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NOTES.

CONSTRUCTION OF THE SAFETY APPLIANCE ACT.

In the case of *United States* v. *Illinois Central R. Co.*,[1] decided on March 27, 1909, the liability of interstate railroads under the Safety Appliance Act[2] was fully discussed. The action was brought by the United States against the railroad company to collect penalties for infractions of the Act. Among the sections violated was the second, which declares it to be "unlawful for any such common carrier to haul * * * on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." It was argued for the United States

[1] 170 Fed. 542.

[2] Mch. 2, 1893, C. 196, § 6, 27 Stat. 532.

that the Act was absolute in its terms, and could be satisfied only by having all cars so equipped and in working order at all events. The Court, however, construed this clause as imposing only a duty to equip the cars with the specified appliances, after which the law would be satisfied by a compliance with the Common Law requirement that the utmost diligence be exercised to keep the appliances in repair.

The plaintiffs position, favoring an absolute reading of the Act, has some support,[3] the decisions going on the ground that the wording of the statute is plain and the question of hardship or injustice is not for the courts, but for the legislature.[4] This interpretation is based on reading the words, "and which can be uncoupled without the necessity of men going between the ends of the cars," as imposing an independent requirement. It would seem, however, that the interpretation of this clause in the principal case, as descriptive of the appliance in question, and not as adding anything to the requirements of the section is more reasonable. This is the majority view and is amply supported by recognized rules of statutory construction.

The able opinion in *Ry. Co.* v. *Delk*[5] first approaches the subject by inquiring into the purpose of the statute. We find from the title that the general purpose is to promote the safety of employés and travellers, and that the immediate purpose is to compel common carriers to equip their cars with automatic couplers. The title could not, of course, override the plain language of the Act itself, but it is legitimate to examine it in connection therewith,[6] and in this case we find that section two corresponds with what the title has indicated—it requires that cars be equipped with automatic couplers. In order to discover just how much of the previous law this requirement is meant to supersede, the Court in the Delk case then examines the state of the law before the Act. At that time a number of types of couplers were in use, chiefly the link and pin variety, and the Common Law rule of utmost diligence in the inspection and care of them obtained. The purpose of the Act is fully accomplished by changing the type of coupler without altering the law in any other respect.

This reading is still further supported by the rule that a

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[3] *Ry.* v. *Taylor*, 210 U. S. 281; *U. S.* v. *Ry.*, 135 Fed. 122; *U. S.* v. *Ry.*, 150 Fed. 229.

[4] Endlich, Interpretation of Statutes, § 4.

[5] 158 Fed. 931.

[6] *Chas. R. Bridge* v. *Warren Bridge*, 11 Pet. 420, at p. 611; Endlich, Interpretation of Statutes, § 58.

statute in derogation of the previous law, particularly when it was Common Law, is strictly construed.[7] Much stress has been laid also on the rule that when a statute admits of two constructions, and one imposes a duty impossible to perform, the other should be preferred. If the Safety Appliance Act were construed absolutely it would result in a carrier's being liable for a break or defect that occurred in a car moving between stations, no matter how quickly it was discovered and remedied;[8] and it has been pointed out that such a rule would lead to the absurd result that the very act of repairing a defective coupler would make a case and work a forfeiture.[9]

In support of the majority rule it has also been said that an unjust construction should be avoided where possible.[10] The object of the statute is fully accomplished without subjecting the railroad to the burden of an insurer.[11]

It is to be regretted that the only Supreme Court utterance on this subject (which, however, is under a different section and therefore not binding on the Court in the principal case), is in accord with the absolute construction of the Act. On principle the doctrine of the principal case would seem to be preferable.

Re-entry and Forfeiture of Estates on Condition.

In a recent Arkansas case[1] the Court, in an elaborate opinion, held that the grantor of an estate on condition might after breach of the condition convey the land without re-entry and that the grantee might enforce the forfeiture for breach of the condition. This decision is based on two grounds (1) that the doctrine of livery of seisin does not exist in Arkansas and (2) that there is no law against maintenance in that state.

(1) The doctrine that an entry, or its equivalent, by the grantor, or his heir, is necessary before the forfeiture of an estate for breach of condition can be effected, had its origin in the theory that, as livery of seisin was necessary for the creation of a freehold estate, a ceremony of equal solemnity

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[7] *R. R.* v. *Brinkmeier*, 93 Pac. 621; Endlich, Interpretation of Statutes, § 127.

