See *Adirondack Record Inc. v. Lawrence*, 202 App. Div. 251, 254, 255, 195 N. Y. Supp. 627, 629, 630 (3rd Dept. 1922); *Dupont Engineering Co. v. Nashville Banner Pub. Co.*, 13 F. (2d) 186, 189 (M. D. Tenn. 1925). This rule applied to corporations not organized for profit causes some difficulty. See opinion in instant case at 565. In a situation similar to that of the instant case the Massachusetts court solved the problem by giving damages for injury to reputation. *Finnish Temp. Soc. v. Pub. Co., supra.* A recent New York decision held that a membership corporation had no "credit" and therefore could not suffer any pecuniary loss. *Electrical Board of Trade v. Sheehan*, 214 App. Div. 712, 210 N. Y. Supp. 127 (1st Dept. 1925). The instant case is distinguished on the ground that a corporation organized for a specific purpose is organized for the "business" of carrying on such work, and may thus suffer injury to its credit, *i. e.*, loss of contributions. The adoption of the Massachusetts view would obviate such fine distinctions.

MASTER AND SERVANT—RESPONSIBILITY OF MASTER FOR TORT OF SERVANT BASED ON ACCOUNTABILITY OF SERVANT FOR DAMAGES.—The wife of an employee sued the employer for injuries suffered while riding as a passenger in an automobile being driven by her husband in the course of his employer's business. The jury found that the injury was caused by the negligence of the employee. *Held*, that since the servant was under an immunity from a suit in tort by his wife, the master enjoyed a like immunity, his responsibility being secondary and derived from the responsibility of the servant. *Schubert v. August Schubert Wagon Co.*, 129 Misc. 578, 222 N. Y. Supp. 115. (Sup. Ct. 1927).

Relying on the common law theory of the legal indentity of husband and wife, most jurisdictions still refuse to allow a wife to sue her husband for a personal tort. *Thompson v. Thompson*, 218 U. S. 611, 31 Sup. Ct. 111 (1910); *Rogers v. Rogers*, 265 Mo. 200, 177 S. W. 382 (1915); *Perlman v. Brooklyn City R. Co.*, 117 Misc. 353, 191 N. Y. Supp. 891 (Sup. Ct. 1921); *Woltman v. Woltman*, 153 Minn. 217, 189 N. W. 1022 (1922). But a modern tendency to the contrary allows such a suit, finding in the married women's acts a legislative intent to abrogate the common law fiction of legal identity and to restore to a married woman all the capacities of a feme sole. *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432 (1925); *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917); *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9 (1923); *Gilman v. Gilman*, 78 N. H. 4, 95 Atl. 657

(1915); see Comment (1924) 33 YALE LAW JOURNAL 315; (1926) 10 MINN. L. REV. 439; (1926) 26 COL. L. REV. 895. On the other hand, the general policy underlying the master's responsibility for negligent acts of his servant seems to be that such risks are an incident of the master's business. See *Bugge v. Brown*, 26 C. L. R. 110, 3 Br. R. C. 631 (High Ct. Australia, 1919). The reasons would apply equally to injuries caused to the servant's wife as to any other case, while to allow a suit by the wife against the master would not seem to infringe the reasons of policy for the immunity granted in husband and wife cases. The instant court relied on cases denying recovery against a master, where the facts failed to state a cause of action against the servant, there being no proof of careless conduct by the latter. *New Orleans & N. E. R. R. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. 109 (1891); *Hobbs v. Ill. Central R. R.*, 171 Iowa 624, 152 N. W. 40 (1915). But in the instant case, the servant was expressly found guilty of negligence. The court might have based its decision on the rule that a master is not responsible for injuries to an unauthorized invitee. *Nelson v. Johnstown Traction Co.*, 276 Pa. 178, 119 Atl. 918 (1923); *Rolfe v. Hewitt*, 227 N. Y. 486, 125 N. E. 804 (1920); see (1925) 3 WIS. L. REV. 188. This would obviously not cover many cases where the invitee factor was not present. It would seem desirable to disregard altogether, as serving a purpose not primarily in question in these cases, the rule that husband or wife may not sue each other for torts.

