RECENT CASES.

CONSTITUTIONAL LAW—LOCAL AND SPECIAL LEGISLATION.—An act of the Pennsylvania legislature regulating the maximum rate of fare for transportation of passengers in cities of the second class, has recently been held to be unconstitutional on the ground of being special and local legislation. Ashworth v. Pgh. Rys. Co., 80 Atl. 981 (Pa. 1911).

By act of June 25, 1895, P. L. 275, cities are divided into three classes "for the purpose of legislation regulating their municipal affairs, the exercise of certain corporate powers and having respect to the number, character, powers and duties of certain officers thereof." The Supreme Court declared that the act under discussion relates solely to street railway fares, and it is therefore apparent that the subject is of a general, as distinguished from a municipal character; and, inasmuch as it applies to certain street railways located in but two of the cities of the State, it is special and local legislation, and therefore unconstitutional.

The court has repeatedly declared that the only purposes for which cities are legally classified are distinctly stated in the act. "In order that a given act of assembly, relating to a class of cities, may escape the charge of being a local law, it is necessary that it . . . must be directed to the existence and regulation of municipal powers, and to matters of local government." Trust Co. v. Fricke, 152 Pa. 231 (1893); Weinman v. Ry. Co., 118 Pa. 192 (1888); Ayer's App., 112 Pa. 266 (1888). These are held to be the only matters in regard to which cities need different legislation according as their population, the "common characteristic" of each class, may be greater or less.

A dissenting opinion, perfectly logical in its conclusion, is based on a recent decision, Phila. v. P. R. T., 228 Pa. 325, from which it must be inferred that legislation regarding street railway affairs is legislation affecting municipal affairs.

For a learned discussion on "Restrictions Upon Local and Special Legislation," see a series of articles by Charles Binney, Esq., in 41 Am. Law Reg. One of the tests of special legislation there enumerated, and especially applicable to this case, is, whether a difference in the size of the municipality, in respect to population, has any connection with the need or propriety of the legislative regulation in question.

CONTRACTS—LIABILITY OF A CONTRACTOR TO INDEMNIFY A CITY FOR DAMAGES PAID TO A PERSON INJURED BY DEFECTIVE PAVING.—In the City of New York v. Sicilian Asphalt Paving Co., 130 N. Y. S. 468 (1911), a paving company contracted with the city to pave a certain street, and during the performance of the work to place proper guards and lights around the same to prevent accidents; to save the city harmless against suits for damages; and to repair and restore the pavement over all openings made by corporations, with consent of the president, at any time during five years after the acceptance of the work, within five days after notification. A telegraph company, within five years opened the pavement. The paving company, after notice, failed to repair it; an accident happened; the city was sued for injuries and paid damages and brought suit to recover against the paving company. It was held that the paving company was not liable to the city. The case was held to depend on the interpretation of the contract. The majority of the court took the view that under it, the paving company assumed risks only during the performance of the work, and assumed no risks while no work was in progress. Although the paving company failed to comply with its contract by neglecting to make repairs within five days after notice, nevertheless for this failure the city's remedy was to do the work itself and collect a fair cost from the paving company.

The duty of a city to keep its streets in a safe condition for public travel is absolute, and it is bound to exercise reasonable care to accomplish that end. Cooley on Torts (3rd Ed.), 1315, and cases cited. A city does not escape the primary liability to travelers by the employment of an independent contractor to repair the street, unless the injury results from negligence in the immediate conduct of the work, and not from a dangerous condition of the street, due to the work itself, however skilfully performed. Birmingham v. McCary, 84 Ala. 469 (1887); Cooley on Torts (3rd Ed.), p. 1095, and cases cited. Whether or not the city has a remedy over against the contractor, depends on the particular contract of indemnity. Morton v. Union Traction Co., 20 Pa. Sup. 325 (1902).

CONTRACTS—VALIDITY—MUTUALITY.—In Bustonaby Bros. v. Revardel, 130 N. Y. S. 894 (1911), certain musicians contracted to furnish music at the plaintiffs' restaurant for a period of two years. There was no corresponding promise of employment by the latter, but the third and fourth paragraphs of the agreement provided for a fixed salary per week, the privilege of renewal by the plaintiffs at the end of two years, and in case of discharge payment up to the time of dismissal only. When the plaintiffs, at defendant's request, refused to reform the contract and properly set forth the contract of employment, they left. This was an action to recover a penal sum for breach of contract. It was held that the agreement was void as lacking mutuality.