[8] *U. S.* v. *Ry.*, 156 Fed. 182.

[9] *U. S.* v. *Ry.*, 150 Fed. 442.

[10] Endlich, Interpretation of Statutes, § 258; Bishop on Statutory Crimes, § 82.

[11] *U. S.* v. *Ry.*, 156 Fed. 182.

[1] *Moore* v. *Sharpe*, 121 S. W. 341.

was essential to its termination.[2] Where, therefore, the doctrine of livery of seisin does not prevail the logical conclusion is that an entry is unnecessary, and in the United States generally the doctrine prevails that an action of ejectment may be maintained without proof of entry, either for the reason stated above, or on the ground that the confession of entry involved in the action is sufficient.[3]

(2) The Common Law rule that conditions cannot be taken advantage of save by the grantor or his heirs and are therefore incapable of assignment is of feudal origin, and the reason thereof was stated by Coke to be "for avoiding of maintenance, suppression of right, and stirring up of suits."[4] It is submitted, however, that this reason applies only to the case of an assignment after breach of condition, and that the reason why there can be no assignment before breach is that the grantor has "only a possibility of reverter,—a naked and very remote possibility, but nothing that he could convey to an assignee."[5] In Mass, however, it would seem that the courts are inclined to give greater substance to the right of entry before breach of condition. In one case it is said that the grant of an estate on condition subsequent "leaves in the grantor a vested right, which by its very nature is reserved to him as a present existing interest transmissible to his heirs."[6] But the weight of authority holds that the grantor in such a case has a bare possibility of reverter, and the cases support the view that this is the real reason why there can be no assignment *before* breach of condition.[7] *After* breach of condition the grantor has a right to enter or (where entry is unnecessary) a right to bring ejectment, and the test of the transferability of such right must be the existence or non-existence of the law against maintenance. In the case of *McKissick* v. *Pickle*[8] the Supreme Court of Pennsylvania said: "The law against maintenance has never been adopted in this State. The reason assigned why a condition in England could not be assigned is because no title could be made to land held by another adversely as that was against the law which forbid mainte-

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[2] *Co. Litt.*, 214b, Litt. § 351.

[3] *Cowell* v. *Colorado Springs Co.*, 100 U. S. 55; *Austin* v. *Parish*, 21 Pick. 215.

[4] *Co. Litt.*, 214a.

[5] *Nicoll* v. *R. R.*, 12 N. Y. 121.

[6] *Church* v. *Grant*, 3 Gray, 142, 148.

[7] *Bethlehem* v. *Annis*, 40 N. H. 34, 45; *Bouvier* v. *R. R.*, 67 N. J. L. 281.

[8] 16 Pa. 140.

nance. * * * This is a fair case for the application of the maxim *cessante ratione cessat ipse lex.*" In that case the right of entry for breach of condition was reserved to the assigns in the deed creating the conditional estate, but in New Jersey, in the case of *Bouvier* v. *R. R.*[9] it was held that this was not essential. In the course of the opinion in the latter case the Court said, "I think that in any case wherever the English law against maintenance is not in force a right of entry for condition broken should be held transferable after breach of the condition. Before breach I think transfer to be legal must be authorized by legislation."

The results of the foregoing considerations may be summarized as follows:

(1) Where the doctrine of livery of seisin is not in force there is no necessity of entry for breach of condition.

(2) Before breach the right of entry for condition broken is transferable only by statutory authority.

(3) After breach the transferability of the right of entry depends upon the existence or non-existence of the law against maintenance.

Gaming Contracts Governed by Lex Loci Contractus, Not by Lex Fori.

In the case of *Saxby* v. *Fulton*[1] we have an interesting illustration of the attitude of the English courts upon the subject of loans for gambling purposes. In this case one Brooks and the plaintiff had been in the habit of together paying annual visits to Monte Carlo. It was their custom for the plaintiff to find the whole of the money for the expenses of both, while Brooks made all the arrangements and paid the bills out of money supplied to him for that purpose. Accounts were settled after their return to England, when the expenses of the trip were shared equally between them, and the balance remaining due from the one to the other was discharged. This action was brought to recover the balance due plaintiff on money advanced by him during their trips in 1905 and 1906. The greater part of the advances had been used by Brooks for the purpose of gambling at the roulette tables at Monte Carlo, roulette being lawful at that place, but unlawful in England by statute, and the judges assumed that plaintiff knew when he

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[9] 67 N. J. L. 281.

