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Recent Decisions

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legislature to change methods of procedure, as the Declaratory Judgment Acts generally do, and to create new forms of action and remove restrictions against invoking court action, has long been admitted. Law is a progressive science, and certain forms of procedure once thought essential are now disregarded because of altered conditions. Conditions are so altered now as to require and justify declaratory judgments.

Wilton John Sherman.

RECENT DECISIONS

ACTION—JURISDICTION AS TO REMEDY—ARBITRATION AGREEMENT.—The plaintiff was engaged in the business of distributing motion pictures to theaters. By a contract with the defendant, the plaintiff was to furnish ten motion pictures to the defendant to be shown in the latter's theater. The plaintiff delivered five of these pictures and was ready and willing to deliver the rest but the defendant refused to accept them. There was an arbitration agreement between the parties in the original contract whereby they agreed that before either should resort to any court for the determination or the protection of his rights, all claims and controversies arising under the contract should be submitted to the board of arbitrators. A board of arbitrators was selected as per agreement and decided that the defendant must pay for the pictures he had ordered and refused to accept. Before the award, however, the defendant had stated he would not abide by it. The defendant refused to comply with the award after it was made. This is a suit upon that award arising in the common pleas court of Ohio. The plaintiff contends that the agreement contains a proviso that it is to be determined by the law of New York embodied in a statute of that state. *Held,* that the New York statute goes to the remedy, and as the law of jurisdiction where relief is sought controls as to all remedial matters as distinguished from substantive rights, the law of Ohio must be enforced and judgment was entered accordingly for the defendant. *Shafer v. Metro-Goldwyn-Mayer Distributing Corporation,* 172 N. E. 689 (Ohio 1930).

The *lex fori,* or law of the jurisdiction in which relief is sought, controls as to all matters pertaining to remedial, as distinguished from substantive rights, and the only uncertainty which may arise concerning this rule must result from conflicting views as to what matters fall within one or the other of such classes of rights. 12 C. J. 483, 484. This is a rule of practically universal application. The *lex fori* prevails over the *lex rei sitae,* the *lex contractus,* the *lex loci solutionis,* and all other laws so far as concerns matters that relate to the remedy as distinguished from the substantive contract. 5 R. C. L. 942. In the instant case the interpretation of the New York rule upon arbitration agreements must be considered to see whether or not they regard them as a part of the remedy or of the substance of the contract. The New York view is that they are a part of the remedy. *Meachem v. Jamestown, F. & C. R. Co.,* 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851 (1914). The law that governs remedies is the law of the forum. Thus a law such as New York has in regard to arbitration agreements, has no extra-territorial force. *Red Cross Line v. Atlantic Fruit Co.,* 264 U. S. 109, 44 S. Ct. 274, 68 L. ed. 582 (1923). Also, such a statutory remedy will not be enforced in another jurisdiction in which such methods of procedure are unknown. *Stoddard v. Lum,* 159 N. Y. 265, 53 N. E. 1108 (1899); *Marshall v. Sherman,* 148 N. Y. 9, 42 N. E. 419 (1895); *Stewart v. Baltimore and Ohio R. Co.,* 168 U. S. 445, 18 S. Ct. 105, 42 L. ed. 537 (1897); *Erickson v. Nesmith,* 15 Gray 221 (1860). According to the Ohio decisions and view upon an arbitration agreement, the present agree-

ment is equivalent to a common law agreement to arbitrate. As the defendant in this case had refused to submit to the arbitration board, this distinction becomes very important, since at common law one had the right to revoke his agreement to arbitrate at any time prior to the announcement of the award. *State v. Jackson,* 36 Ohio St. 281 (1880). "At common law the authority of an arbitrator could be revoked at any time before award was made. Only an award in final form could bar the right to revoke the submission. This was true even though the parties had made an express covenant not to revoke, because the parties could not make that irrevocable which was in its nature, revocable." 3 Ohio Jurisprudence 76. The New York court, speaking in *Berkovitz v. Arbib,* 230 N. Y. 261, 130 N. E. 288, 289 (1921), says "that the common law limitation upon the enforcement of promises to arbitrate is part of the law of remedies. The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights or wrongs out of which differences grow." It is readily seen that the Ohio court was justified in reversing the lower court in this case and holding that the law of Ohio applied where the question was one of remedy and not of substantive law.

Kenneth J. Konop.

CONTRACTS—DEFALCATION BY EMPLOYEE—AGREEMENT BY FRIENDS TO REPAY INSURER.—J, an employee of a bank, defaulted for a considerable sum of money. The bank had taken out a bond or policy with plaintiff, which bond stipulated to indemnify the bank against loss caused by the dishonesty of any of its employees. After such default J transferred property owned by him to the plaintiff partially to indemnify it for it's loss under said policy or bond with the bank. A number of J's friends including Thomas, defendant in this action, entered into an agreement obligating themselves to pay to the plaintiff the amounts necessary to reimburse the plaintiff for the loss resulting from the bond hereinabove referred to. When called upon to pay Thomas refused, and this action was commenced. *Held,* contract between the plaintiff and bank was one of "insurance"; consequently employee was not indebted to the plaintiff, and Thomas, who signed the agreement sued on, did so without consideration, the only pretended consideration being the alleged debt of the employee J to the plaintiff surety company. *United States Fidelity and Guaranty Co. v. Thomas,* 129 So. 556 (La. 1930).