In order to constitute a contract of hiring and service, there must be a mutual engagement, on the one part to serve, and on the other to employ and pay. 2 Parsons on Contracts, 44. This seems the position taken in the principal case. *Accord:* Sykes v. Dixon, 9 A. and E. 693 (1839); Vogel v. Penoc, 157 Ill. 339 (1895).

The case of Phila. Ball Club v. Lajoie, 202 Pa. 210 (1902), appears to lay down different principles. The defendant agreed to furnish his services for a period of three years, the plaintiff agreeing to pay a stated salary, with the privilege of discharging the defendant at any time on ten days' notice. The court upheld the contract, laying down as the test, not that each party should have the same remedy in form, effect and extent, but that each party should be able to compel the performance of the other's promises. If this is to be the test it is difficult to see how any agreement involving two promises could be held void for lack of mutuality, and surely the one in the case under discussion would have been held valid. If the employee can enforce the promise of payment for the time he has been employed, the above case seems to say that it is immaterial that there is no promise to employ at all, or a right by one party only, to terminate it. The two cases, Bustonaby Bros. v. Revardel, *supra,* and Phila. Ball Club v. Lajoie, seem very close on their facts, and there can be little doubt that the decision are contra.

CORPORATIONS—MEETINGS—WITHDRAWAL OF STOCKHOLDERS.—A by-law of a corporation read, "The holders of a majority of the stock issued shall constitute a quorum for the transaction of business at any regular or special meeting." At an annual meeting a chairman was elected by *viva voce* vote. Subsequently certain stockholders demanded that a stock vote be taken for chairman, and when this was refused, withdrew in order to break the quorum. Those remaining, not sufficient in number to constitute a quorum, but a majority of those originally present, proceeded to an election of officers. *Held,* that the election was valid and the withdrawing members had no standing to maintain *quo warranto* proceedings against the officers elected to deprive them of their offices. Comm. v. Vandegrift, 232 Pa. 53 (1911).

It is true, as a general rule, that a quorum is necessary for the legal transaction of business, 1 Thomp. Corp. (2nd Ed.) § 845, and, whatever number may be necessary to constitute the quorum, the rule is, unless other-

wise fixed by statute or by-law, that a majority of such quorum is necessary to elect. State v. Wilmington, 3 Harr. (Del.) 294.

However, only a stockholder whose rights have been infringed and who is equitably entitled to complain, may institute proceedings to contest an election, 2 Cook Corp. (6th Ed.), § 620, and a corporator may be estopped to object to an election as invalid. Where the wrong complained of is the result of his own misconduct, or he has acquiesced or concurred in it, he will not be heard. 1 Thomp. Corp., (2nd Ed.), § 934. This doctrine leads inevitably to the rule adopted in the principal case and by the weight of authority, that if a meeting is once organized and all parties have participated, no person or faction can then, by refusing to vote or by withdrawing, defeat the organization or render the proceedings invalid. Neither can seceders organize another meeting and hold a valid election. State v. Chute, 34 Minn. 135 (1885); Commonwealth v. Patterson, 158 Pa. 476 (1893); 2 Cook Corp. (6th Ed.), § 606; 1 Thomp. Corp. (2nd Ed.) § 910.

CRIMES—HOMICIDE—BURDEN OF PROOF—CAUSE OF DEATH.—In People v. Nelson, 130 N. Y. S. 488 (1911), the decedent received fatal injuries while scuffling with the defendant in a closed room. The lower court convicted the defendant of manslaughter in the first degree. On appeal this decision was reversed. It was held that the circumstances did not show that the defendant was criminally liable for the death of decedent. The person charged with a crime is not required to explain the situation. The State must show by independent facts that the defendant criminally caused the death. Hence, if the prisoner pleads self-defense, the burden is on the State to rebut the plea.