[1] L. R. 1909, ii K. B. 208.

advanced it that it was to be used for that purpose. Brooks paid interest to plaintiff on the balance due him until his death but died without repaying the balance due plaintiff. No security had been given for the debt.

It was decided that as the debt was one which was not illegal in the country where the contract was made and was not one that the English courts could on grounds of public policy hold not to be governed by the *lex loci contractus*, that it could be enforced in the courts of England. *Quarrier* v. *Colston*[2] was held to govern the case under discussion.

The Gaming Act of 1710, *inter alia*, made void all securities the consideration for which should for the reimbursing or repaying any money knowingly lent or advanced for gaming at "cards, dice, tables, tennis, bowls, or other game or games whatsoever." The Gaming Act of 1835[3] in order to avoid the hardship suffered by the innocent indorsee for value or *bona fide* holder for value of such paper substituted the provision that such paper should be deemed to have been given for an illegal consideration, thus enabling the above mentioned parties to recover thereon.

The Court in the present case refused to adopt the view that the security was to be deemed to have been given for an illegal consideration, not merely for the purpose of relieving the *bona fide* holder for value, but for all purposes, and that, therefore, it is not possible to sue upon the consideration. Buckley, L. J., at page 229 said: "The principal argument before us has been whether the effect of the Acts of 1710 and 1835 is to make the consideration, as well as the security, void. I do not think that that is the effect of those statutes." * * *

This view was first taken by Lord Mansfield in *Robinson* v. *Bland*.[4] At page 260 Lord Mansfield says: "Next as to the money lent. It has been twice judicially determined * * * that the legislature meant only to void the security, not the contract, in order to give courts an opportunity to examine into the merits of the consideration. * * *" The above view seems to be inconsistent with the view taken by the Court in *Applegarth* v. *Colley*.[5] In that case Rolfe, B., in the opinion of the Court, page 731, speaking of the Act of 1835, said: "That Act, while it repeals so much of the statute as makes the securities void, expressly enacts that they shall have been

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[2] 1 Ph. 147 (1842).
[3] 5 and 6 Will. 4, c. 41.
[4] 1 W. Bl. 256.
[5] 10 M. & W. 722 (1842).

deemed to have been given on an illegal consideration; and it is impossible to impute to the legislature an intention so absurd, as that the consideration should be good and capable of being enforced, until some security is given for the amount, and then that by the giving of the security the consideration should become bad.

We assume, therefore, with the defendant, that the Statute of Anne, in connection with the 5 and 6 Will, 4 C. 41, must be taken to avoid all contracts for the payment of money won at play."

Kennedy, J., in his opinion in *Saxby* v. *Fulton* (*ante*), page 234, said, referring to two decisions, one of which was the case above mentioned: "But those judgments related only to transactions within this country to which the Gaming Acts apply; they cannot be conclusive authorities where the contract itself and the giving of a security are alike legal in the country where the contract was made."

Where the parties to the contract, though contracting abroad, have by the terms of the contract or of the security indicated that the law of England was intended to govern it, the English courts have applied the Acts of 1710 and 1835, aforesaid, and held the security void, although the consideration for the security was legal in the country where the contract was made. For an illustration of this principle see *Moulis* v. *Owens*,[6] where a cheque was given in Algiers on an English bank, and this was held sufficient to show that the parties contracted with reference to the English law.

Buckley, L. J., in *Saxby* v. *Fulton* (*ante*), at page 230, said: "*Moulis* v. *Owens* affirmed the view that the Statute of Anne and the Act of 1835 rendered a security given for a gaming debt or for money lent for the purpose of gaming illegal and void in the hands of the original holder wherever the gaming might have taken place."

It should be noted, however, that in that case the Court rested its decision upon the fact of the parties having shown by the giving of a check on an English bank that they contracted with reference to the English law. *Moulis* v. *Owens* would, therefore, not seem to be authority for the broad principle laid down by Buckley, L. J. There seems to be no reason why the courts of England should not hold valid a security given in a foreign country in pursuance of a contract entered into in the foreign country, in which such security and contract were valid, and containing nothing from which it could be inferred that the parties intended the law of England to

[6] L. R. 1907, 1 K. B. 746.

govern the transaction, even though the security would, if entered into in England, be invalid by the Gaming Act of 1835.

