RECENT CASES.

ADVERSE POSSESSION.

True Owner in Possession as Tenant

Where A executes a mortgage on part of his land, believing it to cover the whole tract, and upon foreclosure and sale, attorns to D, the purchaser, as tenant, pays rent for ten years and at the end of the lease, without claiming title, surrenders possession to B, the grantee of D, to whom a deed covering the whole tract has been executed, D has acquired title to the whole by adverse possession, though he was not in by color of title except by payment of taxes, though physical possession never passed out of A, and though the record disclosed the true boundaries. *Steckter* v. *Ewing,* 93 Pac. (Cal.) 286.

Adverse possession must be actual, hostile, exclusive, open, notorious and continuous during the statutory period, five years in California, failure of any one of which bars title by adverse possession. *Collins* v. *Lynch,* 167 Pa. 635; *Ward* v. *Cochran,* 150 U. S. 597; *Creekmur* v. *Creekmur,* 75 Va. 430.

In the principal case, the disseisor paid the taxes on the whole tract which was enclosed within one fence and the owner, during the full period, treated the disseisor as the owner. The decision can be supported under *Royer* v. *Bentlow,* 10 S. & R. 303, which holds that the payment of taxes gives color of title.

But it is held that where the lessee, under belief that he is occupying only the demised premises, occupies land beyond the boundaries thereof, of which the lessor never had possession, nor claimed title to, nor included in the lease, the lessee's possession is not that of the lessor so as to make him a disseisor. *Holmes* v. *Turner,* 150 Mass. 547. So where the lessee of a minor entered and took wrongful possession and the lessor received the rent without ever personally entering upon the land as owner, the lessor is not a disseisor. *Matheson & Trots Case,* 1 Leon. 209. Where one co-owner occupies as tenant of the other, who is in under color of title, the exclusive character of the possession is not destroyed. *Belles* v. *Belles,* 122 Mass. 414. Under these cases there may be some doubt as to the exclusive character of the possession in the leading case.

BILLS AND NOTES.

The Uniform Negotiable Instrument Law is declaratory of the Law Merchant in that, where a note is endorsed to A as "cashier," "agent" or "successors in office," it is an anomalous endorsement in which delivery to the principal without endorsement on the note, is in due course, but, where the endorsement is to such person personally, transfer must be made by endorsement on the note to be in due course so as to bar the equities of the antecedent parties. *Bank* v. *McCulloch,* 93 Pac. (Or.) 366.

Endorsement: Cashier

It is generally held that if a note be payable to an individual with the mere suffix of his official character, such suffix is a mere *descriptio personae. Hatley* v. *Pike,* 162 Ill. 241. In other jurisdictions, it is held to show the character in which the person acts. *Babcock* v. *Beman,* 11 N. Y. 200; *Folk* v. *Moebs,* 127 U. S. 597. The relation of principal and agent must appear in the instrument, but if it is ambiguous as to the real party intended such ambiguity may be explained by parol. *Schmittler* v. *Simon,* 114 N. Y. 176.

CONTRACTS.

A bankrupt was managing agent for a life insurance company, under a contract having several years to run, which entitled him to an interest in renewal premiums on policies previously written when they should be collected, as long as the contract was in force, subject to the right of the company to terminate such interest if dissatisfied. *Held,* the contract as a whole being based on trust and confidence, was not transferable, yet the rights under the contract passed to the trustee, who would be entitled to the interest in the premiums which had come due since the filing of the petition, even though the company might defeat the object of the transfer by withholding its consent. *In re Wright,* 157 Fed. 544.

Assignments: Bankruptcy.

The Act of July, 1898, c. 541 (30 Stat. 565), provides that the trustee shall be vested with all the property which prior to the filing of the petition the bankrupt could "by any means have transferred * * *."

But personal privileges subject to restrictions in transfer have been held to vest in trustees in bankruptcy. So a seat in a stock exchange, though the assignee must be elected before enjoying the privileges. *In re Gaylord,* 111 Fed. 717. And a liquor license, where assignee must be approved by the court. *In re Becher,* 98 Fed. 407.