There is a distinct division of opinion in the United States on this question, but the weight of authority supports People v. Nelson. In State v. Shea, 104 Iowa, 724 (1898), the court says: "The law seems to be well settled that the burden is upon the state to show that the defendant was not acting in self-defence, and this it must do by evidence sufficiently strong to remove all reasonable doubt." In Granby v. State, 38 Nebr. 871 (1894), it is *held,* "The decided weight of recent authority is that in criminal prosecution the burden of proof rests upon the state throughout. This rule applies not alone to the case as made by the state, but to any distinct, substantive defence which may be interposed in order to justify or excuse the act charged." This seems to be the better rule. If self-defence is a valid defence to the charge, the state has clearly not proved the guilt of the accused until it has shown that the act committed was not done in self-defence. *Accord:* Dent v. State, 105 Ala. 14 (1895); People v. Downs, 123 N. Y. 558 (1890); Tiffany v. Com. 121 Pa. 165 (1888); Com. v. McKie, 67 Mass. 61 (1854).

Some jurisdictions, however, uphold the opposite view. The Penal Code of California, sec. 1105, provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him. . . . People v. Milner, 122 Cal. 171 (1898). In *accord:* Tucker v. State, 89 Md. 471 (1899). "When the state has made out a case which shows the defendant's guilt beyond a reasonable doubt, and the prisoner sets up an affirmative defence, such as self-defence, as an excuse for the act, the burden is on him to establish it by preponderating evidence." See also State v. Barringer, 114 N. C. 840 (1894); State v. Yocum, 11 S. D. 544 (1899).

CRIMES—HOMICIDE—JUSTIFICATION—RECAPTURE OF STOLEN PROPERTY.—The deceased had stolen, sometime during the night, a mule and buggy, the property of the defendants, who set out in pursuit as soon as the theft had been discovered. They overtook the deceased and shot him three times, twice while he was sitting in the buggy, which was standing in the highway, and once after he had leaped from the wagon and was making his escape. Before any of the shots were fired, the deceased reached down into the bottom of the wagon as though to pick up something. *Held,* the homicide was not justifiable,

there being no necessity, either real or apparent, for the shooting. Drew, *et al.*, v. State, 71 S. E. Rep. 1108 (Ga. 1911).

The right of one from whom the property has been stolen to pursue the thief and recapture the property is generally recognized. Crawford v. The State, 90 Ga. 701 (1892); Comm. v. Donohue, 148 Mass. 529 (1889). In recapturing the property, the owner is authorized to use such force as is reasonably necessary to effect his purpose, provided it does not extend to the use of deadly weapons. State v. Dooley, 121 Mo. 591 (1894). If, however, the owner is resisted, he may repel force with force, and need not retreat, and if the thief is unavoidably killed, the homicide is justifiable. Lilly v. The State, 20 Tex. App. 1 (1885); Story v. State, 71 Ala. 329 (1882).

The evidence in Drew v. State, *supra,* does not show which one of the shots caused the death of the deceased. Had his death resulted from the last shot fired, there might have been some justification for the homicide, provided, of course, that the defendants were trying to effect an arrest and were not shooting in revenge. In Story v. The State, *supra,* it is intimated in a dictum that the stealing of a horse in the night time is such a grave felony as to render justifiable a homicide committed in an attempt to effect the arrest of the felon.

DAMAGES—BREACH OF CONTRACT—MEASURE OF DAMAGES.—The plaintiff agreed to do work for the defendant in consideration whereof he was to receive the sum of $200, the same to be paid in loam at twenty-five cents per square yard. Loam increased in value. In an action for breach of contract, the plaintiff contended that he was entitled to eight hundred square yards of loam, or the value thereof, regardless of the $200 limit. *Held:* That the measure of damages is $200. "The object of the contract was not a sale of loam, but the building of a road, the amount to be paid for the building of which was $200." Strout v. Joy, 80 Atl. Rep. 830 (Me. 1911).

The leading case on this general subject is Hadley v. Baxendale, 9 Ex. 341 (Eng. 1854). "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered either arising naturally from such breach, or such as may be reasonably supposed to have been in contemplation of both parties at the time of the making of the contract, as the probable result of the breach of it." And it is the law in the great majority of our jurisdictions that the parties contemplated, at the time of making the contract, the payment, on the one side, and the receipt on the other, of the nominal consideration. White v. Tompkins, 52 Pa. 363 (1866); Jones v. Dimmock, 2 Mich. N. P. 87 (1871). *Contra:* McDonald v. Hodge, 5 Haywood, 85 (Tenn. 1818).

