

tion of a statute prohibiting the carrying of firearms concealed on or about the person, there must be proof that the firearm is carried in such a manner as to give no notice of its presence, and in such proximity of the accused as to be within his easy reach and under his control and we find the courts of Missouri lenient in determining what constitutes such proof. D. C. J. '28.

HOMESTEAD—OWNER OF A HOMESTEAD INTEREST IS NOT ENTITLED TO OIL PRODUCED FROM THE LAND.—A widow, having a homestead interest in land filed this action to restrain the appellee oil company taking oil from land under a lease executed by the children of the deceased. *Held*, that the widow was not entitled to oil produced or the proceeds thereof, nor to take over and operate the wells during the continuance of the homestead interest, in view of the fact that her right was merely to the use of the surface of the land. *Brandenburg v. Petroleum Exploration et al.*, (Ky. 1927) 291 S. W. 757.

It seems as if the entire decision is predicated upon the construction of the Kentucky Statutes (Sec.) 1707 which provides that homestead rights do not create an estate in land, but only give owner of homestead the right to occupy and use it, free from disturbance by heirs, creditors or others. This, however, is not the general law throughout the country. The courts of Missouri hold that an homestead interest is a life estate. In *West v. McMullen*, 112 Mo. 406, l. c. 411, the court said, "We think the statute vested in the widow and minor children, if any, an estate for her life, and during their minority, and not a mere right of occupancy. Decisions upon statutes essentially different from ours throw no light upon the question. But our own decisions and those of the Vermont courts and of New Hampshire, under the act of 1868, determine that the homestead is a life estate in land, and not a mere exemption dependent upon occupancy, and being a vested life estate, the widow may use or rent it out as she may see fit during her life. *Rockhey v. Rockhey*, 97 Mo. 76; *Freund v. McCall*, 73 Mo. 343; *Lake v. Page*, 63 N. H. 318; *Skouten v. Wood*, 57 Mo. 380; *Day v. Adams*, 42 Vt. 516. Again in *Bushnell v. Loomis*, 243 Mo. 371, l. c. 385, the court said, "Our own cases recognize that after the death of the husband and the right of homestead has thereby become consummate, then the wife's right rises to the dignity of an interest or estate in land. *West v. McMullen*, 112 Mo. l. c. 411, *Hufschmidt v. Gross*, 112 Mo. l. c. 656. . . . Homestead as well as dower are both life estates."

Some of the decisions in other states go further than the Mo. decisions. In the case of *Smith v. Shrieves*, 13 Nev. 303 the court in construing the homestead law of that state held that the surviving spouse had a fee simple estate. To the same effect are the following cases: *In re Bailard*, 178 Cal. 293, 173 P. 170; *Rawlins v. Dade Lumber Co.*, 80 Fla. 398, 86 S. 334 where the court was of the opinion that the surviving spouse took absolutely all the estate or interest that was vested in the deceased homesteader in the homestead property at the time of his death.

After a review of the various decisions of the different states the rule that should be followed in regard to the homestead laws is best stated in 29 Corpus Juris 783 wherein it is said, "The homestead interest depends entirely on organic or statutory provisions nothing like it being known at common law; and there can of course be no greater right in the homestead property than is created by these provisions. Because of the difference in the wording of the homestead laws in the various jurisdictions, the interest created thereby differs widely.

M. W. S. '29.

LOTTERIES—EFFECT ON COLLATERAL TRANSACTION—BAILMENT OF PRIZE BY WINNER.—Plaintiff held a ticket entitling its holder to participate in a drawing for

an automobile. She intrusted this ticket to the defendant with instructions to inform her if her ticket won the prize. The ticket did in fact contain the winning number, and the defendant, presenting it, claimed and received the automobile. On defendant's refusal to deliver to plaintiff the automobile so acquired, this suit in replevin was brought. *Held*, that defendant under these circumstances took possession of the automobile as bailee of the plaintiff, and he cannot defeat the plaintiff's right to the car by showing that it was secured by a lottery in violation of the law. *Matta v. Katsoulas*, (Wis. 1927) 212 N. W. 261.