CONSTITUTIONAL LAW.

Interstate Commerce

The Supreme Court of the United States in *Adair* v. *U. S.* (advance sheets March 1st, page 277), declares section 10 of the Act of June 1st, 1898, to be unconstitutional. Section 10 makes it a criminal offense for an officer of an interstate carrier to discharge an employee from service to such carrier, because of his membership in a labor organization. The court holds that this provision cannot be referred to the clause of the constitution giving Congress power to regulate interstate commerce, for there is no legal or logical connection between an employee's membership in a labor organization and the carrying on of interstate commerce, and that the provision is condemned by the fifth amendment.

In *Howard* v. *Illinois C. R. Co.* (Adv. sheets Feb. 1, page 141), the majority of the court were of the opinion that the regulation of the relation of master and servant between carriers engaged in interstate commerce, was a regulation of such commerce. Mr. Justice McKenna, who dissented in the Adair case, was of the opinion that this case was an "immediate and guiding light" to the decision at which he arrived.

It should be borne in mind that in the Adair case the Act under discussion was considered repugnant to the fifth amendment, while the only question in the Howard case was a regulation of interstate commerce.

DISCOVERY.

Production of Documents Before Trial

The plaintiff sued on a judgment obtained in England in an action by the defendant against the plaintiff's assignor. The defendant averred that the English suit was brought without his authority. In order to discover the truth of this assertion, an order was granted, on motion for the production of the defendant's books before trial, under section 724, U. S. Rev. Stat. *Shaefer* v. *International Power Co.*, 157 Fed. 896 (S. N. N. Y. Circuit). This case is in accord with the current of authority, *Exchange Bank* v. *Wichita Cattle Co.*, 61 Fed. 190; *Brown* v. *McDonald*, 133 Fed. 867.

ELEVENTH AMENDMENT.

Suit Against Attorney General

An action against the Attorney-General and prosecuting officers of a State to enjoin them from instituting criminal proceedings is in effect an action against the State, and cannot be maintained in a court of the United States under the eleventh amendment to the constitution. *Logan and Bryan* v. *Postal, etc., Co.*, 157 Fed. 570.

In *Western Union Telegraph Co.* v. *Andrews*, 154 Fed. 95, with facts similar to those in the principal case, it was *held*, that a suit by a foreign telegraph company was an action against the defendants merely in their capacity as attorneys for the State, and was in effect a suit against the State, within the eleventh amendment.

The principle as laid down by Chief Justice Marshall in *Osborn* v. *Bank of U. S.*, 9 Wheat. 738 (1824), that a State is not sued unless it is named as a defendant upon the record, may be said to have been abandoned long ago. A federal court has no jurisdiction of a suit against a State officer to coerce performance of a contract by the State. However, it may take jurisdiction of a suit against such an officer to enjoin a threatened injury to a vested right under authority of an unconstitutional statute of the State. *Yale College* v. *Sanger* (C. C.), 62 Fed. 177 (1894).

See note UNIVERSITY OF PENNSYLVANIA LAW REVIEW, Vol. 56, p. 52.

INSURANCE.

Recovery where the Insured is Executed for Crime

A was executed for crime by the State and his estate sued on an insurance policy, payable to his personal representatives, which contained no stipulation covering the point at issue. Recovery was allowed on the ground that, forfeiture for attainder of blood having been abolished by the federal constitution, the policy, like all other choses in action, passed to his personal representatives. *Collins* v. *Metropolitan Ins. Co.*, 83 N. E. (Ill.) 542.

In the case of suicide the question of recovery has resolved itself into two divisions: first, where the policy is made payable to the estate of the deceased; secondly, where it is vested in a particular beneficiary. Recovery is denied in the first class, because, it is said, a man should not be allowed to increase his estate by crime. *Ritter* v. *Ins. Co.*, 169 U. S. 139. In the

INSURANCE (Continued).

second class relief is granted. *Morris* v. *Life Ins. Co.,* 183 Pa. 563; *Darrow* v. *Family Fund Soc.,* 116 N. Y. 537.

