RECENT CASES

ALTERATION OF INSTRUMENTS.

Alteration of a Bond from Joint to Joint and several

Where one of the sureties on a joint bond, given by the Mercantile Refining Company to the Union Oil Company to secure the payment by the Mercantile Refining Company to the Union Oil Company, plaintiff, of the consideration for oil furnished by the latter to the former, without the knowledge and consent of the appellants, who were also sureties on said bond, added to the bond words changing it into a joint and several bond, said surety not being an appellant, it was held that it was a mere spoliation and that the plaintiff could recover judgment against appellants as on a joint bond. *Union Oil Company of California* v. *Mercantile Refining Company,* 97 Pac. 919 (Cal.), 1908.

The changing of an instrument from a joint to a joint and several obligation is material and discharges the parties not consenting [*Warring* v. *Williams,* 8 Pick. (Mass.) 322 [1829], but not in Pennsylvania (under Acts of Assembly of April 6, 1830, and April 11, 1848, see *Miller* v. *Reed,* 27 Pa. St. 244 (1856). Compare rule in Maine. *Eddy* v. *Bond et al.,* 19 Me. 461 (1841).

The general rule is that a material alteration in a written contract by one of the parties thereto, which varies its legal effect and operation, renders it void as against those parties to the instrument not consenting to such change, although the absence of consent was not known to the obligee when he received the instrument, nor was the said change made by him or his agent. *People* v. *Kneeland,* 31 Cal. 289 (1866); *Greenfield Savings Bank* v. *Stowell et al.,* 123 Mass. 196 (1877); *Woods* v. *Steel,* 73 U. S. 80 (1867).

In this connection compare the opinion of Crockett, J., in *Langenberger* v. *Kroeger,* 48 Cal. 147 (1874), some portions of which appear to intimate that if the change is made without the knowledge or authority of the payees, who were plaintiffs, it is the act of a stranger and therefore a spoliation.

COMMON CARRIERS.

Negligence: Passenger Not for Hire

Plaintiff's husband while riding on the engine of one of defendant's passenger trains, at the invitation of the conductor, engineer and fireman, and without paying or intending to pay fare, was killed by a derailment caused by the defective condition of the track. It did not appear that there was any custom permitting such a form of travel. It was held that he was a trespasser and that his widow had no cause of action against the railroad for his homicide. *Morris* v. *Georgia R. & Banking Company* (Ga. Sup. Ct.) 62 S. E. 579 (1908).

The law upon this question does not appear to be entirely settled.

The ordinary business of conducting and managing a freight train does not involve any right to invite persons to ride upon such train or to accept them as passengers and the railroad company is not liable for injuries sustained by a person riding upon such an invitation [*Powers* v. *Boston & Maine R. R.*, 153 Mass. 188 (1891)]; or where plaintiff rode, against the rules, on the pilot of the engine of a construction train in sight of the engineer [*Darwin* v. *Charlotte, Columbia & Augusta R. R. Co.*, 23 S. C. 531 (1855)]; or where a boy was killed while on defendants' engine at the request of the fireman to perform a duty which he had no right to delegate [*Flower v. P. R. R. Co.*, 69 Pa. 210 (1871)]. But see *contra, Harris* v. *Perry*, L. R. 2 K. B. (1903) 219; compare *Washburn* v. *Nashville & Chattanooga R. Co.*, 3 Head (Tenn.) 638 (1859).

In Massachusetts, however, it has been decided that an invitation by the driver of a horse car to the plaintiff to ride on the car he was driving was an act within the general scope of the driver's employment, and if plaintiff accepted it innocently, she was not a trespasser. *Wilton* v. *Middlesex R. Co.*, 107 Mass. 108 (1871).

Where one is travelling by a passenger train and is not connected with the railroad, the legal presumption is that he is a passenger and travelling for a consideration. *Creed* v. *P. R. R. Co.*, 86 Pa. 139 (1878).

CONSTITUTIONAL LAW.

Franchise a Property Right

The Supreme Court of the United States, in the case of *Wilcox* v. *Consolidated Gas Company*, decided January 4th, 1909 (not yet reported), held that a company which has obtained a franchise without cost may demand a return upon it as property.

