RECENT CASES

CARRIERS.

The plaintiffs inquired of the defendant railroad company's agent the rate on potatoes, for the purpose of ascertaining the price at which they could quote potatoes at a distant point. The agent, through an innocent mistake, referred to a tariff that had been superseded, and quoted a rate 25½ cents per hundred pounds lower than that actually in force at that time. The plaintiffs, relying on the information given by the agent, quoted a price at the point in question, received orders at that price, and shipped three carloads of potatoes. The consignees had to pay the higher rate, and deducted the difference from the plaintiff's draft, paying only the balance. *Urquhart Co.* v. *R. W. Co.*, 11 Western L. R. (Canada) 425.

Rates: False Representation

The Court first pointed out the fact that all the elements necessary to support the action of tort for deceit were not present, since the person making the representation had not made it without honest belief in its truth. In order to find this necessary constituent of deceit present, they must have held the principal and agent to be completely identified for the purpose of knowledge of the falsity of the representation. The Court animadverted on the doubtful nature of this proposition, but avoided deciding it, although there is authority in support of the theory of the identity of principal and agent in such a situation. *Fuller* v. *Wilson*, 9 Q. B. 629; *Fitzsimmons* v. *Joslin*, 21 Vt. 129.

The weight of authority is, however, opposed to this proposition. *Derry* v. *Peek*, L. R. 14, A. C. 337, 375; *Le Lievre* v. *Gould*, L. R. 1893, 1 Q. B. D. 491, 500; and the decision was wisely rested upon a ground the soundness of which cannot be questioned. A common carrier is under a common law duty to give information concerning rates. This duty is not altered by the Railway Act, sec. 339, sub-sec. 3, which is merely modal. A breach of this duty resulting proximately in damage gives a right of action on the case. *Barley* v. *Warford*, 9 Q. B. 196, 206; *Low* v. *Bouverie*, L. R. 1891, 3 Ch. D. 82, 100.

DESCENT.

The plaintiff's father was a Tonawanda Indian, and her mother a squaw of the Seneca tribe, who had moved to the Tonawanda reservation and there been married. The mother was never recognized as a member of her husband's tribe. According to the ancient custom of the Indians all clan and tribal relations follow that of the mother rather than that of the father. Consequently on the father's death the tribe distributed his property among his nephews, the defendants, completely cutting off the plaintiff. It was held that this distribution was illegal. That since the Indians have adopted the ways of civiliza-

Kinship by Mother Right

DESCENT (Continued).

tion, the reasons for the enforcement of the old custom no longer exist, and that their tribal relations should be determined by the rule of the common law, by which the lineage of the child follows that of the father. *Hatch* v. *Luckman,* 118 N. Y. Supp. (1909) 689.

Among all barbaric tribes this so-called custom of kinship by mother right has been enforced. This was chiefly because marital relations were loose and uncertain, and it was often difficult to determine the paternity of a child. It was practically the universal custom among the North American Indians. The question whether our courts should recognize this custom as existing among the Indians has been frequently raised, where a half-breed, indicted under a criminal statute, expressly exempting Indians from its operation, claims that exemption, because his mother was an Indian. The earliest decision is *U. S.* v. *Sanders,* Hempstead (1847), 483. There it was decided that the *quantum* of Indian blood in the veins of the child did not determine its condition, but that the status of the mother decided the question. This followed the rule of the civil law as to the offspring of a freeman and a slave. The first point in this decision has been affirmed by later cases, the second overruled. *Ex parte Reynolds,* 5 Dill. (1879) 394; *U. S.* v. *Ward,* 42 Fed. (1890) 320. The common law adopted the civil law rule *partus sequitur ventrem,* only as to slaves and other property, and never as to the offspring of free persons. Indians are freemen. Hence their status is that of their fathers'. Our principal case is in accord with this almost universal rule.

In Ohio the *quantum* of Indian blood in the veins of the offspring decides its legal status. If he has more white blood than Indian blood, he is a white person. A half-breed, therefore, is considered an Indian, irrespective of his mother's or father's status. *Lane* v. *Baker,* 12 Ohio (1843), 237. An exception to the general rule of the *Reynolds case, supra,* has been recognized in a recent line of cases. Where the child of a white father and an Indian mother is abandoned by the father and reared by the Indian mother in the tribal relation, it follows the status of the mother and is regarded as an Indian. *U. S.* v. *Higgins,* 103 Fed. (1900) 348; *Farrell* v. *U. S.,* 110 Fed. (1901) 945. But mere residence on an Indian reservation without an abandonment on the part of the father is not sufficient to change the status of the offspring. *U. S.* v. *Hadley,* 93 Fed. (1900) 437.

EQUITY PRACTICE.

Discovery and Relief in Equity: Remedy Existing at Law

In the case of *Keystone Lumber Co.* v. *Yazoo & M. V. R. Co., et al.,* 50 South. Rep. (1909) 445, the plaintiff filed a bill for discovery and also prayed a decree for the amount of reciprocal demurrage charges, a combination, which if granted, would amount to full relief. The defendant demurred, which demurrer was sustained, but on appeal the Supreme Court reversed this ruling and remanded the case for answer.