PATENTS—DEFENSE OF DOUBLE PATENTING NOT AVAILABLE AGAINST MECHANICAL PATENT AFTER PRIOR DESIGN PATENT TO SAME INVENTOR IS DECLARED INVALID.—An anticipating design patent for a child's tricycle was followed by a mechanical patent thereon to the same inventor. The District Court dismissed a suit for the infringement of both patents on the ground of double patenting. *Held*, on appeal, that the design patent was invalid for want of rudimentary aesthetic appeal while the mechanical patent was valid, since, on being relieved of his first dedication, the inventor was again free to dedicate his disclosure, and the defense of double patenting did not apply. *H. C. White Co. v. Morton E. Converse & Son Co.*, 20 F. (2d) 311 (C. C. A. 2d, 1927).

Where an inventor obtains two patents for the same invention the later patent is void. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 14 Sup. Ct. 310 (1894). But the same article may exhibit patentable mechanical invention as well as a patentable design, in which case the mechanical and design patents may co-exist. *Mathieu v. Mitchell Vance Co.*, 7 F. (2d) 837 (C. C. A. 2d, 1925). Yet where a design and mechanical patent disclose the same inventive thought, the general rule applies and the one of later issue is void. *Roberts v. Bennett*, 136 Fed. 193 (C. C. A. 2d, 1905); *President Suspender Co. v. Macwilliam*, 233 Fed. 433 (S. D. N. Y. 1916). Even where the anticipating design patent is declared invalid, it has been said that the subsequent mechanical patent still fails because of double patenting. *Williams Calk Co. v. Neverslip Mfg. Co.*, 136 Fed. 210, 212 (M. D. Pa. 1905), *aff'd* on other grounds, 145 Fed. 928 (C. C. A. 3d, 1906). But the instant court refused so technical a rule. And where a prior design patent for a glass was declared invalid for want of ornamental qualities a mechanical patent thereon was sustained. *Ferd Messmer Mfg. Co. v. Albert Pick & Co.*, 251 Fed. 894 (C. C. A. 8th, 1918). A mechanical patent for an auto parking light has also been held valid after a prior design patent thereon was held invalid for want of invention. *Gross v. Norris*, 18 F. (2d) 418 (D. Md. 1927). The vice of double patenting lies in that the original monopoly is thereby extended, but this objection is not well taken in the instant and similar cases as no monopoly is conferred on the issue of the invalid design patents. The inventor acquires his exclusive right to make,

use, and vend only after issue of the valid mechanical patents, and the period of monopoly properly dates therefrom.

PLEADING—AMENDED ANSWERS—STATING NEW DEFENSE.—In an action on a promissory note, the defendant pleaded the general issue. After joinder by the plaintiff, the defendant amended his answer to plead forgery. The plaintiff's motion to have the amendment struck out was denied and judgment was given for the defendant. On appeal, it was *held* (one judge *dissenting*) that the judgment be reversed as in contravention of the statute. Md. Code (Bagby, 1924) Art. 75, § 28, subd. 108 (providing that the execution of a written instrument filed in the pleadings must be denied in the next succeeding pleading or be taken as admitted). *Farmers' & Merchants Nat. Bank of Cambridge v. Harper*, 137 Atl. 702 (Md. 1927).