In this connection it is interesting to note an extract from Pothier: "All agreements to pay in specific articles are presumed to be made in favor of the debtor, and he may in all cases pay the amount of the debt in money, in lieu of the articles which, by the terms of the contract, the creditor had agreed to receive instead of money." Pothier on Ob., No. 497.

EQUITY—CONTEMPT OF COURT—PUNISHMENT.—In *Ex parte* Karlson, 117 Pac. Rep. 447 (Cal. 1911), it was held that the defendant had been properly committed to prison for his failure to pay a fine imposed for contempt in violating an injunction issued against him. The commitment was sustained despite the fact that it was for a longer period than the time for which the defendant could have been sentenced for the contempt if no fine had been levied.

Under the common law the payment of the fine might be enforced by imprisonment until the fine was paid. This was the uniform practice in the courts of England and was adopted by the early courts in America. Lord George Gordon's Case, 22 Howell's State Trials, 235 (1787); King v. Waddington, 1 East, 166, 172 (1801); Dodge v. State, 24 N. J. L. 455 (1854). Not

only could the defendant be committed for his failure to pay the fine, but at the same time the state could proceed to collect it under a *levari facias*, the two methods not being held inconsistent. King v. Woolf, 2 B. & Ald. 609 (1819); *In re* Beall, 26 Ohio St. 195 (1875); 1 Bish. Crim. Proc. § 1303; O'Connor v. State, 40 Tex. 27 (1874).

On the other hand, in many jurisdictions today, the adoption of a code providing a maximum imprisonment as punishment for contempt, has given rise to some diversity of law on the subject. A review of the cases indicates that *Ex parte* Karlson, *supra*, represents the weight of authority. It holds that the commitment is not a separate punishment added to the payment of the fine, but only an incident of the fine.

Lubbering v. State, 19 Ohio Cir. Ct. 658 (1900), is one of the later cases holding otherwise. In it the court decided that the sum ordered to be paid as a fine in a contempt proceedings amounts simply to a judgment for money, and the court has no power to imprison for contempt on failure to pay it.

In line with the principal case may be cited Fisher v. Hayes (C. C.) 6 Fed. 63 (1881); *Ex parte* Crittenden, 62 Cal. 534 (1881); Lamper v. Dewell, 156 Iowa, 153 (1881); Stephenson v. Hanson, 67 How. Prac. 305 (N. Y. 1884).

FEDERAL COURTS—JURISDICTION—RESIDENCE OF PARTIES.—An action commenced in the Supreme Court of New York was removed by the defendant to the United States Circuit Court on the ground of diverse citizenship. The plaintiff was a citizen of Massachusetts, and the defendant a citizen of New York. At the time the action was commenced, however, and long prior thereto, both parties had been residents of England. On an objection raised by the plaintiff, the Circuit Court held that it did not have jurisdiction of the parties and therefore could not try the case. Jackson v. Hooper, 188 Fed. 509 (1911).

This opinion presents the decision of a new and interesting jurisdictional question. No other case with similar facts can be found anywhere in the reports. Says Coxe, J.: "The case at bar is *sui generis* because, so far as I am informed, it presents for the first time a controversy where the parties are citizens of, but neither resides in, the United States. The venue could not have been laid either in the district of the residence of the plaintiff or defendant, for neither had such a residence."

Section 1 of the Act of March 3, 1875, c. 137, 18 Stat. 470, U. S. Comp. St. 1901, p. 508, regulating the jurisdiction of the Circuit Courts of the United States, reads: "Where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the *residence* of either the plaintiff or the defendant." The decision here is only an application of this section of the statute to a novel and peculiar state of facts.

FRAUD—ELEMENTS OF DAMAGE—PECUNIARY LOSS.—An administrator suing a railroad company for damages for false representation made to her by the company's agent, which induced a settlement of her claim against the company for the negligent death of her intestate, must show that she had a valid and existing claim and not merely one which was disputed, but which she could reasonably apprehend was just. Urtz v. N. Y. Cen. & H. R. R. Co., 95 N. E. Rep. 711 (N. Y. 1911).

The leading cases of Derry v. Peek, L. R. 14 App. Cas. 337 (1889), and Smith v. Bolles, 132 U. S. 125 (1889), lay down the undisputed rule that one suing for damages for fraud must show, aside from representation, falsity, knowledge, deception and injury the further essential element of pecuniary loss to the party deceived.

