RECENT CASES

ATTORNEY AND CLIENT.

Attorney's Lien for Costs

In the matter of *Road Rapid Transit Company*, L. R. 1909, 1 Chan. Div. 96, the Chancery decided that a solicitor who holds documents of a company which has discharged him, and who has paid costs in connection with his work upon them, has a valid lien for such costs.

(For a discussion of the entire subject, see note, p. 642 of this issue.)

BILLS AND NOTES.

When a Check Drawn to the Order of a Fictitious Payee Is Payable to Bearer

In an action on a check drawn to the order of a fictitious payee, by a bona fide holder for value, *held*, that where an instrument containing all the other elements of negotiability is knowingly made payable to the order of a fictitious person the instrument becomes negotiable without indorsement and is to be treated as if in terms made payable to bearer. Under the Negotiable Instruments Law, Sec. 9, § 3, the plaintiff must prove that the maker knew of the fiction. *Boles* v. *Harding*, 87 N. E. 481.

The rule at Common Law in most jurisdictions was that a bill drawn to the order of a fictitious payee was equivalent to a bill drawn to the order of bearer when indorsed in the name of such payee. (*Gibson* v. *Menot*, 1 H. Bl. 569; *Hunter* v. *Blodget*, 2 Yeates 480); but it was necessary to show that the defendant, whom it was sought to hold on the bill, was aware of the fiction. (*Bennett* v. *Farnell*, 1 Camp. 130-180 c.) The rule at Common Law in New York, however, was that such a bill was payable to bearer without indorsement. (*Plets* v. *Johnson*, 3 Hill 112; *Irving Nat. Bk.* v. *Alley*, 79 N. Y. 536.) The English Bills of Exchange Act, Sec. 7, § 3, provides that "when the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." Under it knowledge of the fiction on the part of the defendant need not be proved. (*Vagliano Bros.* v. *The Bank of England*, L. R. 16 App. Cases 107.) But whether the necessity of indorsement is dispensed with seems open to question. (Cf. Chalmers Bills of Exchange, 5th ed. 22.) The Negotiable Instruments Law, sec. 9, § 3, on the other hand, practically codifies the New

BILLS AND NOTES (Continued).

York rule, and provides that "the instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." Thus, under it knowledge of the fiction on the part of the defendant is expressly required, while the general Common Law rule that an indorsement is necessary, is abolished. Professor Ames has strongly attacked this subsection of the Negotiable Instruments Law, and technically his criticism seems sound inasmuch as it "permits the transfer without indorsement of an instrument, which, for all that appears on the face of it, requires an indorsement to make a valid transfer." (See Brannan—The Negotiable Instruments Law, 106.)

COMMON CARRIERS.

Warehouse Company Engaged in Business of Moving Household Goods

The defendant, an incorporated company, chartered to do a general warehouse and storage business, did not confine itself strictly to the particular business for which it was chartered, but engaged also in the business of moving household goods. It solicited business of this character by public advertisements in various ways, thereby holding itself out to the public as engaged in the business of moving household goods and inviting employment along this line. None of these advertisements contained a suggestion of limited liability, or that the company would render such service only as it might select its patrons. However, the company did, in fact, claim the right to select those whom it would serve and it had been its custom to discriminate, accepting some and rejecting others, as it chose. In an action to recover damages for the loss of household goods destroyed by fire while being moved in defendant's wagon:

Held, that defendant was a common carrier and liable as such. The Court, p. 154, said: "We express a doctrine universally sanctioned when we say, that anyone who holds himself out to the public as ready to undertake for hire or reward the transportation of goods from place to place, and so invites custom of the public, is in the estimation of the law a common carrier. * * *"

It is not decided whether there is a legal duty attaching as a necessary incident to the relation of common carrier, under any and all circumstances, to treat alike all applying for its services, and to avoid discrimination except upon justifying circumtsances, but the Court decided that even if there is this

COMMON CARRIERS (Continued).

duty, defendant could not escape its liability as a common carrier on the ground that it had persistently disregarded it and arbitrarily chosen whom it would serve.

