RECENT CASES

BILLS AND NOTES.

A executed notes to B, a corporation, in return for the exclusive privilege, within a certain territory, of vending a popular unpatented article. B, through its president, indorsed the notes to C, the plaintiff in the present suit, in payment of a personal obligation due from the president to C. There was no direct evidence that C knew the nature of the consideration given for the notes in suit, but there was much circumstantial evidence tending to show that he had considerable knowledge of the business in which the original payees of the notes were engaged, and of the circumstances under which these notes were given. The question as to whether C was a holder in due course was submitted to the jury, but only with this rigid instruction: that if the plaintiff had notice of facts which would lead a prudent man to investigate, and he neglected to do so, he could not be a purchaser in good faith. (*Kipp* v. *Smith,* 118 N. W. 848.)

Notice: Gross Negligence: Bad Faith

This instruction was reversed by the Supreme Court, or at least modified into the ruling that gross negligence, while evidence from which bad faith might be inferred, did not in itself constitute bad faith as a matter of law, thus following the line of common-law decisions on the subject, as laid down first in *Lawson* v. *Weston* (4 Sep. 56), and after a good deal of argument, settled finally in *Goodman* v. *Harvey,* 4 Ad. & El. 870). In the absence of special statutes, gross negligence was not in itself sufficient to deprive a holder of the right to recover, and while possible evidence of bad faith, was not the same thing. (Daniel: Negot. Insts. Secs. 5774-5.)

The present case was decided under the Negotiable Instruments Act, adopted in Wisconsin in 1906 (Sanborn's St. Supp., 1906, 1676-26). One of its sections provides that "To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

The interpretation of the statute in the case in hand seems

BILLS AND NOTES (Continued).

satisfactory from the view points both of history and convenience. The Law Merchant governing bills and notes was dictated largely by business convenience, and the common-law idea of what notice was, was settled only after considerable change and continual harping on what was considered a "logical" point of view; and was settled in the only way to secure a free interchange of these securities. The idea of the Negotiable Instruments Act was not to change the law, but merely to codify it and make it uniform, and hence it would seem that the decisions under it should follow the common law under the particular heading. A statute similar to the one in hand has been interpreted in a precisely similar way in Massachusetts (*Mass. Bank* v. *Snow,* 72 N. E. 959); and the rule is a good one, since it relieves notes of the clog otherwise put on their negotiability, and presents the clear and intelligible question of good faith for consideration by the jury, whereas to leave it to a jury to determine as to the degrèe of caution which a prudent man should exercise, would lead to great perplexity and frequent injustice.

CONSTITUTIONAL LAW.

Power of Interstate Commerce Commission

That the Interstate Commerce Commission has no power to make general investigations, on its own motion, of all the acts and incidents of interstate commerce, and that Congress could not constitutionally delegate to it such power, is decided in *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407.

(For a full discussion see note, p. 399 of this issue.)

CONTRACTS.

Entire Contract: Part Performance

Under an agreement to thresh all defendant's grain at so much per bushel, plaintiffs threshed part of it, and then refused to thresh the remainder, and now sue on a *quantum meruit. Held,* where there has been an intentional failure to complete the contract, or a departure so substantial as to be incapable of a remedy, there can be no partial recovery.—*Johnson* v. *Fehsefeldt,* 118 N. W. R. 797. (Minn.)

While the doctrine here announced is supported by the

CONTRACTS (Continued).

weight of Minnesota authority (See: *Kriger* v. *Lippel,* 42 Minn. 6) and has in that state been extended even to the case of building contracts, where the variations are too substantial for the owner to be compensated in damages, as in *Hoglund* v. *Sortedahl,* 101 Minn. 359, yet the rule is by no means universal. In the case of *Jordan* v. *Fitz,* 63 N. H. 227, the facts were almost identical with those of the principal case, and the Court allowed a recovery on a *quantum meruit;* and again in *McMillan* v. *Malloy,* in 4 N. W. R. 1004 (Iowa) the facts were identical, even to the contract being for the threshing of grain, and the plaintiff was allowed to recover the amount agreed on by the contract, less the damage sustained by the defendant. The law in Pennsylvania, on the other hand, supports the view of the principal case, and allows no recovery for partial performance where the abandonment was wilful: *Gillespie Tool Co.* v. *Wilson,* 123 Pa. 19, and this was the old common law rule. The conflict appears to have been caused by the different standpoints from which the courts view such actions. Some consider that allowing a partial recovery encourages breaches, while the other authorities consider it only equitable for a man to pay for what he has received, and cannot return.

New Promises to Perform and Existing Liability

The Court of Appeals of New York, in the case of *Weed* v. *Spears,* 86 N. E. 10, refused to allow a surety to collect from his co-surety the amount of a note paid by him which, according to the terms of an agreement formed by the sureties among themselves, was to have been paid by the defendant.