The right to discovery in equity has been long existant, and was formerly much used, the law courts being unable to force the production of certain evidence. But this defect has been largely remedied by statute, and consequently, where the jurisdiction of equity in this regard has not been expressly abolished—as it has in a few states—tho' the right to discovery remains, it is rarely used. How-

EQUITY PRACTICE (Continued).

ever, where the bill for discovery has attached to it a petition for relief, a very difficult condition is presented. If the case be one founded on equitable jurisdiction, relief, after the Court has become familiar with the discovered facts, will often be given. *Street,* Fed. Equity Prac., sec. 1865, but where the case is one founded in law, the general practice is for the Court to refuse to act.

McKeon v. *Lane,* 9 Paige (N. Y. 1829), 520; *Law* v. *Thorndyke,* 20 Pick. (Mass. 1838) 317; *Sugar Beets Product Co.* v. *Lyons Refining Co.,* 161 Fed. (1898) 216.

Practically, since it is possible in almost every case to concoct some legitimate ground for a discovery, if the equity courts would grant relief, once they were in possession of the facts, nearly every case could, by skillful manipulation, be thrown into equity and the time honored system of trial by jury done away with.

The Court bases its decision on the Mississippi Constitution of 1890, and two Mississippi cases which apparently extend to equity the right, once it has entertained a bill for discovery, to go on and extend full relief, notwithstanding the existence of a full and adequate remedy, both as to the discovery and relief, at law. The only other recent cases we have been able to find in line with this practice are *Smith* v. *Smith's Adm.,* 92 Va. (1896) 696; *Collins* v. *Sutton,* 94 Va. 127; *Thompson* v. *Iron Co.,* 41 W. Va. (1895) 574. It would seem, however, that the general trend of the modern decisions on this point are the other way, and properly so, if we are to preserve that fundamental element in our law, the right, in most cases, to trial by jury. *Cecil National Bank* v. *Thurber,* 59 Fed. (1894) 913; *Sugar Beets Product Co.* v. *Lyons Refining Co.,* 161 Fed. (1908) 215; *N. & W. R. R. Co.* v. *Storey,* 17 Conn. (1845) 364; *Elk Brewing Co.* v. *Neubert,* 213 Pa. (1906) 171.

LIBEL.

In the case of *Fowler* v. *Nankin,* 11 Western Reporter, 586 (Canada, 1909), the plaintiff and defendant had entered into partnership for a year to conduct a theatre upon certain agreements, one of which was, that on either party becoming insolvent, the partnership should cease. Before the end of the term, the defendant wrote to the plaintiff that as the latter was unable to meet his liabilities, the defendant determined the partnership. The defendant also published in a daily newspaper of Edmonton:—

Innuendo

"Notice.

"The Grand Family Theatre has been closed. The undersigned will not be liable for any debts contracted on behalf of the Grand Theatre Co. by Robert L. Fowler.

"S. Nankin."

Harvey, J., with Beck, J., concurring held these words libellous, as the necessary inference to be drawn from them is that they contain a reflection on the honesty of the plaintiff. The purpose of the notice, said the Court, was to prevent the plaintiff from contracting debts for which he, the defendant, might be liable, and as there would be no necessity for such a notice unless the plaintiff were likely to attempt to contract such debts, which the notice states he has no right to do, the innuendo is clearly against the honesty of the plaintiff.

It is submitted that the Court went over the line in holding this to be libel, and that the view of Stuart, J., dissenting, was the correct one where he said, "the only impression the ordinary man would take

LIBEL (Continued).

from the words would be, that Fowler and Nankin had been connected with each other in some way in the business of the Grand Theatre Co., that the affair had shut down, that the parties had disagreed, and that Nankin wished to warn people that he would not consider himself liable for what the other man would do."

These words would hardly convey to the ordinary man the suggestion that Nankin was afraid Fowler would act in bad faith. Even if these words are capable of the meaning that Fowler might do something he *knew* he had no right to do, there is nothing in the evidence to show that they conveyed that meaning to the mind of any person who read them.

MASTER AND SERVANT.

Assumption of Risk

The plaintiff was a brakeman in the employ of the defendant company. In running by the side of his train waiting for an opportunity to seize a grab-rail, he stumbled on a clinker about one-half the size of a man's head, and was injured by the wheels of the train passing over his legs. The station master had neglected to clean the yard as directed by the orders of the company. *Vaillancourt* v. *Grand Trunk Ry. Co.*, 74 Atl. (Vt. 1909) 99.