At the English Common Law the borrowing and lending of money for the purpose of gaming was neither immoral or unlawful. Certain games have been made illegal in England by statute, and money lent for the purpose of gaming and of playing with at an illegal game cannot be recovered back.[7] In *McKinnel* v. *Robinson*, Lord Abinger, C. B., said, at page 440: "This principle is that the repayment of money, lent for the express purpose of accomplishing an illegal object, cannot be enforced. * * *"

In *Quarrier* v. *Colston*[8] it was decided that money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal might be recovered in the courts of England. In *Saxby* v. *Fulton*[9] this decision was treated as binding on the court, but in *Quarrier* v. *Colston* it is expressly stated by the Chancellor that it does not appear what the games were, or that they would have been illegal, even in England,[10] while in the principal case the money was lent by plaintiff for gaming at roulette, a game which was illegal in England.[11]

The law in New York appears to be in accord with *Saxby* v. *Fulton*. In *Harris* v. *White*[12] Folger, Ch. J., said: "If the common law prevails in the other States in which by the contract the plaintiffs agreed to drive the defendant's horses, then that contract was not illegal by the law of those States, and the statute law of this State may not run over its borders into those States and with it carry thither the public policy of this State." (See also in the case of lotteries, *Com. of Ky.* v. *Bassford*.[13]

The law of Massachusetts seems to be in accord with *Saxby* v. *Fulton*.[14] This decision (*McIntyre* v. *Parks*) has been severely criticized and limited, but upon another ground,[15] and in a comparatively recent case[16] it is said never to have been

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[7] 3 M. & W. 434 (1838).
[8] 1 Ph. 147 (1842).
[9] *Ante.*
[10] At p. 51.
[11] *Lasby* v. *Fulton* (*ante*), p. 220.
[12] 81 N. Y. 532, at p. 544.
[13] 6 Hill (N. Y.), 526.
[14] *McIntyre* v. *Parkes* (3 Metc. 207), 1841.
[15] *Webster* v. *Munger*, 8 Gray, 584 (1857).
[16] *Graves* v. *Johnson*, 179 Mass., at p. 58.

overruled.[17] However, it has been held that a sale of intoxicating liquors in another State by one citizen of Massachusetts to another with knowledge or reasonable cause to believe that they were to be resold by the purchaser in Massachusetts against law and with a view to such resale will not support an action for the price in Massachusetts.[17] It was likewise held where the purpose of the sale was to violate the laws of Maine.[18]

In New Jersey contracts which are in violation of the New Jersey statute against gaming will not be enforced, although valid in the State where made.[19] For an interesting discussion of the principles of this view of the law see the cases cited and also the opinion of Magie, J., in *Flagg* v. *Baldwin*.[20] Some American jurisdictions are in accord.[21]

The law in Pennsylvania seems to favor the English view as laid down in *Saxby* v. *Fulton*, but the decisions on the subject are not very satisfactory upon this point.[22]

Damages for Delayed Telegram as Affected by Conflict of Law.

The recent case of *Western Union Telegraph Company* v. *Hill*[1] raises an interesting point on which the cases are in absolute conflict. A telegram was sent from Georgia to Alabama. Through the negligence of the telegraph company, the delivery was delayed, and the sendee brought action in Alabama for breach of contract, and claimed to recover damages for mental anguish caused by the negligence. The law of Alabama allows such damages, but that of Georgia does not. It was held that the law of Alabama governed the case.

Where a contract is made and performed in the same State, it is well settled that matters relating to its execution, validity, or interpretation are determined by the law of that State. In

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[17] *Webster* v. *Munger* (*ante*).

[18] *Graves* v. *Johnson*, 156 Mass. 214 (1892).

[19] *Minzesheimer* v. *Doolittle*, 60 N. J. Eq. 394 (1899).

[20] 11 Stew. (38 N. J. Eq.), 219 (1884).

[21] See cases cited in 20 Cyc. 924, n. 49; 24 Cent. Dig. cols. 1532-4.

[22] *Scott* v. *Duffy*, 14 Pa. 18 (1849).