(For a full discussion of the principle involved, see note, p. 404 of this issue.)

Time No Essence of Contract

In *Zemfel* v. *Hughes et al.,* 85 N. E. 641, the Supreme Court of Illinois decided that, where the vendor prevents the performance within the stipulated by the vendee, he cannot take advantage of the provision as to performance within a certain time, in order to rescind the contract.

(For a full discussion see note, p. 408 of this issue.)

CORPORATIONS.

Unpaid Subscriptions: Right of Set Off

A corporation borrowed money from its stockholders several times, and as an additional incentive to the loan, advanced shares of new stock to the par value of one-half the money advanced to the corporation, though notes had already been issued to cover the amount. Shortly afterward the aggregation stopped doing business, and a creditor of the concern sued the stockholders for the amount due from them to the company on account of their unpaid shares. The defendants were allowed to set off, in the action, the amount owed them by the corporation on the notes issued to secure the loan. (*Austin Powder Co.* v. *Commercial Lead Co.,* 114 S. W. 67.) The obligations mentioned accrued on account of the advancements made while the company was still a going, but embarrassed concern, and it was not contended that the obligations of the company to the individual stockholders were tainted by fraud or bad faith.

The American courts have held uniformly that the capital stock of a corporation and its other property are to be deemed a trust fund for the payment of debts of the corporation, so that the creditors have a lien upon, or right of priority of payment out of it, in preference to any of the shareholders of the corporation. (*Sawyer* v. *Hoag,* 17 Wall. 6, o.) This trust fund includes unpaid subscriptions for shares. (*Washburn* v. *Green,* 133 U. S. 30; *Sawyer* v. *Hoag, supra.*)

Many jurisdictions have refused the stockholder, in a suit against him by the creditor of the corporation on his unpaid subscription, the right to set off a debt due him from the corporation. (*In re* Empire City Bank 8 Abb. Prac. 192.) But the Missouri courts have consistently allowed this practice, beginning with the case of *Webber* v. *Leighton,* 8 Mo. App. 502 and followed up by *Coquard* v. *Prendergast* (35 Mo. App. 148) and *Jerman* v. *Benton* (79 Mo. 148).

The reason given for allowing the set off is this: If a defunct corporation is indebted to a holder of unpaid shares, the latter should enjoy the same facilities for obtaining satisfaction of his debt that any other creditor has, and is not to be discriminated against by permitting a judgment creditor to collect his demand in full out of the shareholder's liability on his shares. The two kinds of creditors are thus put on an equal footing as regards obtaining priority of satisfaction out of the assets of the company, and their success made to depend upon their comparative diligence. As the holder of unpaid shares cannot proceed against himself for satisfaction of his

CORPORATIONS (Continued).

claim, his liability is an asset of the company which is not accessible to him by statutory remedy; and hence his equality with other creditors ought to be protected, as regards said asset, by allowing him to set off any debt the company owes him, if another creditor seeks satisfaction from him.

CRIMES.

False Pretense: Indictment: To Whom the Money Obtained Must Belong

Upon an information for obtaining money by false pretenses, from one Mayer, it was proved that the money obtained from Mayer belonged to one Freedman, of whom Mayer was the agent. *Held:* Ownership is a material averment in an indictment for false pretense and must be proved as laid. The crime, if any was proven, was not the crime charged. *Martins* v. *State,* 98 Pac. (Wy.) 709.

The wording of the Wyoming statute is, "obtain from any other person any money &c., with intent to cheat or defraud any such person of the same." There is no express provision that the party from whom the property is obtained must, in fact, be defrauded. However, statutes of this kind have universally been construed as requiring that element to constitute the crime of false pretense (*Owens* v. *State,* 83 Wis. 496; *People* v. *Behee,* 90 Mich. 353; *Jacobs* v. *State,* 31 Neb. 33), and that is the effect of the above decision; for, if the property obtained did not belong to Mayer, he was not defrauded. In other words, since the prosecution failed to prove the ownership alleged, they failed to prove the crime as alleged under the statute.

That being the case the question immediately arises, was the prisoner guilty of any crime. He could certainly not be convicted of obtaining money by false pretenses from Freedman, as the false pretenses were not made to him. Could he be convicted under an indictment for obtaining by false pretenses from Mayer, money, the property of Freedman, with intent to defraud Freedman? The wording of the statute, requiring that the intent be against the person from whom the property is obtained, would seem not to include such a state of facts. But it is said in Bishop on Criminal Law (Vol. 2, § 473), in speaking of the intent, pretense and fraud necessary to constitute false pretense, "there seems to be no necessity, that, as a universal rule they (*i. e.,* the above elements), should operate severally against the same person." *Commonwealth*

CRIMES (Continued).

v. *Call,* 38 Mass. 515, is sighted in support of this statement, and amply bears it out. However, the wording of the Massachusetts statute does not seem to require that the intent and the fraud be against the person from whom the money is obtained.