(For a full discussion see note, p. 315 of this issue.)

CONTRACTS.

The Court of Civil Appeals of Texas, in *Mutual Reserve Life Insurance Co.* v. *Seidel,* 113 Southwestern, 945, *held* that, where a promise is made, inducing the other party to act, and the jury find that there was no intention on the part of the promisor of keeping his promise at the time of making it, the contract is rescindable on the ground of fraud.

Promise to Perform a Statement of Fact

(For a full discussion see note, p. 325 of this issue.)

A having a claim against his employer B for injuries sustained, it was agreed that B should pay A $150 in money and "furnish him steady work during the times he was able to work." B paid the money but refused to employ A who brings action for breach of contract. *Held,* that the compromise furnished a sufficient consideration for the agreement to employ, and that the plaintiff could recover damages for breach thereof.

Validity of Contracts for Steady Employment: Compromise of Claim as Consideration

Kelly v. *Peter & Burghard Stone Co.,* 113 S. W. 486.

This decision while undoubtedly correct raises a rather interesting question as to the validity of contracts of employment for as long as the employee is able to work. Such contracts are not void as against public policy.

Jessup v. *C. & N. W. R. Co.,* 82 Ia. 243 (1891).

Nor do they come within the rule that employment for an indefinite time is an employment at the will of either party, if the consideration for the employment is paid, partially at least, as it was here, in advance.

Penna. Co. v. *Dolan,* 6 Ind. App. 109 (1892).

CORPORATIONS.

The Berea College was convicted under section 1, of the Act of Kentucky, of March 22, 1904 (Acts Ky. 1904, chap. 85, p. 181), viz: "That it shall be unlawful for any person, corporation or association of persons, to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction * * *."

State Statute: Separable Sections

The United States Supreme Court (Nov. 9, 1908), affirmed

CORPORATIONS (Continued).

the judgment of the Court of Appeals (123 Ky. 209), sustaining the conviction. The Supreme Court decided that section 1 was separable; that it was in effect an amendment to defendant's charter and within the power reserved to the State by the constitution of 1891, under which defendant was incorporated; and that "Such a statute may conflict with the Federal constitution in denying to individuals powers which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by the State." An able dissenting opinion held that section 1, of the Act was not separable, that it was not an amendment to defendant's charter, and that it was contrary to the Fourteenth Amendment to the Federal constitution. *Berea College* v. *The Commonwealth of Kentucky* (Nov. 9, 1908), advance sheets.

The test of separability is, Are the parts of a statute so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not pass the residue separately? If they are, the act or section is not separable; if they are not, it is separable. *Allen* v. *Louisiana,* 103 U. S. 80 (1880); *Warren, et al.,* v. *Mayor and Alderman of Charlestown,* 2 Gray (Mass.), 84 (1854).

The opinion of the Court does not determine whether or not section 1 of the Act, is constitutional as applied to individuals. In this connection see *Bertonneau* v. *The Directors of City Schools,* 3 Woods (U. S. C. C.), 177 (1878), where a regulation providing separate public schools for white and colored children was held constitutional.

CRIMES.

Burden of Proof

The rule in the Pennsylvania law, that if the evidence establishes a purposeful killing, the burden of proving self-defence, insanity or other justification shifts to the prisoner, was reaffirmed in the case of *Commonwealth* v. *Palmer,* 71 Atlantic, 100.

(For a full discussion see note, p. 318 of this issue.)

EQUITY.

Conversion of Partnership Realty into Personalty

A judgment creditor sought to subject the interest of one of the defendants in a tract of land, to the payment of his judgment. One of the defendants pleaded that the land in question, being partnership assets, had been converted into personal property, so that the judgment was not a lien on it, and the judgment was dismissed. On appeal the Court affirmed the trial decision, finding to their satisfaction that the lots in question were partnership property. *Mann* v. *Paddock, et al.,* 62 S. E. 951.