The Court, p. 154, said: "An unavoidable implication arises that it holds itself in readiness to engage with anyone who might apply. *Lloyd* v. *Hough*, 223 Pa. 148 (1909).

This decision is in accord with the law established by earlier cases. *Verner* v. *Sweitzer*, 32 Pa. 208 (1858). It is, however, interesting upon its peculiar facts.

The law is settled in most of the states in accord with the English view that no one should be treated as a common carrier unless he has in some way held himself out to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for anyone who wished to employ him in the particular kind of service which he thus proposes to undertake. See Hutchinson "Carriers (3rd. ed.), p. 53; *Allen* v. *Sackrider*, 37 N. Y. 341 (1867). But compare the opinion of Gibson, C. J., in *Gordon* v. *Hutchinson*, 1 W. & S. (Pa.) 285 (1841), and also in *Steinman* v. *Wilkins*, 7 W. & S. 466, p. 468 (1844); *Moss* v. *Bettis*, 4 Heisk (Tenn.) 661 (1871).

CONSTITUTIONAL LAW.

Extraterritorial Authority of State Over Corporation

The Supreme Court of the United States, in *Hammond Packing Company* v. *Arkansas*, 29 Supreme Court Reporter, 378, held constitutional a statute of Arkansas prohibiting any individual, corporation, etc., from entering into a pool or combination to regulate or fix prices within or without the State.

(For a full discussion of the principles involved, see note, p. 644 of this issue.)

CONTRACTS.

Accord and Satisfaction

A devised his lands by will to three of his sons, B, C and D, subject to the payment by them of a legacy of $1200 to his youngest son, E; and on the probate of the will a decree was entered, making the legacy a specific lien on the land. B and C paid their shares in full. D paid less than the required amount, but claimed that the sum paid was accepted by E in full satisfaction of the amount due. There was no release under seal, and no varia-

CONTRACTS (Continued).

tion in the mode or time of payment; and the Court held that, under the circumstances, the debt was not discharged (*Wheeley* v. *Rowe*, 119 N. W. 222).

The case follows the common law rule, which has systematically held that payment of a less sum at the time and place where a greater sum, liquidated and undisputed, was due, is not satisfaction (Anson, Contracts, p. 116); this because there is no consideration for forgiving the rest of the debt (*Foakes* v. *Beer*, 54 L. J., Q. B. D. 130), such payment being no more than a man is already bound to do (*Pinnel's Case*, 5 Coke, 117).

The rule is not universally adhered to, however. A comparatively recent case in New Hampshire has allowed payment of a smaller sum to act as a discharge of the debt due (*Frye* v. *Hubbell*, 68 Atl. 325); and Pennsylvania seems to hold that where the circumstances show impending bankruptcy, the usual ruling will not be followed (*Melroy* v. *Kemmerer*, 67 Atl. 669). Furthermore, several jurisdictions have abolished the doctrine of *Foakes* v. *Beer* by statute:

Alabama.—Code (1876), Sec. 2774;
California.—Civil Code (1844), Sec. 1524;
Maine.—Rev. St., Ch. 82, Sec. 45;
North Carolina.—Code, Sec. 574;
North Dakota.—Rev. Code, Sec. 3827;
Oregon.—Hill's Amer. Laws, Sec. 755;
South Dakota.—Comp. Laws, Sec. 3486;
Tennessee.—Code (1884), Sec. 4539;
Virginia.—Code (1897), Sec. 2858;

Mississippi abolished the rule by decisions without statutory aid (*Clayton* v. *Clark*, 74 Miss. 497).

CORPORATIONS.

Forfeiture of Charter by Illegal Pooling

The Supreme Court of Missouri, in *State* v. *Standard Oil Co.*, 116 S. W. 902, held that where a combination was formed which had the power to raise or lower prices at pleasure, this was a violation of the Anti-Trust Act of the State, sufficient to warrant forfeiture of the charter of a corporation becoming a member of the combine.