Criminal Libel: Province of Court and Jury

In the case of *Michael* v. *Bacon,* 63 S. E. 228, the plaintiff was an employe of the defendant and had the following statement published in a newspaper: "Mr. Bacon was about to appoint McC. Hill superintendent of his factory when we, claiming that Hill was a scab, struck. Whereupon Bacon stated that he would under no circumstances appoint Hill and so we went back to work. Later, Bacon posted a bulletin stating that Hill had been appointed and each of us as we read it quietly quit work, because as Mr. Bacon had not lived up to his promise, we could not see our way clear to work under a scab."

The Court *held,* that the question whether the words were criminally libellous was one of fact for the jury and that a jury might reasonably find in this case that the publication in substance charged that the defendant was a liar and might find that to accuse a man of lying to his employes was imputing dishonesty to him.

The provinces of judge and jury in cases of libel have been very clearly defined in the case of *Commonwealth* v. *Wolfinger,* 7 Kulp. 537, where it was *held,* that it it is for the judge to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to determine whether such meaning is truly ascribed to it. In our principal case the Court was correct in holding that it was for the jury to decide whether words are libellous, but no court seems to have gone so far as to hold that the words above, which merely charge a man with breaking an agreement or promise, *could* be so construed as to be criminally libellous.

EQUITY.

Bill to Compel Transfer of Stock

Defendant indorsed a corporation certificate of indebtedness in blank, and delivered it to his broker to sell. The broker tortiously pledged it with the plaintiff as security for an antecedent debt, and the plaintiff later accepted it in part payment of the debt. Plaintiff now brings his bill to compel a transfer on the books of the

EQUITY (Continued).

company, and to enjoin the defendant from claiming the certificate. *Held,* the title passed by delivery of the certificate with power of attorney indorsed in blank, even though the by-laws of the company provided to the contrary; and the defendant was estopped from claiming that his broker was not an assignee for value.—*McCarthy* v. *Crawford,* 86 N. E. R. 750 (Ill.).

There are two distinct theories on each of which the decision of the Court can be sustained. The Court, however, has confused both theories, while incorporating both in its conclusions. In the first place, if it be determined that a good legal title is passed by a blank indorsement without transfer on the company's books, then the plaintiff in this case gains title from the fact that he was a purchaser for value without notice from a trustee of the legal title, and this rule is well settled: *Pilcher* v. *Rawlins,* L. R. 7 Ch. App. 259. In this connection, however, there has been some doubt as to whether indorsement without transfer does pass a valid title. (*Weale* v. *Ollive,* 17 Beav. 252.) On the other hand, the decision may rest on the theory that the defendant, by clothing his trustee with the indicia of title, is estopped from denying the plaintiff's title, who has purchased for value. This theory is sparingly applied, and does not extend to cases of mere bailments of choses in action, *Midland Co.* v. *Hitchcock,* 37 N. J. Eq. 549; yet in England has been applied to the deposit of title deeds; See: *Lloyd's Banking Co.* v. *Jones,* 29 Ch. Div. 221. Under the estoppel doctrine, however, it must be noted that value is essential, *i. e.,* the purchaser must have altered his position as a result of the deceit; so that if the plaintiff in the case at bar had continued to hold the certificate merely as collateral for the antecendent debt, he could not have invoked the doctrine of estoppel. But since he accepted the certificate in part payment of the debt, thereby releasing so much of the debt, and before notice, his position was altered. The two theories are quite distinct, but as each would here lead to the same conclusion, it is unnecessary to determine whether or not the Court was correct in holding that the broker obtained the legal title; though probably the weight of authority is in accord with the Court's view: *Kiddell* v. *Farrell* 3 Sm. & G. 428.

EQUITY (Continued).

Injunction: "Balance of Injury" Doctrine

Where an injunction, if granted, would injure a great industry and a large community, and benefit only the plaintiff, it should be refused: *McCarthy* v. *Bunker Hill and Sullivan Mining Co.*, 164 Fed. 927.

(For a full dicussion see note, p. 396 of this issue.)

EQUITY PLEADING.

Injunction Against a Municipality: Persons Bound

Complainant, a gas company, brought a bill against a city and its officers, to enjoin the enforcement of an ordinance, fixing the price to be charged for gas, and alleged to be unconstitutional. A temporary decree issued including all the customers of the complainant, although not parties to the record. *San Francisco Gas Co.* v. *San Francisco,* 164 Fed. 884.