It is a general rule that when real estate is purchased with partnership funds for partnership purposes and without any intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, such real estate is to be considered as partnership property, and as liable to all the equitable rights of the partners between themselves. Bispham on Eq., p. 639. The result of this rule is that as each partner has an equity to insist on a sale of such real estate, it is to be treated as personalty for the purposes of the partnership; but whether it is to be so treated for all purposes is a question upon which there has been some conflict of authority.

In England, the rule now settled is to the effect that in the absence of agreement to the contrary, partnership realty is *ipso facto,* in the view of equity, converted into personalty for all purposes, both for the purpose of adjusting partnership debts and the claims of the partners *inter se,* and for determining the succession as between the personal representatives and the heirs at law of the deceased partners. *Crawshay* v. *Maule,* 1 Swanst. 495. The rule is probably based upon the nature of the partner's interest (Lindley on Partnership, 667); and has been codified in the English Partnership Act of 1890 (53-54 Vict., c. 39).

In the United States, the conditions which gave rise to the English view of the question are not present, and consequently the rule is modified. It is held by the great majority of decisions in this country that in the absence of any agreement to the contrary, express or implied, between the partners, firm realty retains its character as such, with all the incidents of that species of property (*Darrow* v. *Calkins,* 154 N. Y. 514), except that each share of the partnership realty is impressed with a trust, implied by law in favor of the other partner or partners, that so far as necessary it shall

EQUITY (Continued).

be first applied to the adjustment of partnership obligations and the payment of whatever balance may be found due between partners on the winding up of the firm's affairs; and to the extent necessary for these purposes, the character of the property is in equity deemed to be changed into personalty. *Hoyt* v. *Sprague,* 8 Rep. 616; *Darrow* v. *Calkins,* 154 N. Y. 514. Much is to be said in favor of the American rule on account of its simplicity; it makes the legal title subservient in equity to the original trust, disturbing it no further than is necessary for this purpose, the land not required for partnership equities retaining its character as realty, and the laws of inheritance and descent being left to their ordinary operation. *Darrow* v. *Calkins,* 154 N. Y. 514.

It is regrettable that the Court in the case in hand found it unnecessary to place themselves in line with either the English or the American rule, since Virginia is one of the few jurisdictions whose ruling on this matter is not clear. The earliest decision on the subject followed the English idea sharply (*Pierce* v. *Trigg,* 10 Leigh 406), while later decisions consider the point as doubtful, and apparently incline to one rule or the other according to the merits of the case.

EVIDENCE.

Statements of Pain and Suffering

Statements of an injured woman as to her physical condition, made several months after the accident to her husband, and others made to her physician were held improperly admitted in *Wienninger* v. *Interurban Street Railway Company,* 113 N. Y. Supp. 96.

(For a full discussion see note, p. 322 of this issue.)

Relevancy of Evidence of Drunkenness

In a suit on an account, defendant introduced evidence of the plaintiff's habit of drinking excessively. It was admitted by the trial judge, and on appeal its competency was sustained. *Davis* v. *Stephenson,* 62 S. E. 900.

The appellate body gave little apparent consideration to the matter. "It was offered," they held, "for the purpose of showing that the plaintiff was not competent to transact business or to keep an account correctly. The Court admitted it for that purpose alone, and we think it was some evidence for the consideration of the jury upon the question in dispute

EVIDENCE (Continued).

between the parties." The evidence was also competent for other reasons, according to the judicial statement, but as to the character of those reasons the Court remains discretely silent.

The fact to be proved by the defendant in this case was that he had never accepted any account from the plaintiff, thereby rendering himself a debtor. Was the evidence introduced of such a character as tended to prove this fact? It was undoubtedly competent to prove that plaintiff was intoxicated at the time of the alleged delivery of the account, or for any other reason incapable of attending to his duties. But how the fact of his having been under the influence of liquor at other times would affect this particular case is not apparent; and the consequences of the admission of such evidence might, and indeed in this case did, seriously affect the jury.

