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RECENT CASES

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ACTION—CONDITION PRECEDENT—TENDERING RETURN OF COLLATERAL SECURITY.—REUSENS V. ARKENBURGH, 119 N. Y. SUPP. 821—*Held*, that it is not incumbent on plaintiff, in an action at law on an obligation to pay money, or for moneys loaned or expended at defendant's request, to tender the return of collateral security.

It is well settled that possession is of the essence of a pledge. *Casey v. Cavaroc*, 96 U. S. 467. If a pledgee, after receiving possession of the chattels pledged, permits the pledgor to resume possession of them, he loses his right to their possession. *Thompson v. Dolliver*, 132 Mass. 103. And the pledgor has no right of possession in the property pledged until he has extinguished the debt or made sufficient tender of payment. *Reardon v. Patterson*, 19 Mont. 231. It is also established that a person holding collateral securities is under no obligation to resort to them before suing on the principal claim. *Ambler v. Ames*, 1 App. Cas. (D. C.) 191. In view of these decisions, since tender has been aptly defined as the offer to perform an act which the offeror is bound to perform (*Bouv. Inst.*, Sect. 2437, *quoted* in *McLain v. Batton*, 50 W. Va. 121, 130), the holder of collateral security need not tender back the same before proceeding against the principal debtor. *Trotter v. Crockett*, 2 Port. (Ala.) 401. Similarly it has been held that a tender of stock held as collateral security was not a condition precedent to maintaining an action on the original debt. *Taylor v. Chever*, 6 Gray (Mass.) 146.

BANKS AND BANKING—BANK OFFICERS—ILLEGALLY RECEIVING DEPOSITS.—PARRISH V. COMMONWEALTH, 123 S. W. 339 (*Ky.*).—*Held*, that the term "insolvency" as used in the Ky. St., Sec. 497, providing that, if any president of a bank shall receive or assent to the receiving of deposits with the knowledge that the bank is insolvent, he shall be guilty of a felony, means that all of the bank's property and assets are not sufficient to satisfy its debts, and not that it may not have sufficient funds in its vaults to satisfy all its depositors, or any considerable number of them, on the same day or in case of a run. Hobson and Barker, J.J., *dissenting*.

"Insolvency" has been differently defined by different courts, and it may be said to have two distinct and well defined significations. In its restricted meaning, the term denotes the inability to meet liabilities as they become due in the ordinary course of business. *Chipman v. McClellan*, 159 Mass. 363, 368. As applied to banks, "insolvency," by the weight of authority, is used in its restricted meaning, or, in other words, a bank, by the weight of authority, is insolvent when it cannot pay its deposits on demand, according to its promise. *Atwater v. American Exch. Bank*, 152 Ill. 605. Thus, contrary to the holding of the case at hand, under *Comp. Laws*, Sect. 6850, punishing the receipt of a deposit by a bank officer when the bank is insolvent, and the officer knows of such insolvency, the term "insolvent" means a present inability to pay depositors as banks usually do, and meet all liabilities as they become due in the ordinary

course of business. *State v. Stevens,* 16 S. D. 309. When the alleged insolvent is not a trader or a merchant, the term "insolvency" is ordinarily held to have a less restricted meaning than when applied to bankers, traders, etc., *Williamson v. Hatch,* 55 Minn. 344, or, in other words, "insolvency" as popularly understood, denotes the state of one whose assets are insufficient to pay his debts. *Van Riper v. Poppenhausen,* 43 N. Y. 68. This less restricted meaning has sometimes been applied to banks, and in *State v. Meyers,* 54 Kan. 206, it was held, that in determining the question of a bank's solvency, its capital and surplus were to be considered as resources.

BROKERS—COMPENSATION—EXCLUSIVE AGENCY.—TURNER V. BAKER, 74 ATL. 172 (PA.).—*Held,* that a broker is not entitled to commissions on a sale by his principal, notwithstanding he is given the exclusive right to sell, unless it is also agreed that he shall receive a commission, whether the sale be effected by him, by the principal, or some other person.