(For a full report of the decision, see note, p. 648 of this issue.)

CRIMINAL LAW.

In a recent case in New Jersey the facts were that the defendant illegally carried on the business of a private banker. He appropriated a considerable amount of the money deposited and went to Holland. The treaty with Holland allows extradition for larceny, and on question being made as to the legality of the extradition, the Court *held* that, "a man may be found guilty of larceny who obtains property fraudulently, even though the intent of the parties is to pass title, for, upon ordinary principles of law, the fraud prevents the title from passing." *State* v. *Deutsch*, 72 Atl. 5.

Larceny: Intent to Pass Title

The doctrine laid down by the Court in this case would do away with all distinction between larceny and false pretence, and is manifestly unsound. An essential element of larceny is a trespass; and, as usually stated, the rule is that, "where the owner intends to transfer, not the possession merely, but also the title to the property, although induced thereto by the fraudulent pretences of the taker, the taking and carrying away do not constitute larceny. The title vests in the taker, and he cannot be guilty of larceny. He commits no trespass. He does not take and carry away the goods of another, but the goods of himself. *Kellogg* v. *State*, 26 Ohio St. 16. The contrary view is based upon the erroneous theory that fraud *per se* avoids the contract. The principle that "a contract induced by fraud is not void, but voidable only at the option of the party defrauded," *Oakes* v. *Turquand*, L. R. (1867) 2 H. L. 346, is so fundamental that the error of such a theory must be at once apparent.

Vogel v. *Brown*, 87 N. E. (Mass.) 686. This case illustrates well the distinction between the twin maxims, "*Ignorantia legis neminem excusat*" and "*Omnis legem scire tenetur.*" A statute in Massachusetts provides that any person who wilfully and corruptly demands and receives a greater fee for public services than is allowed by law, shall forfeit thirty dollars for each offence. Brown, a justice of the peace, demanded and received of Vogel, for solemnizing a marriage, a sum greater than that allowed by law. Vogel brought an action for the forfeiture of thirty dollars. The Court held that the element of a corrupt intent must be proved, and that upon the question whether one acts corruptly there is not a conclusive presumption that one knows the law. Judgment was therefore given for the defendant, in the absence of any evidence of corrupt intent, or of defendant's

Omnis Legem Scire Tenetur

CRIMINAL LAW (Continued).

knowledge of the statutory fee. The principle that ignorance of the law excuses no one could have had no application here, in the face of a statute expressly requiring a corrupt intent; but the strict application of the proposition that everyone is presumed to know the law would have involved finding the defendant guilty. Ignorance of the law, it is true, excuses no one from the natural results of his acts—whether those acts involve a crime, a contract, or a tort; but since it is often necessary to find that a man had a specific intention or state of mind before he can be charged with his acts, it is evident that the maxim *"Omnis legem scire tenetur"* must, if it be universally applicable, be purely arbitrary. The better view seems to be that a man's knowledge of the law is a question of fact, just as his knowledge of statistics or geography, and that the law will indulge in no absurd presumptions that a man knows what, as a matter of fact, he could not reasonably know. Thus in *Martindale* v. *Falkner*, 2 C. B. 719, Maule, J., scouted the idea that a layman should be presumed to know that a "decree" is entered in Chancery and not in the Common Law Courts; and in *Regina* v. *Tewkesbury*, 3 Q. B. 635, Blackburn, J., held that electors who knew a candidate to be mayor of the town could not be presumed to know that he was not a qualified candidate on that account. Lord Mansfield said, "It would be very hard upon the profession if the law were so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort." *Jones* v. *Randall*, Cowp. 38.

EVIDENCE.