At its foundation the matter comes down to this: you introduce facts to show that a man has bad habits; from these facts you may infer that at the time of the action he was intoxicated or otherwise incompetent, and consequently that the account he presents is wrong, and his averments concerning it false. But this is basing a presumption upon a presumption, whereas a presumption should be founded only on a fact, and should be a reasonable and natural deduction from such fact. Thus in the present case if it could have been shown that plaintiff was actually drunk at the time, a presumption as to the character of the account would properly arise. But the fact from which the inference is drawn must first be established; it will not do to presume that he was in the condition referred to from some remote fact in no way connected with the case, and upon that presumption base the additional presumption touching the account.

The only other case which bears directly on the one in hand is directly contrary to it. *Henrie* v. *R. R.*, 92 Pa. 431. In that issue, evidence was held improperly admitted, which tended to show, in a suit for damages for the running over of an infant, that the car drivers were at the time cruelly overworked. "The true rule," said Judge Paxson in his opinion, "was correctly stated by Mr. Justice Thompson, in *Douglass* v. *Mitchell's Exrs.*, 11 Casey, 443: 'That as proof of a fact, the law permits inferences from other facts, but does not allow presumptions of fact from presumptions. A fact being established, other facts may be and often are ascertained by

EVIDENCE (Continued).

just inferences. Not so with a mere presumption of a fact; no presumption can with safety be drawn from a presumption; there being no fixed or ascertained fact from which an inference of fact might be drawn, none is drawn.'"

The facts of the two cases are nearly parallel, the law directly contrary; and it would seem as if the Pennsylvania decision were the sounder of the two.

Common Law of Another State

In an action brought in Kansas on a note payable in Missouri, the negotiability of the note was disputed. Decisions of the Supreme Court of Missouri were admitted in evidence to show that such notes were negotiable in that State. Benson, J., states that decisions of a sister state will be followed in such a case, because of the presumption that the parties contracted in reliance upon those decisions; *Sykes* v. *Citizens' National Bank,* 98 Pac. (Kan.), 206. This reasoning will only apply, however, where a contract is involved. In *Ry. Co.* v. *Weaver,* 35 Kan. 412, an action for damages done in Arkansas was brought in Kansas, and the principle of fellow-servants became the crux of the argument. The Court stated that they would have followed Arkansas decisions if they had been put in evidence, but that in their absence, the common law of Arkansas would be presumed the same as that of Kansas. The ground for this view, when no contract is involved, is the anxiety of the Court to keep suitors from crossing the line in order to pursue what would in their own states be invalid claims. The position of the Supreme Court of Kansas represents that taken by most of our jurisdictions, including Pennsylvania. In New York, on the other hand, there exists a totally different viewpoint. The Court argues that the general body of the common law is the same everywhere; that the decisions of a Court are not statements, but merely evidence, of what the law is, and that in consequence no Court can be bound by decisions rendered in another jurisdiction; *St. Nicholas Bank* v. *State Bank,* 128 N. Y. 26. It is interesting to note that the United States Courts once inclined to this view. The case of *Muhlker* v. *R. R. Co.,* 197 U. S. 544, however, rejects the theory which prevails in New York that a decision is only evidence of the law, and seems to place the United States Courts in line with the great weight of authority, as represented by *Sykes* v. *Bank.*

EVIDENCE (Continued).

Res Gestæ Exception to the Hearsay Rule: Statements of a Bystander

In an action for damages for the death of a street car passenger, permitted to alight at a dangerous place while intoxicated, the plaintiff introduced as evidence the exclamation of a fellow passenger, as deceased was leaving the car, that "it looked like murder" to let the deceased off at that place.

Held, that the evidence is inadmissible. "Assuming, without deciding that exclamations of a mere bystander are admissible, yet such exclamations must relate to matters of fact which the party might properly testify to if called as a witness, and not to mere matters of opinion." *Sullivan* v. *Seattle Electric Co.,* 97 Pac. 1109.