In dissenting from the decision in the principal case, Vann, J., pointed out that, as a compromise does not necessarily involve the surrender of a certainty and will be supported if it merely involves the surrender of a

reasonable probability, the jury could, therefore, be the judges of the reasonableness of the claim of the plaintiff against the company.

As a matter of abstract justice it is submitted that the view of Vann, J., is the better one. In the principal case the plaintiff had no other remedy, as the Statute of Limitations had run, and it would seem perfectly reasonable to hold that the jury, in an action for fraud, are competent to assess the putative value of the waived claim, and award accordingly.

Compare with the principal case, Case v. Hall, 24 Wend. 101 (N. Y. 1840), where damages were given for a fraudulent sale of goods, although the real owner had not recovered his property nor the vendee suffered loss; and Bradley v. Fuller, 118 Mass. 239 (1875), where, owing to false representations, the creditor abandoned his intention to sue out an attachment, and lost his debt when other creditors did so. It was held that no legal damage was suffered as the loss complained of was too remote and speculative.

GAMING—LIABILITY UNDER A STATUTE GIVING RIGHT OF ACTION AGAINST WINNERS.—A player in a game of poker, conducted in a gambling house, having lost a large sum of money, sought to recover it from the proprietor of the establishment. He based his action on a statute which allows the loser at gambling or betting, a right of action against the winner of the money. The evidence showed that the defendant had not participated in the game, but had received a certain fixed percentage of every "pot" played. *Held:* The proprietor was not a winner of the money thus received, and consequently was not liable under the statute. Nagle v. Randall, 132 N. W. 266 (Minn. 1911).

At common law, a man who had lost money at gaming, and who had paid it over, could not recover anything from the winner. Most states have enacted statutes allowing the recovery of the sum thus lost from the winner. There is, however, a decided difference of opinion in the jurisdictions as to who is a winner.

In the case of Jones v. Cavanaugh, 149 Mass. 124 (1889), it was held that the defendant, a professional stakeholder, who arranged bets between others and received a definite percentage of the amounts wagered, was not a winner of money lost by the plaintiff. In another case, the plaintiff offered to give the sum of three hundred dollars to anyone who would wager one thousand dollars on a certain election. The defendant bet the thousand dollars and received the reward. In an action to recover the three hundred dollars, the court decided that this money had not been won by the defendant, and gave judgment for him. Johnson v. Ferris, 49 N. H. 66 (1869). The weight of authority seems to be in favor of regarding as a winner only the person whom the fortune of the game points to as the one who shall receive the money wagered.

A very strong argument for the contrary view is presented in Triplett v. Seelbach, 11 Ky. Law. Rep. 278 (1889). That case was one exactly similar on its facts to our principal case. The proprietors of a gambling room took a certain amount from each hand played for the purpose of furnishing drinks and cigars to the players. Anything left over from the "take-out" went to the managers of the room. Even though they did not take part in the game, the court held that they were winners, both technically and actually. *Accord:* Thomas v. Grffin, 1 Indiana App. 457 (1890).

LIBEL—RIGHT OF PRIVACY—PUBLICATION OF PHOTOGRAPH.—A newspaper published an article stating that the plaintiff's father had been charged with fraud, giving the details of the fraudulent acts, and publishing a photograph of the members of the family, including the plaintiff. Plaintiff sought to recover on two grounds: (1) that the article and photograph taken together were libelous; and (2) that the unauthorized publication of the photograph was an invasion of her right of privacy. *Held:* (1) the publication of the photograph in conjunction with the article does not constitute libel under a

statute defining libel as "exposing any living person to hatred, contempt, ridicule or obloquy, or depriving him of the benefit of public confidence or social intercourse." (2) the plaintiff's case does not fall within any of the rules so far recognized by the courts, permitting a recovery for an invasion of the right of privacy. Hillman v. Star Publishing Co., 117 Pac. Rep. 594 (Wash. 1911).

The so-called "Right of Privacy" has never been recognized in England. In this country its existence seems to have been first asserted in 1890 in IV Harvard Law Review 193.