Unstamped Document Admissible after Repeal of the Stamp Act

In an action of ejectment the plaintiff rested its right to recover on a purchase agreement executed December 18, 1900. The defendant objected that such agreement was not admissible because it was not stamped in accordance with the requirements of the act of Congress of June 13, 1898.

Held, the act of Congress of June 13, 1898, was repealed by the act of April 12, 1902, "without reservation of right thereafter to demand the tax in cases where the stamp had been omitted from instruments executed during the period the act was operative, or enforce any of the penalties or forfeitures which the act provided should follow a disregard of

EVIDENCE (Continued).

its provisions," and therefore the document was admissible. *Ohio River Junction R. R. Co.* v. *Pennsylvania Co.*, 222 Pa., 573.

For a discussion of the principle involved in this case see Endlich on the Interpretation of Statutes, § 478.

FRAUD.

In an action for deceit in the sale by defendants to the plaintiff of the stock of a corporation there was evidence that the plaintiff in buying the stock relied upon certain false statements made by the defendants, with whom the plaintiff had long been on terms of friendship, as to the assets, liabilities, and property of the company, and that the stock was of the less value than if the representations had been true. It appeared further that plaintiff had visited the corporation's store, and had been given an opportunity to observe the stock in trade and to examine the books of the corporation; that said books were double-entry, voluminous, and highly artificial; that the plaintiff was given no assistance in examining them, but was in one instance interrupted continually by the defendants while so engaged. Plaintiff was non-suited.

False Representations In Sale of Stock

Held, that courts will refuse to act for the relief of one claiming to have been misled by another's statements, who blindly acts in disregard of knowledge of their falsity or with such opportunity that by the exercise of ordinary observation, not necessarily by search, he would have known. He may not close his eyes as to what is obviously discoverable by him. It is in this sense only that opportunity to know the truth will prevent recovery for deceit. Whether the opportunity is present in any case is usually a question of fact, depending, *inter alia*, upon his intelligence or acuteness and the confidence reposed by him in the other by reason of acquaintance or confidence. This case should have been left to the jury. *Jacobsen* v. *Whitely*, 120 N. W. 285 (Wis., 1909).

The effectiveness of deceit is to be tested by its actual influence on the person deceived, not by its probable weight with another. *Bowe* v. *Gage*, 127 Wis. 245 (1906).

The situation of the parties and the intelligence of the defrauded party must also be considered by the jury in determining if the purchaser was actually deceived. *Kendall* v. *Wilson*, 41 Vt. 509 (1869); (Sale of perpetual motion machine, etc.); *Barndt v. Frederick*, 78 Wis. 1 (1890); (Sale of mining stock). See also *Stones* v. *Richmond*, 21 Mo. App. 17 (1886).

HOMICIDE.

Liability of Conspirators

Where two conspire to commit an assault, and in the execution thereof the victim is killed, the conspirator who did not do the killing is guilty of manslaughter. *State* v. *Darling*, 115 S. W. 1002 (Missouri).

(For further particulars see note p. 635 of this issue.

LIBEL.

Privilege of Witnesses

In a recent case in Georgia the defendant had in a previous action taken an affidavit "that he would not believe the said Buschbaum upon oath." Under the circumstances this was held equivalent to testimony in open court, and, in an action brought against him for libel, the words being material were held to be privileged. The court, however, went further, and in a dictum *held* that a witness is absolutely privileged, except when he volunteers immaterial testimony. *Buschbaum* v. *Heriot*, 63 S. E. 645.