The mere fact that a broker is constituted an exclusive agent to sell, does not prohibit the owner himself from effecting a sale, and in such a case the principal is not liable for commissions. *Dole v. Sherwood,* 41 Minn. 535. However, under similar facts the Supreme Court of Texas has held that such agents are entitled to a reasonable compensation. *Harrell v. Zimpleman & Bergen,* 66 Tex. 292. In *Levy v. Rothe,* 17 Misc. 402 (N. Y.), where brokers are given the "option and exclusive agency to sell," the court, construing the word option as "right," distinguishes between a mere exclusive agency and the exclusive right, and holds the principal precluded from effecting a sale except at the risk of paying commissions if the agents produce a purchaser within the time limited. And in most jurisdictions the rule seems to be, that brokers having the exclusive agency for a certain period are entitled to a commission if they produce, within that time, a purchaser ready and willing to buy on the terms stipulated. *Waterman v. Boltinghouse,* 82 Cal. 659; *Moses v. Burling,* 31 N. Y. 462.

CORPORATIONS — GENERAL MANAGER — IMPLIED AUTHORITY.— STUDEBAKER BROS. CO. V. R. M. ROSE CO., 119 N. Y. SUPP. 970.—*Held,* that the words "general manager" simply import that he is a general executive officer for all the ordinary business of the corporation, and no inference can be indulged in that he possessed authority to make a contract for the purchase of an automobile binding on the corporation.

The implied powers of a general manager to-day are generally understood to be co-extensive with the general scope of the business. *Thomp. Comm. Corp.,* Sect. 8556. His implied authority has been held to extend to the purchase of advertisements and catalogues for an academy, in *Georgia Military Academy v. Estill,* 77 Ga. 409, and to the purchase of signs for similar purposes, in *B. S. Greene Co. v. Blodgett,* 55 Ill. App. 566. However, his authority does not extend to any matters or transactions which are not properly incident to the management of the ordinary business. *First Nat. Bank of Springfield v. Ashville Furn. & Lbr. Co.,* 116 N. C. 827. So he is not authorized to go beyond its usual manner of

transacting its business by hiring a horse and buggy for its employees, where such hiring was not necessary to the transaction of its business. *Baird Lumber Co. v. Devlin*, 124 Ala. 245. Finally, a general manager has no implied authority to make contracts for his personal benefit. *Marshall on Corps.*, Sect. 361.

CRIMINAL LAW—FORMER JEOPARDY—MISTRIAL.—STATE V. KINGHORN, 105 PAC. 234 (WASH.).—A jury was impaneled and sworn, and the state had commenced the examination of prosecutrix, when accused moved to dismiss because he had not been arraigned, and had not pleaded to the information. The motion was denied, whereupon accused was arraigned and entered a plea of not guilty. The jury was then discharged over accused's objection, and a new jury impaneled and sworn, and he was convicted, notwithstanding the plea of former jeopardy. *Held*, that jeopardy had attached, and that accused was entitled to dismissal. Fullerton, J., *dissenting*.

As to the period when jeopardy begins the decisions are not altogether in harmony, but by the decided weight of authority it is held that jeopardy attaches when a person is placed upon trial before a court of competent jursidiction, under an information or indictment sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance, *i. e.*, impaneled and sworn. *In re McClasky*, 2 Okl. 568; *State v. Snyder*, 98 Mo. 556; *Cooley's Const. Lim.* (2nd ed.) 325. *Contra, People v. Goodwin*, 18 John. 187; *U. S. v. Gilbert*, 2 Summ. 60. Under such circumstances the accused cannot again be subjected for the same offense, unless the jury is discharged from rendering a verdict by a legal necessity or by his consent. *People v. Horn*, 70 Cal. 17. In the case of *State v. Bronkol*, 5 N. D. 507, where the jury was impaneled and sworn before defendant had been arraigned or had pleaded to the information, it was held that a discharge of the jury was a legal necessity and hence jeopardy did not attach. And it is well settled that defendant is not put in jeopardy where a jury which was impaneled before his plea, is discharged and a new jury is impaneled and sworn to try the case. *United States v. Riley*, 5 Blatchf. 204; see also *Minor v. Commonwealth*, 5 Ky. Law Rep. 176.