All that the plaintiff agreed to do was to pay the insurance loss which it had suffered and which under its contract of insurance it was bound to pay. It did nothing that it was not forced to do and it refrained from doing nothing which it might do. Defendant Thomas, then, received no consideration whatsoever, certainly not to himself and nothing for the benefit of a third person, to wit, J, for the payment to the bank by the plaintiff did not deprive the bank of its right to sue and recover from J. Louisiana Code, Art. 2315. The contention of the plaintiff is that the bank's contract with plaintiff was one of suretyship, and that when plaintiff paid J's shortage to the bank it was legally subrogated to the bank's claim against J because of articles 2161 and 3052, R. C. C., to the effect that subrogation takes place by right "for the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it." This is true, the argument proceeds, whether the surety has been given with or without the knowledge of the debtor; and further that the promise to pay the debt of another is sufficient consideration. *New Orleans and Carrollton R. Co. v. Chapman,* 8 La. Ann. 97 (1853). The weight of authority is contrary to this contention. In the United States Supreme Court the rule of construction governing insurance contracts is applied to fidelity guaranty contracts. *American Surety Co. v. Pauly,* 170 U. S. 133 (1898). In Arkansas a bond insuring the fidelity of an employee issued by a paid surety is not an ordinary obligation given by a surety but is an indemnity bond in the nature of a contract of insurance. *Title Guaranty and Surety*

Co. v. Bank of Fulton, 89 Ark. 471 (1909). In Kentucky the contract expressed in a fidelity bond is but a form of insurance within the rule that ambiguities must be construed most strongly against the insurer: *Champion Ice Manufacturing & Cold Storage Co. v. American Bonding and Trust Co.*, 115 Ky. 863 (1903). In Michigan a bond for indemnity against loss through default of an employee makes the surety an insurer in all essential particulars and subject to the same rules as fire and life insurance companies in regard to a general agent's authority. *Crystal Ice Company Ltd. v. United Surety Co.*, 159 Mich. 102 (1909). In Missouri these companies are classed as insurers and their contracts interpreted by the rules applicable to ordinary insurance contracts. *Long Brothers Grocery Co. v. United States Fidelity and Guaranty Co.*, 130 Mo. App. 421 (1908). In North Carolina a fidelity indemnity bond, given by a surety company, which in its form and essence resembles an insurance contract, and differs materially from the ordinary forms of bonds, should be placed in the general class of insurance policies, at least so far as the same general principles of construction apply: *Bank of Tarboro v. Fidelity and Deposit Co.*, 128 N. C. 366 (1901). It has been held in Tennessee that employers' indemnity or fidelity bonds are contracts of insurance, and a fidelity corporation is an insurance company within the statute of that state imposing a privilege tax on insurance companies. *American Surety Co. v. Folk*, 124 Tenn. 139 (1911). In Texas the rule of construction against the insurer applies to fidelity indemnity contracts. *Griffin v. Zuber*, 113 S. W. 961 (Texas 1908). According to Wisconsin decisions bonds of this character have all the essential features of insurance contracts so as to make the rule of construction against the insurer applicable. *United American Fire Insurance Co. v. American Bonding Co. of Baltimore*, 146 Wis. 573 (1911).

There are a few cases of a parallel nature to the case discussed. The Pennsylvania Superior Court, in 1923, gave a decision in which it was stated that an agreement by an owner of real estate, to pay a sub-contractor an additional sum of money to perform his contract with the principal contractor, is founded upon a valid consideration and will be enforced. *Whitehous v. Green*, 81 Pa. Sup. Ct. 386. In Massachusetts the rule that a promise to pay one for doing that which he is under prior legal duty to do is not binding for want of consideration does not apply where a party, having entered into a contract with the adverse party to do certain work, refuses to proceed with it, and the adverse party, to secure himself the actual performance of the work in place of a right to collect damages from the party, promises to pay an additional sum; for in that case there is a new consideration for the promise. *Parrot v. Mexican Central Railway Co.*, 207 Mass. 184, 93 N. E. 590 (1911).

Raymond J. Sullivan.