The decision in this case when considered in the light of the generally accepted methods of railroad operation, extends the liability of the master to an alarming extent. The duty to provide a safe place to work is a personal one which the master cannot escape by delegation. But it is not an absolute duty. On proof of injury the master is not *prima facie* liable. The obligation is that due care must be used under the circumstances; what is such reasonable care as will satisfy, the duty must depend upon the circumstances and the dangers fairly to be comprehended. *C. & A. R. R.* v. *Eaton*, 96 Ill. App. 570, 1 Sherman & Redfield; Neg., sec. 185. Whether the care used by the master is sufficient is a mixed question of law and fact; generally it is for the jury, but it may in a given case cease to be such and become a question of law. This is particularly true when a rule of law is applied to determine the effect of a party's conduct. *Browne* v. *Siegel, Cooper & Co.*, 191 Ill. 226; *Wigmore* v. *Evid.*, sec. 2552.

It may be seriously doubted whether the Court was correct in submitting this case to the jury. The care required of the master is directed toward the end of providing for the servant a working place which is as reasonably safe as is compatible with its nature and surroundings. It cannot be that a railroad in order to fully meet the obligations of that duty must sweep its yards.

But granting that the railroad was negligent (for if it was not, there could, of course, be no recovery), some of the authorities would question the right of the plaintiff to recover in any case on the ground of assumption of risk. This doctrine, the reasons for which have been variously stated, is founded upon the voluntary association of the servant with the master in his business. *Thomas* v. *Quartermaine*, 18 Q. B. D. 685. This question, like that of negligence, is ordinarily one for the jury, but in the same manner may be one for the Court when the just inference to be drawn from the facts would lead reasonable men to the same conclusion. Whether a servant assumes the risk of his master's negligence has been productive of much diversity in the decisions. Under one view of the question, such risks are not assumed; the ordinary risks of the service are, under this view, those

MASTER AND SERVANT (Continued).

which remain after the master has performed his primary duty of using reasonable care to see that the premises are safe. *Swensen* v. *Bender,* 114 Fed. 1; 2 Marv. (Del.) 337; *Himrod Co.* v. *Clark,* 197 Ill. 514; *Louisville R. R.* v. *Vestal,* 105 Kty. 461; 49 S. W. 204.

On the other hand, the doctrines of non-assumption of risk of the master's negligence does not apply to a permanent condition created by previous negligence of the master of which the servant has knowledge. *Porter* v. *S. S. Co.,* 113 Ga. 1007; *Dempsey* v. *Sawyer,* 95 Me. 295; *Sanderson* v. *Lumber Co.,* 55 L. R. A. 908; *Browne* v. *Siegel, Cooper & Co.,* 191 Ill. 226; *C. & O. R. R. Co.* v. *Hennessey,* 38 C. C. A., and notes; Thompson, Neg., sec. 4614. The servant is not required to inspect the premises to determine whether the master has performed his duty or not. Of course, the servant does not assume the risk of the master's negligence, but when the master has been negligent to the knowledge of the servant and the servant continues in the employment without objection, he assumes the risk. The risk with which the servant is sought to be charged, must be open and obvious and known to the servant as of such a character that the servant will be charged with knowledge. The danger must be appreciated, *i. e.,* one which a man of ordinary prudence would not face. *Dempsey* v. *Sawyer,* 95 Me. 295. Hence the decision in the principal case may be questioned on this second ground.

The question of contributory negligence must depend on the prior negligence of the master, and on the above supposition the Court was correct in submitting the question to the jury, there being evidence tending to show that the servant was not negligent in not seeing and avoiding the clinker.

In *Hughes* v. *R. R., 27* Minn. 137, under similar facts, recovery was denied, the Court holding that the servant assumed the risk.

Vice-Principals

In *Anderson* v. *Pittsburg Coal Co., et al.,* 122 N. W. R. 794, the Supreme Court of Minnesota decided, that where the plaintiff, engaged as a coal heaver in unloading the hold of the defendant's boat, was knocked down by a coal bucket operated by a crane (which had acquired "too much swing"), because the hatch tender signaled the hoister to stop it and drop it down, but did not warn the plaintiff as his custom and duty required, that the failure of the hatch tender to give the plaintiff the customary warning before the bucket was lowered, was the negligence of a vice-principal and not of a fellow-servant.

The Court reached this conclusion by the premises that:

(*a*) The defendant had intrusted an absolute non-assignable duty to the hatch tender.

(*b*) Delegation to an employé of the duty of taking such measures as are within the power of the master to protect employés against danger while at work cannot relieve the master from liability if the employé to whom such duty is imputed does not exercise reasonable care in its discharge.

(*c*) A person charged by the master to give warning is a vice-principal.

Judge Jaggard's opinion gives a most excellent list of authorities on each side of the question, but the decision seems to be *contra* to the weight of authority in this country. The general rule seems to be in accord with the following cases:

A servant of a street car company who failed to give timely warn-

MASTER AND SERVANT (Continued).

ing of the approach of a car to other employees engaged in track repairing, was held to be a fellow-servant of the repairers, and not a vice-principal. *Lundquist* v. *Duluth Street Ry.* Co., 65 Minn. 387 (1896).

A hatch tender employed to give warning of the approach of falling bales, is not a vice-principal, as respects a servant of the defendant in the hold relying on the hatch tender's care, but a fellow-servant. *The Ocean Steamship Co.* v. *Cheeney,* 86 Ga. 278 (1890).

