THE AMERICAN LAW REGISTER AND REVIEW

PUBLISHED MONTHLY BY MEMBERS OF THE DEPARTMENT OF LAW OF THE UNIVERSITY OF PENNSYLVANIA.

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the TREASURER, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.

THE MAGAZINE. The early numbers of the next volume will contain articles by Lucius S. Landreth, Professor James Burr Ames, Dean of the Harvard Law School, Professor William Draper Lewis, Dean of the Law Department of the University of Pennsylvania, Professors George Wharton Pepper and George S. Patterson, of the University of Pennsylvania, Professor Edward A. Harriman, of Northwestern University, and other distinguished writers. The attention of our subscribers is called to the fact that the subscription price for next year has been placed at the uniform reduced rate of three dollars.

DAMAGES IN CONTRACT FOR MENTAL ANGUISH. In *W. U. Tel. Co.* v. *Mrs. T. J. Hargrove*, 36 S. W. Rep. 1077 (1896), it appeared that the plaintiff's son was fatally ill; that her daughter-in-law went to the defendant's office at X., and left the following message addressed to the plaintiff: "To Mrs. T. J. Hargrove, Smithfield, Texas—Daniel is very sick. Come at once, Maggie"; that the defendant's agent accepted the message with pay therefor; that through his negligence in not informing himself as to whether the company had an office at Smithfield, the message

was not delivered, nor was the money refunded; that in consequence of its non-delivery the plaintiff was unable to reach her son's bedside before his death. Upon these facts there was a verdict of $600 for the plaintiff in an action on the contract. This was sustained by the court on the ground that the plaintiff's grief and mental anguish caused by her failure to be at his bedside during his last days were such as to warrant the verdict.

This case raises two questions:—first, will an action by Mrs. T. J. Hargrove lie on the contract?—second, is mental anguish an element of damage?

Generally, one not a party to a contract has no rights in virtue of that contract, though in some jurisdictions the beneficiary may sue. The present case, however, accords with recent Texas authority: see cases collected in *Tel. Co.* v. *Wood*, 57 Fed. Rep. (N. D. Tex.) 471. The English cases hold substantially that a person to whom a message is sent cannot maintain an action, notwithstanding pecuniary injury may result to him by the failure of a telegraph company to transmit it correctly or within a reasonable time, unless the sender sustains to the person to whom the message is sent, the relation of agent: *Playford* v. *Telegraph Company*, L. R. 4 Q. B. 706.

The true principle of recovery in such cases, according to the weight of judicial decision, is best set forth in *Shingleur* v. *W. U. Tel. Co.*, 13 So. Rep. 425; 72 Miss. 1030 (1895), where the Supreme Court of Mississippi holds that a telegraph company is liable to either the sender or the sendee for damages sustained by reason of the delivery of an altered message, to the sender in contract or tort, and to the sendee in tort. (See this case for a full list of the authorities.)

It may be suggested that since a telegraph company is a quasi public corporation engaged in interstate commerce (*Tel. Co.* v. *Texas*, 105 U. S. 460 [1881]), a recovery in contract by the addressee might be justified upon the same authority which permits a recovery by the consignee in a suit against a common carrier.

With regard to the second question, at common law no action lay for the recovery of damages for mere mental suffering, disconnected from physical injury and not the result of the willful wrong of the defendant: *Tel. Co.* v. *Rogers* (1891), 9 So. Rep. 823; *Gahan* v. *Tel. Co.* (1894), 59 Fed. Rep. 433; *Lynch* v. *Knight*, 9 H. L. Cas. 577; *Tyler* v. *Tel. Co.* (1893), 54 Fed. Rep. 634.