A review of the few cases on the subject will show that it has never been recognized in America, in the absence of circumstances showing a violation of property rights. In Corliss v. Walker Co., 57 Fed. Rep. 434, and 64 Fed. Rep. 280 (1893-4), the court went to some length in distinguishing between public and private persons, and while permitting the publication of the photograph, it seemed to put it on the ground that Mr. Corliss was a public character, thus implying that had he been a private character the publication would have been restrained. This inference, and dicta in one or two other cases, seem to have been the basis of the dissenting opinion of Judge Gray in Schuyler v. Curtis, 147 N. Y. 434 (1895), in which he upholds the right of privacy. In Roberson v. Rochester Folding Box Co., 171 N. Y. 538 (1902), the right is finally denied. *Accord:* Diven v. Partridge, 82 N. Y. Sup. 248 (1903).

There is no doubt, however, of the right to restrain, and recover damages for the unauthorized publication of a photograph for advertising purposes, or purposes of trade, on the ground that this is in derogation of a man's property right to sell his picture for such purposes. A late N. Y. Statute clearly embodies the common law on this subject. Act of April 6, 1903, chap. 132, sec. 2.

REAL PROPERTY—INCUMBRANCES.—The owner of eight houses and lots, built a private sewer under them, and through the land of an adjoining owner, to a distant public sewer. The owner agreed to convey the entire premises clear of all incumbrances and easements to the plaintiff. The buyer alleged that the city might compel him to connect with a nearer public sewer, and that this fact was an incumbrance. The defendant denied that the city would require such connection while the private sewer remained, and the court assumed this to be true. *Held:* The cost the owner will be put to *if he elects* to connect the premises with the nearer sewer does not constitute an incumbrance. Perkinpine v. Hogan, 47 Pa. Sup. 22 (1911).

The right of a city to collect the cost of laying water pipe in what was once a rural district, but which has been made a part of the city, is not an incumbrance. Gilham v. R. E. Title Ins. & T. Co., 203 Pa. 24 (1902). No tax or assessment can exist so as to become an incumbrance until the amount thereof is determined. Dowdney v. Mayor, 54 N. Y. 186 (1873), in which a sewer had been built by the city before the conveyance was made, but the amount of assessment had not been fixed. It was held, therefore, that the liability of the purchaser to pay the assessment was not an incumbrance. The principal case seems, therefore, to have been properly decided.

REAL PROPERTY—LANDLORD AND TENANT—CONSTRUCTIVE EVICTION.—In an action to recover rent, the tenant pleaded a constructive eviction. The evidence showed that the defendant occupied an apartment in the house in question, while the other apartments in the same building were rented to certain lewd women, who used them for purposes of prostitution. The noises, loud arguments and indecent songs until late at night disturbed the defendant, his wife and children, and the wife had been insulted several times in the public halls by drunken men who were visiting the apartments in question. The landlord was notified of this state of affairs but took no action to remedy it. Consequently, the defendant moved out. *Held:* The landlord's

failure to abate this nuisance and allowing it to continue, amounted to a constructive eviction, which justified a removal from the premises and suspended the rent. Phyfe v. Dale, 130 N. Y. Sup. 231 (1911).

This case is the latest opinion in a line of decisions in New York, commencing with the well-known case of Dyett v. Pendleton, 8 Cowen, 727 (1826), all of which have reached the same conclusion on similar facts. The general principle involved is, "that when the lessor created a nuisance in the vicinity of the demised premises, or was guilty of acts that precluded the tenant from the beneficial enjoyment of the premises, in consequence of which the tenant abandoned the possession before the rent became due, the lessor's action for the recovery of rent was barred, although the lessor had not forcibly turned the tenant out of possession." Edgerton v. Page, 20 N. Y. 281 (1859).

The weight of authority in America seems to be in accord with this New York doctrine. Lay v. Bennett, 4 Colo. App. 252 (1894); Silber v. Larkin, 94 Wis. 9 (1896); Doran v. Chase, 2 W. N. C. 609 (Pa. Supreme Ct. 1876). The Massachusetts courts, however, severely criticize the decision in Dyett v. Pendleton, *supra,* in the cases of Royce v. Gugenheim, 106 Mass. 201 (1870), and DeWitt v. Pierson, 112 Mass. 8 (1873). In the latter case, the facts were almost identical with those in Phyfe v. Dale, *supra,* with the exception that the tenant did not vacate the apartments. The court held that there was no eviction. This is distinguishable, however, on the ground that the prime essential in constructive eviction was lacking, namely, an abandonment of the premises.

An excellent summary of the whole question is given in Lay v. Bennett, 4 Colo. App. 252 (1894).