Courts are generally liberal in permitting the amendment of answers. *Cartwright v. Ruffin*, 43 Colo. 377, 96 Pac. 261 (1908) (answer denying execution of note, amended to plea of execution fraudulently procured); *Kansas City Southern Ry. v. Bull*, 120 Ark. 43, 179 S. W. 172 (1915) (answer amended after case called to trial); *Fischer v. Fuelberth*, 109 Neb. 779, 192 N. W. 225 (1923) (amendment allowed on day of trial); *Kershaw v. Reynolds*, 254 Pac. 713 (Okla. 1927) (at commencement of trial); *Thorn v. Smith*, 71 Wis. 18, 36 N. W. 707 (1888) (during trial); *Kellogg v. Scott*, 58 N. J. Eq. 344, 44 Atl. 190 (1899) (after plaintiff's testimony disclosed an unexpected defense); *Hughes Bros. v. Aetna Ins. Co.*, 148 Tenn. 293, 255 S. W. 363 (1923); Pomeroy, *Code Remedies* (4th ed. 1904) § 457; Brown, *The Law of Pleading* (1899) 282. This is especially true if the amended answer is predicated upon a defense prima facie valid. *State v. Central Pocahontas Coal Co.*, 83 W. Va. 230, 98 S. E. 214 (1919); *Johnson v. Alexander*, 87 Wash. 570, 151 Pac. 1121 (1915); Story, *Equity Pleading* (8th ed. 1870) § 902. *Contra: Pue v. Bushnell*, 72 Mont. 265, 233 Pac. 124 (1925) (supplemental answer of discharge in bankruptcy refused because of delay in filing). Inconsistency of the amended answer with the original answer is sometimes no bar. *Thompson v. Rhyner*, 86 Okla. 146, 206 Pac. 609 (1922). *Contra: Bankers' Mortgage Co. v. Robson*, 123 Kan. 746, 256 Pac. 997 (1927). If errors in pleading prejudice or nullify the complaint or answer, they should be construed more stringently against the plaintiff, who is usually privileged to have a voluntary non-suit and later predicate another action on a corrected complaint. But the original suit may be prosecuted in spite of the defendant's objection and a refusal to allow him to amend may, in fact, destroy his "day in court." See *Cartwright v. Ruffin, supra* at 377, 96 Pac. at 261-2; *Diamond v. Williamsburgh Ins. Co.*, 4 Daley 494, 495 (N. Y. 1873). The defendant may be protected by a continuance in the case of a surprise amendment. See Pomeroy, *op. cit. supra*, at 646 n.; *State v. Central Pocahontas Coal Co., supra* at 219. The purpose of the statute is not to penalize the defendant for a serious omission in his answer, but to relieve the plaintiff of the burden of proving what the defendant may admit. Md. Code (Bagby, 1924) Art. 75, § 28, subd. 108; see *Bank v. McCosker*, 82 Md. 518, 525-6, 34 Atl. 539, 541 (1896). Liberal interpretations of statutes granting discretionary powers to raise the substantive issues are consistent with modern tendencies. Clark, *History, Systems and Functions of Pleading* (1925) 11 VA. L. REV. 517, 518, 519, 542; Pound, *Canons of Procedural Reform* (1926) 51 AM. B. A. J. 290, 298-99; Poe, *Pleading and Practice* (5th ed. 1925) § 184. Maryland is a "quasi common law" state with code liberality. Clark, *op. cit. supra*, at 536; Rawls, *Maryland Procedure In Courts of Law* (1912) 35 N. Y. STATE BAR ASS'N REPORT 885, 892. The court in the instant case admits an unfortunate and "unjust" result of its narrow interpretation. This result is unnecessary since the statute provides that amendments may be made at any time with-

in the trial court's discretion and that the case may be "tried on its real merits and justice subserved." Md. Code (Bagby, 1924) Art. 75, § 39. The dissenting opinion reconciles the two sections and arrives at a desirable result, consistent with the spirit of modern pleading.