CRIMINAL LAW—CIRCUMSTANCES GOVERNING RIGHT OF PERSON ATTACKED TO STAND HIS GROUND—DUTY TO RETREAT—QUESTION OF FACT FOR JURY.—The appellant, Frank, was convicted of murder in the first degree, and appealed from the judgment, relying upon errors alleged to have occurred during the trial. The defendant, and his wife, Eva Thompson, were separated. The former became implicated in a row that occurred at the place kept by his wife, and a report was made to the peace officer. There was evidence to show that the defendant believed the deceased to be the supplier of the information, and that the defendant threatened vengeance therefor. The defendant denied these allegations, and testified that the deceased had accused him of the above mentioned threats, and had, in turn, threatened to kill the defendant; that the deceased had warned the defendant that the "best man would win" if the latter again attempted to visit Eva Thompson's place. The defendant further testified that at two o'clock on the morning of December 4th he armed himself with a revolver and went to his wife's place to beg for something to eat; that he rapped on the door, which was opened by one of the inmates, who tried to keep him from entering, and in so doing pushed the door wide open; that the deceased, entering the room at that moment, advanced upon him with a hammer upraised, ready to strike; that the defendant, when the deceased was but two feet away, shot and killed him.

The defendant pleaded self-defense. The court instructed the jury that before a person could avail himself of this defense the jury must be satisfied that self-defense was necessary, and that the person attacked did all he could, consistent with his own safety, to avoid such action. And further that it is the duty of a person attacked to retreat as far as the fierceness of the assault will permit. *Held,* the instruction given by the court was erroneous, as it assumed as a matter of law that the defendant did not have the right to stand his ground, and resist the assault. Whether, under all the circumstances, he had this right, depends upon a conclusion of fact to be decided by the jury. *Frank v. United States,* 42 F. (2d) 623 (C. C. A. 9th, 1930).

In the instant case there was evidence tending to show that the defendant had a perfect right to be where he was at the time of the shooting (the fact that the door was opened to his knock; that he had previously been admitted; his relation to the inmates, etc.), and there was evidence tending to show that he did not have this right (the fact that an attempt was made to eject him as soon as his presence was known). The defendant was entitled to have the jury weigh the credibility of his testimony as against the testimony of the other witnesses under proper instruction from the court. In *Brown v. United States,* 256 U. S. 335, 65 L. Ed. 961, (Texas 1921), the Supreme Court held that it was not the duty of a person attacked to retreat before forcibly resisting an assault. This rule of law was stated on the viewpoint that the failure to retreat was a circumstance, to be considered with all the others, in determining whether the defendant went farther than he was justified in doing. Many eminent writers agree that if a man reasonably believes that he is in imminent danger of death or grievous bodily harm from his assailant, he may stand his ground, and that if he kills the assailant he has not exceeded the bounds of lawful self-defense. In *Beard v. United States,* 158 U. S. 550, 39 L. Ed. 1086, (Ark. 1895), the court stated that detached reflection cannot be commanded in the presence of an uplifted knife, and that therefore it should not be a condition of immunity that one in such a position should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than kill him. The doctrine invoked by the defendant in the main case is necessarily based on the proposition that the party who stands his ground has a right to be where he is at that particular time. 30 C. J. 71. If he has no right to be or remain where he is, and his assailant has a better right there, he should retreat to a place where he is entitled to assert his right to stand his ground. Whether he had the right to be where he was at the time of the shooting was clearly a question of fact for the jury. *Accord: Bang v. State,* 60 Miss. 574 (1882); *Long v. State,* 52 Miss. 35; *Tweedy v. State,* 5 Iowa 433 (1858); *Runyan v. State,* 57 Ind. 80 (1877); *Erwin v. State,* 29 Ohio St. 186 (1872); *State v. Sherman,* 16 R. I. 631 (1889); *State v. Evans,* 33 W. Va. 417 (1889). *Contra: Gibson v. State,* 89 Ala. 121 (1890); *Duncan v. State,* 49 Ark. 47 (1887).

Robert E. Duffy.

LANDLORD AND TENANT—EVICTION BY LANDLORD—EFFECT OF PARTIAL EVICTION ON LIABILITY FOR RENT.—In an action to recover unpaid rent, the defense was partial eviction of the lessee, due to the act of the lessor in making certain repairs and alterations to the leased premises without the consent of the lessee. It appears that as a result of the alterations and repairs, access to the basement had been changed and the corridor thereto and the stairs leading to the second story had been made somewhat smaller. *Held,* that even though it is true that a partial eviction of a tenant from demised premises effects a suspension of the whole rent, even if the tenant continues in possession of the remainder, the facts in this case fail to support a partial eviction. *Penn v. Radio Distributing Corporation,* 148 Atl. 648. (New Jersey 1930).

To form a definition of an "eviction" with any degree of technical accuracy would be difficult. However to define the term in its general aspects would only be a matter of choosing one of numerous authorities who are all in accord in laying down certain elements which go to make up an eviction. "An eviction