The general rule in Courts of Equity is, that all persons materially interested in the subject matter of a suit must be made parties. Story, Eq. Pl. 10th ed. § 172. There are two reasons for this rule; first, the prevention of a multiplicity of suits, and second, the accomplishment of justice, by avoiding making a decree, affecting the rights of any persons who have not had an opportunity to be heard. *Hallet* v. *Hallet,* 2 Paige R. (N. Y.) 15. This rule, however, is not enforced in cases where it would defeat its own end. So we find three well defined exceptions to it, where the parties are too numerous to allow of being joined. These are (1), where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole. (2) Where the parties form a voluntary association, and those who sue or defend many fairly be presumed to represent the rights or interests of the whole. (3) Where the parties are very numerous, and although they have separate interests, yet it is impracticable to bring them all before the Court. In this last case there is usually a privity of interest between the parties, although that is not strictly necessary under the decisions. The principal case comes within the last-named exception and is typical of a large class of similar cases in which the constitutionality of gas or water ordinances is questioned. *Smith* v. *Swormstedt,* 16 How. 303; *Gas & Light Co.* v. *Memphis,* 72 Fed. 952. The rights of the consumers, while separate, are analagous and can fairly be represented by the City, the largest consumer. Then a decree embracing them will prevent

EQUITY PLEADING (Continued).

a multiplicity of suits against the complainant, while the constitutionality of the ordinance is being determined.

This practice of allowing a municipality to represent its citens and tax-payers is further justified by the view, expressed in Freeman on Judgments, § 178, that the position of a municipality towards its citizens is, upon principle, analagous to that of a trustee towards his *cestuis qui trustent.*

EVIDENCE.

Definition of Reasonable Doubt

The jurist is yet to be found who can give an adequate definition of reasonable doubt—a definition that shall be concise and accurate, and yet at the same time sufficiently comprehensive to enlighten properly the not over-ready minds of the "peers" who try us. The District Judge of a court in Oklahoma recently attempted the matter, but with rather unfortunate results. "The term reasonable doubt," he charged the jury, "means a doubt which has some good reason for it, arising out of the evidence in the cause; such a doubt as you are able to find in the evidence or lack of evidence, a reason for." This was held a reversible error by the appellate body. (*Price* v. *State,* 98 Pac. 447.)

The definition just quoted was certainly such as to be prejudicial to a defendant, but those quoted by the leading text-writers seem equally unfortunate for presentation to a jury because of their circumlocution in an effort to be exact. Best in his Criminal Evidence, Par. 195 defines the matter thus: "Guilt must be essentially connected with facts proved so as to flow from them by a species of moral necessity. In other words, conviction must not be founded on suspicion, or even a preponderance of evidence, on the side of delinquency to the accused, but must be based on such a moral certainty of his guilt, as, if not sufficient to destroy all contrary hypotheses, shall at least reduce them within the limits of physical possibility;" and then recognizing the futility of it all he adds—"the nature of this certainty is, however, more easily conceived than defined," so that he has to resort to something outside his elaborate definition after all, and is back at his starting-point.

Perhaps the least unsatisfactory statement of the case is the famous one by Shaw, C. J., in *Com.* v. *Webster* (5 Cush. 295): "The term (reasonable doubt) is often used, but not easily defined. It is not a mere possible doubt; because every-

EVIDENCE (Continued).

thing relating to human affairs depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. It is not sufficient to establish a probability, though a strong probability arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the facts to a reasonable moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

This is exceedingly minute, but will not bear too close an examination, since "reasonable moral certainty" is about as obscure to average lay or even legal mind as "reasonable doubt" and a later Massachusetts case tried to amend it by adding that it was such proof as would satisfy the judgment and conscience of a jury that the crime was committed by the defendant, and so satisfy them as to leave no other conclusion possible. (*Com.* v. *Mosler,* 118 Mass. I.)

It can be seen from these few specimens how unsatisfactory they all are. Each text-book writer is forced in the end to resort to illustration. Perhaps the idea is indefinable accurately. At any rate the Judge knew whereof he spoke when he said that the jury derived their impressions from illustrations for the most part, and that such illustrations were necessary where even an accurate definition, if such a thing could be realized, might fail. (*Hopt* v. *Utah,* 121 U. S. 431.)

Allegation of Jurisdictional Facts in Petition: Judicial Notice

In a rather foggy opinion the Supreme Court of Georgia sustained a demurrer to a petition against a railroad company, on the ground of lack of jurisdiction, the suit not having been brought in the county where the defendant company had its principal office. *White* v. *A., B. & A. Ry. Co.,* 63 S. E. (Ga.) 234.

From the report is is not quite clear whether the Court considered, (1) that lack of jurisdiction appeared from the petition, or merely (2) that jurisdiction did not appear from the petition.

(1) If, in fact, lack of jurisdiction appeared from the petition, the demurrer was rightly sustained on that ground. The

EVIDENCE (Continued).

principle is well settled, that, when want of jurisdiction affirmatively appears from a complaint, that defect can be taken advantage of on demurrer. *Johnson* v. *Adams,* 14 Hun. 89.