CRIMINAL LAW—EVIDENCE—MOTIVE.—PEOPLE V. MORSE, 89 N. E. 816 (N. Y.).—Where the defendant after committing a highway robbery, shot and killed a policeman in his attempt to escape arrest, the court *held*, that evidence of the robbery though not competent to prove another crime, was competent as part of a continuous transaction to show defendant's motive and intent in shooting the policeman.

It is a fundamental rule of evidence that on a prosecution for a particular crime, evidence which in any manner shows or tends to show that accused has committed another crime wholly independent of that for which he is on trial, is irrelevant and inadmissible. *People v. Carpenter*, 136 Cal. 391. However, in an early decision in this country, it has been held that evidence of another independent crime is admissible where it appears to be connected as part of one entire transaction. *Heath v. Common-*

wealth, 1 Robinson (Va.) 735. So in the later cases, as in *Commonwealth v. Robinson,* 146 Mass. 571, this principle seems to be approved and it is there held that evidence of another crime is admissible to show motive when the two crimes are parts of one plan, actuated by a common purpose Under a California decision, evidence of a robbery was admissible when the accused was on trial for the killing of an officer. *People v. Pool,* 27 Cal. 572; and usually where the acts are so connected that they might be regarded as being the continuation of the same transaction, evidence is admissible. *State v. Wentworth,* 37 N. H. 197.

DEATH—PRESUMPTION OF SURVIVORSHIP.—DUNN V. NEW AMSTERDAM CASUALTY CO., 118 N. Y. SUPP. 491.—*Held,* that where insured and his beneficiary, under a policy payable to the legal representatives of insured on the beneficiary's prior death, both perished in the same disaster, no presumption of the survivorship of either will be indulged, and the personal representatives of insured must establish her survivorship by proof to recover on the policy.

Under the civil law, where two persons perished in the same disaster, and there are no circumstances showing which survived, presumptions as to survivorship arise from the probabilities resulting from strength, age, and sex of parties. *Succession of Langles,* 105 La. 39. But the common law indulges in no presumption of survivorship whatever may have been the age, sex, or physical condition of persons. *Faul v. Halick,* 18 App. (D C.) 9; *U. S. Casualty Co. v. Kracer,* 169 Mo. 301. It has been wrongly held that where there is no way to determine which of several parties died first, the rights of succession to their estates are to be determined as if death occurred to each at the same time. *In re Wilbur,* 20 R. I. 126. But the true rule is in accord with the principal case, XIX., *Yale Law Journal* p. 375.

FRAUDS, STATUTE OF—PROMISE OF VENDOR OF CORPORATE STOCK TO REPURCHASE.—SCHAEFFER V. STRIEDER, 89 N. E. 618 (MASS.)—Where the defendant induced the plaintiff to purchase certain stock, the defendant agreeing to refund the purchaser's money at any time on thirty days' notice, should he become dissatisfied, it was *held,* that such a contract was not a contract for the sale of "goods, wares and merchandise," within the statute of frauds.

It is generally held, as in the case under discussion, that where a purchase is made of securities, a promise by the seller to return the money paid for them, if the purchaser becomes dissatisfied, is not within the statute of frauds. *Fitzpatrick v. Woodruff,* 96 N. Y. 561. In *Gwnvell v. Morris,* 2 Cal. App. 451., the same was held, that such a contract is not within the statute, and the reason given for the holding being that the consideration for the defendant's promise was not for the sale of the stock, but was for its purchase by the plaintiff which was executed, and the transfer of the stock became a mere condition incidental to the defendant's promise. A contract, however, between the parties to an executed sale to resell the goods is within the statute. *Smith v. Bryan,* 5 Md. 141; *Gorman v. Brossard,* 120 Mich. 611. Also, an oral agreement by a third

person to repurchase bonds if unsatisfactory to the vendee is within the statute. *Chamberlain v. Jones,* 32 App. Div. N. Y. 237. And, when the third person is the agent of the vendor, the same has been held. *Morse v. Douglass,* 99 N. Y. S. 392.