may, in general terms, be said to occur when the tenant is forced to yield possession to one having a title paramount to that of the landlord, or when the landlord himself dispossesses the tenant, either by actually taking possession or by such acts of interference with the latter's enjoyment of the premises that the tenant is, in the eye of the law, justified in relinquishing possession, and he does relinquish it." 2 TIFFANY, LANDLORD AND TENANT, § 184. Following this general idea of an eviction, we see that it can only result from acts of the landlord, or one having a title paramount to that of the landlord. A mere stranger to the relationship of landlord and tenant cannot act in such a way as to cause an eviction of the tenant. At most he would be a trespasser. *Paterson v. Bridges,* 75 So. 260 (Ala. 1917); *Schilling v. Holmes,* 23 Cal. 227 (1863); *Hyman v. Jockey Club Co.,* 48 Pac. 671 (Colo. 1897); *Eagle v. Matthews,* 98 Kan. 715, 160 Pac. 211 (1916); *Sherman v. Williams,* 113 Mass. 481 (1873); *Stewart v. Lawson,* 199 Mich. 497, 165 N. W. 716 (1917); *City Power Co. v Fergus Falls Water Co.,* 55 Minn. 172, 56 N. W. 685 (1893); *Lancashire v. Garford Mfg. Co.,* 203 S. W. 668 (Mo. 1918); *Blomberg v. Evans,* 194 N. C. 113, 138 S. E. 593 (1927); *Holden v. Tidwell,* 37 Okla. 553, 133 Pac. 54 (1913); *Weinstein v. Barrasso,* 139 Tenn. 593, 202 S. W. 920 (1918); *Powell v. Merrill,* 103 Atl. 259 (Vt. 1918). Furthermore, we see that a landlord is entitled to evict his tenant either by actually dispossessing him of the premises or part of them, or by interfering with the latter's enjoyment of the premises so that he is, in the eye of the law, justified in relinquishing possession, and he does relinquish possession. Of these two forms of eviction, the courts find little difficulty with the first. It is just a matter of finding that the landlord has entered, that he has taken possession, and that the tenant has vacated because of the landlord's possession. The second form, which is called "constructive eviction," gives rise to more difficulties. The doctrine of constructive eviction is an extension of the old common law theory of eviction in favor of the tenant. Its introduction makes it possible for a tenant to set up a defense of eviction not only in cases involving an actual physical interference of the landlord on the premises, but also in cases where the possession of the tenant has been disturbed by the act of the landlord so as to render the premises unfit or unsuitable for occupancy in whole or in substantial part, for the purpose for which they were leased. *Paterson v. Bridges,* 75 So. 260 (Ala. 1917); *Veysey v. Morioyama,* 184 Cal. 802, 195 Pac. 662 (1921); *Central Business College Co. v. Rutherford,* 47 Colo. 277, 107 Pac. 279 (1910); *Keating v. Springer,* 146 Ill. 481, 34 N. E. 805 (1893); *Skally v. Shute,* 132 Mass. 367 (1882); *Lancashire v. Garford Mfg. Co.,* 203 S. W. 668 (Mo. 1918); *Blomberg v. Evans* 194 N. C. 113, 138 S. E. 593 (1927); *Holden v. Tidwell,* 37 Okla. 553, 133 Pac. 54 (1913); *Weinstein v. Barrasso,* 139 Tenn. 593, 202 S. W. 920 (1918); *Powell v. Merrill,* 103 Atl. 259 (Vt. 1918). In addition to the above rule, the latter group of cases all hold that there has to be an abandonment of the premises by the tenant before he can claim constructive eviction. Courts do not attempt to lay down a rule of general application by which to determine what amounts to a constructive eviction, but they do agree that the question is one of law, and includes the question whether the acts constitute proof of the intent of the landlord. The intention referred to here is of a legal nature, and can only be implied from acts on the part of the landlord which would amount to a permanent and substantial interference with the tenant's possession. *Paterson v. Bridges,* 75 So. 260 (Ala. 1917); *Fleming v. King,* 100 Ga. 449, 28 S. E. 239 (1897); *Grommes v. St. Paul Trust Co.* 147 Ill. 634, 35 N. E. 820 (1893); *Skally v. Shute,* 132 Mass. 367 (1882); *Lancashire v. Garford Mfg. Co.,* 203 S. W. 668 (Mo. 1918); *Hayward v. Ramge,* 33 Neb. 836, 51 N. W. 229 (1892); *Blomberg v. Evans,* 194 N. C. 113, 138 S. E. 593 (1927); *Miller v. Maguire,* 18 R. I. 770, 30 Atl. 966 (1895); *Powell v. Merrill,* 103 Atl. 259 (Vt. 1918).

Finally, the main case suggests a question upon which there appears some conflict of authority, namely, does partial eviction of a tenant by the landlord from leased premises suspend the whole rent even though he remains in possession of the remainder of the premises demised, or does such an eviction authorize an abandonment of the premises, and failure to abandon result in liability on