(2) But if jurisdiction merely did not appear, the Court must have reached its conclusion in one of two ways: either (a) by sustaining a demurrer to a petition which merely did not allege jurisdiction, or (b) by taking judicial notice of the location of the principal office of the defendant company, thereby making lack of jurisdiction affirmatively appear from the petition.

(a) If the Court sustained the demurrer merely on the ground that the petition did not show jurisdiction, the case must be considered as wrongly decided, and against the weight of authority. *Powers* v. *Ames,* 9 Minn. 178.

(b) If the Court took judicial notice of the location of the office of the defendant company, the case must be considered an extension of that doctrine. In *Baker* v. *L. & N. R. R. Co.,* 67 Ky. 619, the Court expressly refused to take judicial notice of a similar fact. Aside from this decision, which is in direct contravention of the principal case, the decisions most nearly in point are the following: *Jackson* v. *State,* 72 Ga. 28, where judicial notice was taken of the name of a corporation chartered by the legislature; *L., N. A. & C. Ry. Co.* v. *McAffee,* 15 Ind. App. 442, where the location of a particular railway station within a county was noticed; and *G., C. & S. F. Ry. Co.* v. *State,* 72 Tex. 404, where judicial notice was taken of the location of a railroad.

Although the corporation in the principal case was chartered by the Secretary of State, under an act of legislature, that fact would not justify the taking judicial notice of the location of its principal office, for that fact was not one determined by the certificate of incorporation, as was the name of the corporation in *Jackson* v. *State* (*supra*). The ground for taking such notice, therefore, can be only that it is part of the fund of common knowledge of the locality, and the situation of a railroad office is certainly a less generally known fact than the location of a railroad station, or of a railroad.

GAMING.

A was arrested charged with a violation of Section 351 of the Penal Code of New York in that he received five dollars as the result of a bet upon a horse race made at a race course. On application for a writ of *habeas corpus, Held,* that the Penal Code does not make it a crime to receive a sum of money as the result of a bet on a horse race made and accepted orally.

Private Betting Not Within the New York Anti Gambling Statute

People v. *McLaughlin,* 113 N. Y. S. 306.

This case is interesting as being the first to construe the Anti-Gambling Statute, the passage of which by the New York Legislature last June caused so much excitement. The decision seems sound as the effect of the new statute is merely (1) to remove the statutory exemption of transactions upon the race track [Laws of 1895, Chap. 570, §§ 17, 18] from the operation of Section 351 of the Penal Code which prohibited all bookmaking, poolselling, etc., "upon the result of any lot, chance, casuality, unknown or contingent event whatsoever," and (2) to reduce the grade of the crime for infringement thereof from a felony to a misdemeanor. The Penal Code has never been construed to prohibit oral bets [*People* v. *Snedeker,* 175 N. Y. 57, 62] and there seems to be no reason why a distinction should be made between oral bets on horse races and other oral bets.

NEGLIGENCE.

The plaintiff was injured by being struck by a locomotive of the defendant company at a grade crossing. The defence was contributory negligence, but the plaintiff claimed that, although he was negligent, the defendants' engineer had the last opportunity to avoid the accident.

Last Clear Chance Doctrine

Held, the doctrine of last clear chance is not limited to cases where the peril of the person injured has been actually discovered by those causing the injury, but extends to cases where the peril could have been discovered by the exercise of reasonable care on their part.

Nichols v. *C. B. & Q. R. Co.,* 98 Pac. 808.

The doctrine of the last clear chance is one of delightful uncertainty. It is repudiated altogether by some courts, by some it is confined to cases where the peril of the plaintiff

NEGLIGENCE (Continued).

was actually discovered [*Wabash R. R.* v. *Jones,* 163 Ill. 167], and by others it is extended, as in the principal case, to cover the situation where the peril of the plaintiff *should* have been discovered. Again it is uncertain whether the doctrine goes to the question of proximity of causation [*Inland & Seaboard Coasting Co.* v. *Tolson,* 139 U. S. 551] or is a distinct limitation of legal liability, though in some ways the latter seems the more satisfactory view. [21 Harv. Law Rev., 233, 238.]

The rule laid down by the Court in the case under discussion is but a paraphrase of the doctrine as stated by Shearman and Redfield in their work on Negligence [5th ed. §§ 99, 483, 484] and is based on the well known case of *Davies* v. *Mann.* [10 M. & W. 546.] If the doctrine is to be accepted at all it seems logical to carry it to the limits laid down by the Court in the principal case, as its fundamental basis, in spite of the language used by some courts [*C., C. C. & St. L. R.* v. *Turtt.* 64 Fed. 823], seems to be the negligence of the defendant in not avoiding the accident; and this may as well consist of a failure to perceive the dangerous situation of the plaintiff as in a failure to avoid injuring him after his peril is perceived.