INSURANCE—POLICY—CANCELLATION BY INSURER—RETURN OF UNEARNED PREMIUM.—TAYLOR V. INSURANCE CO. OF NORTH AMERICA, 105 PAC. 354 (OKL.).—*Held,* that the return of the unearned premium is essential to a cancellation of a policy by an insurance company, where the policy among other things provides, "When this policy is cancelled by this company by giving notice, it shall retain only the *pro rata* premium." Dunn and Hayes, J.J., *dissenting.*

If the policy gives the insurer the right at any time to cancel and return the unearned premium, "upon surrender of the policy," or the right to cancel "upon notice," the return of the premium or tender thereof is not a condition precedent to the cancellation of the policy. *Phoenix Mutual Fire Insurance Co. v. Brecheisen,* 50 Ohio St. 542; *Arnfeld v. Guardian Assurance Co.,* 172 Penn. St. 605; *Newark Fire Ins. Co. v. Sammons,* 11 Ill. App. 230. If, however, the return of the unearned premium is a condition for exercising the right of cancellation, a failure to return or tender the premium renders the attempted cancellation nugatory. *Peoria M. & F. Ins. Co. v. Botto,* 47 Ill. 516; *White v. Conn. Fire Ins. Co.,* 120 Mass. 330. In New York, under the "New York Standard policy," whose words regarding cancellation are similar to those used in the case under discussion, a return or tender of the unearned premium is necessary to the cancellation of the policy. The court, in coming to this conclusion said, that although it is not within the language, it is implied. *Tisdell v. New Hampshire Fire Ins. Co.,* 155 N. Y. 163. In *Chrisman & Sawyer Banking Co. v. Hartford Fire Ins. Co.,* 75 Mo. App. 310, the court came to the same conclusion on the ground that a contract cannot be brought to an end by one party except by placing the other party in *statu quo.* Likewise, in *Continental Ins. Co. v. Daniel,* 25 Ky. Law Rep. 1501, the same was held, on the ground that the provision is somewhat ambiguous, and should be construed most strongly against the insurer. The dissenting opinion in the case at hand, is based on the ground that the court is really making a contract for the parties, while a court's jurisdiction only goes as far as the construction of a contract. *Ibid. Lewis v. Comm'rs of Bourbon Co.,* 12 Kan. 186.

INSURANCE — SUBROGATION — ACTIONS — PARTIES.— HANTON V. NEW ORLEANS & C. R. LIGHT & POWER CO., 50 So. 544.—*Held,* that where the owner of property which has been destroyed by fire through another's negligence has been paid part of his losses by an insurer, who thereby becomes subrogated to the remedies of the assured, an action to recover from the wrongdoer the value of the property destroyed is properly brought in the name of the assured, and the insurer is not a necessary party to such action.

It is well settled that if a loss by fire is not settled by a third person legally bound for its satisfaction and the insurance company is compelled

to pay the loss, it is entitled to equitable subrogation to the claim of the insured against such third person. *Hart v. Western R. Co.*, 13 *Met.* (Mass.) 99. But the insurance company can recover only to the extent to which it has been compelled to reimburse the assured for his loss. *Chicago R. Co. v. Glenny*, 175 Ill. 238. The insurance company which had paid only a part of the loss cannot maintain an action against the third party, as this would result in a splitting up of the cause of action. *Mobile Ins. Co. v. Columbia R. Co.*, 41 S. C. 408. But by statutory provisions it is usually possible by joinder to maintain a single action by which the rights of all shall be determined. *Home Ins. Co. v. Oreg. R. Co.*, 20 Ore. 569. By virtue of the subrogation, the company may use the name of the insured without his consent. *Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107. But under statutory provisions allowing the real party in interest to sue, the company may maintain the action in its own name. *Hartford Ins. Co. v. Wabash R. Co.*, 74 Mo. App. 106.