The dictum in this case indicates that Georgia is in line with England and the jurisdictions of this country—among them Maryland, Indiana, Texas, and Washington—which hold that the privilege of a witness is absolute. The justification of this rule is that the witness "is compelled to speak, with no right to decide what is material or what is immaterial; and he should not be subject to the possibility of an action for his words." (Townshend Slander and Libel, 4th ed., § 223.) On the other hand, many American jurisdictions, among which are Massachusetts, New York, Maine, Iowa, and West Virginia, hold that public policy requires that a witness should be absolutely privileged only where the defamatory words are relevant to the matter in issue. Under this view, "whether matter is pertinent is a question for the court, and, in determining the question, no strained, technical, or close construction will be indulged in to deprive the defendant of the protection of privilege." (Cooley Torts, 3d ed., I 433.) A dictum in a recent Pennsylvania case favors this view. (*Kemper* v. *Fort*, 219 Pa. 85, 1907), but the English doctrine seems better, for "the due administration of justice requires that a witness should speak, according to his belief the truth, the whole truth, and nothing but the truth, without regard to the consequences, and he should be encouraged to do this by the consciousness that, except for any willfully false statement, which is perjury, no matter that his testimony may be in fact untrue, or that loss to another ensues by reason of his testimony, no action for slander can be maintained against him." (Townshend Slander and Libel, 339.)

LIMITATION OF ACTION.

Martin v. *White*, 100 Pac. 293 (Ore.). Land was sold the defendant under a tax deed valid on its face, though in fact void because of an unlawful assessment. The true owner, who had never given up possession of the land, brought a bill to remove the cloud on his title. The statute provides that no such action shall be brought unless within two years from the date of record of the deed from the Sheriff. It was held that the action lay here, although more than two years had elapsed since the sale, and this because the purchaser at Sheriff's sale had never had possession of the land. The Court held that where a deed is void it is beyond the power of the Legislature to transfer title by mere lapse of time, and that the purchaser at Sheriff's sale must take possession before the statute can begin to run. Since the owner has both title and possession, the Legislature exceeds its power when it attempts to create the necessity for suit by converting an estate in possession into a mere right of action, and then limiting the time in which the action may be brought. In Pennsylvania, through a difference of statutes, a different conclusion has been reached. The Act of Apr. 3, 1804, provided that no action should lie for the recovery of land by the owner, unless brought within five years of the tax sale. But this was early held inapplicable where the owner had actual possession during the five years; *Bigler* v. *Karns*, 4 W. & S. 137. The Act of March 29, 1824, provided that the owner might bring ejectment against the purchaser at the tax sale, though the latter were not in possession of the land. Since, therefore, the right of legally asserting his title accrued to the owner upon the delivery of the tax deed to the purchaser, it is "perfectly fair to launch the statute from the time he had such opportunity;" *Robb* v. *Bowen*, 9 Ban. 71. This means that in Pennsylvania a purchaser at Sheriff's sale may acquire a good title by the mere lapse of five years, provided the tax deed were good on its face and the owner were not in possession during the five years.

Title Through Tax Sale

NEGLIGENCE.

In a recent case in Michigan the plaintiff was injured while a passenger on the defendant's logging road. *Held*, "If the rule of law as to care to be exercised by common carriers were inflexible, and such logging roads were to be required to furnish the same tracks, train, and equipment generally as are commercial roads, the

Care Required of Common Carriers

NEGLIGENCE (Continued).

result would be the judicial prohibition of enterprises of their nature. All that is required of such roads is the exercise of the highest care under the circumstances. *Campbell* v. *Duluth & Northeastern R. R.*, 120 N. W. 375.

This case raises again the interesting question of the degree of care required of common carriers. The rule laid down in England is that "a railway company is bound to use the best precautions in known practical use to secure the safety of their passengers" (*Ford* v. *L. & S. W. Ry.*, 2 F. & F. 730), and the same rule has been adopted by the United States Supreme Court in the words, "extraordinary vigilance aided by the highest skill (*Pa. Co.* v. *Roy*, 102 U. S. 451), while in New York the test laid down is the utmost care and diligence which human prudence and foresight will suggest to secure the safety of its passengers." *Palmer* v. *D. & H. Canal Co.*, 120 N. Y. 170.