This case leads us to inquire into the exact nature of the *res gestae* exception to the hearsay rule, the underlying principle of which seems to be that statements admissible under it have a guarantee of trustworthiness in that they are the outburst of honest belief in a moment of intense excitement. In order for an exclamation to be admitted under this exception it is necessary (1) that there be a startling occasion; (2) that the statement be made before there is time to fabricate; (3) that it relate to the circumstances of the occurrence, and (4) that declarant have an opportunity to observe personally the matter of which he speaks. If the evidence sought to be introduced fulfils these requisites it is immaterial whether the words were spoken by a party to the transaction or by a mere bystander. Wigmore, Evidence, §§ 1750-1751. Some courts have however misapplied the "verbal act" doctrine to cases within the *res gestae* exception, and have held that the statements of a bystander are not admissible because not made by a party to the transaction. Thus in *Butler* v. *Metropolitan Ry. Co.,* 143 N. Y. 417 (1894), it was said, "If the declarations of a third party are not in their nature a part of the fact they are not admissible, however closely related in point of time." The same mistake seems to have been made in the following cases: *Reg.* v. *Gibson,* L. R. 18 Q. B. D. 537 (1887); *Flynn* v. *State,* 43 Ark. 289, 293 (1884); *Bradshaw* v. *Comm.,* 10 Bush. 576 (1874); and *State* v. *Bellard,* 50 La. An. 594 (1898). However the suggestion of the Court in the case under discussion, that such utterances may often be excluded as mere expressions of opinion, will explain many of the cases where such exclamations have not been admitted, for the *res gestae* exception does not of course, make exclamations of a bystander admissible unless they "relate to matters of fact which the party might properly testify to if called as a witness."

JUDGMENTS.

In *United States Fidelity and Guaranty Company* v. *Haggart,* 163 Fed. 801, the Court held a judgment which had been obtained in an action against a surety company, conclusive evidence of the default of one of the principals where the surety company sued for recovery.

Principal and Surety

(For a full discussion see note, p. 320 of this issue.)

NEGOTIABLE INSTRUMENTS.

A stockholder of a corporation with other stockholders indorsed a note of the corporation, given to raise money for it, and for the indorsers' benefit, before delivery, understanding at the time that the note bound all the indorsing stockholders equally. *Held*: Under the decisions before the Negotiable Instruments Act an indorser before delivery was liable as a co-maker, and therefore not entitled to demand, or notice of non-payment. The effect of the Act is to render such a party *prima facie* liable only as indorser, in the absence of appropriate words binding him in some other capacity. But the real contract between the parties can be shown now as fully as before the Act, and it is not necessary as between the immediate parties, that the indorsement should be accompanied with appropriate words in writing, showing an intention to be bound in some other capacity. The evidence shows that the indorser here was a co-maker, and he was therefore not entitled to notice of dishonor. *Mercantile Bank* v. *Busby,* 113 S. W. 390.

Negotiable Instruments Act: Liability of an Anomalous Indorser

This interpretation of the act is in accordance with that in other states. *Kohn* v. *Consolidated Co.,* 89 N. Y. Supp. 658; *Rockfield* v. *Bank,* 8 O. C. C. U. S. 290; *Quimby* v. *Varnum,* 190 Mass. 211.

Defendant indorsed a non-negotiable note which had been made by an agent of the defendant, presumably as the individual note of the agent, payable to the plaintiff. Upon the maker's failure to pay, the plaintiff brings this action. *Held,* defendant became a guarantor, and was *prima facie* bound to pay the note on the principal's default, without demand or notice. *Tilden* v. *Goldy Machine Co.,* 98 Pac. 39 (Cal.).

Guarantor of Non-negotiable Note

NEGOTIABLE INSTRUMENTS (Continued).

As to the liability as guarantor, the Court had a direct authority in the case of *Bank* v. *Babcock*, 94 Cal. 96, which held that one who writes his name on the back of a non-negotiable promissory note to give it credit, is a guarantor and liable on default of the principal. This case is also authority for the Court's position that demand or notice is not necessary in the case of absolute guaranty, a doctrine which is now considered to be well settled. 14 Am. & Eng. Ency., p. 1149. A question which would undoubtedly give difficulty in some states, is whether or not there was a sufficient memorandum to take the case out of the Statute of Frauds. The point gave no trouble to the Court in the case under discussion, however, inasmuch as the Civil Code of California expressly provides in section 2793, that the writing need not express a consideration in transfers of this kind.