INTOXICATING LIQUORS—LOCAL OPTION—"SPIRITUOUS, VINOUS, OR MALT LIQUORS."—CITY OF BOWLING GREEN V. MCMULLEN, 122 S. W. 823 (KY.).—The Kentucky statutes, 1909, Sect. 2557, made it unlawful, after a local option election resulting in the vote against the sale of "spirituous, vinous, or malt liquors," to sell any such liquors. *Held*, that in view of any prior judicial construction of the words in prior statutes on the subject, the statute is not violated by the sale of malt liquor containing less than two per cent of alcohol, and not intoxicating in the largest quantity in which it may be drunk. O'Rear, J., *dissenting*.

The weight of authority, contrary to the holding of the case at hand, seems to be that if a statute specifically forbids the sale or unlicensed sale of a certain liquor, as "malt liquor," the question of the intoxicating properties of the liquor sold is immaterial. *Evans v. State*, 113 Ga. 749; *State v. O'Connell*, 99 Me. 61; *State v. York*, 74 N. H. 125. Thus, in *Commonwealth v. Reyburg*, 122 Pa. St. 299, no issue was raised under Act. Pa., 1887, prohibiting the sale of malt, brewed, vinous, or spirituous liquors, as to whether the liquor sold was intoxicating. However, in the construction of statutes the prime object is to ascertain and carry out the purpose of the legislature in their enactment, and to do this the words used in the instrument should be first considered in their literal signification; but it is often necessary to inquire beyond such meaning of words. *Evansville v. Summers*, 108 Ind. 192. Courts also in construing or interpreting a statute, give much weight to the interpretation put upon it at the time of its enactment. *Com. v. Parker*, 2 Pick. 556 (Mass.).

LICENSES—CONSTITUTIONALITY—EXEMPTION OF OCCUPATION.—STATE EX REL. GREENWOOD V. RAMAGE, 123 N. W. 823 (MINN.).—*Held*, that a city ordinance prohibiting peddling without a license, which exempts "vendors of farm produce or green fruits and vegetables" is void.

It is well settled that the constitutional requirement of uniformity does not necessarily prohibit a license tax on business or avocation. *McGhee v. State*, 92 Ga. 21; *Morril v. State*, 38 Wis. 428. Yet such requirement is violated by a license fee which does not fall alike on all persons engaged

in the particular business or avocation taxed. *Peoria v. Guggenheim,* 61 Ill. App. 374; *St. Louis v. Spiegel,* 75 Mo. 145. But if all persons engaged in a particular business are classified for taxation according to natural and well recognized lines of distinction, then the constitutional requirement of uniformity is not violated. *Des Moines v. Bolton,* 128 Ia. 108. And the weight of authority is that a law imposing a license on peddlers dealing in goods, wares and merchandise except agricultural products and other specified goods is based on a classification conforming to natural and well recognized lines of distinction. *In re Watson,* 17 S. D. 486. However, it seems well settled in the state of the case at hand, that the legislature cannot make a distinction between peddlers of their own produce and other peddlers. *State v. Wagener,* 69 Minn. 206.

MANDAMUS—CORPORATE STOCK—TRANSFER ON BOOKS.—PEOPLE EX REL. ROTTENBERG V. UTAH GOLD & COPPER MINES CO., 119 N. Y. SUPP. 852.—*Held,* that mandamus will not lie to compel a corporation to transfer stock on its books; relator's title being perfect on delivery to him of the certificate properly endorsed, the registration only further evidencing his title and insuring payment of dividends, and the remedy at law by action for damages being available.