SALES—RATIFICATION OF FACTOR'S ACT.—A music company, which sold pianos for the plaintiff company on commission, delivered one of the pianos to the defendant in satisfaction of a note for rent due on a storehouse leased by the music company, the note reserving a lien on the piano to secure payment. Plaintiffs sued the music company to recover a balance due, including the price of the piano. After this suit had been begun, but before judgment had been given, they sued the defendant to recover the piano. *Held:* That the plaintiff did not ratify the music company's act by the subsequent suit against it. Pemberton v. Price & Teeple Co., 139 S. W. Rep. 742 (Ky. 1911).

When a suit instituted by a principal against his factor will establish a ratification of the factor's act, has been the subject of considerable discussion. While the facts in Pemberton v. Teeple Co., *supra,* differ materially from those in most of the cases, the result arrived at in the decision is a just one and is supported by the great weight of authority on the subject. The appellant's rights against the music company were in no way prejudiced, and the music company might have moved to open the judgment and have it reduced by the value of the piano.

It is generally held that where a factor acts for his principal and receives money from a sale, a suit to recover the money will amount to a ratification of the act. See Storey on Agency, § 259, and cases cited. When, however, the factor acts solely in his own interest, there is no attempt to execute an agency, and there is nothing to ratify. Hamlin v. Sears, 82 N. Y. 327 (1886); Keighly v. Durant (1901), A. C. 259. The owner in such a case may confirm the act, but he cannot do this by a simple act of ratification. It appears that the confirmation must be supported by a consideration or set up by an estoppel, neither of which was present in the principal case.

SURETYSHIP—STATE AS OBLIGEE IN A BOND—DELIVERY AND ACCEPTANCE.—A, in his lifetime, received, as "custodian and holder," from the guardian of several minors, a sum of money belonging to the estate of the minors. He gave his bond to secure the return of the money, holding himself "firmly bound to the State of Maryland" to deliver up the money. He died, and

his administrators refused to repay the money. The guardian sued in the name of the state, to the minors' use, to recover from the sureties. No such bond was required by statute. *Held:* The state may not, without its consent, be made the obligee in a bond in which it has no interest, and which is not required by law to be executed. The court further pointed out that, no one being authorized to accept such a bond on behalf of the state, it was invalid for want of a delivery and acceptance. State v. Gaver, 80 Atl. Rep. 891 (Md. 1911).

Could such a bond be taken in the name of the state, without permission, the state might become involved in responsibilities and duties foreign to the legitimate purposes of government. State v. Shirley, 23 N. C. 597 (1841). In U. S. v. Pumphrey, 11 App. D. C. 44 (1897), the United States was obligee in a bond with reference to a contract between the obligors and a number of Indians. The right to act as obligee without express statutory authority was upheld because of the peculiar relation between the Government and the Indians. It has been held that a county cannot, without statutory requirement, take a bond to protect those furnishing materials and labor on a schoolhouse. Breen v. Kelly, 45 Minn. 352 (1891); Sears v. Williams, 9 Wash. 428 (1894). *Contra:* Sample v. Hale, 34 Neb. 220 (1892); Lyman v. Lincoln, 38 Neb. 794 (1894).

A bond required by a statute which does not specify who shall be obligee, may, where many persons are interested, be taken in the name of the state. Ing. v. State, 8 Md. 287 (1855). *Contra:* Breen v. Kelly (*supra*). And suit may be brought on it by those for whose protection it is required, without obtaining permission of the state for that purpose. State v. Norwood, 12 Md. 177 (1857). But the contrary view is expressed by the United States Supreme Court in Corp. of Washington v. Young, 10 Wheaton, 406 (1825).

TORTS—VOLUNTARY ASSUMPTION OF RISK AS DEFENSE TO STATUTORY LIABILITY.—In Fegley v. Lycoming Rubber Co., 80 Atl. Rep. 870 (Penna. 1911), the plaintiff was, by an accidental collision with a fellow-workman, which was due to miscalculation on the part of the latter, thrown off his balance. In the instinctive effort he made to regain his equilibrium, plaintiff was injured by the machinery of the defendant company, which was, contrary to a statute, without guards. *Held:* That the company was liable.