SEARCHES AND SEIZURES—ADMISSIBILITY OF EVIDENCE OBTAINED AS AN INCIDENT OF A LAWFUL ARREST.—The defendant was convicted of conspiracy to violate the Tariff Act and National Prohibition Act. The boatswain of a Coast Guard patrol, discovering the defendant's motor boat alongside a schooner twenty-four miles from shore, boarded the motorboat, ordering the defendant and two others to surrender. On board were cases of grain alcohol. The boatswain arrested the three men, and took them with the boat and liquor to Boston. The defendant objected to the admission of the boatswain's testimony as to what he discovered on the motorboat at the time of his command to those on board to surrender. The evidence was admitted. The Circuit Court of Appeals (one judge *dissenting*) held this to be error, the evidence having been obtained by an illegal search and seizure. On certiorari to the Supreme Court, *held* that the latter judgment be reversed, since, if any search was made before reaching port, it was valid as an incident of a lawful arrest of persons whom the officer had reasonable cause to believe were engaged in committing a felony. *United States v. Lee*, 47 Sup. Ct. 746 (1927).

Since prohibition, the federal courts have resorted to extreme measures to avoid the application of the so-called federal rule making inadmissible evidence obtained as the result of an illegal search or seizure. See Comment (1927) 36 YALE LAW JOURNAL 536, 542. Consequently, confusion and uncertainty as to the proper application of the rule has resulted. See Comment (1927) 36 *ibid.* 536, 542. Its attempted application has resulted in a serious interference with the practical workings of prohibition enforcement. See Comment (1927) 36 *ibid.* 988. Efforts to avoid the rule by showing that the search and seizure were made "incidental to a lawful arrest" have met with indifferent success. See Comment (1926) 35 *ibid.* 612. The court in the instant case reached a proper result, but it would seem unnecessary to determine whether the search and seizure were legal or illegal, so long as they were not unreasonable. See Comment (1927) 36 *ibid.* 988, 991; see dissenting opinion of Anderson, J. *Lee v. United States*, 14 F. (2d) 400, 406 (C. C. A. 1st, 1926).

TORTS—CONTRIBUTORY NEGLIGENCE—REASONABLE PRECAUTION.—While the plaintiff was seated in the rear of a third party's automobile, the defendant's agent pumped gasoline into the tank without first removing a lighted lantern that had been placed near the tank. In an action for injuries occasioned by the resulting explosion, judgment was entered for the plaintiff despite the defendant's contention that the plaintiff's failure to protest was contributory negligence. *Held*, on appeal (two judges *dissenting*) that the judgment be affirmed. *Underhill v. Major*, 220 App. Div. 173, 221 N. Y. Supp. 123 (4th Dept. 1927).

A plaintiff who, by a reasonable exercise of his faculties could have discovered the danger and avoided it, but did not, cannot recover. *Nehring v. Connecticut Co.*, 86 Conn. 109, 84 Atl. 301 (1912). Thus, a railroad worker who, by a use of ordinary care, could have discovered the approach of a train and avoided the accident is barred by a failure to do so. *Chicago, R. I. & P. Ry. Co. v. Baldwin*, 164 Fed. 826 (C. C. A. 8th, 1908). But, an extraordinary degree of alertness is not required. *Campion v. Eakle*, 79 Colo. 320, 246 Pac. 280 (1926) (automobile guest held not required to keep lookout for impending collisions); (1921) 31 YALE LAW JOURNAL 101. It has been held that a plaintiff might recover even though he was not en-

tirely free from want of caution. *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460 (1912) (plaintiff failed to ascertain whether cars were coming from opposite direction before turning from behind trolley car). Where a plaintiff fails to protest against the continuing careless conduct of the defendant, his recovery is barred. *Harding v. Jesse*, 189 Wis. 652, 207 N. W. 706 (1926) (guest in automobile failed to protest against excessive speed). But in the instant case the plaintiff failed to protest against careless conduct which at most could only have been anticipated. And generally, a plaintiff is not barred for failure to anticipate that the defendant would act negligently. *Clark v. W. M. Lloyd Co.*, 254 Pa. 168, 98 Atl. 866 (1916) (plaintiff failed to watch as defendant's servant in backing a wagon negligently turned it so as to strike plaintiff); 1 Shearman & Redfield, *Negligence* (6th ed. 1913) § 92. Thus, one working on a building is not barred by failure to anticipate that servants of another contractor would perform their work negligently. *O'Rourke v. Sproul*, 241 Ill. 576, 89 N. E. 663 (1909). In view of the rapid succession of events and the type of accident involved, the instant decision seems justified.