On the other hand, the rule in the majority of United States jurisdictions (noticeably so in the South and West) is such skill, diligence and foresight as is exercised by a very cautious person *under like circumstances*" (*Furnish* v. *Ry. Co.*, 102 Mo. 438), which is but another phraseology of the test adopted in the case under discussion. The cause of the divergence of jurisdictions as to this test of negligence is to be found mainly in the wide difference in economic conditions in the localites where the several rules have been adopted. While a State is in a process of rapid development it is necessary to encourage the building of railroads as much as possible, and it is obvious that if the highest degree of equipment were immediately required of such roads, "the effect would indeed be the judicial prohibition of enterprises of their nature;" and the courts, as was said in a North Carolina case, "are not disposed to check the process of evolution from a lumber road into a comfortable line for passengers as the development of business justifies the change." *Hansley* v. *R. R.*, 115 N. C. 602. On the other hand, in England and in some of our Eastern States, such a degree of economic development has been reached that it is more important to discourage the insufficient equipment of railroads now in existence than it is to encourage the building of new lines, and hence "the best precautions in known practical use" are required.

NEGLIGENCE (Continued).

Necessary Care of Dangerous Agency

An electric light company, which allows its wires to run through trees into which children are likely to climb, is bound to keep them insulated, and is liable for injury to a child coming in contact with an exposed portion of it. *Mullen* v. *Wilkes-Barre Gas and Electric Co.*, 38 Pa. Superior, 3.

(For a full discussion see note p. 639 of this issue.)

NEGOTIABLE INSTRUMENTS.

Accommodation Paper Negotiated for Value After Maturity

Jones, for the accommodation of Herman, made his promissory note, payable two years after date, to the order of Herman. Herman, after the maturity of the note, indorsed it to plaintiff's assignor as collateral security for a note then executed by Herman to plaintiff's assignor. The note was assigned to plaintiff after maturity and presumably for value, although the case is not clear as to the latter point. *Held:*

"It is a question upon which the precedents are at some variance, whether or not the agency of the party accommodated to use the accommodation paper to raise money thereon (no express agreement appearing) expires with the maturity of the paper. * * * The courts of this State are not yet committed upon the question presented, and it seems more in harmony with the uniform negotiable instrument law, and with the weight of judicial authority, to hold, as we do, that the mere fact that the accommodation note was transferred by the party accommodated after due to a holder for value does not permit the accommodation maker to defeat recovery at the suit of the holder for value merely upon the ground that the note was an accommodation note, and without consideration moving to the accommodation maker." *Marling* v. *Jones*, 119 N. W. 931 (Wis., 1909).

Before the act the decisions in America upon this point were conflicting. In accord with *Charles* v. *Marsden*, 1 Taunton, 224 (1808), and the principal case, see *Bank* v. *Grant*, 71 Me. 374 (1880); dictum of Beasley, C. J., in *Seyfert* v. *Edison*, 45 N. J. L. 393 (1883); *Connerly & Co.* v. *Ins. Co.*, 66 *Ala.* 432 (1880); *contra*, *Chester* v. *Dorr*, 41 N. Y. 279 (1869); *Peale* v. *Addicks*, 174 Pa. 549 (1896); *Cottrell* v. *Watkins, et al.*, 89 Va. 801 (1893); in Wisconsin not decided. *Black* v. *Tarbell*, 89 Wis. 390, p. 393 (1895).

The principal case must be distinguished from those where

NEGOTIABLE INSTRUMENTS (Continued).

a recovery was allowed against the accommodation party, there being an intermediate *bona fide* holder for value before maturity, as in *Dunn* v. *Weston*, 71 Me. 270 (1880). For the rule of law upon this state of facts see 1 Daniel "Negot Instr.," Sec. 786; also N. I. L., Sect. 58, par. 2. Wis. St. Suppl., 1676-28. See *Mersick* v. *Alderman*, 77 Conn. 634 (1905).

The English Bills of Exchange Act has apparently codified the English law as established by *Charles* v. *Marsden, supra.* Byles "Bills," pp. 196, 197, footnote (x).