If a master has properly selected and instructed a competent man to give warning to his other employees of the movements of machinery involving danger to them, such as apparatus for unloading coal from a vessel, he will not be responsible for an injury to one of said employees caused by a negligent failure of such man to give the warning. *Portance* v. *Lehigh Valley Coal Co.,* 101 Wis. 574 (1899).

MECHANICS' LIENS.

Constitutionality of Mechanics' Lien Act of 1901

The Supreme Court of Pennsylvania holds that section 38, of the Mechanics' Lien Act of June 4, 1901, P. L. 431, which permits a claim to be filed against a building without reference to the land and further provides for a sale and removal of such building for the benefit of lien holders, is unconstitutional, as violating article III, sec. 7, of the State Constitution, which prohibits special legislation providing or changing methods of collecting debts. *Henry Taylor Lumber Co.* v. *Carnegie Institute,* 225 Pa. 486 (1909). The whole Mechanics' Lien law, says Mr. Justice Brown, is legislation for a special class of creditors, only supportable on the theory that the Constitution of 1894 did not strike down existing systems of practice. As this is the third section of the act of 1901 that has met with the disapproval of the Supreme Court [*Vulcanite P. C. Co.* v. *Allison,* 220 Pa. 382 (sec. 28); *Vulcanite P. Co.* v. *Philadelphia R. T. Co.,* 220 Pa. 603 (sec. 46)], it would seem safe to predict a similar fate for other new features of the law, which was one of several practice acts that were recommended by the State Bar Association, but were somewhat altered on their passage through the legislature. Few would shed tears if the whole system of mechanics' liens was abolished. It is special legislation of the most flagrant sort, while the practice has become so cumbersome as to constitute a nuisance to the legal profession.

NEGLIGENCE.

Act Regulating the Employment of Children in Industrial Establishments

Stehle v. *Jaeger Automatic Machine Co.,* 225 Pa. 348 (1909), is a decision under the Pennsylvania Act of May 2, 1905, P. L. 352, section two, of which reads, "No child under fourteen years of age shall be employed in any establishment." The plaintiff, a boy under fourteen years of age, had his hand crushed in attempting to clean a pipe in which there was a rapidly revolving wheel, while in the employment of the defendant. The Court held, that by the very nature of the act, contributory negligence and assumption of risk as possible defenses were excluded. The employment of the boy in violation of the Act was sufficient evidence of negligence, and the negligence was the proximate cause of the injury, for clearly the accident would not have happened but for

NEGLIGENCE (Continued).

the plaintiff's illegal employment. This decision follows an earlier case involving the same Act. *Sullivan* v. *Hanover Cordage Co.*, 222 Pa. 40 (1908), which in turn was based on *Lenahan* v. *Pittston Coal Mining Co.*, 218 Pa. 311 (1907), a decision under an act prohibiting the employment of boys under fifteen years of age in coal mines.

In New York, under an act containing essentially the same provisions as the Pennsylvania one, the same rule as regards contributory negligence and assumption of risks was laid down. *Marino* v. *Lehmaier*, 173 N. Y. 530 (1903). This Court did not say the violation of the act was sufficient evidence of negligence but some evidence. That some confusion on the subject exists in New York is quite evident from the recent cases of *Kircher* v. *Iron Clad Mnf. Co.*, 118 N. Y. Supp. 823 (1909), and *Lee* v. *Sterling Silk Mnf. Co.*, 118 N. Y. Supp. 852 (1909). The former case holds, the employment of a child in violation of the act makes out a *prima facie* case of negligence against the employer, which may be rebutted by showing justification for believing the child to be over the age limit. *Marino* v. *Lehmaier* is followed as regards contributory negligence and assumption of risk. The latter case makes a startling departure from that rule and says question of contributory negligence is for the jury, the violation of the act being some evidence of negligence. These cases are not expressions of opinion from the highest court in New York with the exception of *Marino* v. *Lehmaier*. It looks as though another case will have to be taken there to ascertain just what the law really is on this point.

Injury to Licensee

In the case of the *Indian Refining Co.* v. *Mobley*, 121 S. W. (Ky.) 657 (1909), the plaintiff, a life insurance solicitor, was injured by the explosion of a boiler on the premises of the defendant. The plaintiff was there by permission of the defendant to solicit insurance among his employés. Recovery of damages for his personal injuries was not allowed on the ground, that he was a mere licensee and entered the defendant's premises at his peril. This decision is in accord with the authorities, if the cause of the boiler explosion was the construction of the boiler and not the negligence of the defendant's servants in their use of it. The evidence on this point was not clear. One witness said the steam pipes were badly constructed, but he attributed the explosion directly to the carelessness of the defendant's employés. If the latter were the cause, then the case should have been decided differently. See *Gallagher* v. *Humphrey*, 6 L. T. R. (N. S.) 684 (1862), and these American cases *De Haven* v. *Hennessey Bros. and Evans Co.*, 137 Fed. 472 (1905); *Corrigan* v. *Union Sugar Refy.*, 98 Mass. 577 (1868). The licensee takes the premises as they exist. Hence if he be injured by their faulty construction, it is his misfortune. But where negligence on the part of the person granting the permission or his servants, after the license is granted, is shown, the licensee can recover. The licensor cannot further endanger the safety of the licensee by some additional act.