The court regarded the negligence of the defendant in leaving unguarded such dangerous machinery as the proximate cause of the injury, and did not so consider the accidental mistake of the plantiff's fellow-servant. It based its decision on the theory that it was because such accidental slips and miscalculated moves on the part of either a workingman or his fellow-servant were of common occurrence in ordinary enterprises, that the statute requiring guards for machinery was enacted. Accordingly, to hold that, under the facts given, the proximate cause was the mistake of the plaintiffs' fellow-servant would be, in effect, a nullification of the law which was passed to protect laborers against accidents occurring from just such causes.

In regard to the doctrine of voluntary assumption of risk by the plaintiff, over which defense, in cases of this character, the decisions are at variance, the court considered themselves bound by the rule established in Jones v. American Caramel Co., 225 Pa. 644 (1909), and Valjago v. Carnegie Steel Co., 226 Pa. 514 (1910). These decisions hold that in Pennsylvania an employer cannot invoke the defense of voluntary assumption of risk by the employee in the face of a statute requiring safeguards on dangerous machinery. *Accord:* Narramore v. C. C. C. & St. L. Ry. Co., 90 Fed. 248 (1899), and the cases in Illinois, Indiana, Michigan, Missouri and Washington. *Contra:* Denver & Rio Grande Ry. Co. v. Norgate, 141 Fed. 249 (1906), and St. Louis Cordage Co. v. Miller, 126 Fed. 195 (1903). Also the rule in Massachusetts, Minnesota, Rhode Island, Wisconsin and New York.

TORTS—LIABILITY OF RAILWAY CORPORATION FOR THE MALPRACTICE OF A PHYSICIAN DELEGATED TO RENDER AID TO A PASSENGER.—The plaintiff was injured by a fall from the defendant company's car and the company gratuitously sent a physician to furnish medical aid. The physician so negligently treated the plaintiff as to cause permanent injury, whereupon suit was brought against the company. *Held:* That an action for malpractice founded on such an averment does not establish any cause and is bad on demurrer. Youngstown Park & Falth St. Railway Company v. Kessler, 95 N. E. Rep. (Ohio, 1911).

This decision was based upon two grounds, concerning one of which there can scarcely be any doubt. The following cases deny that there is any duty whatever to furnish aid to those injured by a company in the course of its business. King v. R. R., 23 R. I. 583 (1902); Union Pacific R. R. v. Coppier, 66 Kan. 649 (1903); Griswold v. R. R. 183 Mass. 434 (1903); Ollett v. P. R. R. (1902).

The cases which maintain that, where a company voluntarily attempts to aid a person they have injured, they are responsible for further injuries caused by their negligent efforts, are all in accord with the principal one. The rule in the following cases is that, in order to set forth grounds of action for the result of negligence during such a relationship, it must be shown either that there was great carelessness and negligence on the part of the company's servants or else that the company was not reasonably careful in the selection of those into whose care the person injured was given. See Bresnahan v. Landsdale Co., 51 Atl. Rep. 624 (R. I. 1900); Dyche v. R. R. Co., 74 Miss. 301 (1901); Whitesides v. R. R. 128 N. C. 229 (1901); Northern Central Ry. v. State, to the use of Price, 29 Md. 420 (1868); Raasch v. Elite Laundry Co., 98 Minn. 357 (1906). The fundamental principle of these cases was first established in Fitzherbert's "De Natura Brevium" (1547), and in the leading English case of Coggs v. Bernard, 2 Ld. Raym. 909, namely, that when one voluntarily undertakes a transaction, even if there is no consideration for his so doing, nevertheless he is responsible for damages resulting from his improper execution thereof.

The other basis for the decision given by the court was that a contract to perform medical services made by a corporation which was organized to operate a railroad is *ultra vires,* and accordingly such a company could not be guilty of malpractice under any circumstances. While this may be true under the Ohio code in this case, it does not appear that a corporation must be always regarded as free from liability in a tort action for damages resulting from the negligence of its duly authorized agent, acting within his scope in the execution of a contract made by the corporation which is, in reality, *ultra vires.* See Nims v. Mount Herman Boys' School, 160 Mass. 177 (1893), in which the school ran a ferry and the plaintiff was injured by the ferryman's negligence. *Held:* That the doctrine of *ultra vires* could not be raised as a defense in an action for negligence in the performance of the ferriage contract. Also Bissel v. Michigan Southern & Northern Indiana Railroad Company, 22 N. Y. 258 (1854), and other decisions cited in Nims v. School, *supra.*