Sect. 58, par. 1, N. I. L. provides: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable." 1. Wis. Suppl., 1676-28. This would seem in effect equivalent to Section 36, par. 2, Eng. B. E. A. One of the essential requisites of a holder in due course is that he became a holder before the instrument was overdue. N. I. L., Sect. 52; Wis. St. Suppl., 1676-22. Eng. B. E. A., Sect. 29, par. 1(a).

Absence of consideration is not enumerated as making defective the title of one who negotiates an instrument. N. I. L., Sect. 55; Wis. St. Suppl., 1676-25; Eng. B. E. A., Sect. 29, par. 2.

N. I. L., Sect. 29 (Wis. St. Suppl., 1675-55), provides: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." This is substantially Sect. 28, Eng. B. E. A.

Thus far the Negot. Instr. Law has consistently followed the English act in adopting the doctrine of *Charles* v. *Marsden, supra.* But it is difficult to reconcile this doctrine with Sect. 28 N. I. L. (Wis. St. Suppl., 1675-54); not in Eng. B. E. A. This section provides: "Absence or failure of consideration is matter of defence as against any person not a holder in due course; * * *." A holder in due course must take the bill before it is overdue" (see *supra*).

The effect of the decision is to hold that under Secs. 28 and 29 of the act, a negotiable instrument given for the payee's accommodation may be transferred by him after maturity for value and subsequently transferred for value to the plaintiff, so as to confer on him a title against the accommodating maker.

Though this accords with the previously existing law of

NEGOTIABLE INSTRUMENTS (Continued).

certain States, it is a direct overthrow of a principle firmly established in many others.

It is instructive to note that in all the controversy as to the meaning of the Act no one has anticipated such an interpretation as that given by the principal case. But the power of codification is not always accompanied by the power of accurate prediction of the future interpretation of the code.

Section 29 of the Negotiable Instrument Law is a reproduction substantially of the English Bills of Exchange Act, 45 & 46 Vict., Ch. 61, Sec. 28, and standing alone leads to the conclusion of *Charles* v. *Marsden*.

Section 28 of the Negotiable Instrument Law is a new section drawn by the American codifiers, and standing alone leads to the conclusion of *Chester* v. *Dorr*. When the two sections are put together they present apparently logical contradictories, because Sec. 28 declares that absence of consideration is matter of defence against one who purchases after maturity, and Sec. 29 declares that an accommodation party is liable to a holder for value. The Wisconsin Court accepted the latter horn of the dilemma and held Sec. 28 to be meaningless, as applied to accommodation paper. Perhaps we shall hereafter see the two sections construed by some other Court so as to give effect to both sections by construing "holder for value" in Section 29 to mean, holder for value before maturity.

The English Code doctrine is supposed to go even to the length of holding "that an original absence of consideration in the case of an accommodation bill is *not* one of those equities which attach on the instrument and defeat the title of an indorsee for value of an overdue bill, *although with* notice of the fact." Byles on Bills, 16th English Edition, p. 196, note (x).

Is this now the law under the American Negotiable Instruments Act? Possibly some Courts will recoil from keeping a liability over the head of an accommodating party for six years after the maturity of the loan of his credit even where the purchaser has knowledge of the circumstance.

What Constitutes Notice

Assumpsit on two promissory notes executed by defendants, as co-partners, and eighteen others, to one Crawford, as part purchase price of a horse, and by him assigned to plaintiff for value, indorsed by Crawford "Payment guaranteed." Defendants claimed that the note was procured by Crawford's agent with the understanding

NEGOTIABLE INSTRUMENTS (Continued).

that each of the signers could release himself of liability by paying $100; that one of the defendants paid $100 before the note left his office, and thereupon by agreement endorsed the notes as paid in full by defendants; that subsequently this endorsement was altered without the consent of the aforesaid partner for the purpose of enabling Crawford to negotiate the note, the endorsement as altered not showing payment in full by defendants. Plaintiff, by his agent, bought the notes, with notice of the erasure and of the writing over it.