Dynamite

Where a person stores dynamite in a small building within a few inches of a red hot stove, with percussion caps lying on the floor, he will be liable for injuries caused by the explosion of the dynamite. *Kiser* v. *Kerbaugh*, 40 Pa. Super. Ct. 163 (1909). What more need be said? See *Kerbaugh* v. *Caldwell*, 151 Fed. 194; *Derry Coal & Coke Co.* v. *Kerbaugh*, 222 Pa. 448; *Sowers* v. *McManus*, 214 Pa. 244, and the oft quoted phrase *sic itur ad astra.*

PUBLIC OFFICERS.

The Supreme Court of Oklahoma has held, in *Stevens* v. *Sims*, 104 Pacific (Okla. 1909), 44, in conformity with the majority of jurisdictions, that the payment of an official salary to a *de facto* officer—not an intruder—and not having been judicially determined not to be the *de jure* officer—is a valid defense to a claim against the public corporation, in an action against it by the *de jure* officer; holding that the municipality being interested only in having the duties of such office properly performed, should not be required to assume the responsibility for payment of such salary to him who holds the office under color of title and has performed the duties thereof, or the trouble of requiring the disputants to interplead therefor.

Salary of De Jure Officer

Although it has been held in several jurisdictions that a *de facto* officer is entitled to compensation for the time he has actually held office, the sounder and now generally established rule is that he cannot maintain any action against the city or county therefor; *Dolan* v. *N. Y.*, 69 N. Y. 274; and may be compelled to account for emoluments received, to the officer *de jure* in any appropriate action. *U. S.* v. *Addison*, 6 Wall. 291. This being true, it would seem that the officer *de jure* has a property right in such salary dependent not upon his performance of the duties of office, but his title thereto; and more sound judicial principles seem to be expressed in those decisions *contra* which hold that such right is not impaired by the payment of the salary to a *de facto* officer.

QUO WARRANTO.

In *State, ex rel., Richards, Atty.-Gen.* v. *Brooks*, 74 Atl. (Del. 1909) 37, an information in the nature of *quo warranto* averred that the defendants were unlawfully exercising the offices of directors in the B. Company, a corporation created by and existing under the General Corporation Laws of that State. On motion to dismiss the information the Court held that title to a public franchise is properly triable by information in *quo warranto;* that the sole issue is the title to the franchise, and therefore the information would not be dismissed because it would be ineffective, in that it could not determine which of the alleged directors is to be substituted for the one whose right to the office is questioned.

Quo Warranto to Try Title to Office

The ancient writ of *quo warranto* and its successor, the information, must be carefully distinguished. This is often of great importance on a question of jurisdiction. *State* v. *Ashley*, 1 Ark. 279. The writ of *quo warranto* was a high prerogative writ, in the nature of a writ of right for the King, issuing out of Chancery, against one who usurped any office, franchise or liberty of the Crown to inquire by what authority he supported his claim, in order to determine the right. Being in the nature of a writ of right, the judgment was conclusive even against the Crown. 3 Blacks. Com., sec. 262. By the statutes of *quo warranto*, 6 and 18 Edw. I, jurisdiction of the writ was given to the King's justices in eyre, and while it is uncertain at what time the writ fell into disuse, it is probable that it passed away with the abolition of the circuits of the justices in eyre. The complexity of the procedure and the fact that it was civil in character probably contributed to its downfall. While the writ and the information existed formerly side by side, the latter has continued as a remedy for many

QUO WARRANTO (Continued).

centuries since the former ceased to be used. The information was originally criminal in character, entailing a fine and judgment of ouster. In its later development it lost its criminal character in all except the forms of procedure, which it still retains. It was still, however, a prerogative writ, and it was not until Statute 9 Anne, Ch. 20, that it became the means of trying title by private persons in respect to public franchises and offices. By the same statute the extension of the remedy was confined to England and Wales, so that it did not extend to the American colonies. That statute, however, did recognize that a practice by information in the nature of *quo warranto* had formerly been usual, and it may be that this more restricted procedure is the parent of the remedy in use to-day in this country.

Whatever the exact origin of the information may be, it is well recognized as applicable to try title to public franchises. It is the proper means of trying title to office in a private corporation. *State* v. *Stewart,* 6 Houst. (Del.) 359; *Atty.-Gen.* v. *Looker,* 111 Mich. 498. This was formerly doubted but is now well established. In England it is held that the remedy is not applicable unless the duties of the office are in some way of a public nature. *Queen* v. *Grimshaw,* 10 Ad. & E. (U. S.) 747; 2 Cook, Corporations, sec. 617. But, as is suggested in the principal case, an office designed to execute a franchise granted by the State must necessarily partake of the public nature of the franchise itself. The remedy is proper to test the legality of a corporation. *Atty.-Gen.* v. *American Tobacco Co.,* 56 N. J. Eq. 847, 42 Atl. 1117; to enforce forfeiture of charter and franchises of a corporation for misuser or non-user. 32 Cyc. 1427; *Atty.-Gen.* v. *N. Y., N. H. & H. R. R. Co.,* 83 N. E. (Mass. 1908) 408; and to public offices generally, High, Ex. Rem., sec. 609.