NEGOTIABLE INSTRUMENTS.

Taking Over Assets and Liabilities Not Value

The Security Savings Bank was incorporated for the purpose of succeeding to the business and assets of the private bank of the same name, previously conducted and managed by one Ellis, who was a stockholder and president of the incorporated bank. The corporation agreed to assume the liability of the private bank in consideration of the transfer of the assets of said private bank to the corporation. Among the assets transferred in pursuance of this agreement was defendant's note. In a suit by the receiver of the incorporated bank on the said note it was held that the note in the hands of the incorporated bank was subject to a contemporaneous parol agreement between defendant and Ellis—the note having been given to Ellis for the price of mining stock sold by Ellis to the defendant—by which the note never became an absolute obligation *in praesenti.* *Paulson* v. *Boyd* (Wis. Sup. Ct.), 1908, 118 N. W. 841.

The Court appears to have been justified in construing the agreement between the corporation and the private bank to

NEGOTIABLE INSTRUMENTS (Continued).

mean that the new bank received the assets charged with the conditions to which they were subject in the hands of the private bank and constituting an express assumption of all defenses to which they were subject in the hands of the former owner. The corporation is more than the mere assignee of the note; it stands, as regards it, in the shoes of the private bank. It has been held where the members of an existing firm formed a partnership with other parties and the new partnership took over all the assets (including some negotiable notes, not yet due) of the original partnership, that the new partnership was not an innocent purchaser for value before maturity of said notes. [*Stephens* v. *Olson* (1895), 62 Minn. 295.]

Collateral Security for Antecedent Debt as Constituting Value

This was a suit by the indorsee of a promissory note against the maker. There was no fraud in the inception of the note, and the holder had no knowledge, actual or constructive, of alleged fraud which induced the payee to indorse it and transfer it to the La Tronteriza Mining Co., and it was received in good faith from said mining company, either as plaintiff contended, in payment of an equivalent amount of the company's indebtedness or, as defendant contended, as collateral security therefor; it was held "that any person to whom a negotiable security has been pledged as collateral would be a holder for value to the extent of the amount due him." The Court decided that Sections 25, 27 of the Negot. Instr. Act changed the rule laid down in *Maynard* v. *Davis* 127 Mich. 571, (1901) *Graham* v. *Smith,* 118 N. W. 726 (Mich. Sup. Ct., 1908).

In accord with the law established in this case see *Payne* v. *Zell,* 98 Va. 294 (1900); *Brooks* v. *Sullivan* 129 N. C. 190, (1901); *Mersick* v. *Alderman, et al.,* 77 Conn. 634 (1905).

The doctrine of the principal case would appear to be supported by parts of the opinion in *Petrie* v. *Miller* 57 App. Div. 17, p. 19 (N. Y. Sup. Ct. (1901); affirmed by Court of Appeals without opinion, 173 N. Y. 596 (1903), and also by *Brewster* v. *Schrader* 26 Misc. (N. Y. Sup. Ct.) 480 (1899). The opinion in *Petrie* v. *Miller,* however, also goes on other grounds. These decisions, so far as they relate to the point decided by the principal case, have not been followed. In *Sutherland* v. *Mead* 80 N. Y. App. Div. (Sup. Ct.), 103, p. 110 (1903); it was held that "merely taking such paper as collateral security for the payment of a pre-existing or antecedent

NEGOTIABLE INSTRUMENTS (Continued).

debt does not constitute such debt value within the meaning of this statute." This case has been followed in Pennsylvania, *Raken* v. *Henry*, 16 Pa. Dist. R. 208; 64 Legal Intelligencer 146.

SALES.

Payment by Instalments on Sale of Chattels

Property was delivered by plaintiff to defendant, with the agreement that defendant should pay the purchase price in instalments, that title should remain in plaintiff till the last instalment was paid, and that plaintiff should have the right to re-take the property upon the failure of any one payment. Defendant failed in the payment of one instalment and the court held that the plaintiff might elect any one of three remedies, (1) replevin; (2) trover; (3) a suit for the purchase price. *Fritsch* v. *Wells*, 86 N. E. (Mass.), 775. The third of these remedies is based upon the theory that plaintiff, in a transaction of this kind, may elect to regard the agreement as one of sale and delivery, *i. e.*, as a complete sale. It is difficult to see how this theory may be supported in the teeth of the express agreement that title shall remain in the vendor till full payment has been made. *Fleury & Co.*, v. *Tufts*, 25 Ill. 105, indicates that, since the provision that title is to remain in the vendor is inserted solely for the vendor's benefit it is his to waive or not as he sees fit. This agreement takes account only of the parties' state of mind at the time of entering into the contract, not at the time of breach, and does not, therefore, seem conclusive. In sales on credit, where title is to remain in the vendor till payment, the vendor's remedy for a failure to pay is to re-take the goods; *Drug Co.* v. *Teasdall*, 52 Neb. 698. These cases differ in only one particular from the ordinary executory contract of sale, viz., the vendee gets possession immediately; but this difference can have no effect upon the question of passage of title. It is submitted that the principal case is really of the same class as *Drug Co.* v. *Teasdall.* Upon breach of the executory contract of sale, the vendor's remedy should be either a re-taking of the goods, an action for damages, or an action for the payment of the particular instalment which has not been paid. Much confusion has arisen in the cases through the various names which have been applied to this transaction—"Conditional Sale", "Bailment", "Practically a Mortgage", etc. But in any event, it is evident that title