In the principal case the law implies an agreement to redeliver; i. e., an obligation to account to the plaintiff for the automobile won with her ticket. As said in *Burns v. State*, 145 Wis. 373; 128 N. W. 987, 1. c. 990, "It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not." See, to the same effect, *Foulke v. N. Y. Consol. Ry. Co.*, 228 N. Y. 269, 127 N. E. 237; *Leonard v. Co. v. Amer. Exp. Co.*, 216 Mo. App. 561, 260 S. W. 129.

The Wisconsin court's decision that defendant could not defend this action on the ground of the illegality of the lottery in which the automobile was won is amply supported by authority. See *Kiewert v. Rindskopf*, 46 Wis. 481, 1 N. W. 163; *Gipson v. Knard*, 96 Ala. 419, 11 So. 482; *Brady v. Horvath*, 167 Ill. 610, 47 N. E. 757; *Catts v. Phalen & Morris*, 2 How. (U. S.) 376; *Martin v. Richardson*, 94 Ky. 183, 21 S. W. 1039; *Dee v. Sears-Nattinger Auto. Co.*, 141 Ia. 610, 118 N. W. 529. While a party to a contract may defend on its illegality, a third person who is a stranger to that contract may not invoke such a defense. *Owens v. Davenport*, 39 Mont. 555, 104 P. 682, 28 L. R. A. (N. S.) 966; *Hartford Fire Ins. Co. v. Galveston, H. & S. A. Ry. Co.*, 239 S. W. 919; *Kiewert v. Rindskopf*, *supra*; *Gipson v. Knard*, *supra*; *Brady v. Horvath*, *supra*. The test upon which each case is to be decided is whether the action is based upon the illegal contract or one connected with and in furtherance of it, in which case the plaintiff must lose, *Hill v. Ruggles*, 56 N. Y. 424; *Hooker v. DePalos*, 28 Oh. St. 251; *Atkinson Novelty Co. v. E. L. Prince & Son*, 28 Ga. App. 497, 111 S. E. 699; *Grove Mfg. Co. v. Jacobs*, 117 Me. 163, 103 A. 14; or upon some separate and distinct transaction, unaffected by the illegal contract, in which case he may succeed, *Canfield Mfg. Co. v. Paddock*, 96 Vt. 41, 116 A. 115; *Rothrock v. Perkinson*, 61 Ind. 39; *Perkins v. Clemm*, 23 Ark. 221. In some cases this criterion has been expressed as follows: The party seeking a recovery may succeed when he can make out his case otherwise than through the medium of an illegal transaction, *Roselle v. Beckemeier*, 134 Mo. 380, 35 S. W. 1132; if a plaintiff requires any aid from an illegal transaction to establish his demand, he cannot recover it, *Phalen v. Clark*, 19 Conn. 421; *Martin v. Hodge*, 47 Ark. 378, 1 S. W. 694; if a plaintiff can show a complete cause of action without having to prove his own illegal act, he should get judgment, *Woolf v. Bernero*, 14 Mo. App. 418. And plaintiff's action will not be defeated because an illegal transaction is shown by the evidence, if such evidence is introduced simply to provide an historical background for the cause of action, complete without it. *Phalen v. Clark*, *supra*, and other cases cited. Moreover, plaintiff's prior illegal acquisition of title cannot excuse defendant's present wrongful detention of the automobile. The law must not let a bailee wrong his bailor merely because the bailor has broken the law. As was said by the Court in *Woolf v. Bernero*, *supra*, a suit to recover the value of a chattel lost negligently by a bailee intrusted with it for the purpose of a raffle: "Plaintiffs are not deprived by law of their property in the diamond because they deposited it with defendant for the purposes of an illegal raffle." See also *Gipson v. Knard*, *supra*. In addition, it is a well settled principle of agency that an agent cannot defend in an action for money belonging to his principal on the ground that the principal acquired the property as the result