Held, that the controlling question in the case was whether the notes as they appeared to the plaintiff's agent required investigation, and made it a matter of bad faith to buy without it." It is not sufficient that the circumstances ought to excite the suspicion of a prudent, careful person. "Such circumstances of suspicion or even gross negligence are merely admissable as evidence tending to show bad faith, but do not of themselves preclude the holder from recovery." *Custard* v. *Hodges,* 119 N. W. 583 (Mich., 1909).

This case is apparently covered by the Negotiable Instruments law (Mich. Pub. Acts, 1905, p. 389, sect. 58, p. 398), which in this respect corresponds to the Negotiable Instruments Law of Pa. (Sect. 56) N. Y. (Sect. 95) and Mass. (sect. 56).

In accord with the principal case see. *Bank* v. *Union Trust Co.,* 145 Mich. 656 (1906); *Bank* v. *Weston,* 172 N. Y. 259 (1902); *Tillebrown* v. *Hayward,* 190 Mass. 472 (1906). Compare, however, *Pelton* v. *Sawmill & Lumber Co.,* 112 N. W. 29, Wis. 1907.

In this respect the act has been decided to be a codification of common law, prior to its passage. *Tillebrown* v. *Hayward* (*supra*).

A purchaser who wilfully closes his ears to information, or refuses to make inquiry when circumstances of grave suspicion demand it is not protected by any rule of law. *Lytle* v. *Lansing,* 147 W. S. 59, p. 71 (1893). See also 7 Cyc. 945.

RAILROADS.

Duty to Maintain Approaches to Railroad Crossing

A railway company, being authorized to carry their railway across a highway on the level, constructed the railway at a slightly higher level than the road, and, in order to bring the road up to the level of the railway, raised it by means of inclined planes on either side of the railway, under powers conferred by their special act. The act was silent as to any obligation of the company to repair the roadway upon the

RAILROADS (Continued).

inclined planes. Plaintiffs are the highway authority responsible for the repair of the main roads in the county of Hertfordshire. *Held*, that there was imposed upon the company by the common law, as a condition of the statutory authority to interfere with the highway an obligation to keep in repair the roadway upon the whole of the inclined planes, including those portions which lay outside the fences of the railway. *Hertfordshire County Council* v. *Great Eastern Ry. Co.*, 1 K. B. (1909), Part III, p. 368.

In *Roxbury* v. *Railroad Co.*, 60 Vt. 121 (1887), p. 138, Feazey, J., said:

"It is plain that the company's duty did not end at the line of its land, if the highway could not be made good and sufficient without extending the fill of the crossing further. A crossing that could not be used in ordinary travel on the highway without the embankment or fill constituting the approaches being extended beyond the railroad land, would not be, without such extension, such a crossing as the law required. With such a defective crossing the highway would not be restored to its former state and usefulness. It would not be good and sufficient."

Where a railroad crosses a public road already in use, the railroad company and its successors must, if not relieved by statute, not only restore the public road, but erect and maintain perpetually all structures and keep up all repairs made necessary by such crossing for the safety and convenience of public travel. *Dyer County* v. *R. R.*, 87 Penn. 712 (1889). See also *Roe* v. *Elmendorf*, 52 How. Pr. Rep. 232 (Sup. Ct., 1876); *Pa. R. R. Co.* v. *Borough of Irwin*, 85 Pa. 336 (1877); approaches to bridge over crossing, *Hayes* v. *N. Y. C. & H. R. R. R. Co.*, 9 Hun, 63 (N. Y. Sup. Ct., 1877). But see *contra M. K. & T. Ry. Co.* v. *Long*, 27 Kan. 684 (1882); *P. Ft. W. & C. R. Co.* v. *Maurer*, 21 Ohio St. 421 (1871). Compare *Brookins* v. *Central R. & Banking Co.*, 48 Ga. 523 (1873).