SALES (Continued).

has not passed up to the time of the breach; and there seems no particular reason for giving the vendor an opportunity, after breach, to force title upon an unwilling vendee.

Title to Goods Manufactured on Order of Purchaser

Brown & Company sold to the plaintiffs goods to be manufactured by certain mills, for which they were the selling agents. The course of business between Brown & Co. and the plaintiffs was that upon receipt of invoices from the mills for the manufactured goods when shipped, Brown & Co. would send invoices of them to the plaintiffs and assign the right to receive payment to a bank for advances made to Brown & Co., sending it a duplicate invoice. The invoice to the plaintiffs stated that payment was to be made to the assignee. The goods were shipped when finished without waiting for the complete order to be finished. Plaintiffs paid the assignees the amount of the invoices. Brown & Co. sent the load of goods in question under this arrangement to the plaintiffs who stated that they could not store them and requested that they be kept until plaintiffs could receive them. Brown & Co. stored the goods with defendant and subsequently pledged the goods to defendants for advances. Defendant's advances were made before plaintiff paid for the merchandise. Defendant refused to let plaintiffs have the goods unless they repaid said advances. Plaintiffs refused and replevined the goods. *Held*: That whatever title Brown & Co. had, passed to the bank, when Brown & Co. assigned to them the right to receive payment; Brown & Co. holding the goods thereafter as bailees, so that their subsequent pledge of the goods to defendant was ineffectual. Judgment for plaintiffs. *Schwab* v. *Oatman*, 113 N. Y. Suppl. 910.

The Court did not decide whether Brown & Co. acted in the transaction with plaintiffs as the agents of the mills or independently. Neither does it decide whether the title to the merchandise rested in the plaintiffs at the time of their receipt of the invoices, or at the time of their payment to the bankers.

When an article is manufactured, and notice of that fact is given to a party who has ordered it, it becomes the property of the party ordering it, subject to the lien of the manufacturer for the price. [*Higgins* v. *Murray*, 4 Hun. (N. Y.) 565 (1875).] Therefore, regarding Brown & Co., as the agent of the mills, it is clear that no title passed to defendant.

If Brown & Co. is regarded as the vendor and plaintiff as the vendee, the itemized invoice would seem to be a sufficient identification to pass title to plaintiff, if the vendors so in-

SALES (Continued).

tended. Therefore, if this was the intention, the transaction of Brown & Co. with the bank must be regarded as an assignment to the bank of Brown & Co.'s right to receive the purchase price. [*Tollerton & Stetson Co.* v. *Bank,* 112 Iowa, 706 (1901).]

But, if we regard title as not passing to the plaintiff until payment, it follows that regarding Brown & Co. as the vendors, it had not passed out of Brown & Co. at the time of the pledge to defendant, unless it had passed to the bank as security for its advances, as, for instance, where a bill of lading is pledged. [See *Bank of Cincinnati* v. *Kelly,* 57 N. Y. 34 (1874).] But an invoice standing alone is never regarded as evidence of title. [*Sturm* v. *Boker,* 150 U. S. 312, p. 328 (1893).]

Neither is it clear that the bank had a lien on the goods for the collection of the purchase money. There can be no legal lien without possession, except by a mortgage duly filed. [*Taylor* v. *Perkins,* 26 Wend. (N. Y.) 123. See p. 126.] Possession may be actual or constructive. However, a receipted bill of parcels has been held insufficient unless the pledgee retain possession of the goods themselves. [*Shaw* v. *Wilshire,* 65 Me. 485, p. 492 (1876).] It is difficult to see how delivery of an invoice without delivery of the goods or evidence of title is sufficient to create a lien as respects defendant, who is a creditor of Brown & Co.

SPECIFIC PERFORMANCE.

Lack of Mutuality as a Defence

Plaintiff sought an injunction to prevent the violation of a contract of lease. By a term of the contract the plaintiff had the right upon payment of one dollar to surrender the lease for cancellation and avoid all liability. *Held,* a court of equity will not do a vain and useless thing by rendering a decree settling the rights of parties, which one of them may set aside at his will. *Ulrey* v. *Keith,* 86 N. E. R. 696 (Ill.).