the tenant's part for a just portion of the rent? Many courts hold that in case of partial eviction by the landlord of the tenant, the latter is relieved from the whole rent so long as he is kept out of possession of such part, and this is true even though the tenant continues in possession of the remainder. *Skaggs v. P. N. Emerson,* 50 Cal. 3 (1875); *Hayner v. Smith,* 63 Ill. 430 (1872); *Hoagland v. New York, etc., R. Co.,* 111 Ind. 443, 12 N. E. 83 (1887); *Colburn v. Morrill,* 117 Mass. 262 (1875); *Ravet v. Garelick,* 221 Mich. 70, 190 N. W. 637 (1922); *Dolph v. Barry,* 165 Mo. App. 659, 148 S. W. 196 (1912); *Galleher v. O'Grady,* 100 Atl. 549 (N. H. 1917); *Morris v. Kettle,* 30 Atl. 879 (N. J. 1895); *Peerless Candy Co. v. Habreich,* 211 N. Y. S. 676 (1924); *Frankel v. Steman,* 92 Oh. St. 197, 110 N. E. 747 (1915); *Seabrook v. Moyer,* 88 Pa. 417 (1879); *Edminson v. Lowry,* 3 S. D. 77, 52 N. W. 583 (1892); *Miller v. Southern Ry. Co.* 131 Va. 239, 108 S. E. 838 (1921); *Powell v. Merrill,* 92 Vt. 125, 103 Atl. 259 (1918); In *Illinois Cent. Ry. Co. v. A. H. Bowman & Co.,* 291 S. W. 711 (Ky 1927), the court approved of the above rule but failed to apply it in a case where the landlord remained in possession of a portion of the leased premises at the time the tenant took possession. In *Weinstein v. Barrasso,* 202 S. W. 920 (Tenn. 1918), the court recognized the rule but failed to extend it so as to include a constructive eviction, the reason being that a person cannot claim constructive eviction unless he has relinquished possession. This rule is supported on the ground that an actual eviction of the tenant of the leased premises presents a tortious aspect involved in the wrongful trespass of the landlord. Since the agreement in a lease to pay is entire, in consideration of the demise of the whole estate, the landlord cannot apportion his own wrong as to enforce the lessee to pay anything for the residue. *Ravet v. Garelick,* 190 N. W. 637 (Mich. 1922); *Morse v. Goddard,* 13 Metc. 177, 46 Am. Dec. 728 (1847); *Dolph v. Barry,* 165 Mo. App. 659, 148 S. W. 196 (1912). In *Galleher v. O'Grady,* 100 Atl. 549 (N. H. 1917) the court said, "No man may be encouraged to injure or disturb his tenant in possession, whom by the policy of feudal law he is bound to protect and defend." On the other hand, there are cases holding that a partial eviction of the tenant by the landlord does not entitle the tenant to a suspension of the entire rent, unless it be shown that the tenant surrendered or abandoned possession of the whole premises. Failure to show such an abandonment will discharge the rent only *pro tanto,* to the extent of the value of the use and occupation of the part of the premises of which the tenant is dispossessed. *Anderson v. Winton.* 136 Ala. 422, 34 So. 962 (1903); *In re Simon Hotel* 223 Fed. 664 (D. C., N. D. Ala. 1915); *Manville v. Gray,* 1 Wis. 250, 60 Am. Dec. 379 (1853).

Joseph Yoch.

MASTER AND SERVANT—DEATH OF SERVANT—NEGLIGENCE—RIGHTS OF INSURER —SUBROGATION.—This is an action of tort brought by the plaintiff, an insurer under the Workmen's Compensation Act of Massachusetts, for the death of an employee of a subscriber, against a third person whose negligence caused the death of the employee. The insurer has paid $4,000 to the administratrix of the deceased and is suing to recover that amount from the defendant. The insurer bases his right to recover on the Massachusetts Statute, G. L. c. 152 § 15, which permits the insurer, who has paid compensation for the employee's death, to enforce for his own benefit against a third person negligently causing the employee's death, the rights which would have been available to the representatives of the deceased employee. The complaint alleged that the person to whom the money was paid was the wife of the deceased, but the answer put this fact in issue, and the court *held,* that the administratrix was not the legal wife of the deceased employee, and that it is a condition precedent to recovery by the personal representatives for the death of the deceased, caused by the negligence of another, to show that the deceased left a widow or next of kin. The right of the insurer to recover from negligent third persons, having paid for employee's death, does not rest upon the principle of subrogation. *Fidelity & Casualty Co. of N. Y. v. Huse & Carleton Inc.,* 172 N. E. 590 (Mass. 1930).