[1] 50 Southern, 248 (Ala.).

some jurisdictions this principle has been deemed sufficient to justify a decision contra to the principal case on similar facts.[2] But the contract in the principal case was not wholly performed in the State in which it was made. Where a contract is made in one State and performed in another, the rule is that the intention of the parties to the contract determines the law applicable. To determine such intention, the subsidiary *prima facie* rule has been adopted that the law of the place of performance governs. But the contract in the principal case may be considered as partly performed in each State. Where a contract is partly performed in the State in which it is made, the weight of authority favors the view that the *lex loci contractus* governs, notwithstanding the part performance in another State.[3] But some jurisdictions have considered that the delivery of the telegram is the performance contemplated by the parties, and therefore have held that the law of the place to which the telegram is sent governs the contract.[4] This would seem to be the better view, if it is really a question of intention.

The conclusion in the principal case was reached on an entirely different ground. The general rule in tort cases is that the *lex loci delicti* governs the right of action, and the Court, considering that the duty of a telegraph company to transmit a telegram in due time is a public duty, held that the negligence was as much a tort as a breach of contract, and, since the breach occurred in Alabama, the law of that State was applied. This ground seems very unsatisfactory, because the action was on the contract, and by the laws applicable to contracts, the place where the breach occurred is immaterial.[5]

In Indiana, the penalty allowed by statute for the negligence of a telegraph company cannot be recovered unless the telegram was sent from Indiana,[6] while in Tennessee, under a somewhat

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[2] *Western Union Telegraph Co.* v. *Waller*, 74 S. W. 751 (Tex.); *Western Union Telegraph Co.* v. *Woodard*, 84 Ark. 323; *Bryan* v. *Western Union Telegraph Co.* 133 N. C. 603.

[3] *Reed* v. *Western Union Telegraph Co.*, 135 Mo. 661; *Bartlett* v. *Collins*, 109 Wis. 477; *Hudson* v. *N. Pac. Ry. Co.*, 92 Iowa, 231.

[4] *Western Union Tel. Co.* v. *Eubanks*, 100 Ky. 591; *North Packing Co.* v. *Western Union Tel. Co.*, 70 Ill. App. 275; *Western Union Tel. Co.* v. *Blake*, 29 Tex. Civ. App. 224 (this case is probably overruled by later Texas cases, however).

[5] *Western Union Tel. Co.* v. *Waller*, 74 S. W. 751; *Bryan* v. *Western Union Tel. Co.*, 133 N. C. 603; *Western Union Tel. Co.* v. *Blake*, 29 Tex. Civ. App. 224.

[6] *Western Union Tel. Co.* v. *Hamilton*, 50 Ind. 181; *Carnahan* v. *Western Union Tel. Co.*, 89 Ind. 526; *Western Union Tel. Co.* v. *Reed*, 96 Ind. 195.

similar statute, recovery is allowed if the action is brought in Tennessee, regardless of the *locus contractus.*[7]

The relation of the *lex fori* to the measure of damages under such circumstances is not discussed in the majority of the cases, and yet this would seem to be the first point to be determined. It is settled law that the *lex fori* determines all matters relating to the remedy. Does, then, the measure of damages recoverable for the breach of a contract pertain to the remedy merely, or is it an element of the substantive rights of the litigants? Upon this point there is much confusion.

In Texas it has been held that the measure of damages pertains to the right and not to the remedy,[8] and this view is favored by Wharton,[9] but opposed by Minor.[10] The majority of the cases *ex contractu* are silent upon the subject. Where the law of the forum is applied, it is because the forum is also the place of performance or the *locus contractus;* and where it is not applied, it is usually without mention of its relation to the case.

In actions of tort the decisions are in conflict. The weight of authority is perhaps in favor of the view that the measure of damages is an element of the substantive rights of the parties and therefore determined by the *lex loci delicti,*[11] but there is considerable authority to the contrary.[12]

Where interest is allowed, not under contract, but by way of damages, the rule seems to be that the rate must be according to the *lex fori.*[13] On the other hand, the measure of damages recoverable from an indorser for the protest of a promissory note or bill of exchange is determined by the law of the place where the contract of indorsement was made.[14] But in such case there seems a valid distinction. The indorsers of a bill of exchange contract to guarantee its acceptance and payment at the proper place, and, in default of such payment, they

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[7] *Gray* v. *Western Union Tel. Co.*, 108 Tenn. 39.

[8] *Thomas* v. *Western Union Tel. Co.*, 25 Tex. Civ. App. 398.

[9] Wharton, Conflict of Laws, § 471f, note 2.

[10] Minor, Conflict of Laws, § 208.