In some jurisdictions mandamus has been held a proper remedy to compel a corporation to transfer stock on its books. *People v. Crockett,* 9 Cal. 112. This has been for numerous reasons; because the secretary's duty is ministerial, in *In re Klaus,* 67 Wis. 401; as to railroad corporations, because the public is interested therein, in *State v. Railroad,* 38 La. Ann. 312; and because the legal remedy was too doubtful in character, in *State v. McIver,* 2 Rich. N. S. (S. C.) 25. But mandamus generally does not lie to enforce private rights. *Asylum v. Phoenix Bank,* 4 Conn. 172. Nor when there is an adequate remedy at law. *State v. Houseworth,* 63 Neb. 658. Accordingly, corporate officers cannot be so compelled to transfer stock on its books, without proof that their refusal will cause pecuniary injury unrecoverable at law. *State ex rel. Mepham v. St. Louis Paint Mfg. Co.,* 21 Mo. App. 521. And the probable weight of authority holds that the extraordinary remedy of mandamus will not be granted to compel the transfer of corporate stock, since the applicant has an adequate remedy at law for damages. *Shipley v. Mechanics Bank,* 10 Johns. (N. Y.) 484.

MUNICIPAL CORPORATIONS—DEFECTIVE WALKS OR CROSSINGS—NOTICE OF DEFECT.—MILLER V. VILLAGE OF MULLAN, 104 PAC. 660 (IDAHO).—The municipal authorities cannot be held chargeable with notice of the time when, and conditions under which, a wooden sidewalk will cease to be safe for pedestrians, merely on account of age and consequent decay, where there is no obvious or patent defect.

As a general rule the municipality is liable for injuries caused by defects in the highway only if it had actual or constructive notice of such defect a sufficient time before the accident, to show negligence on its part in failing to repair it. *District of Columbia v. Woodbury,* 136 U. S. 450; *Cummings v. Hartford,* 70 Conn. 115. But if the

defective condition is due to the direct act of the municipality itself, or a person whose acts are constructively its own, then no notice either actual or constructive need be shown. *Jones v. Deering,* 94 Me. 165. And as the duty of care and supervision of sidewalks imposed upon a municipality by its charter, requires it to take notice of the natural tendency of wooden sidewalks to decay, *Furnell v. City of St. Paul,* 20 Minn. 117, it was held liable by some courts for injuries caused by wooden walks which had become defective on account of age and consequent decay. *City of Indianapolis v. Scott,* 72 Ind. 196; *Denver v. Dean,* 10 Col. 375. Constructive notice of a defect in a sidewalk will be presumed if it was such as to put a reasonably prudent man, whose business it was to look after the repairs, on inquiry to examine its condition, *City of Joliet v. Walker,* 7 Ill. App. 267, or if it was openly and notoriously defective. *Lindholm v. City of St. Paul,* 19 Minn. 245. But if those constantly using a street failed to notice the defect it may be presumed that the municipal authorities had no notice of it. *Broburg v. City of Des Moines,* 63 Ia. 523. It may also be added that the municipality is not an insurer or guarantor of the safety of the highways, and consequently may not be liable for injuries even though the person injured was in the exercise of due care. *Wilson v. Granby,* 47 Conn. 59; *Hunt v. New York,* 109 N. Y. 134. That by the weight of authority cities are liable, even in absence of express statute to that effect, for injuries resulting from defects in highways amounting to negligence, while quasi-corporations, such as towns and counties are not, see *Smith's Cases on Municipal Corporations.* p. 119 note.

MUNICIPAL CORPORATIONS—SEWER SYSTEM—NEGLIGENCE IN CONSTRUCTION.—HART V. CITY OF NEILLSVILLE, 123 N. W. 125 (WIS.).—Where a municipality puts a sewer system in operation, having first duly adopted plans therefor, and the same is insufficient because of failure to exercise ordinary care in executing such plans, *held* that it was liable for injuries proximately caused to private property, without concurrence of contributary negligence of the owner thereof. Winslow and Dodge. J. J., *dissenting.*