SALES.

In a recent case certain standing timber was sold and no time was fixed for the felling and removing thereof. *Held,* that the sale must be treated as passing an equitable interest in the real estate.

When Sales of Standing Timber Pass an Interest in Land

McCoy v. *Fraley*, 113 S. W. 444.

This case raises again the much mooted question as to when sales of standing timber involve an "interest in or concerning land." While it is impossible to reconcile the decisions on this question the general broad rule seems to be that laid down by Lord Coleridge, in the leading case of *Marshall* v. *Green*, L. R. 1 C. P. D. 35, "that where, at the time of the contract, it is contemplated by the parties that the purchaser should derive benefit from the land then there is a contract within the fourth section [of the Statute of Frauds]; but if the thing purchased is to be immediately withdrawn from the land, then the parties having had no intention of dealing with any interest in or concerning land, the contract does not fall within that section." Under this rule the determining factor is the stipulation of the contract as to the time of felling the timber. Thus in *Green* v. *Armstrong*, 1 Denio, 550, where the trees were to be cut and removed "at any time within twenty years," and in *Pattison's Appeal*, 61 Pa. 294, where the time of felling was at the discretion of the buyer, the contracts were held to involve an

SALES (Continued).

interest in the real estate. On the other hand where the trees are to be cut immediately or within a reasonable time it is held that there is no sale of any interest in the land. *Marshall* v. *Green,* L. R. 1 C. P. D. 35; *Erskine* v. *Plummer,* 7 Greenl. 447.

See also 8 Harv. Law Rev. 367.

If the case under discussion is to be reconciled with this view it must be upon the ground that where nothing is said as to the time when the timber shall be taken off, the presumption is that it is at the discretion of the buyer and therefore the contract concerns an interest in land. It would however seem better to hold that the presumption in such a case is that the trees must be felled within a reasonable time and that therefore there is no sale of any interest in land, especially since there is much to be said for the view that the Statute of Frauds was never meant to apply to such a matter as this at all.

Substantial Compliance

Defendant ordered a sign composed of electric lights, which was to contain a specified number of bulbs, etc., and the plaintiff was not to construct any other like it in that town. The sign in fact contained fewer bulbs than contracted for and defendant refused to accept it. Plaintiff argued that there had been substantial compliance. *Held,* if the parties specifically stipulated 296 lights, the courts would have no power to set aside such stipulation, even though a less number of lights might be more desirable, either from standpoint of beauty or utility. *Ellison Co.* v. *Langever,* 113 S. W. R. 178 (Tex.).

The doctrine of substantial performance can never be applied in the teeth of an express term of the contract as above. Even in those jurisdictions which follow the English view as expressed in *Chandler* v. *Lopus,* 2 Cro. Jac. 2, it is acknowledged that in an executory sale the description may be treated as a condition. *Wolcott* v. *Mount,* 36 N. J. L. 262. This seems to be the correct view to take of the transaction, namely, that correspondence to description is a condition precedent, and not a warranty at all, strictly speaking. Mechem on Sales, pp. 1210. And the slightest deviation from the specifications, even though beneficial to the vendee, has been held to give the purchaser a right to refuse acceptance. *Marble Co.* v. *Dryden,* 90 Iowa, 37.

SALES (Continued).

Delivery to Carrier: Insurance

A certain man bought goods from a firm, through its travelling agent or drummer. Among other directions, he insisted on the insuring of the matter of sale; but through some oversight on the part of the agent, this stipulation was never reported to his principal, and the goods were sent uninsured and lost at sea. In the trial for the recovery of the purchase price of the goods by the vendor the judge held as a matter of law that these facts amounted to no defence, and directed a verdict for the plaintiff. The Court of Appeals reversed his decision on the question, and finding that the agent had full authority to transmit the directions, gave judgment for the defendant, on the ground that the goods having been shipped in a different manner from that ordered, property in those goods did not pass, and consequently the loss was in the vendor. *McDonald* v. *Pearre Bros. & Co.*, 62 S. E. 830.