In *Tel. Co.* v. *Wood* (*supra*), Pardee, J., citing numerous decisions, says, "The general rule that mental anguish and sufferings, unattended by any injury to the person, resulting from simple actionable negligence, cannot be sufficient basis for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities, by the conceded state of the general law prior to the *So Relle Case*, 55 Texas, 308 (1881), and by the uniform decisions of the federal courts and

decisions of the Supreme Courts of Nevada, Dakota, Kansas, Maine, Mississippi, Georgia, Massachusetts, and by the opinions of several text writers of unquestioned standing as expounders of the law."

The doctrine established by the *So Relle Case* (*supra*) that mental suffering disconnected from physical injury, may be compensated for in actions for breach of contract has since been repeatedly reaffirmed in Texas, and it is upon this line of decisions that the court in *Tel. Co.* v. *Hargrove* based its rulings. The courts of Alabama, Tennessee, Indiana, and Kentucky have followed the Texas doctrine: *Tel. Co.* v. *Henderson*, 89 Ala. 510, 7 So. Rep. 419; *Wadsworth* v. *Tel. Co.*, 86 Tenn. 695, 85 S. W. Rep. 574; *Reese* v. *Tel. Co.*, 123 Ind. 295, 24 N. E. Rep. 163; *Chapman* v. *Tel. Co.*, 13 S. W. Rep. 880.

The deplorable consequences of the rule in the *So Relle Case* are thus set forth in *Tel. Co.* v. *Rogers* (*supra*), per Cooper, J. "The rapid multiplication of cases of this character in the state of Texas since the case of *So Relle* indicates to some extent the field of speculative litigation opened up by that decision, ... Kentucky, Tennessee, Indiana, and Alabama, have but recently established the rule, the dangers and difficulties of which are becoming apparent in Texas, the intolerant litigation invited and appearing in Texas has not yet fairly commenced in those states. It will, however, appear in due time, and the courts will be forced to resort to refined limitations, as Texas has done, to restrict it. We prefer the safety afforded by the conservatism of the old law, as we understand it to be, and are of the opinion that no recovery for mental suffering can be had in this case."

The federal courts have, by an unbroken line of decisions, maintained that such damages were *damnum absque injuria: Chase* v. *Tel. Co.*, 44 Fed. Rep. 554 (1890); *Tyler* v. *Tel. Co.*, 54 Fed. Rep. 634 (1893); *Kester* v. *Tel. Co.*, 55 Fed. Rep. 603 (1893); *Gahan* v. *Tel. Co.*, 59 Fed. Rep. 433 (1894); *Stafford* v. *Tel. Co.*, 73 Fed. Rep. 273 (March, 1896).

With such eminent and overwhelming authority against the doctrines of the Texas cases, and remembering the mischievous consequences springing from it, as well as its direct opposition to the true principle of recovery in cases of breach of contract, it is to be hoped that the rule will not be followed in states where it has not already been adopted.

RIGHT OF MORTGAGEE AGAINST THE GRANTEE OF MORTGAGED PREMISES. The conflict of decision as to the nature and extent of the right of a mortgagee of real estate against a subsequent grantee who by the terms of the conveyance to him has agreed to assume and pay the mortgage, is emphasized by the recent cases on the subject. In *Morris* v. *Nix*, 46 Pac. Rep. 55, Kansas, an assumption clause in a deed was held to create no liability to the mortgagee on the part of the grantee where his immediate grantor was.

not liable for the mortgage. The court, in accord with the courts of New York, New Jersey, and the United States, recognized that the only right of the mortgagee against the grantee was the equitable right of a creditor to all securities given by the principal to the surety for the payment of the debt; in the absence of the personal liability of the grantor, upon the sale of the mortgaged premises, the relation as between grantor and grantee. of surety and principal to the mortgage debt did not arise and therefore the equitable doctrine had no application. It is to be noted that this result is reached in a jurisdiction which admits the right of a third person to maintain an action upon a promise made to another for his benefit.