The general rule is in accord with the above case and holds that a municipal corporation is liable for damages sustained by an individual from want of proper care, skill, and diligence on the part of the corporation in the construction of sewers. *Woods v. City of Kansas,* 58 Mo. App. 272; *Barton v. City of Syracuse,* 36 N. Y. 54. As the construction is the exercise of a merely ministerial function it must be performed with reasonable care and skill to avoid liability in case of injury. *Langley v. Augusta,* 118 Ga. 590; *Van Pelt v. Davenport,* 42 La. 308. It is also the duty of the municipality to keep the sewers in repair and for failure to do so, causing damage, it is liable. *City of Savannah v. Spears,* 66 Ga. 304. But the municipality is not liable for an error of judgment on the part of the authorities in locating or planning a sewer. *Aicher v. Denver,* 10 Col. App. 413; *Keely v. Portland,* 100 Me. 260. This rule, however, according to a number of authorities does not extend to exempt a municipality from liability for negligence in the adoption of a plan; so, where an obviously defective plan is adopted, the municipality is liable for the resulting damage. *De Baker v. So. Cal. R. Co.,* 106 Cal. 257; *Louisville v. Norris,* 111

Ky. 903. Some courts hold that the adoption of such a plan is a judicial act for which the municipal authorities are under no common law liability. *Darling v. City of Bangor,* 68 Me. 108; *Johnston v. Dist. of Col.,* 118 U. S. 19.

SALES—CONDITIONAL SALES—DESTRUCTION OF PROPERTY—LIABILITY OF PURCHASER.—NATIONAL CASH REGISTER CO. v. SOUTH BAY CLUB HOUSE ASS'N., 118 N. Y. SUPP. 1044.—*Held,* that where the defendant gave a note for the price of a cash register under a contract of conditional sale, with reservation of title and before payments were made on the note, the defendants' club house and the contents, including the register, were destroyed by fire without defendant's fault, it is liable on the note.

The weight of authority is that where personal property is sold and delivered to the vendee under an agreement that the title is to remain in the vendor until payment, the loss or destruction of the property while in the possession of the vendee before payment, without his fault, does not relieve him from the obligation to pay the price. *Tufts v. Griffen,* 107 N. C. 47. But, on the other hand, it has been held in a case where a note was given with an agreement that title was to remain in the plaintiff until the note was paid that when the property in the defendant's possession was destroyed without his fault the consideration for the note failed. *Arthur & Co. v. Blackman,* 63 Fed. 536. *A fortiori* it is well settled that where the property is lost through the negligence of the vendee he will be liable. *Neally v. Wilhelm,* 4 G. Green (Ia.) 240. But in the case of an optional sale an accidental loss of property, before the option to purchase is exercised, falls on the bailor. *Strauss Saddlery Co. v. Kingman,* 42 Mo. App. 208.

TRUSTS—CONSTRUCTIVE TRUSTS—STATUTE OF FRAUDS.—CONGREGATION KEHAL ADAH JESHURUM M'YASSY v. UNIVERSAL B'LD'G. & CONSTR. CO., 119 N. Y. SUPP. 72.—Where a religious corporation, owning property about to be sold on the forclosure of a mortgage, held by a business corporation composed wholly of members of the former, entered into an oral agreement with the mortgagee in consideration of money paid on a prior unexecuted contract and the mortgagor's promise not to bid or procure bidders, that the mortgagee should bid in the property for the mortgagor's benefit and convey it to the mortgagor, it was *held,* that the mortgagee in an action to enforce the agreement, should not take advantage of the statute of frauds. Ingraham J., *dissenting.*

The statute of frauds, making an express trust created by parol invalid, has no application to cases where the law raises a constructive trust by reason of fraudulent acts and purposes in procuring title to land. *Crossman v. Keister,* 23 Ill. 69. Thus, where the defendant orally agreed to act as agent for the plaintiff to buy certain land in the plaintiff's name but had the conveyance made out to himself, paid for it with his own money, and denied the agency, it was held that the defendant was liable to the plaintiff as trustee *ex maleficio. Halsell v. Wise Country Coal Co.,* 19 Tex. Civil App. 564. But, there is much authority holding that the defendant