SALES.

Conditional Liability of Purchaser on Destruction of the Property

At the defendant's request, the plaintiff shipped to him a cash register, and in "consideration of the above" the defendant paid a sum down and gave promissory note for the balance, payable in installments, agreeing in case of default in any payment, all unpaid payments should become at once due and payable, and finally that the title should not pass to the buyer until the price was paid in full. After loss by fire without the defendant's fault and his refusal to make a payment due, it was held that the defendant became liable on the note. *National Cash Register Co.* v. *South Bay Club House Asso'n.,* 118 N. Y. Supp. (1919) 1044.

The general principle of liability on notes given for the purchase money of personal property where title is retained for security for payment, has been often before the courts, and the weight of authority supports the conclusion here reached, viz., that the purchaser is liable on such notes though the property which is the subject matter of the sale has been destroyed without his fault. *Whitlock* v. *Auburn Lumber Co.,* 58 S. E. (N. C. 1907) 909; *Burnley* v. *Tufts,* 5 So. (Miss. 1888) 627; *Tufts* v. *Griffin,* 10 L. R. A. (N. C. 1890) 526. The distinguishing characteristic of these cases, found also in the principal case, is the fact that at the payment of the last installment due for the purchase price either on the general credit of the purchaser or on his note or notes given therefor, the title is to pass from the vendor without anything more being done. See *Osborne* v. *South Shore Lumber Co.,* 65 N. W. (Wis. 1895) 184.

SALES (Continued).

Most of the cases which are in apparent conflict with the principal case are, therefore, to be distinguished by reason of some provision in the contract between the parties that at the final payment, the vendor will execute a bill of sale, or sell and transfer, etc., the property to the purchaser. *Swallow* v. *Emery,* 111 Mass. 355 (execute a bill of sale); *Arthur* v. *Blackman,* 63 Fed. 536 (sell and transfer). But when the contract lacks these or similar provisions, and it is clear that title was meant to pass without anything else being done by the vendor, the case has been treated with almost complete uniformity as being a sale, and the relation of the parties as that of mortgagor and mortgagee of a chattel, in effect if not in form. *Osborne* v. *So. Shore Lumber Co., supra; American Soda Fountain Co.* v. *Vaughan,* 55 Atl. (N. J. 1903) 54; *Jessup* v. *Fairbanks, Morse and Co.,* 78 N. E. (Ind. 1906) 1050. It is thought that an exception to the maxim *res perit domino,* taken for granted as a settled rule of the common law in *Rugg* v. *Minet,* 11 East, 210, was justified by the fact that the title was retained by the seller only for purposes of security, and that to all other intents, it had passed to the purchaser, subject to vesting absolutely in him only on the payment of the price. *Barrows* v. *Anderson,* 3 Cent. Law Jour. (Mo. 1876) 413. And that having received a *quasi* title to such an extent and being able to demand nothing more in the way of action from the vendor, the consideration for the purchaser's promise to pay or for his note given, was held to be the receipt of the possession of the goods and the acquisition of a right to the title absolutely on final payment. *Burnley* v. *Tufts, supra; White* v. *Solomon,* 42 N. E. (Mass.) 104. Therefore, tho' the goods may have been destroyed before the payment was due, without fault of the purchaser, by the weight of authority it is considered there has been no failure of consideration. *American Soda Fountain Co.* v. *Vaughn, supra; Kilner* v. *Moneyweight Scale Co.,* 36 Ind. App. (1905) 568; *Tufts* v. *Wynne,* 45 Mo. App. (1891) 42, and the purchaser must bear the loss.

On the other hand, the few cases parallel in fact with the principal case, which have reached a different conclusion, have stuck doggedly to the rule that the risk of loss attends the legal title. In *Cobb* v. *Tufts,* 2 Tex. Civ. App. (Wilson), sec. 152, a plea of failure of consideration was held good and the loss placed on the vendor. In *Randle* v. *Stone,* 77 Ga. 501, the vendee was treated as a bailee, and since the loss was without fault of his, he was not liable to the seller. The Alabama court reaffirmed earlier rulings to the same effect in that state in *Bishop* v. *Minderhout and Nichols,* 128 Ala. (1900) 162, tho' recognizing the contrary decisions in many other states.

It is to be said of the cases placing the loss upon the vendee, that they are a departure from the general rule that the risk of loss falls on the holder of the legal title. 1 *Benj. on Sales,* sec. 452.