This division does not appear in the cases involving the question under consideration. The decision of *Amicable Society* v. *Bolland,* 4 Bligh (N. R.) 194 (1830), refuses payment on a policy on a state of facts directly in point. This case was decided prior to the abolition of forfeiture from crime in England and was therefore aptly put on public policy. In *Burt* v. *Insurance Co.,* 187 U. S. 362, also on all fours with the case under discussion, recovery was denied.

In a litigation involving the same parties as the present case, the two decisions cited, which seem to be the only cases squarely in point, were approved and followed; *Collins* v. *Ins. Co.,* 27 Pa. Super. Ct. 353. These rulings seem to adhere to the first division of the suicide cases.

SALES.

By Dealer—Implied Warranties—Fitness for Purpose Intended

A dealer who keeps for sale specific well-known brands of piping for the particular purpose of driving oil wells and who knows that the buyer intends using it for such purpose, impliedly warrants the fitness of the piping for the known contemplated use, and the fact that the buyer designated a particular brand of piping which the seller furnished, does not prevent the implied warranty of fitness from arising. *Oil Well Supply Co.* v. *Priddy* (Indiana), 83 N. E. 623.

The case of *Jaricki M'f'g Co.* v. *Kerr,* 165 Pa. 529, reaches a contrary decision upon almost the identical facts, holding, "that where the buyer ordered a particular brand of tubing to be used for an oil well, which was delivered to him, it is no defense that it was not suitable for the purpose for which he wanted it, although the seller knew the use to which it was to be put." The latter case was judged *per curiam* to fall within the third rule as designated by Justice Mellor in the case of *Jones* v. *Just,* L. R. 3 Q. B. 197, to wit, "Where a known, described and definite article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, prescribed and defined thing be actually supplied there is no warranty that it shall answer the particular purpose intended by the buyer." Myers, J., brings the present case under the fourth and fifth rule as laid down by Justice Mellor,

SALES (Continued).

that where a dealer undertakes to supply an article in which he deals, for a particular known purpose, so that the purchaser relies upon the judgment and skill of the dealer, there is an implied warranty that the article shall be reasonably fit for the purpose intended. English and many American jurisdictions accord. *Zimmerman* v. *Dreucker,* 44 N. E. 557; *Emaho Coal Co.* v. *Fay,* 37 Neb. 48. Contra, *Thompson* v. *Libby,* 35 Minn. 443; *Dounce* v. *Dow,* 64 N. Y. 411; *Gerst* v. *Jones & Co.,* 32 Gratt (Va.) 518.

Statute of Frauds—Acceptance and Receipt

B, after having lumber belonging to A upon his premises for thirty days, verbally offered to buy it from A. A the next day accepted the order. Five days later B repudiated the contract. *Held,* that since B did not repudiate the sale immediately on getting A's acceptance of his offer, there was acceptance and receipt of the goods sufficient to satisfy the Statute of Frauds. *Godkin* v. *Weber,* 114 N. W. 924. One person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts which amount to an acceptance and receipt within the statute. *Benjamin on Sales, 5th Ed.* 215. Very slight evidence is sufficient to show acceptance and receipt, as where a factor, having property of his principal in his possession, purchased it by parol and then sold it, which, of course, under his contract of factorship he was entitled to do. *Edan* v. *Dudfield,* 1 Q. B. 302. But it must clearly appear that the conduct of the buyer in dealing with goods already in his possession is wholly inconsistent with the fact that his former possession continues unchanged. *Lillywhite* v. *Devereux,* 15 M. & W. 283. As there was nothing in the principal case inconsistent with the possession which existed before the sale remaining unchanged, it is submitted that the case should not have gone to the jury. *Silkman Co.* v. *Hunholz,* 112 N. W. 1081.