There is no question as to the propriety of this decision. It is undoubtedly true as a general rule that when goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties, or directed by the purchaser, or when no agreement is made or direction given, to be transported in the usual manner, or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected—the goods, when delivered to the carrier, are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage *in transitu*. *Whiting* v. *Farrand*, 1 Conn. 60; *Quimby* v. *Carr*, 7 Allen, 417; *Finn* v. *Clark*, 10 Allen, 479; *Downer* v. *Thompson*, 2 Hill (N. Y.) 137; *Wigton* v. *Bowley*, 130 Mass. 252. But in order to convert the carrier into the agent of the consignee, the goods must be delivered to the carrier in the manner specified by the consignee. 1 Mechem on Sales, 746, *et seq.* If there is a material variation as to route, time, place, or manner of delivery to the carrier, the consignee is not bound thereby, and the carrier is the agent of the consignor. *Corning* v. *Colt*, 5 Wend. (N. Y.) 253. Here the goods were contracted for under the express condition that insurance should be placed on them, and the plaintiff in disregarding those orders through his agent, exercised a right of ownership inconsistent with any subsequent demand for the purchase price. *Wheelhouse* v. *Parr*, 141 Mass. 593.

SALES (Continued).

Under these circumstances, the loss should in all reason fall on the vendor, unless he can recover over from the carrier. *Wheelhouse* v. *Parr,* 141 Mass. 593; *N. Y. Tartar Co.* v. *French,* 154 Pa. St. 273.

Warranty of Quality

Defendant contracted to buy from plaintiff wood of a certain quality, agreeing to take it on plaintiff's measurement and inspection. When the wood was delivered to defendant, he found it was not of the quality ordered. In an action for the purchase price, it was held that defendant must accept the wood, but might show by way of set-off, damages for breach of contract by vendor; *Wiburg* v. *Walling,* 113 S. W. (Ky.) 832. To arrive at this conclusion, the Court must have construed the contract in one of two ways: (1) As containing a warranty of quality. But this seems impossible, because the quality of the wood was the main provision of the contract, and not collateral to it. (2) Or, the Court may have thought that the contract contained a condition that the wood should be of a certain general quality, with a warranty that it should be of a particular quality, included within those general bounds. But there is a difficulty in the latter interpretation. The provision for inspection by the vendor certainly waives the rights of the vendee, provided the wood be of the general quality ordered; and of this quality it would necessarily be, in the absence of fraud or mistake on the part of the vendor. If there were such fraud or mistake, the vendee could refuse to take the wood at all. No middle course is apparent; yet the Court have taken what, it must be admitted, is a curious one. The vendee is obliged to take the wood, because it is of the general quality which he ordered; and though the vendor has confined his choice within those general bounds especially allowed him by the contract, he is still liable for his variation from the strict standard set by the vendee.

SURETYSHIP.

Discharge of Surety

In an action against a surety on a promissory note, it was shown that, upon maturity of the note, the principal, without the surety's knowledge, gave his creditor a new note and paid interest on it in advance. It was held that the payment of interest in advance was sufficient consideration for the renewal of the original note,

SURETYSHIP (Continued).

and that such renewal discharged the surety. *Morehead* v. *Citizens Deposit Bank,* 113 S. W. (Ky.) 501. To discharge the surety by an extension of time to the principal, the contract to extend the time must be a binding one, founded on good consideration. The payment of interest in advance is in almost all jurisdictions a consideration upon which a promise to extend time may be supported; and therefore, when there is (1) such a payment, coupled with (2) the taking of new notes or with (3) an express promise to extend time, the surety is discharged. But where only the first of these three elements is present, the authorities conflict as to whether or no the surety is discharged. Of course, there is no discharge when the creditor has made a mere naked promise to extend time; and it is equally plain that there must be a discharge where the creditor has taken new notes in payment of the old note. But where no express promise to extend time appears and no new note is given, it becomes a question how far payment of interest in advance may be evidence of such a contract to pay. Holmes, J., in *Haydensville Bank* v. *Parsons,* 138 Mass. 53, held that it was no evidence at all, and though in that case the creditor, upon receiving the advance interest, had said to the principal, "We'll let the note lay along, if you pay interest as you have been doing," yet there was not thought to be enough evidence of a contract for extension of time to be submitted to a jury. Another view of the question admits the payment of interest in advance as *prima facie* evidence of a contract to extend time, which becomes conclusive, upon lack of rebutting evidence; *Hollingsworth* v. *Tomlinson,* 108 N. C. 245. The latter view is the more widely followed, and seems supported by the sounder reasoning; for it is difficult to conceive that payment of interest in advance can point to anything but to a contract to extend the time.

