RECENT CASES.

COPYRIGHT.

In Musical Compositions: Perforated Rolls

Perforated rolls, which, when used in connection with mechanical piano players, reproduce in sound copyrighted musical compositions, do not infringe the copyright in such compositions. *White-Smith Music Pub. Co.* v. *Apollo Co.*, U. S. Adv. Sheets, March 16, 1908, p. 319.

Justice Day said: "These perforated rolls are parts of a machine, which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious production. But we cannot think they are copies within the copyright act." *Kennedy* v. *McTammany*, 33 Fed. 584.

In a similar case relative to phonograph discs, the Court said: "It is not pretended that the marks upon the wax cylinders can be made out by the eye or that they can be utilized in any other way than as parts of the mechanism of the phonograph." *Stern* v. *Rosey*, 17 App. Div. (D. C.) 562.

The question came squarely before the English court in *Bosey* v. *Wright* (1899) 1 Ch. 836, and it was there held that the perforated rolls did not infringe the English Copyright Act protecting sheet music. The Court based their decision upon the ground that "the rolls are intended merely for causation and not for indication of the music."

Justice Holmes, in concurring specially, pointed out the evident injustice of the decision, made necessary by the statute. He said, "One would expect the protection to be coextensive, not only with the invention, which, though free to all, only one had the ability to achieve, but with the possibility of reproducing the results which gives to the invention its meaning and worth. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or if the statute be too narrow, ought to be made so by further act, except so far as some extraneous consideration of policy may oppose."

CRIMINAL LAW.

False Pretence: Value

Defendant by his false representations that certain land was worth $11,000, induced the prosecutor to pay him that sum in a sale of the land. The land, it was alleged, was worth only $330. Defendant was indicted for false pretence, and at the trial evidence was given that he knew the land was not worth $11,000. *Held*, when a statement as to value is made as an existing fact, and when the speaker knows it to be false and intends it to be an inducement to the other party, it becomes a false representation of a material fact. And whether it was intended as an expression of opinion or as a fact, is to be determined by the jury. Supreme Court of Ohio, 83 N. E. 802.

The same rule was applied in the recent case of *Crandall* v. *Parks*, 93 Pac. 1018, which was an action to rescind a contract on the ground of fraud.

GUARANTY.

Notice of Acceptance

A executed a guaranty upon an order for goods from B, which contained a condition that the order should not be a binding contract until approved by B. The order and guaranty were delivered to B's agent. B approved the order and shipped the goods, but no notice of the acceptance of the guaranty was given to A. B sues A on the guaranty. Judgment was given for A on the ground that notice of the acceptance of the guaranty is necessary to bind the guarantor. *Smith Co.* v. *Thesmann*, 93 Pac. 977 (Oklahoma).

This follows the rule laid down by the Supreme Court of the United States in *Davis Co.* v. *Richards*, 115 U. S. 524, that mere performance of the offer of guaranty does not complete the contract.

In *Bishop* v. *Eaton*, 161 Mass. 500, it is said that acting on the guaranty completes the contract, but the acceptor must notify the guarantor within a reasonable time after the performance. This duty, however, is performed by the mailing of the letter giving notice, though it never reaches the guarantor. But see *Lennox* v. *Murphy*, 171 Mass. 370.

This rule of notice, which seems to be limited to cases of guaranties, has been adversely criticised. See Hare on Contracts, 320.

HOMICIDE.

The following charge was requested by the defendant and refused by the Court: "The Court charges the jury that one of the ingredients of murder in the second degree is willfulness and malice aforethought, and unless the jury believe beyond all reasonable doubt that the deceased came to his death by blows inflicted upon him by the defendant intentionally and with malice aforethought they cannot find him guilty of murder in the second degree." *Held*, the trial Court did not err in refusing the charge; "that it was misleading, for the use of the word 'aforethought' as applied to murder in the second degree." *Smith* v. *State*, 45 South. Rep. 626.