STATUTE OF FRAUDS.

Agreements Not to be Performed within a year

A conveyed land to B, part of the consideration was B's oral promise to pay certain notes given by A. The notes were not due within a year. *Held,* the contract being completely executed on one side was not within not to be performed within a year must be in the statute of frauds, providing that agreements writing. Supreme Court of Colorado in *Enos* v. *Anderson,* 93 Pac. 475.

STATUTE OF FRAUDS (Continued).

The rule adopted here appears to have had its origin in *Donellan* v. *Read,* 3 Barn. & Ald. 899.

In this country the rule is generally held to apply, but only when nothing remains to be done but the payment of money. *Curtis* v. *Sage,* 35 Ill. 22; *Reed* v. *McCormick,* 45 S. E. 868.

It has been held that where both sides of the contract are executory, an action would lie against the party whose promise was capable of being performed within the year, but not against the party whose promise was not to be performed within the year. *Sheeby* v. *Adarene,* 41 Vt. 541.

The arguments in favor of the view that such a contract is within the statute unless it is to be completely executed within the year, seem to be based on a sounder interpretation of the statute. *Marcy* v. *Marcy,* 9 Allen 8; Browne on the St. of Fr., page 382 (5th Ed).

WILLS.

Signing—Making a Mark for a Signature

A statute in the jurisdiction provides that the will of a testator shall be "signed by him or by some person in his presence and by his express direction." A testator's name, without his request, was placed at the end of a proposed will and the testator then made his mark. *Held,* that this was a sufficient signing within the statute. *In Re Tierney's Est.,* 114 N. W. 838. That the testator's mark is a sufficient signing of a will has long been settled. *In Re Bryce,* 2 Curt. Eccl. Rep. 325. It is immaterial whether the testator can write or not. *Baker* v. *Dening,* 8 Adol & El. 94. In Pennsylvania under the Wills Act of 1833 a mark was held an insufficient signing, *Asay* v. *Hoover,* 5 Pa. 21; but this was cured by the Act of January 27, 1848. Where there are both the mark of the testator and his name signed either at his request or otherwise, the mark is the signature and not the name written near it. *Jackson* v. *Jackson,* 39 N. Y. 153. However, where a statute in the jurisdiction requires that one who signs the testator's name at his request must subscribe as a witness and state the request, it has been held that when there is such a signature together with the testator's mark, the written name is the signing required by the statute and excludes the mark. *McGee* v. *Porter,* 14 Mo. 611. But if the name has been written other than by request the same Court has said that the mark is a sufficient signing. *Northcutt* v. *Northcutt,* 20 Mo. 266.

WILLS (Continued).

Passing of After-Acquired Real Property

A statute in the jurisdiction provides that every will devising in express terms or by intent all of the testator's real estate, shall be construed to pass all he owned at his death. Testator's will read: "I give * * * to my husband all my real estate * * * of which I am now possessed." Subsequent to the making of the will the testator sold a farm and purchased other real estate. *Held,* that the words, "of which I am now possessed," did not prevent the after acquired property from passing. *Hodgkins* v. *Hodgkins,* 108 N. Y. Sup. 173.

Under modern statutes in considering whether after acquired realty is to pass, the intention of the testator is to control, and that is to be gathered from the whole will. *Lent* v. *Lent,* 31 N. Y. 436. The particular combination of words found in the principal case—"all my real estate of which I am now possessed" has been construed so as not to pass after acquired property where the word "now" was used in other parts of the devise, plainly having reference to the time of executing the will. *Cole* v. *Scott,* 1 MacN. & G. 518. Similarly, where certain property which the testator at the time of making his will intended subsequently to acquire, was mentioned by name, this was held to exclude other after acquired property. *Quinn* v. *Hardenbrook,* 54 N. Y. 83. But where the word was used by itself with nothing to show that the testator meant the word now to refer to the date of making the will, it has been held, as in the principal case, that after acquired property passed. *Lent* v. *Lent,* 31 N. Y. 436.