TRIAL—EXAMINATION ON VOIR DIRE—EXTENT OF PRIVILEGE.—In an action for personal injuries sustained in an automobile accident, the plaintiff recovered a judgment of $2000. On voir dire examination of the jurors, plaintiff's counsel asked, over objection, if any of the jurors were "interested in any way in an insurance company that wrote liability insurance." *Held*, on appeal, that such questions were improper. But, since the evidence showed clearly that the defendant was at fault, the judgment was affirmed on condition that the plaintiff file a remittitur of $1000. *Campbell v. Polk*, 297 S. W. 719 (Mo. 1927).

A wide latitude is usually permitted on voir dire to enable attorneys to exercise intelligently the privilege of peremptory challenge and challenge for cause. See *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 644-5, 88 N. E. 312, 314 (1909); 2 Elliott, *General Practice* (1894) § 512; *cf. Moore v. State*, 265 S. W. 385 (Tex. Cr. App. 1924) (question as to membership in Ku Klux Klan); see Note (1925) 19 ILL. L. REV. 601. For this purpose it is generally held, in an action for personal injuries, that the talesmen may be interrogated as to their interest in an insurance company. *Martin v. Farmers' Mut. Fire Ins. Co.*, 139 Mich. 148, 102 N. W. 656 (1905); *Pearcy v. Michigan Mut. Life Ins. Co.*, 111 Ind. 59, 12 N. E. 98 (1887). But *cf. Tatarsky v. Smith*, 242 Pac. 971 (Colo. 1926) (good faith necessary); *Balderson v. Monaghan*, 278 S. W. 783 (Mo. 1925) (insurance company must actually be interested). It is almost universally held error to inform the jurors directly that the defendant is insured. *Mithen v. Jeffery*, 259 Ill. 372, 102 N. E. 778 (1913); *Spinney's Adm'x v. Hooker*, 92 Vt. 146, 102 Atl. 53 (1917); *Houston Car Wheel Co. v. Smith*, 160 S. W. 435 (Tex. Civ. App. 1913). But see *Spoonick v. Backus Brooks Co.*, 89 Minn. 354, 359, 94 N. W. 1079, 1081 (1903) (presumption that jury will treat all litigants impartially). Reference to the insurance company during trial is not generally permitted. *Ross v. Transfer Co.*, 248 Pac. 1088 (Or. 1926) (examination of witnesses); *Coe v. Van Why*, 33 Colo. 315, 80 Pac. 894 (1905) (argument of counsel). In some cases any conveyance of such information to the talesmen has been held prejudicial error. *Lipschutz v. Ross*, 84 N. Y. Supp. 632 (Sup. Ct. 1903); *Eckhardt v. Swan Milling Co.*, 101 Ill. App. 500 (1902). And persistent intimation of such facts in bad faith has been held grounds for reversal. *Schwalen v. Fuller & Co.*, 107 Wash. 476, 182 Pac. 592 (1919). Thus it is possible to bring in matters in good faith on the voir dire which are inadmissible on examination of witnesses. See Note (1926) 25 MICH L. REV. 208, 209. But judicial disapproval of the use of the voir dire as a part of trial strategy is shown

in the number of reversals on this score. In recent federal cases the examination of the jurors has been handled by the judge, counsel being given opportunity to put questions through the bench. *Murphy v. United States*, 7 F. (2d) 85 (C. C. A. 1st, 1925) (following Massachusetts practice); *cf. Carroll v. United States*, 16 F. (2d) 951, 955 (C. C. A. 2d, 1927) (in both civil and criminal practice); *Kurczak v. United States*, 14 F. (2d) 109, 110 (C. C. A. 6th, 1926). This would seem a satisfactory solution. The instant decision seems desirable in that it effects substantial justice while avoiding the expense and delay of further litigation.