of a illegal transaction or intrusted it to the agent for an illegal purpose. *Nave v. Wilson*, 12 Ind. A. 38, 38 N. E. 876; *Clarke, Harrison & Co. v. Brown*, 77 Ga. 606; *Munns v. Donovan Comm. Co.*, 117 Ia. 516, 91 N. W. 789; *Morgan v. Groff*, 4 Barb. (N. Y.) 524. No question of par delictum could possibly enter into the principal case to defeat the plaintiff's action, as in *Garland v. Isbell*, 139 Ga. 64, 76 S. E. 591, which was a suit to determine which of the parties was the rightful winner of a lottery prize. A comparison between that case and *Martin v. Hodge*, *supra*, brings out well the distinction between a suit in which plaintiff relies upon the lottery to make out his case and an action in which he makes out cause of action without reference to the lottery. R. L. A. '29.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENTAL INJURY SUFFERED IN THE COURSE OF EMPLOYMENT.—The Workmen's Compensation Act of Illinois provides compensation for "accidental injuries or death suffered in the course of employment." A young girl, employed in a factory in the city of Westville, Illinois, contracted typhoid fever, and died as a result of the illness. From fifteen to thirty girls employed in the same factory were treated at the time for typhoid fever and the weight of evidence established that the deceased had contracted the disease through the medium of drinking water furnished in the factory. The parents of the girl were awarded compensation for her death by an arbitrator, the award was affirmed by the Industrial Commission. *Held*, the ruling of the commission was correct, and the death resulted from "an accidental injury suffered in the course of employment." *Rissman & Son v. Ind. Commission*, 323 Ill. 459, 154 N. E. 203.

Both English and American decisions recognize the fact that there are certain acts necessary to the life, comfort, and convenience of the servant while at work, which, though strictly personal to himself, are incidental to the service, and an injury sustained in the performance of such an act is deemed to have arisen "in the course of employment." Hence, injuries occasioned while the employee was preparing to eat lunch have been compensated. *Clem v. Chalmers Motor Co.*, 178 Mich. 340; *Blouss v. Delaware, L. & W. Ry. Co.*, 73 Pa. Super. Ct. 95; *Haller v. City of Lansing*, 195 Mich. 753. Also injuries incurred while the servant attempted to care for his own comfort are suffered in the course of employment. *Benson v. Bush*, 104 Kan. 198; *Evans v. The Peterson*, 28 Times L. R. 18. An indulgence in tobacco, satisfying a natural want, should be necessarily contemplated by the employer, and an injury incidental to such an act occurs in the course of employment. *Whiting-Mead Commercial Co. v. Industrial Accident Commission*, 178 Cal. 505; *Dzikowska v. Superior Steel Co.*, 259 Pa. 578; *Springer v. North*, 200 N. Y. S. 248; *Kaetha v. Hall Mercantile Co.*, 157 Minn. 290. A workman injured while washing in preparation to go home after his day of work can recover compensation. *Hollenbach Co. v. Hollenbach*, 181 Ky. 262. Stopping work to take a drink of water is incidental to the employment. *In re Osterbrink*, 229 Mass. 407; *Gililand v. Edgar Zinc Co.*, 112 Kan. 39; *Widdell Co. v. Industrial Commission of Wisconsin*, 180 Wis. 179; *Archibald v. Ott*, 77 W. Va. 448. Other cases involving personal incidental services to the same effect are *Zabriskia v. Erie Ry. Co.*, 85 N. J. L. 157; *Weldon v. Skinner & Eddy Corp.*, 103 Wash. 243; *Morris v. Lambeth*, 22 Times L. R. 22, and *Leach v. Oakley Co.* (1911), 1 K. B. 523. In the light of such decisions, many of which were decided under identical statutes, the Illinois Court was certainly justified in holding that the injury to the deceased occurred "in the course of employment."

The troublesome question concerning the case under discussion is whether the contraction of typhoid germs through drinking water is an "accidental injury" under the Act. A prior Illinois decision, *Christ v. Pacific Mutual Life*