The administratrix appointed in this case was not the legal wife of the deceased employee. She therefore had no rights under the statutes of Massachusetts to sue a negligent third person who had caused the death of the deceased. The plaintiff, the insurer in this case, by paying her the deceased's insurance, was therefore possessed of her rights; but as she had no action against the defendant, the insurer got nothing by paying her. Massachusetts has repeatedly held that the insurer stands in no better position than the representatives would stand if prosecuting the action in their own names for the benefit of those designated as beneficiaries under the statute. *Turnquist v. Hannon,* 219 Mass. 560, 107 N. E. 443 (1914); *Bindbeutal v. L. D. Willcutt & Sons Co.,* 244 Mass. 195, 138 N. E. 239 (1923). It has been held repeatedly that where an action is brought by the personal representatives to recover damages for the death of a decedent caused by the negligence of another, it is a condition precedent to recovery to show that the deceased left a widow or next of kin, to whom the penalty, when recovered, may be paid. *Daly v. New Jersey Steel & Iron Co.,* 155 Mass. 5, 29 N. E. 507 (1891); *Bartley v. Boston & Northern Street Railway Co.,* 198 Mass. 163, 83 N. E. 1093 (1908); *Gorski's Case,* 227 Mass. 456, 460, 461, 116 N. E. 811 (1917). The leading case on this subject in Massachusetts is *Turnquist v. Hannon, supra,* which held that the insurer of the employer which has paid to the widow, compensation under the *Workmen's Compensation Act,* has a right of action to enforce for its own benefit the penalty provided by statutes against the person who has negligently caused the death of the workman, and this right does not depend on any theory of reimbursement or subrogation. A claim by the employee against the employer or insurer for compensation may, by express provision of the statute, operate as an assignment to the employer or insurer of the employee's right of action against the person causing the injury. *Lester v. Otis Elevator Co.,* 169 App. Div. 613, 155 N. Y. S. 524 (1915); *Pawlak v. Hayes,* 162 Wis. 503, 156 N. W. 464 (1916); *McGarvey v. Independent Oil Co.,* 156 Wis. 580, 146 N. W. 895 (1914). There is a conflict of authority on the amount of damage the insurer can recover in a suit against the negligent third person. It has been held that the insurer can only recover to the amount of the compensation paid. *U. S. Fidelity Co. v. New York R. Co.,* 156 N. Y. S. 615 (1915). But in *McGarvey v. Independent Oil Co., supra,* it was held that the insurer succeeds to the entire right of action as the real party in interest. Also, by statute in California, Connecticut, New Jersey, and Massachusetts and others, it is provided that any surplus collected by the insurer in excess of the indemnification, shall be deposited in the state insurance fund.

Kenneth J. Konop.

MORTGAGES—RENEWAL OF NOTE NOT DEEMED PAYMENT.—Appeal from a judgment of foreclosure of a mortgage. The defendant, a corporation, executed and delivered its promissory note for the sum of $55,000, together with a mortgage upon certain real property, to the Barmer Consolidated Mines, Inc. The mortgage provided that upon default in any installment of the note the entire sum should become due at the option of the holder. The first installment became due, but no part of its principle or interest was paid. Later the note and mortgage were assigned to the plaintiff who sued for foreclosure of the mortgage. Defendant contended that the execution and delivery of another note by them constituted payment in full of the note which is secured by the mortgage. Plaintiff contended that the second note was accepted as a mere extension of time of payment of the first installment of the original note. *Held,* a note executed as a renewal of the original note secured by a mortgage is not deemed in payment thereof. *Archibald v. Western Mines Consolidated, Inc.,* 291 Pac. 440 (Cal. 1930).

A mortgage secures a debt or obligation and not the evidence of it, and neither the renewal or substitution of the evidence of the debt will impair the lien of the mortgage. 2 JONES ON MORTGAGES, § 924; *Cullen v. Brank Bank at Mobile,* 23 Ala. 797 (1853); *Dana v. Binnery,* 7 Vt. 493 (1835); *Brown v. Dunckel,* 46 Mich. 29 (1881); *Gleason v. Wright,* 56 Miss. 247 (1876); *Hill v.*

Beebe, 13 N. Y. 556 (1856). Nothing but payment or a release will have the effect of discharging a mortgage. *Parkhurst v. Cummings*, 56 Me. 155 (1868); *Whittacre v. Fuller*, 5 Minn. 508 (1861). In *Boles v. Chauncey*, 8 Conn. 392 (1831), the court said, "As between the mortgagor and the mortgagee there can be no pretense for saying that the substitution of one note for another is a satisfaction of the condition of the mortgage." And again the rule is stated that, the renewal of a note secured by a mortgage is not payment thereof, nor is the substitution of a new note for the old one a payment; and in the absence of some agreement or plain manifestation of a contrary intention, the security remains intact. *Oliphint v. Eckerly*, 36 Ark. 69 (1880); *Bolles v. Chauncey*, 8 Conn. 386 (1831); *Watkins v. Hill*, 8 Pick. 522 (1829). A mortgage is security for the payment of a debt. So the general rule which would logically follow would be, that, whatever extinguishes the latter, at the same time puts an end to the former: but nothing but the actual payment of the debt or an express release will operate as a discharge of the mortgage. In *Ames v. New Orleans M. & T. R. Co.*, Fed. Case No. 329 (1876) the court found that the lien of the mortgagor is not affected by the substitution of new notes or bonds for those originally secured, or by the giving of a new mortgage expressly reserving the rights of the original mortgagee. In *Burdett v. Clay*, 8 B. Mon. 287 (1848), the taking of a second mortgage was no waiver of a first one made for the same debt. Neither is the taking of personal security for the debt a waiver of the mortgage. In *Blume v. Weston*, 127 S. E. 561 (S. C. 1925), it was held that change in the mode or time of payment does not operate to discharge the mortgage. In an Indiana case, *Pivot City Realty Co. v. State Savings and Trust Co.*, 162 N. E. 27 (1928), an execution or renewal note was held not to discharge indebtedness, for which the original note was given, or to release the security. Even assuming that the new note was executed as a renewal of the original note, it would not be deemed to have been in payment thereof, as it would still be mere evidence of the original indebtedness for which the mortgage was given as security. In *Sloan v. Rice*, 41 Iowa 465 (1875), it was held that if a new note is given, the burden is upon the mortgagee to show an agreement that the mortgage should be released upon the execution of the new note. *Coles v. Withers*, 33 Gratt 186 (1880). From these cases it can be readily seen that there can be no actual changes in the rights or remedies of the mortgagee, unless there is an actual agreement or intention of the parties that the mortgage shall be discharged.