is not liable on these facts, on the ground that the trust is created by the agreement of agency, and so is within that section of the statute of frauds requiring declarations of trust in lands to be in writing. *Burden v. Sheridan,* 33 Iowa 425; *Nestal v. Schmidt,* 29 N. J. Eq. 458. The ruling of the first case, that the trust is not within the statute, seems to be based on the better reasoning, in that agency, though created by an agreement, is properly a relation, or *status,* which, for a particular purpose, is fiduciary, and an abuse by the agent of this fiduciary relation is a fraud on his principal, and renders him liable for the proceeds of his wrongful act as a constructive trustee; and so this trust really results by operation of law. and so is not within the statute of frauds. *Winn v. Dillon,* 27 Miss. 494. There is even greater reason, in the case under discussion, for the holding that the trust is not within the statute, for, by means of the verbal agreement, the purchaser was able to obtain the property at a price below its value. Under practically the same facts the same was held in *Ryan v. Dox,* 34 N. Y. 307, and in *McNeil v. Gates,* 41 Ark. 264; and this seems to be the weight of authority on the subject.

WATERS AND WATER COURSES—PUBLIC WATER SUPPLY—WATER COMPANY—PAYMENT OF DISPUTED BILL FOR WATER.—HATCH V. CONSUMERS CO. LTD., 104 PAC. 670 (IDAHO).—*Held,* that a water company cannot enforce a rule requiring a consumer to pay an old or disputed bill for water furnished him at some previous time, or for some other and independent use, or at some other place or residence, or for a separate and distinct transaction from that for which he is claiming and demanding a water supply, as a condition precedent to supplying him with water, where he tenders payment of the established water rate in advance for the service he is demanding.

It is well established that the rule allowing a water company to shut off the water supply, for the non-payment of its bills refers to current rents only, and not to rents for past service. *Merrimac River Savings Bank v. City of Lowell,* 152 Mass. 556. And similarly, a quasi-public company cannot refuse to furnish gas to a consumer, where he tenders payment of the prescribed rate in advance, because he refuses to pay a former gas bill, or a bill contracted for gas used on other premises. *Gas Light Co. of Baltimore v. Colliday,* 25 Md. 1; *Lloyd v. Washington Gas Light Co.,* 1 Mackay (D. C.) 331. But a water company may provide by its by-law that if the rent is not paid, the supply shall be cut off until all arrears, and expenses for shutting off, are paid. *Brumm v. Pottsville Water Co.,* 9 Penn. 483. And the one desiring the supply turned on must pay the arrears even though they were incurred by a former tenant. *City of Atlanta v. Burton,* 90 Ga. 486; *Girard Life Ins. Co. v. Phila.* 88 Pa. St. 393.

WITNESS—ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—RICHARDS V. RICHARDS, 119 N. Y. SUPP. 81—Where a client gives his attorney notice of his place of residence it was *held,* not to affect the attorney's professional employment, and is not a "privileged communication," which the attorney cannot be compelled to disclose for the purpose of service of an order on such client.

As a general rule every communication which a client makes to his legal adviser for the purpose of professional advice or aid upon the subjects of his rights or liabilities is to be deemed confidential and the disclosure thereof is forbidden. *Vogel v. Gruaz,* 110 U. S. 311; *Carter v. West,* 93 Ky. 211. But it has been held in one jurisdiction that the attorney may disclose or be compelled to disclose the address of his client. *Alden v. Goddard,* 73 Me. 345. For a communication by a client to his attorney was held not to be privileged where it was not made for the purpose of enabling him to give advice or to render professional services. *House v. House,* 61 Mich. 69. Nor does the general rule apply to mere abstract legal opinions on general questions of law, either civil or criminal. *McMannus v. State,* 39 Tenn. 213. It is not necessary in order to entitle the client to claim the privilege, that he enjoin secrecy upon the attorney or even be aware of the existence of any privilege. *McLellan v. Longfellow,* 32 Me. 494. The privilege is not confined to statements by the client to the attorney, but applies with equal force to statements made and advice given by the attorney to his client. *Liggett v. Glenn,* 4 U. S. App. 438. And as the privilege is that of the client, it is within his power to waive it whenever he sees fit to do so. *Hunt v. Blackburn,* 128 U. S. 464.