WILLS—SURVIVING SPOUSE IS "HEIR."—The testatrix made a specific bequest to her niece, and also provided that part of the remainder of the entire estate, both real and personal, should go to the niece. In event that the niece should die before the testatrix, it was provided that the heirs of the niece should receive the share to which the niece would have been entitled. In a suit by the executor of the estate to determine the construction of the will, the question of whether the husband of the niece was an "heir" under the will was reserved for the Supreme Court. *Held*, (one judge *dissenting*) that the husband was an "heir" and entitled to a share in his wife's estate. *Hartford Connecticut Trust Co. v. Lawrence*, 138 Atl. 159 (Conn. 1927).

At common law, "heirs" were those who inherited real estate in case of intestacy. 2 BL. COM. *201; Rood, *Wills* (2d ed. 1926) § 449. In the absence of a contrary intent of the testator, such an exclusive connotation was ascribed to the term "heirs" in a will. *Nicoll v. Irby*, 83 Conn. 530, 77 Atl. 957 (1910); *Black v. Jones*, 264 Ill. 548, 106 N. E. 462 (1914); Ann. Cas. 1915D 1178, annotation. A surviving spouse taking only through dower or curtesy is not an heir in this technical sense. *McCarthy v. Walsh*, 123 Me. 157, 122 Atl. 406 (1923); *Appeal of Dodge*, 106 Pa. 216 (1884); *Fidelity & Columbia Trust v. Vogt*, 199 Ky. 12, 250 S. W. 486 (1923); L. R. A. 1918A 1110, annotation. However, in those states where the spouse takes an absolute interest in realty under the statute, on the theory of inheritance, and not by virtue of the marital relation, he is technically considered an heir. *Binkley v. Switzer*, 75 Colo. 1, 223 Pac. 757 (1924); *Lavery v. Egan* 143 Mass. 389, 9 N. E. 747 (1887); *Brooks v. Parks*, 189 Mich. 490, 155 N. W. 573 (1915); *Miller v. Miller*, 29 Ohio Cir. Ct. R. 451 (1906); Page, *Wills* (2d Ed. 1926) § 887. Since 1877, dower and curtesy have been abolished in Connecticut, and the surviving spouse has taken, in the event of intestacy, an absolute interest in a part of the realty by statute. Conn. Gen. Stat. (1918) § 5055 (Amended 1921, Conn. Pub. Acts 1920-21, c. 221). In the first decision following this statute, it was held that a husband was not an "heir" for the purpose of taking his deceased wife's share under a will. *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885 (1897). This view was followed in the next two cases. *Perry v. Bulkley*, 82 Conn. 158, 72 Atl. 1014 (1909) (widow not "heir"); *Hartford Trust Co. v. Purdue*, 84 Conn. 256, 79 Atl. 581 (1911) (husband not "heir at law"). In 1918, however, the Connecticut court held that a widow was included under the designation "heirs at law according to the laws of distribution of intestate estates." *Morse v. Ward*, 92 Conn. 408, 103 Atl. 119 (1918). In 1923, a widow was held included as an "heir" on very slight evidence of such an intent—indicating a desire to avoid a strict application of the old technical meaning of that term. *Beach v. Meriden Trust Co.*, 98 Conn. 821, 120 Atl. 607 (1923). In reaching their present decision, and practically overruling earlier cases, the Supreme Court of Connecticut gives support to the prevailing view which places a surviving spouse within the designation of "heir" where such spouse, by statute, takes an absolute interest in realty in case of intestacy.