This decision antagonizes squarely the Pennsylvania cases which assert the common law rule that none but the parties to a contract or its consideration can sue upon it and yet hold that the grantee assumes a direct liability to the mortgagee by his agreement with the grantor, whether or not that grantor is personally liable for the mortgage debt. In *Blood* v. *Crew Levick Co.*, 171 Pa. 328, 342, it was expressly agreed in a deed to the defendants that they accepted the title to the mortgaged premises subject to certain mortgages. Upon this agreement, as an express covenant of indemnity, the covenantee was allowed to collect a sum of money which he had paid to the mortgagee for a return of his personal notes, secured by the mortgage; the mortgagee was permitted to recover upon the ground that the agreement was an express covenant to pay to him the amount due upon the mortgage; the court further said it saw no reason why still another action might not be brought by the covenantee for damages sustained by reason of the breach of the covenant. This result of a covenantor subjected to separate actions by different parties upon the same covenant for the same breach is certainly anomalous. In *Freeman* v. *Pa. R. R. Co.*, 173 Pa., 275, the plaintiff sought to charge the defendants, lessees, with liability upon certain obligations of the lessor railroad, by reason of a covenant in the lease whereby the defendants agreed either to pay the obligations out of the earnings of the leased road or to purchase them. It was held, the debt having been incurred and bonds issued and negotiated before the agreement, that the defendants had never in any way assumed any obligation for their payment, that the plaintiff was not a party to the contract or its consideration, that the contract was made for the benefit and relief of the lessor Railroad, which alone had a right to bring an action upon it, and that the plaintiff must look to the original debtor and the mortgage security for the only redress he was entitled to. Disregarding precedent, it is difficult to see why upon principle, the reasoning in this case should not be applied with like force and effect to the facts, substantially the sume, in *Blood* v. *Crew Levick Co.* (*supra*).

The result of the Pennsylvania construction of agreements between the vendor and vendee of mortgaged premises is to give to a

third party under this particular class of contracts rights in excess of those recognized by jurisdictions which admit the right of a third person generally where a contract is one made for his benefit: *Merriman* v. *Moore*, 90 Pa. 78; *Crandall* v. *Payne*, 154 Ill. 627. The common sense interpretation of a clause of assumption in a deed would seem to be, where the grantor is personally liable, that it is a covenant of indemnity to him, and where there is no such personal liability, that the general covenants of seizin and warranty in the conveyance are to be understood as not extending to these particular encumbrances: *Moore's Appeal*, 88 Pa. 450; *King* v. *Whitely*, 10 Paige, 465.

The solution of the problem of the vendee's liability to the mortgagee, by the use of an equitable formula applicable to creditor, surety and principal debtor—asserted by eminent authority to have obviated the difficulty of relying upon a contract relation between the two: *Keller* v. *Ashford*, 133 U. S., 610,—has worked out results not wholly satisfactory and consistent: *Shepherd* v. *May*, 115 U. S. 505; *Paine* v. *Jones*, 76 N. Y. 274; *Union Life Ins. Co.* v. *Hanford*, 143 U. S. 187. It is submitted that the real difficulties in this question arise from a failure or refusal to recognize that the rights of a mortgagee against a vendee are generically the rights of a stranger under a contract conferring an incidental benefit upon him: *Mellen* v. *Whipple*, 1 Gray, 317; *Meech* v. *Ensign*, 49 Conn. 191.

The dissenting opinion in *Solicitors' Loan & Trust Co.* v. *Robbins*, 45 Pac. Rep. 39, Oregon, admits the weight of authority to be with the majority, but maintains that upon principle the conclusion that a mortgagee may enforce the liability of the grantee, is illogical and wrong. In view of the inconsistency and diversity of opinion, not only in different but in the same jurisdictions, it is to be regretted that in a jurisdiction unhampered by precedent, principle should not have prevailed, rather than authority unsupported by principle.