[11] *Louisville Co.* v. *Whitlow*, 19 Ky. Law Rep. 1931; *Hyde* v. *Wabash etc., Ry. Co.*, 61 Iowa, 441.

[12] *Evey* v. *R. R. Co.*, 56 U. S. App. 118, 81 Fed. 294; *Higgins* v. *R. R.*, 155 Mass. 176; *Wooden* v. *R. R.*, 126 N. Y. 10.

[13] *Clark* v. *Child*, 136 Mass. 344; *Goddard* v. *Foster*, 17 Wall. 123; *Carson* v. *Smith*, 133 Mo. 606.

[14] *Green* v. *Bond*, 37 Tenn. 328; *Allen* v. *Union Bank*, 5 Wharton (Pa.), 420; *Peck* v. *Mayo*, 14 Vt. 33. See also *Roe* v. *Jerome*, 18 Conn. 138.

agree, upon due protest and notice, to reimburse the holder of the note in principal and interest at the place where they entered into the contract. The damages are therefore a part of the contract itself, and the *lex loci contractus* is rightly applied.

Upon the whole, it is submitted that the better view is that the measure of damages is a matter of remedy merely. It has nothing to do with the right of action, or its inherent elements or character, and the wrong should be redressed in accordance with the public policy of the forum.

LEGISLATIVE ENACTMENT LIMITING THE USE OF DEMISED PREMISES AS AFFECTING A TENANT'S LIABILITY TO PAY RENT.

A very nice legal question is often raised in determining just what acts amount to such a deprivation of the use of premises by a tenant as to terminate the lease and work a suspension of the rent. A new phase of this question has been raised by the passing of prohibition laws in several of the Southern States, as is illustrated by the recent Alabama case of *O'Byrne* v. *Henley*, 50 Southern, 83 (1909). There premises were let "for saloon purposes," and some time before the term of the lease was expired the prohibition law in question was passed, whereupon the tenant claimed he was absolved from the payment of further rent, the premises being rendered unfit for the purposes for which they were let. But the Court decided the lease was not terminated so as to excuse the tenant, reasoning as follows: By Common Law, where leased premises are destroyed by fire, inevitable accident, etc., the tenant is not relieved from an express covenant to pay rent[1] unless the property is wholly destroyed, when the tenant is relieved from the payment of rent. An example of such total destruction is where apartments have been leased in a building which was destroyed by fire; the enjoyment of the space demised in air has thus become impracticable.[2] With this as a basis the Court goes on to argue that the destruction of business which by the lease was to be carried on in the demised premises is, as to the liability of the tenant to pay rent, analogous to the destruction of premises, and where the business is *wholly* destroyed the liability to pay rent ceases, although under the facts in

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[1] *Cook* v. *Anderson*, 85 Ala. 99, 4 South, 713; Taylor on Landlord and Tenant, § 377.

[2] *Shawmut* v. *National Bank*, 118 Mass. 125; *Ainsworth* v. *Pitt*, 38 Cal. 89.

question the prohibition law did not totally destroy the business, since the word "saloon" as used in the lease, while it included the sale of intoxicants, did not exclude the sale of other things.[3] Since there was only a partial destruction the conclusion was that the rent had to be paid for the whole term.

The final conclusion thus obtained is in accordance with the general trend of decisions that where the public authorities restrict the use of leased premises that does not constitute a sufficient excuse for the non-payment of rent,[4] as where city authorities tear down a building and remove it as dangerous and unlawful.[5]

However, the analogy drawn in the Alabama case has not been the usual method of attacking the problem, for the usual inquiry has been whether the acts complained of have amounted to an eviction, which would operate to suspend the rent. A Rhode Island[6] case, decided in 1898, well illustrates this line of reasoning. There the lessee's license was taken away because of the erection of a public school within one hundred feet of the premises, which by legislative enactment took away the power of granting a license. The Court considered it only in the light of an eviction, and decided there was none because the act taking away the beneficial enjoyment of the premises was not that of the landlord or due to his procurement. Where, however, the action of the public officer is due wholly to the attitude of the landlord the rent is suspended[7] when the question of the presence or absence of an eviction is held to be basic; as, where, when a place was rented for a distillery the landlord refused to sign papers necessary to the granting of the license—the lessor's own action caused the prevention of the beneficial enjoyment by the public authorities. But the mere fact that a lessor voted for a local option law under which the lessee's license is taken away does not entitle the lessee to terminate the lease.[8] Nor does the fact that the owner of premises leased them for saloon premises prevent him,

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[3] *Brewer Co.* v. *Boddie*, 181 Ill. 622; *Goozen* v. *Phillips*, 49 Mich. 7.