Change of Personnel of Principal

In the case of *Lamm* v. *Colcord,* 98 Pacific, 355, the Supreme Court of Oklahoma held that a guaranty given for A. B. cannot be held to extend to the A. B. Company unless positive evidence is given that they are one and the same person.

(For a full discussion see note, p. 327 of this issue.)

TRUSTS.

Spendthrift Trust: Agreement Between Trustee and Beneficiary to Terminate the Trust

In the course of an opinion, deciding that the will in question did not create a trust, the Court said, "This Court has given some recognition to the doctrine of spendthrift trusts in *Olsen* v. *Youngerman,* 113 N. W. 538, where it is held that the trustee and beneficiaries cannot by mutual agreement terminate such a trust, and defeat the purpose of the donor to give to the beneficiary a support which shall be free from the claims of creditors." *Merchants Bank* v. *Crist,* 118 N. W. 394.

It is submitted that the case cited in the opinion does not stand for the proposition indicated. Nevertheless it would appear to be sound on principle. Most jurisdictions which recognize spendthrift trusts do so on the ground that, in order to effectuate the intention of the donor, Equity has the inherent power to modify an estate of its own creation. *Lampert* v. *Haydel,* 96 Mo. 439. Other jurisdictions give the reason that a testator who gives without any pecuniary return, may attach to the gift the incident of continued use. *Nichols* v. *Eaton,* 91 U. S. 716. Under each of these theories the above dictum can be sustained, for although their reasoning is different, they arrive at the same rule, and have the same object in view in applying it, viz., to carry out the will of the donor, which would be defeated if the beneficiary and trustee could terminate the trust by agreement.

WATERS AND WATER COURSES.

Surface Waters: Drainage as Between Adjoining Landowners

Parties owned adjoining lots on a paved city street. By defendant's improvements, the surface water, that formerly spread over both lots, was caused to run over plaintiff's. *Held*: The owner of a city lot has an unqualified right to shut out the surface flow from his lot, in the course of the non-negligent improvement thereof, with two exceptions. First, he may not obstruct a natural channel or one that is an easement for the flow of water; second, he may not gather surface water into a body and discharge it upon the adjoining land. He is under no obligation to prevent it from flowing over the adjacent land, or to lead it by artificial means to a sewer or other avenue of escape. *Reilly* v. *Stephenson,* 222 Pa. 252.

WATERS AND WATER COURSES (Continued).

The doctrine prevalent in Pennsylvania with respect to surface water is the Civil Law rule. According to that, upper premises have a qualified easement over lower ones, which gives the right to discharge all surface water that would naturally flow from one to the other. *Kauffman* v. *Griesemer,* 26 Pa. 407. But at an early date an exception was established to this rule by the case of *Bentz* v. *Armstrong,* 8 W. & S. 40, which decided that in the case of city lots, no such easement existed as that allowed by the Civil Law rule, and that any city lot owner could, in the course of improvements, shut out the surface drainage from adjoining premises at will, providing that he disposed of the surface water that collected on his own premises, by conducting it to a sewer or the like. This proviso, was in fact mere *dictum,* and has now been overruled by the case under discussion, which makes the Pennsylvania rule with regard to surface water on city lots, practically identical with the Common Law rule in force in Massachusetts, to the effect that the owner of land is not responsible for the effect of any legitimate act of dominion over his property, affecting the drainage of surface water to or from it. *Gannon* v. *Hargadon,* 10 Allen, 106.