The motive of such decisions appears to be a feeling that the purchaser who has had the possession and all possible chances to take care, should bear the loss rather than the vendor, out of possession and control, though no provable negligence of the former is shown. Three distinct lines of reasoning are traceable in the cases, reaching a conclusion in conformity with that feeling. The purchaser has made an absolute promise to pay; it was not in the least conditional; had he wished to avoid his present predicament, he should have made the stipulation in his contract. *Burnley* v. *Tufts, supra.* The transaction is in effect, if not in form, a sale and a chattel mortgage, and the effect of the transaction should be considered. *Osborne* v. *So. Shore Lumber*

SALES (Continued).

Co., supra; Williston on Sales, Sec. 404. It is to be noted that this employs a decided fiction in face of the express agreement that title is not to pass, and is inconsistent in not going logically forward to require recording of the chattel mortgage. And finally, the queston is put of what is the consideration for the promise or note. If it is the passing of title, the defense of failure of consideration is good. *Swallow* v. *Emery, supra.* If it is the delivery of the property, with the right to acquire a title immediately on payment, the consideraton has passed, *Amercan Soda Fountain Co.* v. *Vaughn, supra.* It is upon this last theory that the principal case is reasoned.

The peculiar character of the contract, which is not a true sale on condition precedent in its general sense, but which is something more than an executory conditional sale, would seem to justify the feeling to which reference is made above. Clear legal reasoning in conformity thereto meets difficulties. Perhaps it is best given in the argument first noted in the preceding paragraph, at least in cases where the terms of the contract are not reduced to writing, so that they admit of a clear determination as to the exact consideration for which the promise or note is given. In the present case, that being possible, the decision should be taken as sound and supported by reason as well as authority.

STATUTES.

Vassey v. *Spake,* 65 S. E. (S. C. 1909) 825, was an action for malicious trespass upon real property. The question was raised whether this action was included by a statute, which put certain restrictions on any action "for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, seduction, or any other action for damages for torts." It was held that the rule of *ejusdem generis* was applicable, and that the action of malicious trespass did not come within the proviso of the statute as to "any other action for damages for torts."

Interpretation: Application of Ejusdem Generis Rule

This rule of *ejusdem generis,* sometimes known as Lord Tenderden's rule, is generally stated as follows, "Where a statute or other document enumerates several classes of persons or things and immediately following and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as *ejusdem generis* with, and not of a quality superior to, or different from, those specifically enumerated." 21 *Am. & Eng. Encyc.,* 1011. The reason for this restrictive interpretation of the statute is given by Kenyon, C. J., in *Rex* v. *Wallis,* 5 T. R. (1793) 379, where he says if the legislature had not meant to restrict the working of the statute to one particular class, it "would have used only one compendious word." This rule is practically universal, but the courts differ widely in applying it to the facts of cases. A railway depot has been held *ejusdem generis* with stores and warehouses. *State* v. *Edwards,* 109 Mo. (1891) 315. Surface railroads are of the same class as underground and elevated street railroads. *Ruckert* v. *Grand Ave. R. R. Co.,* 163 Mo. (1901) 260. So in a very recent case in the United States Supreme Court, in interpreting an act providing punishment for making and aiding false entries in the customs, the words "owner, importer, consignee, agent or other person" were held to include a government weigher. *United States* v. *Mescall,* 215 U. S. 26 (1909). Under the broadest application

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of the rule, however, the decision in our principal case is sound, as the personal torts enumerated are distinctly of a different class from torts to property like malicious trespass. The rule of *ejusdem generis* is not always applied and in some case the word "other" has been held to be unrestrictedly comprehensive. "Horses, mules, or other animals" of a railroad company has been interpreted to include swine. *Henderson* v. *Wabash R. R. Co.*, 81 Mo. (1884) 605. *Reg.* v. *Payne*, L. R. 1 C. C. (1866) 27. Wherever the intention of the legislature is clearly shown by the language of the statute, there is no room for construction, and the rule does not apply. *State* v. *Switzer*, 59 S. C. (1900) 225.

TAXATION.

Fraternity Houses: Exemptions of Literary and Scientific Institutions

The real estate of all literary and scientific institutions occupied by them for these purposes, or by an officer thereof as a residence, is exempted from taxation in Maine under Rev. St. c. 9, Sec. 3. *Held*, that the chapter house of a Greek letter society was liable to taxation, "its corporate purposes being neither literary nor scientific, but rather they are domestic in the nature of a private boarding house, and such is the business it carries on." *Inhabitants of Orono* v. *Sigma Alpha Epsilon Society*, 74 Atl. (Me. 1919) 19.

The decision here is supported by authority. It has been pointed out by the Appellate Court of New York that the incorporation purposes of a society of similar character may be such as to bring it within the exemption clauses of this class of statutes, but that the test of actual exemption of property must be the purposes for which that property is really used. *P. ex rel. Delta Kappa Epsilon Society* v. *Lawler*, 77 N. Y. Supp. (1902) 840, affirmed 71 N. E. (N. Y. 1903) 1136.