Trial: Instructions: Requests

An authority in support of the conclusion in the principal case is *Wilson* v. *State*, 128 Ala. 17, in which it was said: "A term giving rise to views so divergent would probably have confused the jury and misled them to believe that premeditation was a necessary ingredient of murder in the second degree, whereas malice which may arise on the instant and without deliberation, when concurring with an intention to kill, may constitute that offense."

Both authority and principle seem to be contra to this decision, however. "The word 'aforethought' does not necessarily require either deliberation or premeditation." Bishop on Criminal Law. "To bring a killing within the provision 'deliberate and premeditated,' it must be such as would be murder at the common law, otherwise expressed it must be of 'malice aforethought;' added to which, it must be 'deliberate and premeditated.'" *Smith* v. *S.*, 68 Ala. 424. "The malice which is an essential element in the offense of murder, has always been described as malice aforethought." *Ethridge* v. *State*, 141 Ala. 29; *Fields* v. *State*, 52 Ala. 348.

PRINCIPAL AND SURETY.

In a building contract, it was specified that no instalment should exceed seventy-five per cent. of the cost of materials delivered for the work. The contractor fraudulently substituted materials inferior to those named in the contract, and by collusion with the engineer of the one for whom he was building, instalments were made exceeding seventy-five per cent. of the cost of materials actually furnished but not ex-

Departure From Contract Obtained by Fraud of Principal

PRINCIPAL AND SURETY (Continued).

ceeding seventy-five per cent. of the materials pretended to be furnished. *Held,* that the claim of the contractor's surety to be discharged on the ground that the creditor had failed to maintain the reserve stipulated for by the contract until the work was completed, was not sound. *Van Buren County* v. *American Surety Co.,* 115 N. W. 24. It is generally held that where, by the terms of the contract, the principal is to be paid in instalments, and he is paid faster than the contract provides, a surety for the completion of the work to be performed by the principal is discharged. *Calvert* v. *Dock Co.,* 2 Keen 638. One court has held, where the principal by fraud obtained money not due from the creditor, that the surety is discharged, *Goodin* v. *Ohio,* 18 Ohio Rep. 6; but the better rule seems to be that under such circumstances the surety is not discharged even though the negligence of the creditor's agent made the principal's fraud easier of accomplishment. *Ryan* v. *U. S.,* 22 U. S. Supr. Ct. Rep. (L. Ed.) 172.

PAYMENT.

Where a debtor executes his note, governed by the law merchant, for a pre-existing debt, such note is only a *prima facie* presumption of payment of the debt; but where this presumption of payment deprives the party accepting it of collateral security or some other substantial benefit, such circumstance rebuts the presumption of payment. This rule is the same where the debtor, at the instance of the creditor, executes his note to a third person. *Beach* v. *Huntsman,* 83 N. E. (Ind.) 1033.

Pre-Existing Debt: Promissory Note: Presumption

This rule of law that the giving of a promissory note by a debtor to the creditor or to a third person, at the request of the creditor, is *prima facie* payment of the pre-existing debt obtains in the jurisdiction of Massachusetts, Maine, Vermont, Indiana and Louisiana. *Paddock* v. *Simmons,* 186 Mass. 152; *Krider* v. *Knox,* 48 Me. 551; *Dickenson* v. *King,* 28 Vt. 378; *Hunt* v. *Boyd,* 2 La. 109.

In all jurisdictions, except as above, a promissory note given by the debtor to the creditor or to a third person at his request does not raise a presumption of payment of the pre-existing debt, but is governed by the agreement of the parties. *Owen* v. *Morse,* 7 T. R. 66; *Price* v. *Price,* 16 M. & W. 240;

PAYMENT (Continued).

Sweet v. *Jones*, 2 R. I. 292; *Mooring* v. *Mobile*, 27 Ala. 256; *Bank* v. *Daniels*, 12 Pet. 32; *Phila.* v. *Stewart*, 195 Pa. 314.