CONTRACT FOR AN ILLEGAL PURPOSE. ENFORCEMENT OF CONTRIBUTION BETWEEN WRONGDOERS. In the case of *McMullen* v. *Hoffman*, 75 Fed. R. 547, a contract was declared valid and enforceable in equity by the United States District Court, which had previously, in 69 Fed. R. 509, been held void by the same court, on the ground that its object was illegal. The water committee of Portland, Or., having advertised for bids for constructing a pipe-line, the parties to this suit entered into a secret agreement by which the defendant on their joint account bid for the work in the name of Hoffman & Bates, and the complainant filed a separate bid under another firm-name; the latter bid being $49,000 higher than the joint bid, and not made seriously. The contract was awarded to the defendant, who agreed in writing with the plaintiff to execute it on their joint account, the plaintiff assisting in the work; upon which written

agreement the plaintiff now sues to compel an account of the profits.

The case, as first reported, came before the court upon exceptions to the defendant's answer, which alleged that the plaintiff had been prepared to bid, and, but for his agreement with the defendant, would have bid, for the work at a much lower figure than the defendant; and that under said agreement the two bids were presented as competing bids in such a way as to cause the water committee to believe the defendant's bid to be more reasonable and advantageous to the city than it actually was. Upon this answer the court held that since the purpose of the contract was to avoid mutual competition, thus defeating the object of the Legislature in requiring the work to be awarded upon bids, it was against public policy; that in appearing before the water committee as *bona-fide* competitors in pursuance of the agreement the parties were guilty of a fraud upon the city; and that the contract was, therefore, void and the plaintiff should not recover upon that part of it which formed the ground of his suit. Viewing the case in this light, and regarding the plaintiff's claim as based upon an unlawful executory contract for a division of the profits accruing to the defendant from his contract with the city, the decision is entirely sound. Where parties contract for an unlawful purpose the contract is void; and a contract between bidders for an important public work to avoid competition among them, being clearly against public policy, is for an unlawful purpose: *Kine* v. *Turner*, 27 Or. 356; *Atlas Nat. Bank* v. *Holm*, 71 Fed. Rep. 489; *Brooks* v. *Cooper*, 26 Atlan. R. 978; *Hunter* v. *Pfeiffer*, 108 Ind. 197; *People* v. *Stephens*, 71 N. Y. 527; *Hay's Estate*, 159 Pa. 381. And when the parties seek to perpetrate a fraud upon a third person, of course the contract is void.

But the facts of the case differed materially from the defendant's allegations. It was not shown that either party intended to bid, or would have bid, on his own account; and the successful bid and the resulting contract with the city were, in fact, the joint action of both the plaintiff and the defendant. Hence the court held, in its final decision, that the contract for co-operation between the parties, instead of lessening competition for the public work, served to increase the number of bidders. And however reprehensible their action in making two bids, one of which was merely intended to deceive the committee to the injury of the city, this did not constitute a fraud and render the contract illegal, because the evidence clearly showed that it had not influenced the water committee in the slightest. Thus the contract in suit proved to be valid, and the plaintiff recovered. The court in its opinion goes a step farther and declares, in effect, that even if the attempted fraud had been successful and the contract with the city had resulted therefrom, yet neither of the joint contractors could have disputed on that ground the right of the other to share the profits. Because it would still be a mere question of division of profits between two

parties having equal rights; and "the distribution of the profits of this contract, which are as much the property of one of the parties as of the other, does not violate any rule of morals or of public policy." This reasoning seems in accord with the principle laid down in the leading case of *Sharp* v. *Taylor*, 2 Phil. Ch. 801, where one partner in a vessel was obliged to divide its profits with the other, although its voyages had been illegal; and in *Brooks* v. *Martin*, 2 Wall. 70, in which the profits of an illegal transaction in real estate were ordered to be divided among the partners to the scheme. But it seems contrary to the rule stated in *Pomeroy's Eq. Jurisp.* § 401: "Generally, where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves." And it is submitted that the latter rule would properly govern the case under discussion had the parties actually committed fraud, in spite of the reasoning of the court to the contrary.