The position thus taken by the court was first established by Judge Cooley in the case of *Rust* v. *Conard,* 47 Mich. 449, and in fact has nothing to do with lack of mutuality. The reasoning by which lack of mutuality is held to bar specific recovery in cases where there is an option to terminate, is equally applicable to cases where there is an option to continue, whether mutuality of obligation or mutuality of remedy is taken as the test, and yet options to continue have almost universally been

SPECIFIC PERFORMANCE (Continued).

held not to constitute a bar to specific performance. (See A. L. R., Vol. 49, p. 326.) The decision of Judge Cooley, *supra*, however, brought in a practical, if not theoretical distinction between the two classes of options. It is that in the case of the option to terminate the plaintiff after securing specific performance from the defendant, can at any time render the decree void by exercising his option. This theory was expressly repudiated in Pennsylvania, however, in the case of the *Philadelphia Ball Club* v. *Lajoie*, 202 Pa. 210. Whether the weight of authority will follow the Pennsylvania decision or Judge Cooley's view remains to be seen. It certainly seems unreasonable that a distinction should be drawn between options to continue, and those to terminate, on any other ground, though the earlier case of *Marble Co.* v. *Ripley*, 77 U. S. 339, decided by the Supreme Court of the United States, admits lack of mutuality as a defence in case of an option to terminate.

SURETYSHIP.

Duty of Creditor to Secure Collateral Securities in His Hands

One Scheffer had given to the plaintiff four promissory notes of $900—each and had also as security given plaintiff an insurance policy on his (Scheffer's) life and agreed to pay all the premiums on the same. The defendants guaranteed that the interest upon the promissory notes should be paid until the principal was fully paid. Scheffer paid neither the interest upon the notes nor the life insurance premiums and so the policy lapsed. Scheffer died and the plaintiff sued the guarantors for interest due. The defendants claimed that the plaintiff should have given them notice of the default of Scheffer and should have paid the premiums upon the life insurance policy when Scheffer failed to.

Held, that there was no duty imposed by law upon a creditor to take steps to prevent the depreciation of securities for the debt in his hands. In this case there was no duty expressed in the contract which required the creditor to pay the premiums and the law wouldn't imply one. *Held*, also, that creditor does not have to give notice of debtor's failure to pay. *Merritt* v. *Haas*, 118 N. W. 1023.

This decision seems to be in line with the principal decisions in most of the States. The cases have uniformly held that a creditor cannot do anything that will cause securities in his hands to depreciate, but there is no case

SURETYSHIP (Continued).

which holds that he must take active measures to prevent depreciation, nor is he even obliged to inform the debtor's sureties that the securities are depreciating or that the debtor has defaulted. Upon this latter point see, however, *Mayberry* v. *Bainton & Bancroft*, 2 Harr. (Del.) 24.

TRUSTS.

Implied Trusts and the Statute of Frauds

In *Turpin* v. *Miles*, 71 Atlantic, 440, the Supreme Court of Maryland re-stated the rule that where a conveyance is made to B and the purchase money is paid by C, a trust arises in favor of C.

(For a full discussion, see note, p. 401 of this issue.)

UNFAIR TRADE COMPETITION.

Injunctions Against Unfounded Suits for Alleged Infringements of Patents

B brought suit in Cuba against a purchaser of a patented article manufactured by A for an alleged infringement of his (B's) patent, which had by a former decree of a United States Court in a suit between A and B been declared invalid. A brings bill to enjoin B from bringing suit against his customers in Cuba. *Held*, that after the validity of a patent has been determined by final judgment in a suit for infringement, the defeated party may be restrained by a decree *in personam* from bringing suits against the successful party's customers based on the same patents, either in this or a foreign country. (The Court, however, decided that the suit in Cuba was based, not on the United States patent, but on a Cuban grant, and was, therefore, not barred by a decree as to the validity of the United States patent.) *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co.*, 164 Fed. 869.

The principle that the malicious bringing or threatening of suits against the customers of the patentee of an article for an alleged infringement of a patent known to be invalid, will be restrained as unfair trade competition in the nature of a boycott, was first laid down in the leading case of *Emack* v. *Kane* [34 Fed. 46, 1888], and has been consistently followed. *Kessler* v. *Eldred*, 206 U. S. 285 (1907); *Dittgen* v. *Racine Paper Goods Co.*, 164 Fed. 85 (1908); *Farquhar Co.* v. *National Harrow Co.*, 102 Fed. 714 (1900).

UNFAIR TRADE COMPETITION (Continued).

If the interference is *bona fide,* the validity of the patents being undetermined, it will of course not be restrained. *Kelley* v. *Ypsylanti Dress Stay Mfg. Co.,* 44 Fed. 19 (1890).

These principles of unfair trade competition are so well established as to require no comment.