But, unless otherwise agreed, it does raise a presumption of conditional payment which merges the debt in the note and suspends all right of action on the debt during the running of the note. *Ward* v. *Evans*, 2 L. Raymond 928; 2 Ames Bills and Notes 571; *Kilpatrick* v. *Association*, 119 Pa. 36; *Humelstown* v. *Knerr*, 25 Pa. Sup. 467.

SALES.

Fraudulent Conveyances: Retention of Possession by Vendor

A purchased an automobile from C, giving a note and extinguishing an old debt in payment. He allowed it to remain in C's possession, and permitted C to use the same in consideration of its storage in C's garage. Subsequently, C mortgaged the machine to B, who took possession of it. In an action of replevin A was permitted to recover, and it was held that whether the retention of possession by the vendor was fraudulent upon the subsequent mortgagee was a question for the jury. *Wilson* v. *Walrath*, 115 No. West. 203 (Minn).

Whether retention of possession by the vendor after a sale is fraudulent upon a subsequent innocent vendee for value, appears to have been first dealt with in Twyne's Case, 5 Eng. Rul. Cas. 21, interpreting St. 13 Eliz. C. 5 and St. 27 Eliz. C. 7. It was there ruled in point of law to be fraudulent. The English court, after considerable shifting, has finally determined it to be merely presumptive of fraud, which may be rebutted. *Cookson* v. *Swire*, 9 App. Cas. 653.

The American cases have, either under statute or common law, taken three views: First in following the early English view, *Stephen* v. *Gifford*, 137 Pa. 219; secondly, holding it a presumption of law which may be rebutted, *Hobbs* v. *Bibb*, 2 Stew. 54; thirdly, that the retention is only *prima facie* evidence of fraud, and is a question for the jury. The majority of States, together with the Federal courts, have adopted the third view, *Mohton* v. *Robinson*, 40 Mich. 200; *Warner* v. *Norton*, 20 How. 460. The principal case which is an interpretation of a State statute, is in accord with this majority view which represents the modern tendency.

WATER COURSES.

Removal of Artificial Constructions

A canal company, under a franchise from the State, constructed a cross-canal, which drained a lowland in an artificial course. B built upon the land relying upon the new flowage. After forty years A, who was then owner of the canal, obstructed the cross-canal thus throwing back the water to its original drainage, and thereby flooding B's land. *Held*, that A could not be restrained from obstructing the cross-canal and establishing the original flow. *Lake Drummond Canal and Water Co.* v. *Durnham, et al.*, 60 So. East. Rep. 650 (N. Co.).

The question whether one may return to its true course a stream, which has been controlled by an artificial device for the prescriptive period, has frequently come before the courts. Almost uniformly the answer has been in the negative. The reasons assigned are: First, the one against whom the right to divert has been acquired, has himself gained a prescriptive right to insist that the new course be maintained, *Mathewson* v. *Hoffman*, 77 Mich., 420; secondly, it is a species of dedication to the public use, *Ford* v. *Whitlack*, 27 Vt. 265; and thirdly, where a change has been made which presents the appearance of permanency, the doctrine of estoppel will prevent a stream being reverted to its ancient course to the injury of one who has been induced to act upon such appearances, *Smith* v. *Musgrove*, 32 Mo. App. 241.

The objection to the first reason is that the user of him against whom the right to divert has been acquired, cannot be called adverse; to the second that dedication must be to the public, while here it is simply to the individuals who happen to be within the radius of the change in flow. Farnham on Water and Waters, p. 2331.

The third reason, while perhaps the best, admits of much judicial discretion in determining what change exhibits sufficient permanency. In the present case a user of forty years was held only temporary. It might very well, with more justice and accordance with authority, have been held contra. *Withers* v. *Purchase*, 60 L. T. N. S. 819; *Belknap* v. *Trimble*, 3 Paige 577.