Carl Frankovitch.

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—NATURE OF—HOW ENFORCED—PERSONAL LIABILITY—PENALTY FOR NONPAYMENT.—The private Acts of 1927, c. 768, which was an amendment of Acts 1909, c. 401, authorized the city of South Fulton to improve it streets "and to cause the entire cost or expense . . . to be assessed against the property abutting or adjacent to said street, avenue, alley or any other public place so improved." The act, however, failed to prescribe any method or procedure for the collection of the assessment, but provided for a penalty of ten per cent on each assessment not paid when due. By authority of this ordinance two streets were paved with gravel and concrete. The present suit has arisen out of the original bill to enforce the apportionment of the assessment against the abutting property owners. *Held*, that the assessments should be declared liens on the respective parcels of land, and that the same be sold in satisfaction of the claims of the city, and that the penalty be declared void. *City of South Fulton v. Parker*, 28 S. W. (2d) 639 (Tenn. 1930).

As to the nature of a special assessment there is little dispute. In fact, it is generally recognized as a particular kind of tax. As the court says in the case of *Arnold v. Knoxville*, 115 Tenn. 195, 212, 90 S. W. 469, 3 L. R. A. (N. S.) 837 (1905), "assessments are in the nature of taxation and the power to impose them is sustained as an exercise of the taxing power of the government." In *Roesch v. State*, 62 Fla. 263, 270, 56 So. 562, 564, 565, (1911), an assessment is said to be a tax specially levied against the property benefitted. Other cases in

accord with this proposition are: *Gadd v. McGuire,* 69 Cal. App. 347, 231 Pac. 754 (1924); *Fairmont Wall Plaster Co. v. Nuzum,* 85 W. Va. 667, 102 S. E. 494 (1920); *Madsen v. Bonneville Irr. Dist.* 65 Utah 571, 239 Pac. 781 (1925); *Palmer v. Stumph,* 29 Ind. 329 (1868). The fact that the ordinance failed to prescribe a method of collection does not preclude the idea that no recovery could be had against the abutting property owners for the assessments. In *McQuillan, Municipal Corporations,* vol. 5, § 2133, it is said, "If no specific mode of enforcing assessments has been authorized by statute or charter, an action will lie; but if the method has been provided, ordinarily, it is exclusive." In *Cooley on Taxation* (4th ed.) vol. 3, § 1331, it is said, "The implication of an intent to give a remedy by suit is so strong as to be conclusive, where the statute provides for a tax, but is silent as to the method of collection." Moreover, it is not reasonable to suppose that the legislature would intend to do a vain thing, which would be the case of conferring a right and at the same time denying a remedy for its enforcement. Having decided that there is a liability on the abutting property owners the question is, what is the nature of this liability? The instant case holds the liability to be a personal one, with the limitation that only the property against which the assessment is made is liable for its payment. This is in accord with the majority rule that special assessments, being a charge upon particular property, may be collected by enforcing a lien upon property. *Meyer v. City of Covington,* 103 Ky. 546, 45 S. W. 769 (1898); *City of Omaha v. State,* 69 Neb. 29, 94 N. W. 979 (1903); *Town of Macon v. Patty,* 57 Miss. 378, 38 Am. Rep. 451; *City of Raleigh v. Peace,* 110 N. C. 32, 14 S. E. 251 (1892): *Higgins v. Ausmuss,* 77 Mo. 351 (1883), *Contra: Bennett v. City of Buffalo,* 17 N. Y. 383 (1858); *Hazzard v. Heacock,* 39 Ind. 172 (1872); *Bonsall v. Mayor, etc., of the Town of Lebanon,* 19 Ohio 419 (1850). A municipal corporation depends for the validity of its acts on the express provisions of its charter. As there is no provision allowing for the assessment of a penalty for nonpayment the penalty cannot be sustained.

Joseph Wetli.