[4] *Taylor* v. *Finnigan*, 189 Mass. 568; *Miller* v. *Maguire*, 18 R. I. 770; *Kellog* v. *Love*, 38 Wash. 293; *Barghman* v. *Portman*, 14 S. W. 342 (Ky.); *International Trust Co.* v. *Schuman*, 158 Mass. 287; *McLaren* v. *Spaulding*, 2 Cal. 510; *Chase* v. *Turner*, 10 La. 19; *Nicholls* v. *Byrne*, 11 La. 170; *Abodie* v. *Berges*, 6 South, 529; *Kerley* v. *Mayer*, 31 N. Y. Supp. 818; *Gallup* v. *Albany R. R. Co.*, 65 N. Y. 1; *Vermilyon* v. *Austin*, 2 E. D. Smith, 303; *Hitchcock* v. *Bacon*, 118 Pa. 272.

[5] *Hitchcock* v. *Bacon*, 118 Pa. 272.

[6] *Miller* v. *Maguire*, 18 R. I. 770.

[7] *Grabenhorst* v. *Nicodemus*, 42 Md. 236.

[8] *Barghman* v. *Portman*, 14 S. W. 342.

as owner of other lots in the same block, from protesting to the city council against a renewal of the tenant's liquor license; and the fact that such protest together with others made a majority and prevented the city council from renewing the license was held not sufficient to amount to a constructive eviction in a recent Washington case.[9]

The last conclusion of the Court in the Alabama case, that under the word "saloon" the premises could be used for other lawful purposes besides the selling of liquor, has also been applied to show there was no constructive eviction to justify a suspension in the rent, in that the beneficial enjoyment of the premises was not totally destroyed, which is essential to an operative constructive eviction.[10] It is also interesting to note that if the deprivation of beneficial enjoyment of the premises results from an act done in the lawful exercise of the authority of the municipal corporation and in a proper manner, it is immaterial that it was done by the landlord himself under a statutory provision authorizing the owner in such a case to do the work.[11]

A review of the authorities thus leads us to the conclusion that whether the Act of the legislature depriving the lessee of the right to use the premises for the selling of liquor be considered from the point of view of a constructive eviction or in analogy to the total destruction of demised premises the conclusion is that it does not terminate the lease so as to suspend the rent.

Is a Criminal Trial Ending by Discharge of Jury, on Failure to Reach Verdict, a Former Jeopardy?

In *State* v. *Barnes*,[1] a trial for murder, the jury were unable to agree. On being brought into the court room, the foreman stated that they wanted to know what punishment would be meted out if their verdict should be "Not guilty by reason of insanity." He also stated that they could not agree unless they received this information. This information they were not entitled to have. The Court, however, told them what the punishment would be, in that case, and then discharged them. When the defendant was again placed on trial, he pleaded "former jeopardy." The defence was not allowed.

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[9] *Kellog* v. *Love*, 38 Wash. 293.

[10] *Kerley* v. *Mayer*, 31 N. Y. Supp. 818.

[11] *Gallup* v. *Albany R. R. Co.*, 65 N. Y. 1.

[1] 103 Pacific, 792 (Wash.).

This brings up an interesting question on which, at one time, there was much doubt and conflict of authority. It has been said that anciently, in England, if the jurors could not come to a verdict, before the end of the term, they were put in carts, and hauled after the judges into the next county.[2] It has been held in some American courts that the evidence of time alone can establish the jury's inability to agree during the term, and that therefore if the jury is discharged after a short deliberation, on any other proofs, the prisoner cannot be tried again.[3]

At the present time, however, in most of the American States, in England, and in Ireland, the judge may discharge the jury when he is reasonably convinced that they cannot agree, and the defendant may be tried again. This has been decided in numerous cases, in one of which the deliberation of the jury lasted only thirty minutes.[4] Many other cases hold that the discharge of the jury is within the sound discretion of the trial judge and will not be reviewed unless the discretion was grossly abused.[5]

Other cases hold that a trial judge may discharge the jury if he believes that they cannot agree, but must fully set out on the record his reasons for so doing.[6] These decisions are based on the principle that the record shows a *prima facie* jeopardy, and should, therefore, also show matter negativing it. This is the view considered correct by Bishop.[7]