Exemptions from taxation by statutory provisions are strictly construed. *State* v. *New Orleans R. R.*, 7 La. 724; *St. Mary's College* v. *Crowl*, 10 Kan. 442. A house erected by the college within the Harvard Yard and leased to a professor at an annual rental is not exempt from taxation, though it would be otherwise if occupied by the permission of the college, the occupant having no estate therein and paying no rent. *Pierce* v. *Inhabitants of Cambridge*, 56 Mass. (1849) 611. A somewhat broader view is taken in *Northampton County* v. *Lafayette College*, 128 Pa. (1889) 132, where a building on the campus owned by the college, and leased by it at an annual rental, was exempted from taxation, the proceeds being devoted to the expenses of the college, itself an educational institution within the exemption provisions. Where no rent is paid by a professor occupying a house owned by the college on its campus the dictum of the Massachusetts case *supra* is followed. *Harvard College* v. *Assessors*, 55 N. E. (Mass.) 844; *State* v. *Ross*, 24 N. J. L. 497; *Contra, Kendrick* v. *Farquahar*, 8 Ohio (1837) 189.

In accord with the general idea expressed in the Pennsylvania case *supra*, it is generally held that college buildings occupied by students as dormitories at a certain cost per annum, though payable to the college, are not taxable property, being occupied for the purposes of the college. See *Yale University* v. *New Haven*, 42 Atl. (Conn.) 87; *Williard* v. *Pike*, 9 Atl. (Vt.) 907; *People* v. *Mezger*, 73 N. E. (N. Y.) 1130. And a club house, the property of the institution, used by the students and alumni for recreation and social purposes, was declared

TAXATION (Continued).

exempt in *Chicago et al* v. *University of Chicago,* 28 Ill. (1907), 10 Ann. Cas. 669.

But where the buildings used by students as dormitories are not the property of the college, nor does the income go to the college, they are not exempt. *Phi Beta Epsilon Corp.* v. *Boston,* 65 N. E. (Mass.) 824; *Delta Kappa Epsilon* v. *Lawler, supra.* Therefore the principal case would seem to be sound, although the building was situated on the campus. As was remarked in the two cases above, it cannot, for this purpose, be regarded as anything more than a student boarding house, and therefore its occupancy is not for literary and scientific purposes.

However, as the law progresses, spreading out in the adaptibility of the common law to meet new situations and conditions, it does not seem too much to expect the courts to listen to an argument, that as they have exempted within these clauses college dormitories, from which is derived a large proportion of the income from student payments, they should also include those dormitory buildings owned and operated solely by the students themselves, with no intent to make financial profit, and supported by a *pro rata* division of actual expense. If the purpose of a dormitory owned by the college and occupied by students only, is literary and scientific within the meaning of the Legislature, it is perhaps an undue refinement which characterizes a dormitory occupied *and owned* by the same kind of students as unliterary and unscientific in its purposes, and therefore taxable in the same measure as any private boarding house managed for pecuniary profit.

TRESPASS.

Liability for Damages in False Imprisonment

In the case of *Knickerbocker Steamboat Co.* v. *Cusack,* 172 Fed. Rep. 358 (1909) the question arose as to the liability in damages of one who prefers a charge against an innocent person which leads to his commitment by a magistrate. Generally speaking the defendant in the resulting action for false imprisonment is liable in damages for the natural and probable consequences of his act and hence there seems to be no question of such liability up to the moment the case is taken from his hands by the committing officer. But when the defendant has merely laid a complaint before a magistrate, who, believing that such facts bring the case within the law and that there are sufficient grounds to make a case against the prisoner, orders him to jail, there seems to be some conflict of authorities as to whether this is one of the natural and probable consequences of the defendant's act and hence a matter for which he is liable.

Perhaps the cases may best be reconciled upon the theory that where certain facts are laid before a magistrate, and he, in applying the law thereto, makes a mistake either in regard to their sufficiency to warrant his holding the prisoner, or in his jurisdiction over the case, the person making the complaint is not liable, beyond the bare arrest. *Barber* v. *Stetson,* 73 Mass. (1856) 53; *Teal* v. *Fissel,* 28 Fed. (1886) 351; *Newman* v. *Railroad,* 54 Hun. (1889) 335. But if, on the other hand, the complainant lays before the magistrate unwarranted statements of fact, upon which, if they were true, the latter would be derelict in his duty should he refuse to act, then his action in holding the accused flows naturally from the unjustifiable assertions of the former, and he should be held liable for all damage done the plaintiff from the mo-

TRESPASS (Continued).

ment of his arrest until he was set at liberty. *Shea* v. *Manhattan R. R. Co.,* 15 Daly (1890) 528; *Murphy* v. *Countiss,* 1 Harr. (Del. 1833) 143; *McGarrahan* v. *Lavers,* 15 R. I. (1888) 302.

This theory seems in line with the case under discussion, but goes to the point upon which the court refused to commit itself. By considering that the damages assessed were adequate no matter which view was taken as to the point where defendants' liability ceased, they left in doubt the real point at issue, which, upon the foregoing grounds could readily have been decided, and the law settled.