NEGLIGENCE—STOREKEEPER'S LIABILITY TO CUSTOMER—DAMAGES.—Appeal from a judgment against the appellant, defendant below, for damages resulting from injuries sustained by the plaintiff in the defendant's store. The defendant conducted a "five-and-ten-cent" store. On a certain afternoon, the plaintiff entered the store and made a purchase, and, on leaving, slipped and fell upon the floor, thereby breaking her arm. She testified that at the time of the accident she noticed an oval shaped spot on the floor at about the point where she fell; that the spot was darker than the floor; that it was slightly raised above the floor; and that she believed that her heel went into the spot and caused her to slip. Witnesses testified that, upon an immediate examination of the floor after the accident, no substance appeared on the floor that would cause the plaintiff to slip. One witness testified that he was employed by the defendant as a receiving clerk; that he immediately went to the point where the plaintiff fell, and upon close examination of the floor found it to be perfectly dry. The manager and assistant manager of the store and two clerks testified that they examined the floor within a few minutes after the accident and that they found the floor to be clean; that there was no trash, soap, or grease of any kind on the floor. It is charged in the declaration that the defendant was negligent in that "it allowed and permitted some greasy, slimy, oily, or other foreign substance to be and remain upon the said floor, and did fail to remove and clear said floor of said substance thereon." *Held,* that the customer slipping on the floor of a store has the burden of proving the store owner's negligence. *F. W. Woolworth Co. v. Williams,* 41 Fed. (2d), 970 (C. A., Dist. of Col. 1930).

The burden of proving defendant's negligence is upon the plaintiff. The mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence. On the contrary, the legal presumption is that reasonable care was exercised by the defendant. On the whole, the plaintiff must show that the defective condition of the floor, as the case will be, had

either been in fact brought to the previous notice of the defendant, or that the defect had existed for such space of time before the occurence as would have afforded the company sufficient opportunity to make proper inspection of its floors to ascertain their condition as to safety, and to repair their defects, if any. In the absence of proof of either, the legal presumption is that the defendant had used reasonable care. Evidence in the case substantiated the fact that the floor had been swept only a few minutes prior to the accident. The plaintiff cannot sustain her case by merely showing that a spot was there. And as the plaintiff made no attempt to show how or by whom the spot was created, or how long it had existed, her case must fail. It is by no means sufficient for her to show that the oil was there; she must go further and show its presence under circumstances sufficient to charge the defendants with responsibility therefor. The proprietor of a store is merely under the duty of exercising reasonable care to keep his store in a safe condition, and like any other person who expressly or impliedly invites others upon his premises, is not an insurer of their safety while in the store; but he owes to them merely the duty of exercising reasonable care to keep the store in a safe condition for their proper use. *Kaufman Dept. Stores, Inc., v. Cranston,* 258 Fed. 917, 918 (C. C. A. 3rd, 1919). Consequently, it is not the law to make a store proprietor an insurer for the safety of its customers while in its store.

Harold Tuberty.

SALES—SUBSTITUTION OF GOODS—IGNORANCE OF THE BUYER.—The defendant purchased lumber for a building, specifying fir. Plaintiff delivered hemlock instead of the lumber specified. After the building was finished defects appeared which were caused by the substitution of the hemlock lumber for the fir. The defendant had no knowledge of the substitution until after the building had been completed. The plaintiff filed a lien for the balance due on the purchase price of the lumber. Defendant set forth a counter-claim for damages stating that the hemlock lumber was not fit for the purpose for which it was furnished. *Held,* as the building was completed before the defendant learned of the substitution he must retain the hemlock and is entitled to damages resulting from its inferior quality. *Midland Lumber & Coal Co. v. Bean,* 231 N. W. 206 (Minn. 1930).

The case of *Danville Lumber and Mfg. Co. v. Gallivan Bldg. Co.,* 97 S. E. 718 (N. C. 1919), is in point. In this case the court held that unless the defendant building contractor knew of the defects in the sashes, his retention thereof would not constitute a waiver of defects; waiver being largely a matter of intent and dependent on knowledge. The cases on this point hold that the party cannot waive this defect as it could not be ascertained under the ordinary inspection and is not apparent until the goods are applied to some use which precludes a return thereof. A majority of the states are in accord with the principle case. *McCaa v. Elam Drug Co.,* 114 Ala. 74, 21 So. 479, 62 Am. St. Rep. 88 (1897); *Wallace v. Knoxville Woolen Mills,* 117 Ky. 450, 78 S. W. 192, 25 Ky. L. Rep. 1445 (1904); *Buick Motor Co. v. Reid Mfg. Co.,* 150 Mich. 118, 113 N. W. 591 (1907); *Carleton v. Lombard,* 149 N. Y. 137, 43 N. E. 422 (1896); *Zabriskie v. Central Vermont Rr. Co.,* 131 N. Y. 72, 29 N. E. 1006 (1892); *Bagley v. Cleveland Rolling-Mills Co.,* 21 Fed. 159 (1884); *Shreveport Mill and Elevator Co. v. Stoehr,* 139 La. 719, 71 So. 961 (1916).

Alvin G. Kolski.

THEATERS AND SHOWS—STATUTORY OFFENSES BY PROPRIETORS.—The defendant was operating a public restaurant in a seventeen room building. In one of the rooms a new hard-wood floor had been installed, particularly suitable for dancing, and especially used therefor. In this room there was a piano and a phonograph, the latter being operated by means of a nickel placed in a slot. Although the defendant at times would deposit a coin therein to obtain music, it was generally operated by the patrons of the restaurant. The defendant had a restaurant license. Two witnesses testified that they, with four other couples danced after