The Pennsylvania decisions on this point are peculiar. The Pennsylvania Constitution provides: "No person shall, for the same offense, be twice put in jeopardy of life or limb."[8] In *Commonwealth* v. *Cook*,[9] Tilghman, J. C., in a very elaborate opinion, lays the foundation for the Pennsylvania decisions: "When the jury are charged with the prisoner, his life is undoubtedly in jeopardy during their deliberation. If they are divided in opinion, and especially if there should be a great majority in favor of the prisoner, he has gained an advantage of which he is deprived if the Court discharges the jury." He further states that the mere fact that the jury say they cannot

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[2] *King* v. *Ledgingham*, 1 Vent. 97.

[3] *Ex parte* Vincent, 43 Ala. 402; *Com.* v. *Cook*, 6 S. & R. 577; *Josephine* v. *State*, 39 Miss. 613.

[4] *People* v. *Green*, 13 Wend. 55; *State* v. *Leach*, 120 Ind. 124; 1 Russell on Crimes, 6th Ed., 52 n.

[5] *Hurley* v. *State*, 6 Ohio, 399; *People* v. *Sheldon*, 156 N. Y. 268.

[6] *Ex parte* Maxwell, 11 Nev. 428.

[7] Bishop, New Criminal Law, 8th Ed., sec. 1033 *et seq.*

[8] Art. 1, sec. 10.

[9] 6 S. & R. 577.

agree does not by any means prove that they cannot agree, and is not sufficient cause for their discharge. In the case which was being tried, the defendant's plea of "former jeopardy" was upheld. In *Commonwealth* v. *Clue*[10] the jury was discharged before verdict, and the defendant's plea of "former jeopardy" was sustained.

In *Commonwealth* v. *McCreary*[11] a plea of "former jeopardy" in a trial for burglary, the jury having been discharged before verdict, was not allowed. But the Court expressly stated that if it were a capital case, if the lives of the defendants were at stake, the discharge of a jury against defendant's consent would be equivalent to an acquittal.

In *Commonwealth* v. *Fitzpatrick*[12] the Court said: "* * * Unless some overriding necessity arises after the jeopardy begins, the trial must proceed until it ends in a conviction or acquittal. In a capital case, therefore, a Court has no power to discharge a jury without the defendant's consent, unless absolute necessity requires it. The mere inability of the jury to agree within a few hours or days, is not such a necessity, nor is the fact that the regular term is approaching its end, for the courts have power to continue the term." In this case the plea of "former jeopardy"—the jury have been discharged before verdict—was sustained. This is a strong case, for the jury were discharged only after having been out five days.

It will be noticed that the Pennsylvania decisions are against the weight of authority, only in capital cases. A few other States also make this distinction.[13] Even in capital cases in Pennsylvania, however, a defendant can be tried a second time, after discharge of jury, where he has tampered with the jury, or has contrived to keep back witnesses for the prosecution, or when the prisoner becomes insane during the trial, or when a juror dies.[14]

On a common sense interpretation of the jeopardy clause which is found in substantially all the State constitutions, it is submitted that the Pennsylvania cases, in the few instances where the question has arisen, are wrong both in principle and in expediency. The argument in favor of the Pennsylvania view proves too much. The contention is: "The prisoner is in jeopardy as soon as the jury is charged with the case."[15] Why

[10] 3 Rawle, 498.
[11] 29 Pa. 323.
[12] 121 Pa. 109, 1 L. R. A. 451.
[13] *State* v. *Bullock*, 63 N. C. 570.
[14] *Com.* v. *McCreary*, 29 Pa. 323.
[15] *Com.* v. *Cook*, 6 S. & R. 577.

stop at that point? Why not say he is in jeopardy as soon as the first accusation is made, and if that accusation is dropped and the person is afterward accused, let him plead "former jeopardy?" The defendant has not been actually in jeopardy until the trial has proceeded to completion, either to an acquittal or conviction. In administering justice, it is essential to have some limit, in point of time, to the deliberation of a jury. Most of the jurisdictions have placed the matter entirely in the discretion of the trial judge, making the same subject to review only where there is a gross abuse of discretion. That seems to be the proper way of treating the subject. The defendant will not be subjected to an indefinite number of trials in any event, because the custom has been, if there are two mistrials, to dismiss the defendant, even in murder trials, on bail, and not try him a third time.